ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained a left shoulder injury proximately caused by the performance of service arising out of and in the course of his employment?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 6 were admitted into evidence. Respondents' hearing exhibits A through P were admitted into evidence with the exception of Exhibit G, p. 15, which Respondents withdrew.

2. Claimant alleges that on August 12, 2014 he sustained a compensable injury to his lefty shoulder while performing his duties at the Employer's transmission repair shop. Claimant credibly testified that on the date of the alleged injury he had been working for the employer for about 1 month.

3. Claimant was involved in a serious motor vehicle accident (MVA) in July 2012, approximately two years prior to the alleged injury in this case. As a result of the MVA Claimant sustained multiple injuries including rib fractures, a broken sternum and a torn labrum of the left shoulder.

4. On October 19, 2012 Claimant underwent surgical repair of the left shoulder. The surgery was described as "arthroscopy of the left shoulder, repair anterior capsule and labrum."

5. Robert Winfield, M.D., examined the Claimant on March 13, 2013 for "shoulder pain and rib/sternal pain". Claimant reported "occasional" pain that was present "1/4 to ½ of the time." Claimant rated this pain as 5 on a scale of 10 (5/10). In his treatment plan, Dr. Winfield noted the Claimant was "using quite a bit of narcotics [8-9 Dilaudid a day] for his pain … [and that the doctors] need to get him weaned down off the narcotics quickly."

6. On April 24, 2013 Dr. Winfield again examined the Claimant for left chest wall and left shoulder pain. Dr. Winfield noted Claimant was 6 months out from surgery and about 9 months out from the MVA. Claimant reported increasing pain. He advised that his current pain level with the pain medication program was 8/10 and his pain level without medication was 10/10. However, Dr. Winfield noted the Claimant did not exhibit "pain behaviors." Claimant advised Dr. Winfield that he preferred Dilaudid to Percocet. A drug screen was positive for marihuana. Dr. Winfield continued Claimant's work

restrictions and prescribed Percocet 5-325 mg tabs 1 po every six hours and a Butrans 10 MCG/HR patch to be changed every seven days.

7. Claimant credibly explained that when he underwent treatment by Dr. Winfield in April 2013 he had a "dependency problem" with narcotic medication and this problem led him to report high pain levels. Claimant's testimony is corroborated by Dr. Winfield's March 13, 2013 report in which he noted Claimant should quickly be weaned off narcotics.

8. Claimant credibly testified that after the spring of 2013 he did not undergo any further medical treatment for his left shoulder and that his treating physicians "green lighted" him to return to work. Claimant's testimony is corroborated by the absence of any medical documentation showing that he sought medical treatment for his shoulder between the spring of 2013 and August 2014. Claimant's testimony is further corroborated by witness Robert Femyer. Femyer credibly testified that on Claimant's first day of work for the Employer that he went out to lunch with Claimant. During the lunch Claimant described the 2012 MVA and consequent injury to his left shoulder. However, Femyer recalled that Claimant stated he was "okay" afterwards and everything was good.

9. Claimant's duties at the Employer's business included cleaning the shop, driving or pushing cars in and out of the shop and acting as "a kind of apprentice" in the transmission repair business.

10. Claimant credibly testified as follows. On August 12, 2014 John Hanson (Hanson), a supervisor, directed Claimant to remove the transmission pan on a Dodge truck. Claimant drove the truck onto a lift that raised the truck overhead. He held a 20 pound transmission pan over his head with his left hand while removing bolts with his right hand. His left hand and arm were held overhead for approximately 30 minutes. After Claimant showed the contents of the transmission pan to Hanson Claimant was instructed to replace the pan in preparation for removing the entire transmission. Claimant again held the pan overhead with his left arm while tightening bolts with the "impact" in his right hand. While performing this activity he began to experience "a problem in the back of the shoulder and down the arm." He did not immediately report an injury to Mr. Hanson because he "hoped it was just a simple sprain" and that it would pass.

11. Claimant's testimony that he experienced the onset of pain while holding the transmission pan overhead is corroborated by Hanson's testimony. Hanson stated he was Claimant's supervisor and was working with Claimant on August 12, 2014. Hanson recalled that Claimant took a transmission pan off of a vehicle and then was instructed to put it back on. Claimant then tried to hold the pan with one hand and reattach it to the vehicle with the other hand. Claimant then came to Hanson and said he couldn't get the pan back on because it was too heavy. Hanson recalled the Claimant said "he could not support the pan; that his shoulder was hurting." As a result Hanson showed Claimant how to use a "transmission jack" to raise the pan into position. Claimant then completed reattachment of the pan and continued work.

12. Claimant testified that on August 14, 2014 he told Hanson that he was having pain in his shoulder form working on the Dodge truck and wanted to see a doctor. According to Claimant he told Hanson that if "it" was "something small like a strain" he would use his own health insurance but if "it" required x-rays or specialist treatment he "would use Workers' Comp."

13. Hanson testified that on August 14, 2014 Claimant advised him he was going to have his shoulder looked at "on his own dime" but never mentioned workers' compensation. Hanson said he would not have agreed to a workers' compensation claim because he was aware of Claimant's prior shoulder injury and he knew no injury occurred while Claimant was working for Employer. Hanson explained he knew there was no "injury" at work because "no traumatic event" happened such as something falling and striking the Claimant. Hanson said he did not learn claimant was going to file a claim until sometime later when an MRI was requested.

14. On August 14, 2012 Claimant reported to UCHealth Longmont Clinic where he was examined by Marie Bush, M.D. Claimant gave a history of injuring his shoulder "48 hours ago" when he was working overhead and developed a "sharp pain in the left shoulder." Claimant advised Dr. Bush that he then "dropped the transmission pan that weighed about 30 pounds." Claimant told Dr. Bush about the 2012 MVA and that he underwent a left labral repair. Claimant reported that his current pain was similar to the pain he experienced after the MVA. Claimant expressed fear he would lose his job if was unable to work. On examination Dr. Bush noted Claimant could abduct his shoulder to 90 degrees and that external rotation was poor. There was tenderness over the posterior aspect of the left shoulder. Dr. Bush assessed a "left rotator cuff sprain" and she restricted Claimant to no use of the left arm at work. Dr. Bush prescribed ibuprofen and ice.

15. On August 18, 2014 Dr. Bush again examined Claimant. Dr. Bush maintained the diagnosis of "left rotator cuff strain" and referred Claimant for an orthopedic evaluation by "Dr. Wood." Dr. Bush restricted Claimant to no reaching above shoulder level with the left arm and no lifting greater than 15 pounds with the left hand.

16. Orthopedist Peter Wood, M.D., examined Claimant on August 20, 2014. Claimant gave a history of the 2012 MVA and produced medical records detailing the consequent arthroscopic surgery to his left shoulder. Claimant also reported that on August 12, 2012 he was lifting a heavy "oil pan with his left hand and bolting it back with his right." Claimant reported he "slowly developed discomfort in his shoulder following this work" and the pain became "much worse over the past week." Dr. Wood assessed "left shoulder pain of unclear etiology" and referred Claimant for an MRI.

17. On August 29, 2012 Dr. Wood reviewed the MRI and assessed "shoulder joint pain" and "derangement of shoulder joint." Dr. Wood opined it "would be prudent to proceed with a trial of physical therapy." Dr. Wood opined that not all of Claimant's pain was related to the small labral tear.

18. On September 16, 2014 Dr. Bush examined Claimant. She noted tenderness over the "anterior shoulder joint" with rood but painful range of motion. Dr. Bush stated Claimant's workers' compensation claim had been denied by Employer and that he was paying for physical therapy (PT) and the MRI out of his own pocket. Dr. Bush referred Claimant for 8 additional PT sessions. Dr. Bush also transferred Claimant's care to Mindy Gehrs, M.D.

19. On September 19, 2014 Dr. Gehrs, a specialist in physical medicine and rehabilitation, examined Claimant. Claimant gave a history that on August 12, 2014 he was at work and "having to put force up above his head for a long period of time and he started to develop tightness and discomfort in his shoulder." Claimant also advised Dr. Gehrs of the 2012 MVA and consequent surgical repair of the labrum in October 2012. Claimant told Dr. Gehrs that after the surgery he lost about "10% of his motion" and he would "occasionally" experience "some soreness, tightness, grinding and popping, but generally he just needed to use ibuprofen once or twice a week." Claimant further advised that when he was released from the 2012 injury "he was told that he could really do anything and did not have any significant restrictions." Dr. Gehrs assessed the following: (1) Left shoulder pain, prior labral tear with current MRI revealing new or residual superior labral tear; (2) Myofascial shoulder pain; (3) Possible central sensitization. Dr. Gehrs prescribed tramadol, cyclobenzaprine and continued PT. Dr. Gehrs opined there is a myofascial component to Claimant's pain and opined he might benefit from trigger point injections.

20. On October 22, 2014 Dr. Gehrs again examined Claimant. Claimant reported that a majority of his pain was gone and he was not using medications. On examination Dr. Gehrs found no significant tenderness and normal range of motion in the left shoulder. She assessed "left shoulder pain and impingement with history of previous labral tear." Dr. Ghers "suspected" Claimant "just had flare in his shoulder from the past, likely related to overhead activity, which does put more stress on the shoulder." Dr. Gehrs predicted Claimant would be "at MMI in about a month and recommended that he do one physical therapy a week for the next four weeks and continue with his home exercise program."

21. Claimant proved it is more probably true than not that on August 12, 2014 he sustained a compensable injury to his left shoulder. The credible and persuasive evidence establishes that it is more probably true than not that Claimant sustained an injury to his left shoulder arising out of and in the course of his employment. Specifically, Claimant proved that although he had a pre-existing left shoulder condition that condition was aggravated by holding a transmission pan overhead with his left arm for approximately 30 minutes. Further, Claimant proved it is more probably true than not that the aggravation caused a need for medical treatment.

22. In reaching these conclusions the ALJ credits Claimant's testimony that he did not need or obtain any treatment for the 2012 shoulder injury after April 2013 until August 2014. The record contains no credible or persuasive medical records showing that Claimant ever sought treatment for the left shoulder from April 2013 to August 2014. Further, claimant's testimony is corroborated by the testimony of Mr. Femyer and

is consistent with the history he gave to Dr. Gehrs. In this regard the ALJ notes Claimant never sought to conceal the 2012 MVA or the resulting left shoulder injury. Rather, he consistently reported the MVA and surgery to his providers.

23. Claimant credibly testified he experienced the onset of discomfort and pain in his left shoulder while holding the 20 pound transmission pan overhead with his left arm and tightening bolts with his right hand. Claimant's testimony is corroborated by Mr. Hanson's testimony that on August 12, 2014 he was working with Claimant and Claimant told him he had trouble holding the pan overhead and experienced pain in his shoulder. As a result Hanson assisted Claimant by demonstrating use of the transmission jack.

24. Respondents' argument notwithstanding, Claimant's testimony is also largely, albeit not entirely, consistent with the histories he provided to Dr. Bush, Dr. Wood and Dr. Gehrs. Generally Claimant related to these physicians that he experienced the onset of left shoulder pain and discomfort while holding the transmission pan overhead on August 12, 2014. The ALJ is not persuaded that a few inconsistencies in the histories provided to these physicians are so significant that they discredit the Claimant's overall testimony concerning the events of August 12, 2014.

25. The opinions of Dr. Gehrs are credible and given substantial weight. The ALJ interprets Dr. Gehrs's opinion to be that Claimant's activity in performing overhead activity at work on August 12, 2014 caused an aggravation of his pre-existing shoulder condition. Further, Dr. Gehrs is of the opinion that this aggravation warranted medical treatment including medication and physical therapy. The opinion of Dr. Ghers is corroborated by the credible opinion of Dr. Bush. Dr. Bush was aware of Claimant's pertinent history including the 2012 MVA and subsequent labral repair. Despite Claimant's history, on August 14, 2014 Dr. Bush diagnosed a "left rotator cuff sprain" and prescribed treatment and restrictions.

26. Respondents did not present nor do they cite any credible or persuasive medical opinion sufficient to refute the opinions of Dr. Gehrs and Dr. Bush. Only Dr. Wood questioned the etiology of Claimant's shoulder symptoms and he never offered a clear and well reasoned opinion sufficient to refute Dr. Ghers and Dr. Bush.

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

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1),

C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

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

COMPENSABILITY

Claimant contends that a preponderance of the evidence establishes it is more probably true than not that he sustained a left shoulder injury arising out of and in the course of his employment and that the injury was proximately caused by the performance of the employment. Respondents argue the evidence fails to establish that Claimant sustained an aggravation or acceleration of his preexisting left shoulder condition. In connection with this argument Respondents assert Claimant’s testimony is not credible and that the opinions of his providers are not credible because they are based on an inaccurate history. The ALJ agrees with Claimant.

Claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires Claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is

sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Pain is a "typical symptom" caused by the aggravation of a pre-existing condition. However, an "incident that merely elicits symptoms caused by a pre-existing condition does not compel a finding that the clamant sustained a compensable aggravation." *Miranda v. Best Western Rio Grande Inn,* WC 4-663169 (ICAO April 11, 2007).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

As determined in Findings of Fact 21 through 26. Claimant proved it is more probably true than not that he sustained an injury arising out of and in the course of his employment, and that the injury was proximately caused by the performance of his duties. The ALJ credits Claimant's testimony that he experienced an onset of discomfort and pain while holding the transmission over his head while at work on August 12, 2014. The ALJ infers from Claimant's testimony and the credible opinion of Dr. Gehrs that the injury consisted of an aggravation of Claimant's pre-existing shoulder condition resulting from the 2012 MVA. As found, Dr. Ghers credibly opined that overhead activity puts stress on the shoulder and in this case probably aggravated Claimant's preexisting condition so as to increase his pain and necessitate medical treatment. The opinions of Dr. Gehrs are corroborated by credible opinions of Dr. Bush.

The issue presented to the ALJ was limited to "compensability" of the claim. No award of specific medical or indemnity benefits was requested. Consequently the award of specific benefits is not addressed by this order and is reserved for future determination.

ORDER

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

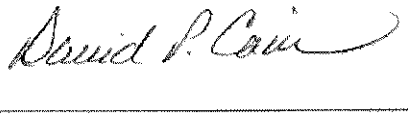
1. On August 12, 2014 Claimant sustained a compensable injury proximately caused by the performance of service arising out of and in the course of his employment.

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

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

DATED: July 30, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

1. Whether the ongoing medical maintenance care being provided by Byron Jones, M.D. consisting of ongoing trigger point injections, opioids, and a muscle relaxant constitutes reasonable and necessary medical maintenance care for the Claimant's January 7, 2002 industrial injury.

2. Whether the Respondents' request to change physicians should be granted.

FINDINGS OF FACT

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

1. The Claimant sustained a compensable industrial low back injury on January 6, 2002 when he slipped and fell at work (Respondents' Exhibit I, p. 152).

2. The Claimant was placed at maximum medical improvement on September 15, 2004 by the Division Independent Medical Examiner, Erasmus Morfe, M.D. (Respondents' Exhibit G).

3. The Claimant had sustained a prior low back injury in 1992 and has been under the care of Byron Jones, M.D. for approximately 23 years total. Dr. Jones has also been the primary treating physician for the last 13 years for the January 7, 2002 industrial injury.

4. The Claimant failed conservative care management and underwent an L-5 decompression with fusion at L5-S1 with Dr. Jatana on October 16, 2003. Dr. Jones testified credibly and persuasively that, although the surgical intervention was appropriate, ultimately, the Claimant did not have a good result overall.

5. Dr. Jones testified at hearing that he has been treating the Claimant for chronic pain since the Claimant was placed at maximum medical improvement in 2004. He testified that the Claimant would have some periods of improvement, but also times when the Claimant was essentially bedridden. He testified that over the course of treatment, many different modalities have been tried with the overriding concern of achieving a better level of function for the Claimant. He testified that he attempts to reach a balance with the Claimant's medication and treatment so that the Claimant is not under-medicated nor over-medicated and the follow-up focuses on what the Claimant is able to do function-wise in his activities of daily living.

6. Dr. Jones is not Level II accredited, but testified that he is aware of the Colorado Medical Treatment Guidelines. He testified that the Claimant's care was initially within the Medical Treatment Guidelines, but after a certain point in this case, he found it necessary to exceed the Guidelines in terms of the numbers of trigger point injections provided and the sites injected. Over the course of care, Dr. Jones testified that, at times, he has tried to decrease the frequency of injections but this has resulted in increased pain and significantly decreased function for the Claimant. Dr. Jones further testified that the trigger point injections are combined with an active exercise approach, self-directed pain management and medical management of opioid prescriptions.

7. Dr. Jones acknowledged that under the Medical Treatment Guidelines, the maintenance duration for injection therapy is not more than four injections per session, not to exceed four sessions per 12 month period (Respondents' Exhibit J, p. 263). Dr. Jones disagrees with this recommendation in this case and believes the Claimant is a "unique" case and requires eight injection sites every six weeks. Under the Medical Treatment Guidelines, if patients are provided with trigger point injections they should be reassessed after each injection session for an 80% improvement in pain and evidence of functional improvement for three months. Dr. Jones acknowledged that there is no documentation in the medical records of 80% improvement in pain or functional improvement for three months as the injections are provided every six weeks (Respondents' Exhibit J, p. 201).

8. Dr. Jones specifically acknowledged that his care and treatment for the Claimant exceeds the recommended treatment under the Medical Treatment Guidelines, but argues that, in this case, the treatment beyond the Guidelines boundaries is warranted. Dr. Jones performs trigger point injections on the Claimant every six weeks and when these injections are performed he injects eight sites. Over the course of care in this case, Dr. Jones has determined that the Claimant gets 6 weeks of good relief, after which the Claimant has a significant increase in pain and would come in to the office "writhing in pain."

9. Dr. Jones opined that the trigger point injections provided in excess of the Medical Treatment Guidelines is reducing the need for opioid medications and the potential need for having to increase the dosage of these medications. He believes that the Claimant is "not addicted" to the injections, but is physically dependent on such injections. The Claimant's level of opiates have not changed in the last 11 years and his use of opiates has not decreased with the ongoing trigger point injections being provided by Dr. Jones. However the use of opiates has not increased significantly either.

10. Dr. Jones does not follow Rule 16 or the Medical Treatment Guidelines in providing trigger point injections. He does not request preauthorization for the injections. According to Dr. Jones, he provides his office notes to the insurance company and he felt that this was a way that the insurance carrier would be apprised of his medical treatment of the Claimant. Dr. Jones also testified that "when Claimant comes in he is likely going to need trigger point injections."

11. An MRI was performed on January 20, 2015 (Respondents' Exhibit B). Dr. Jones opined that this showed a "worsening" at the L4-5 segment. His office notes reflect a potential referral to a surgeon but Dr. Jones has not made any referral for a surgical evaluation since January of 2015. The ALJ finds that the Respondents have not denied any written request from Dr. Jones for a surgical referral.

12. Dr. Jones has prescribed Skelaxin, a muscle relaxant, for over 13 years. He has opined that the Claimant obtains "functional benefit" from such medication and that since this is not a scheduled drug, it has a far lower risk than opiates. Dr. Jones specifically opined that he prefers Skelaxin to Flexeril because it is less sedating and allows for increased function.

13. According to Dr. Jones, the Claimant follows instructions and has been extremely compliant. However, Dr. Jones acknowledged that the Claimant utilizes marijuana and that Dr. Jones does not agree with this. `

14. Dr. Jones testified that the Claimant does not receive long-term, lasting relief from the injections. If the Claimant is not a surgical candidate, Dr. Jones intends to continue the same treatment program consisting of trigger point injections, opiates, muscle relaxant, and physical therapy. In the future Claimant may be referred for stem cell therapy or a spinal stimulator. Dr. Jones testified that he does not like to perform trigger point injections every six weeks because he is aware of the risks. However, Dr. Jones testified that, at the current time, this is the best treatment option for the Claimant of which he is aware.

15. The Claimant was evaluated by Joel L. Cohen, Ph.D. on July 22, 2013. Dr. Cohen's clinical impressions and recommendations were:

> Diagnostically, the information rendered thus far would suggest: Pain Disorder with a General Medical Condition and Psychological Factors (307.89) and Adjustment Reaction with Depressed Mood (309.00). I consider both to be injury related. More broadly, [the Claimant's] presentation now 11 years post-injury is also consistent with what we see as a behavioral chronic pain syndrome in the fact of significant injury and substantial ongoing pathophysiology. Clearly, much of the medical care he receives at this point is supportive and it is unclear to the extent that it increases his level of function. He has certainly not had psychological care since the injury and I think 8-10 behaviorally based psychotherapy would be beneficial if only to introduce cognitive behavioral techniques to stabilize his mood, diminish his depression and also address the possibility that he might engage in avoidant pain behavior (Respondents' Exhibit E, pp. 130-131).

16. The Claimant has been evaluated by John J. Aschberger, M.D. on numerous occasions since he was placed at maximum medical improvement. On March

25, 2013 Dr. Aschberger noted that there had been continued utilization of trigger point injections by Dr. Jones with no clear justification regarding the necessity of the injections for maintenance purposes other than from the Claimant regarding deterioration in his condition with attempts at tapering out the injections. Dr. Aschberger indicated that "there may be a pain avoidance/fear issue going on, and some psychological support and intervention may be helpful in terms of further weaning of treatment. It is unlikely that Mr. Sanchez will willingly taper down." (Respondents' Exhibit F, p. 133).

17. From November 20, 2013 to January 27, 2014, the Claimant treated with Amy Milkavich, Psy.D., and, per Dr. Cebrian's October 13, 2014 report, the Claimant's mood was significantly improved and he was more socially engaged over the course of the psychological treatment. There was no discharge summary provided, it was simply noted that the last note available was from January 27, 2014 (Respondents' Exhibit D, p. 109).

18. Dr. Carlos Cebrian evaluated the Claimant on August 28, 2014 and issued a detailed report dated October 13, 2014 (Respondents' Exhibit D). Dr. Cebrian is Level II accredited. Dr. Cebrian testified at hearing that, subsequent to his independent medical examination, he had also had the opportunity to review the updated medical records and hear the testimony of Byron Jones, M.D.

19. Dr. Cebrian testified that he agrees that the Claimant does require long-term care and medications. However, he testified that the ongoing care and treatment provided by Dr. Jones consisting of trigger point injections, ongoing physical therapy, and use of a muscle relaxant, is not reasonable and necessary medical care under the Medical Treatment Guidelines.

20. According to Dr. Cebrian, chronic use of any muscle relaxant, including Skelaxin, is not recommended under the Medical Treatment Guidelines due to their habit-forming potential, seizure risk following abrupt withdrawal, and documented contribution to deaths of patients on chronic opioids due to respiratory depression. In this case, the Claimant has been on chronic opioids for over 20 years. Therefore, he believes that Skelaxin is an inappropriate medication for the Claimant in combination with sedating opioids. Dr. Cebrian believes that the opiates are more beneficial than the Skelaxin and that the combination of medications creates a dangerous situation. Dr. Cebrian testified that muscle relaxants should only be used for acute situations and never for chronic pain. He recommended that the Claimant be weaned from the Skelaxin over a 30 day period under the supervision of a physician. Dr. Cebrian recommended Flexeril instead of Skelaxin, that, over time, would be tapered down.

21. Dr. Cebrian has reviewed the complete medical records in this matter dating back to 1994. He testified that these records reflect that the Claimant has been receiving trigger point injections to his thoracic and lumbar spine since 1994. Under Medical Treatment Guidelines Rule 17 regarding trigger point injections, Dr. Cebrian testified that there are certain guidelines that must be followed in terms of trigger point injections. Patients should be reassessed after each injection section for an 80%

improvement in pain as well as evidence of functional improvement for three months. The Claimant has not had an 80% improvement in evidence of functional improvement for three months from the trigger point injections. Not only has he not returned to baseline function or had any increased activities, the trigger point injections have not decreased the use of the opioid medications in Dr. Cebrian's opinion. Dr. Cebrian notes that the injections have been going on since 1996 and do not constitute a recent phenomenon to maintain Claimant's condition. In addition, there is no documentation in Dr. Jones' records that he has ever attempted to increase the periods of time between injections. Dr. Cebrian has opined that it is not medically probable that the need for trigger point injections in the thoracic and lumbar spine is related to the January 7, 2002 industrial injury. Dr. Cebrian indicated that under the Medical Treatment Guidelines, a patient should never receive injections to more than four areas. Under maintenance care, trigger point injections should only be provided four times per year with four injection sites. Dr. Jones has been injecting eight sites at one time, every six weeks. Dr. Cebrian indicated that this is not appropriate nor reasonable and necessary maintenance care.

22. In terms of other potential treatment modalities, Dr. Cebrian testified that he agrees with Dr. Aschberger that the continued trigger point injections and use of passive treatments is creating reliance in the Claimant. He opined that physical therapy can be appropriate in maintenance care, but it is not in this case. Dr. Cebrian testified that regular, self-directed exercise is the best form of therapy for chronic pain, including specific exercises to achieve a sustained, elevated heart rate. Dr. Cebrian testified that the new MRI findings were not unexpected and he was surprised the changes were not worse. However, he does not recommend a surgical consult and does not believe the changes are significant to necessitate a second surgery, especially as the first surgery was not successful.

23. In rebuttal testimony, Dr. Jones addressed some of the points discussed by Dr. Cebrian. He opines that a surgical consult is appropriate as there are objective findings and indicators of discogenic pain. In terms of the Claimant's exercise regimen, Dr. Jones testified that spine specific stability exercises are addressed but the Claimant is not yet at a point to receive benefit from aerobic exercises.

24. Rule 17-2(A) provides that all healthcare providers shall use the Medical Treatment Guidelines adopted by the Division. Rule 17-2(B) provides that payers shall routinely and regularly review claims to ensure that care is consistent with the Division's Medical Treatment Guidelines.

25. Rule 16-5(A) provides that in cases where treatment falls within the purview of a Medical Treatment Guideline, prior authorization for payment is unnecessary. However, in cases in which the treatment deviates from the Guidelines, the provider must request care and follow the procedures for prior authorization in Rule 16-9. Dr. Jones testified that he has not requested preauthorization for the treatment or the medication usage, although he is aware his treatment exceeds the recommendations in the Medical Treatment Guidelines.

26. C.R.S. § 8-43-501(2)(a) provides that, “an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider.” Per C.R.S. § 8-43-501(2)(b), “prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) “when an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate.

27. Rule 10-1(A) provides that “a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, “the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure.”

28. The ALJ finds that Dr. Jones has the Claimant’s best interests in mind and that Dr. Jones, as the physician who has treated the Claimant over many years, is in a strong position to understand the Claimant’s ongoing medical maintenance needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections beyond the recommendations in the Medical Treatment Guidelines is not optimal, but he reasonably believes that it is the best available option for the Claimant’s pain management at this time. However, Dr. Jones is not following the rules of the workers’ compensation system. His treatment is beyond the Medical Treatment Guidelines recommendations and yet he is not seeking prior authorization for this treatment. By bypassing the prior authorization procedure, he is prohibiting additional input from other physicians.

29. The Respondents have not requested a review of services by Dr. Jones per the utilization review process authorized by the statute and the Rules. This is an avenue by which the Respondents could obtain additional input from other physicians as to whether the medical services provided by Dr. Jones are reasonably necessary as medical maintenance treatment and by which the Respondents’ request for change of physician (which is effectively seeking a de-authorization of Dr. Jones) could be addressed.

CONCLUSIONS OF LAW

Generally

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

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

Medical Benefits

Medical Maintenance Treatment after MMI and Respondents' Request for Change of Physician

Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

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

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

A change of physician can be requested by a claimant pursuant to C.R.S. 8-43-404(5)(a)(III) or (IV). However, nothing in these provisions authorizes Respondents to seek a change of physician. Rather, a medical utilization review is the process by which a medical provider's course of treatment of a claimant can be examined to determine its reasonableness. To the extent that Respondents seeks a "change of physician," Respondents are essentially seeking to de-authorize a treating physician and this would be governed by the medical utilization review process. *Franz v. Industrial Claim Appeals Office,* 250 P.3d 755 (Colo. App. 2010); *Garner v. Town of Ignacio,* W.C. 4-288-201 (ICAO October 5, 2001). C.R.S. § 8-43-501(2)(a) provides that, "an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider." Per C.R.S. § 8-43-501(2)(b), "prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) "when an insurer, self-insured employer, or claimant requests utilization review, no other party shall

request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate. Rule 10-1(A) provides that "a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, "the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure."

All medical providers in this matter agree that some degree and level of ongoing medical maintenance care is reasonable and necessary for the Claimant. Dr. Jones has expressed a level of frustration with the system and believes that the workers' compensation system hampers his treatment of the Claimant. However, the ALJ finds that the care that is being provided is under the workers' compensation system and this system holds the Respondents responsible for payment of the medical care but provides Respondents with the opportunity to challenge specific medical treatment, and the Claimant must prove that the treatment is reasonably necessary.

Over the course of his treatment of the Claimant, Dr. Jones has failed to comply with the Medical Treatment Guidelines and is not following the rules of the workers' compensation system and this has the effect of preventing the Respondents from one of the various avenues by which they can evaluate ongoing medical treatment to ensure it is appropriate. Physicians are required to use the Medical Treatment Guidelines per Rule 17-1(A). In cases that require deviation, the physicians should follow the request for preauthorization. The ALJ finds that this process would benefit all parties. Dr. Jones should follow the prior authorization process which will allow additional input on the care and treatment being provided to the Claimant.

While the ALJ finds that Dr. Cebrian performed a thorough and extensive review of the medical records and provided additional insight and guidance for the Claimant's medical treatment and the ALJ also finds that Dr. Jones' treatment has exceeded the Medical Treatment Guidelines, the ALJ declines to order a change in physician. The ALJ is uncomfortable making what is essentially a medical decision without the benefit of the utilization review process that the Respondents have not initiated. The Respondents have cited no legal authority to support a change of physician in the manner in which they are seeking, nor have Respondents provided any rationale for failing to comply with C.R.S. § 8-43-501(2)(a) and Rule 10-1(A) to seek a utilization review.

In weighing the conflicting evidence and opinions presented at the hearing, it was found that, as the physician who has treated the Claimant over many years, Dr. Jones is in a stronger position to understand the Claimant's ongoing medical maintenance

needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections he is performing are beyond the recommendations in the Medical Treatment Guidelines and that this is not optimal. Nevertheless, he reasonably believes that this the best available option for the Claimant's pain management at this time, along with the prescription of Skelaxin as a muscle relaxant and he persuasively opined that these treatments are necessary for the Claimant to maintain his level of function. The Claimant has established that these ongoing medical treatments are reasonably necessary as ongoing maintenance care in this case.

Although the ALJ does not find that the Claimant's care and treatment should be changed at this time, the ALJ finds that the Claimant would benefit from other evaluations with respect to ongoing treatment. The ALJ finds that the Claimant would benefit from a psychiatric evaluation to determine if there are other factors and treatment that must be considered. The ALJ also finds that the Claimant should be provided with an independent medical examination by a chronic pain specialist or another physician to evaluate the modalities being provided by Dr. Jones. These doctors should weigh in on whether the treatment plan being provided by Dr. Jones constitutes reasonable and necessary medical care and recommend additional treatment modalities to consider.

ORDER

It is therefore ordered that:

1. The Respondents' request to change physicians is denied.

2. Respondents shall provide a list of three psychiatrists to perform an independent psychiatric evaluation of the Claimant. The Claimant shall choose a psychiatrist from the list and Respondents shall be responsible for the cost of the examination.

3. Respondents shall provide a list of three chronic pain specialists or other type of physician to perform an independent medical evaluation of the Claimant. Claimant shall choose a physician from the list and Respondents shall be responsible for the cost of the examination.

4. Dr. Jones shall comply with the Medical Treatment Guidelines and Rule 16 in requesting preauthorization for any medications or treatment outside of the Colorado Medical Treatment Guidelines.

5. Respondents shall be liable for the post-MMI medical treatment consisting of trigger point injections and muscle relaxants prescribed by Dr. Jones that is reasonably necessary to maintain the Claimant's MMI status, subject to the above limitations. Respondent shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 27, 2015

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

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ISSUES

1. Whether Claimant established by a preponderance of the evidence that he is entitled to platelet-rich plasma (PRP) injections as a form of post maximum medical improvement (MMI) treatment.

2. Whether Claimant established by a preponderance of the evidence that he is entitled to continued prescriptions for Horizant as a form of post MMI treatment.

FINDINGS OF FACT

1. On June 28, 2006 Claimant sustained an admitted industrial injury while working as a superintendant. Claimant was standing on a two story stone window ledge, holding onto a gutter with his right hand, when a piece of window frame gave way and caused him to fall to the ground.

2. Claimant blacked out. Claimant suffered many serious injuries as a result of the fall including: fractured skull/closed head injury, multi fracture of his right wrist, fracture of his left wrist, right eye injury, nasal fracture, cracked teeth, partial tear of right rotator cuff, and partial tear of left rotator cuff with impingement. Claimant also suffered psychological issues as a result of the injury, extensive treatment, and inability to work.

3. On August 30, 2006 Phillip Stull, M.D. evaluated Claimant. Dr. Stull noted Claimant had complaints of anterior pain in his left shoulder, worsened with overhead positions. Dr. Stull reviewed an MRI of Claimant's left upper extremity performed on August 16, 2006. Dr. Stull noted post traumatic bursitis, impingement, and tendonitis of the left shoulder and noted Claimant had a type II acromion and mild AC joint arthritis. *See* Exhibit 7.

4. On January 10, 2007 Dr. Stull evaluated Claimant. Dr. Stull noted that Claimant's left shoulder had mildly positive impingement signs. *See* Exhibit 7.

5. On July 27, 2007 Claimant underwent bilateral shoulder sonographic analysis performed by Scott Primack, D.O. Dr. Primack noted clinical limitations in strength in Claimant's bilateral shoulders. Dr. Primack opined that there was both clinical and sonographic evidence of bilateral partial thickness rotator cuff tears in both shoulders and of minimal bilateral impingement syndrome in both shoulders. *See* Exhibit 7.

6. On December 10, 2007 Claimant underwent right shoulder surgery that involved right shoulder arthroscopy with extensive debridement, open modified repair of the rotator cuff, acromioplasty and release of the CA ligament, and distal clavicle excision. *See* Exhibit 7.

7. On February 25, 2008 Claimant underwent an additional surgery on his right shoulder that involved right shoulder manipulation under anesthesia and arthroscopy with extensive debridement. *See* Exhibit 7.

8. On March 2, 2008 Felix Meza, M.D. evaluated Claimant. Claimant reported improved range of motion for his right shoulder and Dr. Meza advised Claimant to consider surgery for the left shoulder based on the outcome for the right shoulder. *See* Exhibit 7.

9. On October 21, 2008 Claimant was placed at MMI by Usama Ghazi, D.O. *See* Exhibit 7.

10. On June 17, 2009 Claimant underwent a Division Independent Medical Examination with Sander Orent, M.D. Dr. Orent agreed with the date of MMI and provided impairment ratings for Claimant's upper extremities, cervical spine, and psychological issues. *See* Exhibit 7.

11. On August 6, 2009 Dr. Meza evaluated Claimant. Claimant reported his left shoulder was stable with some discomfort and that he had the same amount of discomfort in his right shoulder as he did prior to surgery. *See* Exhibit 7.

12. From September 10, 2012 through November 5, 2012 Claimant was evaluated by PA Jennifer Voag and by Dr. Ghazi. Claimant reported his greatest pain was in his shoulders and that he was willing to consider surgery for his left shoulder. Claimant was referred again to Dr. Stull. *See* Exhibit 7.

13. On November 10, 2009 Respondents filed a Final Admission of Liability (FAL) admitting to an MMI date of November 6, 2008. The FAL admitted for medical maintenance care that was reasonable, necessary, and related.

14. On January 7, 2013 Dr. Stull evaluated Claimant for his bilateral shoulder pain. Dr. Stull noted Claimant's left shoulder had a painful arc and positive impingement signs. His impression was impingement, rule out rotator cuff tear. An X-ray of the left shoulder was performed and showed a large acromial spur. *See* Exhibit 7.

15. On February 11, 2013 Claimant was evaluated by PA Voag who noted Claimant had a partial tear of the left rotator cuff and a bone spur resulting in impingement. *See* Exhibit 7.

16. On June 24, 2014 Dr. Stull again evaluated Claimant for his left shoulder. Claimant reported continuing to have pain with overhead activities in the left shoulder. Dr. Stull noted that Claimant had a very long trial of conservative measures including injections and therapy in the left shoulder. Dr. Stull assessed partial cuff tear, impingement, and AC joint arthritis of the left shoulder. Dr. Stull discussed further conservative care versus surgical care. Claimant chose to pursue surgical care and Dr. Stull opined that surgical care was indicated due to persistent symptoms and the lack of definitive response to long-term conservative measures. *See* Exhibit 7.

17. On July 14, 2014 Jorje Klajnbart, D.O. performed a rule 16 assessment. Dr. Klajnbart opined that the request for left shoulder surgery was medically reasonable, necessary, and related to Claimant's June 28, 2006 injury. *See* Exhibit 7.

18. On December 9, 2014 Claimant was evaluated by Dr. Ghazi. Claimant reported he did not undergo left rotator cuff surgery with Dr. Stull because he was unable to take time off work and support his family. Dr. Ghazi discussed with Claimant the option of trialing platelet-rich plasma (PRP) injections to the left biceps tendon and left subacromial bursa/rotator cuff. Dr. Ghazi opined that between 1 or 2 sessions he should be able to significantly reduce and possibly fully alleviate Claimant's symptomatology forgoing the need for surgery.

19. Dr. Ghazi opined that the PRP injections could be done in office, would be far less expensive than surgery, and would only require 2 days off work versus surgery that would require 12 weeks off work. Dr. Ghazi noted that if the injections provide some relief, he could do a series of 2 or 3 PRP injection and that it was possible that would alleviate Claimant's symptomatology.

20. Dr. Ghazi also noted no scapular winging. Dr. Ghazi changed Claimant's prescription of gabapentin to horizant which he noted was a long acting gabapentin.

21. On December 16, 2014 Dr. Ghazi requested authorization for PRP injection under ultrasound to the left biceps tendon and subacromial bursa.

22. On December 18, 2014 the request was denied by Respondent. Carlos Cebrian, M.D. provided a Rule 16 assessment opinion supporting the denial. Dr. Cebrian noted that the utilization of PRP for shoulder pathology was not supported by scientific evidence at the time and that it was not addressed in the Colorado Division of Workers' Compensation Shoulder Injury Medical Treatment Guidelines. Dr. Cebrian thus opined that the PRP injection was not medically reasonable or necessary and should not be approved. *See* Exhibit 7.

23. On December 18, 2014 Dr. Cebrian also issued his report of an Independent Medical Examination (IME) that he performed on October 9, 2014. Dr. Cebrian opined that Claimant had sustained injuries to the bilateral shoulders, bilateral wrists, cervical spine, lumbar spine, and head and had also been treated for depression as part of the claim. Dr. Cebrian agreed with Dr. Klajnbart that surgery for Claimant's

left shoulder was medically reasonable, necessary, and related to the claim. Dr. Cebrian opined that there was evidence of a partial left rotator cuff tear with ongoing impingement syndrome. Dr. Cebrian noted that Claimant was on multiple medications that were sedating including gabapentin. Dr. Cebrian noted that Claimant was prescribed gabapentin for scapular neuritis in 2009 by Dr. Ghazi but that there was no current symptomatology of scapular neuritis or other post-traumatic neuropathy. Dr. Cebrian opined that gabapentin should be discontinued and that removing the sedative effects from gabapentin may assist in increasing Claimant's mood. Dr. Cebrian also again noted that PRP injections for shoulder pathology was not supported by scientific evidence, not addressed in the Colorado Division of Workers' Compensation Shoulder Medical treatment Guidelines, and was not medically reasonable or necessary. *See* Exhibit 7.

24. The Colorado Division of Workers' Compensation Shoulder Injury Medical Treatment Guidelines, Rule 17, Exhibit 4 effective February 1, 2015 included a section addressing PRP injections for shoulder pathology. The Guidelines indicate there is some evidence that in the setting of supraspinatus tendinosis or partial thickness tears…an injection of 3 ml of PRP has clinical benefits lasting up to six months. The Guidelines indicate there is good evidence that in the setting of rotator cuff tendinopathy, a single dose of PRP provides no additional benefit over saline injection when the patients are enrolled in a program of active physical therapy. The Guidelines also indicate the preponderance of the evidence suggests that PRP is not likely to have long term beneficial effects and that PRP is not generally recommended.

25. The Guidelines indicate PRP may be considered in unusual circumstances in cases with tendon damage and where persons have not responded to appropriate conservative measures and where the next level of guideline-consistent therapy would involve an invasive procedure with risk of significant complications.

26. The Guidelines also indicate that they are in place to set forth care that is generally considered reasonable for most injured workers but that reasonable medical practice may include deviations from the guidelines as individual cases dictate. The Guidelines and recommendations are for pre-MMI care and are not intended to limit post-MMI treatment.

27. Dr. Cebrian testified at hearing. Dr. Cebrian explained that the idea behind the PRP injection in this case is the hope that the injected platelets with growth factors will cause re-growth, regeneration, and healing of the tendon. He opined that the medical evidence to support this theory was limited, inconsistent, and not shown to have long term benefits.

28. Dr. Cebrian opined that Claimant's left shoulder has impingement syndrome, partial rotator cuff tear, arthritis, and bone spurs. He noted that part of Dr. Stahl's proposed surgery would take out part of the clavicle and clear out the bone spurs to create more space in Claimant's shoulder to relieve Claimant's impingement.

Dr. Cebrian opined that the proposed surgery would improve Claimant's range of motion and pain.

29. Dr. Cebrian opined that Claimant's bone spurs at the AC joint were causing Claimant's tendon inflammation and impingement. Dr. Cebrian opined that even if the PRP injection helped the partially torn rotator cuff tendon regenerate and heal, it won't alleviate Claimant's impingement or create more space in the shoulder. Rather, he opined that the tendon will still be impinged because of the bone spurs.

30. Dr. Cebrian acknowledged that the Guidelines were not intended to limit post MMI treatment and that deviation from the Guidelines can be appropriate for some cases. However, Dr. Cebrian opined that in this case the injections will not alleviate Claimant's symptomatology and opined that the PRP injections were not reasonable or necessary treatment.

31. Dr. Cebrian also opined that Claimant currently has no objective evidence of neuropathy, that neuropathy can go away on its own after a period of time, and that it was reasonable to taper Claimant off the Horizant over a period of 4-6 weeks.

32. Dr. Cebrian is found credible and persuasive. His medical opinions are comprehensive, consistent with diagnostic studies noted throughout Claimant's treatment, and are consistent with recommendations made by Dr. Klajnbart and Dr. Stull.

33. The opinion of Dr. Ghazi is not as credible or persuasive. Dr. Ghazi does not provide a comprehensive analysis of the proposed PRP injections and how they will impact Claimant's specific left shoulder pathology, and do not provide sufficient support to show that PRP injections are reasonably needed.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

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

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

Medical Maintenance Care

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." *See §* 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). An award for ongoing medical benefits after MMI is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. Thus an award of post-MMI medical benefits should be general in nature. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003).

In cases where the respondents file an FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Id.* When the respondents challenge the claimant's request for specific post-MMI medical treatment the claimant bears the burden of proof to establish entitlement to the medical benefit. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009).

PRP Injections

Claimant has failed to meet his burden of proof to establish an entitlement to PRP injections for his left shoulder. The PRP injections have not been shown to be reasonably needed to cure and relieve Claimant from the effects of his injury. The testimony of Dr. Cebrian is found credible and persuasive that the PRP injections will not relieve Claimant from his current symptoms nor will they, even if successful, cure or relieve the problems in Claimant's left shoulder. Dr. Cebrian credibly points to the bone spurs on the AC joint as a cause of Claimant's impingement and the large bone spurs were noted on diagnostic studies. The ALJ finds Dr. Cebrian credible that even if the PRP injection is successful in regeneration of the tendon, the regenerated tendon will still be impinged and Claimant's symptoms will not be cured or relieved by the PRP injection.

Further, Claimant has failed to show that PRP injections are reasonably needed in this case. The ALJ agrees with Claimant's arguments that the Medical Treatment Guidelines are not intended to limit post MMI maintenance care, nor are they required to be followed explicitly. However, the Guidelines do provide guidance on generally accepted medical practices. Although the Guidelines indicate that there is some evidence that with a partial thickness tear a PRP injection may have benefits lasting up to six months, the Guidelines note that a preponderance of the evidence suggests that PRP injections are not likely to have long term beneficial effects and that they are not generally recommended. Further, neither the guidelines nor any medical provider has indicated that PRP injections are likely to be successful when the shoulder pathology includes the type of impingement (bone spurs, type II acromion) that Claimant's pathology demonstrates in addition to his partial rotator cuff tear. The Guidelines do not indicate that PRP injections can cause relief of bone spurs, or create more space in the shoulder to relieve impingement, nor has a medical provider given such an opinion. Dr. Cebrian credibly opined that the PRP injections, given Claimant's shoulder pathology, will not cure and relieve his symptoms. Dr. Cebrian's opinion that Claimant actually needs surgery to cure and relieve the effects of his injury and to relieve his symptomatology is credible, persuasive, and supported by the recommendations of Dr. Stull and Dr. Klajnbart. Although the ALJ understands Claimant's hesitation to undergo left shoulder surgery given Claimant's past complications with right shoulder surgery and given his financial considerations, there is insufficient evidence to support that the less invasive PRP injections are a reasonable solution or that they will cure or relieve the effects of Claimant's injury.

Dr. Ghazi's request for PRP injections and his opinions do not support a conclusion that the injections are reasonable and necessary to relieve the effects of Claimant's injury. At the December 9, 2014 appointment, Dr. Ghazi initially noted that Claimant was unable to take time off work for left shoulder surgery. Dr. Ghazi then discussed trialing PRP injections. He indicated that he should be able to significantly reduce and possibly fully alleviate Claimant's symptomatology. Although he would like to trial the PRP injections and his opinion presents some evidence as to what the PRP injections should or possibly could do, his opinion is not as detailed or comprehensive as that of Dr. Cebrian. Dr. Ghazi's opinion fails to address the bone spurs and impingement shown by diagnostic studies or how the PRP injections would work despite

this pathology. Thus, after reviewing all the medical documentation, evidence, and testimony, the ALJ concludes that Claimant has failed to meet his burden. The opinion of Dr. Cebrian is found more credible and persuasive than that of Dr. Ghazi as Dr. Cebrian's opinion is more comprehensive, addresses the documented impingement and bone spurs, and is supported by the opinions of two other providers that Claimant truly needs surgery and not injections to cure and relieve the effects of his injury.

Horizant

Claimant has also failed to meet his burden of proof to establish an entitlement to continued prescriptions of gabapentin/Horizant. Gabapentin was initially prescribed in 2009 for neuropathy. The prescription was changed to long acting gabapentin (Horizant) more recently and Claimant continues to take Horizant. Although Claimant appears to be functioning while on this medication, the records fail to show that Claimant continues to have signs of neuropathy requiring this specific prescription. Claimant has failed to present sufficient evidence that he still suffers from neuropathy requiring the continued use of Horizant. Rather, the opinion of Dr. Cebrian is found credible and persuasive that Claimant currently has no objective evidence of neuropathy, that neuropathy can go away on its own after a period of time, and that it is reasonable to taper Claimant from the Horizant over a period of 4-6 weeks. Claimant argues that his current level of functioning is support for continued use of this medication, however it is noted that Claimant has had continued ongoing psychological issues and Dr. Cebrian has opined that the use of gabapentin has a sedative effect and that removing the sedative effects of the Horizant may assist in increasing Claimant's mood. Without current objective evidence of neuropathic pain requiring the use of Horizant and given its possible side effects, Claimant has failed to meet his burden to show that continued use of this drug is reasonable and necessary to relieve the effects of his injury. Claimant shall work with his authorized treating provider to taper off Horizant over the course of 4-6 weeks. If signs of neuropathy exist during the tapering period or shortly thereafter, the issue of Horizant will have to be revisited. However, at this point, Claimant has failed to establish that Horizant is reasonably necessary to cure and relieve the effects of his injury as Claimant has not established that he continues to have neuropathy.

ORDER

1. Claimant has failed to prove by a preponderance of the evidence that he is entitled to PRP injections. His request for PRP injections is denied and dismissed.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to continued prescriptions for Horizant at this time. Claimant shall work with his authorizing treating physician to taper off Horizant in a 4-6 week time period. If Claimant displays signs of neuropathy during the tapering or shortly thereafter, the issue of the necessity of Horizant may be revisited.

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

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

DATED: July 31, 2015

/s/ Michelle E. Jones

_____

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

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ISSUES

- Did Claimant overcome by clear and convincing evidence the Division-sponsored Independent Medical Examination physician's finding that Claimant reached maximum medical improvement on March 12, 2010?

- Are Respondents entitled to terminate Claimant's ongoing temporary total disability benefits until they recover a "credit" allegedly due them under the holding in *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995)?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 though 46 were received in evidence. Respondents' Exhibits A through K and Respondents' Exhibit M were received into evidence.

2. On November 30, 2007 Claimant sustained numerous injuries when a pressurized lid weighing between 50 and 70 pounds blew off of a rail car and struck him in the head and face. As a result of this incident Claimant sustained numerous fractures to the bones of the face including the bilateral maxillary sinuses, the right orbit and the right mandible at the mandibular angle. On November 30 Claimant underwent open reduction and internal fixation of a right "ZMC fracture" and closed reduction of the mandibular right subcondyle.

3. Thereafter Claimant suffered headaches and facial pain that resulted in a prolonged course of treatment including the prescription of narcotic pain medication. On January 25, 2008 Claimant was examined by "Dr. Crane" who noted a malocclusion and opined Claimant would require orthodontic treatment to ready the teeth for surgery as well as "maxillary and mandibular surgery." (Respondents' Exhibit A p. 6). On August 25, 2008 Claimant underwent a consultation with "Dr. Doughty" concerning dental and orthodontic treatment. Dr. Doughty opined a reasonable treatment plan included removal of teeth, stage one orthodontic movement presurgery, one having maxillary osteotomy on the right side, stage two orthotic movement and finalization of occlusion. Dr. Doughty opined that maximum medical improvement (MMI) would occur at 3-1/2 years "after stage one orthodontic treatment." (Respondents' Exhibit A p. 6).

4. In September 2008 Jeffrey Wunder, M.D., became one of Claimant's authorized treating physicians (ATP). When Dr. Wunder examined Claimant on September 19, 2008 Claimant complained of facial pain, headaches, facial numbness

on the right side, difficulty with the sinuses on the right side and neck pain. Dr. Wunder prescribed numerous therapies and referred Claimant for an ENT consult to evaluate the sinus issues. (Respondents' Exhibit A p. 6).

5. On February 5, 2009 Sanjay Gupta M.D., of Front Range ENT performed surgery described as septoplasty, bilateral maxillary sinus endoscopic enterostomy with tissue removal and inferior turbinate partial submucosal resection coblation bilaterally. (Respondents' Exhibit A p. 7).

6. Thereafter Claimant underwent numerous other procedures including medial branch blocks, a trigeminal nerve block, a right C2 through C5 radiofrequency neurotomy, an occipital nerve block and the extraction of teeth. (Respondents' Exhibit A pp. 8-9).

7. On March 12, 2010 Dr. Wunder placed Claimant at MMI. Dr. Wunder assessed the following: (1) S/P facial trauma and fractures; (2) S/P sinus surgery; (3) Cervical facet disorder, improved S/P RF neurotomy; (4) Reactive myofascial pain syndrome; (5)Trigeminal neuralgia; (6) S/P trigeminal radiofrequency ablation; (7) Multifactorial headaches; (8) Mild traumatic brain injury; (9) Psychological factors, i.e. reactive depression. Dr. Wunder assessed 33% whole person impairment based on the combined value of 15% impairment of the cervical spine, 10% impairment for persistent trigeminal neuralgia, 10% impairment for mild traumatic brain injury with limitations in cerebral functioning and 4% for psychological impairment.

8. In his March 12, 2010 note Dr. Wunder stated the Claimant continued to wear orthodontic braces and was "awaiting orthognathic surgery to his jaw." Dr. Wunder wrote that the surgery might occur as "late as June, July, or even later." Dr. Wunder also stated that Claimant "will need to have his case reopened at the time of his surgery" and "will be seen on a regular basis for medication maintenance."

9. On April 10, 2010 Dr. Wunder noted that "next month" Claimant was scheduled to see his orthodontist (Dr. Crane) about whether to proceed with jaw surgery recommended by Dr. Orr. Claimant reported that he had a feeling of "fluid in his ears" that resulted in an increase in headaches. Dr. Wunder referred Claimant back to Dr. Gupta for an "ENT reevaluation."

10. On May 10, 2010 Dr. Wunder wrote that Claimant felt pressure in his head associated with popping ears. The Claimant had not heard from Dr. Gupta's office regarding the referral made by Dr. Wunder on April 10. The Claimant reported that his "orthodontist indicated that he probably would be in dental braces another five to six months before surgery could be considered." Dr. Wunder again referred Claimant to Dr. Gupta.

11. A division-sponsored independent medical examination (DIME) was requested to review Dr. Wunder's finding of MMI and his impairment rating.

12. On June 28, 2010 Gregory Reichhardt, M.D., conducted the DIME. In connection with the June 28 DIME report Dr. Reichhardt took a history form Claimant, performed a physical examination and reviewed pertinent medical records through May 21, 2010. Claimant reported right-sided neck pain, numbness of the right arm and hand, headaches with frontal and occipital components, pain in the distribution of the trigeminal nerve and facial pain. Dr. Reichhardt assessed the following (1) Facial fractures, right subcondylar mandibular fracture and right zygomatic arch fracture. Status post ORIF. Status post hardware removal. Status post orthodontic treatment; (2) Status post septoplasty and sinus surgery; (3) Depression, work-related; (4) Possible TBI, work-related; (5) Chronic headaches, work-related; (6) Trigeminal neuralgia post neurolysis, work-related; (7) Neck pain and right upper extremity paresthesias, non-work related.

13. Dr. Reichhardt agreed with Dr. Wunder that Claimant had reached MMI on March 12, 2010. Dr. Reichhardt also noted that the Claimant "will require orthognathic surgery under his Workers' Compensation Claim." Dr. Reichhardt stated Claimant's treatment for the work-related conditions had "been quite comprehensive and appropriate."

14. On July 12, 2010 Dr. Reichhardt submitted an addendum to his DIME report after he reviewed some additional medical records. The addendum did not alter the opinions he expressed in the June 28, 2010 DIME report.

15. In the June 28, 2010 DIME report Dr. Reichhardt assessed a 20% whole person impairment rating. This was based on the combined value of 16% whole person impairment and 5% psychological impairment. In so doing Dr. Reichhardt stated that he disagreed with Dr. Wunder that Claimant's cervical impairment was related to the 2007 industrial injury. Dr. Reichhardt explained this was the "primary reason" that his impairment rating was lower than Dr. Wunder's.

16. On July 7, 2010 Respondents filed a Final Admission of Liability (FAL) that admitted claimant reached MMI on March 12, 2010. The FAL admitted liability for temporary total disability (TTD) benefits through March 11, 2010. The FAL further admitted for permanent partial disability (PPD) benefits commencing March 12, 2010. The FAL admitted for a total amount of $38,282.12 in PPD benefits based on Dr. Reichhardt's physical and psychological impairment ratings.

17. On July 16, 2010 Dr. Wunder noted Claimant had "chronic jaw pain and headaches." The headaches had not improved. Dr. Wunder also stated that the Claimant's orthodontist was "tightening up his braces in preparation for orthognathic surgery previously mentioned."

18. Pursuant to Dr. Wunder's referral, Dr. Gupta evaluated Claimant on August 23, 2010. Claimant reported symptoms of aching and throbbing in both ears that had "been a problem for several months." Dr. Gupta noted this was "a recurrent problem characterized by intermittent otalgia" and the "first episode occurred three years prior to this visit." Dr. Gupta assessed bilateral otogenic pain, chronic bilateral maxillary

sinusitis, unspecified bilateral tinnitus, bilateral hearing loss and bilateral headaches. Dr. Gupta referred Claimant for a CT scan of the paranasal sinuses.

19. On September 17, 2010 Dr. Wunder noted Claimant was reporting "lots of sinus pain," posterior neck pain and headaches. Claimant also reported he was "anxious to get his jaw surgery done" and had encouraged his "orthodontist to try to crank up his braces so that he "could get surgery sooner." However, the orthodontist was reportedly hesitant to do so.

20. On September 23, 2010 Claimant underwent a CT scan of the sinuses. The radiologist assessed "moderate ethmoid and maxillary sinus disease" with postsurgical changes.

21. On September 29, 2010 Dr. Gupta examined Claimant and reviewed the CT scan results. Dr. Gupta assessed bilateral rhinitis, bilateral maxillary sinusitis and bilateral face pain. Dr. Gupta described these conditions as "unstable." He recommended that Claimant continue using Astepro and add a medrol dose pack and Augmentin. Claimant was to follow-up in 12 weeks.

22. On November 15, 2010 Dr. Wunder reported claimant had "increased right facial pain" that seemed to be related to his sinuses. The Claimant advised that the medications prescribed by Dr. Gupta had not "impacted" his symptoms. Dr. Wunder opined that the Claimant "needs ongoing evaluation and treatment" and that "his condition has worsened." Dr. Wunder recommended Claimant return to Dr. Gupta sooner than the visit scheduled for December 22, 2010. Dr. Wunder also stated that he lacked the expertise to treat Claimant's sinus problems. Consequently, Dr. Wunder referred Claimant to Scott Pace, M.D., for an allergy evaluation and treatment. Dr. Wunder stated the Claimant was "currently unable to work."

23. Claimant returned to Dr. Gupta on November 17, 2010. Dr. Gupta noted a history of facial pain that began "after trauma to face he sustained with subsequent sinus infections." Dr. Gupta noted Claimant had undergone "extensive evaluation and therapy including previous surgical intervention." Dr. Gupta stated that the CT scan documented "continued sinus infection" and that sinus disease can act as a "trigger for facial pain and headache." Dr. Gupta recommended additional surgery.

24. On November 18, 2010 Gary Zuehlsdorff, M.D., a specialist in occupational medicine, did a paper review of Dr. Wunder's request for an "allergy referral." Dr. Zuehlsdorff opined the "significant architectural damage to the [Claimant's] facial anatomy" resulting from the 2007 industrial injury may have caused any "preexisting allergic phenomenon to worsen and cause sinus infections." Thus, Dr. Zuehlsdorff recommended approval of a one-time visit to an allergist.

25. Claimant returned to Dr. Wunder on November 29, 2010 and reported his "right facial pain is much worse." Dr. Wunder noted that Dr. Gupta had recommended surgery. In light of this information Dr. Wunder opined the case should be "re-opened and surgical issues addressed."

26. On December 14, 2010 the Insurer filed a General Admission of Liability (GAL). The GAL stated the Respondents were "reopening" the claim based on Dr. Wunder's November 15, 2010 report. Specifically, the GAL remarked that the Claimant "has been taken off work and we therefore have a worsening of condition." The GAL reinstated TTD benefits commencing November 15, 2010. The GAL also stated the Claimant was "overpaid by $38,282.12 in benefits previously paid" and this amount would be "credited toward any future permanency." The GAL reserved the right to claim any and all offsets and recover any and all overpayments.

27. On December 30 2010 Dr. Gupta performed surgery described as bilateral frontal sinusotomy, bilateral ethmoidectomy, bilateral submucosal reduction of the inferior trubinates and resection of synechiae bilaterally.

28. On February 3, 2011 Dr. Wunder examined the Claimant. Claimant reported that his facial pain had worsened since the recent sinus surgery. Dr. Wunder referred Claimant to Ken Allan, M.D., for another radiofrequency ablation of the right trigeminal nerve. Claimant had also developed an inguinal hernia that Dr. Wunder thought was caused by constipation resulting from the use of Embeda (timed-release morphine).

29. On April 14, 2011 Dr. Wunder noted Claimant had undergone repair of the right inguinal hernia. Claimant also had undergone radiofrequency rhizotomy of the right trigeminal V2 branch. The rhizotomy resulted in only "mild improvement." The Claimant was still using dental orthotic devices but the orthognathic surgery was apparently "on hold until his sinus infections" could be alleviated. Dr. Wunder opined Claimant was "getting to the point where further treatment" was "unlikely to help him much." Dr. Wunder noted that the "only treatment remaining therefore would be the completion of his orthotic work as well as orthognathic surgery."

30. On September 9, 2011 Dr. Wunder recorded Claimant was still having "significant pain and pressure in the right sinus area." Claimant had recently been seen by Thomas Peterson, M.D., who thought there was "anatomic abnormality in the sinuses perhaps trapping fluid and resulting in recurrent infections." Dr. Peterson had recommended another sinus surgery. Dr. Wunder opined Claimant should undergo the surgery recommended by Dr. Peterson and then undergo "his other jaw surgery."

31. On November 18, 2011 Dr. Peterson, performed another sinus surgery described as a sphenoid and ethmoid sinoscopy with balloon sinoplasty. (Respondents' Exhibit M p. 12).

32. On February 22, 2012 Claimant underwent orthognathic surgery. (Respondents' Exhibit M p. 13).

33. On August 30, 2012 Dr. Wunder opined Claimant would probably need a dental implant for his right upper incisor but was probably at MMI for all other issues.

34. On September 24, 2012 Nicholas K. Olsen, M.D., performed an independent medical examination (IME) at the request of the Insurer. At that time Claimant reported severely painful right-sided headaches that flared up 4 to 5 times per month, "nerve pain" in the neck and face and depression. Dr. Olsen reviewed medical records and noted that in 2010 Claimant had complained of sinus pain and that Dr. Gupta performed sinus surgery on December 30, 2010. Dr. Olsen also noted that Claimant underwent sinus surgery on November 18, 2011 and orthognathic surgery in February 2012. Dr. Olsen was asked to opine whether Claimant had "again reached MMI." Dr. Olsen replied that Claimant considered the November 2011 sinus surgery to be a success. Dr. Olsen opined Claimant reached MMI in January 2012 when "he had realized the November surgery was a success." Dr. Olsen did not comment as to why the February 2012 "orthognathic surgery" did not affect the date of MMI. Dr. Olsen also noted Claimant was scheduled to see Dr. Orr and Dr. Crane regarding hardware removal. However, Dr. Olsen explained that he considered hardware removal to be "maintenance care."

35. On April 25, 2013 Dr. Wunder noted the Claimant stated he was "still having chronic sinusitis infection." Dr. Wunder opined that Claimant should be seen by another ENT specialist since Dr. Peterson had apparently left practice without a forwarding address. Claimant had also contacted Dr. Orr about removing "hardware from his right sinus fractures." Dr. Wunder opined Claimant should be approaching MMI once he "can see an ENT and see his oral surgeon about the fixation hardware."

36. On January 22, 2014 Dr. Orr performed surgery to "remove fixation hardware from the right maxillary area."

37. On March 21, 2014 Dr. Wunder noted that Claimant had undergone hardware removal for the right maxilla and that Dr. Orr indicated "there was nothing else to offer from his point of view." Dr. Wunder opined Claimant should return to an ENT specialist (Dr. Lipkin) to see "whether or not [Claimant] needs any further procedures done on sinuses." Dr. Wunder opined that if claimant did not need further procedures he would be approaching MMI.

38. On August 7, 2014 Dr. Wunder noted Claimant underwent additional surgery on his sinuses at the end of July. Claimant advised that after surgery his sinus infection returned.

39. On December 15, 2014 Dr. Wunder authored a letter to Claimant's counsel. Dr. Wunder noted the Claimant was placed at MMI on March 12, 2010, but continued to have "sinus difficulties and pressure." Dr. Wunder stated that these "ENT problems" required ongoing evaluation and treatment and Claimant "eventually had surgeries including sinus surgeries and orthognathic surgery." Dr. Wunder opined Claimant "never did really obtain MMI, as he had ongoing problems in an area in which I am not a specialist." Dr. Wunder also stated that Dr. Reichhardt is not an ENT specialist and opined that "neither one of us is really a specialist to determine whether or not [Claimant] had reached maximum medical improvement for ENT issues which appear to be the most prominent ongoing medical problems."

FINDINGS OF FACT CONCERNING MMI

40. It is highly probable and free from serious doubt that the DIME physician, Dr. Reichhardt, incorrectly found Claimant reached MMI on March 12, 2010. Claimant proved it is highly probable and free from serious doubt that on March 12, 2010 not all injury-related conditions were "stable" and he needed additional medical treatment to reach MMI.

41. The opinions expressed by Dr. Wunder in his letter of December 15, 2014 are highly credible and persuasive. Dr. Wunder explained that although he initially opined Claimant reached MMI on March 12, 2010, that opinion was proven to be incorrect by Claimant's subsequent course of treatment for "ENT" problems. Dr. Wunder persuasively explained that although he initially assigned an MMI date of March 12, 2010, Claimant "continued" to have sinus pain and pressure that necessitated additional treatment including surgeries. Additionally, Dr. Wunder persuasively explained that after March 12, 2010 Claimant required orthognathic (jaw) surgery to alleviate the effects of the industrial injury. The ALJ understands Dr. Wunder's opinion to be that events subsequent to March 12, 2010 proved Claimant's injury-related sinus and jaw problems were not stable on March 12 and that these conditions required additional treatment before Claimant reached MMI.

42. Dr. Wunder's opinion that Claimant did not reach MMI on March 12, 2010 is corroborated by medical evidence showing the course of Claimant's treatment for jaw problems. The medical records establish that as early as January 2008 Dr. Crane was considering mandibular surgery. On August 25, 2008 Dr. Doughty opined Claimant would not reach MMI until 3-1/2 years "after stage one orthodontic treatment." On March 12, 2010 Dr. Wunder himself noted Claimant was still "awaiting orthognathic surgery to his jaw" and remarked that the claim would need to be "reopened" when the orthognathic surgery was performed. The ALJ infers from Dr. Wunder's March 12 statement regarding "reopening" that it is was his belief the need for orthognathic surgery would be inconsistent with MMI. This inference is supported by Dr. Wunder's December 14, 2014 letter indicating that Claimant "never really did obtain MMI" in part because he needed and eventually underwent orthognathic surgery. The medical records demonstrate Claimant did not undergo the orthognathic surgery until February 2012.

43. Dr. Wunder's opinion that Claimant did not reach MMI on March 12, 2010 is also corroborated by persuasive medical documentation showing that after that date Claimant needed ongoing medical treatment for sinus problems. Claimant was diagnosed with sinus problems soon after the November 2007 injury and Dr. Gupta performed surgery on Claimant's sinuses in 2009. On April 10, 2010, less than a month after Dr. Wunder first opined Claimant had reached MMI, Dr. Wunder referred Claimant back to Dr. Gupta because of increased headaches. When Dr. Gupta examined

Claimant on August 23, 2010 he diagnosed otogenic pain, bilateral maxillary pain and tinnitus and immediately referred Claimant for a CT scan the sinuses. According to Dr. Gupta the CT scan showed recurrent sinus infections and he performed surgery for this condition on December 30, 2010. Subsequently Claimant would undergo additional sinus procedures in November 2011 and July 2014. This medical documentation persuasively supports Dr. Wunder's December 15, 2014 opinion that Claimant did not reach MMI on March 12, 2010 because he continued to have ongoing sinus problems that required additional treatment including surgeries.

44. Dr. Reichhardt's June and July 2010 DIME opinion that Claimant reached MMI on March 12, 2010 is not persuasive and is given much less weight than Dr. Wunder's December 15, 2014 opinion. Dr. Reichhardt did not credibly and persuasively explain his opinion that Claimant reached MMI on March 12, 2010 even though Dr. Reichhardt admitted Claimant still required orthognathic surgery as of that date. Dr. Reichhardt did not persuasively and credibly refute Dr. Dr. Wunder's December 2014 opinion that Claimant did not reach MMI on March 12, 2010 because Claimant still required treatment for ongoing sinus problems and underwent surgery for those problems. Indeed, there is no credible and persuasive evidence that Dr. Reichhardt was ever asked to reconsider his MMI opinion in light of Claimant's symptoms and course of treatment after May 2010.

FINDINGS OF FACT CONCERNING CLAIMED CREDIT AGAINST TTD BENEFITS

45. At hearing the parties stipulated that if Dr. Reichhardt's DIME opinion concerning MMI is upheld then the amount of the credit sought by Respondents is $38,282.12. The parties also stipulated that if Dr. Reichhardt's DIME opinion concerning MMI is overcome by Claimant and Claimant is awarded TTD benefits from March 12, 2010 through November 14, 2010, the amount of the credit sought by Respondents is $12,459.30.

46. As found above, the ALJ determines that Claimant proved by clear and convincing evidence that he did not reach MMI on March 12, 2010. Because Claimant has overcome the DIME physician's opinion concerning MMI the amount of the credit sought by Respondents is $12,459.30. The ALJ understands the $12,459.30 to represent the amount of money paid to Claimant by the Insurer in excess of the amount that would have been paid if the insurer had simply continued paying TTD benefits from March 12, 2010 through November 14, 2010.

CONCLUSIONS OF LAW

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

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

litigation. Section 8-40-102(1), C.R.S. Except as noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

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

OVERCOMING DIME ON MMI

Claimant contends he proved by clear and convincing evidence that the DIME physician, Dr. Reichhardt, erred in finding that MMI was reached on March 12, 2010. Claimant argues his condition was not “stable” on March 12, 2010 and he needed additional treatment to reach MMI. Respondents argue that Claimant failed to overcome the DIME physician’s opinion by clear and convincing evidence. They reason that Claimant reached MMI on March 12, 2010 and suffered a subsequent “worsening of condition” that caused them to voluntarily reopen the claim as of November 15, 2010. The ALJ agrees with Claimant.

MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” Section 8-40-201(11.5), C.R.S. MMI is not divisible among the various components of an industrial injury. Rather, MMI does not occur until the claimant reaches MMI for all components of the industrial injury. *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010).

A DIME physician’s finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence that renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician’s finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000).

As determined in Findings of Fact 40 through 44, it is highly probable and free from serious doubt that the DIME physician incorrectly found Claimant reached MMI on March 12, 2010. As found, Dr. Wunder's December 15, 2014 opinions concerning MMI are highly credible and persuasive. Indeed, Dr. Wunder's opinions constitute clear and convincing evidence that the DIME physician's opinion was incorrect. Specifically, the ALJ is persuaded Dr. Wunder's opinion that on March 12, 2010 Claimant's injury-related jaw condition was not stable because it still required surgical treatment. That surgery was contemplated as early as 2008 and did not occur until February 2012. The DIME physician offered no credible and persuasive explanation as to why he believed Claimant reached MMI on March 12, 2010 even though the required orthognathic surgery had not yet occurred.

The ALJ is also persuaded that it is highly probable and free from serious doubt that on March 12, 2010 Claimant's sinus condition was not stable and that he needed additional medical treatment, including surgeries, to reach MMI. Once again, Dr. Wunder's December 15, 2014 opinion is highly credible and persuasive. Specifically, Dr. Wunder credibly opined that Claimant's symptoms and course of treatment after March 12, 2010 demonstrate Claimant had not reached MMI for the sinus condition. To the contrary, Dr. Wunder's opinion and the credible medical documentation establish Claimant's sinus condition was not stable on March 12, 2010 and he continued to need several surgeries to treat it. As found, the DIME physician did not offer any credible and persuasive refutation of Dr. Wunder's opinion concerning the need for treatment of Claimant's sinus condition after March 12, 2010.

Once a claimant establishes a right to receive TTD benefits they must ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S. Here, as shown by the FAL, Respondents sought to terminate Claimant's TTD benefits solely on the basis that he reached MMI on March 12, 2010. However, the ALJ has found the DIME physician's opinion that claimant reached MMI on March 12, 2010 has been overcome by clear and convincing evidence. Consequently, Claimant's TTD benefits must be reinstated March 12, 2010 and paid in full until Respondents began paying TTD benefits on November 14, 2010.

RESPONDENTS' REQUEST FOR CREDIT AGAINST TTD BENEFITS

Relying on *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995), and the $150,000 benefits cap contained in § 8-42-107.5, C.R.S. Respondents argue they are entitled to a "credit" in the amount of $12,459.30 based on the "PPD benefits" they paid to Claimant after March 12, 2010 and before they voluntarily "reopened" the claim on November 15, 2010. Respondents argue *Donald B. Murphy Contractors v. Industrial Claim Appeals Office, supra* entitles them to recover the "credit" by discontinuing Claimant's TTD benefits "until the credit has been recovered in full." However, the ALJ concludes the "credit" created by the *Murphy Contractors* court does not apply to this case because Claimant has never reached MMI.

Section 8-42-107.5 provides as follows:

> No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payment and permanent partial disability payments."

Donald B. Murphy Contractors v. Industrial Claim Appeals Office, *supra*, concerns a case in which a claimant had reached MMI and was assigned an impairment rating of seventeen percent. The respondents then paid the claimant $28,491.12 in TTD benefits and $31,508.88 in PPD benefits to reach the $60,000 benefits cap then specified in § 8-42-107.5, C.R.S. The claimant's condition subsequently worsened and he sought an award of additional TTD benefits and medical benefits. The respondents argued the claimant was not entitled to additional TTD benefits because he had already reached the statutory cap of combined TTD and PPD benefits. The court ruled that application of the statutory benefits cap was "premature" because the claimant was not at MMI. Therefore his impairment rating could not be determined. However, the *Murphy Contractors* court also held that the respondents were entitled to "a credit for permanent partial disability benefits already paid against temporary total disability benefits, subject to claimant's right to seek further benefits available under § 8-42-107.5." 916 P.2d at 614-615. The court reasoned that fashioning this "credit" maintains the "incentive" for employers and insurers to settle and provide PPD benefits, allows claimants to obtain additional benefits to which they may be entitled under the cap and eliminates the need to seek recovery of overpayments in the event no further benefits are available.

In *Leprino Foods v. Industrial Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005), the respondents sought application of the *Murphy Contractors* credit in a case where an ATP placed the claimant at MMI and assigned a 27% upper extremity impairment rating. The respondents filed an FAL consistent with the ATP's rating and paid PPD benefits including a lump sum. However, the claimant timely contested the MMI determination and the DIME physician found the claimant was not at MMI. The

respondents did not timely contest the DIME physician's finding regarding MMI but sought the *Murphy Contractors* credit against their liability for additional TTD benefits.

The court in *Leprino Foods v. Industrial Claim Appeals Office, supra*, held the respondents were not entitled to reduce the claimant's TTD benefits by the amount of money that they previously paid as PPD benefits under the FAL. The court noted that "MMI is a predicate to a determination of claimant's medical impairment rating" and that the claimant's impairment rating could not yet be determined because she had "not yet reached MMI." 134 P.3d at 480; *see also Laabs v. Integrated Communication Service, Inc.,* WC 4-890-061-02 (ICAO March 19, 2015). The *Leprino Foods* court stated the following:

> We note the decision in *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, *supra*, was reached by applying the plain language of the statute, which clearly provides that application of the benefits cap depends on the impairment rating. Accordingly, it is equally clear that the General Assembly intended to require employers to continue paying benefits without application of the cap until such time as a claimant reaches MMI. 134 P.3d at 480.

Similarly, in *United Airlines v. Industrial Claim Appeals Office,* 312 P.3d 235 (Colo. App. 2013), the respondents sought to recover an alleged "overpayment" of TTD benefits that exceeded the $75,000 cap contained in § 8-42-107.5. The claimant received $99,483.14 in TTD benefits until she was released to return to work. After reaching MMI she received a 5% whole person impairment rating from the DIME physician. The respondents argued that the TTD benefits paid in excess of the $75,000 cap constituted an "overpayment" that the claimant was obligated to repay.

However, the *United Airlines* court held there was no "overpayment" within the meaning of § 8-40-201(15.5), C.R.S. The court noted that § 8-40-201(15.5) defines "overpayment" as the claimant's receipt of money that "exceeds the amount that should have been paid." The court reasoned that the claimant did not receive money in excess of the amount that should have been paid because that the Act does not permit termination of TTD benefits except under the circumstances set forth in § 8-42-105(3), C.R.S., and that section does not refer to the cap. Conversely, § 8-42-107.5 does not "cross-reference" § 8-42-105(3). Therefore, all of the money the claimant received prior to returning to work was properly paid as TTD benefits and was not in excess of the amount of money that should have been paid. The court also concluded that the cap requires the payment of "combined" TTD and PPD benefits, and because the claimant exceeded the cap before her temporary benefits were terminated "none of the benefits paid to her was compensation for permanent impairment." The *United Airlines* court also distinguished *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, *supra* because *Murphy Contractors* does not address whether claimants would "be entitled to additional TTD benefits if, as here, those benefits, when calculated exclusive of their permanent benefits, reached the statutory cap."

Here, the ALJ finds Claimant overcame by clear and convincing evidence the DIME physician's opinion that MMI was reached on March 12, 2010. Consequently, Claimant has never reached MMI and his impairment rating has never been legally determined. It follows that application of the cap is "premature" and the "credit" discussed in *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, *supra*, is not applicable. In these circumstances Respondents are not entitled to terminate Claimant's TTD benefits until the alleged "credit" is fully recovered. *United Airlines v. Industrial Claim Appeals Office, supra*; *Leprino Foods v. Industrial Claim Appeals Office, supra; Laabs v. Integrated Communication Service, Inc., supra.*

In reaching this result the ALJ does not address the question of whether the $12,459.30 that Respondents seek might be recoverable as a form of "overpayment" under § 8-40-201(15.5). At the commencement of the hearing Respondents' counsel limited the issue to recovery of a "credit" under the authority of *Donald B.* Murphy Contractors *v. Industrial Claim Appeals Office*, *supra*. Respondents' counsel did not raise any argument that the $12,459.30 constituted a statutory "overpayment" subject to recovery under the Act. Further, Respondents' position statement limits the issue to recovery of the *Murphy Contractors* "credit" and does not argue that there has been a statutory "overpayment."

Because Respondents have not raised the issue of statutory "overpayment" the ALJ need not address Claimant's argument that recovery of an "overpayment" would be barred by the statute of limitations contained in § 8-42-113.5(b.5)(I), C.R.S. Similarly, the ALJ need not address the proper rate for recovery of any hypothetical overpayment.

ORDER

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

1. Insurer shall pay Claimant temporary total disability benefits at the admitted rate for the period March 12, 2010 through November 14, 2010.

2. Respondents' request to terminate Claimant's ongoing TTD benefits until they recover a "credit" of $38,282.12 or $12,459.30 is denied.

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

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

DATED: August 24, 2015

DIGITAL SIGNATURE:

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

1. Whether the claim closed by operation of law when Claimant failed to object to the Final Admission of Liability (FAL) within 30 days.

2. If the claim is closed, whether Claimant has established that the claim should be reopened based upon change of medical condition.

3. If the claim is closed, whether Claimant has established that the claim should be reopened based upon mistake or error.

4. Whether Claimant has established that he is entitled to temporary total disability (TTD) benefits from December 16, 2014 and ongoing.

5. Determination of Claimant's average weekly wage.

6. Whether Claimant has established that treatment provided by Memorial Emergency Department and Memorial Urgent Care on April 20, 2009, January 8, 2015, and January 17, 2015 is reasonable, necessary, and causally related to his March 31, 2009 industrial injury.

7. Whether Claimant is entitled to a change of physician based upon the authorized treating physician's refusal to provide medical treatment for non medical reasons.

FINDINGS OF FACT

1. Claimant was employed by Employer as a construction worker building custom homes and performed various duties in this position. The number of hours per week that Claimant worked varied throughout his employment.

2. On March 31, 2009 while so employed, Claimant suffered an industrial injury when he was working on a wooded peak area on the top of a roof. Claimant fell, and a truss landed on his chest. Claimant was sent to Concentra for medical treatment.

3. At the time of his injury Claimant was earning $13.00 per hour. His pay also included insurance benefits for himself, his wife, and his six children. From January 1, 2009 through March 26, 2009 Claimant earned $4,838.47. The monthly value of continuing Claimant's health insurance was $431.79. *See* Exhibit 15, Exhibit 16.

4. On the date of injury Claimant was evaluated at Concentra by Daniel Peterson, M.D. Claimant reported he was moving trusses, picking up a girder, and slipped backwards. Claimant reported he hit the ground the girder fell on his chest. He complained of chest, upper back, and neck pain. *See* Exhibit 5, Exhibit D.

5. Dr. Peterson noted on physical exam that Claimant's cervical range of motion was decreased in all planes with pain and that palpation of the cervical spine was positive for tenderness C2 to T4. Dr. Peterson also noted that Claimant's range of motion of the trunk was decreased in all planes with pain and that palpation of the spine was positive for pain at C6 through T10. *See* Exhibit 5, Exhibit D.

6. Thoracic Spine, Cervical Spine, Chest, and Rib X-rays were performed and were unremarkable with no abnormalities shown. *See* Exhibit 5, Exhibit D.

7. Dr. Peterson assessed chest wall contusion, cervical strain, and thoracic strain with no sign of fractures. Dr. Peterson took Claimant off work for the rest of the day, and indicated Claimant should return the following day for evaluation. *See* Exhibit 5, Exhibit D.

8. On April 1, 2009 Dr. Peterson evaluated Claimant. Claimant reported that he felt better and had improved range of motion. Dr. Peterson noted Claimant's range of motion in the cervical spine was improved, and that Claimant's range of motion in the trunk was normal with pain. He assessed cervical strain, thoracic strain, and chest wall contusion. He recommended physical therapy and home exercise and placed Claimant on work restrictions. Dr. Peterson anticipated Claimant would reach maximum medical improvement (MMI) in two to four weeks. *See* Exhibit 5, Exhibit D.

9. On April 10, 2009 Dr. Peterson evaluated Claimant. Claimant had been working within the work restrictions and reported feeling worse. Claimant indicated his neck was still very stiff, he was having severe headaches, and could not stand straight up in full extension, and reported marked pain from C7 to T9. Dr. Peterson was concerned with the severity of Claimant's headaches and opined that Claimant's progress had been too slow. Dr. Peterson requested MRIs of the brain, cervical spine, and thoracic spine to be certain the injury was not more serious than it initially appeared. Dr. Peterson noted the anticipated MMI date would depend on the MRI findings. *See* Exhibit 5, Exhibit D.

10. On April 14, 2009 Dr. Peterson evaluated Claimant. Dr. Peterson noted that Claimant's brain, cervical spine, and thoracic spine MRI results were completely normal. Claimant reported improving and feeling better and that he had not been taking medications because his condition was improved. Dr. Peterson reported the range of motion in Claimant's cervical and thoracic regions was markedly improved. Claimant had been working and Dr. Peterson increased the lifting weight allowed by Claimant on Claimant's work restrictions. Dr. Peterson anticipated Claimant would reach MMI in two weeks. *See* Exhibit 5, Exhibit D.

11. On April 20, 2014 at approximately 8:40 a.m. Dr. Peterson evaluated Claimant. Claimant reported worsening symptoms and that he had been working within his work restrictions. Claimant reported the decrease in work restrictions made his chest hurt and reported that he fell off the back porch stoop at home while trying to get in the back door with his arms full of groceries. Claimant reported pain in his chest, cervical spine, and thoracic spine was worse. Dr. Peterson increased Claimant's work restrictions and again anticipated that MMI would be in two weeks. *See* Exhibit 5, Exhibit D.

12. On April 20, 2009 at approximately 9:30 a.m. Claimant underwent physical therapy. Claimant also reported at physical therapy that his pain had increased. *See* Exhibit D.

13. On April 20, 2009 at approximately 2:12 p.m. Claimant went to the Emergency Room at Memorial Health Systems and was evaluated by Michael Bowen, M.D. Claimant reported neck pain, headaches, neck stiffness, and tightness around and soreness in the occiput area as well as occasional paresthesias of his right arm and a stinging sensation in his right anterior chest. Dr. Bowen noted Claimant was very uncomfortable. Dr. Bowen performed a head CT and cervical spine CT that were both normal. Dr. Bowen discharged Claimant with instructions to follow up with his worker's compensation physician. Dr. Bowen diagnosed acute neck and back strain and chronic neck and back pain, status post injury. *See* Exhibit F.

14. Claimant testified that on April 20, 2009 after his physical therapy appointment he was in extreme pain. Claimant attempted to schedule an appointment to go back to Concentra and Dr. Peterson that day, but they were unable to see him. Concentra advised him to go to the emergency room if in severe pain. Claimant was in extreme pain and decided to go to the emergency room since Concentra was unable to treat him. This testimony is found credible, consistent with the report of increased pain to Dr. Peterson and to his physical therapist that morning, and consistent with reports to the emergency room physician.

15. On April 29, 2009 Claimant was arrested. Claimant was incarcerated by the Colorado Department of Corrections until December 15, 2014 when he was released.

16. While Claimant was incarcerated and on June 5, 2009 Dr. Peterson closed Claimant's case for non-compliance and indicated that he was unable to determine MMI. Dr. Peterson filled out a closing physician's report of workers' compensation injury releasing Claimant to full duty work with no restrictions as of June 5, 2009. Dr. Peterson indicated that the MMI date was unknown due to Claimant's noncompliance. *See* Exhibit B, Exhibit 5.

17. On June 19, 2009, Respondents filed a General Admission of Liability (GAL) admitting liability for medical benefits. On the GAL it was noted that the admission was for "med only" and that there was no lost time in excess of 3 scheduled

work days. On January 5, 2010 Respondents filed a Final Admission of Liability (FAL). Respondents left the line for "Date of MMI" blank. The FAL admitted for no medical benefits after MMI and no temporary or permanent indemnity benefits. The FAL was mailed to Claimant at 7433 Colonial Drive, Dallas, TX 75252. *See* Exhibit 1, Exhibit 2.

18. Claimant has never lived in Dallas, TX. At the time the FAL was mailed, Claimant was incarcerated in the Department of Corrections (DOC). Claimant did not change his address on file with the Division from the address he lived at with his family prior to his incarceration to his DOC address. Claimant's home address prior to incarceration was on Colonial Drive in Fountain, Colorado.

19. Claimant did not receive the FAL and had no opportunity to review it or object to it.

20. On August 10, 2010 Claimant underwent prison intake procedures and reported that he had a present upper back problem. Claimant was prescribed medications for his reported pain and back symptoms. *See* Exhibit E.

21. On August 17, Kathleen Melloh, P.A.-C evaluated Claimant. Claimant reported to PA Melloh that he had an x-ray as well as an MRI done on his upper back prior to his incarceration and reported to her that he never received the results of those tests. Claimant reported that a doctor at Memorial Hospital told him there was something wrong with his back. *See* Exhibit E.

22. On September 10, 2010, while imprisoned, Claimant underwent radiographs of his cervical spine, thoracic spine, and lumbosacral spine that were interpreted by Christopher Klassen, M.D. Dr. Klassen opined that the findings were unremarkable. *See* Exhibit E.

23. On November 9, 2010 Claimant was evaluated by Joseph Fortunato, M.D. Claimant reported to Dr. Fortunato that he had a normal MRI on the outside prior to incarceration. Dr. Fortunato noted Clamant walked in a neck flexed posture and did not objectively appear to be in pain. Dr. Fortunato was doubtful of Claimant's reported pain and opined that Claimant's posturing led him to question the basis of Claimant's reported pain. *See* Exhibit E.

24. On February 10, 2011 Claimant was evaluated by Lindsey Fishdepena, M.D. Dr. Fishdepena noted that the etiology of Claimant's reported back pain was unclear, that Claimant's exam showed several inconsistencies, and that an extensive chart review showed Claimant was evaluated by multiple providers and that his pain/discomfort appeared out of proportion. *See* Exhibit E.

25. On January 29, 2012 Claimant was evaluated by Susan Tiona, M.D. Dr. Tiona noted Claimant walked hunched over dramatically. She opined that Claimant did not have a neurologic basis for his reported symptomatology based upon exam and other objective information. Dr. Tiona noted that several provider encounters indicate

that Claimant's reported pain and body posturing were not supported by objective findings. She, nonetheless, noted that Claimant was quite insistent that something was very wrong with his back and right leg and referred him for EMG testing. *See* Exhibit E.

26. On March 14, 2012 Claimant underwent EMG testing in Pueblo, Colorado. The testing was performed by Ashakiran Sunku, M.D. who noted a normal evaluation with no electrophysiological evidence of bilateral lumbosacral radiculopathies or large, fiber neuropathy. *See* Exhibit E.

27. While in DOC, Claimant used a cane for walking. In May of 2012 he was observed moving without difficulty and the decision was made that he did not require any accommodation and he was required to surrender his cane. *See* Exhibit E.

28. On July 9, 2014 Claimant was evaluated by Gisela Walker, M.D. Claimant reported he wanted an evaluation only and did not want any treatment or a cane. Claimant reported having an EMG but felt it was not done right. Claimant reported feeling he was not getting the treatment he needed in DOC. Dr. Walker noted that Claimant was difficult to assess musculoskeletally as Claimant's effort was questionable. Dr. Walker noted that Claimant resisted attempts at range of motion both passively and actively. *See* Exhibit E.

29. Upon release from incarceration in December of 2014 Claimant attempted to obtain an appointment for medical treatment at Concentra. Claimant was denied treatment by Concentra and was advised that his case was closed and that Insurer would not authorize further treatment.

30. A claim note from Insurer indicates that on January 5, 2015 Insurer denied reopening Claimant's claim and denied authorizing further treatment as it had been five years since Claimant treated. *See* Exhibit 9.

31. On January 8, 2015 Claimant sought treatment at Memorial Urgent Care and was evaluated by John Torrent, M.D. Claimant reported upper back pain due to a work accident 6 years prior. Claimant reported he was being evaluated at that time when he was sent to prison. Claimant reported he never really had further imaging or a trial of physical therapy. Dr. Torrent ordered thoracic spine X-rays which were performed and were normal. Dr. Torrent recommended Claimant see an occupational health provider or a primary care provider for further evaluation and possible physical therapy referral and provided Claimant with a prescription for medications. *See* Exhibit F.

32. On January 17, 2015 Claimant again sought treatment at Memorial Urgent Care and was evaluated by Darren Campbell, M.D. Claimant reported he was not yet able to see his primary care physician. Dr. Campbell authorized a refill of the prescriptions provided by Dr. Torrent and advised Claimant he needed to establish care with a primary provider. *See* Exhibit F.

33. On May 11, 2015 Claimant underwent an Independent Orthopedic Evaluation performed by orthopedic surgeon Ira Stephen Davis, M.D. Claimant reported to Dr. Davis that he had requested treatment during his five years in prison, but was denied care. Dr. Davis noted on clinical examination that Claimant appeared reasonably comfortable and that in physical examination testing procedures there was a marked discrepancy when compared to pre-examination observations. Dr. Davis noted Claimant permitted 5-10 degrees flexion and extension, lateral bending, and rotation in cervical spine motion and similar range in his lumbar spine range of motion. Dr. Davis noted guarding was excessive in comparison to observations made during the course of the interview. Dr. Davis opined that Claimant sustained a chest contusion and thoracic spine strain/sprain causally related to his March 31, 2009 injury which would be expected to heal within a period of 6-12 weeks following the trauma. Dr. Davis opined that Claimant's orthopedic examination was unremarkable, imaging studies were normal, and that Claimant's persistent pain complaints to date were not explained on the basis of objective findings related to the March 31, 2009 injury. *See* Exhibit A.

34. Dr. Davis testified at hearing consistent with his report. Dr. Davis testified that the imaging studies including all the MRIs, X-rays, and the EMG were normal. Dr. Davis opined that Claimant was at MMI with no work restrictions related to his March 31, 2009 injury. Dr. Davis opined that Claimant could return to full duty work. Dr. Davis opined that Claimant has never had any objective medical tests indicating anything is wrong with him and that Claimant's subjective symptoms are not supported by the medical evidence.

35. The opinions of Dr. Davis are found credible and persuasive and are supported by the extensive objective testing performed on Claimant prior to his incarceration, while incarcerated, and after his release. The opinions of Dr. Davis are consistent with multiple medical providers who have noted normal objective tests and who cannot explain the basis for Claimant's subjective complaints, including: Dr. Peterson; Dr. Klassen; Dr. Fortunato; Dr. Fishdepena; Dr. Tiona; Dr. Sunku; Dr. Walker; and Dr. Torrent.

36. Claimant's testimony, overall, is not found credible or persuasive. Claimant provided incorrect information to multiple medical providers surrounding whether or not he had prior testing, what the testing revealed, and whether or not he received prior treatment. Claimant also presented with exaggerated symptoms and limitations on movement.

37. Claimant has not been placed at MMI by an authorized treating physician. Dr. Davis was an IME doctor and not a treating physician. Claimant was never placed at MMI by Dr. Peterson with whom he treated in 2009 prior to his incarceration. Dr. Peterson indicated MMI could not be determined due to Claimant's non-compliance and failure to attend medical appointments. Claimant was never placed at MMI for medical reasons or because he did not require further treatment to treat his industrial injury. He was discharged from treatment solely for non-compliance.

CONCLUSIONS OF LAW

Generally

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

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

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

Final Admission of Liability

Section 8-43-203(2)(b)(II)(A), provides that a claim will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing, including selection of an independent medical examiner pursuant to section 8-42-107.2. Section 8-43-203(2)(d),

C.R.S., provides that once a case is closed under subsection (2) the issues closed may only be reopened pursuant to section 8-43-303." The automatic closure provisions contained in these statues are designed to "promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of formal administrative determination in cases not presenting a legitimate controversy." *Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821 (Colo. App. 2001).

The provisions of § 8-43-203(2)(b)(II) affording the claimant 30 days after the date of the final admission to object to the FAL and file an application for hearing are designed to insure an opportunity for informed decision-making regarding the right to contest the FAL. *See Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Requiring that the claimant be mailed a copy of the FAL at her home address maximizes the probability the claimant will receive notice, and protects the claimant's due process right to be apprised of critical decisions in sufficient time to take necessary procedural steps to preserve her rights. *Bowlen v. Munford,* 921 P.2d 59 (Colo. App. 1996).

Here, Respondents failed to mail the FAL to Claimant's home address and to the address on file with the Division. Respondents sent the FAL to an address in Texas that had no connection whatsoever to Claimant. Although it was established that at the time of the mailing of the FAL Claimant was incarcerated in DOC, mailing the notice to Claimant's home address where he lived with his family prior to his incarceration would have maximized the likelihood and probability that the notice would have been received by Claimant apprising him of his rights. Here, by mailing to an address with no connection to Claimant, there was no likelihood that Claimant would have been notified at all of the closure of his claim or the process to dispute or contest the FAL. Claimant never received notice of the FAL in this case and had no opportunity to review it, contest it, or preserve his rights. By failing to mail it to Claimant's home address, Respondents erred and the FAL is determined to have been invalid due to this error. Respondents' argument that Claimant was incarcerated and therefore would not have received the notice even if it were mailed to the correct address is not persuasive. The FAL in this matter was invalid and therefore cannot operate to administratively close the present claim. The claim remains open under the GAL for medical benefits only that was filed by Respondents on June 19, 2009.

Petition to Reopen

As found above, the present claim did not administratively close because the FAL was invalid and mailed to an improper address. Claimant had no notice of the filing of the FAL or its contents within a timeframe to review and/or contest it. As the FAL failed to close the claim, the claim remains open and the issue of re-opening is moot and need not be further addressed.

Temporary Total Disability (TTD)

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result

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

Claimant has failed to meet his burden to show an entitlement to TTD benefits from December 16, 2014 and ongoing. As found above, Claimant's industrial injury caused him to miss only the remainder of the day of his injury. He continued to work starting the day after his injury, earned full and regular wages, and missed no work while under work restrictions nor did he suffer any actual wage loss. Rather, Employer accommodated Claimant's work restrictions. Claimant only suffered subsequent wage loss due to his incarceration. But for his incarceration, the evidence establishes that it is more likely than not that Claimant would have remained employed by Employer with full wages. Further, it is noted that Claimant is required to establish a causal connection between his work related injury and subsequent wage loss. Claimant has failed to establish that at the current time he suffers from medical incapacitation caused by the March 31, 2009 work injury. Rather, the opinions of Dr. Davis, Dr. Walker, Dr. Torrent, Dr. Sunku, Dr. Tiona, Dr. Fishdepena, Dr. Fortunato, Dr. Klassen, and Dr. Peterson are persuasive that Claimant has had normal X-rays, normal MRI's, normal EMG testing, and inconsistent and unexplainable subjective symptoms. Claimant has failed to meet his burden to show that any inability to work after his release from incarceration is causally connected to his work related injury.

It is noted that Claimant was never placed at MMI by Dr. Peterson prior to Claimant's incarceration. Although Dr. Peterson anticipated MMI within a couple of weeks, Dr. Peterson closed Claimant's case for noncompliance and failure to attend medical appointments without ever opining or concluding that Claimant had reached MMI. On June 5, 2009 Dr. Peterson released Claimant to full duty work with no restrictions. This was despite not seeing Claimant on June 5, 2009 and having had Claimant on restrictions as of the last time Dr. Peterson evaluated Claimant. Although it is thus unclear as to whether or not Claimant is currently under work restrictions, Claimant has failed to show that even if he is under current work restrictions that the work restrictions have caused his inability to earn wages. Neither his injury nor any work restrictions have caused him wage loss. Rather, Claimant's wage loss and impairment of earning capacity was a direct result of the intervening act of being sent to

prison for a lengthy period of time. Claimant was working full time within his work restrictions earning full wages prior to his incarceration. After a review of the evidence, Claimant has failed to establish by a preponderance of the evidence that he is entitled to TTD benefits and that his inability to earn wages from December 16, 2014 until current is causally connected to his March 31, 2009 work injury.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Pursuant to § 8-40-201(19)(b), C.R.S. the term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan.

Claimant's wages and the number of hours he worked per week varied during his course of employment with Employer. As his wages and number of hours per week varied greatly, the ALJ concludes that the using the discretionary authority of 8-42-102(3) to alter the statutory formula is the best way to calculate a fair approximation of Claimant's average weekly wage due to the varied hours per day and per week that Claimant worked. The ALJ reviewed the evidence and wage submissions and finds it appropriate to use the three months preceding the injury to average the number of hours worked and total wages earned during this 12 week period of time leading up to Claimant's injury. From January 1, 2009 and through Claimant's paycheck ending the week prior to his injury on March 26, 2009 Claimant earned $4,838.47. This was over a period of 12 weeks and equals an average weekly wage of $403.21. Additionally, Claimant testified credibly that while employed by Employer he and his family received health insurance under Employer's group plan including on the date of his injury. Thus, the inclusion of the continuing cost of health insurance is appropriate in this case. Based on the evidence submitted at hearing, the monthly value of continuing the same health insurance was $431.79, resulting in a weekly value of $99.64. As a result, this ALJ finds that a fair determination of Claimant's AWW is $502.85.

Medical Benefits

Respondents are liable for emergency and authorized treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Section 8-43-404(5), C.R.S., affords the insurer the right, in the first instance, to select the authorized treating physician. Once selected, the claimant is not free to

change physicians except with permission from the respondent or the ALJ. *Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo. App. 1996). However, § 8-43-404(5) implicitly contemplates that the respondent designates a physician who is willing to provide treatment. Therefore, if the physician selected by the respondent refuses to treat the claimant for non-medical reasons, and the respondent fails to appoint a new treating physician, the right of selection passes to the claimant. *Teledyne Water Pik v. Industrial Claim Appeals Office, W.C. No. 92CA0643 (December 24, 1992)*; *Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (November 4, 1996); *Ragan v Dominion Services, Inc.*, W.C. No. 4-127-475, (September 3, 1993). When medical treatment results from a referral by an authorized treating physician, such treatment is considered part of the normal progression of authorized treatment and the express consent of the employer or the Industrial Commission is not required. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo.App.1985).

April 20, 2009 treatment

In an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. *Sims v. Industrial Claim Appeals Office of State of Colo*., 797 P.2d 777 (Colo. App. 1990). As found above, after Claimant attended physical therapy on April 20, 2009 he experienced a significant increase in his work related pain symptoms. Claimant contacted his authorized treating provider Concentra, but they were unable to schedule an appointment for him that day and advised him to go to the emergency room. Claimant did so. Claimant's pain and the belief that medical treatment was emergent is supported by his attempts to be seen immediately by his treating provider Concentra. Concentra referred him to the emergency room and treatment in this case was not only emergent but was also upon referral by the authorized treating provider. The emergent treatment was for the injuries related to his March 31, 2009 work injury and the pain reported is consistent with treatment Claimant received earlier that day where he indicated to Dr. Peterson and to his physical therapist that his pain had been increasing. Following his physical therapy his pain increased to the point of requiring him to seek emergent treatment. Therefore, Claimant has established the treatment was reasonable, necessary, and related to his work injury. The treatment was both emergent and upon referral by his authorized treating provider. Therefore, Respondents are liable and shall pay, pursuant to fee schedule, for the April 20, 2009 treatment.

January 8, 2015 and January 17, 2015 treatment

As found above, Claimant attempted to obtain medical treatment from the ATP Concentra upon his release from incarceration but was not allowed to schedule an appointment. Concentra refused to treat Claimant after Insurer advised Concentra that the claim was closed and that they would not authorize treatment. This determination was a non-medical determination. Claimant was never discharged from treatment for

medical reasons and it was never determined by an authorized treating provider that Claimant was at MMI and required no further medical treatment to cure or relieve the effects of his industrial injury. At the time Concentra refused to treat Claimant, the claim was in effect under a general admission of liability for medical benefits. The FAL that had been filed was invalid. Therefore, Concentra should have treated Claimant when he contacted them to seek treatment. Concentra should have evaluated Claimant, placed Claimant at MMI if appropriate, and either treated or closed out Claimant's case. Instead, Claimant was denied treatment for the non-medical reason that they believed the case was closed by the FAL that Claimant had failed to object to. This was in error.

Claimant has shown by a preponderance of the evidence that the treatment he sought upon his release from incarceration at Memorial Urgent Care on January 8, 2015 and January 17, 2015 was reasonable, necessary, and related to the claim. Claimant, upon his release, required further treatment under his open claim to determine whether or not he was at MMI, to determine whether or not he still required the work restrictions provided by Dr. Peterson in April of 2009, and to either receive more treatment or close his claim. Concentra failed to treat Claimant and Claimant sought treatment at Memorial Urgent Care. Both doctors he saw at urgent care referred Claimant back to his workers' compensation doctor or primary care provider. Although the treatment at Memorial Urgent Care is found to be reasonable, necessary, and related the treatment of an Urgent Care center is not that of an authorized treating or regular treating provider. Claimant failed to treat with a primary physician or a physician of his choosing after Concentra refused him an appointment. Instead he sought Urgent Care treatment, and was referred both times at Urgent Care to seek out his workers' compensation provider or a primary care provider. Claimant has not yet done so.

Proper Treating Physician

After an individual's release from confinement, the individual shall be restored to the same position with respect to entitlement to benefits as the individual would otherwise have enjoyed at the point in time of such release from confinement. *See* §8-42-113(2), C.R.S. Upon release from prison, a claimant may again receive medical, benefits under the Workers' Compensation Act. *Landeros v. Indus. Claim Appeals Office,* 214 P.3d 544 (Colo. App. 2008). Here, upon release from prison, Claimant should have been restored to the same position and should have continued to be under the GAL for medical benefits with Concentra. The ALJ concludes here based on Claimant's treatment at Urgent Care and referral back to a workers' compensation provider or a primary care provider that Concentra should resume treatment as Claimant's ATP in this claim. Concentra should provide evaluation consistent with where the treatment and medical benefits left off when Claimant became incarcerated. Claimant has failed to show that a change of physician would be appropriate in this case. Although Claimant was denied medical treatment for a mistaken belief that his claim was closed, Claimant has not chosen a new ATP and has only sought urgent care treatment. Both urgent care physicians referred Claimant back to a workers' compensation provider or a primary care provider. Claimant has presented insufficient evidence that he has a primary care provider, that there is another provider able and

willing to treat him, or that he was dissatisfied with the prior treatment he received at Concentra. The ALJ concludes that the proper authorized treating physician continues to be Concentra and that it is appropriate to restore Claimant back to the same position he was in before incarcerated which includes continued treatment with Concentra to determine his status related to his March 31, 2013 injury, whether he is at MMI, whether he requires further medical treatment, and whether any work restrictions are appropriate at this time. Claimant's argument that he shall be allowed to choose any new treating provider he wishes at this time is not found persuasive. Claimant has failed to show by a preponderance of the evidence that he is entitled to a change of physician or that the referral of the Urgent Care physicians back to his workers' compensation provider was inappropriate. The administrative confusion surrounding whether or not his claim was closed was based on an unusual circumstance where Claimant was incarcerated and failed to receive a copy of the FAL. The ALJ concludes, after a review of the relevant statutes and case law, that Concentra is an appropriate ATP and that restoring Claimant to treatment with Concentra is appropriate.

ORDER

It is therefore ordered that:

1. The FAL filed on January 5, 2010 was invalid, and the claim remains open at this time.

2. Claimant's AWW is $502.85.

3. Claimant has failed to meet his burden to show entitlement to TTD. His claim for TTD from December 16, 2014 and ongoing is denied and dismissed.

4. Respondents shall pay all outstanding medical bills from Memorial Emergency Department and Memorial Urgent Care pursuant to the Colorado Workers' Compensation fee schedule for treatment received by Claimant on April 20, 2009, January 8, 2015, and January 17, 2015.

5. Claimant remains under a GAL for medical benefits. Claimant is entitled to further evaluation at Concentra to determine his current work related MMI status, work restrictions, and need or lack thereof for medical treatment. The ATP remains Concentra for this claim and Claimant is not entitled to a change of physician to any physician he chooses. Claimant is hereby restored to the position he was in prior to his incarceration and shall continue treatment with Concentra.

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

DATED: 08/07/2015

/s/ Michelle E. Jones

_____

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

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ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician regarding the date of maximum medical improvement (MMI).

2. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from February 9, 2013 to May 3, 2013.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to permanent total disability (PTD) benefits.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to disfigurement benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a CNA with duties including assisting residents. Claimant bathed, dressed, and changed residents. She cleaned their rooms, took their vital signs, took them to the dining room, assisted them with eating, took food orders, delivered food to residents unable to make it to the dining room, and assisted residents with using the bathroom. Claimant also took vital signs and input information for the day about residents into a computer system.

2. Claimant performed most of her job duties in English. Claimant wrote patient notes, medical orders, and status reports in English. Claimant took food orders in English and conversed with residents in English. Employer was satisfied with Claimant's job performance.

3. While so employed and on September 25, 2009, Claimant suffered an injury. Claimant was transferring a patient when the patient fell and Claimant sustained an injury to her right knee and her lumbar spine.

4. On January 6, 2011 Respondents filed a general admission of liability for the claim. *See* Exhibit 1.

5. Claimant has undergone significant medical treatment related to this injury.

6. On May 3, 2010 Claimant underwent an L5 laminectomy with far lateral right-sided L5-S1 foraminotomy with a right L5-S1 TLIF performed by Brian Reiss, M.D. *See* Exhibit 6.

7. On October 4, 2011 Dr. Reiss evaluated Claimant. Claimant reported continued pain following surgery. Dr. Reis noted a CT myelogram study had been performed and that there was a definite possibility that Claimant had a nonunion at L5-S1, noted there was lucency around the L5 screws, and opined there was not convincing evidence of a complete fusion. Dr. Reis noted Claimant could consider further surgery to redo the fusion. Dr. Reis referred Claimant to David Wong, M.D. for a second opinion. *See* Exhibit 6.

8. On November 21, 2011 Dr. Wong evaluated Claimant and recommended a revision decompression and fusion surgery at L5-S1. *See* Exhibit 12.

9. On December 7, 2011 Claimant underwent a revision L5-S1 laminectomy performed by Dr. Wong. *See* Exhibit 14.

10. Claimant had delayed surgical treatment for her right knee injury until her back had healed from surgery. Following her second revision back surgery and on August 30, 2012 Claimant underwent right knee surgery to repair a medial meniscal tear. The surgery was performed by James Ferrari, M.D. At hearing, Claimant displayed two arthroscopic scars on her right knee from this surgery. The scars measured less than ¼ of an inch each in diameter and remained white and discolored form her normal skin tone. *See* Exhibit 15.

11. On November 16, 2012 Claimant was evaluated by Dr. Wong. Dr. Wong noted it had been almost one year since Claimant's revision decompression L5-S1. Claimant reported her residual back and lower extremity symptoms had plateaued but that she had continued back pain and lower extremity symptoms, left worse than right. Dr. Wong noted that her incision was well healed and that x-rays showed the fusion was solid. Based on Claimant's report of continued symptoms, Dr. Wong recommended an EMG and nerve conduction study of the lower extremities and also recommended a hardware block at L5-S1. *See* Exhibit 12.

12. On December 7, 2012 Claimant was evaluated by Ronald Hattin, M.D. Claimant reported persistent low back pain following her revision surgery. Dr. Hattin noted that imaging studies revealed a solid fusion at the L5-S1 level with good screw placement. Dr. Hattin noted Claimant was tender bilaterally in the region of the retained hardware. Dr. Hattin noted Claimant likely had mechanical back pain due to retained hardware and that she could be having some radicular irritation into the left lower extremity. He noted EMG studies had been performed but he did not have the results. He performed a diagnostic lumbar hardware block to determine what portion of Claimant's mechanical back pain was coming from the retained hardware with an eye toward possible hardware removal. He noted the EMG studies would ultimately show if any further decompression was required. Dr. Hattin noted that he would base any

further treatment considerations such as hardware removal based upon her response to the blocks. *See* Exhibit 14.

13. On December 11, 2012 Claimant was evaluated by Barry Ogin, M.D. Claimant reported pain across her back and down both legs. Dr. Ogin noted her complaints were of fairly diffuse discomfort, but that her examination was fairly benign and her electrodiagnostic examination had been negative. Claimant reported to Dr. Ogin that she had injections last Friday that provided her no relief and that she actually felt worse after the injections. Dr. Ogin opined that Claimant was a very poor candidate for any further surgery. He opined that hardware removal would not necessarily significantly improve her back or bilateral leg pain unless there was objective evidence of nerve root compromise based on the hardware. He noted that Claimant was approaching MMI. *See* Exhibit I.

14. On January 7, 2013 Claimant was evaluated by Dr. Ogin. Dr. Ogin noted that Claimant was over one year out from her revision lumbar fusion and that she continued to have pain. Dr. Ogin noted he had planned to place Claimant at MMI and provide an impairment rating. He noted, however, that Claimant was seeing Dr. Wong and that Dr. Wong had recommended hardware removal surgery. Claimant was unsure whether she wanted to pursue hardware removal surgery. Dr. Ogin held off on formally placing Claimant at MMI. He opined that if she was not going to proceed with the hardware removal then she would be at MMI. He noted that if Claimant decided to proceed with hardware removal then MMI would need to be deferred until after the surgery had been performed. *See* Exhibit I.

15. On February 4, 2013 Claimant was evaluated by Bryan Castro, M.D. Dr. Castro noted Claimant had buttock, back, and leg pain with poor response to prior surgical intervention. He opined that it was not clear that the hardware itself was the source of Claimant's symptoms. He opined that hardware removal would not appreciably alter her symptoms and he did not think that further intervention would relieve Claimant's pain. He recommended a CT scan to evaluate the healed nature of the fusion and opined that even if fully healed he would not favor hardware removal as a treatment option for Claimant's ongoing low back pain. *See* Exhibit K.

16. On February 8, 2013 Claimant was again evaluated by Dr. Ogin. Claimant reported she was scheduled to have her hardware removed despite no improvement following hardware blocks. Dr. Ogin opined that Claimant did not appear to be in significant distress with casual observation, but continued to complain of back and leg pain. Dr. Ogin opined that Claimant had a non-physiologic distribution and that it would be very unlikely that she would get relief with hardware removal. He noted her pain was diffuse in nature, across her back and down both of her legs. He opined that if the hardware was indeed irritating a nerve root or causing pressure on a structure, he would expect more focal symptoms. Dr. Ogin placed Claimant at MMI and provided an impairment rating. He noted that if Claimant pursues hardware removal down the road then an impairment rating may need to be recalculated, but reiterated that she was a

poor candidate for hardware removal and that she was unlikely to get significant relief from the hardware removal procedure. *See* Exhibit I.

17. On February 19, 2013 Claimant underwent a CT scan of her lumbar spine that was interpreted by Steven Karsh, M.D. Dr. Karsh concluded there was no evidence of nerve root impingement. *See* Exhibit F.

18. On February 22, 2013 Claimant was evaluated by Dr. Castro. Dr. Castro noted the CT scan showed Claimant had a solid fusion posteriolaterally at L5-S1. Dr. Castro noted back pain as Claimant's predominant complaint but opined there was no indication for hardware removal and that the hardware appeared stable. Dr. Castro opined that the hardware removal procedure would not predictably relieve back pain and recommended only expectant management. *See* Exhibit K.

19. On February 27, 2013 Claimant was evaluated by John Sanidas, M.D. Claimant reported pain in her low back going down both posterior legs. Dr. Sanidas explained to Claimant that since her spine had completely healed, she could have the hardware removed surgically, but he opined it would not change her status or pain. Dr. Sanidas noted that Claimant had done a certain amount of "double speak" when asked if she wanted hardware removal surgery or not. Claimant advised Dr. Sanidas that she wanted surgery. Claimant was advised that if she did not want the surgery her case would be closed and that she needed to make a decision. Dr. Sanidas noted he did not want any more delays, deliberate or otherwise, from Claimant. *See* Exhibit N.

20. On March 6, 2013 Claimant was evaluated by Dr. Sanidas. Dr. Sanidas again advised Claimant that he, Dr. Ogin, and Dr. Castro were of the opinion that she would not have much significant difference or improvement in her back pain with hardware removal. *See* Exhibit N

21. On March 7, 2013 Claimant was evaluated by Dr. Wong. Dr. Wong discussed the pros and cons of hardware removal and exploration surgery. Dr. Wong noted that Claimant had normal EMG testing and that he doubted any additional decompression would be of significant clinical benefit. He opined that Claimant might get partial improvement in her symptoms with the hardware removal but have persistent right lower extremity symptoms. Claimant indicated she wanted to proceed with arrangements for surgery. *See* Exhibit 12.

22. On March 8, 2013 Claimant was evaluated by Dr. Ogin. Claimant reported she had no significant benefit after the hardware blocks, but felt better one week later. Claimant also, however, reported her pain level was going up and that everything made it worse and that her pain was extreme at a level of 9/10. Dr. Ogin opined that Claimant remained at MMI and that she was a poor surgical candidate. He noted he had nothing further to offer claimant and would continue with medication management. *See* Exhibit 16.

23. On March 13, 2013 Claimant was evaluated by Dr. Sanidas. Dr. Sanidas again informed Claimant that the chances of her having pain relief following surgery was quite minimal considering the pain she had at that time. He opined that Claimant had a non physiological distribution of her pain and it was unlikely she would have significant relief with hardware removal. He noted Claimant was aware of the opinions that had been discussed many times and still wanted to go ahead with the surgery knowing there may be side effects and possible complications. Dr. Sanidas noted that while Claimant was trying to make up her mind on the hardware removal surgery, Dr. Ogin recommended an impairment rating. Dr. Sanidas noted the impairment rating should be put on hold since Claimant was having surgery and that Claimant was not at MMI. *See* Exhibit N.

24. On March 22, 2013 Claimant underwent a third back surgery that was performed by Dr. Wong. Dr. Wong removed the spinal pedicle screw instrumentation at L5-S1 and noted that Claimant had a solid intertransverse L5-S1 fusion. At hearing, Claimant displayed scarring from this surgery and her two prior back surgeries. Claimant had a raised scar on her lower back approximately 4 inches long and ¼ of an inch wide. The scar was discolored, raised, and uneven with her normal skin tone. *See* Exhibit 17.

25. On April 3, 2013 Claimant was evaluated by Dr. Sanidas. Claimant reported she was still having pain in her low back that was the same as she had pre-operatively with radiation into both buttocks. *See* Exhibit N.

26. On April 25, 2013 Claimant was evaluated by Dr. Sanidas. At this appointment Claimant reported she was doing slightly better since the lumbar hardware removal surgery. *See* Exhibit N.

27. On May 3, 2013 Claimant was evaluated by Dr. Ogin. Dr. Ogin noted he had placed Claimant at MMI on February 8, 2013 and that she subsequently underwent hardware removal surgery. He noted thus that he needed to recalculate her impairment rating. Claimant reported to Dr. Ogin that the hardware removal was minimally helpful. Dr. Ogin noted Claimant did not appear to be in significant distress and ambulated around the room without difficulty. He noted a sharp contrast on formal examination when Claimant exhibited quite a bit of grimacing and pain behavior. He noted that when he just held his hands on her to place an inclinometer on her back, she cried out that he should not push on her. He opined that she had negative electrodiagnostic studies and that she had noted pain behaviors and subjective complaints. He opined that her condition was stable and was really unchanged from prior to her hardware removal surgery. *See* Exhibit 16.

28. On May 15, 2013 Dr. Sanidas provided a response to a question regarding Claimant's MMI date. The question asked was whether he agreed with Dr. Ogin that Claimant was at MMI as of May 3, 2013. Dr. Sanidas circled "no" and indicated he anticipated MMI at the next visit and on May 23, 2013. *See* Exhibit N.

29. On May 23, 2013 Claimant was evaluated by Dr. Sanidas. Dr. Sanidas noted Claimant was noncompliant with her pain medication, and asked him for more pain medication. Dr. Sanidas advised Claimant her contract for opioid use was with Dr. Ogin and only he could legally prescribe her the medication. Claimant reported Dr. Ogin was rude to her and hurt her during measurements of her back. Claimant reported she did not want to return to Dr. Ogin. Dr. Sanidas agreed with the 22% whole person rating that Dr. Ogin provided and with permanent work restrictions. The work restrictions Dr. Sanidas agreed with were: walking and standing to tolerance, alternated as needed; avoiding repetitive bending at the waist; no crawling, kneeling, squatting, or climbing ladders; and pushing, pulling, and carrying no more than five to ten pounds. Dr. Sanidas discharged Claimant from his care and advised Claimant he would take care of any emergencies within the next 30 days and that she had 30 days to find another physician. *See* Exhibit N.

30. On August 28, 2013 Kristin Mason, M.D. took over Claimant's care. Claimant reported low back pain that was constant and on both sides worse with sitting, standing, or walking for a prolonged period of time. *See* Exhibit H.

31. On September 24, 2013 Claimant was evaluated by Dr. Wong. Dr. Wong noted that Claimant had partial improvement in the back symptoms with the hardware removal surgery. *See* Exhibit O.

32. On October 10, 2013 Claimant underwent a Division Independent Medical Examination (DIME) performed by John Ogrodnick, M.D. Dr. Ogrodnick opined that Claimant had reached MMI on February 8, 2013. Dr. Ogrodnick found no anatomic or physiological reason for Claimant's examination or her worse range of motion during the DIME as compared to prior testing performed by Dr. Ogin. *See* Exhibit C.

33. On November 25, 2013 Respondents filed a Final Admission of Liability (FAL) consistent with the DIME physician's MMI date and rating. *See* Exhibit B.

34. On March 10, 2014 John Raschbacher, M.D. performed an independent medical examination. At the examination Claimant presented with very slow and deliberate movement. Dr. Raschbacher opined that Claimant displayed odd behavior when she was asked to do a lumbar extension. Claimant groaned then jerked her body forward. Claimant displayed virtually nil or nothing on lumbar extension and Dr. Raschbacher opined that her exhibition was not the result of anything physical or physiologic. *See* Exhibit Q.

35. Dr. Raschbacher noted that Claimant did not display the pain behaviors displayed at hearing with grunting and heavy breathing, but that she did show other types of pain behaviors during his examination. He agreed with Dr. Ogrodnick's assessment that Claimant had pain behaviors and a non physiologic presentation.

36. Dr. Raschbacher opined that Claimant certainly was not permanently and totally disabled by any means. He opined that her subjective reports were not likely

reliable. He indicated his belief after the IME that she could work with a 40 pound restriction which would be more reasonable and effective and would still be pretty conservative. He did not have much doubt that Claimant could lift up to 40 pounds and that she could probably lift more.

37. On December 20, 2014 surveillance video of the Claimant shows her taking care of six children. Claimant walks, bends, and climbs into a vehicle without apparent difficulty. Claimant arrives at a store with the children and pushes a cart with a child sitting in the cart in the store for approximately 1.5 hours. While in the store, Claimant reaches on shelves for items, bends, and continues to push the child in the cart. Claimant then pushes the cart out of the store, with two children sitting inside the cart. Claimant lifts a child over the cart and bends with the child in her arms to place the child into the backseat of her car. Claimant then drives the six children to a park. At the park she walks, throws a ball and plays baseball with the children, bends over, squats, lifts the youngest child with her arms, and sits hunched over with the youngest child on her lap. Claimant lifts the youngest child with one arm and swings him around. Claimant speed-walks/jogs to get the baseball, bends over, and throws the ball. Claimant displays normal unrestricted movement throughout the surveillance. Claimant also pushes children on the swings and leans backward and forward as if to demonstrate to the children how to swing. Upon leaving the park, Claimant carries the youngest child down a hill to the vehicle. Claimant spent over three hours total out and about with the children with no visible problems in her movement. *See* Exhibit T.

38. Dr. Raschbacher noted that after his examination he had the opportunity to review the surveillance video of Claimant. He noted that the video showed Claimant could do a fair amount physically and that the video suggests that the lifting restrictions Dr. Mason had provided were unduly restrictive and not supported by the objective evidence in the video. He opined that the activities shown in the video were grossly inconsistent with Claimant's presentation at the examination he performed.

39. Dr. Raschbacher opined that Claimant had reached MMI on February 8, 2013 even though she had hardware removal surgery a month later. Dr. Raschbacher opined that hardware removal as maintenance treatment was appropriate in this case. Dr. Raschbacher noted that the actions shown on video surveillance of lifting, bending, moving, twisting, sitting, and walking are typically the function you would expect her to have after the type of surgery that was performed in this case.

40. On March 17, 2015 Dr. Mason reviewed surveillance video of Claimant. Dr. Mason opined that Claimant certainly exceeded a 5 to 10 pound lift and that she squatted on a couple of occasions. She opined that Claimant presented slightly different than Claimant had appeared in her office and did not appear to be in any discomfort in the video when she was in at least mild distress when seen in the office. Dr. Mason indicated she would alter Claimant's permanent work restrictions to a 15 to 20 pound occasional lifting but would keep the 5 to 10 pound limit for frequent lifting and that she would limit kneeling and squatting to rare as opposed to not at all. Dr. Mason

opined that Claimant has genuine chronic pain and that none of the activities on the videotape simulate an eight hour work day. *See* Exhibit H.

41. Prior to working for Employer, Claimant worked for Safeway for approximately five years as a deli clerk. Prior to her Safeway job, Claimant cleaned houses for many years.

42. Claimant studied for and passed a GED test in English in 1993. Claimant spoke English in her position as a deli clerk while assisting customers. As part of her deli clerk duties, she prepared food, cleaned displays, cut meats, and cashiered.

43. In 1999 Claimant took a certified nursing assistance (CNA) test in English and passed. Claimant also took and passed a CPR test and First Aid test in English. Claimant applied for her job with Employer in English.

44. Vocational experts Cynthia Bartman and Doris Shirver both assessed Claimant. They came to differing conclusions regarding Claimant's ability to obtain future employment.

45. On February 13, 2014, Cynthia Bartman performed an assessment of Claimant. Claimant reported that she was unable to vacuum or go grocery shopping due to the amount of push/pull/lift involved. Claimant also reported she could not do laundry as the clothes were too heavy for her to lift in and out of the laundry. Ms. Bartman opined after a review of Claimant's work restrictions and Claimant's prior employment that Claimant had marketable transferable skills in the area of cashiering, and that she had the ability to learn other unskilled to semi skilled positions. Ms. Bartman also contacted several employers in the local market. Ms. Bartman opined that there were a variety of career opportunities for Claimant that met her vocational skills and her work restrictions and firmly believed Claimant was able to work. Ms. Bartman further opined that Claimant's bilingual skills made her very marketable. *See* Exhibit R.

46. Ms. Bartman noted Claimant had passed the GED in English as well as the CNA test and had been successful both at the Safeway deli counter and at the residential home while assisting customers/patients in English. Ms. Bartman opined that Claimant was competitive and fully employable in the areas of cashiering and customer service and identified several positions suitable for Claimant such as: airport cashier; cashing checks; handing out towels at a YMCA; unarmed security guard; lobby attendant; room service order taker; and light production machine operator or package assembler. *See* Exhibit R.

47. On March 5, 2014 Ms. Shriver performed an assessment of Claimant. Claimant reported having three back surgeries with the most recent being hardware removal in March of 2013 because her hardware was too big for her body. Claimant reported receiving therapy after each surgery that did not help and that she has continued to get worse with more numbness and pain. Ms. Shriver noted Claimant's

permanent work restrictions and opined that the injury left Claimant with daily incapacitating chronic pain, limitations with sitting, standing, walking, lifting, climbing, balance, stooping, kneeling, crouching, crawling, reaching, fingering, handling, neck and trunk movements, with deficits in range of motion and strength, decreased motor coordination, sleep deprivation and mental challenges. Ms. Shriver opined that overall Claimant was at the 1st percentile compared with the average worker and that she could not compete in the general labor market. Ms. Shriver opined that unskilled work would require high hand use and/or proficient conversational English vocabulary, spelling, comprehension and math skills and that Claimant had none of these at a competitive level. *See* Exhibit 19.

48. Claimant reported to Ms. Shriver that she moved all of her clothing at home to waist height so she did not have to reach overhead or down low to get it. She reported with cooking that she also had everything at waist level so that she does not have to reach or bend. Claimant reported she no longer goes shopping alone and has to have people to push the cart and lift items. Claimant reported driving only when she had to and that she had increased pain when pushing the pedals. Claimant reported she used to be active with cleaning, walking, driving, and going to the park and carrying/playing with her grandchildren but that now she watched television, napped, and rested. *See* Exhibit 19.

49. On March 11, 2015 Ms. Bartman provided an updated employability evaluation. Ms. Bartman continued to opine that Claimant had marketable transferable skills in the area of cashiering and ability to learn other unskilled to semi skilled positions. Ms. Bartman concluded that Claimant was employable and capable of earning a wage. Ms. Bartman reviewed Ms. Shriver's report and had concerns that Ms. Shriver used limitations that did not come from treating physicians. Ms. Bartman also noted that Ms. Shriver used the McCarron-Dial Work Evaluation System to evaluate Claimant's employability and that the information entered into the system for the testing was an inaccurate description of Claimant's ability. Ms. Bartman noted Claimant clearly has vocational skills at a high school level as she was successful in obtaining a GED.

50. Ms. Bartman and Ms. Shriver both testified at hearing consistent with their prior reports.

51. Ms. Shriver opined that any work requiring standing, walking, lifting, stooping, crouching, reaching, or handling would be prohibitive for Claimant and that Claimant could not compete in the general labor market. She opined that Claimant does not have the stamina or ability to sustain work day to day for any job and would need to take unscheduled breaks and naps. She opined that Claimant would not do very well in an extreme or emergent situation. She opined that Claimant could sit for a maximum of 20 to 30 minutes at one time, stand for a maximum of 10 to 15 minutes at one time, and walk for a maximum of 1 to 15 minutes at one time.

52. Ms. Bartman opined that Claimant was capable of earning wages, that Colorado's manufacturing sector had a good job market for unskilled positions and that

the Colorado job market was the best it has been in six years. Ms. Bartman also noted that she had reviewed the surveillance video and that the surveillance was very inconsistent with Claimant's self-reported abilities. Ms. Bartman again noted that the scores on the testing performed by Ms. Shriver were inconsistent with everything else of Claimant that she reviewed, and that she couldn't utilize the test results because they were so inconsistent with Claimant's demonstrated abilities.

53. The opinions of Ms. Bartman are more persuasive and credible than the opinions of Ms. Shriver. Ms. Shriver bases her opinions on Claimant's work abilities mainly on an assessment test that depends on the effort of the test taker. Claimant has been noted by multiple physicians to exaggerate symptoms and complaints and to have a non physiologic presentation. Ms. Bartman's assessment is supported by surveillance video showing that Claimant is indeed capable of much more activity than she reports. Claimant overall lacks credibility and the assessment performed by Ms. Shriver in March of 2014 relied heavily on Claimant's incredible subjective reports of her limitations. Claimant's actual abilities are much greater than what is documented by Ms. Shriver. Further, after the surveillance, Dr. Mason provided increased lifting, squatting, and kneeling which would have opened Claimant up to even more job opportunities, yet Ms. Shriver maintained her opinion that Claimant still remained unable to be competitive in the job market. Ms. Shriver also made conclusions regarding Claimant's English language skills that were inconsistent with Claimant's demonstrated GED in English from 1993 and her subsequent work history over several years where Claimant successfully communicated with customers and patients in English. Ms. Bartman took into account all of the medical restrictions in place, Claimant's past work history, and the current job market and her opinions are overall found more persuasive.

54. Claimant's testimony overall is not found credible or persuasive. Claimant has presented with many inconsistencies throughout the claim, noted by physicians who document her non physiologic presentation and the gross inconsistency between examination and what is shown on video surveillance.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University*

Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Overcoming the DIME

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997. A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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

Here, Claimant has failed to meet her burden to show by clear and convincing evidence that the DIME physician's opinion concerning the date of MMI was incorrect. The DIME physician's opinion that Claimant reached MMI on February 8, 2013 was consistent with the opinions of Dr. Ogin, Dr. Castro, and Dr. Sanidas that hardware removal surgery was unlikely to improve Claimant's injury-related medical condition. In determining that Claimant's date of MMI was February 8, 2013 DIME physician Dr. Ogrodnick made a determination that as of February 8, 2013 there was no further treatment reasonably expected to improve Claimant's condition. This determination was consistent with multiple treating providers who also concluded that the hardware removal surgery recommended by Dr. Wong would not improve her function or reduce her pain. Claimant also provided varying reports to providers as to whether or not the diagnostic block provided her relief. Prior to the hardware removal surgery, Claimant had presented inconsistently and had a non physiologic presentation. Therefore, three different doctors opined that the hardware removal surgery was not reasonably expected to improve her condition. The DIME physician, in determining the MMI date was February 8, 2013, reached a consistent conclusion.

In addition to the opinions of Dr. Ogin, Dr. Castro, and Dr. Sanidas that the hardware removal surgery would unlikely improve Claimant's condition which support the DIME physician's conclusion, Dr. Raschbacher also agreed that Claimant had reached MMI as of February 8, 2013. Dr. Raschbacher opined that the hardware removal surgery after MMI was done as maintenance treatment and he agreed that as of February 8, 2013 there was no further treatment needed to improve Claimant's function or her pain. Although Claimant presents a difference of opinion between DIME physician Dr. Ogrodnick and the opinion of Dr. Wong, Claimant has failed to show more than a difference of opinion as to whether the hardware removal surgery was reasonably expected to improve her condition. Despite not recommending hardware removal surgery and believing it would not improve Claimant's condition, Dr. Sanidas indicated that Claimant's MMI date should be delayed until she recovered from the hardware removal surgery. Dr. Ogin recalculated her permanent impairment after the hardware removal surgery but did not change the date of MMI he had previously provided. Although there appears to be some confusion amongst the providers as to whether her MMI date should change following a surgery that they did not believe would improve her condition, the statutory definition of MMI clearly describes when MMI exists. Both Dr. Ogin and Dr. Sanidas concluded that the hardware removal surgery would not

be reasonably expected to improve Claimant's condition. These opinions are consistent with a date of MMI of February 8, 2013. Claimant has failed to show by clear and convincing evidence that DIME physician Dr. Ogrodnick was incorrect on MMI date. Rather, his opinion appears to be well founded and supported by three of Claimant's treating providers and an additional physician who performed an independent medical examination. Therefore, Claimant has failed to meet her burden to overcome the DIME physician's opinion on the date of MMI. Clamant reached MMI on February 8, 2013.

Temporary Total Disability

Temporary disability benefits are based on a worker's lost or impaired earning power and are designed to protect against actual loss of earnings as a result of an industrial injury. *Univ. Park Holiday Inn/Winegardner & Hammons, Inc. v. Brien*, 868 P.2d 1164 (Colo. App. 1994). To receive temporary disability benefits, a claimant must establish a causal connection between the injury and the loss of wages. *See* § 8-43-103(1)(a), C.R.S. Once a claimant attains MMI, she is no longer entitled to temporary indemnity. *Id.* The claimant bears the burden to prove any entitlement to temporary disability benefits. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, Claimant reached MMI on February 8, 2013 and she has failed to overcome DIME physician Dr. Ogrodnick's opinion of the date of MMI. As such, she is not entitled to temporary indemnity after the date of MMI. Therefore, Claimant has failed to prove an entitlement to TTD benefits from February 9, 2013 through May 3, 2013.

Permanent Total Disability

To prove her claim that she is permanently and totally disabled, the claimant shoulders the burden of proving by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. *See* § 8-40-201(16.5)(a) and 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Id.* The question of whether the claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

Claimant has failed to meet her burden to show she is unable to earn any wages in the same or other employment. Ms. Bartman's vocational assessment is found credible and persuasive. Claimant is able to earn wages despite her industrial injury. The ALJ has considered Claimant's physical condition, mental ability, age, employment history, education, and the availability of work in the local job market that Claimant could perform and agrees with Ms. Bartman's assessment that employment exists that is reasonably available to claimant despite her work restrictions. Claimant has demonstrated in past employment her ability to speak and work with customers and residents in English, has a high school level education she obtained in English 22 years ago, and has passed CNA testing in English. Claimant has demonstrated the past use of her upper extremities in the deli counter job and ability to work in a customer service environment. Additionally, Claimant's subjective report of limitations cannot be relied upon. Surveillance video reviewed shows Claimant is capable of much more than she reports to medical providers and much more than she reported to the vocational experts who evaluated her. Claimant reported to the vocational experts that she was unable to bend to get her own clothing or to do her own grocery shopping as she couldn't push a cart. Claimant's activities in the surveillance video show walking, bending, climbing into a car, lifting a child into a car, pushing a grocery cart with two children inside the cart, playing baseball with grandchildren at the park, and pushing grandchildren on swings at the park. The video shows over three hours of active movements by Claimant that are grossly inconsistent with her presentation to medical providers and to the vocational experts. Many providers have noted Claimant's presentation at medical appointments as inconsistent and having no physiologic basis or explanation. Claimant is capable of more than she lets on. Relying on Claimant's subjective complaints or the results of testing that is based in any part on Claimant's efforts is not an adequate way to measure Claimant's ability to obtain future employment.

After surveillance video review, Claimant's provider Dr. Mason increased Claimant's work restrictions which would open her up to even more possible job opportunities. Ms. Shriver's opinion that Claimant is permanently and totally disabled and unable to obtain future employment is not persuasive. Ms. Shriver based her opinion, in part, on Claimant's subjective report of complaints, symptoms, and on the results of a test that rely on Claimant's effort. Relying on Claimant's subjective reports or efforts is not a valid way to determine her ability to obtain future employment as Claimant is not credible in her reporting. Ms. Bartman, in contrast, took into account multiple factors and restrictions from treating physicians as well as Claimant's past performance and her opinions are more persuasive. Claimant has thus failed to meet her burden to show she is incapable of earning any wages.

Disfigurement

As a result of her three back surgeries as well as her right knee surgery, Claimant has visible disfigurement to the body. Her disfigurement includes a raised 4 inch long scar on her back that is approximately ¼ of an inch wide, discolored, raised, and uneven with her normal skin tone. Claimant also has two arthroscopic scars on her right knee that measure less than ¼ of an inch in diameter. The scarring on her right

knee remains white and discolored form her normal skin tone despite adequate time for healing. Claimant has therefore sustained serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. §§ 8-42-108(1), C.R.S; 8-42-108(2), C.R.S. After viewing the scarring, the ALJ finds that a disfigurement award of $2,100.00 is appropriate.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME physician's opinion of MMI. Claimant reached MMI on February 8, 2013.

2. Claimant has failed to establish an entitlement to TTD benefits. Her claim for TTD from February 9, 2013 to May 3, 2013 is denied and dismissed.

3. Claimant has failed to establish that she is permanently and totally disabled. Her claim for PTD benefits is denied and dismissed.

4. Claimant has established she is entitled to disfigurement benefits. Insurer shall pay Claimant $2,100.00 for the disfigurement outlined above.

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

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

DATED: August 19, 2015

/s/ Michelle E. Jones

_____

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

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STIPULATIONS

1. The parties stipulated to an average week wage of $457.28.

2. The parties stipulated that the Claimant is receiving $643.00 a month in Social Security Disability which entitles Respondents to an offset in the amount of $74.19/week commencing March 1, 2011.

3. The parties stipulated that the authorized treating providers include Dr. Bert Furmansky, Dr. Robert Kawasaki, Dr. James Bachman and Dr. Ricardo Esparza.

4. The parties stipulated the issue of temporary disability benefits and permanent partial disability benefits are closed with prejudice, subject to reopening.

ISSUES

The issues presented for hearing are:

1. Whether the Claimant has proven, by a preponderance of the evidence, that she is permanently totally disabled.

2. Whether the Claimant has proved by a preponderance of the evidence that future medical benefits are reasonably necessary to relieve the effects of her injury or prevent deterioration of her condition and maintain maximum medical improvement

FINDINGS OF FACT

1. The Claimant was born in Zacatecas, Mexico and received her formal education through the second year of high school there. She came to the United States in 1997 and lived here for 3 years, then returned to Mexico for 3 years. Then, she moved back to the United States and has been here for the past 14-15 years (Hrg. Tr., May 13, 2014, pp. 30-31). She is 38 years old (Hrg. Tr., May 13, 2014, p. 49). On cross-examination, the Claimant admitted that she had told people that she had graduated from high school. She testified that when she started working, she took some courses in childcare at the community college working towards an associate degree and after she had already taken a number of classes, the Claimant discovered that high school

graduation was a prerequisite for the courses. So, when she was questioned about it, she told people that she had finished high school in Mexico (Hrg. Tr., May 13, 2014, pp. 50-51). Later, after taking a number of classes, she was asked to provide a certificate, she admitted she did not have one, but stated that she would work on it later after she finished the courses in which she was currently enrolled (Hrg. Tr., May 13, 2014, pp. 83-84). During an October 2012 IME, the Claimant told Dr. Judith Weingarten that she finished high school in Mexico and she took some classes at community college that were required for her job. She told Dr. Weingarten that the classes were in Spanish (Respondents' Exhibit B, p. 5).

2. The Claimant demonstrated at the hearing that she does understand some English and can speak in English. However, the Claimant testified that she doesn't completely understand everything when English is spoken. The Claimant testified that, at times, at work she would pretend to understand spoken English even though she hadn't really understood to demonstrate that she was prepared and capable of doing things. The Claimant also testified that she has had difficulty understanding and speaking with doctors and attorneys in this case (Hrg. Tr., May 13, 2014, pp. 31-33). On cross examination, the Claimant has taken a number of English classes, including classes designated at the intermediate/advanced level (Hrg. Tr., May 13, 2014, pp. 53-54; Respondents' Exhibit U). During the course of testifying at the hearing, the Claimant did answer a couple of questions before the interpreter translated them into Spanish for her (Hrg. Tr., May 13, 2014, p. 62).

3. The Claimant testified that she worked as a teacher's aide for Employer with the infants. She testified that her job duties consisted of meeting their basic needs (Hrg. Tr., May 13, 2014, p. 82). Mr. Brett Dabb, a supervisor of the Claimant provided conflicting testimony about the Claimant's position and job duties. Mr. Dabb was originally a prekindergarten teacher/group leader, who has worked at Employer since 2008. He testified that he was initially a coworker of the Claimant and that they both held the position of teacher/group leader. He testified that he was in the prekindergarten classroom and the Claimant was with the infants, but for a period of time they held the same position. In September of 2009, Mr. Dabb testified that he was promoted to Early Childhood Education Operations Manager and he became the Claimant's supervisor. He provided classroom support and conducted classroom observations (Hrg. Tr., May 13, 2014, pp. 90-91). Mr. Dabb testified that the Claimant's direct supervisor was Charlene Dicer, who was the infant supervisor. He testified that Ms. Dicer would move back and forth between two separate infant classrooms, with the Claimant about half of the time and in the other classroom about half of the time (Hrg. Tr., May 13, 2014, p. 91). Mr. Dabb testified that neither he nor Ms. Dicer are fluent in Spanish and they both communicated with the Claimant in English, when working on lesson planning, at staff meetings, during continuing education sessions held at work, and during performance evaluations (Hrg. Tr., May 13, 2014, pp. 92-96). Based on the Claimant's classroom scores in her evaluations, Mr. Dabb testified that the Claimant had good working knowledge of English and a command of the information she learned from the tools and training materials that were provided to employees in English only (Hrg. Tr., May 13, 2014, p. 98). Mr. Dabb also testified that as a classroom teacher, the Claimant would

complete the Observation Logs for the children in her classroom (Respondents' Exhibit T was discussed as an example of the type of log that the Claimant would complete although it was established that the Claimant was not the person who completed Exhibit T; also see Hrg. Tr., May 13, 2014, pp. 99-100).

4. The Claimant testified that on January 20, 2010, she tripped as she was going down outside concrete stairs. She testified that she grabbed the stair rail as she was falling, but still continued falling and she hit about 10 steps until she stopped. The Claimant testified that the first thing she remembered after her fall was that she was short of breath and it felt like her mouth was full of blood. She testified that people were trying to hold her head up but she was trying to signal them that she couldn't breathe and wanted them to set her on her side. The Claimant testified that after the accident, she went to the hospital and received treatment there (Hrg. Tr., May 13, 2014, p. 34).

5. The Claimant was transported to Rose Medical Center by ambulance. The location of the Claimant's injuries were listed as "head, face, neck and upper and mid back." The Claimant sustained a blow to the head but no loss of consciousness. The Claimant reported a headache and nausea, but no pain on weight bearing, no numbness, no dizziness, no loss of vision, no hearing loss, no chest pain, no difficulty breathing, no weakness, no vomiting and no abdominal pain. X-rays and a CT of the cervical spine and head were normal with no fractures and no acute findings. The Claimant was prescribed Vicodin and Valium and was advised to follow up with a Workers' Compensation doctor the following day (Claimant's Exhibit 28; Respondents' Exhibit V).

6. The day following the fall, the Claimant testified that the whole right side of her face was bruised and her eyes were shut they were so swollen. She testified that she was also bruised on her right shoulder. The Claimant did not remember any bruising on her hip or anywhere else (Hrg. Tr., May 13, 2014, p. 34-35).

7. The Claimant was seen the day after her injury, on January 21, 2010, by Dr. James Bachman. A translator was present at this visit (Claimant's Exhibit 29; Respondents' Exhibit W). The Claimant reported pain in her occiput, mid back, and lower back with her lower back described as her worst symptom. She denied coughing. She denied radiation of her neck and back pain into her extremities. She was feeling symptoms in her right knee, left hip and right shoulder. Dr. Bachman specifically noted "GU: no frequency, hematuria or change in urination" (Claimant's Exhibit 29; Respondents' Exhibit W, p. 247). He diagnosed cervical, thoracic and lumbar strains but Dr. Bachman did not report objective muscle spasms. He also identified strains/contusions in the Claimant's right shoulder, left wrist, left hip and right knee as well as a concussion.

8. The Claimant was seen on January 28, 2010 by Dr. Bachman with a translator. His report stated, "There is no history of bladder or bowel dysfunction. . . There is no saddle block anesthesia" (Claimant's Exhibit 29; Respondents' Exhibit X, p. 250). Dr. Bachman felt the Claimant's reflexes were symmetrical.

9. A cervical MRI and lumbar MRI occurred on February 12, 2010. There were minor disc bulges at C4/5 and L5/S1 but there was no nerve root compression, spinal cord compression, spinal canal stenosis nor foraminal stenosis (Claimant's Exhibits 31 and 32; Respondents' Exhibit Y).

10. On February 18, 2010, the Claimant was seen by Dr. Bachman with a translator. The Claimant's gait was reported as "very unsteady and she walks only with assistance" (Claimant's Exhibit 29; Respondents' Exhibit Z, p. 258). There was no physiologic explanation noted for a change in her gait 39 days after her accident. On this visit, the Claimant's MRI results were reviewed with her by Dr. Bachman and she was instructed to return to desk work 4 hours per day.

11. Four days later, on February 23, 2010, the Claimant presented to the emergency room at St. Joseph's Hospital (Respondents' Exhibit AA). The Claimant reported 10/10 low back pain which radiated down both legs. She denied bladder and bowel dysfunction to Christine Wright RN (KIWI) in triage, Dr. Alisha Garth (ALGA) and Genevieve Nation RN (EVE). It was noted the Claimant did not have any urine output changes, no dysuria, no urinary frequency, and no urinary urgency (Respondents' Exhibit AA, p. 261). The Claimant denied any headaches, paresthesias, focal weakness, or sensory changes. The Claimant denied neck pain and the medical providers noted her cervical spine was non-tender on exam and her range of motion of her neck was normal (Respondents' Exhibit AA, pp. 261- 262). Though the Claimant's stated her low back pain was 10/10, on physical exam of the low back there was "no CVA Tenderness, there is no tenderness to palpation, normal inspection" (Respondents' Exhibit AA, p. 261). The medical record noted "patient with steady gait" and "ambulates without assistance" (Respondents' Exhibit AA, p. 262). It was also reported "no gait changes" and on physical exam it was reported "gait normal" and "able to walk without difficulty" (Respondents' Exhibit AA, p.261). At discharge the Claimant was educated about bowel and bladder dysfunction and asked to return for such symptoms (Respondents' Exhibit AA, pp. 262- 264). This becomes pertinent in the Claimant's medical appointment the next day.

12. The Claimant met with Meghan Dukes, PT the following day on February 24, 2010 (Respondents' Exhibit BB, p. 265). On this visit, the Claimant reported numbness in both legs posteriorly on the left to the ankle and on the right to the back of the knee. The day before, the Claimant had denied paresthesias and sensory changes. The Claimant reported to Ms. Dukes she had incontinence of bladder but denied saddle anesthesia. At the ER, the Claimant had denied bladder changes to three providers. Ms. Dukes reported the Claimant required minimal assistance with position changes and her gait was antalgic and slow. The day before, the Claimant's gait was noted as normal by two medical providers at multiple points in the report.

13. The Claimant saw Dr. Bachman on February 25, 2010, two days after the emergency room visit and reported she was "losing urine" (Respondents' Exhibit CC). Dr. Bachman reported the Claimant's "Gait was very unsteady and she walks only with assistance." She was taken off of work and referred to Dr. Robert Kawasaki.

14. The Claimant met with Dr. Robert Kawasaki on March 9, 2010, which is approximately two months after her date of injury (Claimant's Exhibit 30; Respondents'' Exhibit DD). Dr. Kawasaki remains the Claimant's ATP to this day. The Claimant gave Dr. Kawasaki a medical history discrepant from the history she gave before at the Emergency Room and reported new symptoms to him never reported before. The Claimant reported to Dr. Kawasaki she had a loss of consciousness of a few seconds after her fall and reported an immediate onset of pain throughout her body including her head, neck and low back with numbness and tingling throughout her lower extremities. The Claimant advised Dr. Kawasaki she had numbness and tingling "into both of her legs in a diffuse pattern" (Claimant's Exhibit 30; Respondents' Exhibit DD, p. 269). The Claimant reported some incontinence including stress incontinence, occasional leaking and incomplete emptying, numbness in the perirectal region noticed when she is cleaning herself after a bowel movement, and numbness in her genitalia observed during intercourse (Claimant's Exhibit 30; Respondents' Exhibit DD, p. 270). The Claimant also reported to Dr. Kawasaki she had decreased sensation below the nipple line from T4 to the lower extremities. Dr. Kawasaki observed what he believed to be hyperreflexia with clonus and was concerned about a thoracic spinal cord lesion. He made a STAT referral for a thoracic MRI and a STAT referral to Michael Shen MD, orthopedic surgeon (Claimant's Exhibit 30; Respondents' Exhibit DD, pp. 271-272). Dr. Kawasaki noted the Claimant's newly reported loss of consciousness but noted the patient had no retrograde or anterograde amnesia. Dr. Kawasaki noted the Claimant was clear cognitively with him during history taking (Claimant's Exhibit 30; Respondents' Exhibit DD, p. 272).

15. The thoracic MRI occurred on March 12, 2010 was normal without evidence of stenosis, disc herniation or spinal cord lesion (Respondents' Exhibit EE, p. 273). The Claimant was referred for an EMG and to a urologist.

16. On March 25, 2010, the Claimant met with Dr. Bachman and reported that she was experiencing "forgetfulness" (Claimant's Exhibit 29; Respondents' Exhibit C, p. 49). Dr. Bachman recommended a brain MRI, which was normal (Respondents' Exhibit GG, p. 276).

17. On April 6, 2010, Dr. Kawasaki reported the EMG studies of her bilateral lower extremities were normal (Respondents' Exhibit HH, 278-280). On April 20, 2010, the Claimant reported to Dr. Kawasaki that her neck was feeling better although her headaches were increased and her low and mid back pain persisted with pain radiating into the bilateral lower extremities (Respondents' Exhibit II).

18. As of April 27, 2010, the Claimant had returned to light duty with the Employer. Despite cervical symptoms being reported as negative to two emergency room examiners on February 23, 2010, and neck pain being noted as improved on April 20, 2010 by Dr. Kawasaki, the Claimant's neck pain returned and she advised Dr. Kawasaki she was having "increasing discomfort." Dr. Kawasaki also noted the Claimant had a "significant antalgic gait, her gait was much more so than seen previously" (Claimant's Exhibit 30; Respondents' Exhibit JJ, p. 283).

19. The Claimant met with orthopedic surgeon Michael Shen, MD on April 28, 2010. On his physical exam, he reported the Claimant's gait was "non-antalgic nor broad based and the patient is able to heel-and-toe walk normally" (Respondents' Exhibit KK, p. 286). On Dr. Shen's exam, the Claimant's paraspinous muscle tone was normal and spasms were absent (Respondents' Exhibit KK, p. 286).

20. The Claimant was evaluated by urologist, Ferdinand Mueller MD starting on May 5, 2010. The Claimant advised Dr. Mueller she "first started noticing urine leaking in February" (Respondents' Exhibit LL, p. 290). The Claimant had detrusor overactivity on urodynamic study. Lisa Zwiers PA-C in Dr. Mueller's office reported the Claimant had failed improvement on medications at both high and low doses (Respondents' Exhibit FFF, p. 337).

21. The Claimant was seen by neurologist Dr. Joshua Renkin on June 9, 2010. On motor examination, Dr. Renkin reported "very limited effort with all strength testing, predominately in the legs. She cannot bring her ankles up, although there is no reason to think they are weak based on gait evaluation" (Respondents' Exhibit NN, p. 295). He noted Claimant had normal tone and marked antalgic gait without signs of motor weakness. Dr. Renken also evaluated her deep tendon reflexes and noted,

> unusual jerking movement of the ankles which I presume is what Dr. Kawasaki felt was clonus. This does not actually seem to be clonus and may be volitional in nature versus discomfort. She seems to push down, not allow me to dorsaflex her feet. [sic] I have evaluated this carefully several times, and also had Dr. Nitka, an office partner, and board certified neurologist for a second opinion. He agrees that this does not appear to be clonus (Respondents' Exhibit NN, p. 296).

Dr. Renkin concluded the Claimant's exam was inconsistent with atypical movement of the feet which was not clonus and she had no other upper motor neuron signs such as upgoing toes or increased tone or other significant type of reflexia. The following day, a repeat thoracic MRI was normal (Respondents' Exhibit OO, p. 297). Dr. Renkin reviewed the urology records and thoracic MRI and concluded, "No clinical evidence no radiograph evidence for spinal cord, brain or any central nervous system injury" (Respondents' Exhibit RR, p. 303).

22. The Claimant was seen by Dr. Bachman on June 24, 2010. The Claimant reported an increased pain episode and her "legs would not move." This happened with "stress" at home and Dr. Bachman noted that she cried and became upset talking about this (Claimant's Exhibit 29; Respondents' Exhibit PP, p. 298). Dr. Bachman noted that for the Claimant's "Long Term Plan" that the neuro urological evaluation was to be completed, he recommended a psychiatric refill and evaluation, and then after that, opined the Claimant would be at MMI (Claimant's Exhibit 29; Respondents' Exhibit PP, p. 299).

23. Dr. Bachman saw the Claimant again on August 16, 2010 and Dr. Bachman noted that in speaking with Dr. Kawasaki, they agreed the Claimant's case was approaching MMI. Dr. Bachman noted that the Claimant was referred to Dr. Furmansky for depression but had not yet seen him. The claimant complained of low back pain and Dr. Bachman noted a "very long" (40 min) conversation with the Claimant about her pending psych evaluation, MMI, impairment ratings and maintenance care (Respondents' Exhibit SS, p. 304).

24. Dr. Kawasaki met with the Claimant on August 17, 2010. He recorded "the patient has pain behaviors" and was "stiff and guarded with thoracolumbar range of motion." She had diffuse tenderness to palpation with cervical, thoracic and lumbar regions. Dr. Kawasaki did not note the Claimant walking with a limp or using a cane. He outlined she had negative neurologic scans of the brain, cervical, thoracic, and lumbar region, idiopathic hypereflexia, and her urinary incontinence had unclear etiology with no correlating neurologic lesion. He also stated, "delayed recovery and probable psychologic issues perpetuating pain issues." He placed the Claimant at MMI from a physical standpoint (Respondents' Exhibit TT, p. 306).

25. On August 17, 2010, the Claimant was initially referred to Dr. Bert Furmansky for a psychiatric evaluation and treatment for severe depression. She saw Dr. Furmansky the same day that Dr. Kawasaki placed her at MMI from a physical standpoint. She presented to Dr. Furmansky using a cane, which no doctor prescribed, and not observed by Dr. Kawasaki the same day. The Claimant reported to Dr. Furmansky that, on the day of her fall, she was very happily employed as an infant daycare worker for Employer. Then, she tripped on concrete steps "landing on her face falling forward about 10 steps resulting in loss of consciousness and multiple physical injuries. She remembers waking up after the fall in pain and was 'blank' in the ambulance, but capable of moving her arms and legs. She sustained severe and massive soft tissue injury to her face and left thorax. A series of x-rays was within normal limits and subsequent MRIs have been negative although she demonstrates consistent neurological findings of a thoracic spinal cord lesion" (Respondents' Exhibit UU, p. 308). Dr. Furmansky noted the Claimant "is worried about whether she will be able to recover and return to full time work. Her options are rather limited as a Spanish speaking female without much English language use" (Respondents' Exhibit UU, p. 309). The Claimant reported to Dr. Furmansky that "she worked in the office at her father's factory in high school and completed 12th grade graduating in 1996 or 1997 when she was approximately 18 years old. Following high school graduation she continued to work for her father who paid her salary." The Claimant also reported that she took English classes and became certified in early childhood daycare before going to work as a child care worker for Employer (Respondents' Exhibit UU, p. 310). Dr. Furmansky diagnosed her with severe depression and anxiety. He noted that she experienced a loss of consciousness and a concussion but noted that he had very few medical records available to him at the time of this initial evaluation. Dr. Furmansky also noted that he found it difficult to evaluate her cognitive abilities due to her being Spanish speaking and he noted that his required consideration. Dr. Furmansky recommended an

increase in medication and a psychiatric follow-up to include psychotherapy and marital psychotherapy for a work-related relational problem with a Spanish speaking psychologist, Ricardo Esparza (Respondents' Exhibit UU, pp. 311-312).

26. On September 14, 2010, Dr. Kawasaki noted that the Claimant reported her pain was getting worse in her mid back. He also noted her reports of diffuse complaints of numbness and tingling in her bilateral extremities. The Claimant reported frustration with her continued pain and she "feels the pain is stronger." On examination she had "very minimal motion with lumbar forward flexion, extension and lateral bend." Dr. Kawasaki added "delayed recovery" to his impression. Dr. Kawasaki noted that he believed the Claimant was at MMI for her physical condition and noted "we will leave the psychologic maximum medical improvement to Dr. Furmansky (Respondents' Exhibit XX, pp. 317-318).

27. On September 16, 2010, Dr. James Ogsbury performed a medical record review concluding that there was no evidence of a spinal cord injury and nothing to indicate MRI pathology consistent with detrusor hyperactivity or relate to her urologic condition. Dr. Ogsbury opined that the Claimant's bladder situation was not causally related to a spinal injury and he found her at MMI for all physical conditions (Respondents' Exhibit YY, pp. 319-320).

28. On September 22, 1010, The Claimant presented to Dr. Bachman with a cane and, other than this, he noted no change from previous exams. He indicated that the Claimant would follow up with him in two weeks for MMI and medical impairment rating (Respondents' Exhibit ZZ, pp. 331-332). On October 22, 2010, the Claimant told Dr. Bachman "the medication is not working anymore" and her headaches were getting worse. The Claimant told Dr. Bachman that, "Dr. Furmansky thinks that Dr. Kawasaki should evaluate her headaches prior to MMI." Dr. Bachman noted that he would wait to place her at MMI until after she had an appointment with Dr. Kawasaki (Exhibit AAA, pg 323).

29. Dr. Kawasaki met with the Claimant on November 2, 2010 (Exhibit BBB, pp. 325-326). The Claimant reported continued diffuse pain complaints, neck pain with headaches more towards the right into the occipital region and continued low back pain, numbness and paresthesis into the lower extremities. On this examination, Dr. Kawasaki reported the Claimant had giveway pattern weakness throughout the bilateral lower extremities not following a dermatomal pattern. Because of her increasing pain complaints of breakthrough pain, Dr. Kawasaki increased the Claimant's prescription of opiates to add Vicodin to her morphine sulfate and he switched her headache medication from Maxalt to Midrin. Dr. Kawasaki expected the Claimant would be placed at MMI on her next visit with Dr. Bachman (Exhibit BBB, pp. 325-326).

30. On November 12, 2010 Dr. Bachman placed the Claimant at MMI. Dr. Bachman provided the Claimant a 43% whole person rating and included a cervical rating (including the headaches), a thoracic rating, and a lumbar rating. At this visit, Dr. Bachman noted that on her pain diagram, the Claimant shaded in her entire body, "from

her head to toes only leaving her arms out" as being in pain and she listed her current pain level as an "8" with a range of 7-9. Dr. Bachman noted that the Claimant's course of care included the following:

1. Multiple MRIs of the brain and entire spine
2. PM & R evaluation from Dr. Kawasaki
3. Second opinion from Dr. Shen, orthopedics
4. Neuro/urologic evaluation
5. EMGs of the LEs
6. Neurological evaluation from Dr. Renkin
7. Psychiatric evaluation and treatment from Dr. Furmansky
8. Psychological evaluation and treatment from Dr. Esparza
9. Extensive physical therapy

Dr. Bachman also noted that as of November 12, 2010, the Claimant was taking the following medications:

1. Maxalt MLT 10
2. Gabapentin 300
3. Enablex 15
4. Cymbalta 30
5. MS Contin 30
6. Nortriptyline
7. Celebrex
8. Ambien

Dr. Bachman indicated the Claimant's work status is desk work only 4 hours per day. He recommended as ongoing maintenance care:

1. pain management with Dr. Kawasaki 3 months with appropriate labs (8 visits);
2. psychiatric management with Dr. Furmansky, deferred to Dr. Furmansky;
3. psychological management with Dr. Esparza, deferred to Dr. Furmansky;
4. Biofeedback with Jessica Graves, MA, deferred to Dr. Furmansky;
5. Physical therapy at CACC 2/week for six weeks (12), 1/week for six weeks (6) for total of 18 visits, then re-evaluate;
6. PCP W/C management by myself q 3 months for 2 years (8 visits).

(Claimant's Exhibit 29; Respondent's Exhibit DDD).

31. The Claimant saw Dr. Furmansky for treatment prior to psychiatric MMI from August 31, 2010 through March 21, 2011, at which time Dr. Furmansky placed the Claimant at MMI (Respondents' Exhibits WW, CCC, EEE, JJJ and Claimant's Exhibit 35, pp. (a)-(f)). On March 21, 2011, Dr. Furmansky provided a psychiatric impairment rating for the Claimant. As part of his impairment rating calculation, Dr. Furmansky notes that the Claimant is moderately impaired in her sexual functioning and sleep, markedly impaired in her recreational activities with family, moderately impaired in her

interpersonal relationships and mildly impaired in her ability to manage conflicts and face adversity. He found the Claimant minimally impaired in memory, attention and concentration. Dr. Furmansky found her markedly impaired in her adaptation to job performance requirements. He assigned the Claimant a 23% overall psychiatric permanent impairment rating (Claimant's Exhibit 35, p. (c); Respondents' Exhibit JJJ, p. 346). Ultimately, Dr. Furmansky did not place the Claimant at psychiatric MMI for seven months after initially seeing her. He initially listed traumatic brain injury as a diagnosis, though this had never been listed as a diagnosis by any prior doctor (Exhibit UU, p. 311). Dr. Furmansky noted he did not have medical records at his first visit and stated his opinions might change should he receive additional medical records (Exhibit UU, p. 312). He treated the Claimant as if she had a thoracic spinal cord lesion or neurological injury, yet these diagnoses had been excluded by Dr. Kawasaki on the same day that Dr. Furmansky began treating the Claimant. Dr. Furmansky was in error to include these diagnoses and his assumptions regarding her diagnoses were not corrected for two years and two months.

32. After placing the Claimant at MMI, Dr. Furmansky opined that the Claimant required maintenance care of 8 more psychotherapy sessions over 18 months and ongoing psychiatric care of evaluations every 2 weeks for the first year and then anticipating psychiatric treatment every 2-4 weeks for an undetermined period of time based on her clinical status and ability to taper down or off of some of her mediation (Claimant's Exhibit 35, p. (c); Respondents' Exhibit JJ, p. 346). Dr. Furmansky continued to diagnose and treat the Claimant per his March 21, 2011 report until February of 2013.

33. The Respondents sought a Division IME and Dr. Carolyn Gellrick was selected as the DIME. Dr. Gellrick examined the Claimant on April 19, 2011. Dr. Gellrick also performed a review of medical records and diagnostic testing and studies. Dr. Gellrick assessed the Claimant with: (1) facial abrasions – normal CT and MRI of the brain, no evidence of lesions today; (2) cervical spine strain with cervicogenic headache; (3) thoracic strain with normal MRI x2; (4) lumbar strain with disk bulge at L5-S1 normal lower extremity EMGs; and (5) depression and anxiety. Dr. Gellrick noted that she agreed with the date of MMI assigned. She notes that there was a very thorough and comprehensive work up due to the persistence of pain, but no evidence of spinal cord lesion or neurological problems and no evidence of memory, thinking or concentration issues. Dr. Gellrick also specifically stated that the bladder symptoms are not causally related to the Claimant's work injury. The Claimant received impairment ratings for her cervical spine (16%) and thoracic spine (6%). The Claimant's lumbar range of motion was invalidated initially and the Claimant returned to have range of motion repeated. She later assigned a 15% rating for her lumbar spine on April 21, 2011. In combining the values, Dr. Gellrick assigned the Claimant a 33% whole person impairment for her physical rating with no apportionment. As for the psychiatric impairment, she noted that Dr. Furmansky had assigned a 23% whole person impairment rating. Dr. Gellrick stated, "Admittedly, this examiner finds Dr. Furmansky's impairment rating rather high considering how the patient presents today in the office.

However, this examiner is not a board certified psychiatrist. Therefore, it is requested that the patient undergo a psychiatric IME to determine impairment with this examiner's impairment calculation being different significantly from that of Dr. Furmansky." Dr. Gellrick recommended the Claimant follow with Dr. Kawasaki and Dr. Furmansky for medication maintenance for 18 months (Claimant's Exhibit 5; Respondents' Exhibit LLL).

34. The Claimant met with Dr. Gary Gutterman on September 6, 2011 as a DIME provider to evaluate psychiatric conditions (Claimant's Exhibit 5; Respondents' Exhibit OOO). Dr. Gutterman noted the Claimant had improved and stabilized from a psychiatric perspective while on Prozac and agreed the Claimant was at MMI. He assigned a four percent (4%) partial mental impairment based on four areas of functioning assessed in the mental impairment rating. Per his worksheet, he rated the Claimant's impairment at a 1 for "Activities of Daily Living"; a 1.5 for "Social Functioning"; a zero for "Thinking, Concentration and Judgment"; and a 1.5 for "Adaptation to Stress" resulting in his overall rating of 4% impairment. Dr. Gutterman commented on maintenance care and recommended the Claimant meet with Dr. Furmansky one time per month for four more months, follow up for medication management every 2 months for an additional 2 months, every three months for 12 months to 15 months, and then a reassessment for use of psychotropics would be necessary. He did not recommend ongoing psychotherapy in his discussion of maintenance care (Claimant's Exhibit 5; Respondents' Exhibit OOO).

35. The Claimant continued to follow up with Dr. Kawasaki reporting continued multiple global pain and pain in her neck and low back with continued urinary incontinence, depression, headaches and dizziness. He noted that "she reports in the last few months, her right arm has been falling to sleep on her. She indicates at times she has no sensation in the arm and has been losing strength. She indicates that this symptom was more intermittent previously but is now very constant with regard to the right arm numbness and weakness." Dr. Kawasaki notes an antalgic gait pattern and use of a cane. Dr. Kawasaki reco9mmended an EMG/nerve conduction study of the right upper extremity based on the Claimant's new complaint (Claimant's Exhibit 30; Respondents' Exhibit QQQ).

36. On April 3, 2012, Dr. Kawasaki noted the Claimant continued to report "global pain" that changes from time to time. The Claimant reported "that she has a sense that her nerves are pulling in her body, causing pain. She gave her pain level at 9/10 but Dr. Kawasaki noted "she does not have the appearance of somebody in 9/10 pain." He reported diffuse tenderness and numbness and guarding with motion and a "give-way pattern weakness through the right upper extremity diffusely." Dr. Kawasaki noted the EMG study he recommended had not been authorized yet. In response to the Claimant's questions about her diffuse pain and worsening of her symptoms, Dr. Kawasaki noted "I do not have a good explanation for this." He also strongly warned the Claimant about changing her medications on her own. He noted she would discontinue morphine sulphate and start the Claimant on OxyContin (Respondent's Exhibit RRR).

37. On May 8, 2012, the Claimant saw Dr. Kawasaki again with report of another new pain complaint in the right knee that she reported has occurred in the last three weeks. Dr. Kawasaki noted multiple side effects on the Oxycodone and switched her back to morphine. Dr. Kawasaki noted new complaint of right knee pain was not related to the Claimant's work injury (Respondents' Exhibit SSS).

38. The Claimant saw Dr. Mark Paz for an IME on July 31, 2012 (Respondents' Exhibit A). Dr. Paz took a detailed history from the Claimant, performed a physical examination, and he conducted an extensive medical record review as detailed in Appendix A of his report (Respondents' Exhibit A, pp. 11-18). In the history that she provided to Dr. Paz, the Claimant does not mention a loss of consciousness during or immediately after the fall. Rather, she states that "she does not recall what occurred after the paramedics arrived….her next recollection is when she woke up in the hospital" (Respondents' Exhibit A, p. 2). He noted that the Claimant told him that her walking is limited to 15-20 minutes and she does not drive a motor vehicle "because of the right lower extremity trembling which occurs in the right foot (Respondents' Exhibit A, p. 4). On his physical examination, Dr. Paz did not observe spasm of the Claimant's cervical, thoracic or lumbar spine. It was his opinion there were no objective studies of the cervical, thoracic or lumbar spine which clinically correlated with the subjective complaints and diffuse findings on physical examination (Respondents' Exhibit A, p. 7). He observed pain behaviors and nonphysiologic responses during his physical examination. He noted she continued to report symptoms of depression despite pharmacotherapy and clinical therapy. Her depression had been attributed to a subjective report of multiple areas of severe symptoms, yet these severe physical symptoms were not supported by objective findings (Respondents' Exhibit A, p. 7). Dr. Paz opined there were no objective findings which clinically supported a conclusion that claimant could not return to work on a full or part time basis. He opined her "subjective complaints of pain . . . are the only basis for her functional limitations" (Respondents' Exhibit A, p. 8). Dr. Paz also opined continued psychological treatment was not medically necessary in this case, concluding current psychosocial care has fostered on ongoing dependence on therapy (Respondents' Exhibit A, pp. 8-9).

39. On August 21, 2012, the Claimant reported to Dr. Kawasaki that her pain medications were losing effectiveness and she was switched to fentanyl patches and break through hydrocodone (Respondents' Exhibit UUU). At a September 18, 2012 visit with Dr. Kawasaki, the Claimant reported the fentanyl patches were helpful. She continued to report pain diffusely including her neck, down her arm, her thoracic spine, low back and pain, numbness and tingling into her legs bilaterally and in her right arm and some head pain. Dr. Kawasaki noted no change in the Claimant's functional status with regards to the prior work restrictions established by Dr. Bachman (Respondents' Exhibit VVV).

40. The Claimant saw Dr. Judith Weingarten on October 8, 2012 for an IME and Dr. Weingarten prepared a written report dated October 19, 2012 (Respondents' Exhibit B). The Claimant appeared at the IME with an interpreter and Dr. Feldman

(Respondents' Exhibit B, p. 19). Dr. Weingarten reported that the Claimant described her mechanism of injury as follows:

> [S]he got hurt as she was coming back from lunch one day and had to go down the stairs to the basement. She tripped on the first couple of steps and flew down the stairs. She stated that she felt like her head and face cracked. She remembers being told not to move and remembers she couldn't breathe and was choking. She stated that at the moment she got hurt, everything hurt. She stated that she hit her head and her face was scraped. Her whole body was in pain and she could not even lie down (Respondents' Exhibit B, p. 20).

41. Dr. Weingarten took a lengthy history from the Claimant and questioned her in detail about her activities prior to and after her injury and how they differed. Dr. Weingarten also noted that the Claimant stated, "that her pain is in the area of her mid back and she also has pain in her neck. Her other symptoms include her legs feeling heavy, her right hand starts to feel heavy like she can't grasp things and headaches that are very frequent with a lot of dizziness" (Respondents' Exhibit B, p. 20). The Claimant advised Dr. Weingarten that there is nothing else in her life that is causing her stress other than this and that she currently sees Dr. Furmansky every two to three weeks to help control her stress, depression and for medication management (Respondents' Exhibit B, p.22). As part of her IME, Dr. Weingarten reviewed the records from Rose Medical Center ER, Dr. Bachman, Dr. Kawasaki, Dr. Shen, Dr. Mueller, Dr. Renkin, Dr. Furmansky, Dr. Esparza, Dr. Ogsbury, Jessica Graves (physical therapist), Dr. Gellrick, Dr. Gutterman and Dr. Paz. Dr. Weingarten provided a summary and review of the medical records which spanned from January 20, 2010 to October 2, 2012 (Respondents' Exhibit B, pp. 24-33). As a result of her examination, history and record review, Dr. Weingarten diagnosed a pain disorder associated with both psychological factors and a general medical condition and opioid dependence (Respondents' Exhibit B, p. 33). Dr. Weingarten opines that the Claimant meets the criteria for Pain Disorder associated with both psychological factors and a general medical condition and "this diagnosis explains what is going on with [the Claimant], specifically her delayed recovery. With Pain Disorder, there is no obvious relationship between the objective findings and the degree of pain and suffering that a patient complains of" (Respondents' Exhibit B, p. 34). Dr. Weingarten expressed concerns that the Claimant has developed symptoms after the initial injury that do not make physiologic sense, and according to her medical records, has non-organic findings on the physical exam (Respondents' Exhibit B, p. 34). Dr. Weingarten cautioned against treating subjective complaints as opposed to objective evidence of injury and noted that most Pain Disorder patients do not respond to psychotherapy so that should be brought to a close (Respondents' Exhibit B, p. 36). She also recommended against continued narcotic medications for the Claimant. She opined that the lack of functional gain while the Claimant has been on narcotics, combined with the risks and side effects of opioids, make this a poor treatment option for the Claimant and she recommended tapering off all opioid medication (Respondents' Exhibit B, p. 37). Dr. Weingarten also opined that the

continued referrals for the Claimant, both medical and psychiatric, create a psychological risk for the Claimant and may have fostered an ongoing dependence on therapy (Respondents' Exhibit B, p. 38).

42. On November 29, 2012, there is a note of Dr. Furmansky that he spoke with Dr. Kawasaki regarding a SAMMS conference. The note refers to Dr. Paz' orthopedic consultation and Dr. Weingarten's opinion of "inappropriate meds." The note also references "migratory" symptoms with "few objective signs" and "unidentified generators" (Respondents' Exhibit XXX).

43. Dr. Kawasaki also authored a note dated November 29, 2012 wherein he discussed the SAMMS conference of November 28, 2012. Dr. Kawasaki noted, "it was clear that Dr. Furmansky did not have all the medical records and knowledge as far as what was going on with the patient from a physical standpoint. He was under the impression that there was an anatomic lesion to explain her symptomatology." Dr. Kawasaki reviewed the Claimant's work up, "which has been essentially negative with no clear objective findings to substantiate her subjective findings. I also discussed that she has had some migratory expanding symptomatology." Dr. Kawasaki also noted that he discussed pain medication management with Dr. Furmansky and stated that "Dr. Furmansky was fully agreeable to helping in the process of trying to get the patient to understand that she does not have objective findings to warrant continual use of opioid medications" and noted a goal to wean her off these medications in the next two months (Respondent's Exhibit YYY).

44. On December 3, 2012, Dr. Kawasaki authored a note regarding his conversation with Dr. Esparza about the SAMMS conference and the Claimant's diagnosis of pain disorder. Dr. Kawasaki noted that Dr. Esparza "was very agreeable to see the patient, treat the patient for this disorder, and help in the process" (Respondents' Exhibit ZZZ).

45. On December 12, 2012, the Claimant requested a follow-up visit with Dr. Esparza because "she has been feeling desperate because there is a sense that others do not believe her given that pain symptoms have persisted for a long period of time without major improvement. She is struggling with the default interpretation to her problem as only psychological in nature. Part of the difficulty is that [the Claimant] has over-identified being a patient because she was initially told that she had major physical problems." Dr. Esparza noted that the Claimant "concurs that she emphasizes her physical condition because she cannot understand how something physical could change to that of being psychological." Dr. Esparza noted that the Claimant needs to "renew her commitment to pain management strategies, coping skills, reality testing, problem solving, and support by which she could focus on ways to adapt rather than maintaining her victimization mentality" (Claimant's Exhibit 36; Respondents' Exhibit BBB).

46. On January 22, 2013, the Claimant saw Dr. Kawasaki for maintenance care and she came in "asking about why her medications were decreased." Dr.

Kawasaki “rehashed with her” the recent events culminating in discussions with her doctors and an agreement by all of her authorized treating providers that she would be best served by trying to decrease her medications and get her off all opioid medications. Dr. Kawasaki noted the Claimant “is not at all happy with this decision” and had multiple pain complaints and wanted to know why her pain still exists. He explained that in spite of an extensive workup there was “no clear objective explanation for her ongoing symptomatology” (Claimant’s Exhibit 30; Respondents’ Exhibit CCCC).

47. On January 30, 2013, the Claimant was referred to Dr. Ricardo Esparza for additional counseling for coping skills as she is being weaned off pain medications. Dr. Esparza notes that “patient understands this referral has occurred because there is more than one medical opinion that psychological factors are playing a much greater role in her pain perception,” although Dr. Esparza further noted that the Claimant disagrees with this perspective because she feels that she experiences pain at the physical level. Dr. Esparza noted the Claimant was distressed by what she felt was the minimization of her condition and a focus on psychological issues and she feels this is because others do not understand her pain condition. Thus, Dr. Esparza comments that the Claimant remains in a “victimization mentality” with a high degree of anxiety about her physical condition. He notes “she remains hyper-sensitive to anything that does not meet her belief system while at the same time, cannot let go of a need to prove that she has pain” (Claimant’s Exhibit 36, p. 214; Respondents’ Exhibit EEEE, p. 411). Dr. Esparza noted the Claimant was distrustful of her medical providers and their intentions towards her, including rehabilitation providers, who she perceives as not caring about her and setting her up to fail. Dr. Esparza noted that an effort was made to help the Claimant discuss the need to move away from a reliance on pain medication and physical complaints in order to move forward. However, he noted the Claimant was resistant to this strategy and was anxious about case closure because she feels she will be forced into a situation where there is no available treatment that will cure her (Claimant’s Exhibit 36, p. 215; Respondents’ Exhibit EEEE, p. 412).

48. On January 30, 2013, Dr. Furmansky noted that the Claimant is “permanently and totally disabled.” He stated: “she suffers from chronic pain, chronic depression, chronic anxiety; chronic insomnia and has multiple problems adjusting to her severe social, occupational, and recreational losses.” He opined “She requires ongoing maintenance treatment to prevent further mental and physical decline or increased impairments; patient is receiving several psychotropic and other medications requiring monitoring for serious toxic effects” (Claimant’s Exhibit 35, p. 182; Respondents’ Exhibit DDDD). In February, 2013, his opinion regarding total disability of the Claimant remained the same. He also reported she still continued to receive several psychotropic medications which required monitoring for serious toxic effects same (Claimant’s Exhibit 35, p. 183).

49. On February 19, 2013, the Claimant saw Dr. Kawasaki and complained that her low back was worsening, her thoracic region was worsening and she had pins-and-needles sensations down her bilateral lower extremities with neck pain and achiness in her head. Her reported pain level was 7-8/10. The Claimant reported that

she is barely able to get out of bed on some days and is not able to be as active as she was previously. Dr. Kawasaki did note that prior to being taken of opioid medications the Claimant's pain ranged between 6-8/10 so there was not significant change. The Claimant stated to Dr. Kawasaki that she felt she needed to be back on her pain medications for increased functionality. However, he pointed out that the goal was to get her off all opioid medications due to long term side effects and he pointed out to her that her pain scores had not really changed. Dr. Kawasaki noted pain behaviors and guarding with motion. Dr. Kawasaki also noted that Dr. Furmansky was recommending Suboxone but Dr. Kawasaki opined that it is in the Claimant's best interests to stay away from all opioid/narcotic medications due to a non-objective pain disorder. Dr. Kawasaki noted the Claimant has had quite a bit of physical therapy in the past. He recommended a recreational center including a pool pass for her to continue rehab on her own, but indicated this was denied by the insurer. Dr. Kawasaki opined that "physical activity including strengthening, conditioning, and cardiovascular exercises could be important for [the Claimant] to continue her chronic rehab process" (Respondents' Exhibit FFFF).

50. On February 25, 2013, after reviewing medical records including the IMEs of Drs. Weingarten, Gellrick, Gutterman, Renkin and medical records of Dr. Kawasaki from November 29, 2012, December 3, 2012 and January 22, 2013, Dr. Furmansky notes that neurological evaluations and studies conclusively demonstrated that the Claimant does not have a spinal cord injury or any other medically objective signs of neurological defects. Dr. Furmansky opined that, based on his review of the provided medical records, the most accurate physical diagnosis is myofascial strain of the cervical, thoracic, and lumbar areas with cervicogenic headaches. Dr. Furmansky also opined that the Claimant's "symptoms of depression and anxiety have been improving and are much more mild than when she first entered treatment" (Respondents' Exhibit GGGG, p. 406). Dr. Furmansky also observed that the Claimant's pain complaints "are greater than one would expect from an individual suffering from myofascial pain syndrome" and he also stated that, "I had until very recently been under the mistaken impression that [the Claimant] had indeed suffered from a spinal cord injury in the thoracic area, and the information I have obtained will be incorporated into a revised treatment plan." Dr. Furmansky continued to disagree with the conclusions of Dr. Weingarten and felt that there was objective evidence to support the Claimant's pain complaints. However, he ultimately opined that the Claimant's "work-related anxiety and depression have contributed to her pain complaints and there is some degree of psychological enhancement of her complaints," especially, as Dr. Furmansky notes, the Claimant continues to believe she suffers from a serious neurological problem that has not been adequately diagnosed and treated. Based on his revised opinions, Dr. Furmansky detailed an updated treatment plan to: (1) review medical records with the Claimant over several sessions to reinforce that she does not suffer from any serious neurological spinal disorder; (2) help the Claimant set realistic goals for functioning physically at a higher level, including resuming driving and walking without a cane; (3) continue to treat signs and symptoms of work-related depression with medication and psychotherapy; (4) continue to treat signs and symptoms of work-related anxiety with

medication and psychotherapy; (5) refer the Claimant back to Jessica Graves for 4 biofeedback sessions; (6) assist the Claimant in understanding that she may have to live with chronic pain for the rest of her life, but it doesn't mean is permanently totally disabled; (7) encourage the claimant to continue English classes; (8) provide emotion support for the Claimant as she increases her level of physical functioning; and (9) encourage the Claimant to participate in regular physical exercise including hydrotherapy (Respondents' Exhibit GGGG, pp. 417-418).

51. In spite of his February 25, 2013 report wherein Dr. Furmansky acknowledged that he was mistaken about the Claimant's physical diagnoses and he noted in his treatment plan that while the Claimant may have to live with chronic pain, it doesn't mean she has to be permanently totally disabled, Dr. Furmansky, nevertheless, begins his March 2013 medical note with the statement, "Patient is permanently and totally disabled and has reached psychiatric and physical MMI." Not surprisingly, Dr. Furmansky later notes that "she is confused about the dsiaganosis [sic] based on the recantation of previous diagnoses. She is scared because she still has the pain and cannot go on with her life" (Claimant's Exhibit 35, p. 184; Respondents' Exhibit IIII, p. 420).

52. On March 7, 2013, Dr. Kathy McCranie reviewed the Claimant's case. She noted that Dr. Kawasaki successfully tapered the Claimant off opioid medications and was completing treatment for the Claimant's pain disorder. Dr. MCranie opined that it was reasonable for the Claimant to return to work and it did not appear that the Claimant had any physical restrictions. She recommended a return to Dr. Kawasaki for assessment for return to work on a full-time, full-duty status (Respondents' Exhibit HHHH).

53. May 7, 2013, Dr. E. Jeffrey Donner, an orthopedic surgeon, evaluated the Claimant and reviewed prior MRI scans from 2010 and ordered new scans to be completed since prior cervical scans were blurred based on movement. Dr. Donner noted that the Claimant "now requires the use of a cane for ambulation" and he noted her multiple complaints, "including chronic headaches, neck pain, a pins and needles sensation into the right upper and lower extremities, and numbness in the left lower extremity" along with urinary incontinence (Claimant's Exhibit 37, pp. 216-218).

54. On May 8, 2013, the Claimant reported to Dr. Furmansky that she has increased severe chronic pain that was made worse by increased activity, increased stress and made better by changing positions and by medication. Dr. Furmansky also noted that the Claimant sought a second opinion with a surgeon identified as "Dr. Don" somewhere near Greeley and she had an argument with her prior attorney and stated that "she got disgusted by her attorney's behavior yelling at her in the last sesttlement [sic] hearing. She and her husband agree that this is not just as [sic] mental problem because there are days when she cannot get out of bed." Dr. Furmansky noted that the Claimant does not accept her current condition as a point of MMI because she still believes that there is something that has not been diagnosed. From a physical standpoint, Dr. Furmansky noted that the Claimant complained of incontinence,

headaches and dizziness and pain that is too great to allow her to do any physical exercise. Dr. Furmansky further noted that the Claimant's mother was sending Diclofen (Voltaren) from Mexico and the Claimant was using it. She reported that the higher dose of Gabapentin was helping but it starts to wear off around noon and she takes an extra 200mg at that time (Claimant's Exhibit 35, pp. 187-188; Respondents' Exhibit MMMM, p. 425).

55. On June 19, 2013, Dr. Donner re-evaluated the Claimant, reviewed MRI reports from June 7, 2013 and noted bulging discs at C4-5, C5-6 and C6-7, along with an annular tear and protrusion at L5-S1. Dr. Donner noted that the Claimant had been through extensive conservative treatment, but she has not had radiofrequency rhizotomy or EMG nerve conduction studies to his knowledge. He referred the Claimant to Dr. Pouliot for nerve conduction studies and potential facet rhizotomies on her right side of her cervical and lumbar areas (Claimant's Exhibit 37, pp. 219-221).

56. On July 10, 2013 the Claimant saw Dr. Donner and he noted that "she continues to have neck pain with radiation down both arms with symptoms primarily in the right arm in the radial distribution. She is now starting to notice symptoms on the left side in the same distribution. However, her worst symptom is at the lumbosacral junction with radiation into both legs, primarily the right leg where she has numbness and weakness. The pain at the lumbosacral junction also radiates into the thoracic region when she in active." Dr. Donner opined that "[the Claimant does not show evidence of chronic pain behavior or symptom amplification." He further stated: "I referred her to Dr. Pouliot for lumbar discography since I suspect the L5-S1 annular tear is the source of her chronic disabling pain. I explained if the discogram is positive at L5-S1, then she would be a good candidate for a one-level interbody fusion." He noted that her cervical condition would continue to be managed conservatively (Claimant's Exhibit 37, pp. 223-225).

57. On November 20, 2013, Dr. Weingarten wrote a Supplemental IME report after reviewing additional records. Dr. Weingarten reviewed additional records ranging from September 18, 2012 through September 17, 2013 (Respondents' Exhibit D). In the time since the Claimant's IME with Dr. Weingarten a little over a year prior, Dr. Weingarten noted that Dr. Kawasaki had tapered the Claimant off all her opioid medications and the medical records indicated that the Claimant's pain decreased in severity when she went off opiates (Respondents' Exhibit B, p. 81). In discussing events occurring since Dr. Weingarten's last report, she expressed that she was impressed by Dr. Kawasaki's success in weaning the Claimant off of all opiates with Dr. Furmansky's help, especially as the Claimant was opposed to the idea. Dr. Weingarten noted that Dr. Kawasaki's medical records showed that initially once off the opioids, the Claimant's pain levels were reported as lower, but then later, she reported more diffuse pain, which is consistent with the diagnosis of Pain Disorder (Respondents' Exhibit B, p. 81). Dr. Weingarten opined that Dr. Furmansky's continuing treatment is not reasonable or necessary. She went on to say that even though Dr. Furmansky has received information from Dr. Kawasaki that the Claimant has no spinal cord injury and no clear objective findings to explain her subjective symptoms, it appears to Dr. Weingarten that

Dr. Furmansky treats the Claimant as if she has a physical diagnosis causing her pain, namely, myofascial strain of the cervical, thoracic and lumbar areas with cervicogenic headaches. In Dr. Weingarten's opinion, myofascial pain does not warrant psychiatric treatment twice a month but would be best treated by a family doctor or physiatrist familiar with Pain Disorder. Dr. Weingarten also expresses concern that, although Dr. Furmansky revised his treatment plan for the Claimant, he seems to have deviated from the plan and continues to discuss pain complaints and note that he would monitor her pain and adjust pain medications accordingly and support the Claimant in pursuing new treatments such as biofeedback, physical therapy, pool therapy and getting a second opinion for surgery. As such, Dr. Weingarten finds that Dr. Furmansky is not treating the Pain Disorder, but rather, is treating the Claimant with the belief that the Claimant has pain that is yet to be diagnosed and treated (Respondents' Exhibit B, p. 82). Dr. Weingarten also opined that she disagreed with Dr. Furmansky and she does not believe that the Claimant has depression or anxiety related to her work injury. Dr. Weingarten opines that the Claimant gets anxious or scared when she has certain symptoms or she is upset about what she can't do, but this is explained by the diagnosis of Pain Disorder (Respondents' Exhibit B, p.83). Dr. Weingarten also expressed concerns about Dr. Furmansky, a psychiatrist, prescribing medications for physical conditions when he is not evaluating those physical conditions (Respondents' Exhibit B, p. 84). With respect to Dr. Donner's recommendations for continue treatment and consideration of surgical options, Dr. Weingarten strongly opines that the Claimant is not a surgical candidate (Respondents' Exhibit B, p. 84). Dr. Weingarten opines that the Claimant remains at MMI and that there should not be any further medical treatment (Respondents' Exhibit B, p. 84). She further opines that there are no psychological work restrictions. As for physical work restrictions, Dr. Weingarten cautions that it is important to base those on an actual diagnosis with objective findings and not on subjective complaints of pain or Claimant's statements about what she can or cannot do (Respondents' Exhibit B, p. 85). Dr. Weingarten ultimately adds that she believes it is important that the Claimant's providers do not advise the Claimant her problems are psychiatric rather than physical in a dismissive way. Rather, she opined that the Claimant's providers merely need to understand what Pain Disorder is and keep in mind that no treatments will result in decreased complaints and they should anticipate that various symptoms will continue or occur over time with or without treatment. The best treatment in Dr. Weingarten's opinion is to empathize and "do no harm" by avoiding unnecessary surgery, ER visits and medications, and to support work and functionality rather than disability. Dr. Weingarten opines that if her providers "collude" by attributing the Claimant's difficulties to her injury and pain, she will not be able to maximize her potential to live a productive an independent life (Respondents' Exhibit B, p. 85).

58. The Claimant saw Dr. Furmansky on January 3, 2014 reporting increased severe chronic pain and Dr. Furmansky noted continuing chronic depression and anxiety. He noted new physical symptoms reported by the Claimant for the first time to him of: legs cramping at night which keep her up and her arms hurt and her fingers get stiff. He also noted that she reported a strong headache and then her eye gets blurred on the right and her eye lid feels spasms and then her face gets numb including her

tongue. Dr. Furmansky opined these were “classic migraine symptoms.” He also noted that the Claimant reported her pain is much worse in the last 2 months than it has ever been before. At this visit, Dr. Furmansky again characterizes the Claimant as “permanently and totally disabled” (Respondents’ Exhibit RRRR, pp. 435-439). In confidential psychotherapy notes dated January 3, 2014 and January 22, 2014, Dr. Furmansky indicates that the Claimant’s relationship with her husband was healing and that her husband is more patient of her physical condition. He notes that the Claimant is frustrated by her case being closed or moving to settlement, especially with requirements of attending appointments and evaluations. He notes that the Claimant’s vocational testing has to be repeated. Dr. Furmansky noted that the Claimant’s husband supports her having surgery in Mexico if she wants it, but the Claimant reported that it does not look like that will happen as the surgeon her attorney sent her to was out of the chain of referrals and his opinion on surgery is not going to be considered. The Claimant reported that she still is not driving due to sensations and weakness of her right foot (Respondents’ Exhibit RRRR, p. 440).

59. On October 23, 2013, Dr. Jutta Worwag performed an IME with respect to the Claimant’s low back pain, cervicothoracic junction/neck pain, headaches, bladder incontinence, right greater than left leg symptoms and right arm parethesias (Respondents’ Exhibit C, p. 40). Dr. Worwag provides an extensive recap of her interview with the Claimant, including notes of Dr. Worwag’s observations of the Claimant’s behaviors and movements during the course of the interview which Dr. Worwag finds inconsistent with the Claimant’s reported pain complaints. In describing her fall, the Claimant stated “she felt she was flying through the air and landed on her right face and right head on cement flooring” and she felt she lost consciousness for a while (Hrg. Tr., November 17, 2014, p. 41). Dr. Worwag provided an extensive review and summary of the medical records provided to her (Hrg. Tr., November 17, 2014, pp. 44-65). Dr. Worwag also conducts a physical examination. Dr. Worwag finds the Claimant’s reflexes to be “symmetric for biceps, triceps, brachioradialis, knee and ankle jerks.” Dr. Worwag also notes, “there’s no Hoffmann sign, no Babinsky’s, variable and not reproducible 1-2 beats clonus either on left or right” (Hrg. Tr., November 17, 2014, p. 66). Ultimately, Dr. Worwag opined that “there is no physiologic anatomic or nervous system basis for this examination. In other words, there is no evidence of a spinal or peripheral nerve lesion that would explain this examination which is marked by nonphysiologic findings and pain behavior. There is no objective evidence of a lumbosacral radiculopathy” (Hrg. Tr., November 17, 2014, p. 67). Dr. Worwag assigns the DSM-IV diagnosis of Pain Disorder, renamed as Somatic Symptom Disorder in the new DSM-V. She opines that this diagnosis is not causally related to the Claimant’s work injury, “but is rooted in her personality structure and coping abilities” (Hrg. Tr., November 17, 2014, pp. 67-68). Dr. Worwag expresses significant concerns regarding Dr. Furmansky’s psychiatric treatment, including his positions that the Claimant is on the appropriate medications and that she continues to require psychological care without addressing the Pain Disorder diagnosis. She questions “the validity and efficacy” of his approach (Hrg. Tr., November 17, 2014, p.70). With respect to Dr. Donner’s evaluation and recommendations, Dr. Worwag notes that “no other medical provider has ever

diagnosed the patient with radiculopathy or discogenic pain" nor is there clinical evidence of the same (Hrg. Tr., November 17, 2014, p. 71). Dr. Worwag opines that the Claimant remains at MMI and finds that, in tapering the Claimant off narcotics, her pain level and functional status were not negatively impacted (Hrg. Tr., November 17, 2014, p. 71). Aside from additional care by Dr. Kawasaki to taper the Claimant off current prescribed medications, Dr. Worwag opines that "no additional medical treatment is recommended in relation to the patient's work injury of 1/20/2010" (Hrg. Tr., November 17, 2014, p.73). Dr. Worwag opines that work restrictions must be based on objective underlying pathology and clinical diagnoses that influence the restrictions need to be based on objective data. She finds that "there is no objective evidence that this patient cannot return to work without restrictions" from a strictly medical perspective (Hrg. Tr., November 17, 2014, p. 73).

60. On December 24, 2013, Dr. Kawasaki responded to a request to review medical evaluations by Dr. Worwag and a supplemental report dated November 21, 2013 by Dr. Weingarten. Based on his review, Dr. Kawasaki opined,

> I do agree with Dr. Worwag's interpretation that work restrictions have not been anatomically based but based on the patient's subjective somatic complaints. She has had extensive workup, which has been very well documented in my previous notes and conversation with you during the SAMMS conference. She has had multiple migrating symptomatologies that were well described in Dr. Worwag's and Dr. Weingarten's notes as well. The patient had a very through workup with regard to her multiple complaints including multiple MRIs, basically, imaging her entire neuraxis from her brain, cervical spine, thoracic spine, and lumbar spine as well as bilateral lower extremity EMGs, which have not shown any pathology to explain her objective symptomotology. I agree with both Dr. Worwag and Dr. Weingarten that the patient has a pain disorder to a somatic symptom disorder. She has had continuation of severe complaints of subjective pain without objectification of symptomotology without any significant pathology. She has had no real response to very extensive treatment. I fully agree there is not medical explanation for her subjective pain. Therefore, there is no contraindication for full-time, full-duty work from a physical standpoint. However, the patient is very entrenched in her disability subjectively, which is more of a psychological/psychiatric issue, which is part of the pain disorder. There are no objective findings, which any restrictions would be applicable (Respondents' Exhibit PPPP).

Dr. Kawasaki specifically noted that "there are no objective reasons as discussed above for the patient to be placed on any work restrictions. The patient can certainly be released to a light-duty job, which she would be able to handle from her subjective pain standpoint (Respondents' Exhibit PPPP).

61. The Claimant saw Dr. Kawasaki on January 7, 2014 reporting that she was subjectively worse. Yet Dr. Kawasaki noted that he observed the Claimant turning

her neck from side to side with fluid motions, looking at him and the interpreter. However, when he went to examine the Claimant, she was very guarded with range of motion of her neck at only 30 degrees of rotation in either direction. Dr. Kawasaki also noted that the Claimant brought MRI films of her cervical and lumbar spine on a disk and wanted him to review these. These MRIs were not ordered by Dr. Kawasaki, but rather by Dr. Donner, who is a surgeon that the Claimant advised her attorney had sent her to see. On review of the MRIs with the Claimant, Dr. Kawasaki noted the prior MRIs were not available for comparison, but although there were some mild degenerative changes, there was "no specific pathology to explain the myriad of symptomatology that she continues to complaint of" (Respondents' Exhibit SSSS).

62. The Claimant saw Dr. Jack Rook on March 29, 2014 for an evaluation related to complaints of headaches, dizziness, neck pain, shoulder pain, mid and lower back pain, right hip pain and leg weakness (Claimant's Exhibit 27, p. 97). The Claimant described her mechanism of injury and immediate aftermath to Dr. Rook as follows:

> She tripped at the top of a flight of stairs. She reports that she was holding a paper file in her right hand and she had her left hand on the staircase railing. These stairs were outdoors and were made of cement. There were 10 stairs. She stated that her right foot got caught on something and she fell forwards. Her right knee initially struck the first concrete step causing her to let go of the file and the handrail. She had momentum and she tumbled down the stairs. She describes rotating head over heels in the air two times before she struck the concrete landing. She struck the landing against the right side of her head and face. She does not recall how her body moved after the initial impact of her head, She was quite dazed initially and she believes she sustained a loss of consciousness. The next thing she remembered was awakening with people around her and telling her not to move her neck. The patient felt as if she were choking on her blood and she reports that someone turned her head to the side and called an ambulance. At this time she was experiencing pain throughout her body. She then had another loss of consciousness as the next thing she remembered was awakening in an ambulance. She states that was blood everywhere. She had total body pain (Claimant's Exhibit 27, p. 97).

After summarizing the Claimant's history, Dr. Rook undertook an extensive review of medical records, including the records of Dr. Bachman, Dr. Kawasaki, Dr. Furmansky, Dr. Donner, Dr. Gutterman and noted that the DIME report of Dr. Gellrick was not contained in the records he received although it was listed as a provided document (Claimant's Exhibit 27, pp. 98-105). In reviewing these medical records with the Claimant, Dr. Rook then discusses them with the Claimant and discusses the various treatments with her and her level of function over the course of her treatment, noting that over the previous two years the Claimant reports "little if any improvement in her condition" and that she "states that she was better off when she was prescribed analgesics as she was more comfortable and she slept better when she was on these

medications" (Claimant's Exhibit 27, pp. 105-108). On physical examination, Dr. Rook notes that the Claimant changed position from sit to stand to sit on a few occasions, she ambulated with a limp utilizing a cane in her right hand and she tended to favor her right lower extremity. Dr. Rook noted that the Claimant's right distal extremity motor strength was diminished, the Claimant's perception of pinprick sensation was diminished in her right leg, cervical range of motion was markedly decreased in all planes, especially with cervical extension and that she had palpable muscle spasm in her right-sided paracervical and upper trapezius musculature and that this region was extremely tender. He also noted spasm and tenderness in the right sided paralumbar musculature and tenderness of both sacroiliac joints, affecting the right side more than the left (Claimant's Exhibit 27, p. 108). Dr. Rook diagnosed: (1) chronic neck pain, (2) chronic thoracic myofascial pain syndrome, (3) low back pain, (4) stress urinary incontinence, (5) sleep disturbance, (6) tension headaches, and (7) intermittent dizziness (Claimant's Exhibit 27, p. 110). Dr. Rook opined that "it is certainly possible that the patient sustained a spinal cord contusion at the time of her injury which would account for some of her symptoms….More than likely, the patient sustained trauma to pelvic floor musculature resulting in the stress incontinence that she currently describes" (Claimant's Exhibit 27, p. 111). Dr. Rook notes that based on the Claimant's report that she was doing better when she was on a sustained release opioid analgesic, "consideration should be given to resumption of the Fentanyl/Hydrocodone combinations in an effort to make this individual more comfortable and to improve the quality of her sleep (Claimant's Exhibit 27, p. 111). Dr. Rook opined that at that point, the Claimant did not appear to be capable of competitive employment due to sleep interruptions causing her to be tired during the day, bladder dysfunction requiring her to be close to a bathroom at all times and physical functioning "in a less than sedentary physical demand level" with right leg weakness. Further he found that due to headaches and dizziness, the Claimant is afraid to drive (Claimant's Exhibit 27, pp. 111-112). Dr. Rook also opined that he found the psychiatric impairment rating of Dr. Furmansky more persuasive than that of Dr. Gutterman (Claimant's Exhibit 27, p. 112).

63. On April 8, 2014, the Claimant saw Dr. Kawasaki for follow-up and she was reporting "global pain" including neck pain, headaches, back pain, pain radiating into her bilateral lower extremities, and pain and numbness in her right arm. She reports no improvement overall and indicates almost intolerable increasing pain. Dr. Kawasaki noted that the Claimant ambulated using a cane "very antalgically and dramatically" and had difficulty standing from a seated position with complaints of severe pain in her right hip region, pointing to the greater trochanter areas. The Claimant was exhibiting quite a bit of facial grimacing and verbalization of pain. Dr. Kawasaki diagnosed: idiopathic hyperreflexia, multiple pain symptoms without specific correlating symptoms, right greater trochanter bursitis, chronic headaches, psychologic and emotional issues with delayed recover and pain disorder. He noted that the Claimant had been weaned off narcotic medications and was requesting something stronger than Dr. Furmansky was currently prescribing (Claimant's Exhibit 30, pp. 172-173; Respondents' Exhibit UUUU, pp. 450-451).

64. Dr. Furmansky testified by deposition on October 24, 2014 as an expert witness in the areas of psychiatry and forensic psychiatry and as a member of the committee to develop the CDLE Division of Workers' Compensation report and worksheet for Permanent Work-Related Mental Impairment Rating (form WC-M3-Psych) as set forth in Claimant's Exhibit 41 (which the ALJ notes is admitted per the deposition testimony of Dr. Furmansky). Dr. Furmansky testified that he currently sees the Claimant about every three weeks and prescribes the Claimant Fluoxetine, Bupropion, Pantaprazole, Zaleplon and Gabapentin. Dr. Furmansky opined that these medications should be continued at this time (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 11). Dr. Furmansky confirmed that he placed the Claimant at MMI on March 21, 2011 and that he still considers her to be at MMI (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 11). However, he also testified that the Claimant requires ongoing post-MMI treatment to prevent further regression (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 12). Dr. Furmansky testified that he finds objective data to support the Claimant's reported physical complaints (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 12-19). Dr. Furmansky testified that the Claimant's ongoing diagnosis to be: chronic depression with intermittent exacerbations and improvements, chronic anxiety, and insomnia and per the DSM-5, somatic symptom disorder with predominant pain, persistent, severe (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 19). Dr. Furmansky testified that he considers the Claimant permanently and totally disabled because he does not believe that an employer would accept her absences or her symptoms of depression that include attention and concentration impairments, some memory loss and fatigue (Tr. of Depos. of Drs. Furmansky and Weingarten, p.22). In relation to the Claimant's inability to work from a psychiatric standpoint, Dr. Furmansky went on to testify that the Claimant's psychiatric functioning is inconsistent in terms of activities of daily living, she is fatigued due to impaired sleep and her social functioning is impaired when she is in severe pain so that the Claimant would have difficulty relating appropriately to others. The Claimant's cognitive impairments include attention, concentration and short-term memory impairments and the Claimant would have a difficult time adapting to moderately stressful situations (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 27-28).

65. On cross-examination, Dr. Furmansky concedes that contrary to his August 17, 2010 report, there were no medical records that documented a loss of consciousness nor any that diagnosed a post-concussive syndrome. Rather, Dr. Furmansky's testimony at the deposition was that this opinion must have come from the Claimant's history and reporting of her trauma (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 33-37). After being directed to his treatment notes (Respondents' Exhibits WW and PPP), Dr. Furmansky also agreed that the Claimant had advised him that as of August 31, 2010, that she was driving a little and on May 11, 2011 that she was driving her car and got stuck at the gas station (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 37-39). Dr. Furmansky testified that after being advised by Dr. Kawasaki of the discussions during a SAMMS conference (held on November 29, 2012) that the Claimant's treating physicians ruled out a thoracic spinal cord lesion, he and Dr. Kawasaki agreed that the Claimant would be weaned off opioid medications under Dr.

Kawasaki's monitoring. In order to help with this process, Dr. Furmansky prescribed Gabapentin starting on January 30, 2013 to help with withdrawal symptoms (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 47-49 and 64-67). Dr. Furmansky also testified that on February 25, 2013, after he had the opportunity to review all of the Claimant's medical records for the first time, he issued a new report with a new treatment plan station (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 70). Relying on the reports of Drs. Gellrick, Kawasaki and Renkin, Dr. Furmansky opined that "the most accurate physical diagnosis is myofascial strain of her cervical, thoracic, and lumbar area with cervicogenic headaches" (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 71). Dr. Furmansky agreed that there was no physical reason why the Claimant should have an antalgic gait or why she couldn't resume driving a motor vehicle (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 83). When questioned about why he noted the Claimant was totally disabled on his March 3, 2013 note, Dr. Furmansky testified because she still was at that time even though his treatment plan was to encourage the Claimant to "start to reconceptualize her physiological physical state" (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 84-85). On redirect testimony during his deposition, Dr. Furmansky testified that it is not his impression that the Claimant is a drug seeker and that he believes that the Claimant has a bona fide physical injury. He testified that her remaining physical injury involves "the paraspinal muscles in the cervical, thoracic, and lumbar regions, as well as some chronic facet pathology" (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 93).

66. Dr. Weingarten testified by deposition on October 24, 2014 as an expert witness in the area of psychiatry and as to matters related to Workers' Compensation Level II accreditation (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 108-110). Dr. Weingarten testified that at the time of her two written reports, she diagnosed the Claimant under the DSM-IV, which was in effect at that time, with Pain Disorder associated with both psychological factors and a general medical condition and opioid dependence. Under the DSM-V, which is currently in effect, Dr. Weingarten testified the diagnosis title has changed to "Somatic Symptom Disorder" but although the terminology changed, it is the same system complex (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 111-112). Dr. Weingarten testified that in reaching the diagnosis of Pain Disorder, she reviewed the medical records and conducted an interview and came to the conclusion that her subjective pain complaints were not consistent with objective findings and there were changes in her pain complaints, including more diffuse pain, sometimes in her entire body, and the Claimant had a dramatic way of presenting her pain (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 113). Dr. Weingarten testified that another way in which the Claimant met the criteria for Pain Disorder was that as one complaint would go away, another one would come up, such as the urinary complaints and the headaches and, later on, complaints of numbness (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 114). In addition, Dr. Weingarten testified that, "a very important part of pain disorder is that no matter what treatment is offered to a patient and what – no matter what treatment they undergo, the compliant of pain is not significantly relieved and pretty much doesn't go away (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 114). Dr. Weingarten testified that when a person has a Pain

Disorder, they often get numerous referrals and numerous treatments that yield negative results and no alleviation of symptoms, or if the symptoms are relieved, new ones appear. In the Claimant's medical records, Dr. Weingarten observed this occurring (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 120). Dr. Weingarten testified that when a Pain Disorder is identified, it is appropriate for all doctors involved with treatment to be aware of the diagnosis and likely outcome that no matter what treatment is provided, the pain is not likely to stop (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 123). She testified that if there are multiple doctors and one doctor is not applying the correct approach to a Pain Disorder patient, then the patient continues to think they are going to be cured and treatment gets prolonged and the patient inadvertently has iatrogenic problems resulting from treatments that don't cause them to feel better or make functional gains but do cause side-effects (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 124-125). In going through the criteria for a diagnosis of Depression, Dr. Weingarten testified that she did not come up with a required five symptoms that the Claimant had (out of the constellation of symptoms for diagnosing Depression) and therefore, found that the Claimant did not meet the DSM-IV or DSM-V criteria for depression (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 135-137). Based on this, Dr. Weingarten testified that it is not reasonable or necessary for the Claimant to continue to take antidepressants (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 138). Dr. Weingarten also testified that the Claimant did not meet the criteria for Generalized Anxiety Disorder, but also stated that, even if she did, it would not be related to the work injury. She opines that it is not reasonable or necessary to prescribe medications to treat anxiety (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 138-139). Dr. Weingarten testified that, in her opinion, a psychiatrist should not prescribe medications for pain, headache, or anything physical. She further testified that it can blur the role of the psychiatrist with a Pain Disorder patient and gives that patient the false impression that the psychiatrist thinks there is pain that is going to go away (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 144). Dr. Weingarten also testified that ongoing psychotherapy is not reasonable and necessary because, as a Pain Disorder patient, she won't respond to psychotherapy and because she is not improving in terms of functionality (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 156). Dr. Weingarten testified that she disagrees with Dr. Furmansky that the Claimant is permanently and totally disabled and discusses that it is not in the Claimant's best interest to reinforce that rather than have the expectation that she should be more functional, including returning to work (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 157-158).

67. On cross-examination, Dr. Weingarten reconsidered her diagnosis of Pain Disorder with a generalized medical component and stated that "right now I cannot see a generalized medical component to this case" (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 160-161). Dr. Weingarten acknowledged that it is not recommended to immediately withdraw all medications from the Claimant, but rather certain medications, such as Gabapentin and Senoda/Zaleplon (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 164-170). Dr. Weingarten also testified that the Claimant's psychiatric care should be discontinued in a termination process that also includes discontinuing or

tapering medications in a healthy way for a short period of time (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 178-179 and pp. 183-184).

68. After the testimony of Dr. Weingarten at the depositions on October 24, 2014, Dr. Furmansky was asked to testify in rebuttal (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 193). Dr. Furmansky testified that he agreed that there are some medications that cannot be terminated immediately but must be gradually and incrementally reduced while evaluating the consequences of each incremental move (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 194). Dr. Furmansky testified that he thinks there is a "tremendous misunderstanding" about the Claimant's clinical case as of the time when Dr. Weingarten evaluated her, namely because the Claimant had already received a lot of care for depression and generalized anxiety by then through medication and psychotherapy. So, if at the time of the evaluation, the Claimant did not meet all of the criteria for depression or generalized anxiety disorder, it was because her treatment for several years prior to that time had been effective (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 196). Dr. Furmansky testified that the point of his care was to get the Claimant to the point where she did not present as depressed and anxious as when she first started to treat with him (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 197). However, as Dr. Furmansky testified, although the Claimant is improving, it is not appropriate to just wean her off her medications and discharge her after 4 weeks because it depends on her diagnosis and the Claimant also had a chronic stressor of myofascial pain (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 197-198). Dr. Furmansky also testified that he believes that there is a misunderstanding about how much contact he had with Dr. Kawasaki. He testified that there was almost no contact until it was discovered that the Claimant did not have a spinal cord lesion. That was the first communication that Dr. Furmansky had with Dr. Kawasaki (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 200). Dr. Furmansky also testified that with respect to withdrawing the Claimant from narcotics, he opined that this was successful primarily because of the cooperation between Dr. Kawasaki and him and the Claimant herself, who he believes was supportive as she did not seek to be on unnecessary medication (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 199-200). Dr. Furmansky also testified that he disagreed with Dr. Weingarten about the differences between Pain Disorder in the DSM-IV and Somatic Symptom Disorder in the DSM-V, and states that there is a "reconceptualization" of these diagnoses with the new emphasis on a more comprehensive and complex understanding of how individuals experience pain with "culture-related diagnostic issues that refer to environment, education, course modifiers, vulnerability of certain individuals, preexisting other medical disorders….instead of thinking all individuals are uniformly built and have the same electrical structure" (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 203-204). Dr. Furmansky also further addressed the issue of medications and stressed again the importance of carefully titrating down certain medications, such as Gabapentin, to avoid serious medical symptoms (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 205-206). Dr. Furmansky also cautioned against an abrupt withdrawal of psychotherapy in a complex case such as the Claimant's because if this support is withdrawn, the Claimant is much more vulnerable to a significant relapse in any of her

symptoms (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 207). On cross-examination of the rebuttal testimony, Dr. Furmansky agreed that it is possible that they Claimant's new symptoms reported on January 3, 2014 of numbness on her face, even affecting her tongue, could be a side effect of Gabapentin (Tr. of Depos. of Drs. Furmansky and Weingarten, pp.211-212).

69. Dr. Jack Rook testified as an expert in the areas of physical medicine and rehabilitation, pain management and electrodiagnostic medication, anatomy and physiology of the urinary system and dysfunction, and as to Workers' Compensation Level II accreditation matters on the second day of hearing testimony on November 17, 2014 (Hrg. Tr., November 17, 2014, pp. 8-10). Dr. Rook testified regarding his evaluation and medical record review of the Claimant on March 29, 2014. Dr. Rook testified that he generally found the description of the Claimant's mechanism of injury to be compatible with medical records he reviewed, although he noted "it's a little unclear as to whether she had a loss of consciousness, although the early medical records suggest that she did not" (Hrg. Tr., November 17, 2014, p. 11). Based on his evaluation of the Claimant, Dr. Rook testified that he believes the Claimant's overall work restrictions should limit lifting to 10 lbs., no carrying due to her limp and use of cane, limit standing and walking to 15-30 minutes, avoid, bending, twisting, climbing and ladders, kneeling and crawling. Dr. Rook opined that the Claimant would have difficulty reaching above shoulder level on the right side and difficulty with any prolonged activity. He also noted the Claimant's social disability with urinary incontinence requiring access to a bathroom (Hrg. Tr., November 17, 2014, pp. 13-14). With respect to the Claimant's urinary incontinence condition, Dr. Rook testified that per a urodynamic study the Claimant underwent, it was identified that the Claimant has a neurogenic bladder, or detrusor sphincter dyssynergia (DSD), which basically means that her bladder and sphincter do not work together as they are supposed to function. Based on this, Dr. Rook opined that at some point in time, the Claimant suffered some level of spinal cord injury that resulted in her urinary incontinence condition. Dr. Rook testified that this is also supported by the findings identified by Dr. Kawasaki in his initial evaluation of a sensory level at the T4 level, hyperreflexia in her lower extremities, multiple beats of clonus at the ankle and a positive Babinski sign. Dr. Rook testified that he attributes this to the significant forces associated with the Claimant's injury. While Dr. Rook testified that he agrees that the imaging studies do not reveal a disk herniation or spinal cord lesion, a spinal cord can, nevertheless, be injured by concussive forces and bodies twisting in a certain way (Hrg. Tr., November 17, 2014, pp. 14-16). In addition to this finding, Dr. Rook also testified that the Claimant exhibited other objective findings such as chronic muscle spasm throughout her neck and back (Hrg. Tr., November 17, 2014, p. 17). Dr. Rook testified about the risks associated with terminating the medications the Claimant is currently taking, especially if the medications are withdrawn rapidly, from an increase in pain, to a seizure disorder in the case of the Gabapentin (Hrg. Tr., November 17, 2014, pp. 19-20). In accord with his written report, Dr. Rook also testified that he believes the opiate medications the Claimant previously took are reasonable and necessary and they would help the Claimant with the sleep problems she is having (Hrg. Tr., November 17, 2014, p. 21). Dr. Rook further recommended that the Claimant

finish her urology work up and that she may be a candidate for a sacral nerve stimulation procedure (Hrg. Tr., November 17, 2014, p. 22). Dr. Rook also testified that due to the Claimant's physical disabilities and her social disability with the bladder dysfunction and her inability to feel safe when driving, in conjunction with her poor sleep, the Claimant has factors that negatively impact her employability (Hrg. Tr., November 17, 2014, pp. 26-27).

70. On cross-examination, Dr. Rook agreed that the Claimant's reflexes were examined in the initial emergency room visit after her injury and they found no reflex changes (Hrg. Tr., November 17, 2014, pp. 30-31). He also agreed that the effects of a spinal cord contusion would be immediate, including urinary changed, but Dr. Rook is not aware of the Claimant mentioning urinary changes to the emergency room practitioners nor to Dr. Bachman, who initially treated the Claimant (Hrg. Tr., November 17, 2014, pp. 31-32). Dr. Rook testified that he understands that there was no documentation in the medical records for almost two months post-injury of a urinary issue (Hrg. Tr., November 17, 2014, p. 32). After reviewing the emergency room records at Respondents' Exhibit AA, from the Claimant's February 23, 2010 visit to the emergency room, Dr. Rook agreed that there was no bowel or bladder incontinence, no motor weakness, no numbness, no abdominal pain and no dysuria or urine output changes or urinary urgency and that this was "a pretty comprehensive review of systems" (Hrg. Tr., November 17, 2014, p. 33-36). Dr. Rook also agrees that there is no early documentation of urinary changes for the Claimant until Dr. Kawasaki's note. He further conceded that if the onset of urinary changes happened after February 26, 2010, that would probably not be connected to a fall on January 20, 2010 (Hrg. Tr., November 17, 2014, p. 36). Dr. Rook testified that he does not believe the Claimant has a Pain Disorder or a Somatic Symptom Disorder (Hrg. Tr., November 17, 2014, p. 38), although he agrees that the Claimant has some degree of psychological enhancement in her pain complaints (Hrg. Tr., November 17, 2014, p. 40). On redirect examination, Dr. Rook testified that, to the extent the Claimant does have a Pain Disorder, it would be caused by the Claimant's 2010 injury (Hrg. Tr., November 17, 2014, p. 54).

71. Dr. Jutta Worwag testified as an expert in the areas of physical medicine and rehabilitation, anti-aging and regenerative medication, acupuncture, and as to Level II accreditation matters at the second day of hearing on November 17, 2014 (Hrg. Tr., November 17, 2014, pp. 171-172). Dr. Worwag testified that she performed an IME of the Claimant including a rather extensive review of medical records, an interview and a physical examination. Based on this IME, Dr. Worwag concluded the Claimant's diagnosis was Pain Disorder and that the Claimant had a work-related fall down stairs on January 20, 2010 without loss of consciousness or fractures. Dr. Worwag further testified that the Claimant was a delayed recovery case, with local pain complaints without an anatomic basis for the subjective complaints. She also testified that the Claimant had a late onset of migraine headaches and a delayed onset of urinary incontinence with may have a potentially relational component (Hrg. Tr., November 17, 2014, pp. 172-173). For Dr. Worwag, the pain disorder diagnosis is not based on any one single thing, but the whole pattern of components. She testified the diagnosis is

supported by a lack of objective anatomic basis for subjective symptoms, symptoms that have multiplied and magnified over time, diffuse/global pain, and lack of change in pain despite years of intervention (Hrg. Tr., November 17, 2014, pp. 173-175). Dr. Worwag specifically noted that the onset of the urinary incontinence was an issue in that the medical records show that the Claimant was discharged from an ER visit related to leg pain with instructions that, if she has problems with her bowel or bladder, to return to the ER. Then, the next day, the Claimant presented to physicians with her legs numb and complaints of bladder incontinence (Hrg. Tr., November 17, 2014, p. 177). Dr. Worwag testified that there is also a change from how the Claimant initially presented her injury without involving a loss of consciousness and then, later, with a loss of consciousness (Hrg. Tr., November 17, 2014, p. 180). Regarding Dr. Rook's testimony that a spinal cord contusion could be causing the Claimant's symptoms even if it were not revealed by an MRI, Dr. Worwag testified that it is not medically probable that the onset of symptoms from a spinal cord contusion would be weeks later (Hrg. Tr., November 17, 2014, pp.188-191). Dr. Worwag testified that after Dr. Kawasaki had the opportunity to review Dr. Weingarten's report and after the SAMMS conference, Dr. Kawasaki changed the course of the Claimant's care significantly, including tapering the Claimant off medications (Hrg. Tr., November 17, 2014, p. 199). However, Dr. Worwag testified, Dr. Furmansky continued to treat the Claimant as if she had a thoracic spinal cord lesion, when she didn't (Hrg. Tr., November 17, 2014, p. 200). Dr. Worwag also testified that she has concerns with a psychiatrist prescribing medications for physical conditions (Hrg. Tr., November 17, 2014, p. 208). With respect to biofeedback and it's use with physical medicine and rehabilitation, Dr. Worwag testified that biofeedback is not used to diagnose or verify the presence of an injury, it is a therapeutic tool to help with pain management (Hrg. Tr., November 17, 2014, pp. 217-218). Dr. Worwag also testified that the Claimant should be tapered off Gabapentin since the original reason it was prescribed was to get the Claimant off opioids and this has occurred and there are no functional gains demonstrated clinically from her current use of Gabapentin (Hrg. Tr., November 17, 2014, p. 221). Dr. Worwag also recommended that the Claimant be tapered off Neurontin (Hrg. Tr., November 17, 2014, p. 222), Wellbutrin and Prozac (Hrg. Tr., November 17, 2014, p. 223), Pantoprazole sodium (Hrg. Tr., November 17, 2014, p. 224) and Sonata (Hrg. Tr., November 17, 2014, pp. 224-225). Ultimately, Dr. Worwag opines that none of these medications have increased or helped the Claimant with her functioning (Hrg. Tr., November 17, 2014, p. 225). As for work restrictions, Dr. Worwag testified that it is not appropriate to rely on the restrictions from Dr. Bachman because they are outdated and she disagrees with Dr. Rook regarding his opinion and testimony regarding the Claimant's employability (Hrg. Tr., November 17, 2014, p. 228).

72. At the first day of hearing, the Claimant testified that prior to her injury, she was an active person and she did laundry, cleaned the house, prepared food, ran errands, drove, shopped for groceries, attended sporting events with her children, took family trips to Mexico, went dancing with her husband, went out to dinner, took her children to amusement parks (Hrg. Tr., May 13, 2014, pp. 36-37). Since her injury, the Claimant does not do most of these activities. Her husband and children do the laundry and clean the house. Sometimes she can prepare food but some days she cannot. Her

family, friends and neighbors now run her errands or drive her places. The Claimant no longer attends sporting events with her children as often because sometimes she is in pain and also because she no longer drives and cannot take the children to sports practice. The Claimant no longer goes out dancing (Hrg. Tr., May 13, 2014, pp. 37-39). The Claimant testified that strong pain currently limits her activities of daily living and in between engaging in activities, she must stop and rest for 20-30 minutes (Hrg. Tr., May 13, 2014, p. 40).

73. On cross examination during the testimony on the first day of hearing, the Claimant testified that she stopped driving when she started taking narcotics and signed a document that she wouldn't drive while taking morphine and narcotics. However, the Claimant agreed that she was no longer taking morphine (Hrg. Tr., May 13, 2014, p. 70) and was weaned off narcotics in September of 2012 (Hrg. Tr., May 13, 2014, p. 74). The Claimant currently holds a valid driver's license and there are currently no restrictions from any medical provider that would prevent her from driving (Hrg. Tr., May 13, 2014, p. 71). The Claimant testified that the reasons she does not currently drive are that she gets dizzy, can't concentrate, has headaches, has slow reaction time and does not have good sensation in her right toe and cannot move it up and down (Hrg. Tr., May 13, 2014, pp. 72-73).

74. The Claimant testified that she currently experiences urinary incontinence and must wear absorbent pads all of the time and limit the amount of liquid intake. The Claimant testified that she has sought medical treatment for this condition and would like to proceed with surgery that has been recommended (Hrg. Tr., May 13, 2014, pp. 47-48). On cross-examination, the Claimant agreed that in the first few weeks after her injury, due to medications she was taking she was sleeping most of the time and not eating much, so she did not notice a problem with urinary incontinence. She would have mentioned it to her medical providers when it started happening (Hrg. Tr., May 13, 2014, p. 76).

75. The Claimant returned to work only briefly for three weeks after her injury. She was provided with office duties, making copies and cutting out activities. The Claimant testified that her pain level was higher when she did this work. She did not go back to her normal duties of caring for the 6 week to 15 month-old babies. The Claimant testified that she was told by the principal at her Employer that because she could not return to her work caring for the babies, she would be given "family release" (Hrg. Tr., May 13, 2014, pp. 42-44).

76. The Claimant testified that her tolerance for standing and sitting is about one and ½ hours. As for walking, the Claimant testified that she will start to feel more pain and will have to keep slowing her pace. If she has a day where she exceeds her tolerances for standing or walking, the following morning she is in a lot of pain and spends most of that day resting (Hrg. Tr., May 13, 2014, p. 44).

77. Prior to working for Employer, the Claimant had several other job positions. She worked in the nursery at a place that offered adult English classes, she

worked as a package scanner at FedEx, and she has worked for cleaning companies that cleaned at commercial locations (Hrg. Tr., May 13, 2014, pp. 44-45).

78. The Claimant was evaluated by Donna Ferris on March 10, 2014. Ms. Ferris provided a lengthy and thorough history and summary of the Claimant's medical care (Respondents' Exhibit E, pp. 87-98). Ms. Ferris also interviewed the Claimant to discuss her current status through an interpreter as the Claimant reported "she does not speak English and understands only a little English" (Respondents' Exhibit E, p. 98). The Claimant reported the following to Ms. Ferris about her current symptoms:

> …she is the 'same' since the time of her injury. [The Claimant] explained her primary source of pain is her low back which is constant…constant neck pain and struggles to turn her head to the right….her right hand feels very weak and initially stated she had weakness and tingling at the time of the injury although later reported the tingling developed after the injury. [The Claimant] spent some time discussing mid back pain initially reporting her right shoulder and right side of her neck become painful when the mid-back is 'really bad.' [The Claimant] then explained when the pain is 'very strong' in her neck, her mid back becomes painful and noted there are times when she has no mid back pain. [The Claimant] indicated her sense the neck and mid-back pain 'go together.' [The Claimant] then stated her entire right side is painful. When asked about any pain in her right arm, [the Claimant] stated she has pain from the shoulder radiating to the palm of her hand. [The Claimant] explained the pain is not constant although has arm pain with increased neck pain. [The Claimant] reported difficulty using her right hand noting even very light items such as an envelope falls out of her hand....[The Claimant] then stated actually her left hand feel the same as her right hand and estimated the left hand symptoms developed one and one-half years ago. [The Claimant reported bilateral leg pain 'the majority of the time' and when asked to describe her pain, she indicated, 'it is hard to explain'….When asked why she uses a cane, [the Claimant] reported her knees give out and she has poor strength in her legs, the right being worse than the left….[The Claimant] reported daily headaches 'with a lot of dizziness. [The Claimant] indicated the headaches generally last for one and one-half to two hours although they can last longer on occasion. [The Claimant] reported urinary incontinence that also 'affects' her 'a lot' …. While discussing other topics, [the Claimant] later recalled another problem she experiences as a result of her injury. [The Claimant] reported she has difficulty with her memory explaining she has trouble recalling dates, memorizing 'new words,' is unable to multi-task, and gets distracted when moving from one task to another, forgetting the initial task (Respondents' Exhibit E, pp. 98-100).

79. During her evaluation, Ms. Ferris noted that the Claimant sat comfortably and stood several times without hesitation or the appearance of discomfort and never appeared to place any weight on her cane to assist with standing. Ms. Ferris noted that

the Claimant did not appear to be in discomfort while sitting or standing and completed twisting body movements fluidly and without any appearance of pain. The Claimant reported that she was having a 'little headache' at the time of the evaluation and reported her pain level at 6/10 although Ms. Ferris indicated that the Claimant never behaved in any manner to suggest her pain level was as high as she reported (Respondents' Exhibit E, p. 100).

80. Ms. Ferris noted that the Claimant reported she no longer takes pain medications as it was "taken away" from her. The Claimant reported that her pain level was 4-4.5/10 when on the narcotics and that the medications were very helpful (Respondents' Exhibit E, p. 101). Ms. Ferris also noted that the Claimant "went into significant detail about her evaluation with [Dr. Donner] and his recommendation for surgery." The Claimant reported that it is her understanding that she has two herniated discs in her neck that are very damaged which are causing the mid back pain and the tingling and weakness in her hands. The Claimant also reported that it is "her understanding that she has herniated discs in her low back and with surgery she would recover the strength in her legs, resolve the incontinence, and decrease the low back pain." The Claimant described Dr. Donner as lifting her up because he offered "something to do" (Respondents' Exhibit E, p. 101). The Claimant reported to Ms. Ferris that she does not drive because when she was returned to light duty work tasks and driving to work at that time, she noticed her reflexes failing her and she had headaches and dizziness. She also stated that she would not drive while taking narcotic medications. Now that she is no longer on narcotics, the Claimant continues to refrain from driving because she quickly loses focus and her ongoing symptoms prevent her from driving (Respondents' Exhibit E, p. 102).

81. Ms. Ferris relied on the opinions of Drs. Kawasaki, Paz, and Worwag in determining that the Claimant is capable of full time, unrestricted work activities. Based on this, Ms. Ferris opines that the Claimant "remains capable of earning wages despite her work related experience and subsequent medical care (Respondents' Exhibit E, p. 108).

82. The Claimant was evaluated by Michael Fitzgibbons on April 11, 2014. Mr. Fitzgibbons noted that the Claimant reported the following to him:

> constant pain in her lower back radiating into her buttocks. Her legs can feel heavy and numb. She described having ongoing neck pain which can radiate into upper back, shoulder blades and arms. Cold and weather changes can increase her pain. She has headaches on almost a daily basis. She needs to take medication and lie down until they subside. Along with headaches, she has dizziness. She related having urinary incontinence following the work injury. She avoids drinking any liquids except when she is home or close to a bathroom. This is a daily problem for her. [The Claimant] responded when asked about depression that she is affected by depression. She described difficulty with prolonged sitting, standing or walking. She uses a cane to ambulate. She further reported

difficulty with lifting, carrying, bending, kneeling and squatting as restricted by Dr. Bachman (Claimant's Exhibit 38, pp. 228-229).

83. He administered the Wide Range Achievement Test (WRAT-4) to obtain additional information about her academic abilities. She scored at the 3.8 level in word reading, grade 4.9 in sentence comprehension, 3.9 in spelling and 4.8 in arithmetic. He stated she showed competitive performance during the testing (Claimant's Exhibit 38, p. 230). Although Mr. Fitzgibbons noted that the Claimant earned vocational certification in early childhood development and had English as a second language classes over a number of years, he assesses the Claimant with only elementary school academic abilities. Although he does note, "she was able to work, take classes and be active with her three children before sustaining the work injuries" (Claimant's Exhibit 38, p. 231).

84. In his report dated April 11, 2014, Mr. Fitzgibbons relies heavily on the opinion of Dr. Bachman that the Claimant could "work only four hours a day at a desk/office setting" in spite of the fact that this opinion is quite dated, having been issued by Dr. Bachman on November 12, 2010 when he placed the Claimant at MMI. Mr. Fitzgibbons seems to discount the 4% psychological impairment rating provided by Dr. Gutterman and adopted by Dr. Gellrick through her DIME, and instead focused on the much more significant psychological impairment provided by Dr. Furmansky which "would preclude [the Claimant] from being able to successfully engage in competitive employment" (Claimant's Exhibit 38, pp. 232-233). He also discounts the opinions of Respondents' independent medical examiners, Dr. Weinstein, Dr. Worwag and Dr. Paz, that Claimant has no lack of function and therefore no work restrictions should be imposed. Mr. Fitzgibbons did note that if Respondents' independent medical examiners were the only opinions to be considered, and no restrictions should be imposed then Claimant could return to work (Claimant's Exhibit 38, p. 232). However, he opined that when considering the opinions of the multiple treating and DIME examiners and the limited vocational possibilities from her vocational profile (lack of education, academic abilities and discomfort in speaking English), he believed that the Claimant would "be so limited in her vocational possibilities as to be unable, within a reasonable degree of vocational probability, to independently identify and secure appropriate employment (Claimant's Exhibit 38, p. 232). Mr. Fitzgibbons concludes that "in consideration of all the relevant vocational factors and relying on the description of her functioning by the treating providers, [the Claimant] is unable to earn a wage" (Claimant's Exhibit 38, p. 233).

85. Mr. Michael Fitzgibbons testified as an expert in the areas of vocational rehabilitation and counseling at the hearing on November 17, 2014 (Hrg. Tr. November 17, 2014, p. 64). Mr. Fitzgibbons ultimate opinion regarding the Claimant's ability to return to and sustain gainful employment was "that she is not able to resume earning a wage." He recommended vocational rehabilitation assistance, without which, he could not see that it was feasible or reasonable for the Claimant to return to work (Hrg. Tr. November 17, 2014, p. 66). Mr. Fitzgibbons testified that if you assume that the Claimant has no work restrictions, then the entry-level positions identified by Ms. Ferris on page 20 of her report would be appropriate. However, Mr. Fitzgibbons opined that when you look at the work restrictions from Dr. Bachman, the Claimant can only do

office work for four hours a day with no lifting, carrying, pushing, pulling, crawling, kneeling, squatting, or climbing, and the Claimant also has psychological limitations. So, given these restrictions, Mr. Fitzgibbons finds that the occupations identified by Ms. Ferris are not within the Claimant's physical limitations (Hrg. Tr. November 17, 2014, p. 67).

86. Mr. Fitzgibbons further testified that in most office positions there is a higher level of reading, writing and arithmetic required for those positions as well as some computer knowledge and some keyboarding, all skills which Ms. Gomez does not possess (Hrg. Tr. November 17, 2014, p. 68. He testified that in his experience employers would like to return their employees to work because it saves cost in hiring a new person (Hrg. Tr. November 17, 2014, p. 78). The Claimant was reported to have done a very good job with the Employer so there would be a strong incentive for the Employer to provide employment for her on an ongoing basis if that can be done within their limitations (Hrg. Tr. November 17, 2014, p. 79). However, the Claimant attempted a light duty position with the Employer which Mr. Fitzgibbons opined was not successful in sustaining other office-work employment (Hrg. Tr. November 17, 2014, p. 79). He opined that all positions recommended by Ms. Ferris (hostess, food service, fast and casual food restaurants, and janitorial) were outside the restrictions recommended by the treating physicians (Hrg. Tr. November 17, 2014, pp. 79-81)

87. The work restrictions relied on by Mr. Fitzgibbons were not persuasive. Mr. Fitzgibbons stated he relied on physical restrictions assigned by Dr. Bachman as Dr. Bachman stopped treating the Claimant in December 2010. Mr. Fitzgibbons could not even state the last date Dr. Bachman had met with Claimant (Hrg. Tr. November 17, 2014, pp. 129-130). Dr. Bachman issued those restrictions without any of the subsequent information which has come to light about the Claimant's diagnosis of a Pain Disorder. In addition, although Mr. Fitzgibbons stated he was relying on restrictions issued by Dr. Kawasaki, Dr. Kawasaki had more recently clearly stated the Claimant's condition does not justify any work restrictions. Instead, Mr. Fitzgibbons parsed Dr. Kawasaki's December 24, 2013 letter regarding work restrictions and chose to interpret it as releasing the Claimant to light duty only (see Exhibit QQQQ). This strained interpretation is not consistent with the unambiguous statements Dr. Kawasaki made later regarding the Claimant's lack of objective injury and full duty release to work. Mr. Fitzgibbons ultimately conceded if the court relies on Dr. Kawasaki's current opinion, the Claimant is able to work (Hrg. Tr. November 17, 2014, pp. 144-145).

88. Mr. Fitzgibbons relied on Dr Furmansky's permanent impairment rating to outline psychiatric work restrictions (Hrg. Tr. November 17, 2014, p.123). Mr. Fitzgibbons agreed Dr. Furmansky did not outline psychiatric work restrictions when he set forth his permanent impairment rating (Hrg. Tr. November 17, 2014, p. 125). Instead, Mr. Fitzgibbons testified his experience allowed him to "determine" what restrictions were appropriate when reviewing the impairment rating. Mr. Fitzgibbons agreed Dr. Furmansky's rating was not adopted by the DIME physician (Hrg. Tr. November 17, 2014, p.126).

89. Mr. Fitzgibbons relied on WRAT4 testing as "a basic assessment of a person's academic abilities" Hrg. Tr. November 17, 2014, p.67). Mr. Fitzgibbons claimed this test evaluated the Claimant's ability for word recognition, reading comprehension, spelling and math. Mr. Fitzgibbons' test results indicated the Claimant scored a grade 3.8 level in word reading, grade 4.9 in sentence comprehension, grade 3.9 in spelling and grade 4.8 in math. However, the WRAT testing was not created for forensic situations, was purely effort dependent and did not have a validity measure (Hrg. Tr. November 17, 2014, pp. 108-109). The test is typically administered to an English speaking population to determine their education level (Hrg. Tr. November 17, 2014, pp. 111-112). Though the Claimant's graduation from high school has been an issue of controversy, the Claimant acknowledged to Mr. Fitzgibbons she completed the 11th grade. Mr. Fitzgibbons made no comment on why her math would be at a 4.8 grade level. Mr. Fitzgibbons was unaware the Claimant was taking English as a second language course work at Focus Points in 2012 and 2013 (Hrg. Tr. November 17, 2014, p. 114). He had not reviewed her testing scores while at Focus Points.

90. To reach his opinion, Mr. Fitzgibbons relied on incomplete and flawed data. He used old restrictions which were not offered in the context of the Claimant's current diagnoses. He extrapolated psychiatric restriction and he used test results which were inconsistent with the Claimant's real world accomplishments at Focus Points, accomplishments of which Mr. Fitzgibbons was unaware. Most importantly, he ignored the opinion of the Claimant's treating doctor that the Claimant had no work restrictions. As Mr. Fitzgibbons acknowledged, using Dr. Kawasaki's statement of no work restrictions, the Claimant was employable.

91. Ms. Donna Ferris testified as an expert in the area of vocational rehabilitation by deposition on December 15, 2014 (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 3). It was Ms. Ferris' opinion that the Claimant remained capable of earning wages despite her work-related injury (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 4). Ms. Ferris testified that his case was complex due to the large volume of medical records and the restrictions provided by the Claimant's treating physicians over time (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 5-6). She testified that she was aware of the restrictions provided by Dr. Bachman, Dr. Kawasaki, Dr. Furmansky, Dr. Weingarten and Dr. Worwag (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 6). In looking at all of the medical information, and understanding that Dr. Kawasaki provided care from March of 2010 and continues to provide care and has had the advantage of seeing what has evolved over time, Ms. Ferris consequently relied on Dr. Kawasaki's recommendations as far as the Claimant's functional capabilities (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 6-7). Commenting on Mr. Fitzgibbon's reliance on Dr. Bachman's restrictions, Ms. Ferris noted that Dr. Bachman placed the Claimant at MMI in November of 2010 and did not treat the Claimant after that point (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 8). As for Dr. Furmansky's opinion, Ms. Ferris commented that his opinion is "confusing" since he believes the Claimant is permanently and totally disabled from a psychiatric standpoint, however, he has not discussed whether she has restrictions and has not provided information to support this belief (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 9). Ms. Ferris also testified that

she did not consider Dr. Furmansky's psychiatric restrictions because Dr. Weingarten's independent medical evaluation, which identified a pain disorder, became important to the case outcome (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 19-20 and pp. 75-76). Dr. Kawasaki relied on Dr. Weingarten who indicated the Claimant was not psychiatrically restricted from working (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 77).

92. Ms. Ferris disagreed with Mr. Fitzgibbons' use of a psychiatric impairment rating as a basis for determining work restrictions. Ms. Ferris opined that an impairment rating does not define function (Tr. of Depo. of Ms. Ferris, December 15, 2014, p.11. Furthermore, as Ms. Ferris testified, the Division Examiner did not adopt Dr. Furmansky's impairment and did not assign any psychiatric work restrictions (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 15).

93. Ms. Ferris did not find urinary symptoms were an impediment to return to work. She testified that people function with urinary incontinence while at work and can wear special underwear (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 16). When Ms. Ferris met with the Claimant, she observed her for 2-1/2 hours and the Claimant did not leave the room. At the hearing in November, Ms. Ferris observed that the Claimant did not leave the courtroom until 11:30AM (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 17). Ms. Ferris explained these two pieces of experience tell her there would be normal breaks within the workday where the Claimant could go to the bathroom.

94. Ms. Ferris also evaluated the Claimant's vocational background. As part of that process, she looked at the Claimant's English abilities. In reviewing the medical records, Ms. Ferris noted on two occasions, the Claimant attended medical appointments and was able to get through the appointment without use of an interpreter (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 21). When Ms. Ferris met with the Claimant, she brought an interpreter. She encouraged the Claimant to use as much English as she felt comfortable with so Ms. Ferris make a fair assessment of the Claimant's ability to speak and understand English (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 22). Ms. Ferris explained during her interview she observed two things. First, the Claimant did not speak one word of English during their meeting. Second, the Claimant clearly understood many questions posed to her before the interpreter translated the question (Tr. of Depo. of Ms. Ferris, December 15, 2014, p.22). Ms. Ferris specifically asked the Claimant, "Do you speak or understand any English?" The Claimant stated, "None whatsoever. I do not speak English and I have very little understanding of English" (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 23). Ms. Ferris stated this was very troubling to her because there was a great amount of information to the contrary (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 23). Ms. Ferris learned from the Employer that the Claimant spoke, understood, read and wrote English (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 21-23). The employer indicated the Claimant's English skills improved significantly over her period of employment. The Claimant was capable of functioning within her position as a group leader. The Claimant was able to complete forms written in complete sentences in English. She also spoke with English-speaking parents regarding their child (Tr. of

Depo. of Ms. Ferris, December 15, 2014, p. 25). Ms. Ferris indicated information from the Employer was important when formulating her vocational opinion because the employer has day-to-day experience over a period of years which is a very reliable assessment of a person's ability to function in their job. It was clear based on the Claimant's job tasks that she had adequate English language skills (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 27).

95. When looking at the Claimant's vocational background, Ms. Ferris asked the Claimant about her job with the Employer and the Claimant minimized her job tasks with the Employer. The Claimant disagreed she was working as a group leader stating she was a "helper" (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 35). This is despite the undisputable credential that the Claimant held with the State of Colorado (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 36-37). Ms. Ferris asked the Claimant about her educational level. The Claimant advised Ms. Ferris she completed high school (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 39). However, the Claimant stated to Mr. Fitzgibbons she did not finish high school. Ms. Ferris indicated it is important to understand Claimant's motivations and note the timing of her change of her story; she only told Mr. Fitzgibbons and Dr. Rook that she was not a high school graduate (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 42-43).

96. Ms. Ferris disagreed with the conclusions drawn by Mr. Fitzgibbons based on the WRAT4. The Claimant's work requirements at the Employer indicated she functioned at a higher level than she tested with Mr. Fitzgibbons (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 29). Furthermore, Ms. Ferris learned the Claimant was involved in English as a second language education through Focus Points and her scores at Focus Points contradicted her WRAT4 scores (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 29). Ms. Ferris testified that contacted Cristina Del Nolio, the Program Coordinator at Focus Points, to obtain a general understanding of testing scores (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 32). The Program Coordinator explained their program provides training in speaking, understanding, reading and writing English. A score of 230 was the highest test score a person could earn in their English as a second language program. The Program Coordinator explained a person who scored 220 or 230 would have "advanced" speaking and comprehension and their reading and writing comprehension would be "good" (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 33). Asking for further elaboration on a definition of "advanced" and "good," Ms. Ferris asked her to be specific from a functional standpoint. The Program Coordinator explained with these scores, an individual would be capable of taking the language portion of the GED in English (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 34). Ms. Ferris testified the Claimant's scores at Focus Points were "entirely inconsistent" with the English skills the Claimant described to her and other providers and depicted in the WRAT4 testing (Tr. of Depo. of Ms. Ferris, December 15, 2014, p.34).

97. Ms. Ferris opined the Claimant remained employable doing the types of jobs she had done in the past (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 44). These jobs included her childcare position at the employer, production work similar to

what she had done at Federal Express, production work similar to her work as a food service worker and also janitorial work (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 44). These jobs all created transferable skills. These are all jobs where she had prior experience and these jobs are all currently found in the labor market on a full and part time basis (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 45). Ms. Ferris felt the vast majority of the jobs she had identified would be below 20 pounds and would even fall within the light duty work category (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 46).

Ultimate Findings of Fact

98. There was conflicting evidence presented about the Claimant's ability to understand and speak English. The Claimant herself states that she understands some English and can speak very little English. Mr. Fitzgibbons has testified that her testing score supports this finding her English abilities at an elementary school level. However, his testing had no measures to ensure valid effort on the part of the Claimant. While the Claimant downplays her ability to understand and speak English, the ALJ notes that she has lived in the United States for more than 18 years. She has previously held various jobs, including her position with Employer where she was required to participate and function in English. The Claimant was identified as a good employee prior to her work injury and was successful in this position. In addition, the Claimant has taken intermediate to advanced classes in English as a second language and she attained a childcare certification and made solid progress in a post-secondary vocational program, all of which were taught in English. It is found that the Claimant has sufficient ability to understand, speak and otherwise communicate in English such that the Claimant's education level and English language skills would not be a substantial impediment to obtaining and maintaining employment in her commutable labor market.

99. There was conflicting evidence as to whether the Claimant suffered a loss of consciousness during or after her fall down concrete stairs on January 20, 2010. Initial emergency room records do not document a loss of consciousness and the Claimant had substantial recall of events occurring during and after her fall to describe the same to the ER personnel and to Dr. Bachman when he saw her the following day. It was not until her first office visit with Dr. Kawasaki on March 9, 2010 that the Claimant reported a loss of consciousness right after her fall, after which she started to report to Dr. Bachman for the first time, around March 25, 2010, that she was experiencing forgetfulness. Dr. Bachman then ordered a brain MRI which was normal. After this point, the Claimant reported loss of consciousness both immediately after her fall and then again in the ambulance on the way to the hospital. The DIME physician Dr. Gellrick later found no evidence of memory, thinking or concentration issues, nor did Dr. Gutterman in his assessment of the Claimant's psychiatric conditions. Based on the medical records, inconsistent reporting, and giving weight to earlier reports of the Claimant's injury, it is more likely than not that the Claimant did not suffer a loss of consciousness or only suffered a very brief loss of consciousness. The weight of the evidence as set forth in subsequent medical work-up and evaluations have revealed no significant

sequelae resulting from a loss of consciousness, to the extent that there was any loss of consciousness.

100. With respect to the Claimant's bladder dysfunction/urinary incontinence issues, there is no report of urinary system dysfunction in the January 20, 2010 ER records. The following day, on January 21, 2010, Dr. Bachman specifically noted that there was "no frequency, hematuria or change in urination. On January 28, 2010, Dr. Bachman noted "no history of bladder or bowel dysfunction." At an ER visit on February 23, 2010 for low back pain, the Claimant again denies urine output changes, dysuria or changes in urinary frequency or urgency. It is not until February 24, 2010 that the Claimant reports to her physical therapist that she had bladder incontinence and then she reports this again to Dr. Bachman on February 25, 2010. As a result of this, the Claimant is referred to Dr. Mueller for a urology evaluation and to Dr. Renkin for a neurological evaluation. The DIME physician found that the Claimant's bladder symptoms are not causally related to her work injury. It is found that there was no persuasive evidence to establish that the Claimant's urinary incontinence symptoms are causally related to the Claimant's January 20, 2010 work injury.

101. The Claimant received an extensive work-up by her authorized treating physicians as they tried to determine her pain generators and the source of her expanding symptomatology over the course of her treatment. The Claimant had multiple MRIs of all levels of her spine, including lumbar, thoracic and cervical, as well as a brain MRI. She was evaluated by neurologists and orthopedic specialists and underwent an EMG of her lower extremities. Ultimately, all of the Claimant's authorized treating physicians, the DIME physician, Dr. Gellrick and IME evaluators Drs. Paz and Worwag concluded that the Claimant did not have a spinal cord lesion, and that there was no physiologic anatomic or nervous system basis for the symptoms the Claimant continued to exhibit. All of the doctors treating or evaluating the Claimant's physical medicine complaints, except for Drs. Rook and Donner, found that there was no pathology to explain the Claimants subjective symptomatology. Dr. Rook alone continues to opine that it is possible that the Claimant suffered a spinal cord contusion at the time of her injury. Dr. Donner has opined that pathology showing bulging cervical disc and an annular tear and protrusion at L5-S1 may be the source of the Claimant's chronic pain. However, the overwhelming weight of the evidence is that there is no persuasive evidence of pathology to explain the Claimant's expanding symptomatology. It is found as fact that the Claimant did not suffer a spinal cord or nervous system injury during her January 20, 2010 work injury.

102. The Claimant was placed at MMI for her physical condition on November 12, 2010 and she was placed at MMI for her psychiatric condition on March 21, 2011. Ultimately, a DIME was performed by Dr. Gellrick, with psychiatric input from Dr. Gutterman. The Claimant was provided a 33% whole person impairment rating for her cervical, thoracic and lumbar conditions and range of motion deficits and a 4% whole person impairment rating for her psychiatric condition. This DIME determination was not challenged.

103. Subsequent to MMI for her physical condition, the Claimant has continued to treat with Dr. Kawasaki and she continued to be prescribed narcotic medications for pain until after a SAMMS conference that took place on November 28, 2012. Around this time, treating and evaluating physicians reached the consensus that the Claimant had no objective findings to explain or substantiate her subjective complaints and expanding and migratory symptomatology. Dr. Kawasaki concurred with Dr. Weingarten and Dr. Worwag that the Claimant's correct diagnosis was Pain Disorder (per the DSM-IV then in effect, and now Somatic Symptom Disorder per the DSM-V). In light of this, Dr. Kawasaki tapered the Claimant safely and effectively off all opioid medications. Subsequent to this, the Claimant's reporting of her pain level remained effectively level although the Claimant testified and complained to her treating physicians that her pain was increasing. The Claimant currently takes medications prescribed by Dr. Furmansky, including anti-depressants, anti-anxiety medication, Gabapentin, Neurontin, and Sonata/Zaleplon and Pantoprazole Sodium. Based on the persuasive testimony and opinions of Drs. Worwag and Weingarten, and the lack of functional gain as evidenced by the medical records, it is found that these medications are not reasonable or necessary to cure and relieve the Claimant of the effects of her January 20, 2010 injury or prevent further deterioration of her condition.

104. With regard to work restrictions, there was also a considerable amount of conflicting testimony and evidence. At the time he placed the Claimant at MMI on November 12, 2010, Dr. Bachman provided work restrictions for the Claimant of sedentary office work for only 4 hours per day. Dr. Bachman has not treated the Claimant since December of 2010. Dr. Kawasaki initially concurred with Dr. Bachman's work restrictions. However, continuing to treat the Claimant as her case evolved with new information, Dr. Kawasaki changed his opinion regarding work restrictions. On December 24, 2013, Dr. Kawasaki noted that after his review of the medical evaluations of Drs. Worwag and Weingarten, he clearly changed his opinion. He stated that there are no objective reasons for the Claimant to be placed on any work restrictions. He opined that the Claimant can certainly be released to a light-duty job, which she would be able to handle from her subjective pain standpoint. Dr. Rook testified that, based on his evaluation of the Claimant on March 29, 2014, he believes the Claimant's work restrictions should limit lifting to 10 lbs., no carrying due to her limp and use of case, limit standing and walking to 15-30 minutes, avoid bending, twisting, climbing, ladders, kneeling and crawling. He also opined that the Claimant would have difficulty with above the shoulder work on the right side. Finally, he opined that the Claimant's social disability with urinary incontinence requires access to a bathroom. In weighing the evidence, special consideration is given to the persuasive opinion of Dr. Kawasaki who treated the Claimant since 2010 to the present and has the best understanding of how the Claimant's case and her course of treatment has evolved. Relying upon the opinion of Dr. Kawasaki, as supported by Drs. Worwag, Paz, and McCranie, it is found as fact that there are no objective reasons for the Claimant to be placed on work restrictions and that her subjective complaints of pain would allow her to be released to a light duty job.

105. From a psychiatric standpoint, Dr. Furmansky has repeatedly stated his opinion that the Claimant is permanently and totally disabled. He testified that he diagnoses the Claimant with chronic depression, chronic anxiety, insomnia and somatic symptom disorder with predominant pain. He testified that he considers the Claimant permanently and totally disabled because he does not believe that an employer would accept her absences or her symptoms of depression that include attention and concentration impairments and some memory loss and fatigue. However, Dr. Furmansky has never provided specific work restrictions for the Claimant's psychiatric condition. Dr. Weingarten disagrees that the Claimant is permanently and totally disabled by any psychiatric condition. In her supplemental IME report, Dr. Weingarten opined that there are no psychological work restrictions. In deposition testimony, Dr. Weingarten opined that it is in the Claimant's best interests that there be the expectation that she should be more functional, including return to work. Based on the weight of the evidence, and Dr. Weingarten's persuasive opinion, it is found that the Claimant does not have psychological work restrictions.

106. With respect to the vocational rehabilitation expert opinions, the opinion of Ms. Ferris is found to be more persuasive than that of Mr. Fitzgibbons.

107. Based on the foregoing, and considering and weighing all of the lay and expert testimony and the hearing submissions, it is found that the Claimant has not satisfied her burden of proving that she is unable to earn wages in the same or other employment.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Permanent Total Disability

Permanent total disability, as defined in § 8-40-201(16.5), C.R.S., means an "employee is unable to earn any wage in the same or other employment." When the statute was amended in 1991, it established a strict definition of permanent total disability. The intention of the amendments was to create a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently and totally disabled. *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115 (Colo. App. 1997). A claimant must also establish that the industrial injury was a significant causative factor by showing a direct causal relationship between the industrial injury and the permanent total disability. *Joslins Dry Goods Co. v. Indus. Claim App. Off*., 21 P.3d 866 (Colo. App. 2001)*; Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App.1986).

It is the claimant's burden of proof to establish that she is permanently totally disabled by a preponderance of the evidence. The question of whether claimant has the ability to earn any wages is one of fact for resolution by the administrative law judge. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In *McKinney* the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. It is not necessary that the claimant be able to return to previous employment. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for the purpose of the statute. *See also Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997). Although, if the evidence establishes that a claimant is not physically able to sustain post-injury employment, or that such employment is unlikely to become available to a claimant in the future in light of particular circumstances, an ALJ is not required to find a claimant is capable of earning wages. *Joslins,* supra; *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701, (Colo. App. 1999).

The determination of whether a claimant is permanently and totally disabled is made on a case by case basis and varies according to the particular abilities and circumstances of the claimant. In determining whether a claimant is permanently totally disabled, the ALJ may consider various "human factors" such as mental capabilities, physical ability, education, vocational training, overall physical condition, former employment, and availability of work a claimant can perform within a commutable labor market. The overall objective is to determine whether employment exists that is reasonably available to a claimant under her particular circumstances. *Weld County*

School Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998). No one factor, including the existence of permanent medical impairment, is determinative of permanent total disability. *Van Roy vs. Industrial Claims Appeals Office* (ICAO, July 2, 2001). Medical impairment is distinguished from disability and an individual who is impaired is not necessarily disabled. A respondent's willingness to admit that a claimant sustained permanent medical impairment under the AMA Guides does not amount to an admission that the impairment resulted in any disabling restrictions or that any alleged physical limitations are the result of the admitted medical impairment. *Almodovar v. Resource Management Systems, Inc.,* W.C. No. 4-198-272, (ICAO, July 18, 2001). In *Almodovar,* the claimant was placed at MMI with a 26% impairment rating which was admitted by the carrier. It was found that even though there was an admitted rating for 26% whole person physical impairment, the Claimant failed to carry her burden to establish permanent and total disability.

In this case, the Claimant had migrating and expanding symptomatology which could not be explained by her medical testing and multiple doctors reached the consensus that there were no objective findings to correlate to the Claimant's subjective pain complaints. Eventually, her presentation was considered by Dr. Weingarten who identified the Claimant with a pain disorder. The Claimant's ATP, Dr. Kawasaki, agreed and sought to coordinate with the Claimant's treating psychiatrist, who did not adopt this opinion and possibly delayed and complicated the Claimant's recovery. Dr. Kawasaki specifically agreed with Dr. Worwag that there was no significant pathology to explain Claimant's symptomatology. The medical opinions of Drs. Kawasaki, Weingarten and Worwag were found to be the most persuasive regarding the Claimant's diagnosis. Their opinions are consistent with the various specialists who found no persuasive objective evidence to support the Claimant's ongoing and changing complaints and some who found non-organic results of their testing. These doctors opine that the Claimant could return to full-duty, full time work and the Claimant is not permanently and totally disabled. Even the Claimant's vocational rehabilitation expert, Mr. Fitzgibbons, agreed if the ALJ were to rely on Dr. Kawasaki's statement that Claimant could return to full duty full time work, then the Claimant is employable.

The Respondents' vocational rehabilitation expert, Donna Ferris, relied on the opinions of Drs. Kawasaki, Worwag and Weingarten. She relied on the medical information which makes the most sense of the claimant's shifting medical presentation. Relying on the opinions of these doctors, Ms. Ferris opined that the Claimant can return to work in her commutable labor market. Donna Ferris opined the Claimant can do all of the prior work she performed in the past, and even with light duty work restrictions. Her opinion was that the Claimant remains employable and is not permanently and totally disabled. Donna Ferris' opinion was credible and more persuasive than that of Mr. Fitzgibbons who relied on outdated restrictions from Dr. Bachman and an opinion of Dr. Furmansky that the Claimant was permanently and totally disabled, without providing specific work restrictions.

Ultimately, the Claimant did not meet her burden of proof to show she is permanently and totally disabled. She relied on Dr. Furmansky who did not fully adopt the diagnosis of pain disorder and failed to apply the treatment approach necessary for the diagnosis for pain disorder based on inaccurate information regarding the Claimant's medical status for two years. Moreover, Dr. Furmansky insisted the Claimant had a physical injury; a myofascial condition which was not supported by any treating physical medical doctor or his referrals. Dr. Furmansky disregarded the warnings from Dr. Weingarten and Dr. Worwag of iatragenic injury and disregarded requests for assistance from Dr. Kawasaki to follow the protocol adopted by consensus of treating and evaluating physicians. Thus, Dr. Furmansky's opinion is not persuasive. Likewise, the opinion of Dr. Rook was not persuasive. His opinion is inconsistent with the specialists who have evaluated the case and found there was no organic explanation for the Claimant's injury. He found myofascial injury and spasm when no significant spasms were observed by the treating providers over the course of her care. Dr. Rook's opinion regarding work restrictions was not persuasive. He agreed with Dr. Bachman who has not been involved in the case since December 2010 and Dr. Bachman was unaware of the diagnosis of pain disorder. Dr. Rook opined the Claimant had a spinal cord injury; he is the only doctor who holds this opinion. The Claimant admitted to the urologist that her urinary complaints did not start until weeks after her date of injury. Dr. Rook agreed a delayed onset of urinary complaints was not consistent with a spinal cord injury. Therefore, Dr. Rook has contradicted his own opinion. Finally, Dr. Rook did not observe on exam the numbness from T4 down, the very symptoms which were ostensibly the indicia of the spinal injury. For these reasons, Dr. Rook's opinion is not persuasive.

Finally, the Claimant relied on Mr. Fitzgibbons' opinion, which was based on unsound information. He relied on old restrictions based on medical opinions which were not squared with the current understanding of the Claimant's medical diagnosis. Mr. Fitzgibbons developed restrictions from psychiatric impairment based on a method not supported by the definition of impairment or by the medical experts in this case. He also relied on data diminished by the Claimant's lack of effort. Contrary to the opinion of Mr. Fitzgibbons, the ALJ found that the evidence established the Claimant has sufficient ability to understand, speak and otherwise communicate in English such that the Claimant's education level and English language skills would not be a substantial impediment to obtaining and maintaining employment in her commutable labor market.

In sum, the Claimant's work injuries do not preclude her from returning to work. The Claimant has not met her burden of proof to establish she is permanently and totally disabled. Rather, it is determined that the Claimant has sufficient function, ability, training and education to obtain and maintain continuous employment and such employment is available to the Claimant in her commutable labor market. The claim for permanent total disability benefits is denied and dismissed.

Medical Maintenance Treatment after MMI

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In this case, the Claimant has not met her burden of proof to establish that continuing care, including, but not limited to, ongoing prescriptions and psychotherapy is reasonable and necessary. Dr. Furmansky admitted in his first meeting with the Claimant that he did not have medical records and receipt of those may change his opinion. He did not follow up on getting those records. Two years later he learned her treating doctor felt she had no organic injury, migrating symptoms and a pain disorder. When he learned the assumptions he had about the case were wrong and his client had not told him the basic truth about her medical status, he still insisted to Dr. Kawasaki that his medication regimen was appropriate. Dr. Weingarten and Dr. Worwag both explained this was unusual, as Dr. Furmansky should have obtained the medical records, revisited his Axis III diagnoses, met again with the Claimant and considered alternative psychiatric diagnosis. More importantly, in the face of Dr. Kawasaki's application of the diagnosis of pain disorder and recommendation that claimant's medication usage be reduced, Dr. Furmansky increased the Claimant's medications and began prescribing for physical conditions. When he finally reviewed the medical records, Dr. Furmansky still concluded the Claimant had a myofascial condition, relying on old medical records, despite the fact this was not a current physical diagnosis offered by Dr. Kawasaki. Dr. Furmansky eventually agreed the Claimant should not have the level of complaints she offered with only a myofascial condition. He agreed she should not need to utilize a cane and should resume driving. However, he has not effectively

pursued his own treatment plan. Instead, he has increased her medications and increased her dependence on his care. This is not curing and relieving the effects of the injury. Dr. Furmansky has substantially ignored the information from the physical medicine doctor who has opined she does not have a significant physical injury. He has prescribed medications for a physical condition, and did this strictly based on the Claimant's self report of symptoms. He has not chronicled any increase in function to support those prescriptions as is recommended by the Medical Treatment Guidelines.

Dr. Weingarten and Dr. Worwag testified persuasively that medications for depression and anxiety were not reasonable and necessary. Dr. Worwag and Dr. Weingarten testified prescriptions for medications including, but not limited to, Gabapentin, bupropion, diclofenac potassium, Zaleplon, Fluoxetine HCL, pantoprazole sodium, Zanaflex, and tinzanidine were not reasonable and necessary because they have not helped the Claimant and did not increase her function. The Claimant shall be weaned off of these medications as medically appropriate in accordance with the recommendations of her authorized treating physicians. The treating physician who currently prescribes the prescription(s) shall be responsible for overseeing the Claimant's safe and appropriate withdrawal of the prescription medications. This entire process should be monitored and overseen by Dr. Kawasaki to ensure that the withdrawal process is completed safely, but without unreasonable delay.

Claimant has not shown by a preponderance of the evidence that her request for ongoing maintenance medical benefits consisting of psychotherapy and the medications prescribed by Dr. Furmansky are reasonable, necessary and related to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition.

In addition, the Claimant has failed to establish that her urinary incontinence symptoms and condition are causally related to her January 20, 2010 work injury. With respect to the Claimant's bladder dysfunction/urinary incontinence issues, there is no report of urinary system dysfunction in the January 20, 2010 ER records. The following day, on January 21, 2010, Dr. Bachman specifically noted that there was "no frequency, hematuria or change in urination. On January 28, 2010, Dr. Bachman noted "no history of bladder or bowel dysfunction." At an ER visit on February 23, 2010 for low back pain, the Claimant again denied urine output changes, dysuria or changes in urinary frequency or urgency. It is not until February 24, 2010 that the Claimant reported to her physical therapist that she had bladder incontinence and then she reported this again to Dr. Bachman on February 25, 2010. Ultimately, the DIME physician found that the Claimant's bladder symptoms were not causally related to her work injury. It was found that there was no persuasive evidence to establish that the Claimant's urinary incontinence symptoms are causally related to the Claimant's January 20, 2010 work injury and therefore post-MMI medical care for the Claimant's urinary condition is denied and dismissed.

Finally, all of the doctors treating or evaluating the Claimant's physical medicine complaints, except for Drs. Rook and Donner, found that there was no pathology to explain the Claimants subjective symptomatology. Dr. Rook alone continues to opine that it is possible that the Claimant suffered a spinal cord contusion at the time of her injury. Dr. Donner has opined that pathology showing bulging cervical disc and an annular tear and protrusion at L5-S1 may be the source of the Claimant's chronic pain. However, the overwhelming weight of the evidence is that there is no persuasive evidence of pathology to explain the Claimant's expanding symptomatology. It is found as fact that the Claimant did not suffer a spinal cord or nervous system injury during her January 20, 2010 work injury. The Claimant has failed to establish that the surgery or any other procedures recommended by Dr. Donner is reasonable and necessary to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition.

ORDER

It is therefore ordered that:

1. The Claimant has failed to establish that she is unable to earn any wages and has failed proven that she is entitled to receive permanent total disability benefits. The Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

2. The Claimant has failed to meet her burden of proof regarding maintenance medical treatment. Ongoing prescriptions and psychiatric care is not related and is not reasonable and unnecessary, except, to the extent outlined in this order, as required for the safe and appropriate withdrawal of the medications being prescribed. The treating physician who currently prescribes the prescription(s) shall be responsible for overseeing the Claimant's safe and appropriate withdrawal of the prescription medications. This entire process should be monitored and overseen by Dr. Kawasaki to ensure that the withdrawal process is completed safely, but without unreasonable delay.

3. The Claimant has failed to establish that the surgery or any other procedures recommended by Dr. Donner are reasonable and necessary to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition. The claim for ongoing medical benefits for surgery or related procedures recommended by Dr. Donner is denied and dismissed.

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

and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 26, 2015

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

ISSUES

The issues to be determined by this decision are:

1. Whether the claimant has proven by a preponderance of the evidence that she is permanently and totally disabled under the Workers' Compensation Act;

2. If the claimant is not permanently and totally disabled, whether the claimant has overcome the DIME rating;

3. Whether the respondents are liable for penalties in connection with temporary disability benefits;

4. Whether the claimant is entitled to reimbursement and/or ongoing payment of personal training services; and

5. Disfigurement benefits.

FINDINGS OF FACT

1. The claimant suffered an admitted industrial injury on August 13, 2010. She tripped and fell while walking into work, and landed directly on her right shoulder. As a result of the accident, she sustained a "very massive" tear of the right rotator cuff.

2. The claimant was referred to Dr. Meinig, an orthopedic surgeon, who ultimately performed three surgeries on the claimant's right shoulder. The first surgery was performed on May 13, 2010, and involved an AC joint resection, distal clavicle resection, and repair/reattachment of the rotator cuff tendons, which had been completely avulsed. The second surgery was done on July 21, 2010 to repair a recurrent tear of the supraspinatus tendon. She underwent a third surgery on February 7, 2013, which was a manipulation under anesthesia (MUA) to address a "frozen shoulder." Dr. Meinig also found that her deltoid had detached.

3. The claimant has continued to suffer from significant pain and limitation in her right shoulder and arm despite extensive treatment. She has also had significant pain, muscle spasm, and trigger points affecting her neck.

4. The claimant returned to work in a part-time, modified duty position for the respondent-employer in January 2011. She initially started at six hours per day, with the hope of working up to eight hours shifts. However, the work severely aggravated her condition, despite substantial accommodations provided by the respondent-employer. As a result, her schedule was reduced to four hours per day.

5. The aggravation resulting from her work activities is repeatedly documented throughout her medical records, particularly her contemporaneous physical therapy records. She was forced to resign her position in November 2012, and has not worked since that time.

6. The respondents admitted liability for TTD benefits after the claimant stopped working. However, the respondents did not pay TTD benefits. Rather, they continued to pay TPD benefits at the same rate they had been paying while the claimant was working part-time.

7. Dr. Tyler became the claimant's primary ATP on January 30, 2012. Dr. Tyler found a number of significant clinical findings on physical examination. For example, she had an anteriorly displaced right shoulder girdle complex, due to significant muscle spasm with active trigger points in multiple locations. Examination of her cervical spine revealed segmental dysfunctions at C4 and C5 due to increased myofascial tone in the superior medial periscapular muscles as well as some myofascial trigger points in the scalenes and splenius capitis muscles on the right.

8. Dr. Tyler placed the claimant at MMI on October 9, 2013, with a 34% whole person impairment. His rating included a rating for the neck. Dr. Tyler opined that

> [t]his patient also has pathology in the cervical spine related to chronic spasticity in the right posterior and lateral cervical spine brought on by the injuries suffered to the right shoulder. There is objective finding of spasms with myofascial trigger points and even localized areas of segmental dysfunctions in the cervical spine based on clinical examination today. There is even some soft tissue swelling in the supraclavicular notch related to ongoing chronic spasticity in the cervical spine, which gives further objective evidence of injury to this region.

9. The respondents filed a Final Admission of Liability (FAL) on June 10, 2014. The FAL admitted liability for medical benefits after MMI.

10. The claimant has been exercising with the assistance of a personal trainer for the past several years. The claimant has paid for these services out of her own pocket.

11. Dr. Tyler opined that the ongoing use of the personal trainer services is not reasonable and necessary treatment for the admitted injury. Dr. Raschbacher agreed that ongoing personal trainer services were not reasonable or necessary. The ALJ finds these opinions to be credible.

12. Mr. Fitzgibbons opined that the claimant is unable to obtain or sustain employment in any occupation. Mr. Fitzgibbons based his opinion on several factors, including Dr. Tyler's opinions, the results of a valid functional capacity evaluation (FCE), the claimant's inability to sustain her part-time accommodated modified-duty assignment with the respondent-employer, the limitation to part-time work, and the claimant's advanced age. Mr. Fitzgibbons also opined that the effects of chronic pain would substantially impair the claimant's ability to obtain and maintain employment on a consistent basis. Mr. Fitzgibbons also opined that none of the occupations identified by the respondents' vocational expert, Ms. Nowotny, were suitable for the claimant.

13. Ms. Nowotny opined that the claimant can work as a telemarketer/ customer service representative, retail sales clerk, parking lot attendant, or receptionist.

14. The ALJ finds that the opinions of Mr. Fitzgibbons are credible and more persuasive than vocational opinions to the contrary.

15. The ALJ finds that the opinions of Dr. Tyler are credible and more persuasive than medical opinions to the contrary.

16. The ALJ finds that the claimant has established by a preponderance of the evidence that she is unable to earn any wages in the same or other employment.

17. The ALJ finds that the claimant has failed to establish by a preponderance of the evidence that she is entitled to reimbursement for personal trainer services or payment of future personal trainer services.

18. The ALJ finds that the claimant has failed to establish by a preponderance of the evidence that the respondents are responsible for the payment of penalties.

19. The claimant has a surgical scar on the right shoulder that is approximately six inches in length and one-half inch in width at its widest. The scar has a depressed appearance and is discolored when compared to the surrounding tissue. At

one end of the scar is a visible suture that has remained for over six months. The ALJ finds that the claimant should be awarded $1,200.00 for this disfigurement.

CONCLUSIONS OF LAW

1. A claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

3. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

4. A claimant is permanently and totally disabled if she "is unable to earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. 2005. In determining whether the claimant is unable to earn any wages, the ALJ may consider a number of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). These factors include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within her limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining employment. *See e.g.*,

Case v. The Earthgrains Co., W.C. No. 4-541-544 (ICAO, September 6, 2006); *Cotton v. Econ. Lube N Tune*, W.C. No. 4-220-395 (ICAO, January 16, 1997). Consequently, if the evidence shows the claimant is not physically able to "sustain" employment, the ALJ can find that she is not capable of earning wages. *Joslins Dry Goods Co. v. ICAO*, 21 P.3d 866m 868 (Colo. App. 2001).

5. If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits which are reasonably necessary to cure and relieve the work-related injury. C.R.S. §8-42-101; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). Where liability for a particular medical benefit is contested, the claimant must prove that the treatment reasonably necessary and is causally related to the industrial injury. See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997); *Grover v. Industrial Commission,* 759 P2d 705 (Colo. 1988). Whether services are medically necessary for treatment of a claimant's injuries or incidental to obtaining such treatment is a question of fact to be determined by the ALJ. *Bellone v. Indus. Claim Appeals Office of the State,* 940 P.2d 1116 (Colo. Ct. App. 1997).

6. Section 8-43-304(1) subjects an insurer to penalties for violation of the Act, violation of the rules, or violation of an order. *Holliday v. Bestop, Inc*., 23 P.3d 700 (Colo. 2001). The maximum penalty is $1,000 per day for conduct occurring after August 11, 2010. *Robinson v. Goodbye Blue Monday*, W.C. No. 4-613-287 (ICAO, April 21, 2011). The failure to comply with a procedural rule is a failure to obey an "order" within the meaning of § 8-43-304(1). *Paint Connection Plus v. ICAO*, 240 P.3d 429, 435 (Colo. App. 2010). "An insurer or employer fails to obey an order if it failed to take the action that a reasonable insurer or employer would take to comply with the order." *Id*.

7. The imposition of penalties under § 8-43-304(1) is a two-step process. The ALJ must first determine if the Respondents violated a rule or statute. If so, the ALJ also must determine whether the violator's actions were objectively reasonable. *Thomson v. Pioneers Hospital of Rio Blanco County*, W.C. No. 4-536-930 (ICAO, April 14, 2004). Whether the insurer's action was objectively reasonable depends on whether it was predicated on a rational argument based on law or fact. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312, 1313 (Colo. App. 1997).

8. Section 8-42-108 provides for additional compensation if an employee is permanently disfigured about the head, face, or parts of the body normally exposed to public view.

9. As found above, the preponderance of persuasive evidence demonstrates

that the claimant is unable to earn any wages in the same or other employment. Accordingly, she is permanently and totally disabled under the Workers' Compensation Act of Colorado.

10. The claimant is not capable of sustaining competitive employment, even on a part-time basis. A finding of PTD in this case is supported by objective medical evidence regarding the claimant's severe pathology; the persuasive testimony of Dr. Tyler; the persuasive vocational opinions of Mr. Fitzgibbons; and the credible testimony of the claimant, her spouse, and the claimant's personal trainer.

11. Dr. Tyler has been the claimant's primary authorized treating physician (ATP) since January 2012. This longitudinal treatment relationship allowed Dr. Tyler to develop a good understanding of the claimant's functional capacity and tolerance for activities.

12. Dr. Tyler provided permanent work restrictions when he placed the claimant at MMI. In addition to physical limitations, Dr. Tyler opined at hearing that the claimant's chronic pain has significantly impacted her emotional state. With respect to the claimant's capacity to sustain employment in general, Dr. Tyler opined that she would not be able to tolerate work activities on a regular basis, even in a part-time, sedentary job.

13. The ALJ finds Dr. Tyler's testimony and opinions to be credible and persuasive. The ALJ finds Dr. Tyler's opinions more persuasive than the contrary opinions expressed by the respondents' expert, Dr. Raschbacher.

14. As found above, Mr. Fitzgibbons opined that the claimant is unable to obtain or sustain employment in any occupation. The ALJ concludes that the opinions of Mr. Fitzgibbons are credible and more persuasive than vocational opinions to the contrary.

15. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is unable to earn any wages in the same or other employment.

16. In light of the foregoing finding that the claimant is permanently and totally disabled, the issues of permanent partial disability and challenging the DIME are moot.

17. The ALJ concludes that the claimant's unreimbursed expenses for personal trainer services were not reasonable and necessary treatment for the industrial injury. The ALJ concludes that ongoing personal trainer services are not reasonable and necessary treatment for the industrial injury.

18. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence a basis for imposition of penalties.

19. The claimant has sustained a permanent disfigurement as a result of her compensable injury. The ALJ concludes that the claimant should be awarded $1,200.00 for this disfigurement.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay permanent total disability benefits based on the admitted AWW, subject to the applicable offset for Social Security retirement benefits, commencing October 9, 2013, and continuing until terminated according to law;

2. The claimant's request for permanent partial disability benefits is dismissed as moot;

3. The claimant's requests for reimbursement of personal trainer services, and payment of ongoing personal trainer services are denied and dismissed;

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

5. The respondent-insurer shall pay $1,200.00 to the claimant for disfigurement;

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

7. Any and all issues not determined herein, and not closed by operation of law, are reserved for future decision.

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

DATE: August 20, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-834-919-04

ISSUE

- Whether the ligament reconstruction tendon interposition ("LRTI") surgical procedure recommended by Dr. Thomas Fry to eliminate stress on the scaphotrapezotrapezoidal ("STT") joint of Claimant's right hand is related, reasonable, and necessary to cure and relieve the effects of her industrial injury.

FINDINGS OF FACT

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

1. Claimant is a 29 year old, right hand dominant woman who sustained an occupational disease to both her left and right hand as a result of her work as a medical equipment assembler for Employer. The job required repetitive use of both her hands including constant gripping, grasping and use of tools to clip and clamp. Claimant has undergone extensive medical treatment, including multiple surgeries since that time. But, she has not yet achieved her desired result in her right hand and now requests an LRTI procedure be performed on her right wrist.

Course of Treatment

2. On September 16, 2009, Dr. Fry performed surgery on Claimant's right hand/thumb; a carpometacarpal ("CMC") joint arthroscopy. Claimant testified that this procedure was to remove a chip in her right thumb joint. The operative report noted that a loose body was suggested on X-ray but none was seen at the time of the procedure.

3. On March 29, 2010, Dr. Fry performed a second surgery on Claimant's right hand/thumb. Iit included an exploration of the STT joint and CMC joint, capsulorrhaphy with reattachment of volar beak ligament, reconstruction of the volar ligaments and capsule. Claimant testified that the purpose of that surgery was to put a pin in her right thumb to stabilize her thumb joint. The operative note indicates that the indication for surgery was chronic pain and instability that had been unresponsive to non-operative treatment. The report indicated that the STT joint was intact; but the CMC joint was unstable with a medial evulsion of the volar beak ligament and extremely lax volar capsule.

4. Claimant testified that her right hand was in a cast for a significant period of time, and during this time she began to develop difficulties with her left thumb, particularly after she returned to work because her right hand was casted.

5. On December 8, 2010 the same problems developed in Claimant's left thumb, Dr. Fry performed surgery on Claimant's left hand/thumb; a left volar beak

ligament reconstruction and volar CMC joint capsular augmentation. The purpose of the surgery was to stabilize the CMC joint with a pin. The surgical notes indicate that Claimant had left thumb CMC joint instability and capsular laxity with volar beak ligament laxity. Dr. Fry noted a thinned and lax volar capsule with a lax volar beak ligament. Dr. Fry noted that on examination the CMC joint had significant attenuation of the volar capsule and significant laxity of the joint.

6. On July 19, 2011, Claimant's ATP placed her at MMI, provided an impairment rating, and placed her on work restrictions.

7. On December 27, 2011, Dr. Timothy Sandell performed a Division IME. He rated Claimant's impairment as a 3% upper extremity rating for her left hand. Although Dr. Sandell agreed with MMI, he advised that should Claimant have a significant change in symptoms, she may need a follow up evaluation with a hand surgeon and this can occur on an as-needed basis. The ALJ who presided over an earlier hearing found that both of Claimant's hands were included in her claim and Dr. Sandell had erred by failing to include her right hand in his evaluation and failing to provide an impairment rating.

8. Claimant continued to have pain in her bilateral thumb joints, with locking, popping, and pain. She continued to have difficulty using her hands for everyday activities.

9. On October 8, 2012, Dr. Thomas Mordick conducted a Respondents' IME. After examining Claimant, Dr. Mordick stated that objective findings were not present to correlate to Claimant's subjective pain. Dr. Mordick indicated Claimant's current symptomology was not evident on x-rays, which showed stable CMC joints of the thumb with possibly very slight laxity on the right side still within the physiologic range. Claimant did not demonstrate evidence of swelling, crepitus, or arthritic changes. Dr. Mordick noted Claimant's historic presentation to doctors had been inconsistent with regards to range of motion. Specifically, Dr. Mordick referenced Claimant's Functional Capacity Evaluation ("FCE") conducted on July 13, 2011, in which Claimant showed normal function of her right thumb with above-average grip strength. By October 8, 2012, Claimant showed very limited strength even though she has had no "forceful employment." Dr. Mordick recommended no future surgeries or treatment, with the possibility of maintenance care for pain control issues.

10. On June 17, 2013, Administrative Law Judge Bruce Friend found that Claimant's condition had worsened by April 17, 2013, and reopened her case. Respondent's reinstated TTD on June 11, 2012. TTD remains ongoing.

11. On July 23, 2013, Dr. Fry performed a left thumb CMC joint fusion surgery on Claimant's left hand/thumb. Prior to surgery, Dr. Fry noted that despite a significant decrease in activities, Claimant was no longer working but in school, her left hand was very painful. He noted synovitis, crepitance, and instability at the CMC joint. The surgery notes indicate that the indication for surgery was chronic pain CMC joint with failure of soft tissue reconstruction. Claimant had severe pain which interfered with the

motion of her left thumb in forceful and simple activities of daily living.

12. Claimant testified that the left thumb fusion performed by Dr. Fry on her left thumb "helped a lot," and that although it remains achy, the pain is tolerable and she can live with it.

13. On February 25, 2014, Dr. Fry performed a CMC joint fusion surgery on Claimant's right hand/thumb. He performed the fusion because Claimant complained of ongoing pain, especially when the joint would "pop" out of place. Dr. Fry noted during the surgery that there were "significant chrondromalacic changes in the CMC joint with a pencil eraser size state chrondromalacic change and the majority of the rest of the base of metcarpal was stage III chondromalacia."

14. Following the right CMC joint fusion, Claimant had ongoing difficulties. On May 28, 2014, three months post right CMC joint fusion, X-rays showed incomplete healing and incomplete bridging of the fusion. Dr. Fry left Claimant in a thumb spica cast and was concerned that Claimant was still experiencing discomfort and pain. Claimant remained casted as of June 9, 2014.

15. Respondent requested that Claimant undergo an IME with Dr. Jonathan Sollender, a plastic surgeon, on June 12, 2014. Dr. Sollender indicated that he was unable to physically examine Claimant's right hand, wrist and thumb because her right hand and wrist were still in a cast and no quality hand examination was able to be performed at that time. He opined that it was nearly impossible for a 28 year old to have osteoarthritis. He questioned whether a genetic-based collagen disease could be causing Claimant's problems, and noted that a Connective Tissue Disease would explain the significant laxity in her thumbs. He recommended a formal evaluation by a rheumatologist for connective tissue disorders, and noted that even if auto-immune conditions are ruled out, a possible skin biopsy for evaluation of connective tissue disorder might be worthwhile.

16. Dr. Sollender opined Claimant's current condition long ago ceased to be related to her work. Her work only transiently aggravated her underlying condition, but the aggravation was not permanent. Whatever current care was afforded to her through workers compensation specific to her right thumb CMC joint fusion needed to be completed, barring any complications specific to her CMC joint. Further treatment should be outside workers compensation. Dr. Sollender also indicated that he believed that Claimant would begin to have problems with the STT joint, which is adjacent to the CMC joint, and that a stabilization surgery might become necessary in the future because when a person has laxity in a joint and the joint is stable the laxity will start to bother contiguous joints. According to Dr. Sollender the stabilization should not be by fusion because if you fuse all the joints, Claimant will be unable to operate her thumb in conjunction with her hand. Dr. Sollender noted that activities such as buttoning her blouse to turning the keys in car were then aggravating her condition.

17. On August 4, 2014 Dr. Fry removed the retained hardware from Claimant's right hand fusion cite.

18. Dr. Fry referred Claimant to Dr. Hompland for pain control. On August 27, 2014, Dr. Hompland noted that Claimant was doing worse after a right wrist fusion and that any activity can cause her thumb to pop at this point and it is very painful.

19. Claimant saw Dr. Fry on September 2, 2014. His notes indicate that "following cast removal Claimant notes that she is having numbness and tingling and cramping in the hand." She notes that she is having a "popping or catching" at the base of the thumb that is different than the previous problem because the pain in the previous area is gone. The numbness tingling and cramping do not appear to be related to the clicking in the base of the thumb." Dr. Fry indicated that x-rays showed the fusion to be solid but he suspected ulnar neuropathy. He was uncertain of the cause. Dr. Fry ordered an EMG to determine whether or not there is an ulnar neuropathy. There is notation during this examination of tenderness at the adjacent STT joint.

20. On September 9, 2014 Dr. Woodward performed the EMG and documented mild median neuropathy at the right wrist.

21. On October 14, 2014, Claimant told Dr. Hompland that she was not currently involved in physical therapy because there was concern that that the fusion may not have been successful because she continued to experience instability and pain.

22. On October 28, 2014, Dr. Fry followed up on Claimant's right thumb popping, pain, and instability. "Patient appears to have significant pain at the scaphoid trapezial [ST] joint. X-rays are normal today for this joint. This suggests a capsular contracture due to prolonged immobilization, perhaps local scarring, and inflammation." He opined that Claimant's CMC joint was healing nicely, but the adjacent ST joint was problematic. Dr. Fry notes significant pain at the distal ST joint. He injected the ST joint on October 28, 2014. On November 25, 2014, Dr. Fry reported that Claimant's right thumb pain was worse following the injection. He recommended that Claimant seek a second opinion.

23. On November 6, 2014 Claimant was evaluated by rheumatologist Dr. Muddapa Kalajah who indicated there was no evidence for underlying arthritis or systemic connective disuse disorder. He indicated that Claimant's pain and symptoms were only in the bilateral CMC joints and because she has no swelling redness, tenderness, or morning stiffness in any other joints that did not point towards systemic connective tissue disorder. He also indicated that she did not have any other signs and symptoms suggestive of lupus, systematic solerosis or Sjogren's syndrome. He recommended obtaining imaging studies of her hands and feet to rule out erosions or other findings that are commonly seen in inflammatory arthritis and to obtain laboratory studies to include serologic studies to evaluate for rheumatoid arthritis, lupus or other connective tissue disorders.

24. On November 12, 2014, Claimant reported to Dr. Hompland that the last time she saw Dr. Fry; he thought that the popping was coming from the adjacent ST joint.

25. On December 1, 2014, Dr. Fry's notes indicate that he discussed Claimant's various further treatment options. He noted that although she was young, it was his recommendation that she consider an LRTI type of procedure. Dr Fry indicated that this would eliminate both the stress of the fusion on the STT joint as well as any degenerative problems at the ST joint. It would also eliminate any bone spurs she may have. He opined that using her own tendons for the surgery gave her a good chance of a long term result. He did not recommend an implant arthroplasty for the CMC joint. Claimant indicated she would like to proceed with the surgery. She decided to see Dr. Michael Gordon at University Hospital for a second opinion.

26. On December 30, 2014, Claimant returned to Dr. Hompland with ongoing bilateral wrist pain, right greater than left. He noted her wrist pain was aggravated by wrist motion and cold weather. Nevertheless, Claimant continued with all activities of daily living although she limited the use of her hands. Dr. Hompland recommended a psychological evaluation/treatment and a second opinion regarding additional hand surgery. The psychological evaluation/treatment have not yet occurred.

27. On January 12, 2015, Claimant saw Dr. Fry and reported a right thumb injury while brushing her hair and that she heard two pops. She re-expressed her desire to pursue surgery. Dr Fry recommended right thumb LRTI, tendon frat/transfer with excision of trapezium. According to Dr. Fry, Claimant pointed to the STT joint which she has treated with ice and immobilization. Claimant wants to proceed with the recommended surgery. Dr. Fry noted that her then-current options were implant arthroplasty, LRTI, STT fusion, or living with it. It was Dr. Fry's opinion that the STT fusion would significantly increase stress on the remainder of the wrist and limit her ability to use her thumb. He did not recommend the implant arthroplasty because of the significant chance of failure at some point in the future. He opined that the LRTI had a good chance of giving acceptable motion and stability in addition to relieving stresses on the other joints. Dr. Fry noted that Claimant is young for the recommended procedure, and that with her healthy tissue and mobility she had a good chance for long term relief. She was advised that even with this surgery she would be unable to return to heavy hand activities such as manufacturing type work. Dr. Fry requested authorization for the surgery on this date.

28. On January 13, 2015, Claimant reported to Dr. Hompland that Dr. Fry had recommended a new surgical procedure to insert a tendon into the joint space to avoid the popping and subsequent pain, and to avoid instability and allow motion.

29. On February 11, 2015, Dr. Kalajah prepared a report following his October 2014 evaluation of Claimant for inflammatory arthritis/systemic connective tissue disorders. Dr. Kalajah concluded that "at this point, I do not see any evidence of underlying systemic connective tissue disease or inflammatory arthritis. Bilateral CMC arthritis appears degenerative in nature. Unsure why a young 29-year old otherwise healthy woman would have such significant degeneration of both CMC joints."

30. On April 3, 2015, Dr. Michael Gordon evaluated Claimant on Dr. Fry's referral for a second opinion regarding Claimant's condition and proposed medical

treatment. Dr. Gordon noted this is an extremely complicated case and that Claimant presented with no significant improvement despite repeated surgical intervention. Dr. Gordon does note marked tenderness over TMC joint and mildly positive grind test. Dr. Gordon believes that there is tenderness suggestive of STT tenderness but this is minor compared with the TMC joint. On exam, Dr. Gordon was unable to identify the ST joint as a source of Claimant's symptoms. Dr. Gordon pointed out that x-ray and MRI studies were inconclusive regarding that joint as the location of pain. "Throughout this there has been a paucity of objective findings to be able to document the pathology at least by a study (x-ray or MRI.)" Dr. Gordon noted that Claimant is young and that the presence of pain symptoms suggested some sort of underlying pathology that may never be diagnosed. Dr. Gordon agreed with Dr. Sollander's recommendation for further evaluation by a rheumatologist, apparently unaware of Dr. Kalajah's work-up. In Dr. Gordon's opinion, the treating physician needed to definitively identify the source of pain through diagnostic injections or radiographic imaging. Even if the source of symptoms is the ST joint, Dr. Gordon was "extremely reluctant" to offer intervention, and noted that any intervention should be undertaken with "great trepidation" as "to consider a fourth surgical procedure for her right thumb, I think, is definitely stretching the limits of our surgical abilities to manage the patient in any rational way."

31. The medical records document that Claimant does well with her hand in a cast. When her hand is not in a cast she has locking, popping, and pain when using her hand to perform everyday hand functions.

32. Claimant testified that her understanding of the requested surgery was that Dr. Fry was going to take tendons from her arm and put them in and around her thumb joint so it can't and won't pop and will allow her to use the thumb with stability. No other persuasive evidence of what the LRTI surgery involved was presented.

33. Respondent filed an Application for Hearing denying Dr. Fry's request for surgery as being unrelated and not reasonable or necessary to cure and relieve the effects of the industrial injury.

34. Claimant's provided Dr. Fry with Dr. Gordon's report and asked for comment. Dr. Fry indicated that the site of the Claimant's current crepitance and symptoms had been identified and a reasonable surgical procedure was available to treat it. Claimant was not at MMI. Dr. Fry recommended removal of bone spurs and a LRTI to recreate thumb motion, stability, and eliminate the ST and TMC impingement and crepitus that are producing the ongoing pain.

35. Dr. Fry was specifically asked whether he agreed with Dr. Gordon that the ST joint was not definitely localized as Claimant's ongoing pain generator. Dr. Fry responded that he reviewed Dr. Gordon's excellent and complete report but that Dr. Gordon must not have been provided with all of the medical records specifically the most recent X-ray that would have provided him with the information that Claimant's TMC joint had been fused and therefore on physical examination there could not be crepitance at a joint that no longer exists. Dr. Fry indicated that he felt the crepitance that Dr. Gordon was feeling and describing was partially at the ST joint, but primarily

from the interface between the fusion site and the trapezoid and index metacarpal. Dr. Fry noted that the recent X-rays noted significant irregularity and spurring at that site.

36. Dr. Fry was asked to respond to Dr. Gordon's statement "that a fourth surgical procedure for her right thumb is definitely stretching the limits of our surgical abilities to manage the patient in any rational way." Respondents' counsel asked Dr. Fry to address how the additional surgery he recommended was reasonable necessary and related to the work injury and designed to cure and relieve the effects of the work injury. Dr. Fry answered that Dr. Gordon's comment was consistent with the multiple surgical procedures and the frustration that all involved feel in a case like this. However it was Dr. Fry's opinion that based upon a reasonable degree of medical certainty that the site of Claimant's recurrent crepitance and symptoms has been identified and a reasonable surgical procedure is available. Dr Fry indicated that each surgical intervention must be evaluated both in its overall context as well as within its isolated set of symptoms and objective findings. In the isolated contest this procedure is completely justifiable and necessary.

37. On May 5, 2015, Dr. Hompland referred Claimant to pain psychology. Claimant has not participated in pain psychology recommended by Dr. Hompland.

38. Claimant testified that her condition on her right thumb remains essentially unchanged since her original injury despite multiple surgeries. She still has pain, throbbing, and sometimes her thumbs pop. Claimant wants to proceed with surgery to restore function, decrease pain, and because she does not want to be in a cast or continue with medications. She understands that the proposed surgery may not help either. Claimant testified that she is participating in pain management with Dr. Hompland, but that is not enough to allow functional use of her right dominant hand. Claimant is concerned that the longer she is casted and has to use her left hand to do all her activities of daily living, that the left hand will "go bad" again.

39. The ALJ credits the opinions of Dr. Gordon over those of Dr. Fry with respect to surgery and that surgery is not related, reasonable, or necessary. Dr. Fry's opinion is not persuasive because of the lack of objective findings to support that Dr. Fry identified a pain generator and that another surgery will cure and relieve the effects of the work injury when multiple prior surgeries failed. The ALJ finds the opinions of Dr. Gordon to be based on a fuller and more accurate understanding of Claimant's medical situation. Therefore, the ALJ finds the opinions of Dr. Gordon to be more credible and persuasive than the opinions of Dr. Fry.

40. Claimant has not established by a preponderance of the evidence that the recommended surgery is related, reasonable, or necessary to cure and relieve the effects of her industrial injury.

CONCLUSIONS OF LAW

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

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999).

Claimant failed to demonstrate that another surgery is reasonable or necessary or related to her admitted work injury. The ALJ credits the opinions of Dr. Gordon and and Dr. Solender over those of Dr. Fry and finds the opinions of Dr. Gordon and Dr. Solender to be more credible and persuasive than the opinions of Dr. Fry. Dr. Fry has performed multiple surgeries on Claimant's right hand/thumb but they failed to accomplish the desired results. Dr. Fry did not indicate that another surgery has any better chance of success. Dr. Fry's opinion is not persuasive, in part, because of the lack of objective findings to support identification of a pain generator. For example, on September 9, 2014, Dr. John Woodward performed an electrodiagnostic evaluation that was essentially normal; on October 28, 2014, Dr. Fry noted popping, pain, and instability at the scaphotrapezial joint but also noted that x-rays were normal for that joint; and Dr. Fry performed an injection that was not diagnostic.

The ALJ finds the opinions of Dr. Gordon to be based on a fuller and more accurate understanding of Claimant's medical situation. Dr. Fry suggested Dr. Gordon perform the second opinion evaluation. Dr. Gordon credibly reported that Claimant presented with no significant improvement despite repeated surgical intervention. Dr. Gordon was unable to identify the scapho-trapezial joint as a source of Claimant's symptoms and he pointed out that x-ray and MRI studies were inconclusive regarding that joint as the location of pain. Dr. Gordon noted that Claimant is young and that the presence of pain symptoms suggested some sort of underlying pathology that may never be diagnosed. Dr. Gordon credibly reported that the treating physician needs to definitively identify the source of pain through diagnostic injections or radiographic imaging. Also, Dr. Gordon opined that even if the source of symptoms is the scapho-trapezial joint, he was "extremely reluctant" to offer intervention, and any intervention should be undertaken with "great trepidation" as "to consider a fourth surgical procedure for her right thumb, I think, is definitely stretching the limits of our surgical abilities to manage the patient in any rational way."

Dr. Gordon's opinion is supported by Dr. Mordick's opinion as far back as October 8, 2012, when Dr. Mordick reported that objective findings were not present to correlate to Claimant's subjective pain. At that time, Dr. Mordick indicated Claimant's then-current symptomology was not evident on x-rays. That is still the case. On October 28, 2014, Dr. Fry noted that x-rays were still normal. Dr. Mordick recommended against future surgeries or treatment, with the possibility of maintenance care for pain control issues. Nevertheless, additional surgeries occurred and, as Dr. Mordick anticipated, despite multiple surgeries, Claimant's condition remains essentially the same as when she initially reported her claim.

Also, on June 12, 2014, Dr. Sollender reported that Claimant's current condition long ago ceased to be related to her work. Her work only transiently aggravated her underlying condition, but never permanently. Whatever current care was afforded to her through workers compensation specific to her right thumb CMC joint arthrodesis needs to bevcompleted, barring any complications specific to her CMC joint. Further treatment should be outside workers compensation. In fact, Claimant has not worked for Respondent for years but continues to aggravate her condition. For example, on August 27, 2014, Dr. Hompland noted right wrist pain worse after her wrist recently popped; and on January 12, 2015, Dr. Fry noted Claimant suffered another significantly painful episode when she was brushing her hair and heard two pops and felt pain.

Other treatments may exist. Dr. Hompland recommended a psychological evaluation and pain psychology; neither of which have occurred. Dr. Gordon recommended the treating physician definitively identify the source of pain through diagnostic injections or radiographic imaging; and that has not occurred.

In summary, the ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate that additional surgery proposed by Dr. Fry is reasonable or necessary or related to her injury at work.

ORDER

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

1. The request for LRTI surgery recommended by Dr. Fry is denied.

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

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

DATED: August 3, 2015

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

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ISSUES

- Whether claimant has proven by a preponderance of the evidence that claimant has sustained a permanent impairment that is not contained on the schedule of impairment set forth at Section 8-42-107(2), C.R.S. allowing for a conversion of her scheduled impairment rating to a whole person impairment rating?

- Whether claimant has proven by a preponderance of the evidence that she has sustained a disfigurement that is normally exposed to public view and allows for an award under Section 8-42-108, C.R.S. as a result of her admitted industrial injury?

- Whether claimant has proven by a preponderance of the evidence that she is permanently totally disabled as a result of the industrial injury?

- The parties stipulated prior to the hearing that claimant's date of maximum medical improvement ("MMI") is May 21, 2014.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on November 7, 2012 when she tripped and fell at work, landing on her knees. When claimant fell, she hit the inside of her left arm on a cart as she fell and injured her left pectoral area and shoulder.

2. Claimant was taken to the Mercy Medical Center Emergency Room ("ER") after her fall. Claimant underwent x-rays at the ER which were negative for any fractures, but did show mild AC joint osteoarthritis. Claimant was provided with medications and a sling and released with instructions to follow up with Mercy Occupational medicine. Claimant was diagnosed on discharge with an axillary contusion, shoulder injury, shoulder dislocation and brachial plexus injury.

3. Claimant was evaluated on November 8, 2012 by Dr. Graham with Mercy Occupational Medicine Center. Dr. Graham noted claimant was complaining of pain in her left shoulder, left elbow, left forearm, left wrist and left hand. Dr. Graham took an x-ray of claimant's wrist and recommended physical therapy. Claimant returned to Mercy Occupational Medicine on November 13, 2012 and was evaluated by Dr. Jernigan. Dr. Jernigan diagnosed claimant with ulnar neuritis along with contusions from the fall. Dr. Jernigan recommended a quick splint and prescribed medications including Neurontin and Relafen.

4. Claimant continued to treat with Dr. Jernigan who ordered a magnetic resonance image ("MRI") of her left shoulder on November 16, 2012. The MRI was

performed on November 30, 2012 and showed a full thickness tear of the distal supraspinatus tendon.

5. Following the MRI, claimant was referred to Dr. Phipps for surgical consultation. Dr. Phipps examined claimant on December 17, 2012. Dr. Phipps noted that claimant likely had lateral epicondylitis associated with her left elbow pain and paraspinal pain involving her neck. Dr. Phipps recommended physical therapy and prescribed valium and Dilaudid. Claimant eventually underwent surgical intervention to repair her left rotator cuff tear under the auspices of Dr. Phipps on January 31, 2013. The surgery consisted of an open repair and sub-acromial decompression. The operative report indicates visual confirmation of the full thickness tear of the rotator cuff. The anchor was noted to have broken which required Dr. Phipps to convert that arthroscopic repair into an open repair of the rotator cuff tendon.

6. Following her surgery, claimant returned to Dr. Jernigan on February 18, 2013 with complaints of a lot of pain post surgery. Dr. Jernigan encouraged claimant to continue to follow up with her post surgical evaluations with Dr. Phipps and continued claimant off of work. By March 28, 2013, Dr. Jernigan noted claimant had begun a course of physical therapy and noted that claimant would likely need a nerve conduction study to see if the nerve going to the deltoid was damaged.

7. Claimant underwent a bilateral nerve conduction study ("NCS") under the auspices of Dr. Wallach on May 7, 2013. The NCS was noted to be abnormal, but Dr. Wallach noted that there was not a severe nerve injury and determined that the atrophy was probably more secondary to disuse. In regards to the primary question of potential axillary nerve injury, Dr. Wallach noted he found no electrodiagnostic evidence of denervation to the deltoid or teres minor.

8. Claimant returned to Dr. Jernigan on May 16, 2013 with complaints of twitching and burning pain in her deltoid. Dr. Jernigan noted a little less atrophy on physical examination. Claimant retuned to Dr. Jernigan on June 6, 2013. Dr. Jernigan noted that Dr. Phipps had recommended claimant undergo a repeat MRI to make sure that was not any posterior recurrent muscle injury. Dr. Jernigan agreed with this course of care.

9. Claimant eventually underwent the MRI of her left shoulder on July 3, 2013. The MRI showed a complete retear of the insertions of the supraspinatus and infraspinatus tendons, retracted to the level of the glenoid with moderate atrophy.

10. Claimant returned to Dr. Phipps on July 9, 2013. Dr. Phipps noted claimant's functionality was quite limited and the MRI showed the retear of the rotator cuff. Dr. Phipps noted that claimant's rotator cuff tear could be irreparable due to the condition of claimant's bone in her shoulder and it's inability to hold an anchor. Dr. Phipps recommended a CAT scan to get a better sense of the bone structure and determine if claimant is a candidate for reattempt at a rotator cuff repair. Claimant was subsequently referred to Dr. Hackett for a second opinion on claimant's further course of treatment.

11. Claimant was examined by Dr. Hackett on August 29, 2013. Dr. Hackett performed a physical examination and diagnosed claimant with left shoulder failed rotator cuff repair with significant decrease in function in her left shoulder. Dr. Hackett referred claimant for another MRI of the left shoulder and noted that he would develop a treatment plan after reviewing the results of the MRI.

12. The August 29, 2013 MRI showed elevation of the humeral head with a large full thickness rotator cuff tear with approximately 4-5 centimeters defect retraction of the supraspinatus and infraspinatus tendons to the level of the glenoid rim, among other changes.

13. Claimant returned to Dr. Jernigan several times during the fall of 2013. Dr. Jernigan noted that claimant had been referred to Dr. Hackett and indicated that MMI would be dependent on what Dr. Hackett recommended as far as additional treatment. Dr. Jernigan continued claimant with work restrictions that included minimal use of the left arm during this time.

14. Claimant returned to Dr. Hackett on December 5, 2013. Dr. Hackett recommended an injection to the left shoulder in order to alleviate some pain and increase her deltoid function. Claimant underwent a second set of injections on January 9, 2014, again under the auspices of Dr. Hackett. Dr. Hackett also recommended that the physical therapist focus on triceps and deltoid strengthening.

15. On February 21, 2014, Dr. Jernigan noted claimant's ongoing neck complaints and referred claimant for six massage therapies. Dr. Jernigan also noted that claimant was continuing to consult with occupational therapy to figure out an orthotic device for claimant. Eventually, it was recommended that claimant receive a Lehrman's brace. Dr. Hackett noted on May 15, 2014 that the Lehrman's brace would offer claimant forearm support thus allowing claimant to rotate her body in order to move her hand and wrist on a keyboard and would successfully allow her to improve her function from an occupational standpoint.

16. Dr. Jernigan eventually placed claimant at MMI on May 21, 2014 and noted that there was nothing further to provide claimant except to allow her to finish physical therapy and get her Lehrman's brace. Claimant returned to Dr. Jernigan on June 11, 2014 for a permanent impairment rating. Dr. Jernigan noted it was difficult to ascertain claimant's range of motion of her shoulder, but used his best judgment to find that it had ankylosed to 0. This equated to a 45% upper extremity impairment for range of motion. Dr. Jernigan provided claimant with an additional 38% upper extremity impairment for a neurologic injury involving the upper brachial plexus trunk with atrophy of the muscles and no motor or sensory use of her C5 trunk of the brachial plexus. Combining the 45% upper extremity and 38% upper extremity rating, Dr. Jernigan came to a total impairment of 66% of the upper extremity. Dr. Jernigan noted that this converted to a 40% whole person impairment rating. Dr. Jernigan noted that claimant's only work restriction would be "no left arm use of significance" and noted that when claimant got the Lehrman brace, she should be able to use her hand and wrist and even elbow to some degree.

17. Claimant eventually underwent a Division-sponsored Independent Medical Evaluation ("DIME") on November 13, 2014 with Dr. Thurston. Dr. Thurston reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Thurston prepared a medical report dated November 16, 2013 and effectively agreed with the 66% upper extremity impairment rating provided by Dr. Jernigan, including the 45% for loss of range of motion and 38% for loss of axillary nerve sensory and motor function.

18. The parties stipulated prior to the hearing to the 66% upper extremity impairment rating, but noted that a dispute existed as to whether the 66% upper extremity rating should be converted to a 40% whole person impairment rating for the issue of permanent partial disability.

19. Following the DIME, respondents filed an application for hearing endorsing the issue of PPD benefits. Therefore, no final admission of liability was entered in this case and the issue of PPD benefits was endorsed as an issue for hearing, but resolved as to the extent of the permanent impairment, by the stipulation of the parties. They only issue involving PPD benefits is merely if the permanent impairment is limited to the schedule of impairment. Claimant endorsed the issue of permanent total disability benefits in her response to the application for hearing.

20. Claimant underwent a vocational evaluation with Mr. Van Iderstine with an interview taking place on September 4, 2014. Mr. Van Iderstine issued a vocational report dated January 28, 2015. Mr. Van Iderstine reviewed claimant's medical records in connection with his report. Mr. Van Iderstine noted that claimant was a 56 year old (claimant was 57 years old at the time of hearing) married female residing in the area of Ignacio, Colorado. Mr. Van Iderstine indicated in his report that he performed a labor market research in the Ignacio and La Plata County geographical area. Mr. Van Iderstine noted that claimant had not driven since January 2013 and opined that he was unable to identify any current job openings that would be appropriate for claimant.

21. Mr. Van Iderstine testified consistent with his vocational report at hearing. Mr. Van Iderstine testified that claimant was left hand dominant and that, based on his review of the medical records, he considered her work restrictions to be that claimant was not able to use her left upper extremity. Mr. Van Iderstine testified that claimant could lift 8-10 pounds maximum.

22. Mr. Van Iderstine admitted on cross examination that he was unaware of Dr. Hackett's report from May 2014 that claimant's use of the Lehrman brace would allow claimant to use her hand and wrist with a keyboard. Mr. Van Iderstine agreed, however, that claimant would be able to use her left hand and wrist to some degree.

23. Claimant underwent a vocational evaluation with Ms. Montoya at the request of respondents. Ms. Montoya interviewed claimant on March 25, 2015. Ms. Montoya issued a vocational report dated April 20, 2015 in which she indicated that it was her opinion that claimant was capable of returning to work in the area of a receptionist, front desk clerk or service cashier.

24. Ms. Montoya testified at hearing consistent with her report. Ms. Montoya noted that claimant had graduated high school and performed on-the-job training while employed with employer. Ms. Montoya testified claimant worked for her family before she went to work for employer. Ms. Montoya testified claimant worked for employer in the banking industry beginning in 1984 and had transferrable skills from that work that included dealing with people, handling money and customer service.

25. Ms. Montoya testified that claimant had not been provided with work restrictions that would limit her standing or sitting or driving. Ms. Montoya testified that the work restrictions she considered when determining claimant's ability to earn wages were the restrictions set forth by Dr. Jernigan in his June 11, 2014 report that limited her use of the left upper extremity.

26. Claimant testified at hearing that she was injured at work and eventually underwent surgery involving a rotator cuff repair that did not take. Claimant testified she was unable to perform keyboarding with her left arm. Claimant testified she did not think she could use her left arm at all. With regard to the Lehrman brace, claimant testified she felt stable while wearing the brace and wore the brace for protection. Claimant testified she has not looked for employment since her injury. Claimant testified she owns a treadmill and can walk for fifteen minutes at most. Claimant testified that she can sit for 15 to 30 minutes before she has to change positions. Claimant testified at hearing that she lies down 10-15 times per day but did not provide credible testimony as to why she needs to lie down or how it relates to her work injury. Claimant's testimony regarding these self-imposed limitations are not credited by the ALJ over the work restrictions set forth by Dr. Jernigan in his June 11, 2014 report.

27. Claimant testified at hearing that she could not carry more than three towels. However, claimant did not explain why she would not be able to carry anything more than three towels when there are no lifting restrictions involving her right hand. While claimant is left hand dominant, claimant's ability to lift up to 8-10 pounds, as testified to by both Mr. Van Iderstine and Ms. Montoya, appears to be the appropriate lifting restriction. This would place claimant's work restrictions in the sedentary work capabilities, as testified to by Ms. Montoya.

28. Claimant testified that she graduated high school in 1978 and attended vocational school in Cortex, Colorado for secretarial courses, but did not receive any certificates. Claimant testified she received on the job training while employed with employer and held positions in the mail room, as a teller, in customer service and as a teller supervisor. The ALJ credits the opinions from Ms. Montoya regarding claimant's transferrable skills obtained with her work in the banking industry and finds the medical restrictions used by Ms. Montoya to be supported by the medical records entered into evidence at hearing.

29. The ALJ credits the testimony of Ms. Montoya regarding claimant's ability to earn wages in the commutable labor market over the contrary opinions expressed by Mr. Van Iderstine and finds that claimant has failed to demonstrate that it is more probable than not that she is permanently totally disabled.

30. The ALJ notes that the medical records document claimant sustained an injury to her shoulder that resulted in surgery involving an open repair and sub-acromial decompression of her left shoulder. Following the surgery, claimant developed atrophy involving her deltoid. Claimant testified at hearing that she has pain in the left side of her neck and between her shoulder blade and her neck.

31. The ALJ credits claimant's testimony at hearing regarding her symptoms involving her left shoulder and notably the atrophy involving her deltoid and finds that claimant has proven that it is more likely than not that she sustained a permanent impairment that is not contained on the schedule of impairment set forth at Section 8-42-107(2), C.R.S. The ALJ therefore finds that claimant has established that she is entitled to a whole person award based on the conversion set forth by Dr. Jernigan and Dr. Thurston.

32. As a result of claimant's November 7, 2012 injury, claimant has disfigurement consisting of a scar on her left shoulder measuring 2 ½ inches in length and ½ inch in width along with a portal scar measuring ½ inch in diameter that was discolored on the back of her left shoulder. Claimant also had a scar on the top and back of her left shoulder measuring 1 inch in length and ½ inch in width and a scar with sutures on the front of her left shoulder measuring ½ inch in length and ½ inch in width. Claimant also had noticeable atrophy of the left shoulder.

33. The ALJ finds claimant has proven that it is more probable than not that she is entitled to an award for disfigurement pursuant to Section 8-42-108, C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2012. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(1) states in pertinent part:

(a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.

(b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

4. It is claimant's burden of proof by a preponderance of the evidence to establish both that she suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is Claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

5. As found, claimant has proven by a preponderance of the evidence that she sustained a permanent impairment to a part of the body not contained on the schedule of impairment. As found, claimant's injury has resulted in atrophy to the deltoid region following her surgery to repair the rotator cuff tear and subacromial decompression. As found, claimant is entitled to an award based on a whole person impairment rating.

6. Based on the stipulation of the parties entered into evidence prior to the hearing, the impairment rating based on the conversion is 40% whole person.

7. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. §8-40-201(16.5)(a), C.R.S. (2007). A claimant therefore cannot receive PTD benefits if he or she is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. See, *Lobb v. ICAO,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances. *Weld County School Dist. R.E. 12 v. Bymer*, Id.

8. The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds*, *Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

9. As found, claimant has failed to establish that she is unable to earn wages in the same or other employment. As found, the opinions expressed by Ms. Montoya regarding claimant's ability to return to work are more credible and persuasive than the contrary opinions expressed by Mr. Van Iderstine.

10. Pursuant to Section 8-42-108, C.R.S. in effect at the time of claimant's injury, claimant is entitled to a discretionary award up to $4,504 for her serious and permanent bodily disfigurement that is normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the ALJ concludes claimant is entitled to disfigurement benefits in the amount of $1,501.33, payable in one lump sum.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant PPD benefits based on a 40% whole person impairment rating.

2. Respondents shall pay claimant disfigurement benefits in the amount of $1,501.33.

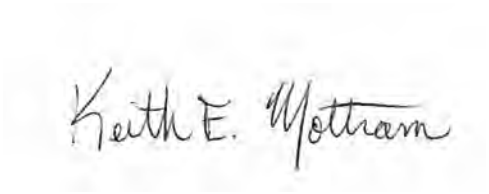
3. Claimant's claim for permanent total disability benefits is denied and dismissed.

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

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

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

DATED: August 17, 2015



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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the L5-S1 disc replacement surgery recommended by Dr. Patel is reasonable medical treatment necessary to cure and relieve claimant from the effects of his admitted November 4,2 011 work injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his low back on November 4, 2011 when he was working in an access room, got tangled in some debris and fell landing on his left hip with his leg going into an opening into the vault below. Claimant was initially seen in the emergency room ("ER") following his injury. Claimant underwent x-rays of the pelvis, right tibia, right fibula and lumbar spine. Claimant was given a prescription and released from the ER.

2. Claimant followed up with Dr. Lorah following his injury. Dr. Lorah had previously treated claimant for a cervical spine issue. Dr. Lorah diagnosed claimant with a lumbar strain with a possible sacroiliac ("SI") joint dysfunction and referred claimant for physical therapy.

3. Claimant was referred to Dr. Lippman, Sr. for medical treatment in April 2012. Dr. Lippman referred claimant for a magnetic resonance image ("MRI") of his lumbar spine. The MRI was completed on June 7, 2012 and showed degenerative disc disease without evidence of nerve root compression. Dr. Lippman referred claimant to Dr. Feler following the MRI for surgical consultation. Dr. Feler issued a report dated June 26, 2012 that noted claimant's ongoing complaints of pain and recommended claimant return to physical therapy. Claimant testified at hearing that Dr. Feler did not recommend surgery.

4. Claimant was referred to Dr. Hahn for facet joint injections in July 2012. After noting that the facet joint injections did not provide any reported improvement, Dr. Hahn recommended epidural steroid injections ("ESI"). Dr. Hahn performed an interlaminar epidural steroid injection at the L5-S1 level on August 21, 2012. Dr. Hahn noted on September 7, 2012 that the claimant did not report any improvement with the injection. Claimant reported some relief following a left sided SI injection on September 18, 2012, but reported no relief, other than for the first 2 hours, following an SI injection on November 20, 2012.

5. Claimant testified he was referred to Dr. Patel by Dr. Lippman. Claimant further testified that he was referred to Dr. Adams by Dr. LIppman and Dr. Adams

recommended stretching and core strengthening. Claimant testified he found Dr. Patel's name on a computer search. Claimant testified Dr. Adams recommended against the original SI joint fusion.

6. Claimant was initially seen by Dr. Patel on February 4, 2013. Dr. Patel reviewed claimant's SI injections and noted claimant was complaining of debilitating pain. Claimant testified Dr. Patel recommended surgery on his first visit.

7. Claimant underwent sacroiliac fusion surgery at the University of Colorado Medical Center on April 25, 2013 under the auspices of Dr. Patel. Claimant remained under the care of Dr. Patel following the surgery. Claimant continued to complain of pain and was eventually referred for a follow up MRI scan on February 27, 2014. The MRI noted no significant changes from his prior MRI in June 2012.

8. Claimant underwent a computed tomogram ("CT") scan with a discogram of his lumbar spine on June 12, 2014. The CT and discogram showed a degenerated L5-S1 disc with an annular tear but no complication of the SI fixation devices. Dr. Patel recommended L5-S1 disc replacement surgery.

9. Dr. Patel testified at hearing in this matter that the proposed surgery was necessary to cure claimant's symptoms. Dr. Patel testified that the L5-S1 level was a pain generator.

10. Respondents referred claimant for an independent medical examination ("IME") with Dr. Rauzzino on September 13, 2014. Dr. Rauzzino reviewed claimant's medical records, obtained a medical history and performed a physical examination of the claimant in connection with his IME. Dr. Rauzzino issued a report that opined that claimant's proposed L5-S1 disc replacement surgery was not related to his November 4, 2011 work injury. Dr. Rauzzino noted that claimant's pain was the result of the SI joint and not from the disc disease at the L5-S1 level. Dr. Rauzzino opined that there was no additional treatment for the left SI joint that would be recommended at this point.

11. Dr. Rauzzino testified consistent with his report at his deposition. Dr. Rauzzino opined during his deposition that the SI joint was claimant's sole pain generator and was treated following his injury. Dr. Rauzzino further testified that if claimant's symptoms were coming from the L5-S1 disc disease, claimant would have reported a significant response to the L5-S1 ESI in August 2012.

12. The ALJ finds the IME report and testimony of Dr. Rauzzino to be credible and persuasive.

13. Dr. Patel testified in rebuttal in this case. Dr. Patel noted that claimant's MRI of June 7, 2012 showed degeneration of the discs at the L5-S1 level. Dr. Patel testified that the June 7, 2012 MRI showed evidence that the L5-S1 disc could be a pain generator as of June 7, 2012. Dr. Patel testified that he believes the L5-S1 disc is the source of claimant's pain because the MRI findings show significant degeneration and

claimant's back complaints are consistent with degenerative disc disease type of pain, and claimant's discogram findings verified the source of claimant's pain. Dr. Patel was not able to provide an opinion, however, as to whether claimant's work injury was the cause of his L5-S1 degenerative disc condition that was causing his pain.

14. Dr. Rauzzino subsequently provided additional testimony in this case after reviewing the testimony of Dr. Patel. Dr. Rauzzino continued to maintain his opinions after the deposition of Dr. Patel that the proposed surgery was not related to claimant's November 4, 2011 work injury.

15. The ALJ credits the opinions expressed by Dr. Rauzzino in his report and testimony and finds that claimant has failed to demonstrate that it is more likely than not that the L5-S1 arthroplasty recommended by Dr. Patel is reasonable and necessary medical treatment related to claimant's November 4, 2011 work injury. The ALJ credits the opinions expressed by Dr. Rauzzino and denies claimant's request for an Order requiring respondents to pay for the surgery recommended by Dr. Patel.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2012. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994).

4. As found, claimant has failed to prove by a preponderance of the evidence that the surgery recommended by Dr. Patel consisting of an L5-S1 arthroplasty is reasonably necessary to cure and relieve claimant from the effects of the industrial injury.

5. As found, the opinions expressed by Dr. Rauzzino in his report and testimony are found to be credible and persuasive regarding the issue involving the relatedness of the proposed surgery to the November 4, 2011 work injury. Therefore, claimant's request for an Order requiring respondents to pay for the surgery recommended by Dr. Patel is denied.

ORDER

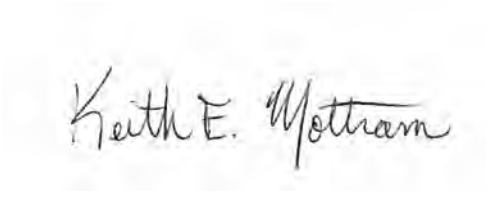
It is therefore ordered that:

1. Claimant's request for an Order requiring respondents to pay for the L5-S1 arthroplasty recommended by Dr. Patel is denied and dismissed.

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

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

DATED: August 28, 2015



Keith E. Mottram
Administrative Law Judge
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ISSUES

1. Whether the respondents have forfeited the right to challenge the opinion of the Division Independent Medical Examiner (DIME) for failure to comply with the jurisdictional deadline contained in C.R.S. 8-43-203(2)(b)(II)(A), C.R.S. 8-42-107.2(4)(c) and WCRP Rule 5-5(F).

2. If the respondents have not forfeited the right to challenge the DIME, have the respondents proven by a preponderance of the evidence that the DIME opinion has been overcome, and if so, what is the most appropriate measure of permanent medical impairment.

3. Whether the claimant has proven by a preponderance of the evidence that she sustained injuries which are not on the schedule of impairments contained in C.R.S. 8-42-107(2) permitting conversion to whole person impairment pursuant to C.R.S. 8-42-107(8).

4. Whether the claimant has proven that penalties pursuant to C.R.S. 8-43-304 and C.R.S. 8-43-305 should be imposed upon the respondents for violation of C.R.S. 8-42-107.2(4)(c), C.R.S. 8-43-203(2)(b)(II)(A) and Rule 5-5(F).

5. Whether the claimant has proven by a preponderance of the evidence that she sustained a substantial and permanent disfigurement pursuant to C.R.S. 8-42-108.

FINDINGS OF FACT

1. The claimant was injured on February 10, 2013 within the course of employment with the respondent-employer. She is employed as a flight attendant. The injury was admitted as compensable by the respondent-insurer.

2. The claimant's injury occurred while she was walking down a concourse at Denver International Airport. She fell to the ground landing on her outstretched left upper extremity. The injury has been admitted as arising out of and in the course of employment by the respondent-insurer.

3. She was initially diagnosed with a comminuted minimally displaced greater tuberosity fracture of the humerus; myofascial strain of the deltoid muscle, triceps muscle and rotator cuff muscles; small full-thickness tear of the supraspinatus muscle; and inferior capsular tear with a tear of the inferior glenohumeral joint complex and inferior labral tear; joint effusion; fluid extending into the subacromial subdeltoid bursa through the rotator cuff tear.

4. As her diagnosis developed she was additionally diagnosed by electrodiagnostic testing with "severe left brachial plexopathy and left axillary neuropathy."

5. She also has developed osteoarthritis in the left hand.

6. The claimant was afforded lengthy and comprehensive diagnostic testing and treatment ultimately reaching the status of maximum medical improvement on August 19, 2014 as determined by her authorized treating physician Dr. Albert Hattem.

7. A functional capacity evaluation was performed which permitted the claimant to return to her job as a flight attendant in the medium physical demand level.

8. The claimant credibly testified that she continues to have marked difficulty with the left upper extremity. She is forced to wear a compression glove at all times on her hand and wrist. She has had to modify her activities so as to use her right hand extensively more than the left. She cannot tolerate having her upper extremity touched. She testified that the upper extremity is always swollen. Further she has lost range of motion in the shoulder. She has decreased grip strength in her left hand. She is unable to fully discern textures of objects by touch. She has a permanent and unremitting tremor in her hand. She has osteoarthritis in the bones of her hand causing thinning of the bones. Due to her loss of range of motion she has great difficulty using her upper extremity above the level of the shoulder. She describes loss of sensation and pain in the upper extremity. Although claimant's pain will wax and wane, it is always present when she uses the extremity. She describes muscle wasting in the entire extremity, including the left thumb.

9. Notwithstanding the release to her regular job as a flight attendant, the claimant credibly testified that she has had to make accommodations and adjustments to her job functions in order to fulfill her duties. She is forced to close all overhead bins in the airplane with her right arm as she experiences pain in raising her left arm above the shoulder. Lifting carry-on bags is a source of pain and difficulty and she likewise primarily uses her non-injured arm to perform this duty.

10. The claimant credibly testified that she feels her condition has deteriorated since the cessation of her occupational and physical therapy. Her sleep is impaired due to the inability to lie on her left shoulder. She described that when she inevitably rolls onto that shoulder she is immediately awakened due to pain in the shoulder. This has an impact on the quantity and quality of her sleep. She has lost the ability to type; play the piano and violin; open jars; hold hands with her husband; clap her hands together; and close a fist, among many other limitations. Her inability to fully use her left arm has caused symptoms of overuse to develop in her right arm.

11. The AMA Guides to the Evaluation of Permanent Impairment (3rd Edition Revised) sets for the parameters for evaluating a brachial plexus injury in Section 3.1h. Administrative notice is given that brachial plexus injuries require an initial determination as to the affected trunks of the brachial plexus (Table 13, page 44). Once the initial determination is made it is then followed by a determination as to whether the injury has caused deficits in pain and sensory function as well as deficits in motor and power function. If there are such deficits a determination as to the severity of those deficits is made using a grading scheme. (Tables 10 and 11, page 42).

12. The initial impairment of permanent impairment was provided by Dr. Albert Hattem, Concentra Medical Centers on August 19, 2014. Dr. Hattem provided a 23% upper extremity and the equivalent 14% whole person impairment rating. His upper extremity impairment consisted of 6% due to loss of range of motion of the shoulder and 18% for impairment due to the loss of motor and power arising from the upper trunk of the brachial plexus. He graded the loss of motor and power as being "2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=25%."

13. Upon receipt of Dr. Hattem's impairment rating, the respondent-insurer filed a Final Admission of Liability (FAL) on September 11, 2014. The admitted permanent impairment was 23% of the upper extremity.

14. The claimant timely objected to the FAL and requested an independent medical examination through the auspices of the Division of Workers' Compensation. Dr. William Watson was selected to perform the DIME.

15. The claimant sought an independent medical evaluation with Dr. Timothy Hall which took place on November 10, 2014. Dr. Hall provided a 53% upper extremity and the equivalent 32% whole person impairment rating. His upper extremity impairment consisted of 4% due to loss of range of motion of the shoulder; 25% due to loss of motor and power from the entire (all three trunks of the) brachial plexus of the

brachial plexus; and 35% for pain and loss of sensation from the entire (all three trunks of the) brachial plexus. He graded the loss of motor and power as being “2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=25%.” He graded the pain and sensory loss as being “3. decreased sensation with or without pain, which interferes with activity-35%.”

16. The Division IME took place on January 20, 2015 with Dr. William Watson. Dr. Watson set forth an extensive description of the history of present illness, chart review, and physical examination. Dr. Watson provided a 49% upper extremity and the equivalent 29% whole person impairment rating. His upper extremity impairment consisted of 9% due to loss of range of motion of the shoulder; 20% due to loss of motor and power from the entire (all three trunks of the) brachial plexus brachial plexus; and 30% for pain and loss of sensation from the entire (all three trunks of the) brachial plexus brachial plexus. He graded the loss of motor and power as being “2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=20%.” He graded the pain and sensory loss as being “3. decreased sensation with or without pain, which interferes with activity-30%.” It is noteworthy that Dr. Watson stated that the decreased range of motion of the shoulder is directly related to the pathology within the shoulder and not to the neurological injury. Further, it is noteworthy that he stated in the neurological impairment section, “…my (physicial) evaluation showed that she has sensory loss both in the upper, middle, and lower trunk.”

17. The respondent-insurer commissioned an independent medical examination with Dr. Allison Fall. This examination took place on April 24, 2015. Dr. Fall provided a 34% upper extremity and the equivalent 20% whole person impairment rating. Her upper extremity impairment consisted of 8% due to loss of range of motion of the shoulder; 18% due to loss of motor and power for only the lower trunk of the brachial plexus; and 12% for pain and loss of sensation for only the lower trunk of the brachial plexus. She graded the loss of motor and power as being “2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=25%.” She graded the pain and sensory loss as being “3. decreased sensation with or without pain, which interferes with activity-60%.”

18. The brachial plexus is a bundle of nerve roots which begins in the neck. The roots commingle with other nerve roots as they descend towards the upper extremity ultimately becoming individual nerve roots prior to entering the arm itself. It is found that all of the structures of the brachial plexus structures are beyond the “arm.” Consequently, the structures of the brachial plexus are permanently altered and damaged above and medial to the glenohumeral joint and therefore, above the “arm.”

19. Doctors Hall and Watson (DIME physician), both opine that all of the trunks of the brachial plexus remain compromised. It is found that these opinions are credible to the ALJ. It is found that the opinion of Dr. Fall does not rise to the level of clear and convincing evidence. Nor does it rise to the level of a preponderance of the evidence. It is merely a reasonable difference of opinion as between the medical providers.

20. The claimant has proven by a preponderance of the evidence that the situs of her functional impairment extends beyond the arm at the shoulder. Work activities and other activities of daily living cause pain in her arm and shoulder, such that the claimant is unable or limited in her ability to engage in actions requiring overhead movement or movement behind her back, among other things. Her impairment requires her to make adaptations in the performance of work duties and other activities of daily living. The claimant's testimony regarding her sleep disturbance caused by pain into the shoulder is also evidence of functional impairment beyond the arm at the shoulder.

21. The claimant has proven by a preponderance of the evidence that she sustained permanent medical impairment of 29% of the whole person as found by the DIME physician.

22. Contrary to the requirements of W.C.R.P. Rule 11-2(B) there is no indication on the Division IME report dated January 20, 2015, nor the attachments to it, that the DIME physician mailed the report to any party.

23. On March 2, 2015 adjuster Libby Taylor covering for adjuster Bea Calvert, who was on a leave of absence, testified she found no Division IME report in the file and wrote a letter to opposing counsel asking if he had a copy of the DIME report and whether the claimant attended the Division IME.

24. On March 17, 2015, it is uncontroverted that counsel called adjuster, Bea Calvert, to confer with her regarding filing an Application for Hearing on penalties. Bea Calvert credibly testified that she informed counsel she had neither the Division IME report, nor the Notice of Complete DIME in her file. Thereafter counsel faxed the DIME report and the Notice of Complete DIME to the adjuster Bea Calvert on March 17, 2015.

25. Ms. Taylor credibly testified that she evaluated the status of the claim on March 2, 2015 and found neither the Division IME report nor the Notice of Complete Division IME, and testified that therefore she wrote and asked counsel if he would provide the DIME report or if the claimant attended the DIME appointment.

26. Ms. Calvert testified credibly and consistently that after being telephoned by counsel she could not locate and did not receive the Division IME report or the Notice of Complete Division IME prior to March 17, 2015. The first time the respondents had the Division IME report and the Notice of Complete DIME was on March 17, 2015.

27. Based upon a totality of the evidence the ALJ finds that the respondents rebutted the presumption that the Division IME and the Notice of Complete Division IME were actually received by the respondents prior to March 17, 2015.

28. The ALJ finds that the respondents did not have actual notice of the DIME report or the Notice of Complete DIME until March 17, 2015.

29. On March 17, 2015 the claimant filed an Application for Hearing on the issues of disfigurement, PPD, and penalties.

30. On March 18, 2015, the respondents filed an Application for Hearing pursuant to Rule 5-5(F).

31. The respondents substantially complied with this Rule once they had notice of the Division IME report and the Notice of Complete DIME.

32. The ALJ finds that the respondents have not forfeited their right to apply for a hearing in conjunction with the DIME.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondents violated any provisions of the Act or Rules of procedure entitling them to an award of penalties.

34. The claimant has sustained muscle wasting on and about the left hand as compared with her uninjured hand. She has a continuous tremor in the left hand. She is forced to wear a compression glove at all times to avoid the painful sensation of touch. All of these findings are serious, substantial, and normally exposed to public view. The claimant has proven by a preponderance of the evidence that she sustained a substantial and permanent disfigurement pursuant to C.R.S. 8-42-108. The ALJ awards the amount of $2,000.00 for the disfigurement.

35. The ALJ finds that the respondent-insurer has previously paid the claimant permanent partial disability benefits pursuant to their FAL and is entitled to an offset for those payments.

CONCLUSIONS OF LAW

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

2. Scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of C.R.S. §8-42-107.8(c) which state that the DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. See *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

3. Nonetheless, the ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the DIME physician was incorrect in his assessment of the claimant's permanent impairment scheduled rating.

4. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S.* However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. Section 8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in Section 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder. *Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

5. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not

necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled*, Strauch, supra.* Physical impairment relates to an individual's health status as assess by medical means. Disability or 'functional impairment", on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. ICAO, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc., supra at 658.*

6. "Functional impairment" need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7, 2009); Aligaze v. Colorado Cab Co, W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008).* Moreover, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez, v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005); Latshaw v. Baker Hughes, Inc., W.C. No. 4-842-705 (ICAO, December 17, 2013).* Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with the claimant's ability to use a portion of her body to be considered functional impairment. *See Mader v. Popejoy Construction Co., Inc., W.C. No. 4-198-489 (August 9, 1996), aff'd Popejoy Construction Co., Inc., (Colo. App. 96CA1508, February 13, 1997)(not selected for publication)*(claimant sustained functional impairment of the whole person where back pain impaired us of the arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as impairment of the whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits her "capacity to meet personal, social and occupational demands." *Askew v. ICAO, 927 P.2d 1333 (Colo. 1996).* Consequently, an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm at the shoulder. *Walker v. Jim Fucco Motor Co., supra; Strauch v. PSL Swedish Healthcare System, supra; Langton V. Rocky Mountain Health Care Corp., supra.*

7. Whether the claimant has sustained functional impairment beyond the arm at the shoulder is a factual question for the ALJ and depends on the particular circumstances of the individual case. *Walker v. Jim Fuoco Motor Co., supra.* In the instant case, the medical records support that claimant has consistently complained of (and received treatment for) pain, discomfort and functional loss beyond the shoulder

joint. She has increased symptoms while completing activities of daily living as well as activities of employment and upon MMI demonstrated loss of active range of motion of the left shoulder. She testified credibly regarding her inability to move the arm overhead in all planes.

8. As found, the claimant has proven by a preponderance of the evidence that she has sustained a functional impairment beyond the arm at the shoulder entitling her to permanent partial disability compensation based upon an impairment rating of 29% whole person.

9. In *Henderson v. Kaiser Hill Co.*, W.C. No. 4-604-199 (August 3, 2012) the Industrial Claim Appeals Office ruled that the time period to dispute a DIME finding established by §8-42-107.2(4) did not begin to run until after a DIME report is considered final and after the report is mailed by the Division as documented by its Certificate of Mailing. This was to ensure that the parties were provided a final DIME report by a time certain as indicated by the Division's Notice of Completion. Here, the Certificate of Mailing on the Notice of Complete Division IME dated February 4, 2015 indicates mailing on that date. Respondents have submitted testimony of Libby Taylor and Bea Calvert, which establishes that neither the Division IME report, nor the Notice of Complete Division IME were in their possession until March 17, 2015.

10. Due process requires the parties receive adequate notice of a critical determination and the effect of the failure to act. *Hall v. Home Furniture Company*, 724 P.2d 94 (Colo. App. 1996). An Order is a "critical determination." ID. Although a properly executed Certificate of Mailing may create a presumption that notice was finally received, the presumption may be overcome by competent evidence. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The factual assertions of adjusters, Bea Calvert and Libby Taylor, establish that the respondent-insurer did not receive the Division IME report or the Notice of Complete Division IME until March 17, 2015.

11. Section §8-43-304 C.R.S. provides that an insurer who refused to obey any lawful Order made by the Director shall be punished by a fine of not more than $1,000.00 per day for each such offense. The imposition of penalties under this statute requires a two-step analysis. It must first be determined whether the disputed conduct constituted a violation of a lawful Order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

12. Under the circumstances in this case neither the Division IME report nor the Notice of Complete DIME were received by the respondents until March 17, 2015. As a result, there was no violation of the Act or Rules.

13. The ALJ concludes that the claimant is entitled to an award of $2,000.00 for disfigurement pursuant to C.R.S. 8-42-108.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents request to overcome the DIME with respect to the scheduled rating is denied and dismissed.

2. The respondent-insurer shall pay the claimant permanent partial disability benefits based upon a whole person rating of 29%.

3. The claimant's request for penalties is denied and dismissed.

4. The respondent-insurer is entitled to offset payments previously made for permanent partial disability benefits.

5. The respondent-insurer shall pay the claimant a $2,000.00 award for disfigurement.

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

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

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

DATE: August 18, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Claimant proved by a preponderance of the evidence that she is permanently and totally disabled? If not,

- Whether Claimant proved by a preponderance of the evidence that her scheduled upper extremity impairment rating should be converted to whole person?

- Whether Claimant overcame the DIME physician's opinion that her neck and back conditions are not work-related?

- Whether Respondents overcame the DIME physician's impairment rating? And

- Whether Claimant proved by a preponderance of the evidence entitlement to mileage reimbursement?

FINDINGS OF FACT

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

1. Claimant sustained admitted industrial injuries arising out of her employment on April 8, 2013. Claimant alleges these injuries include her bilateral shoulders; bilateral knees; cervical, thoracic, and lumbar spine; and bilateral upper extremities.

2. Claimant has a pre-injury history of lumbar and thoracic back injuries. In 2010, Claimant filed a workers' compensation claim for a low back injury which was treated and resolved. On April 2, 2012, Claimant went to the University Hospital emergency room complaining of severe back pain. Imaging revealed a herniated thoracic spine disc and Claimant was diagnosed with prolapsed intervertabral disc. The treating physician referred Claimant to the hospital's spinal clinic for further treatment.

3. Claimant has a history of pre-injury shoulder injuries. In 1982, Claimant underwent a right shoulder subacromial decompression. By April 8, 2013 Claimant had asymptomatic moderate acromioclavicular joint arthrosis in both shoulders.

4. Claimant's pre-injury history includes knee injuries and knee osteoarthritis. In 1992, Claimant reported a non-work related left knee injury that was "scoped." A May 23, 2013 MRI of Claimant's left knee revealed advanced patellofemoral chondromalacia, an area of full thickness cartilage loss on the lateral tibial plateau with subchondral cystic change and bone edema, and moderate cartilage loss along the

medial femoral condyle. These conditions, noted on May 23, 2013, are degenerative and would have existed pre-injury, although they appear to have been asymptomatic.

5. Claimant suffers from type II diabetes, which predates the injuries involved in this matter. She has a BMI of 31.

6. On April 8, 2013, Claimant sustained an admitted injury to her left upper extremity and left knee when she tripped over boxes and fell face forward onto her stomach.

7. Before her injury, Claimant worked as a quality control inspector for Employer. Her job involved constant walking between three production lines, lifting receivers onto and off of podiums, and frequent lifting of eight pound items. She was able to perform all of her job duties.

8. Claimant denied having problems with her left shoulder and neck prior to her work injury. She acknowledged prior problems with her right shoulder, low back, and left knee. All of these had been treated and were resolved before April 8, 2013.

9. On April 9, 2013, Claimant saw Dr. Moore at Concentra Medical Center. At that time, she reported pain in her bilateral shoulders, thoracic / cervical spine, and bilateral hips. Claimant also reported hitting her left knee on the floor. Knee x-rays performed that day revealed osteoarthrosis of both knees without acute findings. Physical examination revealed tenderness to the low back and left knee.

10. On April 11, 2013, Claimant returned to Dr. Moore. X-rays of Claimant's cervical spine were negative for any acute fracture or malalignment of the cervical spine. But they did show moderate degenerative disc disease from C4-C7. Claimant added her lumbar spine as an area of pain, along with her medial right knee, prompting Dr. Moore to note, "Patient has added several body parts since her last original visit." However, Dr. Moore had noted lumbar spine pain in his April 9, 2013 exam notes, and only the right knee had been added. Claimant was referred to physical therapy and provided work-restrictions.

11. On April 12, 2013, four days after Claimant's work-related injury, Employer terminated her due to "review of business needs, as well as performance, your [Claimant's] position is being eliminated effective today, April 12th, 2013."

12. On April 16, 2013, Claimant's left knee range of motion was full and pain-free. Claimant reported stocking-glove numbness and tingling in both hands. Dr. Moore opined that this was not consistent with cervical radiculopathy and recommended a shoulder MRI. Dr. Moore noted again that Claimant added a symptom at each visit and was insistent that all of her problems were related to her fall. He referred Claimant to Dr. John Burris.

13. On April 19, 2013, Claimant's left shoulder MRI revealed a full-thickness supraspinatus tear, partial articular surface tear of the subscapularis, and acromioclavicular joint arthrorsis.

14. On April 30, 2013, Dr. Terrell Webb at Concentra evaluated Claimant. He reviewed Claimant's pain diagram and opined that she did not appear to have pain to the extent of her rating of 9/10 pain. Dr. Webb noted that Claimant could sit, stand, change positions, walk, and get on and off the exam table without assistance. Her cervical range of motion was normal.

15. On May 2, 2013, Claimant underwent an orthopedic consultation with Dr. Sean Griggs with complaints of pain in her left shoulder and neck with numbness in her bilateral hands. Dr. Griggs recommended left shoulder surgery and a cervical MRI.

16. On May 9, 2013, Claimant underwent a cervical spine MRI, with findings of multilevel overall moderate cervical spine degenerative changes with broad-based disc bulges and superimposed large posterior protrusions at C4-C5, C5-C6 and C6-C7 which indent the anterior aspect of the spinal cord at multiple levels and cause multilevel spinal canal stenosis. Spinal stenosis was greatest and moderate at C6-C7. There was no abnormal spinal cord signal. Multilevel overall mild neural foraminal narrowing was also present.

17. On May 17, 2013, Claimant was seen in follow up by Dr. John Burris at Concentra. Claimant's primary complaints were left shoulder and left knee, and Claimant's pain diagram indicated complaints involving Claimant's bilateral knees, bilateral shoulders, neck, low back, and bilateral upper extremities. Dr. Burris recommended a left knee MRI.

18. On May 23, 2013, Claimant underwent a left knee MRI revealing advanced patellofemoral chondromalacia, full-thickness cartilage loss along the weight-bearing surface of the lateral tibial plateau, with subchondral cystic change and bone edema, and moderate cartilage loss along the weight-bearing surface of the medial femoral condyle.

19. On June 7, 2013, Dr. Burris opined that Claimant was at an endpoint for care for the left knee and that the work injury did not cause an exacerbation or acceleration of her pre-existing arthritis. The ALJ finds Dr. Burris' opinion on this point to be unpersuasive because it is not supported by his referral of Claimant for further treatment, and it is inconsistent with Claimant's pre-injury ability to perform her job duties. Further, Dr. Burris provide no work-restrictions contrary to all other physicians. Additionally, Dr. Burris' opinions and statement in the medical records often are contradicted by the medical evidence, and Claimant's pain diagrams which consistently documented Claimant's complaints were seemingly ignored by Dr. Burris.

20. On June 19, 2013, Dr. Griggs performed a left shoulder arthroscopic rotator cuff repair, subacromial decompression, and distal clavicle excision.

21. On September 13, 2013, Dr. Burris noted that Claimant had full range of motion in her left shoulder and full strength with abduction. Dr. Griggs noted Claimant had near-full range of motion in her left shoulder.

22. On December 6, 2013, Dr. Burris again opined that Claimant's knee complaints were wholly consistent with her pre-existing degenerative arthritis. However, he referred Claimant to Dr. Sacha for evaluation and treatment of her left knee and left shoulder, and consideration of injection therapy: actions inconsistent with a finding of non-work relatedness.

23. Dr. Sacha performed steroid and viscosupplemental injections for Claimant's left knee. He placed Claimant at MMI on February 18, 2014.

- Dr. Sacha issued a 17% left lower extremity permanent impairment rating for Claimant's left knee injury.

- He issued a 10% left upper extremity rating for Claimant's left shoulder injury, which would convert to a 6% whole person permanent impairment rating.

- Dr. Sacha recommended a gym and pool pass for 12 months, medications, and office follow up.

24. The ALJ finds Dr. Sacha's conclusions that Claimant's left knee injury was related to her work injury and warranted an impairment rating credible and persuasive. The ALJ also finds credible and persuasive Dr. Sacha's conclusions that Claimant's left shoulder injury was related to her work injury, warranted an impairment rating, and conversion to a whole person impairment.

25. On February 28, 2014, Claimant followed up with Dr. Burris. Dr. Burris added osteopathic manipulation to Claimant's maintenance regime as she had done well with chiropractic care and had tightness in her shoulder girdle. Dr. Burris noted no other complaints. However, Claimant had diagramed pain in her neck and noted back symptoms. It appears that Dr. Burris did not assign any work-restrictions.

26. Claimant underwent osteopathic and massage therapy from Dr. Mark Winslow. Dr Winslow assessed cervicothoracic strain and left upper extremity pain, lumbosacral pain, poor rotator cuff strength, poor mobility, overuse of extrinsic and little coordination of intrinsic muscle coordination and strength in the shoulder-movement system impairment.

27. On June 9, 2014, Dr. Beatty performed a DIME.

- Dr. Beatty agreed with Dr. Sacha's February 18, 2014 MMI date.
- He assigned a 23% upper extremity rating, including 14% for loss of range of motion and 10% for the clavicle resection, which would convert to a 14% whole person rating.

- For the left knee, Dr. Beatty assigned a 44% loss of range of motion impairment, combined with a 5% impairment for Table 40, totaling 47%.
- Dr. Beatty did not note in his report any attempt to reconcile the difference between his range of motion measurements and those of Dr. Sacha.
- Dr. Beatty did not assign an impairment of the upper or lower back as he found no objective specific disorder of the spine.
- Dr. Beatty recommended restrictions of 15 pounds lifting, limited overhead and away-from-the-body work, standing and walking limited to one hour per day, and no kneeling, squatting, climbing, or crawling.
- He recommended a fitness center with pool for 1 year, 6 sessions each of osteopathic manipulation and massage, and appropriate medical follow up.

28. The ALJ finds Dr. Beatty's conclusion that Claimant's left shoulder injury warrants an impairment rating and conversion to a whole person rating to be persuasive and credible. The ALJ finds Dr. Beatty's conclusion that Claimant's left knee injury warrants an impairment rating to be persuasive and credible. The ALJ is not persuaded by Dr. Beatty's opinion that Claimant's cervical and lumbar spine complaints are not related to her work injury as she was able to perform all of her job functions before the injury, noted pain in those areas in her initial reports, and Dr Winslow assessed cervicothoracic strain and lumbosacral pain in an earlier assessment. In addition, Claimant's underlying degenerative back issues were asymptomatic immediately prior to the work injury and became symptomatic with the injury. The ALJ is not persuaded by Dr. Beatty's impairment ratings as they do not comply with the AMA Guides. This finding is supported by the opinions of both Dr. Cebrian and Dr. Hughes.

29. On July 10, 2014, Respondents filed a FAL admitting to the opinions of Dr. Beatty, including liability for a 23% left upper extremity rating, 47% left lower extremity rating, and maintenance medical benefits.

30. On September 18, 2014, Claimant's primary care provider, Ruth Knight, P.A. at Arvada Clinic authored a letter noting that due to osteoarthritis of the knees and persistent rotator cuff pathology of her shoulder, Claimant could not stand or walk for any prolonged period, reach overhead or carry any weight above 10 pounds. Ms. Knight opined that Claimant had been unable to work due to her injuries, and was medically disabled.

31. On or about October 27, 2014, Claimant underwent a vocational workers' compensation evaluation performed by O.T. Resources, Inc. with a report date of December 1, 2014. This evaluation included a functional capacity evaluation and employability assessment. Doris Shriver, who authored the report, opined that

- Claimant's work injury had precluded her from returning to her previous employment positions of quality assurance inspector, administrative assistant, hand packager or customer service representative.

- Ms. Shriver felt Claimant had no transferable skills that would fit within her residual functional capacity because she could not stand or walk long enough to work at the light category of work, and hand use could not be an essential function because Claimant has dominant right hand weakness and lacked coordination.
- Ms. Shriver also pointed to other factors which eliminated work including chronic pain, sleep deprivation and behaviors related to depression that Claimant suffered from and which affected Claimant's concentration, memory and pace.

32. Dr. Carlos Cebrian performed a Respondents' IME and issued a report dated December 3, 2014.

- Dr. Cebrian opined that Claimant was at MMI and required no further medical treatment for her work-related injuries.
- Dr. Cebrian felt the only work-restrictions appropriate for Claimant were limited occasional lifting above left shoulder level to 10 pounds.
- Dr. Cebrian opined Claimant did not merit any impairment rating to her left knee.
- He opined that Dr. Beatty erred in providing his rating by failing to investigate or document the disparity between his lower extremity rating and Dr. Sacha's, or to compare ratings with the uninjured knee.
- Dr. Cebrian provided an 18% left upper extremity rating for Claimant's left shoulder.
- Dr. Cebrian opined that Claimant's permanent impairment for her left shoulder did not extend beyond her left upper extremity and the impairment should remain on the schedule of injuries.

33. The ALJ is not persuaded by Dr. Cebrian's decision to not rate Claimant's left knee or provide restrictions. The ALJ finds it more likely than not that Claimant's underlying arthritic condition was aggravated or accelerated by her work injury as she went from functioning well and without pain, to restricted walking with an assistive device and constant pain. The ALJ is also not persuaded that Claimant's left shoulder injury should remain scheduled as she reports and has been treated for pain and tightness in her shoulder girdle, and Dr. Winslow also treated Claimant for symptoms extending beyond the glenohumeral joint.

34. On December 8, 2014 Dr. John Hughes performed a Claimant's IME. His report contained the following opinions:

- Dr. Hughes opined that he agreed with Dr. Sacha that Claimant's work-related injuries were stable and Claimant was at MMI.
- Dr. Hughes opined that Claimant sustained work-related injuries to her neck and low back in addition to her left shoulder and left knee. He

agreed with Dr. Beatty that Claimant was entitled to a left lower extremity rating for her knee based on an incremental increase in the severity of her patellofemoral arthritis as a result of the work injury.

- Dr. Hughes assessed Claimant with cervical spine sprain/strain secondary to her work related fall, with persistent generalized myofacial pain. He also assessed a lumbar spine sprain/strain secondary to her work related fall with persistent lumbosacral regional myofacial pain. He concluded that Claimant's cervical and lumbar spine injuries were work related because her injury was relatively high energy, there was good documentation of cervical and lumbar spine symptoms from early on in her course of care, and he felt she met the criteria for a specific disorder impairment as outlined in Table 53 of the AMA Guides. He opined that in addition to specific disorder impairments of the neurologic system that range of motion impairments should be included as well.
- Dr. Hughes opined that Claimant sustained functional impairment proximal to her left glenohumeral joint as a result of her work-related injuries. Dr. Hughes further indicated that Claimant had left-sided shoulder and neck pain that extends into the cervical region, concurrent with cervical spine pain that was documented throughout Claimant's care. He opined that Claimant's left shoulder impairment should be converted to a whole person impairment rating unless her cervical spine injury were rated.
- Dr. Hughes opined that Claimant's emerging right shoulder problems were not causally related to Claimant's industrial injury. Dr. Hughes opined that the most likely etiology of Claimant's right shoulder was diabetic tendinopathy. Dr. Hughes anticipated an MRI would show evidence of tendinopathy and even a complete rotator cuff tear.
- Similarly, Dr. Hughes felt that Claimant's right arm, hand, leg, and foot involved neuropathic pain that could be severe and substantially limit her residual functional capacity, although not necessarily work related.
- Dr. Hughes opined that Claimant had permanent restrictions from both her occupational and non-occupational conditions which resulted in a residual functional capacity of less than sedentary as defined by the U.S. Department of Labor. Specifically, standing and walking was limited to one hour per day with use of cane. No bending, stooping or twisting or activities involving kneeling or crawling. Lifting and carrying was limited to five pounds, and Claimant should not perform activities that involve fine motor coordination of her dominant right arm and hand as well as any activity that involves reaching or lifting above shoulder level.

35. Dr. Hughes attributed Claimant's standing and walking with a cane restriction, and her restriction on kneeling and crawling, to both occupational and non-occupational factors. He specifically opined, "I believe that the left knee contusion with increased arthritis contributed measurably to the severity of that restriction."

36. Dr. Hughes attributed Claimant's no bending, stooping, or twisting restrictions to her work related spine problems.

37. Dr. Hughes attributed Claimant's lifting and carrying restriction of ten pounds, and her frequent lifting or carrying restriction of five pounds, to her right shoulder diabetic tendonopathy, her left shoulder arthrosis post work-related injury, her lumbar spine injury, her cervical spine injury, her bilateral knee osteoarthritis, and her work-related left knee contusion.

38. Dr. Hughes attributed Claimant's dominant hand restriction of avoiding fine motor coordination and lifting above her shoulder with her right hand to non-work related causes.

39. The ALJ finds persuasive Dr. Hughes' opinions about the relatedness of Claimant's cervical and lumbar spine as she consistently reported pain in those areas beginning with her initial reports to her medical providers. And, while she had pre-injury degenerative arthritis in those areas, her injury aggravated her condition which then became symptomatic. The ALJ also finds persuasive Dr. Hughes' opinions that Claimant's left shoulder and knee should be given impairment ratings. The ALJ also credits as persuasive Dr. Hughes' opinion that Claimant's permanent restrictions from both her occupational and non-occupational conditions resulted in a residual functional capacity of less than sedentary as defined by the U.S. Department of Labor. The ALJ also credits as persuasive Dr. Hughes' opinion that Claimant's permanent restrictions related to her work injuries substantially impair her ability to earn any wages.

40. On December 9, 2014, Claimant underwent a right shoulder MRI with findings consistent with chronic appearing full-thickness tears of the supraspinatus and infraspinatus tendons. Moderate supraspinatus tendinosis and mild to moderate intra-articular biceps tendinosis were also noted.

41. Ms. Katie Montoya performed a vocation assessment at Respondents' request and issued a report dated December 19, 2014.

- Ms. Montoya opined that Claimant retained residual functional capacity to earn wages in the Denver labor market within the work-restrictions provided by Dr. Beatty.
- Ms. Montoya identified employment in the sedentary work category with material handling in the sedentary to light category. Ms. Montoya specifically identified job titles including office clerk, lobby assistant, PBX operator, customer service clerk, customer service representative/call center, and appointment setter.
- Ms. Montoya's report separates the work-restrictions from Dr. Beatty and Dr. Hughes by eliminating non-occupation factors identified by Dr. Beatty. Ms. Montoya acknowledged that the work-related and non-work related restrictions provided by Dr. Hughes may certainly restrict Claimant's capacity to work at this time.

42. The ALJ finds Ms. Montoya's opinion that Claimant retained residual functional capacity to earn wages in the Denver labor market not persuasive as it is based on the work restrictions assigned by Dr. Beatty which the ALJ finds less credible and persuasive than those assigned by Dr. Hughes. The ALJ credits Ms. Montoya's opinion that the work-related and non-work related restrictions provided by Dr. Hughes restrict Claimant's capacity to work at this time.

43. Dr. Hughes testified by deposition on behalf of Claimant as an expert in Occupational Medicine with Level II accreditation.

- Dr. Hughes testified that Dr. Beatty erred in providing Claimant 6% rather than 5% for 40 degrees left shoulder extension. As a result, Dr. Hughes testified Claimant should have received a 22% left upper extremity which would convert to a 13% whole person rating.
- Dr. Hughes opined Claimant sustained a work-related injury to her neck and low back as a result of her injury. In support, Dr. Hughes noted early documentation of cervical and lumbar injuries. As a result, Dr. Hughes felt Claimant satisfied Table 53 criteria pursuant to the AMA Guides. Dr. Hughes opined that Claimant should receive 4% whole person for the cervical and 5% whole person for the lumbar pursuant to Table 53. Additionally, Dr. Hughes opined that Claimant should receive 10% for range of motion loss for the cervical and 6% for range of motion loss for the lumbar spine.
- Dr. Hughes testified that he agreed with Dr. Beatty that Claimant qualified for permanent impairment of the left lower extremity due to the medically probable increase in the severity of Claimant's patellofemoral arthritis arising of her work-related injury.
- Dr. Hughes testified that Dr. Beatty should have measured the contralateral right leg to determine a baseline and should have supported his disparity in permanent impairment ratings pursuant to AMA Guides and DWC impairment rating tips.
- Dr. Hughes testified that both occupational and non-occupational factors contributed to the restriction of limiting walking and standing to 1 hour per day with use of cane. Dr. Hughes testified that limitation on bending, stooping or twisting were attributable to the spine and occupational. Dr. Hughes testified that the limitation on kneeling and crawling were both occupational and non-occupational, as were the lifting and carrying requirements. Dr. Hughes testified that all dominant right arm and hand limitations were non-occupational.

44. The ALJ finds that Dr. Hughes provided a comprehensive evaluation of Claimant and rendered opinions both for and against Claimant. Dr. Hughes credibly supported his opinions and recognized the varying strengths and weaknesses of the competing arguments.

45. Respondents obtained an independent medical exam from Dr. Cebrian.

- Dr. Cebrian noted that Claimant's pain complaints were widespread, had expanded throughout the course of the claim, and were out of proportion to objective findings.
- Dr. Cebrian opined that Claimant's left knee complaints are solely related to her underlying arthritic condition, as there was no diagnostically demonstrated change in anatomy that could be attributed to Claimant's fall.
- Dr. Cebrian opined that Claimant's work-related impairment is restricted to the left shoulder, and assigned an 18% upper extremity rating only.

46. Dr. Cebrian identified several problems with Dr. Beatty's DIME. He noted that the DIME identified range of motion deficits which were not previously seen or identified thereafter. Dr. Beatty's measurements were not reproducible or consistent with any prior measurement. Dr. Cebrian noted that pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 3d ed. Revised, "If the current findings are not in substantial accordance with the information of records, the appropriate course is to undertake further clinical evaluation to resolve disparities and determine the individual's present status." The AMA Guides further state, "If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity." Dr. Cebrian noted that Dr. Beatty failed to explain the difference between his measurements and those of Dr. Sacha. Nor did Dr. Beatty undertake any actions to reconcile the differences. As such, Dr. Cebrian opined that Dr. Beatty's DIME rating was incorrect.

47. Dr. Cebrian testified on Respondents' behalf as an expert in family practice and general medicine, Level II certified. Dr. Cebrian testified Claimant suffers from degenerative arthritis in her cervical spine and bilateral knees, all predating her work injury. Dr. Cebrian testified that Claimant's work-related injuries were limited to her left shoulder. Dr. Cebrian opined that objective testing failed to reveal any acute changes in Claimant's left knee. Dr. Cebrian opined that Claimant's neck and back conditions were not work-related. Dr. Cebrian agreed with Dr. Hughes that Claimant's right upper extremity complaints were related to her diabetes. Dr. Cebrian testified that a rating under Table 40 is improper with no objective evidence that Claimant's arthritic condition was caused by her fall. Dr. Cebrian opined that Claimant's neck and back conditions are not work related, based on the waxing and waning nature of her complaints. He testified that an acute injury would elicit consistent pain complaints. He also opined that Claimant's grasping and reaching restrictions were not work related.

48. The ALJ finds Dr. Cebrian's opinions about relatedness are less credible and persuasive than those of Dr. Hughes. The ALJ notes that pre-injury arthritis is not determinative of whether an injury is work related; neither are acute changes in anatomy required. Additionally, the ALJ finds that Claimant consistently reported

cervical and lumbar spine pain, contrary to Dr. Cebrian's characterization of those complaints as waxing and waning. Dr. Cebrian's opinion that all of Claimant's conditions are pre-existing and degenerative in nature fails to consider elements of legal causation reflecting a work-related aggravation of a pre-existing condition. Dr. Cebrian's opinions are contrast to the opinions of Dr. Sacha, Dr. Beatty, and Dr. Hughes with regard to the left knee extremity impairment rating, work-restrictions, and maintenance medical benefits.

49. Claimant underwent a vocational workers' compensation evaluation performed by O.T. Resources, Inc. on or about October 27, 2014 with a report date of December 1, 2014. This evaluation included a functional capacity evaluation and employability assessment. Doris Shriver, who wrote the report, opined that Claimant's work injury precluded her from returning to her previous employment of quality assurance inspector, administrative assistant, hand packager, or customer service representative. Ms. Shriver felt Claimant had no transferable skills that would fit within her residual functional capacity because she could not stand or walk long enough to work at the light category of work, and hand use could not be an essential function because Claimant has dominant right hand weakness and lacked coordination. Ms. Shriver also pointed to other factors which eliminated work including chronic pain, sleep deprivation and behaviors related to Claimant's depression which affected Claimant's concentration, memory, and pace.

50. Dr. Cebrian testified, contrary to Ms. Shriver that none of Claimant's medications would cause a reduction in her cognitive functioning. Dr. Cebrian testified that Claimant's alleged chronic pain would not cause any cognitive impairment or diminished academic testing as found by Ms. Shriver. Dr. Cebrian acknowledged that lack of sleep could limit job performance from a concentration and focus standpoint. Dr. Cebrian testified that Claimant did not sustain any functional limitation proximal to her left shoulder or to any other body part than her arm that would warrant conversion of the shoulder rating to whole person. Dr. Cebrian testified that none of Claimant's work-related restrictions prevent her from working.

51. The ALJ finds these opinions of Dr. Cebrian not to be persuasive as they are inconsistent with earlier findings regarding relatedness of impairments. Additionally, the ALJ finds it more probably true than not that Claimant's narcotic pain medications, chronic pain, and sleep deprivation would cause cognitive impairment and diminished academic testing as opined by Ms. Shriver.

52. Respondents obtained a vocational evaluation from Katie Montoya. Ms. Montoya interviewed Claimant concerning her education, skills, and work history/experience. Claimant has a high school education. She took several computer programming and Excel classes between 1981 and 2000. Her work experience includes production work, inspecting pharmaceutical products, work as an administrative assistant, and work as a cashier. Ms. Montoya noted that in July 2013, shortly after Claimant's shoulder surgery, while her arm was still in a sling, Claimant applied for and was hired by Anthem. She began a six-week training course as a

customer service representative. Ultimately, however, Claimant quit that job, believing she was unable to complete the training while her arm was in a sling.

53. Ms. Montoya reviewed relevant labor market research materials, Claimant's work history, education, and experience, and the restrictions imposed by the physicians. Using the restrictions imposed by Dr. Beatty, Ms. Montoya opined that Claimant had transferrable skills based on her experience as a cashier, customer service rep, and administrative assistant. Ms. Montoya opined that Claimant could perform work as a clerk, lobby assistant, customer service clerk/representative, and appointment setter. Ms. Montoya reviewed recent job postings in the Denver metro area and located numerous jobs which she opined Claimant was able to perform within Dr. Beatty's restrictions.

54. Claimant testified at hearing that she is currently suffering neck pain; pain going down her shoulder, lower, and upper back; muscle spasms going down both arms; and the inability to user her right hand. Claimant testified that immediately after she fell, she only felt pain in her left knee, but by the next day she also felt pain in both shoulders, her neck, arms, and back, and included this information on her pain diagram. Claimant testified that she had a prior right shoulder surgery but that her condition was fine prior to the current injury. Claimant denied any prior neck problems. Claimant testified that she did have a prior low back injury that had also resolved prior to the current injury. Claimant testified that she had a left knee operation in 2005 and was doing fine prior to the current injury.

55. Claimant testified that her job at Employer was very fast-paced and physically demanding. Claimant was able to perform all the essential functions of her job prior to the current injury.

56. Claimant testified that:

- she experiences muscle spasms going from her neck to her left shoulder, and also across her shoulder blades.
- she has difficulty reaching with her left arm to even comb or wash her hair.
- when she performs range of motion she experiences pain in the front, top, and back of her shoulder region between her neck and shoulder capsule.
- With regard to her left knee, she walks "real slow" without her cane, and that her knee "goes out," and she loses her balance.
- she experiences pain, burning, and a bone-on-bone sensation in her knees. Claimant testified to a loss of strength in her left leg.
- she was able to walk for 15 minutes with her cane before she needed to sit down. She could stand for 30 minutes at a time, but could not stoop or kneel.
- she had referred pain in her left hip and down in to her right foot.

- she had neck spasms and headaches every day with limited range of motion in her neck.
- she has muscle spasms in her low back near her tailbone that radiate into her left hip.
- her right shoulder hurts everyday and she cannot lift anything, and was unable to comb or wash her hair, vacuum, iron or clean.
- she attempted to return to work as a customer service representative at Anthem Blue Cross/Blue Shield, but was unable to perform the job duties and stopped her training due to her injuries.
- her current level of function is less than when she tried working at Anthem.
- she has looked for jobs and sent out applications in hopes that her condition would improve.
- she believes her right shoulder, left shoulder, neck, back, and left knee were all injured in her fall.
- she does not feel she can work due to her pain, functional limitations, and inability to concentrate due to pain, medication, and sleep deprivation.

57. Doris Shriver testified at hearing on Claimant's behalf as a vocational expert and expert in occupational therapy. Ms. Shriver opined that based upon her workers' compensation evaluation of Claimant's physical, academic, cognitive and behavioral testing and medical history, that Claimant is unable to earn wages in the Denver labor market. Ms. Shriver testified to Claimant's performance in the McCarron-Dial Work Evaluation System, also utilized by the Colorado State Division of Vocational Rehabilitation. Ms. Shriver testified that Claimant performed in the 1st percentile in this standardized test wherein individuals need to score in at least the 15th percentile for employability. Ms. Shriver testified that Claimant's ability to function, both physically and cognitively, would be decreased by chronic pain and sleep deprivation. Respondents stipulated that Ms. Shriver opined that Claimant was unable to perform the jobs identified by Katie Montoya as a result of her work-restrictions. Ms. Shriver testified that Claimant's sedentary work-restrictions were the result of her left knee injury. Ms. Shriver testified that restrictions to sedentary, unskilled jobs removed 98% of all jobs. Ms. Shriver testified sedentary jobs restrictions eliminated 75-77% of available jobs. Ms. Shriver further testified that when considering whether Claimant could meet the requirements of certain jobs identified, she did not determine whether Claimant's work-related or non-work related restrictions prevented her from performing those jobs.

58. Katie Montoya testified as an expert in vocational rehabilitation on Respondents' behalf. Ms. Montoya performed a vocational assessment of Claimant, including review of her medical records, personally interviewing Claimant, and performing vocational research. In performing her assessment, Ms. Montoya used Dr. Beatty's restrictions and testified that, within those restrictions, Claimant was capable of returning to work as a cashier, in customer service, clerk, and appointment setter. Ms. Montoya identified several potential jobs that fell within Claimant's restrictions within the

Denver metro area. Ms. Montoya testified that even within the work-related restrictions issued by Dr. Hughes, which are more limiting than those of Dr. Beatty, Claimant would still be capable of working. Ms. Montoya assumed that Claimant was able to meet the pre-employment testing criteria with Anthem before being hired, and was able to understand and complete the training she participated in as evidence that Claimant's cognitive abilities were greater than revealed by Ms. Shriver's testing. Ms. Montoya ultimately opined that Claimant was capable of working within her work-related restrictions.

59. The ALJ finds Ms. Montoya's opinions flawed in that she adopts Dr. Beatty's work restrictions which the ALJ finds less appropriate than those of Dr. Hughes. Ms. Montoya's opinion also does not take into account Claimant's testimony, which the ALJ credits as persuasive, that Claimant was offered the training position at Anthem not based on her merits, but rather on her daughter's lengthy history of successful employment with the same employer.

60. The ALJ finds Claimant's testimony credible. Claimant's testimony that she is incapable of working is consistent with her inability to perform many daily functions such as cooking, personal hygiene, and washing dishes. Claimant has only limited abilities to drive, care for her granddaughter, and shop for herself, and her daughter and grandchildren help her with these tasks. She is only able to use a computer for a few minutes at a time because her dominant hand is weakened, and is limited to minimal standing and walking.

61. The ALJ finds that Claimant has shown by a preponderance of the evidence that she is permanently and totally disabled. This finding is supported by the opinions of Dr. Hughes, Ms. Shriver, and is acknowledged by Ms. Montoya. Claimant has proven by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. Claimant has shown by a preponderance of the evidence that her compensable injuries, including her left shoulder, left knee, cervical, and lumbar spine, are significant causative factors in her permanent total disability, at least in part because they restrict her to a sedentary job, and because they require medication, cause chronic pain, and deprive Claimant of sufficient sleep for her to function in terms of concentration, memory, and pace. Claimant has established a direct causal relationship between her industrial injury and her permanent total disability.

62. Claimant seeks reimbursement for mileage she recorded to attend massage therapy appointments and to meet with Respondents' vocational expert, Ms. Montoya. Claimant clarified some of the mileage numbers at hearing. According to Claimant's testimony, which the ALJ finds credible and persuasive on this issue, Claimant is entitled to reimbursement for a total of 400 miles.

63. In light of these findings, the ALJ need not address the remaining issues.

CONCLUSIONS OF LAW

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

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

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

PERMANENT TOTAL DISABILITY

To prove her claim that she is permanently and totally disabled, the claimant shoulders the burden of proving by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather, the claimant must demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifried*. Thus, while a condition may have been caused by a compensable injury, the ALJ must determine whether that condition caused a claimant to be unable to earn any wages.

In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The question of whether

the claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

Respondents contend the evidence and facts in this matter are similar to those in *Wallace v. Current USA, Inc.*, W.C. No. 4-886-464 (ICAO December 24, 2014). There, according to Respondents, ALJ Felter found that claimant failed to establish a causal connection between her work injury and permanent total disability based on Ms. Montoya's testimony in that case that claimant was capable of working when only her work restrictions were considered. Respondents argue that here, only Ms. Montoya's and Dr. Cebrian's testimony addressed claimant's work-related restrictions.

The ALJ is not persuaded. In *Wallace*, the ICAO affirmed ALJ Walsh's denial of Claimant's request for permanent total disability benefits. There, the ALJ's denial was based on his finding that the opinions of the ATP and the DIME doctor that claimant's injuries were limited to her elbow were persuasive and credible. The ALJ found the opinion of a physical therapist – who the ALJ considered a lay person based on her lack of education and experience -- that the claimant's injuries included her shoulder, cervical spine, back, and right arm, to not be credible or compelling. In addition, the ALJ found that any restrictions caused by claimant's cervical spine, shoulder and right arm did not represent a disability proximately or significantly caused by her work injury. Accordingly, the ALJ denied the claimant's request for permanent total disability benefits. *Wallace* is distinguishable on the facts. Here, the ALJ found Dr. Hughes' more inclusive opinion on related injuries to be the most credible and persuasive. In addition, the ALJ found that work restrictions based on those related injuries were a significant cause of her inability to earn any wages.

The ALJ concludes that Claimant is unable to earn any wages. This conclusion is supported by the credible and persuasive opinions of Ms. Shriver and Dr. Hughes. It is further supported by Ms. Montoya's acknowledgment that if Dr. Hughes' work restrictions were to be imposed – as the ALJ has found they should be – Claimant's capacity to work is restricted.

In reaching this conclusion, the ALJ also considers human factors which she finds also prevent Claimant from earning any wages. Specifically, Claimant is fifty-nine years old; she is in poor physical condition, living a sedentary lifestyle and with a BMI associated with obesity; while she has a high school diploma, her vocational teting indicated her language and math skills are at a fourth or fifth grade level. In addition, Claimant's testimony and medical records support the conclusion that Claimant's ability to handle pain and her perception of pain are very low.

Claimant showed a direct causal relationship between her industrial injury and permanent total disability. Claimant's work related injuries consist of: (1) cervical spine sprain/strain with persistent generalized myofacial pain; (2) lumbar spine sprain/strain with persistent lumbosacral regional myofacial pain; (3) medically probable increase in the severity of Claimant's left knee patellofemoral arthritis; and (4) left shoulder arthrosis post work-related injury. These injuries are the basis of numerous restrictions imposed

by Dr. Hughes and are the bases, at least in significant part, of his restrictions on Claimant's walking, standing, bending, stooping, twisting, kneeling, crawling, lifting, and carrying. Additionally, these injuries have caused Claimant to require medications, suffer from chronic pain, and interfere with her sleep – all of which reduce her concentration, memory, and pace. Claimant's non-work related dominant hand restrictions additionally limit her ability to earn wages. The ALJ concludes that Claimant's injuries and ensuing work-related restrictions are a significant causative factor in her permanent total disability.

MILEAGE REIMBURSEMENT

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove entitlement to benefits by a preponderance of the evidence. Mileage expenses to and from authorized medical treatment are a compensable medical benefit. *Sigman Meat Co. v. ICAO,*761 P.2d 265 (Colo. App. 1988).

Respondents have not contested that the medical appointment to Dr. Sacha, Claimant's receipt of massage treatments, and Claimant's appointment with Ms. Montoya are not authorized reasonable, necessary, and related medical benefits arising out of Claimant's industrial injury. As a result, the mileage expenses to and from the authorized treatments is compensable.

As found, Claimant credibly testified that the mileage logs, corrected by her hearing testimony, accurately reflect the mileage she drove to and from the medical appointments after correction. Pursuant to W.C.R.P Rule 18-6 (E), Claimant shall be compensated $.52 per mile for 400 miles.

ORDER

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

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

2. Claimant is permanently and totally disabled from earning wages.

3. Respondents are liable to Claimant for mileage reimbursement for 400 miles reimbursed at $.52 per mile.

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

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

DATED: August 13, 2015

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

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Written transcripts of The evidentiary depositions of Neil Pitzer, M.D., taken on February 13, 2015 (Pitzer Depo. #1, followed by a page number) and August 3, 2015 (Pitzer Depo. #2, followed by a page number) were lodged with the Office of Administrative Courts on August 6, 2015.

At the conclusion of the hearing, the ALJ established a briefing schedule. Claimant's opening brief was filed on August 18, 2015. The Respondents' answer brief was filed on August 18, 2015. Claimant's reply brief was filed on August 24, 2015, at which time the matter was deemed submitted for decision.

PROCEDURAL

The matter was initially scheduled for hearing on the Claimant's application to overcome the opinion of the Division Independent Medical Examiner's (William S. Griffis, D.O.) that the Claimant was at maximum medical improvement (MMI) on January 22, 2014. At the time of hearing, the Claimant stipulated that he reached MMI on January 22, 2014, the date provided by DIME Dr. Griffis, but that he was no longer at MMI and needed medical care for the diagnosed L5-S1 allegedly work-related pars defect and the Claimant requested reinstatement of temporary total disability (TTD) benefits as of January 15, 2015 when he returned to surgeon Douglas Wong, M.D.

The parties agreed to try the issue of reopening by consent, although it was not listed as an issue for hearing. The Claimant filed a Petition to Reopen the claim, post-hearing, on August 13, 2015, alleging a change in condition and an allegedly mistaken diagnosis by Dr. Wong that the pars defect was **not work-related**.

The Claimant's hearing submission packet contains medical records that do not belong to the Claimant (Claimant 6 #131-134) and, therefore, are not considered as part of the record.

ISSUES

The issues to be determined by this decision concern the Claimant's request that his claim be reopened on the grounds of a change in condition or mistake of fact, based on a diagnosis of a worsening and disabling L5-S1 pars defect, allegedly work-related, which requires medical care and treatment and the Claimant's request for TTD benefits from January 15, 2015, the date surgeon Dr. Wong diagnosed the pars defect [which Independent Medical Examiner (IME), L. Barton Goldman, M.D. was of the opinion that the pars defect was a work-related consequence of the admitted injury of June 2, 2013].

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was injured on June 2, 2013 when he fell from a roof; falling 15 to 20 feet hitting his back on a railing made of a large log before falling to the ground. He was employed as a roofing laborer, lifting 60 lbs and installing shingles on roofs.

2. Douglas Wong, M.D., evaluated the Claimant on June 12, 2013, and noted the presence of a bilateral L5 pars defect. He noted 40 degrees of kyptosis at T12-L1 with ligament disruption. The Claimant had mild compression fractures at T12-L1 and L2. Dr. Wong recommended posterior stabilization to correct the deformity and pain.

3. Dr. Douglas Wong began providing medical care for the Claimant on June 12, 2013. At the initial consultation, Dr. Wong reviewed MRI (magnetic resonance) scans and CT scans noting 40 degrees of kyptosis at T12-L1 with disruption of the lagamentum flavum, mild compression fractures at T12-L1 and L2, and a deformity and gapping of the facets. Dr. Wong also identified and diagnosed the Claimant with a bilateral L5 pars defect, asymptomatic**.**

4. Dr. Wong performed surgery on June 14, 2013 at St. Anthony's Hospital. The operative report documents a posterior spinal fusion at T10-T11; T11-T12; T-12-L1; L1-L2. Posterior segmental instrumentation of T10, T11, T12, L1, L2. Open reduction, internal fixation of T12 fracture and L1 and L2 fractures.

5. Dr. Wong in describing the indications for surgery noted that the patient appears to have asymptomatic **at this point** (emphasis added) L5 lyric pars defect noted on CT scan.

6. Following surgery, the Claimant continued to receive care with Dr. Wong until Dr. Wong placed him at maximum medical improvement (MMI) on November 19,

2013. Dr. Wong is not Level 2 accredited by the Division of Workers' Compensation (DOWC).

7. The Claimant's condition continued to improve and he was released from care by Dr. Wong on November 19, 2013, the date that Dr. Wong declared the Claimant to be at MMI. Dr. Wong also indicated that the Claimant should continue physical therapy, follow up as necessary, will set up FCE (Functional Capacity Evaluation) and impairment rating.

8. Dr. Wong noted that the Claimant could do sedentary work on November 19, 2013. He also noted the Claimant's concerns about working at heights since the Claimant injured himself falling from a roof. Claimant was also concerned about heavy lifting.

9. On January 8, 2014, Dr. Wong recommended home assistance for the Claimant to assist with the transition to home.

10. On December 23, 2013, an FCE assessment found the Claimant able to lift and carry 35 lbs., 25 lbs frequently and constant lifting of 10 lbs.

11. The Respondents referred the Claimant to Dr. Pitzer on January 22, 2014 for the purposes of MMI determination and impairment rating. Dr. Pitzer noted pain levels of 2 on a good day 4 on a bad day. Dr. Pitzer found the Claimant to be at MMI and provided him with a 28% whole person impairment rating for his lumbar spine. Dr. Pitzer, in his original impairment rating evaluation, stated the opinion that the Claimant should be able to work in the light to medium work category with maximum lifting up to 35 lbs.

12. Dr. Pitzer evaluated the Claimant on January 22, 2014 for MMI determination and permanent impairment. At that time, the Claimant reported that his pain levels varied from a 2/10 on good days to 4/10 on bad days. At the time of this evaluation, the Claimant was still utilizing the narcotic medication, Oxycodone, to treat his pain symptoms. Dr. Pitzer agreed that the Claimant had reached MMI and provided a 28% who person impairment, specific to the lumbar spine. Respondents' Exhibit C 0028-0030. He also agreed with the 35 lb. lifting restrictions as noted in the functional capacity evaluation.

Continued Treatment

13. Physical therapy records from January 17, 2014 through January 31, 2014, indicate that the Claimant did not just have low back pain, but also had symptoms of radiating pain that extended from his lower back to his lower extremities bilaterally. These symptoms existed at the time the Claimant was placed at MMI by the Dr. Pitzer on January 22, 2014.

14. During his course of care, the Claimant was also evaluated by PA-C (Physician's Assistant) Lisa Brozovich. PA-C Brozovich specifically evaluated the Claimant during the time just before being placed at MMI and also just after MMI. On January 7, 2014, PA-C Brozovich reported that the Claimant was "weak in his core and had decreased ROM (range of motion) of his left hip." The Claimant also self-reported the he could lift up to 15 lbs., but generally tried to stay at 10 lbs. On February 6, 2014, 18 days after his evaluation with Dr. Pitzer, PA-C Brozovich noted that the Claimant continued to take narcotic pain medications at night with noted increases of pain associated with weather changes. Again restrictions were limited to 10 pounds lifting, carrying and pushing/pulling with no crawling, kneeling squatting or climbing. By March 6, 2014, the Claimant noted that his pain seem to be the same on the level of 4/10 in the day and 6/10 after exercise and at bedtime. PA-C Brozovich noted that the Claimant's physical therapist had felt that he had maximized his benefits from therapy. She also noted that she would call Dr. Wong to determine if the Claimant's current levels of pain were cause for concern.

15. The Claimant's condition was continuing to improve with pain levels, reduction in pain medications and physical tolerances and by March of 2014 the Claimant reached a plateau.

16. Dr. Wong stated his opinion that the pars defect condition was not work-related in a hand-written note issued on March 13, 2015.

17. On March 18, 2014, Dr, Wong noted that the Claimant reported that he had an increase of back pain up to 5/10 with increased activities and lifting. PA-C Brozovich then saw the Claimant back on March 20, 2014 and assigned permanent work restrictions of 30 pounds lifting, 15 pounds repetitive lifting and 15 pounds carrying, 5 hours per day of walking, standing and sitting at ½ hour intervals, crawling, kneeling and squatting 12 minutes at a time, and no climbing.

Division Independent Medical Examination (DIME) by William S. Griffis, D.O.

18. Dr. Griffis performed a DIME on July 3, 2014. At that time, the Claimant was complaining of deep aching in his low back with sharp pains in the low back. The

Claimant indicated that his pain was worse with bending, stooping, twisting and lifting. He was not working and taking 5mg of oxycodone at night.

19. Dr. Griffis provided the Claimant with a 36% whole person impairment rating for the lumbar and thoracic spine injuries. Dr. Griffis was of the opinion that the Claimant would require maintenance care. Dr. Griffis provided an impression of chronic lumbosacral myofascial pain in addition to the surgical procedure.

20. On August 12, 2014, the Respondents filed a Final Admission of Liability (FAL), admitting for Dr. Griffis's impairment rating of 36% whole person, an MMI date of January 22, 2014 and post-MMI medical maintenance benefits (*Grover* medicals).

Functional Capacities Evaluation

21. A functional capacity evaluation (FCE) by OT Resources, Inc.. was performed on November 25, 2014 and completed on December 23, 2014 Respondents' Exhibit I—Report dated December 28, 2014), found that the Claimant able to lift and carry 35 lbs., 25 lbs. frequently, and 10 lbs. constantly. Contrary to the Respondents' assertions that the FCE illustrates that the Claimant's condition had not worsened, the FCE noted more restrictive lifting limitations, increased daily pain levels, and a significant impact of the admitted back injury on the Claimant's activities of daily living (ADLs), including an opinion that the Claimant was not capable of working at that time. The ALJ infers and finds that the ultimate thrust of the FCE illustrates a significant worsening of the Claimant's condition since being placed at MMI on January 22, 2014.

Progression of Claimant's Condition

22. By November 25, 2014, the Claimant was taking Ibuprofen for pain, and was complaining of constant pain in the left side of his hip, shoulder blade and incision. He indicated that the pain was an average of 4/10 daily. By November 25, 2014, the Claimant's lifting capacity was 10 lbs. (one time lift).

23. On January 16, 2015, the Claimant returned to Dr. Wong indicating that he had continued left lateral thigh pain that radiates to the knee, moderate low back pain that worsens when sitting or driving greater than one hour intervals, was last seen in March 2013 and noted back pain. The Claimant continued to note left sided back pain with radiation to the left thigh and knee and has been doing physical therapy. X-rays on this date showed lumbar disc narrowing and retrolisthesis and L5-S1 DDD. Dr. Wong indicated that an MRI (magnetic resonance imaging) would be ordered to check for left side neural compression to then consider ESI (epidural steroid injections). The Claimant had some left quad weakness. Dr. Wong recommended a follow-up after a

completion of work up for reevaluation, to review the MRI, to assess response to treatment. His diagnosis was lumbosacral neuritis and symptomatic lumbago.

24. According to the Claimant, his low back condition had worsened since he saw DIME Dr. Griffis. The Claimant testified that the pain on left side of his low back had gotten worse, and by the time he returned to see Dr. Wong in January of 2015 he was noticing left thigh pain which went to his knee with numbness in his leg.

25. Medical records prior to January 16, 2015 indicate that leg numbness had not been a documented problem.

26. On January 26, 2015, an MRI was performed at Advanced Medical Imaging.

27. The Claimant returned to Dr. Wong on February 17, 2015, and Dr. Wong noted continued left sided low back pain radiating to left thigh and knee with left quad weakness. Dr. Wong ordered a diagnostic left L2-L3 transforaminal ESI. Dr. Wong noted " if no relief, will consider diagnostic left L5-S1 epidural steroid injection." Dr. Wong prescribed Norco for pain and Robaxin for muscle spasms.

28. On March 5, 2015, Karen Knight, M.D., performed an L2-3 transforaminal ESI.

Follow Up Independent Medical Examination by Neil Pitzer, M.D.

29. On April 16, 2015, the Claimant returned to Dr. Pitzer for a follow up IME. According to Dr. Pitzer, there was pain in thoracolumbar spine with pain across the pelvic region. According to Dr. Pitzer, the Claimant did not indicate radiating pain and he had a pain level of 6/7 out of 10 on average.

30. Dr. Pitzer was of the opinion that there was not a significant change in the Claimant's condition and the Claimant remained at MMI. Dr. Pitzer noted that the significant changes and current restricted tolerances were not consistent with the previous FCE performed at the time of MMI.

31. Dr. Pitzer provided the Claimant with an increased impairment rating of 33% whole person and indicated that at the time of his previous impairment rating, Dr. Pitzer did not have the operative reports and should have included the thoracic spine in the rating.

Dr. Pitzer's Testimony

32. The testimony of Dr. Pitzer was taken two times, by evidentiary deposition, the first time on February 13, 2015. Dr. Pitzer testified that absent a new injury or some intervening aggravation he would not expect the Claimant's condition to get progressively worse (February 13, 2015 Pitzer deposition, p. 8, lns 1-7). Dr. Pitzer confirmed a 35 lb. lifting restriction during his deposition and a light to medium work category (February 13, 2015 Pitzer deposition p. 10, lns 12-25 and p. 11, lns 1-2). He confirmed a 20 lb. repetitive lift. (February 13, 2015 Pitzer deposition, p. 12, lns 3-4)

33. Dr. Pitzer testified that Dr. Wong's evaluations were new medical information to him, and he acknowledged that between Dr. Griffis DIME and the January 216, 2015 visit with Dr. Wong the Claimant had "a significant or worse" condition and was complaining of more pain symptoms, "which may require a change in restrictions (February 213, 2015 Pitzer deposition, p. 20, lns 22-25 and p. 21, lns 1-6).

34. In his February 13th deposition, Dr. Pitzer, when discussing the Claimant's new complaints of left lateral thigh pain, noted that it could be related to post-fusion changes or the Claimant's pars defects (February 13, 2015 Pitzer deposition, p. 27, lns 16-22) and that the Claimant's pars defects and degenerative changes at L5-S1 will make him more prone to have symptoms over time, and patients with this type of condition have increasing back symptoms over time even without injuries like the one Claimant sustained (February 13, 2015 Pitzer depo., p. 28, lns 18-25; 29, lns 1-8). Dr. Pitzer agreed in his August 3, 2015 deposition that the left lateral thigh complaints were new complaints (August 3, 2015 Pitzer deposition, p. 24, lns 19-25 and p. 25, lns 1-3).

35. Dr. Pitzer, in his February 13, 2015 deposition, testified that he would expect increased lifting activities to increase the Claimant's back pain, either due to the surgery, compression fracture or his pars defect (February 13, 2015 Pitzer deposition, p. 41, lns 1-5).

36. Dr. Pitzer re-evaluated the Claimant and a 2nd deposition occurred on August 3, 2015 (August 3, 2015 Pitzer deposition p. 3, lns 12-23) Dr. Pitzer indicated that Claimant was not really complaining of low back pain when he examined him on January 22, 2014 (August 3, 2015 Pitzer deposition, p. 9, lns 20-24).

37. Dr. Pitzer testified in his August 3, 2015 evidentiary deposition, that after re-evaluating the Claimant and comparing his findings between his first appointment and second, the Claimant remained at MMI. Specifically Dr. Pitzer attempted to support his ultimate opinion by noting:

- The Claimant's condition did wax and wane following MMI, which is to be expected.
- Just because a patient's symptoms may wax or wane over time, or if treatment modalities are changed, does not mean a case is

reopened. This just means that the Claimant's condition is being managed post-MMI as is to be expected.

- The Claimant's imaging had not changed since being placed at MMI.
- The Claimant showed no significant changes in range of motion from before and after MMI.
- The Claimant's functional levels had not changed significantly. There was no need for increased physical restrictions from when the Claimant was placed at MMI (nonetheless, Dr. Pitzer acknowledged increased restrictions).
- Likewise, the Claimant's condition has not caused him to suffer a greater impact on his work capacity since being placed at MMI. His approval of various jobs for the Claimant have not changed since when he placed him at MMI (the ALJ finds this vocational opinion beyond Dr. Pitzer's expertise and lacking in credibility)
- Upon examination he did not notice a neurologic involvement that was in any way different from when he examined the Claimant at the time he placed him at MMI.
- He did not detect any muscle weakness in the lower extremities when he evaluated him on April of 2015. .
- His diagnoses have not changed since he placed the Claimant at MMI.
- Patients who have had fusions often get maintenance treatment in the form of injections, whether epidural or facet blocks, for flare-ups of pain, but that doesn't change their overall status. Under these circumstances MMI would not be changed due to that type of treatment recommendation.
- There is nothing hard and fast to say that there has been a deterioration in the Claimant's functional or physical status since being placed at MMI.

38. Respondent argues that Dr. Pitzer was of the opinion that there is no objective evidence of worsening because there were no changes on imaging, because the pars defect pre-existed the injury, and "this is not a condition that you would expect to see changes on imaging." Dr. Pitzer was of the opinion that increased pain is not a basis for reopening a claim when, at the same time, he acknowledged the Claimant's increased pain levels. Dr. Pitzer's own reports and testimony document increased pain levels, significant worsening, changed restrictions and work categories. Dr. Pitzer did not provide a clear diagnosis, and to the extent that Dr. Pitzer is disagreeing with the diagnosis made by Dr. Wong of symptomatic L5-S1 pars defect, more weight is accorded to the opinions of Dr. Wong regarding the diagnoses and need for medical care.

39. The ALJ finds Dr. Pitzer's notations as of August 3, 2015 to be contrary to the weight of the evidence, and rationalizations to justify MMI as of January 22, 2014, despite the fact that the Claimant's restrictions and pain levels have increased since MMI. Indeed, Dr. Pitzer increased his former impairment rating as a result of the August 3, 2015 evaluation of the Claimant. It makes no sense to opine that the degree of impairment has increased despite the fact that MMI remains static although a lesser degree of impairment was assigned.

40. Dr. Pitzer testified that when he saw Claimant on January 22, 2014, the Claimant had pain levels on average of 3 out of 10 (August 3, 2015 Pitzer deposition, p. 13, lns 16-17) and that changes in pain complaints alone is not a worsening, and there would need to be objective signs of worsening (August 3, 2015 Pitzer deposition, p. 13, lns 20-25; p. 14, lns 1-11). The Claimant was reporting increased pain levels of 6/7 out of 10 during his 2015 reevaluation (August 3, 2015 Pitzer deposition p. 24, lns 3-8).

41. Dr. Pitzer testified that the Claimant could lift 10 lbs and would be in a sedentary to light duty work category following his April 2015 reevaluation (August 3, 2015 Pitzer deposition p. 21, lns 2-12). Dr. Pitzer also testified that he did not note quadriceps weakness on the left side at the time of his evaluation in April of 2015 (August 3, 2015 Pitzer deposition p. 21, lns 22-25).

42. Dr. Pitzer stated that epidural steroid injections are diagnostic as well as therapeutic (August 3, 2015 Pitzer deposition, p. 26, lns 17-20) and were done for the purpose of determining the current pain generator (August 3, 2015 Pitzer deposition, p. 36, lns 6-12).

43. Dr. Pitzer also agreed that the Claimant **was asymptomatic for his pars defect** prior to the work injury (August 3, 2015 Pitzer deposition, p. 27, lns 5-11), but indicated that he was not certain that the Claimant's problems were from a symptomatic pars defect because of the conflicting epidural steroid injection reports, and Dr. Wong was probably confused as a result (August 3, 2015 Pitzer deposition, p. 28).

44. After considerable discussion, Dr. Pitzer agreed that if the epidural steroid injection done was to the L2-L3 and not the L4-L5 then he would agree that the low back problems are more likely than not related to the pars defect (August 3, 2015 Pitzer deposition, p. 34, lns 14-25 and p. 35, lns 1-12).

Return to Dr. Wong

45. The Claimant returned to Dr. Wong on July 7, 2015 and noted an increase in thoracic back pain that began at the end of May and continued lumbar pain with left lower extremity radiculopathy and weakness.

46. Dr. Wong indicated that the Claimant's condition had worsened, but the worsening was due to the Claimant's bilateral L5-S1 pars defects "which are not work related." Dr. Wong noted that the Claimant had an IME with Dr. Pitzer.

47. Dr. Wong diagnosed an acute thoracic sprain and referred the Claimant to physical therapy for the thoracic spine and made a referral to Dr. Horner (physiatry) if there was continued pain. On examination, Dr. Wong noted that there was burning pain above the surgical incision. On physical examination, the Claimant also had maximum tenderness in the paraspinous areas and pain with motion. The Clamant had difficulty walking, parathesia and muscle weakness.

48. According to the Claimant, his current therapy is different than the therapy provided post operatively, and his condition has worsened in that he is not able to do all the activities that he was doing at the time he was released, he is more restricted and has more problems bending twisting and lifting. Now he can only lift about 10 lbs.

Medical Records Review and Testimony of L. Barton Goldman, M.D.

49. On July 15, 2015, Dr. Goldman performed a medical records review at the request of the Claimant. Dr. Goldman testified at hearing that the only reason he did not perform a physical examination of the Claimant was because of his inability to see the Claimant in a timely manner for the legal deadlines in the case.

50. Dr. Goldman also testified that in forming his opinion he was relying on Dr. Wong's opinions regarding diagnosis and treatment recommendations. Dr. Goldman stated that he knew Dr. Wong and trusted his judgment and treatment recommendations, but disagreed with his causation opinions, specifically, with Dr. Wong's opinion that the L5-S1 pars defect, and its worsening effects, was not work-related.

51. Dr. Goldman indicated in his report and testified at hearing that the pars defect is a congenital or preexisting condition and because the Claimant has no past medical history for prior back pain it would be an asymptomatic finding and apparently not caused by this particular injury. The fractures from essentially T12 all the way down through the L4 levels would certainly create abnormal body mechanics and increased loading on the posterior elements at the L5 and S1 levels that could be symptomatically aggravating to the pars defects as described, the facet joints at L4-L5 and L5-S1 as well

as creating additional stress in both the multifid and the iliocostalis musculature as well as the iliopsoas stabilizing anterior musculature.

52. Dr. Goldman indicated that the pars defect probably represents an asymptomatic and preexisting condition in terms of the pars defect, but certainly the nature of the injury biomechanically could create an aggravation if not at the pars level at the posterior elements surrounding the pars defect where deep muscle core stabilization would already be suboptimal (although asymptomatic) as a result of the pars defect.

53. Dr. Goldman discussed the probable biomechanical reason for the Claimant's now symptomatic L5-S1 pars defect as a consequence of the work related injury. Dr. Goldman is of the opinion that the L5-S1 pars defect was not caused by the work-related injury as best we can tell, but the mechanical changes that the patient's spine has had to undergo as well as the overall core de-conditioning has led to a very physiologic record of accelerating symptoms once the patient's functional abilities and physical therapy moved into a more solid light to medium work category. Dr. Goldman indicated that it is certainly a clinical picture that he sees all too often. There is no documentation of any other injury or non-physiologic findings. The records that Dr. Goldman reviewed document a reasonably thorough physical examination and are consistent with Dr. Wong's assessment. Dr. Goldman concluded that within a strong medical probability the patient's current low back pain more likely than not is a direct result of acceleration of preexisting but asymptomatic conditions in the lower lumbar spine that have now needed to bear a greater load in a postural and core strength and endurance context and apparently are unable to do so.

54. Although Dr. Goldman was of the opinion that there was a good possibility Claimant was not and may never have been at MMI, the Claimant is currently no longer at MMI, according to Dr. Goldman. Dr. Goldman is of the opinion that if one used the determined prior date of MMI of January 22, 2014, as opined by Dr. Pitzer and agreed to by Dr. Griffis, one could propose that the patient was "temporarily at maximal medical improvement," by March 25, 2014, once he had completed his most intensive treatment in terms of his follow up at the Frisco Clinic and with Dr. Wong as well as at Avalanche Physical Therapy. Dr. Goldman states "once Dr. Wong determined as of March 13, 2015, his clinically probably (*sic*) opinion that the patient's symptoms were due to what this reviewer has established as a preexisting and asymptomatic but now aggravated L5-S1 pars defect as a result of the patient's work related injury, the case at the very least should have been reopened as of at least March 13, 2015 if not even January 16, 2015, when Dr. Wong reinitiated the workup that led to this clinically pertinent diagnosis."

55. Dr. Goldman indicated that he contemplated the issue of the Claimant no longer being at MMI, and he re-reviewed the records, to the degree that the providers in the case did not have the advantage of "20/20" hindsight, the most reasonable date of MMI in this case would either have been March 25, 2014, when the patient completed his physical therapy or perhaps more definitively July 3, 2014, after DIME. Dr. Goldman also indicated that the claim should be reopened as of January 16, 2015 for further workup of the condition that is due to a work-related aggravation of the patient's preexisting L5-S1 pars defect.

Temporary Total Disability (TTD)

56. The Claimant has been unable to return to his former occupation as a result of his admitted work injury. he has not been offered modified work and he has not found work in another occupation.

57. The Claimant has proven, by preponderant evidence, that he has increased restrictions since he was declared to be at MMI on January 22, 2014, and these increased restrictions result in a "greater impact on the Claimant's temporary work capacity than he had originally sustained as a result of the" injury. The Claimant's testimony in this regard is not only un-refuted but it is supported by the Respondents' IME, Dr. Pitzer.

58. The ALJ finds that the Claimant has not only experienced a change of condition, but he has experienced a newly diagnosed condition which is amounts to a mistake or error as of the time the Claimant was placed at MMI, specifically, the work-relatedness of the aggravation and acceleration of the pars defect and its subsequent disabling effects. The Claimant has increased restrictions, which result in a greater impact to his temporary work capacity.

59. According to Dr. Goldman, in his experience the Claimant's type of injury would cause an increase in pain and restrictions. The medical records document more restrictive work capabilities from 35 lbs and a light to medium work category by Dr. Pitzer in January of 2014, to his repeat evaluation in April of 2015 when he limited the Claimant to 10 lbs and a sedentary to modified light work category.

60. Dr. Pitzer's evaluation also documents an increase in pain levels from 2 to 4 in January of 2014; and, from 6 to 7 in April of 2015. According to Dr. Pitzer, there was not much in the way of low back problems documented in 2014 as compared to 2015, and that the development of left lateral thigh pain was new and is a symptom that can be associated with L5-S1 pars defect. For the reasons outlined herein below, the ALJ does not find Dr. Pitzer's opinion that the Claimant has remained at MMI **credible.**

61. The Claimant testified credibly that he is worse and not able to do as many things now as he could when he was initially placed at MMI by the doctors. The ALJ finds that this testimony is un-refuted and, indeed, supported by the medical records.

62. The ALJ finds that Claimant has proven that he has been temporarily and totally disabled since January 16, 2015, the date he returned to Dr. Wong.

The claimant's worsened condition has resulted in greater physical restrictions and has had a greater impact on the claimant's temporary work capacity beyond that which existed at MMI. This is supported by the following:

1) The Claimant credibly testified that his condition had worsened and this worsening has affected his activities of daily living and he is less able to care for himself and perform many of the things that he was able to do prior to the injury and at MMI.

2) Claimant reported pain levels of 2 on a good day and 4 on a bad day in January of 2014 to Dr. Pitzer: in April of 2015 Claimant had pain levels of 6/7.

3) There is a newly diagnosed medical condition of a symptomatic L5S1 pars defect, with additional findings of radiation to Claimant’s left thigh and knee, including numbness and documented weakness in Claimant’s left quadriceps muscle. Dr. Goldman testified that in his experience this type of diagnosis and condition will cause increased pain and limitations

4) Dr. Wong indicated as of January 16, 2015 Claimant’s condition had worsened and required further diagnostic work up in order to diagnosis and treat Claimant’s condition, this included X-rays, MRI’s, and diagnostic L2L3 injections

5) The Claimant testified he cannot perform the job that he did at the time of injury and is not able to work at this time

6) There has been a increase in Claimant’s work restrictions since MMI on January 22, 2014 from a valid FCE in December of 2013 indicating that Claimant was able to lift and carry 35 lbs, 25 lbs frequently and 10 lbs constantly; permanent restrictions from the ATP of lifting up to 30 lbs, 15 lbs repetitive lifting. By November of 2014 a FCE performed by OT Resources confirms that Claimant has a lifting ability of 10 lbs-one time lift, and employability opinion that Claimant is not able to work at that time

7) There is change of work capacity level from Dr. Pitzer. In January of 2014 he indicated Claimant should be able to work in the light to medium work category with a maximum lift of 35 lbs and repetitive lifting of 20 lbs; In April of 2015 Dr. Pitzer indicates that Claimant's work capacity is now a sedentary to light work category with lifting of 10 lbs

Claimant is entitled to an award of temporary total disability benefits because the worsened condition has resulted in a "greater impact" of his work capacity than existed at the time of MMI, and even with the limitations that he had at the time of MMI, he is even more limited now.

Work-Relatedness of the Aggravation of the Pars Defect and the Consequences Thereof

63. The Claimant's back pain and associated symptoms are causally related to the admitted compensable injury of June 2, 2013, specifically, any symptoms related to a pre-existing but previously asymptomatic L5 pars defect were aggravated and accelerated by the admitted compensable injury, but the diagnosis that the pars defect had become symptomatic did not occur until Dr. Wong's visit of January 16, 2015..

64. The Claimant has a documented change of subjective symptoms after MMI and a new diagnosis of a symptomatic L5-S1 pars defect. Diagnostic testing was performed that confirms that this is the current pain generator that requires treatment. Although the pars defect is pre-existing and most likely congenital, Dr. Goldman is of the opinion that it can be aggravated by trauma and the type of surgery performed to cure and relieve the effects of the work related injury in this case. Dr. Goldman is also of the opinion that the fusion surgery also altered the biomechanics of the spine and as a result the previously asymptomatic pars defect became symptomatic as a consequence. In this case there was significant alteration in the spinal biomechanics due to the fractures, pain and fixation, not to mention the injury itself. Although Dr. Goldman did a medical records review and did not physically examine the Claimant, the ALJ finds his opinion concerning the work-relatedness of the aggravation and acceleration of the pars defect and its effect on the biomechanics of the spine more credible and persuasive than the opinions of Dr. Wong and Dr. Pitzer that the aggravation of the pars defect is not work-related.

65. Although the Claimant's initial pain drawings document lower lumbar spine and some lower leg problems and the Respondents argued that these were not new symptoms, Dr. Goldman is of the opinion that the pars defect symptoms began "perculating" when the Claimant became more active and was participating in his work hardening therapy program.

66. The ALJ accords more weight to the opinions of Dr. Goldman regarding whether the work injury rendered the Claimant's previous asymptomatic lumbar L5-S1 pars defect symptomatic. Among other credentials bearing upon his expertise, Dr. Goldman is Level II Accredited and helped develop and teaches the Level II curriculum to physicians seeking Level II accreditation. Dr. Goldman is the only physician to have performed a complete review of the medical records in forming his opinion. His thoroughness and greater expertise shine through in his opinion of the critical issue, "work-relatedness of the pars defect and its contribution to the Claimant's worsened condition since originally having been declared to be at MMI. Dr. Goldman did not rely on the subjective complaints of Claimant, but relied upon a thorough review of the medical records in a historic and reflective manner.

67. The medical records portended the potential development of a symptomatic L5-S1 pars defect as early as Dr. Wong's operative report which notes "Claimant's L5-S1 pars defect is not symptomatic yet." Dr. Goldman notes as early as June 12, 2013 that there is a degradation and incompetency, particularly of the posterior thoracolumbar muscular, which potentially would effect (*sic*)whether there would be further decompensation at the proximate levels to the documented fractures*, i.e.* at the L5 level (Respondents' Exhibit H, p. 79)

68. Dr. Goldman is of the opinion that Claimant is not currently at MMI because the Claimant's condition worsened, new symptoms were present (left lateral thigh pain and numbness radiating to knee), which required diagnostic testing (x-rays, MRI, epidural steroid injections) to identify a new condition subsequently diagnosed as a result*, i.e*. symptomatic L5-S1 pars defect.

69. Dr. Goldman is of the opinion that the Claimant's L5-S1 pars defect was not caused by the industrial injury, it was pre-existing and probably congenital. Dr. Wong indicated that Claimant had worsened and it was more likely than not related to his L5-S1 pars defect. Dr. Goldman disagreed with Dr. Wong's opinions that the pars defect was not related to the work injury because it pre-existed the work injury. He was disagreeing with Dr. Wong if Dr. Wong's opinions were that the current treatment necessary for the pars defect was not related to the work injury, because the treatment for and subsequent changes to the Claimant's spine rendered those defects symptomatic and were proximately and causally related to the consequences of the original admitted work-related injury.

Ultimate Findings

70. The ALJ finds the Claimant's testimony credible and un-impeached. Further, the ALJ finds the opinions of Dr. Goldman on the work-related consequences of

the aggravation and acceleration of the Claimant's pars defect more credible and persuasive than the opinions of Dr. Pitzer and Dr. Wong to the contrary because Dr. Goldman's opinions are more consistent with the totality of the medical evidence and the product of a more thorough consideration of the Claimant's medical case, despite the fact that Dr. Goldman performed a medical records review without physically examining the Claimant.

71. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Goldman and to reject any and all opinions to the contrary on the issue of a work-related worsening condition, and mistaken failure to diagnose the aggravation and acceleration of the work related consequences of the worsening of the pars defect.

72. The mistake, as hereby found with the benefit of hindsight in reliance on Dr. Goldman's ultimate opinion, was Dr. Wong's and Dr. Pitzer's acknowledgment of the fact that the Claimant's pars defect had become symptomatic and disabled the Claimant more than he was disabled as of the MMI date of January 22, 2014, but their failure to correctly diagnose that the symptomatic pars defect and the consequences thereof, including its effect on the Claimant's biomechanics, was within the proximate chain of causation stemming from the original admitted low back injury of June 2, 2013.

73. The Claimant has proven, by a preponderance of the evidence that his work-related condition has changed/worsened since the MMI date of January 22, 2014 by virtue of the work-related consequences of the aggravation and acceleration of his underlying pars defect, and this worsening occurred as of January 16, 2015.

74. The Claimant has proven, by preponderant evidence, that he has been temporarily and totally disabled since January 16, 2015 and continuing. The period from January 16, 2015 through August 8, 2015, the hearing date, both dates inclusive, equals 205 days. The admitted TTD rate is $351.22 per week, or $50.17 per day. Aggregate past due TTD benefits for the above-mention range of dates, equal $12,543.57.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was credible and un-impeached. Further, as found, the opinions of Dr. Goldman on the work-related consequences of the aggravation and acceleration of the Claimant's pars defect were more credible and persuasive than the opinions of Dr. Pitzer and Dr. Wong to the contrary because Dr. Goldman's opinions were more consistent with the totality of the medical evidence and the product of a more thorough consideration of the Claimant's medical case, despite the fact that Dr. Goldman performed a medical records review without physically examining the Claimant.

Substantial Evidence

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

Re-Opening

c. The Claimant agreed that he was at MMI on January 22, 2014, pursuant the opinion of the DIME examiner, Dr. Griffis. He is now requesting that his case be reopened effective January 16, 2015, because he was no longer at MMI as of that date. The DIME process does not govern the determination of whether a claimant's condition has worsened after MMI, and whether such worsening is causally-related to the original industrial injury. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002) A change in condition refers to either a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328, 1330 (Colo. App. 1985); accord *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323, 330 (Colo. 2004).

d. A mistake in diagnosis is sufficient to justify reopening. *See Standard Metals Corp. v. Gallegos,* 781 P.2d 142 (Colo. App. 1989) [under circumstances where there is a mistake in diagnosis because the medical technology available to the treating physician at the time of the initial order is limited, a petition to reopen based on a mistake of fact may properly be granted]. At the time a final award is entered, *available medical information may be inadequate*, a diagnosis may be incorrect, or a worker may

experience an unexpected or unforeseeable change in condition subsequent to the entry of a final award. When such circumstances occur, § 8-43-303, C.R.S., provides recourse to both the injured worker and the employer by giving either party the opportunity to file a petition to reopen the award. The reopening provision, therefore, reflects a legislative determination that in "worker's compensation cases the goal of achieving a just result overrides the interest of litigants in achieving a final resolution of their dispute." *Standard Metals Corp v. Gallegos, supra,* at 146 (quoting *Grover v. Indus. Comm'n,* 759 P.2d 705 (Colo. 1988).

e. In *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270, 273 (Colo. App. 2005), the Court cites the Larson treatise on Workers' Compensation (8A. Larson, *Larson's Workers' Compensation Law* § 131.05 [2] [b], at 13-162 (2004):

> "[T]he desirability of preserving a right to reopen for genuine mistake seems too self-evident for argument. In the nature of things, there are bound to be many occasions when even the most thorough and [skillful] diagnosis misses some hidden compensable condition. Should the Claimant then be penalized because of an erroneous disposition, either by award or settlement, when the only fault lies in the imperfections of medical science?"

Reopening is permitted on several grounds, including mistake. *See* § 8-43-303(1), C.R.S. "The grounds of 'mistake' as used in [section 8-43-303] means any mistake, whether of law or fact." *Ward v. Azotea Contractors,* 748 P.2d 338, 341 (Colo. 1987). A mistake in diagnosis may be "sufficient to justify reopening." *Berg v. Indus. Claim Appeals Office, supra.* The *Berg* court rejected the argument that the claimant's failure to timely object to a Final Admission and obtain a DIME forfeits his right to reopen his claim. As found, the mistake, as hereby determined with the benefit of hindsight in reliance on Dr. Goldman's ultimate opinion, was Dr. Wong's and Dr. Pitzer's acknowledgment of the fact that the Claimant's pars defect had become symptomatic and disabled the Claimant more than he was disabled as of the MMI date of January 22, 2014, but their failure to correctly diagnose that the symptomatic pars defect and the consequences thereof, including its effect on the Claimant's biomechanics, was within the proximate chain of causation stemming from the original admitted low back injury of June 2, 2013.

Temporary Total Disability

f. As found, the Claimant has been unable to return to his former occupation as a result of his work injury. Claimant was not offered modified work and has not found work in another occupation. In City *of Colorado Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997), the Court held that in order to receive TTD benefits based on a change of condition reopening, a claimant must show increased restrictions which result in a "greater impact on the Claimant's temporary work capacity than he had originally sustained as a result of the" injury (emphasis in original), 954 P.2d at 639-640. The disability, however, need not be proven by medical evidence alone. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, this is a case not only of a change of condition, but also a case of a newly diagnosed condition (the work-relatedness of the pars defect and its consequences on MMI and ability to work) which amounts to a mistake or error. As found, the Claimant has proven he has increased restrictions, which result in a greater impact to his temporary work capacity.

g. As found, Dr. Goldman testified that in his experience this type of injury would cause an increase in pain and restrictions. The medical records document more restrictive work capabilities from 35 lb and a light to medium work category by Dr. Pitzer in January of 2014, to his repeat evaluation in April of 2015 when he limited Claimant to 10 lbs and a sedentary to modified light work category. Dr. Pitzer's evaluation also documents an increase in pain levels from 2 to 4 in January of 2014; from 6 to 7 in April of 2015. Dr. Pitzer also testified that there was not much in the way of low back problems documented in 2014 as compared to 2015, and that the development of left lateral thigh pain was new and is a symptom that can be associated with L5-S1 pars defect. As found, the Claimant testified credibly that he is worse and not able to do as many things now as he could when he was initially placed at MMI by the doctors. January 16, 2015, the date he returned to Dr. Wong. Consequently, as found, the Claimant has proven temporary total disability since January 16, 2015 and continuing.

h. In determining entitlement to temporary total benefits it is the impact of the claimant's work "capacity," not proof of an actual wage loss, which determines whether the claimant has established entitlement to TTD benefits in connection with a worsening of condition after MMI.

i. The Industrial Claim Appeals Office determined that *City of Colorado Springs v. Indus. Claim Appeals Office, supra,* stands for the proposition that a worsening of condition after MMI may entitle a claimant to additional temporary disability benefits if the worsened condition caused a "greater impact" on the claimant's temporary work capacity than existed at the time of MMI. *Root v. Great American Insurance Company,* W.C. No. 4-534-254 [Indus. Claim Appeals Office (ICAO), (April 15, 2009]. Further, the ICAO that *City of Colorado Springs* does not require a claimant to establish an "actual wage loss" where, for example, the claimant was not working

immediately before the worsened condition. *Moss v. Denny's Restaurants,* W.C. No. 4-440-517 (ICAO, September 27, 2006).

j. In *Sheryl Friesz v. Wal-mart Stores, Inc. and American Home Assurance,* W.C. No. 4-823-944-01 (ICAO, December 21, 2012*),* ICAO determined that the critical issue in cases controlled by *City of Colorado Springs* is not whether the worsened condition actually resulted in additional temporary wage loss, but whether the worsened condition has had a greater impact on the claimant's temporary work "capacity." *See El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Ridley v. K-Mart Corp.,* W.C. No. 4-263-123 (ICAO, May 27, 2003). It therefore follows that it is the impact of the claimant's work "capacity," not proof of an actual wage loss, which determines whether a claimant has established entitlement to TTD benefits in connection with a worsening of condition after MMI. In *Sheryl Friesz v. Wal-mart Stores, Inc. and American Home Assurance, supra,* the claimant suffered a work related condition that at the time of MMI rendered her incapable of working. The claimant had CRPS that significantly impaired her ability to work at the time of MMI. The ALJ relied on the claimant's report of increased pain, and testimony regarding a decrease in her ability to participate in activities of daily living and in her reported physical abilities to sustain the award of temporary disability benefits. ICAO noted that even though it is true that the claimant's open labor market options were quite limited at the time of MMI and excluded her from working for her employer, her options were even more limited after her worsening and the reopening. In *Sandra E. Ridley v. K-mart Corp. (Store No. 4918)* W. C. No. 4-263-123 (ICAO, 2003) The lack of change in permanent work restrictions assigned at the time of MMI did not prevent a finding of entitlement to TTD after worsening. In *Annie Moss v. Denny's Restaurants*, W. C. No. 4-440-517 (ICAO, 2006) ICAO determined that the ALJ may rely on Claimant's anecdotal reports of symptoms and perceptions of his\her own limitations as well as on the medical evidence in order to determine whether there has been an impact of claimant's work "capacity." As found, the ALJ relied, in part, on the Claimant's reports of symptoms. These reports, however, as found, were corroborated by the medical record.

k. the Claimant temporary total disability benefits at the admitted rate of $351.22 per week, or $50.17 per day, from January 16, 2015 through August 8, 2015, the date of hearing, both dates inclusive, a total of 205 days, in the aggregate amount of $10,284.85, which is payable retroactively and forthwith. The Respondents shall continue paying the Claimant temporary total disability benefits of $351.22 per week from August 9, 2015 and continuing until cessation thereof is warranted by law.

Burden of Proof

l. The party attempting to reopen a claim "shall bear the burden of proof as to any issues sought to be reopened." § 8-43-303(4), C.R.S. Thus, the Claimant bears

the burden of demonstrating that a mistake meriting reopening had occurred. *See Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002); *City & Cnty. of Denver v. Indus. Claim Appeals Office,* 58 P.3d 1162, 1164 (Colo. App. 2002). An ALJ has broad discretionary authority to determine whether a claimant has met his burden of proof justifying reopening. *See Renz v. Larimer Cnty. Sch. Dist. Poudre* R-1, 924 P.2d 1177, 1181 (Colo. App. 1996). Indeed, § 8-43-303 states simply that an ALJ "may" reopen a claim if a change in condition or mistake is demonstrated. The statutory reopening authority granted ALJ's is thus permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Cordova v. Indus. Claim Appeals Office, supra.*

m. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of establishing whether a case should be re-opened and entitlement to additional benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to a changed condition, mistake at the time he was declared to be at MMI, and entitlement to additional TTD benefits from January 16, 2015 and continuing.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 4-920-110-04 is hereby re-opened, effective January 16, 2015.

B. The Respondents shall pay the Claimant temporary total disability benefits at the admitted rate of $351.22 per week, or $50.17 per day, from January 16, 2015 through August 8, 2015, the date of hearing, both dates inclusive, a total of 205 days, in the aggregate amount of $10,284.85, which is payable retroactively and forthwith.

C. The Respondents shall continue paying the Claimant temporary total disability benefits of $351.22 per week from August 9, 2015 and continuing until cessation thereof is warranted by law.

D. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this_____day of August 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

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

ISSUES

The issues for determination at the hearing were:

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

2. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to medical treatment recommended by the DIME examiner that is reasonably necessary to cure and relieve the effects of the Claimant's April 23, 2013 work injury.

3. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits after May 31, 2014 and ongoing.

FINDINGS OF FACT

1. The Claimant suffered a work injury on April 23, 2013 when slipped and fell on a ladder next to an upright tank. He fell through the area where a safety rail was not in place and he landed on the ground in a sitting position. He immediately felt pain in his back and legs. The Claimant was injured on the last day of an 8-day "hitch" and was then scheduled to have 6 days off.

2. The Claimant has a history of low back issues prior to April 25, 2013 and had recently undergone surgery. With respect to the prior surgery, the Claimant had been evaluated by Dr. Donn Turner in late November of 2012 for persistent low back pain. An MRI showed spondylosis at L5-S1 contributing to left lateral recessed stenosis and moderate canal stenosis. He first underwent and injection and then on January 30, 2013, the Claimant underwent the surgical procedure of a left-sided L5-S hemilaminectomy and medial facetectomy and foraminotomy with a left L5-S1 discectomy performed by Dr. Turner. By March 4, 2013, the Claimant reported that he was doing better initially after the surgery but he was having some recurrent symptoms. As of April 9, 2013, Dr. Turner noted the Claimant was progressively better. He was experiencing soreness in the mornings and some trouble sleeping at night, but the sciatica symptoms had pretty much resolved during daytime activities.

3. After the April 23, 2013 fall, the Claimant again saw Dr. Turner for a neurosurgical consultation. Dr. Turner evaluated the Claimant on April 25, 2013 and noted the Claimant had right shoulder surgery in 2010 and spine surgery in 2013. Consistent with medical records discussing the prior January 30, 2013 surgery, the Claimant completed a questionnaire for the current visit with Dr. Turner on April 25,

2013 in which he reported that he had back surgery in January of 2013 and he stated that his pain began after the surgery but it got worse after he fell.

4. Dr. Turner referred the Claimant for an MRI of the lumbar spine which was performed on April 26, 2013 and showed no evidence of recurrent disc herniation although there was a bulge on the left side. Dr. Turner recommended a left S1 selective nerve root block and if there was no improvement, then consideration of an L5-S1 fusion.

5. By May 14, 2013, the Claimant had not improved with therapy and an injection, and the Claimant was still not able to return to work secondary to his pain. Therefore, Dr. Turner recommended the L5-S1 fusion.

6. On May 28, 2013, the Claimant underwent L5-S1 decompression and fusion surgery performed by Dr. Turner.

7. On June 25, 2013, the Claimant reported he was doing much better with no nerve pain whatsoever and only a little bit of a sore back. The Claimant was started on physical therapy to get him ready to return to his heavy duty job.

8. By August 20, 2013, Dr. Turner noted the Claimant was doing better and had no sciatica whatsoever, only a little bit of back discomfort. The Claimant wanted to return to work and Dr. Turner returned him to work full duty and provided work restrictions of up to 40 pounds frequent lifting and 50 pounds infrequent lifting with a caution regarding limits for walking on stairs. Due to concerns of the employer regarding the Claimant's fitness for duty, Dr. Turner was provided with a statement of the essential job functions for Lease Operator #3 and was asked to clarify and verify that the Claimant could perform all essential functions of the job with no restrictions or accommodations. The Claimant advised Dr. Turner that he really wanted to return to work and so, on October 16, 2013, Dr. Turner opined that the Claimant could perform all essential functions, including being able to lift 51-100 lbs. for 2-5 hours of his shift. However, after starting physical therapy, the Claimant advised Dr. Turner that he was not as strong as he thought. Dr. Turner took the Claimant off work again until the Claimant completed physical therapy.

9. By December 24, 2013, the Claimant had completed physical therapy but was still not at the level required for his job description, so Dr. Turner ordered work hardening with a functional capacity evaluation at the conclusion.

10. On May 28, 2014, Dr. Turner reported that the Claimant had been doing a lot of walking and he felt great and wanted to return to work without any further studies or tests. Dr. Turner noted, "therefore, I am going to say he is at maximum medical improvement as of 5/31/2014, and he can return to work at his regular job on 6/1/2014 with a 75 pound maximum weight lifting restriction." Dr. Turner noted that if an impairment rating is needed, he would refer the Claimant to a physiatrist to obtain one. Dr. Turner further noted that he was canceling a planned selective nerve root block, a lumbar MRI, CT and x-rays since the Claimant was requesting to be put at MMI. While

Dr. Turner apparently complied with the Claimant's request to be put at MMI so the Claimant could return to work, Dr. Turner had recommended the additional studies and only appears to have canceled them due to his patient's request.

11. Dr. Rafer Leach evaluated the Claimant on October 17, 2014 for the purposes of providing a Level II physician impairment rating. Dr. Leach reviewed medical records and conducted a physical examination of the Claimant. On physical examination, Dr. Leach noted that the Claimant was "clearly uncomfortable with sitting" and had "difficulty moving from the table to the chair and certainly performing lumbar range of motion impairment measurements using dual inclinometry, but he does give valid and good effort." Based on the review of medical records and the physical evaluation, Dr. Leach opined that the Claimant was not at MMI as he believed that additional pain generators in the lumbar spine might be at play. He recommended interventional pain management and further evaluation and diagnostic studies.

12. On January 30, 2015, Dr. Jonathan Bloch evaluated the Claimant for a Division IME. He reviewed medical records prior and subsequent to the incident on April 23, 2013, took a history from the Claimant regarding the mechanism of injury, reviewed diagnostic studies and conducted a physical examination. Dr. Bloch opined that he agreed with Dr. Leach that the Claimant was not at MMI for the April 2013 injury if the Claimant was willing to undergo additional treatment. Dr. Bloch specifically recommended the Claimant undergo a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage.

13. On March 4, 2015, Dr. Turner transferred care of the Claimant to Dr. Rafer Leach.

14. On March 25, 2015, the Claimant saw Dr. Leach for evaluation and additional treatment. The Claimant complained of lumbar back pain at an 8/10 pain level. Dr. Leach performed a physical examination and noted that he agreed with the recommendations by Dr. Bloch. Dr. Leach referred the Claimant to Dr. Ken Allen for medication management and interventional pain management treatment. Dr. Leach recommended a surgical evaluation and he recommended that physical therapy and manual therapies and possibly cold laser, acupuncture and massage be implemented per the DIME recommendation. Dr. Leach also referred the Claimant for an MRI of the lumbar spine.

15. On April 20, 2015, the Claimant started to implement the treatment plan from Dr. Leach, as suggested by Dr. Bloch. Dr. Leach noted that medications would be changed, and increased for an interim period, with the goal of decreasing pain and increasing function, so that the Claimant could engage in more aggressive physical therapy and conservative modalities. The Claimant also had an initial evaluation with physical therapy at MSK Medical to develop an independent home exercise program and engage in physical therapy for progressive cervical, thoracic, and lumbar spinal

stabilization exercises and neuromuscular re-educations over a 6-8 week period with a frequency of 2-3 times per week.

16. On May 4, 2015, Dr. Lawrence Lesnak performed an IME of the Claimant, taking a history from the Claimant and conducting a physical examination. Subsequent to the IME, Dr. Lesnak also reviewed the medical records of Dr. Bloch, Dr. Turner and Dr. Leach and prepared a thorough summary of the medical records. Dr. Lesnak found that the Claimant had a long history of low back pains and bilateral leg symptoms that predated his April 23, 2013 work injury. Dr. Lesnak noted that he was seeing Dr. Turner prior to the work injury for follow up after a January 30, 2013 L5-S1 decompression/foraminotomy and discectomy procedure and had been off work until mid-March 2013 secondary to that procedure. After the work injury, the Claimant first went to the emergency room and then returned to Dr. Turner for a neurosurgical evaluation. Dr. Lesnak opined that he found no reported evidence of traumatic lumbar spine pathology on the MRI and he questioned Dr. Turner performing a posterior L5-S1 arthrodesis procedure on May 28, 2013. Dr. Lesnak then noted that Dr. Turner placed the Claimant at MMI on May 31, 2014 and sent the Claimant to Dr. Leach for an impairment rating. Dr. Lesnak opined that he agrees with Dr. Turner's placement of the Claimant at MMI on May 28, 2014 and he disagrees with Dr. Leach and Dr. Bloch's opinions that the Claimant is not at MMI. Dr. Lesnak opined that while the Claimant may require some post-MMI medical maintenance treatments, including a brief course of physical therapy and a gym pass, he did not feel that this would affect the MMI status as determined by Dr. Turner. Dr. Lesnak opines that a lumbar discogram procedure would by unnecessary and that EMG testing and other diagnostic testing is not likely to lead to surgical intervention or other treatment that would affect MMI status. Dr. Lesnak also opines that Dr. Bloch "significantly erred" in calculating the Claimant's impairment rating because of improper range of motion measurements and the failure to apportion for the Claimant's pre-existing lumbar spine pathology and surgical procedure.

17. On June 18, 2015, Dr. Leach authored a rebuttal opinion to the IME report of Dr. Lesnak. With respect to MMI, Dr. Leach continues to opine the Claimant was not at MMI as of May 31, 2014 as his symptoms and function have worsened and there are additional interventions that may improve symptoms and function. Only if the Claimant elects not to undergo these procedures, is MMI appropriately applied. Regarding apportionment, Dr. Leach notes it may be appropriate to apportion, but he defers to Dr. Bloch and Dr. Turner on this issue. As for the range of motion measurements, Dr. Leach noted that his measurements were valid and not affected by fear, inhibition, pain or neuromuscular inhibition and they were very similar to those obtained by Dr. Block.

18. At the hearing, Dr. Lesnak testified generally in accordance with his IME report dated May 4, 2015. He testified that in comparing the Claimant's 2 MRI reports, from before and after the April 23, 2013 fall, he found that the only change were expected post-surgical changes from the Claimant's prior January 2013 surgery. Dr. Lesnak testified that between the Claimant's second May 28, 2013 surgery and being placed at MMI by Dr. Turner on May 31, 2014, the Claimant was on medications, in physical therapy and work hardening. Dr. Lesnak attributes the Claimant's continuing

low back pain to the lack of movement in his fused section. He opined that an MRI or referral to an interventional physiatrist will not change the Claimant's function. He further opined that being at MMI does not necessarily mean that a patient is "fixed" or "cured" but only that there is no more active care that is likely to improve the condition. Thus, in spite of Dr. Bloch's recommendations, Dr. Lesnak finds that Dr. Bloch is incorrect when he opines that the Claimant is not at MMI because the Claimant's condition is stable. He further testified that the advisory impairment rating by Dr. Bloch is incorrect due to the failure to apportion and the calculation of the impairment rating itself. On cross-examination, Dr. Lesnak testified that the diagnostics and modalities recommended by Dr. Bloch, including: additional MRI, pool therapy, physical therapy, work hardening, cold laser therapy, acupuncture and massage are not likely to be curative in nature and are not going to solve the Claimant's anatomic condition. He went on to testify that earlier on these modalities are more helpful, but at this juncture in the Claimant's care, the passive, manual modalities are not recommended by the Medical Treatment Guidelines because they are not likely to be curative. He did concede that if there is a flare of the Claimant's symptoms, that the modalities could be helpful and reasonable, but opined that this would be in the nature of maintenance medical care.

19. At the hearing the Claimant testified that after his January 2013 spinal surgery, he was released to return to work without any restrictions and could lift up to 100 lbs. as per his job requirements. Before his work injury on April 23, 2013, the Claimant testified that he would be a little sore in the mornings but could perform all of the essential functions of his job. The Claimant testified that had he not had the work injury, he had no plans to return to Dr. Turner. The Claimant also testified that once he was cleared for work after recovering from his January 2013 surgery, he did not use any narcotic drugs because that could cause him to lose his job. He testified that he still had some narcotics left over from when he was off work for the surgery and recovery, but that he no longer took them once he went back to work.

20. In weighing the competing opinions of Dr. Leach and Dr. Lesnak, the ALJ finds the opinion of Dr. Leach to be more persuasive. The ALJ is not persuaded that Dr. Turner's opinion as to MMI supports Dr. Lesnak either. Dr. Turner was clearly recommending additional treatment and diagnostics aimed at identifying whether the Claimant was a surgical candidate or if there was further medical treatment to recommend for improvement of the Claimant's condition. Dr. Turner only placed the Claimant at MMI as the Claimant requested he do so at that time in accordance with the Claimant's desire to return to full time, unrestricted work. To the extent that the Claimant is unable to return to work due to an inability to meet essential job functions, as is the case, then the opinion of Dr. Turner as to MMI status is questionable. Moreover, the DIME physician found the Claimant was not at MMI and made reasonable recommendations for diagnostics and continued treatment aimed at improving the Claimant's function and condition. Dr. Lesnak's opinion clearly varies from that of Dr. Bloch. However, Dr. Lesnak's opinion amounts to a mere difference of opinion with Dr. Bloch. The Respondents failed to establish that Dr. Bloch's opinion regarding MMI was in error.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

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

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

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

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

Here, the Respondents have failed to meet their burden of proof to show that it is highly probable that the opinion of Dr. Bloch on the determination of the Claimant's MMI status was clearly incorrect. Dr. Lesnak disagrees with Dr. Bloch's opinion that the Claimant is not at MMI. Dr. Bloch found that the Claimant is not at MMI because he opined that there were additional medical treatment options to improve the Claimant's low back condition, which, if the Claimant were willing to undergo such treatment, would not be consistent with a finding of MMI. He specifically recommended the Claimant undergo a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage. The opinion of Dr. Bloch is further supported by that of Dr. Leach who strongly disagrees

with Dr. Lesnak because he opines that there is a likelihood of discogenic pain generators and he believes that the recommended modalities are likely to improve the Claimant's function and overall condition.

The conclusion of Dr. Lesnak that the Claimant is at MMI for his low back condition amounts to a difference of opinion with Dr. Bloch, which is not sufficient to overcome the DIME physician's opinion. Thus, Dr. Bloch's determination that the Claimant is not at MMI has not been overcome by clear and convincing evidence. Therefore, Respondents' application to overcome the DIME opinion is denied and dismissed.

Medical Benefits–Authorized, Reasonably Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical

treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

The Claimant continues to suffer from low back pain attendant to his April 23, 2013 work injury. Both the DIME physician Dr. Bloch and the Claimant's current ATP, Dr. Leach recommend the Claimant undergo a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage. The Claimant's surgeon, Dr. Turner had also recommended additional diagnostics and treatment, but cancelled them as the Claimant voiced a strong preference to return to work with no work restrictions which necessarily required a finding of MMI. The Claimant has been unable to return to work as the Claimant cannot perform essential job functions and he is not at MMI per Dr. Bloch and Dr. Leach and as found herein. While Dr. Lesnak disagrees and opines that that the recommended treatment is not likely to result in improvement, his opinion on this issue is less persuasive than that of Dr. Leach.

Thus, the Claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. Leach and Dr. Bloch is reasonably necessary to cure and relieve the Claimant of the effects of his April 23, 2013 work injury.

Temporary Disability Benefits

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

(a) the employee reaches maximum medical improvement;
(b) the employee returns to regular or modified employment;
(c) the attending physician gives the employee a written release to return to regular employment; or
(d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

Through testimony and the exhibits, it was established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. Although the Claimant was placed at MMI for this work injury by Dr. Turner, and Dr. Turner returned him to work with no restrictions effective June 1, 2014, the Claimant was ultimately unable to return to work. The Claimant's condition left him with the inability to meet the essential functions of his job duties, as required by his employer, and he was not permitted to return to work. As Drs. Leach and Bloch found, the Claimant was not at MMI and his physical abilities did not correspond to the Claimant's ability to return to regular employment. The Claimant suffered a wage loss as a result of his April 23, 2013 work injury. Therefore, the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 1, 2014 ongoing until the occurrence of one of the events set forth in C.R.S. 8-42-105 (d)(3).

ORDER

It is therefore ordered that:

1. The Respondents have failed to meet the burden of proving, by clear and convincing evidence that the DIME physician is in error as to his determination that the Claimant is not at MMI.

2. The Respondents' application to overcome the DIME opinion is denied and dismissed.

3. The Respondents shall provide medical treatment to the Claimant consisting of the treatment recommendations by Drs. Bloch and Leach, including a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage.

4. The Claimant is entitled to receive temporary total disability indemnity benefits commencing on June 1, 2014, the day after Dr. Turner placed the Claimant at MMI and the day that Dr. Turner returned the Claimant to work with no restrictions. The Claimant's TTD benefits shall be calculated and paid in accordance with C.R.S. § 8-42-105.

5. Respondents shall pay statutory interest at the rate of 8% per annum on all amounts due and not paid when due.

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

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

DATED: August 7, 2015

Kimberly A. Allegretti

#JJHHHFCF0D198Vv 12

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

ISSUES

- Is Claimant entitled to a change of physician pursuant to 8-43-404(5)(a)(VI), C.R.S.?

FINDINGS OF FACT

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

1. Claimant suffered a compensable industrial injury on October 17, 2013 while working for Respondent-Employer. Claimant injured her low back when she was lifting a fan while in an awkward position. An E-1 was filed by Employer on October 8, 2013.

2. Claimant was initially evaluated by Laura Rosi at Concentra, who assessed Claimant as suffering a lumbosacral strain. Claimant was next evaluated by Darla Draper, M.D. who noted experienced a significant increase in back pain after Claimant started physical therapy.

3. John Aschberger, M.D. at Concentra became an authorized treating physician for Claimant in early 2014. Dr. Aschberger conservatively treated Claimant with medications and massage therapy. From January 17, 2014 through February 28, 2104, Dr. Aschberger noted symptom improvement.

4. Claimant saw Dr. Draper on March 7, 2014, at which time it was noted that she was stable and "close to discharge".

5. On May 2, 2014, Dr. Aschberger determined that Claimant was at maximum medical improvement ("MMI") and assigned a 9% whole person impairment.

6. On May 7, 2014, Claimant was seen for follow-up evaluation by Dr. Draper, who noted Claimant attained MMI today and ordered massage therapy 1/wk for 4wks, medication and monitoring appointments with Dr. Aschberger for one year, 1-2 steroid injections if needed for radicular symptoms.

7. Claimant was seen by Dr. Aschberger on June 27, 2014, at which time she reported increasing symptoms. They discussed treatment options and Dr. Aschberger prescribed additional hydrocodone, as well as naproxen.

8. Claimant was next seen by Dr. Aschberger on July 25, 2014 and she reported increasing symptoms. Dr. Aschberger noted that previous recommendations including massage therapy and a repeat injection were denied. Dr. Aschberger recommended electrodiagnostic testing and noted that he considered her treatment to be maintenance, but "if there is objective deterioration MMI may need to be reassessed". Dr. Aschberger gave Claimant a flector patch for additional symptom relief.

9. Dr. Aschberger examined Ms. Goff on September 12, 2014 at which time he noted that Claimant had pain in her back and right leg. His assessment was lumbar radicular symptoms with a L3-L4 disc protrusion. He testified these were worsening symptoms. He recommended a repeat epidural at L4, since Ms. Goff had a response to the previous epidural injection. Dr. Aschberger referred Claimant to Dr. Sacha.

10. Greg Reichhardt, M.D. conducted a Division of Worker's Compensation Independent Medical Examination on September 18, 2014. Claimant reported aching pain in her low back, with pain extending down the posterior aspect of the right thigh and calf with tingling in the plantar medial aspect of the foot. Dr. Reichhardt concluded that Claimant was not at MMI.

11. Dr. Reichhardt recommended that Claimant be evaluated by a psychologist to consider whether she suffered from work-related depression. He noted: "If she does have work-related depression it would be reasonable to consider use of an antidepressant. One might consider Cymbalta to see if this helps with her pain as well as her depression." Dr. Reichhardt stated that he could not assign an impairment rating for her subjective report of depression, as he could not make a medically probable diagnosis of work-related depression. In his testimony at hearing, Dr. Aschberger agreed that it was reasonable to refer Claimant for a psychological evaluation.

12. Dr. Reichhardt also opined that it would be reasonable for Claimant to be reevaluated by Dr. Sacha for consideration of a repeat epidural steroid injection. Dr. Reichhardt stated that an electrodiagnostic evaluation would also be appropriate given her report of a feeling of "near giving way with the right leg, as well as her recurrent symptoms". Dr. Reichhardt observed that Dr. Aschberger also felt that this might help direct treatment.

13. Dr. Aschberger testified at the hearing[1] and stated Ms. Goff has not voiced any opposition to him treating her. In treating patients within the worker's compensation system, Dr. Aschberger testified that he has experienced the situation where the DIME physician overruled his finding of MMI for a patient he was treating. He testified that he did not have a problem treating a Claimant when his determination of MMI was overruled by the DIME physician. He had no problem providing the treatment to Claimant which was recommended by the DIME physician, Dr. Reichhardt.

[1] Although he was not offered as an expert, Dr. Aschberger is board-certified in Physical Medicine and Rehabilitation and is Level II accredited pursuant to the *Worker's Compensation Rules of Procedure.*

14. Dr. Aschberger did not talk with Claimant about the DIME report issued by Dr. Reichhardt and had not received a copy of the DIME report. Claimant testified that she did not provide a copy of the DIME report to Dr. Aschberger, nor did she discuss it with him. Dr. Aschberger testified he generally receives the copy of the DIME report from the insurance carrier. He was not aware of the specific recommendations made by Dr. Reichhardt. Dr. Aschberger also stated that he is not in contact with the carrier as to whether the claim is open or closed.

15. Dr. Aschberger saw Claimant in follow-up on October 7, 2014 and her complaints were pain in the back and into the anterior thigh. It was noted that he had referred her for a repeat lumbar epidural injection, which was denied. Dr. Aschberger opined that given her worsening symptoms and signs of weakness, Claimant did not appear to be at MMI. He referred her for a surgical evaluation by an orthopedic spine specialist.

16. On October 9, 2014 Claimant's counsel (Patrick Barnes, Esq.) sent a letter [via facsimile] to Respondents' counsel requesting a change of physician to Stephen Lindenbaum, M.D. Claimant testified that this letter expressed her wish to change treating physicians. There was no response to this correspondence, which was admitted into evidence.

17. Claimant was evaluated by Gary Ghiselli, M.D. on October 16, 2014, at which time he reviewed her symptoms, as well as the 2013 MRI. Dr. Ghiselli's assessment was continued low back and right anterior thigh pain following 10/7/13 work injury. Claimant was noted to have been failing non-operative treatment thus far, but another injection was scheduled next week. Degeneration of lumbar or lumbosacral intervertebral disc, as well as displacement of lumbar or lumbar intervertebral disc (without) myelopathy), lumbago, radiculitis (thoracic lumbosacral neuritis or radiculitis unspecified) was noted. Dr. Ghiselli felt it would be good for Claimant to proceed with the injection and if there she did not get lasting relief, recommended a new updated MRI.

18. Claimant received a bilateral L4 transforaminal epidural injection/spinal nerve root block on October 23, 2014 which was administered by Dr. Sacha. His report indicated Claimant reported a 90% relief of her pain.

19. Dr. Aschberger saw Claimant on October 31, 2014, noting she had a diagnostic response to her epidural injection. Immediately post-injection, she had resolution of leg as well as back pain. Dr. Aschberger described this as an excellent response to the injection.

20. A General Admission of Liability ("GAL") was filed on November 5, 2014. In the remarks section, it noted that the "per DIME" Claimant was not at MMI. Respondents admitted for medical benefits pursuant to the GAL.

21. Dr. Aschberger re-evaluated Claimant on January 2, 2015, at which time his assessment was lumbar radiculitis. Dr. Ghiselli's report was reviewed. Claimant's

previous EMG findings were described as “mild”, but supportive of an L4 distribution abnormality. Since Ms. Goff indicated that she would consider surgical intervention, Dr. Aschberger ordered a repeat MRI.

22. Dr. Aschberger next saw Claimant on February 13, 2015 and his assessment was chronic low back pain and lumbar radiculitis. Her MRI scan of 2/10/15 showed improvements over her previous test, with degenerative disc changes at L3-4 and a small central bulge which was less prominent. Ms. Goff’s electrodiagnostic testing was positive and described as “mild”. Dr. Aschberger opined she was an unlikely candidate to proceed with surgical intervention and he renewed her medication. He noted that he would see her back in two months for maintenance.

23. Claimant returned to Concentra on March 17, 2015 and was evaluated by Jennifer Huldin, M.D. Dr. Huldin’s office note indicated that Claimant presented for work note, had been at MMI for nearly a year and that she saw Dr. Aschberger monthly for medical maintenance. Dr. Huldin’s assessment was lumbosacral strain and the neurological finding of leg weakness was noted. Dr. Huldin’s plan was for Claimant to follow-up with Dr. Aschberger.

24. Claimant was seen by Dr. Aschberger on March 19, 2015 and reported a flare-up of her back symptoms. She reported pain in her back and right leg. Dr. Aschberger noted myofascial tightness and restriction upon examination, which were described as “objective findings that coincide with her symptomatology”. He recommended that she continue on her medication regimen and advised Ms. Goff to pursue a home exercise program. He also prescribed Robaxin.

25. Claimant testified at hearing that she returned to Concentra on one occasion and was not seen. She was told her case was closed. She did not specify when this occurred.

26. Dr. Aschberger examined Claimant on March 27, 2015, noting she continued to have significant irritation and the she had tenderness at the right lumbar parpaspinal levels with restricted flexion. The report for this appointment referred to the date of MMI as May 7, 2014. Claimant testified that she had spoken to Dr. Aschberger about and injection and he agreed with her. Dr. Aschberger referred her for an L4 selective nerve route block. A copy of the written referral was admitted into evidence at hearing.

27. Dr. Aschberger saw in her follow-up on April 3, 2015 and he diagnosed recurrent lumbar radiculitis. Dr. Aschberger was noted that Claimant would contact him if there was anything he could do to help expedite getting the injection authorized.

28. Dr. Aschberger examined Ms. Goff on April 17, 2015, the day after she received her injection. She did not respond well, reporting increased symptoms in her leg. The assessment was recurrent lumbar radiculitis and Dr. Aschberger recommended that Claimant continue with the hydrocodone, a muscle relaxant and naproxen.

29. Dr. Aschberger saw Claimant one week later on April 24, 2015. At that time, Claimant reported persistent irritation at the right leg, with an improvement in back pain after the injection. Dr. Aschberger concluded that Claimant was suffering from low back pain with radiated symptomatology into the lower extremity, which he felt suggested some component of sciatica. Dr. Aschberger recommended that Claimant reinitiate gabapentin and pursue a home exercise program.

30. Dr. Aschberger saw Ms. Goff for a follow-up evaluation on May 27, 2015 and noted that she had low back pain and symptoms of radiculitis. He reviewed the MRI from 2/10/15, which showed no real changes with some mild degenerative change at the L3 L4 disc. Dr. Aschberger felt that the MRI looked mild over her previous MRI scan, with improvement. He recommended a short trial of chiropractic and stated beyond that she will need to continue with "maintenance care".

31. In his appointment with Claimant on June 15, 2015, Dr. Aschberger noted that Claimant reported persistent pain in her low back, including some issues of pain radiating into the right leg. He reiterated his recommendation for a short course of chiropractic and wanted Claimant to pursue her home exercise program. Dr. Aschberger planned to see Claimant in 6-8 weeks.

32. Claimant was seen by John Mobus, D.O. on June 22, 2015 upon referral by Dr. Aschberger. Claimant was noted to have right–sided belt line low back pain, aching and throbbing into right lateral thigh, but no motor or sensory deficit. Dr. Mobus' diagnosis was chronic repetitive right lumbar pelvic strain. Dr. Mobus provided treatment in the form of manipulation of lower thoracic spine, lower lumbar spine and right SI joint. Claimant returned to Dr. Mobus on June 25th for a re-check, at which time he noted she felt some benefit from the previous appointment, but was experiencing ongoing unresolved back pain.

33. Claimant returned to Dr. Mobus on June 29, 2015, reporting continued bilateral belt line low back pain, somewhat stronger on the right. Claimant reported her back pain improved 20%. Range of motion was notable for mild aggravation of right low back pain bilaterally. Ms. Goff was treated with myofascial release to the right lumbar and gluteal musculature, therapeutic stretching to the lower extremities. Neuromuscular therapies to the right lumbar pelvic region with pelvic blocking were also provided.

34. Claimant was seen by Dr. Mobus on July 2, 205, who noted she had complaints of regional right SI, low back and lumbopelvc pain. Ms. Goff denied radiation, referral or radicular complaints. She noted moderate improvement in her pain with treatment, with symptoms returning the following day. Dr. Mobus provided active myofascial release to the affected area, therapeutic stretching to the lower extremities and neuromuscular therapies to the right lumbar pelvic region with pelvic blocking. Claimant was scheduled for follow-up in one week.

35. Claimant testified that she wanted to change physicians because that she wasn't getting the medical attention she needed. She felt that Dr. Aschberger should

have been provided a copy of the DIME report and that he should have had all the information related to her care.

36. Claimant has experienced symptoms of depression. She has not had a conversation with Dr. Aschberger or other medical personnel at his office regarding a referral to a psychologist. As of the date of hearing, she had not been referred for a psychological evaluation.

CONCLUSIONS OF LAW

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

Generally

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

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

Change of Physician

The ALJ considered the two possible bases for change of physician under the Act. More particularly, change of physician is governed by Section 8-43-404(5)(a)(III)[2], C.R.S [effective April 1, 2015], which provides in pertinent part:

"An employee may obtain a one-time change of the designated authorized treating physician under this section by providing notice that meets the following requirements:

(A) The notice is provided within **ninety days after the date of injury**, but before the injured worker reaches maximum medical improvement.

[2] See also W.C.R.P. Rule 8-5

(B) The notice is in writing and submitted on a form designated by the director. The notice provided in this subparagraph (III) shall also serve as a request and authorization to the initially authorized treating physician to release all relevant medical records to the newly authorized treating physician.

(C) The notice is directed to the insurance carrier or to the employer's authorized representative, if self-insured, **and to the initially authorized treating physician** and is deposited in the U.S. mail or hand-delivered to the employer, who shall notify the insurance carrier, if necessary, and the initially authorized treating physician." [Emphasis added]

…

The ALJ concludes that this section of the Act does not apply in this instance, as notice was not provided within ninety days (90) after the date of injury and no copy was sent to the initially authorized treating physician. Further the request was not submitted on the form prescribed by the Director of the DOWC. Therefore, Claimant's request for change of physician does not meet the requirements of this section.

Alternatively, the ALJ considered whether Claimant is entitled to a change of physician pursuant to Section 8-43-404(5)(a)(VI), C.R.S.[3] This section provides in relevant part:

"In addition to the one-time change of physician allowed in subparagraph (III) of this paragraph (a), upon written request to the insurance carrier or to the employer's representative, if self-insured, an injured employee may procure written permission **to have a personal physician or chiropractor** treat the employee. If permission is neither granted nor refused within twenty days, the employer or insurance carrier shall be deemed to have waived any objection to the employee's request. Objection shall be in writing and shall be deposited in the United States mail or hand-delivered to the employee within twenty days…" [Emphasis added]

As a starting point, the evidence establishes that a one-time change of physician request was sent to counsel for Respondents and there was no response to this request within twenty (20) days. Under this section, this would constitute a waiver by Respondents to the request for change of physician.

However, in reviewing the other part of this statute, the ALJ concludes Claimant has failed to satisfy her burden of proof to change the authorized treating physician under the foregoing provision in two respects. First, there is no evidence before the ALJ that Dr. Lindebaum was (or is) a personal treating physician of the Claimant. The ALJ is bound to apply the plain meaning of the statute. "To discern the legislative intent, we look first to the plain and ordinary meaning of the statutory language." *City of Brighton v. Rodriguez*, -P.3d –, 2104 CO 7, 2104 Colo Lexis 61(Colo. 2014) quoting *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). A commonly accepted meaning is preferred

[3] See also W.C.R.P. Rule 8-7

over a strained or forced interpretation. *M.S. v. People*, 812 P.2d 632, 636 (Colo. 1991). Additionally, courts look to the overall statutory context when construing meaning. *Bd. of Cnty. Comm'rs. v. Hygiene Fire Prot. Dist*., 221 P.3d 1063, 1066 (Colo. 2009).

The plain language of Section 8-43-404(5)(a)(VI), C.R.S. requires Claimant to request a change of physician to a personal physician or chiropractor. Since there is no evidence before the ALJ that Dr. Lindenbaum is a personal physician, this request for change of physician does not meet the Act's requirements.

Second, the inference that is drawn from this language in the statute is that the Colorado Legislature intended to impose some limitation on requests for change of physician. The use of the terms "personal physician or chiropractor" is evidence of the Legislature's intent to limit the circumstances where the injured employee can change physicians. Absent a showing that meets the requirements of the statute, the ALJ concludes that Claimant has not met her burden of proof and is not entitled to a change of physician.

The ALJ also considered Claimant's argument that the relationship between Ms. Goff and Dr. Aschberger warrants a change of physician. In this regard the ALJ considered cases decided under the prior version(s) of the Act to determine whether Claimant satisfied her burden of proof with regard to change of physician. The ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. See *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009). The claimant may procure a change of physician where he/she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995).

In this case, Claimant expressed misgivings about Dr. Aschberger's treatment of her, since he had not seen the DIME report. She offered her belief that he should have all relevant information concerning her care. While this undoubtedly is true, this falls short of a showing that she and Dr. Aschberger were unable to communicate or that she did not trust him. Dr. Aschberger's treatment notes reflect that over the course of his appointments with Ms. Goff, he has discussed treatment options with her. These discussions took place at regular intervals, as Dr. Aschberger was evaluating Ms. Goff every 1-2 months. Dr. Aschberger's testimony at hearing also demonstrated to the ALJ that he was knowledgeable about Ms. Goff's course of treatment and continued to provide treatment, including referrals despite not having the DIME report. Dr. Aschberger has also offered to assist Claimant in securing authorization for treatment, as documented in his April 3, 2015 note and his testimony at hearing.

Under these circumstances, where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *See Greenwalt-*

Beltmain v. Department of Regulatory Agencies, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

The ALJ notes that Claimant has received extensive medical treatment from Dr. Aschberger, both before and after MMI. The latter treatment was provided despite the fact that he had not seen the DIME report. Dr. Aschberger testified credibly that he has no problem providing treatment to a patient where MMI was reversed by the DIME physician.

Indeed, Dr. Aschberger has continued to provide treatment to Ms. Goff, despite not having a copy of Dr. Reichhardt's DIME report. The ALJ notes that the medical records admitted at hearing document the fact that Claimant had 12 appointments with Dr. Aschberger since the DIME was conducted on September 18, 2014. Dr. Aschberger's treatment records and his testimony evince a willingness to consider various treatment options and modalities. He has made multiple referrals including referrals for injections, electrodiagnostic testing and chiropractic treatment. Claimant has been able to see Dr. Aschberger (as well as Dr. Huldin) on non-scheduled appointment days. Dr. Aschberger also made referrals to other providers such as Dr. Sacha and Dr. Mobus. A repeat MRI was also performed after the DIME. Dr. Aschberger also agreed that it would be appropriate to refer Claimant for a psychological evaluation. Thus, the ALJ concludes that Claimant has continued to receive adequate treatment from Dr. Aschberger to cure and relieve the effects of her industrial injury. The ALJ is also persuaded by Dr. Aschberger's testimony that it is not unusual to have a DIME physician determine that patient is not at MMI and he would not have a problem continuing to treat Ms. Goff.

The ALJ has considered Respondents' contention that Dr. Aschberger has provided a significant amount of treatment after the DIME was conducted. The ALJ is persuaded by this argument and notes further that much of Dr. Aschberger's post MMI treatment is consistent with what was recommended by Dr. Reichhardt. This is not a case where the authorized treating physician has refused to provide treatment to the Claimant. Under these facts, a change of physician is not warranted.

In light of Dr. Aschberger's testimony concerning a psychiatric referral and Respondents' argument above, the ALJ concludes that Respondents should provide further treatment in the form of psychiatric referral for Claimant. This is reasonable given the conclusions of the DIME physician, Dr. Reichhardt and the testimony of Dr. Aschberger.

ORDER

It is therefore ordered that:

1. Claimant's request for change of physician is denied and dismissed.

2. Respondents shall provide the remaining medical treatment, as outlined in Dr. Reichardt's DIME report, including a referral for psychological treatment and prescription(s).

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

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

DATED: August 7, 2015

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-962-842-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 10, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 6/10/15, Courtroom 1, beginning at 8:30 AM, and ending at 12:15 PM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection, with the exception of Exhibit 12 to which there was a relevance objection, which was overruled. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, a deadline of 30 days for the filing of the evidentiary depositions of Danny Lopez , Rebecca Hohnstein, and the Claimant's rebuttal deposition was established. Thereafter, a responsive briefing schedule was established. Written transcripts of all three evidentiary depositions were filed on July 2, 2015. Instead of filing an opening brief, the Claimant filed a document labeled proposed order ('Findings of fact, Conclusions of Law and Order") on July 17, 2015, indicating that he had not reviewed the Respondents' brief. Despite the labeling of the document, the ALJ construes it as the Claimant's opening brief. On July 15, 2015, the Respondents' filed what was labeled as "Respondents Position Statement," which the ALJ construes as Respondents' answer brief. On July 20, 2015, the Respondents filed an unopposed

"Motion to File Response to Claimant's" Proposed Findings of Fact, Conclusions of Law and Order," which was granted on July 27, 2015. On July 28, 2015, the Respondents filed what is labeled as "Respondents' Answer Brief," which the ALJ construes as the Respondents' reply brief. Based on the actions of the parties in taking and filing post-hearing depositions of all witnesses listed on the Respondents' case information Sheet (CIS), and the rebuttal evidentiary deposition of the Claimant, plus the fact that **no** continuation hearing has been set, the ALJ determines that the Respondents completed their case-in-chief by evidentiary depositions, and the Claimant completed his case in rebuttal by his evidentiary deposition. Consequently, as of the filing of the Respondents' reply brief on July 28, 2015, the ALJ deems the matter submitted for decision as of that date.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits, average weekly wage (AWW); and, a reservation of the issue of temporary total disability (TTD) benefits. The respondents raised the affirmative defense of 'responsibility for termination," and the issue of unemployment insurance (UI) offset.

Despite the fact that the Respondents initiated the hearing on all issues (which accounts for the mislabeling of the briefs), the Claimant bears the burden of proof, by a preponderance of the evidence, with the exception of the issues of "responsibility for termination,' and UI offset, in which case the Respondents bear the burden of proof, by preponderant evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds if compensable, to an AWW of $1,315.32.

2. The Claimant was born on January 7, 1953, and he was 62 years of age at the date of the hearing. The Claimant is right hand dominant.

3. Claimant was hired by Employer on or about July 22, 2014 as a delivery truck driver. The job required Claimant to make multiple local deliveries of petroleum in each shift. Deliveries required Claimant to drive and handle truck hoses to deliver product to customers.

Procedural History

4. The Claimant testified that he prepared a memorandum reporting his injury (Exhibit 6), which he hand delivered to the base office on a date uncertain, but before October 3.

5. On September 30, 2014, the Claimant called Rebecca Hohnstein (hereinafter "Hohnstein"), co owner of the Employer. Hohnstein advised the Claimant to bring in his access card, radio, and uniforms. She advised him that he was fired.

6. On October 3, 2014, the Claimant turned in his access card, radio and uniforms at the base office.

7. The Respondents filed a "First Report of Injury or Illness" on October 6, 2014.

8. The Respondents filed a Notice of Contest on October 14, 2014.

Prelude to the Injury Incident

9. It is undisputed from the testimony of the Claimant and Danny Lopez, the Employer's Dispatch and Operations Manager, that on September 22, 2014, the Claimant noticed a leak in one of the hoses attached to his delivery truck. He called Lopez and informed him of the leak. Lopez told him to return to the Employer's base of operations at 725 S. Main Street in Brighton ("Base"). The Claimant alleges he suffered a right shoulder injury from attempting to twist off the hose after returning to Base. The Employer denies that the Claimant engaged in that activity and suffered an injury. The ALJ finds that the Claimant did **not** suffer a right shoulder injury at this time, or at any time in the course and scope of his employment for the Employer herein.

10. The Claimant's counsel called Lopez as an adverse witness in his case-in chief, and Lopez also testified by post-hearing deposition in the Respondents' case-in-chief. According to Lopez, his responsibilities include monitoring the warehouse, ensuring employees complete their assigned tasks, and dispatching drivers to deliveries. At his deposition, Lopez testified that the Claimant was aware he was the Claimant's supervisor because new employees are informed of this during the interview process and employees know that Lopez is their supervisor simply from the course of their work. Rebecca Hohnstein corroborates Lopez, and she testified, in her evidentiary deposition, that she told the Claimant that Lopez was his supervisor. The Claimant denies that Lopez was his supervisor. The ALJ finds no plausible reason for Lopez and Hohnstein to say that Lopez was the Claimant's supervisor, if he was not. The Claimant's denial of this fact impairs his credibility. The ALJ finds that the Claimant knew, at all relevant times, that Danny Lopez was his supervisor.

The Injury Incident

11. According to Lopez, on September 22, 2014, the Claimant returned to Base around 4:00 PM. The leak was at a 3" hose connection where the fuel is sucked out from the storage container on the truck. Lopez testified the hose fits into a mount on the body of the truck, and the hose fits into the mount with a male/female coupling. The attachment is secured by flipping two ears prongs. Lopez testified to remove the hose, the ears would be unhooked, and then the hose pulled out. To put the hose back into the mount, it would be inserted, and the two ears would be secured. This contradicts the Claimant's version that the hose had to be twisted round to unhook it. The ALJ finds that Lopez's testimony concerning the removal of the hose is accurate and the Claimant's testimony in this regard is **not** accurate.

12. It is undisputed that the Claimant notified Lopez of the leak and then returned to Base for Lopez to examine the leak. Lopez testified he had removed a hose of this type on occasions in the past, including when he himself had worked as a delivery driver. It is entirely logical that Lopez inspected the hose and removed the hose from the truck after the Claimant returned to Base for the specific purpose of having Lopez examine the hose and determine what repairs were required

13. Also, according to Lopez, when the Claimant returned to Base, another employee, Josh Peak, was in the vicinity and came over to assist. Lopez positively testified that the Claimant did not assist with removing the hose from the truck. Rather, Lopez asked Peak to grab a bucket for the leaking fuel while he removed the hose, and Lopez himself unhooked the hose and drained the remaining fuel from the hose into the bucket. At his deposition, Lopez testified that, when he removed the hose, it did not feel stuck or difficult to pull out. This squarely contradicts the Claimant's version of events. According to Lopez there was no indication that Tabares had tried to unhook the hose. Also Lopez stated that Tabares did not inform him that he had injured his shoulder, nor did he appear to be in discomfort. The ALJ finds that Lopez, and not the Claimant, removed the hose.

14. The Claimant testified that he knelt on the ground, and then tried to detach the hose from the truck mount. He testified that detaching the hose was not easy, that he had to put some force and twisting action into the detachment and that, in the process, he hurt his right shoulder. He further testified that Peak had to finish detaching the hose. He also testified that Lopez never touched the hose. This contradicts Lopez's testimony that Lopez had to unhook the hose. The Claimant further testified that he did not say anything to Lopez or Peak about his shoulder since he considered neither of these individuals to be his supervisor. In his mind, the co-owner, Becky Hohnstein ("Hohnstein"), was his only supervisor. The ALJ infers and finds that the Claimant's belief in this regard is contrary to reality. The Claimant's testimony

contradicts Hohnstein's and Lopez's testimony. The ALJ finds that Lopez, and not the Claimant, removed the hose.

15. Lopez positively testified that it was unnecessary for the Claimant to have tried to twist the hose to remove it. Lopez stated there was no twisting involved with unhooking the latches or pulling the hose out. Rather, it required a forward and backward movement to insert or remove the hose. Lopez clarified in his post-hearing deposition that the hose was a suction hose, which only required lifting the ears and pulling out the hose. He also testified that the male/female interlocking parts did not even allow the hose to be moved from one side or the other once inserted. Lopez testified at hearing that the Claimant's description in his written statement that he tried to "unhook and twist off the hose" did not make sense with how the hose would be removed. The ALJ accepts Lopez's version of the "hose removal," and rejects the Claimant's version because Lopez has no direct interest in the outcome of this claim, there has been no showing of animosity for the Claimant as a motive, and Lopez version makes sense and the Claimant's version makes **no** sense.

16. According to the Claimant, he injured his right shoulder at approximately 4:00 PM, on September 22, 2014 at Base. The Claimant testified that when he returned with the truck to Base, Lopez instructed him to take the hose off the mount. The Claimant testified that he knelt down to remove the hose. He further testified that after the ears were pulled back it was difficult disconnecting the male/female connection. He testified he could not pull out the hose. He testified while trying to twist the hose off he hurt his right shoulder, he immediately stood up, backed away from the truck, and put his left hand on his right shoulder. The Claimant testified that he felt something ripping in his right shoulder. He testified his pain at that time was 10/10, where 10/10 was so severe one would want to commit suicide. He testified he did not tell Lopez he was hurt, because Lopez was just a dispatcher and not his boss. The Claimant's testimony is contradicted by Lopez, who has no direct interest in the outcome of this claim. The ALJ finds the Claimant's version of the alleged hose removal incident as lacking in credibility. Moreover, the ALJ finds Lopez's version more credible than the Claimant's version of the incident and, as found, the Claimant did **not** remove the hose.

17. The Claimant acknowledged that the hose had a male/female part where the male part on the hose fit into grooves of the female mount, which would require the hose to be inserted and pulled out in backwards and forwards motions. Despite this, he stated that twisting the hose helped with removing it, and the twisting caused his right shoulder injury. Based on the Claimant's concession concerning the male/female mounts and the pulling backwards and forwards to remove the hose, as also testified to by Lopez and Peak, the Claimant's "twisting" version makes no sense, and it undermines his version of the mechanics of his right shoulder injury.

18. According to the Claimant, after he moved away from the vehicle in pain, Josh Peak wound up disconnecting the hose. The Claimant testified that Peak put a

bucket under the hose to allow it to drain, and the Claimant testified that Peak lifted the center part of his hose with his left hand to finish draining the fuel. The ALJ infers and finds the Claimant's version of Peak finishing the disconnection of the hose disingenuous insofar as it attempts to be consistent with Peak's role in the removal of the hose. Lopez, however, testified that he removed the hose, and the Claimant had no role in the removal of the hose.

Aftermath of the Incident

19. After the hose was removed, according to Lopez, he told the Claimant to use the other mounts on his truck to finish his scheduled deliveries for that day, and that the Claimant was to take the truck to have the leaking hose repaired the next morning. At that point, according to Lopez, the Claimant requested the set-up of the mounting location be changed as well to be moved higher and closer to the front of the truck. Lopez told the Claimant that he would not approve that change, because it would be costly (there is an indication that it would cost between $15 and $20 thousand dollars), it would take the truck out of service, it was not necessary to fix the leak, and the company has never had issues related to the location of the mounting and hose. According to Lopez, the Claimant appeared frustrated at this denial, shook his head, and then left Base for the day. The ALJ finds Lopez's testimony in this regard accurate.

20. Lopez prepares a dispatch sheet every evening assigning deliveries for his drivers the following day. He would post this dispatch sheet in the office for his drivers to see the next morning, and he placed tickets for the individual jobs in a basket that was next to the dispatch sheet. He also stated he would fax the sheet to his other warehouse in Commerce City, so that the warehouse would know what product to pull for the drivers. According to Lopez, drivers became aware of their assigned deliveries by checking the dispatch sheet and grabbing their tickets when they arrived in the morning. Lopez never assigns work by walking up to drivers and delivering tickets, contrary to what the Claimant testified he expected the next morning. The Claimant's written statement, which noted that the Claimant waited outside for deliveries to be assigned, is contrary to Lopez's, the dispatcher, testimony (*See* Respondents' Exhibit). E. The only way deliveries would be assigned would be by the dispatch sheet. In this regard, the ALJ finds Lopez's testimony credible and the Claimant's testimony lacking in credibility.

21. According to Lopez, the dispatch sheet (Respondents' Exhibit D, p. 12), is the sheet he prepared the night of September 22, 2014, for September 23, 2014. Lopez testified that the copy of the dispatch sheet used at hearing was the same as the one he prepared on the evening of September 22, and it had not been altered since that time. At his deposition, he stated that the time stamp on the bottom of the page which states "Received Time Sep. 22 2014 6:13PM No. 7737," is a fax confirmation showing receipt of the sheet to the Commerce City warehouse on that date.

22. The Claimant is identified as "TJ" on the dispatch sheet. Lopez testified that on September 23, 2014, the Claimant was required to complete his deliveries from the day before that were held up due to the discovery of the leak, taking the truck in for the repair, and then completing those deliveries listed under his name on the September 23, 2014 dispatch sheet. Lopez understood that the Claimant may not have been able to finish all of his assigned September 23 deliveries, but Lopez testified that he expected the Claimant to begin those jobs after the quick repair was completed.

The Hose Leak Repair

23. According to Lopez, the next day, on September 23, he received a call from an employee of the repair vendor, Polar, advising that the Claimant was requesting the location of the hose mounting of the truck be moved, as the Claimant had proposed to Lopez the day before. Lopez responded that the change was not authorized, only the repair of the leaking hose. At this time, Lopez was still not aware that the Claimant was alleging he had suffered a right shoulder injury the day before.

24. Lopez saw the Claimant return from Polar with the repaired vehicle at approximately 12:00 PM, and then he saw the Claimant leave Base in his personal vehicle. Lopez tried calling the Claimant on his cell phone when he saw him leaving, but the Claimant did not answer or call him back that day. Lopez assumed that the Claimant simply went off-site for lunch at the time he saw him leave. Lopez discovered, however, two or three hours later, that the Claimant's tickets for his jobs assigned for that day were still in the basket next to the dispatch sheet and had not been picked up or completed by the Claimant. Lopez assumed that the Claimant had quit due to the Claimant's leaving work without completing his deliveries. Lopez was still not aware that the Claimant was alleging a work-related right shoulder injury.

September 24, 2014/Claimant's Termination

25. Lopez prepared a dispatch sheet for September 24, 2014 on the evening of September 23, 2014 (Respondents' Exhibit D, p. 13). He did not assign any jobs to the Claimant based upon his assumption that the Claimant had quit. He specifically disputed the Claimant's written statement that he had covered up the Claimant's name with white tape on the dispatch sheet at the time it was posted. In this regard, the ALJ finds Lopez credible and the Claimant's testimony lacking in credibility.

26. On September 24, 2015, Lopez arrived at work around 7:00 AM. He stated that the Claimant came into the office and asked if there was any work for him, and Lopez told him "no." It was Lopez's decision to not assign the Claimant work due to the events of the prior day, and Lopez had not yet consulted with Rebecca Hohnstein regarding the Claimant's employment status. As a result, Lopez had nothing more to inform the Claimant at that time. On September 24, 2014, Lopez informed Hochstein of

the events from the previous day involving the Claimant. Lopez stated that Hochstein informed him (Lopez) at that time that the Claimant was fired.

27. Lopez's drivers prepared logs documenting their deliveries. The log marked as Respondents' Exhibit D, p. 10, was the Claimant's log for his work on September 22 and 23, 2014. According to Lopez, the deliveries applicable for September 22, 2014 run through the Valley Crest entry. *Id.* According to Lopez, the Sinclaire entry thereafter documented the Claimant's arrival at the Employer's terminal at 5:40 AM on the following day, followed by two off-site deliveries. *Id.* Lopez further testified that the sheet shows the Claimant's time at Polar for the repairs and return to Base at 12:20 PM. *Id.* The jobs listed on the September 23, 2014 dispatch sheet are not listed on the Claimant's September 23, 2014 daily log, showing that he did not complete those jobs. *See Id.* at pp. 10 & 12.

The Hose Repair and Subsequent Deliveries According to the Claimant

28. According to the Claimant, after the hose had been removed, Lopez instructed him to use the other mounts to complete his deliveries and have the truck repaired the next day. The Claimant testified that he then suggested to Lopez that they change the location of the mount. According to the Claimant, Lopez did not acknowledge his request.

The Claimant's Testimony Concerning the Hose Repair

29. According to the Claimant, the next day he completed two deliveries and then was instructed by Lopez to take the truck to Polar for the repairs. The Claimant stated that he called Rebecca Hohnstein, the owner, from Polar after being told that Lopez had not authorized his suggestion. The Claimant testified that he requested from Hohnstein that the mount be moved on the truck, and that he told her about the alleged injury at that time. He testified that she "didn't say anything" about the injury and did not approve the redesign. Hohnstein denies that the Claimant informed her of a work-related injury at the time, however, she admits that she would not approve the Claimant's suggested repair of re-doing the mounts.

30. According to the Claimant, when he came back to Base, he went inside to look for more work on the dispatch sheet. The Claimant testified the September 23, 2014 dispatch sheet had his name whited out and there were no work assignments under his name. He testified the dispatch sheet entered into evidence as *Respondents' Exhibit D*, p. 12, was not the same sheet as what was posted. He also suggested that the dispatch sheet was therefore modified after the fact to make it seem like he had jobs on that day. The Claimant stated he cleaned his truck, waited outside to see if someone would bring him more work, and clocked out and left. The ALJ infers that the Claimant's actions of looking for work are inconsistent with his allegedly "severe" right shoulder injury. As found herein above, the ALJ does not find the Claimant's version of

the “whited out” dispatch sheet credible. It is contradicted by Lopez’s testimony, and it makes no sense for Lopez to have “whited” out the Claimant’s name for September 24, 2014. Lopez testimony has indicia of regularity in keeping dispatch sheets. The Claimant’s version suggests a “grand conspiracy theory,” without any other supporting evidence than the Claimant’s bald statement.

31. According to the Claimant, he clocked in when he arrived in the morning. He did not see any assignments on the dispatch sheet for him so he left. He testified he did not see or talk to Lopez on that day. He testified he assumed that the Employer did not want to assign him any jobs because he suffered an injury, and he did not show up to work on subsequent days because he was not assigned work on September 24, 2014. The Claimant testified he talked with Hohnstein over the phone on September 30, 2014, and he alleged she told him to turn in his equipment. He testified that he interpreted that as him being fired. The ALJ infers and finds that the Claimant’s testimony, regarding his informing Hohnstein of his injury is contradicted by Hohnstein. It makes no sense for Hohnstein to ask the Claimant to turn in his equipment and fire him after he reported an injury to Hohnstein.

Rebecca Hohnstein

32. Rebecca Hohnstein testified by post-hearing deposition. She positively testified that Lopez was the Claimant’s supervisor, which included determining the Claimant’s work schedule, coordinating repairs of the vehicles, managing deliveries, and “anything that has to do with the trucks, and the drivers, and deliveries to customers” (Hohnstein Depo, p. 4, ll. 2-18), and the ALJ so finds. She testified that she told the Claimant that Lopez was his supervisor, and the ALJ so finds.

33. According to Hohnstein, the first time she was aware of the leaking hose was on September 23, 2014, when the Claimant called her from Polar requesting authorization for the redesign changes to the truck. She testified that the Claimant told her that Lopez had denied the changes, and she agreed with the denial. She also testified that the Claimant sounded aggravated with her denial based upon the tone of his voice. Hohnstein positively testified that the Claimant did not inform her that he had suffered an injury, and the ALJ so finds.

34. The next time Hohnstein heard of any issues involving the Claimant was the next day when Lopez informed her that the Claimant had left the job site the prior day without completing his deliveries.

35. According to Hohnstein, she figured that the Claimant had quit because he was mad that his requested changes were not approved. She also testified the Claimant’s leaving the job site without completing his tasks were grounds for termination. In Hohnstein’s opinion, the Claimant’s return to work on the morning of September 24, 2014 did not cure his abandonment the prior day. Hohnstein did not call

the Claimant on that day because she expected him to be calling her in the next couple days anyway to pick up his final check. She stated that he did call her four or five days later to arrange for dropping off his equipment and picking up his check, and she confirmed with him at that time that his employment was terminated. Hohnstein positively testified that the Claimant had not informed her of an injury as of that date, and the ALJ so finds.

36. There is an undertone in the Claimant's argument that Lopez and Hohnstein conspired against the Claimant in creating an argument that he did not complete deliveries to which he was assigned on September 23, 2014 and that the Claimant could have completed his remaining September 22 assignments, have the truck repaired, and completed additional assigned deliveries on September 23. The Claimant cites a portion of Lopez's deposition for the proposition that Lopez did not know how long the repairs were to take. Lopez shortly thereafter, in his deposition, went on to clarify that he did not believe the repairs would take long or prevent the Claimant from completing his additional deliveries, as follows:

> Q: And we established you didn't know how long would take. Correct?
>
> A: It was just a hose. I didn't think it was going to take that long.
>
> Q: Okay. So what you are saying is you expected him to do the two jobs he hadn't done, get the hose repaired, and complete five deliveries?
>
> A: Correct. Yeah, correct.

The complete picture of Lopez's testimony paints a different picture than that portrayed by the Claimant. The actual timing of the events proved Lopez's testimony to be true. The Driver's Daily Log for September 23, 2015 shows that Claimant completed his two carryover repairs from the prior day early on the 23rd [Brannan Mix and 5280 Waste]. Respondents' Ex. D, p. 10. The Claimant then took the truck in for repairs, which were completed by noon. Lopez's testimony that he assigned the Claimant additional assignments for September 23, 2015, because he felt the Claimant could complete his remaining repairs from the prior day and have the hose fixed in a short amount of time was proven true. The Claimant had the entire afternoon to complete a new set of assigned deliveries. The Claimant's position that it is not credible that Lopez would have assigned the Claimant additional jobs for September 23, 2014 is itself lacking in credibility when the Claimant himself admitted he had completed with his work and the repairs by noon on that date, and that he was looking for additional work.

Medical

37. On October 9, 2014, the Claimant saw Paul Raford, M.D. who noted a chief complaint of "right shoulder pain" and noted a history, given by the Claimant, as follows: "He tried to bend down and find the valve between the bumper and another

valve and twisted, facing toward the left and kneeling. He then had acute onset of right shoulder pain and felt a 'grating'." (Exhibit C, Bate p.7). The ALJ finds that the history the Claimant gave Dr. Raford is **not** accurate because the Claimant did not unhook the valve (hose). Lopez unhooked it.

38. Dr. Raford assessed "right biceps tendon, shoulder sprain, and moderate suspicion for internal derangement." He recommended occupational therapy, naproxen and topical creams. Dr. Raford returned the Claimant to "full duty modified duty with a 5-pound weight limit with the right upper extremity, no over-stomach-level motion, and no climbing of ladders" (Exhibit C, Bate pp. 8-9). Because the Claimant has failed to prove an injury arising out of the course and scope of his employment for the Employer herein, Dr. Raford's evaluations and treatments are **not** work-related.

39. Claimant has not received any further treatment because, according to him, he does not have personal health insurance.

Ultimate Findings

40. The ALJ finds the Claimant's testimony lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, the ALJ finds Lopez's and Peak's version of events credible.

41. The ALJ makes a rational choice, between conflicting testimonies, to accept the credibility of testimonies of Danny Lopez and Rebecca Hohnstein and to reject the credibility of the Claimant's testimony.

42. This case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. The Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein, and it is not credible. This lack of credibility undermines the Claimant's theory of an injury occurring within the course and scope of his employment, and arising out of his employment. Therefore, the ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014, arising out of the course and scope of his employment.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony is lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, Lopez's and Peak's version of events is credible, and the Claimant's version is **not** credible.

Substantial Evidence

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

Compensability

c. "Course of employment" deals with the time, place and circumstances of an employee's injury. *See General Cable Co. v. Indus. Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994). As found, the Claimant failed to prove, by preponderant evidence that he sustained the right shoulder injury in the course and scope of his employment for the Employer herein. "Arising out of employment" deals with the proximate causal connection between the employment and the injury. *See L.E.L Construction v. Goode,* 849 P.2d 876 (Colo. App. 1992), *rev'd on other grounds, L.E.L. Construction v. Goode,* 867 P.2d 875 (Colo. 1994). The Claimant failed to prove a proximate causal connection between his right shoulder condition and his work for the Employer.

d. An "unexplained injury satisfies the "arising out of" employment requirement in § 8-41-301 (1) (c), C.R.S., if the injury would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he was injured. The phrase "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of injury. *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** As found

herein above, the Claimant failed to prove that his right shoulder condition even happened while he was at work.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, this case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. As found, the Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein and the Claimant's version is not credible. This lack of credibility undermines the Claimant's theory of compensability. Therefore, as found, the Claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this_____day of August 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of August 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ALJ took administrative notice of the Guides and overruled the objection. Respondents' Exhibits A through T were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on August 18, 2015. On August 19, 2015, the Respondents filed some objections to the Claimant's proposed decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

In this admitted claim, the issue to be determined by this decision is whether the Respondents' have overcome the finding of the Division Independent Medical Examiner's opinion (DIME), Frederick Scherr, M.D., that the Claimant is not at maximum medical improvement (MMI).

FINDINGS OF FACT

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

Preliminary Findings

1. This matter initially went to hearing before ALJ Peter Cannici on the issues of average weekly wage (AWW), temporary total disability (TTD) and temporary partial disability (TPD) benefits. ALJ Cannici, based on a stipulation of the parties, determined that the Claimant's AWW was $422.05, and he awarded the Claimant TTD benefits from December 4, 2013 through December 19, 2013; and, TPD benefits from December 20, 2013 through February 17, 2014. The respondents had previously filed a General Admission of Liability (GAL).

2. Thereafter, the Claimant received treatment from Ted Villavicencio, M.D. [who became the Claimant's authorized treating physician (ATP)] at Concentra, and Samuel Chan, M.D.

3. The Claimant underwent a right shoulder arthrogram on December 24, 2013. This was interpreted by Pinnacol Advisor Christopher Isaacs, D.O., as depicting a right rotator cuff tendonitis and impingement, along with AC arthritis.

4. The Claimant underwent surgery with Mark S. Failinger, M.D., on June 20, 2014.

5. After the surgery, the Claimant was prescribed physical therapy but missed several appointments, some of which she rescheduled.

6. According t the Claimant, after the surgery her symptoms had not markedly improved.

7. The Claimant was placed at MMI on November 18, 2014, by ATP Dr. Villavicencio, who accorded her a right upper extremity (RUE) rating of 11% for a distal clavicle resection, as well as for loss of range of motion, and placed her at MMI, effective November 18, 2014.

9. According to the Claimant, she received only minimal relief from the medical modalities given to her, which included physical therapy, chiropractic treatment, injections, pain medications and surgery, with the exception of a stimulator which she used and continues to use with relative frequency.

10. The Respondents filed a Final Admission of Liability (FAL) admitting for an extremity rating of 11% RUE, and admitting for post-MMI maintenance medical benefits (*Grover* medicals). The Respondents request that *Grover* medicals be limited "as recommended by ATP Villavicencio in his report, dated 11/18/14." An injured worker is ordinarily entitled to a **general award of future medical benefits**, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Consequently, the Respondents objection in this regard is modified.

11. When the Claimant was placed at MMI by Dr. Villavicencio on November 18, 2014, Dr. Villavicencio recommended that she follow up with Dr. Chan for six months. Dr. Villvicencio made no specific recommendation in this regard, and the Claimant did not follow up because she did not believe the follow up would help her condition. The Respondents scheduled a follow up visit with Dr. Chan on July 28, 2015, which the Claimant attended. Dr. Chan indicated: "In general, the patient is in no acute distress…cervical range of motion is within functional limits…." Ultimately, Dr. Chan had nothing to offer the Claimant. Consequently, the July 28, 2015 visit confirms that Dr. Chan did not help her condition. At some point, the Claimant went to the emergency room (ER) for her pain and used her private insurance for this purpose. The Respondents' request to add this ER visit implies, without sufficient foundation, that the Claimant's pain is either not real or not related. The ALJ rejects this implication.

12. The Respondents make an underlying implication that the Claimant did not cooperate with medical care after being declared to be at MMI, and after her

ATPs, Dr, Villavicencio and Dr. Chan told her that there was nothing more that they could do for her. The ALJ rejects this implication as unsupported by the medical record.

Division Independent Medical Examination (DIME) by Frederick Scherr, M.D.

13. The Claimant timely objected to this FAL and requested a DIME, which was performed by Dr. Scherr. DIME Dr. Scherr was of the opinion that the Claimant was not at MMI and gave her a tentative rating of approximately 25% upper extremity which he converted to 15% whole person [as required by the *AMA Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. (hereinafter the "*AMA Guides"*)].

14. DIME Dr. Scheer made numerous recommendations with regard to diagnoses and treatment. He specifically recommended an MRI (magnetic resonance imaging) arthrogram to ascertain whether there was new pathology, including adhesive capsulitis. He also recommended that following the results of the MRI the Claimant be treated under the Division's Treatment Guidelines ("*Guidelines*"). He emphasized that the Claimant's must be complaint with this treatment since her prior non-compliance had contributed to her current situation. It was DIME Dr. Scherr's opinion that if the MRI of the right shoulder "does not indicate any new pathology **then [Claimant] will be at MMI** (Respondents' Exhibit Q, p. 273).

15. The Claimant was asked why she did not return to treatment after MMI, although this treatment had been admitted under the FAL. She credibly testified that she did not return to ATP Dr. Villavicencio or Dr. Chan **because both had informed her there was nothing further they would be able to do to help her symptoms**. According to the Claimant, the only treatment that she had thereafter was a visit to an ER. She did not know the date.

Respondents' Independent Medical Examination by Eric O. Ridings, M.D.

16. The Claimant underwent an IME at Respondents' expense with Dr. Ridings. Dr. Ridings disagreed with the opinion of DIME Dr. Scherr on both MMI, and the Claimant's loss of range of motion. Dr. Ridings, a physiatrist with no credentials in psychiatry or moral judgments, stated the opinion that the Claimant was **consciously malingering.** He did not present a psychological basis for this opinion nor, for that matter, any basis for this moral judgment. He was also of the

opinion that the Claimant's range of motion loss was exaggerated and was not valid. His explanation for this related to his view that the Claimant **was consciously malingering.** Thus, even though he had found significant range of motion loss he did not accord any impairment for this loss.

17. Concerning DIME Dr. Scherr's opinion on the potential of adhesive capsulitis, Dr. Ridings stated the opinion that if adhesive capsulitis was found it would not be work related. This is contrary to DIME Dr. Scherr's determination that any capsulitis would be attributable to this injury. .Dr. Ridings has a mere difference of opinion with DIME Dr. Scherr on all issues, and this difference of opinion does not rise to the level of making it highly probable, unmistakable and free from serious and substantial doubt that any of DIME Dr. Scherr's opinions are in error. Indeed, Dr. Ridings' moral judgment of "consciously malingering' underlies his entire opinion and, thus, significantly compromises his credibility.

18. Contrary to Dr. Ridings opinion the ALJ finds that DIME Dr. Scherr's MMI opinion, is supported by the record and demonstrates his proper use of the *AMA Guides.* Thus, even though Dr. Ridings may disagree with the DIME's conclusion on MMI, the ALJ finds that the evidence shows that DIME Dr. Scherr properly applied the *AMA Guides.*

The Claimant

19. The Claimant has continued to work on a part-time basis at the Dollar Tree, but she could only use her left hand for cashiering. Dr. Ridings, without further questioning of the Claimant and without further investigation, questioned that the Claimant's continued ability to work was evidence of the fact that she was magnifying her symptoms. Thus, his opinion is that her work at Dollar Tree is "incompatible" with an inability to perform "job duties". At the same time, he did not comment on the fact that the Claimant was unable to use her left arm for performing job functions there.

Ultimate Findings

20. The ALJ finds the Claimant's testimony credible, supported by the medical record, and the ALJ rejects the implication that the Claimant did not cooperate with medical treatment after being declared to be at MMI on November 18, 2014. Indeed, her ATPs, Dr. Villvicencio and Dr. Chan, told her that they had nothing more to offer her. Further, the ALJ finds the opinions of DIME Dr. Scherr more credible and persuasive than the opinions of Respondents' IME Dr. Ridings because DIME Dr. Scherr's opinions are more consistent with the totality of the medical evidence and the product of a more thorough treatment of the Claimant's medical case. Indeed, Dr. Ridings' opinions lack credibility because they are primarily founded on his unsupported moral judgment that the Claimant "is consciously malingering."

21. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of DIME Dr. Scherr and to reject any and all opinions to the contrary.

22. The Respondent has failed to prove that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Scherr's ultimate opinion that the Claimant is not at MMI is in error. Dr. Ridings maintains a mere difference of opinion with Dr. Scherr, and even that difference of opinion, as found, is not credible, however, if the MRI of the right shoulder does not show any new pathology, according to DIME Dr. Scherr, then the Claimant is at MMI. Consequently, DIME Dr. Scherr's opinion is subject to his potential declaration that the Claimant has been at MMI since November 18, 2014, the admitted MMI date.

23. The Claimant has proven, by a preponderance of the evidence, that post-MMI medical maintenance care is warranted in the discretion of the Claimant's ATPs.

CONCLUSIONS OF LAW

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

Credibility

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

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible, supported by the medical record and the ALJ rejected the implication that the Claimant did not cooperate with medical treatment after being declared to be at MMI on November 18, 2014. Indeed, her ATPs, Dr. Villvicencio and Dr. Chan, told her that they had nothing more to offer her. Further, as found, the opinions of DIME Dr. Scherr were more credible and persuasive than the opinions of Respondents' IME Dr. Ridings because DIME Dr. Scherr's opinions were more consistent with the totality of the medical evidence and the product of a more thorough treatment of the Claimant's medical case. Indeed, Dr. Ridings' opinions lacked credibility because they are primarily founded on his unsupported moral judgment that the Claimant "is consciously malingering."

Substantial Evidence

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

Overcoming the Division Independent Medical Examination

c. Section 8-42-101(3.7), C.R.S. mandates that physicians evaluating injured workers' impairments follow the *AMA Guides.* A DIME's physician's finding concerning MMI is binding unless overcome by clear and convincing evidence. § 8-42-107(8) (b) (III), C.R.S; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002). Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; **it is evidence that his highly probable and free from serious and substantial doubt** (emphasis supplied)**."** *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980).

d. The enhanced burden of proof imposed by § 8-42-108 (b) (III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses resulting from the industrial injury as part of the DIME's assessment process the DIME physician's opinion regarding causation of those losses, including pain, is also subject to the same enhanced burden of proof. *Qual-Med, Inc. v. Industrial Claim Appeals Office, supra*.

e. To overcome DIME Dr. Scherr's MMI finding, the Respondents were required to present clear and convincing evidence*, i.e*., evidence which is unmistakable and free from serious or substantial doubt. *De Leo v. Koltnow,* 613 P.2d 318 (Colo. 1980). Respondents did not meet their burden through Dr. Riding's testimony. Dr. Riding's testimony challenged DIME Dr. Scherr's opinion on MMI, yet he failed to credibly demonstrate the DIME's error. *See Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202, 204 (Colo. App. 2002); *McLane Western v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999). Although medical providers, as reasonable professionals, may disagree, this difference of opinion alone does not constitute clear and convincing evidence. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 [Indus. Claim Appeals Office (ICAO), July 19, 2004]; see *Shultz v. Anheuser Busch, Inc*., W.C. # No.-380-560 (ICAO, November 17, 2000). As found, dr. Ridings maintained a difference of opinion with DIME Dr. Scherr but this difference of opinion did not rise to the level of "clear and convincing evidence." Indeed, Dr. Ridings' difference of opinion was not credible as well.

f. Dr. Riding' challenges DIME Dr. Scherr's application of the *AMA Guide*s. Deviation from the *AMA Guides* is only one evidentiary fact which the ALJ may consider among others in determining the overall question of whether the DIME physician's rating has been overcome. *Paredes v. ABM Industries Inc.,* W.C. No. 4-862-312 (ICAO, Nov.

13, 2014); *Almanza v. Majestic Industries*, W.C. No. 4-490-054 (ICAO, Nov. 13, 2003); *Smith v. Public Service Company of Colorado*, W.C. No. 4-313-575 (ICAIO, May 20, 2002); See, *Rivale v. Beta Metals*, *Inc*., W.C. No. 4-265-360 (ICAO, April 16, 1998), *aff'd., Rivale v. Industrial Claim Appeals Office*, (Colo. App. No. 98CA0858, January 28, 1999) (not selected for publication). Contrary to Dr. Ridings opinion, as found, DIME Dr. Scherr's MMI opinion, is supported by the record and demonstrates his proper use of the *AMA Guides.* Thus, even though Dr. Ridings disagreed with the DIME's conclusion on MMI, as found, the evidence showed that DIME Dr. Scherr properly applied the *AMA Guides.* Thus, the DIME's opinion on both causation, and his determination that the Claimant is not at MMI must stand. *See* § 8-42-107(8) (c), C.R.S; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra.*

Maximum Medical Improvement

g. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). See *also MGM Supply Co., v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Co. App. 2002). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. Also *see Villela v. Xcel*, W.C. No. 4-400-281, (ICAO, Feb. 26 2006). As found, the Respondents failed to overcome, by clear and convincing evidence, the DIME physician's opinions that the Claimant is not at MMI because DIME Dr. Scherr ordered an MRI to see is there is any new pathology. If there is no new pathology disclosed on the MRI, then Dr. Scherr would be of the opinion that the Claimant is at MMI.

h. As DIME Dr. Scheer implicitly recognized in his report, a finding of MMI is premature when a claimant is willing to submit herself to a course of medical treatment, including, diagnostic testing, which may have a reasonable prospect of improving her condition. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080 (Colo. App. 1990). The determination that further testing would assist in this is one which is clearly within the DIME's purview as an evaluator.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents having failed to overcome the Division Independent Medical Examination of Frederick Scherr, M.D., the Claimant is not presently at maximum medical improvement.

B. Any and all issues, including whether Dr. Scherr determines, after reviewing the latest MRI results, that the Claimant previously reached maximum medical improvement and temporary disability benefits are reserved for future decision.

DATED this_____day of August 2015.

_____
EDWIN L. FELTER, JR.

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Administrative Law Judge

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

ISSUES

The issues presented for determination are whether the Claimant is an "independent contractor" pursuant to §8-40-202(2), C.R.S.; and if the Claimant is not an independent contractor, whether Claimant sustained an injury while in the course and scope of his employment with the Respondent.

FINDINGS OF FACT

General Findings

1. The Respondent contracts with insurance carriers to market the carriers' products directly to potential consumers. The Respondent markets such products through sales agents.

2. On September 9, 2009, the Claimant executed a contract to become a "Career Agent I" for the Respondent.[1]

3. James Beard was Claimant's Regional Sales Director from September 2009 through January 12, 2012. Beard essentially recruited the Claimant with the belief that Claimant would be good at sales and eventually move into a management position.

4. The Respondent terminated Beard's position in January 2012 after which Claimant reported to Andy Dastur. Dastur left the company then Claimant reported to Daniela Karrow. Karrow testified that Claimant was her "subordinate."

5. Claimant's initial responsibilities included selling Medicare supplement insurance plans and other insurance products.

6. Claimant lacked experience in selling insurance products prior to working with the Respondent although he had prior sales experience.

The Independent Contractor Agreement

7. During the hearing, the Claimant recalled the contents of the 2009 contract.

8. The Respondent asserts that Claimant electronically signed a second contract in July 2012 entitled New Agency Contract (hereinafter "contract"). Claimant does not remember signing a contract in July 2012. The July 2012 contract contains Claimant's

[1] The ALJ declined to admit the 2009 New Agent Contract (exhibit G) because the Respondent failed to exchange it within 20 days prior to either hearing. Respondent's counsel admitted that he received exhibit G just a few days prior to the second hearing.

type written name, but no actual signature. According to Claimant, every other document related to his work with the Respondent contained original wet signatures and he personally signed the documents.

9. The Claimant agreed that his home address is on the July 2012 contract.

10. The Claimant testified that "until all of this happened" he believed he continued to be subject to the 2009 contract. Claimant agreed that the 2009 and 2012 contracts are the same or substantially similar other than the dates.

11. The ALJ finds that Claimant was subject to the New Agent Contract signed on July 5, 2012. Regardless, the contract fails to meet the criteria set forth in §8-40-202(2)(b)(IV), C.R.S., thus it does not create a rebuttable presumption of an independent contractor relationship between the Claimant and Respondent.

Content of the Contract Relevant to these Proceedings

12. The second numbered paragraph of the contract is labeled, "**INDEPENDENT CONTRACTOR**." Under that heading, the contract reads:

> You are a non-exclusive independent contractor authorized to solicit insurance applications subject to the terms of this Contract. Nothing in this Contract shall be construed to create the relationship of principal and agent or master and servant or employer and employee. You are responsible for filing all the necessary income tax returns and reports to the Federal and State government to reflect all self-employment income as required by under any federal state, or local laws and regulations.

13. The 2012 contract describes Claimant's obligations to pay all expenses relating to the sale of insurance, and states that nothing in the contract "shall be construed to abridge your independent judgment as to the place, time, and manner of soliciting applications."

14. While the 2012 contract conferred Claimant independent judgment, the contract notes that the insurance sales industry is heavily regulated and therefore Respondent "may prescribe standards of conduct and procedures regarding the conduct of the insurance sales business, with the purpose ensuring that all Agents comply with the applicable Federal and State laws and insurance regulations."

15. Paragraph 13 of the 2012 contract is entitled "Termination" in bold all capital letters, and states:

> Either you or UIG may terminate this Contract without cause by giving the other party fifteen (15) days written notice . . . . This Contract shall terminate in the event of (a) your death, (b) your

> becoming totally or permanently disabled as determined by us, (c) your breach of any provision of this Contract or (d) our withdrawal from the territories where you are licensed. After termination of this Contract for any reasons, all debts or commission advances owed to us by you are due and payable immediately without further notice or demand.
>
> You understand and agree that because of the administrative and overhead costs and expenses incurred by [Respondent] in providing support to you, [Respondent] expects you to qualify consistently as an "Active Agent" as described in the CAS. If you cease to qualify as an Active Agent for any calendar quarter, [Respondent] has the right, but is not required, to declare your failure to qualify as an Active Agent for any calendar quarter as a breach of this Contract by you.

16. The contract also allows the Respondent to terminate the contract for cause based on conduct prohibited under paragraph 5 of the contract. The contract allows the Respondent to withhold renewal commissions if the agent is terminated for cause.

17. The contract states under paragraph 18:

> **FUNDS AND SUPPLIES.** All books, correspondence, documents, vouchers, receipts, lists, notices, or other papers of any kind used by you in any transaction involving us and any other personal property furnished by us shall remain our property, shall be open to inspection at all times, and shall be returned to us at termination of this Contract or at our demand. The demand may be made by sending you notification through the ARC. We reserve the right not to pay you commissions if you are holding such property after we demand you return the property to us.

18. The 2012 contract also contains a non-compete clause. The non-compete clause states the following:

> During the term of this Contract and during the period beginning with the date of termination of this Contract, and ending two years following the termination of this Contract, you shall not contract with any other agency or company to sell any insurance product issued by an insurance company represented by [Respondent] as of the date of the termination of this Contract. In addition, [Respondent] will not release agents to sell insurance for an agency that represents an insurance company that is also represented by [Respondent].

19. A document entitled “Representative Responsibilities” accompanied the contract. By his electronic signature dated July 5, 2012, the Claimant acknowledged that he would comply with Respondent’s guidelines concerning federal regulations; that he has received a copy of the Respondent’s handbook on compliance and telemarketing restrictions and that he will comply with such rules; and that he understood he would be subject to discipline including termination of his appointment with the Respondent, and all its insuring partners.

20. The contract required the Claimant to purchase errors and omissions insurance. The contract is silent as to workers’ compensation insurance.

Exclusivity

21. Beard worked for the Respondent as a Regional Sales Director from 2009 through January 2012. Beard received a W2 tax form and was not considered an independent contractor.

22. At the time of hearing, Beard worked for another insurance carrier selling insurance as an employee and not an independent contractor. Beard testified that sales agents are typically exclusive to an agency or carrier. In his present position, he is not permitted to sell products for any other carrier.

23. Beard has held positions in insurance sales for various companies. At times he was an independent contractor and at other times, an employee.

24. Beard worked at the office identified in paragraph 5 above, with an administrative assistant who was also a W2 employee.

25. Beard testified that all of the career agents for the Respondent were independent contractors per the independent contractor agreement; however, he also testified that in his 38 years of experience selling insurance, that the term “career agent” typically meant that the agent was exclusive.

26. Beard explained that the Respondent had 12,000 independent brokers around the country and about 300 career agents. The brokers were not exclusive whereas the career agents were exclusive. Claimant was considered a career agent.

27. According to Karrow, the difference between the brokers and the career agents were that the brokers received higher commissions and less support than the career agents.

28. Beard testified he had “marching orders” to terminate the contracts of Career Agents if the Respondent determined that the Career Agent had a contract to sell insurance products for an insurance carrier not affiliated with Respondent. The Respondent required Beard to provide proof that the Career Agent terminated his or her contract with competitors.

29. Beard believed that sales agents such as the Claimant were not permitted to sell products not affiliated with the Respondent based on his experience with the Respondent.

30. Beard terminated two DSMs right after he began working for the Respondent.

31. Although the contract says “non-exclusive” Claimant, Marjory Leight and Beard disagreed with this characterization. Marjory Leight was also a Career Agent for Respondent.

32. Claimant testified that he earned 100% of his income from Respondent.

33. Claimant was involved in a business called E.Oliver, a hard money lender with no connection to insurance. The Claimant earned no money from E.Oliver in 2013.

34. On October 15, 2013, the Claimant exchanged e-mail messages with Steven Hensley. Hensley is the Vice President of Administration and Compliance for the parent company of Respondent. Hensley contacted the Claimant concerning E.Oliver.

35. The initial e-mail Hensley sent to Claimant references an attachment which was not offered into evidence. The ALJ infers the attachment mentioned E.Oliver. Hensley asked for a response from Claimant concerning the content of the attachment and imposed a deadline of November 17, 2013.

36. The Claimant responded to Hensley’s message and explained that E.Oliver is a hard money lender that takes small investors. Claimant stated, “I want to make sure everyone is clear on this that they are not insurance company.” Claimant continued to explain details concerning a specific individual and the issues that individual had with E.Oliver.

37. Hensley testified that he made the inquiry with the Claimant because Claimant used a Respondent business card to conduct the E.Oliver business. Claimant, however, believes Hensley inquired about it because he wanted to be sure Claimant was not selling insurance products that were not affiliated with Respondent.

38. Claimant testified that the Respondent “made no bones” about terminating agents if those agents had appointments with insurance carries not affiliated with the Respondent.

Training

39. The Claimant lacked experience in selling insurance products prior to working with the Respondent although he had prior sales experience

40. When Claimant first became a Career Agent I, he received training at an office located in Colorado and leased by Respondent.

41. The initial training provided by Beard lasted three and one-half days in the local office. The training consisted of classes on Medicare regulations, appointment setting, reviewing scripts used to make sales calls, and learning the Respondent's expectations. The Respondent offered several scripts depending on the potential customer and insurance product.

42. Karrow testified that Respondent required use of the scripts for the purpose of complying with Medicare rules.

43. Ongoing training included weekly mandatory sales meetings with Beard and the sales agents. The meetings included reviewing appointments scheduled for the upcoming week and scheduling more appointments if not enough appointments were already scheduled. Beard provided scripts to the sales agents along with the leads. He monitored the sales calls to ensure the agents were making correct statements to the potential customers.

44. On a monthly basis, the Respondent offered classes about products and sales techniques.

45. The Respondent also offered additional training on specialized products, which were not mandatory.

46. The Respondent required the Claimant to pass its tests in order to receive approval to go into the field to sell insurance products.

47. Training generally lasted two months before the sales agents were confident enough to be in the field without supervision.

48. According to Beard and Claimant, the Respondent wanted the agents to represent the company and products in the best way which could not be accomplished without proper training. In addition, the Respondent required compliance with the Medicare rules, which required extensive training.

49. The Claimant also received the New Agent Starter Kit, which was essentially a training manual. The manual contained "Rules of Engagement" setting forth the rules an agent must adhere to when making sales calls.

50. The manual also contained the scripts for making sales calls for both Medicare and non-Medicare products.

51. The Respondent also provided the Claimant a document entitled Sales Practice Guidelines – Prohibited Marketing and Selling Behaviors. This document provides a detailed list of prohibited marketing and sales behaviors.

Compensation, Duties, Quality Standard, and Time of Performance

52. The Respondent compensates its sales agents, including the Claimant, on a commission basis for each sale. The Respondent does not pay a salary or provide any

benefits. The Claimant has no ability to negotiate the amount of the commission. The commission amounts are solely set by Respondent.

53. The Respondent paid the Claimant personally. Claimant did not maintain a trade name.

54. Claimant's responsibilities included selling Medicare supplement insurance plans and other insurance products.

55. Selling the insurance products involved face-to-face meetings with the clients whether at the clients' homes or in alternative locations.

56. Sales agents, including the Claimant, must travel to meet with the potential clients. Sales agents typically use their own private vehicle to travel to sales meetings.

57. The Respondent does not reimburse the agents for any travel expenses the agents incur.

58. In March 2010, the Respondent promoted Claimant to District Sales Manager ("DSM") which resulted in additional responsibilities.

59. The Respondent maintained a list of qualifications for a DSM which included the following:

- Preference for one or more years of insurance background in life and health
- Team player
- Maintains 15 or more appointments per week
- Professional dress, speech, performance and relates to others
- Know the product footprint for marketing area
- Experience selling all product lines
- Willingness to demonstrate use of marketing plan
- Adaptability
- Positive, optimistic attitude
- In the top 25% of field for production

60. The District Sales Managers, including the Claimant, also signed a separate Independent Contractor Agreement which outlined the compensation and production requirements for the DSM position. For instance, the agreement Claimant signed on March 11, 2011 indicated that Claimant would receive $250 per week for maintaining at

least four producing agents who are submitting a combined average of four or more applications per week. The agreement also states that the DSM will meet additional production targets and "assist with managerial responsibilities in the Territory."

61. The DSM Agreement Claimant signed on March 11, 2011 also stated that the agreement was terminable at will by either party upon notice to the non-terminating party, and that parties agree that arrangement described in the agreement constitutes an independent contractor arrangement and not an employment arrangement.

62. Claimant began receiving a weekly training allowance in the amount of $500 to assist in the cost of training new sales agents.

63. As a DSM, Claimant's duties included, but were not limited to, the following:

- Monitoring his agent's daily activity
- Recruiting and training new agents including accompanying agents in the field
- Knowledge of the three-step recruiting system
- Maintaining minimum sales or production requirements for the agents he managed
- Reviewing future leads with his agents
- Ongoing training with agents

64. The Respondent still required Claimant to meet his own sales goals. If Claimant failed to meet his production goals or his team failed to meet production goals, Respondent could issue a corrective action and demote him or terminate his position.

65. The Claimant was subjected to a Performance Evaluation Plan in December 2010, which included production goals, and activity ratings. The activities ranged from agent training and development to communication with agents.

66. Beard and Claimant testified that the Respondent placed DSMs on a "CAP" or corrective action plan if the DSM failed to meet his or her production goals.

67. When Claimant first became a Career Agent, the Denver office had 14 cubicles for the agents to use to make sales calls.

68. The Respondent provided sales scripts and guidelines to the agents to follow when making sales calls and discussing products with potential customers.

69. The Respondent confined the agents' sales radius to 10 miles from his or her residence unless exceptions applied such as a lack of agents within a 20-mile radius of a potential customer.

70. The Respondent has a sales lead program through its own telemarketing company. The Respondent solicits potential leads via telemarketing and mail and provides the information to the agents. The telemarketing company schedules appointments between the leads and the sales agents.

71. The telemarketing company vetted the potential clients by learning about their needs providing notes to the sales agents.

72. According to Karrow, the sales agents could modify their appointments with the leads, although Claimant testified that he could not.

73. Respondent requires that the sales agents "close" on 20 percent of the leads provided. If the agent is not meeting the 20 percent closing goal the Respondent investigates the reasons.

74. The Respondent reduces the number of leads it provides to an agent if that agent is not making a sufficient number of sales. The Respondent also suspends provision of leads or cuts leads entirely when an agent fails to meet the closing goals.

75. The Respondent prohibited the sales agents from selling insurance products not affiliated with Respondents to the leads provided by Respondent. This condition is not found in the contract.

76. The Respondent shut down the brick and mortar office located in Colorado and terminated all of its Regional Sales Directors, including Beard. Sales agents then primarily worked from home with some exceptions.

77. The Respondent had previously provided the agents with access to a web application known as the Agent Resource Center ("ARC").

78. Instead of face-to-face time in the office, the Respondent directed the agents to rely more heavily upon the ARC. The ARC website offered a multitude of information including a calendar of the appointments scheduled by the telemarketing team. Claimant testified that he could not change the appointments made for him in the ARC system.

79. After the office in Denver closed, the Respondent assumed the cost for one weekly two-day UPS package for shipment of documents to the Respondent's home office. The Respondent also provided a scanner to the agents, the cost of which was "heavily subsidized" based on the agent's level of production. The Respondent also provided access to an IT help desk and software for scanning and uploading documents.

80. The Claimant was responsible for purchasing his own computer, internet access, fax machine and telephone.

81. After the brick and mortar offices closed, the Respondent also paid for the agents to receive new business cards to reflect the change in address.

82. The Respondent also paid to rent office space in the Denver area when necessary.

83. On June 11, 2012, Dastur sent an e-mail message to Claimant requiring that Claimant submit a plan by June 18, 2012 to increase sales, improve team's conversion performance, and expand his team.

84. On January 29, 2013, Dastur sent an e-mail to Claimant containing "Do's" and "Don't's" regarding the DSMs' management of new agents. After the list, Dastur commented that he has occasionally received calls from new agents complaining about the DSMs not communicating enough. Dastur reminded the DSMs that they get paid for communicating and assisting new agents. He then set a goal for the DSMs to recruit one new agent per quarter.

85. Karrow testified that Claimant did not recruit new agents and that Respondent did not require him to do so.

86. Karrow also communicated with the Claimant and other DSMs via e-mail. On January 2, 2014, Karrow sent the Claimant an e-mail message instructing him to create a DSM business plan by the close of business on January 10, 2014.

87. Claimant testified, and Karrow agreed, that Claimant needed approval from the Respondent to terminate agents or hire new agents. The Claimant did not have independent judgment in hiring or terminating new agents.

Termination of the Contract

88. As the contract states, either the agent or the Respondent can terminate the contract without cause with 15 days notice to the other party. Respondent also maintains the right to terminate an agent for cause. No liability attached to Respondent if either party terminated the contract other than outstanding commissions owed to the Claimant. Claimant also owed Respondent nothing upon termination of the contract unless he had an outstanding debt to Respondent.

Ultimate Findings

89. The Claimant did not have a trade name, and only received commissions based on his sales. He received a "training allowance" once he became a DSM.

90. The witnesses offered conflicting testimony as to whether the Respondent required the Claimant to work exclusively for it given that the contract specifically states that agents are non-exclusive. The ALJ finds that the testimony of Claimant and Beard was more credible than that of Karrow and Hensley regarding the Respondent's practices concerning exclusivity.

91. The contract itself contains provisions that are somewhat in conflict. While the contract states the sales agent is considered "non-exclusive," the "non-compete" clause limits the agents to selling insurance only for carriers not affiliated with the Respondent.

There was no evidence concerning the number of insurers affiliated with the Respondent. As such, the non-compete clause could be so limiting as to render the Claimant exclusive for all practical purposes. Regardless, the credible testimony of Beard and Claimant is persuasive. Beard's testimony is most persuasive because it was the least likely to be self-serving contrary to Respondent's assertions. Beard no longer works the Respondent, he has a new job, and he has no interest in the outcome of this case. As such, the ALJ finds that the Respondent required the Claimant only to sell insurance products on its behalf, and for no other carrier or agency.

92. Although the independent contractor agreement existed and contained a statement concerning Claimant's ability to exercise independent judgment, the Respondent did not truly allow the Claimant to exercise independent judgment. As an example, the Respondent promoted Claimant to a DSM, a position which required the recruitment of new agents, yet the Claimant had no authority to actually hire a new agent. He could only recommend people and the Respondent had to approve them.

93. As found above, the Respondent provided tools that include, but are not limited to the following: extensive training, an office (then access to an office if necessary), access to a web application, UPS shipments, a reduced cost scanner, sales leads, and scripts.

94. The Respondent dictated the time and manner in which the Claimant performed his work duties. The Respondent took an active role in scheduling appointments for the Claimant, assisted the Claimant with selling its products by providing training, and provided access to an office (including a Regional Manager) and then a web application for further assistance. The Respondent required the Claimant to follow scripts depending on the product he was selling. The Respondent maintained rules pertaining to Claimant's sales footprint. The Respondents required the Claimant to close on 20 percent of the leads it provided to him or risk the punishment of a suspension of good leads. The Respondent required the Claimant to meet certain sales goals or risk termination of his contract with Respondent. The Respondent required the Claimant to provide access to the documents used in transactions related to his work for the Respondent.

95. As found above, the Respondent provided extensive training in more areas than just regulatory compliance. The training included, but was not limited to the following: sales techniques, scripts, manuals, best practices, agent recruiting techniques, product-specific training and training in the field.

96. The Respondent maintained a strict quality standard. While it is true the Respondent did not oversee Claimant's day-to-day work activities, the Respondent required the Claimant to develop plans for increasing business, maintain communications with the sales agents in his "downline", follow scripts and guidelines when selling insurance and when recruiting new agents. As a DSM, the Claimant was required to monitor is agent's "daily activity" and provide ongoing training to the agents. He was required to dress professionally, be a team player and have a positive, optimistic attitude.

Automobile Accident

97. On January 2, 2014, Claimant was involved in an automobile accident on CR 27 near Fort Lupton, CO. He was on his way to Arvada, CO for a 1:00 p.m. appointment with a potential client. Prior to the accident, he had gone to the Fort Lupton post office to mail documents to the Respondent pertaining to another client.

98. The Respondent had scheduled the appointment with potential client on January 2, 2014.

99. The Claimant's injuries as a result of the accident include, but are not limited to a broken left femur, right ankle dislocation, left rotator cuff shoulder injury, left knee injury and traumatic brain injury including a brain bleed and vision impairment. He has had multiple surgeries on his right leg and additional surgeries are anticipated.

100. The Claimant was hospitalized for six months as a result of the injuries he received in the January 2, 2014 automobile accident.

101. As of the date of the hearing, Claimant's medical bills exceed $2.5 million.

102. The Claimant was in the "scope of his employment" at the time of the auto accident.

103. The Claimant's injuries "arise out of" his employment UIG.

104. Shortly after the accident, the Claimant's wife reported to the Respondent that Claimant had been involved in a serious automobile accident.

105. Prior to the accident, the parties had never discussed the fact that the Respondent did not provide workers' compensation insurance. The contract is silent regarding workers' compensation coverage.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following conclusions of law:

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

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

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

Employment Status

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

5. The putative "employer" may establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S., creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Nelson v. Industrial Claim Appeals Office, supra.*

6. In addition to proving that the Claimant is free from control, the Respondent must also establish the Claimant is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Section 8-40-202(2)(a), C.R.S. In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of

circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. The court further stated that there is no dispositive single factor or series of factors that would resolve the nature of the relationship between the employee and putative employer.

7. In this case, the Respondent has failed to prove that Claimant was an independent contractor. The Respondent failed to show that Claimant was free from direction and control in the performance of his duties. To the contrary, Respondent exercised an abundance of control over Claimant's performance of his duties as an insurance sales agent. The ALJ is not persuaded by Respondent's argument that the control was limited to legal compliance concerns. The Respondent basically set Claimant's daily schedule, built in punishment for failure to comply with its rules and regulations, maintained performance and quality standards, provided tools and extensive training, and paid the Claimant a non-negotiable commission to him personally and not to a trade name.

8. The Respondent also failed to prove that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. The only persuasive evidence on this issue arose from Beard's testimony. Beard testified that he has been a W2 employee in his last three positions in insurance sales, and he has also been an independent contractor. He provided no explanation for the reasons.

9. Balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S., and considering the nature of the relationship between the Claimant and Respondent, the ALJ determines concludes that the Respondent has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

Compensability

10. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

11. The Claimant has proven that he sustained injuries arising from an automobile accident while he was in the course and scope of his employment with the Employer. The Claimant's testimony was credible and persuasive regarding his activities on January 2, 2014. He had finished performing a work activity and was en route to another work-related appointment when the accident occurred. It is clear that the Respondent contemplated that Claimant would travel by car to appointments. As such, Claimant's claim for workers' compensation benefits is granted.

ORDER

It is therefore ordered that:

1. Claimant is an employee rather than independent contractor.

2. Claimant's claim for workers' compensation benefits is granted.

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

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

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

DATED: August 28, 2015

DIGITAL SIGNATURE:

L. Broniak

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

#JD1J7DQU0D1DECv 2

ISSUE

Whether Claimant has established by a preponderance of the evidence that a right total hip arthroplasty is reasonable, necessary, and related to his August 1, 2013 work injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver and furniture delivery person for approximately two years.

2. On August 1, 2013 Claimant suffered an admitted injury while carrying a sofa with a co-worker. Claimant was lifting and moving a sofa when he twisted, felt a pop in his right hip, and had pain in his groin area.

3. Claimant reported the injury to Employer and began treating with Gary Zuehlsdorff, D.O.

4. Following the injury Claimant underwent several weeks of conservative treatment including pain medications and physical therapy. On October 4, 2013 Dr. Zuehlsdorff ordered a right hip MRI.

5. Claimant underwent an MRI on October 10, 2013 that was interpreted by Scott Lowe, M.D. Dr. Lowe assessed moderate degenerative changes within the right hip, tearing of the anteriosuperior and superolateral acetabular labrums, mild insertional tendonitis and partial tearing of the gluteus medius and minimus tendons on their insertion at the greater trochanter, and mild degenerative changes centered at the pubic symphysis. *See* Exhibit C.

6. On October 21, 2013 Dr. Zuehlsdorff reviewed the MRI results and referred Claimant to Brian White, M.D. for surgical evaluation. *See* Exhibit A.

7. On November 1, 2013, Claimant was evaluated by Dr. White's physician assistant (PA), Shawn Karns. PA Karns obtained pelvic and cross lateral view x-rays. Claimant was diagnosed with femoroacetabular impingement, labral tear, trochanteric bursitis, and low back pain. PA Karns ordered a diagnostic intra-articular hip injection to determine if Claimant was a candidate for a hip arthroscopy. *See* Exhibit B.

8. On November 14, 2013 Joseph Morgan, M.D. administered a right hip intra-articular injection. Dr. Morgan noted that "the patient reported a pain level of 9/10 before the procedure with no change after the procedure." *See* Exhibit C.

9. On November 19, 2013, PA Karns spoke to Claimant and noted that Claimant noticed no difference after the injection and essentially Claimant's pain stayed the same. PA Karns opined that the result from the injection made the hip joint less likely to be Claimant's pain generator. PA Karns reviewed the results of the injection with Dr. White and they recommended a repeat diagnostic injection, noting that if Claimant still did not obtain relief he should be seen by Dr. Zuehlsdorff to have a low back and/or hernia workup going forward. *See* Exhibit B.

10. On December 19, 2013 Eric White, M.D. performed a second right hip intra-articular injection. Claimant reported his pain decreased from a 10/10 prior to injection to a 6/10 after injection. *See* Exhibit C.

11. On December 31, 2013 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff noted Claimant reported 40% temporary relief following the second right hip intra-articular injection and described it as minimally diagnostic. Dr. Zuehlsdorff opined the injection was "probably at least minimal enough to go forward with surgery." *See* Exhibit B.

12. On January 22, 2014 Claimant was evaluated by Dr. White. Dr. White confirmed the diagnosis of right hip impingement and labral tear and concluded Claimant was a candidate for right hip arthroscopy surgery. *See* Exhibit B.

13. On March 10, 2014 Claimant underwent right hip arthroscopy performed by Dr. White. Claimant's labrum was torn beyond repair and Dr. White removed Claimant's labrum and reconstructed it. Dr. White noted that Claimant had delaminated cartilage on the edge of the cup such that he had to have a microfracture procedure to re-grow cartilage and noted that the deep lamination was pretty far medial into the cup. Dr. White opined that the surgery usually has a high success rate, but was complicated by the microfracture procedure and by the size of the microfracture. *See* Exhibit B.

14. Following surgery, it was noted by multiple providers that Claimant was doing well.

15. On March 21, 2014, Dr. White evaluated Claimant and noted Claimant was doing very well post-operatively. On April 1, 2014 Dr. Zuehlsdorff evaluated Claimant and also noted Claimant was doing very well. On May 2, 2014 PA Karns evaluated Claimant and noted Claimant's hip joint motion felt nice and smooth without any discomfort, and Claimant reported he was progressing well. On May 14, 2014, Dr. Zuehlsdorff evaluated Claimant and indicated Claimant was doing well, was actively participating in therapy and home exercises, and had improving range of motion. On June 12, 2014, PA Karns evaluated Claimant and noted Claimant's hip joint moved nice and smooth without catching. PA Karns also reviewed pelvis and right hip x-rays which showed that Claimant's joint space was well preserved, and that the osteoplasties had healed nicely. On June 18, 2014, Dr. Zuehlsdorff evaluated Claimant and noted

Claimant was walking smoother, and was “doing great” three months out from surgery. *See* Exhibit E, Exhibit F.

16. On July 7, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Claimant reported that on July 5, 2014 he was at a barbeque and as he was getting up from a chair he felt a lot of immediate acute pain in his groin surgical area. Dr. Zuehlsdorff assessed acute exacerbation, noted Claimant was much worse, and noted Claimant could barely bear weight on his right foot and had to limp. Dr. Zuehlsdorff noted that when laying down flat any movement of the hip joint caused Claimant a moderate to high degree of pain. Dr. Zuehlsdorff obtained x-rays and saw postsurgical changes but could not tell if there was anything acute. Dr. Zuehlsdorff ordered an MRI/arthrogram. *See* Exhibit E.

17. On July 8, 2014 Claimant underwent a right hip MRI/arthrogram interpreted by Cameron Bahr, M.D. Dr. Bahr gave the impression of: postsurgical changes in the right hip with slight blunting of the superolateral and anterior acetabular labrum and focus of magnetic susceptibility at the right femoral head-neck junction; slightly irregular contrast extending into the posterior labrum suspicious for tear; complete resolution of the mild marrow edema in the superolateral acetabular labrum since the prior MRI with no new areas of marrow edema; no fracture or osteonescriosis; and mild tendinosis of the gluteus medius tendons bilaterally at their insertions onto the greater trochanters. *See* Exhibit G.

18. On July 10, 2014 Claimant was evaluated by PA Karns. PA Karns noted that Claimant had a very guarded gait, very contracted and guarded muscles in the hip flexor region, and assessed an acute flare and hyperspastic muscle spasms of the hip flexors and quads. PA Karns noted that x-rays showed the joint space in the hip was well preserved, that the femoral and acetabular osteoplasties had healed very nicely and that there were no acute findings. PA Karns noted the MRI results were reviewed in detail with Dr. White and that they show the labral reconstruction was in good position with no evidence of any complication, tearing, or displacement and no significant hip joint effusion, no evidence of fracture or osteonecrosis, and that the femoral osteoplasty looked well healed. PA Karns noted that Claimant was reassured that it did not appear there were any acute findings to be concerned of. PA Karns noted Claimant should alter his physical therapy regimen as Claimant reported doing straight leg raises which inflamed and hurt his hip and that straight leg raises should never have been performed in the course of Claimant’s rehabilitation protocol. *See* Exhibit F.

19. On July 14, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff noted the x-ray had been negative and that Dr. White reviewed and felt the surgical site was clean. Dr. White expressed concern to Dr. Zuehlsdorff that Claimant was doing straight leg raises and was not supposed to. Claimant reported to Dr. Zuehlsdorff he was feeling much better, and Dr. Zuehlsdorff noted Claimant could move and transition a lot better. Dr. Zuehlsdorff noted discrepancies between the hip arthroscopic protocol and the prescription that would be fixed and switched Claimant to Proaxis physical therapy.

20. On August 6, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Claimant reported he continued to have as much pain as he had prior to surgery and reported feeling very frustrated. He complained of continued pain in the right groin area radiating around to the right buttock area. Dr. Zuehlsdorff assessed Claimant with situational depression and referred Claimant to Ricardo Esparza, PhD for counseling.

21. On September 2, 2014 Claimant was evaluated by Dr. Esparza. Dr. Esparza noted Claimant was having a difficult time emotionally and diagnosed major depression, moderate to severe somatic symptom disorder, and generalized anxiety disorder. Dr. Esparza recommended psychological counseling and after attending a couple of sessions, Claimant abandoned care at the end of September. See Exhibit I.

22. On September 10, 2014 Claimant was evaluated by Dr. White. Dr. White noted Claimant still had pain, was not functioning well, had guarded range of motion, and that his hip did not move well. Dr. White opined that the joint space from the x-rays and the MRI looked good and that the labral reconstruction through the MRI looked good. Dr. White noted that the hip joint itself looked pretty reasonable. Dr. White noted in his assessment that he was concerned as to whether Claimant was having a soft tissue issue or a joint issue since Claimant had not responded well to the surgery despite what looks good technically on x-ray, MRI, and arthroscopic images. Dr. White planned for a period of 6-8 weeks to see if Claimant made improvement and if not planned to do a diagnostic injection. Dr. White indicated that after paying attention to the diagnostic injection he would consider a total hip replacement. Dr. White opined that he was unsure if this would provide complete resolution of pain, but that it would take out the joint component. *See* Exhibit F.

23. On September 17, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff noted that he had spoken with Dr. White who was concerned about the hip joint itself and that there could be pathology that Dr. Zuehlsdorff had been concerned about in July. Dr. White suggested to Dr. Zuehlsdorff possibly an injection, but said he might have to just go to a total hip replacement. Claimant reported to Dr. Zuehlsdorff that he wanted a second opinion. *See* Exhibit 1.

24. On October 7, 2014 Claimant was evaluated by Michael Ellman, M.D. Dr. Ellman opined that Claimant's exam was out of proportion to the imaging findings. Dr. Ellman noted Claimant had significant guarding on exam making it difficult to delineate any extra-articular versus intra-articular etiology for his pain. Dr. Ellman noted Claimant had a high degree of muscle spasm occurring in and about the hip as well as potentially some intra-articular pathology. Dr. Ellman thought it would be reasonable to proceed with a diagnostic and therapeutic cortisone intra-articular injection to help elucidate whether Claimant's pain was emanating from the joint itself versus from the soft tissue around the joint. Dr. Ellman opined that Claimant likely had elements of both and that the injection would give them a good idea of how much pain is emanating from the joint itself. Dr. Ellman opined that Claimant would not be a good candidate to rush back into another surgery. Dr. Ellman reviewed the July 8, 2014 MRI and noted that the labrum

appeared well fixed around the acetabulum and that even though it was read as a labral tear, he opined it was not a tear but showed normal postsurgical changes. *See* Exhibit 5.

25. On December 10, 2014, Claimant was evaluated by Dr. White. Dr. White noted Claimant was continuing to get worse. Dr. White noted on imaging there was no interval loss of joint space. Dr. White opined that Claimant had done poorly after arthroscopy and that in his mind the surgery had failed. He recommended a diagnostic/small potential therapeutic cortico steroid injection of the right hip and noted that if Claimant got relief from the injection, his recommendation would be to move forward with a total hip replacement. *See* Exhibit F.

26. On December 15, 2014, Joseph Morgan, M.D. administered a right hip intra-articular injection of local anesthetic and corticosteroid. Dr. Morgan noted that contrast material was seen in the right hip joint space on the spot images and that Claimant reported a pain level of 8/10 prior to the procedure with slight improvement to a level of 6/10 following the injection. *See* Exhibit K.

27. On December 17, 2014 Claimant called PA Karns. Claimant reported to PA Karns that for the first several hours after the injection, he got about 70-75 percent relief of his symptoms and then the pain gradually returned. PA Karns noted that per Dr. White Claimant would be a candidate for a right total hip replacement. *See* Exhibit F.

28. On December 19, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Claimant reported he received 75% relief from the injection for a few hours but that now his pain was back to where it was prior to the injection. Dr. Zuehlsdorff concurred with the recommendation of Dr. White for a total hip replacement.

29. On December 22, 2014 Jon Erickson, M.D. performed a physician advisory review regarding the request for a total hip replacement. Dr. Erickson recommended denying the request for a total hip replacement pending an Independent Medical Evaluation (IME) with an individual with expertise in the hip joint. Dr. Erickson noted that from review of the MRI it appeared Claimant did not have advanced arthritis of the hip joint and questioned whether it would be appropriate to do a total hip replacement even if Claimant had intra-articular abnormalities causing his pain. *See* Exhibit L.

30. On January 19, 2015 Dr. Zuehlsdorff evaluated Claimant and reviewed Dr. Erickson's opinion. Dr. Zuehlsdorff disagreed with Dr. Erikson's denial of total hip replacement and disagreed with several of Dr. Erikson's opinions. Dr. Zuehlsdorff opined that Dr. White is one of the more elite specialists in the area regarding hip pathology including arthroplasties and replacements. *See* Exhibit 1.

31. On February 10, 2015 James Lindberg, M.D. performed an IME. Dr. Lindberg is an orthopedic surgeon with more than thirty years of experience performing

total hip replacements. Dr. Lindberg obtained a history from Claimant, which was audio-recorded. Dr. Lindberg also performed a medical record review, reviewed Claimant's MRI/arthrogram, and performed a physical examination. *See* Exhibit N.

32. Dr. Lindberg opined that the MRI/arthrogram showed no significant pathology and that it was virtually normal. He noted that Claimant's symptoms and response to physical examination were out of proportion to the pathology on the MRI/arthrogram, and that Claimant had a highly abnormal physical examination. Dr. Lindberg strongly recommended against a total hip replacement. *See* Exhibit N.

33. Claimant was questioned by Dr. Lindberg about whether the injections had helped his pain. When asked about the three injections Claimant reported "I guess they last for an hour…it felt good after they gave the shot, but then after an hour the pain was just right back." Claimant reported initially he got a little bit of pain relief but not a lot. Claimant reported the last shot didn't do anything, the pain was still there. Claimant then reported that he received "not a lot" of pain relief from the first two injections in the first hour, but "after it wore off it was right back where it was." Claimant reported the third injection was in December and that "the last one just didn't do anything because they told me –Dr. White told me to call in and let them know if I got anything, and then I let them know right away, and I told them it was nothing, that it was still the same." *See* Exhibit O.

34. On February 23, 2015 Dr. Erickson performed a second physician advisory review of the total hip replacement request. Dr. Erikson noted that Claimant had undergone a very extensive arthroscopic surgical procedure performed March 10, 2014 by Dr. White and has not done well after the procedure. Dr. Erikson noted his prior letter recommending denial for a total hip replacement based on the fact that it had not been determined that Claimant had advanced degenerative arthritis. Dr. Erickson opined that this was an extremely complex case. Dr. Erikson recommended addressing Claimant's psychiatric difficulties and chronic opioid use, and opined that Claimant's pain and lack of alternatives to a total hip replacement was not adequate justification for a major surgical procedure which may have substantial psychiatric overlay. *See* Exhibit P.

35. On March 20, 2015 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff continued to recommend a total hip replacement. Dr. Zuehlsdorff noted that after the July, 2014 MRI he was concerned for a re-tear of the acetabular labrum. Dr. Zuehlsdorff again noted that Claimant reported to him four days following the injection that he had received 75% relief for a few hours. Dr. Zuehlsdorff disagreed with Dr. Lindberg's opinion that the MRI was benign and opined that the MRI showed significant concern for suspected re-tear consistent with Claimant's July re-injury, worsening, and the fact that Claimant had not recovered since July. Dr. Zuehlsdorff noted that Claimant reported to Dr. Lindberg that when the injection wore off he went back to his normal pain level and opined that Dr. Lindberg misinterpreted Claimant's responses. Dr. Zuehlsdorff dramatically differed with Dr. Lindberg's review. *See* Exhibit E.

36. Claimant testified at hearing surrounding his continued pain and limitations due to his right hip injury. Claimant stated that after the three injections wore off, he was in pain again and that the pain returned after approximately an hour. Claimant is found credible and persuasive in his testimony surrounding his current pain, limitations, and function. His testimony is consistent with reports throughout his medical treatment.

37. Dr. Lindberg testified at hearing. Dr. Lindberg opined that the primary basis of Dr. White's recommendation for a total hip replacement was Claimant's subjective report of 70-75% relief following the December injection, but that Claimant told Dr. Morgan the injection only reduced his pain from 8/10 to 6/10 and that Claimant told him that the injection provided no relief.

38. Dr. Lindberg opined that if Claimant's pain is from an extra-articular source that doesn't have to do with the hip joint, then a total hip replacement would not be appropriate. Dr. Lindberg opined that in this case, Claimant is not a candidate for a total hip replacement since he has only subjective complaints of pain, with no evidence of a hip joint issue, a virtually normal MRI, an intra-articular injection that provided no relief, primarily extra articular issues on physical exam, and lack of severe osteoarthritis.

39. Dr. Lindberg opined that the hip joint is not the source of Claimant's pain. Dr. Lindberg noted that the purpose of the injection was to rule out intra-articular versus extra-articular pain sources and that the injection was negative for an intra-articular source of pain since it provided no relief. Dr. Lindberg opined that the lidocaine works immediately to numb the area but that the marcaine is more slowly acting and that the steroid part of the injection would kick in and last longer, and would provide significant relief. Dr. Lindberg opined that if Claimant's pain was from the hip joint, he would expect 60-80% relief from the injection. Dr. Lindberg opined that a total hip replacement was not appropriate, that Claimant did not meet the medical treatment guidelines of surgical indications for a total hip replacement, and that other sources of Claimant's pain should be investigated.

40. Dr. Zuehlsdorff also testified at hearing. Dr. Zuehlsdorff opined that a total hip replacement was reasonable and necessary at this time. Dr. Zuehlsdorff opined that the intra-articular hip injection was diagnostic and that Claimant received 75% relief. Dr. Zuehlsdorff agreed that if the injection provided no relief, then it would be non-diagnostic and that if Claimant's pain source was extra-articular then a total hip replacement might not be needed. Dr. Zuehlsdorff opined that Claimant's pain source was intra-articular and that the tests for intra-articular sources including a supine flex hip, flex knee, and external internal rotation showed support for an intra-articular source of pain. Dr. Zuehlsdorff further indicated that Claimant may have some alteration of the extra articular area, implicating the surrounding musculature including the back, the hip, and the gluteus, but opined that was not the primary cause of Claimant's pain.

41. Dr. White testified via deposition. Dr. White opined that Claimant's hip joint is the problem, but that Claimant does not have end stage arthritis, the classic indication for a total hip replacement. Dr. White noted that the hip joint is the problem

and did not get better with the labrum arthroscopy and that a total hip replacement is the only viable solution for Claimant. Dr. White noted that Claimant's joint space looks good on imaging, but that Claimant has a significant area where he is missing cartilage and that Claimant continues to have poor function.

42. Dr. White opined that the steroid injection for the hip joint does not work for a long period of time and that it can work for a day or two days or three days or one hour depending on the patient. Dr. White opined that the diagnostic portion of the injection, the lidocane, should work for about an hour and that if the injection worked for the defined hour it would show objectively that the hip joint is the source of continued pain. Dr. White noted that Claimant may have some other issues coming from his back, sciatic joint and muscles around the hip joint but that the procedure to help Claimant is a total hip replacement. Dr. White opined that when a hip scope doesn't work, it doesn't work catastrophically and a lot of associated symptoms occur around the hip joint, especially muscle spasm and poor function in general and that Claimant fits that picture.

43. Dr. White opined that Claimant had clear intra-articular sources of pain and that everything in clinical examination pointed to a hip joint issues.

44. The Medical Treatment Guideline address total hip replacements in Rule 17.6.E.5. The surgical indications and considerations are listed as severe osteoarthritis and all reasonable conservative measures have been exhausted and other reasonable surgical options have been considered or implemented. *See* Exhibit Q.

45. The opinions of Dr. White and Dr. Zuehlsdorff are found credible and persuasive. Their opinions are consistent with findings on MRI, consistent with Claimant's continued pain and poor function, and are supported by physical examinations showing intra-articular sources of pain. Further, the opinion of Dr. Ellman consistently opines that Claimant likely has intra-articular sources of pain.

46. The opinion of Dr. Lindberg is not found as credible or persuasive. Dr. Lindberg's opinion that the MRI was virtually normal is inconsistent with the noted suspected labral tear on MRI, and opines that Claimant's subjective reporting of pain is inconsistent with the pathology. However, Claimant is found credible in his subjective reporting which has been consistent throughout the claim. Overall, Dr. Lindberg is not as persuasive as Dr. White and Dr. Zuehlsdorff.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving

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

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

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

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003).

Claimant has met his burden to show, more likely than not, that a right total hip replacement is reasonable and necessary. The testimony and opinions of Dr. White and Dr. Zuehlsdorff are found credible and persuasive. Claimant underwent an initial right hip arthroscopy after clinical indicators, MRI, and an intra-articular injection pointed

to the hip joint as his pain source. The surgery was a significant surgery complicated by microfracture procedure and showed a complete tear of Claimant's labrum. Claimant performed well following the initial surgery until July 5, 2014 when a fairly benign act of rising from a chair at a BBQ caused him intense pain. Claimant has continued to fair poorly following the July 5, 2014 incident. An MRI in July of 2014 was interpreted by the radiologist as suspicious for a re-tear in the posterior labrum. After waiting some time to see if Claimant's symptoms would improve with conservative treatment, Dr. White ultimately opined that the initial surgery had failed. Dr. White opined credibly that when that type of surgery fails, it fails catastrophically and that a patient will have significant symptoms relating to the hip joint including muscle spasm and poor function. Claimant has displayed these symptoms and is credible in reporting his current pain and limitations.

Dr. White's opinion that the only option to cure and relieve Claimant's intra-articular right hip pain is a right total hip arthroplasty is found persuasive. Although Claimant has only moderate osteoarthritis and not severe osteoarthritis, Claimant has undergone significant conservative treatment measures and has undergone a significant arthroscopic surgery to his right hip joint that ultimately failed. To treat his right hip intra-articular pain, a further right hip arthroscopy would not be appropriate given the amount of damage in his hip joint and the significant prior surgery that was not successful. A total hip replacement, as opined by both Dr. White and Dr. Zuehlsdorff is both reasonable and necessary to treat Claimant's injury. Dr. White credibly opined to the hip joint symptoms that Claimant displayed upon physical examination. Similarly, Dr. Zuehlsdorff opined that the tests for intra-articular sources of pain including the supine flex, flex knee, and external and internal rotation showed support that Claimant's primary source of pain is intra-articular. The ALJ finds persuasive the opinions of both Dr. White and Dr. Zuehlsdorff that Claimant's primary source of pain is intra-articular and defers to their medical opinion that a total hip arthroplasty is necessary at this point to cure and relieve the intra-articular issues.

The opinion of Dr. Lindberg is not found as credible or persuasive. As found above, the July, 2014 MRI was suspicious for labral tear. Both Dr. White and Dr. Zuehlsdorff opined that Claimant's clinical examination and presentation was consistent with intra-articular sources of pain. The overall opinion of Dr. Lindberg that Claimant's only had subjective complaints of pain with no evidence of a hip joint issue is not persuasive. The MRI as well as the clinical examinations point to the hip joint and intra-articular pathology as the source of Claimant's continued pain. Dr. Ellman noted Claimant's high degree of muscle spasm occurring in and about the hip as well as some intra-articular pathology, and opined that Claimant likely had elements of both intra-articular and extra-articular pathology. Dr. Erickson recommended denying the total hip replacement due to the lack of advanced arthritis of the hip joint and opined that even if Claimant had intra-articular abnormalities causing his pain, it might not be appropriate to perform a total hip replacement. However, Dr. Erickson does not offer an alternative solution to cure and relieve Claimant's intra-articular sources of pain and notes that this is a complex case. Further, Dr. Erickson defers to the opinion via IME of an individual with expertise in the hip joint. Dr. White is an expert in the hip joint and the ALJ defers

to his credible and persuasive opinion that the reasonable and necessary solution for Claimant is a total hip replacement. Even if Claimant has both intra-articular and extra-articular sources of pain, Claimant has shown that a right total hip replacement is reasonable and necessary to cure and relieve the current existing intra-articular pain

Claimant reported somewhat inconsistently surrounding the December 2014 intra-articular injection. Claimant advised Dr. Morgan that immediately at injection he received a 20% reduction in pain. Claimant then called PA Karns two days later and reported that for the first several hours after the injection, he got about 70-75 percent relief of his symptoms before the pain gradually returned. Claimant reported similarly four days after the injection to Dr. Zuehlsdorff that he received 75% pain relief for a couple of hours following the injection before the pain returned. At the IME with Dr. Lindberg, Claimant reported he called Dr. White's office and advised them that he received no pain relief from the injection and that his pain was the same. Claimant also reported to Dr. Lindberg that the third injection didn't do anything for his pain. However, earlier in the conversation with Dr. Lindberg, Claimant reported that the three injections lasted for an hour, felt good after the shots, but then the pain came right back. Claimant's reports to Dr. Lindberg appear to be confused as Claimant initially reported some pain relief following all three injections for an hour, but then later reported no pain relief from the third injection. The ALJ finds Claimant's contemporaneous reports made to Dr. Morgan, PA Karns, and Dr. Zuehlsdorff within four days of the injection to be more reliable and persuasive. Thus, the ALJ also agrees with the conclusion of Dr. White and Dr. Zuehlsdorff that the intra-articular right hip injection was diagnostic and in addition to the clinical examination findings, provided additional support for the need for a total hip replacement.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that a right total hip arthroplasty is reasonable, necessary, and related to his August 1, 2013 work injury. Claimant's request for a right total hip arthroplasty is granted.

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

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

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

DATED: August 28, 2015

/s/ Michelle E. Jones

_____

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

STIPULATIONS

1. The Claimant's average weekly wage (AWW) is $490.00.

2. The Claimant withdrew her claim for penalties against Respondents for alleged late filing of either a Notice of Contest or a General Admission of Liability

ISSUES

In light of the above stipulations, the issues remaining for determination are:

1. Whether the Claimant has proven, by a preponderance of the evidence, that she suffered an occupational disease related to her low back claim with a claim date of November 30, 2013.

2. If the Claimant's low back claim is compensable, whether the Claimant has proven, by a preponderance of the evidence, that she is entitled to medical treatment to cure and relieve her from the effects of the November 30, 2013 occupational disease.

3. If the Claimant's low back claim is compensable, whether Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability benefits from December 4, 2013 ongoing.

FINDINGS OF FACT

1. The Claimant's date of birth is September 16, 1985 and she is 29 years old. She began working for Employer on April 12, 2013 and was employed there until January 17, 2014.

2. The Claimant was employed as a server and her job duties included waiting tables and clearing and bussing tables. The Claimant testified that she would carry food and drink items to the tables up and down the stairs. The food was carried on large, round oval shaped trays that would fit 5 – 6 entrees. She estimated the loaded trays would weigh between 20 and 50 pounds. The drink trays were about 1 foot in diameter. She testified that there was not much assistance bringing food and drinks to her tables and she did most of the carrying work during her shift.

3. The Claimant testified that the week of Thanksgiving 2013, work was very busy and she worked 6 shifts, including a 12 hour shift on Thanksgiving and the Friday and Saturday shifts after Thanksgiving. The section of the restaurant she was working

required her to go up and down the stairs repeatedly with heavy food and beverage trays. The Claimant started to experience soreness in her back while working over this week.

4. By Monday, December 2, 2013, the Claimant had difficulty getting out of bed due to the pain in her back. She went in to work on Monday but her supervisor allowed her to go home to rest because the restaurant was not busy. On Tuesday, December 3, 2013, the Claimant reported her injury to her supervisor, Jason Aragon. She advised her supervisor that she was going to Denver Health Medical Center for treatment on December 3, 2013 and testified that at that time she reported a Workers' Compensation claim.

5. According to the testimony of the Respondent's witness, Chad Ashley, managers were trained to complete a First Report of Injury and provide employees with a list of designated physicians. The Claimant was not provided with a list of designated physicians and a First Report of Injury was not filed by Respondents around the time the Claimant first reported a low back claim. Mr. Ashley also testified that he was not aware of the Claimant's injury until weeks afterward. However, even then, his testimony and the Claimant's testimony indicates that the appropriate steps for initiating a workers' compensation claim and obtaining medical care through workers' compensation were not followed.

6. On December 3, 2013, Claimant was seen by the attending physician at Denver Health Medical Center Adult Urgent Care. She reported low back pain for three to four days after increased work over the past week. She was diagnosed with a low back strain, given medications and referred to find a primary care physician for further care.

7. The Claimant testified credibly that she provided her supervisor Katrina with a release from the doctor taking her off work for 3-4 days. Sometime during the second week of December, the Claimant returned to work for one shift in which her supervisor gave her light duty telling her to have someone else carry everything for her. The Claimant testified that this did not work well and she was not scheduled for either regular or light duty after this time. She did contact co-workers and her supervisor about covering other shifts for which she was scheduled. The Claimant testified that she also contacted her supervisors on several occasions between December 2013 and January 2014 to check the status of her workers' compensation claim, to find out what she needed to do for the claim, and to find out how to get medical treatment, but she was not provided with any information. The Claimant's testimony regarding her contact with her supervisors and attempts to report a workers' compensation claim and obtain medical treatment was credible and is found as fact.

8. The Claimant testified that she didn't see any doctors in December 2013 after the 3rd because she didn't have insurance.

9. The Claimant returned to Denver Health Medical Center on January 16,

2014 with the continued complaint of low back pain over the past two months. The medical provider noted that the Claimant reported an onset when she worked 6 days in a row as a waitress. The provider recommended that the Claimant get Medicaid and follow up with a PCP.

10. In January of 2014, the Claimant testified that she had a call from her Employer to meet with Jason from HR. It was the Claimant's understanding that she was to go in to fill out paperwork for her workers' compensation claim. On January 17, 2014, the Claimant met with Jason in HR and was asked to sign a resignation letter which stated that she had not accepted another position but no longer wished to be employed. The Claimant testified that it was her understanding she was required to sign the letter in order to have her workers' compensation claim move forward. The Employer completed a First Report of Injury with its carrier dated January 17, 2014. The Claimant testified the form was completed online and/or on the telephone while she was in the Employer's office at the same meeting where she signed the resignation paperwork.

11. The First Report of Injury filed by the Employer on January 17, 2014, indicates the Employer was notified on December 18, 2013. It alleges the Claimant's last date worked was November 30, 2013, and that she returned to work for the one shift on December 12, 2013. The First Report of Injury filed by the Employer on January 17, 2014, acknowledges that Claimant received treatment at Denver Health Medical Center. At this time, the Claimant again was not provided with a list of designated providers, nor sent to a physician, nor was she provided with a Notice of Contest or General Admission of Liability following the First Report of Injury filed on January 17, 2014. A Notice of Contest was later filed on June 2, 2014.

12. The Claimant testified that after she was set up with Medicare, she obtained conservative back care at Aurora South and was prescribed with muscle relaxants.

13. The Claimant began treating with Michael Holder, M.D. in April 2014. On April 8, 2014, the Claimant reported a four month history of low back pain and Dr. Holder noted there was no specific injury or history of major trauma, which was consistent with the Claimant's testimony and prior reports. Dr. Holder noted "lower thoracic and lumbar spasms intermittent and RT hip and upper thigh pain perhaps 1-2 times per week. Works as a waitress. Went to Urgent Care in Dec. No help." He diagnosed the Claimant with low back pain and recommended the Claimant start physical therapy and get x-rays.

14. The Claimant underwent an MRI at Lutheran Medical Center on June 24, 2014 with findings of chronic lumbar spondylosis at L4-5 and L5-S1 with a moderate central broad-based disc protrusion at L5-S1, causing mild mass effect upon both right and left subarticular recesses and the associated S1 nerve roots and mild bilateral facet arthrosis at L5-S1.

15. Dr. Holder referred Claimant to Dr. Brian Fuller at Mountain Spine & Pain Physicians following the MRI. On August 11, 2014, the Claimant reported to Dr. Fuller that she had increasing, right greater than left, low back pain with radiation to the bilateral buttocks and intermittently to the right calf. Dr. Fuller noted the Claimant sustained an injury while performing work duties lifting November 2013. Dr. Fuller diagnosed a disc protrusion at L5-S1 as well as facet arthropathy and scheduled right L5-1, S1-2 transforaminal epidural steroid injections. He noted that treatment options included a bilateral SI joint injection and trans-piriformis sciatic nerve block, bilateral L4-5 medial branch neurotomy and a repeat right L5-S1 transforaminal epidural steroid injection and physical therapy. Dr. Fuller noted the Claimant was pursuing a Workers' Compensation claim. The Claimant testified that she didn't have the injection recommended by Dr. Fuller at that time because she was waiting on her Worker's Compensation claim.

16. In August or September of 2014, Respondents designated Franklin Shih, MD, as the Claimant's treating provider. The Claimant was seen by Dr. Shih on September 9, 2014. Dr. Shih noted that the Claimant was referred for treatment of a work-related injury. Dr. Shih recommended physical therapy, acupuncture and possible injections and provided work restrictions of limiting her to bending and twisting on an occasional basis, frequent positional changes and a maximal lift of 10 pounds. Dr. Shih noted that he had an extensive discussion with the Claimant about her multiple potential pain generators and treatment options. There was also apparently discussion regarding work restrictions and whether or not the Claimant was capable of working. Dr. Shih noted the Claimant became quite frustrated with him and felt that his evaluation was of no benefit and he noted that the Claimant expressed that she was not comfortable with Dr. Shih as a treating provider. As Dr. Shih and the Claimant did not establish a good therapeutic relationship, Dr. Shih recommended the Claimant see a different primary provider.

17. The Claimant's care was transferred to Dr. Jade Dillon and the Claimant was initially seen by Dr. Dillon on September 22, 2014. The Claimant reported to Dr. Dillon low back pain symptoms that began in November 2013. Consistent with the Claimant's testimony and prior reports, the Claimant told Dr. Dillon that she did not recall any one specific injury but that she had worked extra shifts six days in a row over the week of Thanksgiving as a waitress. Dr. Dillon diagnosed a work-related injury of lumbar sprain and sacroiliitis and recommended physical therapy. Dr. Dillon noted that she would obtain prior medical records to determine what injections the Claimant may have had. Dr. Dillon provided work restrictions limiting lifting to 10 lbs and avoiding repetitive bending and twisting.

18. The Claimant continued to treat with Dr. Dillon, who referred the Claimant to Dr. Feldman for bilateral sacroiliac injections in December 2014.

19. On January 14, 2015, Dr. Dillon noted that the Claimant reported that her symptoms had now returned to baseline after an immediate and short term positive response to sacroiliac joint injections. Dr. Dillon noted the Claimant was referred back to

Dr. Feldman for a repeat set of sacroiliac injections and the Claimant was to continue physical therapy and her self-directed exercise program.

20. The Claimant was evaluated by Dr. Linda Mitchell on January 14, 2015 for an Independent Medical Examination (IME). Dr. Mitchell reviewed medical records and performed a physical examination, took a history from the Claimant and reviewed some surveillance video. In the surveillance video, Dr. Mitchell notes that the Claimant is seen getting in and out of her car, walking through snow and ascending and descending steps without difficulty, walking her dog, dancing and doing 100 sit ups in 4 minutes. At the hearing, the Claimant took issue with the video surveillance and testified credibly and persuasively that she does not live upstairs, she lives in the downstairs and the person seen in the video is the Claimant's mother-in-law and not the Claimant. Dr. Mitchell noted "nonspecific low back pain with straight leg raise, Faber and piriformis maneuvers bilaterally." Dr. Mitchell diagnosed lumbar spondylosis. Dr. Mitchell noted the Claimant had a "very lengthy" course of treatment, but acknowledged that it was "somewhat interrupted." She found the Claimant currently has predominantly myofascial pain with some component of radicular pain on the right in an S1 distribution. Dr. Mitchell opined that the response to the SI joint injections was a nondiagnostic response as it was not at least an 80% improvement. She did not recommend repeat injections. She recommended the physical therapy be weaned to a home exercise program and some maintenance medications and electrical stimulation for 6 months. Dr. Mitchell also opined that a right L5-S1 transforaminal epidural steroid injection could be repeated up to three times. Dr. Mitchell did not find the Claimant to be at MMI, but recommended that when the Claimant did reach MMI, she should be assessed for permanent partial impairment.

21. Dr. Feldman performed bilateral sacroiliac joint injections on February 9, 2015 with post procedure pain reportedly decreased from 7/10 to 4/10. Dr. Feldman noted the Claimant could benefit from diagnostic medial branch blocks on the L3 to L5 levels.

22. On February 16, 2015, Dr. Dillon continued to diagnose lumbar spine pain, sacroiliitis and now listed the additional diagnosis of arthropathy of spinal facet joint. She recommended the Claimant continue to follow up with Dr. Feldman and proceeding with medial branch blocks, and, if indicated by the results of the blocks, with radiofrequency ablation.

23. On April 2, 2015, Dr. Dillon noted that, eight days prior, the Claimant had nerve root blocks and did well with a good diagnostic response and considerable pain relief for one day. After that, the symptoms returned. Based on the positive diagnostic response, Dr. Dillon recommended proceeding with the radiofrequency ablation, and continuing with medications and physical therapy.

24. The Claimant has been unable to work her regular job duties since December 3, 2013. Although the Employer had the Claimant return for one shift and attempt modified work, the Claimant was unable to perform the activities required and

could not complete the shift. The Claimant did not return to regular or modified job duties for the Employer. The Employer did not provide a modified duty job offer in writing pursuant to C.R.S. § 8-42-105. The Claimant is not currently working and has only worked very transiently. The Claimant's credible testimony was that she cleaned a friend's house the previous summer for a couple of months, performing light cleaning every other week. She was initially paid $40.00 per housecleaning, then later $50.00 per house cleaning.

25. Based on the stipulation of the parties, which the ALJ accepts, the ALJ finds that the Claimant's AWW is $490.00, which results in a temporary total disability (TTD) benefit rate of $326.63 per week.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S §§ 8-40-101, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The Claimant shoulders the burden of proving entitlement benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The fact in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness whether the testimony has been contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Co v. Cline,* 98 Colo. 275, 57 p.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 138 P.3d 684 (Colo. App. 2008; *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability - Occupational Disease

The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the

course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, supra.

C.R.S. § 8-40-201(14) defines "occupational disease" as:

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

The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. Id. Where the

disease for which a claimant is seeking compensation is produced solely by some extrinsic or independent cause, it is not compensable. *Anderson* at 824. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once such a showing has been made, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The hazardous conditions of employment need not be the sole cause of the disease. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

As found, the Claimant reported low back pain to her Employer after working long shifts over a 6 day period over the week of Thanksgiving. The Claimant advised her Employer that she was requesting medical care for the work-related low back pain on December 3, 2013, but was not given a list of designated providers nor was she directed to complete the necessary Workers' Compensation claim forms at this point. The general manager, Chad Ashley testified on behalf of Employer and, while his testimony established the procedure that should have been followed, it also supported the Claimant's argument that the appropriate procedures for initiating a Workers' Compensation claim and obtaining medical care were not followed by the Employer. Even after the Claimant brought a 3-day release from work duties from Denver Health Medical Center, the Claimant's supervisors do not appear to have taken steps to direct the Claimant to medical care for a workers' compensation claim. Yet, even the early medical records from Denver Health Medical Center attribute the low back pain to the Claimant's work duties.

Subsequently, the Claimant's medical treatment was sporadic and interrupted due to the lack of insurance and the lack of initial treatment under the Workers' Compensation system. Eventually, the Claimant was referred for treatment under Medicaid and then finally under the Workers' Compensation treatment.

Over the course of the medical care that the Claimant received, there are notes that there was no specific major trauma or injury, but rather, the onset of low back pain over a period of time around Thanksgiving of 2013. Prior to this, the Claimant has no history of low back pain, and, after this, the Claimant's low back pain was relatively constant. The type of work that the Claimant performed is consistent with the low back condition documented in the medical records. The Claimant's reporting of the onset of her condition has been consistent and was not questioned by any of her treating

physicians. Even the Respondents' IME physician, Dr. Mitchell, did not raise any serious questions about causation. There was no persuasive evidence presented that the Claimant was exposed to a hazard outside of employment that could have been a proximate cause of her low back condition. To the extent that the medical records of Dr. Mitchell reference video surveillance of physical activities which would be inconsistent with the Claimant's low back condition, the Claimant's credible testimony that the person in the video surveillance was her mother-in-law, and not her, refutes any other inferences from said video surveillance. Dr. Mitchell's reliance on the video surveillance is misplaced. In any event, Dr. Mitchell nevertheless, did not opine that the Claimant did not suffer a work-related occupational disease, but rather opined that the Claimant was at, or nearing, maximum medical improvement.

Overall, the medical opinions of Dr. Holder, Dr. Fuller, Dr. Shih and Dr. Dillon, which did not question causation, in combination with the Claimant's MRI findings, support the conclusion that the Claimant's injury arose out of her work duties during the last week of November of 2013.

Based on the Claimant's job activity descriptions and complaints of pain and other symptoms, along with the opinions of Dr. Holder, Dr. Fuller, Dr. Shih and Dr. Dillon, it is found that the Claimant's job activities likely caused the Claimant's back and radicular symptoms and were causally related to the Claimant's need for medical treatment for her low back condition. The nature and type of heavy lifting of trays laden with food and beverages, which had to be carried up and down stairs was more prevalent in her position with Employer than in her everyday life and, overall, the weight of the evidence, based on the Claimant's testimony, the evidence submitted at the hearing, combined with the physical symptoms documented in the medical records, supports the finding that the Claimant's back was more likely than not caused by her work duties. Because the Claimant met her evidentiary burden, it shifts to Respondents to establish that the Claimant's condition was caused by an outside non-industrial event. Respondents failed to establish the existence of an outside, non-industry cause of the Claimant's condition and need for medical care for her low back. The testimony of the supervisor Chad Ashley that he did not know that the Claimant was attributing her low back pain to work duties is not sufficient, by itself, to establish a hazard outside of employment.

Based on the foregoing, the Claimant has established by a preponderance of the evidence that she suffered a compensable occupational disease causing, aggravating, combining with, or accelerating the symptoms related to her back condition.

Medical Benefits –Authorized, Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101 C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the

course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v, Industrial. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence musty establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971): *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Per C.R.S. § 8-43-404 (9)(a), health care services shall be deemed authorized if the claim is found to be compensable when:

- Compensability of a claim is initially denied
- The services of the physician selected by the employer are not tendered at the time of the injury; and
- The injured worker is treated….at a public health facility in the state (or within 150 miles of the residence of the injured worker).

If the treatment provided to a claimant is found to be reasonably necessary and related to the injury, the claimant shall not be liable for treatment by the provider where the conditions of C.R.S. § 8-43-404 (9) are met.

Authorized providers also include those medical providers to whom a claimant is directly referred by the employer, as well as providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of*

Ignacio v. Industrial Claim Appeals Office, 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Here, the Claimant testified credibly, and it was found, that she attempted to file Workers' Compensation claim to obtain medical care for her work-related condition. However, initially, the Employer did not follow the appropriate procedures for initiating a claim and directing an employee to appropriate medical care. What followed was sporadic and interrupted care for the Claimant's low back condition, first through two urgent care visits to Denver Health Medical Center due to lack of insurance. Then, once the Claimant was set up with Medicaid, she was able to treat with Drs. Holden and Fuller. However, she did not obtain all of the recommended care due to financial concerns. Ultimately, Respondents referred her to Dr. Shih, within the Workers' Compensation system. As Dr. Shih was unable to establish a good therapeutic relationship with the Claimant, he recommended referral to another doctor. The Claimant was then referred to Dr. Dillon, who assumed the role of the Claimant's medical treatment provider. While the Claimant's path to treatment with Dr. Dillon was somewhat convoluted, in the end, Dr. Dillon is currently the Claimant's authorized treating physician. This is because either (1) Employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion; or (2) Employer failed to offer to provide a Claimant with medical treatment in the first instance, and the right of selection passed to the Claimant.

In this case, the Claimant also testified credibly that she was working her regular food server duties during the week of Thanksgiving in 2013 when experienced the onset of pain in her low back with symptoms radiating to her lower extremities, right worse than left. There was no persuasive evidence presented that the Claimant had previously been treated for symptoms related to her low back before December 3, 2013. The Claimant had not been on medical restrictions prior to December 3, 2013. The conservative medical care that the Claimant received to date from Denver Health Medical Center, from Dr. Holden, Dr. Fuller, Dr. Shih and Dr. Dillon was reasonably necessary to treat the Claimant's work-related condition.

The Claimant has established that she is entitled to further evaluation of her lower back condition to determine if she requires additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act. As of April 2014, Dr. Dillon also recommended proceeding with the radiofrequency ablation, and continuing with medications and physical therapy. This conservative treatment is found to be reasonably necessary to cure and relieve the Claimant of her November 30, 2013 occupational disease.

Temporary Disability Benefits

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result

of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

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

Here, the onset of the Claimant's occupational disease was during the week of Thanksgiving 2013 and, per the claim, is given a date of November 30, 2013. The Claimant came in to work on Monday, December 2, 2013 as scheduled, but was permitted to leave as the restaurant was not busy. On Tuesday, December 3, 2013, the Claimant reported her low back condition to her supervisor and sought medical treatment. The medical provider at Denver Health Medical Center provided her with work restrictions taking her off work for 3 days. At some point during the second week of December, the Claimant reported for work and attempted to work a shift under "light duty" with someone else carrying her food and beverage trays. The Claimant could not complete the shift and was not scheduled again for regular or light duty. Then on January 17, 2014, the Claimant was advised to come in to work, ostensibly to sign paperwork to initiate her Workers' Compensation claim and get referred to medical care for her condition. The Claimant testified credibly that she was led to believe that she needed to sign a resignation form stating that she had not accepted another position but no longer wished to be employed in order to move her Workers' Compensation claim

forward. This was signed the same day that the First Report of Injury was completed and transmitted to the Insurer by the Employer, supporting the Claimant's contention.

Since then, the Claimant has treated with various physicians sporadically, as set forth in greater detail above. The Claimant's current authorized treating physician, Dr. Dillon, is presently recommending additional conservative care for the Claimant's low back condition and the Claimant is under work restrictions limiting her to lifting no greater than 20 pounds and avoiding repetitive bending and twisting. The Claimant has not returned to regular or modified employment, nor has the Employer made a written offer modified employment to the Claimant within her restrictions that the Claimant has failed to begin.

The Claimant's work-related disability has resulted in her missing more than 3 work shifts and she has missed work shifts for more than two weeks resulting in a wage loss. Therefore the Claimant is entitled to temporary total disability benefits from the day she last worked. The last day that the Claimant worked for Employer was December 2, 2013. So, the Claimant is entitled to TTD benefits from December 3, 2013 ongoing. The Claimant has not worked, other than a very short, transient time period of two months when she performed light housekeeping for a friend, and has suffered a wage loss through the present. The Respondents did not endorse offsets as an issue in the Response to Claimant's November 4, 2014 Application for Hearing, and so, there is no offset for the Claimant's payment for light housecleaning work over a brief time period. In any event, the total amount the Claimant may have received for this limited work was not sufficiently established. The parties stipulate that the Claimant's average weekly wage is $490.00, with a corresponding TTD rate of $326.67 for the purposes of calculating the Claimant's temporary total disability benefits. The Claimant has proven entitlement to benefits based on this rate from December 3, 2013 ongoing, pursuant to statute, until one of the occurrences listed in § 8-42-105(3), C.R.S.

ORDER

It is therefore ordered that:

1. The Claimant's suffered a compensable occupational disease with a claim date of November 30, 2013.

2. The Claimant is entitled to medical benefits to treat her low back and associated symptoms which are causally related to the November 30, 2013 occupational disease and the Respondents are responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

3. Dr. Jade Dillon is Claimant's authorized treating physician.

4. The Claimant is entitled to temporary total disability benefits at the

TTD rate of $326.67 per week, from the time period of December 3, 2013 ongoing until one of the occurrences listed in § 8-42-105(3), C.R.S.

5. All compensation not paid when due shall bear interest at the rate of 8% per annum.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1523 Sherman Street, 4th Floor, Denver, Colorado 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301, C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 12, 2015

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) benefits for the period April 6, 2014 through April 19, 2014.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period April 20, 2014 until terminated by statute.

FINDINGS OF FACT

1. Claimant works as a Bartender for Employer. Her job duties involve serving food, bussing tables, making drinks, washing dishes, cleaning tables, changing kegs, stocking alcohol and closing the bar.

2. On Saturday, March 8, 2014 Claimant was changing out an empty beer keg. Claimant noted that an empty beer keg weighs approximately 40 pounds. While in Employer's walk-in cooler Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward, lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." The incident occurred shortly after 5:00 p.m. Claimant's back pain continued to increase throughout the rest of her work shift. She explained that towards the end of her shift she sat down and processed credit card receipts in an effort to reduce her lower back pain.

3. On Monday, March 10, 2014 Claimant went into work to perform inventory. General Manager Christina Fahey was at the bar because she oversees inventory. Claimant reported that she thought she had hurt her ribs or "popped some ribs out of place changing the Budweiser keg on Saturday night." She commented that she was unable to continue inventory duties because she was having difficulties sitting, breathing and talking. Claimant remarked that Ms. Fahey arranged for another employee to cover the shift and provided her with a list of two designated Workers' Compensation medical providers. Claimant chose HealthOne.

4. Claimant drove to HealthOne Occupational Medicine and Rehabilitation and was evaluated by Deana Halat, FNP. FNP Halat reported that Claimant had attempted to pick up an empty keg at work on March 8, 2014 but experienced pain throughout her back. In completing a physical examination of Claimant, FNP Halat explained that there was "no palpable tenderness along the paraspinous muscles in [Claimant's] lower back." She determined that Claimant suffered from "shortness of breath, pain [and] left upper quadrant abdominal pain." FNP Halat remarked that she

contacted 9-1-1 to transport Claimant to Swedish Medical Center because Claimant required more extensive evaluation than could be provided at the clinic.

5. Claimant was admitted to Swedish Medical Center because of abdominal pain, flank pain, vomiting and nausea. Claimant reported that her symptoms began three days earlier while lifting a heavy keg at work. A chest x-ray and an abdominal CT scan did not reveal any acute findings. A subsequent CT scan of the lumbar spine was also normal. Doctors thus suspected that Claimant's pain was secondary to a musculoskeletal strain. On March 14, 2014 Claimant was discharged from Swedish Medical Center with a diagnosis of "low back pain, secondary to muscle spasm."

6. On March 17, 2014 Claimant returned to HealthOne for an examination. David Williams, M.D. noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed a lumbar strain and muscle spasms. He also took Claimant off of work. She subsequently attended several other appointments at HealthOne during March and April 2014. She was diagnosed with a lumbar strain and possible torn paraspinous muscles in her lower back. Claimant underwent conservative treatment that included medications and physical therapy.

7. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014.

8. Although Dr. Williams' April 8, 2014 medical record noted that Claimant had been released to modified duty employment and returned to work on the previous night, the record also reflects that Claimant's pain at work became unbearable and she only worked for approximately two hours. Dr. Williams thus took Claimant off of work from April 8, 2014 through April 11, 2014. On April 11, 2014 Dr. Williams released Claimant to modified work duty of four hours per day. Another medical record from April 18, 2014 specifies that Claimant was "taken off work schedule as of April 17, 2014."

9. Claimant worked an average of 30 hours per week for Employer. She earned $4.98 each hour plus tips. Claimant had gross earnings of $4,511.24 for the period December 28, 2013 through March 8, 2014. Dividing $4,511.24 by 12 weeks yields an AWW of $375.94. An AWW of $375.94 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

10. During the two week period from April 6, 2014 through April 19, 2014 Claimant earned total wages of $246.54. Based on her AWW of $375.94 Claimant should have earned $751.88 for the two week period. Claimant thus earned $505.34 less than her AWW for the period April 6, 2014 through April 19, 2014. Multiplying $505.34 by 66.67% yields $336.91. Accordingly, Claimant is entitled to receive TPD benefits in the amount of $336.91 for the period April 6, 2014 through April 19, 2014.

11. By April 20, 2014 Claimant was unable to return to work for Employer. Claimant credibly testified that she has not worked at all since mid-April 2014. Moreover, Claimant has not reached MMI. Accordingly, Claimant is entitled to receive TTD benefits for the period April 20, 2014 until terminated by statute.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). TPD benefits are calculated based on the difference between an employee's AWW at the time of the injury and the employee's earnings during the continuance of the disability. §8-42-106(1), C.R.S. Specifically, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's AWW at the time of the injury and the AWW during the continuance of the temporary partial disability. §8-42-106(1), C.R.S. TPD benefits shall continue until either the employee reaches MMI or the attending physician gives the employee a written release to "return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." §8-42-106(2), C.R.S.

5. As found, during the two week period from April 6, 2014 through April 19, 2014 Claimant earned total wages of $246.54. Based on her AWW of $375.94 Claimant should have earned $751.88 for the two week period. Claimant thus earned $505.34 less than her AWW for the period April 6, 2014 through April 19, 2014. Multiplying $505.34 by 66.67% yields $336.91. Accordingly, Claimant is entitled to receive TPD benefits in the amount of $336.91 for the period April 6, 2014 through April 19, 2014.

6. To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

7. As found, by April 20, 2014 Claimant was unable to return to work for Employer. Claimant credibly testified that she has not worked at all since mid-April 2014. Moreover, Claimant has not reached MMI. Accordingly, Claimant is entitled to receive TTD benefits for the period April 20, 2014 until terminated by statute.

ORDER

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

1. Claimant shall receive TPD benefits in the amount of $336.91 for the period April 6, 2014 through April 19, 2014.

2. Claimant shall receive TTD benefits for the period April 20, 2014 until terminated by statute.

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

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

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

DATED: August 10, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

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

ISSUES

1. Whether the claimant should receive a scheduled rating or a whole person rating for his right foot injury?

2. What percentage either for a scheduled or whole person rating should be assigned for the claimant's right foot injury?

3. Whether QSART testing, psychotherapy and biofeedback are reasonable and necessary post-MMI medical benefits?

4. Whether the respondents are entitled to an Order crediting TTD payments made since MMI was reached on April 17, 2014 to be applied to awarded PPD benefits?

5. What is the proper calculation of Claimant's Average Weekly Wage?

STIPULATED FACTS

The parties agreed to the following stipulated facts prior to commencement of the hearing:

1. The claimant was employed by the respondent-employer as a Driver Merchandiser.

2. The claimant suffered an admitted injury to his right foot on May 28, 2013. While working in a warehouse for the respondent-employer, the brake on a nearby pallet jack failed, causing the pallet jack to roll backwards. As a result, the pallet jack pinned the claimant's right foot, causing a crush contusion.

3. The claimant had been working for approximately two-weeks as a Driver Merchandiser at the time of the injury.

4. The injury resulted in a sesamoid fracture in the right foot.

5. On June 14, 2013, the respondents admitted for the injury by filing a General Admission of Liability. The respondents admitted to an average weekly wage

of $668.30, based on a 52-week average (from May 25, 2012 through May 24, 2013) of a similar employee working as a Driver Merchandiser with the respondent-employer.

6. On August 23, 2013, the claimant underwent surgery to remove the sesamoid bone, along with an arthrotomy of the medial aspect of the right foot.

7. On April 17, 2014, the claimant was placed at maximum medical improvement by Albert Hattem, M.D.

8. On December 31, 2014, the claimant underwent a Division-IME by Caroline Gellrick, M.D. Dr. Gellrick opined that the claimant was properly placed at MMI on April 17, 2014.

9. The claimant has been receiving Temporary Total Disability (TTD) benefits since May 29, 2013 at a rate of $445.56 per week.

10. From May 29, 2013 through July 20, 2015 (two days prior to the date of hearing), the claimant has received TTD benefits in the amount of $50,615.09.

FINDINGS OF FACT

1. Although the claimant began working for the respondent-employer approximately two weeks before his industrial injury on May 28, 2013, he had previously worked for this respondent-employer.

2. The claimant originally began working for the respondent-employer in August of 2012 and quit this job in November of 2012.

3. The claimant was paid $1,891.97 for the time period from May 18, 2013 through May 31, 2013. This was the claimant's first and only full pay period since returning to the respondent-employer in May of 2013.

4. The claimant quit his job with the respondent-employer in November of 2012 because he was offered a local position in Pueblo, CO for more money. In March 2013, the claimant's previous supervisor from the respondent-employer contacted him about a new position with the respondent-employer for substantially more money.

5. The claimant was re-hired by the respondent-employer and the primary reason he agreed to return to the respondent-employer was due to the substantially better pay.

6. The ALJ finds that the appropriate average weekly wage for the claimant is $945.99 as this amounts to his actual wage loss.

7. The claimant underwent surgery to remove the sesamoid bone in his foot on August 23, 2013. The claimant reported to his treatment provider on August 27, 2013 that his pain had been worse since surgery.

8. The claimant continues to live with pain on a daily basis. It affects everything in his life from cooking and doing the dishes to bathing and sleeping. He has difficulty walking due to an altered gait.

9. The claimant received sympathetic blocks in his spine for treatment of his injury. This results in 100% pain relief for two to three months.

10. The claimant admittedly suffered from depression prior to May 28, 2013. In approximately 2002 he relocated to Michigan for his wife. He struggled with depression due to the move away from his home and family. The claimant moved back to Colorado in 2006 and he was doing "extraordinarily well" up until his May 28, 2013 injury.

11. The medical record demonstrates that the claimant was not started on an anti-depressant—Venlafaxine XR 150mg/day—until on or around August 4, 2013. Dr. Caughfield explained on October 15, 2013 that the claimant's neuropathic pain was being complicated by "acute on chronic anxiety, which is escalating." Dr. Caughfield recommended the claimant undergo psychosocial evaluation.

12. The claimant underwent an initial evaluation with Dr. David Hopkins, Ph.D., on October 23, 2013. Dr. Hopkins' report documents that the claimant "is extremely frustrated with his slow progress, his inability to work, and fears of a poor recovery."

13. Dr. Hopkins recommended six to eight biofeedback and relaxation sessions along with six to eight verbal psychotherapy sessions.

14. Dr. Caughfield's note from November 18, 2013 indicates that the claimant would like to follow through with treatment with Dr. Hopkins, but "there is apparently a denial of that treatment per insurance carrier…."

15. The claimant was not able to receive the six to eight biofeedback and relaxation sessions that were previously recommended by Dr. Hopkins because the treatment was denied by the respondent-insurer. The claimant would "absolutely" like to

have this treatment still because he believes it can only help his condition. The claimant similarly did not receive the six to eight verbal psychotherapy sessions that were recommended by Dr. Hopkins because they were denied by the respondent-insurer. He would also like to have this treatment.

16. The claimant's surgeon, Dr. Angelo Giarratano, began suspecting the claimant had Reflex Sympathetic Dystrophy (RSD) around November 11, 2013. He recommended evaluation for RSD. The claimant underwent his first lumbar sympathetic block on December 10, 2013. Dr. Giarratano concluded, "Due to the patient having complete relief for 3 days from the epidural blocks, [it] is very apparent that the chronic regional pain syndrome [CRPS] has been confirmed." He stated on January 16, 2014, that "If patient does not get his blocks on a regular basis, there is no chance of a cure. The delay from Workers' Comp. is unprecedented."

17. Dr. Caughfield documented on November 18, 2013, that the claimant gets swelling in his right foot. He documented that on January 13, 2014, the claimant's right foot was slightly duskier than the left. On March 6, 2014, Dr. Caughfield diagnosed the claimant with "Right foot crush injury status post surgery with complex regional pain syndrome." He further stated that the claimant had a positive response to the block and has had physical findings consistent with a sympathetic dysfunction.

18. Dr. Hattem placed the claimant at MMI on April 17, 2014. Dr. Hattem stated that a thermogram and bone scan were negative for CRPS, but that the claimant reported significant improvement from three separate sympathetic blocks. He determined that the diagnosis of CRPS was "equivocal" and chose to assign a rating for CRPS. Dr. Hattem provided a 10% whole person rating based on Table 1, page 109 of the AMA Guides, Third Edition Revised, because the injury affected the claimant's ability to stand and walk.

19. The claimant underwent a Division IME with Dr. Caroline Gellrick on December 31, 2014. Dr. Gellrick stated in her report that the claimant has a "distant past history of depression, but it has gotten worse with this injury." She also noted that, according to the claimant, when Dr. Massey performs the block in the lumbar spine, the claimant feels the sensation going down the right leg in the L5 dermatome to the greater hallux, which alleviates pain and tenderness.

20. Dr. Gellrick explained that she would recommend a QSART test as maintenance to further aid in the diagnosis of CRPS.

21. The claimant would like to undergo the QSART testing as recommended by Dr. Gellrick.

22. Dr. Gellrick recommended the claimant receive the treatment that was previously recommended by Dr. Hopkins and that this could be done as maintenance treatment.

23. The claimant testified at hearing that he would still like to receive the treatment that was previously recommended by Dr. Hopkins.

24. Dr. Gellrick provided the claimant with an 11% whole person rating based on the L5 nerve distribution of the right lower extremity. She concluded the claimant's rating should be that of a whole person since the pain is sympathetically mediated in the L5 distribution alleviated with sympathetic blocks.

25. Dr. Kathy McCranie performed an independent medical examination of the claimant on April 16, 2015 at the request of the respondent-insurer. She agreed with both Drs. Gellrick and Hattem that the claimant is at MMI; however, she disagreed with the impairment ratings provided by both of them.

26. Dr. McCranie acknowledged that the Division of Workers' Compensation does allow for impairment ratings using the spinal cord table for patients with CRPS, but it is her opinion that the claimant does not have a "clinical" diagnosis of CRPS and that his clinical examination was not consistent with CRPS. For this reason, she did not think the claimant "fit" into this impairment rating category.

27. Dr. McCranie was of the opinion that the claimant should have a 16% lower extremity rating. This is based on loss of range of motion of the toe, loss of range of motion of the ankle, and causalgic pain in the distribution of the medial plantar nerve.

28. Dr. McCranie stated that the claimant should continue to receive medication management for his anxiety for one year, but if his need for these medications lasts longer than a year, it should be transitioned back to his family physician.

29. Dr. Kathy McCranie testified at hearing that the claimant's maintenance care should continue for a period of a year, but that the sympathetic blocks should continue as long as he continues to receive benefit from the blocks.

30. Dr. McCranie testified that the QSART test recommended by Dr. Gellrick would not be maintenance care because it is a diagnostic test and not treatment and

that it would not be therapeutic to the claimant and that it would "not add anything to his medical treatment." However, she did admit that it would provide additional information as to whether the claimant has a diagnosis of CRPS.

31. Dr. McCranie testified that the claimant does not meet the "clinical" diagnosis of CRPS. She stated that he had some of the symptoms consistent with CRPS, but not enough to be "clinically" diagnosed.

32. Dr. McCranie testified that Level II doctors are taught by the Division of Workers' Compensation that if a claimant has CRPS, they can use the spinal cord rating for change in gait. Dr. McCranie testified that Level II doctors have a choice based on how to provide ratings based on where the doctor thinks the claimant's biggest problem is located.

33. Dr. McCranie testified that Dr. Gellrick gave the claimant a rating based on lumbar radiculopathy. Dr. McCranie is of the opinion that Dr. Gellrick rated the wrong body part.

34. Dr. McCranie testified that the claimant has sympathetically maintained pain. She agrees that the lumbar sympathetic blocks that the claimant receives results in decreased pain and increased function.

35. Dr. Timothy Hall performed an independent medical examination of the claimant on May 14, 2015 at the request of the claimant's counsel.

36. Dr. Hall noted that, when the claimant has not received a sympathetic block, "he can barely walk and can barely weight bear and has dramatic pain in this area of the toe and forefoot."

37. Dr. Hall explained he did not believe it was appropriate to rate the claimant for his range of motion loss. "This patient's problem is not a consequence of his range of motion loss…. His situation is far beyond that. His impairment is with standing and walking when his pain is not controlled." Dr. Hall therefore agreed with the rating for CRPS as provided by Dr. Hattem.

38. Dr. Hall explained that "sympathetically-maintained pain, which is his diagnosis, is a spinal cord issue." Dr. Hall agreed with the usage of page 109, table 1, category A to assign the impairment rating. This category allows for a rating from 5% to 20%. Dr. Hall agreed 10% was appropriate.

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

40. The ALJ finds that the opinions of Dr. Caughfield, Dr. Hattem, Dr. Hall, and Dr. McCranie are credible and persuasive insofar as they are in concurrence with Dr. Gellrick's analyses and opinions.

41. The ALJ finds that the claimant has established that it is more likely than not that the claimant's impairment is not on the schedule and that the claimant is to be rated for a whole person impairment.

42. The ALJ finds that the claimant has established that it is more likely than not that the claimant's average weekly wage is $945.99 per week.

43. The ALJ finds that the respondents have failed to establish by clear and convincing evidence that the DIME physician's whole person impairment rating is clearly erroneous.

44. The ALJ finds that the claimant has established that it is more likely than not that the claimant is in need of maintenance medical care as specifically delineated by Dr. Gellrick in the DIME report.

45. The ALJ finds that the respondents have established that it is more likely than not that any overpayment of indemnity benefits paid to the claimant since reaching MMI on April 17, 2014 should be applied to permanent partial disability benefits due under this order.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. § 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

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

3. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for

observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

4. When it comes to determining the appropriate permanent partial disability (PPD) benefits to be awarded when a Division Independent Medical Examination ("DIME") has taken place, the necessary first step will be to determine if PPD benefits are to be awarded for a scheduled rating or a whole person rating. *Egan v. Indus. Claim Appeals Office of State*, 971 P.2d 664, (Colo. App. 1998); *Janine Jones-Roberts v. Frontier Airlines and Pinnacol Assurance*, 2015 WL 546080. This necessity is derived from the fact that the burden of proof involved will depend on the type of rating that is at issue.

5. "The question of whether the claimant sustained scheduled impairment within the meaning of § 8-42-107(2)(a), or a whole person medical impairment compensable under § 8-42-107(8)(c) is one of fact for determination by the ALJ." *Jones-Roberts*, at 6, citing *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). This is, of course, subject to the claimant's burden of proof by a preponderance of the evidence to prove that he sustained functional impairment not found on the schedule. See *Elaine Olson v. Foley's*, 2000 WL 1563216, at 2. "In resolving this question, the ALJ must first determine the situs of the claimant's 'functional impairment,' and the site of the functional impairment is not necessarily the site of the injury itself." *Jones-Roberts*, at 6, citing *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

6. As found above the claimant has established by a preponderance of the evidence that he sustained an impairment beyond the situs of the injury as determined by the DIME physician Dr. Gellrick.

7. Claimant is asserting a claim for whole person benefits, based on the 11% assigned by the Division IME, Dr. Gellrick.

8. Where a DIME has taken place and the DIME physician assigns a whole person impairment rating, this rating must be overcome by clear and convincing evidence.

9. As found above, the respondents have failed to establish by clear and convincing evidence that the whole person impairment rating provided by Dr. Gellrick is incorrect.

10. An award of maintenance medical benefits is appropriate when "future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury." *Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705, 711 (Colo. 1988). It is the claimant's burden to prove by a preponderance of the evidence, which requires substantial evidence in the record, that maintenance medical benefits meeting this standard should be awarded. *Regina Van Meter v. City Market*, 2012 WL 6027192, at 3; citing *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Further, it has been held that "Grover requires the claimant to prove: 'that but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far.'" *Ronald Brock v. Jack Brach & Sons Trucking*, 1995 WL 785442, at 1; quoting *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992) Whether the need for maintenance medical benefits is causally related to an industrial injury is a question of fact for the ALJ. *Id*.

11. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence the need for maintenance medical treatment as delineated by Dr. Gellrick.

12. AWW shall be calculated upon the wages the injured worker was receiving at the time of the injury. C.R.S. §§ 8-40-201(2). The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant's AWW is $945.99. The ALJ concludes that there are no special circumstances requiring a deviation from the standard method of computation.

14. C.R.S. § 8-42-105(3)(a) states that temporary total disability benefits must continue until the employee reaches maximum medical improvement. The termination of TTD benefits under any one of the conditions enumerated in § 8-42-105(3)(a) is mandatory. *Laurel Manor Care Ctr. v. Indus. Claim Appeals Office of State of Colo.*, 964 P.2d 589, 590 (Colo. App. 1998); referencing *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661 (Colo. App.1995).

15. Claimant was placed at MMI by Dr. Hattem on April 17, 2014. All subsequent medical opinions have concurred with this opinion and the parties have stipulated to this fact.

16. Claimant has been receiving Temporary Total Disability (TTD) benefits since May 29, 2013 at a rate of $445.56 per week. From May 29, 2013 through July 20, 2015 (two days prior to the date of hearing), Claimant has received TTD benefits in the amount of $50,615.09. Claimant continues to receive TTD benefits since July 20, 2015 at a rate of $63.65 per day ($445.56 divided by 7 days per week). The amount of TTD benefits paid since MMI was reached on April 17, 2014 until August 5, 2015 is $30,234.43.

17. Therefore, it is found that Claimant's entitlement to TTD benefits was terminated as of April 17, 2014. Respondents are entitled to a credit against any awarded PPD benefits in the amount of $30,234.43, plus $63.65 per day after August 5, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant is entitled to a whole person impairment rating of 11%.

2. The respondents request to overcome the DIME with respect to the whole person impairment rating established by the DIME physician is denied and dismissed.

3. The claimant's average weekly wage is $945.99 per week.

4. The claimant is entitled to post-MMI maintenance medical treatment as delineated by the DIME physician.

5. The respondent-insurer is entitled to a credit against PPD for indemnity benefits paid subsequent to MMI on April 17, 2014.

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

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

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

DATE: August 26, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues to be determined by this decision include compensability of an alleged work related heart attack and claimant's entitlement to medical benefits. The specific questions to be answered are:

I. Whether Claimant established by a preponderance of the evidence that his heart attack of May 15, 2014, was proximately caused by an unusual exertion that arose out of, and in the course and scope of, his employment duties pursuant to § 8-41-302 (2), C.R.S.

II. If Claimant established that his May 15, 2014, heart attack is compensable, whether the medical treatment for that heart attack provided at St. Mary Corwin Hospital from May 15 through May 17, 2014, was reasonable, necessary, and causally related to that heart attack.

III. Claimant withdrew, without objection, his claim for an occupational respiratory disease arising out of and in the course and scope of his employment with employer. The ALJ approved and accepted Claimant's withdrawal of this claim.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing testimony of Dr. Volz, the ALJ enters the following findings of fact:

1. Claimant is a longtime sandblaster/painter for Employer having worked on and off for the company since 1992. On May 15, 2014, Employer assigned Claimant to work as a "pot tender" outside of a water tank that Employer had contracted to refurbish. Among other things, the contract called for the inside of the tank to be sandblasted and re-painted.

2. As noted above, Claimant was instructed to tend to the sand pot, which he would periodically fill for continuous supply of blasting agent to the workers inside the tank. On May 15, 2014, Employer had assigned two workers to blast the inside of the tank while Claimant tended to the pot. One blaster did not show for work and the job supervisor had not yet arrived on site which Claimant testified slowed the progress of work. Frustrated that the second sandblaster was a no show for work, Claimant took it upon himself, without seeking permission, to enter the tank and begin sandblasting.

3. As the job called for the blasting and removal of lead based paint, the sandblasters inside of the tank wore protective, loose fitting Tyvek suits and breathing

hoods connected to an air hose. The air hood extends down past the neck, draping over the wearer's chest, back, and over their shoulders. The air hose was connected to a machine called an "Air Pig" that filtered the air four times, removing any impurities/oil and/or gas residue before it reached the workers. The air flowing to the hood from the hose is not used as an oxygen supply for the sandblaster to breathe. Rather, the hood and air hose are designed to blow air into the mask, exerting air pressure downward away from the wearer's head and face where it ventilates out the bottom of the hood in order to prevent the particulate matter from sandblasting from entering the hood and being inhaled. Consequently, if the air supply from the hose is somehow interrupted, the blaster would not asphyxiate.

4. Claimant put on his Tyvek suit, donned his hood, and entered the tank. He got onto a scissor lift inside the tank, and began sandblasting. Accordingly to Claimant it was about 65-70 degrees outside the tank and not hot inside. Claimant testified that he was not working at any increased pace. He was not under pressure to work quickly, was not using any new or additional equipment to perform his work, and was not wearing any new or unusual clothing. To the contrary, Claimant admitted that he was performing his sandblasting work as he customarily did that morning. There was nothing unusual or unexpected about his work that morning.

5. Claimant claims that after he had been sandblasting for approximately one hour and 30 minutes, his air hose became kinked and he lost all the air to his hood. According to Claimant, this alleged kink and air loss did NOT cause him any breathing difficulty, concern, panic, or stress. He kept breathing normally. Based upon the design of the hood and air ventilation system, the ALJ finds that a kink in the hose would not have caused any unusual exertion on Claimant's cardiovascular system.

6. Claimant asserts that he got down from the scissor lift, walked over to the kink, took his hood off, after which he took a deep breath inhaling a "mouthful" of dust. Claimant did not explain the reason for removing his hood at hearing but informed Dr. Mayer, during an IME in excess of one year after the initial event, that he took it off because "he did not have enough excess hose to un-kink it." He admitted he was able to breathe normally at all times during this alleged event. Claimant said he fixed the hose's kink, put his hood back on, walked back to the scissor lift, and resumed work sandblasting. Claimant told no other employee, hearing witness, or medical provider of these alleged events on May 15, 2014 or in the days and weeks following the incident in question. Claimant presented no witness to corroborate this version of events.

7. Claimant testified that he worked for about 30 minutes more, sandblasting without any incident, problem, change in his work, unusual events, stress, heat, or symptoms. Per Claimant's testimony, the visibility in the tank was poor with lots of dust in the air. According to Claimant's report to Dr. Mayer he normally could not see 2-3 feet in front of him while sandblasting. Claimant testified that he developed chest and arm pain as he was working. He kept sandblasting as he normally did for another 30 minutes, when the lights inside the tank flashed on and off, which was the signal for the blasters to exit the tank. Claimant exited the tank, testifying that his chest and arm pain

persisted. Claimant went into the trailer that Employer had at the worksite, and laid down where he was later contacted by Lawny and Dean Norvell, the owner/operator of Employer. Claimant drank some water, although he testified that he did not feel dehydrated. He took a couple of antacids which provided no relief. He walked around and vomited on two occasions. He told Dr. Mayer that he "spit up some blood."

8. Claimant testified that he told Dean Norvell, that he "breathed in a mouthful of dust," and that he was having pain. Both Dean and Lawny Norvell dispute this assertion, testifying that Claimant repeatedly told them that he did not know why he was having the aforementioned symptoms. Lawny Norvell testified Claimant had reported to another employee that he was feeling ill on the way to the jobsite to begin his workday on May 15, 2014. Claimant disputes this. According to both Lawny and Dean Norvell, Claimant never mentioned that his air hose kinked, that he took off his hood to un-kink it or that he inhaled a "mouthful" of dust leading to acute chest and arm pain. According to both Lawny and Dean Norvell, Claimant did not mention that he had been working harder than usual or that he was under any stress when his symptoms arose.

9. Dean Norvell transported Claimant to St. Thomas Moore Hospital Emergency Room (ER) in Canon City where he remained with Claimant while Claimant discussed his symptoms and work with medical personnel. Claimant testified that he told the providers at St. Thomas Moore that, he was working a sand blasting job when he breathed in a mouthful of dust. According to Dean Norvell, Claimant never mentioned the alleged hose kinking, hood removal and dust exposure events he testified to at hearing to providers at St. Thomas Moore ER.

10. The report from Claimant's St. Thomas Moore ER visit reflects the following history of present illness: "Patient was sandblasting the pain started . . . He has a history of similar pain in the past . . . He is associated shortness of breath. He was working a suit therefore states that he was sweaty prior to the pain starting. . ." The report is devoid of any mention that Claimant's symptoms began after breathing dust after removing his protective hood and un-kinking his air hose.

11. Claimant was instructed to proceed from the ER to the Centura Centers for Occupational Medicine (CCOM) because he had reported that his symptoms arose while sandblasting. Consequently, Claimant was discharged from St. Thomas Moore and taken immediately to CCOM by Dean Norvell where he was evaluated by Dr. Richard Nanes. Dr. Nanes' report from this encounter is also devoid of any mention that Claimant's symptoms began after inhaling dust while un-kinking his air hose. Although Dr. Nanes provided a diagnosis of strained ribs, he remained concerned that Claimant's symptoms were potentially cardiologic in nature. Accordingly, he recommended further cardiac workup precipitating Claimant's return to St. Thomas Moore ER. Upon his return to the ER, Claimant was reevaluated and determined to be having a ST elevated myocardial infarction (STEMI) or simply put a heart attack. Due to the emergent nature of his condition, Claimant was transported to Pueblo by flight for life to St. Mary Corwin Hospital where he was treated for that heart attack.

12. Upon his admission to St. Mary Corwin, Claimant was evaluated by Dr. Clarice Sage. He was asked for and provided a history of his symptoms. He made no mention of the events he testified, in great detail about at hearing, during this initial evaluation. He instead gave a completely different history of how his symptoms arose. Concerning the history of present illness, Dr. Sage documented as follows: "51 year-old male with a smoking history, but otherwise does not take medications or see doctors, presenting to the emergency department at St. Thomas Moore after complaining of midsternal chest pain that started at approximately 12:30 this afternoon while at work exerting himself" . . . The patient's symptoms seemed to improve and he was transferred to our facility for further evaluation and higher level of care."

13. While in the hospital a cardiology consultation was requested. Claimant was evaluated by Dr. Adam Strunk. Dr. Strunk obtained the following history from Claimant: "This is a pleasant 51 year-old gentleman who was working this morning when he developed the acute onset of chest discomfort up in Florence. He states this was about 10:30 in the morning. He was working and started feel (sic) very hot and sweaty. He took off his work suit and then developed abrupt onset of left-sided chest discomfort which felt like heartburn." Careful inspection of the report generated following this consultation fails to reflect any mention of Claimant's symptoms beginning after removing his air hood to un-kink his air line which resulted in Claimant inhaling a large quantity of dust.

14. Claimant was discharged from St. Mary Corwin Hospital on May 17, 2015, with diagnoses of coronary artery disease, hypotension, and tobacco. The discharge note does not document any of the workplace events that Claimant testified occurred at hearing.

15. Claimant was a heavy tobacco smoker at the time of his heart attack. He testified that he smoked from the age of 16 or 17 until May 15, 2014 when he was instructed to quit. Claimant switched from packaged cigarettes to hand-rolled cigarettes years before his alleged injury, because those unfiltered, hand-rolled cigarettes delivered more of the tobacco's stimulants than pre-rolled cigarettes. Since he could smoke fewer of them to achieve the same desired effect, Claimant testified that hand-rolling his own cigarettes saved him money.

16. When Claimant returned to work for Employer after May 17, 2014, he discussed his heart attack with Dean Norvell. According to Mr. Norvell, Claimant did not mention the alleged events which he claims caused his heart attack namely unusual exertion or that his air hose became kinked, he had to remove that kink, and breathed in dust when took off his hood. The first notice that Mr. Dean Norvell received that Claimant was alleging his heart attack was work-related was when he received a letter giving notice of this claim from his attorney.

17. Dean Norvell testified, the hood and air line the company used on this job site is the best ventilation system on the market and met all OSHA's guidelines and

requirements. According to Dean Norvell, the air hose was heavy duty and designed to be kink proof. Both Dean and Lawny Norvell testified that they have never seen, or heard of the air hose used by the sandblasters on May 15, 2014 becoming kinked in their decades of work with this type of air hose. Despite purposeful attempts, Dean Norvell testified that he was unable to kink the air hose used by Claimant during his sandblasting on May 15, 2014.

18. Dean Norvell testified that an open exhaust vent was cut into the roof of the tank and another 10 foot by 10 foot opening for ingress and egress for employees and equipment was cut into its side and dust socks installed to collect particulate matter. According to Dean Norvell, the tank was ventilated with an air exhaust system that exchanged 100% of the air inside the tank every 30-45 minutes. Inside the tank were two large fans that were constantly running during sandblasting work. The tank was 75 across and 35 feet high. Dean Norvell testified that air quality testing; both inside and outside the tank, was performed by an independent industrial hygienist during the work in question on three separate occasions. Per Mr. Norvell that testing returned results of "Non-detectable" levels of respirable particulates in the air during periods of testing inside the tank. There had been no complaints about the air quality inside the tank. According to Dean Norvell, the visibility inside the tank was 20 to 30 feet, and neither Claimant nor any other employee had told him on May 15, 2014, that the visibility was reduced or less than this usual visibility. According to Dean Norvell, all workers would have been removed from the tank if the visibility inside was 5 feet as that degree of dust in the air poses a risk for creating a dust explosion.

19. Black Beauty was used as the blasting agent on the jobsite. Black beauty is an OSHA accepted, low silica, coal slag blasting agent containing iron Employer frequently uses for commercial sandblasting.

20. Claimant's detailed statements to medical personnel on the date of injury cannot be reconciled with the testimony he gave at hearing. As Claimant discussed his symptoms and their onset with multiple medical providers and with Lawny and Dean Norvell on May 15, 2014, without once mentioning or even alluding to the alleged events he testified about at hearing more than one year after his alleged injury, the ALJ is persuaded that those events likely did not happen as Claimant asserts. Accordingly, the ALJ finds the statements Claimant provided to multiple medical providers on May 15, 2014, more credible than his hearing testimony. Based upon the evidence presented as a whole, the ALJ finds that Claimant is not a trustworthy historian and his testimony regarding the events and condition of his work environment on May 15, 2014 is unreliable.

21. Claimant consulted Dr. Annyce Mayer, a Level II Accredited, Board Certified Occupational and Environmental Medicine Expert to conduct an Independent Medical Examination (IME) of Claimant. Dr. Mayer undertook that assignment and generated a report following her IME on May 15, 2015. As Claimant withdrew his claim for an occupational respiratory disease arising out of and in the course and scope of his employment, the ALJ limits his findings of fact concerning Dr. Annyce's opinions as

expressed in her IME report and subsequent hearing testimony to the issue of whether Claimant's heart attack should properly be considered "work related." Based upon a theory that Claimant was exerting himself at a level greater than or equal to 6 METS, which is the metabolic equivalent of brisk walking or light jogging, inhaled "fine" particulates and was working in a low oxygen environment, Dr. Annyce attributed Claimant's heart attack to his work duties. She reiterated these opinions during her testimony at hearing.

22. Dr. Mayer testified that based on the Claimant's description of the water tank, there would be reduced ventilation that can cause the levels of dust in the air to become much higher than they would when there is better ventilation. She testified that this most likely created a low oxygen atmosphere environment.

23. Dr. Mayer testified that there are studies that have studied the particles that are produced during sandblasting. Per Dr. Mayer studies have indicated that particulate matter from sandblasting can be small of respirable size typically less than 4 um and with an average size of 1 um which is a very highly respirable particulate. She cited, as an analogy to Claimant's work environment, other studies that have looked at PM 2.5, which is a measure of fine particulate matter 2.5 microns and less which have been associated with increased hospitalizations and emergency department visits for heart attacks. Dr. Mayer testified that a recent study found an 18% increased risk of STEMI, for each 7 ug/m3 increase in a PM 2.5 (particulates <=2.5 microns). She testified that based on Claimant's description that he didn't have visibility for more than 4 or 5 feet, the concentration of particulate in the tank would be in far excess of this level. (Claimant's Ex. 9, pp 109).

24. Dr. Mayer testified that she agreed with Dr. Svinarich, that unusual physical exertion can be a trigger that increases the probability of plaque rupture and thrombosis in a patient with asymptomatic atherosclerotic plaques. She testified that the level of physical exertion associated with myocardial infarction has varied in the literature, but was most commonly defined at greater than or equal to 6 METs, which is the metabolic equivalent of briskly walking or light jogging. (Claimant's Ex. 9, pp. 109). She testified that it is her opinion that when Claimant was sandblasting and moving around, he was exerting that level of exertion; that combined with the fine particulate he was exposed to when he took off his mask, and potentially a low oxygen environment lead to his heart attack. She testified that a heart attack is triggered when the heart is not getting enough oxygen and if the amount that you are breathing in is lower than normal that will escalate the risk of a heart attack because of hypoxia.

25. Respondents asked a cardiologist, J.T. Svinarich, M.D. at Colorado Heart & Vascular to review Claimant's medical records and consider whether Claimant's heart attack of May 15, 2015, arose out of any unusual exertion Claimant experienced or performed at work on May 15, 2014. In his report, found on pages 59 and 60 of Respondents' hearing exhibit D, Dr. Svinarich concluded there was no link between claimant heart attack and his work activities of May 15, 2014, writing:

The patient has evidence of underlying atherosclerotic heart disease, which is a chronic condition. Atherosclerotic plaque in the coronary artery exists prior to the onset of acute myocardial infarction symptoms. Extreme exertion, stress, dehydration can be the triggers that increase the probability that plaque rupture in a chronic atherosclerotic plaque will occur leading to occurrence of symptoms of an acute myocardial infarction in a patient who otherwise had asymptomatic atherosclerotic plaque. The patient's work conditions did not cause his underlying heart disease, in other words did not cause atherosclerotic plaque in his arteries.

It is true that the occurrence of extraordinary exertion or stress may increase the probability of plaque rupture, but these plaques can rupture under any circumstances include sleep and rest. It is difficult to predict whether or not the patient would have had acute myocardial infarction had he not been under this degree of stress, but it is likely that the plaque rupture may have occurred subsequently without work related stress, since other factors such smoking can contribute not only to the presence of underlying atherosclerotic disease, but also with progression and its ultimate plaque rupture and development of acute myocardial infarction.

(Id, pg. 60). As stated previously, Claimant denied extreme heat, exertion, stress, or dehydration on May 15, 2014. Given the evidence presented the ALJ finds that Claimant's heart attack would have, more probably than not, occurred whether Claimant was sandblasting on May 15, 2014, or not. The ALJ finds that Claimant's heart attack was more likely than not due to his smoking and underlying coronary artery disease.

26. Dr. Svinarich is the only cardiology expert to address causation in this claim and his opinions concerning causation are more credible and persuasive than the contrary opinions of Dr. Mayer for the following reasons: During her testimony, Dr. Mayer admitted she did not have data or information specific to the Black Beauty blasting agent Claimant was using on the job. Moreover, Dr. Mayer admitted that she was not aware of any study that linked the inhalation of Black Beauty to a heart attack's occurrence. She also admitted she was not a cardiologist, was not an expert in treating or evaluating heart attacks or cardiac conditions or diagnoses and that she had no information regarding the ventilation system and air circulation in the tank where claimant was working. Consequently, the ALJ finds Dr. Mayer's suggestion that inhalation of fine particulate matter likely caused Claimant's heart attack unpursuasive. Her testimony citing various reports indicating that air pollution is a "well established cause of cardiovascular dysfunction", while likely true is unconvincing considering the dearth of persuasive evidence establishing that Claimant actually inhaled any particulate matter on May 15, 2014. On the evidence presented, the ALJ finds that Dr. Mayer based her opinions on Claimant's statements to her during his IME appointment, not independent evidence or information sources. As found above, Claimant's testimony regarding the events of May 15, 2014 and his work environment are not reliable and are unpersuasive. Accordingly, the ALJ finds Dr. Mayer's opinions unconvincing.

27. Based upon her report and testimony the ALJ finds that Dr. Mayer misunderstood the purpose, design and function of the ventilation hood. The ALJ finds that Claimant's direct testimony indicating that he was able to breathe normally throughout his hours of work inside the tank, even with an allegedly kinked air hose

strongly contradicts Dr. Mayer's suggestion that Claimant was working in a low oxygen environment.

28. Based upon the information Claimant provided to Dr. Mayer as outlined in her IME report, the ALJ finds Dr. Mayer's suggestion that Claimant was working at a level of 6 METS or greater conjecture. Even if Claimant had proven that he was working at this level, Claimant's testimony indicates that there was nothing unusual about this level of exertion. Consequently, while Claimant may have been exerting himself on May 15, 2014, he failed to prove that that exertion was unusual as required to prove a compensable heart attack.

29. Michael Volz, M.D., a pulmonologist, examined Claimant at Respondents' request on February 26, 2015. Dr. Volz' exam and report focused on Claimant's alleged occupational respiratory disease which Claimant withdrew at hearing. However, he repeated Dr. Svinarich's conclusion that Claimant's heart attack and heart disease had no work-relatedness. During his evidentiary deposition, taken June 29, 2015, by respondents, he testified that he agreed Claimant's heart attack would not have been caused by any inhalation of dust or particulate matter as Claimant alleged at hearing. He stated: "That the heart attack was not related to work exposure or work activities on that day." (Volz depo. pg. 14: 17-18) He found nothing to indicate that Claimant's work activities were in any way more exertional than his usual average work activities on that day (Id: 21-25) Dr. Volz testified heart attacks can occur without inciting events. (Id. pg. 15: 14-21) He reviewed the medical report from Claimant's medical expert, and pointed out she has no objective, scientific data to support her theory of causation, and that she did not cite any literature to support her theory that Black Beauty would be inhaled and would cause a heart attack as claimant suffered on May 15, 2014, to occur. He testified she did not define what particulate materials she was using to reach her opinion and that her report seemed to be speculative (Volz depo. pgs. 17-21: 5-8).

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to

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

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found here, Claimant is not a reliable historian and his testimony regarding the events which he now claims, approximately one year later precipitated his heart attack, specifically removing his ventilation hood and inhaling a “mouthful” of dust, cannot be reconciled with the medical record evidence which is devoid of any mention of said events. Accordingly, the ALJ concludes that Claimant’s testimony is unreliable.

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* Heart attacks are compensable if “over-exertion” at work causes the heart attack. Industrial Commission v. Havens, 136 Colo. 111, 314 P.2d 698 (1957); Ellerman v. Industrial Commission of Colorado, 73 Colo. 20, 213 P.120 (1923). The “unusual exertion” requirement developed as a special element of the “arising out of” element of compensability in heart attack cases. *Section 8-41-302 (2), C.R.S. (2013).* Under § 8-41-302 (2), C.R.S. a claimant must satisfy a two-prong test of compensability where the claim is based upon a heart attack. First, the claimant must show he experienced an "unusual exertion arising out of and within the course of the employment," and second,

that the heart attack was caused by the unusual exertion. *Vialpando v. Industrial Claim Appeals Office,* 757 P.2d 1152 (Colo. App. 1988); *Kinninger v. Industrial Claim Appeals Office,* 759 P.2d 766 (Colo. App. 1988). Exertion meets this statutory definition if it is unusual in kind and quality when compared to the work history of the claimant or decedent. *Vialpando v. Industrial Claim Appeals Office, supra; Townley Hardware Co. v. Industrial Commission,* 636 P.2d 1341 (Colo. App. 1981).

F. As found here, Claimant has not satisfied his burden of proof on the issue of compensability. He has presented insufficient evidence that the sandblasting work he was doing preceding his symptoms, which would later be appreciated as a heart attack, was of a different kind, quality, pace, or intensity than his usual sandblasting work. To the contrary, Claimant admitted that he preformed his sandblasting in his customary way and there was nothing unusual about his work. The temperature in the water tank was not excessive, and all air circulation systems inside the water tank, exchanging the air every 30-45 minutes were operating properly. Most importantly, Claimant made no mention of the alleged events he now claims constitute "unusual exertion" leading to his heart attack. Had claimant's air hose been kinked, his air supply been interrupted, and had he breathed in dust as he claims, he likely would have mentioned at least one of those important, memorable events to at least one person he spoke with on May 15, 2014, or at the hospital where he stayed from May 15 through 17, 2014. The ALJ finds Claimant's lengthy delay in relaying this information to anyone and then, for the first time, to his retained medical expert suspicious. Based upon the totality of the evidence presented, the ALJ finds Claimant's assertions concerning the kink in his air hose, the removal of his ventilation hood and the claim that he inhaled a "mouthful" of dust dubious.

G. Even if Claimant had proven that he had experienced an unusual exertion based upon the aforementioned events, he failed to present credible evidence that those events caused his heart attack. Crediting the report of Dr. Svinarich and the testimony of Dr. Volz, the ALJ concludes that Claimant's heart attack was, more probably than not due to his coronary artery disease caused by decades of smoking which caused a plaque to dislodge and a heart attack to occur. The balance of the persuasive evidence establishes that Claimant's heart attack was not precipitated by unusual exertion. As found, Dr. Mayer's contrary opinion is not supported by the facts of this claim. Dr. Mayer was ignorant about claimant's work environment and work activities on May 15, 2014. Consequently, her opinions are not convincing. Because Claimant failed to establish that he experienced unusual exertion while performing his sandblasting work on May 14, 2015, and because the credible and persuasive evidence fails establish that his heart attack was caused by the unusual exertion, his claim must be denied and dismissed.

ORDER

It is therefore ordered that:

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

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

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

DATED: August 18, 2015

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

ISSUES

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

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

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits or temporary partial disability ("TPD") benefits for the period of October 22, 2014 and continuing?

FINDINGS OF FACT

1. Claimant testified at hearing that she was employed with employer as a housekeeper. Claimant testified that on May 9, 2014 she worked at her second job at a concurrent employer from 6:30 a.m. until 3:00 p.m., then went to the store, then proceeded to her second job with employer. Claimant testified that her job duties included cleaning rooms. Claimant testified that while she was in the last room she was cleaning, she leaned over to the edge of a bathtub and kneeled down, putting the ball of her kneecap on the edge of the tub when she began to experience burning pain inside her knee. Claimant testified she then went downstairs and reported her injury to her co-worker.

2. Mr. Henrichon, the director of operations for employer, testified at hearing that he became aware of the alleged injury at around 4:00 p.m. on May 9, 2014 when one of the supervisors for the property where claimant was working called him and informed Mr. Henrichon that claimant had injured her knee.

3. Mr. Henrichon testified that a few days later, he got a call from the supervisor who indicated he may want to come in and question claimant because it had become apparent that claimant may have injured herself at her other job. Mr. Henrichon testified that this information came from a co-employee of claimant, Ms. Gonzales.

4. Ms. Gonzales testified at hearing in this matter that claimant reported to work at approximately 4:30 p.m. and reported that she had been doing some deep cleaning and carrying heavy things for her concurrent employer and that her body was

very tired. Ms. Gonzales denied that claimant reported injuring her knee at her other job. Ms. Gonzales testified that from talking with her other colleagues and friends from the job, they thought claimant's injury might have happened on the other job. Ms. Gonzales didn't explain completely why the other employees thought claimant might have injured herself at her other job, other than the fact that claimant reported to work on the day of the injury and indicated that she was very tired from her other job.

5. Issues were brought up by Mr. Henrichon and Ms. Jennings, the adjuster assigned to the claim by insurer, that claimant had denied to Mr. Henrichon and Ms. Jennings having worked at her concurrent employer on the day of her injury when she was interviewed about having an injury with her concurrent employer. Claimant denied at hearing recalling a conversation with Mr. Henrichon in which she denied having worked at her concurrent employer.

6. Claimant testified she did not recall telling Ms. Jennings or anyone from insurer that her concurrent employer was closed for the off season in an interview with insurer.

7. Claimant testified that she reported to work on October 22, 2014 and found out she was no longer on the schedule. Claimant testified she called employer and was informed she was fired. Mr. Henrichon testified employer terminated claimant from her employment on October 25, 2014. Mr. Henrichon testified employer terminated claimant because she was not being honest regarding her alleged injury.

8. Claimant testified she continues to work for her concurrent employer.

9. Employment records from claimant's concurrent employment were entered into evidence at hearing. The records indicate that claimant worked for her concurrent employer from 8:15 a.m. until 5:00 p.m. The records are contradicted by the testimony of Ms. Gonzales who testified she spoke with claimant at employer's premises at approximately 4:30 p.m. The testimony of Mr. Henrichon indicated that he learned of claimant's injury around 4:00 p.m. on May 9, 2014. The records further indicate claimant did not work for her concurrent employer during the week before May 9, 2014.

10. Claimant was referred for medical treatment at Roaring Fork Family Practice and was initially seen on May 22, 2014 by Ms. Campbell, a physician's assistant. Claimant reported she was injured when she was leaning on a bathtub on May 9 and had been experiencing ongoing anterior patellar pain since that time. The physical examination showed trace tenderness along the patellar tendon. Ms. Campbell noted her physical examination revealed a negative McMurray's test. Ms. Campbell recommended physical therapy.

11. Claimant began her physical therapy on May 29, 2014. Claimant reported to the therapist an accident history of kneeling on the edge of a tub repetitively and feeling a sharp pain over the anterior patella region which got worse over the next few days. The physical therapy records indicate claimant's condition was an anterior knee

contusion from prolonged and repetitive stress resulting in point specific and global knee swelling. Respondents argue in their position statement that the reported accident history to the physical therapist is inconsistent with her accident history of suffering an acute injury on May 9. The ALJ finds the accident history provided to the therapist consistent with claimant's testimony at hearing and provided to the other treating providers.

12. Claimant returned to Ms. Campbell on June 11, 2014 with complaints of pain for a full month on her knee following an excessive compression across her right kneecap. Claimant reported more pain with physical therapy and noted recently she began to feel swelling along with occasional swelling in the past two weeks. Ms. Campbell recommended a magnetic resonance image ("MRI") of claimant's right knee. Claimant was provided with lifting restrictions of 20 pounds and limitations that included no kneeling, crawling, squatting or climbing.

13. The MRI was performed on June 18, 2014 and demonstrated a very small collection of fluid at the anterior inferior aspect of the patella that may be related to prepatellar bursitis, a seroma or a hematoma. A small joint effusion was likewise noted. There was no evidence of a tear involving the anterior horn or posterior horn of the medical meniscus or of the lateral meniscus.

14. Claimant returned to Ms. Campbell on June 25, 2014 and discussed the results of the MRI. Ms. Campbell recommended a Fletchor patch to see if it would reduce the inflammation across the anterior knee. Ms. Campbell provided claimant with restrictions that included no kneeling, squatting or climbing.

15. Claimant again returned to Ms. Campbell on July 23, 2014 and noted her pain increased to the point where she was unable to fully flex of fully extend the knee. Ms. Campbell noted the results of the MRI and recommended claimant be referred for an orthopedic evaluation due to her continued complaints. Claimant was again given work restrictions that included no lifting over 20 pounds.

16. Claimant was evaluated by Dr. George on August 19, 2014. Dr. George noted that his physical examination revealed some sensitivity over the medial joint line with a positive McMurray's examination.

17. Claimant was evaluated on August 21, 2014 by Ms. Campbell and Dr. Spindell. Ms. Campbell noted claimant continued to have a painful click when she went up and down stairs. Claimant reported she had received a steroid injection into the knee on August 19, 2014 under the auspices of Dr. George. Ms. Campbell recommended claimant attempt returning to physical therapy.

18. Claimant was examined by Dr. George on September 9, 2014. Dr. George noted claimant had 4 months of medial sided knee pain, likely from a medial meniscus tear. Dr. George reviewed claimant's MRI and opined that there was an abnormal signal within the meniscus on her MRI which was consistent with the area in which claimant was reporting pain and symptoms. Dr. George indicated claimant's

treatment options were to live with her symptoms and modify her activity or consider arthroscopic surgery for a partial menisectomy.

19. Claimant returned to Dr. George on October 7, 2014. Dr. George noted that claimant's surgery was postponed "due to insurance coverage". Dr. George again reiterated that he believed the MRI showed a tear in the medial meniscus which was consistent with her findings on exam.

20. Respondents arranged for an independent medical examination ("IME") of claimant with Dr. Lindberg on February 17, 2015. Dr. Lindberg obtained a medical history, reviewed claimant's medical records and performed a physical examination of claimant in connection with the IME. On physical examination, Dr. Lindberg noted that claimant's McMurray test caused lateral pain on the lateral side of the patella with no noise and no medial pain at all, including no medial joint line tenderness on McMurray's testing and no instability. Dr. Lindberg opined that claimant has prepatellar bursitis, but noted that, at this point, he saw no indication for arthroscopy recommended by Dr. George.

21. Dr. Lindberg issued an addendum to his report on February 24, 2014 after reviewing the MRI films and x-rays. Dr. Lindberg indicated the x-rays were normal and the MRI showed no evidence of a meniscal tear. The ALJ notes that Dr. Lindberg opines that claimant's injury was limited to prepatellar bursitis, but does not indicate an opinion that claimant was not injured at work. Instead, the opinion of Dr. Lindberg appears limited to the condition of claimant's knee and his opinion that claimant does not suffer from a meniscal tear in her right knee.

22. The records indicate claimant reported the injury to her employer on the date of the occurrence. The ALJ finds claimant provided a consistent accident history to her medical providers and in her testimony at hearing. Respondents maintain that claimant could have been injured on her other job, but that information appears to have come from conjecture from claimant's co-workers. Such a theory does not overcome claimant's testimony that she was injured while at work for employer on May 9, 2014. Additionally, claimant's statements to Mr. Henrichon and Ms. Jennings that claimant denied working for her other employer on the date of her injury, while attacking claimant's credibility, do not establish that claimant was not injured at work with employer as she testified.

23. The ALJ credits the testimony of claimant at hearing along with the supporting medical records and determines claimant has established that it is more likely than not that she sustained a compensable injury arising out of and in the course of her employment with employer.

24. The ALJ credits the testimony of the claimant along with the medical records entered into evidence and finds that claimant has established that it is more likely than not that the medical treatment provided by Dr. George and Roaring Fork Family Medicine is reasonable and necessary to cure and relieve the claimant from the effects of her work injury. The ALJ further credits the opinions expressed by Dr. George

and finds that the proposed arthroscopic surgery recommended by Dr. George is reasonable and necessary medical treatment related to her May 9, 2014 work injury. The ALJ credits the reports from Dr. George and Roaring Fork Family Medicine as credible and persuasive with regard to the issue involving the medical treatment and notes that claimant's report of the accident history was sufficiently consistent as reported in the medical reports and testified to at hearing. The ALJ credits the reports from Dr. George and Roaring Fork Family Medicine as more credible and persuasive than the contrary opinions expressed by Dr. Lindberg in his report.

25. As testified to by Mr. Henrichon, claimant was terminated on or about October 22, 2014 because employer felt claimant was not being truthful regarding her work injury. Claimant has established that it is more probable than not that she was under work restrictions at the time she was terminated and has shown that her work injury contributed to her wage loss.

26. Claimant testified at hearing that she continued to work at her job with her concurrent employer as she was called by the employer for the new season. Claimant testified at hearing that she is currently working with this employer. Therefore, claimant is not entitled to an award for temporary total disability, as she is not "totally" disabled. However, claimant has established that her work injury resulted in the loss of her ability to earn wages with employer as evidenced by the work restrictions set forth by Ms. Campbell and claimant's loss of earnings following her termination of employment. Claimant is therefore entitled to an award of TPD benefits beginning October 25, 2014 and continuing until terminated by law or statute.

27. The ALJ notes that claimant may not have been working for her concurrent employer at the time she was terminated, but testified she returned to work for employer when they called for the new season. Therefore, this wage loss is properly considered to be TPD benefits as opposed to TTD benefits.

28. The ALJ further notes that there was conflicting testimony regarding whether claimant was terminated on October 22 or October 25, 2014, but finds that the evidence establishes that claimant was terminated as of October 25, 2014.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. As found, claimant has proven by a preponderance that she suffered compensable injury arising out of and in the course of his employment with employer when she kneeled on the tub and sustained an injury to her right knee.

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

6. As found, claimant has proven by a preponderance of the evidence that the medical treatment provided by Roaring Fork Family Medicine and Dr. George was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the injury. As found, claimant has proven by a preponderance of the evidence that the surgery proposed by Dr. George is reasonable medical treatment necessary to cure and relieve claimant from the effects of the injury. The ALJ credits the reports from Dr. George and Roaring Fork Family Medicine as credible and persuasive with regard to this issue.

7. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

8. As found, claimant has established by a preponderance of the evidence that she is entitled to an award of TPD benefits for the period beginning October 25, 2014 and continuing until terminated by law or statute.

9. In this case, claimant continued to work at her concurrent employer according to her testimony. Therefore, claimant is not entitled to an award of TTD benefits as claimant's wage loss was not "total". Instead, the wage loss is based off of claimant's loss of earnings related to her work with employer, and not the combined earnings of her employer and concurrent employer.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of her industrial injury pursuant to the Colorado Medical Fee Schedule.

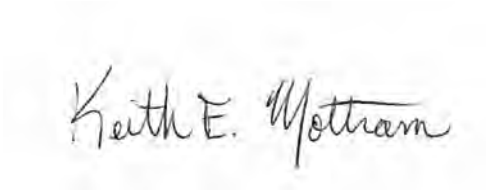
2. Respondents shall pay claimant TPD benefits beginning October 25, 2014 and continuing until terminated by law or statute.

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

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

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

DATED: August 7, 2015



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

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PROCEDURAL MATTER

1. Pursuant to an Order dated October 6, 2014, WC No. 4-956-967-02 was consolidated with WC No. 4-871-341-02.

STIPULATION

1. Respondent Protective and Respondent Pinnacol stipulated to the fact that Protective was the insurer of record from October, 2011, until June 6, 2012, and that Pinnacol was the insurer of record on the date of the alleged work-related injury, July 17, 2014.

ISSUES

In light of the above stipulation and procedural matter, the following issues were raised for consideration at the hearing:

1. Whether the Claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury to his back on July 17, 2014 in WC 4-956-967-02

2. If the Claimant's claim for the July 17, 2014 injury, which is the subject of WC 4-956-967-02, is compensable, whether the Claimant proved, by a preponderance of the evidence, that medical treatment that he received was reasonably necessary to cure and relieve the effects of that work injury and whether he is entitled to such further medical benefits as are reasonably necessary to cure and relieve the effects of his July 17, 2014 work injury.

3. If the Claimant's has not proven that his claim for the July 17, 2014 injury which is the subject of WC 4-956-967-02 is compensable, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to medical benefits that are reasonably necessary to cure and relieve the effects of his prior October 29, 2011 injury, which is the subject of WC 4-871-341-02.

4. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits beginning on July 17, 2014.

FINDINGS OF FACT

Based on the evidence presented at hearing and through deposition testimony, the ALJ finds the following facts:

1. The Claimant's date of birth is November 17, 1970 and he is currently 44 years old. He has worked for Employer, which is a contractor for FedEx ground deliveries, since October 2010 as a courier/delivery truck driver. The Claimant's job-related responsibilities included delivering packages, as well as loading and organizing packages onto a delivery truck. The Claimant testified credibly that he would start his work day at the delivery terminal. Packages for his route would be located on ground level pallets on the dock behind his truck. The Claimant and other drivers take the packages off the pallets load their own trucks and then deliver the packages. The packages range in size from as small as an envelope to large heavy boxes. The average size box is a file box/banker's box (also see Claimant's Exhibit 14, p. 64; Respondent Protective's Exhibit Q1, p. 48; Respondent Pinnacol's Exhibit M2, p. 142).

2. The Claimant sustained a previous compensable work-related injury on October 29, 2011 (Respondent Pinnacol's Exhibit F2, p. 68). The injury affected the L2-3 level of the Claimants back (Claimant's Exhibit 7; Respondent Protective's Exhibit A1; Respondent Pinnacol's Exhibit H2), and the Claimant ultimately had a microdiskectomy, performed by Dr. Michael Shen, at the L2-3 level (Respondent Pinnacol's Exhibit F2, p. 86). The Claimant was treated, and placed at MMI, with an 8% whole person impairment rating, on July 13, 2012, by Dr. John Aschberger (Respondent Protective's Exhibit E1, p. 16; Respondent Pinnacol's Exhibit E2, p. 65).

3. The Claimant requested a Division Independent Medical Examination ("DIME") for the prior 2011 injury and was evaluated by Dr. Stanley Ginsburg. Dr. Ginsburg assigned a 14% whole person impairment rating, which included a 7% loss of range of motion, and affirmed the July 13, 2013 date for MMI (Respondent Protective's Exhibit F1, p. 17; Respondent Pinnacol's Exhibit G2, p. 103). The case was closed on all issues, with the exception of maintenance, and medication to keep his condition stable.

4. The Claimant returned to work full duty, only requiring maintenance medication. The Claimant testified that he still experienced low back pain, as well as numbness in his right foot and right foot drop/drag, when he gets tired, and cramping at night, but manages his symptoms with rest, and medication. On September 30, 2014, Respondent Protective filed a Final Admission of Liability for the October 29, 2011 injury, and agreed to pay for reasonable and necessary maintenance medical benefits, which had been outlined by Dr. Aschberger and Dr. Raymond Rossi (Respondent Protective's Exhibit T1, pp 89-90).

5. The Claimant was seen for maintenance on June 16, 2014, by Dr. Evan Schwartz, and reported pain that was "identical" to the previous visit in July of 2013, and that the pain was "occasional" (Respondent Protective's Exhibit G1, p. 24).

6. The Claimant testified that there was a heavy work load in early July, 2014, and that his back had been bothering him. According to the Claimant, after completing 90 stops on the morning of July 17, 2014, the Claimant stood up from the seat in his delivery vehicle and turned in order to go to the back of the truck. As he twisted, the Claimant testified that he felt severe and immediate back pain. The Claimant testified that the pain felt like someone drove a stake right into his back. Unlike the pain from the previous injury, the Claimant testified that the pain just stayed right in his back and didn't radiate down into his leg. The Claimant testified that the back pain hit him so hard he nearly lost his balance. The pain caused the Claimant to grab the sides of the shelves on the delivery vehicle and brace himself. When he felt he could move again, the Claimant decided to finish up his route. The Claimant took a Naproxen, and finished his shift. Once home, the Claimant took his medication, and rested. Claimant testified that at first this injury felt like the 2011, but not exactly. According to the Claimant, the 2011 injury caused pain to shoot down his leg, but this injury stayed in his back. On cross-examination, the Claimant testified that when he showed his wife where it hurt on his back it was below his scar from the previous surgery. The Claimant's testimony regarding the mechanism of injury and the description of his pain symptoms on July 17, 2014 was credible and is found as fact.

7. The Claimant asserts that the morning of July 18, 2014, the day after the alleged injury, he had trouble getting up, he was not feeling better, and his supervisor had previously asked for volunteers to take the day off. The Claimant testified that normally he did not volunteer since he wanted to work, but on this day he contacted his immediate supervisor and volunteered to take the day off. His supervisor approved this and the Claimant was told to bring in his delivery vehicle and another driver would take his route. The Claimant "doubled up" on his medications before driving to the delivery terminal, taking extra Naproxen, as well as Ibuprofen, along with his Metaxalone and went to return the vehicle. Upon returning his vehicle, the Claimant was told he needed to wait for a ride home from a co-worker. The Claimant helped load the delivery vehicle with his co-worker. He claims that he was able to do so because he had taken the extra medication, in addition to being strong, and, also, he did not want to show his pain. The Claimant testified that after 2 hours of work, he went home and took a nap. When he awoke from the nap, his back seized up with pain again. The Claimant's testimony regarding the events of the morning of July 18, 2014 was credible and is found as fact.

8. A video of the Employer's warehouse loading dock (Respondent Pinnacol' Exhibit N2) was played during the hearing. In the portion of the video played at hearing, the Claimant is seen engaging in activities, such as loading a delivery truck, bending over to pick up parcels and carrying them to the truck, kicking a soccer ball and grabbing a conveyor belt with both hands and swinging his body underneath while reaching under with his left hand to pull something out Dr. Raschbacher testified at the hearing that the Claimant's ability to do such things as squat, lift, kick a soccer ball, and swing under the conveyor belt did not reflect the Claimant's assertion that he had suffered an injury the day before. In addition, Dr. Raschbacher did not believe that the extra medication would have made such movement possible for an injured individual. In

her deposition, Dr. Fall also stated that the activity in the video was inconsistent with the reported injury, and that extra medication would not extinguish all of the Claimant's symptoms (Dr. Fall Depo. Tr., pp. 45-46). However, Dr. Bisgard testified at trial that the portion of the video entered into evidence was only a portion of the video she reviewed. According to her, the entirety of the video shows the Claimant standing around a lot, as well as using proper body mechanics for squatting and lifting. Additionally, Dr. Bisgard disagreed with Dr. Raschbacher and Dr. Fall, testifying that the extra medication, as well as proper body mechanics, would have allowed the Claimant to engage in the activities displayed on the video. The ALJ finds that Dr. Bisgard is more persuasive regarding her analysis of the video.

9. Steven Sampson, who is the co-owner of S4 Holdings, testified at hearing that he was at the delivery terminal on the morning of July 18, 2014, and he did not observe the Claimant in pain. He also stated that the Claimant did not report his injury on the previous day, July 17, 2014. The ALJ find that this is not inconsistent with the Claimant's own testimony that he did not report an injury that day but, rather, volunteered for a day off. Further the Claimant had testified that he did not want to show he was in pain.

10. The Claimant stated that after he returned from loading the delivery vehicle, he went back home, and laid down to rest. However, when he woke up, he had such severe back pain that he could barely walk. It was at this point that the Claimant called the Employer to report the injury, and stated that he was going to Concentra for treatment. According to the Claimant, the Employer was against this, but the Claimant decided to go to Concentra anyway. The Claimant testified that he had back spasms, and that it took him 30 minutes to get to his vehicle, and that he had to crawl. At Concentra, the Claimant saw Corey Feldman, PA-C. Mr. Feldman's report notes pain in the right lower back which radiates to the buttocks, as well as the right thigh and calf. The Claimant described the pain as "severe" and put the pain level at 7/10 (Claimant's Exhibit 10, pp. 24-26; Respondent Protective's Exhibit H1, pp 26-28; Respondent Pinnacol's Exhibit J2, pp. 114-15).

11. Mr. Feldman referred the Claimant for an MRI, which showed similar symptoms at L2-3 to the October 2011 injury, yet showed worsened symptoms at L4-5, and new symptoms at L5-S1 (Claimant's Exhibits 7, p. 15, and 8, pp. 17-18; Respondent Protective's Exhibits A1, pp. 1-2, and I1, pp. 29-30; Respondent Pinnacol's Exhibits H2, pp. 110-11, and I2, pp 112-13).

12. The Claimant saw Dr. Evan Schwartz on July 21, 2014, who released the Claimant to modified duty, with the restrictions that there be no repetitive lifting over 10 lbs., no pushing/puling over 10 lbs. of force, and no bending. In addition, the Claimant was prohibited from squatting, and climbing stairs or ladders (Claimants Exhibit 11, p. 29; Respondent Protective's Exhibit J1, pp. 31-32; Respondent Pinnacol's Exhibit J2, pp. 116-17).

13. The Claimant returned to Dr. Schwartz on July 28, 2014 (Claimant's Exhibit 11, pp. 27-28; Respondent Protective's Exhibit K1, pp. 33-35; Respondent Pinnacol's Exhibit J2, pp. 120-22), and was referred to Dr. Fall, in addition to being referred to physical therapy (Respondent Pinnacol's Exhibit J2, pp. 118-19).

14. The Claimant testified that he contacted the Employer via the phone, as well as email, regarding his work restrictions, after seeing Dr. Schwartz, and that he could perform modified duty, yet did not receive a response from the Employer. The Claimant further testified that he did not receive a letter regarding modified duty from the Employer, and that his next interaction with the Employer was a COBRA letter informing the Claimant that he had been terminated from his employment.

15. Dr. Fall evaluated the Claimant on August 4, 2014, and noted that a lumbar spine MRI revealed disc extrusions at the L2-3 and L3-4, with possible compression of the right L3 and L4 nerve roots (Claimant's Exhibit 12, pp. 37-39; Respondent Protective's Exhibit L1, pp. 36-39; Respondent Pinnacol's Exhibit K2, pp. 131-33). Dr. Fall referred the Claimant back to Dr. Shen, noting that Dr. Shen had more experience with the Claimant's back condition.

16. The Claimant followed up with Dr. Fall on August 15, 2014. Dr. Fall noted that the results of an EMG were negative for diagnosis of lumbar radiculopathy. (Claimant's Exhibit 12, pp. 33-35; Respondent Protective's Exhibit M1, pp. 40-43; Respondent Pinnacol's Exhibit K2, pp. 135-37).

17. The Claimant visited Dr. Shen on August 20, 2014. Dr. Shen reviewed the lumbar MRI, and noted damage to the L2-3, as well as L3-4, with herniation at the L3-4 discs. Dr. Shen recommended right sided L4 transforaminal steroid injection, in addition to recommending that the Claimant continue medication and physical therapy. (Claimant's Exhibit 9, pp. 19-21; Respondent Protective's Exhibit N1, p. 44; Respondent Pinnacol's Exhibit F2, p. 99).

18. The Claimant followed up with Dr. Fall on August 25, 2014, and Dr. Fall noted her agreement with Dr. Shen's treatment plan. (Claimant's Exhibit 12, p. 32; Respondent Protective's Exhibit P1, p. 46; Respondent Pinnacol's Exhibit K2, p. 138).

19. Dr. Jeff Raschbacher performed an Independent Medical Examination ("IME") of the Claimant on November 7, 2014, on behalf of the Respondent Pinnacol. Dr. Raschbacher took a history from the Claimant, performed a physical examination and reviewed relevant medical records and video footage from the Claimant's workplace taken on July 18, 2014. Based in large part on his review of the Claimant's activities as seen in the video footage, Dr. Raschbacher concludes that there is no objective basis or physical evidence that an injury likely occurred on July 17, 2014 (Claimant's Exhibit 14, p. 70; Respondent Protective's Exhibit Q1, p. 54; Respondent Pinnacol's Exhibit M, p. 148). He stated further that there is no documented objective finding of a change of condition, and that the presumption of injury was based purely on Claimant's subjective reporting. In addition, Dr. Raschbacher noted that review of the

dock surveillance video from July 18, 2014 (Respondent Pinnacol's Exhibit N2) displayed physical activity that made it medically improbable that the Claimant suffered an injury on July 17, 2014.

20. Dr. Elizabeth Bisgard performed an IME on behalf of the Claimant on January 5, 2015, on behalf of Respondent Protective. Dr. Bisgard took a history from the Claimant regarding his prior October 29, 2011 injury as well as a history of his current injury. Prior to the IME, Dr. Bisgard reviewed relevant medical records and she discussed them with the Claimant at the IME and the record review is combined with the history in her written report. Additionally a summary chart of the record review is provided. Dr. Bisgard also reviewed a pain diagram completed by the Claimant and conducted a physical examination. In her report, Dr. Bisgard states that a comparison of the MRI scans from 2011 and 2014 show disc herniation at L2-3, as well as herniation of L3-4, which is effacing both L4 nerve roots, consistent with the assessment of Dr. Shen, as well as Dr. Fall. In addition, Dr. Bisgard concludes that this is a new injury, and not the result of the previous 2011 work-related injury. Dr. Bisgard opined that the Claimant requires additional treatment prior to being placed at MMI (Claimant's Exhibit 13, p. 46; Respondent Protective's Exhibit R1, p. 71).

21. The Claimant testified that his examinations with Dr. Fall generally lasted around 20 minutes. He further claimed that his IME with Dr. Raschbacher only lasted around 30 minutes. His IME with Dr. Bisgard lasted at least 1 hour.

22. Dr. Allison Fall testified by evidentiary deposition on January 12, 2015. Dr. Fall testified that the Claimant reported to her doing well post-surgery for his 2011 injury other than minor aches and pains The evidentiary deposition of Allison Fall, M.D. occurred on January 12, 2015 The evidentiary deposition of Allison Fall, M.D. occurred on January 12, 2015. Dr. Fall testified that the Claimant reported to her doing well post-surgery for his 2011 injury other than minor aches and pains (Dr. Fall Depo. Tr., p. 9). Dr. Fall testified that after reviewing Dr. Ginsburg's DIME report at the deposition, she found that the Claimant's complaints in that report were not consistent with what the Claimant told her about his post-MMI condition for the 2011 injury (Dr. Fall Depo. Tr., p. 11). She testified that the "entire leg numbness and pain intolerable is different" (Dr. Fall Depo. Tr., p. 26). She testified that the radicular symptoms the Claimant described post July 2014 injury were reflected in the DIME report for the 2011 injury, including right foot numbness and right leg numbness (Dr. Fall Depo. Tr., pp. 12-13). She also testified that the pain complaints he made to Dr. Ginsburg appeared more severe than what he told her over a year later (Dr. Fall Depo. Tr., p. 13). Dr. Fall further testified that the electrodiagnostic testing performed by Dr. Aschberger more likely indicated an impingement at L4-5 rather than L2-3, where Claimant had been surgically treated (Dr. Fall Depo. Tr., p. 16). She also testified that, to her, the symptoms of low back and buttocks pain, along with the nature of the radicular symptoms described in the medical records from 2012 and 2013 indicated involvement at spinal levels lower than L2-3 (Dr. Fall Depo. Tr., pp. 16-18). Dr. Fall testified that she felt the references to those symptoms and the EMG findings indicated that the Claimant had involvement of or

symptoms emanating from lumbar levels below L2-3 at that time with respect to his prior injury (Dr. Fall Depo. Tr., p. 18).

23. Dr. Fall also testified as to the differing MRI findings in 2011 and 2014. She agreed that a comparison MRI review by a radiologist of the two MRIs would have been the preferred way to prevent against different interpretations of the studies (Dr. Fall Depo. Tr., pp. 19-20). She opined that additional new conditions identified in the 2014 MRI, including ligamentum flavum thickening at L4-5 and facet joint capsulitis which was causing stenosis were degenerative conditions (Dr. Fall Depo. Tr., pp. 21-22). Dr. Fall noted that there was a three year gap with an intervening surgery between the MRIs, and it was possible that the conditions shown in the 2014 MRI were present at the time of the DIME with Dr. Ginsburg (Dr. Fall Depo. Tr., p. 25). She opined that the symptoms the Claimant reported to Dr. Ginsburg were reflective of a higher degree of spinal pathology than shown in the 2011 MRI (Dr. Fall Depo. Tr., p. 26). She also felt that it was more likely that after his 2011 MRI, the Claimant developed a progression of his degenerative conditions at the lower levels of L3-4 and L4-5 that could have shown up on an MRI had it been done at the time (Dr. Fall Depo. Tr., pp. 26-27).

24. Dr. Fall was shown portions of the July 18, 2014 FedEx video at the deposition. After reviewing the video, Dr. Fall stated that she agreed with Dr. Raschbacher that the physical activity in which the Claimant was engaged in the video made it appear unlikely there was actual significant symptomatology in his lumbar spine at that time (Dr. Fall Depo. Tr., p. 30). She also agreed the activity was inconsistent with the level of symptoms he reported to her, and she “wouldn’t have expected him to be doing all of that” (Dr. Fall Depo. Tr., pp. 31). As for whether the Claimant’s taking extra pain medications on the morning of July 18, 2014 would have enabled the Claimant to engage in the activities seen on the video, Dr. Fall testified that the movement patterns and fluidity of his movements, such as kicking a soccer ball, awkward positioning such as putting a leg up and leaning over, and carrying objects on his shoulder, were not consistent with actions someone would take if they suffered a back injury the prior day. (Dr. Fall Depo. Tr., pp. 31-32). She also did not believe taking pain medication would extinguish all of his symptoms, and if he had a back injury, he would still have had spasms, stiffness, and other symptoms (Dr. Fall Depo. Tr., pp. 32-33). She testified that not knowing the weight of the objects he was lifting on the video had no bearing on her opinions, because the awkward positioning and posturing was more relevant (Dr. Fall Depo. Tr., p. 40). She testified he appeared fully functional at the time of the video (Dr. Fall Depo. Tr., p. 31-33). She also testified that the video was evidence that it was not medically probable that the Claimant suffered an injury the day before that led him to not being able to work because he is seen working in the video (Dr. Fall Depo. Tr., pp. 33-34). She also opined that his post 2011 injury symptoms appeared to wax and wane and it was possible his most recent complaint of symptoms were a waxing and waning of those symptoms (Dr. Fall Depo. Tr., p. 34). Dr. Fall also testified that the nature of the work the Claimant did on a daily basis contributed to the waxing and waning of symptoms (Dr. Fall Depo. Tr., p. 35).

25. At the hearing, Dr. Bisgard testified as an expert in the field of occupational medicine. She testified that she performed an IME with the Claimant and

spent an hour with him. She testified that she has previously reviewed medical records from the October 29, 2011 injury and the July 18, 2014 injury. In regard to the 2011 injury, Dr. Bisgard testified that the Claimant had a herniated disk at L2-3 and the symptoms, MRI pathology and mechanism of injury all added up and Dr. Shen performed a microdiskectomy which was appropriate. Dr. Bisgard testified that if there was other pathology present at that time, she would have expected Dr. Shen, as the treating surgeon, to have addressed it. Her understanding was that the Claimant had a good result from the surgery performed by Dr. Shen for the 2011 injury in that the Claimant's symptoms were alleviated enough for him to go back to work full duty without work restrictions. It was also her understanding that the Claimant was able to manage his condition with medications without substantial change in his symptoms, although waxing and waning of symptoms would be typical given the Claimant's work.

26. Dr. Bisgard testified that the Claimant's last maintenance visit for the October 29, 2011 injury prior to the onset of new symptoms in July of 2014 was a June 16, 2014 visit with Dr. Schwartz. Dr. Bisgard compared the Claimant's clinical presentation on that visit with his July 18, 2014 Concentra visit. She testified that on July 18, 2014, the Claimant's description of a high level of pain that was sharp, dull, aching, burning, and stabbing were descriptions not contained in the June 16, 2014 record. She also testified the tenderness in his lower spine was a new finding compared to June 2014 in addition to loss of motion and an altered gait on July 18, 2014. Dr. Bisgard felt the two reports comparatively showed that "something happened" in the intervening period and the MRI of July 18, 2014 supported the occurrence of an event in that time period. She noted that this could possibly be related to the recent deliveries of awkward and heavy boxes for the wine of the month club that the Claimant had advised her occurred in this time frame. As to the MRIs, Dr. Bisgard noted the July 2014 MRI was different because the L3 herniation was abutting the left L3 nerve root, which was different than in 2011, and there was new pathology affecting the L4 nerve roots, as well as progression of the ligament pathology and onset of facet hypertrophy. She opined the new findings explain where the symptoms were originating from. Dr. Bisgard testified that she felt Dr. Ginsburg's determination to keep the Claimant at MMI meant that he felt the Claimant's condition remained stable.

27. Dr. Bisgard also testified as to the FedEx video that was reviewed in part at the hearing. She testified that she had viewed it in its entirety. She testified that the Claimant stood around a lot over the course of the entire video and people around him were moving at a faster pace. She testified he used good body mechanics such as squatting while lifting. She also testified the boxes were not big and were of unknown weight. She disagreed with Dr. Fall that the Claimant used awkward positioning. Dr. Bisgard also testified that the medications the Claimant took the morning of July 18, 2014 would have allowed him to perform the activities shown in the video along with using good body mechanics even if he had suffered a recent back injury. She testified that it was her opinion that the Claimant suffered a substantial aggravation of his underlying condition in July 2014 and that the video footage did not change this opinion.

28. On cross-examination, Dr. Bisgard admitted she did not take formal range of motion measurements. Her statement of limitation on his ability to forward flex was

based upon his statement that he was previously able to touch his fingers to the floor. She confirmed that Claimant had full extension and no objective signs to correlate complaints of radicular symptoms at her IME. She testified this was similar to Dr. Aschberger's physical exam at MMI for the 2011 injury. Dr. Bisgard agreed on cross-examination that Claimant's allegation of foot drag in relation to the 2011 injury was first documented by Dr. Aschberger after Dr. Shen released Claimant from care post-surgery. She agreed that Dr. Aschberger then performed an EMG which identified nerve root irritation at levels below L2-3. She also agreed foot drag could possibly correlate with a L5-S1 dermatome, which was also lower than L2-3. She also agreed that complaints of radiculopathy through the whole leg and into the toes, and low back pain into the buttocks, as documented by Dr. Ginsburg, could possibly correlate to levels below L2-3. Dr. Bisgard agreed that the entirety of that clinical presentation as seen in Dr. Aschberger's and Dr. Ginsburg's records could possibly be suggestive of possible nerve root irritation at lumbar levels below L2-3. However, she testified that there was not an MRI at that point and she opined that Dr. Ginsburg, a respected neurologist, felt that the Claimant was at MMI and didn't make a note of pathology or symptoms at other levels, which was indicative to her that he didn't make this correlation. Dr. Bisgard agreed on cross-examination that it was possible the findings on the 2014 MRI were present in 2012 and 2013, but she did not feel it was probable due to Claimant's change in clinical presentation and that she felt the 2014 MRI findings were consistent with his post-July 2014 presentation. She opined that it is possible that the new MRI pathology was pre-existing, but stated that she didn't think it likely that the findings would have been present, but asymptomatic, until 2014. She also agreed that Claimant's subjective complaints to Dr. Ginsburg represented a progression of symptoms from his treatment with Dr. Shen and Dr. Aschberger, but his objective exam did not correlate the worsening complaints, although, she again noted that an MRI was not obtained at this point as Drs. Aschberger and Ginsberg felt the Claimant at MMI.

29. At the hearing, Dr. Raschbacher testified at hearing as an expert in the field of occupational medicine. Dr. Raschbacher testified that he performed an IME of the Claimant and was aware of his prior 2011 injury and subsequent discectomy. Dr. Raschbacher testified he felt it medically improbable that Claimant suffered an injury in July 2014. He testified that in his opinion after review of the medical records, the Claimant's subjective reports appeared to be dependent upon the situation, and there was a large difference in those complaints, specifically as between Dr. Shen's, Dr. Fall's and Dr. Ginsburg's notes. Specifically, he noted the Claimant's complaint to Dr. Ginsburg of intolerable pain was in great contrast to earlier reports to Dr. Shen and Fall about a great recovery, and his range of motion was much reduced as well. Dr. Raschbacher also testified the Claimant informed him at the IME that his pain was "tolerable" after his prior surgery, which was directly contradictory to his report to Dr. Ginsburg that his pain could be "intolerable." However, this would be consistent with over all reporting that the Claimant's symptoms waxed and waned at time. Dr. Raschbacher testified that the symptoms associated with an L2-3 impingement would not manifest in symptoms below the medical knee in general. He also noted an L3 impingement would not innervate any muscles that cause foot drop or foot drag. He testified that this is more of an L5 issue. He testified that the Claimant's complaints after being released by Dr. Shen of low back / buttocks pain, foot drag and foot drop, as well

as Dr. Aschberger's EMG findings, were suggestive of pain generators originating at levels below L2-3. The EMG represents objective findings of that fact. He also noted Dr. Fall's later EMG was essentially the same, which objectively showed no worsening in terms of nerve root irritation. Dr. Raschbacher further testified that if Claimant's subjective complaints to Dr. Ginsburg were taken as true, these would represent a progression of symptoms that Dr. Aschberger stated at MMI would have warranted a new MRI, and therefore, a new MRI should been taken at that time. Dr. Aschberger stated if he had been in Dr. Ginsburg's place, and assuming he believed Claimant's subjective reports to be accurate, he would have stated Claimant was not at MMI and recommended a repeat EMG and repeat MRI. Yet, as the records demonstrate, this did not happen. Dr. Raschbacher compared Dr. Schwartz's August 25, 2014 treatment note, one month after the date of the alleged July 2014 injury, with Dr. Ginsburg's DIME. He noted Dr. Schwartz documented intermittent dull pain described as mild with improving symptoms, and he stated this characterization was much better than those described to Dr. Ginsburg. He also noted that Dr. Schwartz documented a normal range of motion whereas Dr. Ginsburg documented range of motion loss in 2013. Dr. Raschbacher further testified that he had not seen any range of motion measurements in any records after July 2014 which showed greater limits on range of motion than that recorded by Dr. Ginsburg, including Dr. Fall's documentation of range of motion. Dr. Raschbacher himself testified he recorded minor range of motion loss, but less than that recorded by Dr. Ginsburg. So, he opines that the Claimant's current condition is a natural progression of his October 29, 2011 injury. He also testified that, based on the MRIs that were reviewed, he finds it more likely that the findings on the July 2014 MRI were present before the injury, just not symptomatic. Dr. Raschbacher admitted that he had not previously compared the 2011 MRI with the one from 2014. However, after reviewing both at trial, Dr. Raschbacher stated that the 2014 MRI had new findings, but opined that different radiologists read MRI's in different ways.

30. Dr. Raschbacher also commented on portions of the FedEx video which were shown during his testimony. He noted specific activities which he would not expect the Claimant to perform if he had suffered an injury the prior day, including a portion of the video when Claimant is seen swinging under a conveyor belt at 7:18:45 a.m. He testified that the Claimant was seen in the video bending, lifting, and squatting, all of which were movements that did not reflect the Claimant suffered an injury. He testified that the video of the Claimant's repeated lifting and bending spoke for itself and periods of the video in which the Claimant was not as active did not minimize the relevance of the portions in which he is seen as physically active. Dr. Raschbacher also testified he did not believe the Claimant's explanation of taking medications justified the actions in the video, as, in his opinion, the Claimant was still able to engage in awkward positioning and move without apparent limitation. Although later in cross-examination testimony, Dr. Raschbacher did agree that people in pain can work through their pain.

31. With respect to the DIME opinion of Dr. Ginsberg that the Claimant was at MMI from the October 29, 2011 injury, Dr. Raschbacher opined that the DIME report is just one puzzle piece that you put in to get the whole picture. In the context of this case, Dr. Raschbacher opines that the subjective reports the Claimant provided, which Dr. Ginsberg relied on, were not so reliable, so the DIME report itself has flaws. Ultimately,

Dr. Raschbacher believed that the Claimant's symptoms which were not attributable to the L3 nerve root were present before July 2014, they were just not symptomatic.

29. In weighing the contradictory evidence in this case, the ALJ finds that the Claimant's testimony was credible and generally supported by the medical records. Whether the Claimant receives continuing medical treatment for his prior injury or he receives medical treatment for a new injury, does not impact the Claimant and there would be no incentive for the Claimant to prefer one over the other, as long as he receives treatment. Therefore, it is persuasive that the Claimant is adamant that the pain he felt on July 17, 2014 was markedly different from the pain that he felt from the October 29, 2011 injury. This testimony is also supported by the comparison of the MRI from November 23, 2011 and the one from July 18, 2014, as well as the credible and persuasive testimony of Dr. Bisgard. Further, having experienced some waxing and waning of symptoms from the 2011 injury and having managed these with medications over several years, it is more likely than not that the Claimant would recognize symptoms that were simply more of the same. The symptoms the Claimant currently experiences are significantly different and, per the testimony of Dr. Bisgard, they do correlate to pathology on the MRI and the mechanism of injury described by the Claimant. It is found as fact that the Claimant suffered a new injury on July 17, 2014 or that his work injury permanently aggravated, accelerated or combined with his preexisting condition.

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

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

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the

precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The Claimant in this case was employed as a delivery driver. The Claimant's job included loading his truck, handling packages, and delivering packages. On October 29, 2011, the Claimant suffered a work-related injury to the L2-3 level of his back. The Claimant was treated by Dr. Michael Shen, who eventually performed a microdiskectomy on the injured area. On July 13, 2012, Dr. John Aschberger placed the Claimant at MMI, with an 8% whole person impairment rating. The Claimant requested a Division Independent Medical Examination, and was examined by Dr. Stanley Ginsburg. Dr. Ginsburg assigned a whole person impairment rating of 14%, which included a 7% loss of range of motion, rather than the 8% previously assigned by Dr. Aschberger, and affirmed that MMI was achieved on July 13, 2012. The Claimant returned to full-duty work, despite suffering from ongoing waxing and waning of symptoms, including back pain and occasional foot drag, both of which were manageable through the use of medication, as well as rest.

During the month of July, 2014, the Claimant was experiencing increased back soreness, due to his heavy workload. On the morning of July 17, 2014, the Claimant was taking a break, after having completed approximately 90 stops. The Claimant stood up from his seat in the delivery vehicle, and twisted, and felt a sudden pain in his back. The pain was so severe that the Claimant had to brace himself on the sides of his delivery vehicle, with his arms spread out from his sides. The pain was isolated to his lower back, in contrast to the 2011 injury which caused pain to radiate down his right leg. He took some of his prescribed Naproxen, and managed to finish his shift. The following morning, the Claimant was not feeling better, and informed his supervisor that he would volunteer to take the day off. He was told to bring in his delivery vehicle, and that he would be given a ride home. Once at the loading dock, he decided to help his coworker who would be covering his deliveries load her vehicle. At this point, he had doubled up on the medications he was taking, and refrained from showing his pain, as he was still not sure how bad his back was. The Claimant was taken home after the delivery vehicle was loaded, and he proceeded to lie down and rest, in hopes that his back would feel better. However, when the Claimant tried to get up from his rest, he found that his back had gotten worse. He called his supervisor and requested that he be allowed to go to Concentra for treatment. His supervisor denied that request, yet the Claimant decided to take himself in anyway. It took him 30 minutes to make his way through his house in order to get to his car. He could barely walk, and was forced to crawl some of the way.

At Concentra, the Claimant was treated by Corey Feldman, PA-C. Mr. Feldman noted that the Claimant had pain in the right lower back, as well as pain that radiated down to the Claimant's buttocks, and down the right leg. Mr. Feldman ordered an MRI, which revealed that the Claimant still had symptoms at the L2-3, yet also had increased damage to the L4-5, as well as new damage to his L5-S1 levels. On July 21, 2014, the Claimant visited Dr. Evan Schwartz, who examined him, and released him to modified duty, restricting him from lifting anything over 10 lbs, pushing/pulling using anything over 10 lbs of force, as well as refraining from all bending, squatting, and climbing, including stairs and ladders. The Claimant followed up with Dr. Schwartz on July 28, 2014, and referred to Dr. Fall, and was also referred to physical therapy. Around this time, the Claimant contacted his employer via phone and email, regarding his modified duty, but did not hear a response. It wasn't until the Claimant later received a letter from COBRA that he learned of his termination.

Dr. Fall examined the Claimant on August 4, 2014, and noted that a lumbar spine MRI revealed disc extrusions at the L2-3 and L3-4, with possible compression of the right L3 and L4 nerve roots. The Claimant was referred to Dr. Shen, since Dr. Shen had more experience with the Claimant's back, and was seen again by Dr. Fall on August 15, 2014, wherein an EMG was used to rule out lumbar radiculopathy. Dr. Shen examined the Claimant on August 20, 2014, and found that the Claimant had damage to his L2-3 and L3-4, noting herniation of the L3-4 discs. A transforaminal steroid injection for the right side L4 was recommended by Dr. Shen. The Claimant followed up with Dr. Fall on August 25, 2015, and Dr. Fall agreed with Dr. Shen's diagnosis, as well as recommended course of treatment.

On November 7, 2014, Dr. Jeff Raschbacher performed an IME on the Claimant, on behalf of the Respondent Pinnacol. Dr. Raschbacher determined that there were no objective findings which would indicate that the Claimant had sustained a back injury on July 17, 2014. Dr. Raschbacher had at that point, only reviewed the MRI from July 18, 2014. At trial, Dr. Raschbacher conceded that when comparing the two MRIs, the July 18, 2014 did indeed have new findings. However, he opined that discrepancies between the two MRIs could be due to reporting styles of different radiologists.

On January 15, 2015, Dr. Elizabeth Bisgard performed an IME on the Claimant, on behalf of the Respondent Protective. Dr. Bisgard compared the MRI related to the 2011 injury with the one taken on July 18, 2014, and found, as Dr. Shen, and Dr. Fall had, that the Claimant continued to have some damage to the L2-3 level of his spine, as well as new disc herniation to the L3-4 level, with additional damage to both sides of the L4 root. Dr. Bisgard concluded that this new injury was likely the result of the July 17, 2014 injury.

The Claimant offered credible testimony. His account of the morning of July 17, 2014, as well his increased pain in the days following, establishes that it is more likely than not that he did in fact sustain a new injury. Further, the Claimant established that this new injury arose out of, and within the scope of, his work-related duties for employer.

The expert testimony of Dr. Bisgard was found to be more persuasive than that of Dr. Raschbacher. Specifically persuasive was Dr. Bisgard's opinion that the Claimant had new injuries that were most likely attributable to the twisting injury reported by the Claimant and were consistent with the Claimant's medical records. Dr. Raschbacher's testimony regarding the video surveillance was not enough to overcome the generally consistent findings illustrated in the Claimant's medical records.

As found, the ALJ determines that the Claimant has proven, by a preponderance of the evidence, that his work activities on July 17, 2014 caused or permanently aggravated, accelerated or combined with his preexisting condition. Thus, the Claimant suffered a compensable injury on July 17, 2014.

Medical Benefits
Authorized, Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). It is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ.

Kroupa v. Industrial Claim Appeals Office, supra; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As set forth above, the Claimant's new back injury is found to be causally related to the Claimant's work activities and is compensable. The Claimant received conservative treatment after his July 14, 2014 injury and it was reasonably necessary in order to treat this new injury. In addition, Dr. Bisgard persuasively testified that the Claimant's condition related to the July 14, 2014 injury is not stable and that he requires further evaluation and medical treatment before he can be placed at MMI.

With respect to the post-MMI treatment that the Claimant was receiving for his October 29, 2011 per the Final Admission of Liability dated September 20, 2013, nothing in this order would disturb that, to the extent that his symptoms attributed to the prior injury continue to require treatment, and the Claimant continues to be entitled to Grover medical benefits as outlined in the Final Admission of Liability for that injury, in addition to treatment he receives for the July 14, 2014 injury.

Per the stipulation of the parties that Respondent Protective was the insurer of record from October, 2011, until June 6, 2012, and that Respondent Pinnacol was the insurer of record on the date of the alleged work-related injury, July 17, 2014, Respondent Protective remains responsible for Grover medical benefits only for the October 29, 2011 injury which, at the present time, has been limited to medication management. Respondent Pinnacol is responsible for all other medical treatment provided since July 18, 2014 and ongoing (except for medication management that the Claimant receives for the October 29, 2011 injury) that is reasonably necessary to cure and relieve the Claimant of the effects of his July 17, 2014 work injury.

Temporary Disability Benefits

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

Through testimony and the exhibits, it was established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. The Claimant voluntarily took a day off on July 18, 2014 due to the pain he felt after the incident on July 17, 2014. He went to the terminal to return his truck and helped another driver load the truck over a period of two hours. After he returned from loading the delivery vehicle, the Claimant went back home and rested. When he woke up, he had such severe back pain that he could barely walk. The Claimant then called the Employer to report the injury, and stated that he was going to Concentra for treatment. According to the Claimant, the Employer was against this, but the Claimant decided to go to Concentra anyway. At Concentra, the Claimant saw Corey Feldman, PA-C. Mr. Feldman's report notes pain in the right lower back which radiates to the buttocks, as well as the right thigh and calf. The Claimant described the pain as "severe" and put the pain level at 7/10. Mr. Feldman referred the Claimant for an MRI. The Claimant saw Dr. Evan Schwartz on July 21, 2014, who released the Claimant to modified duty, with the restrictions that there be no repetitive lifting over 10 lbs., no pushing/puling over 10 lbs. of force, and no bending. In addition, the Claimant was prohibited from squatting, and climbing stairs or ladders. The Claimant's testimony that he contacted the Employer via the phone, as well as email, regarding his work restrictions, after seeing Dr. Schwartz,

and that he could perform modified duty, yet did not receive a response from the Employer was not challenged or disputed. The Claimant further testified that he did not receive a letter regarding modified duty from the Employer, and that his next interaction with the Employer was a COBRA letter informing the Claimant that he had been terminated from his employment.

The claim for the July 17, 2014 injury was found compensable. Through testimony and the exhibits, it was also established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. There is no evidence that the Claimant was released to regular duty work or that Employer provided an offer of modified work at any time after July 17, 2014. The Claimant suffered a wage loss as a result of his July 17, 2014 work injury. Therefore, the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 18, 2012 ongoing until the occurrence of one of the events set forth in C.R.S. 8-42-105 (d).

ORDER

Based upon the foregoing, it is ordered that:

(1) The Claimant established that he suffered a compensable injury on July 17, 2014 by a preponderance of the evidence; and

(3) Respondent Pinnacol shall be liable for all authorized, reasonably necessary and related treatment related to the July 17, 2014 injury which is the subject of WC no. 4-956-967-02, and shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation; and

(4) The Claimant is entitled to receive temporary total disability indemnity benefits beginning on July 18, 2014. The Claimant's TTD benefits shall be calculated and paid in accordance with C.R.S. § 8-42-105. Respondent Pinnacol is liable for the payment of TTD benefits; and

(5) Nothing in this order affects the Claimant's entitlement to post-MMI medical benefits per a Final Admission of Liability, and in accordance with the Act, related to an October 29, 2011 work injury that is the subject of WC no. 4-871-341-02. Respondent Protective remains liable for the payment for post-MMI medical benefits related to the October 29, 2011 work injury; and

(6) Respondents shall pay statutory interest at the rate of 8% per annum on all amounts due and not paid when due; and

(7) All matters not determined herein are reserved for future determination.

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

DATED: July 30, 2015

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer on July 31, 2014;

2. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve Claimant from the effects of the work injury;

3. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that the back surgery recommended by Dr. James Gebhard is reasonable and necessary medical treatment to cure and relieve Claimant from the effects of the industrial injury; and

4. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") beginning August 1, 2014 and continuing until terminated by law?

STIPULATIONS

The parties stipulate and agree that, if the claim is compensable, Claimant's average weekly wage (AWW) is $870.00.

FINDINGS OF FACT

1. Claimant is a 59-year-old male who was hired by Employer in March 1975. Claimant had no other employers between 1975 and 2014. Claimant worked at Employer's in production, on the loading dock, as a service technician, and as an equipment deliverer and installer. He worked as a service technician and in equipment delivery and installation for 35 years.

2. The physical demands of working as an equipment installer required that Claimant typically work with vending machines, coolers, and fountain equipment for soft drinks. Claimant's job involved delivering and installing equipment for Employer's customers. Claimant used assistive equipment like hand trucks to move the equipment, yet, the work still involved pushing, pulling, lifting, bending, stooping, and squatting. Claimant's job also required moving other equipment or furniture out of the way before installing new equipment. Claimant had to maneuver the equipment around various obstacles, through tight doorways, over curbs, up and down slopes, and up and down

stairs. The vending machines weighed an estimated 500-800 pounds, and the fountains could weigh between 200-700 pounds. Claimant lifted some of the coolers himself but some larger coolers weighed between 400-600 pounds. Claimant performed his work on a full-time basis for 35 years as of 2014.

3. Claimant's work involved making deliveries in Western Colorado and Eastern Utah. His work involved significant driving between customers' locations, especially if he was making deliveries to remote areas. Even on days when Claimant had long drives in order to make deliveries, he still performed physical activities on a daily basis.

4. Claimant had assistance from co-workers on some deliveries. However, typically, Claimant spent more than half of his time delivering and installing equipment by himself. Even when Claimant had assistance with the deliveries and the work still involved substantial physical activity.

5. Since 1975, Claimant engaged in some physical activities outside of work. This included some home repairs and playing one season of recreational softball. Claimant also hunted approximately four times in the past 15 years. Claimant occasionally had back pain, which he described as muscle spasms or "a knot in the back," but the occasional symptoms never caused Claimant to miss work. Claimant had pain in the muscles right above the buttocks area. Claimant never had radiating pain to his legs. He occasionally took ibuprofen and Flexeril to treat his symptoms, but he did not take medications on a daily basis.

6. On Thursday, July 31, 2014, Claimant was performing deliveries and installations in the Vail area. Over the course of the day, Claimant moved approximately 16 vending machines. He did not notice a sudden onset of low back or leg symptoms over the course of his workday.

7. Claimant began to have symptoms when he had lunch with a Vail Associates employee with whom he was working that day. He began having pain in his hip and his back. He continued to bend and lift over the course of the day while his symptoms increased. As the day went on, he began having radiating pain into his left leg. Although there was an incident before lunch when a vending machine broke a pallet, Claimant did not feel anything strange involving his low back or legs in connection with that incident.

8. On the afternoon of July 31, 2014, Claimant made a phone call to James Townsend, lead tech. Mr. Townsend requested that Claimant come in the following day to move more equipment. Claimant told Mr. Townsend that he was in a lot of pain. He told Mr. Townsend that he had already worked 48 hours that week, and wanted to rest over the weekend and feel better. Claimant did not report a work injury to Mr. Townsend at that time. Claimant hoped he could use ibuprofen, ice, heat and feel better after taking some time off of work.

9. Claimant did not work on August 1 or August 2, 2014. Claimant sought medical care at Primary Care Partners on Sunday, August 3, 2014, because his regular doctor's office was not open that day, and his pain had become so severe that he needed medication.

10. Dr. John Bratteli at Primary Care Partners noted on August 3, 2014, that Claimant had "pain in the left lower back that extends down to his buttock and down to the back of his leg, all the way to the back of his left ankle." Dr. Bratelli noted that Claimant had no history of significant back issues. Dr. Bratelli noted that Claimant had had "about a week of low back pain without any obvious cause. Claimant told the doctor that there was no "specific obvious cause" to his symptoms because he did not want to report a work injury at that time. He still hoped he could get over his symptoms and return to work.

11. Dr. Bratteli referred Claimant to Dr. Dale Utt for follow-up and opined that Claimant should not work on August 4 and 5, 2014.

12. Claimant spoke by phone with Robert Josey, marketing equipment supervisor for Employer, on August 3, 2014, after his appointment with Dr. Bratteli. Claimant asked Mr. Josey if he could take some time off from work using Claimant's sick and vacation time in order to get time away from moving heavy equipment.

13. Claimant saw Dr. Dale Utt at Foresight Family Physicians on August 5, 2014. Dr. Utt is Claimant's family doctor. Claimant presented to Dr. Utt with primarily left-sided low back pain and left leg pain. Dr. Utt noted that Claimant's symptoms began a week earlier with no specific event. Dr. Utt also noted that Claimant did not think he hurt himself at work although his job is physical.

14. Claimant was asked by various providers to identify a specific event in which he injured himself, but he could not give them a specific time or point where an injury had occurred. Claimant's symptoms came on during the course of the day on July 31, and progressively got worse.

15. Dr. Utt recommended a MRI and, potentially, epidural steroid injections.

16. On August 9, 2014, Respondents referred Claimant to Dr. Reicks. Claimant saw Dr. Reicks with Foresight Family Physicians on August 9, 2014. Dr. Reicks prepared and signed a WC-164 form dated August 9, 2014, noting that Claimant had increased lower back pain and leg pain that started at work with no definite event. Dr. Reicks imposed work restrictions on Claimant involving lifting and carrying limits of 10 pounds.

17. Claimant decided to report the injury as a workers' compensation injury prior to his meeting Dr. Reicks on August 9, 2015, because Claimant's pain was getting more severe, and he decided that he needed to take care of the injury.

18. Employer filed its First Report of Injury on August 11, 2014. The First Report noted an injury date of July 31, 2014. The First Report noted: "[Claimant] states that while performing repetitive occupational duties, he began to experience discomfort (strain) to his lower back area. He was diagnosed with a pinched nerve to his back area." The First Report noted that August 1, 2014, was the "date disability began," and that Robert Josey was notified of the injury on August 11, 2014. Respondents filed a Notice of Contest on August 15, 2014.

19. Claimant returned to see Dr. Reicks on August 15, 2014. Dr. Reicks notes that Claimant did not report a specific event but does note that his back started hurting at work around July 31 and he started getting radicular symptoms into his left buttock and left leg. Dr. Reicks noted that Claimant's work involved significant stooping, bending, and heavy lifting and Claimant had done the work for more than 30 years. Although Dr. Reicks noted that low back pain and radiculopathy can be part of the degenerative process, he noted that Claimant's current radicular pain could be work related.

20. Claimant decided to report his injury as work-related when he realized that his pain was worsening and he needed significant medical care in order to improve and return to work.

21. On August 20, 2014, Dr. Reicks noted that Claimant had a long history of working a heavy-duty job and that on July 31, 2014, he had to move 16 pop vending machines. Dr. Reicks reports that, on July 31, 2014, Claimant had a fairly hard day, working without a helper, in Vail and another location working at odd angles and working around the loading dock. Claimant reported to Dr. Reicks that he had some back pain on July 31, 2014, after his work activities.

22. Claimant saw Dr. Jeffrey Bowman on August 26, 2014, who noted that Claimant had ongoing back and leg pain that was not improving. Dr. Bowman recommended an MRI. Claimant underwent an MRI on August 28, 2014. The MRI scan showed a broad-based disc bulge, posterior osteophytes, prominent facet hypertrophy, and circumferential spinal stenosis at the L4-L5 level. The MRI also showed posterior spurring and facet hypertrophy with neural foraminal narrowing to the left side due to spurs at the L5-S1 level.

23. On September 9, 2014, in a follow-up appointment with Dr. Bowman, the doctor noted that the MRI results explained Claimant's low back pain and left leg symptoms. Dr. Bowman referred Claimant to Dr. Robert Frazho for consideration of spinal injections.

24. Dr. Frazho saw Claimant on September 16, 2014, at which time the doctor recommended left L4-L5 and L5-S1 transforaminal epidural injections. Claimant underwent three sets of injections between September 22, 2014, and December 1, 2014. Claimant's pain continued after the injections. Dr. Frazho recommended surgical referral to Dr. James Gebhard.

25. Claimant returned to Primary Care Partners for a core stabilization program recommended by Dr. Frazho.

26. Claimant saw Dr. James Gebhard on December 11, 2014. Dr. Gebhard noted:

> [Claimant's] history actually goes back to July 31, 2014, when he was moving heavy vending machines and had onset of symptoms after this extensive lifting and transport of the machines. Before that, [Claimant] really had nothing similar in complaints related to back or leg pain. He has been doing this type of work for a long time and probably had some accumulated degeneration, but this one day, in my opinion, is what pushed him over the edge and brought on his symptoms and has made them persist.

Claimant's Exhibit 3, p. 49.

27. Dr. Gebhard noted that Claimant had improvement with epidural injections, but still had pain, especially with activity. Dr. Gebhard noted that surgical options included decompression surgery alone or a combination of decompression and fusion surgery. Dr. Gebhard noted that Claimant would continue with physical therapy, and if there was not much improvement after four weeks, then surgery would be considered.

28. Claimant returned to see Dr. Gebhard on January 15, 2015, with symptoms that had not improved since his last visit. Dr. Gebhard noted that Claimant would have one more month of therapy, and if there was no improvement, then surgery would be indicated.

29. Claimant saw PA Daniel Meyer with Work Partners on February 3, 2015. PA Meyer noted an injury date of July 31, 2014, and noted Claimant's chief complaint was low back pain caused by moving around vending machines all day. PA Meyer also provided work restrictions and opined that Claimant's injury was work related.

30. PA Meyer noted:

> [Claimant] reports three incidents on July 31. The first was loading off a truck onto a dock and his back tightened up. Then later he was loading a machine onto a pallet and it broke, causing him to brace his back and brought on the radicular symptoms. Then he continued with his day going to another store in the Vail area where he loaded double digit number of machines. From there he reports he couldn't move with pain down his [left] leg and went to Docs on Call that Sunday.

Claimant's Exhibit 2, p. 31.

31. Claimant returned to see PA Jason Bell in Dr. Gebhard's office on February 17, 2015. PA Bell described Claimant as motivated to get well and return to

work. The PA recommended proceeding with surgery, pending ruling on whether Claimant's claim was a compensable workers' compensation injury.

32. On March 31, 2015, Dr. Gebhard noted that Claimant was a candidate for surgical correction and addressed the urgency of Claimant's need to undergo surgical correction of a nerve compression problem. Respondents denied authorization for the surgery and the surgery nonetheless occurred on June 22, 2015, under Claimant's private medical insurance provider. Claimant explained that he was in extreme pain and was hopeful that the surgery would allow him to return to work for Employer and work for Employer until he retired.

33. Claimant testified that he had not worked for Employer or any other employer since July 31, 2014. He testified that he has been receiving short-term and long-term disability benefits and Social Security Disability Insurance (SSDI) benefits.

34. Mr. Josey testified that Claimant told him about his back and leg problems after July 31, 2014. Mr. Josey recalled that Claimant told him he didn't know where he injured himself, but did not state clearly that the injury occurred outside his employment. Mr. Josey instructed Claimant to speak with Suzette Bellario to file for short-term disability benefits. It was with Mr. Josey's instruction to apply for short term disability benefits that Mr. Josey recalled that Claimant reported the injury as work-related.

35. Mr. Josey stated that he was aware that Claimant had been moving vending machines on July 31, 2014, and Claimant's workload on that date constituted a big day, work wise, in his opinion. Mr. Josey observed Claimant at the end of his work day on July 31, the date of Claimant's injury, and Mr. Josey observed that Claimant appeared injured and was noticeably limping. Mr. Josey stated that Claimant never missed time from work for back symptoms prior to July 31, 2014.

36. Respondents obtained an independent medical examination (IME) with Dr. Tashof Bernton on December 10, 2014. Dr. Bernton was recognized at hearing as an expert in the fields of internal medicine and occupational medicine. Dr. Bernton opined in his report that Claimant's low back condition was not work-related and that surgery was reasonable and necessary. He based his opinion that Claimant's condition was not work-related at least in part on his opinion that Claimant's condition was degenerative.

37. Dr. Bernton opined that Claimant's leg pain was caused by a bone spur compressing the nerve root at L5-S1. He testified that lifting on July 31, 2014, could not have caused the bone spurs. However, Dr. Bernton testified the condition could become acutely symptomatic when the bone spurs put pressure on the nerve root. Dr. Bernton testified the symptoms could appear in connection with trauma. Dr. Bernton testified that in patients he has treated, lumbar bone spurs can be present without any symptomatology, but can become symptomatic in connection with specific trauma.

38. Dr. Bernton offered conflicting opinions that medical science has not established that bone spurs can be caused by 30 years of lifting activities. However, Dr. Bernton also opined that prolonged stress on the spine can cause bone spurs to form.

39. Dr. Bernton opined that Claimant's symptoms came on over the course of one day, and with leg pain being experienced on July 31, 2014. Dr. Bernton opined that Claimant's preexisting clinical history with low back pain was different from the symptoms after July 31, 2014. Dr. Bernton described Claimant as having unremitting leg pain and back soreness and stiffness, which was different than the occasional back symptoms he had prior to July 31, 2014. Dr. Bernton acknowledged that Claimant never reported leg pain prior to July 31, 2014.

40. Dr. Bernton testified that although decompression surgery was appropriate for Claimant, he would advise Claimant to get a second opinion as to whether fusion surgery should be performed.

41. The ALJ credits the testimony of Claimant regarding the onset of his low back and leg symptoms on July 31, 2014. The ALJ credits Claimant's testimony that he noticed back and leg pain over the course of the workday as he moved 16 large soda vending machines in the Vail area. The ALJ finds it is more likely than not that the physical activity Claimant engaged in while working for Employer on July 31, 2014 caused Claimant's back and leg symptoms.

42. The ALJ also credits the opinions of Dr. Gebhard and PA Meyer over the contrary opinions of Dr. Bernton regarding the work-relatedness of Claimant's low back condition. The ALJ finds that it is more likely than not that Claimant's work activity on July 31, 2014 caused Claimant to have low back and lower extremity symptoms, and that the employment aggravated, accelerated, or combined with a preexisting condition to cause disability and a need for treatment.

43. The ALJ finds that Claimant has demonstrated that it is more likely true than not that he sustained a work injury involving his low back in the course and scope of his employment with Employer with on July 31, 2014. The ALJ finds that Claimant has demonstrated it is more likely true than not he is entitled to medical benefits and treatment that may reasonably be needed to cure and relieve the effects of the July 31, 2014, injuries involving his low back.

44. The ALJ credits the opinions expressed by Dr. Gebhard and Dr. Frazho as credible and persuasive and determines that Claimant has established that it is more likely true than not that the proposed surgery recommended by Dr. Gebhard is related, reasonable and necessary to cure and relieve Claimant from the effects of his July 31, 2014, work injury. The ALJ finds that Respondents are responsible for the cost of the proposed medical treatment recommended by Dr. Gebhard pursuant to the Colorado Medical Fee schedule.

45. The ALJ finds that Claimant was taken off of work completely by Dr. Bratteli effective August 3, 2014. Claimant established that he was disabled from his usual employment commencing August 1, 2014, and is entitled to temporary total disability benefits (TTD) benefits commencing August 1, 2014, and continuing until terminated by law or statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. Claimant proved that moving heavy vending machines and other heavy equipment on July 31, 2014 caused an injury that aggravated, accelerated or combined with Claimant's preexisting condition to produce the disability and need for treatment.

5. The ALJ credits the testimony of Claimant along with the supporting medical opinions of PA Meyer and Dr. Gebhard over the contrary medical opinions of Dr. Bernton.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S.

7. Claimant proved by a preponderance of the evidence that the treatment provided by providers at Foresight Family Physicians, Work Partners, and by Dr. James Gebhard was reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

8. Claimant proved that the surgical treatment recommended by Dr. Gebhard is reasonable and necessary to cure and relieve Claimant from the effects of the work injury. The ALJ credits the medical opinions of PA Meyer, Dr. Frazho, and of Dr. Gebhard over the contrary opinions expressed by Dr. Bernton.

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

10. Claimant proved by a preponderance of the evidence that he sustained an injury that led to a medical incapacity in his ability to work. Claimant established that he did not work following July 31, 2014, injury because of back and leg symptoms that disabled him from performing his normal job. Claimant established that he is entitled to TTD benefits beginning August 1, 2014, and continuing until terminated by law or statute.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment provided by authorized medical providers to cure and relieve Claimant from

the effects of his July 31, 2014, industrial injury pursuant to the Colorado Medical Fee Schedule, including the surgery recommended by Dr. Gebhard.

2. Respondents shall pay Claimant TTD benefits commencing August 1, 2014, and continuing until terminated by law or statute.

3. Claimant's AWW is $870.00.

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

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

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

DATED: __8/24/2015_____

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts

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ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for prior authorization of L5-S1 anterior/posterior fusion surgery by Roger Sung, M.D. is reasonable, necessary and causally related to her May 30, 2014 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Deli Associate. On May 30, 2014 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. While moving a case of meat and starting to rotate, Claimant experienced a pulling sensation in her lower back area and pain in her right leg.

2. On June 5, 2014 Claimant visited Autumn Dean, M.D. for an examination. Dr. Dean diagnosed Claimant with a lumbar strain/spasm. She referred Claimant for physical therapy, ordered x-rays, assigned work restrictions and prescribed medications.

3. On July 3, 2014 Claimant underwent an MRI of her lumbar spine. The MRI revealed the following: (1) a grade 1 anterolisthesis of L5 over S1 measuring one centimeter secondary to bilateral spondylolisthesis; (2) mild degenerative changes from the L1-2 to L4-5 disc space with minimal grade 1 retrolisthesis of L2 over L3 measuring 0.4 centimeters; and (3) mild segmental neural canal and mild foraminal narrowing of the levels without evidence of nerve root impingement.

4. On July 31, 2014 Claimant visited Stephen Scheper, D.O. for an evaluation. He noted that Claimant was working full-time modified duty for Employer. Dr. Scheper explained that Claimant had suffered lower back pain in 2011 without any mechanism of injury. He remarked that she had been told she had arthritis in the spine and her symptoms resolved without treatment. After reviewing Claimant's July 3, 2014 MRI, Dr. Scheper commented that "[f]lexion and extension images refute instability of her spondylolisthesis; no surgical management is appropriate at this time." Dr. Scheper planned nerve conduction studies, a needle EMG of the bilateral lower extremities and consideration of right L2-3 and bilateral L5-S1 transforaminal epidural steroid injections.

5. On July 31, 2014 Dr. Scheper also conducted an EMG/NCS evaluation of Claimant's bilateral lower extremities. The testing revealed the following: (1) a mild, right L2-3 radiculopathy of recent chronicity; (2) a moderate, right greater than left L5 chronic, latent radiculopathy; (3) a moderate left L5 radiculitis; and (4) bilateral distal

sensory slowing that was likely related to peripheral polyneoropathy but not related to radicular pathology or consistent with the mechanism of injury.

6. On August 7, 2014 Claimant underwent a psychological evaluation with James H. Evans, Ph.D. He determined that Claimant was experiencing reactive depression secondary to her inability to engage in usual activities because of pain in her lower back, groin and legs from her industrial injury. In an Addendum to his report Dr. Evans remarked that on Symptom Checklist 90 Claimant endorsed 83 symptoms. The number of symptoms demonstrated a fairly high degree of emotional reactivity and the possibility of a hysterical, exaggerated response. Dr. Evans summarized that Claimant had a significant psychological overlay to her symptoms.

7. On September 3, 2014 Claimant returned to Dr. Scheper for an examination. Dr. Scheper determined that Claimant suffered from chronic lower back pain with lower extremity radicular symptoms, a right L2-3 subacute radiculopathy and bilateral L5 chronic radiculopathy that was minimally responsive to epidural steroid injections. He also remarked that imaging studies revealed L5-S1 degenerative spondylolisthesis.

8. On September 26, 2014 Claimant visited Roger Sung, M.D. for an evaluation. Dr. Sung obtained x-rays that showed a grade II spondylolisthesis at L5-S1 with quite significant degeneration of the disc. He noted that an MRI reflected significant L5 neural foraminal stenosis and a small disc bulge at the L2-3 level. Dr. Sung remarked that Claimant's situation was very complicated "in that a lot of her dysfunction is in her right anterior thigh and I really am not seeing a whole lot on this scan that would account for this."

9. On November 20, 2014 Claimant again visited Dr. Sung for an examination. She told Dr. Sung that her right thigh pain had resolved and really noticed how much the remainder of her symptoms were bothering her. She had completed physical therapy and received additional injections at L5-S1 but they had not resolved her posterior buttock and leg issues or her lower back pain. Dr. Sung discussed surgical intervention at the L5-S1 level. He set up an appointment in one month and planned to proceed with an L5-S1 anterior/posterior fusion if Claimant successfully quit smoking.

10. On January 20, 2015 Dr. Sung requested prior authorization for an L5-S1 anterior/posterior fusion. He diagnosed Claimant with spondylolisthesis and lumbar degenerative disc disease.

11. On April 20, 2015 Claimant underwent an independent medical examination with Wallace K. Larson, M.D. Dr. Larson concluded that the need for the recommended spinal surgery was not related to Claimant's industrial injuries because her ongoing symptoms were caused by the pre-existing conditions of spondylolisthesis and nerve root compression. He detailed that Claimant likely suffered a muscular strain to her lower back on May 30, 2014. Because the muscular strain would have resolved, Claimant's continuing symptoms constitute the natural progression of her pre-existing

L5-S1 spondylolisthesis. Dr. Larson noted that there was no objective evidence that the spondylolisthesis was caused by her work-related activities. He also commented that Claimant mentioned a large number of somatic symptoms and complaints, which combined with her history of cigarette smoking, placed her at a significant increased risk of surgical failure. Accordingly, surgical intervention was not reasonable or related to Claimant's May 30, 2014 industrial injury.

12. Claimant was previously treated for severe lower back pain and diagnosed with spondylolisthesis in 2011. On November 24, 2011 she was transported by ambulance to the St. Francis Medical Center Emergency Department. The ambulance report noted that Claimant was reporting pain at level 10 out of 10 in her lower back after she attempted to get out of bed. The ambulance drivers administered intravenous narcotic pain medications A subsequent CT of the abdomen and pelvis revealed spondylotic changes of the lumbar spine.

13. On December 18, 2011 Claimant presented to the Emergency Department of Memorial Hospital with lower back pain that had been present since Thanksgiving. The Emergency Department physician obtained another CT of the abdomen and pelvis with contrast. The CT revealed lumbar disease at L5 with a pars defect, degenerative changes and spondylolisthesis.

14. On June 7, 2015 Dr. Scheper wrote a rebuttal to Dr. Larson's independent medical examination of Claimant. He specifically responded to Dr. Larson's determination that Claimant's symptoms constituted the "natural progression" of her spondylolisthesis. Dr. Scheper explained that it was unlikely that Claimant would have been free of symptoms from November 2011 until the onset of her severe pain on May 30, 2014 if she was experiencing the natural progression of a pre-existing condition. Instead, he maintained that Claimant's May 30, 2014 symptoms constituted a "work-related aggravation of an admitted pre-existing condition" and that surgery was her best option.

15. Dr. Scheper also testified at the hearing in this matter. He maintained that Claimant did not experience the natural progression of her pre-existing condition but suffered a sudden change in symptoms on May 30, 2014. Dr. Scheper determined that Claimant's L5-S1 condition was affected by the May 30, 2014 incident because she went from fully functional with no pain complaints to the rapid onset of debilitating pain. Her symptoms suggested a "sudden change in anatomy" rather than the slow deterioration of her condition over time. Dr. Scheper explained that Claimant's rapid change of symptoms on May 30, 2014 necessitated surgical intervention because she had not responded to conservative treatment.

16. Dr. Larson testified at the hearing in this matter. He concluded that the fusion surgery recommended by Dr. Sung is not causally related to Claimant's May 30, 2014 industrial injury. Dr. Larson explained that spondylolisthesis is the primary diagnosis triggering the surgery recommendation. Spondylolisthesis is a developmental weakness in part of the vertebral body called pars interarticularis that allows a very slow slippage of one vertebral body over the next. The process typically occurs over many

years. As the vertebra slips over time people can develop pain in the lower back and sometimes into the legs. Dr. Larson reasoned that Claimant's spondylolisthesis almost certainly had existed for decades before the December 18, 2011 CT scan.

17. Dr. Larson explained that Claimant's current symptoms are the same as the spondylolisthesis diagnosed in 2011. Spondylolisthesis can commonly become symptomatic without a traumatic event. People often develop symptoms because of the gradual progression of the slippage. The natural expected course of spondylolisthesis is that symptoms will wax and wane.

18. Dr. Larson disagreed with Dr. Scheper's opinion that the May 30, 2014 incident directly impacted Claimant's L5 level. He noted that Dr. Scheper's determination was speculative because it was based on Claimant's subjective symptoms. There was a lack of objective evidence in the chart reflecting an injury to the L5 level or any acute damage. Furthermore, there was nothing on the MRI that revealed any fractures at the L5 level. There was also nothing on the MRI that showed an increased slip, a fracture or any other change in an identifiable structure. Based on Claimant's description, Dr. Larson remarked that she probably suffered a muscular strain caused by her work injury. Dr. Larson summarized that Claimant's ongoing medical treatment has addressed the L5-S1 spondylolisthesis and spondylolysis and not the lower back strain that she sustained at work. He concluded that, if the May 30, 2014 industrial accident had never occurred, Claimant's lower back pathology and need for fusion surgery would be the same as they are today. Accordingly, Claimant's symptoms constitute the natural progression of her pre-existing condition.

19. Dr. Larson testified that the EMG by Dr. Scheper showed Claimant had chronic changes in the L5 distributions suggesting long-term pressure on the nerves. The larger amplitude at the L5-S1 level was an indication that Claimant was having some progression of her spondylolisthesis. In contrast, there was nothing on the EMG that clearly supported recent trauma from Claimant's industrial accident. The slippage of spondylolisthesis is gradual because the disc provides internal stability. It stretches out the tissue over time.

20. Claimant has failed to demonstrate that it is more probably true than not that the request for prior authorization of L5-S1 anterior/posterior fusion surgery by Dr. Sung is reasonable, necessary and causally related to her May 30, 2014 admitted industrial injury. On May 30, 2014 Claimant suffered an admitted industrial injury to her lower back while working for Employer. After conservative treatment failed, Dr. Sung requested fusion surgery. However, the request for the L5-S1 anterior/posterior fusion is primarily an attempt to stabilize Claimant's long-standing spondylothesis. Dr. Larson persuasively explained that Claimant's continuing symptoms constitute the natural progression of her pre-existing L5-S1 spondylolisthesis. He noted that there was no objective evidence that the spondylolisthesis was the result of her work-related incident.

21. Dr. Larson detailed that spondylolisthesis is a developmental weakness in part of the vertebral body called pars interarticularis that allows a very slow slippage of one vertebral body over the next. The process typically occurs over many years. As the vertebra slips over time people can develop pain in the lower back and sometimes into the legs. Dr. Larson reasoned that Claimant's spondylolisthesis almost certainly had existed for decades before the December 18, 2011 CT scan. Furthermore, Dr. Larson testified that the EMG by Dr. Scheper showed Claimant had chronic changes in the L5 distributions suggesting long-term pressure on the nerves. The larger amplitude at the L5-S1 level suggested that Claimant was having some progression of her spondylolisthesis. In contrast, there was nothing on the EMG reflecting that Claimant suffered from recent trauma attributable to her industrial accident. Finally, Dr. Larson commented that Claimant mentioned a large number of somatic symptoms and complaints, which combined with her history of cigarette smoking, placed her at a significant increased risk of surgical failure.

22. In contrast, Dr. Scheper maintained that Claimant did not experience the natural progression of her pre-existing condition but instead suffered a sudden change in symptoms on May 30, 2014. Dr. Scheper determined that Claimant's L5-S1 condition was affected by the May 30, 2014 incident because she went from fully functional with no pain complaints to the rapid onset of debilitating pain. Claimant's rapid change of symptoms on May 30, 2014 necessitated surgical intervention because she has not responded to conservative treatment. However, the testimony of Dr. Scheper is not persuasive because it was based on Claimant's subjective symptoms. Dr. Larson explained that there was a lack of objective evidence reflecting an injury to the L5 level or any acute damage on May 30, 2014. Moreover, there was nothing on the MRI scan that showed an increased slip, a fracture or any other change in an identifiable structure. Based on the persuasive reports and testimony of Dr. Larson as well as the medical records, Dr. Sung's request for L5-S1 anterior/posterior fusion surgery is not reasonable, necessary or causally related to Claimant's May 30, 2014 industrial injury. Claimant's request for surgery is based on the natural progression of her pre-existing spondylolisthesis at the L5-S1 levels.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the request for prior authorization of L5-S1 anterior/posterior fusion surgery by Dr. Sung is reasonable, necessary and causally related to her May 30, 2014 admitted industrial injury. On May 30, 2014 Claimant suffered an admitted industrial injury to her lower back while working for Employer. After conservative treatment failed, Dr. Sung requested fusion surgery. However, the request for the L5-S1 anterior/posterior fusion is primarily an attempt to stabilize Claimant's long-standing spondylothesis. Dr. Larson persuasively explained that Claimant's continuing symptoms constitute the natural progression of her pre-existing L5-S1 spondylolisthesis. He noted that there was no objective evidence that the spondylolisthesis was the result of her work-related incident.

6. As found, Dr. Larson detailed that spondylolisthesis is a developmental weakness in part of the vertebral body called pars interarticularis that allows a very slow slippage of one vertebral body over the next. The process typically occurs over many years. As the vertebra slips over time people can develop pain in the lower back and sometimes into the legs. Dr. Larson reasoned that Claimant's spondylolisthesis almost certainly had existed for decades before the December 18, 2011 CT scan. Furthermore, Dr. Larson testified that the EMG by Dr. Scheper showed Claimant had chronic changes in the L5 distributions suggesting long-term pressure on the nerves. The larger amplitude at the L5-S1 level suggested that Claimant was having some progression of her spondylolisthesis. In contrast, there was nothing on the EMG reflecting that Claimant suffered from recent trauma attributable to her industrial

accident. Finally, Dr. Larson commented that Claimant mentioned a large number of somatic symptoms and complaints, which combined with her history of cigarette smoking, placed her at a significant increased risk of surgical failure.

7. As found, in contrast, Dr. Scheper maintained that Claimant did not experience the natural progression of her pre-existing condition but instead suffered a sudden change in symptoms on May 30, 2014. Dr. Scheper determined that Claimant's L5-S1 condition was affected by the May 30, 2014 incident because she went from fully functional with no pain complaints to the rapid onset of debilitating pain. Claimant's rapid change of symptoms on May 30, 2014 necessitated surgical intervention because she has not responded to conservative treatment. However, the testimony of Dr. Scheper is not persuasive because it was based on Claimant's subjective symptoms. Dr. Larson explained that there was a lack of objective evidence reflecting an injury to the L5 level or any acute damage on May 30, 2014. Moreover, there was nothing on the MRI scan that showed an increased slip, a fracture or any other change in an identifiable structure. Based on the persuasive reports and testimony of Dr. Larson as well as the medical records, Dr. Sung's request for L5-S1 anterior/posterior fusion surgery is not reasonable, necessary or causally related to Claimant's May 30, 2014 industrial injury. Claimant's request for surgery is based on the natural progression of her pre-existing spondylolisthesis at the L5-S1 levels.

ORDER

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

Dr. Sung's request for prior authorization of L5-S1 anterior/posterior fusion surgery is denied and dismissed.

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

DATED: July 30, 2015.

DIGITAL SIGNATURE:

_____

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

overruled. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, a deadline of 30 days for the filing of the evidentiary depositions of Danny Lopez , Rebecca Hohnstein, and the Claimant's rebuttal deposition was established. Thereafter, a responsive briefing schedule was established. Written transcripts of all three evidentiary depositions were filed on July 2, 2015. Instead of filing an opening brief, the Claimant filed a document labeled proposed order ('Findings of fact, Conclusions of Law and Order") on July 17, 2015, indicating that he had not reviewed the Respondents' brief. Despite the labeling of the document, the ALJ construes it as the Claimant's opening brief. On July 15, 2015, the Respondents' filed what was labeled as "Respondents Position Statement," which the ALJ construes as Respondents' answer brief. On July 20, 2015, the Respondents filed an unopposed "Motion to File Response to Claimant's" Proposed Findings of Fact, Conclusions of Law and Order," which was granted on July 27, 2015. On July 28, 2015, the Respondents filed what is labeled as "Respondents' Answer Brief," which the ALJ construes as the Respondents' reply brief. Based on the actions of the parties in taking and filing post-hearing depositions of all witnesses listed on the Respondents' case information Sheet (CIS), and the rebuttal evidentiary deposition of the Claimant, plus the fact that **no** continuation hearing has been set, the ALJ determines that the Respondents completed their case-in-chief by evidentiary depositions, and the Claimant completed his case in rebuttal by his evidentiary deposition. Consequently, as of the filing of the Respondents' reply brief on July 28, 2015, the ALJ deems the matter submitted for decision as of that date.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits, average weekly wage (AWW); and, a reservation of the issue of temporary total disability (TTD) benefits. The respondents raised the affirmative defense of 'responsibility for termination," and the issue of unemployment insurance (UI) offset.

Despite the fact that the Respondents initiated the hearing on all issues (which accounts for the mislabeling of the briefs), the Claimant bears the burden of proof, by a preponderance of the evidence, with the exception of the issues of "responsibility for termination,' and UI offset, in which case the Respondents bear the burden of proof, by preponderant evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds if compensable, to an AWW of $1,315.32.

2. The Claimant was born on January 7, 1953, and he was 62 years of age at the date of the hearing. The Claimant is right hand dominant.

3. Claimant was hired by Employer on or about July 22, 2014 as a delivery truck driver. The job required Claimant to make multiple local deliveries of petroleum in each shift. Deliveries required Claimant to drive and handle truck hoses to deliver product to customers.

Procedural History

4. The Claimant testified that he prepared a memorandum reporting his injury (Exhibit 6), which he hand delivered to the base office on a date uncertain, but before October 3.

5. On September 30, 2014, the Claimant called Rebecca Hohnstein (hereinafter "Hohnstein"), co owner of the Employer. Hohnstein advised the Claimant to bring in his access card, radio, and uniforms. She advised him that he was fired.

6. On October 3, 2014, the Claimant turned in his access card, radio and uniforms at the base office.

7. The Respondents filed a "First Report of Injury or Illness" on October 6, 2014.

8. The Respondents filed a Notice of Contest on October 14, 2014.

Prelude to the Injury Incident

9. It is undisputed from the testimony of the Claimant and Danny Lopez, the Employer's Dispatch and Operations Manager, that on September 22, 2014, the Claimant noticed a leak in one of the hoses attached to his delivery truck. He called Lopez and informed him of the leak. Lopez told him to return to the Employer's base of operations at 725 S. Main Street in Brighton ("Base"). The Claimant alleges he suffered a right shoulder injury from attempting to twist off the hose after returning to Base. The Employer denies that the Claimant engaged in that activity and suffered an injury. The ALJ finds that the Claimant did **not** suffer a right shoulder injury at this time, or at any time in the course and scope of his employment for the Employer herein.

10. The Claimant's counsel called Lopez as an adverse witness in his case-in chief, and Lopez also testified by post-hearing deposition in the Respondents' case-in-chief. According to Lopez, his responsibilities include monitoring the warehouse, ensuring employees complete their assigned tasks, and dispatching drivers to deliveries. At his deposition, Lopez testified that the Claimant was aware he was the Claimant's supervisor because new employees are informed of this during the interview process and employees know that Lopez is their supervisor simply from the course of their work. Rebecca Hohnstein corroborates Lopez, and she testified, in her evidentiary deposition, that she told the Claimant that Lopez was his supervisor. The Claimant denies that Lopez was his supervisor. The ALJ finds no plausible reason for Lopez and Hohnstein to say that Lopez was the Claimant's supervisor, if he was not. The Claimant's denial of this fact impairs his credibility. The ALJ finds that the Claimant knew, at all relevant times, that Danny Lopez was his supervisor.

The Injury Incident

11. According to Lopez, on September 22, 2014, the Claimant returned to Base around 4:00 PM. The leak was at a 3" hose connection where the fuel is sucked out from the storage container on the truck. Lopez testified the hose fits into a mount on the body of the truck, and the hose fits into the mount with a male/female coupling. The attachment is secured by flipping two ears prongs. Lopez testified to remove the hose, the ears would be unhooked, and then the hose pulled out. To put the hose back into the mount, it would be inserted, and the two ears would be secured. This contradicts the Claimant's version that the hose had to be twisted round to unhook it. The ALJ finds that Lopez's testimony concerning the removal of the hose is accurate and the Claimant's testimony in this regard is **not** accurate.

12. It is undisputed that the Claimant notified Lopez of the leak and then returned to Base for Lopez to examine the leak. Lopez testified he had removed a hose

of this type on occasions in the past, including when he himself had worked as a delivery driver. It is entirely logical that Lopez inspected the hose and removed the hose from the truck after the Claimant returned to Base for the specific purpose of having Lopez examine the hose and determine what repairs were required

13. Also, according to Lopez, when the Claimant returned to Base, another employee, Josh Peak, was in the vicinity and came over to assist. Lopez positively testified that the Claimant did not assist with removing the hose from the truck. Rather, Lopez asked Peak to grab a bucket for the leaking fuel while he removed the hose, and Lopez himself unhooked the hose and drained the remaining fuel from the hose into the bucket. At his deposition, Lopez testified that, when he removed the hose, it did not feel stuck or difficult to pull out. This squarely contradicts the Claimant's version of events. According to Lopez there was no indication that Tabares had tried to unhook the hose. Also Lopez stated that Tabares did not inform him that he had injured his shoulder, nor did he appear to be in discomfort. The ALJ finds that Lopez, and not the Claimant, removed the hose.

14. The Claimant testified that he knelt on the ground, and then tried to detach the hose from the truck mount. He testified that detaching the hose was not easy, that he had to put some force and twisting action into the detachment and that, in the process, he hurt his right shoulder. He further testified that Peak had to finish detaching the hose. He also testified that Lopez never touched the hose. This contradicts Lopez's testimony that Lopez had to unhook the hose. The Claimant further testified that he did not say anything to Lopez or Peak about his shoulder since he considered neither of these individuals to be his supervisor. In his mind, the co-owner, Becky Hohnstein ("Hohnstein"), was his only supervisor. The ALJ infers and finds that the Claimant's belief in this regard is contrary to reality. The Claimant's testimony contradicts Hohnstein's and Lopez's testimony. The ALJ finds that Lopez, and not the Claimant, removed the hose.

15. Lopez positively testified that it was unnecessary for the Claimant to have tried to twist the hose to remove it. Lopez stated there was no twisting involved with unhooking the latches or pulling the hose out. Rather, it required a forward and backward movement to insert or remove the hose. Lopez clarified in his post-hearing deposition that the hose was a suction hose, which only required lifting the ears and pulling out the hose. He also testified that the male/female interlocking parts did not even allow the hose to be moved from one side or the other once inserted. Lopez testified at hearing that the Claimant's description in his written statement that he tried to "unhook and twist off the hose" did not make sense with how the hose would be removed. The ALJ accepts Lopez's version of the "hose removal," and rejects the Claimant's version because Lopez has no direct interest in the outcome of this claim,

there has been no showing of animosity for the Claimant as a motive, and Lopez version makes sense and the Claimant's version makes **no** sense.

16. According to the Claimant, he injured his right shoulder at approximately 4:00 PM, on September 22, 2014 at Base. The Claimant testified that when he returned with the truck to Base, Lopez instructed him to take the hose off the mount. The Claimant testified that he knelt down to remove the hose. He further testified that after the ears were pulled back it was difficult disconnecting the male/female connection. He testified he could not pull out the hose. He testified while trying to twist the hose off he hurt his right shoulder, he immediately stood up, backed away from the truck, and put his left hand on his right shoulder. The Claimant testified that he felt something ripping in his right shoulder. He testified his pain at that time was 10/10, where 10/10 was so severe one would want to commit suicide. He testified he did not tell Lopez he was hurt, because Lopez was just a dispatcher and not his boss. The Claimant's testimony is contradicted by Lopez, who has no direct interest in the outcome of this claim. The ALJ finds the Claimant's version of the alleged hose removal incident as lacking in credibility. Moreover, the ALJ finds Lopez's version more credible than the Claimant's version of the incident and, as found, the Claimant did **not** remove the hose.

17. The Claimant acknowledged that the hose had a male/female part where the male part on the hose fit into grooves of the female mount, which would require the hose to be inserted and pulled out in backwards and forwards motions. Despite this, he stated that twisting the hose helped with removing it, and the twisting caused his right shoulder injury. Based on the Claimant's concession concerning the male/female mounts and the pulling backwards and forwards to remove the hose, as also testified to by Lopez and Peak, the Claimant's "twisting" version makes no sense, and it undermines his version of the mechanics of his right shoulder injury.

18. According to the Claimant, after he moved away from the vehicle in pain, Josh Peak wound up disconnecting the hose. The Claimant testified that Peak put a bucket under the hose to allow it to drain, and the Claimant testified that Peak lifted the center part of his hose with his left hand to finish draining the fuel. The ALJ infers and finds the Claimant's version of Peak finishing the disconnection of the hose disingenuous insofar as it attempts to be consistent with Peak's role in the removal of the hose. Lopez, however, testified that he removed the hose, and the Claimant had no role in the removal of the hose.

Aftermath of the Incident

19. After the hose was removed, according to Lopez, he told the Claimant to use the other mounts on his truck to finish his scheduled deliveries for that day, and that the Claimant was to take the truck to have the leaking hose repaired the next morning.

At that point, according to Lopez, the Claimant requested the set-up of the mounting location be changed as well to be moved higher and closer to the front of the truck. Lopez told the Claimant that he would not approve that change, because it would be costly (there is an indication that it would cost between $15 and $20 thousand dollars), it would take the truck out of service, it was not necessary to fix the leak, and the company has never had issues related to the location of the mounting and hose. According to Lopez, the Claimant appeared frustrated at this denial, shook his head, and then left Base for the day. The ALJ finds Lopez's testimony in this regard accurate.

20. Lopez prepares a dispatch sheet every evening assigning deliveries for his drivers the following day. He would post this dispatch sheet in the office for his drivers to see the next morning, and he placed tickets for the individual jobs in a basket that was next to the dispatch sheet. He also stated he would fax the sheet to his other warehouse in Commerce City, so that the warehouse would know what product to pull for the drivers. According to Lopez, drivers became aware of their assigned deliveries by checking the dispatch sheet and grabbing their tickets when they arrived in the morning. Lopez never assigns work by walking up to drivers and delivering tickets, contrary to what the Claimant testified he expected the next morning. The Claimant's written statement, which noted that the Claimant waited outside for deliveries to be assigned, is contrary to Lopez's, the dispatcher, testimony (*See* Respondents' Exhibit). E. The only way deliveries would be assigned would be by the dispatch sheet. In this regard, the ALJ finds Lopez's testimony credible and the Claimant's testimony lacking in credibility.

21. According to Lopez, the dispatch sheet (Respondents' Exhibit D, p. 12), is the sheet he prepared the night of September 22, 2014, for September 23, 2014. Lopez testified that the copy of the dispatch sheet used at hearing was the same as the one he prepared on the evening of September 22, and it had not been altered since that time. At his deposition, he stated that the time stamp on the bottom of the page which states "Received Time Sep. 22 2014 6:13PM No. 7737," is a fax confirmation showing receipt of the sheet to the Commerce City warehouse on that date.

22. The Claimant is identified as "TJ" on the dispatch sheet. Lopez testified that on September 23, 2014, the Claimant was required to complete his deliveries from the day before that were held up due to the discovery of the leak, taking the truck in for the repair, and then completing those deliveries listed under his name on the September 23, 2014 dispatch sheet. Lopez understood that the Claimant may not have been able to finish all of his assigned September 23 deliveries, but Lopez testified that he expected the Claimant to begin those jobs after the quick repair was completed.

The Hose Leak Repair

23. According to Lopez, the next day, on September 23, he received a call from an employee of the repair vendor, Polar, advising that the Claimant was requesting the location of the hose mounting of the truck be moved, as the Claimant had proposed to Lopez the day before. Lopez responded that the change was not authorized, only the repair of the leaking hose. At this time, Lopez was still not aware that the Claimant was alleging he had suffered a right shoulder injury the day before.

24. Lopez saw the Claimant return from Polar with the repaired vehicle at approximately 12:00 PM, and then he saw the Claimant leave Base in his personal vehicle. Lopez tried calling the Claimant on his cell phone when he saw him leaving, but the Claimant did not answer or call him back that day. Lopez assumed that the Claimant simply went off-site for lunch at the time he saw him leave. Lopez discovered, however, two or three hours later, that the Claimant's tickets for his jobs assigned for that day were still in the basket next to the dispatch sheet and had not been picked up or completed by the Claimant. Lopez assumed that the Claimant had quit due to the Claimant's leaving work without completing his deliveries. Lopez was still not aware that the Claimant was alleging a work-related right shoulder injury.

September 24, 2014/Claimant's Termination

25. Lopez prepared a dispatch sheet for September 24, 2014 on the evening of September 23, 2014 (Respondents' Exhibit D, p. 13). He did not assign any jobs to the Claimant based upon his assumption that the Claimant had quit. He specifically disputed the Claimant's written statement that he had covered up the Claimant's name with white tape on the dispatch sheet at the time it was posted. In this regard, the ALJ finds Lopez credible and the Claimant's testimony lacking in credibility.

26. On September 24, 2015, Lopez arrived at work around 7:00 AM. He stated that the Claimant came into the office and asked if there was any work for him, and Lopez told him "no." It was Lopez's decision to not assign the Claimant work due to the events of the prior day, and Lopez had not yet consulted with Rebecca Hohnstein regarding the Claimant's employment status. As a result, Lopez had nothing more to inform the Claimant at that time. On September 24, 2014, Lopez informed Hochstein of the events from the previous day involving the Claimant. Lopez stated that Hochstein informed him (Lopez) at that time that the Claimant was fired.

27. Lopez's drivers prepared logs documenting their deliveries. The log marked as Respondents' Exhibit D, p. 10, was the Claimant's log for his work on September 22 and 23, 2014. According to Lopez, the deliveries applicable for September 22, 2014 run through the Valley Crest entry. *Id.* According to Lopez, the Sinclaire entry thereafter documented the Claimant's arrival at the Employer's terminal

at 5:40 AM on the following day, followed by two off-site deliveries. *Id.* Lopez further testified that the sheet shows the Claimant's time at Polar for the repairs and return to Base at 12:20 PM. *Id.* The jobs listed on the September 23, 2014 dispatch sheet are not listed on the Claimant's September 23, 2014 daily log, showing that he did not complete those jobs. *See Id.* at pp. 10 & 12.

The Hose Repair and Subsequent Deliveries According to the Claimant

28. According to the Claimant, after the hose had been removed, Lopez instructed him to use the other mounts to complete his deliveries and have the truck repaired the next day. The Claimant testified that he then suggested to Lopez that they change the location of the mount. According to the Claimant, Lopez did not acknowledge his request.

The Claimant's Testimony Concerning the Hose Repair

29. According to the Claimant, the next day he completed two deliveries and then was instructed by Lopez to take the truck to Polar for the repairs. The Claimant stated that he called Rebecca Hohnstein, the owner, from Polar after being told that Lopez had not authorized his suggestion. The Claimant testified that he requested from Hohnstein that the mount be moved on the truck, and that he told her about the alleged injury at that time. He testified that she "didn't say anything" about the injury and did not approve the redesign. Hohnstein denies that the Claimant informed her of a work-related injury at the time, however, she admits that she would not approve the Claimant's suggested repair of re-doing the mounts.

30. According to the Claimant, when he came back to Base, he went inside to look for more work on the dispatch sheet. The Claimant testified the September 23, 2014 dispatch sheet had his name whited out and there were no work assignments under his name. He testified the dispatch sheet entered into evidence as *Respondents' Exhibit D*, p. 12, was not the same sheet as what was posted. He also suggested that the dispatch sheet was therefore modified after the fact to make it seem like he had jobs on that day. The Claimant stated he cleaned his truck, waited outside to see if someone would bring him more work, and clocked out and left. The ALJ infers that the Claimant's actions of looking for work are inconsistent with his allegedly "severe" right shoulder injury. As found herein above, the ALJ does not find the Claimant's version of the "whited out" dispatch sheet credible. It is contradicted by Lopez's testimony, and it makes no sense for Lopez to have "whited" out the Claimant's name for September 24, 2014. Lopez testimony has indicia of regularity in keeping dispatch sheets. The Claimant's version suggests a "grand conspiracy theory," without any other supporting evidence than the Claimant's bald statement.

31. According to the Claimant, he clocked in when he arrived in the morning. He did not see any assignments on the dispatch sheet for him so he left. He testified he did not see or talk to Lopez on that day. He testified he assumed that the Employer did not want to assign him any jobs because he suffered an injury, and he did not show up to work on subsequent days because he was not assigned work on September 24, 2014. The Claimant testified he talked with Hohnstein over the phone on September 30, 2014, and he alleged she told him to turn in his equipment. He testified that he interpreted that as him being fired. The ALJ infers and finds that the Claimant's testimony, regarding his informing Hohnstein of his injury is contradicted by Hohnstein. It makes no sense for Hohnstein to ask the Claimant to turn in his equipment and fire him after he reported an injury to Hohnstein.

Rebecca Hohnstein

32. Rebecca Hohnstein testified by post-hearing deposition. She positively testified that Lopez was the Claimant's supervisor, which included determining the Claimant's work schedule, coordinating repairs of the vehicles, managing deliveries, and "anything that has to do with the trucks, and the drivers, and deliveries to customers" (Hohnstein Depo, p. 4, ll. 2-18), and the ALJ so finds. She testified that she told the Claimant that Lopez was his supervisor, and the ALJ so finds.

33. According to Hohnstein, the first time she was aware of the leaking hose was on September 23, 2014, when the Claimant called her from Polar requesting authorization for the redesign changes to the truck. She testified that the Claimant told her that Lopez had denied the changes, and she agreed with the denial. She also testified that the Claimant sounded aggravated with her denial based upon the tone of his voice. Hohnstein positively testified that the Claimant did not inform her that he had suffered an injury, and the ALJ so finds.

34. The next time Hohnstein heard of any issues involving the Claimant was the next day when Lopez informed her that the Claimant had left the job site the prior day without completing his deliveries.

35. According to Hohnstein, she figured that the Claimant had quit because he was mad that his requested changes were not approved. She also testified the Claimant's leaving the job site without completing his tasks were grounds for termination. In Hohnstein's opinion, the Claimant's return to work on the morning of September 24, 2014 did not cure his abandonment the prior day. Hohnstein did not call the Claimant on that day because she expected him to be calling her in the next couple days anyway to pick up his final check. She stated that he did call her four or five days later to arrange for dropping off his equipment and picking up his check, and she confirmed with him at that time that his employment was terminated. Hohnstein

positively testified that the Claimant had not informed her of an injury as of that date, and the ALJ so finds.

36. There is an undertone in the Claimant's argument that Lopez and Hohnstein conspired against the Claimant in creating an argument that he did not complete deliveries to which he was assigned on September 23, 2014 and that the Claimant could have completed his remaining September 22 assignments, have the truck repaired, and completed additional assigned deliveries on September 23. The Claimant cites a portion of Lopez's deposition for the proposition that Lopez did not know how long the repairs were to take. Lopez shortly thereafter, in his deposition, went on to clarify that he did not believe the repairs would take long or prevent the Claimant from completing his additional deliveries, as follows:

> Q: And we established you didn't know how long would take. Correct?
>
> A: It was just a hose. I didn't think it was going to take that long.
>
> Q: Okay. So what you are saying is you expected him to do the two jobs he hadn't done, get the hose repaired, and complete five deliveries?
>
> A: Correct. Yeah, correct.

The complete picture of Lopez's testimony paints a different picture than that portrayed by the Claimant. The actual timing of the events proved Lopez's testimony to be true. The Driver's Daily Log for September 23, 2015 shows that Claimant completed his two carryover repairs from the prior day early on the 23rd [Brannan Mix and 5280 Waste]. Respondents' Ex. D, p. 10. The Claimant then took the truck in for repairs, which were completed by noon. Lopez's testimony that he assigned the Claimant additional assignments for September 23, 2015, because he felt the Claimant could complete his remaining repairs from the prior day and have the hose fixed in a short amount of time was proven true. The Claimant had the entire afternoon to complete a new set of assigned deliveries. The Claimant's position that it is not credible that Lopez would have assigned the Claimant additional jobs for September 23, 2014 is itself lacking in credibility when the Claimant himself admitted he had completed with his work and the repairs by noon on that date, and that he was looking for additional work.

Medical

37. On October 9, 2014, the Claimant saw Paul Raford, M.D. who noted a chief complaint of "right shoulder pain" and noted a history, given by the Claimant, as follows: "He tried to bend down and find the valve between the bumper and another valve and twisted, facing toward the left and kneeling. He then had acute onset of right shoulder pain and felt a 'grating'." (Exhibit C, Bate p.7). The ALJ finds that the history

the Claimant gave Dr. Raford is **not** accurate because the Claimant did not unhook the valve (hose). Lopez unhooked it.

38. Dr. Raford assessed "right biceps tendon, shoulder sprain, and moderate suspicion for internal derangement." He recommended occupational therapy, naproxen and topical creams. Dr. Raford returned the Claimant to "full duty modified duty with a 5-pound weight limit with the right upper extremity, no over-stomach-level motion, and no climbing of ladders" (Exhibit C, Bate pp. 8-9). Because the Claimant has failed to prove an injury arising out of the course and scope of his employment for the Employer herein, Dr. Raford's evaluations and treatments are **not** work-related.

39. Claimant has not received any further treatment because, according to him, he does not have personal health insurance.

Ultimate Findings

40. The ALJ finds the Claimant's testimony lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, the ALJ finds Lopez's and Peak's version of events credible.

41. The ALJ makes a rational choice, between conflicting testimonies, to accept the credibility of testimonies of Danny Lopez and Rebecca Hohnstein and to reject the credibility of the Claimant's testimony.

42. This case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. The Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein, and it is not credible. This lack of credibility undermines the Claimant's theory of an injury occurring within the course and scope of his employment, and arising out of his employment. Therefore, the ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014, arising out of the course and scope of his employment.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony is lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, Lopez's and Peak's version of events is credible, and the Claimant's version is **not** credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App.

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

Compensability

c. "Course of employment" deals with the time, place and circumstances of an employee's injury. *See General Cable Co. v. Indus. Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994). As found, the Claimant failed to prove, by preponderant evidence that he sustained the right shoulder injury in the course and scope of his employment for the Employer herein. "Arising out of employment" deals with the proximate causal connection between the employment and the injury. *See L.E.L Construction v. Goode,* 849 P.2d 876 (Colo. App. 1992), *rev'd on other grounds, L.E.L. Construction v. Goode,* 867 P.2d 875 (Colo. 1994). The Claimant failed to prove a proximate causal connection between his right shoulder condition and his work for the Employer.

d. An "unexplained injury satisfies the "arising out of" employment requirement in § 8-41-301 (1) (c), C.R.S., if the injury would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he was injured. The phrase "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of injury. *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** As found herein above, the Claimant failed to prove that his right shoulder condition even happened while he was at work.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, this case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. As found, the Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein and the Claimant's version is not credible. This lack of credibility undermines the Claimant's theory of compensability. Therefore, as found, the Claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this_____day of August 2015.

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_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

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ISSUE

A determination of Claimant's correct Employer on April 15, 2014.

FINDINGS OF FACT

1. Claimant testified that he worked for Employer at a Popeye's restaurant in Northglenn, Colorado. On April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead.

2. Claimant explained that, at the recommendation of Employer's Store Manager, he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14.

3. Respondent did not appear at the hearing in this matter. However, representative of Employer Nick Amirian submitted documents on Employer's behalf reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold. In fact, the documents reveal that all Popeye's stores operated by Employer were part of a sale/transfer agreement to HZ Foods, LLC on September 9, 2013. Moreover, the Division of Workers' Compensation website for insurance coverage verification (https;//www.colorado.gov/pacific/cdle/node/20371) reflects that HZ Foods, LLC had Workers' Compensation insurance coverage in place for various Popeye's locations on the date of Claimant's injuries.

4. Claimant credibly explained that he sustained head injuries on April 15, 2014 during the course and scope of his employment. Claimant's credible testimony reflects that on April 15, 2014 he was opening a partially broken freezer door that came off and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead. Claimant obtained treatment at HealthOne North Suburban Medical Center for his injuries and incurred total charges of $2,114.26 with an estimated balance of $317.14.

5. Although Claimant suffered head injuries on April 15, 2014, the record reveals that Employer was not liable for the injuries. The persuasive evidence reflects that Employer ceased doing business in Colorado on September 9, 2013 because the company was sold. All Popeye's stores operated by Employer were part of a sale/transfer agreement to HZ Foods, LLC on September 9, 2013. Moreover, the Division of Workers' Compensation website for insurance coverage verification reflects

that HZ Foods, LLC had Workers' Compensation insurance coverage in place for various Popeye's locations on the date of Claimant's injuries. HZ Foods, LLC was thus Claimant's employer on April 15, 2014. Accordingly, Claimant's claim against Respondent is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

5. The identity of the liable employer in a Workers' Compensation case is a question of fact for the ALJ. The determination of the liable employer is based on the totality of the circumstances. *See MeInick v. Industrial Commission,* 656 P.2d 1318 (Colo. App. 1982).

6. As found, although Claimant suffered head injuries on April 15, 2014, the record reveals that Employer was not liable for the injuries. The persuasive evidence reflects that Employer ceased doing business in Colorado on September 9, 2013 because the company was sold. All Popeye's stores operated by Employer were part of a sale/transfer agreement to HZ Foods, LLC on September 9, 2013. Moreover, the Division of Workers' Compensation website for insurance coverage verification reflects that HZ Foods, LLC had Workers' Compensation insurance coverage in place for various Popeye's locations on the date of Claimant's injuries. HZ Foods, LLC was thus Claimant's employer on April 15, 2014. Accordingly, Claimant's claim against Respondent is denied and dismissed.

ORDER

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

HZ Foods, LLC was Claimant's Employer on April 15, 2014. Claimant's claim against Respondent is denied and dismissed.

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

DATED: August 20, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

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

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ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an occupational disease proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits commencing January 5, 2015 and continuing?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and authorized medical benefits?

FINDINGS OF FACT

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

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

2. Claimant testified as follows. In 2014 she worked for the Employer as a receiving and repack worker. In this job she lifted boxes from a pallet and put them on a wheeled cart. It took 5 to 6 minutes to load the cart with boxes. The boxes contained various food products and soap and weighed between 10 and 50 pounds. When the cart was fully loaded with boxes she pushed it to a shelving area. She would then cut open the boxes with a "knife-like tool" (box cutter) and place the opened boxes on the shelves. The claimant would cut open about 50 and 100 boxes per day. She typically worked 90 hours over two weeks.

3. Claimant further testified as follows. In March 2014 she began to experience pain in her thumb that moved up her forearm to the outside of the elbow. The pain was especially noticeable when she was cutting open boxes. Claimant explained that she gripped the box cutter with her thumb holding one side and the four opposing fingers grasping the other side. Despite these difficulties she continued performing her job. By May she was still experiencing a lot of pain that ran from her right thumb up to her elbow. As a result she decided to go to her primary care physician Joseph Soler, M.D.

4. Claimant testified that prior to commencing work for Employer in 2003 she had no wrist or elbow pain and she never saw a physician for these symptoms.

5. On May 16, 2014 Dr. Soler examined Claimant. Dr. Soler recorded that Claimant was seen for follow-up of her "Right elbow Pain, Hypothyroidism, Polyarthralgias, [and] Myalgias." Dr. Soler noted the complaints of "joint pain" in the right elbow were better. He recommended Claimant continue with "former meds" for the elbow pain and continue with the treatment plan established for the other conditions. Dr. Soler's May 16 notation contains no explicit mention of right hand, thumb, wrist or forearm pain.

6. Claimant testified that after she saw Dr. Soler on May 16, 2014 she continued performing her regular job duties. She continued feeling the same pain from her wrist to the elbow and decided to return to Dr. Soler.

7. Claimant returned to Dr. Soler on July 26, 2014. On July 26 Dr. Soler noted a complaint of "hand pain" and stated Claimant was present for follow-up of her "Hypothyroidism, Right Wrist pain, Myalgia, [and] Polyarthralgia." Dr. Soler noted Claimant was "still having problems with her R-wrist pain." Dr. Soler recommended x-rays of the right wrist. He prescribed medication for Claimant's other diagnoses.

8. Claimant testified that her pain never stopped and at some point in time she decided to see a chiropractor. The chiropractor recommended that she see a hand specialist. As a result Claimant made an appointment to see Kavi Sachar, M.D., of Hand Surgery Associates, PC.

9. Dr. Sachar examined Claimant on July 28, 2015. Claimant gave a history of right wrist pain that had been present for about 3 months and "started after she started a new job." On examination Dr. Sachar noted swelling over the "1st DC," tenderness over the "1st DC," a positive Finkelstein's maneuver and limited ulnar deviation with pain. Three-view right wrist x-rays were negative. Dr. Sachar assessed right de Quervain's. He injected Claimant's first dorsal compartment with xylocaine and corticosteroid.

10. On August 18, 2014 Dr. Sachar noted Claimant was "doing very well" after the right first dorsal compartment injection. Dr. Sachar further stated that Claimant's symptoms were "resolved" but she had "not yet get gone back to work." Dr. Sachar recorded that Claimant had a full range of motion and a negative Finkelstein's test. He wrote that Claimant was "offered two weeks."

11. Claimant testified as follows. After the injection she was on vacation for approximately two weeks. She stated that when she returned to Dr. Sachar she advised him she experienced a "little less pain" after the injection. She returned to work after the vacation and again experienced pain extending from her hand to her elbow. As a result she made another appointment with Dr. Sachar.

12. On September 24, 2014 Dr. Sachar again examined Claimant. She was seen for follow-up of "right de Quervain's." Dr. Sachar noted the injection he performed "did not help." Dr. Sachar's examination demonstrated the presence of a ganglion cyst over the right first dorsal compartment and a markedly positive Finkelstein's test. Dr.

Sachar recommended Claimant undergo surgery described as a "right first dorsal compartment release and ganglion cyst excision." Claimant was limited to lifting no more than 5 pounds with the right upper extremity.

13. On September 25, 2014 Claimant reported her alleged injury to the Employer. She completed a written report in which she stated that she injured her right hand and a "tendon" by lifting and opening boxes every day. Employer referred Claimant to Occupational Medicine (Occ Med) for treatment.

14. On September 25, 2014 Claimant reported to Occ Med where she was evaluated by PA Jim Keller. Claimant gave a history that she had worked for the employer for 11 years but changed duties when she was assigned "from inventory to receiving in March of this year." Claimant reported the new job required her to lift heavy boxes and stock them. She started to experience pain in her "right wrist and elbow that progressively got worse." She was seen by Dr. Sachar who "determined this was a work-related injury." On examination of the right hand PA Keller noted a ganglion cyst and "extreme discomfort subjectively" with provocative motion of the thumb. The right elbow was "exquisitely tender with palpation of the lateral epicondyle and less so at the medial epicondyle." The elbow exhibited no crepitus or instability. PA Keller assessed right de Quervain's tenosynovitis, a ganglion cyst and right lateral and medial epicondylitis. Keller opined Claimant would not need to be seen at Occ Med again until after the "first postoperative visit with Dr. Sachar."

15. On September 25, 2014 PA Keller completed a Physician's Report of Workers' Compensation Injury (WC 164). He marked a box indicating that his "objective findings" were "consistent with history and/or work related mechanism of injury/illness." He listed his work-related diagnoses as right de Quervain's tenosynovitis, ganglion cyst and right lateral and medial epicondylitis. PA Keller imposed right upper extremity restrictions of no lifting or carrying greater than 5 pounds, no pinching or gripping. Claimant was also instructed to wear a splint and an arm band.

16. On October 23, 2014 Jonathan Bloch, D.O., examined Claimant at Occ Med. Claimant's chief complaints were right wrist and elbow pain. Dr. Bloch noted Claimant's work history of "handling packaging, shipping, and receiving at a company for 11 years." Dr. Bloch opined that "based on the Colorado Work Comp. Guidelines and the nature of her packing, receiving, scalpel use, and working with the orders and supplies that this would be reasonably compensable underneath those Guidelines." Dr. Bloch stated that he had not received Dr. Sachar's notes and was not "exactly sure what the diagnosis is here." Dr. Bloch recommended "an MRA of the right wrist and an MRI of the right elbow, as well as EMG of the right upper extremity."

17. On October 23, 2012 Dr. Bloch completed a WC 164. He marked a box indicating that his "objective findings" were "consistent with history and/or work related mechanism of injury/illness." Dr. Bloch also noted Claimant was working and that she was able to return to work at modified duty with a restriction of no use of the right arm.

18. On November 7, 2014 either PA Keller or Greg Smith, D.O., examined Claimant at Occ Med. Claimant complained of right wrist and elbow pain. The examiner noted Claimant was "tolerating work well." He commented that the surgery recommended by Dr. Sachar and the diagnostic procedures recommended by Dr. Bloch had not been completed because the claim was "under investigation." On PE there was no gross deformity of the right upper extremity except for a ganglion cyst "just inferior to the radial styloid." Any motion caused pain and Claimant was "extremely tender to palpation along the lateral and medical epicondyles." The examiner assessed "elbow enthesopathy." He recommended the continuation of "modified work restrictions" and that Claimant wear splints.

19. On November 21, 2014 Dr. Smith examined Claimant. Dr. Smith assessed a right-sided ganglion cyst and stated "whether this is work related could be challenged." He also assessed a "positive Finkelstein's with de Quervain's," and stated that he felt this was work-related. Dr. Smith also assessed "mild epicondylitis."

20. On December 8, 2014 Ms. Gail Pickett (Ms. Pickett), vocational consultant, performed a "Job Analysis" of the tasks Claimant performed at work. Pickett noted Claimant generally worked 8 hour shifts 5 days per week, but hours varied with the season. Pickett noted that prior to May 2014 Claimant worked in a cold area (34 degrees) receiving groceries. In this position she lifted up to 50 pounds at the "low end of occasional" (1% - 33% of workday) and 30 pounds occasionally. In May 2014 Claimant was removed from the cold area because, according to the Employer, the temperature "was aggravating the arthritis in her feet." Pickett described the pre-May 2014 duties as "medium work." After May 2014 Claimant worked in an area that was 54 degrees and she was not required to lift more than 10 pounds. She lifted up to 10 pounds frequently (34% - 66% of workday). Pickett observed that Claimant constantly used her hands during the workday but did "not do the same task repetitively." Claimant used her hands to perform multiple tasks that included manipulating pieces of paper, writing, lifting boxes and scanning. Pickett described the post-May 2014 duties as "light work."

21. On December 10, 2014 Allison Fall M.D., performed an independent medical examination (IME) at Respondents' request. Dr. Fall is board certified in physical medicine and rehabilitation and is Level II accredited. In connection with the IME Dr. Fall took a history from Claimant, reviewed medical records, reviewed the job analysis and performed a physical examination (PE). At the time of the IME Claimant reported symptoms in her right wrist, forearm, elbow, shoulder as well as her neck and back. On PE Dr. Fall found no right upper extremity swelling or erythema. There were positive Tinel's signs over "areas not corresponding to a nerve." A Finkelstein's maneuver could not be completed because Claimant "indicated she could not flex her fingers." There "was not focal tenderness over the epicondyles" but rather diffuse complaints of pain.

22. In the IME report Dr. Fall assessed right "distal upper extremity complaints, nonlocalizing without specific diagnosis or physiologic explanation." She also assessed "[P]rior diagnosis of dorsal compartment tenosynovitis (de Quervain's

tenosynovitis) and dorsal ganglion cyst, resolved." Dr. Fall opined that currently there was "no diagnosis based on lack of objective findings correlating with symptoms." With regard to Dr. Sachar's prior diagnosis of de Quervain's tenosynovitis Dr. Fall considered Claimant's history and the job analysis. Dr. Fall then applied the Cumulative Trauma Conditions Medical Treatment Guidelines (MTG) (WCRP 17 Exhibit 5) matrix/algorithm for the determination of causation. Dr. Fall opined that Claimant was exposed to only one "secondary risk factor" of working in a cold temperature prior to May 14, 2014. However, Dr. Fall noted cold temperature is not associated with a diagnosis of de Quervain's disease under the "diagnosis based risk factors" portion of the algorithm. Instead, the only specific risk for de Quervain's disease is a combination of force, repetition and posture which is not present in this case. Dr. Fall explained that the only "force" required by Claimant's job was lifting boxes and that was done "intermittently" and not "continuously."

23. Dr. Smith examined Claimant on December 12, 2014. Dr. Smith reported Claimant had significant pain to palpation in her right arm and minimal grip. He noted she had a positive de Quervain's test. Dr. Smith assessed de Quervain's tenosynovitis, a minimal ganglion cyst and "right medial and right lateral epicondylitis that is part of the entire pain threshold today and not just its own entity." Dr. Smith prescribed Voltaren, recommended referral to "Dr. Hawkins" for depression and recommended that Claimant undergo an EMG.

24. Claimant testified as follows. On January 5, 2015 her supervisor requested that she apply for short term disability (STD) benefits. Claimant applied but the request for STD was denied because this workers' compensation case was pending. When the STD benefits were denied she was still under the restriction of no use of the right hand. She needs both hands to perform her job duties and the Employer told her she cannot return to work until she has 100% use of both hands. The Employer has not offered her any job since she left work on January 5, 2015.

25. Claimant testified that her symptoms did not improve while she was working light duty between September 25, 2014 and January 4, 2015. She further testified her symptoms have not improved since she stopped working in January 2015.

26. On January 29, 2015 Larisa Ravdel, M.D., performed an "annual physical" examination of Claimant. Dr. Ravdel stated the claimant was "not able to continue to work with one hand due to R. hand pain." Dr. Ravdel noted Claimant denied "other specific complaints." Dr. Ravdel assessed "tendinitis" of the right forearm, acquired hypothyroidism and "overweight."

27. On March 2, 2015 John S. Hughes, M.D., performed an IME at Claimant's request. Dr. Hughes took a history from Claimant, reviewed medical records, reviewed the job analysis and performed a PE. Claimant reported that she had worsening "radial arm and hand pain." Dr. Hughes noted he did not have Dr. Sachar's notes. Dr. Hughes assessed the following: (1) Hypothyroidism; (2) Right de Quervain's tenosynovitis with recrudescence of symptomatology; (3) Right lateral epicondylitis; (4) Probable bilateral shoulder rotator cuff tendinopathy. Dr. Hughes stated that like Dr. Bloch and Dr. Fall he

found “it difficult to establish a definite diagnosis of [Claimant’s] right upper extremity conditions” although it seemed “fairly clear she has sustained onset of de Quervain’s tenosynovitis as well as right lateral epicondylitis.” Dr. Hughes stated the he, like Dr. Fall, did not “see that there has been a substantial injurious activity factor present in [Claimant’s] job.” However, he opined that Claimant has “underlying inflammatory pathology that makes her more prone to development of these soft tissue injuries in the absence of a substantial injurious physical exposure factor.” Dr. Hughes recommended claimant undergo the diagnostic testing recommended by Dr. Smith prior to a “final determination of work-relatedness.”

28. On March 12, 2015 Dr. Ravdel signed a note stating Claimant should be excused from work from March 25, 2015 to July 6, 2015 because of right hand tendonitis and pain radiating to the right shoulder.

29. On March 18, 2015 Claimant underwent an MRI of the right hand and fingers. The radiologist noted the tendons of the hand were normal in “caliber and signal” and there was no evidence of “tendinosis, tear, or tenosynovitis present.” The radiologist’s findings included “subchondral cyst formation within the lunate triquetrum” with an otherwise negative examination.

30. On March 18, 2015 Claimant underwent an MRI without contrast of the right forearm. The radiologist noted the tendons of the forearm appeared normal. However there was “mild edema” of the supinator muscle at the radial head. The radiologist assessed a mild strain of the supinator muscle and an otherwise negative exam.

31. On March 20, 2015 the Claimant underwent electrodiagnostic studies of the right upper extremity. The neurologist reported a “minimally abnormal study” with electrodiagnostic “evidence of a right median mononeuropathy at the wrist (carpal tunnel syndrome) that is electrically mild.”

32. On March 23, 2015 Dr. Hughes issued a second report after reviewing Dr. Sachar’s notes and the results of the diagnostic tests performed after his IME. Dr. Hughes noted that on March 2, 2015 Claimant reported that her symptoms of shoulder, neck and back pain improved after she stopped work on January 5, 2015, but the symptoms of right radial arm and hand pain worsened after January 5. Dr. Hughes assessed the following: (1) Hypothyroidism; (2) Right de Quervain’s tenosynovitis with recrudescence of symptomatology; (3) Occult right carpal tunnel syndrome, secondary to right wrist regional tendonitis; (4) Right forearm supinator muscle strain; (5) Probable bilateral shoulder rotator cuff tendinopathy.

33. On March 23, 2015 Dr. Hughes again opined that it seems “fairly clear that [Claimant] has sustained onset of de Quervain’s tenosynovitis.” He also noted Claimant did not “manifest clinical findings of right carpal tunnel syndrome.” Dr. Hughes noted that Claimant gave a history that “repetitive activity using her right upper extremity has made her symptomatic.” Dr. Hughes wrote that it seemed probable that Claimant has “underlying inflammatory pathology that makes her more prone to development of these

soft tissue injuries in the relative absence of a substantial injurious physical exposure." Dr. Hughes further opined that Claimant's right wrist and elbow conditions were "measurably accelerated by her work activities through January 5, 2015."

34. Dr. Fall testified at the hearing. Dr. Fall explained the de Quervain's tenosynovitis is a condition involving inflammation of 3 tendons that lie within a "sleeve" or sheath in the first dorsal compartment at the base of the thumb. The function of these tendons is to extend the thumb. She stated that the exact cause of de Quervain's tenosynovitis is not known. However, she explained that de Quervain's tenosynovitis is covered by the cumulative trauma MTG. Dr. Fall stated that under the MTG the only work-related risk factor for development of de Quervain's tenosynovitis is a combination of force, repetition and awkward posture at least two-thirds of the day. Dr. Fall testified that application of the MTG algorithm to Claimant's job duties does not warrant a finding that the diagnosis of de Quervain's tenosynovitis is causally related to Claimant's employment.

35. Dr. Fall testified that there is no indication that Dr. Hughes applied the MTG algorithm insofar as he opined that the diagnosis of de Quervain's tenosynovitis is causally related to the conditions of Claimant's employment. Dr. Fall noted that Dr. Hughes in fact stated that he did not see any work-related risk factor for the development of de Quervain's tenosynovitis.

36. Dr. Fall testified that Dr. Sachar's reports do not show that he offered any opinion concerning the cause of the de Quervain's tenosynovitis. Dr. Fall specifically opined there is no evidence that Dr. Sachar conducted a causation analysis or applied the MTG matrix/algorithm to the issue of whether the diagnosis of de Quervain's tenosynovitis is causally related to Claimant's employment.

37. Dr. Fall opined it would be inconsistent with a diagnosis of work-related de Quervain's tenosynovitis if Claimant's symptoms worsened after she was placed on light duty and after she stopped work altogether. Dr. Fall explained that pain from de Quervain's tenosynovitis results from movement of the thumb and she would anticipate the pain would improve or resolve when Claimant stopped moving her thumb at work.

38. Dr. Fall reviewed Dr. Hughes's March 2, 2015 IME report. Dr. Fall opined that based on Claimant's description of her duties and the job analysis none of Dr. Hughes's diagnoses, including de Quervain's tenosynovitis and right lateral epicondylitis, is work-related under the MTG. Dr. Fall opined that Dr. Hughes made the argument that none of the proposed diagnoses is work-related when he stated he could not find any work-related physical exposure.

39. Dr. Fall also reviewed Dr. Hughes's March 23, 2015 report. Dr. Fall stated that Dr. Hughes's March 23 diagnosis of right regional wrist tendinitis is a distinct diagnosis from the diagnosis of right de Quervain's tenosynovitis with recrudescence of symptomatology. She further opined that a diagnosis of right regional wrist tendinitis is not supported by the wrist MRI which showed no inflammation of tendons. Dr. Fall noted there was no indication that Dr. Hughes applied the MTG matrix/algorithm in

reaching the conclusion that the duties of Claimant's employment accelerated one or more of her various diagnoses.

40. Dr. Fall testified that a ganglion cyst is a fluid filled cyst that can arise from a tendon sheath or a nerve. She further stated that ganglion cysts only cause problems when they are in an area where they can be traumatized, cause pain or get in the "way of a mechanical movement." Dr. Fall explained that there is no known cause for ganglion cysts and the MTG don't discuss ganglion cysts as a work-related cumulative trauma condition.

41. Dr. Fall testified she considered Claimant's testimony and the job evaluation in determining the duties of Claimant's employment. She then applied the cumulative trauma MTG matrix/algorithm and concluded there is no work-related cause for any of the multiple diagnoses suggested by the Claimant's medical providers. Dr. Fall explained Claimant was subjected to the "secondary risk" factor of cold temperature prior to May 2014. However, Dr. Fall explained that cold temperature is not a risk factor for the development of any of the conditions for which Claimant seeks compensation.

42. Claimant failed to prove it is more probably true than not that she sustained any occupational disease proximately caused by the performance of service arising out of and in the course of her employment.

43. The ALJ assigns great weight to WCRP 17 Exhibit 5 (cumulative trauma MTG) principles for assessment of causation of cumulative trauma conditions. *See* WCRP 17, Exhibit 5 (D)(3). As noted in WCRP 17, Exhibit 5 (D)(3)(a) the cumulative trauma MTG are based on "a thorough review of the epidemiologic literature" available at the time the MTG were issued. The ALJ finds that this evidence based method for determining causation presents a credible and persuasive method for determining whether a particular condition is related to an on-the-job activity.

44. Dr. Fall credibly and persuasively opined that based upon consideration of Claimant's testimony and Ms. Pickett's job analysis, and based on consideration of the cumulative trauma MTG, none of Claimant's diagnoses is causally-related to her employment. Dr. Fall persuasively opined that under the MTG Claimant's employment exposed her to only one cumulative trauma risk factor, which is cold temperature. However, that risk factor is not associated with any of the diagnoses Claimant alleges are causally-related to her employment. Dr. Fall credibly opined that under the cumulative trauma MTG the duties of Claimant's employment did not subject her to sufficient force, repetition and awkward posture sufficient to be considered the cause of de Quervain's tenosynovitis, epicondylitis or any of the other diagnoses mentioned by Claimant's medical providers and Dr. Hughes.

45. Dr. Fall also persuasively argued that there is a questionable temporal relationship between the Claimant's work duties and the progression of her symptoms. Dr. Fall credibly opined that if Claimant's symptoms were work-related she would have expected them to diminish after Claimant was placed on light duty in September 2015. Dr. Fall would also have expected symptoms to diminish or end after Claimant stopped

working in January 2015. However, by Claimant's testimony and Dr. Hughes's report most of Claimant's symptoms continued to worsen after she was placed on light duty and after she ceased work.

46. Dr. Fall credibly opined there is no known cause for a ganglion cyst and that it is not considered to be a cumulative trauma condition under the MTG. Dr. Fall's testimony is corroborated by Dr. Smith's statement that the work-relatedness of the ganglion cyst "could be challenged."

47. Claimant's argument notwithstanding, Dr. Fall's testimony concerning causation is not rendered incredible because she failed to diagnose de Quervain's tenosynovitis. Dr. Fall did not testify that the other physicians incorrectly diagnosed Claimant with de Quervain's tenosynovitis. Indeed, Dr. Fall's IME report expressly acknowledges a "prior diagnosis" of de Quervain's tenosynovitis. Dr. Fall credibly testified that she did not disagree with the diagnosis of de Quervain's made by other physicians prior to the December 10, 2014 IME. Rather, Dr. Fall stated that on December 10, 2014 she was unable to diagnose de Quervain's tenosynovitis because the Claimant said pain prevented performance of the tests necessary to make the diagnosis. Further, even if Dr. Fall did not correctly diagnose de Quervain's tenosynovitis that does not detract from her testimony that if Claimant has or had de Quervain's the disease was not caused by her employment.

48. The opinions expressed by Dr. Hughes are not as persuasive as those of Dr. Fall. Dr. Hughes's opinion that Claimant was more "prone" to the development of de Quervain's tenosynovitis, epicondylitis, and perhaps some of the other conditions, because she had "underlying inflammatory pathology" is not persuasive. The ALJ finds that Dr. Hughes agrees with Dr. Fall that application of the cumulative trauma MTG to Claimant's job duties does not identify any risk factor for the development of any cumulative trauma condition including de Quervain's tenosynovitis. The ALJ therefore infers that Dr. Hughes is of the opinion that the cumulative trauma MTG do not or should not apply in a causation analysis where the duties of employment are found to have the "aggravated" or "accelerated" a pre-existing condition. However, Dr. Hughes's opinion that the MTG causation matrix/algorithm does not apply to aggravation or acceleration of a pre-existing condition is refuted by the credible testimony of Dr. Fall that the MTG do apply in this case.

49. Dr. Hughes's implicit opinion that the MTG causation matrix/algorithm does not apply to the alleged aggravation or acceleration of a pre-existing condition is also refuted by reference to the cumulative trauma MTG. WCRP 17, Exhibit 5 (D)(3) notes that a "clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury." This provision also states that a work-related condition is "covered" when, among other things, the "work exposure causes the activation of a previously asymptomatic or latent medical condition" or "the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition." Finally, this section of the cumulative trauma MTG establishes a six-step process that "should be used to evaluate causality in CTC cases." The six steps are as follows; (1) Identification of a

"specific and identifiable diagnosis," (2) Determination of whether the specific "disorder is known to be or is plausibly associated with work," which is "largely based on comparison of risk factors" (under the cumulative trauma Matrix) with the patient's work tasks; (3) Determination of whether risk factors are present in sufficient degree and duration to cause or aggravate the condition; (4) Matching the risk factors identified on the Risk Factor Table and the established diagnosis; 5) Determination of whether a temporal association exists between the workplace risk factors and the onset or aggravation of symptoms; (6) Identification of non-occupational diagnoses.

50. Dr. Hughes did not present any persuasive argument as to why deviation from the cumulative trauma MTG is appropriate in this case. Dr. Hughes did not cite any credible and persuasive medical literature or scientific evidence to support his argument that Claimant's "underlying inflammatory pathology" rendered her "prone" to develop cumulative trauma conditions from exposure to hazards at levels below those cited in the MTG.

51. Dr. Fall correctly testified that Dr. Sachar diagnosed de Quervain's tenosynovitis, but did not state in any of his reports that he considered this condition to be work-related. In any event, Dr. Fall correctly points out that there is no indication that Dr. Sachar applied the cumulative trauma MTG to assess the cause of the de Quervain's tenosynovitis. Thus, to the extent that Dr. Sachar proffered any opinion concerning causation his opinion is assigned very little weight.

52. Dr. Bloch's opinion that Claimant's symptoms of right wrist and elbow pain are work related under the MTG is not persuasive. Although Dr. Bloch claims to have applied the MTG in his causation analysis, his October 23, 2014 states he was uncertain of the Claimant's diagnosis and that he recommended additional testing to reach a diagnosis. The ALJ infers that if Dr. Bloch had actually applied the cumulative trauma MTG he would have recognized that the first step in assessing causation is to arrive at a "specific and identifiable diagnosis." Without such a diagnosis it is not possible to proceed through the cumulative trauma matrix/algorithm to determine causation. (*See* Finding of Fact 49). Moreover, Dr. Bloch's October 23 report was based solely on Claimant's reported history and was not informed by Ms. Pickett's job analysis performed in December 2014.

53. To the extent PA Keller diagnosed work-related de Quervain's tenosynovitis , epicondylitis and ganglion cyst his causation opinion is not persuasive. There is no credible or persuasive evidence that PA Keller is level II accredited. Neither is there any credible and persuasive indication that PA Keller considered and applied the cumulative trauma MTG in arriving at his opinion concerning causation.

54. To the extent Dr. Smith diagnosed work-related de Quervain's tenosynovitis his opinion is not persuasive. There is no credible or persuasive evidence that Dr. Smith considered or applied the cumulative trauma MTG in arriving at his opinion concerning causation.

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

CONCLUSIONS OF LAW

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

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

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

COMPENSABILITY OF ALLEGED OCCUPATIONAL DISEASES

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

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

hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). If the claimant makes the requisite showing of causation the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the MTG upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

The ALJ concludes Claimant is attempting to prove that she sustained the compensable occupational diseases of right de Quervain's tenosynovitis, right wrist ganglion cyst, right lateral and medial epicondylitis, and possibly other conditions. In this regard, the ALJ finds that Claimant has not alleged or proven that any of these conditions is attributable to a specific time, place and cause. Rather, Claimant argues that the repetitive performance of various activities (lifting boxes and cutting boxes) over

time caused the alleged diseases or aggravated or combined with pre-existing conditions so as to cause disability and/or the need for treatment.

As determined in Finding of Fact 42, Claimant failed to prove it is more probably true than not that any of her alleged occupational diseases (including de Quervain's tenosynovitis, lateral epicondylitis and ganglion cyst) was proximately caused, aggravated or accelertaed by the performance of service arising out of an in the course of her employment. As found, the ALJ places great weight on the cumulative trauma MTG causation analysis set forth in WCRP 17, Exhibit 5 (D)(3). As determined in Findings of Fact 44 through 46, Dr. Fall credibly and persuasively opined that application of the cumulative trauma MTG matrix/algorithm to Claimant's job duties establishes that none of the alleged disease processes is causally related to Claimant's employment. Dr. Fall credibly opined that there is no known cause for a ganglion cyst and that a ganglion cyst is not even recognized as a cumulative trauma condition under the MTG.

To the extent Dr. Hughes opined Claimant's employment aggravated or accelerated underlying inflammatory conditions so as to cause a compensable disease process, the ALJ is not persuaded for the reasons stated in Findings of Fact 48 though 50. To the extent other providers opined that Claimant developed a work-related disease process or processes their opinions are not persuasive for the reasons stated in Findings of Fact 51 through 54.

Because Claimant failed to prove she sustained a compensable occupational disease the claim must be dismissed.

ORDER

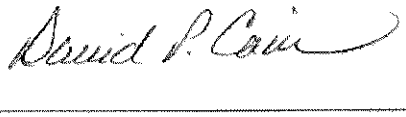
Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-963-828 is denied and dismissed.

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

DATED: August 4, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing October 22, 2014?

- If Claimant otherwise proved he is entitled to temporary total disability benefits, did Respondents prove by a preponderance of the evidence that Claimant is disqualified because he was responsible for his termination from employment?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 and 2 were received in evidence. Respondents' Exhibits A through F were received in evidence.

2. Claimant contends he is entitled to an award of temporary total disability (TTD) benefits commencing October 22, 2014 and continuing. Respondents contend that if Claimant can prove he was disabled on October 22, he is not entitled to TTD benefits because he was responsible for his termination from employment on October 21, 2014.

3. In February 2008 Claimant was hired by Employer to perform the job of "lead maintenance worker." In this position Claimant performed numerous activities including cement work, yard work, paint work, and facility maintenance. The "job description" for Claimant's position states the worker must be able to lift up to 50 pounds and stand, stoop, bend, kneel, climb and work in uncomfortable positions.

4. When Claimant applied for employment in February 2008 he signed a U.S. Department of Justice Employment Eligibility Verification form I-9. On the form I-9 Claimant represented that he was a "lawful permanent resident" of the United States and an "alien authorized to work." Respondents' Exhibit F p. 21 contains copies of a driver's license issued in Claimant's name and a Social Security card number 564-87-689 issued in Claimant's name. Claimant admits that Respondents' Exhibit F p. 21 contains copies of documents he submitted to Employer. The form I-9 also reflects that in February 2008 Claimant submitted to Employer a driver's license and Social Security Card number 564-87-689.

5. On September 17, 2014 Claimant suffered work-related injuries to his right upper extremity and back. On September 18, 2014 NP Monica Garbiso examined Claimant at Concentra Medical Centers (Concentra). NP Garbiso assessed "shoulder pain" and "shoulder/upper arm strain." NP Garbiso imposed restrictions of no climbing

stairs or ladders, no lifting over 20 pounds, no pushing or pulling with over 30 pounds of force and no reaching above shoulders.

6. On September 25, 2014 Scott Richardson, M.D., examined Claimant at Concentra. Dr. Richardson assessed shoulder pain, shoulder/upper arm strain and a lumbar strain. Dr. Richardson imposed restrictions of no lifting over 3 pounds, no pushing or pulling with over 3 pounds of force, no reaching above shoulder, and no squatting and/or kneeling.

7. Claimant credibly testified that after the accident the Employer initially permitted him to continue working. The ALJ infers that Claimant was permitted to continue working within the restrictions imposed by NP Garbiso and Dr. Richardson.

8. On October 7, 2014 Claimant received a notice from the Employer. According to Claimant the notice advised that his "social security number did not match with the information" he had given to the Employer and he "needed to fix the situation." The employer gave Claimant until October 21, 2014 to resolve the situation. However, Claimant testified that "in spite of the deadline" he could not fix the situation "because I don't have that." The ALJ infers from Claimant's testimony that he admits he does not have a valid social security number matching the one he provided to the Employer in February 2008.

9. Respondents' Exhibit F p. 16 is a copy of the notice provided to Claimant by the Employer. The notice is dated October 7, 2014. The notice contains a handwritten "Employer Statement" indicating that Claimant's social security number "does not match with his information provided." The notice further states Claimant has until October 21, 2014 "to provide documentation from the SS office that the SS# he provided is his." Claimant was warned that if he did not provide the information by October 21 he would be terminated. Claimant testified he was "familiar" with the warning notice and that he signed it. Claimant's signature is dated October 8, 2014.

10. Ms. Shannon Janson (Janson) credibly testified as follows. She is Employer's Risk Manager. Employer is required by federal law to verify that an employee presented the necessary work authorization documents as defined by the form I-9. Janson explained that if an employer knows that an employee does not possess the requisite I-9 documentation the employer could be held "liable" by the Federal government.

11. Janson credibly testified as follows. When Claimant applied for work with the Employer in 2008 he provided I-9 documentation in the form of a driver's license and social security card. These items constituted sufficient documentation to satisfy the requirements of the I-9 form.

12. Janson credibly testified as follows. In the fall of 2014 Employer conducted open enrollment for its 401(k) program. Janson encouraged Claimant to enroll in the 401(K) program and Claimant submitted an application. Janson went online to submit the applications for the new 401(K) enrollees including Claimant. However, she was unable to

enter Claimant's application. Janson contacted Great West, Employer's 401(k) third party administrator, about the problem. A representative of Great West advised Janson that Great West has a system for checking social security numbers. According to the Great West representative the system showed thirteen other individuals had the same social security number that Claimant provided to Employer. When Janson had another employee (Melanie) speak to Claimant about fixing the social security problem he replied that "he couldn't do that" and his "real identity was not good."

13. Janson credibly testified the employer terminated Claimant's employment on October 21, 2014 because he failed to correct the problem with the Social Security number.

14. On December 9, 2014 Dr. Richardson assessed a shoulder strain, supraspinatus tendinitis, a labral tear of the shoulder, shoulder pain and a lumbar strain. At that time Dr. Richardson imposed restrictions of lifting up to 10 pounds, pushing and pulling up to 20 pounds, occasional bending and no reaching above shoulder with the affected extremity.

15. On November 24, 2014 the Insurer filed a General Admission of Liability (GAL) for medical benefits only.

16. Respondents proved Claimant is not entitled to receive TTD benefits. Specifically, Respondents proved it is more probably true than not that Claimant was responsible for his termination from employment on October 21, 2014.

17. Respondents proved that when Claimant applied for employment he submitted a false Social Security card as documentation of his immigration status. As found, Claimant admitted the Social Security card that he provided to Employer was not valid. The ALJ infers from this evidence that Claimant deliberately submitted the false Social Security in order to procure employment with the Employer.

18. The Respondents proved it is more probably true than not Claimant acted "volitionally" when he supplied the false Social Security card to the Employer. The ALJ infers from Claimant's action in submitting the false Social Security card that he knew production of a valid card was important to the employer's decision to hire him and that failure to supply a valid card might result in his termination. Indeed, Claimant was expressly warned of this fact when he received the October 7, 2014 "notice" from the Employer. However, Claimant admitted he did not provide a valid Social Security number because he could not. The ALJ finds that by supplying the false Social Security card Claimant exercised some degree of control over the circumstances that ultimately led to his termination on October 21, 2014.

CONCLUSIONS OF LAW

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

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

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

RESPONSIBILITY FOR TERMINATION

Claimant contends he is entitled to an award of temporary total disability (TTD) benefits commencing October 22, 2014, the day after he was terminated by Employer. Claimant argues the evidence establishes that on October 22 he was temporarily disabled within the meaning of the Act. Respondents contend that if Claimant proved he was temporarily disabled commencing October 22, a preponderance of the evidence establishes he is disqualified from receiving TTD benefits because he was "responsible" for his termination from employment. The ALJ agrees with Respondents that Claimant is disqualified from receiving TTD benefits because he was responsible for his termination from employment.

The ALJ assumes for purposes of this order that Claimant proved it is more probably true than not that on October 22, 2014 he was temporarily disabled within the meaning of the Act.

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., (termination statutes) provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because the termination statutes provide a defense to an otherwise valid claim for TTD benefits, respondents shoulder the burden of proof by a preponderance of the evidence

to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (ICAO July 18, 2003).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of a degree of control over the circumstances leading to the termination. *Apex Transportation, Inc. v. Industrial Claim Appeals Office,* 321 P.3d 630 (Colo. App. 2014); *Gilmore v. Industrial Claim Appeals Office, supra*; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* The ICAO has held on numerous occasions that where an employee consciously provides a false social security number in order to procure employment the employee's conduct may be found "volitional" for purposes of the termination statutes. *E.g. Gutierrez-Delgado v. North Star Foods*, WC 4-857-384-03 (ICAO December 19, 2012); *Olaes v. Elkhorn Construction Co.,* WC 4-782-977 (ICAO April 12, 2011); *Gutierrez v. Exempla Healthcare, Inc.,* WC 4-495-227 (ICAO June 24, 2002).

As determined in Findings of Fact 16 though 18 Respondents proved it is more probably true than not the Claimant acted volitionally in causing his termination from employment on October 21, 2014. Claimant deliberately supplied a false social security card as documentation of his eligibility to work in the United States. The ALJ infers Claimant supplied the false documentation with knowledge that Employer might not hire him if he did not supply a valid social security number and might terminate him upon learning that he could not supply a valid social security number. The ALJ concludes Claimant was "responsible" for his termination within the meaning of the termination statutes.

Notwithstanding, Claimant argues that he is entitled to an award of TTD benefits because this case is controlled by the holding in *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). In *Champion* the court held that a "Mexican national who did not possess legal work status in the United States" was entitled to TTD and later temporary partial disability (TPD) benefits. The respondents argued that the claimant was not entitled to TTD and TPD benefits because his immigration status caused a "legal disability" that precluded him from proving that any of his wage loss was caused by the effects of the industrial injury. However, the court held that the claimant's immigration status did not create a "legal disability" that prohibited him from entering into an employment contract. Rather, under federal immigration law the claimant's unauthorized work status merely prohibited employers from hiring or continuing to employ claimant with knowledge of his unauthorized status. Further, applying the principles set forth in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995), the *Champion* court held that the claimant's unauthorized work status did not

prohibit him from establishing that "to some degree" his wage loss was caused by the industrial injury.

The ALJ concludes that Claimant's reliance on *Champion Auto Body v. Industrial Claim Appeals Office, supra*, is misplaced. In *Gutierrez v. Exempla Healthcare, Inc., supra*, the ICAO upheld an ALJ's ruling that under the termination statutes the claimant was disqualified from receiving TTD benefits because she "acted volitionally when she used a social security number that was not assigned to her for purposes of getting hired." The claimant argued that the *Champion* decision dictated a different result. However, in *Gutierrez* the ICAO pointed out that *Champion* was decided under the law as it existed prior to enactment of the termination statutes. The ICAO held that the termination statutes were adopted to "overturn *PDM Molding, Inc. v. Stanberg, supra*" and prevent an otherwise temporarily disabled worker "from recovering temporary disability benefits where the worker is at fault for the loss of post-injury employment, regardless of whether the industrial injury remains a proximate cause of the subsequent wage loss." The ICAO explained that the termination statutes preclude an ALJ from "finding that a claimant's post-separation wage loss is 'to some degree' the result of the industrial injury where the the claimant is 'responsible' for the termination." *See also, Enriquez v. Oglebay Norton Co.,* WC 4-603-526 (ICAO January 21, 2005).

The ALJ concludes that the reasoning in *Gutierrez* is persuasive. Claimant has not distinguished *Gutierrez* and cites no authority that disapproves or overrules *Gutierrez*.

Moreover, the reasoning in *Gutierrez* is consistent with the supreme court's subsequent interpretation of the termination statutes in *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323, 328 (Colo. 2004). In *Anderson* the supreme court acknowledged that "the legislative history to section 8-42-105(4) demonstrates" that *PDM Molding* "caused concern among employers, their insurers, and members of the General Assembly that [the court] had created a 'loophole' promoting illegitimate claims." As one example of the "loophole" the *Anderson* court noted legislative history showed that *PDM Molding* had been applied to award TTD benefits to a claimant who "was not authorized to work in this country" and had "falsified his work documents at his hiring." 102 P.3d at 329. Ultimately, the *Anderson* court stated that the "General Assembly intended section 8-42-105(4) to weed out wage loss claims subsequent to voluntary or for-cause termination of modified employment that do not involve a worsened condition."

Claimant was responsible for his termination from employment within the meaning of the termination statutes. Therefore, the claim for TTD benefits commencing October 22, 2014 and continuing must be denied.

ORDER

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

1. The claim for temporary total disability benefits commencing October 22, 2014 and continuing is denied.

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

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

DATED: August 12, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

- Did Claimant prove by a preponderance of the evidence that on September 25, 2014 he sustained a compensable injury proximately caused by the performance of service arising out of and in the course of his employment?

- Did Claimant prove by a preponderance of the evidence that on or about October 1, 2014 he sustained a compensable injury proximately caused by the performance of service arising out of and in the course of his employment?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award or reasonable, necessary and authorized medical benefits as a result of the alleged injuries?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing October 16, 2014 and continuing?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 6 were admitted into evidence. Claimant's Exhibit 8 pages 63 through 65 were admitted into evidence. Respondents' Exhibits A through E were admitted into evidence.

2. Claimant alleges he injured his left knee at work on September 25, 2014 and/or October 1, 2014.

3. On June 2, 2014 the Employer hired Claimant as an auto body technician. Claimant has more than twenty-years of experience in this field.

4. Claimant testified as follows concerning the events of September 25, 2014. He was pushing a tool cart through the Employer's shop. The cart caught on uneven pavement and he "flipped forward over the cart." He injured his right knee, hip, low back and forehead. He experienced immediate and "excessive" knee pain. Claimant described the pain as a 9 on a scale of 10 (9/10). Claimant reported this event to his supervisor Nate Stephenson (Stephenson) and requested medical treatment on September 25. However, Claimant stated that Stephenson declined to send Claimant for medical treatment.

5. Claimant testified as follows concerning the events after September 25, 2014. On several occasions Claimant requested the Employer to provide medical treatment but the Employer ignored his requests. Between September 25, 2014 and October 1, 2014 it was "very visible" to Claimant's co-employees that he was experiencing 9/10 pain while working. Despite this pain Claimant did not seek out medical treatment on his own but continued to work and perform his duties as an auto body technician.

6. Claimant testified as follows concerning events on October 1, 2014. While at work Claimant "stubbed" his leg on a "piece of metal sticking out of the ground in the shop." He experienced a worsening of his pain. Stephenson was not present but Claimant reported the incident to the office manager and a "writer." Claimant was told that Stephenson would come to see him when he returned. Stephenson did not come to see Claimant. Claimant initially testified on cross-examination that after the October 1 incident his pain skyrocketed to 20/10. However, Claimant did not seek any medical treatment after October 1 and continued to perform his duties as an auto body technician.

7. Stephenson testified as follows. On September 25, 2014 he was at the employer's shop. He did not see Claimant trip or fall but he heard the "clutter" of Claimant falling over his "tool box." Stephenson went to the scene of the incident and observed Claimant "kind of limping around, stumbling around." Stephenson asked Claimant if was "okay" and Claimant responded that he was "fine." Claimant did not request medical treatment for his knee or any other body parts in the "couple of days" immediately following September 25. After the incident Claimant returned to work. Stephenson did not notice Claimant limping at any time from immediately after the September 25 accident until October 16, 2014. Stephenson was unaware of the alleged October 1, 2014 incident and does not recall Claimant requesting any medical treatment as a result of that incident.

8. Danny Graffenberger (Graffenberger), one of Claimant's co-workers, testified that he did not witness the September 25, 2014 incident but he did discuss it with Claimant. Graffenberger testified that Claimant stated he had been pushing his "roll cart" across the concrete when he hit a crack and fell over the cart. Graffenberger recalled Claimant stated "they wanted him to go to the doctor to get checked out." However, Claimant advised Graffenberger he was "fine" and did not want medical treatment "because it was involving drug tests and all this other stuff."

9. Stephenson testified as follows concerning events on October 15, 2014. On October 15 Claimant was aware a Mercedes needed to be repaired and returned to an insurance company's facility during the morning hours. Claimant had promised Stephenson the work would be completed and the Mercedes returned to the insurance company on time. However, on the morning of October 15 Claimant was running late to work which prompted Stephenson send a text message to Claimant asking where he was and reminding Claimant that the Mercedes needed to be completed. Stephenson testified the Mercedes was later returned to the insurance company but "there were issues with the workmanship." Consequently, Claimant "went down to fix the issues" at

the insurer's facility. During a lunch meeting Stephenson received a text from Claimant stating that he was "coming to get his box and he was done." Stephenson then called Claimant who told Stephenson he was not "feeling well" and told Stephenson to give away all of Claimant's work. Stephenson testified that during this telephone call Claimant never stated he was leaving work because he had been hurt on the job and needed medical treatment.

10. Claimant testified as follows concerning the events of October 15, 2014. On October 15 he had a "discussion" with Stephenson. Claimant stated that he began the discussion by requesting medical treatment for his leg. However, Stephenson wanted Claimant to finish the Mercedes job before he took Claimant to the doctor. Claimant was "dropped off" several miles from the Employer's facility (presumably at the insurer's facility). Claimant testified that his leg was hurting and he couldn't do the work on the Mercedes. He also testified that he wanted to go home because his leg was hurting. (Transcript pp. 40-41).

11. Several October 15, 2014 text messages between Claimant and Stephenson were introduced into evidence. At 7:43 a.m. Stephenson texted Claimant requesting his "eta." At 7:45 a.m. Claimant texted Stephenson: "15 min." At 7:49 a.m. Stephenson texted Claimant: "The merc [sic] has got to go!" At 8:06 a.m. Claimant texted Stephenson stating: "I know boss first thing I'll do is get it done, would have been do [sic] yesterday if I wasn't getting pulled off it ever [sic] 30 mins to deal with other BS in the shop…" At 11:50 a.m. Claimant sent a text to Stephenson. Some of this text is not decipherable because holes were punched through the top of the exhibit. (*See* Exhibit 8 p. 64). As best the ALJ can determine the text states: "Really (illegible) you left me hear [sic] (illegible) dude won't do this agin [sic]." At 11:52 a.m. Stephenson texted Claimant stating: "You ready? I am on my way if you are." At 11:53 Claimant texted: "Been ready boss it was simple fix I'm not hourly sir." At 12:02 p.m. Claimant texted himself stating, "This is some real BS!" At 12:03 p.m. Stephenson sent a text to Claimant stating, "Dusty said you were on the way back." At 12:04 p.m. Claimant texted Stephenson stating, "I'm coming back loading my tools and I'm done." At 12:08 p.m. Stephenson texted Claimant stating: "At a lunch meeting, I will talk to you afterward." At 12:48 p.m. Claimant texted Stephenson: "I'm going home for the day I'm not feeling well need to get my head together cam [sic] we talk tomarrow [sic]."

12. Because of the events of October 15, 2014 Stephenson prepared a disciplinary "write up" for delivery to Claimant on the morning of October 16, 2014. The "write up" stated Claimant had not timely and properly completed the Mercedes job and that he had told Stephenson to give away his work and then "hung up." The "write up" also noted a "decrease in the quality" of Claimant's work and an "increase in erratic behavior" by Claimant. Claimant was warned that failure to improve would result in further discipline up to and including dismissal.

13. Claimant testified as follows concerning the events of October 16, 2014. He received the write up from Stephenson at approximately 8:30 a.m. He told Stephenson that his production had dropped because he "got hurt three weeks prior" and had been complaining about his leg and other injuries. On October 16 Claimant

"insisted" on seeing a doctor because his leg was excessively swollen and bruised. Claimant stated that he worked until approximately 2:30 p.m. Sometime after 2:30 p.m. Stephenson took Claimant to Concentra Medical Centers (Concentra) for treatment.

14. Stephenson testified as follows concerning the events of October 16, 2014. At approximately 8:30 a.m. Claimant came into Stephenson's office and was given a copy of the "write up." At this time Stephenson did not notice the Claimant limping. Claimant signed the "write up," stated he would "do better" and went to work. Claimant did not give a reason why his productivity had declined and did not advise Stephenson his knee was hurting. At 11:00 a.m. Claimant reported to the office manager that he was hurt and needed medical attention. Stephenson went to see Claimant and ask what was going on. At this time Stephenson observed Claimant was limping. Claimant told Stephenson that his leg hurt and he needed to "get checked out."

15. Graffenberger testified to a conversation he had with Claimant. Graffenberger could not be certain of the exact date of the conversation but he believed it was about a month after the September 25, 2014 "roll cart incident" and "about two days" before October 16, 2014. Graffenberger observed Claimant was limping and asked him if everything was okay. Claimant told Graffenberger that early in the morning he went outside his house to smoke a cigarette and accidentally locked himself out. Claimant also told Graffenberger that he then got on a chair to climb in a window but fell and "blew his knee out."

16. Claimant denied that he injured his knee at home while trying to crawl through a window. Claimant denied that he ever told Graffenberger he fell from a chair trying to get into the house. Claimant testified that his house has a keypad security system and he would not have needed to crawl through a window if he had been locked out. Claimant opined Graffenberger was "lying" about the alleged conversation.

17. On October 16, 2014 Julie Parsons, M.D., examined Claimant at Concentra. Claimant reported symptoms of right proximal and right anterior knee pain. He rated the pain as 6/10. Claimant gave a history that he suffered a direct blow to the knee at work and experienced the onset of symptoms immediately after the injury. Dr. Parsons listed the date of injury (DOI) as October 15, 2014. On physical examination (PE) Dr. Parsons noted an "antalgic gait." She also recorded the right knee exhibited "effusion grade 2 and swelling." There was diffuse anterior knee tenderness and tenderness in the quadriceps tendon and medial tibial plateau. Range of motion was restricted in flexion. Dr. Parsons assessed "right knee injury." Dr. Parsons referred Claimant for an MRI. Dr. Parsons returned Claimant to "modified duty" with restrictions of seated duty, no driving of the "company vehicle," "non-weight bearing" and use of an "assistive device." The October 16 report contains no mention that Claimant reported a hip or back injury. The October 16 report contains no mention that there were two work-related incidents that caused knee pain.

18. Claimant testified that he took the restrictions to Stephenson but was not offered any job within the restrictions. Claimant testified he has been unemployed since October 16, 2014.

19. On October 20, 2014 Carol Ramsey, D.O., examined Claimant at Concentra. Claimant reported constant right knee pain rated at 10/10 and Dr. Ramsey wrote that the pain increased to "20/10 at times." Claimant also complained of "ankle pain." He advised Dr. Ramsey that he "stepped in a hole and also flipped over a cart injuring his back." The history does not mention any report that Claimant tripped over a piece of metal on or about October 1, 2014. The back pain was rated as 5/10. Claimant also reported that his pain was not controlled by a current prescription for Percocet. Dr. Ramsey wrote that Claimant had been "getting unauthorized medications from a neighbor." Dr. Ramsey listed the DOI as "9/28/2014." Dr. Ramsey assessed right knee injury, internal derangement right knee, back pain and right knee pain. She prescribed Celebrex and Oxycodone and directed Claimant to stop using "all other narcotics." She placed Claimant on a "no work" status.

20. During cross-examination Claimant testified that Dr. Ramsey's reference to "20 out of 10" pain did not come from him and he didn't know where that reference came from. Claimant also testified that he didn't understand the reference "20 out of 10" pain because the scale only "went from one to ten." Claimant's testimony that Dr. Ramsey's reference to "20 out of 10" did not come from him is contradicted by Claimant's earlier testimony that his pain "skyrocketed" to 20/10 after the alleged incident of October 1, 2014.

21. On October 20, 2014 Claimant underwent an MRI of the right knee. The radiologist assessed a complex tear through the posterior horn of the medial meniscus, a Baker's cyst and moderate-size joint effusion.

22. On October 22, 2014 Dr. Parsons noted Claimant had suffered a "complex MMT." The ALJ understands this reference is to the MRI results showing a tear of the medial meniscus. Dr. Parsons referred Claimant for an orthopedic evaluation of the right knee. On October 28, 2014 Dr. Parsons referred Claimant to a pain specialist. On October 28 Dr. Parsons imposed restrictions of no driving the company vehicle, no squatting, no kneeling, no walking on uneven terrain and no climbing of stairs.

23. On November 6, 2014 orthopedic surgeon Mark Failinger, M.D., examined Claimant. Dr. Failinger recorded a history that on "9/26/2014" Claimant sustained injuries when he was "pushing a cart through a shop with his supervisor" and the "wheels caught." Claimant reported that he experienced right knee pain, hip pain and back pain as a result of this incident. The history does not mention any report that Claimant tripped over a piece of metal on or about October 1, 2014. Dr. Failinger's impressions included a complex tear of the right medial meniscus and "back and hip pain." Dr. Failinger recommended that Claimant undergo a surgical "scope to clean up the meniscus."

24. On November 7, 2014 physiatrist Kathie McCranie, M.D., examined Claimant. Claimant gave a history that on "09/26/14 he was walking on uneven pavement and fell over a tool cart in the body shop." Claimant stated that as a result of this incident he had "immediate pain in the right knee, right hip, and right side of his low back." The history does not mention any report that Claimant tripped over a piece of metal on or about October 1, 2014. Dr. McCranie reviewed the MRI results, medical records from October 16, 2014 through November 6, 2014 and performed a PE. Dr. McCranie's impressions include right knee pain with tear of the posterior horn of the medical meniscus, effusion and Baker cyst on MRI. Dr. McCranie also noted right-sided low back pain "myofascial versus facet mediated and right anterior hip pain status post contusion/strain." Dr. McCranie recommended x-rays of the right hip and lumbar spine, chiropractic care and acupuncture. Dr, McCranie noted that opioid medications were discussed and that Claimant was to proceed with a urine drug screen.

25. Claimant returned to Dr. McCranie on November 21, 2014. Dr. McCranie noted the urine drug screen showed "multiple substances that were not prescribed" for Claimant. Dr. McCranie stated that Claimant "admitted he had been buying opioid medications from friends and had been given benzodiazepine from a neighbor." Dr. McCranie advised Claimant that "this combination [of drugs] is very dangerous and, in fact, can be lethal."

26. Claimant testified that he did not obtain narcotics from a neighbor. Instead, Claimant stated he took some prescription medication that was leftover from treatment of a non-industrial infection that he had months earlier.

27. Claimant failed to prove it is more probably true than not that he sustained any compensable knee injury, including a right knee injury resulting in a torn medial meniscus, on September 25, 2014. A preponderance of the credible and persuasive evidence establishes that the torn meniscus was probably the result of an off-the-job accident that Claimant sustained at home a few days prior to October 16, 2015.

28. The evidence proves that it is more probably true than not that on September 25, 2014 Claimant fell over his tool cart while pushing it at work.

29. However, Claimant's testimony that the September 25, 2014 accident resulted in a knee injury for which he promptly and repeatedly requested medical treatment is not credible and persuasive. Claimant's testimony that the alleged knee injury of September 25 immediately caused excessive pain in the range of 9/10 is contradicted by the fact Claimant returned to work after the incident and continued performing his duties until October 16, 2015. Claimant's testimony is also contradicted by the credible testimony of Graffenberger and Stephenson. Stephenson credibly testified that immediately after the September 25 accident Claimant said he was "fine" and did not request any medical treatment after the incident. Graffenberger credibly testified that after the September 25 incident he spoke to Claimant and Claimant stated he was "fine" and had turned down the Employer's offer of medical treatment.

30. Claimant's testimony that he was visibly impaired at work after September 25, 2014 is not corroborated by credible and persuasive evidence, such as the testimony of a co-worker. However, Claimant's testimony is contradicted by the credible testimony of Graffenberger and Stephenson. Graffenberger credibly testified that he did not observe Claimant limping until approximately two days prior to October 16, 2014. Stephenson credibly testified he did not observe Claimant limping until the late morning of October 16.

31. Claimant's testimony that he suffered a right knee injury at work on September 25, 2014 is contradicted by Claimant's own statement to Graffenberger. Graffenberger credibly testified that a couple of days prior to October 16, 2015 he observed Claimant limping at work. Graffenberger inquired if Claimant was "okay" and Claimant replied he had "blown out his knee" when he fell off of a chair trying to get into his house. Although Claimant asserts Graffenberger was lying, the ALJ finds the evidence does not establish any persuasive reason for Graffenberger to falsify his testimony. Graffenberger was Claimant's co-worker and not a manager of the Employer's business. The record does not persuasively demonstrate that there was any pre-injury animus between Graffenberger and Claimant that might incline Graffenberger to testify against Claimant.

32. Claimant's testimony that he consistently requested medical treatment for his knee after September 25, 2014, and did so again on the morning of October 15, 2014, is undermined by the texts that he exchanged with Stephenson on October 15. In the texts Claimant notified Stephenson the Mercedes had been an "easy fix." Later Claimant texted Stephenson he was going home because he "didn't feel well." Claimant testified at hearing that he went home on October 15 because his knee was painful and it prevented him from completing the Mercedes job. The ALJ finds that if Claimant's testimony were true he would not have texted Stephenson that the Mercedes was an "easy fix." Further it is probable Claimant's texts would have explicitly mentioned his knee as the reason he was leaving work.

33. Claimant's testimony that he requested Stephenson to provide medical treatment on the morning of October 16, 2014, and that he told Stephenson that his declining performance was caused by a knee injury three weeks earlier, is not credible and persuasive. Stephenson credibly testified that when Claimant was presented with the "write up" at 8:30 a.m. on October 16 Claimant did not mention a knee injury as the reason for his declining performance. Stephenson also credibly testified Claimant did not request treatment for the alleged knee injury until approximately 11:00 a.m. on the morning of October 16. The ALJ infers Claimant was suddenly motivated to ascribe his non-industrial knee problems to the September 25, 2014 accident because the write up caused him to realize he might lose his job and need workers' compensation benefits.

34. Claimant's testimony is not credible and persuasive because it was self-contradictory. At one point Claimant testified that after the alleged incident of October 1, 2014 his pain increased to 20/10. Later Claimant professed to be confused by Dr. Ramsey's note that he sometimes had 20/10 pain. Claimant stated he was confused

because the pain “scale” only went to 10, not 20. Dr. Ramsey’s note that Claimant reported occasional 20/10 pain is credible and persuasive.

35. Claimant’s testimony that he did not obtain drugs from neighbors is not credible and persuasive. Claimant’s testimony is contradicted by Dr. McCranie’s credible office note that Claimant told her he bought drugs from friends and received benzodiazepines from neighbors. Claimant’s testimony is also contradicted by Dr. Ramsey’s note that Claimant was getting unauthorized medications from a neighbor.

36. Claimant failed to prove that it is more probably true than not that on or about October 1, 2014 he sustained an injury to his knee arising out of and in the course of his employment.

37. Claimant failed to prove it is more probably true than not that his right knee condition was caused or aggravated by any injury arising out of and in the course of his employment on or about October 1, 2014. Claimant’s testimony that his knee condition was caused or aggravated by a work-related incident on or about October 1, 2014 is not credible and persuasive. Claimant’s testimony regarding this incident is found to be incredible for essentially the same reasons stated above. Claimant did not seek any medical treatment after the alleged October 1 injury but continued to perform his regular work. Claimant later told Graffenberger that he was limping because he injured his knee at home when he fell off of a chair. On October 16 when Stephenson presented Claimant with the write up Claimant did not mention that the alleged October 1 injury was a reason for his declining performance. The Claimant’s testimony is also found to be incredible because the histories contained in the medical records commencing October 16, 2014 do not make any credible reference to an October 1 incident where Claimant tripped over some metal.

38. The ALJ has reviewed Respondents’ Exhibit D (video) and finds that it is entitled to little weight. The ALJ finds the video is not illuminating with respect to the issues in this case.

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

CONCLUSIONS OF LAW

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

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

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

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

COMPENSABILITY OF ALLEGED INJURY OF SEPTEMBER 25, 2014

Claimant alleges that he proved it is more probably true than not that on September 25, 2014 he injured his right knee when he tripped over a tool cart and fell. Claimant relies on his own testimony as well as the medical evidence that he suffers from a torn medial meniscus of the right knee. The respondents argue that the compensability of the alleged injury depends largely on Claimant's testimony and that he was not a credible witness. The ALJ agrees with respondents.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment and disability benefits were proximately caused by an injury arising out of and in the course of his employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the work-related injury and the claimed disability and need for medical treatment. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

As determined in Findings of Fact 27 through 35, Claimant failed to prove it is more probably true than not that he sustained a compensable "injury" to his right knee or other part of his body when he tripped and fell over a tool cart on September 25, 2014. Rather, a preponderance of the credible evidence establishes that Claimant's torn meniscus and alleged disability are probably the result of a non-industrial accident that he suffered shortly before October 16, 2015. Insofar as Claimant's testimony would permit the inference that the September 25 incident caused a torn medial meniscus that warrants surgery and is the cause of his alleged disability, the ALJ finds that testimony is not credible and persuasive for the reasons stated in Findings of Fact 29 through 35.

COMPENSABILITY OF ALLEGED INJURY OF OCTOBER 1, 2014

The Claimant failed to prove that the tear of his medial meniscus was caused or aggravated by tripping over metal at work on or about October 1, 2014. For the reasons stated in Finding of Fact 37, the ALJ determines Claimant's testimony concerning the alleged incident of October 1 is not credible and persuasive. Claimant has failed to establish that it is more probably true than not that he sustained any injury at work on or about October 1, 2014.

The claim for benefits in WC 4-964-273 must be denied. Consequently, the ALJ need not address the other issues raised by the parties.

ORDER

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

1. The claim for workers' compensation benefits in WC 4-964-273 is denied and dismissed.

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

DATED: August 10, 2015

DIGITAL SIGNATURE:

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant proved by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment with respondent on October 15, 2014;

2. Whether the claimant proved by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course and scope of her employment with respondent;

3. Whether, should the claimant prove a compensable claim, the claimant has proven by a preponderance of the evidence that the specific medical benefits provided by Memorial Hospital and Front Range Orthopaedics are authorized;

4. Whether, if the claimant satisfies her burden of proof on compensability, the claimant has proven her entitlement to TTD benefits from October 15, 2014, and continuing by a preponderance of the evidence;

5. Whether, if the claimant proves her condition is compensable, and that she is entitled to TTD benefits from October 15, 2014, and continuing, the respondent is entitled to an offset equal to the claimant's $316 weekly unemployment benefits paid to the claimant beginning December 6, 2014, and;

6. Whether, if claimant proves a compensable claim, respondents have proven by a preponderance of the evidence that claimant was responsible for her termination from her job with respondent on November 17, 2014, and responsible for her resulting wage loss, and respondents therefore have no liability for temporary disability benefits pursuant to C.R.S. Sections 8-42-103 (1) (g) and 8-42-105 (4).

Respondent also requested that any medical benefits awarded be paid in accordance with the Division and WCRP medical fee schedule.

STIPULATIONS

1. Claimant withdrew the issue of TPD benefits endorsed for hearing.

2. Claimant's average weekly wage, if the claim is found compensable, is $293.46.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

1. The claimant was employed at the respondent-employer on October 15, 2014, the date of reporting of an injury. She was employed as a commercial baker.

2. The claimant began working for the respondent-employer as a commercial baker on June 25, 2013.

3. The claimant's essential job duties as a baker were among other things:

- Prepare all baked and fried products for the department to established standards.
- Set up product to be baked and fried.
- Maintain work area in a safe and sanitary manner.
- Bake and fry products to established standards.
- Receives load, rotate, verifies and stocks to proper location.
- Transports product to preparation and finishing areas.
- Stocks and organizes supplies in designated areas.
- Handling boxes.

4. The claimant's physical demands as a baker required her to:

- Lift 25 to 40 pounds 21-41% of the shift.
- Lift 41to 50 pounds 21-40% of the shift.
- Carry 1 to 10 pounds 61-80% of the shift.
- Carry 11to 25 pounds 61-80% of the shift.
- Carry 26 to 40 pounds 21-40% of the shift.
- Carry 41-50 pounds 21-40% of the shift.
- Reach above shoulders 21-40% of the shift.
- Use of hands 61-80% of the shift.
- Bending of wrists 61-80% of the shift.
- Twisting wrists 61-80% of the shift.
- Squeezing motion with hands 61-80% of the shift.

5. The claimant's typical shift would start by stretching and pulling the loaf bread dough to fit the baker's tray. She would then have to lift the trays of bread into the baker's rack which was approximately six (6) feet high. This required her to lift overhead. Meanwhile, the claimant would pull racks out of the back freezer containing

boxed product which was approximately six (6) feet high. She would then begin to prepare the doughnuts from frozen dough. To prepare the doughnuts, the claimant would place them in baker's racks and glaze them using the glazing machine. The glazing machine weighs approximately fifteen pounds.

6. One the bread dough was finished proofing, the claimant would wheel the baker's rack into a proofer and the dough would proof for about thirty (30) minutes. Then, she would wheel the baker's rack into the oven to bake for about twenty minutes.

7. After preparing the doughnuts, the claimant would go to the back freezer and assess the back stock load. There are two sets of pallets- one for the bakers and one for the decorators. She was assigned to cut the plastic off both pallet loads. She testified that these pallets were approximately eight (8) feet tall. Then, she would take the individual boxes off of the pallet and load them onto a "u-boat". She would stack the "u-boat" with boxes up to the handle bar height, which is about five (5) feet high. Then, the claimant would either push or pull the "u-boat" to her department. The claimant testified that she was instructed to either push or pull the "u-boat" based on which ever was more comfortable. She would then unload the "u-boat" and lay out the products that she was going to need for the day and put away any product that was not needed. Next, the claimant would take out any product that was needed for the next night (frozen breads, baguettes, and pastries). These products were in transits in the freezer about six (6) feet high with back stock boxes on top of the transits. The claimant would have to reach overhead for these products.

8. The claimant testified that her job required a lot of pushing and pulling. She testified that should was required to push and pull approximately fifty to sixty (50 to 60) pounds. She testified that on "u-boats" she could have to push/pull approximately one hundred pounds with the "u-boat" assistance.

9. The claimant testified that she lifted thirty to thirty-five pound boxes. She testified that she would typically lift between 75 to 125 boxes per shift.

10. At first the claimant had difficulty performing her job because she was having difficulty reaching boxes from the top shelves. She had asked for a stool. She was told that a stool in the kitchen would be a direct safety violation because of slip hazards. The claimant asserted she was having trouble reaching because she is 5'2".

11. The claimant testified that she began experiencing right shoulder pain and numbness in her digits for about three (3) months. She experienced pain when reaching

overhead to retrieve boxes. The claimant also noticed pain when loading and unloading the back stock. The claimant testified that she felt pain in her right shoulder.

12. The claimant testified that she gradually became more stiff while working. The claimant testified that the pain was brought on by specific activities. She testified that a week prior to October 15, 2014, a box tilted off of a stack and leaned on right scapula. She testified that hadn't had any other incidents that could explain the pain that she was experiencing in her right shoulder.

13. The claimant testified that on October 15, 2014, she woke up around 4:00 a.m. with pain in her right shoulder. She testified that she could not move her right shoulder.

14. The claimant testified that she went to the emergency department at Memorial Hospital because she was having right shoulder pain. The claimant reported that

> A couple of weeks ago she says some bread from work fell on top of her right scapula and she has had some shoulder pain ever since. She feels like it is more painful with movement. She has been taking Tylenol. No ibuprofen. She has no primary care, no orthopedic surgeon. She denies any falls or significant trauma. She denies numbness or tingling. She denies rashes, swelling, but just states that repetitive use seems to exacerbate her symptoms.

15. It was further noted that the claimant "presents with chronic right shoulder pain that was reinjured 1 week ago when a box of bread fell and struck the shoulder." She was instructed to follow up with Dr. Reeves Doner at Specialty Family Medicine. She was also instructed to follow up Dr. Geoffrey Doner at Front Range Orthopedics in one week.

16. On October 17, 2014, the claimant was examined by Dr. Brian McIntyre at CCOM. The claimant stated that "she awoke on the 15th with inability to move the shoulder. She is unaware of any specific incident causing an injury. A constant ache that progressed into stiff shoulder that she could not move at all."

17. Eric Ridings, M.D. testified at hearing, and examined the claimant on January 19, 2015. His report documents non-physiologic findings on exam, inexplicable subjective symptoms, and inconsistencies in the claimant's presentation and medical history. Dr. Ridings, after performing his examination and reviewing all the medical records, opined, "In my opinion within a reasonable degree of medical probability, the patient's current complaints cannot be related to her work activities at [the respondent-

employer]. More generally, I do not find objective evidence of any diagnosis to explain the patient's history and findings at her right shoulder, right elbow, right wrist, or right hand. There are multiple issues regarding the patient's given history which I cannot medically explain . . . ." The claimant gave Dr. Ridings a history that was inconsistent with the history and reports she gave at Memorial Hospital on October 15, 2014. Dr. Ridings wrote, "I do not have a medical explanation for how one can awake from sleep at home with sudden onset of such severe shoulder pain that the shoulder cannot be moved . . . ." He concluded, "Overall, within a reasonable degree of medical probability, I find no diagnoses for any of the patient's complaints, which are all greater than objective findings (which are lacking)."

18. The ALJ finds and concludes that Dr. Ridings' analysis and opinions are credible and more persuasive than medical evidence to the contrary.

19. The ALJ finds and concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with the respondent-employer on or about October15, 2014.

20. The ALJ finds and concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course of her employment with the respondent-employer and reported on or about October15, 2014.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might

lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

4. The claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

5. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

6. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); see also, *Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957).

7. The Workers' Compensation Act creates a distinction between the terms “accident” and “injury.” The term "accident" refers to an, “Unexpected, unusual, or undesigned occurrence.” § 8-40-201(1), C.R.S. In contrast, an “injury” refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an “injury” is the result. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the “accident” results in a compensable "injury." *Romine v. Air Wisconsin Airlines*, W. C. No. 4-609-531 (October 12, 2006)

8. An occupational disease is a "disease which results directly from the employment or the conditions under which the work is performed," and which is a natural incident of the work, and is not the result of "hazards to which the worker would have been equally exposed outside of the employment." § 8-40-201(14), C.R.S.

9. A claimant seeking benefits for an occupational disease must first establish the existence of the disease and that it was directly and proximately caused by claimant’s employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims,* 989 P.2d 251, (Colo. App. 1999); *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). Once identified, before a disease can be found to be a compensable occupational disease, it must meet each element of the test mandated by the statute, which operates as an additional causal limitation. *Anderson v. Brinkoff*, 859 P.2d 819, 824 (1993). Included in the analysis is the “particular risk” test. Particular risk means that claimant was exposed by his employment to risk causing a disease in a measurably greater degree and in a substantially different manner than are persons in employment generally*. Id.* Even if a particular risk is proven, claimant must also prove that his disease is the result of a special hazard associated with employment and not the type he would be equally exposed to outside of employment. *Id.;* C.R.S. § 8-40-201 (14).

10. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. §8-41-301(1) (c); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

11. To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of

a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988).

12. The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms, or that the employment aggravated or accelerated a preexisting condition. Instead, the appearance of symptoms may be the logical and recurrent consequence of a preexisting condition *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985). As noted in *Martinez v. Monfort, Inc*., W.C. No. 4-284-273 (ICAO August 6, 1997), "The fact that the claimant's job duties may have intensified her pain does not compel a different result because the ALJ was persuaded that it is the underlying condition which prevents the claimant from returning to work."

13. The question of whether the claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

14. As found above, the ALJ conclues that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

15. The ALJ concludes, as found above, that the weight of the lay and medical evidence establishes that the claimant has failed to establish by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with respondent-employer.

16. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course of her employment with the respondent-employer and reported on or about October15, 2014.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: August 28, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant sustained a compensable injury to her right knee;

2. Whether the claimant is entitled to reasonable, necessary, and related medical benefits to cure or relieve her from the effects of her injury, specifically Dr. Merchant's referral of the claimant to an orthopedic surgeon.

STIPULATION

The parties stipulated that if this claim is found compensable, the referral by Dr. Merchant to an orthopedic surgeon is reasonably necessary in order for the parties to have a reviewable order.

FINDINGS OF FACT

1. At the time of the injury the claimant worked as a receptionist and scheduler for all parole board hearings.

2. The claimant is still employed by the respondent.

3. On September 18, 2014, the claimant was getting into a co-workers vehicle to go to lunch, in the parking lot of the facility that she worked at, when she slipped on the gravel in the parking lot and twisted her knee. She also felt a popping sensation and felt intense pain.

4. On the morning of September 18, 2014, the claimant's knee felt great and she had no problems at all with her right knee.

5. The ALJ finds that the claimant's testimony is credible and persuasive.

6. There is insufficient evidence to establish that the claimant ever sought medical treatment for her right knee at any point throughout her life up to the date of injury, September 18, 2014.

7. The claimant sought treatment for her right knee after the injury at CCOM. She initially saw Steven Bryne, P.A. who diagnosed the claimant with "sprains and strains of other specific sites of knee and leg." Mr. Bryne did not believe that the claimant's knee injury was related to her work.

8. The claimant was next seen by Dr. Merchant on October 10, 2014. Dr. Merchant agreed with Mr. Bryne's diagnosis concerning the knee and also agreed that the claimant had not suffered a work related injury because the claimant was not entering a company vehicle or engaged in any work activity at the time of the injury.

9. The claimant was sent to Wallace Larson, M.D. for an independent medical evaluation. Dr. Larson saw the claimant on January 21, 2015. In his report Dr. Larson opined that

> [I]t is likely that the patient has some pre-existing osteoarthritis of her knee and a torn medial meniscus. She has not had any imaging studies, either radiographic or MRI. From an orthopedic stand point, it would be indicated to obtain weight bearing radiographs of her right knee, depending on the results, possible treatment with either injection or additional diagnostic studies such as an MRI scan.

10. Dr. Larson also opined that the claimant did not suffer a work related injury because she was not engaged in work activities at the time of the injury.

11. On March 23, 2015, Dr. Larson reviewed weight bearing radiographs and determined that the claimant suffered from moderate to severe cartilage space narrowing medially with mild bony eburnation and small marginal osteophytes with possible stress fracture. Dr. Larson request that an MRI be done to verify the diagnosis.

12. On June 12, 2015 an MRI was completed at the request of Dr. Merchant. That MRI showed 1. Chondromalacia Patellae type III with mild Osteoarthritis in the medial compartment of the joint with small joint effusion. 2. Small tear in the posterior horn of the medial meniscus and 3. Thinning of the anterior cruciate ligament, possibly a remote partial tear.

13. Paul Merchant, M.D. testified by deposition. When he initially saw the claimant on October 2, 2014, it appeared to him that the claimant had suffered an acute injury.

14. The reason that Dr. Merchant did not order further treatment after October 2, 2014, was due to his concern over the work relatedness of the incident since it occurred in a parking lot at lunchtime. Dr. Merchant compared the injured right knee to

the claimant's left knee and it was clear to him from his examination that the claimant had suffered an injury to her right knee.

15. The ALJ finds Dr. Merchant's testimony credible and persuasive.

16. Wallace Larson, M.D. testified by deposition as well. Dr. Larson did not believe that the claimant's knee was asymptomatic at the time of the injury on September 18, 2014. Dr. Larson testified that it would be a matter of history to determine the symptomology of the claimant's knee prior to the injury. Dr. Larson did not examine the left knee to compare the conditions of both knees to help in determining whether or not he claimant had suffered an injury to her right knee on September 18, 2014. Dr. Larson assumes that the claimant had knee pain prior to this injury, even though there is insufficient evidence to that effect.

17. The ALJ does not find Dr. Larson's testimony persuasive.

18. The ALJ finds that the claimant has established that it is more likely than not that she sustained an injury to her right knee arising out of and in the course of her employment with the respondent.

19. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to reasonable, necessary, and related medical care to cure or relieve her from the effects of his injury, specifically the referral to an orthopedic surgeon as requested by Dr. Merchant.

CONCLUSIONS OF LAW

1. To establish a compensable injury, the claimant has the burden to prove by a preponderance of the credible evidence that his condition arose out of and in the course of his employment. *See* §8-41-301(1)(c), C.R.S. *Madden v. Mountain West Fabricator's*, 977 P.2d 861 (Colo. 1999).

2. The case are bar is slightly different to the extent that it involves an injury that occurred in a parking lot. However, the law has been well settled concerning this issue. The courts have consistently ruled that a parking lot provided by the employer is considered to be an extension of the employer's premises, and that injuries occurring in such parking lots are within the course of employment. *Matter of Welham*, 653 P.2d 760 (Colo. App. 1982); *Stewart v. U. S.*, 716 F.2d 755 (10th Cir.1982). As found the

claimant was going to lunch when she stepped into a co-workers vehicle and slipped into a hole causing immediate onset of pain.

3. It is true that injuries sustained while going to and from work do not arise out of employment because they lack a sufficient causal connection to the employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). Colorado's appellate courts, however, have long recognized that accidents "occurring in or en route to parking lots maintained on its premises or provided by the employer for the benefit of employees, are compensable as arising out of and in the course of employment." *State Compensation Insurance Fund v. Walter*, 143 Colo. 549, 553, 354 P.2d 591, 593 (1960).

4. The ALJ must then determine if the injury that the claimant suffered is more likely that not to have been caused by the incident alleged. In this case it is clear that the claimant did not have any previous knee conditions or even a previous report of pain, even if the claimant had previous asymptomatic knee conditions. That being the case the statute requires that even if the claimant has a pre-existing condition that is exacerbated by a workers' compensation injury it is compensable. C.R.S.A. § 8-42-104 (1) states: The fact that an employee has suffered a previous disability or impairment or received compensation therefor shall not preclude compensation for a later injury or for death, but, in determining compensation benefits payable for the later injury or death, the employee's average weekly earnings at the time of the later injury shall be used in determining the compensation payable to the employee or such employee's dependents.

5. The question of whether the claimant met his burden of proof is one of fact for determination by the ALJ. *See Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988)

6. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark*, 593 P. 2d 792 (Colo. 1979).

7. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of an injured worker or the rights of the employer. *See* §8-43-201, C.R.S. (2010).

8. When determining credibility, the fact finder should consider among other things the consistency or any inconsistencies of the witness' testimony, the fact that the witness' testimony in important particulars was contradicted by other witnesses; the

reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness, and the bias or prejudice of the witness, if any. *See Prudential Insurance Co. of America v. Cline*, 57 P.2d 1205 (1936), CJI Civil 3:16 (2005).

9. As found, the ALJ concludes that the claimant and Dr. Merchant's testimony is credible and persuasive.

10. After considering all the evidence, the ALJ concludes that the claimant has established by a preponderance of the evidence that she sustained an injury to her right knee arising out of and in the course of her employment with the employer.

11. The respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant has proven by a preponderance of the evidence that her low back condition is related to the work injury the claimant sustained on January 15, 2013.

12. Here it has been stipulated that the referral by Dr. Merchant is reasonable and necessary.

13. The ALJ concludes that the claimant is entitled to medical benefits per the parties' stipulation.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The claimant's claim for reasonable, necessary, and related medical benefits is granted, specifically the referral by Dr. Merchant to an orthopedic surgeon.

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

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

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

DATE: August 28, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that on July 4, 2014 she sustained a right shoulder injury proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that as a result of the alleged injury she is entitled to an award of reasonable and necessary medical benefits including right shoulder surgery?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 6 were received in evidence. Respondents' Exhibits A through K were received in evidence.

2. Claimant was employed as the general manager of the Employer's restaurant business. She is also a 7% owner of the business. In her management capacity Claimant performs numerous duties including supervision, bar tending and food preparation.

3. Claimant testified as follows concerning the events of Friday, July 4, 2014. The Employer's restaurant was very busy because of the holiday weekend. At about 2:30 p.m. Claimant was in a walk-in freezer and getting ready to exit when she remembered she needed to take out some steaks. At this moment Claimant reached out with her right arm in order to pick up the steaks. Her arm was extended to the side and slightly below and behind the shoulder joint. Just as Claimant touched the steaks she heard a "crinkle" sound and experienced "discomfort" in her shoulder. Claimant had not yet begun to lift the steaks when she heard the noise and experienced the discomfort.

4. Claimant testified as follows concerning the remainder of her shift on July 4, 2014. She continued working at the restaurant until shortly before 4 p.m. During this period she experienced some discomfort and pain in her right shoulder. By 4 p.m. Claimant was required to leave the restaurant and travel to another Employer facility known as the Tiki Bar. A bartender scheduled to work at the Tiki Bar called in sick and Claimant was required to fill in. While bartending at the Tiki Bar Claimant experienced some increased pain in the right shoulder when she reached overhead to place bottles and pull tap handles and when she picked up an ice bucket.

5. Claimant testified that prior to July 4, 2014 she never had problems with her right shoulder, never had an injury to the right shoulder and never received medical treatment for the right shoulder.

6. At the hearing the parties stipulated that Claimant is not alleging that she sustained a repetitive motion type of injury when working at the Tiki Bar. Claimant's counsel stated in open court that Claimant's sole "issue" is the injury allegedly caused by reaching for the steaks and the testimony concerning the Tiki Bar was solely for the purpose of establishing how Claimant felt after she reached for the steaks.

7. Claimant notified her "partners" of the alleged shoulder injury on the morning of Saturday, July 5, 2015. Nevertheless, on July 5 Claimant continued to work at the restaurant and also at the Tiki Bar. Claimant also worked on Sunday July 6, 2014. On Monday, July 7, 2014 Claimant made an appointment at High Country Healthcare (HCH) for treatment for her shoulder. Claimant knew that HCH was the Employer's designated provider for workers' compensation injuries.

8. On July 7, 2014 Lawrence George, M.D., examined Claimant at HCH. Dr. George recorded a history that Claimant was at work on Friday when she "felt pain in the posterior upper arm and shoulder when she reached for something." Dr. George also wrote that Claimant "was lifting." Dr. George assessed a "strain of [the] right upper arm" and "shoulder pain." He prescribed pain medication. He also imposed restrictions of no lifting greater than "10-15" pounds, no repetitive lifting greater than 5 pounds, no pushing/pulling greater than "5-10" pounds and no reaching overhead or away from the body. Dr. George completed a Physician's Report of Compensation Injury (M 164) and checked a box indicating that his "objective findings" were consistent "with history and/or work related mechanism of injury/illness."

9. On July 14, 2014 Dr. George again examined Claimant. Claimant reported that she wasn't feeling any better but was functioning well at work within the restrictions. Dr. George referred the Claimant for physical therapy (PT).

10. On October 3, 2014 Dr. George recorded that Claimant had been in PT but "wasn't making much progress." X-rays of the right shoulder revealed "mild arthritis" of the acromioclavicular joint and possible tendon calcification superior to the femoral head. Dr. George performed a right shoulder subacromial cortisone injection.

11. On October 27, 2014 Dr. George noted the cortisone injection "helped a lot for a couple of weeks" but the Claimant's pain was "starting to come back including at night." Dr. George referred Claimant for an MRI to "rule out a torn rotator cuff."

12. On October 30, 2014 Claimant underwent an MRI of the right shoulder. The radiologist's impressions were as follows: (1) Longitudinal tear of the infraspinatus myotendinous junction with extension into the infraspinatus articular surface and mild to moderate infraspinatus tendinosis; (2) Disruption of the biceps pulley with subluxation of the long head of biceps tendon, and moderate intra-articular tendinosis of the long head of the biceps tendon and likely partial tearing involving up to 50

percent of total tendon substance; (3) Chronic degeneration of the glenoid labrum including a partially detached tear of the anterior-superior to anterior-inferior labrum.

13. On October 31, 2014 Dr. George reviewed the results of Claimant's MRI. He referred Claimant to Vail Summit Orthopedics (VSO) for a consultation regarding her "torn rotator cuff." Dr. George also completed an M 164 listing Claimant's work related diagnosis as "Rotator Cuff tear R shoulder." Claimant was restricted to lifting, carrying, pushing and pulling no more than 40 pounds and no overhead reaching.

14. On November 4, 2014 orthopedist Erik Dorf, M.D., examined Claimant at VSO. In his office note Dr. Dorf recorded a history that 4 months previously Claimant "was reaching for a box of tenderloins and twisted her arm causing pain in her right shoulder. Claimant reported "pain with rotation of the arm, and forearm." On physical examination (PE) of the right shoulder Dr. Dorf noted mild weakness with internal rotation and weakness with external rotation. He also noted a "positive empty can test" and a positive Yergesons test. Dr. Dorf assessed a "rotator cuff tear" and stated Claimant was "likely to require surgical management of this in the future." Dr. Dorf noted that the Claimant "would like to proceed with an operative treatment plan at this time."

15. On November 4, 2014 Dr. Dorf completed an M 164. Dr, Dorf wrote that Claimant's description of the injury was "lifting tenderloin @ work / twist /pop in R shoulder." Dr. Dorf listed Claimant's work related diagnosis as "RCT R shoulder" and checked a box stating that his objective findings were "consistent with history and/or work related mechanism of injury/illness."

16. Dr. Dorf requested authorization to perform a rotator cuff repair surgery.

17. At the Insurer's request orthopedic surgeon Christopher Isaacs, D.O., completed a records review of Dr. Dorf's request to perform surgery. Dr. Isaacs wrote that based on his review of the records Claimant's reported mechanism of injury was "simply reaching to her side when she had sudden pain in her shoulder" and she had not "yet grasped anything." Dr. Isaacs opined that based on the MRI results the surgery recommended by Dr. Dorf (arthroscopic repair of shoulder with open biceps tenodesis) is appropriate. However, Dr. Isaacs opined that the "mechanism of injury is completely inconsistent with the extensive nature of the MRI findings." Dr. Isaacs explained that "it would have been nearly impossible to have torn multiple components of the rotator cuff complex along with dislocation and tearing of the biceps tendon simply from reaching." Dr. Isaacs concluded that the MRI findings "predated" Claimant's alleged injury and recommended denial of Dr. Dorf's request for surgery.

18. After the request for surgery was denied Dr. Dorf authored an undated "appeal letter." Dr. Dorf wrote that his November 4, 2014 examination of Claimant was "concerning" for a "tear of her proximal biceps." He noted that the MRI showed tearing of the infraspinatus, superior tearing of the subscapularis and "medial subluxation of the biceps." Dr. Dorf stated that he agreed with Dr. Isaacs that "some of these issues are likely chronic." However, Dr. Dorf opined that Claimant's "biceps symptoms were

caused or greatly exacerbated" by a "twisting reach." Dr. Dorf noted Claimant did not report any shoulder symptoms prior to the reaching incident and had "continued to complain of biceps symptoms since."

19. Dr. Isaacs testified at the hearing. Dr. Isaacs is board certified in orthopedic surgery and level II accredited. Dr. Isaacs reiterated his opinion that the MRI findings, including the rotator cuff tear and biceps tendon tear predated the July 4, 2014 reaching incident. Dr. Isaacs does not have an opinion as to what caused the rotator cuff tear and biceps tendon tear except that they were not caused by the reaching incident of July 4. Dr. Isaacs opined that the act of reaching is such a minor physiological stress that it could not have caused the pathologies depicted on the MRI. Dr. Isaacs also disagreed with Dr. Dorf's opinion that the Claimant's bicep symptoms could have been aggravated by the reaching incident. Dr. Isaacs explained that based on his knowledge and experience the act of reaching requires such minimal effort that it could not have altered the pre-existing pathologies. Dr. Isaacs also testified that his opinion would not change if the evidence showed Claimant had been twisting her body and reaching behind when she heard the "crinkle" noise in her shoulder. Dr. Isaacs stated the Claimant was unlikely to have injured the tendons by reaching behind and that the "crinkle" noise the Claimant heard could have been caused by many different things. Dr. Isaacs understood that Claimant had no pre-injury diagnosis of shoulder problems and no pre-injury history of treatment of the shoulder. The absence of pre-injury symptoms did not alter his opinions concerning causation.

20. Claimant proved it is more probably true than not that on July 4, 2014 she sustained a right shoulder injury arising out of and in the course of her employment. Claimant also proved it is more probably true than not that the injury was a proximate cause of her subsequent need for medical treatment including the shoulder surgery recommended by Dr. Dorf.

21. Claimant credibly testified that on July 4, 2014 she experienced the onset of right shoulder symptoms when she reached for meat with her right arm extended to her side slightly below and behind the level of her shoulder joint. Claimant's testimony is largely consistent with the history she provided to Dr. George and Dr. Dorf, as well as the history that Dr. Isaacs gleaned from the medical records. Although there is some question in Dr. George's July 7, 2014 office note as to whether Claimant initially gave a history that she was "lifting" meat or merely "reaching" for meat, the ALJ finds that this discrepancy is minor. The discrepancy does not lead the ALJ to conclude the Claimant attempted to conceal her true history from Dr. George. Indeed, Dr. Dorf's letter of November 14, 2014 and the testimony of Dr. Isaacs reflect that both physicians understand that the alleged "mechanism of injury" involves reaching, not lifting.

22. Claimant credibly testified that the right shoulder symptoms began contemporaneous with the reaching incident of July 4, 2014 when she experienced a "crinkle" sound and "discomfort" in the shoulder. Throughout the remainder of the day Claimant experienced symptoms of shoulder pain, especially when reaching overhead at the Tiki Bar. Claimant credibly testified that she reported this incident to her

"partners" the next day and sought treatment with Employer's authorized providers (HCH) on Monday, July 7, 2014.

23. Claimant proved that the July 4, 2014 reaching incident occurred "in the course of" her employment. Specifically, Claimant was on duty at the Employer's restaurant performing her duties as the restaurant manager. These duties included reaching for steaks to help with food preparation.

24. Claimant proved the July 4, 2014 reaching incident "arose out of" her employment. Dr. Dorf credibly opined that although Claimant had pre-existing degenerative conditions of her shoulder including the biceps tendon and pulley as shown by MRI, the act of reaching back with a "twisting" motion to pick up the steaks probably caused an aggravation of the pre-existing biceps problems. Dr. Dorf credibly and persuasively pointed out that prior to July 4, 2014 Claimant's right shoulder was apparently asymptomatic and she had not sought medical treatment for any shoulder problems. However, after the reaching incident Claimant has continuously complained of symptoms associated with her biceps tendon. Dr. Dorf's opinion is corroborated by Dr. George who diagnosed a work-related "Rotator Cuff tear R shoulder."

25. There is no credible and persuasive evidence, including medical records, to show that Claimant ever complained of or sought treatment for right shoulder symptoms prior to the July 4, 2014 incident.

26. The opinion of Dr. Isaacs that the reaching incident was not sufficient to be a "mechanism of injury" is not as persuasive as Dr. Dorf's contrary opinion. Dr. Isaacs did not examine the Claimant nor did he meet with Claimant to take a direct history. More importantly, Dr. Isaacs did not persuasively refute Dr. Dorf's argument that the temporal relationship between the onset of Claimant's right shoulder symptoms and the reaching incident of July 4, 2014 is an important indicator of a causal relationship between the two events. The ALJ understands Dr. Isaacs to opine that the reaching incident of July 4 was purely coincidental with the onset of Claimant's right shoulder symptoms. However, in light of Dr. Dorf's opinion, the ALJ finds it improbable that the lifting incident and the onset of symptoms are coincidental and not causally related.

27. Claimant proved it is more probably true than not that the industrial aggravation of the pre-existing right shoulder condition is a proximate cause of her subsequent need for medical treatment including the surgery recommended by Dr. Dorf. As found, some of Claimant's shoulder pathology undoubtedly pre-dated the lifting incident of July 4, 2014. However, the medical records and the opinions of Dr. Dorf demonstrate that the lifting incident caused additional injury to the biceps tendon and pulley so as to cause Claimant to experience pain and discomfort. Claimant's right shoulder was asymptomatic prior to July 4 and she was able to perform her regular duties. After that date Claimant was symptomatic and sought treatment for right shoulder symptoms. The ALJ infers from this evidence that there is a direct causal relationship between the reaching incident of July 4 and claimant's need for treatment including the proposed surgery.

28. The parties stipulated at hearing that the surgery proposed by Dr. Dorf is reasonable and necessary to cure and relieve the effects of Claimant's right shoulder condition.

29. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

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

COMPENSABILITY OF ALLEGED SHOULDER INJURY

Claimant contends the evidence establishes it is more probably true than not that when she reached for the meat on July 4, 2014 she caused injury to her shoulder or aggravated pre-existing pathology so as to necessitate medical treatment including the surgery recommended by Dr. Dorf. Claimant argues that this chain of events constitutes a compensable injury that arose out of and in the course of employment. Respondents contend the evidence establishes that Claimant's shoulder pathology is not the result of an injury "arising out of" her employment but is instead the product of a "personal risk" that predated the injury. The Respondents further argue that the act of reaching is "ubiquitous" and is not a "special hazard" of Claimant's employment that would elevate her shoulder pathologies to compensable injuries. The ALJ agrees with Claimant.

The claimant in a workers' compensation case is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course her employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof to establish these elements is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Painting Co. v. Blair*, *supra.*

In *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2013) the supreme court stated that risks causing injury to employees may be placed "within three well-established, overarching categories:

> (1) *employment risks,* which are directly tied to the work itself; (2) *personal risks*, which are inherently personal or private to the employee him- or herself; and (3) *neutral risks* which are neither employment related nor personal.

The *City of Brighton* court stated that the first category of risks encompasses "risks inherent to the work environment itself" and the causal relationship of such risks to the employment is "intuitive and obvious." Hence, injuries resulting from such risks are "universally considered to 'arise out of' employment under the Act." 318 P.3d at 502. In contrast, the court stated that the second category of risks are "entirely personal or private" to the employee and include preexisting idiopathic illnesses or medical conditions that are completely unrelated to the employment. Such idiopathic conditions and injuries are generally not compensable unless an exception, such as the "special hazard doctrine," applies. 318 P.3d at 503. The third category of risks are "neutral risks" and are "not associated with either the employment itself nor with the employee him- or herself." Injuries caused by neutral risks, such as lightning, murderous lunatics and stray bullets "arise out of" because they would not have occurred *but for* employment. Such neutral risk or "positional risk" injuries are causally related to the employment because the employment "obligated the employee to engage in employment-related functions, errands, or duties at the time of injury." 318 P.3d at 503-504.

A pre-existing disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107

P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is a typical symptom from the aggravation of a pre-existing condition and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the industrial injury and is not attributable to an underlying pre-existing condition. *Sanderson v. The Servicemaster Co.*, WC 4-854-168-02 (ICAO May 14, 2013); *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

In cases where there is a compensable aggravation of a pre-existing condition the claimant need not show that the industrial injury was the "sole cause" or "principal cause" of a need for medical treatment. Rather, it is sufficient to show the injury was a "significant" cause of the need for treatment in the sense that there is a direct causal relationship between the industrial aggravation and the need for treatment. *Coleman v. General Parts International,* WC 4-912-645-01 (ICAO February 26, 2o14); *Nicholl v. Cannino Sausage Co.,* WC 4-473-725 (ICAO March 10, 2003).

The ALJ concludes Claimant proved by a preponderance of the evidence that on July 4, 2014 she sustained an injury to the right shoulder "in the course of" her employment. As determined in Findings of Fact 21 through 23, Claimant experienced the onset of right shoulder symptoms when she reached for some steaks while performing her duties as a restaurant manager. This incident occurred during the time and place limits of Claimant's employment while she was performing her duties.

The ALJ concludes Claimant proved by a preponderance of the evidence that on July 4, 2014 she sustained and injury "arising out of" her employment. Specifically, the ALJ concludes that the act of reaching precipitated an aggravation of Claimant's pre-existing biceps tendon and pulley conditions.

As determined in Findings of Fact 24 through 26 the ALJ credits the opinion of Dr. Dorf that, although Claimant had pre-existing shoulder pathology, the reaching incident of July 4, 2014 "aggravated" the biceps tendon and pulley pathology so as to render it symptomatic and cause a need for treatment. As found, Dr. Dorf persuasively explained that the temporal relationship between the lifting incident and the onset of Claimant's symptoms supports the conclusion that the two events are causally related. Dr. Dorf's opinion is corroborated by the opinion of Dr. George. It is also supported by Claimant's credible testimony that she did not have any right shoulder symptoms or treatment prior to the reaching incident of July 4, 2014. Although Dr. Isaacs expressed opinions that conflict with those of Dr. Dorf, the ALJ finds Dr. Isaacs's opinions are not persuasive for the reasons stated in Finding of Fact 26.

In reaching this result the ALJ necessarily rejects Respondents' argument that Claimant's injury is not compensable because it was "precipitated" by a pre-existing "personal" or "idiopathic condition" condition. In this case the ALJ finds the duties of Claimant's employment precipitated an aggravation of pre-existing pathology. As such the ALJ concludes that the injury in this case resulted from a risk that was inherent in the duties of Claimant's employment and therefore arose out of her employment. *City of Brighton v. Rodriguez, supra*; *H & H Warehouse v. Vicory, supra.*

As determined in Finding of Fact 27, the reaching incident of July 4, 2014 rendered Claimant's shoulder condition symptomatic and caused her need for medical treatment including the surgery recommended by Dr. Dorf. Thus the industrial injury of July 4 proximately caused a need for medical treatment. The fact that the injury combined with a pre-existing condition to cause the need for treatment does not sever the causal relationship between the injury and need for treatment. *Coleman v. General Parts International, supra*; *Nicholl v. Cannino Sausage Co., supra*.

REASONBLE AND NECESSARY MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The parties stipulated that if the claim is compensable the surgery proposed by Dr. Dorf constitutes reasonable and necessary medical treatment. Because the ALJ finds the claim is compensable the Respondents shall provide reasonable and necessary medical treatment including the surgery recommended by Dr. Dorf.

ORDER

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

1. On July 4, 2014 Claimant sustained a compensable injury to her right shoulder arising out of and in the course of her employment.

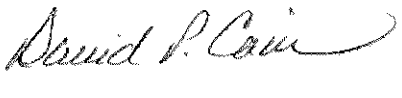
2. As a result of the compensable injury Insurer shall provide reasonable and necessary medical treatment including the surgery proposed by Dr. Dorf.

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

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

DATED: August 17, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained compensable occupational diseases in the form of bilateral Carpal Tunnel Syndrome (CTS), right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome during the course and scope of her employment with Employer.

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

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of 911.00.

2. If Claimant suffered an occupational disease she is entitled to receive Temporary Total Disability (TTD) benefits for the period January 7, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 54 year old female who worked for Employer as a Membrane Specialist. Claimant's job duties entailed separating whey into protein and lactose through a human machine interface. The area in which Claimant worked is a warehouse-type facility with pipes that carry whey through the system to containers or vessels. The vessels are long, cylindrical, metal tubes. Inside the vessels are membranes that filter the whey into protein and lactose.

2. Claimant explained that a typical work shift lasted from 10-12 hours per day or approximately 40-50 hours each week. She engaged in a variety of tasks in performing her job duties. She monitored operations and performed computer work. The computer work involved data entry for daily reports and lasted for approximately 30-60 minutes sporadically throughout each day.

3. Claimant also removed and tested samples of protein that were already in the filtration system. She explained that the vessels were connected to the pipes in the system by small, clear tubes. Claimant removed weekly samples from the tubes by holding a small bag under the stopcock. She then twisted the bags closed for testing.

4. Claimant explained that the most physically demanding part of her job involved changing the membranes. She testified that she spent approximately one to four hours each day changing between five and 30 membranes. The membranes had to be pushed out of the vessel from the back using a metal pole. Each vessel contained up to five membranes. The vessels were eight inches in diameter and up to 20 feet long. Each vessel had an eight-inch diameter metal face plate on the front and back that was attached by two screws. The vessels were stacked six high and reached approximately 12-13 feet off the floor. Claimant noted that she used a platform but still worked overhead when the vessels were above chest height. Each membrane was four feet in length and about eight inches in diameter. The membranes were connected to each other in the vessel by a metal plate called an ATD unit. When wet inside the vessel each membrane weighed 42 pounds.

5. Claimant remarked that at times the membranes were tight and required significant force to push them through. As each membrane came out of the vessel it had to be separated from the membrane behind it. Claimant commented that she had to hold the first membrane and move it up and down to "shake it loose" from the attached membrane. Once a membrane was out of the vessel, Claimant placed it on a mat. She then removed the ATD by prying it off.

6. New membranes were stored in plastic bags in crates or near the ground. The new, dry membranes weighed 32 pounds. Before installing the new membranes Claimant was required to log the serial numbers of the membranes to keep track of their sequence in the vessel. She reattached the ATD to each membrane and placed the membrane in the vessel. Claimant then reconnected the faceplates to the vessels and the vessels to the pipes. She estimated that it took 45-60 minutes to complete the process of changing all membranes in a vessel.

7. Claimant occasionally performed a "bubble test." The procedure involved submerging a membrane in water, holding it beneath the water and running air through it to check for leaks. On days when bubble testing was required, Claimant performed the procedure between two and 30 times during her shift.

8. In June of 2014 Claimant began to develop pain into her right thumb. The pain was associated with numbness and tingling that extended into her right wrist. Claimant also began to develop right elbow pain. She reported her symptoms to Employer and was directed to Workwell Occupational Medicine for treatment. Claimant was diagnosed with flexor tenosynovitis in both wrists. She received splints, medications, physical therapy and work restrictions. The claim was assigned Workers' Compensation case No. 4-953-809.

9. Claimant returned to work within her restrictions. In October 2014 she was notified that she and a coworker would need to begin night shifts to look for defects in membranes. They were expected to change about 30 membranes each night for approximately three to four weeks. The total project consisted of changing 360 membranes. Claimant commented that she changed about 20 of the 30 membranes each night while her coworker changed the remaining 10. Claimant was required to

work at a fast pace because of time deadlines. She explained that her symptoms worsened and she began to develop radiating symptoms into her right shoulder. Claimant reported her symptoms to Employer and chose to visit Banner Occupational Health Clinic for medical treatment. The claim was assigned Workers' Compensation case No. 4-966-230.

10. On November 5, 2014 Claimant visited Laura Caton, M.D. at Banner for an evaluation. Claimant explained her job duties and reported symptoms that included aching pain in both arms and occasional sharp pain in her thumbs, elbows and right shoulder. Dr. Caton diagnosed Claimant with bilateral gamekeeper's thumb, myofascial pain syndrome of the thoracic spine, degenerative joint disease of the bilateral 1st CMC joints and bilateral elbow tenosynovitis. X-rays did not reveal any significant degenerative changes.

11. Claimant returned to work for Employer with restrictions. She visited Dr. Caton a number of times, but Dr. Caton never completed a causation analysis. Dr. Caton reviewed an ergonomic report of Claimant's work activities, but concluded the report "[w]as not specific enough in cycles, force or repetitions to provide an adequate causality assessment" pursuant to the Division of Workers' Compensation Guidelines." She remarked that "[a] full ergonomic assessment with the employee present to measure force, repetitions, and ergonomics of the job site would be key in determination of casualty." Dr Caton prescribed physical and occupational therapy.

12. Claimant attended one physical therapy session but her claim was subsequently denied. On January 7, 2015 Employer notified Claimant that it could no longer accommodate her work restrictions and terminated her employment. Claimant has thus not worked since January 7, 2015.

13. On March 19, 2015 Vocational Evaluator Joe Blythe performed a Job Demands Analysis. Part of his job duties is to assess an individual's work activities for purposes of quantifying the force and repetition involved. Mr. Blythe testified that he is familiar with the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5 Cumulative Trauma Conditions (*Guidelines*). The purpose of his evaluations is to obtain the correct measurements and data necessary to determine if an individual's work activities meet the criteria set forth in the *Guidelines*. On two occasions, Mr. Blythe traveled to Employer's factory and observed workers' performing Claimant's job activities. He testified that it is not unusual to perform a job site analysis in the absence of the injured worker. In fact, the injured worker is often not available because of work restrictions.

14. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of

supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

15. Mr. Blythe drafted three separate vocational reports evaluating the job site for primary and secondary risk factors for cumulative trauma. During his two visits, he did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture and repetition/duration (elbow flexion). Mr. Blythe concluded that in a 7.5-hour day an individual would meet the force time risk factor only 1.1 hours per day or far less than the required six hours. Even in a 10.5-hour day the force measurement only reached 1.5 hours per day. Similarly, Mr. Blythe concluded that in a 10.5-hour day an individual would meet the elbow flexion risk factor only 1.4 hours per day or far less than the required six hours. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration.

16. In an addendum to his first report Mr. Blythe addressed the membrane changing aspect of Claimant's job. He confirmed with Claimant's supervisor that on two days each week Claimant spent more time changing membranes than what was depicted in the body of his report. Based on the increased percentage of membrane changes the force time for a 10.5-hour day only reached 2.3 hours. In a report dated April 12, 2015 Mr. Blythe prepared an addendum to calculate the force demands assuming that Claimant completed one daily cycle by only changing membranes. Using a workday duration of 10.5 hours the force time equaled 2.8 hours.

17. In order to best calculate the force demands associated with changing membranes, Mr. Blythe returned to Employer's facility a second time to observe workers who were only changing membranes. In his report dated June 27, 2015 Mr. Blythe calculated force measurements based both on a solo worker changing membranes and a team changing membranes. Concerning the solo worker study, a 10.5-hour workday yielded 1.1 hours per day of maximum force. Regarding elbow flexion, a 10.5-hour workday yielded 1.5 hours per day of greater than 90 degrees elbow flexion. For the team study a 10.5-hour workday yielded a maximum force of approximately 2.7 hours and elbow flexion of 1.4 hours per day. Accordingly, Claimant's membrane changing activities did not meet the minimum thresholds for force, repetition or duration to establish an occupational disease pursuant to the *Guidelines*.

18. On March 30, 2015 Claimant underwent an independent medical examination with Elizabeth Bisgard, M.D. At the time of her examination, Dr. Bisgard only had Mr. Blythe's first report. Claimant provided Dr. Bisgard with a complete and accurate account of her job duties. Dr. Bisgard assessed Claimant with right shoulder

impingement with secondary myofascial pain syndrome and signs and symptoms consistent with CTS and de Quervain's tenosynovitis. Based on Mr. Blythe's report, Dr. Bisgard concluded that the work performed by Claimant did not meet the threshold of work related CTS or de Quervain's tenosynovitis pursuant to the *Guidelines*. Dr. Bisgard noted that, although Claimant described using force and awkward positioning, there was enough "rest time in between task and 'down time' to allow sufficient recovery." Specifically, Claimant performed several different activities throughout the day and many of the activities did not meet the minimal force or time duration requirements pursuant to the *Guidelines*.

19. Regarding Claimant's right shoulder, Dr. Bisgard was equivocal. She noted that based on Claimant's job duties the right shoulder impingement might be work related. However, Dr. Bisgard testified at the hearing that upon review of Mr. Blythe's supplemental reports her opinion was no longer equivocal concerning Claimant's right shoulder. She determined that Claimant's work activities did not meet the criteria for cumulative trauma based on Rule 17, Exhibit 4 of the *Guidelines*. Dr. Bisgard explained that Claimant's work activities did not meet the criteria for cumulative trauma to the right shoulder. She also noted that the number of years working above shoulder level is one of the most significant factors contributing to shoulder pathology. Claimant's work above the shoulder was far less than the 13.3 year threshold for developing shoulder pathology.

20. Dr. Bisgard determined that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. Utilizing the calculations performed by Mr. Blythe, Dr. Bisgard explained that in one hour, a worker averages approximately 5.4 membrane changes. In four hours there would be 21.6 membrane changes. Mr. Blythe concluded that in one hour there were 21 minutes of force time associated with changing membranes. Accordingly, the force time associated with 4 hours would be calculated as 4 hours multiplied by 21 minutes divided by 60 minutes, or 1.4 hours of force time. For a 10-hour workday, changing membranes would equal 3.5 hours of force time and include 54 membrane changes.

21. Dr. Bisgard also remarked that she considered whether Claimant had any secondary risk factors that might shorten the time duration necessary for cumulative trauma. Relying on Mr. Blythe's comprehensive job analysis, Dr. Bisgard determined that Claimant did not have secondary risk factors and that her conditions were not related to her work activities for Employer. .Although Claimant engaged in forceful activities at times in her job, her duties did not meet the minimum threshold of force, repetition and duration to develop CTS or de Quervain's syndrome pursuant to the *Guidelines.* Moreover, Claimant's job duties did not meet the minimum threshold of force, repetition and duration for the development of shoulder pathology.

22. Claimant has failed to establish that it is more probably true than not that she sustained compensable occupational diseases in the form of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome during the course and scope of her employment with Employer. Although Claimant attributed her

symptoms to her work activities, a review of her job duties as a Membrane Specialist reflects that they lacked the requisite force or repetition to cause her conditions. Claimant engaged in a variety of tasks throughout each shift. She monitored operations, performed computer work and tested samples of Employer's product. The most demanding part of Claimant's job was removing and replacing membranes. The persuasive testimony of Mr. Blythe and Dr. Bisgard reveals that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

23. Mr. Blythe drafted three separate vocational reports evaluating Claimant's job site for primary and secondary risk factors for cumulative trauma conditions pursuant to Rule 17, Exhibit 5 of the *Guidelines*. During his two visits to Claimant's job site he did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture and repetition/duration (elbow flexion). Mr. Blythe calculated that in a 7.5-hour day an individual would meet the force time risk factor only 1.1 hours per day or far less than the required six hours. Even in a 10.5-hour day the force measurement only reached 1.5 hours per day. Similarly, Mr. Blythe concluded that in a 10.5-hour day an individual would meet the elbow flexion risk factor only 1.4 hours per day or far less than the required six hours. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum threshold in the *Guidelines*.

24. In order to best calculate the force demands associated with changing membranes, Mr. Blythe returned to Employer's facility to observe workers who were only changing membranes. Mr. Blythe calculated force measurements based both on a solo worker changing membranes and a team changing membranes. Concerning the solo worker study, a 10.5-hour workday yielded 1.1 hours per day of maximum force. Regarding elbow flexion, a 10.5-hour workday yielded 1.5 hours per day of greater than 90 degrees elbow flexion. For the team study a 10.5-hour workday yielded a maximum force of approximately 2.7 hours and elbow flexion of 1.4 hours per day. Accordingly, although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration.

25. Relying on the *Guidelines*, Dr. Bisgard persuasively testified that the combination of repetition, force and cycle time in Claimant's duties as a Membrane Specialist failed to meet the causation requirements for the development of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome. Utilizing the calculations performed by Mr. Blythe, Dr. Bisgard explained that in one hour, a worker averages approximately 5.4 membrane changes. In four hours there would be 21.6 membrane changes. Mr. Blythe concluded that in one hour there were 21 minutes of force time associated with changing membranes. Accordingly, the force time associated with 4 hours would be calculated as 4 hours multiplied by 21 minutes

divided by 60 minutes, or 1.4 hours of force time. For a 10-hour workday, changing membranes would equal 3.5 hours of force time and include 54 membrane changes.

26. Dr. Bisgard explained that Claimant's job duties did not meet the Primary Risk Factors because she did not engage in a repetitive cycle activity with the requisite force. She also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Furthermore, relying on Mr. Blythe's comprehensive job analysis, Dr. Bisgard determined that Claimant's conditions were not related to her work activities for Employer. .Although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration to develop CTS or de Quervain's syndrome pursuant to the *Guidelines.* Moreover, Claimant's job duties did not meet the minimum threshold of force, repetition and duration for the development of shoulder pathology pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Finally, Dr. Bisgard remarked that the number of years working above shoulder level is one of the most significant factors contributing to shoulder pathology. Claimant's work above the shoulder was far less than the 13.3 year threshold for developing shoulder pathology.

CONCLUSIONS OF LAW

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

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

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

Occupational Disease

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the

development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

8. Rule 17, Exhibit 4 specifically includes factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting over 10 times per day over the years may contribute to shoulder disorders. Vibration can also be considered an additional risk factor pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology.

9. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained compensable occupational diseases in the form of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome during the course and scope of her employment with Employer. Although Claimant attributed her symptoms to her work activities, a review of her job duties as a Membrane Specialist reflects that they lacked the requisite force or repetition to cause her conditions. Claimant engaged in a variety of tasks throughout each shift. She monitored operations, performed computer work and tested samples of Employer's product. The most demanding part of Claimant's job was removing and replacing membranes. The persuasive testimony of Mr. Blythe and Dr. Bisgard reveals that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

10. As found, Mr. Blythe drafted three separate vocational reports evaluating Claimant's job site for primary and secondary risk factors for cumulative trauma conditions pursuant to Rule 17, Exhibit 5 of the *Guidelines*. During his two visits to Claimant's job site he did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture and repetition/duration (elbow flexion). Mr. Blythe calculated that in a 7.5-hour day an individual would meet the force time risk factor only 1.1 hours per day or far less than the required six hours. Even in a 10.5-hour day the force measurement only reached 1.5 hours per day. Similarly, Mr. Blythe concluded that in a 10.5-hour day an individual would meet the elbow flexion risk factor only 1.4 hours per day or far less than the required six hours. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum threshold in the *Guidelines*.

11. As found, in order to best calculate the force demands associated with changing membranes, Mr. Blythe returned to Employer's facility to observe workers who

were only changing membranes. Mr. Blythe calculated force measurements based both on a solo worker changing membranes and a team changing membranes. Concerning the solo worker study, a 10.5-hour workday yielded 1.1 hours per day of maximum force. Regarding elbow flexion, a 10.5-hour workday yielded 1.5 hours per day of greater than 90 degrees elbow flexion. For the team study a 10.5-hour workday yielded a maximum force of approximately 2.7 hours and elbow flexion of 1.4 hours per day. Accordingly, although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration.

12. As found, relying on the *Guidelines*, Dr. Bisgard persuasively testified that the combination of repetition, force and cycle time in Claimant's duties as a Membrane Specialist failed to meet the causation requirements for the development of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome. Utilizing the calculations performed by Mr. Blythe, Dr. Bisgard explained that in one hour, a worker averages approximately 5.4 membrane changes. In four hours there would be 21.6 membrane changes. Mr. Blythe concluded that in one hour there were 21 minutes of force time associated with changing membranes. Accordingly, the force time associated with 4 hours would be calculated as 4 hours multiplied by 21 minutes divided by 60 minutes, or 1.4 hours of force time. For a 10-hour workday, changing membranes would equal 3.5 hours of force time and include 54 membrane changes.

13. As found, Dr. Bisgard explained that Claimant's job duties did not meet the Primary Risk Factors because she did not engage in a repetitive cycle activity with the requisite force. She also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Furthermore, relying on Mr. Blythe's comprehensive job analysis, Dr. Bisgard determined that Claimant's conditions were not related to her work activities for Employer. .Although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration to develop CTS or de Quervain's syndrome pursuant to the *Guidelines.* Moreover, Claimant's job duties did not meet the minimum threshold of force, repetition and duration for the development of shoulder pathology pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Finally, Dr. Bisgard remarked that the number of years working above shoulder level is one of the most significant factors contributing to shoulder pathology. Claimant's work above the shoulder was far less than the 13.3 year threshold for developing shoulder pathology.

ORDER

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

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

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

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

DATED: August 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

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ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury to her left shoulder during the course and scope of her employment with Employer on September 14, 2014.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period November 12, 2014 until terminated by statute.

3. Whether Claimant has demonstrated by a preponderance of the evidence that the request for left shoulder surgery by Roger Davis, M.D. is reasonable, necessary and causally related to her September 14, 2014 industrial injury.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $320.00.

FINDINGS OF FACT

1. Claimant is a 67 year old female who worked for Employer as a Residential Technician. Her job duties involved caring for residents by transporting them to activities, administering medications and assisting with activities of daily living. Claimant assisted approximately three residents during a typical work shift.

2. On August 25, 2014 Claimant was involved in a motor vehicle accident during the course and scope of her employment with Employer. Claimant testified that she did not injure her shoulder during the motor vehicle accident but developed left shoulder symptoms on the evening after the accident. She described her symptoms as spasms that spanned from her neck, across the left shoulder and into her arm.

3. On September 3, 2014 Claimant visited Terrence Lakin, D.O. for an examination. She completed a pain diagram identifying left shoulder symptoms. Dr. Lakin noted that she might require work restrictions because a client was "grabbing her all the time."

4. Claimant explained that on September 14, 2014 she was assisting a resident move from his bed to a wheelchair. She fastened a gait belt to the resident's waist and began to help him get off the bed. The resident grabbed her left shoulder to gain leverage in an attempt to move into the wheelchair. Claimant remarked that she immediately experienced pain on the top of her left shoulder as a result of the incident.

She did not report the accident and completed her shift because she hoped the pain would subside.

5. During visits to medical providers in September and October, 2014 Claimant noted increasing left shoulder pain. On October 16, 2014 Claimant told Dr. Lakin that a resident required total care and did not cooperate very well so that the work was harder on her shoulders. Dr. Lakin noted that Claimant's left shoulder pain was not related to her motor vehicle accident but to different work expectations and type of work. Notably, Claimant did not mention the September 14, 2014 incident.

6. On November 6, 2014 Dr. Lakin determined that Claimant had reached Maximum Medical Improvement (MMI) for her August 25, 2014 motor vehicle accident. He did not assign Claimant a permanent impairment rating for her left shoulder condition. Claimant completed a pain diagram reflecting left shoulder symptoms substantially identical to the September 3, 2014 pain diagram. Dr, Lakin remarked that Claimant's left shoulder injury occurred "from the [resident] constantly grabbing her left shoulder and pulling on it." He commented that Claimant might need to file another claim for her left shoulder injury "that has happened since her motor vehicle accident."

7. On November 11, 2014 Claimant reported the September 14, 2014 incident to Employer. Claimant returned to Dr. Lakin for an examination on November 13, 2014. Claimant reported that on September 14, 2014 "while lifting a [resident] from the bed to a wheelchair, he grabbed her shoulder to help get up." She then experienced immediate left shoulder pain. Dr. Lakin concluded that Claimant's objective findings were consistent with a work-related mechanism of injury.

8. On December 11, 2014 Claimant underwent a left shoulder MRI. The MRI revealed a "low grade partial-thickness articular sided tear of the distal supraspinatus. Superior and posterior labral tear. Subdeltoid bursitis."

9. On December 17, 2014 Claimant visited Roger Davis, M.D. for a surgical evaluation. Dr. Davis noted the radiologist's diagnosis of a labral tear but his review of the MRI reflected only degenerative changes around the glenoid and humeral head. He diagnosed Claimant with "impingement syndrome with acromioclavicular arthritis, partial rotator cuff tear and probable degenerative labral tearing left shoulder." Dr. Davis commented that Claimant would require preoperative clearance for potential left shoulder surgery because of a previous heart attack, smoking history and COPD.

10. On January 15, 2015 Claimant returned to Dr. Davis for an examination. Dr. Davis diagnosed Claimant with acromioclavicular arthritis, a partial rotator cuff tear and degenerative changes in the glenohumeral joint. He also administered a subacromial space steroid injection that improved Claimant's active range of motion.

11. On February 6, 2015 Claimant underwent an independent medical examination with Jack Rook, M.D. Dr. Rook concluded that Claimant suffered an acute left shoulder injury on September 14, 2014 while transferring a resident. He detailed the following bases for his opinion: (1) Claimant developed the acute onset of left shoulder

pain while she was performing a job activity; (2) the activity involved lifting a 170 pound man while he was pushing down on her left shoulder; (3) she was not having left shoulder pain when she went to work that day; (4) there were no other traumatic events around the time of Claimant's injury; (5) Claimant's non-vocational activities are not physically demanding; and (6) any shoulder discomfort prior to September 14, 2014 was related to her industrial motor vehicle accident.

12. On April 9, 2015 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Considering Claimant's left shoulder MRI, Dr. Fall diagnosed Claimant with age-appropriate left shoulder degenerative joint disease. She determined that the MRI did not reveal any acute findings and any tears could not have been caused by the September 14, 2014 incident. Dr. Fall explained that there was no internal or external rotation of Claimant's left shoulder beyond 90 degrees when she was helping the resident move from his bed to a wheelchair. Rotation of the shoulder would have been necessary to cause any internal derangement.

13. Dr. Fall also testified at the hearing in this matter. She maintained that Claimant did not suffer an acute injury to her left shoulder on September 14, 2014. Dr. Fall explained that Claimant's left shoulder remained in a static position when she was transferring the resident and he grabbed her shoulder on September 14, 2014. She remarked that Claimant's left shoulder MRI findings were diffuse, degenerative in nature, consistent with her age group and negative for evidence of any acute injury or inflammation. Dr. Fall determined that the most likely cause of Claimant's shoulder symptoms was the progression of her pre-existing, degenerative left shoulder condition. The September 14, 2014 incident did not change Claimant's left shoulder pathology, alter her course of treatment or cause a disability.

14. Dr. Fall remarked that she disagreed with Dr. Rook's opinion that Claimant's symptoms "localized" in her left shoulder following the September 14, 2014 incident. She described Claimant's symptoms as diffuse and similar to her pre-existing condition. Moreover, in contrast to Dr. Rook, Dr. Fall noted that the natural degenerative process in Claimant's left shoulder would have continued regardless of whether her non-vocational activities were demanding. Finally, Claimant's left shoulder symptoms in August 2014 and November 2014 were virtually identical.

15. Dr. Fall explained that Claimant is not a good surgical candidate. Claimant had minimal left shoulder MRI findings, good range of motion, adequate strength and contraindications including a previous heart attack and long-term smoking. Finally, any need for surgery was caused by Claimant's underlying degenerative condition.

16. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury to her left shoulder during the course and scope of her employment with Employer on September 14, 2014. Initially, Claimant stated that she injured her left shoulder while transferring a resident on September 14, 2014. However, she had been involved in a work-related motor vehicle accident on August 25, 2014 in which she identified some left shoulder symptoms. Moreover, Claimant did not

report the September 14, 2014 incident until after she was discharged at MMI for her motor vehicle accident on November 11, 2014. Finally, during visits to medical providers in September and October, 2014 Claimant noted increasing left shoulder pain but did not mention the September 14, 2014 incident.

17. Dr. Fall persuasively explained that Claimant's left shoulder MRI did not reveal any acute findings and any tears could not have been caused by the September 14, 2014 incident. She remarked that Claimant's left shoulder MRI findings were diffuse, degenerative in nature, consistent with her age group and negative for evidence of any acute injury or inflammation. Dr. Fall explained that there was no internal or external rotation of Claimant's left shoulder beyond 90 degrees when she was helping the resident move from his bed to a wheelchair on September 14, 2014. She concluded that the most likely cause of Claimant's shoulder symptoms was the progression of her pre-existing, degenerative left shoulder condition.

18. In contrast, Dr. Rook maintained that Claimant suffered the acute onset of left shoulder symptoms on September 14, 2014 while transferring a resident. He explained that Claimant was not experiencing left shoulder symptoms prior to the incident. However, as noted by Dr. Fall, Claimant's symptoms were not "localized" in her left shoulder following the September 14, 2014 incident. Dr. Fall described Claimant's symptoms as diffuse and similar to her pre-existing condition. Moreover, Claimant's left shoulder symptoms in August 2014 and November 2014 were virtually identical. Accordingly, although there was a temporal correlation between the September 14, 2014 incident and Claimant's left shoulder symptoms, any increased pain constituted the logical and recurrent consequences of her pre-existing left shoulder condition. The September 14, 2014 incident thus did not aggravate, accelerate, or combine with Claimant's pre-existing left shoulder condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury to her left shoulder during the course and scope of her employment with Employer on September 14, 2014. Initially, Claimant stated that she injured her left shoulder while transferring a resident on September 14, 2014. However, she had been involved in a work-related motor vehicle accident on

August 25, 2014 in which she identified some left shoulder symptoms. Moreover, Claimant did not report the September 14, 2014 incident until after she was discharged at MMI for her motor vehicle accident on November 11, 2014. Finally, during visits to medical providers in September and October, 2014 Claimant noted increasing left shoulder pain but did not mention the September 14, 2014 incident.

8. As found, Dr. Fall persuasively explained that Claimant's left shoulder MRI did not reveal any acute findings and any tears could not have been caused by the September 14, 2014 incident. She remarked that Claimant's left shoulder MRI findings were diffuse, degenerative in nature, consistent with her age group and negative for evidence of any acute injury or inflammation. Dr. Fall explained that there was no internal or external rotation of Claimant's left shoulder beyond 90 degrees when she was helping the resident move from his bed to a wheelchair on September 14, 2014. She concluded that the most likely cause of Claimant's shoulder symptoms was the progression of her pre-existing, degenerative left shoulder condition.

9. As found, in contrast, Dr. Rook maintained that Claimant suffered the acute onset of left shoulder symptoms on September 14, 2014 while transferring a resident. He explained that Claimant was not experiencing left shoulder symptoms prior to the incident. However, as noted by Dr. Fall, Claimant's symptoms were not "localized" in her left shoulder following the September 14, 2014 incident. Dr. Fall described Claimant's symptoms as diffuse and similar to her pre-existing condition. Moreover, Claimant's left shoulder symptoms in August 2014 and November 2014 were virtually identical. Accordingly, although there was a temporal correlation between the September 14, 2014 incident and Claimant's left shoulder symptoms, any increased pain constituted the logical and recurrent consequences of her pre-existing left shoulder condition. The September 14, 2014 incident thus did not aggravate, accelerate, or combine with Claimant's pre-existing left shoulder condition to produce a need for medical treatment.

ORDER

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

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

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

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

DATED: August 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

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

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ISSUE

The issue raised for consideration at hearing is whether Claimant suffered a compensable work injury in the course and scope of her employment on November 13, 2014.

FINDINGS OF FACT

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

1. Claimant was and continues to be employed by Employer as a nurse to facilitate Wellness Clinics. At the Clinics, Claimant administers certain tests to assess and evaluate an individual's wellness/health. Claimant was required to travel to Wellness Clinics throughout Colorado.

2. On November 13, 2014, Claimant and her sister were traveling to Glenwood Springs, Colorado for a Clinic which was to occur the next day. The driving conditions were adverse. Vail Pass was icy and snow packed and, at approximately 1:50 p.m., Claimant was involved in an automobile collision. Claimant sustained injuries and was transported to Vail Valley Medical Center by ambulance.

3. It was commonplace for Claimant to travel with her sister to the Wellness Clinics. No credible or persuasive evidence was presented that Claimant's sister did more than travel with Claimant to her destination. It was also commonplace for Claimant to travel the day before a Clinic in order to assure her timely arrival and attendance at the Wellness Clinic.

4. Employer made Claimant's travel arrangements and paid for the hotel accommodations. Employer also paid an hourly drive time rate and reimbursed Claimant for mileage. Employer's representative, William DeFlavio, testified that he was aware that Claimant's sister traveled with her and that Claimant had never been reprimanded for traveling with her sister. Employer's representative also testified that he made the hotel arrangements for Claimant to travel the day before the Clinic.

5. Testimony offered by Respondents' witness, Tammy Swain, Director of Nursing, was considered and rejected as not persuasive. Ms. Swain supervised the clinical side of the Employer's office. Ms. Swain testified that she never met or spoke to Claimant. She testified that it was considered a nursing "best practice" for a registered nurse not to take family

in the car when traveling to a Wellness Clinic. She testified that Employer did not maintain a rule or policy of employment for registered nurses not to take family in their car when traveling to a Wellness Clinic. No credible or persuasive evidence was presented to establish that Claimant was informed that taking her sister to travel with her to a Welness Clinic was contrary to registered nursing best practices or contrary to the Employer's wishes.

CONCLUSION OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are entered.

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

2. In order to recover benefits the claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of her employment. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

3. Generally, injuries that occur while a claimant is going to or coming from the place of employment are not considered to have arisen out of and in the course of the employment. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). However, various factors may be considered in determining whether travel to and from work arises out of and in the course of employment. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel was on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; (4) whether the employment created a special "zone of danger."

An injury sustained during travel initiated at the direct or implied request of the employer, or during travel that confers a benefit on the employer beyond the employee's mere arrival at work is, barring some deviation, sufficient to satisfy the arising out of and in the course of tests because the travel is contemplated by the employment contract. *Id.* at 865.

4. For these reasons, our courts have held that where the employer provides the means of transportation to and from work, or where the employer requires the claimant to drive a vehicle to and from work for use in the employer's business, injuries that occur during the travel are compensable. *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Whale Communications v. Claimants in re Death of Osborn,* 759 P.2d 848 (Colo. App. 1988). It is not necessary for the claimant to prove the employer compensated or reimbursed the claimant for the travel if the employment contract contemplates that travel is a substantial part of the service provided to the employer. *Benson v. Compensation Insurance Authority,* 870 P.2d 624 (Colo. App. 1994); *Sanchez v. Southwest Home Health,* W.C. No. 4-504-148 (ICAO June 5, 2002). Further, the performance of an activity that causes the injury need not represent a strict duty of employment or confer a specific benefit on the employer if it is "sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of the employment." *Panera Bread v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006).

5. Here, the credible and persuasive evidence presented at hearing established that Claimant was in the course and scope of her employment for Employer at the time of the automobile collision. Claimant was required at the request of her Employer to attend Wellness Clinics. Employer paid for the travel time and mileage reimbursement. Employer made hotel arrangement for Claimant to travel the day before a Clinic and paid for the accommodations. It is concluded that Claimant suffered a compensable work injury in the course and scope of her employment for Employer on November 13, 2014, and is therefore covered by the workers' compensation act.

ORDER

It is therefore ordered, as follows:

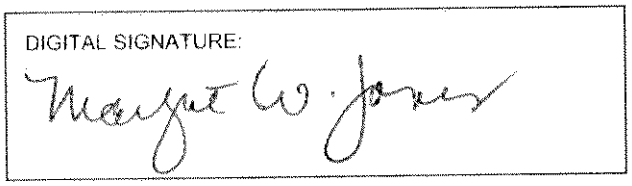
Claimant's claim is compensable. ~~Respondents shall be liable to Claimant for Workers' Compensation benefits.~~

All matters not determined herein are reserved for future determination.

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

DATED: September 10, 2015__

DIGITAL SIGNATURE:



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

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ISSUES

The following issues were raised for consideration at hearing:

1. What is Claimant's average weekly wage (AWW); and

2. Whether the right to select an authorized treating provider passed to Claimant.

FINDINGS OF FACT

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

1. Claimant was hired by Employer on March 20, 2014, as a driver and loader. Claimant's duties for Employer included driving to various job sites, removing unwanted items and hauling them away. Claimant suffered an admitted work injury on September 29, 2014.

2. Claimant's initial rate of pay for Employer was $11.00 per hour. Claimant received a pay raise on September 8, 2014, to $13.50 per hour. When Claimant started working for Employer, he was not working in a full time capacity. In March, April and May of 2014, business at employer was slow and Claimant only worked between ten and twenty hours per week. Claimant's periods of low pay at Employer in March, April and May of 2014 was due, in part, to the fact that Claimant volunteered to give up his shifts at Employer during this slower period while Claimant worked at his second job at Two Men with Big Hearts Moving and Storage, where he received more working hours and earned more.

3. At Two Men with Big Hearts Moving and Storage, Claimant was employed as a driver, loader and mover between February and May of 2014. Claimant testified that he voluntarily left his job with Two Men with Big Hearts Moving and Storage because he was offered more hours at Employer.

4. In May 2014, Claimant's hours increased at Employer, although his hours continued to fluctuate depending on work availability.

5. Mr. Paul Durant, the owner of Employer, employed between six and nine workers in 2014. Each employee's hours depended on the amount of work Employer had available. Employer's busiest time of year starts in March or April, and continues

until August. Mr. Durant did not guarantee any of his employees any number of hours, but when hours were limited, he made an effort to give employees who were top performers as many hours as possible. Mr. Durant considered Claimant to be one of the top performers.

6. Using Employer's payroll records for Claimant's dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation reflects a fair and accurate approximation of Claimant's AWW at the time of his injury on September 29, 2014.

7. Claimant injured his right shoulder while performing work-related duties on September 29, 2014. Respondents filed General Admissions of Liability, dated April 2, and 30, 2015, for medical and temporary disability benefits. Respondents admitted for an AWW of $463.36

8. Mr. Durant was Claimant's supervisor on September 29, 2014. The parties offered conflicting evidence regarding whether Claimant discussed the September 29, 2014, work injury with Mr. Durant on September 30, 2014. Claimant maintained that he told Mr. Durant he had a work injury and needed medical attention but was provided none. Mr. Durant maintained that Claimant indicated he injured himself but he did not need medical attention on September 30, 2014. Mr. Durant advised Claimant to keep him posted whether he needed medical attention. Mr. Durant maintained, and it is found that, Employer was not advised that Claimant needed medical attention until November 2014 when Claimant advised Mr. Durant that his private health insurance provider diagnosed a rotator cuff tear.

9. Following the September 29, 2014, injury, Claimant sought treatment on his own through his primary care physician at Denver Health Medical Center, David Ginosar, M.D. In October 2014, Claimant began treating with Dr. Ginosar for the injuries sustained in this claim. Dr. Ginosar diagnosed Claimant with a rotator cuff tear.

10. In mid-November of 2014, following Dr. Ginosar's diagnosis, Claimant advised Mr. Durant he was diagnosed with a right rotator cuff tear. Mr. Durant instructed Claimant to seek medical care from Michael V. Ladwig, M.D. of Aviation and Occupational Medicine. Mr. Durant also instructed Claimant to discontinue treatment at Denver Health Medical Center. Claimant was not given a choice of providers from whom to seek treatment during the conversation with Mr. Durant in November of 2014.

11. Claimant began treatment with Dr. Ladwig on November 26, 2015. Since that date, Claimant has treated with Dr. Ladwig and the physicians to whom Dr. Ladwig has referred Claimant. Since commencing treatment with Dr. Ladwig, Claimant has not returned to Denver Health Medical Center for treatment related to his right shoulder.

12. The right of selection of a medical provider passed to Claimant in November 2014, when Claimant was not provided a choice of two medical providers as required by Section 8-43-404(5)(a), C.R.S.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

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

2. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

a. Average Weekly Wage

3. In this case, Claimant contends that he is entitled to increased AWW. The AWW of an injured employee shall be taken as the basis upon which to compute compensation payments. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. Section 8-42-102(1), C.R.S.; *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

4. When an injured employee is being paid by the hour, the AWW is usually determined using the "hourly rate" at which the employee was working "at the time of the injury or would have worked if the injury had not intervened." Section 8-42-102(2)(d), C.R.S. If this method does not result in a fair calculation of the injured worker's AWW, then subsection (3) of Section 8-42-102 may apply. An administrative law judge has broad discretion in calculating the employee's AWW according to the facts of the case. *RJS Painting v. Industrial Commission of State*, 732 P.2d 239 (Colo. App. 1986).

5. Using the procedure set forth in Section 8-42-102(2)(d), C.R.S., it is necessary to determine how much Claimant was earning at Employer at the time of the injury, or how much Claimant was likely to have earned had the injury not occurred. This is most fairly and accurately determined by considering checks issued to Claimant by Employer between July 18, 2014, and September 26, 2014. This period constitutes the 12-week period leading up to Claimant's injury, and excludes a period when Claimant was working reduced hours at a lower rate of pay

6. Using dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation is in accordance with Section 8-42-102(1)(d),

C.R.S., and reflects a fair and accurate approximation of Claimant's AWW at the time of his injury.

7. Respondents contend that Claimant's AWW is $463.36 using Claimant's pay between February 24, 2014 and September 26, 2014, combining wages earned from Employer and a concurrent employer, Two Men with Big Hearts Moving and Storage. Respondents' calculation of AWW is rejected as Respondents' calculation includes a period of almost four weeks wherein Claimant had not yet been hired as an employee for Employer and Respondents' calculation uses a period of time immediately following Claimant's date of hire when he volunteered to work reduced hours for Employer.

b. Authorized Treating Physician

8. Claimant contends that the right to select a medical provider passed to him when Respondents failed to comply with Section 8-43-404(5)(a)(I)(A). This section provides that:

> "In all cases of injury, the employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee."

9. The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

10. This statute affords the employer the right to designate at least two physicians and/or corporate providers that are deemed authorized to provide medical treatment. Consistent with the version of Section 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

11. If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

12. The credible and persuasive evidence presented at hearing established that November 2014 is when Mr. Durant was first advised that Claimant's September 29, 2014, work injury required medical attention. At that time, Mr. Durant referred Claimant to Dr. Ladwig and failed to comply with Section 8-43-404(5)(a), C.R.S. by providing Claimant with the choice to two medical providers from which to choose a provider. Therefore, the right of selection of medical provider passed to Claimant in November 2014.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $543.18.

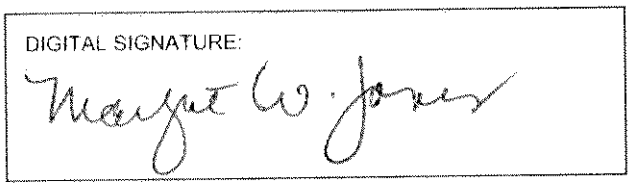
2. The right to select an authorized treating physician passed to Claimant in November 2014. Claimant shall appoint an authorized treating physician and notify Respondents of his choice within seven (7) business days of the date of this Order.

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

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

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

DATED: __August 27, 2015___



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

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ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

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

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from December 1, 2014 and continuing.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to change his authorized treating physician?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant testified at hearing he began working for employer as a truck driver on January 14, 2011.

2. Claimant has a history of back problems dating back to the 1970's. Claimant had surgery on his low back in 2007 that involved a fusion performed by Dr. Dohm. Following claimant's surgery, claimant was returned to work without restrictions, but continued to receive medical treatment for his low back.

3. On October 17, 2011, claimant reported to Dr. Coleman that he was suffering from chronic low back pain. Claimant was referred for a lumbar spine x-ray on November 7, 2011. The x-ray showed degeneration of claimant's lumbar spine most pronounced at L4-5 and L5-S1.

4. On May 1, 2012, claimant fell when a step on his truck broke. Claimant received medical treatment for complaints of numbness and tingling into his bilateral lower extremities following this incident. Claimant was ultimately referred for a magnetic resonance image ("MRI") of his lumbar spine on June 5, 2012. The MRI showed post-

operative changes at the L4 and L5 levels and soft tissue edema from L3 to S1. Claimant was discharged from medical care on June 8, 2012 and released to return to work without restrictions. Claimant continued to treat periodically for low back pain in 2013 with his primary care physician.

5. Claimant testified at hearing that on November 26, 2014, he was putting tire chains that weighed approximately 80 pounds on his truck when he felt pain in the right of his low back that almost knocked him to the ground. Claimant testified he reported his injury to his supervisor, Mr. Lancaster. Claimant testified he completed his work shift but that his pain started to get worse.

6. Claimant testified he did not seek medical treatment on the date of his injury, and the next day was Thanksgiving, which claimant did not work. Claimant also had the Friday after Thanksgiving off before returning to work on November 29, 2014. Claimant testified he hauled frack tanks on November 29, 2014. Claimant testified that on December 1, 2014 his back hurt so badly that he could not get out of bed. Claimant testified he contacted Mr. Lancaster who made an appointment for claimant with a clinic in Parachute.

7. Claimant was evaluated by Mr. Zimmerman, a physician's assistant with Grand Valley Health and Safety, on December 1, 2014. Mr. Zimmerman noted claimant reported he was chaining his truck up on November 26, 2014 and felt a sharp pain in his back. Claimant reported he currently had pain in his back and down his right leg. Mr. Zimmerman diagnosed claimant with back pain with right L4 radicular symptoms and weakness in his right leg. Claimant was referred for a magnetic resonance image ("MRI") of the lumbar spine and was taken off of work for 2 weeks.

8. Claimant underwent the MRI on December 17, 2014. The MRI showed a right paracentral disc extrusion with contact upon the right L3 and L4 nerve roots and a disc bulge with right paracentral disc protrusion at the L4-L5 level with impingement or contact upon several nerve roots. The MRI also showed a broad disc bulge at the L5-S1 level that contacts the S1 nerve root in the lateral recess.

9. Claimant returned to Mr. Zimmerman on December 22, 2014 with continued complaints of weakness of the right leg, particularly in the right hip flexor, as well as pain that goes into the right groin and down the medial aspect of the right leg. Mr. Zimmerman recommended claimant remain off of work for another month and referred him to Dr. Krauth for neurosurgical evaluation and treatment.

10. Respondents filed a notice of contest on December 12, 2014. Claimant testified at hearing that he thought respondents were denying his claim and sought treatment with his family physician, Dr. Lippmann. Claimant filed a request for a one time change of physician to Dr. Lippmann on December 24, 2014.

11. Claimant was evaluated by Dr. Lippman on January 19, 2015. Dr. Lippman noted claimant reported he was injured on November 29, 2014 when he was

chaining up his truck and felt a sudden twinge of pain in his back with pain radiating down to his right ankle. Claimant reported he had a prior back injury in 2006 when he was on a step that broke and received treatment through Dr. Dohm. Claimant reported he had a recurrence of pain in 2012 when he was treated at the Grand River Medical Center. Dr. Lippman continued claimant off of work. Claimant was referred for a neurosurgical evaluation.

12. Claimant was evaluated by Dr. Ceola on February 6, 2015. Dr. Ceola noted claimant reported a history of lifting a heavy object when he experienced the onset of low back pain. Dr. Ceola noted claimant had a previous history of back issues but opined that the injury at work was the primary reason he was presenting for treatment. Dr. Ceola diagnosed claimant with degenerative spondylolisthesis and lumbar radiculopathy. Dr. Ceola recommended conservative treatment including physical therapy. Claimant was counseled to quit smoking.

13. Claimant was referred by Dr. Ceola to Dr. Dickstein for injections, but the medical care was denied.

14. Respondents referred claimant for an independent medical examination ("IME") with Dr. Fall on May 26, 2015. Dr. Fall reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with her IME. Dr. Fall issued a medical report that summarized her findings on physical examination and opined that claimant's current symptomatology was a result of the chronic, progressive, degenerative changes of his lumbar spine and not related to any acute injury.

15. Dr. Fall testified at hearing consistent with her report. Dr. Fall noted that claimant had undergone an MRI on November 8, 2002 that showed an L4-5 disc protrusion that was contacting the thecal sac. Dr. Fall opined that the 2007 MRI showed more localized findings, including a disc bulge at the L5-S1 level and enlarged facet joints. Dr. Fall noted claimant had a discectomy in January 2008 and MRI findings in June 2012 showed a disc protrusion to the right at the L3-4 level contacting the L4 nerve root.

16. Dr. Fall testified that claimant's discharge note of June 2012 was the most important record, showing claimant had a degenerative spine with arthritis nerve impingement. Dr. Fall testified this would be an ongoing problem for claimant and he should seek treatment outside the workers' compensation system. Dr. Fall testified that she would expect claimant to have ongoing symtpomotology and that anything could cause an increase in claimant's symptoms. Dr. Fall opined that the proposed surgery would not be reasonable because claimant's symptoms are so diffuse. Dr. Fall further opined that the proposed would not be related to claimant's November 26, 2014 injury. Dr. Fall testified it would be hard to identify what injury claimant sustained on November 26, 2014, but that it could be a lumbar strain.

17. Respondents presented the testimony of Mr. Thate at hearing. Mr. Thate is the general manager for employer. Mr. Thate testified if claimant had passed out as a result of his back pain, he would have heard about claimant passing out.

18. Mr. Thate further testified he was sent a change of physician request by the claimant. Mr. Thate testified he did not respond to the request for a change of physician.

19. Respondents presented the testimony of Mr. Bonnell at hearing. Mr. Bonnell testified he was the safety technician for employer. Mr. Bonnell testified he went to see Rocky Mountain Orthopedics on November 17, 2014 because they were asking for a claim number for claimant for an MRI of the lower back. Mr. Bonnell testified he followed up with claimant some time later and claimant told him he was feeling better and no longer needed medical treatment. Mr. Bonnell testified he found out about claimant's alleged injury on November 30, 2014 when claimant called in sick due to back pain.

20. Respondents presented the testimony of Mr. Gurule at hearing. Mr. Gurule is the operations manager for employer. Mr. Gurule testified claimant went to his own doctor on November 17, 2014 because his back was hurting, but the physician would not provide treatment because it was from a workers' compensation injury.

21. Respondents presented the testimony of Mr. Lancaster, a field supervisor for employer. Mr. Lancaster testified claimant told him on November 26, 2014 that he had tweaked his back chaining up his truck a couple days earlier. Mr. Lancaster testified claimant did not request medical treatment on that date.

22. Respondents presented the testimony of Ms. Rodda, the pilot car driver. Ms. Rodda testified she worked with claimant on November 25, 2014 and claimant reported to her that he had hurt his back a few days before while putting chains on the truck. Ms. Rodda testified claimant did not indicate that he wanted to go to a doctor for his back condition.

23. The ALJ credits the testimony of claimant at hearing, along with the medical opinions contained in the reports from Mr. Zimmerman, Dr. Lippman and Dr. Ceola and finds that claimant has demonstrated that it is more probable than not that he suffered an injury to his low back on November 26, 2014 while lifting truck chains. The ALJ finds claimant reported the incident to his employer and eventually sought medical treatment on December 1, 2014.

24. The ALJ notes that claimant has a history of prior treatment to his low back, but credits claimant's testimony and finds that claimant has demonstrated that it is more probable than not that the incident lifting the truck chains aggravated, accelerated, or combined with his pre-existing condition to cause the need for medical treatment.

25. The ALJ credits the medical records from Mr. Zimmerman that took claimant off of work completely as of December 1, 2014 and finds that claimant has demonstrated that it is more probable than not that he is entitled to an award for temporary total disability benefits beginning December 1, 2014 and continuing until terminated by law. The ALJ noted that Dr. Lippman continued claimant's work restrictions that kept claimant off of work completely when he began treating claimant on January 19, 2015.

26. The ALJ finds that claimant requested a change of physician to Dr. Lippman by filling out the change of physician form. The ALJ finds that Dr. Lippman is authorized to treat claimant in this case.

27. Claimant testified at hearing that he earned $20 per hour and worked between fifty four and seventy four hours per week. According to the wage records entered into evidence at hearing, in the twenty four weeks claimant worked between June 2, 2014 and November 16, 2014, claimant earned $36,719.29. This equates to an AWW of $1,529.97.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where

the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he lifted the tire chains and felt a sharp pain in his lumbar spine. The ALJ credits the testimony of claimant at hearing along with the opinions expressed by Mr. Zimmerman, Dr. Lippman and Dr. Ceola to be credible and persuasive on this issue.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a)(VI) allows for the injured worker to request a change of physician. If the request for a change of physician is not responded to within 20 days, the employer or insurance carrier is deemed to have waived any objection to the request for a change of physician.

7. As found, the treatment provided claimant by Mr. Zimmerman, Dr. Lippman and Dr. Ceola was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

8. As found, claimant was initially referred to Mr. Zimmerman for medical treatment. Claimant's claim was denied and claimant requested a change in physician to Dr. Lippman. Respondent did not respond to the change of physician and Dr. Lippman became authorized to treat claimant in this case.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1)

Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. As found, claimant has demonstrated that the injury resulted in work restrictions from Mr. Zimmerman and Dr. Lippman resulting in an impairment of wage earning capacity demonstrated by claimant's inability to resume his prior work.

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

12. As found, in the twenty four weeks claimant worked between June 2, 2014 and November 16, 2014, claimant earned $36,719.29. As found, claimant's AWW is determined to be $1,529.97.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits based on an AWW of $1,529.97 beginning December 1, 2014 and continuing until terminated by law or statute.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury from Grand River Health and Safety, Dr. Lippman, and Dr. Ceola.

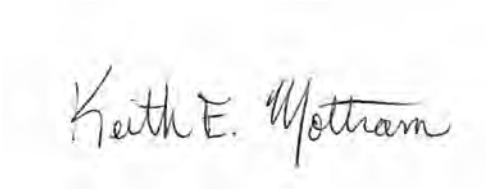
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

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

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

DATED: August 31, 2015



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right ankle arising out of and in the course of his employment with Respondent on July 20, 2014.

2. If the claim is compensable, whether Claimant has established by a preponderance of the evidence that the platelet rich plasma injections were reasonable, necessary, and related to his July 20, 2014 work injury.

3. If the claim is compensable, whether Claimant has established by a preponderance of the evidence that the March 13, 2015 surgery performed by Bharat M. Desai, M.D. was reasonable, necessary, and related to his July 20, 2014 work injury.

STIPULATIONS/PROCEDURAL ISSUES

1. The Court, with the agreement of the parties, issued a Protective Order in this case. Any references to a patient's name, except by initials, shall be redacted from the record. There are no known instances where evidence was submitted in violation of this Order.

2. In the event that the claim is found compensable, the parties stipulate to the maximum average weekly wage of $1,322.47 per week with a maximum temporary disability rate of $881.65 per week.

3. In the event that the claim is found compensable, the parties agree that Concentra and its referrals are authorized providers.

4. The parties withdrew the issues of temporary disability benefits for consideration at hearing without prejudice. In the event the claim is found compensable, the parties will work together to resolve any outstanding temporary disability benefits issues.

FINDINGS OF FACT

1. Claimant works for Employer as a safety security officer and was first hired in October of 1983. In 2001, Claimant was promoted to the position of safety security officer III and in that capacity supervised 5-6 employees.

2. Claimant works at Colorado Mental Health Institute at Fort Logan. His duties as a safety security officer include: protecting the lives of patients, staff, and

visitors on the grounds; protecting state property; securing buildings; assisting clinical staff with patients; controlling combative and resistive patients; and other miscellaneous duties as assigned. *See* Exhibit 9.

3. Claimant works with a partner and regularly accompanies doctors and nurses when they administer care to patients at the facility. Claimant uses force on occasion in the performance of his job duties.

4. On July 20, 2014 Claimant was so employed. Claimant was called to the North Day Room area of the Mental Health Institute by Nurse Rebecca Vidaurri to assist with patient "L" who was acting aggressively.

5. Claimant's partner that day was Tyler Tripp. Claimant and Mr. Tripp responded to the call, placed patient "L" against a wall, moved patient "L" to a seclusion room, and put restraints on patient "L."

6. During this incident, patient "L" attempted to strike Claimant. Claimant stepped back on his right foot to avoid being hit then lunged forward toward patient "L" to help restrain and get him under control.

7. At the time of the incident, Claimant felt a pulling and slight pain in his right ankle. Claimant continued to work the remainder of his shift and worked the remainder of the month of July.

8. Claimant did not immediately report the incident as a workers' compensation injury. Claimant frequently got scrapes and bangs as part of his regular job duties and believed his right ankle pain would get better over time. Claimant thought at one point it was just old age catching up to him. Claimant also believed there was a stigma against reporting injuries and believed he would not be viewed as a good employee if he had a lot of reported injuries. Claimant was familiar with the requirements of reporting injuries and was familiar with the forms used to make a report. Claimant had previously reported injuries he suffered while working for Employer and as a supervisor had experience directing others to file reports.

9. The first two weeks of August, 2014, Claimant had scheduled time off for vacation. Claimant had planned to ride his motorcycle to Sturgis during his scheduled time off. However, his ankle continued to bother him and his "riding partner" was unable to make the trip. Claimant decided not to go to Sturgis and used the two weeks off work to rest his ankle with hopes that it would get better.

10. Claimant's ankle did not get better. From July 20, 2014 until September 18, 2014 Claimant's right ankle pain progressed slowly. Claimant experienced days where he had pain and days where he did not. Eventually the pain got much worse following his return to work after his vacation.

11. By September 18, 2014 Claimant was limping, had no power in pushing off, and felt as though he was unable to respond adequately to calls on the job. Claimant believed it was not safe for him to continue working.

12. On September 18, 2014 Claimant filled out an Injury/Exposure on the Job (IOJ) form, placed the form in his supervisor's in-box, and sought medical treatment.

13. On the IOJ form, Claimant reported he had injured his right foot/ankle in the back of the ankle running to and lunging at a combative patient who tried to hit him. Claimant listed the date of the injury as July 22, 2014 and listed Tyler Tripp as a witness to the incident. *See* Exhibit 1.

14. Sometime after the July 20, 2014 incident with patient "L" but prior to Claimant's scheduled vacation at the beginning of August, Claimant reported to Tyler Tripp that his ankle was hurting and that he might not go to Sturgis because of his ankle.

15. After Claimant returned from vacation, Claimant spoke with Tyler Tripp and Rebecca Vidaurri about what could have caused his ankle pain. They discussed the call on July 20, 2014 and Claimant believed that was the only incident that could have caused his pain.

16. Normal practice at the Colorado Mental Health Institute at Fort Logan involved documenting all the calls that the safety security officers respond to in a "daily safety blotter." Kent Heath, Claimant's supervisor, reviewed the daily safety blotter for the date of injury Claimant listed on the IOJ form and found no incident that matched Claimant's description of a combative patient. Claimant later realized he listed an incorrect date of July 22, 2014 when the incident occurred on July 20, 2014. Mr. Heath then reviewed the daily safety blotter for July 20, 2014 and again there was no incident in the blotter matching the description.

17. Claimant testified that he observed the incident documented in the daily safety blotter and that it must have been deleted at some point. Mr. Heath testified that he did not delete the incident and that no one would have a reason to delete any entries.

18. Mr. Heath testified that there was no policy of dissuading someone from reporting an injury and that the policy was to report any injury as soon as possible by filling out an IOJ form. He confirmed that Claimant was familiar with the required forms and has filled out IOJ forms in the past.

19. After putting the IOJ form in Mr. Heath's in-box, Claimant sought medical treatment.

20. Claimant was evaluated by Bryan Counts, M.D. on September 19, 2014. Claimant filled out a form stating that the reason for his visit was due to an injury.

Claimant reported that on July 20, 2014 he had been running and or lunging at a patient that had tried to hit him and injured his right ankle/foot. Claimant reported to Dr. Counts that he had pain over his right Achilles tendon since July 20th. Dr. Counts assessed right Achilles tendonitis. Dr. Counts opined that there was a greater than 50% probability that it was a work related injury. *See* Exhibit B.

21. On October 21, 2014 Claimant was evaluated by Kathryn Bird, D.O. Claimant reported worsening pain that waxed and waned and was worse with standing after sitting for a period of time. Dr. Bird noted Claimant continued to work regular duty. Dr. Bird ordered an MRI of Claimant's right ankle. *See* Exhibit B.

22. On October 27, 2014 Claimant underwent an MRI interpreted by Virginia Scroggins, M.D. Dr. Scroggins opined that Claimant had severe non-insertional Achilles tendinopathy with partial tearing and a chronic anterior talofibular ligament sprain. See Exhibit F.

23. On November 6, 2014 Claimant was evaluated by Dr. Bird. She noted Claimant was working regular duty and had not been taking anything for the pain. She reviewed the results of the MRI and referred him to a physiatrist for consultation and treatment of a partial Achilles tendon tear. *See* Exhibit B.

24. On November 19, 2014 Claimant was evaluated by John Sacha, M.D. Dr. Sacha noted Claimant had a slight antalgic gait to the right side and noted Claimant was having significant pain. Dr. Sacha noted Claimant wanted to avoid surgical intervention. Dr. Sacha opined that a platelet rich plasma injection was reasonable to try to speed up recovery. *See* Exhibit 5.

25. On December 11, 2014 Dr. Sacha injected claimant with platelet rich plasma using ultrasound guidance. *See* Exhibit 5.

26. On December 22, 2014 Claimant was evaluated by Dr. Sacha. Claimant reported he was doing well and that his pain had improved markedly. Dr. Sacha noted Claimant was ready to move forward with strengthening and conditioning. *See* Exhibit 5.

27. On January 27, 2015 Claimant was evaluated by Dr. Bird. He reported he was doing a little better, was doing physical therapy that helped, and was working modified duty. Claimant reported he was walking about a mile a day but that walking had been making his ankle sore and swell. *See* Exhibit B.

28. On February 25, 2015 Claimant was evaluated by Dr. Bird. He reported his right ankle was overall worse. He reported he was washing his car at home on February 14, 2015 when the hose whipped around and hit him on the right Achilles tendon and that he dropped to the ground with severe pain. Claimant reported the pain had been worse since then and that he had a difficult time walking. Dr. Bird ordered a

new MRI of Claimant's right ankle to see if Claimant had further torn his Achilles. *See* Exhibit B.

29. On February 27, 2015 Claimant underwent an Independent Medical Evaluation performed by Timothy O'Brien, M.D. Claimant reported the altercation with a patient on July 20, 2014. Claimant reported he did not note ankle pain that day and for the next week did not note ankle pain, but then started to note it in the back of his ankle but did not report it because he thought it would get better. Claimant reported pain that ranged from a 0-8 on a scale of 10 and that the pain was worse when he was more active. Dr. O'Brien noted that Claimant walked with a limp and opined that Claimant had significant swelling and a palpable defect in his Achilles tendon that was a full-thickness defect. *See* Exhibit A.

30. Dr. O'Brien opined that Claimant did not sustain a work related injury on July 20, 2014. Dr. O'Brien noted that the absence of pain experienced by Claimant on the date of injury argues against the occurrence of an injury. Dr. O'Brien noted that Claimant's prior injuries had resulted in altered biomechanics of his foot and ankle and that he had chronic changes due to this that were shown by MRI. He opined that Claimant had overuse tendinitis of the Achilles tendon and that his altered biomechanics resulted in significant increased stress on his Achilles tendon. Dr. O'Brien opined that Claimant's significant atrophy and inflammation of the Achilles tendon was pre-existing and became manifest to Claimant on or about July 20, 2014. Dr. O'Brien opined that the MRI scan showed chronic and longstanding changes including the severe tendinopathy that take months or years to become evident. Dr. O'Brien opined that if an acute injury had occurred on July 209, 2014 he would have expected the MRI scan to show bleeding or hematoma around the severe partial thickness tear. *See* Exhibit A.

31. Dr. O'Brien opined that Claimant was a candidate for an Achilles tendon repair surgery. Dr. O'Brien opined that the injection of platelet rich plasma was an unwarranted intervention that had no science to back its utilization in this case. He opined that there were no studies in a peer review journal achieving level 1 or level 2 evidentiary status to support the use of platelet rich plasma for a chronic Achilles tendon rupture in a diabetic who is obese, or for any type of Achilles tendon injury. Dr. O'Brien opined that the injection was contraindicated and that an ultrasonic guided injection added expense and did not allow a practitioner to more accurately inject. *See* Exhibit A.

32. On March 3, 2015 Claimant underwent a second MRI that was interpreted by Dr. Scroggins. Dr. Scroggins noted there had been development of a full-thickness tear of the Achilles tendon in the area of previously noted tendinopathy. She also noted moderate atrophy of the soleus muscle. *See* Exhibit 6.

33. On March 5, 2015 Claimant was evaluated by Bharat Desai, M.D. Dr. Desai opined that Claimant's injury occurred due to work from Claimant's restraint and attempt to elude a punch. Dr. Desai opined that Claimant had a right Achilles tendon tear and explained to Claimant the surgical and non surgical options. Claimant wished to undergo surgery and Dr. Desai agreed that surgery was appropriate. *See* Exhibit 7.

34. On March 13, 2015 Claimant underwent surgery to repair his right acute Achilles tendon tear. Dr. Desai noted Claimant in fact had a complete tear that was clearly visible in surgery. Dr. Desai noted that Claimant had significant chronic as well as acute Achilles tendon issues. Dr. Desai noted there was a significant amount of Achilles tendon damage and that it was not just an acute Achilles tendon tear. *See* Exhibit 7.

35. Prior to the work incident in July of 2014, Claimant had an altered gait on the right side. Claimant suffered a lawnmower incident in 2007 which caused the second toe on his right foot to be amputated and his third toe to be realigned pointing inward. Claimant also suffered a motorcycle accident in 2012 and broke his right tibia also contributing to an altered gait on the right side.

36. On May 5, 2015 John Hughes, M.D. performed a case review. Dr. Hughes opined that Claimant was an increased degree of susceptibility for a right Achilles tendon rupture due to his diabetes and previous traumatic injuries to his right foot. Dr. Hughes opined that Claimant sustained progressive tendon tearing and that the progression shown between the two MRIs was consistent with progressive tendon rupture. Dr. Hughes opined that the progressive tendon rupture was set in motion by Claimant's work related injury on July 20, 2014 and that on July 20, 2014 Claimant strained his right Achilles tendon. Dr. Hughes noted that Claimant was not symptomatic with any Achilles tendon pathology prior to July 20, 2014. Dr. Hughes opined that Claimant had probable occult tendinopathy of his right Achilles tendon pre-existing his work related injury but that he suffered a work related right Achilles strain on July 20, 2014 that progressed to a right Achilles tendon rupture. *See* Exhibit 2.

37. The opinions of Dr. Hughes are found credible and persuasive. His opinions are consistent with Claimant's presentation and the progression of Claimant's pain and Achilles tendon shown by MRIs. Dr. Hughes' opinions are supported by the onions of Dr. Counts and Dr. Desai who both opined that the injury was work-related and by Dr. Desai who opined that there were both acute and chronic Achilles tendon issues.

38. On June 4, 2015 Claimant was evaluated by Dr. Desai. Dr. Desai noted Claimant was doing very well following surgery, had good range of motion, and that his wound was healed. Dr. Desai noted there was no evidence of any ongoing Achilles issues. *See* Exhibit 7.

39. On June 10, 2015 Dr. O'Brien provided a supplement report. Dr. O'Brien disagreed with Dr. Hughes' opinion that Claimant's progressive tendon rupture was set in motion by Claimant's July 20, 2014 incident. Dr. O'Brien opined that an Achilles tendon that is strained or torn absolutely does not go unrecognized and that it is a very painful injury resulting in a limp, dysfunction, and the need for urgent medical attention. Dr. O'Brien opined that Claimant's lack of ankle or Achilles tendon pain on July 20, 2014 was consistent with the absence of any injury to the tendon on that date. Dr. O'Brien

also opined that diabetics develop chronic tendinopathy in the Achilles tendon that progresses over time to the point that an Achilles tendon rupture becomes evident. He opined that Claimant did not develop an Achilles tendon rupture due to an incident on July 20, 2014 but developed an Achilles tendon rupture due to chronic attritional deterioration of the Achilles tendon consistent with his age, body habitus, and diabetes. *See* Exhibit A.

40. Dr. O'Brien testified at hearing consistent with his reports. He opined that you truly can't be functional with an Achilles tendon tear, can't put weight on your leg, and that partial ruptures are just as painful. He opined that Claimant struggled with his Achilles tendon for a long time before the incident and that the tendon slowly stretched out over time and that the work incident on July 20, 2014 did not exacerbate Claimant's pre-existing condition. Dr. O'Brien opined that Claimant's Achilles was partially torn before July 20, 2014, and that by October, 2014 Claimant had a fully torn Achilles tendon, but that it was not caused by the July 20, 2014 incident.

41. The opinions of Dr. O'Brien are not found as credible or persuasive as the opinions of Dr. Hughes. Dr. O'Brien's opinions are not supported by Claimant's presentation in this case, the progression of Claimant's symptoms, and the state of Claimant's Achilles tendon as shown by MRI.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals*

Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to prove it is more likely than not that he suffered an injury to his right Achilles tendon on July 20, 2104. Although medical providers agree that Claimant had pre-existing tendinopathy in his right Achilles tendon, there is disagreement as to whether Claimant suffered an injury to his Achilles tendon on July 20, 2014. After a review of all of the evidence and testimony, the ALJ concludes that the events of July 20, 2014 caused Claimant's pre-existing tendinopathy to develop into an Achilles strain that later progressed to a full thickness Achilles tear. The opinion of Dr. Hughes in this regard is found credible and persuasive. Claimant is credible that he experienced slight pain at the time of the July 20, 2014 incident and believed it would just go away. This pain continued on and off and Claimant reported it to Mr. Tripp prior to his planned vacation at the beginning of August. The pain from the July 20, 2014 incident prevented Claimant from taking a planned motorcycle trip during the first two weeks of August while he had time off for scheduled vacation. Prior to July 20, 2014 Claimant was working full duty in a physically demanding job and despite any pre-existing tendinopathy, Claimant had no difficulties performing his job duties. Between July 20, 2014 and the beginning of August, Claimant had enough pain to verbally mention it to Mr. Tripp and to decide against taking a motorcycle trip. Although Claimant believed the injury would go away on its own, he is found credible that he had

pain at the time of the incident and that it continued to wax and wane. Claimant is credible in explaining the reason he delayed reporting the injury for approximately two months was due to his believe the pain would resolve on its own. Further, although the daily safety blotter makes no mention of the July 20, 2014 incident with patient "L," the incident itself was confirmed by the testimony of Mr. Tripp. The lack of entry into the blotter does not take away the credibility of Claimant and Mr. Tripp who both described a very similar incident.

The opinions of Dr. Hughes are also supported by the opinion of Dr. Counts that the injury was work related. Further, the opinions of Dr. Hughes are consistent with the opinions of Dr. Desai. Dr. Desai opined that the injury was work related and after performing surgery on Claimant's Achilles tendon opined that Claimant had both chronic and acute Achilles tendon issues. Dr. O'Brien's opinions in this matter are not found as persuasive. Dr. O'Brien opined that someone with an Achilles tear, even partial, would experience it as devastating and would have significant dysfunction. However, as found above, at the time Claimant was diagnosed by Dr. O'Brien with a full thickness tear in February of 2015, Claimant was functional. Claimant had good days and bad days and had pain that ranged from a 0 to an 8 and was able to walk albeit with an antalgic gait. Claimant, as shown by MRI, had at least a partial Achilles tendon tear as of October of 2014, yet Claimant did not have significant dysfunction or the need for urgent medical attention. Claimant just knew he wasn't getting better and needed to be treated. Treatment records show that on November 6, 2014 Claimant (with a partial tear) was working regular duty and not on pain medication. Similarly, as of January 27, 2015 Claimant was walking one mile per day (with a partial tear). This was one month before Dr. O'Brien concluded that Claimant in fact had a full thickness Achilles tendon tear. Claimant did not present in the fashion Dr. O'Brien opined someone with a partial or full tear would present despite findings on MRI confirming the tear existed. Although most patients may present in a certain way, Claimant did not do so. The conclusion of Dr. O'Brien that Claimant would have needed urgent care on July 20, 2014 if he in fact suffered an injury to his Achilles tendon is not found persuasive. Rather, Dr. Hughes' opinion that Claimant's injury on July 20, 2014 was consistent with an Achilles tendon strain that later progressed to a full thickness tear is credited. Although Claimant had pre-existing tendinopathy and deterioration of his Achilles tendon that made him more susceptible to injury, this does not disqualify his claim. The events of July 20, 2014 caused Claimant to suffer an Achilles tendon strain that later developed into a full thickness tear. Claimant has demonstrated, more likely than not, that the work incident caused the need for medical treatment of his Achilles tendon.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has met his burden to establish by a preponderance of the evidence that the March 13, 2015 surgery performed by Dr. Desai was reasonable, necessary, and related to his July 20, 2014 work injury. As found above, the surgery was recommended by multiple providers including Respondents' expert. Although Respondents argue the surgery is not related to the July 20, 2014 injury this is not persuasive. Claimant sustained an injury to his right Achilles tendon as result of his employment and the surgery was both reasonable and necessary to cure and relieve the effects of his injury.

Claimant has failed to establish by a preponderance of the evidence that the platelet rich plasma injections were reasonable, necessary, and related to the July 20, 2014 work injury. Although Dr. Sacha opined that trying the platelet rich plasma injection was a reasonable step to take, Dr. Sacha failed to provide an opinion as to the necessity of the injections. Dr. Sacha did not opine as to the likelihood that the injections would be successful or provide any scientific support for the use of platelet rich plasma on an Achilles tendon. Dr. O'Brien credibly opined that the injections are not supported by any studies in a peer review journal achieving level 1 or level 2 evidentiary status and that the injections were contraindicated. After weighing the evidence, the Claimant has failed to show how the platelet rich plasma injections were both reasonable and necessary to cure and relieve the effects of his Achilles tendon injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right ankle arising out of and in the course of his employment with Respondent on July 20, 2014.

2. Claimant has established by a preponderance of the evidence that the surgery performed by Dr. Desai on March 13, 2015 was reasonable, necessary, and related to his July 20, 2014 work injury.

3. Claimant has failed to establish by a preponderance of the evidence that the platelet rich plasma injections were reasonable, necessary, and related to his July 20, 2014 work injury. Claimant's request for this treatment to be paid for by Respondents is denied and dismissed.

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

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

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

DATED: August 24, 2015

/s/ Michelle E. Jones

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

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ISSUES

I. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his back as a consequence of an assault occurring December 16, 2014. The threshold question regarding compensability is whether the assault was due to an inherently private dispute between Claimant and a co-worker and thus, unrelated to Claimant's employment or whether the assault was sufficiently connected to Claimant's work-related functions so as to "arise out of" his employment.

II. If Claimant did suffer a compensable injury to his back, whether he proved by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment.

III. If Claimant's low back injury is compensable, whether he is entitled to temporary total and/or temporary partial disability benefits as a result.

IV. Whether the right of selection has passed to Claimant, who has chosen Dr. Timothy Hall as his Authorized Treating Provider.

V. Whether Claimant has established by a preponderance of the evidence that his average weekly wage is $557.68.

Because the undersigned ALJ finds that Claimant's injuries did not arise out of his employment, but rather as a consequence of an assault involving an inherently private dispute, this order does not address issues II-V.

FINDINGS OF FACT

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

1. Claimant alleges he suffered a work related injury to his back on December 16, 2014 after being pushed into a forklift by a co-worker when a verbal exchange between the two became personal.

2. Respondents filed a Notice of Contest on January 6, 2014.

3. Claimant worked for Employer as a forklift operator and pallet builder. Claimant's primary duty was to build pallets with cases of liquor/beer, wrap the product placed on the pallet and transport the "built" pallet to the scale with a forklift for weighing.

4. On December 16, 2014, Claimant and his co-worker, Cameron Horner, who also worked as a pallet builder were working near each other at Employer's warehouse. Both Claimant and Mr. Horner were proceeding to the scale to weigh a pallet they had built. Mr. Horner felt Claimant cut in front of him with his forklift in an effort to get to the scale first. According to Mr. Horner, Claimant then took a long time on the scale to weigh his pallet. Consequently, Mr. Horner shook his head at him. Claimant responded by telling Mr. Horner not to shake his head at him. Mr. Horner testified that he then told Claimant he "would do what the fuck [he] wanted" resulting in Claimant calling Mr. Horner a "bitch."

5. Mr. Horner then drove his forklift from the area of the scale to "stage" his pallet and continue his work. Mr. Horner testified that he tried to stay away from Claimant, but it was inevitable that they would see and come in close proximity to one another during their shift.

6. The back-and-forth name-calling and verbal exchange continued for some time and the disagreement became pointedly personal when Claimant started talking about Mr. Horner's personal life. Mr. Horner testified that Claimant called him a "piece of shit father" and told him that he "didn't deserve to breathe the air that he was breathing." Mr. Horner testified he became very uncomfortable with the situation.

7. After the verbal quarrel had started, Claimant took a 15 minute authorized break, at 7:00 p.m. Claimant's supervisor, Abdullah "Trench" Mayo, had heard the verbal spat between Mr. Horner and Claimant. He pulled Claimant aside during the 7:00 p.m. break to counsel him as to appropriate workplace behavior. Mr. Mayo testified he heard Claimant making personal comments towards Mr. Horner's family and his family life prompting his decision to pull Claimant aside. Mr. Mayo testified he specifically heard Claimant tell Mr. Horner "you're a shitty father. You don't deserve to breathe the air around me. You have to be with your son to be a father."

8. After talking with Mr. Mayo, Claimant returned to work. Claimant ignored Mr. Mayo's counseling and began taunting Mr. Horner about his personal life again while the two were building pallets in close proximity to one another. Each then attempted to dismantle the others pallets by removing product from it. Claimant admitted that the argument got personal and that he shouted personal, non work-related remarks at Mr. Horner regarding Mr. Horner's son and family life. According to Mr. Horner the verbal attack was so personal that he felt compelled to shove Claimant as he was standing between a pallet and forklift.

9. Mr. Horner testified that he was provoked into pushing Claimant as a consequence of the personal comments he made as Claimant was "making fun of me and my personal life." According to Mr. Horner, Claimant "was picking at my personal life, like bringing out stuff that he had no right to talk about. I felt violated." Consequently, Mr. Horner testified that he retaliated.

10. Claimant testified that he likely took the 7:00 to 7:15 PM break and that about 2

hours elapsed between the time of the argument at the pallet scale and the time he made personal comments to Mr. Horner resulting in him being shoved. Mr. Mayo testified that the argument culminated into Mr. Horner shoving Claimant at around 9:30-10:00 PM. The ALJ credits the testimony of Mr. Mayo to find that a verbal argument, which had its nexus in the parties work duties started before 7:00 PM at the pallet scale. The ALJ finds further that Claimant was counseled about infusing personal issues into the workplace during the 7:00 PM break and that Claimant ignored this directive, choosing instead to re-initiate a verbal exchange with Mr. Horner about matters that had no connection to the parties work related functions.

11. Per Mr. Horner's credible testimony and Claimant's own admission he was not pushed until he made a comment about Mr. Horner's abilities to act as a father to his son. Based upon the evidence presented, the ALJ finds that Mr. Horner's motivation for assaulting Claimant was purely personal and had nothing to do with being cut off in the line to the pallet scale, taking too long on the scale, the name calling thereafter or the removal of product from his pallet, just before the pushing incident occurred.

12. After being pushed, Mr. Horner testified that Claimant fell back over the fork of the forklift and "caught himself" on the 3 ft. tall rack of the forklift, then "pushed himself back up and got right back in my face." Claimant testified similarly, specifically that the shove caused him to fall backwards after getting caught on the forks of the fork lift. According to Claimant he twisted and struck his back on the mast of the forklift suffering immediate pain. Based upon the testimony of Mr. Horner and Claimant, the ALJ finds that Claimant never fell to the ground. Claimant testified that he did not retaliate, choosing instead to take a smoke break.

13. After this altercation, which Mr. Mayo did not witness, he found Claimant by the back door, taking the aforementioned "smoke" break. Mr. Mayo told Claimant that it was not a designated break time and asked what was going on. Claimant told Mr. Mayo about being pushed and requested that Mr. Horner be fired. Mr. Mayo explained that he would not fire a veteran employee based upon the events leading up to him being pushed. According to Mr. Mayo, Claimant "was inconsolable" making it clear that he was going to hurt Mr. Horner, that he refused to work around Mr. Horner and that he wanted him fired. Mr. Mayo testified he again counseled Claimant about not making such comments, as he had made to Mr. Horner, and that the gist of their conversation was "don't take personal shots at people's families."

14. Claimant returned to work and finished his shift on December 16, 2014. He testified that he worked with a deep aching in his low back and experienced progressive stiffness throughout the balance of his shift. According to Claimant, he did not seek medical care because he felt his injury was minor and his pain would go away on its own.

15. Mr. Horner testified Claimant never said that he hurt his back after being pushed

into the forklift. Similarly, Mr. Mayo testified that Claimant never said he injured his back on December 16, 2014 when he counseled Claimant at the back door, when Claimant resumed his shift or after Claimant finished his shift and left for the evening.

16. Claimant returned to work the following day, December 17, 2014, for his regular shift. Claimant still wanted Mr. Mayo to fire or discipline Mr. Horner for pushing him, so Mr. Mayo talked to Claimant and Mr. Horner. He then passed them off to his supervisor, Dynetro "Dino" Podhirny for further counseling. According to Mr. Mayo, Claimant never mentioned back pain before beginning his shift on December 17, 2014.

17. Prior to starting his shift on December 17, 2014, Claimant and Mr. Horner met with Mr. Podhirny regarding the pushing incident from the night before. Mr. Podhirny testified Claimant told him that he called Mr. Horner names, "saying he wasn't a good father and he was a piece of shit." Mr. Horner then told Mr. Podhirny he pushed Claimant as a result.

18. Mr. Podhirny testified that during their meeting Claimant "made it clear that he wanted [Mr. Horner] to be terminated." Mr. Podhirny refused to terminate Mr. Horner and recognized, after a short period of time of discussing that with Claimant, he wasn't going to be able to resolve the situation. Consequently, Mr. Podhirny, who shares an office door with his supervisor, Myrl Johnson, advised Mr. Johnson that he could not resolve the situation and "Myrl took over from there."

19. Claimant never reported that his back hurt to Mr. Podhirny before starting his shift on December 17, 2014. Mr. Podhirny also testified that he saw no indication that Claimant was injured. According to Mr. Podhirny, Claimant "wasn't moving funny. He wasn't acting funny. He never indicated to me that he was injured and couldn't perform his full job duties."

20. Mr. Johnson testified he heard Claimant's statement's to Mr. Podhirny through the open door adjoining their offices. Mr. Johnson testified he heard Claimant's statements repeating what he had said on December 16, 2014, which were "personal over family and who was a better parent and that Cameron was a horrible parent and didn't deserve to be a father." Mr. Johnson testified he heard the meeting with Mr. Podhirny become "belligerent," which was when Mr. Podhirny sent Claimant and Mr. Horner over to his office. Mr. Johnson testified that when he met with Claimant and Mr. Horner, he "did not notice any injuries on either employee and neither said they were hurt." Mr. Johnson testified that when Claimant began working his shift on December 17, 2015, he did not report any injury.

21. Claimant worked approximately 1/3 of his shift, i.e. 3 hours on December 17, 2014, after which he testified that his low back pain increased precluding him from working further. He went home.

22. Claimant reported to the Emergency Department (ED) at Memorial Hospital at

2:32 PM on December 18, 2015 complaining of low back pain. He provided the following history: ". . . was working with his friend the other night at work. States his friend pushed him, he twisted around, straining his right low back and his leg got caught on a metal fork off (sic) a loading device, and said he landed on his right side. He has right lateral lumbar back pain and states his right side hurts at this time." The ALJ finds this history suggestive that Claimant reported that he actually fell, landing on his right side. Such history is inconsistent with Claimant's own testimony and is contradicted by the testimony of Mr. Horner that Claimant did not fall.

23. Physical examination was positive for complaints of tenderness, pain and muscle spasm but otherwise negative for bony tenderness, crepitus, step off, ecchymosis or edema. The final assessments following Claimant's ED visit were coded as: 1. Lumbago, 2. Sprain of lumbar region, 3. Contusion of unspecified site. It also listed a Clinical impression of: 1. Acute back pain. 2. Lumbar spine strain. 3. Contusion. The report from Claimant's ED encounter does not address work restrictions.

24. Claimant then saw Physician Assistant (PA-C) Robert Crandell at Integrity Urgent Care on 12/23/14. PA Crandell wrote that Claimant "was pushed at work and tripped over the forks of a fork lift, injuring his back." He documented abnormal/painful ROM in the upper and lower back as well as moderate paraspinous tenderness on the right side of the lumbar spine. He also documented right SI joint tenderness and mild muscle spasm. Assessment was noted as: Sprain/strain lumbroscaral and muscle spasm. PA Crandell also imposed work restrictions from 12/23/14 to 12/31/14 of no lifting, repetitive lifting, pushing, pulling or carrying more than 5 pounds. Postural limitations included no crawling, kneeling, squatting or climbing.

25. Claimant returned to work on December 26, 2014. He presented the aforementioned medical records imposing work restrictions to Employer and Myrl Johnson initiated the workers compensation claims paperwork. Claimant was assigned a light duty position of sitting in a chair counting pallets or trucks on December 26, 2014. Mr. Mayo testified when Claimant returned to work on December 26, 2015, he received the same daily wage as he had up to December 17, 2015.

26. Claimant returned to Integrity Urgent Care on January 2, 2015 at which time he was evaluated by PA-C Andrew Austin. The report from this date indicates that PA Austin ordered an x-ray of the lower spine, which was subsequently read as a "normal examination." He also referred Claimant to physical therapy (PT) "2 times a week for 2-3 weeks." Claimant's work restrictions were liberalized from 5 pounds to 15 pounds lifting, pushing, pulling and carrying. Repetitive lifting remained at 5 pounds and Claimant was precluded from crawling, kneeling squatting and climbing. Claimant's next appointment was scheduled for January 16, 2015. Claimant did not return to Integrity Urgent Care and did not start the recommended physical therapy due to denial of the claim.

27. Claimant's Employer required a Preparticipation Physical Evaluation to determine

his work capacity. The physical was completed on January 17, 2015 at Integrity Urgent Care. The examination required that Claimant complete a medical history form. In completing the required history form, Claimant responded "NO" to question 23. "Do you have a bone, muscle, or joint injury that bothers you?" He also responded "NO" to question 2. "Do you have any ongoing medical conditions?" Claimant's subsequent physical examination was completed by PA Austin, the same PA who evaluated him at Integrity Urgent Care on January 2, 2015. Claimant's back was among the body parts comprising the musculoskeletal system evaluated by PA Austin. That examination revealed normal findings only. Claimant testified he still had pain at the time of this examination, but he needed an income so misrepresented the condition of his back.

28. Claimant, while working for Employer applied for a job at Swire Coca Cola ("Coca Cola") on March 18, 2015. Claimant testified this new job would pay more than his job at Employer. Claimant was hired by Coca-Cola, full time at $14.00/hour, as a truck loader effective April 15, 2015. He then quit his job with Employer. As part of his hire with Coca-Cola, Claimant indicated that he needed no accommodations and had no disability.

29. While working at Coca Cola, Claimant applied for a job at Adarand Constructors ("Adarand"). He was hired by Adarand and separated from employment with Coca-Cola on May 1, 2015. At the time he was seeking employment with Adarand, Claimant stated on this job application that he could perform the job for which he was applying without accommodations. He applied and was hired for the position of "Installer." The "Installer" job description clearly states that the holder of the position must "be able to perform extremely strenuous work consistently throughout the day, while lifting of up to 125 pounds occasionally and 50 pounds repeatedly."

30. Dr. Mitchell performed an independent medical examination ("IME") of Claimant on June 1, 2015. She generated a report following that IME. In her report, Dr. Mitchell wrote "the mechanism of injury and early examination findings are consistent." When asked about this on cross examination, Dr. Mitchell admitted that this portion of her report had not changed.

31. Dr. Mitchell further noted that "The current diagnosis of lumbar spine is consistent with the mechanism of injury, which is twisting and hitting his back on the forklift. This is consistent with the objective findings as documented in the medical records of 12/23/14 and 01/02/15." When questioned about this at hearing, Dr. Mitchell testified that this opinion has not changed.

32. Dr. Mitchell recommended a course of physical therapy twice a week for 4-6 weeks following her IME. She also indicated that medications such as a mild muscle relaxant and anti-inflammatories would be appropriate as well as an MRI given the duration of Claimant's symptoms. In her IME report, Dr. Mitchell anticipated MMI in 2-3 months"; however, after receipt of additional information unavailable to her at the time of her IME she retracted the aforementioned recommendations during her hearing testimony.

33. Dr. Mitchell testified Claimant complained of back pain during her IME. At the IME, Claimant did not inform Dr. Mitchell he was doing heavy lifting at his current position at Adarand. Prior to the IME, Dr. Mitchell reviewed Claimant's medical records from December 23, 2014 through January 2, 2015. She did not have Claimant's employment records at the time of the IME or when writing her IME report. She subsequently reviewed Claimant's employment records, testifying that if Claimant did have an injury in December 2014, it had resolved by January 17, 2015 when Claimant completed his employment physical at Integrity Urgent Care.

34. Dr. Mitchell testified based on Claimant's employment records, specifically his job description for Adarand requiring "extremely strenuous work consistently throughout the day while lifting up to 125 pounds occasionally and 50 pounds repeatedly", that "he is capable of performing a very heavy job." Dr. Mitchell testified Claimant has been working in hard labor positions, without restriction and without reasonable accommodations since leaving his job for Employer. According to Dr. Mitchell it is reasonable for a person performing such heavy labor to have a sore back at the end of the day. She testified that Claimant's current back pain is not due to the shoving incident in December 2014. Rather, she attributed Claimant's current back pain to the physical demands of his current job for Adarand.

35. Concerning her previous recommendation for physical therapy, Dr. Mitchell testified as follows: Claimant "is obviously quite functional. The purpose of physical therapy is to restore function and he can do a very heavy job; so I don't think he needs physical therapy." Dr. Mitchell does not recommend any medical treatment related to the December 2014 incident.

36. Dr. Mitchell testified Claimant's current work restrictions are due to his May 2015 facial work injury at Adarand. (T: 53 18-22) She testified that she would not assign any work restrictions regarding Claimant's back.

37. The ALJ finds Dr. Mitchell's testimony to be credible and persuasive.

38. Claimant testified that he was involved in a car accident a few days prior to the work assault. Nonetheless, he testified that he suffered no injuries, did not go to the hospital or Emergency room, and sought no care as a result. Claimant characterized the accident as a "fender bender." He worked the day after the accident testifying that he was completely pain-free.

39. Based upon the totality of the evidence presented, the ALJ finds that the assault was precipitated by a private dispute having no connection to the conditions and obligations of employment, which was imported to the workplace by Claimant after he was instructed to stop his personal verbal attacks. Consequently, the ALJ finds that Claimant has failed to carry his burden of establishing that his injuries arose out of his employment.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-01, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. *Section 8-43-201, C.R.S*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The ALJ has considered these factors and concludes, based upon the evidence presented, that Claimant's implication that he needs treatment for ongoing pain as a consequence of the December 16, 2014 assault unpersuasive. The persuasive evidence contradicts Claimant's implication and establishes that he is currently working in a physically demanding job without restriction associated with his low back. Consequently, there is no need for physical therapy according to the convincing testimony of Dr. Mitchell. Moreover, the ALJ finds Claimant's credibility suspect given his admission that he misrepresented the condition of his back during his January 17, 2015 employment physical. Claimant's testimony that he misrepresented the condition of his back to assure that he could continue to work is unconvincing given that Employer had placed him in a modified duty position and he was earning a wage at the time.

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

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra.* Colorado courts have repeatedly emphasized that the determination of whether alleged injuries arose out of and in the course of an employment relationship is largely dependent upon the facts surrounding the injury in question. *Bennet v. Furr's Cafeterias, Inc.*, 549 F. Supp 887 (D. Colo. 1982).

F. An assault is considered to "arise out of" the employment if the underlying dispute giving rise to the assault has an inherent connection to the employment, or is the result of a "neutral force". *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *In Re Questions Submitted by U.S. Court of Appeals*, *supra*. Accordingly, injuries suffered during an assault are compensable if the assault grew out of an argument over performance of work, possession of work tools or equipment, delivery of a paycheck, quitting or being terminated. Further, even if the subject of the dispute is unrelated to the work, injuries in an assault are compensable if work-related tensions exacerbate the underlying dispute. However, where the assault arises from an inherently private dispute imported into the employment and the dispute is not exacerbated by the employment, the resulting injuries are not compensable. *In Re Questions Submitted by U.S. Court of Appeals, supra*. In arguing that his back injury is compensable, Claimant points to the fact the injury occurred within the time and place limits of his employment. He also asserts that the injury arose out of an employment

relationship because the assault was precipitated by Mr. Horner's perception that Claimant "seemingly cut him off in line" to the scale or because Claimant was "taking too long to weigh his pallet for Mr. Horner's liking" or because the parties were "actively messing with each other's pallets." Consequently, Claimant argues that the requisite causal connection between the injury and his employment has been established. The ALJ is not persuaded, finding instead that the assault was precipitated by a private dispute surrounding Mr. Horner's family life and attributes as a father. Here, the credible and convincing evidence establishes that the original argument, where the combatants had exchanged verbal insults at the scale had passed and Claimant had taken a break where he was instructed not to infuse personal issues into the workplace again. Choosing to ignore that directive and re-engage Mr. Horner in a personal dispute over his family life precipitated Claimant's assault and constitutes evidence that he (Claimant) imported the dispute into the workplace.

G. Claimant asserts that even if the argument was inherently private, his injuries are nevertheless compensable because his dispute with Mr. Horner was exacerbated by the employment. As noted above, injuries resulting from assaults stemming from inherently private disputes imported into the employment remain compensable if the dispute is exacerbated by the employment. *In Re Questions Submitted by U.S. Court of Appeals, supra*.; *Valasquez v. Industrial Commission*, 581 P.2d 748 (Colo.App. 1978). Here, Claimant argues that the confines of his employment exacerbated the dispute leading to his assault because the two men were in "close proximity with one another the whole night." The ALJ understands Claimant's argument to be that "but for" the "enforced contacts" occasioned by the duties of the job and the confines of the warehouse, Claimant's assault would not have occurred. The ALJ is not convinced. Rather, the ALJ concludes that based upon the extremely personal nature of the comments made to Mr. Horner, Claimant, more probably than not, would have been assaulted no matter where these combatants encountered one another. Such assaults are not compensable. *See Valasquez v. Industrial Commission, supra.* Based upon the evidence presented, the ALJ concludes that Claimant's employment did not exacerbate the dispute nor did the conditions and obligations of his employment cause the friction which resulted in the assault. *Horodyskyj v. Karanian, supra*. Consequently, the ALJ concludes that Claimant has failed to establish, by a preponderance of the evidence, that his low back injury "arises out of" his employment.

H. In concluding that Claimant has failed to prove that his injuries arose out of a compensable assault, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Ferhat Varupa, v. Bron Tapes Inc.*, W. C. No. 4-552-808 (ICAO, October 29, 2003) instructive. In *Varupa*, the claimant, who was Muslim was assaulted by a co-worker following the escalation of a verbal exchange with the co-worker concerning the superiority of Muslims or Christians which expanded to include vulgar remarks about their mothers. The ALJ determined the claimant had no connection with the co-worker outside the workplace and would not have encountered the co-worker had he not worked for the respondent-employer. Expressly relying on *Rendon v. United Airlines,* 881 P.2d 482 (Colo. App. 1994), the ALJ further found that "but for" the employment the

claimant would not have been assaulted. Consequently, the ALJ determined the injuries were compensable.

I. On review, the Industrial Claims Appeals Panel reversed, rejecting the ALJ's reliance on the holding in *Rendon* to conclude that the "but for" test was applicable to determine the compensability of the work-place assault under the facts of the case. In *Rendon*, the claimant was injured as a result of verbal and physical assaults by co-workers who believed the claimant to be a homosexual. The court upheld an ALJ's determination that the injuries were compensable. The *Rendon* court reasoned that: "In such circumstances, the cause of the event is the friction and strain created by the work environment that places claimant in a position to receive the impact of his co-workers' personality and increases the likelihood of assault. It is because of the employment, and only because of the employment, that the claimant is subjected to his tormentor as an established fixture of the employment environment. (citation omitted) Furthermore, it is solely the obligations of the employment that compel the association of the employees, which would otherwise not come about, and it is this enforced and uneasy association that leads to the explosive finale. . . . In addition, the fact that a claimant or a fellow employee may overreact to an adverse condition of employment or that the overreaction may stem from some unusual quality of either employee's personality does not alter the fact that the subject of that reaction had an inherent connection with employment." *Id* at 485.

J. However, in *Horodyskyj v. Karanian*, 32 P.3d 470, 476 (Colo. 2001), our Supreme Court rejected the court's reasoning in *Rendon* and concluded that analysis improperly eliminated the "causality requirement needed for an injury to arise out of the employment." The Supreme Court held the *Rendon* test improperly framed the issue as "but for the bare existence of the employment" rather than "but for the conditions and obligations of the employment." *Ibid* at 476. Therefore, the court held that evidence employees met through the employment "is not enough to cause offensive on-the-job conduct between them to fall within the 'friction and strain' of the job." *Ibid* at 476.

K. In this case, Claimant makes an argument similar to that asserted in *Rendon* and *Varupa*, namely that he would not have been assaulted had he not worked for Employer and had he not been forced to work in close proximity to Mr. Horner. Accordingly, Claimant alleges that his assault was precipitated by the conditions and obligations of his employment. As found, the ALJ is not convinced. To the contrary, just as the assault in *Varupa* was precipitated by the verbal taunting associated with a personal religious dispute; the assault in the instant case was precipitated by a deeply personal dispute concerning Mr. Horner's abilities to discharge his paternal obligations. The fact that these combatants had no connection to each other outside the workplace or the fact that they had to work in close proximity to one another is, according to the holding expressed in *Horodyskyj*, legally insufficient to establish a sufficient causal connection between the injuries and the employment. On the evidence presented, the ALJ

concludes that Claimant's assault was precipitated by a private dispute having no connection to the conditions and obligations of the employment. Consequently, the claim must be denied and dismissed as Claimant has failed to establish that his injuries have an origin in his work-related functions and are sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra.* Simply put, Claimant's injuries did not "arise out of" his employment. In view of that, Claimant's remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries arising out of a December 16, 2014 assault is denied and dismissed.

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

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

DATED: August 24, 2015

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

ISSUES

I. Whether Claimant sustained a compensable right foot Achilles tendon strain while ascending two stairs on January 25, 2015 entitling her to reasonable, necessary medical treatment, including care received through Dr. Ralph Wentz, D.P.M.

FINDINGS OF FACT

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

1. Claimant works as a correctional officer in the kitchen of the Buena Vista Correctional facility. As the Officer in charge, Claimant's duties include supervising offenders in the kitchen and preparing/baking all food for service. Claimant's duties keep her on her feet and moving around for the majority of her shift. Consequently, Claimant walks and/or stands on concrete floors for 8 hours per day while in the prison.

2. On January 25, 2015, at around 1:15 PM, Claimant developed pain in her right foot/heel while ascending two stairs at work. Claimant's pain worsened throughout her shift. Consequently, she reported her pain to the shift commander and a first report of injury was taken. Claimant was able to complete her shift and return home where she attempted to relieve her persistent pain with a hot bath followed by ice.

3. On Monday, January 26, 2015, Claimant's pain was "somewhat" better but her right heel was still sore. Accordingly, Claimant called Human Resources (HR) to report her injury. During her conversation with an HR representative, Claimant requested that she be permitted to see a doctor. Claimant was directed to a designated clinic.

4. At 12:54 on January 26, 2015, Claimant presented to Constance Gable, Family Nurse Practioner (FNP) at Heart of the Rockies Regional Medical Center. During this encounter, Claimant reported that she was "going up stairs at work" when she felt a "pulling sensation" on the back of her right foot in the "achilles tendon area." A physical examination of Claimant's foot revealed "very mild tenderness at medial side of R achilles tendon attachment" and "no localized erythema or heat." An x-ray was ordered. Claimant's right foot x-ray demonstrated small calcaneal spurs as well as pes cavus (high arch). The ALJ finds from the evidence presented that Claimant's right calcaneal spurring pre-existed the January 25, 2015 alleged date of injury.

5. At the conclusion of her January 26, 2015 appointment, Claimant was

referred to physical therapy (PT), instructed to take Ibuprofen, rest, ice, use an ACE wrap 24/7 and elevate her leg as much as possible. Work restrictions included no standing. Claimant was assessed as having "probable mild achilles tendonitis."

6. On February 2, 2015 Claimant returned to FNP Gable reporting improvement in her symptoms when using ice and taking Ibuprofen. FNP Gable commented that Claimant's January 26, 2015 x-ray demonstrated a "Heel spur" and that Claimant was a known patient to Dr. Wentz for this and that she had shoe orthotics. Physical examination revealed continued right "mild tenderness along medial side of Achilles tendon." Claimant was assessed as having "probable achilles tendon strain and was informed that her next visit would need to be scheduled with Dr. Kanar.

7. Prior to seeing Dr. Kanar, Claimant testified that she was advised by the adjuster assigned to the case that the claim was denied and that as a consequence all treatment "stopped." The Third Party Administrator, through their representative, Jackie L. Slade filed a Notice of Contest on February 6, 2015.

8. Claimant testified that because all further treatment had been denied she elected to return to Dr. Wentz on February 12, 2015. The evidentiary record indicates that Claimant saw Dr. Wentz on February 12, 2015 and that Dr. Wentz completed "State of Colorado Fitness-to-Return Certification paperwork indicating that Claimant was capable of full duty work without restriction beginning February 15, 2015. Claimant testified that she paid $50.00 out-of-pocket for services rendered during the February 12, 2015 appointment.

9. Claimant testified that Dr. Wentz recommended additional physical therapy during her February 12, 2015 appointment. Although, the medical report of Claimant's February 12, 2015 visit was not introduced into evidence, Respondents' Exhibit A, page 1, which the ALJ finds is part of the paper work completed by Dr. Wentz regarding Claimant's fitness for duty, indicates that he treated Claimant on February 12, 2015 for an "Achilles strain" and that Claimant was referred for additional treatment in the form of "US." The ALJ finds that the reference to "US", more probably than not indicates a request for ultrasound treatment through physical therapy.

10. Claimant returned to work without restriction on February 15, 2015.

11. On March 6, 2015, Claimant returned to Dr. Kanar for re-evaluation. The ALJ finds, after careful review, that the report generated from this date of visit contains no meaningful information concerning the cause of Claimant's right heel pain. To the contrary, the report does not address Claimant's heel pain at all. The report simply notes that the visit involved a routine medical examination and lists Claimant's "Problems" as: "Hypothyroidism" and being "Overweight."

12. Based upon the evidence presented, the ALJ finds Claimant's reports of pain while ascending two steps at work on January 25, 2015 credible. Nevertheless, this finding does not resolve the question of causality for that pain and whether Claimant sustained a compensable injury as a consequence of walking up some stairs. Based

upon the factual findings set forth below, the ALJ finds that Claimant has failed to carry her burden of proof.

13. Claimant has a prior history of left foot pain dating back to May 16, 2013. On this date, Claimant was evaluated by Dr. Wentz for persistent left foot pain over the head of the forth metatarsal of the left foot worse with weight bearing. An x-ray revealed a healed 3rd metatarsal stress fracture. Dr. Wentz assessed the cause of Claimant's pain as 4th metatarsal "overload due to neglected 3rd metatarsal stress fracture." He did not state a cause for Claimant's 3rd metatarsal stress fracture. Claimant was provided a prescription for bilateral foot orthotics (BFO) to use for one month followed by reassessment.

14. Claimant returned to Dr. Wentz on June 13, 2013 with complaints of plantar metatarsal phalangeal (MP) joint pain. Consequently, Dr. Wentz administered a capsulitis injection into the 4th metatarsal phalangeal joint capsule and recommended "orthotic therapy with L4 metatarsal head accommodation."

15. On January 16, 2014, Claimant returned to Dr. Wentz with complaints of right heel pain, aggravated by weight bearing which had developed the week prior to her visit. Physical exam revealed pain localized to the right "posterior right calcaneus at the insertion of the achilles tendon." An x-ray of the right heel was obtained and demonstrated "early inferior and posterior calcaneal spurs. Dr. Wentz provided the following diagnostic impression: "right heel pain with insertional achilles tendinitis with a differential diagnosis of "calcaneal stress fracture not yet visualized radiographically." The treatment plan included use of "BFO's with bilateral heel lifts", anti-inflammatory medication and rest.

16. By January 30, 2014, a repeat x-ray of the right foot revealed a "sclerotic line across the tuber of the calcaneus." Consequently, Dr. Wentz provided a diagnosis of "right calcaneal stress fracture." Claimant was placed in a fracture boot and restricted to a non-weight bearing (NWB) status for four weeks. Additional laboratory testing was ordered and Claimant was instructed to return for follow-up in four weeks.

17. The ALJ finds the January 26, 2015 x-ray of Claimant's right foot/heel to demonstrate changes similar to those of the right foot, as explained by Dr. Wentz in his January 16, 2014 report, namely early calcaneal spurring. Consequently, the ALJ finds Claimant's spurring pre-dated Claimant's January 25, 2015 injury (See ¶ 4 of the above Findings of Fact).

18. Based upon the evidence presented, including careful inspection of Dr. Wentz' reports, the ALJ is unable to find support that Dr. Wentz related Claimant's right heel condition, including insertional Achilles tendinitis and/or calcaneal fracture to Claimant's occupation as a correctional officer. According to Dr. Wentz, there was "no history of injury." Moreover, Dr. Wentz raised concern for non-occupational causes of Claimant's left and right foot problems, including a family history of Osteopenia and the potential for vitamin D or calcium deficiencies.

19. During cross examination, Claimant admitted that she ascends and descends stairs in her home and encounters stairs outside of work on a daily basis. Claimant did not testify that the stairs she encounters at work are unique or different in character than other stairs she encounters on a daily basis. The ALJ finds that stairs, in general are ubiquitous and that Claimant, in this case was equally exposed to the hazard which she asserts is the cause of her right heel condition outside of work. Claimant also submitted a WebMD page entitled Insertional Achilles Tendinopathy which provides the following:

> Insertional Achilles tendinopathy is tendon damage in the area where the tendon attaches to the heel bone. *It tends to develop when the tendon is rubbing on a bone spur or other type of bone growth."* (emphasis added)

20. Given the similar findings between Claimant's right heel x-rays combined with Dr. Wentz' records, which fail to connect Claimant's heel pain/condition to her work duties and Claimant's equal exposure to stairs outside of her employment, the ALJ finds Claimant's contention that her right foot/heel pain was caused by ascending two steps at work unpersuasive. Rather, the persuasive evidence presented, including the x-rays, persuades the ALJ that the injury to Claimant's right Achilles tendon occurring January 25, 2015 was probably caused by the natural progression of a pre-existing non-industrial condition imported to the workplace by Claimant rather than simply ascending two steps. Claimant's testimony to the contrary is unconvincing.

21. Based upon a totality of the evidence presented, the ALJ finds that Claimant failed to prove that the stairs she encountered at work constituted a special hazard which combined with a pre-existing condition to result in a compensable injury to Claimant's right heel.

CONCLUSIONS OF LAW

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

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

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

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S.

D. To recover workers' compensation benefits, the Claimant must prove she suffered a compensable injury. A compensable injury is one which arises out of and in the course of employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, the ALJ finds that Respondents are not contending that Claimant's alleged injury did not occur in the course of her employment. Rather, based on the testimony presented and the records submitted, the undersigned ALJ understands Respondents contention to be that Claimant's asserted injury did not "arise out" of her employment.

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2014. The fact that claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

F. Based upon the persuasive evidence presented, including the x-rays, the ALJ concludes that Claimant's right Achilles tendinopathy/tendinitis and/or strain was, more probably than not, caused by the natural progression of pre-existing, non-industrial calcaneal spurring rather than her ascending two stairs as claimed. In other words, while Claimant may have experienced pain when ascending stairs, the ALJ concludes her pain was precipitated by a pre-existing condition that she brought to the workplace and not an activity or condition distinctly associated with her employment, i.e. ascending

two stairs.

G. In concluding that Claimant has failed to prove, by a preponderance of the evidence, that she suffered a compensable work injury, the ALJ has considered the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989). Under the "special hazard" rule," a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Id*. The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See National Health Laboratories v. Industrial Claim Appeals Office, supra; Ramsdell v. Horn, supra.* In this case, the ALJ concludes that Claimant's right Achilles tendon injury was precipitated by a pre-existing, non-industrial condition rather than a discrete injury while ascending two steps. On the evidence presented, the ALJ concludes that Claimant imported to her workplace a predisposition to injuring her Achilles tendon merely ascending steps given the pre-existing spurring revealed by the x-ray of the right heel, the last occurring on January 26, 2015. Consequently, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to prove that she sustained a compensable work injury to her left heel. *National Health Laboratories, supra.*

H. To be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). In this case, Claimant failed to establish that a stairs which she encountered at work constituted a special hazard of employment which would increase the risk or extent of injury. To the contrary, Claimant's did not set these steps apart from any others she encounters on a daily basis, in terms of design or character during her testimony. Thus, while the ALJ concludes that Claimant sustained an injury to her right heel as a consequence of her pre-existing calcaneal spurring, she failed to prove that the instrument which she alleges caused her injury, namely stairs constituted a special hazard in this case. Accordingly, her claim for benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's January 25, 2015 claim for a work related injury is denied and dismissed.

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

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

DATED: August 11, 2015

/s/ Richard M. Lamphere

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

STIPULATIONS & ADMISSIONS

At the commencement of the hearing, the parties resolved several issues by way of stipulation and judicial admissions. Respondents judicially admitted that Claimant sustained a compensable psychological injury in the form of PTSD, anxiety, and depression related to the accidental death of a coworker on January 7, 2015. Respondents further admitted that Claimant was entitled to TTD benefits commencing January 29, 2015 and continuing until February 20, 2015 for this compensable injury.

Respondents disputed that Claimant sustained a compensable injury to his right shoulder as a consequence of his admitted psychological injury. Accordingly, Respondents contest that Claimant is entitled to medical treatment and additional wage loss benefits after February 20, 2015 due to Claimant's inability to work as a consequence of the subsequent, unrelated, right shoulder injury.

Finally, the parties stipulated to an AWW in the amount of $625.52 on the date of injury, increasing to $726.99 effective June 1, 2015 based on COBRA health insurance cost. The ALJ approves the parties' stipulations and admissions.

REMAINING ISSUES

The issues to be determined by this decision are:

I. Whether claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder as a consequence of his admitted psychological injury.

II. If Claimant did sustain a compensable right shoulder injury, whether he is entitled to medical benefits for his right shoulder condition.

III. Whether Claimant is entitled to wage loss benefits from after February 20, 2015.

FINDINGS OF FACT

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

1. Claimant sustained an industrial injury on January 7, 2015 in the course and scope of his employment. Claimant worked at the Employer's glass production and finishing facility in Pueblo.

2. On January 7, 2015, Claimant was performing his regular duties, which included moving large sheets of glass with a crane. He needed to maneuver the crane through large stacks of glass colloquially known as "stoges." Claimant was unaware that two coworkers were changing light bulbs nearby using a scissor lift. The crane Claimant was operating hit the scissor lift and knocked it over. One of the coworkers fell to the floor, was seriously injured and subsequently died.

3. Claimant personally witnessed the coworker lying on the ground in a pool of blood before he was taken away by paramedics. That image has been the source of repeated distressing recollections and "flashbacks" of the incident for Claimant. Additionally, Claimant feels a great deal of remorse and guilt for his role in causing the fatal accident.

4. Claimant was evaluated by his primary care provider, Veronica Ritchey, FNP-C on January 9, 2015. The appointment had already been scheduled prior to the accident to establish a PCP under his new insurance. Nurse Ritchey noted that he was having "depression and anxiety . . . from an incident that occurred recently at work and [he] is having some difficulties dealing with this and is not sleeping." Nurse Ritchey prescribed Xanax and Zoloft for the anxiety, depression and sleep disturbance.

5. The Employer gave Claimant a couple of days off after the accident. When he returned to work, he began struggling with anxiety and depression related to the accident. He experienced panic attacks associated with physical symptoms such as stomach pain, lightheadedness, dizziness, and heart palpitations. Initially, Claimant did not realize these symptoms were manifestations of panic attacks.

6. Claimant left work and went to see Nurse Ritchey on January 29, 2015 after a panic attack which caused him to become lightheaded and dizzy while he was carrying a large sheet of glass. Nurse Ritchey documented that "the death at work is weighing heavy on him and he is constantly reminded of the incident and every time he goes into a panic attack and is dizzy with sob [shortness of breath], palp, [palpitations] N/V [nausea and vomiting] and is afraid that he is going to get hurt himself at work." As a result of these symptoms, Nurse Ritchey requested that Claimant be given a medical leave of absence. Nurse Ritchey noted that "[d]ue to the recent situation at his place of employment, Alex is having some health concerns that lead me to believe it would be necessary to put him on personal FMLA starting 1/30/2015. . . . This health concern will put the patient at increased risk for injury therefore I will evaluate him on a weekly basis for return to work status." Nurse Ritchey subsequently completed a FMLA leave form, where and she indicated Claimant was unable to work at this time "due to safety risk."

7. Claimant has not returned to work since January 29, 2015. He has not been released to work without restrictions, and he has not been offered any modified duty.

8. Claimant saw Nurse Ritchey again on February 5, 2015, at which time he was still reporting symptoms including "chest pain and palpitations," "nightmares," "headaches and dizziness . . . with panic episodes," "vertigo," and sleep disturbance.

9. The Employer made counseling services available to employees who wanted help coping with the incident, and Claimant saw Marjorie Genova, MA, LPC on four occasions. At the initial evaluation, Ms. Genova documented that Claimant was "experiencing intense feelings of guilt and grief for the accidental death of his colleague." She further documented that he was suffering from nightmares, flashbacks, anxiety. Physical symptoms included increased blood pressure, stomach pain, and "dizziness." Ms. Genova diagnosed Claimant with "PTSD from the work-related accident."

10. On February 10, 2015, Claimant experienced a panic attack at home and went upstairs to get his medication. He was lightheaded and dizzy, and subsequently fell down the stairs, injuring his right shoulder.

11. Later that day, Claimant went to the Employer's designated facility, CCOM. He reported that his current symptoms included feeling "dizzy." CCOM directed him to seek attention at St. Mary Corwin Hospital Emergency Room (ER) for the shoulder. The ER record reflects that "[Claimant] was having a panic attack and was going upstairs to get his medications when he apparently passed out and woke up at the bottom of the stairs." The ER gave Claimant a sling and recommended orthopedic evaluation.

12. Claimant was evaluated by Dr. Nanes at CCOM for the first time on February 13, 2015. Dr. Nanes documented that "he continues with ongoing rather severe panic attacks and PTSD-like symptoms." Dr. Nanes noted that "he started to have a panic attack [at home] and he was going up the stairs to get his medicine when he fell and landed on his right shoulder." Dr. Nanes referred Claimant for an MRI of the right shoulder to assess a suspected rotator cuff tear. He also referred Claimant to Amy Alsum, LCSW for psychological counseling.

13. The Respondents denied liability for the right shoulder based on a record review performed by Dr. Larson. On February 25, 2015, Dr. Nanes stated that "his right shoulder condition has been denied by the insurance company and the patient was advised to see his primary care physician for this injury."

14. As instructed, Claimant contacted Nurse Ritchey and was referred for a right shoulder MRI under his health insurance. The MRI showed rotator cuff tears, so Nurse Ritchey referred Claimant to an orthopedic surgeon, Dr. Jennifer FitzPatrick.

15. Claimant was evaluated by Dr. FitzPatrick on March 23, 2015. Dr. FitzPatrick noted that he "was having a panic attack and thus ran up the stairs to get his medication and fell." Dr. FitzPatrick diagnosed rotator cuff tears, and recommended surgery. The surgery was performed on April 10, 2015. Arthroscopic findings included "a large tear" of the subscapularis tendon, a mid substance tear of the subscapularis tendon at the musculotendinous junction, and dislocation of the biceps tendon. Dr. FitzPatrick opined that the intraoperative findings were "evidence of an acute injury."

16. Claimant had his final visit with Ms. Genova on February 20, 2015. The report states he was "feeling improved," but was still having issues with "flashbacks and ruminating thoughts."

17. Claimant began treating with Amy Alsum, LCSW on March 4, 2015 on referral from Dr. Nanes. At that time, he was having "panic attacks occurring 2 or 3 times a day, when he feels as if he is having a heart attack. He becomes dizzy. His heart rate speeds up. He is sweaty and has difficulty breathing." Ms. Alsum documented that "he also hurt his shoulder about a month after the incident. He was at home when he experienced a severe panic attack. When he has panic attacks he becomes dizzy, and on this particular day he fell down some stairs as he was trying to get to his medications and hurt his right shoulder."

18. Claimant has continued working with Ms. Alsum on a regular basis since March 2015. Records reflect that he still suffers from severe anxiety and frequent panic attacks. Ms. Alsum also documented severe anxiety episodes triggered by any attempt to return to his workplace. For example, on March 16, 2015, Ms. Alsum noted:

> [H]is readiness to return to work was addressed. He reports that he went back to his workplace last week, to pay his insurance premium, and his anxiety was so high that he could not make himself enter the building. He was receptive to discussing how he can utilize exposure therapy, that is, to increase his exposure to the workplace by small increments, utilizing calming techniques as he does so. He is currently not ready to return to work, but is receptive to working toward the goal of returning to work.

19. Similarly, on March 25, 2015, Ms. Alsum documented that "[h]e has made one attempt to get to the parking lot at work, but was overwhelmed with anxiety." On April 8, 2015, Claimant reported that "he continues his efforts to manage his anxiety related to a work accident. He has been driving through the parking lot at work, on a daily basis. This has gone well, but when he tried to stop the car and stay in the parking lot for a minute, he had a panic attack. He was encouraged to continue his efforts."

20. The ALJ finds Claimant's testimony credible and supported by the medical record evidence.

21. Claimant's February 8, 2015 right shoulder injury is a compensable consequence of his January 7, 2015 industrial injury. Although the shoulder injury did not occur at work, it was clearly precipitated by Claimant's well-documented panic attacks, which the ALJ finds and concludes are a manifestation of Claimant's admitted PTSD/anxiety condition.

22. The right shoulder surgery performed by Dr. FitzPatrick was reasonable, necessary, and causally related to Claimant's compensable fall on the stairs. Based upon the evidence presented, the ALJ finds and concludes that the changes noted on the March 14, 2015 MRI were, more likely than not, acute and caused by Claimant's fall on the stairs.

23. The right shoulder treatment that Claimant received, including surgery, was authorized because Dr. Nanes, Claimant's authorized provider at CCOM for the psychological injury, referred Claimant to his primary care provider for treatment of the shoulder. Based on the referral of Dr. Nanes, Claimant saw Nurse Ritchey, and was subsequently referred to Dr. FitzPatrick for surgery. Therefore, Dr. FitzPatrick was within the chain of authorized referrals for the compensable injury.

24. Claimant has been temporarily disabled as a consequence of his industrial injury since January 29, 2015. As of the date of the hearing in this matter, Claimant had not been placed at MMI, been released to regular duty, or returned to work.

CONCLUSIONS OF LAW

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

A. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for

observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between employment and the alleged injuries. *Section* 8-43-201, C.R.S. 2014.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

G. As found, Claimant's February 8, 2015 right shoulder injury was proximately caused by his panic attacks, which are directly related to his January 7, 2015 industrial injury. As such, the right shoulder injury is a compensable consequence of the admitted injury.

H. Respondents argue, based primarily on the testimony of Dr. Larson, that Claimant did not sustain an acute injury to his right shoulder in a fall on the stairs, and even if he did the injury is unrelated to his admitted psychological injury because it occurred at home. In other words, Respondents' contend that if Claimant injured his right shoulder that injury did not arise out of and in the course and scope of Claimant's employment. Based upon a totality of the evidence presented, the ALJ is not convinced.

In his written report, Dr. Larson opined that Claimant's right shoulder injury is a consequence of a non-occupationally related incident although he did not give a specific medical basis for that opinion. Rather, Dr. Larson simply indicated that Claimant's "anxiety did not cause him to fall on his stairs at home." At hearing, Dr. Larson did not dispute that Claimant has panic attacks. He also testified that he had no basis to dispute that Claimant becomes dizzy or unstable when he has a panic attack. He simply indicated that dizziness is an "uncommon" symptom of a panic attack and that a panic attack would cause someone to fall. The ALJ credits Claimant's testimony to find and conclude that his panic attacks make him light headed and dizzy and that his dizziness likely lead to his fall down some steps in the rush to secure his anti-anxiety medication to abort his panic attack. The contrary testimony of Dr. Larson is unpersuasive.

I. Although the shoulder injury did not occur at work, it was clearly precipitated by Claimant's well documented panic attacks, which are a manifestation of Claimant's admitted PTSD/anxiety condition. In reaching this conclusion the ALJ agrees with Claimant that settled case law reflects a wide variety of secondary events and injuries that were deemed to be proximately related to an original compensable injury. For example, in *Johnson v. Industrial Commission*, 366 P.2d 864 (Colo. 1961), the court awarded death benefits for a worker who died of pneumonia. The claimant had suffered a chest wall injury as a result of a compensable accident. Subsequently, he became sick with pneumonia and died. There was no suggestion that the pneumonia had been caused by his employment. Rather, the causal nexus was found in the fact that pain from the admitted injury prevented the man from coughing and clearing his bronchi. The court found that "the decedent died from bacterial pneumonia which undoubtedly went to the point of fatal termination because of the confusing factor of the decedent's injury which caused him pain and that the pain of the injury kept him from coughing and clearing out his bronchi." *Id*. at 865. The court found that "the injury was the proximate, although not the immediate, cause of the death." *Id*. Noting that "it is not necessary that the injury be the immediate cause, but only the proximate cause of the death in order to sustain an award," the court concluded that compensability was established as a matter of law.

J. Similarly, in *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970), the claimant had sustained a compound fracture of his right leg in a compensable industrial accident. While he was still recovering from that injury, he slipped on an icy sidewalk and re-fractured his right leg. The court found that the second fracture was causally related to the original compensable injury, because it had left the leg in a weakened condition and more susceptible to injury. The court rejected the employer's argument that the second accident constituted an "intervening event," because it had "occurred when Ball was on a personal errand and not working for his employer." *Id*. at 623. The court noted that "even though Ball fell on the icy sidewalk, his leg would not have been re-fractured but for the fact of the prior fracture."

K. Respondents' argument in this case is essentially the same argument raised by the employer, and rejected by the court, in the *Standard Metals* case. Here, Respondents are arguing that Claimant's shoulder injury occurred at home, and not during the performance of any work duties. Even though Claimant's right shoulder injury

occurred at home, the ALJ finds and concludes it would not have occurred "but for" the pervasive, persistent anxiety and work-related panic attacks precipitated by his admitted work related psychological injury. Consequently, the ALJ concludes that a causal connection between the Claimant's right shoulder complaints and his admitted psychological injury exists in this case. The right shoulder injury is compensable.

L. Once a claimant has established a compensable work injury, the claimant is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S. 2014*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo. App. 1999). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

M. Based upon the evidence presented, the ALJ concludes that Claimant's need for right shoulder surgery was related to his compensable fall from his stairs. Crediting Claimant's report to Dr. Larson and his testimony, the ALJ finds that before his fall, he had no history of problems with or treatment directed to the right shoulder. The ALJ finds Dr. Larson's opinion, that there was nothing on the MRI suggesting that an "acute" injury, unpersuasive. Based upon the evidence presented, the ALJ finds and concludes that the changes noted on the March 14, 2015 MRI were, more likely than not, acute and caused by Claimant's fall from the stairs. Having determined the issue of relatedness of Claimant's need for treatment, including surgery, for the right shoulder the ALJ addresses the issue of authorization for such treatment.

N. The ALJ agrees with Claimant that the treatment for the right shoulder was authorized because Dr. Nanes, Claimant's authorized provider at CCOM for the psychological injury, referred Claimant to his primary care provider. On February 25, 2015, Dr. Nanes stated that "[h]is right shoulder condition has been denied by the insurance company and the patient was advised to see his primary care physician for this injury." (Cl. Ex. 4, p. 64). The ALJ finds and concludes that this constitutes a valid referral for authorization purposes under *Cabela v. ICAO*, 198 P.3d 1277 (Colo. App. 2008). In *Cabela*, the designated ATP had concluded that a knee condition was not causally related to her employment, and recommended that the claimant follow-up with her personal physician. Subsequently, the claimant established compensability for her knee condition at hearing. In concluding that all treatment received through the claimant's primary care providers was considered authorized, the Court held:

> As the ALJ found, the employer's physician, an ATP, referred claimant to her personal primary care physician. The referral reflects no purpose other than treatment for claimant's knee problems, and claimant's testimony indicates that she understood the referral to be for treatment of her knee. Indeed, the ALJ found that claimant sought medical attention for her knee

> from her primary care doctor. Thus, even if the employer's physician provided the referral under the mistaken belief that the knee condition was not work-related, we perceive no factual basis for the ALJ's conclusion that the referral was made outside the ordinary course of treatment. Instead, ***we hold that the risk of mistake by an ATP in concluding that an injury is noncompensable lies with the employer***. We thus conclude the referral made here was in the ordinary course of treatment. *Id*. at 1281. (Emphasis added).

O. Here, Dr. Nanes referred Claimant to his PCP for treatment of the right shoulder, because it was "denied by the insurance company" based primarily on the report of Dr. Larson that Claimant's shoulder injuries were a consequence of a "nonindustrial incident." Based on that referral, Claimant saw Nurse Ritchey, and was subsequently referred to Dr. FitzPatrick for surgery. Therefore, Dr. FitzPatrick was within the chain of authorized referrals. The ALJ finds and concludes that the "mistake" by Dr. Larson in concluding that the shoulder injury was "noncompensable" in this case also lies with the Employer. Consequently, the undersigned is persuaded that Claimant's care, including his surgery at the hands of Dr. FitzPatrick for his right shoulder is authorized.

P. Because Claimant's right shoulder injury is deemed compensable, Respondents are required to reimburse Claimant and his health carrier for any related medical expenses under § 8-42-101(6)(a). Specifically, § 101(6)(a) provides

> If … the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

Q. Section 101(6)(a) was enacted in 2013 to ensure that injured workers, and health insurance carriers, are reimbursed for all injury-related medical treatment provided outside of the workers' compensation system while a claim or benefit is under a denial. This case presents exactly the scenario the statutory amendment was intended to address.

R. To establish entitlement to TTD benefits, a claimant must show that he was "disabled," that he left work as a result of the injury, and that he missed at least three days from work. *E.g., City of Colorado Springs v. ICAO*, 954 P.2d 637, 639 (Colo. App. 1997). In this context, a "disability" exists if the industrial injury causes restrictions or limitations that impair the claimant's ability to effectively and properly perform the duties of his regular employment. *E.g., Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Further, the claimant need not prove the industrial injury is the sole cause of the wage loss, so long as it is a contributing cause. *Horton v. ICAO,* 942 P.2d 1209 (Colo. App. 1996). Once commenced, TTD benefits continue until the occurrence of one of the terminating events listed in § 8-42-105(3).

S. At hearing, the Respondents admitted that Claimant was temporarily disabled as a result of the now-admitted injury of PTSD/anxiety and depression. Respondents further stipulated that Claimant is entitled to TTD benefits commencing January 29, 2015 through February 20, 2015. Nonetheless, Respondents argue that TTD benefits should terminate on February 20, 2015, based on a notation that Claimant's psychological status had "improved" as of that date and/or that he was disabled by his non-work related right shoulder injury. The ALJ is not convinced for several reasons.

T. First, as a general rule, once commenced, TTD benefits continue until terminated by one of the events enumerated in § 8-42-105(3)(a)-(d). Those events are MMI, return to work, full duty release, or refusal of modified duty. None of those events of occurred in this case. Accordingly, there is no legal basis to terminate TTD benefits. To the extent that Respondents assert that Claimant had reached psychological MMI on February 20, 2015, the ALJ is unconvinced because no physician indicated he was at MMI as of that date. Only "an authorized treating physician" can make a determination of MMI. *Section 8-42-107(8)(b)(I).* The ALJ finds Ms. Genova to be a therapist, and therefore not legally authorized to declare MMI. The Court does not have jurisdiction to determine MMI in the absence of an opinion from an authorized treating physician.

U. Second, Respondents' argument that Claimant had "improved," and therefore would no longer be considered "disabled" after February 20, 2015 is factually incorrect. To the contrary, the medical record clearly establishes that he continues to struggle with severe PTSD, anxiety, and depression, which the ALJ concludes from the totality of the persuasive evidence presented, precludes him from returning to work at this time. His treating therapist, Amy Alsum, has documented that Claimant has experienced numerous panic attacks simply driving by or trying to go into his place of work. Although he is working on "desensitization" therapy, he still is not psychologically ready to return to work, notwithstanding his shoulder injury. Accordingly, the evidence demonstrates that Claimant is currently "disabled" by his psychological impairments. He was temporarily totally disabled before the shoulder injury occurred and he continues to be disabled by those mental impairments.

ORDER

It is therefore ordered that:

1. Claimant's February 8, 2015 injury to his right shoulder is compensable.

2. Respondents shall provide all reasonable and necessary medical treatment of Claimant's right shoulder injury, including reimbursement to Claimant for out-of-pocket expenses, and any expenses paid by Claimant's health insurance carrier for surgery performed by Dr. Jennifer FitzPatrick.

3. Respondents shall pay TTD benefits commencing January 29, 2015 and continuing until terminated by law, based on the stipulated average weekly wage.

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

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

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

DATED: August 24, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-762-01

ISSUE

Whether Claimant has established by a preponderance of the evidence that he sustained a compensable inguinal hernia on March 2, 2015 during the course and scope of his employment with Employer.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $440.17.

2. If Claimant suffered a compensable inguinal hernia he is entitled to treasonable, necessary and related medical benefits.

3. If Claimant suffered a compensable inguinal hernia he is entitled to receive Temporary Total Disability (TTD) benefits for the period March 3, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 65 year old male who began working for Employer as a Painter on February 17, 2015. He had not worked for the previous eight years after he retired from operating his own painting business. Claimant's job duties primarily involved interior and exterior painting of an apartment complex managed by Employer.

2. Claimant explained that on March 2, 2015 he was carrying five gallon buckets of paint from a storage room to other buildings in the complex where he was painting. He noted that the buckets weighed approximately 70 pounds each. Claimant commented that there was an appliance dolly on-site but it could not be used to move paint because the belt was too high to wrap around the buckets. He remarked that, based on his prior experience, paint buckets would tip over when he turned a corner.

3. Claimant noticed some abdominal symptoms while carrying the first bucket of paint. By the time he carried the third bucket he experienced immediate discomfort in the right groin area. After carrying the fourth bucket, Claimant noticed increased pain, but completed his work shift. His symptoms began at about 4:00 p.m. and his shift ended at 5:00 p.m. Claimant stated that he did not report his symptoms to Employer because he was concerned about losing his job.

4. Claimant went home, lied in bed and fell asleep "on and off." He then planned to take a shower. While stepping into the shower Claimant noticed a significant

mass in his right groin area. He applied ice to his groin area but his symptoms persisted.

5. Claimant's supervisor Shaun Harris testified at the hearing in this matter. Mr. Harris testified as to the events of March 2, 2015. He recounted that four buckets of paint had been delivered to the office at noon that day and told Claimant they needed to move the paint after lunch. Mr. Harris remarked that when they returned from lunch at around 1:00 p.m., he moved two of the buckets himself. He further commented that Claimant used the dolly to move the other two buckets of paint. Mr. Harris further testified that Claimant did not complain of discomfort at all on March 2, 2015 and he did not appear to be in pain at the end of the day.

6. On March 2, 2015 Claimant visited the Memorial Hospital Emergency Room for treatment. Claimant reported that for the "last few weeks he has been having increasing pain in his right groin, intermittently having a lump in his right groin." He explained that "he has had a lump that he has not been able to get to go away." The attending physician diagnosed Claimant with a right inguinal hernia. He was able to reduce Claimant's hernia so that it was no longer incarcerated. Claimant felt significantly better. The physician assigned work restrictions of no heavy lifting and referred Claimant for a surgical evaluation.

7. On March 10, 2015 Claimant visited Larry J. Butler, M.D. for an evaluation. Dr. Butler noted that Claimant suffered an incarcerated right inguinal hernia. Claimant reported that he had suffered the hernia "for a longstanding period" but it became incarcerated a few days earlier. Dr. Butler commented that Claimant has had increasing difficulty reducing the hernia and "remains quite symptomatic." He reduced the hernia with minimal difficulty. Dr. Butler recommended repairing the hernia with mesh.

8. On May 13, 2015 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Claimant reported that on March 2, 2014 he carried five gallon buckets of paint approximately 30 to 50 feet down a hill and then up some stairs. He noted that during his two week period of employment for Employer he carried about 15 five gallon buckets of paint. Claimant began to develop symptoms including aching leg, arm and chest muscles by the time he carried his third paint bucket on March 2, 2014. He also developed right groin discomfort. Claimant explained that he completed his work shift, went home and prepared to take a shower at approximately 8:00 p.m. As he was planning to take a shower, Claimant noticed a mass approximately four inches in diameter and two inches in height protruding from his right groin inguinal region. Claimant was subsequently diagnosed with a right inguinal hernia at the Memorial Hospital Emergency Room.

9. After conducting a physical examination and reviewing Claimant's medical records, Dr. Paz concluded that Claimant's right inguinal hernia was not causally related to his March 2, 2014 work activities. He noted that Claimant discovered his hernia approximately four hours after carrying five gallon paint buckets on March 2, 2015. Dr. Paz explained that the clinical evolution of an inguinal hernia occurs over days or

weeks. He commented that a mass expanding over a four hour time period would likely cause severe pain and discomfort. Dr. Paz summarized that the "incidental identification of such a mass is inconsistent with a rapid evolution of an inguinal hernia." He thus determined that the proposed surgical treatment for Claimant's right inguinal hernia was not related to the March 2, 2015 industrial incident.

10. On June 5, 2015 Claimant underwent an independent medical evaluation with Timothy O. Hall, M.D. Dr. Hall recounted that Claimant was carrying five gallon buckets of paint on March 2, 2015 when he developed pain in his right groin area. He stated that Claimant had reported to Dr. Butler that his hernia had been a longstanding problem that became incarcerated on March 2, 2015. Dr. Hall disagreed with Dr. Paz and concluded that Claimant's right inguinal hernia was caused by his March 2, 2015 work activities for Employer. He explained that Claimant's job duties of lifting buckets of paint were consistent with the development of a hernia. Claimant was de-conditioned and discovered the symptoms a relatively short time after the inciting event. Dr. Hall thus remarked that "I cannot think of any other more reasonable explanation for the development of this hernia."

11. Dr. Paz testified at the hearing and through an evidentiary deposition in this matter on August 6, 2015. He maintained that Claimant's right inguinal hernia was not caused by his work activities for Employer on March 2, 2015. He explained that Claimant's report to the Memorial Hospital Emergency Room revealed that Claimant had a hernia for a longstanding period of time prior to his employment with Employer. Dr. Paz commented that the emergency room note reflected that Claimant sought treatment on March 2, 2015 because his hernia was no longer reducible. He testified that incarceration of a hernia is when the contents of the hernia become entrapped within an extruded piece of intestine and create a bulge. Dr. Paz noted that the emergency room records reflected the bulge had been present before March 2, 2015, had previously been reducible and was similarly reducible on March 2, 2015. He summarized that the inconsistencies in reports, references to a previous bulge and Claimant's prior desire for treatment based on the bulge and not pain, made it medically improbable that Claimant's hernia was work-related. Dr. Paz commented that, based on Claimant's reports of a longstanding hernia and preexisting symptoms, the hernia was likely present prior to Claimant's employment with Employer and "many weeks prior" to the emergency room visit.

12. Dr. Paz explained that it was not medically probable that Claimant's inguinal hernia was work-related. He testified that the levels of pain and function Claimant reported on March 2, 2015 were not consistent with the levels of pain that he would have felt for a bulge of that size to develop in such a short period of time. Dr. Paz remarked that the nerve endings and peritoneum tissue that would be displaced by such a rapid progression of the bulge would have caused intense pain. He commented that the peritoneum is a very sensitive tissue and causes severe pain that typically does not even respond to morphine. Dr. Paz determined that it is not clinically reasonable that Claimant's bulge expanded that much in one day. He explained that the extreme level of pain would likely override any individual pain tolerances.

13. Dr. Paz remarked that, even if Claimant's pre-existing hernia became larger at work on March 2, 2015, it would not have accelerated his need for medical treatment. Dr. Paz maintained that Claimant's medical treatment for the hernia would have remained the same regardless of the size of the hernia as long as it remained stable. He testified that the imposition of Claimant's work restrictions on March 3, 2015 would have been required at the time the hernia first developed. Dr. Paz remarked that the restrictions would have been required from the start to prevent strangulation of the hernia. The medical records reflect that Claimant's hernia had been incarcerated for an extended period and was not aggravated to the extent of becoming a strangulated hernia.

14. Claimant has failed to establish that it is more probably true than not that he sustained a compensable inguinal hernia on March 2, 2015 during the course and scope of his employment with Employer. Claimant explained that on March 2, 2015 he was carrying five gallon buckets of paint from a storage room to other buildings in the complex where he was painting. By the time he carried the third bucket he experienced immediate discomfort in the right groin area. Claimant returned home after completing his work shift, prepared to shower and noticed a significant mass in his right groin area. At the Memorial Hospital Emergency Room Claimant was diagnosed with a right inguinal hernia. The attending physician was able to reduce Claimant's hernia so that it was no longer incarcerated. Despite Claimant's account, the medical records, the credible testimony of Mr. Harris and the persuasive testimony of Dr. Paz demonstrate that Claimant's inguinal hernia was not caused, aggravated or accelerated by his work activities for Employer.

15. The persuasive evidence reveals Claimant's reports regarding his medical history, the onset of symptoms, and the discovery of the mass have either shifted over time or are directly contradicted. Because his claim significantly rests on his testimony regarding the onset of symptoms and presence of the hernia mass, Claimant has failed to establish a causal connection between his hernia and work activities on March 2, 2015. Initially, Mr. Harris testified that four buckets of paint had been delivered to the office at noon on March 2, 2015 and told Claimant they needed to move the paint after lunch. Mr. Harris remarked that when they returned from lunch at around 1:00 p.m., he moved two of the buckets himself and Claimant used the dolly to move the other two buckets of paint. Mr. Harris further testified that Claimant did not complain of discomfort at all on March 2, 2015 and he did not appear to be in pain at the end of the day. Furthermore, Claimant informed the Memorial Hospital personnel on March 2, 2015 that he had pain for a "few weeks" and an intermittent lump that he had been pushing back in but could not do so himself on that day. There is no mention of a growth in the mass, but instead simply that he was seeking treatment because he could no longer decrease the bulge. Finally, Claimant reported to Dr. Butler that he had suffered the hernia "for a longstanding period" but it became incarcerated a few days earlier. Dr. Butler commented that Claimant has had increasing difficulty reducing the hernia and "remains quite symptomatic."

16. Dr. Paz persuasively maintained that Claimant's right inguinal hernia was not caused by his work activities for Employer on March 2, 2015. Dr. Paz explained that it was not medically probable that Claimant's inguinal hernia was work-related. He testified that the levels of pain and function Claimant reported on March 2, 2015 were inconsistent with the levels of pain that he would have felt for a bulge of that size to develop in such a short period of time. He summarized that it is not clinically reasonable that Claimant's bulge expanded that much in one day. Finally, Dr. Paz explained that, even if Claimant's pre-existing hernia became larger at work on March 2, 2015, it would not have accelerated his need for medical treatment. Dr. Paz maintained that Claimant's medical treatment for the hernia would have remained the same regardless of its size as long as it remained stable. He testified that the imposition of Claimant's work restrictions on March 3, 2015 would have been required at the time the hernia first developed.

17. In contrast, Dr. Hall disagreed with Dr. Paz and concluded that Claimant's right inguinal hernia was caused by his March 2, 2015 work activities for Employer. He explained that Claimant's job duties of lifting buckets of paint were consistent with the development of a hernia. Claimant was de-conditioned and discovered the symptoms a relatively short time after the inciting event. Dr. Hall thus remarked that "I cannot think of any other more reasonable explanation for the development of this hernia." However, Dr. Hall's analysis was predicated on Claimant's reports and failed to adequately consider the multiple conflicting medical records regarding the development and growth of the hernia. Dr. Paz noted that the emergency room records reflected the bulge had been present before March 2, 2015, had previously been reducible and was similarly reducible on March 2, 2015. He summarized that the inconsistencies in reports, references to a previous bulge and Claimant's prior desire for treatment based on the bulge and not pain, made it medically improbable that Claimant's hernia was work-related. Accordingly, Claimant has failed to demonstrate that his work activities for Employer on March 2, 2015 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable inguinal hernia on March 2, 2015 during the course and scope of his employment with Employer. Claimant explained that on March 2, 2015 he was carrying five gallon buckets of paint from a storage room to other

buildings in the complex where he was painting. By the time he carried the third bucket he experienced immediate discomfort in the right groin area. Claimant returned home after completing his work shift, prepared to shower and noticed a significant mass in his right groin area. At the Memorial Hospital Emergency Room Claimant was diagnosed with a right inguinal hernia. The attending physician was able to reduce Claimant's hernia so that it was no longer incarcerated. Despite Claimant's account, the medical records, the credible testimony of Mr. Harris and the persuasive testimony of Dr. Paz demonstrate that Claimant's inguinal hernia was not caused, aggravated or accelerated by his work activities for Employer.

8. As found, the persuasive evidence reveals Claimant's reports regarding his medical history, the onset of symptoms, and the discovery of the mass have either shifted over time or are directly contradicted. Because his claim significantly rests on his testimony regarding the onset of symptoms and presence of the hernia mass, Claimant has failed to establish a causal connection between his hernia and work activities on March 2, 2015. Initially, Mr. Harris testified that four buckets of paint had been delivered to the office at noon on March 2, 2015 and told Claimant they needed to move the paint after lunch. Mr. Harris remarked that when they returned from lunch at around 1:00 p.m., he moved two of the buckets himself and Claimant used the dolly to move the other two buckets of paint. Mr. Harris further testified that Claimant did not complain of discomfort at all on March 2, 2015 and he did not appear to be in pain at the end of the day. Furthermore, Claimant informed the Memorial Hospital personnel on March 2, 2015 that he had pain for a "few weeks" and an intermittent lump that he had been pushing back in but could not do so himself on that day. There is no mention of a growth in the mass, but instead simply that he was seeking treatment because he could no longer decrease the bulge. Finally, Claimant reported to Dr. Butler that he had suffered the hernia "for a longstanding period" but it became incarcerated a few days earlier. Dr. Butler commented that Claimant has had increasing difficulty reducing the hernia and "remains quite symptomatic."

9. As found, Dr. Paz persuasively maintained that Claimant's right inguinal hernia was not caused by his work activities for Employer on March 2, 2015. Dr. Paz explained that it was not medically probable that Claimant's inguinal hernia was work-related. He testified that the levels of pain and function Claimant reported on March 2, 2015 were inconsistent with the levels of pain that he would have felt for a bulge of that size to develop in such a short period of time. He summarized that it is not clinically reasonable that Claimant's bulge expanded that much in one day. Finally, Dr. Paz explained that, even if Claimant's pre-existing hernia became larger at work on March 2, 2015, it would not have accelerated his need for medical treatment. Dr. Paz maintained that Claimant's medical treatment for the hernia would have remained the same regardless of its size as long as it remained stable. He testified that the imposition of Claimant's work restrictions on March 3, 2015 would have been required at the time the hernia first developed.

10. As found, in contrast, Dr. Hall disagreed with Dr. Paz and concluded that Claimant's right inguinal hernia was caused by his March 2, 2015 work activities for

Employer. He explained that Claimant's job duties of lifting buckets of paint were consistent with the development of a hernia. Claimant was de-conditioned and discovered the symptoms a relatively short time after the inciting event. Dr. Hall thus remarked that "I cannot think of any other more reasonable explanation for the development of this hernia." However, Dr. Hall's analysis was predicated on Claimant's reports and failed to adequately consider the multiple conflicting medical records regarding the development and growth of the hernia. Dr. Paz noted that the emergency room records reflected the bulge had been present before March 2, 2015, had previously been reducible and was similarly reducible on March 2, 2015. He summarized that the inconsistencies in reports, references to a previous bulge and Claimant's prior desire for treatment based on the bulge and not pain, made it medically improbable that Claimant's hernia was work-related. Accordingly, Claimant has failed to demonstrate that his work activities for Employer on March 2, 2015 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

ORDER

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

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

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

DATED: August 26, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

#JN1NWJWV0D15SDv 2

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

At the conclusion of the October 23, 2014 session of the hearing, the ALJ established a schedule for the filing of the post-hearing evidentiary deposition of Amit O. Agarwala, M.D., and the rebuttal evidentiary deposition of I. Stephen Davis, M.D; and a continuation session of the hearing was set for January 16, 2015. Dr. Agarwala's deposition was taken on November 11, 2014 and filed on December 12, 2014. Dr. Davis' deposition was taken on November 13, 2014 and filed on November 21, 2014. At the conclusion of the January 16, 2015 session of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents,' giving Claimant's counsel 2 working days within which to object or approve as to form. The proposed decision was filed on January 27, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJH has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision is whether the surgery recommended by Dr. Agarwala is reasonably necessary to cure and relieve the effects of the Claimant's admitted low back injury of November 18, 2010.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was employed by the Employer, a manufacturer of contact lenses, at the time of the admitted low back injury. In 2005, the Claimant went to Dr. Kenneth Sheridan D.C., for chiropractic care. On his initial visit with Dr. Sheridan, D.C., the Claimant noted that he had experienced low back for "20" years. Over the next five years, the Claimant treated with Dr. Sheridan, D.C., on a regular basis. At times, the Claimant's low back pain would wax and wane but it was noted that the pain would radiate into his buttocks and legs.

2. On November 18, 2010, the Claimant lifted a box and slipped and fell. He noted an increase in back pain at that time.

3. The Respondents filed the latest Amended Final Admission of Liability (FAL), dated January 26, 2012, admitting for a maximum medical improvement (MMI) date of July 28, 2011; permanent partial disability (PPD), based on 10% whole person impairment; and, denying post-MMI medical care and treatment..

4. The Claimant presented to Thomas Maino, M.D., in February 2011. Dr. Maino reviewed the chiropractic notes and noted that the Claimant felt a dull aching pain. Dr. Maino diagnosed the Claimant with low back pain, possibly muscle related.

5. The Claimant was seen by Karen Knight, M.D., physiatrist, on March 14, 2011. Due to the ongoing pain, Dr. Knight reviewed the MRI (magnetic resonance imaging). The MRI finding was primarily degenerative changes in the lumbar spine, it was noted that the Claimant had incurred a ruptured disc at L-4-5, specifically Dr. Knight noted a paracentral disc protrusion.

6. The Claimant underwent an epidural steroid injection (ESI) on April 14, 2011, at L-4-5. Physical therapy (PT) continued over the next several weeks and the Claimant noted improvement. The ALJ finds that the specific injury to the Claimant's low back was the L4-5 disc extrusion. The Claimant had pre-existing degenerative disc disease in the lumbar spine at multiple levels and this had been treated actively for the five years preceding the admitted injury herein. On the date of the admitted low back injury, the Claimant experienced an acute injury and not an exacerbation/aggravation of a pre-existing condition.

7. The Claimant improved with PT and was placed at MMI on July 28, 2011. Dr. Knight noted that the Claimant's complaints had subsided, but that his symptoms appeared to continue to wax and wane. Range of Motion (ROM) measurements were performed on October 17, 2011. Dr. Knight found that the Claimant had a 3% loss of ROM. Her final diagnosis was lobular left Para central disc extrusion at L4/5 and the likely source of radiculapathy was that it compressed the root.

8. Eventually, the Claimant returned to Dr. Knight and she assigned him a 10% whole person rating. This was based on a combination of the 3% ROM loss and a 7% specific disorder for the L4-5 disc. This rating was admitted.to by the Respondents. There was no Division Independent Medical examination (DIME).

9. The Claimant returned to Dr. Knight on March 9, 2012. He had undergone a post-MMI ESI and reported doing very well. Dr. Knight was of the opinion that the Claimant's care was complete, but that he could return for additional ESIs. The Claimant underwent a second MRI on March 12, 2012. The findings were essentially the same as those from the prior MRI.

10. The Claimant presented to Dr. Agarwala, orthopedic surgeon, on April 13, 2012. Dr. Agarwala noted the history of the industrial injury of November 2010, but did not make note of the care preceding the injury. Dr .Aragawala had the Claimant return so the doctor could review the MRI. Dr Aragawala noted that there was the disc bulge at L4/5, but that there was no neuro compression. He recommended that the Claimant return to work without restrictions. After further injections and PT, on September 10, 2013, Dr Agarwala stated the opinion that there was nothing surgical to be performed.

The ALJ finds that the Claimant had returned to his base line level of symptoms prior to the November 2010 admitted injury.

11. The Claimant returned to Dr. Knight on April 1, 2013. He noted a sudden onset of pain Dr. Knight was of the opinion that there was no need for further imaging and that there was no surgical indication at that time .Repeat injection was ordered and the Claimant noted that the injections helped generally. It was noted that average daily living activities aggravated the Claimant's symptoms. By July 2013, the Claimant's symptoms continued to wax and wane, and Dr. Knight ordered a repeat MRI.

12. The Claimant presented to Shay Bess, M.D., an orthopedic surgeon, for evaluation on August 14, 2013. Dr. Bess noted the history of the industrial injury and performed a physical exam. 5/5 strength was noted and the straight leg raise was negative. In reviewing the previous MRI, Dr Bess noted that X-rays showed degenerative changes at L4/5, but agreed to obtain a third MRI.

13. The third MRI was performed on August 23, 2013. A comparison was made with previous imagining studies. The radiologist was of the opinion that the previously identified disc extrusion at L4/5 was no longer present. The final assessment was multilevel degenerative changes.

14. The Claimant returned to Dr. Bess on August 2013. Dr. Bess reviewed the films and noted degeneration at the L4/5 facets. Dr. Bess' physical exam was identical the exam on the previous visit. Dr. Bess recommended a series of facet injections. Dr. Bess expressed no opinion concerning surgery.

Dr. Agarwala's Recommendation

15. Instead of undergoing the care as prescribed by Dr. Bess, the Claimant returned to Dr. Agarwala. Dr. Agarwala was of the opinion that the Claimant had failed six months of conservative treatment. Therefore, Dr. Agarwala recommended a two level laminectomy at L3/4 and L-4/5, despite a normal neurological exam. Pre-authorization of the surgery was requested and the Respondents denied the surgery request, pursuant to Workers Compensation Rules of Procedure (WCRP) Rule 16, 7 CCR 1101-3.

Independent Medical Examination by I. Stephen Davis, M.D.

16. At the request of the Respondents, the Claimant was seen by Dr. Davis, orthopedic surgeon, for an IME. Dr. Davis reviewed the history with the Claimant. He noted that the Claimant had prior chiropractic treatments with Dr. Sheridan, D.C., before the admitted injury. Dr. Davis reviewed the medical records and personally reviewed the imaging studies. On physical exam, Dr. Davis noted that the most remarkable finding was irritation in the left hip. It was Dr. Davis' opinion that the Claimant had

incurred an injury to his lumbar spine in November of 2010 and that the pain complaints had varied since that time. Dr. Davis wanted to review the prior chiropractic records in light of the degenerative changes at the discs. He also recommended an examination of the non-work related hip condition. Dr. Davis requested the prior records of Dr. Sheridan, D.C.

17. Dr. Davis was of the opinion that the injured disc at L 4/5 had retracted and that presently there was no imaging study suggesting a nerve root compression. He noted that the degenerative changes found in the spine were age related and not related to the work injury. He specifically disagreed with Dr. Agarwala's surgery recommendation. The ALJ finds the opinions of Dr. Davis to be credible, persuasive and corroborated by the totality of the evidence.

Other Medical

18. The Claimant underwent hip injections which were non-diagnostic and unfortunately the Claimant was diagnosed with prostate cancer and the treatment for his spine was delayed due to that condition.

19. The Claimant presented to Kyle Morgan, D.O., on March 18, 2014. Dr. Morgan reviewed records and history, as well as performing a physical examination. Dr. Morgan noted multilevel degenerative changes and spondylosis. Dr. Morgan noted that the Claimant also had arthritis in the hip. He prescribed medications and physical therapy.

20. The Claimant continued to treat with Dr. Morgan. Functional improvement and improved pain were noted with exercise and medications. Stable pain was noted on the Claimant's last visit in August of 2014.

21. The Clamant had a 25 year history of low back pain preceding the injury of November 2010. He incurred a specific injury to L4/5 in the form of an extruding disc on the date of injury herein. No other body parts or levels of the spine were injured in the incident. All other findings on the MRI of March 3, 2011 are degenerative in nature and more than likely pre-dated the industrial injury for which the Claimant was symptomatic. Both Dr. Davis and Dr. Aragawala stated that while it is difficult to state when a degenerative change occurred, the degenerative changes found at other levels than L4/5 were not caused by the industrial injury.

22. The Claimant returned to his baseline pre-injury status at the time of MMI. Given that his most recent imaging study shows that the extruding disc has now recessed, the Claimant's spinal condition is now degenerative in nature and not directly caused by the industrial injury. The proximate chain of causation has been broken, and the Claimant reverted to the natural progression of his degenerative condition after MMI.

23. The ALJ finds the opinions of Dr. Agarwala lacking in credibility and persuasiveness on multiple points. Dr. Agarwala is currently the only physician who is of the written opinion that the surgery he is requesting is causally related to the industrial injury. This is primarily based on the subjective complaints of the Claimant. Dr. Knight and Dr. Bess do not comment on the need for surgery. Dr. Knight had previously stated the opinion that surgery was not warranted in this case. At that time, the Claimant still had the extruding disc which is now no longer present. Dr. Agarwala agreed that the disc protrusion had healed itself. In that Dr. Agarwala is requesting to perform an **elective** surgery to not only L-4/5, but also to L-3/4 to correct the degenerative changes. The ALJ finds that this surgery is not casually related to the industrial injury. This is not a situation in which the injured disc has either caused damage to an adjacent level, or it is necessary to treat the adjacent level in order to achieve the desired results at the site of injury. The degenerative changes are not causally related to the industrial injury. The requested surgery is not reasonably necessary and causally related to the industrial injury.

24. Dr. Davis' opinions are consistent in his report and testimony. Dr. Davis reviewed the complete prior medical records of Dr. Sheridan, D.C., and the notes of Dr. Morgan. Dr. Aragawala had not reviewed the records of Dr. Sheridan, D.C., while formulating his opinion. During his deposition, Dr. Agarwala admitted that the Claimant had a pre-existing low back condition prior to the date of injury and that he was in an active care program prior to injury. Dr. Davis' opinion that surgery is not warranted was based on the normal neurological exam and lack of finding of a compressed nerve root on MRI. His opinion in this regard is credible and persuasive. His opinions are supported by the medical evidence contained in the record. Dr. Davis noted his own normal neurological exam as well as those of Dr. Bess and Dr. Agarwala. Dr. Davis consistently testified, even after being presented with new medical records and the testimony of Dr. Agarwala, that the surgery was not reasonably necessary and causally related to the industrial injury.

Ultimate Findings

25. For the reasons herein above stated, the opinions of Dr. Davis are more credible and persuasive than the opinions of Dr. Agarwala.

26. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Davis and to reject the opinions of Dr. Agarwala.

27. The Claimant has failed to prove, by preponderant evidence, that the **elective** surgery recommended by Dr. Agarwala is causally related to the admitted injury of November 18, 2010 and/or reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the opinions of Dr. Davis that the recommended surgery is not reasonably necessary or causally related to the admitted injury herein are more credible and persuasive than the opinions of Dr. Agarwala, primarily because Dr. Davis' opinions are corroborated by the totality of the evidence. Dr. Agarwala's opinions are not corroborated.

Substantial Evidence

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

Causally Related and Reasonably Necessary Recommended Surgery

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the elective surgery recommended by Dr. Agarwala is not causally related to the admitted injury of November 18, 2010. Moreover, it is related to the Claimant's return to the base line of the natural progression of his degenerative back condition. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the recommended **elective** surgery is neither warranted nor is it reasonably necessary to cure and relieve the effects of the Claimant's admitted low back injury.

d. A claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *See Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-mart Stores*, W.C. No. 4-669-654 [Indus. Claim Appeals Office (ICAO), January 28, 2008]. As found, the surgery recommendation is based on the natural progression of the Claimant's degenerative back condition and not as a direct and unbroken consequence of the admitted injury.

Burden of Proof

e. Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. 1997). Whether a claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this case, the Claimant's burden is by a preponderance of the evidence, of establishing entitlement to the recommended surgery. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden.

ORDER

IT IS, THEREFORE, ORDERED THAT:

The Claimant's request for the elective surgery recommended by Amit Agarwala, M.D., is hereby denied and dismissed.

DATED this 30 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 7, 2014, in Denver, Colorado. The hearing was digitally recorded (reference: 1/7/14, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

The Claimant was present in person and represented by Michael P. Dominick, Esq. The Respondents were represented by Amanda J. Branson, Esq.

Hereinafter Camille L. LaFont shall be referred to as the "Claimant. Wellbridge d/b/a Colorado Athletic Club shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through C were admitted into evidence, without objection. The evidentiary deposition of John S. Hughes, M.D. (hereinafter "Depo." followed by a page number) was also admitted into evidence.

ISSUE

The sole issue to be determined by this decision concerns the Claimant's request to overcome the Division Independent Medical Examination (DIME) of Hua Chen, M.D., concerning his rating of zero permanent medical impairment for the Claimant's admitted low back injury of February 4, 2013.

The Claimant bears the burden of proof by clear and convincing evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that the Claimants average weekly wage (AWW) is $473.38 per week. The AWW is a factor in the formula for determining who person permanent partial disability (PPD).

2. The Respondents filed a Final Admission of Liability (FAL), dated Augutst 18, 2014, admitting for zero PPD, pursuant to DIME Dr. Chen's rating.

3. The Claimant filed a timely objection to the FAL, and requested a hearing.

4. The Claimant was born on July 11, 1976. She was employed as a housekeeper by the Employer. On February 4, 2013 while rolling up a rubber mat in the locker room, suffered an admitted injury to her low back. She was initially seen at Arbor Occupational Medicine (the ATP) on February 11, 2013, by Richard Shouse, PAC (Physician's Assistant). The initial medical note lists the impression as "lumbar strain."

Medical

5. The Claimant continued seeing medical providers at Arbor Occupational Medicine until April 16, 2013. The final medical note at Arbor Occupational Medicine indicated that the Claimant's work related medical diagnosis as "L/S Strain/Pain."

6. David Yamamoto, M.D., assumed the Claimant's care as the primary ATP. Dr. Yamamoto's initial note of April 22, 2013 assessed the Claimant with a "Strain of Lumbar region NOS; Possible facet syndrome." Dr. Yamamoto's medical note of that date indicated that "pain is in the lower back in the L5/S1 level with tingling on the left leg… her pain level is 7 out of 10… she has quite a bit of pain with numbness down the posterior and lateral left leg. She complains of some numbness on the bottom of her left foot."

7. The Claimant continued treating with Dr. Yamamoto and his referrals. Ultimately Dr. Yamamoto placed the Claimant at maximum medical improvement (MMI) on February 24, 2014. At that time his assessment was: " Lumbar strain/ mechanical low back pain with persistent symptoms. Complaints of left leg pain and numbness." Dr. Yamamoto awarded the Claimant a Table 53 [American medical Association *Guides to the Evaluation of permanent Impairment,* 3d. ed., Rev.] rating of 5% and a range of motion (ROM) loss impairment of 9% for a combined final rating of 14% whole person (Claimants Exhibit 1). Dr. Yamamoto recommended that the Claimant should have post MMI maintenance treatment (*Grover* medicals). Dr. Yamamoto gave the Claimant permanent work restrictions, including a maximum lift of 8 pounds, repetitive lift of 5-7 pounds, carrying 5-7 pounds, pushing and pulling 8 pounds, avoid repetitive bending at the waist, and an additional 10 minute break per shift (Claimants Exhibit 1).

8. The Claimant was seen for an independent medical examination (IME) by Brian Shea, D.O., on June 27, 2014. Dr. Shea assessed the Claimant with a "lumbar strain with left leg radicular symptoms." Dr. Shea assigned a Table 53 rating of 5% and a ROM rating of 9% for a total of 14% whole person rating (Claimants Exhibit 2).

The Division Independent Medical Examination (DIME)

9. The Respondents challenged Dr. Yamamoto's MMI date and impairment rating. A DIME was scheduled with Dr. Chen for July 10, 2014. Dr. Chen's assessment was "Chronic back and leg pain without spine pathology or structural damage." Dr. Chen stated: "I believe patient did have work related soft tissue injury to her lower back and possible left leg. However with time and treatment she is expected to have complete recovery. Her current condition of non-specific pain without pathology does not qualify for permanent impairment." Dr. Chen stated: "I agree that patient has reached MMI. I agree that she was at MMI when Dr. Yamamoto evaluated her on 2/24/2014 with no further treatment required. There is no spine impairment rating since patient does not have spine disorder diagnosis. Consequently, no range of motion evaluation is applied to her case. Therefore she will receive no permanent impairment rating" (Claimants Exhibit 3).

10. After the FAL, the Claimant was seen for an IME by John S. Hughes, M.D., on September 17, 2014. Dr. Hughes's opinion was that the Claimant was suffering from: (1) "Lumbosacral spine sprain/strain secondary to [Claimant's] work related event of moving a rolled up mat on February 4, 2013; and (2) persistence of Left SI joint dysfunction secondary to number one". Dr. Hughes commented that he was "puzzled by Dr. Chen's failure to document a physical examination of [Claimant's] lumbar spine". Dr. Hughes stated that there were objective findings of consistent restrictions in right lateral flexion compared to left lateral flexion over time, considerable clinical consistency with previous examination findings of normal true lumbar flexion and restricted sacral flexion as well as mild to no restriction in lumbar spine extension. Dr. Hughes stated that objective findings were present in the Claimant's case as documented in sequential lumbar spine ROM tests.

11. Dr. Hughes stated: "My findings would support a range of motion impairment of 6% whole person. I agree with doctors Yamamoto and Shea that [Claimant] sustained: (1) A medically documented injury, (2) Six months of medically documented pain as well as, none to minimal degenerative changes seen [on the MRI (magnetic resonance imaging) scan]." Dr. Hughes stated: "In my opinion [Claimant's] lumbar spine injury satisfies these three criteria outlined in Table 53 II (B) for assignment of a 5% impairment of the whole person."

Overcoming the DIME

12. Dr. Hughes further stated: "It is my opinion that Dr. Chen failed to perform an adequate physical examination of the lumbar spine and that this was necessary for her to argue against objective physical examination findings outlined by other providers, including even Dr. D'Angelo, who documented [Claimant's] increased right low back pain with right lateral flexion. I feel there is a medical basis for assignment of a specific disorder impairment of 5% whole person, in accordance with the AMA Guides to the Evaluation of Permanent Impairment 3rd edition revised, as instructed by the Colorado Division of Workers Compensation in the level II accreditation course. Range of motion impairment varies over time, and on examination today, my findings would support a range of motion impairment of 6% whole person." Dr. Hughes's stated that the 5% table 53 disorder rating combined with a 6% range of motion rating would equal an 11% whole person impairment rating."

13. The Claimant's attorney took the evidentiary deposition of Dr. Hughes on December 17, 2014. Dr. Hughes testified in his deposition that he has been board certified in Occupational Medicine since 1988, that he had been Level II Accredited since the inception of that program in September 1992, and that he had served as an instructor for the Division of Workers Compensation (DOWC) on how to rate impairments in the Lumbar Spine.

14. According to Dr. Hughes, the Claimant met the requirements for obtaining a Table 53 low back impairment rating. Dr. Hughes stated that the Claimant had consistent restrictions in range of motion over time. He testified that; " in two separate examination performed 7 months apart [the first being the examination of Dr. Yamamoto for MMI in February 2014 and the second being Dr. Hughes' IME examination in September 2014] that we had some correlation that would be really, frankly, a little difficult to do behaviorally.

> I had found restricted right lateral flexion in excess of left lateral flexion with my measurements being right lateral flexion 20°, left lateral flexion 24°. Dr. Yamamoto identified that same pattern of right greater than left lateral flexion restriction with his specific measurements being 15° right lateral flexion and 17° left lateral flexion. That reveals a correlation that implies validity. Also implied is the fact that over the 7 month period, [Claimant's range of motion had gradually improved. And that is consistent with low grade but continued healing process…" (Hughes Depo. pp. 15 and 16). Dr. Hughes continued that the

> Claimant's improving ranges of motion and consistency over time "imply both validity and consistency of effort. They also imply biomechanical plausibility, meaning that it is consistent with a mechanical pain generator such as sacroiliac joint dysfunction" (Depo., pp. 16 and 17).

15. According to Dr. Hughes, Dr. Chen did not perform a physical examination of the spine in accordance with what is taught by the DOWC in Level II training. He noted that Dr. Chen should have "documented the appearance of the spine, palpation findings in the spine, range of motion findings in the spine, and any special tests that she might have considered necessary" (Depo. p. 18). Dr. Hughes is of the opinion that neither a positive MRI nor a positive EMG are required in order to have a Table 53 rating, since Table 53 provides for a rating with a medically documented injury and a minimum of six months of medically documented pain associate with **none** to minimal degenerative charges on structural test.

Respondents' IME

16. Kathleen D'Angelo, M.D., testified at the hearing by telephone. She had evaluated the Claimant on February 18, 2014 for a Respondents' IME. No written IME report by Dr. D'Angelo was submitted into evidence by the Respondents. Dr. D'Angelo testified to her understanding of the DOWC's Impairment Rating Tips. The Impairment Rating Tips were not submitted into evidence. Furthermore, even if submitted, rating tips do not even rise to the level of guidelines much less medical principles or rules. Dr. D'Angelo had not seen the Claimant since her (D'Angelo's) IME on February 18, 2014. Dr. D'Angelo held fast to her understanding of the Impairment Rating Tips as binding for her, and she did not demonstrate any persuasive clinical judgment in her testimony. The testimony of Dr. D'Angelo in support of the DIME physician's refusal to assign an impairment rating under Table 53 is highly unpersuasive and lacking in credibility.

17. The records review of Alison Fall, M.D. (Respondents' Exhibit B), likewise is unpersuasive and lacking in credibility. Dr. Fall did not testify and she simply agreed with the DIME doctor. Dr. Fall failed to demonstrate any persuasive clinical judgment. Therefore, her opinions are not credible.

Ultimate Findings

18. The opinions of Dr. Hughes are consistent with a totality of the evidence, well reasoned and, therefore, highly persuasive sand credible. The same is true for the

opinions of ATP Dr. Yamamoto. The opinion of DIME Dr. Chen is not credible because it is inconsistent with the totality of the evidence and lacking in an adequately explained medical basis. The opinions of Dr. D'Angelo and Dr. Fall are also inconsistent with the totality of the evidence and lacking in adequately explained medical bases, thus, they are not credible.

19. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Hughes and Dr. Yamamoto, and to reject the opinions of DIME Dr. Chen, and IME Drs. D'Angelo and Fall.

20. The ALJ finds that Dr. Chen did not do a complete lower back evaluation and did not follow the *AMA Guides* in performing her evaluation. Based on the totality of the evidence, including Dr. Hughes's IME report and the testimony of Dr. Hughes, the ALJ finds that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Chen's zero impairment rating is erroneous. Therefore, the Claimant has overcome the DIME opinion of Dr. Chen by clear and convincing evidence.

21. Having overcome the DIME opinion by clear and convincing evidence, the opinion of Dr. Hughes concerning the degree of permanent whole person impairment more credible and persuasive than the opinion of Dr. Yamamoto. Therefore, the Claimant has established, by preponderant evidence that the degree of the Claimant's permanent medical impairment is 11% whole person. The Claimant reached MMI on February 24, 2013, as admitted in the FAL.

22. The Claimant did not designate *Grover* medicals in her Application for Hearing, however, in ruling from the bench, the ALJ stated that this issue would be reserved for future decision, in order that the Respondents have a full and fair opportunity to defend on this issue.

CONCLUSIONS OF LAW

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

Credibility

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

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the opinions of Dr. Hughes were consistent with a totality of the evidence, well reasoned and, therefore, highly persuasive sand credible. The same is true for the opinions of ATP Dr. Yamamoto. The opinion of DIME Dr. Chen was not credible because it was inconsistent with the totality of the evidence and lacking in an adequately explained medical basis. The opinions of Dr. D'Angelo and Dr. Fall were also inconsistent with the totality of the evidence and lacking in adequately explained medical bases, thus, they are not credible.

Substantial Evidence

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

evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Hughes and Dr. Yamamoto, and to reject the opinions of DIME Dr. Chen, and IME Drs. D'Angelo and Fall.

Overcoming the Division Independent Medical Examination of Hua Chen, M.D.

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Dr. Chen did not do a complete lower back evaluation and did not follow the *AMA Guides* in performing her evaluation. Based on the totality of the evidence, including Dr. Hughes's IME report and the testimony of Dr. Hughes, the ALJ found that it was highly probable, unmistakable and free from serious and substantial doubt that Dr. Chen's zero impairment rating was erroneous. Therefore, as found, the Claimant overcame the DIME opinion of Dr. Chen by clear and convincing evidence. Also, as found,

Burden of Proof on Degree of Permanent Partial Disability

d. Once the DIME opinion of zero PPD was overcome, it became the Claimant's burden of proof, by a preponderance of the evidence, of establishing the degree of permanent partial disability.. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, having overcome the DIME by clear and convincing evidence, the Claimant has proven, by preponderant evidence that the degree of the Claimant's permanent medical impairment is 11% whole person

Reservation of Post-MMI Medical Benefits Issue.

e. In *Hire Quest LLC dba Trojan Labor v. Indus. Claim Appeals office, supra,* the Court explicitly held that issues that would otherwise be closed for failure to designate them in an application for hearing are **preserved** if the ALJ reserves the issue in the Order. The underlying reasons for this holding is that if the ALJ does not **reserve** the issue, the law makes a concession to the shortness of life by closing the case. In this case, the ALJ is explicitly reserving the issue of *Grover* medicals.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has overcome the Division Independent Medical Examiner (Hua Chen, M.D.) by clear and convincing evidence.

B. The Claimant's average weekly wage is $473.38.

C. The respondents shall pay the Claimant permanent partial disability benefits, based on 11% whole person, from February 24, 2014 and continuing until paid in full.

D. The respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. The issue of post-maximum medical improvement maintenance medical benefits is reserved for future decision.

DATED this 19 day of February 2015.

EDWIN L. PELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, to be filed, electronically, giving the Claimant 2 working days within which to file objections. The proposed decision was filed, electronically, on February 3, 2015. On February 5, 2015, Claimant filed objections which, essentially, argue that the Claimant was an "employee," and which placed an adversarial spin on suggested modifications to the proposed decision. The central issue in dispute is whether the Claimant was an "employee" sat the time of his injury. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The primary issue to be determined by this decision concerns whether the Claimant was an "employee" of the Employer at the time he suffered an injury to his left lower extremity (LLE) on March 10, 2013, or was he a volunteer. The Claimant argues that he was an "employee" of the Employer, and was also in the course and scope of that employment at the time of his injury.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Course and Scope of Employment

1. The Claimant, a 64 year old male, suffered an injury to his left leg when he was struck by the alleged Employer's backhoe/forklift on Sunday, March 10, 2013. This incident happened at the alleged Employer's personal residence in Denver, where the Claimant was temporarily residing in a basement with his Uncle. The alleged Employer operates a small business out of his home. According to the Claimant, he had moved to Denver from Brighton to work with the Employer. According to the Employer, he did not request the Claimant to move into his basement or request him to work for him. Rather the Employer allowed him to stay at his home as a family courtesy.

2. On Sunday, March 10, 2013, the Claimant was at the alleged Employer's home, involved in various activities, including cooking, and relaxing. At approximately 5:00 PM, on March 10, 2013, the Claimant heard the alleged Employer, and the alleged Employer's 90 year old father, working outside in the driveway. The Claimant came outside in his pajamas and offered to assist the alleged Employer in directing a ladder rack onto a small truck. The alleged Employer was using a backhoe/forklift to assist

with putting the ladder rack on the vehicle. The alleged Employer confirmed that the Claimant provided some limited help, but had not been requested to help, nor was his help really needed. There was no agreement to pay the Claimant for his limited assistance on March 10, 2013. The Claimant confirmed that he had no anticipation of working or receiving pay for his assistance with the ladder rack that Sunday.

3. The evidence establishes that the Claimant performed some work for the alleged Employer, on a case-by-case basis, while staying as a guest at the alleged Employer's home during the weeks before his injury. Specifically, the Claimant worked for the alleged Employer on March 8, 2013, and March 9, 2013, assisting with the installation of a sewer line pipe. The Claimant worked with the alleged Employer's son (owner of a separate construction company), and another worker. According to the Claimant, he received $50 cash at the end of each day of work. The alleged Employer confirmed that he provided very limited work to the Claimant on an as-needed, day to day basis. The alleged Employer confirmed that there were many days when no work was available or offered, and that the Claimant had only worked with them a few days during the entire time that he stayed at the alleged Employer's home. The majority of the time during the Claimant's stay, he did not work with the alleged Employer in any capacity.

4. Although the Claimant agrees that he did not expect to get paid for his assistance on Sunday, March 10, 2013, he stated that he had a vague belief that the alleged Employer may have some work for him in the weeks following March 10, 2013. Thus, the Claimant argues that his limited assistance with the ladder rack on Sunday, March 10, 2013, placed him within the course and scope of some future employment to occur in the upcoming weeks. There was no express or implied contract for hire, however, nor was there an agreement between the alleged Employer and the Claimant related to the limited help provided on Sunday, March 10, 2013. The Claimant did not have any expectation of pay, no understanding of any obligation, and was not asked to help by the alleged Employer. Moreover, the Claimant's expectations of work in the future were uncertain at best, and would have only been on a daily basis if needed at all.

5. The alleged Employer confirmed that there was no specific anticipated work during the week following March 10, 2013, and that the placing of the ladder rack on his little truck had nothing to do with any specific future work that the Claimant may have been offered. The alleged Employer stated that the little truck on which he was placing the ladder rack was used by him to do various errands, including those related to his rental business. The little truck was used by the alleged Employer himself for small errands because it got better gas mileage. The little truck was not used by the alleged Employer's workers, it did not have his company name on it, and it was not going to be used by the Claimant. The Claimant had not been told that he should expect work during the week following March 10, 2013. The Claimant did not

demonstrate that he had been offered any specific work in the future or that he would have some reason to expect work during the week of March 10, 2013.

6. Following his injury, the Claimant was transported to Denver General Hospital where he underwent multiple medical procedures. After the Claimant was released from the hospital, he followed up with the Salud Family Health Centers where he received limited treatment including removal of his stitches. Although the parties stipulated, and the ALJ found, that Denver General Hospital and Salud Family Health Centers were authorized providers if the matter was found to be compensable, medical benefits are moot because the Claimant was not an "employee" of the alleged Employer.

Ultimate Findings

7. The Claimant has failed to prove by a preponderance of the evidence that there was an employer-employee relationship between the alleged Employer and the Claimant on March 10, 2013, at the time he was injured. The Claimant was a volunteer at the time.

8. The Claimant has failed to prove by the preponderance of the evidence that he was within the course and scope of any employment that may have existed before March 10, 2013, or that may have been anticipated in the future.

9. Because the Claimant was not an "employee," all other issues are moot.

CONCLUSIONS OF LAW

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

Credibility

a. The facts and circumstances of the March 10, 2013 incident are undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Employer-Employee Relationship

b. For the purposes of the Colorado Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a "contract of hire." § 8-40-202 (1) (b), C.R.S; *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991). The essential elements of the contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *See*

Denver Truck Exchange v. Perryman, 134 Colo. 586, 307 P.2d 805 (Colo. 1957); *Anna Kay Tressell Deceased, John Tressell Claimant v. Alpha Therapy Services, LLC*, W. C. No. 4-322-755[Indus. Claim Appeals Office (ICAO), December 15, 1999]. In *Aspen Highlands Skiing Corp. v. Apostolou,* 854 P.2d 1357 (Colo. App. 1992) aff'd, 866 P.2d 1384 (Colo. 1994), the Colorado Supreme Court, citing *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963), noted that if the services are volunteered without any expectation of compensation in return, the fact that the alleged employer may provide some benefit on a gratuitous basis will not convert a volunteer into an employee. *See Dell v. Jaz Con,* W.C. No. 4-777-941 (ICAO, November 4, 2009). Where the parties ascribe different meanings to a material term of the contract and that term is ambiguous, the parties have not "manifested mutual assent" and there has been no "meeting of the minds" and no valid contract exists. *Westerman v. Manitou and Pikes Peak Railway and/or High Bridge Saloon*, W. C. Nos. 3-903-645, 4-407-473 (ICAO, November 17, 2000). *See Sunshine v. M. R. Mansfield Realty, Inc.*, 575 P.2d 847 (Colo. 1978). As found, the Claimant failed to establish that a contract for hire or an employer-employee relationship existed at the time of his injury on March 10, 2013, thus, he was a volunteer and not an "employee.".

Course and Scope of Employment

c. Generally, an activity arises out of and in the course of employment if it is "sufficiently interrelated to the conditions and circumstances under which the employee usually performs his job functions that the activity may reasonably be characterized as an incident of employment, even though the activity itself is not a strict obligation of employment and does not confer a specific benefit on the employer." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The 'arising out of' requirement refers to the origins and causes of an injury while the words 'in the course of' refer to the time, place, and circumstances under which the injury occurred. *Deters v. Times Publishing Company*, 38 Colo. App. 48, 552 P.2d 1033 (1976). In determining whether an injury occurred in the course or employment, 'the totality of the circumstances' must be examined to determine whether there is a 'sufficient nexus' between the employment and the injury. *City and County of Denver School District No. 1 v. Indus. Comm'n*, 196 Colo. 131, 581 P .2d 1162 (1978). As found, although the Claimant may have been involved in some case-by-case work for the Employer in the past whereby he was paid $50 for each task, he was not involved in those activities on March 10, 2013, and he did not have a reasonable expectation of work or pay at that time, nor did he have a reasonable expectation of employment during the week following his injury. Because the Claimant was **not** an "employee" of the alleged Employer at the time of his injury on March 10, 2013, he was **not** in the course and scope of employment when he was injured.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this 9 day of February 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, to be filed, electronically, with 5 working days. No timely proposed decision having been filed, the ALJ hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns the Respondents' request to overcome the Division Independent Medical Examination (DIME) of David Yamamoto, M.D., whereby Dr. Yamamoto is of the opinion that the Claimant has not reached maximum medical improvement (MMI).

The Respondents bear the burden of proof by clear and convincing evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant, a 45-year old Welder-Framer (d.o.b. 05/19/1969), walked up some stairs on July 30, 2013, moved a sheet of plywood and fell approximately 14-feet through a hole from the 2nd floor to the 1st floor, primarily injuring his right thoracic region and shoulder.

2. Ultimately, the Respondents filed a Final Admission of Liability (FAL), admitting for medical benefits, an average weekly wage (AWW) of $800; temporary total disability (TTD) and temporary partial disability (TPD) benefits through May 5, 2014; an MMI date of June 4, 2014; and permanent partial disability (PPD) benefits, based on whole person permanent impairment of 7% working unit and scheduled permanent impairment of 19% of the right upper extremity (RUE). The FAL was based on the opinion of authorized treating physician (ATP) John J. Aschberger, M.D.

3. There was a timely request for a DIME and David Yamamoto, M.D., was selected as the DIME Physician.

Division Independent Medical Examination (DIME) of Dr. Yamamoto

4. Dr. Yamamoto examined the Claimant on September 23, 2014, issued a report on October 13, 2014, and testified by telephone at the hearing, having been called by the Respondents as an adverse witness.

5. Dr. Yamamoto's assessment was:

1. Compression fractures at T8, T9 and T12, stable.
2. Right shoulder, SLAP tear, **symptomatic** (emphases supplied)
3. Right shoulder acromioclavicular athrosis.
4. Multiple finger sprains including a dislocation of the right fifth finger PIP joint with subsequent moderate loss of range of motion and loss of grip strength.
5. Secondary depression.

6. Dr. Yamamoto is of the opinion that the Claimant is not at MMI because: (1) the Claimant should have a second opinion orthopedic evaluation regarding the right shoulder SLAP tear; also, because the Claimant may be a candidate for distal clavicle excision as the Claimant "is quite symptomatic over the acromioclavicular joint; and, (2) Dr. Yamamoto believes that the Claimant's depression, secondary to his lack of right shoulder function, should be addressed. Ultimately, it was Dr. Yamamoto's opinion that the Claimant's condition has been exacerbated, attributable to the admitted injuries of July 30, 2013.

7. The Claimant's secondary depression has never been addressed by a referral to a psychologist, psychiatrist, or any kind of a counselor.

Record Review by Deborah Saint-Phard, M.D.

8. The limited task of Dr. Saint-Phard was to do a paper review of the request to have orthopedic specialist, Dr. Hewitt, look at the Claimant. Dr. Saint-Phard did not physically examine the Claimant nor did she perform a full-scale independent medical examination (IME). She states "...this right shoulder injury needs to be pursued as a completely separate work injury circumstance and completely unrelated to the date of injury of the workers' compensation claim from 07/30/13." She recommended denial of this request because she was of the opinion that the Claimant had sustained a new injury with the new employer after June 4, 2014. The ALJ infers and finds that Dr. Saint-Phard, in arriving at her ultimate opinion, relied on Dr. Aschberger's note of July 28, 2014, wherein Dr. Aschberger stated that the Claimant had gone back to work with a new employer and was reporting "worsening symptomatology at the right shoulder." Dr. Saint-Phard did not mention that Dr. Aschberger, in the next sentence, stated: **"He** (Claimant) **had not had a new injury."** The ALJ infers and finds that Dr. Saint-Phard disagrees with Dr. Aschberger. While Dr. Saint-Phard's opinion borders on the line between a legal conclusion and a medical opinion of non-work relatedness, the ALJ finds that the opinions of ATP Dr. Aschberger and DIME Dr. Yamamoto significantly outweigh Dr. Saint-Phard's opinion because they are based on dealing with the

Claimant more frequently, plus more thorough knowledge of the Claimant's medical case and more detailed explanations for their opinions.

New Compensable Injury after Return to Work for Different Employer or Exacerbation in the Natural Progression of the Admitted Injuries

9. Dr. Aschberger had released the Claimant to return to work, effective May 14, 2014 and placed him at MMI on June 4, 2014. On July 28, 2014, the Claimant returned to see Dr. Aschberger and Dr. Aschberger noted that the Claimant had gone back to work with a new employer and was reporting "worsening symptomatology at the right shoulder." Dr. Aschberger explicitly indicated: **"He had not had a new injury."** Dr. Aschberger further noted: He is performing overhead work and lift, which has resulted in some aggravation for him." The Respondents theory concerning why Dr. Yamamoto's DIME opinion is in error is that the Claimant sustained a new, compensable injury or occupational disease after MMI of June 4, 2014, with the new employer. Regardless of whether or not Dr. Aschberger's indication of "no new injury," seems to border between a legal conclusion and a medical opinion, there is sufficient background information in Dr. Aschberger's reports that reveals that he had a thorough understanding of, and appreciation for, the severity of the Injuries of July 30, 2013. The same is true of Dr. Yamamoto's opinions.

10. Due to the medical severity of the admitted, compensable injury to the right shoulder of July 30, 2013, the ALJ infers and finds that Dr. Aschberger's and Dr. Yamamoto's references to an "aggravation," after June 4, 2014, are meant to convey the idea of an exacerbation in the natural progression of the originally admitted right shoulder injury, thus, it would amount to speculation to infer that these two doctors meant to imply that the Claimant had sustained a new injury or occupational disease to the right shoulder after working for the new employer. The only support for the "new injury" theory is in Dr. Saint-Phard's cursory and conclusory opinion, which the ALJ rejects.

Ultimate Findings

11. DIME Dr. Yamamoto's testimony, reports and opinions were straight-forward, persuasive and credible. Indeed, the substance of Dr. Aschberger's latest opinion of July 28, 2014 corroborates the idea that the Claimant is not at MMI. Because both Dr. Yamamoto and Dr. Aschberger exhibit a thorough understanding and appreciation of the Claimant's medical case, the ALJ finds their opinions to be credible and to significantly outweigh the opinion of Dr. Saint-Phard. The ALJ finds that opinion of Dr. Saint-Phard to be inadequately supported by credible evidence and, therefore, lacking in credibility.

12. Contrary to Dr. Saint-Phard's assertions, the weight of the medical evidence establishes that the Claimant **did not** sustain a new compensable aggravation of a pre-existing injury, to wit, the admitted injury of July 30, 2013. Moreover, the weight of the evidence establishes that the worsening of the Claimant's right shoulder condition is attributable to an exacerbation in the natural progression of the admitted injury of July 30, 2013.

13. Although there may be differences of opinion, the Respondents have failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's DIME opinion that the Claimant is not at MMI is erroneous. The bases of his opinion are multifold: (1) the Claimant should have an orthopedic second opinion; and, (2) the Claimant's work-related depression should be evaluated and addressed.

14. The weight of the evidence establishes that the Claimant has not reached MMI.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo.

275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, DIME Dr. Yamamoto's testimony, reports and opinions were straight-forward, persuasive and credible. Indeed, the substance of Dr. Aschberger's latest opinion of July 28, 2014 corroborates the idea that the Claimant is not at MMI. Because both Dr. Yamamoto and Dr. Aschberger exhibit a thorough understanding and appreciation of the Claimant's medical case, as found, their opinions are credible and significantly outweigh the opinion of Dr. Saint-Phard. As further found, the opinion of Dr. Saint-Phard is inadequately supported by credible evidence and, therefore, lacks credibility.

Overcoming the Division Independent Medical Examination (DIME)

b. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005**). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence."** *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411, 412 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21, 24 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v.*

Sealy, Inc., W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, although there may be differences of opinion, the Respondents have failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's DIME opinion that the Claimant is not at MMI is erroneous. The bases for his opinion are multifold: (1) the Claimant should have an orthopedic second opinion; and, (2) the Claimant's work-related depression should be evaluated and addressed.

Maximum Medical improvement (MMI)

c. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 (ICAO, October 27, 2011). .As found, the Respondents failed to overcome, by clear and convincing evidence, the DIME physician's opinions regarding "not at MMI." The weight of the evidence establishes that the Claimant has not reached MMI. As found, Dr. Yamamoto supports his opinion, among other things, on two principal bases: (1) the Claimant should have an orthopedic second opinion; and, (2) the Claimant's work-related depression should be evaluated and addressed.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents have failed to overcome the Division Independent Medical Examination opinion of David Yamamoto, M.D., that the Claimant is **not** at maximum medical improvement.

B. The Claimant is not at maximum medical improvement.

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

DATED this 18 day of February 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, to be filed, electronically, giving counsel for the Respondent 2 working days within which to file objections. The proposed decision was filed, electronically, on February 4, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The issue to be determined by this decision is whether the Claimant suffered a compensable injury to his right shoulder (RUE) on September 17, 2013, in Mexico City, while in the course and scope of employment while on travel status with Employer.

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

FINDINGS OF FACT

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

1. The Claimant (D.O.B. 07/13/1965) is a credible witness and his testimony is both persuasive and consistent with the medical records in the case.

2. The Claimant is a sixteen year pilot for the Employer. He flew to Mexico City on assignment by Employer on September 17, 2013, where he suffered an injury to his right knee (RLE) and right shoulder (RUE) at the Mexico City airport and in an exercise facility at the hotel in which the Employer placed the Claimant. His injury began occurring when he slipped on slick granite flooring while toting baggage weighing approximately 40-50 lbs. He caught himself and torqued his right arm and shoulder, injuring both his right shoulder and his right knee. He suffered immediate pain.

3. The Claimant spent the night at the Employer's designated hotel. Approximately eight hours later (September 18, 2013) he attempted his regular exercise regime hoping to relieve his continuing right shoulder pain through a workout. He also wanted to maintain his regular workout regime to remain fit as a pilot while on travel status.

4. During exercise in the hotel gym, the Claimant experienced additional tearing in his right shoulder.

5. When the Claimant returned to the United States, he sought treatment from authorized treating physician (ATP), Wayne K. Gersoff, M.D. ATP Dr. Gersoff had treated the Claimant previously and had performed surgeries on the Claimant's right knee and right shoulder.

6. ATP Dr. Gersoff's Report of September 26, 2013, confirms that the Claimant was complaining of pain in both his right knee and right shoulder, occurring when he had slipped on marble floors while in Mexico, D.F., in between flights (Claimant's Exhibit 2, bate stamp 12).

7. ATP Dr. Gersoff found weakness in the Claimant's right shoulder rotator cuff and he sent the Claimant for MRIs (magnetic resonance imaging) on both his right shoulder and right knee. *Id.* These were performed on September 24, 2013 (Claimant's Exhibits 3 and 4).

8. The MRI of the Claimant's right shoulder found a large tear in the supraspinatus and infraspinatus tendons, synovitis changes in the subacromial and subdeltoid spaces, progression of tendinosis-tendinopathy in the subscapularis tendon (Claimant's Exhibit 4, bate stamp 17).

9. ATP Dr. Gersoff recommended right shoulder surgery which was performed on October 8, 2013, for a repair of a "massive rotator cuff tear" (Claimant's Exhibit 5, bate stamp 19) [The Claimant also underwent a right knee arthroscopy at the same time]. The Claimant had a post-operation right shoulder infection and underwent a subsequent surgery (Respondent's Exhibit E, bate stamp 30).

10. The Respondents filed General Admissions of Liability (GAL) on October 24, 2013, and March 26, 2014, admitting that the Claimant suffered a compensable right knee (RLE) injury on September 17, 2013, but denying liability for the right shoulder (RUE) component of the Claimant's injury.

11. As the result of the denial of liability for the Claimant's right shoulder injury, the Claimant had significant unreimbursed out-of-pocket expenditures for the treatment recommendations of ATP Dr. Gersoff (Claimant's Exhibit 7, bate stamp 26).

12. Prior to his injury of September 17, 2013, the Claimant had undergone surgery on his right shoulder. He recovered and was able to return to full duty as a pilot, without restrictions. He also had follow up evaluations with ATP Dr. Gersoff between 2004 and April 2013, and underwent several rounds of physical therapy (PT). He was able to continue to perform his profession as a pilot, full duty

13. Additionally, on April 24, 2013, the Claimant was assigned by the Employer to fly a Boeing 737 to Hawaii. As he was removing his flight bag from an area in the cockpit, he pulled his right shoulder and he experienced some discomfort

(Claimant's Exhibit 9). He did not file a workers' compensation claim. Rather, he sought PT on his own. This was covered by co-pays and health insurance between June and July 2013 (Claimant's Exhibit 6, bate stamp 25).

14. Between April 24, 2013, and the date of his injury on September 17, 2013, the Claimant had occasional discomfort with his right shoulder. This, however, did not interfere with his ability to perform his regular activities for the Employer while in the course and scope of employment.

15. After the Claimant's injury in September 2013, his right shoulder dramatically worsened and he was functionally unable to perform his pilot duties. Subsequently, he was out of work due to the combined effect of his right shoulder and right knee injuries for approximately six months, between September 24, 2013, and March 11, 2014 (Claimant's Exhibit 1).

Respondent's Independent Medical Examination (IME) by Timothy S. O'Brien, M.D.

16. Dr. O'Brien was accepted as an expert in the field of orthopedics, treating work related injuries, and being a Level II accredited physician.

17. Dr. O'Brien acknowledged that the Claimant had an extensive tear as evidenced by the September 24, 2013 MRI; and, that this MRI showed that there had been significant changes in right shoulder findings between an earlier MRI in 2008 and the one on September 24, 2013.

18. It was Dr. O'Brien's opinion that the Claimant's massive tear was the result of a natural progression of symptomatology dating back to 2004 or 2008, or thereabouts. Dr. O'Brien did not dispute the fact that the Claimant's right shoulder surgery was reasonably necessary. He also was of the opinion that the Claimant's right knee problems were not work related despite the GAL dated March 26, 2014, which is *res judicata* concerning the work-relatedness of the right knee condition (Respondent's Exhibit C, bate stamp 18). The Respondents have not moved to withdraw this admission.

19. Dr. O'Brien's ultimate opinion is that neither the Claimant's slip at the Mexico City airport, nor the weight lifting episode occurring during exercise were clinically significant to the Claimant's right shoulder pathology. Yet he agreed with the Claimant that the tearing sensation the Claimant experienced while working out was probably the most significant episode of the two (Respondent's Exhibit D, bate stamp 18).

20. In March 2014, the Claimant returned to work full duty and is currently working as a full-time pilot for the Employer.

Ultimate Findings

21. The Claimant's testimony was straight-forward and credible throughout. Dr. O'Brien's opinions are contrary to the weight of the evidence and are specifically outweighed by the Claimant's testimony. Therefore, the ALJ finds that Dr. O'Brien's opinions lack credibility.

22. In resolving the conflict between the Claimant's testimony and Dr. O'Brien's opinions, the ALJ makes a rational choice to accept the Claimant's testimony and the plausible inferences drawn there from, and to reject the opinions of Dr. O'Brien.

23. The Claimant's testimony, and the totality of circumstances, credibly established that he had pre-existing right shoulder problems which were significantly aggravated by the events occurring in Mexico City in September 2013. As a consequence, the ALJ rejects the opinion of Dr. O'Brien, and accepts the position of the Claimant, that he suffered a significant aggravation to his right shoulder in Mexico, D.F., while on travel status with the Employer.

24. The ALJ also rejects the Respondent's argument that the Claimant's exercising in the hotel gym in Mexico City after the initiating injury, constituted a personal errand which constituted a substantial deviation from his travel status.

25. The Claimant has proven, by a preponderance of the evidence that he sustained a compensable aggravation of his pre-existing right shoulder condition as herein above described. The compensable aggravation of his RLE condition was admitted by the GAL, dated March 26, 2014.

CONCLUSIONS OF LAW

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

Credibility

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

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was straight-forward and credible throughout. Dr. O'Brien's opinions are contrary to the weight of the evidence and are specifically outweighed by the Claimant's testimony. Therefore, the ALJ finds that Dr. O'Brien's opinions lack credibility.

Substantial Evidence

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

from, and to reject the opinions of Dr. O'Brien. Despite medical opinion to the contrary, a claim may be supported by lay testimony alone. *See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Compensability

c. An injury is compensable under the Workers' Compensation Act if incurred by an employee in the course and scope of employment. § 8-41-301(1) (b), C.R.S.; *Price v. Indus. Claim Appeals Office,* 919 P.2d 207 (Colo. 1996). A claimant must show a connection between the employment and the injury such that the injury has its origin in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. See *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). As found, carrying the bag at the airport in Mexico, D.F., and exercising in the hotel gym, while on travel status, had its origins in the Claimant's employment as a pilot.

d. The Respondent cites to *Price, supra,* in support of its argument that exercise to remain fit for employment is not within the course and scope of employment. The fallacy with this argument is that the worker was not on travel status 24/7. Thus, the analogy does not hold up.

. e. To prove causation medical evidence is not necessary and the Claimant's testimony, as well as the constellation of facts surrounding the Claimant's injury, suffice to establish the requisite *nexus* between his injury and his travel status. See *Lymburn v. Symbios Logic, supra.*

f. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P .3d 999, 1001 (Colo. App. 2004); § 8-42-104(1), C.R.S. Thus, if an industrial injury **aggravates, accelerates, or combines** with a pre-existing condition so as to produce disability and the need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Siefried v. Indus. Comm'n*, 736 P .2d 1262, 1263 (Colo. App. 1986). As found, the Claimant's RUE and RLE injuries of September 17/18, 2013, aggravated and accelerated his pre-existing conditions.

g. An employer takes an employee as it finds him and bears responsibility for any increased disability caused by a pre-existing weakened condition. *Cowin v. Medina*, 860 P .2d 535, 538 (Colo. App. 1992). Aggravation of pre-existing condition has long been held to be compensable, and compensation does not depend on the state of an employee's health or the employee's freedom from weakness or latent tendency. *Indus. Comm'n v. Newton Lumber & Mfg. Co.,* 135 Colo. 594, 601, 314 P .2d 297, 301 (1957); § 8-42-104(1), C.R.S.

Travel Status

h. The Respondents argue that the Claimant's injury of September 17, 2013, is not compensable because the Claimant was deviating from travel status when he was performing exercise at the Employer's chosen Mexico City hotel gym on September 18, 2013. As determined in the Employer's GAL, the Claimant's right knee injury in Mexico City injury was undisputed, while the Claimant was in travel status on September 17/18 2013 (Claimant's Exhibit). Injuries occurring when travel confers a benefit on an employer are compensable. See generally, *Madden v. Mountain West Fabricators, supra at* 865. There is no question that the Claimant's travel while piloting a flight to Mexico City conferred this benefit.

i. The Respondent argues that the Claimant's exercise on September 18, 2013 was a non-compensable deviation from normal travel status, citing *Silver Engineering Works, Inc. v. Simmons,* 180 Colo. 309, 505 P.2d 966 (Colo. 1973). In *Silver Engineering,* the worker met his death when the Mexican plant where he was working shut down and he and other employees drove over a difficult road to a remote beach to swim and fish. The decedent went swimming in the outlet of a river and met his death. The analogy to the facts in the present case is so attenuated that it is not a valid analogy.

j. When an employee is in travel status the employee is under continuous workers' compensation coverage unless engaged in a distinct departure on a personal errand. *See Pacesetter Corp., v. Collett*, 33 P.3d 1230 (Colo. App. 2001), (reh. den and cert. den.). The risk associated with the necessity of eating, sleeping, ministering to personal needs while away from home are considered incidental to and within the scope and course of the traveling employee's employment. *Pacesetter, supra* at 1233. The exception is when an employee in travel status deviates from employment in a manner **so substantial** as to remove it from the employment relationship. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 990 (Colo. App. 2006). As found, exercise to stay fit as a pilot, while on travel status is not a substantial deviation from the pilot/airline employment relationship. Further, the exercise benefited the Employer by potentially reducing the Claimant's extent of injury and by assuring that he was in top notch physical status as a pilot while in travel status.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A

"preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden concerning the compensability of the RLE and RUE aggravating injuries of September 17/18, 2013.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's right shoulder and right knee injuries of September 17/18, 2013, subject to the Division of Workers Compensation Medical Fee Schedule.

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

DATED this 11 day of February 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

At the conclusion of the hearing, counsel for the Respondents moved for a judgment in the nature of a directed verdict. The Motion was granted and the ALJ ruled from the bench, referring preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on February 2, 2015. On the same date, counsel for the Claimant indicated no objections. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues designated for hearing concerned the compensability of a mental-mental stress reaction on the job on July 14, 2014, pursuant to § 8-43-301 (2) (a), C.R.S. If compensable, additional issues included medical benefits; average weekly wage (AWW); and, temporary total disability (TTD) from July 14, 2014 and continuing.

FINDINGS OF FACT

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

Preliminary Findings

1. The Employer employed the Claimant as a part-time un-loader at their Centennial-Englewood facility. The Claimant normally worked at night. At some point in early January 2014, he obtained a job transfer from an un-loader position to a full-time package car driver position working out of the same facility. The package car position provided for higher pay, but required the Claimant to work from about 8:30 a.m. until the job was completed.

2. The Claimant underwent a one week in-class training course to become a package car driver. He then successfully completed a 30 day "on the ground" training course. The training route the Claimant drove for the training course was a Castle Rock route mixed with business and residential delivery stops.

3. Following his completion of his training course, the Claimant's job was that of a "swing driver." A swing driver is not assigned to a dedicated route. Rather, the swing driver is provided a route at the beginning of the shift. The Claimant worked as a swing driver from early March 2014 through July 14, 2014.

4. Package car drivers normally work alone. The route stops are organized and up-loaded on the driver's "diad" computer. The Claimant was aware that if he required assistance completing a route, he could call dispatch and the Employer would send him assistance.

5. As part of the Claimant's job, he was required to deliver air packages and other packages with sensitive delivery times. As part of the Claimant's job, he was assigned new routes daily. According to the Claimant, he had delivered air packages prior to July 14, 2014. He stated that the potential employee discipline for not delivering air packages was merely a discussion with management. The Claimant had not been disciplined in the past and did not have any problems between March and July meeting his deadlines on swing routes.

6. Prior to working for the Employer, the Claimant served three tours of duty in the U.S. Marines serving in Iraq. He underwent basic training and learned time management skills. He specialized in driving assault combat vehicles, and he learned time management skills while undergoing combat training.

The Incident of July 14, 2014

7. On the morning of July 14, 2014, the Claimant sent a text message to his manager, Dennis Messer. The Claimant requested the day off. Messer directed the Claimant to come to work. The Claimant arrived at the Employer's facility. The Employer provided the Claimant his daily route. The Claimant's swing route was a mixed business and residential route in suburban Castle Rock. Prior to starting his route around 9 AM, the Claimant took an "energy pill," which is not relevant to whether or not he suffered stress, job related or otherwise. The Claimant had until 10:30 AM to deliver the air packages.

8. Around 10:00 AM, the Claimant contacted Messer by telephone. He told Messer that he could not breathe. Messer instructed the Claimant to call 911. He did so and thereafter, he was taken to the emergency room (ER). He was diagnosed with a panic attack.

9. The Claimant indicated that there was nothing out of the ordinary on the morning of July 14, 2014. He stated that the pressure of finishing his air package deliveries on an unknown route caused him to suffer a panic attack. He further stated, however, that he spoke with Messer in the days following the panic attack. He told. Messer at that time he did know what caused the panic attack.

The Aftermath of July 14, 2014

10. The Claimant's treating physicians took him off work from July 15, 2014 through December 3, 2014. During that period, the Claimant applied for short-term disability (STD) benefits. The STD carrier, however, denied STD benefits on the ground the Claimant sustained a work related injury.

11. The Claimant returned to work for the Employer in the capacity of an overnight un-loader on December 3, 2014.

12. After a review of the medical records contained in the Claimant's Exhibits, except for Exhibit No. 6 (which was not admitted into evidence), the ALJ finds that though the authorized treating physician (ATP), Alisa M. Koval, M.D., stated the opinion that the Claimant sustained a work-related panic attack, the determination of whether the Claimant sustained a legally sufficient stress-related panic attack is within the purview of the ALJ and not the ATP in this instance.

13. Robert E. Kleinman, M.D., a board certified psychiatrist, who performed an independent medical examination (IME) at the behest of the Respondents, was of the opinion that the Claimant suffered from "an adjustment disorder with anxiety, resolved; and, a panic attack, single episode, resolved. Further, Dr. Kleinman was of the opinion that the incident of July 14, 2014 would not evoke symptoms of distress in a worker under similar circumstances.

Ultimate Findings

14. Dr. Kleinman's opinions are more persuasive and credible than all of the other medical opinions contained in the medical records.

15. The Claimant failed to prove that he sustained a legally sufficient work-related mental impairment "panic attack." The reason the Claimant sustained a panic attack was based upon his fear of not being able to complete his job on July 14, 2014, a fear that is not outside of a worker's usual experience that would evoke similar symptoms of distress in a package delivery driver in similar circumstances. The fear of not being able to complete a job related task is a personal, existential condition that is common to all fields of employment. The Claimant is a military combat veteran who served three tours as a combat assault vehicle driver. The fear of not being able to deliver packages on time with little or no disciplinary consequences, which the Claimant would have faced in this instance would this be a legally sufficient psychologically traumatic event, as measured by a worker in similar circumstances. The Claimant's reaction to the situation in question was unusually personal and would not evoke symptoms of distress in a similarly situated package delivery driver.

16. At the conclusion of the Claimant's case-in-chief, the Claimant had failed to establish a *prima facie* case. The Claimant's evidence could not get any better at that juncture, and a preponderance of the evidence was not there.

17. The Claimant has failed to prove, by a preponderance of the evidence, that he sustained a legally sufficient mental impairment claim as defined by § 8-41-301 (2) (a), C.R.S. The Claimant's claim is based on his emotional reaction to a situation that is common to all similarly situated package delivery drivers for the Employer.

18. Nonetheless, the Claimant clearly has a valid claim for short term disability (STD) benefits because the Claimant was medically disabled for non-work related reasons. The STD administrator should re-evaluate that Claimant's claim for STD benefits for the period from July 14, 2014 through December 3, 2014.

CONCLUSIONS OF LAW

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

Judgment in the Nature of a Directed Verdict

a. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966); *Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, at the conclusion of the Claimant's case-in-chief, the Claimant had failed to establish a *prima facie* case. The Claimant's evidence could not get any better at that juncture and a preponderance of the evidence was not there.

Credibility

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

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, Dr. Kleinman's opinions are more persuasive and credible than all of the other medical opinions contained in the medical records because Dr. Kleinman has the most specific expertise in the field of mental impairments.

Compensability of Mental-Mental Claim

c. The Workers' Compensation Act provides that an injured worker must prove several additional statutory elements when the claimant's claim falls within the scope of a mental-metal injury. A mental-mental injury is one that is caused by mental impairment solely from an emotional stimulus. *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo.App.1996). As stated in *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo.App.2012), "an injury that is 'the product of purely an emotional stimulus that results in mental impairment requires a 'heightened standard of proof' to 'help prevent frivolous or improper claims'" [*citing Davison v. Indus Claim Appeals Office,* 84 P.3d 1023, 1029 (Colo. 2004)].

Section 8-41-301(2) (a), C.R.S., requires that:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no

> physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim shall have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

Section 8-41-301 (2) (b) further provides that:

> Notwithstanding any other provision of articles 40 to 47 of this title, where a claim is by reason of mental impairment, the claimant shall be limited to twelve weeks of medical impairment benefits, which shall be in an amount not less than one hundred fifty dollars per week and not more than fifty percent of the state average weekly wage, inclusive of any temporary disability benefits; except that this limitation shall not apply to any victim of a crime of violence, without regard to the intent of the perpetrator of the crime, nor to the victim of a physical injury or occupational disease that causes neurological brain damage; and nothing in this section shall limit the determination of the percentage of impairment pursuant to section 8-42-107 (8) for the purposes of establishing the applicable cap on benefits pursuant to section 8-42-107.5.

The Workers' Compensation Act does not permit compensation to an injured worker when "[t]he claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment." § 8-41-301(2) (c), C.R.S. As found, the Claimant's claim is based on his emotional reaction to a situation that is common to all similarly situated package delivery drivers for the Employer.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for work-related mental impairment are hereby denied and dismissed.

DATED this 3 day of February 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, to be filed electronically, giving the Respondent 2 working days thereafter within which to file objections. The proposed decision was filed, electronically, on March 4, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether or not the Claimant has the right to a Division of Workers Compensation Independent Medical Evaluation (DIME) although the Respondent has not filed either a General Admission (GAL) or a Final Admission of Liability (FAL), under the unique circumstances whereby the Respondent paid the Claimant's medical bills, designated an authorized treating physician (ATP), Sander Orent, M.D., determined that the Claimant had reached maximum medical improvement on October 18, 2014, with zero permanent partial disability (PPD). It is the Respondent's position that an FAL is a prerequisite to filing a request for a DIME, and Dr. Orent's opinion closes the case.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the documentary evidence, judicial admissions and arguments of counsel presented at hearing, the ALJ makes the following Findings of Fact:

Stipulations and Preliminary Findings

1. At the beginning of the hearing, the parties stipulated that the Claimant had injured her low back lifting boxes at work on March 24, 2014. This stipulation is accepted and the ALJ so finds.

2. The parties further stipulated that the Claimant had no compensable lost time since her work restrictions were accommodated by the Respondent, and the ALJ so finds.

3. It is the Respondent's position that although the injury is work-related, it is not a legally **compensable** work-related injury because there was no lost time and no

permanent disability, according to ATP Dr. Orent, thus, the case is closed and the Claimant has no further recourse.

4. The Claimant is a 31 year old woman who was employed as an Administrative Aide for the Employer's Head Start Program (Claimant's Exhibit 2).

5. The Claimant suffered an injury/occupational disease to her low back and neck on March 24, 2014 moving heavy boxes of school books and other school items down stairs on behalf of the Employer at work (Claimants Exhibit 2 and Stipulation). The Respondent made a judicial admission that the medical records support these circumstances of injury.

Medical Treatment

6. The Claimant was first seen by Respondent's designated provider, Arbor Occupational Medicine (hereinafter " Arbor"), on April 7, 2014. At Arbor, the Claimant came under the care of sander Orent, M.D. (hereinafter "authorized treating physician," "ATP," or "Dr. Orent"). Dr. Orent's initial impression was "cervical and lumbar strains, related to a lot of carrying and lifting at work." Dr. Orent gave the Claimant lifting restrictions and advised her to avoid twisting and forward bending at the waist (Claimant's Exhibit 6, Note of April 7, 2014).

7. The Claimant continued her treatment at Arbor with Dr. Orent until October 8, 2014. The medical records at Arbor over that time period from April 7 – October 8, 2014 indicated a cervical and lumbar strain, which waxed and waned (Claimant's Exhibit 6). Dr. Orent imposed physical restrictions, which the Respondent accommodated (Claimant's Exhibit 6). The Respondent paid the Claimant at her regular hourly rate for the time she missed work for doctor appointments. This finding is based on judicial admissions by both parties.

8. On October 8, 2014, the Claimant had her final visit with Arbor. The Arbor doctor, Dr. Orent, noted that the Claimant had "both neck and lumbar pain with paraspinous spasm but the pain generators are very diffuse and virtually impossible to identify and treat." Dr. Orent noted that the Claimant appeared to be sad and depressed. He placed the Claimant at MMI. Dr. Orent stated **"there is no ratable impairment here."** He then gave the Claimant permanent lifting restrictions of 10-15 pounds maximum weight, no crawling, and no climbing ladders. He recommended maintenance medical care after MMI (Claimants Exhibit 6, Note of 10/8/2014).

9. Arbor records indicate that on two occasions the Claimant requested either x-rays or an MRI (magnetic resonance imaging) study of her cervical spine and lumbar spine. No MRI or x-rays of the Claimant's back were ever done (Claimant's Exhibit 6, Notes dated 6/3/2014, and 8/1/2014).

10. The final report from Arbor on October 8, 2014 states under physical examination: "paraspinous tenderness and tightness continue on physical examination." The Assessment/Plan in the final note reads: "I [Dr. Orent] believe that [Claimant] is, indeed, at maximum medical improvement. I do not think there is anything more we can offer her. She did not benefit from the therapeutic dry needling. I reviewed with her all of the various treatments that we have done and there frank lack of success. I have encouraged her to be as active as possible, explaining to her that movement is not going to cause structural damage but would likely benefit her considerably in terms of her conditioning, bone density and other issues of that nature. There is no ratable impairment here. In my view we have been unable to isolate structural abnormalities here. The pain is diffuse. As stated, I do not have anything further to offer her. I think her ongoing symptoms are much more related to static posturing in her classes, driving, etc., but it is hard to attribute her worsening to her previous work issues" (Claimant's Exhibit 6, Note 10/8/2014).

11. Based on the medical records and the statements and judicial admissions of counsel at the hearing, the ALJ finds that the Claimant's work injury was a significant injury. But for the Respondent's decision to accommodate the Claimant's work restrictions and to pay the Claimant her regular wage for the time she missed attending medical appointments, the ALJ draws a plausible inference and finds that the Respondent would have had to pay indemnity benefits to the Claimant for the time missed from work because of the injury/occupational disease. Also, ATP Dr. Orent recommended post-MMI medical maintenance care.

Procedural Posture

12. On October 10, 2014, the Claimant filed a Worker's Claim for Compensation (Respondent's Exhibit A) with the Division of Workers Compensation (DOWC). On October 21, 2014, the Respondent filed a Notice of Contest for Further Investigation," review of medical records" (Respondent's Exhibit C).

13. On October 27, 2014, the Claimant filed a Notice and Proposal to Select a Division IME, indicating that she wished to challenge the zero impairment rating given by ATP, Dr. Orent. The Respondent filed a Motion to Strike Claimant's Notice and Proposal

(Respondent's Exhibit E). The Claimant filed a Response to Respondent's Motion to Strike (Respondent's Exhibit F). On November 13, 2014, Prehearing ALJ (PALJ) Thomas DeMarino entered an order denying Respondent's Motion to Strike (Respondents Exhibit G). Thereafter, the Respondent filed a Motion for Reconsideration of the Order Permitting Claimant to Obtain a DIME (Respondents Exhibit I). The Claimant filed a Response to the Respondent's Objection (Respondent's Exhibit K).

14. On February 18, 2015, PALJ DeMarino entered a Prehearing Conference Order striking the DIME Application. PALJ DeMarino indicated that "both sides have stated valid arguments for their positions." **PALJ DeMarino resolved the dispute in favor of the Respondent's Motion to Strike, stating that a "condition of a DIME is that it has no application in a workers' compensation case where compensability as an issue has been contested. A DIME only applies in a workers compensability case where the compensability issue has been determined or judicially admitted in favor of a claimant. ...no DIME will be conducted in the case until the issue of compensability has been determined judicially in favor of the claimant"** (emphasis supplied) [Respondent's Exhibit M].

Ultimate Findings

15. The Claimant sustained a legally sufficient work-related injury/occupational disease on March 25, 2014, which necessitated significant medical treatment for at least six months thereafter, permanent physical restrictions, and ATP recommended post-MMI maintenance medical treatment.

16. Arbor and Dr. Orent were the Claimant's authorized treatment providers.

17. On October 8, 2014, ATP Dr. Orent placed the Claimant at MMI with zero PPD, he gave the Claimant permanent physical restrictions causally related to the work injury of March 25, 2014, and he recommended post-MMI maintenance medical treatment.

18. Upon receipt of ATP Dr. Orent's MMI and PPD opinions, the Claimant filed a timely Notice and Proposal to Select a DIME as herein above found and required by the Workers Compensation Act (hereinafter the "Act"). The ALJ infers and finds, based on PALJ DeMarino's Prehearing Conference Order, that the DIME request requirements place the Claimant between a "rock and a hard place" because a formal, legalistic determination of "compensability" had not yet been made, as is being made herein. The Respondent implicitly argues that the Claimant's claim was contested until the ruling herein.

19. After the Claimant filed a Worker's Claim for Compensation, dated October 10, 2014, the Respondent filed a timely Notice of Contest on October 21, 2014.

The Claimant's Argument

The Claimant argues that by definition she has suffered a legally compensable injury. The Respondent stipulated that the Claimant was injured at work and that she incurred, and Respondent paid, medical treatment through the ATP, Dr. Orent at Arbor. The Claimant argues that § 8-42-107.2 (2) (b), C.R.S., allows for a DIME in these circumstances. That statue reads: "if any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME... Unless such Notice and Proposal are given within thirty days after the date of mailing of the final admission of liability **or** the date of mailing or delivery of the disputed findings or determination as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physicians finding and determinations shall be binding on all parties and on the division" (emphasis supplied). The Claimant argues that in this case the ATP's disputed findings and determination were mailed on October 8, 2014 and that the Claimant was required to file a Notice and Proposal within thirty days in order to preserve her right to a DIME. The Claimant filed her Notice and Proposal on October 27, 2014. The Claimant argues that the statutory trigger for a DIME is in the disjunctive by virtue of the word "**or**" being used. Consequently, there are two alternative triggers for a DIME and the Claimant chose the second trigger.

The Respondent's Argument

The Respondent argues that if there was no lost compensable time, no indemnity benefits paid, and no impairment rating at the end of treatment, therefore, by definition the injury cannot be considered to be a legally **"compensable injury"** requiring the Respondent's to file a FAL. The Respondent further argues that a FAL is the only trigger allowing a claimant to seek a DIME, and since the Respondent is not required by § 8-43-101 and 8-43-103, C.R.S., to file any report with the Division of Workers Compensation (DOWC), the Claimant, therefore, cannot obtain a DIME and cannot challenge the ATP's MMI determination and zero percent rating. The Respondent argues that to hold otherwise would lead to a deluge of claims for minor injuries that would have to be processed by insurance companies and the DOWC (this argument is not supported by any studies or statistics).

CONCLUSIONS OF LAW

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

Judicial Admissions

a. A judicial admission is defined as a "formal, deliberate declaration that a party or his or her counsel makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or facts about which there is no real dispute." *Kempter v. Hurd,* 713 P.2d 1274 (Colo. App. 1986); *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP,* 230 P.3d 1275, 1283 (Colo. App. 2010). Judicial admissions must be unequivocal but become binding once they are made. *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000). *Also see Valdez v. Texas Roadhouse,* W.C. No. 4-366-133 [Industrial Claim Appeals Office (ICAO), January 25, 2001]. Stipulations are a form of judicial admission and are binding on the party who makes them. *Maloney v, Brassfield,* 251 P.3d 1097, 1108 (Colo. App. 2010). As found and concluded, the Respondent stipulated to certain facts and these stipulations constitute judicial admissions. As further found and concluded, the Respondent made unequivocal judicial admissions in its arguments as herein above and herein below referenced.

Compensability

b. The parties have stipulated that the Claimant did not have any lost time from work as a result of the injury in excess of three shifts or calendar days. . *See* § 8-43-101, C.R.S. Notice of Injury- time limit. (1) "*Every employer shall keep a record of all injuries that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days…".* Consequently the Respondent was not required to file any forms with the DOWC reporting the injury.

c. The parties agree that the Respondent furnished the Claimant medical care and treatment for the work injury/occupational disease without admitting or denying liability. § 8-43-103, C.R.S. Notice of Injury- time limit. *"(2) The furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section."* The statute, §. 8-43-103 (2), is a statute of limitations which would prevent a claimant from making any claim within two years after the date of the injury even if she received medical benefits. Insofar as it is a statute of limitations, the critical milestone from which the time is measured is the date of the **compensable** event. The ALJ concludes that the statute does not stand for the proposition that a claim is not compensable if only medical benefits are provided. As

found, the Claimant filed her Application for Hearing on the issue of compensability after PALJ DeMarino ruled that no DIME could be held until compensability of the underlying injury had either been determined or judicially admitted. Arguably, under § 8-43-101 the Respondent was not required to file a Response to the Claimant's Application for Hearing. Nonetheless, the Respondent filed a "*Notice of Contest for further investigation, medical records review*". Ultimately, at the hearing, as found, the Respondent stipulated and agreed in oral argument, which constitutes a judicial admission, that the Claimant had suffered a work injury which required medical benefits that were paid by the Respondent.

d. The Respondent argues that under the statutory scheme of the Act, they are not required to file a Final Admission of Liability (FAL) and , consequently, the Claimant is absolutely barred from asking for a DIME. The Respondent relies on § 8-42-107.2 (2)(a), C.R.S., which reads: "*(I)Except as otherwise provided in subparagraph (II) of this paragraph (a), the time for selection of an IME* (DIME) *commences as follows, depending on which party initiates the dispute:*

> *(A) For the claimant, the time for selection of an IME commences with the date of mailing of a final admission of liability by the insurer or self-insured employer that includes an impairment rating issued in accordance with section 8-42-107."*

e. The Claimant argues that she is entitled to a DIME pursuant to § 8-42-107.2 (2) (b) which reads: "*If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the Division by rule… Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability* ***or*** *the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division"* (emphasis supplied). The Respondent argues that this section only applies to respondents, despite the wordage that states *"any party."* As found, the Claimant began the process for requesting a DIME, within 30-days of the receipt of ATP Dr. Orent's opinion of MMI with zero PPD. For the Claimant to wait for the herein determination of compensability, pursuant to PALJ DeMarino's order that a DIME could not be pursued until there was a determination of compensability would be to risk exceeding the statutory time limit to request a DIME, thus, lending the Respondent the argument that the Claimant was too late to request a DIME. The only logical resolution of the dilemma is to relate the request for a DIME forward to the herein finding of compensability

f. Section. 8-40-20, C.R.S. Definitions, states: "*(2) "Accident"," injury", or" injuries" includes disability or death resulting from accident or occupational disease as*

defined in subsection (14) of this section." Subsection (14) states *"Occupational disease means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment."* Indeed, the definitions do not state that there is no compensable injury if an employer/insurance carrier pays medical benefits and regular wages, during time off work, without admitting or denying liability.

g. In *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App 1991), the Court stated "the term injury has been construed by our Supreme Court to mean a compensable injury. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *See generally* 1B A. Larson Workman's Compensation Law Section 42.00 (1991). Consistent with the statutory definition and judicial construction, our court has consistently held that an occupational disease is compensable only if it results in disablement and that rights and liabilities for occupational disease are governed by the law in effect at the onset of disability" (emphasis supplied). As found, the Claimant's injury/occupation disease resulted in her "disablement" –but her Employer paid regular wages when she was off work and the insurance carrier paid medical benefits without admitting or denying liability. The ALJ infers and finds that ATP Dr. Orent's permanent physical restrictions amount to "disablement."

h. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc., supra. Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment **or** be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. In *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002), ICAO stated *"A compensable industrial accident is one which results in an injury requiring medical treatment **or** causing disability."* In *Wherry,* ICAO upheld the ALJ who had found that the claimant's injury was an incident which was *"sufficiently insignificant"* that it did not cause an *"injury"* to the Claimant. As found, the Claimant's injury in the present case was **not** insignificant. *Au contraire,* her injury was significant to the extent that she was given permanent work restrictions and but for the altruistic actions of her Employer, she would have been entitled to indemnity benefits for her time off work.

i. In *Price v. Indus. Claim Appeals Office*, 919 P.2d 207 (Colo. 1996), the Court held: *"To be compensable under the Workers Compensation Act, an injury incurred*

by an employee must arise out of and in the course of the employee's employment. The ALJ concludes as a matter of statutory construction, that the Claimant in this case suffered a *"**compensable injury**".* The injury suffered by the Claimant was not a minor cut finger or a stubbed toe. It was sufficiently serious to require medical treatment and permanent work restrictions. But for the Respondent's accommodation of the Claimant's work restrictions, the Claimant would have been entitled to indemnity benefits. In this case, as found, the Claimant suffered an injury to her low back and neck, she was treated for approximately six months, she was given permanent work restrictions, and ATP Dr. Orent recommended post-MMI medical maintenance care.

j. The Respondent argues that the case of *Harmen-Bergstedt v. Loofbourrow,* 320 P.3d 327 (Colo. 2014) stands for the proposition that there can be no DIME without a FAL. The ALJ notes that there is a great deal of *dicta* in the *Loofbourrow* case. The Court itself stated: *"the sole issue before this court is whether Loofbourrow could be entitled to an award of temporary disability benefits without having challenged, by means of a division sponsored independent medical examination, the initial treating physician's assessment that she had reached maximum medical improvement."* The facts in the *Loofbourrow* case are significantly distinguishable from the facts in this case, and the *dicta* in the opinion was unnecessary for its ultimate disposition. The *Loofbourrow* opinion is neither dispositive nor helpful to the resolution of this case.

k. Reading the statutory provisions in the way argued by the Respondent would allow employers/insurance carriers to deny DIMEs by having an employer accommodate the restrictions no matter what they might be if the ATP (chosen by the employer) declared that the Claimant had reached MMI with no impairment. If the Employer in this case had decided to not accommodate the Claimant's work restrictions, the Respondent would have had to pay indemnity benefits and the Claimant would have had the unquestionable right to a DIME. In *Vargo v. Indus. Comm'n*, 626 P.2d 1164 (Colo. App.1981), the Court noted the general "*beneficial intent"* of the Workers Compensation Act. In *Loofbrourrow, supra,* the Court implicitly acknowledged the beneficial intent of the act by concluding that the term "*Maximum Medical Improvement as a statutory term of art, therefore has no applicability or significance for injuries insufficiently serious to entail disability indemnity compensation in the first place"* (emphasis supplied). Based on this statutory interpretation, the *Loofbourrow* Court decided that the injured worker did not need a DIME before receiving temporary disability benefits despite the fact that she had been placed at MMI. To allow a respondent to avoid a DIME in situations such as this where a claimant has suffered an admitted (but Respondent argues –not a legally **compensable** injury) serious injury, has received substantial medical care, has been given permanent work restrictions with a zero medical impairment rating, and has been prescribed post-MMI medical maintenance benefits, would produce an inequitable and unjust result that would subvert the beneficent intent of the Workers Compensation Act by closing the door to challenge, based on a tortured and mechanistic interpretation of the interplay between provisions of the Act.

l. A statute which prevents a claimant from exercising her rights to administrative or judicial review of an employer selected physician would violate due process concepts. *See Whiteside v. Smith,* 67 P.3d 1240 (Colo.2003). Equal protection is violated when a challenged procedure results in dissimilar treatment for similarly situated individuals. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). As stated in *Henderson, supra: "We must presume the general assembly intended a just and reasonable result. ...If a statute is susceptible to two interpretations, one would uphold the statue and its constitutionality, the other would strike it down, it is the court's duty to apply a constitutional interpretation. People v. Fagerholm,* 768 P.2d 689 (Colo. 1989). The ALJ concludes that § 8-42-107.2 (2) (b), C.R.S., and 8-42-107(8) (b) (II) and (8) (c) should be interpreted in a manner that would allow a claimant who has suffered an admitted or judicially determined consequential work injury or occupational disease to a DIME even if the respondents are not obligated under the relevant statutes to file a FAL.

The Historic Compact and Liberal Interpretation of Statutory Provisions

m. Section 8-40-102 (1), C.R.S. declares:

> It is the intent of the general assembly that the "Workers' Compensation Act of Colorado" be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers...recognizing that the workers' compensation system in Colorado is based on a mutual **renunciation** (emphasis supplied) of common law rights and defenses by employers and employees alike.

See "Erosion of the Exclusive Remedy in Workers' Compensation," Felter. Edwin L., Jr. and Hubbard, Sarah A., 31 *The Colorado Lawyer* 83 (2002). The Act "is highly remedial and beneficent in purpose, and should be **liberally** (emphasis supplied) construed so as to accomplish its evident intent and purpose. *Indus. Comm'n v. Johnson,* 64 Colo. 461, 172 P. 422 (1918); *Mountain City Meat Co. v. Oqueda,* 919 P.2d 246 (Colo. 1996). While the law is to be liberally construed, the facts are on a "level playing field" of appropriate evidentiary standards of proof. To accept the Respondent's interpretation of DIME triggers in such a way that an injured worker can be "slam dunked" out of the right to a DIME when an employer pays medical benefits and regular wages for a significant work-related injury, without admitting or denying liability, and then refer the worker to an authorized treatment provider that places the worker at MMI with zero PPD, would be to strictly and technically construe the DIME provisions to preclude further recourse by the injured worker. Such a construction hardly works to achieve the beneficent purposes of the Act to "assure the quick and efficient delivery of ...benefits." Indeed, such an interpretation, although providing a "full employment act" for attorneys to argue about technical, procedural constructions of the Act, it does nothing to advance the speedy and efficient delivery of benefits to an injured worker.

n. PALJ DeMarino's Prehearing Conference Order to the effect that there can be no DIME until "compensability" is determined is correct, however, it does not mean that the previous sequencing of the DIME process should be negated and start on the date of this decision wherein "compensability' has been determined. Consequently, the Notice and Proposal, filed on October 27, 2014, should proceed from today forward. The most logical way to accomplish the beneficent purposes of the Act to provide the speedy and efficient delivery of benefits is to consider the DIME process as having begun on the date of this decision and move forward from today.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has the right to a Division Independent Medical Examination (DIME), pursuant to the Workers Compensation Act and the Division of Workers Compensation Rules, and the DIME process, having commenced on October 27, 2014, shall be considered to have commenced from the date of this decision and shall move forward accordingly.

B. Any and all issues not determined herein, including average weekly wage, are reserved for future decision.

DATED this 12 day of March 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

Whether Claimant has established by a preponderance of the evidence entitlement to ongoing maintenance medical care.

FINDINGS OF FACT

1. Claimant suffered a work related injury to her upper left extremity on November 15, 1993.

2. Claimant was placed at maximum medical improvement (MMI) on June 12, 1995 and began receiving permanent total disability benefits and maintenance medical benefits.

3. Respondents admitted to reasonable, necessary, and related maintenance medical benefits in their final admission of liability. Respondents now are challenging whether Claimant's numerous medications and continuing treatment are reasonable, necessary, and related to her 1993 work injury.

4. Claimant has been receiving medical maintenance treatment since 1995 with very little success.

5. Prior to Claimant's work related injury in 1993, Claimant had significant medical problems. She was involved in a motor vehicle accident in 1978 that resulted in severe headaches. She had a second motor vehicle accident in 1992 and developed pain, numbness, and tingling in the entire left arm and hand. In 1992 she also had an MRI of the cervical spine that showed a disc bulge at C5-C6. Claimant also was diagnosed with carpal tunnel syndrome and thoracic outlet syndrome in 1992.

6. On November 30, 1994 Richard Grenhart, Psy.D., diagnosed Claimant with: adjustment disorder with mixed emotional features; provisional somatoform pain disorder; and history of personality disorder with narcissistic and dependent traits. Dr. Grenhart opined that Claimant was a poor candidate for pain management treatment and recommended against prescribing ongoing pain medications.

7. In March of 1995 Claimant attended an intensive outpatient pain management program and it was noted by psychiatrist Howard Entin, M.D. that

Claimant's pain behaviors showed a dramatic decrease and that the program helped significantly.

8. On June 7, 1995 Henry Roth, M.D. diagnosed Claimant with somatization disorder with chronic pain. He opined that the enormity of the complaints and dysfunction Claimant presented with were not related to her Workers' Compensation claim. Dr. Roth noted that Claimant had the same chronic pain syndrome and same distribution of symptoms prior to this claim.

9. On June 13, 1995 Dr. Roth noted Claimant's history of chronic pain involving the left upper quarter since a 1993 motor vehicle accident.

10. On September 27, 1997, Gary W. Jay, M.D. saw Claimant in a pain medicine consultation appointment and recommended she discontinue medications.

11. On May 8, 1998, Edwin Healey, M.D. performed an Independent Medical Evaluation. He noted Claimant was requiring multiple medications without an improvement in her symptoms. He opined that her chronic pain syndrome began with her history of traumatic emotional and physical abuse in childhood. He opined that Claimant had severe symptom magnification, chronic pain, and a desperate need to manipulate her environment and family with her pain.

12. On May 12, 1998 Howard Entin, M.D. performed an Independent Medical Evaluation. He opined that Claimant had a preexisting personal susceptibility to depression and somatization and had ongoing mild depression.

13. On August 21, 2001 Claimant underwent a psychiatric Independent Medical Examination by Burt Furmansky, M.D. He assessed Claimant with major depressive disorder, chronic pain disorder, posttraumatic stress disorder, preexisting due to abuse, and personality disorder.

14. On April 6, 2004, Thomas Whalen, M.D. noted that despite a marked increase in opiate medications, there was no evidence of any improvement in pain or functional capacity. Dr. Whalen recommended Claimant immediately stop all of her opiate medications and begin to wean her other medications.

15. On July 27, 2004, Brian Lambden, M.D. performed an Independent Medical Examination (IME) of Claimant. Dr. Lambden recommended reducing and hopefully discontinuing Claimants opioid use and indicated that Claimant's current medication regimen was not appropriate.

16. Following the IME, Dr. Lambden became Claimant's authorized treating physician upon agreement of the parties. At this time, Claimant was living in New Mexico but flying to Denver every four to six months to see Dr. Lambden. Per his recommendations and opinion, Dr. Lambden decreased Claimant's use of OxyContin from 500 mg to 100 mg from 2004-2006.

17. At a March 16, 2006 appointment, Claimant filled out a progress questionnaire. In the pain diagram to indicate where she felt pain, Claimant scribbled in and blacked out almost the entire body diagram. Claimant wrote that since her last appointment she felt worse, nothing was better, and everything was worse.

18. On June 14, 2006, Brian Lambden, M.D. submitted a letter to Pamela Black, M.D. who was to be taking over Claimant's care. Dr. Lambden indicated in the letter that Claimant has a long history of pain dating back to 1978. Dr. Lambden noted that Claimant did not have chronic regional pain syndrome, but a very complex medical history with significant chronic pain syndrome/somatoform pain disorder complicated by opioid dependence.

19. Dr. Black took over Claimant's maintenance medical care in New Mexico on May 30, 2006 and continues to prescribe opioid medications to Claimant.

20. Since May 30, 2006, Claimant's function has not improved despite the continuing medication and opioid use.

21. On April 7, 2014 Dr. Lambden again noted his opinion that Claimant had chronic pain symptoms that were not due to underlying organic tissue pathology but due to chronic pain syndrome and somatoform pain disorder, which had been present since the 1970's, complicated by her depression, personality disorder, and opioid dependence.

22. Dr. Lambden opined that Claimant's opioid dependence would be best served by slowly tapering off and discontinuing opioid agents. Dr. Lambden opined that Claimant's continued use of opioids is not appropriate because her functionality is not improving.

23. Dr. Black reviewed Dr. Lambden's recommendations, and opined in a report that she was open to weaning Claimant off narcotic medication or substantially reducing Claimant's narcotic medication, but that she did not have time in her schedule immediately to take that on.

24. Dr. Lambden's opinion that Claimant's depression, somatoform pain disorder, and chronic headaches all existed prior to her work injury in 1993 is credible, persuasive, and supported by the extensive medical records as well as the opinions of several other physicians as found above.

25. The following medications are not related to Claimant's 1993 work injury: wellbutrin, an antidepressant; valium, an anxiety medicine; trazedone, an antidepressant used for sleep issues; simvastatin, a cholesterol medication; lyrica, an anti-seizure/pain medication; levothyroxine, a thyroid medication; calan, a headache medication; diazide, for swelling; and fioricet, a headache medication.

26. Dr. Lambden's opinion that the above medications are not related to Claimant's 1993 work injury is found credible, persuasive, and supported by the extensive medical records.

27. Claimant began using opioids due to her 1993 work injury. She continues to use opioids and has an opioid addiction due to her work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2003). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Maintenance Medical Benefits

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Respondents have challenged Claimant's request for ongoing maintenance treatment and medications in this matter. Claimant argues that all of her current medications are reasonably necessary to relieve the effects of her November, 1993 injury and to prevent further deterioration of her condition. Claimant's argument and testimony is not persuasive. As found above, Claimant suffered a left upper extremity work related injury in 1993. Although this injury required treatment, Claimant had significant medical issues including depression, somataform pain disorder, and chronic headaches prior to the work injury as documented and opined credibly by Dr. Roth, Dr. Healey, and Dr. Lambden. These significant pre-existing problems continue to date. The testimony of Dr. Lambden is found credible and persuasive that other than the opioid/pain medication and the stool softener (due to opioid use), all the other medications Claimant currently takes are not related to Claimant's work injury. Claimant was unable to testify or recall from memory what types of medications she currently takes or explain how they were related to her 1993 upper extremity work injury. The medical records, as found above, show significant medical issues unrelated to the work injury that cause the need for most of Claimant's current medications. Claimant has failed to meet her burden to specifically show that the following medications that Respondents have challenged are, more likely than not, related to her 1993 work injury: wellbutrin, valium, trazadone, simvastatin, lyrica, levothyroxine, calan, diazyde, and fioricet.

Claimant has presented substantial evidence to show that future medical treatment is reasonably necessary to prevent further deterioration of her condition, only as it relates to her opioid addiction. Although Claimant is stable and performs very

basic daily living activities at the present, the heavy medication that she is currently taking is not preventing her deterioration but rather is making Claimant's opioid dependence worse. As found above, dating back to 1994, multiple providers have opined as to the necessity to discontinue medication and have documented that even with greater opioid use, Claimant is not seeing any functional improvement. In 1994, Dr. Grenhart recommended against prescribing ongoing pain medications. In 1997, Dr. Jay recommended Claimant discontinue medications. In 1998, Dr. Healey noted Claimant was requiring multiple medications without an improvement in her symptoms. In 2004, Dr. Whalen noted that despite a marked increase in opiate medications, there was no evidence of any improvement in pain or functional capacity and recommended Claimant immediately stop all of her opiate medications and begin to wean her other medications. Despite these warnings and recommendations of physicians, dating back 21 years, Claimant continues to take and use significant medications including opioids. Dr. Lambden is credible and persuasive that the opioids are not appropriate and Claimant should be tapered off the medications. Claimant's current treatment plan is not reasonable and necessary to maintain Claimant's condition and in fact is furthering Claimant's opioid addiction.

Claimant has shown by a preponderance of the evidence that she currently suffers from opioid addiction, and that this addiction is more likely than not related to her 1993 upper extremity work injury. To prevent further addiction, and further deterioration of her current addicted state, a rehabilitation program to address the opioid addiction is reasonably necessary and related to her work injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for maintenance medical care related to her November 15, 1993 injury is limited to in-patient rehabilitation and out-patient follow up treatment for her addiction to opioid medications, for up to one year from the date of this Order.

2. Claimant has failed to meet her burden to show she is entitled to further maintenance care for her November 15, 1993 injury other than treatment for opioid addiction.

3. Claimant has failed to meet her burden to show that the following medications are reasonable, necessary, or related to her November 15, 1993 work injury: Wellbutrin, Valium, Trazadone, Simvastatin, Lyrica, Levothyroxine, Calan, Diazyde, and Fioricet. Respondents are not responsible for the cost of these medications.

4. For one year following this order, Respondents shall continue to be responsible for the costs of any opioid medications, colace,

and any opioid replacement medications used for treatment of Claimant's opioid addiction.

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

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

DATED: February 20, 2015

/s/ Michelle E. Jones

_____

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

ISSUES

The issues presented for determination are whether the Claimant is entitled to ongoing maintenance medical treatment in the form of medications and periodic examinations.

FINDINGS OF FACT

1. The Claimant sustained a compensable injury to his neck on June 27, 1999. Claimant received medical treatment from various providers including Dr. John Charbonneau.

2. Dr. Charbonneau determined that Claimant reached maximum medical improvement (MMI) for the work injury on September 15, 2000. At that time, Dr. Charbonneau believed that Claimant had more wide spread physical complaints which he did not believe were related to the injury. With regards to maintenance care, Dr. Charbonneau referred Claimant back to Dr. David Reinhard for medication. Dr. Charbonneau noted that Claimant's medications at that time were Zestril; Ibuprofen; Ultram; Baclofen; and Vitamin E supplements. Historically, Claimant had tried Celebrex, Ibuprofen and Vioxx. Dr. Charbonneau outlined a treatment plan for Claimant that included medication and periodic evaluations: "I do want him to see Dr. Reinhard next week to address medication issues. He may need to see me or Dr. Reinhard or Dr. Burns for periodic surveillance in the future. I will be happy to make his medication available to him."

3. Claimant underwent a DIME with Dr. Ray Jenkins on February 27, 2001. Dr. Jenkins agreed with the date of MMI, and agreed that Claimant's thoracic and lumbar spine symptoms were unrelated to Claimant's work injury. Dr. Jenkins determined Claimant's impairment rating was 32% whole person with no apportionment. Dr. Jenkins' report specifically notes that the impairment rating was for an injury to the C5-6 level of Claimant's spine. Dr. Jenkins noted that Claimant's medications at that time included Baclofen, Neurontin, Ultram, Zestril, Lidoderm patch and Celexa. Dr. Jenkins noted that Claimant's current medications were reasonable.

4. In April 2003, the Claimant applied for hearing on the issue of permanent total disability. ALJ Barbara Henk denied Claimant's claim for permanent total disability and specifically stated that maintenance medical benefits were reserved for future determination.

5. On January 7, 2013, the Respondents referred the Claimant to Dr. Nicholas Olsen, for an independent medical examination. Dr. Olsen examined the Claimant, reviewed his medical records and issued a report. Dr. Olsen admittedly did

not review all of the medical records, particularly the surgical reports for the non-work related surgeries performed by Dr. Donner.

6. Claimant had problems in his cervical spine prior to the June 1999 injury. Specifically, Claimant underwent a cervical MRI on January 18, 1999. Dr. Olsen testified that this MRI revealed that Claimant had multiple herniated disks at this C4-5, C5-6, and C6-7 levels. Dr. Olsen testified that this level of degeneration at these levels was caused by the natural progression of his degenerative disk disease. Dr. Olsen also testified that, as of that time, it was probable that Claimant's degenerative disk disease at these levels would worsen over time. Dr. Hans Coester performed a fusion surgery at the C4-5 level of Claimant's cervical spine on January 29, 1999.

7. Claimant then had his June 27, 1999 work injury. Based on his review of the medical records, Dr. Olsen opined that the work injury resulted in pathology at the C5-6 level.

8. On August 16, 1999, Claimant had his second cervical surgery. Specifically, Claimant underwent cervical fusion at the C5-6 level.

9. Claimant saw Dr. Reinhard on September 20, 2000. At that time, Claimant was complaining of a constellation of pain symptoms. On physical examination, Claimant presented in a significantly disabled fashion. Specifically, Claimant walked stiffly in apparent discomfort and showed significant restrictions of range of motion both in his cervical and lumbar area. Claimant demonstrated tenderness over the cervical, thoracic, and lumbar spine. Dr. Reinhard did not have any further treatment recommendations for Claimant. Dr. Reinhard rendered the opinion that Claimant's cervical problems did not explain this constellation of pain symptoms. Rather, Dr. Reinhard believed that Claimant's recent deterioration was largely due to numerous psychological stressors. At that time, Claimant was only on Ultram and Baclofen. Dr. Olsen testified that Ultram is a very mild pain medication and Baclofen is a mild muscle relaxer. Claimant reported that the consumption of Ultram and Baclofen was very helpful.

10. Dr. Olsen agreed with the opinions of Dr. Charbonneau and Dr. Jenkins that Claimant's lumbar and thoracic problems were not related to his June 1999 work injury.

11. On October 20, 2004, the Claimant underwent a fusion procedure at the C6-7 level of his spine, which Dr. Jeffrey Donner performed. At the time of the surgery, Dr. Donner viewed the fusion performed at the C5-6 level (a fusion for the 1999 injury), and noted that the fusion was solid.

12. Dr. Olsen opined that the October 2004 surgery was performed to address the degenerative disc disease at the C6-7 level. Dr. Olsen also opined that the June 1999 injury did not in any way result in further pathology at the C6-7 level.

13. On February 6, 2006, Dr. Donner performed another surgical procedure on Claimant's cervical spine. As the operative report reflects, Dr. Donner performed this

procedure due to Claimant's development of pseudoarthrosis at the C6-7 level. Pseudoarthrosis is a non-fusion at the C6-7 level. The February 6, 2006 operative report again reflected that the fusion at the C5-6 level was still solid.

14. Dr. Donner performed a thoracic fusion at the T4 through T11 levels on September 19, 2005. Dr. Olsen noted that this procedure involved putting in pedicle screws at each of the levels from T4 through T11 and then joining them by using rods. Dr. Donner fused 7 out of the 12 thoracic vertebrae levels in this procedure. As found above, Dr. Olsen agreed with Dr. Charbonneau and Dr. Jenkins that Claimant's thoracic condition was not related to his work injury. Dr. Olsen testified, and the ALJ finds, that the need to perform this thoracic surgery was not in any way related to the June 1999 work injury.

15. On May 8, 2006, Dr. Donner then fused Claimant's L4 through S1 levels. With this procedure, Dr. Olsen noted that Dr. Donner then had fused 50% of Claimant's spine. Again, as found above, Dr. Olsen agreed with Dr. Charbonneau and Dr. Jenkins that Claimant's lumbar condition was not related to his 1999 work injury. Dr. Olsen testified, and the ALJ finds, that the need to perform the lumbar fusion was not related to Claimant's 1999 work injury.

16. Claimant began treating with Amy Gentry, a nurse practitioner, at the Fort Collins Pain Treatment Center, on June 4, 2008. Ms. Gentry treated the Claimant at a different clinic beginning in either 2000 or 2001.

17. Ms. Gentry confirmed that Claimant is taking long-acting opioids, Oxycontin 10 milligrams up to three times per day, and 5 milligrams of Percocet two times per day, and Valium for spasms in his upper extremities and for sleep.

18. According to Dr. Olsen, the medications Claimant was taking at the time of MMI and the DIME included Ultram, which is a non-narcotic mild pain reliever and Baclofen, which is a mild muscle relaxer. Since September 2000, the Claimant has graduated to Oxycontin and Percocet, which Dr. Olsen testified were "heavy hitters" in terms of narcotic pain medications.

19. Ms. Gentry testified that it is her belief that Claimant underwent three cervical spine surgeries related to his workers' compensation injury, and that she is treating him for pain management related to those surgeries. She also noted that Claimant has pain in his thoracic and lumbar spine as well as fibromyalgia. Ms. Gentry ultimately opined the ongoing pain medications are reasonable and necessary and relieve Claimant of the effects of his workers' compensation injury.

20. Ms. Gentry also agreed that she would continue to prescribe the same pain medications for Claimant's lumbar and thoracic spine pain complaints.

21. Claimant has completed multiple pain diagrams while seeking treatment with Ms. Gentry. Dr. Olsen testified that Claimant, as part of his evaluation, also completed a pain diagram for Dr. Olsen. Dr. Olsen, in comparing the pain diagram that Claimant completed for Ms. Gentry on October 27, 2011 with the pain diagram that

Claimant completed at Dr. Olsen's evaluation, indicated that these two pain diagrams are very similar.

22. Dr. Olsen noted that Claimant's pain diagrams indicates that Claimant has pain in his mid-back, his low-back, and pain extending down to his sacral area. Claimant also indicates that he has pain in both legs as well as arm pain.

23. Dr. Olsen stated that the arm pain could be the result of Claimant's thoracic symptoms, his fibromyalgia, or coming from his neck. Dr. Olsen, in his January 7, 2013 report, stated the following:

> To the degree that [Claimant] needs continued treatment including medications, I am unable to relate them to this second surgical surgery [the C5-6 fusion caused by the June 1999 injury] and ongoing needs for opiates as well as Valium can be related to [Claimant's] subsequent non-occupational fusions in both his thoracic and lumbar spine.

24. At hearing, Dr. Olsen testified that if Claimant's level of pain complaints in his low back and mid back is reliable, he would still need the medications prescribed by Ms. Gentry even if he had no cervical symptoms at all. To the extent that Claimant had symptoms in his cervical area, those symptoms are not being caused by the C5-6 pathology and subsequent fusion. The C5-6 fusion was successful based on Dr. Donner's examination following the surgery. Three or four years after reaching MMI, when it was re-explored surgically on two occasions, the C5-6 fusion was considered stable.

CONCLUSIONS OF LAW

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

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

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

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

5. In this case, the Claimant has been receiving maintenance medical care for following placement at MMI, which occurred in September 2000. At that time, both Drs. Charbonneau and Jenkins had determined that periodic examinations and the prescription medications, Baclofen and Ultram, were reasonable for the Claimant. Approximately fourteen years later, the Claimant asserts that his need for opioid medication and periodic examinations is related to his work injury.

6. As found, Claimant's 1999 work injury was limited to the C5-6 level of his spine. The Claimant had a spinal fusion of the C5-6 level under this claim, which was determined to be stable during subsequent non-work related surgeries. Since then, the Claimant has had four additional surgeries to various other levels of his spine, including fusions of the majority of his lumbar and thoracic spine.

7. At the time Claimant was placed at MMI on September 15, 2000, he was being prescribed Baclofen and Ultram. As opined by Dr. Olsen, Ultram is a non-narcotic mild pain reliever and Baclofen is a mild muscle relaxer. Since September 2000, the Claimant has graduated to Oxycontin and Percocet, which Dr. Olsen testified were "heavy hitters" in terms of narcotic pain medications. The substantial evidence found in the medical records reflects that Claimant did not need these heavy duty narcotic pain medications and Valium until after he underwent the non-work related surgeries to other levels of his spine.

8. The Claimant now has widespread pain as evidenced by the pain diagrams admitted into evidence. The ALJ is not persuaded that the 1999 work injury is causing a level of pain that would necessitate opioids and Valium given the additional problems Claimant has had since the work-related fusion surgery. As both Dr. Olsen and Ms. Gentry testified, the Claimant would need these medications absent any injury to his cervical spine. Further, Claimant did not need opioids or Valium when he was placed at MMI. Clearly, his pain symptoms have progressed over the years and there is no persuasive evidence the 1999 work injury is contributing to his high levels of pain. As such, the ALJ concludes that the Claimant's ongoing need for narcotic pain medication (Oxycontin and Percocet) and Valium is not related to his 1999 industrial injury.

ORDER

It is therefore ordered that Respondents are no longer liable for ongoing narcotic pain medication, Valium and periodic medical examinations related to the 1999 work injury.

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

DATED: February 24, 2015

DIGITAL SIGNATURE:

L. Broniak

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

CERTIFICATE OF MAILING OR SERVICE

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

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Date: 2/4/15

/s/Charleen Corliss
Court Clerk

ISSUES

The issues presented for determination are whether the claim should be reopened and Respondents permitted to withdraw their general admission of liability based on allegations of fraud. Alternatively, Respondents seek to reopen Claimant's permanent total disability award based on an allegation that Claimant has the ability to return to employment. Respondents also seek applicable offsets and claim an overpayment.

Claimant filed a response to application for hearing alleging penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to pay permanent total disability benefits as ordered by ALJ Cannici on February 1, 2010. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to comply with Rule 5-8 regarding permanent total disability benefits alleging Respondents terminated permanent total disability benefits without a hearing. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S. for Respondents alleged failure to pay medical benefits consistent with the fee schedule in WCRP Rule 18.

The response to application for hearing alleges the defenses of WCRP Rule 7-3 (A) alleging Respondents failed to meet reopening requirements, waiver, estoppel, issue preclusion, claim preclusion, res judicata, doctrine of laches, statute of limitations, § 8-43-303, C.R.S. (2005), costs pursuant to § 8-42-101 (5), C.R.S., and attorney's fees pursuant to § 8-43-211 (2)(d),C.R.S. for endorsing issues not ripe for adjudication, C.R.S. § 8-43-203 (2), *Lewis v. Scientific Supply*, 897 P.2d 905 (Colo. App. 1995) and appeal of prehearing orders.

In response to the penalty allegations, Respondents moved to endorse the issue of 'cure' pursuant to C.R.S. § 8-43-304 (4), which was granted on February 25, 2013.

BASIS FOR CORRECTED ORDER

Upon additional review of this order, the ALJ determined that she inadvertently cited to a former version of §8-43-304(1), C.R.S., in the Conclusions of Law portion of the order entered on January 16, 2015. Thus, pursuant to §8-43-302, C.R.S., the ALJ deems that a Corrected Order is necessary to clarify this clerical error. Despite the incorrect citation, the ALJ did consider that the maximum applicable penalty is $1,000.00 per day rather than $500.00 per day when imposing the penalty awarded in this case. The corrections are denoted in bold font type.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. The Claimant worked for the Employer as a hairstylist and manager.

2. On August 28, 2005, the Claimant completed an Employer's First Report of Injury and reported that on August 28, 2005, she injured her left arm. She reported that she was changing loads of towels, spilled water on the floor, fell and hurt her left lower arm. She indicated she had a strain and limited mobility. No one witnessed the accident.

3. The Claimant went to the Boulder Medical Center on August 28, 2005 and reported that she slipped in water and put arm out to break her fall. According to the treatment note, the Claimant had a contusion and possible fracture. She was released to return to work with restrictions.

4. The Respondents admitted liability on October 17, 2005, and the Claimant underwent medical treatment and continued to work for the Employer in a modified duty capacity until May 5, 2007, when the Claimant began experiencing pain in her thoracic spine. A separate workers' compensation claim was initiated.

5. The Claimant underwent treatment for her thoracic spine symptoms until she was placed at maximum medical improvement (MMI) on August 9, 2007.

6. By stipulation of the parties which was approved by the Judge on January 3, 2008, the 2005 claim was re-opened and the 2007 thoracic spine claim was incorporated into the 2005 left arm claim.

7. The Claimant has received a significant amount of medical treatment for her injuries, including a spinal cord stimulator.

8. On February 10, 2010, after a contested hearing, ALJ Peter J. Cannici found that Claimant was permanently and totally disabled. The Respondents did not appeal ALJ Cannici's decision.

9. Claimant has continued to receive maintenance care from her authorized treating physicians.

Findings related to fraud allegation

10. Kimberly Workman, the adjuster on this claim, testified that prior to July 26, 2010, Respondents had not received any information that would suggest Claimant had not suffered an injury at work on August 28, 2005, but rather suffered her injury the day before at Water World. Workman testified that, if at the time of the filing of the original General Admission of Liability, Respondents had information that Claimant had actually suffered an injury to the same body part the day before at Water World,

Respondents would have never admitted liability in this claim. Rather, Respondents would have filed a Notice of Contest.

11. On July 26, 2010, Workman received a phone call from the fraud unit with the DOWC notifying Respondents that a tipster had called stating that Claimant did not have an injury at work, but rather injured herself the day before at Water World. Workman testified that she relayed this information to the adjuster who then notified defense counsel. Specifically, the e-mail that Workman sent to the adjuster is dated July 26, 2010. The e-mail stated the following:

> Hi Cathy,
>
> I just got a call from the fraud department at the DOWC. They received a tip (we think it is from the ex-husband) stating that EE never got hurt at work. She was hurt at Water World. In attendance were her ex-husband, ex-mother-in-law, and brother. Apparently, EE is driving to California right now to take the kids to Disney Land. "Herman" (our tipster) can be reached at 303-591-5456.
>
> You may want to pass this along to defense counsel. Thanks.

12. H. Armenta was Claimant's husband from April 2001 through May 2009.

13. H. Armenta provided a statement to a private investigator on October 5, 2010. During that recorded statement, H. Armenta stated that the day before Claimant filed a Workers' Compensation claim, Claimant, Claimant's daughter, Claimant's brother, James, and H. Armenta went to Water World. Water World is a water park in the Denver metro area.

14. H. Armenta stated that at Water World, the Claimant, H. Armenta, and Claimant's brother, were in inner tubes floating in the wave pool. When the waves started to come, Claimant reached out to get hold of her brother's tube and when the wave hit, it separated her away from her brother's tube. In that process, she hurt her left arm because she was holding on to H. Armenta's tube and her brother's tube at the same time, and H. Armenta and her brother went separate ways. In this recorded statement, H. Armenta also stated that on August 28, 2005, he received a phone call from Claimant stating that Claimant was in the hospital because she had just fallen at work. When H. Armenta asked her what happened, Claimant stated that it was just from yesterday, that she was hurt at Water World and that she had just filed it as a Workers' Compensation claim. In the recorded statement, H. Armenta also stated that Claimant had decided the night of August 27, 2005 that she would report this injury to her left arm as a work-related injury the next day because it was best for the family.

15. At hearing, H. Armenta testified that on August 27, 2005, he was at Water World with Claimant, Claimant's brother, James, and her mother as well as their daughter, Alexa. H. Armenta testified that Claimant, Claimant's brother, James, and he were in the large wave pool. H. Armenta testified that when the wave hit their tubes,

Claimant was pulled in both directions. As a result, Claimant began complaining of pain in her left arm, neck, and back. H. Armenta testified that immediately following this incident, they left Water World because Claimant was in too much pain to stay there. Claimant was experiencing pain in these areas on the night of August 27, 2005, as well as the morning of August 28, 2005.

16. H. Armenta has denied that he has ever contacted the fraud unit at the Division of Workers' Compensation despite the many references to the contrary. In three separate documents, Respondent's counsel referred to H. Armenta as the reporting party. Further, the comments made by Workman to the former claims adjuster are telling. Armenta's first name was specifically mentioned. It is apparent, despite his vehement denials, that Armenta called the DOWC fraud line.

17. The allegation regarding Water World surfaced on July 26, 2010. By then, H. Armenta and Claimant had been divorced for over a year. Armenta reported to the fraud tip line that Claimant was on her way to Disneyworld with her two children. H. Armenta is their father.

18. The evidence presented suggested that the Claimant's divorce from H. Armenta was contentious. The two argued about custody of their two children, child support, and visitation schedules.

19. Martha Armenta is H. Armenta's mother. M. Armenta gave a statement to an investigator on October 5, 2010. She stated that Claimant told her that after Claimant had been drinking margaritas at a Broncos party, that Claimant actually injured herself at Water World. M. Armenta also stated that H. Armenta had told her at one time that Claimant injured herself at work.

20. M. Armenta also made inconsistent statements concerning when she learned Claimant was allegedly injured at Water World rather than at work. She also testified at hearing that Claimant told her at the Broncos party that Claimant injured herself at work then changed it and said she meant to say Water World.

21. M. Armenta's testimony is equivocal and unpersuasive.

22. H. Armenta's testimony and reports of fraud lack credibility. H. Armenta had motivation to fabricate the reports made to the DOWC. Further, his repeated denial that he contacted the DOWC fraud tip line renders his testimony wholly incredible.

23. The testimony of Claimant's family members concerning how Claimant injured herself is of little consequence and will not be recited in this order. The evidence presented by Respondents to support the fraud claim is not persuasive and lacks credibility.

Reopening – No longer PTD

24. In rendering his decision concerning PTD, ALJ Cannici relied on work restrictions issued by Dr. Justin Green on June 9, 2009. Dr. Green opined that

Claimant should not engage in repetitive lifting with her left upper extremity; no lifting greater than five pounds on an intermittent basis with the left upper extremity; no prolonged standing greater than 30 minutes; no working greater than 90 minutes continuous sitting without a 15-minute rest break. Dr. Green recommended no greater than 1-2 hours of work per day. Dr. Green based his restrictions on a June 2009 Functional Capacity Evaluation (FCE) and on his clinical judgment.

25. Since Claimant was determined permanently and totally disabled, the Respondents have conducted video surveillance of the Claimant. The ALJ reviewed all of the video surveillance admitted into evidence.

26. In the September 6, 2010 video, the ALJ observed the following: The Claimant was shopping at Wal-Mart. She picked up an item with her left hand. She held a greeting card in her right hand. Neither item appeared to be particularly heavy. The Claimant was in the store for approximately 45 minutes. As she was leaving, she was leaning on the grocery cart and pushing it slowly.

27. In the video taken on January 26, 2011, in the span of eight minutes, the Claimant left her house, placed her purse down in the front of a minivan, and lifted a child into the back of a minivan.

28. Five months later on May 30, 2011, the Judge observed the Claimant smoking cigarettes using her left hand. She picked up a young child who she primarily held with her right hand (and not her left arm contrary to Dr. Olsen's noted observations). The Claimant walked out of the camera view with the child and reappears within seconds. The Claimant was next observed holding a spray bottle for week killer (which appeared to be a one-gallon size) in her right hand which was attached to a hose and sprayer which the Claimant held with her left hand. She sprayed some weeds while bent at the waist. At one point she pumped the spray bottle with her left hand and then held the bottle with her left while holding the sprayer with her right arm. After spraying weeds for approximately ten minutes, the Claimant began using garden loppers to cut weeds or plants. She bent over at the waist to make the cuts and used her right hand to pick up the debris. The Claimant performed this activity for approximately six minutes before taking a break. While taking a cigarette break, the Claimant helped lower her older child out of a tree. The Claimant raised her arms over her head for a few seconds to help the child. The Claimant does not return to gardening activities in this video.

29. Later on May 30, 2011, the Claimant went for a walk with three children, two of whom she pulled in a wagon. The walk lasted approximately 24 minutes. The Claimant pulled the wagon with her right arm for the first eight minutes, she switched to her left arm for approximately ten seconds then switched right back to pulling with her right arm. The Claimant primarily pulled the wagon with her right arm and used her left arm for seconds at a time on two occasions. The Claimant occasionally raised her left hand and arm to her head to keep her hat from blowing away due to the obvious wind.

30. In the video taken on June 11, 2011, the Claimant walked a short distance with some papers in her left hand. On June 14, 2011, the Claimant walked a short distance with some papers in her left hand. She appeared to walk with a slight limp. The Claimant is next observed walking out Target carrying a bag of items with her left arm and hand.

31. On June 23, 2011, video surveillance shows the Claimant walking to a store with a wallet under her left arm. She purchased cigarettes then walked home carrying the cigarettes in her left hand. The total time of this video is seven minutes.

32. On June 24, 2011, video surveillance shows the Claimant walking to the store with two young girls (presumably her daughters). At one point, she bent down to put a cigarette out using her left arm. She bent at the waist as well as bending her legs. They enter the store and Claimant returns with a plastic bag which she initially carried on her right arm. She switched the bag to her left arm at point and also held her daughter's hand with her left hand. She walked while carrying the bag in her left hand for about five minutes before bending down again to put a cigarette out on the curb. The Claimant switched bag back to her right hand for the next five to six minutes. She carried the bag in her left hand again very briefly before entering her house.

33. On August 29, 2011, video surveillance shows the Claimant lifting her younger child into a minivan. The Claimant bends slightly at the waist into the van. Later on August 29, 2011, the Claimant crouches down for approximately two to three minutes to put new tags on a truck. She also bent down on the waist to complete the task. The Claimant also bent at the waist to pull some weeds for approximately two minutes.

34. On August 30, 2011, very little footage was obtained. The Claimant stood for a few minutes reading some papers she held with her left hand while she smoked a cigarette with her right hand.

35. On March 21, 2013, Dr. Green issued a report wherein he noted that he had reviewed surveillance video taken of the Claimant, a report from Dr. Nicholas Olsen, and a repot from Starting Point dated February 11, 12, and 13, 2013. Dr. Green also examined the Claimant on that day. Based on the information before him at that time, Dr. Green opined that Claimant's had improved. He recommended work restrictions of maximum lifting 20 pounds floor to knuckle; no greater than 10 to 15 pounds of repetitive lifting; no prolonged standing greater than 30 minutes without a 10 minute posture break; and no greater than 90 minutes of continuous sitting without a 15 minute rest break. Dr. Green recommended that Claimant work for no greater than 3 to 4 hours per day.

36. Counsel for Claimant sent a copy of the Starting Point evaluation to Dr. Phil Cambe in a letter dated February 20, 2013. In a report dated February 27, 2013, Dr. Cambe put a check by the following statement purportedly prepared by counsel for Claimant:

> I have been treating [Claimant] for her work injury for many years. I agree with the findings in the Starting Point evaluation dated February 16, 2013 and signed by Pat McKenna. [Claimant's] condition has not substantially changed. The work restrictions provided by Dr. Green on June 9, 2009 are still appropriate.

37. The Claimant underwent a Work Performance and Occupational Feasibility Evaluation at Starting Point with Pat McKenna on February 11, 12, and 13, 2013. Ms. McKenna concluded that Claimant could lift 10 pounds from floor to chin level on a very rare basis; 5 pounds from floor to overhead on an infrequent basis with her right arm; and four pounds from floor to overhead on a rare basis with her left arm.

38. Ms. McKenna also made the following observations based on the Work Performance and Occupational Feasibility Evaluation:

> Claimant could not complete one minute of the assembly test which is bilateral, lifting pegs, not dissimilar to those on a cribbage board and placing them in holes in the board in front of her.
>
> If Claimant's left hand had to be engaged at all in a task, her pain became so severe that it would have made it impossible for her to concentrate well.
>
> Claimant was only able to flex her right shoulder 66 degrees and abduct her right shoulder 106 degrees.
>
> Claimant was only able to sit for 20 minutes at a time and two hours in a eight hour day.
>
> Claimant was only able to stand one to ten minutes at a time and 30 minutes an entire day.
>
> Claimant was only able to walk for 20 minutes at a time and two hours in an eight hour day.
>
> Claimant, with her left arm, was unable to tolerate even light lifting on a repetitive basis (such activity would cause a significant increase in her pain)
>
> Claimant was very limited in reaching above her shoulder level, reaching from waist to chest level, and reaching below waist level.
>
> Claimant, with grasping activities, was limited to extremely limited.

39. Ms. McKenna stated that, based on Claimant's evaluation, Claimant would be so limited in her ability to use her left hand and arm that it would be very difficult for her to even get ready for work.

40. Ms. McKenna ultimately concluded that she agreed with Dr. Green's restrictions in his March 21, 2013 report, and opined that Claimant would not be able to sustain any job in a manner that an employer would be able or willing to tolerate.

41. Doris Shriver evaluated the Claimant on October 1, 2009. Based on the restrictions Dr. Green had imposed on June 9, 2009, and on other factors, Ms. Shriver opined that Claimant was unable to work in any capacity.

42. Ms. Shriver evaluated the Claimant again on April 29, 2013. During the hearing, Ms. Shriver testified that she had reviewed the medical records from Dr. Green, Dr. Cambe, Dr. Olsen, as well as the Starting Point evaluation dated February 16, 2013. Based on the review of these medical records, it was Ms. Shriver's opinion that she believed Claimant was doing slightly worse than how Claimant presented during the October 2009 evaluation. Ms. Shriver disagreed with Dr. Green's restrictions in his March 21, 2013 report.

43. The video surveillance taken of the Claimant did not impact Ms. Shriver's opinions. Ms. Shriver pointed out that the video surveillance merely represents a "snapshot" of Claimant's life on a particular day and should not be used as a measure of potential work performance.

44. Dr. Nicholas Olsen issued a report dated September 20, 2012, and another report dated December 11, 2012. In the September 20, 2012 report, Dr. Olsen documents reviewing video surveillance as part of his overall evaluation of Claimant. Dr. Olsen documented his observations in his report dated December 11, 2012. Dr. Olsen opined that Claimant's current permanent restrictions should be: 40 pound maximum lifting limit and a 25 pound repetitive lifting limit. No limits on her ability to work overhead. No limits in sitting, standing, or walking. Dr. Olsen also indicated that these would represent Claimant's minimal capability.

45. At hearing, Claimant testified as to her ongoing restrictions that she believes are attributable to this injury. Claimant testified that she does not have any "good" days, only "bad" days or "average" days. In the course of a week, she believes she has 2-3 average days a week, the rest being "bad." When she is having a "bad" day, she can barely stand or walk at all. Claimant does not believe she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any fine manipulation with her left upper extremity on a "bad" day. Claimant does not believe that she can reach above her shoulder when she is having a "bad" day.

46. On an "average" day, Claimant does not believe that she can stand more than 15 minutes before she begins to experience pain. Claimant does not believe she can walk for more than 45 minutes before she needs to discontinue that activity. Claimant does not think that she can lift more than 10 pounds on an "average" day. On an "average" day, Claimant still does not believe that she can lift overhead with her left arm. Claimant does not believe that she can push or pull at all with her left arm on an "average" day.

47. As part of her evaluations with Dr. Cambe, Claimant has completed Brief Pain Inventories over the period of time from August 9, 2010 through February 26, 2013. In the Brief Pain Inventory forms, Claimant was asked to rate how her pain interferes with the following activities: general activities, walking ability, normal work (includes both work outside the home and house work), and sleep. Claimant was asked to rate on a scale of 0 to 10 with 0 being no interference in that activity and 10 being complete interference in that activity. As these inventory forms reflect, Claimant has consistently indicated to Dr. Cambe that her pain has resulted in complete interference of general activities, walking abilities, normal work activities, and sleep.

48. During Claimant's evaluation with Dr. Olsen on September 20, 2012, Claimant also provided a description of her perceived limitations. Specifically, Ms. Deane stated the following to Dr. Olsen: She is unable to carry anything using both hands and unable to use her left hand. With regards to yard work, Claimant attempted to plant flowers on Mother's Day, but her mother had to finish the task. At a store, Claimant pushes the cart with her right arm and waist while she rests her left arm on the cart. Claimant rarely grips with her left arm. Claimant is not able to use the left hand to turn a grocery cart.

49. In addition, during Dr. Olsen's physical examination of Claimant, Claimant was only able to demonstrate forward flexion in her left shoulder of 90 degrees and 120 degrees in her right shoulder. Claimant was unable to lift her right arm above head height and left arm above shoulder height. In her upper extremities, Claimant was only able to demonstrate 1/5 strength at wrist grip, and 2/5 at wrist flexion and extension. Dr. Olsen indicated this was for both of her upper extremities.

50. Dr. Olsen explained that on a scale of 0 to 5 with grip strength, 0 is no strength whatsoever and 5 is full strength with maximum resistance. With 1/5 grip strength, a physician can see contractibility, but there would be no range of motion initiated by the patient. With 2/5 grip strength, a patient would require some assistance to complete full range of motion. Dr. Olsen testified that he asked Claimant to squeeze his index finger with each of her hands. He could see that Claimant was trying to contract her hands but there was really no significant force.

51. Margot Burns was retained by Respondents as their vocational expert. Ms. Burns issued a report dated March 20, 2013. Based on the restrictions that Dr. Olsen had placed on Claimant in his September 20, 2012 report, Ms. Burns opined that based on these updated restrictions, Claimant would be able to return to work as a hair stylist. Additional occupational choices that Claimant would be able to perform given

Dr. Olsen's restrictions included receptionist, customer service representative, security guard, host/greeter, and movie theatre employee. As part of Ms. Burns' evaluation, labor market research was done to determine whether these positions were readily available in the Denver labor market. Based on this labor market research performed specifically for this claim, as well as labor market research that Ms. Burns continuously performs as a vocational expert, it was her opinion that positions within these occupations were readily available in the Denver labor market.

52. Ms. Burns also provided her vocational opinions based on Dr. Green's permanent restrictions identified in Dr. Green's March 21, 2013 report. Ms. Burns rendered the opinion that Claimant could perform the occupations of receptionist, greeter, or a customer service person. In some of these positions, Ms. Burns indicated that an employer may need to provide an accommodation in order to comply with Dr. Green's restrictions. However, Ms. Burns stated that it has been her experience that nearly every employer will accommodate a person if that person is still able to perform the essential functions of the job. For instance, if a person is taking tickets, that person could perform the job sitting on a stool, or standing. Consequently, as long as the restrictions do not change the scope of the job or the essential functions of the job, employers are consistently willing to accommodate those restrictions.

53. Doris Shriver also performed an evaluation of Claimant and issued an updated report dated April 29, 2013. Ms. Shriver did not meet with Claimant for this updated evaluation, but she did review the Starting Point evaluation, and had a conversation with the Claimant about the surveillance videos. Ms. Shriver testified that the Starting Point evaluation was consistent with the initial evaluation she conducted in 2009.

54. Ms. Shriver opined that Claimant is unable to work for a full eight-hour work day. She also testified that Claimant is unable to work three to four hours per day consistently. Ms. Shriver also testified that some employers may allow flex time, but no employer will consistently allow an employee to arrive late, choose a schedule, lie down or leave if the employee is unable to continue working. Ms. Shriver ultimately opined that Claimant continues to remain unemployable.

55. As noted above, Ms. Shriver disagreed with the restrictions that Dr. Green provided for Claimant in his March 21, 2013 report. However, Ms. Shriver agreed that Claimant would be employable if Dr. Olsen's restrictions in his September 20, 2012 medical report were accurate.

56. The ALJ finds that Claimant is likely present herself to treatment providers and evaluators as more disabled than she actually is; however, the video surveillance does not demonstrate that Dr. Olsen's restrictions are appropriate. The video surveillance shows short snapshots of Claimant's life, and nothing in the videos demonstrates that Claimant should have no limits on her ability to work overhead or no limits in sitting, standing, or walking. The restrictions imposed by Dr. Green on March 21, 2013 are the most appropriate. He reviewed the video surveillance as well as

additional medical reports when he provided the updated work restrictions making his opinion well-informed.

57. Based on the restrictions issued by Dr. Green on March 21, 2013, both Ms. McKenna and Ms. Shriver have opined, and the ALJ agrees, that Claimant cannot sustain employment. Ms. Burns' opinion to the contrary is not persuasive. In addition, Dr. Cambe consistently evaluates the Claimant and he has opined that Dr. Green's initial restrictions from 2009 are most appropriate. Under either set of restrictions, the ALJ finds that Respondents have failed to prove that Claimant has engaged in activities that would indicate she can return to employment.

Penalty Claims

58. Following ALJ Cannici's February 10, 2010 Order, Respondents filed a Final Admission of Liability on May 5, 2010.

59. In a Notice of Award dated October 1, 2011, the Social Security Administration notified Claimant that she had received an award of Social Security disability benefits. Specifically, Claimant was determined to be entitled to permanent total disability benefits beginning July 2009 and ongoing. Claimant's monthly benefit amount equaled $1,314.00. Because of the retroactive award of Social Security disability benefits, Claimant had been overpaid permanent total disability benefits in the amount of $21,789.96.

60. Respondents filed a Final Admission of Liability on April 17, 2012. In that Final Admission of Liability, Respondents stated the following:

> Per the attached Social Security disability award dated October 1, 2011, Claimant began receiving Social Security disability benefits in the amount of $1,314 per week effective July 1, 2009. Respondents shall, prospectively, take the statutorily allowed Social Security disability offset of $151.62 per week. In addition, because of Claimant's award of Social Security disability benefits is retroactive to July 1, 2009, Claimant has been overpaid $21,789.96. By agreement of Claimant through counsel, in counsel for Claimant's letter dated January 23, 2012, Claimant is agreeable to allowing Respondents to taking an additional $75.81 per week to recoup the overpayment. Consequently, the total offset that Respondents will take against Claimant's permanent total disability award is $227.43.

As a result, beginning February 6, 2012, Claimant was receiving a weekly PTD rate of $15.87. The Claimant did not object to this Final Admission of Liability.

61. At hearing, John Messner, the adjuster that filed the April 17, 2012 Final Admission of Liability, stated that he had a copy of the January 23, 2012 letter from counsel for Claimant that was referenced in the Final Admission of Liability. At hearing,

Claimant testified that she authorized the offer allowing Respondents to take the offset of $151.62 per week and the additional amount of $75.81 per week consistent with the January 23, 2012 letter from her counsel.

62. Claimant, in her Response to Application for Hearing dated May 16, 2013, identified the following as the penalty claim that she was alleging against Respondents concerning adjustment of payment of her permanent total disability. Penalties pursuant to C.R.S. Section 8-43-304 for failing to pay PTD benefits as ordered by ALJ Cannici in an Order dated February 1, 2010 (penalty dates from February 5, 2012 ongoing or August 15, 2012 ongoing) (the amount of PTD benefits were reduced in February 2012 and were stopped in August 2012 in violation of the ALJ's Order dated February 1, 2010). Penalties pursuant to C.R.S. Section 8-43-304 for failing to comply with Rule 5-8 regarding permanent total disability benefits (penalties date from August 15, 2012 ongoing – Respondents terminated PTD benefits without a hearing in August 2012 in violation of Rule 5-8).

63. The Claimant failed to prove that the reduction in PTD in February 2012 was inappropriate under the circumstances. This is especially true given that Claimant failed to notify the Insurer about the reduction until she filed a response to an application for hearing alleging penalties in February 2013. It is apparent that the Claimant expected the reduced amount and only complained about it once the Respondents alleged that she committed fraud by filing this workers' compensation claim. She also never objected to the April 17, 2012 Final Admission of Liability.

64. The Claimant testified that the Respondents ceased all PTD payments in August 2012. The payment log reflects a gap in PTD payments from August 20, 2012 through February 7, 2013. If payments are made every two weeks, payment would have been due on September 3, 2012, subjecting the Respondents to penalties for 157 days.

65. The Claimant admitted that she has been receiving PTD checks subsequent to February 2013 in the amount of $31.74 every two weeks.

66. The Respondents offered no explanation for the failure to timely issue PTD payments to the Claimant for approximately six months. In a claim file note dated February 5, 2013, a notation was made that PTD had not been paid since August and that 20 weeks was owed to the Claimant. The adjuster made an additional note about claim reserves, but did not state that the failure to confirm reserves was the reason for the failure to pay the PTD. In any event, the Respondents admitted, through that claims file notation, that they did not pay PTD for 20 weeks.

67. Claimant failed to notify the Respondents that she had not received PTD checks until she filed a response to an application for hearing on February 4, 2013. Claimant offered no explanation for the delay.

68. In a Prehearing Conference Order from PALJ McBride dated June 20, 2013, Claimant was allowed to add the issue of penalties for hearing pursuant to C.R.S.

Section 8-43-304 for failure to pay medical benefits consistent with the fee schedule in W.C.R.P. Rule 18. At the commencement of the hearing, Respondents confirmed that the penalty that Claimant was requesting was for improper fee scheduling of certain bills as opposed to non-payment of certain bills from Dr. Bennett.

69. Jody Wasserman is the billing and collection manager for Dr. Bennett. In a letter dated June 11, 2013 from Ms. Wasserman to counsel for Claimant, Ms. Wasserman attached a spreadsheet reflecting how certain bills for certain dates of service were either not paid or, in her opinion, were not paid pursuant to the fee schedule.

70. On May 3, 2010, Dr. Bennett's office billed the Insurer for a date of service of April 28, 2010. The Insurer paid only $429.29 on June 1, 2010. Ms. Wasserman initially testified that Dr. Bennett's office did not receive the rest of the payment until August 3, 2013. She later testified that the Insurer or third party administrator paid all outstanding bills by July 1, 2013.

71. It is not abundantly clear from the record that the basis for the underpayment was due improper fee scheduling. The April 28, 2010 date of service involved a right sided radiofrequency procedure, but Claimant offered no explanation concerning how that procedure should have been fee scheduled other than Ms. Wasserman's testimony that Respondents owed more than $429.29 for performing the procedure.

72. In Ms. Wasserman's letter to counsel for Claimant dated June 11, 2013, Ms. Wasserman stated that she had recently completed an audit of Claimant's claims. Ms. Wasserman testified that she did not complete the audit for determining whether the remaining bills were properly fee scheduled until sometime in June 2013. Ms. Wasserman testified that prior to performing this audit, she was unaware that Dr. Bennett's medical bills for dates of service referenced in her spreadsheet were improperly fee scheduled. Ms. Wasserman confirmed that as of July 1, 2013, Dr. Bennett's bills had been paid in full. Ms. Wasserman also confirmed that once the third party administrator was notified of the billing problems, she received 16 checks within a reasonable period of time which cleared up the outstanding accounts.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

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

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

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

Waiver

4. The Claimant asserts that Respondents waived their right to seek reopening of this claim because Respondents filed two final admissions of liability admitting for permanent total disability benefits in 2012, which was after the alleged fraud first surfaced and after the Respondents had taken surveillance video of the Claimant. The ALJ disagrees that the doctrine of waiver applies under these circumstances. Under § 8-43-303(1), C.R.S., a party may file a petition to reopen on the ground of fraud at anytime within six years after the date of injury. In addition, when a claimant has been determined to permanently and totally disabled, the award may be reopened at any time to determine if the claimant has returned to employment or has participated in activities which show that the claimant has the ability to return to employment. Section 8-43-303(3), C.R.S. The ALJ concludes that filing admissions of liability concerning The filing of a final admission of liability merely for the purpose of claiming an offset does not constitute waiver.

Reopening - Fraud

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

> At any time within six years after the date of injury, the director or an administrative law judge may … review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

6. In this case, the Respondent bears the burden of Claimant shoulders the burden of proving by a preponderance of the evidence the Claimant fraudulently induced the filing of an admission of liability for an injury the Respondents allege

occurred outside the course and scope of Claimant's employment with the Employer. Section 8-43-201, C.R.S. The Respondents have failed to prove that Claimant fraudulently induced the filing of a general admission of liability when she initially filed this claim in August 2005. The evidence Respondents rely upon lacks credibility and is not persuasive. The motivation of Claimant's former husband, Herman Armenta, is highly questionable. Mr. Armenta's testimony that he was not in fact the person who notified the Division of Workers' Compensation lacks credibility in light of the other evidence to the contrary. The ALJ also does not believe the testimony of Martha Armenta. She appeared confused.

Reopening - Ability to Work

7. Cases in which a claimant is determined to be permanently and totally disabled may be reopened to determine if a claimant has returned to employment or if the claimant has participated in activities which indicate the claimant has the ability to return to employment. If either circumstance is proven, claimant's permanent total disability award shall cease. Section 8-43-303(3), C.R.S. Respondent bears the burden of proof to establish that Claimant has engaged in activities which would indicate that she has the ability to return to employment.

8. Respondents failed to meet their burden of proof. The Starting Point evaluation, the OT Resources evaluation from 2009, Dr. Green's restrictions from 2009, and the functional capacity evaluation done by Shari Barta in 2009 are all relatively consistent with regards to Claimant's functional ability. Dr. Cambe still believes the 2009 restrictions by Dr. Green are appropriate. In March 2013, Dr. Green altered the weight restriction and the amount of time Claimant can work, but this alteration was still highly inconsistent with the work restrictions proposed by Dr. Olsen. Respondents' own vocational expert, Margot Burns, testified that an employer would have to modify a job position to fit within Dr. Green's 2013 restrictions. As found, such modification means that jobs are not available on the open labor market. Doris Shriver persuasively testified that employers would not modify a position to fit Claimant's restrictions. Dr. Olsen opined that Claimant can engage in activities that would enable Claimant to work; however, no persuasive evidence supported Dr. Olsen's opinions regarding appropriate restrictions or that Claimant can engage in such activities on a consistent basis in work environment.

9. The three-day evaluation done at Starting Point is persuasive as is the report of treating physician Dr. Cambe who adopted this report. Dr. Cambe is the only physician who is seeing Claimant on a regular basis at this point. Given that fact, his opinion that Claimant's condition has not substantially changed is highly persuasive.

Penalties

10. Section 8-43-304, C.R.S. **(2011)**, governs when penalties may be imposed in a workers' compensation matter and provides in relevant part, that any employer or insurer:

> who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey and lawful order…, shall be subject to … a fine of not more than **one thousand** dollars per day for each such offense.

First, it must be determined whether a party has violated any provision of the Workers' Compensation Act or an Order. If a violation is found, it must then be determined whether the violator acted reasonably. §8-43-304, C.R.S.; *see also Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). In this case, the Claimant seeks penalties for three reasons: Respondents' failure to pay PTD to the Claimant when owed; unilateral reduction of PTD payments; and failure to properly pay Dr. Bennett's bills consistent with the DOWC fee schedule.

11. As found above, the ALJ declines to impose penalties for the reduction in the PTD amount which occurred in January 2012. It is apparent the Claimant anticipated the reduction based on her agreement to have her payments reduced to repay an overpayment. She made no complaints about the reduction until well after it had begun. As such, the Claimant has not proven that penalties should be imposed against the Respondents for issuing a reduced PTD check starting in January 2012.

12. The Respondents admittedly failed to pay PTD to Claimant when owed over a period of 20 weeks which totaled $317.40. As such, penalties are appropriate. After considering the factors set forth in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), the ALJ imposes a penalty of $50.00 per day for a period of 157 days (September 3, 2012 through February 7, 2013) for a total penalty of $7,850.00. The Claimant offered no testimony that the failure to receive the PTD payments presented a hardship for her, and she failed to even notify the Respondents that she was not receiving the payments until her attorney filed a response to an application for hearing in February 2013. Respondents offered no credible explanation about why the payments were not made. Yet, they cured as soon as they were notified. As such, a minimal penalty is warranted.

13. Regarding Claimant's claim of penalties for Respondents' failure to pay Dr. Bennett's bill consistent with the fee schedule, the ALJ declines to impose penalties. Ms. Wasserman believed the underpayment was due to inappropriate fee scheduling, but no persuasive evidence was offered to show how the procedure should have been billed. The Claimant made no specific reference to WCRP Rule 18 and which procedure applies to this penalty claim. Although the ALJ has no reason to doubt the veracity of Ms. Wasserman's testimony, she simply did not make it clear as to why she felt that the Respondents improperly fee scheduled the April 28, 2010 procedure Claimant underwent. Thus, Claimant's claim for penalties on that basis is denied.

Remaining Issues

14. In light of the findings and conclusions made herein concerning the issue of waiver, Claimant's claim for attorney's fees and costs is denied. The Respondents did not file applications for hearing on issues that were not ripe. In addition, there is insufficient evidence in the record to support Claimant's claim for costs pursuant to §8-42-101(5), C.R.S. The issue of overpayment is also moot.

ORDER

It is therefore ordered that:

1. The Respondents' petition to reopen based on fraud is denied and dismissed.

2. The Respondents' petition to reopen based on Claimant's ability to return to employment is denied and dismissed.

3. Claimant is entitled to ongoing PTD payments consistent with the April 17, 2012 Final Admission of Liability.

4. Claimant's claim for penalties concerning the reduction in PTD beginning in February 2012 is denied and dismissed.

5. Claimant's claim for penalties concerning the failure of Respondents to pay PTD for 157 days is GRANTED. Respondents shall pay penalties in the amount of $7,850.00 to Claimant. None of the penalty shall be apportioned to the Subsequent Injury Fund.

6. Claimant's claim for penalties concerning the alleged failure of Respondents to properly fee schedule the procedure Dr. Bennett performed on April 28, 2010 is denied and dismissed.

7. Claimant's claim for attorney's fees and costs is denied and dismissed.

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

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

DATED: February 4, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

The issues presented for determination are whether this workers' compensation claim has remained open, closed, or whether it has been re-opened; whether the Claimant is entitled to additional permanent partial disability (PPD) benefits; and whether penalties should be imposed against the Claimant for his failure to comply with the June 25, 2013 and July 10, 2013 orders of PALJ Purdie.

RESPONDENTS' MOTION TO STRIKE

The Respondents submitted a position statement which addressed both claim closure and penalties. The Claimant's position statement addressed only the issue of whether the claim was open. The Claimant then amended his position statement to address the issue of penalties which prompted the Respondents to file a motion to strike the amended position statement.

During the hearing on May 16, 2014, the ALJ determined that she would initially address the issue of whether the claim remained open or whether the Claimant has proven his claim should be re-opened if, in fact, the claim had closed. If it was determined that the claim was open and that Claimant properly obtained a Division Independent Medical Examination (DIME), the ALJ would leave the record open for the submission of additional evidence and position statements on whether the Respondents had overcome the DIME opinions regarding permanent impairment. The issue of penalties was largely dependent on the outcome of the initial order regarding whether this claim is open, and after listening to the recording of the hearing, it was not abundantly clear whether the parties should brief the penalties issue for the initial order. As such, the Respondents' Motion to Strike is DENIED. The Claimant's amended position statement is hereby accepted.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. The Claimant suffered an admitted injury to his back on April 8, 2005. His authorized treating physician determined that Claimant reached maximum medical improvement (MMI) on February 28, 2006 with 5% whole person impairment.

2. The Claimant saw Dr. John Aschberger for a Division Independent Medical Examination (DIME) on June 29, 2006. Dr. Aschberger concurred with the date of MMI and the impairment rating.

3. Claimant filed a petition to reopen on July 26, 2007. The claim was voluntarily reopened pursuant to a stipulation dated December 7, 2007. The Claimant

had additional treatment and he was once again placed at MMI as of May 17, 2007 with no additional impairment.

4. Claimant returned to Dr. Aschberger for a follow-up DIME on January 30, 2008 where he was again determined to be at MMI with no additional impairment to his lumbar spine.

5. The Respondents filed an Amended Final Admission on March 27, 2008 which admitted for the PPD, but did not admit for maintenance medical care. The date of MMI remained February 28, 2006.

6. The Claimant then attempted to re-open his claim again in March 2011. At the same time, Claimant also alleged a new injury to his lumbar spine arising on July 27, 2010 (W.C. No. 4-856-179).

7. In order to resolve the disputes relating to Claimant's March 28, 2011 petition to reopen and the new claim for benefits, the parties entered into a stipulation, approved on January 5, 2012, with the following relevant language.

> The parties stipulate that claimant filed a timely Petition to Reopen the April 8, 2005 claim under §8-43-303(1). The parties stipulate and agree that Claimant will continue to receive reasonable, necessary and related medical care to maintain maximum medical improvement for the 2005 claim by way of the authorized treating physician, Dr. Cathy Smith.
>
> "The parties stipulate and agree that the current medical evidence does not support a new injury to the lumbar spine on July 27, 2010. Claimant agrees to withdraw W.C. number 4-856-179 with a date of injury of July 27, 2010 with prejudice. The parties agree that the claim pertaining to the listed date of injury of July 27, 2010 shall only be reopened on the grounds of fraud or mutual mistake of material fact. All other issues are hereby reserved."

8. Claimant withdrew his Application for Hearing on the issue of reopening before approval of the stipulation on December 2, 2011.

9. The Respondents did not file an amended final admission at that time, and were not required to do so.

10. Dr. Smith discharged the Claimant from care on November 12, 2012 because he did not want additional injections. On November 12, 2012, Dr. Smith determined Claimant had reached MMI on February 28, 2006, and that his impairment rating remained the same at 5% percent whole person.

11. The Claimant then filed an application for hearing on July 23, 2012 seeking an increase in his permanent impairment rating. This application was not accompanied by a Petition to Reopen. As an affirmative defense, in the Response to Application for Hearing, Respondents asserted that a Petition to Reopen was required. Hearing on Claimant's July 23, 2012 Application was held on December 7, 2012 before ALJ Broniak.

12. At the December 7, 2012 hearing, the issue of whether the claim had ever been reopend arose and the ALJ heard arguments from both parties. Claimant took the position that this claim was opened or re-opened by virtue of the December 2011 stipulation which admitted for benefits that had previously been denied by the March 2008 final admission of liability. Claimant believed that the stipulation essentially reopened the claim for all issues including permanent partial disability. It was Respondents' position that the claim remained closed pursuant to the the March 27, 2008 Final Admission of Liability.

13. At hearing, the ALJ indicated that she might be unable to decide the issue of whether Claimant was entitled to additional PPD benefits without a determination of whether the claim was reopened. Claimant was unwilling to go forward with the issue of reopening at the time of hearing, but was willing to go forward on the issue of PPD benefits. Because Respondents had multiple witnesses in attendance, including an IME physician, the parties agreed to go forward on the issue of whether Claimant's low back condition had worsened sufficent to warrant an increase in permanent partial disability benefits. The ALJ agreed to go forward with a hearing on this issue and postponed ruling on whether reopening was required. Both parties submitted position statements on this issue.

14. After a lengthy discussion concerning the issues for the December 7 hearing, the parties eventually agreed that the undersigned ALJ could determine whether the Claimant was entitled to an increase in his permanent impairment rating.

15. Although the parties had agreed on the issue to being litigated and based their position statement on same, ALJ Broniak entered an order on February 8, 2013, and ultimately found she lacked jurisdiction to issue a ruling on claimant's permanent impairment. In her Findings of Fact Conclusions of Law and Order ALJ Broniak stated:

> "The Claimant apparently disagrees with the ATP's determination of permanent impairment, which requires the Claimant to follow the procedures set forth in §§ 8-42-107(8)(c) and 8-42-107.2, C.R.S. Because the Claimant has not followed the applicable procedure to challenge the ATP's determinations, the Judge lacks the authority to enter an order modifying the previously admitted PPD award."

16. Following ALJ Broniak's ruling, Claimant filed an Application for a Division IME (DIME) and a DIME was scheduled with Dr. Brian Shea for July 2, 2013.

17. Respondents sought to strike Claimant's DIME by filing a Motion to Strike with the Division of Workers' Compensation. In their Motion to Strike, Respondents

argued that the most recent final admission of liability was filed by Respondents on March 27, 2008. Because Claimant did not request a DIME within thirty days of the filing of this admission, Claimant was procedurally barred from requesting a DIME.

18. On June 25, 2013 by ALJ Purdie granted the Respondents' Motion to Strike the Application for a Division and IME and noted that Claimant failed to file a response to the Motion. PALJ Purdie ordered that the DIME shall be vacated.

19. On July 2, 2013, Claimant filed a Motion for Reconsideration Regarding Claimant's Application for a Division IME. Claimant asserted that he had filed an objection to the motion to strike and argued that he was entitled to undergo a DIME. ALJ Purdie denied the Motion for Reconsideration on July 10, 2013. She stated, "paragraph 2 of the parties' December 22, 2011 stipulation affirms that claimant was at MMI as of that date (or earlier) and was receiving maintenance medical benefits. Claimant abandoned the petition to reopen by canceling the hearing. The claim remains closed except for maintenance medical benefits."

20. Although the DIME had been vacated by ALJ Purdie, Claimant went forward with the evaluation which was scheduled for July 2, 2013. Dr. Shea issued his report on or about July 10, 2013.

21. Respondents filed an Application for Hearing on July 26, 2013 in response to the DIME report endorsing PPD benefits, overcoming of the DIME if necessary, that a petition to reopen is necessary, and penalties for claimant's failure to comply with the orders of ALJ Purdie. Claimant's response endorsed PPD benefits, issue preclusion, and "appeal of PALJ Purdie's pre-hearing Order dated July 10, 2013."

22. Respondents requested a prehearing conference in order to bifurcate the issues for hearing. On October 24, 2013 ALJ Goldstein issued a prehearing conference order granting Respondents' motion to bifurcate issues. ALJ Goldstein held: 1) Respondents' motion to bifurcate the issues of PPD and penalties from those to be adjudicated at the November 8, 2013 hearing is granted, and 2) the bifurcated issues are preserved for future determination depending on the resolution of the procedural issues. ALJ Goldstein's order allowed the parties to address procedural issues, whether the claim had been reopened and whether respondents would be required to challenge or admit to the DIME physician's rating.

23. The parties agreed that a hearing was not necessary on the first set of issues bifurcated by ALJ Goldstein and submitted a joint exhibit packet and position statements to ALJ Cain on November 25, 2013. In his December 12, 2013 order ALJ Cain found: 1) the claim for benefits was not reopened by the stipulation of the parties dated December 22, 2011; 2) the order of ALJ Broniak dated February 8, 2013 did not determine that the claim was reopened, and even if it had, ALJ Broniak's order had no preclusive or determinative effect with respect to the issues addressed in ALJ Cain's order because ALJ Broniak's order was not a final order on the merits, and 3) the claim for the April 2005 injury remains closed pursuant to the Final Admission of Liability on March 27, 2008.

24. Neither party appealed ALJ Cain's order.

25. With the procedural issues resolved by ALJ Cain's order and a determination that the claim was not reopened, according to ALJ Goldstein's prehearing conference order and the original Application and Response, the remaining issues are PPD benefits and penalties.

26. In order to set this matter for hearing on the remaining issues Respondents filed an Application for Hearing on January 2, 2014 endorsing the issue of penalties and indicating the Application for Hearing was filed in accordance with ALJ Goldstein's prehearing conference order. Claimant filed a Response to Application for Hearing and an Amended Response to Application for hearing on January 27, 2014 endorsing the issues of medical benefits, authorized provider, petition to reopen, permanent partial benefits, worsening of condition and maintenance medical care. As of the date of the hearing in this matter, the Claimant has not filed a petition to reopen the claim as required by WCRP 7-3.

27. As of the date of the hearing in this matter, there is no evidence that Claimant has filed a petition to reopen with the Division since March 2011.

28. At the May 15, 2014 hearing, argument was heard from both parties regarding whether the claim had been reopened, the conclusive effect of ALJ Cain's order, medical benefits and penalties. Exhibits were submitted by both parties and no witnesses testified.

29. Based on the evidence presented and the prior orders entered in this claim, the ALJ finds that Claimant's claim is not open, has never been re-opened since March 28, 2008, and remains closed as to all issues except for the maintenance medical care pursuant to the December 2011 stipulation of the parties. The order approving the stipulation specifically states that Claimant remains at maximum medical improvement. The only modification made to this claim's status was the Respondents' agreement to provide maintenance medical treatment.

30. Because Claimant's claim is closed, and he has not properly filed a petition to reopen, Claimant cannot prove entitlement to an increase in his PPD award. That issue has been closed based on the final admission filed on March 28, 2008.

31. The ALJ finds that Claimant did not violate PALJ Purdie's June 25, 2013 order because he filed a Motion for Reconsideration of that order which was not ripe for a decision until after the DIME appointment had occurred. Claimant acted reasonably when proceeding with the DIME appointment given the circumstances. The Claimant also did not violate the July 10, 2013 order entered by PALJ Purdie. As a practical matter, he could not have violated it by proceeding to a July 2, 2013 DIME appointment as the DIME appointment preceded the order. As such, no penalty shall be imposed against the Claimant.

CONCLUSIONS OF LAW

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

2. The Claimant asserts that his claim was reopened by virtue of the parties' December 2011 stipulation. As found by ALJ Cain, the stipulation did not indeed reopen the claim in its entire

3. The "law of the case" doctrine is a discretionary rule, which provides that legal issues that have been litigated and decided ordinarily should not be relitigated in the same proceeding. *Jiron v. Douglas County School District RE 1*, W.C. No. 4-636-107 (ICAO November 4, 2009). Application of the rule of "law of the case" is discretionary with the ALJ. It presents considerations about the binding effect of judicial decisions similar to collateral estoppel and usually is applied to preclude relitigation of an issue already decided unless manifest injustice would result. Phillips & Phillips, *Colorado Workers' Compensation Practice and Procedure* § 13.32 (West 2010) citing *Verzuh v. Rouse*, 660 P.2d 1301 (Colo. App. 1982).

4. ALJ Cain previously determined that this claim remains closed pursuant to the Final Admission of Liability dated March 27, 2008. ALJ Cain's decision contained a comprehensive analysis of December 2011 stipulation, and its effect on this claim's status. ALJ Cain also reviewed the decision entered on February 8, 2013 by the undersigned ALJ, and determined that the decision assumed, but did not decide, that the claim was reopened for the purpose determining whether the Claimant was entitled to additional PPD. The undersigned ALJ agrees with ALJ Cain's interpretation of her decision. Here, the law of the case is that this workers' compensation claim is closed. The ALJ perceives no basis to disturb the prior rulings, in including her own, none of which determined that this claim is open or that a petition to reopen is pending.

5. After a careful and exhaustive review of all of the evidence in this case, including listening to the hearing recordings, the ALJ concludes that this claim remains closed, and no petition to reopen is pending. As such, the Claimant cannot, as a matter of law, be entitled to pursue an increase in his PPD award at this time.

6. Section 8-43-304, C.R.S. (2013), governs when penalties may be imposed in a workers' compensation matter and provides in relevant part, that any employer or insurer:

> who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey and lawful order…, shall be subject to … a fine of not more than one thousand dollars

per day for each such offense.

7. First, it must be determined whether a party has violated any provision of the Workers' Compensation Act or an Order. If a violation is found, it must then be determined whether the violator acted reasonably. Section 8-43-304, C.R.S.; *see also Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). As found, the Claimant did not violate the June 25, 2013 order of PALJ Purdie. Even if it could be determined that he did violate the order, he acted reasonably under the circumstances. The Claimant also did not violate the July 10, 2013 order entered by PALJ Purdie. As a practical matter, he could not have violated it by proceeding to a July 2, 2013 DIME appointment as the DIME appointment preceded the order. As such, no penalty shall be imposed against the Claimant.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is closed, and has been pursuant to the March 28, 2008 final admission of liability. Thus, as a matter of law, the issue of whether Claimant should receive an increase in his PPD award cannot be determined at this time.

2. No penalties shall be imposed against the Claimant for his alleged violations of PALJ Purdie's orders.

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

DATED: February 5, 2015

/s/ Laura A. Broniak

_____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-692-431-04

ISSUE

Whether Claimant's request for a wheel-chair accessible roll-in shower, and the accompanying home bathroom modifications, are reasonable, necessary, and related to Claimant's industrial injury.

Claimant's Work Injury

1. Claimant is a 67 year-old man who lives in Yakima, Washington. He was injured on a moving walkway at Denver International Airport on June 16, 2006, and as a consequence, was diagnosed with severe spinal stenosis at C4-5, with impingement on the spinal cord.

2. Claimant subsequently underwent an anterior cervical discectomy and fusion of C2 through C5, and on October 19, 2007, was diagnosed with quadriplegia and quadriparesis, C5-C7.

3. As a result of his admitted injury, claimant is permanently and totally disabled, and has been almost entirely confined to a wheelchair for approximately the past six years. When Claimant has attempted to walk with a walker, he has suffered numerous falls due to weakness of his legs, which have greatly aggravated an orthopedic condition discussed below.

Claimant's Knee Injuries and Surgeries

4. Claimant has suffered from degenerative arthritis in his right knee since at least 1996. In 2010 he had total knee replacement surgery, and in 2009, 2013, and 2014 he underwent right knee repairs.

5. Claimant never sought treatment for his knee condition under his workers' compensation claim. However, Claimant's spinal injury is connected to his knee issues. His spinal injury has led to leg weakness and to Claimant's inability to control his legs. The leg weakness and lack of control in turn have resulted in Claimant falling multiple times, exacerbating his knee condition.

6. After his 2014 knee surgery, Claimant suffered a bad fall when using a walker, and as a result of that fall he tore anterior medial ligaments.

7. Dr. John S. Place, M.D., the surgeon who performed Claimant's knee surgery in 2013, wrote that Claimant "has balance issues related to his cervical spine disease . . . [and] chronic gait abnormality associated with cervical myelopathy."

8. Mr. Darren Joffs has been a physical therapist for 17 years and worked as Claimant's physical therapist following his 2013 knee surgery. He was admitted as an expert at hearing.

9. Mr. Joffs credibly testified that Claimant used the "Nautilus" leg press machine during physical therapy and was able to significantly and objectively increase his baseline leg strength, but that there was no corresponding increase in leg functionality.

10. Mr. Joffs further credibly testified that it was not often he saw someone increase their leg strength like Claimant but not show any improvement walking or standing.

11. Mr. Joffs wrote a report concerning Claimant in 2014 in which he made the following conclusions, which are found as facts here:

a. to try and separate this patient's knee surgery needs from his cervical accident needs is futile. Any attempt to say that the issues were pre-existing and unrelated would be inaccurate.

b. It is also highly likely that the change in his knee requiring the initial knee replacement was due to the manner in which he walked over time following his cervical injury….this is evidenced by the gait he used in therapy which impairments can be directly related to his initial spinal injury causing lower extremity weakness.

c. Finally, the most recent repair of the knee joint in 11/2013 was again due to his inability to sustain a contraction in his legs and prevent his knees from buckling and he fell. It is impossible to separate the injury from his fall that caused the spinal issues from the sequelae that result in his current limitations.

12. Although Claimant did have a pre-existing knee condition, his work-related spinal injury resulted in leg weakness, an inability to control his legs, leg buckling and multiple falls, and ultimately in Claimant's confinement to a wheelchair.

Claimant's Bathroom and Safety Concerns

13. Claimant's home in Yakima has two restrooms, one in the master bedroom and one off the hallway, which he refers to as the hall or guest bathroom.

14. Claimant does not use the bathroom in the master bedroom because the space is too small for him to maneuver in and out of the shower safely.

15. When Claimant has attempted to use the master bathroom in the past, he fell. Claimant therefore only uses the hall bath, which measures six feet wide and ten feet deep. At the far end of this bathroom is the bathtub.

16. In order to bathe, Claimant wheels his wheelchair into the hall bathroom until he is one foot away from the bathtub. He is unable to rotate the wheelchair to be parallel to the bathtub because the toilet is in the way. Once perpendicular to the tub, Claimant holds onto grab bars and slowly lifts himself from his wheelchair onto a "transfer bench" that sits perpendicular on the bathtub.

17. The transfer bench is 40" long by 12" wide, and there are approximately 18-20" of the bench that hang outside of the tub. Claimant lifts his legs one at a time into the tub, then tries to secure the shower curtain in the tub.

18. Claimant uses a handheld shower wand in order to wash himself. The shower curtain is ineffective at keeping the water off of the bathroom floor because of the opening that is needed for the portion of the transfer bench that hangs out into the bathroom. Because of this opening, there are pools of free standing water on the bathroom floor after Claimant bathes.

19. The pools of free standing water on the floor present a serious slip and fall safety hazard to Claimant when he is trying to get back into his wheelchair and out of the bathroom after showering.

20. Claimant is able to use this bathroom to shower unassisted, and he has not slipped or fallen to date, but he is extremely worried that he will fall and become further debilitated.

21. The two bathrooms in Claimant's home are not large enough to fit him, his wheelchair, and another person to assist him should he ever fall or otherwise need assistance in the bathroom. This fact presents a serious safety hazard for Claimant.

22. Although Claimant is able at times to use a walker, there are times when he is weakened by other conditions, such as illness, and must use his wheelchair. Therefore, although Claimant and another person might be able to both fit in Claimant's bathrooms currently if he used a walker, it is necessary that the bathrooms be large enough to fit Claimant and another person for the times when Claimant is confined to his wheelchair.

<u>Prescriptions and Recommendations for a Roll-in Shower or ADA Compliant Bathroom</u>

23. Due to the risk of serious injuries in Claimant's current bathing situation, physicians and other treatment providers have prescribed or recommended that a "roll-in shower" be installed in Claimant's home.

24. A roll-in shower, as opposed to a roll-in bathtub, does not have a "lip" on the floor, and therefore, since it is flush with the floor, would allow Claimant to safely roll his wheelchair into the shower and bathe himself. He would not have to transfer out of his wheelchair onto a transfer bench and then back into his wheelchair.

25. On November 20, 2012, Dr. Bruce Kite, M.D., an occupational medicine physician, wrote a prescription for Claimant for an "ADA compliant shower."

26. On April 30, 2013, Erin See, an Advanced Registered Nurse Practitioner ("ARNP") wrote that "[Claimant's] symptoms have been constant since his date of injury . . . He needs a shower that is accessible with a wheelchair or walker as he does not have to step over anything . . . I will order an ADA bathroom with roll in shower for him."

27. On September 24, 2013, Dr. Kite wrote another prescription, this time stating "ADA bathrooms with showers and shower tub. Diagnosis: spinal cord injury."

28. On February 10, 2014, Mr. Joffs wrote "until changes are made to allow for an ADA compliant bathroom where he can easily get in and out of a tub, use the toilet, and have space for any person to assist, he will remain at a higher risk for falls and further injury."

29. On February 27, 2014, Dr. Place wrote "because of multiple spine and low extremity problems which require full time use of a wheelchair or walker I strongly advise an ADA bathroom with a roll in shower for this man."

30. On May 2, 2014, Cari J. Cowin, ARNP wrote "I am the Washington State Labor and Industries certified provider for [Claimant]. I have reviewed a recommendation dated February 10, 2014 from [Claimant's] physical therapist regarding modifications needed in his home that will allow him to safely receive adequate treatment and make his bathroom accessible using a wheelchair. I concur with the physical therapist report that indicates [Claimant] requires a wheelchair accessible, roll-in shower . . . [Claimant] is confined to a wheelchair and as part of this requires a handicap bathroom in his home to be able to take a shower and use the toilet. It is my opinion that this is industrial related and medically necessary. He would require an ADA, handicap bathroom with a roll in shower as well as grab bars installed in the shower as well as by the toilet."

31. On July 22, 2014, Dr. Daniel Kwon, M.D., wrote "I am board certified in PM&R [physical medicine and rehabilitation] and pain medicine. I have been caring for [Claimant] for about five years after his tragic accident and resultant cervical myelopathy and severe chronic pain all over his body, especially all four extremities, especially his legs. This has resulted in frequent falls that have caused multiple injuries resulting in multiple surgeries to repair these injuries. [Claimant] needs simple modifications to his bathroom to make it ADA compliant. This would be for patient safety and accommodation for his disability."

32. Claimant's request for a wheel-chair accessible roll-in shower, and the accompanying home bathroom modifications, are reasonable, necessary, and related to Claimant's industrial injury.

CONCLUSIONS OF LAW

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

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

3. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. *Id.*

4. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990).

5. The ALJ is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and weight of evidence based on an expert's knowledge, skill, experience, training and education. *See, e.g.* § 8-43-210, C.R.S.; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

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

7. "A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury."

Duncan v. Industrial Claim Appeals Office, 107 P.3d 999, 1001 (Colo. App. 2004), citing *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

8. "Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S.

9. The Colorado Court of Appeals has opined on the ramifications of section 8-42-101(1)(a) by explaining that "in order for a wheelchair to provide adequate relief, it must be usable in the claimant's residence which usually requires some modification of the residence to include the installation of ramps, widening of doorways, and modification of the kitchen, bathroom, and bedroom to accommodate the wheelchair and claimant." *Cheyenne County Nursing Home v. Industrial Claim Appeals Office of State of Colo.*, 892 P.2d 443. 444 (Colo. App. 1995).

10. The Court of Appeals concluded "the employer must make such improvements or modifications to the residence of a claimant as may be necessary to allow the claimant access to, and the use of, those portions of the residence which provide for the claimant's health and medical necessities." *Id.* at 446.

11. The ALJ is persuaded that Claimant sustained multiple falls as a result of his work injury, exacerbating his pre-existing knee conditioning, and leading to his near total confinement to a wheelchair. Claimant and Mr. Joffs were both credible about their safety concerns with Claimant's current bathrooms when they testified, and the medical records clearly supported those concerns. The Claimant has established that he is entitled to medical benefits to relieve the effects of his work injury, which the ALJ finds and concludes include a wheel-chair accessible roll-in shower, and the accompanying home bathroom modifications necessary to accommodate the roll-in shower.

ORDER

Respondents shall pay for a wheel-chair accessible roll-in shower for one of Claimant's bathrooms, and for any accompanying home bathroom modifications necessary to accommodate the roll-in shower.

DATED: February 2, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

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

ISSUE

The issue endorsed for consideration at hearing is whether Claimant proved by a preponderance of the evidence that he is entitled to an award of penalties under Section 8-43-304(1), C.R.S. for Respondent's failure to comply with the March 15, 2011, order of Administrative Law Judge (ALJ) Michael E. Harr.

FINDINGS OF FACT

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

1. In August of 2006, Employer operated an oil drilling business in the State of Colorado. Claimant worked for Employer on one of its oil rigs in Colorado as a roughneck. Claimant sustained a compensable injury while working for Employer on August 31, 2006. Claimant injured his left lower leg that resulted in a below the knee amputation and lumbar injury while in the course and scope of his employment with Employer when a loader put down some drilling pipe on railroad ties and the pipes rolled off and into him.

2. At the time of Claimant's injury, Employer failed to maintain workers' compensation insurance as required under Section 8-43-408, C.R.S., of the Act. Employer thus is non-insured.

3. On May 19, 2008, Claimant proceeded to hearing before Administrative Law Judge Margot W. Jones on the issues of compensability, medical benefits, whether Employer carried workers' compensation coverage with Pinnacol Assurance, temporary total disability (TTD) benefits and penalties for failure to maintain workers' compensation insurance under Section 8-43-408, *supra*.

4. In her Final Order of July 7, 2009, Judge Jones determined that Employer is liable for all reasonably necessary medical expenses arising out of Claimant's August 31, 2006, compensable work-related injury. Judge Jones found Claimant qualified for the maximum TTD rate of $719.74 per week. Judge Jones ordered Employer to pay TTD benefits at the rate of $1079.61 per week, after adding a 50% penalty under Section 8-43-408(1), *supra*, for Employer's failure to carry workers' compensation insurance.

5. As required under Section 8-43-408(1), *supra,* ALJ Jones also ordered Employer to pay a bond in the amount of $7480.00 with the Division of Workers' Compensation, Special Funds Unit, as the trustee.

6. On July 14, 2009, Sue Sobolik, Trustee for the Division of Workers' Compensation, Special Funds Unit, wrote a letter to Employer providing notice of nonpayment of a trust deposit or failure to file a bond as ordered by Judge Jones on behalf of the Claimant. Ms. Sobolik advised Employer to make arrangements to honor said bonds within 15 days or be subject to additional penalty sanctions under Section 8-43-408(4). Employer disregarded Ms. Sobolik's letter and failed to comply with the order of Judge Jones to pay the trust deposit or file a bond.

7. On October 22, 2010, Claimant proceeded to hearing before Administrative Law Judge Michael E. Harr on the issue of penalties pursuant to Section 8-43-408(4), *supra,* for employer's failure to file a trust deposit, post a bond, or otherwise comply with the July 7, 2009, Final Order entered by Judge Jones.

8. Following hearing on October 22, 2010, ALJ Harr entered Findings of Fact, Conclusions of Law, and Order dated March 15, 2011. Judge Harr found that Employer failed to comply with the Final Order of Judge Jones and was liable to Claimant in the amount of $11,880.00 in benefits and penalties under Section 8-43-408(4), *supra.* ALJ Harr also found that Employer is liable for payment of outstanding medical bills on behalf of Claimant. On March 15, 2011, ALJ Harr specifically ordered that the "Employer shall pay Claimant adjudicated benefits and penalties in the aggregate amount of $35,640.00.

9. The record establishes that Employer failed to comply with ALJ Harr's March 15, 2011, order. Claimant seeks an award of penalties for the failure to comply with the March 15, 2011, order of ALJ Harr. It is found that the Employer's actions constitute a knowing, willful, blatant and repeated violation of the provisions of the Colorado Workers' Compensation Act. Respondent shall be liable for a penalty under Section 8-43-304, C.R.S. in the amount of $50.00 per day from April 5, 2011, (April 5, 2011, is the date ALJ Harr's March 15, 2011, order was final) to the date of the hearing in this matter on December 12, 2014, totaling 1348 days, or $67,400, for failure to comply with ALJ Harr's March 15, 2011, order.

10. On October 6, 2014, OAC provided notice to the parties of the hearing held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided to the parties of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at the December 12, 2014, hearing. Respondent was provided notice of the status conference and the hearing at: Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. The address utilized by OAC for Respondent was provided by Claimant on his application for hearing

11. On December 8, 2014, Claimant, utilizing a Certified Process Server in Florida, personally served Respondent's registered agent, Shelley Jones, at the above referenced Fort Myers, FL address. An Affidavit from the Process Server affirms that the Respondent corporation's register agent was personally served, the following pleading:

a. the Notice of Status Conference and Notice of December 12, 2014, Hearing dated October 6, 2014 in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

b. the Motion and Order to Consolidate Claims dated October 29, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341;

c. the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

d. the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton, Rueben Perez and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795, 4-740-341 & 4-734-913; and

e. the June 3, 2009, Findings of Fact, Conclusion of Law and Order of ALJ Friend in John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-740-341.

12. Respondent did not appear, in person or through counsel, at the December 10, 2014, status conference or the December 12, 2014, hearing. As of the date of this Order, Respondent has not filed a motion, or otherwise contacted the Court.

13. It is found that, consistent with OACRP 23(B)(1), the October 6, 2014, Notice of Hearing, and other relevant pleading, including the Notice of Status Conference dated October 6, 2014, the Order of Consolidation dated October 29, 2014, and Findings of Fact, Conclusion of Law and Order of ALJ Harr dated March 15, 2011 were sent to Respondent's address at 4411 Cleveland Avenue, Fort Myers, FL 33901. This is an address maintained for Respondent by OAC and an address at which Respondent or Respondent's authorized representative was likely to receive it. It is further found that, on December 8, 2012, the Notice of December 12, 2014, Hearing dated October 6, 2014, and other relevant pleading,was in fact personally served on Respondent's authorized representative at 4411 Cleveland Avenue, Fort Myers, FL 33901. Therefore, it is found that Respondent received notice of these proceedings and this order may be entered against Respondent.

CONCLUSIONS OF LAW

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

1.A consolidated hearing was held on December 12, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341. Applications for hearing in each case were filed in which Claimant

sought penalties under Section 8-43-304, C.R.S. against Respondent for failure to comply with ALJ Harr's March 15, 2011, order. At the conclusion of the December 12, 2012, hearing, Claimant argues that he has proven by a preponderance of the evidence the Employer should pay penalties pursuant to Section 8-43-304 for failure to comply with the orders entered by Administrative Law Judge Jones on July 7, 2009, and Administrative Law Judge Michael E. Harr on March 15, 2011 and December 30, 2011.

2. It is concluded that Claimant proved by a preponderance of the evidence that he is entitled to penalties pursuant to Section 8-43-304, C.R.S. for Respondent's failure to comply with the March 15, 2011, order of ALJ Harr. The ALJ rejects Claimant's contention that he is entitled to penalties for violation of the orders of Administrative Law Judge Jones dated July 7, 2009, and Administrative Law Judge Michael E. Harr dated December 30, 2011, because Claimant did not provide notice of his intent to raise these claims.

3. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, *supra*.

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

5. Section 8-43-304(1) states, in pertinent part that,

> Any employer or insurer, or any officer of agent of either, or any employee, or agent of either, or any employee, or any other person who violates any provision or articles 40 to 47 of this title or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a find or not more than five hundred dollars per day for each such offense, seventy-five percent payable to the aggrieved party and twenty-five percent to the subsequent injury fund created in Section 8-46-101, C.R.S.

6. Employer failed to comply with the Order of ALJ Harr dated March 15, 2011. Respondent's conduct, their blatant and repeated failure to comply with prior orders as well as the provisions of Articles 40 to 47 of this Act, constitute grounds for penalties of $50.00 per day as provided under Section 8-43-304(1) from April 5, 2011, (April 5, 2011, is the date that ALJ Harr's March 15, 2011, order became final) to the date of the hearing in this matter on December 12, 2014.

7. Accordingly, Respondent shall be liable to Claimant for 1348 days of penalties at $50.00 per day totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850, shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

8. On October 6, 2014, OAC provided notice to the parties of a hearing to be held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at hearing. Respondent did not appear at the December 10, 2014, Status Conference or the December 12, 2014, Hearing.

9. Respondent was provided notice of the Status Conference and the Hearing at Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. This is the addressed maintained by OAC for Respondent. This is the same address to which the above referenced court orders were sent: the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr; and the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr. The October 6, 2014, notice of hearing, along with relevant orders, was personally served on Respondent's registered agent on December 8, 2014, in Florida at 4411 Cleveland Avenue, Fort Myers, FL 33901.

10. Therefore, it is concluded Respondent, or it's registered agent, received notice of the December 12, 2014, hearing and, other related pleading, and ALJ Harr's March 15, 2011, order. Therefore, it is concluded that, under OACRP 23, an order may be entered against Respondent.

ORDER

It is therefore ordered that:

1. Accordingly, Respondent shall be liable to Claimant for 1348 days of penalties under Section 8-43-304, C.R.S. for Respondent's failure to comply with the March 15, 2011, order of ALJ Harr. Penalties are assessed at $50.00 per day for 1348 days totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850,

shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

2. All benefits not paid when due are subject to 8% interest per annum.

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

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

DATED: February 6, 2015

DIGITAL SIGNATURE:
Margot W. Jones

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

ISSUE

The issue endorsed for consideration at hearing is whether Claimant proved by a preponderance of the evidence that he is entitled to an award of penalties under Section 8-43-304(1), C.R.S. for Respondent's failure to comply with the March 15, 2011, order of Administrative Law Judge Michael E. Harr.

FINDINGS OF FACT

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

1. Employer operated an oil drilling business where Claimant worked as a roughneck. Claimant sustained a compensable injury to his right lower leg on April 2, 2007, when a load of steel tubing shifted, fell and struck his leg.

2. Employer was non-insured for workers' compensation injuries at the time of Claimant's injury.

3. On May 14, 2009, Claimant proceeded to hearing before Administrative Law Judge Bruce C. Friend on the issues of compensability, medical benefits, average weekly wage, penalties pursuant to Section 8-43-304, C.R.S. for failure to file an Employer's First Report of Injury, penalties pursuant to Section 8-43-203(2)(a), C.R.S. for failure to timely admit or deny liability, and penalties pursuant to Section 8-43-408, C.R.S. for failure to maintain workers' compensation insurance. Employer failed to appear for hearing.

4. On June 3, 2009, Judge Friend entered his Findings of Fact, Conclusions of Law and Order concluding Claimant's claim is compensable, awarding medical benefits, and awarding penalties against Employer. As required by Section 8-43-408(1), C.R.S., Judge Friend calculated the present value of Employer's liability under Claimant Ferrara's claim and ordered Employer to file a bond or deposit the sum of $73,000.00 with the Division of Workers' Compensation, Special Funds Unit, as trustee.

5. On June 8, 2009, Sue Sobolik, Trustee for the Division of Workers' Compensation, Special Funds Unit, wrote a letter to Employer providing notice of nonpayment of a trust deposit or failure to file a bond as ordered by Judge Friend on behalf of Claimant. Ms. Sobolik advised Employer to make arrangements to honor said bonds within 15 days or be subject to additional penalty sanctions under Section 8-43-408(4). Employer disregarded Ms. Sobolik's letter and failed to comply with the order of Judge Friend to pay the trust deposit or file a bond.

6. Claimant proceeded to hearing before Administrative Law Judge Harr on October 22, 2010. ALJ Harr ruled in his Findings of Fact, Conclusions of Law and Order on March 15, 2011, that Claimant,

> …showed it more probably true than not that Employer failed to comply with the lawful order of Judge Friend. The Order of Judge Friend required Employer to pay the trust deposit or file a bond under Claimant's claim in the amount of $73,000.00. Section 8-43-408(4) authorizes the Judge to impose an additional penalty of 50% of the trust deposit or bond, plus reasonable attorney fees, against Employer for such violation. Employer thus is liable to Claimant Ferrara for an additional penalty of $36,500.00 (50% x $73,000.00), plus reasonable attorney fees. Claimant Ferrara thus proved by a preponderance of the evidence that Employer currently is liable for adjudicated benefits and penalties in the aggregate amount of $109,500.00 ($36,500.00 + $73,000.00)

7. On March 15, 2011, ALJ Harr ordered that the "Employer shall pay Claimant Ferrara adjudicated benefits and penalties in the aggregate amount of $109,500.00.

8. Employer failed to comply with the March 15, 2011, Order of ALJ Harr and pay the amounts due under the Order as a deposit or to file a bond as required by Section 8-43-408, *supra.*

9. Claimant presented evidence at the hearing herein of a June 4 2009, Findings of Fact, Conclusions of Law and Order of ALJ Friend in WC No. 4-740-341 ordering this Respondent to pay reasonably necessary and related medical benefits totaling $44,531.95 in this claim and awarding penalties against Respondent totaling $28,100.00. Respondent did not comply with the June 4, 2009, order.

10. The record establishes that the Employer failed to comply with prior Orders, and specifically, ALJ Harr's March 15, 2011, order. Claimant seeks an award of penalties for the failure to comply with the March 15, 2011, order of ALJ Harr. It is found that the Employer's actions constitute a knowing, willful, blatant and repeated violation of the provisions of the Colorado Workers' Compensation Act. Respondent shall be liable for a penalty under Section 8-43-304, C.R.S. in the amount of $50.00 per day from April 5, 2011, (April 5, 2011, is the date ALJ Harr's March 15, 2011, order was final) to the date of the hearing in this matter on December 12, 2014, totaling 1348 days, or $67,400, for failure to comply with ALJ Harr's March 15, 2011, order.

11. On October 6, 2014, OAC provided notice to the parties of the hearing held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided to the parties of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at the December 12, 2014, hearing. Respondent was provided notice of the status conference and the hearing at: Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. The address utilized by OAC for Respondent

was provided by Claimant on his application for hearing

12. On December 8, 2014, Claimant, utilizing a Certified Process Server in Florida, personally served Respondent's registered agent, Shelley Jones, at the above referenced Fort Myers, FL address. An Affidavit from the Process Server affirms that the Respondent corporation's register agent was personally served, the following pleading:

a. the Notice of Status Conference and Notice of December 12, 2014, Hearing dated October 6, 2014 in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

b. the Motion and Order to Consolidate Claims dated October 29, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341;

c. the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795;

d. the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr in Kelly Sutton, Rueben Perez and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-734-795, 4-740-341 & 4-734-913; and

e. the June 3, 2009, Findings of Fact, Conclusion of Law and Order of ALJ Friend in John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC No. 4-740-341.

13. Respondent did not appear, in person or through counsel, at the December 10, 2014, status conference or the December 12, 2014, hearing. As of the date of this Order, Respondent has not filed a motion, or otherwise contacted the Court.

14. It is found that, consistent with OACRP 23(B)(1), the October 6, 2014, Notice of Hearing, and other relevant pleading, including the Notice of Status Conference dated October 6, 2014, the Order of Consolidation dated October 29, 2014, and Findings of Fact, Conclusion of Law and Order of ALJ Harr dated March 15, 2011 were sent to Respondent's address at 4411 Cleveland Avenue, Fort Myers, FL 33901. This is an address maintained for Respondent by OAC and an address at which Respondent or Respondent's authorized representative was likely to receive it. It is further found that, on December 8, 2012, the Notice of December 12, 2014, Hearing dated October 6, 2014, and other relevant pleading,was in fact personally served on Respondent's authorized representative at 4411 Cleveland Avenue, Fort Myers, FL 33901. Therefore, it is found that Respondent received notice of these proceedings and this order may be entered against Respondent.

CONCLUSIONS OF LAW

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

1. 1.A consolidated hearing was held on December 12, 2014, in Kelly Sutton and John Ferrera v. Lags Exploration d/b/a Waterboyz International, LLC, WC Nos. 4-734-795 & 4-740-341. Applications for hearing in each case were filed in which Claimant sought penalties under Section 8-43-304, C.R.S. against Respondent for failure to comply with ALJ Harr's March 15, 2011, order. At the conclusion of the December 12, 2012, hearing, Claimant argues that he has proven by a preponderance of the evidence the Employer should pay penalties pursuant to Section 8-43-304 for failure to comply with the orders entered by Administrative Law Judge Jones on July 7, 2009, and Administrative Law Judge Michael E. Harr on March 15, 2011 and December 30, 2011.

2. It is concluded that Claimant proved by a preponderance of the evidence that he is entitled to penalties pursuant to Section 8-43-304, C.R.S. for Respondent's failure to comply with the March 15, 2011, order of ALJ Harr. The ALJ rejects Claimant's contention that he is entitled to penalties for violation of the orders of Administrative Law Judge Jones dated July 7, 2009, and Administrative Law Judge Michael E. Harr dated December 30, 2011, because Claimant did not provide notice of his intent to raise these claims.

3. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, *supra*.

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

5. Section 8-43-304(1) states, in pertinent part that,

> Any employer or insurer, or any officer of agent of either, or any employee, or agent of either, or any employee, or any other person who violates any provision or articles 40 to 47 of this title or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel or any

judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a find or not more than five hundred dollars per day for each such offense, seventy-five percent payable to the aggrieved party and twenty-five percent to the subsequent injury fund created in Section 8-46-101, C.R.S.

6. Employer failed to comply with the Order of ALJ Harr dated March 15, 2011. Respondent's conduct, their blatant and repeated failure to comply with prior orders as well as the provisions of Articles 40 to 47 of this Act, constitute grounds for penalties of $50.00 per day as provided under Section 8-43-304(1) from April 5, 2011, (April 5, 2011, is the date that ALJ Harr's March 15, 2011, order became final) to the date of the hearing in this matter on December 12, 2014.

7. Accordingly, Respondent shall be liable to Claimant for 1348 days of penalties at $50.00 per day totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850, shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

8. On October 6, 2014, OAC provided notice to the parties of a hearing to be held on December 12, 2014, in Greeley, CO at the University of Northern Colorado in the above referenced claim. Also, on October 6, 2014, notice was provided of a December 10, 2014, Status Conference at which the parties were directed to appear by phone and advise the Court whether they were ready to proceed at hearing. Respondent did not appear at the December 10, 2014, Status Conference or the December 12, 2014, Hearing.

9. Respondent was provided notice of the Status Conference and the Hearing at Lags Exploration d/b/a Waterboyz International, LLC, 4411 Cleveland Avenue, Fort Myers, FL 33901. This is the addressed maintained by OAC for Respondent. This is the same address to which the above referenced court orders were sent: the December 30, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr; and the March 15, 2011, Findings of Fact, Conclusion of Law and Order of ALJ Harr. The October 6, 2014, notice of hearing, along with relevant orders, was personally served on Respondent's registered agent on December 8, 2014, in Florida at 4411 Cleveland Avenue, Fort Myers, FL 33901.

10. Therefore, it is concluded Respondent, or it's registered agent, received notice of the December 12, 2014, hearing and, other related pleading, and ALJ Harr's March 15, 2011, order. Therefore, it is concluded that, under OACRP 23, an order may be entered against Respondent.

ORDER

It is therefore ordered that:

1. Respondent shall be liable to Claimant for 1348 days of penalties under Section 8-43-304 at the rate of $50.00 per day totaling $67,400 for failure to comply with ALJ Harr's March 15, 2011, order. Twenty five percent of the penalty, or $16,850, shall be paid to the Subsequent Injury Fund created in Section 8-46-101, C.R.S. and seventy five percent, or $50,550, shall be paid to Claimant.

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

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

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

DATED: February 6, 2015

DIGITAL SIGNATURE:
Margot W. Jones

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

ISSUES

- Do the doctrines of law of the case and/or issue preclusion prevent the respondents from litigating whether admitted for post-MMI chiropractic treatments are reasonable and necessary to relieve the effects of the injury?

- Did the claimant waive the issues of law of the case and issue preclusion by failing timely to plead them?

- Did the claimant establish by a preponderance of the evidence that ongoing chiropractic treatment constitutes reasonable and necessary post-MMI medical treatment to relieve the effects of her industrial injury?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 7 were admitted into evidence. Claimant's Exhibit 8 was admitted into evidence with the exception of pages 252 through 261 (Dr. Kesten's Deposition) which were withdrawn. Respondents' Exhibits A through G were admitted into evidence.

2. The claimant sustained an admitted low back injury on April 21, 2008.

3. The claimant testified that she had been under the care and treatment of her primary care doctor, Jeffrey Kesten, M.D., for the residual physical problems related to her low back condition and that Dr. Kesten referred her for chiropractic treatment to Kelvin Washington, D.C., for her low back in approximately January of 2013.

4. The claimant testified that she is a dental hygienist and described the work activities that she needs to perform in order to pursue her occupation. She further testified as to the number of jobs that she has had in the same or similar employment since the on the job injury and opined that without the ongoing chiropractic treatments it would be difficult for her to continue to perform her occupation.

5. On June 26, 2012 Dr. Kesten issued a report stating that the claimant had been seen on May 10, 2012 and placed at maximum medical improvement (MMI) with a 9% whole person impairment rating. However, the claimant returned to Dr. Kesten on June 26 because the prior range of motion measurements were considered to be invalid. On June 26 the claimant advised Dr. Kesten that on scale of 0 to 10 with 0 representing no pain and 10 representing the worst pain imaginable her lumbosacral pain was a 9 (9/10). On this examination the claimant reported she was using Topracin

(a topical cream) and a mechanical lumbar traction unit. The claimant also reported she was "attending chiropractic" with Doug Gibson, D.C., and receiving massage through Dr. Gibson's office. Dr. Kesten noted that the claimant had, in addition to physical therapy, previously undergone 2 prior courses of chiropractic treatment with Dr. Gibson. Dr. Kesten's diagnoses included the following: (1) Lumbar, sacral and left inguinal pain; (2) Lumbosacral strain; (3) L1-2 degenerative disk disease; (4) Minimal L1-2 disk osteophyte complex; (5) Severe L1-2 spondylosis (6) L2-3 degenerative disk disease; (7) Moderate L4-5 central and left lateralizing disk protrusion; (8) L4-5 degenerative disk disease; (9) Possible Left L5 radiculitis secondary to diagnosis # 7; (10) L4-5 annular tear; (11) Mild L5-S1 facet arthropathy; (12) Right sacroiliac (SI) joint dysfunction with associated pelvic obliquity. On June 26 Dr. Kesten assessed a 16% whole person impairment based on a specific disorder of the lumbar spine and reduced range of motion of the lumbar spine. He stated that the claimant was "released to full-time employment without restrictions and [was] encouraged to perform her prescribed independent home exercise program daily."

6. On August 9, 2012 the insurer filed a Final Admission of Liability (FAL). The FAL admitted for permanent partial disability benefits based on Dr. Kesten's 16% whole person impairment rating. The FAL further admitted for medical benefits after maximum medical improvement (MMI) including "Topracin (homeopathic) cream topically, mechanical lumbar traction unit as long as it affords her benefit, continue attending chiropractic and massage therapy."

7. After the claimant was placed at MMI Dr. Kesten continued to prescribe Topracin, traction, massage therapy and chiropractic treatment with Dr. Gibson. On November 8, 2012 the claimant reported to Dr. Kesten that the chiropractic treatments afforded her "appreciable benefit." On that date Dr. Kesten prescribed an additional "6-session course of maintenance chiropractic per Doug Gibson, DC whereby she attends monthly." On January 16, 2013 Dr. Kesten wrote a prescription for chiropractic treatment to be provided by Kelvin Washington, D.C. The prescription described this chiropractic treatment as "maintenance care" and was for 2 months with 6 sessions per month.

8. Dr. Washington commenced treating the claimant on January 16, 2013. The claimant reported lower back pain since the date of the injury that was worsening with time. She estimated her pain as 10/10 with 10 being the worst pain she could feel. Dr. Washington prepared a treatment plan in which he stated that the claimant's condition involved "soft tissue" including fascia, ligaments and muscles. He stated his treatment would include "three stages of care." The first stage, lasting 4 to 12 weeks, would be the "symptomatic relief stage." The second stage would be would be the "repair stage" and the third stage would be the "regenerative stage." Dr. Washington wrote that if the claimant kept her appointments he expected she would increase her lumbar range of motion by 75%, decrease discomfort by 75%, be able to drive with little pain, stabilize her lumbar region and both hips, improve function of the lumbar region and improve posture.

9. Dr. Kesten has continued to prescribe chiropractic treatment as a form of maintenance treatment. On July 16, 2013 Dr. Kesten noted the claimant was enrolled in an "18-session course of maintenance chiropractic" with Dr. Washington. The claimant reported "benefit" from this course of treatment although she stated her pain was 7/10 and her problems become worse "when she is at work, stands up, stands for a prolonged time and bends." On August 12, 2013 the claimant reported to Dr. Kesten that she was benefiting from chiropractic treatment and the Dr. Washington needed "a script for 9 more visits." On August 12, 2013 Dr. Kesten wrote a prescription for 8 more visits with Dr. Washington. On December 12, 2013 the claimant reported she had not been attending chiropractic treatment with Dr. Washington because the insurer denied authorization for these treatments. Dr. Kesten noted he had spoken with Dr. Washington who stated the claimant needed maintenance care every other week and that the claimant was performing home exercise and has a gym membership with logs showing consistent visits. The claimant rated her lumbosacral pain at 6-7/10. Dr. Kesten requested the insurer to authorize "6 additional sessions (32 sessions total)" of chiropractic treatment with Dr. Washington. On March 27, 2014 the claimant reported to Dr. Kesten that her lower back is frequently tight, stiff, aching agonizing, annoying, miserable, sore, smarting, tingling and that her pain had recently ranged in the range of 5-7/10. Dr. Kesten requested authorization for 4 additional chiropractic sessions.

10. The ALJ has reviewed Dr. Washington's numerous treatment notes from January 16, 2013 through November 26, 2014. These notes reflect that beginning in March 2013 the claimant typically rated her back pain as 6/10 or 7/10 with occasional minor fluctuations up or down. With minor variations the claimant typically reported that her pain was aggravated by the weather, work, standing, sitting and doing "nothing in particular." The claimant typically reported that her symptoms improved with acupuncture, "adjustments," stretching and massage. Throughout this period of time Dr. Washington applied chiropractic manipulations. Dr. Washington's notes frequently state that at the end of treatment the claimant reported she was feeling "better" or that she felt she had increased range of motion. Dr. Washington often concluded his notes by stating that the claimant's prognosis was "fair" because she was "responding well" or with "mixed results" to "conservative chiropractic therapy."

11. On August 11, 2014 Richard K. Mobus, D.C., submitted a report of a records review that he conducted regarding the claimant's chiropractic treatment. Dr. Mobus is a chiropractor, is Level 1 certified, participated In writing the Level 1 accreditation course and has participated on Division of Workers' Compensation low back treatment committees. Dr. Mobus noted that the claimant began treatment with Dr. Washington on January 16, 2013, but Dr. Washington's notes do not include a date of injury. Dr. Mobus further noted that Dr. Washington's notes refer to the claimant as having suffered a herniated disc after a sneeze, and that Dr. Washington also diagnosed lumbosacral neuritis, radiculitis unspecified, lumbar region subluxation, stiffness of the pelvic and thigh joints, degeneration of the lumbar or lumbosacral disc and muscle spasm.

12. On October 17, 2013 Dr. Washington stated the claimant was in the "strengthening stage" of treatment which he expected to last 4 to 12 weeks.

Nevertheless, on October 30, 2013 the claimant advised Dr. Washington that her pain was at 7/10 and that her back was tight, stiff, aching, agonizing, annoying and constant." On December 12, 2013 Dr. Washington wrote the claimant had returned to the "symptomatic stage" of treatment which he expected to last 4 to 12 weeks. On January 18, 2014 Dr. Washington wrote the claimant remained in the symptomatic stage and that he recommended 8 additional visits.

13. In his report Dr. Mobus opined it is "unclear" how the claimant could have continued to suffer from a lumbar radiculopathy five years after the date of injury. Dr. Mobus opined that ongoing care in workers' compensation cases is "justified by functional gains, not by ongoing pain that suggests treatment has been ineffective." Dr. Mobus noted that when the claimant first appeared for treatment with Dr. Washington her pain level was 10/10. On her second visit of February 6, 2013 the reported pain had improved to 7/10. After her sixth visit on March 1, 2013 her low back pain "remained at 7/10." On April 5, 2013, the tenth visit, the pain level was "still 7/10." Dr. Mobus opined this constituted a "reasonable trial" of chiropractic treatment. He further opined that although Dr. Washington reported that the claimant's function improved, there is "no evidence through the course of 71 treatments of chiropractic care from January 15, 2013 to June 25, 2014, of overall progress or of functional gains."

14. Dr. Mobus testified as follows. He reviewed Dr. Washington's chiropractic records from January 2013 through June 25, 2014. During that time Dr. Washington treated the claimant 71 times. Dr. Mobus opined Dr. Washington's records fail to document any functional improvement and contain no objective evidence of improvement in the claimant's condition. Dr. Mobus opined that continued chiropractic treatment is not reasonable because ongoing treatment is predicated on functional improvement, not ongoing symptoms. He further opined that continued chiropractic treatment is not necessary because if treatment is effective it is not extensive.

15. Dr. Mobus testified that under WCRP 17 Exhibit 1, the Medical Treatment Guidelines (MTG) for Low Back Pain (found in his written report) 6 treatments constitutes a reasonable trial to establish clinical benefit from chiropractic care. Dr. Mobus testified that under the MTG chiropractic care should be discontinued if the patient is not showing functional gains. In this case Dr. Mobus opined the claimant's first 6 to 10 visits with Dr. Washington complied with the MTG, but after that they did not.

16. Dr. Mobus testified that if a patient has reached maximum medical improvement (MMI) he is uncertain of whether the MTG limit the authorized treating physician's discretion to prescribe additional chiropractic treatment. Dr. Mobus conceded that the claimant testified that the chiropractic treatment with Dr. Washington provided her functional gains but reiterated that Dr. Washington's records did not document any functional gains.

17. The provisions of the Low Back Pain MTG cited by Dr. Mobus in his written report state that "manipulation" is defined "as the therapeutic application of manually guided forces by an operator to improve physiologic function and/or support

homeostasis that has been altered by the injury…and has associated clinical significance." The MTG provide that the time to produce effect from manipulation is "4 to 6 treatments" and the optimum duration is "8 weeks." The MTG further provide that the "maximum duration" of manipulation is 8 weeks and at 8 weeks the "patient should be re-evaluated." The MTG provide that care "beyond 8 weeks may be indicated for certain chronic pain patients in whom manipulation is helpful in improving function, decreasing pain, and improving quality of life." In these cases "treatment may be continued at one treatment every other week until the patient has reached MMI and maintenance treatments have been determined." Extension of manipulation beyond "maximum" may be "necessary in cases of re-injury, interrupted continuity of care, exacerbation of symptoms, and in those patients with co-morbidities." Care beyond maximum should be "re-evaluated and documented on a monthly basis."

18. Lloyd J. Thurston. D.O., conducted an independent medical examination of the claimant at the respondents' request. He prepared a written report dated September 2, 2014, reviewed medical records and performed a physical examination. Dr. Thurston is board certified in family practice and is level II accredited. The ALJ has reviewed Dr. Thurston's testimony and has reviewed his report of September 2, 2014.

19. Dr. Thurston opined that the claimant reached MMI in April 2010 and needed 6 months of maintenance treatment after that date. He opined that the chiropractic treatment the claimant has received since that time is "palliative care" that affects her symptoms but does not improve her underling condition. Dr. Thurston stated he found no evidence of "functional gains" from the chiropractic treatment. Dr. Thurston opined it is not reasonable to continue providing chiropractic care in this case. He explained that further chiropractic treatment to make the claimant "feel better" is not warranted and that the claimant should be "responsible" for her own care through exercise. Dr. Thurston opined that a home exercise program is warranted. He explained that active therapy is better for the claimant than "passive" chiropractic therapy which provides no long term benefit. He opined that "pain avoidance" is not going to help the claimant and that she is not going to hurt herself with activity.

20. A preponderance of the credible and persuasive evidence establishes that the chiropractic treatment being provided by Dr. Washington no longer constitutes reasonable and necessary maintenance treatment.

21. The ALJ credits the opinion of Dr. Thurston that the care being provided by Dr. Washington is essentially "palliative" in nature and that such "passive" treatment is no longer reasonable and necessary. Dr. Thurston credibly opined that the best type of treatment for the claimant is activity and that such activity will not injure her.

22. The ALJ finds that Dr. Kesten has been prescribing chiropractic treatment as "maintenance care." However, Dr. Washington's treatment plans indicate that the objectives of his treatment are to improve the claimant's condition by reducing pain and increasing function. However, a preponderance of the evidence establishes that after a lengthy course of chiropractic treatment the claimant's pain level has remained essentially unchanged and remains at the usual level of 6-7/10. The ALJ infers from

this evidence that the chiropractic treatment is providing no long term pain relief and very little short term relief. Moreover, Dr. Mobus and Dr. Thurston credibly opined that Dr. Washington's notes fail to document any functional gains from the chiropractic treatment. Rather, the claimant has advised Dr. Washington that her symptoms reappear with work, standing, sitting, changes in the weather and even when doing nothing at all. The credible and persuasive evidence establishes that the claimant's function has not been significantly improved for more than very brief periods of time between chiropractic visits. All of this evidence corroborates Dr. Thurston's opinion that further chiropractic treatment is not warranted because it is not providing any sustained benefit to the claimant and because it is not the best course of treatment to maintain her condition and relieve her symptoms.

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

CONCLUSIONS OF LAW

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

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

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

LAW OF THE CASE AND ISSUE PRECLUSION

At the hearing the claimant asserted that because the respondents admitted liability for continuing medical treatment after MMI, including ongoing chiropractic care, the doctrines of law of the case and issue preclusion prevent the respondents from litigating whether subsequent care is reasonable and necessary. The ALJ understands from the claimant's position statement that she has now abandoned these arguments

and concedes that law of the case and issue preclusion do not prevent the respondents from disputing the reasonableness and necessity for ongoing care. (See Claimant's proposed Finding of Fact 3 and proposed Conclusions of Law pp. 5 and 6).

In any event, the ALJ concludes that the filing of an FAL admitting for a specific ongoing medical benefit, like chiropractic care, does not constitute an admission that the respondents are automatically liable to pay for all subsequent care of that type regardless of the reasonableness, necessity and cause of the need for care. Rather, where the respondents admit liability for ongoing medical benefits after MMI they retain the right to litigate whether specific care sought in the future is reasonable, necessary and related to the industrial injury. *See Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003); *Ford v. Regional Transportation District*, WC 4-309-217 (ICAO February 12, 2009).

REASONABLENESS AND NECESSITY FOR ONGOING CHIROPRACTIC CARE

The claimant contends the evidence establishes that she needs ongoing chiropractic care as a form of post-MMI medical treatment to relieve her ongoing symptoms and maintain function so that she can perform her job as a dental hygienist. The respondents contend the evidence establishes that such care is not reasonable and necessary.

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

Except in certain circumstances not present here, when the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District, supra*. The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As determined in Findings of Fact 20 through 22, a preponderance of the credible and persuasive evidence establishes that ongoing chiropractic treatment is not reasonable and necessary to relieve the effects of the claimant's injury or prevent deterioration of her condition. Dr. Thurston credibly opined that at this point the chiropractic treatment provided by Dr. Washington is "palliative" in nature and that this type of passive treatment is no longer warranted for the claimant's condition. Rather,

the most appropriate treatment to relieve and maintain the claimant's condition is exercise. Dr. Thurston's opinion in this regard is supported by evidence that the claimant's pain has remained more or less constant despite numerous and frequent chiropractic treatments and there is no documentation that such treatment have altered her function for any significant length of time. Indeed, Dr. Washington's treatment plans were aimed at reducing pain and improving function, but the credible and persuasive evidence establishes that this has not occurred and the claimant's condition has remained static and she is not receiving any substantial relief of her symptoms despite an extensive course of chiropractic treatment.

ORDER

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

1. The respondents are no longer required to pay for chiropractic treatment as a form of post-MMI medical benefit.

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

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

DATED: February 24, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

The issue raised for consideration is whether Claimant may proceed to hearing on the issue of permanent total disability benefits (PTD)

PARTIES' STIPULATION OF FACT

The parties appeared at hearing through counsel, called no witnesses, offered no documentary evidence, and requested ruling on the issue raised above based on the parties' stipulated facts.

1. On June 30, 2009, the claimant was involved in a work related motor vehicle accident involving a collision with a freight train

2. The claimant's authorized treating physician is Richard Book, M.D. Dr. Book is a family medicine physician practicing in La Junta, Colorado. Dr. Book is not a Level II accredited physician.

3. Richard Book, M.D. determined that the claimant reached maximum medical improvement as of November 6, 2013, but did not provide an impairment rating.

4. The respondents continue to pay temporary total disability benefits pursuant to the General Admission of Liability filed on July 13, 2011. A final admission has not been filed.

5. On July 11, 2014, the claimant filed an Application for Hearing on the issue of permanent total disability benefits.

6. The claimant underwent an appointment with Dr. Miguel Castrejon on October 16, 2014, for the purpose of an impairment rating. Dr. Castrejon is Level II accredited and was agreed upon by both parties.

CONCLUSIONS OF LAW

Having considered the stipulated facts of the parties, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as noted below the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that

which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-2

2. Claimant filed an Application for Hearing endorsing the issue of permanent total disability benefits. In order to be awarded permanent total disability benefits, the employee must be "unable to earn any wages in the same or other employment". Section 8-40-201(16.5)(a) (C.R.S. 2014). Respondents contend that the determination whether the claimant is permanently and totally disabled is not ripe until the claimant has reached maximum medical improvement (MMI) and the permanent effects of the injury are ascertainable. *Golden Animal Hospital v. Horton*, 897 P.2d 833, 838 (Colo. 1995). The statute's reference in Section 8-43-211(2)(b), C.R.S. to an issue that is "ripe for adjudication" means an issue that is "real, immediate, and fit for adjudication." *Franz v. Industrial Claim Appeals Office,* 250 P.3d 1284 (Colo. App. 2010); *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006); *Chavez v. Cargill, Inc.* W.C. No. 4-421-748 (November 1, 2002). An issue is "fit for adjudication" if there is no "legal impediment" to its immediate resolution. *Maestas v. Wal Mart Stores, Inc.,* WC 4-717-132 (ICAO January 22, 2009).

3. Respondents contend that the determination of MMI and impairment rating by a Level II accredited physician needs to be made before PTD can be adjudicated. Claimant contends that the determination of MMI by a level II accredited physician is not a prerequisite to Claimant's right to proceed to hearing on the issue of PTD.

4. In this case, it is concluded, contrary to the finding of the Summary Order, there is no legal impediment to adjudication of the issue of permanent total disability benefits.

5. A claimant has reached MMI "when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expect to improve the condition." Section 8-40-201(11.5) C.R.S. (2014). Respondents rely on the provision of the statute contained in Section 8-42-107(8)(b)(II) and (III) C.R.S. to argue that the issue of PTD raised by Claimant is not ripe for adjudication. These sections provide that, once an authorized treating physician places a claimant at MMI, "if either party dispute a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2". Section 8-42-107(8)(b)(II) C.R.S. (2014). A treating physician's determination regarding maximum medical improvement cannot be challenged absent a Division Independent Medical Examination. *Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). Section 8-42-107(8)(b)(III), C.R.S. provides that, "The findings regarding maximum medical improvement and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence. A hearing on this matter shall not take place until the findings of the independent medical examiner has been filed with the division."

6. In this case, the ALJ finds and concludes that the issue of PTD is ripe for determination on grounds that are not related to Respondents failure to timely refer Claimant for impairment rating. Under the applicable law, claimant is permanently and totally disabled if he is unable to "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The claimant's commutable labor market or other similar concepts that depend upon the existence of employment that is reasonably available to the claimant under his or her particular circumstances must be considered. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

7. A person's ability to earn wages is not determined by any single criterion. The extent and degree of permanent disability is assessed on the basis of interdependent factors which affect the worker's capacity to be gainfully employed. *Professional Fire Protection v. Long*, 867 P.2d 175 (Colo. App. 1993). PTD benefits are established by Section 8-42-111, C.R.S., which contains no requirement that the parties use the Division IME process that is required for the impairment rating benefits. The ICAO in the case entitled, *Dighero v. Jefferson County*, W.C. No. 4-250-485 (Industrial Claim Appeals Office, May 30, 1997), seems to indicate that the Division IME provisions in Section 8-42-107(8)(c), C.R.S., do not apply to permanent total disability determinations.

8. Therefore, it is found and concluded that the provisions of Sections 8-42-107(8) and 8-42-107.2(2)(b), C.R.S. do not apply to a claim for PTD so as to bar the claim from going forward at hearing before exhausting the DIME process. Claimant's claim of PTD is ripe for adjudication and may proceed at hearing.

ORDER

It is therefore ordered that:

1. The issue of PTD is ripe for determination at hearing because there are no legal impediments to the Claimant's ability to proceed to hearing on the issue.

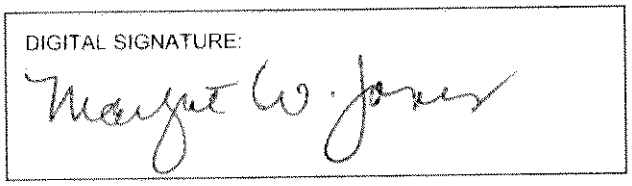
2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

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

DATED: _February 17, 2015_____

DIGITAL SIGNATURE:



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

PROCEDURAL HISTORY/PRELIMINARY MATTERS

There are prior rulings related to this matter to consider. On November 1, 2012, ALJ Friend entered an Order Re: Respondents' Unopposed Motion for Corrected Order, determining that Claimant's average weekly wage is $1,092.88, with a corresponding TTD benefit rate of $782.59. In addition, on September 4, 2013, ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order that Respondents had failed to overcome the Division Independent Medical Examination of Brian Beatty, D.O.; that, therefore, the Claimant's left upper extremity condition is proximately related to the admitted right upper extremity injury of February 21, 2011; that Claimant was not at maximum medical improvement; that Respondents shall pay Claimant medical benefits at the hands of previously authorized physicians. Respondents timely filed a Petition to review ALJ Felter's order to the Industrial Claim Appeals Office. On March 4, 2014, the Industrial Claim Appeals Office dismissed the Respondents' petition to review ALJ Felter's order without prejudice for lack of a final order.

STIPULATIONS

The doctors at Concentra, including Dr. Ogden, and Dr. Ogden's valid referral, Dr. Motz, are authorized treating physicians in this case. Dr. Lichtenberg is not an authorized treating physician in this case.

ISSUES

In light of the foregoing stipulations, the following remained at issue for the hearing:

1. Whether the Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits for his right shoulder condition.

2. Whether the Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits for his left shoulder condition.

3. Whether the Claimant proved that he is entitled to temporary disability benefits from July 23, 2012 ongoing.

4. If the Claimant is entitled to temporary disability benefits, whether the Respondents proved they are entitled to offsets.

FINDINGS OF FACT

1. The Claimant was born on June 29, 1951. He was 63 years old at time of the October 1, 2014 hearing (Claimant's Exhibit 3). It is undisputed that he was performing his usual job duties on February 21, 2011 when he suffered an admitted work injury.

2. The Claimant testified at the hearing on October 1, 2014. The ALJ notes that the Claimant appeared to have difficulty raising his right hand to take his oath and he was grimacing while his hand was slightly raised to take the oath. The Claimant testified that he was hired by Employer on October 1, 2004 as a stage hand. His duties were warehouse work and he worked 7 days a week, about 60-65 hours per week. At the time of his February 21, 2011 work injury, the Claimant's title was dock master and he was in charge of getting items into trucks so that Employer can install the materials for tradeshows. It is a labor-intensive, highly physical job and there is little to no sitting around. The Claimant testified that he frequently lifted heavy items overhead, including carpet which could weigh up to 200 lbs. He also loaded stacks of tables and chair carts which could get very heavy. The materials to be loaded on the trucks were stored on racks from 5 feet tall up to 25/30 feet tall. Ladders and forklifts are used to get to the high racks. In referencing a physical work description for the Employer (Claimant's Exhibit 12), the Claimant testified that he performed most of the work listed on the sheet, all of which is physically challenging and generally requires lifting items. The Claimant did not have a second job outside of his primary employment with Employer. Outside of work, his activities included riding his Harley Davidson motorcycle and playing Santa at Christmas. The Claimant recalled working on Presidents' Day on February 21, 2011 and he heard a snap. His arm started to turn black and he was in pain and he reported the injury right away and was sent for medical treatment at Concentra. The Claimant's testimony as stated in this paragraph was credible and persuasive and found as fact.

3. The Claimant treated with his authorized treating physicians at Concentra, including Dr. Paul Ogden. Dr. Ogden referred the Claimant to Dr. Cary Motz for an orthopedic surgery evaluation. On March 28, 2011, Dr. Cary Motz performed a repair of the right proximal biceps rupture, a repair of the right supraspinatus, and an arthroscopic subacromial decompression (Claimant's Exhibit 18).

4. The Claimant testified that after his first surgery, he used a sling to immobilize his right arm and he participated in physical therapy. He testified that for a lot of the exercises in physical therapy, he had to use both arms. The Claimant testified that he was not permitted to work until his rehabilitation was complete so he was out of work from March of 2011 until September 2011. He returned to work, but in September 2011 he was having right shoulder pain again. He testified that the condition of his right arm was such that it hurt the whole time he was working through December of 2011. The Claimant's testimony as set forth in this paragraph is supported by the medical records and was credible and persuasive and is found as fact.

5. After surgery, the Claimant participated in 57 physical therapy sessions occurring over a period of approximately six (6) months, during which he used both upper extremities during many of the physical therapy exercises (Claimant's Exhibit 11).

6. The Respondents admitted liability for the right upper extremity injury and paid temporary total disability benefits between March 28, 2011 and September 5, 2011 (Claimant's Exhibit 4).

7. On or about September 6, 2011, the Claimant returned to full duty performing his regular duties, and he continued to work full time until about December 16, 2011.

8. By September 26, 2011, the Claimant sought medical care for continued problems with his right shoulder. In a report of that date, Dr. Ogden noted that "Patient relates worsening of pain… the patient has had physical therapy and does not feel better. The pain is located on the anterior aspect of the right shoulder.…Since returning to work, he tires easily. He has had to increase his pain medications." Dr. Ogden decided to hold off on performing an impairment rating and referred him back to Dr. Motz to consider other interventions (Claimant's Exhibit 11). Reports from Concentra doctors dated October 18, October 31, November 10, and November 23, 2011 record continuing pain in the right shoulder (Claimant's Exhibit 11).

9. An MRI of the right shoulder on November 2, 2011 revealed a re-tear of the Claimant's supraspinatus (Claimant's Exhibit 6, p. 6).

10. On December 19, 2011, Dr. Motz performed a second surgery on the Claimant's right shoulder. The post-operative diagnosis was right shoulder recurrent 2-cm supraspinatus tear, and the operation was an arthroscopic revision of the rotator cuff repair and removal of retained sutures (See Claimant's Exhibit 6, p. 6)

11. The Claimant testified that he underwent a second right shoulder surgery in December 2011 and was advised that he would be off work until he passed a physical assessment test. It was estimated that he would be able to take the assessment test in July of 2012. The Claimant testified that in between the return to work and his second right shoulder surgery, the condition of his left shoulder was starting to hurt and give him problems. After the second surgery, when he had his 65 physical therapy visits (Claimant's Exhibit 23, Report of Thomas Ryan PT dated July 16, 2012), the left shoulder was hurting from the elbow to the neck and certain movements made it worse. The Claimant testified that over this time period his level of pain for the left upper extremity changed from about a 2 to days where it was more of a 7 or 8 out of 10. The Claimant testified that he told Dr. Ogden about the problems he was having with his left upper extremity. The Claimant agrees that Dr. Ogden's report of February 27, 2012 in Claimant's Exhibit 11 is an accurate history of present illness, although the Claimant later testified on cross-examination that he recalled that he told Dr. Ogden before this date that his left shoulder was having pain. The Claimant's testimony as set forth above was credible and is found as fact.

12. In a report dated February 13, 2012, Thomas Ryan, PT reported that the Claimant's left shoulder was hurting him more than the right (Claimant's Exhibit 23). In a report dated February 27, 2012, the Claimant's primary treating physician, Paul Ogden, M.D. wrote that "left shoulder has gradually worsened with pain. He thinks it started around May of 2011. He wasn't working at the time, but was in therapy. It smoldered with pain, the [pain] was much worse after going back to work in September. Now pain with abduction and flexion, and IR. Weakness also" (Claimant's Exhibit 11).

13. While he was in physical therapy after the second surgery, the Claimant testified that he did not receive a modified job offer with Employer nor has he returned to work for the Employer after the conclusion of his physical therapy sessions. He did undergo a physical assessment test after the second surgery but the Claimant testified that he could only pick up 45 lbs. and so he could not do his former job without restrictions. At that time, the Claimant testified that with respect to his left arm he was also very limited and couldn't do half of what he used to be able to do and he could not do his job nor could he do all of the normal day-to-day activities at home such as moving laundry upstairs and putting away dishes. The Claimant testified that he gave his full effort using both arms for a physical assessment performed with his physical therapist Mr. Ryan on July 16, 2012.

14. In a report dated March 7, 2012, Dr. Ogden referred the Claimant to Dr. Motz for surgical consultation for the left shoulder (Claimant's Exhibit 6, Report of Dr. Beatty dated December 5, 2012, p. 7). By report dated May 2, 2012, Dr. Ogden noted that Dr. Motz feels that the condition is causally related as Claimant has favored the right shoulder during recovery from two surgeries and other than PT has not had a particular injury" (Exhibit 6, Report of Dr. Beatty dated December 5, 2012, p. 9).

15. Respondents denied liability for a left shoulder surgery.

16. On July 23, 2012, Dr. Ogden noted that Claimant's return to full duties has been somewhat limited by his left shoulder condition as well, that he is currently not working due to no available light duty, and that he that he had a 12% impairment of the RUE which converts to a 7% whole person impairment (Claimant's Exhibit 11).

17. On April 26, 2012, Dr, Motz opined that "The patient returns for evaluation of left shoulder pain which developed as a result of overusing following right shoulder surgery approximately 1 year ago. The discomfort is currently moderate to severe in intensity and has been progressively worsening" (Claimant's Exhibit 10).

18. On May 18, 2012, Dr. Ron Carbaugh, providing psychological evaluation, reported that testing revealed open and honest responses with no major distortions, that there did not appear to be any magnification of symptoms, and that the Claimant was the type that would minimize physical and psychological discomfort (Claimant's Exhibit 6, Report of Dr. Beatty dated December 5, 2012, p. 9).

19. In a record review report dated May 23, 2012, John Douthit, M.D. opined that as to causality, just because the symptoms in the left shoulder began concurrently with the right shoulder condition, it does not follow in itself that the left shoulder conditions are related. Dr. Douthit found it more medically probable that the Claimant has a "chronic tendinopathy of his left shoulder related to his aging with symptoms naturally occurring." Dr. Douthit opined that the development of symptoms in the left shoulder was coincidental (Respondents' Exhibit C).

20. On July 23, 2012, Dr. Ogden determined the Claimant was at MMI and rated the Claimant with a 12% upper extremity impairment. Dr. Ogden assigned a permanent lifting restriction of no lifting over 45 pounds, no pushing over 75 pounds, and no pulling over 55 pounds (Claimant's Exhibit 11; Respondents' Exhibit B, pp. 23-24).

21. The restrictions imposed by Dr. Ogden will not allow Claimant to return to work at his regular job which requires lifting at least 50 pounds overhead, and pushing and pulling carts, crates and objects weighing hundreds of pounds or more (Claimant's Exhibit 12). The Employer will not allow Claimant to return to work until he passes a Physical Assessment Test and is able to return back to work 100% without restrictions (See Exhibit 12).

22. The Respondents filed a Final Admission of Liability admitting for a 12% scheduled impairment and noting two periods of TTD paid to the Claimant. The Claimant received temporary total disability benefits from 3/28/2011 to 9/5/2011 and then again from 12/19/2011 to 7/22/2012 (Claimant's Exhibit 4).

23. On November 1, 2012, ALJ Friend entered an Order Re: Respondents' Unopposed Motion for Corrected Order, determining that Claimant's average weekly wage is $1,092.88, with a corresponding TTD benefit rate of $782.59.

24. On December 5, 2012, Dr. Brian Beatty performed a Division Independent Medical Examination. In his report, Dr. Beatty opined that the Claimant was not at MMI from the effects of the February 21, 2011 injury. Dr. 3Beatty diagnosed right rotator cuff tear with repair and left rotator cuff tear; opined that the Claimant was not at maximum medical improvement even though he had exhausted all treatment avenues for the right shoulder; opined that he needs surgical repair of the left shoulder as recommended by Dr. Motz and appropriate physical therapy. Dr. Beatty gave the Claimant a 14% RUE rating which converted to an 8% whole person rating. Dr. Beatty opined that "I believe his current left shoulder symptoms are related to his work due to the fact that he works at a very heavy labor intensive job requiring a lot of upper body use. Based on the history he gave to me and Dr. Ogden his left shoulder symptoms worsened considerably after returning from his right shoulder surgery."

25. On December 13, 2012, Dr. Allison Fall performed an independent medical examination of the Claimant and reviewed his medical records. Dr. Fall opined that "the left shoulder chronic degenerative findings are not work related. Medical

records are not supportive that he developed symptoms when he returned to work or even initially after the injury when he was more limited with his right shoulder. The first reported documentation of the left shoulder symptoms were in 02/12. He was not working at that time. He was able to use his right shoulder for activities of daily living. I am not aware that he was performing any heavy manual labor at home." Dr. Fall agreed in this regard with Dr. Douthit (Claimant's Exhibit 7; Respondents' Exhibit A, p. 17).

26. Disputing the DIME, the Respondents litigated the issue of "not at MMI." On September 4, 2013, ALJ Felter issued Full Findings of Fact, Conclusions of Law and Order that Respondents had failed to overcome the Division Independent Medical Examination of Brian Beatty, D.O.; that, therefore, the Claimant's left upper extremity condition is proximately related to the admitted right upper extremity injury of February 21, 2011; that Claimant was not at maximum medical improvement; that Respondents shall pay Claimant medical benefits at the hands of previously authorized physicians, subject to the Division of Workers' Compensation Medical Fee Schedule; and that W.C. No. 4-916-403-01 was denied and dismissed as moot. Respondents timely filed a Petition to review ALJ Felter's order to the Industrial Claim Appeals Office. On March 4, 2014, the Industrial Claim Appeals Office dismissed the Respondents' petition to review ALJ Felter's order without prejudice for lack of a final order. ALJ Felter's order is not final for purposes of review or law of the case.

27. On June 19, 2014, Dr. Fall performed a follow-up independent medical examination of Claimant and reviewed his medical records. Dr. Fall noted that his pain behaviors had increased, and his limitations secondary to pain had increased, but otherwise he was in the same situation as he was at her previous evaluation. Regarding the left shoulder, she stated that findings were consistent with degenerative changes and he had undergone appropriate treatment for it. "Given the outcome of the right shoulder and the significant pain behaviors and psychological issues likely playing a role, it is unlikely there would be any functional benefit to be gained from a left shoulder arthroscopy." She has opined that the Claimant should be able to return to his regular job, and that he is magnifying his symptoms. She has further opined that any inability to work is due to the Claimant's RUE injury or a non-work-related LUE condition. She opined that Claimant would be at MMI for his left shoulder condition regardless of whether it was work-related and that the cause for the need of any additional treatment for the left shoulder would be age related (Claimant's Exhibit 17; Respondents' Exhibit A).

28. In his IME report dated July 8, 2014 (Exhibit 16), Alan Lichtenberg, M.D. opined that claim-related diagnoses included right shoulder rotator cuff tear, status post surgical repair x 2, permanent aggravation of left shoulder degenerative joint disease due to overuse syndrome/repetitive motion/cumulative trauma, and adjustment disorder with depression/anxiety/insomnia; with a reasonable degree of medical probability, that the accident of February 2, 2011 was the proximate cause of the claim-related diagnoses; that a treatment plan would include right shoulder re-evaluation by an orthopedic specialist, left shoulder surgery and appropriate postoperative care, and, for both shoulders, psychological pain evaluation and treatment for severe adjustment

disorder with depression and anxiety; that the Claimant is not at MMI with respect to his left shoulder injury; that Dr. Fall missed the proper diagnosis of the Claimant's left shoulder condition by dismissing the notion of an overuse syndrome as not real; that at this time the Claimant is unable to work because "both shoulders have contributed to his inability to work at his regular job"; and that he has not been able to work at all since July 23, 2012 (when TTD ended by Final Admission) "due to inability to use his arms and shoulders, with associated psychological factors and high levels of chronic pain" (Claimant's Exhibit 16).

29. On September 17, 2014, Glenn Petersen, PA, a Concentra physician assistant, opined that the Claimant was restricted to "No lifting over 0 lbs." PA Petersen also restricted Claimant from driving and any work above waist level. He referred Claimant to an orthopedist and he projected a date of MMI of January 17, 2015 (Claimant's Exhibit 23).

30. Dr. Ogden testified as an expert in the areas of family medicine, preventative medicine and occupational medicine. Dr. Ogden is not board certified in occupational medicine but has been practicing occupational medicine since August of 2010 and has seen thousands of occupational medicine patients and is also currently an area medical director for Concentra. Dr. Ogden is Level II accredited (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 2-9). Dr. Ogden treated the Claimant, seeing him multiple times with respect to an admitted right upper extremity injury dated February 21, 2011 (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 10-11). Dr. Ogden testified that it was his understanding that the Claimant worked at a physically demanding job that would fall within the "heavy" or "very heavy" classification of DOT jobs (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 13-14). Dr. Ogden testified that he commenced treating the Claimant just before the Claimant's first surgery date on March 28, 2011. It is Dr. Ogden's understanding that the first surgery was an attempt to repair the proximal right bicep, supraspinatus and a subacromial decompression (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 15). Dr. Ogden testified that after the first surgery, the Claimant was off work for approximately six months due to work restrictions (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 16-17). During the time the Claimant was off work after the first surgery, the Claimant participated in physical therapy visits with Concentra physical therapists and he was in an arm sling to immobilize his right upper extremity (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 18-19). At some point after this, the Claimant was authorized to return to work full duty. Dr. Ogden reviewed medical records indicating that on October 31st, November 10th and November 23rd the Claimant was full duty (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 23-24). The Claimant had a second surgery on December 19, 2011 which was a repeat repair of the supraspinatus muscle of the right upper extremity (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 21). There had been an MRI of the right upper extremity on November 2, 2011 which Dr. Ogden initially opined showed a new injury, a tear in the supraspinatus muscle (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 21-22). However, Dr. Ogden later conceded that he did not know when the tear that showed up on the November 2, 2011 MRI occurred, since there hadn't been a prior MRI (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 24-25). Dr. Ogden reviewed a medical report of his from February 27, 2012 and agreed there was a lifting restriction with respect to

the Claimant's left arm. Dr. Ogden testified that he recalled that restriction was due to the Claimant reporting that his left shoulder was bothering him (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p.32). Based on that medical note, Dr. Ogden indicated that the Claimant thought the pain in the left shoulder started around May, it was low grade and lingering at first, but not severe, then the Claimant told him it was much worse after going back to work in September (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 34). Dr. Ogden ordered an MRI after obtaining approval from an adjuster to determine causality for the left shoulder (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 36-37). Dr. Ogden testified that the March 1, 2012 left shoulder MRI showed advanced acromioclavicular joint arthrosis, or essentially that the joint was deteriorated (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 37). Dr. Ogden testified that he made a referral for the Claimant for a surgical consult with Dr. Motz for the left shoulder (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 38). Dr. Ogden testified that he spoke with Dr. Motz after this evaluation and noted that it was his understanding that Dr. Motz found the left shoulder injury casually related because the Claimant favored his right shoulder during recovery from 2 surgeries, but that other than PT, the Claimant had not had a particular injury (Depo. Tr. 03/18/2013 Dr. Paul Ogden, pp. 39-40). On cross-examination, Dr. Ogden testified that from September 1, 2011 through December 19, 2011 when the Claimant was working, he did not indicate any left shoulder symptomatology on pain diagrams (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 52). In discussing the March 1, 2012 MRI, Dr. Ogden noted that advanced acromioclavicular joint arthrosis is a degenerative condition but that not all of the findings on the MRI were merely consistent with the aging process. He stated that it usually takes more than just aging for the findings on the Claimant's MRI (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 55). Although, Dr. Ogden conceded that there was no support in the therapy records that the Claimant developed left shoulder problems in May of 2011 either because of right shoulder immobility or therapy he was doing (Depo. Tr. 03/18/2013 Dr. Paul Ogden, p. 61).

31. Dr. Ogden's testimony was completed by deposition on May 13, 2013. On questioning about whether or not the Claimant's left shoulder condition could be related to overuse while his right shoulder was immobilized, Dr. Ogden testified that he did not think that was likely as he didn't think there would have been enough use of the left shoulder to account for the problems that he was having with his left shoulder at that point (Depo. Tr. 05/13/13 Dr. Paul Ogden, pp. 6-7). He did believe that it is probable that the Claimant had a left shoulder rotator cuff tear to due years of work using his shoulders and working overhead (Depo. Tr. 05/13/13 Dr. Paul Ogden, p. 7). He clarified a little later in the testimony that he did not find that the Claimant had an aggravation of the wear-and-tear process on the left arm by virtue of his having had a right shoulder injury (Depo. Tr. 05/13/13 Dr. Paul Ogden, pp. 10-11). Dr. Ogden later testified on cross-examination that it was his opinion that the Claimant's work caused his pathology, but that the pathology didn't become symptomatic until three months after he had stopped working (Depo. Tr. 05/13/13 Dr. Paul Ogden, p. 15).

32. Dr. Cary Motz testified by deposition on March 22, 2013. He is board certified in orthopedic surgery with a subspecialty in sports medicine and a Level II accreditation (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 3). Dr. Motz testified that he first

treated the Claimant for a right shoulder injury that the Claimant sustained when he was lifting carpet (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 4). He performed a right shoulder rotator cuff repair with a subacromial decompression and an open biceps tenodesis on March 28, 2011 (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 4). The Claimant was not complaining of left shoulder issues in this time frame (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 4). Dr. Motz testified that the Claimant continued to follow up with him through August 19, 2011 and the Claimant still made no complaints to Dr. Motz about left shoulder problems through that time (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 6). Dr. Motz testified that he saw the Claimant on October 4, 2011 and November 15, 2011 and Dr. Motz's PA saw the Claimant on December 6, 2011 and there is no documentation of left shoulder pain (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 7-8). Dr. Motz testified that he performed a second surgery on the Claimant's right shoulder on December 19, 2011 (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 8). The Claimant continued to see Dr. Motz for follow up after the second surgery and the first note that Dr. Motz has in his records of the Claimant complaining of left shoulder pain is from February 23, 2012. The note indicates that the Claimant reports that the left shoulder pain had started in June of 2011, but Dr. Motz agreed that the medical records don't support that the pain had been ongoing since June of 2011 (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 9). Dr. Motz reviewed over a dozen pain diagrams completed by the Claimant from March 3, 2011 through January 3, 2012 and saw no evidence of pain complaints for the left shoulder in any of them (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 12-15). Dr. Motz testified that, in spite of the lack of documentation in the medical records, he did have a recollection that when he and the Claimant were discussing the second right shoulder surgery that the Claimant had told Dr. Motz about left shoulder pain and that he had some concern about what this might entail for his left shoulder (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 16-17). Dr. Motz testified that just because the Claimant had left shoulder pain that it does not necessarily mean it is related to the right shoulder injury, and Dr. Motz agreed with Dr. Douthit's opinion that it is more reasonable and medically probable that the Claimant has a chronic tendinopathy of his left shoulder related to the natural aging process (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 20-21). In reviewing the Claimant's March 1, 2012 left shoulder MRI, Dr. Motz testified that there is no evidence that the left shoulder findings are related to the right shoulder, but rather that the left shoulder pathology was pre-existing but asymptomatic before February of 2012 (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 21-22). Dr. Motz later testified that although his previous opinion was that the left shoulder was related to the right shoulder, he is now opining that there is no necessary connection between the right shoulder injury and the left shoulder condition. However, Dr. Motz further testified that the Claimant's left shoulder has become symptomatic due to overuse of his left shoulder because of an extended period of time that he was without full use of his right shoulder (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 25). Dr. Motz does believe that the need for the second right rotator cuff surgery was due to work activities after the first surgery, that the repair from the first surgery had not healed fully, and the Claimant was further injured, requiring the second surgery (Depo. Tr. 03/22/2013 Dr. Cary Motz, pp. 30-33). Then, notwithstanding his opinion that the March 1, 2012 pathology is not necessarily consistent with the Claimant's history of heavy work, Dr. Motz testified that he felt that the left shoulder symptomotology was related to an overuse of his left arm on account of the two

surgeries on the right shoulder (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 33). So, it is not just a coincidence, as Dr. Douthit suggested, that the Claimant's left shoulder symptoms started in February of 2012, rather is it likely that a patient with degenerative pathology in the opposite shoulder, because of overuse, developed pain in that shoulder that could eventually require surgical intervention (Depo. Tr. 03/22/2013 Dr. Cary Motz, p. 34). The testimony of Dr. Motz is credible and persuasive among the various physician opinions.

33. Mr. Thomas J. Ryan provided deposition testimony on April 10, 2013. He has been a physical therapist for 11 years and has worked out of the Stapleton Concentra office for 6 ½ years. He provided physical therapy to the Claimant (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 4). Mr. Ryan examined two sets of physical therapy records (contained within Claimant's Exhibit 20), the first beginning on April 22, 2011 and the second beginning on January 2012 (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 7). Mr. Ryan testified that there was nothing in the physical therapy charts from 2011 that the Claimant complained of left shoulder symptoms (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 8). In examining the 2012 records, Mr. Ryan testified that the first time the Claimant advised Mr. Ryan that his left shoulder was bothering him was February 13, 2012 (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 9-10). On February 17, 2012, Mr. Ryan testified that the records show that the modalities and therapies performed on the Claimant included: cold pack with electrical sim, manual therapy, bony prominence clearing, passive range of motion, soft tissue mobilization, TheraBand exercises, corner stretching, scapular stabilization exercises in prone, and pulleys. The pulley therapy involved use of the left upper extremity but the therapy note does not indicate that the Claimant complained that the modality caused any symptoms in his left shoulder (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 14-15). Mr. Ryan similarly testified that there was no note that the Claimant had complaints of left shoulder symptoms at the February 20, 2012 therapy session (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 16-17). Mr. Ryan testified that on February 22, 2012 the Claimant complained of left shoulder symptoms (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 18). Mr. Ryan testified that on February 24, 2012, the Claimant reported to Mr. Ryan that his left shoulder is hurting more and more, and he's having more problems with the left (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 20). Per the therapy records, Mr. Ryan didn't document that the Claimant complained of left shoulder pain on February 24, 2012 or February 27, 2012 (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 20-22) but on February 29, 2012, Mr. Ryan testified that he did document that the Claimant "appears concerned about the worsening of his left shoulder (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 22-23). On March 2, 2012, the Claimant was again complaining of left shoulder symptoms (Depo. Tr. 04/10//2013 Tom Ryan, P.T., p. 24). On March 5, 2012, the Claimant again complained of left shoulder symptoms and Mr. Ryan testified that the note indicates that the Claimant "rolled onto his left shoulder the night before" (Depo. Tr. 04/10//2013 Tom Ryan, P.T., pp. 25-26).

34. Dr. Alan Lichtenberg testified by deposition on August 20, 2014. Deposition Exhibits A and B and Deposition Exhibits 1, 2 and 3 were introduced during the deposition, Dr. Lichtenberg testified about them and these exhibits are admitted into evidence and included in the record for this matter. Dr. Lichtenberg authored a written report dated July 8, 2014 (found at Claimant's Exhibit 16). As part of Dr. Lichtenberg's

examination of the Claimant, Dr. Lichtenberg had the Claimant complete the Clinical Evaluation Questionnaire prior to the appointment for the Examination. The completed questionnaire was designated Deposition Exhibit C. The Claimant noted that the immediate effects after the accident included "pain in right arm" and gradual or delayed effects included "pain in left arm and neck." In his work history, the Claimant indicated the last day he worked was December 17, 2011. Under future plans, the Claimant wrote he wanted to "get fixed and go back to work" (Lichtenberg Deposition Exhibit C). Dr. Lichtenberg then testified about the particulars of his physical examination of the Claimant (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, pp. 25-27). Based on the review of medical records that Dr. Lichtenberg deemed relevant and the physical examination, Dr. Lichtenberg diagnosed the Claimant with "permanent aggravation of the left shoulder/degenerative joint disease due to overuse syndrome, repetitive motion, cumulative trauma and adjustment disorder with depression/anxiety/insomnia" (Claimant's Exhibit 16; Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 28). Dr. Lichtenberg testified that based on the March 2012 MRI, the Claimant had degenerative joint disease and it was Dr. Lichtenberg's opinion that the preexisting condition was permanently aggravated due to overuse syndrome, repetitive motion and cumulative trauma (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 28). Dr. Lichtenberg later testified that he essentially equates "overuse syndrome" with "cumulative trauma" (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 30). Dr. Lichtenberg testified, in accordance with his written report that Dr. Douthit's opinion is completely wrong and should be ignored (Claimant's Exhibit 16, p. 8; Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 43). Dr. Lichtenberg also testified that he opines that Dr. Fall "missed the proper diagnosis" and as a result her medical report should be discarded. Specifically, Dr. Lichtenberg testified that Dr. Fall did not diagnose permanent aggravation of preexisting left shoulder degenerative joint disease and that Dr. Fall believes all of the left shoulder finding relate only to aging (Claimant's Exhibit 16, p. 8; Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 46). As for the type of surgery that the Claimant requires for his left upper extremity, Dr. Lichtenberg would defer to Dr. Motz, the orthopedic surgeon (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 64). Dr. Lichtenberg testified that it is his opinion that Dr. Mot's care with respect to the Claimant's right shoulder was reasonable and necessary (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 65). Dr. Lichtenberg testified that he saw no evidence of symptom magnification when he examined the Claimant (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 66) rather he opined that the Claimant's complaints have been fairly consistent and it is expected that his symptoms would increase with time and that is, in part, why Dr. Lichtenberg recommended psychological evaluation and treatment (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, pp. 66-67). Dr. Lichtenberg testified that he does not believe the Claimant was able to return to his regular job as a laborer at any time since he last worked for the Employer (Depo. Tr. 08/20/2014 Dr. Alan Lichtenberg, p. 68).

35. Dr. Allison M. Fall testified by deposition on August 21, 2014 as an expert in the areas of physical medicine and rehabilitation and as to Level II accreditation matters (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 4-5). Dr. Fall has evaluated the Claimant on two separate occasions for IMEs and has reviewed the Claimant's medical

records (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 7). Dr. Fall first saw the Claimant on December 13, 2012 and last saw him on June 19, 2014. She also reviewed medical records from Dr. Motz and from physical therapy at Concentra (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 7-8). Dr. Fall testified that she does not believe the proposed surgery for the left shoulder is reasonably necessary based on pathology in a March 1, 2012 MRI. She further testified that in looking at the entire context of the Claimant's treatment, he had no benefit from two surgical procedures to his right upper extremity and the risks of the left shoulder surgery outweigh the likelihood that the Claimant will get any benefit from a left shoulder arthroscopy (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 9-10). Dr. Fall also testified that based on her review of the medical evidence, she does not see any support that the Claimant's right shoulder problems caused by his February 2011 work injury worsened as a natural progression so that by June of 2014 his ability to lift and his range of motion (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 10-11). Dr. Fall opines that the Claimant does not require any further medical treatment because of the right shoulder injury he sustained in February 2011 because there is no physiologic explanation for his pain complaints (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 11). Dr. Fall testified that in her review of medical records in this case and based on her medical research, she does not find any support that the Claimant's left upper extremity pathology in the March 2012 MRI was a direct and proximate result of his inability to use his right upper extremity resulting in overuse or repetitive motion by the left upper extremity (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 12). Dr. Fall also testified that it is her opinion that the Claimant did not require any restrictions or limitations from working because of his left upper extremity in July 2012 (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 15). Dr. Fall testified that when she saw the Claimant in December of 2012 he could use his right shoulder and arm and when she saw him in June of 2014 he could use his right shoulder and arm (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 18). Dr. Fall further testified that the fact that the Claimant worked for two months and his FCE establish that the Claimant could use his right shoulder and arm (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 19). Dr. Fall also testified that while the Claimant may have advised his physical therapist and Dr. Ogden at a later date, in 2012, that he had been having left shoulder complaints back in 2011, the review of the medical records shows no contemporaneous complaints of left shoulder pain in May 2011 and then getting worse in September 2011 when he returned to work (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 22-23). Dr. Fall opined that the pathology seen on the March of 2012 MRI showed degenerative changes but the MRI does not establish when this pathology occurred and she believes this is the result of a progressive disease process (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 24). Dr. Fall further testified that, regardless of whether the pathology on the MRI is work related, she does not believe this requires operative intervention (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 25). Rather, Dr. Fall finds that due to the fact that on July 8, 2014, the Claimant had "normal and equal bilateral sensation, reflexes, pulses and strength was 4 out of 5 bilaterally," that no further healthcare treatment is indicated and there is no medical basis for surgery per his physical exam (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 28-30). Dr. Fall also disagrees with Dr. Lichtenberg's diagnosis of "overuse syndrome/repetitive motion/cumulative trauma" because this is not a specific diagnosis per Level II training and the AMA Guides (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 34). Dr. Fall also disagrees with Dr. Lichtenberg's treatment recommendation for

reevaluation of the right shoulder by an orthopedic surgeon. She feels that the recommendation does not correlate with the patient and there would be nothing new to offer (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 36). Dr. Fall also disagrees with Dr. Lichtenberg's recommendation for a psychological pain evaluation and treatment as related to his February 21, 2011 work injury because he does not have a work-related diagnosis of a mental disorder. Specifically, Dr. Fall commented that Dr. Carbaugh's working diagnosis of "probable personality traits or coping style affecting rehabilitation" would not be a work-related condition as it relates to the Claimant's personality (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 38). Dr. Fall notes that in discussing depression or stressors as a mental disorder for the Claimant, Dr. Lichtenberg relates things unrelated to his shoulder such as financial issues, bankruptcy, divorce, etc., which are not work-related (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 39). Dr. Fall also takes issue with Dr. Lichtenberg's use of the AMA Guides, 6th addition as opposed to the 3rd Edition in his discussion that the Claimant suffers from "central sensitization" since Colorado, by statute, requires use of the 3rd Edition. Moreover, Dr. Fall does not find that the Claimant suffers from a chronic paid disorder in any event (Depo. Tr. 08/21/2014 Dr. Allison Fall, pp. 40-42). With regard to the "overuse injury," Dr. Fall again reiterated that her review of the medical records and patient statements shows that there was no repetitious activity noted to cause such an overuse injury therefore, there is no aggravation of the underlying degenerative changes due to the overuse, but rather just a naturally occurring degenerative process (Depo. Tr. 08/21/2014 Dr. Allison Fall, p. 43).

36. Dr. Fall continued her testimony by deposition on September 18, 2014. Dr. Fall agreed that the Claimant passed an FCE which permitted the Claimant to return to work full duty at his regular job from September 9, 2011 and December 16, 2011, after his first right shoulder surgery on March 28, 2011(Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 55-57). Dr. Fall also agreed that the portion of the March 28, 2011 surgery to repair the torn biceps was reasonable and necessary to cure and relieve the Claimant from the February 21, 2011 work-related injury. However, she believes that the portion of the surgery to fix the rotator cuff tear was related to a degenerative condition (Depo. Tr. 09/18//2014 Dr. Allison Fall, p 59-60). Dr. Fall also agreed that, following the March 28, 2011 surgery, the Claimant was in a sling for about three weeks and had limited use of the right arm and this is appropriate post-surgery treatment (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 61-62). Dr. Fall also agreed that the Claimant had 56-57 physical therapy visits after the surgery which was about twice a week over a six-month period (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 62). Dr. Fall also testified that after the initial exercises in physical therapy, the Claimant would have been using both arms as they moved into more strengthening-type exercises such as pull downs (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 63). Dr. Fall testified that the Claimant told her that when he went back to work for just over three months, he tried to do his job as best as he could, but he was experiencing worsening pain in his right arm (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 64-65). In reviewing Dr. Motz's operative report from the December 19, 2011 surgery, Dr. Fall opined that the Claimant experienced a second small tear because "it was a failure of the prior repair" (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 66-67). However, Dr. Fall testified that she couldn't say that this was due to the fact the

Claimant went back to work, because sometimes rotator cuff surgical repairs just fail, there are just a certain percentage of them that Dr. Fall believes will simply fail (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 67-68). When questioned about the Claimant's recovery after the second surgery, Dr. Fall agreed that the Claimant had 65 additional physical therapy visits, for 121 total physical therapy visits after both right shoulder surgeries (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 69). Nevertheless, Dr. Fall maintains that neither 3 months of working full duty in between surgeries nor the physical therapy had anything to do with the Claimant's left shoulder symptoms. Dr. Fall bases this primarily on the fact that there is no documentation of the Claimant complaining of left shoulder problems until after the second surgery (Depo. Tr. 09/18//2014 Dr. Allison Fall, pp. 70-71). Dr. Fall also testified that she believes the Claimant is magnifying his symptoms of left shoulder pain based on her physical examinations of the Claimant although she agrees that the Claimant's treating physicians have not ever opined that the Claimant is symptom-magnifying (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 72). She believes this because of pain behaviors and the way the Claimant handled maneuvers on examination and that he was much worse at her second examination as opposed to the first without having any additional trauma between the two visits (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 92). In any event, Dr. Fall states that the fact that the Claimant's left shoulder symptoms began to be reported after his two right shoulder surgeries would be merely coincidental and there is no relationship to the right shoulder surgeries (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 73). Later Dr. Fall further clarified that it was her opinion that the pathology in the Claimant's left shoulder was likely there for years, he just started complaining of symptoms in his left shoulder. Yet this didn't have anything to do with the right shoulder injury or the things the Claimant was doing at work (Depo. Tr. 09/18//2014 Dr. Allison Fall, p. 90).

37. The Claimant testified that about 3 years ago, he worked for another decorator company for about 3 days doing temporary forklift work. He only worked the 3 days because they only needed a forklift driver for 3 days. The Claimant testified that this work was within his restrictions and didn't make his right shoulder or his left shoulder worse. The Claimant also testified that he has not ridden his Harley Davidson motorcycle since about halfway through his physical therapy. He testified that the vibration from the Harley goes up his arms into his shoulders. The Claimant testified that although it does not appear in the medical records or his pain diagrams, his left shoulder symptoms got worse when he went back to work in 2011. As far as specific events occurring during work, the Claimant testified that the only specific "ouch" event was when his right shoulder bicep tendon popped, and that was the only "outstanding event."

38. No evidence was provided that Employer ever offered the Claimant a job, or that any provider ever released the Claimant to his regular job, at any time since July 23, 2012. The Claimant has not undergone a Physical Assessment Test, nor has he gone back to work for Employer at any time since he was found at MMI by Dr. Ogden for his right shoulder injury, July 23, 2012. The Claimant has not received any

unemployment compensation or social security benefits, or any wages except for the temporary forklift job.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Medical Benefits – Reasonable and Necessary, Related and Authorized

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). It is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting

condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

A claimant may also establish a causal relationship through the "quasi-course of employment doctrine" such as where a claimant is injured while seeking authorized medical treatment, physical therapy or medical evaluation for a work injury even though this is outside employment-related activities where the employer has a quasi-contract obligation to provide treatment for a compensable injury and the claimant has a corresponding obligations to submit to the treatment or evaluation. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1993).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Under the Workers' Compensation Act, treatment is compensable where it is provided by an authorized treating physician. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008). Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Industrial Claims Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claims Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an authorized

treating physician refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claims Appeals Office*, 70 3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an authorized treating physician has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claims Appeals Office*, 902 P.2d 854 (Colo. App. 1995).

The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

The Claimant initially injured his right shoulder in an admitted work-related injury. The Claimant underwent his first surgery on March 28, 2011 to repair a right proximal biceps rupture and a repair of the right supraspinatus and an arthroscopic subacromial decompression. After the first surgery, the Claimant used a sling to immobilize his right arm and he attended approximately 57 physical therapy sessions over a period of almost 6 months. After this, the Claimant returned to work full duty on September 6, 2011. He was able to perform his regular work duties. However in October, November and December of 2011, the medical records document a return of the pain in the Claimant's right upper extremity. An MRI of the right shoulder revealed a re-tear of the Claimant's supraspinatus. On December 19, 2011, Dr. Motz performed a second surgery on the right shoulder. After the second surgery, the Claimant was off work again and he again engaged in physical therapy, approximately 65 visits. After completing his course of physical therapy, the Claimant had a functional capabilities assessment and he was unable to lift more than 45 lbs. with his right upper extremity. The Claimant's surgeon persuasively opined that the need for the second right shoulder surgery was due to the Claimant's work activities after his first surgery, essentially that the Claimant

had not fully healed and was further injured. This opinion is supported by the opinions of Dr. Ogden and Dr. Lichtenberg. The DIME physician opined that the Claimant has exhausted treatment options for his right shoulder, although he noted that the Claimant may benefit from maintenance care including cortisone injections.

After the second surgery, the medical records begin to document, in February of 2012, that the Claimant had complaints of left shoulder pain. When the Claimant first began to complain of left shoulder symptoms has been the subject of considerable debate in this case as has whether or not the Claimant is entitled to medical benefits related to the left shoulder condition.

Dr. Fall and Dr. Douthit argue, on the one hand, that the medical records only begin to document left shoulder complaints in February of 2012 and therefore, the Claimant's left shoulder pain did not start until February of 2012. Dr. Fall also believes that the Claimant is magnifying his symptoms and may not be experiencing the level of left shoulder pain that the Claimant now reports. Dr. Douthit and Dr. Fall both further opine that the objective pathology in the Claimant's left shoulder MRI was unrelated to the original right shoulder injury and was more probably due solely to an age-related degenerative and progressive disease process. Dr. Fall further opined that even if the left shoulder condition were to be found related, the condition does not require operative intervention based on the results of her physical examination of the Claimant and the failure of the surgeries on the right shoulder.

In the other camp are Doctor Ogden, Dr. Motz, Dr. Beatty and Dr. Lichtenberg. Dr. Ogden reviewed medical records and conceded that the records, including pain diagrams completed by the Claimant, do not documentation of left shoulder complaints until February of 2012. However, Dr. Ogden opined that, upon review of his February 27, 2012 medical report, he imposed a lifting restriction for the Claimant's left arm and at that visit Dr. Ogden noted that the Claimant had told him that the pain started around May of 2011, then got worse when he went back to work in September of 2011. Dr. Ogden believed the Claimant's statements about when the pain began, ordered an MRI and referred the Claimant to Dr. Motz for a consultation about the left shoulder. Commenting on the left shoulder pathology he saw on the Claimant's March 1, 2012 MRI, Dr. Ogden opined that not all of the findings on the MRI were merely consistent with the aging process and that it usually takes more than just aging for the type of findings he noted on the Claimant's MRI. Dr. Ogden believes that the Claimant's work caused the pathology, but that the pathology did not become symptomatic until 3 months after he had stopped working following the first right shoulder surgery. Dr. Motz is the Claimant's treating orthopedic surgeon. Dr. Motz testified that although there is a lack of documentation in the medical records of the Claimant's left shoulder complaints until February 2012, Dr. Motz specifically recalled that during the time frame when he and the Claimant were discussing proceeding with the second right shoulder surgery, that the Claimant had told Dr. Motz of left shoulder pain and questioned what the second right shoulder surgery might mean for the left shoulder. As the second right shoulder surgery took place on December 19, 2011, this would put the Claimant's complaints about left shoulder pain back into 2011, likely in late November or early

December. Dr. Motz' testimony in this regard is credible and persuasive. Dr. Motz opined that that the Claimant's left shoulder symptomotology was related to an overuse of his left arm on account of the two surgeries on the right shoulder and that it is likely that a patient with degenerative pathology in the opposite shoulder, because of overuse, developed pain in the other shoulder eventually requiring surgical intervention. Dr. Beatty, the DIME physician, and Dr. Lichtenberg agreed with Dr. Motz and opined that the Claimant suffers from a permanent aggravation of preexisting left shoulder degenerative disease. Dr. Lichtenberg specifically agreed with Dr. Ogden that the pathology on the March 1, 2012 left shoulder MRI is not related solely to the aging process.

Ultimately, in weighing the conflicting evidence in this case, it is found the Claimant established by a preponderance of the evidence that the maintenance medical treatment recommended by the DIME physician Dr. Beatty is reasonably necessary to prevent further deterioration of the Claimant's right shoulder, but the Claimant is at MMI for the right shoulder condition, so no further right shoulder evaluation is necessary and the Claimant requires only such maintenance care as the Claimant's authorized treating physicians recommend to prevent deterioration of the condition.

As for the left shoulder condition, the Claimant proved by a preponderance of the evidence that he is entitled to medical benefits. In weighing the conflicting medical opinions, it is found that the Claimant's left shoulder preexisting degenerative disease was permanently aggravated or accelerated by either or both his return to work after his first surgery and/or overuse of his left upper extremity at his work duties and/or during his extensive courses of physical therapy following each of the right shoulder surgeries. The Claimant's left shoulder condition requires active medical treatment as recommended by Drs. Ogden and Motz, up to, and including surgical intervention. The Claimant has proven that his left shoulder condition is related to his February 21, 2011 work injury and he has established that the recommended medical benefits are reasonably necessary to cure and relieve the effects of the injury.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

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

Through testimony and the exhibits, it was established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. The Respondents admitted liability for the right upper extremity injury and paid temporary total disability benefits between March 28, 2011 and September 5, 2011. The Claimant then returned to work and earned full wages until he was taken off work again in December 2011 when he had his second right upper extremity surgery. The Claimant received temporary total disability benefits again from December 19, 2011 to July 22, 2012 when the Claimant was off work again for the surgery and subsequent physical therapy. On July 23, 2012, Dr. Ogden found the Claimant at MMI for the right upper extremity condition and provided an impairment rating. Although, it has been found pursuant to this order that the Claimant was not at MMI at that point as his left shoulder condition was active then and that condition requires medical treatment and would have prevented the Claimant from performing his job duties. After this time, the Claimant did not receive temporary disability benefits, nor did he receive unemployment compensation or social security benefits. The only wages that the Claimant received was payment for the three days of forklift work that the Claimant performed on a temporary basis. This temporary 3-day work was within the Claimant's restrictions at the time and does not provide evidence that the Claimant was released to or capable of regular employment. On September 17, 2014, Concentra physician assistant Glenn Petersen noted that the Claimant was restricted from lifting anything and from driving and any work above waist level. There is no evidence that the Claimant was released to regular duty work or that Employer provided an offer of modified work at any time after July 23, 2012.

Therefore, the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 23, 2012 ongoing until the occurrence of one of the events set forth in C.R.S. 8-42-105 (d). The Respondents are entitled to an offset for any amounts paid to the Claimant for his temporary 3-day work providing forklift services.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The Claimant's current right shoulder condition was caused, aggravated or accelerated by the work injury he suffered on February 21, 2011. Per Dr. Beatty, the Claimant requires and has proven he is entitled to maintenance care for the right shoulder condition.

2. The Claimant's preexisting left shoulder condition was aggravated or accelerated by the work injury he suffered on February 21, 2011 and the Claimant has proven that he is entitled to medical benefits reasonably necessary to cure and relieve the Claimant from the effects of his work injury and subsequent quasi-course of employment injury.

3. The Respondents shall be liable for all authorized, reasonably necessary and related treatment rendered by the Concentra doctors, including Dr. Ogden or provided pursuant to appropriate referral, to cure and relieve the Claimant of the effects of his left shoulder condition. This liability shall include, but is not limited to the surgical proposal of Dr. Motz for the Claimant's left shoulder condition. Insurer shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

4. The Claimant is entitled to temporary disability benefits, and Respondents shall, therefore, pay Claimant temporary disability benefits in accordance with the November 1, 2012 Corrected Order of ALJ Friend, determining that the Claimant's average weekly wage is $1,092.88, with a corresponding TTD benefit rate of $782.59. Temporary total disability benefits shall be paid from July 23, 2012 ongoing pursuant to statute.

5. Respondents shall pay statutory interest at the rate of 8% per annum on all amounts due and not paid when due; and

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

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

DATED: February 18, 2015

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

ISSUE

Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to a Social Security offset pursuant to §8-42-103(1)(c)(I), C.R.S. after February 1, 2013.

FINDINGS OF FACT

1. Claimant was born on February 10, 1947. He was 67 years old at the time of the hearing in this matter.

2. On November 29, 2010 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. He was in the process of changing a forklift battery when he injured his back.

3. On March 11, 2012 Claimant received a Notice of Award from the Social Security Administration (SSA). The SSA determined that Claimant had become disabled on March 29, 2011. He was thus entitled to monthly disability benefits of $1,840.00 beginning on September 1, 2011.

4. Following a Division Independent Medical Examination (DIME) Respondents issued an amended General Admission of Liability (GAL). In the amended GAL Respondents took an SSDI offset of $252.52 for periods of Temporary Total Disability (TTD) after February 1, 2013. The offset was taken pursuant to the March 11, 2012 SSA determination.

5. On February 1, 2013 Claimant received a letter from the SSA. The letter specified that Claimant was no longer entitled to SSDI benefits because he had reached full retirement age. Instead, Claimant would receive Social Security Retirement (SSR) benefits in the amount of $1,871.00 beginning March 13, 2013. The basis for the SSA's decision was that Claimant was born on February 10, 1947 and had reached 66 years of age.

6. However, a printout of information from the SSA website reveals that Claimant received SSDI benefits in the monthly amount of $1,871.00 through December 11, 2013. Beginning on January 8, 2014 Claimant received SSR benefits in the monthly amount of $1,899.00. The document provided a complete payment history of dates and amounts.

7. Respondents have demonstrated that it is more probably true than not that Claimant continued to receive SSDI benefits from the SSA in the monthly amount of $1,871.00 from September 1, 2011 through December 11, 2013. Although the SSA notified Claimant in a February 1, 2013 letter that his SSDI benefits would be converted

to SSR benefits effective March 13, 2013 because he had reached the full retirement age of 66, it appears that the conversion did not occur until January 2014. The actual payment history, including dates and amounts, reflects that Claimant's SSDI benefits were not actually converted to SSR benefits until January 8, 2014. As revealed in the SSA's February 1, 2013 letter Claimant's benefits should have converted to SSR when he reached 66 years of age in February 2013. Because the conversion did not actually occur, Claimant continued to receive SSDI benefits. Because Claimant continued to receive SSDI benefits after February 1, 2013, Respondents are entitled to take a Social Security offset through December 2013 pursuant to §8-42-103(1)(c)(I), C.R.S.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-103(1)(c)(I), C.R.S. provides, in relevant part, that TTD benefits "shall be reduced, but not below zero, by an amount practically equal to one-half" of SSDI benefits. The overpayment statute in §8-42-107.5, C.R.S. also refers to the SSDI offset. The overall purpose of §8-42-107.5, C.R.S. is to prevent "double recovery" of SSDI and Workers' Compensation benefits for the same disability. *U.S. West Communications, Inc. v. Industrial Claim Appeals Office,* 978 P.2d 154, 156 (Colo. App. 1999). SSDI payments must be accounted for when determining whether a claimant has received funds reaching the statutory cap. Thus, the actual temporary or partial disability benefits paid out should include a proportionate amount of SSDI

benefits for the duration of the payments. *See Flores v. Oregon Steel Mills, Inc.,* W.C. No. 4-608-694 (ICAP, Dec. 14, 2009).

5. As found, Respondents have demonstrated by a preponderance of the evidence that Claimant continued to receive SSDI benefits from the SSA in the monthly amount of $1,871.00 from September 1, 2011 through December 11, 2013. Although the SSA notified Claimant in a February 1, 2013 letter that his SSDI benefits would be converted to SSR benefits effective March 13, 2013 because he had reached the full retirement age of 66, it appears that the conversion did not occur until January 2014. The actual payment history, including dates and amounts, reflects that Claimant's SSDI benefits were not actually converted to SSR benefits until January 8, 2014. As revealed in the SSA's February 1, 2013 letter Claimant's benefits should have converted to SSR when he reached 66 years of age in February 2013. Because the conversion did not actually occur, Claimant continued to receive SSDI benefits. Because Claimant continued to receive SSDI benefits after February 1, 2013, Respondents are entitled to take a Social Security offset through December 2013 pursuant to §8-42-103(1)(c)(I), C.R.S.

ORDER

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

Respondents' entitlement to an offset for SSDI benefits continued through December 2013 and terminated effective January 1, 2014..

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

DATED: February 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his claim for compensation should be reopened based on a worsening of his condition?

- Whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased to $833.86?

- Whether respondent has proven by a preponderance of the evidence that claimant's claim for reopening is precluded by issue preclusion or res judicata?

FINDINGS OF FACT

1. Claimant was employed with Employer on June 2, 2011. Claimant was required to drive his Ford truck to the hot plant in Delta and wait in line to have the bed of his truck loaded with hot asphalt. While having his truck loaded with asphalt, claimant pulled up and the operator began dumping the asphalt onto the hood of Claimant's truck. Claimant testified that the front windshield caved in and the asphalt came into the truck.

2. Following the accident, claimant was taken to the emergency room ("ER") at Montrose Memorial Hospital by his supervisor. Claimant was diagnosed with burns to his right thigh and right hand and provided burn cream and vicodin and discharged from the ER. Claimant came under the care of Dr. Mosley for his physical injuries. Dr. Mosely provided claimant with treatment through June 29, 2011 at which point he placed claimant at MMI. Dr. Mosely, however, recommended a psychological evaluation.

3. Claimant was evaluated by Dr. Bowen for his psychological issues on July 8, 2011. Dr. Bowen obtained a history and performed a psychiatric evaluation. Dr. Bowen recommended 12 to 15 sessions of treatment.

4. Claimant subsequently transferred his psychiatric care to Dr. Holland, in Delta, Colorado. Dr. Holland diagnosed post traumatic stress disorder ("PTSD") and recommended continued treatment. Claimant continued to treat with Dr. Holland through November 18, 2011. Claimant returned to Dr. Holland for additional psychiatric care on December 14, 2012. Dr. Holland noted that claimant demonstrated moderate depression with irritability, fatigue, loss of interest and pleasure, guilt, and social withdrawal. Dr. Holland noted that the past season claimant did as little asphalt as possible and dreaded days he had to haul asphalt. Dr. Holland noted claimant had

significant depression had developed since the last meeting one year ago. Dr. Holland recommended ongoing psychiatric treatment.

5. Claimant returned to Dr. Holland on January 18, 2013. Dr. Holland again noted depressive behavior and noted claimant couldn't stand performing asphalt work now. Claimant testified he eventually changed jobs with employer so that his exposure to asphalt work would be minimized.

6. Respondents had previously filed a final admission of liability ("FAL") on June 30, 2011 that denied liability for medical treatment after MMI. Claimant did not object to the FAL and his case was closed as a matter of law. This case proceeded to hearing before the undersigned ALJ on a prior occasion and resulted in an award of post-MMI medical treatment for claimant's psychological condition. The Order also denied claimant's petition to reopen his claim based on a worsened condition.

7. Claimant sought treatment with Dr. Holland on August 2, 2013 and received cognitive behavioral treatment for anxiety. Claimant returned to Dr. Holland on August 30, 2013 again for additional treatment for anxiety. Dr. Holland eventually referred claimant to Dr. Price on January 10, 2014 after claimant requested an impairment rating. Dr. Holland noted in her referral that she was not "set up" to perform an impairment rating.

8. Dr. Price evaluated claimant on May 1, 2014. Dr. Price diagnosed claimant with a history of PTSD, a history of insomnia and a history of nightmares. Dr. Price recommended claimant continue seeing Dr. Holland and recommended his primary care physician consider placing him on prazosin for his nightmares. Dr. Price also recommended claimant consider seeing a psychiatrist.

9. Claimant returned to Dr. Price on June 23, 2014. Claimant reported he had tried the prazosin, but the medications made him sick to his stomach and he stopped the medication. Dr. Price performed an impairment rating and provided claimant with a 7% whole person impairment rating for this psychiatric condition.

10. Claimant was referred for an independent medical examination ("IME") with Dr. Kleinman on two occasions. Claimant's initial IME with Dr. Kleinman took place on March 7, 2013 and determined, following an examination and review of claimant's medical records, that claimant suffered a physically and psychologically traumatic injury at work and that claimant was still presenting with PTSD symptoms. Dr. Kleinman noted that claimant's symptoms increase during each "asphalt season". Dr. Kleinman recommended claimant have psychotherapy as a maintenance benefit related to his work injury.

11. Dr. Kleinman performed a second IME on October 21, 2014. Dr. Kleinman reviewed claimant's updated medical records and again performed an examination in connection with his IME. Dr. Kleinman noted that claimant reported he

was still suffering from depression, anxiety and PTSD. Dr. Kleinman noted that claimant reported that while he was not as social as he was before the injury, he was leaving the house for social occasions. Claimant reported he was less irritable since being on valproic acid, but continued to be somewhat irritable. Claimant reported having nightmares about twice a week and reported his frequency of nightmares had decreased since being on prazosin. Dr. Kleinman reported that when questioned regarding additional treatment, claimant indicated he would like to see a psychiatrist who would do psychotherapy and would like marital counseling. Dr. Kleinman indicated in his report that claimant was presenting now much as he did in 2013. Dr. Kleinman reviewed the reports from Dr. Holland and noted claimant had some progress with his treatment. Dr. Kleinsman opined that the reports did not indicate a worsening of his condition. The ALJ finds the report of Dr. Kleinsman to be credible and persuasive.

12. Dr. Kleinsman testified at hearing consistent with his report. Dr. Kleinsman noted that after his initial evaluation of claimant, claimant had gotten married and had adapted well. Dr. Kleinsman noted that claimant continued to complain of symptoms, but could talk about the incident without arousal and that this was "a plus" with regard to his condition. Dr. Kleinsman opined that claimant's physiologic response had gotten less and less and it was not interfering with claimant's activities of daily living. Dr. Kleinsman opined that claimant's psychological condition had improved since 2013. The ALJ finds the testimony of Dr. Kleinsman to be credible and persuasive.

13. The ALJ has carefully reviewed the medical records entered into evidence at hearing in this matter and determines that claimant has failed to establish that it is more probable than not that he has sustained a change of condition after being placed at MMI that would justify a reopening of his claim. The ALJ notes that claimant received psychological treatment through Dr. Holland and appears to have improved following this treatment. The ALJ credits the reports and testimony of Dr. Kleinman regarding claimant's condition and finds that claimant has not proven a worsened condition causally related to his work injury.

14. Claimant also argues at hearing that his AWW should be increased to $833.86 based on his earnings through August 31, 2011. Claimant argued that this would properly take into consideration the overtime claimant would work during the summer months. The ALJ is not persuaded that claimant's AWW should be increased in this case by earnings claimant secured after his date of injury.

15. The ALJ notes that the Colorado Workers' Compensation Act was amended in 2010 to include language that establishes that when calculating an AWW, the calculation should include the injured workers earnings at the time of the injury. The ALJ recognizes that the court continues to have discretion to use an alternative method for calculating an appropriate AWW, but declines to use that discretion in this case. The ALJ therefore determines that claimant has failed to establish that his AWW should be modified to include earnings after his injury.

16. Because the ALJ denies claimant's petition to reopen and denies claimant's request to increase his AWW, the ALJ need not consider the affirmative defenses raised by respondents at hearing.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, claimant has failed to demonstrate by a preponderance of the evidence that his condition has worsened since being placed at MMI. As found, the existence of an impairment rating provided to claimant at claimant's request does not automatically establish the basis for reopening. As found, the ALJ determines that

claimant's psychological condition was not worsened to justify a reopening of his workers' compensation claim.

5. As found, the ALJ relies on the opinions expressed by Dr. Kleinsman, along with the other medical records submitted in this case, and determines that claimant has failed to prove by a preponderance of the evidence that his case should be reopened based on a change of condition.

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

7. Claimant argues at hearing that his AWW should be increased based on his earnings through August 31, 2011. However, Section 8-42-102(5) provides that the intent of the phrase "at the time of the injury" in subsection (2) of the statute governing the calculation of an injured workers' AWW, "the wage on the date of the accident shall be used." As found, claimant has failed to demonstrate by a preponderance of the evidence that the claimant's AWW should be modified to include his earnings after his date of injury.

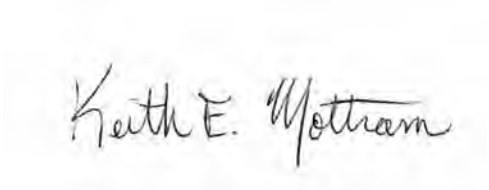
ORDER

It is therefore ordered that:

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

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

DATED: February 4, 2015



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

ISSUES

The issues for determination at the hearing were:

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

2. Whether the Claimant proved, by a preponderance of the evidence, that she is entitled to medical treatment recommended by the DIME examiner that is reasonably necessary to cure and relieve the effects of the Claimant's June 7, 2011 industrial injury.

FINDINGS OF FACT

1. The Claimant was born January 8, 1975. She has had no prior injuries pertinent to this claim.

2. The Claimant worked for the Employer as a materials handler/packager. She worked for them for approximately one and one-half years prior to the injury.

3. On or about June 7, 2011, the Claimant suffered an admitted work injury when she lost control of a box she was lifting. The Claimant testified the box shifted. She first developed symptoms in her right fingers, in her nailbed which progressed to her right shoulder. The shoulder pain worsened after she later pulled on a heavy drawer on June 17, 2011.

4. The Claimant was examined and treated at Centura Centers for Occupational Medicine ("CCOM") by Dr. Mary Dickson, M.D. She was diagnosed with a right shoulder strain. An MRI of the right shoulder indicated supraspinatus tendinosis, mild joint arthrosis and synovitis (Respondents' Exhibit A, p. 1).

5. The Claimant began a course of physical therapy and was given work restrictions. Her right shoulder pain continued and she was referred for both an orthopedic evaluation and biofeedback training. On September 19, 2011 she was given a psychological evaluation by Dale P. Mann, PsyD. He administered the Pain Patient Profile, the Brief Battery for Health Improvement-2, the Beck Depression Inventory-2 and the Beck Anxiety Inventory. Dr. Mann opined that the testing indicated moderate to severe psychological stress, extreme functional distress, severe anxiety and moderate to severe depression. It was recommended that she be placed in a comprehensive pain rehabilitation program (Respondents' Exhibit A, pp. 1-2; Respondents' Exhibit C, pp. 1-2).

6. The Claimant's physical condition deteriorated to the point that she underwent a bursa injection and an arthroscopy. The latter revealed a partial rotator cuff tear and torn joint disc. As a result, she underwent a rotator cuff debridement, acromioplasty and distal clavicular resection (Respondents' Exhibit A, p. 2).

7. An October 1, 2012 MRI showed disc protrusions. The Claimant underwent physical therapy for a time. She also received a pain management referral. Prior to beginning the pain management program, she underwent a second arthroscopy with revision, subacromial decompression and distal clavicle resection on March 14, 2013. She then began her physical therapy once again (Respondents' Exhibit A, p. 3).

8. The Claimant's remaining course of physical treatment included trigger point injections, pool therapy, pain medications and chiropractic treatment. During this time the Claimant was also sent back to Dr. Mann due to her ongoing pain disorder for treatment that included cognitive behavioral therapy, mood stabilization, biofeedback, relaxation training, and additional pain management (Respondents' Exhibit A, p. 3).

9. On June 13, 2013, Dr. Mary Dickson referred the Claimant back to Dr. Mann to evaluate the Claimant's current level of psychological functioning. The Claimant reported that she currently experiences constant headaches, neck and right shoulder pain which ranges from a level of 3-9. Her sleep is very poor and she reports feeling quite depressed, irritated and angry. She also has nightmares most nights about her accident and she thinks about it quite often during the day. The Claimant reported no outlets for expressing her stress at this time and significant problems with memory and concentration. She also reported fear of being along and she gets upset when her husband leaves the house. The Claimant reported no past injuries, surgeries or major medical problems, diseases or psychiatric treatment or counseling prior to her work injury. The Claimant reported no family history of psychiatric problems. At this evaluation, the Claimant was administered the Pain Patient Profile, the Brief Battery for Health Improvement-2, the Posttraumatic Stress Diagnostic Scale, the Beck Depression Inventory-II and the Beck Anxiety Inventory. Dr. Mann's diagnosed the Claimant with Pain Disorder with psychological factors and a general medical condition; Dythmyic Disorder, Psychosocial stressors involving being unable to work and GAF of 50. Dr. Mann noted that the results of his evaluation "included an extensive clinical interview, a review of the patient's history and psychological testing." He concluded that his evaluation "revealed an individual who is currently experiencing severe anxiety, severe depression, high somatic distress, and extremely high functional distress." He recommended participation in a follow up program to include psychological intervention, biofeedback treatment and participation in the chronic pain coping group. The patient and her husband both agreed to Dr. Mann's plan (Respondents' Exhibit C, pp. 3-6).

10. On December 12, 2013 she was seen by Dr. Daniel Olson at CCOM, who had provided little or none of her ongoing care, for a "Maximum Medical Improvement ["MMI"] and Impairment Report." Dr. Olson testified that her ATP was no longer practicing at CCOM and he was on duty the day that the Claimant's impairment rating appointment was scheduled. He placed her at MMI as of that date and gave her a 16% whole person impairment rating for her upper extremity involvement, which he

diagnosed in part as a "failed shoulder" (Respondents' Exhibit A, pp. 3-4; Respondents' Exhibit B).

11. Regarding her "psychological status," Dr. Olson stated that he did not know the Claimant well enough to assign her an impairment rating. He did nevertheless opine that, "it is apparent from the first visit that she has some underlying psychological overlay that is more than likely pre-existing. In addition, many of the symptoms that the psych check list has are probably limited by her physical condition and not her psych status. Language difficulties also make assessing her phsych status difficult." The only mental impairment rating he did provide was 3% for "ongoing medication." He also provided permanent sedentary restrictions and two years' worth of ongoing pain management with Dr. Jenks and counseling with Dr. Mann (Respondents' Exhibit B).

12. A DIME was performed by Dwight R. Leggett, II, M.D. on April 29, 2014. After reciting her medical history as partially indicated above, Dr. Leggett related that the Claimant had ongoing pain from the right shoulder into the right neck area and over the top of her head. The Claimant stated to him that the pain was "intense, sharp and constant" and was made worse with activity and with "sitting, standing, or laying down." Claimant indicated she was unable to perform tasks with her right arm and felt she had extreme instability and weakness. Dr. Leggett "maintained" the 16% whole person impairment rating which had been provided by Dr. Olson for her right shoulder injury and range of motion deficits.

13. In his DIME report, Dr. Leggett also addressed the "psychological component" of the Claimant's injury. Dr. Leggett indicated Claimant was experiencing sadness, depression, was constantly "mad" and felt antisocial. She reported ongoing anxiety. He stated he believed she was not at MMI psychologically and that her antidepressant and/or related treatments had not been "maximized," including alternative antidepressant medications or related treatments. He recommended that she have a psychiatric referral to coordinate the pain management and counseling sessions with Dr. Mann and Amy Alsum. Dr. Leggett opined that, "with proper treatment of the psychological component of her injury, this will likely [sic] her tolerance of shoulder pain as her perception of the shoulder injury is distorted by her ongoing depression and anxiety" (Respondents' Exhibit A).

14. In the absence of further active treatment, Dr. Leggett provided the Claimant an additional 16% whole person rating for the psychological component which he combined for a total whole person impairment of 29% (Respondents' Exhibit A).

15. On or about September 28, 2014, Dr. David Zierk, Psy. D. evaluated the Claimant. Dr. Zierk's psychological assessment involved a clinical interview and a number of psychosocial tests, including, Clinical Assessment of Depression (CAD), Health Index Questionnaire (HIQ), Millon Behavioral Medicine Diagnostic (MBMD), the Brief Battery for Health Improvement-2 (BBHI-2), and the MMPI-2 RF. Based on his interview and testing, Dr. Zierk stated that the Claimant was struggling with moderately severe depression, generalized anxiety and generalized emotional distress. He diagnosed her with mood and pain disorders along with dependent personality traits,

occupational insecurity and limited social support (9/28/14 Report of Dr. Zierk, admitted post-hearing pursuant to Motion).

16. Respondents applied for this hearing to challenge the results of the DIME and Dr. Leggett's deposition was taken in preparation for the hearing. None of his findings from the DIME were changed or, effectively, challenged in the deposition. He did state that he "honestly" did not think the Claimant was magnifying her symptoms (Depo. Tr. Dr. Leggett, p. 41) and that what he perceived as her dependence on her husband was not something he was "critical" of (Depo. Tr. Dr. Leggett, p. 51). Dr. Leggett reiterated that he did not believe the Claimant was at MMI for the psychological component as she had not maximized potential treatment (Depo. Tr. Dr. Leggett, p. 31). Dr. Leggett specifically testified that the Claimant could benefit from a regime of antidepressant medications and that only a couple had been tried on the Claimant so far and he did not feel that this was a sufficient medical trial to determine if the Claimant could benefit from certain dosages and frequencies of medications (Depo. Tr. Dr. Leggett, p. 33). Dr. Leggett testified that he would defer to Dr. Mann to refer a psychiatrist for the Claimant for medication trials and to coordinate with the psychological treatment with Dr. Mann and Amy Alsum (Depo. Tr. Dr. Leggett, pp. 34-35).

17. Dr. Olson also testified by deposition. He testified that he did not believe the Claimant was "faking" her pain presentation (Depo. Tr. Dr. Olson, p. 20). In referring back to his impairment rating report, he testified that he "did not have the time or information there to assess her pre-injury status. I think the psychologist, they do spend more time with them. They can assess that better than I can. I certainly left it open that if there needed to be a psychiatric impairment, that that should be evaluated as well" (Depo. Tr. Dr. Olson, p. 14). Dr. Olson also testified that he would defer to Dr. Mann on psychological issues (Depo. Tr. Dr. Olson, p. 15). He testified that the reason he felt the Claimant did not need additional psychiatric care was that he believed that one of the notes from Amy Alsum said that the treatment was wrapping up (Depo. Tr. Dr. Olson, p. 16). He testified that he felt the Claimant was at MMI but that she would require maintenance visits with Dr. Mann for the next 2 years (Depo. Tr. Dr. Olson, p. 17.

18. At the hearing, the Claimant testified that she experiences sadness and depression and wakes up screaming from the pain and from bad dreams. She testified she still has dreams of the initial injury with the box and dropping it and now wishes she would have just let go. She experiences continued depression, memory issues, photosensitivity, dizziness and nausea. She testified that she is in more pain now than she was before her two surgeries. She testified that she believes that biofeedback sessions that she had with Amy Alsum helped her condition. The Claimant testified that she is sad because she is hoping to be healed but it feels hopeless and she doesn't know if she will be healed. The Claimant testified that she has never experienced mental illness before her injury nor was she ever treated for mental illness or depression. Before her injury, the Claimant testified that she played tennis and hung out with a bunch of people and went to church. Now, she does not like to be around a lot of people so she doesn't go to church or play tennis anymore. She testified that she wants the phychological referral recommended by the DIME physician.

19. The Claimant's husband also testified at the hearing. He married the Claimant on October 22, 2008. He takes the Claimant to all of her appointments because she doesn't want to go anywhere without him. He met his wife, who is Filipino in the Phillipines. She was on a tennis court playing tennis when he met her but now she no longer plays tennis. The Claimant's husband testified that the Claimant was different when he met her, she was wonderful and he was looking forward to a wonderful marriage. He testified that now he feels he is as much a caregiver as a husband. He testified that now she is closed in and afraid.

20. The Claimant and her husband testified persuasively at the hearing. The Claimant requested the psychiatric referral mentioned above and her husband testified as to the significant mental changes she had experienced since the admitted injury.

21. Excerpts of written materials from Level II Curriculum training were entered into evidence at Respondents' Exhibit E and both Dr. Leggett and Dr. Olson commented on it during their depositions. The information provides instruction for the performance of a psychiatric examination for the purpose of Workers' Compensation. There is a detailed description listing the sections of the examination which are to include: description of causal work event, history of immediate or ensuing physical injury, history of immediate emotional impact and ensuing psychiatric disorder, review of the worker's basic psychological development (composition of nuclear family including birthplace, earlier relationships with family members, performance in school including highest level of education, social adjustment growing up), experience with use of alcohol and or drugs, history of emotional, physical or sexual abuse, detailed history of past psychiatric treatment, detailed occupational history, family psychiatric history, legal history, current adjustment consisting of detailed description of a typical day's activities, description of sleet, other activities of daily living, detailed description of current enjoyable activities, mental status evaluation (Respondents' Exhibit E, pp. 2-3). The materials also note that as to determination of MMI, "workers who have not received medically necessary and appropriate treatment are not at psychiatric MMI. For example, the examiner must assess whether maximal does of medications and psychiatric therapy have been utilized to abate symptoms before the worker is considered at psychiatric MMI" (Respondents' Exhibit E, p. 4).

CONCLUSIONS OF LAW

Generally

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

rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

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

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

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

opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

Here, the Respondents have failed to meet their burden of proof to show that it is highly probable that the opinion of Dr. Leggett on the determination of the Claimant's MMI status was clearly incorrect. Dr. Olson disagrees with Dr. Leggett's opinion that the Claimant is not at MMI. Dr. Leggett found that the Claimant is not at MMI because the Claimant was experiencing sadness, depression, was constantly "mad" and felt antisocial. She reported ongoing anxiety. He stated he believed she was not at MMI psychologically and that her antidepressant and/or related treatments had not been "maximized," including alternative antidepressant medications or related treatments. He recommended that she have a psychiatric referral to coordinate the pain management and counseling sessions with Dr. Mann and Amy Alsum. Dr. Leggett opined that, "with proper treatment of the psychological component of her injury, this will likely [sic] her tolerance of shoulder pain as her perception of the shoulder injury is distorted by her ongoing depression and anxiety." The Claimant herself testified that she was interested in pursuing the psychiatric referral of the MMI physician. Dr. Mann's DIME report was detailed, thorough and complied with the Level II Curriculum with respect to the psychiatric component of his opinion.

For his part, Dr. Olson testified that he did not believe the Claimant was "faking" her pain presentation. In referring back to his impairment rating report, he testified that he simply "did not have the time or information there to assess her pre-injury status" but he also testified that "he certainly left it open that if there needed to be a psychiatric impairment." Dr. Olson also testified that he would defer to Dr. Mann on psychological issues. He testified that the reason he felt the Claimant did not need additional psychiatric care was that he believed that one of the notes from Amy Alsum said that the treatment was wrapping up. He testified that he felt the Claimant was at MMI but that she would require maintenance visits with Dr. Mann for the next 2 years. Dr. Olson did not address the DIME physician, Dr. Leggett's recommendation for a psychiatric

referral and trials of different types, doses and frequencies of medications to alleviate the Claimant's psychiatric symptoms.

The conflict between the conclusion of Dr. Olson that the Claimant is at MMI for her psychiatric condition amounts to a difference of opinion with Dr. Leggett, which is not sufficient to overcome the DIME physician's opinion. Moreover, neither Dr. Olson, nor Dr. Mann, nor any other physician has disagreed with Dr. Leggett's reasonable recommendation that the Claimant obtain a psychiatric referral and for coordination between a psychiatric and the psychological treatment that the Claimant is receiving from Dr. Mann and Amy Alsum. Thus, Dr. Mitchell's determination that the Claimant is not at MMI has not been overcome by clear and convincing evidence. Therefore, Respondents' application to overcome the DIME opinion is denied and dismissed.

Medical Benefits–Authorized, Reasonably Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical

treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

The Claimant continues to suffer from a debilitating psychiatric condition attendant to her June 7, 2011 work injury. At the hearing, the Claimant testified that she experiences sadness and depression and wakes up screaming from the pain and from bad dreams. She testified she still has dreams of the initial injury with the box and dropping it and now wishes she would have just let go. She experiences continued depression, memory issues, photosensitivity, dizziness and nausea. She testified that she is in more pain now than she was before her two surgeries. She testified that she believes that the biofeedback sessions that she had with Amy Alsum helped her condition. The Claimant testified that she is sad because she is hoping to be healed but it feels hopeless and she doesn't know if she will be healed. The Claimant testified that she has never experienced mental illness before her injury nor was she ever treated for mental illness or depression. Before her injury, the Claimant testified that she played tennis and hung out with a bunch of people and went to church. Now, she does not like to be around a lot of people so she doesn't go to church or play tennis anymore. She testified that she wants the psychiatric referral recommended by the DIME physician.

Dr. Leggett specifically testified that the Claimant could benefit from a regime of antidepressant medications and that only a couple had been tried on the Claimant so far and he did not feel that this was a sufficient medical trial to determine if the Claimant could benefit from certain dosages and frequencies of medications. Dr. Leggett testified that he would defer to Dr. Mann to refer a psychiatrist for the Claimant for medication trials and to coordinate with the psychological treatment with Dr. Mann and Amy Alsum.

There was no persuasive testimony to contradict the recommendation of Dr. Leggett and the recommendation is reasonably necessary to cure and relieve the Claimant of the effects of her admitted work injury. In addition, the 2 years of continued psychological treatment with Dr. Mann and Amy Alsum recommended by Dr. Olson is likewise reasonably necessary to cure and relieve the Claimant of the effects of her admitted work injury.

Thus, the Claimant has proven by a preponderance of the evidence that the psychological and psychiatric treatment recommended by Dr. Leggett and Dr. Olson is reasonably necessary to cure and relieve the Claimant of the effects of her June 7, 2011 work injury.

ORDER

It is therefore ordered that:

1. The Respondents have failed to meet the burden of proving, by clear and convincing evidence that the DIME physician is in error as to his determination that the Claimant is not at MMI.

2. The Respondents' application to overcome the DIME opinion is denied and dismissed.

3. The Respondents shall provide medical treatment to the Claimant consisting of the psychiatric referral and treatment recommendations by Dr. Leggett and the continued psychological treatment recommended by Dr. Olson.

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

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

DATED: February 9, 2015

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

ISSUES

1. Whether Respondents have proven by a preponderance of the evidence that they should be permitted to withdraw their December 23, 2012 General Admission of Liability (GAL) because Claimant did not suffer an occupational disease in the form of Carpal Tunnel Syndrome (CTS) during the course and scope of her employment with Employer.

2. Alternatively, whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Shimon Y. Blau, M.D. that she did not suffer CTS during the course and scope of her employment with Employer.

3. Whether Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered CRPS and was entitled to a 5% whole person impairment rating.

4. Whether Claimant is entitled to a 2% whole person mental impairment rating for depression as a result of chronic pain.

FINDINGS OF FACT

1. Claimant began working for Employer in March 2010 as a Markdown Associate. She worked 3-4 days per week for 5-8 hours each day for a total of approximately 20-25 hours per week. Claimant also received two 15 minute breaks and one 30 minute lunch break. Her duties involved scanning clothing and other merchandise using a scan gun. When using the scan gun on an item Claimant pulled a trigger with her right index finger. The gun then printed a bar code ticket that Claimant affixed to the scanned item. While performing her job duties Claimant began to experience tingling in her forearms, wrists and hands.

2. In 2011 Claimant was promoted to the position of Stock Room Lead for Employer. She worked an average of 37.5 hours per week. Claimant received two 15 minute breaks and one 30 minute lunch break. For the first 30-45 minutes of each day Claimant unloaded boxes from a truck by sliding them down a conveyor belt to the stock room floor. Claimant and her employees would then open the boxes, remove plastic from the clothing items, place them on hangers and hard-tag the merchandise. Claimant explained that the hard tags consisted of two pieces. One piece was circular, about two inches in diameter, and contained a pin that would be inserted into the other part of the tag. The tags were used as a theft deterrent. Claimant noted that her job duties as a Stock Room Lead caused her hands to become tingling and painful.

3. Based on her upper extremity symptoms Claimant filed a claim for Workers' Compensation and visited Guy Cook, D.O. for an examination. He took her off of work and ordered an EMG/NCS. The EMG revealed CTS. Claimant was then referred to Randy Bussey, M.D. for a surgical consultation. On February 23, 2012 Respondents filed a General Admission of Liability (GAL) acknowledging that Claimant's job duties for Employer caused her to develop CTS. On March 13, 2012 Dr. Bussey performed an open single incision decompression of the median nerve of Claimant's left upper extremity.

4. On July 10, 2013 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian also testified at the hearing in this matter. Dr. Cebrian testified that he relied on the *Division of Workers' Compensation Medical Treatment Guidelines (Guidelines)* in performing his causation analysis. He explained that in order to perform a medical causation assessment for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis. The next step is to evaluate causation of the diagnosis, including defining the job duties, and identifying whether any of the duties meet the delineated risk factors in the *Guidelines*. Dr. Cebrian further explained that, if the job duties do not meet the primary or secondary risk factors, then the condition is not work-related. If one or more primary risk factors are present, then the next step is to determine whether the primary risk factor is physiologically related to the diagnosis. If secondary risk factors are present then a third step in the causation analysis is required.

5. Dr. Cebrian noted that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5 of the *Guidelines*. He discussed each of the risk factors enumerated in the *Guidelines*. Dr. Cebrian remarked that Claimant's job duties as a Markdown Associate involved scanning clothing and other merchandise. The scan gun weighed approximately one pound. Scanning involved pulling a trigger with her right index finger. Claimant told Dr. Cebrian that scanning accounted for approximately 80% of her work day. Dr. Cebrian determined that the preceding job duties did not meet the primary or secondary risk factors as outlined in the *Guidelines*. The *Guidelines* specify activities including computer work, using handheld vibratory power tools, working in cold environments, a combination of force and repetition (e.g. six hours of graded and 50% of individual maximum force with task cycles of 30 seconds or less), use of handheld tools weighing two pounds or greater and awkward posture and duration. Dr. Cebrian remarked that repetition alone is not a risk factor for CTS and there must be a proven combination of repetition, force and cycle time in order to meet the causational requirements. He summarized that, even if Claimant used the scan gun continuously during her shift she would not meet the requirement of performing the repetitive task for an average of six hours per shift. Notably, Claimant's most severe CTS symptoms involved her left wrist area but she used her right hand to operate the scan gun.

6. Dr. Cebrian explained that Claimant's job duties as a Stock Room Lead involved working an average of 7.5 hours per day with two 15 minute breaks and one 30 minute break. Claimant thus actually worked for an average of 6.5 hours per day. She attributed her CTS symptoms to hard-tagging items. However, Dr. Cebrian detailed that

hard-tagging was only a small portion of Claimant's task cycle. Claimant typically reached into a box, pulled out an item of clothing, removed any packaging material, identified the area in which to sort the item and hang the clothing. Claimant would then attach a hard-tag to the item. She was not required to hard-tag home merchandise that was removed from boxes. Claimant also noted that approximately 80% of her day involved hard-tagging. If Claimant worked 6.5 hours each day and spent 80% of her time hard-tagging items, she only spent 5.2 hours per day performing the activity and thus did not meet the six hour threshold delineated for cumulative trauma conditions in the *Guidelines.* Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Stock Room Lead failed to meet the causation requirements for CTS outlined in the *Guidelines.*

7. Following her CTS surgery Claimant developed chronic pain in her upper body. She was referred to Authorized Treating Physician (ATP) Gregory Reichhardt, M.D. for medical treatment. On September 14, 2012 she visited Dr. Reichhardt for an evaluation of her chronic pain. He referred Claimant for diagnostic testing regarding possible Chronic Regional Pain Syndrome (CRPS).

8. On September 24, 2012 Claimant underwent a Functional Infrared Thermogram performed by Timothy Conwell, D.C. The thermogram met the criteria for bilateral CRPS Type II with associated median nerve root involvement. On December 18, 2012 Claimant underwent an Autonomic Testing Battery performed by J. Tashof Bernton, M.D. The testing revealed a high probability for CRPS Type II.

9. Dr. Reichhardt referred Claimant to Daniel Bruns, Psy.D. for chronic pain management. Dr. Bruns began treating Claimant for depression beginning August 16, 2012.

10. Dr. Reichardt determined that Claimant reached Maximum Medical Improvement (MMI) on March 14, 2014 and assigned a 14% whole person impairment rating. The rating consisted of 5% for CRPS and 2% for depression. The rating also included a 12% right upper extremity impairment for CTS that converted to a 7% whole person rating.

11. Respondents challenged Dr. Reichardt's 14% whole person impairment rating and sought a DIME. On July 14, 2014 Claimant underwent a DIME with Dr. Blau. Dr. Blau reviewed Claimant's medical records, conducted a physical examination, made diagnoses and performed a causation analysis of Claimant's injuries. Dr. Blau determined that Claimant suffered from bilateral CTS and left upper extremity CRPS. He agreed with Dr. Cebrian that Claimant's bilateral CTS did not meet the *Guidelines* for a work-related injury. However, Dr. Blau explained that Claimant's CRPS was "iatrogenically caused" by her left upper extremity CTS surgery performed under her Workers' Compensation claim. Based on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* he assigned Claimant a 5% whole person impairment because of her left upper extremity CRPS. Dr. Blau did not assign Claimant any impairment rating for depression. He agreed with Dr. Reichhardt that Claimant reached MMI on March 14, 2014.

12. Respondents have proven that it is more probably true than not that they should be permitted to withdraw their December 23, 2012 GAL because Claimant did not suffer an occupational disease in the form of CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Markdown Associate and a Stock Room Lead while working for Employer caused her to develop CTS in her left upper extremity. However, relying on the *Guidelines,* Dr. Cebrian noted that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5. He discussed each of the risk factors enumerated in the *Guidelines*. Relying on the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Markdown Associate or Stock Room Lead failed to meet the causational requirements for CTS outlined in the *Guidelines.* DIME. He persuasively explained that Claimant did not suffer CTS as a result of her work activities for Employer. DIME Dr. Blau agreed with Dr. Cebrian that Claimant's bilateral CTS did not meet the *Guidelines* for a work-related injury. Accordingly, Respondents have demonstrated that the hazards of Claimant's employment did not cause, intensify, or, to a reasonable degree, aggravate her left upper extremity condition. Respondents are thus permitted to withdraw their December 23, 2012 GAL. Because Respondents are permitted to withdraw their GAL it is unnecessary to address Claimant's challenge to Dr. Blau's determination that her work activities did not cause her CTS.

13. Respondents have failed to produce clear and convincing evidence to overcome the opinion of DIME Dr. Blau that Claimant suffered CRPS as a result of her CTS surgery. Based on Claimant's upper extremity symptoms that she attributed to her work activities for Employer, she filed a claim for Workers' Compensation and visited Dr. Cook for an examination. He took her off of work and ordered an EMG/NCS. The EMG revealed CTS. Claimant was then referred to Dr. Bussey for a surgical consultation. On February 23, 2012 Respondents field a GAL acknowledging that Claimant's job duties for Employer caused her to develop CTS. On March 13, 2012 Dr. Bussey performed an open single incision decompression of the median nerve of Claimant's left upper extremity. Following her CTS surgery Claimant developed chronic pain in her upper body. After diagnostic testing consisting of a Functional Infrared Thermogram and an Autonomic Testing Battery she was diagnosed with CRPS Type II. Dr. Blau agreed that Claimant suffered from left upper extremity CRPS. He explained that Claimant's CRPS was "iatrogenically caused" by her left upper extremity CTS surgery performed under her Workers' Compensation claim. Based on the *AMA Guides* he assigned Claimant a 5% whole person impairment rating for her left upper extremity CRPS. Nevertheless, Respondents assert that Dr. Blau's determination was erroneous because Claimant's underlying CTS was not caused by her work activities for Employer. Because the CTS was a non-work-related injury, Respondents assert that subsequent surgery for the condition cannot be work-related. However, Respondents contention fails based on the quasi-course of employment doctrine.

14. Claimant developed CRPS while undergoing authorized medical treatment for an industrial injury. Even though the condition occurred outside the ordinary time and place limitations of normal employment, CRPS developed because of Claimant's surgery. Employer was thus required to provide reasonable and necessary medical

treatment and Claimant was required to submit to it or risk suspension or termination of benefits. Surgical treatment by Dr. Bussey to relieve the effects of her admitted industrial injury thus became an implied part of the employment contract. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Blau's 5% whole person impairment determination for CRPS was incorrect.

15. Finally, Dr. Reichhardt assigned Claimant a 2% whole person mental impairment for depression because of chronic pain. Dr. Blau did not address the 2% whole person mental impairment rating. In fact, Respondents Application for a DIME did not include any request to review Claimant's 2% whole person impairment for depression assigned by Dr. Reichhardt. Because Dr. Blau was not asked to address Claimant's 2% whole person mental impairment rating, his failure to consider the rating was not clearly erroneous. Dr. Reichardt's assignment of a 2% whole person mental impairment rating does not constitute unmistakable evidence free from serious or substantial doubt that Dr. Blau's failure to assign a rating for depression was incorrect.

CONCLUSIONS OF LAW

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

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

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

Withdrawing the FAL

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

5. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2013), C.R.S. On February 23, 2012 Respondents admitted that Claimant sustained the occupational disease of CTS while working for Employer. Accordingly, Respondents have the burden of proving by a preponderance of the evidence that Claimant did not sustain CTS to withdraw the GAL.

6. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

7. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to

development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

8. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

9. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

10. As found, Respondents have proven by a preponderance of the evidence that they should be permitted to withdraw their December 23, 2012 GAL because Claimant did not suffer an occupational disease in the form of CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Markdown Associate and a Stock Room Lead while working for Employer caused her to develop CTS in her left upper extremity. However, relying on the *Guidelines,* Dr. Cebrian noted that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5. He discussed each of the risk factors enumerated in the *Guidelines*. Relying on the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Markdown Associate or Stock Room Lead failed to meet the causational requirements for CTS outlined in the *Guidelines.* DIME. He persuasively explained that Claimant did not suffer CTS as a result of her work activities for Employer. DIME Dr. Blau agreed with Dr. Cebrian that Claimant's bilateral CTS did not meet the *Guidelines* for a work-related injury. Accordingly, Respondents have demonstrated that the hazards of Claimant's employment did not cause, intensify, or, to a reasonable degree, aggravate her left upper extremity condition. Respondents are thus permitted to withdraw their December 23, 2012 GAL. Because Respondents are permitted to withdraw their GAL it is unnecessary to address Claimant's challenge to Dr. Blau's determination that her work activities did not cause her CTS.

Overcoming the DIME

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

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

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

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

. 15. As found, Respondents have failed to produce clear and convincing evidence to overcome the opinion of DIME Dr. Blau that Claimant suffered CRPS as a result of her CTS surgery. Based on Claimant's upper extremity symptoms that she attributed to her work activities for Employer, she filed a claim for Workers' Compensation and visited Dr. Cook for an examination. He took her off of work and ordered an EMG/NCS. The EMG revealed CTS. Claimant was then referred to Dr. Bussey for a surgical consultation. On February 23, 2012 Respondents field a GAL acknowledging that Claimant's job duties for Employer caused her to develop CTS. On March 13, 2012 Dr. Bussey performed an open single incision decompression of the median nerve of Claimant's left upper extremity. Following her CTS surgery Claimant developed chronic pain in her upper body. After diagnostic testing consisting of a Functional Infrared Thermogram and an Autonomic Testing Battery she was diagnosed with CRPS Type II. Dr. Blau agreed that Claimant suffered from left upper extremity CRPS. He explained that Claimant's CRPS was "iatrogenically caused" by her left upper extremity CTS surgery performed under her Workers' Compensation claim. Based on the *AMA Guides* he assigned Claimant a 5% whole person impairment rating for her left upper extremity CRPS. Nevertheless, Respondents assert that Dr. Blau's determination was erroneous because Claimant's underlying CTS was not caused by her work activities for Employer. Because the CTS was a non-work-related injury, Respondents assert that subsequent surgery for the condition cannot be work-related. However, Respondents contention fails based on the quasi-course of employment doctrine.

16. As found, Claimant developed CRPS while undergoing authorized medical treatment for an industrial injury. Even though the condition occurred outside the ordinary time and place limitations of normal employment, CRPS developed because of Claimant's surgery. Employer was thus required to provide reasonable and necessary medical treatment and Claimant was required to submit to it or risk suspension or termination of benefits. Surgical treatment by Dr. Bussey to relieve the effects of her admitted industrial injury thus became an implied part of the employment contract. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Blau's 5% whole person impairment determination for CRPS was incorrect.

17. As found, finally, Dr. Reichhardt assigned Claimant a 2% whole person mental impairment for depression because of chronic pain. Dr. Blau did not address the 2% whole person mental impairment rating. In fact, Respondents Application for a DIME did not include any request to review Claimant's 2% whole person impairment for depression assigned by Dr. Reichhardt. Because Dr. Blau was not asked to address Claimant's 2% whole person mental impairment rating, his failure to consider the rating was not clearly erroneous. Dr. Reichardt's assignment of a 2% whole person mental impairment rating does not constitute unmistakable evidence free from serious or substantial doubt that Dr. Blau's failure to assign a rating for depression was incorrect.

ORDER

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

1. Respondents are permitted to withdraw their December 23, 2012 GAL because Claimant did not suffer an occupational disease in the form of CTS during the course and scope of her employment with Employer. It is thus unnecessary to address Claimant's challenge to DIME Dr. Blau's determination that her work activities did not cause her CTS.

2. Respondents have failed to produce clear and convincing evidence to overcome the opinion of Dr. Blau that Claimant suffered CRPS as a result of her CTS surgery. Claimant is thus entitled to a 5% whole person impairment rating for CRPS.

3. Claimant is not entitled to a 2% whole person mental impairment rating for depression as a result of chronic pain.

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

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

DATED: February 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-879-404-03

ISSUE

The sole issue presented for adjudication at the hearing was:

1. Whether Respondent has proven it is entitled to a fifty percent (50%) reduction in compensation because Claimant's injury was caused by a willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

FINDINGS OF FACT

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

1. The Claimant was hired by Employer in April 2001 to work at the Employer's bakery plant (Respondent's Exhibit D). The Claimant began working on the freezer bread molder in the bakery plant on May 27, 2007. The Claimant signed a bid for the position with her seniority date in May 2007 and won the bid on May 22, 2007. The essential duties for the Freezer Bread Molder position that the Claimant signed up for in May 2007 included: responsible for daily set up of all machinery, responsible for all changeovers to various products in a timely manner, maintaining an efficient line, responsible for inventories of raw material whenever needed, responsible for all paperwork that is needed on the job, responsible for keeping a clean and safe working area (each area has designated clean ups), knowledge of all lock out-tag out procedures. At the time, the Claimant won the bid, a listed foreperson for the position was Jacob Vigil and a supervisor was Joseph McCaffery (Respondent's Exhibit I; 08/27/14 Hearing Tr. pp. 34-35).

2. While working on the freezer bread molder on February 13, 2012, the Claimant sustained an admitted work-related injury. The injury occurred when Claimant was setting up the freezer bread molder for production. The Claimant was attempting to place a piece of cardboard on top of the lower conveyor belt to catch flour and dough that would fall from the top conveyor belt during production. This was typically done by some of the workers to aid in clean up at the end of the shift. When the Claimant attempted to put the cardboard on the lower conveyor belt on February 13, 2012, the top conveyor belt was in the down position and running. While the Claimant was placing the cardboard on the lower conveyor belt, the cardboard got caught in the rollers of the upper conveyer belt and pulled the Claimants' left hand into the top conveyer belt and her arm became trapped in the roller of the upper conveyor belt that was running. The Claimant specifically testified that she was placing cardboard and the lower conveyer was off, although the top conveyer was on, when the cardboard pulled her left arm into the top conveyor belt and roller. She testified that she held her left arm with her other arm to keep it from being pulled all the way into the machine. She told another co-worker to turn off the machine, but the co-worker turned off the magnets instead. Then the Claimant testified that she remembered another switch that was above her and she

turned it off (9/19/2114 Hearing Tr. p. 12). The Claimant suffered a severe injury that included broken bones in her left arm that required surgery.

3. Joseph McCaffery testified that he has been the Production Manager at the King Soopers Bakery for approximately the last seven years 08/27/14 Hearing Tr. p. 71). Mr. McCaffrey was working as supervisor on duty the day of the Claimant's February 13, 2012 injury and he testified that the Claimant violated Employer's safety rules 41, 15 and 2 (08/27/14 Hearing Tr. p. 76-77). He testified that King Soopers does not have a specific rule, company policy or operational policy for employees placing cardboard on the lower conveyor belt that is done to facilitate the ease of cleaning up at a later time by an employee (08/27/14 Hearing Tr. pp. 77-79 and p. 83). However, Mr. McCaffery stated that employees are to turn off the upper conveyer belt before placing the cardboard on the lower conveyer belt because there is a specific policy about moving machinery (08/27/14 Hearing Tr. p. 84). He further testified that he has not witnessed anyone not turning off the upper conveyer belt before placing the cardboard on the lower conveyer belt (08/27/14 Hearing Tr. pp. 80-81).

4. Mr. McCaffery completed a hand-written first report of injury on February 13, 2012. He wrote that the Claimant was "setting up her work area. She was placing sheets of cardboard under a running conveyor (caught (L) arm above)." Mr. McCaffery noted on the first report of injury that the injury occurred because of a safety violation as he checked this box. Mr. McCaffery testified that it was his understanding that the Claimant was placing a piece of cardboard on top of the lower conveyer belt while the upper conveyer belt was running and that this was a safety rule violation. (Respondent's Exhibit A; 08/27/14 Hearing Tr., p. 63). A typed first report of injury was found at Claimant's Exhibits, p. 3, but Mr. McCaffery did not type it and it is unclear where the typed first report of injury came from or who created it. It does indicate that Mr. McCaffery did complete it and it is dated February 13, 2012. In the typed version of Employer's First Report of Injury, the box about whether the injury occurred because of a safety rule violation was left unchecked (Claimant's Exhibits, p. 3).

5. Mr. McCaffery also completed an employee incident root cause analysis report. On the form as the reasons/at risk acts that caused to injury, Mr. McCaffery checked "inattention" and "inattention to hazard." Mr. McCaffery also noted there was "no at risk condition" that caused the injury. Mr. McCaffery noted on this form that this incident was not Claimant's 1st unsafe action and listed an amputation of finger from 2005. Mr. McCaffery also noted that the store management's actions to prevent reoccurrence were corrective discipline of associate involved (Claimant's Exhibits, p. 4; Respondent's Exhibit E).

6. Ms. Katherine Saunders testified during the first day of hearing that she is currently the General Manager for King Soopers Bakery plant and was the Operations Manager/Safety Manager at the time of the Claimant's injury. She had held the position of Operations Manager/Safety Manager for 14 years (08/27/14 Hearing Tr. pp. 22-23). Ms. Saunders testified that the Employer takes safety very seriously in this plant and that safety violations are written up and kept in a log book (08/27/14 Hearing Tr. p. 32). Copies of written warnings for safety violations were admitted into evidence at

Respondents' Exhibit V, pp. 153-224. Most of these write ups related to Lockout / Tag Out procedures or placing hands in moving machinery. Many were for cleaning or trying to unplug product out of machinery that was not turned off.

7. There was considerable testimony and a number of exhibits entered into evidence about the Lockout / Tagout Procedures of the Employer, including a Lockout / Tagout Training Power Point (Claimant's Exhibits, pp. 15-41; Respondent's Exhibit J), and a Lockout / Tagout procedure form for the Employer's bakery for the bread molder/sheeter equipment (Respondent's Exhibit K, p. 69). The Power Point presentation notes that,

> LOTO procedures are for YOUR safety. These procedures apply when it becomes necessary to place any part of your body into an area on a machine or in equipment where the cycling of that machine/equipment could cause injury. These procedures are designed to prevent those accidents and injuries caused by the unexpected start up of a piece of equipment/machinery during cleaning, servicing or maintenance.
>
> (Claimant's Exhibits, p. 16; Respondent's Exhibit J, p. 44)

8. There was some dispute during the course of the proceedings as to the Claimant's ability to understand, speak and read English. The Claimant testified that she speaks and understands just a little bit of English and reads and writes in English not too much. (09/10/14 Hearing Tr. pp. 10-11). However, there was evidence presented at the hearings to the contrary that the Claimant has greater ability to understand, speak and read English that she testified. When the Claimant applied for employment with Employer, she completed a job application in English. The Claimant also completed a job interview before she was hired. The Claimant testified that she completed the interview in Spanish. However, Kathy Saunders, who has worked for Employer for 38 years, credibly testified that interviews are only done in English and not offered in Spanish (Respondent's Exhibit D; 09/10/14 Hearing Tr. pp. 66–67). Ms. Saunders also testified that she has known the Claimant for 13 years. Ms. Saunders does not speak or understand Spanish yet testified she communicates with the Claimant and has never had any difficulty communicating with the Claimant. The Claimant speaks with Ms. Saunders in English and has never spoken with Ms. Saunders in Spanish (08/27/14 Hearing Tr. pp. 24–25). Mr. McCaffery testified that he has known the Claimant for 9 years. Mr. McCaffery testified that he does not speak or understand Spanish but he is able to communicate with the Claimant easily. Mr. McCaffery testified that the Claimant only speaks to him in English and does not communicate with him in Spanish. Mr. McCaffery testified that he has never had difficulty understanding the Claimant. (08/27/14 Hearing Tr. pp. 74–75). Mr. Vigil, the Claimant's co-worker and former foreman, testified that he worked on the freezer line with the Claimant for 4 years. Mr. Vigil does not speak or understand Spanish. Mr. Vigil testified that he always communicates with the Claimant in English. Mr. Vigil testified that he would ask the Claimant to perform various tasks, clean this, and clean that in English, and the Claimant would always understand him and do the work. Mr. Vigil also testified that the Claimant does not speak in "broken English" in his opinion (09/10/14 Hearing Tr. pp.

34–36; p. 49). When the Claimant met with Ms. Saunders, Mr. McCaffery, and Mr. Vigil on April 9, 2012 to discuss her injury and explain what happened, she did this without an interpreter present despite Ms. Saunders, Mr. McCaffery, and Mr. Vigil not speaking or understanding Spanish. Ms. Saunders testified that an interpreter was not present when the Claimant showed them how the injury occurred and explained what had happened (08/27/14 Hearing Tr. p. 49). Based on the totality of the testimony and the evidence, it is found as fact that, although English is clearly not the Claimant's first language, she has sufficient skills understanding, reading and speaking English that language is not a barrier that would likely have prevented the Claimant from understanding training and safety information that the Claimant received from the Employer.

9. The Claimant knew Employer's safety rules based on over 10 years of training. When Claimant was hired, she was given a copy of the February 1996 Main Bakery Plant Safety Manual on April 16, 2001 and signed acknowledging receipt and that she was responsible for the policies and procedures. On April 17, 2001, Claimant underwent orientation and training with Employer. The Claimant's orientation checklist notes the following in regards to safety: "5. Has read and understands the Safety Rules. … 16. Familiarization with general work area and job duties (Special attention given to safety procedures related to the job or area)." The Claimant signed the orientation checklist on April 30, 2001 (Respondent's Exhibit L pp. 71-73).

10. Employees also receive 30 days of training on the job that includes lock out/tag out training. This is repeated with new positions. The Claimant would have received this 30 days of training in 2001 and again in May 2007 with the new position on the freezer bread line (08/27/14 Hearing Tr. p. 30).

11. After her orientation and initial training, the Claimant underwent annual safety training. Ms. Saunders testified regarding the training process. Ms. Saunders has worked for Employer for 38 years with 14 of those years as the safety manager. Ms. Sanders' job duties as safety manager included overseeing all of the safety training, documentation, and record keeping, including the lock out/tag out training and enforcement of safety rules. Ms. Saunders testified that the lock out/tag out annual training includes a power point presentation that is reviewed every year with the employees (08/27/14 Hearing Tr. pp. 22-23 and p. 28).

12. The Claimant received multiple trainings on safety rules and lock-out/tag-out procedures. On January 29, 2004, the Claimant was trained on the lock out/tag out scope, application, exceptions, and procedures. Claimant also completed a lock out/tag out quiz and a lock out/tag out review on January 29, 2004 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit M pp. 73-77). On February 16, 2005, the Claimant was trained again on the lock out/tag out scope, application, exceptions, and procedures. The Claimant also completed a lock out/tag out quiz on February 16, 2005 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit M pp. 78-83). She was trained on the lock out/tag out scope, application, exceptions, and procedures on April 30, 2006. The Claimant also completed a lock out/tag out quiz and a lock out/tag

out review on April 30, 2006 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit M pp. 89-93). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2006 including rules number 2, 15 (formerly number 14), and 45 (Respondent's Exhibit O pp. 85-87). On February 13, 2007, Claimant was trained again on lock out/tag out procedures and policies. Claimant also completed a lock out/tag out quiz on February 13, 2007 and acknowledged that she had read and understood the training handbook on lock out/tag out. (Resp. Ex. P p. 98-101). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2007 including rules number 2, 15, and 46 (formerly number 45) (Respondent's Exhibit P pp. 94-97). The Claimant was trained again on the lock out/tag out procedures on February 12, 2009. Claimant also completed a lock out/tag out quiz and a lock out/tag out review on February 12, 2009 and acknowledged that she had read and understood the training handbook on lock out/tag out (Respondent's Exhibit Q pp. 105-09). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2009 including rules number 2, 15, and 46 (Respondent's Exhibit Q pp. 102-05). The Claimant was trained again on the lock out/tag out procedures on February 10, 2010. The Claimant also completed a lock out/tag out quiz and general safety rules quiz on February 10, 2010, which included acknowledgements for understanding these rules and training (Respondent's Exhibit R pp. 114-15). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2010 including rules number 2, 15, and 46 (Respondent's Exhibit R pp. 110-13). On February 1, 2011, the Claimant was trained again on the lock out/tag out procedures. The Claimant also completed a lock out/tag out quiz and general safety rules quiz on February 1, 2011 acknowledging that she had read and understood the training and procedures (Respondent's Exhibit S pp. 119-20). The Claimant was also trained on King Soopers Bakery Plant General Safety Rules in 2011 including rules number 2, 15, and 41 (formerly number 45 and 46) (Respondent's Exhibit S pp. 116-18). The Claimant was trained as recently as January 26, 2012 (two weeks prior to the work injury) on the lock out/tag out procedures. The Claimant also completed a lock out/tag out quiz on January 26, 2012 (Respondent's Exhibit T pp. 121-25). Additionally, employees are required once a year to demonstrate proper lock out/tag out procedures to a supervisor. Claimant demonstrated the proper procedures on February 16, 2011 on the KRD & Pan Mat. This is a part of the same machine that the February 13, 2012 injury occurred on (Respondent's Exhibit K; 08/27/14 Hearing Tr. pp. 30–31).

13. Ms. Saunders also testified that when the employees are trained on the safety rules, they are given a copy to read but that the safety rules are also read aloud by the supervisors at the training and there is a discussion of the rules. The training is done in a meeting of 10 to 20 employees for 8 to 10 hours. The employees are asked whether they understand and if they have any questions. Mr. McCaffery also testified that the training is conducted in this manner, rules are read aloud, and employees are encouraged to ask questions if they do not understand (08/27/14 Hearing Tr. pp. 27–29 and pp. 72–73).

14. In addition, employees have weekly and/or bi-weekly safety awareness huddles to discuss various safety concerns around the plant. The huddles are done in the conference room, one crew at a time, and with a supervisor. Topics for the safety

huddles include safety rules, lock out/ tag out, emergency procedures, accidents, food safety, and personal protective equipment. The Claimant attended 22 safety huddles in 2011 and 5 safety huddles in 2012 prior to the accident. On February 9, 2012, 4 days before the injury, the Claimant attended a safety huddle addressing lock out/tag out procedures on the freezer line (Claimant's Exhibit 7; Respondent's Exhibit U; and 08/27/14 Hearing Tr. pp. 29-30 and pp. 73–74).

15. The Claimant was previously written up for an injury on August 25, 2005. The Claimant received a written behavior notice and a 1-day suspension for violation of safety rule #14. With respect to that injury, the notice indicates that the Claimant stuck her hand in equipment while it was running and it resulted in injury to her index finger (Respondents' Exhibit G). Ms. Saunders also provided testimony in reference to safety rules promulgated by Employer in effect at the time of the Claimant's previous 2005 injury. In reference to Exhibit N, pp. 80-82, Ms. Saunders testified regarding the three rules that she believes the Claimant violated in 2005 when she injured her index finger were,

> Safety rule #2: No employee shall engage in any act which endangers himself or another. Employees working in a manner that might cause injury to them or others will be advised of the danger and appropriate disciplinary action taken where warranted. Repeated violation of safety policies or rules will result in possible suspension or termination.
>
> Safety rule # 14: Always turn off equipment before placing hands into it. Reaching into moving machinery will cause serious injury and is strictly forbidden. Cleaning and repairing equipment requires following specific Lock-Out Tag-Out procedure which must be followed.
>
> Safety rule #45: Any employee that puts their hands in running equipment will be suspended and or terminated for this safety violation.
>
> (Respondent's Exhibit N, 08/27/14 Hearing Tr. pp. 39-42).

16. Ms. Saunders testified that she was not present when the Claimant's current February 13, 2012 injury happened (08/27/14 Hearing Tr. p. 63). She testified that completed an accident investigation in April 2012 in which she accompanied the Claimant to the accident site. There the Claimant explained how the accident occurred. Mrs. Saunders acknowledged that the description of the accident as reported on the Associate Work-Related Injury Illness Report (Claimant Exhibit 1) is correct. In her written behavior notice to the Claimant, which is stated to be a "5-day 'final' warning for safety violation," the Claimant is put on notice that any further safety violations will result in her termination. Ms. Saunders noted that,

> [the Claimant] was placing a piece of cardboard on the belt – without the top conveyor being locked out – (it was running). [The Claimant] states the cardboard pulled her left hand in the rollers – causing a very serious

accident. The top conveyor should have been shut off and locked out before doing this.

(Respondent's Exhibit F, p. 23).

18. For this violation, Ms. Saunders determined that Claimant's actions on February 13, 2012 violated safety rules number 2, 15, and 41. Safety rule number 2 pertains to not engaging in actions that endanger an employee, number 15 (formerly number 14) is for placing hands in equipment without turning it off and doing lock out/tag out, and number 41 (formerly number 45) is for placing hands into running equipment (Respondent's Exhibit F; 08/27/14 Hearing Tr. p. 26).

19. On cross-examination, Ms. Saunders testified that she was aware of the customary practice of employees placing a sheet of cardboard on the lower conveyer belt to facilitate in clean up at the end of their shift. However, Ms. Saunders testified that it was not common to put the cardboard on the lower conveyer belt with a moving upper conveyer belt. Ms. Saunders testified that if the upper conveyer belt is moving, then the act of placing the cardboard on the lower conveyer belt would be a violation of the safety rules (08/27/14 Hearing Tr. pp. 56-57).

20. Mr. Bobby Alexander also testified on the first day of hearing. He that he has worked for King Soopers for fourteen (14) years and is familiar with the freezer line. He stated that Joe McCaffery has been his supervisor for the last six years (08/27/14 Hearing Tr. pp. 96-97). He has worked off and on at the freezer line for awhile. Mr. Alexander testified that it is customary practice for employees to place cardboard on the lower conveyor belt to expedite cleanup. Mr. Alexander testified that in his observation, not all employees turned off the upper conveyor belt when they are placing cardboard on the lower conveyor belt. He specifically stated, "there's times it's on, there's times it's off" (08/27/14 Hearing Tr. pp. 97-98). He agreed that although some employees turn the upper conveyor belt off to place the cardboard or pan underneath, other employees will leave the upper conveyor belt on while putting the cardboard in (08/27/14 Hearing Tr. p. 98).

21. The Claimant testified on the second day of hearing on September 19, 2014. The Claimant testified consistently with how she described the way the accident occurred to her supervisors when she was placing cardboard on the lower conveyor belt, which was turned off, and the corner of the cardboard got caught in the rollers of the upper conveyor belt and yanked her left hand and arm into the upper rollers of the conveyor belt (09/19/2014 Hearing Tr. p. 12).

22. The Claimant testified that the reason that the production line employees place the cardboard on the lower conveyor belt is so that they can catch the powder. The employees are responsible for clean up at the end of the day and the Employer wants them to do this quickly because they don't want the employees to do overtime (09/19/2014 Hearing Tr. p. 19). She testified that when she got to work on the day of her accident, the upper conveyor belt was already on and the Employer didn't let the employees turn off the conveyor belt because it would stop production. She said that

this is customary to begin her shift with the upper conveyor belt running and that the foreman who gets there first has to turn it on (09/19/2014 Hearing Tr. pp. 20-21). She stated that her co-workers would do the same and place cardboard on the bottom conveyor belt without turning off the upper conveyor belt. She further testified that none of her supervisors or foreman had trained her to turn off the upper conveyor belt before placing the cardboard on the lower conveyor belt (09/19/2014 Hearing Tr. p. 21 and p. 22). The Claimant testified that neither Mr. McCaffrey nor her foreman Hassan has ever told her to turn the top conveyor belt off before putting the cardboard underneath it on the bottom conveyor belt (09/19/2014 Hearing Tr. p. 23). Because the lower conveyor belt was turned off when she placed the cardboard on it, the Claimant understood that she was not violating safety rule #15 about putting hands into running equipment (09/19/2014 Hearing Tr. p. 23). When asked what her understanding of lockout tag out, she stated that this was to be done when you need to perform maintenance, cleaning, or have to service the machine (09/19/2014 Hearing Tr. p. 24). The Claimant testified that they do not let the employees do a log-out/tag-out when they are setting up their machines, only when they are cleaning them at the end of the day (09/19/2014 Hearing Tr. pp. 24-25).

23. Mr. Jacob Vigil testified on the second day of hearing in this matter. Mr. Vigil testified that he has worked at the Bakery plant for King Soopers for 21 years. He is currently a production foreman and was the lead foreman on the freezer line at the time of the Claimant's injury (09/19/2014 Hearing Tr. pp. 33-34). Mr. Vigil stated that employees do place cardboard on the lower conveyor belt and that he has done it as well (09/19/2014 Hearing Tr. pp. 34-36). Mr. Vigil is familiar with the machine that the Claimant was working on the day of her February 13, 2012 injury (09/19/2014 Hearing Tr. p. 36). Mr. Vigil is also familiar with the practice of placing a piece of cardboard on the lower conveyor belt (09/19/2014 Hearing Tr. p. 37). However, he specifically testified that he has never placed cardboard on the lower conveyor belt while the upper conveyor belt was running (09/19/2014 Hearing Tr. p. 37). Mr. Vigil testified that employees were allowed to turn off the top conveyor belt that it didn't hurt anything and that is what the employees are trained to do. He specifically stated that he has never been told that he could not turn off the top conveyor belt (09/19/2014 Hearing Tr. p. 37).

24. Mr. Amado Santana testified on the second day of the hearing. Mr. Santana testified that he worked for King Soopers in October 1999 until somewhere in October 2006 as a maintenance mechanic at the bakery department at King Soopers. He later agreed that he left King Soopers in 2005. He testified that it was a common practice for employees to place cardboard or pans on the top of lower conveyer belt without turning off the upper conveyor belt and he saw several employees, not just the Claimant, who would do this (09/19/2014 Hearing Tr. p. 74). Mr. Santana testified that sometimes the top conveyor belt would be on when they placed the cardboard and pans and sometimes it would be off (09/19/2014 Hearing Tr. pp. 75-76). He further testified that the lock out tag out was used at the end of the day when cleaning.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing that Claimant's injury was caused by a willful violation of a safety rule. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201 (2008) C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Safety Rule Violation

C.R.S. § 8-42-112(1)(b), provides for a 50% reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by the willful failure obey any reasonable rule adopted by the employer for the safety of the employee.

The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be "brought home" to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be a cause of the claimant's injury.

Here, it is clear that there was no specific rule about how to place cardboard under a conveyor belt to catch dough and make for easier clean up. It is equally clear that the placement of cardboard on the lower conveyor belt was a relatively standard practice by the production line employees in this department. While there was no specific rule related to the placement of cardboard, Employer urges that the activity is encompassed by three other safety rules which the Claimant violated. Namely, the Employer argues that the Claimant violated the following:

> Safety rule #2: No employee shall engage in any act which endangers himself or another. Employees working in a manner that might cause injury to them or others will be advised of the danger and appropriate disciplinary action taken where warranted. Repeated violation of safety policies or rules will result in possible suspension or termination.
>
> Safety rule #15 (formerly #14): Always turn off equipment before placing hands into it. Reaching into moving machinery will cause serious injury and is strictly forbidden. Cleaning and repairing equipment requires following specific Lock-Out Tag-Out procedure which must be followed.
>
> Safety rule #45: Any employee that puts their hands in running equipment will be suspended and or terminated for this safety violation.

The question of whether a claimant knew of a safety rule is a factual determination for the ALJ. *Gutierrez v. Seven Hills Trucking, Inc.,* W.C. 4-561-352 (ICAO April 29, 2004). Here, although there was no specific rule about placing pans or cardboard beneath a conveyor belt to assist with clean up later, the activity of placing the cardboard does come within other specific safety rules. In order to have a specific, unambiguous and definite safety rule, it is not necessary that every single possible activity employees can engage in be covered by a separate rule. If this were the case, it would be nearly impossible for an employer to have an understandable, manageable list of safety rules. Rather, if conduct falls within a rule, that is sufficient. Here it is not necessary to have a rule about putting a piece of cardboard down where there is more than one specific rule about putting hands in equipment. The rule is simple and that is that employees are forbidden to reach into moving machinery. The Claimant argues that the bottom conveyor belt was off and so she was not reaching into moving machinery. However, the Claimant was reaching in between a lower conveyor belt that was turned off and an upper belt that was turned on. When the upper belt was on, it was down and closer to the lower belt than when it was turned off. A reasonable person would

understand that the safety rules prohibited the placing of hands into or near the moving upper conveyor belt, even if the lower conveyor belt was off. It is the moving belt that was a danger and this is the reason for the rule. The rule is reasonable since it was designed to prevent hands and body parts from being injured in moving equipment, the exact injury that the Claimant suffered.

Through the promulgation of specific rules which were reinforced with trainings, the Employer "brought home" the safety rules at issue in this case. It was specifically found that the Claimant's understanding of written and spoken English was sufficient that she understood the safety rule that an employee is to always turn off equipment before placing hands into it. Reaching into moving machinery will cause serious injury and is strictly forbidden.

Even if, as Claimant and other witnesses testified, other employees were placing cardboard on the lower conveyor belt with the top conveyor belt running, the Claimant's actions still violated safety rules. Just because other employees are doing something wrong does not make it acceptable. Mr. McCaffery, Ms. Saunders and Mr. Vigil testified that the employee are required to turn off the upper conveyor belt before placing anything on the lower conveyor belt. If they would have been aware of employees doing otherwise, they would stop and discipline employees they notice violating the rules.

The Employer had established safety rules to protect the employees. The Claimant was aware of the safety rules through annual training, safety huddles, her prior injury, and her prior write-up. Despite her knowledge of the rules, Claimant chose to place the cardboard on the lower conveyor belt while the top conveyor belt was running and not locked out/tagged out. This resulted in her injury. This is a safety rule violation and warrants a reduction in benefits if it is found that the Claimant acted willfully and with deliberate intent.

The question of whether the Respondent proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). intention. Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Here, the Claimant argues that she did not place her left arm deliberately into the machinery. Rather, she argues that as she placed a piece of cardboard on a lower conveyor belt, the cardboard was pulled into the machinery and her arm was pulled in with it. Essentially, Claimant argues that her conduct was negligent or careless but it

was not willful and that she did not, in fact, put her left hand in moving machinery. However, the conduct in question is not intentionally putting her arm into the moving upper conveyor belt. Instead, the issue is whether the conduct of placing the cardboard on the lower belt in close proximity to the upper conveyor belt violates the rule of keeping hands out of moving machinery. A reasonably prudent person would find that the safety rules, as promulgated and explained repeatedly by the Employer, are intended to include a situation such as the one here, where an employee is placing the piece of cardboard on the lower belt while the upper belt is moving. The upper belt is the danger or hazard and it is reasonably predictable that the act of placing the cardboard in relatively close proximity to the moving upper conveyor belt would cause exactly the type of injury that occurred to the Claimant. The employees can simply turn off the moving machinery, place cardboard where it will catch falling product to assist with clean up later, and then turn the upper belt back on. There was no compelling or persuasive testimony that this practice was prohibited. In fact, several credible witnesses testified that employees are trained to turn off moving machinery to accomplish this sort of task and then turn it back on. The ALJ finds that although the Claimant did not have the intent of sticking her hands into the upper conveyor belt in this case, she did intend to put her hand into moving machinery by the act of placing the cardboard on the lower belt while the upper belt was moving.

Therefore, the Respondent has demonstrated the existence of specific safety rules covering the conduct in question in this case, long-standing education and enforcement of the rules, effective communication of the rules to the Claimant and the Claimant's willful failure to adopt a reasonable rule adopted by the Employer for her safety. As such, Respondent is entitled to a reduction in benefits pursuant to §8-42-112(1).

ORDER

It is therefore ordered that:

1. Respondent has established that Claimant's injury resulted from her willful failure to obey a reasonable safety rule adopted for the safety of the employees and therefore Respondent is entitled to a reduction in benefits pursuant to §8-42-112(1).

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

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

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

DATED: February 9, 2015

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

ISSUES

I. PPD Conversion: Whether claimant established by a preponderance of the evidence that his scheduled ratings on W.C. Nos. 4-898-537 and 4-897-278 should be converted to whole person impairment ratings.

II. MMI: Whether claimant has produced clear and convincing evidence to overcome the Division IME's opinion that he reached MMI on October 3, 2013 for his industrial injuries in W.C. Nos. 4-898-537 and 4-897-278.

III. Medical Benefits: Whether respondents are liable for a left total knee replacement surgery on W.C. No. 4-898-537 and a right total knee replacement surgery on W.C. No. 4-891-278.

PROCEDURAL BACKGROUND/HISTORY

1. W.C. No. 4-891-278 concerns the admitted right knee injury of May 9, 2012.

2. W.C. No. 4-898-537 concerns an admitted left knee injury sustained September 5, 2012.

3. Claimant attained MMI for both injuries on October 3, 2013 according to authorized treating physicians. Dr. George Johnson, an authorized treated physician, determined impairment for both injuries. Respondents filed Final Admissions of Liability in each claim on November 13, 2013 consistent with Dr. Johnson's reports.

4. Claimant objected to both Final Admissions. He requested a Division IME on the claims.

5. The claims were consolidated for the purposes of completion of a global the Division IME by unopposed motion and the subsequent order of Prehearing Administrative Law Judge Carolyn Sue Purdie on January 15, 2014. .

6. Dr. Shank performed the global Division IME on March 6, 2014. Dr. Shank agreed claimant reached MMI on October 3, 2013 for both injuries. Dr. Shank determined claimant had a 24% scheduled rating of the left lower extremity for the May 9, 2012 injury. Regarding the right knee, Dr. Shank determined claimant sustained a 34% scheduled rating.

7. Respondents filed Final Admissions of Liability on both claims consistent with the Division IME's report.

8. Claimant applied for hearing on both claims. Issues for determination included claimant's attempt to overcome the Division IME opinions on impairment, causation and MMI, as well as permanent total disability. A prehearing was held before Prehearing ALJ Thomas O. McBride on August 4, 2014 to streamline the issues for hearing and to consolidate the two claims for the purposes of hearing. Judge McBride granted the motion to consolidate the claims for purposes of hearing. He also granted claimant's unopposed motion to hold the issue of PTD in abeyance pending the outcome of any scheduled hearing to determine the aforementioned issues.

9. Claimant asserted he "is attempting to show he is not at MMI because he has a present need for bilateral total knee replacements." *See* August 5, 2014 Prehearing Conference Order, ¶ 2.

FINDINGS OF FACT

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

1. Claimant is a 52-year-old man who worked as a truck driver and trash collector for Employer, a refuse collection company.

2. Claimant injured his right knee on May 9, 2012. That injury was assigned W.C. No. 4-891-278. Claimant described injuring his right knee while attempting to stop his garbage truck from rolling down a hill. Claimant slipped and fell, hitting his right knee on the metal step of the truck.

3. Claimant injured his left knee on September 5, 2012. On that date, Claimant reported his left knee popped as he exited his garbage truck. Claimant's left knee injury was assigned W.C. No. 4-898-537.

4. The insurer admitted liability for both injuries.

5. Prior to both injuries, the medical records demonstrate Claimant had difficulty with both knees. An MRI of the right knee was recommended shortly before the May 9, 2012 injury occurred. As early as 2003, the records demonstrate Claimant had left knee problems that caused swelling in the knee and pain when he walked. Claimant was prescribed Vicodin for his pain complaints.

6. The medical records demonstrate Claimant sought treatment for his bilateral knees on September 1, 2011. Claimant related his bilateral knee complaints to an April 16, 2009 motor vehicle accident. The symptoms were constant and described as sharp, shooting and tingling. The problems were "worsening" according to claimant. Pain was at a 7/10 level and it interfered with his social activities all of the time. Claimant walked with a cane on September 1, 2011. Treatment of the knees had been delayed because

of Claimant's incarceration. The pain made it difficult for Claimant to find work. X-rays of the knees and other load bearing joints in his body showed extensive degenerative arthritis in both knees. Claimant was encouraged to make an appointment with an orthopedist.

7. On April 26, 2012, claimant treated with a physician's assistant, PA Heard. The PA noted Claimant was taking Percocet and ibuprofen for his knee pain at that time. The PA ordered a right knee MRI. This appointment took place less than two weeks prior to the right knee injury at work.

8. Before the MRI could be performed on the right knee, Claimant sustained the injury to his right knee on May 9, 2012. Claimant struck the front part of his right knee on his work truck's metal step as he attempted to stop the vehicle from rolling off.

9. PA Mullen examined Claimant on May 24, 2012 after striking his knee on the metal step. PA Mullen took a history of a prior injury to the right knee from playing basketball. Prior medical records indicate Claimant also injured his right knee in a 2009 MVA, a 2010 MVA and walking up stairs in 2011. Claimant told PA Mullen he had been under the care of PA Huard at Peak Vista for "ongoing chronic right knee pain." Claimant admitted he already had a right knee MRI scheduled prior to his latest right knee injury. PA Mullen left undetermined what part of claimant's right knee complaints were related to the May 9, 2012 work injury.

10. The MRI taken of the right knee showed a complex medial meniscus tear and mild medial compartment osteoarthritis. The medial compartment of the right knee had joint space narrowing and chondromalacia. There was no evidence of any bony contusion on the MRI. PA Mullen told Claimant to continue his Percocet and ibuprofen, the same medications he took prior to the right knee injury on May 9, 2012.

11. On June 7, 2012, PA Huard examined Claimant and diagnosed a medial meniscus tear after falling at work and preexisting right knee pain. Following the May 9, 2012 work injury, Dr. Matthews performed a right knee arthroscopy to debride the meniscus.

12. Respondents' IME, Dr. Roth, asked Claimant for a history of knee complaints before his injuries during his examination. Claimant reported to Dr. Roth he had no history of any knee problems prior to his May 9, 2012 work injury. Claimant did not recall treatment in 2003, 2011 and 2012 for his right knee injury. Dr. Roth attempted to spark his memory by mentioning a basketball injury. Claimant asserted the basketball injury primarily affected his ankle, not his knee. Claimant denied any problems with his knees prior to the accident at work on May 9, 2012.

13. Dr. Roth testified credibly and persuasively that Claimant's symptoms prior to his right knee injury on May 9, 2012 were entirely consistent with what was seen on the MRI. Claimant's complaints were sufficient to cause his providers to prescribe narcotic pain medication prior to May 9, 2012. An MRI was ordered before the May 9, 2012

injury. Further, a “complex posterior horn medial meniscus tear” is more likely than not pre-existing degenerative anatomy according to Dr. Roth. Current evidence-based epidemiology reviewed by Dr. Roth demonstrate this type of tear is evidence of ordinary degenerative change that more likely than not predated the May 9, 2012 injury.

14. Dr. Roth’s opinion that the right knee meniscus tear is degenerative in nature is supported by other facts reviewed in the medical records. The mechanism of injury on May 9, 2012 is not likely to have caused a meniscus tear. There was no twisting or torqueing of the knee one would expect to cause a meniscus tear. As described by Claimant, he sustained a contusion to the right knee. Dr. Roth reviewed the MRI findings for both knees. Despite completely different mechanisms of injury, claimant had the “exact same anatomy” in his right and left knees. The identical pathology in the knees despite two different mechanisms of injuries indicates the changes are degenerative in nature according to Dr. Roth.

15. Claimant’s left knee injury on September 5, 2012 shares a similar complicated history. Nonetheless, liability was admitted on the left knee.

16. On August 27, 2012, Claimant indicated to his physical therapist he had pain in his left knee secondary to compensating for the right knee. Claimant returned to work. At the end of his shift, he had swelling in the left knee. On September 5, 2012, Claimant stated his right knee is not getting any better. He has a follow up MRI on the right knee scheduled for the following week. Also, he had left knee swelling secondary to compensation.

17. There was no mention of any injury to the left knee in this September 5, 2012 PT report.

18. Claimant told Dr. Roth he injured his left knee on September 5, 2012 while getting out of his truck. He had some irritation from overuse, but the left knee “snapped” when he stepped down from his truck. Dr. Roth notes the left knee complaints were present before September 5, 2012.

19. The MRI on December 3, 2012 for the left knee showed medial meniscus changes, similar to those found on the right knee. Claimant had “complex tearing” of the medial meniscus. There was subarticular reactive marrow change and mild to moderate cartilage loss in the medial compartment.

20. The medical records indicate claimant’s pain in his right knee did not improve after the medial meniscus surgery on June 27, 2012.

21. The evidence demonstrates Claimant already had chronic worsening right knee pain prior to the May 9, 2012 injury. Dr. Roth asked the key question – if he already had pain in the right knee that required the use of Percocet and caused an MRI to be ordered, what was causing this chronic pain in the knee. The only abnormality on the MRI was the complex medial meniscus tear. The tear is consistent the pain complaints of Claimant before and after the May 9, 2012 injury. The mechanism of injury for the right knee on May 9, 2012 is not consistent with a meniscus tear – it is

consistent with a contusion. Treatment and evaluation after May 9, 2012 revealed the medial compartment meniscus abnormality. According to Dr. Roth, this is the only abnormality in the right knee. "Thus, this being the only abnormality, it is the only explanation for his symptoms and dysfunction prior to 5/09/12."

22. Another MRI was taken of the right knee on September 17, 2012. Claimant's history of the injury changed to a "twisting" injury with previous surgery, despite the records showing it was an injury consistent with a contusion. It is unknown where the "twisting" aspect of the right knee injury description came from. Claimant did not describe a twisting injury to providers before this time. With Dr. Roth, Claimant did not describe a twisting injury. Claimant described a contusion-type injury. But now, in the MRI description for the right knee, the mechanism of injury is described as a twisting event. A second surgery was suggested to treat Claimant.

23. Dr. Erickson reviewed the surgery request. He notes the need for medical records prior to the May 9, 2012 injury date. Dr. Erickson thought the subchondral edema seen in the September 17, 2012 MRI of the right knee was consistent with a re-tear of the meniscus.

24. Dr. Roth disagrees with Dr. Erickson's assessment. But he was aided with the medical records Dr. Erickson suggested should be reviewed and that were not available to him when he reviewed the request for surgery. Those records demonstrate Claimant had substantial knee pain prior to May 9, 2012 that continued after that date. The knee pain did not ebb with surgery on June 27, 2012. Physical therapy did not improve the condition. The records do not establish the pain worsened at any time. Dr. Roth opined it is an erroneous assumption to assess claimant's pain as a "reflection of an abnormality or event that occurred subsequent to the June 27, 2012 surgery. It is not reasonable to assume that persistent pain after medial meniscectomy is not the same pain that existed prior to the meniscectomy, as a partial meniscectomy is no guarantee of pain relief." Dr. Roth's opinion is credible and persuasive.

25. Dr. Roth opined it is "a weak assumption that the edema or subchondral bone changes are a reflection of recent trauma as these are the exact abnormalities expected with degeneration. Yes, [claimant] describes returning to his usual job duties, which may have included jumping, but there is no point in time that [claimant] identifies an acute injury or sudden change in his post 6/27/12 subjective status. He simply had pain all along, the pain did not improve."

26. Dr. Matthews performed the second surgery on the right knee on November 12, 2012. The meniscus was trimmed again.

27. Dr. Matthews performed arthroscopic surgery on the left knee on January 9, 2013. Like the right knee, Claimant had a complex posterior horn medial meniscus tear. Dr. Matthews states the rest of the medial compartment is normal for age. Claimant reported intense pain following the surgery.

28. Claimant was sent to Dr. David Walden for a second opinion after he failed to

experience improvement in his left knee condition. Dr. Walden evaluated claimant on April 9, 2013. He noted there was confusion regarding "when the patient injured his left knee." Claimant reported in September of 2012, he jumped from a truck, felt a pop in his left knee and the knee swelled. Dr. Walden was unable to determine what was related to an injury and what was consistent with degeneration in the knee. Pain medications, other than Percocet, were not helpful according to claimant when he spoke with Dr. Dixon on May 10, 2013. Dr. Dixon expressed her medical opinion that use of narcotics is not indicated.

29. Dr. Walden reviewed a repeat MRI of the left knee. Claimant wanted to pursue surgery on the knee because repeat surgery helped a small bit on the right knee. Dr. Walden performed the second surgery to claimant's left knee on June 17, 2013.

30. Dr. George Johnson examined claimant on June 4, 2013 and June 25, 2013. Claimant told Dr. Johnson his pain was 9/10. Dr. Johnson was concerned about the long-term use of opiates and addiction. Dr. Johnson refused to prescribe Percocet, because there appeared to be drug-seeking behavior.

31. On July 18, 2013, Dr. Walden noted Claimant had no improvement following the second surgery to the left knee. Dr. Walden determined "the majority of the patient's symptoms are likely coming from the arthritic changes in the knee."

32. On August 14, 2013, Dr. Johnson reevaluated claimant. Dr. Johnson continued to express his concern with the use of opioids for Claimant's condition. Claimant's subjective symptoms did not match the objective findings according to Dr. Johnson. Claimant walked normally without the cane he uses (claimant used a cane prior to May 9, 2012). Dr. Johnson indicated claimant did not appear to be in severe pain and thought claimant was exaggerating his pain complaints.

33. On August 29, 2013, Dr. Walden believed claimant reached MMI for the left knee. Dr. Walden restated his belief that while a TKR may be indicated in the future for the left knee but whether or not it is work related is difficult to determine.

34. On September 6, 2013, Dr. Johnson evaluated claimant for his right knee. Claimant was able to walk normally without his cane. Claimant's right knee was wrapped in an Ace bandage, but there was no swelling. The knee was non-tender to palpation. The knee was stable. Dr. Johnson questioned whether Claimant gave his full effort in the range of motion measurement. Dr. Johnson noted he was not successful in his attempts to wean Claimant from the Vicodin he used daily. Dr. Johnson stated Claimant's "subjective complaints of pain are not supported by the objective findings."

35. On September 12, 2013, Dr. Walden opined claimant's right knee had undergone two meniscectomies. Claimant had right knee osteoarthritis. Dr. Walden believed Claimant was continuing to experience pain due "presumably" to his osteoarthritis. Dr. Walden stated claimant may be a candidate for a right knee TKR, as

well. He thought causation of any need for a TKR on the right side would still need to be determined.

36. On October 3, 2013, Dr. Johnson placed claimant at MMI for both injuries. For the right knee, Dr. Johnson noted Claimant stated his right knee pain was severe and unrelenting. Claimant was using Vicodin two times a day. This is less medication than he used prior to the May 9, 2012 right knee injury. Claimant had 8/10 pain on average. Claimant was conversant and in no acute distress. He was able to walk normally without a cane. The right knee was wrapped, but not swollen. The knee was stable. Dr. Johnson opined the "subjective complaints of pain are not supported by the objective findings." Claimant was placed at MMI and Dr. Johnson noted a rating would be provided.

37. Likewise, with the left knee, Dr. Johnson also placed claimant at MMI for the September 5, 2012 left knee injury on October 3, 2013. Dr. Johnson recorded Dr. Walden's belief claimant would need a TKR on the left knee in the future, but "he does not believe that this is a time for that." The pain in the left knee was worse than the right. Claimant had 9/10 pain on average. Claimant's symptoms did not match the objective findings in the examination, according to Dr. Johnson. Claimant did not appear to be in severe pain. Dr. Johnson believed claimant was exaggerating his symptoms.

38. Dr. Johnson provided impairment ratings for both injuries on October 7, 2013. Claimant's right knee was rated at 23% of the lower extremity, which converts to a 9% W.P. impairment. Claimant's left knee was rated at 27% of the left lower extremity, which converts to an 11% W.P. impairment.

39. There were no functional impairments identified in the record that demonstrate Claimant had impairment outside the schedule as the result of either injury; Claimant's functional impairment, as it existed, was confined to the right and left lower extremities.

40. Dr. Johnson noted maintenance care was necessary to help with the medications he used (Mobic and Tramadol) for pain control.

41. Dr. Johnson indicated Claimant did not have problems with his knees prior to the work injuries. This is incorrect, as demonstrated by the record, as Claimant clearly had problems with both knees prior to the work injuries and was scheduled for an MRI of the right knee prior to the May 9, 2012 injury.

42. Respondents filed final admissions consistent with the reports of Dr. Johnson. Claimant objected and a Division IME, Dr. Shank, performed an examination of both claims, consolidated for the purposes of the Division IME.

43. Dr. Shank, the Division IME, agreed claimant was at MMI for both injuries on October 3, 2013. He placed Claimant at MMI with the understanding TKR surgery may be performed in the future. Dr. Shank found Claimant had right knee impairment of 24% of the right lower extremity. For the left knee, Dr. Shank found claimant had 34% of the

left lower extremity. Nothing in Dr. Shank's Division IME report suggests claimant has impairment related to the injuries that is outside the schedule of disabilities.

44. Respondents filed final admissions consistent with Dr. Shank's Division IME report and admitted for the scheduled ratings. Claimant applied for hearing to overcome the Division IME on MMI and asked for medical benefits in the form of bilateral total knee replacement surgery. Claimant also applied for hearing to convert the scheduled ratings to whole person awards. Claimant's PTD request was held in abeyance and the claims were consolidated for the purposes of hearing.

45. Claimant obtained two IME reports after the final admissions were filed. The first was from Dr. Simpson. Dr. Simpson did not agree that total knee replacement surgery was warranted. Claimant's pain complaints were "definitely out of proportion to the objective physical findings that have been noted on multiple MRI's and arthroscopic findings." Dr. Simpson was concerned the pain complaints were excessive, given that Claimant had "no appreciable bone on bone arthrosis and no MRI evidence of avascular necrosis." Dr. Simpson thought claimant might have a neuropathic pain syndrome. He was concerned a TKR might not improve his non-objective pain complaints and suggested other treatment. Dr. Simpson cautioned Claimant against aggressive additional surgeries unless there was confidence his pain would lessen. Dr. Simpson expressed concern about the reliability of claimant's pain complaints. He had suggestions for additional conservative treatment and testing, but would not recommend a total knee replacement.

46. After Dr. Simpson completed his IME for claimant, Dr. James Duffy was asked to perform an IME for Claimant. Dr. Duffy issued a two-page report. He determined claimant had osteoarthritis of the left knee. He concluded claimant "did not have a history of knee problems or visits for knee complaints of the left knee prior to this [September 5, 2012] work-related injury." Based on this history, Dr. Duffy concluded total knee replacement surgery of the left knee should be considered as part of the September 5, 2012 work injury. Dr. Duffy is willing to perform (and be paid for) knee replacement surgery on his left knee.

47. Dr. Duffy's report is not persuasive. He summarily declares there is no history of left knee complaints prior to September 5, 2012, but fails to list or document what history or records he relies on for this opinion. He fails to address the MMI determination by the Division IME and why it might be incorrect. He fails to address the concerns from Dr. Simpson – claimant's prior IME – that a total knee replacement may not be beneficial to claimant given his out of proportion subjective complaints. He fails to explain why Dr. Shank, the Division, and the treating physicians were incorrect when they declared claimant reached MMI for his work injuries.

48. Read in the most favorable light to claimant, Dr. Duffy's report could be read to indicate that Claimant was never at MMI for the left knee injury because total knee replacement surgery was contemplated but not performed prior to MMI. That interpretation leaves the MMI determination for the right knee injury W.C. No. 4-891-278 (May 9, 2012 DOI) intact and without any factual objection. Claimant failed to prove by

clear and convincing evidence the Division IME is incorrect when he placed claimant at MMI for this right knee injury. Additionally, Claimant failed to prove a right-sided total knee replacement surgery is reasonably necessary or related to his May 9, 2012 work injury.

49. As for the left knee, W.C. No. 4-898-537 (September 5, 2012), there is much doubt as to whether any other treatment is causally related to the work injury. In fact, the Division IME expressed doubt whether there was a work related injury to the left knee at all.

50. Following the IME report from Dr. Duffy, Claimant took the evidentiary deposition of Dr. Shank, the Division IME. Dr. Shank expressed early on in his deposition he did not "see that he had a new injury to the left knee." Dr. Shank Deposition ("Shank Depo") at p. 5. "I don't see it clearly documented that he had an injury to the left knee. …It was more of a compensation-type thing." BN 345, Shank Depo at pp. 5-6. Dr. Shank could not support Claimant's contention that left knee replacement surgery resulted from a work related injury, because it was "tough" for him to say Claimant had a work-related left knee injury requiring treatment. Shank Depo pp. 7-8. He agreed with Dr. Simpson that claimant's "global" pain complaints demonstrate it is probably wiser to rule out other disorders before attempting a total knee replacement. But he does not believe Claimant has a pain disorder; Dr. Shank believes Claimant has "knee arthritis." Shank Depo pp. 14-15.

51. Dr. Shank's statement that Claimant sustained a "compensatory-type" problem in his left knee rather than an accident connected to a specific time and place creates a contradiction. Claimant did not report a compensatory-type of injury to his left knee. Claimant attributed his left knee problems to a specific event occurring on September 5, 2012. Dr. Shank believed there needed to be a specific "injury" to the left knee for knee replacement surgery to be considered attributable to a work injury. Shank Depo pp. 7-8.

52. Claimant alleges he never reached MMI because Dr. Duffy is willing to perform a total left knee replacement surgery. Dr. Duffy attributes the total left knee replacement surgery to the September 5, 2012 work injury because Claimant "did not have a history of knee problems or visits for knee complaints of the left knee prior to his work-related injury." That opinion is contrary to the evidence presented at hearing showing claimant had preexisting problems with the left knee. Dr. Duffy's opinion is not persuasive.

53. Respondents' IME, Dr. Roth, was presented with all of the medical evidence available, which including records prior to either injury. He was asked to perform a causation evaluation and determine whether Claimant was at MMI for his work injuries. Dr. Roth testified at hearing.

54. Since Dr. Duffy wanted to perform a left total knee replacement. Dr. Roth addressed whether such a surgery is causally related to work-related activities. Dr. Roth opined and credibly testified total knee replacement surgery is not related to any work

related activity. Dr. Roth testified credibly and persuasively claimant is at MMI for his work injuries.

55. Significantly, Dr. Roth found identical pathology in both knees, which is evidence claimant's degeneration, is unrelated to work activities. The mechanisms of injury, described by Claimant, are completely different yet MRI findings were identical. "That the MRI of the right and left knees are so similar is medically probably an indication of underlying pre-existing endogenous arthrosis/degeneration." The persistence of Claimant's symptoms indicated the pain in the knees reflects arthritis according to Dr. Roth.

56. Claimant's pain never improved with any of the care provided to him. Claimant has pain because of the underlying arthritis, not the surgeries, according to the testimony of Dr. Roth. The MRI demonstrated preexisting degenerative changes according to Dr. Roth. Dr. Roth performed a medical literature search and found minor to moderate injuries like contusions and sprains do not accelerate osteoarthritis. Meniscus tears may be part and parcel of osteoarthritis in the knees.

57. Dr. Roth also noted the location of Claimant's tears is more suggestive of osteoarthritis, not trauma. Medical literature demonstrates isolated medial compartment tears are associated with osteoarthritis, not injuries. Injuries are more likely to show up as damage in all compartments of the knees.

58. The evidence demonstrates Claimant's medial meniscus tear is more likely associated with his preexisting osteoarthritis, not an injury. Claimant's MRI findings are more likely than not degenerative in nature and pre-existing. They do not reflect acute or recent trauma according to current medical literature reviewed by Dr. Roth.

59. Dr. Roth concluded Claimant's current need for evaluation and treatment of his knees is a reflection of the ongoing nature and the progression of the preexisting osteoarthritis that started years before this claim. Tr at 19, lns. 8-18. The osteoarthritis was active and being evaluated when the claims began.

60. Claimant is now at MMI, according to Dr. Roth, who agreed with Dr. Shank, the Division IME. Tr at 20-22. Claimant's condition is stable and has plateaued. Further treatment is not like to improve Claimant's condition. While there may be some future treatment suggested, there are considerable issues whether the treatment would be work-related. Tr at 20-21.

61. Dr. Roth reviewed Dr. Shank's deposition. He understood there had been a recommendation by Dr. Duffy and a request by Claimant to have the left knee TKR covered under the claim. Dr. Roth noted Dr. Shank in his deposition does not find clear evidence of an injury to the left knee. Tr at 21-22. Dr. Shank stated he could not opine that a TKR for the left knee should be covered under worker's compensation. Dr. Shank thought a global review of the claims by an expert looking at causation might be helpful. Dr. Roth performed that review and concluded claimant remains at MMI and the TKR surgery suggested for the left knee is not work-related. Tr 22-23.

62. Dr. Roth agrees with Dr. Shank there is not clear evidence of an injury to the left knee on September 5, 2012. Tr at 23, lns 8-13. Dr. Roth notes Claimant described a very clear, serious, and emergent event when his knee snaps backwards and he has acute pain with dramatic swelling on September 5, 2012. But, Claimant continued working that day. He does not mention this injury to his physical therapist, whom his sees on September 5, 2012. Tr at 23-24. Claimant instead describes pain in his left knee due to over-compensation for the right knee that started prior to September 5, 2012. Tr at 24-25. Claimant had similar issues in 2011, according to Dr. Roth.

63. The onset of Claimant's right knee problems is similar to the left. Claimant had problems before May 9, 2012. He was in active treatment and was scheduled to have an MRI. The MRI was ordered on April 25, 2012. Tr at 26-27. The pain was significant enough prior to May 9, 2012 to require narcotics. Tr at 27-28.

64. The total knee replacement suggested by Dr. Duffy is, according to the credible and persuasive testimony of Dr. Roth, only reasonable or necessary to treat the underlying arthritis, not the work injury. It is a reflection of a preexisting condition that will continue to progress. It was documented prior to the work injuries and it is progressing. He may need a joint replacement because he has global pain in the knees, not a work injury. Tr at 37-39.

65. Dr. Roth agreed with Claimant's first IME, Dr. Simpson, when he stated Claimant has pain that is out of proportion to objective findings. Tr at 39, lns 9-18. Claimant has consistently had pain that is out of proportion when compared to his objective findings. Tr at 39-40. Dr. Johnson agreed with this assessment. Dr. Johnson also found drug-seeking behavior, which Dr. Roth documented on page 20 (BN 73) of his report. Tr. 40, lns 9-18.

66. Dr. Roth credibly and persuasively opined claimant is now as he would have been whether or not these injuries occurred. "His pain, his need for treatment, whether or not that treatment works, is not a reflection of an injury sustained on September 5, 2012." Tr at 48-49. While the injuries may have caused pain complaints, Claimant eventually reverted back to baseline. Treatment initially directed at the complaints caused by the injury eventually transitioned to treatment of claimant's underlying degenerative arthritis.

67. The ALJ is not persuaded that Dr. Shank expressed ambiguity regarding Claimant's MMI status. To the contrary, during his deposition testimony, Dr. Shank was clear when he testified as follows:

> Well, I think if – if we're proceeding with a total knee, he is not at MMI. You know, it – upon review of the medical records, I think their goal was to get him better with a knee scope and place him at MMI. So, if he – if the treatment plan involves a knee replacement, he is not at maximum medical improvement. If workers' comp is not going to approve the knee replacement or state that it is work-

> related, then he is probably at maximum medical improvement, or was so on the October date that we dictated in the chart.

68. There was no outstanding recommendation for a right total knee arthroplasty at the time of the DIME. Consequently, the ALJ finds that Claimant was unambiguously placed at MMI by Dr. Shank during the DIME performed March 6, 2014.

69. The persuasive evidence demonstrates Claimant attained MMI on October 3, 2013; he failed to present sufficient evidence to prove he is not at MMI for either injury. Likewise, Claimant failed to prove total knee replacement surgery for either knee is reasonable, necessary or related to the respective knee injuries. Further, Claimant failed to prove conversion of his scheduled ratings to whole person awards is warranted.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of rights of respondents. §8-43-201, C.R.S. (2005). A preponderance of the evidence is that which leaves the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S. As found, Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case. Furthermore, the ALJ concludes that Dr. Fall's testimony to be contradicted by the more persuasive opinions of Drs. Larimore and Jones.

Overcoming the DIME

D. Claimant bears the burden of proof to overcome the MMI opinions of Dr. Shank by clear and convincing evidence. *Lambert & Sons, Inc. v. Indus. Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). "Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc., v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Whether the DIME physician properly applied the AMA Guides in determining MMI, and whether the rating was overcome by clear and convincing evidence are issues of fact for the ALJ's determination. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995.).

E. A party meets the burden of overcoming the DIME conclusion on MMI only if the party demonstrates that the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). The instant case involves complex questions concerning medico-legal causation. Clamant has received extensive treatment, including surgical intervention and has been evaluated by multiple providers who have expressed various opinions regarding his appropriateness for additional surgery. Nonetheless, the evidentiary record supports the conclusion that following his treatment, Claimant was placed at MMI and provided a rating for both injuries. Knee replacement surgery was reviewed, but not recommended, before his treating provider declared Claimant at MMI. The evidentiary record also supports the conclusion that after Claimant was placed at MMI, the determination of MMI was challenged through the DIME process. The DIME considered MMI and the causal relationship of a total left knee replacement to the September 5, 2012 injury and could not support relating any need for a total knee replacement to that injury. The DIME considered the opinion of Dr. Duffy and did not change his opinion. To the extent that Dr. Duffy's opinions concerning MMI diverge from those expressed by Dr. Shank, the ALJ concludes those discrepancies constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Claimant has failed to prove that it is highly probable that Dr. Shank was highly probably incorrect when he placed Claimant at MMI for both knee injuries involved in these consolidated cases.

F. Claimant's request for medical benefits in the form of a total knee arthroplasty for either the right or left knee is denied and dismissed. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990).

G. However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). Based upon the evidence presented, the ALJ credits the opinions of Dr. Roth to conclude that Claimant's immediate need for a left total knee replacement, as well as any future right knee replacement procedure is, more probably than not, related to an underlying progressive degenerative osteoarthritis of his knees.

H. Claimant's request for conversion of his scheduled lower extremity impairment to impairment of the whole person is denied and dismissed. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8-42-107(1)(a), C.R.S. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. Here, conversion of Claimant's scheduled lower extremity impairment to impairment of the whole person is not warranted. The persuasive evidence demonstrates that Claimant's complaints and treatment were associated with and directed to his knees. Claimant did not testify and the medical records do not support that Claimant's knee injuries have resulted in any decreased capacity to meet his personal, social or occupational demands. Consequently, the ALJ concludes that Claimant has not sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which would warrant conversion.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the Division IME's opinion that MMI was attained on October 3, 2013 in W.C. Nos. 4-898-537 and 4-897-278 is denied and dismissed.

2. Claimant's request for medical benefits in the form of total knee replacement surgery on the left knee under W.C. No. 4-898-537 is denied and dismissed.

3. Claimant's request for medical benefits in the form of total knee replacement surgery on the right knee under W.C. No. 4-891-278 is denied and dismissed.

4. Claimant's request for conversion of his scheduled rating to a whole person award on W.C. No. 4-898-537 is denied and dismissed.

5. Claimant's request for conversion of his scheduled ratings to a whole person award is denied and dismissed.

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

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

DATED: _February 17, 2015____

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-893-705-01

ISSUES

The issues to be determined by this decision are:

A. Reopening the claim;
B. Medical Benefits.

STIPULATION

The parties stipulated that if the case is reopened, Dr. Orgel is an authorized provider.

FINDINGS OF FACT

1. Claimant's date of birth is January 18, 1965. He began working as a transportation maintenance worker for Employer on November 1, 2008. Claimant's job duties include all aspects of highway and vehicle maintenance including heavy equipment operation, blacktop and asphalt overlays, pothole repair, guard rail repair and snow removal. Claimant's job duties include driving snowplows, gravel trucks, dump trucks, and tandem dump trucks.

2. On July 16, 2012, Claimant sustained an admitted industrial injury while stepping down from a loader.

3. On July 17, 2012 Claimant was initially seen by Amber Payne, PA, at Concentra. Ms. Payne reported that, "he states that there was no accident. He reports, no twisting, I didn't get off the loader wrong. I stepped and felt a sharp pain." Claimant denied previous knee pain and injuries. Ms. Payne informed Claimant that walking does not correlate to a work-related injury and she urged Claimant to follow up with his primary care physician and have x-rays done. Claimant did see a Kaiser doctor on July 18, 2012.

4. On July 24, 2012 Claimant saw Dr. David Orgel at Concentra. He reported to Dr. Orgel that when he was coming down off the loader, his left foot was on the bottom rung of the ladder and his right foot was planted as he twisted left to step down off the ladder and that as he twisted left with his right foot planted, he developed pain in the right knee. The ALJ finds that Claimant's report of how the injury occurred is not consistent with what he told Ms. Payne the day before;

although this finding is not relevant to compensability because that issue has already been determined, it does relate to Claimant' credibility. Dr. Orgel reported that he discussed the situation with the employer, stating that he felt that the claim should be evaluated as a work-related condition. Dr. Orgel referred Claimant for an MRI and authorized a return to work for July 24, 2012 with restrictions of no lifting over 10 lbs. and no squatting and/or kneeling. As a result, the claim was admitted and payment of temporary total disability benefits began on July 17, 2012.

5. On July 30, 2012, Claimant underwent a right knee MRI. He was diagnosed with a complex tear of the medial meniscus, moderate degenerative changes of the patellofemoral compartment, mild to moderate degenerative changes within the medial compartment and mild to moderate thinning of the cartilage overlying the medial femoral condyle.

6. On August 2, 2012, Dr. Orgel referred Claimant to an orthopedist. On August 3, 2012, Claimant saw Dr. William Ciccone who reported that Claimant had right knee pain with a severity level of 10. Claimant reported that he had physical therapy which helped minimally and that his pain was persistent with walking. Dr. Ciccone reported that Claimant had persistent right-side medial joint line pain consistent with a meniscal tearing and that he had been unresponsive with conservative treatment, including physical therapy. Dr. Ciccone discussed the meniscal tearing with Claimant as well as the fact that there were some degenerative changes within the right knee.

7. On August 20, 2012, Dr. Ciccone performed surgery to repair the medial meniscal tear. His post operative diagnosis included right knee meniscal tear, Grade 3, chondromalacia patellae and Grade 3 chondromalacia of the medial femoral condyle. Dr. Ciccone performed a right knee arthroscopy with partial medial meniscectomy with chondroplasty of the medial femoral condyle. Dr. Ciccone documented that while probing with a scope he found no further flaps of the meniscus, however, he did find articular cartilage flaps along the medial femoral condyle with Grade 3 chondromalacia. He performed a chondroplasty in this area utilizing a shaver.

8. In a September 19, 2012 post operative report, Dr. Ciccone reports that Claimant is doing well. Claimant reported to Dr. Ciccone that he was feeling much improved and happy with his result.

9. On October 4, 2012, Claimant saw Dr. Orgel and reported noted improvement but continued pain. Claimant expressed his desire to return to work without restrictions. Dr. Orgel reported that he discussed this with the physical therapist

who agreed that Claimant was able to return to work full duty. Dr. Orgel reported normal gait and good range-of-motion. His assessment was that Claimant was improved and could return to work full duty.

10. Claimant's final post operative visit with Dr. Ciccone occurred on October 24, 2012. Claimant reported that he was back to work full duty with some occasional pain along the joint line which is much resolved, and that he feels improved. Dr. Orgel determined MMI and assigned a 14% scheduled rating, which included a 9% for loss of range-of-motion and 5% for a partial meniscectomy. Dr. Orgel discharged Claimant with the impairment and determined that no follow-up or maintenance was required.

11. Respondents filed a Final Admission of Liability on November 2, 2012 consistent with Dr. Orgel's October 24, 2012 report.

12. On December 17, 2012, Claimant returned to Dr. Orgel with complaints that his right knee is more painful than at discharge in October 2012 and the pain is with activity. Dr. Orgel placed Claimant on work restrictions and referred him for a repeat MRI.

13. Claimant had a repeat MRI on December 24, 2012. The radiologist, Dr. Tanya Tivorsak, reported that no displaced medial meniscal tear was present but that Claimant had a subchondral fracture and Grade 4 full-thickness chondral loss. Areas of high-grade partial thickness, chondral loss was reported in the medial femoral condyle, as well as postsurgical changes of partial medial meniscectomy and degeneration of the medial and lateral meniscus. Dr. Tivorsak also noted scarring of the anterior cruciate ligament (ACL) from an old injury related to the right knee.

14. On January 2, 2013, Claimant was seen by Dr. Sarah Harvey at Concentra on as a follow-up of the repeat MRI. Dr. Harvey reported, "Dr. Orgel has informed the insurance company that the finding in the MRI is not work-related. Patient is so informed."

15. On January 7, 2013, Claimant was seen by Dr. Robert Rhodes at Kaiser and reported that he has been weight bearing without pain and ready to return to work. Dr. Rhodes noted that Claimant was upset, angry, and worried that he would be fired from his job because he did not have much FMLA time remaining. It was recommended that Claimant be seen by an orthopedist for evaluation prior to being given a full duty work release.

16. Claimant had bilateral knee x-rays at Kaiser on January 10, 2013, which showed mild degenerative changes to both knees, right greater than left. The left knee x-ray showed patellar spurring, small ossicles projected adjacent to the left proximal tibia, which may represent interarticular loose bodies. The radiologist determined there was no fracture.

17. Claimant was seen by Dr. David Gladu, an orthopedist at Kaiser, on January 10, 2013. He reported to Dr. Gladu that he was "really minimally symptomatic, once or twice a week that he has some aching in his knee and takes some over-the-counter ibuprofen for this with very good relief." After a review of the x-rays, Dr. Gladu reported that Claimant did not have a true subchondral fracture but noted that Claimant has degenerative changes in the right knee with a loss of nearly 50% of the joint space and a subchondral lesion in the medial femoral condyle which correlates well with what was in the MRI report. He encouraged a weight management program for Claimant and advised that Claimant not return to any high-impact exercise so that the arthritis does not progress rapidly. Dr. Gladu gave Claimant a full-duty work release. Dr. Gladu reported that Claimant's symptoms fit with changes sometimes seen in osteoarthritis. There is nothing in Dr. Gladu's report indicating that he thought Claimant's arthritic change was due to his work injury or his injury-related surgery.

18. Claimant returned to Kaiser on April 4, 2013 with complaints of right knee pain. He stated that he minimized his pain at the January 2013 appointments because he wanted to return to work. The ALJ gives this record very little weight due to credibility issues with Claimant. On May 10, 2013, Claimant was seen at Kaiser and received a right knee injection.

19. On May 10, 2013, Claimant was seen at Kaiser and received a right knee injection.

20. Kaiser records indicate that Claimant is obese and could benefit from a weight management program or surgery. Claimant expressed an interest in weight management particularly because he believed it may help his knee condition.

21. On September 20, 2013, Claimant saw Dr. Orgel with complaints of right knee pain and his desire to have maintenance treatment under the work-related injury claim. After review of the Kaiser records, Dr. Orgel reported that Claimant had a permanent aggravation of his underlying arthritis and that his claim should be reopened.

22. Claimant testified that he continued to work full duty and that his co-workers often helped him with job duties due to his knee pain. The ALJ is not persuaded by

this testimony regarding assistance from co-workers. Other than Claimant's testimony, there was no other evidence or testimony presented that Claimant's co-workers assisted him with his job duties.

23. Claimant returned to Concentra on July 16, 2014 with complaints of right knee pain. He saw Nurse Practitioner, Keith Meier who recommended that the work-related injury claim from July 2012 be reopened.

24. On July 17, 2014, Dr. Orgel signed a State of Colorado Medical Certification Form (Employee's Health Condition) on behalf of Claimant.

25. Claimant's last day of employment with Employer was July 16, 2014.

26. Claimant testified that prior to his last day of employment, he had been getting good quarterly evaluations by Employer. However, sometime prior to July 16, 2014, Claimant lost his Colorado Commercial Driver's License (CDL) due to being charged with a DUI.

27. Having a CDL is a requirement of Claimant's job and at the point he lost the license he was no longer able to perform all of the duties associated with his position. At hearing, Claimant denied that he was facing a disciplinary hearing due to the loss of his CDL. The ALJ finds that Claimant is not credible in his testimony regarding such and no other evidence was presented to support Claimant's testimony.

28. In the first half of July 2014, Claimant testified that he rode his bike to work for national bike day. Claimant testified that on July 16, 2014, he told a co-worker "I can't take another step."

29. The ALJ finds the timing of pain that was so severe that Claimant could not take another step is suspicious when considered with the timing of Claimant losing his CDL and his inability to perform all of his work duties due to losing the license.

30. The ALJ finds that Claimant was able to work following MMI doing physically difficult work until July 16, 2014, with the exception of work restrictions by Dr. Orgel in December 2012. The ALJ finds that Claimant's symptoms seemed to wax and wane depending on who he was talking to about his right knee. For instance, when Claimant saw both Drs. Rhodes and Dr. Gladu in January 2013, he was minimally symptomatic and ready to return to work. However, in the month before, in December, 2012, Claimant was complaining of right knee issues and pain to Dr. Orgel.

31. Despite Claimant's assertion at hearing of right knee pain that continued to get worse post-MMI, Claimant did not seek regular treatment for his knee. Claimant testified that he did not seek treatment due to not having the time off to do so, finances, and not wanting to lose his job. However, even after his last day of employment with Employer on July 16, 2014, Claimant did not seek regular treatment for his right knee except for prescription medications.

32. From July 16, 2014 through the end of October 2014, Claimant was on temporary disability. Claimant could have sought medical treatment under the temporary disability coverage and did not do so.

33. At hearing, Claimant testified that he told Dr. Gladu in January 2013 that he was minimally symptomatic, when in reality, he was having more pain than he represented. The fact that Claimant was not truthful regarding his knee condition in the past presents a problem for his credibility at hearing.

34. On January 16, 2014, Claimant saw Dr. Joel Gonzales, an orthopedic surgeon, due to Respondents' request for an Independent Medical Examination (IME). Dr. Gonzales agreed that the December 24, 2012 MRI did not show an acute fracture of the medial aspect of the knee after personally reviewing the images. He felt that Claimant had Grade 4 degenerative changes on the medial compartment of the knee. Claimant reported that he continues to work full duty and does heavy work with increased pain, which is mainly activity related. Dr. Gonzales reported that Claimant has a significant amount of arthritis but continues to perform a very demanding job without restrictions. He opined that Claimant's BMI is 44, which equates to severe obesity. His treatment recommendations include weight loss, activity modifications, anti-inflammatories and possibly cortisone injections or visco supplementation injections. He went on to report:

> …
>
> "I do not believe that these should be related to the claimant's July 16, 2012, claim. I believe that the patient sustained a meniscus tear on July 16, 2012, and that it was treated appropriately with surgery and the patient improved after the surgery and was returned to work full-duty.
>
> I do not believe the claimant's condition has worsened since he was put at MMI on October 2012.
>
> …

> It is my medical opinion that the current symptoms Mr. Young is experiencing are consistent with the natural history of the progression of degenerative joint disease."

35. Dr. David Orgel testified by evidentiary deposition on November 18, 2014. Dr. Orgel is Board Certified in Internal and Occupational Medicine and is Level II certified as well. Dr. Orgel's opinion was that Claimant sustained a permanent aggravation of his underlying arthritic condition. It is Dr. Orgel's opinion that when Dr. Ciccone repaired Claimant's meniscus, he also performed a chondroplasty to smooth out the medial femoral condyle. The chondroplasty of the medial femoral condyle was to treat Claimant's degenerative condition. Had Dr. Ciccone not gone in to treat the meniscus injury, he would not have treated the medial femoral condyle. He believed that it was the chondroplasty that accelerated Claimant's underlying arthritic condition because it thinned the cartilage. However, Dr. Orgel also testified, in the context of whether Claimant's situation would be improved by weight loss, that weight accelerates arthritic changes.

36. Dr. Orgel finished his testimony by indicating that but for the meniscal injury and surgery, Claimant's knee would not be in the position it currently is based only on the natural progression of the degenerative changes.

37. Dr. Joel Gonzales testified by evidentiary deposition on December 4, 2014. Dr. Gonzales is Board Certified by the American Board of Orthopedic Surgery and also Board Certified for Sports Medicine. When he saw Claimant in January 2014, Claimant was not limping or using an assistance device, he had good range-of-motion with no swelling in the right knee and there was nothing very remarkable on exam. Dr. Gonzales agrees that Claimant did not have a subchondral fracture. However, his opinion is that Claimant had preexisting arthritis in his knee, and then had an acute injury which was the tearing of the meniscus that was treated appropriately by Dr. Ciccone. He testified that Claimant returned to baseline, his injury was taken care of and Claimant's continuing symptoms were due to arthritis in his knee.

38. Dr. Gonzales agrees with Dr. Orgel, that if Claimant had not had the meniscus injury and arthroscopic repair, the chondroplasty would not have taken place. Dr. Gonzales testified that the Grade 3 chondromalacia was preexisting. He discussed that there were some flaps of cartilage and Dr. Gonzales cannot say one way or another whether the injury made those flaps worse. Dr. Gonzales also testified that the flaps may have been created when Claimant twisted his knee, and in that case, the condition that prompted the chondroplasty could be related to the acute work injury. The ALJ finds there is not sufficient medical

evidence or testimony to show that the flaps were created when Claimant injured his right knee at Employer or that the flaps are related to the acute work injury.

39. Dr. Gonzales does not agree with Dr. Orgel's opinion that the chondroplasty accelerated Claimant's degenerative arthritis. Dr. Gonzales testified that he has done probably close to 1000 chondroplasties, if not more. It is not typical that this procedure would accelerate a patient's arthritis. The fact that Claimant has Grade 3 chondromalacia at the time of the surgery means that there had been significant degeneration of the cartilage in the compartment of the knee. Grade 4 is when there is no cartilage left and it is just raw bone and Grade 3 is just when there is a little bit left. It would not be unusual for Claimant's chondromalacia to progress from Grade 3 at the time of Dr. Ciccone's surgery to Grade 4, which was demonstrated on the December 24, 2014 MRI. The ALJ finds this testimony persuasive.

40. Dr. Gonzales testified that Claimant's current symptoms are consistent with arthritis, which he had before, and even if he Claimant was asymptomatic prior to the work-related injury, Claimant would have had the symptoms either way given the condition of his right knee. Dr. Gonzales testified that Claimant's weight is a factor which contributes to his current symptoms.

41. The ALJ finds that Claimant weighed approximately 320 lbs. at the time of the work-related injury. All doctors who expressed opinions regarding Claimant's weight agree that Claimant is obese and that being obese contributes to knee problems.

42. Weighing the evidence against Claimant's burden of proof in this case, the ALJ is more persuaded by the testimony and medical records of Dr. Gonzales and medical records from Dr. Gladu than the testimony and medical records from Dr. Orgel. The ALJ finds that Claimant is not credible or persuasive due to his admitted dishonesty and inconsistent reporting of symptoms showing a willingness and ability to be dishonest for advantage and/or benefit.

43. Medical records document the following: On October 24, 2012, when Claimant was placed at MMI, he reported some occasional pain as high as 3/10, with some locking and crepitation in the knee. On December 17, 2012, Claimant reported to Dr. Orgel that he had episodes of locking and knee pain with activity and the exam showed mild effusion. By January, 2013, he reported to Dr. Rhodes that he was weight bearing on the knee and ready to return to work; his right knee exam was normal. Also in January 2013, Claimant gave a similar account to Dr. Gladu, Dr. Gladu noted no obvious effusion. One year later, in January 2014, Dr. Gonzales documented no effusion in the right knee or

increased warmth. The chronology suggests that Claimant's right knee condition was similar in January 2013 to what it was at MM in October 2012, and even improved by January 2014. The timing of pain so severe in July 2014 that Claimant could not take another step correlates with pending employment issues due to Claimant's loss of his CDL and potential disciplinary proceedings rather than a worsened or changed condition in the right knee.

44. Claimant has failed to show by a preponderance of the evidence that his right knee complaints are causally connected to the admitted industrial injury or that his condition has changed or worsened.

45. Thus, the ALJ finds that Claimant's work-related injury was treated and Claimant stabilized and returned to baseline. The ALJ finds that it is more probably true than not that any continued right knee pain is due to Claimant's preexisting degenerative condition/osteoarthritis and the natural progression of the degenerative changes as well as Claimant's weight. Additionally, Claimant's preexisting condition was not aggravated or accelerated by the industrial injury or treatment thereof.

CONCLUSIONS OF LAW

Based on the Findings of Fact enunciated above, the undersigned ALJ makes the following Conclusions of Law:

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

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

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

d. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Clam Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009).

e. The burden to prove that a claim should be reopened rests with the claimant to demonstrate that reopening is warranted by a preponderance of evidence. *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323 (Colo. 2004). Pursuant to Section 8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985).

f. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). Resolution of that issue is one of fact for the ALJ. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). Claimant has failed to show by a preponderance of the evidence that his preexisting condition was aggravated or accelerated by the industrial injury.

g. Claimant has failed to demonstrate by a preponderance of the evidence that it is more probably true than not that his injury-related condition has worsened or changed since being placed at MMI on October 24, 2012. The opinions of Dr. Gonzales are more compelling than those of Dr. Orgel. Here, it is undisputed, that Claimant's injury-related condition was a meniscal tear. Drs. Gonzales and Orgel agree that the claim-related meniscus remains intact, has not worsened

and is not a basis for reopening this claim. What is at issue here, is whether a surgical procedure, specifically a chondroplasty, performed by Dr. Ciccone to repair an underlying, not related chronic condition, to repair for cartilage of the medial femoral condyle accelerated Claimant's arthritic condition. Dr. Gonzales' opinion that Claimant's current condition is due to a natural progression of the claimant's underlying arthritic condition is more persuasive. The fact that Claimant had a Grade 3 chondromalacia when Dr. Ciccone performed surgery on August 20, 2014, is persuasive in the undersigned ALJ's determination that Claimant had a severe underlying arthritic condition preexistent to Claimant's work-related meniscal tear, and the preexisting condition progressed naturally to a Grade 4 chondromalacia.

h. When Dr. Orgel first saw Claimant after the December 24, 2012 MRI, he opined that Claimant's condition was unrelated and that his claim should not be reopened, notwithstanding the fact that it was reported that Claimant's chondromalacia had advanced to Grade 4.

i. Dr. Gladu, the Kaiser orthopedist, saw Claimant on January 10, 2013 and reported that Claimant did not have a true subchondral fracture and that what was seen on x-ray was a change in Claimant's osteoarthritis. He reported that Claimant's symptoms fit the condition of what is seen with osteoarthritis. There is nothing in Dr. Gladu's report indicating that he thought Claimant's arthritic change was due to his work injury or his injury-related surgery.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen Claim is denied and dismissed.

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

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-907-349-03

IINITIAL MATTERS

At the beginning of hearing the ALJ determined that Respondents had not copied Claimant's counsel on their Response to Application for Hearing. As a result Claimant was not informed that Respondents would call Dr Brian Lambden as a live witness. To avoid any prejudice to Claimant, the ALJ granted Claimant up to January 15, 2015 to submit additional evidence based on testimony taken at hearing from Dr. Lambden. Claimant submitted no additional evidence.

The ALJ admitted into evidence Claimant's hearing exhibits 1-17 and 19, over Respondents standing objection based on the parol evidence rule. The ALJ overruled Respondents' objection because Claimant's exhibits were used to establish a mutual mistake of material fact and not to alter the terms of the unambiguous contract. To the extent Respondents continue to raise that same objection, it is overruled for the same reason.

STIPULATION

The parties stipulated that the settlement documents in this case were based on the Division-approved form promulgated under the Rules. The parties also stipulated that Respondents' Exhibit B (also Claimant's Exhibit 17) is a true and accurate copy of the settlement documents, signed by Claimant while represented by previous counsel.

ISSUES

- Whether Claimant established by a preponderance of the evidence that he is entitled to a reopening of the settlement agreement based on a mutual mistake of material fact?

- Whether Claimant established by a preponderance of the evidence that his post settlement medical treatment was provided by an authorized provider?

- Whether Claimant established by a preponderance of the evidence that his post settlement medical treatment was reasonably necessary?

- Whether Claimant established by a preponderance of the evidence his average weekly wage?

- Whether Claimant established by a preponderance of the evidence his entitlement to temporary total disability benefits?

FINDINGS OF FACT

General

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

1. Claimant is a 60 year old driver who began working for Employer on April 29, 2012, delivering butane gas.

2. On December 29, 2012 Claimant slipped on ice and fell backward while delivering a load of butane gas to a location in Sinclair, Wyoming.

3. As a result of Claimant's December 29, 2012 injury, Claimant filed a workers' claim for compensation and Employer filed a first report of injury. Respondents then filed two general admissions of liability, the first on January 24, 2013 and the second on February 6, 2013. Respondents admitted to an average weekly wage of $1162.38 and to temporary partial disability benefits at a varying rate.

4. Claimant received treatment and evaluation for his work injury including approximately three weeks of physical therapy which increased his pain. Claimant obtained an MRI scan of his right shoulder which showed irreparable rotator cuff pathology. Claimant was referred to Dr. John Papilion who performed a reverse total shoulder arthroplasty on February 20, 2013. Post surgery Claimant's shoulder dislocated on one or more occasions requiring him to seek emergency medical attention. Dr. Papilion preformed a revision arthroplasty on May 1, 2013 using a larger ball and thicker plate to prevent further injury. The plate was secured onto Claimant's scapula with a number of screws.

Settlement

5. Following his May 1, 2013 surgery, Claimant continued to experience severe pain and instability in his shoulder joint and blade. Claimant testified he had terrible right-sided pain between the middle and top of his shoulder blade, his shoulder did not improve after the second surgery, and he continued to have pain and feelings of instability in his right shoulder. Claimant credibly testified he thought his continuing symptoms were part of the healing process and that the pain would resolve over time.

6. On July 30 2013, Dr. Lambden performed a Respondents' IME. In his report he stated he anticipated Claimant reaching MMI within two to three months.

7. Respondents offered Claimant $35,000 to settle his claims. Respondents' counsel stated in Respondents' position statement that, "*A $35,000 settlement for an injury contemplates a potential impairment rating and waiver of potential medical benefits.*" Respondents were represented by the same counsel during the settlement negotiations. The ALJ finds that this amount is consistent with Dr. Lambden's report and further supports a finding that at the time of settlement Respondents believed and understood that Claimant was recovering from his revision surgery and would soon reach MMI.

8. The ALJ infers from Claimant's testimony, Respondents' counsel's representation, and from Dr. Lambden's report of anticipated MMI that the parties mutually understood Claimant to be recovering from his revision surgery with the expectation that he would soon reach MMI.

9. Claimant and Respondents entered into a settlement before Claimant was actually placed at MMI. However, the record is void of any credible evidence that any parties' expectation that Claimant would soon be at MMI ever changed. The ALJ thus finds that when the parties entered into the settlement, they mutually understood that Claimant was recovering from a revision arthroplasty and approaching MMI.

10. Claimant was represented by counsel when he entered into the settlement. The settlement details were provided on the Division of Workers' Compensation mandated form and were approved by an Order dated September 12, 2013. Claimant understood that once the case settled that his claim was closed.

Post Settlement

11. Post settlement, Claimant continued to have right shoulder pain and instability and eventually sought treatment in mid-October 2013 at a Kaiser facility through his private health insurance. Claimant was referred to Dr. Michael Gallagher, an orthopedic specialist. Dr. Gallagher obtained an x-ray on October 15, 2013 which revealed a fracture in Claimant's right scapula.

12. Claimant credibly testified that the October 15 x-ray was the first indication he had of a fracture in his right scapula. He testified further that if he had been aware of the fracture in his scapula, he would not have settled his worker's compensation case.

13. Because no evidence of the fractured scapula existed prior to October 15, the ALJ finds that Respondents could not have known at the time of settlement that Claimant had a fractured right scapula.

14. After the shoulder fracture was diagnosed, Dr. Gallagher recommended surgical repair which was performed November 20, 2013. The surgery was unsuccessful and the fracture remained unhealed.

15. When Claimant sought to reopen his claim, Insurer sent him back to Dr. Papilion who referred Claimant to Dr. Hatzidakis, another shoulder surgical specialist, for evaluation and treatment. Dr. Hatzidakis did a follow-up surgery in September 2014 and at the time of the hearing Claimant was scheduled for another surgery with Dr. Hatzidakis on January 16, 2015.

Expert Testimony

16. Dr. Gallagher is board certified in orthopedic surgery with a specialty in fracture management. Dr. Gallagher opined that Claimant's fracture was the result of a screw used in the surgical repair of this right shoulder creating a stress fracture. Dr. Gallagher opined:

> Claimant's scapular fracture was likely due to a stress riser created by one of the screws from his right shoulder reverse arthroplasty.

> The tip of at least one of the screws was seen on radiographs taken on 10/15/2013, to be in the scapular spine fracture, suggesting it played a role. . . . Claimant denied further trauma to the shoulder subsequent to his shoulder surgeries.

Dr. Gallagher further testified that the tip of a screw was right in the fracture site.

17. Dr. Gallagher testified the larger ball and socket put in during the revision surgery also may have played a role by creating greater tension. Dr. Gallagher testified the best method to see an early stress fracture is a bone scan or MRI [which were not performed] rather than plain x-ray, and that the location of the scapular fracture would not typically have been seen on the MRI taken on June 1, 2013.

18. According to Dr. Gallagher, the first objective evidence of an actual fracture became available on October 15, 2013. Prior to then, there was no way for anyone to know that the scapula fracture existed. While Dr. Gallagher acknowledged he could not state the exact date when the stress fracture began, he stated that a stress fracture is something that develops over time and, more likely than not, in this case it took several months to develop. The natural course of a stress fracture is that it begins so small that it is invisible, and then develops over time into a true or open fracture.

19. Both Dr. Gallagher and Dr. Papilion agreed that the stress fracture is related to the workers' compensation case. The doctors disagreed, however, about what caused the stress fracture: Dr. Papilion believed that the fracture occurred when Claimant's shoulder dislocated; Dr. Gallagher believed the stress fracture was likely due to the reverse shoulder arthroplasty, although he acknowledged that Dr. Papilion's theory could be true and reasonable. Both doctors agreed that the scapular fracture was not caused in the initial fall in December of 2012, and that the stress fracture developed *before* the settlement was finalized.

20. Dr. Papilion specifically opined "the scapular fracture likely occurred at the dislocation of his total shoulder prosthesis and was not visualized at revision surgery." Dr. Papilion explained that one would not normally be able to be visualize the scapular spine during a revision surgery. Dr. Papilion also opined that "the treatment for this fracture and subsequent arthroplasty is related to [Claimant's] worker's compensation claim."

21. Dr. Lambden performed two Respondents' IMEs on Claimant, one before the settlement and one after the fracture was discovered. Dr. Lambden is a physical medicine and rehabilitation specialist. He is not an orthopedist or an orthopedic surgeon. Dr. Lambden opined there were four possible causes of the fracture. He believed (1) a small stress fracture might have existed undetected after the dislocation following Claimant's first shoulder surgery, or (2) the fracture occurred in the response to the screw penetration after the revision procedure following the dislocation. Dr. Lambden explained the fracture identified on October 15, 2013 may have been caused by the screw because the screw passes through the fracture. Dr. Lambden also opined (3) the fracture could have

occurred after the revision surgery due to a trauma, or (4) the fracture could have been due to progression of a post-revision trauma.

22. Dr. Lambden admitted that the scapular fracture could have occurred as early as August 2013. Specifically, Dr. Lambden testified that "in my mind there is a stress fracture, and then there was an obvious acceleration of the stress fracture to create an actual [open] fracture evident on plain x-rays." Dr. Lambden also acknowledged the likely culprit was a screw that created a stress point or stress riser: "I think we can say that the screw, more likely than not, was the cause." Dr. Lambden agreed that there is no report of trauma in the initial Kaiser medical record in October of 2013 and that Claimant reported no new injury in that record. While Dr. Papilion's records contain a hand written notation that Claimant fell on May 13, 2014, Claimant credibly testified that he did not suffer any such fall and that he contacted Dr. Papilion's office to correct the record. Dr. Lambden acknowledged there were no other medical records documenting any kind of fall by Claimant at any time other than at the initial fall.

23. Claimant credibly testified that following the work-related fall in December 2012, he did not have any other falls or injuries to his right shoulder and he never reported any falls to any doctors. After the settlement, Claimant did not have any falls or injuries to his right shoulder and did not report any falls or injuries to his right shoulder. The ALJ finds it more likely than not that trauma did not cause or exacerbate his scapula fracture, thus eliminating Dr. Lambden's causation options (3) and (4).

24. Dr. Lambden stated that an individual with Claimant's shoulder range of motion could not do a semi-truck driving job. Dr. Lambden also agreed that the surgeries by Dr. Gallagher and Dr. Hatzidakis to address the scapula fracture and the non-union have been reasonable and appropriate to treat Claimant's condition. The ALJ finds this opinion to be credible and persuasive.

25. Dr. Lambden stated that as of the date of the hearing, Claimant would not be considered at MMI from his recovery from his September 2014 surgery with Dr. Hatzidakis. The ALJ finds this opinion to be credible and persuasive.

26. Doctors Gallagher and Papilion both opined the fracture identified on Claimant's October 15, 2013 x-ray was related to Claimant's original work injury in December 2012.

27. In large part, Dr. Gallagher and Dr. Lambden agree on the source of the fracture: a screw created a stress riser that created a stress fracture that developed into an actual [open] fracture over time. That actual fracture was not discovered until October 15, 2013. Nevertheless, it was the type of fracture that develops over time, absent trauma. Dr. Gallagher opined that this type of fracture would take months to develop. Dr. Lambden opined that the fracture could have existed as early as August of 2013, more than a month prior to the settlement. Ultimately, the ALJ finds the opinions of the orthopedic specialist, Dr. Gallagher, to be more credible and persuasive. To the extent Dr. Lambden's opinions are consistent with the opinions of Dr. Gallagher, they are also

accepted. To the extent Dr. Lambden's opinions differ from Dr. Gallagher's opinions, the ALJ rejects them as less persuasive.

28. At the time of the settlement, Claimant had an existing, undiagnosed, and undiscovered fracture in his scapula consistent with the medical opinions of Dr. Gallagher. Neither party sought or paid consideration for the unknown fracture for the precise reason that no one knew of its existence. Thus the ALJ finds that the parties entered into the settlement without being fully informed concerning the "extent, severity and likely duration" of Claimant's shoulder injury.

29. Additionally, Claimant attended school only through the eighth grade. The ALJ observed Claimant often had difficulty understanding even his own attorney's questions. The ALJ also observed Claimant express that he often had difficulty understanding things generally.

30. At the hearing, after Claimant rested, Respondents moved for a directed verdict arguing a lack of evidence that Respondents settled Claimant's case on a mutual mistake of material fact and a lack of evidence that Claimant's shoulder was fractured on the day of settlement, or that any party had knowledge of a fracture that existed in Claimant's shoulder on the day of settlement. The ALJ reserved ruling and now denies that motion.

31. Based on the above findings, the ALJ finds that the parties were mutually mistaken at the time of the settlement because they believed Claimant's continued pain was attributable to his recovery from the revision arthroplasty and that he was approaching MMI. While in actuality at the time of settlement Claimant had an undisclosed and undiagnosed scapula fracture stemming from his work injury and surgeries, which was unknown to any party at the time of the settlement.

32. The ALJ further finds that the scapula fracture was material because it required numerous surgeries to attempt to repair, it prevented Claimant from being able to return to work, and at the time of the hearing the status of Claimant's fracture remained uncertain.

33. As mandated by the Act and the Director, paragraph 4 of the settlement agreement provides for reopening based on mutual mistake of material fact. Section 8-43-204(1) is an explicit legislative directive to favor a just result over Respondents' interest in finality under the facts in this case.

34. Based on the factual findings above, the ALJ finds that Claimant has satisfied his burden of establishing that the settlement agreement was reached based upon a mutual mistake of material fact as provided for by C.R.S. section 8-43-204(1).

REMAINING ISSUES

35. Dr. Papilion, an authorized treating physician in the claim, referred Claimant to Dr. Hatzidakis for treatment. Dr. Hatzidakis is thus an authorized provider.

36. The credible testimony of doctors Gallagher, Papilion, and Lambden supports a finding that all of the medical treatment received by Claimant for his right shoulder on and after October 15, 2013 has been reasonable, necessary, and related to his worker's compensation injury or the surgeries he received for that injury.

37. Claimant was off of work as a result of the work injury and was receiving TTD benefits at the time of the settlement. Since his first surgery Claimant has been unable to perform his regular job duties with Employer. He also has continued to be on restrictions since the settlement date.

38. Dr. Lambden's testimony supports a finding that Claimant remains unable to perform his regular duties as a semi-truck driver for Employer. He remains on restrictions that prevent him from performing his regular job. Claimant has not worked in any other capacity since the settlement.

39. Respondents admitted to an average weekly wage of $1162.38. However, the evidence Claimant presented at hearing shows it to be more likely that Claimant's gross earnings from his work for the employer in the 11.86 weeks leading up to the injury totaled $14,010.09. This results in an average weekly wage of $1181.29. Thus, Claimant has established his entitlement to an average weekly wage of $1181.29 for the entire claim.

40. Claimant has been receiving a Social Security Disability benefit in the monthly amount of $1,387.60 awarded back to the date of the initial injury plus the five month waiting period. Claimant also received $35,000 in compensation pursuant to the settlement agreement.

41. Respondents are entitled to a credit for a proper Social Security offset and the amount paid at the time of settlement.

CONCLUSIONS OF LAW

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

General

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

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

A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The requirements of proof for civil non-jury cases in the district courts apply in workers' compensation hearings. § 8-43-210, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of this issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). It is the ALJ's prerogative to weigh the evidence, and that the ALJ might have reached a contrary conclusion is immaterial on review. *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Mutual Mistake of Material Fact

By legislative mandate, every workers' compensation settlement is subject to reopening on the grounds of mutual mistake of material fact. C.R.S. section 8-43-204(1) provides:

> An injured employee may settle all or part of any claim for compensation, benefits, penalties, or interest. If such settlement provides by its terms that the employee's claim or award shall not be reopened, such settlement shall not be subject to being reopened under any provisions of articles 40 to 47 of this title other than on the ground of fraud or mutual mistake of material fact.

Paragraph 4 of the settlement document at issue incorporates the required language from the statute: "The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact."

The reopening provisions of the Act are based on a strong legislative policy favoring a just result over litigants' interest in achieving a final resolution of their dispute. *Padilla v. ICAO*, 696 P.2d 273, 278 (Colo. 1985); *Travelers Insurance Co. v. industrial Commission*, 646 P.2d 389 (Colo. App. 1981). Contrary to Respondents' arguments, section 8-43-204(1) is the General Assembly's explicit resolution of the tension between respondents' interests in finality, and claimants' interests in reopening where settlements are founded on mutual mistakes of fact. *See Cary v. Chevron, U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993).

The claimant has the burden of proof in seeking to reopen a claim. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000). The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R–1*, 924 P. 2d 1177 (Colo. App. 1996). The question of whether the claimant has proven a mutual mistake of material fact is one of fact to be decided by the ALJ. *Maryland Casualty Co. v. Buckeye Gas Products Co., Inc.*, 797 P.2d 11 (Colo. 1990).

A mistake may be found where parties settle a claim without being fully informed concerning the "extent, severity and likely duration" of the injury. *Gleason v. Guzman*, 623 P.2d 378 (1981). In this regard, the mistake must pertain to a past or present fact not an opinion or prophecy about the future. *Guzman*, 623 P.2d 378 (1981) (a "mutual mistake of material fact" is one which relates to the "nature" of a known injury rather than a prediction about the future course and effects of the injury). Further, a mutual mistake is one which is reciprocal and

common to both parties to an agreement. *Maryland Casualty Co. v. Buckeye Gas Products Co.*, 797 P.2d 11 (Colo. 1990); *Cary v. Chevron U.S.A., Inc.*, 867 P. 2d 117 (Colo. App. 1993).

Claimant has met his burden of establishing the grounds for reopening based on mutual mistake of a material fact. The only plausible inference from the evidence is that the mistake was mutual. Both parties entered into the settlement with the understanding that Claimant was recovering from his revision arthroplasty and soon would reach MMI. Both testifying doctors agreed that the first objective evidence of the scapula fracture was discovered on October 15, 2013, approximately a month *after* approval of the settlement. Claimant testified he would not have settled his claim if he had known of the fracture. Further, neither party sought or paid consideration for the unknown fracture for the precise reason that no one knew of its existence. Respondents' offer of $35,000 does not reasonably reflect the value of a claim which would involve numerous surgeries and a lengthy if not permanent period of disability. The settlement was based upon a mistake concerning the existence of the scapula fracture which existed at the time of settlement which constitutes a past or present fact and not an opinion or prophecy about the future. In addition, the evidence compels the conclusion that the mistake was material. The undisclosed and undiagnosed fracture has resulted in three additional surgeries, an unresolved medical condition, and Claimant's inability to work as a result of the fracture and the surgeries.

In *Gleason v. Guzman*, *supra,* the court indicated that, for a "general release" to be effective against unknown injuries, "It must appear from the circumstances surrounding the transaction that such was [the releasor's] clear intention." The court went on to state that a party could not be found to have intended to release "future unknown injuries or the later consequences of known or unknown injuries where there is evidence that he was not fully aware of the basic character of the primary injury for which the release was sought and executed." *Gleason v. Guzman*, 623 P.2d at 387. Here, the ALJ concludes that Claimant could not have intended to release Respondents because the evidence shows that Claimant could not have been aware of the scapula fracture -- the basic character of the primary injury -- until October 15, 2013 when the fracture was discovered by x-ray.

Moreover, paragraph (4) of the settlement agreement explicitly states, as it must, that the settlement is subject to section 8-43-204(1). Thus, the parties recognized that Claimant retained the right to reopen based upon mutual mistake of material fact, and, contrary to Respondents' arguments, the settlement agreement cannot be construed to abrogate the claimant's statutory right. *See Padilla v. Industrial Commission*, 696 P.2d 273 (Colo. 1985) ("under the Act claims resolved by settlement agreements remain subject to the reopening provisions of the statute in the same manner as claims resolved by the granting of an award, and that parties may not by private agreement modify this strong legislative policy").

Parol Evidence

Paragraph 4 of the settlement agreement is clear and unambiguous. Claimant did not seek to admit any evidence regarding the interpretation of that unambiguous language. Instead, as the ALJ ruled, Claimant presented evidence to establish a mutual mistake of material fact. The parol evidence rule has no application in this situation. *See Boyer v. Karakehian*, 915 P.2d 1295, 1299 (Colo. 1996), *as modified on denial of reh'g* (May 20, 1996).

Remaining Issues

To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his/her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

Based on the ALJ's findings of fact, Claimant has established his entitlement to TTD benefits from the date after the settlement (September 13, 2013) forward and continuing. Subject to a credit for the amount paid at the time of settlement and a proper Social Security offset, Respondents shall pay TTD benefits from September 13, 2013 and continuing.

The ALJ must determine an employee's average weekly wage (AWW) by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of injury, which must include any advantage or fringe benefit provided to the employee in lieu of wages. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

The ALJ concludes Claimant's average weekly wage is $1181.29 with a corresponding TTD rate of $787.53. This average weekly wage and corresponding TTD rate applies back to the date the claim was opened. Respondents shall pay back due benefits with interest using this TTD rate. TTD benefits shall continue until terminated by law or order pursuant to sections 8-42-105 and 8-42-103, C.R.S.

Dr. Hatzidakis is an authorized treating provider based on a referral for treatment by Dr. Papilion. Respondents are liable for all medical treatment provided by Dr. Papilion, Dr. Hatzidakis, and their referrals, as all of their treatment has been reasonable, necessary, and related to the work injury. *See* section 8-43-404(9), C.R.S.

While Respondents noticed for hearing the issue of attorney fees, they did not pursue the claim at hearing and have not addressed it in their position statement. Respondents' claim for attorney fees is deemed abandoned and as such is denied and dismissed.

ORDER

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

1. Claim 4-907-349 is reopened.
2. Claimant's average weekly wage is $1181.29 with a corresponding TTD rate of $787.53. Respondents shall pay past due benefits back to the initial entitlement to TTD in the claim and interest using this TTD rate.
3. Claimant is entitled to TTD beginning September 13, 2013 and continuing, subject to a credit for the amount paid at the time of settlement and a proper Social Security offset.
4. Dr. Papilion and Dr. Hatzidakis is an authorized treating physician, and so are his referrals.
5. Respondents are liable for all medical treatment provided to Claimant by Dr. Papilion, Dr. Hatzidakis, and their referrals.
6. Respondents' request for attorney fees is DENIED and DISMISSED;
7. Respondent shall pay interest at the statutory rate of 8% on all benefits not paid when due.
8. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 12, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-909-364-06

ISSUES

- Whether Respondents have overcome the DIME's opinion on MMI by clear and convincing evidence?
    - Whether Respondents have overcome the DIME's opinion that Claimant's right shoulder complaints are related to her industrial injury of November 28, 2012?
    - If so, whether Respondents have overcome the DIME's opinion that Claimant's depression is attributable to her shoulder complaints?
- If not, whether Clamant is entitled to TTD from February 28, 2014, ongoing, payable at the rate of $848.82 per week?

FINDINGS OF FACT

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

At the opening of the hearing, Respondents entered the deposition transcript of Claimant's Authorized Treating Physician (ATP), Dr. John Raschbacher into evidence. Based upon the evidence in the record, the Judge enters the following findings of fact:

1. Claimant was employed for nineteen years by the City of Littleton as a firefighter on the date of her injury. On November 28, 2012, Claimant was reloading fire hoses overhead and suffered a compensable injury. She eventually underwent surgery on June 24, 2013, for cervical disc problems.

2. Claimant was treated by ATP Dr. Raschbacher and released by him at MMI on February 28, 2014. Dr. Raschbacher rendered an opinion that Claimant had suffered a 22% whole person impairment. Claimant has not worked and has been under restrictions and treatment since being placed at MMI on February 28, 2014. Respondents issued a Final Admission of Liability ("FA") on March 28, 2014, to which a timely objection was filed.

3. The parties have agreed to a temporary total disability benefit rate of $848.82, based on admissions showing an average weekly wage of $1,590.47.

4. Prior to the November 28, 2012 injury, Claimant had a previous right shoulder injury, specifically a right labral tear and bone spur in 2006. Dr. Steven Horan treated Claimant in 2007 by debriding the labral tear and completing an arthroplasty for impingement.

5. On December 12, 2012 Claimant sought medical treatment for her November 28, 2012 injury. PA Karen Matusik at Arbor Occupational Medicine evaluated her. The history from the initial intake indicates that Claimant reported an exacerbation of her pre-existing neck pain with complaints of pain down the right side and pain over the right cervical paraspinal muscles and facets.

6. Claimant returned to Arbor on December 28, 2012, and was diagnosed with cervical sprain/strain, and was referred for chiropractic treatment and a surgical consultation.

7. Claimant reported right shoulder and extremity pain; however, Dr. Raschbacher decided Claimant's right shoulder complaints were due to her cervical injury. Dr. Raschbacher did not veer from that decision as the case evolved over time.

8. Claimant underwent x-rays and a cervical MRI. On January 8, 2013, Claimant saw Dr. Sean Markey, who, upon review of Claimant's imaging and history, found significant degenerative findings and foraminal stenosis at C4-C5 and C6-C-7. Ultimately, Dr. Markey recommended a three level spinal fusion from C-4 to C-7.

9. On January 15, 2013, Claimant returned Dr. John Raschbacher and requested a second opinion from an orthopedic spinal surgeon to explore the possibility of a disc arthroplasty. Dr. Raschbacher referred Claimant to Dr. Michael Janssen.

10. On January 24, 2013, Dr. Janssen evaluated Claimant, and found that Claimant's work related injury required surgery.

11. On June 24, 2013, Claimant underwent surgery for her neck. The surgery was complex, but consisted primarily of a one level fusion at C6-7 and total disc arthroplasties following decompressions and reconstructions at the two adjacent levels.

12. After surgery, Claimant began a course of physical therapy (PT) with Performax Physical Therapy. Claimant testified that she performed many shoulder exercises during PT and that she was unable to extend her arm above her head. Claimant's testimony about shoulder pain and complaints during PT are supported by numerous PT records admitted into evidence.

13. Four months after surgery, Claimant reported to Dr. Raschbacher that her physical therapist told her she may have some impingement in her right shoulder. At the time, Dr. Raschbacher again noted that she was not doing strenuous, repetitive, overhead activities, and that Claimant did not present with any risk factors for impingement syndrome. Dr. Raschbacher found that Claimant had tenderness at her right AC joint, but concluded the symptoms in the shoulder were not related to her November 28, 2012, injury.

14. On November 26, 2013, Claimant returned to Dr. Raschbacher with continued complaints of right shoulder pain. Dr. Raschbacher acknowledged a note from the physical therapist's office regarding right shoulder involvement, and that Claimant stated she could not progress very well with neck rehabilitation because her

right shoulder was bothersome. Dr. Raschbacher discussed with Claimant that her right shoulder was not a body part under treatment in this claim. However, Dr. Raschbacher's note reflected Claimant had a positive impingement sign and decreased and painful internal rotation.

15. Dr. Raschbacher's November 26, 2013 note contains the following remark,

> We discussed the fact that the right shoulder is not a body part under treatment in this claim and no liability has been accepted by the carrier for the right shoulder. Additionally, the neck is what has been treated and one would not like to presume that cervical spine surgery was done when in fact the shoulder should have been addressed. This is unlikely as she clearly has cervical pathology. She has improved after the surgery, but has pain at the front and the top of the right shoulder which is aggravated with activity.

Despite the fact that Dr. Raschbacher knew of Claimant's prior labral injury, was aware that Claimant had consistently reported the onset of should symptoms during physical therapy and acknowledged Claimant's shoulder complaints, he remained committed to his original impression that only Claimant's neck was involved. Confronted with substantial information that Claimant's shoulder could be involved, he viewed the situation as either neck or shoulder, and since the neck had been treated, was not open to any other possible injury. The ALJ finds that Dr. Raschbacher's failure to consider whether Claimant's shoulder injury was related to her claim because he had previously identified a neck injury limits the persuasiveness of his opinions.

16. On December 17, 2013, Claimant had a recheck visit with Dr. Raschbacher who noted, "It appears her right shoulder, at least by description, is interfering with rehabilitation of the neck. . . . She is stuck in rehabilitation, with respect to the shoulder. She states that the shoulder happened in physical therapy. She was doing physical therapy at Performax and states that this is where the right shoulder became a problem."

17. On January 2, 2014, Claimant reported to Dr. Raschbacher who noted that he had reviewed the records and that there had initially been "some right shoulder symptomology," but he attributed it to her neck injury, without explanation. "She states that she hurt the right shoulder doing shoulder shrugs and similar exercises in physical therapy. It is still sore and she is still not able to progress well for rehabilitating the neck with the limitations at the upper right extremity."

18. On January 17, 2014, Claimant returned to Dr. Raschbacher noting that her right shoulder was interfering with the rehabilitation of her neck. Dr. Raschbacher explained his opinion that it was unlikely that Claimant could have suffered any intrinsic anatomic pathology in her shoulder from the physical therapy, including shoulder shrugs. Despite his belief that there was no pathology, he ordered an MRI to support

his contention, rather than for the purposes of diagnosis or treatment. He also noted that the MRI might be denied because Claimant's shoulder had never been part of the accepted claim. Insurer denied the MRI as unrelated.

19. On February 10, 2014, Claimant returned to Dr. Raschbacher continuing to state that whatever happened to her shoulder happened in physical therapy.

20. Dr. Raschbacher placed Claimant at MMI on February 28, 2014 with a 22% whole person impairment.

21. Claimant testified that she was suffering from these same shoulder complaints when Dr. Raschbacher found her at MMI.

22. Claimant timely objected to the Final Admission and obtained a DIME with Dr. Edwin Healy.

23. At hearing, Dr. Swarsen offered expert testimony that DIME Dr. Healey performed his DIME examination consistently with the directives of the DOWC, the AMA *Guides* and its medical records. He also testified that DIME Dr. Healey's MMI opinion is supported by the totality of the evidence, specifically the documentation found in those records addressing treatment post-MMI.

24. Dr. Healy was "specifically requested by [Claimant's] attorney to evaluate specific body parts and conditions including chronic pain, neck pain, right should pain, right trapezius and scapular pain, cervical pain and neurological radiating pain and to determine if any additional diagnostic testing was necessary and to recommend medical maintenance treatment if required." The chief complaint listed for the DIME was "chronic right shoulder pain."

25. During his examination of Claimant, Dr. Healy found diffuse tenderness over her right shoulder, particularly over the right bicipital tendon and subacromial bursa and mildly over the acromioclavicular joint. He noted decreased range of motion in her right shoulder and crepitus and popping with adduction of the right shoulder.

26. Based on his review of the medical records, his history from Claimant and his examination, Dr. Healy concluded that Claimant was not at MMI for her November 28, 2012 injury. His report included the following diagnoses: (1) right shoulder pain occurring during rehabilitation of her cervical spine, with ongoing chronic pain, stiffness and crepitus of her right shoulder; (2) Prior history of right shoulder injury in 2006, requiring arthroscopy, subacromial decompression, labral tear repair and impairment rating; (3) Intermittent dysphagia and hoarseness after intubation for cervical surgery; and (4) Adult adjustment disorder with depression and anxiety due to chronic pain and disability.

27. During her DIME, Claimant reported that she had similar shoulder problems associated with her 2006 work related injury. She stated that when she was injured on November 28, 2012, she had been lifting hoses overhead when she had the onset of neck and right upper extremity pain and weakness. Claimant reported she was

not certain if she injured her shoulder at that time but noticed her shoulder pain was particularly aggravated by various activities she did in physical therapy. She reported that her symptoms of pain and stiffness progressed over time. The ALJ credits Claimant's statements made during her DIME as credible, consistent with her earlier reports, and consistent with the medical records in evidence. The ALJ particularly credits Claimant's testimony relating her current symptoms with her earlier labral tear as she had personal experience of that injury.

28. Dr. Healy opined that Claimant's prior right labral tear was aggravated by extensive physical therapy treatment she underwent. His opinion was based on claimant's report and the medical records which indicate that her right shoulder symptomology began in physical therapy. Dr. Healy recommended Claimant undergo an MRI of her right shoulder and see an orthopedic spinal surgeon for evaluation and treatment of her right shoulder pain and disability as a result of her rehabilitation for her November 28, 2012 work injury. Dr. Healy opined that treatment of Claimant's right shoulder would also improve her function and help her depression.

29. Dr. Healy opined that Claimant's adult adjustment disorder was caused by her chronic pain, inability to sleep, and other psychosocial factors relating to the loss of her career. He recommended Claimant undergo psychological evaluation and some psychological counseling to help her cope with her depression and anxiety. Dr. Healy postulated that treatment of Claimant's shoulder should result in significant improvement of her depression.

30. Dr. Healy determined that Claimant continued to experience difficulty swallowing, and recommended Claimant see an ENT physician for evaluation of her swallowing problem to determine whether anything else could be done to treat it.

31. Dr. Healy provided a provisional impairment rating which included a combined specific impairment of her cervical spine plus a loss of cervical range of motion, for a combined 19% whole person impairment of her cervical spine; a whole person impairment for loss of range of motion for her right shoulder of 4%; a mental impairment rating of 3% whole person. Dr. Healy assigned Claimant a combined 24% whole person impairment, noting that she had not yet reached MMI for her shoulder, or her depression, and that she might require an impairment rating for her dysphagia.

32. The ALJ finds Dr. Healy's opinions and conclusions, especially his opinion that Claimant's shoulder injury was related to the treatment of her November 28, 2012 injury to be persuasive, credible, and well supported by a great weight of the evidence.

33. Prior to hearing, Claimant underwent the MRI recommended by Dr. Healey. On October 31, 2013 Dr. Horan, who previously treated Claimant's right shoulder in 2006, reviewed the MRI and found "a little tendinitis in the rotator cuff and maybe *a little irritation of the anterior labrum*, but these are minor." (emphasis supplied). While Dr. Horan's findings do not provide strong support for Dr. Healy's relatedness opinion, they do note irritation of the labrum.

34. Claimant returned to Dr. Horan on December 12, 2014 and received an injection of Kenalog into her right shoulder joint. Claimant received a second injection at a later date. Claimant testified that the injections provided her with pain relief and greater mobility. The ALJ finds that Claimant's improvement with injections supports Dr. Healy's opinion that her shoulder was not at MMI.

35. Prior to hearing, the parties deposed Dr. Raschbacher who described the difference between his speculation about Dr. Healy's opinion concerning aggravation of a labral tear and the actual MRI finding which showed mild tendonitis with chondromalacia of the humeral head. On cross-examination and in contrast to Dr. Horan's note mentioning irritation of the anterior labrum, Dr. Raschbacher stated that the MRI did not show labral pathology. Dr. Raschbacher opined Claimant's diagnosed right shoulder tendonitis was not related to her work injury of November 2012 or the physical therapy after her surgery.

36. Dr. Raschbacher testified by deposition that chondromalacia, defined by Meriam-Webster's Medical Desk Dictionary, revised edition, as "abnormal softness of cartilage" is "essentially an arthritis" which commonly becomes symptomatic idiopathically, and was not caused by any specific action of the Claimant. However, Dr. Raschbacher did not explain why the idiopathic onset of chondromalacia was more likely to have occurred than the aggravation of a prior shoulder condition, especially in light of Claimant's continued and specific complaints of pain with activity and the onset of such pain occurring during physical therapy which involved shoulder exercises.

37. In addition, the record supports an inference that Dr. Raschbacher was not familiar with the exercises Claimant was required to do during physical therapy. For example, when asked the basis for his opinion that physical therapy had not caused significant intrinsic anatomic pathology, he responded, "I imagine that it would be based primarily on some knowledge of what people do for rehabilitation…" This response is both speculative and not tied to Claimant's case. Dr. Raschbacher further testified that he was unsure who had ordered the physical therapy. When asked if he was aware of what physical therapy Claimant was undergoing, he responded, "Well, the basic therapy would be as stated in the therapy goals – decreased pain, increased motion, increased strength." Again, his answer was not specific as to Claimant's therapy, and did not indicate that Dr. Raschbacher was at all familiar with Claimant's actual exercises and therapy.

38. In Dr. Raschbacher's opinion, the MRI ordered by Dr. Healey does not support his diagnosis and conclusion that Claimant's right shoulder pain was related to her work-related injury or therapy. Both Dr. Horan, who interpreted the MRI, and Dr. Raschbacher who explained Dr. Horan's findings contradict Dr. Healey's DIME opinion.

39. Because the ALJ has found Dr. Healy's opinions to be supported by the greater weight of evidence, and that Dr. Raschbacher's opinions were less persuasive and motivated by his desire to not expand Claimant's claim, the ALJ further finds that Dr. Raschbacher's and Dr. Horan's opinions constitute only a disagreement of opinion and do not rise to the level of clear and convincing evidence of an error in Dr. Healy's

conclusions and opinions. The ALJ finds Claimant's shoulder injury is related to her industrial injury of November 28, 2012

40. Dr. Healy only partially related Claimant's depression to her continuing right shoulder pain, also attributing it to Claimant's inability to sleep, and other psychosocial factors relating to the loss of her job. Therefore, his opinion concerning the causal relatedness of the depression to the work-injury of November 28, 2012, is not rebutted by the opinions of Dr. Horan and Dr. Raschbacher.

41. Subsequent to the DIME opinion of Dr. Healey, Claimant was referred to Dr. Jeffrey Cutler for evaluation and treatment of her swallowing difficulties. Dr. Cutler performed a pharyngoscopy and diagnosed Claimant with both dysphagia and globus. Dr. Culter then referred Claimant for a barium swallow, speech therapy, and a follow up appointment after speech therapy.

42. At the hearing, Claimant testified about her complaints of right shoulder pain and how it began during physical therapy. She testified credibly that although she raised the issue on numerous occasions with Dr. Raschbacher, he was not open to the idea that her right shoulder complaints could possibly be related to her work injury or her rehabilitative therapy. Claimant also testified about her depression and difficulty swallowing, her treatments post DIME, and the relief they had provided.

43. None of the physical therapy notes admitted into evidence indicate what exercises or therapy Claimant performed during her PT appointments.

44. Clamant is entitled to TTD from February 28, 2014, ongoing, payable at the rate of $848.82 per week.

CONCLUSIONS OF LAW

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Section 8-42-107(8), C.R.S., provides that the determination of MMI and impairment by a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Because both determinations inherently require the DIME to assess whether a claimant's medical condition is related to an industrial injury, the DIME's opinion on causation is binding unless overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office*, 55 F.3d 186 (Colo. App. 2002). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The ALJ has found that the opinions of Dr. Horan and Dr. Raschbacher are less persuasive than those of Dr. Healy. The mere difference of opinion between the physicians fails to constitute error. The difference between their opinions does constitute clear and convincing evidence that Claimant's right shoulder complaints are not causally related to this claim or the treatment which Claimant received in recovering from her cervical surgery.

Because the ALJ finds and concludes that Claimant's shoulder injury is related to her claim, Respondents' argument that her depression is caused by her unrelated shoulder claim fails. Additionally, as found, Dr. Healy only partially related Claimant's depression to her continuing right shoulder pain, also attributing it to Claimant's inability to sleep, and other psychosocial factors relating to the loss of her job. Therefore, his opinion concerning the causal relatedness of the depression to the work-injury of November 28, 2012, is not rebutted by the opinions of Dr. Horan and Dr. Raschbacher.

DIME physician Dr. Healey's opinion states that Claimant's difficulty swallowing is causally related to her industrial injury. No persuasive evidence was offered to overcome this opinion.

To obtain TTD benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. §8-42-1 03(1)(a), C.R.S. To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, which she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements:

(1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when she has a complete inability to work or there are restrictions that impair her ability to effectively and properly perform her regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595 (Colo. App. 1998). A respondent's liability for TTD benefits ceases on the date when the claimant has attained MMI. §8-42-1 05(3)(a), C.R.S.

In this case, Respondents have not overcome the DIME opinion concerning the causal relatedness of Claimant's right shoulder pain, depression, and difficulties swallowing. Claimant has not been placed at and is entitled to TTD benefits from February 28, 2014, ongoing, payable at the rate of $848.82 per week.

ORDER

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

1. Respondents have failed to overcome by clear and convincing evidence the DIME's opinion that Claimant is not at MMI.

2. Claimant is not at MMI and continues under disability. She is entitled to TTD benefits commencing February 28, 2014, ongoing, at the rate of $848.82 per week, ongoing, until terminated by statute.

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

4. All other issues are reserved.

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

DATED: February 2, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-912-371-01

ISSUE

1. Whether Claimant has proven by a preponderance of the evidence that he is permanently totally disabled?

FINDINGS OF FACT

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

1. The Claimant has an 11th grade formal education, but has obtained his G.E.D.

2. Prior to working for Respondent-Employer, the Claimant's work experience included work as a manager at an Elk's lodge, where he placed orders for the lodge, scheduled the bartending staff, ran the cash register, worked as a bartender, and cooked occasionally. He also had his own body shop, where he did auto body work and administrative work, such as estimates, final billing and deposits. The Claimant also has experience as an estimator at an auto body shop, where he would look at vehicles and estimate the damages and costs to repair.

3. The Claimant sustained an admitted workers' compensation injury on February 25, 2013 when he fell off a ladder while he was employed as an HVAC technician for the Respondent-Employer. The Claimant's job duties required him to climb ladders, run wire and pipe, and put in switches.

4. The Claimant began treating with Concentra, the authorized treating provider, on February 26, 2013 and was diagnosed with multiple rib fractures, pneumothorax, and chest wall/back contusion (Respondents' Exhibit D, pgs. 166 & 157).

5. Dr. Robert Nystrom, of Concentra, referred the Claimant to Dr. Kathy McCranie for a physiatric evaluation and pain management.

6. As part of his treatment, the Claimant received physical therapy, injections, and a psychological evaluation. The physical therapy reports indicate the Claimant was able to lift 45 lbs. from July 23, 2013 through September 18, 2013 (Respondent's Exhibit I, pgs. 214-235).

7. The Claimant explained he was able to perform in physical therapy because he was taking "lots of Percocet" which allowed him to do more than normal.

8. On January 10, 2014 the Claimant was referred to Dr. Albert Hattem, a delayed recovery specialist at Concentra (Respondents' Exhibit D, pgs. 103-106). Dr. Hattem examined the Claimant on February 17, 2014 and agreed with Dr. McCranie that the Claimant was approaching maximum medical improvement (MMI). The Claimant was to follow-up with Dr. McCranie for an impairment rating. Dr. Hattem did not believe that a Functional Capacity Evaluation (FCE) was needed (Respondents' Exhibit E, pg. 173).

9. Dr. McCranie placed the Claimant at MMI on March 3, 2014 and provided him with a 5% whole person rating for his thoracic spine. It was noted that his rib fractures had healed and the pneumothorax had resolved. She noted that the Claimant indicated his goal was to retire and not return to work. Dr. McCranie further noted that the Claimant was lifting up to 45 lbs. in physical therapy and did not believe that an FCE was necessary. Dr. McCranie referred the Claimant to Dr. Hattem for final discharge and to assign any permanent work restrictions (See Respondents' Exhibit C, pgs. 038-041).

10. On March 24, 2014, the Claimant returned to Dr. Hattem for a final evaluation. Dr. Hattem noted that the Claimant continued to complain of mid back pain, and that the Claimant wanted him to document that he had left hip discomfort, as well as, bilateral ulnar digit numbness. The Claimant also reported to Dr. Hattem that he was unable to lift more than 30 lbs. without experiencing mid back pain. Dr. Hattem agreed with Dr. McCranie's impairment rating and provided the Claimant with permanent work restrictions of 30 lbs. lifting limit (Respondents' Exhibit E, pgs. 169-173).

11. The Claimant attended a Division Independent Medical Examination (Division IME) on July 17, 2014 with Dr. Linda Mitchell. Dr. Mitchell was asked to evaluate the Claimant's multiple rib fractures, collapsed lung, left hip, left shoulder, and middle back (Respondents' Exhibit B, pg. 013). Dr. Mitchell noted the Claimant's current complaints as back pain, hip pain, numbness and tingling in his arms, mid back pain that radiated up to his neck and gave him headaches and radiated down the back of his legs to his knees (Respondents' Exhibit B, pg. 019).

12. Dr. Mitchell agreed that the Claimant reached MMI on March 3, 2014. She opined that the Claimant's hip pain, low back pain, upper extremity numbness, tingling and weakness, and lower extremity tingling were not attributable to the work injury. Dr. Mitchell provided the Claimant with an 8% whole person impairment rating for his thoracic spine and opined that the Claimant was capable of working a medium category job (25 lbs. of force frequently and 50 lbs. of force occasionally for lifting, carrying, pushing, or pulling), but that he should avoid frequent bending or twisting of the thoracic region (Respondents' Exhibit B, pgs. 012-022).

13. Dr. McCranie, accepted by the ALJ as an expert in physiatry, physical medicine and rehabilitation, and pain medicine who is Level II Accredited, testified that the Claimant was referred to her from Concentra for pain medication management and to start him in a rehabilitation program when appropriate. She stated that she agrees

with the Division IME that the Claimant's hip issues, cervical issues, upper extremity symptoms and lower extremity symptoms were not related or attributable to the Claimant's work injury. Dr. McCranie testified that she only attributed the rib fractures, pneumothorax, and thoracic strain to the work injury. As the rib fractures and pneumothorax had fully resolved (the Claimant confirmed this resolution), she provided the Claimant with an impairment rating for his thoracic spine.

14. Dr. McCranie also testified that, contrary to the Claimant's contention, he was not on Percocet the entire time he was in physical therapy. She stated that the Claimant had discontinued Percocet five days prior to August 30, 2013, well before the physical therapy report of September 11, 2013 which showed the Claimant lifting up to 45 lbs. She further testified that she did not believe an FCE was necessary in the Claimant's case because she found they were only helpful for patients who are trying to prove they can go back to work. In the Claimant's case, he specifically told her he had no intention of going back to work, therefore she didn't believe an FCE was necessary and did not think it would show his true functional potential.

15. The Respondents filed a Final Admission of Liability based on Dr. Mitchell's report on August 8, 2014 (Respondents' Exhibit L).

16. The Claimant's counsel represented to this ALJ that the Claimant did not challenge the PPD, MMI and causation opinions of the Division IME. Therefore, the Division IME's opinions on these issues are binding.

17. The Claimant, of his own volition, had an FCE done during the first week of November 2014. The FCE results showed the Claimant had a 10 lb. infrequent lifting limit, could sit and stand 10-15 minutes at a time, and could walk 5-15 minutes at a time.

18. Additionally, the Claimant testified that he could not sit, stand or lay for long periods of time. He stated when sitting he tries to make it to a half an hour, but said he moves around a lot, and can't stay in one position. The Claimant testified that if he stands too long his hip bothers him and his back burns. He stated his injury has affected his ability to do his job because he can't squat, bend over, or lift the weight he was required to lift. He testified he was in pain every day and could not sleep at night, generally only getting 1-3 hours of sleep. He stated he was generally very uncomfortable and hurt, with some days being worse than others. He said when the pain was at its worst he experienced a burning, aching, and pinching sensation. The Claimant stated his pain was an average of 8 out of 10, almost every day and he had 6-7 "bad days" per week. He testified since his injury he avoids cleaning and stairs, and only goes shopping when he has to. The Claimant stated that his neighbor, his son and his daughter-in-law help him with the things he can't do.

19. The Claimant further testified that he lives in Thornton, has a working car and can drive, occasionally goes shopping, can carry light bags, and is capable of getting gas for his vehicle.

20. Louis C. Phillips was accepted as an expert in vocational rehabilitation counseling. Mr. Phillips completed a vocational evaluation on the Claimant's behalf on November 18, 2014. Mr. Phillips obtained an educational history and work history from the Claimant similar to the Claimant's testimony. Mr. Phillips testified that he identified a number of skills that the Claimant has acquired from his past employment that could transfer from one job to another. He relied primarily on the FCE results in his evaluation, because he stated the FCE was one of the best ways to determine what a person could do and contained built in tests to determine if the individual is putting forth full effort. He found the FCE results were consistent with the Claimant's report of his abilities. He also reviewed the medical records.

21. Mr. Phillips testified that the FCE placed the Claimant in the sub-sedentary category of work, which is less than the lowest level of work. This could indicate that the individual could not work at all. In his opinion, the Claimant should be considered permanently totally disabled, because based on the Claimant as a whole, he cannot return to work. The factors he considered were Claimant's age, his self-reported limitations, tested work tolerances through the FCE which show limitations on sitting, standing and walking, the Claimant's inability to return to any prior work. In his opinion, the Claimant was not able to utilize any transferable skill he has obtained and due to his physical condition was unlikely to be hired by anyone.

22. However, Mr. Phillips conceded that if the Claimant was able to work at a minimum of sedentary level he could be employable, if no other factors were considered. He acknowledged that the Claimant had previous sedentary work experience as an estimator. He also agreed that if Dr. Hattem's 30 lb. permanent lifting restriction was accurate that the Claimant would be able to work.

23. Katie G. Montoya was accepted as an expert in vocational rehabilitation and consulting. Ms. Montoya completed a vocational evaluation of the Claimant on behalf of Respondents on December 16, 2014. Ms. Montoya relied on the physical restrictions provided by the Claimant's treating providers, Dr. Hattem and Dr. McCranie, and the physical restrictions provided by the Division IME, Dr. Mitchell. She testified that none of these doctors placed sitting, standing or laying restrictions on Claimant. Ms. Montoya also did a transferable skills analysis and, similar to Mr. Phillips, found the Claimant had multiple transferable skills, including estimator skills, management, computer skills, and customer service. She agreed with Mr. Phillips that if any of the restrictions provided by the treating doctors were correct the Claimant would be employable. She based her opinion on the fact that even considering Dr. Hattem's 30 lb. permanent restrictions, which was the lowest the Claimant was provided from his treating providers or the Division IME, would put him in a light to medium work classification and approximately 90% of jobs were classified as medium or under. She testified that even unskilled workers could find activities they could perform in these work categories.

24. Ms. Montoya also agreed that even if the Claimant had sedentary work restrictions that he could return to work as he had experience as an estimator so could

return to some aspects of that work, and his customer service and other skills he has obtained through his previous employment would allow for sedentary work activities. She further testified that the Denver metro area's unemployment rate was low and she found several positions during a labor market sampling which would fall within a sedentary work classification that were consistent with the Claimant's background. She testified that the vocational opinions have been consistent that if the Claimant was found to have permanent restrictions of sedentary work or greater he would be employable.

25. The ALJ finds that the results of the Claimant's FCE are significantly at odds with the opinions of both Drs. McCranie and Hattem, the Claimant's treating physicians, and the Division IME. The physical therapy reports support that the Claimant can lift more than 10 lbs. Additionally, this ALJ observed the Claimant in the courtroom throughout the course of the hearing and found that, while he may appear to be in some discomfort, the Claimant can sit in excess of that noted in the FCE. Therefore, the ALJ is not persuaded by the Claimant's FCE results and does not find the FCE reliable.

26. The ALJ does not find Mr. Phillips' opinion that the Claimant is permanently totally disabled persuasive or credible. Mr. Phillips testified that he relied primarily on the FCE in formulating his opinion. As the ALJ find the results of the FCE do not accurately depict the Claimant's physical capabilities, Mr. Phillips' reliance on the FCE in his determination that the Claimant is unemployable is neither persuasive nor credible based on the finding that the FCE does not accurately reflect the Claimant's physical abilities and is therefore not reliable.

27. Both Mr. Phillips and Ms. Montoya opined that the Claimant had numerous transferable skills from his employment background. Additionally, Mr. Phillips and Ms. Montoya agreed that if any of the permanent work restrictions provided by the Claimant's treating providers, Drs. McCranie and Hattem, or the Division IME were correct then the Claimant would be employable. Furthermore, the testimony of the vocational rehabilitation experts indicate that even if the Claimant had sedentary restrictions he would be employable. The ALJ finds the opinions of Drs. McCranie and Hattem, who were the Claimant's treating physicians for almost a year, regarding the Claimant's permanent restrictions to be more persuasive and accurate than the FCE. Drs. McCranie and Hattem's permanent restrictions place the Claimant's physical capabilities into the sedentary work category, and may very well put the Claimant into the light work category and possibly even into the lower medium category.

28. The Claimant is 58 years old, has experience in management of an Elk's lodge, auto body work, and owned his own auto body business, which included estimating damages and costs. The ALJ credits the testimony of Ms. Montoya that a number of the Claimant's transferable skills fall within the sedentary and light work categories. In fact, both vocational experts agree that there would be positions available for the Claimant within the sedentary category. Additionally, the ALJ finds the Claimant lives in Thornton, Colorado which is within the Denver metro area, which has a relatively low unemployment rate, as testified to by both Mr. Phillips and Ms. Montoya. The ALJ

further finds that there is an availability of work that the Claimant could perform within the commutable labor market.

29. The Claimant has failed to prove by a preponderance of the evidence that he is unable to earn wages in his same or other employment.

CONCLUSIONS OF LAW

Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Permanent Total Disability

Permanent total disability, as defined in § 8-40-201(16.5), C.R.S., means an "employee is unable to earn any wage in the same or other employment." When the statute was amended in 1991, it established a strict definition of permanent total disability. The intention of the amendments was to create a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently and totally disabled. *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115 (Colo. App. 1997). A claimant must also establish that the industrial injury was a significant causative factor by showing a direct causal relationship between the industrial injury and the permanent

total disability. *Joslins Dry Goods Co. v. Indus. Claim App. Off*., 21 P.3d 866 (Colo. App. 2001)*; Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App.1986).

It is the claimant's burden of proof to establish that he is permanently totally disabled by a preponderance of the evidence. The question of whether claimant has the ability to earn any wages is one of fact for resolution by the administrative law judge. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In *McKinney* the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. It is not necessary that the claimant be able to return to previous employment. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for the purpose of the statute. *See also Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997). Although, if the evidence establishes that a claimant is not physically able to sustain post-injury employment, or that such employment is unlikely to become available to a claimant in the future in light of particular circumstances, an ALJ is not required to find a claimant is capable of earning wages. *Joslins,* supra; *Holly Nursing Care Center v. Industrial Claim Appeals Office, 992 P.2d 701, (Colo. App. 1999).*

The determination of whether a claimant is permanently and totally disabled is made on a case by case basis and varies according to the particular abilities and circumstances of the claimant. In determining whether a claimant is permanently totally disabled, the ALJ may consider various "human factors" such as mental capabilities, physical ability, education, vocational training, overall physical condition, former employment, and availability of work a claimant can perform within a commutable labor market. The overall objective is to determine whether employment exists that is reasonably available to a claimant under her particular circumstances. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Holly Nursing v. ICAO*, 992 P.2d 701, 703 (Colo. App. 1999).

In the present case, the Claimant is 58 years old, has numerous skills from his experience in management of an Elk's lodge, auto body work, his own auto body business, which included estimating damages and costs. The ALJ credits the persuasive testimony of Ms. Montoya that a number of the Claimant's transferable skills fall within the sedentary and light work categories. In fact, both vocational experts agree that there would be positions available for the Claimant within the sedentary category. Additionally, the Claimant lives in Thornton, Colorado which is within the Denver metro area, which has a relatively low unemployment rate, as testified to by both Mr. Phillips and Ms. Montoya. Therefore, the evidence proves there is an availability of work that the Claimant could perform within the commutable labor market.

Moreover, the medical restrictions from the treating doctors and Division IME all place claimant in at least the light to medium category of work. Dr. Hattem indicated that the Claimant could lift up to 30 pounds, Dr. McCranie provided a 45 pound restriction and the Division IME had that lifting up to 50 pounds may be permissible.

The FCE that the Claimant had performed lacks credibility and does not accurately describe the Claimant's physical abilities. The Claimant has the ability to perform even sedentary work based on his transferrable skills and this ALJ finds the Claimant has the physical ability to perform medium duty work based on the opinions from the medical doctors on this case. As a result, the Claimant has failed to prove that he is permanently and totally disabled.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. The Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

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

Date: February 23, 2015

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

ISSUE

Whether Claimant's 8% scheduled impairment rating for his left shoulder injury incurred on February 28, 2013 should be compensated as a whole person pursuant to § 8-42-107(8)(d), C.R.S., or remain a scheduled rating.

STIPULATIONS

1. The parties stipulated that there is no permanent impairment for the left elbow in relation to this claim.

2. The parties stipulated that the upper extremity 8%, or 5% whole person rating, given by Dr. Shih for Claimant's left shoulder injury is not challenged. However, the parties disagree over whether this injury should be compensated as a whole person.

FINDINGS OF FACT

1. Claimant is a 58 year-old man who has been a tractor trailer driver for UPS for approximately 27 years. Most of his job involves breaking down freight. Additionally, he drives, loads and unloads the truck, and attaches and detaches the trailer.

2. On February 28, 2013, Claimant was at work and was having difficulty with a frozen fifth wheel hitch. He was pulling it toward himself with his left, dominant side, when he felt a pop and deep pain in his left shoulder blade.

3. Claimant reported his injury to Employer, and on March 1, 2013 he underwent initial treatment with authorized treatment provider Dr. Jonathan Bloch, D.O., at Concentra Medical Center.

4. On March 11, 2013, Claimant underwent a left shoulder MRI, which found a partial thickness tear of the anterior joint of the left shoulder, mild tendinosis and a type II acromion.

5. On March 21, 2013, Claimant saw Dr. Mark S. Failinger, M.D., a board certified orthopedic surgeon, for evaluation. After seeing Dr. Failinger, Claimant underwent a regimen of conservative therapy and steroid injections.

6. During a follow-up visit on August 1, 2013, Claimant indicated significant improvement as the result of a July 11, 2013 injection. Dr. Failinger wrote that the injection was "in some ways, miraculous for him." Dr. Failinger also noted that

Claimant's range of motion was improved, and that treatment at that time was largely just for pain.

7. Claimant's injections gave him some relief; however, he continued to be symptomatic and therefore, on October 22, 2013, Claimant underwent surgery with Dr. Failinger. Dr. Failinger performed a left shoulder examination under anesthesia, an arthroscopic debridement and subacromial decompression of the left shoulder, and left shoulder manipulation under anesthesia. Dr. Failinger stated that Claimant had "left shoulder glenoid degenerative joint disease with grade 4 chondromalacia in the superior and posterior head."

8. Claimant saw Dr. Bloch on February 17, 2014, after which Dr. Bloch wrote "history of present illness: pain is with overactivity, a tolerable dull ache located at left shoulder. Patient has had physical therapy and feels better. Patient has been taking their [sic] medications and has noted improvement."

9. Claimant pointed to his entire shoulder to over his back when he was telling Dr. Bloch where his pain was located.

10. On March 10, 2014, Dr. Bloch released Claimant to full work duty with no restrictions.

11. On April 9, 2014, Dr. Bloch placed Claimant at MMI, with an impairment rating of 8% on Claimant's left shoulder, which he converted to a 5% whole person impairment.

12. In April of 2014 Claimant went back to work at UPS, where he still works.

13. On July 8, 2014, Claimant saw Dr. Eric Ridings, M.D., for an Independent Medical Exam. Dr. Ridings opined that, as a result of the February 28, 2013 work injury, Claimant sustained a partial-thickness rotator cuff tear and an aggravation of significant preexisting left shoulder adhesive capsulitis.

14. Dr. Ridings agreed with the MMI date of April 9, 2014.

15. On July 15, 2014, Claimant underwent a DIME with Dr. Franklin Shih, M.D. Dr. Shih found that the Claimant was at MMI on April 9, 2014 and accorded him an 8% upper extremity rating which he converted to a 5% whole person.

16. Dr. Shih performed a physical examination and found, among other things, that Claimant had suffered loss of range of motion with diffuse discomfort around the shoulder girdle anteriorly over the rotator cuff and along the bicep tendon.

17. On July 24, 2014, Respondents filed an Amended Final Admission of Liability ("FAL") admitting for an 8% scheduled impairment rating of the upper extremity.

18. Claimant timely filed an Application for Hearing seeking to have his impairment compensated as a whole person.

19. At hearing, Claimant credibly testified, and it is found as fact, that the work injury of February 28, 2013 has caused him the following ongoing and current difficulties:

a. He is left hand dominant. Prior to his injury, Claimant used his left shoulder to carry things; he currently cannot carry objects on his left shoulder.

b. He sleeps on his side, and because of pain from his injury, he wakes up to roll over on average two times per night.

c. Claimant has difficulty using his left shoulder to lift objects above his head.

d. Claimant has to pull a garage-type door up and down as part of his job and he is unable to do that in the same way in which he was able to prior to his injury. Now, to open the door he has to use a 16 inch long strap that he holds onto to pull the door up. He ties a rope onto the door to close it. He cannot use his left shoulder to pull the door down like he used to.

e. Part of Claimant's job involves stacking pallets, which requires him to reach over his head, which causes pain.

f. Claimant has difficulties steering and viewing vehicles when he is driving the UPS tractor trailer. UPS drivers abide by the "Smith System" when driving, in which they scan their mirrors every five to eight seconds. Claimant's tractor trailer has four mirrors that he scans. He begins driving at 4:00 A.M., and by 10:00 or 11:00 A.M. he has to move his entire upper body instead of just his head in order to scan the mirrors due to his left shoulder pain.

20. Using a pain diagram, Claimant indicated that he experienced numbness, burning, and aching in his posterior left shoulder, and numbness, burning, the feeling of pins and needles, and aching in the anterior of his left shoulder.

21. Dr. Ronald J. Swarsen, M.D. is Level II accredited and was admitted as an expert in occupational medicine at hearing. Dr. Swarsen had not performed a physical examination of Claimant but did review his medical records. Dr. Swarsen testified on behalf of Claimant.

22. Using an anatomical diagram, Dr. Swarsen credibly testified, and it is found as fact, that all of Claimant's pathology and treatment in connection with his work

injury was to the left shoulder, and not to the left arm. He further credibly testified, and it is found as fact, that the situs of Claimant's functional impairment was at his shoulder.

23. Dr. Swarsen testified, and it is found as fact, that the areas impacting Claimant's function were part of the shoulder girdle, which is located above the glenohumeral head of the left arm.

24. Dr. Swarsen opined to a reasonable degree of medical certainty that Claimant's impairment should be converted to a whole person.

25. Dr. Ridings is Level II accredited, and was admitted as an expert in physical medicine and rehabilitation at hearing. He testified on behalf of Respondents.

26. Dr. Ridings testified that loss of ability to sleep is not ratable as a permanent impairment under the AMA Guides.

27. Dr. Ridings also testified that reaching overhead and the ability to carry objects on the shoulder are activities which primarily involve the arm. He testified that the July 11, 2013 steroid injection that Claimant received was diagnostic in nature, and that Claimant's subsequent temporary relief and improvement indicated his symptomatology was derived from anatomical areas proximal to the function of the arm.

28. Dr. Ridings testified that the shoulder serves to support the functions of the arm and operates as part of the upper extremity. He further testified that Claimant had significant degenerative arthritis of the left shoulder contributing to his ongoing symptoms which would not be expected to have resulted from the work-related mechanism of injury involved in this claim. Dr. Ridings was ultimately of the opinion that Claimant's permanent functional impairment pertained only to limited range of motion of the shoulder, which primarily impacts the use of Claimant's arm.

29. Dr. Ridings also testified that there was strong indication that situs of injury was Claimant's shoulder joint.

30. Dr. Ridings testified that Claimant's injury, according to the AMA Guides, was to his upper extremity, and that no permanent impairment was warranted because the situs of injury was at the joint. He testified that his opinions were to a reasonable degree of medical certainty.

31. On cross-examination, Dr. Ridings testified that the pathology was to Claimant's left shoulder, all of his treatments were to his left shoulder, and that Claimant's functional loss was to his left shoulder.

32. However, while Dr. Ridings was ultimately of the opinion that Claimant's permanent functional impairment pertained only to limited range of motion of his

shoulder, he opined that that impairment primarily impacted the use of Claimant's arm, which is on the schedule of permanent impairment.

CONCLUSIONS OF LAW

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

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275; 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

3. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

4. Pain and discomfort which limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *See Langton v. Rocky Mountain Healthcare Corp.*, *supra*; *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996).

5. Here, the issue to be determined is whether Claimant's injury resulted in a "loss of an arm at the shoulder" or whether Claimant has proven that the situs of his functional impairment extends beyond the "arm at the shoulder."

6. Claimant has met his burden of proof that the situs of his functional impairment extends beyond the arm at the shoulder. Claimant credibly testified that there are many things he cannot do because of pain in his left shoulder that he used to be able to do, such as carrying things on top of his left shoulder, using his left shoulder

to help him lift objects over his head, using his left shoulder to pull a garage-type door, and having to turn his entire body to scan his mirror while driving. These difficulties are all due to pain in Claimant's shoulder, not in his arm. Both Respondents' and Claimant's medical experts testified that Claimant's pathology was to his left shoulder, his treatments were to his left shoulder, and that Claimant's functional loss was to his left shoulder. There was no testimony or evidence that Claimant's pathology or treatments were to his left arm.

7. The ALJ does not find persuasive Dr. Ridings' opinion that Claimant's permanent functional impairment primarily impacted the use of his arm, thus making his injury scheduled. The persuasive and credible evidence pointed to the fact that Claimant's permanent functional impairment was to his shoulder. The fact that the shoulder joint affects arm mobility, or that the arm and shoulder's functions may be to some degree intertwined, does not mean Claimant sustained only a "loss of arm at the shoulder." Claimant has ongoing functional impairment of his left shoulder which causes the problems stated in paragraph 6 above, all involving his shoulder much more than his arm, which the ALJ concludes makes Claimant's injury beyond his "arm at the shoulder." Accordingly, Claimant's impairment is not on the schedule of permanent impairment and he is entitled to a rating for the whole person at 5% based on the impairment rating assessed by Dr. Shih.

ORDER

1. Claimant has sustained a functional impairment of 5% of the whole person for his left shoulder injury incurred on February 28, 2013. Medical impairment benefits shall be calculated under § 8-42-107(8)(d), C.R.S., based upon a 5% whole person rating.

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

DATED: February 19, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

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

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

ISSUES

The issues to be determined herein are:

1. Compensability;

2. Medical benefits; and,

3. A contest to the denial of authorization for surgery.

Based upon the findings and conclusions below that the claim is not compensable, the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant testified that while working his regular job he began to notice a problem with pain in his arm. The pain was keeping the claimant up at night.

2. The claimant saw a Nurse Practitioner who recommended the claimant see Dr. Idler, a hand specialist.

3. The claimant was seen by Dr. Idler who referred the claimant to Dr. Leppard for an EMG diagnostic study. The claimant was assessed with a severe left carpal tunnel syndrome.

4. Once the claimant had been diagnosed he believed that the condition must be work related because he did not think he engaged in any specific activities outside of work.

5. The claimant testified that he does a lot of lifting, moving, and holding with his left arm when engaged in his work activities. The claimant works 40-hours per week.

6. The claimant was seen by the respondent-employer's workers' compensation doctor and a work-site evaluation was conducted by a Ms. Porter.

7. The claimant took the results to the doctor.

8. The claim was ultimately denied by the respondent-insurer.

9. The claimant is a 54-year old man who began working for the respondent-employer in 2012.

10. The claimant's duties involve working with extruded aluminum products. The claimant's is in the position of Head Stretcher. He is involved in the stretching and cutting of the extruded aluminum to ensure it meets required specifications. Once the product is cut it is moved to a table. The claimant uses his right arm to engage and disengage the product from the stretching machine; his left arm is used to maneuver the product.

11. The claimant does play golf on a regular basis. He regularly plays a round of golf on Fridays. When golfing the claimant does use his left wrist. He did not think that golf was the cause of his condition and therefore did not report that activity to the doctors.

12. Once the claimant's ENG results were in Dr. Jones had concerns that the results of the EMG did not correspond to the claimant's symptoms.

13. The claimant indicated that his duties do not require him to bend his wrist up and down. Additionally, his elbow is not bent a lot.

14. Dr. Jonathan Sollender conducted an independent medical evaluation og the claimant and issued a report dated June 26, 2013. Dr. Sollender reviewed the medical records as well as the results of the work place evaluation and examined the claimant.

15. Dr. Sollender also spoke directly with Ms. Porter the author of the work place evaluation.

16. Dr. Sollender opined that the work place evaluation was flawed in several respects and did not accurately assess the conditions under which the claimant was working.

17. Dr. Sollender opined that the cliamant's work conditions did not meet the Medical Treatment Guidelines for Cumulative Trauma to establish causality.

18. Dr. Sollender opined that the claimant's left arm condition was not caused by hie employment duties.

19. The ALJ finds that Dr. Sollender's opinions are credible and persuasive and entitled to great weight.

20. There is no medical evidence definitively opining that the claimant's condition is work related.

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

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

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

6. An "occupational disease" is defined by §8-40-201(14), C.R.S., as:

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

7. Under this statute the claimant bears the burden to prove that the disease was "directly and proximately caused" by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. The ALJ concludes that Dr. Sollender's opinions are credible and entitled to great weight.

9. As found above, the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury or occupational disease arising out of and in the course of his employment on or about April 15, 2013.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: February 11, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether Claimant's right shoulder injury resulted in functional impairment beyond that found in the schedule of impairments under § 8-42-107(2)(a), C.R.S., or whether Claimant's impairment is limited to his right upper extremity.

- Whether Respondent has overcome the DIME opinion by clear and convincing evidence.

STIPULATION

At hearing the parties stipulated that Respondent will pay $899.62 for temporary disability benefits for the period between July 18, 2013 and July 28, 2013, inclusive. The stipulation resolves the issue of temporary disability benefits that Claimant endorsed for hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. Claimant is 49 years old and his date of birth is May 31, 1965. He has worked for Employer for approximately eighteen years. He works full-time in maintenance at a vehicle repair facility.

2. Claimant sustained an admitted compensable injury to his right shoulder on April 18, 2013. He initially received medical treatment at Concentra with Dr. Kirk Holmboe.

3. After being seen at Concentra, Claimant was referred for an MRI which took place on May 6, 2013. The MRI found that the Claimant had numerous problems impacting his right shoulder, i.e., tendinopathy of the supraspinatus, infraspinatus and subscapularis tendons, a large full-thickness tear of the distal fibers of the supraspinatus and infraspinatus tendons (rotator cuff tear), high grade partial-thickness articular surface tear of the distal fibers of the subscapularis tendon, tendinopathy and partial tearing of the long head of the biceps tendon, mild concave under surface type II acromion with mild anterior down sloping.

4. Claimant was eventually referred to Dr. Michael Hewitt, an orthopedist, who first evaluated Claimant on May 20, 2013. On June 4, 2013, Claimant underwent the following surgical procedures with Dr. Hewitt: right shoulder arthroscopic rotator cuff

repair, arthroscopic subacromial decompression, distal clavicle co-planing, superior labral debridement, and right shoulder manipulation. Dr. Hewitt discharged Claimant with instructions to return in a week for a wound check and begin formal physical therapy.

5. After the surgery, Claimant's medical treatment was managed by Dr. Holmboe and Claimant participated in physical therapy. Claimant also saw Dr. Hewitt on occasion.

6. On November 14, 2013, Claimant returned to Concentra and saw Dr. Steve Danahey. Prior to November 14, 2013, Dr. Danahey had not treated Claimant. Dr. Danahey determined that Claimant reached maximum medical improvement ("MMI") on November 14, 2013. He noted that Claimant had mild motion limitations with respect to the right shoulder and rated 2% for flexion, 1% for extension, 0% for adduction, and 1% for abduction. Internal rotation was measured and rated at 1% and external rotation was measured and rated at 0%. Dr. Danahey determined a 5% upper extremity impairment rating, and he noted that if applicable, it may be converted to a 3% whole person impairment from Table 3.

7. Dr. Danahey noted that Claimant was comfortable working on his exercises at home and had already returned to his regular duty job without any problems. He documented that Claimant reported that overhead repetitive motion bothers him and reaching behind him is problematic. Dr. Danahey noted that Claimant was aware that he may have orthopedic follow-up with Dr. Hewitt on a maintenance basis up to two times within the next year.

8. On December 4, 2013, Respondents filed a Final Admission of Liability consistent with Dr. Danahey's report. Claimant subsequently applied for a Division Independent Medical Examination ("DIME").

9. The DIME occurred on February 27, 2014, which Dr. Ronald J. Swarsen performed. He agreed with the authorized treating physician that Claimant reached MMI on November 14, 2013 with respect to his right shoulder. Dr. Swarsen's report demonstrates his proper use of the AMA *Guides* and appropriate methods of measuring range of motion. He concluded Claimant had range of motion deficits in his right shoulder in flexion, extension, abduction, adduction, and internal/external rotation that resulted in a 12% upper extremity impairment rating which he converted to a 7% whole person rating. He noted that apportionment was not applicable.

10. Dr. Swarsen's report reflects that Claimant reported that he can lift his arm, but has trouble with overhead work and a lot of difficulty with internal rotation and reaching behind his back. Claimant reported off and on pain at night when he sleeps on the shoulder and he awakens with marked stiffness; he stated that his pain was usually around 4/10 (with 1 being almost not noticeable) and Claimant stated that at its worst, his pain is an 8/10. Claimant expressed concern that his main treating physician, Dr. Holmboe was not the physician who did his impairment rating.

11. In his report, Dr. Swarsen opined that the differences between his ratings and Dr. Danahey's ratings were due to discontinuation of formal physical therapy rehabilitation or the possible development of adhesive capsulitis. He recommended a more directed maintenance program.

12. Claimant returned to Dr. Danahey on June 3, 2014 for a maintenance evaluation at Dr. Danahey's suggestion. Claimant reported that he is doing very well and that everything is good and work is not aggravating his shoulder. Claimant did note that he has trouble shooting 3-pointers in basketball and had trouble reaching back.

13. Following Dr. Swarsen's DIME and report, Respondent requested an Independent Medical Examination ("IME") and it was performed by Dr. John S. Hughes. He examined Claimant on July 16, 2014 and agreed that Claimant reached maximum medical improvement on November 14, 2013. He noted that Claimant had Type II diabetes. He noted crepitation in both shoulders. He determined that Claimant had range of motion deficits in internal and external rotation, flexions and extension, and abduction and adduction. These deficits amounted to a 7% impairment of the right upper extremity. Dr. Hughes characterized Dr. Swarsen's 12% impairment rating as an "outlier."

14. Dr. Hughes also noted that Claimant had full strength to manual testing in both arms. He noted that other upper extremity joint examinations were normal. Claimant had a slight decrease in left lateral flexion and rotation of the head and neck but no symptoms and no palpable right-sided trapezius hypertonicity. Claimant told Dr. Hughes that he had no symptoms of pain but had difficulty with activities that required internal rotation of the right arm at the shoulder. Claimant had no restrictions on any occupational activities.

15. At hearing, Dr. Hughes testified as an expert in occupational medicine who is fully Level-II accredited. He testified about the location of the pathology in Claimant's shoulder and generally described the procedures that were performed. He explained that Claimant might have adhesive capsulitis and that people with diabetes are more likely to have this problem.

16. Dr. Hughes testified that the April 18, 2013 injury did not cause functional impairment above Claimant' arm. Rather, that injury has caused small limitations on right arm range of motion, but did not functionally impair any structures above the arm.

17. Dr. Hughes discussed that Claimant has undergone considerable physical therapy and has had a good post-surgical recovery from the industrial injury.

18. The record contains documentation from twenty-four physical therapy sessions, beginning in June 2013 and ending in September 2013, although it appears that Claimant may have had additional physical therapy sessions after October 8, 2013. During Claimant's twenty-four physical therapy sessions, he frequently reported pain in his right shoulder when sleeping and with internal rotation activities.

19. Claimant's right shoulder concerns seemed to improve with regular physical therapy, but he still had some limitations on internal rotation when he returned to Dr. Holmboe on October 8, 2013.

20. At hearing Claimant testified that he has functional loss in the area of his right shoulder and that he suffers both pain and dysfunction when performing various activities at work, including overhead work when he is changing valets or repairing hoses. He also testified that he has problems sleeping on his right side. He stated that when he sleeps on his right side he wakes up with pain in the area between his shoulder joint and the base of his neck. He is also limited in carrying objects on his right shoulder; and avoids using his right shoulder, relying extensively on his left shoulder to perform this activity.

21. Although Claimant's testimony may seem contradictory in reference to statements made to Dr. Hewitt on August 26, 2013 and October 7, 2013, and his statement to Dr. Hughes on July 16, 2014, and finally his statement to Dr. Danahey on June 3, 2014, all regarding shoulder pain or the lack thereof and sleep issues; the ALJ finds that Claimant's testimony is not inconsistent with the medical records and on and off complaints regarding his right shoulder. Hi testimony is not in conflict with his statements to Dr. Swarsen on February 27, 2014.

22. On February 27, 2014 Claimant reported to Dr. Swarsen that he can lift his arm, but has trouble with overhead work and a lot of difficulty with internal rotation and reaching behind his back for dressing and for hygiene. He reported that he cannot shoot overhead in basketball the way he used to. Claimant also reported that he has off and on pain at night when he sleeps on his right shoulder and then awakens with marked stiffness. Finally, Claimant reported to Dr. Swarsen that he returned to full duty work and was doing well with it but does have some trouble with sustained resisted activity with the right upper extremity and overhead work, but is accommodating himself reasonably well. The ALJ reconciles the differing statements by recognizing and finding that Claimant has had off and on pain with sleeping at night and that his pain waxes and wanes with certain activities, including work activities and whether he is doing his regular job duties.

23. At hearing, Dr. Swarsen testified as an expert in occupational medicine who is fully Level-II accredited. He testified that Claimant's injury was to his right shoulder and that the Claimant's functional impairment was to that shoulder. He also testified that the Claimant's arm is not his shoulder and that the Claimant's right shoulder is functionally impaired. Thus, a whole person rating is warranted.

24. In response to Dr. Hughes' testimony that Claimant was not entitled to a whole person impairment because his functional impairment did not include loss to the neck or thoracic spine, Dr. Swarsen agreed that there was no loss to the neck or thoracic spine. However, Dr. Swarsen opined that there was loss to the shoulder girdle which is not the same as a loss to the arm. Thus, a whole person rating is appropriate.

25. Dr. Swarsen described the shoulder as the scaffolding upon which the arm operates and that the arm cannot function without the shoulder girdle. Further, he testified that the Claimant's functional impairment was to his right shoulder and that there was no evidence in the record of injury to the Claimant's right arm. The Judge finds this testimony persuasive.

26. Dr. Swarsen's opinion was that Claimant's testimony concerning the Claimant's functional loss was consistent with the nature of the Claimant's right shoulder pathology and surgical intervention. He agreed with Dr. Hughes concerning the anatomical location of the Claimant's problems. Dr. Hughes noted in his report that he agrees with the opinion that Claimant has impaired ranges of motion of his right shoulder.

27. Both Dr. Swarsen and Dr. Hughes agreed that there were no tonicity problems in the area of the Claimant's trapezius. Dr. Swarsen testified that this was not inconsistent with the fact that the Claimant suffers functional loss when attempting to use his right shoulder girdle for lifting and carrying objects or sleeping on his right side.

28. Dr. Hughes' disagreement with Dr. Swarsen's findings and ratings does not constitute clear and convincing evidence that Dr. Swarsen is incorrect. The opinions and conclusions of Dr. Hughes regarding the situs of functional impairment and impairment rating are a difference of medical opinion only and are insufficient to overcome Dr. Swarsen's opinion and rating.

29. The ALJ finds that the report and testimony of Dr. Swarsen is more persuasive than the report and testimony of Dr. Hughes and that Dr. Swarsen obtained a valid impairment rating on February 27, 2014. The Judge is not convinced that Dr. Swarsen's impairment rating is an "outlier" or that his impairment rating is in error compared to the ratings of Dr. Hughes and Dr. Danahey. Both Drs. Hughes and Swarsen testified that with impairment ratings for range of motion deficits there are reasonable degrees of variance. Dr. Swarsen testified that things can be different on different days.

30. Based on the credible and persuasive testimony and report of Dr. Swarsen, and the credible testimony of Claimant, the ALJ finds that Claimant's right shoulder injury resulted in functional impairment beyond that found in the schedule of impairments under § 8-42-107(2)(a), C.R.S. Thus, Claimant's impairment is not limited to his right upper extremity. The situs of Claimant's functional impairment extends beyond the "arm at the shoulder."

31. Respondents have failed to overcome the DIME opinion regarding a whole person rating by clear and convincing evidence to show that it is highly probable that Dr. Swarsen is incorrect.

32. Claimant has suffered a 12% upper extremity impairment rating which is appropriately converted to a 7% whole person rating as a result of the April 18, 2013 industrial accident and resulting right shoulder injury.

33. At hearing, Claimant withdrew the issue of medical maintenance benefits.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792, 800 (Colo. 1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. Section 8-42-101(3.7) mandates that physicians rating injured workers' impairments follow the AMA *Guides*.

5. A DIME physician's findings concerning a claimant's whole person impairment rating are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. 2006; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002). Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt**."** *Metro Moving & Storage Co v. Gussert,* 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988). A party meets this burden only by demonstrating that the evidence contradicting the DIME is "unmistakable and free from

serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

7. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (Nov. 17, 2000). To overcome Dr. Swarsen's DIME opinion, Respondent was required to present clear and convincing evidence, i.e. evidence which is unmistakable and free from serious or substantial doubt. *De Leo v. Koltnow,* 613 P.2d 318 (Colo. 1980). Respondent has not met this burden through Dr. Hughes' testimony. Dr. Hughes did not demonstrate that Dr. Swarsen erred in his application of the AMA *Guides* and rating. Whether the physician properly applied the AMA *Guides* is a question of fact for the ALJ. *Metro Moving and Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, Dr. Swarsen's report demonstrates his proper use of the AMA *Guides* and appropriate methods of measuring range of motion. He concluded Claimant had range of motion deficits in his right shoulder in flexion, extension, abduction, adduction, and internal/external rotation.

8. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

9. The fact that the AMA *Guides* do not provide for a method to rate a particular condition as a whole person is not dispositive of whether the Claimant suffered compensable functional impairment not enumerated on the schedule of disabilities. Thus, the ALJ may find functional impairment not listed on the scheduled of disabilities. See *Cordova v. Industrial Claims Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

10. Where the Claimant suffers an injury not enumerated in section 8-42-107(2), C.R.S., the Claimant is entitled to whole person impairment benefits under section 8-42-107(8), C.R.S. In the context of section 8-42-107(1), C.R.S. the term "injury" refers to

the manifestation in a part or parts of the body which have been functionally impaired or disabled as a result of the industrial accident or injury. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996); *Martinez v. Albertsons*, W.C. # 4-692-947 (ICAO 6/30/08). The determination of the situs of the functional impairment is one of fact and is distinct from the Claimant's medical impairment rating. As a matter of law, upper extremity impairment ratings contained in the AMA *Guides* may, or may not, be consistent with the scheduled injury ratings contained in section 8-42-107(2), C.R.S. *See Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996).

11. Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. See *Langton v. Rocky Mountain Healthcare Corp.*, *supra*; *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Functional impairment need not take any particular form. Accordingly, discomfort which interferes with the Claimant's ability to use a portion of the body may be considered "impairment". *Mader v, Popejoy Construction Co., Inc.* W.C. No. 4-198-489 (ICAO 8/9/96). aff'd, *Popejoy Construction Co., Inc.* (Colo. App. No. 96CA1508, February 13, 1997) (not selected for publication) (Claimant sustained functional impairment of the whole person where back pain impaired use of arm).

12. Here, Claimant has functional loss to his right shoulder, and the use of Claimant's right shoulder is impaired. Claimant suffers both pain and dysfunction when performing various activities at work, including overhead work when he is changing valets or repairing hoses. Claimant has problems sleeping on his right side. When he sleeps on his right side he wakes up with pain in the area between his shoulder joint and the base of his neck. He is also limited in carrying objects on his right shoulder; and avoids using his right shoulder, relying extensively on his left shoulder to perform this activity. Claimant's shoulder joint itself is impaired because it does not function as it did before his injury. The mere fact that the shoulder joint affects arm mobility does not mean Claimant sustained only a "loss of arm at the shoulder." The situs of Claimant's functional impairment extends beyond the "arm at the shoulder."

13. Accordingly, Claimant's impairment is not on the schedule of permanent impairment and he is entitled to a rating for the whole person at 7% based on impairment rating assessed by Dr. Swarsen.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME physician's opinions by clear and convincing evidence.

2. The Respondents shall pay permanent partial disability benefits to the Claimant based upon a whole person impairment rating of 7%.

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

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

DATED: February 12, 2015

/s/ Sara L. Oliver

_____

SARA L. OLIVER
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined are as follows:

1. Whether the Claimant has proven that his request for cervical injections and a cervical/upper extremity EMG recommended by Dr. Bhavesh Patel is reasonable, necessary and related to his work-related injury of June 8, 2013[1];

2. Whether the Claimant has proven that his request for injections and discectomy at the L5-S1 level of his lumbar spine recommended by Dr. Michael Karnasiewicz is reasonable, necessary and related to his work injury of June 8, 2013.

3. Whether the Claimant has proven that he is entitled to temporary total disability benefits from December 19, 2013 ongoing.

PROCEDURAL MATTERS

Following the hearing, the ALJ permitted the parties to complete the testimony of Dr. Karnasiewicz by telephone. That deposition was completed and the transcript has been submitted. In addition respondents were given the opportunity to depose Dr. Paz and Dr. Walker as part of their case in chief. In lieu of completing those depositions the parties agreed to submit a supplemental report authored by Dr. Paz that addresses the reasonableness, relatedness, and necessity of the lumbar surgery recommended by Dr. Karnasiewicz. That report was submitted to the ALJ and entered into evidence.

FINDINGS OF FACT

1. The Claimant is 23-year-old male who was hired by Employer in March 2013 to repair and maintain pools and spas.

2. On June 8, 2013, the Claimant was hanging over a pool while unscrewing and opening steel jet covers. He was in the process of removing a metal plate from the

[1] The Claimant's Case Information sheet noted that "Pursuant to ALJ Felter's Order dated May 7, 2014, the issues to be heard at this hearing are (1) the authorization of the recommendations of the Connecticut authorized treating provider (ATP), Bhavesh Patel, M.D. for a lumbar fusion, (2) a cervical EMG, (3) a cervical traction unit, and (4) physical therapy for Claimant's whole body. However, these issues were not all pursued at hearing (except the Claimant mentioning the EMG for his upper extremity and cervical), and, in the Claimant's post hearing brief, the Claimant did not seek redress on the remaining issues, but rather only the 3 issues listed above.

jet with the use of a screw driver and when he lifted himself out of the pool, he experienced pain in his left mid back just to the left of his spine (Claimant's Exhibit 1, p. 3, ¶3, excerpt from Order of ALJ Felter dated December 3, 2013).

3. The Respondents initially admitted for injuries including the thoracic and cervical spine, but contested injury to the lumbar spine which included a herniated disc (Claimant's Exhibit 1, p. 3,¶ 4, excerpt from Order of ALJ Felter dated December 3, 2013). ALJ Felter determined that the weight of the medical evidence established that the Claimant's lumbar spine condition was causally related to the admitted injury of June 8, 2013 (Claimant's Exhibit 1, p. 6, ¶¶ 18-19 and p. 10, excerpt from Order of ALJ Felter dated December 3, 2013). ALJ Felter ordered that, "Respondents shall pay the costs of medical care and treatment for the Claimant's thoracic and low back injuries of June 8, 2013, subject to the Division of Workers Compensation Medical Fee Schedule (Claimant's Exhibit 1, p. 12, ¶A, excerpt from Order of ALJ Felter dated December 3, 2013).

4. The Claimant originally received medical care from Dr. Sander Orent and Dr. Sharon Walker at Arbor Medical Clinic. The initial history provided by the Claimant on June 11, 2013 was "back pain" (Claimant's Exhibit 10, p. 72; Respondents' Exhibit E, p. 17). On June 12, 2013, Dr. Sander Orent assessed the Claimant with "thoracic strain, in an otherwise healthy young man" (Claimant's Exhibit 10, p. 78; Respondents' Exhibit E, p. 18). On June 18, 2013, the Claimant was still complaining of a good deal of pain. Dr. Orent noted that, on review of imaging studies, "there is evidence of an old T7 compression fracture, although there is no history thereof, so it may be a lot more acute than what we realize based on the imaging finding itself." As for the Claimant's symptoms, Dr. Orent noted "some numbness at the ends of his hands. It is worse with certain positions. He is complaining of some discomfort in the neck as well. The primary pain, though, is right over the T7 area in the central portion of the spine." Dr. Orent further noted that the Claimant was taking enough narcotics for the pain that he should not be driving or working, even at sedentary activities in the work place (Claimant's Exhibit 10, p. 83; Respondents' Exhibit E, p. 19). On June 28, 2013, the Claimant came to Dr. Orent's clinic to report that he was going to be moving to Connecticut. As Dr. Orent was out, the Claimant was seen by P. A. Clint Dillard. The Claimant continued to report pain in the thoracic region and reported lumbar pain. P.A. Dillard noted that there were no radicular symptoms. P.A. Dillard felt the Claimant had a "myofascial spasm" and questioned the need for a lumbar spine MRI as P.A. Dillard did not see any indications on physical exam on that date.

5. The Claimant moved to Connecticut on July 12, 2013 and transferred his care briefly to Concentra Medical Center where he was seen by Dr. Victor Cohen, and Dr. Victor Wasilauskas. On July 16, 2013, the Claimant told Dr. Cohen, "I was hanging over the edge pulling steal jet covers off when I pulled myself out I pulled my back out – I have pain up and down my back, but mid and upper back is unbarable [sic]." Dr. Cohen assessed thoracic strain, trapezius strain and lumbar strain. On July 29, 2013, the Claimant saw Dr. Wasilauskas and reported "pain located on neck and middle back" and "no radicular pain noted." Dr. Wasilauskas referred the Claimant for a neurosurgical

consultation for his neck and thoracic spine conditions. On August 26, 2013, Dr. Wasilauskas noted that the Claimant was still reporting thoracic pain and low back pain but no radicular symptoms were noted. Dr. Wasilauskas also noted that the Claimant had been seen by Dr. Karnasiewicz and he did not feel that the Claimant needed surgery but would benefit from physical therapy (Claimant's Exhibits 15 and 16; Respondents' Exhibit F).

6. The Claimant saw Dr. Karnasiewicz on August 8, 2013. Dr. Karnasiewicz noted that the Claimant reported that he currently has "bilateral upper extremity pain right greater than left that he describes as 'pressure.' He states this is into the bilateral upper trapezius, lateral and posterior arm throughout into the lateral hand and lateral third through fifth digits. He admits to paresthesias right greater than left into the posterior arm and hand. He denies any frank weakness into the upper extremities bilaterally. He also admits to right mid back flank pain. He states that he also has lower back pain and bilateral lower extremity pain throughout the buttock, posterior and anterior thigh. He admits to paresthesias into the dorsal feet bilaterally. He also admits to weakness into the lower extremities bilaterally stating that his knees give out on him on occasion. He states that the severity of his pain is 7/10 and is alleviated with physical therapy and lying supine. Dr. Karnasiewicz assessed the Claimant with a "diffuse spinal injury" and noted "at the present time surgery is not recommended." Dr. Karnasiewicz recommended continued physical therapy and medication refill (Claimant's Exhibit 3; Respondents' Exhibit H).

7. The Claimant flew back out to Colorado for an IME with Dr. Paz which took place on September 10, 2013. Dr. Paz prepared a report dated October 7, 2013, in which he determined that the Claimant reached MMI with respect to his June 8, 2013 event and determined that the Claimant's current symptoms were not related to the work injury, stating, "[the Claimant's] differential diagnosis includes myofascial pain in the thoracic and lower chest wall. However, the natural history of a myofascial strain of the thoracic region would be to improve and resolve of 4-6 weeks. The history, in this particular case, is inconsistent with the natural history of myofascial pain of the thoracic region and chest wall. The "spread" of symptoms from the thoracic region to the cervical and lumbar region is inconsistent with myofascial strain" (Respondents' Exhibit I). In a prior Order on compensability issues and causal relatedness, ALJ Felter found this IME opinion of Dr. Paz "lacking in credibility and outweighed by the totality of the medical opinions of each of the Claimant's authorized treating physicians" (Claimant's Exhibit 1, p. 6, ¶ 19, excerpt from Order of ALJ Felter dated December 3, 2013).

8. Subsequently, the Claimant's care was then transferred to Dr. Bhavesh Patel at US MedGroup who took over as the Claimant's primary care provider in Connecticut. On September 12, 2013, Dr. Patel noted that upon examination and after review of an MRI scan of the Claimant's lumbar spine performed on 08/29/2013, there was evidence of a small left L5-S1 disk herniation encroaching the left S1 nerve root. And a small disc bulge at the L4-L5 level. Dr. Patel also noted that the Claimant's thoracic spine MRI done on 06/19/2013 revealed evidence of a right sided C4-C5 disk protrusion with mild indentation of the retro aspect of the cord. Dr. Patel assessed

cervicalgia associated with motion, rule out left C6 radiculopathy, mild stenosis, mechanical back pain and left L5-S1 radiculitis secondary to a small herniated disc. Dr. Patel recommended "a left L5-S1 transforaminal epidural steroid injection to help his back and left radicular leg pain which favors the L5-S1 distribution (Claimant's Exhibit 4, Respondents' Exhibit G).

9. The Claimant saw Dr. Patel again on October 10, 2013 continuing to complaint of "pain to the lower back and left leg and also, pain in his neck and left arm." The Claimant was recommended for lumbar injections and further workup including an EMG of his left upper extremity, but Dr. Patel notes that "this was denied through Workers' Compensation." Dr. Patel continued to opine that the Claimant would benefit from a lumbar epidural injection to help with his left leg pain and he further recommended continued light duty work and physical therapy and medication distribution (Claimant's Exhibit 4, Respondents' Exhibit G).

10. Per a Physician Work Activity Status Report by Dr. Cohen dated December 19, 2013, the Claimant's work status is "no activity" (Claimant's Exhibit 6, p. 61). Also note that, in a letter dated June 13, 2014, the Claimant requested that Dr. Patel clarify his opinion that Claimant's working restrictions was "no activity." The letter was answered by Dr. Barinder Mahal on June 18, 2014, indicating that "Patient with symptomatic cervical & lumbar radiculopathy with restrictions lifting, pushing, pulling, standing, & sitting. His restrictions should remain "No Activity"(Claimant's Exhibit 6, p. 62). The Claimant has not returned to any type of employment. It is noted that ALJ Felter previously found that the Claimant had voluntarily left modified employment with Employer to return to Connecticut to be with family and that he was responsible for termination due to his decision to abandon medically approved modified work provided by the Employer (Claimant's Exhibit 1, pp. 6-8, Order of ALJ Felter dated December 3, 2013). However, the "no activity" work status occurs on December 19, 2013 after ALJ Felter's Order as does the further clarification on June 18, 2014.

11. As of January 2, 2014, Dr. Patel notes that the Claimant's range of motion in his cervical spine and lumbar spine is restricted bilaterally and straight leg raising causes localized low back pain and left leg pain (Claimant's Exhibit 4, Respondents' Exhibit G).

12. On January 16, 2014, due to the continued pain symptoms and continuing restrictions on range of motion, Dr. Patel referred the Claimant back to see Dr. Karnasiewicz, the neurosurgeon, for re-evaluation of the lower back and leg pain (Claimant's Exhibit 4, Respondents' Exhibit G).

13. The Claimant continued to see Dr. Patel for pain management, and as of May 1, 2014, Dr. Patel recommended a cervical injection for his neck and right arm pain and an injection to help his lumbar pain, pending surgery. The Claimant was continuing to take Percocet and was started on Neurontin (Claimant's Exhibit 4, p. 52).

14. After the Claimant's condition did not improve with physical therapy and treatment by Dr. Patel, he returned to Dr. Karnasiewicz on February 11, 2014 for re-evaluation. At this visit, Dr. Karnasiewicz reviewed the lumbar MRI scan noting it showed a herniated disc that was abutting the left S1 nerve root and a concomitant annular tear. At that point in time, since the Claimant had not received any type of improvement in spite of considerable conservative care including over 40 sessions of therapy, a microdiskectomy was recommended. Complications of the surgery were discussed, and the Claimant wished to proceed with surgery (Claimant's Exhibit 3, pp. 19-20).

15. Respondents denied the surgery and sent the Claimant for a medical examination with Dr. Michael Rauzzino in Colorado. Dr. Rauzzino, in his May 17, 2013 written report stated that he agrees with Dr. Paz's earlier opinion that was rejected in the December 3, 2013 Order by ALJ Felter, that there was no compensable workers' compensation injury and that the problems with the Claimant's lumbar spine were more likely related to previous activities. Dr. Rauzzino opined that the Claimant sustained no structural injury to his spine on June 8, 2013, but only myofascial strain. He further stated that he did not believe the Claimant needed any sort of surgery and does not have a true S1 radiculopathy. This was in spite of the fact that Claimant had pain radiating down his left leg, has breakaway weakness in the muscles of his left leg, and very noticeable atrophy in his left leg. The atrophy was visibly noticeable and was observed by this Court. Dr. Rauzzino believes the Claimant is at MMI and his case should be closed with no impairment. Dr. Rauzzino also found that the Claimant had positive Waddell's signs and also based his report on video surveillance footage which showed the Claimant doing tricks on his bicycle approximately two (2) to three (3) years prior to Claimant's injury on the job (Respondents' Exhibit P). The video, taken significantly prior to the incident does not show the Claimant suffering a spinal injury nor does it negate the fact that two (2) years later, the Claimant sustained an admitted work injury and by his December 3, 2013 Order, ALJ Felter determined that the claim was compensable and the Respondents were responsible for medical care for the Claimant's cervical, thoracic and lumbar spine conditions.

16. Dr. Rauzzino also testified by deposition on June 30, 2014. Dr. Rauzzino is board certified in neurosurgery with an active clinical practice taking care of patients with both brain and spinal disorders (Depo. Tr. Dr. Rauzzino, pp. 5-6). Dr. Rauzzino characterizes the Claimant's lumbar MRI as showing "a fairly small disc protrusion at L5-S1, which contacted, but didn't put the specific amount of pressure on the S1 nerve root (Depo. Tr. Dr. Rauzzino, p. 7). Dr. Rauzzino testified that he did not believe that these structural abnormalities came from the Claimant's described mechanism of injury on June 8, 2013 since his initial complaints were not directed to the lumbar spine but to his neck and upper back (Depo. Tr. Dr. Rauzzino, p. 8). Dr. Rauzzino testified that the initial treating physicians ordered neck and thoracic MRIs initially but did not image his lumbar spine at that time since they did not feel that his symptoms at that time were consistent with a lumbar injury (Depo. Tr. Dr. Rauzzino, p. 9). Then, the pattern of his symptoms changes and he complained of pain radiating down his leg and there were x-rays taken in August of 2013 (Depo. Tr. Dr. Rauzzino, p. 9). Dr. Rauzzino testified that if

the Claimant had suffered a structural injury to his low back on June 8, 2013 then the symptoms would have shown up within a few days, 4-5 at the most, not 4 weeks later (Depo. Tr. Dr. Rauzzino,pp. 13). Dr. Rauzzino testified that the surgery that is being proposed is designed to treat a lumbar disc herniation, putting pressure on a nerve and radicular pain that goes down the leg in the distribution of the nerve which is being affected by the disc. He does not believe the Claimant should have this surgery because he thinks the Claimant is "a bad surgical candidate, in the sense that I don't know that surgery is likely to make him getter. If he has a very clear presentation that makes sense and has very significant radiographic findings, then one might consider to operate on him." However Dr. Rauzzino did not see clear-cut evidence of the specific nerve being bothered when he examined the Claimant (Depo. Tr. Dr. Rauzzino, p. 14). Dr. Rauzzino opines that the Claimant's responses to pain were exaggerated and out of proportion and not consistent with a specific nerve and a specific distribution (Depo. Tr. Dr. Rauzzino, p. 15). In general, Dr. Rauzzino testified that he agreed with the opinion of Dr. Paz but felt that his own opinion was a little more detailed in terms of causation (Depo. Tr. Dr. Rauzzino, pp. 32-34). On cross-examination, Dr. Rauzzino testified that it was his opinion that the Claimant had degenerative changes due to injuries before his June 8, 2013 work injury. However, he agreed that there were no medical records that supported prior injuries, except to the extent that Dr. Rauzzino noted radiographic evidence of chronic injury to his spine (Depo. Tr. Dr. Rauzzino, pp. 48-50).

17. In addition to IME's that the Respondent has requested the Claimant undergo, Respondents have requested peer reviews from several physicians for review of the requests of Dr. Patel and Dr. Karnasiewicz.

- On February 12, 2014, Dr. Anjmum Sharma reviewed the Claimant's medical presentation and found that the recommended treatment for disc and nerve pathology was not necessary nor related to the injuries the Claimant suffered on June 8, 2013. Specifically, Dr. Sharma felt that the Claimant's mechanism of injury was not significant enough to result in the injury that he is reporting of chronic, unmitigating cervical, thoracic and lumbar pain. Dr. Sharma opined the Claimant is at MMI and required no further treatment based, in part, on video surveillance that he reviewed showing the Claimant walking, talking on a cell phone and getting into a car and closing the door and raising the hood of the car (Respondents' Exhibit B, pp. 2-5).

- On September 23, 2013, Dr. Deborah Saint-Phard reviewed and found the requests for additional physical, therapy epidural steroid injections and EMG requested on September 8, 2013, to be not related to the injuries the Claimant may have suffered on June 8, 2013 (Respondents' Exhibit B, p. 6).

- On December 11, 2013, Dr. Fillmore also opined that the request for an upper extremity EMG should be denied based on Dr. Paz' IME and the other medical records that Dr. Fillmore may have reviewed (Respondents'

Exhibit B, p. 7).

- Dr. James Ogsbury, neurosurgeon, reviewed the case as of January 9, 2014. He noted that while requests were forthcoming to treat low back problems, the requests should be denied until medical necessity is fully explored in spite of his recognition that the hearing officer found the low back condition a compensable work-related injury. He also noted all cervical treatment is denied as not work-related (Respondents' Exhibit B, p. 9).

18. The Claimant testified at the hearing. He testified that prior to June 8, 2013 he worked Monday – Saturday performing heavy lifting, including huge bags on his shoulders while he worked for Employer and he never had any problems before. He identified himself as the person riding a bike and performing tricks, riding up and down stairs, in a DVD entered into evidence at Exhibit Q. He testified that he did not fall very often because he stayed close to the ground. He testified that after the video was prepared, he worked at an asphalt company working 70+ hours per week and then 50+ hours per week at Employer and there were never physical problems or limitations. He testified that prior to the injury he never had the pain and now he has it all the time. The Claimant testified that his low back pain and leg pain is ongoing. The pain from his upper left buttocks travels down the back of his butt, down the quad, down past the knee and sometimes down the calf and occasionally reaches his foot. It is constant and he never has relief. Sitting and putting pressure on his low back makes it worse. The Claimant exhibited his right leg and left leg for observation in the court. His right leg appeared to have regular muscle definition. His left leg showed visible atrophy and little muscle definition. The circumference of his calf was smaller on the left than the right. He testified that his doctor has recommended surgery for his lumbar spine because of a disk sitting on a nerve root. The Claimant also testified that he would like to proceed with cervical injections because his hands and fingers go numb and hurt. He also testified that his doctors have recommended an EMG for his upper extremities/cervical. He would like to pursue the lumbar surgery recommended by his doctors. The Claimant's testimony regarding his symptoms and his ability to work without restrictions or limitations prior to his June 8, 2013 injury was credible and persuasive and is found as fact.

19. Dr. Karnasiewicz testified at the hearing and continued his testimony in a deposition of July 28, 2014. Dr. Karnasiewicz is a neurosurgeon in Connecticut who not only treats patients, but performs medical examinations for the Workers' Compensation Board in Connecticut. He is appointed by judges to render opinions in cases when there is a question on compensability and the reasonableness and necessity of surgical intervention. Here, Dr. Karnasiewicz testified that the first time he saw the Claimant, he noted diffuse spinal complaints but did not have the benefit of lumbar imaging and he did not recommend surgery. When the Claimant was referred back a second time, Dr. Karnasiewicz testified that the pain complaints, which were more specific and with radiation down the left leg, along with the MRI of the lumbar spine, changed his recommendation. With the clinical presentation, visible leg atrophy, and the MRI, which

clearly showed that the disc was herniated and had been abutting the nerve root, this pathology was a reasonable explanation for the Claimant's lower back pain and left leg pain. Dr. Karnasiewicz opined that his explanation for why the Claimant's complaints changed from his first visit to his second was that the tear in the annulus had progressed. While the herniation in the MRI is small, it is in the location to compress and abut the nerve root. Considering the Claimant's clinical findings, complaints of pain which are consistent with a herniated disc, along with a MRI which shows the herniated disc itself, Dr. Karnasiewicz opined that the surgery would more likely than not improve the Claimant's condition. Dr. Karnasiewicz has no other medical treatment to offer Claimant other than surgical intervention. He opined that it is reasonable and that there is no other option that will relieve the Claimant's symptoms and those symptoms will not abate on their own. Dr. Karnasiewicz also testified that the mechanism of injury described by the Claimant is consistent with the symptoms the Claimant is experiencing. He disagrees with the opinion of Dr. Rauzzino on the issue of radiculopathy noting the Claimant has signs and symptoms of left L5-S1 radiculopathy and he also notes that he did not find evidence of positive Waddell's signs in his examinations of the Claimant.

20. At the completion of his testimony by deposition on July 28, 2014, Dr. Karnasiewicz testified that he felt strongly enough that the Claimant's symptoms were coming from the pathology on the lumbar MRI that he is willing to operate (Depo. Tr. Dr. Karnasiewicz, p. 4). He did not find it probable that the Claimant's symptoms were coming from somewhere else (Depo. Tr. Dr. Karnasiewicz, p. 4). He testified that "there is hard neurological evidence of compression of the S1 nerve root. Atrophy, which is consistent with longstanding compression, doesn't happen in a matter of weeks. It takes several months, sometimes a year for that to happen (Depo. Tr. Dr. Karnasiewicz, p. 21). Since there is radiographic findings and clinical signs that are consistent with S1 radiculopathy, Dr. Karnasiewicz opines that "it all fits together" (Depo. Tr. Dr. Karnasiewicz, p. 22). Dr. Karnasiewicz also testified that he is not overly concerned with the opinions of the earlier treating physicians in Colorado in this case because he didn't find any Waddell's signs and the Claimant "has a very straightforward problem" (Depo. Tr. Dr. Karnasiewicz, p. 32). While he understood that Dr. Rauzzino was an expert hired by Respondent, Dr. Karnasiewicz did not feel that this was a reason to hold this against his opinion, since he, himself, does IMEs as well. Rather, Dr. Karnasiewicz testified that their findings were different. In the end, Dr. Karnasiewicz testified that some of the Claimant's other symptoms were resolving on their own, but the herniated disk on the MRI at L5-S1 is clearly displacing the left S1 nerve root and causing the Claimant's low back and leg symptoms (Depo. Tr. Dr. Karnasiewicz, p. 44).

21. On August 19, 2014, Dr. Paz, was asked to render an additional opinion as to the reasonable necessity of the surgical recommendation and he issued a written report which was submitted into evidence in lieu of further deposition testimony. Dr. Paz noted that before a surgical recommendation should be followed through with, both organic and non-organic causes of symptoms need to be fully evaluated. He opined that the clinical course he reviewed prior to the Claimant leaving Colorado did not support a finding that the symptoms the surgery seeks to relieve are related to the disc

pathology seen on MRI. Therefore, he opined that the surgery is not reasonable nor necessary to treat the Claimant's condition. Moreover, the evidence strongly suggests that the symptoms the surgery intends to treat are not related to the abnormalities seen at the L5-S1 level. Dr. Paz opines that the fluctuating signs and symptoms seen in the Claimant's medical records are more consistent with a non-organic low back pain condition. Moreover, Dr. Paz considered the Colorado Medical Treatment Guidelines for Chronic Pain which include additional diagnostic procedures and psychological evaluation in cases like this. Dr. Paz also notes that with respect to the Colorado Medical Treatment Guidelines in Rule 17, Exhibit 1 for Low Back Pain, it specifically states, "in order to justify operative interventions, clinical findings, clinical course and the diagnostic tests must all be consistent resulting in a reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement." With respect to these Guidelines, Dr. Paz finds the absence of objective findings to support disk herniation with radiculopathy of the lumbar spine prior to July 13, 2013. Thus, he finds that the records do not support an organic etiology which is likely to improve with surgical intervention. As a result, Dr. Paz concludes that "the proposed surgery is not reasonable, necessary and causally related to the June 8, 2013 reported event." See Dr. Paz Supplemental Report, June 8, 2013.

22. There are a number of conflicting medical opinions in this case. However, the ALJ finds the opinions of Dr. Karnasiewicz and Dr. Patel more persuasive than the opinions of the peer review physicians and the opinions of Drs. Paz and Rauzzino.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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

Medical Benefits – Related and Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the “Medical Treatment Guidelines”) when furnishing medical aid under the Workers’ Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff’d Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App.

March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

In this claim, the Claimant testified credibly that the onset of his low back pain and his cervical/upper extremity symptoms corresponded temporally with his work injury. He also testified that prior to the June 8, 2013 work injury, the Claimant did not have the symptoms and there are no persuasive medical records to indicate that the Claimant treated for his current symptoms prior to this claim. Respondents try to correlate the Claimant's trick bike-riding activities from 2 years prior to the incident to his symptoms and/or pathology with no persuasive medical evidence. In the alternative, Respondents' experts have opined that the Claimant's symptoms and reports of pain do not correlate with the objective pathology.

Drs. Karnasiewicz and Patel reasonably relate the Claimant's current symptoms to the pathology seen in the Claimant's MRIs. Dr. Karnasiewicz testified that the first time he saw the Claimant, he noted diffuse spinal complaints but did not have the benefit of lumbar imaging and he did not recommend surgery. When the Claimant was referred back a second time, Dr. Karnasiewicz testified that the pain complaints, which were more specific and with radiation down the left leg, along with the MRI of the lumbar spine, changed his recommendation. With the clinical presentation, visible leg atrophy, and the MRI, which clearly showed that the disc was herniated and had been abutting the nerve root, this pathology was a reasonable explanation for the Claimant's lower back pain and left leg pain. Dr. Karnasiewicz opined that his explanation for why the Claimant's complaints changed from his first visit to his second was that the tear in the annulus had progressed. While the herniation in the MRI is small, it is in the location to compress and abut the nerve root. Considering the Claimant's clinical findings, complaints of pain which are consistent with a herniated disc, along with a MRI which shows the herniated disc itself, Dr. Karnasiewicz opined that the surgery would more likely than not improve the Claimant's condition. Dr. Karnasiewicz has no other medical treatment to offer Claimant other than surgical intervention. He opined that it is reasonable and that there is no other option that will relieve the Claimant's symptoms and those symptoms will not abate on their own. He did not find it probable that the Claimant's symptoms were coming from some other pain generator (or none at all, as has been suggested). Dr. Karnasiewicz testified credibly and persuasively that "there is hard neurological evidence of compression of the S1 nerve root and the presence of atrophy. Atrophy, which is consistent with longstanding compression, doesn't happen in a matter of weeks. It takes several months, sometimes a year for that to happen. Since there are radiographic findings and clinical signs that are consistent with S1 radiculopathy, Dr. Karnasiewicz opines that "it all fits together" and the Claimant "has a very straightforward problem." Dr. Karnasiewicz testified that while his findings were different. In the end, Dr. Karnasiewicz testified that the herniated disk on the MRI at L5-S1 is clearly displacing the left S1 nerve root and causing the Claimant's low back and leg symptoms.

The medical records and the opinions of Drs. Karnasiewicz and Patel as well as the testimony of the Claimant, establish that the Claimant underwent extensive

conservative treatment but nothing offered sustained relief from the cervical and lumbar symptoms that the Claimant continues to suffer. Dr. Karnasiewicz persuasively opines that the pathology at L5-S1 on the Claimant's lumbar MRI is more likely than not the pain generator for the Claimant's symptoms and that the proposed surgery is more likely than not to provide relief and improvement from the lumbar and leg symptoms.

Crediting the opinions of Dr. Karnasiewicz it is found the proposed surgical intervention is the Claimant's best opportunity for relief and Claimant is a reasonable candidate for the proposed surgery. The Claimant has proven by a preponderance of the evidence that the findings at L5-S1 are causally related to the Claimant's June 8, 2013 work injury and that the surgery recommended by Dr. Karnasiewicz is reasonably necessary. The Claimant has also established that the medical requests by Dr. Patel at issue in this matter are reasonable and necessary.

Temporary Disability Benefits

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

In this case, the Claimant established that he suffered a compensable injury on June 8, 2013 and that he has missed work and suffered a wage loss since that time as a result of the June 8, 2013 work injury. The Claimant's initial treatment was conservative, and he was authorized to continue to work with restrictions. Later, per a Physician Work Activity Status Report by Dr. Cohen dated December 19, 2013, the Claimant's work status is "no activity." This status is later confirmed in a letter dated June 13, 2014, when the Claimant requested that Dr. Patel clarify his opinion that Claimant's working restrictions was "no activity." The letter was answered by Dr. Barinder Mahal on June 18, 2014, indicating that "Patient with symptomatic cervical & lumbar radiculopathy with restrictions lifting, pushing, pulling, standing, & sitting. His restrictions should remain "No Activity." The Claimant has not returned to any type of employment. It is noted that ALJ Felter previously found that the Claimant had voluntarily left modified employment with Employer to return to Connecticut to be with

family and that he was responsible for termination due to his decision to abandon medically approved modified work provided by the Employer. Thus, ALJ Felter ordered that the claim for temporary disability benefits from July 12, 2013 through the date of the hearing (November 21, 2013) was denied and dismissed (Claimant's Exhibit 1, pp. 6-8, Order of ALJ Felter dated December 3, 2013). However, the "no activity" work status occurs on December 19, 2013 after ALJ Felter's Order as does the further clarification on June 18, 2014. Claimant has not been released from his "no activity" work status yet and the opinions of Drs. Rauzzino and Paz that the Claimant is (and has been) at MMI are not found to be credible or persuasive. Therefore, the Claimant has not worked since December 19, 2013 due to the disability related to his June 8, 2013 work injury and he has suffered a wage loss entitling him to receive temporary total disability benefits until one of the occurrences listed in § 8-42-105(3), C.R.S.

ORDER

It is therefore ordered that:

1. The L5-S1 discectomy recommended by Dr. Karnasiewicz is reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013 lumbar spine work injury.

2. The CESI injection C-Spine recommended by Dr. Patel is reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013 cervical spine work injury.

3. The cervical/upper extremity EMG recommended by Dr. Patel is reasonably necessary to cure and relieve the Claimant from the effects of his June 8, 2013 cervical spine work injury.

4. Respondent's liability shall specifically include medical treatment consisting of the above surgery, EMG and injection and all related medical treatment required for appropriate preparation for the surgery, as well as reasonably necessary post-surgical follow-up treatment per the Division of Workers Compensation Medical Fee Schedule.

5. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing December 19, 2013 until one of the occurrences listed in § 8-42-105(3), C.R.S.

6. Respondents shall pay the Claimant statutory interest at the rate of 8% per annum on all amounts not paid when due.

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

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

DATED: February 6, 2015

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

ISSUES

1. Whether Claimant is entitled to temporary total disability benefits.

2. Whether Claimant is responsible for the termination of her employment and resulting wage loss.

3. Whether the stipulated temporary partial disability benefits owed to Claimant shall terminate as of October 14, 2014.

STIPULATIONS

The parties made the following stipulations at the outset of the hearing

1. Claimant's average weekly wage is $825.16, with a corresponding temporary total disability (TTD) rate of $550.11.

2. Claimant was injured April 2, 2013. She continued to work thereafter until August 7, 2013.

3. Claimant was off work and paid TTD benefits from August 7, 2013 through November 22, 2013.

4. Claimant returned to work on November 22, 2013 and worked through June 6, 2014. No claim is being made for TTD or temporary partial disability (TPD) benefits during this timeframe.

5. Claimant has been off work since June 7, 2014.

6. As a result of the Claimant's separation from employment, she was offered COBRA benefits commencing on July 1, 2014. Those benefits are in the amount of $1,137.38 per month and are being paid by Claimant.

7. If Claimant is successful in asserting a right to receive TTD benefits, her average weekly wage would be increased to $1,087.63 effective July 1, 2014, and the TTD rate would be $725.09.

8. Claimant received unemployment benefits for three weeks from June 15, 2014, through July 5, 2014, in an amount of $481.00 per week for a total payment of $1,443.00, which would be offset 100 percent from any amount found to be due and owing by Respondents.

9. The Respondents' job offer to Claimant, which is the basis for their contention that no TTD benefits are due and owing, was at a rate $2.60 less than the Claimant's rate as of June 6, 2014. Therefore, the Claimant would be entitled to TPD benefits at two-thirds (2/3) of $104.00 per week, or a total amount of $69.33 per week from June 7, 2014, and ongoing until the restrictions are removed, Claimant is released at MMI, or Respondents are entitled to terminate pursuant to rule or statute.

FINDINGS OF FACT

1. Claimant was employed by Employer from May of 2010 until June 6, 2014. Claimant suffered an admitted work related injury on April 2, 2013. At the time of her injury, Claimant's title was Team Lead-Special Projects.

2. As Team Lead-Special Projects, Claimant's job duties were primarily customer service in nature. Claimant was also a supervisor and was responsible for coaching, managing, and providing direction to a team of customer service associates. The physical requirements of the job indicated that Claimant would be required to remain in the seated position for up to 90% of a shift. The physical requirements of the job description also indicate that reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions. *See* Exhibit A.

3. Due to the admitted work related injury on April 2, 2013, Claimant underwent hip surgery in August of 2013 and returned to work on November 23, 2013.

4. Upon her return, Claimant had work restrictions provided by John Papilion, M.D. The restrictions included: lifting no more than 10 pounds; no walking more than 2 hours per day, no sitting more than 6 hours per day, and no standing more than 1 hour per day. *See* Exhibit 2.

5. Employer accommodated Claimant's restrictions upon her return and Claimant continued working in the same position for Employer through June 6, 2014. Claimant worked full time and received her regular pre-injury pay. During this time Claimant was allowed to modify her job, as needed, to accommodate the restrictions given to her by Dr. Papilion.

6. In late May of 2014 Employer began making changes to Claimant's department due to the termination of a contract with a particular vendor. At the same time, a new contract had been executed and individuals within Claimant's department were being transferred from the contract that was ending to the new contract.

7. Claimant was aware of the changes going on and knew that positions within her department were being eliminated and that employees were being transferred to the new contract.

8. On June 2, 2014 Claimant emailed Employer's human resource department and inquired as to whether she was eligible to apply for any current job listings within the company due to her restrictions, including the 6 hour limitation on

sitting. The email was sent to Megan Cramer, Human Resources Recruiter, and Dawn Hart, Human Resources Business Partner. Claimant did not receive a reply to her inquiry by email. *See* Exhibit 5.

9. Two days later, on June 4, 2014, Claimant's inquiry was answered by Ms. Hart at a meeting held where Claimant and 14 other employees were present.

10. At the meeting, Claimant and the 14 other employees were advised that their contract was being downsized and that all of them, including Claimant, were being offered transfer positions to a new contract.

11. The employees were advised that they could accept the new transfer position or choose to end their employment with Employer. They were advised that the job offers for the transfer positions would be sent by email the following day.

12. The employees, including Claimant, were also advised by Ms. Hart that any work restrictions or accommodations would continue into the transfer position. At the meeting there were four or five individuals, including Claimant, who had current restrictions. Ms. Hart did not go into each restricted employees' details or schedules, but assured the entire group that the restrictions would be accommodated in the new positions.

13. Ms. Hart advised the employees that the job offers they would receive would be generic offers that would not outline or detail individual restrictions, but that once the job transfer was made, the employees would work with their new supervisors to make sure their restrictions continued to be accommodated.

14. Following the meeting, Claimant approached Ms. Hart in the elevator. Claimant asked Ms. Hart whether her restrictions would be accommodated during the three day training for the transfer position. Ms. Hart advised Claimant that it would not be a problem.

15. The testimony of Ms. Hart is found credible and persuasive.

16. The next day, on June 5, 2014, Claimant received the job offer discussed above via email from Ms. Cramer. The offer was for the position of Mortgage Servicing Specialist. The job duties again were primarily customer service in nature. The main difference between Claimant's position and the transfer position was that the transfer position was not a supervisory role. Ms. Cramer's email indicated Claimant must reply either accepting or declining the offer by 8:00 a.m. on June 6, 2014. *See* Exhibit 4.

17. The physical requirements listed in the transfer position required the employee to remain in the seated position for a minimum of 85% of their shift. The remaining requirements were essentially the same as Claimant's prior position. Like Claimant's prior position, the transfer job description also stated under physical requirements that "reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions." *See* Exhibit 4.

18. The transfer position job offer did not specify the number of days or number of hours that the Claimant was to work. The offer, on its face, did not violate Claimant's restrictions of sitting no more than 6 hours per day as imposed by Dr. Papilion.

19. On June 6, 2014 at 7:30 a.m. Claimant responded to the transfer position offer, declining the position. Claimant's email stated, "since one of the physical requirements for this position is to be seated for 85% of the time and that exceeds my restriction of sitting no more than 6 hours and there was no mention of what, if any, accommodations would be made, I need to decline this offer…" *See* Exhibit 4.

20. Several of Employer's employees who had restrictions in place accepted transfer positions and continued to work for Employer and their individual restrictions continued to be accommodated in the transfer positions.

21. Claimant's email declining the transfer position was a voluntary separation of her employment. Claimant's testimony is not logically credible or persuasive.

22. The transfer position would have resulted in a wage loss of $104.00 per week due to an hourly rate difference of $2.60 per hour, and would have started June 7, 2014.

23. Due to her voluntary separation of employment from Employer, Claimant lost health insurance benefits and began paying for COBRA benefits on July 1, 2014 in the amount of $1,137.38 per month.

24. Claimant received unemployment benefits from June 15, 2014 through July 5, 2014 in the amount of $481.00 per week.

25. On October 14, 2014 Claimant saw Dr. Papilion. Dr. Papilion indicated under assessment/plan that Claimant was ready to return to work. Dr. Papilion indicated his belief that Claimant was approaching MMI with regard to her hips and knee and noted that he would see her as needed. *See* Exhibit C.

26. Dr. Papilion did not remove Claimant's work restrictions nor did he place Claimant at MMI.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014).

Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

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

Responsible for Termination

Section 8-42-103(1)(g), C.R.S. (2014), and § 8-42-105(4)(a), C.R.S. (2014), provide that if a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, *supra.*

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), opinion after remand, 908 P.2d 1185 (Colo. App. 1995); *Lozano v. Grand River Hospital District,* W.C. No. 4-734-912 (ICAO, February 4, 2009). However, an employee is not responsible for a termination from employment if the physical effects of the industrial injury preclude the performance of assigned duties and cause the termination. *See Gilmore v. Industrial Claim Appeals Office, supra; Colorado Springs Disposal v. Industrial Claim Appeals Office, supra* (concept of responsible for termination does not

refer to the claimant's injury or injury producing conduct); *Lozano v. Grand River Hospital District, supra.*

Here, Claimant was not terminated due to her injury. In fact, the evidence shows that Employer continued to employ Claimant and accommodated her work restrictions without issue upon her return from surgery in November of 2013. The evidence also establishes that Employer would have continued to accommodate Claimant's restrictions in the transfer position that they offered her when her position was being downsized. The transfer position offered to Claimant was almost identical in terms of hours worked, work that was mostly sedentary, and work that was also customer service in nature. The evidence establishes that Employer made accommodations not only for Claimant but for other employees before the offer of the transfer position and that Employer continued to accommodate those employees who accepted the transfer positions. Respondents have met their burden to show, more likely than not, that if Claimant had accepted the transfer position instead of resigning she would remain Employed by Employer at this time and her restrictions would have continued to be accommodated by Employer.

Further, Claimant was advised at the June 4, 2014 meeting that her restrictions would continue to be accommodated in the transfer position. In addition to this advisement at the June 4, 2014 meeting, the transfer job position stated on its face in the job description that reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions of the job duties. Further, the job offer on its face does not indicate that it would require Claimant to sit for more than 6 hours per day, only that it would require sitting for 85% of a shift. It is not logically credible that Claimant believed she had to decline the job offer because it would not accommodate her restrictions. Claimant had been working with restrictions and with no problem for Employer from November of 2013 until June of 2014. Her position, similar to the transfer offer, indicated under job description that reasonable accommodations may be made and Employer had made accommodations to allow Claimant to continue working following her return from surgery. With a transfer job offer that was almost identical in terms of duties and an almost identical job description also indicating reasonable accommodations may be made, Claimant's testimony that she believed she would not be accommodated in the transfer position is not credible or persuasive.

Claimant's testimony that at the June 4, 2014 meeting there was no discussion of accommodations for work restrictions is also not credible or persuasive. It is illogical to conclude that following the meeting Claimant would have asked Ms. Hart in the elevator about accommodations during the three day training period for the transfer position and not about the transfer position generally if Claimant had concerns that were not covered at the general meeting surrounding the position itself. Logically, one would be more concerned with the job accommodations than the training accommodations.

Claimant's resignation was the cause of her separation of employment from Employer. Her choice to resign was not caused by her injury. Further, as found above, the transfer position did not require or specifically list hours that would exceed Claimant's medical restrictions on its face. Claimant's argument that she had to resign

because she could not perform the job duties as listed in the job offer is not persuasive. Respondents have met their burden, by a preponderance of the evidence, to show that Claimant's separation of employment was due to her own volitional act of resigning. Claimant was aware of the transfer position duties, knew they were similar to her prior job duties, and was advised her restrictions would continue to be accommodated. Yet, she made a volitional decision to resign employment. Based on her resignation, the termination and separation of employment was the fault of Claimant. Claimant's resulting wage loss is not attributable to her injury and she therefore is not entitled to TTD payments.

Temporary Partial Disability

Pursuant to the parties' signed stipulation offered to the court, temporary partial disability (TPD) benefits in the amount of $69.33 per week starting June 7, 2014 are owed to Claimant until the restrictions are removed, Claimant is released at maximum medical improvement, or Respondents are entitled to terminate benefits pursuant to rule or statute.

Although Respondents stipulated that TPD is owed, Respondents argue that the TPD benefits should end as of October, 14, 2014 and argue that at that time, Claimant was given a full release to return to work. This argument is not found persuasive. At the October 14, 2014 appointment Dr. Papilion merely indicated that Claimant was ready to return to work and was approaching MMI. Claimant's restrictions have not been removed, nor does the evidence show that Dr. Papilion has placed Claimant at MMI. Thus, there is insufficient evidence to support termination of the stipulated TPD benefits. In accordance with the parties' stipulation that TPD benefits are owed, Respondents must continue to pay TPD until termination consistent with § 8-42-106, C.R.S., (2014).

ORDER

It is therefore ordered that:

1. The claim for temporary total disability benefits is denied and dismissed.

2. Claimant was responsible for the termination of her employment and the resulting wage loss.

3. Pursuant to the stipulation of the parties, Respondents shall pay temporary partial disability benefits at a rate of $69.33 per week from June 7, 2014 and ongoing until termination consistent with § 8-42-106, C.R.S. (2014).

4. Pursuant to the stipulation of the parties, Respondents are entitled to an offset against temporary partial disability benefits for the

unemployment benefits Claimant received from June 15, 2014 through July 5, 2014.

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

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

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

DATED: February 10, 2015

/s/ Michelle E. Jones

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

STIPULATIONS AND PROCEDURAL MATTERS

A portion of testimony during the Claimant's cross-examination and redirect was not recorded due to error. The ALJ provided a transcription of her notes from this brief period of testimony on August 13, 2014 and the parties stipulated that the notes from the testimony missing from the digital recording accurately reflected the testimony and would substitute for the testimony or the need to retake the testimony. The ALJ's notes are made part of the record of the testimony in addition to the testimony that was available from the digital recording.

ISSUES

The following issues were submitted for determination at hearing:

1. Whether the Claimant proved, by a preponderance of the evidence, that she suffered a compensable injury in the course and scope of her employment on May 22, 2013.

2. If the Claimant's claim is compensable, whether she proved, by a preponderance of the evidence, that any or all of the medical treatment that she received was authorized, causally related and reasonably necessary to cure and relieve the effects of her work injury.

3. If the Claimant's claim is compensable, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability indemnity benefits from September 1, 2013 ongoing.

4. If the Claimant's claim is compensable and she establishes that she is entitled to TTD benefits, whether Respondents proved, by a preponderance of the evidence, that the Claimant failed to timely report her injury to the Employer in compliance with C.R.S.§8-43-102, and if so, the amount of the penalty.

FINDINGS OF FACT

1. The Claimant is a 36 year old female who was last employed by Employer. The last day that she worked was September 1, 2013 and she has not worked for Employer or anyone else since that date.

2. The Claimant has a long pre-existing history of low back pain with bilateral hip and lower extremity pain. The Claimant's medical records show pain in her low back associated with her fibromyalgia dating back 15 years. The medical records since 2008

demonstrate the Claimant's ongoing pain complaints and multiple associated symptoms. The Claimant was seen on December 10, 2008 at Memorial Emergency Department for five days of pain in her right buttocks running down the back of her leg to her foot. The Claimant complained of constant pain in her back. The Claimant listed sciatica and low back pain. The Claimant was again seen at Memorial on March 28, 2009 for her low back. On December 20, 2010, the Claimant was seen by her primary care doctor for an evaluation regarding chronic/constant back, lumbar, knee and left shoulder pain that she had been experiencing for the past 10 years. The Claimant also noted being nearly blind in her right eye and she has suffered from headaches since 2005 (Claimant's Exhibits 7, 9, 11,13 and 20; also see Respondents' Exhibit B, pp. 16-17). The Claimant underwent another examination with her primary care physician on December 9, 2011. At that examination, the Claimant stated she had low back and leg pain that was aggravated by ascending stairs, daily activities, rolling over in bed, sitting, standing, and walking. The Claimant noted that she has declined back surgery for years (Claimant's Exhibit 11, p. 581; Respondents' Exhibit C, p. 108). The Claimant had another follow-up examination with her primary care doctor on May 10, 2012. It was noted the Claimant had mild spinal stenosis at L4-5 and was again referred to a surgeon (Claimant's Exhibit 11, p. 604; Respondents' Exhibit B, p. 18). The Claimant's symptoms associated with her low back pain include a loss of balance, decreased mobility, limping, tingling in the legs, joint instability, joint tenderness, swelling and leg weakness. These are documented in the medical reports dated October 10, 2012 and July 18, 2012 (Claimant's Exhibit 11, p. 612 and p. 625; Respondents' Exhibit C, p.66 and p. 78). The Claimant was again seen on April 5, 2013 complaining of pain to the bilateral buttock, bilateral calf, bilateral hip, and bilateral thigh (Claimant's Exhibit 11, p. 643; Respondents' Exhibit B at p. 19). Thus, the Claimant testified inconsistent with her medical records that she has never complained about her hip (Hearing Tr. 08/13/2014 at p. 63). The Claimant had associated symptoms that included leg numbness, leg pain, spasms, and tightening and numbness in her extremities (Claimant's Exhibit 20; Respondents' Exhibit B at p.19). The pain was described as aching, discomforting and dull. The Claimant's medical records are replete with the symptoms associated with her low back pain. On December 10, 2012, the Claimant was examined by Dr. Shriver for nausea, anxiety and low back pain (Claimant's Exhibit 11, p. 632; Respondents' Exhibit C at 58). The Claimant presented with anxious/fearful thoughts, excessive worry, racing thoughts and relentlessness. The Claimant's anxiety is aggravated by conflict or stress. The Claimant described pain in her middle and low back that radiated into her legs. Claimant described the pain as an ache, discomforting, sharp, shooting and throbbing (Claimant's Exhibit 11, p. 632; Respondents' Exhibit C at 58). On March 7, 2013, the Claimant returned for a follow-up regarding her anxiety and back pain (Claimant's Exhibit 11, p. 639; Respondents' Exhibit C at p. 51). The Claimant stated the location of the pain was in her upper, middle, and lower back. The Claimant described the pain as burning, deep, sharp, shooting and stabbing. The Claimant was examined by Dr. Shriver again on April 5, 2013 for her anxiety and degenerative disc disease (Claimant's Exhibit 11, p. 643; Respondents' Exhibit C, p. 47). The Claimant described the location of pain in her bilateral lower back and bilateral lumbar area. The Claimant noted the pain radiated into her bilateral buttock, bilateral calf, bilateral foot and bilateral thigh. The Claimant described the pain as aching, discomforting and dull. Aggravating factors

included bending and standing. Associated symptoms included leg numbness, leg pain, numbness in extremities, spasms, tightening in legs, tightening in thighs and tenderness (Claimant's Exhibit 11, p. 643; Respondents' Exhibit C, p. 47). On May 2, 2013, the Claimant described her low back pain as deep and diffuse (Claimant's Exhibit 11, p. 647; Respondents' Exhibit C, p. 43).

3. In addition to the medical records, the Claimant testified regarding her extensive history of low back pain radiating down her right leg. The Claimant also testified regarding blurred vision and blindness in her right eye. The Claimant also testified that she has experienced numbness in her right leg. The Claimant testified there are some portions of her leg that she cannot feel and gets electric feelings in her feet. Claimant stated she had concerns regarding her leg and back pain that she wore special Doc Martin shoes to prevent her from falling (Hearing Tr. 8/13/2014 at p. 67).

4. The Court notes that the Claimant testified inconsistently from the medical records in that she stated she had never been referred for a surgical consultation for her back condition (Hearing Tr. 08/13/2014 at p.65). The Claimant further inconsistently testified that she only had intermittent leg pain in the past although the medical records document consistent leg pain (Hearing Tr. 08/13/2014 at p. 64). When asked whether her low back pain was chronic the Claimant testified that it was not chronic (Hearing Tr. 08/13/2014 at p.68). The Claimant also denied, inconsistent with her medical records, that daily activities such as walking aggravated her leg pain. The Claimant's medical records show that she had constant chronic back pain and had declined surgical recommendations multiple times in the past. Medical records show the Claimant's pain is aggravated by daily living activities outside of work.

5. The Claimant worked for the Employer as a nighttime sales associate. The Claimant's job duties for the Employer included working as a sales associate during business hours, then, once the store closed to the public, cleaning the bathroom, sweeping the floors, wiping down countertops, organizing and straightening up the store. The Claimant testified that she was working on the night of May 22, 2013 from 5 to 10 pm. (Hearing Tr. 8/13/2014 at p.19). Claimant testified that around 9:00 p.m. on May 22, 2013, "Josh" was the manager on duty that evening and he was closing up the front cash register. The Claimant testified that she was headed back to the break room to hang her apron up. Upon leaving the break room to head back out to the sales floor, the Claimant stated she made a right hand turn in the stockroom and her right leg came out from under her. The Claimant testified that she fell so hard she hit the ground and bounced back up to her feet (Hearing Tr. 8/13/2014 at pp. 19-20). The Claimant testified that she hit the side portion of her right knee and her right hip and buttocks area and the area of impact was mainly in the right side of her buttocks (Hearing Tr. 8/13/2014 at p. 20). The Claimant testified that due to the layout of the store and a wall separating the area where she fell and the front of the store, the manager on duty would not have had a direct line of site so as to view the Claimant's alleged fall (Hearing Tr. 8/13/2014 at p. 20). The Claimant testified that she did not slip on anything in particular, including water, but that she just slipped on the concrete (Hearing Tr. 8/13/2014 at pp. 23-24). The Claimant testified that her knee did not buckle and she was not having back

pain that night that caused her to fall (Hearing Tr. 8/13/2014 at p. 24). She testified that she was wearing a pair of Doc Marten shoes to prevent a slip since she does have a preexisting back and knee condition (Hearing Tr. 8/13/2014 at p. 25). The Claimant attributed her fall simply to the sealed concrete floor that she testified was "quite slick" with a "high shine to it" (Hearing Tr. 8/13/2014 at p. 25).

6. Ms. Butler credibly testified about her knowledge of the area in which Claimant's alleged fall occurred. Ms. Butler stated the ground was flat concrete with no topical liquids or oils applied to it. (Tr. 2 at 19-20). Ms. Butler stated they have never had any complaints regarding the ground in the stockroom and break room being slippery. (Tr. 2 at 20).

7. The Claimant testified that she did not feel immediate pain when she fell. She stated that she was in shock more than anything else and embarrassed and had a slight discomfort on the right side of her leg (Hearing Tr. 8/13/2014 at p. 25). She testified that the discomfort was different than pain she had experienced in the past. It was in a different specific spot in her DI up on her top flank of her hip where there is a bulging knot on her right side (Hearing Tr. 8/13/2014 at pp. 28-29).

8. The Claimant testified that she did not report her fall to the manager, Josh, that evening because she felt very uncomfortable around him (Hearing Tr. 8/13/2014 at p. 26).

9. The Claimant testified that within a few days after the incident that the pain/discomfort progressed and she noticed discomfort when she put on her work belt and she felt an odd feeling in her back. The work belt rubbed a spot right on her SI (Hearing Tr. 8/13/2014 at pp. 29-30). On the date of the alleged injury the Claimant further testified that she was on pain medications for her pre-existing back pain. The Claimant stated she could not feel her back pain because she was on her medications (Hearing Tr. 8/13/2014 at p. 74). The Claimant claimed the only pain she felt after falling was from a small bruise on her right knee. She stated the fall was nothing big and did not find it was a big ordeal, she was just embarrassed (Hearing Tr. 8/13/2014 at p. 80). The Claimant testified no medical treatment was needed on the date of injury and she didn't have pain in her buttocks until a couple of days after the fall (Hearing Tr. 8/13/2014 at p. 82).

10. The Claimant's medical records also document a motor vehicle accident that occurred a few days after the fall at work (Claimant's Exhibit 11, p. 654; Respondents' Exhibit C, p. 37). During cross examination, the Claimant confirmed that she was in a motor vehicle accident after the fall at work, but before the first time she sought medical care for her alleged work injury. Although the Claimant testified that the MVA was minor and the car just bumped a guardrail at low speed and the Claimant only had a headache from this MVA and there was no aggravation to her back (Hearing Tr. 08/13/2014 pp. 86-88 and stipulated ALJ notes of testimony missing from digital recording).

11. There was considerable discrepancy between the testimony of the Claimant and the testimony of the Claimant's supervisors and co-workers as to how and when the Claimant reported a fall occurring on May 22, 2011.

12. Although the Claimant claimed she fell at work on the evening of May 22, 2013, the Claimant's supervisor Shelley Jocson testified that she reviewed time records for the store and determined the Claimant was not working on May 22, 2013 although she had worked on May 21, 2013. Additionally, according to Ms. Jocson, the manager "Josh" who the Claimant testified was working the night of her fall, did work on May 22nd but on May 21st, the date that the records show that the Claimant worked, he left at 6:30pm and he was not the closing manager. Instead, a female manager Lynn Henderson was the closing manager on May 21, 2013 (Hearing Tr. 10/6/2014 at p. 43).

13. The Claimant testified the first person to whom she reported the injury was Ms. Butler, an assistant store manager for the Employer, and she reported it the next time they worked together. The Claimant stated she was not sure what day this was, but it was within two days from the alleged date of injury (Hearing Tr. 08/13/2014 at p. 31). In that conversation, the Claimant testified Ms. Butler told her the store surveillance cameras were not working at the time (Hearing Tr. 08/13/2014 at pp. 32-33). However, Ms. Butler credibly testified that the Claimant never approached her and told her she fell in the two to three days following the injury (Hearing Tr. 10/6/2014 at p. 10). Ms. Butler stated that she never had a conversation with Claimant regarding security cameras (Hearing Tr. 10/6/2014 at pp. at 10-11).

14. The Claimant also testified that on June 9, 2013, when she attended a work party at P.F. Changs in the evening, she talked to Ms. Butler again about her fall and how she had gone to urgent care that morning and that the Claimant felt the problem was becoming worse (Hearing Tr. 08/13/2014 at p. 36). The Claimant stated that Ms. Butler sat up looked, gazed around and said "ok" (Hearing Tr. 08/13/2014 at p. 37). However, Ms. Butler credibly testified the Claimant never told her about her alleged fall at the June 9, 2013 Pier 1 work party. Ms. Butler stated that, had the Claimant told her she fell at work, she would have immediately told her supervisor, Shelly Jocson, who was sitting across the table from her (Hearing Tr. 10/6/2014 at p.12). Ms. Jocson further testified that neither Ms. Butler nor the Claimant told her anything about a back injury at the Pier 1 party on June 9, 2013 (Hearing Tr. 10/6/2014 at p. 39).

15. Ms. Butler credibly testified the first time the Claimant told her about a workplace event was in mid to late June (Hearing Tr. 10/6/2014 at p.12). The Claimant told Ms. Butler in a light hearted manor, akin to joking, about the fall (Hearing Tr. 10/6/2014 at p.14). Ms. Butler further testified that the Claimant told Ms. Butler that she was not hurt and was really just more embarrassed about the fall so she hurried up looked around to see if anyone was watching and kept walking (Hearing Tr. 10/6/2014 at p.14). At that time, Ms. Butler testified that she asked the Claimant if she tripped or slipped on anything, which the Claimant replied she had not (Hearing Tr. 10/6/2014 at p.14). Ms. Butler testified that she told Ms. Jocson the following day. Ms. Butler informed Ms. Jocson because the conversation with the Claimant struck her as "odd,"

she believed she should report the conversation (Hearing Tr. 10/6/2014 at p.18). Ms. Jocson, the store manager, credibly testified that the Claimant told Ms. Butler she fell in the stockroom in mid-June. Ms. Jocson knew something happened but did not have notice of an injury from the Claimant (Hearing Tr. 10/6/2014 at p.38).

16. The Claimant's primary care physician told her on June 24, 2014 that she should notify her human resources department about reporting a potential injury (Claimant's Exhibit 11, p. 653; Respondents' Exhibit C at p. 168). The medical note does not document that during this visit the Claimant told her physician she had already reported it twice.

17. The Claimant testified she reported her injury to Ms. Jocson, the general manager of the store, for the first time on the day before they put in the workers' compensation claim (Hearing Tr. 08/13/2014, pp. 38-39). There is a form completed by Ms. Jocson titled "Telephone Reporting Workers' Compensation Report." The report notes that the injury was reported to the Employer on July 1, 2013 with an injury date of May 22, 2013. The loss description was, "walking from breakroom to mop room to shut off water. Foot placement did not take hold and fell (Claimant's Exhibit 4, p. 15). The Employer's First Report of injury was completed by Ms. Jocson on July 2, 2013. In describing the injury it states, "EE walked into the stock room and fell, with no cause, she saw a doctor but her diagnosis is unknown, she complains of back pain…" (Respondents' Exhibit A, p. 1).

18. Overall, the more credible testimony and the documents support a timeline that the Claimant did not report her fall to Ms. Butler around late June 2012 and then to Ms. Jocson on July 1, 2013, after her June 24, 2013 visit with her primary care physician where the Claimant's doctor advised her to report the fall to her Employer.

19. The Claimant stated Ms. Jocson told her she could no longer work until they figured out what was going on. The Claimant testified Ms. Jocson provided her a list of physicians at that time (Hearing Tr. 08/13/2014 at pp.38-39).

20. In the midst of the confusion about the date the Claimant reported she fell at work, the Claimant had actually sought care two weeks following her alleged fall, before reporting it to her Employer and before a workers' compensation claim was commenced. There is a medical record dated June 9, 2013 at Memorial Urgent Care. The Claimant was examined by Dr. Stanley Johnson. The Claimant arrived on a Sunday, over two weeks following her alleged injury, talking about how terrible her hip pain was. The Claimant stated the bruising and pain in her leg were gone and denied ever having pain in her low sacrum or tailbone areas (Claimant's Exhibit 9, p. 453). It was noted that the Claimant had chronic pain troubles before, including fibromyalgia and migraines, as well as, surgery on her right knee along with a number of other medical issues (Claimant's Exhibit 9, p. 453). Dr. Johnson's examination showed the Claimant's thigh was negative to palpation with no loss of range of motion. The Claimant underwent X-rays on her hip and back which were negative (Claimant's Exhibit 9, p. 453). These medical records show no objective signs that an injury

occurred to her back, buttocks or hip.

21. The Claimant testified that her shoulder was a separate issue that had been going on "for years" and was not related to the motor vehicle accident (Hearing Tr. 08/13/2014 at p. 87). The Claimant had stated to Dr. Ridings she had been having recurrent left shoulder dislocations since age 17 and reported 19 dislocations over the past six years (Respondents' Exhibit B, p.14). However, Claimant's medical records for a year leading up to the alleged date of injury do not mention any shoulder problems (Respondents' Exhibit B).

22. The Claimant treated again after another two weeks passed, when she was seen by her primary care provider Dr. Phillip Shriver on June 24, 2013. Dr. Shriver noted that the Claimant should notify her human resource department at work as her pain could be work-related (Claimant's Exhibit 11, p. 653; Respondents' Exhibit C at p. 168). The Claimant was complaining of right hip pain that radiated down her leg that was piercing and sharp. Dr. Shriver noted that there was an injury and a motor vehicle accident according to the history given by the Claimant. The Claimant complained of a headache and left arm dislocation from the motor vehicle accident. The Claimant complained of tailbone pain from her fall at work. The Claimant described pain that hurts all the time and makes it difficult to sleep (Claimant's Exhibit 11, p. 654; Respondents' Exhibit C, p. 169).

23. The Claimant was seen by Dr. Shriver again on July 2, 2013. Claimant was seen at this visit for musculoskeletal pain and instability in her left shoulder. The Claimant was referred for physical therapy and referred to an orthopedic surgeon for a surgical evaluation for her left shoulder. There was discussion about a 15 year history of her shoulder history which she reported had increased significantly in the last 6 months. There was no mention of the Claimant relating back pain to her alleged injury on May 22, 2013, nor discussion of any back, hip or leg pain at this visit (Claimant's Exhibit 11, p. 656; Respondents' Exhibit C, p. 33).

24. The Claimant selected Concentra as her authorized treating provider. The Claimant presented no credible evidence that the Employer did not give her a list of two designated physicians. The Claimant was first examined on July 8, 2013 at Concentra by Dr. Daniel Peterson. Dr. Peterson reported that the Claimant described her injury as a slip and fall where she landed right on her right buttock cheek. He noted that the injury occurred about 7 weeks prior, but the Claimant did not file a workers' compensation claim until just recently. Dr. Peterson noted that the Claimant reported not having any trouble at the time of the fall, but that by June 9, 2013, the Claimant went to Memorial Urgent Care and they did an x-ray of her sacrum and coccyx which revealed only developmental (not acute) abnormalities and an x-ray of her right hip which was completely normal. Dr. Peterson noted, but did not explore in detail, Claimant's history of low back problems before the fall at work, noting a prior MRI scan that showed typical age-related mild disc degeneration at L4-5. There was no nerve root displacement or spinal canal compromise. Dr. Peterson also noted Claimant had a history of migraines degenerative disk disease, fibromyalgia, blindness in her right eye, blurred vision, eye

pain, head injuries, leg swelling, joint pain, back pain and joint stiffness and she claims that she has celiac disease. Dr. Peterson had the Claimant's lumbar spine X-rayed and noted it was read as normal. Dr. Peterson noted that Claimant stated this had been accepted as a workers' compensation claim because of the fall at work even though it did not occur in the performance of her work duty. He diagnosed the Claimant with a back contusion and a sacroiliac strain. Dr. Peterson additionally opined "this is the ridiculous thing; it could happen anywhere, but has been accepted apparently by the work comp insurance already (Claimant's Exhibit 15, pp. 690-691; Respondents' Exhibit F, pp. 147-148). Contrary to the Claimant's statements to Dr. Peterson, Respondents contested the claim.

25. On follow-up with Dr. Peterson on July 23, 2013, the Claimant stated her symptoms were only slowly getting better and that she had been working regular duty. The Claimant advised that she had been to physical therapy multiple times and this made her feel better. Dr. Peterson noted that the Claimant agreed that she has SI joint dysfunction. Dr. Peterson also noted the Claimant was frustrated with slow progress being made on her SI stabilization. Dr. Peterson also noted that in the meantime Dr. Topper planned for Claimant's left shoulder surgery (Claimant's Exhibit 15, p. 698; Respondents' Exhibit F, p. 144).

26. At a re-check appointment with Dr. Peterson on August 6, 2013, the Claimant was working regular duty but she reported her pattern of symptoms only slowly getting better although the medications provided relief. The Claimant reported that the SI joint was finally staying stable although she still reported a lot of pain in the SI area (Claimant's Exhibit 15, p. 701; Respondents' Exhibit F, p. 140).

27. The Claimant underwent an orthopedic evaluation for her left shoulder in August of 2013. Following the orthopedic evaluation, Ms. Butler testified she had a conversation with Claimant regarding her shoulder and her needing surgery. The Claimant came to her in tears and told Ms. Butler that she could not even lift a pillow. When Ms. Butler told the Claimant she needed to talk to Ms. Jocson about her shoulder, the Claimant protested stating she did not want to because Shelly would have to cut her hours, and she needed the money. Ms. Jocson testified that in late August, one of the last days Claimant worked, she came to work with a sling on her shoulder (Hearing Tr. 10/6/2014, pp. 21-22).

28. Dr. Peterson examined the Claimant again on August 29, 2013. The Claimant told Dr. Peterson that she had not been working because she chose not to work. Claimant took herself off of work for two weeks. Dr. Peterson reported that the Claimant did get an SI injection on the right side from PA Peter Brumlich and reported 100% temporary relief from the injection. Dr. Peterson did note that the Claimant was getting ready to have shoulder surgery for a non-workers' compensation issue (Claimant's Exhibit 15, p. 21; Respondents' Exhibit F, p. 135). The Claimant's statements about taking herself off work voluntarily is contrary to the testimony of Ms. Jocson who testified that the Claimant was off work because of her left shoulder (Hearing Tr. 10/06/2014, pp. 45-46).

29. Claimant underwent an arthroscopic left shoulder surgery on October 11, 2013 (Claimant's Exhibit 20, pp. 773; Respondents' Exhibit B, p. 15).

30. The Claimant was not seen again for her workers' compensation injury until November 7, 2013. The Claimant came in as a walk-in and saw Dr. Lori Rossi who noted the Claimant was reporting increased pain and that she felt "back to square one." A referral was made to PA Peter Brumlich for a repeat SI injection (Claimant's Exhibit 15, p. 709; Respondents' Exhibit F, p. 125).

31. On December 10, 2013, the Claimant saw Dr. Peterson again and reported her symptoms were no better. Claimant stated she was not working because there was no light duty available. Dr. Peterson referred the Claimant to a physiatrist and pain specialist. He also made a referral for "case review and management due to complexity and delayed recovery" (Claimant's Exhibit 15, p. 320; Respondents' Exhibit F, p. 124).

32. The Claimant saw Dr. Eric O. Ridings for an IME on January 6, 2014. In conjunction with the IME, Dr. Ridings reviewed extensive medical records and provided a thorough medical record review. He also conducted an interview with the Claimant about the history of her present illness and conducted a physical examination. Dr. Ridings opined that Claimant's description of the fall was not reasonable stating that her right leg shot out in front of her, then, she fell very hard onto her right buttocks which resulted in her bouncing back up again onto her two feet again, all in the same movement. Dr. Ridings further opined that her current complaints are consistent with those she has documented on many occasions and are related to her chronic pain syndrome for which she has been on daily opiates for years. Consistent with her prior medical history, Dr. Ridings notes that the Claimant reported no benefit with multiple conservative treatment interventions. He opined that his examination revealed "diffuse pain to palpation in the lateral lumbar region, not over spinal joints or the SI joint" and "diffuse non-dermatomal numbness in the bilateral lower extremities." Dr. Ridings opined that he did "not see any objective evidence of any ongoing injury that [he] can relate within a reasonable degree of probability to the patient's claimed fall at work on 05-22-13." Dr. Ridings further opined Claimant's evaluation was not consistent with pain of a discogenic, facet, SI joint or neurologic etiology. He essentially found the Claimant was at her long-term baseline and requires no additional treatment and suffered no aggravation of her pre-existing conditions (Claimant's Exhibit 20, p. 778; Respondents' Exhibit B, p. 20).

33. Dr. Ridings persuasively testified at hearing consistent with his written IME report dated January 6, 2014. Dr. Ridings was present during both days of testimony for this hearing and heard the testimony of the Claimant, Ms. Butler and Ms. Jocson. Dr. Ridings testified that he could not say whether the Claimant actually fell or not on May 22, 2013. However, he did testify that regardless of whether or not she fell, there was no evidence that would connect any of the Claimant's ongoing symptoms to a fall at work (Hearing Tr. 10/06/2014, pp. 74-75). Notwithstanding the Claimant's testimony that the pain she has is different somehow, Dr. Ridings testified that based on his examination,

his questioning of her about where she was having pain, and his review of the medical records, the symptoms that the Claimant attributes to a fall occurring on May 22, 2013 are, in reality, the same symptoms that have been documented for years (Hearing Tr. 10/06/2014, pp. 75-79). Dr. Ridings also expressed concerns about the mechanism of the injury that the Claimant has described to several physicians and in her testimony. He opined that the description of her right foot being out in front of her then landing on her buttock and somehow also striking the outside of the knee in a position with her hip externally rotated and then bouncing back up to her feet would not be physically possible unless the fall was on a trampoline (Hearing Tr. 10/06/2014, p. 81). Dr. Ridings testified that, someone with fibromyalgia who hit the ground as the Claimant stated she did, would expect to have significant pain right away, not a couple days later as the Claimant had testified (Hearing Tr. 10/06/2014, p. 83). Dr. Ridings also testified that in reviewing the initial medical reports closest to the reported incident, there were fractures or bruising in any areas where she reported pain (Hearing Tr. 10/06/2014, pp. 82-84). Ultimately, Dr. Ridings testified that if the Claimant did fall, she did not sustain any injury as a result of that fall (Hearing Tr. 10/06/2014, p. 87).

34. Overall, the ALJ finds that the Claimant is not as credible a witness as Ms. Butler and Ms. Jocson. The Claimant also has credibility issues related to conflicts in her testimony and the extensive medical records in this case. The Claimant's testimony is also legitimately questioned due to the testimony of Dr. Ridings. Notably, the Claimant's description of her fall and the ensuing injury is not likely to have occurred in the manner the Claimant stated it did. The Claimant testified she stepped on flat concrete lost her footing and fell down bouncing back up onto her feet before coming to a stop. Dr. Ridings noted this simply was not physically possible. Dr. Peterson also noted this was "ridiculous." The Claimant also recalls conversations she had with her supervisor Ms. Butler that do not appear to have occurred. The Claimant testified the first person to whom she reported the injury was Ms. Butler, an assistant store manager for the Employer, the next time she worked. The Claimant stated she was not sure what day this was, but it was within two days from the alleged date of injury. In that conversation. The Claimant testified Ms. Butler told her the cameras were not working at the time. The Claimant testified she told Ms. Butler she took a fall in the stockroom and if she would replay the footage, she would "get a good laugh." The Claimant inconsistently testified she was not aware of there being any cameras in the backroom. The Claimant also testified she never had hip pain or chronic back pain prior to her workplace injury; however, the medical evidence showed the Claimant had an extensive prior history of chronic back and hip pain in the months and years prior to her alleged workplace injury. The Claimant further testified her usual back pain was not constant but was intermittent. The prior medical records show the Claimant had constant chronic back pain prior to her workplace injury. The Claimant testified she was given work restrictions for her workers' compensation claim and was never given work restrictions for her shoulder injury. The medical records indicate she received work restrictions for her shoulder. The Claimant testified it was her work restrictions from her alleged fall that Pier 1 took her off of work. The medical records and testimony from Dr. Ridings indicate the Claimant was taken off work for her shoulder injury. Testimony from Ms. Butler was that the Claimant was off work for her shoulder surgery. The Claimant made clear

misstatements to Dr. Peterson regarding the fact the insurance company had already accepted the claim when, in fact, it was not accepted.

35. There is no objective credible, or persuasive medical evidence that the Claimant suffered a new injury from her alleged slip and fall. Dr. Ridings noted in his report and testified that the Claimant was suffering from no new symptoms. While Claimant stated she had a "new pain that was sharp" and in a new area, the medical records showed the Claimant to have the same pain complaints she has had for the previous 10 years. The medical records indicate that the Claimant had prior hip pain, prior back pain, prior bilateral radiating leg pain, and bilateral buttock pain.

36. Overall, the Claimant's testimony was inconsistent and not generally substantiated by witnesses or the evidence. The testimony of Ms. Butler, Ms. Jocson and Dr. Ridings was generally found to be more credible and persuasive than that of the Claimant where there were conflicts in the testimony and evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. §8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

In resolving whether the Claimant has met her burden of proof to establish that she suffered a compensable injury, the ALJ must examine the totality of the evidence and consider credibility. In addition to issues related to the initial reporting of the alleged work injury, there are other inconsistencies in the Claimant's statements to medical providers, supervisors and in her testimony. In addition, Dr. Ridings testified that the mechanism of injury the Claimant provided to him and during testimony at the hearing was medically improbable and, even if it did occur, it was not likely to be the cause of the symptoms that the Claimant was now attributing to the slip and fall. He further

testified that if the symptoms were related to the slip and fall, the pain would have had a more immediate onset than that reported by the Claimant. After hearing the Claimant's testimony and reviewing medical records, Dr. Ridings concluded that if the Claimant fell, she did not sustain any injury as a result of the fall.

The first red flag in this case is the Claimant's very description of her mechanism of injury. The Claimant's ATP Dr. Peterson who saw the Claimant approximately 7 weeks after the alleged fall noted that the claim was "ridiculous." Dr. Ridings also expressed concerns about the mechanism of the injury that the Claimant has described to several physicians and in her testimony. He opined that the description of her right foot being out in front of her then landing on her buttock and somehow also striking the outside of the knee in a position with her hip externally rotated and then bouncing back up to her feet would not be physically possible unless the fall was on a trampoline. Further, Dr. Ridings testified that, someone with fibromyalgia who hit the ground as the Claimant stated she did would expect to have significant pain right away, not a couple days later as Claimant had testified. Dr. Ridings also testified that in reviewing the initial medical reports closest to the reported incident, there were fractures or bruising in any areas where she reported pain. Dr. Ridings further opined that the Claimant's current complaints are consistent with those she has documented on many occasions and are related to her chronic pain syndrome for which she has been on daily opiates for years. Consistent with her prior medical history, Dr. Ridings notes that the Claimant reported no benefit with multiple conservative treatment interventions. He opined that his examination revealed "diffuse pain to palpation in the lateral lumbar region, not over spinal joints or the SI joint" and "diffuse non-dermatomal numbness in the bilateral lower extremities." Dr. Ridings opined that he did "not see any objective evidence of any ongoing injury that [he] can relate within a reasonable degree of probability to the patient's claimed fall at work on 05-22-13." Dr. Ridings further opined Claimant's evaluation was not consistent with pain of a discogenic, facet, SI joint or neurologic etiology. He essentially found the Claimant was at her long-term baseline and requires no additional treatment and suffered no aggravation of her pre-existing conditions Notwithstanding the Claimant's testimony that the pain she has is different somehow, Dr. Ridings testified that based on his examination, his questioning of her about where she was having pain, and his review of the medical records, the symptoms that the Claimant attributes to a fall occurring on May 22, 2013 are, in reality, the same symptoms that have been documented for years.

In addition to the issues over the mechanism of injury, the Claimant's testimony regarding the reporting of the incident and her initial treatment for injuries she attributed to the fall also raise concerns as to the Claimant's credibility and her recollection. Overall, the ALJ finds that the Claimant is not as credible a witness as Ms. Butler and Ms. Jocson. There were conflicts between the Claimant's testimony and the extensive medical records in this case. The Claimant also recalls conversations she had with her supervisor Ms. Butler that do not appear to have occurred. The Claimant testified the first person to whom she reported the injury was Ms. Butler, an assistant store manager for the Employer, the next time she worked. The Claimant stated she was not sure what day this was, but it was within two days from the alleged date of injury. In that

conversation, the Claimant testified Ms. Butler told her the cameras were not working at the time. The Claimant testified she told Ms. Butler she took a fall in the stockroom and if she would replay the footage, she would "get a good laugh." The Claimant inconsistently testified she was not aware of there being any cameras in the backroom. The Claimant also testified she never had hip pain or chronic back pain prior to her workplace injury; however, the medical evidence showed the Claimant had an extensive prior history of chronic back and hip pain in the months and years prior to her alleged workplace injury. The Claimant further testified her usual back pain was not constant but was intermittent. The prior medical records show the Claimant had constant chronic back pain prior to her workplace injury. The Claimant testified she was given work restrictions for her workers' compensation claim and was never given work restrictions for her shoulder injury. The medical records indicate she received work restrictions for her shoulder. The Claimant testified it was her work restrictions from her alleged fall that Pier 1 took her off of work. The medical records and testimony from Dr. Ridings indicate Claimant was taken off work for her shoulder injury. Testimony from Ms. Butler was that the Claimant was off work for her shoulder surgery. The Claimant made clear misstatements to Dr. Peterson regarding the fact the insurance company had already accepted the claim when, in fact, it was not accepted.

Ultimately, there is no objective credible or persuasive medical evidence that the Claimant suffered a new injury from her alleged slip and fall. Dr. Ridings noted in his report and testified that the Claimant was suffering from no new symptoms. While Claimant stated she had a "new pain that was sharp" and in a new area, the medical records showed the Claimant to have the same pain complaints she has had for the previous 10 years. The medical records indicate that the Claimant had prior hip pain, prior back pain, prior bilateral radiating leg pain, and bilateral buttock pain.

Based on the foregoing, it hereby determined that the Claimant's testimony with regards to critical elements related to the purported work injury on May 22, 2013 is not credible and persuasive. Given the circumstances, including the inconsistent statements made by the Claimant, and the contrasting and more persuasive testimony of other witnesses, and the extensive medical records, the ALJ determines that the Claimant has failed to meet her burden of proof to establish that she sustained a work injury on May 22, 2013. As such, the Claimant's claims for compensation for WC 4-928-545-01 is denied and dismissed.

Remaining Issues

The Claimant failed to prove that an unwitnessed slip and fall that she alleges occurred on May 22, 2013 resulted in a compensable injury requiring medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issues regarding temporary disability benefits, medical benefits and penalties are moot.

ORDER

It is, therefore, ordered that:

1. The Claimant has failed to sustain her burden of proving by a preponderance of the evidence that she suffered a compensable injury resulting from work activities on May 22, 2013.

2. The Claimant's claims for benefits under the Workers' Compensation Act of Colorado under case number WC 4-928-545-01 are denied and dismissed.

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

DATED: February 18, 2015

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

STIPULATIONS

To the extent that the Claimant's alleged vertigo and hearing loss in his right ear are found to be related to the Claimant's February 19, 2013 work injury, the parties agree that, as of February 25, 2014, the Respondents would be liable for TTD benefits from that date ongoing.

ISSUES

The issues for determination are:

1. Whether the Claimant proved, by a preponderance of the evidence, that medical treatment for the Claimant's cognitive and memory issues, vertigo, and hearing loss in his right ear (including surgery performed on the right ear on March 5, 2014) is reasonably necessary and causally related to the Claimant's industrial injury on February 19, 2013.

2. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits from April 5, 2013 ongoing.

3. If the Claimant proves that he is entitled to temporary total disability indemnity benefits, whether the Respondents' proved that the Claimant is responsible for his termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Claimant worked for Employer for about six years prior to a work related injury on February 19, 2013. He initially was employed as a building maintenance engineer, level I (Hearing Tr. 07/29/2014, p. 14). While he held this position, his job duties included general electrical, heating, air conditioning, painting, repair, hot tub chemistry, locks, window and doors and just general building maintenance. The Claimant was not initially a supervisor and his supervisor was Terry Kressler (Hearing Tr. 07/29/2014, p. 15). After some time, the Claimant was promoted to maintenance engineer II. In addition to his other duties, he provided his supervisor with more assistance with the paperwork and he had a few more responsibilities. The Claimant testified that his work ratings as maintenance engineer II were not as good as when he was a maintenance engineer I, but he still generally received a good report on his reviews (Hearing Tr. 07/29/2014, p. 16; Claimant's Exhibit 14, pp. 200-207). Then, in May of 2012, the Claimant's supervisor retired and recommended the Claimant for the position of chief engineer. The Claimant applied for the position and he was hired for it (Hearing Tr. 07/29/2014, pp. 16-17). The Claimant testified that he was concerned about some of the computer and paperwork aspects of the chief engineer position but

he was assured that he would be trained. However, due to management travelling off-site and management changes, the Claimant testified that he was not properly trained and the management was not available to discuss issues with the Claimant (Hearing Tr. 07/29/2014, pp. 17-18). The Claimant also testified that he was understaffed almost the whole time he was chief engineer, having not been able to fill his old position, so there was only him with 2 other engineers instead of 3 (Hearing Tr. 07/29/2014, pp. 19-20). The Claimant also testified that when he took over the chief engineer position he took it upon himself to tackle some larger, long-standing maintenance problems. So, he would get frustrated that his supervisor would stress small issues and not recognize the overall job that he was performing (Hearing Tr. 07/29/2014, p. 21).

2. Ms. Gina Weeks testified by telephone at the hearing on July 29, 2014. Ms. Weeks is the resort director for the Employer and is familiar with the Claimant. She worked with him for a number of years when she was working with the developer and then she was his manager when she was promoted to resort director. Ms. Weeks testified that when the Claimant was in the position of maintenance technician, he was a great employee, responding to all of his calls and doing what he was supposed to and even going beyond that to do extra stuff (Hearing Tr. 07/29/2014, p. 63). Ms. Weeks testified that the Claimant was promoted to chief engineer on June 19, 2012 (Hearing Tr. 07/29/2014, p. 63). As a result of this, the Claimant had about 30 days of on the job training with Terry Kressler, the outgoing chief engineer who was retiring. Ms. Weeks does not recall any other training provided to the Claimant (Hearing Tr. 07/29/2014, p. 64). Once the Claimant was in the chief engineer position, Ms. Weeks described his job performance as “very poor.” She testified that the main performance issue was the Claimant’s lack of urgency. He never did anything “now” but put everything on hold for a later day (Hearing Tr. 07/29/2014, p. 64). Ms. Weeks had a counseling session and issued a written warning to the Claimant on November 12, 2012. Ms. Weeks testified the write-up was for a few issues, the main issue being that “he showed male chauvinistic tendencies towards me being a manager” and that he had no sense of urgency. The remaining issues in the write-up were smaller issues (Hearing Tr. 07/29/2014, p. 65). The written warning is consistent with Ms. Weeks testimony. The Performance Improvement plan was for “[the Claimant] to work on his leadership skills and his sense of Now. These are 2 important [Employer] values that have not been present in [the Claimant’s] demeanor since his shift from Maintenance Tech to Chief Engineer.” It was noted that if the Claimant could not manage his staff and himself more efficiently, then the consequences could lead up to termination (Respondents’ Exhibit A, p. 3).

3. Ms. Weeks testified that when she returned to work on October 1, 2012, after having a baby, she came back to the Claimant having been promoted to chief engineer. She noticed that the Claimant hadn’t hired a maintenance tech to replace his old position and some other employees came into her office telling her that morale was down. Ms. Weeks testified that she approached the Claimant about this to let him know morale was down with the engineering staff and that they needed to hire someone sooner rather than later. She testified that the Claimant looked at her and asked if she thought that morale was down because they were working for a woman, which Ms. Weeks characterized as a statement “which came out of nowhere.” Ms. Weeks did not

agree with the Claimant's recollection of the conversation that they were "commiserating." She testified that she told the Claimant clearly that morale was down because they needed to hire somebody because everybody was feeling overworked (Hearing Tr. 07/29/2014, p. 65-66). The Claimant testified that he never indicated that the staff's morale was down because they worked for Gina who was a woman. The Claimant described the situation differently. He testified that Gina had come into the Claimant's office and mentioned that in her new position as property manager she wasn't getting much respect from some of the employees. In response to this, the Claimant asked if Gina thought that this might be because she was a woman and some men have a problem with working for women. The Claimant testified that he did not say he ever had a problem working for women, only that this may be the issue, and they were having this discussion in the context of commiserating with each other. Then, the Claimant testified, that they went on to discuss other things that day and he felt that in a later write-up the conversation was taken out of context to make it sound like the Claimant didn't respect her because she was a woman. He felt that his word had been twisted into something that couldn't be any farther from the truth (Hearing Tr. 07/29/2014, pp. 56-57).

4. Ms. Weeks testified that the Claimant's 2012 performance review done in January 2013 was not a good review and he was found to be below "partially meets expectations" (Hearing Tr. 07/29/2014, p. 68). Ms. Weeks testified that the problems the Claimant was having included, difficulty from transitioning from an hourly to a salary employee, a lack of urgency, and failure to take direction from Ms. Weeks (Hearing Tr. 07/29/2014, p. 69). The 2012 Performance review confirms Ms. Weeks testimony and the Claimant received marks of either "partially meets expectations" or "does not meet expectations" in 7 of 8 reviewed categories. As for his overall performance it was noted that [the Claimant] does a great job in Maintenance. When asked to perform a task, [the Claimant] gets it done to satisfaction. [The Claimant] is a great Maintenance Tech, however, [the Claimant] needs to be a great Chief Engineer. He needs to see the whole big picture of taking care of the building and taking care of his team (Claimant's Exhibit 14, pp. 221-222; Respondents' Exhibit A, pp. 5-6).

5. Ms. Weeks testified that the Claimant received another write-up on February 2, 2013 (Hearing Tr. 07/29/2014, p. 69). The written write-up is for performance transgression. The write-up specifically details that the sidewalk had not been shoveled after snowfall for the second day in a row. After asking the Claimant to do this, Ms. Weeks found out a different employee actually did the work. The Claimant had also failed to install breaks on the double doors at the front of the building. There were other examples of projects that the Claimant was slow to begin or complete that had to be completed by the resort manager. The resort manager also noted that the Claimant had difficulty working with Housekeeping Department and does not always communicate with the Front Desk in the way that he should. It also came to light that the Claimant was apparently drawing pictures and writing songs in the Engineering log when he should have been working (Respondents' Exhibit A, p. 8).

6. Ms. Weeks testified that the Claimant missed one day of work after his February 19, 2013 work injury and when he returned his work restrictions included not

being able to climb on a ladder. However, the Claimant did not follow that restriction (Hearing Tr. 07/29/2014, p. 70). Ms. Weeks testified that the Claimant's behavior following his February 19, 2012 work injury was not any different than before. Specifically, Ms. Weeks testified that he did not seem any more forgetful (Hearing Tr. 07/29/2014, p. 70). Ms. Weeks testified the Claimant's employment was ultimately terminated due 100% to his job performance, but not related to any one specific circumstance (Hearing Tr. 07/29/2014, pp. 70-71). On cross-examination, Ms. Weeks confirmed that in mid-2012 the Claimant was promoted to chief engineer, Rafe Sykes was promoted to regional general manager and Ms. Weeks, who was previously the assistant GM was promoted to resort director. She characterized this as natural progressions and testified that "none of it was a big surprise" (Hearing Tr. 07/29/2014, p. 72). Ms. Weeks agreed that the Claimant received good reviews as a maintenance tech and that he didn't have bad performance reviews until he was promoted to chief engineer (Hearing Tr. 07/29/2014, p. 73).

7. On cross-examination, the Claimant was questioned about write-ups the Claimant received for work performance. The Claimant did not initially recall the details a write-up from November 12, 2012, but he believed he did receive a write-up around that time, about 3 months after he had been promoted to chief engineer (Hearing Tr. 07/29/2014, p. 37). In discussing the issues listed in the November 12, 2012 write-up, the Claimant testified that he believes he set his priorities differently from his supervisor Gina and that he felt it was a disagreement about priorities (Hearing Tr. 07/29/2014, pp. 38-39). The write-up also noted that the Claimant came in late for shifts, left in the middle of shifts and left early from shifts. However, the Claimant testified that this was a rare occurrence that he left mid-shift and it only happened one time when he had to give medicine to a sick pet (Hearing Tr. 07/29/2014, p. 40). The write-up also noted that the Claimant was asked to work extra shifts, but instead, he had another staff member work overtime. Regarding this issue, the Claimant did not have a specific recollection but he recalled that it was an emergency situation (Hearing Tr. 07/29/2014, pp. 40-41). The Claimant was also questioned about a poor performance review in January 2012. The Claimant attributes the problems brought up in this review to being understaffed and not having enough workers to take care of all of the issue that came up, so he would have to prioritize (Hearing Tr. 07/29/2014, pp. 42-43). On February 2, 2013, the Claimant received a final written warning, and he testified that he was aware that this meant his job was on the line if his performance did not improve. He testified that the way that he felt was that it seemed like the harder he worked, the more mistakes he made. He testified that "it was not for a lack of effort. I just felt like the victim of circumstances that I couldn't control" (Hearing Tr. 07/29/2014, p. 44).

8. The Claimant testified that on February 19, 2013 ice fell right on the back of his head just below the crown. He reported the injury within a few minutes of it happening to Gina Weeks, his supervisor (Hearing Tr. 07/29/2014, p. 22). The Claimant testified that Ms. Weeks did not provide a list of 2 providers, but rather sent the Claimant to the Breckenridge Clinic which was about a mile away. The hotel's shuttle driver took the Claimant to the clinic as the Claimant couldn't drive due to the loud whistle going off in both ears, the double vision and the dizziness/vertigo he was experiencing (Hearing Tr. 07/29/2014, pp. 23-24). The Claimant testified that he saw Dr.

Hay, the attending physician and she took the Claimant off work for a couple of days. Then, she released him to modified duty (Hearing Tr. 07/29/2014, p. 25). On cross-examination Ms. Weeks confirmed that the Claimant wasn't given a list of two doctors because there is only one medical center in Breckenridge, but that if it were after hours or more urgent, then an employee can go to St. Anthony's Hospital in Frisco (Hearing Tr. 07/29/2014, p. 77).

9. The Claimant was initially seen by Dr. Erin Hay at High Country Health Care Breckenridge. Dr. Hay noted that the Claimant reported "working on a fence when a large piece of ice fell from the 5th story roof landing on posterior of patient's head. Ice then exploded into smaller pieces." The Claimant complained of ringing in ears, tunnel vision at the time of injury and some double vision at the time he was at the clinic, slight dizziness and some overall weakness. The Claimant reported his head was full with pressure, worse later than when the incident occurred. Dr. Hay assessed the Claimant with a mild concussion and encouraged hydration, rest and Tylenol or ibuprofen as needed. He was taken off work until a follow-up visit in 2 days. He was sent to the hospital for a CT scan of his head (Claimant's Exhibit 4, pp. 5-8; Respondents' Exhibit F, pp. 130-133). In follow up on February 21, 2013, the Claimant reported feeling much better but he still had the ringing in bilateral ears and a headache. The CT scan was negative. The Claimant was released to return to work but was not to climb until further follow up (Claimant's Exhibit 4, pp. 9-11; Respondents' Exhibit F, pp. 126-129).

10. The Claimant received another final written warning for job performance on February 22, 2013, three days after his work injury. This write up was for performance transgression again. While dated on February 22, 2012, all of the specific transgression items took place between 2/2/13 and 2/17/2013, prior to the Claimant's injury. The performance transgressions included: the common hot tubs being unusable and dirty with one out of order; a Christmas wreath still being up on 2/3/13; failure to paint a wall that Claimant was asked to paint for 2 months; walking into a guest room with a "do not disturb" sign and encountering a guest in the bathroom in his underwear and then telling the guests they could not use their bathroom, leaving the guests angry and requiring the front desk agent to refund their entire stay; continued failure to work with the Housekeeping Department; and on 2/17 giving two employees the same week off so that the third employee and the Claimant had to cover all of the shifts that week and requiring overtime (Claimant's Exhibit 14, pp. 223-224; Respondents' Exhibit A, pp. 16-17). The Claimant testified that he was able to draft a rebuttal to the write up addressing each of the points in the written warning. The Claimant testified that it took him a long time to write this rebuttal compared to the other ones that he had written to his prior written discipline (Hearing Tr. 07/29/2014, p. 45).

11. On March 1, 2013, the Claimant returned to see Dr. Hay at High Country Health Breckenridge and he reported constant tinnitus, with his left ear worse than the right. The Claimant reported occasional mild headaches that occurred every few days. The Claimant reported no dizziness and stated he felt like he could climb ladders. The Claimant was returned to work with no work restrictions (Claimant's Exhibit 4, pp. 12-15; Respondents' Exhibit F, pp. 122-125).

12. When the Claimant saw Dr. Hay on March 18, 2013, he reported that the headaches went away and he has no dizziness. The Claimant still had ringing in his ears and was going to see Dr. Mawn about that. Dr. Hay noted that her ear exam of the Claimant was unremarkable (Claimant's Exhibit 4, pp. 15-17; Respondents' Exhibit F, pp. 118-120).

13. The Claimant testified that while he was working modified duty until about March 31, 2013, he was having mental and physical difficulties performing his job. He testified that his short-term memory suffered and he would forget things he had done or forget to do things that he should have done (Hearing Tr. 07/29/2014, p. 25). The Claimant testified that the types of problems that he was having at work before his injury were very different from the types of problems he was having after the injury. On one occasion, he recommended an employee for a raise and put it into the computer, but he told the employee he gave him a much bigger raise than he actually had, since he did not remember what he had put into the computer (Hearing Tr. 07/29/2014, p. 26). The Claimant's employment was terminated and he testified that his last day was April 5, 2013.

14. A termination reference was drafted on April 5, 2013 but was not provided to the Claimant. This write-up included all of the performance issues between the last write-up and April 5, 2013. Many of the listed items are continuations of problems for which the Claimant received write-ups in the past including the failure to complete maintenance projects such as a leak into the parking garage between 4/1 and 4/4; failure to hold meetings and complete paperwork; continued failure to communicate effectively with the Housekeeping Department and the Front Desk and failing to answer his phone; arriving at work late on the day a new engineer was starting; failing to paint an area that the manager had been asking him to paint since last fall; hot tub maintenance issues; continued failure to shovel walkways; a continued lack of urgency and inability to assist with hotel guests who were angry; and working on ladders before he was cleared to go on ladders by his doctor. Many of these performance issues are the same issues that management had been addressing with the Claimant since November of 2012 (Respondents' Exhibit A, pp. 22-24). The Claimant testified that he recalled that Dr. Hay released him to work, but with the restriction that he was not to be on ladders. The Claimant testified that he violated this recommendation because he did not remember he wasn't supposed to be on a ladder. He remembers being dizzy on the ladder and not feeling safe, but he was so worried about losing his job he has doing things that he probably shouldn't have done (Hearing Tr. 07/29/2014, p. 47).

15. After the Claimant was terminated, the Claimant testifies that his memory problems continue and now he forgets things around the house and doesn't remember chores he has already done. The Claimant also testified that he continued to have dizzy spells in the morning (Hearing Tr. 07/29/2014, p. 27). When the Claimant was referred to Dr. Mawn, he testified that he told Dr. Mawn about the continuing dizziness as well as the tinnitus (Hearing Tr. 07/29/2014, p. 29). The Claimant then saw an audiologist who gave him hearing tests and told him that his hearing was good for his age, but diagnosed tinnitus in a lower frequency in his right ear and in a higher frequency in his left ear (Hearing Tr. 07/29/2014, p. 30). The Claimant testified that he was told there

was no effective treatment for tinnitus but he suggested a medication that was essentially a mood enhancer. The Claimant did not like the way the pills made him feel so he discontinued them after a few days. Dr. Mawn also suggested a white-noise generator to mask the tinnitus at night so it would be less bothersome and the Claimant could sleep better (Hearing Tr. 07/29/2014, p. 31). The Claimant testified that over the next months his cognition problems lingered and he became depressed (Hearing Tr. 07/29/2014, pp. 32-33).

16. On July 12, 2013, the Claimant saw Dr. Christopher Mawn on referral from Dr. Hay for evaluation of posttraumatic head injury tinnitus. The Claimant denied any hearing loss but reported headaches which were diffuse in nature and controlled with Motrin. The Claimant reported difficulty making decisions. Dr. Mawn stated, that he asked the Claimant about his memory and "he does not think that he has decreased memory." The Claimant reported nausea with no vomiting and no vision changes. With respect the ear examination, Dr. Mawn noted,

> The external ears are normal there are no deformities and no masses. The external auditory canals are normal. The tympanic membranes are normal they are in good position with a normal light reflex. There is no middle ear effusion and the tympanic membranes move well. The hearing is normal as estimated through our conversation.

From the audiology test, Dr. Mawn noted that there was hearing loss on the left at 6000 Hz and there is only one frequency with asymmetry. Dr. Mawn prescribed amitriptyline for his daily headache and to see if it would help with the tinnitus. Dr. Mawn recommended a neurology evaluation to someone who specializes in post concussive cognitive deficits (Claimant's Exhibit 7, pp.104-106; Respondents' Exhibit F, pp. 139-141).

17. The Claimant did not see Dr. Hay again until August 12, 2013. The Claimant returned to Dr. Hay because he was referred to a neurologist by Dr. Mawn due to complaints of memory loss. However, due to this being a workers' compensation matter, the Claimant needed to be evaluated by Dr. Hay before seeing the specialist. The Claimant reported being very frustrated as he reports he was laid off for memory issues, but he feels that the memory issues only started after his head injury. Dr. Hay referred the Claimant to Dr. Lynn Parry a neurologist who specializes in mild head trauma post concussive symptoms. Dr. Hay noted no work restrictions at this time (Claimant's Exhibit 4, pp. 20-23; Respondents' Exhibit F, pp. 114-117).

18. The Claimant saw Dr. Mawn again on August 23, 2013 and complained of worsening tenderness of the ears bilaterally, worse on the right. Dr. Mawn noted that the Claimant's tinnitus was secondary to his head trauma and post concussive syndrome. The Claimant stopped taking the medication Dr. Mawn prescribed at the last visit as it made him nauseous and dizzy. Dr. Mawn noted that the Claimant was now exhibiting depression secondary to his mental status changes. Dr. Mawn advised the Claimant to go back to Dr. Hay for evaluation of a different antidepressant and follow up with a neurology appointment. However, Dr. Mawn opined that he has nothing else to

help him since the Claimant was not interested in trying tinnitus masking (Claimant's Exhibit 7, pp.109-110; Respondents' Exhibit F, pp. 136-137).

19. On September 26, 2013, Dr. Hay notes that Dr. Parry provided a neurological evaluation on 9/5/2013, but the Claimant and Dr. Hay did not have the reports. Dr. Hay additionally noted that the Claimant was "really concerned about his memory loss since the injury. He was fired due to forgetfulness and he has to write things down to remember them. Long term memory ok but new memory and short term memory have deficits." Dr. Hay noted that the Claimant "clearly has a more flat affect now" due to stress from losing his job and his memory difficulty. The Claimant was referred to neurologist Dr. Moon and for an MRI of the brain (Claimant's Exhibit 4, pp. 26-30; Respondents' Exhibit F, pp. 109-112).

20. On October 25, 2013, Dr. Hay noted that she still did not have the notes from Dr. Lynn Parry and her evaluation of the Claimant so she referred the Claimant to Dr. Moon. Additionally, Dr. Hay noted "this patient is out of a job due to his memory loss after his head trauma and I think it is related. Unfortunately he lost his job and there was a large amount of time when I did not see him and he did not relay to me how much memory difficulty he was having until after he lost his job. Once I saw him again he had lost his job. Memory difficult all after his injury per patient and I do think there is true memory difficulty now and I see a different affect in [the Claimant] (Claimant's Exhibit 4, pp. 31-34; Respondents' Exhibit F, pp. 1104-107).

21. On November 11, 2013, the Claimant was evaluated by Dr. Justin S. Moon. The Claimant described his mechanism of injury consistent with prior reports. Dr. Moon notes the Claimant complained of having "dizziness with room spinning, lightheadedness, and a rocking sensation that were all mile but fairly frequent." The Claimant reported that Dr. Mawn diagnosed him with tinnitus, but no other findings. He reported that Dr. Lynn Parry, who saw him once, diagnosed him as having memory deficits. An MRI was unremarkable. The Claimant told Dr. Moon that what he is most concerned about is his cognition and memory. "He states that he went back to work and was making mistakes and was disoriented and was eventually fired." The Claimant also reported he has been depressed since the incident and has a daily bilateral temporal low-grade headache. He reports sleep problems and some nausea. Dr. Moon performed an examination reporting no abnormalities. He diagnosed the Claimant with concussion, postconcussion syndrome and memory impairment. Dr. Moon noted that the Claimant's primary complaint of memory and cognition seemed to be "greater than one would suspect in association with the other postconcussion syndrome symptoms. In most cases, patients with memory complaints following a concussive state improve once the headaches, sleep issues and dizziness are controlled, but in this case, I am not certain that is going to take place." Dr. Moon prescribed Nortripytyline for the headache and central vertigo (Claimant's Exhibit 8, pp. 115-116; Respondents' Exhibit E, pp. 94-95).

22. The Claimant saw Kevin Reilly, Psy.D., on December 11, 2013 for evaluation of his neuropsychological status to assist in diagnosis and treatment planning. Dr. Reilly conducted a clinical interview and administered the

Neuropsychological Assessment Battery (NAB), the Medical Symptom Validity Test (MSVT), the Memory Complaints Inventory (MCI) and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). In terms of validity and reliability, Dr. Reilly noted that the Claimant's pattern of performance on verbal learning tasks was indicative of inconsistent/poor effort. The MCI also demonstrated a pattern of magnified memory complaints. The Reliable Digit Span score was indicative of poor effort. Based on this, Dr. Reilly opined that the results of this evaluation "cannot be considered a valid and reliable estimate of the patient's 'true' neurocognitive capacities." Dr. Reilly's ultimate impression is that the results of the evaluation are indicative of non-organic/psychosocial factors contributing to symptom production and/or maintenance. Further, "while the neurophsychometrics cannot be considered a valid and reliable measure of the patient's 'true' cognitive abilities, they were not indicative of memory impairments." Dr. Reilly further opined that "the ongoing reported cognitive difficulties are not likely due to the patient's possible concussion in February of this year (Respondents' Exhibit I).

23. The Claimant returned to see Dr. Moon again on January 13, 2014. The Claimant reported that he did not try the Nortriptyline that Dr. Moon recommended previously. The Claimant continues to report headaches and dizziness with fluctuations in his sleep. Dr. Moon noted that formal neurocognitive testing "seemed to suggest psychosomatic issues relating to the patient's memory. He was very inconsistent in his testing, as per report from Dr. Kevin Reilly." The Claimant expressed disappointment in the neuropsychological report and Dr. Moon advised that the only option is to get a second opinion. To treat the symptoms of headache, dizziness and sleep problems, Dr. Moon again recommended Nortriptyline (Claimant's Exhibit 8, p. 120; Respondents' Exhibit E, p. 87).

24. On January 23, 2014, Dr. Carolyn Burkhardt performed an independent medical examination of the Claimant including a review of medical and employment records from February 19, 2013 to October 9, 2013 (Claimant's Exhibit 9, pp. 122-127; Respondents' Exhibit C, pp. 58-63). Dr. Burkhardt also conducted an interview and a physical examination of the Claimant. Dr. Burkhardt noted the medical records initially report dizziness, but by March 1, 2013, the Claimant denied dizziness although he reported he still had tinnitus and occasional mild headaches (Claimant's Exhibit 9, p. 58; Respondents' Exhibit C, p. 122). Dr. Burkhardt noted that the Claimant was referred to Dr. Chris Mawn, an ENT. Dr. Burkhardt notes that in a July 1, 2013 medical report, Dr. Mawn described the pain when he was first on the head "like an explosion" and then he had head pain for a number of days with vertigo that resolved. There was no hearing loss reported at that time and the Claimant had a complexly normal exam with a hearing test that showed only one frequency with asymmetry on the left at 6000 Hz. Dr. Burkhardt notes that Dr. Mawn diagnosed the Claimant with headache, tinnitus and traumatic brain injury (Claimant's Exhibit 9, pp. 123; Respondents' Exhibit C, pp. 59). Dr. Burkhardt notes that the Claimant saw Dr. Hay on August 12, 2013 and the Claimant reported memory issues with things that happened after his injury, but had no problem remembering things that happened before the injury. At this visit, Dr. Burkhardt notes the Claimant denied headaches but was frustrated because he was laid off from work for memory issues that he felt started only after the head injury. The Claimant was

assessed with post-concussive symptoms including memory difficulty and he was referred to Dr. Parry and for follow up with Dr. Mawn (Claimant's Exhibit 9, pp. 123; Respondents' Exhibit C, pp. 59). In follow up with Dr. Mawn, the Claimant was still having tinnitus and the trial of amitriptylline caused nausea and dizziness so the Claimant stopped it after a week. Dr. Burkhardt noted that at an appointment with Dr. Parry on September 5, 2013, the Claimant was felt to have depression due to mental status changes and issues with sleep (Claimant's Exhibit 9, pp. 123; Respondents' Exhibit C, pp. 59). Dr. Burkhardt notes that when the Claimant saw Dr. Hay on 9/26/2013, he was worried about his memory issues and was afraid he could not get another job. The Claimant was referred to Dr. Moon for a neurology consult and an order of a brain MRI (Claimant's Exhibit 9, p. 123; Respondents' Exhibit C, p. 59). Dr. Burkhardt then reviewed and commented on work evaluations and discipline from 11/12/2012, 1/3/2013, 2/2/2013, 2/22/2013 and 4/5/2013 (Claimant's Exhibit 9, pp. 123-127; Respondents' Exhibit C, pp. 59-63). In the patient interview with the Claimant, Dr. Burkhardt notes that the Claimant reports he doesn't recall his accident that well. He told Dr. Burkhardt that something struck him on the head and at first he thought there was an explosion or that he was shot. He advised her that his ears were ringing loudly and he developed tunnel vision. He advised Dr. Burkhardt that he saw a doctor who determined that the Claimant had a concussion. He was disoriented and confused and was off work for several days before returning. When the Claimant went back to work he would forget things and he told Dr. Burkhardt that he has a bad memory now and he gets dizzy in the morning when he sits up. He also has constant ringing in his ears. The Claimant advised Dr. Burkhardt that he has always had a good memory and now he is missing things he is supposed to do as part of his job because of his memory issues (Claimant's Exhibit 9, pp. 127-128; Respondents' Exhibit C, pp. 63-64). In reviewing the records, Dr. Burkhardt concludes that the Claimant's memory problems and the issues he was having with his job predate the injury date and that the Claimant was having difficulties before the injury that he now states occurred after the injury (Claimant's Exhibit 9, p. 130; Respondents' Exhibit C, p. 64). Ultimately, Dr. Burkhardt opines that none of the Claimant's complaints, including the memory problems are related to the injury other than the tinnitus/ringing in the ears (Claimant's Exhibit 9, p.130; Respondents' Exhibit C, p.64). Dr. Burkhardt put the Claimant's date of MMI at 8/23/2013, the date the ENT stated there were no further treatments for tinnitus. Dr. Burkhardt provides an impairment rating of 1% for the tinnitus which does not impair the Claimant's hearing. She found the complaints of dizziness to be "minimal" and falling into "Class I vestibular function" which does not merit a rating. She finds that any memory issues are unrelated to the injury and provided no rating for such. Dr. Burkhardt did suggest a work up for dementia outside the workers' compensation system (Claimant's Exhibit 9, p.131; Respondents' Exhibit C, p.64).

25. In January of 2014, the Claimant testified that the dizziness he had been experiencing became more frequent, not just in the mornings but when he was driving and at night (Hearing Tr. 07/29/2014, p. 33). Then, the Claimant began to hear a "swishing" sound in his right ear. He testified that it sounded exactly like the washing machine running at the other end of the house. After several days, the Claimant testified, he realized that the sound was his own blood rushing through his middle ear (Hearing Tr. 07/29/2014, p. 34). Then, on February 25, 2014, the Claimant testified the

rhythmical swishing sound in his right ear was louder than it had been and he started to experience mild dizziness. When he rolled over onto his right side, the Claimant testified that he heard a kind of thump, thump swishing sound and then he realized he had gone completely deaf in his right ear. He testified that when he sat up in bed the vertigo set in and the room was spinning uncontrollably and he began to vomit. The Claimant's stepson called an ambulance and they took him to St. Anthony's Hospital. They called Dr. Mawn to evaluate the Claimant and he determined that the Claimant had a perilymphatic fistula in his right middle ear (Hearing Tr. 07/29/2014, pp. 34-35). The Claimant was transferred to the St. Anthony's Hospital in Lakewood after several days and the Claimant testified that Dr. Mawn performed surgery on his ear. At that point the Claimant was taken completely off work and put on bed rest (Hearing Tr. 07/29/2014, p. 36).

26. Regarding his dizziness, the Claimant testified that sometimes it would get better for a period of days when the dizziness was not as intense, but some days would be worse. The Claimant testified that when Dr. Mawn reported in a medical note that the Claimant's initial vertigo resolved, he thinks this likely refers to the Claimant telling Dr. Mawn that he might have been feeling better for some period of time (Hearing Tr. 07/29/2014, pp. 49-50). So, if Dr. Mawn noted that the Claimant "denies any vertigo," the Claimant testified that if he wasn't feeling dizzy right at that time, he would have said he didn't feel dizzy (Hearing Tr. 07/29/2014, p. 51).

27. The Claimant testified that he began monitoring his blood pressure in January and February of 2013 because he was losing weight and feeling stressed so a friend lent him a blood pressure monitor. He did not directly relate his blood pressure to the swishing sound he was hearing in his ear. There were times when he took his blood pressure and it was high and there was no swishing sound and times when he noted his blood pressure was normal but he was hearing the swishing sound, so he did not think these were related symptoms (Hearing Tr. 07/29/2014, p. 53).

28. On March 5, 2014, Dr. Mawn performed surgery on the Claimant. He noted that complete hearing loss and vertigo was the indication for the surgery. He performed a right middle ear exploration and right round window perilymphatic fistula repair. Dr. Mawn did note that there was "no obvious fluid leak from the oval window." Although Dr. Mawn did note a small amount of fluid in one of the edges of the round window. After suctioning this, there was no immediate reaccumulation (Claimant's Exhibit 7, pp. 111-112; Respondents' Exhibit N, pp. 186-187). The Claimant was discharged on March 8, 2014 with worsening tinnitus in his right ear and dizziness. The Claimant suffered hearing loss that the surgery did not correct (Claimant's Exhibit 5; Respondents' Exhibit N). On May 21, 2014, Dr. Mawn responded to interrogatories from the Claimant's counsel that medical care and treatment that began on February 25, 2014, including ambulance service, hospitalization at St. Anthony's and surgery performed on March 5, 2014 was more likely than not related to the Claimant's head injury at work on February 19, 2013 (Claimant's Exhibit 7, pp. 113-114; Respondents' Exhibit G, pp. 134-135).

29. On March 17, 2014, the Claimant was evaluated by Dr. Alan Lipkin. Dr. Lipkin noted the Claimant had a fistula repair on the right ear several weeks prior and that the packing remains. The Claimant's vertigo symptoms have been gradually improving since the surgery. The Claimant has not been able to hear from the right ear since the acute worsening. Dr. Lipkin noted that the case presented a "complicated history of probably right sided labytinthine fistula with a repair of the possible fistula three weeks ago. Dr. Lipkin opined that the Claimant's hearing loss is likely permanent but that the tinnitus will hopefully become less bothersome with time. Dr. Lipkin found no additional medication, surgery or imaging warranted at this time. He recommended discontinuation of ear drops, keeping the right ear dry and vestibular rehabilitation to be referred by Dr. Mawn (Claimant's Exhibit 11; Respondents' Exhibit K).

30. On May 20, 2014, the Claimant was evaluated by Dr. Bennet I. Machanic to assess for maximum medical improvement and permanent partial impairment. Dr. Machanic interviewed the Claimant, provided a review of the medical records and performed a physical examination and a mental status exam. Dr. Machanic found that the Claimant was at maximum medical improvement as of May 20, 2014. Dr. Machanic rated the Claimant for permanent, very mild and subtle cognitive problems, posttraumatic emotional depression and complete hearing loss in the right ear associated with the perilymphatic fistula along with continued vestibular dysfunction. In reference to the AMA Guidelines, 3rd Edition, for the 100% hearing loss in the right ear, Dr. Machanic provided a rating of 6% whole person, a rating of 7% whole person for his balance issues, an 8% whole person impairment for complex integrated cerebral function and 1% for the tinnitus. In combining the 6%, 7%, 8% and 1%, Dr. Mechanic provides a 20% whole person impairment rating (Claimant's Exhibit 12; Respondents' Exhibit H).

31. On May 31, 2014, Dr. Alan Bruns evaluated medical records of the Claimant and prepared a written report of his record review. Dr. Bruns did not interview or perform a physical examination of the Claimant in conjunction with this record review (Claimant's Exhibit 13; Respondents' Exhibit D). Dr. Bruns reviewed medical records from February 19, 2013, the date when a large piece of ice fell from a fifth story roof and landed on the posterior part of the Claimant's head, through March 17, 2014 (Claimant's Exhibit 13, p. 81-84; Respondents' Exhibit D, p. 149-152). Dr. Bruns ultimately concludes that the Claimant's memory loss, hearing loss and vertigo are not related to the Claimant's work related injury on February 19, 2013. Rather, Dr. Bruns finds that it is more likely that in February of 2014, the Claimant's acute and sudden hearing loss with associated vertigo is more likely attributable to a viral or vascular event. Dr. Bruns does not associate the February 14, 2014 event with a perilymphatic fistula. In any event, Dr. Bruns opined that, regardless of the final diagnosis, the February 25, 2014 event is not temporally related and was not caused by the traumatic icicle injury that occurred on February 19, 2013 (Claimant's Exhibit 13, p. 154; Respondents' Exhibit D, p. 86).

32. At the hearing, Dr. Burkhardt testified as an expert who is board certified in neurology and Level II accredited. Dr. Burkhardt generally testified in accord with her written IME report and she maintained that by and large the Claimant's memory and

cognition issues were not related to the Claimant's February 2013 work injury (Hearing Tr. 07/29/2014, pp. 83-84). Subsequent to the IME she performed, Dr. Burkhardt reviewed a record related to a neuropsychological test that the Claimant underwent (Hearing Tr. 07/29/2014, p. 88). She testified that this testing confirmed her opinion regarding the non-relatedness of the Claimant's memory issues to the work injury (Hearing Tr. 07/29/2014, p.90). Dr. Burkhardt testified that partly this was due to the Claimant failing the validity testing, indicative of poor effort, and suggestive of symptom magnification and response bias. Also, in some of the detailed testing, the Claimant tested as average. Overall, Dr. Burkhardt felt that this did not present a clear pattern suggesting a post-concussive picture (Hearing Tr. 07/29/2014, p. 90).

33. Dr. Bruns testified by deposition in this matter on August 13, 2014. Dr. Bruns has practiced medicine for 24 years and is board certified in otolaryngology and testified as an expert in that field (Depo. Tr. Dr. Alan Bruns, pp. 4-6). Dr. Bruns testified that he conducted a record review of the Claimant's medical records and, in conjunction with that, he researched online medical literature related to tinnitus vertigo hearing loss and trauma (Depo. Tr. Dr. Alan Bruns, p. 7). Dr. Bruns testified that there can be a number of differential diagnoses for a sudden onset hearing loss, including a viral insult, a vascular incident, autoimmune disease, trauma, ototoxic drugs or tumors. Dr. Bruns testified that of the 8-10 patients per year that come in with a sudden hearing loss, about half of those have a viral etiology (Depo. Tr. Dr. Alan Bruns, p. 9). Dr. Bruns testified that vascular etiologies are likely the second most common cause of sudden hearing loss (Depo. Tr. Dr. Alan Bruns, p. 12). Dr. Bruns testified that as for perilymphatic fistulas, he believes that it may be hard to relate this to sudden onset symptoms, other than those related to barotraumas or a penetrating top trauma to the temporal bone (Depo. Tr. Dr. Alan Bruns, p. 13). Dr. Bruns testified that in about 30-60% of patients who experience sudden hearing loss, there is associated vertigo (Depo. Tr. Dr. Alan Bruns, pp. 14-15). In the Claimant's case, Dr. Bruns testified that his record review noted "dizziness" at the time of the February 19, 2013 icicle injury, but not necessarily vertigo contemporaneous with the initial incident. Additionally Dr. Bruns noted that the dizziness went away within a couple of days although the Claimant still had tinnitus (Depo. Tr. Dr. Alan Bruns, pp. 17-18). Then, Dr. Bruns notes that the Claimant's dizziness returned but was related to the medication taken for the tinnitus. Dr. Bruns also notes that it did not sound like the dizziness was accompanied by the "spinning sensation" that more describes vertigo (Depo. Tr. Dr. Alan Bruns, p. 18). Dr. Bruns notes that it is not until the event on February 24, 2014, as documented in the ER medical records on February 25, 2014, that the Claimant specifically complains of vertigo (Depo. Tr. Dr. Alan Bruns, p. 18). Dr. Bruns also testified that in that record, the Claimant made the comment that the vertigo was a newer sensation for him in terms of the way the dizziness felt (Depo. Tr. Dr. Alan Bruns, p. 19). Dr. Bruns testified that a perilymphatic fistula is a disruption of the membrane within the inner ear and the perilymph, which is the fluid on the outer side of the inner ear, starts to leak into the middle ear. This can happen in several places, but most notably would happen in the round window or the oval window (Depo. Tr. Dr. Alan Bruns, p. 20). Dr. Bruns testified that this is often documented in an airplane or scuba diving and there is a change in pressure and the inner ear doesn't adjust and can pop like a balloon causing immediate hearing loss and vertigo and usually ringing (Depo. Tr. Dr. Alan Bruns, p. 20-21). In

cases of direct trauma, a significant head trauma with temporal bone fractures can cause a perilymphatic fistula (Depo. Tr. Dr. Alan Bruns, p. 21). Dr. Bruns also testified that this is usually a sudden onset as opposed to delayed symptoms (Depo. Tr. Dr. Alan Bruns, p. 22). Dr. Bruns testified that typical treatment of a perilymphatic fistula is 4-5 days of bed rest, and if the symptoms did not resolve, then a surgical procedure where the disruption is closed or a blood patch is put over the oval window and the round window (Depo. Tr. Dr. Alan Bruns, p. 23). As to when a perilymphatic fistula may have occurred in the Claimant, if it did, Dr. Bruns testified that the Claimant did not initially have hearing loss at the February 2013 incident and about 5 months after that a hearing test showed normal hearing on that side, so Dr. Bruns does not think that it would make sense that he had a fistula at that time (Depo. Tr. Dr. Alan Bruns, p. 24). In reviewing Dr. Mawn's operative note, Dr. Bruns testified that there wasn't anything that he read in the report that objectively confirmed there was a fistula because Dr. Mawn didn't see any evidence of fluid coming from the inner ear. While Dr. Mawn did suction some fluid, there was no re-accumulation, so the initial fluid could have been drainage from surrounding tissues or from the local that was injected. However, Dr. Bruns conceded that there is not a lot of fluid in the inner ear and if it were to drain out, you probably wouldn't see it, which is why Dr. Bruns opines that the operation is a bit nebulous and whether or not it really helps is nebulous (Depo. Tr. Dr. Alan Bruns, pp. 25-26). Dr. Bruns ultimately opined that it is hard to say whether or not the Claimant had a perilymphatic fistula in February of 2014. However, even if that could be proven, Dr. Bruns opined that it would not be probable that it was the result of a head trauma that the Claimant had the year prior in February of 2013 (Depo. Tr. Dr. Alan Bruns, pp. 27-28). Dr. Bruns also finds the Claimant's vertigo unrelated to the event of February 2013 (Depo. Tr. Dr. Alan Bruns, p. 29). On cross-examination, Dr. Bruns agreed that he did not evaluate the Claimant and did not take a history from him (Depo. Tr. Dr. Alan Bruns, p. 30). Dr. Bruns did not agree that the surgery performed in February 2014 to treat a diagnosed fistula was necessary, but he did agree that it was reasonable (Depo. Tr. Dr. Alan Bruns, p. 31). While it is hindsight that the surgery didn't provide benefit to the Claimant, Dr. Bruns did acknowledge that this is simply a risk of surgery, that it might provide benefit and it might not (Depo. Tr. Dr. Alan Bruns, pp. 32-33). Because the initial complaint was dizziness and didn't mention spinning or nausea or hearing loss, Dr. Bruns does not believe the Claimant had vertigo after the February 2013 incident, and this is not merely because the specific term vertigo was not used, it is also because of the lack of other items associated with vertigo (Depo. Tr. Dr. Alan Bruns, pp. 34-35). While Dr. Bruns agreed that "certain convincing head traumas" can cause perilymphatic fistulas, this would be rare and usually associated with severe head trauma (Depo. Tr. Dr. Alan Bruns, p. 61).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving

entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Medical Benefits - Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165

Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

This is an admitted claim and the Claimant has received conservative medical treatment for the initial symptoms that his treating physicians attributed to the February 19, 2013 industrial injury when a piece of ice fell from several stories up and landed on the posterior of the Claimant's head. The Claimant was initially seen by Dr. Erin Hay at High Country Health Care Breckenridge. Dr. Hay noted that the Claimant reported "working on a fence when a large piece of ice fell from the 5th story roof landing on posterior of patient's head. Ice then exploded into smaller pieces." At that time, the Claimant complained of ringing in ears, tunnel vision at the time of injury and some double vision at the time he was at the clinic, slight dizziness and some overall weakness. The Claimant reported his head was full with pressure, worse later than when the incident occurred. Dr. Hay assessed the Claimant with a mild concussion and encouraged hydration, rest and Tylenol or ibuprofen as needed. He was taken off work until a follow-up visit in 2 days. He was sent to the hospital for a CT scan of his head. The CT scan was negative. The Claimant was released to return to work but was not to climb until further follow up. On March 1, 2013, the Claimant returned to see Dr. Hay at High Country Health Breckenridge and he reported constant tinnitus, with his left ear worse than the right. The Claimant reported occasional mild headaches that occurred every few days. However, the Claimant reported no dizziness and stated he felt like he could climb ladders so he was returned to work with no work restrictions. When the Claimant saw Dr. Hay on March 18, 2013, he reported that the headaches went away and he has no dizziness. The Claimant still had ringing in his ears and was going to see Dr. Mawn about that. Dr. Hay noted that her ear exam of the Claimant was unremarkable.

The Claimant testified that while he was working modified duty until about March 31, 2013, he was having mental and physical difficulties performing his job. He testified

that his short-term memory suffered and he would forget things he had done or forget to do things that he should have done. The Claimant testified that the types of problems that he was having at work before his injury were very different from the types of problems he was having after the injury. However, in the initial medical records in February and March, the Claimant was not raising these complaints and the Claimant's ATP was not noting these issues independently.

The Claimant's employment was terminated on April 5, 2013. After the Claimant was terminated, the Claimant testifies that his memory problems continue and now he forgets things around the house and doesn't remember chores he has already done. The Claimant also testified that he continued to have dizzy spells in the morning When the Claimant was referred to Dr. Mawn, he testified that he told Dr. Mawn about the continuing dizziness as well as the tinnitus. The Claimant then saw an audiologist who gave him hearing tests and told him that his hearing was good for his age, but diagnosed tinnitus in a lower frequency in his right ear and in a higher frequency in his left ear. The Claimant testified that he was told there was no effective treatment for tinnitus but he suggested a medication that was essentially a mood enhancer. The Claimant did not like the way the pills made him feel so he discontinued them after a few days. Dr. Mawn also suggested a white-noise generator to mask the tinnitus at night so it would be less bothersome and the Claimant could sleep better. The Claimant testified that over the next months his cognition problems lingered and he became depressed. However, the Claimant only started to raise these memory and cognition complaints after his employment was terminated and he argued that this was the reason that he was terminated.

Yet, even in the summer of 2013, the Claimant made conflicting statements to his medical providers about the memory and cognition issues. On July 12, 2013, the Claimant saw Dr. Christopher Mawn on referral from Dr. Hay for evaluation of posttraumatic head injury tinnitus. The Claimant denied any hearing loss but reported headaches which were diffuse in nature and controlled with Motrin. The Claimant reported difficulty making decisions. Dr. Mawn stated, that he asked the Claimant about his memory and "he does not think that he has decreased memory." The Claimant reported nausea with no vomiting and no vision changes. With respect the ear examination, Dr. Mawn noted,

> The external ears are normal there are no deformities and no masses. The external auditory canals are normal. The tympanic membranes are normal they are in good position with a normal light reflex. There is no middle ear effusion and the tympanic membranes move well. The hearing is normal as estimated through our conversation.

From the audiology test, Dr. Mawn noted that there was hearing loss on the left at 6000 Hz and there is only one frequency with asymmetry. Dr. Mawn prescribed amitriptyline for his daily headache and to see if it would help with the tinnitus. Dr. Mawn recommended a neurology evaluation to someone who specializes in post concussive cognitive deficits. Essentially, at this point, the Claimant's initial symptoms following the injury had generally subsided other than the tinnitus and headaches and the Claimant

was likely aware that there was not much more that could be done medically to improve his condition.

It was only after this that the Claimant began to raise the cognitive issues and connect them with his injury. The problem with this is that although the Claimant perceives that he was fired for cognitive and memory issues that impacted his job performance only after the February 19, 2013 injury, the employment records tell a different story. In reviewing the employment records, it is clear that the Claimant's job performance actually altered at the time he was promoted from being an hourly maintenance technician to a salaried chief engineer and supervisor. The write-ups show that the types of things for which the Claimant was disciplined after the injury were actually the same types of incidents (in some cases a continuation of the very same incidents) that were occurring as early as October of 2013, shortly after his employment change. To the extent that the Claimant has memory and cognitive issues, if he does, then these issues were certainly manifesting themselves months prior to a February 19, 2013 work injury. However, the treating physicians did not have access to the employment records and disciplinary write-ups and reviews, and therefore, they took the Claimant at his word that the problems that he was having commenced after the injury date and had not been ongoing for quite some time.

As a result of the Claimant's memory and cognitive complaints, starting in August of 2013, the physicians began to focus more on these issues as opposed to the initial treatment focus. When the Claimant returned to see Dr. Hay after an absence of several months, he had to see her because he was referred to a neurologist by Dr. Mawn due to complaints of memory loss. However, due to this being a workers' compensation matter, the Claimant needed to be evaluated by Dr. Hay before seeing the specialist. The Claimant reported being very frustrated as he reports he was laid off for memory issues, but he feels that the memory issues only started after his head injury. The Claimant saw Dr. Mawn again on August 23, 2013 and complained of worsening tenderness of the ears bilaterally, worse on the right. Dr. Mawn noted that the Claimant's tinnitus was secondary to his head trauma and post concussive syndrome. The Claimant stopped taking the medication Dr. Mawn prescribed at the last visit as it made him nauseous and dizzy. Dr. Mawn noted that the Claimant was now exhibiting depression secondary to his mental status changes. However, Dr. Mawn opined that he has nothing else to help him since the Claimant was not interested in trying tinnitus masking.

As of October 25, 2013, Dr. Hay was of the opinion that the Claimant "is out of a job due to his memory loss after his head trauma and I think it is related." Again, Dr. Hay was relying on the Claimant's reports and not the employment records which told a different picture. On November 11, 2013, the Claimant was evaluated by Dr. Justin S. Moon. Dr. Moon performed an examination reporting no abnormalities. He diagnosed the Claimant with concussion, postconcussion syndrome and memory impairment. Dr. Moon noted that the Claimant's primary complaint of memory and cognition seemed to be "greater than one would suspect in association with the other postconcussion syndrome symptoms. In most cases, patients with memory complaints following a concussive state improve once the headaches, sleep issues and dizziness are controlled, but in this case, I am not certain that is going to take place." Dr. Moon

recommended a psych evaluation and the Claimant was sent to Kevin Reilly, Psy.D., on December 11, 2013 for evaluation of his neuropsychological status. Dr. Reilly conducted a clinical interview and administered the Neuropsychological Assessment Battery (NAB), the Medical Symptom Validity Test (MSVT), the Memory Complaints Inventory (MCI) and the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). In terms of validity and reliability, Dr. Reilly noted that the Claimant's pattern of performance on verbal learning tasks was indicative of inconsistent/poor effort. The MCI also demonstrated a pattern of magnified memory complaints. The Reliable Digit Span score was indicative of poor effort. Based on this, Dr. Reilly opined that the results of this evaluation "cannot be considered a valid and reliable estimate of the patient's 'true' neurocognitive capacities." Dr. Reilly's ultimate impression is that the results of the evaluation are indicative of non-organic/psychosocial factors contributing to symptom production and/or maintenance. Further, "while the neurophsychometrics cannot be considered a valid and reliable measure of the patient's 'true' cognitive abilities, they were not indicative of memory impairments." Dr. Reilly further opined that "the ongoing reported cognitive difficulties are not likely due to the patient's possible concussion in February of this year.

On January 23, 2014, Dr. Carolyn Burkhardt performed an independent medical examination of the Claimant including a review of medical and employment records from February 19, 2013 to October 9, 2013. Ultimately, Dr. Burkhardt opines that none of the Claimant's complaints, including the memory problems are related to the injury other than the tinnitus/ringing in the ears. Dr. Burkhardt spent a good deal of time comparing the employment records with the medical records and concluded that the Claimant's reported memory problems and issues he was having with his job predated the injury. Dr. Burkhardt put the Claimant's date of MMI at 8/23/2013, the date the ENT stated there were no further treatments for tinnitus. Dr. Burkhardt provides an impairment rating of 1% for the tinnitus which does not impair the Claimant's hearing. She found the complaints of dizziness to be "minimal" and falling into "Class I vestibular function" which does not merit a rating. She finds that any memory issues are unrelated to the injury and provided no rating for such. Dr. Burkhardt did suggest a work up for dementia outside the workers' compensation system. At the hearing, Dr. Burkhardt generally testified in accord with her written IME report and she maintained that by and large the Claimant's memory and cognition issues were not related to the Claimant's February 2013 work injury. Subsequent to the IME she performed, Dr. Burkhardt reviewed a record related to a neuropsychological test that the Claimant underwent. Dr. Burkhardt testified that was due to the Claimant failing the validity testing, indicative of poor effort, and suggestive of symptom magnification and response bias, this did not present a clear pattern suggesting a post-concussive picture.

Then, in January of 2014, the Claimant testified that the dizziness he had been experiencing became more frequent, not just in the mornings but when he was driving and at night and he began to hear a "swishing" sound in his right ear. On February 25, 2014, the Claimant testified the rhythmical swishing sound in his right ear was louder than it had been and he started to experience mild dizziness. When he rolled over onto his right side, the Claimant testified that he heard a kind of thump, thump swishing sound and then he realized he had gone completely deaf in his right ear. He testified

that when he sat up in bed the vertigo set in and the room was spinning uncontrollably and he began to vomit. The Claimant's stepson called an ambulance and they took him to St. Anthony's Hospital. They called Dr. Mawn to evaluate the Claimant and he determined that the Claimant had a perilymphatic fistula in his right middle ear. The Claimant was transferred to the St. Anthony's Hospital in Lakewood after several days and the Claimant testified that Dr. Mawn performed surgery on his ear. At that point the Claimant was taken completely off work and put on bed rest.

On March 5, 2014, Dr. Mawn performed surgery on the Claimant. He noted that complete hearing loss and vertigo was the indication for the surgery. He performed a right middle ear exploration and right round window perilymphatic fistula repair. Dr. Mawn did note that there was "no obvious fluid leak from the oval window." Although Dr. Mawn did note a small amount of fluid in one of the edges of the round window. After suctioning this, there was no immediate reaccumulation. The Claimant was discharged on March 8, 2014 with worsening tinnitus in his right ear and dizziness. The Claimant suffered hearing loss that the surgery did not correct. On May 21, 2014, Dr. Mawn responded to interrogatories from the Claimant's counsel that medical care and treatment that began on February 25, 2014, including ambulance service, hospitalization at St. Anthony's and surgery performed on March 5, 2014 was more likely than not related to the Claimant's head injury at work on February 19, 2013.

On March 17, 2014, the Claimant was evaluated by Dr. Alan Lipkin. Dr. Lipkin noted the Claimant had a fistula repair on the right ear several weeks prior and that the packing remains. The Claimant's vertigo symptoms have been gradually improving since the surgery. The Claimant has not been able to hear from the right ear since the acute worsening. Dr. Lipkin noted that the case presented a "complicated history of probably right sided labytinthine fistula with a repair of the possible fistula three weeks ago. Dr. Lipkin opined that the Claimant's hearing loss is likely permanent but that the tinnitus will hopefully become less bothersome with time. Dr. Lipkin found no additional medication, surgery or imaging warranted at this time. He recommended discontinuation of ear drops, keeping the right ear dry and vestibular rehabilitation to be referred by Dr. Mawn.

On May 20, 2014, the Claimant was evaluated by Dr. Bennet I. Machanic to assess for maximum medical improvement and permanent partial impairment. Dr. Machanic interviewed the Claimant, provided a review of the medical records and performed a physical examination and a mental status exam. Dr. Machanic found that the Claimant was at maximum medical improvement as of May 20, 2014. Dr. Machanic rated the Claimant for permanent, very mild and subtle cognitive problems, posttraumatic emotional depression and complete hearing loss in the right ear associated with the perilymphatic fistula along with continued vestibular dysfunction. In reference to the AMA Guidelines, 3rd Edition, for the 100% hearing loss in the right ear, Dr. Machanic provided a rating of 6% whole person, a rating of 7% whole person for his balance issues, an 8% whole person impairment for complex integrated cerebral function and 1% for the tinnitus. In combining the 6%, 7%, 8% and 1%, Dr. Mechanic provides a 20% whole person impairment rating.

Shortly after this, on May 31, 2014, Dr. Alan Bruns evaluated medical records of the Claimant and prepared a written report of his record review. Dr. Bruns ultimately concluded that the Claimant's memory loss, hearing loss and vertigo are not related to the Claimant's work related injury on February 19, 2013. Rather, Dr. Bruns finds that it is more likely that in February of 2014, the Claimant's acute and sudden hearing loss with associated vertigo is more likely attributable to a viral or vascular event. Dr. Bruns does not associate the February 14, 2014 event with a perilymphatic fistula. In any event, Dr. Bruns opined that, regardless of the final diagnosis, the February 25, 2014 event is not temporally related and was not caused by the traumatic icicle injury that occurred on February 19, 2013. Dr. Bruns testified by deposition in this matter on August 13, 2014. Dr. Bruns testified that he conducted a record review of the Claimant's medical records and, in conjunction with that, he researched online medical literature related to tinnitus vertigo hearing loss and trauma. Dr. Bruns testified that there can be a number of differential diagnoses for a sudden onset hearing loss, including a viral insult, a vascular incident, autoimmune disease, trauma, ototoxic drugs or tumors. Dr. Bruns testified that about half of patients who suffer a sudden loss of hearing have a viral etiology and that that vascular etiologies are likely the second most common cause of sudden hearing loss. Dr. Bruns testified that as for perilymphatic fistulas, he believes that it may be hard to relate this to sudden onset symptoms, other than those related to barotraumas or a penetrating top trauma to the temporal bone. Dr. Bruns notes that it is not until the event on February 24, 2014, as documented in the ER medical records on February 25, 2014, that the Claimant specifically complains of vertigo and that the Claimant made the comment that the vertigo was a newer sensation for him in terms of the way the dizziness felt. Dr. Bruns testified that a perilymphatic fistula is a disruption of the membrane within the inner ear and the perilymph, which is the fluid on the outer side of the inner ear, starts to leak into the middle ear. This can happen in several places, but most notably would happen in the round window or the oval window. Dr. Bruns testified that this is often documented in an airplane or scuba diving and there is a change in pressure and the inner ear doesn't adjust and can pop like a balloon causing immediate hearing loss and vertigo and usually ringing. In cases of direct trauma, a significant head trauma with temporal bone fractures can cause a perilymphatic fistula. Dr. Bruns also testified that this is usually a sudden onset as opposed to delayed symptoms. Dr. Bruns testified that typical treatment of a perilymphatic fistula is 4-5 days of bed rest, and if the symptoms did not resolve, then a surgical procedure where the disruption is closed or a blood patch is put over the oval window and the round window. As to when a perilymphatic fistula may have occurred in the Claimant, if it did, Dr. Bruns testified that the Claimant did not initially have hearing loss at the February 2013 incident and about 5 months after that a hearing test showed normal hearing on that side, so Dr. Bruns does not think that it would make sense that he had a fistula at that time. In reviewing Dr. Mawn's operative note, Dr. Bruns testified that there wasn't anything that he read in the report that objectively confirmed there was a fistula because Dr. Mawn didn't see any evidence of fluid coming from the inner ear. While Dr. Mawn did suction some fluid, there was no re-accumulation, so the initial fluid could have been drainage from surrounding tissues or from the local that was injected. However, Dr. Bruns conceded that there is not a lot of fluid in the inner ear and if it were to drain out, you probably wouldn't see it, which is why Dr. Bruns opines that the operation is a bit nebulous and whether or not it really helps is nebulous.

Dr. Bruns ultimately opined that it is hard to say whether or not the Claimant had a perilymphatic fistula in February of 2014. However, even if that could be proven, Dr. Bruns opined that it would not be probable that it was the result of a head trauma that the Claimant had the year prior in February of 2013. Dr. Bruns also finds the Claimant's vertigo unrelated to the event of February 2013. Because the initial complaint was dizziness and didn't mention spinning or nausea or hearing loss, Dr. Bruns does not believe the Claimant had vertigo after the February 2013 incident, and this is not merely because the specific term vertigo was not used, it is also because of the lack of other items associated with vertigo.

Ultimately, based upon review of the medical records in conjunction with the employment records, and taking into account the credible testimony of Ms. Gina Weeks, it is clear that to the extent that the Claimant does exhibit a cognitive and/or memory condition, this was evident months prior to the February 19, 2013 work injury. In looking at the Claimant's job employment complaints subsequent to the work injury, there does not appear to be any substantial difference in the type or frequency of the complaints. Additionally, the objective testing performed by Dr. Reilly, as analyzed by both Dr. Moon and Dr. Burkhardt, point to a lack of significant cognitive problems and possible symptom magnification for secondary gain. Therefore, any cognitive or memory issues that the Claimant has are not related to the industrial injury.

As for the relation of the Claimant's possible perilymphatic fistula, or any other condition that resulted in his total loss of hearing in the right ear, the medical records and the persuasive opinion of Dr. Bruns point to this being an unfortunate, but ultimately unrelated, event that occurred a year after his injury and after most of the initial symptoms from the work injury had abated or stabilized. The only conditions that are related to the original injury are the tinnitus, occasional headaches and mild dizziness. While the surgery performed by Dr. Mawn on March 5, 2014 may have been reasonable to address the Claimant's condition at that time, the condition itself was not related to the work injury.

Temporary Disability Benefits – Responsible for Termination

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

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

In this case, as the only medical conditions that were found to be related to the work injury were the tinnitus, headaches and dizziness, the Claimant's entitlement to temporary disability benefits hinges entirely on the issue of whether or not he was responsible for his own termination which would bar him from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

At issue in this case is the Employer's allegation that the Claimant was terminated for cause for ongoing work performance issues. The Claimant argues that his termination was, instead, due to memory and cognitive issues that arose only after his February 19, 2013 work injury.

The work performance issues are well-documented in the record and there was credible and persuasive testimony from the Claimant's supervisor, Ms. Gina Weeks, to provide further support and details regarding the documented issues.

Ms. Gina Weeks testified by telephone at the hearing on July 29, 2014. Ms. Weeks is the resort director for the Employer and is familiar with the Claimant. She worked with him for a number of years when she was working with the developer and then she was his manager when she was promoted to resort director. Ms. Weeks testified that when the Claimant was in the position of maintenance technician, he was a great employee, responding to all of his calls and doing what he was supposed to and even going beyond that to do extra stuff. Ms. Weeks testified that the Claimant was promoted to chief engineer on June 19, 2012. Once the Claimant was in the chief engineer position, Ms. Weeks described his job performance as "very poor." She testified that the main performance issue was the Claimant's lack of urgency. He never did anything "now" but put everything on hold for a later day. Ms. Weeks had a counseling session and issued a written warning to the Claimant on November 12, 2012. Ms. Weeks testified the write-up was for a few issues, the main issue being that "he showed male chauvinistic tendencies towards me being a manager" and that he had no sense of urgency. The written warning is consistent with Ms. Weeks testimony. The Performance Improvement plan was for "[the Claimant] to work on his leadership skills and his sense of Now. These are 2 important [Employer] values that have not been present in [the Claimant's] demeanor since his shift from Maintenance Tech to Chief Engineer." It was noted that if the Claimant could not manage his staff and himself more efficiently, then the consequences could lead up to termination.

Ms. Weeks testified that the Claimant's 2012 performance review done in January 2013 was not a good review and he was found to be below "partially meets expectations." Ms. Weeks testified that the problems the Claimant was having included, difficulty from transitioning from an hourly to a salary employee, a lack of urgency, and failure to take direction from Ms. Weeks. The 2012 Performance review confirms Ms. Weeks testimony and the Claimant received marks of either "partially meets expectations" or "does not meet expectations" in 7 of 8 reviewed categories. As for his overall performance it was noted that the Claimant does a great job in Maintenance. When asked to perform a task, the Claimant gets it done to satisfaction. However, the Claimant needs to be a great Chief Engineer. He needs to see the whole big picture of taking care of the building and taking care of his team.

Ms. Weeks testified that the Claimant received another write-up on February 2, 2013. The written write-up is for performance transgression. The write-up specifically details that the sidewalk had not been shoveled after snowfall for the second day in a row. After asking the Claimant to do this, Ms. Weeks found out a different employee actually did the work. The Claimant had also failed to install breaks on the double doors at the front of the building. There were other examples of projects that the Claimant was slow to begin or complete that had to be completed by the resort manager. The resort manager also noted that the Claimant had difficulty working with Housekeeping Department and does not always communicate with the Front Desk in the way that he should.

Ms. Weeks testified that the Claimant's behavior following his February 19, 2012 work injury was not any different than before. Specifically, Ms. Weeks testified that he did not seem any more forgetful. Ms. Weeks testified the Claimant's employment was

ultimately terminated due 100% to his job performance, but not related to any one specific circumstance

On cross-examination, the Claimant was questioned about write-ups the Claimant received for work performance. The Claimant did not initially recall the details a write-up from November 12, 2012, but he believed he did receive a write-up around that time, about 3 months after he had been promoted to chief engineer. In discussing the issues listed in the November 12, 2012 write-up, the Claimant testified that he believes he set his priorities differently from his supervisor Gina and that he felt it was a disagreement about priorities. The Claimant was also questioned about a poor performance review in January 2012. The Claimant attributes the problems brought up in this review to being understaffed and not having enough workers to take care of all of the issue that came up, so he would have to prioritize. On February 2, 2013, the Claimant received a final written warning, and he testified that he was aware that this meant his job was on the line if his performance did not improve. He testified that the way that he felt was that it seemed like the harder he worked, the more mistakes he made. He testified that "it was not for a lack of effort. I just felt like the victim of circumstances that I couldn't control."

The Claimant received another final written warning for job performance on February 22, 2013, three days after his work injury. This write up was for performance transgression again. While dated on February 22, 2012, all of the specific transgression items took place between 2/2/13 and 2/17/2013, prior to the Claimant's injury. The performance transgressions included: the common hot tubs being unusable and dirty with one out of order; a Christmas wreath still being up on 2/3/13; failure to paint a wall that Claimant was asked to paint for 2 months; walking into a guest room with a "do not disturb" sign and encountering a guest in the bathroom in his underwear and then telling the guests they could not use their bathroom, leaving the guests angry and requiring the front desk agent to refund their entire stay; continued failure to work with the Housekeeping Department; and on 2/17 giving two employees the same week off so that the third employee and the Claimant had to cover all of the shifts that week and requiring overtime.

The Claimant testified that while he was working modified duty until about March 31, 2013, he was having mental and physical difficulties performing his job. He testified that his short-term memory suffered and he would forget things he had done or forget to do things that he should have done. The Claimant testified that the types of problems that he was having at work before his injury were very different from the types of problems he was having after the injury. However, the records paint a different picture and show that the types of problems after the work injury were generally the same types of problems that he was having since October of 2013, well before the injury.

A termination reference was drafted on April 5, 2013 but was not provided to the Claimant. This write-up included all of the performance issues between the last write-up and April 5, 2013. Many of the listed items are continuations of problems for which the Claimant received write-ups in the past including the failure to complete maintenance projects such as a leak into the parking garage between 4/1 and 4/4; failure to hold

meetings and complete paperwork; continued failure to communicate effectively with the Housekeeping Department and the Front Desk and failing to answer his phone; arriving at work late on the day a new engineer was starting; failing to paint an area that the manager had been asking him to paint since last fall; hot tub maintenance issues; continued failure to shovel walkways; a continued lack of urgency and inability to assist with hotel guests who were angry; and working on ladders before he was cleared to go on ladders by his doctor. Many of these performance issues are the same issues that management had been addressing with the Claimant since November of 2012.

The weight of the evidence establishes that with respect to the Claimant's termination from employment with Employer, the Claimant had been receiving progressive discipline related solely to job performance issues that were serious enough to warrant employment termination with this Employer. As early as November of 2013, the Claimant was put on notice that unless he addressed the job performance issues, he was subject to further employment discipline, up to and including termination of his employment. As the record documents, the Claimant did not correct his performance transgressions, but rather, continued in the same fashion over a period of months. Therefore, the Claimant's wage loss is the result of the Claimant's volitional acts, which are unrelated to the Claimant's injury, and the Claimant is not entitled to TTD benefits.

ORDER

It is therefore ordered that:

1. The Claimant's request for medical benefits to treat memory and cognitive issues, depression, vertigo, and hearing loss in the right ear is denied and dismissed as these conditions are not causally related to the February 19, 2013 work injury.

2. The Claimant is responsible for his termination and the Claimant's claim for total temporary disability benefits is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For

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

DATED: February 19, 2015

_____

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

ISSUE

The following issue was raised for consideration at hearing:

> Whether Claimant sustained his burden of proof to establish that he is entitled to an award of reasonably necessary and related medical benefits. Specifically, Claimant seeks an order finding that the proposed right shoulder arthroscopy, rotator cuff repair, biceps tenodesis, and possible need for a subscapular repair are related to the November 1, 2013, industrial injury.

FINDINGS OF FACT

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

1. Claimant sustained an admitted industrial injury on November 1, 2013, when he was cleaning a Zamboni and he backed into the machinery and flipped over a low open door. A Zamboni is a large machine used to clean floors in a commercial setting. Claimant is a 63 year old man employed by Employer, a bulk food distributor. Claimant works for Employer performing plant and equipment maintenance.

2. On November 1, 2013, Claimant was using a water hose to clean the Zamboni when he backed into and flipped over the low open door with his right arm up above his head. Claimant landed directly on his elbow with his arm raised and behind his back. Claimant's testimony regarding the mechanism of injury is found credible and persuasive.

3. Claimant did not have right shoulder pain complaints, medical treatment, or impairment of the right upper extremity prior to this injury. No credible or persuasive evidence established that he sustained an intervening injury after the November 1, 2013, industrial injury. Claimant has a medical history which includes nicotine addiction, osteoporosis, chronic obstructive pulmonary disease, thyroid disease, and hypertension.

4. Claimant credibly testified that, on November 1, 2013, he fell backward landing on his arm outstretched. When asked on direct examination whether Claimant landed on the tip of his elbow, he testified that he landed on his arm outstretched. When Claimant was reminded during cross examination that

the medical records from Claimant's emergency room examination on November 2, 2013, reflected that he did not have shoulder pain, Claimant credibly explained that he did not report pain in the shoulder because he was focused on the pain in his elbow. Claimant credibly testified that he could not affirm that his shoulder was examined; however, he was aware that his right arm was examined in the emergency room.

5. To further explain Claimant's lack of awareness of his shoulder injury, Claimant testified that his arm was in a sling "all the time." The medical records on November 2, 2013, indicate that Claimant's arm was placed in a splint. Claimant had surgery on the elbow fracture on November 7, 2013, six days after the injury, and thereafter the records reflect that Claimant's arm was in a sling.

6. On November 6, 2014, Dr. Armodios M. Hatzidakis, MD, an orthopaedic specialist, opined, "In my opinion it is more likely than not that his [Claimant's] fall onto his right upper extremity in not only abduction/external rotation but also with axial load did cause his symptomatic rotator cuff tear. He had no shoulder symptoms whatsoever before that time and did not have any doctor visits for the shoulder and only had shoulder pain after the work-related injury."

7. Dr. Wallace K. Larson testified at hearing, and was qualified as an expert in orthopaedic surgery. When asked to identify the critical factors supporting his opinion that Claimant's right shoulder problems were neither caused, nor aggravated, by the November 1, 2013, fall, the doctor identified three concerns. They were, as follows: (1) the mechanism of the injury did not include trauma to the shoulder; (2) the pain complaints did not commence until the end of December 2013; and (3) the findings on the MRI.

8. Dr. Larson's understanding of the mechanism of injury contradicts Claimant's testimony and the medical records. It is undisputed in the medical records, and Claimant's testimony, that he fell backwards while backing up and landed on his elbow. Dr. Larson twice demonstrated during his testimony the mechanism of injury as Claimant hitting his elbow in front of him.

9. Dr. Larson testified that he could not state with certainty that Claimant's right shoulder was examined by medical personnel and that remarks in the medical records regarding the shoulder were based on thorough examination. He testified that he assumed that the reference to no shoulder pain in the November 2, 2013, emergency room report was an indication that Claimant right shoulder was examined, but he testified that he could not be sure of that. He explained that it could have been medical personnel reciting that Claimant was reporting no shoulder pain on November 2, 2013, when Claimant was in the emergency room for the more acute elbow fracture. Dr. Larson testified that in subsequent medical reports he also found it difficult to discern the

extent of the examination of the right shoulder. He testified the first report of shoulder problems came on December 6, 2013, when Claimant complained of "stiffness in the shoulder."

10. Claimant's shoulder pain complaints did not begin until the end of December 2013, however, the evidence established that Claimant's arm was "in a sling almost all of the time" following his injury on November 1, 2013, largely immobilized until December 20, 2013, when Claimant began physical therapy. Claimant first described his shoulder condition as painful on December 30, 2013; 10 day after physical therapy was started.

11. Claimant has demonstrated that it is more probably true than not that his right shoulder pain complaints and symptoms were caused and/or aggravated by the November 1, 2013, industrial injury. Claimant treated with Jonathan T. Bravman, M.D. for the right shoulder condition on August 15, 2014. Dr. Bravman proposed treatment for the right shoulder was shoulder arthroscopy, rotator cuff repair, bicep tenodesis and possible need for subscapularis repair. The proposed surgical treatment by authorized treating physician Jonathan Bravman is reasonable, necessary and related medical treatment.

CONCLUSIONS OF LAW

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

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

2. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (Industrial Claim Appeals Office (ICAO), March 20, 2002).

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

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

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

6. In this case, the totality of the evidence, including Claimant's credible testimony and the medical record, supports the conclusion that Claimant's right shoulder pain complaints and symptoms were caused and/or aggravated by the November 1, 2013, industrial injury. The evidence credibly established that Claimant's shoulder pain complaints did not begin until the end of December 2013, however Claimant's right arm was "in a sling almost all of the time" following his injury on November 1, 2013, largely immobilized until December 20, 2013, when Claimant began physical therapy. Claimant testified that, initially, he was more focused on the fracture of his elbow. He testified that, although, he was conscious that the right arm was injured, he did not isolate the right shoulder pain until December 30, 2013, when he started physical therapy. Claimant's description of the mechanism of injury and his course of treatment supports the conclusion that the November 1, 2013, injury caused or aggravated the right shoulder injury.

7. Claimant has demonstrated that it is more probably true than not that his right shoulder pain complaints and symptoms were caused and/or aggravated by the November 1, 2013, industrial injury. Claimant treated with Jonathan T. Bravman, M.D. for the right shoulder condition on August 15, 2014. Dr. Bravman proposed treatment for the right shoulder was shoulder arthroscopy, rotator cuff repair, bicep tenodesis and possible need for subscapularis repair. The proposed surgical treatment by authorized treating physician Jonathan Bravman is reasonable, necessary and related medical treatment.

ORDER

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

1. Respondents shall be liable for Claimant's medical treatment for the right shoulder, specifically the proposed right shoulder arthroscopy, rotator cuff repair, biceps tenodesis, and possible need for a subscapular repair is granted.

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

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

DATED: February 12, 2015

DIGITAL SIGNATURE:
Margot W. Jones

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

ISSUES

The Claimant endorsed the following issues for hearing in her application: compensability, medical benefits, reasonably necessary, average weekly wage, disfigurement, temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, permanent total disability benefits, and death benefits. The Employer did not file a response to the application for hearing, thus no issues were properly endorsed, although the issue of offsets was raised by the Employer at the commencement of hearing.

After a lengthy discussion between the parties, the issues presented for determination are whether Employer has established by a preponderance of the evidence that Claimant is an "independent contractor" pursuant to §8-40-202(2), C.R.S. If the Claimant is not an independent contractor, whether Claimant has established by a preponderance of the evidence that she sustained an injury while in the course and scope of her employment with the Employer, and whether she is entitled to medical benefits. The ALJ also determined that if the Claimant met her burden on compensability, the issue of penalties for failure to maintain insurance would be addressed. All of the remaining issues, including whether any offsets are applicable, were reserved for future determination.

FINDINGS OF FACT

Based on evidence presented at hearing, the Judge finds as fact:

1. The Claimant's native language is Spanish.

2. The Employer operates a cleaning business. The Employer's business involves cleaning both houses and business properties. The Employer's principal owner is Stephanie Hart. She started the business in 2011.

3. The business is set up as a Chapter S corporation and her Articles of Incorporation list only Ms. Hart as an employee.

4. Ms. Hart requires that the individuals who clean her clients' properties sign a Subcontractor Agreement.

5. Ms. Hart maintains that she cannot financially afford to operate her business in any manner other than through subcontracting workers.

6. The Employer does not maintain workers' compensation insurance. Ms. Hart testified that she applied for a waiver of the workers' compensation insurance

requirement to a committee within the Division of Workers' Compensation, and that her waiver request was granted. Ms. Hart provided no documentation to support this assertion. The ALJ is unaware of a process by which a company can request an exemption or waiver from the requirement to maintain workers' compensation insurance other than that available to sole proprietors, corporate officers or members of LLCs such as Ms. Hart pursuant to §8-41-202, C.R.S.

7. The Claimant was apparently introduced to Ms. Hart through Arturo Bueno who was also performing cleaning services for the Employer.

8. The Claimant admitted to receiving a copy of the Subcontractor Agreement. She denied understanding it because it was written in English. The Claimant did not sign the Subcontractor Agreement. Instead, she returned it to Ms. Hart unsigned.

9. Helen Montoya also provides cleaning services for the Employer through a Subcontractor Agreement. Ms. Montoya speaks both Spanish and English.

10. Ms. Montoya claims that she met with the Claimant before Claimant's first work assignment and explained, in Spanish, the contents of the Subcontractor Agreement to the Claimant. Ms. Montoya claims she explained to the Claimant that Claimant would not be an employee, there is no insurance coverage, the subcontractors work when they want to, they are not supervised, there is no training and they get paid for each job completed.

11. The Claimant denied that Ms. Montoya provided the explanation described in paragraph 10 above. Rather, the Claimant asserts that Ms. Montoya gave her the Subcontractor Agreement and told Claimant that she would explain it to her later. Claimant signed only a W-9 form and was never asked for identification. Claimant believed she was an employee.

12. The existence of the Subcontractor Agreement in and of itself is not sufficient to prove that Claimant was an independent contractor rather than an employee. The Subcontractor Agreement fails to comply with §8-40-202(2)(b)(IV), C.R.S., in that both parties did not sign the agreement.

13. The Employer paid the Claimant and other individuals a flat rate on a per job basis. There was little explanation at hearing concerning the bases for the rate per job. The wage records admitted into evidence reflect that the Employer paid the Claimant various rates of pay. For instance, the Claimant was paid $30 for cleaning a property on Ash Street, but paid $40 for a property on Elizabeth Street. The ALJ infers that the Employer set the rate for each work order and that the Claimant had no input into negotiating that rate.

14. The Claimant did not have a trade name, and there was no persuasive or credible evidence that Claimant operated her own cleaning business.

15. The Employer issued checks to the Claimant as an individual.

16. The Employer provided no training to the Claimant.

17. The Employer issued work orders to the workers with instructions detailing the areas within each property that required cleaning, and the time each work order should be performed.

18. A work order dated October 30, 2013, included the following language and instructions. The Claimant is identified as Patti:

> Nancy, Helen, Lisa, Patti, Connie, Pat meet at storage at 8 A.M. Helen drop Lisa, Nancy and Patti off at [Address] Fairgate Way and go to your crew's job one and then pick Lisa, Nancy, Patti up at finish. Then drop Lisa, Nancy and Patti off at their job 2 and call the homeowner when 30 minutes away and then go to your crew's job 2. Pick up Lisa, Nancy and Patti after their job 2.

19. For all of the work orders on October 30, 2013, each job had a lead crew member and three additional crew members. Each work order provided a detailed list of the areas to clean within the property, including which cleaning product to use on the floors.

20. Claimant denied having the freedom to decline work order requests made by the Employer.

21. Ms. Montoya testified that the workers were not supervised yet she was often designated as the lead crew member. In addition, Claimant credibly testified that Ms. Montoya supervised the quality of the work performed by Claimant and the other non-lead workers.

22. Ms. Montoya also testified that there was no pressure put on her or the other workers to arrive at job sites, and that she had the freedom to decide which clients to work for. This statement is contradicted by the language in the work orders that reflects the Employer identifying which locations the workers will perform work, what time to arrive at the locations, and that workers were dropped off at the clients' properties by Ms. Montoya herself. It follows that once a worker was dropped off at a site, she would be unable to leave that site unless she found some alternative form of transportation.

23. Claimant asserts, and the ALJ finds, that cleaning supplies were provided to her. There was no persuasive evidence that Claimant ever purchased or provided her own supplies in order to complete the work she performed for the Employer.

24. Ms. Montoya drove the Claimant to the jobs the Claimant performed during her tenure as a cleaner for the Employer.

25. The Claimant was not working for any other employer on or around November 4, 2013, although the Employer did not specifically preclude Claimant from obtaining other work.

26. According to the work order dated November 4, 2013, the Claimant met Nancy and Helen at "storage" at 8:30 a.m. From there, the three cleaned a property beginning at 9:00 a.m. on West 3rd Avenue. Job number two commenced at 10:30 a.m., followed by job number three which commenced between 12:30 and 1:00 p.m.

27. Also on November 4, 2013, Ms. Hart received a call from a client on Smokey Hill Road in Aurora around midday asking if she could arrange for cleaning services on that day. Ms. Hart contacted Ms. Montoya to ask if she, Nancy and the Claimant had time to clean an additional apartment. Ms. Montoya and Claimant agreed but Nancy was unable to clean the fourth property on that day. Because the client made a last minute request, no specific work order exists for the fourth job on November 4, 2013.

28. Claimant and Ms. Montoya arrived at the Smokey Hill apartment on November 4, 2013, between 3:00 and 4:00 p.m. As Claimant stepped down from a ladder she was using to clean lamps, she fell backward and fractured her left wrist.

29. Ms. Montoya drove the Claimant to St. Joseph's hospital emergency department where she was admitted for treatment.

30. Claimant sustained fractures to her left wrist that resulted in surgery, which Dr. Mordick performed on November 20, 2013. Following surgery, the Claimant underwent physical therapy, and attended follow-up medical appointments. It is Claimant's understanding that the screws and plates surgically installed into her wrist will need to be removed through a surgery sometime in the future.

31. Claimant attempted to make a claim against Travelers Insurance. It is unclear from the record which entity Travelers insured although there was some indication it was the property owner at the Smokey Hill apartment. In any event, Claimant selected Healthone as an authorized provider and had at least one appointment there on November 18, 2013. At that time, the physician released her to modified duty work which included no use of the left hand. She was referred to Dr. Davis for a surgical consultation.

32. The Claimant made several emergency room visits in addition to the initial visit on November 4, 2013. Claimant provided little or no explanation concerning the reasons for these visits.

33. The Claimant explained that she is still having some residual problems with her left wrist making it difficult for her to maintain any type of employment that requires the use of her hands. For instance, Claimant started working as a caregiver for an elderly lady but had difficulty lifting the lady due to her left wrist injury.

34. A review of Claimant's medical bills shows she was charged in excess of $40,000 for all of the medical care she has received. Claimant's medical bills to the various hospitals have been covered through a debt forgiveness program. However, the Claimant maintains that all of the expenses associated with her surgery were not covered. The Claimant did not explain how much she paid out-of-pocket for any of her medical expenses or how much she still owes, if any.

35. The Employer has failed to show that Claimant was free from direction and control in the performance of her duties or that she was customarily engaged in an independent business related to property cleaning. Although the Employer provided only minimal training to Claimant and did not require the Claimant to work exclusively for it, the Employer dictated specific times when Claimant was required to arrive at job sites, and dictated, in detail, the work to be performed. In addition, the Employer supervised the Claimant's work performance (including quality assurance) through the lead crew members assigned to each job. The Employer paid the Claimant a flat rate per job, at a non-negotiable rate. The Employer issued payment to Claimant, individually, rather than to a trade name. Balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S. reflects that the Employer has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

36. Claimant has proven that on November 4, 2013, she sustained an injury to her left wrist within the course and scope of her employment. Claimant has also proven entitlement to medical benefits to cure and relieve her of the effects of her injury.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following conclusions of law:

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

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

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

Employment Status

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The "employer" may establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II) creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Nelson v. Industrial Claim Appeals Office, supra.*

5. As found, The Employer has failed to show that Claimant was free from direction and control in the performance of her duties or that she was customarily engaged in an independent business related to property cleaning. Although the Employer provided only minimal training to Claimant and did not require the Claimant to work exclusively for it, the Employer dictated specific times when Claimant was required to arrive at job sites, and dictated, in detail, the work to be performed. In addition, the Employer supervised the Claimant's work performance through the lead crew members assigned to each job. The Employer paid the Claimant a flat rate per job, at a non-negotiable rate. The Employer issued payment to Claimant, individually, rather than to a trade name. Balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S. reflects that the Employer has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

Compensability

6. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

7. The Claimant has proven that she sustained an injury to her left wrist while in the course and scope of her employment with the Employer. The Claimant's testimony was credible and persuasive. Further, there was little dispute that the Claimant fell and injured her wrist while in the property belonging to Employer's client. Ms. Montoya, who was cleaning alongside the Claimant on November 4, 2013, drove the Claimant to the hospital after the Claimant fell. Further, the medical records support that Claimant injured her left wrist, and that her injury required surgery. No credible or persuasive evidence rebutted the testimony of the Claimant concerning the circumstances of her fall from a ladder while performing cleaning work for the Employer. As such, Claimant's claim for workers' compensation benefits is granted.

8. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant received medical treatment from various providers to cure and relieve her of the effects of her injury. The treatment Claimant has received thus far is authorized since the Employer did not refer Claimant to a physician. The treatment has also been reasonable and necessary to cure and relieve the Claimant of the effects of her injury. The Claimant is also entitled to future medical treatment to cure and relieve her of the effects of her injury.

9. This case presents a unique situation because much of Claimant's debt for medical expenses has been forgiven or written off. Regardless, it is the Employer who is responsible for the payment of the medical expenses associated with this claim. As such, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S. Further, the Employer is liable for any outstanding medical expenses associated with Claimant's injury. Claimant mentioned that not all of the expenses associated with her surgery were covered, but she did not specify a dollar amount. Finally, Claimant is likely to require an additional surgery.

Penalties – Failure to Maintain Insurance

10. In any case where the employer fails to comply with the insurance provisions of the Act, the amount of compensation or benefits an employee may claim shall be increased by fifty-percent. Section 8-43-408(1), C.R.S. It is not in serious dispute that the Employer failed to carry the requisite workers' compensation insurance. As such, Claimant is entitled to a fifty-percent increase in her compensation or benefits. Medical benefits, however, are not subject to the fifty percent increase. *See Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957). Because this decision does not award a benefit that is subject to the fifty-percent increase, the penalty shall not be specifically imposed at this time but may be applicable to benefits awarded in the future.

ORDER

It is therefore ordered that:

1. The Claimant is an employee rather than an independent contractor.

2. Claimant sustained a compensable injury to her left wrist on November 4, 2013.

3. The Claimant is entitled to medical benefits, including all treatment which she has already received and future medical benefits that are reasonable, necessary and related to this claim. Because Employer is liable for payment of Claimant's medical costs associated with her work injury, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S.

4. The Employer failed to maintain workers' compensation insurance which shall subject the Employer to a penalty pursuant to § 8-43-408(1), C.R.S.

5. All matters not determined herein are reserved for future determination. Any additional issues that the parties wish to raise must be endorsed in a separate application for hearing.

6. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

   a. Within ten (10) days of the date of service of this order, deposit the sum of $10,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

   b. Within ten (10) days of the date of service of this order, file a bond in the sum of $10,000.00 with the Division of Workers' Compensation:

      (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

      (2) Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

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

DATED: February 2, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUE

The issue raised for consideration at hearing is whether Respondents proved by clear and convincing evidence that the Division independent medical examination of Dr. Henke is most probably incorrect.

FINDINGS OF FACT

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

1. On September 10, 2013, Claimant, a 59 year old male, employed with Employer as a truck driver, groundskeeper, and mechanic suffered an admitted work-related injury. On that day, while stepping from a mowing machine, Claimant slipped and fell approximately two feet striking his right lower back and posterior hip against a piece of steel. He reported the injury to his supervisor and proceeded to Lutheran Medical Center where he was examined in the emergency room.

2. Claimant returned to work and continued his regular duties until November 15, 2013, when he experienced pain in the low back radiating down the leg and thigh. Walking and standing were painful. He was not able to work, and went to Saint Joseph Hospital when his Employer did not refer him for medical evaluation.

3. On December 4, 2013, Claimant was referred to Dr. Craig Anderson for evaluation and treatment. Dr. Anderson opined that the injury was work-related based on Claimant's report. Dr. Anderson referred Claimant for physical therapy, MRI, and further treatment. Dr. Anderson stated in his December 4, 2013, report: "In my opinion, the development of right lower extremity pain that is possibly consistent with a radiculopathy at 2 months approximately post his work accident, and is probably consistent with a work-related mechanism of injury.

4. On December 13, 2013, Claimant saw Dr. Anderson again, this time "…with persisting pain to a moderate severe degree, and mild weakness in the right lower extremity.", according to Dr. Anderson's report. Additionally, Claimant experienced "…tingling and numbness at the bottom of the right foot." Straight leg raise test was found to be "… strongly positive on the right." A MRI was ordered by Dr. Anderson.

5. On January 2, 2014, Claimant again saw Dr. Anderson, who noted "…lumbar strain associated with radiating right leg pain, possibly consistent with a right-sided lumbar radiculopathy." Claimant reports a constant level of low back pain at 5/10 that is constantly present in the right leg, radiating into the S1 distribution. He has

occasional sharp radiating pains in the left lower extremity, but this is intermittent. Some days, the left leg is not involved." Dr. Anderson diagnosed Claimant with "… L4-5 and L5 nerve root impingement on the right."

6. As of March 7, 2014, two to three months prior to the anticipated maximum medical improvement (MMI) date, Dr. Anderson placed Claimant at MMI with no impairment rating and released Claimant from treatment, stating in his MMI report: "MRI evidence of degenerative disease, severe at L5-S1. …Probably not work-related." Yet, in Dr. Anderson's prior handwritten notes of December 4, 2014, December 13, 2014, December 18, 2013, January 17, 2014, January 20, 2014, January 31, 2014, February 21, 2014, and even March 7, 2014, in response to the question, "Are your objective findings consistent with history and work-related mechanism of injury/illness?" Dr. Anderson consistently indicated that objective findings were consistent with history and work-related mechanism of injury/illness. On the last page of his MMI report, Dr. Anderson indicates: "The more severe MRI findings do not correlate with clinical symptoms and signs of right leg pain. Right leg pain probably not due to a true radiculopathy." Dr. Anderson offers no explanation why he changed his mind from his earlier findings that Claimant's condition is work-related. Only at the time of MMI does Dr. Anderson find Claimant's condition to be, "Probably not work-related…."

7. Two weeks following his placement at MMI and release from restrictions to full duty employment, Claimant felt extreme pain when riding and bouncing on a piece of machinery called a "Bobcat." In the following weeks, Claimant went to the emergency room twice and saw Dr. Robert Springs, M.D., approximately six times.

8. On July 18, 2014, Claimant was seen by Dr. Clarence Henke for a Division independent medical examination (DIME) where he was found to be not at MMI. Dr. Henke's DIME report concludes that, consistent with Claimant's statements to Dr. Shih, Claimant sought post MMI medical treatment with Dr. Springs. on March 12, 2014, five days after he was released by Dr. Anderson. Dr. Springs ordered laboratory tests, x-rays and scheduled Claimant to return in two months on May 5, 2014. On May 5, 2014, Dr. Springs saw Claimant and indicated that Claimant had been to two emergency rooms since mid-April, and was treated with a Medrol Dosepak without benefit. On May 5, 2014, Claimant complained of the same pain in his back with radiation into his right leg, which he complained of throughout the course of his treatment, and again after his release and return to full-time duty.

9. On August 27, 2014, Dr. Franklin Shih was retained by Respondents to conduct an independent medical evaluation of Claimant. During the examination, Claimant reported to Dr. Shih that he had doubts about Dr. Anderson's decision to place him at full duty, that he experienced severe pain after being returned from restricted duty to full-duty while riding a Bobcat, and that he went to the emergency room twice, and Dr. Springs several times in succession, for treatment of his back pain. In Dr. Shih's report regarding Claimant, the doctor describes Claimant's history as inconsistent.

10. Dr. Shih prepared a written report dated August 27, 2014, opining that he relied on Dr. Anderson's medical records finding the doctor's records were more credible than Claimant's oral history. Dr. Shih concluded that it was not within medical probability to relate Claimant's complaints to the September 20, 2013, work injury.

11. On November 21, 2014, at his deposition, Dr. Anderson testified that Claimant had no impingement and no radiculopathy. Dr. Anderson reports as support for his opinion of no impingement and no radiculopathy, "… we don't have any mention of displacement of the nerve roots or impingement of the nerve roots, which would be indicative of a true radiculopathy." Yet, in Dr. Anderson's earlier written reports of January 2 and 31, 2014, Dr. Anderson reports that Claimant has L4-5 and L5 nerve root impingement on the right. Significantly, Claimant complained of pain radiating into the right leg throughout the course of his treatment.

12. At hearing, Dr. Shih testified that his role was to resolve discrepancies in the medical history. Dr. Shih opined that he disagreed with Dr. Henke's determination that Claimant was not at MMI. He further testified that Dr. Henke's report was not performed in accordance with the *AMA Guides because* Dr. Henke did not provide impairment rating worksheets and that he did not measure Claimant's range of motion three times. Dr. Shih credibly testified that his opinion that Dr. Henke's MMI determination is incorrect amounts to a difference of opinion between physicians and does not constitute clear and convincing evidence that the DIME is most probably incorrect.

13. Dr. Henke's DIME determination that Claimant is not at MMI has not been overcome. Dr. Henke recommends: 1. Bilateral lower level extremity EMG (electromyogram) examination; 2. Neurosurgical consultation; 3. Restricted work activities of lift limit 10 pounds, avoid bending, lifting or ladder climbing; and 4. Continue current medications for pain relief. Dr. Henke's recommendations are intended to cure and relieve Claimant of the effects of the industrial injury.

CONCLUSIONS OF LAW

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

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. Respondents contend that it overcame the opinion of the DIME by clear and convincing evidence on the issue of MMI. Claimant takes the opposite position arguing that Respondents failed to sustain their burden of proof to establish that the DIME is most probably incorrect, he is not at MMI and the DIME properly determined that he is not at MMI. It is concluded that Respondents failed to sustain their burden of proof to establish by clear and convincing evidence that Dr. Henke's opinion of MMI is most probably incorrect.

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

5. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Whether a particular component of Claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the *AMA Guides*. *See Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo.1996) (a rating of overall medical impairment necessarily includes consideration of apportionment of the impairment to other causes). Indeed, the *AMA Guides* specifically require the treating physician to determine the cause or causes of Claimant's overall impairment. See, *AMA Guides* ch. 2.2. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

6. Dr. Henke determined that Claimant is not at MMI and requires additional treatment to cure and relieve him of the effects of the industrial injury.

7. Dr. Shih testified for Respondents after conducting an independent medical examination and providing a written report. Dr. Shih credibly testified that his opinion that Dr. Henke's MMI determination is not correct amounts to a difference of opinion between physicians. As such, it is concluded that Dr. Shih's opinion is not clear and convincing evidence that the DIME is most probably incorrect. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician *Javalar v. Monte Vista Head Start, Inc.* W. C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004). Further, even if the ALJ finds the DIME physician deviated from the rating protocols of the *AMA Guides*, the party challenging the rating must still demonstrate that the deviation casts substantial doubt on the overall validity of the rating. *Schrameck v. USA Waste Management*, W.C. No. 4-407-221 (ICAO May 18, 2001), *Rivale v. Beta Metals, Inc*., W.C. No. 4-2655-360 (April 16, 1998), *aff'd. Rivale v. Industrial Claim Appeals* Office, (Colo. App. No. 98CA0858, January 28, 1999) (not selected for publication). Deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect*. In Re Gurrola*, W.C. No. 4-631-447 (ICAP Nov. 13, 2006) Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings*. Id.*

8. Dr. Anderson's testimony and medical reports were found to be less credible and persuasive than Claimant's testimony regarding his pain and other symptoms. Dr. Anderson's written reports are internally inconsistent, and inconsistent with his deposition testimony. Dr. Anderson indicates throughout his reports that there is a radiculopathy, until the date of release at MMI, when he finds that there is not a true radiculopathy. Dr. Anderson says in his reports that there is nerve root impingement, but then at deposition says that there is no nerve root impingement. Dr. Anderson noted moderate to severe pain consistent with the mechanism of injury throughout his reports, and then on the date of Claimant's release at MMI, Dr. Anderson said that the MRI findings do not correlate with clinical symptoms and signs of right leg pain.

9. Despite the fact that Dr. Shih indicated at hearing that his role was to resolve discrepancies, the above described discrepancies in Dr. Anderson's record and testimony regarding Claimant were never resolved by Dr. Shih. By contrast, Claimant's testimony at hearing is found to be consistent and credible. Claimant's testimony is consistent with the evidence contained in medical reports, and consistent with Dr. Henke's findings. Throughout his medical history, Claimant consistently complained of low back pain, hip pain, pain into the buttocks, and pain radiating down the right leg, and occasionally into the left leg. Claimant never deviated to other parts of the body which were not anatomically related to his pain complaints. Further, Claimant reported to Dr. Shih that he began to have pain two weeks after he returned to work full duty.

10. Dr. Henke's rating has not been overcome by clear and convincing evidence. Dr. Henke recommends: 1. Bilateral lower level extremity EMG (electromyogram) examination; 2. Neurosurgical consultation; 3. Restricted work

activities of lift limit 10 pounds, avoid bending, lifting or ladder climbing; and 4. Continue current medications for pain relief. Dr. Henke's recommendations are intended to cure and relieve Claimant of the effects of the industrial injury.

ORDER

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

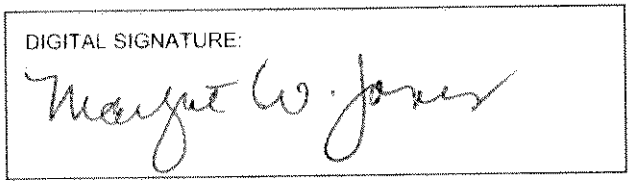
1. Respondents have failed to produce clear and convincing evidence to overcome the Division Independent Medical examination and opinion of Dr. Clarence Henke, M.D. that Claimant is not at MMI.

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

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

DATED: February 19, 2015

DIGITAL SIGNATURE:



MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether the Claimant has established by a preponderance of the evidence that Dr. Kristin Mason's prescription for a modification to the Claimant's home providing an emergency exit from the Claimant's bedroom with an extended porch is reasonably necessary and related to the injury pursuant to C.R.S. 8-42-101(1)(a).

FINDINGS OF FACT

1. The Claimant was born on October 2, 1953 and he is 61 years old.

2. The Claimant was driving a forklift in the Employer's warehouse when the forklift malfunctioned and ran into a column. The Claimant suffered an industrial injury to his C2 spinal cord with central cord syndrome along with a moderate traumatic brain injury and lacerations to the front and back of his head during the course and scope of his employment on November 29, 2013 (Claimant's testimony and Claimant's Exhibit 6, p. 18).

3. The Claimant has been assessed as C2-3 tetraplegia with preservation of more muscle groups in the lower extremities than upper extremities and he is status post C3 through C7 posterior spinal decompression and fusion along with other complications from his injury and current condition (Claimant's Exhibit 6, pp. 20-21).

4. The Claimant was initially hospitalized at Medical Center for the Rockies and later transferred to Craig Hospital on March 6, 2014. The Claimant was then transferred to a facility called CareMeridian (Claimant's Exhibit 6, p. 18).

5. The Claimant's family purchased a home that was modified to make it accessible for him. He has a definitive electric wheelchair with Tilt-in-Space feature and requires a Hoyer lift for toilet transfers. On May 2, 2014, Dr. Mason notes that the Claimant is medically delicate and opined that "the best thing for him, both physically and psychologically, is to complete home modifications with due haste and get him into a different care environment (Claimant's testimony and Claimant's Exhibit 6, pp. 18-19).

6. On May 23, 2014, Dr. Kristin Mason issued a note prescribing an emergency exit from the Claimant's bedroom in case of fire. On this note, she was asked the reasons that the emergency exit is medically reasonable and necessary. Her response is below:

> "The patient feels strongly he needs an exit door in his bedroom that is ramped for emergency escape in case of fire, and I believe that is fairly obvious and agree with that as medically reasonable and necessary" (Claimant's Exhibit 6, p. 27.)

7. The Claimant submitted the original 3/19/2014 proposed modification to the Claimant's home (Claimant's Exhibit 4) and the 5/13/2014 Amended Modified Floor plan which illustrates the actual modification to the Claimant's home for the emergency exit from the Claimant's bedroom (Claimant's Exhibit 5).

8. Dr. Mason did express opinions in the medical records that the Claimant was experiencing "situational depression and anxiety" due to his living situation in the care facility and not being able to be in his home while construction modifications were progressing but not completed. After the Claimant transitioned to his own home in December of 2014, Dr. Mason's follow up medical note no longer references the situational depression and anxiety (Claimant's Exhibit 6).

9. At hearing, the Claimant testified that he was not currently diagnosed or taking any medication for anxiety or depression nor is he in treatment with a psychologist or psychiatrist.

10. At hearing, the Claimant testified that other home modifications were completed, including carpet removal, hall and door widening, and air conditioning installation.

11. At hearing, the Claimant testified that he would like the emergency exit in his bedroom prescribed by Dr. Mason. Importantly, the Claimant testified that he was concerned about a fire and being able to get out of the house, since the only other exit that would accommodate him goes through hallways past the kitchen. He testified that the emergency exit would provide him with peace of mind as the second exit would allow him to get straight out of the house from his bedroom. This exit also provides him the ability to exit the home for medical appointments and allows his at-home medical care staff to enter and exit.

12. On cross examination, the Claimant testified that he has twenty-four hour nursing care in his home and that the nurses are able to use a medical lift to get him from his bed into his wheelchair.

13. The Claimant did not testify that without the exit, medical providers could not access him for medical care. The Claimant did not testify that the exit was necessary in order for him to leave his home to obtain medical care. The Claimant did not testify that the lack of the second exit would have a negative effect on his physical condition related to the work injury.

14. Based on the testimony and the documents in evidence, the ALJ finds that while an emergency exit would provide peace of mind for a tetraplegic and would provide an alternative exit from the home in the event of a fire, the proposed home modification does not provide a therapeutic benefit.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Medical Benefits – Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment or modality is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999); *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

Employers are required to provide services which are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment. *See Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116, 1117-18 (Colo. App. 1997) (upholding child care services as medical in nature because they relieved the symptoms and effects of the injury and were directly associated with claimant's physical needs). However, in interpreting the scope of C.R.S. 8-42-101(1)(a), the Colorado Court of Appeals has narrowly construed the Act by stating that an apparatus must be necessary for the treatment of the injury or it must provide therapeutic relief from the effects of the injury. *Cheyenne Cnty. Nursing Home v. Indus. Claim Appeals Office*, 892 P.2d 443, 446 (Colo. App. 1995) (upholding employer's refusal to pay for a stair glider as being a medical apparatus because it did not provide a therapeutic benefit to the disabling injury although it provided peace of mind and access to lower levels of a home in a tornado-prone area). If the apparatus is not medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment then the employer will not be liable to pay for it. *See ABC Disposal Servs. v. Fortier,* 809 P.2d 1071, 1073 (Colo. App. 1990) (upholding employer's refusal to pay for a snow blower because it was not prescribed as a medical aid to cure or relieve claimant from the symptoms of his injury but rather provided an easier way to accomplish a household chore). In other recent cases, the courts have likewise denied an "apparatus" or a service where it was not found to be medically necessary, but was rather prescribed as a means to achieve an independent lifestyle or provided peace of mind in emergencies. *Bogue v. SDI Corporation, Inc.,* 931 P. 2d. 477 (Colo. App. 1996)(holding that a wheelchair accessible van was not medically necessary and therefore beyond the intent of C.R.S. 8-42-101(1)(a)); *Robertson v. Vincam Staff Administrators,* WC 4-389-907 (ICAO January 10, 2007)(a cell phone denied because it was not prescribed for therapeutic relief but for medical emergency needs); *Hillen v. Tool King,* 851 P.2d 289 (Colo. App. 1993)(Although lawn care services necessitated by Claimant's work-related condition, they are unrelated to physical condition and the lawn care was not prescribed to cure or relieve Claimant of symptoms of the injury, but simply to relieve the Claimant of the rigors of yard work).

In the Colorado cases where an apparatus or services were authorized, the courts found that the apparatus or service was medically necessary. *Bellone,* supra; *Atencio v. Quality Care,* 791 P.2d 7 (Colo. App. 1990)(housekeeping services allowed where Claimant had severely restricted use of hands and could not perform activities of daily living or chores without assistance); *City and County of Denver, School District 1 v. Indus. Claims Appeals Office,* 682 P.2d 513 (Colo. App. 1984)(Hot tub installed in home found medically necessary where Claimant's work hours prevented use of health club and hot tub was prescribed to cure and relieve the Claimant from the effects of his work injury).

The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Here, the Claimant has failed to establish by a preponderance of the evidence that the emergency exit prescribed by Dr. Mason is reasonable and necessary to cure or relieve the effects of his industrial injuries. Dr. Mason prescribed the emergency exit door in his bedroom stating that "I believe that is fairly obvious and agree with that as medically reasonable and necessary." In contrast, the Claimant testified that he does not have a diagnosis or take any medication for anxiety or depression. Rather, Claimant stated that the emergency exit would provide him with peace of mind. However, the Claimant's home already has an exit that would enable him to exit the home in an emergency, paired with the fact that he is provided with twenty-four hour medical care. The main exit to the home also allows Claimant to exit the home for medical appointments and allows for his homecare medical staff to enter and exit his home. As there is no therapeutic benefit to the proposed modification to the Claimant's home, the Claimant's claim for this specific medical benefit is denied and dismissed.

ORDER

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

1. The Claimant's request for an emergency exit from his bedroom as prescribed by Dr. Kristin Mason is hereby denied and dismissed.

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

DATED: February 18, 2015

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

ISSUES

The issues for determination are:

1. The respondents' request to withdraw admissions of liability based on fraud;

2. Medical benefits;

3. Average weekly wage ("AWW");

4. Temporary disability benefits; and

5. Overpayment.

FINDINGS OF FACT

1. On December 23, 2008, the claimant was seen by Michael Messner, D.O. for right elbow pain and swelling which he reported began two months earlier without any specific injury. The claimant reported the pain would shoot down the arm and wake him at night. Dr. Messner diagnosed lateral epicondylitis and recommended ice, rehabilitation, and an elbow sleeve.

2. On August 12, 2012, the claimant reported right elbow pain, and he underwent right elbow x-rays which did not reveal any acute problems.

3. On September 28, 2012, the claimant was seen by Dr. Messner and reported pain in both shoulders, which he related to his job duties at his additional job at Safeway. Dr. Messner also diagnosed a right wrist contusion, for which he recommended wrist/forearm physical therapy.

4. At the hearing, the claimant testified that he did not have any right shoulder problems prior to the work-related accident. The claimant also testified that he had right elbow pain just "one time" before the alleged accident, which had existed for only two days before he underwent a single evaluation for the condition.

5. On Thursday, December 5, 2013 the claimant sustained a minor injury involving the right upper extremity while he was shoveling snow and working for the

respondent-employer. The claimant completed his regular shift that day. The School was closed on the following day due to the weather.

6. The claimant reported his accident to Angel Thomas and Paula Prater (employees of the respondent-employer), individually, on December 5, 2013. The ALJ finds the testimony of Ms. Thomas and Ms. Prater to be credible.

7. Frank Beeman (who sometimes volunteers for the respondent-employer) had a conversation with the claimant on December 10, 2013 during which the claimant reported injuring himself while shoveling snow at the School. The ALJ finds the testimony of Mr. Beeman to be credible.

8. At the time of the accident, the claimant was working for the respondent-employer (a school) as a custodian from Monday through Friday, for an average of approximately 40 to 45 hours per week. The claimant's gross annual wages with the respondent-employer were approximately $25,494.58, which equates to an AWW of $490.28.

9. The claimant had two other jobs at the time of the accident. In addition to his job with the respondent-employer, he was working as a custodian for a cleaning company named Paramount Building Solutions ("Paramount"), and as a server for a restaurant named Fiesta Mexicana ("Fiesta").

10. The claimant worked for Paramount every night, where he averaged approximately 37 hours of work per week over the four weeks preceding the accident. The claimant's job duties with Paramount included waxing and cleaning the floors of the Safeway store in Woodland Park. To wax the floors, the claimant used a mop to apply a stripping solution. To clean the floors, the claimant would guide a large floor cleaning machine up and down every aisle. The machine frequently broke down and required repairs, which the claimant would perform by laying on the floor and pushing and pulling a drive chain with his arms until it returned to the correct position.

11. The claimant worked at Fiesta on Fridays, Saturdays, and Sundays, where he averaged 15 hours of work per week over two weeks preceding the accident. The claimant worked at Fiesta over the weekend following the work-related accident, on December 6, 7, and 8, 2013. There is no dispute that the claimant's AWW with Fiesta was $241.85.

12. The claimant first sought treatment for the injury on December 11, 2013, at Penrose-St. Francis, where he reported worsening right shoulder and elbow pain. Douglas Smith, FNP diagnosed rotator cuff strain, shoulder bursitis, and lateral

epicondylitis. Mr. Smith assigned temporary restrictions which essentially prohibited the claimant from using his right upper extremity. Despite these restrictions, the claimant continued working for Paramount.

13. On December 13, 2013, the claimant participated in a recorded telephone conversation with Jeni Schietzelt, who is the respondent-insurer's claim representative assigned to this case. The claimant made the following representations during that conversation: he had no right shoulder or right elbow problems before the accident; he worked at Fiesta on the three days following the accident; and he was not working anywhere else.

14. On December 30, 2013, the respondent-insurer filed the first general admission of liability. The respondents have since admitted liability for an AWW of $732.13, based on the claimant's earnings with Fiesta ($241.85) and the respondent-employer ($490.28), in addition to ongoing temporary disability benefits beginning on December 6, 2013.

15. On December 31, 2013, Dr. Messner assigned a "total work restriction." Despite this restriction, the claimant continued working for Paramount.

16. On January 14, 2014, the claimant was seen by Dr. Messner, who reported that the claimant's lateral epicondyle tenderness had improved. Dr. Messner diagnosed lateral epicondylitis (which he had previously diagnosed in 2008), and did not make any mention of medial epicondyle symptoms.

17. On January 16, 2014, the claimant underwent a right shoulder MRI, which did not reveal any acute abnormalities.

18. On January 22, 2014, the claimant returned to work with the respondent-employer in a modified position.

19. On February 17, 2014, the claimant underwent an initial evaluation by Ronald Fisher, PT. The claimant reported being employed by the respondent-employer, but he apparently did not disclose his job with Paramount.

20. On February 19, 2014, Dr. Messner noted that the claimant's shoulder and lateral epicondyle tenderness were still improving. That same day, Dr. Messner released the claimant to modified duty, with a restriction of no overhead arm/hand placement.

21. On March 17, 2014, the claimant was seen by Dr. Snyder and reported that his elbow was swollen and his pain was worse.

22. On March 19, 2014, the claimant was seen by Dr. Messner and reported that his elbow pain had increased over the last week. Dr. Messner observed increased tenderness at the lateral epicondyle and added a 15-pound lifting restriction.

23. On March 31, 2014, the claimant was examined by Katherine Leppard, M.D. and reported worsening elbow pain. Dr. Leppard diagnosed myofascial shoulder pain based on the normal MRI.

24. Dave Gordon (a co-worker employed by the respondent-employer) prepared a written statement dated April 16, 2014 regarding a conversation he had with the claimant around the same time that his symptoms were worsening:

> Jesus has told me that he also works at Safeway. He does hard surface floor maintenance there. One morning when Jesus came in for morning Crossing Guard duty he told me that he had been working all night at Safeway and had just gotten off. He said that he had only been off for about one hour and that his arm was hurting him very badly. He even had me look at it pointing out that it was swollen. He said that he had been stripping and re-waxing the floors at Safeway and that he had been mopping all night and that was why his arm was hurting so badly. He said it hurt so badly that he couldn't even lift it. I pointed out that he did not hurt it here at [the respondent-employer] because he is on very light duty. He did agree at that time that it was not from anything he did at [the respondent-employer] but was from mopping all night at Safeway.

25. Mr. Gordon was uncertain of the exact date on which the conversation occurred, but it was sometime in March or April of 2014, and he overheard the claimant have a similar conversation with Melanie Carter in March or April of 2014. The ALJ finds the testimony of Mr. Gordon to be credible.

26. Melanie Carter also testified, via deposition on November 13, 2014 regarding a similar conversation which she had with the claimant around the same time. Ms. Carter is employed by a company named Chartwells and she works in the same building as the claimant. Ms. Carter had a conversation with the claimant sometime in March or April of 2014 (before the April 5, 2014 MRI noted below), which occurred in the presence of Dave Gordon. During that conversation, the claimant reported pain and swelling above and about the elbow, he related his symptoms to "mopping and doing floors all night at Safeway," and Ms. Carter observed swelling of the elbow. Ms. Carter

also testified that she likes the claimant and was concerned about his medical condition. The ALJ finds the testimony of Ms. Carter to be credible.

27. Notably, the number of hours which the claimant worked for Paramount increased after the accident. As compared to the 37 hours he had previously averaged, the claimant averaged roughly 40 hours of work per week over the two-week pay period ending December 27, 2013 and roughly 42 hours of work per week over the following three pay periods. The claimant's work with Paramount peaked over the next five pay periods, when he averaged at least 46 hours per week.

28. Andres Yarasca was the claimant's supervisor at Paramount; the claimant was the only person who would perform the basic floor cleaning duties at the Safeway in Woodland Park; and the claimant's job responsibilities for Paramount remained the same after his accident until he quit in April 2014, though he was encouraged to do "light" work. Mr. Yarasca could only speculate why the claimant resigned. The ALJ finds the testimony of Mr. Yarasca to be credible.

29. Brandon Heedt previously worked with the claimant at the Safeway in Woodland Park, while Mr. Heedt was employed by Safeway as a night crew manager. Mr. Heedt observed that the claimant's job duties with Paramount stayed the same after the accident, though he would sometimes get help when moving large items after his elbow symptoms worsened. Mr. Heedt testified that the operator of the floor cleaning machine must "push the bar down" to move it, some pushing and pulling is required to turn the machine, and mopping the floor requires repetitive use of the upper extremities. The ALJ finds the testimony of Mr. Heedt to be credible.

30. Matthew Maconachy is the head night clerk at the Safeway in Woodland Park. He worked with the claimant at the Safeway during the period of December 2013 through April 2014; the claimant continued performing his regular job duties for Paramount during that timeframe*;* and the claimant commonly performed those duties without assistance. Mr. Maconachy observed that the claimant began reporting increased right arm pain in March or April 2014; the claimant told him that those symptoms could be due to his job duties with Paramount, including waxing floors and operating the machine; and the claimant did not attribute those symptoms to his injury with the respondent-employer initially. When asked whether pushing and pulling the chain was difficult, Mr. Maconachy said "it was always a pain." Mr. Maconachy further observed that the claimant's explanation regarding the cause of his increased symptoms later changed: "It seemed like it was more in the direction of things that had happened at Safeway, and then, it seemed as though he had finally come to a conclusion that he had actually hurt himself at the [respondent-employer]. . . . He hurt

himself at Safeway, until he said that: He might have hurt himself at the [respondent-employer]." The claimant informed Mr. Maconachy that he might need to testify on his behalf, and, during that conversation, the claimant asked, "You have never seen me waxing floors at Safeway, just supervising, right?" Mr. Maconachy had in fact seen the claimant waxing floors, however. The ALJ finds the testimony of Mr. Maconachy to be credible.

31. On April 5, 2014, the claimant underwent a right elbow MRI, which revealed a partial tear of the common flexor tendon with edema/hemorrhage tracking into the flexor carpi radialis muscle. The radiologist, Nicholas Moore, M.D., diagnosed tendinopathy, sprain of the common extensor tendon and radial collateral ligament, and mid distal biceps insertional tendinopathy.

32. On April 16, 2014, the claimant was seen by Karl Larsen, M.D., who diagnosed lateral and medial epicondylitis, and assigned work restrictions of no use of the right arm.

33. On April 17, 2014, the claimant participated in a second recorded telephone conversation with Ms. Schietzelt, during which he made the following representations: He was "so pissed off" about having to shovel the snow; he had not performed any work besides his modified job with the respondent-employer; and the only wages he was earning were with the respondent-employer. Upon being confronted by Ms. Schietzelt regarding his job with Paramount which the respondent-insurer had learned about through an investigation, the claimant admitted that he had lied about his employment status.

34. On April 17, 2014, the claimant resigned from Paramount. The corresponding paperwork from Paramount does not suggest he resigned due to medical problems.

35. On May 21, 2014, Dr. Snyder opined that the claimant had exacerbated his condition possibly due to "continued repetitive motion activity." Dr. Snyder later opined it was reasonable to assume that the claimant's condition "was aggravated by certain activities between his visit on February 10, 2014 and March 17, 2014."

36. On June 20, 2014, the claimant was evaluated by Scott Primack, D.O., who diagnosed a right shoulder strain, right elbow strain, and lateral epicondylitis. Dr. Primack opined that no further medical treatment was reasonably necessary for the work-related injury, because the claimant's injury had improved before his job duties with Paramount significantly aggravated his elbow and shoulder conditions.

37. On July 29, 2014, the claimant was seen by Derek Purcell, M.D., who opined that the MRI findings indicate that the claimant's "shoulder is essentially within normal limits with no evidence of rotator cuff tear."

38. On November 14, 2014, Dr. Messner testified via deposition. Dr. Messner explained that a "total work restriction" means no work whatsoever; he verbally advised the claimant of the "total work restriction" both times that he assigned it; and he was unaware of the claimant's job with Paramount despite asking him about his employment status. The ALJ finds these factual portions of Dr. Messner's testimony to be credible, but the ALJ also finds that the causation opinions offered by Dr. Messner were not credible, in light of the credible and persuasive medical evidence to the contrary.

39. On November 20, 2014, Dr. Purcell testified via deposition. Dr. Purcell diagnosed AC joint osteoarthritis and rotator cuff tendinitis (i.e. impingement syndrome), and explained that this diagnosis was based on his physical examination given the minimal MRI findings. For impingement syndrome, Dr. Purcell typically recommends conservative treatment. Dr. Purcell testified that osteoarthritis is very common, and patients with osteoarthritis can become symptomatic from a wide range of activities. Besides the MRI report dated January 16, 2014 and Dr. Primack's report, Dr. Purcell did not review any other medical records before testifying. The ALJ finds that the causation opinions offered by Dr. Purcell were not credible, in light of the credible and persuasive medical evidence to the contrary.

40. Dr. Primack testified that the two months' of nighttime elbow pain which the claimant had leading up to the September 28, 2012 visit with Dr. Messner was suggestive of a recurrent and degenerative condition such as osteoarthritis or arthritic pain. Dr. Primack also testified that the imaging of the claimant's right shoulder revealed only common degenerative changes. Dr. Primack explained that the MRI from April 5, 2014 confirms that another injury must have occurred after the work-related accident, because it revealed an acute tear of the medial epicondyle with effusion, rather than the lateral epicondylitis which Dr. Messner had previously diagnosed. Dr. Primack reasoned that, although shoveling snow could cause an injury, the claimant's repetitive and demanding job duties with Paramount were the most likely cause of his shoulder and elbow problems, based on his failure to promptly seek treatment for what would have been a very painful torn tendon, his heightened workload with Paramount after the accident, and his conversations with Mr. Gordon and Mr. Carter regarding his job at Paramount being the cause of the increased symptoms. The ALJ finds the testimony of Dr. Primack to be credible and persuasive, except that the ALJ rejects Dr. Primack's opinion that claimant did not sustain a compensable injury in the first instance.

41. Ms. Schietzelt testified that the respondent-insurer had paid the claimant $17,859.95 in compensation benefits prior to the hearing. The ALJ finds the testimony of Ms. Schietzelt to be credible.

42. With the exception of the claimant's original injury complaint, the ALJ finds that the claimant is not credible. The ALJ specifically finds the claimant's testimony regarding the existence of any disability or need for medical treatment beyond December 11, 2013 which are causally related to the work-related accident to not be credible.

CONCLUSIONS OF LAW

1. The respondents have the burden to prove that the claimant committed fraud by a preponderance of the evidence. *Section 8-43-201(1), C.R.S.* A preponderance of the evidence is that which would lead the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). "Fraud" is a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Wolford v. Pinnacol Assurance*, 107 P.3d 947 (Colo. 2005)*, citing Black's Law Dictionary* 685 (8th ed. 2004). When a claimant has supplied materially false information upon which a respondent relied in filing an admission of liability, the admission may be withdrawn retroactively in addition to prospectively. *Vargo v. ICAO,* 626 P.2d 1164 (Colo. App. 1981). Here, the ALJ concludes that respondents failed to carry their burden of proof on the issue of fraud and are therefore not permitted to withdraw their admission of liability for the initial accident.

2. The claimant had the burden to prove his entitlement to additional medical benefits by a preponderance of the evidence*. §8-43-201, C.R.S.* The respondents are only liable for the medical treatment which is reasonable and necessary to cure and relieve the alleged work-related injury. *§8-42-101(1)(a), C.R.S.* Even after an admission of liability is filed, the respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO,* 942 P.2d 1337 (Colo. App. 1997). Here, the ALJ concludes that the claimant failed to carry his burden of proof to establish that any further medical treatment is reasonably necessary for and related to the December 5, 2013 work-related injury, and any need for medical

treatment which the claimant had after December 11, 2013 was most likely caused by his preexisting condition or his job duties with Paramount. This conclusion is bolstered by the testimony of Dr. Primack, Mr. Heedt, Mr. Maconachy, Ms. Carter, and Mr. Gordon.

3. The respondents have the burden to establish that the claimant's temporary disability benefits should be terminated by a preponderance of the evidence. *§8-43-201, C.R.S.* An injured worker is only entitled to temporary disability benefits to compensate for wage loss which is causally related to the work-related injury. *See, generally, sections 8-42-105 and 8-42-106, C.R.S.* Here, the ALJ concludes that the respondents carried their burden of proof and the claimant's temporary disability benefits should be terminated as of December 11, 2013, because the work-related injury was minor in nature, any disability caused by the work-related injury ended by December 11, 2013, the claimant continued working for Paramount after December 11, 2013 despite the restrictions he was assigned, and any disability which the claimant had after December 11, 2013 was most likely caused by his job duties with Paramount. This conclusion is bolstered by the testimony of Dr. Primack, Mr. Heedt, Mr. Maconachy, Ms. Carter, and Mr. Gordon.

4. If a temporarily disabled injured worker is earning wages which are less income than his AWW, then TPD benefits are payable rather than TTD benefits, and the respondents are entitled to offset the TPD benefits payable based on any such partial earnings. *Section 8-42-106(1), C.R.S.* Here, because the claimant earned some wages during the period of disability which was caused by the work-related injury (i.e. December 6, 2013 through December 11, 2013), claimant is entitled to TPD benefits from December 6, 2013 through December 11, 2013, and respondents are entitled to offset their corresponding TPD liability based on the wages which the claimant earned during this period.

5. The responsible for termination of employment defense created by section 8-42-103(1)(g), C.R.S. applies to subsequent employers. *Garbiso v. Wal-Mart Stores, Inc.*, W.C. No. 4-695-612 (ICAO 2008); *Colorado Springs Disposal v. ICAO*, 58 P.3d 1061 (Colo. App. 2002). The ALJ concludes that this issue is moot based on his conclusion that claimant does not have any ongoing disability which is causally related to the December 5, 2013 work-related injury.

6. The claimant had the burden to establish by a preponderance of the evidence that the admitted AWW should be increased. *Section 8-43-201, C.R.S.* An injured worker's AWW should be fair. *Section 8-42-102(3), C.R.S.* When a worker is concurrently employed, an ALJ has the discretion to exclude the concurrent wages from

the AWW. *Broadmoor Hotel and Continental Ins. Co. v. ICAO*, 939 P.2d 460 (Colo. App. 1996); *Coleman v. National Produce Service*, W.C. No. 4-601-676 (ICAO July 12, 2005) (disagreeing with the ALJ's conclusion that the worker's concurrent wages needed to be included in the AWW). Here, the ALJ concludes that the claimant failed to carry his burden of proof to increase the admitted AWW, the admitted AWW fairly reflects claimant's earnings with the respondent-employer and Fiesta at the time of the accident, and it would be unfair to include the claimant's wages with Paramount in the AWW in light of his intentional concealment of that employment from the respondent-insurer.

7. The respondents have the burden to prove their entitlement to an overpayment or an offset by a preponderance of the evidence. *Section 8-43-201(1), C.R.S.; Quintana v. Sunstrand Aviation*, W.C. No. 3-062-456 (ICAO Sep. 24, 2007). An "overpayment" is defined as "money received by a Claimant that exceeds the amount that should have been paid, or which the Claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." *Section 8-40-201(15.5), C.R.S.* Repayment of any overpayment is now required even in the absence of fraud. *Simpson v. ICAO,* 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds by Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777 (Colo. 2010); *see also Haney v. Shaw*, W.C. No. 4-796-763 (ICAO 2011). Here, the ALJ concludes that the claimant was paid temporary disability benefits in excess of what he should have been paid and was entitled to receive. The ALJ further concludes that the respondents are entitled to recoup the overpayment from the claimant, and the overpayment shall be calculated by subtracting the amount of TPD benefits owed for the period of December 6, 2013 through December 11, 2013 from the total amount of indemnity benefits which have been paid in the claim.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to withdraw their admission of liability for the initial accident based on fraud is denied and dismissed.

2. The claimant's request to increase the admitted AWW is denied and dismissed. The AWW shall remain $732.13.

3. The claimant's requests for additional medical benefits for his right shoulder and right elbow conditions are denied and dismissed. No further medical benefits are payable for the work-related injury.

4. The respondents' request to terminate the claimant's temporary disability benefits is hereby granted. The claimant is entitled to temporary partial disability benefits from December 6, 2013 through December 11, 2013, but respondents are not liable for any temporary disability benefits after December 11, 2013.

5. The respondents are hereby awarded an overpayment in an amount equal to the indemnity benefits which have been paid in this claim minus the temporary partial disability benefits which are payable for the period of December 6, 2013 through December 11, 2013. The respondent-insurer shall file an admission of liability in which the overpayment shall be claimed consistent with this Order. The respondent-insurer is then entitled to repayment of the overpayment, though the claimant may file an application for hearing concerning how the overpayment shall be repaid or to contest whether the calculation of the overpayment is consistent with this Order.

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

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

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

DATE: February 19, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has established by clear and convincing evidence that he is not at maximum medical improvement (MMI) for his December 12, 2013 compensable injury.

2. If the claimant is at MMI, whether the respondents have overcome the impairment rating provided by the Division IME, Dr. William Griffis, by clear and convincing evidence.

3. If the claimant is not at MMI, whether the claimant is entitled to temporary total disability (TTD) or temporary partial disability (TPD) benefits.

4. Whether the claimant has established his average weekly wage.

FINDINGS OF FACT

1. The claimant is a 48 year old man. His date of birth is November 16, 1966. He was 47 years old on December 12, 2013 when he sustained a compensable injury while working for the respondent-employer.

2. On December 12, 2013, the claimant was performing his typical work duties when an industrial sized clamp came loose and struck him in the head. There was two to three tons of pressure on the clamp when it came loose. The force of the impact split open the claimant's eyebrow and left orbital rim.

3. The claimant sought immediate emergency treatment at Penrose St. Francis Hospital. He was instructed to follow up with an otolaryngologist.

4. The claimant posted on his Facebook page on December 14, 2013 that he was "still wicked dizzy" from the incident. After the incident, the claimant was experiencing headaches, dizziness, vertigo, and memory loss.

5. The claimant began treatment with a workers' compensation physician on December 19, 2013. He saw Dr. Walter Larimore at Concentra. The claimant complained of dizziness when he would stand too quickly.

6. The claimant was not seen by a physician again until March 7, 2014, when he was examined by Dr. Randall Jones. The claimant complained to Dr. Jones of ongoing headaches. Dr. Jones placed the claimant at MMI on that date, March 7, 2014.

7. Dr. Jones' March 7, 2014 report states that the claimant was no longer experiencing dizziness. The claimant disagreed with this report and believes that he was still experiencing dizziness at this time, but that he was feeling overall better than he had been months ago.

8. The respondents filed a Final Admission of Liability on April 14, 2014.

9. On April 13, 2014, the claimant walked into his garage to smoke a cigarette. While stepping into the garage, he felt a strong vertigo sensation and it "was like the whole room was spinning." He fell into a refrigerator and hit his head. The claimant believes that this sensation that caused him to fall was the same sensation that he had been experiencing since his injury on December 12, 2013.

10. The claimant began experiencing increased dizziness and vertigo while at work on April 14, 2014. The respondent-employer sent him to the emergency room for an evaluation.

11. The claimant returned to Dr. Jones on April 21, 2014. He explained to Dr. Jones that his headaches and dizziness have increased in both frequency and intensity since being placed at MMI the previous month. Dr. Jones stated that the claimant was medically unable to work. He further referred the claimant to Dr. Bowser for a neurology evaluation and also for a NeuroPsych evaluation. Dr. Jones opined that the claimant was no longer at MMI and that MMI would not be reached for another three to six months.

12. Dr. Eric Ridings, a physiatrist, performed an independent medical examination (IME) at the request of the respondents on July 16, 2014. Dr. Ridings opined that the medical record does not support that the claimant suffered a brain injury due to the accident. Dr. Ridings further stated that the claimant did in fact reach MMI on March 7, 2014 and he remains at MMI.

13. Dr. Ridings further opined that the dizziness and vertigo that the claimant was experiencing prior to his April 14, 2014 emergency room visit was not related to his December 12, 2013 incident. Despite Dr. Ridings being of the opinion that none of the

claimant's current complaints were work related, he urged the claimant to seek further evaluation for his condition outside of the workers' compensation system.

14. The claimant underwent a Division IME with Dr. William Griffis on August 11, 2014. The claimant complained to Dr. Griffis of ongoing, moderately severe headaches, occurring four to five times per week. The claimant also complained of short-term memory loss and difficulty concentrating.

15. Dr. Griffis diagnosed the claimant with posttraumatic concussion headaches and a closed head injury with cognitive deficits. He provided the claimant with a 10% whole person rating for Episodic Neurologic Disorders.

16. Dr. Griffis recommended that the claimant receive a neuropsychological evaluation to further investigate the claimant's cognitive deficits including short-term memory loss and difficulty concentrating. However, Dr. Griffis recommended this be performed as maintenance care and found the claimant to be at MMI.

17. Dr. Bennett Machanic, a specialist in neurology, performed an IME of the claimant at the request of the claimant's counsel on November 24, 2014. The claimant reported dizziness, vertigo, falling due to the vertigo, headaches, memory loss, and mood swings.

18. Dr. Machanic's examination demonstrated the claimant's difficulty recalling items over a three minute time period. Dr. Machanic performed a modified Hallpike procedure that supported the claimant's subjective complaints of vertigo. The claimant's tandem gait was very unsteady and he veered forward while walking.

19. Dr. Machanic believes that the December 12, 2013 incident was associated with a mild cerebral concussion. Although the forehead laceration was repaired, the claimant continues to have problems with the left suborbital branch of the trigeminal nerve. He finds the more important issue to be the effect of the injury on the claimant's headaches, and on his vestibular and cognitive functions.

20. Dr. Machanic diagnosed the claimant as having posttraumatic muscle contraction headaches and posttraumatic vestibular dysfunction. He explained that "the possibility of a more extensive traumatic brain injury has not been excluded to date."

21. Dr. Machanic concluded that he is "quite concerned" about the claimant's situation. "I fully disagree that [the claimant] has reached any semblance of maximum

medical improvement and I do think that his Workers' Compensation case should immediately be reopened and I would suggest strongly that [the claimant] be evaluated thoroughly and fully by an otolaryngologist."

22. Dr. Machanic indicated that the claimant's impairment rating would be "very close to 30%," but opined that it is not appropriate to provide an impairment rating at this point given the claimant's need for further treatment.

23. Brian Gessel testified at hearing that he is the General Manager of the Motor City branch of the respondent-employer. He verified that the claimant continued working with the respondent-employer after the injury. He did recall an event wherein the claimant told him he was experiencing dizziness and headaches. He instructed the claimant at that time to "go back and have it checked out."

24. Mr. Gessel testified that the claimant continued to work with the respondent-employer through April 14, 2014. He had no interaction with the claimant after that date. Mr. Gessel testified that the claimant told him that he was resigning because he found a new job.

25. The notes of Dr. Jones indicate that the claimant told him that he quit his job because he does not like it.

26. The ALJ finds that the claimant quit his job voluntarily and not as a result of the effects of his industrial injury.

27. Dr. Ridings testified at hearing for the respondents as an expert in physical medicine and rehabilitation. He is not a neurologist. He testified that the natural history of a closed head injury is to have maximum problems shortly after the injury and then a gradual decrease in symptoms.

28. Dr. Ridings testified that it was his opinion that the claimant's symptoms in April of 2014 were not related to his original, December 12, 2013 trauma. It was his ultimate opinion that the claimant obtained MMI on March 7, 2014 without any permanent impairment.

29. Dr. Ridings acknowledged at hearing that the claimant only had two visits with two different doctors before being placed at MMI. He testified that his report stated the claimant did not have a brain injury, but testified that dizziness can be a sign of a head injury.

30. Dr. Ridings testified that if a person were to have balance problems caused by a head injury, it would be reasonable to send that person to an ENT doctor. If the claimant's ongoing symptoms are related to the December 12, 2013 incident, Dr. Ridings agreed he should be evaluated by an ENT doctor under workers' compensation and also have a neuropsych evaluation as recommended by Dr. Griffis.

31. Dr. Ridings agreed that there is some evidence in the record to suggest that the claimant's headaches had never fully resolved prior to his examination with Dr. Griffis. Dr. Ridings testified that headaches often do not have objective findings and are solely documented through subjective complaints. The diagnosis would have to be based solely on the history of the patient and the medical record. Dr. Ridings agreed that the claimant's own history documented ongoing headaches and that the medical record documented ongoing headaches to a degree.

32. The claimant has continued to experience symptoms that he attributes to the December 12, 2013 incident. He has ongoing dizziness/vertigo, headaches, memory loss, and mood swings.

33. Prior to December 12, 2013, the claimant never had problems with recurring headaches. The record is absent of any documentation of headaches prior to December 12, 2013.

34. The claimant has never had dizziness, vertigo, or memory issues prior to December 12, 2013. The record is absent of any documentation of dizziness, vertigo, or memory issues prior to December 12, 2013.

35. The claimant's symptoms continue to cause him to fall and he has fallen recently. He recently fell attempting to use his home bathroom and struck his hip on the toilet. He explained this to be the same sensation that caused his fall on April 13, 2014. The claimant testified that he had never had issues with falling prior to December 12, 2013.

36. The claimant was hired on November 25, 2013. There is only one pay stub available from his employment with the respondent-employer prior to his December 12, 2013 date of injury. The claimant earned $1,965.95 between November 25, 2013 and December 8, 2013. $1,965.95 divided by 2 weeks equals $982.98.

37. The ALJ finds the claimant to be credible with respect to his medical condition.

38. The ALJ finds that the claimant has established that Dr. Griffis' opinion determining that the claimant was at MMI on March 7, 2014 is clearly erroneous.

39. The ALJ finds that the claimant is not at MMI for his industrial injury.

40. The ALJ finds that the claimant has failed to establish that it is more likely than not that he is entitled to temporary indemnity benefits.

41. The ALJ finds that the claimant has established that it is more likely than not that his average weekly wage is $982.98 per week.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

3. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

6. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and

convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), *citing Dilco v. Koltnow,* 613 P.2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010).

7. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, (W.C. No. 4-874-745-01, ICAO February 14, 2014); *See also Javalera v. Monte Vista Head Start, Inc.,* (W.C. No. 4-532-166, ICAO July 19, 2004); *Gonzales v. Browning Industries of Colorado*, (W.C. No. 4-350-356, ICAO March 22, 2000).

8. The ALJ concludes that that the opinions of Dr. Machanic and Dr. Jones, that the claimant is not at MMI, are more credible and more persuasive than medical opinions to the contrary, and that Dr. Griffis clearly erred when finding the claimant to be at MMI as of March 7, 2014. The ALJ concludes that this is not a mere difference of opinion but a clear error on Dr. Griffis' part.

9. As found above, the ALJ concludes that the claimant has established by clear and convincing evidence that the claimant is not at MMI.

10. As a result of the conclusion that the claimant is not at MMI, the respondents' challenge to the impairment rating is moot.

11. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001).

12. The ALJ concludes that the claimant voluntarily quit his employment with the respondent-employer and that the wage loss is therefore not attributable to the industrial injury.

13. The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), See Also Section 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p.

1457. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

14. The claimant was hired on November 25, 2013. There is only one pay stub available from his employment with the respondent-employer prior to his December 12, 2013 date of injury. The claimant earned $1,965.95 for the two week period from November 25, 2013 to December 8, 2013. $1,965.95 divided by 2 weeks equals $982.98.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to overcome the opinion of the DIME physician is denied and dismissed.

2. The claimant is not at maximum medical improvement and the respondent-insurer shall provide medical care necessary to cure or relieve the claimant from the effects of his industrial injury.

3. The claimant's request for temporary indemnity disability benefits is denied and dismissed.

4. The claimant's average weekly wage is $982.98.

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

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

DATE: February 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

Whether the need for the arthroscopic shoulder surgery recommended by Dr. Weinstein is causally related to Claimant's October 22, 2013 industrial injury.

FINDINGS OF FACT

1. The claimant was employed as a Correctional Officer I on October 22, 2013 when he was called to a unit to help restrain an inmate who was refusing medications. The claimant used a 2 x 6 plastic shield weighing between 6½ and 10 pounds to help gain control of a restrained inmate. The claimant used the handles on either side of the shield to hold the shield up to about shoulder level for the 1½ minutes that it took to gain control of the restrained inmate. About 30 seconds into the confrontation the claimant felt a pop in his left forearm. The claimant did not seek medical treatment and finished out his shift.

2. The claimant delayed seeking any medical treatment for approximately two and a half months at which time, on January 7, 2014, he then sought treatment at CCOM. The claimant reported that while pinning an offender to the wall with a shield, he left a "pop" in his left forearm with immediate pain in the back of his left elbow. On January 7, 2014, the claimant complained of pain, weakness and swelling in the left forearm and hand. Dr. Schwender noted that the claimant's pain diagram included left elbow/forearm pain. The claimant did not report any symptoms or problems regarding his left shoulder to Dr. Schwender and did not document any left shoulder problems on his pain diagram. On physical examination, the claimant's shoulders revealed full range of motion. Dr. Schwender diagnosed the claimant with left medial epicondylitis, recommended occupational therapy, and released the claimant to return to work with no restrictions.

3. The claimant returned to CCOM on January 22, 2014, February 26, 2014, and March 19, 2014 for his left elbow. At each visit the claimant only complained of left elbow pain and only noted pain in his left elbow down to his left hand on his pain diagrams. Dr. Nanes continued to release the claimant to work with no restrictions.

4. The claimant saw Dr. Leppard on February 28, 2014 for an EMG study. The claimant's chief complaint was left elbow pain and hand numbness. The claimant

reported having persistent left inner elbow pain since his injury on October 22, 2013. The claimant did not report any left shoulder pain or problems. Dr. Leppard did not note any left shoulder problems arising out of her physical examination and did not provide the claimant with a diagnosis for his left shoulder.

5. The claimant saw Dr. Larsen on February 3, 2014, March 3, 2014, and April 2, 2014. The claimant only complained of left elbow pain. Dr. Larsen did not note that the claimant had any left shoulder complaints or problems, did not document any left shoulder complaints or problems during his physical examination, and did not provide the claimant with a diagnosis related to his left shoulder on any of those dates.

6. The claimant had continued to work his regular job for over 5 months from October 22, 2013 through April 8, 2014 when he underwent surgery on his left elbow.

7. The claimant initially testified that he first reported having left shoulder pain when he came out of his sling approximately 4-5 days following his left elbow surgery. The claimant later testified that his left shoulder pain had always been present since the October 22, 2013 injury but that his elbow was his primary concern.

8. The claimant completed a pain diagram on April 14, 2014, 6 days following his left elbow surgery. The claimant only circled the area around his left elbow. The claimant did not mark any symptoms in his left shoulder.

9. The claimant returned to CCOM on April 16, 2014, 8 days following his left elbow surgery complaining of left elbow pain only. Dr. Nanes did not note any left shoulder complaints from the claimant on that date.

10. The claimant saw Dr. Larsen for a surgical follow-up on April 21, 2014, 13 days following his surgery. Dr. Larsen did not note any left shoulder problems or complaints at that time.

11. The first notation of left shoulder problems in the claimant's medical records appears in Dr. Nanes' May 14, 2014 chart note. Dr. Nanes noted that the claimant "continues to have considerable pain and discomfort in the left elbow and actually in the left upper extremity including the left shoulder."

12. The claimant saw Dr. Larsen on May 21, 2014 for a surgical follow-up. Dr. Larsen did not note any left shoulder problems or complaints.

13. The claimant saw Dr. Gray at CCOM on May 28, 2014. The claimant's only complaint at that time was left elbow pain. Dr. Gray did not note any left shoulder problems or complaints.

14. On June 11, 2014, Dr. Nanes noted that the claimant "has developed left shoulder limitation [and] discomfort and Dr. Larsen feels that this was from the prolonged wearing of his cast." This is not consistent with Dr. Larsen's records which do not document any left shoulder complaints or attribute any left shoulder problems to the prolonged wearing of a cast. This is also inconsistent with the claimant's testimony that he developed left shoulder pain 4-5 days after his left elbow surgery. On July 16, 2014, Dr. Nanes offered an opinion that the claimant's left shoulder condition "is due to his injury of the left elbow and was probably caused by wearing his brace for a prolonged period." Dr. Nanes did not opine that the claimant injured his left shoulder during the October 22, 2013 incident and his opinion that the claimant's left shoulder condition is due to the prolonged wearing of a brace is not consistent with the claimant's testimony that his left shoulder started hurting 4-5 days after his left elbow surgery.

15. The claimant had a left shoulder MRI on July 24, 2014.

16. The claimant saw Dr. Weinstein on one occasion, August 16, 2014, for an orthopedic consultation. The claimant reported to Dr. Weinstein that he had a twisting injury to his left arm with immediate pain in his left shoulder as well as his left elbow. This history is not consistent with the claimant's medical records or his testimony at hearing. Dr. Weinstein's report does not summarize or refer to any of the claimant's prior medical records or otherwise indicate that he had any of the claimant's prior medical records to review as part of his consultation. Dr. Weinstein diagnosed the claimant with left rotator cuff tendinitis and left superior labral/biceps inflammation/tear. Dr. Weinstein recommended left shoulder surgery given that the claimant "has been symptomatic over a year despite rest, modification of activity, physical therapy and anti-inflammatory medication". This is not consistent with the claimant's medical records or his hearing testimony. According to his testimony and his medical records, the claimant did not become symptomatic until after his left elbow surgery in April, only 4 months before seeing Dr. Weinstein. Prior to that time, the claimant had been working full duty with no rest or modification of his activities. Dr. Weinstein did not offer an opinion on the cause of the claimant's left shoulder condition or specifically relate the need for the surgery to either the incident on October 22, 2013 or the prolonged wearing of a cast/sling.

17. Dr. Ciccone performed an Independent Medical Evaluation (IME) for Respondent on November 12, 2014. As part of the IME, Dr. Ciccone reviewed copies

of the claimant's medical records, took a history from the claimant, and performed a physical examination. The claimant told Dr. Ciccone that at the time of injury, he felt a pop on the lateral side of his left elbow that radiated up to the shoulder but that he noted mostly forearm pain at the time. Dr. Ciccone opined that the claimant's testimony of first experiencing shoulder pain after his elbow surgery was consistent with his review of the claimant's medical records. However, the claimant told him that he notified CCOM of his shoulder problems when he first obtained treatment on January 7, 2014. This is not consistent with the claimant's medical records or his testimony at hearing. Dr. Ciccone credibly testified that he did not question the claimant's veracity, that he agreed with Dr. Weinstein's diagnoses, and that the shoulder surgery recommended by Dr. Weinstein was reasonably necessary. Dr. Ciccone credibly and persuasively testified that the MRI was essentially normal revealing only generative changes and no acute injury.

18. Dr. Ciccone credibly and persuasively opined that the need for the surgery was not causally related to the claimant's October 22, 2013 injury. The claimant's MRI showed only degenerative changes with no acute injury. Dr. Ciccone credibly explained that if the claimant had injured his shoulder on October 22, 2013, he would have complained of left shoulder pain initially. Rather, two and a half months after the injury, the initial visit at CCOM revealed no shoulder complaints, no shoulder problems were noted on the pain diagram, and physical examination showed full range of motion in the claimant's bilateral shoulders.

19. Dr. Ciccone's opinion that the recommended surgery is not related to the claimant's October 22, 2013 injury is found to be more credible and persuasive than the written opinion of Dr. Nanes that the claimant's left shoulder condition was the result of the prolonged wearing of a cast/sling following the claimant's left elbow surgery. Dr. Weinstein did not offer an opinion on the cause or need for the recommended surgery. Moreover, it does not appear that Dr. Weinstein had the benefit of the claimant's medical records. The history that Dr. Weinstein documented was inconsistent with a review of those medical records and with the claimant's testimony at hearing.

20. The claimant has failed to establish that it is more likely than not that the need for the left shoulder surgery recommended by Dr. Weinstein is causally related to his October 22, 2013 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

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

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

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

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

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

6. The ALJ concludes that Dr. Ciccone's opinion that the recommended surgery is not related to Claimant's October 22, 2013 injury is found to be more credible and persuasive than the written opinion of Dr. Nanes that Claimant's left shoulder condition was the result of the prolonged wearing of a cast/sling following Claimant's left elbow surgery.

7. As found, the claimant has failed to establish by a preponderance of the evidence that the need for the left shoulder surgery recommended by Dr. Weinstein is causally related to his October 22, 2013 industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for surgery as recommended by Dr. Weinstein is denied and dismissed.

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

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

DATE: February 24, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from February 4, 2014 to June 17, 2014 and from July 24, 2014 to August 26, 2014.

2. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment on November 5, 2014

FINDINGS OF FACT

1. Claimant was employed by Employer as a courtesy clerk.

2. On January 7, 2014 Claimant suffered an admitted industrial injury to his right knee and low back when a customer backed into a row of grocery carts that Claimant was pushing.

3. On January 8, 2014 Claimant was evaluated by Jonathan H. Bloch, D.O. Dr. Bloch assessed Claimant with contusions of both knees, contusions of both wrists, and lumbar strain. Dr. Bloch assigned work restrictions of: no significant kneeling, crawling, squatting, or climbing; limit bending to less than 6 times per hour; and no ongoing lifting greater than 15 pounds. *See* Exhibit 4.

4. On January 13, 2014 Claimant was evaluated by Terrell R. Webb, M.D. Claimant reported to Dr. Webb that his knee and wrist symptoms had resolved but that he continued to have mild pain in the low back. Claimant reported he was not working as there was no light duty work available with Employer. Dr. Webb assessed: contusion of knee, resolved; contusion of wrist, resolved; and lumbar strain, improving. Dr. Webb released Claimant to a trial of regular duty work, and scheduled a follow up visit for one week later. *See* Exhibit 4.

5. In late January or early February, Claimant slipped and fell on ice on his way to school. In the slip and fall he aggravated his knee injury and had additional pain for approximately one week before his knee returned to its baseline condition. The slip and fall did not cause a new injury but merely aggravated his already injured knee for approximately one week.

6. Claimant attended school during both the fall semester of 2013 and the spring semester of 2014. In the fall semester he took a tai chi class and also, on occasion during this time period, practiced martial arts in the park with his friends.

7. On February 4, 2014 Claimant was evaluated by Glen D. Peterson, P.A. P.A. Peterson noted that Claimant was improving when he fell on the ice. P.A. Peterson noted no significant change in subjective complaints from prior visits, and assessed Claimant with lumbar strain. P.A. Peterson assigned work restrictions of: no squatting and/or kneeling; must wear brace; should be sitting 50% of the time; and no climbing stairs or ladders. *See* Exhibit 4.

8. Claimant provided a copy of the restrictions to Employer and Employer was unable to accommodate the restrictions or provide work that Claimant could do within the restrictions.

9. On March 4, 2014 Claimant was again evaluated by P.A. Peterson. Claimant's work restrictions were not changed. P.A. Peterson noted that Claimant had slight improvement in his condition and ordered a left knee MRI to rule out internal derangement. *See* Exhibit 4.

10. On March 19, 2014 Claimant again saw P.A. Peterson and his work restrictions were continued. *See* Exhibit 4.

11. On May 2, 2014 Claimant was evaluated by Matthew Miller, M.D. Dr. Miller assessed Claimant with Chondromalacia. Claimant reported to Dr. Miller that he was not working as no work was available. Dr. Miller assigned work restrictions of: no repetitive lifting over 20 pounds; no pushing/pulling over 20 pounds of force; no squatting; no kneeling; and should be sitting 50% of the time. *See* Exhibit 4.

12. On May 13, 2014 Claimant saw P.A. Peterson who assessed Claimant with lumbar sprain. PA Peterson noted Claimant's bilateral knee and lower back pain was getting better. PA Peterson assigned work restrictions of: no repetitive lifting over 20 pounds; no pushing/pulling over 30 pounds of force; no squatting; and no climbing. *See* Exhibit 4.

13. On May 27, 2014 Claimant saw PA Peterson. PA Peterson again assessed lumbar sprain. PA Peterson noted that Claimant was doing better. PA Peterson released Claimant to a trial of regular full duty work with a limit of 4 hours per day. PA Peterson noted Claimant would follow up in 1-2 weeks for less restrictions and possibly a trial of 8 hours per day. *See* Exhibit 4.

14. On June 17, 2014 Claimant saw PA Peterson. PA Peterson assessed lumbar sprain, chondromalacia, and ACL injury tear. PA Peterson released Claimant to regular full duty work with no activity restrictions and advised Claimant to wear knee brace when working. *See* Exhibit 4.

15. Claimant returned to work for Employer at this time, but was not able to perform his normal job duties due to the pain in his knees and back.

16. On July 24, 2014 Claimant saw PA Peterson. PA Peterson assessed lumbar sprain and ACL injury tear. PA Peterson assigned new work restrictions of 6 hours per day. *See* Exhibit 4.

17. Claimant had further visits on July 30, 2014, August 11, 2014, and August 27, 2014 where his work restrictions of 6 hours per day were not changed or lifted. *See* Exhibit 4.

18. Claimant is unsure as to whether or not he worked for Employer subsequent to July 24, 2014 and indicated in his testimony that the records would show.

19. Employer records show that Claimant worked on July 27, 2014, then called in sick for two shifts, then worked a shift, then called in sick again. Employer records show that Claimant worked on August 9, 2014 and that August 9, 2014 was his last day of work. Claimant called Employer on August 15, 2014 indicating he could not work for two weeks as he had to watch his niece. *See* Exhibit G, Exhibit I.

20. From July 24, 2014 through August 26, 2014 Employer provided Claimant the opportunity to work within his restrictions of 6 hours per day.

21. Employer had a policy that required all employees on leave due to work-related injuries to present up to date documentation from their physicians. Claimant was aware of the policy and submitted paperwork from his physicians to Employer on February 4, 2014 and March 4, 2014.

22. Claimant failed to provide paperwork from his physician in April and was contacted by Employer. Claimant assured Employer that he would provide the documentation. *See* Exhibit G.

23. Claimant failed to do so. On April 28, 2014 store manager Kevin Quigley sent Claimant a letter stating that Claimant must contact him or one of the two assistant store managers within three days to discuss his status with King Soopers. The letter advised Claimant that if he failed to contact them within three days, his employment would be terminated for being absent without leave. *See* Exhibit F.

24. Claimant responded to the April 28, 2014 letter from Mr. Quigley. Claimant contacted Employer and provided updated paperwork from his physicians.

25. On October 2, 2014 Claimant sent a fax to Employer with a note on the cover page stating “Sorry about the lack of contact on my part. Depression and my injuries have made it hard for me to leave my house lately. Here is my schedule and I will send a document from my doctor soon.” *See* Exhibit J.

26. On October 23, 2014 Mr. Quigley once again sent Claimant a letter. The letter indicated Claimant must contact him or an assistant store manager within three days to discuss his status with King Soopers. The letter advised Claimant if he failed to contact Employer within three days that he would be terminated. *See* Exhibit K.

27. Claimant received the October 23, 2014 letter. Claimant did not respond to the letter or contact Employer within three days.

28. Claimant testified that he did not contact Employer within three days because he did not have an updated doctor's note and thought Employer needed that. Claimant did not call Employer to ask if they needed a doctor's note and made the decision not to respond to the letter.

29. After failing to respond to the October 23, 2014 letter, Claimant was terminated from employment, effective November 5, 2014. *See* Exhibit L.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

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

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until the first occurrence of any one of the following: the employee reaches maximum medical improvement; the employee returns to regular or modified employment; the attending physician gives the employee a written release to return to regular employment; or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. § 8-42-105(3), C.R.S. (2014).

Here, Claimant was under restrictions that impaired his ability to effectively and properly perform his regular employment from February 4, 2014 through June 17, 2014. During this time, Employer was unable to offer modified employment that met Claimant's work restrictions and claimant was unable to resume his prior work. Claimant's slip and fall on the way to school occurred just prior to February 4, 2014 and only aggravated his underlying work related injury for one week. Even after he returned to baseline, Claimant remained unable to perform his regular employment duties and remained under restrictions until June 17, 2014. Claimant has established by a preponderance of the evidence that during this time, he suffered an impairment of earning due to his work injury and thus has met his burden to show entitlement to TTD benefits from February 4, 2014 through June 17, 2014.

However, during the period from July 24, 2014 through August 26, 2014, Claimant has failed to meet his burden to show loss of wages attributed to his injury. As found above, Claimant was unable to establish or recall any specific dates that he missed work due to his injury. Employer records show that he in fact worked during this time period, and that he missed work during this time for various reasons not related to his injury. As found above, he missed two weeks during this period of time due to his need to care for his nieces. He also missed work during this time due to unspecified sickness. Employer records also show that he worked on July 27, 2014, called in sick for two shifts, then worked, then again called in sick. Although Claimant clearly suffered a compensable injury on January 7, 2014 Claimant has failed to meet his burden to show that he suffered a loss of wages between July 24, 2014 and August 26, 2014 due to his injury. It is just as likely that the wage loss during this time period was a result of other events including unrelated illnesses and Claimant's choice to take time off to care for his nieces. Further, Employer records indicate on certain dates during this time period that Claimant actually worked, which contradicts his claim of total wage loss. Claimant has failed to meet his burden and has not shown an entitlement to TTD

benefits during this period time and has not met his burden to show that the loss of wages from July 24, 2014 through August 26, 2014 was more likely than not due to his injury.

Responsible for Termination

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

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

However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

Here, Claimant was not terminated due to his injury. In fact, the evidence shows that Employer continued to employ Claimant and gave him several chances to remain employed by simply communicating with Employer. Claimant, as found above, failed to adequately communicate with Employer over the course of several months. Claimant missed work for many non-injury related reasons and often called in sick without specific information as to whether he could not work due to his injury or do to other illnesses. Employer had to go the extreme of sending Claimant a letter in April of 2014 advising Claimant he would be terminated if he did not contact them within three days. Claimant responded to this letter, but later his communication again became

inadequate. In early October Claimant apologized for the lack of communication on his part. Later that month, and on October 23, 2014 Employer again had to send a letter to Claimant surrounding his lack of communication. Claimant received this letter, which explained that he would be terminated if he did not contact management within three days, and unlike in April, this time Claimant failed to respond to the letter.

Claimant's decision not to respond to the October 23, 2014 letter was a volitional decision and volitional act on his part. Claimant could have simply contacted management in response to the letter. Had Claimant responded to the letter by contacting management, it is likely he would remain employed. Claimant knew his employment would be terminated if he did not contact management, and he made that choice. Respondents have shown that Claimant had a history of poor communication with Employer and that Employer had to send letters to Claimant twice, in attempts to get Claimant to communicate. Although Claimant responded to the April letter, he failed to respond to the October letter despite knowing it would lead to his termination. Therefore, Respondents have met their burden of showing that Claimant's termination was justified. Any wage loss after the termination date of November 5, 2014 was due to the fault of Claimant and he is not entitled to any benefits following his at fault termination.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show entitlement to temporary total disability benefits for the time period of February 4, 2014 through June 17, 2014.

2. Claimant has failed to meet his burden to show entitlement to temporary total disability benefits for the time period of July 24, 2014 through August 26, 2014. The claim for temporary total disability benefits during this time period is denied and dismissed.

3. Respondents have met their burden to establish that Claimant was responsible for his termination from employment on November 5, 2014.

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

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

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

DATED: February 13, 2014

/s/ Michelle E. Jones

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

ISSUES

- Did the claimant prove by a preponderance of the evidence that the respondents are subject to penalties because they failed timely to deny a request for prior authorization for surgery as provided in WCRP 16?

- If the respondents failed timely to deny authorization for surgery is the proposed surgery "deemed" authorized by operation of WCRP 16-10(E)?

- If the surgery was not "deemed" authorized did the claimant prove by a preponderance of the evidence that carpal tunnel release surgery is reasonable, necessary and related to the industrial injury of January 12, 2014?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 15 were admitted into evidence. Respondents' Exhibits A through H were admitted into evidence. The deposition of Wallace Larson, M.D., was received into evidence.

2. On October 9, 2008 the claimant was seen at Poudre Valley Health System for a report of groin pain. At that time the claimant gave a history of "hand surgery." The report does not state which hand was operated on or what the diagnosis was.

3. In July 2011 the claimant was treated for a bite to his right little finger. There is no credible or persuasive evidence in these records that the claimant was complaining of wrist symptoms or numbness in his first three digits.

4. On January 12, 2014 the claimant sustained an admitted injury to his right hand and wrist. The respondents filed a General Admission of Liability (GAL) for this injury on February 18, 2014. The GAL admitted for medical benefits. The GAL was filed by Ms. Shannon Browne (Browne) for the insurer in care of Sedgwick Claims Management Services, Inc. (Sedgwick). The ALJ infers that Sedgwick is the respondents' third-party adjusting firm.

5. The claimant testified as follows concerning the admitted injury. On January 12, 2014 he was employed as a driver taking passengers to and from the airport. In this capacity he was unloading a 50 pound bag that began to fall from the back of a vehicle. He grabbed the luggage handle to keep the bag from falling. The bag pulled his hand downwards and he felt an immediate "pop" in his wrist and also

experienced immediate pain. Within one hour his right hand became numb except for his little finger. He was not experiencing these symptoms prior to January 12, 2014. The claimant immediately reported the injury to the employer and was referred to Concentra Medical Centers (Concentra) for medical care.

6. On January 13, 2014 the claimant was seen at Concentra by Robert Nystrom, D.O. Dr. Nystrom noted the claimant had "no previous injuries to the right wrist or hand." Dr. Nystrom noted the claimant gave a history that he was pulling luggage out of the back of a shuttle vehicle. The claimant had his hand on the handle of the suitcase and it started to fall. The claimant reported that he "felt a pop in his right wrist." The claimant also reported some immediate pain and shortly thereafter, swelling. On physical examination Dr. Nystrom noted diffuse swelling around the right wrist and to a lesser extent the right hand. He also noted some altered sensation to pinprick and soft touch of the first 3 digits of his right hand and some pain to palpation over the ventral aspect of the wrist. An x-ray of the right wrist showed no "bony abnormality." Dr. Nystrom assessed a "right wrist sprain". He prescribed a wrist brace, ibuprofen and occupational therapy. Dr. Nystrom imposed restrictions of no lifting over 5 pounds and no pushing or pulling with greater than 5 pounds of force. Dr. Nystrom wrote that he would have a "low threshold" for performing and MRI if there was not improvement in the claimant's condition.

7. On January 13, 2014 the claimant completed a medical history questionnaire at Concentra. The claimant answered affirmatively to the question of whether he had prior surgeries. The claimant wrote on a line describing the type of surgery performed but his writing is illegible and indecipherable. The claimant mentioned having symptoms in his "right hand." It is not clear if the claimant was indicating past or present symptoms in the right hand.

8. The claimant returned to Dr. Nystrom on January 16, 2014. The claimant reported his wrist wasn't any better and he could hardly grasp with the right hand. Dr. Nystrom noted diffuse pain and swelling of the right wrist and decreased range of motion (ROM) and grip strength. Dr. Nystrom ordered an MRI "on [an] urgent basis" and referred the claimant to hand surgeon Jeffrey Chapman, M.D.

9. The claimant underwent an MRI of the right hand on January 22, 2014. The radiologist's impression was small cortical erosions of the third and fifth metacarpal heads.

10. Dr. Chapman examined the claimant on January 28, 2014. The claimant gave a history of injuring his hand when lifting a bag out of the back of a van on January 12, 2014. He reported numbness and tingling since as well as some diffuse pain. The claimant reported no history of numbness or tingling in the upper extremities. Dr. Chapman reviewed the MRI and noted some "STT arthritis, pisotriquetral effusion but otherwise no real findings." On physical examination Dr. Chapman noted a "minimally positive Tinel's over the median nerve at the wrist and a negative Phalen's test. The claimant had decreased sensation in a classic median distribution and "severe weakness of the APV on the right." Dr. Chapman opined that the claimant had

sustained a neurapraxic injury of the median nerve. He recommended that an EMG/nerve conduction studies be considered if there was no improvement within one month.

11. On February 25, 2014, Dr. Chapman again examined the claimant. The claimant reported continued numbness and tingling in the thumb, index and long fingers. Dr. Chapman noted that the patient had a positive Tinel's from the middle of the forearm up into the palm with the median nerve. There was "decreased sensation in the median distribution and a very weak APB." Dr. Chapman diagnosed median nerve neurapraxic injury. Because it had been 6 weeks since the injury and the claimant still had a significant median nerve deficit Dr. Chapman and ordered an EMG/nerve conduction study. Dr. Chapman recommended a restriction of no repetitive use of the right upper extremity.

12. On March 11, 2014 Eric Hammerberg, M.D., performed electrodiagnostic testing of the claimant's right upper extremity. Dr. Hammerberg reported that nerve conduction velocity "studies showed a delayed and attenuated distal motor response (recording from the 2nd lumbrical muscle) and no distal sensory response in the right median nerve." Other nerves tested were normal. Dr. Hammerberg also noted that needle EMG "studies of the upper extremity showed signs of acute partial denervation in the opponens pollicis muscle." Other tested muscles were normal. Dr. Hammerberg wrote that the findings were "compatible with the clinical diagnosis of a severe acute" right carpal tunnel syndrome (CTS).

13. Dr. Chapman examined the claimant again on March 25, 2014. The claimant still had complaints of numbness in the median distribution. On examination Dr. Chapman noted the EMG/ nerve studies suggested "acute carpal tunnel syndrome." However, Dr. Chapman wrote "that it certainly would be unusual to have a single injury cause such an abrupt severe carpal tunnel syndrome". Dr. Chapman assessed right "median nerve neuropathic injury versus acute carpal tunnel syndrome." The claimant elected to try a steroid injection which Dr. Chapman performed.

14. On April 1, 2014 Virginia Hrywnak, D.O., examined the claimant at Concentra. The claimant reported he was not doing any better and was described as "frustrated." The claimant denied a history of diabetes or thyroid conditions but thought he had "been injected on in the past." He reported "no change at all" in response to the steroid injection administered by Dr. Chapman. Dr. Hrywnak assessed CTS, right wrist sprain, lesion median nerve and right hand pain. She recommended fasting blood work to rule out diabetes and thyroid conditions.

15. Dr. Chapman examined the claimant on April 8, 2014 and completed an office note concerning this examination. Dr. Chapman wrote the claimant reported the injection "helped with his feeling of fullness" but he was still experiencing numbness and weakness. On examination Dr. Chapman noted "dense median nerve sensory loss as well as weakness of his abductor pollicis brevis." He assessed right "median neuropathy, likely carpal tunnel syndrome." Dr. Chapman wrote that he discussed with the claimant "his EMG nerve conduction study results as well as the fact he did get

some response to the steroid injection." Dr. Chapman recommended a "carpal tunnel release" and discussed "endoscopic versus open release" as well as possible complications from these procedures.

16. On April 9, 2014 Rosalinda Pineiro, M.D., examined the claimant at Concentra. She took a history that the claimant was "in a motor vehicle accident on January 12, 2014" and felt his wrist popped. She noted he had undergone three months of medications, restrictions and physical therapy but still had pain and reduced grip. Dr. Pineiro noted the claimant had an EMG that showed "acute carpal tunnel," that he responded positively for 2 or 3 days to an injection and had positive Phalen's and Tinel's tests of the right wrist. Dr. Pineiro diagnosed a motor vehicle accident and "traumatic acute carpal tunnel syndrome." Dr. Pineiro continued light duty restrictions and noted the claimant was awaiting approval for surgery by Dr. Chapman. She also referred the claimant to Dr. Joel Cohen for evaluation of depression.

17. Ms. Amanda Bluel (Bluel) testified as follows. She is employed by Dr. Chapman's office to perform scheduling and requests for surgical authorization. On April 9, 2014 she received from Dr. Chapman an order for surgery. On April 9 she contacted Concentra to obtain their referral and notes. On April 10, 2010 she faxed to Browne a request for prior authorization for surgery. The request included a Pre-Authorization Request for Surgery form requesting permission to perform a right endoscopic carpal tunnel release. The request also included a Patient Referral form in which Dr. Chapman noted diagnoses of a lesion of the median nerve and wrist sprain and referred the claimant for surgery. The request also included Dr. Chapman's office note of April 8, 2014. The request for prior authorization did not include a copy of Dr. Hammerberg's electrodiagnostic study results. Ms. Bluel explained that if the fax had not been received her office would get a "kickback message" stating that the fax had not gone through. However, no kickback message was received after she transmitted the request on April 10, 2014.

18. Bluel further testified as follows. On April 17, 21, 23 and 30, 2014 she telephoned Browne to check on whether the request for prior authorization had been received and the status of the request. She left voice mail messages for Browne but Browne did not call back. On April 23 Browne's voice mail message stated she would be out of the office until "Monday." On May 6, 2014 Bluel called Browne as well as Sedgwick's "main number" but no one answered.

19. Bluel testified that on May 7, 2014 she called the Sedgwick switchboard to check on the prior authorization request. She spoke to an operator who stated that Sedgwick had just received the request for prior authorization from claimant's attorney on April 29, 2014 and it had not yet been determined. Bluel advised the operator that she had faxed the request for prior authorization on April 10 and the operator replied that Sedgwick had "some internal fax problems" on April 10 and 11 and perhaps that was why the April 10 request for prior authorization had not been received. Bluel told the operator that she had left several unreturned voicemails with Browne. The operator transferred the claimant to Browne's supervisor and Bluel left a voicemail regarding the unreturned calls. Later that day Browne called Bluel and stated that Browne had

decided to deny the request for prior authorization because the need for surgery was not work related. Bluel stated that this was the first time she spoke with Browne.

20. Bluel kept business notes documenting her actions regarding the request for prior authorization that she allegedly faxed to Browne. These notes indicate the request was faxed to Sedgwick on April 10, 2014. The notes reflect that she called Browne on April 17, 21, 23 and 30, 2014 and left messages. The notes further indicate she called Sedgwick's switchboard operator on May 7, 2014 and was advised that "they were having internal fax issues on 04-10." The May 7 note further reflects that Bluel told the operator that it was "unacceptable" that she made 4 phone calls to Browne and had not received a call back. The notes also state that she left a message for Browne's supervisor and then received a call from Browne. Browne advised that a decision had been made to deny the request for prior authorization "as not work related."

21. Browne testified as follows. She has been employed with Sedgwick since 2002. She has adjusted workers' compensation claims for nearly twenty years. She handled Colorado claims between 1995 and 1998 and from 2012 onward. She did not receive the request for prior authorization allegedly faxed by Bluel on April 10, 2014. Browne explained that faxes to Sedgwick are received by an outside vendor that then routes the fax to the correct adjuster in an electronic format similar to email. If the vendor routes the fax to the wrong adjuster that adjuster may determine the correct adjuster and forward it, or may send the fax to a "default" system which then determines the correct adjuster. The alleged request for prior authorization faxed on April 10, 2014 has not "emerged" in the employer's system. Browne did not have any knowledge of calls made to her by Bluel between April 17, 2014 and April 30, 2014. She was in her office on all of the days of the alleged calls except for April 23, 2014.

22. Browne further testified as follows. She received the request for prior authorization faxed by claimant's counsel on April 28, 2014. She testified that in her opinion the request was not "complete" within the meaning of WCRP 16 because Dr. Chapman's note did not explain the reasonableness and necessity for the requested surgery. Nevertheless Browne submitted the request to Wallace Larson, M.D., for an opinion and denied the request for prior authorization on May 7, 2014. Even though Browne did not believe the request was "complete" she denied it because she was "proactive." Browne acknowledged that claimant's counsel used Sedgwick's correct fax number (303 713-6056) to send the April 28 request for prior authorization. Browne does not know what fax number Bluel may have dialed on April 10, 2014.

23. At the respondents' request Dr. Larson conducted a WCRP 16 records review. Dr. Larson is a hand specialist, board certified in orthopedic surgery and level II accredited. Dr. Larson authored a report dated May 1, 2014. Dr. Larson reviewed medical records from January 13, 2014 through April 9, 2014. Dr. Larson opined the claimant had "severe right carpal tunnel syndrome, not related to occupational exposure." He stated the diagnosis of CTS "is not consistent with the described injury". Rather, the claimant's condition was "consistent with a history of long-standing pre-existing carpal tunnel syndrome". According to Dr. Larson, the claimant's CTS "was not caused or aggravated by his occupational exposure."

24. On May 7, 2014 Browne wrote a letter to Dr. Chapman denying the request for surgery received by Sedgwick on "4/28/14." The letter stated the request was being denied for both medical and non-medical reasons. Specifically the letter states the proposed surgery is "not reasonable and necessary to address the alleged work injury." The letter further stated Dr. Larson's May 1, 2014 report that supports "the fact that the requested surgery may not be reasonable and necessary under the circumstances of this case."

25. On May 13, 2013 Dr. Nystrom wrote that he was going to refer the claimant for a second opinion regarding his hand. Dr. Nystrom assessed CTS and reactive depression. He wrote that CTS "can be caused by repetitive use, but anything that causes swelling can also cause it." Dr. Nystrom opined the claimant had an "injury to his wrist and developed carpal tunnel symptoms for the first time following his work-related injury." Dr. Nystrom stated that he considered the claimant's injury and CTS symptoms "temporally related."

26. On May 28, 2014 Mark Durbin, M.D., performed a surgical consultation at Orthopaedic & Spine Center of the Rockies. Dr. Durbin noted a history that the claimant suffered a "traumatic injury to his right hand" when trying to "catch a suitcase when it fell from the truck and it pulled on him." Dr. Durbin's physician's report of injury notes the date of injury as January 12, 2014. The claimant reportedly experienced severe numbness and tingling throughout his thumb, index and middle finger. The claimant advised that a "long time ago" he had a "nerve study" that showed "mild carpal tunnel" but denied "any history of problems with his carpal tunnel" before the injury. Dr. Durbin noted the "recent nerve study that shows significant injury to the [the claimant's] median nerve as well as the opponens muscle" and that the claimant was "getting significantly weaker." Dr. Durbin diagnosed "right median nerve traumatic injury with swelling in the forearm." He opined the claimant had a "traumatic injury to his median nerve with swelling that is now causing him almost compartment carpal tunnel type syndrome." Dr. Durbin recommended the claimant undergo a "right median nerve neurolysis and decompression at the wrist level" secondary to the January 12, 2014 injury.

27. On May 30, 2014 Dr. Durbin's office submitted to Sedgwick a request for prior authorization to perform the recommended surgery.

28. Browne submitted Dr. Durbin's request to Dr. Larson. Dr. Larson issued a report on June 4, 2014 stating he had reviewed Dr. Durbin's report as well as the medical records. Dr. Larson again opined that the claimant's CTS was not "occupationally related." He explained that "objective evidence" does not indicate that the claimant sustained an injury to his nerve. Dr. Larson opined the mechanism of injury "would possibly" cause a "strain or sprain" of a wrist ligament but would not be the cause of CTS.

29. On June 5, 2014 Browne sent a letter to Dr. Durbin denying the request for surgery. The letter stated the request was being denied based on Dr. Larson's June 4, 2014 report that supports "the fact that the requested surgery may not be reasonable and necessary under the circumstance of this case."

30. Dr. Larson testified by deposition. Dr. Larson stated his opinion to a reasonable degree of medical probability that the claimant's CTS was not caused or aggravated by the work-related injury of January 12, 2014. Dr. Larson explained that the vast majority of CTS cases are idiopathic in origin. Another set of CTS cases is caused by metabolic disorders. Dr. Larson agreed that CTS can be traumatic in origin where people experience wrist fractures, dislocations of the lunate bone and severe crush injuries. He explained that such injuries cause pressure on the median nerve or bleeding in the carpal tunnel as a result of the deformity or fracture. Dr. Larson opined the claimant's CTS was not traumatic in origin because there was no evidence of a fracture or a clotting disorder that would cause inordinate bleeding in the carpal tunnel. He further stated there was nothing "objective" in the medical records that "would indicate trauma sufficient to be posttraumatic acute carpal tunnel."

31. On cross-examination Dr. Larson was asked if agreed that a wrist sprain could cause acute carpal tunnel syndrome. He replied that he supposed he "would need to look at that in context to see what kind of strain that someone is looking at." However, he opined that a minor strain of the wrist would not cause carpal tunnel syndrome." Dr. Larson agreed that "severe sprains, such as ligamentous ruptures" of the wrist can cause CTS. Dr. Larson agreed that in cases of traumatic CTS paresthesias can occur in the fingers within an hour or two of the precipitating event. Dr. Larson opined that the word "acute" does not necessarily eliminate something that is longstanding but "it does, by its nature, imply something very recent."

32. The respondents are not subject to a penalty for violation of WCRP 16-10(A) as alleged by the claimant. The request for prior authorization was not a "completed request" within the meaning of WCRP 16-9(F) because it did not include "supporting documentation" including "documents used in the provider's decision making process to substantiate the need for the requested treatment." Here, it is clear from Dr. Chapman's April 8, 2014 office note that he considered Dr. Hammerberg's "EMG nerve conduction study findings" in formulating his recommendation that the claimant undergo surgery for his CTS. However, Ms. Bluel admitted that she did not include a copy of Dr. Hammerberg's test results when she allegedly submitted the request for prior authorization on April 10, 2014. Thus, the April 10 request for prior authorization was not a "completed request" for purposes of WCRP 16-10(A) and there was no rule violation on which to predicate an award of penalties.

33. The claimant proved it is more probably true than not that his CTS and need for surgery were proximately caused by the industrial injury of January 12, 2014.

34. The claimant credibly testified that on January 12, 2014 he experienced a pop in his wrist and the immediate onset of pain when he grabbed the handle of a heavy piece of luggage as it was falling from a vehicle. He also credibly testified that within one hour of this event he experienced the onset of numbness in his right hand except for his little finger. The claimant credibly testified that he was not experiencing similar symptoms prior to this incident. Although there is some evidence the claimant may have had prior symptoms of CTS in the remote past, the record does not contain any persuasive medical documentation that the claimant was reporting or seeking treatment

for right upper extremity symptoms between 2011 (when his right small finger was bitten) and January 2014.

35. Dr. Durbin credibly opined the claimant sustained a "right median nerve traumatic injury" that was causing "almost compartmental carpal tunnel type syndrome." Dr. Durbin received an accurate description of the onset of the claimant's symptoms after trying to catch the suitcase. Dr. Durbin was even aware the claimant reported a history of an old "nerve study" showing "mild carpal tunnel." Considering the claimant's history, the absence of CTS symptoms before the injury, the "recent nerve study" showing "significant injury" to the median nerve and the progression of the claimant's symptoms, Dr. Durbin persuasively opined that the claimant's CTS was the result of the January 12, 2014 injury.

36. Dr. Durbin's opinion is corroborated by the persuasive opinions of Dr. Chapman, Dr. Pineiro and Dr. Nystrom. Dr. Nystrom, who was the first physician to examine the claimant after the injury, persuasively opined that there was a causal relationship between the CTS and the injury. Dr. Nystrom persuasively argues that the temporal relationship between the onset of the claimant's symptoms and the occurrence of the injury supports the existence of a causal relationship between the two events. Even Dr. Larson agreed that in cases of traumatic carpal tunnel syndrome numbness may appear in the hands within one to two hours of the precipitating event. Although Dr. Chapman does not elaborate, he did request prior authorization to perform surgery and listed the date of injury as January 12, 2014. The ALJ infers from these facts that it is Dr. Chapman's opinion that the claimant's CTS resulted from the January 12 injury.

37. Dr. Durbin's opinion is also corroborated by the results of Dr. Hammerberg's electrodiagnostic testing. Dr. Hammerberg credibly stated that the test results were "compatible" with "severe acute right carpal tunnel syndrome." Dr. Larson admitted that the term "acute" implies something "very recent." Thus, the electrodiagnostic tests reinforce the inference that there is a significant temporal relationship between the industrial injury and the development of the CTS.

38. Dr. Larson's opinion that there is no relationship between the admitted wrist injury and the development of the CTS is not persuasive. Dr. Larson did not persuasively refute the inference that the temporal relationship between the injury and the development of the "acute" CTS argues for a finding of a causal relationship. Dr. Larson did not deny that CTS can be traumatic in origin; he merely stated that trauma is a less common cause than other etiologies such as idiopathic disease. For the reasons stated above, the particular facts of this case support the inference that the claimant's CTS is traumatic in origin.

39. Based on the reports of Dr. Chapman and Dr. Durbin, the claimant proved it is more probably true than not that carpal tunnel release surgery constitutes reasonable and necessary medical treatment to cure and relieve the effects of the injury-related CTS.

CONCLUSIONS OF LAW

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

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

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

PENALTIES FOR ALLEGED VIOLATION OF WCRP 16

The claimant seeks the imposition of penalties against the "respondents" pursuant to § 8-43-304(1), C.R.S. Specifically the claimant argues that on April 10, 2014 Bluel submitted to Sedgwick a "complete" request for prior authorization of surgery within the meaning of WCRP 16-9(F). The claimant further alleges the respondents failed to contest the request for prior authorization for surgery within seven (7) business days, or by April 21, 2014, as required by WCRP 16-10(A). The claimant contends that the respondents' conduct constituted the violation of an "order" within the meaning of § 8-43-304(1). The respondents argue the claimant failed to prove that the request for prior authorization was received by Sedgwick until claimant's attorney faxed the request on April 28, 2014. Thus, the respondents assert Browne's May 7, 2014 denial of the request was timely and there was no violation of the rule. The respondents further contend the evidence establishes that Dr. Chapman's request for prior authorization was not "completed" within the meaning of WCRP 16-10(A) and WCRP 16-9(F). Therefore, the respondents reason the rule did not obligate them to respond and there was no violation of the rule that could subject them to penalties. The ALJ concludes that because the request for prior authorization was not "complete" within the meaning of the rules no penalties may be imposed.

Section 8-43-304(1) authorizes the imposition of penalties of not more than $1000 per day if an insurer "fails, neglects, or refuses to obey any lawful order made by

the director or panel." An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." Section 8-40-201(15), C.R.S. Thus, violation of a rule of procedure constitutes violation of an "order." *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002).

Whether statutory penalties may be imposed under § 8-43-304(1) involves a two-step analysis. First, the ALJ must first determine whether the insurer's conduct constituted a violation of a rule of procedure. If so, the ALJ must determine whether the action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

WCRP 16-10(A), the rule that the claimant alleges was violated by the respondents, provides as follows:

> If the payer contests a request for prior authorization for non-medical reasons as defined under 16-11(B)(1), the payer shall notify the provider and parties, in writing, of the basis for the contest within seven (7) business days from receipt of the provider's completed request as defined in 16-9(F). A certificate of mailing of the written contest must be sent to the provider and the parties.

WCRP 16-9(F) provides as follows:

> To complete a prior authorization request, the provider shall concurrently explain the reasonableness and necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical documentation is defined as documents used in the provider's decision making process to substantiate the need for the requested service or procedure.

The question of whether the provider has submitted a "completed request" for prior authorization is one of fact for determination by the ALJ. *Lichtenberg v. J.C. Penny Corp.,* WC 4-814-897 & 4-842-102 (ICAO July 19, 2012); *Skelly v. Wal-Mart Stores, Inc.,* WC 4-632-887 (ICAO July 31, 2008). If a provider fails to submit a completed request for prior authorization, as defined by the rules, the insurer's duty to respond is not triggered and its failure to do so does not subject it to penalties. *Skelly v. Wal-Mart Stores, Inc., supra.*

The ALJ concludes that the respondents, through Browne, took the position that the request for prior authorization allegedly submitted on April 10, 2014 should be denied, at least in part, for the "non-medical reason" that the need for the carpal tunnel release surgery was not causally related to the admitted industrial injury. See WCRP 16-11(B)(1) (non-medical reasons for contesting prior authorization include contention that services are not related to the admitted injury). This was the clear import of Dr. Larson's May 1, 2014 report and the Browne's' May 7, 2014 letter denying prior authorization for Dr. Chapman's proposed surgery. (Findings of Fact 23 & 24). For this reason the ALJ concludes that the provisions of WCRP 16-10(A) were triggered.

However, as determined in Finding of Fact 32, the respondents did not violate WCRP 16-10(A) by failing to deny the request for prior authorization within 7 business days of its alleged receipt on April 10, 2014. WCRP 16-10(A) requires respondents to deny a request for prior authorization within 7 days of receipt of a "completed request" for prior authorization. A "completed request" is defined by WCRP 16-9(F) to include "documents used in the provider's decision-making process to substantiate the need" for the requested procedure. Bluel admitted that the request for prior authorization she allegedly submitted on April 10, 2014 did not include a copy of Dr. Hammerberg's electrodiagnostic study results. As found, the ALJ is persuaded by Dr. Chapman's April 8, 2014 note that he relied on these results when arriving at his conclusion that the claimant should undergo the proposed carpal tunnel release surgery. Because Dr. Hammerberg's results were not included in the request for prior authorization the ALJ finds and concludes that the April 10, 2014 request for prior authorization was not "complete" within the meaning of WCRP 16-9(F), and the respondents had no obligation to respond to it under WCRP 16-10(A). For this reason there was no violation of an order of the Director under which penalties could be imposed. *Skelly v. Wal-Mart Stores, Inc., supra.*

In light of this determination the ALJ need not address the respondents' contention that the evidence fails to establish that Sedgwick "received" the request for prior authorization on April 10, 2014. The ALJ further notes that the claimant does not argue that the respondents failed timely to contest any of the subsequent requests for prior authorization.

MEDICAL BENEFITS

The claimant contends the evidence establishes that he is entitled to reasonable and necessary medical benefits in the form of the carpal tunnel release surgery recommended by Dr. Chapman and Dr. Durbin. The ALJ agrees with the claimant.

The claimant first argues that because the respondents failed timely to contest the April 10, 2014 request for prior authorization the surgery proposed by Dr. Chapman is "deemed" authorized by operation of WCRP 16-10(E). That rule provides that the payer's failure "timely to comply in full with the requirements of 16-10(A) or (B), shall be deemed authorization for payment of the requested treatment" except in certain circumstances.

The ALJ notes that the ICAO has held that WCRP 16-10(E) should not be read as depriving ALJ's of their statutory jurisdiction to determine whether medical treatment is reasonable and necessary to cure and relieve the effects of an industrial injury. *See Lichtenberg v. J.C. Penny Corp., supra*. In any event, as determined above the respondents did not violate WCRP 16-10(A) as the claimant alleges. Consequently, by its own terms WCRP 16-10(E) does not operate to "deem" the surgery authorized. Because the proposed surgery is not "deemed" authorized by operation of law the ALJ must determine whether it can be awarded as a medical benefit under the standard legal principles.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Further, the claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Expert medical opinion "is neither necessary nor conclusive in determining causation." However, when expert medical opinions are presented it is for the ALJ to determine the weight to be accorded such opinions. *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990).

As determined in Findings of Fact 33 through 38 the claimant proved it is more probably true than not that his CTS was proximately caused by the admitted wrist injury sustained on January 12, 2014. The ALJ is persuaded by Dr. Durbin's opinion that the claimant sustained traumatic CTS as a result of the January 12 injury. Dr. Durbin credibly and persuasively based his opinion on the history of the accident, the absence of CTS symptoms before the injury, Dr. Hammerberg's electrodiagnostic studies showing "significant injury" to the median nerve and the progression of the claimant's symptoms after the injury. Further, as determined in Finding of Fact 36, Dr. Durbin's opinion regarding the cause of the CTS is corroborated by the credible opinions of Dr.

Nystrom, Dr. Pineiro and Dr. Chapman. Dr. Durbin's opinion is also corroborated by Dr. Hammerberg's opinion that the March 2014 electrodiagnostic studies demonstrate "severe acute right carpal tunnel syndrome." For the reasons stated in Finding of Fact 38 the ALJ is not persuaded by the opinions of Dr. Larson.

As determined in Finding of Fact 39 the claimant proved it is more probably true than not that carpal tunnel release surgery recommended by Dr. Chapman and Dr. Durbin constitutes reasonable and necessary medical treatment to cure and relieve the effects of the CTS.

ADMISSIBILITY OF DEPOSTION EXHIBIT 1

The ALJ reviewed the parties' written arguments concerning the admissibility of Deposition Exhibit 1 offered by the claimant at the conclusion of Dr. Larson's deposition. The ALJ agrees with the respondents that the documents contained in Deposition Exhibit 1 are hearsay. The ALJ further agrees with the respondents that on review of the deposition transcript Dr. Larson never testified that the documents contained in the exhibit constitute "reliable authorities" so as to be admissible as "Learned treatises" within the meaning of CRE 803(18). Dr. Larson merely stated that he had read one of the documents "quite a while" ago (Hoppenfeld's book) but otherwise did not testify that it was a medically reliable source. Otherwise, Dr. Larson was asked if he agreed or disagreed with statements contained in the documents but was never asked to vouch for their reliability.

The ALJ declines the claimant's invitation to take judicial or administrative notice of the "reliability" of the documents contained in Deposition Exhibit 1. Applying CRE 201 (b) the ALJ concludes that the question of whether these documents are medically reliable authorities is not "generally known within the territorial jurisdiction" of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The ALJ concludes Deposition Exhibit 1 is not admissible in evidence because it is hearsay that is not subject to any cited exception, including CRE 803(18).

ORDER

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

1. The claimant's request for the imposition of penalties against the "respondents" for an alleged violation of WCRP 16 is denied.

2. The insurer shall pay for reasonable and necessary medical benefits in the form of carpal tunnel release surgery and related expenses.

3. Issues not addressed in this order are reserved for future determination.

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

DATED: February 4, 2015

DIGITAL SIGNATURE:

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he has received was authorized, reasonable and necessary to cure or relieve the effects of a work-related injury.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 11, 2013 through March 2, 2014.

4. Whether Respondents have established that Claimant is subject to a penalty for late reporting pursuant to §8-43-102(2), C.R.S.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,256.54.

FINDINGS OF FACT

1. Claimant is a 63 year old male who works as a Social Work Counselor at Employer's Limon Correctional Facility. He began working for Employer in June 2012. Claimant's job duties involve providing mental health therapy and treatment to inmates in the Facility.

2. Claimant explained that when he initially began working for Employer he was one of two mental health counselors aiding medium and closed custody inmates at Employer's Limon Correctional Facility. In December 2012 Employer hired a female psychologist to also help treat inmates. However, by May 2013 Employer instituted policy changes that involved transferring medium custody offenders out of the facility and bringing closed custody offenders into the facility. Claimant remarked that approximately 25-40 closed custody inmates were brought into the Limon Facility each week. He commented that closed custody inmates are typically more violent offenders and have greater mental health needs. They require more daily monitoring and counseling.

3. In October 2013 the female psychologist left employment with Employer. Claimant's caseload thus increased to approximately 150 inmates.

4. On January 11, 2014 Claimant was at home taking down Christmas decorations and carrying boxes up stairs when he experienced dizziness and shortness of breath. He visited the Littleton Hospital Emergency Room. Claimant was admitted to the hospital for testing. The tests did not reveal any acute abnormalities and Claimant was discharged on January 12, 2014.

5. On January 17, 2014 Claimant again visited the Littleton Hospital Emergency Room because he was experiencing dizziness and shortness of breath. He underwent additional testing and was discharged on the same day.

6. On January 21, 2014 Claimant again reported to the Littleton Hospital Emergency Room because he was suffering shortness of breath. Testing again did not reveal any acute abnormalities. Claimant reported significant work stress and associated anxiety.

7. On January 23, 2014 Claimant underwent a psychiatry consultation with Clinical Nurse Specialist (CNS) Adriana Frazier. Under chief complaint CNS Frazier noted that Claimant stated "[y]ou're going to help me with dealing with my stress…work and my family is sick." Claimant reported a history of depression and that he had stress associated with his family life. CNS Frazier detailed:

> [Claimant] states that he has quite a bit of stress, especially over the last 2 years: wife has colitis, which has changed some of their lifestyle; daughter is in remission after breast cancer; another daughter has Chron's disease; and the youngest daughter has fibromyalgia and will undergo a hysterectomy within the next 2 weeks. The latter daughter (youngest) has moved in back home (which he does not identify as a stressor). He works as a social worker in a federal prison, which requires his being away from home for a week and a half at a time. He's been doing that for a least 1 and a half years, living in one bedroom room in Limon. His job is quite stressful, and over the last week he found out that his supervisor may be fired.

Claimant also explained that his work was stressful and thinking about work could lead to anxiety. Claimant added that he has a very large caseload and no clinical supervision. CNS Frazier determined that Claimant had significant stress associated with his family situation and job. The stress manifested itself with physical symptoms including shortness of breath. CNS Frazier diagnosed Claimant with major depressive disorder, anxiety and seasonal affective disorder. She recommended outpatient counseling.

8. From January 28, 2014 through February 25, 2014 Claimant received treatment from Bob Whitehouse, Ed.D. Claimant detailed his work history and responsibilities. Claimant's symptoms resolved through treatment.

9. On February 27, 2014 Claimant filed a claim for Workers' Compensation benefits. Claimant attached a written statement detailing the circumstances of his

injury. He stated that beginning in May 2013 he experienced increased job-related stress and anxiety. As a result he suffered a physical breakdown in January 2014. Claimant noted that, because of his stress and anxiety, he experienced severe shortness of breath, dizziness, chronic fatigue, chronically reduced energy and physical stamina, impaired concentration and memory/decision making, agitation and irritability. Claimant related his increased stress and anxiety, as well as his related symptoms, to Employer's policy decisions. The policy decisions changed the make-up of the inmate population. He specifically noted that medium custody offenders were transferred out of the Limon Correctional Facility while closed custody offenders were transferred into the Facility. Claimant explained that closed custody offenders, who are the highest risk and most dangerous inmates, require significantly more work than medium custody offenders. The process increased Claimant's caseload from 125 to 190 inmates. Claimant summarized that, because of the changes and stress associated with working with closed custody offenders, he experienced significant anxiety that prevented him from working.

10. On March 3, 2014 Claimant resumed full-time employment for Employer without restrictions. Claimant explained that he had simply needed to be off of work.

11. On November 20, 2014 Claimant underwent an independent medical examination with Psychiatrist Stephen A. Moe, M.D. Claimant reported that he works as a counselor at a correctional facility. He noted that he feels comfortable with the intensity of working in a prison. Claimant explained that in May 2013 Employer made a policy decision to transfer closed custody offenders into the prison and transfer medium custody offenders out of the Facility. He remarked that the change in the makeup of the inmate population increased his work demands. Claimant stated that his work demands became so overwhelming that he was unable to effectively perform his job duties. By January 2014 he suffered an acute onset of shortness of breath, dizziness and lightheadedness. Claimant attributed his physical symptoms to his increased job duties and work stress.

12. Dr. Moe agreed that physical symptoms in January 2014 were "significantly influenced" by emotional stress. He remarked that Claimant experienced progressively greater emotional stress as a result of his escalating work demands. However, Dr. Moe disagreed that Claimant's emotional stress in the fall of 2013 and early 2014 was primarily caused by his job demands. He thus concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that

> excessive work demands are not explicitly mentioned among the exclusions listed in the statute, which include disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination and retirement. However, even as it should not be minimized as an important cause of emotional stress, feeling overwhelmed by one's assigned duties is a stressor similar in kind to those that are specifically listed in the statute as exclusions to bringing a mental stress claim, each of which can also be a significant cause of emotional stress.

13. Dr. Moe summarized that Claimant's mental stress concerns relating to his job were simply related to increased work demands common to all forms of employment. He explained:

> Although [Claimant] worked in an intense and potentially dangerous setting of a prison where his decision had important consequences, the fundamental symptom-causing issues he described – demands that he regarded as too voluminous and too intense to meet – are common to all forms of employment. In other words, the type of work he did, and the setting in which he worked, are not meaningful elements of his claim. [Claimant's] claim boils down to a straightforward 'excessive-work-demands narrative.'

14. Dr. Moe also testified at the hearing in this matter. He reiterated that Claimant failed to meet the legal criteria for a work-related mental stress claim. He considered the effect of work stress as opposed to other factors on Claimant's condition. Dr. Moe explained that, in the Workers' Compensation context, there are three separate influences on an individual's stress level: 1) work-related stressors; 2) personal attributes, which are the individual's own subjective tendencies or vulnerabilities to feel anxious or depressed; and 3) non-work related stressors. He gave equal weight to each element. Dr. Moe commented that Claimant's main stressors outside of work were his medical condition, family-related concerns involving his wife and three daughters and his living arrangement apart from his family. He also noted Claimant's history of treatment for mental health conditions and stress reactions to previous jobs. Dr. Moe determined that it is probable that the work stress had less influence than the other two elements in causing Claimant's stress reaction during January 2014.

15. Claimant has failed to establish that it is more probably true than not that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his increased work demands as a Social Work Counselor at Employer's Limon Correctional Facility. He explained that by May 2013 Employer instituted policy changes that involved transferring medium custody offenders out of the Facility and bringing closed custody offenders into the Facility. Claimant remarked that approximately 25-40 closed custody inmates were brought into the Limon Facility each week. He commented that closed custody inmates are typically more violent offenders and have greater mental health needs. They require more daily monitoring and treatment from the counselors.

16. By January 2014 Claimant experienced several episodes of dizziness and shortness of breath. He visited the Littleton Hospital Emergency Room and testing did not reveal any acute abnormalities. The medical records reflect that Claimant's physical symptoms were caused by emotional stress. The record reveals that Claimant was not only experiencing work stress but family health concerns. In January 2014 CNS Frazier determined that Claimant had significant stress associated with his family situation and job. The stress manifested itself with physical symptoms including shortness of breath.

CNS Frazier diagnosed Claimant with major depressive disorder, anxiety and seasonal affective disorder.

17. Dr. Moe persuasively concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that, although excessive work demands are not specifically delineated in the mental health statute, they are "similar in kind to those that are specifically listed in the statute as exclusions to bringing a mental stress claim." Dr. Moe detailed that in the Workers' Compensation context there are three separate influences on an individual's stress level: 1) work-related stressors; 2) personal attributes, which are the individual's own subjective tendencies or vulnerabilities to feel anxious or depressed; and 3) non-work related stressors. Dr. Moe testified that it is probable that the work stress had less influence than the other two elements in causing Claimant's stress reaction. Dr. Moe gave equal weight to each element. He noted Claimant's history of treatment for mental health conditions and stress reactions to previous jobs. Based on the medical records and persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Social Work Counselor for Employer.

CONCLUSIONS OF LAW

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

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

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

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

5. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAP, Jan. 6, 2009).

6. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2)

generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his increased work demands as a Social Work Counselor at Employer's Limon Correctional Facility. He explained that by May 2013 Employer instituted policy changes that involved transferring medium custody offenders out of the Facility and bringing closed custody offenders into the Facility. Claimant remarked that approximately 25-40 closed custody inmates were brought into the Limon Facility each week. He commented that closed custody inmates are typically more violent offenders and have greater mental health needs. They require more daily monitoring and treatment from the counselors.

8. As found, by January 2014 Claimant experienced several episodes of dizziness and shortness of breath. He visited the Littleton Hospital Emergency Room and testing did not reveal any acute abnormalities. The medical records reflect that Claimant's physical symptoms were caused by emotional stress. The record reveals that Claimant was not only experiencing work stress but family health concerns. In January 2014 CNS Frazier determined that Claimant had significant stress associated with his family situation and job. The stress manifested itself with physical symptoms including shortness of breath. CNS Frazier diagnosed Claimant with major depressive disorder, anxiety and seasonal affective disorder.

9. As found, Dr. Moe persuasively concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that, although excessive work demands are not specifically delineated in the mental health statute, they are "similar in kind to those that are specifically listed in the statute as exclusions to bringing a mental stress claim." Dr. Moe detailed that in the Workers' Compensation context there are three separate influences on an individual's stress level: 1) work-related stressors; 2) personal attributes, which are the individual's own subjective tendencies or vulnerabilities to feel anxious or depressed; and 3) non-work related stressors. Dr. Moe testified that it is probable that the work stress had less influence than the other two elements in causing Claimant's stress reaction. Dr. Moe gave equal weight to each element. He noted Claimant's history of treatment for mental health conditions and stress reactions to previous jobs. Based on the medical records and persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Social Work Counselor for Employer.

ORDER

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

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

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

DATED: February 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Brian Shea, M.D. that Claimant reached Maximum Medical Improvement (MMI) on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury.

FINDINGS OF FACT

1. On August 8, 2012 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. Claimant had been carrying a heavy roll of plastic weighing approximately 100-150 pounds with a coworker when she experienced a "pull" in her lower back. Employer referred Claimant to the Workwell Occupational Medical Clinic for an evaluation.

2. On August 9, 2012 Claimant visited Kerry Kamer, D.O. at Workwell for an examination. He diagnosed Claimant with a lumbar spine sprain. Dr. Kamer prescribed medications, physical therapy and chiropractic treatment. He assigned work restrictions of lifting, carrying and pulling not to exceed 10 pounds constantly, 20 pounds frequently and 30 pounds occasionally. Claimant did not lose any time from work as a result of her lumbar strain and thus did not receive any temporary partial or total disability benefits.

3. On August 16, 2012 Claimant visited Frederick Scherr, M.D. at Workwell for an evaluation. Claimant reported lower back pain with some intermittent pain radiating down her right leg. Dr. Scherr referred Claimant to Scott Parker, D.C. for chiropractic treatment. He limited Claimant's work activities to no lifting in excess of 10 pounds.

4. On September 17, 2012 Claimant returned to Dr. Scherr for an evaluation. Dr. Scherr remarked that Claimant continued to improve through physical therapy and chiropractic treatment with Dr. Parker. He decreased Claimant's work restrictions so that she could lift, carry, push and pull up to 25 pounds.

5. On September 28, 2012 Claimant was involved in a non-work-related motor vehicle accident. She was rear-ended while stopped at a red light and could not move by the next morning. On the following Monday Claimant visited Associates of Family Medicine and was diagnosed with whiplash.

6. On October 2, 2012 Claimant returned to Dr. Scherr for an evaluation. She continued to improve with physical therapy and chiropractic treatment but mentioned her September 28, 2012 motor vehicle accident. Dr. Scherr noted "[a]ll

symptoms are gradually improving. ROM is better. She has no new complaints. She tolerated the 25 pounds and was doing well until she was rear ended on Friday. She now has neck and upper back issues. Her low back and hip issues remain stable. It does not appear that the accident made the low back or hip worse. She is going to see her PCP in regards to this recent accident and her neck and upper back." Dr. Scherr released Claimant to regular duty.

7. On October 16, 2012 Claimant returned to Dr. Kamer for an examination. Dr. Kamer reported Claimant "is better. Chiro and PT have really helped. She is no longer taking any medication." Dr. Kamer also noted that "all symptoms are improving. ROM is better. She has no new complaints. She tolerated full duty and is doing well." Dr. Kamer also commented that Claimant had been rear-ended in a motor vehicle accident and continues to have neck and upper back issues but her "low back and hip issues remain stable." Dr. Kamer stated that: "[i]t does not appear that the accident made the low back or hip worse. She is going to see her PCP in regards to this recent accident." Dr. Kamer determined that Claimant had reached MMI with no impairment. He also released Claimant to full duty employment. Claimant did not request or receive any subsequent medical care for her August 8, 2012 work injury.

8. Claimant continued to receive physical therapy at Advanced Spine and Rehabilitation for injuries sustained in her non-work-related motor vehicle accident. On October 8, 2012 Claimant reported neck and scapular pain. She also experienced trapezius, shoulder and headache symptoms. By. November 15, 2012 Claimant suffered a worsening of lower back pain and pain on both sides of her pelvis.

9. In April 2013 Claimant visited Brooke Bennis, D.O. for an examination. Dr. Bennis remarked that Claimant had lower back and right hip pain. She had undergone an SI joint injection on the right without significant relief. An MRI revealed a disk extrusion at L4-5. He diagnosed Claimant with the following: an L4-5 disk extrusion; right SI joint dysfunction; right hip pain; right trochanteric pain; myofascial pain; radicular symptoms and lumbar facet pain. Dr. Bennis commented that, if Claimant continued to have back pain, she might require additional procedures in the form of medial branch blocks. Dr. Bennis referred Claimant to lumbar spine surgeon Douglas Beard, D.O.

10. On April 11, 2013 Claimant visited Dr. Beard for an examination. Claimant reported mid to lower back pain and right hip pain that moved down the legs, under the buttocks and into the left hip. Claimant explained that following the motor vehicle accident, she felt neck pain, lower back pain and right groin pain. Since the accident Claimant had relative resolution of her neck pain, but her lower back, buttock and inguinal pain had worsened. Dr. Beard diagnosed Claimant with right-sided sciatica and right anterior inguinal pain.

11. During May 2013 Claimant continued to visit Dr. Bennis and report lower back and hip pain. Dr. Bennis thus referred Claimant to surgeon Joshua Snyder, M.D. for an examination.

12. On June 4, 2013 Claimant visited Dr. Snyder for an evaluation of her hip pain. Dr. Snyder commented that Claimant had been suffering right hip pain since her September 2012 motor vehicle accident. He summarized that, after the motor vehicle accident, Claimant suffered "right leg pain and she has been dealing with some other right-sided back pain and occasionally right-sided leg pain and left-sided leg pain as well. She has had injections into the back which give her fleeting relief, but she has never had complete relief of pain that is in her right groin. Apparently, Dr. Bennis obtained an MRI of her right hip and found that she did have a labral tear and therefore sent her over here." Dr. Snyder diagnosed Claimant with a traumatic tear from the motor vehicle accident that had not resolved with conservative treatment. He thus recommended a right hip arthroscopy and labral repair surgery.

13. On June 17, 2013 Claimant underwent a right hip arthroscopy and labral repair surgery. Claimant did not request authorization for the surgery in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for surgery was related to the admitted industrial injury in the present case.

14. On August 19, 2013 Dr. Beard recommended a lumbar arthroplasty at L4-L5 for Claimant. He reported that Claimant had been experiencing increasing lower back pain and pain radiating into her right leg as a result of the September 28, 2012 motor vehicle accident.

15. On October 29, 2013 Claimant underwent an anterior lumbar arthroplasty at L4-L5. Claimant did not request authorization for the surgery in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for surgery was related to the admitted industrial injury in the present case.

16. On March 3, 2014 Respondents filed a Final Admission of Liability (FAL) based on Dr. Kamer's determination that Claimant had reached MMI with no impairment on October 12, 2012.

17. Claimant retained Ryan H. Heatherman, Esq. to represent her in her motor vehicle accident case against the insurance company. He wrote a letter to the insurance company. The letter provided that Claimant "continues to experience significant and persistent hip and low back pain due to the collision." The letter details that the "collision occurred Friday September 28, 2012 while [Claimant] was stopped for a red light, facing North in her jeep at an intersection" when [her] jeep was rear-ended. According to the letter "[t]he forces from the impact of [the other driver's] truck caused severe injuries to [Claimant's] neck, hips and lower back . . . " Claimant "has so far had 60 different medical visits since the collision in September 2012, including multiple injections in the lower back, hip surgery and low back surgery." The letter provided that "[p]rior to the collision, [Claimant] experienced low back and hip pain while moving a heavy object for her job on 8 August 2012. She was in the final stages of recovery for pre-existing low back and hip pain . . . before the collision. This accident caused much more severe symptoms in the lower lumbar and hip as well as new injuries to the neck and back."

18. Claimant testified that she had not previously reviewed the letter from Mr. Heatherman but stated that the delineated facts were incorrect. She specified that she did not suffer any new injuries to her back or hip during the motor vehicle accident. Claimant remarked that she underwent hip and back surgery through her private health insurance because she was unaware that she could pursue the surgeries through Workers' Compensation. She commented that her back and hip problems did not worsen as a result of her motor vehicle accident but instead arose from her August 8, 2012 industrial incident.

19. Claimant challenged Dr. Kamer's determination that she reached MMI on October 16, 2012 with no permanent impairment. She underwent a DIME with Brian Shea, M.D. on July 15, 2014. Dr. Shea recounted that Claimant had been placed at MMI on October 16, 2012 but "[n]o impairment rating was done." He noted that Claimant had undergone two surgeries since reaching MMI. Dr. Shea explained that "[t]he first surgery was for a right hip joint labral tear repair on 6/17/13. A second surgery was done 10/29/13 for a lumbar disk repair and replacement." He thus concluded that Claimant reached MMI on July 15, 2014 and assigned a 15% whole person impairment rating. The impairment consisted of 5% for a specific disorder of the lumbar spine, 7% for loss of range of motion from spine surgery and 3% for right hip surgery.

20. However, Dr. Shea did not engage in a causality assessment regarding Claimant's need for hip or back surgery. Dr. Shea lacked medical records regarding the hip or back surgery in order to perform a causality determination. Moreover, Dr. Shea did not have copies of x-rays or MRI's of the lumbar spine or right hip joint. He assigned Claimant a rating for the back and hip surgeries because he was under the impression that both surgeries pertained to the Workers' Compensation claim. Claimant did not request authorization for the surgeries as part of her Workers' Compensation claim. Finally, no physician has determined that Claimant's need for surgery was related to the admitted industrial injury in the present case.

21. On September 29, 2014 Claimant underwent an independent medical examination with John Raschbacher, M.D. Dr. Raschbacher also testified at the hearing in this matter. Dr, Raschbacher explained that Dr. Shea erroneously assigned Claimant an impairment rating for her hip and back surgeries because they were not related to her August 8, 2012 industrial injury. He specifically noted that Claimant did not seek care for her back and hip for quite a period of time after she was discharged from treatment on October 16, 2012 in her Workers' Compensation claim. Prior to her discharge from medical care Claimant was progressing and had returned to regular work status.

22. Dr. Raschbacher detailed Dr. Shea's errors in performing the DIME. Initially, Dr. Shea assigned Claimant a 15% whole person impairment rating based on his impression that her lumbar disc disease and hip joint pathology were related to her August 8, 2012 admitted industrial injury. However, no physicians have determined that Claimant's surgeries were related to her industrial injury.

23. Second, Dr. Shea did not have the medical records of Claimant's treatment in 2013. Dr. Raschbacher explained that Dr. Shea rated two body parts for which he did not have adequate records. It would thus not have been possible for Dr. Shea to perform a rating based on objective pathology because he did not know the objective symptoms or causes. Dr. Raschbacher remarked that there was no clear, objective basis for Dr. Shea's ratings other than knowing that surgery had been performed and Claimant's subjective history. Dr. Shea did not request operative reports or medical records and therefore could not have known Claimant's specific medical diagnoses.

24. Dr. Raschbacher explained that Dr. Shea simply failed to delineate between Claimant's admitted August 8, 2012 Workers' Compensation claim and her September 28, 2012 non-work-related motor vehicle accident. Although Claimant reported a worsening of her symptoms during 2013, Dr. Shea could not assess whether the increased symptoms were caused by the natural progression of Claimant's industrial injuries or the intervening motor vehicle accident. Dr. Raschbacher summarized that providing an impairment rating for Claimant's back and hip in the absence of medical records and a causation analysis was erroneous. In assigning Claimant a 15% whole person impairment rating and determining that she did not reach MMI until July 15, 2014, Dr. Shea's analysis failed to comply with Table 53 II, B of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or the *Impairment Rating Tips*.

25. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Shea that Claimant reached MMI on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury. On August 8, 2012 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. On September 28, 2012 Claimant was involved in a non-work-related motor vehicle accident. After undergoing conservative treatment for the Workers' Compensation claim, Dr. Kamer determined that Claimant had reached MMI with no permanent impairment on October 12, 2012. On June 17, 2013 Claimant underwent a right hip arthroscopy and labral repair surgery. On October 29, 2013 Claimant underwent an anterior lumbar arthroplasty at L4-L5. Claimant did not request authorization for the surgeries in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for the surgeries was related to her admitted industrial injury.

26. On July 15, 2014 Claimant underwent a DIME with Dr. Shea. He concluded that Claimant reached MMI on July 15, 2014 and assigned a 15% whole person impairment rating. The impairment consisted of 5% for a specific disorder of the lumbar spine, 7% for loss of range of motion from spine surgery and 3% for right hip surgery. However, Dr. Shea did not engage in a causality assessment regarding Claimant's need for hip or back surgery because he lacked medical records regarding the surgeries. Moreover, Dr. Shea did not have copies of x-rays or MRI's of the lumbar spine or right hip joint. He assigned Claimant a rating for the back and hip surgeries because he was under the impression that both surgeries pertained to the Workers' Compensation claim.

27. Dr. Raschbacher persuasively explained that Dr. Shea erroneously assigned Claimant an impairment rating for her hip and back surgeries because they were not related to her August 8, 2012 industrial injury. Dr. Shea lacked the medical records of Claimant's treatment in 2013 and failed to perform a causation analysis. Dr. Raschbacher remarked that Dr. Shea simply failed to delineate between Claimant's admitted August 8, 2012 Workers' Compensation claim and her September 28, 2012 non-work-related motor vehicle accident. Although Claimant reported a worsening of her symptoms during 2013, Dr. Shea could not assess whether the increased symptoms were caused by the natural progression of Claimant's industrial injuries or the intervening motor vehicle accident. Dr. Raschbacher summarized that providing an impairment rating for Claimant's back and hip in the absence of medical records and a causation analysis was erroneous. In assigning Claimant a 15% whole person impairment rating and determining that she did not reach MMI until July 15, 2014, Dr. Shea's analysis failed to comply with Table 53 II, B of the *AMA Guides* or the *Impairment Rating Tips*. Accordingly, based on Dr. Kamer's determination, Claimant reached MMI on October 16, 2012 with no permanent impairment as a result of her August 8, 2012 industrial incident.

CONCLUSIONS OF LAW

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

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

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

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial*

Claim Appeals Office, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

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

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

. 7. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Shea that Claimant reached MMI on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury. On August 8, 2012 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. On September 28, 2012 Claimant was involved in a non-work-related motor vehicle accident. After undergoing conservative treatment for the Workers' Compensation claim, Dr. Kamer determined that Claimant had reached MMI with no permanent impairment on October 12, 2012. On June 17, 2013 Claimant underwent a right hip arthroscopy and labral repair surgery. On October 29, 2013 Claimant underwent an anterior lumbar arthroplasty at L4-L5. Claimant did not request authorization for the surgeries in her Workers' Compensation claim. Moreover, no physician has determined that Claimant's need for the surgeries was related to her admitted industrial injury.

8. As found, on July 15, 2014 Claimant underwent a DIME with Dr. Shea. He concluded that Claimant reached MMI on July 15, 2014 and assigned a 15% whole person impairment rating. The impairment consisted of 5% for a specific disorder of the lumbar spine, 7% for loss of range of motion from spine surgery and 3% for right hip

surgery. However, Dr. Shea did not engage in a causality assessment regarding Claimant's need for hip or back surgery because he lacked medical records regarding the surgeries. Moreover, Dr. Shea did not have copies of x-rays or MRI's of the lumbar spine or right hip joint. He assigned Claimant a rating for the back and hip surgeries because he was under the impression that both surgeries pertained to the Workers' Compensation claim.

9. As found, Dr. Raschbacher persuasively explained that Dr. Shea erroneously assigned Claimant an impairment rating for her hip and back surgeries because they were not related to her August 8, 2012 industrial injury. Dr. Shea lacked the medical records of Claimant's treatment in 2013 and failed to perform a causation analysis. Dr. Raschbacher remarked that Dr. Shea simply failed to delineate between Claimant's admitted August 8, 2012 Workers' Compensation claim and her September 28, 2012 non-work-related motor vehicle accident. Although Claimant reported a worsening of her symptoms during 2013, Dr. Shea could not assess whether the increased symptoms were caused by the natural progression of Claimant's industrial injuries or the intervening motor vehicle accident. Dr. Raschbacher summarized that providing an impairment rating for Claimant's back and hip in the absence of medical records and a causation analysis was erroneous. In assigning Claimant a 15% whole person impairment rating and determining that she did not reach MMI until July 15, 2014, Dr. Shea's analysis failed to comply with Table 53 II, B of the *AMA Guides* or the *Impairment Rating Tips*. Accordingly, based on Dr. Kamer's determination, Claimant reached MMI on October 16, 2012 with no permanent impairment as a result of her August 8, 2012 industrial incident.

ORDER

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

1. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Shea that Claimant reached MMI on July 15, 2014 and suffered a 15% whole person permanent impairment as a result of her August 8, 2012 industrial injury. Based on Dr. Kamer's determination, Claimant reached MMI on October 16, 2012 with no permanent impairment as a result of her August 8, 2012 industrial incident.

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

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

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

DATED: February 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on January 13, 2014.

STIPULATIONS

Claimant endorsed the issue of temporary benefits for hearing. Respondents endorsed the affirmative defense of responsibility for termination. Evidence was taken on both issues. Subsequent to hearing, Claimant withdrew his claim for temporary benefits, therefore the issue of temporary benefits and responsibility for termination is moot.

FINDINGS OF FACT

1. Claimant worked for Employer as the director of maintenance from November of 2004 to March of 2014.

2. Employer is a long-haul trucking company. As the director of maintenance Claimant's duties included overseeing Employers' trucks, trailers, forklifts, and working on equipment as needed.

3. On December 23, 2006 Claimant sustained a torn left rotator cuff when he slipped and fell shoveling snow for Employer. Claimant reported the injury to Employer's general manager, Don Losasso, within three days of the injury and Claimant was immediately referred for medical treatment.

4. On March 9, 2007, Claimant underwent arthroscopic repair of his supraspinatus and infraspinatus tendons. Claimant reached maximum medical improvement for that injury on October 10, 2007. Claimant continued to work for Employer following this injury.

5. Following his 2007 surgery Claimant frequently complained to his co-workers and Employer's co-owner Mark Nolan about ongoing pain and discomfort in his left shoulder. Claimant occasionally left work early due to his shoulder pain complaints.

6. On January 13, 2014 Employer was undergoing an audit by Commerce City. Claimant was tasked on that day with finding and retrieving three file boxes that were believed to be in a storage trailer on Employer's property.

7. Employer stored records in a semi trailer in file boxes, stacked on wooden pallets and wrapped in shrink wrap. The file boxes were stacked up to six feet high and were on four separate pallets with the boxes facing outwards so that the date of the information contained within the box could be read.

8. Claimant went to the trailer to search for the three requested boxes. Claimant had to climb over the front pallets to get to the rear pallets and to look at the dates on the boxes.

9. Claimant found two of the three requested file boxes while in the storage trailer. Claimant moved the two boxes, one at a time, to the door of the storage trailer. While moving the second box from one stack to another Claimant alleges that he reached his arm above his head and backward when he felt a sharp pain in his left shoulder.

10. Claimant then brought the two boxes to Employer's co-owner Mike Reilly and advised Mr. Reilly that he could not find the third box. Claimant did not tell Mr. Reilly that he had injured his left shoulder. Mr. Reilly's testimony was credible that if Claimant had made a report of injury, he would have been referred to Mr. Losasso to fill out a report.

11. Claimant then went to lunch with Mr. Nolan. Claimant did not tell Mr. Nolan that he had injured his left shoulder. Mr. Nolan's testimony was credible that if Claimant had made a report of injury, he would have been referred to Mr. Losasso to fill out a report or if Mr. Losasso was unavailable, that Mr. Nolan would have filled out a report himself.

12. After lunch, Claimant pulled the storage trailer up to Employer's main office space. Mr. Nolan used a pallet jack to move the pallets from the back of the trailer to the front of the trailer so they could be unloaded to the ground. The pallets full of the file boxes were unloaded to the ground and the third file box was located by Mr. Reilly.

13. Claimant did not report his alleged left shoulder injury to Mr. Losasso until March 13, 2014.

14. Claimant worked for two days following January 13, 2014 and then went to Florida due to the death of his father-in-law. While in Florida, Claimant and Claimant's daughter's boyfriend performed maintenance at his mother-in-law's home including pulling weeds, putting in landscaping rock and paving stones, and repairing an air conditioner. While in Florida, Claimant sent a text message to Mr. Nolan describing all the above maintenance that he and his daughter's boyfriend performed. Claimant did not mention any left shoulder pain in this text message.

15. Claimant returned to work on January 31, 2014. Claimant made no mention of left shoulder pain or the January 13, 2014 alleged injury upon his return to work.

16. On February 4, 2014 Claimant was involved in a physical altercation with another employee, Jim Barnes. Claimant had used Mr. Barnes' truck cab to conduct a road test for a prospective employee. Mr. Barnes had a cat and kept a litter box in the truck cab. Claimant removed the litter box prior to the road test and forgot to replace it afterwards and left it outside.

17. When Mr. Barnes arrived at work and noticed the litter box outside he was upset and confronted Claimant. The two exchanged words and Mr. Barnes went outside to prepare for a trip. Claimant stated he was leaving to get breakfast and drove toward the exit of Employer's premises.

18. Claimant saw Mr. Barnes preparing for a trip. Claimant did an abrupt u-turn in his vehicle, sped toward Mr. Barnes, stopped abruptly, and got out of his truck to approach Mr. Barnes. The two got into a physical altercation, and struck one another. Claimant struck Mr. Barnes with his left arm, and knocked out one of Mr. Barnes' teeth.

19. Both Claimant and Mr. Barnes were suspended for three days and were required to complete anger management training before returning to work.

20. Employer made a decision to terminate Claimant's employment based on a number of factors including Claimant's poor attendance record, history of anger issues and physical altercations with other employees, and declining job performance.

21. Claimant was terminated on March 12, 2014. Employer asked Claimant to remain on the job to assist in training his replacement.

22. After being notified he was being terminated, Claimant asked about his left shoulder injury. This was the first time Claimant informed Employer of his left shoulder injury that allegedly occurred on January 13, 2014, the day of the audit.

23. As this was Claimant's first report of an alleged injury, Claimant was referred to Mr. Losasso to fill out paperwork. Claimant met with Mr. Losasso on March 13, 2014 and advised Mr. Losasso that he had injured his left shoulder in January when searching for the audit boxes. Mr. Losasso asked Claimant why it took Claimant almost two months to make the report of injury and Claimant stated "I know this doesn't look good."

24. Mr. Losasso filled out a first report of injury and provided Claimant with a designated provider list. *See* Exhibit Z.

25. The same day, and on March 13, 2014 Claimant saw Michael Ladwig, M.D. Claimant told Dr. Ladwig that he was moving boxes overhead from pallet to pallet

when he felt injured his left shoulder. Dr. Ladwig noted that x-rays showed no acute changes. Dr. Ladwig diagnosed left shoulder strain and opined based upon Claimant's description of the mechanism of injury that the injury was work related. Dr. Ladwig imposed work restrictions of no lifting, repetitive lifting, carrying, pushing, or pulling with left arm. He also imposed no reaching overhead or away from body with left arm. *See* Exhibit 2.

26. Claimant was referred to orthopedic surgeon Michael Hewitt, M.D. Dr. Hewitt ordered an MRI. Dr. Hewitt noted Claimant's prior rotator cuff repair seven years prior and Claimant reported to Dr. Hewitt that he had no postoperative issues, no problem with overhead reaching, and had minimal shoulder pain prior to the January 2014 incident. Dr. Hewitt recommended surgical repair of the rotator cuff. *See* Exhibit 6.

27. On April 8, 2014 Claimant underwent an MRI which showed: near complete undersurface supraspinatus tendon tear with mild retraction near its myotendinous junction with a single bursal sided fiber possibly intact; severe infraspinatus tendinopathy including partial-thickness undersurface tear; moderate-severe subscapularis tendinopathy including high grade partial thickness undersurface tear; posterior superior subluxation of the humeral head; and moderate tendinopathy of the intact long head of the biceps tendon. *See* Exhibit 3.

28. Insurer denied the claim and Claimant went forward with treatment under his own medical insurance.

29. On July 14, 2014 Nicholas Olsen, D.O. performed an Independent Medical Examination on Claimant. Dr. Olsen opined that Claimant's left shoulder injury was chronic in nature rather than acute. Dr. Olsen opined that there was no marked edema on the April 2014 MRI that would be noted with an acute rotator cuff injury. Rather, Dr. Olsen noted that there was severe atrophy and fatty infiltration of the supraspinatus muscle consistent with chronic degenerative condition that extended from the 2007 surgical repair/injury. *See* Exhibit E.

30. Dr. Olsen opined that if Claimant in fact suffered an acute rotator cuff tear in January, Claimant would not have been able to strike Mr. Barnes with sufficient force to knock out a tooth in February. Dr. Olsen opined that on the day of the fight with Mr. Barnes, Claimant's shoulder was functioning at a high level and that Claimant did not therefore sustain a torn rotator cuff on January 13, 2014.

31. Dr. Olsen opined that it was not physically possible for Claimant to have generated enough force to knock out a tooth even if Claimant was in "fight or flight" mode as adrenaline only works when there is an intact muscle available for the adrenaline to act on. Dr. Olsen opined that because a punch requires the arm be extended at or above shoulder height, that Claimant did not have a completely torn rotator cuff prior to the February fight.

32. Dr. Olsen is found credible and persuasive.

33. On October 20, 2014 Claimant saw PA-C Brandon Kolodzek. Claimant reported to PA-C Kolodzek that he felt that he tore his left shoulder rotator cuff while unloading boxes at work. Surgery was discussed with Claimant and Claimant chose to schedule surgery with Robert Greenhow, M.D. *See* Exhibit 4.

34. On November 3, 2014 Elizabeth Bisgard, M.D. performed an Independent Medical Examination on Claimant. Dr. Bisgard diagnosed Claimant with left rotator cuff tear with severe tendinopathy. Dr. Bisgard opined that based on the history given by Claimant, there was a specific injury in January of 2014 that caused a substantial worsening of underlying shoulder pathology. Dr. Bisgard opined that Claimant was asymptomatic until the incident lifting boxes in January of 2014 and was working full time and full duty without difficulty. Dr. Bisgard noted that the MRI showed chronic changes, but despite the chronic changes Claimant was asymptomatic until January of 2014 when the incident lifting boxes occurred. *See* Exhibit 1.

35. Dr. Bisgard opined based on a reasonable degree of medical probability that Claimant sustained a work related left shoulder injury. *See* Exhibit 1.

36. On November 18, 2014 Claimant had surgery on his left shoulder performed by Robert Greenhow, M.D. Dr. Greenhow found a left shoulder full-thickness rotator cuff tear and a superior labral tear which he repaired. *See* Exhibit 5.

37. Claimant's testimony is not credible or persuasive. The medical doctors who opined that the injury was work related based their opinion on Claimant's history of injury. Therefore, the opinions of Dr. Ladwig and Dr. Bisgard are also not found persuasive as they rely upon Claimant's incredible description of injury

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2013). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury was proximately caused by the performance of such service. § 8-41-301(1)(b) & (c), C.R.S. (2014) The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. (2013). The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of requirement is satisfied when it is shown that there is a causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo.2001).

In the present case, Claimant has failed to meet his burden to show that he suffered an injury that arose out of his employment or occurred in the course of his employment on January 13, 2014. The opinion of Dr. Olsen is persuasive that the injury to Claimant's left shoulder was not acute in nature as shown by MRI. Additionally, the Claimant's course of action following his alleged injury on January 13, 2014 is not logically consistent with an injury on that date. Claimant suffered a similar injury in 2006 and reported the injury immediately, spoke with general manager Losasso immediately, filled out an incident report, and was referred for treatment. In the present case, despite allegedly suffering a similar injury to the 2006 injury, Claimant did not make any report of injury for approximately two months. This does not make logical sense considering Claimant was familiar with the process to report a work injury.

The evidence also establishes that Employer promptly responded to Claimant's 2006 injury and referred him for treatment. Similarly, in this case, Employer promptly filled out a "first report of injury" and referred Claimant for treatment when Claimant finally made a report of injury in this case in March of 2014. The evidence and testimony shows that it was Employer's practice to act promptly upon notification of any injury from any Employee. Claimant's testimony that he reported the injury to several people at work on the date of injury is not credible or persuasive. It is incredible that Claimant made would have made several reports of a left shoulder injury with no response from Employer. The testimony of Mr. Reilly, Mr. Nolan, and Mr. Losasso is credible that if Claimant had reported an injury in January of 2014, they would have referred him to fill out a report of injury and would have referred him for treatment immediately.

Further, the evidence shows that Claimant performed maintenance work at his mother in law's home, returned to work for two months and struck a co-worker with enough force to knock out a tooth following his alleged injury with no problems or reported complaints of left shoulder pain. If Claimant had a left shoulder injury that he suffered on January 13, 2014 it would logically follow that striking someone with enough force to knock out a tooth would cause significant pain to an already "injured" shoulder. Yet, after striking Mr. Barnes in early February, Claimant still did not report any pain or any alleged injury for another month. Despite Claimant's prior immediate treatment following an injury in 2006, in this case Claimant did not make a report or see any medical provider for approximately two months following his alleged injury. As found above, Claimant did not report any alleged injury until the day he was terminated by Employer.

Although the evidence shows that at the time of Claimant's MRI in early April of 2014 he had an almost complete tear of his rotator cuff, the explanation by Claimant of when and where this occurred is not found credible or persuasive. Claimant has failed to link the tear shown on the MRI to the time and place limits of his employment or to an employment related activity. The ALJ concludes that the tear did not occur acutely on January 13, 2014 as the action by Claimant following this date are inconsistent with someone who has suffered an acute injury. Claimant has failed to show, more probably than not, that he suffered a work related injury on January 13, 2014.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show that he suffered a compensable work injury on January 13, 2014.

2. Claimant's claim for benefits is denied and dismissed.

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

DATED: February 3, 2015

/s/ Michelle E. Jones

_____

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an injury to her right arm, right shoulder, and cervical spine on March 19, 2014 that was proximately caused by the performance of service arising out of and in the course of employment?

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of reasonable, necessary, and authorized medical benefits as a result of the alleged work injury.

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of temporary total disability benefits from March 19, 2014 and continuing.

STIPULATION

The parties stipulated Claimant's average weekly wage was $423.97.

PROCEDURAL ISSUES

Maria Bravo acted as an interpreter for Claimant during the hearing. She was properly sworn at the beginning of the proceeding.

Claimant requested a sequestration order which the Court granted. A potential Employer witness was excluded from the courtroom.

Claimant's exhibits 1-21 and Respondents' exhibits A-F, excluding Bates Nos. 81-84 under Exhibit D, were admitted into evidence.

FINDINGS OF FACT

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

1. Claimant is a laborer who began working for Employer, a temporary work company, on February 12, 2014. Claimant alleges she was injured on March 19, 2014, less than five weeks after she was hired.

2. Claimant's job on the date of alleged injury required her to take cake pops (small balls of cake) from a conveyer belt end point and transfer the pops to trays. The conveyer moved cake pops to a stationary table top landing in front of Claimant and other workers who loaded trays with the pops. Claimant testified that on the date of her alleged injury, two other women worked in the same space also transferring cake pops from the conveyer landing to the trays. Both other workers were away from the area

when Claimant was allegedly injured, and the alleged injury was unwitnessed.

3. Claimant's last day of work for Employer was March 19, 2014. She remained unemployed as of the hearing date.

CAUSATION

4. Claimant provided inconsistent versions of how she was allegedly injured on March 19, 2014. Initially, Claimant alleged her right upper extremity was compressed in the machine between the roller and the plate; the compression on her right forearm caused an injury in the form of a bruise slightly larger than a quarter in size. Claimant testified that she showed the bruise to co-workers and her supervisor. Employer's first report of injury is consistent with such an injury. In addition, after Claimant reported her injury to her supervisor, she spoke with a triage nurse who had Claimant treat the bruise with first aid and return to work.

5. Claimant later alleged her arm was trapped long enough to cause her to panic and try to free her arm from the machine using all of her bodily force. She claimed such force caused an injury to her right shoulder and cervical spine in addition to her right arm. Claimant variably testified her arm was stuck in the machine for "seconds" and her arm was caught for "an instant."

6. Video of the machine was submitted into evidence. It shows a regular back and forth motion of plates to the sides of the conveyor belt. When the machine moves to the tightest position, there is an opening of at least three or four inches. The machine then immediately opens wider. The entire cycle takes approximately one second.

7. There is a gap that widens and narrows as the belt moves back and forth. Only with great difficulty was Claimant able to describe what parts of the machine "trapped" her arm, causing what she describes as a crush or compression injury and a subsequent pulling injury to her right shoulder and neck.

8. The video demonstrates how it is possible for Claimant to have sustained a bruise on her forearm, if she put her hand in the machine in the space between the roller (that moves back and forth) and the side-rail of the machine.

9. Claimant was unable to explain how she became stuck or trapped in a machine that had a wide enough gap and fast enough movement to instantly release her hand even if her forearm was momentarily compressed.

10. Even if Claimant had the time to react to the machine closing by beginning to pull her arm away, the machine would be open and her hand would have been free by the time she started pulling.

11.

12. Claimant testified inconsistently at hearing about the onset of her alleged shoulder and neck injuries. One version was that she had immediate onset of shoulder and neck pain. For example, Claimant testified when the machine let her go, "that's when I felt all the pain." "When I pulled really hard was [when] I felt the pain all the way up to my ear." Claimant also testified "when I pulled my hand was when I felt the pain go up." "When I pulled my arm out of the machine, when I pulled against the machine so hard that's when I hurt myself."

13. However, later in her direct examination, Claimant testified to a second version: that her shoulder and neck pain came on two hours after the incident with the machine. She testified that she did not tell co-workers about her other injuries because she did not discover pain in her neck and shoulder area until approximately two hours after the alleged injury "because [her] arm had gotten – grown cold."

14. In addition, versions one and two of Claimant's hearing testimony were inconsistent with her third version that those symptoms did not develop until the next day. Claimant reported during her IME with Dr. Paz that her neck and shoulder symptoms developed "the day following" the alleged injury.

15. Claimant testified she told Dr. Paz her right upper extremity was trapped in the machine, and when the machine moved she was able to free herself from the machine. Dr. Paz performed Respondents' IME on June 9, 2014 and his report is dated July 7, 2014. He testified as an expert in occupational medicine at the hearing.

16. Claimant reported her alleged injury to her supervisor, Tito Texidor, within twenty to thirty minutes. His written statement indicated that Claimant complained of pain in her forearm and a bruise beginning on her forearm. She did not report any other pain to Mr. Texidor or to the triage nurse at MedCor who advised her by telephone to ice her forearm and take some pain medication. Mr. Texidor's written statement provided he sent Claimant home for the day to do so. His statement indicates that Claimant called back that day requesting to go to the hospital because the pain in her forearm was increasing. Again, nothing in Mr. Texidir's report indicates Claimant reported any injury other than a bruise on her forearm and pain in her forearm.

17. MedCor documented the call in a March 19, 2014 record. Claimant spoke about her complaint through an interpreter. Claimant said she put her arm into the machine, the machine moved, and her forearm was caught between the machine and a plate. Claimant reported 9/10 pain that restricted her activities, including movement of her thumb. MedCor documented Claimant was to use minor first aid on the bruise. Claimant called back through her son-in-law after work because her arm was "swollen and tingly." MedCor provided her with the designated provider information.

18. Claimant testified that later that afternoon she spoke with Michelle Donnel, Employer's safety manager, and reported, "I had a lot of pain in my arm; that it was hurting so bad and that it was hurting all the way to – to below my ear and my neck." While Ms. Donnel sent Claimant for medical treatment, when she completed Employer's First Report of Injury dated March 31, 2014, she reported that Claimant's injury was to her "lower arm" and did not mention Claimant's alleged report of pain extending from her forearm up to her ear.

19. Claimant was initially treated on March 20, 2014 by Dr. Lorenzo Ladwig at Aviation Occupational Medicine. Claimant reported that the machine had stopped when "she went to grab the pops" and "the machine suddenly started and caught her right forearm." Contrary to Dr. Ladwig's report, Claimant testified that she never said that the machine stopped and then started suddenly. Claimant reported pain in her neck radiating into her right shoulder and then into her right hand and fingers. She also reported tenderness on range of motion testing. A quarter size bruise was present. X-rays of Claimant's cervical spine, right shoulder, and right forearm were all negative for

acute changes. Thus, while Claimant had subjective reports of pain, the objective evidence was positive only for a small bruise.

20. Regardless of the objective evidence, Dr. Ladwig's report diagnosed cervical radiculopathy, lumbar radiculopathy, and "dorsal strain." However, it appears from Dr. Ludwig's handwritten notes that the actual diagnoses were cervical radiculopathy, right shoulder strain, and right forearm strain. The ALJ finds that Dr. Ladwig including inaccurate diagnoses on his report reflects poorly on his credibility and makes his reports less persuasive.

21. Based on his diagnoses, Dr. Ladwig's report concluded -- in quotation marks -- that based on the patient's history, mechanism of injury, and objective findings on examination, that it was his medical opinion that there is a greater than 51% probability that this is a work-related injury or condition. Dr. Ludwig prescribed anti inflammatories, muscle relaxants, and pain medications; he also restricted Claimant to no use of her right arm.

22. On March 27, 2014 Claimant had a follow-up exam with Dr. Hector Brignoni, also with Aviation Occupational Medicine. He noted that Claimant's symptoms had not improved despite being off work and on medications. Claimant testified at hearing that pain medications helped her, however her testimony is contradicted by Dr. Brignoni's account that she continued to report pain even while on pain medication. He referred Claimant to physical therapy and continued her restrictions.

23. On April 4, 2014 Claimant followed up with Dr. Brignoni again. He continued her temporary restriction of no right arm use and continued her medications. He noted that Claimant had pain magnification with only mild movement. He also continued to note that medications, not working, and physical therapy were not helping.

24. On April 8, 2014 Claimant followed up with Dr. Ladwig. She reported her pain level as 8/10 while on pain medication and that pain only lets her sleep for a couple of hours at a time. Dr. Ladwig continued her temporary restriction of no right arm use and continued her medications, despite Claimant's statements that they were not providing her with relief.

25. On April 16, 2014 Claimant returned for another follow up. She reported that she was not improving because she was not receiving physical therapy. She reported that her pain remained the same despite not working and medications which "only help for a little while."

26. Claimant's May 1, 2014 visit was the same – Claimant reported no change in her condition and that her pain medications only worked for short periods of time.

27. On May 28, 2014 Claimant reported to Dr. Brignoni that her cervical and right shoulder problems were "mostly gone" but that she was having pain radiating down to the palm of her hand. In contrast though, during a June 2, 2014 physical therapy session, Claimant reported increased pain in her right shoulder at a level of 9/10.

28. On June 4, 2014, Dr. Ladwig recommended an MRI of Claimant's cervical spine after her pain was "really high this weekend." Claimant reported she almost went to the emergency room for the pain.

29. On June 13, 2014 an MRI of Claimant's cervical spine was performed. It showed no evidence of an objective pain generator and no acute findings.

30. Dr. Ladwig discussed the MRI with Claimant on June 16, 2014. The results of the MRI were "essentially benign." Dr. Ladwig discussed Claimant's need for a physiatry referral and Claimant was sent to Dr. Franklin Shih.

31. In testimony, Claimant denied telling Dr. Ladwig that the machine stopped before she put her hand inside it. In her initial report to Dr. Ladwig, Claimant asserted the machine stopped, she put her hand into the machine, and then suddenly it restarted without warning trapping her hand. Again, the machine did not close sufficiently to trap Claimant's hand (which claimant asserts caused her to violently struggle to free herself, injuring her shoulder and neck). But Claimant's allegation the machine stopped and then started suddenly is abandoned in later medical records, including Dr. Paz's IME, and in Claimant's testimony. Claimant's story evolved after this initial report to Dr. Ladwig. This change in the "mechanism of injury" makes Dr. Ladwig's determination that Claimant sustained a work-related injury less reliable and less persuasive. He relies on a version of the story which Claimant denied at hearing. Dr. Ladwig never corrected the mechanism of injury in his reports to harmonize it with Claimant's revised mechanism of injury, as stated to Dr. Paz or as reported by Claimant in her testimony.

32. Dr. Shih, a physiatrist, evaluated Claimant for the first time on July 2, 2014. Claimant described her alleged injury as occurring when she reached across a sorting table when a sweeping device pinched her right hand. Claimant did not report to Dr. Shih that she pulled so hard to free her hand from the machine that she sustained right shoulder and neck injury. Instead, Claimant told Dr. Shih her "symptoms evolved" to encompass her "entire right upper extremity" with pain extending to her right upper trunk and neck area. In contrast, Claimant had told Drs. Ladwig and Dr. Brignoni she had cervical and shoulder complaints because she attempted to pull her trapped arm out of the machine.

33. Dr. Shih diagnosed claimant with a "non-specific" right upper extremity pain complex. Claimant had no acute distress. Claimant's cervical range of motion was "within functional limits." Palpation by Dr. Shih was remarkable for nonspecific tenderness in the upper trunk on the right. The tenderness was "diffuse and non-focal."

34. Dr. Shih noted that Claimant's history was remarkable for previous back injury and a laceration to her right elbow area.

35. Claimant's complaints "did not fall into a specific peripheral nerve or nerve root distribution." Dr. Shih concluded Claimant had a "relatively nonspecific examination." Claimant was given the options of trying to progress back to work, to try alternative treatments such as chiropractic or acupuncture, or to return to physical therapy. She chose acupuncture with Dr. Shih.

36. Regarding causation, Dr. Shih never stated Claimant's complaints were work-related. Instead, Dr. Shih left blank the boxes where he was asked to opine whether Claimant's symptoms were consistent with a work related injury. His characterization of the complaints as "nonspecific" is consistent with his finding that Claimant had "diffuse" pain complaints that followed "no specific nerve root or

distribution" pattern.

37. Dr. Shih again did not characterize Claimant's pain complaints as work related when he saw her on July 8, 2014. In that examination, Dr. Shih expressed his hope Claimant's examination would "become more focal."

38. Claimant's final appointment with Dr. Shih was on July 15, 2014. Again, Dr. Shih refused to state that objective findings were consistent with a "work related mechanism of injury."

39. On July 7, 2014, Dr. Mark Paz performed an independent medical examination at Respondents' request. Dr. Paz was asked to perform a causation analysis to determine whether Claimant's reported mechanism of injury was consistent with the complaints she alleges were caused by the mechanism of injury. Dr. Paz testified as an expert in occupational medicine.

40. Claimant had difficulty providing Dr. Paz with a history of her complaints and what may have caused them. Dr. Paz spent 53 minutes of his examination time gathering a history from Claimant.

41. Claimant's description of how the machine allegedly injured her was inconsistent with what Dr. Paz saw in the video showing the machine in operation. Claimant told Dr. Paz she was trapped in the machine. While a contusion could have resulted from Claimant putting her hand in the machine, Claimant told Dr. Paz she also developed right shoulder and neck pain.

42. Claimant told Dr. Paz the shoulder and neck pain did not develop until the day after the alleged injury.

43. Dr. Paz considered whether Claimant's description of the mechanism of alleged injury could have caused shoulder and neck problems. He concluded he could not. "For a causation analysis, you need both a mechanism of injury as well as a diagnosis. For the symptoms in the neck and the shoulder and . . . right arm, there is no medical diagnosis." While there may have been a contusion, the persistence of symptoms is not consistent with the natural progression of a contusion.

44. Diagnostic tests did not confirm the presence of an injury, according to Dr. Paz. Dr. Shih's evaluation demonstrated diffuse, non-specific complaints which are consistent with Dr. Paz's findings. "Given the information available [to Dr. Paz], there continues to be no medical diagnosis of the neck, shoulder, or distal right upper extremity [that] is consistent with an injury."

45. Dr. Paz opined that both a mechanism of injury and a medical diagnosis are required when conducting a causation analysis. Further, the mechanism of injury and diagnosis must be related. Dr. Paz stated it was improbable that Claimant sustained a compensable injury to the neck, right shoulder or right arm on March 19, 2014.

46. While it is possible Claimant may have sustained a contusion, it required first aid at most, not medical treatment. First aid is providing a band-aid or an ice pack. Claimant did not need medical treatment for any contusion.

47. Further, the machine's constant cycling from open to less open is

inconsistent with the trapping of a body part as Claimant reported to Dr. Paz. As observed in the video and as Dr. Paz testified, the machine would have fully opened by the time an individual would have realized the machine was in its least open capacity. There was not sufficient time for an individual to react and generate a pull on one's upper extremity before the machine cycled to its fully open position. Claimant's allegation that she injured her shoulder and neck by pulling at her trapped arm is not medically probable given a body's reaction time. Even if Claimant pulled her arm, there would have been no counterforce that would have created the energy [resistance] necessary to injure Claimant's body. Viewing the totality of the evidence, the ALJ finds it unlikely that Claimant could have been trapped for seconds in the machine. Rather, the ALJ finds it likely that the machine compressed Claimant's forearm for an instant and immediately began opening upon reaching its most closed position.

48. The ALJ finds Claimant to be a poor and inconsistent historian regarding the onset, extent, and cause of her alleged injuries, other than the bruise on her forearm, and does not credit her testimony.

49. Claimant failed to present evidence that establishes it is more likely than not that she sustained a compensable work related injury. At most, Claimant may have suffered a bruise on her forearm that did not require medical treatment or compensation benefits.

50. No objective test showed any acute injury requiring medical treatment.

51. Dr. Paz credibly and persuasively testified it is not medically probable that Claimant sustained a work related injury on March 19, 2014. Dr. Paz concluded the mechanism of injury would not have caused the symptoms Claimant reported. The Judge finds Dr. Paz's opinions related to causation to be more credible and persuasive than Dr. Ladwig's.

52. Dr. Paz testified consistently with his report. The ALJ finds Dr. Paz's testimony provided a credible and persuasive assessment that Claimant's self-described mechanism of injury would not cause a work related injury.

53. Dr. Ladwig's reports rely on a mechanism of injury Claimant abandoned in her testimony. To the extent that Dr. Ladwig was unaware of Claimant's inconsistent reports, the ALJ finds his conclusions to be less persuasive than those of Dr. Paz.

54. The ALJ finds it more likely true than not that Claimant's allegation of an injury on March 19, 2014 is not credible given the above findings of fact. Claimant's allegation of an injury while stacking cake pops is less likely true than not given the credible and persuasive medical evidence that Claimant's mechanism of injury would not cause her cervical, right shoulder and right arm complaints.

55. Claimant bears the burden of proving by a preponderance of the evidence that she sustained a compensable injury on March 19, 2014. The Judge finds that Claimant has not met this burden.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1) (b) & (c), C.R.S.

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

As found, Claimant's hearing testimony was both internally inconsistent and inconsistent with information she provided to Dr. Paz. Dr. Paz's opinions regarding the mechanism of injury being unable to cause the injuries she claimed, combined with a lack of any objective findings of injury, cause the ALJ to conclude that Claimant did not sustain an injury on March 19, 2014. To the extent that Claimant suffered a bruise requiring minor first aid, the ALJ concludes that such bruise does not rise to the level of an injury requiring medical treatment as contemplated by statute. The ALJ concludes that based on the totality of the evidence, Claimant failed to meet her burden of proof.

In light of this determination the Judge need not reach the other issues.

ORDER

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

1. Claimant's claim for workers' compensation benefits in WC 4-946-453-01 is denied.

DATED: February 23, 2015

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

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

ISSUES

The issues presented for determination are whether Claimant suffered a right knee injury in the course and scope of her employment on March 19, 2014; whether Claimant is entitled to medical benefits; and whether Claimant is entitled to temporary total disability (TTD) benefits commencing on March 21, 2014 and ongoing.

The parties stipulated that if the claim is compensable, the applicable average weekly wage is $985.37. The parties also stipulated that James Genuario, M.D., and Matthew Lugliani, M.D., are authorized treating physicians.

FINDINGS OF FACT

1. Claimant has been employed by Employer as a Customer Service Agent for the past 14 years. As a part of her work-related duties, Claimant is required to squat down to pick up luggage or put tags on luggage and other carry-on items on a regular basis.

2. On March 19, 2014, at approximately 10 a.m., Claimant squatted down to put a tag on a customer's stroller. While Claimant arose from the squatted position, she turned to speak to the customer that she was assisting. She felt a pop in her right knee that was followed immediately by severe pain and swelling. Claimant managed to continue working for two or three hours after the injury, but due to the severe pain she was experiencing she requested to perform her duties from a seated position, which is generally not permitted by Employer. Claimant was also able to work her scheduled shift on March 20, 2014, but she was in such severe pain that she was unable to stay and complete the mandatory overtime shift.

3. The Claimant had experienced some minor aches in her right knee before March 19, 2014, but she had never experienced any symptoms as severe as those she felt after the squatting incident.

4. On March 21, 2014, Claimant sought treatment for her right knee symptoms with James Genuario, M.D. at Steadman Hawkins Clinic. During her visit, the Claimant completed a patient history form in which she reported that her right knee pain had begun "about a month earlier" with swelling in her right knee. Dr. Genuario's note indicated that Claimant was experiencing catching and sharp stabbing pain with the knee giving way when she attempted to walk. Dr.

Genuario ordered a MRI of Claimant's right knee, and the MRI showed a grade III chondral fissure of the median patellar ridge and acute lateral edema.

5. On March 28, 2014 On March 28, 2014, Dr. Genuario's assistant, Jeremy Smith, PA, saw Claimant and discussed the results of Claimant's right knee MRI. Claimant's right knee MRI revealed some cartilage thinning in the medial patellar facet with mild edema and no evidence of meniscus tear. PA Smith indicated that he reviewed Claimant's medical history with Claimant and that there were no changes from the information contained in the chart on file. There is no mention in the report of a squatting injury on March 19, 2014.

6. When Claimant saw Dr. Genuario on March 31, 2014, Dr. Genuario reported that Claimant had noticed increasing symptoms with twisting activities at work. Dr. Genuario stated that if Claimant failed conservative measures, she would be a good candidate for right knee lateral release surgery. Dr. Genuario recommended that Claimant seek further medical treatment through the workers' compensation system.

7. Shortly thereafter, Claimant reported her injury to the Employer on April 2, 2014. She reported that she injured her right knee while bending down to tag a customer's stroller.

8. After Claimant reported the injury, the Employer referred the Claimant for medical treatment. Claimant elected to pursue treatment at Healthone.

9. On April 2, 2014, the Claimant first saw Matthew Lugliani, M.D. at Healthone. Claimant reported that she injured her right knee at work on March 19, 2014 when she bent down to put a tag on a stroller. After completing a physical examination of Claimant, Dr. Lugliani diagnosed Claimant with chondromalacia and knee pain, and noted that in his professional opinion there was greater than 50% medical probability that Claimant's injuries were causally and proximally related to the March 19, 2014 accident at work. Dr. Lugliani referred Claimant back to Dr. Genuario for further evaluation and treatment.

10. On April 14, 2014, Dr. Genuario diagnosed right knee patellofemoral syndrome. Dr. Genuario also who opined that Claimant's condition failed to improve with non-operative treatment, and recommended an arthroscopic debridement and lateral release, which Claimant underwent on May 9, 2014.

11. Claimant's preoperative diagnosis was acute chondral defect of the patella with patellofemoral pain syndrome. Dr. Genuario's pre-operative report stated that Claimant suffered an acute injury while at work when she lifted baggage.

12. During surgery, Dr. Genuario noted that the cartilage surrounding Claimant's chondral defect looked smooth and healthy, and that the bone exposed under Claimant's chondral defect did not look sclerotic, or hardened.

13. Dr. Genuario testified by deposition. He explained that patellofemoral pain syndrome is a generic term for pain in the patellofemoral joint, and that it can be caused by a number of different conditions. In Claimant's case, the patellofemoral pain syndrome was caused by the chondral defect in the cartilage of Claimant's right kneecap. There are two types of chondral defects, those caused by degenerative changes and those caused by an acute injury. When chondral defects are caused by degenerative changes, the cartilage surrounding the patella will appear broken down and cracked upon arthroscopic exam. When chondral defects are caused by an acute injury, the cartilage surrounding the defect will look smooth and healthy. Dr. Genuario opined that because the area surrounding Claimant's chondral defect appeared smooth and healthy upon arthroscopic exam, it is clear that Claimant's chondral defect was caused by an acute injury rather than by degenerative changes.

14. Dr. Genuario also testified that when bone is exposed for a prolonged period of time it will become sclerotic, or hardened. Upon arthroscopic exam, the bone under Claimant's chondral defect did not look sclerotic, but instead looked like fresh bone that had recently been exposed. Dr. Genuario felt that the fresh bone was indicative of an acute injury.

15. Dr. Genuario noted that the edema present on Claimant's March 21, 2014 MRI provides further evidence that Claimant suffered from an acute injury.

16. At the Respondents' request, Claimant was evaluated by Wallace K. Larson, M.D. on July 29, 2014. Claimant told Dr. Larson that she injured her right knee when she bent down to tag a stroller and that by the time she left work her pain was severe and brought her to tears the following day**.** Dr. Larson opined that Claimant had not likely suffered an acute trauma at work and that, instead, Claimant's symptoms were due to patellofemoral pain syndrome. Dr. Larson opined that Claimant's diagnosis was unrelated to work and Claimant's symptoms were the product or a naturally progressing pre-existing condition.

17. Both Dr. Larson and Dr. Genuario testified that patellofemoral pain syndrome can be caused by cartilage defects, leg muscle weakness/imbalance, and arthritis. Both Dr. Larson and Dr. Genuario testified that women are more prone to developing patellofemoral pain syndrome than are men because of the angle of their hip compared to the knee joint and that development of this syndrome may have a genetic component.

18. After he acknowledged that he recalled Claimant's testimony describing her job duties, Dr. Larson testified that Claimant's right knee

patellofemoral syndrome was not caused by Claimant's work duties or the squatting event of March 19, 2014. When he was directed to WCRP 17, Exhibit 6 of the Medical Treatment Guidelines, Dr. Larson testified that the factors set forth for in the guidelines for determining the occupational relatedness of patellofemoral pain syndrome were not sufficiently present in Claimant's employment to establish an occupational relationship between Claimant's patellofemoral syndrome and her work.

19. Dr. Genuario opined that Claimant suffered an acute injury to her right knee because during surgery, he visualized a focal chondral defect where the damaged cartilage flap was still attached and surrounding cartilage was smooth and non-sclerotic**.** Dr. Genuario stated that right knee swelling prior to March 19, 2014 might be indicative of ongoing cartilage wear.

20. According to Dr. Larson, the occurrence of a focal chondral defect in Claimant's right knee does not establish that Claimant suffered a traumatic injury. Dr. Larson agreed that trauma can, in fact, cause a focal chondral defect but that the trauma would likely be in the nature of a dislocation of the patella or knee cap caused by an impact. Dr. Larson testified that Claimant's alleged injury of March 19, 2014 did not involve that kind of trauma. Dr. Larson opined that progressive degenerative changes associated with anatomic variation, unrelated to trauma, could account for the chondral defect in Claimant's right knee. Dr. Larson noted that the anatomy in Claimant's right knee is probably similar, if not identical, to the anatomy in Claimant's left knee, and Claimant suffered, previously, from patellofemoral pain syndrome in the left knee with cartilage involvement.

21. In June 2012, Claimant suffered an injury to her left knee when a piece of luggage struck her in the knee. Claimant's diagnosis for the injury was left patellofemoral pain syndrome. Claimant had lateral release surgery to her left knee on August 20, 2012.

22. Dr. Larson testified that if Claimant had suffered a dislocated knee cap that might constitute a traumatic explanation for the focal chondral defect in her right knee, Claimant would have, likely, experienced significant pain and would be certain that something serious had occurred in her right knee.

23. Dr. Larson also testified that healthy cartilage that is not suffering from degenerative changes usually looks smooth, and that it is possible to see hardening, or sclerosis, of a bone upon arthroscopic exam. However, Dr. Larson stated that in his opinion, this evidence is not enough to definitively state that Claimant suffered from an acute injury, and that even if she did, the findings do not necessarily pinpoint the exact date that the injury occurred. Because Dr. Larson believes that a dislocation of the knee is the most typical way in which an acute chondral defect is created, he refused to acknowledge that Claimant's

squatting and twisting motion on March 19, 2014 could be the mechanism of injury in this case.

24. Dr. Larson opined that Claimant suffered from a pre-existing condition in her right knee that was not aggravated by her work duties. Dr. Larson opined that Claimant suffers from an anatomical variation in both of her knees that predisposes her to patellofemoral pain syndrome and chondral defects. At hearing, Dr. Larson opined that in order for Claimant to have suffered an aggravation of a pre-existing condition, she must suffer a permanent change in her symptoms or a structural change to the injured body part. Dr. Larson's opinion concerning the standard for aggravation of a pre-existing condition is incorrect. Nevertheless, the Claimant did sustain a permanent change in her symptoms in that her symptoms were significantly worsened as a result of the squatting incident on March 19, 2014, such that she required surgery.

25. Claimant testified that in order to perform her work related duties for Employer she must squat down at least 30 times throughout each shift. At home, Claimant squats down very infrequently, and she does not engage in any sports or hobbies outside of work that require squatting on a regular basis.

26. Claimant testified that for approximately one month prior to March 19, 2014, she occasionally experienced minor aches, pains, and swelling in her right knee. However, prior to March 19, 2014, Claimant never experienced pain or swelling in her right knee that kept her from performing activities of daily living or made it difficult to perform her work-related duties. Claimant never sought medical treatment for her right knee prior to March 19, 2014, nor did she mention problems with her right knee to the medical providers that she was seeing for unrelated issues. This testimony is supported by medical records from Concentra Medical Center and Denver Vail Orthopedics for 2012 and 2013 that do not show any complaints or treatment for Claimant's right knee.

27. Claimant testified that she has no experience, knowledge, or training regarding how preexisting conditions are treated under the Colorado workers' compensation system. Given that Claimant was experiencing light aches, pains, and swelling in her knee for the month leading up to the March 19, 2014 injury, Claimant assumed that she could not report her injury as work-related, so she sought treatment on her own from Dr. Genuario. It was not until March 31, 2014, when Dr. Genuario informed her that her right knee injuries were caused by an acute injury at work, that Claimant knew she needed to report her injury to Employer.

28. Claimant testified regarding the questionnaire that she completed during her first appointment at Dr. Genuario's office on March 21, 2014. Claimant explained that in response to the question regarding when her problem started, she responded that her knee became swollen a month ago, and also put a question mark next to the question that asked if her injury was work related,

because she was not sure whether the mild swelling in the weeks leading up to March 19, 2014 was related to the sudden onset of severe right knee pain and swelling that she experienced on March 19, 2014 or not.

29. Claimant has been under work restrictions from Dr. Genuario since her first appointment with him on March 21, 2014, and that at her first appointment with Dr. Lugliani on April 2, 2014, Dr. Lugliani retroactively assigned work restrictions to Claimant that date back to her date of injury.

30. At the time of the hearing in this matter, Claimant had not worked for the Employer since March 20, 2014, and that she had not yet been released to return to work. Upon reporting her injury to the Employer, Employer told her that that they would not accommodate her work restrictions.

CONCLUSIONS OF LAW

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

General Legal Principles

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

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

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

Compensability

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. An industrial aggravation of a preexisting medical condition can result in a compensable injury as long as the aggravation is the proximate cause of the need for treatment. *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, when a claimant experiences symptoms while at work it is for the ALJ to determine whether subsequent need for treatment was caused by an industrial aggravation of a pre-existing condition or by the natural progression of the pre-existing condition. The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the pre-existing condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. The Claimant has proven that she sustained an injury to her right knee while in the course and scope of her employment. The Claimant had experienced only mild symptoms in her right knee in the past. After the March 19, 2014 work incident, the Claimant had significant symptoms that required treatment including surgery. The ALJ credits the opinions of Drs. Genuario and Lugliani over those of Dr. Larson. As the Claimant's surgeon, Dr. Genuario credibly explained that during the surgery he performed on Claimant's right knee, he visualized various structures in Claimant's knee that led him to conclude she suffered an acute injury. Even if Claimant did not suffer an acute injury, the credible and persuasive evidence reflects that Claimant suffered an aggravation or exacerbation of any pre-existing condition. Claimant was able to work full duty prior to March 19, 2014, and had only experienced mild symptoms in her knee before that day. After the squatting and twisting incident of March 19, 2014, Claimant required surgery. Dr. Larson's opinion that a claimant must suffer a permanent change in her symptoms or a structural change to the injured body part in order to establish a compensable aggravation of a pre-existing condition is inaccurate. Regardless, the Claimant did suffer a permanent change in her symptoms or a structural change to the injured body part in that after March 19, 2014, her symptoms became so severe that she could no longer work and she required medical treatment including surgery. The Claimant is, therefore, entitled to benefits under the Workers' Compensation Act for her right knee injury.

Medical Benefits

7. A claimant is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of the injury. § 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office,* 996 P.2d 228 (Colo.App. 1999). A claimant bears the burden to prove by a preponderance of the evidence the causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

8. The Claimant has proven entitlement to medical treatment to cure and relieve her of the effects of her right knee injury, including treatment she has already received at Healthone with Dr. Lugliani, and with Dr. Genuario. The treatment Claimant thus far received is reasonable, necessary and related to her work injury. Per the stipulation of the parties, Dr. Lugliani and Dr. Genuario authorized treating providers although Dr. Genuario did not become an authorized provider until after Dr. Lugliani referred the Claimant back to him on April 2, 2014.

Temporary Total Disability Benefits

9. To prove entitlement to temporary total disability benefits, a claimant must prove the industrial injury caused a "disability." § 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements. The first is "medical incapacity," which is evidenced by loss or impairment of bodily function. The second is temporary loss of earning capacity, which is evidenced by the claimant's inability to perform his pre-injury full duty job. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). Whether the claimant has proved a disability is a question of fact for the ALJ. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo.App. 1997).

10. Claimant has not worked since March 21, 2014. Dr. Genuario and Dr. Lugliani imposed work restrictions dating back to the date of injury that prevented Claimant from performing her normal job duties as a customer service agent for the Employer. Claimant testified that Employer indicated they would not accommodate her restrictions. The Claimant has suffered a disability that prevented her from performing her normal job duties. Accordingly, the Claimant is entitled to TTD at the stipulated average weekly wage commencing on March 21, 2014 and ongoing until terminated pursuant to law.

ORDER

1. Claimant suffered a compensable injury while working for Employer on March 19, 2014, and therefore, is entitled to benefits and compensation.

2. Respondents are responsible for the medical treatment Claimant received from Healthone Occupational Medicine and for the medical treatment Claimant received from Steadman Hawkins Clinic after Dr. Lugliani's April 2, 2014 referral, including Claimant's May 9, 2014 surgery.

3. Respondents shall pay for ongoing reasonable and necessary medical treatment needed to cure and relieve the effects of the March 19, 2014 injury.

4. Respondents shall pay Claimant temporary total disability benefits from March 21, 2014 and ongoing until terminable by law. The disability benefits will be calculated based on the average weekly wage of $985.37.

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

6. All other issues not determined herein are reserved for future determination.

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

DATED: February 2, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease to her left elbow arising out of and in the course of her employment with employer?

- The parties stipulated prior to the hearing that if claimant does prove a compensable occupational disease, respondents would be liable for the reasonable and necessary medical mileage pursuant to the Colorado Medical Fee schedule.

FINDINGS OF FACT

1. Claimant is employed with employer as a student information systems specialist. Claimant testified her job duties include data entry involving a computer keyboard. Claimant testified at hearing that she generally works 40 hours per week, but has a busy period from August to November when she works 50 to 60 hours per week and is constantly keyboarding. Claimant testified that she is in charge of overseeing 15-20 data bases and keeping the information updated and that her work load increases at the beginning of each school year requiring her to be constantly keyboarding while at work.

2. Claimant testified at hearing that she has noticed 2 years ago during her busy period that symptoms develop in her left elbow. Claimant testified she reported the symptoms to her physician and received a cortisone shot in her left elbow. Claimant testified that the cortisone shot provided her with relief for approximately 6-7 months.

3. Claimant was seen by Dr. Salmen on January 12, 2012. Claimant was diagnosed with lateral epicondyliits of the left elbow. Claimant was provided with a cortisone shot and instructed to stretch hourly at work. Claimant testified her pain returned again in the fall with her increased hours and constant data entry. Claimant testified she reported her symptoms to her employer and her employer sent her back to the doctor.

4. According to the medical records, claimant returned to Dr. Salmen on December 21, 2012, after another busy season, and was again complaining of left lateral epicondylitis and extensor tendonosis symptoms. Dr. Salmen noted that claimant's symptoms were related to her intensive daily keyboard activity at work. Dr. Salmen again performed a cortisone injection and recommended physical therapy and work restrictions.

5. Claimant returned to Dr. Salmen on January 22, 2013 and reported that her symptoms had markedly improved. Dr. Salmen recommended claimant continue physical therapy. Claimant was re-evaluated by Dr. Salment on February 25, 2013 and was placed at MMI. Claimant testified at hearing that after the cortisone injection, her symptoms again receded for another 6-7 months.

6. Claimant testified that in August 2013, claimant had another extremely busy work month. Claimant testified her symptoms in her left elbow again returned and were far worse this time. Claimant testified she reported the injury to her employer and they again sent her back to the doctor.

7. Claimant was examined by Dr. Salmen on February 3, 2014. Dr. Salmen noted that this was claimant's third annual episode and opined that claimant's condition was related to her work with employer. Dr. Salmen again diagnosed claimant with left elbow epicondylitis and referred claimant to Dr. Golden for evaluation.

8. Claimant was examined by Dr. Golden on February 12, 2014. Dr. Golden noted claimant's ongoing complaints of left chronic tennis elbow that had been treated with 2 elbow injections and 2 courses of physical therapy. Dr. Golden noted that because this was claimant's third recurrence that she was recommending a different course of treatment. Dr. Golden recommended claimant undergo a PRP injection. Claimant testified at hearing that the PRP injection relieved her symptoms.

9. Claimant testified that in the Fall of 2013, her symptoms worsened, then got a bit better when she was off of work for 3 weeks. Claimant testified that her symptoms again returned after her three weeks off when she returned in December 2013.

10. Claimant testified her claim was then denied and she was not allowed to finish her physical therapy. Claimant testified she did not follow up with her doctor appointments because she advised by insurer that her claim was denied.

11. Respondents had Mr. Van Iderstine perform a job site analysis April 11, 2014. Mr. Van Iderstine issued a report dated May 19, 2014 and indicated claimant reported she typically worked from 7:30 a.m. until 5:30 p.m. form Monday through Thursday and 8:00 a.m. until 12:00 p.m. on Friday. Mr. Van Iderstine reported that claimant's workstation was redesigned approximately 2 years ago after insurer provided an occupational therapist to ergonomically reconstruct the work station. Mr. Van Iderstine reported that claimant typically spent 2/3 of her day keyboarding with the remaining time utilizing her mouse. The report also mentions tripad use by claimant. The ALJ finds that the reference to "tripad" use refers to a track pad claimant testified she used instead of a mouse.

12. Following the job site analysis, respondents had Dr. Sollender perform a physician advisory opinion on June 25, 2014. Dr. Sollender opined that the jobs demands analysis identified the presence of the only risk factor of computer work listed

as “7 hours of keyboard and tripad use.” Dr. Sollender noted this was an insufficient job site analysis.

13. Mr. Van Iderstine issued an addendum to the job analysis narrative on June 27, 2014 that indicated that claimant’s job duties require 7 hours of daily keyboarding and utilization of a tripad instead of using a mouse. Mr. Van Iderstine indicated that the specific breakdown was 4.7 hours keyboarding and 2.3 hours per day of tripad use.

14. Claimant testified that the job site analysis was not performed during her busy season and testified that she disagreed with some conclusions in the job site analysis. Claimant testified that she worked 10 your days during the fall and felt the amount of time on the keyboard was underestimated. The ALJ finds claimant’s testimony in this regard to be credible and persuasive.

15. Dr. Sollender issued another physician advisory opinion on July 9, 2014. Dr. Sollender reviewed the June 25, 2014 addendum and opined that the claimant’s job did not have the presence of any risk factor and therefore, claimant’s claims for injuries related to her occupation were unfounded.

16. Dr. Sollender subsequently performed an independent medical examination (“IME”) of claimant on October 28, 2014. Dr. Sollender issued a report in connection with his IME dated November 26, 2014. Claimant reported to Dr. Sollender during the IME that she works 10 hour days from August through November and during which all she does is “push and pull data on her computer”. Dr. Sollender noted that claimant reported she only does typing with her left hand and estimated that 95% of her work was performed on her computer. Dr. Sollender noted that in reviewing her records from her busy time from August 1, 2013 to November, there were numerous days with work hours of 10, 11 and up to 12 hours per day.

17. Dr. Sollender indicated in his report that he remained uncertain as to if claimant’s work was the cause of her condition because of discrepancies between claimant’s report versus the vocational expert report. Dr. Sollender noted that each would result in mutually different results. Dr. Sollender concluded that if you credited the vocational report, claimant’s condition was not caused by her work based on an analysis of the Colorado Medical Treatment Guidelines set forth by the Division of Workers’ Compensation. Dr. Sollender effectively concluded that if the vocational report is accurate, claimant’s time spent keyboarding is insufficient to cause her condition.

18. Dr. Sollender noted, however, that if you credited claimant’s report of her work activities as accurate, claimant would meet the exposure requirements to make her work a primary risk factor in causing her lateral epicondylitis. Dr. Sollender noted that this decision as to which report of work activities is accurate would be left up to a decision in the hearing involving the compensable nature of claimant’s condition.

19. The ALJ credits the testimony of claimant and determines that her report of her work activities during her busy period of August through November is an accurate description of her work with employer. The ALJ rejects the findings in the job site analysis as being less credible that claimant's testimony. The ALJ notes that the job site analysis was performed during a period of time in which claimant's work was not as busy. The ALJ further notes that Dr. Sollender indicated in his IME report that the issue of compensability in this case came down to which set of data is determined to be most accurate regarding claimant's work activities. In this regard, the ALJ finds claimant's description of her work activities to be more credible and persuasive that the Job Analysis Report.

20. The ALJ concludes that claimant has proven that it is more likely than not that her left lateral epicondylitis is a compensable occupational disease arising out of and in the course of her employment with employer. The ALJ credits the testimony of claimant regarding her work duties along with the opinions of Dr. Salmen, Dr. Golden and Dr. Sollender in coming to this conclusion.

21. The ALJ further credits claimant's testimony that her symptoms increase with her busy season each year as credible and persuasive. The ALJ notes that claimant's testimony in this regard is supported by the medical records, including the records from Dr. Salmen dated December 21, 2012 and February 25, 2013. The ALJ also credits claimant's testimony that her condition improved after taking three weeks off while her symptoms returned when she came back to work in December 2013 as credible evidence that her lateral epicondylitis is related to her work with employer.

22. Respondents shall pay for the medical mileage for the February 3, 2014 medical appointment with Dr. Salmen and the February 12, 2014 evaluation with Dr. Golden pursuant to the Colorado Medical Fee Schedule set forth by the Division of Workers' Compensation.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

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

5. As found, claimant has proven by a preponderance of the evidence that she suffered an occupational disease arising out of and in the course of her employment as a result of her data entry and keyboarding. As found, the opinions expressed by Dr. Salmen and Dr. Sollender are credible and persuasive regarding the relatedness of claimant's left elbow epicondylitis to her work with employer. As found, claimant's testimony regarding her work duties is found to be more credible and persuasive than the Job Analysis Reports provided by Mr. Van Iderstine.

6. As found, pursuant to the stipulation of the parties, respondents shall pay for the reasonable and necessary medical mileage for the February 3, 2014 appointment with Dr. Salmen and the reasonable and necessary medical mileage for

the February 12, 2014 medical appointment with Dr. Golden pursuant to the Colorado Medical Fee Schedule.

ORDER

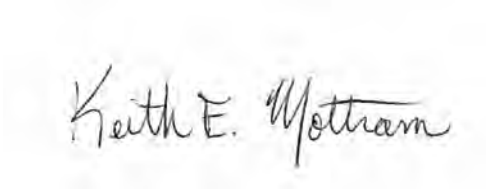
It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical mileage pursuant to the Colorado Medical Fee Schedule for the medical appointment with Dr. Salmen on February 3, 2014and Dr. Golden on February 12, 2014.

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

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

DATED: February 6, 2015



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-949-727-02

ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an injury on May 8, 2014 that was proximately caused by the performance of service arising out of and in the course of employment?

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of reasonable, necessary, and authorized medical benefits as a result of the alleged work injury.

- If Claimant proved she sustained a compensable injury, whether Claimant proved that she is entitled to an award of temporary total disability benefits from May 9, 2014 and continuing.

STIPULATION

The parties stipulated Claimant's average weekly wage was $281.80.

PROCEDURAL ISSUES

Claimant requested a sequestration order. Fact witnesses for the employer, with the exception of an advisory witness, were excluded from the courtroom. Dr. D'Angelo, an expert witness called by Respondents, remained in the courtroom for the testimony of the fact witnesses.

Respondents took the evidentiary deposition of Carol Hulse, Business Manager for Employer. The transcript of Ms. Hulse's evidentiary deposition was received by the Court and admitted into evidence.

FINDINGS OF FACT

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

Braking Incident

1. Claimant has worked as a school bus driver for Employer since 2006.

2. Claimant alleges she injured her neck while driving her morning route on May 8, 2014. Claimant was stopped at Colfax. When she began to proceed slowly into the intersection, Claimant applied the bus's brakes to avoid a vehicle with the right-of-way. There was no collision. Claimant alleges the application of brakes caused her to have neck pain, headaches and left arm numbness.

3. Claimant described her stopping the bus as slamming on the brakes of the bus to avoid the vehicle on Colfax. Claimant testified she was looking to the right when

she slammed on the brakes; she felt like the braking caused her to go "forward and backwards." Claimant testified she was upset and wanted to make sure the passengers in the bus were okay. She radioed her manager and asked that she meet her at the bus.

4. Claimant testified she became nauseated, developed a headache and "a little ways down the line [her] neck started hurting." Claimant testified she was almost "in shock."

5. Claimant prepared a statement of what happened on May 8, 2014 for Employer. Claimant reported she "had to put the brakes on very hard to keep from having an accident." Claimant described the stop was hard enough to "[throw] me forward and backwards."

6. Ms. Overholser, a paraprofessional who helped a special needs student on the bus, testified the bus was stopped at the stop sign. Claimant began pulling away from the stop sign when another vehicle was approaching the intersection. Claimant "pressed on the brakes." The vehicle went by and the bus proceeded through the intersection.

7. Ms. Overholser testified Claimant's pressing on the brakes created a "little bit of a jolt, there was motion, but nothing too strong or hard." Ms. Overholser did not believe anyone on the bus sustained an injury when Claimant stopped the bus at the Colfax intersection.

8. Claimant testified that the special needs student went to the hospital later in the day. However, Ms. Overholser checked on the student and did not believe she sustained any injury as a result of Claimant applying the brakes.

9. Employer maintains three cameras on the bus Claimant drove. Video from the bus shows the interior of the bus from three views: Claimant in her seat as she drives, the front section of the bus, and the rear of the bus. Respondents' F, BN 175A is the 59 minute copy of the video from the bus on the morning of May 8, 2014. Claimant testified the actions around the 51:27 mark show the stop that allegedly caused her cervical spine injury.

10. The video depicts absolutely no movement in Claimant's upper body, much less any whiplash type of movement, when she applies the brakes. It does not even appear that the braking was sufficient to cause Claimant's shoulder restraint to tighten. While the video does show students sliding somewhat forward in their seats, no one on the bus appeared to sustain any injury. The video does not show Claimant being thrown forward and backwards in her seat. Rather, it depicts the bus accelerating slowly from the stop and then Claimant applying the brakes with no resulting movement in her body. The video shows no movement of Claimant's cervical spine. Claimant's neck remains rigid.

11. Braking and forces associated with braking appear on the video. But the braking is not violent or severe. Claimant brakes, then immediately looks left and right with no apparent restricted range of motion. She looks up with no apparent restricted range of motion and asks if everyone is okay. She proceeds with the route. She opens and closes the door. She continues to look up at her mirror and to talk to occupants of

the bus. Claimant does not demonstrate any behaviors that would indicate she sustained a neck injury. The video depicts no sign that Claimant is in pain. There is no sign of a headache or nausea. At 57:41, Claimant places her left hand on the left side of her neck, but she does not rub or massage her neck, and she drops her hand seconds later. She continues driving and moving her head freely left, right, up and down.

12. Although Claimant does not move in the video, she points to the two students riding in the front seat of the bus as evidence of the force caused by Claimant's braking. The students appear to be sleeping in the video with their feet up on the seats. As Claimant applies the brakes, they slide forward on their seats and wake up. They do not appear to be injured in any way and they are not thrown off of their seats.

13. Video of Claimant's alleged injury is wholly inconsistent with her statements to Employer and treatment providers that she was thrown forward and backward.

14. Claimant's description of what happened to her on May 8, 2014 on the bus is not credible or persuasive when compared to the video of the alleged injury and the testimony of Ms. Overholser, and Dr. D'Angelo below.

15. Respondents denied liability for the alleged injury. Claimant has preexisting degeneration in her cervical spine. Her cervical spine was treated regularly, along with her back, by a chiropractor. Diagnostic studies are consistent with pain from degenerative disc disease, not any acute injury. Video of the alleged injury does not support Claimant's allegation of injury.

16. David Spiller, Employer's information technology director, and Lora Blake, the transportation director, testified the video of the alleged injury was taken from the bus after Claimant reported she was hurt. The video was copied and the original was placed in a safe. The video is contained on a removable hard drive. Mr. Spiller testified there are no gaps on the video.

17. Ms. Blake, Claimant's supervisor, testified Claimant called her on the radio on May 8, 2014. Claimant indicated she had to step on the brakes hard and wanted Ms. Blake to meet her to check on the students. Claimant had asked if all of the kids were okay and they stated they were. When the bus reached the school, Ms. Blake and Claimant talked to the students and they all said they were okay.

18. Claimant came into Ms. Blake's office after finishing unloading the students. Ms. Blake asked if she needed medical treatment. Claimant did not want to travel into Denver. Ms. Blake offered to take her to a clinic in Strasburg. Claimant initially refused treatment but went back into the office a few minutes later and said she wanted treatment because her husband said she should be checked out. Ms. Blake suggested if the stop were severe enough to cause her to be treated; Claimant should call the mother of the special needs child on the bus. Claimant called the mother while Ms. Blake called Ms. Hulse, the business manager for the school, to arrange Claimant's treatment.

19. Ms. Blake reviewed the video with Mr. Spiller after the video was removed

from the bus.

20. Carol Hulse, business manager for the school district, testified via evidentiary deposition on January 15, 2015 that she took a history from Claimant on May 9, 2014. Claimant told Ms. Hulse "she had to slam on the brakes to avoid hitting a car . . . [*The] force from braking the bus was so hard that it had thrown her into the steering wheel, and then back into the back of the seat*." Video from the alleged injury does not show Claimant being thrown into the steering wheel and then back into the seat. Claimant's statements are not consistent with what is seen on video.

Medical Treatment

21. Employer provided Claimant with immediate medical attention.

22. Ms. Hulse's assistant, Teri Boon, took Claimant to Plains Medical Center on the morning of May 8, 2014.

23. Claimant told Dr. DeBuck at Plains Medical Center that braking caused her head to move forward and backwards. "Driving bus this morning had to apply brakes really hard. Went forward and back hard in seat." "Patient presents for neck pain following slamming on her school bus brakes very hard, flying forward and then back very hard." In the narrative report from Plains Medical Center, Claimant reported: "She was at a stop sign and went to accelerate but saw a car coming and had to slam on the brakes and her head went forward and backwards." The provider at Plains Medical Center described the injury as a "whiplash injury." On a July 22, 2014, medical report, Claimant's alleged injury was described as a "whiplash." On August 5, 2014, Claimant's description of injury was "slammed brakes on school bus – whiplash."

24. Claimant reported to Dr. Knight at Denver-Vail Orthopedics that she had to suddenly apply the brakes very hard. Dr. Knight described the alleged injury as a "Whiplash."

25. Claimant also reported a whiplash injury to her physical therapist at Pro Active physical therapy. "Patient slammed brakes hard, felt like whiplash." Claimant's description of the injury led her physical therapist to describe Claimant as presenting with "whiplash like symptoms."

26. Claimant's description of a whiplash injury led her medical providers to believe Claimant sustained a whiplash – from her head violently moving forward and back. They treated her for whiplash. Kathleen D'Angelo, M.D., Respondents' IME, credibly testified Claimant's head movement on May 8, 2014 is inconsistent with whiplash. Dr. D'Angelo credibly and persuasively testified the video of the alleged injury is inconsistent with the development of any work related condition. Claimant has preexisting osteoarthritis. She treated for this osteoarthritis for years. While she denies treatment for the neck after 2002, the records from her chiropractor demonstrate Claimant was in active treatment for her cervical spine through at least August 2011.

27. Contrary to Claimant's testimony that her neck pain developed "a little ways down the line," she told Plains Medical Center that she had "immediate pain in the neck." She also told Dr. D'Angelo she had immediate neck pain after the stop.

Respondent's Independent Medical Examination

28. On August 18, 2014 Claimant was examined by Dr. D'Angelo at Respondents request for an independent medical evaluation. Dr. D'Angelo testified at hearing as an expert in occupational and internal medicine.

29. Dr. D'Angelo asked Claimant to describe the mechanism of alleged injury. Claimant reported, "I had to put the brakes on very hard to stop, so we would not get hit. The seat belt tightened across my shoulder [and] it threw students out of their seats. I felt like I was moved back and forth." "I saw just out of the corner of my eye . . . I saw a blue van so I slammed, I . . . I, mean slammed the brakes on."

30. Dr. D'Angelo reviewed the video of the alleged injury and compared it with Claimant's description of the alleged injury. Whiplash, according to Dr. D'Angelo, "involves the forceful forward and then back motion of the neck." What Dr. D'Angelo saw on the video was not whiplash. "I didn't see movement of the head," Dr. D'Angelo testified.

31. Dr. D'Angelo stated she could not correlate the complaints Claimant associates with driving the bus on May 8, 2014 with what was seen in the video.

32. According to Dr. D'Angelo, Claimant has degenerative spine disease. An MRI shows Claimant has disc bulges, sclerosis and spondylosis in her cervical spine which correlate with Claimant's prior examinations, including chiropractic records and Department of Transportation exams.

33. At almost every visit prior to August 2011, Claimant's chiropractor indicated Claimant "had tenderness to her cervical spine," or had some procedure, treatment plan, or complaint associated with her cervical spine.

34. Dr. D'Angelo noted Claimant has osteoarthritis throughout her spine.

35. Dr. D'Angelo reviewed the mechanism of injury as described by Claimant and compared it with what she saw on video.

> Also, of interest, was the discrepancy between the patient's account of the severity of the incident and the video recording I was able to view of the patient during the time of the alleged incident . . . The incident was very brief . . . Of significance, [Claimant] did not appear to be jostled at all during the actual incident and for the remainder of the video was moving her neck and head normally and without apparent discomfort except for one brief moment when [Claimant] turned to the left to look at traffic after which she reached for her left neck area. Following this, she continued to drive, turn her head, and look into the mirror to view the passengers, to whom she was talking."

36. Dr. D'Angelo continued: "At no time during the video did [Claimant] or any of the passengers appear to be in distress. Following the incident, the children and the paraprofessionals were seen laughing and smiling . . . . .[Claimant] does not appear to be in any discomfort except for that one brief moment during which she reached for her neck. . . [Claimant] reported that she had to slam her brakes on the school bus very hard, playing forward and then backwards very hard, and had resultant neck pain. As

mentioned previously, this was not appreciated on video."

37. As part of her causation analysis, Dr. D'Angelo next determined the diagnosis she would apply to Claimant's complaints and findings. Dr. D'Angelo determined Claimant has osteoarthritis in the cervical and thoracic spine. Claimant has had headaches and left arm numbness for many years. Claimant had no work related diagnosis.

38. The final step of Dr. D'Angelo's causation analysis was to determine whether there was any correlation between Claimant's diagnosis and the mechanism of injury. Dr. D'Angelo testified, "Clearly in this video I do not see a mechanism of injury."

39. Dr. D'Angelo opined within medical probability that Claimant "did not suffer a cervical strain or cervical neck injury as a result of applying her brakes abruptly on May 8, 2014." Dr. D'Angelo continued: "In viewing video documentation of the incident, [Claimant] was not jostled or moved in anyway. Furthermore, the motion of the passengers suggests this was not a severe event. The passengers did not appear to be in any distress during or after the incident." Dr. D'Angelo could not see any indication why any person on the bus would have been injured as a result of the stop.

40. Claimant's osteoarthritis is not linked to her occupation. Claimant's degenerative changes are related to osteoarthritis. Claimant had "identical complaints following her 1990 fall at work."

41. Claimant's osteoarthritis was symptomatic prior to the alleged injury on May 8, 2014. Claimant's report of neck pain, headaches and left arm numbness predate the alleged injury.

42. Dr. D'Angelo asked Claimant about her prior history of neck problems. Claimant initially told Dr. D'Angelo that treatment she received from her chiropractor prior to the alleged injury was for her back, not her neck. Review of the records show the treatment by Cooper Chiropractic clearly included treatment of the neck and complaints of headaches with left arm numbness.

43. After Dr. D'Angelo showed Claimant the prior records documenting neck, left arm, and headache complaints prior to the alleged May 8, 2014 injury, Claimant conceded she did have neck problems before, but they went away in after 1992. Dr. D'Angelo opined the records do not support Claimant's contention that the neck problems went away in 1992. In fact, the last chiropractic record from August 19, 2011 showed Claimant was treated for neck pain.

44. Claimant admitted to Dr. D'Angelo that her left arm numbness has been a problem since she fell in 1990. Claimant reports a neck injury in 1990 when a chair rolled out from underneath her. Also, prior to 1990, Claimant reported to Dr. D'Angelo, she had a motor vehicle accident where she experienced whiplash.

45. Dr. D'Angelo noted Claimant "underwent a decade of treatment for neck pain following a minor injury in 1990."

46. After review of the records with Claimant, Dr. D'Angelo noted in her report that Claimant "insisted" her treatment with the chiropractor was limited to the thoracic and lumbar spine. This is clearly inconsistent with the records from Cooper

Chiropractic.

47. Dr. D'Angelo's examination of Claimant demonstrated Claimant had normal symmetrical musculature of the cervical spine. There was no muscle spasm. Palpation of the cervical spine revealed no tenderness. Range of motion for the cervical spine was almost full, but definitely functional without apparent discomfort. Claimant's Spurling's test was negative. Neurologically, Claimant had normal muscle strength. Claimant had an "essentially normal examination today except for some subjective [complaints of pain] with palpation over the medial left parascapular muscles." Neurologically the patient was intact at the time of her initial evaluations and was intact in the examination conducted by Dr. D'Angelo.

48. Dr. D'Angelo's description of the video is consistent with Ms. Overholser's account of what happened that day on the bus and what the ALJ observed on the video.

49. Dr. D'Angelo considered whether Claimant's movement on video could have caused Claimant to have neck problems. She persuasively and credibly concluded the alleged mechanism of injury is inconsistent with a work related diagnosis. Dr. D'Angelo's opinion that the "described mechanism of injury did not cause the patient's present symptoms" is consistent with the totality of the evidence. The opinion is persuasive and credible. Treating provider opinions regarding causality are faulty because they are based on Claimant's reports of whiplash, which are inconsistent with the video of Claimant on the bus when she was allegedly injured.

50. The lay witnesses who testified for Respondents regarding the process and safeguards taken by Employer following the alleged injury, including securing the video that Claimant admits shows her on the alleged date of injury, are credible and persuasive. Ms. Overholser's testimony is consistent with the video showing what happened on the bus on the morning of May 8, 2014. Ms. Blake, Mr. Spiller, Ms. Peek, Ms. Hulse, and Ms. Boon all credibly testified to the events occurring after Claimant alleged she was injured.

51. Claimant's testimony is not credible. She repeatedly reported to Employer and her treatment providers movement of her body that is inconsistent with what is seen on video. Her history of prior complaints is inconsistent with the medical records.

52. The Judge finds it more likely true than not that Claimant's allegation of an injury on May 8, 2014, while braking her school bus, is not credible given the above findings of fact. Claimant's allegation of an injury while braking her school bus is less likely true than not given the credible and persuasive evidence that Claimant's mechanism of injury would not cause her cervical and extremity complaints and headaches.

53. Claimant bears the burden of proving by a preponderance of the evidence that she sustained a compensable injury on May 8, 2014. The ALJ finds that Claimant did not meet this burden.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found above, Claimant is not credible. Dr. D'Angelo's opinions on causation are more credible than those of Claimant's treatment providers because Dr. D'Angelo viewed the videotape and diagnosed Claimant based on what objectively occurred. Claimant's treatment providers based their diagnoses on her misrepresentations of having suffered a whiplash injury.

A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1) (b) & (c), C.R.S. As found, Claimant did not establish she suffered any injury when she applied the brakes as described above.

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

Claimant has the burden of proving an injury that was proximately caused by the performance of service arising out of and in the course of her employment with the employer on May 8, 2014. As found, Claimant failed to meet this burden of proof.

In light of this determination the ALJ need not reach the other issues raised by the parties as they are now moot.

ORDER

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

1. The claim for workers' compensation benefits in WC 4-949-727-02 is denied and dismissed.

DATED: February 24, 2015

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

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable right knee injury on May 13, 2014 during the course and scope of his employment with Employer.

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

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period May 14, 2014 through June 10, 2014.

STIPULATIONS

1. The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $915.00.

2. If the claim is compensable Claimant is entitled to receive TPD benefits for the period May 14, 2014 through June 10, 2014. However, the parties reserved the right to litigate specific amounts owed to Claimant during the period if they are unable to reach an agreement.

FINDINGS OF FACT

1. Claimant works for Employer as a Crane Technician. His job duties involve general maintenance and repair of large, hydraulic crane mechanisms.

2. On May 13, 2014 Claimant was repairing the hydraulic suspension struts on a crane. He had been working on the same piece of equipment for approximately one week. Claimant punched in to work that morning at 6:57 a.m. and began working on the crane. He repeatedly crawled underneath the equipment to align the bolts that attach the struts. Claimant was kneeling and standing during the repair. The underbody of the crane was elevated about 30 inches off the ground during the process.

3. While Claimant was down on both knees he tried to stand up and his right knee "popped." As he attempted to "walk it off" his knee continued popping and grinding. Claimant reported his injury to Service Manager Troy Nevergall. Employer's Safety Coordinator then directed Claimant to Aviation and Occupational Medicine for medical treatment.

4. Claimant visited Michael Ladwig, M.D. on the day of the incident for an examination. Dr. Ladwig recorded that Claimant reported "a right knee injury secondary to getting up from a kneeling position. The patient states he was kneeling down and when he stood up he felt a pop in his knee." Dr. Ladwig noted that Claimant continued to experience grinding and popping in his right knee. X-rays revealed no acute findings in Claimant's right knee. He diagnosed Claimant with a right knee strain and determined that there was a "greater than a 51% probability that this is a work-related injury or condition." Dr. Ladwig assigned work restrictions of no lifting or repetitive lifting in excess of 10 pounds, and no crawling, kneeling, squatting or climbing.

5. On May 19, 2014 Claimant underwent a right knee MRI. The MRI revealed multiple ligament strains and a mostly horizontal tear of the medial meniscus.

6. On May 28, 2014 Claimant visited Orthopedic Surgeon Mark S. Failinger, M.D. for an examination. Dr. Failinger diagnosed Claimant with a "right knee, complex tear of the medial meniscus, posterior horn." Based on Claimant's presentation, pain symptoms and MRI findings, Dr. Failinger recommended right knee surgery.

7. On June 4, 2014 Albert Hattem, M.D. performed a physician advisor review. He determined that Claimant merely "stood up" from a seated position and injured his right knee. Dr. Hattem explained that "standing up" is a "ubiquitous activity not unique to the workplace." Moreover, he commented that the mere act of "standing up" would not be expected to cause a meniscus tear. Accordingly, Dr. Hattem concluded that Claimant did not suffer a work-related injury to his right knee.

8. Claimant worked light duty because of his work restrictions until June 10, 2014. At his June 10, 2014 examination with Dr. Ladwig Claimant sought a full duty release because Employer was running out of light duty positions around the shop.

9. On August 26, 2014 Orthopedic Surgeon James P. Lindberg performed an independent medical examination of Claimant and testified at the hearing in this matter. He reviewed the medical records, including actual MRI films, and conducted a physical examination. Claimant reported right knee pain as a result of the May 13, 2014 work incident. Dr. Lindberg commented that he agreed with Dr. Hattem that standing up and feeling a right knee pop would not likely have caused Claimant's meniscus tear.

10. Dr. Lindberg testified that the specific tear sustained by Claimant is not the type of meniscal tear most commonly associated with acute, work-related injuries. Rather than being torn around the rim (a vertical tear) Claimant exhibited a horizontal, internal tear, also known as a "shear tear." Dr. Lindberg drew an illustration that was admitted into evidence in order to explain the nature and uniqueness of the tear.

11. The meniscus, which is a c-shaped cartilage between the femur and the tibia, usually tears vertically if a traumatic or acute injury occurs. Claimant had a shear or horizontal tear that was confirmed on the MRI. Dr. Lindberg explained that the form of tear is significant because, as a general rule, a shear tear is "chronic" not acute. The symptoms from a shear tear manifest as popping and grinding when the patient is using

the knee for walking, standing, kneeling or squatting. Dr. Lindberg explained that there is only a 10% chance that a shear tear would be caused by standing up from a kneeling position. He therefore concluded that Claimant's work activities on May 13, 2014 did not cause his right knee symptoms.

12. Dr. Lindberg commented that the MRI also revealed a mild collateral ligament strain, a mild medial collateral ligament strain, a mild posterior lateral corner strain/sprain and a mild strain of the popliteus. The popliteus is located in the posterior, lateral corner of the knee. Dr. Lindberg remarked that there was a 0% chance that the preceding types of strains could be caused by standing from a kneeling position.

13. Dr. Lindberg explained that the most likely scenario for Claimant's right knee injury required a significant lateral force on the knee or a major stress from lateral to medial that would have elicited significant acute pain. He testified that Claimant's description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. There is simply no mechanism of injury described in the medical records that would account for Claimant's injuries. Dr. Lindberg noted that examples of the types of lateral forces that would be necessary to cause Claimant's injuries would be a football-type event when a patient is hit on the side of the knee or a skiing injury in which the skier falls and the bindings do not release. Simple twisting would not cause the injuries revealed on Claimant's MRI. Dr. Lindberg thus concluded that there is substantial evidence that a force more significant than merely squatting and kneeling caused the medial collateral ligament strains and other strains identified on the MRI. Finally, he determined that there is no evidence that Claimant sustained an acute aggravation of the meniscus tear or any other condition in the right knee that caused or accelerated his need for medical treatment.

14. Dr. Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis. He explained that, as a treating surgeon, Dr. Failinger's job is to care for the patient, repair the injury and advocate for the patient regardless of how the injury occurred. In contrast, the job of an independent medical examiner is to review the record, perform a physical examination of the patient and form an unbiased medical opinion regarding the diagnoses, mechanism of injury and causation.

15. Dr. Lindberg testified extensively regarding the various histories provided by Claimant as to the mechanism of injury. Nothing in Dr. Ladwig's reports mentions Claimant crawling around under a crane or squatting. Dr. Ladwig's report simply stated that Claimant stood up from kneeling and felt a pop. Dr. Failinger's report noted that Claimant "stepped up" and had pain and discomfort. Claimant then told Dr. Lindberg that he was crawling around under a crane, kneeled down, felt a pop and then stood up. The version of events as sworn by Claimant in his discovery responses was also different. Claimant's comments that he was repeatedly kneeling and standing up prior to the work accident on May 13, 2014 did not change Dr. Lindberg's opinions regarding causation. Finally, although Dr. Lindberg reviewed medical reports at the time of the hearing that he had not seen before, he explained that the additional information did not change his causation opinion.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable right knee injury on May 13, 2014 during the course and scope of his employment with Employer. Claimant explained that on May 13, 2014 he was repairing the hydraulic suspension struts on a crane. He was down on both knees, tried to stand up and his right knee "popped." As he attempted to "walk it off" his knee continued popping and grinding. X-rays on the day of the incident revealed no acute findings in Claimant's right knee. Dr. Ladwig diagnosed Claimant with a right knee strain and determined that there was a "greater than a 51% probability that this is a work-related injury or condition." Orthopedic Surgeon Dr. Failinger subsequently diagnosed Claimant with a "right knee, complex tear of the medial meniscus, posterior horn." Based on Claimant's presentation, pain symptoms and MRI findings, Dr. Failinger recommended right knee surgery.

17. In contrast, Dr. Lindberg persuasively determined that Claimant's right knee condition was not caused by his work activities for Employer on May 13, 2014. Dr. Lindberg considered the various histories provided by Claimant as to the mechanism of injury. He explained that the specific tear sustained by Claimant is not the type of meniscal tear most commonly associated with acute, work-related injuries. Rather than being torn around the rim (a vertical tear) Claimant has a horizontal, internal tear, also known as a "shear tear." Dr. Lindberg detailed that the form of tear is significant because, as a general rule, a shear tear is "chronic" not acute. The symptoms from a shear tear manifest as popping and grinding when the patient is using the knee for walking, standing, kneeling or squatting. Dr. Lindberg explained that there is only a 10% chance that a shear tear would be caused by standing up from a kneeling position. Moreover, Dr. Lindberg remarked that there was a 0% chance that Claimant's right knee strains revealed on the MRI were caused by standing from a kneeling position. Furthermore, Dr. Lindberg testified that Claimant's description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. There was simply no mechanism of injury described in the medical records that accounted for Claimant's injuries. Dr. Lindberg noted that examples of the types of lateral forces necessary to cause Claimant's injuries would be a football-type event when a patient is hit on the side of the knee or a skiing injury in which the skier falls and the bindings do not release. Simple twisting would not cause the injuries revealed on Claimant's MRI. Dr. Lindberg thus concluded that there is substantial evidence that a force more significant than merely squatting and kneeling caused the medial collateral ligament strains and other strains identified on the MRI. Dr. Lindberg summarized that there is no evidence that Claimant sustained an acute aggravation of the meniscus tear or any other condition in the right knee that caused or accelerated his need for medical treatment. Finally, Dr. Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis. The temporal proximity of Claimant's symptoms at work does not establish a causal connection to his work activities. Claimant has thus failed to establish that his work activities on May 13, 2014 aggravated, accelerated or combined with a pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18,

2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable right knee injury on May 13, 2014 during the course and scope of his employment with Employer. Claimant explained that on May 13, 2014 he was repairing the hydraulic suspension struts on a crane. He was down on both knees, tried to stand up and his right knee "popped." As he attempted to "walk it off" his knee continued popping and grinding. X-rays on the day of the incident revealed no acute findings in Claimant's right knee. Dr. Ladwig diagnosed Claimant with a right knee strain and determined that there was a "greater than a 51% probability that this is a work-related injury or condition." Orthopedic Surgeon Dr. Failinger subsequently diagnosed Claimant with a "right knee, complex tear of the medial meniscus, posterior horn." Based on Claimant's presentation, pain symptoms and MRI findings, Dr. Failinger recommended right knee surgery.

8. As found, in contrast, Dr. Lindberg persuasively determined that Claimant's right knee condition was not caused by his work activities for Employer on May 13, 2014. Dr. Lindberg considered the various histories provided by Claimant as to the mechanism of injury. He explained that the specific tear sustained by Claimant is not the type of meniscal tear most commonly associated with acute, work-related injuries. Rather than being torn around the rim (a vertical tear) Claimant has a horizontal, internal tear, also known as a "shear tear." Dr. Lindberg detailed that the form of tear is significant because, as a general rule, a shear tear is "chronic" not acute. The symptoms from a shear tear manifest as popping and grinding when the patient is using the knee for walking, standing, kneeling or squatting. Dr. Lindberg explained that there is only a 10% chance that a shear tear would be caused by standing up from a kneeling position. Moreover, Dr. Lindberg remarked that there was a 0% chance that Claimant's right knee strains revealed on the MRI were caused by standing from a kneeling position. Furthermore, Dr. Lindberg testified that Claimant's description of his right knee injury did not constitute sufficient stress or force to cause the MRI findings. There was simply no mechanism of injury described in the medical records that accounted for Claimant's injuries. Dr. Lindberg noted that examples of the types of lateral forces necessary to cause Claimant's injuries would be a football-type event when a patient is hit on the side of the knee or a skiing injury in which the skier falls and the bindings do not release. Simple twisting would not cause the injuries revealed on Claimant's MRI. Dr. Lindberg thus concluded that there is substantial evidence that a force more significant than merely squatting and kneeling caused the medial collateral ligament strains and other strains identified on the MRI. Dr. Lindberg summarized that there is no evidence that Claimant sustained an acute aggravation of the meniscus tear

or any other condition in the right knee that caused or accelerated his need for medical treatment. Finally, Dr. Lindberg remarked that Dr. Failinger did not address whether Claimant's right knee condition was related to his work for Employer or otherwise provide a causation analysis. The temporal proximity of Claimant's symptoms at work does not establish a causal connection to his work activities. Claimant has thus failed to establish that his work activities on May 13, 2014 aggravated, accelerated or combined with a pre-existing condition to produce a need for medical treatment.

ORDER

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

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

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

DATED: February 9, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The issues to be determined by this decision are the following:

1. Whether the claimant proved by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment duties for the respondent-employer on May 15, 2014;

2. If so, whether the claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits from June 11 until June 20, 2014, and July 28 until August 15, 2014, when she was released to full duty without restrictions.

3. If so, whether the claimant, has proven that the medical treatment received from and provided by C.C.O.M., Colorado Sport and Spine Center, and the Penrose Imaging MRI scan of June 22, 2014, is causally related to this claim's injury and is reasonable and necessary to treat this claim's injury.

Based upon the findings and conclusions below that the claim is not compensable the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant was a full time residence associate hired by the respondent-employer on July 16, 2013.

2. On May 15, 2014 the claimant was with a resident at the respondent-employer's facility, while the resident was in her bathroom.

3. The resident was sitting on her toilet. When the claimant turned to reach for a piece of toilet tissue she experienced pain in her lower back. This pain was very brief, lasting less than a second. It then disappeared.

4. The claimant continued to work her normal job tasks. The claimant was not lifting anything at the time this pain arose and immediately disappeared. She was not touching, lifting, or assisting the resident. She was not in an awkward position, was

not bending, was not stooping, and was not doing anything other than simply reaching for the piece of toilet tissue.

5. The claimant said she had no symptoms while continuing to work after this event. Approximately 5 minutes afterwards the claimant was standing still at the front door at the facility entering a code to open a door to allow a person to exit the facility. The claimant's left leg suddenly went out, and she went down to her knee. She did not injure herself while going down to her knee. She was not walking, twisting, shifting, or doing anything other than standing at the keypad when this second alleged incident occurred. The claimant reported this claim's injury to the respondent-employer after the incident at the door occurred, and completed paperwork to report the claim to the respondent-employer.

6. Eric Ridings, M.D. documented in his independent medical examination (IME) report, and testified at hearing, that the claimant received no relief with the exhaustive conservative treatment she was provided at through C.C.O.M. While the claimant alleged the pool therapy had been helpful, Dr. Ridings explained the alleged improvement was, "[B]arely perceptible . . . ." Dr. Ridings opined that this shows there is not an anatomic, identifiable injury or diagnosis.

7. The claimant's physical exam revealed non-anatomic findings, such as nondermatomal distribution of sensation, giveway weakness, invalid straight leg raising testing results, normal muscle tone despite pain complaints, range of motion differing substantially between formal testing and when tested while seated, severely self-limited and invalid range of motion of the lumbar spine, and pain to only light palpation and brushing of the skin. Other than subjective pain behaviors, claimant's physical examination was, "[B]enign."

8. Dr. Ridings found the claimant "[D]oes not describe any activity at the time of onset of symptoms that within a reasonable degree of medical probability would cause any injury."

9. Dr. Ridings opined that the slight bending to get the piece of toilet tissue would not stress the low back, and is an activity preformed numerous times daily. The slight motion would not have caused any injury to claimant's low back anatomy. The claimant's report of pain while standing still is also not injurious and could not cause any actual injury to her lower back. Again, he opined this is an idiopathic activity and did not injure claimant.

10. The claimant's history, Dr. Ridings wrote, "[I]s not consistent with a disc injury, or even a muscle strain, neither of which would cause a sharp pain lasting less than a second." The claimant's MRI showed no abnormalities or injury. Dr. Ridings wrote, and testified at hearing, "In my opinion within a reasonable degree of medical probability, the patient's symptoms are most likely related to psychological factors, particularly stress, leading to somatization."

11. The claimant's allegation that all her pain disappeared, but only temporarily, with trigger point injections supports this conclusion Dr. Ridings explained, and showed there is no anatomic basis for claimant's symptoms or any injury. Dr. Ridings opined that the claimant has no injury from her work duties and activities on May 15, 2014, as alleged in this claim.

12. Dr. Timothy Hall conducted an IME of the claimant and produced a reort dated November 14, 2104 in which he opined that the claimant's injury was work-related.

13. The ALJ finds that Dr. Ridings' opinions are credible, and more persuasive than medical opinions to the contrary.

14. The ALJ finds that the claimant has failed to establish that it is more likely than not that on May 15, 2014 she suffered an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

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

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

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

4. Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

5. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

6. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course

of a worker's employment arise out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); see also, *Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957).

7. The Workers' Compensation Act creates a distinction between the terms “accident” and “injury.” The term "accident" refers to an, “Unexpected, unusual, or undesigned occurrence.” § 8-40-201(1), C.R.S. In contrast, an “injury” refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an “injury” is the result. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the “accident” results in a compensable "injury." *Romine v. Air Wisconsin Airlines*, W. C. No. 4-609-531 (October 12, 2006)

8. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. §8-41-301(1) (c); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

9. To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988).

10. The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms, or that the employment aggravated or accelerated a preexisting condition. Instead, the appearance of symptoms may be the logical and recurrent consequence of a preexisting condition *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985). As noted in *Martinez v. Monfort, Inc*., W.C. No. 4-284-273 (ICAO August 6, 1997), “The fact that the claimant’s job duties may have intensified her pain does not

compel a different result because the ALJ was persuaded that it is the underlying condition which prevents the claimant from returning to work."

11. The question of whether the claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

12. The ALJ concludes that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

13. The ALJ concludes, as found above, that the weight of the lay and medical evidence establishes that the claimant has failed to establish by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: February 6, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues presented for determination are whether the Claimant is entitled to temporary total disability benefits from June 28, 2014 ongoing; and whether Claimant was responsible for the termination of his employment pursuant to § 8-42-103 and/or § 8-42-105, C.R.S.

STIPULATIONS

The parties stipulated that Claimant's wage at the time of his termination was $622.00 per week. The parties reserved the issue of any change to Claimant's average weekly wage for future determination.

The parties also stipulated that Claimant had a right to designate his own physician pursuant to Rule 8, and the parties agreed to Dr. Greg Reichhardt as the new authorized treating physician.

FINDINGS OF FACT

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

1. Claimant worked for the Employer for approximately five years. He became a shipping supervisor sometime in 2010.

2. Claimant's job duties involved shipping windows and doors. He coordinated shipping and delivery with customers, warehouse workers and transportation companies. He also packaged the products in preparation for shipping.

3. Claimant's job required heavy lifting up to approximately 120 pounds on his own and at times, heavier objects with the assistance of other employees.

4. On May 1, 2014, Claimant sustained an admitted injury to his back. As a result of his injury, the authorized treating physician, Dr. Terrell Webb, assigned a 30-pound lifting restriction, no climbing, and no kneeling/squatting.

5. Claimant returned to work and Employer provided modified duty.

6. Claimant did not miss any work as a result of his injury.

7. Claimant testified that after returning to work, his supervisor, Tom Hassell frequently asked him to perform tasks in excess of his restrictions, including lifting items that weighed more than 30 pounds and raising items above his head.

8. Claimant also testified that Hassell consistently criticized Claimant's job performance after returning to modified duty.

9. Hassell is Employer's production and operations manager and was Claimant's direct supervisor. Hassell testified that Employer was able to accommodate Claimant's restrictions, and that only part of Claimant's job duties involved lifting over 30 pounds, kneeling and/or squatting. Hassell testified that other employees pitched in to perform those tasks Claimant was unable to perform himself.

10. Hassell denied ever asking Claimant to perform tasks that exceeded his restrictions and denied constant criticism of Claimant. Rather, Hassell testified that he would ask Claimant to return to work only when observing Claimant taking unauthorized breaks or surfing the internet while not on break.

11. Hassell testified that Claimant never complained to him that he was being made to perform tasks exceeding his restrictions nor did any other employee complain to him about having to perform Claimant's job duties.

12. Hassell testified that it did not cause Employer any problems or hardship to allow Claimant to work modified duty.

13. Doug Wichlacz is Employer's general manager and oversees all Employer operations. Wichlacz observed Claimant working modified duty numerous times.

14. Wichlacz frequently reminded Claimant to work within his restrictions. Claimant never complained to Wichlacz that he was made to perform tasks in excess of his restrictions.

15. Wichlacz testified that it did not cause Employer any problems or hardship to allow Claimant to work modified duty.

16. In early June, Employer performed reviews for all employees, including Claimant.

17. Claimant's review occurred on June 6, 2014, after he had returned to work on modified duty.

18. Wichlacz and Hassell performed Claimant's review which was generally positive. Wichlacz specifically noted improvement in Claimant's attitude and ability to adjust to situations where Claimant felt he had been wronged.

19. Claimant's comments on the Employee Performance Evaluation form were, "Getting help for tasks; talked about scheduling. Will work on." Wichlacz recalled that he likely had a discussion with Claimant regarding getting Claimant more help.

20. At approximately the same time, Employer decided to give certain employees pay raises, including Claimant. The pay raises were scheduled to go into effect on June 23, 2014.

21. Wichlacz and Hassell reviewed each employee to determine whether each employee would receive a pay increase, and if so, the amount. After making the final determination, they would meet with the employee individually to discuss the increase.

22. On June 20, 2014, Hassell sent Employer's payroll manager, Cindy Serafin, an email with the final increase amounts for all employees receiving pay increases. Claimant's increase was included in this email, and went into effect on June 23, 2014.

23. Claimant was on vacation on June 23 and June 24, 2014. As a result, Hassell and Wichlacz were not able to meet with him prior to Friday, June 27, 2014.

24. Wichlacz and Hassell both testified that they intended to meet with Claimant to discuss his pay increase, but were unable to do so due to Claimant's vacation and the press of business.

25. Hassell did not discuss pay increases with any employee, including the Claimant, prior to June 23, 2014.

26. Claimant testified that both Hassell and Wichlacz told him that he would not be receiving a pay raise.

27. On June 27, 2014, Claimant sent Hassell an email stating "So everyone on the Production floor gets a raise and I get shit. That's real nice guys!"

28. Upon receipt of the email, Hassell attempted to find Claimant to discuss the matter. However, Claimant had already gone to lunch. Hassell sent Claimant an email response asking that the Claimant see him when he returned from lunch.

29. After returning from lunch, Claimant went to see Hassell and Wichlacz.

30. Wichlacz and Hassell both testified that Claimant was upset and angry during the meeting. Claimant's voice was raised and he became belligerent. Wichlacz questioned Claimant why he believed he was not receiving a pay raise. According to Wichlacz, Claimant did not answer the question, and instead demanded to know if it was true or not. Wichlacz testified that he was not willing to discuss Claimant's raise in light of Claimant's attitude and temper issues. Wichlacz asked the Claimant if he really wanted to "go down that road" meaning whether Claimant wanted to be angry and belligerent about something which he knew nothing about.

31. Wichlacz and Hassell both testified that Claimant stated he would contact his attorney and walked out of the meeting.

32. Claimant testified that he did not lose his temper or become upset during the meeting. He also testified that the main topic of the meeting was Employer's inability to continue meeting his restrictions. Claimant testified that Wichlacz advised that continuing to meet Claimant's restrictions was causing Employer difficulty and therefore Employer had to terminate Claimant. Claimant testified that he asked Wichlacz to bring

Cindy Serafin into the meeting at that point, and Wichlacz declined the request. Claimant testified that after he was terminated, Hassell escorted him from the building.

33. Wichlacz testified that the issue of Claimant's restrictions never came up during the meeting, and that Claimant never requested Cindy Serafin be part of the meeting.

34. Hassell confirmed Wichlacz's testimony in great part, testifying that Claimant was angry and agitated during the meeting. Also, Claimant's restrictions were never discussed during the meeting, nor did Claimant ever ask Cindy Serafin to attend the meeting.

35. After Claimant left the meeting, Hassell followed him out in an attempt to discuss the matter further with Claimant. Hassell asked Claimant if he was sure he wanted to leave like this. Claimant stated again that he would be contacting his attorney, and left the premises.

36. Later that same day, Claimant sent a text message to Hassell asking if he should return the keys to Employer's facility. In response, Hassell stated, "Yes please that would be good. Can you bring them to me today?" Claimant's response was, "I will bring my keys when I pick up my last check." Hassell responded by stating, "We would like to get the keys back and if you are willing would like to sit down and talk to you this afternoon." Claimant declined the meeting for Friday afternoon because he had sent his child care provider home already. The Claimant agreed to a meeting for Monday morning at 10:00 a.m.

37. At no time during the exchange of text messages on Friday did Claimant raise the issue of his restrictions or Employer's alleged inability to accommodate them.

38. On Saturday, June 28, 2014, in the afternoon, Claimant sent another series of text messages to Hassell. The first message stated "Tom when we last spoke you fired me because I was not willing to bend the rules due to my restrictions." Claimant then wrote to Hassell that he was "Sorry it had to end like this."

39. Hassell testified that he was astounded at Claimant's allegations and that he didn't know the basis for them. Both Wichlacz and Hassell testified that Claimant was not terminated for any reason, but that he had walked off the job.

40. Hassell further testified that based on Claimant's text messages he believed Claimant no longer wished to work for Employer and that he was abandoning his employment.

41. Claimant did not report for work on Monday, June 30, 2014. That same day, Employer sent Claimant a letter indicating that he was no longer employed by Employer due to his failure to finish his shift on Friday, June 27, 2014 and failure to report for work on Monday, June 30, 2014.

42. The ALJ finds that based on the credible evidence, the Claimant abandoned his job when he left the meeting with Hassell and Wichlacz on Friday, June 27, 2014 then failed to report for work on Monday, June 30, 2014. The ALJ is not persuaded by contrary evidence presented by the Claimant that the Employer terminated his employment due to the Claimant's work restrictions.

43. Claimant failed to present any credible evidence that Employer had any difficulty accommodating his restrictions. The undisputed evidence is that no other employee complained about having to perform some of Claimant's job duties and that accommodating Claimant's restrictions did not cause Employer any hardship or harm. Thus, Claimant's contention that he could no longer continue working for the Employer because the Employer refused to abide by his work restrictions also lacks credibility.

44. The tone of the email Claimant sent concerning his lack of a pay raise supports Wichlacz's testimony that Claimant often became upset and agitated when he believed he was being wronged, and that he would lash out as a result.

45. In addition, the text exchange between the Claimant and Hassell on Friday, June 27, 2014 suggests that Claimant's employment was not terminated. Hassell suggested that Claimant return to work on June 27 to return the building keys but also to talk. The ALJ infers that Hassell would not initiate a meeting to talk if he or Wichlacz had just terminated Claimant's employment. To the contrary, such an invitation would suggest that Claimant walked off the job, leaving in anger, as Hassell and Wichlacz testified.

46. The text messages sent by Claimant on June 28, 2014 are telling. Out of nowhere on a Saturday afternoon, the Claimant sent a text message to Hassell stating that Hassell had fired him for failing to work outside of his restrictions. The Claimant reiterated the alleged basis for his termination, and then advised the Employer to cease all communications with him and speak to his lawyer. These comments make no sense given that Hassell had invited the Claimant to talk about things on Monday, and Claimant had agreed to the meeting. The text messages from June 28 do not read as a natural continuation of the previous events, and thus lack credibility.

47. Based on the above findings of fact, Claimant was responsible for the termination of his employment. He voluntarily walked off the job on Friday, June 27, 2014, and failed to return on Monday. These actions are clearly volitional, and resulted in the loss of his employment.

48. Claimant's work restrictions changed on July 3, 2014. Dr. Webb imposed restrictions that included no repetitive lifting over 20 pounds, no pushing/pulling over 30 pounds of force, no bending more than five times per hour, no squatting, kneeling or climbing, and sit as needed. Claimant testified that his back had gotten worse around June 30.

49. Dr. Webb's July 3 note also states that Claimant has had "little change in his symptoms." The note did not indicate that Claimant reported an increase in his pain or

other symptoms. The note also does not appear to reflect any increase to his medications.

50. Based on the foregoing, the ALJ is not persuaded that the change in Claimant's work restrictions re-establishes a causal connection between Claimant's wage loss and his work injury, or that it represents a worsening of his condition. Claimant has failed to prove by a preponderance of the record evidence that he suffered a worsened condition following his termination from employment or that any such worsened condition, instead of his voluntary resignation, caused his wage loss.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-105(4)(a) states "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A Claimant must act volitionally or exercise a degree of control over the circumstances of the termination in order to be found responsible for the termination. *Richards v. Winter Park Recreational Assoc.,* 919 P.2d 933 (Colo. App. 1996). Respondents shoulder the burden of proving by a preponderance of the evidence that claimant was responsible for his or her termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000). An employee is "responsible" if the employee precipitated the employment termination by a volitional act, which an employee would reasonably expect to result in the loss of employment. *Patchek v.*

Colorado Department of Public Safety, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995).

5. As found, the Claimant precipitated the loss of his employment. His actions in sending an insubordinate email to his supervisor and general manager, becoming agitated and raising his voice during the meeting with his supervisors, walking off the job prior to finishing his shift on Friday, June 27, 2014 and failing to return to work on Monday, June 30, 2014 were voluntary. Claimant's voluntary actions in terminating his employment are further supported by the fact that he agreed to return to work on June 30 to meet with Employer to discuss his raise and attitude, yet failed to attend the meeting.

6. Claimant's contention that he was terminated due to Employer's inability to continue accommodating his restrictions is not credible. Employer gave Claimant a positive work evaluation and a pay raise while providing Claimant with modified duty, actions it likely would not have taken if it was having difficulty accommodating Claimant's restrictions. Further, the unrebutted testimony of Hassell and Wichlacz established that Employer did not encounter any difficulty in accommodating Claimant's restrictions, and that no other employee complained about having to assist Claimant with his duties.

7. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004) held that section 8-42-105(4), C.R.S. was not a permanent bar to receipt of TTD benefits and such benefits could be awarded if claimant's worsened condition caused the wage loss. As found, Claimant has failed to prove by a preponderance of the record evidence that he suffered a worsened condition following his termination from employment or that such worsened condition, instead of his voluntary resignation, caused his wage loss. Consequently, Claimant's claim for TTD benefits commencing June 28, 2014 is barred.

ORDER

It is therefore ordered that:

1. Claimant's claim for temporary benefits is DENIED and DISMISSED.

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

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

DATED: February 18, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUE

- Claimant's Average Weekly Wage (AWW)

FINDINGS OF FACT

1. Claimant began working for Employer in June of 2011 as an installer, installing and building large industrial freezer and cooler systems for businesses, industries, and the United States government.

2. On June 23, 2014 Claimant suffered an admitted work related injury.

3. Respondents filed a General Admission of Liability on July 22, 2014 admitting to an average weekly wage of $885.29, with a temporary total disability (TTD) rate of $590.19. *See* Exhibit C.

4. It is unclear how Respondents came to the calculation of $885.29.

5. On November 21, 2014, Respondents filed a Petition to Modify, Terminate, or Suspend Benefits and asserted that their prior admission of AWW was too high. Respondents sought to modify the AWW to $626.07, with a TTD rate of $417.38.

6. In the Petition to Modify, Terminate, or Suspend Benefits Respondents indicated that they had received updated wage information showing Claimant made gross wages of $32,555.42 during the period of 6/23/13 through 6/22/14, which is how they arrived at the AWW of $627.07 ($32,555.42/52 weeks = $626.07).

7. Based on submission of wage records, Respondents statement in the Petition to Modify, Terminate, or Suspend Benefits is incorrect. From June 23, 2013 through June 22, 2014 Claimant made **net** wages of $32,555.42, not gross wages as stated in the Petition. *See* Exhibit D.

8. Attached to the Petition are email messages between Kelly Huck, an employee of Employer and Trudy Spratta, Senior Claims Specialist for Liberty Mutual Insurance. In these emails, Ms. Huck indicated in error that Claimant's **gross** wages were $32,555.42. *See* Exhibit B.

9. The printout of wage records for Claimant clearly shows that Ms. Huck erred when stating that $32,555.42 was the amount for gross wages. Rather, this

amount is the amount of net wages Claimant earned in the four quarters prior to his injury.

10. Claimant's gross wages in the four quarters prior to his injury amounted to $42,251.62. *See* Exhibit D.

11. In the third quarter of 2013, Claimant made gross wages of $10,141.05. In the fourth quarter of 2013, Claimant made gross wages of $10,915.30. In the first quarter of 2014, Claimant made gross wages of 8,693.88. In the second quarter of 2014, Claimant made gross wages of $12,501.39. *See* Exhibit D.

12. The gross wages Claimant earned in the four quarters prior to his injury show a total of $42,251.62 earned in a period of 50 weeks. *See* Exhibit D.

13. $42,251.62 divided by 50 weeks is $845.03.

14. Claimant's work involved significant overtime that fluctuated depending on the type of job he was working on.

15. At the time of his injury, Claimant was working on a job assignment for American Pet Foods and was working as many hours of overtime as he could due to the customer's sense of urgency to complete the job.

16. In the second quarter of 2014 and in the twelve weeks prior to his injury, Claimant's gross wages were higher than they were for the prior three quarters due to working more overtime hours for the American Pet Foods job.

17. The job for American Pet Foods was expected to last for a total period of one year. Although Claimant was expected to maintain a significant amount of overtime hours while assigned to this job, the job assignment and hours were not guaranteed by Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

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

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

Average Weekly Wage

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

The ALJ concludes that the best way to reach a fair approximation of Claimant's wage loss in this matter is to use the discretionary authority granted by § 8-42-103(3), C.R.S. (2014) and to use the total gross wages earned by Claimant in the four quarters prior to his injury. Although at the time of injury, and in the quarter prior to injury, Claimant was making a higher salary than normal due to the urgency of the American Pet Foods job assignment, this job assignment was not permanent. Claimant's wages were not expected to continue at that high rate permanently nor would it provide a fair approximation of Claimant's diminished earning capacity by basing the AWW on this temporary job assignment. Although the testimony was that the job was expected to last one year, Claimant was not guaranteed wages by Employer at the high rate shown in the second quarter of 2014. The high wages earned in the second quarter of 2014 could have ended at any point and Claimant would then return to a more regular and normal work schedule. As shown by the year prior to Claimant's injury, his wages varied greatly based upon the number of overtime hours worked. As found above, in the first quarter of 2014 Claimant's earnings were overall less than average. Just as it would be an inaccurate approximation of his lost wages if the AWW were based on this quarter and the lull in Claimant's earnings, it would also be an inaccurate approximation

of Claimant's lost wages to base his AWW on the peak earnings period in the second quarter of 2014. With varied wage records, the ALJ concludes that the best way to come to a fair approximation is to use the four quarters preceding the injury (50 weeks available from submitted wage records).

As found above, Claimant's gross wages for the 50 weeks prior to his injury amount to $42,251.62. This makes his average weekly wage $845.03. Respondents filed a Petition to Modify, Terminate, or Suspend Benefits that was based on Claimant's net wages and not gross wages. This was clear error on Respondents part. When reviewing the wage records in Exhibit D, the amount calculated by Respondents in their Petition is based on Claimant's net wages. As this is clear error, their Petition to modify the Average Weekly Wage to $626.07 is not correct or persuasive. Although the Petition is in error, Average Weekly Wage was placed at issue at hearing and after reviewing all the evidence, the ALJ concludes that Claimant's Average Weekly Wage based on the records is $845.03. The Average Weekly Wage shall be modified from November 21, 2014 and ongoing to reflect this order.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $845.03. The Average Weekly Wage previously admitted to shall be modified to reflect this wage starting November 21, 2014 and ongoing.

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

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

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

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

DATED: February 24, 2015

/s/ Michelle E. Jones

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

ISSUES

- Did the claimant prove by a preponderance of the evidence that he sustained an injury proximately caused by the performance of service arising out of and in the course of employment?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing June 21, 2014?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical benefits?

- What is the claimant's average weekly wage?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 8 were admitted into evidence. Respondents' Exhibits A through D and F through L were admitted into evidence.

2. The claimant testified as follows. On June 20, 2014 he had been working for the employer for approximately one and a half years. His main duty was to use the "Archer Tool" to tear down drill bit assemblies for servicing. He explained that the Archer is a 5 and ½ foot steering unit for drill bits. The Archer consists of sub-parts including a "steering sleeve" that weighs approximately 60 pounds and a "bit box" that connects the drill bit to the archer. At approximately 4:00 p.m. on Friday, June 20 he lifted a bit box off of a three foot high table and "twisted" to place it on a four foot high cart. He felt a "little sudden stab" in his back.

3. The claimant also testified as follows. He underwent safety training provided by the employer. The employer has a policy that requires a worker to report an injury right away no matter how minor. He did not report the injury to the employer until Sunday June 22, 2014. On June 22 he called his supervisor, Mr. Matt Wilson (Wilson), and told Wilson that he had hurt his back and needed to get checked by a doctor. The employer referred him to Concentra for medical treatment. However, he was not able to get hold of "workers comp" for several days and first sought treatment from David Doig, M.D., his family physician.

4. On July 11, 2014 the claimant gave a statement to American Claims Services, Inc. At that time the claimant reported that "he had been working hunched over a bench for some time, when he picked up a steering sleeve, and noted the onset

of low back pain." The claimant further reported that his "pain was so bad the next morning" that he could not move.

5. Wilson, the claimant's supervisor, testified as follows. He was at a National Guard meeting when he received a call from the claimant on June 22, 2014. Because he was in a meeting, he declined the call and texted the claimant that he couldn't talk. The claimant texted Wilson that his back was "messed up" and he needed to go to a doctor. Wilson sent a text to the claimant asking if the injury happened at work. The claimant texted back that he injured his back at work on Friday and had gotten worse and could not stand upright. Wilson asked how. The claimant texted back that the benches are low for him and he was hunched over and turned to do something and wrenched it. Wilson responded by texting an expletive and stated he would contact "HSE." Wilson stated that he used the expletive because on-the-job injuries are a headache and require a lot of paperwork.

6. Wilson further testified that he was unable to reach HSE and called the claimant to ask how he injured himself. Wilson recalled the claimant stated that he was working on the Archer bench, picked up a steering sleeve, turned to put the steering sleeve on a cart and wrenched his back.

7. However, Wilson later learned the claimant reported to "HSE" that he injured his back while lifting a "steering sleeve clamp" (also known as a "bit box"). For Wilson this raised a "red flag" because the steering sleeve and the steering sleeve clamp are removed from the Archer assembly at the "breakout machine" (Respondents' Exhibit F) before the Archer is taken to the Archer bench (Respondents' Exhibit J) for teardown. Also, when the steering sleeve clamp is removed from the Archer assembly it is immediately taken by cart to another area known as the inspection and wash bay area. Thus, in Wilson's opinion there would be no reason for a steering sleeve clamp to be at any bench including the Archer bench. Wilson also learned that the claimant told HSE that he lifted the steering sleeve clamp off of the bias bench (Respondents' Exhibit I) or the teardown bench (Respondents' Exhibit K). Thus, Wilson testified that the claimant's statement about where the injury occurred had changed over time and this raised another "red flag."

8. Wilson testified that all employees are trained to report injuries immediately no matter how minor they may be.

9. Mr. Raymond Mascarenas (Mascarenas) testified as follows. He is the claimant's co-worker. On June 20, 2014 he was filling in for Wilson who was away on National Guard duty. Mascarenas stated the steering sleeve and steering sleeve clamp are removed from the Archer assembly at the breakout machine and immediately transported by cart to the inspection area. The only exception is that the steering sleeve might be transported to a bench to measure the "wear plates." Therefore there is no need for steering sleeve clamps to be on benches.

10. Mascarenas testified that on June 20, 2014 the claimant was not working on the Archer bench but was refurbishing hand tools in the area of the benches shown

in Respondents' Exhibits H & K. Mascarenas noticed that Mr. Casey Hill (Hill) was working the Archer bench.

11. Mascarenas testified the claimant did not report any injury to him on June 20, 2014 and he did not notice the claimant was having any physical problems that day. Instead, near the end of the day the claimant asked Mascarenas if he needed help within anything.

12. Hill testified as follows. He is employed as a maintenance technician trainee and works on the Archer tool teardown and assembly. In this job he works on the breakout machine shown in Respondents' Exhibit F and the Archer bench shown in Respondents' Exhibit J. He explained that the steering sleeve and steering sleeve clamp are removed from the Archer assembly at the breakout machine and put on a cart for transport to the inspection/wash bay area. The Archer shaft is then moved by cart to be disassembled at the Archer bench. He explained there is no reason for the steering sleeve clamp to be at the Archer bench (Respondents' Exhibit J). On June 20, 2014 Hill recalled that he worked at the breakout machine early in the day and on the Archer bench in the afternoon where he tore down two Archer shafts. He does not recall the claimant working with him at the Archer bench. He does not recall seeing the claimant lift a steering sleeve clamp on to and off of the Archer bench and place the clamp on a cart. Hill knows of no reason why the claimant would have performed such a task. Hill recalls that on June 20 the claimant was refurbishing hand tools and assembling them into kits.

13. Following the testimony of the respondents' witnesses (Wilson, Mascarenas and Hill) the claimant was recalled in rebuttal. The claimant testified that on June 20, 2014 he performed a number of jobs including refurbishing parts and tools. He worked at the Archer bench (Respondents' Exhibit J) and the bias bench (Respondents' Exhibit I). The claimant further testified that on June 20 multiple steering sleeve clamps came out of the wash bay and the "threads" were cracked. The claimant stated that he helped Mascarenas ship these clamps to the machine shop for rethreading. The claimant stated that in order to complete this task he had to place the steering sleeve clamps on the Archer bench (Respondents' Exhibit J) so he could copy down the serial numbers and insert them into the employer's computerized parts tracking system. The claimant explained that it was during this course of this process that he lifted a steering sleeve clamp and injured his back.

14. Wilson testified in response to the claimant. Wilson stated that heard the claimant's rebuttal testimony and that the claimant's description of how the injury occurred was nothing like what the claimant told him. Wilson explained that when he talked to the claimant the claimant said he was refurbishing parts on the Archer bench, twisted to set one on a cart and injured his back. Wilson further testified that in his time working for the employer that he had seen only two cracked steering sleeve clamps. Further Wilson explained that once a steering sleeve clamp is cracked there is nothing to be done and it is "junk." Therefore, there would be no reason for the claimant to be performing the task he described on rebuttal.

15. The claimant was examined by Dr. Doing on June 23, 2014. He complained of low back pain since lifting a heavy metal object at work on "Friday." Dr. Doing noted tenderness to palpation in the paravertebral lumbar regions bilaterally and limited and range of motion "secondary to pain." Dr. Doing prescribed oxycodone and warned the claimant "regarding the possible addictive nature of narcotic medications and to use them sparingly and only when needed for pain."

16. On June 24, 2014 Darla Draper, M.D., examined the claimant at Concentra. The claimant reported bilateral low back pain rated 8 on a scale of 10 (8/10). The onset of pain was described as "sudden." The claimant gave a history that the injury began at work when he picked "up a 70 pound object from a low bench and moved it to a cart that was" 2 inches above the bench and located afoot or two from the bench. Dr. Draper assessed a lumbar strain. She continued oxycodone and referred the claimant for physical therapy 2 times per week.

17. On June 20, 2014 Dr. Draper completed a WC 164 and placed an "x" in a box indicating that her "objective finings" were consistent with history and/or work related mechanism of injury. Dr. Draper indicated the claimant was unable to work from June 24, 2012.

18. On July 3, 2014 it was noted the claimant was unable to tolerate any physical therapy exercise or soft tissue massage of the lumbar paraspinals.

19. On July 11, 2014 the claimant underwent a lumbar MRI. The radiologist's impression was multilevel disc degeneration of the lumbar spine greatest in severity at L5-S1. At L5-S1 the radiologist noted disc desiccation with loss of disc space height and mild diffuse posterior disc bulging and a very shallow disc protrusion. There were very small bilateral facet joint effusions and no central canal stenosis. There was mild bilateral foraminal stenosis.

20. On July 18, 2014 the claimant was examined by Yusuke Wakeshima, M.D. Dr. Wakeshima assessed "axial low back pain" and opined the claimant's history, examination and mechanism of alleged injury were "cost consistent with sacroiliac joint dysfunction." Dr. Wakeshima recommended SI joint injections.

21. On July 23, 2014 physical therapy was stopped by PA-C Casey McKinney because there had been "minimal improvement." Restrictions were changed to no lifting over 10 pounds and no pushing/pulling with over 10 pounds of force.

22. On July 31, 2014 the claimant underwent sacroiliac (SI) joint injections performed by Samuel Chan, M.D. On August 6, 2014 the claimant reported to Dr. Wakeshima that he did not experience any improvement from the bilateral SI joint injections and his pain had "become more profound." The claimant reported he was taking Percocet "5/325 three per day."

23. On August 18, 2014 Dr. Wakeshima noted the claimant was still reporting "profound axial low back pain." Dr. Wakeshima noted there was no improvement after the SI joint injections and that there were "minimal findings" on MRI of the lumbar spine.

Dr. Wakeshima stated the claimant's clinical history and examination were suggestive of a lumbar "strain/sprain/myofascial pain." Dr. Wakeshima also noted there were "significant discrepancies on urine toxicology study." Dr. Wakeshima noted that the last two toxicology studies "demonstrated no oxycodone and oxymorphone" were detected and stated that in light of these results another study was not indicated. Dr. Wakeshima wrote that the claimant informed him "that he last took oxycodone a day and a half before his last urine drug screen, which is contrary to what he informed me on our appointment on August 6, 2014 where he reported that he was taking Percocet 5/325 three per day." Dr. Wakeshima opined the claimants symptoms appeared out of proportion to his studies.

24. The claimant testified that he did not know why the prescribed medications were not detected during the urine tests because he was taking them

25. On October 25, 2014 the claimant was examined by Fredric Zimmerman, D.O. Dr. Zimmerman noted the claimant's evaluation was complicated by "unexpected results on urine drug screens." He noted the claimant underwent three drug tests that showed unexpectedly little or no oxycodone and oxymorphone in his system despite reportedly taking "oxycodone 10/325 up until one or two days before urine collection on each test." Dr. Zimmerman referred the claimant for testing to determine if the claimant was a rapid metablolizer of opioid medications which might explain the unexpected urine drug test results.

26. On October 30, 2014 the claimant was again seen by Dr. Zimmerman. He noted the claimant had drug results from October 30, 2014 which were a "combination of unexpected and expected findings." Unexpected findings included hydrocodone, hydromorphone, oxycodone, oxymorphone and tramadol. Dr. Zimmerman indicated the claimant is not a candidate for narcotic analgesics. Genetic testing showed the claimant was an essentially normal metabolizer. Dr. Zimmerman performed trigger point injections and the claimant reportedly experienced 40 % relief of his muscular pain. Dr. Zimmerman suggested for further diagnostic purposes that the claimant undergo L4-5 and L5-S1 medical branch blocks that might lead to radiofrequency neurotomy if there was a diagnostic response.

27. The claimant failed to prove it is more probably true than not that he sustained a low back injury proximately caused by the performance of service arising out of and in the course of his employment.

28. Combining the claimant's testimony on direct examination and on rebuttal, he stated that he injured his back when he lifted a bit box (also known as a steering sleeve clamp) off of the Archer bench to place it on a cart. On rebuttal the claimant explained the steering sleeve clamps were on the Archer bench because they were cracked and he was recording their serial numbers in preparation for transporting them to the machine shop for repair. However, the claimant's testimony is not credible and persuasive. The claimant's hearing testimony is contradicted by various other reports and statements which he has made since the alleged injury. Mr. Wilson credibly testified that when he spoke to the claimant on June 22, 2014 the claimant stated that

he injured himself when lifting a steering sleeve (not a steering sleeve clamp) off of the Archer bench. However, Wilson subsequently learned that the claimant reported to the employer's "HSE" that he injured his back while lifting a steering sleeve clamp off of the bias bench. Moreover, when the claimant made the July 11, 2014 report to American Claims Services, Inc. he reported that he injured his back picking up a "steering sleeve," not a steering sleeve clamp or "bit box."

29. The claimant's credibility is significantly contradicted and undermined by the credible testimony of Mascarenas, Hill and Wilson. These witnesses credibly testified that there was no reason for a steering sleeve clamp to be on the Archer bench since that part is removed at the breakout bench for transport to the inspection/wash bay before the Archer assembly is taken to the Archer bench. Mascarenas credibly testified that he was present on June 22, 2014 and the claimant was refurbishing hand tools and preparing kits, and it was Hill who was working on the Archer bench. Mascarenas did not state the claimant was asked to record serial numbers on cracked steering sleeve clamps in preparation for transporting them to the machine shop. Hill credibly testified that on the afternoon of June 22 he was working at the Archer bench disassembling two Archer units and the claimant was not there assisting him. Moreover, Hill credibly testified that he did not see the claimant lift any steering sleeve clamps off of the Archer bench on the afternoon of June 22. Wilson credibly testified that it is unusual for a steering sleeve clamp to crack, but if it does it is "junk." The ALJ infers from Wilson's testimony that it is improbable that the claimant lifted steering sleeve clamps onto the Archer bench in order to record their serial numbers prior to their movement to the machine shop for repair. Rather, the ALJ is persuaded that cracked steering sleeve clamps are irreparable and therefore constitute "junk" as testified by Wilson. The ALJ also considers it significant that there is no credible or persuasive evidence that the claimant ever told anyone before his rebuttal testimony that his injury resulted from lifting cracked steering sleeve clamps in preparation for transporting them to the machine shop.

30. The claimant's credibility is further undermined by the fact that he failed immediately to report his alleged back injury. The claimant was admittedly aware of the company policy requiring an immediate report of any injury no matter how minor. In this case he failed to report the injury until two days after it allegedly occurred. The claimant's credibility is also undermined by failure truthfully to inform his doctors about his use and failure to use prescribed narcotics. The claimant's untruthfulness is documented by multiple drug tests. The claimant was even tested to insure that he was not a "rapid metabolizer" of opioids. The claimant is a normal metabolizer and the drug test results cannot be explained by some biological abnormality.

31. Evidence and inferences contrary to or inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

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

COMPENSABILITY

The claimant alleges that a preponderance of the evidence establishes that he sustained a low back injury while lifting a "steering sleeve clamp" or bit box while performing his duties at work. The respondents contend the claimant's testimony is not credible. The ALJ agrees with the respondents and concludes the claim for benefits must be denied.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 27 through 30, the claimant failed to prove it is more probably true than not that on June 22, 2014 he sustained a low back injury proximately caused by the performance of service arising out of and in the course of his employment. As found the claimant's testimony that he sustained an injury while lifting a steering sleeve clamp from the Archer bench is contradicted by and inconsistent with various statements the claimant made to other employees and American Claims

Services, Inc. The claimant's credibility is also undermined by the credible testimony of Wilson, Mascarenas and Hill as set forth in Finding of Fact 29. Finally, the claimant's credibility is undermined by his failure timely to report the injury in accordance with company policy and his misstatements to physicians concerning his use and non-use of narcotic medications.

In light of these determinations the claim for benefits must be denied. The ALJ need not address the other issues raised by the parties.

ORDER

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

1. The claim for workers' compensation benefits in WC 4-956-748 is denied and dismissed.

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

DATED: February 18, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease to his cervical spine during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period December 20, 2012 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 32 year old male who formerly worked for Employer as a Bus Driver. He began employment with Employer in June 2011. Claimant's job duties involved inspecting his designated bus before and after his shift and driving his assigned route. His duties were primarily sedentary in nature and involved sitting while operating the bus. Claimant was not responsible for any maintenance work or significant lifting.

2. On May 3, 2012 Claimant sought treatment for mild neck pain. Because Claimant was a student he obtained treatment at the Auraria Health Center. He did not report any specific neck trauma. The medical examination revealed minimal neck pain upon movement and no tenderness on palpation. Claimant was advised to report his injury to Employer if his symptoms were work-related.

3. On September 17, 2012 Claimant again sought medical treatment for his neck pain. By this time Claimant was only driving buses for Employer one day each week. He did not demonstrate any neck pain with movement and his cervical spine did not reveal any tenderness on palpation. Claimant was again instructed to report his neck concerns to Employer if his condition was work-related.

4. Claimant explained that on December 20, 2012 he reported his neck symptoms to Employer. He contended that he suffered neck pain as a result of performing his job duties as a Bus Driver.

5. On January 22, 2013 Claimant again sought medical treatment for his neck pain. Claimant exhibited full range of motion with no cervical spine pain. X-rays revealed the minor degenerative finding of mild disc height loss at C6-C7.

6. On February 6, 2013 Claimant sought chiropractic treatment for his continuing neck pain. He completed an intake form and noted that his condition was not related to his work for Employer.

7. Claimant subsequently underwent physical therapy, chiropractic treatment and injections for his continuing cervical symptoms. However, his neck pain persisted.

8. Claimant testified that his neck symptoms began approximately 8-10 months after beginning his job as a Bus Driver with Employer. He attributed his cervical symptoms to sitting in the bus and constantly checking the mirrors while driving. Claimant explained that he decreased his work hours to one day each week because of his persistent neck pain. Nevertheless, he acknowledged that he has never received any work restrictions from his physicians for his condition. Claimant ceased working for Employer in October 2014.

9. On December 29, 2014 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Claimant reported that he began experiencing neck pain while working as a Bus Driver for Employer. He specifically explained that turning his head right, left and vertically in an upward direction to look in the rearview mirror while driving certain buses caused his neck symptoms. Claimant stated that he began suffering intermittent neck pain that resolved after he completed his work shift. However, the neck pain subsequently became constant. Claimant noted that he nevertheless continued to drive buses and did not miss work as a result of his neck symptoms. He commented that, although he ceased working for Employer in October 2014, he continued to receive injections for his ongoing neck pain.

10. Dr. Paz conducted a physical examination of Claimant, reviewed medical records, obtained Claimant's job description and considered the mechanism of injury. He concluded that Claimant suffered neither an acute trauma nor an occupational disease to his cervical spine during the course and scope of his employment with Employer. Dr. Paz maintained that Claimant's neck symptoms were likely consistent with early cervical degenerative disc disease and/or cervical degenerative joint disease. He determined there was no mechanism of injury that causally related Claimant's medical diagnosis and work-related exposure. Moreover, there was no work exposure that aggravated or accelerated Claimant's pre-existing cervical spine degenerative disc disease or joint disease. Dr. Paz explained that Claimant experienced pain while driving because of the degenerative condition but there was no cause and effect between the work activities and condition.

11. Dr. Paz testified at the hearing in this matter. He maintained that Claimant's job duties for Employer did not cause his cervical symptoms. Dr. Paz reiterated that Claimant suffered from cervical degenerative disc disease and/or cervical degenerative joint disease. He explained that it was not medically probable that Claimant's described mechanism of injury of turning his head left, right and upwards while driving a bus would have caused neck pain. Dr. Paz also determined that there was insufficient work exposure to have aggravated or accelerated Claimant's pre-existing cervical spine condition. He testified that, while the x-rays revealed some degenerative changes at the C6-7 level, the affected location of the neck from turning the head was at the C1-2 position. Dr. Paz thus concluded that Claimant's medical treatment for his neck was not reasonable, necessary or causally related to his work as a Bus Driver for Employer. Furthermore, Dr. Paz commented that, if Claimant's neck

pain was related to his job duties for Employer, his symptoms would not have persisted or worsened when he began working fewer hours and ultimately ceased employment. Finally, Dr. Paz explained that Claimant might experience cervical pain anytime he moves his neck because of his underlying degenerative condition. Claimant's symptoms constituted the natural progression of his underlying degenerative cervical condition.

12. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease to his cervical spine during the course and scope of his employment with Employer. Claimant testified that he began to suffer neck symptoms approximately 8-10 months after beginning his job as a Bus Driver with Employer. He attributed his cervical symptoms to sitting in the bus and constantly checking the mirrors while driving. Claimant specifically noted that turning his head right, left and vertically in an upward direction to look in the rearview mirror while driving certain buses caused his neck symptoms. Claimant initially sought treatment for his neck symptoms in May 2012 and reported his symptoms to Employer on December 20, 2012.

13. Dr. Paz performed an independent medical examination of Claimant and testified at the hearing in this matter. He concluded that Claimant suffered neither an acute trauma nor an occupational disease to his cervical spine during the course and scope of his employment with Employer. Dr. Paz maintained that Claimant's neck symptoms were likely consistent with early cervical degenerative disc disease and/or cervical degenerative joint disease. He explained that it was not medically probable that Claimant's described mechanism of injury of turning his head left, right and upwards while driving a bus would have caused neck pain. Dr. Paz also determined that there was insufficient work exposure to have aggravated or accelerated Claimant's pre-existing cervical spine condition. He testified that, while the x-rays revealed some degenerative changes at the C6-7 level, the affected location of the neck from turning the head was instead at the C1-2 position. Dr. Paz thus concluded that Claimant's medical treatment for his neck was not reasonable, necessary or causally related to his work as a Bus Driver for Employer. Dr. Paz explained that Claimant might experience cervical pain anytime he moves his neck because of his underlying degenerative condition. Claimant's symptoms constituted the natural progression of his underlying degenerative cervical condition. Based on the medical records and persuasive testimony of Dr. Paz, Claimant has failed to demonstrate that the hazards of his employment as a Bus Driver for Employer caused, intensified, or, to a reasonable degree, aggravated his cervical spine condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering

all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The mere fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The Panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work.

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease to his cervical spine during the course and scope of his employment with Employer. Claimant testified that he began to suffer neck symptoms approximately 8-10 months after beginning his job as a Bus Driver with Employer. He attributed his cervical symptoms to sitting in the bus and constantly checking the mirrors while driving. Claimant specifically noted that turning his head right, left and vertically in an upward direction to look in the rearview mirror while driving certain buses caused his neck symptoms. Claimant initially sought treatment for his neck symptoms in May 2012 and reported his symptoms to Employer on December 20, 2012.

8. As found, Dr. Paz performed an independent medical examination of Claimant and testified at the hearing in this matter. He concluded that Claimant suffered neither an acute trauma nor an occupational disease to his cervical spine during the course and scope of his employment with Employer. Dr. Paz maintained that Claimant's neck symptoms were likely consistent with early cervical degenerative disc disease and/or cervical degenerative joint disease. He explained that it was not medically probable that Claimant's described mechanism of injury of turning his head left, right and upwards while driving a bus would have caused neck pain. Dr. Paz also determined that there was insufficient work exposure to have aggravated or accelerated Claimant's pre-existing cervical spine condition. He testified that, while the x-rays revealed some degenerative changes at the C6-7 level, the affected location of the neck from turning the head was instead at the C1-2 position. Dr. Paz thus concluded that Claimant's medical treatment for his neck was not reasonable, necessary or causally related to his work as a Bus Driver for Employer. Dr. Paz explained that Claimant might experience cervical pain anytime he moves his neck because of his underlying degenerative condition. Claimant's symptoms constituted the natural progression of his underlying degenerative cervical condition. Based on the medical records and persuasive testimony of Dr. Paz, Claimant has failed to demonstrate that the hazards of his employment as a Bus Driver for Employer caused, intensified, or, to a reasonable degree, aggravated his cervical spine condition.

ORDER

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

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

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

DATED: February 27, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease in the form of Carpal Tunnel Syndrome (CTS) to his right hand and wrist during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right hand and wrist injury on July 26, 2014 during the course and scope of his employment with Employer.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment in the form of a right carpal tunnel release that is reasonable and necessary to cure or relieve the effects of a work-related injury.

4. Whether Claimant has established by a preponderance of the evidence that the medical treatment he received at University of Colorado Hospital was authorized and Respondents are liable for payment of the treatment.

FINDINGS OF FACT

1. On May 12, 2014 Employer hired Claimant to work as a Tank Engine Driver. Claimant has alleged either an occupational disease of right hand and wrist CTS or an acute injury to his right hand and wrist on July 26, 2014. The date of injury is approximately 10 weeks after Claimant began employment with Employer. For six of his ten weeks of employment Claimant underwent training.

2. Claimant's job as a Tank Wagon Driver consists of 14 hour shifts. Claimant would report to Employer's Wellington Yard in Wellington, CO to start his shift. He began working there at 4:00 p.m. on July 26, 2014. Claimant then drove to Greeley, CO to pick up co-worker Frac Tech Clayton Jones on July 26, 2014. Claimant and Mr. Jones then drove to the fracking site in Fort Lupton, CO. Claimant testified that driving took approximately 2.5 to 3 hours to complete.

3. After Claimant arrived at the fracking site in Fort Lupton he would receive a "pass on" from the prior crew. The crew informed Claimant of fuel levels in equipment and the number of gallons that the site was burning per hour. Claimant then typically conducted a safety meeting with Mr. Jones. After the safety meeting, Claimant would strap on to both trucks at the site and climb on them to check the fuel levels in order to verify the information from the prior crew. The process required Claimant to wear fall

equipment, gloves, and eye protection. He climbed a ladder and used a wooden measuring stick to check fuel levels.

4. To fill a piece of equipment or pump with fuel, Claimant drove the fuel truck into position. After checking fuel levels, Claimant and Mr. Jones prepared the hoses. The hoses are two inches in diameter. Mr. Jones would then carry the hose out to the equipment to fill it with fuel. Claimant would assist him by feeding out the hose from the truck. After the hose was out to the equipment approximately 150 to 200 feet away, Claimant then walked back to the truck and turned on the pump. Mr. Jones then filled up the piece of equipment with fuel. While Mr. Jones was filling up the equipment with fuel, Claimant recorded data and watched for fuel leaks.

5. After finishing a round of fueling Claimant would sit in his truck, complete paperwork and log all of the fuel information. He would not get a formal break but would eat his lunch while completing the paperwork. Claimant typically completed paperwork for 40 to 45 minutes before he and Mr. Jones would start another round of fueling. The paperwork was in addition to the documentation Claimant completed while each piece of equipment was being fueled. Claimant explained that no more than four rounds of fueling per shift could be completed at the Fort Lupton fracking site.

6. Claimant explained that on July 26, 2014 multiple machines on the fracking site required fueling. Claimant demonstrated the hand over hand motion to distribute and retract the approximately 150 to 200 foot fuel hose. Claimant remarked that he spent a significant portion of his day extending and retracting the fuel hose on July 26, 2014. Because Mr. Jones was a new employee he filled the equipment completely and thus caused the hose to click. Claimant noted that when the hose clicked it would "snap like a snake" in his hands. He commented that the jerking occurred multiple times while fueling equipment on July 26, 2014. Claimant explained that he suffered tingling in his right hand as a result of the jerking hose and reported his symptoms to Driver Manager Jason Martinez. Claimant did not immediately seek medical treatment but after he went home he called Mr. Martinez to tell him he was going to obtain medical treatment at an emergency room.

7. On July 26, 2014 Claimant sought medical treatment at the University of Colorado Hospital Emergency Room. Claimant reported a two-day history of numbness with sharp, shooting pains to his right fingers. The examining physician could not determine a mechanism of injury.

8. On August 18, 2014 Claimant visited Hope Edmonds, M.D. for an examination. Claimant reported numbness, tingling and shooting pain in his right hand. Dr. Edmonds noted "there was not acute injury or trauma." She diagnosed Claimant with right wrist flexor tenosynovitis and right CTS. Dr. Edmonds remarked that medical causation was not known at the time and ordered a job site analysis to evaluate causation. She recommended physical therapy and released Claimant to light duty.

9. On September 12, 2014 Claimant visited Bret Peterson, M.D. for an orthopedic consultation. Claimant reported right hand discomfort that he attributed to a

workplace injury. Dr. Peterson determined that Claimant had symptomatology consistent with a median compressive lesion that might represent CTS. Dr. Peterson recommended electrodiagnostic testing to determine if Claimant had CTS, cervical pathology or rotator cuff pathology due to shoulder weakness.

10. On September 25, 2014 Claimant underwent EMG/NCV testing. The testing revealed moderate to severe right median neuropathy at the wrist without denervation but no evidence of cervical radiculopathy or brachial plexopathy. Based on the EMG/NCV results Dr. Peterson diagnosed Claimant with moderate to severe right CTS.

11. On October 16, 2014 Vocational Case Manager William E. George conducted a job site analysis of Employer's Fort Lupton fracking site. He could not observe Claimant perform his duties as a Tank Wagon Driver because Claimant was still on modified duty. Nevertheless, he observed other employees in the position lifting, carrying and dragging hoses, lifting wheel chalks to block truck tires, lifting fire extinguishers, gripping and coupling hoses, placing gas nozzles into gas tanks, climbing ladders, driving trucks and completing paperwork. Mr. George noted that employees will sit for one hour after a round of fueling is completed and that an employee may sit for a total of 4 to 6 hours during one shift. He concluded that the job duties of a Tank Wagon Driver do not meet any of the Colorado risk criteria regarding lifting, using hand tools, wrist flexion and extension or vibration. Mr. George reviewed each of the risk factors enumerated in the *Medical Treatment Guidelines* (*Guidelines*) Rule 17, Exhibit 5 regarding cumulative trauma conditions. He concluded that none of Claimant's job duties met any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5.

12. On December 16, 2014 Mr. George testified through a post-hearing evidentiary deposition. Mr. George considered Claimant's hearing testimony about his job duties and maintained that the job duties did not meet any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5 of the *Guidelines*. Mr. George testified that when he calculated the amount of time an employee sits during a shift he included the time the employee was completing paperwork.

13. On October 29, 2014 Karl Larsen, M.D. conducted an independent medical examination of Claimant. He also testified through a post-hearing evidentiary deposition in this matter. Dr. Larsen explained that Claimant worked at four to five different sites for multiple hours and operated refueling hoses. Claimant specifically moved a heavy, stiff hose frequently because it often jumped and twisted. Based on Claimant's description of his job duties of "very heavy, forceful, repetitive gripping and pulling activities at work," Dr. Larsen concluded "I think this is very clearly related to his work activities and is a work-induced or exacerbated carpal tunnel syndrome. I say this because we do not know what any sort of baseline examination would have looked like, but he absolutely denies any problems before this work event." In reaching his opinion Dr. Larson did not review the EMG/NCV testing, job site analysis or Claimant's job description. Moreover, Dr. Larson did not consider W.C.R.P. Rule 17, Exhibit 5 regarding cumulative trauma conditions in rendering his opinion.

14. Dr. Edmonds reviewed the job site analysis performed by Mr. George and issued a letter on October 30, 2014. Dr. Edmonds concluded that Claimant's "carpal tunnel syndrome does NOT meet criteria for a cumulative trauma injury as defined by the Division of Workers' Compensation for the state of Colorado. Mr. George reports NO primary or secondary risk factors present."

15. On October 31, 2014 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Claimant reported right hand numbness, tingling and pain. Dr. Cebrian considered Claimant's job duties in great detail. He noted that on July 26, 2014 Claimant was completing paperwork approximately 8 to 10 hours into his shift after having finished three rounds of fueling when he began to experience pain and numbness in his right fingers. Dr. Cebrian explained that Claimant's job duties involved driving a fuel truck from Wellington to pick up a co-worker, then driving to Fort Lupton, staging a tank wagon, dispensing fuel and operating a fuel hose. Dr. Cebrian remarked that Claimant was required to complete a large amount of paperwork including a pre-trip check, a 705 equipment form and an asset tracker. The paperwork took Claimant 20 to 30 minutes to finish per round of fueling. A round of fueling lasted approximately two to three hours. He would complete the paperwork while sitting in his truck. Moreover, Claimant calculated the amount of fuel used during the fueling process while the frac tech was fueling equipment.

16. Dr. Cebrian explained that in order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated primary risk factors. Dr. Cebrian concluded that Claimant had right CTS with EMG evidence of moderate to severe right median nerve compression.

17. Dr. Cebrian compared Claimant's job duties with the delineated primary risk factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater. Dr. Cebrian concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration. Dr. Cebrian noted that Claimant performed several different activities throughout the day and many of the activities do not meet the minimal force or time duration requirements.

18. Dr. Cebrian noted that an additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees, 6 hours of elbow flexion greater than 90 degrees, or 6 hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for

at least 50% of a task cycle. Additional Primary Risk Factors include computer work for more than 7 hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than 4 hours or use of a handheld vibratory power tool for 6 hours or more. Dr. Cebrian determined that Claimant's job duties did not meet any of the Primary Risk Factors. Moreover, Dr. Cebrian explained that Claimant's work activities did not meet the Secondary Risk Factors enumerated in the *Guidelines*

19. Dr. Cebrian remarked that the manifestation of symptoms while at work does not establish a causal relationship with job duties. He explained:

> Carpal tunnel syndrome is a disease process of the median nerve as it travels through the carpal tunnel in the wrist. This disease process occurs over several years. … [T]he majority of cases of carpal tunnel syndrome are in fact not caused by work. In assessing the possible work relatedness of carpal tunnel syndrome, it is imperative to utilize a scientific based methodology to determine if there is a work-related causal relationship. The Colorado Division of Workers' Compensation has utilized a scientific based methodology in assisting physicians in determining whether carpal tunnel syndrome is work-related or not. Four-hundred and sixty-nine medical articles were utilized in establishing Guidelines for Cumulative Trauma Conditions.

Dr. Cebrian thus concluded that Claimant's right CTS was not caused by his work activities for Employer.

20. On December 15, 2014 Dr. Cebrian testified through an evidentiary deposition in this matter. Dr. Cebrian discussed the Primary and Secondary Risk Factors enumerated in the *Guidelines*. He testified that the key to the *Guidelines* is that the tasks have to be a combination of the force, repetition and duration for a minimum time period. Different activities are not included in calculating the time period. Dr. Cebrian testified that Claimant's job duties do not meet the Primary Risk Factors because he does not get into a repetitive cycle of doing a forceful activity. He also testified that Claimant's job duties do not meet the Secondary Risk Factors because they do not involve continuous, repetitive activity. Finally, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Engine Driver failed to meet the causation requirements for CTS outlined in Rule 17, Exhibit 5 of the *Guidelines*.

21. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease in the form of right CTS during the course and scope of his employment with Employer. Although Claimant attributed his right hand and wrist symptoms to his work activities, a review of his job duties reflects that they lacked the requisite force or repetition to cause his CTS. Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's tasks as a Tank Wagon Driver included driving a truck, completing a pre-trip inspection, checking tank levels, helping the frac tech stage hoses, fire watching, recording fuel levels, winding the hose and completing paperwork. Although Claimant's job duties

sometimes exceeded the minimum force requirements under the *Guidelines*, his job duties did not exceed the force requirements for the required repetition and time periods. Rule 17, Exhibit 5 of the *Guidelines* requires a combination of force, repetition and duration. However, Claimant's job duties fail to meet all of the criteria in the *Guidelines* for a cumulative trauma condition.

22. Relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Wagon Driver failed to meet the causational requirements for CTS. He persuasively explained that Claimant did not suffer CTS as a result of his work activities for Employer. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian testified that Claimant's job duties did not meet the Primary Risk Factors because he did not engage in a repetitive cycle activity with the requisite force. He also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Finally, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Engine Driver failed to meet the causation requirements for CTS outlined in the Rule 17, Exhibit 5 of the *Guidelines.* Based on Claimant's job duties, Dr. Cebrian also determined that he would not be maintaining the types of postures for the requisite time periods as outlined in the *Guidelines*. He remarked that Claimant was simply not performing his job duties for a continuous repetitive cycle.

23. The job site analysis completed by Mr. George supports the opinion of Dr. Cebrian. Mr. George also concluded that the job duties of a Tank Wagon Driver do not meet any of the Colorado risk criteria regarding lifting, using hand tools, wrist flexion and extension or vibration. He reviewed each of the risk factors enumerated in Rule 17, Exhibit 5 of the *Guidelines* regarding cumulative trauma conditions. He concluded that none of Claimant's job duties met any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5. Mr. George also found that Claimant's job duties fail to the meet the requirement for force, repetition, and duration required by the *Guidelines.* He testified that even assuming that Claimant lifted and pulled hoses as frequently as he testified and that the hose jerked as often as Claimant asserted, his job duties still did not meet the requirements of the *Guidelines* for the Primary or Secondary Risk Factors.

24. In contrast, Dr. Larsen concluded that Claimant's work activities for Employer caused him to develop right CTS. However, in reaching his opinion Dr. Larson did not review the EMG/NCV testing, job site analysis or Claimant's job description. Moreover, Dr. Larson did not consider W.C.R.P. Rule 17, Exhibit 5 regarding cumulative trauma conditions in rendering his opinion. Accordingly, Claimant has failed to demonstrate that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated his right CTS. Claimant has failed to prove that his right CTS was directly or proximately caused by his employment or working conditions.

25. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right hand and wrist injury on July 26, 2014 during the

course and scope of his employment with Employer. The medical records are replete with evidence that Claimant did not suffer an acute injury while he was working as a Tank Engine Driver for Employer. On July 26, 2014 Claimant sought medical treatment at the University of Colorado Hospital Emergency Room. Claimant reported a two-day history of numbness with sharp, shooting pains to his right fingers. The examining physician could not determine a mechanism of injury. On August 18, 2014 Claimant visited Dr. Edmonds and reported numbness, tingling and shooting pain in his right hand. Dr. Edmonds noted "there was not acute injury or trauma." Although Claimant may have manifested right CTS symptoms while working for Employer on July 26, 2014, the record contains insufficient evidence to establish that his work activities caused an acute development of CTS.

CONCLUSIONS OF LAW

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

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

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

Occupational Disease

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

8. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease in the form of right CTS during the course and scope of his employment with Employer. Although Claimant attributed his right hand and wrist symptoms to his work activities, a review of his job duties reflects that they lacked the requisite force or repetition to cause his CTS. Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's tasks as a Tank Wagon Driver included driving a truck, completing a pre-trip inspection, checking tank levels, helping the frac tech stage hoses, fire watching, recording fuel levels, winding the hose and completing paperwork. Although Claimant's job duties sometimes exceeded the minimum force requirements under the *Guidelines*, his job duties did not exceed the force requirements for the required repetition and time periods. Rule 17, Exhibit 5 of the *Guidelines* requires a combination of force, repetition and duration. However, Claimant's job duties fail to meet all of the criteria in the *Guidelines* for a cumulative trauma condition.

9. As found, relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Wagon Driver failed to meet the causational requirements for CTS. He persuasively explained that Claimant did not suffer CTS as a result of his work activities for Employer. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian testified that Claimant's job duties did not meet the Primary Risk Factors because he did not engage in a repetitive cycle activity with the requisite force. He also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Finally, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Tank Engine Driver failed to meet the causation requirements for CTS outlined in the Rule 17, Exhibit 5 of the *Guidelines.* Based on Claimant's job duties, Dr. Cebrian also determined that he would not be maintaining the types of postures for the requisite time periods as outlined in the *Guidelines*. He remarked that Claimant was simply not performing his job duties for a continuous repetitive cycle.

10. As found, the job site analysis completed by Mr. George supports the opinion of Dr. Cebrian. Mr. George also concluded that the job duties of a Tank Wagon Driver do not meet any of the Colorado risk criteria regarding lifting, using hand tools, wrist flexion and extension or vibration. He reviewed each of the risk factors enumerated in Rule 17, Exhibit 5 of the *Guidelines* regarding cumulative trauma conditions. He concluded that none of Claimant's job duties met any of the criteria regarding primary or secondary risk factors outlined in Rule 17, Exhibit 5. Mr. George also found that Claimant's job duties fail to the meet the requirement for force, repetition, and duration required by the *Guidelines.* He testified that even assuming that Claimant lifted and pulled hoses as frequently as he testified and that the hose jerked as often as Claimant asserted, his job duties still did not meet the requirements of the *Guidelines* for the Primary or Secondary Risk Factors.

11. As found, in contrast, Dr. Larsen concluded that Claimant's work activities for Employer caused him to develop right CTS. However, in reaching his opinion Dr.

Larson did not review the EMG/NCV testing, job site analysis or Claimant's job description. Moreover, Dr. Larson did not consider W.C.R.P. Rule 17, Exhibit 5 regarding cumulative trauma conditions in rendering his opinion. Accordingly, Claimant has failed to demonstrate that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated his right CTS. Claimant has failed to prove that his right CTS was directly or proximately caused by his employment or working conditions.

Acute Injury

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

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

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right hand and wrist injury on July 26, 2014 during the course and scope of his employment with Employer. The medical records are replete with evidence that Claimant did not suffer an acute injury while he was working as a Tank Engine Driver for Employer. On July 26, 2014 Claimant sought medical treatment at the University of Colorado Hospital Emergency Room. Claimant reported a two-day history of numbness with sharp, shooting pains to his right fingers. The examining physician could not determine a mechanism of injury. On August 18, 2014 Claimant visited Dr. Edmonds and reported numbness, tingling and shooting pain in his right hand. Dr. Edmonds noted "there was not acute injury or trauma." Although Claimant may have manifested right CTS symptoms while working for Employer on July 26, 2014, the record contains insufficient evidence to establish that his work activities caused an acute development of CTS.

ORDER

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

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

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

DATED: February 12, 2015.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

The issues raised for the hearing included a determination of dependents of Claimant Jeffrey Stromberger and the amount of benefits to be paid pursuant to Sections 8-41-501 and 8-41-503, C.R.S.

FINDINGS OF FACT

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

1. On August 29, 2014, Claimant was involved in a motor vehicle accident in the course and scope of his employment while employed by Employer. On August 29, 2014, at approximately 10:53 a.m., while southbound on highway 385 near mile post 206, Claimant was involved in a rollover accident causing his death.

2. Kristyn N. Stromberger filed a Dependent's Notice and Claim for Compensation for which a Notice of Contest was filed by Respondents on November 5, 2014. Respondents have agreed that the Notice of Contest is hereby withdrawn and have stipulated that Claimant's death did arise out of the course and scope of employment in the motor vehicle accident on August 29, 2014.

3. Respondents have obtained information through the Colorado State Patrol Accident Reports, mechanical investigation, autopsy report and confirming letters from Colorado State Patrol Trooper Seth Soukup regarding the cause of the accident. As a result of this investigation, and documents submitted, there was no safety rule violation that would have affected the outcome in regard to this accident.

4. Employer records have been obtained regarding wages earned by Claimant from January 1, 2014, through August 29, 2014. The parties have stipulated, and from the records it appears proper, that Claimant's wages for that period of time including any fringe benefits was $42,388.78. Based on the gross wages for that period of time, the average weekly wage is determined by taking the $42,388.l78, divided by 241 days, and multiplying by seven days per week which equals $1,231.21. As a result, the temporary total disability rate to determine dependent benefits would be two-thirds of that amount or $820.81 per week.

5. Based on the marriage certificate produced by Kristyn N. Stromberger, and her testimony, which the Court finds credible, the Court finds that Kristyn N. Stromberger is the widow of the decedent, Claimant Jeffrey Stromberger, and was living in the same household at the time of his death and therefore is entitled to dependent's benefits.

6. Based on the certificate of live birth for Pacyn K. Stromberger and the testimony of Kristyn N. Stromberger, which has been found credible, it is determined that Pacyn K. Stromberger is a minor child who relied on support of Claimant Jeffrey Stromberger entitled to dependent's benefits.

7. Kristyn N. Stromberger testified that she has had access to all financial accounts of Claimant Jeffrey Stromberger. She testified that she is aware of the content and that there has not been any payments made to, or for the benefit of, any other individual for the purpose of support. Additionally, she testified that she would be aware if Claimant Jeffrey Stromberger had any other children and there are no other children.

8. Kristyn N. Stromberger testified that Employer continued to pay full wage benefits through September 30, 2014. Additionally, she testified that the funeral benefit of $7,000 has already been paid.

9. The record shows that the Social Security Administration has awarded to Kristyn N. Stromberger, for her minor child, Pacyn K. Stromberger, an entitlement to a Social Security benefit in the amount of $1,464.40 per month.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following conclusions of law.

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

2. In deciding whether an injured worker has met the burden of proof the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002; *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of a witness. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000

3. Section 8-41-503(1), C.R.S entitled, "Dependency and Extent Determined-How" provides, that:

> (1)Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and right

to death benefits shall become fixed as of said date . . . . Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the Director may designate.

4. Section 8-41-501(1)(a), C.R.S. entitled "Persons Presumed Wholly Dependent," provides, "that the following described persons shall be presumed to be wholly dependent (however, such presumption may be rebutted by competent evidence) :

(a) Widow or widower, unless it is shown that he or she was voluntarily separated and living apart from the spouse at the time of injury or death or was not dependent in whole or in part on the deceased for support .

(b) Minor children of the deceased under the age of eighteen years, including posthumous or legally adopted children."

5. It is determined that decedent Claimant Jeffrey Stromberger died in the course and scope of his employment on August 29, 2014. As a result, Claimant Jeffrey Stromberger has two surviving dependents. They are his widow, Kristyn N. Stromberger, and his minor daughter whose date of birth is July 25, 2013. There are no other dependents.

6. At the time of Claimant Jeffrey Stromberger's death, his average weekly wage was $1,231.21 with a TTD benefit rate used for the dependents' benefit rate of $820.81 per week. It is the determination of this Court that 50% of the benefit shall go to Kristyn N. Stromberger and 50% to Pacyn K. Stromberger. In regard to the benefits owed to Pacyn K. Stromberger, her benefits shall be reduced pursuant to law by 50% for the Social Security offset. Taking the $1,464.40 Social Security benefit rate per month times 12 months, dividing that by 52 weeks, and taking 50%, the Court finds the weekly reduction shall be $168.97. This offset shall continue pursuant to law.

7. Based on the documents submitted and testimony in this case, the funeral benefits have been paid and it is believed there are no outstanding medical bills at this time. It is also found that Employer continued to pay Claimant's wages until September 30, 2014.

ORDER

It is therefore ordered that:

1. Respondents shall pay to Kristyn N. Stromberger $410.41 per week until her death or until remarriage or otherwise pursuant to law.

2. It is determined that Pacyn K. Stromberger is entitled to $410.40 per week until she reaches the age of 18, or 21 as provided by statute, or otherwise terminated by law. This amount shall be reduced by $168.97 for the Social Security offset which

would provide a weekly benefit of $241.43 per week. This amount shall be paid to Kristyn N. Stromberger for the benefit of Pacyn K. Stromberger.

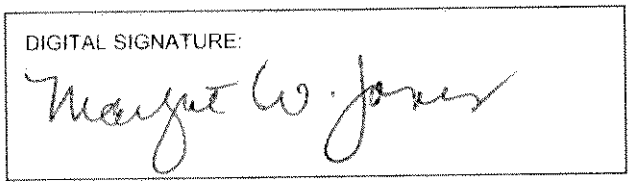
3. As a result of the continued payment of wages for Claimant Jeffrey Stromberger through September 30, 2014, the benefits due and payable to the dependents shall begin October 1, 2014, and continuing pursuant to law.

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

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

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

DATED: February 6, 2015_



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

ISSUE

Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with Employer in August of 2014.

FINDINGS OF FACT

1. Claimant works for Employer as an Eligibility Advocate with duties including assisting uninsured and underinsured patients secure healthcare benefits. In her position, Claimant interviews patients, makes phone calls, and inputs data. Claimant has been employed in this position for approximately four years.

2. In August of 2014, Claimant began experiencing pain and discomfort in her bilateral hands and wrists.

3. On August 14, 2014, Claimant informed Employer of the pain, indicating that she began experiencing pain in both wrists and hands one week prior on August 7, 2014. *See* Exhibit A.

4. Employer filled out an Employer's First Report of Injury and referred Claimant for treatment. *See* Exhibit A.

5. On September 3, 2014 Claimant saw John Stephen Gray, M.D. Claimant had bilateral hand and wrist pain. Claimant was convinced that her pain was caused by her work, but noted no specific accident or injury. Claimant indicated that data history and writing caused her hand pain. Claimant denied any prior problems with her hands. Claimant indicated no significant change in her job recently to explain the onset of her symptoms. *See* Exhibit F.

6. Claimant had a positive history for hypertension, hypothyroidism, asthma, vitamin D deficiency, and bilateral pedal edema. Claimant also had a positive family history of gout. *See* Exhibit F.

7. Claimant had very minimal swelling over the MCP joints of the third metacarpals bilaterally and tenderness over the CMC joints of the thumbs with a positive grind test bilaterally, right greater than left. *See* Exhibit F.

8. Dr. Gray diagnosed bilateral hand and wrist pain, work relatedness unclear. Dr. Gray opined that causation was at issue, that there was no clear-cut

mechanism of injury, and that Claimant did not seem to meet the criteria for high repetitions nor high force nor awkward positioning. *See* Exhibit F.

9. On September 17, 2014 Claimant again saw Dr. Gray. Dr. Gray reviewed the results of Claimant's laboratory tests with her. Claimant's tests showed a high uric acid level, an elevated sedimentation rate, and an elevated C-reactive protein level. *See* Exhibit F.

10. Dr. Gray diagnosed Claimant with bilateral hand and wrist pain, probably related to an inflammatory condition such as gout/hyperuricemia and opined that it was probably not work related. *See* Exhibit F.

11. Dr. Gray opined that causation was somewhat more clear at that time, and that it appeared that Claimant had an inflammatory condition that is probably related to her pain and is probably not work related. Dr. Gray advised Claimant to see her primary care physician and to get a referral to a rheumatologist for appropriate diagnosis and treatment. *See* Exhibit F.

12. On October 15, 2014 Claimant again saw Dr. Gray. Claimant had similar complatints of bilateral hand and wrist pain that she indicated was severe following her last visit. Claimant questioned whether the diuretic she was taking for her blood pressure might be affecting her uric acid levels. Claimant's examination showed essentially no changes. *See* Exhibit F.

13. Dr. Gray again diagnosed bilateral hand and wrist pain and opined that it was probably related to an inflammatory condition such as gout/hyperuricemia and opined that he doubted work relatedness. *See* Exhibit F.

14. On October 22, 2014 Respondents filed a Notice of Contest alleging the injury/illness was not work related. Claimant then filed an Application for Expedited Hearing on November 26, 2014. *See* Exhibits B, C.

15. Claimant appeared pro se at hearing and testified that she was still experiencing pain and discomfort in her bilateral hands and wrists, believed the pain to be related to her employment, and believed there was not enough information for a conclusion that her pain is not work related.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201,

C.R.S. (2014). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained the burden of proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. (2014). The Claimant must establish that the injury meets this two pronged requirement by a preponderance of the evidence. *See* § 8-43-201(1), C.R.S. (2014).

The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). In the present case, Claimant has failed to establish that her bilateral hand and wrist pain occurred due to her work as an eligibility advocate. Rather, as found above, Dr. Gray diagnosed Claimant with bilateral hand and wrist pain, probably related to inflammatory condition such as gout/hyperuricemia and opined that it was probably not work related. Claimant's testing, as found above, showed a high uric acid level and an elevated sedimentation rate and c-reactive protein. Claimant also had a past history of hypertension, hypothyuroidism, asthma, vitamin D deficiency, bilateral pedal edema, and a family history positive for gout. Although Claimant testified that she believes the pain in her wrists and hands is due to her work and believes it was caused by her work, Claimant has failed to prove more probably than not, that the bilateral hand and wrist pain was due to her employment. Claimant did not present any evidence or testimony as to her daily activities, any repetitive motion, or any information to support a conclusion that an injury to her bilateral hands and wrists occurred as a result of her employment. Dr. Gray opined that Claimant's job duties did not appear to meet criteria for high repetition nor high force nor awkward positioning. Claimant's duties included interviewing patients over the first several hours of her work then intermittently inputting data and making phone calls. Claimant did not establish how these job duties that she has performed over the last four years suddenly caused an onset of pain in her bilateral wrists and hands.

The opinion of Dr. Gray that Claimant's bilateral wrist and hand pain is probably due to an inflammatory condition and that it was doubtful that it was work related is found persuasive. Claimant has numerous non-work related risk factors as shown by the medical records and she has failed to prove any causal relationship between her pain and her employment. In her testimony and case presentation, Claimant argued that she believed there was not enough information to conclude that the condition was not work related. Claimant appears to be misplacing the burden. It is not Respondents burden to prove the bilateral hand and wrist pain is not work related. Rather, it is Claimant's burden to prove that the bilateral hand and wrist pain is work related. The medical reports do not support such a conclusion and doubt the work relatedness of Claimant's pain. Claimant has not established or presented sufficient evidence or testimony to support her claim and to prove by preponderant evidence the compensability of her bilateral hand and wrist pain.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show she suffered a compensable injury in August of 2014. The claim is denied and dismissed.

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

DATED: February 4, 2015

/s/ Michelle E. Jones

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

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. All notices to the Respondent were sent to its address on file with the DOWC and have not been returned as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ so finds.

2. Hearing in the above-captioned matter is presently scheduled for April 14, 2015, in Denver, Colorado.

3. On December 4, 2014, the Petitioner filed an Application for Hearing and Notice to Set pursuant to Office of Administrative Courts Rules of Procedure (OACRP), Rule 8, 1 CCR 104-1 and § 8-43-409 (1), C.R.S.

4. The Notice of Hearing was mailed to the Respondent at its last known address on file with the Division of Workers' Compensation (hereinafter "DOWC").

5. On January 12, 2015, the Petitioner filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist, pursuant to OACRP, Rule 17 and § 8-43-409, C.R.S. Pursuant to OACRP, Rule 17, the Respondent had 20 days after the filing of the Motion within which to file an objection and/or respond to the Motion. The Respondent failed to file a timely response to the Motion for Summary Judgment. Therefore, there are no genuine issues of disputed material fact for hearing.

Findings

6. The Respondent employs employees for whom it must carry workers' compensation insurance under the provisions of the Act.

7. The Respondent does not have a policy of workers' compensation insurance in effect.

8. The Respondent continues to operate its business in the absence of workers' compensation insurance.

9. The Respondent received notice of the hearing set before the Office of Administrative Courts for April 14, 2015.

10. The Respondent is in default of its workers' compensation insurance obligations under the Act.

11. There is no genuine issue of disputed material fact with respect to Findings 1 through 9 herein above.

12. The Motion for Summary Judgment is supported by documents and affidavits.

13. The Respondent is currently operating its business without a policy of workers' compensation insurance in effect, and has been operating its business without workers' compensation insurance since at least January 1, 2007, thus, exposing its existing employees to real, immediate, sand irreparable harm from an on-the-job injury that would not be covered by insurance.

14. In an Order, dated February 13, 2012, the Director of the DOWC imposed a fine in the amount of $18,530.00 against the Respondent for failing to maintain workers' compensation insurance from at least January 1, 2007 through the date of the Order.

15. The Director's Order was recorded as a judgment in the Denver District Court on May 17, 2012 (Denver Dist. Ct. Case No. 12CV3004).

16. The Petitioner has demonstrated by a preponderance of the evidence that there is no genuine disputed issue of material fact and the Petitioner is entitled to summary judgment on the cease-and-desist issue.

CONCLUSIONS OF LAW

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

Notice

a. As found, all notices of to the Respondent, unreturned as undeliverable, establish a legal presumption of receipt, warranting a finding of receipt by the Employer. *See Olsen v. Davidson,* 142 Colo. 205, 350 P. 2d 338 (1960). *See also Campbell v. IBM Corp.,* 867 P. 2d 77 (Colo. App. 1993).

Jurisdiction

a. The ALJ has jurisdiction of the subject matter and over the parties to this action pursuant to the Workers' Compensation Act of Colorado.

Summary Judgment

b. OACP, Rule 17, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." The Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents and affidavits.

c. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the attachments and the Affidavit of Nikki Gwin establish that there is no genuine issue of disputed material fact with respect to the Findings herein above.

d. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Respondent did not file a timely response to the Motion. Therefore, the allegations in the Motion for purposes of summary judgment are deemed true and accurate.

Cease-and-Desist

d. As found, the Respondent failed to provide a written response with supporting documentation to the Petitioner's Motion for Entry of Summary Judgment. Accordingly, the facts set forth in the Petitioner's Motion and in the supporting affidavit attached to the Motion are undisputed. *WRWC, LLC v. City of Arvada*, 107 P.3d 1002, 1006 (Colo. App. 2004).

e. The Respondent is in violation of § 8-44-101 (1), C.R.S., by failing to maintain workers' compensation insurance for its covered employees, and is therefore subject to penalties under § 8-43-409.

f. Section 8-43-409 (1) (a), C.R.S., provides that an employer in default of its workers' compensation insurance obligations shall be ordered to cease and desist immediately from continuing its business operations during the period such default continues.

g. The issuance of an order requiring the Respondent to cease and desist business operations while in default of its workers' compensation insurance obligations is an appropriate penalty for failure to keep workers' compensation insurance in force.

Burden of Proof

h. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Petitioner has sustained its burden that employees of the Respondent will suffer immediate and irreparable harm in the event of an on-the-job injury unless the Respondent is ordered to cease-and-desist doing business, immediately and forthwith.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment is hereby granted and Respondent shall cease and desist , immediately, from continuing its business operations during the period it remains in default of its mandatory, legal obligation to carry workers' compensation insurance.

B. The scheduled hearing of April 14, 2015 is hereby vacated.

DATED this 9th day of February 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, giving counsel for the Claimant 3 working days after receipt thereof to file electronic objections as to form. The proposed decision was filed, electronically, on January 20, 2014 On January 21, 2015, counsel for the Claimant filed comments on the proposed decision with counsel for the Respondents, which were forwarded to the ALJ on the same date. The comments were proofreading edits and not objections. The edits are well taken. After a consideration of the proposed decision and the editing comments, the ALJ has modified the proposal and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns the Claimant's request for post maximum medical improvement (MMI) medical benefits (*Grover* medicals), including hip replacement surgery.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The ALJ has jurisdiction to hear the issue of whether the Claimant is entitled to an order awarding medical benefits after MMI.

2. The Claimant is a fifty-one year old male who was injured on March 10, 2011, when he fell from a ladder while installing vent covers. He sustained right arm radial and ulnar fractures and a right acetabular (hip) fracture. As a result of these injuries and the treatment thereto, the Claimant also developed a sciatic nerve condition.

3. The Respondents filed a Final Admission of Liability (FAL), dated April 1, 2014, admitting for temporary disability benefits through January 16, 2012; and, for scheduled permanent partial disability (PPD) benefits of 13% of the right upper extremity (RUE) and 27% of the right lower extremity (RLE); and, denying *Grover* medicals, pursuant to the opinion of Division Independent Medical Examiner (DIME), Franklin Shih, M.D. Medical benefits were provided to the Claimant to treat the injuries he sustained. He had surgery and follow up care for his injuries through his authorized

treating physician (ATP), Amy Sheeder, M.D., and her referrals. The FAL contained language advising the Claimant that he must file an objection and an Application for Hearing on any disputed issues within 30-days, which was substantially done as herein below found. The ALJ finds that the statute, § 8-43-203 (2) (b) (UII) (A), C.R.S., does not require any particular format in the request for hearing—only that the request be filed within 30-days.

Medical

4. On August 19, 2013 Edward Jonassen, M.D., an orthopedic surgeon, stated that the Claimant had reached MMI [Resp. Exhibit J, Bates stamp 58].

5. Dr. Sheeder agreed with the MMI opinion of Dr. Jonassen, and she referred the Claimant to Gary Hess, M.D., who is Level II accredited, for an impairment rating. [Resp. Ex. H, Bates stamp 40-41.] On October 15, 2013, Dr. Hess was of the opinion that the lingering effects of the sciatic nerve injury kept the Claimant from being at MMI [Resp. Ex. F, Bates stamp 23]. Dr. Sheeder agreed with Dr. Hess and stated that the Claimant was not at MMI [Resp. Ex. H, Bates stamp 38].

6. Dr. Hess noted at the time of the above evaluation that the Claimant has arthritis in his right hip [Resp. Ex. F, Bates stamp 23]. Dr. Hess stated: "It should be noted that this patient has evidence of posttraumatic arthritis in the right hip and will someday require hip replacement surgery **if he becomes more symptomatic**." (emphasis supplied) [Resp. Ex. F, Bates stamp 24].

The Division Independent Medical Examination (DIME) of Dr. Shih

7. A DIME was requested by the Respondents, pursuant to § 8-42-107 (8) (a) (II), C.R.S., and it was performed by Dr. Shih on March 11, 2014. Dr. Shih placed the Clamant at MMI as of August 9, 2013. He assigned a RUE impairment of 13% and a RLE impairment of 27%. The FAL herein above referenced was filed, based on DIME Dr. Shih's opinion.

Subsequent to the DIME

8. The Claimant was seen in follow up by Dr. Hess's partner, Jared L. Michalson, M.D., on March 20, 2014. Dr. Michalson noted x-ray results confirming "mild degenerative changes" in the right elbow and hip. Regarding the right hip, Dr. Michalson stated, "I would not expect either of these areas in terms of arthritic changes to improve and would expect gradual worsening over time as consistent with posttraumatic arthritis." [Resp. Ex. G, Bates stamp 28].

9. Medical benefits were denied in the FAL, based on the post-DIME follow up evaluation with Dr. Sheeder on March 31, 2014. Dr. Sheeder discussed the DIME

report of Dr. Shih. Under the "Plan" section of her chart note, Dr. Sheeder stated "no follow up needed at present as at MMI with no intermittent care needed" [Resp. Ex. H, Bates stamp 32]. Dr. Sheeder completed the M164 form report and stated under Return Appointment – **"None needed"** (emphasis supplied). Dr. Sheeder also checked the box to indicate **no maintenance care after maximum medical improvement was required** (emphasis supplied) [Resp. Ex. H, Bates stamp 34]. The Claimant was self-represented at the time he received the FAL. The FAL contains language which advises the Claimant to file an application or hearing with the Office of Administrative Courts (OAC) on any disputed issue. [Resp. Ex. D, Bates stamp 05].

10. The Claimant seeks to obtain a determination that potential hip replacement in the future will be prospectively authorized if an ATP subsequently determines that it will be reasonably necessary at some future, undermined time.

Timely Objection, and Request for Hearing: The Final Admission of Liability

11. The Claimant wrote a letter to the Division of Workers' Compensation (DOWC) on April 25, 2014, objecting to the Final Admission [Claimant's. Ex. 6]. The letter indicates it was copied to the claims representative at Pinnacol Assurance. The ALJ finds that the Claimant's letter constitutes a timely objection to the FAL.

12. Also, on April 25, 2014, the Claimant wrote a letter addressed to DOWC and the OAC in which he requested a hearing in this claim [Claimant's. Ex. 5]. The ALJ notes that this letter was not copied to Pinnacol Assurance. Date stamps on the letter indicate that it was first received by DOWC on May 2, 2014 and by OAC on April 30, 2014. This ALJ finds that the April 25, 2014 letter constitutes a valid and timely notice that the Claimant wished to proceed with a hearing to contest certain portions of the FAL.

13. Because the Claimant had not completed the proper form to request a hearing pursuant to OAC Rules of Procedure (OACRP), Rule 8 (A), 1 CCR 104-1, which requires that the application "...shall be on a form provided by the OAC, or on a substantially similar form," DOWC wrote to the Claimant on May 28, 2014 and explained the deficiency in his pleadings, providing him at that time with the correct form for requesting a hearing [Claimant's. Ex. 7].

14. The Claimant completed the Application for Hearing form and filed it on July 31, 2014 [Claimant's. Ex. 8]. The form reflects that a copy was exchanged with Pinnacol Assurance. The ALJ finds that this Application relates back to the Claimant's timely letter request for a hearing.

15. In the present case, the ALJ finds that the Claimant timely advised the OAC through a written letter received by the OAC on April 30, 2014 that he requested a hearing to contest the April 1, 2014 FAL. Rather than a full rejection by the OAC clerk,

the Claimant was advised in writing that a form application for hearing should be filed. The Claimant completed the form and sent copies of this form to Pinnacol Assurance. The ALJ finds that although the actual form was completed past the thirty day filing deadline, the Claimant was in substantial compliance with the requirements of § 8-43-203 (2) (b) (II) (A), C.R.S., and OACRP, Rule 8 to contest the FAL and have an ALJ determine the disputed issues at a merits hearing.

Ultimate Findings

16. The Claimant was in substantial compliance with the requirements of timely objecting to a FAL and timely requesting a hearing. Consequently, a petition to reopen on the issue of *Grover* medicals is unnecessary.

17. A hip replacement is not presently contemplated by any ATP. Medical providers are of the opinion that a hip replacement will become necessary at some future, undetermined time. Not only is the need for a hip replacement **not** imminent, the idea of a hip replacement is speculative at this point. There is **not** substantial evidence that a hip replacement is a present certainty and reasonably necessary at present, or at a future determinable time. There is no present course of treatment recommended to maintain the Claimant at MMI and to prevent a deterioration of his condition.

18. The medical recommendations in this case are speculative and do not rise to the level of recommendations to cure and relieve the effects of the injury or to prevent deterioration of the Claimant's condition. The Claimant has therefore failed to establish, by a preponderance of the evidence that he is entitled to an award of post-MMI maintenance medical benefits.

CONCLUSIONS OF LAW

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

Substantial Compliance with Timely Request for Hearing

a. In order to support a finding of substantial compliance with a regulatory mandate, there must be evidence of a genuine effort to comply with statutory requirements. *See Pinon v. U-Haul*, W.C. No. 4-632-044 [Indus. Claim Appeals Office (ICAO), April 25, 2007], *aff'd sub. nom. Pinon v. Indus. Claim Appeals Office* (Colo. App. 07CA0922, April 3, 2008) (NSOP) [substantial compliance requires party intent or to actually make good faith or colorable effort to comply with statutory requirements]. As found, the Claimant's actions under the particular circumstances of this case constitute substantial compliance with the statutory requirement that he request a hearing at OAC within thirty days of the FAL. Although the Claimant's initial letter requesting the hearing

does not reflect that it was copied to Pinnacol Assurance, Pinnacol did receive a copy of the Claimant's objection to the FAL and it was aware of the arguments the Claimant alleged as to why he disputed portions of the FAL.

Credibility: The Reasonable Necessity of a Hip Replacement

b. As found, it is undisputed that a hip replacement is not presently contemplated by any ATP. Medical providers are of the opinion that a hip replacement will become necessary at some future, undetermined time. Not only is the need for a hip replacement **not** imminent, the idea of a hip replacement is speculative at this point. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Future Medical Benefits

c. An award of future medical benefits is proper when there is substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent a deterioration of a claimant's condition. *See Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). As found, there is not substantial evidence to support a determination that hip replacement is reasonably necessary at a future determinable time.

d. If the evidence in a particular workers' compensation case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of injury or to prevent deterioration of a claimant's present condition under the statute requiring the employer to provide medical treatment that is reasonably required to relieve a claimant from the effects of injury. *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992.) To determine this issue, an ALJ must determine whether the medical evidence constitutes substantial evidence that further medical treatment will be reasonably necessary. The ALJ must therefore determine in this case whether substantial evidence has been presented that future hip replacement surgery will be necessary. As found, such a determination at present would be speculative

e. In *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995), the Court of Appeals considered the question of whether evidence of potential for future degenerative changes would suffice to establish the need for future medical treatment as required to support an award of ongoing medical benefits. The Court first concluded that a particular or specific course of treatment need not be anticipated or articulated at the time of the order awarding ongoing medical benefits to workers' compensation claimant. The Court, however, went on to state that before an order for

future medical benefits may enter, there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve workers' compensation claimant from the effects of injury or to prevent further deterioration of his or her condition. The claimant in *Stollmeyer* requested an order for future medical treatment based on medical opinions that there was a chance of degeneration in the ankle in the future which may lead to the need for surgery. The claimant in *Stollmeyer* asked the Court to equate medical evidence indicating the likelihood of future degeneration, for which there was record support, with the need for medical treatment. The Court of Appeals, citing the *Milco Construction* decision, declined to do so, stating: "...This we cannot do. A showing of need for treatment is not met by simply proving that degenerative changes will occur. It is entirely possible that an ALJ, within the exercise of his discretion, could determine that no treatment could prevent or relieve certain types of degeneration. If so, an award of ongoing medical benefits would be inappropriate." *Stollmeyer, supra,* at 611. The facts of the present case are similar to those in *Stollmeyer*. Here, the medical evidence supports a finding that future degeneration is an anticipated consequence of the industrial injury. In the present case, there are no specific recommendations for treatment to cure and relieve the effects of the injury or to prevent deterioration of the Claimant's condition. The only statement regarding future medical treatment is authored by Dr. Hess who stated that the Claimant has arthritis in the hip "...and will someday require hip replacement surgery if he becomes more symptomatic."
As found, the medical recommendations in this case are speculative and do not rise to the level of being recommendations to cure and relieve the effects of the injury or to prevent deterioration of the Claimant's condition.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for post-maximum medical improvement maintenance medical benefits, including hip replacement, are hereby denied and dismissed.

DATED this 22 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

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Claimant's Exhibits 1 through 9, with the exception of a portion of Exhibit 1 concerning a Christo appointment, were admitted into evidence, without objection. Respondents' Exhibits A through W, with the exception of Exhibits U and V which were withdrawn, were admitted into evidence, without objection.

By Procedural Order, dated January 15, 2015, the ALJ established the following briefing schedule: Claimant's opening brief was due, electronically, within 5 days of the Procedural Order, Respondents' answer brief was due, electronically, within 5 days of the opening brief; and, the Claimant's reply brief, if any, was due, electronically, within 2 days of the answer brief. The Claimant's opening brief was filed on January 20, 2015. The Respondents' filed a document entitled "Full Findings of fact, Conclusions of Law and Order," despite the fact that the ALJ has not yet made a decision, on January 26, 2015. Consequently, the document will be construed as the Respondents' answer brief as originally ordered in the above-mentioned Procedural Order. No timely reply brief was filed. Consequently, the matter was deemed submitted for decision on January 29, 2015.

ISSUE

The sole issue designated in both parties Case Information Sheets (CISs) concerns the Claimant's request to overcome the Division Independent Medical Examination (DIME) of Kevin K. Nagamani, M.D., with respect to his determination that the Claimant had reached maximum medical improvement (MMI) on November 27, 2013 [with a scheduled rating of 35% of the left lower extremity (LUE)]. Medical benefits and temporary disability benefits were **not** designated as issues for the October 28, 2014 hearing by either party.

The Claimant bears the burden of proof on the designated issue, by clear and convincing evidence

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant worked as a mechanic for the Employer at the time of the admitted industrial accident of July 4, 2012.

2. The Respondents filed a Final Admission of Liability (FAL), dated June 18, 2014, admitting compensability; an average weekly wage (AWW) of $818.50; temporary disability benefits through November 26, 2013; an MMI date of November 27, 2013; and, scheduled permanent

partial disability of 35% of the LUE, based on the DIME opinion of DIME Dr. Nagamani. The Claimant filed a timely objection and request for hearing to challenge Dr. Nagamani's DIME opinion concerning MMI. The FAL was silent concerning post-MMI medical maintenance benefits.

3. Dr. Nagamani, M.D., was of the opinion that the Claimant reached MMI on November 27, 2014 and he recommended some continued pain management.

4. According to the Claimant, his chronic, severe, and unrelenting pain interferes with essentially all of his activities and precludes him from being able to return to work to support his family, t

5. All of the Claimant's treating physicians have diagnosed probable Complex Regional Pain Syndrome (CRPS), including Brian Beatty, D.O., Stephen Lindenbaum M.D., Benjamin Schnell, M.D., David Hahn, M.D., Robert Guirguis, D.O. and Rasheed Singelton, M.D.

6. Edwin M. Healey, M.D., the Claimant's expert, asserts that the correct diagnosis is CRPS and that the Division of Workers Compensation (DOWC) "Complex Regional Pain Syndrome Medical Treatment Guidelines," as admitted into evidence, provide the guidance as to what testing and treatment ought to be provided for CRPS..

7. The above-referenced DOWC Guidelines for CRPS, page 16, paragraph 3 state:

> "(3) At least one sign at time of evaluation in two or more of the following categories:
>
> -*sensory:* evidence of hyperalgesia (to pinprick) and/ or allodynia (to light touch and/ or deep somatic pressure and/ or joint movement
> - *Vasomotor:* evidence of temperature asymmetry and/ or skin
> color changes and/or asymmetry. Temperature asymmetry
> should ideally be established by infrared thermometer measurements showing at least a 1 degree Celsius difference between the affected and unaffected extremities.
>
> -*Motor/trophic:* evidence of decreased range of motion and/ or motor dysfunction (weakness, tremor, dystonia) and/ or trophic changes (hair,

nail, skin).

(4) No other diagnosis that better explains the signs and symptoms." The evidence in this matter shows that none of the required tests to determine CRPS were performed because the Respondents denied authorization therefore.

8. Apparently, no other diagnosis better explains the Claimant's symptoms than the diagnosis CRPS. The ALJ finds that the DIME physician was in error by establishing the MMI date, based upon an incorrect diagnosis.

9. The DOWC Guidelines for CRPS **require** the following diagnostic testing:

a) A clinical diagnosis meeting the above criteria.

b) At least 2 positive tests from the following categories of
diagnostic tests:

i. Trophic tests

comparative X-rays of both extremities including the distal phalanges

Triple Phase Bone Scan.

iii. Vasomotor/Temperature test-infrared Stress Thermography

iv. Sudomotor test- Autonomic Test Battery with an emphasis on QSART 10. The Claimant's treating physicians clinically diagnosed CRPS but were unable to obtain the required testing by the Respondents. The basis for the treating physician's consensus CRPS diagnosis is rooted in the classical history of a talar dome fracture, followed by surgery, followed by progressive pain, temperature changes and edema leading to the clinical diagnosis of CRPS without reliance on any particular objective testing. The testing that did occur is consistent with CRPS and, apparently, there is no other condition that describes the symptoms as found by objective testing.

10. Contrary to the DIME's opinion, the radiographic testing in this case is consistent with the diagnosis of CRPS. That testing includes a July 13, 2012 X-ray which revealed a fibular closed avulsion fracture, an August 9,2012 CT scan which revealed a 7 mm osteochondral injury to the medial talar dome, a diagnostic arthroscopy on August 28,2012 by Stephen Lindenbaum, M.D. which showed a medial talar dome lesion with a possible depressed fragment or loose body, followed by micro fracture of the talar dome, and an October 30,2012 MRI (magnetic resonance imaging) again showing a talar dome lesion along with marked tears of the peroneal tendons. Dr. Hahn also reviewed x -rays taken on September 9, 2013 and found disuse osteopenia or bone loss in the left ankle. These objective studies alone do not prove CRPS but rather are consistent with the classical history of the CRPS diagnosis.

11. Following diagnostic and therapeutic arthroscopic surgery by Dr. Lindenbaum on August 17, 2012 involving debridement of a cartilaginous injury followed by micro-fracture of the left talar dome, the Claimant suffered recalcitrant symptoms consistent with CRPS. There has been lack of improvement despite conservative care that included sympathetic block injections, opiate pain medications, non- weight-bearing, crutches and restriction from work activities begining on July 5, 2012 and continuing to the present. Because the Claimant's CRPS condition has been resistant to treatment, further studies and a more focused aggressive approach is warranted.

12. In a report dated December 19, 2012 Dr. Lindenbaum stated that before surgery most of the left ankle pain was anterior only but that after surgery [Claimant] pointed to the entire ankle from the medial around to the lateral and poster lateral malleolus as being severely painful. Dr. Lindenbaum stated that he was concerned about doing further surgery and referred the Claimant to David Hahn, M.D., a foot and ankle limb preservation specialist and orthopedic surgeon, for a second opinion.

13. On January 2, 2013 Claimant presented to David Hahn M.D., a board certified orthopedic surgeon. Dr. Hahn was provided the history following the surgery:

> "the patient was placed in a boot, did six weeks of physical therapy but did not improve. Now at this point.., about six months out from his surgery, he complains still of severe pain in his ankle joint, which has begun to radiate to the surrounding parts of his

distal leg and foot. He describes this pain as a sharp pain, sometimes nerve pain, with burning and electrical qualities to it. He also describes being quite hypersensitive to touch as well, pretty much globally in his foot, having difficulty wearing any sort of shoe or sleeping with his foot under the bed sheets at night. He complains of his foot being very cold all of time, despite his efforts to keep it warm. He also notes that there have been some color changes as well. He rates his pain as between 7-8/10. It is made slightly better with Vicodin as well as when he uses his physical therapy TENS unit" (Claimant's Exhibit 2, p. 1).

14. Dr. Hahn's physical examination on January 2, 2013 revealed moderate atrophying of the calf muscle and a left ankle that showed discoloration that envelopes his entire foot". Dr. Hahn described the left foot CRPS symptoms on that date as follows:

"the patient's foot and leg look to me very icy cold in comparison to the contralateral leg which feels normal body temperature. His passive range of motion with this ankle dorsi flexion to about neutral position with about 20 degrees of planter flexion, very minimal inversion and eversion, all limited by pain. His active range of motion is from about -5 degrees dorsi flexion 1 0 t020 degrees of plantar flexion and no inversion or eversion. His light touch sensation appears to be diminished globally below the ankle. His pulses are diminished as well. His posterior tibia pulse is 1 +. The contra lateral side is 2+. I was not able to palpate the dorsal is pedals pulse today"

He notes that he was in a fiberglass cast for approximately 6 weeks following arthroscopic surgery. Thereafter when he came out of the cast he notes that his ankle was very stiff and very difficult to mobilize. He was however able to go to physical therapy but that does not seem to have been terribly helpful to him. Because he continues to have discomfort and lack of function and mobility, he is here today.

I should note that a small osteochondral defect was noted by Dr. Lindenbaum at the surgery and

performed and this was taken care of with debridement and micro fracturing. There is also some history of a fibular fracture which sounds like an undisplaced spiral type fracture which I do not quite understand but seems to have been a problem at one point. The other issue has to do with a fairly recent MRI that showed evidence for peroneal tendinopathy which did not seem to be a problem prior to this incident.

My examination today reveals a left limb that is very cold to palpation. His right leg is nice and warm as one would expect but the left is probably' about 25 degrees cooler than the left and very noticeably so. He has discomfort to palpation of almost every area on his foot and ankle but he does not react in a hysterical manner. He has a mild amount or swelling around his lateral ankle. He has very little motion in the ankle subtalar joints themselves.

After talking to him about his situation and examining his foot and ankle I do feel that his sympathetic nervous system is not functioning appropriately and that I believe is the main cause for his symptoms. "

I also spoke on the phone with Dr. Lindenbaum about the situation and told him that I did not feel that further surgical intervention at this point was indicated. It does not seem as though the patient's ankle is locked but rather just very stiff from a combination of issues. I do think and Dr. Lindenbaum agrees that the sympatheticdystrophy issue is primary importance and that further treatment of that issue is most important and would probably achieve the greatest benefit for this most pleasant gentleman."

15. On January 16, 2013 the Claimant was referred to Rasheed Singe1ton, M.D., a pain management specialist. Dr. Singleton noted on examination that Claimant demonstrated allodynia of his left lower extremity, swelling and coldness to palpation, which are primary symptoms consistent with a diagnosis of complex regional pain syndrome. Other symptoms found by Dr. Singleton at that time consistent with CRPS included, autonomic symptoms, distal swelling, edema and a cold affected extremity with range of motion reduction and muscle strength diminishment. Dr. Singleton assessed

Complex Regional Pain Syndrome and chronic pain syndrome.

16. Dr. Singleton recommended a CRPS series of lumbar sympathetic nerve blocks and CRPS directed physical therapy for strength and conditioning of the left lower extremity. Dr. Singleton stated that Claimant had signs and symptoms of left lower extremity reflex sympathetic dystrophy. Dr. Singleton also recommended a QSART test for THE Claimant's CRPS symptoms including the swelling, edema and coldness found on exam (Respondents' Exhibit C, bate stamp 033). The QSART is a test required by the DOWC guidelines for CRPS. It measures the volume of sweat produced by stimulation. Despite confirmation by. Moshe Lewis, M.D., the Respondents declined to authorize the QSART test. (Claimant's Exhibit 7, February 28, 2013 --Report of Dr. Lewis, page 1-2).

17. At one point Dr. Singleton questioned the diagnosis of CRPS. On his last examination of August 14, 2013, however, Dr. Singelton again confirmed the diagnosis of CRPS. Dr. Singleton found on his most recent physical exam allodynia, swelling, an antalgic gait, weakness, signs of vasomotor, psuedomotor and trophic changes. These signs of vasomotor, psuedo motor and trophic changes are consistent with the DOWC treatment guidelines for CRPS (Respondents' Exhibit C, bates stamp 052).

18. On February 1, 2013 the Claimant returned to Benjamin Schnell, D.O., primary treating physician who also concurred with the diagnosis of CRPS. Dr. Schnell recommended ongoing CRPS directed physical therapy and a series of sympathetic nerve blocks. By this time, none of this was authorized by the Respondents.

19. On April 26, 2013 Dr. Schnell noted that the Claimant presents with symptoms of CRPS and a delayed recovery. It was noted that all treatment and testing for CRPS was stopped and awaiting authorization from the insurance carrier (Respondents' Exhibit H, bates stamp 185,186). The Claimant also complained that he was doing his home exercise program but that his pain was better controlled when he was active in physical therapy. The Claimant expressed that he was very discouraged and worried about his family's financial future. Thereupon, Dr. Schnell referred the Claimant to William Boyd, Ph.D., a clinical psychologist, for his depressed mood. On April 26, 2013 Dr. Schnell noted that except for medications, all treatment was cut off, including Dr. Singleton, physical therapy and additional testing. On his last visit with Dr. Singleton, April 30, 2014, Dr. Singleton again diagnosed CRPS and chronic pain syndrome finding that the Claimant's condition had not changed (Claimant's Exhibit 3 –the April 30, 2014 visit.

20. Because the treating physicians diagnosed CRPS and because the QSART test is designed to detect that condition, on March 4, 2013 Moshe Lewis, M.D., Board Certified in Physical Medicine & Rehabilitation after reviewing the records noted the following history:

> "After the surgery he has had swelling, sweating, and intense pain to the touch at the left foot and ankle .... Clinical findings on 1/24/13 show sensory deficit to pinpoint stimulation throughout
>
> L2-S1. There is allodynia in the left lower extremity with mild swelling and coldness to palpation. The claimant was seen on 2/28/13 noting that the left sympathetic ganglion block did not benefit him significantly. He has chronic pain due to CRPS which is unimproved with conservative management. Now a test for RSD is requested.
>
> REVIEW OUESTION (S):
>
> 1. Is a Qzart Test medically necessary?
>
> Yes, a Qzart Test is medically necessary.
>
> The guidelines support the use of this modality to diagnose the claimant's underlying condition. Therefore, a Qsart Test is medically necessary" (Claimant's Exhibit 7).

21. The Claimant returned to see Dr Guirquis on April 2, 2013. It was noted that the Claimant was still at baseline pain in the left ankle and a second lumbar sympathetic nerve block had been denied by the Respondents as well as physical therapy. The denial of the recommendations by an ATP was prior to a scheduled second opinion Independent medical Exam (IME) appointment. Thereafter on April 17, 2013 the Respondents sent a notice setting and IME with Neil Pitzer, M.D. for June 3, 2013 but the IME actually occurred on July 3, 2013.

22. On April 2, 2013, Dr. Guirguis examined the Claimant and found that the left foot still showed swelling and there was allodynia and that Claimant had chronic intractable chronic pain in the left ankle. Dr. Guirguis diagnosed complex regional pain syndrome and a chronic pain syndrome. Dr. Guirguis opined that chronic opioid therapy may be

continued indefinitely and that Claimant would be reassessed at regular office visits (Claimant's Exhibit 4).

23. On March 12, 2013, the Claimant underwent a comprehensive pain psychological evaluation at the request of William Boyd, Ph.D. The psychological testing of the Claimant revealed that the Claimant's somatization score was close to the average for a pain patient suggesting that he is concerned about and attentive to his health-related problems and symptoms, but somatic issues did not appear to occupy an undue amount of the Claimant's attention and that individuals with a clearly defined organic basis for pain often respond in this manner. Dr. Boyd was of the opinion that although the Claimant was cognitively and emotionally distressed by his physical symptoms, his score suggested that the Claimant has the ability to actively participate in a treatment plan for pain relief without major interference from excessive somatic thought and his level of somatic complaints should not seriously interfere with his treatment program. Dr. Boyd concluded that the Claimant suffered moderate levels of depression and anxiety in response to the stress of his chronic pain, not working and decreased functioning. Dr. Boyd diagnosed a claim related adjustment disorder with anxiety and depressed mood (Claimant's Exhibit 5).

Independent Medical Examination (IME) by Neil Pitzer, M.D.

24. Dr. Pitzer conducted two separate IMEs of the Claimant, at the behest of the Respondents. The first IME was on July 3, 2013, and the second IME on August 28, 2014. On July 3, 2013, Dr. Pitzer's exam found that even mild resistance on strength testing caused significant pain in the Claimant's left foot and ankle and that dystrophic changes were present with mild discoloration of the skin in the left distal foot and ankle area. There was2+ pitting edema to the foot with a markedly abnormal gait. Nonetheless, Dr. Pitzer was the first physician to disagree with the consensus opinion of the numerous treating physicians who diagnosed probable CRPS. Dr. Pitzer recommended anti-inflammatories and knee-high compression stockings along with aggressive pool therapy. Dr. Pitzer also recommended amitriptyline at night for sleep and follow-up with Dr. Lindenbaum to see if additional surgery would be recommended before placing Claimant at MMI. Dr. Pitzer was of the opinion that a more aggressive course of medication management, pool therapy and additional lumbar sympathetic nerve block to rule out a sympathetic component causing CRPS were medically necessary.

25. After the July 3, 2013, exam, Dr. Pitzer recommended further treatment for the Claimant including another lumbar sympathetic block,

an anti-inflammatory for joint pain and swelling, and a knee high compression stocking. He also recommended aggressive pool therapy for independent walking. Dr. Pitzer originally concluded that the Claimant did not have a picture consistent with CRPS, "as the pain is limited to the ankle and proximal foot area and does not involve the hip, knee, proximal calf or toe." The Claimant also had a negative response to lumbar sympathetic blocks and local ankle joint injection.

26. The Claimant underwent a second lumbar sympathetic block on August 23, 2013. Dr. Pitzer performed another exam and reviewed additional medical records on August 28, 2014. By this time, the Claimant had been placed at MMI by Dr. Beatty, undergone the DIME with Dr. Nagamani and an IME by Dr. Healey. Dr. Pitzer noted that the Claimant had diminished sensation from the ankle joint with some numbness along the lateral aspect of the peroneal nerve but he did not demonstrate any allodynia to light touch, no hyperalgesia to pinprick and no pain with light touch throughout the leg. There was no significant dystrophic changes of the hair, skin or nails as compared to the right foot. Dr. Pitzer's observations differ with the observations of several other physicians.

27. Dr. Pitzer noted that his exam was somewhat different than that of the Claimant's medical expert, Dr. Healey, in that Dr. Pitzer did not elicit hyperalgesia to pinprick and there was no allodynia to light touch. Dr. Pitzer again concluded that the Claimant did not meet the physical exam findings for criteria of reflex sympathetic dystrophy (RSD) or CRPS. Dr. Pitzer made the non-medical conclusion that there was a significant component of symptom magnification. Dr. Pitzer agreed with Dr. Nagamani's methodology for the impairment rating by using ankle range of motion. The opinions of Respondents' IME, Dr. Pitzer, are at odds with the consensus opinions of most other physicians, with the exception of DIME Dr. Nagamani's opinions. The ALJ makes a rational choice to accept the opinions of Dr. Healey and the other physicians who diagnosed probable CRPS, and to reject the opinions of Dr. Pitzer as not based on substantial evidence.

28. Dr. Pitzer stated that one of the reasons the Claimant's symptoms are not consistent with a CRPS diagnosis is that the Claimant's pain does not extend beyond the site of his injury. Dr. Pitzer's diagnosis was osteochondral joint pain and disuse atrophy. (Pitzer Depo. Tr. p. 19-20).

29. According to Dr. Pitzer, the Claimant is not a good candidate for a neurostimulator because the Claimant has an undiagnosed

condition (according to Dr. Pitzer). The ALJ finds this observation of Dr. Pitzer to be inconsistent with Dr. Pitzer's opinion supporting DIME Dr. Nagamani's MMI date and the statutory concept that MMI is when a **determinable** medical condition is stable. *See* §8-40-201 (11.5), C.R.S. Dr. Pitzer added that the Claimant is not likely to be a successful candidate for this procedure (Depo. Tr. p. 22). The Claimant has undergone numerous treatments thus far from at least seven separate treatment providers and nothing has relieved his pain (Depo. Tr. p. 22). Dr. Pitzer was unable to make any objective findings consistent with the diagnosis of CRPS during either of his physical exams of the Claimant (Depo. Tr. p 16).

30. When asked about the workers' compensation Medical Treatment Guidelines regarding the diagnosis of CRPS, Dr. Pitzer stated the following:

> I'm not sure that additional testing would be helpful. If we are looking at treatment of CRPS, I do not think it is going to matter in this case. You can never rule out CRPS, you can never rule it in absolutely. It is a nebulous diagnosis with vague diagnostic criteria and that is what the leading pain centers talk about, there is not a good way to rule it in or rule it out.

31. The ultimate opinions of Dr. Pitzer are not credible for the reasons herein above stated.

Additional Medical

32. On August 15, 2014, the Claimant returned to Dr. Lindenbaum, who continued to support the diagnosis of probable Reflex Sympathetic Dystrophy (RSD), recommending more aggressive treatment (Respondents' Exhibit G, bate stamp 124).

33. On August 16, 2013, the Claimant underwent an EMG nerve conduction study, interpreted by John Aschberger, M.D., who noted that there was difficulty in obtaining adequate sensory testing likely due to significant swelling of the left ankle (Respondents' Exhibit D, bate stamp 60).

34. On September 13, 2014, the Claimant presented for a physical therapy (PT) evaluation at Select Physical Therapy. The record from Select PT indicates that the Claimant developed severe stiffness and pain in the left ankle. At that time, the assessed pain level was 8/10 at worst and 6/10 at best. The Range of Motion (ROM) in the left ankle

was markedly restricted on dorsi-flexion
compared to the right. There was moderate to severe edema in the left ankle and foot with tenderness throughout. Strength testing revealed major strength deficiencies of -3/5 to the left foot compared to 5/5 on the right foot (Respondents' Exhibit S, bate stamp 370-371).

35. On September 9, 2013, the Claimant returned to Dr. Hahn who examined the Claimant and observed significant left ankle edema or fluid stiffness and pain. Claimant remained non-weight bearing and used crutches to get around. Dr. Hahn was of the opinion, after a review of x-rays taken on that date, that the Claimant suffered disuse osteopenia or bone loss in the left ankle. Dr. Hahn's continued impression was of a pain syndrome such as RSD and that the Claimant would benefit from treatment of this condition. Dr. Hahn again recommended Allison Franklin, M.D. Dr. Hahn suggested surgery to allow the Claimant to move his ankle more which would give him protection for the purpose of increasing activity levels.

36. On November 21, 2013, the Claimant underwent a functional capacity evaluation (FCE) by Christine Couch, occupational therapist. The evaluation noted that the Claimant demonstrated a consistency of 14 out of 14 tests including the standard J - Mar dynamometer testing, Rapid Grip Exchange and J-mar Maximum Voluntary Effort. Couch noted that the Claimant demonstrated consistency with the two internal consistency measures (Respondents' Exhibit 0, bate stamp 258). The testing revealed deficiencies in sitting, standing and walking without crutches which placed the Claimant and that his overall scores indicate that Claimant perceives himself below the sedentary Work group, below the 5th percentile of employed and unemployed healthy males (Respondents' Exhibit 0, bate stamp 258-262).

Impairment Rating by Brian Beatty, D.O.

37. The Claimant was seen for an impairment rating and discharge evaluation by Brian Beatty, D.O., on November 27, 2013. Dr. Beatty reviewed the records of Dr. Boyd, Dr. Hahn, Dr. Lindenbaum and Dr. Franklin. On examination, Dr. Beatty found an antalgic gain with marked restriction of motion in the left ankle demonstrated by - 10 degrees of dorsi flexion, 30 degrees plantar flexion, 10 degrees inversion and 5 degrees eversion. Dr. Beatty noted that the foot demonstrated diffuse tenderness and swelling, weakness and pain, 1 + edema. Dr. Beatty also noted that the November 21, 2013 FCE revealed that the Claimant could primarily perform seated activities and

limited lifting and carrying because of his inability to bear weight on his left foot.

38. Dr. Beatty listed a diagnosis of closed fibular fracture and provided an impairment rating using the *AMA Guides*, which included a 10 % whole person impairment due to CRPS. Dr. Beatty placed permanent restrictions of primarily seated activities with limited standing and walking. Dr. Beatty recommended that the Claimant receive maintenance medication care for one year (Claimant's Exhibit 6).

39. On follow-up on January 20, 2014, Dr. Beatty noted that the Claimant still required crutches to walk and that there continued to be ongoing swelling of the left foot which was quite cool. Dr. Beatty noted that the Claimant still required Vicodin and recommended an ongoing home exercise program.

Division Independent Medical Examination (DIME) by Kevin Nagamani, M.D.

40. On April 15, 2014, the Claimant underwent a Division Independent Medical Examination (DIME) by Kevin Nagamani, M.D. a general orthopedic surgeon. Dr. Nagamani noted that Dr. Lindenbaum and Dr. Hahn were of the opinion that there was evidence of sympathetic dysfunction in the Claimant's left ankle and that a surgical procedure was unlikely to be beneficial. .

41. Dr. Nagamani noted that a peer review report by Dr. Frank Polanko M.D., dated February 28,2013, sought approval for obtaining a QSART test for the purpose of diagnosing the sweat changes found in clinical exam that were consistent with CRPS. Although the QSART is required according to the DOWC Guidelines for CRPS, Dr. Nagamani failed to comment on the failure to authorize the QSART. Based on this failure, the ALJ infers and finds that Dr. Ngamani is not knowledgeable about the DOWC Guidelines regarding CRPS nor does he have an understanding of the significance of the QSART test.

42. Dr. Nagamani examined Claimant and found that the Claimant keeps his foot in a plantar flexed position when walking with crutches; that Claimant had only an active dorsiflexion to -5 degrees on the left with full dorsi flexion on the right. With regard to inversion and eversion; that the Claimant had only about 5 degrees of active motion. Active strength testing was diminished in all directions with give way with resisted movements, presumably due to pain. Dr.

Nagamani assessed left ankle osteochondral lesion at the talus sustained as a result of the compensable work related injury of July 4, 2012 with chronic pain and disability of the ankle. Using the *AMA Guides to Evaluation of Permanent Impairment,* 3rd Ed. Rev., Dr. Nagamani assigned a 35 % impairment of the lower extremity, and due to a normal EMG study, Dr. Nagamani rendered anionopine that no neurological dysfunction would apply. Dr. Nagamani converted the 35% impairment of the lower extremity to a 14 % whole person impairment (*See* Respondents' Exhibit A).

43. Dr. Nagamani concurred with Dr. Beatty that November 27, 2013 was the date of MMI. Dr. Nagamani indicated that it was difficult for him to establish a firm diagnosis because the Claimant did not respond to the sympathetic nerve blocks or EMG yet from a physical exam there were demonstrated signs of CRPS that certainly explains his condition today. Dr. Nagamani stated the following opinion:

> *"clearly there* is some *pain syndrome involved in claimant's condition; however I do not feel comfortable assigning a diagnosis of complex regional pain syndrome based on his poor response to sympathetic block as well as lack of objective testing to support the diagnosis* ".

44. Dr. Nagamani prescribed permanent restrictions of only sedentary work, concurring with the limitations stated in the FCE. Dr. Nagamani gave the following work restrictions: of a job that is at a minimum 80% seated with no more than 20% ambulation as appropriate with no standing or ambulating of more than 5 minutes at a time. Dr. Nagamani noted that the Claimant had responded poorly to conservative measures other than pain management.

Claimant's Independent Medical Examination (IME) by Edwin M. Healey, M.D.

45. On July 15, 2014, the Claimant underwent an IME with Edwin Healey, M.D., board certified in Occupational Medicine/Neurology and Pain Medicine, at the behest of the Claimant. Dr. Healey disagreed with the conclusions of Dr. Nagamani. In particular, Dr. Healey was of the opinion that the Claimant sustained CRPS and that the Claimant was permanently and totally disabled unless he has significant

improvement of his symptoms and function (*See* Claimant's Exhibit 1, p. 23).

46. Dr. Healey testified on October 28, 2014 and provided his twenty two page report along with Rule 17, Exhibit 7, "Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy" DOWC Medical Treatment Guidelines, and an article entitled "Demystifying CRPS: What Clinicians Need to Know", all of which were admitted into evidence. Dr. Healey noted that Claimant's medical findings met all the requirements of the DOWC Guidelines stating that Claimant meets the requirements of the DOWC Medical Treatment Guidelines as follows:

> "The requirements of the DOWC at the time of evaluation include the following: Sensory evidence of hyperalgesia to pinprick and/ or allodynia to light touch or deep somatic pressure and joint movement; he meets these criteria; vasomotor evidence of temperature asymmetry and/ or skin color changes and symmetry; pseudo motor edema; evidence of edema and/or sweating changes or sweating asymmetry; motor or trophic changes including evidence of decreased range of motion and motor dysfunction with weakness and, finally, no other diagnosis that would better explain the signs and symptoms." (*See* Claimant's Exhibit 1 p. 20).

Dr. Healey is of the opinion that the Claimant meets all four criteria as documented by various medical providers during his clinical course.

47. Dr. Healey states that there is no definitive test that exists for CRPS. The diagnosis must be made by exclusion (Claimant's Exhibit 1, p. 20). The hallmark of diagnosis is thorough clinical evaluation of symptoms and signs. Testing, however, including EMG or nerve conduction testing to rule out peripheral neuropathy; MRI and x-rays to identify soft tissue trauma or bone disorders can be helpful; pseudo-motor testing such as QSART to assess resting and provoked sweat output of the painful versus unaffected limbs may indicate abnormal sympathetic activity (disturbances in blood flow). QSART is also helpful in identifying allodynia which is a symptom

common to CRPS and which was consistently found on the examinations of the various treating physicians in this case (*See* article, "Demystigying CRPS", Claimant's Exhibit 1, p. 52)

48. Dr. Healey is of the opinion that under diagnostic components needed to confirm CRPS, that even though the medical treatment guidelines require specific positive testing, that the consensus of the academic pain community is that CRPS is a clinical diagnosis rather than dependent on specific tests as required by the DOWC. Every single treating physician in this case diagnosed Claimant as suffering from an industrial accident causing CRPS. Those physicians include Dr. Schnell, Dr. Beatty, Dr. Singleton, Dr. Lindenbaum and Dr. Hahn. Even the insurance carrier's peer review pain expert, Dr. Moshe Lewis, agreed a QSART test was medically necessary for Claimants CRPS. Dr. Lewis stated: "The claimant was seen on 2/28/2013 noting that the left sympathetic ganglion block did not benefit him significantly. He has chronic pain due to CRPS which is unimproved with conservative management. Now a test for RSD is requested.

49. With respect to diagnostic testing, Dr. Healey states:

> "In regards to testing, it is required that tropic tests including comparative x-rays of both extremities including distal phalanges or a triple-phase bone scan be done. Neither of these tests have been done: however, the x-rays of his left ankle indicates osteoporosis. Other testing includes a vasomotortemperature test with infrared stress thermography. This has never been done by any of this treating physicians. Another test, recommended by the peer review consultant for the insurance company, was a pseudo motor test with autonomic battery with emphasis on QSART; that test has never been performed" (Claimant's Exhibit 1, p. 20).

50. Dr. Healey commented on the Claimant's negative responses to the sympathetic blocks as follows:

> "There is no statement regarding sympathetic blockade. It should be noted that not all people who have complex regional pain syndrome do respond to sympathetic blockade. This is well known, again,

in the pain community. Therefore, the fact that he did not have significant pain relief with sympathetic nerve blocks does not rule out the diagnosis of complex regional pain syndrome". Also see article "Demystifying CRPS: What Clinicians Should Know", page 53, where a study found only one-third of patients undergoing sympathetic nerve blocks obtained complete relief of symptoms" (Claimant's Exhibit 1).

51. Rather, Dr. Healey supported the diagnosis of CRPS as a clinical diagnosis that had all the signs and symptoms from all the visits to the treating physicians. In this regard Dr Healey states the following opinion:

> "[Claimant] presents with a classical history of complex regional pain syndrome with a talar dome fracture, followed by surgery, followed by progressive pain, temperature changes and edema. His initial treating physicians opined that his problem was probably complex regional pain syndrome. This has been questioned by Dr. Pitzer, and at one point by Dr. Singleton; however, in his last notes Dr. Singleton continues to maintain that [Claimant] has complex regional pain syndrome and I concur with his opinion" (Claimant's Exhibit 1, p. 20).

52. Dr. Healey's physical exam included:

> "Examination of the left ankle and foot reveals 1 + edema. There is a noticeable difference in temperature between his left ankle and foot and his right ankle and foot in that his left foot and ankle are extra ice cold to palpation. Even light palpation of his left ankle and foot causes complaints of severe pain and withdrawal. He notes decreased light touch, but there is hyperalgesia with pinprick testing involving the left ankle and left foot up to the medial malleolus and lateral malleolus. Motor testing is not possible due to the fact that any attempt to bear weight or heel or toe walk he is not able to perform due to complaints of stiffness and pain in his left ankle. The pain elicited on palpation

is diffuse and involves the medial lateral and dorsal ankle and plantar foot. He has markedly decreased range of motion of his left ankle, with 5 degrees of dorsi flexion, 10 degrees of plantar flexion, 3 degrees of eversion and inversion."

53. Dr. Healey diagnosed: "complex regional pain syndrome type 1, rule out central sensitization pain syndrome" (Claimant's Exhibit 1, p. 20).

54. Dr. Healey asserts that the Claimant's CRPS has been:

" recalcitrant to treatment, including sympathetic nerve blocks and medications which he has had difficulty tolerating. He has undergone psychological counseling but continues to be depressed and anxious over his chronic, severe, unrelenting pain that interferes with essentially all activities and precludes him from being able to return to work to support his family."

55. With respect to Dr. Nagamani's DIME opinion, Dr. Healey states:

"Dr. Nagamani, appeared to equivocate in his report as to whether or not [Claimant] had complex regional pain syndrome but had no other explanation for it, and he notes that he had a normal

EMG/nerve conduction velocity, which is not uncommon with complex regional pain syndrome since the pain fibers, the A -delta and unmyelinated C fibers are small fibers and frequently will not be positive with an EMG/ nerve conduction velocity test; therefore, it is irrelevant whether or not he had a positive EMG/ nerve conduction velocity test of his left lower extremity for making the diagnosis of complex regional pain syndrome."

56. Dr. Healey questions Dr. Nagamani's familiarity with the DOWC CRPS diagnostic guidelines. As Dr. Healey states in his report:

There is not documentation or evidence of

> familiarity by Dr. Nagamani with DOWC CRPS diagnostic guidelines which include a triple-phase bone scan, x-rays, infrared stress thermography and pseudo motor Qsart testing, which are additional tests required in order to make the diagnosis. Therefore, I do not find Dr. Naganami's opinion credible because he does not appear in his report to have in-depth knowledge of complex regional pain syndrome or the medical treatment guidelines promulgated by the Division of Workers' Compensation on complex regional pain syndrome. It should be noted that lumbar sympathetic nerve blocks are not part of the required diagnostic criteria promulgated by the Division of Worker's Compensation, and this appears to be one of the major reasons that Dr. Nagamani did not agree with the treating physicians that [Claimant] has complex regional pain syndrome."

57. For the treatment of Claimant's CRPS, Dr. Healey recommended a trial of spinal cord stimulation for his left lower extremity CRPS as well as aggressive treatment of his chronic pain with opioids, which [Claimant] may need indefinitely. In addition Claimant is having problems with depression. Dr. Healey recommends anti-depressants and ongoing psychological counseling concurring with Dr. Singletons' recommendation for additional physical therapy and water therapy.

58. Dr. Healey also is of the opinion that the Claimant may have a chronic centralized pain disorder as described on page 5 under C. Introduction to Chronic Pain in Rule 17, Exhibit 9, DOWC Chronic Pain Disorder Medical Treatment Guidelines. Central pain is recalcitrant to treatment but may be significantly improved with high dose opioid medication.

59. Regarding Impairment, Dr. Healey is of the opinion that the Claimant is not at MMI. Dr. Healey states that the Claimant can stand and walk only on level surface using a crutch without bearing weight on left lower extremity. Dr. Healey concluded that under the facts of this case as follows:

The Claimant's Testimony

60. The Claimant testified at the hearing of October 28, 2014. He that he has not been able to walk without crutches since the date of the initial injury, despite the treatment offered herein. He is severely limited in his ability to bend, stoop, or pick anything up anything off the floor because he cannot stand on his left foot and cannot balance on his right foot. He can stand for approximately 4-5 minutes before needing to sit for approximately 15 minutes, at which time, he can stand again. After walking a short distance, the Claimant needs to sit and rest for approximately 15 minutes to give his aching left shoulder and right knee a break, at which time he can get back up and walk. He can't kneel or crouch or twist while using his crutches. He can drive for approximately half an hour before needing to take a fifteen minute break. In addition, The Claimant feels constant, severe pain in his left ankle which swells and freezes up. Claimant has very little range of motion in his left ankle and has trouble moving it. The ALJ finds the Claimant's testimony credible and un-refuted.

61. The Claimant testified to his daily routine. He has three children that he takes and picks up from school. With the assistance of his wife and his children, and because he is able to take breaks and sit as needed, he is able to help his children get snacks, do their homework and get ready for bed. When his pre-school child takes a nap in the middle of the day, he gets on coloradojobdepartment.com web site and searches for work. He has trouble playing with his children and can't do anything that requires putting pressure on his left foot. Claimant is not unemployed because he isn't motivated to take care of his family, he is unemployed because he has a severely painful CRPS condition which completely disables him from regular employment.

Ultimate Findings

62. The ALJ finds the Claimant's presentation and testimony credible, contrary to Respondents' IME Dr. Pitzer's psychological opinions. Further, the ALJ finds the opinions of all the physicians who indicate that the Claimant probably has CRPS and that a QSART Test is warranted are more credible than the opinions of Dr. Pitzer and DIME Dr. Nagamani.

63. Between conflicting medical opinions, the ALJ accepts the opinions of Dr. Healey and the other physicians who indicate that the Claimant may have CRPS and rejects the opinions of Respondents' IME Dr. Pitzer and DIME Dr. Nagamani. It is insufficient, however, to simply reject DIME Dr. Nagamani's opinion on MMI. It must be shown that it is highly probable, unmistakable and free from serious and substantial doubt that Dr.

Nagamani's opinions are erroneous.

64. Dr. Nagamani, the DIME physician, misdiagnosed the underlying medical condition of the Claimant when he failed to assign the diagnosis of CRPS disorder to this case. Dr. Nagamani's report itself demonstrates that the he was unfamiliar with both the diagnosis and treatment of CRPS but also the DOWC CRPS Medical Treatment Guidelines. The basis of his opinion was either the lack of response to EMG testing or sympathetic block injections, both tests which cannot rule out CRPS. The one test that was required by the DOWC Guidelines, the QSART, was never addressed in the DIME's report, even though the Respondents' own peer review expert, Dr. Lewis, agreed that this test should be performed. As Dr. Healey stated, Dr. Nagamani's opinion lacks credibility because he did not appear, in his report, to have an in-depth knowledge of CRPS or the Medical Treatment Guidelines promulgated by the DOWC. For example, even though Dr. Nagamani stated that the Claimant clearly had the signs and symptoms of CRPS, he did not feel comfortable in assigning an impairment rating because of the lack of positive response to the sympathetic nerve blocks and any objective testing. This statement reveals that Dr. Nagamani's opinion is not based on substantial evidence and that it is clearly erroneous. Additionally, Dr. Nagamani did not mention the objective tests required by the DOWC Guidelines.

65. As found, herein above, the Claimant has proven that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Nagamani's opinion that the Claimant reached MMI on November 27, 2013 is erroneous. As Dr. Healey observed, Dr. Nagamani ignored accepted tests for CRPS, including the QSART Test.

66. The issues of medical benefits, AWW and temporary disability benefits were **not** designated as issues. Therefore, the Respondents had not received advance notice of these issues. Thus, they were not afforded a meaningful opportunity to be heard on these issues at the October 28, 2014 hearing.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's presentation and testimony was credible, contrary to Respondents' IME's, Dr. Pitzer's,

credibility opinions. Further, the opinions of all the physicians who indicated that the Claimant probably has CRPS, and that a QSART Test is warranted, are more credible than the opinions of Dr. Pitzer and DIME Dr. Nagamani.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ accepted the opinions of Dr. Healey and the other physicians who indicated that the Claimant may have CRPS and rejected the opinions of Respondents' IME Dr. Pitzer and DIME Dr. Nagamani. It is insufficient, however, to simply reject DIME Dr. Nagamani's opinion on MMI. It must be shown that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Nagamani's opinions are erroneous.

Maximum Medical Improvement (MMI)

c. MMI is defined as the point in time when any medically **determinable** physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment. As found, the QSART test was recommended to definitively determine if the Claimant has CRPS and, thus, what a proper course of treatment for it would be. *See*

In the Matter of the Claim of William Soto, Claimant, W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. .As found, the Claimant has overcome DIME Dr. Nagamani's opinion that the Claimant is at MMI.

Overcoming the DIME of Dr. Nagamani

d. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Dr. Nagamani, the DIME physician, misdiagnosed the underlying medical condition of the Claimant when he failed to assign the diagnosis of probable CRPS disorder to this case. Dr. Nagamani's report itself

demonstrates that the he was unfamiliar with both the diagnosis and treatment of CRPS but also the DOWC CRPS Medical Treatment Guidelines. As found, the basis of his opinion was either the lack of response to EMG testing or sympathetic block injections, both tests which cannot rule out CRPS. The one test that was required by the DOWC Guidelines, the QSART, was never addressed in the DIME's report, even though the Respondents' own peer review expert, Dr. Lewis, agreed that this test should be performed. As Dr. Healey stated, Dr. Nagamani's opinion lacked credibility because he did not appear in his report to have an in-depth knowledge of CRPS or the Medical Treatment Guidelines promulgated by the DOWC. For example, even though Dr. Nagamani stated that the Claimant clearly had the signs and symptoms of CRPS, he did not feel comfortable in assigning an impairment rating because of the lack of positive response to the sympathetic nerve blocks and any objective testing. This statement reveals that Dr. Nagamani's opinion is not based on substantial evidence and that it is clearly erroneous. Additionally, Dr. Nagamani did not mention the objective tests required by the DOWC Guidelines.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has overcome the Division Independent Medical Examiner's (Kevin Nagamani, M.D.) opinion that the Claimant reached maximum medical improvement on November 27, 2013, by clear and convincing evidence.

B. The Claimant has not yet reached maximum medical improvement.

C. Any and all issues not determined herein, including medical benefits, average weekly wage and temporary disability, are reserved for future decision.

DATED this 29 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of the portion of a proposed decision concerning compensability to counsel for the Claimant to be submitted, electronically, within 5 working days, giving counsel for the Respondents 2 working days after receipt thereof to file electronic objections as to form. The ALJ referred the portion of the proposed decision concerning penalties to counsel for the Respondents to be filed , electronically, within 5 working days, giving Claimant's counsel 2 working days within which to file objections. The portion of the proposed decision concerning compensability was filed on January 13, 2015. The portion concerning penalties was filed, electronically, on the same date. No timely objections were filed by either party. After a consideration of the two portions of the proposed decision, the ALJ has synthesized and modified them and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability of injuries sustained in an automobile accident on October 7, 2013, specifically, were the injuries sustained as a result of the motor vehicle accident (MVA) in the course and scope of employment and arising out of employment; medical benefits; and, penalties versus the Respondents, pursuant to § 8-43-304(1), C.R.S., because the insurance carrier allegedly did not file a timely Notice of Contest for alleged failure to timely admit or contest liability.

At the conclusion of the Claimant's case-in-chief, the Respondents moved for judgment in the nature of a directed verdict. After hearing the arguments of counsel, the ALJ granted the Respondents' motion for judgment in the nature of a directed verdict.

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

FINDINGS OF FACT

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

General Finding

1. The parties stipulated and the ALJ finds that the Claimant's average weekly wage (AWW) is $703.03.

Compensability –The Claimant's Job Duties

2. The Claimant worked as a Regional Supervisor for the Employer and supervised five branches in Colorado and three branches in Utah.

3. The Employer provided the Claimant with a company vehicle to travel to each branch and the Employer paid for the vehicle and the gasoline. The Employer also provided the Claimant with a company cell phone.

4. The Claimant was paid a salary and did not need to clock in and out of work. She was expected to be available to take care of any issues that arose with any of the branches, such as if the security alarm went off, if a computer went down at a branch, or if an employee called in sick.

5. The Claimant's job duties included, hiring and firing associates for each branch, setting up the associates schedules, training new associates, and traveling daily to the branches to provide them with supplies.

6. The Claimant has a work office set up at her home with a computer to address work issues throughout the day. The Claimant also keeps work supplies at her home to distribute to the different branches that need supplies.

7. The Claimant's regular schedule is to wake up in the morning and to check her cell phone, from home, to determine if she has received any emails or phone calls from work to which she would needed to respond. The Claimant is responsible to make sure that all the employees at each branch are working, or to get another employee to cover the shift, if needed. She is expected to check the security emails to make sure each branch has opened. Then the Claimant is expected to drive to each branch to supervise, train the associates, and bring them any supplies they need.

8. As part of her job duties, the Claimant was suppose to travel to five Colorado branches and three Utah branches to bring work supplies, to train associates and to cover shifts when associates were sick. On October 7, 2013, when she was involved in the car accident, she was traveling to the Commerce City branch to cover a shift.

Compensability – The Injury Incident

9. On October 7, 2013, the Claimant woke up around 6:30 or 7 AM and picked up her cell phone and responded to work emails. Her plan that day was to drive to the Aurora branch which was located at 1450 Havana Street in Aurora, Colorado to drop off supplies for the branch, and then drive to the Commerce City branch to cover a shift.

10. While heading north on I-225, toward the Aurora branch, the Claimant changed her mind and remembered she had already gone to the Aurora Branch on October 4, 2013, so she did not need to go to that branch that day. Therefore, she stayed on northbound I-225, in order to head to the Commerce City branch which was located at 5640 East 64th Avenue, Commerce City, Colorado.

11. While on northbound I-225, the Claimant was trying to get onto westbound I-70, to head to the Commerce City branch, when she was hit by a semi-truck (T-boned) [Claimant's Ex. 7 pp. 17-18].

12. At the time of impact, the airbags erupted and the Claimant hit her head, neck, left shoulder, left arm, back, and left leg.

13. The Claimant was given a company cell phone, and on the morning of October 7, 2013 she checked her work emails and voice messages, and responded to work emails from home. The Claimant then, got into the company provided vehicle, and planned to take supplies to the Aurora branch. As she was driving, she changed her mind and decided to drive to the Commerce City branch to cover a shift when she was involved in a car accident injuring her head, neck, left shoulder, arm, back and left leg. Therefore, her official work duties began that morning at home.

Medical –Emergent Care

14. The Claimant was taken by ambulance with Rural/Metro of Central Colorado, to the University of Colorado Hospital (Claimant's Ex. 8 p. 30).

15. On October 7, 2013, Michael C. Overbeck, M.D., at the University of Colorado Hospital noted that the Claimant was in a motor vehicle collision and had pain in her head, neck and left hip. On physical examination, he noted positive for neck pain, back pain, laceration on her head and left arm and left leg pain (Claimant's Ex. 11 pp. 79-80).

16. On October 7, 2013, Dr. Overbeck recommended an x-ray of the Claimant's cervical spine, pain management and laceration repair (Claimant's Ex. 11 p. 95).

17. On October 7, 2013, Jeremy Voros, M.D., a resident at the University of Colorado Hospital, recommended for the Claimant to be off of work for three days (Claimant's Ex. 11, p. 96).

18. On October 7, 2013, the Claimant called and reported the injury to her supervisor, Jose Estrada, who is the Regional Director.

19. On October 9, 2013, Dr. Overbeck, performed a laceration repair at the University of Colorado Hospital (Claimant's Ex. 11, p. 103).

20 On October 11, 2013, Dr. Ryan, a resident at the University of Colorado Hospital, removed the sutures from the laceration (Claimant's Ex. 11, p. 114).

Medical –Authorization and Treatment

21. The Employer referred the Claimant to Concentra.

22. On October 11, 2013, Robert J. Dixon, M.D., at Concentra, who became the Claimant's authorized treating physician (ATP), noted that the Claimant was in a motor vehicle accident and she hit her left forehead, left chest and has pain in her neck, left shoulder, left arm and lower back. He noted on physical exam that she had tenderness in her neck, thoracic area, lumbar area, and left upper arm. (Claimant's Ex. 13 pp. 123-124)

23. On October 11, 2013, Dr. Dixon recommended a CT scan of the Claimant's head, physical therapy (PT) of her neck and back, and he assessed that it was "Greater than 50% likely work related" (Claimant's Ex. 13 p. 125). The ALJ infers and finds that Dr. Dixon has expressed an opinion that to a reasonable degree of probability that the Claimant's injury was work-related. Nonetheless, the determination of compensability rests on the Claimant's job duties as of the time of the accident and the fact that she had entered into the course and scope of employment as of the time she left home. Therefore, the Claimant's was not "going to" work (outside the course and scope). She was already working at the time of the accident.

24. On October 11, 2013, Dr. Dixon recommended no lifting over 10 pounds, and no pushing and/or pulling over 20 pounds (Claimant's Ex. 13 p. 126).

25. The Claimant received PT and Dr. Dixon referred her to Alison Fall, M.D., for further medical treatment.

26. On March 24, 2014, Dr. Fall noted that the Claimant was at maximum medical improvement (MMI) and gave her a zero percent impairment rating (Claimant's Ex. 15, p. 245).

27. On December 10, 2014, John S. Hughes, M.D., performed an independent medical examination (IME) at the Claimant's behest, and he was of the opinion that the Claimant injured her head, chest, neck, upper back and lower back in the MVA, and he recommended that the Claimant needed a non-contrast MRI (magnetic resonance imaging) of her cervical and thoracic spine regions (Claimant's Ex. 16 p. 249).

Penalties

28. After the MVA, the insurance carrier promptly and continually paid for the Claimant's medical treatment as a result of the MVA up to and including the April 25, 2014 date of MMI. The Claimant was placed at MMI on April 25, 2014 by John Burris, M.D., and was discharged from care with no permanent impairment, no work restrictions, and no medical maintenance care recommended.

29. As a result of her injuries, the Claimant only missed three days of work for which she was paid in full by Employer: October 7, 8, and 9, 2013.

30. On June 2, 2014, the Claimant's counsel, Ms. McClure, completed a Worker's Claim for Compensation on behalf of the Claimant, which was then entered by the Division of Workers' Compensation (hereinafter "DOWC") on June 9, 2014.

31. At the hearing, the Claimant alleged that the insurance carrier was required to either admit or deny liability within twenty days of the filing of the Workers' Claim for Compensation pursuant to § 8-43-203(1) (a), C.R.S. On August 7, 2014, Paul Tauriello, Director of the DOWC, issued an Order requiring the insurance carrier to submit an Admission of Liability or Notice of Contest within fifteen days of the date his Order was mailed. The Respondents timely filed a Notice of Contest on August 19, 2014, pursuant to Director Tauriello's Order. Apparently, the Claimant's theory is that Director Tauriello' order retroactively bootstrapped an obligation for the respondents to admit or contest in the past tense. This theory is rejected by the ALJ.

32. In her August 6, 2014, Application for Hearing, the Claimant endorsed § 8-43-304(1), C.R.S., as the applicable penalty provision, seeking penalties of up to $1,000 per day from the time the admission/denial was allegedly due to when the admission/denial was filed.

33. After the Claimant rested her case-in-chief, the Respondents moved for a ruling in the nature of a directed verdict on the issue of penalties.

Ultimate Findings

34. The Claimant presented and testified credibly. Specifically, the ALJ finds the Claimant credible when she testified at hearing that she was heading to the Aurora office but changed her mind and diverted to start heading to the Commerce City Office by starting to get onto the ramp from I-225 to I-70, where the MVA occurred.

35. The Claimant's has proven, by a preponderance of the evidence that the MVA of October 7, 2013 was in the course and scope of her employment and arose out of it. Therefore, the Claimant sustained compensable injuries as a result of the MVA. Travelling from branch to branch was contemplated by the implicit contract of the

Claimant's employment. Also, going from branch to branch created a "special zone of danger," as opposed to merely going from home to the office.

36. The Claimant has proven, by preponderant evidence that all of her medical care and treatment was authorized, within the chain of authorized referrals, of an emergent nature, causally related to the injuries sustained in the MVA and reasonably necessary to cure and relieve the effects thereof. The medical causality opinions are undisputed.

37. As an academic matter at this point in time, the Claimant's AWW is $703.03.

38. The Claimant failed to prove, by a preponderance of the evidence entitlement to penalties against the respondents for alleged failure to timely admit or contest because the Claimant was temporarily disabled for three (3) days or less, and the Respondents were not legally obliged to admit or contest. As found, the Respondents paid medical benefits without taking a position, which they were allowed to do under the Workers Compensation Act (hereinafter the "Act").

CONCLUSIONS OF LAW

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

Credibility

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

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the medical causality opinions are, essentially, undisputed. As further found, the Claimant was credible in her testimony concerning the nature of her job duties, and her testimony in this regard was, essentially undisputed. Consequently, the Claimant's testimony supports the fact that her MVA was in the course and scope of her employment and arose out of it. Therefore, it supports compensability of her injuries.

Compensability

b. The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n of Colorado v. Jones,* 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra.* As found, the Claimant's injuries arose out of and were within the course and scope of her employment.

c. Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). As found, the Claimant's MVA necessitated medical treatment. Therefore, her injuries were sufficient to be compensable.

d. The general rule is that injuries sustained by employees going to and from work are not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 212 (Colo. 1967). An exception to this general rule exists when "special circumstances" create a causal relationship between the employment and the travel, beyond the sole fact of the employee's arrival at work. *Madden v. Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). The courts have listed four factors which are relevant in determining whether "special circumstances" have been established which create an exception to the "going to and coming from" rule. The factors are:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Madden v. Mountain West Fabricators, *id.* As found, travel was contemplated by the Claimant's implicit employment contract. The Claimant's travel on October 7, 2013 was at the Employer's express or implied request and such travel conferred a benefit on the Employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Indus. Comm'n,* 154 Colo. 491, 391 P.2d 677 (1964). As found, the Claimant was given a company cell phone, and on the morning of October 7, 2013 she checked her work emails and voice messages, and responded to work emails from home. The claimant then, got into the company provided vehicle, and planned to take supplies to the Aurora branch. As she was driving, she changed her mind and decided to drive to the Commerce City branch to cover a shift when she was involved in a car accident injuring her head, neck, left shoulder, arm, back and left leg. Therefore, her official work duties began that morning and it is found she was within the course and scope of employment when she was involved in the MVA. The Claimant's travel to the different branches was contemplated by her employment contract and a substantial part of the service to the Employer. As part of her job duties, the claimant was suppose to travel to five Colorado branches and three Utah branches to bring work supplies, to train associates and to cover shifts when associates were sick. On October 7, 2013, when she was involved in the car accident, the claimant was traveling to the Commerce City branch to cover a shift. Claims have been deemed compensable when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Indus. Comm'n*, 154 Colo. 491, 495, 391 P.2d 677, 679 (1964) [holding that when an employee uses his own car to perform services for or at the direction of his employer, the employee remains in the course of his employment until he returns home].

e. Furthermore, as found, the Employer provided the company vehicle and also paid for the gasoline. Claims have also been compensable when the employer provides

transportation or pays the cost of the employee's travel to and from work. *See Indus. Comm'n v. Lavach*, 439 P.2d 359 (Colo. App. 1968). As ultimately found, the Claimant has prove that she was within the course and scope of employment on October 7, 2013 when she was involved in the car accident injuring her head, neck, left shoulder, arm, back and left leg.

Medical

f. As found, the claimant went to the ER at the University of Colorado Hospital where Dr. Overbeck recommended x-rays, pain management, laceration repair and she was put off of work for three days. § 8-42-101(1) (a), C.R.S., provides:

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

g. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the ambulance and ER at the University of Colorado Hospital was emergent care, exempt from the specific medical authorization requirements.

h. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to her injuries sustained in the MVA of October 7, 2013. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment as reflected in the evidence was and is reasonably necessary.

i. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all of the Claimant's medical care and treatment for the injuries sustained in the MVA of October 7, 2013 was within the authorized chain of referrals.

Average Weekly Wage (AWW)

j. It was stipulated and found that the Claimant's AWW is $703.03.

Penalties

k. When a tribunal is the trier of fact, a motion for a "directed verdict" is actually a motion to dismiss pursuant to C.R.C.P. 41(b). *Campbell v. Commercial Credit Plan, Inc.*, 670 P.2d 813 (Colo. App. 1983). Under C.R.C.P. 41(b) (1), after a plaintiff in a civil action tried without a jury has completed the presentation of the evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. *Romero v. Tristar Drywall, Inc.*, W.C. No. 4-745-833 [Indus. Claim Appeals Office (ICAO), May 24, 2010]. A motion for a directed verdict is an appropriate procedural step to test the sufficiency of a party's case in a workers' compensation proceeding. *Romero v. Tristar Drywall, Inc.*, *supra*; *see also* Office of Administrative Courts (OACRP), Rule 2 (B), 1 CCR 104-1 (stating the Colorado Rules of Civil Procedure apply to Workers' Compensation hearings unless they are inconsistent with these rules and the provisions of the Workers' Compensation Act). The tribunal is not required to view the evidence in the light most favorable to the plaintiff. *Rowe v. Bowers*, 417 P.2d 503 (Colo. 1966); *Blea v. Deluxe/Current, Inc.*, W.C. Nos. 3-940-062, 4-279-268 (ICAO, June 18, 1997) [applying these principles to workers' compensation proceedings]. Rather, the test is whether in light of all the evidence, judgment should be entered for the movant. *Smith v. Weindrop,* 833 P.2d 856 (Colo. App. 1992); *Campbell v. Commercial Credit Plan, Inc.*, *supra*; *Blea v. Deluxe/Current, Inc.*, *supra.* As found, the Claimant's evidence could not get any better as of the conclusion of her case-in-chief and she had not established entitlement to penalties by a preponderance of the evidence. Therefore, it was appropriate to grant the Respondents Motion for Judgment in the nature of a Directed Verdict on the issue of penalties for alleged failure to timely admit or contest.

l. Penalties under § 8-43-304 (1), C.R.S. can be assessed for violations of the Colorado Workers' Compensation Act ("the Act") where there is no other penalty provision provided or for violating a Director's Order. The statute provides:

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent

> jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense.

§ 8-43-304(1), C.R.S. is not a legal remedy available to a claimant. If penalties were available to the Claimant, they would be limited to § 8-43-203(1) (a), C.R.S.

As found, the Claimant requested that the ALJ grant her an award of penalties under § 8-43-304 (1), C.R.S., for the insurance carrier's alleged late filing of a Notice of Contest. Nevertheless, § 8-43-203 (1) (a) and § 8-43-203 (2) (a), C.R.S., establish the only penalty provision that could be applicable. Because the Claimant is not legally entitled to relief under the statute she cited, no relief should be granted. Nonetheless, if the Claimant had sought penalties under the correct statute, § 8-43-203 (2) (a), C.R.S., she would not be entitled to relief because she was never entitled to disability benefits, and Respondents timely filed its Notice of Contest in response to the Director's Order.

m. Under § 8-43-101, C.R.S, certain types of injuries must be specifically reported to the DOWC . § 8-43-101(2), C.R.S states:

> [I]njuries to employees that result in no more than three days' or three shifts' loss of time from work, or no permanent physical impairment, or no fatality to the employee shall be reported by the employer only to the insurer of said employer's workers' compensation insurance liability, which injuries and exposure the insurer shall report only by monthly summary form to or as otherwise requested by the division.

Indeed, an employer or carrier may pay medical benefits without admitting or contesting if three (3) days or less time off work is involved. The duty to admit or deny liability does not arise under the statute until the insurer has obtained knowledge that would reasonably lead it to believe that a claimant sustained an injury resulting in **more than three days of lost time**, if there is evidence of permanency, or in the event of a fatality. Workers Compensation Rules of Procedure (WCRP), Rule 5-2 (B), 7 CCR 1101-3; *Palmer v. Borders Group, Inc.*, W.C. Nos. 4-751-397; 4-723-172 (ICAO, Nov. 28, 2008). Additionally, disability indemnity benefits are not recoverable in all cases where an employee misses time from work. *See* § 8-42-103 (1) (a), C.R.S. That section provides, "If the period of disability does not last **longer than three days** (emphasis supplied) from the day the employee leaves work as a result of the injury, no disability indemnity shall be recoverable except the disbursement provided in articles 40 to 47 of this title for medical, surgical, nursing, and hospital services, apparatus, and supplies. . . ." § 8-42-103 (1) (a), C.R.S. As found, the Claimant missed only three days from work—not more than three days. She sought no temporary disability benefits. Additionally, the insurance carrier had no obligation to file an admission of liability or a notice of contest with the DOWC because none of the scenarios requiring an insurer to submit a filing existed. *See* § 8-43-101 (1)-(2), C.R.S; *see also* § 8-43-203 (1) (a),

C.R.S. The carrier, however, filed a timely the Notice of Contest after the Director's Order was issued. Though the Director issued an Order requiring a position statement, Claimant's injuries carried no reporting requirement. *See* § 8-43-101 (2), C.R.S. Regardless of whether the insurance carrier filed a Notice of Contest on August 19, 2014 when Claimant alleges it was due on June 29, 2014, an obligation to file earlier did not exist because the Claimant was being treated under a medical-only claim.

n. When construing the Act, an ALJ's goal is to effectuate the intent of the General Assembly, and it is the General Assembly's intent that the Act be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without resorting to litigation. § 8-40-102 (1), C.R.S.; *Dillard. v. Indus. Claim Appeals Office*, 134 P.3d 407 (Colo. 2006). The insurance carrier herein promptly and efficiently paid the Claimant's medical benefits as a result of the MVA and did so up until she was discharged at MMI by an ATP, Dr. Fall. Forcing the insurance carrier to file an admission of liability or notice of contest in a medical-only claim when disability was not at issue would be at odds with the General Assembly's intent and could tend to hinder the Claimant's receipt of medical care. Taken to its logical end, the Claimant's argument that the insurance carrier was required to file a Notice of Contest in a medical-only claim would have forced the carrier to take a position on compensability early on, which may have delayed the Claimant's treatment and forced litigation.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's injuries, sustained in the motor vehicle accident of October 7, 2013, subject to the Division of Workers Compensation medical Fee Schedule.

B. The Claimant's average weekly wage is $703.03.

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

DATED this 16 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

Exhibit B was rejected. Otherwise, the remainders of Exhibits A through C were admitted into evidence without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief to be filed, electronically, within 5 working days; Respondents' answer brief to be filed, electronically, within 5 working days of the opening brief; and, the Claimant's reply brief to be filed within 2 working days of the answer brief. On December 18, 2014, the Claimant filed a document labeled (Findings of Fact, Conclusions of Law and Order." On December 30, 2014, the ALJ entered a procedural order indicating that the Claimant's document would be construed as an opening brief. On December 30, 2014, the Respondents filed a document labeled "Respondents' Proposed Findings of Fact, Conclusions of Law and Order." The ALJ will construe this document as the Respondents' answer brief. No timely reply brief was filed. The ALJ is uncertain about what the parties do not understand about "briefs." In light of the fact that the ALJ has not yet decided the case, it would seem to be presumptuous to offer the ALJ proposed decisions at this juncture.

ISSUES

The issues to be determined by this decision concern whether the Claimant suffered compensable injuries on May 28, 2014, specifically, among other things, alleged mental injuries resulting from the physical injuries, or mental injuries resulting from work-related mental trauma, during the course and scope of his employment; if so, whether Claimant has established that he is entitled to reasonably necessary medical benefits, causally related to his May 28, 2014 injuries;. if so, whether selection of the authorized medical provider passed to the Claimant; and, if so, whether the Claimant is entitled to temporary disability temporary total disability (TTD) benefits from August 4, 2014 and continuing until terminated by law, in addition to TTD and temporary partial disability (TPD) benefits for the periods stipulated. The Claimant bears the burden of proof, by a preponderance of the evidence on the above stated issues.

The Respondents raised the affirmative defense that the Claimant was "responsible for his termination," effective June 6, 2014, with the Respondents asserting that the Claimant is barred from further temporary disability benefits, effective June 7, 2014. The Respondents bear the burden of proof, by preponderant evidence of this issue.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds, that, if the claim is compensable, the Claimant's average weekly wage (AWW) is $443.21. The ALJ finds that this AWW results in a TTD benefit rate of $295.47 per week, or $42.21 per day.

2. The parties further stipulated, and the ALJ finds, that, if the claim is compensable and if the Claimant was not responsible for termination, the Claimant is owed TTD benefits from June 7, 2014 to June 15, 2014 and June 21 to July 20, 2014; and he is owed temporary partial disability (TPD) benefits from June 16 to June 20, 2014, and from July 21 through August 3, 2014.

3. Prior to May 28, 2014, the Claimant had no symptoms of tinnitus, headaches, dizziness, chest pains, eye pain, depression, or anxiety. He had been an employee of the Employer for approximately 10 years, performing duties of a maintenance worker. His responsibilities included mowing the lawn, weeding, trimming trees, painting, and fixing pipes, among other duties. The Employer's premises was a complex of over 600 homes, including the Claimant's home.

4. On July 29, 2014, the Respondents filed a Notice of Contest, stating that further investigation was needed for a determination of compensability and time lost.

Compensability

5. While performing his work duties on May 28, 2014, the Claimant was mowing the lawn of a park located on the Employer's property. He was using a small tractor-type riding lawn mower. The area that he was mowing had overgrown grass and weeds, which was covering a gas service pipe that protruded from the ground approximately around 4 inches but no more than 6 inches.

6. As the Claimant was mowing and attempting to turn the lawn mower, the wheels of the mower slipped due to the grass being wet and the Claimant lost control of the lawn mower. The blades of the mower, located directly underneath the mower, went over a protruding gas pipe and cut off a portion of the pipe, causing the pressurized gas to explode upward and engulfing the mower and the Claimant. The pipe was struck on the left side of the mower. The pipe was a metal pipe approximately ½ to ¾ of an inch wide. The pipe began immediately releasing natural gas.

7. The Claimant did not realize how close he was to the gas pipe because of the overgrowth that covered the gas pipe and, because there were no markers indicating the location of the pipes. The Employer had previously ordered the posts removed which had before provided notice of the placement of the gas pipes and served as protective barriers.

8. When the gas line was cut, the gas exploded with sufficient force to rock the mower. The force additionally caused the Claimant to be nearly knocked off the mower. Claimant testified the mower rocked a bit when it struck the pipe, initially stating it was the force of the gas. On cross-examination, the Claimant could not be sure whether it was the gas or the mower striking the pipe that caused the mower to rock. Either way, the Claimant remained seated in the mower. He moved the mower to the side to evaluate the damage.

9. The explosion of gas, the force and burst of noise from the gas pressure releasing as the pipe was severed created an extremely loud blast, with the gas completely enveloping the Claimant. The Claimant inhaled the gas, both through his nose and mouth.

10. The Claimant sustained several injuries. Most notably, he developed tinnitus from the damage to his auditory system as a result of being exposed to the blast of the pressurized gas.

11. Immediately after the incident, the Claimant sought a way to cover the pipe. He attempted to place a one foot square heavy brick over the pipe, further exposing himself to the gas, but the force of the escaping gas kept the brick suspended and did not permit the brick to stay on the pipe.

12. Unable to temporarily seal the pipe, the Claimant left the area and went to the maintenance shop to report the accident to Michael Slyker, his manager. Instead of demonstrating concern for the Claimant, Slyker became angry with the Claimant. In his testimony regarding this encounter, Stryker skirted the issue and made no persuasive denial of the Claimant's version of this encounter.

13. The Claimant returned to the site while Slyker went into the shop to look for fittings and tools to fix the pipe. Slyker arrived at the site, exited his truck, and could hear the noise of the escaping gas even though he came no closer to the gas line than approximately 20 to 25 feet. He looked over to where he heard the gas and observed the Claimant crouching over the ruptured gas pipe. After seeing the extent of the damage, Slyker realized that the pipe could not be repaired by them. Slyker took pictures and left, assigning the Claimant duties with the co-worker, Gregorio Garcia. The Claimant remained at the site, where he continued to be exposed to the gas.

14. According to Slyker, it may be possible to cap a broken gas pipe with tools they have in the shop. If they are unable to do so, however, the utility company must be called. When Slyker arrived at the site, he observed the Claimant near the broken pipe. According to Slyker, It was quickly apparent to him that the break would require repair by the utility company. According to Slyker, he instructed the Claimant to get away from the pipe, go on his lunch break and go work on the other side of the property, away from the leak, with Gregorio Garcia, another employee. Slyker called the office and asked that the utility company be notified. A handyman who was often working around the property, but not an employee of the Employer, ultimately plugged the pipe with a piece of wood.

15. Shortly, thereafter, a coworker arrived at the site with a piece of wood to plug the gas pipe. As the coworker hammered the wood inside the pipe, the Claimant held the wood in place, increasing his exposure to the gas.

16. There is conflicting testimony regarding what happened at the site of the leak. According to the Claimant, Slyker took a photo and left the scene right away. Claimant further stated that he held a piece wood in place while it was hammered into place. The Claimant's version of events was in conflict with the testimony of Slyker. Additionally, Gregorio Garcia testified that, while he observed that the Claimant was exposed to the gas, he did not observe him holding wood in place while the leak was plugged. The fact that Garcia did not observe the Claimant holding wood in place while the leak was plugged does not mean it did not happen. Indeed, the Claimant was there. To the extent that conflicting versions were presented regarding what happened while examining the broken pipe, the ALJ credits the testimony of the Claimant more than Slyker's and Garcia's testimony since Slyker was only there for a short while after the fact and Garcia was observing, sporadically, while the Claimant was right there.

Responsibility for Termination

17. The Claimant exhibited initial symptoms of severe nausea, vomiting, and anxiety. Despite these symptoms, he finished his working day as scheduled and subsequently returned every day for his scheduled shift until he was fired. On the day of the incident, the Claimant returned to work following the lunch break and worked the remainder of the day. He worked the rest of the week, and all of the following week, through June 6, 2014. According to Slyker, the Claimant did not report an injury during this time. Slyker stated that he did not observe any difference in the Claimant's behavior such as nervousness, shaking hands, or anything of that nature. Based on Slyker's lack of medical and psychological training, the ALJ infers and finds that Slyker's failure to observe medical or psychological symptoms bears very little weight. The Claimant may have been "smiling on the outside, and hurting on the inside."

18. On June 6, 2014, the Claimant reported to Slyker that he was experiencing symptoms from the gas explosion, including nausea, vomiting, dizziness,

and hand tremors. Slyker denies that this happened. The ALJ credits the Claimant's version in this regard and rejects Slyker's version, Slyker did not refer the Claimant to a medical provider. Consequently, the Claimant self-referred to the People's Clinic in Boulder (Clinica Family Health Services).

19. On the same date, Slyker fired the Claimant from his employment stating to the Claimant that there simply was no more work for him.

20. The Employer's stated reason for firing the Claimant was due to the damage to the Employer's property.

21. At the hearing, Slyker testified by telephone that the Claimant had numerous performance issues, concerns over safety, attention to detail, and damage to property and equipment that culminated in the decision to end the employment relationship. The culmination of Claimant's work performance resulted in the decision to terminate Claimant. The ALJ infers and finds that the Claimant's employment was terminated on June 6, 2014 because the Claimant failed to measure up because of poor performance, however, the Respondents failed to demonstrate a volitional act on the Claimant's part that would have led the Claimant to believe that he would be fired if he committed the act.

22. The Claimant stated that he reported his symptoms to Slyker on June 6, 2014, when he was informed that he was fired. Slyker testified that no symptoms or conditions were reported to him on June 6, 2014. Slyker stated that the first time he was made aware of any alleged symptoms or conditions was when he was notified of the claim by corporate headquarters near the end of July 2014. The Respondents' implied theory is that the Claimant "manufactured" a workers' compensation claim after he was fired. This theory is significantly compromised by the fact that there is medical corroboration of the facts of the Claimant's injuries and it would be a substantial threat to theorize that the Claimant had been exposed to gas fumes outside of work in light of the totality of the evidence herein. The ALJ resolves this conflict in the testimony in favor of the Claimant reporting a work-related injury on June 6, 2014, at the time that he was fired.

23. The Claimant did **not** exercise a degree of control over the circumstances leading up to his termination from employment. He was what he was –an unsatisfactory employee who did not measure up to Michael Slyker's standards

Authorization of Medical Treatment

24. Slyker did not refer the Claimant to a medical provider. Consequently, the Claimant self-referred to the People's Clinic in Boulder, Clinica Family Health Services (hereinafter "Clinica"). Clinica made generalized referrals to an opthamologist and a psychiatrist/psychologist. In response to these referrals, the Claimant saw Robert

Krone, O.D. (optometrist) and Michael Dow, Psy.D., a clinical psychologist. Both were in the chain of authorized referrals.

Medical

25. On June 9, 2014, the Claimant presented to Clinica Family Health Services (People's Clinic on Boulder) and was seen by Amy Alper, PA-C. Alper noted that since the incident, the Claimant had been constantly nauseous and could not eat. He continued to hear the gas exploding in his ears when he slept, and he had trouble sleeping due to the trauma. This had also been making him shaky. Alper noted that gas covered the Claimant, and got into his eyes. The Claimant's vision was blurry and burning. Alper assessed the Claimant as having eye pain, insomnia, and dizziness/vertigo. Alper prescribed Omeprazole and Trazodone HCL.

26. On June 9, 2014, the Claimant also saw Dr. Dow, Psy.D. He noted that Claimant had trouble sleeping, eating, nausea, and would wake up hearing hissing. Dr. Dow reported advising the Claimant about the normal effects of trauma, in the Claimant's case which were exacerbated by lack of support, and explicit additional negative consequences. Dr. Dow implied, and the ALJ finds, that the Claimant's mental problems were caused by the traumatic event of May 28, 2014 (*See* Claimant's Exhibit 4).

27. On June 25, 2014, Dr. Krone, O.D., diagnosed the Claimant with unspecified tear film insufficiency/dry eye syndrome, stating, that it "may have been caused by explosion."

28. On July 28, 2014, Amy Alper, PA-C, reported the Claimant's diagnoses as depression, anxiety, vertigo, and vision discomfort. She restricted the Claimant to sedentary duty, including lifting no more than 10 pounds, no motor vehicle operation, no driving greater than 0 minutes, no working around machinery, no ladder or stair climbing, no pole climbing, no exposure to chemicals/irritating inhalants.. Alper referred the Claimant to an ophthalmologist and a psychiatrist. She noted that the Claimant was not able to return to his regular duties without restrictions.

29. On September 11, 2014, Alper reported the Claimant's work restrictions as including no lifting over 20 pounds, no working around machinery, no pole climbing, and no exposure to chemicals/irritating inhalants. Alper continued to state that the Claimant should see an ophthalmologist, and was that he was unable to return to his regular duties without restrictions.

Claimant's Independent Medical Examination (IME) by Caroline Gellrick, M.D.

30. On October 31, 2014, Dr. Gellrick diagnosed the Claimant as: "Status post gas explosion work-related injury on the job, which occurred May 28, 2014,

loud noise exposure causing:

- Tinnitus, right greater than left ear, question decreased sensory neural hearing loss.

- Persistence of cephalalgia from concussive-type force to the chest and face, which nearly knocked him off the lawnmower.
- Chest wall discomfort, consistent with costochondritis versus anxiety.
- Anxiety with elements of PTSD.
- Conjunctivitis of the eyes persistent, with redness seen today. The patient complaining of dry eye syndrome, ophthalmology insufficient tear film active dry eye syndrome, with some nuclear sclerosis per ophthalmology.
- Occasional dizziness."

(Dr. Gellrick's Report of October 31, 2014, p. 4).

31. Dr. Gellrick recommended that the Claimant get a baseline EKG to ensure the cardiac status is normal. She stated, "I suspect the chest discomfort is due to anxiety and may be costochondritis, not a cardiac etiology." With regard to the Claimant's hearing and tinnitus, Dr. Gellrick stated that the Claimant needs a full evaluation with ENT and "they can also evaluate the dizziness with further vestibular testing." With regard to the anxiety and depression, Dr. Gellrick stated that the Claimant needs evaluation with psychology to include modalities of EMDR. Dr. Gellrick was of the opinion that the Claimant may benefit from the use of a short-acting topical steroid for the ophthalmological problem, but definitely needs repeat evaluation for irritation under workers' compensation (based on this reference, the ALJ infers and finds that Dr. Gellrick is of the opinion that all of the above medical problems are work-related). Dr. Gellrick stated that the Claimant is currently not at maximum medical improvement (MMI) for his work-related injuries, but needs further intensive evaluation with the specialists mentioned above. Dr. Gellrick stated that the Claimant should not lift over 10 pounds, should have no loud noise exposure, and should avoid mechanized equipment. Dr. Gellrick also stated that the Claimant should not drive if he is dizzy. Dr. Gellrick concluded, "It is suspected when the patient's anxiety dissipates, his cephalalgia symptoms will dissipate, but in the interim he can certainly use the preferred NSAID of Celebrex to decrease cephalalgia symptoms." (Dr. Gellrick's Report, p. 4). The ALJ infers and finds that Dr. Gellrick's opinion in this regard establishes that the cephalagia is generated by the Claimant's anxiety, a mental phenomenon.

Independent Medical Examinations of the Respondents

32. On November 12, 2014, Sharon R. Walker, M.D., performed an IME at the Respondents' request. The Claimant described the loud sound as an initial loud sound followed by hissing of leaking gas. He reported gas getting into his eyes, nose, ears and face. The Claimant was wearing safety goggles. He stated the whole incident left him shaken and scared, but he could not explain why he was scared (the ALJ takes administrative notice of, and infers and finds, that the classical definition of "anxiety" is related to fear of that which one knows not). The Claimant described nightmares of his manager knocking on the door or window and telling him to come to work, but he does not have nightmares of the actual event. The Claimant reported that most of his current symptoms began 15-20 days after the May 28, 2014, event. The Claimant also reported itchy eyes, bilateral ear pain that starts in his right ear, goes through his head, and to his other ear, followed by his whole head hurting. The Claimant reported memory loss beginning approximately 1 and ½ months after the accident. (Respondents'Exhibit. A, pp. 1-12).

33. Dr. Walker diagnosed exposure to natural gas. Natural gas was identified as a simple asphyxiant with no systemic toxicity. According to Dr. Walker, this means in a confined space natural gas displaces oxygen, but in an open air environment, there is no toxic effect. Dr. Walker is of the opinion that natural gas is not identified as irritating to the eyes or skin. Dr. Walker noted that there was no explosion meaning no noise loud enough to cause tinnitus. To the extent that the mower striking the pipe would have caused a loud noise, Dr. Walker noted that the Claimant complained of right sided tinnitus, though his left ear was closer to the sound. Further, the Claimant did not notice tinnitus until 15-20 days after the accident. Dr. Walker concluded within a reasonable degree of medical probability "based on the properties of natural gas, nature of tinnitus, lack of true explosion, delay in onset of symptoms and discrepancies in his description of the event that none of [Claimant's] complaints are the result of exposure to natural gas (Respondents' Exhibit A, pp. 10-11).

34. On November 19, 2014, Robert E. Kleinman, M.D., a psychiatrist, performed a psychiatric an IME at the Respondents' request. Dr. Kleinman noted that the Claimant reported feeling depressed and having "flashbacks." According to Dr. Kleinman, the flashbacks described, however, were not a physiologic response, but rather memories accompanied by vague feelings. The Claimant reported having recurrent dreams of his boss knocking on the window and telling him to go to work.

35. Dr. Kleinman is of the opinion that Claimant catastrophized (a verb that is apparently not used in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5,* but apparently used by Dr. Kleinman in support of his opinion that the Claimant does **not** suffer from a "work-related" psychiatric condition) the event by continuing to refer to the event as an explosion, when no explosion occurred. According to Dr. Kleinman while the Claimant exhibited signs of depression, anxiety and situational adjustment disorder, the source of this was related to the loss of the job and resulting financial hardship, not the result of exposure to natural gas. According to Dr. Kleinman, stress related to the loss of the job is indicated by the content of the Claimant's reported

dreams. For instance, the Claimant had bad dreams that his boss came to his home to make him go back to work. To the reasonably prudent lay person, this dream would seem to indicate a fear of returning to work because of the trauma to which the Claimant was exposed. For a reason not adequately explained, this dream indicates to Dr. Kleinman that the trauma is related to the Claimant's firing (dreaming about the boss forcing the Claimant back to work seems to be inconsistent with trauma caused by being fired). Dr. Kleinman noted that the Claimant's reported symptoms were inconsistent through the records and his own review, and appear to be over reported. As another example, according to Dr. Kleinman (who apparently has no expertise in Opthamology), the Claimant reported ophthalmological conditions that would be unrelated to gas exposure. Further, according to Dr. Kleinman, the Claimant's restrictions appear to be correlated to the over-reporting of symptoms and are not likely to be necessary. The ALJ infers and finds that the totality of Dr. Kleinman's opinions have a foundation in his theory that the Claimant is "catastrophizing," exaggerating and, although not explicitly stated, magnifying his symptoms. Dr. Kleinman does not go so far as to opine that the Claimant is consciously malingering. Nonetheless, Dr. Kleinman's opinions are overshadowed by his implied theory of "symptom magnification," an interesting phenomena in psychiatry if this is not a conscious process. Presumably, it may all depend on an individual and what triggers depression and anxiety in an individual with a specific make-up. Indeed, some war veterans, all exposed to the same stressors, returned with PTSD and others did not. The ALJ, however, infers and finds that Dr. Kleinman's opinions support the proposition that the Claimant's mental problems did **not** arise out of the physical injuries of May 28, 2014.

36. Dr. Kleinman did not express any opinions concerning whether the Claimant was malingering or lying. Dr. Kleinman, however, implied that the Claimant was unconsciously exaggerating, "catastrophising, thus, magnifying symptoms or the Claimant's condition was encapsulated under a dome of functional overlay. There is no indication that Dr. Kleinman's overarching foundational opinion is supported by any objective tests of scientific validity. Consequently, the ALJ has concerns about the overall credibility of Dr. Kleinman's opinions, with the exception that Dr. Kleinman's opinions do not support the proposition that the Claimant's bad dreams, anxiety and depression arose out of his physical injuries of May 28, 2014.

Claimant's Employment Subsequent to Injury

37. The Claimant found employment with J&W Five Star General Construction Company from June 16, 2014 to June 20, 2014, both dates inclusive, a total of 5 days. The Claimant was paid $460 (Claimant's Exhibit 5), or $92 per day, which yields a weekly wage of $644 for this period of time, which exceeds the AWW. He was performing work in construction, including painting but he was having problems with dizziness and lifting, so he was forced to quit this job. Consequently, the Claimant experienced no temporary wage loss during this period of time.

38. The Claimant found another job working for Colterra Restaurant from

July 21, 2014 to August 3, 2014, as a kitchen helper, but he was unable to continue to perform this job because of the heavy mats he was required to lift and he was forced to quit this job. This employer, however, advised the Claimant that when he no longer had restrictions, he could return to work. There is no persuasive evidence that the Claimant experienced a temporary wage loss during this period of time.

39. The Claimant continues to experience decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness, chest pains, bad dreams, though not as frequent as before. He also suffers from depression and anxiety caused by the traumatic incident, caused by the explosion.

40. Based on the totality of the evidence, the ALJ infers and finds that the Claimant's depression and anxiety have been directly caused by the explosion incident, and **not** by the Claimant's physical injuries, *i.e.,* decreased sound tolerance, ringing and hissing in the ears, dry eyes, dizziness and chest pains, thus, the depression and anxiety are mental-mental phenomena.

41. The ALJ finds that the Claimant's mental injuries did **not** arise out a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Moreover, his mental injuries arose primarily from his then occupation and place of employment, specifically, his mental reaction and trauma caused by the gas leak and explosion of May 28, 2014.

Temporary Disability

42. The Claimant was temporarily and totally disabled from June 7, 2014 to June 15, 2014 and June 21 to July 20, 2014. He was **not** temporarily and partially disability from June 16 to June 20, 2014, and from July 21 through August 3, 2014. Additionally, the Claimant has not yet been release to return to his pre-injury work without restrictions, he has not actually returned to his pre-injury work, he has not been declared to be at MMI by an authorized treating physician, and he has earned no wages, other than those earned in his brief and unsuccessful attempts at work, during which times he was temporarily and partially disabled.

Ultimate Findings

43. The Claimant presented as a credible witness insofar as his testimony contributes to the ultimate resolution of the questions involving the compensable consequences of the Claimant's injuries of May 28, 2014. As found, the ALJ has resolved the credibility conflicts in favor of the Claimant and against Michael Sylker, his supervisor. Further, the ALJ finds the opinions of the Claimant's treating providers and IME Dr. Gellrick, more persuasive and credible than the opinions of Respondents' IMEs, Dr. Walker and Dr. Kleinman, with the exception of the proposition that Dr. Kleinman's

opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

44. Between conflicting testimony and medical opinions, the ALJ makes a rational choice to accept the Claimant's testimony and to reject Michael Slyker's testimony; and, to accept the opinions of the Claimant's treating providers and IME Dr. Gellrick, and to reject the opinions of the Respondents' IMEs, Dr. Walker and Dr. Kleinman, with the exception of the proposition that Dr. Kleinman's opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

45. The Claimant has proven, by a preponderance of the evidence that he suffered compensable physical injuries resulting from the work-related gas line break, consisting of experience decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness and chest pains. As a separate matter, the Claimant has proven that he sustained mental injuries consisting of bad dreams, depression and anxiety caused by the traumatic incident of May 28, 2014. The Claimant has **failed** to prove, by preponderant evidence that the mental injuries were caused by the physical injuries. Moreover, the mental injuries were caused by the mentally traumatic event.

46. The parties stipulated, and the ALJ found, if the case was determined compensable as it now is, the AWW is $443.21, which yields ATTD rate of $295.47 per week, or $42.21 per day. The AWW also is the baseline from which to measure temporary wage loss and concomitant TPD benefits, if any.

47. The parties further stipulated, and the ALJ found, if the case was compensable as it now is, the Claimant was temporarily and totally disabled from June 7, 2014 through June 15, 2013, both dates inclusive, a subtotal of 9 days; and, from June 21, 2014 through July 20, 2014, both dates inclusive, a subtotal of 30 days. The parties stipulated, and the ALJ found, that the Claimant was temporarily and partially disabled from June 16 through June 20, both dates inclusive; and, from July 21, 2014 through August 3, 2014, both dates inclusive. There was no persuasive evidence of a temporary wage loss during these periods of time. Indeed, Claimant's Exhibit 5 establishes that the Claimant's weekly wage from June 16 through June 20, 2014, exceeded the Claimant's AWW. In light of the stipulation of the parties, the issue of TPD from July 21, 2014 through August 3, 2014 remains open and upon a satisfactory showing of wages at Colterra Restaurant, if less than the AWW, the Claimant would be entitled to 2/3rds of his temporary wage loss during this period of time.

48. The Claimant has proven, by preponderant evidence that significant contributing factors to his TTD from August 4, 2014 and continuing are the physical injuries consisting of decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness, chest pains. Indeed, Dr. Gellrick's present and prevailing restrictions are primarily tied into the physical injuries sustained on May 28, 2014.
The medical treatment provided by Clinica and its generalized referrals to Dr. Dow,

Psy.D., and Dr. Krone, O.D., were authorized and within the chain of authorized referrals. Further, the medical treatment for the Claimant's physical injuries of May 28, 2014 was and is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

49. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant was responsible for his termination through a volitional act, or acts, on his part that would lead a reasonable person to believe that he would be fired. Indeed, as found, the reasons for the Claimant's firing involved "poor performance," specifically, he did not measure up.

50. As found herein above, the Claimant's mental injuries did **not** arise out a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Moreover, his mental injuries arose primarily from his then occupation and place of employment, specifically, his mental reaction and trauma caused by the gas leak and explosion of May 28, 2014. His mental injuries are separate and apart from his physical injuries and did not arise there from.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon

appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant presented as a credible witness insofar as his testimony contributed to the ultimate resolution of the questions involving the compensable consequences of his injuries of May 28, 2014. As found, the ALJ resolved the credibility conflicts in favor of the Claimant and against Michael Sylker, his supervisor. Further, the ALJ found the opinions of the Claimant's treating providers and IME Dr. Gellrick, more persuasive and credible than the opinions of the Respondents' IMEs, Dr. Walker and Dr. Kleinman, , with the exception of the proposition that Dr. Kleinman's opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimony and medical opinions, the ALJ made a rational choice to accept the Claimant's testimony and to reject Michael Slyker's testimony; and, to accept the opinions of the Claimant's treating providers and IME Dr. Gellrick, and to reject the opinions of the Respondents' IMEs, Dr. Walker and Dr. Kleinman, with the exception of the proposition that Dr. Kleinman's opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

Compensability

c. In order for an injury to be compensable under the Workers'

Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant established that he sustained compensable injuries, specifically, he suffered compensable physical injuries resulting from the work-related gas line break, consisting of decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness and chest pains. As a separate matter, the Claimant has proven that he sustained mental injuries consisting of bad dreams, depression and anxiety caused by the traumatic incident of May 28, 2014. The Claimant has **failed** to prove, by preponderant evidence that the mental injuries were caused by the physical injuries. Moreover, the mental injuries were caused by the mentally traumatic event.

Mental Injuries

d. A claim for mental injuries may be compensable under the provisions of. § 8-41-301 (2) (a), C.R.S., which states:

> "A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim shall have

arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

The ALJ concludes that the weight of the credible evidence supports the fact that the Claimant suffered a mental injury arising out of a mental trauma that occurred on May 28, 2014. As further found, the opinion of clinical psychologist, Michael Dow, Psy.D., supports the compensability of the mental-mental injury. Furthermore, the portion of Dr. Kleinman's opinion that was credited, **does not** support that the mental injuries arose out of the physical injuries of May 28, 2014. As further found, the Claimant's mental injuries did **not** arise out a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the Employer. Moreover, the Claimant's mental injuries arose primarily from his then occupation and place of employment, specifically, his mental reaction and trauma caused by the gas leak and explosion of May 28, 2014.

e. The additional compensability requirements for a mental injury [as specified in § 8-41-301 (2) (a), C.R.S.] do not apply to a mental or emotional injury which is a natural consequence of a physical injury. *See Jakco Painting Contractors v. Indus. Comm'n,* 702 P.2d 755 (Colo. App. 1985). As found, the Claimant has failed to establish that his mental injuries which arose out of his physical injuries. They were not natural consequences of his hearing hissing sounds, ringing in the ears and blurred vision. The mental injuries were a natural consequence of psychological trauma caused by the incident of May 28, 2014 itself.

f. The 12-week limitation on mental-mental disability benefits applies only to (permanent) medical impairment benefits **but not** to temporary disability benefits. *City of Thornton v. Replogle,* 888 P.2d 782 (Colo. 1995); *Rendon v. United Airlines,* 881 P.2d 482 (Colo. App. 1994). As found, only temporary disability benefits are at issue now.

Authorization of Medical Treatment

g. Because this matter is compensable, the Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of the industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). As found, this was not done. An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the right of selection passed to the Claimant and he selected Clinica, which was authorized.

h. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997 As found, the referrals to Clinical Psycholgist Dow and Optometrist Krone were within the chain of authorized referrals and the Respondents are liable for the treatment causally related to the compensable physical injuries, and the compensable mental-mental injuries.

Medical Care and Treatment

i. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his physical injuries of May 28, 2014, and to his mental-mental injuries of May 28, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, as reflected in the evidence was and is reasonably necessary to cure and relieve the effects thereof.

Average Weekly Wage

j. As found, based on the stipulation of the parties, the Claimant's AWW is $443.21. The ALJ finds that this AWW results in a TTD benefit rate of $295.47 per week, or $42.21 per day.

Temporary Disability

k. As found, based on the stipulation of the parties, the Claimant was temporarily and totally disabled from June 7, 2014 through June 15, 2013, both dates inclusive, a subtotal of 9 days; and, from June 21, 2014 through July 20, 2014, both dates inclusive, a subtotal of 30 days. As further found, based on the stipulation of the parties, the Claimant was temporarily and partially disabled from June 16 through June 20, both dates inclusive, however, he experienced no temporary wage loss during this period and, therefore, is entitled to no TPD benefits for this period of time. The parties further stipulated that the Claimant was temporarily and partially disabled from July 21, 2014 through August 3, 2014, both dates inclusive, however, no persuasive evidence concerning a temporary wage loss, if any, was presented. In light of the stipulation, the issue of TPD for this later period should remain open.

l. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. The Claimant's termination in this case was not his fault, under the test for "responsibility for termination." There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id.* As found, the Claimant's temporary disability and resultant wage loss was caused by the compensable injuries of May 28, 2014.

m. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant was temporarily and totally disabled from June 7, 2014 through June 15, 2013, both dates inclusive, a subtotal of 9 days; and, from June 21, 2014 through July 20, 2014, both dates inclusive, a subtotal of 30 days. As further found, the Claimant was temporarily and partially disabled from June 16 through June 20, both dates inclusive, however, he sustained **no** temporary wage loss during this period and is, therefore **not** entitled to TPD benefits for this period of time. The parties stipulated that the Claimant was temporarily and partially disabled from July 21, 2014 through August 3, 2014, both dates inclusive, however, there was no persuasive evidence concerning his temporary wage loss during this period. Therefore, the issue of TPD for the later period should remain open.

n. As found, the Claimant has been temporarily and totally disabled since August 4, 2014 and continuing [the period from August 4, 2014, through the hearing date, December 11, 2014, both dates inclusive, equals 130 days].

Affirmative Defense of Responsibility for Termination

o. Section 8-42-105 (4), C.R.S., provides that an employee responsible for his/her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether the claimant is responsible, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. The Supreme Court has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). As found, Respondents failed to satisfy their burden of proof on the affirmative defense that Claimant was responsible for his termination through a volitional act on his part and/or that Claimant exercised ad degree of control over the circumstances leading to termination.

Burden of Proof

p. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has met his burden on all designated issues, with the exception of the mental injuries having been caused by the physical injuries of May 28, 2014, and TPD from June 16 to June

20, 2014. The Respondents have failed to meet their burden with respect to the affirmative defense of "responsibility for termination."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims that the Claimant's mental injuries were caused by his physical injuries of may 28, 2014 are hereby denied and dismissed, however, the claim that his mental injuries were caused by the mentally traumatic exposure to the gas leak explosion of May 28, 2014, is hereby allowed.

B. The Respondents shall pay the costs of all medical and psychological care and treatment for the Claimant's injuries of May 28, 2014, subject to the Division of Workers Compensation Medical Fee Schedule.

C. As of the present time, the 12-week limitation on indemnity benefits does **not** apply because the Claimant's temporary disability as of this time is causally related to the **physical** injuries of May 28, 2014, and the limitation does not apply to temporary disability benefits.

D. The Respondents shall pay the Claimant temporary total disability benefits in the amount of $295.47 per week, or $42.21 per day disabled from June 7, 2014 to June 15, 2014, both dates inclusive, a subtotal of 9 days; and, from June 21 to July 20, 2014, both dates inclusive, a subtotal of 30 days, in the aggregate subtotal amount of $1,646.19, which is payable retroactively and forthwith. For the period from August 4, 2014 through the hearing date, December 11, 2014, both dates inclusive, a subtotal of 130 days, Respondents shall pay the Claimant the subtotal amount of $5,487.30, which is payable retroactively and forthwith. In summary, the Respondents shall pay the Claimant aggregate temporary total disability benefits through the hearing date of in the aggregate amount of $7,134.09, which is payable retroactively and forthwith.

E. Any and all claims for temporary partial disability benefits from June 16 to June 20, 2014 are hereby denied and dismissed.

F. The respondents shall pay the Claimant temporary partial disability benefits from July 21 through August 3, 2014, in an amount equal to 2/3rds of his temporary wage loss.

G. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

H.. Any and all issues, including which indemnity benefits will be attributable to the Claimant's mental-mental injuries, are reserved for future decision.

DATED this 5 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

The issues presented for determination are whether the claim should be reopened and Respondents permitted to withdraw their general admission of liability based on allegations of fraud. Alternatively, Respondents seek to reopen Claimant's permanent total disability award based on an allegation that Claimant has the ability to return to employment. Respondents also seek applicable offsets and claim an overpayment.

Claimant filed a response to application for hearing alleging penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to pay permanent total disability benefits as ordered by ALJ Cannici on February 1, 2010. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to comply with Rule 5-8 regarding permanent total disability benefits alleging Respondents terminated permanent total disability benefits without a hearing. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S. for Respondents alleged failure to pay medical benefits consistent with the fee schedule in WCRP Rule 18.

The response to application for hearing alleges the defenses of WCRP Rule 7-3 (A) alleging Respondents failed to meet reopening requirements, waiver, estoppel, issue preclusion, claim preclusion, res judicata, doctrine of laches, statute of limitations, § 8-43-303, C.R.S. (2005), costs pursuant to § 8-42-101 (5), C.R.S., and attorney's fees pursuant to § 8-43-211 (2)(d),C.R.S. for endorsing issues not ripe for adjudication, C.R.S. § 8-43-203 (2), *Lewis v. Scientific Supply*, 897 P.2d 905 (Colo. App. 1995) and appeal of prehearing orders.

In response to the penalty allegations, Respondents moved to endorse the issue of 'cure' pursuant to C.R.S. § 8-43-304 (4), which was granted on February 25, 2013.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. The Claimant worked for the Employer as a hairstylist and manager.

2. On August 28, 2005, the Claimant completed an Employer's First Report of Injury and reported that on August 28, 2005, she injured her left arm. She reported that she was changing loads of towels, spilled water on the floor, fell and hurt her left lower arm. She indicated she had a strain and limited mobility. No one witnessed the accident.

3. The Claimant went to the Boulder Medical Center on August 28, 2005 and reported that she slipped in water and put arm out to break her fall. According to the treatment note, the Claimant had a contusion and possible fracture. She was released to return to work with restrictions.

4. The Respondents admitted liability on October 17, 2005, and the Claimant underwent medical treatment and continued to work for the Employer in a modified duty capacity until May 5, 2007, when the Claimant began experiencing pain in her thoracic spine. A separate workers' compensation claim was initiated.

5. The Claimant underwent treatment for her thoracic spine symptoms until she was placed at maximum medical improvement (MMI) on August 9, 2007.

6. By stipulation of the parties which was approved by the Judge on January 3, 2008, the 2005 claim was re-opened and the 2007 thoracic spine claim was incorporated into the 2005 left arm claim.

7. The Claimant has received a significant amount of medical treatment for her injuries, including a spinal cord stimulator.

8. On February 10, 2010, after a contested hearing, ALJ Peter J. Cannici found that Claimant was permanently and totally disabled. The Respondents did not appeal ALJ Cannici's decision.

9. Claimant has continued to receive maintenance care from her authorized treating physicians.

Findings related to fraud allegation

10. Kimberly Workman, the adjuster on this claim, testified that prior to July 26, 2010, Respondents had not received any information that would suggest Claimant had not suffered an injury at work on August 28, 2005, but rather suffered her injury the day before at Water World. Workman testified that, if at the time of the filing of the original General Admission of Liability, Respondents had information that Claimant had actually suffered an injury to the same body part the day before at Water World, Respondents would have never admitted liability in this claim. Rather, Respondents would have filed a Notice of Contest.

11. On July 26, 2010, Workman received a phone call from the fraud unit with the DOWC notifying Respondents that a tipster had called stating that Claimant did not have an injury at work, but rather injured herself the day before at Water World. Workman testified that she relayed this information to the adjuster who then notified defense counsel. Specifically, the e-mail that Workman sent to the adjuster is dated July 26, 2010. The e-mail stated the following:

Hi Cathy,

> I just got a call from the fraud department at the DOWC. They received a tip (we think it is from the ex-husband) stating that EE never got hurt at work. She was hurt at Water World. In attendance were her ex-husband, ex-mother-in-law, and brother. Apparently, EE is driving to California right now to take the kids to Disney Land. "Herman" (our tipster) can be reached at 303-591-5456.
>
> You may want to pass this along to defense counsel. Thanks.

12. H. Armenta was Claimant's husband from April 2001 through May 2009.

13. H. Armenta provided a statement to a private investigator on October 5, 2010. During that recorded statement, H. Armenta stated that the day before Claimant filed a Workers' Compensation claim, Claimant, Claimant's daughter, Claimant's brother, James, and H. Armenta went to Water World. Water World is a water park in the Denver metro area.

14. H. Armenta stated that at Water World, the Claimant, H. Armenta, and Claimant's brother, were in inner tubes floating in the wave pool. When the waves started to come, Claimant reached out to get hold of her brother's tube and when the wave hit, it separated her away from her brother's tube. In that process, she hurt her left arm because she was holding on to H. Armenta's tube and her brother's tube at the same time, and H. Armenta and her brother went separate ways. In this recorded statement, H. Armenta also stated that on August 28, 2005, he received a phone call from Claimant stating that Claimant was in the hospital because she had just fallen at work. When H. Armenta asked her what happened, Claimant stated that it was just from yesterday, that she was hurt at Water World and that she had just filed it as a Workers' Compensation claim. In the recorded statement, H. Armenta also stated that Claimant had decided the night of August 27, 2005 that she would report this injury to her left arm as a work-related injury the next day because it was best for the family.

15. At hearing, H. Armenta testified that on August 27, 2005, he was at Water World with Claimant, Claimant's brother, James, and her mother as well as their daughter, Alexa. H. Armenta testified that Claimant, Claimant's brother, James, and he were in the large wave pool. H. Armenta testified that when the wave hit their tubes, Claimant was pulled in both directions. As a result, Claimant began complaining of pain in her left arm, neck, and back. H. Armenta testified that immediately following this incident, they left Water World because Claimant was in too much pain to stay there. Claimant was experiencing pain in these areas on the night of August 27, 2005, as well as the morning of August 28, 2005.

16. H. Armenta has denied that he has ever contacted the fraud unit at the Division of Workers' Compensation despite the many references to the contrary. In three separate documents, Respondent's counsel referred to H. Armenta as the reporting party. Further, the comments made by Workman to the former claims adjuster are telling. Armenta's first name was specifically mentioned. It is apparent, despite his vehement denials, that Armenta called the DOWC fraud line.

17. The allegation regarding Water World surfaced on July 26, 2010. By then, H. Armenta and Claimant had been divorced for over a year. Armenta reported to the fraud tip line that Claimant was on her way to Disneyworld with her two children. H. Armenta is their father.

18. The evidence presented suggested that the Claimant's divorce from H. Armenta was contentious. The two argued about custody of their two children, child support, and visitation schedules.

19. Martha Armenta is H. Armenta's mother. M. Armenta gave a statement to an investigator on October 5, 2010. She stated that Claimant told her that after Claimant had been drinking margaritas at a Broncos party, that Claimant actually injured herself at Water World. M. Armenta also stated that H. Armenta had told her at one time that Claimant injured herself at work.

20. M. Armenta also made inconsistent statements concerning when she learned Claimant was allegedly injured at Water World rather than at work. She also testified at hearing that Claimant told her at the Broncos party that Claimant injured herself at work then changed it and said she meant to say Water World.

21. M. Armenta's testimony is equivocal and unpersuasive.

22. H. Armenta's testimony and reports of fraud lack credibility. H. Armenta had motivation to fabricate the reports made to the DOWC. Further, his repeated denial that he contacted the DOWC fraud tip line renders his testimony wholly incredible.

23. The testimony of Claimant's family members concerning how Claimant injured herself is of little consequence and will not be recited in this order. The evidence presented by Respondents to support the fraud claim is not persuasive and lacks credibility.

Reopening – No longer PTD

24. In rendering his decision concerning PTD, ALJ Cannici relied on work restrictions issued by Dr. Justin Green on June 9, 2009. Dr. Green opined that Claimant should not engage in repetitive lifting with her left upper extremity; no lifting greater than five pounds on an intermittent basis with the left upper extremity; no prolonged standing greater than 30 minutes; no working greater than 90 minutes continuous sitting without a 15-minute rest break. Dr. Green recommended no greater than 1-2 hours of work per day. Dr. Green based his restrictions on a June 2009 Functional Capacity Evaluation (FCE) and on his clinical judgment.

25. Since Claimant was determined permanently and totally disabled, the Respondents have conducted video surveillance of the Claimant. The ALJ reviewed all of the video surveillance admitted into evidence.

26. In the September 6, 2010 video, the ALJ observed the following: The Claimant was shopping at Wal-Mart. She picked up an item with her left hand. She

held a greeting card in her right hand. Neither item appeared to be particularly heavy. The Claimant was in the store for approximately 45 minutes. As she was leaving, she was leaning on the grocery cart and pushing it slowly.

27. In the video taken on January 26, 2011, in the span of eight minutes, the Claimant left her house, placed her purse down in the front of a minivan, and lifted a child into the back of a minivan.

28. Five months later on May 30, 2011, the Judge observed the Claimant smoking cigarettes using her left hand. She picked up a young child who she primarily held with her right hand (and not her left arm contrary to Dr. Olsen's noted observations). The Claimant walked out of the camera view with the child and reappears within seconds. The Claimant was next observed holding a spray bottle for week killer (which appeared to be a one-gallon size) in her right hand which was attached to a hose and sprayer which the Claimant held with her left hand. She sprayed some weeds while bent at the waist. At one point she pumped the spray bottle with her left hand and then held the bottle with her left while holding the sprayer with her right arm. After spraying weeds for approximately ten minutes, the Claimant began using garden loppers to cut weeds or plants. She bent over at the waist to make the cuts and used her right hand to pick up the debris. The Claimant performed this activity for approximately six minutes before taking a break. While taking a cigarette break, the Claimant helped lower her older child out of a tree. The Claimant raised her arms over her head for a few seconds to help the child. The Claimant does not return to gardening activities in this video.

29. Later on May 30, 2011, the Claimant went for a walk with three children, two of whom she pulled in a wagon. The walk lasted approximately 24 minutes. The Claimant pulled the wagon with her right arm for the first eight minutes, she switched to her left arm for approximately ten seconds then switched right back to pulling with her right arm. The Claimant primarily pulled the wagon with her right arm and used her left arm for seconds at a time on two occasions. The Claimant occasionally raised her left hand and arm to her head to keep her hat from blowing away due to the obvious wind.

30. In the video taken on June 11, 2011, the Claimant walked a short distance with some papers in her left hand. On June 14, 2011, the Claimant walked a short distance with some papers in her left hand. She appeared to walk with a slight limp. The Claimant is next observed walking out Target carrying a bag of items with her left arm and hand.

31. On June 23, 2011, video surveillance shows the Claimant walking to a store with a wallet under her left arm. She purchased cigarettes then walked home carrying the cigarettes in her left hand. The total time of this video is seven minutes.

32. On June 24, 2011, video surveillance shows the Claimant walking to the store with two young girls (presumably her daughters). At one point, she bent down to put a cigarette out using her left arm. She bent at the waist as well as bending her legs. They enter the store and Claimant returns with a plastic bag which she initially carried

on her right arm. She switched the bag to her left arm at point and also held her daughter's hand with her left hand. She walked while carrying the bag in her left hand for about five minutes before bending down again to put a cigarette out on the curb. The Claimant switched bag back to her right hand for the next five to six minutes. She carried the bag in her left hand again very briefly before entering her house.

33. On August 29, 2011, video surveillance shows the Claimant lifting her younger child into a minivan. The Claimant bends slightly at the waist into the van. Later on August 29, 2011, the Claimant crouches down for approximately two to three minutes to put new tags on a truck. She also bent down on the waist to complete the task. The Claimant also bent at the waist to pull some weeds for approximately two minutes.

34. On August 30, 2011, very little footage was obtained. The Claimant stood for a few minutes reading some papers she held with her left hand while she smoked a cigarette with her right hand.

35. On March 21, 2013, Dr. Green issued a report wherein he noted that he had reviewed surveillance video taken of the Claimant, a report from Dr. Nicholas Olsen, and a repot from Starting Point dated February 11, 12, and 13, 2013. Dr. Green also examined the Claimant on that day. Based on the information before him at that time, Dr. Green opined that Claimant's had improved. He recommended work restrictions of maximum lifting 20 pounds floor to knuckle; no greater than 10 to 15 pounds of repetitive lifting; no prolonged standing greater than 30 minutes without a 10 minute posture break; and no greater than 90 minutes of continuous sitting without a 15 minute rest break. Dr. Green recommended that Claimant work for no greater than 3 to 4 hours per day.

36. Counsel for Claimant sent a copy of the Starting Point evaluation to Dr. Phil Cambe in a letter dated February 20, 2013. In a report dated February 27, 2013, Dr. Cambe put a check by the following statement purportedly prepared by counsel for Claimant:

> I have been treating [Claimant] for her work injury for many years. I agree with the findings in the Starting Point evaluation dated February 16, 2013 and signed by Pat McKenna. [Claimant's] condition has not substantially changed. The work restrictions provided by Dr. Green on June 9, 2009 are still appropriate.

37. The Claimant underwent a Work Performance and Occupational Feasibility Evaluation at Starting Point with Pat McKenna on February 11, 12, and 13, 2013. Ms. McKenna concluded that Claimant could lift 10 pounds from floor to chin level on a very rare basis; 5 pounds from floor to overhead on an infrequent basis with her right arm; and four pounds from floor to overhead on a rare basis with her left arm.

38. Ms. McKenna also made the following observations based on the Work Performance and Occupational Feasibility Evaluation:

> Claimant could not complete one minute of the assembly test which is bilateral, lifting pegs, not dissimilar to those on a cribbage board and placing them in holes in the board in front of her.
>
> If Claimant's left hand had to be engaged at all in a task, her pain became so severe that it would have made it impossible for her to concentrate well.
>
> Claimant was only able to flex her right shoulder 66 degrees and abduct her right shoulder 106 degrees.
>
> Claimant was only able to sit for 20 minutes at a time and two hours in a eight hour day.
>
> Claimant was only able to stand one to ten minutes at a time and 30 minutes an entire day.
>
> Claimant was only able to walk for 20 minutes at a time and two hours in an eight hour day.
>
> Claimant, with her left arm, was unable to tolerate even light lifting on a repetitive basis (such activity would cause a significant increase in her pain)
>
> Claimant was very limited in reaching above her shoulder level, reaching from waist to chest level, and reaching below waist level.
>
> Claimant, with grasping activities, was limited to extremely limited.

39. Ms. McKenna stated that, based on Claimant's evaluation, Claimant would be so limited in her ability to use her left hand and arm that it would be very difficult for her to even get ready for work.

40. Ms. McKenna ultimately concluded that she agreed with Dr. Green's restrictions in his March 21, 2013 report, and opined that Claimant would not be able to sustain any job in a manner that an employer would be able or willing to tolerate.

41. Doris Shriver evaluated the Claimant on October 1, 2009. Based on the restrictions Dr. Green had imposed on June 9, 2009, and on other factors, Ms. Shriver opined that Claimant was unable to work in any capacity.

42. Ms. Shriver evaluated the Claimant again on April 29, 2013. During the hearing, Ms. Shriver testified that she had reviewed the medical records from Dr. Green,

Dr. Cambe, Dr. Olsen, as well as the Starting Point evaluation dated February 16, 2013. Based on the review of these medical records, it was Ms. Shriver's opinion that she believed Claimant was doing slightly worse than how Claimant presented during the October 2009 evaluation. Ms. Shriver disagreed with Dr. Green's restrictions in his March 21, 2013 report.

43. The video surveillance taken of the Claimant did not impact Ms. Shriver's opinions. Ms. Shriver pointed out that the video surveillance merely represents a "snapshot" of Claimant's life on a particular day and should not be used as a measure of potential work performance.

44. Dr. Nicholas Olsen issued a report dated September 20, 2012, and another report dated December 11, 2012. In the September 20, 2012 report, Dr. Olsen documents reviewing video surveillance as part of his overall evaluation of Claimant. Dr. Olsen documented his observations in his report dated December 11, 2012. Dr. Olsen opined that Claimant's current permanent restrictions should be: 40 pound maximum lifting limit and a 25 pound repetitive lifting limit. No limits on her ability to work overhead. No limits in sitting, standing, or walking. Dr. Olsen also indicated that these would represent Claimant's minimal capability.

45. At hearing, Claimant testified as to her ongoing restrictions that she believes are attributable to this injury. Claimant testified that she does not have any "good" days, only "bad" days or "average" days. In the course of a week, she believes she has 2-3 average days a week, the rest being "bad." When she is having a "bad" day, she can barely stand or walk at all. Claimant does not believe she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any fine manipulation with her left upper extremity on a "bad" day. Claimant does not believe that she can reach above her shoulder when she is having a "bad" day.

46. On an "average" day, Claimant does not believe that she can stand more than 15 minutes before she begins to experience pain. Claimant does not believe she can walk for more than 45 minutes before she needs to discontinue that activity. Claimant does not think that she can lift more than 10 pounds on an "average" day. On an "average" day, Claimant still does not believe that she can lift overhead with her left arm. Claimant does not believe that she can push or pull at all with her left arm on an "average" day.

47. As part of her evaluations with Dr. Cambe, Claimant has completed Brief Pain Inventories over the period of time from August 9, 2010 through February 26, 2013. In the Brief Pain Inventory forms, Claimant was asked to rate how her pain interferes with the following activities: general activities, walking ability, normal work (includes both work outside the home and house work), and sleep. Claimant was asked to rate on a scale of 0 to 10 with 0 being no interference in that activity and 10 being

complete interference in that activity. As these inventory forms reflect, Claimant has consistently indicated to Dr. Cambe that her pain has resulted in complete interference of general activities, walking abilities, normal work activities, and sleep.

48. During Claimant's evaluation with Dr. Olsen on September 20, 2012, Claimant also provided a description of her perceived limitations. Specifically, Ms. Deane stated the following to Dr. Olsen: She is unable to carry anything using both hands and unable to use her left hand. With regards to yard work, Claimant attempted to plant flowers on Mother's Day, but her mother had to finish the task. At a store, Claimant pushes the cart with her right arm and waist while she rests her left arm on the cart. Claimant rarely grips with her left arm. Claimant is not able to use the left hand to turn a grocery cart.

49. In addition, during Dr. Olsen's physical examination of Claimant, Claimant was only able to demonstrate forward flexion in her left shoulder of 90 degrees and 120 degrees in her right shoulder. Claimant was unable to lift her right arm above head height and left arm above shoulder height. In her upper extremities, Claimant was only able to demonstrate 1/5 strength at wrist grip, and 2/5 at wrist flexion and extension. Dr. Olsen indicated this was for both of her upper extremities.

50. Dr. Olsen explained that on a scale of 0 to 5 with grip strength, 0 is no strength whatsoever and 5 is full strength with maximum resistance. With 1/5 grip strength, a physician can see contractibility, but there would be no range of motion initiated by the patient. With 2/5 grip strength, a patient would require some assistance to complete full range of motion. Dr. Olsen testified that he asked Claimant to squeeze his index finger with each of her hands. He could see that Claimant was trying to contract her hands but there was really no significant force.

51. Margot Burns was retained by Respondents as their vocational expert. Ms. Burns issued a report dated March 20, 2013. Based on the restrictions that Dr. Olsen had placed on Claimant in his September 20, 2012 report, Ms. Burns opined that based on these updated restrictions, Claimant would be able to return to work as a hair stylist. Additional occupational choices that Claimant would be able to perform given Dr. Olsen's restrictions included receptionist, customer service representative, security guard, host/greeter, and movie theatre employee. As part of Ms. Burns' evaluation, labor market research was done to determine whether these positions were readily available in the Denver labor market. Based on this labor market research performed specifically for this claim, as well as labor market research that Ms. Burns continuously performs as a vocational expert, it was her opinion that positions within these occupations were readily available in the Denver labor market.

52. Ms. Burns also provided her vocational opinions based on Dr. Green's permanent restrictions identified in Dr. Green's March 21, 2013 report. Ms. Burns rendered the opinion that Claimant could perform the occupations of receptionist, greeter, or a customer service person. In some of these positions, Ms. Burns indicated that an employer may need to provide an accommodation in order to comply with Dr. Green's restrictions. However, Ms. Burns stated that it has been her experience that

nearly every employer will accommodate a person if that person is still able to perform the essential functions of the job. For instance, if a person is taking tickets, that person could perform the job sitting on a stool, or standing. Consequently, as long as the restrictions do not change the scope of the job or the essential functions of the job, employers are consistently willing to accommodate those restrictions.

53. Doris Shriver also performed an evaluation of Claimant and issued an updated report dated April 29, 2013. Ms. Shriver did not meet with Claimant for this updated evaluation, but she did review the Starting Point evaluation, and had a conversation with the Claimant about the surveillance videos. Ms. Shriver testified that the Starting Point evaluation was consistent with the initial evaluation she conducted in 2009.

54. Ms. Shriver opined that Claimant is unable to work for a full eight-hour work day. She also testified that Claimant is unable to work three to four hours per day consistently. Ms. Shriver also testified that some employers may allow flex time, but no employer will consistently allow an employee to arrive late, choose a schedule, lie down or leave if the employee is unable to continue working. Ms. Shriver ultimately opined that Claimant continues to remain unemployable.

55. As noted above, Ms. Shriver disagreed with the restrictions that Dr. Green provided for Claimant in his March 21, 2013 report. However, Ms. Shriver agreed that Claimant would be employable if Dr. Olsen's restrictions in his September 20, 2012 medical report were accurate.

56. The ALJ finds that Claimant is likely present herself to treatment providers and evaluators as more disabled than she actually is; however, the video surveillance does not demonstrate that Dr. Olsen's restrictions are appropriate. The video surveillance shows short snapshots of Claimant's life, and nothing in the videos demonstrates that Claimant should have no limits on her ability to work overhead or no limits in sitting, standing, or walking. The restrictions imposed by Dr. Green on March 21, 2013 are the most appropriate. He reviewed the video surveillance as well as additional medical reports when he provided the updated work restrictions making his opinion well-informed.

57. Based on the restrictions issued by Dr. Green on March 21, 2013, both Ms. McKenna and Ms. Shriver have opined, and the ALJ agrees, that Claimant cannot sustain employment. Ms. Burns' opinion to the contrary is not persuasive. In addition, Dr. Cambe consistently evaluates the Claimant and he has opined that Dr. Green's initial restrictions from 2009 are most appropriate. Under either set of restrictions, the ALJ finds that Respondents have failed to prove that Claimant has engaged in activities that would indicate she can return to employment.

Penalty Claims

58. Following ALJ Cannici's February 10, 2010 Order, Respondents filed a Final Admission of Liability on May 5, 2010.

59. In a Notice of Award dated October 1, 2011, the Social Security Administration notified Claimant that she had received an award of Social Security disability benefits. Specifically, Claimant was determined to be entitled to permanent total disability benefits beginning July 2009 and ongoing. Claimant's monthly benefit amount equaled $1,314.00. Because of the retroactive award of Social Security disability benefits, Claimant had been overpaid permanent total disability benefits in the amount of $21,789.96.

60. Respondents filed a Final Admission of Liability on April 17, 2012. In that Final Admission of Liability, Respondents stated the following:

> Per the attached Social Security disability award dated October 1, 2011, Claimant began receiving Social Security disability benefits in the amount of $1,314 per week effective July 1, 2009. Respondents shall, prospectively, take the statutorily allowed Social Security disability offset of $151.62 per week. In addition, because of Claimant's award of Social Security disability benefits is retroactive to July 1, 2009, Claimant has been overpaid $21,789.96. By agreement of Claimant through counsel, in counsel for Claimant's letter dated January 23, 2012, Claimant is agreeable to allowing Respondents to taking an additional $75.81 per week to recoup the overpayment. Consequently, the total offset that Respondents will take against Claimant's permanent total disability award is $227.43.

As a result, beginning February 6, 2012, Claimant was receiving a weekly PTD rate of $15.87. The Claimant did not object to this Final Admission of Liability.

61. At hearing, John Messner, the adjuster that filed the April 17, 2012 Final Admission of Liability, stated that he had a copy of the January 23, 2012 letter from counsel for Claimant that was referenced in the Final Admission of Liability. At hearing, Claimant testified that she authorized the offer allowing Respondents to take the offset of $151.62 per week and the additional amount of $75.81 per week consistent with the January 23, 2012 letter from her counsel.

62. Claimant, in her Response to Application for Hearing dated May 16, 2013, identified the following as the penalty claim that she was alleging against Respondents concerning adjustment of payment of her permanent total disability. Penalties pursuant to C.R.S. Section 8-43-304 for failing to pay PTD benefits as ordered by ALJ Cannici in an Order dated February 1, 2010 (penalty dates from February 5, 2012 ongoing or August 15, 2012 ongoing) (the amount of PTD benefits were reduced in February 2012 and were stopped in August 2012 in violation of the ALJ's Order dated February 1, 2010). Penalties pursuant to C.R.S. Section 8-43-304 for failing to comply with Rule 5-8 regarding permanent total disability benefits (penalties date from August 15, 2012 ongoing – Respondents terminated PTD benefits without a hearing in August 2012 in violation of Rule 5-8).

63. The Claimant failed to prove that the reduction in PTD in February 2012 was inappropriate under the circumstances. This is especially true given that Claimant failed to notify the Insurer about the reduction until she filed a response to an application for hearing alleging penalties in February 2013. It is apparent that the Claimant expected the reduced amount and only complained about it once the Respondents alleged that she committed fraud by filing this workers' compensation claim. She also never objected to the April 17, 2012 Final Admission of Liability.

64. The Claimant testified that the Respondents ceased all PTD payments in August 2012. The payment log reflects a gap in PTD payments from August 20, 2012 through February 7, 2013. If payments are made every two weeks, payment would have been due on September 3, 2012, subjecting the Respondents to penalties for 157 days.

65. The Claimant admitted that she has been receiving PTD checks subsequent to February 2013 in the amount of $31.74 every two weeks.

66. The Respondents offered no explanation for the failure to timely issue PTD payments to the Claimant for approximately six months. In a claim file note dated February 5, 2013, a notation was made that PTD had not been paid since August and that 20 weeks was owed to the Claimant. The adjuster made an additional note about claim reserves, but did not state that the failure to confirm reserves was the reason for the failure to pay the PTD. In any event, the Respondents admitted, through that claims file notation, that they did not pay PTD for 20 weeks.

67. Claimant failed to notify the Respondents that she had not received PTD checks until she filed a response to an application for hearing on February 4, 2013. Claimant offered no explanation for the delay.

68. In a Prehearing Conference Order from PALJ McBride dated June 20, 2013, Claimant was allowed to add the issue of penalties for hearing pursuant to C.R.S. Section 8-43-304 for failure to pay medical benefits consistent with the fee schedule in W.C.R.P. Rule 18. At the commencement of the hearing, Respondents confirmed that the penalty that Claimant was requesting was for improper fee scheduling of certain bills as opposed to non-payment of certain bills from Dr. Bennett.

69. Jody Wasserman is the billing and collection manager for Dr. Bennett. In a letter dated June 11, 2013 from Ms. Wasserman to counsel for Claimant, Ms. Wasserman attached a spreadsheet reflecting how certain bills for certain dates of service were either not paid or, in her opinion, were not paid pursuant to the fee schedule.

70. On May 3, 2010, Dr. Bennett's office billed the Insurer for a date of service of April 28, 2010. The Insurer paid only $429.29 on June 1, 2010. Ms. Wasserman initially testified that Dr. Bennett's office did not receive the rest of the payment until August 3, 2013. She later testified that the Insurer or third party administrator paid all outstanding bills by July 1, 2013.

71. It is not abundantly clear from the record that the basis for the underpayment was due improper fee scheduling. The April 28, 2010 date of service involved a right sided radiofrequency procedure, but Claimant offered no explanation concerning how that procedure should have been fee scheduled other than Ms. Wasserman's testimony that Respondents owed more than $429.29 for performing the procedure.

72. In Ms. Wasserman's letter to counsel for Claimant dated June 11, 2013, Ms. Wasserman stated that she had recently completed an audit of Claimant's claims. Ms. Wasserman testified that she did not complete the audit for determining whether the remaining bills were properly fee scheduled until sometime in June 2013. Ms. Wasserman testified that prior to performing this audit, she was unaware that Dr. Bennett's medical bills for dates of service referenced in her spreadsheet were improperly fee scheduled. Ms. Wasserman confirmed that as of July 1, 2013, Dr. Bennett's bills had been paid in full. Ms. Wasserman also confirmed that once the third party administrator was notified of the billing problems, she received 16 checks within a reasonable period of time which cleared up the outstanding accounts.

CONCLUSIONS OF LAW

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

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

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

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

Waiver

4. The Claimant asserts that Respondents waived their right to seek reopening of this claim because Respondents filed two final admissions of liability admitting for permanent total disability benefits in 2012, which was after the alleged fraud first surfaced and after the Respondents had taken surveillance video of the Claimant. The ALJ disagrees that the doctrine of waiver applies under these circumstances. Under § 8-43-303(1), C.R.S., a party may file a petition to reopen on the ground of fraud at anytime within six years after the date of injury. In addition, when a claimant has been determined to permanently and totally disabled, the award may be reopened at any time to determine if the claimant has returned to employment or has participated in activities which show that the claimant has the ability to return to employment. Section 8-43-303(3), C.R.S. The ALJ concludes that filing admissions of liability concerning The filing of a final admission of liability merely for the purpose of claiming an offset does not constitute waiver.

Reopening - Fraud

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

> At any time within six years after the date of injury, the director or an administrative law judge may … review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

6. In this case, the Respondent bears the burden of Claimant shoulders the burden of proving by a preponderance of the evidence the Claimant fraudulently induced the filing of an admission of liability for an injury the Respondents allege occurred outside the course and scope of Claimant's employment with the Employer. Section 8-43-201, C.R.S. The Respondents have failed to prove that Claimant fraudulently induced the filing of a general admission of liability when she initially filed this claim in August 2005. The evidence Respondents rely upon lacks credibility and is not persuasive. The motivation of Claimant's former husband, Herman Armenta, is highly questionable. Mr. Armenta's testimony that he was not in fact the person who notified the Division of Workers' Compensation lacks credibility in light of the other evidence to the contrary. The ALJ also does not believe the testimony of Martha Armenta. She appeared confused.

Reopening - Ability to Work

7. Cases in which a claimant is determined to be permanently and totally disabled may be reopened to determine if a claimant has returned to employment or if the claimant has participated in activities which indicate the claimant has the ability to return to employment. If either circumstance is proven, claimant's permanent total disability award shall cease. Section 8-43-303(3), C.R.S. Respondent bears the

burden of proof to establish that Claimant has engaged in activities which would indicate that she has the ability to return to employment.

8. Respondents failed to meet their burden of proof. The Starting Point evaluation, the OT Resources evaluation from 2009, Dr. Green's restrictions from 2009, and the functional capacity evaluation done by Shari Barta in 2009 are all relatively consistent with regards to Claimant's functional ability. Dr. Cambe still believes the 2009 restrictions by Dr. Green are appropriate. In March 2013, Dr. Green altered the weight restriction and the amount of time Claimant can work, but this alteration was still highly inconsistent with the work restrictions proposed by Dr. Olsen. Respondents' own vocational expert, Margot Burns, testified that an employer would have to modify a job position to fit within Dr. Green's 2013 restrictions. As found, such modification means that jobs are not available on the open labor market. Doris Shriver persuasively testified that employers would not modify a position to fit Claimant's restrictions. Dr. Olsen opined that Claimant can engage in activities that would enable Claimant to work; however, no persuasive evidence supported Dr. Olsen's opinions regarding appropriate restrictions or that Claimant can engage in such activities on a consistent basis in work environment.

9. The three-day evaluation done at Starting Point is persuasive as is the report of treating physician Dr. Cambe who adopted this report. Dr. Cambe is the only physician who is seeing Claimant on a regular basis at this point. Given that fact, his opinion that Claimant's condition has not substantially changed is highly persuasive.

Penalties

10. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides in relevant part, that any employer or insurer:

> who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey and lawful order…, shall be subject to … a fine of not more than five hundred dollars per day for each such offense.

First, it must be determined whether a party has violated any provision of the Workers' Compensation Act or an Order. If a violation is found, it must then be determined whether the violator acted reasonably. §8-43-304, C.R.S.; *see also Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). In this case, the Claimant seeks penalties for three reasons: Respondents' failure to pay PTD to the Claimant when owed; unilateral reduction of PTD payments; and failure to properly pay Dr. Bennett's bills consistent with the DOWC fee schedule.

11. As found above, the ALJ declines to impose penalties for the reduction in the PTD amount which occurred in January 2012. It is apparent the Claimant anticipated

the reduction based on her agreement to have her payments reduced to repay an overpayment. She made no complaints about the reduction until well after it had begun. As such, the Claimant has not proven that penalties should be imposed against the Respondents for issuing a reduced PTD check starting in January 2012.

12. The Respondents admittedly failed to pay PTD to Claimant when owed over a period of 20 weeks which totaled $317.40. As such, penalties are appropriate. After considering the factors set forth in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), the ALJ imposes a penalty of $50.00 per day for a period of 157 days (September 3, 2012 through February 7, 2013) for a total penalty of $7,850.00. The Claimant offered no testimony that the failure to receive the PTD payments presented a hardship for her, and she failed to even notify the Respondents that she was not receiving the payments until her attorney filed a response to an application for hearing in February 2013. Respondents offered no credible explanation about why the payments were not made. Yet, they cured as soon as they were notified. As such, a minimal penalty is warranted.

13. Regarding Claimant's claim of penalties for Respondents' failure to pay Dr. Bennett's bill consistent with the fee schedule, the ALJ declines to impose penalties. Ms. Wasserman believed the underpayment was due to inappropriate fee scheduling, but no persuasive evidence was offered to show how the procedure should have been billed. The Claimant made no specific reference to WCRP Rule 18 and which procedure applies to this penalty claim. Although the ALJ has no reason to doubt the veracity of Ms. Wasserman's testimony, she simply did not make it clear as to why she felt that the Respondents improperly fee scheduled the April 28, 2010 procedure Claimant underwent. Thus, Claimant's claim for penalties on that basis is denied.

Remaining Issues

14. In light of the findings and conclusions made herein concerning the issue of waiver, Claimant's claim for attorney's fees and costs is denied. The Respondents did not file applications for hearing on issues that were not ripe. In addition, there is insufficient evidence in the record to support Claimant's claim for costs pursuant to §8-42-101(5), C.R.S. The issue of overpayment is also moot.

ORDER

It is therefore ordered that:

1. The Respondents' petition to reopen based on fraud is denied and dismissed.

2. The Respondents' petition to reopen based on Claimant's ability to return to employment is denied and dismissed.

3. Claimant is entitled to ongoing PTD payments consistent with the April 17, 2012 Final Admission of Liability.

4. Claimant's claim for penalties concerning the reduction in PTD beginning in February 2012 is denied and dismissed.

5. Claimant's claim for penalties concerning the failure of Respondents to pay PTD for 157 days is GRANTED. Respondents shall pay penalties in the amount of $7,850.00 to Claimant. None of the penalty shall be apportioned to the Subsequent Injury Fund.

6. Claimant's claim for penalties concerning the alleged failure of Respondents to properly fee schedule the procedure Dr. Bennett performed on April 28, 2010 is denied and dismissed.

7. Claimant's claim for attorney's fees and costs is denied and dismissed.

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

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

DATED: January 16, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

- Whether claimant has overcome the Division-sponsored Independent Medical Examination ("DIME") physician regarding the issue of whether claimant's right shoulder injury was caused by the admitted industrial injury by clear and convincing evidence?

- Whether claimant has overcome the DIME physician regarding the issue of whether claimant's right wrist injury was caused by the admitted industrial injury by clear and convincing evidence?

- Whether respondents have overcome the DIME physician by clear and convincing evidence regarding his opinion that claimant's need for oxygen is causally related to hiss work injury?

- Whether claimant has proven by a preponderance of the evidence that he is entitled to an award for disfigurement?

FINDINGS OF FACT

1. Claimant sustained a work related injury on March 19, 2010 when was riding as a passenger with a co-worker in a vehicle, when the co-worker lost control of the car and they were broad-sided by a pickup truck going about 65 to 70 miles per hour. Claimant testified at hearing that at the time of the injury, he was a passenger in a sports car and was wearing a seat belt. Claimant testified that at the time of impact, his hands hit the dashboard and the dashboard caved in. Claimant testified he injured his head, right shoulder; right arm, wrist and fingers, left hip, left knee and lower back in the accident.

2. Claimant received medical treatment at the scene of the accident. The EMS personnel noted that claimant complained of midline neck pain and the C5-6 level, thoracic pain anterior and posterior, right clavicle pain, left hip pain and left knee pain. Claimant was transferred to Littleton Adventist Hospital where he was treated for a concussion and right shoulder, neck, right chest, left clavicle, left knee and left hip pain.

3. Claimant began treating with Dr. Welling on March 26, 2010. Dr. Welling noted that claimant complaints of pain on palpation to his left thigh, and pain to his neck and low back. Dr. Welling recommended medications and released claimant to return to work full duty.

4. Claimant testified that when he returned home, his treatment was initially focused on the lower back and neck. Claimant testified he first noticed pain in his right wrist and thumb when he was back at work, still on crutches and had problems opening and closing valves because of pain in his wrist. Claimant testified he discussed his pain with Dr. Welling's office in April or possibly later. Claimant testified he noticed pain in his shoulder and could not reach to get supplies off the top shelf when he was back at work.

5. Claimant denied injuring either his right wrist, thumb or shoulder after the motor vehicle accident.

6. Claimant continued to treat with Dr. Welling for problems with his left hip, neck and back. Claimant was referred for chiropractic treatment. The chiropractic notes document claimant having ongoing complaints involving his neck and back areas. By April 9, 2010, claimant reported to Dr. Welling that he was feeling 100% better, but still reported a little soreness.

7. Claimant returned to Dr. Welling on May 21, 2010 and reported some problems with his memory. Dr. Welling recommended a referral to a neurological specialist.

8. Claimant returned to Dr. Welling on June 3, 2010 with continued complaints of memory problems and bilateral wrist pain. Dr. Welling recommended an electromyelogram ("EMG") of the right upper extremity and a brain magnetic resonance image ("MRI"). The EMG and MRI were both performed and interpreted to be negative.

9. Claimant was evaluated by Dr. Rivera on December 7, 2010 with complaints of neck pain and extremity pain right greater than left. Claimant reported having problems with his neck, right shoulder and arm and sometimes his left wrist. Claimant reported numbness in his firth forearm and hand. Dr. Rivera diagnosed myositis, cervicalgia and cervical radiculopathy and recommended a cervical MRI and physical therapy.

10. Respondents initially denied the claim to determine whether the claim was compensable. Respondents ultimately file a General Admission of Liability ("GAL") dated January 11, 2011 admitting for medical benefits only. Claimant did not receive medical treatment for his injury between July 14, 2010 and December 7, 2010 because of the denial of the claim.

11. Claimant returned to Dr. Rivera on January 13, 2011 and reported less numbness in his left hand and arm pain after physical therapy. Dr. Rivera diagnosed claimant with pain in his shoulder region. By February 24, 2011, Dr. Rivera noted claimant was complaining of continued neck pain with pain radiating down his right upper extremity in a C6-7 distribution. Dr. Rivera noted he might consider a repeat

EMG if claimant's symptoms persisted. Dr. Rivera recommended a cervical epidural steroid injection ("ESI").

12. Claimant returned to Dr. Rivera on March 29, 2011 with complaints of some residual right thumb pain. Claimant noted that the ESI provided relief for his other symptoms, but not the right thumb pain. Dr. Rivera referred claimant to Dr. Cortgageorge for counseling and continued claimant's medications. Dr. Rivera recommended an x-ray of claimant's right thumb.

13. On April 6, 2011, Dr. Rivera noted the x-ray revealed a carpal cyst of the scaphooid bone. Dr. Rivera noted this could be a result of trauma. Dr. Rivera referred claimant to an orthopedist for further evaluation.

14. Claimant was examined by Dr. Anderson with Durango Orthopedics on May 23, 2011. Dr. Anderson noted claimant complained of pain with a mild amount of swelling at the STT joint on the right side. Dr. Anderson noted claimant's x-ray revealed a nearly complete obliteration of the STT joint articulation space for the distal pole scaphoid cyst. Dr. Anderson recommended an injection to treat the severe arthritis.

15. Claimant returned to Dr. Anderson on July 7, 2011. Claimant noted he did well following the injection, but became severely symptomatic the previous weekend. Dr. Anderson recommended voltaren gel and a possible repeat injection.

16. Claimant was eventually referred to Dr. Orndorff in January 2012 by Dr. Anderson. Dr. Orndorff noted claimant's continued complaints of neck and shoulder pain with headaches and depression. Dr. recommended a repeat MRI of the cervical spine that was obtained on February 13, 2012. The MRI showed multilevel degenerative disc disease with facet joint arthropathy. Dr. Orndorff noted on his evaluation of claimant on February 13, 2012 that claimant continued ot have complaints of cervical spondylosis and cervical radiculopathy. Dr. Orndorff recommended a C4 to C7 cervical discectomy and fusion with interbody cage, allograft bone followed by laminectomy decompression and posterior instrumented fusion to address the central canal stenosis.

17. Claimant eventually underwent cervical spine surgery on December 14, 2012 under the auspices of Dr. Orndorff. The surgery included an anterior cervical decompression of the spinal cord at C5-C6, C6-C7 as well as C4-C5, anterior discectomy and arthodesis at C4-C5, C5-C6 and C6-C7, application of a PEEK interbody cage at C4-C5, C5-C6 and C6-C7, anterior instrumentation at C4-C5, C5-C6 and C6-C7, with allograft bone graft extender. This procedure was followed by a posterior approach with application and removal of Mayfield tongs and posterior instrumentation with Stryker Oasis cervical screws at C4, C5, C6 and C7, posterolateral cervical arthrodesis at C4-C5, C5-C6 and C6-C7, laminectomy and decompression of C4-C5, C5-C6 and C6-C7.

18. Dr. Dempsey was consulted following the surgery due to the fact that claimant's surgery took ten (10) hours and when claimant was extubated he was having significant pain and was given fentanyl and Dilaudid to help with his pain. Dr. Dempsey noted that claimant obstructed his airway and was not able to ventilate correctly. Dr. Dempsey noted that claimant's pre-operative screening was highly suggestive of sleep apnea and the sleep apnea was predisposing him to airway collapse when he received narcotics for his postoperative pain. Dr. Dempsey diagnosed post-operative respiratory failure and recommended claimant undergo an outpatient sleep study after his discharge.

19. The medical records contain documentation the claimant had a possible sleep apnea issue prior to the surgery, including the report from PA-C Baumchen dated September 21, 2012. Claimant denied at hearing having been diagnosed with sleep apnea prior to his surgery.

20. Following claimant's surgery, claimant began to complain of increasing problems with his right wrist. Claimant was examined by PA-C Gardner on February 4, 2013 with complaints of dorsal wrist pain after being transferred from a cast to a thumb spica brace following his surgery.

21. Claimant underwent an MRI of his right wrist on March 26, 2013. The MRI revealed a large tear of the central triangular fibrocartilage. Dr. Lindauer reviewed the MRI and diagnosed presumed postsurgical changes centered at the triscaphe articulations with severe arthrosis with a diffuse wrist synovitis. Dr. Lindauer also diagnosed a large tear of the central triangular fibrocarilage disc, moderate distal radioulnar joint arthrosis and mild tenosynovitis of the flexor tendons and 1st through 4th extensor compartment tendons at the level of the wrist that Dr. Lindauer noted was likely reactive.

22. Claimant underwent injections and physical therapy as treatment for the right wrist.

23. The medical records also document claimant developing right shoulder pain. PA-C Baumchen noted on July 18, 2013 that claimant reported increasing pain with tenderness over the bicipital groove and AC joints. Baumchen obtained x-rays of the right shoulder and noted that the x-rays showed degenerative changes with arthritic change though the AC joint. Claimant also began complaining of left shoulder pain and x-rays of the left shoulder showed mild AC arthritis. Claimant underwent an injection into the right shoulder on July 18, 2013.

24. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Jernigan on January 24, 2014. Dr. Jernigan noted claimant's mechanism of injury and his cervical disc injury resulting in surgery along with this right hand STT injury complicating arthritic problems in the hand now status post surgery. Dr. Jernigan further diagnosed claimant with a closed head injury, a history of depression that was

now stabilized and a low back injury that was likewise stabilized. Dr. Jernigan provided claimant with a PPD rating of 33% whole person. The impairment rating considered of 27% for the cervical spine. Dr. Jernigan also provided an impairment rating of 14% upper extremity for the wrist, that converted to an 8% whole person impairment rating. This combined with the 27% of the cervical spine for the 33% whole person impairment rating. Dr. Jernigan further noted that claimant continued to use a TENs unit and a CPAP unit and recommended both of these should be maintained as they were related to the injury.

25. Claimant returned to Dr. Anderson on May 23, 2014 with continued complaints of right shoulder pain. Dr. Anderson diagnosed claimant with a long head of biceps tendinitis with consideration for tendon sheath injection. Dr. Anderson noted that the physical findings were not consistent with a rotator cuff team, but referred claimant for an MRI of the shoulder. The MRI was performed on June 6, 2014 and demonstrated a near complete full thickness tear of the supraspinatus tendon retracted to the glenohumeral joint level. Dr. Anderson recommended shoulder surgery and noted that claimant had only very mild shoulder pain prior to the car accident and opined that the nature of the shoulder pain and severity increased dramatically after the injury.

26. In response to an inquiry from claimant's counsel, Dr. Jernigan opined on June 24, 2014 that there was a greater than 50% chance that the right shoulder rotator cuff injury did occur with the motor vehicle accident. Dr. Jernigan further recommended claimant undergo the surgery recommended by Dr. Anderson.

27. Dr. Jernigan issued another report on June 27, 2014 after examining claimant and noted that claimant was on crutches from his injury and reported his hip and shoulder have been sore since the accident and had not really improved that much. Dr. Jernigan recommended claimant continue with the CPAP machine and reiterated his opinion that claimant's right shoulder condition was related to his work injury.

28. Claimant underwent a DIME with Dr. Castrejon on July 2, 2014. Dr. Castrejon reviewed claimant's medical records, obtained a medical history from the claimant and performed a physical examination in connection with his DIME. Dr. Castrejon notes in his report with regard to the right shoulder that there is a lack of consistency with regard to the right shoulder complaints, noting that in some areas the records reflect complaints to the right shoulder and other records document complaints to the left shoulder. Dr. Castrejon notes that the initial records document complaints of shoulder pain, there is also documentation that the shoulder pain resolved following treatment that allowed for claimant to be released at MMI on April 9, 2010. Dr. Castrejon opined that this would be consistent with resovlement of uncomplicated straining injuries. Dr. Castrejon further noted that there was no further mention of should problems until the evaluation by Dr. Rivera on December 7, 2010, nine months after the injury.

29. Dr. Castrejon ultimately opined that claimant's shoulder condition was not related to the work injury of March 19, 2010. In coming to this conclusion, Dr. Castrejon noted that while claimant initially complained of some issues with his shoulder, he reported improvement following the chiropractic care and then didn't complain of ongoing shoulder problems until nine months post-accident. Likewise, Dr. Castrejon opined that claimant's wrist and thumb complaints were not causally related to the March 19, 2010 injury. Dr. Castrejon noted that osteoarthritis most commonly presents in the STT join which is often confused, clinically, with first CMC joint arthritis. Dr. Castrejon noted that while this can be related to trauma, he did not a sufficient reference to an acute injury to either wrist following the motor vehicle accident. Dr. Castrejon notes that the first reference to wrist pain was approximately 2 ½ months post accident. Dr. Castrejon noted that if the motor vehicle accident were responsible for claimant's wrist symptoms "coming to light", he would expect the symptoms would present themselves before 2 ½ months post accident. For these reasons, Dr. Castrejon opined that the motor vehicle accident did not aggravate claimant's underlying degenerative condition. Dr. Castrejon opined that it was medically probable that claimant experienced injuries to multiple parts of his body in the motor vehicle accident, but concluded that most of these injuries were minor strains and contusions that expectedly improved and subsequently resolved.

30. With regard to claimant's sleep apnea, Dr. Castrejon noted that claimant denied any preoperative respiratory issues. Dr. Castrejon further noted that following claimant's surgery, a critical care consult from Dr. Dempsey documents claimant having post operative respiratory failure requiring BIPAP. Dr. Castrejon noted that it was his opinion that were it not for the increase risk that claimant was subjected to during and following surgery the claimant would not have required treatment for an underlying asymptomatic sleep apnea.

31. Dr. Castrejon also noted that based on the neuropsychological evaluation that was completed, claimant would not qualify for the diagnosis of a mild traumatic brain injury as there had been no permanent sequelae. Dr. Castrejon provided claimant with a permanent impairment for the cervical spine that amounted to 27% whole person. Dr. Castrejon recommended maintenance medical care as recommended by Dr. Jernigan.

32. The ALJ notes that Dr. Castrejon's opinions regarding the causal relationship between claimant's wrist and shoulder injuries and the motor vehicle accident are based on the temporal relationship between claimant's accident and when he sought treatment for his injuries. This is likewise somewhat complicated by the fact that claimant did not receive medical treatment between July 2010 and December 2010 due to the fact that claimant's claim had been denied.

33. The ALJ finds the testimony of claimant to be credible and persuasive that he hit his hands on the dashboard during the motor vehicle accident. The ALJ further finds the testimony of claimant credible that he experienced pain in his hands and

shoulder shortly after the motor vehicle accident. The ALJ finds that claimant has sufficiently explained the lack of documentation in the medical records and finds that claimant has overcome the opinion of the DIME physician by clear and convincing evidence regarding the relatedness of the wrist and shoulder complaints.

34. The ALJ notes that the initial medical records from Littleton Adventist Hospital document claimant complaining of right shoulder pain. The ALJ further credits claimant's testimony that he noticed continued problems in his right shoulder when returning to work and being unable to lift supplies off the higher shelves. The ALJ therefore finds that claimant has demonstrated that it is likely true and free from substantial doubt that he injured his shoulder and wrist in the March 19, 2010 motor vehicle accident.

35. Respondents argue that Dr. Castrejon's opinion that claimant's need for oxygen for his sleep apnea issues has been overcome by clear and convincing evidence. The ALJ is not persuaded.

36. Dr. Castrejon's opinion regarding relatedness of the sleep apnea is again based on the temporal relationship between claimant's onset of symptoms that resulted in the need for the sleep apnea treatment and the surgery that included and extended period of anesthesia. While claimant may have had issues with sleep apnea symptoms prior to the surgery, there was no need for treatment for the possible sleep apnea until after the surgery. Therefore, the ALJ finds that respondents have failed to demonstrate that Dr. Castrejon's opinion regarding the cause of the sleep apnea has been overcome by clear and convincing evidence.

37. As a result of claimant's surgery, claimant has a surgical scar on the back of his neck measuring six (6) inches in length and one (1) inch in width. Claimant also has a surgical scar on the front of his neck measuring three (3) inches in length and 1/8 inch in width. The ALJ finds that claimant has proven that he suffered disfigurement that is normally exposed to public view as a result of his injury. Claimant likewise has a surgical scar measuring 2 ½ inches in length and 1/8 inch in width on his right wrist. Due to the fact that the ALJ finds that the claimant has overcome the opinion of Dr. Castrejon regarding the relatedness of the right wrist, the ALJ will award disfigurement for the right wrist scar.

CONCLUSIONS OF LAW

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

306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, the ALJ credits the testimony of claimant regarding the onset of his symptoms in his right shoulder and right wrist and determines that claimant has proven by clear and convincing evidence that the right shoulder and right wrist are causally related to the industrial injury.

6. As found, respondents have failed to overcome the opinion of Dr. Castrejon by clear and convincing evidence regarding the relatedness of claimant's sleep apnea condition.

7. Pursuant to Section 8-42-108, C.R.S., 2009 Claimant is entitled to a discretionary award up to $4,286.00 for his serious and permanent bodily disfigurement that is normally exposed to public view. Considering the size, placement, and general

appearance of Claimant's scarring, the ALJ concludes Claimant is entitled to disfigurement benefits in the amount of $1,714.40, payable in one lump sum.

ORDER

It is therefore ordered that:

1. Claimant's wrist and shoulder injuries are a compensable component of the March 19, 2010 industrial injury.

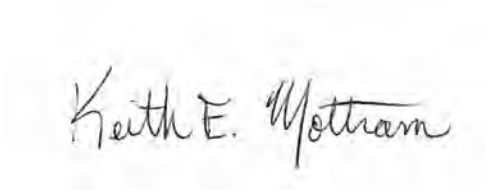
2. Respondents shall pay $1,714.40 to claimant for disfigurement for the scars to claimant's neck and wrist.

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

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

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

DATED: January 6, 2015



_____

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

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ISSUES

The issue for determination is the reasonableness and necessity of medical benefits to include the toxicology screen by Rapid Tox Screen for the date of service of June 16, 2014, topical cream prescriptions for AB8 Ketamine 10%, BB3 Tramadol 10%, MS2-MethylPyridHydrox and AB5-KGDBLC, as well as the reasonableness and necessity of continued Lyrica, Morphine, and Celebrex.

FINDINGS OF FACT

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

1. Claimant was injured on or about June 7, 2011. Claimant sustained a back injury and underwent a L3-L5 decompression.

2. Claimant takes Lyrica and Celebrex twice per day and Flexeril at night for pain relief. The medications help with his aches and pains in his back and legs. He uses Morphine sparingly and only in cases of extreme pain caused by increased activity. If he goes without Lyrica and/or his Celebrex, for two to three days, his pain levels increase, especially in his back and legs. Claimant testified that he has "good days" and "bad days." On a good day, claimant deals with his pain, runs errands and does things around the house. On bad days claimant is laid up on the couch using heat/ice to assist in managing his pain. The ALJ finds from claimant's testimony that he likely takes Morphine on bad days in order to control his pain levels in an effort to remain as functional as possible. Based upon the medical records documenting the nature and extent of Claimant's injury and his subsequent treatment, the ALJ finds Claimant's testimony regarding his need for ongoing medications and the effectiveness of previously prescribed medications credible and persuasive.

3. Dr. Ridings placed claimant at MMI on June 6, 2012. Claimant was provided maintenance medication consisting of Lyrica, Morphine and Diclofenac.

4. By report dated June 28, 2012, Dr. Ridings reviewed video surveillance. Based on the videotape surveillance, Dr. Ridings reevaluated claimant's medication needs, his impairment rating, and retracted his previous opinion regarding claimant's need for possible additional surgery.

5. On July 10, 2012, drug testing was performed which did not detect the presence of Morphine.

6. On July 13, 2012, Dr. Ridings issued a report indicating that he prescribed Morphine (60 tablets) on April 3, May 1, May 23 and June 20, 2012. He indicated Morphine doses should be decreased if claimant did not need them within the two- to four-day window, which Dominion Diagnostic states that Morphine would be detectable by the assay.

7. Dr. Ridings indicated on July 19, 2012 he was decreasing claimant's Morphine as he was concerned about claimant's lack of severe functional limitations which were not apparent on recent surveillance videotape and his need for Morphine.

8. On October 24, 2012, claimant underwent a Division IME with Dr. Sandell. On that date, claimant reported pain levels of 7/10 at rest, and 8-9/10 with activity. Physical examination showed tenderness in the paraspinal muscles of the lumbosacral region bilaterally. Claimant had no focal trigger points, good motor strength without any focal motor weakness or muscle atrophy, grossly intact light sensation, and diminished reflexes bilaterally. Claimant had a negative straight leg raise on the right and a positive straight leg raise on the left. Dr. Sandell provided the claimant with 15% whole person impairment.

9. On December 12, 2012, Dr. Ridings noted that he was not convinced that claimant really required opiates, given the issues discussed at length regarding the surveillance videotape. Additionally, on his most recent urine drug test screen at a time when claimant told Dr. Ridings he was taking Morphine daily, Morphine was not found in his urine on two separate tests.

10. Dr. Ridings retired from active practice. Consequently, claimant's ongoing care was transferred to Dr. George Johnson. Dr. Johnson first saw the claimant on June 3, 2013. At that time, claimant reported pain levels 9/10 at worst, and 8/10 on average. Dr. Johnson recommended physical therapy and injections and referred claimant to Dr. Joseph Brooks.

11. Dr. Brooks' specialty is in interventional pain management. He is board certified in internal medicine and pain management. He evaluated claimant on July 29, 2013. During this appointment claimant reported pain radiating down both legs, worse with prolonged sitting or standing and driving a car. He was taking Lyrica, Celebrex and opiates (Morphine) sparingly. Drug testing performed on that day was positive for Lyrica and Morphine.

12. On November 5, 2013, claimant continued to report pain levels of 8/10 at worst, and 8/10 on average. Claimant was taking Lyrica, Celebrex, Morphine and was also prescribed Flexeril. By letter dated November 18, 2013, Dr. Johnson indicated that he had not prescribed any narcotic medication.

13. Dr. Brooks saw the claimant again on December 16, 2013 and requested a drug test. On that day, claimant's pain levels were 8/10.

14. Drug testing performed on December 16, 2014 was negative for Morphine and positive for Lyrica and Flexeril.

15. Dr. Brooks reevaluated claimant on June 16, 2014 during which appointment claimant reported his pain level was 9/10. Physical examination revealed tenderness in the right back and buttock. The remainder of the examination was normal. Dr. Brooks renewed claimant's Lyrica, Flexeril and Morphine and added a prescription of topical creams, including MS2-Methyl Pyrid Hydrox, AB8 Ketamine 10%, AB5-KGDBLC, and BB3 Tramadol 10%.

16. Dr. Brooks requested drug testing, which was performed on June 16, 2014. The testing was negative for all drugs previously prescribed.

17. Dr. Bisgard performed an independent medical examination (IME) for respondent on January 13, 2014. Dr. Bisgard has a specialty in physical medicine and rehabilitation (PM&R). While she treats patients with chronic pain conditions, she is not board certified in pain management. During his IME claimant reported 8-9/10 level pain with increased activity. On the date of his examination, claimant reported a pain level of 8/10. Dr. Bisgard's reached the following diagnostic impression following completion of her IME: L3-4 and L4- 5 disc bulge with mild retrolisthesis, bilateral lower extremity paresthesias, deconditioning, and possible Charcot-Marie-Tooth syndrome. Claimant was taking Lyrica, Cyclobenzoprine (Flexeril), Celebrex, and Morphine. Regarding the continued use of medications previously prescribed, Dr. Bisgard originally recommended tapering and discontinuing the use of Morphine but recommended that claimant continue taking Celebrex "as it is reasonable". Dr. Bisgard also recommended Lyrica be continued, as "He appears to be getting the best relief with Lyrica." However, Dr. Bisgard has since changed her opinion regarding the continued use of Lyrica and Celebrex.

18. In a subsequent report and during her testimony, Dr. Bisgard indicated it was difficult to determine how much pain and limitation claimant actually had. She reviewed the video surveillance from November 2013 in which claimant was observed sitting and standing at a football game without apparent discomfort. He was also observed sitting in a forward flexed position on a split rail fence without apparent difficulty. Dr. Bisgard testified that physicians determine if prescribed drugs are effective, by a decrease of pain and a corresponding increase in function. Function is not based solely on return to work, but on ability to function with activities of daily living. It was her opinion that at no point did claimant demonstrate pain behaviors, and even when reporting his pain level at 8/10, he did not display any behavior suggesting pain at that level. Consequently, Dr. Bisgard noted: "Due to lack of benefit with the medications including pain relief and/or functional improvement, I recommend the morphine be tapered and stopped as well as the Celebrex." In the final paragraph of her report, Dr. Bisgard expands this list to include Morphine, Celebrex, Lyrica, and Flexeril, stating as the medications are not reducing pain or increasing function, they should be discontinued. Dr. Bisgard recommended a home exercise program, over-the-counter medication, and Flexeril PRN. The ALJ is not persuaded by respondent's suggestion

that Claimant's negative drug testing results is conclusive evidence that the aforementioned medications are not reasonably necessary. Given claimant's testimony that he uses Morphine sporadically, has addiction concerns and has good days and bad days, the ALJ is not surprised by the results of claimant's drug testing. Based upon the evidence presented, including claimant's testimony, the ALJ finds, more probably than not, that the aforementioned medications are likely helping with pain control and maintaining his level of functioning. The ALJ finds that without these medications, including the occasional dosage of Morphine, claimant's average pain levels will likely increase on a daily basis and his level of functioning will deteriorate. Accordingly, the ALJ finds the continued use of Lyrica, Celebrex, Morphine and Flexeril reasonably necessary and related to claimant's industrial injury.

19. The cost of a 30 day supply of the aforementioned topic drugs prescribed is as follows: MS2-Methyl Pyrid Hydrox, $5,825.10; AB8 Ketamine 10%, $903.60; AB5-KGDBLC, $2,756.40; BB3 Tramadol 10%, $1,465.80. The total cost of a 30-day supply of these prescriptions is $10,950.90.

21. Dr. Brooks testified that claimant's diagnosis was radiculopathy and low back pain. During his deposition, Dr. Brooks explained that Ketamine 10% is a topical compound for pain control. Dr. Brooks testified that he routinely prescribes this compound, as part of his standard practice, to his patients with success. Dr. Brooks also testified the Tramadol 10% was prescribed as an additional topical medication to alleviate pain and prevent the need for stronger opiate medications. According to Dr. Brooks this medication is to be used in conjunction with the Ketamine. Dr. Brooks also addressed the prescription for MS2-methyl pyrid hydrox. Per Dr. Brooks, this prescription is for nerve pain and contains a high amount of folic acid, B12 and B6 vitamins and is reasonably necessary to address/treat Claimant's ongoing nerve pain. Dr. Brooks testified that the use of the aforementioned topical creams in this case would be considered an off label use of the medications. He testified that he prescribed the creams in an effort to focus treatment to the regional area of claimant's pain and avoid the side effects attendant with oral medications.

22. Dr. Bisgard testified that she was not familiar with these particular topical medications and had no experience with them. In fact, Dr. Bisgard had to look up the medications and call a pharmacist to investigate the compounds in question. After conducting her investigation, Dr. Bisgard was informed as to what active components were in the compounded creams. She testified that the topical creams contain duplication within the different prescriptions written by Dr. Brooks. Specifically, there is Ketamine in two of the creams, and two muscle relaxers in one of the creams - Cyclobenzoprine and Baclofen. According to Dr. Bisgard, the creams also contained medications which the claimant was also taking orally –Gabapentin-Lyrica (oral); Cyclobenzaprine/Baclofen-Cyclobenzaprine (oral), Diclofenac-Celebrex (oral). Dr. Brooks testified to these same facts. After determining what was in the compounded creams, Dr. Bisgard preformed a medical literature review to determine the use and effectiveness of these topical agents in the treatment of back pain and/or radiculopathy. Based on the medical studies that Dr. Bisgard reviewed, she testified that there was no

support for the use of these topical medications for radiculopathy or low back pain. Dr. Bisgard testified that the *Medical Treatment Guidelines* limit the use of topical Ketamine to neuropathic disorders such as CRPS. According to Dr. Bisgard, claimant does not have neuropathic pain or CRPS and the topical use of this drug (Ketamine) would not help treat radiculopathy because a topical compound cannot penetrate to the level of the nerve root. Per Dr. Bisgard the *Medical Treatment Guidelines* do not recommend the use of topical agents for the specific conditions claimant has. In addition, the *Medical Treatment Guidelines* stated that no studies identified evidence for the effectiveness of compounded topical agents other than those recommended. Therefore, other compounded topical agents were not generally recommended. Based upon the fact that the some of the medications in the topical creams were duplicates of each other and the oral medications claimant had already been prescribed and because claimant did not have a medical condition for which the use of topical medications were recommended or effective in treating, Dr. Bisgard testified that the topical agents prescribed by Dr. Brooks were not reasonable or necessary.

23. Dr. Brooks also requested a drug test through Rapid Tox Screen. The test was comprised of a panel of 48 drugs including common street drugs, such as heroin and ecstasy. Dr. Brooks indicated this extensive drug testing was needed to make sure patients are not using drugs or other medications that they are not telling him about. He requested this confirmatory laboratory testing because he is dealing with patients with chronic pain. Because the claimant was taking Morphine sporadically, Dr. Brooks indicated the test would be either positive or negative. Based on a negative test, he is looking for confirmation of a minute amount of the medication in the system. He also indicated that this population has a higher risk of abusing drug and although he had no suspicion the claimant was actually abusing drugs, he suspects everyone he prescribes opiates to. Although Dr. Brooks indicated that he could narrow the panel to give him information needed, he testified that he casts a "broad network" with every patient that he sees to assure that patient is not "diverging" from what they tell us by using illicit medications/drugs. The cost of the Dr. Brooks drug test was $5,210.00.

24. By letter dated October 9, 2014, Ms. Madsen denied the drug-screening test from Rapid Tox Screen. Respondent sought review of Dr. Brooks request for a 48 panel drug test by Dr. Alan Burgess.

25. Dr. Burgess reviewed the 48-drug panel requested and opined that the number of tests and the cost of the evaluation exceeded necessary medical monitoring and the testing was out of proportion to the number of drugs being given. Claimant was being prescribed three medications, only one of which was a scheduled II drug – Morphine. Per Dr. Burgess, the other 47 drugs tested for were excessive, unnecessary, and the cost was unreasonable. Dr. Burgess testified that testing included drugs not prescribed, metabolites of drugs not prescribed and drugs that were outdated and not in use any longer. He noted that claimant really wasn't following through in filling his prescriptions, which was exactly the opposite of what usually happens when physician drug-monitored testing is requested. He indicated that a 10-panel drug test is the standard for assuring compliance with health care opiates. According to Dr. Burgess, A

10-panel test covers the main illicit drugs, main prescription drugs, and major prescription drugs of abuse. A 10-panel drug test costs in the range of $11.50-$15.00. This would include all of the physical characteristics of the urine, which are included for free. Dr. Burgess opined that it would be reasonable for a physician to limit a confirmatory test to a specific drug. A confirmatory test would cost in the range of $150.00. The ALJ credits Dr. Burgess' testimony to find that a 48-panel drug test under the circumstances presented in this case is unreasonable.

26. Claimant has failed to prove by a preponderance of the evidence that the topical drugs AB8 Ketamine, BB3 Tramadol, AB5-KGDBLC and MS2 Methyl Pyrid Hydrox are reasonable and necessary. The ALJ finds Dr. Bisgard's testimony that claimant does not have a medical condition which would be amenable to treatment with the use of topical agents persuasive. Moreover and importantly, while the Medical Treatment Guidelines are advisory and can be deviated from when appropriate, Claimant has failed to make a persuasive case that the use of topical agents is reasonably or necessary here. To the contrary, outside of Ketamine, the medications in the compounded creams are duplicative of those oral medications, which have proven effective in treating and maintaining his condition. Regarding the need for Ketamine, Claimant testified that he rarely uses an opiate for pain control. He is not contending that the Morphine is ineffective in controlling his pain. Rather, he testified that the Morphine is very helpful for him. He has requested an order for ongoing Morphine as it has assisted in controlling his pain and given him the benefit of improved function. Accordingly, the ALJ is convinced that it is unnecessary to add another potent pain medication to claimant's treatment regime. Also, it is persuasive that MS2 Methyl Pyrid Hydrox is a vitamin B12 complex for which Dr. Brooks cited only anecdotal medical literature as bestowing pain relief properties.

27. Claimant has failed to prove by a preponderance of the evidence that the Rapid Tox Screen 48-panel drug test is reasonable and necessary. The opinion of Dr. Burgess is persuasive that the testing was out of proportion to the number of drugs being prescribed and the circumstances in this case. While it is reasonable for Dr. Brooks to request drug testing to confirm the appropriate use of medications prescribed in this case, the ALJ finds, absent a reasonable suspicion that claimant is abusing or diverting his medications, casting a "broad network" as wide as that thrown here unreasonable. Dr. Brooks made no effort to tailor the requested testing in this case to the actual scheduled II drug in which the claimant was being prescribed. Rather, he simply indicated that he is suspicious of anyone he prescribes to. The ALJ finds such assertion incredible to support a request for a 48-panel drug test in light of the circumstances in this case, including those cited by Dr. Burgess.

CONCLUSIONS OF LAW

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

A. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1)(c); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores v. Industrial Claim Appeals Office*, 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). This includes establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

B. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondent. § 8-43-201(1).

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

D. Claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

E. In deciding whether Claimant has met her burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

F. The mere occurrence of a compensable injury does not require an ALJ to find

that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013.

G. As found, the evidence in the instant case demonstrates that prescriptions for Celebrex, Lyrica, Flexeril and Morphine are likely helping claimant with pain control and are responsible to his level of function. The ALJ is not convinced that claimant's pain levels and functionality would be the same with or without these medications. The ALJ concludes that without these medications, including the occasional dose of Morphine, claimant's average pain levels will likely increase on a daily basis and his level of functioning will deteriorate. Accordingly, the ALJ concludes that the continued use of Lyrica, Celebrex, Morphine and Flexeril is reasonably necessary and related to claimant's industrial injury.

H. However, the addition and administration of topical creams, including MS2-ethyl Pyrid Hydrox are not reasonable or necessary to maintain MMI. The use of the MS2-Methyl Pyrid/Hydrox, AB8 Ketamine, AB5-KGDBLC, and the BB3 Tramadol are off-label use of the drugs prescribed. The use of such compounds to treat claimant's conditions in this case is not supported by studies or by the *Medical Treatment Guidelines*. Moreover, these topical creams contain the same medications proven to be effective in treating claimant's pain and maintaining his current level of function. Consequently, the ALJ concludes it is not reasonably necessary to add additional medications to his treatment regime. Furthermore, while it is reasonable for Dr. Brooks to request drug testing to confirm the appropriate use of medications prescribed in this case, his request for 48-panel drug testing is unreasonable in light of the circumstances presented in this case. As found, the ALJ credits the testimony of Dr. Burgess to conclude that a 10-panel drug test which would covers the main illicit drugs, main prescription drugs, and major prescription drugs of abuse followed by a confirmatory test was all that was necessary in the instant case.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits in the form of the topical creams and the MS2-Methyl Pyrid/Hydrox is denied and dismissed.

2. Claimant's claim for medical benefits in the form of payment for the Rapid Tox Screen drug testing is denied and dismissed.

3. Respondent's shall pay for ongoing prescriptions of Celebrex, Lyrica, Morphine Sulfate and Flexeril as these medications continue to be reasonably necessary to cure and relieve claimant of the effects of his industrial injury.

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

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

DATED: January 5, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that Claimant has fraudulently obtained benefits and compensation by willfully misrepresenting her physical condition to her treating physicians in violation of §8-43-402, C.R.S.

2. If Claimant has committed fraud in violation of §8-43-402, C.R.S., whether Respondents are entitled to the retroactive recovery of indemnity and medical benefits paid to Claimant.

3. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's July 24, 2013 physical altercation with Marie Friedstein constituted a subsequent intervening event that permits them to withdraw their admission of liability.

4. Whether the temporary disability benefits that Respondents have paid Claimant since the July 24, 2013 altercation constitute an overpayment.

5. Whether Claimant has proven by a preponderance of the evidence that the requested surgical procedures for her shoulder, hip and ankle from the physicians at Western Orthopedics are reasonable, necessary and related to her October 6, 2011 industrial injuries.

FINDINGS OF FACT

1. Employer is a major food distribution and restaurant supply corporation headquartered in Houston, Texas. Claimant worked for Employer in its Denver, Colorado facility as a Product Demonstrator and Sales Marketing Associate for approximately four months. Claimant no longer works for Employer.

2. On October 6, 2011 Claimant slipped and fell on a wet floor on Employer's premises during the course and scope of her employment. Claimant sustained contusions to her right shoulder, right wrist, right elbow and right hip. Respondents admitted liability for the claim and Claimant presented to her authorized treating physicians for conservative treatment and management of her injuries.

3. Claimant's main concerns in the months following her injuries were her right shoulder and right upper extremity. Claimant's complaints to her right wrist and right elbow dissipated but she had persistent pain over the posterolateral shoulder with elevation of her arm. She eventually obtained an MRI of her right shoulder on December 20, 2011. The MRI revealed a non-displaced SLAP type labral tear from the biceps labral anchor throughout the posterior superior quadrant. There was no

extension of the tear into the biceps tendon. Claimant was eventually referred to Rajesh Bazaz, M.D. for an evaluation. He recommended arthroscopic surgery to repair the tear in the right shoulder.

4. On January 26, 2012 Claimant underwent an MRI of her right hip. The MRI revealed moderate osteoarthritis of the hip. There was a small focus of degenerative subcoritcal cystic change in the anterior lateral femoral head neck junction but no focal bony bump or other definitive findings for femoral acetabular impingement pattern.

5. On February 23, 2012 Claimant underwent right shoulder surgery. She was placed in a sling and subsequently received conservative care from her treating physicians. On March 20, 2012 Respondents filed a General Admission of Liability (GAL) acknowledging Temporary Total Disability (TTD) benefits from the date of surgery and continuing.

6. Following surgery Claimant experienced continued discomfort in her right shoulder and increasing pain in her right hip. Throughout the rest of 2012 Claimant continued to receive conservative care from her treating physicians. She underwent a series of nerve blocks without a positive response. Claimant's pain continued to increase and her treating physicians suspected possible Chronic Regional Pain Syndrome (CRPS).

7. On November 20, 2012 Claimant visited Ricky Artist, M.D. for a follow-up evaluation. Claimant reported to Dr. Artist that on November 17, 2012 her right hip "locked-up" and she fell to the ground severely spraining her left ankle. X-rays of Claimant's left ankle showed no evidence of a bony injury.

8. On December 13, 2012 Claimant underwent an MRI for her left ankle. The MRI revealed that Claimant had a tear in her anterior talofibular ligament and partial tearing of the peroneus longus tendon.

9. On March 11, 2013 Claimant visited Tashof Bernton, M.D. for an evaluation and CRPS testing. Based on the testing results Dr. Bernton concluded that Claimant did not meet the Medical Treatment Guidelines for diagnosis of CRPS because she had only one out of three positive tests. Dr. Bernton noted that Claimant had potential frozen shoulder. Claimant continued to receive conservative treatment during the remainder of 2013.

10. On July 24, 2013 Claimant was involved in a public altercation in Cherry Creek at approximately 10:30 p.m. with another woman. Cell phone video captured the altercation. Court documents from the City and County of Denver District Attorney's Office identify Claimant and Marie Friedstein as the individuals fighting in the video.

11. Claimant testified at hearing that she is depicted in the video wearing beige high heel stiletto shoes and a dress. Claimant identified the other woman in the video as Ms. Friedstein. Claimant is seen on the video wrestling Ms. Friedstein to the ground. On a second clip Claimant is seen approaching Ms. Friedstein from behind,

grabbing her by the shoulders and throwing Ms. Friedstein forcibly to the ground. Claimant then sits on top of Ms. Friedstein in a straddling position and proceeds to use her right upper extremity to repeatedly punch her in the head and upper torso area. Claimant delivers approximately 11 punches to Ms. Friedstein without any hesitation, pain, or restriction of motion in her right upper extremity. She also walks freely with both of her lower extremities, has no problems with her left ankle and, on several occasions, is able to plant her lower extremities and rotate her body.

12. On August 28, 2013 Claimant presented to Kevin Smith, M.D. for a follow-up examination. She reported that she was continuing to have pain and difficulties with her right upper extremity. Claimant specifically noted that she was having such sensitivity with her right upper extremity that "anything even lightly touching her skin" would cause bothersome symptoms. Claimant also noted to Dr. Smith that she had a previous sprain of her left ankle "which had mostly resolved." Claimant did not report the July 24, 2013 altercation.

13. On October 10, 2013 Claimant underwent an independent medical evaluation with L. Barton Goldman, M.D. Dr. Goldman determined that Claimant did not have CRPS but instead had myofascial pain and upper trunk plexus irritation. He expressed concerns that Claimant was suffering from right adhesive capsulitis or frozen shoulder. Dr. Goldman also remarked that Claimant suffers from "right hip osteoarthritis pre-existing and aggravated by work related injury October 6, 2011 with acetabular impingement." Dr. Goldman summarized that Claimant's mechanism of injury was most consistent with "contusions of the right upper trunk of the brachial plexus, the right shoulder and right hip." He expressed "significant concerns" regarding whether Claimant would tolerate invasive interventions because of her conflicted responses to suggestions and pain management struggles.

14. On November 11, 2013 Claimant underwent an independent medical examination with Floyd O. Ring, M.D. Dr. Ring agreed that Claimant did not meet the definition of CRPS pursuant to the Medical Treatment Guidelines. He also noted that Claimant demonstrated inconsistencies between her presentation and ranges of motion. Dr. Ring commented that Claimant walked with a significant antalgic gait favoring the right lower extremity. He viewed surveillance video of Claimant in which she was walking in high-heeled boots without any apparent difficulties. Dr. Ring expressed concerns of "possible symptom magnification, secondary gain issues or somatization versus malingering." Dr. Ring was unaware of the altercation that took place on July 24, 2013 and the existence of any video of the event.

15. On May 19, 2014 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian released his report on July 10, 2014. Dr. Cebrian was aware of the cell phone video of the altercation involving Claimant and Ms. Friedstein that had surfaced shortly after his examination took place. Dr. Cebrian reviewed additional surveillance of Claimant that had been referenced by Dr. Ring in November 2013. He concluded that Claimant was at Maximum Medical Improvement (MMI) and she did not require additional treatment for her injuries. Dr. Cebrian determined that Claimant's subjective complaints were out of proportion to the

objective findings especially in light of the video showing the July 24, 2013 altercation and the surveillance footage of Claimant from 2013. Dr. Cebrian noted that Claimant had provided exaggerated and inaccurate information to her medical providers throughout the claim. Based upon the inconsistencies in the videos, surveillance of Claimant and her statements to treating physicians, Dr. Cebrian was concerned with symptom magnification, secondary gain issues, somatization and malingering. Dr. Cebrian also noted that none of Claimant's subjective complaints constituted injury-related conditions but were maladaptive coping mechanisms as noted by Dr. Goldman.

16. On July 9, 2014 Dr. Ring issued a second report based on the review of additional medical records and two videos of the July 24, 2013 altercation involving Claimant and Ms. Friedstein. Dr. Ring noted that in the July 24, 2013 video Claimant "shows no decreased range of motion involving the hip, ankles or right upper extremity." He emphasized that Claimant's actions in the videos were inconsistent with her medical records and his physical examination. Dr. Ring specifically noted that Rajesh Bazaz, M.D. had requested surgical intervention based on Claimant's right adhesive capsulitis or frozen shoulder. However, because the videos depicted Claimant "repetitively flex[ing], extend[ing] and abduct[ing]" her right shoulder she did not have any right shoulder limitations and any shoulder surgery was not causally related to her October 6, 2011 industrial injuries.

17. On August 12, 2014 Claimant underwent an examination with Kevin Nagamani, M.D. regarding her left ankle condition. Dr. Nagamani recommended surgery to Claimant's left ankle involving arthroscopy and debridement of the lateral portion of the ankle and a Brostrom repair. He was not aware of the altercation on July 24, 2013, cell phone video and surveillance footage taken in 2013.

18. On October 7, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Nagamani. He received the opportunity to review the November 4, 2013 surveillance footage as well as video of the July 24, 2013 altercation. Dr. Nagamani maintained that Claimant had objective evidence and pathology in the left ankle requiring surgical repair. However, after reviewing the videos, he could not state within a reasonable degree of medical probability that the objective pathology of Claimant's left ankle was related to the November 17, 2012 event in which Claimant's hip "locked up." Dr. Nagamani stated that the videos demonstrate that Claimant did not have an altered gait, appeared to walk fluidly and did not demonstrate instability in her left ankle.

19. On October 10, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Bazaz. Dr. Bazaz recounted that he had performed right shoulder surgery on Claimant on February 23, 2012. She then visited him a few more times until June 18, 2012. He had diagnosed Claimant with frozen shoulder and attributed her condition to the October 6, 2011 industrial slip and fall. Dr. Bazaz did not again see Claimant until June 2014. Dr. Bazaz stated that Claimant demonstrated greater flexion and extension with her right shoulder than she did during subsequent examinations with him in 2014. He noted that objective pathology was present in Claimant's shoulder and he suspected adhesive capsulitis. Dr. Bazaz explained he could not make a

determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. He declined to provide an opinion regarding causation of Claimant's right shoulder complaints.

20. Claimant testified at the hearing in this matter. She explained that she was still having problems with her right upper extremity and particularly her right shoulder. Claimant also remarked that her right hip pain has worsened in the last several months and she is still experiencing pain in her left ankle. She requested authorization for the procedures recommended by Drs. Bazaz and Nagamani as well as treatment for her right hip.

21. Dr. Ring testified at the hearing in this matter. He consistently maintained that Claimant's current right shoulder symptoms are not related to her October 6, 2011 industrial injury. Dr. Ring specifically detailed that Claimant underwent right shoulder surgery, her symptoms resolved and she has no ongoing shoulder pathology. He specified that right shoulder manipulation under anesthesia will not benefit Claimant because her shoulder symptoms either resolved prior to the July 24, 2013 altercation or her symptoms were aggravated as a result of the altercation. Dr. Ring explained that Claimant's subjective complaints were grossly disproportionate to the objective evidence in the videos of the altercation and the surveillance of Claimant in 2013. He testified that the functional abilities of Claimant on the video of the altercation are significant because she would have guarded her upper extremity or refrained from using her upper extremity if her subjective complaints were legitimate. Dr. Ring testified that Claimant exhibited no pain behaviors and demonstrated complete use of her upper extremity during the altercation. He noted that Dr. Bazaz failed to perform a causation analysis prior to recommending right shoulder surgery. Dr. Ring commented that Claimant would benefit from an EMG to rule out any potential conditions to her right shoulder.

22. Marie Friedstein testified in this matter by video deposition. She explained that she was involved in an altercation with Claimant on July 24, 2013. Ms. Friedstein remarked that Claimant attacked her and wrestled her down to the ground. She commented that Claimant repeatedly punched her in the face. Ms. Friedstein testified that she sustained three cracked ribs, broke her collarbone in four places and suffered five contusions to her head. She explained that Claimant did not appear to have any injuries to her right shoulder, right hip, or left ankle.

23. Ms. Friedstein also testified regarding Claimant's other activities during the time Claimant was disabled and receiving TTD. Ms. Friedstein confirmed that Claimant was present at the CU Boulder dorms in August 2012 along with herself, her husband and other individuals. Ms. Friedstein testified that Claimant was helping to move certain belongings into the dorm rooms. One of the items was a large loveseat. Ms. Friedstein testified that several people assisted in the moving of the loveseat since it had become lodged between the doors in the hallway leading into the dorm room. Ms. Friedstein confirmed that Claimant was assisting in the moving of the loveseat using her right upper extremity in an unrestricted manner. She testified that Claimant was not wearing a sling and did not appear to have any pain in her right upper extremity or right hip.

24. Dr. Cebrian testified through a post-hearing evidentiary deposition in this matter on November 8, 2014. He explained that the recommended procedures from Drs. Bazaz and Nagamani, as well as additional treatment to Claimant's hip was not reasonable, necessary or related to her October 6, 2011 industrial injuries. Dr. Cebrian testified that Claimant's ongoing pathology in her right shoulder is likely due to adhesive capsultitis. He remarked that,. based upon the evidence in the video, Claimant's functional abilities and the medical records, the ongoing pathology in the right shoulder is not related to the original October 6, 2011 slip and fall. Dr. Cebrian also explained that Claimant's right hip pathology is likely related to the natural progression of a degenerative condition not related to the original October 6, 2011 event. With regard to the left ankle, Dr. Cebrian explained it was unlikely that Claimant's right hip "locked-up" causing her to fall and twist her ankle. He maintained that treatment for the left ankle is not related based on the functional abilities that Claimant demonstrated during the altercation on July 24, 2013 and the surveillance footage from November 4, 2013.

25. Respondents have failed to establish that it is more probably true than not that Claimant has fraudulently obtained benefits and compensation by willfully misrepresenting her physical condition to her treating physicians in violation of §8-43-402, C.R.S. On October 6, 2011 Claimant slipped and fell on a wet floor on Employer's premises during the course and scope of her employment. Claimant sustained contusions to her right shoulder, right wrist, right elbow and right hip. Respondents admitted liability for the claim and Claimant presented to her authorized treating physicians for conservative treatment of her injuries. On February 23, 2012 Claimant underwent right shoulder surgery but subsequently continued to experience right shoulder symptoms. Claimant's physicians considered whether she was suffering from CRPS but determined through testing that she did not have the condition. Because subsequent conservative measures failed, Claimant's treating doctors ultimately sought authorization for surgery for her shoulder, hip and ankle. Although Respondents have produced evidence through physicians that surgery is not reasonable, necessary and related to Claimant's October 6, 2011 industrial injury, they have failed to demonstrate that Claimant has fraudulently obtained medical benefits. Specifically, Respondents have failed to prove that Claimant falsely misrepresented a material fact to obtain indemnity and medical benefits. Accordingly, Respondents are not entitled to retroactive recovery of benefits paid to Claimant.

26. Respondents have failed to demonstrate that it is more probably true than not that Claimant's July 24, 2013 physical altercation with Ms. Friedstein constituted a subsequent intervening event that permits them to withdraw their admission of liability. On July 24, 2013 Claimant was involved in a public altercation with Ms. Friedstein. Cell phone video captured the altercation. Claimant is seen approaching Ms. Friedstein from behind, grabbing her by the shoulders and throwing Ms. Friedstein forcibly to the ground. Claimant then sits on top of Ms. Friedstein in a straddling position and proceeds to use her right upper extremity to repeatedly punch her in the head and upper torso area. She also walks freely with both of her lower extremities, has no problems with her left ankle and, on several occasions, is able to plant her lower extremities and rotate her body. Dr. Ring maintained that Claimant's shoulder symptoms either resolved prior to the July 24, 2013 altercation or were aggravated as a

result of the altercation. Dr. Cebrian remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records the ongoing right shoulder, right hip and left ankle symptoms are not related to the original October 6, 2011 slip and fall. Although the video depicts Claimant engaging in activities that suggest significant functional abilities, the July 24, 2013 incident did not constitute a subsequent intervening event that severed the causal connection from the October 6, 2011 industrial injury. The July 24, 2013 altercation did not cause Claimant's need for medical treatment but merely reflected an increase in her functional abilities. Accordingly, the July 24, 2013 altercation was not an efficient intervening cause that warrants withdrawal of the admission of liability.

27. Claimant has failed to prove that it is more probably true than not that the requested surgical procedures for her shoulder, hip and ankle from the physicians at Western Orthopedics are reasonable, necessary and related to her October 6, 2011 industrial injuries. Dr. Nagamani maintained that Claimant had objective evidence and pathology in the left ankle requiring surgical repair. Dr. Bazaz noted that objective pathology was present in Claimant's shoulder and he suspected adhesive capsulitis. He explained that he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. Claimant explained that she was still having problems with her right upper extremity and particularly her right shoulder. She also remarked that her right hip pain has worsened in the last several months and she is still experiencing pain in her left ankle. Claimant requested authorization for the procedures recommended by Drs. Bazaz and Nagamani as well as treatment for her right hip.

28. In contrast, Dr. Ring persuasively maintained that in the July 24, 2013 video Claimant "shows no decreased range of motion involving the hip, ankles or right upper extremity." He emphasized that Claimant's actions in the videos were inconsistent with her medical records and his physical examination. Dr. Ring specifically noted that Dr. Bazaz had requested surgical intervention based on Claimant's right adhesive capsulitis or frozen shoulder. However, because the videos depicted Claimant "repetitively flex[ing], extend[ing] and abduct[ing]" her right shoulder she did not have any right shoulder limitations. He consistently maintained that Claimant's current right shoulder symptoms were not related to her October 6, 2011 industrial injury. Dr. Ring specifically detailed that Claimant underwent right shoulder surgery, her symptoms resolved and she has no ongoing shoulder pathology. Moreover, Dr. Cebrian explained that the recommended procedures from Drs. Bazaz and Nagamani, as well as additional treatment to Claimant's hip was not reasonable, necessary, or related to her October 6, 2011 industrial injuries. Dr. Cebrian testified that Claimant's ongoing pathology in her right shoulder is likely due to adhesive capsultitis. He remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records, the ongoing pathology in the right shoulder is not related to the original October 6, 2011 slip and fall. Dr. Cebrian also explained that Claimant's right hip pathology is likely related to the natural progression of a degenerative condition not to the original October 6, 2011 event. Dr. Cebrian explained that treatment for the left ankle is not related based on the functional abilities that Claimant demonstrated during the altercation on July 24, 2013 and the surveillance footage from November 4, 2013.

29. Drs. Nagamani and Bazaz provided equivocal accounts regarding the cause of Claimant's current symptoms. After reviewing the videos, Dr. Nagamani could not state within a reasonable degree of medical probability that the objective pathology of Claimant's left ankle was related to the November 17, 2012 event in which Claimant's hip "locked up." Dr. Nagamani also noted that the videos demonstrate that Claimant did not have an altered gait, appeared to walk fluidly and did not demonstrate instability in her left ankle. Dr. Bazaz explained he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. He declined to provide an opinion regarding causation of Claimant's right shoulder complaints. Based on the persuasive opinions of Drs. Ring and Cebrian, the video of the July 24, 2013 altercation and the equivocal statements from Drs. Nagamani and Bazaz regarding the cause of Claimant's continuing symptoms, Claimant's request for surgical procedures on her shoulder, hip and ankle is denied.

CONCLUSIONS OF LAW

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

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

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

Fraud

4. Respondents assert that, because it relied on Claimant's materially false representation in filing its admissions of liability, it is entitled to the retroactive recovery of its payments. An ALJ may permit an insurer to withdraw a general admission of liability and order repayment of benefits paid under the admission if the claimant

supplied materially false information upon which the insurer relied in filing the admission. *Arenas v. Industrial Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000); *Vargo v. Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981). Because admissions of liability may not ordinarily be withdrawn retroactively, the respondents bear the burden of proof to establish the preceding conditions by a preponderance of the evidence. *See Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001) (admission may not be withdrawn unilaterally).

5. To establish fraud or material misrepresentation a party must prove the following:

> (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; [and] (5) Action based on the representation or concealment resulting in damage.

In Re Arczynski, W.C. No. 4-156-147 (ICAP, Dec. 15, 2005). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *Id.*

6. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant has fraudulently obtained benefits and compensation by willfully misrepresenting her physical condition to her treating physicians in violation of §8-43-402, C.R.S. On October 6, 2011 Claimant slipped and fell on a wet floor on Employer's premises during the course and scope of her employment. Claimant sustained contusions to her right shoulder, right wrist, right elbow and right hip. Respondents admitted liability for the claim and Claimant presented to her authorized treating physicians for conservative treatment of her injuries. On February 23, 2012 Claimant underwent right shoulder surgery but subsequently continued to experience right shoulder symptoms. Claimant's physicians considered whether she was suffering from CRPS but determined through testing that she did not have the condition. Because subsequent conservative measures failed, Claimant's treating doctors ultimately sought authorization for surgery for her shoulder, hip and ankle. Although Respondents have produced evidence through physicians that surgery is not reasonable, necessary and related to Claimant's October 6, 2011 industrial injury, they have failed to demonstrate that Claimant has fraudulently obtained medical benefits. Specifically, Respondents have failed to prove that Claimant falsely misrepresented a material fact to obtain indemnity and medical benefits. Accordingly, Respondents are not entitled to retroactive recovery of benefits paid to Claimant.

Withdrawing the Admission of Liability/Intervening Cause

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

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

9. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2013), C.R.S. Respondents admitted that Claimant sustained industrial injuries on October 6, 2011 while working for Employer. Accordingly, Respondents have the burden of proving by a preponderance of the evidence that Claimant did not sustain injuries to withdraw the admissions.

10. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAP, May 16, 2005). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAP, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

11. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant's July 24, 2013 physical altercation with Ms. Friedstein constituted a subsequent intervening event that permits them to withdraw their admission of liability. On July 24, 2013 Claimant was involved in a public altercation with Ms. Friedstein. Cell phone video captured the altercation. Claimant is seen

approaching Ms. Friedstein from behind, grabbing her by the shoulders and throwing Ms. Friedstein forcibly to the ground. Claimant then sits on top of Ms. Friedstein in a straddling position and proceeds to use her right upper extremity to repeatedly punch her in the head and upper torso area. She also walks freely with both of her lower extremities, has no problems with her left ankle and, on several occasions, is able to plant her lower extremities and rotate her body. Dr. Ring maintained that Claimant's shoulder symptoms either resolved prior to the July 24, 2013 altercation or were aggravated as a result of the altercation. Dr. Cebrian remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records the ongoing right shoulder, right hip and left ankle symptoms are not related to the original October 6, 2011 slip and fall. Although the video depicts Claimant engaging in activities that suggest significant functional abilities, the July 24, 2013 incident did not constitute a subsequent intervening event that severed the causal connection from the October 6, 2011 industrial injury. The July 24, 2013 altercation did not cause Claimant's need for medical treatment but merely reflected an increase in her functional abilities. Accordingly, the July 24, 2013 altercation was not an efficient intervening cause that warrants withdrawal of the admission of liability.

Requested Surgeries

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

13. Claimant has failed to prove by a preponderance of the evidence that the requested surgical procedures for her shoulder, hip and ankle from the physicians at Western Orthopedics are reasonable, necessary and related to her October 6, 2011 industrial injuries. Dr. Nagamani maintained that Claimant had objective evidence and pathology in the left ankle requiring surgical repair. Dr. Bazaz noted that objective pathology was present in Claimant's shoulder and he suspected adhesive capsulitis. He explained that he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. Claimant explained that she was still having problems with her right upper extremity and particularly her right shoulder. She also remarked that her right hip pain has worsened in the last several months and she is still experiencing pain in her left ankle. Claimant requested authorization for the procedures recommended by Drs. Bazaz and Nagamani as well as treatment for her right hip.

14. In contrast, Dr. Ring persuasively maintained that in the July 24, 2013 video Claimant "shows no decreased range of motion involving the hip, ankles or right

upper extremity." He emphasized that Claimant's actions in the videos were inconsistent with her medical records and his physical examination. Dr. Ring specifically noted that Dr. Bazaz had requested surgical intervention based on Claimant's right adhesive capsulitis or frozen shoulder. However, because the videos depicted Claimant "repetitively flex[ing], extend[ing] and abduct[ing]" her right shoulder she did not have any right shoulder limitations. He consistently maintained that Claimant's current right shoulder symptoms were not related to her October 6, 2011 industrial injury. Dr. Ring specifically detailed that Claimant underwent right shoulder surgery, her symptoms resolved and she has no ongoing shoulder pathology. Moreover, Dr. Cebrian explained that the recommended procedures from Drs. Bazaz and Nagamani, as well as additional treatment to Claimant's hip was not reasonable, necessary, or related to her October 6, 2011 industrial injuries. Dr. Cebrian testified that Claimant's ongoing pathology in her right shoulder is likely due to adhesive capsultitis. He remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records, the ongoing pathology in the right shoulder is not related to the original October 6, 2011 slip and fall. Dr. Cebrian also explained that Claimant's right hip pathology is likely related to the natural progression of a degenerative condition not to the original October 6, 2011 event. Dr. Cebrian explained that treatment for the left ankle is not related based on the functional abilities that Claimant demonstrated during the altercation on July 24, 2013 and the surveillance footage from November 4, 2013.

15. Drs. Nagamani and Bazaz provided equivocal accounts regarding the cause of Claimant's current symptoms. After reviewing the videos, Dr. Nagamani could not state within a reasonable degree of medical probability that the objective pathology of Claimant's left ankle was related to the November 17, 2012 event in which Claimant's hip "locked up." Dr. Nagamani also noted that the videos demonstrate that Claimant did not have an altered gait, appeared to walk fluidly and did not demonstrate instability in her left ankle. Dr. Bazaz explained he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. He declined to provide an opinion regarding causation of Claimant's right shoulder complaints. Based on the persuasive opinions of Drs. Ring and Cebrian, the video of the July 24, 2013 altercation and the equivocal statements from Drs. Nagamani and Bazaz regarding the cause of Claimant's continuing symptoms, Claimant's request for surgical procedures on her shoulder, hip and ankle is denied.

ORDER

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

1. Respondents' request for retroactive recovery based on fraudulently obtained indemnity and medical benefits paid to Claimant is denied and dismissed.

2. Respondents' request to withdraw their admission of liability and recover an overpayment of TTD benefits because Claimant's July 24, 2013 physical altercation with Ms. Friedstein constituted a subsequent intervening event is denied and dismissed.

3. Claimant's request for surgical procedures on her shoulder, hip and ankle from the physicians at Western Orthopedics is denied and dismissed.

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

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

DATED: January 7, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

- Whether respondents have proven by clear and convincing evidence that the determination of Division-sponsored Independent Medical Examination ("DIME") physician Dr. Weaver on the issue of permanent partial disability ("PPD").

- Whether claimant has proven by clear and convincing evidence that the determination of DIME physician Dr. Weaver that claimant is at maximum medical improvement ("MMI") is incorrect.

- Whether claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Janssen is reasonable and necessary to cure and relieve claimant from the effects of the work-related injury sustained December 7, 2010?

FINDINGS OF FACT

1. Claimant is employed by the Mesa County Sheriff's Department as a Deputy Sheriff. Claimant sustained an admitted workers' compensation neck injury December 7, 2010 when he reached into his patrol vehicle and attempted to retrieve a weapon that was still locked or stuck in the vehicle's weapons' rack locking apparatus, causing a neck strain and aggravating claimant's pre-existing cervical disc disease.

2. Claimant underwent conservative care until a two level neck surgery was performed January 25, 2012 by Dr. Janssen. Dr. Janssen performed a two level procedure including artificial disc replacement at C5-6 and revision of a prior fusion at C4-5, which was diagnosed by him as a pseudoarthrosis, and was therefore not considered to be a "stable platform" by Dr. Janssen for the adjacent disc replacement procedure at C5-6.

3. Claimant had previously undergone a fusion at C4-5 October 29, 2007 by Dr. Tice. Claimant testified that after he recovered from that procedure he returned to full duty with no impairment. Dr. Tice released Claimant to full duty December 17, 2007. Claimant's testimony in this regard is found to be credible and persuasive and supported by the medical records entered into evidence.

4. Claimant testified that after his initial recovery from the 2012 surgical revision and disc replacement he began to develop left sided symptoms in the latter part of 2012. Claimant testified these symptoms included weakness and pain affecting his left shoulder and left upper extremity.

5. Review of the medical records entered into evidence by the parties demonstrate that Dr. Stagg, Dr. Clifford, Dr. Lewis, and Dr. Janssen document Claimant complaining of left sided neck pain and symptomatology, including shoulder pain, in a similar pattern to the left upper extremity symptoms that re-appeared in late 2012 and continued into 2013 and 2014 for which surgery at C3-4 was proposed by Dr. Janssen.

6. Dr. Janssen testified at hearing in this matter. Dr. Janssen testified that he initially attempted to do the most minimal surgery in 2012 to address a significant neck injury, including the necessary fusion revision at C4-5 and disc replacement at C5-6, but that the initial injury likely also aggravated any pre-existing degenerative disc disease at the C3-4 level, which now requires surgical intervention attributable to the workplace injury. Dr. Janssen's opined that the surgery now proposed at C3-4 was a compensable consequence and natural progression of the admitted neck injury December 7, 2010.

7. On February 16, 2013, Dr. Janssen requested authorization for an artificial disc replacement at C3-4, which was denied by respondents.

8. On February 10, 2014 Dr. Stagg placed Claimant at MMI and provided a 15% whole person impairment after apportioning or deducting 9% attributable to the 2007 surgery. The non-apportioned whole person rating would have been 23%. Dr. Stagg opined the surgery proposed at C3-4 was non-work related but more likely resulted from the 2007 neck injury.

9. Dr. Weaver performed a DIME May 15, 2014. Dr. Weaver opined claimant reached MMI, and opined that the proposed surgery at C3-4 was the result of a pre-existing condition. Dr. Weaver opined that Claimant's current complaints were much the same as the symptoms in 2007 following his prior injury. Dr. Weaver opined claimant was at maximum medical improvement ("MMI") as of Febraury 1, 2013 and provided claimant with a 21% whole person impairment rating.

10. In the May 15, 2014 report, Dr. Weaver diagnosed claimant with a C3-4 disc degeneration with resultant stenosis and nerve root irritation, status post fusion of C4-5 and disc replacement at C5-6, possible SLAP lesion of the left shoulder and gastrointestinal reflux disease ("GERD"). Dr. Weaver opined that apportionment should be considered in this case based on claimant's pre-existing cervical spine disease including two previous operations. Dr. Weaver opined that claimant's surgical stabilization at C4-5 contributed to the progression of disc degeneration at C3-4. Dr. Weaver noted that claimant's current symptoms were the result of the C3-4 disc degeneration. Dr. Weaver opined that of claimant's 21% whole person impairment rating, 60% was related to his pre-existing condition. Therefore, Dr. Weaver opined that a 9% whole person impairment rating was related to the December 7, 2010 injury. Dr. Weaver recommended ongoing medical care based on claimant's continued complaints of pain.

11. However, Dr. Weaver subsequently issued a summary sheet dated June 9, 2014 that indicated that apportionment was not applicable and provided claimant with a 21% whole person impairment rating.

12. Claimant was referred to Dr. Rauzzino by respondents for an independent medical examination ("IME") on or about August 3, 2013. Dr. Rauzzino reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Rauzzino issues a report and opined that Claimant's proposed surgery at C3-4 is the result of the prior 2007 injury and surgery, and not related to the December 7, 2010 injury. Dr. Rauzzino further opined that the surgical revision of the pseudoarthrosis at C4-5 performed by Dr. Janssen was simply coincidental, and not medically necessary due to the 2010 injury causing the need for a second neck surgery.

13. Dr. Stagg testified by deposition in this case. Dr. Stagg opined during his deposition that the apportionment he performed was not incorrect because the prior fusion in 2007 would have constituted permanent impairment, and was therefore "disabling" whether the condition was actually causing any symptoms, or lost time, or medical restrictions immediately prior to the 2010 injury.

14. Dr. Stagg testified he disagreed with Dr. Weaver's initial opinion that claimant PPD rating should be apportioned 60% to a pre-existing condition. Dr. Stagg testified that the Division of Workers' Compensation has indicated that in accessing apportionment, the physician should not use an arbitrary number, which it appeared Dr. Weaver used in his apportionment application.

15. Dr. Weaver testified by deposition in this case. Dr. Weaver noted claimant had a history of pre-existing problems with his neck prior to his December 7, 2010 work injury, including the cervical surgery performed by Dr. Tice. Dr. Weaver testified that he indicated in his report that apportionment would be appropriate because he felt that claimant would not have had the current problems and need for further surgery if he hadn't had the pre-existing cervical disk disease.

16. Dr. Weaver testified that after he issued his report, he was sent an incomplete notice from the Division of Workers' Compensation. Dr. Weaver testified he issued the second DIME summary sheet following the receipt of the incomplete notice. Dr. Weaver testified that he was being forced to comply with the rules of Workers' Comp legislation. Dr. Weaver explained that the rules involving apportionment indicated that the physician should not apportion an injury unless there is a previous documented and rated impairment, but you cannot simply pick a number for apportionment as he did. Dr. Weaver acknowledged during the deposition that this rule applies to injuries after July 1, 2008, such as the injury in this case.

17. Dr. Weaver noted that the 2007 injury involved a surgery that claimant apparently had through his private insurance and did not result in documentation of an actual impairment.

18. The ALJ finds that Dr. Weaver determined he should not apportion the PPD rating based on the DIME summary sheet dated June 9, 2014. The basis of why Dr. Weaver determined he should not apportion the impairment rating is based on his determination after receiving the incomplete notice that apportionment was not applicable under the Colorado Medical Treatment Guidelines applying to apportionment for injuries after July 1, 2008.

19. Nonetheless, the opinion from Dr. Stagg that apportionment is appropriate in this case appears to be a difference of medical opinion between Dr. Stagg and Dr. Weaver. While Dr. Stagg determined that apportionment was appropriate, there is a lack of evidence in this case that Dr. Stagg's apportionment was based on a prior documented impairment. The ALJ therefore determines that respondents have not overcome the opinion of Dr. Weaver by clear and convincing evidence on the issue of the PPD rating provided by Dr. Weaver.

20. With regard to the proposed surgery recommended by Dr. Janssen, Dr. Weave opined that this proposed surgery was not related to the work injury of December 7, 2010. This opinion is supported by the opinion of Dr. Stagg noted in his February 18, 2014 report that it was related to the 2007 injury and not to the December 7, 2010 injury.

21. The ALJ notes that the relatedness of the proposed surgery is intertwined into the decision by Dr. Weaver that claimant is at MMI. Therefore, claimant is held to overcoming the opinion of Dr. Weaver regarding MMI by clear and convincing evidence. Based on the evidence presented at hearing, the ALJ cannot conclude that claimant has overcome this increased burden.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2011. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the DIME physician regarding his opinion on claimant's PPD rating by clear and convincing evidence.

6. As found, claimant has failed to overcome the DIME physician regarding his opinion on MMI.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Even though an admission of liability is filed, the claimant bears the burden of proof to establish the right to specific medical treatment. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

8. As found, claimant has failed to establish that the proposed medical treatment recommended by Dr. Janssen is reasonable and necessary to cure and relieve claimant from the effects of his work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant PPD benefits based on the 21% whole person impairment rating provided by Dr. Weaver.

2. Claimant's attempt to overcome the DIME physician on the issue of MMI is denied.

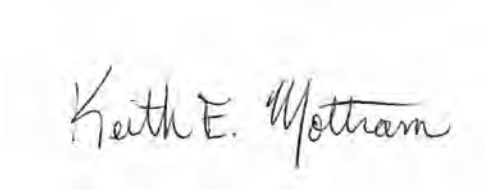
3. Claimant's request for authorization of the cervical surgery recommended by Dr. Janssen is denied.

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

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

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

DATED: January 7, 2015



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

ISSUES

1. Whether the claimant's Application for Hearing and Notice to Set should be stricken as having been untimely filed.

2. If not, whether an Interlocutory Order should issue in which the Administrative Law Judge notes that the treating physicians as well as the DIME physician have considered the role of the claimant's chemical sensitivity in formulating treatment protocols for the claimant's admitted back injury.

For the reasons stated below the claimant's Application for Hearing and Notice to Set is stricken, and , therefore, the ALJ does not reach a decision on the second issue.

FINDINGS OF FACT

1. The instant hearing was set pursuant to the claimant's June 25, 2014 Application for Hearing and Notice to Set concerning the endorsed issues of permanent partial disability benefits and "claimant is going to cancel the Division Independent Medical Examination request related to the Final Admission of Liability filed on May 16, 2014. It was claimant's intent that the parties would enter into a stipulation regarding consolidating both claims and allowing claimant to undergo one Division IME once she had recovered from her knee surgery which took place on June 17, 2014. Claimant further seeks to overcome the DIME opinions of Dr. Hua Chen in connection with the impairment rating and MMI for her back as well as claimant's entitlement to medical benefits and impairment for her chemical sensitivity if any, which was not addressed by Dr. Chen."

2. The respondent filed a timely response to Application for Hearing on July 16, 2014 endorsing the additional issue of "C.R.S. 8-43-201(2)(b)(II) for the claimant's failure to timely file an Application for Hearing following respondent's May 16, 2014 Final Admission of Liability.

3. At the commencement of the hearing, the claimant's counsel withdrew the issues of overcoming the DIME as to maximum medical improvement and permanent impairment and indicated that the only issue is the "consideration" of the claimant's pre-

existing chemical sensitivity for further treatment of the underlying February 16, 2012 low back claim.

4. The respondent had previously filed a Motion for Summary Judgment which was denied. The respondent reiterated its objection to proceeding on the merits of the issues presented based upon the claimant's late Application for Hearing, which jurisdictionally barred the claimant from proceeding on the issues endorsed in her June 25, 2014 Application for Hearing and Notice to Set.

5. The ALJ finds that the issues of permanent partial disability benefits, overcoming the DIME as to MMI and permanent impairment, and the "claimant's entitlement to medical benefits and impairment for her chemical sensitivity" were closed by the Final Admission of Liability dated May 16, 2014, when the claimant failed to apply for a hearing on these issues within 30 days.

CONCLUSIONS OF LAW

1. C.R.S. 8-43-203(2)(b)(II) provides that a Final Admission must contain a statement that the claim will automatically be closed as to the issues admitted, "if the claimant does not, within 30 days after the date of the Final Admission, contest the Final Admission in writing and request a hearing on any disputed issues that are ripe for hearing." The courts have previously treated provisions for objecting to and contesting a Final Admission as jurisdictional. *Roddam v. Rocky Mountain Recycling*, WC No. 4-367-003 (January 24, 2005). *Pete Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004). If the claimant fails to file her Application, the issues admitted in the Final Admission are closed.

2. It is undisputed in this case that the claimant's Application for Hearing was not filed within 30 days of the date of the May 16, 2014 Final Admission of Liability. In fact, the claimant's Application for Hearing filed on June 25, 2014 was filed 40 days after the date of the filing of the Final Admission of Liability.

3. Claimant's endorsed issues of permanent partial disability benefits, overcoming the DIME as to maximum medical improvement and impairment, and "medical benefits and impairment for her chemical sensitivity" were issues in dispute at the time of the filing of the respondent's May 16, 2014 Final Admission of Liability and accordingly struck.

ORDER

It is therefore ordered that:

1. The claimant's Application for Hearing and Notice to Set, dated June 25, 2014 is hereby stricken and the issues stated therein are denied and dismissed.

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

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

DATE: January 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether respondents have overcome the findings of the Division-sponsored Independent Medical Exam ("DIME") physician by clear and convincing evidence on the issue of permanent partial disability ("PPD") benefts?

- Whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits for the period of November 23, 2013 through the date of maximum medical improvement ("MMI")?

- Whether respondents have proven by a preponderance of the evidence that Claimant committed a volitional act that resulted in termination of her employment?

- Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to a general award of post-MMI medical benefits?

- Whether Claimant has proven by a preponderance of the evidence that Dr. Price is authorized to provide medical treatment for her industrial injury?

- Whether claimant has proven by a preponderance of the evidence that her average weekly wage ("AWW") should be increased based on the cost of continuing her coverage under Employer's group health insurance plan effective March 1, 2013, and if so, to what extent it should be increased?

- Whether respondents have proven by a preponderance of the evidence that they are entitled to an offset against TTD and PPD benefits owed to claimant for compensation provided to claimant in the Separation Agreement and Waiver ("the Agreement")?

FINDINGS OF FACT

1. Claimant sustained a compensable injury on February 7, 2012 when she tripped and fell in a parking lot. The claim was initially denied by respondents but was found compensable following a hearing. During the same hearing, claimant's claim for compensation resulting from an occupational disease resulting in carpal tunnel syndrome was denied by the court. At that hearing, the parties had stipulated to an AWW of $651.30.

2. Claimant initially sought medical treatment following the injury with her personal physicians at Western Medical Associates on February 9, 2012 and was

evaluated by Ms. Saunders, a nurse practitioner. Claimant provided a consistent accident history and reported that she was sore in her neck, right shoulder and knees. Claimant was provided with prescription medications. Claimant returned to Western Medical Associates on February 15, 2012 and complained of continuing pain in her right shoulder. Claimant was diagnosed with degenerative problems involving the lumbar and thoracic spine and a shoulder sprain.

1. Claimant was evaluated by Dr. Lewis on March 1, 2012 following a referral from Ms. Saunders. Claimant reported a history of low back pain with radiation into her right lower extremity. Claimant reported she had a history of low back pain following an incident after a cholecsystectomy in 2006 when she fell and struck her right hip sustaining a substantial contusion and hematoma formation. Claimant also reported that three weeks ago she fell forward when tripping in a parking lot and related that this fall exacerbated her pain. Claimant complained of pain in her right shoulder, cervicalgia and occipital head pain following her fall. Dr. Lewis noted Claimant had undergone a magnetic resonance image ("MRI") of the lumbar spine in 2006 and again in October 2011. Dr. Lewis recommended an epidural steroid injection ("ESI") which was accomplished on March 5, 2012.

2. Dr. Lewis spoke to Claimant over the phone on March 8, 2012 and noted Claimant experienced an acute exacerbation of pain following her ESI. Claimant reported feeling much better as of March 8, 2012. Claimant returned to Dr. Lewis on March 13, 2012 and reported some limited improvement in her low back following the ESI, she also reported worsening in her neck and upper extremity symptoms. Dr. Lewis noted that he suspected Claimant to have either a cervical radiculopathy or myelopathy and recommended an MRI of her cervical spine, which was accomplished on March 13, 2012. The MRI showed a small right C6-7 disk herniation laterally in the C7 foramen. Dr. Lewis opined that the herniated disk was likely contributing to claimant's right upper extremity symptoms and recommended neurosurgical consultation.

3. Claimant was referred by employer to Dr. Stagg after claimant requested medical treatment in March 2012. Claimant subsequently was allowed to change her choice of physician to Dr. McLaughlin. Dr. McLaughlin initially evaluated claimant on April 25, 2012. Dr. McLaughlin noted that there was no clear etiology as to why claimant fell and recommended that claimant follow up with Ms. Saunders at Western Medical Associates. At the prior hearing in this case, it was determined that Dr. McLaughlin had refused to provide treatment for claimant for non-medical reasons and the claimant was allowed to continue to treat with Ms. Saunders as an authorized provider based on Dr. McLaughlin's refusal to treat.

4. Claimant continued to follow up with Ms. Saunders and also continued to treat with Dr. Lewis who provided claimant with injections into her low back. Dr. Lewis noted on June 5, 2012 that claimant had a specific right upper extremity problem that seemed to fit well with the C7 nerve distribution. Dr. Lewis noted that claimant's MRI of her cervical spine demonstrated a right sided disc prolapsed into the exiting

neuroforamen at the C7 level, but fortunately there was no electrical evidence of a significant permanent neurologic injury. Dr. Lewis referred claimant to Dr. Tice.

5. Dr. Tice initially evaluated claimant on June 13, 2012. Dr. Tice noted claimant had a right C6-7 disk herniation, but noted Claimant's symptoms would not be completely explained by the herniation. Dr. Tice recommended an electromyelogram ("EMG") to determine if her symptoms were caused by her cervical spine or carpal tunnel. Dr. Tice continued to treat claimant for her low back and shoulder pain.

6. Claimant underwent a C6-7 cervical epidural steroid injection ("ESI") on June 22, 2012 under the auspices of Dr. Lewis. Dr. Lewis performed a repeat ESI on July 24, 2012. Claimant returned to Dr. Lewis on August 16, 2012 and reported some improvement (about 60%) in her right upper extremity symptoms following the two ESI's. Dr. Lewis noted claimant was requesting a referral for physical therapy, which was provided by Dr. Lewis.

7. Claimant returned to see Dr. Tice on November 26, 2013. Dr. Tice discussed the fact that Claimant had been through litigation and her fall in the parking lot was deemed to be work-related, but the carpal tunnel condition was not. Dr. Tice further noted that claimant was reporting that when she fell, she struck her hands in the parking lot and had significant pain in her neck and her arms. Dr. Tice noted that his opinion was unchanged and that claimant had a work injury when she fell in the parking lot on her outstretched hands. Dr. Tice opined that claimant had a carpal tunnel syndrome and cervical and lumbar myofascial symptoms as a result of the fall. Dr. Tice noted he could not "precisely assess her clinically" after an inconsistent physical exam. Dr. Tice noted Claimant was quite disturbed as a result of her recent litigation and job loss. Dr. Tice recommended that claimant be evaluated for possible psychological manifestations as a result of her injury and referred claimant for physical therapy. Dr. Tice took claimant off of work completely as a result of his exam on November 26, 2013.

8. Claimant testified at hearing that at the time she saw Dr. Tice, she had pain in many parts of her body and was a wreck emotionally.

9. Claimant testified that she requested Dr. Tice to refer her to Dr. Price for pain management treatment. Claimant testified that she was aware that Dr. Price did acupuncture and laser treatments she wanted to try alternatives to narcotics for her pain management.

10. On December 30, 2013, Claimant returned to see Dr. Winnefeld at Western Medical Associates. Claimant had previously been referred to Dr. Winnefeld for treatment of her carpal tunnel syndrome before that claim was found to be not compensable. Dr. Winnefeld noted that Claimant was complaining of left shoulder, neck, low back, and bilateral leg pain. Dr. Winnefeld noted that the prior order concluded that her fall and subsequent pain from the fall was compensable under the

Colorado Workers' Compensation Act. Dr. Winnefeld noted that it was his understanding that the decision determined that the fall did not cause claimant's carpal tunnel syndrome. Therefore, Dr. Winnefeld limited his exam to the workers' compensation injury, and not for carpal tunnel syndrome.

11. Dr. Winnefeld further noted that it was still his opinion claimant's carpal tunnel syndrome was work-related and that claimant was not at MMI. Dr. Winnefeld noted that clamant was complaining of neck pain, shoulder pain, and thigh pain and reported she had a herniated disc in her neck. Dr. Winnefeld noted that his interpretation of the MRI performed in March 2012 did not show a herniated disc. Dr. Winnefeld opined that Claimant was at MMI for the February 7, 2012 work injury and referred claimant to Dr. Price for an impairment rating.

12. Dr. Winnefeld noted that claimant should be restricted from working due to her severe emotional issues and pain symptoms. Dr. Winnefeld noted that the was little if any objective evidence of the pain symptoms, but nonetheless provided claimant with restrictions based, at least in part, on her pain symptoms.

13. Claimant testified that she asked Dr. Winnefeld to refer her to Dr. Price because she already had a visit scheduled with Dr. Price, on referral from Dr. Tice. Claimant testified that at that point in time, she did not know what was involved with a permanent impairment rating.

14. Claimant returned to Dr. Tice on January 14, 2014. Dr. Tice noted that claimant had an appointment with Dr. Price for a disability rating. Dr. Tice noted that claimant had minor symptoms regarding the cervical and lumbar spine which were related to her work injury. Dr. Tice further noted claimant's ongoing complaints with regard to her carpal tunnel and ulnar neuropathy. Dr. Tice sent a copy of his report to Dr. Price.

15. Dr. Price initially evaluated claimant on January 15, 2014. Dr. Price noted claimant's accident history of falling on pavement on February 7, 2012. Claimant reported pain complaints to Dr. Price involving her neck, low back and shoulder. Dr. Price recommended claimant begin Cymbalta and referred claimant to Dr. Cohen for her psychiatric condition. Dr. Price performed acupuncture and referred claimant for physical therapy. Dr. Price opined that claimant should be off of work for at least a month until she can see her again and return her slowly back to sedentary or light duty.

16. Claimant returned to see Dr. Lewis on January 27, 2014. Dr. Lewis performed a left-sided epidural steroid injection at the C6-C7 level and noted Claimant needed to return in two weeks for reevaluation.

17. Dr. Price later noted on January 29, 2014 that claimant was referred to her by Dr. Tice for consultation for pain management and initially I was meant to see her under her general medical care. Dr. Price noted that she was informed by the attorney

for respondents that the referral was for an impairment rating only. Dr. Price further noted that she had been provided with Dr. Winnefeld's December 30, 2013 medical report placing claimant at MMI. Dr. Price noted that she had not yet determined if claimant was at MMI, nonetheless, Dr. Price performed an impairment rating.

18. Dr. Price ultimately provided an impairment rating of 28% whole person. The 28% whole person rating was comprised of 14% cervical spine impairment, 13% lumbar spine impairment, and 4% whole person impairment to the shoulder.

19. The ALJ credits the report of Dr. Price along with the testimony of claimant and finds that claimant was referred to Dr. Price by Dr. Tice for treatment of her work related injury. The ALJ therefore determines that claimant has established that it is more likely than not that Dr. Price is authorized to provide treatment related to her work injury.

20. Claimant returned to see Dr. Lewis on February 6, 2014. Dr. Lewis noted claimant had improvement following the injection and had been doing physical therapy. Dr. Lewis noted that if claimant's symptoms did not improve with cervical epidural steroid injections, an additional MRI may be needed since her last MRI took place on March 13, 2012.

21. Following Dr. Price's impairment rating, Respondents requested a DIME, and Dr. James Regan was selected as the DIME physician. Dr. Regan was scheduled to meet with Claimant on May 2, 2014. However, it appears from the records that the date of the appointment was subsequently changed to June 6, 2014. In any event, Dr. Regan reviewed claimant's medical records and the prior order from the ALJ in connection with his DIME, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Regan ultimately opined that claimant was at MMI as of June 6, 2014, and provided a 30% whole person impairment rating. The 30% whole person impairment rating consisted of a 15% cervical spine impairment, 12% lumbar spine impairment, and 6% whole person impairment for Claimant's psychological condition related to her depression.

22. With regard to the psychological impairment, Dr. Regan completed the Division of Workers' Compensation Mental Impairment Rating Report Work Sheet and provided claimant with a DSM diagnosis of depression. Dr. Regan provided scores for various areas of function, including activities of daily living; social functioning; thinking, concentration, and judgment; and adaptation to stress. Dr. Regan averaged the two highest area of function ratings to a total of 2, applied the number 2 to the category conversion table, and arrived at the final rating of 6% whole person for Claimant's depression.

23. Respondents filed a timely application for hearing to overcome Dr. Regan's DIME opinion. The ALJ notes that the issue of MMI, including the date of MMI, was not raised by either party before the ALJ. Therefore, as discussed at the

commencement of the hearing, the ALJ lacks jurisdiction to make any ruling involving the finding of MMI by Dr. Regan.

24. Dr. Bernton testified at hearing on behalf of Respondents consistent with his various independent medical examination ("IME") reports. Dr. Bernton performed two IME's in this case. The first on June 26, 2013, before the prior hearing and on March 26, 2014, after Dr. Price's impairment rating. Dr. Bernton testified that claimant's fall in the parking lot did not lead to disability or impairment. Dr. Bernton opined that Dr. Regan's physical impairment rating did not properly follow the directives of the AMA Guides, 3rd Edition, (Revised) because the impairment rating did not properly consider the guides instructions regarding causation. Dr. Bernton opined that the discussion regarding impairment must include a discussion of the pathophysiology of the particular condition and of the pertinent host characteristics. Dr. Bernton noted that the existence of an impairment does not create a presumption of the contribution by a factor with which the impairment is often associated. Dr. Bernton testified that Dr. Regan's rating of 25% for the neck and the back was flawed due to a failure to reach an assessment of a reasonable pathophysiology that could have occurred from the February 7, 2012 fall, and a failure to establish that the force and magnitude of any injury that may have occurred on February 7, 2012 was sufficient to create the impairment measured by Dr. Regan more than two years later. According to Dr. Bernton, the rating provided by Dr. Regan was not consistent with the history, and not compliant with the causation principles of the AMA Guides.

25. Dr. Bernton testified that he agreed with Dr. Kleinman that Dr. Regan was wrong in asserting that claimant had no pre-existing depression. Dr. Bernton testified that there was no evidence of the type of methodology required to assess mental impairment, and, in this case, there was no evidence of treatment of the condition rated by the authorized physicians in this case. Dr. Bernton also noted that he had performed psychological testing on June 28, 2013 that showed a 98% job dissatisfaction. Dr. Bernton testified that the claimant's job dissatisfaction was not insignificant in the course of this claim. Dr. Bernton testified that he wouldn't expect a trip and fall injury to result in the type of impairment described in Dr. Regan's DIME report because Dr. Bernton felt that claimant had only sustained a minor injury on February 7, 2012.

26. The ALJ finds the testimony of Dr. Bernton to be unpersuasive in determining the issue of PPD. The ALJ notes that the opinion of Dr. Bernton represents a difference of medical opinion as to whether the permanent impairment measured by Dr. Regan was related to the February 7, 2012 fall. Dr. Bernton opined that it was not based on the findings of inconsistencies by the medical providers and his opinion that claimant's fall represented only a minor injury. The ALJ finds that these opinions do not serve to overcome the contrary opinions of Dr. Regan by clear and convincing evidence.

27. With regard to claimant's treatment for psychiatric issues, claimant testified that employer offered its employees six free visits with a counselor as an employment benefit. Claimant testified that she began seeing a therapist, Ms. Starbird, in June 2012 after her work injury because she felt the attitude of managers had become more negative towards her and she was in significant pain at work and would often cry during working hours. The therapy records indicate that claimant complained of being was overwhelmed, stressed, hurt, and frustrated following her injury.

28. Claimant continued to treat with the therapist through the summer of 2012 and noted Claimant had FMLA, but had used all of her sick time and all of her vacation time. The records also document claimant's ongoing personal issues involving her family and issues with work not related to her work injury. The records also document claimant complaining to the therapist that her anxiety was higher because of increased pain.

29. Claimant testified that Ms. Starbird referred her to Dr. Bishop a clinical psychologist who saw her initially on September 25, 2012. Dr. Bishop noted in his description of her presenting problem that claimant sustained an accident at work while on a smoking break when she tripped and fell in the parking lot, and suffered injuries to her wrists, a disc in her neck, and her knees. Claimant reported to Dr. Bishop that since the injury she states that she has been treated differently at work.

30. Claimant continued to see Dr. Bishop through the end of 2012 and into 2013. In a letter dated May 15, 2013, Dr. Bishop wrote that Claimant had reported to him that her long career with employer had been "rather suddenly interrupted by an injury she suffered at work." Dr. Bishop noted that the unsupportive relationship with her immediate supervisor and other senior employees was more instrumental in the development and maintenance of Claimant's clinical depression. Dr. Bishop noted that Claimant reported she was frustrated with her inability to be as productive as she had for many years due to her injuries. Dr. Bishop noted that her stress and frustration was increased by the lack of "institutional and emotional support" she received for her injuries.

31. As noted above, Dr. Price had referred claimant to Dr. Cohen on January 15, 2014. The referral was initially denied by respondents. Dr. Price noted in her report that claimant's stress level and anxiety needed treatment and was impairing her recovery.

32. Following the DIME evaluation with Dr. Regan, claimant was evaluated by Dr. Cohen on June 11, 2014. Dr. Cohen noted that claimant had sustained injuries in her fall with employer and had sought treatment for her non-work related carpal tunnel syndrome through Medicaid. Dr. Cohen noted that claimant had been referred to his office for behavioral education around helping her deal with residual pain. Dr. Cohen noted claimant's ongoing issues involving her financial situation, her prior marriage and

her work injury. Dr. Cohen recommended claimant continue with 6-8 focused psychotherapy visits related to the aspects of her workers' compensation claim.

33. The ALJ finds the opinions of Dr. Cohen to be credible and persuasive.

34. Claimant returned to Dr. Bishop on June 2, 2014. Claimant reported some improvement in her mood which she attributed to Cymbalta. Dr. Bishop re-evaluated claimant on June 24, 2014 and noted she was feeling an increased amount of depression and that the insurer was fighting her impairment rating from the DIME physician. Dr. Bishop recommended claimant further develop and improve her skills at mindfulness and relaxation and work on her procrastination. Claimant again returned to Dr. Bishop on July 8, 2014. Dr. Bishop noted that he and Claimant had processed her interactions with physicians around her disability, and her desire to recover from her injuries. Dr. Bishop noted Claimant was struggling with the idea that she was disabled and that she wanted to go back to work.

35. Dr. Kleinman performed a psychiatric IME on July 11, 2014. Dr. Kleinman issued a report in connection with his IME evaluation and documented claimant's work history and psychological issues with her work. Claimant reported to Dr. Kleinman that she believed her supervisor's opinion of her changed after her work injury. Claimant also noted that around this same time there were errors on a "storm" report that claimant felt she was being blamed for, while claimant felt the errors were attributable to her supervisor.

36. Dr. Kleinman reviewed claimant's medical records and noted that the mental health notes from 2012 and 2013 indicated that claimant's stress was related to family problems, employment problems, litigation issues and personal problems. Dr. Kleinman opined that there was very little mention in the records of psychological issues and stress related to claimant's pain from the trip and fall. Dr. Kleinman noted that claimant was very concerned with how she was treated at work, but Dr. Kleinman opined that claimant's work stress would be present in all fields of employment as it related to reprimands and termination. Dr. Kleinman diagnosed claimant with a major depressive episode that was recurrent. Dr. Kleinman opined that the depression was related to other issues and not related to the trip and fall at work.

37. On July 11, 2014, Dr. Cohen noted that Claimant had undergone the independent medical examination with Dr. Kleinman, but that she should not review Dr. Kleinman's reports and allow her attorney to handle those issues. Dr. Cohen noted that the larger issues revolved around the fact that she has some chronic physical issues which were long standing in nature that claimant will have to accept and learn to live with.

38. Dr. Robert Kleinman testified at hearing on behalf of Respondents consistent with his report dated July 14, 2014. Dr. Kleinman testified that Dr. Regan's psychological impairment rating was invalid because Dr. Regan did not perform a

psychiatric evaluation or diagnosis, and did not follow the correct steps to provide an impairment rating under the Division of Workers' Compensation rules. Dr. Kleinman testified that Dr. Regan provided an impairment rating without discussing how he came to that rating. Dr. Kleinman testified that Dr. Regan only provided a one sentence history of claimant's psychiatric condition. Dr. Kleinman noted that Dr. Regan provided claimant with a diagnosis of depression, but testified that Dr. Regan didn't analyze the diagnosis. Dr. Kleinman further took issue with the fact that claimant had a prior history of major depression. Dr. Kleinman noted that Dr. Regan's finding that claimant was not depressed prior to the fall was factually wrong. Dr. Kleinman relied on records from Ms. Saunders in March 2010 that indicated that claimant was on Prozac as of that date and the records failed to show that the Prozac was discontinued.

39. The ALJ rejects the testimony of Dr. Kleinman at hearing as unpersuasive. Dr. Kleinman relied on records from Dr. Bishop and noted that claimant was not treated for psychiatric issues related to the workers' compensation claim following her injury. However, this finding ignores the fact that there was significant confusion regarding the compensability of claimant's work injury after it occurred and resulted in Dr. McLaughlin refusing to treat claimant for her work injury until after a finding of compensability was obtained by claimant. Even after her claim was found to be compensable, insurer denied the initial referral to Dr. Cohen provided by Dr. Price.

40. The ALJ further finds that claimant made references to her psychiatric problems as being related to her pain from her work injury to Dr. Bishop and Ms. Starbird. While claimant also had other psychological issues during this same period of time, the ALJ cannot state that the opinions, as expressed by Dr. Kleinman, and the basis for his opinions, overcome the contrary opinions expressed by Dr. Regan that claimant had a ratable psychological disorder related to her work injury by clear and convincing evidence.

41. Claimant testified that Dr. Regan provided an impairment rating for her depression because her pain following the work injury prevented her from working and enjoying activities. Claimant testified that she was not depressed prior to the fall, although there were some periods of time where she had mental health problems. Claimant testified that previously she could always work and provide for herself and her family, and after this injury she has been unable to do that. Claimant testified that she had some periods of depression when she was divorced 29 years prior and when her mother died 10 years prior. Claimant testified that those periods of time were not as bad as the periods of time after this injury, because she was unable to handle challenges in her life. Claimant testified that after her injury and termination, she had difficulty communicating and being intimate with her husband, and had difficulty engaging in activities she used to enjoy like swimming and playing with her grandchildren. Claimant testified she was prescribed Prozac in 2010, but did not continue the prescription until after her work injury. The ALJ credits the testimony of claimant and finds it to be credible and persuasive.

42. Claimant testified that she was asked to submit her resignation on February 27, 2013. She testified that her supervisor told her she was being terminated because of her performance. Claimant testified that she had recently received a performance evaluation giving her a low score. Claimant testified that she had received the review a few weeks before she was terminated. Claimant testified that she was not threatened by the fact that she had received a low score because employer previously would offer training to help improve weaknesses in job performance. Claimant testified that she responded to the low score on the performance review with a three-page email response to her supervisor clarifying why she did things the way she did. Claimant testified that some of the policies for employer had changed, and she was asked to do work tasks in a different way than she had done them previously.

43. Claimant testified that prior to her termination, she had undergone some training to improve her work, especially in the areas of coordination of benefits and eligibility. She testified that these were small-group trainings with her supervisor Ms. McKinney and later with Ms. Marden. Claimant testified that she was not worried that she had to do training, because ongoing training was standard in her work with employer. Claimant testified that she had received a $300 merit bonus for her work for employer in 2012. Claimant testified that not all employees receive merit bonuses.

44. Claimant testified that prior to her termination, she was never warned that she needed to perform a specific act or she would be terminated. Claimant testified that she was not aware of any employer rules or regulations that she violated that caused her to be terminated. Claimant testified that there was never a discussion of her termination prior to the day she was terminated. Claimant testified that she was surprised when she heard the reasons given to her for her termination because she had been working with employer for more than twelve years and knew her job inside and out.

45. Ms. McKinney, the supervisor of the claims department for employer, testified at hearing. Ms. McKinney testified that she may have started supervising Claimant in 2011, but was unsure of when exactly she started as claimant's supervisor. Ms. McKinney testified that claimant had a lot of errors in her work. Ms. McKinney testified that there were some changes in the system and that the examiners were looking at more difficult claims. Ms. McKinney testified that in February 2013 she was asked for feedback regarding claimant's performance and reported that she was not seeing improvement in claimant's performance. Ms. McKinney admitted on cross-examination that some of the claimant's mistakes were due to the programming change that happen each year. Ms. McKinney testified that she was not present for the meeting involving claimant's termination. Ms. McKinney testified that she was not aware of whether claimant received a merit bonus, but that the bonuses are given out based on merit and not to every employee.

46. Ms. Burke, the director of human resources for employer, testified at hearing. Ms. Burke testified that she was involved in the decision to terminate claimant.

Ms. Burke testified that claimant was testified for poor performance. Ms. Burke testified that claimant was retrained and did not improve her performance. Ms. Burke did not identify an incident or a violation of employer's policies that led to claimant's termination.

47. The ALJ concludes that claimant was terminated as a result of poor job performance. However, respondents have not proven that claimant was terminated as a result of a volitional act. The ALJ cannot state based on the testimony of Ms. Burke and Ms. McKinney that claimant committed a volitional act that resulted in her termination of employment. Claimant appears, based on the testimony of Ms. Burke and Ms. McKinney, to have been terminated based on an inability to adequately perform the functions of her job, and not based on a volitional act.

48. Claimant testified that after her termination she was offered a severance package, but that she did not accept it until approximately a year later. Claimant signed the Agreement on February 27, 2014. The Agreement provides that claimant would be paid a lump sum of $8,060 as a severance payment in exchange for claimant waiving any and all claims under the ADEA and release employer from liability under several employment laws. The Agreement states: "Notwithstanding any other provision in this Agreement, this Agreement shall not be construed to limit or modify [claimant's] Workers' Compensation rights for the claims designated as W.C. No. 4-914-529 and 4-890-670." The Agreement makes no reference to the basis for claimant's termination, but notes in paragraph one that claimant voluntarily resigns and separates from employment with employer effective February 27, 2013 which is thereafter referred to as her "Termination Date".

49. Claimant testified that she signed the Agreement because she did not think that employer would ever hire her back, and because she thought that her workers' compensation claim was nearly completed.

50. Claimant testified that she continues to receive medical treatment, including treatment from Dr. Price and physical therapists, to treat the ongoing symptoms from her February 7, 2012 injury. Claimant testified that the treatment she receives improves her symptoms. Claimant testified she hopes to continue receiving treatment so that she can improve her symptoms and return to work.

51. The ALJ finds that Dr. Regan's DIME report provides an impairment rating for claimant's specific disorder diagnoses and loss of range of motion in her cervical and lumbar spine to her work injury. The ALJ finds that the range of motion testing and the Table 53 diagnoses during the DIME were similar and consistent with the determinations of Dr. Price in her permanent impairment rating. Although Dr. Bernton opined that no permanent impairment rating is warranted for Claimant's lumbar or cervical spine, The ALJ cannot state that it was clearly erroneous for Dr. Regan to include specific disorder diagnoses under Table 53 or the range of motion testing results in his final impairment rating.

52. Dr. Regan's report also indicates that he relates claimant's depression and its effect on her activities of daily living, socialization, cognition, judgment, and adaptation to stress to her February 7, 2012 work injury. The ALJ notes that Dr. Kleinman opined that no permanent impairment is warranted for claimant's depression because Claimant's depression is not related to the work injury. Dr. Kleinman also opined that Dr. Regan did not perform a proper psychological evaluation. The ALJ finds this testimony not persuasive. The ALJ credits the testimony of claimant at hearing along with the medical reports and opinions from Ms. Starbird, Dr. Bishop, Dr. Cohen, Dr. Price, and finds that it was not clearly erroneous for Dr. Regan to include a psychological rating for depression in his impairment rating.

53. Respondents argue that the psychiatric rating should not be included because the rating relates to litigation stress. The ALJ is not persuaded. The ALJ notes that claimant initially sought counseling outside of the workers' compensation system in June 2012 after her work injury and reported that she was having issues related to, among other issues, the fact that she was in pain while at work and would often cry during work hours. The ALJ notes that claimant's attempts to receive treatment for her psychiatric condition was frustrated by respondents' denial of the claim and denial of her referrals for psychiatric treatment. The fact that these denials may have caused issues for claimant which she discussed with her treating physicians does not make her entire psychiatric claim not compensable under a theory that it is related to litigation stress. Instead, the ALJ finds that claimant's psychiatric issues, as noted by Ms. Starbird in her initial evaluation, are related to claimant experiencing significant pain as a result of her work injury.

54. The ALJ credits the testimony of claimant and the medical records in evidence, including the records of Dr. Tice, Dr. Price, Dr. Cohen and Dr. Regan and determines that Claimant has proven it is more likely than not that she is entitled to a general award of post-MMI medical benefits arising out of the admitted February 7, 2012 injury.

55. The ALJ notes that Ms. McKinney and Ms. Burke both testified that Claimant was terminated as the result of poor performance, and notes that neither could identify a distinct incident that resulted in Claimant's termination. The ALJ finds that Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that resulted in termination of her employment.

56. The ALJ credits Claimant's testimony and the medical records from Dr. Price and determines that Dr. Price is an authorized treating provider who is within the chain of authorized referrals by virtue of her referral from Dr. Tice.

57. The ALJ notes that Dr. Tice provided a no-work restriction for Claimant on November 26, 2013. The ALJ also notes that Dr. Winnefeld and Dr. Price provided work restrictions for claimant on December 30, 2013 and January 15, 2014, respectively, taking claimant off of work completely. The ALJ finds that claimant has

proven it is more likely than not that her injury resulted in a disability lasting more than three work shifts, and resulting in the no-work restrictions from Dr. Tice, Dr. Winnefeld, and Dr. Price. The ALJ therefore finds that claimant is entitled to temporary total disability benefits beginning November 26, 2013 and continuing until June 6, 2014 when claimant was placed at MMI by the DIME physician. The ALJ notes that the MMI date4 was not raised as an issue by the parties and was not subject to litigation.

58. The ALJ credits the testimony of Ms. McKinney and Ms. Burke and notes that claimant was terminated from her employment. The ALJ notes that while the Agreement in this case makes representations regarding a voluntary resignation, the testimony presented at hearing establish that there was no voluntary resignation in this case. The ALJ further finds that the $8,060 provided to claimant in the Agreement was to settle any potential employment lawsuits and will not have any effect on claimant's rights to workers' compensation benefits, including her right to TTD benefits.

59. Respondents contend that Claimant was paid wages in the form of a lump sum payment after claimant signed the Separation Agreement and Waiver. Respondents contend that they are entitled to an offset for the amount of the lump sum payment pursuant to the Separation Agreement against temporary disability benefits. The ALJ is not persuaded.

60. The ALJ credits Claimant's testimony that the $8,060.00 was paid pursuant to the negotiated agreement for Claimant for not filing or pursuing certain legal actions outside of her workers' compensation claims. This is also reflected in the plain language of the Agreement. The ALJ finds that the amount paid was not wages and should not, in any way, effect claimant's right to workers' compensation benefits.

61. Claimant testified that the group health plan provided by Employer covered herself and her entire family during her employment. The cost of continuing the coverage she received during her employment is $1,462.44 per month, which would have covered her family. Claimant testified she received the COBRA notice in March 2013. Claimant testified that she elected to continue health coverage for only herself for one month following her termination, but could not afford to pay for any additional continuation coverage. The cost for the continuing health care that claimant purchased for one month was $585.04.

62. The parties agree that the claimant's AWW should be increased in the present case based on claimant's entitlement to COBRA. Respondents argue that claimant's COBRA increase is limited to the single coverage claimant elected and maintained for one month. Respondents argument is without merit.

63. The Colorado Supreme Court held in *Ray v. Industrial Claim Appeals Panel*, 145 P.3d 661 (Colo. 2006) that the cost of continuing the injured workers' health insurance should be included in calculating the AWW of an injured worker, regardless of whether the injured work elects to continue coverage.

64. In this case, claimant testified she had health insurance through her employer for her family. According to the COBRA letter entered into evidence, the cost of continuing the health insurance coverage for her entire family was $1,462.44 per month. Claimant testified she did not continue the coverage for her entire family because she could not afford it. Instead, she continued coverage for herself for one month. Respondents appear to concede in their position statement that if claimant makes no payment for any continuing COBRA benefit, claimant's AWW is increased by the full amount. Respondents argue that where the injured worker makes a reduced payment for continuing COBRA coverage for an individual as opposed to the family, however, the reduced payment is the amount that should be used for increasing the AWW under Section 8-40-201(19)(b).

65. Respondents argument would effectively reduce the COBRA coverage that should be included in the AWW in any case where an injured worker, such as the claimant in this case, elects to select coverage only for herself and not her family for financial reasons. This is not the intent of the Act. Because the Colorado Supreme Court has held that the cost of continuing the COBRA health insurance should be included in the AWW calculation regardless of whether the injured worker selects coverage, than the full cost of continuing the COBRA coverage should be included where the injured worker elects to limit the extent of the COBRA coverage.

66. It should also be noted that claimant in this case had health insurance for her entire family through her a health insurance plan provided by employer. The mere fact that claimant could not afford to continue this plan after she was terminated, and while her claim was still pending during a period of time in which claimant faced a significant financial hardship, should not serve to reduce claimant's COBRA calculation.

67. The ALJ finds that claimant's cost of continuing the health insurance coverage she actually received during her employment with employer is $1,462.44 per month, or $336.56 per week. The ALJ credits the COBRA letter entered into evidence in coming to this finding. The ALJ finds that combining the $336.56 for claimant's COBRA coverage to the previously stipulated AWW of $651.30, results in a new AWW of $987.86.

68. The ALJ credits the medical reports from Dr. Tice and Dr. Price and finds that the ongoing medical treatment provided by Dr. Price is reasonable and necessary to maintain claimant at MMI. The ALJ rejects the contrary opinions expressed by Dr. Bernton as unpersuasive in coming to the finding.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S.,

4. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

5. As found, based on the testimony of claimant at hearing and the corresponding medical records from Dr. Price dated February 7, 2014, claimant has proven by a preponderance of the evidence that she was referred by Dr. Tice to Dr. Price for consultation for pain management treatment. Claimant was also referred to Dr. Price by Dr. Winnefeld for an impairment rating. However, the referral from Dr. Winnefeld does not limit that referral claimant received from Dr. Tice to Dr. Price for medical treatment.

6. As found, respondents are liable for the cost of the medical treatment provided by Dr. Price as she is an authorized provider within the chain of referrals. Respondents are liable for the cost of the treatment provided by Dr. Price pursuant to the Colorado Medical Fee Schedule.

7. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

8. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

9. As found, the ALJ credits the opinions of Dr. Regan in his DIME report and finds that respondents have failed to overcome the opinions of Dr. Regan regarding the issue of permanent impairment by clear and convincing evidence. As found, the opinions of Dr. Regan are supported by the medical records and impairment rating provided by Dr. Price and are found to be credible and persuasive. As found, the ALJ credits the opinion of Dr. Regan regarding the cause of claimant's psychiatric condition and impairment and finds that respondents have failed to overcome the opinion by clear and convincing evidence. As found, claimant's psychiatric issues are related to her pain from the work injury and not related to "litigation stress".

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

11. As found, claimant has proven by a preponderance of the evidence that she was under work restrictions set forth by Dr. Tice and Dr. Winnefeld and was unable to resume her prior work due to the restrictions. As found, claimant has proven by a preponderance of the evidence that the restrictions were related to her February 7, 2012 work injury.

12. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

13. As found, respondents have failed to establish by a preponderance of the evidence that claimant committed a volitional act that led to claimant's termination of employment. As found, the ALJ credits the testimony of Ms. Burke and Ms. McKinney and finds that claimant was terminated after her work performance failed to improve, but not due to any volitional act on the part of claimant.

14. As found, the Agreement entered into evidence establishes that claimant was terminated as of February 27, 2013. The ALJ does not find that claimant voluntarily resigned her position in connection with the signing of the Agreement.

15. Section 8-40-201(19)(b), C.R.S. provides that the average weekly wage of an injured employee shall include the amount of the employee's cost of continuing the employer's group health insurance plan. The replacement cost of health insurance to the claimant shall be included in the claimant's average weekly wage. *State Compensation Insurance Authority v. Smith*, 768 P.2d 1256 (Colo. App. 1988). The plain language of Section 8-40-201(19)(b), C.R.S., says nothing that would require claimants to purchase health insurance in order for the cost of the insurance to be included in the average weekly wage, and the statute does not require the actual purchase of health insurance for the full amount to be included in the average weekly wage. *Ray, supra.* 145 P.3d at 668.

16. As the Colorado Supreme Court noted in *Ray*, the employer's argument that the injured worker be required to purchase the COBRA benefit fails to consider the significant delay that may occur between the time of employment termination and the

actual receipt of workers' compensation benefits. In this case, claimant was under active medical care for a denied workers' compensation claim at the time she was terminated. As found, claimant testified at hearing that she did not elect the full COBRA coverage due to the fact that she could not afford the full cost of continuing COBRA coverage. The ALJ finds that these facts are consistent with the findings of the Supreme Court in *Ray* to substantiate claimant's claim that her AWW should be based on the full cost of COBRA benefits as opposed to the limited coverage she elected for one month.

17. As found, claimant's cost of continuing the coverage she actually received during her employment with Employer is $1,462.44 per month, or $336.56 per week. Combining the $336.56 to the previously stipulated AWW of $651.30, results in a new AWW of $987.86.

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

19. As found, claimant has proven by a preponderance of the evidence that the proposed medical treatment recommended by Dr. Price is reasonable and necessary to maintain claimant at MMI.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits from November 26, 2013 and continuing until June 6, 2014 when claimant was placed at MMI.

2. Claimant's new AWW based on the cost of continuing her health insurance is $987.86. The AWW is effective February 27, 2013, her termination date.

3. Respondents shall pay claimant PPD benefits based on the impairment rating provided by Dr. Regan.

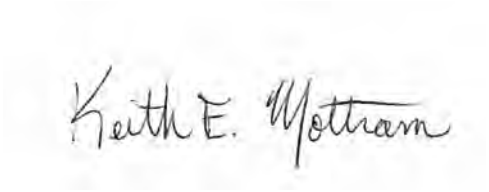
4. Respondents shall admit for post-MMI medical benefits.

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

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

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

DATED: January 16, 2015



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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right hand injury during the course and scope of his employment with Employer on September 2, 2014.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical benefits for his September 2, 2014 right hand injury.

3. Whether Concentra Medical Centers is Claimant's authorized treating provider.

4. Whether Claimant has proven by a preponderance of the evidence that medical treatment in the form of a right hand closed reduction procedure to be performed by Craig Davis, M.D. is reasonable, necessary and related to his September 2, 2014 industrial injury.

FINDINGS OF FACT

1. Employer is a correctional facility. Claimant worked for Employer as a Maintenance Supervisor. He performed general maintenance duties.

2. Claimant testified that on September 2, 2014 he was applying caulk between the floor and walls in the dining halls of Employer's facility. He reported that he was injured when he "stood up and struck his head on a metal box on the wall. It made him mad so he punched the box, and broke his hand."

3. Claimant reported the injury to supervisor Captain Christopher Todd Phillips on September 2, 2014. Captain Phillips explained that he gave Claimant a designated provider list on September 2, 2014. Claimant reported to Captain Phillips that he intended to seek medical attention for the injury to his right hand at Concentra Medical Centers.

4. On September 2, 2014 Captain Phillips also completed a Questionable Claim Notice regarding the September 2, 2014 incident. Captain Phillips documented in the Notice that Claimant came to his office and stated "You know that metal sick call box on the wall in the DRDC Dining Hall, I stood up and hit my head. I got mad and punched the box. Look at my hand."

5. Captain Phillips testified that Claimant's right hand injury occurred because Claimant was upset and punched the metal call box. Captain Phillips remarked that Claimant reported to him the only injury he incurred on September 2,

2014 was to his right hand. In his written and signed description of the incident completed on September 2, 2014 Claimant stated: "I was caulking the wall/floor joint when I stood up I hit my head on the sick call box. I retaliated by punching it. Result was an injury to my right hand smallest digit area."

6. Claimant testified that he had hit his head on the metal call box two times prior to striking it a third time and incurring an injury. Claimant commented that he took no action in response to the first time he hit his head on the metal call box. After the second time Claimant hit his head on the metal call box he retaliated by striking it with his right hand. The third time Claimant hit his head on the metal call box he again struck it with his right hand and fractured his fifth metacarpal.

7. Captain Phillips stated that "punching a metal call box is not part of any maintenance work duty." Claimant testified that he agreed punching the metal call box would not be included on any list of his job duties. However, he stated he believed it was a job duty because he was required to caulk the floor that caused him to be in the area where he eventually punched the metal call box.

8. Claimant remarked that he was aware the call box was metal and very hard before he punched it. He noted that he fractured the fifth metacarpal in his right hand because he intentionally punched the metal call box.

9. On September 2, 2014 Claimant obtained medical treatment at Concentra Medical Centers. Claimant was evaluated by Matt Miller, M.D. Dr. Miller documented that Claimant told him the injury occurred when "[p]atient stood up and hit head on box. In frustration, then punched the metal box with right hand." X-rays of Claimant's right hand demonstrated an angulated distal shaft fracture of the fifth metacarpal bone. Dr. Miller referred Claimant to Craig Davis, M.D. for anticipated right hand surgery.

10. On September 3, 2014 Claimant was evaluated by Dr. Davis at Colorado Orthopedic Consultants. Dr. Davis documented that Claimant reported the injury occurred when "he struck his hand on a box resulting in a fifth metacarpal neck fracture." During the office visit Dr. Davis performed a closed reduction followed by placing a cast with a fairly firm mold over the fracture. He noted that post reduction x-rays showed some improvement but Claimant still had a significant angulation and step-off on the oblique view. Dr. Davis remarked "I don't think this is an adequate reduction. I therefore recommend open reduction internal fixation." On September 12, 2014 Respondent filed a Notice of Contest because claimant's right hand injury was not work-related.

11. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right hand injury during the course and scope of his employment with Employer on September 2, 2014. The persuasive evidence reflects that Claimant's September 2, 2014 right hand injury was self-inflicted.

12. Claimant testified that on September 2, 2014 he was applying caulk between the floor and walls in the dining halls of Employer's facility. He reported that he

was injured when he "stood up and struck his head on a metal box on the wall. It made him mad so he punched the box, and broke his hand." Captain Phillips credibly explained that Claimant's right hand injury occurred because Claimant was upset and punched the metal call box. In his written and signed description of the incident completed on September 2, 2014 Claimant detailed: "I was caulking the wall/floor joint when I stood up I hit my head on the sick call box. I retaliated by punching it. Result was an injury to my right hand smallest digit area."

13. Based on Claimant's written documentation, reports to his doctors, statements to Employer and testimony at hearing, he hit his head three times and actually used his right hand to hit the metal box twice. Claimant's confirmation that he hit his head three times and punched the box more than once demonstrates that Claimant thought about what had happened and made the conscious decision to punch the metal call box in retaliation. The persuasive evidence in the record supports the finding that Claimant did not hit the metal call box with his right hand immediately but only after the second time he hit his head. By the third time Claimant hit his head he already recognized that the call box was very hard and made of metal. Claimant thus had significant time to consider the action he was going to take. He did not react immediately without thinking after the first time he hit his head, but instead waited and did not punch the metal box in retaliation until after he had taken time to carefully consider his options. Claimant's action in punching the metal box was thus self-inflicted, intentionally motivated and retaliatory in purpose.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

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

5. The Act specifically provides that the right to recovery shall obtain "where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted." §8-41-301(1)(c), C.R.S. Self-inflicted injuries are thus not compensable.

6. In *Leon v. Environmental Abatement Services*, W.C. No. 4-438-030 (ICAP, May 13, 2002).the Industrial Claim Appeals Office determined that Claimant's injury, incurred when he punched a window, was voluntarily self-inflicted and not compensable. The ALJ had concluded that "punching the broken window with a bare fist was almost certain to cause injury and evidences more than merely a failure to realize the probable consequences of a foolish act." *Id*. ICAP remarked that Claimant's motivation to strike the window was to "retaliate" against the employer. ICAP stated it was important to the evaluation of whether the injury was self-inflicted that Claimant did not instantaneously strike the window upon being directed to change jobs but instead first began walking to the new work station. *Id*.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right hand injury during the course and scope of his employment with Employer on September 2, 2014. The persuasive evidence reflects that Claimant's September 2, 2014 right hand injury was self-inflicted.

8. As found, Claimant testified that on September 2, 2014 he was applying caulk between the floor and walls in the dining halls of Employer's facility. He reported that he was injured when he "stood up and struck his head on a metal box on the wall. It made him mad so he punched the box, and broke his hand." Captain Phillips credibly explained that Claimant's right hand injury occurred because Claimant was upset and punched the metal call box. In his written and signed description of the incident completed on September 2, 2014 Claimant detailed: "I was caulking the wall/floor joint when I stood up I hit my head on the sick call box. I retaliated by punching it. Result was an injury to my right hand smallest digit area."

9. As found, based on Claimant's written documentation, reports to his doctors, statements to Employer and testimony at hearing, he hit his head three times and actually used his right hand to hit the metal box twice. Claimant's confirmation that

he hit his head three times and punched the box more than once demonstrates that Claimant thought about what had happened and made the conscious decision to punch the metal call box in retaliation. The persuasive evidence in the record supports the finding that Claimant did not hit the metal call box with his right hand immediately but only after the second time he hit his head. By the third time Claimant hit his head he already recognized that the call box was very hard and made of metal. Claimant thus had significant time to consider the action he was going to take. He did not react immediately without thinking after the first time he hit his head, but instead waited and did not punch the metal box in retaliation until after he had taken time to carefully consider his options. Claimant's action in punching the metal box was thus self-inflicted, intentionally motivated and retaliatory in purpose.

ORDER

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

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

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

DATED: January 15, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether the Claimant sustained a compensable injury to his right shoulder on January 20, 2011; whether he is entitled to medical treatment for that injury; whether the surgery he underwent on September 13, 2012 was related to the January 20, 2011 injury; and whether Dr. Horan is an authorized provider.

FINDINGS OF FACT

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

1. The Claimant was involved in an incident on January 20, 2011, when he fell on ice while performing a rescue exercise. Claimant reported to the Employer that he injured his right shoulder and elbow to the Employer. He reported landing on his right elbow and jarring his right shoulder.

2. On January 21, 2011, Respondent timely provided Claimant with a designated provider list from which Claimant selected Dr. Elizabeth Bisgard. He was familiar with Dr. Bisgard and had received treatment from her many times in the past. While Claimant elected Dr. Bisgard, he conceded at hearing that he declined any medical treatment at that time.

3. On January 21, 2011, Kurt Muehler, the adjuster handling Claimant's workers' compensation claim documented Claimant's election to decline medical treatment and specifically informed Claimant that if he changed his mind to contact Respondent.

4. On January 26, 2011, Claimant saw his primary care physician, Dr. Louis Kasunic, at which time Claimant reported headaches and did not mention any shoulder complaints. Dr. Kasunic manipulated Claimant's cervical spine during this visit. At hearing, Claimant admitted that he did not report or treat for any type of shoulder complaints at that time, which was just six days after the slip and fall.

5. Claimant admitted that he did not seek any medical treatment for his right shoulder until he saw Dr. Steve Horan in June 2012.

6. It is undisputed that while Dr. Bisgard was the designated physician to the purported January 20, 2011 injury, Dr. Bisgard did not provide any treatment related to such incident.

7. While Claimant did not seek treatment with Dr. Bisgard for the right shoulder between January 20, 2011 and June 2012, he did see Dr. Bisgard for other body parts and underwent a fit-for-duty evaluation with her.

8. Claimant saw Dr. Bisgard on August 25, 2011, for a lumbar sprain, and made no shoulder complaints.

9. On November 23, 2011, Claimant underwent a fit-for-duty evaluation with Dr. Bisgard and did not mention any shoulder complaints. At that time, Claimant specifically denied having any numbness or pain in his arms, denied having any musculoskeletal problems, weakness in his arms, and specifically denied having any difficulty moving his arms.

10. On August 31, 2012, Claimant returned to Dr. Bisgard for a subsequent back injury. Claimant again conceded at hearing that he did not report any shoulder complaints.

11. On September 6, 2012, Claimant saw Dr. Bisgard for the back injury and did not report any shoulder problems nor did he report that he had seen Dr. Horan.

12. Claimant admitted that he did not seek treatment with Dr. Bisgard for his shoulder from January 20, 2011 through June 2012, but he initially testified that he did treat with Dr. Bisgard between January 2011 and June 2012 because "the shoulder pain got worse."

13. Claimant concedes that he did not receive any treatment from Dr. Bisgard for the January 20, 2011 injury, but he testified that he saw Dr. Bisgard prior to seeing Dr. Horan, but he could not recall when. While Claimant could not recall when, he testified that it was in person and in her office, yet Claimant acknowledged that there was no medical record documenting such appointment.

14. It is undisputed that the medical records are devoid of a referral from Dr. Bisgard to Dr. Horan. Further, when questioned about a referral, Claimant testified he did not need Dr. Bisgard to refer him to Dr. Horan because he had free choice through the Employer's policy to pick a surgeon.

15. Claimant testified that the Employer has written a policy that allows a claimant in a workers' compensation claim to select a physician of his own choosing. He recalled receiving this policy via e-mail through the Employer's read files that were distributed to all employees. Claimant did not submit a copy of the purported policy and ultimately conceded there was no written policy.

16. Claimant initially saw Dr. Horan on June 22, 2012, and underwent surgery on September 13, 2012. The Claimant provided his private health insurance information to Dr. Horan's office. Claimant conceded that he did not request authorization for surgery from Respondent and that it was CIGNA that authorized the surgery, and it was CIGNA that paid for it.

17. Claimant saw Dr. Bisgard on October 2, 2012 as part of his follow-up care and for another fitness for duty evaluation. Claimant reported to Dr. Bisgard that his shoulder injury dated back to high school when he fractured his clavicle but that he had done well since then up until January 2010. Claimant told Dr. Bisgard that he fell on his outstretched right hand while in his dive gear at work and that the incident occurred in January 2010. He told her that he had symptoms at that time which never resolved. Dr. Bisgard opined that Claimant's need for shoulder surgery related back to the January 2010 fall, and that she could not understand why the claim was not accepted.

18. On October 25, 2012, Claimant sustained a compensable injury to his right shoulder. Claimant received a designated provider list from Respondent and again selected Dr. Bisgard. Claimant sought and received treatment with Dr. Bisgard for such injury. It was after this injury that Dr. Bisgard referred Claimant back to his surgeon, Dr. Horan, to ensure that he had not torn anything from his prior surgery.

19. Dr. Nicholas Olsen testified as an expert in physical medicine and rehabilitation. Dr. Olsen evaluated Claimant and prepared a report dated December 19, 2013. During the hearing, Dr. Olsen clarified that due to Claimant's report that the injury occurred in 2010 rather than in 2011, he initially prepared his report with the understanding that the injury occurred in 2010. Once the date of injury was clarified, Dr. Olsen reissued his report which was not altered in any substantive manner. He merely disregarded some of the medical records as irrelevant because they predated the injury of January 20, 2011. Dr. Olsen issued his subsequent report on April 11, 2014.

20. Dr. Olsen testified that the September 13, 2012 surgery to repair Claimant's right shoulder did not relate to the January 20, 2011 incident. Claimant suffered a temporary aggravation of symptoms of his shoulder on January 20, 2011, which resolved within days after the injury.

21. In support of his opinions, Dr. Olsen testified that Claimant reported that he felt pain at 8-9 out of 10 at the time of the January 20, 2011 fall, but that Claimant continued to complete the training exercise "which included diving through this hole, pulling along a rope, and completing his maneuvers which would have been quite difficult to do if one had acutely torn the rotator cuff or labrum." Dr. Olsen testified that Claimant completed those activities and reported that within 24-48 hours, his pain level decreased to a 2 out of 10.

22. Dr. Olsen also pointed out that Claimant delayed treatment for 18 months while continuing to perform all of the duties of a firefighter, as well as heavy workouts. Claimant also reported participation in fairly aggressive activities which would require use of his upper extremities including snowboarding, and possible remodeling of homes. Dr. Olsen noted that Claimant appeared to be functioning at a high level for the18-month period between the slip and fall and the time he sought treatment with Dr. Horan.

23. Dr. Olsen testified when Claimant's right shoulder became symptomatic such that he needed surgery, it was the conditions at that time that led to his surgery, which is simply the degenerative process or wear and tear.

24. Dr. Olsen relied upon the operative report which he opined clearly reflects that there is no acute pathology, but instead reflects a degenerative shoulder. The Claimant has a similar history with respect to his left shoulder. Dr. Olsen noted that the operative report did not reflect any pathology that he could link to the type of fall that Claimant reported. Dr. Olsen explained that Claimant had a very large subacromial spur, which was pressing onto his rotator cuff space, into the labral area, which was surgically removed, which stemmed from a prior clavicular fracture. Dr. Olsen testified that "the size of the spur indicates that it had been there for a long time, it was chronic, and it developed over many years following an injury like a clavicular fracture."

25. According to Dr. Olsen, the type of pathology demonstrated on the operative report was very consistent with the wear and tear history that Claimant provided concerning his left shoulder, for which he had undergone a similar surgery.

26. As found above, Claimant saw his personal physician Dr. Kasunic within one week of the January 2011 slip and fall incident. Dr. Kasunic manipulated Claimant's cervical spine during that visit yet Claimant mentioned no right shoulder pain. Dr. Olsen found it significant that the record reflects no complaints of shoulder pain, because based on his experience as an osteopathic physician who performs manipulations, he finds it necessary to know whether a patient is having problems with his shoulders because it is essential to move the arms as you treat the neck, and if there is an underlying condition, he would want to know about it. Dr. Olsen would have expected Claimant to mention such injury just six days later to Dr. Kasunic in light of the fact that Dr. Kasunic was performing manipulation of Claimant's neck.

27. Dr. Olsen testified that had Claimant sustained a type of lesion for which surgery was performed in September 2012, he would not have expected Claimant to pass a fitness-for-duty evaluation in November 2011, nor would he have expected the Claimant to engage in the recreational activities described above.

28. The opinions of Dr. Olsen are credible and persuasive regarding the causal relatedness of the Claimant's need for treatment to the right shoulder to the January 20, 2011 incident. Dr. Bisgard's opinions to the contrary are not persuasive. She failed to address Claimant's failure to report to her on four separate occasions that he had ongoing right shoulder pain stemming from a January 2011 work incident. She also failed to account for Claimant's ability to work full duty and engage in physically demanding recreational activities a period of 18 months without any significant functional limitation.

29. Claimant testified that he did not tell medical providers everything that was wrong with him at every appointment. He stated that he complained about the physical problem that prompted him to set the appointment.

30. The Claimant recalled that he had a specific moment when he tried to drink coffee and as he raised the cup with his right arm to drink, he felt shearing pain. He testified at that moment he realized that the motion he made with his arm was essential to his job.

31. The Judge is not persuaded by Claimant's explanations concerning his lack of treatment for 18 months or his failure to report shoulder pain to any medical provider, particularly Dr. Bisgard on four separate occasions (one of which was just one week prior to his right shoulder surgery). He knew he had selected Dr. Bisgard as a treating provider for his shoulder so it would make sense he would notify her of his right shoulder problems had they progressed as he described. His explanations concerning the Employer's physician referral policies also lack credibility.

CONCLUSIONS OF LAW

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

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

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the

injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. Claimant has failed to prove that the incident on January 20, 2011, produced the need for treatment especially the right shoulder surgery he underwent on September 13, 2012. The remoteness of the work incident to the date on which the Claimant initially sought treatment presents serious doubts as to whether the incident produced the need for medical treatment. In addition, during the 18-month period between January 2011 and June 2012, the Claimant continued to work full duty as a firefighter, and engage in physical recreational activities. It is apparent Claimant's function was not significantly impaired during this period of time. Further, the Judge credits Dr. Olsen's testimony and opinions concerning the degenerative changes in Claimant's right shoulder found during the surgery. The opinions of Dr. Bisgard and Claimant's testimony were not persuasive for the reasons set forth above.

ORDER

It is therefore ordered that Claimant's claim for benefits under the Colorado Workers' Compensation Act is denied and dismissed. The remaining issues are rendered moot.

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

DATED: January 21, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

The issues to be determined by this Order are:

1. Whether the claimant proved, by a preponderance of the evidence, that the treatment she received on July 15, 2013 and July 16, 2013 at the Memorial Hospital was reasonable, necessary, and related to the admitted September 26, 2012 industrial injury; and

2. Whether the claimant proved, by a preponderance of the evidence, that the July 16, 2013 services provided by Ute Pass Regional Ambulance District were reasonable, necessary, and related to the admitted September 26, 2012 industrial injury.

FINDINGS OF FACT

1. The claimant is a 62-year-old woman with an October 26, 1952 date of birth.

2. The claimant was hired by the respondent-employer on June 28, 2005 to work as a cashier.

3. The claimant was initially injured in an admitted accident on November 17, 2009, when, while walking in the parking lot coming to work, she slipped on some ice, landing on her back, and hitting her head and left elbow. A magnetic resonance image ("MRI") performed in December 2009 showed herniated or bulging discs in the lumbar spine and cervical spine. The claimant received conservative care from Dr. James and Dr. Bjork, including epidural steroid injections. The claimant complained to Dr. James about headaches.

4. In 2008, the claimant received treatment for migraine headaches. At hearing, the claimant denied ever experiencing, or receiving treatment for, migraine headaches prior to the November 17, 2009 injury.

5. On January 16, 2012, Dr. James placed the claimant at maximum medical improvement (MMI) from the November 17, 2009 injury, as of August 23, 2011. He

imposed permanent restrictions against lifting over five pounds or performing any overhead reaching.

6. The November 17, 2009 accident is the subject of W.C. No. 4-812-192, and is not currently at issue.

7. On September 26, 2012, the claimant suffered the subject injury when she tripped on a mat in the fitting room area and fell straight down on her right knee. The claimant denied headache, dizziness, or visual disturbances, but was complaining of pain at a level 10/10 in the lumbar spine region. The claimant was transported by Ute Pass Regional Ambulance to Pikes Peak Regional Hospital, where she was diagnosed with a right knee strain and a low back strain. X-rays of the right knee and lumbar spine were obtained. The x-rays were read as showing degenerative changes, without evidence of acute injury.

8. Dr. Matthew Young was designated to treat the claimant's injuries arising out of the September 26, 2012, accident. On February 4, 2013, the claimant presented to Dr. Young and reported her low back pain was at pre-injury baseline, but "she had a new symptom of headache". The claimant denied any prior history of migraines.

9. On July 15, 2013, the claimant presented to the Memorial Hospital Emergency Room complaining of a headache. The claimant had "some difficulty narrowing down her onset, progression, or length of her symptoms." Ultimately, the claimant stated she "has had headaches most of her life." The claimant also reported noticing some blood on a swab from her ear three days prior, with pressure in her ear ever since. On review of symptoms, the claimant complained of ear pain and global headache, with no neck pain. On physical exam, the TM showed erythema and some blood in the ear canal. A CT of the head was obtained, with the indication "new and changing headache". The CT was read as unremarkable. The claimant was discharged home with ear drops, antibiotics, and Percocet for pain. The claimant's discharge diagnoses included, "headache" and "left otitis media with possible small tympanic membrane perforation."

10. Neither the claimant nor the attending physicians related the claimant's July 15, 2013 headache and ear pain to the September 26, 2012 industrial accident. Memorial Hospital's July 15, 2013 treatment notes do not reference the claimant's September 26, 2012 work injury.

11. On discharge, the claimant guaranteed payment of the July 15, 2013 Memorial Hospital ER bill, with no indication her complaints were related to a work injury, with the respondent-insurer being responsible for payment.

12. The claimant returned to the Memorial Hospital Emergency Room, on July 16, 2013, transported by Ute Pass Regional Ambulance, at approximately 9:56 p.m. The claimant stated she was experiencing a headache that started at 8:30 or 9:00 p.m., the previous night. The claimant complained of light flashes and severe ringing in the ears that was "worse than normal." The attendant's impression was "pain – nontraumatic." The assessment was "HA of unknown etiology." Neither the claimant, nor the ambulance attendants, related the claimant's July 16, 2013 headache to the September 26, 2012 work injury. Ute Pass' July 16, 2014 notes do not reference the claimant's September 26, 2012 work injury.

13. At the Memorial Hospital Emergency Room on July 16, 2013, the claimant gave a history of headache that was "a little more abrupt in onset than her typical migraine headache." The attending ER doctor noted the claimant had treated for headache on July 15, 2013, but the claimant thought the July 16, 2013 headache was "different." The claimant's husband felt the headaches were "similar."

14. The claimant took only one of the Percocet prescribed on July 15, 2013, before returning to the ER on July 16, 2013. In the approximate 24-hour period after her July 15, 2013 ER visit and the July 16, 2013 ER visit the claimant did not contact, nor seek treatment with, Dr. Young, the physician authorized to treat the September 26, 2012 work injury.

15. At the ER on July 16, 2013, the claimant again reported a long history of migraine, "since 2005." The claimant wondered if the July 15, 2013 headache was "just a migraine." The claimant denied any neck pain or neck stiffness, as well as any recent trauma to the head.

16. On physical exam, the claimant was not in any acute distress. The claimant was calm and appropriate, with a normal physical and neurological exam, save a "very abnormal TM" due to prior surgery and radiation. The claimant was discharged home to follow up on an outpatient basis. The attending physician's clinical impression was "headache, most likely migrainous in etiology." Neither the claimant, nor any treating provider, related the claimant's July 16, 2013 headache to her September 26, 2012 work injury. .

17. On discharge, the claimant guaranteed payment for the July 16, 2013 treatment at the Memorial Hospital ER, with no indication the treatment was related to a work injury, and the respondent-insurer was liable for payment. Memorial Hospital's July 16, 2013 treatment notes do not reference the claimant's September 26, 2012 work injury.

18. At the time she underwent ambulance transport and ER treatment on July 16, 2013, the claimant herself did not relate her symptoms to the September 26, 2013 accident. The claimant testified she thought her July 16, 2013 symptoms might have been caused by a "stroke."

19. The claimant initially related the onset of headache to the November 17, 2009 accident, not the September 26, 2012 accident.

20. The claimant's testimony that she had no history of migraine prior to September 26, 2012 is not credible or persuasive.

21. The claimant's testimony that her need for medical treatment on July 15, 2013 and July 16, 2013 and ambulance transport on July 16, 2013, is related to the September 26, 2012 accident is not credible or persuasive.

22. The claimant failed to prove, by a preponderance of the evidence, that the treatment she received at the Memorial Hospital on July 15, 2013 for blood in the ear and headache was reasonable, necessary, and related to the September 26, 2012 accident.

23. The claimant failed to prove, by a preponderance of the evidence, that the ambulance transport to Memorial Hospital Emergency Room on July 16, 2013 for a headache of "unknown etiology" was reasonable, necessary, and related to the September 12, 2012 industrial accident.

24. The claimant failed to prove, by a preponderance of the evidence, that the treatment received at the Memorial Hospital Emergency Room on July 16, 2013, was reasonable, necessary, and related to the September 26, 2012 industrial injury.

25. The claimant took no steps to obtain treatment from the authorized treating physician in connection with either her July 15, 2013, or subsequent July 16, 2013, trip to the Memorial Hospital Emergency Room. The claimant took only one of

her prescribed pain pills in the 24-hour period following her initial ER visit, before returning to the ER.

26. The claimant failed to prove, by a preponderance of the evidence, that the Memorial Hospital July 15 and 16, 2013 treatment was a *bona fide* emergency, and that her condition was so acute, and the need for treatment so immediate, she could not wait and obtain treatment from the ATP.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq*. C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S.

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

3. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

4. The claimant has the burden of proving entitlement to medical benefits by a preponderance of the evidence. Section 8-43-201, C.R.S; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

5. As found, the claimant failed to prove, by a preponderance of the evidence, that the treatment she received at the Memorial Hospital Emergency Room on July 15, 2013 and July 16, 2013, was reasonable, necessary, and related to the September 26, 2012 accident.

6. As found, the claimant failed to prove, by a preponderance of the evidence, that the July 16, 2013 ambulance transport by Ute Pass Regional Ambulance to the Memorial Hospital Emergency Room was reasonable, necessary, and related to the September 26, 2012 accident.

7. Medical services provided in a *bona fide* emergency are an exception to the normal requirement that the claimant obtain authorization for all treatment of the industrial injury. *Larson's Workers' Compensation Law*, § 94.02[6] (1999); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

8. Awards of emergency medical treatment where the claimant's condition was so acute, and the need for treatment so immediate, that the claimant could not reasonably wait for authorization or a hearing to obtain permission for the treatment**.** *See Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995); *Ashley v. Art Gutterson*, W.C. No. 3-893-674 (January 29, 1992).

9. As found, the claimant failed to prove, by a preponderance of the evidence, that the treatment received July 15, 2013 and July 16, 2013, at the Memorial Hospital Emergency Room was a *bona fide* emergency.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for an award of medical benefits for treatment received July 15, 2013 and July 16, 2013 at the Memorial Hospital is denied and dismissed.

2. The claimant's request for an award of medical benefits for treatment received July 16, 2013 through Ute Pass Regional Ambulance District is denied and dismissed.

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

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

DATE: January 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant sustained a compensable injury to his left knee under W.C. No. 4-903-327-02 as a consequence of his right knee injury.

2. Whether Claimant sustained a compensable injury to his low back under W.C. No. 4-903-327-02 as a consequence of his right knee injury.

3. Whether Claimant sustained a compensable injury to his neck under W.C. No. 4-903-327-02 as a consequence of his right knee injury.

4. Whether Claimant sustained a compensable injury to his left knee on March 22, 2013 in W.C. No. 4-948-409-01.

5. Whether Claimant sustained a compensable injury to his low back on January 19, 2014 in W.C. No. 4-940-620-01.

STIPULATIONS

1. If Claimant's left knee injury is found compensable, in either W.C. No. 4-903-327-02 or W.C. No. 4-948-409-01, then the treatment Claimant received for his left knee was reasonable, necessary, and causally related to the injury.

2. If Claimant's low back injury is found compensable, in either W.C. No. 4-903-327-02 or W.C. No. 4-940-620-01, then the physical therapy recommended by his authorized treating physician is reasonable, necessary, and causally related to the injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a night clerk with duties including unloading pallets from trucks, breaking down truck deliveries, taking grocery products to the proper aisles of the grocery store, and stocking items on the store shelves.

2. As a part of his job duties, Claimant lifted merchandise in excess of 100 pounds, pushed and pulled pallets using both automated and non automated jacks, and placed merchandise at low and high shelf levels.

3. On October 31, 2012 Claimant was seen by Elena Weinstein, M.D. at Centura Health. Claimant complained of intermittent, but very frequent swelling and pain in his bilateral hands, knees, ankles, wrists, and shoulders for most of his life. Claimant reported to Dr. Weinstein that he had back pain, joint pain, joint swelling, limited range of motion, neck pain, muscle aches, and stiffness. On examination, Claimant had pain with range of motion of his cervical spine. The abduction and external rotation of both of Claimant's hips was limited by pain as was his lumbosacral flexion. Claimant had tenderness in both knees, tenderness of the thoracic spine, and tenderness over both sacroiliac joints. *See* Exhibit L.

4. Dr. Weinstein's impression was inflammatory polyarthropathy disorder, characterized by back pain, multiple joint pain, and neck pain. *See* Exhibit L.

5. On November 7, 2012 Claimant sustained an admitted work related injury to his right knee. Claimant twisted his knee while unloading pallets off a truck, felt a pop sensation, and had an immediate onset of pain.

6. On November 8, 2012 Claimant sought treatment for his right knee at Kremmling Memorial Hospital Emergency Department. Claimant did not report a prior history of pain in his bilateral knees when receiving treatment. *See* Exhibit 12.

7. On November 8, 2012 Claimant also saw Mark Paulsen, M.D. who assigned work restrictions of no weight bearing. On November 14, 2014 Claimant saw Meghan R. Mont, D.O. who returned Claimant to light duty work. Claimant did not report to Dr. Paulsen or Dr. Mont his prior history of bilateral knee pain. *See* Exhibit 6.

8. On December 10, 2012 an MRI showed that Claimant had a torn medial meniscus and Claimant was referred to Alexander K. Meininger, M.D. Dr. Meininger eventually performed an arthroscopic partial medial meniscectomy on January 11, 2013. *See* Exhibit 7.

9. On February 12, 2013 Claimant was seen by Dr. Meininger for follow up. Claimant was noted to be doing well post surgery. As part of the exam, Claimant's lower left extremity was noted to have full hip, knee, and ankle range of motion with no tenderness, no instability, no effusion, and 5/5 strength from proximal to distal. *See* Exhibit 7.

10. Claimant returned to work on February 12, 2013.

11. On March 14, 2013 a physical therapy note indicated Claimant was having increased pain in his left knee when squatting or attempting to put pressure on his left knee. *See* Exhibit 14.

12. On March 19, 2013 a physical therapy note indicated Claimant's left knee range of motion was reduced by 5% and that Claimant was receiving treatment to increase left leg extension. *See* Exhibit 14.

13. On March 22, 2013 Claimant alleges an acute injury to his left knee while stocking shelves. Claimant alleges while breaking down a pallet and going from a squatting to a walking position he twisted and felt pain and a loud pop in his left knee. He alleges give-way of his left knee.

14. Witness Brooks testified that on March 22, 2013 he was working with Claimant unloading a pallet when he heard a box fall and Claimant say, "ow." Witness Brooks made sure Claimant was okay and they both kept working.

15. On March 26, 2013 Claimant had a follow up visit with Dr. Meininger. Dr. Meininger noted that Claimant's right knee following surgery was resolved without any complaints of pain or instability. Dr. Meininger then noted that Claimant had recurrent left knee pain with increasing activities. The location of the pain was medially based and associated with clicking and loss of motion. Dr. Meininger noted forced knee flexion and positive medial joint line tenderness. Dr. Meininger noted that Claimant was not having any instability to giving away episodes. *See* Exhibit 7.

16. Claimant did not report to Dr. Meininger that he had a specific give way incident or acute injury to his left knee a few days prior.

17. On April 3, 2013 Claimant reported to Dr. Paulson that he was ambulating at work on March 22, 2013 and carrying a 35 pound item when his left knee gave way and he heard a pop. Claimant complained of sharp left knee pain anterior/medial in nature and location. *See* Exhibit 14.

18. On April 3, 2013 Claimant slid a note under his supervisor's door that stated, "on or about 3-22 I was walking and I was stocking aisle 3 when I felt my left knee give out, I'm not sure what happened but my left knee is bothering me. I am putting a lot of weight on it to counter my right knee. I have told my supervisor about this when it happened and I need to have it seen before it gets worse. My left knee is not as strong as it use to be and it is getting harder to get up and down from the floor when stocking." *See* Exhibit R.

19. On April 3, 2013 store manager Tonja Kelm filled out an Employee Incident Questionable Claim Form stating that Claimant left a note under her office door that morning. Ms. Kelm indicated that at this time, Claimant did not want to file a claim and that Claimant felt as though his left knee was sore from using it more due to surgery on his right knee in late 2012. Ms. Kelm noted that Claimant was going to see his primary care physician for treatment. *See* Exhibit R.

20. On April 11, 2013 Claimant saw Dr. Mont for his left knee pain. Dr. Mont assessed left knee pain and believed it was new pain that she suspected was related to compensatory walking due to Claimant's original right knee injury. Dr. Mont noted Claimant had no history of left knee pain or injury in the past. Claimant reported subjectively that the pain in his left knee began on March 22, 2013 but did not report to

Dr. Mont a specific incident on March 22, 2013, just that the pain began on that date. *See* Exhibit 6.

21. At the April 11, 2013 appointment Dr. Mont was unaware of and did not document Claimant's prior history of bilateral knee pain and swelling for most of his life. Dr. Mont was unaware of and did not document a specific acute injury to Claimant's left knee that occurred on March 22, 2013. Dr. Mont noted that Claimant's was now having knee pain in the opposite knee as he had surgery on and that his left knee pain was worse with load bearing, squatting, and after sitting or working for a long period of time and that it began on March 22, 2013. *See* Exhibit 6.

22. Dr. Mont is not level II accredited and has not taken level II accreditation courses on the process for determining medical causation. In her testimony, Dr. Mont could not say with confidence that she knew what happened to cause Claimant's left knee pain. However, after a review of the medical reports, Dr. Mont opined that Claimant's left knee pain was caused both by overuse/overcompensation related to Claimant's original right knee injury and due to a specific incident on March 22, 2013.

23. At the April 11, 2013 appointment, Dr. Mont ordered an MRI of Claimant's left knee. *See* Exhibit 6.

24. On April 29, 2013 an MRI of Claimant's left knee was performed by Frederick Jones, M.D. Dr. Jones concluded that Claimant had a horizontal degenerative tear in the posterior horn of the medial meniscus that appeared to communicate with the undersurface and free edge of the meniscus near the posterior meniscal root. *See* Exhibit 10.

25. On June 25, 2013 Claimant underwent left knee surgery with Dr. Meininger. Dr. Meininger performed a left knee arthroscopy with partial medial meniscectomy. Claimant reported to Dr. Meininger that he was performing a squat on March 22, 2013 when he noticed an immediate onset of left knee pain that he reported was identical to the pain he had in his right knee when he suffered his right knee injury. *See* Exhibit O.

26. The report to Dr. Meininger on June 25, 2013 of a specific incident on March 22, 2013 with an immediate onset of left knee pain was very different from Claimant's earlier report to Dr. Meininger made on March 26, 2013 when Claimant reported recurrent left knee pain with increasing activities and no specific give way episode.

27. On July 30, 2013 Claimant had a follow up appointment with Dr. Meininger. Dr. Meininger did not note any injury to Claimant's back or neck during the course of the appointment. *See* Exhibit 7.

28. On July 31, 2013 Claimant saw Dr. Mont. Dr. Mont noted that Claimant woke up that morning very sore from his waistband up to his neck, and Claimant alleged

he was injured during his appointment the day prior with Dr. Meininger. Dr. Mont did not document nor did Claimant explain exactly how or when during his appointment with Dr. Meininger for follow up for his left knee surgery he suffered an injury from his waistband up to his neck. *See* Exhibit 6.

29. On September 9, 2013 Dr. Mont again saw Claimant. Claimant complained of low back pain, upper back pain, and neck pain. Dr. Mont suspected that due to his right sided knee/leg pain, Claimant might be overcompensating using his upper extremities, causing a strain. *See* Exhibit N.

30. Dr. Mont testified that she thought Claimant's back pain could be work related.

31. On January 8, 2014 Claimant underwent and Independent Medical Evaluation with John Hughes, M.D. Claimant reported to Dr. Hughes that after returning to work following his right knee surgery, his left knee began to hurt. Claimant attributed this to work-related activities and noted that he was not injured per se but had the gradual onset of left knee pain and weakness in the left leg. Claimant also reported to Dr. Hughes that he had the onset of interscapular and low back pain due to his antalgia of gait, that the back pain emerged since his left knee issues in March of 2013, and that the low back pain continued to be symptomatic. Claimant did not report to Dr. Hughes a sudden onset of low back pain on July 31, 2013 following his appointment with Dr. Meininger. Dr. Hughes opined that Claimant's lumbar spine and interscapular pain were of unclear etiology. *See* Exhibit V.

32. On January 19, 2014 Claimant alleges he suffered a new specific injury to his low back and that he felt a sharp pain when unloading a pallet in the back of a delivery truck.

33. Witness Brooks testified that the pallet they were attempting to unload was in tight and they were having trouble getting it out. While taking a "breather" witness Brooks indicated that Claimant stated his back was starting to hurt.

34. On January 24, 2014 Claimant saw Dr. Paulson who documented that Claimant felt a sharp pain in his lower back five days prior.

35. On February 3, 2014 Claimant underwent an Independent Medical Evaluation with J. Raschbacher, M.D. Dr. Raschbacher found no objective findings at either knee other than healed surgical scars. Dr. Raschbacher noted Claimant had pre-existing degenerative changes at both of his knees, a diagnosis of rheumatoid arthritis that can affect knee joints, and a history of chronic pain. Dr. Raschbacher opined that Claimant did not injure his left knee by "overcompensating" for his right knee injury as medical literature does not support the overcompensation theory and as the left knee MRI on April 29, 2013 showed a degenerative tear. Claimant reported to Dr. Raschbacher that Claimant's back pain began after a specific incident on January 19, 2014 and that he did not have back pain prior to that date. *See* Exhibit W.

36. Claimant did not report to Dr. Raschbacher the low back pain documented by Dr. Weinstein in October of 2012, did not report the sudden onset of low back pain documented by Dr. Mont in July of 2013, nor did he report the low back pain beginning in March of 2013 documented by Dr. Hughes.

37. Dr. Raschbacher opined that Claimant's left knee complaints and his lower back complaints were not work related, and that the only work related component to Claimant's admitted industrial injury was Claimant's right knee and that the other injuries were non-occupational. *See* Exhibit W

38. Dr. Raschbacher is level II accredited. He opined that there is no scientific medical support for the proposition that favoring one leg could damage another leg. Dr. Raschbacher also noted that Claimant had documented complaints of pains at his hands, knees, ankles, wrists, and shoulders for most of his life. Also noted was that Claimant had medical conditions of gout and rheumatoid arthritis that can cause pain and tissue injury at multiple joints. Finally, Dr. Raschbacher noted that Claimant provided inaccurate medical histories.

39. Dr. Raschbacher opined that Claimant's failure to be truthful regarding the prior problems in his left and right knees reported to him and to other medical providers compromises the ability to assess the situation and perform a causation analysis.

40. Claimant's testimony and reports to medical providers is found inconsistent and incredible. Claimant has provided multiple explanations and theories for the pain in his left knee, low back, and neck. Claimant failed to report symptoms, pain, and events to different medical providers and when viewing the inconsistencies in whole, the Claimant is found not credible or persuasive.

41. Multiple medical providers relied upon Claimant's explanations of mechanism of injury and onset of pain in forming their opinions. The medical opinions that relied upon Claimant's statements, which after a review of all the evidence were clearly inconsistent, are therefore not found persuasive or reliable as they are based on conflicting information provided by Claimant.

42. The opinion of Dr. Raschbacher after reviewing all of Claimant's records and inconsistent statements that Claimant's left knee pain, low back pain, and neck pain were not work related or compensable is found credible and persuasive.

43. On August 12, 2014 Dr. Hughes issued a supplemental report to his IME report. Dr. Hughes noted in this report that he was puzzled by Claimant's history of the gradual onset of left knee pain since Dr. Hughes found documentation that Claimant sustained a left knee injury performing a squat on March 22, 2013. Despite the direct report to Dr. Hughes that Claimant made of having a gradual onset of left knee pain, Dr. Hughes opined in his supplemental report that Claimant sustained a discrete left knee injury on March 22, 2013 and opined that it was work related. *See* Exhibit V.

44. The opinion of Dr. Hughes is not credible or persuasive and does not account for Claimant's multiple inconsistencies and reports to multiple providers of different onsets of pain.

45. The opinion of Dr. Mont is not credible or persuasive and does not account for Claimant's multiple inconsistencies and reports to multiple providers of different onsets of pain. Dr. Mont does not provide specific information to support her belief that overcompensation for a right knee injury caused Claimant's low back pain or neck pain.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2013). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. V. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. (2014). The Claimant must establish that the injury meets this two pronged requirement by a preponderance of the evidence. *See* § 8-43-201(1), C.R.S. (2014).

The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of requirement is satisfied when it is shown that there is a causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968). An injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. Pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007).

Left knee

Claimant has failed to meet his burden to show that he suffered an injury to his left knee that occurred in the course of and arose out of his employment with employer. The ALJ is not persuaded by Dr. Mont's conclusion that Claimant's left knee injury occurred both due to overcompensating due to Claimant's right knee injury and that the left knee injured occurred also due to a specific incident on March 22, 2013. Rather, the ALJ credits the opinion of Dr. Raschbacher that any injury to Claimant's left knee was related to the natural progression of Claimant's preexisting degenerative left knee condition, as shown by MRI. Dr. Mont and Dr. Hughes, who both opined that Claimant's left knee condition was related to his employment, based their opinions in part on subjective information provided by Claimant as far as how and when his left knee pain began. Claimant, however, is found not credible or persuasive. As the medical opinions on causation were based in part on Claimant's unreliable reports, the opinions are not found persuasive.

Claimant has failed to meet his burden to show, more probably than not, that he suffered a discrete injury to his left knee on March 22, 2013. Claimant's allegation of a specific incident where he injured his left knee while unloading a pallet and either twisting, walking, or squatting on March 22, 2013 is not found credible. Claimant reported to Dr. Meininger that the left knee pain he suffered on March 22, 2013 was an immediate pain that was identical to the pain Claimant had experienced when he previously injured his right knee. Despite this report to Dr. Meininger, Claimant did not seek emergent treatment for his left knee and did not even mention this discrete incident a few days later at his March 26, 2013 appointment. This is not reasonable nor is it logically credible. When Claimant suffered his right knee injury, Claimant sought emergent treatment a day later. If the pain in fact was identical to his right knee injury, it is illogical that Claimant would not have sought treatment for four days and when he sought treatment four days later, it is illogical that Claimant would not even have mentioned the specific incident that caused his alleged onset of left knee pain. In fact, as found above, Claimant did not even report this March 22, 2013 incident that allegedly caused him immediate left knee pain until April 3, 2013. Claimant also reported to Dr. Hughes that he had not been injured per se, but that after his return to work following his right knee surgery, his left knee began to hurt. Medical records show Claimant had constant and chronic left knee pain and swelling prior to March of 2013, and show degenerative changes in Claimant's left knee. Claimant's medical history, combined with his inconsistent reports of onset of pain, fails to establish more likely than not that there is a causal connection between his left knee pain and his employment. Claimant has failed to meet his burden to show he suffered a discrete left knee injury on March 22, 2013.

Claimant has also failed to prove, by a preponderance of the evidence that his left knee pain was due to "overuse" or overcompensation as related to his compensable right knee injury and surgery. Rather, as found above, the opinion of Dr. Raschbacher is persuasive and credible that there is no medical support for this theory. Dr. Mont failed to identify medical support for this theory and her opinion was not made with sufficient support or explanation. Dr. Raschbacher is found more credible and persuasive than Dr. Mont and Claimant has failed to meet his burden to show more likely than not that his left knee pain was due to overuse or overcompensation.

Lower back

Claimant has failed to meet his burden to show that he suffered a compensable injury to his low back on January 19, 2014. As found above, Claimant had numerous reports of low back pain with different dates of the onset of pain. Claimant reported an onset of low back pain that started and was consistent from the time of his left knee pain and from March 2013 and ongoing. Claimant also reported an immediate onset of low back pain on July 31, 2013 that he believed was due to testing performed on his knee by Dr. Meininger on July 30, 2013. Finally, Claimant reported an immediate onset of low back pain on January 19, 2014 while unloading a pallet at work. Witness Brooks testified surrounding the January 19, 2014 event that Claimant reported his low back was starting to hurt while they were unloading a pallet at work. Even if Claimant's back started to hurt on January 19, 2014 while at work, Claimant has failed to show that he

suffered a discrete work injury. An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007). As found above, the evidence clearly establishes that Claimant had low back pain prior to January of 2014.

Claimant reported in October of 2012 to Dr. Weinstein that he had back pain. Dr. Weinstein noted on examination that Claimant's lumbosacral flexion was limited by pain, and that Claimant had tenderness of the thoracic spine. Claimant next reported on July 31, 2013 to Dr. Mont that he injured his neck and back at an appointment the day prior with Dr. Meininger when Dr. Meininger was performing testing on Claimant's injured knee. Despite this specific report of injury to neck and back, Dr. Mont opined that due to Claimant's right sided knee/leg pain Claimant was overcompensating using his upper extremities, which had caused a strain. Dr. Mont opined that the July 2013 report of back pain could be work related due to overcompensation. Claimant then reported to Dr. Hughes on January 8, 2014 that his low back pain began in March of 2013 when his left knee pain started and that he thought it was due to antalgia of gait. Claimant reported on January 8, 2013 that his low back pain continued to be symptomatic. Claimant did not report to Dr. Hughes the low back pain that he had since October of 2012 nor did he report to Dr. Hughes the specific onset of back pain that he allegedly suffered on July 30, 2013 at an appointment with Dr. Meininger. Claimant next underwent an IME with Dr. Raschbacher where Claimant reported that his low back pain began on January 19, 2014 and that he did not have back pain prior to January 19, 2014. This is directly contradicted by Claimant's own reports of back pain in October, 2012, March of 2013, and July of 2013.

Claimant's numerous contradicting statements render him incredible. Based upon medical reports, the ALJ concludes that Claimant had low back pain prior to January 19, 2014. With documented low back pain as early as October of 2012, and with an incredible and inconsistent report of the onset of pain, Claimant has failed to meet his burden to show he suffered a work injury on January 19, 2014 that either caused or accelerated his pre-existing low back pain. Claimant's theory of overuse and overcompensation as related to his lower back pain is also not found credible or persuasive. Dr. Mont is not found persuasive in opining that Claimant may have been overcompensating using his upper extremities due to his right sided knee/leg pain. Her opinion is not explained thoroughly nor is it made with medical certainty as to the cause of his low back pain, but rather, Dr. Mont thinks the pain "may" have been due to overcompensation. Claimant has failed to establish by a preponderance of the evidence a causal connection between his low back pain and his employment or that his low back pain was causally related to his original right knee injury.

Neck

Claimant has failed to meet his burden to show that he suffered an injury to his neck that arose out of and in the course of his employment with Employer. Claimant alleges that his neck was injured during a medical appointment for his knee on July 30,

2013. It is undisputed that injuries sustained during treatment of an industrial injury are compensable under the "quasi-course of employment" doctrine. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993). Although the medical appointment on July 30, 2013 may arguably be covered under the quasi course of employment doctrine, Claimant has failed to present evidence that he suffered an injury during that medical appointment or due to that medical appointment. Although Claimant reported waking up the next day with stiffness and soreness in his back and neck, he failed to identify what at that appointment may have caused his stiffness/soreness in his back and neck or that he suffered a compensable injury during that appointment. Rather, the medical history shows that Claimant had stiffness and soreness in his back and neck for most of his life and the evidence does not support a conclusion, more likely than not, that Claimant suffered a compensable injury during this medical appointment. Additionally, although Dr. Mont noted that Claimant may have been overcompensating using his upper extremities, due to his right side knee/leg pain, Claimant failed to present evidence of overcompensation and Dr. Mont's statement was without specificity and is not persuasive that Claimant actually suffered a neck injury due to overcompensation. Claimant has failed to establish by a preponderance of the evidence a causal connection between his neck pain and his employment or that his neck pain was causally related to his original right knee injury.

ORDER

It is therefore ordered that:

1. Claimant did not suffer a left knee injury in W.C. No. 4-903-327-02 as a consequence of his prior right knee injury. His claim for compensation is denied and dismissed.

2. Claimant did not suffer a low back injury in W.C. No. 4-903-327-02 as a consequence of his prior right knee injury. His claim for compensation is denied and dismissed.

3. Claimant did not suffer a neck injury in W.C. No. 4-903-327-02 as a consequence of his prior right knee injury. His claim for compensation is denied and dismissed.

4. Claimant did not sustain a compensable injury to his left knee on March 22, 2013 in W.C. No. 4-948-409-01 and his claim for compensation is denied and dismissed.

5. Claimant did not sustain a compensable injury to his low back on January 19, 2014 in W.C. No. 4-940-620-01 and his claim for compensation is denied and dismissed.

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

DATED: January 22, 2015

/s/ Michelle E. Jones

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

BASIS FOR SUPPLEMENTAL ORDER

A Petition to Review was filed by Respondents on October 29, 2014. Respondents base the petition on the grounds that conflicts in the evidence were not resolved in the AL's order and that the ALJ's findings of fact did not support the order. In the initial order, the ALJ, on some occasions, summarized more lengthy testimony regarding a finding of fact. To further clarify and assist the parties, the ALJ has added direct testimony from the transcript of the hearing to establish the basis for her summaries or reasonable inferences and made other clarifications. The paragraphs in the findings of fact that have been modified are paragraph #s 8, 9, 22, 23, 24 and 25.

ISSUES

1. Whether the Claimant proved by a preponderance of the evidence that he sustained a worsening of his condition that would entitle him to a reopening of W.C. 4-903-504 under Section 8-43-303(1), C.R.S.

2. If the Claimant proved that his condition worsened, whether the Claimant proved, by a preponderance of the evidence, that the right shoulder surgery recommended by Dr. Gersoff is reasonably necessary and causally related to the Claimant's September 14, 2012 admitted work injury.

FINDINGS OF FACT

1. On September 14, 2012 the Claimant sustained an admitted traumatic injury to his right shoulder when, as part of his job duties, he was pushing six to seven shopping carts when they flipped over due to an irregularity in the pavement in the parking lot outside of the retail location operated by Respondent. The Claimant felt immediate pain in his right shoulder and reported the incident to his supervisor immediately (Hearing Tr., p. 27, l. 13 – p. 28, l. 2).

2. After completing a report about the injury, the Claimant was advised to call the nurse hotline. Based on advice from the nurse on the hotline, the Claimant took ibuprofen and iced his shoulder and he waited to see if it would resolve and did not initially request that he be seen by a doctor for his shoulder injury. Subsequent to this the Claimant was terminated from employment on October 15, 2012 for a reason unrelated to his work injury. After his termination, the Claimant asked if he could still see the doctor and was told to see Dr. Beatty (Hearing Tr. p, 28, l. 21 – p. 29, l. 17; p. 45, l. 24 – p. 46, l. 18).

3. The Claimant saw Dr. Brian Beatty on November 12, 2012 and, consistent with his testimony at the hearing, the Claimant reported that "he was pushing in grocery carts. The grocery carts started to fall and when he grabbed them and pulled his right shoulder and he felt a pop with the onset of pain. He thought it would resolve but it has persisted and he is here for evaluation." The injury was diagnosed as a shoulder impingement (Claimant's Exh. 4, p. 5; Respondents' Exh. A). On December 5, 2012, Dr. Beatty referred the Claimant to Wayne Gersoff, MD for evaluation of the right shoulder (Claimant's Exh. 4, p. 9; Respondents' Exh. A).

4. An MRI of the Claimant's right shoulder was performed on November 19, 2012. The findings included mild arthritis and mild subacromial/subdeltoid bursitis, and mild tendinosis. The radiologist specifically noted that there was no rotator cuff tear and no labral tear (Claimant's Exh. 6, p. 25; Respondents' Exh. B).

5. The Claimant saw Dr. Gersoff on December 19, 2012. Dr. Gersoff notes that the Claimant reported continued pain and discomfort in his right shoulder. The examination revealed full range of motion in the shoulder. Upon review of the MRI, Dr. Gersoff opined that there was "rotator cuff tendinopathy without frank tearing or labral disruption." For the right shoulder, the treatment plan was to first try an injection with some home exercises. Dr. Gersoff further noted that if that did not help, the Claimant may, at some point need to have an arthroscopic and subacrominal decompression surgery. Dr. Gersoff noted that the Claimant was to report on his condition in 1 week's time (Claimant's Exh. 5, p. 18; Respondents' Exh.C).

6. The Claimant returned to Dr. Beatty for follow up on January 14, 2013 and Dr. Beatty noted that the Claimant reported that the right shoulder still hurt but that he felt 80-90% better after the injection. At this office visit, Dr. Beatty discharged the Claimant from treatment, found the Claimant at MMI with no impairment and noted no restrictions (Claimant's Exh. 4, pp. 10-12; Respondents' Exh. A).

7. Respondents filed their Final Admission of Liability on January 16, 2013 based on Dr. Beatty's report (Claimant's Exh. 2, p. 2). The position on medical benefits after MMI was a denial of post-MMI medical treatment on the grounds that it is not reasonable, necessary or related to the compensable injury. Per Dr. Beatty's report, there was no impairment and a release to activities without restrictions.

8. The Claimant testified that his symptoms never fully resolved but continued to flare up with activities involving the use of his right arm (Hearing Tr., p. 32, l. 18 – p. 33, l. 7). In the period from January through April of 2013, the Claimant began avoiding activities such as taking his daughters for walks with his dogs because they would yank the leash, or putting things up at the top of the cupboard because it would hurt his arm (Hearing Tr., p. 34). The Claimant chose to not return to work following his termination by Respondent on October 14, 2013 and after reaching MMI until the spring of 2013. During that period of time, from October, 2012 to April, 2013, the Claimant was a stay at home dad caring for his two daughters during the daytime. The Claimant's home activities included taking his children to the playground and lifting his daughters

onto playground equipment. That activity caused Claimant pain and he was forced to avoid such arm motion above his face level. He encountered similar problems when he worked around the house. The ALJ bases these findings of fact and inferences on the Claimant's testimony that,

> Q: Okay. During that period of time -- the period of time from January 14, 2013 up until you started work at King Soopers, would you describe for the judge the symptoms that you were experiencing in your right shoulder and any progression or worsening occurring at that time?
>
> A: I would characterize it as positional pain.
>
> Q: What does that mean?
>
> A: I would – you know, if I tried to use my drill, if I was showering, you know, like washing my hair, have my hand above my head, try to take the towel, you know, wipe your back, just taking my daughters to the park and not being able to lift them onto the monkey bars. (unintelligible) both hands.
>
> Q: Okay. You're gesturing to about chest level or face level?
>
> A: No, it was probably face level. Face level.
>
> (Hearing Tr., p. 32, l. 18 – p. 33, l. 12)
>
> .....
>
> Q: (BY MR. HOOK) You were describing the type of symptoms that you were experiencing from January through April 2013. Please continue, if there were further examples of these type of symptoms and what you were feeling.
>
> A: I refrained from taking my daughters for a walk because I have dogs, and if I took the dogs and they'd yank on the leash, it would hurt my arm. Just day-to-day chores, putting things up to the top of the cupboard, things like that.
>
> (Hearing Tr., p. 34, ll. 14-23).

Because of the type of symptoms about which he testified at the hearing, the Claimant avoided using his right arm for overhead work as much as possible, even during some home renovations to get his house ready for sale, leaving overhead work to his wife and a neighbor (Hearing Tr., p. 51, l. 22 – p. 54, l. 23).

9. On April 13, 2013, the Claimant returned to work with a different employer, King Soopers, as a stocking clerk on the night shift. The Claimant testified that he did not work at full duty at King Soopers during the first few weeks at the end of April, 2013 because he was in training (Hearing Tr., p. 38, ll. 5-10). With respect to his stocking duties, he also testified that,

> You know, I could do work on the ground, open up boxes. I could unload the pallet, it would hurt. I would drop things down, you know, because it's above your head, and then you take the box, and you open it up, and you have to stock above your head, face height or all the way to the floor. So, I was having pain when I did top-shelf stuff, height.
>
> (Hearing Tr., p. 37, l. 22 – p. 38, l. 4)

.....

> …for doing the job at King Soopers, you know, top-shelf kind of stuff. I would – I would go and get a stepladder, so it was like three or four high, so I would be working like I'd be looking down at the shelf, you know, instead of reaching up.
>
> (Hearing Tr., p. 40, ll. 10-15).

From the Claimant's credible testimony (above) about stocking items, the ALJ infers that the Claimant had difficulty performing stocking overhead due to pain so he developed his own work accommodations to avoid having to work overhead and guarded against making movements with his shoulder that would cause pain. Although, the Claimant testified credibly that, even though the job description had requirements of lifting greater than 30 lbs (see Respondents' Exh. I), the Claimant did not actually lift any product or merchandise weighing more than 30 lbs. nor did he lift overhead (Hearing Tr., p. 38, ll. 13-20).

10. The Claimant continued to take precautions during his employment at King Soopers but nevertheless experienced a progressive worsening of his right shoulder injury, so, he testified that he discussed this with Dr. Gersoff, whom he was still treating for his knee injury (Hearing Tr., p. 37, ll. 6 – 15).

11. The Claimant returned to see Dr. Gersoff on May 1, 2013 in what he characterized as a "combined visit" for his knee and shoulder (Hearing Tr., p. 37). At the visit, the Claimant reported that he had a "fairly good result after his last injection" but that he "was continuing to have some discomfort now with some decreased range of motion." Upon examination Dr. Gersoff noted a "fairly good range of motion with discomfort in internal and external rotation with abduction" with "some mild impingement." After the examination Dr. Gersoff concluded that the Claimant's diagnosis was "right shoulder pain due to chronic impingement." Dr. Gersoff provided a second shoulder injection (Claimant Exh. 5, p. 19; Respondents' Exh. C). There is no

mention of the shoulder condition in follow up visits with Dr. Gersoff on May 13, 2013 and June 10, 2013 (Claimant's Exh. 5, pp. 20-21; Respondents' Exh. C).

12. On July 10, 2013, the Claimant had a follow up evaluation for his right knee again with Dr. Gersoff. At this visit, he also reported some discomfort in his shoulder and wanted an injection for both his knee and shoulder. Upon examination, Dr. Gersoff again noted "some mild to moderate impingement." Dr. Gersoff agreed with the Claimant's request for another shoulder injection and performed it and noted the Claimant tolerated the procedure well (Claimant's Exh. 5, p. 22; Respondents' Exh. C).

13. On August 14, 2013, the Claimant and another employee at King Soopers were engaged in horseplay and the Claimant was hit hard enough to knock him to his knee and reported that the left side of his torso was injured. A first report of injury was completed on August 17, 2013 noting that the injury was reported on the day it occurred. The Report also indicates that the employee would seek medical treatment on August 18, 2013 (Respondents' Exhibit I). On August 28, 2013, King Soopers submitted a Notice of Contest denying the claim for an 8/14/2013 injury as not work-related (Respondents' Exhibit I). In the paperwork related to this incident entered into evidence in this case, there is not mention of injury to the right shoulder, just the left side of the Claimant's torso.

14. On September 4, 2013, the Claimant saw Dr. Gersoff for a follow up evaluation specifically for the right shoulder pain. The Claimant reported that the last cortisone injection helped for a very short period of time but that he was back to having pain, discomfort and functional limitations once again. Dr. Gersoff noted the Claimant sought recommendations for treatment. At that time Dr. Gersoff discussed further treatment options of operative versus nonoperative intervention and the Claimant elected to proceed with a right shoulder arthroscopy subacrominal decompression and debridement as indicated (Claimant's Exh. 5, p. 23; Respondents' Exh. C). Dr. Gersoff testified at deposition with reference to the medical note from the September 4, 2013 visit and the decision to proceed with surgery. Dr. Gersoff testified that the surgery option went from being a "consideration" to a "recommendation at the September 4, 2013 visit as the Claimant had tried nonoperative means of treatment, including injections, strengthening exercises and the shoulder had not gotten better and the pain returned after the injections (Depo. Tr., Wayne Gersoff, MD, pp. 13-14). Dr. Gersoff specifically testified that that the surgical recommendation was related to the original injury at Whole Foods (Depo. Tr., Wayne Gersoff, MD, p. 14).

15. The Claimant filed a Petition to Reopen WC Claim #4-903-504 on October 4, 2013.

16. The Claimant saw Dr. Beatty again on October 21, 2013 and Dr. Beatty noted that since he last saw the Claimant, the Claimant had been back to Dr. Gersoff on a couple of occasions for cortisone injections and that the Claimant gets less benefit with the injection each time he gets one. Dr. Beatty opined that, "since it appears his symptoms have been worsening" an MRI with contrast would be scheduled (Claimant's

Exh. 4, pp. 15-17; Respondents' Exh. A).

17. On October 25, 2013, the Claimant underwent another MRI of the right shoulder, this time done with contrast. In the opinion of the radiologist, Dr. David Solsberg, "there is no change since the prior study allowing for differences in technique since November 19, 2012" (Claimants' Exh. 7 p. 26; Respondents' Exh. B).

18. On October 28, 2013, the Claimant saw both Dr. Beatty and Dr. Gersoff. In the morning of October 28, 2013, Dr. Beatty noted that the Claimant reported "ongoing severe pain involving his right shoulder. He has difficulty lifting his arm without significant pain. He states he also lacks strength in the shoulder." Dr. Beatty further noted that "apparently Dr. Gersoff has recommended arthroscopic surgery." Dr. Beatty further noted that "there really appears to be no change in his MRI. The patient wants to reopen his case due to the recommendation by Dr. Gersoff for arthroscopic surgery" (Respondents' Exh. A). In the afternoon on October 28, 2013, Dr. Gersoff opined that, the Claimant had "right shoulder pain due to chronic rotator cuff tendinopathy without labral pathology seen on MRI." Dr. Gersoff further noted that, "his right shoulder has continued to get worse may at some point need to have surgical intervention. He is scheduled to be seen by an independent Worker's Compensation doctor and will follow up after that" (Claimant's Exh. 5, p. 24).

19. On December 17, 2013, the Claimant saw Dr. Rachel L. Basse for an Independent Medical Evaluation. Contrary to Dr. Beatty's medical record dated November 12, 2012, Dr. Basse notes that the Claimant told her he did not recall any "popping" sensation in his shoulder when he was pushing the grocery carts that were falling on 9/12/12. Dr. Basse notes that the Claimant reported that initially his symptoms were not extreme but he would experience activity-related pain. Dr. Basse noted that the Claimant reported limitations due to pain and that he received injections which would help. Dr. Basse also noted that the last injection the Claimant received did not work well, only decreasing symptoms by about 30% and only lasting 1-2 weeks. Dr. Basse reviewed the Claimant's medical records, both prior to and subsequent to the 9/12/12 incident with the shopping carts. Dr. Basse also questioned the Claimant about his work duties at King Soopers and his activities as a stay at home father and considered these in rendering her opinion. Ultimately, Dr. Basse appears to agree that the Claimant has an impingement syndrome and associated tendinitis. However, she finds that it is a degenerative process contributed to by life, leisure, social and vocational activities. She finds that "the single acute work aggravation at [Employer] greater than one year ago appears to have played a more minimal role in his current symptoms." Dr. Basse recommended follow up with Dr. Gersoff for consideration of a repeat injection and consideration of a change in his anti-inflammatory medication, physical therapy, and a psychologic evaluation. She did find that an acute impingement syndrome in the right shoulder was related to the work injury on 9/12/2012, but found that it responded appropriately to conservative treatment. Dr. Basse opined that the right shoulder arthroscopy subacromial decompression and debridement surgery recommended by Dr. Gersoff was not reasonable and necessary to cure and relieve the effects of the 9/12/12 work injury (Respondents' Exh. F).

20. On April 9, 2014, the Claimant met with Gary S. Gutterman, M.D. for a psychiatric consultation for an IME. Dr. Gutterman issued a written report dated April 15, 2014. After reviewing medical records and work records and records from the Mental Health Center of Denver, and two hour meeting with the Claimant, Dr. Gutterman opined that "if it is determined that the patient's anatomic and physiologic findings adequately support a diagnosis of impingement syndrome regardless of the etiology, I believe the patient probably would be a reasonable surgical candidate from a psychiatric perspective. Dr. Gutterman noted that, if the physiologic and anatomic findings support the diagnosis of impingement syndrome, what remained to be determined for the purposes of determining workers' compensation coverage was whether the physical findings supported a finding that the shoulder impingement syndrome was work related as Dr. Gersoff believed or if the impingement syndrome was unrelated to work as Dr. Basse believed (Respondents' Exh. G).

21. In addition to providing opinions in his written medical records, Dr. Gersoff testified by deposition on April 16, 2014. Dr. Gersoff testified that he first saw the Claimant with respect to the right shoulder condition on December 12, 2012 on referral from Dr. Beatty (Depo. Tr., Wayne Gersoff, MD, pp. 5-6). After reviewing an MRI from November 19, 2012 and conducting a physical examination, noting that there was no observable loss of range of motion at that time, Dr. Gersoff recommended a shoulder injection. The Claimant reported a good result from the injection and the effects lasted until approximately May of 2013 (Depo. Tr., Wayne Gersoff, MD, pp. 6-7). By July 10, 2013, Dr. Gersoff testified that the Claimant was feeling discomfort in his shoulder and physical examination demonstrated mild to moderate impingement signs without gross instability (Depo. Tr., Wayne Gersoff, MD, p. 10). By September 4, 2013, Dr. Gersoff testified that the Claimant was complaining of pain and discomfort along with functional limitations and Dr. Gersoff noted loss of range of motion consistent with a positive finding for impingement (Depo. Tr., Wayne Gersoff, MD, p. 11). Dr. Gersoff testified that, at this point he made the definitive recommendation for shoulder surgery since the Claimant had tried conservative treatment and the shoulder was not improved and the symptoms returned (Depo. Tr., Wayne Gersoff, MD, pp. 13-14). Upon reviewing a job description from the Claimant's position at King Soopers, Dr. Gersoff testified that the work "could have been the cause of renewed symptoms, but his prior injury also may have made him more prone to developing this" (Depo. Tr., Wayne Gersoff, MD, p. 19). Dr. Gersoff elaborated later in testimony that the frequency of the job activities at King Soopers would be a factor in determining if the return of symptoms was due to a re-injury. If the Claimant did not lift heavier items repetitively, then the job duties may not be significant. If the Claimant lifted heavier items repetitively every day, then this activity would have more significance (Depo. Tr., Wayne Gersoff, MD, p. 28). In considering other factors for the return of the Claimant's symptoms, and the recommendation for surgery Dr. Gersoff addressed the progression of the Claimant's response to injections as follows:

> The best way to describe that was that the inflammation and irritation in the tissue just was not responding as well to the injection. I think one of

the problems with an injection is everyone feels everyone feels better right after an injection. And the problem is that human nature is they have an injection, feel better, and they kind of say, I feel better, I can do things with my shoulder. And then gradually that wears off. And it's almost like a rebound phenomena where all of a sudden, it takes off and hurts significantly and so forth. And then you try another injection, and it may not respond as well. That's kind of, I think, what happens when you get that diminishing effect, which is why people wind up having surgery, because they are not getting better.

(Depo. Tr., Wayne Gersoff, MD, p. 30).

22. At his deposition, Dr. Gersoff noted a correlation between the increased inflammation, which causes more discomfort and so the shoulder wants to move less and indicated that this explained why before the Claimant had relatively full range of motion with some discomfort and now there is less range of motion due to more irritation, more inflammation and more discomfort (Depo. Tr., Wayne Gersoff, MD, p. 31). Dr. Gersoff also testified that the recommended surgery to the Claimant's right shoulder was and is reasonable and necessary based on objective findings correlating to the diagnosis of impingement (Depo. Tr., Wayne Gersoff, MD, p. 32). Specifically, Dr. Gersoff testified at the hearing as follows:

Q: So having gone through all this, I need to ask the question, Doctor, do you have an opinion on whether or not surgery to the left – to the right shoulder of [the Claimant] at this time would be reasonable and necessary under this workers' compensation case?

A: Yes.

Q: It would be?

A: Yes.

MR. WEINBERGER: I'm going to object to the extent that calls for a legal conclusion. And I'll follow up. It's for the judge to determine whether an aggravation is the cause of the need for surgery.

MR. HOOK: If there was an aggravation.

MR. WEINBERGER: We'll let the testimony go as is. Of course, we haven't taken the lay testimony or anything.

MR. HOOK: I understand the objection.

Q: (BY MR. HOOK) Just to address that, may I briefly ask, are you familiar with those issues as they relate to workers' compensation injuries, based

on your experience and practice?

A: Which issues?

Q: Whether or not something – a procedure is reasonable and necessary.

A: I'm not sure if I'm exactly certain of how workers' compensation defines it.

Q: How would you define it in your understanding?

A: My understanding whether something is reasonable and necessary is that if someone has subjective and objective findings that go along with the diagnosis and they've failed nonoperative treatment – if nonoperative treatment is an option, or if they've failed that – then operative treatment is indicated.

Concerning the Claimant's work at King Soopers, Dr. Gersoff testified that he couldn't say that the Claimant's symptoms in May were the result of his work in that job and that it was hard to say without knowing exactly what and how much he did at King Soopers. Dr. Gersoff pointed out that it would be important to consider the actual extent of the work duties performed by Claimant as opposed to the written job description (Depo. Tr., Wayne Gersoff, MD, p. 36). With respect to his actual work duties, the Claimant later testified at the hearing as follows:

Q: Despite the fact that this job description for your employment at King Soopers indicates that the job could or may require lifting in excess of 30 pounds, did you at any time during that employment lift anything greater than 30 pounds?

A: I don't think so.

MR. HOOK: That's all I have, Your Honor.

MR. WEINBERGER: One follow up.

THE COURT: All right.

RECROSS EXAMINATION BY MR. WEINBERGER

Q: Could you explain how you're able to indicate what weight you didn't lift or not up to 30 pounds.

A: Well, I know –

Q: One second.

-- at King Soopers? Would it be accurate that you didn't weigh the items?

A: No. But it has a label with a weight on it. It has the weight on the box. It has the weight on the product. Dog food has a weight, 5 pounds, 10 pounds, 15 pounds.

Q: Do all products have a weight.

A: Absolutely. Some of it is volume versus –

Q: Okay. That explains why you know the weight of that when picking something up and not the weight of your children when picking things (sic) up. Thank you.

(Hearing Tr., p. 60, l. 13 – p. 61, l. 16).

23. In addition to providing a written report, Dr. Basse also testified by deposition on April 22, 2014. Dr. Basse confirmed that she performed an IME of the Claimant on December 17, 2013 (Depo. Tr., Rachel Basse, MD, pp. 5-6). At the time of the IME, Dr. Basse took a history from the Claimant regarding his activities from January through May of 2013 (Depo. Tr., Rachel Basse, MD, p. 12). Based on activities involved in childcare for his two young children, Dr. Basse understood that the Claimant "would have increased symptoms with some general care activities that involved use of his shoulder. They would hurt him during that activity, but he would generally be okay between the activities" (Depo. Tr., Rachel Basse, MD, pp. 13-15). Dr. Basse specifically testified that,

Q: And what history did he provide you that you deemed to be relevant , or is it everything in your report that you would like to highlight some?

A: Both.

Q: Okay.

A: And I'm specifically looking for the time frame you discussed.

Q: Page 2, I think.

A: Because you were talking up to April?

Q: Yes. So did he give you a history that he had taken time off from work?

A: Yes.

Q: Okay. And that was prior to his working at King Soopers?

A: Correct.

Q: And did he talk about activities in regard to caring for his children?

A: Yes.

Q: Okay. And that was prior to his working at King Soopers?

A: Correct.

Q: And did he talk about his activities in regard to caring for his children?

A: Yes.

Q: How old were his children per his history?

A: At that time, approximately three and six.

Q: Did he describe the kind of things – did he indicate to you that at the time he was being Mr. Mom at home?

A: Yes.

Q: Okay. And did he tell you what he was doing in that capacity during that time period?

A: Yes.

Q: And what was that that he was doing?

A: All the usual activities: cooking, cleaning, laundry, did childcare.

Q: Did he provide a history that he would take his three- or six-yearold to the playground?

A: Yes.

Q: And that, as part of doing so, he would lift them so they could reach the monkey bars?

A: That would be his three-year-old. He would drop the six-year-old off at school and, on the way back, would hit the playground.

Q: And did he tell you whether those – that activity caused him discomfort?

A: Yes. He did tell me.

Q: And what did he – is that what he told you?

A: That he had daily pain that would last an hour or so.

Q: Did he tell you about how he was or what he was doing in March of 2013?

A: Yes. Up till then, he had been more limited. By March he had been able to catch up on his rest and was generally feeling okay. He still had issues, but he was feeling okay. He would have increased symptoms with some general care activites that involved use of his shoulder. They would hurt him during that activity, but he would generally be okay between the activities.

(Hearing Tr., p. 13, l. 1 – p. 15, l. 7)

With respect to work activities during employment at King Soopers starting around April of 2013, Dr. Basse understood from the Claimant that he was doing lighter work, stocking the lower shelves and then using a step stool to reach upper shelves so he wouldn't have to reach overhead (Depo. Tr., Rachel Basse, MD, p. 16). Dr. Basse specifically testified that,

I don't want to give the wrong history as this is an evidentiary deposition. I understood from him that he would do lighter things, not heavy things, and that he had no problems stocking lower shelves with these lighter things, and then he would use a step stool of some kind to reach the upper shelves so he wasn't having to reach overhead.

(Depo. Tr., Rachel Basse, MD, p. 16, ll. 15-21)

Dr. Basse opined that the Claimant immediately experienced symptoms upon these activities and that the activities and movement in his arm required to do his job caused pain (Depo. Tr., Rachel Basse, MD, p. 17). In considering the testimony of Dr. Gersoff that the Claimant's loss of range of motion was due to irritation, Dr. Basse opined that the irritation was due to his activities, including the work at King Soopers and daily activities of his life (Depo. Tr., Rachel Basse, MD, p. 19). Ultimately, Dr. Basse opined that the surgery recommended by Dr. Gersoff is not related to the Claimant's work exposure for Employer, but rather is an elective procedure based on the Claimant's pain levels and functional tolerances and is attributed to the activities that he needs to do that are causing him pain (Depo. Tr., Rachel Basse, MD, p. 20). Dr. Basse testified that she does not believe that the Claimant requires ongoing maintenance care related to the work injury at issue in this case (Depo. Tr., Rachel Basse, MD, p. 20). On cross-examination, Dr. Basse conceded that Dr. Gutterman had ruled out the

psychological aspect of symptom magnification and exaggeration (Depo. Tr., Rachel Basse, MD, pp. 26-27). Dr. Basse also agreed that she was not aware of any specific incident that occurred at King Soopers that caused a re-injury to the Claimant's right shoulder nor was she aware of any such activities outside of his work at King Soopers, testifying,

> Q: Okay. Isn't it true, to your knowledge, there was no specific incident that occurred at King Sooper's involving [the Claimant's] work performance that caused some sort of reinjury to his right shoulder; isn't that correct?
>
> A: Yes.
>
> (Depo. Tr., Rachel Basse, MD, p. 28, ll. 2-7)

Dr. Basse did not agree that the premise that work activities at King Soopers *aggravated* the Claimant's prior work injury, because it is Dr. Basse's opinion that the work injury at Employer "was done" (Depo. Tr., Rachel Basse, MD, p. 31). Dr. Basse did testify that she would agree that the Claimant's right shoulder condition worsened after he was placed at maximum medical improvement in January 2013, including increased pain and a decrease in range of motion by September 2013 (Depo. Tr., Rachel Basse, MD, p. 31). Dr. Basse testified that the surgery proposed by Dr. Gersoff is reasonable for the Claimant's shoulder condition, but she does necessarily find it necessary since she testified that it depends to what extent the Claimant could modify the demands on his shoulder (Depo. Tr., Rachel Basse, MD, p. 36).

24. Based upon the evidence submitted at the hearing, in particular, the persuasive opinion of Dr. Gersoff, coupled with the Claimant's credible testimony regarding his actual work activities at King Soopers, it is found that the Claimant experienced a worsening of the condition of his right shoulder that is related to his work-related injury of September 14, 2012 after being placed at maximum medical improvement on January 14, 2013. The ALJ recognizes that Dr. Basse provided a contrary opinion regarding the source of the worsening of the Claimant's right shoulder symptoms. However, the ALJ resolves the conflict by giving greater weight to the testimony and reports of Dr. Gersoff, when considered in connection with the factual testimony from the Claimant regarding limits to his work activities at King Soopers and other activities that he would refrain from doing relating to childcare and work around the house.

25. The opinion of Dr. Gersoff regarding the recommendation for the right shoulder arthroscopy subacromial decompression and debridement is also found to be credible and persuasive. Based on this opinion and the weighing of all of the evidence presented to the ALJ, the recommended surgery is found to be reasonably necessary to cure and relieve the Claimant from the effects of his September 14, 2012 work injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

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

Petition to Reopen

The Claimant filed his Petition to Reopen W.C. 4-903-504 on October 4, 2013 on the ground that his medical condition has worsened. The Claimant initially sustained work injuries on September 14, 2012 when he suffered an injury to his right shoulder

while pushing shopping carts. The Claimant now seeks medical benefits in the nature of a right shoulder arthroscopy subacromial decompression and debridement and other care for a worsening right shoulder condition that the Claimant alleges is causally related to his original admitted work injury.

Section 8-43-303(1), C.R.S., provides that an award may be reopened at any time within six years after the date on the ground of a change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As a threshold matter, the Claimant bears the burden of establishing that change in the Claimant's condition is causally related to the original injury. Section 8-41-301(1)(c), C.R.S.; *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Moreover, medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

In order to prove a causal relationship, it is not necessary to establish that the industrial injury was the *sole* cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial*

Claim Appeals Office, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment, such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *City of Durango v. Dunagan*, *supra*. However, to the extent that the worsening of a condition occurs as the result of an independent intervening cause, then reopening would not be warranted as this is unrelated to the original compensable injury. Whether a particular condition is the result of an independent intervening cause is a question of fact for the ALJ. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002).

The Claimant has established, through his testimony and with the medical evidence, that the relief from right shoulder injections was wearing off by May 1, 2013 and that the periods of relief following the injections were diminishing with the each successive injection. Because that treatment was failing, and the Claimant's symptoms were increasing, Dr. Gersoff felt it reasonable and necessary to proceed with a surgical resolution. A comparison of Claimant's range of motion measurements from his date of MMI with those measured by Dr. Beatty and Dr. Gersoff in October, 2013 demonstrate the worsening of the shoulder condition. Respondents do not challenge the findings and conclusion that the Claimant's right shoulder condition worsened subsequent to attaining MMI in January, 2013.

To the extent that the Respondents offered an intervening cause for the worsening of the Claimant's condition, the Respondents failed to meet the burden to establish the Claimant's subsequent work duties at King Soopers or his childcare activities rose to the level of effective intervening causes severing the causal link between the Claimant's September 14, 2012 injury at Employer and his worsened condition subsequent to MMI. See *Kurtz v. King Soopers*, WC No. 4-648-488 (ICAO March 20, 2008).

Although the Claimant was placed at MMI on January 14, 2013, since that point, the Claimant has proved that his right shoulder condition has deteriorated. The medical opinions of Dr. Gersoff and Dr. Beatty support the Claimant's contention that the Claimant's condition has worsened and that this worsened condition is causally related to the original injury. Because the Claimant has proven by a preponderance of the evidence that his condition has changed and he is entitled to benefits, WC Claim No. 4-903-504 is reopened.

Medical Benefits – Reasonably Necessary

Once a claimant establishes the worsened condition is causally related, the claimant must prove the proposed medical treatment is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Here, Claimant established by a preponderance of the evidence that the specific medical treatment consisting of right shoulder arthroscopy subacrominal decompression and debridement proposed for the Claimant's right shoulder by Dr. Gersoff is reasonably necessary to cure and relieve the effects of the September 14, 2012 industrial injury and the worsened condition from which the Claimant is now suffering. Although Dr. Basse disputes that the need for this surgery is related to the work injury, and disagrees that the surgery is necessary, she agreed that the Claimant is a surgical candidate and the surgery would be reasonable. Having found that the Claimant's condition has worsened since he was placed at MMI on January 14, 2013, it is further determined that the Claimant has proven that the surgery recommended by Dr. Gersoff is reasonably necessary to cure and relieve him from the effects of his work injury. The increased symptoms and decreased range of motion experienced by the Claimant are found to be a foreseeable consequence in this case following the failure of conservative treatment, including injections.

ORDER

It is therefore ordered that:

1. Workers' Compensation claim no. 4-903-504 is reopened.

2. Insurer is liable for the medical care the Claimant receives that is reasonably necessary to cure and relieve him from the effects of the

compensable injury that occurred on September 14, 2012, per his authorized treating physician and any authorized referrals, including, but not limited to, right shoulder arthroscopy subacromial decompression and debridement recommended by Dr. Gersoff.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-906-908-02

ISSUES

- Whether Respondent has proven by a preponderance of the evidence that Claimant waived his right to a Division Independent Medical Evaluation (DIME).

STIPULATIONS

1. Claimant attempted to schedule the DIME within 50 days as required by statute.

2. Dr. Miller was scheduled to be out of the country during the 50 days in which the DIME needed to take place.

3. The adjuster agreed that Claimant could schedule the DIME outside of the 50 day time limit provided by statute.

4. Claimant has failed to schedule the DIME.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury on December 27, 2012.

2. Claimant was placed at maximum medical improvement (MMI) on September 25, 2013. A Final Admission of Liability was filed on October 3, 2013. It has been more than 1 year since Claimant was placed at MMI.

3. Claimant timely objected to the Final Admission of Liability and requested a DIME.

4. The DIME Unit issued an IME Physician Confirmation on January 9, 2014 identifying Dr. Frederick Miller as the DIME physician and notifying Claimant that the DIME needed to be scheduled within 5 business days from the date of receipt of the IME Physician Confirmation and that the DIME needed to take place within 35 – 50 calendar days of the date the telephone call requesting the DIME appointment was made.

5. Claimant was unable to schedule the DIME to occur within 50 calendar days because Dr. Miller was going to be out of the country.

6. Lisa Biggs, the adjuster for the third party administrator handling this claim, agreed that Claimant could schedule the DIME to occur outside of the 50 day period. Claimant argues Ms. Biggs' agreement indefinitely extends his time to schedule the DIME. The ALJ disagrees with Respondent's contention and reasonably infers from the evidence that Ms. Biggs' agreement that the DIME could be scheduled to occur outside of the 50 day period was made to accommodate Dr. Miller's international travel schedule; not to indefinitely extend the scheduling or occurrence of the DIME.

7. In his position statement, Claimant seeks to excuse his failure to schedule the DIME by arguing trial strategy, a failed attempt to settle the claim, and assigning responsibility for the failure to Respondents. No evidence was offered at hearing to support these arguments and the ALJ finds they are without merit.

8. The DIME was not scheduled within 5 business days from the date of receipt of the IME Physician Confirmation even after Respondent agreed that the DIME could take place outside of the 35 - 50 calendar day timeframe.

9. Claimant testified at hearing that he did not know if his DIME had ever been scheduled and that he did not know whether or not he was notified of an appointment with Dr. Miller. It has been 11 months since the IME Physician Confirmation was issued. The ALJ finds that to date, no DIME has been scheduled.

10. On August 6, 2014 Respondent notified the Division of its intent to request cancellation of the DIME pursuant to Rule 11-3(I), WCRP and filed an Opposed Request for Cancellation of DIME and Motion to Strike Notice and Proposal.

11. The ALJ finds that Claimant, through his inaction in setting a DIME for nearly 1 year, has waived his right to a DIME. The period of time for the DIME to occur is provided by rule to further the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The period of time for the DIME to occur is also provided by rule to further the legislative intent that impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. By failing to schedule a DIME for almost 1 year since the parties were notified of the selection of a DIME physician, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to have his claim reviewed by a DIME physician, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI. Claimant, through his attorney, knew that a DIME needed to be scheduled within 5 business days of the date of receipt of the IME Physician Confirmation. The adjuster agreed that the DIME could occur outside of the 35 – 50 day time period provided by Rule. Despite this agreement, Claimant never scheduled the DIME. Claimant's failure to schedule a DIME for nearly 1 year is inconsistent with the assertion of his right to a DIME, manifests his intent not to pursue a DIME, and constitutes a waiver of that right.

12. The ALJ finds Respondent has proven by a preponderance of the evidence that Claimant waived his right to a DIME.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. A preponderance of the evidence is evidence which leads the trier-of fact, after conserving all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). Facts in a workers' compensation case are not interpreted liberally in

favor of either the injured worker or the employer. C.R.S. §8-43-201. The party asserting waiver carries the burden of proof. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); *Sholund v. Argenbright Security*, W.C. No. 4-415-403 (June 16, 2004).

Permanent medical impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. As found, it has been more than 1 year since Claimant was placed at MMI.

Rule 11-2(A), W.C.R.P. provides, in relevant part, that *unless otherwise approved by both parties*, the DIME shall occur within 35 – 50 days from the telephone call requesting an appointment. Emphasis added. As stipulated by the parties, the adjuster agreed that the DIME could occur outside of the 35 – 50 day window because Dr. Miller was unable to perform the DIME within the 35 – 50 day window. As found, despite the adjuster's agreement that the DIME could occur outside the 35 – 50 day window, her agreement was not intended to indefinitely extend the time within which Claimant was to schedule the DIME. Claimant has not scheduled the DIME.

Rule 11-3(I), W.C.R.P. provides, in relevant part, that the date of the DIME shall be set in accordance with Rule 11-2(A) and that "[t]he requesting party shall call the IME physician within five (5) business days after providing and/or receiving notice of the final IME physician selection to schedule the examination, and shall immediately notify the Division and the opposing party by telephone, and confirm in writing, the date and time of the examination. Absent good cause as determined by the Director or an administrative law judge, failure to make the appointment and advise all parties within five (5) business days permits the opposing party, after notifying the Division of such failure, to either schedule the IME appointment or to request cancellation of the IME." As found, not only did Claimant fail to schedule the DIME within 5 business days of receipt of the January 9, 2014 IME Physician Confirmation but Claimant has failed to schedule the DIME at all.

Waiver is the intentional relinquishment of a known right. *Johnson, supra*. The exercise of a statutory right is always subject to equitable limitations. *Id.* Waiver may be implied as when a party engages in conduct which manifests an intention to relinquish the right or acts inconsistently with its assertion. *Id.; see also, Munoz v. JBS Swift & Company*, W.C. No. 4-780-871 (March 1, 2010); *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (June 3, 2009). A party may, through inaction, delay, or other similar conduct, waive the right to obtain a DIME. *Johnson, supra.; Munoz, supra.* Parties to a workers' compensation claim are presumed to know the applicable law. *Midget Consol. Gold Mining Co. v. Industrial Commission*, 193 P. 493 (Colo. 1920); *Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). A party may not use ignorance of the law as a defense to its legal duties. *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (January 24, 2005).

As found, Claimant, through his inaction in setting a DIME for nearly 1 year, has waived his right to a DIME. The period of time for the DIME to occur is provided by rule to further the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The period of time for the DIME to occur is also provided by rule

to further the legislative intent that impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. By failing to schedule a DIME for almost 1 year since the parties were notified of the selection of a DIME physician, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to have his claim reviewed by a DIME physician, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI. Claimant, through his attorney, knew that a DIME needed to be scheduled within 5 business days of the date of receipt of the IME Physician Confirmation. The adjuster agreed that the DIME could occur outside of the 35 – 50 day time period provided by Rule. Despite this agreement, Claimant never scheduled the DIME. Claimant's failure to schedule a DIME for nearly 1 year is inconsistent with the assertion of his right to a DIME, manifests his intent not to pursue a DIME, and constitutes a waiver of that right.

ORDER

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

1. Claimant has waived his right to a DIME. Claimant's October 4, 2013 Notice and Proposal to Select an Independent Medical Examiner is hereby stricken.

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

DATED: January 9, 2015

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

ISSUES

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable work injury on December 15, 2012.

2. If the Claimant proved he sustained a compensable injury on December 15, 2012, whether the Claimant proved he is entitled to temporary disability benefits related to the December 15, 2012 injury.

3. If the Claimant proved he sustained a compensable injury on December 15, 2012, whether the Claimant proved that the medical treatment he received was reasonable and necessary to cure and relieve the Claimant from the effects of the December 15, 2012 injury.

4. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable work injury on January 10, 2013.

5. If the Claimant proved he sustained a compensable injury on January 10, 2013, whether the Claimant proved he is entitled to temporary disability benefits related to the January 10, 2013 injury.

6. If the Claimant proved he sustained a compensable injury on January 10, 2013, whether the Claimant proved that the medical treatment he received was reasonable and necessary to cure and relieve the Claimant from the effects of the January 10, 2013 injury.

7. If the Claimant is entitled to any temporary disability benefits, the calculation of the Claimant's average weekly wage.

8. If the Claimant has established that he is entitled to receive temporary disability benefits, have Respondents proven that the Claimant was terminated for cause.

9. If the Claimant is entitled to any temporary disability benefits, determination of any offsets for unemployment benefits.

FINDINGS OF FACT

1. The Claimant is a 54-year old man who worked for Employer as an extra board line haul truck driver starting on May 30, 2012.

Claimant's Prior Medical History

2. The Claimant reported some prior medical history to Dr. Lawrence Lesnak: a right knee arthroscopy in approximately 1985, three separate right ankle surgeries due to a work related injury in the early-mid 1990's; a left shoulder arthroscopy due to a work related injury in the mid-1990s; dental treatment for a 2009 incident when his four bottom teeth were knocked out and a January 25, 2010 injury to his left shoulder and low back. (Claimant's Exhibit 17; Respondents' Exhibit A, pp. 3-4).

3. On July 12, 2003, the Claimant underwent an MRI of the lumbar spine for complaints of low back pain. The findings were generally indicative of degenerative changes from L1 through S1 (Claimant's Exhibit 12).

4. On January 22, 2006, the Claimant presented to HealthOne North Suburban Medical Center complaining of injuries from an assault. The Claimant reported he was assaulted at a bar when several bouncers jumped him. He is unsure whether he lost consciousness or not. He reported that he was hit in the head and complained of neck pain, right shoulder pain, back pain and left knee pain. A CT scan of the Claimant's head was negative and a CT scan of his cervical spine was unremarkable (Respondents' Exhibit B, pp. 34-35).

5. On January 22, 2010, the Claimant slipped and fell at work. At the time, the Claimant was a truck driver and he reported that he was up on his semi and then found himself on the ground. "He states he may or may not have passed out. He does not know. He found himself on the ground after falling forward." The Claimant reported pain to the top of the head and to the cervical spine. His left shoulder was painful and difficult to move secondary to pain. He also reported lumbar spine pain and tingling into the coccyx. On January 27, 2010 the Claimant had stomach "gurgling" and had blood in his stool so he was sent to see Dr. Caroline Gellrick who further referred his that day to Exempla Lutheran for evaluation as to his shoulder (Respondents' Exhibit H, p.114). The Claimant was evaluated again on January 28, 2010 by Dr. Caroline Gellrick. The Claimant's shoulder was not dislocated but he still had left shoulder pain, back pain, tailbone pain and a headache (Claimant's Exhibit 9; Respondents' Exhibit H, p. 111).

6. The Claimant testified that he has had a history of going unconscious. However, he disputed that he had a history of passing out for no known reason. Prior instances he recalled, in 2001 and January of 2010, were due to ice or snow (Hearing Tr., p. 105).

Claimant's Documented Performance Issues Coincide with His Alleged Injuries

7. The Claimant has a history of performance issues which were significant and documented in his employment file which occurred right before the alleged work injuries.

8. On August 2, 2012, the Claimant was given a written warning for "unacceptable behavior, insubordination" and "violation of Company Policy or Work Standards," arising out of an alleged altercation between the claimant and another employee (Respondents' Exhibit J, pp. 174-177).

9. On November 14, 2012, the Claimant was provided a written warning for a "violation of Company Policy or Work Standards" arising out of his failure to timely get medically cleared to drive due to blurred vision. The Claimant was off from work November 6-14, 2012 (Respondents' Exhibit J p. 172 and 206).

10. On November 27, 2012, the Claimant was given a citation for a Department of Transportation ("DOT") vehicle inspection resulting in a left lane violation (Respondents' Exhibit J, p. 203).

11. On December 15, 2012, the Claimant was given a written warning for "poor performance" by Jason Gilbert, Inbound Supervisor, for failing to timely deliver freight from Salt Lake City to Denver. This violation occurred on the same date that the first of the alleged work injuries in this case occurred per the Claimant's testimony (Respondents' Exhibit J, p. 171).

12. On December 21, 2012, the Claimant was given a written warning for "poor performance" arising out of an inability to meet company standard run times (the expected time for a run to last). This performance issue occurred right at the time that the Claimant reported the first alleged work injury (Respondents' Exhibit J, p. 163 and 201). The Claimant disputed this written notice in the comments that he prepared and signed on December 21, 2012 and claims that this was a "witch hunt" to try to eliminate a good employee because he asked for a larger tractor to fit his body. The Claimant also argued that he was not provided with proper tools to meet his expected run times such as maps and good directions to a terminal (Respondents' Exhibit J, pp. 163-164 and 201-202).

Claimant's Employment with Employer and Two Reported Injuries

13. The Claimant is seven feet tall and testified that at the end of 2012, he weighed about 263 pounds (Hearing Tr., p. 31). The Claimant's duties while working for the Employer included driving a truck, pulling doubles and triples, hooking and breaking the sets of trailers, lifting up to 150 pounds (Hearing Tr., p. 32). The Claimant would typically drive long haul routes to destinations in other states and then continue with the next route he was dispatched or wait at the destination until he was dispatched to another destination (Hearing Tr., p. 33).

14. The Employer usually paid the Claimant by the mile, but was occasionally paid by the hour if they were working locally or when the vehicle broke down. The Claimant received a health insurance benefit and was provided with hotel accommodations on overnight drives (Hearing Tr., pp. 35-36). The Claimant testified that he would make an average of $1,100.00 - $1,500.00 per week (Hearing Tr., p. 35)

but that after October 26, 2012 his earnings dropped off considerably because he believed the Employer was limiting the hours on his schedule and not giving him as many routes as he was being more proactive about trying to get a larger truck to drive due to his body frame (Hearing Tr., pp. 36-37). The Claimant testified that between October 26, 2012 and December 14, 2013, the Claimant was at the same time requesting a larger cab to drive for longer distance drives. At the same time, he testified, he was not getting as many routes as he was accustomed to being scheduled even though he was requesting full time work (Hearing Tr., pp. 36-38).

15. The Claimant testified that he was usually assigned a day cab instead of the larger sleeper cab. When he was in the smaller cab his legs would be cramped and get tired and he had to adjust the seat to its highest position to accommodate his legs. However, the Claimant testified that when he adjusted the seat to that position, this put his head right up to the top of the cab (Hearing Tr., p. 38-40). Based on the accommodation request made by the Claimant, the Claimant was evaluated by Dr. Jonathan Block to determine fitness for duty due to the Claimant's complaint that he was having trouble fitting into his truck due to his height (Hearing Tr., p. 44). Dr. Bloch saw the Claimant for evaluation on November 27, 2012 and noted that the Claimant advised him that he was having trouble fitting into his truck. Dr. Bloch noted that the Claimant advised that he seemed to do better in a sleeper truck since he could adjust the seat back instead of just up and down. Dr. Bloch also noted that the Claimant reported that his back was starting to become sore from working in cramped trucks. Dr. Bloch recommended truck manuals be reviewed to see if there is a truck better designed/suited for a man of the Claimant's height, and if so if there are any appropriate reasonable accommodations (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 54-56). The Claimant testified that he did not tell Dr. Bloch at that evaluation that he had problems with his neck or lower back (Hearing Tr., p. 42).

16. The Claimant's inbound supervisor, Jason Gilbert, gave the Claimant a Notice of Written Warning dated December 15, 2012. The written notice describes the misconduct as poor performance for a late delivery. Mr. Gilbert noted that "on 12/14/12 [the Claimant was] dispatched from Salt Lake City to Denver at 22:00 PM, due to arrive in Denver at 07:57 AM, according to the computer system. At approx 10AM I called you and found you had just reached Laramie WY which is 142 miles from the terminal…" (Respondent's Exhibit J, p. 171). At his deposition, Mr. Jason Gilbert testified he previously held the position of inbound supervisor although he is currently the outbound supervisor (Depo. Tr. Jason Gilbert, p. 5). Mr. Gilbert confirmed that the date of the Claimant's write up for lateness was December 15, 2012 (Depo. Tr. Jason Gilbert, p. 7)

Claimant's Alleged December 15, 2012 Injury

17. The Claimant testified that he was first injured while working for Employer on December 15, 2012. The Claimant testified that he was assigned to drive a route to and from Salt Lake City and he was on his way back, driving eastbound on I-80. As he was driving back, there was a blizzard and the overhead road signs were recommended reduced speeds, so the Claimant took longer than usual to get back (Hearing Tr., pp.

45-46). The Claimant testified that as he was approaching Laramie, there was quite a bit of snow on the road although the storm had passed. At this point he testified that he was back up to driving full speed when he hit a berm of snow in the road that he didn't see. He testified that as he hit the berm at a pretty high rate of speed he felt his seat go blat to the floor, squeeze down and the shoot back up. The Claimant's head hit the ceiling and he testified that in the process it jammed his neck up too. The Claimant testified that almost immediately he had an immense headache and pain in the top of his head, back of his neck, the upper trapezius areas and his shoulders and he it was hard to turn his head to either side (Hearing Tr., p. 47). The Claimant testified that he continued to drive the route but it took longer due to the previous weather and his injury. When he returned to Employer's terminal no one was there except for one security guard (Hearing Tr., p. 48).

18. The Claimant testified that supervisors are not at the terminal on Saturday afternoons, which is when he returned after his injury, and they are not there on Sundays. So, he reported his injury to his immediate supervisor Marty Kessler by phone on Monday morning since he didn't have a home number to call Mr. Kessler over the weekend. The Claimant testified that when he called he told Mr. Kessler that he injured himself when he hit a bump in the road and he jammed his neck. The Claimant testified that he asked if he could go to the doctor and Mr. Kessler told him he would get back to him (Hearing Tr., p. 49). The Claimant did not hear from the Employer until Wednesday when the dispatcher called him to do a run. He testified that was off on Monday and Tuesday and testified that he did not seek medical care on those days on his own because he was having financial issues and did not want to incur doctor bills that he couldn't afford to pay (Hearing Tr., pp. 50-51). However, the Claimant later testified that he did work on Monday, December 17th when he drove a local run to Grand Junction (Hearing Tr., p. 56). The Claimant testified that he requested medical care again and had a meeting with his supervisor Marty Kessler and the terminal manager Leo Raker on December 20, 2012 and they told the Claimant that if he was going to get medical care he had to go right away (Hearing Tr., pp. 51-52). On cross-examination, the Claimant's testimony becomes somewhat convoluted about when the injury was reported. The Claimant does insist that he always reported an injury occurring on December 15, 2012 (Hearing Tr., pp. 113-114), however, the supervisor investigation report for an employee injury completed by Marty Kessler states that the Claimant advised him on 12-21-12 that he needed to see a doctor for neck pain due to an injury that happened while driving from terminal 224 to 257 on I-70 near Grand Junction (see Respondents' Exhibit J, p. 197). The Employer's First Report of Injury form also indicates the injury date was 12-20-12 but there is a question mark next to it. It is noted that the injury was reported to management on 12-21-12. The injury was describe as happening when the Claimant was driving a day cab where the Claimant had the seat all the way up and when the tractor hit a dip he injured his head, neck and upper back. The report indicates he was on I-70 eastbound when the Claimant hit the dip in the road. The Claimant signed that he would go to Concentra on 12-21-12. The Claimant's signature is at the bottom of the form with the date of 12-21-12 (Respondents' Exhibit J, p. 193). Later on re-cross examination, the Claimant testified that although the signature on the bottom of the page is his and some of the handwriting on the form is his, some of

it is not his. Specifically, he did not write in the information at lines 1-6, someone else did, although the Claimant testifies that he wrote the question mark next to line 1. The Claimant testified that he does not know if he checked the box in line 7. The Claimant testified that he did write on lines 8, 10, 11, 12 a, b and c, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25. Just below line 25, the Claimant testified he did not write in the "check yes" and the 12-21-12 date and did not write Concentra. Then the printed name, signature, last 4 digits of his Social Security number and the date of 21 Dec 2012 was written by the Claimant (Hearing Tr., pp. 199-206).

19. There was testimony at the hearing and a note from Concentra that the Claimant was sent for a random drug screen. The record indicates the drug screen time in was 1:00 PM and the time out was 1:54 PM (Respondents' Exhibit J, p. 200). Based on the testimony and the later medical record from the same day, it appears that on December 21, 2012, the Claimant first was sent for a random drug screen, then came back to the Employer's property and had discussions with his supervisor and filled out paperwork for the injury that the Claimant insists occurred on December 15, 2012 but paperwork notes occurred on December 20, 2012. Then, the Claimant was sent back to the Concentra clinic for medical evaluation and treatment.

20. The Claimant went to Concentra on December 21, 2012 and saw Glenn Peterson, PA. The medical note indicates that the Claimant's time in to the clinic was 5:20 PM and his time out was 7:10 PM. Mr. Peterson noted that the Claimant reported that on December 15, he was driving to his farm and hit the bottom bumps while driving his cab near the speed limit and bumped his head up against the top of the cab. This happened several time resulting in neck pain. The Claimant reported no loss of consciousness but stated that since the incident, he has had a couple of episodes of blurred vision. The Claimant reported that it hurt to turn his head and he did not feel safe driving a big rig cab. PA Peterson assessed the Claimant with a closed head injury, a cervical strain and a thoracic strain. The Claimant was restricted from commercial driving, provided lifting restrictions, prescribed diclofenac and sent to physical therapy (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 48-50). At the hearing, the Claimant testified that he was not driving to his farm at the time he was injured (Hearing Tr., p. 53).

21. The Claimant testified that after his 12/21/2012 appointment, he could not perform commercial driving and that he went to Concentra for physical therapy (Hearing Tr., pp. 57-58). The Claimant was given modified duty sweeping on the dock and his wages were reduced to $10 per hour. The Claimant testified that he performed the modified duty for a short time but he found it dangerous due to the cold and having to dart in between forklifts (Hearing Tr., pp. 60-61).

22. On January 2, 2013, the Claimant was reevaluated by PA Peterson when he came in as a walk-in appointment. The Claimant reported that he was working in a cold warehouse sweeping and his condition was worsening, with his neck tight and difficulty turning to the side with pain down the left arm with certain neck movements. The Claimant's work restriction of no commercial driving was continued as was the

lifting restriction and an additional restriction of no work in a cold environment was added (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 46-47). The Claimant testified that after January 2, 2013, he no longer worked in a cold environment. He returned to work a couple of days later counting vehicles leaving the yard. He performed this duty for four or five days. His neck was painful at this point but he had only been to one physical therapy visit which helped because, he testified, the Employer was making it as hard as possible for the Claimant to schedule visits due to the hours they were scheduling him for work (Hearing Tr., pp. 62-63).

23. The Claimant was reevaluated on January 8, 2013 by Dr. Bloch who noted this was an "odd case" because the Claimant "was originally seen November 27 for evaluation of fit for duty vs. ADA as he is 7 [sic] tall and truck don't accommodate people that tall, he was then complaining of low back pain mostly from having to hunch into the regular sized cab" and "the then returned to check in for UC on 12/20 with added neck pain from having cramping into the cabs that also cause head to rub on top of cab" and "then he presented 12/21 for a specific injury that occurred on December 20th when he says he was driving the speed limit in his truck…he apparently specifically hit his head on the top of the cab while driving en route back from SLC and is now having said complaints." Dr. Bloch assessed the Claimant with cervical strain with subjective radiculopathy, subjective hip pain, subjective thoracic pain and PMH lumbar injury with IR and PWR. Dr. Bloch noted that he reviewed the Claimant's job functions and he did not find restrictions to activity necessary. He did note that a larger truck would be a reasonable accommodation for the Claimant and the Claimant was returned to regular duty. Dr. Bloch considered an MRI but noted that he did not see a "strong indication" due to a physical examination that was "more of an arthritic exam" and the "lack of objective neuritis" along with a "questionable history of actual traumatic injury" (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 42-44).

24. On January 10, 2013, Dr. Bloch made an appended note to his January 8, 2013 medical note stating that,

> [the Claimant] is an incredibly difficult patient to treat. He incisively calls the clinic, at least 4 times today spending over an hour of our staffs time on the phone. He insists there are miscommunication [sic] that he wants to resolve, when there are none. He admits to recording these phone conversations. He has been offered ASAP appointments to come in and discuss with myself but refuses to schedule anything. He often just walks into the clinic instead….He often ends these phone conversations emotionally labile, angry and yelling….most of my staff expressed discomfort about having to work with him and they are requesting not to work with him. I personally fear him but am willing to see him. He made sexual advances at one of our colleagues. He wants to come to therapy 3x a week instead of the 2x per week that was ordered and is standard, but again won't come in for a doctor's visit to discuss….He insists he cannot come to therapy during our regularly scheduled hours, our head therapist Chris made arrangements to come in early, at 7:30 one morning,

to accommodate [the Claimant] and [the Claimant] did not arrive until after 8am.

At the hearing, the Claimant testified that he did not make sexual advances to one of his colleagues and he took issue with Dr. Bloch's statement that he feared the Claimant. The Claimant also denies that he was angry, yelling and emotional during phone conversations with staff. He testified that he did record every one of his conversations with them. The Claimant denied that he was offered meetings with Dr. Bloch that he refused and denied that he would walk into the clinic demanding to be seen. The Claimant testified that he thinks Dr. Bloch wrote his appended note because of a conflict of personality and because they just don't get along (Hearing Tr., pp. 64-66).

25. The Claimant testified that he was not able to return to work after the January 10, 2013 incident. The Claimant testified that he had a referral from the physician at North Suburban Medical Center to see his workers' compensation doctor on January 14th, but Dr. Bloch refused to see him (Hearing Tr., pp. 88-89).

26. A progress note from Dr. Bloch's office notes, "this claim was denied for reasons unbeknownst to me. Patient is as MMI today without any impairment. Patient has no permanent restrictions and is released to full duty activities today. No medical maintenance should be considered neccisary [sic]. A larger cab form [sic] one they may have vacant in their lot, to fit a larger person, is a reasonable accommodation. Case closure has been accomplished. Patient is released from care today"(Claimant's Exhibit 6; Respondents' Exhibit D, p. 41).

27 The Claimant testified that he went to Dr. Bloch's office on January 14, 2013 and was in the waiting room but he did not get to see Dr. Bloch (Hearing Tr., p. 91).

28. Respondents filed a Notice of Contest for WC claim # 4908381 for a date of injury of 12/20/2012 (Claimant's Exhibit 2).

29. The Claimant testified that he did not seek any medical care with his own providers related to the December 15, 2012 or January 10, 2013 incidents because he did not want to incur more bills that he could not afford to pay. The Claimant testified that he wants medical care for migraine headaches, neck pain and blurred vision (Hearing Tr., p. 93).

30. Dr. Lawrence Lesnak, who had performed an evaluation of the Claimant on March 25, 2014, testified that there were no objective findings with regard to the December 2012 alleged incident. He specifically opined that there was no medical evidence that the Claimant sustained any type of trauma to his neck in December 2012. (Hearing Tr., pp. 216-217). He later clarified: "What I'm saying is whatever happened [in December 2012], even if it did happen, it did not leave any signs of trauma or abnormalities [or] hazards out of that potential incident." (Hearing Tr., p. 234).

31. In considering the totality of the evidence presented, the ALJ credits Dr. Lesnak's opinions along with the supporting medical records and determines that the Claimant has not established that it is more likely than not that he sustained a compensable injury in December 2012 that resulted in the need for medical treatment. The ALJ finds that the objective medical evidence does not support that an injury occurred on December 15 or December 20, 2012. Additionally, the timing of the reporting of this injury is suspect based on the employment documents in evidence. Moreover, there is considerable inconsistency related to the Claimant's testimony, statements and documents in evidence and the Claimant's actions during the time frame from December 15, 2012 to December 21, 2012. Overall, the Claimant's testimony is not found to be credible in the face of more credible and reliable evidence that was presented in this case with respect to the allegations of a December 15, 2012 injury.

32. In the alternative, if there was any injury, the December 2012 incident did not result in the need for permanent impairment or medical care. As noted above, the Claimant was released to MMI with no permanent impairment on January 16, 2013, after just three evaluations. Any effects of the alleged incident were resolved as of that date (Respondents' Exhibit D, p. 40). Dr. Lesnak testified that he agreed that the Claimant did not sustain any permanent impairment as a result of the alleged December 2012 event. Specifically, he testified that there were no objective findings on which a physician could base any need for permanent impairment or medical treatment (Hearing Tr., p. 218). Further, The ALJ credits the medical records and the opinions of Dr. Lesnak and finds that Claimant has not proven that it is more likely than not that the claimant has demonstrated a need for medical treatment as a result of the December 2012 alleged injury. The ALJ determines that the Claimant has failed to establish that the medical care rendered in December 2012 and early January 2013 was reasonable and necessary medical treatment related to a compensable injury.

Claimant's Alleged January 10, 2013 Injury

33. The Claimant testified that on January 9, 2013 at about 9:30 at night he was called in by the dispatcher to do a run to Salt Lake City. He testified that he "felt pressured" by the Employer because they offered him a larger truck and said that he had to get on the road and that he was their best driver. The Claimant further testified that there is a company rule that whenever a driver is called, they have 2 hours from that time to get ready from their house and drive into work (Hearing Tr., pp. 66-67).

34. The Claimant testified that he reported to work on January 9, 2013 at approximately 11:30pm but that he suffered an injury as he was in the process of reporting. The Claimant testified that he was taking some essential items from his personal vehicle which was in the parking lot next to where the tractors are parked. The Claimant testified that he tripped and fell and hit his head on some steps and landed to the side of the steps in the dirt. The Claimant offered photograph which were entered into evidence as Exhibits 19, 20 and 21 to depict the stairs and the area where he

testified he fell (Hearing Tr., pp. 67-78 and Claimant's Exhibits 19, 20 and 21). As the Claimant was carrying items from his vehicle to the tractor he would be driving, he testified that he recalled feeling dizzy and lightheaded and as he felt his legs become weak he stumbled and hit one of the steps and fell forward. He testified that because he was carrying things, he didn't brace and he recalls falling face down in the dirt immediately to the left of the steps (Hearing Tr., p. 80). After this, the Claimant testified, he blacked out and does not have recollection after going unconscious until he woke up in the emergency room. He specifically testified that he does not recall the ambulance ride to the hospital (Hearing Tr., pp. 84-85).

35. Mr. Mark W. Passamaneck, a professional engineer working primarily in forensic engineering and analysis for twenty years, testified as an expert in the area of forensic engineering. Mr. Passamaneck was asked to comment on the location of the Claimant's body, found to the left of the stairs as indicated in witness statements and testimony in relation to the Claimant's testimony that he tripped as he was walking up the stairs. Mr. Passamanek opined that the Claimant's testimony does not make sense from a forensic engineering perspective because if the Claimant was walking up the stairs and he tripped and fell, he would have fallen onto the stairs. If the Claimant had attempted to guard against the fall, the Claimant's upper body would be further off the axis of the stairs in comparison to his feet but a drawing prepared by Jason Gilbert regarding the Claimant's body position in relation to the stairs shows the upper body closer to the stairs and the feet further away (Hearing Tr., pp. 272-273; Respondents' Exhibit J, p. 185). Mr. Passamaneck also noted that the medical information and statements that he read indicate that the Claimant did not suffer cuts or abrasions consistent with falling on cement stairs (Hearing Tr., p. 273). Mr. Passamaneck testified that there was nothing unusual in the area where the Claimant was reported to be found unconscious that would have caused a fall, it was just a gently sloping dirt hill (Hearing Tr., p. 273-274). On cross-examination, Mr. Passamaneck conceded that he did not know if there had been snow or ice on the stairs on the night when the Claimant was found unconscious (Hearing Tr., p. 276).

36. Jason Youmans was a shift coordinator/Class A mechanic in January of 2013. He no longer works for Employer and has worked elsewhere since about December 2013. However, Mr. Youmans was working for Employer the night of January 9, 2013 into the morning of January 10, 2013. Mr. Youmans testified that he was sitting in the office at the shop building taking care of paperwork when the Claimant came in and said, "I need you to call dispatch and tell them I've been here since 11:20." Mr. Youmans testified that he looked at the clock and saw that it was after midnight and he told the Claimant "I can't do that. I'm not going to lie to the company for you. I have no idea how long you've been here." Mr. Youmans testified that the Claimant next complained about not being able to find a particular truck and said that he's been walking around all night trying to find it. Mr. Youmans testified that he told the Claimant that the truck he was looking for was right out front parked along the side of the building they were in. Mr. Youmans testified that the Claimant didn't respond to that and kept talking about how much he disliked the Employer and that they were mean to him and Mr. Youmans testified that he asked the Claimant what was going on, but he didn't

respond to that either. So, Mr. Youmans suggested that if the Claimant was in trouble, the best thing to do was to get the tractor and go to work. Mr. Youmans testified that after a few seconds the Claimant turned around, said okay, and walked out. Mr. Youmans testified that he was concerned about the Claimant's behavior since he wasn't responding to anything Mr. Youmans had said and he didn't look normal; he looked pale and like he was getting sick (Hearing Tr., pp. 292-294). Mr. Youmans generally testified in accordance with the written statement that he had prepared contemporaneous with the events of January 9, 2013 – January 10, 2013 (Respondents' Exhibit J, p. 187A).

37. The Claimant testified in rebuttal that Mr. Youmans was lying and that the Claimant never asked him to lie about saying the Claimant had arrived at 11:20. The Claimant testified that he did have a discussion with Mr. Youmans about trying to find his tractor. The Claimant also disputes that he was complaining about Employer and that he didn't like the company (Depo. Tr. Claimant, pp. 4-6).

38. The Claimant's inbound supervisor, Jason Gilbert, was alerted after he had just arrived at work that the Claimant was found on the ground by the parking lot. Mr. Gilbert testified that he saw the Claimant lying on his stomach, face down, with his arms above his head facing towards the parking lot and up the hill next to the stairs (Depo. Tr. Jason Gilbert, pp. 8-9). Mr. Gilbert prepared a report into the investigation of the injury on January 10, 2013, noting that the time of injury was 12:40 AM. Mr. Gilbert obtained statements from other individuals and prepared his own statement as well (Respondents' Exhibit J, pp. 181-187a). Mr. Gilbert testified that there was no snow or ice at the time of the January 10, 2013 incident. He further testified that there was no blood or abrasions that he could see on the Claimant's face or hands and there was no blood on the stairs (Depo. Tr. Jason Gilbert, pp. 13-14). Although, Mr. Gilbert later conceded that it was night, there was no lighting on the stairs and he did not have a flashlight while examining the Claimant or the area (Depo. Tr. Jason Gilbert, pp. 33-34 and p. 45). Mr. Gilbert testified that he believed that the security guard, Mr. Brodie had a flashlight (Depo. Tr. Jason Gilbert, p. 55) but he was not certain about that (Depo. Tr. Jason Gilbert, p.46)

39. Mr. David Brodie works for a company providing security guard services. In January of 2013, he was working on the Employer's property providing security guard services (Depo. Tr. David Brodie, pp. 5-6). Mr. Brodie has had interactions with the Claimant while working as a security guard. Around 1:00 in the morning on January 10, 2013, Mr. Brodie saw the Claimant laying next to the stairway that went to the employees parking lot. Mr. Brodie testified that the Claimant was lying facedown with his arms raised above his head near his ears (Depo. Tr. David Brodie, pp. 7-8). Mr. Brodie testified that the Claimant was lying about 2 to 3 feet away from the stairs on the left side (Depo. Tr. David Brodie, p. 8). Mr. Brodie testified that he had a flashlight and used it to see the Claimant and did not see any blood or abrasions and did notice anything on the stairs (Depo. Tr. David Brodie, p. 9). Mr. Brodie reviewed the handwritten statement that he wrote shortly after the incident when he found the Claimant lying face down. In his written statement, Mr. Brodie states he was making rounds at 12:35 AM and at 12:45 AM he found the Claimant and tried to get a response

from him. He did not get a response so he called the dispatch office to tell them that there was a driver passed out at the parking lot and that Mr. Brodie was calling an ambulance (Depo. Tr. David Brodie, pp. 15-16; Respondents' Exhibit J, p. 183). Mr. Brodie testified that he called 911 and then two dispatchers, Mike Hashman and Jason Gilbert came to where the Claimant was unconscious. Then, Mr. Gilbert went to meet the ambulance drivers to show them where the Claimant was. The EMTs tried to talk to the Claimant but only got a little response and they put him on a stretcher and took him away in the ambulance (Depo. Tr. David Brodie, pp. 16-17; Respondents' Exhibit J, p. 183). Mr. Brodie testified that he did not see any snow or ice on the stairs but he did recall some erosion on the sides of the stairs (Depo. Tr. David Brodie, p. 20). Mr. Brodie testified that although he used his flashlight to look at the Claimant and the stairs, he did not do a very close examination (Depo. Tr. David Brodie, p. 21).

40. Mike Hashman is a supervisor for the Employer who dispatches line haul drivers. Mr. Hashman called the Claimant on the night of January 9, 2013 asking him to come in to work to deliver a load (Depo. Tr. Mike Hashman, p. 6). Mr. Hashman's notes prepared on January 9, 2013 indicate that he called the Claimant at 21:16 PM, left a message and the Claimant called him back at 21:17 PM. The Claimant arrived at 00:10 AM on January 10, 2013. Then at 00:25 AM, the Claimant called him from the yard and said he was feeling nauseated and ill and Mr. Hashman told the Claimant to go to North Suburban as the Claimant was not in a condition that he was fit for driving (Depo. Tr. Mike Hashman, pp. 6-8 and p. 28; Respondents' Exhibit J, p. 187). Because the Claimant was not punctual for his shift, Mr. Hashman filled out notice of written warning and signed it (Depo. Tr. Mike Hashman, pp. 9-10; Respondents' Exhibit J, p. 191). Mr. Hashman was later called by the security guard and went out to the steps leading to the employee parking lot and saw the Claimant laying on the ground (Depo. Tr. Mike Hashman, p. 11). Mr. Hashman testified that he saw the Claimant to the left of the stairs with his body generally perpendicular to the stairs(Depo. Tr. Mike Hashman, pp. 12-13).

41. Northglenn Ambulance responded to the Employer's location at approximately 1:00AM on January 10, 2013 noting that the Claimant was found lying prone on the ground and there was no obvious cause of the fall. As the Claimant was rolled onto a back board, it is noted that the Claimant began to arouse and could not remember falling. The Claimant was dizzy and nauseated. The note indicates that the Claimant complained of pain in his cervical spine. He was loaded into the ambulance and transported to North Suburban Medical Center without complication (Claimant's Exhibit 7; Respondents' Exhibit C).

42. The Claimant arrived and was admitted to HealthOne North Suburban Medical Center on January 10, 2013 at approximately 1:301 AM. The Claimant reported that he fell at approximately 12:00 am to 12:30 am in the morning at work. Per the EMS, the incident more likely occurred at around 1:00 am. Dr. Alexandra Villacres, the emergency room physician noted that the Claimant had missed a step and then fell face forward towards his left side. In addition to the syncopal episode, the Claimant complained of left-sided pain in his head and trapezius, neck and ribs (Claimant's

Exhibit 8; Respondents' Exhibit B, pp. 11-12). The Claimant was evaluated for possible etiologies for his syncopal episode and it was noted that he was significantly dehydrated with an elevated creatinine level. An MRI of the brain showed no abnormalities. A formal sleep study was recommended to evaluate for sleep apnea after a nocturnal pulse oximetry study performed on the Claimant was noted to be abnormal (Claimant's Exhibit 8; Respondents' Exhibit B, p. 13). A CT scan of the Claimant's cervical spine was positive for degenerative changes only and no acute fracture or subluxation was noted (Claimant's Exhibit 8; Respondents' Exhibit B, p. 17). The bills for HealthOne North Suburban Medical Center have not been paid (Hearing Tr., p. 87).

43. On March 25, 2014, the Claimant saw Dr. Lawrence Lesnak for an IME related to alleged injuries on 12/15/2012 and 01/10/2013 and Dr. Lesnak prepared a written report (Claimant's Exhibit 17; Respondents' Exhibit A). The Claimant testified that he has issues with Dr. Lesnak's IME and report because he saw Dr. Lesnak shut off his recorder before the IME was over and never saw him turn it back on. The Claimant testified that he recorded the entire IME encounter (Depo. Tr. Claimant, pp. 6-8).

44. Dr. Lesnak credibly testified that the Claimant's syncopal episode arose due to underlying dehydration. He testified that blood testing completed on January 10, 2013 definitively established that the claimant had elevated blood urea nitrogen ("BUN") and creatinine levels. Dr. Lesnak indicated that these levels measured kidney function and dehydration. He testified that the claimant had a BUN level of 25 and a creatinine level of 1.8. Normal ranges for those data points are 10-12 for BUN and 0.8-1.2 for creatinine. He testified that this objective testing met the medical criteria for a diagnosis of dehydration. Dr. Lesnak testified that the Claimant's January 10, 2013 event was not an unexplained incident, specifically, "he had a syncope, he passed out. The – he's dehydrated, dehydration causes syncope" (Hearing Tr., p. 212, p. 232 and p. 255).

45. The ALJ credits the medical records from North Suburban Medical Center and the testimony of Dr. Lesnak and finds that Claimant's syncopal event on January 10, 2012 was caused by dehydration.

46. Alternatively, the Claimant argues that his sycnopal episode on January 10, 2013 was related to the injury he alleges occurred on December 14, 2012. Dr. Lesnak credibly testified that neither the alleged December 2012 incident nor any medication prescribed during the evaluation of that incident caused the January 10, 2013 syncopal event. Specifically, Dr. Lesnak testified that, even assuming that an incident occurred in December 2012 and that incident caused a head injury, that incident did not cause the Claimant to have a syncopal event on January 10, 2013. First, Dr. Lesnak indicated that there was no indication that the Claimant had any symptoms consistent with a closed head injury. However, even assuming there was evidence of a closed head injury arising out of the December 2012 event, Dr. Lesnak testified that the symptoms would have been abating, not worsening on January 10, 2013. "So you're not going to have effects of a – any type of closed head injury blatant like that happen all of a sudden. In fact closed head injuries by definition … the worse

is the very first couple hours of the first day, it doesn't get worse later on it gets better" (Hearing Tr., p. 233 and p. 252). Thus, it is more likely than not that there was no relation between any event occurring on December 15, 2012 and the event of January 10, 2013, other than a temporal relationship Further, Dr. Lesnak testified that the medication prescribed to the claimant on January 8, 2013 – Diclofenac and Tizanidine – had no effect on the claimant's syncopal event or the dehydration that caused it. Dr. Lesnak indicated that Tizanidine is a "non-benzodiazepine muscle relaxant" with absolutely no effect on the kidneys and no real effect on elevation of BUN or creatinine levels. Consequently, Dr. Lesnak opined that the use of Tizanidine did not cause the claimant's dehydration or syncope. Dr. Lesnak further testified that while Diclofenac could cause a bump in creatinine (under rare circumstances where the individual was taking the drug for long period of time), it could not cause elevated BUN levels. As a result, Dr. Lesnak opined that the use of Diclofenac did not cause the claimant's dehydration or syncope. (Hearing Tr., p. 247).

47. The Claimant failed to present persuasive evidence that his syncopal event was caused by an alleged prior closed head injury or medications from that injury. The ALJ credits the medical records and opinion of Dr. Lesnak and finds that the Claimant did not establish that it is more likely than not that the January 10, 2013 syncope was caused by the earlier alleged incident or medication prescribed after that incident.

Claimant's Termination from Employer

48. The Claimant acknowledged that he was disciplined for infractions at work prior to January 8, 2013, but the Claimant testified that he believes they were "made up." The Claimant recalled that a December 20th write up was for failing to do his routes within a certain amount of time (Hearing Tr., p. 94).

49. The Claimant testified that he received a phone call from Mart Kessler on February 25, 2013 that his employment was terminated as his medical card was expired and his CDL was not current (Hearing Tr., p. 94). However, Claimant's Exhibit 22 indicates that the Claimant began receiving unemployment benefit payments beginning with the week ending January 26, 2013. The Claimant received the unemployment benefit payments in accordance with the Benefit Payment History dated February 12, 2014. The last unemployment benefits the Claimant received were for the week ending December 21, 2013.

Claimant's Subsequent Employment and Reported Injury

50. The Claimant testified that he went back to work in December of 2013 for Pro Drivers, which is a service supplying truck drivers to companies. The Claimant testified that he was assigned by Pro Drivers to work for Beco, Incorporated for a two week period (Hearing Tr., p. 99).

51. The Claimant informed ProDrivers that he "quit" his employment with the employer in February 2013 and that the reason he was not working between February 2013 and December 2013 was because he was looking for work. Although the Claimant testified that he did not fill in these portions of the application for employment and that the information was taken over the phone, the Claimant did attest (through his signature) that the application for employment "was completed by [him]" and the information contained within the application was true and complete (Hearing Tr. p. 162; Respondents' Exhibit K, pp. 219-223).

52. The Claimant testified that, when he applied for the position at ProDrivers, he informed them that he was physically capable of doing the job. He also testified that he did not tell ProDrivers that he had a prior injury or problem that would prevent his ability to perform the job, which he understood to include lifting in excess of a hundred pounds. The Claimant stated that he would do anything to get a job and if he told them about his prior injury and work restrictions he wouldn't get the job (Hearing Tr., p. 143).

53. The Claimant testified that while he was working for Pro Drivers, he had a subsequent injury on January 12, 2014. The Claimant testified that he was chaining up on Vail Pass while heading eastbound on I-70. The Claimant testified that he heard a car accelerating from behind him and he looked over his shoulder and lost his balance and he slipped and fell. The Claimant testified that he injured his right shoulder, left elbow and lower left buttocks area as a result of this fall. The Claimant testified that this injury did not affect his neck, blurred vision or headaches and they were the same as before the January 2014 injury (Hearing Tr., pp. 102-104).

54. The Claimant filed a workers' compensation claim for his January 2014 incident and it is an admitted claim and he is receiving medical care for that incident (Hearing Tr., p. 104).

55. The Claimant saw Dr. Michael Ladwig for an initial visit on January 14, 2014. Dr. Ladwig reports that the Claimant advised that he was chaining up his vehicle when he had to dive out of the way of a car and he slipped and injured himself. He reported feeling a "pop" in his right shoulder. He reports a right knee, left elbow, neck and mid-low back injury. Dr. Ladwig assessed the Claimant with cervical strain, dorsal strain, lumbar strain, right shoulder strain and left elbow strain. The Claimant was placed on work restrictions and taken off work (Claimant's Exhibit 14; Respondents' Exhibit G, pp. 99-105). The Claimant continued to treat with Dr. Ladwig who later referred him to Dr. Mark Failinger for right shoulder conditions (Claimant's Exhibits 14 and 15; Respondents' Exhibits E and G).

56. The Claimant's actions and statements with respect to obtaining a job and representations he made to his subsequent employer Pro Drivers further support the conclusions that the Claimant did not suffer compensable injuries on either December 15, 2012 or January 10, 2013. In addition, the Claimant's own admissions that he will say what he needs to in order to obtain the result that he seeks further damages his credibility overall.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

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

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

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

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Colorado Supreme Court has identified three well-established and overarching types of risks that cause injuries to employees in the workplace: (1) employment risks, which are tied directly to the work itself; (2) personal risks, which are inherently personal or private to the employee; and (3) neutral risks, which are neither employment-related nor personal *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014).

December 15, 2012 Injury

Because the mechanism of this alleged injury reported by the Claimant was not witnessed and there were some issues with the timing of the injury, as well as the timing of the reporting of the injury to Employer, the credibility of the Claimant is a crucial component of this claim. The Claimant's credibility is first questioned due to the inconsistencies between his recollection of multiple events over a several month period as compared to reports and testimony of the other fact witnesses and the documents in evidence. The totality of the evidence does not support that the Claimant was injured on December 15, 2012 as alleged.

The Claimant testified that he was first injured while working for Employer on December 15, 2012. The Claimant testified that he was assigned to drive a route to and from Salt Lake City and he was on his way back, driving eastbound on I-80. As he was driving back, there was a blizzard and the overhead road signs were recommended reduced speeds, so the Claimant took longer than usual to get back. The Claimant testified that as he was approaching Laramie, there was quite a bit of snow on the road although the storm had passed. At this point he testified that he was back up to driving full speed when he hit a berm of snow in the road that he didn't see. He testified that as he hit the berm at a pretty high rate of speed he felt his seat go blat to the floor,

squeeze down and the shoot back up. The Claimant's head hit the ceiling and he testified that in the process it jammed his neck up too. The Claimant testified that almost immediately he had an immense headache and pain in the top of his head, back of his neck, the upper trapezius areas and his shoulders and he it was hard to turn his head to either side. The Claimant testified that he continued to drive the route but it took longer due to the previous weather and his injury. When he returned to Employer's terminal, he testified that no one was there except for one security guard. The Claimant testified that supervisors are not at the terminal on Saturday afternoons, which is when he returned after his injury, and they are not there on Sundays. So, he reported his injury to his immediate supervisor Marty Kessler by phone on Monday morning since he didn't have a home number to call Mr. Kessler over the weekend. The Claimant testified that when he called he told Mr. Kessler that he injured himself when he hit a bump in the road and he jammed his neck. The Claimant testified that he asked if he could go to the doctor and Mr. Kessler told him he would get back to him. The Claimant testified that did not hear from the Employer until Wednesday when the dispatcher called him to do a run. He testified that was off on Monday and Tuesday and testified that he did not seek medical care on those days on his own because he was having financial issues and did not want to incur doctor bills that he couldn't afford to pay. However, the Claimant later testified that he did work on Monday, December 17th when he drove a local run to Grand Junction. The Claimant testified that he requested medical care again and had a meeting with his supervisor Marty Kessler and the terminal manager Leo Raker on December 20, 2012 and they told the Claimant that if he was going to get medical care he had to go right away. The Claimant's story became more convoluted when he was cross-examined.

The Claimant's testimony is at odds with information that is contained in employment records relating to the injury that the Claimant agrees he signed and dated. However, the Claimant has unlikely explanations for the contradictions between his testimony and the records. With respect to the Employer's First Report of Injury, the Claimant argues that he did not complete all of the information and that someone else wrote it. This is similar to testimony that he later offers with respect to inconsistencies in information he provided on a job application for a subsequent employer. Moreover, the Claimant's alleged injury and the subsequent reporting of the injury happen in the middle of the Claimant receiving multiple disciplinary actions. The Claimant has argued that the Employer was out to get him in a witch hunt because he asked for a larger tractor to accommodate his height and body size. However, there is no evidence to support this and no persuasive evidence that the Employer was not amendable to providing a larger tractor for the Claimant's use as the Employer already had such a tractor available for his use at their property.

Even the Claimant's treating physician, Dr. Bloch noted this was an "odd case" because the Claimant "was originally seen November 27 for evaluation of fit for duty vs. ADA as he is 7 [sic] tall and truck don't accommodate people that tall, he was then complaining of low back pain mostly from having to hunch into the regular sized cab" and "the then returned to check in for UC on 12/20 with added neck pain from having cramping into the cabs that also cause head to rub on top of cab" and "then he

presented 12/21 for a specific injury that occurred on December 20th when he says he was driving the speed limit in his truck…he apparently specifically hit his head on the top of the cab while driving en route back from SLC and is now having said complaints." Dr. Bloch assessed the Claimant with cervical strain with subjective radiculopathy, subjective hip pain, subjective thoracic pain and PMH lumbar injury with IR and PWR. Dr. Bloch noted that he reviewed the Claimant's job functions and he did not find restrictions to activity necessary. He did note that a larger truck would be a reasonable accommodation for the Claimant and the Claimant was returned to regular duty. Dr. Bloch considered an MRI but noted that he did not see a "strong indication" due to a physical examination that was "more of an arthritic exam" and the "lack of objective neuritis" along with a "questionable history of actual traumatic injury."

Then, after the claim was contested, the Claimant testified that he did not seek any medical care with his own providers related to the December 15, 2012 incident. Dr. Lawrence Lesnak, who had performed an evaluation of the Claimant on March 25, 2014, testified that there were no objective findings with regard to the December 2012 alleged incident. He specifically opined that there was no medical evidence that the Claimant sustained any type of trauma to his neck in December 2012. He later clarified: "What I'm saying is whatever happened [in December 2012], even if it did happen, it did not leave any signs of trauma or abnormalities [or] hazards out of that potential incident."

In considering the totality of the evidence presented, the ALJ credits Dr. Lesnak's opinions along with the supporting medical records and determines that the Claimant has not established that it is more likely than not that he sustained a compensable injury in December 2012 that resulted in the need for medical treatment. The ALJ finds that the objective medical evidence does not support that an injury occurred on December 15 or December 20, 2012. Additionally, the timing of the reporting of this injury is suspect based on the employment documents in evidence. Moreover, there is considerable inconsistency related to the Claimant's testimony, statements and documents in evidence and the Claimant's actions during the time frame from December 15, 2012 to December 21, 2012. Overall, the Claimant's testimony is not found to be credible in the face of more credible and reliable evidence that was presented in this case with respect to the allegations of a December 15, 2012 injury.

In the alternative, if there was any injury, the December 2012 incident did not result in the need for permanent impairment or medical care. As noted above, the Claimant was released to MMI with no permanent impairment on January 16, 2013, after just three evaluations. Any effects of the alleged incident were resolved as of that date. The ALJ determines that the Claimant has failed to establish that the medical care rendered in December 2012 and early January 2013 was reasonable and necessary medical treatment related to a compensable injury.

The Claimant has failed to meet his burden of proving that he suffered an injury while performing services arising out of and in the course of his employment on December 15, 2012.

January 10, 2013 Injury

The causal relationship involving employment risks is generally intuitive and obvious and such risks are universally considered to "arise out of" employment and are compensable under the Act. The second category, personal risks, such as pre-existing idiopathic conditions unrelated to the employment, are typically found not to arise out of the employment and are generally not compensable, unless an exception to the rule applies. The final category is neutral risks, such as unexplained falls. Under *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014), the Supreme Court held that the "but for" test applies to these neutral risks. In such a case, an injury that arises from a neutral risk will be found to "arise out of" employment and be compensable if it would not have occurred but for the fact that the conditions and obligations of the employment placed a claimant in the position where he or she was injured.

If the precipitating cause of a fall at work is in the second category of risks, such as a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *Finn v. Industrial Commission*, supra; *Irwin v. Industrial Com'n*, 695 P.2d 763 (Colo. App. 1984); *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (I.C.A.O. July 29, 1999). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" such as that generally encountered outside the work place. *Ramsdell v. Horn*, supra. Only if the precipitating cause of a fall or misstep at work is unexplained, and thus neutral, would the injury be compensable under the *City of Brighton* analysis without the existence of a special hazard.

Here, there is sufficient evidence to establish that the Claimant's syncopal episode on January 10, 2013 was due to his dehydration. Therefore, the event of January 10, 2013 was not an unexplained fall or neutral risk. Moreover, he was dehydrated as he arrived at work, not at the end of the shift. So, his work duties were not a contributing factor in his dehydration. Because this falls under the category of personal risk, it would generally not be compensable unless a special hazard of employment combined with the personal risk to contribute to the injury sustained by the Claimant.

The Claimant testified that he reported to work on January 9, 2013 at approximately 11:30pm but that he suffered an injury as he was in the process of reporting. The Claimant testified that he was taking some essential items from his personal vehicle which was in the parking lot next to where the tractors are parked. The Claimant testified that he tripped and fell and hit his head on some steps and landed to the side of the steps in the dirt. The Claimant offered photographs which were entered

into evidence as Exhibits 19, 20 and 21 to depict the stairs and the area where he testified he fell. As the Claimant was carrying items from his vehicle to the tractor he would be driving, he testified that he recalled feeling dizzy and lightheaded and as he felt his legs become weak he stumbled and hit one of the steps and fell forward. He testified that because he was carrying things, he didn't brace and he recalls falling face down in the dirt immediately to the left of the steps. After this, the Claimant testified, he blacked out and does not have recollection after going unconscious until he woke up in the emergency room. He specifically testified that he does not recall the ambulance ride to the hospital.

Mr. Mark W. Passamaneck, a professional engineer working primarily in forensic engineering and analysis for twenty years, testified as an expert in the area of forensic engineering. Mr. Passamaneck was asked to comment on the location of the Claimant's body, found to the left of the stairs as indicated in witness statements and testimony in relation to the Claimant's testimony that he tripped as he was walking up the stairs. Mr. Passamanek opined that the Claimant's testimony does not make sense from a forensic engineering perspective because if the Claimant was walking up the stairs and he tripped and fell, he would have fallen onto the stairs. If the Claimant had attempted to guard against the fall, the Claimant's upper body would be further off the axis of the stairs in comparison to his feet but a drawing prepared by Jason Gilbert regarding the Claimant's body position in relation to the stairs shows the upper body closer to the stairs and the feet further away. Mr. Passamaneck also noted that the medical information and statements that he read indicate that the Claimant did not suffer cuts or abrasions consistent with falling on cement stairs. Mr. Passamaneck testified that there was nothing unusual in the area where the Claimant was reported to be found unconscious that would have caused a fall, it was just a gently sloping dirt hill. On cross-examination, Mr. Passamaneck conceded that he did not know if there had been snow or ice on the stairs on the night when the Claimant was found unconscious. However, several other fact witnesses testified that there was not snow or ice in that area.

There was persuasive and credible testimony from other witnesses as to the Claimant's unusual behavior on the night of January 9th into the early morning of January 10th. Mr. Jason Youmans testified that the Claimant complained about not being able to find a particular truck that was right out front parked along the side of the building they were in. Mr. Youmans testified that while he was speaking with the Claimant , he was concerned about the Claimant's behavior since he wasn't responding to anything Mr. Youmans had said and he didn't look normal; he looked pale and like he was getting sick. Shortly after the encounter with Mr. Youmans, the Claimant was found face down in the dirt on the left side of stairs that led to the employee's parking lot.

Northglenn Ambulance responded to the Employer's location at approximately 1:00AM on January 10, 2013 noting that the Claimant was found lying prone on the ground and there was no obvious cause of the fall. As the Claimant was rolled onto a back board, it is noted that the Claimant began to arouse and could not remember falling. The Claimant was dizzy and nauseated. The note indicates that the Claimant

complained of pain in his cervical spine. He was loaded into the ambulance and transported to North Suburban Medical Center without complication. The Claimant arrived and was admitted to HealthOne North Suburban Medical Center on January 10, 2013 at approximately 1:301 AM. The Claimant reported that he fell at approximately 12:00 am to 12:30 am in the morning at work. Per the EMS, the incident more likely occurred at around 1:00 am. Dr. Alexandra Villacres, the emergency room physician noted that the Claimant had missed a step and then fell face forward towards his left side. In addition to the syncopal episode, the Claimant complained of left-sided pain in his head and trapezius, neck and ribs. The Claimant was evaluated for possible etiologies for his syncopal episode and it was noted that he was significantly dehydrated with an elevated creatinine level. An MRI of the brain showed no abnormalities. A formal sleep study was recommended to evaluate for sleep apnea after a nocturnal pulse oximetry study performed on the Claimant was noted to be abnormal. A CT scan of the Claimant's cervical spine was positive for degenerative changes only and no acute fracture or subluxation was noted.

On March 25, 2014, the Claimant saw Dr. Lawrence Lesnak for an IME related to alleged injuries on 12/15/2012 and 01/10/2013 and Dr. Lesnak prepared a written report. Dr. Lesnak also credibly testified that the Claimant's syncopal episode arose due to underlying dehydration. He testified that blood testing completed on January 10, 2013 definitively established that the claimant had elevated blood urea nitrogen ("BUN") and creatinine levels. Dr. Lesnak indicated that these levels measured kidney function and dehydration. He testified that the claimant had a BUN level of 25 and a creatinine level of 1.8. Normal ranges for those data points are 10-12 for BUN and 0.8-1.2 for creatinine. He testified that this objective testing met the medical criteria for a diagnosis of dehydration. Dr. Lesnak testified that the Claimant's January 10, 2013 event was not an unexplained incident, specifically, "he had a syncope, he passed out. The – he's dehydrated, dehydration causes syncope."

Crediting the medical records from North Suburban Medical Center and the testimony of Dr. Lesnak, the ALJ found that Claimant's syncopal event on January 10, 2012 was caused by dehydration.

Alternatively, the Claimant argues that his sycnopal episode on January 10, 2013 was related to the injury he alleges occurred on December 15, 2012. Dr. Lesnak credibly testified that neither the alleged December 2012 incident nor any medication prescribed during the evaluation of that incident caused the January 10, 2013 syncopal event. Specifically, Dr. Lesnak testified that, even assuming that an incident occurred in December 2012 and that incident caused a head injury, that incident did not cause the Claimant to have a syncopal event on January 10, 2013. First, Dr. Lesnak indicated that there was no indication that the Claimant had any symptoms consistent with a closed head injury. However, even assuming there was evidence of a closed head injury arising out of the December 2012 event, Dr. Lesnak testified that the symptoms would have been abating, not worsening on January 10, 2013. "So you're not going to have effects of a – any type of closed head injury blatant like that happen all of a sudden. In fact closed head injuries by definition … the worse is the very first couple

hours of the first day, it doesn't get worse later on it gets better." Thus, it is more likely than not that there was no relation between any event occurring on December 15, 2012 and the event of January 10, 2013, other than a temporal relationship Further, Dr. Lesnak testified that the medication prescribed to the claimant on January 8, 2013 – Diclofenac and Tizanidine – had no effect on the claimant's syncopal event or the dehydration that caused it. Dr. Lesnak indicated that Tizanidine is a "non-benzodiazepine muscle relaxant" with absolutely no effect on the kidneys and no real effect on elevation of BUN or creatinine levels. Consequently, Dr. Lesnak opined that the use of Tizanidine did not cause the claimant's dehydration or syncope. Dr. Lesnak further testified that while Diclofenac could cause a bump in creatinine (under rare circumstances where the individual was taking the drug for long period of time), it could not cause elevated BUN levels. As a result, Dr. Lesnak opined that the use of Diclofenac did not cause the claimant's dehydration or syncope. (Hearing Tr., p. 247).

The Claimant failed to present persuasive evidence that his syncopal event was caused by an alleged prior closed head injury or medications from that injury. The ALJ credits the medical records and opinion of Dr. Lesnak and finds that the Claimant did not establish that it is more likely than not that the January 10, 2013 syncope was caused by the earlier alleged incident or medication prescribed after that incident.

Based on the totality of the testimony and evidence, the Claimant's injury was more likely than not caused by dehydration. Further, there was not sufficient evidence to prove that any preexisting condition combined with a special hazard unique to his work situation. Thus, the Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury arising out of and during the course of employment with the Employer on January 10, 2013. The Claimant's injury was not unexplained, nor was there a special hazard that combined with his personal risk. As such, there is no persuasive evidence to support a finding of causation.

Remaining Issues

The Claimant's alleged injuries of December 15, 2012 and January 10, 2013 are not found to be compensable. As such, the remaining are moot.

ORDER

It is therefore ordered that:

1. The Claimant has failed to sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury on either December 15, 2012 or January 10, 2013.

2. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATED: January 28, 2015

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

ISSUES

Whether the surgery recommended by Dr. Philip Marin on July 14, 2014 for operative exploration of the claimant's dorsal fifth CMC region for debridement of the joint as necessary, synovectomy, and possible neuroma excision is reasonable and necessary medical treatment to cure or relieve the claimant from the effects of his admitted work injury.

FINDINGS OF FACT

1. The claimant is a fifty-five year-old man who works for the respondent-employer as a mechanic.

2. On January 8, 2013, the claimant was bitten by a dog in the course and scope of his employment duties. The claimant sustained puncture wounds on his right hand.

3. The claimant initially underwent medical treatment at the emergency department of Parkview Medical Center. X-rays of his right hand were negative for a fracture. The claimant's wound was sutured and he was released.

4. The claimant followed up with Dr. Philip Marin on January 16, 2013. Dr. Marin recommended surgical repair of both extensor tendons. Dr. Marin performed his first surgery on the claimant on January 17, 2013. The surgery consisted of excision of the wound, exploration with repair of tendon injuries to the small finger and extensor tendon.

5. In March 2013, the claimant complained of sensitivity over the wound site. Dr. Marin opined that the extreme sensitivities the claimant was having should resolve with time. If the sensitivity did not resolve, he opined that the claimant may have a small neuroma that may require surgery.

6. The claimant was referred to, and was examined by Dr. Kavi Sachar on May 1, 2013. The claimant presented with a complaint of right small finger numbness and painful nodules in the right palm. Dr. Sachar's diagnosis was pain and numbness in the right hand after extensor tendon repair and dog bite. He noted that the claimant had

significant pain and numbness along the dorsum of the hand with some tenderness along the volar portion of the hand with some small nodules. Dr. Sachar noted “I don’t know that this is something that we can make better. It may have to get better on its own.”) Dr. Sachar also opined that “at this point I don’t see any indications for further surgical intervention.”

7. Despite the recommendations by hand surgeon, Dr. Sachar, the claimant underwent two additional surgeries. The claimant’s condition has continued to get worse.

8. Dr. Marin performed an excision of scar tissue and neuroma from the claimant’s right wrist, and repair of the dorsal sensory branch of the ulnar nerve on January 2, 2014. Dr. Marin’s operative notes state there was a neuroma and inflammation on the dorsal sensory branch of the ulnar nerve. The neuroma appeared to be involving the entire width of the nerve. The neuroma was excised and the dorsal sensory branch was repaired.

9. The clamant followed up with Dr. Marin on January 23, 2014 and appeared to be healing well in the dorsal hand. However, he still had complaints of numbness involving the ulnar nerve distribution and as a result Dr. Marin requested a third surgery.

10. Dr. Marin performed an ulnar nerve decompression on February 13, 2014. The operative report provides; “as the nerve was unroofed it was significantly compressed in the Guyon canal. Once full decompression was performed, there was no obvious injury to the ulnar nerve noted.” Dr. Marin noted during the claimant’s first post-op visit that the ulnar nerve was starting to wake up again. The claimant was experiencing pain in the radial tunnel. Dr. Marin also commented that the claimant continued to have pain at the CMC joint of the fifth digit.

11. When the claimant followed up with Dr. Marin on July 14, 2014, the claimant had overall good sensation in the ulnar nerve area. He did complain that he had pain in the fifth CMC region and over the extensor mechanism in that region.

12. As a result of the claimant’s continuing pain in his hand, Dr. Marin recommended a fourth surgery. Dr. Marin recommended “operative exploration of the dorsal fifth CMC region for debridement of the joint as necessary, synovectomy, and possible neuroma excision as it is exquisitely tender.”

13. Dr. Wallace Larson provided an opinion regarding this request for surgery. At the time of Dr. Marin’s request to perform a fourth surgery on the claimant, Dr.

Larson was familiar with the claimant's condition. Dr. Larson had examined the claimant on June 17, 2014, less than a month before Dr. Marin's request for a fourth surgery. Dr. Larson noted that the back of the claimant's right hand was still very sensitive. The claimant reported numbness and pain in the distribution of the cutaneous sensory branch of the ulnar nerve.

14. On August 11, 2014, Dr. Larson issued a report that concluded any additional surgeries would be unlikely to help the claimant's pain and limitations. Dr. Larson also stated that there was no indication that a specific correctable condition had been identified. Dr. Larson also opined that the recommended surgery would not be beneficial to relieving or curing the effects of the industrial injury.

15. Dr. Larson also explained at hearing that Dr. Marin previously went in and removed the neuroma (a painful stump of the nerve) which had formed at the sensory part of the ulnar nerve, as a result of the original injury. The formation of a neuroma is the result of cutting any nerve. When a nerve is cut the tissue in the nerve try to grow out to find the other end of the nerve. When there is nothing connecting the nerve, the nerve fibers form a bit of a lump, similar to what scar tissue would be. These neuromas can be very sensitive. Although the claimant does have a painful neuroma on the end of his ulnar nerve, Dr. Larson opined that the likelihood of Dr. Marin being able to again remove the neuroma without further damaging the ulnar nerve is very slim. Rather, he opined, the requested surgery poses the risk of a new more painful neuroma forming at the end of the ulnar nerve, as well as the risk of further damaging the ulnar nerve itself.

16. Dr. Larson agreed that upon examination it appears claimant has a painful neuroma on his hand. However, he opines that going in and removing a neuroma for the second time is very unlikely to improve the situation.

17. In addition, there is no indication for this surgery, such as an infection or inflammation in the joint that has been identified. Dr. Larson opines that this recommended surgery is very unlikely to improve the claimant's situation. It is mere conjecture by Dr. Marin that there is anything in that joint that can be made better. This surgery carries a high risk of making the claimant's joint more painful. Moreover, Dr. Marin has not even identified whether or not the 5th CMC joint is the source of the pain. Attempting to operate on this joint also poses a risk of damaging the nerve further. Even if Dr. Marin's goal is not to do anything to the nerve, it will be very difficult to protect the nerve from additional injury while attempting to get into the 5th CMC joint to take a look inside.

18. It is clear that claimant has some type of pain problems. However, any operation in that area tends to trigger some very aggressive pain responses and will make the pain worse.

19. Dr. Larson provided several reasons why the requested surgery is likely to increase claimant's pain and dysfunction and will not relieve the effects of claimant's hand injury. Dr. Marin has already performed a neuroma excision on January 2, 2014. This fourth requested surgery will not result in the resolution of his symptoms and there is a significant risk that this may increase his symptoms. Dr. Larson opined that any additional operation will cause more scar tissue and more irritation to his nerves. This will result in reduced motion of the tendons and increased stiffness and pain.

20. Based on Dr. Larson's report, the respondent-insurer denied the requested surgery by filing an Application for Hearing.

21. Based upon a totality of the medical evidence, the ALJ finds that the opinions of Dr. Larson concerning the reasonableness and necessity of the proposed surgery are more credible and persuasive than medical opinions to the contrary.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that the proposed surgery is reasonable and necessary to cure or relieve the claimant from the effects of his industrial injury.

CONCLUSIONS OF LAW

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. (2014) A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. (2014) A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S. (2014)

2. The respondents must provide medical benefits to cure or relieve the effects of the industrial injury. It is well established that a General Admission of Liability for medical benefits does not make the respondents liable for all of the claimant's subsequent medical treatment. *Rakestraw v. Amer. Med. Response,* W.C. No. 4-384-349 (I.C.A.O. Oct. 3, 2005). To the contrary, the respondents retain the right to dispute

liability for specific medical treatment on the grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. Ct. App. 1997). This law acknowledges that even though an admission is filed, the claimant bears the burden of proving the right to specific medical benefits and the mere admission that an injury occurred and treatment is needed cannot be construed as an admission that all post-injury medical treatment is caused by the injury. *HLJ Mgt. Group Inc. v. Kim*. 804 P.2d 250 (Colo. Ct. App. 1990).

3. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker,* W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000)

4. It is solely within the ALJ's discretionary province to weigh the evidence and determine the credibility of expert witnesses. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

5. Dr. Marin's request for a fourth surgery consists of operative exploration of the dorsal fifth CMC region for debridement of the joint, a synovectomy, and possible neuroma excision.

6. Dr. Marin noted in his reports over the past year that he excised the neuroma, he decompressed the ulnar nerve, the ulnar nerve was without injury, the extensor tendons were in good condition, and the dorsal sensory branch was repaired.

7. Dr. Larson agreed that upon examination it appears claimant has a painful neuroma on his hand. However, he opines that going in and removing a neuroma for the second time is very unlikely to improve the situation.

8. In addition, there is no indication for this surgery, such as an infection or inflammation in the joint that has been identified. Dr. Larson opines that this recommended surgery is very unlikely to improve the claimant's situation. It is mere conjecture by Dr. Marin that there is anything in that joint that can be made better. This surgery carries a high risk of making the claimant's joint more painful. Moreover, Dr. Marin has not even identified whether or not the 5th CMC joint is the source of the pain. Attempting to operate on this joint also poses a risk of damaging the nerve further. Even

if Dr. Marin's goal is not to do anything to the nerve, it will be very difficult to protect the nerve from additional injury while attempting to get into the 5th CMC joint to take a look inside.

9. It is clear that claimant has some type of pain problems. However, any operation in that area tends to trigger some very aggressive pain responses and will make the pain worse.

10. Dr. Larson provided several reasons why the requested surgery is likely to increase claimant's pain and dysfunction and will not relieve the effects of claimant's hand injury. Dr. Marin has already performed a neuroma excision on January 2, 2014. This fourth requested surgery will not result in the resolution of his symptoms and there is a significant risk that this may increase his symptoms. Dr. Larson opined that any additional operation will cause more scar tissue and more irritation to his nerves. This will result in reduced motion of the tendons and increased stiffness and pain.

11. The claimant has not presented sufficient evidence that the requested procedures are reasonable and necessary or will help to relieve or cure the effects of the work injury.

12. The claimant has already undergone three surgeries by Dr. Marin. Another surgery, which poses a high risk of increase the claimant's pain and suffering is not reasonable or necessary medical treatment. Therefore, the respondents are not liable for this surgery request.

13. The ALJ concludes that the medical opinions of Dr. Larson are more credible and persuasive than medical opinions to the contrary.

14. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the proposed surgery is reasonable and necessary to cure or relieve the claimant from the effects of his industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for the recommended surgery is denied and dismissed.

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

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

DATE: January 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues addressed in this decision involve Claimant's entitlement to disfigurement benefits and maintenance medical treatment.

FINDINGS OF FACT

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

1. Claimant works for Respondent-Employer as a safety security officer on a psychiatric unit housing both civilly and criminally committed patients.

2. On March 8, 2013 Claimant was involved in a team restraint of a psychotic patient who had become aggressive on the unit. In the process of neutralizing the patient, Claimant injured his neck and right shoulder, resulting in pain and dysfunction.

3. On April 4, 2013 an MRI of the right shoulder was obtained, which demonstrated a "3 centimeter full thickness rotator cuff tear with tendinosis involving the infraspinatus and subscapularis components and a probable small partial tear of the distal subscapularis tendon and overlying rotator interval.

4. Claimant underwent right shoulder arthroscopic rotator cuff repair surgery performed by Dr. David Weinstein in June 2013 followed by post surgical physical therapy (PT).

5. Claimant reported substantial relief of his shoulder pain and improved range of motion following surgery and PT. He quickly transitioned to a home exercise program (HEP) for his shoulder. Nonetheless, Claimant's neck pain, particularly pain localized to the right lateral cervical region with radiation to the parascapular area persisted. Consequently, an MRI of the cervical spine was obtained on December 16, 2013. This imaging revealed "chronic C5-6 spondylosis, right-sided uncinate arthropathy and spurring with presumed disc herniation causing severe stenosis of the right neural foramen and right lateral recess and impingement of the C6 nerve.

6. Claimant was referred to Accelerated Recovery Specialists where he undertook treatment with Dr. Michael Sparr and Dr. Stephen M. Scheper for his neck complaints.

7. On December 18, 2013 Dr. Sparr opined that Claimant's ongoing neck pain

appeared to stem from a right C6 radiculopathy. Consequently, a cervical epidural steroid injection (ESI) was scheduled.

8. On February 20, 2014, Dr. Scheper administered a cervical facet joint injection at the right C2-3 and C3-4 levels.

9. On March 5, 2014 Claimant followed-up with Dr. Sparr. During this encounter, Claimant informed Dr. Sparr that he had realized no benefit from the injection provided by Dr. Scheper. He reported continued burning pain in the right lateral cervical region radiating into the scapula and intermittently into the right radial arm, thumb and index finger. Dr. Sparr scheduled an electrodiagnostic (EMG) study and recommended a second epidural steroid injection using a transforminal approach at C5-6.

10. Claimant's EMG completed March 17, 2014 was interpreted by Dr. Sparr as being mildly abnormal with "borderline to mild median mononeuropathy" at the level of the carpal tunnel, which was determined to be non-work related. Claimant's right transforaminal ESI at C5-6 was administered March 27, 2014. By report of Dr. Daniel Olson, the designated provider for this injury, Claimant had a "good, but very short response to the 2nd ESI."

11. In conjunction with his cervical spine treatment through Dr. Sparr, Claimant was referred for additional physical therapy for modalities, massage therapy (MT) and dry needling. Dr. Sparr also provided trigger point injections and Claimant received chiropractic care.

12. On May 9, 2014, Dr. Olson stopped Claimant's dry needling as it had not "provided any significant benefit and it is uncomfortable for [Claimant]." Dr. Olson also requested a surgical opinion concerning Claimant's neck. Claimant was referred to Dr. James Sceats.

13. On May 14, 2014 Claimant reported to Dr. Sparr that dry needling, massage therapy and trigger point injections combined with massage had not provided lasting benefit. Dr. Sparr indicated that Claimant continued to experience "persistent cervicothoracic pain which [had] not responded to a multiplicity of treatments including facet injections, epidural steroid injections, trigger point injections, massage therapy, physical therapy, chiropractic, and dry needling. Dr. Sparr had no further ongoing treatment suggestions and nothing left to offer.

14. On May 22, 2014, Claimant was evaluated by Dr. Sceats who assessed "neck pain secondary to degenerative spondylosis and myofascial neck pain with asymptomatic right C5-6 foraminal stenosis. Dr. Sceats did not feel that Claimant would benefit from surgical intervention and noted that "continued physical therapy may improve [Claimant's] cervical range of motion. No ongoing treatment recommendations were made.

15. Claimant attended an appointment with Dr. Olson on July 14, 2014 at which

time he reported constant aching pain in the neck made worse by sitting and standing. Claimant reported that his pain "improved with pain medicine" and that he was using "Aleve which usually gets him through the day."

16. Dr. Olson placed Claimant at MMI on August 12, 2014 with impairment. Concerning ongoing medical treatment, Dr. Olson noted as follows: "None anticipated. Respondents have denied liability for future reasonable, necessary and related medical benefits.

17. Claimant testified that he is working full duty, 3 days/week, 13 ½ hours/day. Claimant testified that he continues to have pain, headaches and muscle spasms on a daily basis. According to Claimant he gets muscle spasms originating on the right side of his neck upwards of six (6) times a day. He has generalized muscle tightness in the area of his neck and shoulder and experiences headaches that travel from the base of his skull upwards over his head.

18. Based upon complete and careful review of the medical records, the ALJ finds support for Claimant's testimony concerning his ongoing symptoms and spasms. The records outline tenderness and myofascial tightness in the right parascapular musculature including the trapezius, levator scapula and the rhomboids. There is reference in the medical record to Dr. Sparr wanting Claimant to proceed with massage therapy "again" to address Claimant's "scapular-thoracic spasms." The ALJ finds, from the evidentiary record that more probably than not, Claimant's ongoing symptoms/spasms are emanating from his neck.

19. Claimant testified that approximately eight (8) hours into his shift he becomes increasingly achy and sore. Claimant testified that he has been prescribed Flexeril for his muscle spasms in the past. He found it helpful in loosening the muscle tension associated with his spasms. Claimant also testified that he has been prescribed Vicodan which was useful in reducing the pain associated with his neck. The ALJ is unable to find any reference to Claimants need for or use of Vicodan in the records submitted as evidence in the case. Claimant wants the ability to obtain ongoing medications under his workers compensation claim to help relieve him of the ongoing effects/symptoms associated with his work-related injuries.

20. Claimant's medical records reveal that over the course of his treatment he has been prescribed medications to address the problems attendant with his injuries. A listing of Claimant's medications as provided for by Dr. Olson at the time Claimant was placed at MMI includes the following: Atenolol, Neurontin, Norvasc, Lorazepam, Robaxin, Flexeril, Prozac, Trazodone, and Motrin. On May 14, 2014 at the time Claimant saw Dr. Sparr for the last time, Dr. Sparr referenced the following regarding Claimant's use of medication: "He takes Neurontin 330 mg 3 times per day, Flexeril at night, ibuprofen as needed, trazodone 50 mg at night, and Prozac during the day." The ALJ finds Claimant's need for medication reasonably necessary to relieve him of the effects of the injury. Further, the ALJ finds Claimant's need for medication related to his

industrial injury. Without ongoing medication, the ALJ finds that Claimant's condition will likely deteriorate.

21. The ALJ credits the medical records and Claimant's testimony to find that Claimant is in need of maintenance medical treatment, including prescription medications.

22. Claimant has a visible disfigurement to the body consisting of four (4) lightly pigmented, 1/2 inch long by 1/16 inch wide arthroscopic surgical scars, in addition to moderate atrophy of the right shoulder girdle as a consequence of his right shoulder surgery.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

C. A workers' compensation case is decided on its merits. *Section 8-43-201*. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Maintenance Medical Benefits

D. Claimant is entitled to ongoing medical benefits after MMI if he presents substantial evidence that future medical treatment will be reasonably necessary to relieve the claimant of the effects of the injury or prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). While Claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment, Claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). Here, the ALJ concludes that Claimant has met his burden to establish his entitlement to maintenance medical treatment. The record evidence is replete with references to Claimant's limited response to active treatment designed to improve his condition. As a result, Claimant continues to suffer from ongoing pain and spasms which are relieved by the use of medication. Without ongoing treatment/medications Claimant's present condition will likely deteriorate further. Consequently, Claimant has proven, by a preponderance of the evidence that there is a probable need for treatment post MMI, which entitles him to an order for ongoing medical benefits.

E. An award of *Grover* medical benefits should be a "general order" awarding ongoing medical benefits. *Stollmeyer v. Industrial Claim Appeals Office, supra.* Even with a general award of maintenance medical benefits, however, the respondent still retains the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity). Indeed, Claimant has requested a general order for maintenance medical benefits subject to Respondent-Employer's right to dispute specific care.

F. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has surgical scarring and atrophy of the shoulder girdle which alters the natural appearance of his right shoulder. The ALJ concludes Claimant's visible scarring and atrophy constitutes a disfigurement provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant is entitled to ongoing medical treatment reasonably necessary and related to his March 8, 2013 industrial injury to maintain MMI.

2. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's March 8, 2013 work injury and/or whether any recommended treatment is reasonable and necessary.

3. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Respondent-Employer shall pay Claimant $1,800.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

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

DATED: January 29, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Respondent violated W.C.R.P. Rule 16-9(B) by failing to deny Peter Millett, M.D.'s June 11, 2014 request for authorization for left shoulder surgery or apply for a hearing within seven business days of June 11, 2014.

2. Whether Claimant has demonstrated by a preponderance of the evidence that medical treatment in the form of left shoulder surgery as recommended by Peter Millett, M.D. is reasonable, necessary and related to her March 10, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 66 year old female who works for Employer as a Ski Instructor. On March 10, 2013 Claimant was struck by another skier and sustained admitted industrial injuries.

2. During March 2013 Claimant received medical treatment from Nurse Practitioner Lucia London at Vail Sports Medicine Physical therapy. NP London diagnosed Claimant with a closed head injury, left neck pain and left shoulder pain. She recommended medications and physical therapy. NP London also assigned work restrictions that included no skiing.

3. On April 22, 2013 Claimant visited NP London and reported "quite a bit of shoulder pain." Claimant remarked that she felt a clicking in her left shoulder with certain arm movements and her left shoulder pain wakes her up at night. Claimant also commented that the left shoulder pain radiates down under her left arm and up to the left side of her neck. NP London noted that Claimant still has a bump on the left side of her left upper arm and tenderness over her left biceps. NP London ordered an MRI of Claimant's left shoulder and referred her to Orthopedic Surgeon Peter Millett, M.D.

4. An April 25, 2013 MRI of Claimant's left shoulder revealed moderate to severe glenohumeral osteoarthritis with extensive high-grade and full thickness chondral loss, degenerative tearing and fraying of the glenoid labrum, a small partial-thickness tear of the supraspinatus and minimal medial subluxation of the biceps tendon at the bicipital groove.

5. On May 3, 2013 Claimant visited Dr. Millett for an examination. He diagnosed Claimant with left shoulder bicipital tendinitis, osteoarthritis and a partial supraspinatus tear. Dr. Millett injected the glenohumeral space in Claimant's left shoulder. He recommended continued physical therapy and medications.

6. On June 21, 2013 NP London noted that Claimant was gaining strength in her left upper extremity and increasing her range of motion. Claimant reported the injection she received from Dr. Millett provided 3-4 weeks of relief but then her pain returned. Claimant also noted popping in her left shoulder. NP London recommended six weeks of work conditioning and continued medications. She also recommended continued work restrictions.

7. On July 23, 2013 Claimant returned to Dr. Millett. She stated that overall her shoulder was doing much better. Physical examination revealed good grip strength along with full range of motion. Although the report references "right" shoulder it is undisputed that the injury is to the left shoulder. Dr. Millett assessed Claimant with osteoarthritis causing generalized joint pain.

8. On August 1, 2013 Claimant presented to Susan Lan, M.D. at Vail Valley Medical Center/Occupational Health (VVMC). Claimant reported that she was "much improved since her initial injury." Dr. Lan noted, "she was seen by Dr. Millett for the shoulder, who recommended additional physical therapy and follow-up only as needed, no surgical indication." Additionally, Dr. Lan remarked that Claimant had stated she is "significantly improved" but not back to baseline.

9. On October 1, 2013 Claimant returned to Dr. Millett for an evaluation. Claimant stated to Dr. Millett that "she has not had any improvements in her symptoms of her left shoulder. . ." Dr. Millett advised Claimant that the osteoarthritis in her left shoulder constituted a chronic condition that was "possibly" exacerbated by the injury in March. He recommended continued conservative treatment for the left shoulder but advised of the possibility of an arthroscopic procedure if she did not respond to the treatment. However, Dr. Millett remarked that a total shoulder arthroplasty would be a "definitive" treatment for Claimant's osteoarthritis.

10. On October 29, 2013 Lawrence Lesnak, M.D. conducted a records review of Claimant's claim. Dr. Lesnak determined that Claimant's March 10, 2013 industrial injury "did not result in any type of anatomic changes to any of her bones, joints, spine, nerves, etc." He remarked that Claimant's "previous and/or current left elbow complaints appear to be completely unrelated" to the March 10, 2013 industrial incident. Dr. Lesnak added that "it appears [Claimant] has essentially reached a state of maximum medical improvement." He commented that Claimant also did not require any specific work restrictions. Finally, Dr. Lesnak noted that Claimant did not have any permanent impairment.

11. On November 21, 2013 Claimant returned to Dr. Lan for an examination. Claimant stated that she had been walking uphill and began to experience increased pain in her left shoulder. Further, Claimant advised that she had undergone an evaluation in Denver with regard to thoracic outlet syndrome but did not have the condition. Dr. Lan observed that Claimant's left shoulder strain was "improving nicely."

12. On January 9, 2014 Claimant visited Dr. Lan for an examination. Claimant had returned to work as a ski instructor for up to three hours per day and "has done well

with this." She reported being able to do more things with her left shoulder, including pushing herself on her skis to traverse a hill, "which previously would have caused significant pain in the left shoulder." Physical examination revealed good range of motion with improved strength. Dr. Lan again noted that Claimant's left shoulder strain was improving.

13. On February 27, 2014 Claimant returned to Dr. Lan. She noted that Claimant was doing better but continued to have discomfort near her left elbow. Claimant completed a pain diagram and noted left shoulder pain, left upper arm pain, lower arm pain as well as pain in her upper back and neck area. Dr. Lan noted that Claimant continued to have pain with range of motion and weakness extending down the medial and posterior aspects of her left arm to the elbow. Dr. Lan recommended continued physical therapy, acupuncture, medications and six sessions of psychotherapy. She also recommended additional blood work regarding Claimant's chronic pain.

14. On March 14, 2014 Claimant presented to Dr. Millett. Claimant reported a deep aching left shoulder discomfort. Dr. Millett noted Claimant's examination was consistent with progressive glenohumeral arthritis with bicep tendonitis of her left shoulder. He discussed a potential arthroscopic surgery as opposed to a total shoulder replacement for Claimant. Dr. Millett did not affirmatively recommend a surgery but instead referred Claimant for an updated MRI.

15. On May 22, 2014 Claimant returned to Dr. Millett to discuss the MRI results. The MRI revealed grade 4 chondral changes of the glenohumeral joint. Claimant was still "bothered" by left shoulder pain with activities. However, she denied any neurological symptoms in the left upper extremity. Physical examination revealed crepitus with range of motion of the shoulder. Dr. Millett noted he spoke with Claimant regarding continued non-operative treatment versus a CAM procedure versus total shoulder arthroplasty. He advised Claimant that her "ultimate treatment" will be a total arthroplasty but he may be able to "buy her some additional time without an arthroplasty if she consents to the arthroscopy procedure." The medical note on May 22, 2014 does not contain a definitive recommendation with regard to the proposed procedure.

16. On June 11, 2014 Dr. Millett's office, The Steadman Clinic, faxed a request for prior authorization to third-party administrator Liberty Mutual. The fax cover sheet reflects that Dr. Millett requested authorization for an outpatient left shoulder arthroscopy, debridement, manipulation under anesthesia, capsular release, lysis of adhesions, removal of loose bodies, osteoplasty, axillary nerve neurolysis, intraoperative fluoroscopy, subacromial decompression and biceps tenodesis. The request for prior authorization was faxed to telephone number (603) 334-8096. Julie Pavelka, an adjuster at Liberty Mutual who had been handling Claimant's Workers' Compensation claim, testified that the preceding telephone number is the general fax number for the Liberty Mutual office in Irving, Texas. The request for prior authorization included a fax cover sheet that described the requested procedure. In addition, the request for prior authorization included Dr. Millett's note dated March 14, 2014 and an

MRI review note dated March 31, 2014. Finally, the request for prior authorization included the actual MRI report.

17. On June 17, 2014 insurance coordinator for The Steadman Clinic, Melissa Pohlman, emailed Ms. Pavelka and asked, "also wondering where we stand with authorization for surgery for [Claimant]." Ms. Pavelka responded she had not yet received a formal request. Ms. Pohlman advised one was faxed on June 11th and then asked "what a good fax number" would be to forward the request for prior authorization. Ms. Pavelka provided her personal fax number of (603) 334-3836. On June 17, 2014 Ms. Pohlman faxed the request for prior authorization directly to Ms. Pavelka.

18. On June 26, 2014 Orthpedic Surgeon Stephen D. Lindenbaum, M.D. reviewed Dr. Millett's request for prior authorization. Referencing the Colorado Medical Treatment Guidelines, Dr. Lindenbaum concluded that the procedure recommended by Dr. Millett was not medically necessary. He noted that Claimant has advanced degenerative changes in her left shoulder joint with concomitant associated pathology normally found with the degenerative process. Dr. Lindenbaum commented that the likelihood of long term improvement with Claimant's preexisting chronic problems was poor and therefore the request was not indicated. He summarized that "this Claimant has had long standing degenerative changes of the shoulder which present with usual accompanying problems including biceps pathology, cuff tears, decreased motion and loose bodies; the likelihood of lasting improvement from this request is small and most likely the Claimant would require some conservative treatment including intraarticular steroids until total left shoulder arthroplasty is indicated."

19. On June 26, 2014 Ms. Pavelka denied the request for prior authorization. On July 10, 2014 Claimant applied for a hearing seeking reasonably necessary medical benefits in the form of the requested left shoulder surgery. Moreover, Claimant sought penalties pursuant to DOWC Rule 16 for Respondent's failure to timely respond to Dr. Millett's June 11, 2014 surgical request.

20. On July 24, 2014 Claimant underwent the recommended left shoulder surgery through her private insurance.

21. During the period August through October 2014 Claimant continued to visit Drs. Lan and Millett for examinations of her left shoulder. Her shoulder condition continued to improve. On October 30, 2014 Dr. Millett noted that he could not rule out that Claimant's left shoulder condition was caused by her March 10, 2013 industrial injury.

22. On November 5, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Lindenbaum. Upon reviewing Claimant's left shoulder MRI dated April 25, 2013 Dr. Lindenbaum testified that it showed significant arthritis in Claimant's glenohumeral joint. Additionally, the MRI revealed some irregularities to the bicep tendon and labrum. He concluded that Claimant's shoulder suffered from a degenerative condition and not an acute injury. Dr. Lindenbaum testified that the medical records reflected that Claimant had full range of motion of her left shoulder just

one month after her work injury. He explained that for a person of Claimant's age, the condition should be treated symptomatically. "If you need an occasional injection in your shoulder, we can do that. We can give you some home exercises to work on to make sure the shoulder doesn't get stiff, and if need be, even put you on a mild anti-inflammatory." Dr. Lindenbaum summarized that Claimant's degenerative joint symptoms in her left shoulder constituted the natural progression of an underlying condition.

23. Dr. Lindenbaum testified he was familiar with the Colorado Medical Treatment Guidelines regarding the upper extremity and surgical considerations. He noted that arthroscopic surgery may be considered in selective patients with moderate degrees of arthritis. He summarized that "[a]nd this is the area where I was concerned, because this [Claimant] has end-staged arthritis of her shoulder, and in my mind, the procedure she was being recommended - - was being recommended to her was one that might give her some temporary relief, but would not be long lasting and I think was not indicated. And that was the basis for my recommendation that she not have this surgery." Ultimately, Dr. Lindenbaum noted that Claimant's shoulder condition, "was treated, it seemed to be improving, and she was functionally fairly well."

24. Ms. Pavelka testified at the hearing in this matter. She explained that she has routinely dealt with the Steadman Clinic in her capacity as an insurance adjuster for Liberty Mutual. Ms. Pavelka testified that requests for prior authorization are faxed to the Liberty Mutual Utilization Management Department or to her personally. The fax number for the Utilization Management Department is (603) 334-0334. Ms. Pavelka's personal fax number is (603) 334-3836. In fact, her voicemail message contains the same instruction. She recounted that, in her experience working with The Steadman Clinic, she had never before seen a request for prior authorization be faxed to the community line. Ms. Pavelka remarked that faxing to the community line is an incorrect procedure because it is designed for any and all non-pressing matters. She commented that The Steadman Clinic routinely submitted requests for prior authorization to either Utilization Management or directly to the adjuster. For example, Ms. Pavelka noted that on October 8, 2013 The Steadman Clinic faxed a request for prior authorization to the Utilization Review Department in the present claim. She had no explanation as to why The Steadman Clinic chose to utilize the community line for Dr. Millett's prior authorization request.

25. Ms. Pavelka explained that, after Ms. Pohlman requested a "good" fax number on June 17, 2014, she received a request for prior authorization. Ms. Pavelka then obtained a medical review from Dr. Lindenbaum. Upon receipt of Dr. Lindenbaum's opinion that the requested surgical procedure was not reasonable and necessary, Ms. Pavelka filed a denial.

26. The June 11, 2014 fax from The Steadman Clinic did not constitute a completed request for prior authorization. The fax contains a list of the procedures being requested. The second page of the fax is a report from three months earlier, or March 14, 2014, in which Dr. Millett notes a discussion with Claimant regarding conservative treatment versus the potential for surgery. In the report Dr. Millett does not

recommend a surgical procedure but only discusses various potential options. Additionally, Dr. Millett recommended an MRI and the request for prior authorization contains the subsequent MRI report. Finally, the request for prior authorization includes an "MRI review" drafted by Dr. Millett. In the report, he discusses the MRI findings. Regarding the left shoulder, Dr. Millett explained, "results were conveyed to [Claimant] at length and again she is scheduled to have her knee operated on this coming Thursday, we will address the shoulder once her workers' compensation gets settled. This was conveyed to [Claimant] and we will continue to discuss further a plan with the shoulder." However, the note does not outline the plan. More specifically, Dr. Millett failed to explain the medical necessity of the recommended procedure. In fact, there is no medical documentation attached to the prior authorization request from the date of the MRI review report on March 31, 2014 through the date of the request on June 11, 2014. Accordingly, the fax and documentation sent to the Liberty Mutual community fax line on June 11, 2014 did not constitute a completed request for prior authorization. Because of the incomplete request for prior authorization Respondent did not violate Rule 16-9.

27. Claimant has failed to demonstrate that it is more probably true than not that medical treatment in the form of left shoulder surgery as recommended by Dr. Millett is reasonable, necessary and related to her March 10, 2013 admitted industrial injury. Dr. Millett sought prior authorization for an outpatient left shoulder arthroscopy procedure. On May 22, 2014 Dr. Millett had advised Claimant that her "ultimate treatment" will be a total arthroplasty but he may be able to "buy her some additional time without an arthroplasty if she consents to the arthroscopy procedure." However, Dr. Lindenbaum concluded that the procedure recommended by Dr. Millett was not medically necessary. He noted that Claimant has advanced degenerative changes in her left shoulder joint with concomitant associated pathology normally found with the degenerative process. Dr. Lindenbaum commented that the likelihood of long- term improvement with Claimant's preexisting chronic problems was poor and therefore the request was not indicated. Moreover, Dr. Lindenbaum testified he was familiar with the Colorado Medical Treatment Guidelines regarding surgical considerations and noted that arthroscopic surgery may be considered in selective patients with moderate degrees of arthritis. He summarized that the requested procedure might provide Claimant some temporary relief, "but would not be long lasting and I think was not indicated." Dr. Lindenbaum summarized that Claimant's degenerative joint symptoms in her left shoulder constituted the natural progression of an underlying condition. Based on Dr. Millett's acknowledged concerns about the long-term efficacy of the requested left shoulder procedure, the medical records and Dr. Lindenbaum's persuasive testimony, Claimant's request for prior authorization is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Prior Authorization Request

4. Workers' Compensation Rule of Procedure 16-9(b) requires the respondents to respond to a request for prior authorization within seven business days from receipt of the provider's completed requests as defined in WCRP. 16-9(e). In order to complete a request for prior authorization, the provider must "concurrently explain the medical necessity of the services requested and shall provide relevant supporting medical documentation." Supporting medical documentation means "documents used in the provider's decision making process to substantiate the need for the requested service or procedure." WCRP 16-9(f). Accordingly, if the request for prior authorization is not a "completed request," then whether the respondents have timely responded is immaterial.

5. As found, the June 11, 2014 fax from The Steadman Clinic did not constitute a completed request for prior authorization. The fax contains a list of the procedures being requested. The second page of the fax is a report from three months earlier, or March 14, 2014, in which Dr. Millett notes a discussion with Claimant regarding conservative treatment versus the potential for surgery. In the report Dr. Millett does not recommend a surgical procedure but only discusses various potential options. Additionally, Dr. Millett recommended an MRI and the request for prior authorization contains the subsequent MRI report. Finally, the request for prior authorization includes an "MRI review" drafted by Dr. Millett. In the report, he discusses the MRI findings. Regarding the left shoulder, Dr. Millett explained, "results were conveyed to [Claimant] at length and again she is scheduled to have her knee operated on this coming Thursday, we will address the shoulder once her workers' compensation gets settled. This was conveyed to [Claimant] and we will continue to discuss further a plan with the shoulder." However, the note does not outline the plan. More specifically,

Dr. Millett failed to explain the medical necessity of the recommended procedure. In fact, there is no medical documentation attached to the prior authorization request from the date of the MRI review report on March 31, 2014 through the date of the request on June 11, 2014. Accordingly, the fax and documentation sent to the Liberty Mutual community fax line on June 11, 2014 did not constitute a completed request for prior authorization. Because of the incomplete request for prior authorization Respondent did not violate Rule 16-9.

Medical Treatment

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

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that medical treatment in the form of left shoulder surgery as recommended by Dr. Millett is reasonable, necessary and related to her March 10, 2013 admitted industrial injury. Dr. Millett sought prior authorization for an outpatient left shoulder arthroscopy procedure. On May 22, 2014 Dr. Millett had advised Claimant that her "ultimate treatment" will be a total arthroplasty but he may be able to "buy her some additional time without an arthroplasty if she consents to the arthroscopy procedure." However, Dr. Lindenbaum concluded that the procedure recommended by Dr. Millett was not medically necessary. He noted that Claimant has advanced degenerative changes in her left shoulder joint with concomitant associated pathology normally found with the degenerative process. Dr. Lindenbaum commented that the likelihood of long-term improvement with Claimant's preexisting chronic problems was poor and therefore the request was not indicated. Moreover, Dr. Lindenbaum testified he was familiar with the Colorado Medical Treatment Guidelines regarding surgical considerations and noted that arthroscopic surgery may be considered in selective patients with moderate degrees of arthritis. He summarized that the requested procedure might provide Claimant some temporary relief, "but would not be long lasting and I think was not indicated." Dr. Lindenbaum summarized that Claimant's degenerative joint symptoms in her left shoulder constituted the natural progression of an underlying condition. Based on Dr. Millett's acknowledged concerns about the long-term efficacy of the requested left shoulder procedure, the medical records and Dr. Lindenbaum's persuasive testimony, Claimant's request for prior authorization is denied and dismissed.

ORDER

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

1. Because of the incomplete request for prior authorization Respondent did not violate WCRP Rule 16-9.

2. Claimant's request for prior authorization for left shoulder surgery is denied and dismissed.

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

DATED: January 21, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

Whether Claimant has established, by a preponderance of the evidence that he is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of his admitted April 20, 2013, industrial injury.

FINDINGS OF FACT

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

1. Claimant injured his low back while working for Advantage Logistics on April 20, 2013.

2. Claimant had surgery on his low back on April 30, 2013.

3. Claimant's post-surgical care was primarily provided by Frank Polanco, M.D., and Paula Homberger, PA-C. Dr. Polanco found the Claimant to be at maximum medical improvement (MMI) on January 9, 2014, and provided him with a 19% whole person impairment rating.

4. Dr. Polanco assigned Claimant work restrictions of 15 pounds lifting and carrying and 40 pounds pushing and pulling.

5. Claimant completed a Functional Capacity Evaluation on November 27, 2013. A report was prepared outlining Claimant's demonstrated capabilities following that evaluation. The report provides as follows: "Patient displayed lifting/carrying capacities between sedentary and sedentary light on this date."

6. Claimant underwent a Division IME with John Ogrodnick, M.D., on June 19, 2014. Dr Ogrodnick agreed that Claimant was at MMI. Dr. Ogrodnick assigned 19% whole person impairment. Claimant uses a stationary bike, participates in a home exercise program and takes medications to maintain his current condition. Currently Claimant takes Narco, Lyrica and a "muscle relaxant", which he takes at night, on a regular basis. Claimant testified that he experiences side effects from his medications to include drowsiness and moodiness. According to Dr. Polanco at the time of his deposition, Claimant did not meet the medical treatment guidelines criteria of prescribing for Narco. Consequently, Dr. Polanco testified that weaning to meet the guidelines was being considered at the time of his deposition.

7. Tim Shanahan performed a vocational evaluation of Claimant at Respondents' request. Mr. Shanahan provided a report dated September 26, 2014. Based upon Claimant's FCE results and the physical restrictions assigned by Dr. Polanco (15 pounds lifting/carrying and 40 pounds pushing/pulling), Mr. Shanahan opined that employment opportunities existed for Claimant in the following positions: cashier, motel/hotel clerk, customer service representative, reservationist, dispatcher, security guard, and light industrial packaging and assembly. Mr. Shanahan concluded that Claimant is capable of performing the aforementioned positions and retained the ability to earn wages.

8. Mr. Shanahan testified consistently with his report; however, he agreed that those individuals possessing high school diplomas competing for jobs with Claimant would have an advantage over the him. Nonetheless, Mr. Shanahan testified that while it would not be easy for Claimant to get a job with his educational background, he still believed Claimant was capable of obtaining work.

9. Dr. Polanco was presented with a list of job descriptions provided by Mr. Shanahan, which included an assembler, cashier, courier, customer service representative/customer complaint clerk, dispatcher, hotel/motel clerk, hotel reservation clerk, information clerk, night auditor/clerk, customer service representative/order clerk, parking lot attendant, sort/pricer, and warehouse/record clerk. After reviewing the physical demands for each job, Dr. Polanco testified that he believed Claimant was physically capable of performing these jobs. Based upon the his review of the medical record, including the results of the FCE and his treatment of Claimant, the ALJ finds that Dr. Polanco is aware of Claimant's physical capabilities. The ALJ finds Dr. Polanco's testimony credible and persuasive.

10. Claimant retained Bruce Magnuson, M.A., for a vocational evaluation. Mr. Magnuson completed his evaluation and provided a report dated August 4, 2014. In his report Mr. Magnuson concluded: "Within a reasonable degree of vocational probability . . . Mr. Starks meets the criteria for permanent and total disability . . . and would not be capable of performing any work on a part- or full-time basis and sustain it in the regional economy." According to Mr. Magnuson, Claimant's limited education combined with significant physical limitation precludes work. However, during cross examination, Mr. Magnuson agreed that Claimant's physical restrictions fell at the "low end" of light duty capacity. Mr. Magnuson also admitted that while it will be "very, very difficult," he did not know if it was "impossible" for Claimant to obtain employment. Based on evidentiary record as a whole, the ALJ finds the opinions of Mr. Shanahan more convincing than the contrary opinions of Mr. Magnuson.

11. Claimant's date of birth is October 22, 1960, making him 54 years of age. He does not have a high school diploma having completed the 11th grade. Claimant has not obtained a GED but did serve in the U.S. Army for 7 ½ years attaining the rank of sergeant. He was honorably discharged. He has a valid Colorado driver's license and does drive.

12. Claimant has past employment experience as a janitor, commercial floor technician, stocker, and cold storage warehouseman. Claimant has worked for Employer for approximately 15 years in the positions of "case picker", "put away driver" and "fork lift operator." Claimant's past job positions required frequent bending, lifting and carrying. Based upon Claimant's testimony, the ALJ finds Claimant's prior jobs physically demanding. Claimant last worked for Employer on or about April 29, 2013. Based upon the evidence presented, the ALJ finds that Claimant is probably precluded from returning to his former occupation and similar positions he has held in the past.

13. Claimant testified that he has no formal computer skills. However, the ALJ finds from his testimony that he is able to get on line and maintain a Facebook page. Claimant also has familiarity with the tasks necessary to operate a computerized inventory system, having worked with such a system in the past while working for Employer. While Claimant has not had to complete substantial data entry, the ALJ finds that he has a basic working understanding of computers and a proven capacity to learn specific computer tasks.

14. Claimant testified that he applied for jobs identified by Mr. Shanahan but was unable to get past the on-line application procedure. According to Claimant, he needed his wife to assist with the on-line applications and at times was stopped in the application process because he did not have a high school diploma. Thus, he did not meet the minimum qualifications for the identified position. The ALJ finds Claimant's effort to complete some on-line applications to constitute a rudimentary job search only.

15. The ALJ credits the report and testimony of Mr. Shanahan to find that the representative sampling of sedentary to light sedentary positions he identified present a number of prospective job positions existing in the local labor market, which afford Claimant the opportunity to earn a wage. Based on the evidence presented, including the report and testimony of Mr. Shanahan, the ALJ finds that Claimant retains the ability to earn a wage in employment reasonably available to him within his physical restrictions and commutable labor market.

16. Claimant has failed to demonstrate, by a preponderance of the evidence, that he is incapable of earning any wage in the same or other employment as a result of his April 20, 2013, work injury.

CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" (hereinafter "Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that

which leads the trier-of-fact, after considering all of the evidence to find that a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S. In this case, the undersigned ALJ concludes that claimant has failed to prove, by a preponderance of the evidence, that he meets the criteria of "permanent total disability" as that term is defined under the Act.

2. Under the applicable law, a claimant is permanently and totally disabled if he/she is unable to "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also, Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

3. Moreover, there is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995). Nonetheless, when determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Considering the human factors involved in the instant case, the ALJ is not convinced that Claimant is incapable of earning any wages in other employment. Rather, while it is more probably true than not, that Claimant is precluded from returning to his former occupation and similar positions he held in the past, the representative sampling of sedentary to light duty type positions identified by Respondents' vocational expert as being within Claimant's physical/mental capabilities present a number of perspective job

positions existing in the local labor market affording Claimant the opportunity to earn a wage. Furthermore, the ALJ is also not convinced that Claimant's age and limited education, in combination with his physical restrictions completely preclude his ability to earn a wage. Claimant has only attempted what the undersigned finds to be a rudimentary job search. In this regard, the ALJ credits the report and testimony of Respondent's vocational expert to conclude, that while it won't be easy for Claimant to secure employment with his educational background, his prior work history and military experience will help and jobs exist which Claimant can compete for and obtain. Indeed, Claimant's own vocational expert reached a similar conclusion, testifying that while it will be "very, very difficult" he did not know if it was "impossible." As found, the ALJ credits Mr. Shanahan's testimony and written report as establishing persuasively that Claimant retains the ability to earn a wage in employment reasonably available to him within his physical restrictions and commutable labor market. Accordingly, Claimant has failed to demonstrate by a preponderance of the evidence that he is incapable of earning any wage in the same or other employment as a result of his April 20, 2013 work injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

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

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

DATED: _January 12, 2015____

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues to be determined by this decision are:

1. Whether the respondents have overcome the Division IME as to whether Dr. Griffis attributed the cause of the claimant's industrial injury to her pre-existing arthritis; and,

2. Whether the claimant has established by a preponderance of the evidence that the claimant is entitled to post-maximum medical improvement benefits in the form of Synvisc injections.

FINDINGS OF FACT

1. The claimant was working for respondent-employer as a Special Education Paraprofessional when she was injured her left knee on November 29, 2012 after a special education student she was working with threw a tricycle, causing her to trip over it and fall onto her knees.

2. The claimant treated with Dr. Richard Nanes at CCOM in Canon City. The work related diagnosis initially listed by Dr. Nanes was bilateral knee contusion. By the claimant's February 21, 2013 visit, the medical diagnoses were sprain to the left knee and leg, pain in the left knee with patellofemoral syndrome and contusion to the left knee. After the claimant's left knee surgery, the diagnosis of chondromalacia patella was added.

3. The claimant underwent physical therapy for her injury but it did not resolve the claimant's left knee pain, which was worsening when she saw Dr. Alex Romero on January 24, 2013. Dr. Romero gave the claimant a Kenalog injection on that date. After this injection and more physical therapy, the claimant reported her left knee had gotten much worse with a sharp pain in the anterior aspect of her knee. As Dr. Romero attempted a second cortisone injection on March 7, 2013.

4. After all conservative treatment had failed to relieve the pain in the claimant's knee she underwent left knee arthroscopy with chondroplasty of the patella

and lateral tibial plaeau, with a lateral release and removal of synovial chondromatosis. The claimant's pre- and post-operative diagnosis was left knee patellar chondromalacia with a tracking abnormality.

5. After this surgery, Dr. Romero noted that he had performed debridement of articular cartilage defects and removal of loose bodies in the left knee as well as the procedures described in his surgical notes. Despite the claimant reporting that she no longer had "the crunchy sensation in the front of her knee" she was still reporting soreness, especially if she were to overdo her daily activities.

6. Two months post surgery, the claimant was still noting anterior knee pain which was more noticeable when she was climbing stairs and kneeling, and that the pain was specifically "deep to the kneecap". The claimant's pain she was experiencing was different than she had experience prior to her surgery. Based upon these complaints, Dr. Romero recommended viscosupplementation to see if it would address the complaints.

7. On September 19, 2013, the claimant had an injection of Snyvisc-One. The injection was helpful in relieving the pain she had been experiencing since her surgery and this is noted in her next visit with Dr. Nanes on October 29, 2013.

8. On October 29, 2013, Dr. Nanes noted that he would do a rating in the next 4 weeks, that the claimant would need permanent restrictions, and that "the patient will require maintenance care and may need periodic Synvisc injections every 6 months if needed over the next 2 years."

9. During the claimant's next visit with Dr. Nanes on November 21, 2013, he placed her at maximum medical improvement, assigned an 11% left lower extremity impairment rating and stated "She does not need any further medical care or medications and has been released from our care."

10. On December 16, 2013, the respondent-insurer filed a final admission of liability admitting to an 11% scheduled impairment rating for the claimant's left lower extremity. No medical maintenance care was admitted and respondent-insurer, specifically denied "any and all liability for pre-existing and unrelated degenerative chondromalacia."

11. The claimant pursued a Division Independent Medical Examination. The exam took place with Dr. William Griffis on April 8, 2014. In his report, Dr. Griffis agreed with the claimant's authorized treatment provider, Dr. Richard Nanes, that the claimant

was at maximum medical improvement (MMI) as of November 21, 2013 and he assessed an 11% scheduled lower extremity impairment rating.

12. In his report, Dr. Griffis recommended maintenance care in the form of "up to 3 Synvisc injections over the next 18 months."

13. The respondents filed an application for hearing on April 23, 2014 with the stated issue being "Overcome the Division IME opinion of Dr. William Griffis on the issue of causation of the degenerative arthritis, if the court determines the Division IME attributed that condition to this injury; what is the true opinion of the Division IME; respondents agree with the Division IME's finding of impairment and MMI."

14. Nowhere within his report does Dr. Griffis address whether the claimant has degenerative arthritis of her left knee as a result of her industrial injury. There is no opinion issued regarding whether degenerative arthritis caused the claimant's initial injury on November 29, 2012 nor whether any type of arthritis was caused by the injury.

15. The ALJ finds that by not giving the claimant an impairment rating under Table 40 for arthritis, and by failing to so state in his report, that Dr. Griffis specifically found that the claimant's pre-existing arthritis was not caused by the claimant's industrial injury.

16. Dr. Griffis did find that Synvisc injections were helpful in relieving the pain the claimant was experiencing as a result of her industrial injury and therefore recommended maintenance care involving Synvisc injections.

17. The only significant evidence presented concerning degenerative arthritis was offered by the respondents' expert, Dr. James Lindberg. Dr. Lindberg opined that the claimant had degenerative joint disease and pre-existing osteoarthritis in her left knee and therefore any maintenance care was not necessary.

18. Neither party called Dr. Griffis as a witness.

19. The ALJ finds that the opinions of Dr. Griffis as found herein are credible and persuasive and are more credible than medical opinions to the contrary.

20. To the extent that the burden of proof may be by clear and convincing evidence, the ALJ finds, nonetheless, that the respondents have failed to establish that it is even more likely than not that Dr. Griffis attributed any of the claimant's industrial injury to her pre-existing arthritis.

21. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to medical maintenance care as recommended by Dr. Griffis.

CONCLUSIONS OF LAW

1. The respondents are seeking to overcome the DIME physician's opinion as to the relatedness of degenerative arthritis to the claimant's industrial injury. However, the DIME physician did not provide an opinion regarding degenerative arthritis relating to the claimant's left knee.

2. To receive workers' compensation benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence; that he or she has sustained a compensable injury proximately, caused by his or her employment. Section 8-41-301(1)(c), C.R.S. 2009; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000) ("Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded..")

3. Litigants bear a higher burden of proof when challenging opinions rendered by a DIME physician. If a DIME physician has rendered an opinion regarding MMI or medical impairment, those opinions must be overcome by clear and convincing evidence. §§ 8-42-107(8)(b)(III), -107(8)(c), C.R.S.; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005) ("DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect ... [and] are binding unless overcome by clear and convincing evidence.").

4. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P,2d 411, 414 (Colo. App. 1995).

5. The party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the DIME impairment rating or MMI finding are incorrect. *Qual-Med*, 961 P.2d at 592. A party has met the burden of establishing that a DIME impairment rating and diagnosis are incorrect if the party has demonstrated that the

evidence contradicting the DIME is “unmistakable and free from serious or substantial doubt.” *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

6. Whether a party has met the burden of overcoming a DIME by clear and convincing evidence “is a question of fact for the ALJ's determination.” *Metro Moving & Storage*, 914 P.2d at 414. The factual determinations of an ALJ will be upheld on review if the decision is supported by substantial evidence in the record. § 8-43-301(8), C.R.S.; *Christie v. Coors Transp. Co.*, 919 P.2d 857, 860 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997).

7. The threshold question of whether the claimant sustained any compensable injury is not at issue here. It was admitted by the respondents, who did not dispute that the claimant suffered an injury on November 29, 2012. Rather, the respondents are now contesting the nature and extent of the ensuing injuries and argued that some of the claimed conditions were not casually related to the industrial injury.

8. The respondents have not presented sufficient evidence to overcome or even clarify the opinion of the DIME physician as to the causation of the claimant’s left knee injury. The only information as to causation/relatedness is that the DIME doctor found that the claimant’s left knee injury was work related and his recommendation that she receive medical maintenance care in the form of 3 Synvisc injections over the next 18 months following his report demonstrated that he thought such injections would be useful for maintaining the claimant at MMI.

9. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence, let alone by clear and convincing evidence, that Dr. Griffis somehow attributed the claimant’s industrial injury to the claimant’s pre-existing arthritis.

10. The claimant is entitled to continuing medical benefits after MMI if the record contains substantial evidence “that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.” *Grover v. Industrial Commission, supra*. The questions of whether a particular condition is related to an industrial injury, and whether a proposed treatment is reasonable and necessary, are issues of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

11. As noted by Dr. Nanes in his October 29, 2013 medical report, he believed at the time that the claimant would benefit from Synvisc injections to her left knee. The DIME physician agreed that Synvisc injections would be helpful to keep the claimant at maximum medical improvement. The claimant has met the burden of showing by a preponderance of the evidence that the recommended medical maintenance care is necessary and related to her industrial injury of November 29, 2012.

ORDER

It is therefore ordered that:

1. The respondents' challenge to the findings of the DIME physician, Dr. Griffis, is denied and dismissed.

2. The respondent-insurer shall pay for post-MMI medical maintenance care as recommended by Dr. Griffis.

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

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

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

DATE: January 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

Did Claimant prove by a preponderance of the evidence that he sustained an occupational disease arising out of the course and scope of his employment?

STIPULATIONS

The parties stipulated that if this claim is determined compensable, the Health One occupational clinic closest to Denver International Airport will be Claimant's authorized treating provider.

The parties stipulated that if this claim is determined compensable, Respondents agree to reimburse Claimant for co-pays Claimant paid for the treatment of his knees during the period 05/02/2013-10/11/2013 with Greg Smith, D.O., Stephen Lindenbaum, MD, Stephen Gray, MD, Doug Hammond, MD, Rocky Mountain Family Medicine, and OccMed.

The parties stipulated that if this claim is found compensable and Claimant receives a demand for reimbursement or repayment from his health insurer asking Claimant to repay his health insurer for payments made to Greg Smith, D.O., Stephen Lindenbaum, MD, Stephen Gray, MD, Doug Hammond, MD, Rocky Mountain Family Medicine, or OccMed related to the treatment of Claimant's knees for the period 05/02/2013-10/11/2013, Respondent will either reimburse the health insurer, subject to the fee schedule, for payments the health insurer made to providers as described above or Respondents will pay the providers pursuant to the fee schedule and request that the providers reimburse the health insurer.

FINDINGS OF FACT

Based on the evidence presented at hearing the Judge finds as fact:

1. Claimant has worked as a ramp agent/baggage handler for Employer since June 1, 2010. He is currently employed with Employer doing the same job duties now as he did when first hired and has continued to work throughout the course of this case.

2. Claimant is twenty-five years of age. On May 2, 2013, Claimant was 6'3" tall and weighed approximately 245 lbs.

3. Claimant's job duties at Employer include loading luggage into aircraft bins, unloading luggage, driving luggage carts, moving luggage carts, and loading luggage carts. Claimant testified that his primary duty is loading the aircraft cargo bins with luggage and freight and during a typical shift, this duty takes about two hours per day. When working in aircraft bins, Claimant wears knee pads and moves about on his

knees. The compartment bin inside the airplane is compact (approximately four feet in height) and Claimant must move baggage weighing between a few pounds up to one hundred pounds.

4. In the first year of employment with Employer, Claimant worked extra mandatory shifts. He worked four, seventeen hour days, per week. During the extra mandatory shifts, Claimant was required to load and unload additional aircraft on numerous gates. Because of the additional shifts, Claimant was squatting and kneeling on his knees in the cargo bins more frequently and for longer periods of time.

5. About six months to a year after Claimant began working for Employer, he began to notice aching and grinding symptoms in his knees when working in aircraft bins. Claimant took ibuprofen to manage the pain. He testified at hearing that he just worked through it and thought it might go away. Claimant likes working for Employer.

6. Claimant did not report a knee injury to his employer until almost two years after his symptoms had begun because he believed the symptoms would resolve.

7. Claimant reported a work-related knee injury to the Employer on May 2, 2013 after which he was seen by authorized treating physician, Greg Smith, D.O., who, on May 2, 2013, diagnosed patella chondromalacia (softening or loss of cartilage). Claimant complained of painful grinding in both knees. On May 10, 2013, Dr. Smith revised Claimant's diagnosis to patella chondromalacia, right side greater than left. Dr. Smith checked the box on the Physician's Report of Worker's Compensation Injury affirming that his objective findings are consistent with history and/or work related mechanism of injury/illness.

8. Respondents filed a notice of contest on May 21, 2013 indicating the basis for the contest as "Injury/Illness Not Work-Related."

9. Claimant sought treatment for his knees through his personal health care providers at Rocky Mountain Family Medicine beginning on May 29, 2013 at which time he was diagnosed with "patellofemoral syndrome-probably work related" by Dr. J. Stephen Gray.

10. On August 1, 2013, Claimant was seen by Dr. Hammond at Rocky Mountain Family Medicine and Dr. Hammond referred Claimant for an orthopedic evaluation.

11. On August 1, 2013, Claimant had x-rays of his right and left knee both of which were deemed normal.

12. On August 14, 2013, Claimant treated with orthopedic specialist, Stephen Lindenbaum, MD who documented Claimant's knee pain as retropatellar pain, right more than left and assessed the knee pain as chondromalacia patella.

13. On September 7, 2013, Claimant had an MRI of his right knee. The MRI revealed full-thickness articular cartilage fissuring involving the lateral patellar facet with underlying marrow change, small reactive effusion.

14. Dr. Lindenbaum examined Claimant on September 4, 2013 and September 11, 2013. At the September 11, 2013 visit, Dr. Lindenbaum discussed surgical options with Claimant since physical therapy was not helpful for Claimant, and he discussed with Claimant that returning to full duties (at work) could aggravate his "situation."

15. Claimant returned to his personal care physicians on October 11, 2013 at which time he was evaluated by Dr. Gray who diagnosed bilateral patellofemoral syndrome-work related. Dr. Gray filled out Physician's Report of Worker's Compensation Injury and noted restrictions for Claimant of lifting no more than 50 lbs, no crawling, no kneeling, no deep squatting, and no climbing.

16. At Respondent's request, Claimant had an Independent Medical Examination by Wallace Larson, MD on February 3, 2014. Dr. Larson issued a report dated February 3, 2014 and diagnosed bilateral retropatellar knee pain. Retropatellar pain is another name for patellofemoral pain syndrome.

17. In his report, Dr. Larson opined that he did not believe that Claimant's work activities as a ramp agent caused, contributed to, or aggravated Claimant's knee problems. He noted that Claimant is not currently involved in any sports or athletic hobbies. He noted that previously, Claimant played high school football and one year of college football, and Claimant played lacrosse in high school, did shot put and discus in high school, and did fairly heavy weightlifting prior to his employment with Employer.

18. At hearing, Dr. Larson testified as an expert in Orthopedics. He is also Level II accredited. He opined that Claimant's patellofemoral pain syndrome is not caused by Claimant's work activities and that his condition is not aggravated or accelerated by work activities. Dr. Larson discussed knee structure and forces on the knee and ultimately opined that the fact that Claimant notices knee problems at work does not mean that work caused it. Dr. Larson testified that patellofemoral pain syndrome is pain that originates at the patellofemoral joint (the joint between the patella and the front of the knee) and also surrounding structures; it is generally thought to be a problem stemming from overloading or maltracking of the knee and is primarily a degenerative type of condition.

19. Dr. Larson testified that several things can cause patellofemoral pain syndrome including a genetically shallow "v" in the patellar bone. Other causes of this condition are the shape of the knee cap, maltracking of the patellar bone, excessive bodyweight, muscle imbalance, jumping sports, weightlifting/squatting, and other activities that put tremendous forces on the patellar region**.** In addition, genetic or developmental issues can cause this condition.

20. Although Dr. Larson agreed that Claimant's knees are subject to compressive forces when Claimant must squat down to get onto his knees to do aircraft bin work, he testified that in this case, the compressive forces from work activities are intermittent and would not *likely* cause or aggravate Claimant's knee

problems. (emphasis added). The ALJ views Dr. Larson's testimony as speculative and not credible.

21. Dr. Larson testified about Claimant's body mass index ("BMI") of 34 being problematic for Claimant and that when a person has a BMI over 30 or perhaps 28, there is a high incidence of knee and hip arthritis/damage. The ALJ is not persuaded that Claimant's weight is a factor here, as other treating doctors documented Claimant's weight and/or BMI and did not address the issue of Claimant's weight as a contributing factor to his bilateral knee condition.

22. Dr. Larson testified that chondromalacia is associated with patellofemoral pain syndrome. He opined that Claimant really does not exhibit signs of poor tracking but rather his condition is most likely something that developed over time with probably a triggering event such as football or weightlifting. Ultimately, Dr. Larson testified that Claimant did not suffer an acute injury, rather, his condition is due to a preexisting condition that was not caused or aggravated by work activities.

23. When he was asked about full thickness cartilage fissuring (initial stages of chondromalacia per Dr. Larson) identified in the MRI of Claimant's right knee, Dr. Larson testified that patellofemoral pain can cause cartilage damage and that the cartilage findings in Claimant's MRI suggest that the condition [patellofemoral pain syndrome] has been going on for a number of years. Dr. Larson did not specify any timeframe for the "number of years" he was referring to. Dr. Larson opined that Claimant's patellofemoral pain syndrome likely pre-existed Claimant's employment.

24. In Dr. Larson's opinion and pursuant to his testimony, each person has some anatomic or genetic predisposition, or not, to certain conditions, and in Claimant's case, "some things adding up against him." Dr. Larson mentioned football and weightlifting as factors that contributed to Claimant's knee condition. However, Dr Larson testified that even if Claimant had not done any of the aforementioned activities, he could not guarantee that Claimant would not have knee pain.

25. During cross examination by Claimant's counsel, Dr. Larson testified that certain activities were relatively inappropriate for Claimant or not advisable. Upon further questioning, Dr. Larson admitted inappropriate or inadvisable activities for Claimant would include being on his knees two hours a day in a four foot high airplane bin.

26. On cross examination, Dr. Larson agreed that Claimant's work activities of being on his knees two hours per day increased his symptomatology. He testified that Claimant "found activities that became symptomatic . . . because of his preexisting condition . . . his situation is such that if he does a lot of kneeling, he is probably going to have some pain, if he doesn't, he probably won't." Notwithstanding, Dr. Larson maintained that an increase in symptoms, or symptoms alone, does not indicate an aggravated condition. The ALJ does not agree and finds it incredible that Dr. Larson, could not or would not, recognize Claimant's job duties of kneeling/squatting in a compact cargo bin as factors that caused, contributed to, or aggravated Claimant's

knee problems especially since Dr. Larson noted in his February 3, 2014 report that "[Claimant] would probably benefit from activity modification to decrease kneeling and squatting . . . .".

27. Claimant credibly testified that prior to working for Employer; he did not have any knee problems or knee pain and never had treatment for his knees. He testified that he played football from the 6th grade through high school and one year of college. Claimant did engage in weight lifting, including squatting, in high school as well as lacrosse, shot put and discus. Claimant stopped weight training shortly after being employed with Employer due to the rigorous work schedule and physical nature of the job.

28. Dr. Larson's testimony regarding the likelihood that Claimant's patellofemoral pain syndrome likely pre-existed Claimant's employment with Employer is not persuasive. The ALJ finds there is not sufficient evidence in the record that Claimant had a preexisting knee condition to either knee. To the contrary, Claimant's credible and persuasive testimony is that he did not have knee problems or knee pain and never had treatment for his knees.

29. All of the physicians who examined Claimant, including Dr. Larson, essentially, agree that the diagnosis for Claimant's knees is patellofemoral pain syndrome. Dr. Gray attributed the patellofemoral pain syndrome to Claimant's work activities. Dr. Lindenbaum recognized that Claimant's return to full duties (at work) could aggravate his "situation."

30. Although the ALJ credits Dr. Larson's testimony that Claimant's bilateral knee condition is most likely something that developed over time with probably a triggering event, the ALJ finds that the timeframe in which Claimant worked for Employer before reporting the symptoms/injury fits within the non-specific timeframe described by Dr. Larson, especially considering that Claimant's first year of employment was equivalent to working approximately 1.7 jobs and compressed the timeframe for an occupational disease to become problematic and/or obvious.

31. The ALJ finds there were triggering events and a direct cause for Claimant's occupational disease. Claimant's work related activities of moving about on his knees, in a kneeling and/or squatting position, in a compact cargo bin while lifting baggage and freight of varying weights were the triggering events-not regarding aggravating a preexisting condition but pertaining to the onset of the occupational disease. Additionally, the ALJ finds that Claimant's excessive work schedule and duties in the first year of employment with Employer are the direct and proximate cause of the bilateral knee injury; Claimant's continued employment, with exposure to the same work duties, further acted to aggravate the injury and symptomatology to Claimant's knees resulting in an occupational disease.

32. Claimant credibly testified that he discontinued weight training shortly after being employed with Employer. Claimant's Answers to Interrogatories indicate that Claimant did not engage in any kneeling activities outside of work. Thus, the ALJ finds

that Claimant was not exposed to kneeling activities that could potentially aggravate his knees outside of the employment activities.

33. Claimant has proven that it is more probably true than not that he suffered a compensable industrial injury/ occupational disease to both knees while in the course and scope of his job duties that included repetitive activities as a ramp agent/baggage handler for Employer. The ALJ reaches this conclusion based on the credible, persuasive testimony of the Claimant as well as the opinions of Dr. Smith, Dr. Gray and Dr. Lindenbaum. The ALJ is not persuaded by Dr. Larson's contrary testimony and in particular, finds that Dr. Larson's testimony at hearing somewhat supports the finding that Claimant suffered an occupational disease due to his work activities as a ramp agent/baggage handler for Employer. There was no credible or persuasive evidence that Claimant's bilateral knee issues were caused by a hazard he was equally exposed to outside his work at Employer.

34. In light of the compensability findings, the Stipulations of the parties, as noted herein, are adopted by the Court.

CONCLUSIONS OF LAW

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

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

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.*

5. An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996).

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

7. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An “occupational disease” means disease which results directly from the employment of the conditions under which work was performed, which can be seen to have followed as a natural incident of the work, and as a result of the exposure occasioned by the nature of the employment, and which be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would been equally exposed outside of the employment. C.R.S. § 8-40-201(14). A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant’s employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999).

8. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009).

9. In deciding whether the Claimant has met his burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from

the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

10. As a matter of law, medical evidence is not required to establish causation, although it is a factor that may be considered in addressing that determination. See *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983).

11. As found, Claimant has established by a preponderance of the evidence that while in the course and scope of his employment he first began having knee pain/grinding and suffered an occupational disease while in the course and scope of his employment. Claimant first reported the injury on May 2, 2013 and credibly testified that his symptoms began within six to twelve months after starting employment with Employer on June 1, 2010.

12. Dr. Larson's testimony regarding that Claimant's patellofemoral pain syndrome likely pre-existed Claimant's employment with Employer is not persuasive. As found, there is not sufficient evidence in the record that Claimant had a preexisting knee condition to either knee. To the contrary, Claimant's credible and persuasive testimony is that he did not have knee problems or knee pain and never had treatment for his knees. All of the physicians who examined Claimant, including Dr. Larson, essentially, agree that the diagnosis for Claimant's knees is patellofemoral pain syndrome. Dr. Gray attributed the patellofemoral pain syndrome to Claimant's work activities. Dr. Lindenbaum recognized that Claimant's return to full duties (at work) could aggravate his "situation."

13. As found, the timeframe in which Claimant worked for Employer before first reporting the symptoms/injury fits within the non-specific timeframe described by Dr. Larson for a knee condition to develop, especially considering that Claimant's first year of employment was equivalent to working approximately 1.7 jobs and compressed the timeframe for an occupational disease to become problematic and/or obvious. As found, the triggering events were Claimant's work related activities of moving about on his knees, in a kneeling and/or squatting position, in a compact cargo bin while lifting baggage and freight of varying weights. Additionally, the ALJ finds that Claimant's excessive work schedule and duties in the first year of employment with Employer are the direct and proximate cause of the bilateral knee injury; Claimant's continued employment, with exposure to the same work duties, further acted to accelerate and aggravate the injury and symptomatology to Claimant's knees resulting in an occupational disease. Claimant had no other kneeling exposure to his knees outside of his employment with Employer.

14. If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. C.R.S. §8-42-101; *Owens v. Industrial Claim Appeals Office of the State of Colo.,* 49 P.3d 1187, 1188 (Colo. App. 2002). To be a compensable benefit, the medical care and treatment must be causally related to a work injury. *Snyder v. Industrial Claim Appeals Office of the State of Colo.,* 942 P.2d 1337, 1339

(Colo. App. 1997). The right to medical benefits arises only when an injured worker establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. *Id.* The question of whether a Claimant has proven by a preponderance of the evidence that a contested medical treatment is reasonably necessary is one of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496, 498 (Colo. App. 1997). Here, Claimant's work-related injury/occupational disease is compensable as established by a preponderance of the evidence. Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986).

15. The Stipulations of the parties, as noted herein, are adopted by the Court.

ORDER

It is therefore ordered that:

a. As proven by a preponderance of the evidence, Claimant suffered a compensable work related occupational disease to both of his knees while in the course and scope of his employment as a ramp agent/baggage handler for Employer.

b. Respondents are liable for the medical care Claimant receives/received from authorized providers which is/was reasonably necessary to cure and relieve Claimant from the affects of his occupational disease reported on May 2, 2013.

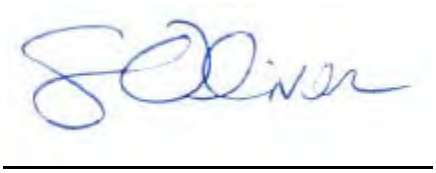
c. The Stipulations of the parties, as noted herein, are adopted by the Court.

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

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

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

DATED: January 16, 2015



Sara L. Oliver
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

ISSUES

The issue addressed in this decision concerns Claimant's entitlement to medical benefits. The specific question presented is whether a total left knee arthroplasty (i.e. total knee replacement surgery) requested by Dr. Purcell is reasonable, necessary, and related to Claimant's July 14, 2013 compensable injury?

FINDINGS OF FACT

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

1. Claimant injured her left knee while working at Sonic Drive-In when she slipped on a tile floor on July 14, 2013. Despite wearing "anti-slip" shoes, excess water on the floor caused Claimant to lose her footing and twist her left knee feeling a "pop" in the process. Claimant completed her shift in pain and waited a week before she sought care through the emergency room (ER) at Penrose-St. Francis on July 21, 2013 for pain and swelling.

2. While in the ER, x-rays of the left knee were obtained which demonstrated compartmental osteoarthritis and a "possible ossified intra-articular body in the posterior knee." Claimant was diagnosed with "left knee sprain" and provided with a knee immobilizer and crutches. She was instructed to follow-up with her "regular doctor or Orthopedics" the following week.

3. On August 19, 2013 Claimant presented to the ER at Memorial Hospital after she twisted her left knee while at home. Claimant reported her history of injury to the knee while at work earlier in the summer, reported use of a knee brace and denied direct trauma to the knee during this encounter. Claimant was diagnosed with "acute exacerbation of chronic knee pain", given a prescription for Percocet and provided with an orthopedic referral. She was then discharged from the ER.

4. Claimant was evaluated by Dr. Derek Purcell on August 22, 2013. Dr. Purcell is an Orthopedist. Dr. Purcell reported Claimant's injury and treatment history noting specifically that Claimant denied "pervious problems" with her knee prior to July 14, 2013 injury. Following examination and review of Claimant's x-rays, Dr. Purcell reached the following impressions: 1. Left knee patellofemoral osteoarthritis; mild. 2. Left Knee possible loose body. 3. Left knee medial meniscus tear.

5. Dr. Purcell recommended MRI which was completed August 23, 2013. MRI

demonstrated “severe patellofemoral compartment osteoarthritis, moderate medial and mild to moderate lateral compartment osteoarthritis, degenerative fraying of both menisci without acute tear, intact knee ligaments and moderate knee joint effusion with extensive synovitis.

6. In follow-up with Dr. Purcell on September 10, 2013, Dr. Purcell and Claimant discussed the results of her MRI. Dr. Purcell noted that Claimant had “severe patellofemoral osteoarthritis with full-thickness cartilage loss” along with “high-grade cartilage loss in the medical compartment” of the left knee and some “mild extrusion of both the lateral and medial meniscus.” Conservative treatment measures were talked about including administration of corticosteroids and viscosupplementation after which Dr. Purcell gave Claimant a steroid injection into the left knee.

7. On October 31, 2013, Dr. Purcell administrated a second steroid injection and raised the potential for a “total-knee arthroplasty” should further conservative treatment measures fail.

8. Respondents filed a “med only” general admission of liability on March 21, 2014. In an attached stipulation to the general admission of liability dated March 12, 2014, Respondents’ agreed to a follow-up appointment between Claimant and Dr. Purcell.

9. Pursuant to the parties’ March 12, 2014 stipulation, Claimant returned for additional evaluation with Dr. Purcell on March 20, 2014. At this visit, Dr. Purcell recommended viscosupplementation injections. Overall, Claimant was provided three Orthovisc injections. This treatment did not provide lasting relief resulting in Dr. Purcell making a recommendation for total knee arthroplasty.

10. On June 12, 2014, Dr. Purcell’s office submitted, to the Insurer’s third party administrator, Gallagher Bassett Services, a “Surgery Authorization Request” for a left total knee arthroplasty. Respondents denied the request.

11. On June 22, 2014 Dr. Wallace Larson completed a WCRP Rule 16 records review of in support of Respondents’ denial of the requested left total knee arthroplasty. (Claimant’s Exh. pg. 196-197). In his report outlining Claimant’s medical records, Dr. Larson indicates that while Claimant is an “appropriate candidate for total left knee arthroplasty”, her need for surgery is not reasonably necessary or causally related to Claimant’s July 14, 2013 industrial injury. To the contrary, it is Dr. Larson opinion that Claimant’s need for surgery is the “result of the natural progression of a pre-existing condition”, specifically degenerative osteoarthritis.

12. Despite the reference in Dr. Purcell’s August 22, 2013 record that Claimant had no “previous problems” concerning her left knee, she testified to a remote history of “scope” surgery to both knees approximately 24 years prior to July 14, 2013. Claimant testified that she simply forgot this history when discussing her condition with Dr. Purcell. Respondents submitted medical records referencing Claimant’s prior surgical history and a motor vehicle accident occurring February 9, 2011, wherein Claimant

injured her left knee. Nonetheless, after careful review of the entire medical record, the ALJ finds no evidence to suggest that Claimant's left knee was symptomatic, that she was actively engaged in ongoing treatment for her left knee or that her left knee was functionally limiting prior to July 14, 2013. Consequently, the ALJ finds Claimant's July 14, 2013 injury caused Claimant's subsequent need for treatment.

13. Claimant testified that immediately prior to her July 14, 2013 injury she was neither taking medication nor was she getting treatment for her left knee. According to Claimant, the condition of her left knee did not limit her prior to her July 14, 2013 injury. She was able to walk her dogs, walk around at the flea market and never missed work. Since her July 14, 2013 injury, Claimant testified that she has good days and bad days. Although she has been able to work despite pain, Claimant is unable to sleep more than 2-3 hours per night and "can't really do what she used to." Dr. Purcell's medical records outline her difficulty with "stairs, steps, squatting, and bent-knee activities" as well as "prolonged standing" due to pain. On June 10, 2014 Claimant tearfully reported to Dr. Purcell that she was having "significant disfunction (sic) with simple activities of daily living, including prolonged standing or walking." The ALJ credits Claimant's testimony regarding the condition and function of her left knee pre and post injury to find that prior to July 14, 2013, Claimant's left knee was asymptomatic and that she was able to work full duty without limitations in the left knee caused by her pre-existing osteoarthritis. Based upon her testimony, the ALJ finds that Claimant has not returned to her previous baseline level of function despite significant conservative care.

14. The Lower Extremity Injury Medical Treatment Guidelines (Guidelines), Rule 17, Exhibit 6 was admitted into evidence. Regarding aggravated knee osteoarthritis the Guidelines provide the following:

i. Description/Definition: Swelling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint.

ii. Occupational Relationship: The provider must establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities such as repetitive kneeling or squatting and climbing, or heavy lifting.

Other causative factors to consider-Previous meniscus or ACL damage may predispose a joint to degenerative changes. In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: menisectomy; hemiarthrosis at the time of the original injury; or evidence of MRI or arthroscopic meniscus or ACL damage. The prior injury should have been at least 2 years from the presentation for the new complaints and there should be a significant increase of pathology on the affected side in comparison to the

original imaging or operative reports and/or the opposite un-injured side or extremity.

15. Dr. Purcell testified by deposition that he is not Level II accredited and also that he was not familiar with the workers' compensation medical treatment guidelines. (Purcell depo, p. 13) Nevertheless, the ALJ finds Dr. Purcell to be an expert in orthopedic surgery.

16. Dr. Purcell testified that the high-grade chondroidal (sic) fissures noted on Claimant's MRI are seen in the presence of osteoarthritis and are not indicative of injury to the knee. (Purcell depo, p. 8) However, Dr. Purcell testified that the effusion in Claimant's knee would suggest an exacerbation of her osteoarthritis. (Id.) Consequently, Dr. Purcell testified that the work related injury exacerbated Claimant's underlying arthritis. (Purcell depo, pp. 19 and 20)

17. Consistent with the opinion of Dr. Larson, Dr. Purcell testified that the recommended surgery is reasonable and necessary. (Purcell depo, p. 20) Based upon the opinions of Dr. Larson and Dr. Purcell, the ALJ finds that the recommended total knee arthroplasty is reasonable and necessary.

18. Dr. Purcell testified that Claimant did not tell him about any prior surgery to her left knee which would be a relevant factor in trying to determine the relatedness of the surgery to her July 14, 2013 injury as "previous surgery would increase the likelihood of having problems with the left knee. (Purcell depo, p. 22) The evidentiary record indicates only that Claimant had surgery to her knees bilaterally. There is no reference to what structures of the knee prior surgery was directed to and/or the extent of injury to those structures. Dr. Larson similarly had no specific information regarding the nature and extent of Claimant's prior knee surgery. Based upon the evidence presented, the ALJ finds the impact that Claimant's prior injury/surgery may have had on the condition of her left knee and its causative role in the subsequent aggravation of her osteoarthritis to be unknown. Accordingly, the ALJ is not convinced that prior trauma/surgery played a causative role in the aggravation of Claimant's pre-existing osteoarthritis as contemplated by the Guidelines referenced above. The ALJ finds Dr. Larson's contrary opinions unpursuasive.

19. Dr. Purcell testified that the Claimant did not tell him about the automobile accident she had in February, 2011 in which she injured her knee. (Purcell depo, p. 22). Dr. Purcell testified that the incident the Claimant had on August 19, 2013 would not have changed the level of arthritis in her knee and he agreed that the amount of osteoarthritis would not have changed from the incident of July 14, 2013. According to Dr. Purcell, the August 19, 2013 incident, wherein Claimant twisted her knee at home would only constitute "an increase in the symptoms that where already there. Dr. Purcell testified that he would not be able to separate the effusion or swelling that she had between the time of the MRI and the two incidents where she injured her knee on July 14th and August 19th. (Purcell depo, p. 24).

20. The ALJ finds, based upon the evidence presented, that but for the activation of

symptoms in the left knee on July 14, 2013, Claimant likely would not have subsequently twisted this knee while getting around her home. Consequently, the ALJ finds that Respondent's have failed to establish, by a preponderance of the evidence, that Claimant suffered an "intervening injury" which would sever the causal relationship between Claimant's July 14, 2013 work injury and her need for a left total knee arthroplasty.

21. Dr. Purcell testified that the knee replacement surgery was to address the cartilage loss and the osteoarthritis. He agreed that the osteoarthritis was present prior to July 14, 2013. (Purcell depo, p. 25).

22. In analyzing whether Claimant engaged in any of the activities listed under Rule 17 which would serve to establish part of the relationship between her work activities and aggravation of her osteoarthritis, including repetitive kneeling, squatting, crawling, climbing or heavy lifting, Dr. Purcell testified that Claimant simply did not mention that activity as part of her job. (Purcell depo, pp. 25 and 26). Based upon the testimony of Dr. Purcell, the ALJ finds it unclear whether any discussion was had between Claimant and Dr. Purcell regarding the nature and extent of the physical activities required to perform Claimant's job duties. Consequently, the ALJ finds Respondents' suggestion that Claimant did not engage in such activities speculative and unsupported.

23. Dr. Larson testified that the arthritis in the Claimant's knee was there prior to her [work] incident (Larson depo, p. 9). Dr. Larson testified that the need for surgery has not met the recommendation under the medical treatment guidelines and he did not see any reason why this case should be an exception to the medical treatment guidelines (Larson depo, pp. 9 and 10). Dr. Larson testified: "I don't think she had an aggravation I think we are just dealing with osteoarthritis." He went on to state "I don't think she had any structural change in her knee as a result of her occupational exposure, no, I don't." (Larson depo, p. 18)

24. During his deposition testimony, Dr. Larson testified that prior to July 14, 2013, Claimant's baseline condition was simply "osteoarthritis of her knee." Dr. Larson admitted that he had no medical reports to establish the presence of swelling or medial joint line tenderness. Although he opined that the high grade chondral fissures present on MRI would have been present prior to July 14, 2013, Dr. Larson admitted that such tears can occur in the face of acute injury and that he had no previous imaging studies to compare with the August 23, 2013 MRI. Consequently, the ALJ finds there is no way to determine the nature and extent of chondral fissuring prior to August 23, 2013. While the ALJ is persuaded that Claimant had severe osteoarthritis in her left knee, with likely chondral fissuring prior to July 14, 2013, the totality of the evidence presented convinces the ALJ that this arthritis was asymptomatic and non-limiting. Even Dr. Larson, who had ample opportunity to detail the "baseline condition" of Claimant's left knee including probable limitation(s) therein given the degree of degenerative change demonstrated on MRI, elected to characterize it only as "osteoarthritis of her knee."

25. The ALJ finds that more likely than not, Claimant aggravated her previously

asymptomatic osteoarthritis on July 14, 2013 when she slipped on a wet floor twisting her left knee in the process. The undersigned finds that conservative treatment measures have failed and that Claimant's current need for a total knee arthroplasty flows proximately and naturally from the July 14, 2013 injury.

26. Claimant has proven by a preponderance of the evidence that she suffered a change in the baseline condition of her left knee as a direct consequence of her work duties. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that there is an occupational relationship between her aggravated left knee osteoarthritis and her need for a total knee arthroplasty. Claimant's need for a left total knee arthroplasty is related to her July 14, 2013 work injury.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo.App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony is generally consistent with the content of the medical records. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

D. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of the his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As found here, Claimant has proven by a preponderance of the evidence that she sustained a compensable aggravation of her previously asymptomatic left knee osteoarthritis and that this aggravation is the proximate cause of Claimant's need for medical treatment, including her need for a total left knee arthroplasty. While it is true that none of the reports of Dr. Purcell specifically state that the recommended knee surgery is related to the incident of July 14, 2013, Dr. Purcell testified that the July 14, 2013 incident exacerbated her osteoarthritis and his reports outline Claimant's functional decline in the face of failed conservative treatment. Taken in its entirety, the ALJ finds that the evidentiary record contains substantial evidence to support a conclusion that Claimant's work duties and not a prior injury/surgery caused a change in the baseline level of her left knee, i.e. from asymptomatic to symptomatic directly resulting in her need for a total knee arthroplasty.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of her left knee condition, including, but not limited to the left total knee arthroplasty as requested by Dr. Derek B. Purcell.

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

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

DATED: January 21, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues presented for determination are:

- Whether the Respondents have overcome the Division Independent Medical Examination (DIME) physician's opinion, by clear and convincing evidence, regarding a sixteen percent whole person permanent physical impairment rating for Claimant?

- Subsequent to a Final Admission of Liability and Respondents' admission to post-maximum medical improvement (MMI) medical benefits; whether Respondents have proven by a preponderance of the evidence that Claimant is not entitled to an award of medical benefits post-MMI to maintain his condition at MMI?

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. Claimant is a 29-year old man, with a May 5, 1985, date of birth.

2. Claimant was injured in the course and scope of his employment with the Employer on March 23, 2013, when he was hit in the neck and upper back by a tire that dropped from approximately eight to twelve feet above him.

3. On March 23, 2013, Claimant sought treatment at St. Anthony's Hospital Emergency Room, where his initial complaints in Triage as noted by a nurse, were neck and back pain, and numbness to bilateral fingers and feet with improvement when lying down. By the time Claimant saw the Emergency Room doctor, medical records documented that his chief complaint was back pain. The records note that Claimant complained of mild, dull pain to his lower neck and upper back without radiating pain. The numbness in his hands had resolved but the numbness in his feet had not resolved.

4. On March 23, 2013, CT scans of the cervical, thoracic and lumbar spine were obtained. All studies were read as showing no evidence of acute pathology. There were no neurological symptoms noted. Claimant was reported to have active prescriptions of oxycodone and hydrocodone, but the cause for the narcotics is not noted. Examination of the neck was "supple" with "mild paraspinous tenderness to palpation near the lower neck/upper thoracic area." Extremities were symmetric with full range of motion. Claimant was discharged home, to follow up with his personal physician

5. Claimant selected HealthOne Occupational Medicine as the provider designated to treat his work injuries. Dr. Dave Hnida first evaluated Claimant on March 25, 2013.

Dr. Hnida's notes reflect that Claimant reported pain at a level 4/10 to 5/10. Claimant's past medical history was positive for migraine headaches. In reviewing Claimant's symptoms, Dr. Hnida noted the only neurological symptom "may be the occasional tingling sensation to the right foot, which is not readily reproducible". Dr. Hnida's impression was contusion to the neck and upper back. Dr. Hnida re-ordered CT scans of Claimant's cervical and thoracic spine. Dr. Hnida kept Claimant off work pending the results of the diagnostic studies.

6. On March 26, 2013, Claimant returned to HealthOne where he was evaluated by Dr. David Orgel. As before, the CT scans were read as normal, except for a non-work related thyroid nodule. Dr. Orgel indicated, "although he has painful range of motion, it is actually pretty well maintained with most of his pain with rotation, very little with flexion, and only mildly worse with extension. Dr. Orgel assessed Claimant with cervical and thoracic strain and prescribed Flexeril, Ibuprofen and physical therapy and released Claimant to return work with restrictions of limited lifting and limited overhead work.

7. On March 29, 2013, Claimant was seen at HealthOne for a physical therapy evaluation. Dizziness was documented as a subjective complaint for Claimant.

8. Claimant continued treating with HealthOne and its referrals. On April 2, 2013, Dr. Orgel evaluated Claimant and documented "mildly reduced rotation to the left, mildly positive Spurling maneuver with pain in a C5 distribution. There is otherwise no cervical spine tenderness. . . ."

9. On April 5, 2013, Dr. Hnida evaluated Claimant on a walk-in basis. Claimant complained of continuing pain in the neck with radiation along the right-greater-than-left trapezius extending out to both shoulders. Claimant also discussed that he noticed some swelling in his hand, as well as some altered sensations in the fingertips.

10. On April 10, 2013, Claimant returned to HealthOne and was evaluated by Dr. George Kohake. The medical records note that Claimant "is now complaining of dizziness at times." His main symptoms were of upper back and neck pain with tight neck muscles.

11. On April 24, 2013, Claimant saw Dr. Orgel, who noted that Claimant's progressive symptoms of dizziness one month after injury "is unusual." Dr. Orgel ordered an MRI of Claimant's brain. Dr. Orgel also referred to Claimant to a neurologist, Dr. Samuel Chan. The MRI of the brain was normal.

12. On May 2, 2013, Dr. Chan evaluated Claimant. Claimant reported, "dizziness, shacki (*sic*) vision, severe headaches, back pain, neck mussles *(sic),* right leg giving up mid-walk. On physical exam, Dr. Chan reported axial loading and truncal rotations slightly exacerbated the pain complaint. Claimant reported tenderness with flexion of the cervical spine. There was no tenderness with extension or rotation of the cervical spine. Dr. Chan noted the diagnostics failed to show any significant permanent pathology. He opined, "The concern is the patient's description of diffuse and vague symptoms". Dr. Chan determined that, neurologically, Claimant was found to be within

normal limits. Dr. Chan did administer bilateral greater and lesser occipital nerve injections.

13. On May 7, 2013, Claimant returned to Dr. Orgel and reported a worsening of his headaches following the injections.

14. On a June 11, 2013 physical exam, Dr. Hnida noted that Claimant had full range of cervical motion. His assessment was ongoing neck pain with subjective complaints of dizziness.

15. On June 20, 2013, Dr. Chan re-evaluated Claimant. Dr. Chan noted a "slightly limited" cervical spine range of motion due to "subjective complaints of pain". Dr. Chan opined, "It is unclear why the patient continues to be symptomatic". He recommended an active exercise program and ordered cervical and thoracic spine MRIs. The cervical and thoracic spine MRIs were performed on June 24, 2013. The thoracic MRI was read as normal. The cervical MRI was read as showing only minimal changes of degenerative disc disease.

16. Dr. Chan performed EMG testing of the right upper extremity on August 1, 2013. As with all other tests, this diagnostic was also read as normal.

17. As part of his treatment for the industrial injury, Claimant was referred for physical therapy, massage, chiropractic, acupuncture, and occipital injections. Claimant was treated with multiple medications. None of the treatment provided Claimant any sufficient benefit.

18. On August 21, 2013, Dr. Chan performed a Functional Capacity Evaluation (FCE) and placed Claimant at MMI and assigned four percent whole person impairment per Table 53(II)(B) and three percent whole person impairment for loss of range of cervical motion. The combined impairment totaled seven percent whole person. Dr. Chan did not recommend medical treatment post-MMI to maintain the Claimant's condition at MMI.

19. On August 22, 2013, Dr. Hnida evaluated Claimant and agreed that Claimant was at MMI. Dr. Hnida opined no maintenance care after MMI is required.

20. On September 19, 2013, Respondents filed a Final Admission of Liability consistent with Dr. Chan's opinions on MMI and impairment, but admitted liability for medical treatment post-MMI.

21. On October 16, 2013, Claimant objected to the Final Admission of Liability and requested a DIME. Dr. Velma Campbell was selected as the Division Examiner.

22. On January 23, 2014, Dr. Campbell performed the DIME and generated a report. Her report notes that the last page of the record reviewed was a July 7, 2013 medical record from a visit with Dr. Chan.

23. Dr. Campbell agreed that Claimant reached MMI on August 21, 2013, but found that Claimant suffered sixteen percent permanent physical impairment as a result of the industrial injury.

24. Dr. Campbell assigned five percent permanent physical impairment for loss of range of cervical motion, four percent permanent physical impairment per Table 53(2)(B) for the cervical spine condition, and three percent impairment per Table 5 for injury to the greater occipital nerve. Dr. Campbell's total combined spinal impairment was twelve percent whole person permanent physical impairment. Dr. Campbell then assigned an additional five percent whole person impairment for vestibular disequilibrium, for a total combined impairment of 16 percent whole person.

25. Dr. Campbell was aware that the prior combined impairment rating by Dr. Chan totaled seven percent whole person.

26. Additionally, Dr. Campbell recommended maintenance medical care and identified a home electronic stimulation unit as helpful to Claimant; Claimant previously used a muscle stimulation machine while seeing Dr. Chan and had a transient decrease in pain.

27. Dr. Campbell also stated that medications as directed by Dr. Chan would be appropriate, especially if they minimize the need for opiates. She noted that chiropractic, massage, acupuncture, and physical therapy did not provide sufficient or even temporary subjective benefit for Claimant's symptoms, therefore, Dr. Campbell did not recommend a routine provision of those therapies, but did recommend that those therapies may be useful for occasional exacerbations.

28. Finally, Dr. Campbell, recommended that maintenance medical care continue for Claimant until Claimant has not needed medical care for at least six consecutive months.

29. Dr. Campbell noted that Claimant described his headaches post- industrial injury as different and more frequent than the migraines he suffered pre-industrial injury. Dr. Campbell assessed Claimant with cervicogenic/occipital headaches with migraine features, cervical vertigo, and chronic cervicothoracic myofascial dysfunction pertaining to the complications of the cervical contusion/sprain. Dr. Campbell noted Claimant's history of significant contusion and strain to the cervical and cervicothoracic region. She noted that physical therapy was not able to progress rapidly because of the dizziness and nausea with head and trunk motions.

30. Dr. Campbell rated Claimant's headaches according to occipital nerve impairment rather than the central nervous system due to, in her opinion, the stronger association with the cervicogenic mechanism of the headache than with a brain injury.

31. Dr. Campbell determined that the dizziness and vertigo as described by Claimant do continue to appear in the record after they first appear, and are also

consistent with cervical or cervicogenic vertigo. She noted this determination is supported by the absent Dix-Hallpike sign and some of the positional factors. Dr. Campbell wrote that the vertigo/disequilibrium is intermittent and interrupts Claimant's activities intermittently, and therefore does not prevent Claimant from engaging in the activities of daily living. However, Dr. Campbell noted there are some activities that Claimant should not perform at work due to the potential for unpredictable loss of balance.

32. Dr. Campbell found permanent partial impairment due to the conditions related to the March 23, 2013 industrial injury. She noted that the conditions include chronic cervical spine strain with spasm and myofascial pain due to the cervicothoracic contusion and strain, posttraumatic headaches with migraine features associated with occipital trigger points.

33. On April 23, 2014, Respondents filed a second Final Admission of Liability admitting to post-MMI medical benefits that are medically, reasonable, necessary, and related to the industrial injury of March 23, 2013; based on the report of Dr. Hnida dated August 22, 2013 and the report of Dr. Chan dated August 21, 2013. Respondents also awarded Claimant a permanent disability award consistent with the impairment rating and DIME report of Dr. Campbell.

34. On May 23, 2014, Claimant objected to the April 23, 2014 Final Admission of Liability and filed an application for hearing on the issues of average weekly wage, temporary total benefits, temporary partial benefits, permanent partial benefits, and overcoming the determination that Claimant had reached MMI.

35. At a pre-hearing conference on November 5, 2014, Claimant sought to withdraw the issues listed on his Application for Hearing dated May 23, 2014, including, overcoming the DIME. PALJ Clisham ordered that Claimant's issues on the May 23, 2014 Application for Hearing were stricken, without prejudice.

36. In their response to Claimant's application for hearing, Respondents endorsed the issues of medical benefits, reasonably necessary, permanent partial disability benefits, and "[o]vercoming opinions of DIME on issue of permanent physical impairment apportionment."

37. On July 21, 2014, Dr. Tashof Bernton performed an IME at the Respondents' request. In connection with his IME, Dr. Bernton performed psychological testing, Battery for Health Improvement 2. This test evaluates the presence of psychological factors when a person complains of chronic pain. Based on the results of the psychological testing, Dr. Bernton generated a report and opined, "Clinicians should take care to make decisions based upon objective findings, as subjective complaints are not likely to be a reliable guide to physically based pain generators. . . . In any case, with the high perseverance scale, this is an individual whose complaints are likely to persist even in the absence of physiologic basis and clinicians should take that into account in assessing and treating his complaints."

38. In his report, Dr. Bernton opined that the findings on psychological testing are consistent with either a strong somatoform (psychologically-based) contribution to the Claimant's pain presentation or possibly to some misrepresentation.

39. At hearing, Dr. Bernton testified as an expert in Occupational Medicine and Internal Medicine. He is Level II accredited and also Board Certified in both Occupational and Internal Medicine. Dr. Bernton testified that his full accreditation permits him to evaluate psychological impairment; he also received training from the author of the Battery for Health Improvement 2, Mr. Dan Bruns. He testified that somatoform disorders are not work-related, but instead are a maladaptive way of coping. Dr. Bernton testified that somatoform complaints are physical complaints that represent emotional conflict.

40. As part of the IME, Dr. Bernton also physically examined the Claimant and reviewed the medical records associated with the March 23, 2013 industrial injury. Dr. Bernton noted that Claimant demonstrated all five Waddell's signs, including complaints of pain at the cervicothoracic junction with minimal axial compression, complaints of lumbar pain with simulated rotation of the hips, pain complaints with skin rolling, inconsistent straight-leg raising, and give-way weakness on strength testing of the right upper extremity. In his opinion, Claimant's complaints represent multiple body systems with multiple non-accident related somatic complaints.

41. Dr. Bernton testified that his findings were consistent with Dr. Chan's findings in that, there were inconsistencies with testing results.

42. Dr. Bernton agreed with Dr. Orgel that Claimant's progressive symptoms of dizziness one month after injury "is unusual." Dr. Bernton testified that Dr. Chan documented full range of motion for Claimant on June 11, 2013 and July 23, 2013 and that his expectation of normal range of motion three months post-accident is resolution and a return to full function.

43. Dr. Bernton testified that range of motion is effort dependent; patients can give decreased but consistent range of motion. Dr. Bernton believed that Claimant did not give maximal effort in range of motion testing with Dr. Campbell. The ALJ finds this is speculation by Dr. Bernton and is not persuasive.

44. Dr. Bernton testified that the AMA Guides, 3rd Ed., Revised, require a physician to perform an analysis to determine that a specific injury is the cause of any impairments and describe the pathophysiology of the particular condition and pertinent host characteristics and establish that the type and magnitude of the factor was sufficient and bore the necessary temporal relationship to the condition.

45. Dr. Bernton testified that Dr. Campbell did not perform this analysis and that Dr. Campbell's evaluation did not meet the AMA Guides' required analysis of causation. He specifically stated that Dr. Campbell did not follow appropriate methodology. He testified that when there are inconsistencies in the medical record, one cannot just go

the AMA tables directly. Dr. testified that in this case, there are substantial discrepancies and that Dr. Campbell rated despite negative findings.

46. Dr. Bernton opined that Dr. Campbell rated for the occipital nerve even though it was documented in the medical records that the occipital nerve is not the cause of the headaches. He adamantly testified that the record does not support an occipital nerve rating because the Claimant underwent occipital nerve injections by Dr. Chan, and those injections worsened the Claimant's headache. Dr. Bernton testified, that if an occipital nerve injury were the cause of the Claimant's headache, the diagnostic occipital nerve injection would have provided pain relief. The ALJ finds this is a matter of differing medical opinions as Dr. Campbell acknowledged that the occipital injections actually made Claimant's condition worse, and yet, she did not terminate her analysis based on that one fact and ultimately determined that the occipital nerve played a role in Claimant's condition.

47. Dr. Bernton disagreed with Dr. Campbell's other ratings as well and testified that she is clearly wrong. Dr. Bernton read the AMA Methodology (page 6) into the record and testified that under the Workers' Compensation Act, it is not appropriate to rate subjective complaints without objective findings.

48. Dr. Bernton testified that the correct impairment rating for Claimant is zero. Although the ALJ finds Dr. Bernton credible in some of his testimony, the ALJ is not persuaded that the correct impairment rating for Claimant is zero.

49. Dr. Bernton testified that Claimant did not report dizziness until April 24, 2013. On cross-examination, Dr. Bernton was questioned about the fact that a March 29, 2013 medical record notes that Claimant complained of dizziness. Dr. Bernton testified that he had the March 29, 2013 when he examined Claimant and reviewed Claimant's medical records and that his opinion is unchanged despite the earlier record of dizziness.

50. On cross-examination, Dr. Bernton testified that a vestibular, or labyrinth, concussion, and other inner ear issues would be expected from a direct blow to the region of the head and neck. The ALJ finds that Claimant suffered a direct blow to his head and neck when the tire fell on him on March 23, 2013. This testimony by Dr. Bernton supports Dr. Campbell's finding of a vestibular issue.

51. Additionally, Dr. Bernton testified that vestibular issues would not show up in radiographic studies or EMG. The ALJ finds that this testimony by Dr. Bernton supports Dr. Campbell's rating for vestibular dysfunction despite the lack of objective findings in radiographic studies or EMG and despite some inconsistencies with other forms of testing.

52. The ALJ finds that Dr. Campbell thoroughly reviewed Claimant's medical records, physically examined Claimant, and conducted appropriate tests.

53. Claimant's records exhibit objective findings related to vestibular dysfunction during Claimant's treatment. Medical records from Dr. Orgel demonstrate that Claimant not only reported dizziness but Dr. Orgel observed nystagmus during his evaluation of Claimant. Claimant's HealthOne Rehabilitation Northwest records show that Claimant's symptoms were reproduced with cervical rotation, "head down", and cervical extension. Those records also state that symptoms were reproduced when Claimant was in the prone position.

54. Claimant's records demonstrate that his providers were treating Claimant for headaches related to occipital nerve impairment. During his treatment, Claimant was seen by Dr. Scott Parker, who noted trigger points in the cervicothoracic region and bilateral atlantooccipital region. Dr. Chan also noted tenderness to palpation over the bilateral greater and lesser occipital nerve insertion. Occipital nerve blocks were completed and Claimant experienced some temporary relief but then experienced increased symptoms. Dr. Chan also recommended acupuncture to treat Claimant's pain in the occiput area. In Claimant's records from HealthOne Rehabilitation Northwest, it is also noted that occipital skin stretch needed to be explored for possible pain relief.

55. As one example of her rationale, and as noted by Dr. Campbell, the AMA Guides provide the following on page 178 regarding a rating for disturbances of vestibular function:

> **Class 2- Impairment of the Whole Person 5-10%**
> A patient belongs in Class 2 when (a) signs of vestibular disequilibrium are present with supporting objective findings; and (b) the usual activities of daily living are performed without assistance, except for complex activities such as bike riding or certain activities related to the patient's work, such as walking on girders or scaffolds.
>
> *AMA Guides to the Evaluation of Permanent Impairment,* 3d Ed., Revised.

56. The ALJ finds that Dr. Campbell acknowledged inconsistencies in the medical record but also determined objective findings from her review of the records and examination of Claimant. Thus, the ALJ finds that there are sufficient and supporting objective findings by Dr. Campbell documented in her report to justify her impairment rating of 16% whole person and that she correctly utilized and applied the AMA Guides.

57. The ALJ finds the opinion of Dr. Campbell more credible and persuasive than that of Dr. Bernton. Dr. Bernton's differing medical opinion from that of Dr. Campbell is not sufficient to overcome Dr. Campbell's opinion.

58. Respondents have failed to overcome the DIME opinion by clear and convincing evidence to show that it is highly probable that Dr. Campbell is incorrect. Consequently, Claimant's appropriate impairment rating is 16% whole person.

59. Respondents have proven by a preponderance of the evidence that Claimant does not need post-MMI medical benefits to prevent deterioration of his physical condition caused by his work injury. Although Dr. Campbell recommended maintenance medical care for Claimant, her recommendation does not constitute substantial evidence of the need for such treatment and her opinion on this issue is not binding. Neither Dr. Chan nor Dr. Hnida recommended medical treatment post-MMI to maintain the Claimant's condition at MMI. Even Dr. Campbell noted that chiropractic, massage, acupuncture, and physical therapy did not provide sufficient or even temporary subjective benefit for Claimant's symptoms. She also noted that a home electric muscle stimulation machine only provided Claimant a transient decrease in pain. There is not sufficient evidence to find that the therapies or treatments recommended by Dr. Campbell are reasonable and necessary to maintain Claimant's condition at MMI and to prevent deterioration of his condition related to the industrial injury.

CONCLUSIONS OF LAW

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

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

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

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

4. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Whether the DIME physician properly applied the

AMA Guides, and ultimately whether the rating has been overcome by clear and convincing evidence are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000).

5. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (Nov. 17, 2000).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

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

8. "It is well settled that where the respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover*, the respondents are not precluded from later contesting their liability for a particular treatment." *In re Claim of Dunn, 100113 COWC, 4-754-838-01* (October 1, 2013). *See also Synder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Generally, when respondents contest liability for a particular medical benefit, the claimant bears the burden of proof that the contested treatment is reasonably necessary to treat the industrial injury and is related to the industrial injury. *See Grover, supra.* "Where, however, the respondents attempt to modify an issue that previously has been determine by an admission, they bear the burden of proof for such modification." *In re Claim of Dunn, 100113 COWC, 4-*

754-838-01 (October 1, 2013). *See also Salisbury v. Prowers County School District,* W.C. No. 4-702-114 (June 5, 2012). In 2009, § 8-43-201(1), C.R.S. was amended to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.2d 1230 (Colo. App. 2001). That decision held that while respondents could move to withdraw a previously filed admission of liability, they were not actually assessed with the burden of proof. As found in *Dunn*, the amendment placed that burden on respondents and the statute serves the same function in regard to maintenance medical benefits. In the case at bar, the effect of Respondents' argument at hearing is to terminate previously admitted maintenance medical treatment, and as such, Respondents have the burden by a preponderance of the evidence pursuant to § 8-43-201(1), C.R.S.

9. No persuasive or credible evidence was introduced showing that Claimant needs additional treatment to prevent deterioration of his physical condition caused by his work injury. On the contrary, Respondents have proven by a preponderance of the evidence that Claimant does not need post-MMI medical benefits to prevent deterioration of his physical condition caused by his work injury. The Judge notes that even if the burden had been assigned to Claimant, the outcome would be the same. The Judge acknowledges that Dr. Campbell recommended maintenance medical care for Claimant. However, Dr. Campbell's recommendation does not constitute substantial evidence of the need for such treatment, is not binding, and does not need to be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Neither Dr. Chan nor Dr. Hnida recommended medical treatment post-MMI to maintain the Claimant's condition at MMI. Dr. Campbell noted that chiropractic, massage, acupuncture, and physical therapy did not provide sufficient or even temporary subjective benefit for Claimant's symptoms. She also noted that a home electric muscle stimulation machine only provided Claimant a transient decrease in pain. There is not sufficient evidence to find that the therapies and treatments recommended by Dr. Campbell are reasonable and necessary to maintain Claimant's condition at MMI and to prevent deterioration of his condition related to the industrial injury.

10. For purposes of determining levels of medical impairment, a physician shall not render an impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. Sections 8-42-101(3.7), 8-42-107(8)(c), C.R.S.

11. The Judge is not persuaded by the opinion of Dr. Bernton that Claimant should be rated at zero and that his symptoms are consistent with either a strong somatoform (psychologically-based) contribution to the Claimant's pain presentation or possibly to some misrepresentation. The Judge is not persuaded by the opinion of Dr. Bernton that Dr. Campbell's opinion is clearly wrong and that she did not perform an appropriate analysis or that her evaluation failed to meet the AMA Guides' required analysis of causation. Dr. Campbell conducted a thorough review of Claimant's medical records and physically examined Claimant and conducted her own range of motion testing. Dr. Campbell acknowledged inconsistencies in the medical record but also determined objective findings from her review of the records and examination of Claimant. As found, there are sufficient and supporting objective findings by Dr. Campbell

documented in her report to justify her impairment rating of 16% whole person and that she correctly utilized and applied the AMA Guides.

12. Claimant has consistently complained of chronic pain as a result of the industrial injury. Claimant complained of dizziness/lightheadedness within six days of the industrial injury. Claimant's records exhibit objective findings related to vestibular dysfunction during Claimant's treatment. Medical records from Dr. Orgel demonstrate that Claimant not only reported dizziness but Dr. Orgel observed nystagmus during his evaluation of Claimant. Claimant's HealthOne Rehabilitation Northwest records show that Claimant's symptoms were reproduced with cervical rotation, "head down", and cervical extension. Those records also state that symptoms were reproduced when Claimant was in the prone position. Furthermore, Claimant's records demonstrate that his providers were treating Claimant for headaches related to occipital nerve impairment. During his treatment, Claimant was seen by Dr. Scott Parker, who noted trigger points in the cervicothoracic region and bilateral atlantooccipital region. Dr. Chan also noted tenderness to palpation over the bilateral greater and lesser occipital nerve insertion. Occipital nerve blocks were completed and Claimant experienced some temporary relief but then experienced increased symptoms. Dr. Chan also recommended acupuncture to treat Claimant's pain in the occiput area. In Claimant's records from HealthOne Rehabilitation Northwest, it is also noted that occipital skin stretch needed to be explored for possible pain relief.

13. Although different forms of testing revealed a lack of structural problems that correlate with the pain or dizziness, Dr. Bernton testified that a vestibular, or labyrinth, concussion, and other inner ear issues would be expected from a direct blow to the region of the head and neck (like Claimant had). He further testified that vestibular issues would not show up in radiographic studies or EMG. As found, his testimony supports Dr. Campbell's rating for vestibular dysfunction despite the lack of objective findings in radiographic studies or EMG and despite some inconsistencies with other forms of testing. Additionally, on August 21, 2013, Dr. Chan conducted a Functional Capacity Evaluation and placed Claimant at MMI and assigned four percent whole person impairment per Table 53(II)(B) and three percent whole person impairment for loss of range of cervical motion. Dr. Campbell also rated Claimant for loss of range of cervical motion. Both Dr. Campbell and Dr. Chan were aware that Claimant's range of motion tests had yielded differing results prior to their impairment rating, Notwithstanding, they determined a loss of range of motion.

14. The Judge is not persuaded by the opinion of Dr. Bernton that Dr. Campbell did not perform an appropriate analysis or that her evaluation did not meet the AMA Guides' required analysis of causation.

15. Accordingly, the Judge is persuaded by the opinion of Dr. Campbell and the Judge is not persuaded by the differing medical opinion of Dr. Bernton; his opinion does not constitute clear and convincing evidence that Dr. Campbell's opinion is incorrect.

16. Respondents have failed to overcome the DIME opinion by clear and convincing evidence to show that it is highly probable that Dr. Campbell is incorrect. Consequently, Claimant's appropriate impairment rating is 16% whole person.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME physician's opinions by clear and convincing evidence.

2. Respondents are bound by the 16% whole person impairment rating as determined by the DIME physician, Dr. Campbell.

3. Respondents have proven by a preponderance of the evidence that Claimant is not entitled to post-MMI medical maintenance benefits to prevent deterioration of his physical condition caused by his work injury or to maintain his condition at MMI.

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

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

DATED: January 8, 2015

/s/ Sara L. Oliver
Sara L. Oliver
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

ISSUES

1. Whether the claimant was a statutory employee of the respondent-employer for purposes of workers' compensation coverage, i.e., whether a real estate broker can be a statutory employer of an employee of an independent contractor real estate agent when the statute providing for statutory employer specifically excludes real estate brokers and agents?

2. If the respondent-employer is determined to be a statutory employer, whether the claimant met her burden of proving:

a. Compensability;

b. Medical benefits;

c. Reasonably necessary;

d. Authorized provider;

e. Average weekly wage; and.

f. Penalties for being uninsured.

FINDINGS OF FACT

1. The claimant was hired by Jeff R. in November 2011 as an assistant. The claimant acknowledged that she was paid by Jeff R. through his personal business account and that she knew Mr. R. was an independent contractor of the respondent-employer.

2. The claimant worked as an assistant to Mr. R for over twenty (20) months prior to the subject accident. On August 14, 2013, at approximately 5:00 PM, the claimant was assisting her co-worker, Ted Bachara, move a chair at the office when her heel caught a rip in the carpet, causing her to trip. The claimant's face hit the arm of the chair, knocking out her front tooth and breaking her upper mandible bone.

3. The claimant reported the incident to her supervisor, Mr. R. via text

message the following morning, as well as to fellow member of the team, Jeff Johnson. Mr. R. advised the claimant to locate the workers' compensation information in the office kitchen and call the workers' compensation carrier directly. Shortly after contacting The Hartford, the claimant was informed that there was no workers' compensation coverage for employees.

4. The claimant sought treatment for her injuries at Meyer & Lydiatt Family Dentistry on August 20, 2013, where she had received dental care prior to this incident. Several years before the subject accident the claimant injured her front #8 tooth, which required placement of a crown. As a result of the subject accident, the claimant's #8 crown dropped and she sustained a fractured mandible.

5. The claimant's medical providers never gave her work restrictions as a result of her injuries.

6. The ALJ finds that the medical treatment provided to the claimant was reasonable, necessary, and related to the claimant's industrial injury herein.

7. Jeff R. testified via telephone that he is an independent contractor with the respondent-employer. He receives commissions only and is not an employee of the respondent-employer. The respondent-employer provides him with an office. He declined worker's compensation coverage in his contract with the respondent-employer. He owns his own corporation which pays its own taxes separate from the respondent-employer. He pays his own employees. For federal tax purposes, he is not considered an employee of the respondent-employer. He has no authority to hire employees for the respondent-employer.

8. Jeff R. hired the claimant as his personal assistant. He did not obtain prior approval from the respondent-employer to hire the claimant as stated in his contract. He paid the claimant from his personal business account. The claimant worked for him, exclusively, and not for the respondent-employer.

9. The claimant told Mr. R. that she knocked out her tooth but did not tell him initially that it happened at work. She did tell him it was work-related about two to three weeks later and asked him how to go about making a worker's compensation claim. He asked one of the employees from the respondent-employer and then referred her to the worker's compensation poster in the break room.

10. The claimant never provided Mr. R. with doctor restrictions regarding her injury. He terminated the claimant on August 15, 2014.

11. Joe C. testified that he is a real estate broker and his company is the respondent-employer. As a broker, he enters into independent contractor contracts with real estate agents, such as Jeff R. Jeff R. worked for commission only and waived workers' compensation coverage. Jeff R. had no authority to hire employees for the respondent-employer. Jeff R. was authorized to use the respondent-employer emblem for marketing purposes. Jeff R. acknowledged that he did not have workers' compensation coverage for the claimant.

12. The respondent-employer had an employee manual for its 20 office employees. The respondent-employer also had a policy manual for its agents. Agents were to provide workers' compensation coverage to their employees. The respondent-employer required agents to obtain prior approval for their employee hires. Jeff R. did not obtain prior approval and Joe Clement found out about the claimant's hire months later.

13. The respondent-employer maintains workers' compensation coverage for its employees as depicted in the caption to this claim..

14. The ALJ finds that the claimant is neither a licensed real estate sales agent nor a licensed real estate broker.

15. The ALJ finds that the claimant is the statutory employee of the respondent-employer.

16. The ALJ finds that section 8-40-301(2), which excludes licensed real estate sales agents and licensed real estate brokers from the definition of "employee" is inapplicable to the claimant.

17. The ALJ finds that the claimant performed services for pay for Jeff R. and is thus clearly an employee.

CONCLUSIONS OF LAW

1. According to C.R.S. §8-43-201, "(a) claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the

evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hosier v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

2. In deciding whether claimant has met her burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

3. An injury "arises out of" employment when the activity causing the injury is "sufficiently interrelated to the conditions and circumstances under which the claimant generally performs his job, that the activity may reasonably be characterized as an incident of employment." *Novak v. Pueblo County*, W.C. No. 4-251-989 (ICAO, October 12, 1995); *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *City of Northglenn v. Eltrich*, 908 P.2d 139 (Colo. App. 1995).

4. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Sarvestani v. Dale A. Wall, DDS*, W.C. Nos. 4-206-040; 4-464-407 (ICAO October 16, 2001).

> All that is necessary to warrant a finding of a causal connection between the accident and the disability is to show facts and circumstances which would indicate with reasonable probability that the injury or death resulted from or was precipitated by the 'accident.' *Colo. Fuel & Iron Corp. v. Indus. Comm.*, 380 P.2d 28, 30 (Colo. 1963).

5. The ALJ concludes the claimant is credible.

6. The ALJ concludes that Jeff R. did not carry workers' compensation insurance for his employees.

7. Under § 8-41-401(1)(a), C.R.S., a company that contracts out part or all of its work to any subcontractor is the statutory employer of the subcontractor's

employees. The purpose of the statute is "to prevent employers from avoiding responsibility under the workers' compensation act by contracting out their regular business to uninsured independent contractors." *Finlay v. Storage Technology Corp.*, 764 P.2d 62, 64 (Colo. 1988). The statutory scheme provides that it is the general contractor to whom the employees of all subcontractors may look for workers' compensation if their immediate employer is uninsured or financially irresponsible. *Edwards v. Price*, 550 P.2d 856 (Colo. 1976), appeal dismissed, 429 U.S. 1056 (1977). This distinguishes the general contractor from the subcontractor and is the rationale which sustains the different treatment accorded general contractors by statute. *Id.* In the event the independent contractor is uninsured, the statute permits employees of subcontractors or independent contractors to reach up-stream to the statutory employer to recover workers' compensation benefits. *Finlay, supra*; *Herriott v. Stevenson*, 473 P.2d 720 (Colo. 1970). Here, Mr. R. waived workers' compensation coverage for himself; however, his waiver does not extend to his employees.

8. The test for determining whether an employer has subcontracted out its regular business is set forth in *Finlay v. Storage Technology Corp.* The *Finlay* court noted that earlier decisions narrowly limited the definition of the contractor's "regular business" to the "primary business" of the contractor. *Finlay*, 764 P.2d at 67. However, the *Finlay* court significantly expanded that standard to the total business of the company's operation. *Id.*, *see also Shumiloff v. Frey*, W.C. No. 4-005-377 (April 24, 1992), *aff'd, Trinity Lutheran Church v. Shumiloff* (Colo. App. No. 92CA0794, April 29, 1993) (not selected for publication*).*

9. Under *Finlay*, the regular business test is satisfied if the contracted-out services are part of the employer's regular business as defined by its "total business operation," which considers "the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Finlay*, 764 P.2d at 67. Furthermore, the importance of the contracted service can be demonstrated by showing that the employer would "find it necessary to accomplish the work by use of his own employees rather than forego the performance of the work." *Id.*; *see also Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379, 381 (Colo. App. 1983).

10. Whether a person or entity has the status of statutory employer is generally a question of fact. *Thornbury v. Allen,* 991 P.2d 335, 339 (Colo.App.1999). Application of the regular business test is dependent on the facts of each individual case. *See Virginia Heritage Square Co. v. Smith*, 808 P.2d 366 (Colo. App. 1991). Consequently, an ALJ's findings must be upheld if supported by substantial evidence. C.R.S., § 8-43-301(8) (2014).

11. The facts are straightforward. The respondent-employer is a real estate brokerage. Buying and selling homes in the Rocky Mountain region is its regular business. The respondent-employer contracted with Jeff C. R. as an independent contractor real estate agent to further its business of buying and selling homes in the Rocky Mountain region. Mr. R. hired the claimant as an assistant to aid him in the business of buying and selling homes. Thus, the respondent-employer contracted out its regular business to Jeff C. R. and his employees. As a result the respondent-employer qualifies as the claimant's statutory employer pursuant to § 8-41-401(1)(a)(I), C.R.S. and is liable for the claimant's workers' compensation benefits.

12. The respondents submitted the legislative history of HB1052 (1985). The ALJ finds that the statute is clear on its face and there is no necessity to resort to legislative history.

13. The ALJ concludes that the claimant suffered her facial injuries arising out of and in the course of her employment with Mr. R. and thus by statute with the respondent-employer.

14. C.R.S. §8-42-101(1)(a) provides that respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (ICAO May 10, 2007), "a showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary."

15. Pursuant to section 8-42-101(6)(a),

> If an employer received notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

16. Pursuant to section 8-42-101(6)(b),

> If a claimant has paid for medical treatment that is admitted or found to be compensable and costs more than the amount specified in the workers'

> compensation fee schedule, the employer...or…insurance carrier shall reimburse the claimant for the amount paid.

17. The ALJ concludes, as found above, that the ensuing medical treatment sought by the claimant subsequent to the injury was reasonable, necessary, and related to her industrial injury and thus payment for this treatment is the responsibility of the respondent-insurer.

18. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001).

19. The ALJ concludes that the claimant has established by a preponderance of the evidence that on August 14, 2013 she sustained an injury to her face and teeth arising out of and in the course of her employment with the respondent-employer.

20. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent-employer denied the claim and failed to provide medical treatment for non-medical reasons subsequent to the denial.

21. The ALJ concludes that the claimant has established by a preponderance of the evidence that the medical care received by the claimant, subsequent to the respondent's denial of medical treatment, was reasonable, necessary, and related to the claimant's industrial injury of August 14, 2013 and that the respondent-insurer is responsible for payment of that care in accordance with the Medical Fee Schedule.

22. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant suffered a loss of wages, due to her industrial injury.

23. The ALJ concludes that based upon the totality of the evidence, the claimant has failed to establish by a preponderance of the evidence that the respondent-employer is uninsured and subject to penalties.

24. The ALJ concludes that based upon the totality of the evidence, this is a medical claim only and defers a decision on the claimant's average weekly wage until indemnity benefits are established.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-employer is the claimant's statutory employer.

3. The respondent-insurer is responsible for the claimant's medical treatment for the injuries sustained in the August 14, 2013 industrial accident.

4. The claimant's claim for indemnity benefits is denied and dismissed.

5. The claimant's claim for penalties is denied and dismissed.

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

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

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

DATE: January 23, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

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

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of November 12, 2013 through May 2014?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

FINDINGS OF FACT

1. Claimant was hired by employer on or about November 7, 2013 as a laborer. Claimant testified he was paid $12 per hour when he was hired. Claimant further testified he was given a raise to $14 per hour on the day he was terminated. Claimant was required to pass a pre-employment drug screen prior to being hired.

2. Claimant testified his job duties included working on a rig and was eventually given the job of a driver where he would pick up people and/or parts from Denver and deliver them to Rifle, Colorado. Claimant testified that on November 11, 2013 he drove to Longmont, Colorado as part of his job duties for employer. Claimant testified he had driven at least 13 hours this day and had only slept 4 hours. Claimant testified he reported to work on November 12, 2013 and was too tired to drive. Claimant testified he went home and slept and returned to work and was told he would be driving to Odessa, Texas. Claimant testified that after speaking with his wife, he decided he was not going to drive to Texas for employer.

3. Claimant testified he returned to employer's shop and spoke with Mr. Brach, the owner. Claimant testified he informed Mr. Brach that he would prefer to work in the shop or on a rig. Claimant testified Mr. Brach told claimant employer was not going to use him and if he didn't leave he was fired. Claimant further testified that Ms. Ottman, the office manager, told claimant that they would be taking money out of his paycheck to pay for the pre-employment drug screen. Claimant testified that Mr. Brach then shoved claimant and said, "Get out of my office!" Claimant denied that he took a swing at Mr. Brach and denied that he informed Mr. Brach that he was quitting when he came back to employer on November 12, 2013.

4. Claimant testified he and Mr. Brach then began fighting and another employee, Mr. Hofius, then ran up the stairs to where claimant and Mr. Brach were fighting and jumped on claimant's back. Ms. Ottomann instructed another employee to call the police and Mr. Brach and Mr. Hofius then let claimant up. Claimant testified that after he was let up, an employee then hit claimant from the side causing claimant to fall down the stairs. Claimant testified when he got outside, he grabbed his skateboard from his vehicle and Mr. Brach grabbed a pipe before claimant got back into his vehicle and was driven home by claimant's wife.

5. Claimant denied on cross-examination telling Ms. Murray that he was quitting prior to speaking with Mr. Brach on November 12, 2013. Claimant's testimony was contradicted by the testimony of Ms. Murray who testified in detail that claimant came to work on November 12, 2013 and informed Ms. Murray that he was going to Texas as part of his assignment, before returning after going home and bringing his hard hat and shirt and said to Ms. Murray, "I can't do this. I quit." Ms. Murray testified that she said she would inform Mr. Brach and claimant said, "I'll tell him myself" before going upstairs to Mr. Brach's office.

6. On cross-examination, when questioned as to why claimant had brought his hard hat and other equipment with him if he wasn't intending on quitting, claimant testified he thought he was going to be fired when he turned down the assignment.

7. Claimant provided contradicting testimony regarding his attempts to return to work in 2014, including testimony that he returned to work sometime in May 2014, he believed. Claimant also testified that he did not recall what happened when he first attempted to return to work.

8. Mr. Brach testified at hearing in this case that he hired claimant in November 2013 to work as a driver. Mr. Brach testified that on November 12, 2013 claimant came in and said he was tired, so Mr. Brach sent him home. Claimant later returned to employer and Mr. Brach testified he offered claimant a job driving to Texas. Mr. Brach testified that claimant did not have clothes for the trip and left to go home and get clothes. Mr. Brach testified that when claimant returned he was in the office with Ms. Ottman when claimant came in and informed Mr. Brach that he was quitting. Mr. Brach testified that claimant demanded his paycheck immediately and was informed

that because he was quitting, he would receive his paycheck on the scheduled payday. Mr. Brach testified that he and Ms. Ottman informed claimant that his check would include certain deductions and claimant demanded that no deductions be taken from his check. Mr. Brach denied threatening claimant's job if he did not make the drive to Texas.

9. Mr. Brach testified claimant pushed him and took a swing at Mr. Brach before Mr. Brach was able to get claimant in a headlock. Mr. Brach testified he had claimant in a headlock while claimant was on top of him on the ground. Mr. Brach testified he was able to get claimant to calm down to the point that he was able to let him out of the headlock and followed claimant down the stairs and out the door. Mr. Brach testified that when claimant got outside the building, he went to his vehicle and got a skateboard and swung the skate board at Mr. Brach. Mr. Brach testified he then went and got a pipe for protection. Mr. Brach testified that claimant then said he was going to come back with a gun.

10. Claimant's threat to return with a gun was confirmed in testimony by Ms. Murray.

11. Mr. Brach testified that claimant left in his vehicle and the police eventually showed up. Mr. Brach testified claimant was subsequently arrested by the police running over fence posts on employer's property in his car.

12. Mr. Nick Hofius testified at hearing. Nick Hofius is the shop foreman for employer. Nick Hofius testified that on November 12, 2013 he was in the shop and hear a commotion and came into the office and witnessed claimant and Mr. Brach wresting. Nick Hofius testified he came up the stairs and saw Mr. Ottman holding claimant's left arm as he was on top of Mr. Brach. Nick Hofius denied hitting claimant and denied pushing claimant down the stairs. Nick Hofius testified that he heard Mr. Brach say to claimant, "calm down and we'll let you go." Nick Hofius testified claimant left the building and then began swearing at him and Mr. Brach and got a skateboard and began swinging it at Mr. Brach. Nick Hoifus testified he returned to the shot and heard loud bangs from the back of the shop and later noticed that the employer's fence posts that held an eight foot chain link fence were damaged.

13. Ms. Wright testified at hearing in this matter. Ms. Wright testified she was in her office across the hall from Mr. Brach's office when claimant came in on November 12, 2013 and informed Mr. Brach that he was quitting. Ms. Wright testified that she witnessed claimant take a swing at Mr. Brach. Ms. Wright testified she heard claimant say, "don't push me" but witnessed Mr. Brach with his hands up. Mr. Wright testified she did not see Mr. Brach push claimant.

14. Mr. Don Hofius testified at hearing. Don Hofius testified that he is not employed by employer but was visiting employer on November 12, 2013. Don Hofius testified claimant came in on November 12, 2013, went upstairs and came back down

approximately 10 minutes later and said, it looks like I'm going to Texas. Don Hofius testified claimant then came back to the office and had his hard hat, book and shirt and said, "I can't do this anymore. I quit."

15. Don Hofius testified claimant went upstairs and he later heard a thud and Ms. Ottman yell, "Call 911". Don Hofius testified he went to the stairs and saw Mr. Brach on the ground on his back with claimant on top of him in a headlock. Don Hofius testified Mr. Brach said, "If you calm down, I'll let you go." Don Hofius testified Mr. Brach let claimant go, claimant came downstairs and went outside. Don Hofius testified he went outside after claimant and saw claimant come back on the property with a skateboard that he was swinging. Don Hofius testified he heard claimant say he was going to get a gun.

16. Ms. Ottman testified at hearing regarding the incident of November 12, 2013. Ms. Ottman testified she informed claimant that he was scheduled to make a run to Texas in the evening of November 12, 2013. Claimant then left to get the things he would need from home. Ms. Ottman testified approximately 20 minutes later her phone rang and she was informed by the secretary that claimant had quit, but that he wanted to talk to Mr. Brach.

17. Ms. Ottman testified claimant came upstairs and said he wanted no hard feelings. Ms. Ottman testified claimant then asked about his check and was informed that he would be issued his check at the end of the week. Ms. Ottman testified claimant told Ms. Ottman that she wasn't going to take any money from his check and was informed by Mr. Brach that it was time to leave. Ms. Ottman testified claimant and Mr. Brach then began to scuffle and she was trying to hold claimant's arm down so that he did not strike Mr. Brach. Ms. Ottman testified Nick Hofius came upstairs and claimant was let go once by Mr. Brach after he settled down. Claimant then went down the stairs and outside. Ms. Ottman testified that Nick Hofius did not hit or kick claimant. Ms. Ottman testified that nobody pushed claimant down the stairs.

18. Ms. Ottman testified that when claimant got outside, he threw down his keys and took off his shirt and tried to get Mr. Brach and Nick Hofius to fight him. Claimant then went to his car and got a skateboard that he began swinging at Mr. Brach. Mr. Brach then got a metal pipe and claimant left.

19. Ms. Ottman testified that claimant was not given a raise to $14 per hour.

20. Claimant's testimony in this case is found to be not credible. Claimant's testimony is contradicted by multiple witnesses regarding his actions on November 12, 2013 and his own interrogatory answers. When questioned regarding his contradictory interrogatory answers, claimant maintained that he had not changed his answer, but instead made a mistake.

21. Claimant further testified that he was given a raise of $2 per hour after only one week on the job. Claimant's testimony in this regard was contradicted by the testimony of Ms. Ottman and not supported by any employment records.

22. Claimant's testimony that his job was threatened by Mr. Brach was likewise contradicted by Ms. Ottman. Claimant's testimony that he was knocked down the stairs was likewise contradicted by Ms. Ottman, Mr. Brach, Don Hofius and Nick Hofius. The ALJ cannot and does not credit claimant's testimony with regard to these actions in any manner.

23. Multiple witnesses for employer noted that claimant returned to employer's premises after being terminated and caused damage to employer's fence. Claimant denied that he was arrested for causing damage to employer's fence, but acknowledged on cross-examination that he was taken to jail for an unrelated outstanding charge. Claimant testified he went to St. Mary's Hospital for medical treatment approximately 30-45 minutes after the incident with employer. Claimant testified he again returned to the hospital after being released from jail.

24. The medical records entered into evidence document a history of claimant having prior medical treatment for physical altercations. Some of these altercations may have been related to mixed martial arts fighting and some to non-sanctioned physical altercations. Notably, claimant underwent evaluation for bipolar disorder on July 9, 2013 with Dr. Kevin Coleman. In this evaluation, it was noted that claimant has gotten into fights in the past.

25. In August 2013, claimant was referred for treatment with Mind Spring clinic by his mother. Claimant noted that he was there "to be diagnosed and to seek any help with my anger to keep me from getting into any fights." It was noted at this evaluation that claimant was using methamphetamines by smoking or snorting and had used this substance 15 times in the previous 30 days. It was reported claimant had used methamphetamines 365 days in the previous year. It was noted claimant had criminal charges pending against him and was facing a court date of November 2013. Claimant reported he began using drugs again in November 2012 following a break up with his girlfriend. It was recommended that claimant be referred for residential treatment for substance abuse, but claimant declined the referral.

26. At other parts of claimant's medical records, claimant reports a history of smoking methamphetamines on a daily basis, using marijuana on a daily basis and smoking crack cocaine on a weekly basis. On February 15, 2013 claimant reported that he experienced many fights and had a hard life.

27. Claimant was also examined on October 1, 2013 by St. Mary's Hospital with a complaint of flank pain. Claimant was diagnosed with acute renal colic and provided with prescription medications including Flomax, oxydodone, Zofran and ibuprofen.

28. Claimant was evaluated following his altercation with Mr. Brach at 8:01 p.m. at St. Mary's Hospital. Claimant reported to St. Mary's Hospital that he was involved in an altercation with his employer when his employer pushed him, and he fought back. Claimant reported he was hit in the face, left flank, left side of his back and abdomen. Claimant also reported he was pushed down a flight of stairs. Claimant underwent diagnostic testing and was diagnosed with 2 lumbar transverse process fractures at L2 and L3. There was no significant surrounding hematoma noted by the physicians. Claimant was diagnosed with a closed fracture of lumbar vertebra without mention of spinal cord injury and contusions of multiple sites, not elsewhere classified. It was reported in the records that claimant reported he had taken a Percocet prior to his arrival at the hospital. Claimant was eventually discharged from the hospital with instructions to follow up with his primary care physician.

29. Claimant returned to the hospital on November 13, 2013 and it was reported that after he was discharged the previous evening, he was taken to jail due to a restraining order. Claimant reported he had pain in his right hand and elbow due to hitting the door at the jail. Claimant was evaluated and a fracture was ruled out before claimant was discharged with a starter pack of 5 mg Percocet and 1mg Ativan.

30. Claimant sought treatment with Nancy Allen, a physical therapist, on December 12, 2013. Claimant reported he was repeatedly kicked during the fight and sustained transverse process fractures at the L1, L2 and L3 levels.

31. Claimant was evaluated by Christopher Ellis, a physical therapist, on January 7, 2014. Claimant reported to Mr. Ellis that he was involved in an altercation with his boss that resulted in him, somehow, falling down the stairs. Mr. Ellis diagnosed claimant with low back dysfunction and healed transverse process fractures at L2-3.

32. Claimant returned to St. Mary's Hospital on February 28, 2014 with continued complaints of low back pain. Claimant again reported he was kicked and pushed down a flight of stairs. Claimant reported taking oxycodone on a daily basis. Dr. Fox noted he reviewed a magnetic resonance image from January 9, 2013 (which is determined to be a typographical error and refers to 2014) that showed a normal central canal without evidence of herniated disk abnormality.

33. Claimant maintains that he was injured on November 12, 2013 during the altercation with Mr. Brach and other employees on that date. While it is true that injuries sustained during a physical altercation may be compensable if the altercation is related to a work related function, such as a paycheck, claimant must still prove by a preponderance of the evidence that his injury was related to the altercation.

34. In this case, claimant's testimony regarding the altercation is completely and wholly not credible. The ALJ finds that claimant was not kicked by employees and was not thrown down the stairs as he reported to his physicians. While claimant was diagnosed with a transverse process fracture at St. Mary's Hospital that evening,

claimant was witnesses swinging a skateboard and attempting to continue a fight with Mr. Brach and other employees after the altercation had ended.

35. The ALJ finds and concludes that claimant has failed to demonstrate that his injuries were sustained in the altercation with employer. The ALJ notes that claimant's accident history regarding the physical altercation was exaggerated to his physicians, including reports that he was kicked multiple times and thrown down the stairs is contradicted by the testimony of other witnesses present at the time.

36. Most significantly, claimant's actions of continuing to challenge Mr. Brach to fight and swinging a skateboard at him in a threatening manner following the altercation is found to be inconsistent with the reported injuries of a transverse process fracture at the L2-3 level.

37. Notably, respondents do not need to prove that claimant's injuries occurred at some other time or place, but testimony was presented that claimant, following the altercation, was damaging employer's fence. Regardless, the ALJ concludes that claimant's reported accident history involving being thrown down the stairs and kicked in the back strays so far from the testimony at hearing that the altercation involved a tumble to the floor in which claimant was on top of Mr. Brach while Mr. Brach had claimant in a head lock and Ms. Ottman was attempting to keep claimant from striking Mr. Brach, that the ALJ finds any medical opinions relating the L2-3 transverse process fractures to be related to the altercation to be unreliable.

38. Because claimant has failed to prove that his injuries arose out of the altercation with employer, claimant's claim for benefits is dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. As noted above, it is claimant's burden to establish by a preponderance of the evidence that his injury is related to a work injury. Where claimant's testimony is not credible regarding the actions leading to his injury, claimant faces a large burden in establishing that his claim is compensable.

5. In this case, the ALJ credits the testimony of Mr. Brach, Ms. Ottman, Ms. Murray, Nick Hofius and Don Hofius over the testimony of claimant. The ALJ finds and determines that the actions of scuffling with Mr. Brach on November 12, 2013 did not result in the need for claimant's medical treatment.

6. The ALJ notes that testimony was presented that claimant was swinging a skateboard and threatening employees after the scuffle. The ALJ finds that these actions are inconsistent with claimant having injuries noted in the medical records. The ALJ further notes that there was testimony presented that claimant returned to employer's premises and damaged the fence on employer's property. These actions are likewise inconsistent with claimant having injuries noted in the medical records.

ORDER

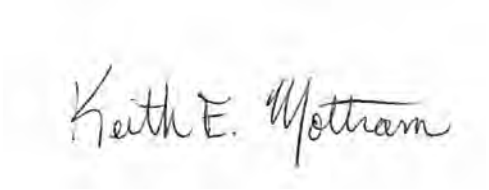
It is therefore ordered that:

1. Claimant's clam for benefits is denied and dismissed.

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

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

DATED: January 27, 2015



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

ISSUES

- Did the claimant prove by a preponderance of the evidence that on July 1, 2014 he sustained a compensable injury arising out of and in the course of his employment?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the period of July 2, 2014 through July 9, 2014?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable and necessary medical expenses for the alleged injury of July 1, 2014?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the period of July 11, 2014 through July 23, 2014?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 18 were admitted into evidence. Claimant's Exhibit 19 was admitted into evidence except for page 1. Claimant's Exhibit 20 was admitted into evidence. Respondents' Exhibits A through K were admitted into evidence. The deposition of Christine Chase was admitted into evidence.

2. The claimant was employed at the employer's store as a grocery manager.

3. The claimant sustained an admitted injury to his low back on November 15, 2013. On February 24, 2014 the respondent employer filed a General Admission of Liability (GAL) for this injury admitting for temporary total disability from November 16, 2013 through February 18, 2014, and for temporary partial disability commencing February 19, 2014. The claim for this injury is assigned W.C. 4-935-186.

4. On November 15, 2013 the claimant received treatment at the emergency room. The records reflect that the claimant gave a history of "recurrent back injuries." He reported that he was at work walking down the stairs when a scanner gun fell from his belt and he stumbled on it. He fell forward and caught himself on the railing. The claimant reported low back pain but no subjective weakness or paresthesias. He advised that in the past he had similar back injuries and his symptoms were controlled

by pain killers and muscle relaxers including hydrocodone. The claimant reported he did not have a primary care physician (PCP) and had received these prescriptions in the "emergency department setting." The claimant was given a diagnosis of "back pain" and prescribed Percocet (oxycodone-acetaminophen).

5. The claimant was referred to Concentra Medical Centers (Concentra) for treatment. On November 16, 2013 he was seen by PA-C Jeffry Winkler. PA Winkler noted a history that the claimant twisted his back when he fell down some stairs at work. The claimant reported instant low back pain. PA Winkler noted decreased active range of motion in all directions with spasm of the lumbar spine at L2, L3, L4 L5 and S1. There was "myospasm with listing to the right." On November 16, 2013 Rosalinda Pineiro, M.D., completed a Physician's Report of Worker's Compensation Injury (WC 164). She prescribed Percocet, Valium and Ibuprofen. She placed the claimant on a "no activity status."

6. On December 5, 2013 the claimant underwent a lumbar MRI. The radiologist's impressions included: (1) Disk degeneration at the mid and the L4-L5 level with annular bulging and more focal right paracentral disk extrusion. There was extension of disk material into the right lateral recess with effacement and posterior displacement of the right exiting L5 nerve root. There was moderate right-sided subarticular recess stenosis; (2) There was disk degeneration at the L3-L4 level with annular bulging and central disk herniation, probable extrusion. An associated annular fissure was present There was effacement of the thecal sac with mild central canal and bilateral foraminal stenosis; (3) There was a transitional vertebral body at L5 and disk desiccation with annular bulging at the L5-S1 level. There was no evidence of herniation or stenosis.

7. On December 6, 2013 Dr. Pineiro reviewed the MRI results and referred the claimant for a physical medicine consult because of the "positive findings." She also noted the claimant had been given an "interferential unit" to help with his pain. Percocet and valium were continued for 10 more days. On December 20, 2013 Dr. Pineiro noted that the claimant could not be seen by physiatry until January 16, 2014 so she referred him for a neurosurgical consultation with Dr. Widdle or Dr. Coester. At this time Dr. Pineiro diagnosed low back pain with radiculopathy and noted that medication and physical therapy had not helped the claimant.

8. On January 16, 2014 Jeffrey Wunder, M.D. performed a physiatric consultation. The claimant reported central to right lumbosacral pain which he described as constant, aching and throbbing. He gave a history of falling and twisting his back on November 15, 2013, but his past history was reported as "unremarkable." Dr. Wunder assessed right L5 radiculopathy, right L4-5 disc protrusion and multilevel degenerative disc disease and bulges. Dr. Wunder recommended an L5 transforaminal epidural steroid injection.

9. On January 16, 2014 the claimant was examined by Hans Coester, M.D. Dr. Coester noted the claimant's history of falling and twisting his back resulting in spasm "so severe he could barely tolerate and was walking dramatically abnormally."

However the claimant reported he was getting progressively better. The claimant reported he had "no chronic medical problems." Dr. Coester reviewed the MRI and noted a "right-sided L4-5 disc protrusion that may contact the L5 nerve root" and a minor disc bulge at L3-4. Dr. Coester opined the L4-5 disc protrusion was probably responsible for the claimant's pain and recommended an epidural steroid injection at the L4-5 level to slow down inflammation. Dr. Coester did not recommend surgery since the claimant was "slowly getting better."

10. On January 27, 2014, Dr. Pineiro recommended an Empi machine (TENS unit) because the claimant reported pain reduction of between 20% - 50% through use of a TENS unit in physical therapy. Dr. Pineiro also recommended a decrease in Percocet with use of the unit. Dr. Pinero continued Valium and prescribed Lyrica. She indicated the claimant should remain on a no activity status pending injections.

11. On February 14, 2014 Dr. Wunder performed a right L5 transforaminal epidural steroid injection for spinal nerve block. On February 17, 2014 the claimant reported to Dr. Pineiro that the injection was helpful for the first 48 hours but his pain was returning. Dr. Pinero also altered the claimant's restrictions to no lifting or pushing over 5 pounds, change positions every hour and work 4 hours per day 5 days per week.

12. The claimant returned to work part-time on February 19, 2014. He performed light duty. He testified that it was difficult to stand and reach while performing these duties.

13. On February 20, 2014 Dr. Wunder recommended a second injection. Dr. Wunder also prescribed OxyContin and reduced the claimant's use of Percocet to no more than 2 per day for "breakthrough pain."

14. On March 13, 2014 Dr. Wunder noted the claimant initially had improvement after the injection but he has experienced extensive low back and right leg pain. Dr. Wunder opined the claimant was showing weakness again in the L5 myotome and that his response to the injection was "poor." Dr. Wunder recommended against further injections and advised the claimant to return to Dr. Coester for reevaluation. Lyrica was discontinued because of side effects.

15. On March 13, 2014 Joel Cohen, PhD performed a psychological evaluation of the claimant. Dr. Cohen assessed a pain syndrome associated with a general medical condition as well as psychological factors along with an injury-related diagnosis of adjustment reaction with mixed emotional features. Dr. Cohen recommended 6 to 8 sessions of psychotherapy "to assist with pain management and stress reduction."

16. On March 20, 2014 the claimant reported a sharp increase in pain and PA-C Julia Balderson took him off of work. On March 24, 2014 Dr. Pineiro continued the claimant's no activity status and recommended a new MRI.

17. On March 25, 2014 Dr. Coester again examined the claimant. The claimant reported increased pain after he returned to work and stated that he had

severe back pain going down his right leg to his foot. Dr. Coester's impression was L5 radiculopathy and he recommended a new MRI.

18. On April 7, 2014 the claimant underwent a repeat lumbar MRI. The results of this MRI were compared to the December 2013 MRI. The radiologist noted that the MRI findings were essentially unchanged.

19. On April 8, 2014 the respondents conducted video surveillance of the claimant. At 10:06 a.m. the video depicts the claimant carrying a dog in his right arm and walking from the back of his car to the driver's door. The claimant walks with a noticeable limp but without swinging his arms. At 10:15 a.m. the claimant gets out of his car. At this time he walks very slowly and with a noticeably worse limp. He swings his arms in a noticeable fashion. He comes to a complete stop when he approaches street curb, and it takes him several seconds to step up on the curb. At 10:25 a.m. the claimant is depicted leaving a building, and walking in the same manner as he did at 10:15 a.m. However, later in the day the claimant is depicted as walking with only a slight but noticeable limp. He also bends at the waist to reach into his car and deposit and remove various items of indeterminate weight. Later in the day the claimant is seen to walk into a building with a slight limp. Later he is taken from the building in a wheel chair and pushed to his car. The claimant walks slowly around the back of the car on two occasions and exhibits great difficulty when getting into the car.

20. On April 16, 2014 Dr. Wunder again examined the claimant. The claimant's major complaint was back pain and he reported that traction had largely alleviated his leg pain. Dr. Wunder noted that Dr. Coester had spoken to Dr. Pineiro and opined the claimant's pain level was disproportionate to the MRI findings. Dr. Coester was hesitant to perform surgery despite "some objective findings." Dr. Pineiro and Dr. Coester had agreed to send the claimant for a psychological evaluation. Dr. Wunder assessed right L5 radiculopathy and right L4-5 herniated nucleus pulposus. The claimant was referred to Dr. Cohen for a psychological evaluation.

21. On April 25, 2014 Dr. Wunder performed a right L5 transforaminal epidural steroid injection.

22. At the respondent's request Judith Weingarten, M.D., performed an independent psychiatric examination of the claimant on April 28, 2014. Dr. Weingarten issued a report on May 12, 2014. In connection with this report Dr. Weingarten interviewed the claimant, reviewed medical records and the surveillance video from April 2014. Dr. Weingarten diagnosed a "high probability of malingering," a probable "opioid disorder," a work injury with abnormal MRI and diagnosis of right L5 radiculopathy and a "previous history of back pain." Dr. Weingarten opined that the claimant does not have a work-related psychiatric condition. In support of this opinion she cited alleged inconsistencies between the claimant's statements to her and the contents of the medical records. For instance, she noted the claimant denied prior use of narcotics except for taking some Percocet for a knee injury. However, the medical records show the claimant told the emergency room (on November 15, 2013) that hydrocodone had helped control back pain in the past. She also opined that the "most

striking" inconsistencies involved the video surveillance where "within the same day [the claimant] walks with no apparent difficult at his own home, and doing errands and walks with a great deal of difficulty when he is at the medical center." Dr. Weingarten also noted that Dr. Wunder opined that the claimant's pain behavior was "disproportionate to the MRI findings."

23. Dr. Weingarten stated in her report that the diagnosis of malingering includes the "intentional production of grossly exaggerated symptoms." She stated that the claimant does have abnormal MRI findings but he could still be malingering by exaggerating his symptoms. Dr. Weingarten opined the "external incentives here are likely obtaining narcotic medications, avoiding work, or obtaining financial compensation." She suggested that the treating physicians review the surveillance video and inconsistencies in the claimant's history to see if they were "concerned about malingering." Dr. Weingarten also expressed concern the claimant was being prescribed opioid medications and diazepam. She cited the claimant's request for hydrocodone at the emergency room, the fact that he ran out of opioids "too soon" on at least one occasion and his continued reports of high degrees of pain despite the use of the medications.

24. The claimant returned to work at light duty on May 7, 2014. Sometime at the end of May or early June 2014 he began working full time.

25. On May 10, 2014 the claimant returned to Dr. Cohen. The claimant reported he had undergone another injection with Dr. Wunder which substantially reduced his lower extremity symptoms. Dr. Cohen noted the claimant had undergone the examination by Dr. Weingarten, although he had not seen her report. Dr. Cohen stated that from his perspective "there is no evidence to suggest malingering nor an inclination towards a symptom magnification." Dr. Cohen was aware the claimant had been videotaped and advised the claimant that the "inconsistencies" mentioned by Dr. Weingarten involved what the videotape showed the claimant could tolerate physically versus his complaints of pain. Dr. Cohen stated his objective was to stabilize the claimant's mood in reaction to the pain and he prescribed Cymbalta.

26. On June 3, 2014, John T. Sacha, M.D., examined the claimant at the request of Dr. Pineiro. The purpose of this examination was to make recommendations regarding further care and to "take over the opioid analgesics." Dr. Sacha's report records that the claimant gave a pre-injury history of "on and off mild back pain in the past but no specific injuries or care." Dr. Sacha documented 3/5 positive Wadell signs, moderate pain behaviors and frequent grimacing. Dr. Sacha's impressions included lumbosacral radiculopathy, adjustment disorder and opioid dependence. Dr. Sacha opined the claimant exhibited "significant symptoms that appear to outweigh the findings." Dr. Sacha recommended an EMG and expressed concern about the claimant's "need for higher amounts of opioid analgesics and other medications." Dr. Sacha discontinued OxyContin and Valium, and switched Claimant to Nucynta 150 and baclofen.

27. On June 11, 2014 Dr. Pineiro stated the claimant could work "modified activity." He was released to work 8 hours per day with no repetitive lifting over 10 pounds and no pushing or pulling with more than 10 pounds of force.

28. On June 18, 2014 Douglas Hemler, M.D. performed electrodiagnostic studies. Dr. Hemler reported the EMG studies were normal with "no current evidence to support lumbar radiculopathy."

29. The claimant testified he was working essentially full-time from the middle of May 2014 through June 2014.

30. On June 24, 2014, Dr. Sacha reviewed the EMG results. He recorded that that the results were "normal with no acute or chronic radiculopathy." Dr. Sacha stated that the claimant exhibited a "nonphysiologic presentation of ongoing symptoms" and opined he was likely at maximum medical (MMI) improvement without the need for further interventional procedures, injections, or surgery.

31. Medical records show that the claimant had received significant treatment for back pain prior to November 15, 2013.

32. In approximately 2006 the claimant sustained a non-industrial back injury while riding a motorcycle. On August 16, 2010 he sought treatment from his PCP, Jay M. Wolkov, D.O., of the Gunnison Family Medical Center (GFMC). Dr. Wolkov noted the history of the motorcycle accident and stated the claimant reported he had "done too much" over the weekend and was now experiencing moderate to severe back pain. Dr. Wolkov prescribed Valium, Ibuprofen and Vicodin for the back pain. On August 21, 2010, Dr. Wolkov wrote a note excusing the claimant from work from August 18-21, 2010. The medical records indicate the claimant did not return for treatment after August 16, 2010, but GFMC "called in" prescriptions for diazepam/Valium and Vicodin through May 5, 2011. On May 5, 2011, and again on June 27, 2011, the GFMC medical records indicate the claimant was advised that he would receive no further medication refills without returning to GFMC for an in-person visit. On July 1, 2011, the medical records indicate that GFMC called the claimant but his phone number had been disconnected.

33. On October 31, 2011 the claimant was examined at the Orthopaedic Center of the Rockies by William D. Biggs, M.D. The claimant reported a history of "a couple of episodes of back pain in the last five years or so where it has kept him out of work." On October 31 the claimant reported this pain had "started buggin him again" and had gotten worse over the last four weeks. X-rays showed a "sciatica type scoliosis curve" and disc degeneration at L5-S1. Dr. Biggs's impressions included disc degeneration, back pain and annular tearing. He opined most of the claimant's symptoms were attributable to muscle spasm" and prescribed a Medrol Dosepak, Flexeril and Vicodin.

34. On April 19, 2013 the claimant presented to Associates in Family Medicine, where he was examined by Steven Broman, M.D. The claimant reported a

history of intermittent back pain for 7 years and that riding in an auto all day had made it acutely worse. On physical examination, Dr. Broman documented that Claimant's gait was "stooped and antalgic bilaterally." There was lumbar paraspinal muscle tenderness. Dr. Broman assessed a "lumbar sprain" and prescribed cyclobenzaprine and hydrocodone-acetaminophen.

35. The claimant returned to Associates in Family Medicine on June 5, 2013 and was examined by Terry Scofield, PA-C. PA Scofield recorded that the claimant "was seen in urgent care by Dr. Bowman [sic] in April and since that time he has had several refills for pain medication and muscle relaxants." The claimant had been told there would be no more refills until he had an appointment. The claimant reported there had been a lot of physical activity to his job that was unexpected and this has worsened his condition. On physical examination the claimant exhibited a "normal gait" but reduced range of motion with extension and flexion. PA Scofield prescribed Vicodin and cyclobenzaprine but advised the claimant that if his pain persisted on such a chronic level for months at a time he needed to be in pain management. PA Scofield referred the claimant to Dr. Brad Sissons for this purpose.

36. There is no credible or persuasive evidence that the claimant ever scheduled an appointment with Dr. Sissons.

37. On June 30, 2014, Carlos Cebrian, M.D., authored a report based on his independent medical examination conducted at the request of the respondent. Dr. Cebrian examined the claimant on May 21, 2014. He also reviewed medical records of the claimant's back treatment prior to November 15, 2013, the medical records after the November 2013 injury, the surveillance video, Dr. Weingarten's report and Dr. Cohen's reports. Dr. Cebrian diagnosed lumbar spine pain, probable malingering "per Dr. Weingarten," chronic opioid use and obesity. Dr. Cebrian wrote that his physical examination was "unremarkable with the exception of mild discomfort and self-limited range of motion." Dr. Cebrian opined that since the November 2013 injury the claimant has exhibited "exaggerated responses." In support of this opinion Dr. Cebrian noted the claimant reported worsening pain despite the absence of an objective changes between the MRIs performed in December 2013 and April 2014. Dr. Cebrian also cited Dr. Coester's opinion that the claimant's symptoms were disproportionate to the MRI findings and the claimant's inconsistent pain behaviors depicted in the surveillance video. Dr. Cebrian opined the claimant had pre-existing degenerative disc disease for which he was treated with narcotic pain medication. Dr. Cebrian wrote that he was unable to "state within a reasonable degree of medical probability whether [the claimant] suffered an injury on" November 15, 2013. Dr. Cebrian further opined that at most the claimant "would have had a temporary aggravation of his underlying multi-level degenerative disc disease." He opined there was no "relationship between the current symptomatology and the work incident" of November 15, 2013. Dr. Cebrian recommended that any provider who is considering treatment watch the video surveillance in its entirety, review the psychiatric IME from Dr. Weingarten, and review then claimant's narcotic history before making any treatment recommendations.

38. The claimant alleges he sustained a compensable foot injury on July 1, 2014. The claim for this injury is assigned WC 4-955-722.

39. The claimant testified as follow concerning the foot injury. On July 1, 2014 he was at work. At approximately 7:00 a.m. he was backing a "power jack" out of a truck and lost his footing. The handle on the power jack then turned and his left foot was crushed against the trailer wall. The claimant opined that his low back problems contributed to this incident because the low back pain made him "unstable" and he did not have good balance. He also testified that the incident was caused by "walking backwards" and using the handle. The claimant stated he reported the injury to the assistant store administrator (Ms. Sheryl Rosell) and to the assistant store manager Christine Chase. The claimant testified that after this incident his left foot was sore and he could not put much weight on it. He also indicated he had intense low back pain.

40. On July 1, 2014 the claimant completed his shift and got off of work at approximately 1:00 p.m. He then went to see Dr. Pinero. The claimant testified he did not believe this was a scheduled visit.

41. Mr. Jesse Ketterman (Ketterman) testified as follows. He is the claimant's fellow employee. He was working on the loading dock on the morning of July 1, 2014. Although he did not see any accident he heard a loud noise like the power jack had hit something. He then saw the claimant who appeared to be in pain, although he could not tell if it was the claimant's foot or back that was hurting. Ketterman testified that prior to July 1, 2014 he observed the claimant had difficulty walking and tended to favor one side. On July 1, 2014 Ketterman observed the claimant was able to walk out of the truck trailer but he was limping much more than before. The claimant told Ketterman that he had mashed his foot but did not mention any back pain.

42. Ms. Christine Chase (Chase) testified as follows. On July 1, 2014 she was the assistant manager at the store where the claimant worked. When she arrived at work at 8:00 a.m. on July 1, 2014, she was advised by a secretary that the claimant had hurt his foot. She went to see the claimant who told her that he stumbled while moving a power jack and smashed his foot between the pallet and the trailer wall. The claimant complained of foot pain but did not mention any back pain. The claimant removed his shoe and sock to show Chase his foot, but she did not see any swelling or bruising. Chase asked the claimant to report back to her before the end of his shift, but he did not report back to her before leaving the store on July 1, 2014. Chase opined that the claimant's limp after July 1, 2014 was no different than it was before July 1.

43. Chase further testified that at approximately 3:00 p.m. on July 1, 2014 she received a call from the claimant stating he had a previously scheduled doctor's appointment for his low back. The claimant advised Chase that he reported to the doctor that he had hurt his foot at work that day. The claimant stated that an x-ray was taken of his foot and that he had suffered a contusion. She recalled the claimant stated that the doctor had taken him off work seven days because of his back and not for his foot.

44. Dr. Pineiro dictated a report concerning her examination of the claimant on July 1, 2014. With regard to the history of present illness she wrote the claimant was returning for a "recheck" of a low back injury and his pain level was 9 out of 10. The claimant reported his back pain was worsening and he did not feel safe at work. The claimant also gave a history that today "he was in the dock and he crush [sic] Lt foot and ankle between the trailer door and pallet." The resulting pain was "moderate." On examination of the lumbar spine Dr. Pineiro noted bilateral muscle spasms. The claimant's range of motion on flexion, extension, left and right lateral flexion and rotation were reportedly "restricted" but painless. Dr. Pineiro assessed a back contusion, radicular pain, foot contusion and ankle contusion. Dr. Pineiro wrote that "due to [the claimant's] severe pain low back and new injury foot and ankle he will not be able to return to work." She advised the claimant that the "ankle and foot would be considered a separate work related injury" that he needed to report.

45. On July 9, 2014 the claimant returned to Dr. Pineiro. He reported that his foot was "back to baseline" but his back pain was "8/10." On examination of the lumbar spine Dr. Pineiro noted bilateral muscle spasms and restricted range of motion that was painful. She noted the claimant was not working and could not work because of pain. She released the claimant to work with restrictions of no squatting and no climbing.

46. The claimant testified that he worked a full day on July 10, 2014. He did not work from July 11, 2013 through July 23, 2014. He stated that he felt sick on July 11 and went to see Dr. Pineiro. He stated that he had not been able to sleep, his face was flush and his neck was tingling and his respiration was not functioning normally. He stated that he had stopped taking his medications prior to July 11, 2014. The claimant explained that he stopped taking his medication because he was concerned the medications were damaging his internal systems.

47. Dr. Pineiro examined the claimant on July 11, 2014 at a "non-scheduled appointment." Dr. Pineiro noted a history that the claimant stopped his medication several days ago and was now experiencing numbness of the face, chest pain, right upper extremity numbness and was "afraid." On examination of the lumbar spine Dr. Pineiro noted no muscle spasms. Dr. Pineiro assessed withdrawal from opioids, radicular pain and back contusion. However, the claimant's range of motion was restricted. Dr. Pineiro placed the claimant on a "no activity" status for the following 24 to 48 hours "due to withdrawal." Dr. Pineiro wrote that at the last visit the claimant was warned he could go into withdrawal.

48. On July 21, 2014 Dr. Pineiro noted there had been a "Sams Conference" with counsel for both parties. There was a discussion of the claimant being off of work since July 1 because of "cervical and low back issues and symptoms were subjective." Dr. Pineiro noted that respondents' counsel would send reports of Dr. Sesin [sic], a psychiatrist and a "history of back issues and drug seeking, which [the claimant] did not report to this provider." She also noted that she would be given a copy of a video recorded in April.

49. On July 22, 2014 Dr. Pineiro again examined the claimant. Dr. Pineiro noted the foot and ankle injury had resolved and the claimant had no limitation from this injury. The claimant reported a pain level of 7/10 and that he was taking his medications as prescribed. He stated he had been unable to work because of back pain. In the lumbar spine Dr. Pineiro noted bilateral muscle spasms and restricted range of motion. Dr. Pineiro wrote that the claimant admitted he had injured his back in a motorcycle accident at home. Dr. Pineiro stated that she "agreed" the claimant had positive MRI findings and that the claimant's subjective symptoms "are not a good barometer to evaluate his condition." She stated that the MRI findings were inconsistent with the claimant's presentation and that this "is shown consistently with" Dr. Sacha, Dr. Coester and "today with myself." She placed the claimant on light duty with the expectation he would be "very limited." She imposed restrictions of no prolonged standing or walking, no repetitive lifting over 10 pounds, no pushing or pulling with over 10 pounds of force and no bending more than 2 times per hour. Dr. Pineiro stated she would refer the claimant for a Functional Capacity Evaluation (FCE).

50. On July 26, 2014 Dr. Pineiro dictated another note regarding the July 1, 2014 visit. She wrote the claimant was working under restrictions for his back when he crushed his left foot "between the truck door and his forklift." His pain was reportedly "9/10." With regard to the ankle she noted no swelling, full flexion, extension, inversion "and eversion but with pain in the foot." There was no discoloration. Diffuse tenderness was present. The claimant's gait was "antalgic." She noted that x-rays revealed no apparent fractures. Dr. Pineiro diagnosed a crush injury of the left foot. She opined to a reasonable degree of medical probability that the foot condition was the result of work-related injury. She further stated that "due to the fact the patient has zero back pain plus crushed foot, patient is going to be placed off work most due to his foot than his low back."

51. On July 29, 2014 Dr. Pineiro authored a WC 164 with regard to the claimant's reported ankle injury of July 1, 2014. She wrote that a as a result of this injury the claimant was unable to work from July 1, 2014 to July 9, 2014.

52. On August 1, 2014 the claimant underwent an FCE. The FCE placed the claimant in the "sedentary-light" work category. He scored 1/5 "by Waddell's protocol indicating that non organic signs are not present and he passed 20/22 validity criteria" which suggested "excellent effort and valid results which can be used for medical and vocational planning." The claimant did not participate in the "constant part of the FCE testing" due to not being safe in his participation in his occasional material testing, especially in his leg lifting, overhead lifting, one hand carrying and dynamic pushing and pulling. The FCE noted the claimant described his job as "very physical, and he is not able to perform his regular work related tasks."

53. On August 10, 2014 Dr. Pineiro issued a report opining the claimant had reached MMI on August 8, 2014 with a 17% whole person impairment rating. This included 7% impairment of the lumbar spine and 11% impairment for reduced range of motion in the lumbar spine.

54. Dr. Wunder reviewed the surveillance video from April 2014. He also reviewed Dr. Cebrian's report. In a report dated August 13, 2014 Dr. Wunder commented that the video did show "some mild limping occasionally. Therefore, he could not say the claimant had "absolutely no back pain." However, Dr. Wunder opined that there was "significant symptom magnification." Dr. Wunder further opined that that Dr. Pineiro's rating was correct "based on information given." Dr. Wunder also noted that the claimant underwent an FCE and he was given a restriction "in lifting, pushing, and pulling." However, Dr. Wunder stated the FCE reports that none of these activities were tested. Therefore Dr. wunder did not "necessarily agree with the physical restrictions."

55. The claimant proved it is more probably true than not than on July 1, 2014 he sustained an injury to his left foot arising out of and in the course of his employment. The claimant also proved it is more probably true than not that this injury proximately caused temporary total disability for the period July 2, 2014 through July 9, 2014.

56. The claimant credibly testified that on July 1, 2014 he was at work pulling a power jack out of a truck when the handle turned and crushed his foot against the trailer wall. The claimant's testimony that this event occurred is corroborated by the credible testimony of the claimant's co-employee Ketterman who was working on the loading dock and heard a loud noise like the power jack had hit something. Ketterman also credibly testified that he saw the claimant who appeared to be in pain and was limping worse than he had prior to this incident. Moreover, the claimant immediately advised Ketterman that he had hurt his foot. The claimant's testimony is further corroborated by Ms. Chase's testimony that the claimant reported the foot injury to her on the morning of July 1, 2014. The claimant's testimony is further corroborated by the history of a left foot injury that he gave to Dr. Pineiro when she examined him on the afternoon of July 1, 2014.

57. The claimant proved it is more probably true than not that the foot injury of July 1, 2014 proximately caused temporary total disability for the period of July 2, 2014 through July 9, 2014. Dr. Pinero credibly diagnosed a "foot contusion" when she examined the claimant on July 1, 2014 and credibly opined this was a "separate work related injury." She also credibly opined that in light of the claimant's back pain and new foot and ankle injury he would not be able to return to work. The ALJ infers from Dr. Pinero's statement that the claimant's restriction from work was at least partially caused by the pain resulting from the foot contusion. Dr. Pinero credibly opined based on the history the claimant gave on July 9, 2014 that the foot had "returned to baseline." Dr. Pineiro's comment is corroborated by her July 22, 2014 note stating the foot and ankle injury had resolved and the claimant was suffering from no limitations associated with this incident.

58. The claimant failed to prove it is more probably true than not that he is entitled to an award of TTD benefits for the period of July 11, 2014 through July 23, 2014.

59. Dr. Pineiro's note of July 11, 2014 indicates the claimant was taken off of work for 24 to 48 hours because of withdrawal symptoms caused by his stopping his medication. This is consistent with the claimant's testimony that he chose to stop his medication because he was concerned about the effects of the medication. The ALJ finds that a preponderance of the evidence establishes the claimant's decision to stop the medication, which led in turn to withdrawal symptoms and Dr. Pineiro's release from work, constituted an intervening cause of the claimant's wage loss between July 11, and July 13, 2014. The claimant's decision to stop his medication after being warned of the possible consequences was not caused by the natural progression of the industrial injury, but was instead caused by the claimant's intervening decision to stop his medication.

60. Dr. Pineiro's note of July 21, 2014 establishes that the claimant was also off of work because of back symptoms which were "subjective." This is consistent with Dr. Pineiro's note of July 22, 2014 which states the claimant gave a history that he was unable to work because of back pain.

61. A preponderance of the credible and persuasive evidence establishes that the cause of the claimant's failure to perform the modified duty that was available to him between July 11, 2014 and July 23, 2014 was not disability caused by injury-related back pain, but was instead his own decision to stop working while providing his treating physicians exaggerated claims of back pain. In this regard the ALJ credits the opinions of Dr. Cebrian and Dr. Weingarten that the claimant has a history of malingering in the sense that he exaggerates his back pain. The opinions of these physicians are supported by the video surveillance depicting wide differences in the claimant's pain behaviors over a brief period of time. These opinions are further supported by evidence from Dr. Weingarten and Dr. Pinero that the claimant failed to give them complete histories of his pre-injury back pain and treatment. Moreover, Dr. Coester credibly opined the claimant's reports of symptoms are disproportionate to his MRI findings, Dr. Sacha credibly opined that the claimant's symptoms outweigh his findings and Dr. Pineiro credibly opined the claimant's subjective symptoms are not a good barometer of condition. Dr. Wunder assessed significant symptom magnification. Further, the claimant was admittedly able to perform restricted duty of a full-time basis for more than a month prior to suffering the foot injury on July 1, 2014.

62. A preponderance of the credible evidence establishes the claimant did not injure or reinjure his back on July 1, 2014. Chase and Ketterman credibly testified that when they spoke to the claimant on July 1 he did not report any new back pain. Dr. Pinero's report of July 1, 2014 does not document a new back injury, but instead states the claimant had sustained a new foot and ankle injury that he would need to report. Dr. Pinero did not state the claimant needed to report a new back injury. In fact, Dr. Pinero states the purpose of the July 1visit was to "recheck" the prior back injury. To the extent the claimant's testimony would permit the inference that the July 1, 2014 constituted a new back injury the ALJ finds that testimony is not credible.

CONCLUSIONS OF LAW

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY OF FOOT INJURY

The claimant contends he proved by preponderance of the evidence that on July 1, 2014 he sustained a compensable injury on July 1, 2014, and that this injury caused temporary total disability for the period of July 2, 2014 through July 9, 2014. The respondents contend the claimant's testimony concerning the foot injury and resulting disability are not credible. The ALJ concludes the claimant sustained a compensable left foot injury that proximately caused temporary total disability.

Section 8-41-301(1)(c), C.R.S., requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the alleged disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. See *Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

As determined in Findings of Fact 55 and 56 the claimant proved it is more probably true than not that on July 1, 2014 he sustained a left foot injury arising out of and in the course of his employment. As found, the ALJ credits the claimant's testimony that this injury occurred when he stumbled while pulling a power jack while working in a trailer. The incident occurred when the stumble caused the handle to turn and pinned the left foot against the side of the trailer. The claimant's testimony concerning this incident is corroborated by the credible testimony of Mr. Ketterman as well as the near contemporaneous reports of injury to Ketterman, Chase and Dr. Pineiro. Evidence and inferences inconsistent with these findings and conclusions are not credible and persuasive.

TEMPORARY TOTAL DISABLITY BENEFITS FOR PERIOD JULY 2, 2014 THROUGH JULY 9, 2014

The claimant contends that he proved the left foot injury caused temporary total disability entitling him to temporary total disability (TTD) benefits for the period of July 2, 2014 through July 9, 2014. The ALJ agrees with this argument.

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

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an

ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Finding of Fact 57, the claimant proved it is more probably true than not that the foot injury of July 1, 2014 caused a period of temporary total disability from July 2, 2014 through July 9, 2014. Dr. Pineiro credibly diagnosed a foot contusion that totally disabled the claimant from work for the period of July 2, 2014 through July 9, 2014. Although Dr. Pineiro also attributed some of the claimant's inability to work to back pain, it is clear from her credible reports that she believed the foot injury played a substantial causative role in the claimant's inability to work during the disputed period of time.

MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The claimant proved it is more probably true than not that he is entitled to compensation for the treatment that Dr. Pineiro provided for the claimant's foot injury of July 1, 2014. Based on the reports of Dr. Pineiro the ALJ finds that this treatment was reasonable and necessary to cure and relieve the effects of the injury.

TEMPORARY TOTAL DISABLITY FOR THE PERIOD OF JULY 11, 2014 THROUGH JULY 23, 2014

The claimant contends he proved he is entitled to an award of TTD benefits for the period of July 11, 2014 through July 23, 2014. The claimant argues that the MRI scans demonstrate "objective medical evidence of [his] low back injury" and that he has "suffered significant symptoms" with respect to the low back injury from the date of injury and continuing through July 23, 2014. He also cites the permanent impairment rating issued by Dr. Pineiro and Dr. Wunder's comment that the surveillance video documents "some level of back pain." The claimant also cites the fact that Dr. Pineiro took the claimant off of work on July 11, 2014 because of increased low back pain, and symptoms of opioid withdrawal. The respondents argue that Dr. Pineiro's decision to restrict the claimant from work was due to his unreliable subjective complaints, and that Dr. Pineiro subsequently admitted that the claimant's subjective complaints are not a good barometer of his disability or lack thereof.

Here it is undisputed, and the ALJ finds, that the claimant returned to modified employment and worked a regular shift on July 10, 2014. Therefore, the claimant's entitlement to TTD benefits ended and he carried the burden of proof to re-establish entitlement to TTD benefits commencing July 11, 2014. Section 8-42-105(3)(b), C.R.S. (TTD benefits end when the claimant returns to regular or modified employment).

In order to receive additional TTD benefits the claimant is required to prove that as of July 11, 2014 the industrial injury of November 15, 2013 caused additional wage loss. Where the evidence establishes that a wage loss is caused by an intervening event the claimant is not entitled to additional TTD benefits. *See Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986); *Caraveo v. David J. Joseph Co.,* WC 4-358-465 (ICAO 2010); *Collinge v. Safeway,* WC 4-680-590 (ICAO 2007). The question of whether alleged disability is the result of the effects of the industrial injury or some intervening cause is one of fact for determination by the ALJ. *Collinge v. Safeway, supra.*

As determined in Findings of Fact 59 through 61, the claimant is not entitled to an award of TTD benefits for the period of July 11, 2014 through July 23, 2014. As found, a preponderance of the evidence establishes that during this period of time the claimant's wage loss was caused first by his personal decision to stop taking his medications so as to produce withdrawal symptoms. The remainder of his wage loss was caused by his decision to avoid performing modified duty by making exaggerated claims of back pain to his treating physicians. As found, the claimant's wage loss during this period of time was not caused by the effects of the industrial injury.

ORDER

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

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

2. The claimant sustained a compensable injury in WC 4-955-722.

3. As a result of the compensable injury in WC 4-955-722 the insurer shall pay temporary total disability benefits for the period of July 2, 2014 through July 9, 2014.

4. As a result of the compensable injury in WC 4-955-722 the insurer shall pay for reasonable and necessary medical expenses including those provided by Dr. Pineiro.

5. The claim for temporary total disability benefits from July 11, 2014 through July 23, 2014 is denied.

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

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

DATED: January 13, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that employer is liable for penalties for failing to report an injury pursuant to Section 8-43-101(1)?

- Whether claimant has proven by a preponderance of the evidence that insurer is liable for penalties for failing to admit or deny liability in violation of Section 8-43-103(1)?

- Whether claimant has proven by a preponderance of the evidence that insurer is liable for penalties for failing to admit or deny liability in violation of Section 8-43-203?

- The parties stipulated prior to the hearing that claimant would be paid temporary total disability ("TTD") benefits for the period of July 24, 2013 through April 28, 2014 at an average weekly wage ("AWW") of $882.66 subject to the statutory offset for unemployment ("UI") benefits received by claimant.

FINDINGS OF FACT

1. Claimant was employed by employer as a hydro-operator III. Claimant sustained an admitted injury on July 23, 2013 when she tripped over a boulder while walking down to a lake in the course and scope of her employment with Employer. Claimant went to Mr. Way's office after the incident to report her injury. Claimant testified Mr. Way was on the phone when she arrived so she wrote a note to him and left the note on his desk. Claimant then went to her truck, drove back to the office, parked in the garage and went into the office to call the medical clinic to get medical treatment. Claimant testified that the medical clinic instructed claimant to go to the emergency room ("ER").

2. Claimant was evaluated at the ER on July 23, 2013 and referred for x-rays of the left wrist. Claimant was taken off of work through July 26, 2013 (the next Friday). Claimant called Mr. Way after leaving the ER and reported that she would be off of work the rest of the week. According to the WC 164 form signed on July 23, 2013, claimant was released to return to work without restrictions as of July 29, 2013. Claimant testified she dropped off a handwritten report of her injury to Employer on July 24, 2013.

3. Claimant testified she was scheduled to be off of work on July 27, July 28 and July 29, 2013. Claimant testified she returned to work on July 29, 2013 and was informed by Mr. Eddy that there was going to be restructuring and she was being laid off. Mr. Eddy advised claimant she could apply for unemployment.

4. Claimant returned to Dr. Britton on July 30, 2013 and reported she was still in a lot of pain. Claimant reported it was difficult for her to lift or grab anything and that is was hard for her to shampoo her hair. Dr. Britton diagnosed claimant with a left wrist sprain and provided claimant with work restrictions of 5 pounds for her left wrist.

5. Mr. Eddy testified at hearing that he became aware of claimant's injury when Mr. Way reported the injury to him on July 23, 2013. Mr. Eddy testified that he called Insurer and reported the injury to insurer after getting notice of the injury from Mr. Way. Mr. Eddy testified he did not speak to claimant after her injury until July 29, 2013 when he had claimant fill out an accident report. Mr. Eddy testified he was not aware of how to calculate the time lost for an injury.

6. Mr. Eddy testified he had a meeting with claimant on July 29, 2013 and informed claimant of the restructuring and the fact that she was being let go. Mr. Eddy testified that he later spoke with an adjuster from insurer and informed the adjuster that claimant was being let go for restructuring. Mr. Eddy testified that claimant was not at fault for her termination of employment.

7. Under cross-examination, Mr. Eddy acknowledged that the claims adjuster notes indicated that claimant had returned to work full duty as of July 24, 2013. Mr. Eddy noted that this was not true. Mr. Eddy confirmed that claimant could not perform her work with a five pound lifting restriction. According to the report of injury Mr. Eddy filled out for insurer, claimant returned to work on July 29, 2013 and Mr. Eddy reported that the injury was a lost time claim.

8. Ms. Woodrum testified on behalf of respondents. Ms. Woodrum is an adjuster for insurer. Ms. Woodrum testified that she began handling the claim in December 2013 and a different adjuster was assigned to the claim prior to that time. Ms. Woodrum testified that this claim was originally reported to insurer as a "not lost time" claim. Ms. Woodrum testified that when she took over the file in December 2013, the claim was still classified as a "not lost time" claim because claimant had been terminated for cause.

9. According to Ms. Woodrum, the claim notes document that as of July 29, 2013 claimant was terminated for performance and attendance issues and the employer was going to follow up with written confirmation. Ms. Woodrum testified that the written

confirmation was never received. Ms. Woodrum eventually filed a “medical only” general admission of liability on December 19, 2013.

10. Ms. Woodrum testified that when she filed the medical only general admission of liability she did not admit for temporary disability benefits because the notes in the file reflected that the claim was a no lost time claim due to the fact that claimant had been responsible for her termination of employment. Ms. Woodrum eventually filed a general admission of liability admitting for temporary disability benefits beginning May 14, 2014 after claimant underwent surgery and was restricted from work.

11. Respondents presented evidence of requests for information and medical releases that were not timely returned by claimant. However, the delay in receiving information from claimant does not provide a defense to the requirement in the statute that the respondents admit or deny liability in a case involving a lost time claim.

12. Respondents further argue that there was confusion initially in the claim regarding whether claimant was released to return to work and whether claimant was responsible for her termination of employment. However, based on the testimony of claimant and the testimony of Mr. Eddy, claimant did not return to work without restrictions prior to being terminated as a result of the restructuring. When claimant was terminated, she was under active restrictions from her treating physician that limited her ability to return to work.

13. Likewise, while insurer apparently believed that claimant was responsible for her termination of employment, there was no factual basis for this belief. Therefore, insurers reliance on the circumstances surrounding claimant’s termination as a basis for not filing the appropriate forms with the Division of Workers’ Compensation either admitting or denying liability is found to be not reasonable.

14. The ALJ finds, based on the evidence presented at hearing that employer reported the injury to insurer on July 23, 2013 when the first report of injury was filled out by employer and forwarded to insurer by Mr. Eddy. The ALJ finds that employer properly notified insurer based on the first report of injury that indicated that claimant had suffered a lost time injury.

15. However, Section 8-43-101(1), C.R.S. requires the employer to notify the Division of Workers’ Compensation of all injuries resulting in lost time from work in excess of three shifts. While employer appears to have relied on insurer to notify the Division of Workers’ Compensation of the lost time claim, there is insufficient evidence that Insurer notified the division of the injury pursuant to Section 8-43-101(1). Moreover, the plain language of Section 8-43-101(1) that places onus on the employer to notify the Division of Workers’ Compensation of lost time injuries does not allow the

employer to avoid the requirements of reporting lost time injuries by properly reporting said injuries to their insurance carrier.[1]

16. The ALJ therefore concludes that claimant has demonstrated that it is more probable than not that employer violated Section 8-43-101(1). Section 8-43-101(1) requires the employer to notify the division of injuries resulting in more than three shifts of lost time within ten (10) days of the date of the injury. Therefore, employer should have notified the Division of Workers' Compensation of the injury no later than August 2, 2013.

17. Likewise, Section 8-43-103(1), C.R.S. places the onus on employer to report an injury for which compensation and benefits are payable to the insurer and the Division of Workers' Compensation. While this section of the statute allows for the insurer to report the injury to the Division of Workers' Compensation, it does not absolve the employer of liability when the employer properly reports the injury to the insurer but does not properly report the injury to the Division of Workers' Compensation as required by the statute.

18. Crediting the testimony of Mr. Eddy, employer was aware as of July 29, 2013 that claimant had work restrictions that prohibited her from performing her job. Claimant was laid off pursuant to a restructuring, but that does not provide a defense to employer's obligation under Section 8-43-103(1) to notify the Division of Workers' Compensation of the injury as employer was aware as of that date that claimant had sustained a lost time injury. This is further evidenced by employer's first report of injury to insurer that acknowledges that the claim is a lost time injury.

19. The ALJ finds, based on the evidence presented at hearing, including the testimony of Mr. Eddy and the first report of injury entered into evidence, that insurer was notified of a lost time claim on July 29, 2013. Insurer may have incorrectly believed that the claim should have been classified as a non-lost time claim, but that does not provide a basis for their failure to either admit or deny liability pursuant to Section 8-43-203(1). The ALJ finds that this violation of the statute was resolved by virtue of the medical only general admission of liability filed by insurer on December 19, 2013.

20. Section 8-43-203(1), C.R.S. requires the insurer to notify the division as to whether liability was admitted or denied within twenty (20) days of the date the notice of injury was filed, or should have been filed with the Division of Workers' Compensation

[1] The ALJ notes that employer is likely in the best position to identify whether an injury has resulted in lost time to the injured worker, and this may explain why the statute places the onus on the employer to notify the Division of Workers' Compensation of injuries such as this. Regardless, however, the ALJ relies on the plain language of the statute and therefore, does not need to make any inquiry into the legislative intent of the statute to interpret it's meaning.

pursuant to Section 8-43-101, C.R.S. As indicated above, notice of the injury should have been provided to the Division of Workers' Compensation no later than August 2, 2013. The ALJ therefore concludes that claimant has demonstrated that it is more probable than not that insurer violated Section 8-43-203(1), C.R.S. for the period of August 22, 2013 (20 days after the period for which notice of the injury should have been filed with the Division of Workers' Compensation) until December 19, 2013 when the medical only general admission of liability was filed.

21. While Section 8-43-203(1), C.R.S., provides that notice to the employer is not considered notice to the insurer, the ALJ determines in this case that insurer was properly notified that this claim involved a lost time injury based on the first report of injury provided to insurer by Mr. Eddy and the testimony of Mr. Eddy at hearing. The mere fact that insurer believed claimant's case may involve a termination for cause scenario does not provide insurer with a basis to fail to admit or deny liability where the factual basis for such a defense is not established.

22. The ALJ notes that Section 8-43-203 allows that ALJ discretion to award a penalty of up to one day's compensation for each day respondents failed to notify the Division of Workers' Compensation and claimant of whether they were admitting or denying liability and respondents argue in their position statement that mitigating factors provide a basis for awarding less than a full days compensation for the violation of the statute. However, based on the evidence at hearing, the ALJ concludes that insurer knew or reasonably should have known that this case involved a lost time claim when employer did not provide insurer a written statement regarding claimant's termination of employment. Despite not receiving information that would support insurers' claim that claimant was responsible for her termination of employment, the evidence fails to establish that insurer made sufficient additional steps to obtain the appropriate information to support this position. As such, the ALJ finds that an award of one day's compensation is appropriate for this case.

23. Claimant argues in her position statement that the penalty period should run through May 14, 2014, the date the general admission of liability was filed admitting for temporary disability benefits. However, nothing in Section 8-43-203 requires the insurer to admit for temporary disability benefits. Therefore, the violation is ended by the date the medical only general admission of liability is filed (December 19, 2013).

24. Both claimant and respondent have made arguments in their position statements regarding potential penalties under Section 8-43-304(1), C.R.S. However, this penalty issue was not identified as an issue for hearing at the commencement of the hearing. Likewise, the affirmative defenses raised by respondents in their position statement were not addressed at the commencement of the hearing. The ALJ has reviewed the file in light of the issues raised by the parties in their position statements to

determine if such issues could have been tried by consent, but cannot, based on the statements made at hearing and the issues identified on the application for hearing and response to the application for hearing, make a finding that this issue was tried by consent. Due to the fact that there are issues with regard to whether this issue was properly identified at hearing and in the application for hearing, along with affirmative defenses raised by respondents, the ALJ determines that the issue is not properly before the court for resolution in this Order.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Section 8-43-101(1), C.R.S., states in pertinent part:

> Every employer shall keep a record of all injuries that result in … lost time from work for the injured employee in excess of three shifts or calendar days.... Within ten days after notice or knowledge that an employee has contracted such … lost-time injury to an employee … the employer shall, upon forms prescribed by the division for that purpose, report said … lost-time injury … to the division. The report shall contain such information as shall be required by the director.

4. As found, claimant has proven by a preponderance of the evidence that employer was aware that claimant sustained a lost time injury and failed to report said injury to the Division of Workers' Compensation as required by the statute. As found,

the ALJ credits the testimony of Mr. Eddy and the first report of injury completed by employer that acknowledged that claimant had sustained a lost time injury to establish that employer was aware of claimant's lost time injury.

5. As found, while employer appears to have relied on insurer to provide the appropriate paperwork reporting the injury to the Division of Workers' Compensation, nothing in the statute provides a defense to the employer for the insurer's failure to notify the Division of Workers' Compensation of a lost time injury. Instead, the statute places the onus on the employer to notify the Division of Workers' Compensation of all lost time injuries. The fact that employer may have properly and timely reported the injury to insurer does not provide a defense to requirement of the statute.

6. Section 8-43-103(1), C.R.S., states in pertinent part:

> Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury…. If no such notice is given by the employer, as required by articles 40 to 47 of this title, such notice may be given by any person. Any notice required to be filed by an injured employee or, if deceased, by said employee's dependents may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing filed with the division within a reasonable time. Such notice shall be in writing and upon forms prescribed by the division for that purpose and served upon the division by delivering to, or by mailing by registered mail two copies thereof addressed to, the division at its office in Denver, Colorado. Upon receipt of such notice from a claimant, the division shall immediately mail one copy thereof to said employer or said employer's agent or insurance carrier.

7. As found, claimant has proven by a preponderance of the evidence that she provided notice to employer of her injury on July 23, 2013. As found, the testimony of claimant and Mr. Eddy and the evidence at hearing establish that notice of the injury was given to employer on July 23, 2013. As found, employer promptly notified insurer of the injury and, by no later than July 29, 2013, of the fact that the injury was a lost time claim. Insurer mistakenly believed that either that the claimant had been returned to work without restrictions, or that she had been responsible for her termination. However, neither of these issues provide a defense to employer's responsibility to notify the Division of Workers' Compensation of claimant's injury where employer is aware that claimant had not returned to work and was not responsible for her termination of employment.

8. Section 8-43-203, C.R.S. states in pertinent part:

> (1)(a) The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee or, if deceased, the decedent's dependents within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for the purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier. The employer or the employer's insurance carrier may notify the division electronically….
>
> (2)(a) If such notice is not filed as provided in subsection (1) of this section, the employer or, if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify; except that the employer or, if insured, the employer's insurance carrier shall not be liable for more than the aggregate amount of three hundred sixty-five days' compensation for failure to timely admit or deny liability. Fifty percent of any penalty paid pursuant to this subsection (2) shall be paid to the subsequent injury fund, created in section 8-46-101, and fifty percent to the claimant.

9. As found, claimant has proven by a preponderance of the evidence that a report should have been filed by August 2, 2013. As found, claimant has proven by a preponderance of the evidence that employer was aware that claimant had sustained a lost time injury on July 23, 2013. As found, claimant has proven by a preponderance of the evidence that insurer failed to timely admit or deny liability within twenty days of the date the report should have been filed.

10. As found, claimant has proven by a preponderance of the evidence that insurer did not file with the Division pursuant Section 8-43-203 notice of whether liability was admitted or denied until December 19, 2013. As found, claimant has proven by a preponderance of the evidence that the employer or insurance carrier may be liable for one day’s compensation for the period of August 22, 2013 through December 19, 2013 as a penalty for their failure to properly admit or deny liability. As found, 50% of the penalty shall be paid to claimant and 50% to the subsequent injury fund as required by statute.

ORDER

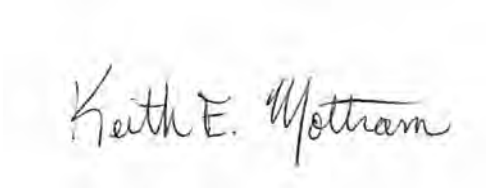
It is therefore ordered that:

1. Insurer shall pay claimant one day's compensation, based on claimant's stipulated AWW, for the period of August 22, 2013 through December 19, 2013, pursuant to Section 8-43-203(2)(a). As required by statute, 50% of this payment shall be made to claimant and 50% to the subsequent injury fund pursuant to Section 8-46-101.

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

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

DATED: January 5, 2015



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

ISSUES

The issues for determination are:

1. Whether the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her low back on or about January 1, 2011;

2. If so, whether the respondents are responsible for medical benefits incurred prior to the claimant reporting the claim on December 13, 2013 as a work-related injury or occupational disease;

3. If so, and the claimant is entitled to temporary total disability benefits, whether there is a reduction of benefits for the claimant's failure to timely report the claim until December 13, 2013; and,

4. If so, is the claimant barred from recovery based on the statute of limitations since the claimant indicates that her injury began January 1, 2011 and did not report a claim until December 13, 2013, greater than two years after she knew or should have known the seriousness of her condition?

Based upon the findings and conclusion below that the claim is not compensable, the ALJ does not address the remaining issues.

STIPULATIONS

The parties stipulated to the following issues:

1. The average weekly wage (AWW) is $911.77 with a temporary total disability (TTD) rate of $606.85 per week.

2. The right of the respondents to offset for short-term and long-term disability benefits which are noted in respondents' exhibit packet, Exhibit SSS and TTT.

3. Short-term disability was paid to the claimant from December 2, 2013 through May 24, 2014 and long-term disability was paid to claimant from May 24, 2014

through September 25, 2014 and possibly continuing should the claim be deemed compensable.

FINDINGS OF FACT

1. The claimant worked at the respondent-employer's hospital from 2003 until the fall of 2013 as a respiratory therapist. She is currently considered to be on a per diem basis.

2. As part of claimant's duties as a respiratory therapist, she cared for 15 to 20 patients per day providing respiratory treatment. Her duties included positioning patients, responding to codes, and pushing a respiratory cart which weighed approximately 50 pounds.

3. The claimant opined that maneuvering the cart in and out of the elevators was difficult. She testified that she had to lift the cart in and out of the elevator. However, Larry Benner, claimant's supervisor, testified the carts were not difficult to maneuver and if necessary, one would tilt the cart to exit the elevator. He further testified that the initial force to initiate movement of the cart was 10 to 20 pounds.

4. The claimant testified that as a result of her job duties, she sustained a back injury which caused left leg pain radiating to her ankle. The claimant could not identify a specific time or activity in which her back pain actually occurred.

5. The claimant did not report to a supervisor that she had back pain or problems as related to her job duties. The claimant did not request a change in her job duties or accommodations in her job duties prior to her leaving her full-time employment in 2013.

6. The claimant did not file a worker's claim for compensation until December 13, 2013, indicating a date of injury of January 1, 2011. The worker's claim for compensation was not filed until the claimant was informed that her FMLA had run and that the claimant would be placed on PRN status.

7. The claimant owns horses and had previously been engaged in riding until recently.

8. The claimant has a long history of back problems:

9. January 16, 1995 – Her back problems relate back to a workers' compensation injury due to heavy lifting on the job. As a result, the claimant had severe back pain with inability to move and presented in a wheelchair. Her diagnosis was acute back pain and sacroiliitis.

10. Between 1995 and 2010 the claimant was seen in excess of a dozen times for complaints of severe back pain.

11. August 15, 2011 – It was noted that she had sacroiliac pain from an old injury and requested an injection. She was using a TENS Unit daily and was being prescribed Vicodin.

12. September 21, 2011 – The claimant received a sacroiliac injection and continued to receive treatment for a diagnosis of sciatica and SI joint dysfunction. Medication consisted of Lidoderm patches and Vicodin.

13. March 23, 2012 – The claimant wanted an SI joint injection. History provided was that she had a back injury 15 years ago with a recent exacerbation.

14. July 20, 2012 – The claimant had extreme back pain since yesterday from an old injury. She had pain from the left SI joint, down the posterior leg, to her foot. She did note pushing a cart was flaring her back more than usual.

15. July 31, 2012 – The claimant had received a trigger point injection which gave her temporary relief.

16. August 6, 2012 – MRI showed a large left paracentral L5-S1 disc herniation with left L5 and bilateral S1 nerve root impingement. She noted a history of back and leg pain for 1-2 years.

17. 2012 – She was provided with epidural steroid injections in September and December.

18. August 21, 2012 – The claimant asked to be released to work without restrictions and she wanted her paperwork "fudged" in order to return to work. Her diagnosis in 2012 was low back pain/sacroiliac joint inflamed.

19. The claimant returned to work performing her normal job duties without accommodations.

20. On July 23, 2013, claimant was seen at the emergency department. There is no indication from the medical record that the claimant reported this problem as related to her work or her work duties.

21. On August 14, 2013, the claimant was seen by Dr. Michael Brown. His note indicated she had severe recurrence of back pain three weeks ago without benefit from an epidural injection. There was no history of a work-related problem and he specifically notes that coughing and sneezing aggravate her pain. She also complained of numbness and tingling in her left hand.

22. He recommended an MRI which was performed on August 22, 2013. There was no significant difference between the August 6, 2012 and the August 22, 2013 MRI's.

23. Dr. Brown performed surgery consisting of a microdiscectomy on August 27, 2013. The claimant did fairly well until approximately October 14, 2013. She indicated that she had been riding in a car for approximately three hours and was having severe left gluteal pain extending into her leg.

24. An MRI was again performed on October 31, 2013 which revealed a recurrent disc protrusion. The claimant underwent a repeat microdiscectomy at L5-S1 on the left.

25. The claimant returned to work between the surgeries full-duty without restrictions and without accommodations.

26. The claimant underwent her third surgery consisting of a fusion on August 6, 2014.

27. Dr. Rauzzino saw the claimant on behalf of the respondents and issued a report dated August 2, 2014. Dr. Rauzzino reviewed all of the records from January 16, 1995 forward. Dr. Rauzzino testified that most disc problems occur idiopathically without injury. He further testified that disc herniations occur due to heavy lifting or axial loading. Dr. Rauzzino testified that horseback riding would create axial loading. Based on his review of the medical records, it was his opinion that the claimant had a disc herniation as early as 1997 and the progression of this disc expressed itself in symptomology consistent with leg pain. It was his opinion that SI joint problems do not manifest symptoms of leg pain or radiculopathy.

28. Dr. Rauzzino noted there was lack of documentation to suggest that the claimant's back problems occurred while at work for the respondent-employer or during

the performance of her duties as a respiratory therapist. It was his opinion that her work duties did not cause the disc herniation or aggravate or accelerate the disc herniation. It was his opinion that her problems are due to degenerative disc disease and the natural progression of the underlying disc herniation relating back to 1997. He also noted there was no specific event or activity which the claimant noted to account for the acute onset of low back pain radiating to her left leg, while she was at work or performing her work duties. Dr. Rauzzino did not believe that pushing a cart would cause or aggravate a herniated disc. He opined that the disc herniation progressed over time which was consistent with her medical history. He testified that any activities to include activities of daily living would increase her back pain.

29. Dr. Brown testified in deposition that he did not think that claimant's problems in 1995 were the same as the problems he saw her for in 2013. However, he conceded that he did not review any prior medical records nor did he know the history of her back complaints. However, he opined that the history provided to the medical providers was important in determining causation of an injury.

30. Dr. Brown further testified that without a specific episode which caused the disc herniation, it was unlikely related to claimant's work activities. He opined that her pain would be exacerbated by pushing the cart but also anything she did would likely increase her pain. He stated that it is the opinion of neurosurgeons that the discs can herniate idiopathically and without an injury. This statement and opinion was consistent with that of Dr. Rauzzino.

31. The ALJ finds that the opinions of Dr. Rauzzino are more credible than other medical opinions to the contrary.

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

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the

burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

3. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

4. A pre-existing disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Renta*, 717 P.2d 965 (Colo. App. 1995).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

7. The ALJ concludes that the claimant has failed to provide sufficient medical or lay evidence that her back condition is related to her job duties.

8. The credible medical evidence and opinions indicate that the claimant's condition is not work related. As found above, the ALJ concludes that the opinions of Dr. Rauzzino are credible and entitled to persuasive weight.

9. The claimant has failed to establish by a preponderance of the evidence that the claimant's carpal tunnel syndrome and her lateral epicondylitis, arose out of and in the course of her employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: January 5, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant is entitled to conversion of a scheduled impairment rating for hearing loss to impairment of the whole person.

II. Whether Claimant's scheduled impairment rating was properly limited to monaural left ear hearing loss.

III. Whether Claimant is entitled to disfigurement benefits pursuant to § 8-42-108(1) as a consequence of his need to wear a hearing aid secondary to his admitted industrial injury.

FINDINGS OF FACT

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

1. Claimant is a long time employee of the Colorado Springs Police Department (CSPD), a separate department within the Self-Insured Respondent. Claimant has worked for Employer for approximately 14 years. As a patrol sergeant with CSPD, 50% of Claimant's duties involve administrative tasks. The remaining 50% of his time is spent working as a patrol officer where Claimant is subjected to traffic noise and sirens. Claimant is also exposed to the resonance and sound associated with gunfire while engaged in target practice required for his job. He also enjoys hunting with firearms. Claimant uses ear protection while shooting on the firing range; however, does not when hunting.

2. Prior his hire with the CSPD, Claimant worked as a patrol officer in Kansas where he had significant contact with traffic noise, sirens and gunfire while engaged in target practice.

3. Upon his appointment to the CSPD, Claimant's hearing was tested on October 24, 2000. Claimant's October 24, 2000 hearing test demonstrated minimal right ear hearing loss.

4. On or around October 24, 2013, Claimant reported increased difficulty with his hearing, especially the left ear, which he attributed to his use of ibuprofen to treat a separate work related injury.

5. Claimant underwent a hearing test at the City of Colorado Springs Occupational

Health Clinic on October 24, 2013, which demonstrated a "moderate loss in hearing." A work injury claim was taken and Claimant was referred to Dr. Joseph Hagarty by Employer's representative, Joanie Butero-Gay.

6. Dr. Hagarty evaluated Claimant on December 4, 2013 at which time a repeat audiogram was preformed. Claimant's December 4, 2013 audiogram demonstrated "minimally impaired" hearing on the right side and a "fairly large mid frequency" left ear hearing loss. In his report from December 4, 2013, Dr. Hagarty opined that Claimant's right sided hearing loss had remained "very similar over the past decade." He also opined that Claimant was suffering from "left noise induced hearing loss."

7. Liability for Claimant's left ear hearing loss was accepted by the Self-Insured Respondent.

8. Dr. Hagarty recommended a left ear hearing aid (HA) and diligent ear protection. Claimant was placed at maximum medical improvement (MMI) and assigned impairment by Dr. Hagarty. Dr. Hagarty's impairment calculation reflects that Claimant sustained 24% monaural hearing loss (impairment) in the left ear. As the average threshold readings for hearing in the right ear were less than 25 dB, Claimant had no ratable hearing loss in the right ear. (See Claimant's Exhibit 8, Bates Stamp page 35 and Claimant's Exhibit 9, Section 9.1a ¶ 7)[1] Consequently, the ALJ finds that Claimant has sustained a monaural hearing loss only. According to Dr. Hagarty's impairment rating report, 24% monaural hearing impairment equates to a 3% binaural hearing impairment[2]. Dr. Hagarty did not reflect the relationship of binaural hearing impairment to impairment of the whole person.

9. Claimant requested a Division Independent Medical Examination (DIME) which was completed by Dr. William S. Griffis on June 30, 2014. Dr. Griffis agreed with Dr. Hagarty's date of MMI. He also completed an impairment rating using Claimant's previously recorded audiogram readings and Tables 1, 2 and 3 of Chapter 9 of the *AMA Guides to the Evaluation of Permanent Impairment Third Edition (Revised)*(hereinafter the *AMA Guides*). Using the readings from Dr. Hagarty's audiogram, Dr. Griffis reached the same result concerning Claimant's monaural hearing loss as did Dr. Hagarty. Dr.

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[1] Paragraph 7 of section 9.1a provides that "If the average hearing level at 500, 1,000, 2,000, and 3,000 Hz is 25 dB (ANSI-1969) or less, no impairment is presumed to exist in the ability to hear everyday sounds under everyday listening conditions. In this case, Claimant's average threshold reading for the right ear was 23 dB.

[2] According to Section 9.1a ¶ 8 a purely monaural hearing impairment "should be converted to binaural hearing impairment" using the formula provided for in the paragraph, with 0% hearing impairment for the better ear. Table 3 of Chapter 9 is derived from this formula. The formula is expressed as:

$$\text{Binaural Hearing Impairment, (\%)} = \frac{\text{5x\% hearing Impairment of better ear}}{6} + \text{\% hearing impairment of poorer ear}$$

In this case, Dr. Hagarty calculated Claimant's binaural hearing loss as follows: 0% + 16dB ÷ 6 = 2.6, which Dr. Hagarty rounded up to 3%.

Griffis also calculated Claimant's binaural hearing loss using the formula provided for by Chapter 9, § 9.1a ¶ 8; however, the ALJ finds that Dr. Griffis expressed Claimant's binaural hearing loss as 3% WP or whole person impairment. Dr. Griffis did not apportion any of Claimant's hearing loss to prior exposure(s) for the following reasons: insufficient medical information, the left ear hearing loss had not be treated previously and the left ear hearing loss had not been independently disabling at the time of Claimant's October 24, 2013 injury.

10. On July 23, 2014, Respondent filed a Final Admission of Liability (FAL) admitting to 24% scheduled impairment for monaural left ear hearing loss. While the FAL took a position regarding disfigurement benefits, it noted simply $0.00 in the benefit summary. Claimant objected to the FAL on August 21, 2014 and filed an application for hearing endorsing the issues of disfigurement and permanent partial disability (PPD) benefits. Claimant was careful to note in his application for hearing that he accepted the impairment rating by the DIME physician, but sought to convert the 24% scheduled rating to the 3% whole person rating expressed by Dr. Griffis on the grounds that he had sustained "functional impairment" beyond his monaural hearing loss. Claimant reiterated this position at hearing. Consequently, the ALJ finds Claimant's burden of proof concerning the "conversion" of PPD to be subject to a preponderance of the evidence standard. Absent conversion of his scheduled impairment to whole person impairment, Claimant asserted that his scheduled impairment should have been calculated at 139 weeks as provided for under C.R.S. § 8-42-107(2)(hh) as opposed to 35 weeks as provided for under C.R.S. § 8-42-107(2)(ii).

11. Claimant testified that since his injury, he is cognizant to position co-workers to his right side so their speech is directed into his right ear even with use of his hearing aid. According to Claimant, his hearing aid amplifies background noise making it more difficult to converse in crowded rooms and discern where specific sounds are coming from. Claimant testified that cold weather causes ringing in his ear and he must put his seat belt on before starting vehicles because the dinging sound associated with ignition, in the absence of being pre-belted, is particularly amplified, painful and bothersome. Claimant testified that he must purchase replacement batteries frequently and take the device out when he is on the shooting range. Despite the aforementioned adjustments, Claimant admitted during cross examination that he has returned to full duty work and is able to perform all functions required of his job and daily living. Based upon the evidence presented, the ALJ finds that, despite his hearing loss, Claimant has not experienced a decreased capacity to meet his personal, social or occupational demands. Accordingly, the ALJ finds that Claimant's "functional impairment" is limited the hearing in his left ear.

12. Claimant has failed to prove by a preponderance of the evidence that he has sustained functional impairment beyond the left ear which would warrant conversion of his 24% scheduled impairment rating to impairment of the whole person. Accordingly, the ALJ finds that Claimant sustained scheduled impairment only as a result of his October 24, 2013 work injury.

13. The ALJ is not persuaded by Claimant's assertion that his scheduled impairment

was improperly limited to one ear. Scheduled impairment for hearing loss is enumerated on the schedule set forth in subsection (2) of § 8-42-107, C.R.S. According to that schedule, injuries causing total deafness in both ears entitle such injured employees to receive compensation for a total of 139 weeks. Conversely, injuries which cause total deafness in one ear limit compensation to a period of 35 weeks. Claimant asserts that his scheduled impairment should have been calculated on the basis of 139 weeks (total deafness of both ears). As found at Findings of Fact, ¶¶ 8-9 above, Claimant has partial unapportioned[3] left monaural hearing loss only. While the hearing in Claimant's right ear is "minimally impaired", impairment for this loss is not measurable because it falls below the 25 dB threshold to qualify as an impairment in the ability to hear everyday sounds under everyday listening conditions. Moreover, simply because Dr. Hagarty and Dr. Griffis indicated that Claimant has 3% binaural impairment does not mean that Claimant suffers from binaural hearing loss.[4] To the contrary, the *AMA Guides* simply provide that purely monaural hearing impairments should be converted to binaural hearing impairment and converted further to impairment of the whole person for inclusion in the impairment rating report. In this case, Claimant's hearing loss is limited to his left ear. Consequently, the ALJ finds that compensation for Claimant's scheduled impairment was properly limited to the category of "total deafness of one ear" entitling him to receive compensation for 35 weeks as provided pursuant to § 8-42-107(2)(ii), C.R.S.

14. Claimant wears an artificial hearing device made up of two parts; a small clear plastic tube and a small gray battery pack containing a small antenna which Claimant places behind his left ear. While subtle, the device is visible, especially when viewed from the side and rear. Claimant's use of this artificial device constitutes an alteration of the "natural appearance" of his head. Consequently, the ALJ finds Claimant's use of a hearing aid to constitute a disfigurement contemplated by § 8-42-108(1), C.R.S. The ALJ finds that Claimant has proven his entitlement to disfigurement benefits by a preponderance of the evidence.

CONCLUSIONS OF LAW

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

A. When a claimant's injury is listed on the schedule of disabilities, the award for

[3] While Dr. Hagarty apportioned the percentage of Claimant's hearing loss to non-occupational factors, the evidence presented establishes that Respondent's accepted liability for Dr. Griffis unapportioned impairment rating.

[4] The ALJ finds that Dr. Griffis' expression that Claimant had a 3% whole person impairment is a clerical error and that he likely intended to reflect that Claimant had 3% binaural hearing loss as did Dr. Hagarty since he not reference that he utilized Table 4 of the AMA Guides to reflect the relationship of binaural hearing impairment to impairment of the whole person in his DIME report. Since Claimant's impairment is limited to scheduled monaural hearing impairment only, the ALJ finds Dr. Griffis error immaterial.

that injury is limited to a scheduled disability award. Section 8-42-107(1)(a), C.R.S. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. Here, conversion of Claimant's scheduled impairment to impairment of the whole person is not warranted. While Claimant's left ear hearing loss has resulted in simple adjustment to some activities, it has not resulted in any decreased capacity to meet his personal, social or occupational demands. Consequently, the ALJ concludes that Claimant has not sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which would warrant conversion.

B. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant wears a hearing aid which alters the natural appearance of his head constituting a disfigurement as provided for by Section 8-42-108 (1), C.R.S. *See also*, *Jane M. Felix v. The Griffith Center, Inc.,* W.C. 3-972-633 (ICAO January 12, 1998).

ORDER

It is therefore ordered that:

1. Claimant's request for conversion from scheduled impairment to impairment of the whole person is denied and dismissed.

2. Claimant's request for scheduled impairment calculated on the basis of 139 weeks is denied and dismissed.

3. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Insurer shall pay Claimant $1,500.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

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

DATED: January 12, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Did the claimant prove by a preponderance of the evidence that he sustained a compensable injury or occupational disease proximately caused by the performance of service arising out of and in the course of his employment?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the March 27, 2014 to September 5, 2014?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical benefits for treatment of his low back condition?

FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 10 and 12 through 13 were admitted into evidence. Respondents' Exhibits A through M were admitted into evidence.

2. The claimant's date of birth is January 20, 1959. Since 1990 the claimant has worked on and off for the employer as a ceiling installer. The claimant was so employed on September 2, 2013.

3. At the hearing on November 25, 2014 the claimant testified as follows. On September 2, 2013 he was installing ceiling tiles at a parking garage on Logan Street. This job required him to lift bundles of ceiling tiles from the floor and place them on a scaffold that was approximately 5 feet above the floor. The bundles contained 4 tiles and the bundles weighed 70 pounds. He would load approximately 20 bundles onto the scaffold and then put on stilts. Once on stilts he would install insulation and tiles. This portion of the work required him to reach down to the scaffold, pick up a tile and then lift it overhead to install in the roof.

4. The claimant further testified as follows. In March 2013 he tore his right rotator cuff. As a result of this injury and the physical circumstances of the Logan Street job he was required to modify the way he performed his work. The claimant explained that in order to lift the tiles to the scaffold he bent over, picked the tiles up with his left arm and then used his back to stand and lift the tiles. This required much more use of his back than was normal. When installing ceiling tiles he would get the tile to shoulder height on the right and then use his left arm to lift the tile up and slide it into place.

Because the floor of the garage sloped downwards it was a further to reach to the ceiling on the downhill side of his stilts.

5. The claimant testified as follows concerning the morning of September 2, 2013. He loaded the scaffold with tiles on three separate occasions. The claimant began to experience a tingling in his right leg. The claimant was not certain when this sensation began but it became very prominent at about 11:00 a.m. when he was loading tiles on the scaffold. The claimant described numbness as running from the middle of the calf into the foot. He had never experienced this type of numbness before. The claimant also mentioned he had pain in the leg. The claimant told his supervisor that he was not "feeling right" and was going home.

6. The claimant testified that he had a motorcycle accident in 2010 which caused rib and head injuries but no low back injury. He testified he had no back pain between 2010 and September 2, 2013. In fact the claimant testified that he had no back pain at all prior to September 2, 2013 except for undergoing some chiropractic treatments sometime in 1982, 1983 or 1984. The claimant testified he did not experience any back pain from September 2, 2013 until he underwent surgery on October 4, 2013 and the pain medications wore off.

7. The claimant testified as follows concerning the events of September 3, 2013. He woke up and felt no better than he did the day before. He then called the employer to give notification he would not be into work. At approximately 1:00 p.m. he lay down and then got up at 3:00 p.m. When he got up his right foot was paralyzed and his right leg was numb from the hip to the foot. The claimant then went to Swedish hospital at approximately 11:00 p.m.

8. Will Schell testified as follows. He has been the vice president of the employer for 20 years. He is familiar with the claimant's job duties and has performed them himself. The bundles of tile used by the claimant weigh approximately 32 pounds; thus each tile weighs 8 pounds. Mr. Schell estimated that the claimant would lift 40 bundles per day, but stated this varies greatly between workers. The claimant was not lifting 70 pounds of material 20 or more times per day, but he occasionally lifted 70 pounds.

9. Mr. Schell further testified as follows. The claimant never reported to Mr. Schell that he sustained a work related back injury in September 2013. Mr. Schell has no recollection that in September 2013 the claimant asked to be off work because of a work related back injury. On October 3, 2013 the claimant came to Mr. Schell and said he was going to have back surgery under the employer's private health insurance. On October 3 the claimant did not tell Mr. Schell that his back condition was work related.

10. Records from the Swedish Medical Center emergency room (ER) reflect that the claimant arrived at 47 minutes after midnight on September 5, 2013. The claimant gave a history that at about 4:00 p.m. "the day before yesterday" he experienced the abrupt onset of weakness on the right side of his face, mild right arm weakness and mild right leg weakness. He reported tingling in the right arm and right

leg and that he had trouble walking. The claimant was admitted to the hospital with a "clinical impression of cerebrovascular accident." The claimant underwent an MRI of the brain that was negative. Dr. Jeffrey Wagner, M.D., opined the claimant probably had not had a stroke but Dr. Wagner was suspicious of a seizure.

11. On September 5, 2013 while the claimant was in the hospital he was evaluated by Charles Koftan, M.D. Dr. Koftan notes a history that "around 12 noon" on September 4, 2013 the claimant noticed the onset of right foot weakness and trouble walking. The claimant also reported 2 days of low back pain. Dr. Koftan noted the claimant had undergone various tests for a stroke but all tests were normal "except for the MRI of the lumbosacral spine." Dr. Koftan recorded that the lumbar MRI showed "degenerative changes at the L4-L5 lumbar regions with diffuse disk bulge and osteophytic ridge and possible small left paracentral herniation extending inferiorly." Dr. Koftan opined the lumbar MRI findings could explain the claimant's right lower extremity symptoms of weakness, altered gait and foot drop. Dr. Koftan wanted to refer the claimant to neurosurgery for an evaluation but the claimant declined because he wanted to be discharged from the hospital. Dr. Koftan discharged the claimant on September 6, 2013 with instructions to see his primary care physician (PCP), Richard Jolly, D.O., for a possible neurosurgery referral.

12. The Swedish medical records of September 5 and 6, 2013 do not indicate the claimant gave any history that his right lower extremity symptoms began while he was working as a ceiling tile installer on September 2, 2013.

13. Dr. Jolly examined the claimant on September 10, 2013. The claimant gave a history of the sudden onset of weakness including the right foot, right forearm and fingers of 4 to 6 days' duration. The history contains no indication that the claimant reported the symptoms began while he was at work. Dr. Jolly referred the claimant for a neurosurgical evaluation and neurological evaluation.

14. The claimant testified that 3 or 4 days after he got out of the hospital he had a conversation with Elena Schell, who was at that time the majority owner of the employer. The claimant stated that he advised Ms. Schell that his back problem happened while he was on the job at the Logan Street parking garage. The claimant stated that Ms. Schell replied she did not know why he was trying to make a workers' compensation claim when private health insurance was already paying for treatment of his back condition.

15. On September 16, 2013 the claimant underwent surgery to repair the right rotator cuff injury.

16. On October 1, 2013 Derrick Cho, M.D., performed a neurosurgical consultation pursuant to the referral from Dr. Jolly. The claimant reported chief complaints of back pain and right foot weakness. Dr. Cho noted a history that on September 5, 2013 the claimant experienced the sudden onset of numbness in the right side of his body along with weakness of the right lower extremity. The note contains no mention that these symptoms began while the claimant was at work. Dr. Cho examined

the claimant and reviewed the lumbar MRI. He noted the MRI showed "L4-5 disc collapse with a right eccentric disc herniation" causing "important compromise of the L5 nerve root." Dr. Cho assessed a lumbar herniated disc including radiculopathy and recommended the claimant undergo surgery.

17. On October 2, 2013, George Kohake, M.D., performed a "followup recheck" of the claimant's right shoulder. Dr. Kohake noted the claimant's right rotator cuff, associated with the March 2013 injury, was repaired on September 16, 2013. Dr. Kohake further noted that the claimant told him he was "scheduled to have a nonwork-related lumbar spine surgery done this Friday on the date of October 4, 2013, in which he is going to have one or two levels of his lumbar vertebrae fused, as well as a decompression, because he has nerve impingement on the right side with a drop foot on the right leg."

18. On October 4, 2013 Dr. Cho performed surgery described as a minimally invasive right L4-5 laminoforaminotomy, medial facetectomy and microdiscectomy for nerve root decompression.

19. On December 16, 2013 the claimant completed a claim for compensation. On this claim form the claimant wrote that he sustained an injury or disease involving his back and right foot on September 2, 2013. He also wrote that he reported this injury to the employer on September 9, 2013.

20. On April 25, 2014 Allison Fall, M.D., performed an independent medical examination (IME). Dr. Fall is board certified in physical medicine and rehabilitation and is level II accredited. Dr. Fall took a history from the claimant, performed a physical examination and reviewed medical records. The claimant gave a history to Dr. Fall that he was at work on September 2, 2013 and "felt weird" around 11:00 a.m. Specifically he reported he experienced tingling in his right leg and foot. The claimant advised that his work required him to stand on stilts and lift insulation and tiles overhead. The tiles weighted 25 pounds. He advised Dr. Fall he had no back pain prior to undergoing surgery. Dr. Fall noted that the September 2013 lumbar MRI showed multilevel degenerative changes including a "mild disc bulge/osteophyte ridge and mild facet degenerative changes at L4-5" with a small paracentral disc herniation encroaching on the exiting L5 nerve roots. She also noted that on November 15, 2013 the claimant underwent lumbar spine x-rays that showed "pronounced degenerative change, most pronounced at L4-5 and L5-S1" with loss of disc space height at and endplate degenerative change "most pronounced at L4-5."

21. In her April 25, 2014 report Dr. Fall assessed the claimant as being status post "L4-5 decompression and microdiscectomy for right foot drop." Dr. Fall opined to a reasonable degree of medical probability that the onset of the foot drop, "which arose when he awoke from a nap, was not work-related." She explained that there was "no traumatic event at work" and the claimant had "significant underlying, degenerative changes, a history of numerous falls, and significant motorcycle accident." Dr. Fall noted the "initial medical records" did not indicate there had been a work related injury.

22. On September 5, 2014 L. Barton Goldman, M.D., performed an IME. Dr. Goldman was qualified as an expert in physical medicine and rehabilitation and is level II accredited. He has participated in the development of the Division of Workers' Compensation Medical Treatment Guidelines. In connection with the IME Dr. Goldman took a history from the claimant, performed a physical examination and reviewed certain medical records. However, in his report Dr. Goldman noted that he received "minimal pre-existing medical records" and that "many pre-existing and co-existing records were not reviewed" prior to the IME.

23. In his report Dr. Goldman noted the claimant gave a history that his job involved lifting up to 85 pounds 4 times per day and lifting 30 t0 50 pounds 1 to 2 dozen times per day. The claimant reported that on September 2, 2013 he was working "on stilts" in a parking garage and was required to lift up to 85 pound bundles of tile. Further the claimant was awaiting right shoulder surgery and was "modifying his activity in some ways" due to shoulder pain. The claimant reported that part way through his working day he "felt weird" and experienced tingling in the right leg. Dr. Goldman stated the claimant was "very specific in noting that he did not experience any specific back pain until after his surgery." The claimant denied a prior history of lower extremity injury or treatment and denied any prior low back pain and treatment. The only exceptions were that the claimant reported 2 back strains in the 1980's and some osteopathic treatments over the past 5 years that were rendered by Dr. Jolly to alleviate "back discomfort."

24. In his report Dr. Goldman assessed "Lumbosacral spondylosis pre-existing and aggravated by September 12, 2013 [sic] work related injury resulting in right L4-5 herniated nucleus pulposus confirmed on right L4-5 laminectomy operative report." He further assessed mild residual right L5 radiculopathy and chronic lumbosacral strain in conjunction with the September 2, 2013 occupational exposure or work related injury.

25. In his report Dr. Goldman noted that based on the claimant's MRI scan he did have some "predisposition to lumbosacral strain or degenerative disk disease" (DDD). However Dr. Goldman opined this was not symptomatic to a degree that required a vocational disability assessment. He further noted that based on the history provided by the claimant and review of the available records there was "nothing to indicate much in the way of significant low back pain." Dr. Goldman opined that the L4-5 disk herniation and right lower extremity symptoms "are more likely than not primarily due to occupational exposure occurring on or around September 2, 2013." He explained that based on the records he reviewed and the claimant's history his "essential job duties particularly on the day that his low back pain was most prospectively documented probably meet criteria for potential occupational exposure." Dr. Goldman stated the claimant was "doing medium/heavy work in an awkward posture for at least a third of the day." Also, the fact the claimant was recovering from a shoulder injury would "probably force him to stabilize asymmetrical through his core musculature further putting him at risk for a strain pattern that could decompensate and result in transmission of ground reactive forces through the disk and hence the herniation is documented." Dr. Goldman further stated the fact that the work site was hard and uneven would create "even more difficult challenges to core strength and

endurance that would predispose to a strain and in light of this underlying lumbosacral degenerative disk disease, a herniation as documented."

26. On October 10, 2014 Dr. Fall issued a "Supplemental Record Review and Report." Dr. Fall indicated she had reviewed Dr. Cho's September 24, 2013 neurological evaluation in which he noted a "history of insidious onset of numbness in the right side of the body with weakness in the right leg." Dr. Fall opined that an "insidious onset would essentially mean of unknown etiology and, therefore would not be work related."

27. In the October 10, 2014 report Dr. Fall also noted that she had reviewed Dr. Goldman's IME report. Dr. Fall stated that based upon the "Level II re-accreditation course where Dr. Mueller in the past has lectured on causation analysis," the available literature would not support that "repetitive activity including lifting up to a certain level causes degenerative changes in the lumbar spine." Dr. Fall further wrote that Dr. Mueller opined that "possibly repetitive lifting over 60 pounds could be considered an occupational exposure to the lumbar spine." However, Dr. Fall stated that Dr. Goldman's own history did not support the conclusion that the claimant's job exposed him to repetitive lifting over 60 pounds. Dr. Fall further opined that the duties described to Dr. Goldman, including "trying to heal from a shoulder injury," would not be considered to cause lumbar degeneration.

28. Dr. Goldman testified at the hearing. Dr. Goldman stated that his opinion "tilts" toward the view that the claimant sustained an occupational disease and that the "straw that broke the camel's back" occurred on September 2, 2013. Dr. Goldman stated that his opinion began with establishing a diagnosis. He opined and that Dr. Cho's operative report clearly establishes the diagnosis of a herniated nucleus pulposus (HNP) with nerve root impingement. Dr. Goldman stated the claimant had some pre-existing DDD but stated the history concerning the onset of the claimant's symptoms and the clinical picture was consistent with an HNP occurring on September 2, 2013. Dr. Goldman next considered whether the circumstances of the claimant's job could have caused or aggravated the HNP. In this regard Dr. Goldman agreed with Dr. Fall that there is very little research on the subject of lifting as a cause or aggravating factor for DDD. He explained most of the research focuses on upper extremity conditions. Dr. Goldman opined that it is more than 50% probable that the claimant's duties caused the HNP and associated back strain. He explained that the claimant was required to lift 30 to 50 pounds overhead while his right arm was disabled and while he was working on stilts on an uneven surface. Dr. Goldman opined that this combination of "ergonomic" factors caused an "asymmetrical challenge" to the claimant's core strength. He opined that this challenge to core strength either caused or contributed to the disc herniation and that the herniation would not have occurred when it did but for the claimant's employment. Dr. Goldman also testified his opinion is supported by the temporal relationship between the appearance of the claimant's symptoms and his work on September 2, 2013, the relief of lower extremity symptoms resulting from surgery and the lack of any preexisting "apportionable conditions."

29. Dr. Goldman stated he did not have any of the claimant's medical records prior to September 2013. He further stated he relied on the history provided by the claimant in arriving at his opinions.

30. Dr. Fall testified at the hearing. Dr. Fall opined that the claimant sustained a disc herniation at L4-5. However, in her opinion this herniation was the result of the natural progression of the claimant's preexisting degenerative back disease and not the duties of his employment. Dr. Fall stated that the preexisting degenerative back disease was "significant" as shown by the September 2013 MRI and the x-rays performed in November 2013. Dr. Fall testified that it is not uncommon for people to have herniated disks that are asymptomatic for a long time, and then, without accompanying trauma, the herniation becomes symptomatic. Dr. Fall stated that in her opinion the herniated disc existed before September 2, 2013. She further opined that if the claimant sustained the herniation while working on September 2, 2013 she would have expected the onset of immediate back pain because an acute herniation is like a "rubber band snapping." However, the claimant did not report experiencing back pain on September 2, 2013, he reported only right lower extremity tingling. In Dr. Fall's opinion this pattern of symptoms is most consistent with the natural progression of the preexisting disc herniation which caused chemical or mechanical inflammation of the nerve.

31. Dr. Goldman testified in rebuttal. Dr. Goldman stated that it often takes a couple of days for symptoms to build up after a disc herniation and that this is a classical pattern for older patients. He believed the claimant's history was consistent with a disc herniation occurring on September 2, 2013 and the gradual buildup of symptoms resulting in the claimant's presentation at the emergency room on September 5, 2013.

32. The claimant testified in rebuttal that the bundles of tile weighed 69.8 pounds. The claimant stated that he ascertained this information by having Home Depot contact the supplier. The supplier then reviewed a Materials Safety Data Sheet establishing the weight of the tiles.

33. Medical records establish that on October 20, 2009 the claimant completed a questionnaire in which he reported experiencing low back pain as well as neck and upper extremity symptoms. On June 23, 2010, while the claimant was being treated for his motorcycle accident he reported he was experiencing daily pain "in the inner thighs" and low back.

34. The claimant failed to prove it is more probably true than not that he sustained an injury or occupational disease proximately caused, intensified or aggravated by the performance of service arising out of and in the course of his employment.

35. The claimant's testimony that he began to experience right lower tingling in his right lower extremity while at work on September 2, 2013 is not credible and persuasive. The claimant's testimony that these symptoms began on the morning of

September 2, 2013 while he was installing ceiling tiles does not appear in the history which he provided to the Swedish Medical Center emergency room on September 5, 2013. The Swedish records indicate that the claimant gave a history that he experienced the abrupt onset of weakness in his right arm and leg at 4:00 p.m. the day before yesterday (or September 3, 2013). The claimant's testimony is also inconsistent with the history he reported to Dr. Koftan on September 5, 2013. Dr. Koftan noted a history of the onset of symptoms on September 4, 2013 at 12:00 noon. There is no mention of symptoms appearing at work on the morning of September 2, 2013. The claimant's testimony is also inconsistent with the history reported to Dr. Jolly on September 10, 2013. Dr. Jolly noted the sudden onset of symptoms of right foot and arm weakness that had lasted 4 to 6 days. Dr. Jolly's records do not indicate these symptoms developed while the claimant was at work. Moreover, if the symptoms had lasted 6 days they would have commenced on September 4 as the claimant reported to Dr. Koftan, not on September 2, 2013 while he was working. The claimant's testimony is also inconsistent with the history he reported to Dr. Cho on October 1, 2013. Dr. Cho noted the claimant gave a history that on September 5, 2013 he experienced the "sudden onset" of right-sided body numbness and right lower extremity weakness. Dr. Cho's note does not contain any history that these symptoms appeared while the claimant was working on September 2, 2013.

36. The claimant's testimony that his right lower extremity weakness commenced while he was at work on September 2, 2013 is also contradicted by Mr. Schell. Mr. Schell credibly testified the claimant never told him his back condition was work related. Schell credibly testified that on October 3, 2013 the claimant said he was going to have back surgery under the employer's health insurance plan. Mr. Schell's testimony is corroborated by Dr. Kohake's October 2, 2013 notation that the claimant reported he was to undergo "nonwork-related lumbar spine surgery" on October 4, 2013. This evidence persuasively establishes that as late as October 2, 2013 the claimant had not yet reported a work related back or lower extremity injury to the employer or to his medical providers. For much the same reasons the claimant's testimony that he reported a work related injury to Elena Schell is not credible.

37. Dr. Goldman's opinion that the claimant's herniated disc and lumbar sprain probably resulted from an injury or more probably an occupational disease is not persuasive. Dr. Goldman's opinion is that although the claimant had preexisting DDD, that condition was aggravated by a September 2, 2013 exposure to a combination of overhead lifting and ergonomic factors that placed stress on the claimant's "core" and caused a lumbar strain and disc herniation. Dr. Goldman further opined that the subsequent evolution of the claimant's symptoms was consistent with a disk herniation occurring on September 2, 2013. However, Dr. Goldman's opinion is significantly based on the claimant's history that his symptoms of right lower extremity numbness developed on September 2 while he was at work lifting tiles overhead while on stilts, standing on an uneven work surface while protecting his right arm. (Findings of Fact 23, 25, 28). As found, the claimant's testimony that he developed symptoms at work on September 2 is not credible. It follows that the history the claimant gave to Dr. Goldman concerning the development of his symptoms is not credible. It also follows that Dr. Goldman's opinion concerning the causal relationship between the ergonomic

conditions of the claimant's employment and the development of his back condition is founded on an inaccurate understanding of the temporal relationship between the symptoms and the exposure to the alleged ergonomic hazards of employment.

38. Dr. Fall credibly and persuasively opined that the claimant's herniated disc and related symptoms are the result of the claimant's preexisting DDD. Dr. Fall's opinion that the claimant had preexisting DDD is corroborated by the September 2013 MRI which showed "degenerative changes at the L4-5 lumbar regions" and the November 2013 lumbar x-rays showing pronounced degenerative disc disease at L4-5. Dr. Goldman agreed that there was preexisting DDD. Dr. Fall credibly opined that it is common for DDD to result in a disc herniation that is unrelated to any trauma. Dr. Fall credibly opined that if the claimant has suffered an acute herniation on September 2, 2013 it is probable that he would have experienced immediate back pain, but the claimant reported that his only symptoms on September 2 were "feeling weird" and numbness in the right lower extremity. Dr. Fall's opinion is all the more persuasive since the ALJ finds the claimant's testimony that he experienced right lower extremity symptoms while at work on September 2 is not credible. As found, the claimant's testimony that his symptoms began at work is inconsistent with his reported history contained in the medical records from September and October 2013 as well as his statements to Mr. Schell and Dr. Kohake. Dr. Fall persuasively noted this inconsistency in her April 2014 report where she observed that the "initial medical records" did not document any report of an alleged work related injury.

39. Dr. Fall credibly opined that the claimant did not describe any "traumatic event" on September 2, 2013 that would explain the development of a herniated disc. Dr. Goldman apparently agrees with Dr. Fall in this regard since he stated that he "tilts" toward a belief that the claimant sustained an occupational disease resulting from the exposure to ergonomic factors and repetitive lifting. Based on this evidence the ALJ finds the claimant did not sustain any occupational "injury" that is traceable to a particular time place and cause.

40. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation

case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF ALLEGED INJURY OR OCCUPATIONAL DISEASE

The claimant alleges that he sustained an injury or occupational disease as a result of performing his duties that entitles him to an award of temporary total disability benefits and compensation for the medical treatment provided by Swedish Hospital, Dr. Jolly, and Dr. Cho. Relying principally on his own testimony and the opinions of Dr. Goldman, the claimant argues that a preponderance of the evidence establishes that on September 2, 2013 he sustained an injury or “occupational exposure” that caused him to experience a herniated disc and back strain. The ALJ disagrees with this contention.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof to establish causation is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards

associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.*

As determined in Findings of Fact 34 and 39, the claimant failed to prove that he sustained any work related "injury" arising out of and in the course of his employment. The ALJ credits the opinion of Dr. Fall that the claimant did not describe any traumatic event on September 2, 2013 that could explain the occurrence of a herniated disc. Indeed, even Dr. Goldman explained that he "tilts" toward the belief the claimant's condition is the result of an occupational disease rather than a traumatic injury. It follows that the claimant did not experience any "injury" that is traceable to a specific time place and cause.

As determined in Findings of Fact 34 through 38, the claimant failed to prove that he sustained an occupational disease of the low back that was proximately caused, intensified or aggravated by the performance of service arising out of and in the course of his employment. As found, the claimant's testimony that he experienced symptoms of right lower extremity numbness while performing his duties on September 2, 2013 is not credible and persuasive. That testimony is inconsistent with the history recorded in the contemporaneous medical records and is inconsistent with statements the claimant made to Mr. Schell and Dr. Kohake. Further, Dr. Fall's opinion that the disc herniation and related symptoms resulted from the natural progression of the preexisting DDD is more credible and persuasive that Dr. Goldman's opinion. As found, Dr. Goldman's opinion is to a large extent based on the assumption that the claimant gave an accurate history that his symptoms began on September 2, 2013 while he was exposed to "ergonomic" factors that placed stress on the disc. However, the ALJ has discredited that history. Moreover, Dr. Fall credibly and persuasively opined that the onset of the claimant's symptoms is consistent with the natural progression of the preexisting DDD.

It follows that the claim for workers' compensation benefits must be denied. The ALJ need not address the parties' other arguments.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-917-643 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 28, 2015

DIGITAL SIGNATURE:

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

The issue whether Claimant's injury occurred within the course and scope of his employment was raised for consideration at hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 22 year old former employee of Employer who worked for respondent employer from January 3, 2014, through January 8, 2014. The job for which Claimant was hired to work consisted of building a pipeline that started in Stratton, Colorado and stretched southeast to Dighton, Kansas. The jobsite was essentially a "moving jobsite" in that work progressed at the rate of approximately two miles per day and the jobsite was not located in the exact same location each day. Claimant worked on the same pipeline for each of his six days of employment with Employer.

2. A truck allowance is extended to employees of Employer at the time of hire for use of their vehicles in transporting workers and supplies to the job site.

3. On January 9, 2014 Claimant was injured while driving to work after returning from a trip to the airport. Claimant had requested the morning off of work in order to take his fiancée to the airport and the trip to and from the airport was in no way related to his work for Employer.

4. At the time of his accident, Claimant was driving a truck owned by his fiancée, Rachel Cooper, who was a former employee for Employer.

5. Although Ms. Cooper applied for and requested that her vehicle be placed on Employer's payroll, neither Ms. Cooper nor Claimant received any truck pay for the vehicle because Employer never received the necessary insurance documents for the vehicle and never authorized use of the vehicle for transporting supplies and employees to the job site.

6. Dwight Brasseaux testified on behalf of Respondents. Mr. Brasseaux was the project superintendent for the job at which Claimant was working. He testified that he was the only person on the project with authority to approve work-related travel. He further stated that any time off for workers on the project should have been cleared with him because he needed to know where each of his workers

was during the work day. Mr. Brasseaux did not authorize Claimant to take his fiancé to the airport and did not authorize Claimant to be paid for that time. Mr. Brasseaux testified that the normal reporting time in the morning was 7:00 a.m. and that no employees were paid for travel to and from work. The only "travel" for which employees were paid was for travel from the warehouse to the jobsite. No employees were considered "on the clock" until they arrived at the warehouse/office or on the actual jobsite.

7. Mr. Brasseaux also testified that only vehicles that have been extended the truck allowance were authorized to be on the jobsite and any other vehicles on the jobsite were considered unauthorized.

8. According to Mr. Brasseaux, Ms. Cooper's vehicle was never extended the truck allowance because Employer never received the necessary insurance documents for Ms. Cooper's vehicle in order to properly extend the vehicle the allowance. Mr. Brasseaux also stated that even if Ms. Cooper had been extended the allowance, once Ms. Cooper's employment terminated, the allowance would have terminated.

9. Claimant testified that his immediate supervisor, Terry Cooper, had given him the morning off to take his fiancée, Mr. Cooper's daughter, to the airport. Claimant said that Mr. Cooper advised him to report to work after the trip. Claimant also testified that he called Mr. Cooper at approximately noon to get instructions on where to report to work and Mr. Cooper gave him the precise location to which he was to report. Claimant testified that his accident occurred on the road leading to the jobsite and that he was never able to locate the precise location to which he had been directed by Mr. Cooper.

10. Claimant also testified that although he never received the truck allowance, it was his understanding that Ms. Cooper's truck was nevertheless on payroll and he used the vehicle on the premises for work purposes.

11. Terry Cooper offered rebuttal testimony on behalf of Claimant. Like Claimant he testified that Claimant called him at approximately noon on January 9, 2014, and that he directed Claimant to a specific location for work and at that point considered Claimant to be working. Mr. Cooper testified he believed this was appropriate because it was consistent with how a workday normally started. According to Mr. Cooper, the crew was considered to be on the clock at 7:00 a.m. after they filled up their trucks at the designated fueling station and received their job assignments for the day. Hence, in Mr. Cooper's opinion, once he told Claimant his assignment for the day and Claimant was on his way to that assignment, Claimant was "on the clock" regardless of Claimant's physical location at the time.

12. Mr. Cooper also testified that he placed Ms. Cooper's truck on payroll and that it was in fact on payroll. Contrary to Mr. Brasseaux's testimony, Mr. Cooper stated

the necessary paperwork had been turned in and simply had not been processed. In fact, Mr. Cooper testified that he was aware that it could sometimes take up to a month for the paperwork on a truck to be properly processed and stated that he "needed that truck" and routinely made use of vehicles while awaiting approval from Employer.

13. Stephen Hamby provided a written statement regarding the January 9, 2014, incident. Mr. Hamby wrote that on January 9, 2014, Claimant did not show up for work. Mr. Cooper told Mr. Hamby that Claimant was expected at noon. According to Mr. Hamby at noon, Mr. Cooper called Mr. Hamby and said he had not heard from Claimant all day and could not reach Claimant. At about 3:00 p.m., Mr. Cooper received a call stating that Claimant had been in an accident and at that time Mr. Cooper told Mr. Hamby to put Claimant on the time sheet and pay him for 5 hours of work and that Mr. Brasseaux had approved it. Mr. Hamby was subsequently told to remove Claimant's name from the timesheet because Claimant had never been at work. At hearing, Mr. Cooper admitted to telling Mr. Hamby to put Claimant down for 5 hours of work but was never able to offer any explanation for how he had come up with 5 hours.

14. The testimony of Mr. Brasseaux is more credible and persuasive than that of Claimant and Mr. Cooper. The ALJ finds that the testimony of Claimant and Mr. Cooper was biased and reflected their personal interest in having the claim deemed compensable.

15. It is found that at the time of Claimant's accident Claimant was not performing any work-related function or traveling in a company vehicle at the time of his accident, and conferred no benefit on Employer beyond Claimant's arrival at work. Rather, Claimant was simply returning from a personal errand, traveling in a private vehicle while on his way to work when the accident occurred. Hence, Claimant has failed to carry his burden of proving that he was in the course and scope of his employment at the time of his accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers'

compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*. A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

2. In this case, the issue whether Claimant sustained his burden of proof rest upon credibility determinations regarding Claimant and his witness's testimony. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found, the testimony of Mr. Brasseaux was more credible than the testimony of Claimant and Mr. Cooper.

3. Travel to and from work that confers no benefit upon the employer beyond the sole fact of the employee's arrival at work, is not travel that occurs within the course and scope of employment and injuries that occur during such travel are not compensable. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). Exceptions to this rule include travel at the express or implied request of the employer, *Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967), or when the travel confers a benefit on the employer beyond the mere fact of the employee's arrival at work. *Shandy v. Lunceford*, 886 P.2d 319 (Colo.App.1994). As found here, Claimant's travel to the jobsite conferred no benefit on Employer beyond Claimant's arrival at the jobsite. The testimony of Claimant and Mr. Cooper that Claimant may have been given any specific travel directions by Mr. Cooper was not credible.

4. Claimant has failed to carry his burden of proving that he was within the course and scope of his employment at the time of his accident. As a result, the claim is not found to be compensable.

ORDER

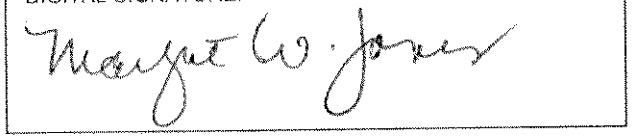
It is therefore ordered that:

Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2015

DIGITAL SIGNATURE:



Margot W. Jones
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant sustained a compensable on-the-job injury while working for Employer.

PRELIMINARY MATTERS AND HEARING ISSUES

Claimant endorsed a number of hearing issues on the application for hearing including compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, temporary total disability benefits (from September 26, 2013 through a date to be determined), temporary partial disability benefits (from September 26, 2013 through a date to be determined), penalties (for Employer allegedly failing to acknowledge Claimant's claim when he first filed it), benefits, and termination.

Respondents endorsed compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, temporary total disability benefits (from September 26, 2013 through a date to be determined), temporary partial disability benefits (from September 26, 2013 through a date to be determined), failure to plead penalties with specificity under § 8-43-304(4), C.R.S., causation, relatedness of medical benefits, preexisting condition, intervening cause or event, safety rule violation pursuant to § 8-42-112(1)(b), C.R.S., voluntary termination of employment, responsibility for termination pursuant to §§ 8-42-103(1)(g) and 8-42-105(4)(a), alternative compensation including FMLA leave and STD/LTD benefits, and offsets.

Claimant initially filed two claims for compensation that generated two workers' compensation numbers, case number 4-944-662-02, which was Claimant's claim for back, shoulder, hands, and arm injuries due to alleged lifting injuries, and case number 4-944-671, which was for occupational disease stemming from Claimant's alleged exposure to radioactive materials. On May 13, 2014, these two claims were consolidated pursuant to WCRP 9-6 after a prehearing conference held on May 9, 2014 before prehearing ALJ Thomas DeMarino.

At the beginning of hearing, Claimant renewed a motion to continue the hearing that he had filed on October 9, 2014. The ALJ denied the motion pursuant to § 8-43-207, C.R.S.

FINDINGS OF FACT

Background

1. Claimant's physical complaints, injuries, and conditions that he attributes to his work for Employer due to lifting include back, shoulder, and arm pain, hand numbness, rotator cuff damage, muscle spasms on the left side of his back, and pain across his back. Claimant stated that he suffers from diverticulitis, an injury to his left

knee, rectal bleeding, body hives and/or cysts, and general malaise, which he believes were caused or exacerbated by his work for Employer.

2. Claimant also alleged injuries and conditions, including anxiety and depression, due to his exposure to radioactive material at Employer's workplace.

Claimant's Employment with Employer – Lifting

3. Employer hired Claimant on October 17, 2005 to work as a mechanical seal repair technician. In this position, Claimant dismantled, washed, polished, and refurbished seals that had been used in industrial pumps of various sizes. These seals were used in pumps primarily in the oil and gas industry, and also in the space industry.

4. Claimant performed approximately 90% of the cleaning, polishing, and refurbishing of the seals for Employer.

5. Claimant's job duties included tasks such as adjusting a "cheater bar" up to 20 times per day.

6. Another task was hand "lapping." Claimant performed about 90% of the lapping work for Employer. Claimant normally used a lapping machine, but at times he performed hand lapping. The lapping machine was between waist and chest high, and several times per year, Claimant "lapped" for two or three days in a row.

7. There was conflicting evidence about the weight of the seals Claimant had to lift. Claimant claimed he had to lift seals that weighed up to 120 pounds, while other evidence suggested that the heaviest seals he had to lift weighed 50 pounds. It is found as fact that the heaviest seals that Employer received weighed 120 pounds, which were the "Flexbox" seals. It is found as fact that the heaviest seals Claimant had to lift weighed 75 pounds.

8. Claimant would have to lift seals to approximately chest height in order to place them on an ultrasonic cleanser as part of his job. Claimant had to hold his arms chest-high when using this machine. Claimant was the employee who primarily performed this task.

9. The typical weight of seals Claimant worked on was between five and 30 pounds. Two to three times per week he would have to work on seals that weighed more than 30 pounds.

10. Employer had an engine hoist and carts available for its employees to use to lift heavy objects. The engine hoist and carts were available to Claimant for his use.

11. Employees wore gloves, safety glasses, and work boots when working on the seals.

Claimant's Employment with Employer – Alleged Exposure to Unacceptable Levels of Radiation

12. In the summer of 2013, one of Employer's customers, Sulzer, hired Employer to clean and refurbish seals that contained "naturally occurring radioactive material," known as "NORM."

13. Neither Colorado nor the federal government have established regulations concerning safe levels of NORM exposure. Companies must determine best practices for safe NORM levels.

14. Sulzer established 1000 parts per milligram ("ppm") as its acceptable NORM level.

15. In or around July of 2013, Employer received two sets of ten seals from Sulzer. The seals were delivered by regular UPS and not by any kind of hazardous materials delivery service.

16. Claimant opened one set of the Sulzer seals in July of 2013, and cleaned two of the seals.

17. Claimant wore gloves and a respirator when he cleaned the two Sulzer seals.

18. Sulzer hired Mr. Richard Block, an expert in workplace environmental studies, to test their seals for radiation levels. Mr. Block is an expert in acceptable levels of NORM, as well as levels of "technically enhanced naturally occurring radioactive material," known as "TENORM."

19. Mr. Block credibly testified, and it is found as fact, that NORM and TENORM are not considered hazardous materials, but that they need to be monitored to ensure they remain at acceptable levels.

20. Mr. Block credibly testified, and it is found as fact, that 1000 ppm is an acceptable NORM level, that it is no higher than people are exposed to in their everyday lives, and that 1000 ppm is a reasonable standard.

21. Employer also hired Mr. Block to inspect and measure the NORM levels at Employer's workplace. Mr. Block explained NORM and TENORM to Employer's employees, and instructed them on the use of Geiger counters to monitor NORM and TENORM levels.

22. Mr. Block inspected and measured the NORM and TENORM levels at Claimant's worksite and found that the levels were acceptable.

23. Mr. Block personally tested the Sulzer seals that are in question in this hearing. He credibly testified, and it is found as fact, that Claimant was completely safe

when he cleaned the two Sulzer seals and that there was no TENORM present in any of the Sulzer seals that Claimant was near.

24. Mr. Block further credibly testified, and it is found as fact, that Claimant breathed in less NORM at Employer's worksite than he did when he was outdoors or at his home.

25. Claimant filed complaints about Employer with OSHA and with the Colorado Department of public Health and Environment ("CDPHE").

26. OSHA conducted an onsite inspection of Employer, interviewed some of Employer's employees, and used a Geiger counter to check for radiation.

27. OSHA did not find any violations on the part of Employer and indicated it would not be conducting any additional investigation.

28. Claimant appealed OSHA's decision and his appeal was denied.

29. CDPHE inspected Employer, and its finding concerning radioactive levels at Employer's worksite was "no contamination."

30. CDPHE sent a letter to Claimant stating that there was no evidence of TENORM contamination at Employer's work site.

31. Claimant did not produce any expert testimony or objective evidence that he was exposed to toxic levels of chemicals or radiation at Employer's workplace.

32. Claimant failed to prove by a preponderance of the evidence that he suffered from exposure to unacceptable levels of NORM, TENORM, or any other type of chemical or radioactive substances at Employer's worksite.

33. Claimant failed to prove by a preponderance of the evidence that any level of NORM or TENORM that he was exposed to at Employer's worksite caused any medical illnesses, conditions, or occupational diseases.

Claimant's Medical and Psychological Conditions and Injuries

34. Dr. David Diffee is a licensed psychologist who has treated Claimant over the years, and who began treating him again on January 22, 2013.

35. Dr. Diffee was deemed an expert in psychology at hearing.

36. In Dr. Diffee's expert opinion, Claimant was depressed, anxious, upset, and confused about where he "fit in" with Employer. Claimant was also very fearful of his workplace situation, and about the fact that he believed Employer did not have his best interests at heart.

37. From January to July of 2013 Claimant saw Dr. Diffee about once per week.

38. Dr. Diffee opined that in January 2013, Claimant was very anxious about airborne particulate/material at his worksite.

39. Dr. Diffee administered the "Personality Assessment Inventory" ("PAI") to Claimant on April 7, 2014, three months prior to the Sulzer seals arriving at Claimant's worksite. Dr. Diffee explained that the PAI is the new standard for psychological testing.

40. Claimant scored high in "malingering" on the PAI.

41. Dr. Diffee testified that while he observed Claimant's emotional health deteriorate, and witnessed Claimant's anxiety and depression increase, he could not state that it was because of chemical exposure at Employer. He also testified that none of Claimant's "Axis I" diagnoses were caused by Employer.

42. Claimant testified that his physical conditions or illnesses included diverticulitis, curvature in his spine, rectal bleeding, high iron in his body, cysts on back of his ear, a baker cyst in his left knee, back, neck and arm numbness, and that his hips locked up impeding his ability to walk.

43. Claimant underwent an independent medical examination with Dr. Eric Ridings, a board certified physical medicine and rehabilitation specialist who is Level 2 accredited. Dr. Ridings examined Claimant on August 26, 2014 and September 18, 2014. He also reviewed Claimant's chiropractor's notes, and notes from a stay Claimant had at Littleton Adventist hospital.

44. Dr. Ridings was admitted as a medical expert at hearing.

45. Dr. Ridings' physical examination of Claimant revealed that Claimant did not have any injuries or medical conditions except for a thoracic kyphosis, which was unrelated to Claimant's employment with Employer.

46. Dr. Ridings credibly testified that he did not find any reason to relate Claimant's job for Employer to any of his alleged injuries or conditions to any degree of medical certainty whatsoever.

47. He further testified that any radiation Claimant was exposed to during his work for Employer did not cause or contribute to Claimant's alleged diverticulitis, knee fracture, curvature of the spine, or rectal bleeding.

48. Claimant did not produce any expert testimony or objective medical evidence that his work for Employer caused or contributed to any of his alleged medical conditions or illnesses.

49. Claimant failed to prove by a preponderance of the evidence that he suffered an injury or occupational disease as a result of lifting at Employer's work site.

50. Claimant failed to prove entitlement to temporary total or temporary partial disability benefits from September 26, 2013 forward. Claimant's alleged wage loss due to work injuries or conditions is not attributable to his work for Employer.

51. Claimant failed to prove a compensable claim or occupational disease secondary to his work for Employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S.

2. For a claim to be compensable under the Act, a claimant has the burden of proving by a preponderance of the evidence that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. § 8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006).

3. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. *Id.*

4. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990).

5. The ALJ is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). Finally, the ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See, e.g.* § 8-43-210, C.R.S.; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

6. An ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion, and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

7. An injury occurs "in the course of" employment when the employee demonstrates that the injury occurred within the time and place of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

8. The "arising out of" element is narrower than the course of employment element, and requires a claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *Triad*; *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). It is generally sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9 (Colo. App. 1995). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996).

9. Claimant has failed to prove by a preponderance of the evidence that any of his alleged injuries or conditions occurred in the course of his employment with Employer. Claimant has likewise failed to prove by a preponderance of the evidence that any of his alleged injuries arose out of his employment with Employer. Claimant did not introduce medical records, physician reports, or physician testimony establishing that he actually suffered from any of the ailments he attributed to working for Employer. This is not to say that Claimant does not suffer from these ailments – he may. However, because Claimant is not a medical doctor or medical expert, his testimony and opinions about his ailments, without corroboration by a medical doctor or by medical records, are insufficient to prove by a preponderance of the evidence that he does suffer from these conditions. Indeed, the one physician who did testify, Dr. Ridings, credibly testified that Claimant had no diagnoses except for thoracic kyphosis, which was unrelated to Claimant's employment with Employer.

10. Claimant likewise failed to introduce any evidence that his work for Employer caused or contributed to any health conditions that he attributed to exposure to toxic levels of NORM, TENORM, or any other chemical. OSHA and CDPHE investigated Employer and found no dangerous levels of NORM or TENORM or other contaminants. Mr. Block personally tested the Sulzer seals Claimant was concerned about, and did not find levels of NORM or TENORM higher than Claimant would have been exposed to outdoors or at his home. Finally, Claimant's high PAI score on malingering, while it does not prove that he is malingering, may explain to some extent why there is no objective medical evidence to support his allegations.

ORDER

It is therefore ordered that any and all of Claimant's claims for workers' compensation, and his request for penalties, are denied and dismissed. Any remaining issues are moot.

DATED: January 29, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that medical treatment in the form of a right total shoulder arthroplasty as recommended by Alireza T. Alijani, M.D. is reasonable, necessary and related to his February 24, 2014 industrial injury (W.C. No. 4-946-408).

2. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his January 9, 2012 Workers' Compensation claim (W.C. No. 4-888-893) based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant is a 59 year old male who works for Employer as a Driver. His job duties involve shuttling vehicles around Employer's facility. Claimant acknowledged that he has had a lengthy history of right shoulder injuries and osteoarthritis.

2. On January 9, 2012 Claimant slipped and fell onto his right side and injured his right shoulder during the course and scope of his employment with Employer. Workers' Compensation number 4-888-893 was assigned to the claim. Respondents admitted the claim and referred Claimant for medical treatment. X-rays taken on January 10, 2012 revealed severe osteoarthritis with decreased glenohumeral space and evidence of chronic calcific tendinitis in the right shoulder. Claimant underwent physical therapy and injections.

3. On March 16, 2012 Claimant visited Michael Hewitt, M.D. for a surgical consultation. Dr. Hewitt reviewed a right shoulder MRI that revealed advanced glenohumeral arthritis. In discussing treatment options, Dr. Hewitt noted that Claimant "understands surgery would require a shoulder replacement and his glenohumeral arthritis is preexisting. He states he is not interested in surgery."

4. On April 24, 2012 Claimant reached Maximum Medical Improvement (MMI). Jeffrey Wunder, M.D. assigned Claimant an 8% right upper extremity impairment rating. Claimant subsequently returned to work for Employer.

5. On July 20, 2012 Respondents filed an Amended Final Admission of Liability (FAL) acknowledging Dr. Wunder's 8% right upper extremity impairment rating. Claimant did not seek a Division Independent Medical Examination (DIME) or otherwise object to the FAL.

6. On February 24, 2014 Claimant injured his right shoulder, left shoulder**,** left knee and left ankle while working for Employer. The injuries occurred when a co-

worker was driving a 15 passenger van and started moving before Claimant entered the vehicle. Claimant was in the process of pulling himself into the vehicle. He explained that he had his left foot on the running board and his right foot was about 18 inches off the ground. Claimant had his left hand on the door and was holding onto seat belts with his right hand when the driver pulled away. Claimant remarked that the motion of the van caused his body to swing abruptly to the side and he was slammed into the back door of the vehicle. .

7. Claimant commented that when the accident occurred he experienced a "pop" in his right shoulder. After initially treating his shoulder with ice, Claimant reported the injury to Employer. Employer referred Claimant to HealthOne Occupational Medical Centers for medical treatment.

8. Respondents admitted the claim and Claimant visited Christian O. Updike, M.D. at HealthOne on March 4, 2014 for an evaluation. Claimant expressed concerns about possible torn tendons in his right shoulder. Dr. Updike noted that Claimant underwent a right shoulder MRI in 2012 and doctors recommended surgery. He determined that Claimant had full active range of motion and diagnosed him with a right shoulder strain that appeared to be muscular. Dr. Updike explained that "[t]his is an unusual mechanism of injury. In the absence of fall, would not meet Colorado treatment guidelines for a rotator cuff tear in my opinion."

9. On March 21, 2014 Claimant underwent a right shoulder MRI. The reading physician compared the current MRI to the 2012 MRI and found "[p]rogression of degenerative change within the glenohumeral joint with bone-on-bone and bone remodeling." The physician also noted chronic degenerative changes within the shoulder joint without evidence of an acute injury. However, there was "a small partial bursal surface rim rent like tear of the cuff" that was new from the previous MRI.

10. On March 28, 2014 Claimant visited Robert White, M.D. for an examination. Dr. White reviewed Claimant's right shoulder MRI report and noted that there were no acute findings. He determined that Claimant suffered from "[c]hronic right shoulder pain. Right shoulder with simply progression of degenerative change with bone-on-bone disease."

11. On April 2, 2014 Claimant visited orthopedist Herbert J. Thomas, III, M.D. Dr. Thomas described the injury to the right shoulder as apparently caused by an abduction and flexion stress. Claimant had pain in the right shoulder area as well as swelling over the anterior and lateral chest region. He described his pain as constant, worsened by moving around and interfering with normal functions. Dr. Thomas noted that Claimant underwent approximately five sessions of physical therapy that did not seem to make any significant change in his symptoms and was subsequently discontinued. Dr. Thomas found that Claimant's range of motion was laterally restricted and he had a positive impingement sign. He also noted crepitus with motion against resistance. Dr. Thomas diagnosed a right shoulder muscle strain with severe degenerative changes. He stated that Claimant might be a candidate for total right shoulder arthroplasty if his symptoms persisted.

12. On April 17, 2014 Claimant visited Mark Failinger, M.D. for an examination. Dr. Failinger noted that Claimant had a significant history of right shoulder problems including arthritis and a recommendation for a total shoulder replacement. Claimant advised Dr. Failinger that he "had bone-on-bone for a long period of time, but [Claimant] thinks the collar bone is the biggest problem." Dr. Failinger diagnosed Claimant with "[r]ight shoulder beyond severe degenerative joint disease" and stated "[t]here is really nothing for the right shoulder other than maybe to live with it or get a shoulder replacement which they tried to convince him to do years ago but he said he did not want to do it because they were going to take down some muscles, so he declined."

13. On April 28, 2014 Claimant underwent an MRI of his clavicle. The imaging revealed degenerative changes in the glenohumeral, sternoclaviclular, and acromioclavicular joints.

14. On May 23, 2014 Claimant was evaluated by orthopedist Alireza T. Alijani, M.D. Dr. Alijani reported that Claimant was suffering pain and discomfort in the right shoulder area. Upon physical examination, Dr. Alijani noted that Claimant had range of motion deficits and crepitus. He diagnosed Claimant with right shoulder osteoarthritis. Dr. Alijani did not make any record of Claimant's mechanism of injury or determine whether his current complaints were related to the February 24, 2014 industrial incident. Dr. Alijani recommended a right shoulder arthroplasty and sought prior authorization from Insurer. Insurer denied the request.

15. On October 8, 2014 Dr. Alijani wrote to Claimant's counsel. He stated that Claimant's current condition is consistent with the diagnosis of right shoulder osteoarthritis. He noted that Claimant's degenerative condition is at an endstage with complete loss of cartilage surface. Dr. Alijani explained that "[i]n terms of his condition being caused by the accident, it is very difficult to say with any medical probability, but, I would say certainly that if he did not have the symptoms in the shoulder prior to the incident and developed them afterwards that, with a high degree of medical probability, the work-related circumstance exacerbated his underlying condition."

16. On August 21, 2014 Claimant underwent an independent medical examination with Neil L. Pitzer, M.D. On November 6, 2014 Dr. Pitzer testified through an evidentiary deposition this matter. After reviewing medical records and performing a physical examination, he concluded that Claimant's right shoulder condition constituted the natural progression of his underlying degenerative osteoarthritis. Dr. Pitzer explained that the force on Claimant's right shoulder during the February 24, 2014 incident was insufficient to cause ligamentous tearing, disruption of the cartilage in the shoulder joint or aggravation of an underlying condition. After reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the progression of Claimant's underlying degenerative osteoarthritis.

17. Dr. Pitzer also explained that Claimant's need for right shoulder replacement surgery was entirely due to his pre-existing and severe degenerative

osteoarthritis and not the result of the February 24, 2014 incident. In his deposition Dr. Pitzer testified that Claimant's described mechanism of injury would not have caused an aggravation of his underlying osteoarthritis and that any pain symptoms Claimant experienced were due to the inevitable progression of severe degenerative osteoarthritis. Ultimately, Dr. Pitzer summarized that Claimant would have required a right shoulder replacement regardless of the February 24, 2014 accident.

18. Claimant testified at the hearing in this matter. He explained that from the time he was discharged at MMI for his January 9, 2012 injury until the present injury on February 24, 2014 he had no problems with his right arm aside from some therapy in approximately August 2012 after he pulled his shoulder while lifting a bucket at work. Claimant remarked that he had no functional limitations, could lift weights and was able to drive with his right arm. He commented that he did not have pain in his right shoulder.

19. Claimant's testimony is contravened by the medical records and opinions of his previous treating physicians. His long history of osteoarthritis is extensively documented in the medical records. Claimant's osteoarthritis was severe and degenerative enough to warrant a recommendation for a total right shoulder replacement in 2012. Further, Dr. Wunder expressed doubt in 2012 that Claimant's shoulder was asymptomatic prior to the January 9, 2012 injury because of the advanced state of his osteoarthritis.

20. Claimant has failed to demonstrate that it is more probably true than not that medical treatment in the form of a right total shoulder arthroplasty as recommended by Dr. Alijani is reasonable, necessary and related to his February 24, 2014 industrial injury. The medical records reflect that Claimant has severe, pre-existing, degenerative osteoarthritis in his right shoulder. A February 4, 2012 right shoulder MRI revealed advanced right shoulder degenerative osteoarthritis. Claimant's condition was severe and degenerative enough to warrant a recommendation for a total right shoulder replacement in 2012. Moreover, Dr. Pitzer persuasively explained that Claimant's right shoulder condition constituted the natural progression of his underlying degenerative osteoarthritis. Dr. Pitzer noted that the force on Claimant's right shoulder during the February 24, 2014 incident was insufficient to cause ligamentous tearing, disruption of the cartilage in the shoulder joint or aggravation of an underlying condition. After reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the natural progression of Claimant's underlying degenerative osteoarthritis. Dr. Pitzer also explained that Claimant's need for right shoulder replacement surgery was entirely due to his pre-existing and severe degenerative osteoarthritis and not the result of the February 24, 2014 incident. Finally, Dr. Alijani explicitly stated that Claimant's need for shoulder surgery was solely related to his underlying osteoarthritis. There is almost no mention of Claimant's injury in Dr. Alijani's reports and he did not perform a causation analysis. Instead, Dr. Alijani simply stated that it is possible that the accident may have temporarily exacerbated Claimant's underlying osteoarthritis. Accordingly, Claimant's request for total right shoulder replacement surgery is denied.

21. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his January 9, 2012 Workers' Compensation claim in W.C. No. 4-888-893 based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant's right shoulder condition was so severe that Dr. Hewitt recommended a total right shoulder replacement in 2012. Dr. Hewitt noted that Claimant's need for right shoulder surgery was not caused by the 2012 injury but rather his advanced osteoarthritis. Moreover, after reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the progression of Claimant's underlying, degenerative osteoarthritis. Any deterioration in Claimant's right shoulder condition constitutes the natural progression of his degenerative condition and is not causally related to his January 9, 2012 industrial injury. Accordingly, Claimant's request to reopen W.C. No. 4-888-893 is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Treatment

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the

employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that medical treatment in the form of a right total shoulder arthroplasty as recommended by Dr. Alijani is reasonable, necessary and related to his February 24, 2014 industrial injury. The medical records reflect that Claimant has severe, pre-existing, degenerative osteoarthritis in his right shoulder. A February 4, 2012 right shoulder MRI revealed advanced right shoulder degenerative osteoarthritis. Claimant's condition was severe and degenerative enough to warrant a recommendation for a total right shoulder replacement in 2012. Moreover, Dr. Pitzer persuasively explained that Claimant's right shoulder condition constituted the natural progression of his underlying degenerative osteoarthritis. Dr. Pitzer noted that the force on Claimant's right shoulder during the February 24, 2014 incident was insufficient to cause ligamentous tearing, disruption of the cartilage in the shoulder joint or aggravation of an underlying condition. After reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the natural progression of Claimant's underlying degenerative osteoarthritis. Dr. Pitzer also explained that Claimant's need for right shoulder replacement surgery was entirely due to his pre-existing and severe degenerative osteoarthritis and not the result of the February 24, 2014 incident. Finally, Dr. Alijani explicitly stated that Claimant's need for shoulder surgery was solely related to his underlying osteoarthritis. There is almost no mention of Claimant's injury in Dr. Alijani's reports and he did not perform a causation analysis. Instead, Dr. Alijani simply stated that it is possible that the accident may have temporarily exacerbated Claimant's underlying osteoarthritis. Accordingly, Claimant's request for total right shoulder replacement surgery is denied.

Reopening

6. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

7. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his January 9, 2012 Workers' Compensation claim in W.C. No. 4-888-893 based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant's right shoulder condition was so severe that Dr. Hewitt recommended a total right shoulder replacement in 2012. Dr. Hewitt noted that Claimant's need for right shoulder surgery was not caused by the 2012 injury but rather his advanced osteoarthritis. Moreover, after reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the progression of Claimant's underlying, degenerative osteoarthritis. Any deterioration in Claimant's right shoulder condition constitutes the natural progression of his degenerative condition and is not causally related to his January 9, 2012 industrial injury. Accordingly, Claimant's request to reopen W.C. No. 4-888-893 is denied.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for authorization for his total right shoulder arthroplasty is denied and dismissed.

2. Claimant's request to reopen W.C. No. 4-888-893 is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 9, 2015.

DIGITAL SIGNATURE:

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined are whether the Claimant sustained an injury to her left shoulder and arm in the course and scope of her employment with the Employer.

FINDINGS OF FACT

Based on the evidence presented during the hearing, the Judge finds as fact:

1. The Claimant worked for the Employer as a lobby attendant.

2. The Claimant alleges she suffered an injury to her left shoulder and left arm on February 17, 2014.

3. On February 17, 2014, Claimant filled out and signed an Employee Injury Report and Statement, stating that the injury occurred "walking to spa" and that "out of nowhere I got this pain on my side."

4. The Claimant also completed a written statement. The Claimant wrote, "I opened the door, started walking to the spa to take towels & I felt shortness of breathe [sic] & I got a weird pain on my side & it started to shoot up to my shoulder."

5. The Claimant completed the Employee Injury Report and Statement within a short period of time after she believed she sustained an injury. The Claimant did not attribute her sudden onset of pain to opening heavy doors while working.

6. Claimant testified that she notified Dora the supervisor of her pain on the day of the accident, and Dora filled out an accident form. Dora stated that "[Claimant] was seen by Todd, the laundry manager, holding her rib and bending over," and that "she states she feels a sudden sharp pain on her left side." Dora did not mention anything about Claimant's shoulder. Dora stated in response to the question asking her to identify all contributing factors to the accident that she was "not sure" and that Claimant "reports it happened suddenly and she was only carrying a basket of towels." Dora did not mention any door on the form.

7. Claimant reported the accident to a security person, Bob Sutter, on the day of the accident after speaking with Dora. Mr. Sutter noted that Claimant opened a door on her way to the spa and felt a sharp pain on her left side that radiated to her shoulder.

8. The Employer sent Claimant to Concentra on February 17, 2014 where she reported that she dropped off towels and started walking when she felt cramping, spasm

along her left side and into her left shoulder. She denied any direct trauma and did not attribute her symptoms to opening heavy doors.

9. The initial evaluation for therapy on February 17, 2014 notes that Claimant "opened the first door, the second door. She was fine. When she was walking to the spa she felt shortness of breath and felt a pulling, stabbing, burning pain in her flank and into her left shoulder."

10. Claimant reported to St. Anthony North Hospital on April 5, 2014 that she pulled open a heavy door and felt a pop and had immediate pain in her left shoulder.

11. Claimant reported to Dr. Hewitt on April 28, 2014 that she was repetitively opening or pulling open doors when she noted sharp pain in her scapula and posterior shoulder region.

12. Respondents referred Claimant to Dr. Elizabeth Bisgard for an independent medical examination on August 14, 2014. Claimant reported to Dr. Bisgard that she was retrieving towels from the basement for delivery to the spa, and that she carried towels in her right hand and used her left hand to open doors. Claimant pulled a door open with her left hand, and pushed another door open with her left hand. Claimant reported she had no issues at that time, with no immediate pain upon opening doors. Claimant also reported that she was with another co-worker.

13. During the hearing, Claimant testified that on February 17, 2014, she opened the basement two doors and felt fine. Next, she went upstairs through the third floor door. Claimant then went into the spa by opening the door, and went to give towels to the receptionist. She then felt something from her side to her shoulder.

14. The Claimant provided inconsistent reports to her supervisors and her healthcare providers as to what she was doing when she felt pain, where she felt the pain in her body, how the pain manifested itself and what activity allegedly caused the pain. As such, the Claimant's testimony as to the circumstances surrounding the alleged incident and how she was injured lacks credibility.

15. Claimant told Dr. Bisgard that the history from the Concentra physical therapist on the date of the accident was incorrect in that it noted Claimant was experiencing shortness of breath. Claimant indicated, however, in her own Employee Injury Report and Statement on the date of accident that she felt shortness of breath.

16. Claimant reported to her physical therapist in March 2014 that she slipped and fell down the stairs at home right before coming to therapy, landing on her back, and re-injuring her left shoulder. However, Claimant reported this incident to Dr. Bisgard, stating that her left shoulder gave out while she was holding onto the railing, and as a result she fell down five steps injuring her right shoulder.

17. In all, Claimant testified that four separate healthcare providers, and on eight

separate occasions, incorrectly wrote down what she reported to them.

18. Additionally, Claimant was in a car accident in April 2013 after which she had work restrictions of not lifting boxes over 10 pounds.

19. Claimant's December 2013 emergency room records state "moderate, diffuse left side back pain." Claimant also complained of a sensation of chest heaviness and that she could not get a complete breath for the prior 2-3 weeks.

20. Despite Claimant's complaints of pain, after analyzing Claimant's medical records (both pre and post alleged injury), Dr. Bisgard, found that there is no objective evidence of any actual injury and Claimant has no diagnosis. Dr. Bisgard based her opinions on the X-rays of Claimant's shoulders taken after the alleged injury which were normal; and an MRI on April 10, 2014 that showed no rotator cuff tear, no labral tear, no tendon tear and no muscle atrophy or edema. The MRI did reveal mild supraspinatus tendinopathy and a trace amount of fluid in the subacromial subdeltoid bursa suggesting mid bursitis. However, Dr. Bisgard opined that the MRI findings did not indicate any significant pathology that would warrant aggressive intervention.

21. Dr. Bisgard also testified that although Claimant has significant subjective pain complaints, there is no clear mechanism of injury, no pathology, and multiple inconsistencies.

22. Claimant complained of pain levels rated at 9 out of 10 when she had full shoulder range of motion.

23. Claimant complained of pain levels at 8 out of 10, but was observed pulling her hair into a ponytail with her left arm, and she had fluid movement without guarding. Pulling her hair into a ponytail requires overhead use, lifting the left arm, and engaging the shoulder muscles, so her subjective high pain levels were inconsistent with casual observation.

24. Claimant initially presented with pain in her flank area, which is just underneath the armpit, and along her flank which is the side, and to the muscles in her anterior chest wall. Claimant was given Ibuprofen for pain relief, and then a more powerful pain reliever, Tramadol, and Flexeril, which is a muscle relaxer. As Dr. Bisgard noted, the Claimant has not responded to these medications, which is a red flag that there is no pathology of physiology that is causing the pain. Physiologic-based pain would improve with Tramadol and Flexeril.

25. Claimant underwent physical therapy, massage therapy, injections, and took anti-inflammatory medications, narcotics, and muscle relaxers with no relief. Dr. Bisgard also explained that Claimant's lack of improvement with any of this treatment is a red flag that there is something other than pathology present.

26. Dr. Bisgard further testified that in an IME, when she is taking notes, she is

also talking out loud, so that the claimant has the opportunity to correct her if what she says is incorrect and so that it can be corrected in the notes for the IME report. She then testified that the Claimant told her, which she noted in the history section of her IME report, that Claimant was not experiencing any pain, discomfort, or problems during the process of opening or pushing doors and she stated that if the process of pushing or pulling an object is enough to cause pathology in the shoulder, there is immediate pain, not delayed pain. The physical force of pushing or pulling would result in immediate pain, not a delayed onset seconds or minutes later. Finally, Dr. Bisgard testified that it makes no sense that Claimant felt pain in her left shoulder after handing off the towels which she carried with her right hand.

27. Claimant exhibited non-physiological responses during Dr. Bisgard's examination. Dr. Bisgard testified that there is nothing to explain why barely touching the skin of Claimant's back would result in Claimant's describing burning pain; even a person with a significant rotator cuff tear would not have this reaction to touching their skin. Dr. Bisgard was not able to localize any specific area of Claimant's pain. Claimant's sensory changes did not correlate with any specific nerve pattern, which Dr. Bisgard again opined did not make sense. Finally, Dr. Bisgard's range of motion measurements showing limited motion made no sense given that the x-ray and MRI showed no specific pathology, and after comparison with the physical therapist's reports of full shoulder range of motion. Dr. Bisgard felt that Claimant exhibited no effort on testing.

28. Dr. Bisgard opined that Dr. Hewitt and Mr. Rassis, were reaching very far to make a diagnosis of bursitis. Dr. Bisgard stated that Claimant's symptoms were vague and nonphysiologic. Dr. Bisgard also stated that Claimant's MRI scan showing mild bursitis cannot account for her significant range of motion loss or subjective complaints. Initially, Claimant described pain in the serratus anterior along the left midaxillary line, with no glenohumeral joint pain and normal range of motion in her shoulder, but a month later she began describing pain and loss of motion in the glenohumeral joint. Dr. Bisgard found there to be no diagnosis to account for her varying symptoms.

29. Dr. Bisgard went to the Employer's premises to test the resistance of the doors Claimant pushed on February 17, 2014. Dr. Bisgard found that the doors Claimant refers to may be heavy in weight, but there is virtually no resistance. Dr. Bisgard was able to push and pull the doors open using only an index finger. Dr. Bisgard walked through and opened every door Claimant would have accessed from the basement to the spa, and some additional doors.

30. Dr. Bisgard concluded, and the Judge agrees, that Claimant did not sustain a work in any capacity around this timeframe. Dr. Bisgard opined that without a diagnosis, causality cannot be determined.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

5. Claimant has failed to prove that she sustained a compensable work injury on February 17, 2014. The evidence does not support that any work activity brought on Claimant's subjective pain complaints. The credible and persuasive evidence in the record reflects that Claimant experienced the sudden onset of subjective symptoms in her left side (flank) and shoulder with no precipitating work-related incident. She admittedly did not feel symptoms until after she handed off some towels to another employee. Claimant believed it was the repetitive opening of doors with her left hand, but the evidence does not support that Claimant was repetitively opening doors with her left hand immediately prior to feeling the pain. In her written statement, she expressed that the pain came out of nowhere. The fact the Claimant experienced pain in the

workplace does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007). In addition, Dr. Bisgard credibly opined that Claimant has no diagnosis, and merely has diffuse non-physiologic subjective complaints of pain, which are not attributable to any of Claimant's work activities. Dr. Bisgard's opinions are supported by Claimant's failure to improve with the various medical treatment the Claimant has received.

ORDER

It is therefore ordered that Claimant's claim for benefits under the Colorado Workers' Compensation Act is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015

/s/ Laura A. Broniak

_____

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Has Claimant established by a preponderance of the evidence that she sustained compensable industrial injuries that arose in the course and scope of her employment on January 22, 2014?

2. If the claim is deemed compensable, has Claimant established by a preponderance of the evidence that the need for a general award for medical benefits is reasonably necessary and causally related to Claimant's January 22, 2014, injury?

3. If the claim is deemed compensable, has Claimant established by a preponderance of the evidence that the need for medical treatment in the form of facet injections is reasonable, necessary, and causally related for treatment of her industrial injuries?

STIPULATIONS OF THE PARTES

1. If the claim is deemed compensable, the parties stipulate that Claimant's average weekly wage is $529.99.

2. Claimant stipulated that she is not asserting an occupational disease, but is only proceeding under the allegation that she sustained an industrial injury arising from a discrete accident.

3. Claimant withdrew the issue of temporary disability benefits at hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is employed as a pad printer for the Employer. Claimant's primary job duty as a pad printer is to print or paint labels on small plastic parts with the use of high tech machinery.

2. Claimant alleges that on January 22, 2014, she sustained injuries to her low back and lumbar spine while working as a pad printer for the Employer. Claimant alleges that on January 22, 2014, she was working as a pad printer, standing and unpacking boxes with bags of parts. Claimant alleges that she lifted a bag of parts out of a box, the bag got stuck on the side of the box, and as she was pulling her body twisted and her body was pulled downward.

Claimant testified that during the incident she felt a “pricking” or “popping” sensation in her low back.

3. Claimant testified that she told her “supervisor” that she sustained work injuries. Employer has no record of Claimant reporting alleged injuries on January 22, 2014. Claimant finished her work shift on January 22, 2014.

4. The next day, January 23, 2014, Claimant testified that she called into work and indicated that she would not be present at work due to her work injuries.

5. In contrast to the Claimant’s testimony, the personnel manager from Employer, Cathy Cairns, testified credibly that she encountered Claimant around 8:30 a.m. on the morning of January 23, 2014. Ms. Cairns testified that when she encountered Claimant that morning, she was unaware that Claimant was asserting that she had sustained work related injuries. Ms. Cairns testified that she requested that Claimant meet with her in the personnel manager’s office to discuss a recent dispute with coworker, Maria Moto-Diaz.

6. Ms. Cairns testified that when she had the discussion with Claimant on January 23, 2014, Claimant became visibly angry. Claimant did not tell Ms. Cairns during this encounter that she was injured and needed to file a workers’ compensation claim. Ms. Cairns testified that Claimant did not appear during this conversation be injured or in pain.

7. Ms. Cairns testified that Claimant had been involved with a dispute with a coworker, Maria Moto Diaz, who alleged that Claimant was harassing her. Ms. Cairns became aware of the claim of harassment on January 22, 2014, after she left work for the day. Ms. Cairns spoke with Ms. Diaz via telephone on the afternoon of January 22, 2014, regarding the alleged harassment.

8. Claimant and Ms. Moto-Diaz have a history of work place disputes that predates her alleged date of accident in this case. Claimant agreed that her problems with Ms. Diaz became so upsetting for her that she stopped coming into work in February 2014. Ms. Cairns testified that in February 2014 she attempted to alleviate the problems between the Claimant and Ms. Diaz by putting them on different work, lunch and break shifts.

9. On Friday, January 24, 2014, Claimant worked her regular shift for the Employer. Sometime during the morning of January 24, 2014, Claimant reported to her supervisor, Gabriel Soto, that she had injured her back at work. Mr. Soto requested that Ms. Cairns come down to the factory production floor to discuss Claimant’s allegation.

10. Ms. Cairns testified that on January 24, 2014, she met with the Claimant and Gabriel Soto in the factory to discuss Claimant’s allegation of work related injuries. Ms. Cairns testified that she conferred with Mr. Soto and confirmed

that this reporting of the incident on January 24, 2014 was the first time that Mr. Soto was aware that the Claimant was alleging work related injuries.

11. Ms. Cairns filed an Employer's First Report of Injury on January 28, 2014, reflecting that the Employer had been notified of Claimant's claim for alleged work related injuries on January 24, 2014. *See Respondents' Exhibit A.*

12. Claimant testified that as a result of the work related injuries, she was experiencing pain located in the center of her back and radiating into the right side of her leg.

13. Claimant agreed that she had experienced the same pain complaints over the past four to five years. Claimant testified that her pain complaints over the past four to five years were in the same location as the pain complaints she had been experiencing since January 22, 2014. Claimant further testified that the type of pain complaints she was experiencing were the same type of pain that she had experienced over the past four to five years. Claimant testified that she believed that her pain had increased in severity after January 22, 2014, as compared to her pain complaints four to five years earlier.

14. Claimant testified that she experienced the onset of pain in her low back over the past four to five years as a result of performing work related duties for the Employer. Ms. Cairns testified that Employer had never been apprised of Claimant's allegation of prior work related injuries sustained sometime four to five years earlier. Ms. Cairns testified that she became aware of this allegation through the pending litigation for Claimant's January 22, 2014 workers' compensation claim. Ms. Cairns and Claimant regularly saw each other at work and have been friendly at work over the past four to five years. Claimant had numerous opportunities to report her prior low back injuries to Ms. Cairns and she never did so.

15. After Claimant reported her work related injuries on January 24, 2014, she commenced treating with Lynne Fernandez, M.D. Claimant's initial consult with Dr. Fernandez occurred on January 24, 2014. Claimant reported to Dr. Fernandez at her initial consultation that she had injured herself when she "lifted a machine at work" and developed pain in her low back and right groin. Claimant alleged pain complaints at level 9/10. Claimant admitted to Dr. Fernandez that her low back pain had initially onset four to five years earlier and had onset while lifting a machine in the same manner that she had done on January 22, 2014. Claimant's report of injury to Dr. Fernandez is inconsistent with the mechanism of injury that Claimant alleged at hearing.

16. Ms. Cairns testified that Claimant's job duties do not require that she lift any machines at work. Ms. Cairns explained that the Claimant works with very large expensive pad printing machines which are not routinely moved for any reason. Ms. Cairns explained that moving the machines can be difficult as the machines have to be perfectly balanced. Ms. Cairns was not aware of

any reason why the Claimant would have moved machines in 2014 or for any reason four to five years earlier.

17. Sara Nowotny testified at hearing regarding her formal job site analysis performed at Employer's factory. Her findings are summarized in a report dated October 9, 2014. Ms. Nowotny testified that she utilized an exertional scale and measured the force required to pull the bag of parts that the Claimant alleged that she lifted on January 22, 2014. The measurements confirmed that pulling the bag required 27 pounds of force. The bag of parts itself weighed 25 pounds and the degree of force required to pull the bag added 2 pounds. Ms. Nowotny's findings and testimony regarding the degree of force require to pull the bag is credited.

18. Ms. Nowotny testified that the Claimant's job position does not require her to move machines. Ms. Nowotny explained that moving the machinery is discouraged because the machinery is high precision machinery that has to be carefully balanced to operate correctly. Ms. Nowotny's job site analysis confirms that moving machinery is not a component of the Claimant's job duties.

19. Dr. Fernandez placed Claimant on work restrictions as of January 24, 2014, limiting her to 15 pounds of lifting. The Employer accommodated the Claimant's restrictions and has continued to accommodate Claimant's restrictions since January 24, 2014.

20. An x-ray of Claimant's lumbar spine taken on February 13, 2014, revealed degenerative changes at L4-5 and L5-S1. Claimant underwent an MRI of her lumbar spine on March 3, 2014, which confirmed additional degenerative changes at L4-5, L5-S1.

21. Claimant returned to Dr. Fernandez on March 11, 2014, for review of her MRI films. Dr. Fernandez opined that it was difficult to determine if the degenerative changes documented at L4-5, L5-S1 were the cause of Claimant's widespread diffuse low back pain complaints. Claimant noted 7/10 level pain, however, Dr. Fernandez noted normal range of motion except slight limitations with extension, no sensory deficit, normal gait, and normal motor findings.

22. On April 17, 2014, Claimant commenced chiropractic manipulations with Marc Cahn, D.C. Claimant described to Dr. Cahn that her injuries had resulted when she was "lifting bags of parts, putting them into carts and then moving the cart to a table where she places the parts. She developed back pain as a result of this repetitive activity." The mechanism of injury that Claimant alleged to Dr. Cahn is different than the mechanism of injury that she alleged at hearing. Claimant admitted to a past medical history significant for a work related lifting injury that occurred two years ago. Claimant did not report to

Dr. Cahn a specific event involving lifting a bag of parts that got caught on a box and feeling a prick or popping sensation as she testified to at the hearing.

23. On August 11, 2014, Claimant was evaluated by John Tobey, M.D. Dr. Tobey recommended consideration of bilateral L4-5, L5-S1 facet joint injections.

24. On September 4, 2014, Claimant underwent an independent medical evaluation with Dr. Carlos Cebrian. Dr. Cebrian testified at the hearing regarding his evaluation, review of Claimant's medical records, the job site analysis, and drafted a report, dated September 10, 2014, summarizing his opinions.

25. Claimant reported to Dr. Cebrian that she had longstanding back pain that was uncomfortable on an almost daily basis for years prior to January 22, 2014. Clamant described to Dr. Cebrian that she would take pain medication on a daily basis for her back pain and that her pain complaints would improve slightly over the weekend with rest. Claimant alleged that on January 22, 2014, she had a specific work related incident that increased her lumbar spine pain. Claimant described that she was opening a box and taking out a plastic bag full of parts when she pulled on the bag, the bag ripped and the parts fell down. Claimant alleged immediate pain in her lumbar spine after performing this activity.

26. Dr. Cebrian opined in his report and testified at hearing that he believed the longstanding daily discomfort that the Claimant experienced in her low back for 3-5 years prior to the date of accident was related to her degenerative changes and Grade 1 spondylolisthesis. Dr. Cebrian opined to a reasonable degree of medical probability that the Claimant did not sustain any injuries or aggravations as a result of the January 22, 2014, work event. Dr. Cebrian further testified that the Claimant's pain complaints in her spine would likely be identical to her presentation today even if she had never come to work for the Employer. Claimant's likelihood for developing back pain on an idiopathic basis are increased based on the fact that she is obese and has a high BMI of 30.9.

27. Dr. Cebrian explained that the experience of back pain at work in conjunction with certain work duties does not mean that there is an injury or aggravation to her lumbar spine. It is not uncommon for individuals with chronic back pain to wake up in the morning after a night of sleep with back pain. The experience of increased back pain in the morning does not mean that sleeping aggravates or accelerates an underlying back condition.

28. Dr. Cebrian explained that the single event of lifting a bag weighing 27 pounds is unlikely to aggravate or accelerate Claimant's pre-existing low back injuries. Dr. Cebrian noted that the Colorado Division of Workers' Compensation Medical Treatment Guidelines explain that for a lifting event to

be causal for back pain, lifting in the range of 50 to 55 pounds performed 10-15 times per day may be causal when performed over a cumulative number of years. By comparison, the discrete lifting event alleged by Claimant to cause her back pain is insignificant and unlikely to aggravate or accelerate pre-existing degeneration of the spine.

29. The medical causation opinion of Dr. Cebrian is credited. There is no other contrary medical opinion analyzing the mechanism of injury alleged by the Claimant at hearing and finding that this one time lifting incident aggravated or accelerated Claimant's low back injuries. Dr. Fernandez has not offered an opinion on causation that supports Claimant's theory because Claimant alleged an entirely different mechanism of injury when evaluated by Dr. Fernandez.

30. The persuasive medical evidence supports the finding that Claimant's back pain is the result of a long standing pre-existing medical condition. The single lifting event that Claimant alleges to have occurred on January 22, 2014, is unlikely to have aggravated or accelerated Claimant's pre-existing back pain. Claimant has alleged multiple mechanisms of injury to various medical providers, which supports the conclusion that Claimant herself does not know what caused her alleged back pain onset.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201(1).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers'

Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Claimant alleges she proved it is more probably true than not that on January 22, 2014 she sustained an injury or aggravation to her low back and lumbar spine arising out of and in the course of her employment. The credible evidence presented at hearing does not support this conclusion.

4. Claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury she was performing services arising out of and in the course and scope of the employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

5. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

6. It is concluded that Claimant failed to establish that the lifting incident on January 22, 2014 caused, aggravated or accelerated her pre-existing degenerative condition in her low back. Claimant admits to have long standing pre-existing daily back pain. The mere occurrence of back pain when performing the lifting duties on January 22, 2014, does not render this event to have caused, aggravated, or accelerated Claimant’s underlying condition.

7. Since Claimant failed to establish a compensable work injury, Claimant has also failed to establish by a preponderance of the evidence that medical treatment generally, and more specifically in the form of facet injections, is reasonable, necessary and/or causally related for treatment of Claimant’s alleged aggravation to her low back and lumbar spine.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits for an alleged January 22, 2014, injury is denied and dismissed.

2. The claim for a general award of medical benefits is denied and dismissed.

3. The claim for medical benefits in the form of facet injections and related expenses is denied and dismissed.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015

DIGITAL SIGNATURE:
Margot W. Jones

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she injured her left on April 10, 2013?

- If claimant has proven she injured her left knee on April 10, 2013, whether claimant has proven by a preponderance of the evidence that the medical treatment she received to her left knee was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury, including the physical therapy recommended by Dr. Krebs on July 15, 2013?

FINDINGS OF FACT

1. Claimant was employed by employer as a sales associate at their store located in Montrose, Colorado. Claimant began her employment with employer in June 2007. Claimant testified her job duties included providing customer service, setting up merchandise, and working the front registers.

2. Claimant sustained an admitted injury at work on April 10, 2013. Claimant testified that she was retrieving merchandise for a customer in a stockroom when she tripped and fell over fallen shelving. Claimant testified she landed on her backside and her head and right arm jerked backward. Claimant further testified she felt a popping in her left knee after she fell. Claimant reported the injury over the radio to a supervisor, Ms. Moreland, and filled out a report of her injury that day. Claimant testified that she did not initially ask to see a doctor because she thought her symptoms were minor and would improve.

3. Claimant testified that after the injury she experienced symptoms in her left knee, right shoulder, and the right side of her neck. Claimant denied at hearing having experienced symptoms in those parts of her body prior to the April 10, 2013 injury. Claimant testified that she had not seen a doctor for any problems in her left knee in the five years prior to the April 10, 2013 injury.

4. Claimant testified that a few days after the injury, she returned to Ms. Moreland, told Ms. Moreland she was feeling worse, and asked to see a doctor. Claimant testified that she still had pain in her right shoulder, neck, and left knee at that time. Claimant was referred to Dr. Krebs for medical treatment.

5. Claimant was initially evaluated by Dr. Krebs office on April 22, 2013. A nurse in Dr. Krebs's office noted: "On 4/10/13 while working for JC Penney, Connie was walking when she tripped over some shelving that had fallen. She did fall to the ground,

landing on her buttocks and hitting her back on the Sephora gate. She has not been to the ER." The nurse's note further reported that claimant was complaining of pain in her right knee, leg, hip, lower back, arms and mid-upper back. Claimant testified that she did not know why the nurse's report noted a "right" knee injury, and testified that she believed it was a misprint because the injury involved her left knee. In the same medical report, Dr. Krebs noted that claimant had pain in her left knee, low back, right shoulder, mid upper back and also left hip pain. Dr. Krebs diagnosed claimant with joint pain of the left leg. Dr. Krebs further noted that he could not rule out patellar tendinitis or intraarticular meniscal or ligament injury involving the left knee. Dr. Krebs referred claimant for physical therapy.

6. Claimant reported for physical therapy on April 23, 2013. The referral was noted to be for neck pain and right shoulder pain. Claimant reported to the physical therapist that she had neck pain, right shoulder pain, tightness in her upper extremity, left hip pain and low back pain. The physical therapy initial reports do not include a report of left knee pain.

7. Claimant returned to Dr. Krebs on April 30, 2013. Dr. Krebs again noted that claimant possibly had patellar tendinitis or intraarticular meniscal injury and ordered a magnetic resonance image ("MRI") of her left knee.

8. Claimant underwent the MRI of her left knee on May 8, 2013. The MRI showed mild patellar chondromalacia and a "trace popliteal cyst."

9. Dr. Krebs reviewed the MRI results with claimant on May 16, 2013. Dr. Krebs recommended claimant undergo physical therapy for her knee in an attempt to diminish inflammation and irritation to the undersurface of the kneecap. Dr. Krebs also noted that "left chondromalacia patellae" was a work related medical diagnosis in the WC 164 form filled out on May 16, 2013. Dr. Krebs recommended over the counter medications to treat the inflammation.

10. The physical therapy records demonstrate claimant began receiving physical therapy for her left knee by no later than May 20, 2013.

11. Claimant returned to Dr. Krebs on May 29, 2013. Dr. Krebs noted that claimant reported that her pain would come and go. Dr. Krebs noted that there were "days that she feels fine _____ if she goes up and down stairs." Claimant testified that the blank in Dr. Krebs's May 29, 2013 record should have read "worse." Dr. Krebs also noted the possibility of an injection to claimant's left knee.

12. On June 13, 2013, Dr. Krebs recommended four additional physical therapy visits for claimant's left knee symptoms. Dr. Krebs again noted in his Physician's Report that claimant's left knee chondromalacia patellae was a work related medical diagnosis.

13. Claimant returned to Dr. Krebs on July 11, 2013. Dr. Krebs noted: "Over the left knee, she is uncomfortable to palpate medially, laterally, superiorly and inferiorly over the left patella. There does appear to be some tenderness over the left patella as well." Dr. Krebs opined that claimant's symptoms were not surgical issues and should resolve with therapy. Dr. Krebs recommended additional physical therapy for claimant's left knee. During these visits, Dr. Krebs also provided medical care for claimant's ongoing right shoulder problems.

14. Claimant returned to Dr. Krebs on July 11, 2013. Dr. Krebs noted that he had been treating claimant for her left knee chondromalacia and right shoulder tendinitis bursitis. Dr. Krebs further noted on exam that claimant was uncomfortable to palpate medially, laterally, superiorly and inferiorly over the left patella.

15. Claimant again returned to Dr. Krebs on July 30, 2013. Dr. Krebs noted that claimant reported physical therapy was uncomfortable for her. Dr. Krebs recommended claimant hold off on occupational therapy for 2 weeks. This recommendation involved the therapy for claimant's knee and her left shoulder.

16. Claimant was referred at various times to Dr. Parker, Dr. Gilman (for an electromyelogram ("EMG")), and Dr. Heune during her claim for evaluation and treatment of her shoulder and neck symptoms. Claimant testified that she did not discuss her knee symptoms with any of those doctors because her knee symptoms had improved by that time, and because those doctors' care was focused on claimant's shoulder and neck symptoms. Claimant's testimony in this regard is found to be credible and persuasive.

17. Claimant continued to see Dr. Krebs for treatment of her shoulder and neck symptoms. The medical records from Dr. Krebs continue to note claimant's patellar chondromalacia while her medical treatment appeared to begin to focus more primarily on her left shoulder beginning in August 2013.

18. Notably, on September 16, 2013, claimant reported her knee was feeling better, but there was still some popping in the left knee.

19. Claimant underwent an independent medical examination ("IME") with Dr. Scott on October 16, 2013. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott noted that claimant reported, with regard to her left knee, that she believed her knee popped when she fell at work on April 10, 2013. Dr. Scott noted that the MRI of the left knee showed no evidence for internal derangement of her left knee. Dr. Scott provided opinions related to claimant's shoulder, but did not provide opinions relating to the compensable nature of claimant's alleged knee injury.

20. On February 17, 2014, Dr. Krebs wrote to the nurse case manager for insurer and noted that he did not believe claimant's shoulder condition of left knee

condition were surgical issues. Dr. Krebs noted that claimant could be at maximum medical improvement ("MMI") in approximately 4-6 weeks.

21. On June 27, 2014, Dr. Krebs noted that claimant was complaining of some left knee discomfort. Dr. Krebs noted that the prior MRI scan demonstrating normal ligaments, no medial meniscus tear or lateral meniscus tear with mild chondral fissuring and softening of the medial eminence of the patella. Dr. Krebs noted that claimant was tender over the left and right anterior knee joint line and was tender beneath the left inferior pole of the patella. Dr. Krebs also noted that patella hesitation and patellar grind test are uncomfortable. Dr. Krebs noted claimant had chondromalacia patellae and pain in her lower leg joint. Dr. Krebs noted that claimant's left knee symptoms should be treated with conservative therapy, and recommended physical therapy and medications. Dr. Krebs noted in his Physician's Report that claimant's left knee pain was a work related medical diagnosis. Claimant testified that at the time of this report, her left knee symptoms had improved, but she had occasional symptoms and pain with certain positions.

22. Respondents filed a general admission of liability ("GAL") admitting for benefits resulting from the April 10, 2013 work injury limited to claimant's right shoulder injury on June 30, 2014.

23. Claimant testified that she underwent a right shoulder surgery in August 2014 as part of her claim. Claimant testified that she was off of work for approximately nine weeks, but had returned to light duty work for employer at the end of those nine weeks. Claimant testified that she still had symptoms in her right arm, right shoulder, neck, and left knee. Claimant testified that although her left knee symptoms had improved since the injury, she still had pain in her left knee in certain positions. She testified that her left knee symptoms had never gone away completely since the April 10, 2013 work injury. The ALJ finds the testimony of claimant to be credible and persuasive.

24. Claimant underwent an IME with Dr. Primack on September 24, 2014. The IME included claimant's shoulder condition. Dr. Primack reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Primack noted that claimant did not complain of left knee symptoms during the examination. Dr. Primack opined that the plain film x-rays and left knee MRI were essentially unremarkable except for chondromalacia that was consistent with claimant's age. Dr. Primack provided a diagnosis for claimant's shoulder condition and opined that claimant should be at MMI by the end of November or early December 2014.

25. Dr. Primack testified at hearing, consistent with his September 24, 2014 independent medical examination report. Dr. Primack testified that knee chondromalacia is a degenerative condition that may or may not be symptomatic. He testified that knee chondromalacia could become symptomatic if there is an

aggravation. He testified that knee chondromalacia symptoms could begin in connection with an event or injury.

26. Dr. Primack testified at hearing consistent with his IME report. Dr. Primack testified that claimant was not complaining of knee symptoms when he examined her. Dr. Primack testified that claimant participated in physical therapy, and then stopped doing therapy when she was given exercises and stretches by Dr. Krebs to do at home.

27. The ALJ credits the medical opinions expressed by Dr. Krebs in his records over the contrary opinions expressed by Dr. Primack in his report and testimony and finds that claimant has proven that it is more likely than not that she suffered a compensable injury to her left knee arising out of and in the course of her employment with Employer.

28. The ALJ credits claimant's testimony that she did not experience knee symptoms in her left knee prior to falling while at work on April 10, 2013. The ALJ finds that claimant has proven that it is more likely than not that her left knee became symptomatic when she tripped and fell while at work on April 10, 2013.

29. As such, the ALJ finds that claimant has proven that it is more likely than not that she suffered an injury to her left knee in the course and scope of her employment with Employer on April 10, 2013. The ALJ credits the opinions of Dr. Krebs and the testimony of claimant and finds that claimant has proven that it is more likely than not that the fall at work on April 10, 2013 caused, aggravated, accelerated or combined with a pre-existing condition to result in the need for medical treatment to her left knee. The ALJ credits the reports from Dr. Krebs and finds that claimant has demonstrated that it is more probable than not that the treatment recommended by Dr. Krebs is reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

30. The ALJ credits the medical opinions expressed by Dr. Krebs in his records and claimant's testimony over the contrary opinions expressed by Dr. Primack in his report and testimony and finds that claimant has proven that it is more likely than not that the medical treatment she received from Dr. Krebs and from the physical therapists for her left knee was reasonable and necessary to cure and relieve the claimant from the effects of her industrial injury. Specifically, the ALJ finds that the physical therapy recommended by Dr. Krebs on or about July 15, 2013 was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance of the evidence that the medical treatment provided by Dr. Krebs for her left knee condition is related to her April 10, 2013 work injury. As found, the work injury caused, aggravated, accelerated or combined with a pre-existing condition to result in the need for treatment.

5. As found, claimant has proven by a preponderance of the evidence that that medical treatment recommended by Dr. Krebs, including the physical therapy recommended on July 15, 2013, is reasonable and necessary to cure and relieve claimant from the effects of the work injury.

ORDER

It is therefore ordered that:

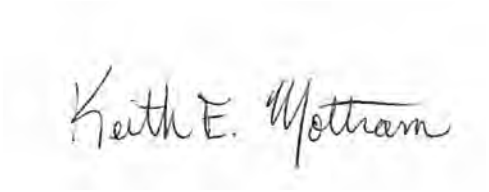
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury related to her left knee.

2. Respondents shall pay for the physical therapy recommended by Dr. Krebs on July 15, 2013 pursuant to the Colorado Medical fee schedule.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 21, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability ("TPD") benefits?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer in the meat and seafood department. Claimant testified she was at work on May 14, 2014 behind the counter in the meat and seafood department and was helping a customer with an order. Claimant testified she finished helping the customer and turned to change her gloves when she caught her right foot and fell awkwardly. Claimant was found unconscious on the floor by a co-worker.

2. Claimant was taken by ambulance to St. Mary's Hospital Emergency Room ("ER"). The hospital records note that claimant was an 82 year old female who was admitted with a chief complaint of loss of consciousness. The ER physician noted that claimant was in her usual state of health and went to work this morning and the next thing she remembers is waking up strapped to a gurney. Claimant reportedly was found by co-workers bleeding from her tongue and left ear. Claimant reported no prior history of syncope or seizures.

3. Claimant was diagnosed with a syncope and collapse and referred for an x-ray of her chest and computed tomography ("CT") scan of her cervical spine and head. The CT scan of her cervical spine showed some degenerative disc disease, but no traumatic fractures or acute alignment abnormalities. The CT scan of claimant's head showed no acute intracranial pathology, no intracranial hemorrhage or mass

lesion and no acute infarction. Claimant was diagnosed with a loss of consciousness with a suspected onset of new seizure given the abrupt loss of consciousness.

4. Claimant underwent a magnetic resonance image ("MRI") of the brain. The MRI showed no acute intracranial abnormality and no finding to explain a possible seizure. Claimant underwent an EEG exam that showed some left temporal spikes and was provided with a prescription for Keppra and given restrictions involving her driving.

5. According to the discharge summary from Dr. Gershten, claimant reported being very fatigued the previous day indicated that she had worked a shift the day before and then cleaned her house, following which she did not sleep well. Dr. Gershten noted that all of these activities could have lowered claimant's seizure threshold. Claimant denied having made these statements to Dr. Gershten and noted that she did not work the day prior to her injury. Claimant further testified that she did not recall having trouble sleeping the night before her injury.

6. Following her treatment at the ER, claimant was not referred by employer for medical treatment. Claimant sought treatment with Dr. Rademacher on May 23, 2014. Dr. Rademacher noted the EEG results and recommended that claimant be evaluated by a neurologist.

7. Claimant was examined by Dr. McDaneld on August 4, 2014. Claimant reported to Dr. McDaneld that she did not remember anything unusual leading up to her episode where she lost consciousness. Dr. McDaneld noted that claimant was sleep deprived prior to her episode. Dr. McDaneld diagnosed claimant with a seizure and noted the results of the EEG exam. Dr. McDaneld noted that the only possible provoking factor was some sleep deprivation, but noted claimant had not had a history of seizures and reported no seizures since the incident. Dr. McDaneld diagnosed claimant with a single unprovoked seizure. Claimant advised Dr. McDaneld that she did not tolerate the Keppra and had weaned herself off the medication. Dr. McDaneld recommended that claimant continue to abstain from driving for 3 months to ensure that she is seizure free and return in 3 months.

8. Claimant testified at hearing that she has remained off the Keppra and has not experienced any more seizures.

9. Claimant testified at hearing that she does not recall being taken to the hospital. Claimant testified that when she got to the hospital, the left side of her head hurt. Claimant testified she still has symptoms including soreness in her back and intermittent numbness in both upper extremities. Claimant testified she thinks she may have struck her head on the metal counter behind the counter when she fell.

10. Claimant was referred for an independent medical examination ("IME") with Dr. Bernton on September 10, 2014. Dr. Bernton reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton noted that claimant had an episode with loss of

consciousness which occurred at work and subsequently recovered. Dr. Bernton opined that it was very unlikely that claimant had a traumatic brain injury with a subsequent seizure.

11. Dr. Bernton testified at hearing consistent with his medical report. Dr. Bernton testified that the EEG showed a discharge consistent with a seizure. Dr. Bernton noted that the medical records could be consistent with claimant having an epileptic seizure and striking her head in the fall, but denied that the medical records would support a finding that the seizure was related to a traumatic event. Dr. Bernton diagnosed claimant with new onset epilepsy. Dr. Bernton acknowledged that this diagnosis is not common for elderly patients, but was the probable diagnosis.

12. Dr. Bernton testified that it was possible that claimant could have fallen and hit her head, but it was not probable. Dr. Bernton acknowledged that the ER records documented that claimant had abrasions and a posterior auricular hematoma. Dr. Bernton further acknowledged that claimant's symptoms following her injury could be consistent with a concussion that could occur with claimant striking her head on the table or floor.

13. Respondent maintains that claimant suffered a seizure while at work that was unrelated to her employment with employer. Respondent argues that the claim is therefore not compensable as the injury resulted from an idiopathic condition unique to claimant and not related to her employment. Claimant, meanwhile, maintains that the injury was a result of a fall at work and is therefore compensable.

14. The ALJ credits the testimony of claimant and the ER records entered into evidence that document claimant having abrasions and a auricular hematoma along with the fact that claimant was bleeding from her ear when she was found by co-workers and finds that claimant has established that she struck her head on the metal table. The ALJ further finds that the metal counter was a hazard of employment that is not ubiquitous and therefore, claimant's injury resulting from hitting her head during the fall are compensable.

15. The ALJ finds that claimant's injury constitutes a compensable injury as claimant was subject to an increased risk of injury particular to her employment by striking her head on the metal table when she fell. In so finding, the ALJ need not consider whether claimant's fall was unexplained or the result of an idiopathic condition as claimant's claim would be compensable under either scenario.

16. The ALJ finds that the medical treatment provided by Dr. McDaneld, Dr. Rademacher and the ER is reasonable and necessary to cure and relieve claimant from the effects of her injury. The ALJ finds that the treatment with the ER is compensable as emergency treatment and the treatment with Dr. Rademacher and Dr. McDaneld is authorized by virtue of employer failing to designate an authorized treating physician.

17. Claimant earned $7,584.66 in the 13 weeks she worked prior to her injury from February 15, 2014 through May 10, 2014. This equates to an AWW of $583.44.

18. Claimant argues that the AWW should be based on claimant's earnings in during the year of 2014 prior to her injury. The ALJ notes that claimant's calculation as argued in the position statement included the number of days in 2014, despite the fact that the wage records demonstrated that claimant's first week of work would have included some days from 2013. In any event, the ALJ finds that the appropriate calculation for her AWW should be based on the 13 weeks prior to her injury which constitute one quarter of a year's worth of wages.

19. Claimant argues that she is entitled to an award of temporary partial disability benefits. However, claimant has failed to establish that her loss of earnings following the injury are related to her work injury. The ALJ notes that the only restrictions provided to claimant by her treating physicians included a limitation on driving. Claimant has failed to establish how her work injury led to a loss of wages other than arguing that her hours with employer were reduced.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-43-201(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201(1), C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201(1), *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. In Colorado, only injuries arising out of and in the course of employment are compensable under the Workers' Compensation Act. *See* Section 8-41-301(1), C.R.S.; *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 2120(Colo. 1996). The terms "arising out of" and "in the course of" are not synonymous, and both conditions must be proven in order to establish entitlement to workers' compensation benefits. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo. 1988).

5. In order to satisfy the course of employment requirement, claimant must show that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her job function. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991).

6. The Colorado Supreme Court recently determined that unexplained falls would be compensable under the Colorado Workers' Compensation Act as resulting from a neutral force and therefore being compensable under the positional risk doctrine. See *City of Brighton v. Rodriguez*, 318 P.3d 496 (2014). In so holding, the Colorado Supreme Court noted that the term "arising out of" refers to the origin or cause of an employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo.2001). Specifically, the term calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Id*. The court noted that an injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *City of Brighton, supra.* It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of the injury. *Id.,* citing *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo.1985); and *In re Question*, 759 P.2d at 22 ("The employee need not necessarily be engaged in the actual performance of work at the moment of injury in order to receive compensation.").

7. Respondent argues that claimant's injury is not compensable as the injury was precipitated by a pre-existing condition (new onset epilepsy) brought by the claimant to the workplace. The ALJ is not persuaded. An otherwise compensable injury does not cease to arise out of employment because it is partially attributable to a pre-existing physical infirmity of the employee. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Rather, an injury which results from the concurrence of a pre-existing condition and a special hazard of employment is compensable. *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Thus, even if the direct cause of the accident is a preexisting idiopathic disease or condition, the resulting disability is compensable if the conditions or circumstances of employment have contributed to the accident or to the injuries sustained by the employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). To be an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered.

8. In this case, if the claimant was injured as a result of an idiopathic condition that claimant brought to the workplace (epiliepsy) that was unique to claimant,

her injury is not compensable. If claimant was injured as a result of an unexplained fall, the injury is compensable. Likewise, if claimant was injured because she struck her head on the metal counter when she fell, he claim is compensable, because even though claimant fell as a result of the seizure, claimant was placed at an increased risk of injury by virtue of the fact that that she struck the metal counter.

9. As found, claimant has proven by a preponderance of the evidence that she sustained an injury when she struck her head on the metal counter when she fell. Because the metal counter represents an employment hazard that is not ubiquitous, claimant's claim is compensable.

10. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once Respondents have exercised their right to select the treating physician, Claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

11. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

12. As found, claimant has established that the medical treatment at the ER is emergency treatment compensable under the Colorado Workers' Compensation Act. As found, claimant has established that the treatment from Dr. McDaneld and Dr. Rademacher was reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury. As found, claimant has proven that Dr. McDaneld and Dr. Rademacher are authorized to treat claimant for her injury due to the fact that employer failed to designate a treating physician.

13. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. See *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

14. As found, claimant has failed to establish that her injury resulted in her temporary wage loss related to her injury.

15. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

16. As found, claimant has established an AWW of $583.44.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the medical treatment provided by St. Mary's Hospital, Dr. Rademacher, and Dr. McDaneld that is reasonable and necessary to cure and relieve claimant from the effects of the work injury.

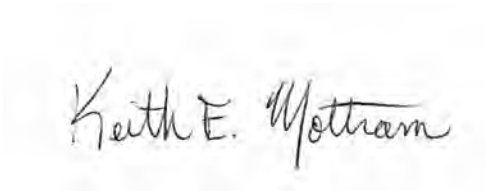
2. Claimant's AWW is $583.44.

3. Claimant's claim for TPD benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015



Keith E. Mottram

#JKS1AZYC0D1733v 2

Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

The following issue was raised for consideration at hearing:

The issue raised is whether the left elbow surgery is reasonable, necessary and related to Claimant's work injury of April 17, 2014.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case.

2. Claimant was hired by Employer in July 1984. He has been a lineman for the past eighteen years.

3. On April 17, 2014, while cleaning the lift bucket on his truck to ensure that it could be operated safely, Claimant suffered a fall from a height of approximately 6 to 7 feet. He landed on his back on top of a toolbox in the bed of his truck. He had scrapes on both arms.

4. Claimant testified that following his fall he was hospitalized at the Medical Center of Aurora, where he was diagnosed with multiple rib fractures. He was hospitalized for three days and given narcotic medications. Claimant testified that as he weaned himself from the narcotics he began experiencing pain in his left elbow. The pain was such that he could barely lift light weight objects such as a coffee cup.

5. Claimant was referred to Dr. John Raschbacher and eventually had right shoulder surgery with Dr. James Genuario on August 14, 2014.

6. On May 9, 2014, Claimant underwent a MRI of his left elbow which showed that Claimant had a moderate flexor tendinosis with a fluid-filled longitudinal split delineating a small intrasubstance partial tear.

7. Claimant testified that prior to this MRI he had never undergone diagnostic testing which established the presence of a left elbow tear.

8. Claimant was seen by Dr. Genuario with the authorization of his adjuster on May 28, 2014, complaining of left elbow pain. The diagnosis of left elbow medial epicondylitis was confirmed by Dr. Genuario by the May 9, 2014, MRI.

9. On July 21, 2014, Dr. Genuario diagnosed left medial elbow pain with an added diagnosis of ulnar neuropathy. Claimant underwent an EMG on August 5, 2014, upon referral from Dr. Genuario. This established left ulnar neuropathy at the elbow consistent with cubital tunnel syndrome. Dr. Genuario recommended surgery for this problem.

10. Thereafter, Claimant was seen by Dr. Kavi Sachar on referral from his authorized treating physician (ATP) Dr. Raschbacher. Dr. Sachar evaluated Claimant on August 13, 2014. He described Claimant's left elbow injury consistent with the testimony of Claimant.

11. In response to a letter dated August 21, 2014, concerning left elbow causation, Dr. Sachar stated: "It is not unusual to sustain multiple injuries from a fall from a significant height. Therefore, within a reasonable degree of medical probability, I do believe the patient's left medial epicondylitis and left cubital tunnel are causally related to the injury he sustained on April 17, 2014."

12. Dr. Sachar issued an additional report on October 22, 2014, in which he noted that Claimant had treatment on his left elbow prior to this injury and suggested that Claimant be sent for yet another evaluation to determine causation. This was not done.

13. The medical records establish that the Claimant was evaluated by Dr. Genuario on March 17, 2014. At that time Dr. Genuario stated that Claimant was suffering "Right medial pain, consistent with medial epicondylitis." Additionally, Claimant was having problems in the left elbow for which he was prescribed an anti-inflammatory cream.

14. The pre-injury records from Dr. Genuario do not note the presence of either left ulnar neuropathy or cubital tunnel syndrome, both of which were found after Claimant's injury of April 17, 2014.

15. There is no specific reference to left elbow pain prior to the Claimant's injury of April 17, 2014. In fact, the reports from Dr. Genuario specifically refer to right medial elbow pain with difficulty experienced primarily on the right not the left.

16. Claimant credibly testified that following his appointment of March 17, 2014, he was given left elbow injections which provided him complete relief from left elbow pain. Claimant returned to see Dr. Genuario on April 16, 2014, continuing to complain of bilateral shoulder pain. However, the records from that date failed to show the presence of either right or left medial epicondyle pain.

17. During his direct testimony, Claimant testified that the problem that he was suffering in his left elbow on March 17, 2014, was numbness in the forearm. The report of April 16, 2014, only indicates some pain generally in bilateral arms when lifting.

18. Post injury on April 17, 2014, Claimant was reporting pain in his left elbow, not the numbness reported earlier.

19. The EMG performed by Dr. Joseph Fillmore on August 5, 2014, showed the Claimant was suffering both numbness and tingling in his left arm and had been referred to rule out ulnar neuropathy which was in fact found. Dr. Fillmore notes that the Claimant had a previous history of medical injections to the neck and the right forearm for pain in the past.

20. ATP Dr. Raschbacher has rendered an opinion that Claimant's left elbow ulnar neuropathy is not injury related. This appears to be based primarily on the fact that Claimant had pre-existing treatment for his left elbow. However, none of the treatment that the Claimant underwent in March 2014 was for ulnar neuropathy or cubital tunnel syndrome. Further, ATP Dr. Raschbacher candidly admitted that following his pre-injury left elbow treatment in March 2014, Claimant had no restrictions and that there is no evidence that Claimant was under restrictions at the time he suffered the fall from 6 to 7 feet on April 17, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

2. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Where the Claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

3. The ALJ finds the opinions of Drs. Genuario and Sachar on causation credible. Claimant has demonstrated that the left elbow surgery recommended by Drs. Genuario and Sachar is reasonable, necessary and related to his injury of April

17, 2014. This is supported by the MRI of May 9, 2014, and the reports of both Drs. Genuario and Sachar.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall be liable for the recommended surgery for Claimant's left elbow, which is found to be reasonable and necessary medical treatment related to Claimant's April 17, 2014, work injury.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _January 22, 2015____

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did the claimant prove by a preponderance of the evidence that he sustained one or more occupational diseases proximately caused by the performance of service arising out of and in the course of his employment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 8 were admitted into evidence. Respondents' Exhibits A through H were admitted into evidence.

2. The parties stipulated that if the claim is found compensable the claimant's average weekly wage is $1210.69. They further stipulated that if the claim is found compensable the claimant is entitled to temporary total disability benefits commencing October 7, 2014 until reduced or terminated pursuant to the Act or WCRP. The parties further stipulated that Concentra Medical Centers and Tracy Wolf, M.D., are authorized treating medical providers. The parties further stipulated that the surgery performed by Dr. Wolf on October 8, 2014 constituted reasonable and necessary medical treatment. However, the respondents dispute whether the need for the surgery was proximately caused by any alleged occupational disease(s) arising out of and in the course of the claimant's employment.

3. The claimant has worked as a delivery driver for the employer for twenty-eight years. The claimant works four days per week for up to 14 hours. On Mondays he drives a large tractor-trailer from Denver to Canon City where he delivers food products to various restaurants and institutions. He also makes deliveries on Tuesday. He then drives to Pueblo where he picks up tortilla chips and returns to Denver. The claimant repeats this itinerary on Thursdays and Fridays.

4. The claimant testified as follows. When he is making deliveries he enters the trailer and unloads products onto a two wheeler. He then transports the products down a ramp from the truck and typically stacks them inside the customer's facility. He stated that he lifts 10,000 to 15,000 pounds of product per day. When delivering products he is required to grasp and lift bags and boxes weighing between 1 and 100 pounds. He estimates the average lift is 35 pounds. He makes 60 to 70 trips up and down the ramp per day. When he is driving the truck he experiences vibration from the steering wheel and the gear shift.

5. The claimant testified as follow concerning the events of April 4, 2014. He experienced pain in his elbows and hands which caused difficulty when moving cases of

product. His grip strength was reduced so that he dropped some items. He had experienced these symptoms prior to April 4 but the problem "came to a head" on this date and he believed he might need medical attention for his symptoms.

6. On April 15, 2014 Carrie Burns, M.D., examined the claimant at Concentra. The claimant gave a history that his job required loading and unloading of multiple boxes of varying weights. He had experienced problems with both arms over the "past few years" and was now complaining of bilateral elbow pain and swelling. The claimant also reported pain shooting pain from the "elbow to the palm with accompanying tingling of his pinky finger" and pain in the "knuckle" of his right middle finger. The claimant reported he received steroid injections many years ago for the finger problems. On examination Dr. Burns noted some "mild motor deficits with both ulnar and medial testing." There was mild bilateral swelling of the elbows with tenderness to palpation of the medial epicondyles on the right and left. Dr. Burns assessed bilateral epicondylitis, bilateral ulnar neuritis, "likely CTS" and right hand pain "at mcp of 3rd finger and thumb." Dr. Burns opined the claimant's bilateral hand and elbow problems likely resulted from "cumulative trauma from his job." Dr. Burns prescribed Naproxen, occupational therapy and an ergonomic evaluation. He released the claimant to return to work at regular duty and referred the claimant to "hand surgery."

7. On April 18, 2014 hand surgeon Tracy Wolf, M.D. examined the claimant. Dr. Wolf assessed bilateral medial epicondylitis, bilateral hand numbness most consistent with "probable ulnar neuropathy coming from the elbow and possible right middle trigger finger." Dr. Wolf stated that not much could be found with respect to the finger. With respect to the suspected ulnar neuropathy Dr. Wolf recommended "getting a nerve test" and stated surgery would be recommended if the findings were severe and the claimant was having "some motor changes."

8. On May 16, 2014 Colleen Waterous of Genex performed a job site evaluation of the claimant's duties. This was on referral from Concentra Medical Centers (Concentra). The claimant participated in the evaluation and provided information to Ms. Waterous. The report states that the claimant engaged in "frequent" lifting of 26 to 50 pounds and occasional lifting of 51 to 100 pounds. He frequently used a firm "power grip" while using the "hand truck," pulling himself into the cab of the truck and carrying product." He was frequently exposed to "flexion/extension/deviation." He was frequently exposed to hand and arm vibration when driving the truck. The report states the "frequent" exposure is one that occurs 34-66% of the time with 13 to 30 repetitions per hour and 101 to 245 repetitions per day.

9. The Genex report states that pursuant to the Colorado Medical Treatment Guidelines (MTG) the claimant was exposed to the "primary risk factor" of awkward posture and repetition/duration. Specifically he was exposed to 4 hours of wrist flexion greater than 45 degrees, extension of greater than 30 degrees or ulnar deviation greater than 20 degrees. The report also indicates the claimant was exposed to the "secondary risk factor" of force and repetition/duration. Specifically the claimant was exposed to 4 hours of lifting 10 pounds more than 60 times per hour.

10. On August 12, 2014 Scott London, M.D., performed nerve conduction testing of the claimant's upper extremities. His impressions included severe left ulnar entrapment at the elbow or cubital tunnel without evidence of median nerve dysfunction. He noted an absent left ulnar sensory response and chronic denervation from the distal ulnar innervated musculature. There was no evidence of right ulnar nerve entrapment.

11. Dr. Wolf examined the claimant on August 19, 2014 and reviewed the results of the electrodiagnostic study performed by Dr. London. On August 19 the claimant was complaining of pain at the inner aspect of his elbows. On the left there was numbness in the small and ring fingers and the claimant felt the left small finger was swollen. The right middle finger had not been "catching" since Dr. Wolf's last examination. Dr. Wolf assessed severe left ulnar neuropathy at the elbow and left epicondylitis. She recommended a left nerve release and medial epicondylectomy. She assessed "right ulnar nerve symptoms" and performed an injection for this.

12. On October 6, 2014 Jeffrey Wunder, M.D. performed an independent medical evaluation (IME) of the claimant at the respondents' request. Dr. Wunder is board certified in occupational medicine and is level II accredited. Dr. Wunder took a history from the claimant, reviewed medical records and performed a physical examination. Dr. Wunder noted that in 1990 the claimant had bilateral palmar pain and pain into the fifth digit. At that time he received an injection into the right wrist. He also received multiple injections for a right middle trigger finger. Dr. Wunder noted that in 2012 Dr. Kawasaki treated the claimant for neck pain with radiation into the right upper extremity after some bread products fell on him. The claimant reported pain and tingling in the right hand. The claimant had left interosseous muscle atrophy and a positive Tinel sign at the left elbow. Dr. Kawasaki reportedly diagnosed right C6 radiculopathy and left ulnar neuropathy "longstanding and probably not work related." The claimant underwent an MRI that showed foraminal stenosis at C5-6. He also underwent electrodiagnostic studies of both upper extremities. The right sided tests were negative and the left sided study revealed ulnar neuropathy "with both acute and chronic axonal change."

13. On October 6, 2014 Dr. Wunder noted the claimant reported bilateral upper extremity pain with the left worse than the right. There was pain at the medial left elbow but the claimant did not describe a lot of pain on the right side. The claimant also reported numbness and tingling on the ulnar side of the both palms going into the fifth digits. Dr. Wunder noted mildly positive Tinel's signs at the cubital tunnels on the right and left. The wrists were non tender. There was a positive carpal compression test but this was in the median nerve distribution rather than on the ulnar side of the hand. Dr. Wunder considered this finding to be "unexpected." There was no triggering in the fingers of either hand. Dr. Wunder assessed "nonspecific bilateral hand pain" and chronic left ulnar neuropathy at the elbow, "longstanding and unrelated to work activities." At the elbows there "was no tenderness either medially or laterally." Dr. Wunder opined the left-sided muscle atrophy was a longstanding issue that had not worsened since the claimant saw Dr. Kawasaki in 2012. Dr. Wunder stated there was no evidence of carpal tunnel syndrome, tendonitis or trigger finger. Dr. Wunder opined the claimant's work activities did not require forceful wrist mobility in combination with

unusual positions and he could "not attribute any diagnosis to his work-related activities."

14. On October 8, 2014 Dr. Wolf performed a left ulnar nerve release at the elbow with a medial epicondylectomy. On October 21, 2014 Dr. Wolf noted the claimant had restrictions of no repetitive wrist or elbow motion, no repetitive lifting, gripping or grasping with the left arm and a lifting restriction of 2 pounds on the left.

15. Dr. Wunder testified at the hearing. Dr. Wunder testified that since his report he had reviewed the Genex evaluation and heard the claimant testify concerning his work activities. Dr. Wunder testified that he believed he fully understands the claimant's job duties.

16. Dr. Wunder testified as follows concerning application of the WCRP 17, Exhibit 5, the Cumulative Trauma Conditions Medical Treatment Guidelines (MTG). Dr. Wunder explained that the MTG were prepared by a panel of physicians who reviewed the medical literature and latest studies to formulate a document to assist physicians in determining the cause of cumulative trauma conditions. Dr. Wunder explained the MTG are "advisory" with respect to a diagnosis and the ultimate diagnosis of a condition is to be made by the clinician.

17. Dr. Wunder testified that under the MTG the first step in identifying the cause of a cumulative trauma disorder is to make a diagnosis. Dr. Wunder opined the claimant's diagnosis is left ulnar neuropathy, also known as left cubital tunnel syndrome. Dr. Wunder opined this diagnosis is severe "end stage" disease in light of interroseous muscle weakening in the left hand. Dr. Wunder did not find evidence of right cubital tunnel syndrome or any other right-sided disease process. He noted that he performed a Tinel's test at the right wrist which produced symptoms in the 4^{th} and 5^{th} fingers. Dr. Wunder explained this was not an anatomically correct response to the test. Dr. Wunder did not find evidence of any right-sided trigger fingers and stated there was no evidence of carpal tunnel syndrome on EMG examination.

18. Dr. Wunder opined that the condition of left ulnar neuropathy is subject to a causation analysis under the MTG. He explained the next step is to compare the activities performed in the workplace to the cumulative trauma risk factors identified in the "Risk Factors Definitions" table contained in the MTG. The clinician then goes to the Diagnosis Based Risk Factors table to determine if there is literature supporting a causal relationship between the duties of employment and the particular diagnosis.

19. Dr. Wunder testified that in order to put the ulnar nerve at risk there is a requirement for forceful flexion of the elbow and he explained that when the elbow is relaxed there is no pressure on the ulnar nerve. In this regard he noted that the MTG state that a positive elbow flexion/ulnar compression test is one of the exam findings that will support a diagnosis of ulnar neuropathy. Dr. Wunder noted that the Genex report and the claimant's testimony identified exposure to the "primary risk factor" of "wrist activity." However, Dr. Wunder explained that wrist activity is not physiologically related to the diagnosis of ulnar neuropathy since wrist activity alone does not involve

elbow flexion. Dr. Wunder also explained that under the Genex evaluation the claimant was exposed to the "secondary risk factor" of 4 hours of lifting 10 pounds at least 60 times per hour. However, Dr. Wunder opined that lifting is not physiologically associated with ulnar neuropathy although it may be pertinent to other cumulative trauma disorders. Dr. Wunder also noted that the Diagnosis Based Risk Factors table states there is a study indicating that a combination of forceful tool use, repetition and probably posture for 6 hours (holding a tool in position with repetition) is associated with cubital tunnel syndrome. However, Dr. Wunder opined that this combination of factors is not present in the claimant's job duties.

20. Dr. Wunder opined to a reasonable degree of medical probability that the claimant's upper extremity symptoms are not the result of an injury or occupational disease caused by the duties of his employment. He explained that ulnar neuropathy may appear "spontaneously" without any identifiable cause.

21. Dr. Wunder testified that none of the Concentra providers, including Dr. Burns, applied the MTG in assessing the cause of the claimant's condition(s). He further noted that Dr. Wolf did not render any opinion concerning the cause of the claimant's diagnoses.

22. Dr. Wunder opined the surgery performed by Dr. Wolf is not related to his employment.

23. The claimant failed to prove that he suffers from any disease or disease process that was proximately caused, intensified aggravated or accelerated by exposure to any hazards of his employment.

24. Dr. Wunder credibly and persuasively testified that his physical examination and the results of the electrodiagnostic testing support only the diagnosis of left ulnar neuropathy (left cubital tunnel syndrome).

25. Dr. Wunder persuasively opined that the claimant does not exhibit any evidence of the disease of a right "trigger finger." This opinion is corroborated by Dr. Wolf who opined on April 18, 2014 that it was only "possible" the claimant had triggering of the right middle finger and "not much could be found" with respect to this condition. On August 19, 2014 Dr. Wolf noted the right middle finger had not been "catching" since the last examination and did not seem "to be a problem."

26. Dr. Wunder persuasively opined that on examination of the claimant he did not find evidence of any disease process except left ulnar neuropathy. Although Dr. Burns and Dr. Wolf diagnosed right and left medial epicondylitis, Dr. Wunder found no evidence of this condition on examination of the claimant. Indeed, the claimant reported no tenderness at the medial aspect of the elbows when he was examined by Dr. Wunder, just two days prior to the surgery performed by Dr. Wolf. The electrodiagnostic testing performed by Dr. London failed to demonstrate evidence of right ulnar neuropathy, and Dr. Wunder persuasively opined that the claimant exhibited

"unexpected" and anatomically incorrect symptoms in the right ulnar distribution when he performed a Tinel's test at the wrist.

27. The opinion of Dr. Wunder and the results of electrodiagnostic testing establish the claimant does not have carpal tunnel syndrome. Dr. Wunder's opinion is supported by Dr. Wolf who did not diagnosis left or right carpal tunnel syndrome.

28. Dr. Wunder persuasively opined that application of the MTG to the claimant's diagnosis of left ulnar neuropathy does not support a finding that there is a causal relationship between the claimant's employment and the disease process. The MTG provide that when the claimant "meets the definition of a sole Primary Risk Factor and the risk factor is physiologically related to the diagnosis, it is likely that the worker will meet causation for the cumulative trauma condition." The MTG further provide that where the "Primary Risk Factor identified is not physiologically related to the diagnosis, causation will not be established at this point and Step 4 needs to be considered." (Respondents' Exhibit A, p. 10). Dr. Wunder considered the Genex job analysis and the claimant's testimony and determined that the only "Primary Risk Factor" present in the claimant's job duties was "wrist activity." Dr. Wunder persuasively explained that "wrist activity" is not physiologically associated with the diagnosis of ulnar neuropathy because it does not involve elbow flexion and consequent stress to the ulnar nerve. Dr. Wunder also persuasively opined that although the claimant's job involved the "Secondary Risk Factor" of 4 hours of lifting 10 pounds more than 60 times per hour, that risk factor did not satisfy the specific criteria for the "Diagnosis Based Risk Factors" for Cubital Tunnel Syndrome. Dr. Wunder persuasively explained that Diagnosis Based Risk Factors table states there is a study indicating that a combination of forceful tool use, repetition and probably posture for 6 hours (holding a tool in position with repetition) is associated with cubital tunnel syndrome. However, Dr. Wunder credibly opined that this combination of factors is not present in the claimant's job duties. Dr. Wunder credibly opined that none of the risk factors identified by the Genex studies is associated with the diagnosis of ulnar neuropathy.

29. Dr. Wunder credibly explained that physical activity is not a prerequisite to the development of ulnar neuropathy and that the condition may appear "spontaneously" in some patients. The ALJ finds that this credible testimony and the persuasive evidence that the duties of the claimant's employment are not a causative or aggravating factor in the development of left ulnar neuropathy, that the most likely cause of the claimant's left ulnar neuropathy is the "idiopathic" appearance of the disease in the claimant's left elbow.

30. The ALJ places significant weight on the MTG causation analysis and Dr. Wunder's application of that analysis. Dr. Wunder credibly explained the MTG causation algorithm is based on review of the best studies and literature pertaining to the causes of cumulative trauma conditions. Dr. Wunder persuasively applied the MTG and explained his opinion that the MTG do not support a finding that there is a causal relationship between the claimant's left ulnar neuropathy and the conditions of his employment.

31. The ALJ further finds it significant that Dr. Wolf has not offered any opinion concerning the causes of her diagnoses. Therefore her opinions have no persuasive effect on the issue of the cause of the claimant's condition. Further Dr. Burns did not purport to apply the MTG when opining that the claimant has sustained several work-related cumulative trauma conditions. Therefore, Dr. Burns' opinions are not as credible and persuasive as those expressed by Dr. Wunder.

32. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF ALLEGED OCCUPATIONAL DISEASE

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the

> employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005).

Expert medical opinion “is neither necessary nor conclusive in determining causation.” However, when expert medical opinions are presented it is for the ALJ to determine the weight to be accorded such opinions. *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990).

When evaluating this issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers’ compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined in Findings of Fact 23 through 31 the claimant failed to prove it is more probably true than not that he sustained an occupational disease proximately caused, intensified or aggravated by the conditions under which he performed his employment. As found, Dr. Wunder credibly and persuasively opined that the claimant’s only diagnosis is left ulnar neuropathy. Dr. Wunder credibly and persuasively

applied the causation algorithm contained in the Cumulative Trauma MTG and opined that the diagnosis of left ulnar neuropathy is not causally related to the duties of the claimant's employment as evidenced by his own testimony and the Genex job analysis.

The claimant cites *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014) for the proposition that the claimant's left ulnar neuropathy arose out of his employment because it was the result of a "neutral" or unexplained cause. However, as determined in Finding of Fact 29, the ALJ has found the most probable cause of the left ulnar neuropathy is the idiopathic development of the disease without any contribution from risk factors encountered in the claimant's employment. Therefore, the credible and persuasive evidence establishes that the disease of left ulnar neuropathy resulted from a "personal" or idiopathic cause and did not arise out of the claimant's employment. Therefore, the holding in *City of Brighton* is inapplicable to the facts of this case.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-952-008 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 21, 2015

DIGITAL SIGNATURE:

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his occupational disease.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary disability benefits for the period October 29, 2013 until terminated by statute.

FINDINGS OF FACT

1. On January 12, 2012 Claimant began working for Employer as a Janitor. He was promoted to Production Lead in April 2012. Claimant's job duties involved supervising the organization of goods for sale and performing the duties of absent employees.

2. The warehouse positions of Belt Loader and Forklift Operator were responsible for moving furniture and boxes weighing up to 500 pounds from the production area to the storage area. The employees working in the positions of Belt Loader and Forklift Operator quit on the same day in September 2012. The positions were not filled until March 2013. Claimant testified that, as the Production Lead, he was responsible for performing the duties of Belt Loader and Forklift Operator during most of his shifts between September 2012 and May 2013.

3. Claimant asserts that he suffered an occupational disease with a date of onset of January 1, 2013. He specifically described his occupational disease as micro traumas caused by his work duties that acted upon his "genetically weak neck and back" to create various symptoms.

4. Claimant clarified the medical benefits that he seeks. Specifically, Claimant stated that he desires reimbursement for three visits at the University of Colorado Hospital with Matthew Leiszler, M.D. in the amount of $35 each. He also seeks reimbursement in the amount of $535 for a May 2, 2013 MRI. Claimant finally wants payment for services of chiropractor Dan Carluccio, D.C. in the amount of $5,850.

5. In March of 2013 Claimant began treatment at the University of Colorado Hospital with Dr. Leiszler. His first visit occurred on March 11, 2013. The History section of the treatment notes provide, "[Claimant] states he thinks that he might have

MS. Symptoms going on for 7+ years. Blackouts, loss of balance, chest pains, tingling in fingers…" Claimant also reported chest pressure, blacking out once or twice per day for the past 3-4 years, twitching in his arms, tingling in his hands at times, short-term memory impairment, slurred speech and body shakes. Dr. Leiszler recommended diagnostic testing. Claimant thus underwent a brain MRI on May 2, 2013, labs on May 6, 2013 and an X-ray of his cervical spine on September 17, 2014. The preceding testing did not identify any basis for Claimant's symptoms.

6. Chiropractor Dr. Carluccio has treated Claimant for his symptoms. He testified that he lives in Claimant's neighborhood, ran into him a number of times, considered Claimant's symptoms and discussed tests that were performed at University of Colorado Hospital. The symptoms Claimant mentioned included dizziness, balance issues, spontaneous collapses of a synoptic nature (without loss of consciousness), mentation issues, speech issues, intermittent tremors of the upper extremities, leg weakness, pain and numbness in the upper and lower extremities, intermittent nausea, extreme need to sleep, extreme intolerance to cold, migraines and constant tension in the right temple. Dr. Carluccio testified that he was with Claimant more than once when Claimant would start to fall and had to be caught. He remarked that Claimant told him he could just be walking and collapse both during and outside of work. Dr. Carluccio commented that one day while discussing matters with Claimant on a street in their neighborhood, he realized that Claimant's symptoms were similar to those of his other patients. After gently pressing an area of Claimant's skull, Dr. Carluccio suspected that Claimant's symptoms were related to his neck. Dr. Carluccio thus began to treat Claimant in May of 2013.

7. Dr. Carluccio testified that Claimant's pre-existing condition was upper cervical instability causing neurological deficits that he considered related to Atlanto-Occipital Syndrome. He explained that "classic" Atlanto-Occipital Syndrome is very often correlated with Downs Syndrome children and involves a laxity of the ligaments. However, Dr. Carluccio remarked that he was using the term in the chiropractic sense. He thus meant "a chiropractic disrelationship or malfunction between the functional dynamics of the skull and [Claimant's] first neck bone, as opposed to a syndrome." Dr. Carluccio acknowledged that he did not have copies of Claimant's medical records, has done no diagnostic testing and has not taken any specific measurements of the spine or any gaps in the spine. Dr. Carluccio explained that he believed Claimant was initially injured when he was 11 years old and kicked three times behind his head during a black belt karate test. He commented that there was no treatment for neck issues following the incident. Although Claimant told him that his symptoms began while working for Employer, Dr. Carluccio determined the kicks at age 11 were the source of Claimant's "disastrous" cervical function.

8. Dr. Carluccio testified that Claimant's work related diagnosis was repetitive over-demanding actions that exploited his Occipital Atlanto and C2 weakness. He detailed that when Claimant was asked to do more physical work he would have to grab behind him, pull a dolly and "torque his whole system to pull it." The motion involved tilting his head to one side at an angle with rotation of the neck. Dr. Carluccio commented that the movement was compressing Claimant's head and exploiting the

pre-existing weakness. He explained that Claimant's symptoms could occur both at work and outside of work. Dr. Carluccio noted that Claimant's activity at work caused his neck to become "stuck" and produced the symptoms outside of work.

9. Dr. Carluccio acknowledged that he was not familiar with the Division of Workers' Compensation Rule 17, Exhibit 5 "Guidelines for Cumulative Trauma Conditions" (Guidelines). Dr. Carluccio testified that he did not follow the method outlined in the Guidelines to arrive at his diagnosis. He also acknowledged that he was unaware of any evidence-based studies that correlated his diagnosis to Claimant's work activities.

10. Dr. Carluccio testified that after six months of chiropractic treatment Claimant's condition significantly improved. Although Claimant still has some balance issues when he gets up, he has improved 98% from the effects of his work exposure. Dr. Carluccio remarked that Claimant has not suffered any permanent physical impairment related to the work duties.

11. Claimant testified that on approximately January 1, 2013 he began experiencing symptoms that affected his work performance and quality of life. His symptoms included a persistent headache, collapsing during and after work, vertigo, momentary loss of consciousness, numbness of the extremities, twitching hands, cold sensitivity, requiring sleep of 12 hours per day and diminished cognitive function. He reported his symptoms to Employer and was directed to medical treatment. Notably, Claimant testified that all of the University of Colorado testing as well as Dr. Carluccio's chiropractic treatment preceded his report of a Workers' Compensation injury to Employer.

12. On February 14, 2014 Claimant visited Authorized Treating Physician (ATP) Elizabeth W. Bisgard, M.D. for an examination. Dr. Bisgard reviewed Claimant's diagnostic testing and the medical records of Dr. Carluccio. She summarized that "[a]fter review of these records, we have no clear diagnosis. Without a diagnosis, we cannot even begin the process of a causality assessment. He is having pain. There is no etiology, therefore there is no causal relationship to work."

13. On November 10, 2014 Douglas C. Scott, M.D. conducted an independent medical examination of Claimant. He also testified at the hearing in this matter. Claimant reported that he developed neck pain, back pain, headaches, dizziness and momentary loss of consciousness as a result of his work activities by January 1, 2013. Dr. Scott performed a physical examination of Claimant. Claimant did not report pain when he moved his neck. Dr. Scott noted that Claimant's neck motion was excellent and within normal ranges. Claimant did not exhibit any evidence of nerve root compromise causing pain or symptoms into his extremities. He also did not demonstrate any balance problems.

14. Dr. Scott reviewed Claimant's MRI and medical records. He remarked that there was no confirmation of any medical diagnosis of Claimant's symptoms and therefore could not assess whether Claimant's work activities caused an occupational

disease. Although Dr. Carluccio noted that Claimant suffered from the chiropractic diagnosis of Atlanto-Occipital Syndrome, Dr. Scott remarked that there was no objective medical documentation or radiographic studies to support Dr. Carluccio's determination. Specific measurements must be taken radiographically to establish that there is a qualifying increased interval between the atlas, the axis and the occipital to support the diagnosis of Atlanto-Occipital Syndrome. The requisite measurements were not performed on Claimant.

15. Dr. Scott stated that there was no cervical neck problem confirmed by the MRI scan. He explained that it was not probable that Claimant has Atlanto-Occipital Syndrome caused by a traumatic event when he was 11 years old. There is simply no evidence that there was movement of the spine at the time of the incident. If the black belt testing caused subluxation or movement in the cervical spine, Claimant would have suffered a very serious medical condition. However, Claimant did not receive any medical treatment after he was kicked in the head when he was 11 years old. Dr. Scott testified that if the kicks had caused movement of the spine Claimant would probably have required hospitalization and immobilization. He also explained that a dislocation at the relevant area of the spine would cause death. Finally, the MRI did not show current subluxation in the relevant area of the spine.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease during the course and scope of his employment with Employer. Claimant asserts that he suffered an occupational disease with a date of onset of January 1, 2013. Claimant specifically described his occupational disease as micro traumas caused by his work duties that acted upon his "genetically weak neck and back" to create various symptoms. Chiropractor Dr. Carluccio testified that Claimant's pre-existing condition was upper cervical instability causing neurological deficits that he considered related to Atlanto-Occipital Syndrome. He explained that Claimant was initially injured when he was kicked three times behind his head during a black belt karate test at 11 years old. Dr. Carluccio detailed that when Claimant was asked to do more physical work for Employer he would have to grab behind him, pull a dolly and "torque his whole system to pull it." The motion involved tilting his head to one side at an angle with rotation of the neck. Dr. Carluccio commented that the movement compressed Claimant's head and exploited the pre-existing weakness.

17. In contrast, Drs. Bisgard and Scott persuasively determined that there was no confirmation of any medical diagnosis of Claimant's symptoms and therefore they could not assess whether Claimant's work activities caused an occupational disease. Dr. Scott explained that there was no cervical neck problem confirmed by the MRI scan. He also noted that it was not probable that Claimant has Atlanto-occipital Syndrome caused by a traumatic event when he was 11 years old. There is simply no evidence that there was movement of the spine at the time of the incident. Moreover, although Dr. Carluccio noted that Claimant suffered from the chiropractic diagnosis of Atlanto-Occipital Syndrome, Dr. Scott remarked that there was no objective medical documentation or radiographic studies to support Dr. Carluccio's determination. Finally, Dr. Carluccio agreed that he was not familiar with the Guidelines and did not follow the

method outlined in the Guidelines to arrive at his diagnosis. Moreover, he acknowledged that he was not aware of any evidence-based studies that correlate his diagnosis to Claimant's work activities. Accordingly, Claimant has not demonstrated that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated a pre-existing condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

8. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease during the course and scope of his employment with Employer. Claimant asserts that he suffered an occupational disease with a date of onset of January 1, 2013. Claimant specifically described his occupational disease as micro traumas caused by his work duties that acted upon his “genetically weak neck and back” to create various symptoms. Chiropractor Dr. Carluccio testified that Claimant’s pre-existing condition was upper cervical instability causing neurological deficits that he considered related to Atlanto-Occipital Syndrome. He explained that Claimant was initially injured when he was kicked three times behind his head during a black belt karate test at 11 years old. Dr. Carluccio detailed that when Claimant was asked to do more physical work for Employer he would have to grab behind him, pull a dolly and “torque his whole system to pull it.” The motion involved tilting his head to one side at an angle with rotation of the neck. Dr. Carluccio commented that the movement compressed Claimant’s head and exploited the pre-existing weakness.

9. As found, in contrast, Drs. Bisgard and Scott persuasively determined that there was no confirmation of any medical diagnosis of Claimant’s symptoms and therefore they could not assess whether Claimant’s work activities caused an occupational disease. Dr. Scott explained that there was no cervical neck problem confirmed by the MRI scan. He also noted that it was not probable that Claimant has Atlanto-occipital Syndrome caused by a traumatic event when he was 11 years old. There is simply no evidence that there was movement of the spine at the time of the incident. Moreover, although Dr. Carluccio noted that Claimant suffered from the chiropractic diagnosis of Atlanto-Occipital Syndrome, Dr. Scott remarked that there was

no objective medical documentation or radiographic studies to support Dr. Carluccio's determination. Finally, Dr. Carluccio agreed that he was not familiar with the Guidelines and did not follow the method outlined in the Guidelines to arrive at his diagnosis. Moreover, he acknowledged that he was not aware of any evidence-based studies that correlate his diagnosis to Claimant's work activities. Accordingly, Claimant has not demonstrated that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated a pre-existing condition.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 23, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment?

II. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability (TTD) benefits?

III. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of medical benefits for her treatment with Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, Penrose-St. Francis emergency room and Southwest Diagnostic Centers?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant worked for Employer as a cashier for approximately six (6) months prior to the date of injury. Although she was originally hired as a part time employee, her hours increased to the point that she was working full time on the date of her injury.

2. Claimant testified that customers would normally approach the checkout counter from her left side and she would then scan the items which were being purchased. She would then have to twist to her right to access the cash register and complete the transaction. On average she would check out approximately 200 people every shift. She would perform the aforementioned twisting motion for every transaction, whether it was cash or a credit transaction.

3. While checking out a customer on June 21, 2014, Claimant scanned a customer's merchandise, turned to the right, and felt an immediate stabbing pain in her lower back. She explained that she felt like she had been "cut in half" by the sharp burning pain as if someone had stabbed her in her lower back. Claimant immediately felt numbness going down the outside of her left thigh. This numbness has persisted through the present time.

4. At the time the incident occurred, Claimant testified it felt like her back "went out" and that she blurted out "Oh My God" when the injury occurred. Tiffany Salazar, a co-employee of Home Depot, was working as a cashier at the register next to Claimant when this occurred. She heard Claimant's outburst and asked her what was wrong and if she was okay. When Claimant told her that she didn't think she was okay, Ms. Salazar called the head cashier, Amber, to report what had happened. Amber

brought Claimant a chair to sit on and requested that she finish her shift because they were shorthanded that day. Claimant was able to complete her shift.

5. No written report was filed by Employer or Claimant on the date of injury. Claimant identified Claimant's Exhibit No. 2 as the statement she wrote on 6/23/14 outlining the circumstances surrounding the injury. She completed this statement at the request of Employer. Claimant was injured on a Saturday and the next two days were her regular days off. She did not contact her employer again until 6/24/14 when she was regularly scheduled to work because she thought her condition might improve during the time she was off. On 6/24/14, Claimant called her employer and spoke with her assistant manager, Eric, who told her to come into the store to get a list of treating providers. She did so on 6/24/14 and chose Penrose Hospital where she was seen in the emergency room on 6/27/14. Claimant testified that she was unable to get to the doctor on 6/2514 and 6/26/14 because her car had broken down and she had no transportation. During that time frame, she stayed at home and either iced or placed heat on her lower back to try to control the pain.

6. Dr. Langstaff, the emergency room physician from Penrose-St. Francis noted in her 6/27/14 report that Claimant "accidentally twisted into an awkward position while working as a cashier at Home Depot". Examination of the Claimant revealed moderate paraspinal tenderness in both the lumbar and thoracic spine. Dr. Langstaff suspected that Claimant had sustained a myofascial strain of her lumbar spine and provided a diagnosis of "acute back pain". Claimant testified that the emergency room physician took her off work for three days. Claimant notified her supervisor, Connie, of the results of the emergency room visit and was directed by Connie to get in touch with the Human Resources Department. The Claimant did so and was referred to Concentra where she began treatment with Dr. Randall Jones on 6/27/14.

7. Dr. Jones examined the Claimant and referred her to physical therapy (PT) three times a week for a period of two weeks. When PT did not help and in the face of worsening pain, Dr. Jones referred Claimant for an MRI at Southwest Diagnostics; to Dr. Jeffrey Jenks, a physiatrist; and for chiropractic care with Absolute Health Center. On 6/27/14, Dr. Jones imposed physical restrictions of no lifting more than 10 pounds and no pushing or pulling more than 20 pounds, no squatting, no climbing of ladders or stairs or climbing of any kind. Dr. Jones noted in his initial assessment that Claimant was standing behind a cash register and twisted to the right to put money in the register and felt left lower lumbar pain. The Physician's Report of Worker's Compensation Injury authored by Dr. Jones on 6/27/14 (Claimant's Exhibit 4, p. 6) notes the objective findings he observed to be consistent with the history and/or work related mechanism of injury.

8. Claimant provided Dr. Jones' restrictions to her employer at which time she was informed that her restrictions could not be accommodated. Claimant has not worked for Employer or at any other job since 6/21/14.

9. The ALJ finds that the Claimant is entitled to temporary total disability (TTD) benefits commencing on 6/21/04.

10. Dr. Jones saw Claimant again on July 12, 2014. He again noted that the objective findings he observed were consistent with the history and/or work related mechanism of injury. He continued Claimant's physical restrictions and added that she be provided a chair with a back adjustable to the proper height to complete her cashiering duties.

11. Claimant began physical therapy on July 16, 2014 at Concentra with Katherine Nikolaus, P.T. Ms. Nikolaus noted mild increased muscle tone in both the right and left paraspinal muscles. She also noted severe tenderness of the paraspinal muscles on the left and moderate tenderness on the right. Her record also reflects that the Claimant was unable to lie on her back. On July 17, 2014, Ms. Nickolaus noted that the Claimant should also be sitting 75% of the time while cashiering. The July 18, 2014 physical therapy notes indicate that Claimant reported increased low back pain up to 9 out of 10. The July 25, 2014 therapy note indicates that the Claimant reported worsening of symptoms and was progressing slower than expected.

12. On August 4, 2014, Dr. Randall Jones saw Claimant and noted that if Claimant did not show significant improvement by the next visit, she would need to be referred for an x-ray, an MRI and to Dr. Zimmerman and Dr. Polvi for chiropractic treatment and acupuncture. He continued her physical restrictions. On August 7, 2014, Dr. Jones discontinued physical therapy and referred the Claimant to Dr. Jeffrey Jenks, Absolute Health Center and Southwest Diagnostics.

13. Claimant underwent an MRI on 8/21/14 which revealed a broad-based right foraminal bulge and facet arthrosis at L4-5 and mild right foraminal stenosis. It also revealed a broad based foraminal bulge and left paramedian protrusion L5-1 with mild canal and foraminal stenosis.

14. Claimant saw Dr. Jeffrey Jenks on August 21, 2014. Dr. Jenks recommended a left sacroiliac joint injection.

15. The ALJ finds that the treatment rendered by Dr. Jones and his referrals in this case reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury.

16. At the time Claimant was hired at Home Depot, she informed Employer that she had restrictions with respect to her knees due to a preexisting degenerative knee condition. She also reported pre-existing multiple sclerosis. Claimant's physical restrictions due to these conditions required her to have use of a chair with a back so that she could sit when needed while performing her cashier duties. At the time Claimant was injured, she was standing and only had a stationary stool (without a back) to sit on. The seat of the stool did not rotate. The Claimant testified that she had previously spoken to an assistant manager, Andy, in the Spring of 2014 regarding her need for a chair with a back on it. She understood the chair to be on back order. She testified she also talked to Andy about the status of the chair in June of 2014 but still had not received it at the time of her industrial injury.

17. Claimant had no preexisting lumbar spine conditions nor had she received treatment for her lumbar spine in the year prior to this claim. Claimant had been seen at Memorial Hospital in the emergency room on April 13, 2014 for burning pain in her shin after receiving a steroid injection to her knee. She explained that this was not the same kind of pain and numbness that she currently has going down the outside of her left thigh since her June 21, 2014 injury. Claimant had also been treated in the emergency room of Penrose St. Francis on April 3, 2014 and April 5, 2014 for knee pain. Finally, Claimant sought treatment through the emergency room of Memorial Hospital on January 25, 2014 for tooth pain. Claimant explained that even though the emergency room report from this visit noted back and neck pain as well as chronic pain, she had no prior back and neck pain and had not been treated for those conditions prior to this industrial injury.

18. Claimant was diagnosed with relapsing and remitting multiple sclerosis (MS) in 2004 after experiencing persistent severe headaches. She did not have any symptoms in her lower back or down her legs at that time. She had a relapse of her MS in 2012 when she lost sight in one of her eyes which eventually returned. Claimant receives social security disability benefits and veteran's administration benefits for her preexisting bilateral knee and ankle issues as well as the multiple sclerosis. At the time of her June 21, 2014 injury, Claimant was taking Oxycodone and Fentanyl for her knee and ankle conditions/pain. She continues to take those pain medications since the injury in this case. She has been given no additional pain medications by Dr. Jones or Dr. Jenks. She also testified that none of her prior medical providers had ever diagnosed her with fibromyalgia.

19. Dr. Allison Fall testified on behalf of the Respondents. Dr. Fall is a Level II accredited physiatrist in the State of Colorado. Dr. Fall opined that the Claimant could not have injured her lower back by the mechanism of injury described by the Claimant. Dr. Fall testified that in her causative analysis, it would not matter how far an individual twisted her trunk nor how many times an individual twists her trunk in a day–twisting at the waist would never cause lower back problems since the human body was "meant" to twist at the waist. Absent any additional weight or bending while twisting, an individual could not injure her low back from merely twisting according to Dr. Fall. Dr. Fall opined that there was no correlation between Claimant's symptoms and the findings on the MRI scan of 8/20/14. She also testified that she did not find any objective findings in her examination of Claimant to substantiate Claimant's pain complaints although she did admit that Claimant could have had muscle spasms which she would not have been able to see or feel at the time she examined the Claimant due to Claimant's obesity.

20. Dr. Fall testified that it is possible that asymptomatic degenerative conditions can become symptomatic in the face of a traumatic event. She also conceded that bulging disks can be sources of pain in the lower back and that individuals with foraminal stenosis can develop pain in their lower back. She admittedly did not review any, nor is she aware of any, records prior to 6/27/14 relating to treatment of Claimant's low back. Dr. Fall also admitted that she was not aware of any other records, prior to 6/27/14, where the Claimant was complaining of radiating leg pain or numbness with the exception of the emergency room report of Penrose Hospital

from 4/3/14 involving pain down the shin after Claimant received a steroid injection to the knee.

21. Dr. Fall further opined that Claimant had preexisting chronic pain associated with fibromyalgia which was probably the source of her ongoing myofascial back pain. However, on cross-examination, Dr. Fall admitted that the basis for this opinion was information that she gleaned from two previous emergency room records which mentioned fibromyalgia in the past medical history section. One of those records was from 2/26/13 (Respondent's Exhibit E, Bates Stamp 156) and one was from 3/3/14 (Respondent's Exhibit D, Bates Stamp 126). Dr. Fall admitted that she had no idea where the diagnosis of fibromyalgia had originated from, nor did she know what doctor or specialist, if any, made the original diagnosis. Additionally, she was not aware of what symptoms (how many tender points and where they were located), if any, the Claimant presented with which resulted in the diagnosis of fibromyalgia. Based upon the totality of the evidence presented, the ALJ is not convinced that Claimant was formally diagnosed with fibromyalgia. Consequently, the ALJ finds Dr. Falls' testimony regarding fibromyalgia as the likely cause of Claimant's low back pain unconvincing. Dr. Fall also opined that she felt the Claimant had some functional overlay in her symptoms due to the Employer failing to accommodate the Claimant's prior work restrictions due to her knee condition (prior to this industrial injury).

22. The Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of the course and scope of her employment with Home Depot.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights

of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. Section 8-43-201, supra.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability & Temporary Partial Disability

D. As noted, for an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

E. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, the evidence demonstrates that Claimant engaged in frequent "twisting" (rotation) of her lumbar spine to complete the duties required of her position as a cashier during her shift. While the ALJ is persuaded that the degenerative findings demonstrated on MRI

were not caused by her twisting, the ALJ finds Dr. Fall's testimony–that Claimant could not have injured her low back twisting at the waist because the human body is designed to twist at the waist–unpersuasive. Similarly, the ALJ is not convinced that Claimant did not injure her low back because Dr. Fall was unable to appreciate any objective findings on physical examination which substantiated Claimant's complaints of low back pain or that Claimant's low back pain is chronic and related to preexisting fibromyalgia. The ALJ notes that Dr. Fall's IME was performed on October 8, 2014, in excess of three months after the date of injury. The medical records closer in time to Claimant's date of injury and thereafter during treatment reflect objective findings consistent with lumbar strain and associated left sacroiliac (SI) joint dysfunction. Moreover, Dr. Fall admitted on cross examination that she based her reliance on "fibromyalgia" as a cause of Claimant's low back pain on information gleaned from two ER reports which mention the diagnosis in the past medical history section of the reports. The ALJ credits Claimant's testimony that she has never been diagnosed with "fibromyalgia". Based upon the totality of the evidence presented, the ALJ concludes that, more probably than not, Claimant suffered a myofascial strain of her lumbar spine and left SI joint while having to twist to complete her work duties. Consequently, the ALJ concludes that a logical causal connection exists between the Claimant's complaints and her work-related duties. Thus, the injury is compensable.

Medical Benefits

F. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). As found, the treatment rendered by Dr. Jones and his referrals in this case was reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury. Nonetheless, Respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

G. Authorization refers to a physician's legal status to treat the industrial injury at respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Once an ATP has been designated, a claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office*, 996 p.2d 228 (Colo. App. 1999).

H. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio*

v. Industrial Claim Appeals Office, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Here, the persuasive record evidence supports that Claimant was given a list of providers from her employer which included Penrose Hospital ER as a choice. After providing the emergency room record to her employer, Claimant was referred to Concentra Medical Centers where she was seen by Dr. Jones who subsequently made referrals to physical therapy, Southwest Diagnostics, Absolute Health Center (Dr. Polvi and Dr. Hill) and Dr. Jeffrey Jenks. Based upon the evidence presented, the ALJ concludes that Dr. Jones is the designated provider for this claim. Consequently, his treatment and the treatment obtained through his referrals, including the physical therapy obtained through Concentra, the imaging performed at Southwest Diagnostics, the chiropractic care obtained at Absolute Health Centers and the treatment with Dr. Jenks is authorized.

Disability Benefits

I. Pursuant to §§8-42-103, 8-42-105, C.R.S., a claimant is entitled to an award of Temporary Total Disability (TTD) Benefits, if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001).

K. The term "disability" as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the Claimant's inability to perform his/her prior regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The second element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions which impair a claimant's ability to effectively perform the duties of his regular job. *See Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, the persuasive evidence establishes that Dr Jones has continually imposed physical restrictions which have precluded the Claimant from performing the duties of her usual work since July 8, 2014. The evidence also establishes that the Employer chose not to accommodate those restrictions by offering Claimant a modified duty position. Thus, Claimant has been out of work due to her industrial injury and has suffered a wage loss as a direct consequence. Accordingly, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and entitled to TTD benefits. *Culver v. Ace Electric, supra; Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office. June 11, 1999). Because Claimant's disability has lasted longer than two weeks from the day she left work as a result of her industrial injury, TTD benefits are recoverable from the day she left work, specifically June 21, 2014. C.R.S. §8-42-103(1)(b).

Respondents shall pay TTD in accordance with C.R.S. §8-42-103(1)(b), i.e. beginning June 21, 2014 at a rate of sixty-six and two-thirds percent of her average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week so long as Claimant's disability is total. C.R.S. §8-42-105(1). Such TTD benefits shall continue until the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3) after which Respondents may terminate such TTD payments.

ORDER

It is therefore ordered that:

1. Claimant's industrial injury to her lumbar spine which occurred on June 21, 2014 is deemed compensable.

2. Respondents shall pay all reasonable and necessary medical bills from Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, the Penrose-St. Francis emergency room and Southwest Diagnostic Center related to this injury.

3. Respondents shall pay Temporary Total Disability benefits in accordance with C.R.S. §8-42-103 from June 21, 2014 to the present and ongoing until such time as TTD benefits may be terminated pursuant to any one of the events enumerated in C.R.S. §8-42-105(3).

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

DATED: January 15, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issues in this expedited hearing are compensability, medical benefits, and affirmative defenses to those issues raised by the respondent.

FINDINGS OF FACT

1. The claimant was employed with the respondent-employer as a lead engineer technician II. His job duties primarily consisted of inspection of hospital facilities and maintenance operations throughout the hospital The claimant spent, on average, six or more hours per day engaged in inspection and maintenance.

2. In the summer of 2014, the hospital set out to refurbish a decorative planter at the entrance of their facility. During the construction of this planter, the claimant's job duties remained those of inspection and repair of the hospital. However, the claimant did have some tangential involvement with the planter, occasionally chipping in to help the employees primarily responsible for the refurbishment.

3. The claimant believes that, at some point during the refurbishment of the planter, in July 2014, he either suffered a work related injury to his right shoulder or incurred an occupational disease in his right shoulder.

4. The claimant testified that he spent a significant amount of time over June and July of 2014 installing the landscaping project in front of the hospital. The claimant testified that he alone cut down a large tree in the previous landscaping installation and that he manually dug out the stump of this tree using a pick and shovel. The claimant testified that he attempted to manually remove boulders weighing 200 to 300 pounds and that he leveled the surface of the landscaping installation using a pick and shovel; this testimony included statements that he dug down at least four inches into the ground throughout the landscaping project. To accomplish these tasks, along with any number of additional landscaping labors, the claimant testified he spent over six hours a day working on refurbishing the planter.

5. The claimant also testified that he moved a number of file cabinets and desks throughout the hospital and that to accomplish this task he was only provided a

small dolly for assistance. The claimant did not relate these duties to his shoulder injury, but emphasized the size and weight of these objects.

6. With respect to the onset of his right shoulder symptoms, at hearing the claimant testified his shoulder became symptomatic in January of 2014. He testified that his symptoms increased over June and July of 2014 due to the use of his right upper extremity, although he could not point to an incident or task which led to the increase in symptoms. The claimant further testified that while he did receive an injection for nausea in March of 2014, this did not lead to shoulder pain. The claimant stated that during June and July of 2014, he was in significant pain and was completely unable to use his right arm.

7. The medical records reflect that on or about March 10, 2014, the claimant reported to nurse Porterfield that he was experiencing pain in his right arm as a result of an injection in his right shoulder. On July 2, 2014, the claimant returned to nurse Porterfield complaining of ongoing pain in his right shoulder radiating down to his elbow as a result of the earlier injection.

8. On July 9, 2014, the claimant underwent an x-ray of his right shoulder "for shoulder pain/recent parental injection."

9. The claimant was next seen by Dr. Robert Thomas on July 14, 2014. In his report, Dr. Thomas states, "the patient is a 44-year-old gentleman coming in complaining of about 5 months of right shoulder pain. He does not remember any one specific injury. He reports having had some type of an injection for nausea, and after that, his shoulder started getting painful." An MRI of the claimant's right shoulder revealed a rotator cuff tear. On July 31, 2014 Dr. Thomas performed an arthroscopic repair of the claimant's right shoulder. Since Dr. Thomas' operation, the claimant has been undergoing conservative postoperative recovery and physical therapy.

10. Billy Strickland, head of facilities and maintenance for the hospital, testified credibly regarding the claimant's job duties through June and July 2014. Mr. Strickland explained that the claimant's primary responsibility was the inspection and repair of the hospital facilities and that this job took at least six hours a day. Mr. Strickland testified that the claimant was in a managerial capacity and was to spend time designating tasks to other employees. Mr. Strickland also testified that refurbishing the planter was not the claimant's primary job duty, and that that task was left to a father and son team, Bill and Charlie Antista. Mr. Strickland explained, given the community environment fostered by the hospital, the claimant would occasionally check on the work being done in the planter and on occasions provided some light assistance.

11. Billy Strickland testified regarding the refurbishment of the planter which he designed and implemented. With respect to removing a tree from the old planter, this was done by an independent contractor. Mr. Strickland testified that the ground was leveled using a Bobcat and that the claimant did not have to dig four to six inches into the ground with a pick and shovel. Mr. Strickland explained that the claimant's job duties had him spending at least six hours a day inspecting and maintaining the hospital. Mr. Strickland testified that this was claimant's primary responsibility and would have precluded the claimant from spending the alleged six hours a day on the landscaping project.

12. Mr. Strickland also provided testimony on the issue of moving furniture in the hospital. He testified that any number of dollies or assistive devices were provided for the transportation of furniture.

13. Both Billy Strickland and Tammy Rogers testified regarding the chain of events leading to claimant's resignation. Mr. Strickland and Tammy Rogers both testified credibly that they had no knowledge of claimant's intent to resign until July 22, 2014. On that day, the claimant advised the hospital that he wished to resign, voluntarily executed a letter of resignation, which was accepted by the respondent-employer, and ended his employment.

14. Billy Strickland, Tammy Rogers, and David Rollins (CFO) all provided testimony regarding statements by the claimant that he was not injured on the job. By the time the claimant had resigned from his employment, he had had the opportunity to be examined by several physicians and had undergone an MRI of his shoulder. Nonetheless, during his resignation, the claimant stated to Billy Strickland and Tammy Rogers that he did not injure his shoulder on the job. Additionally, the claimant voluntarily went to the office of David Rollins and, as part of saying farewell, stated that he did not hurt his shoulder on the job.

15. A deposition of the orthopedic surgeon who treated the claimant's shoulder, Dr. Robert Thomas, was conducted on December 1, 2014. The deposition focused directly on the issue of causation. Dr. Thomas testified, "In my opinion, based on his description of the labor work that he was doing, that would be consistent with a rotator cuff tear." Dr. Thomas further testified that he only had a vague description of the claimant's job duties without information on the specifics or durations of the tasks performed by the claimant. It was his understanding the claimant did "a lot of shoveling of heavy gravel or materials prior to a sudden onset of increased pain."

16. At the request of the respondents, the claimant underwent an independent medical examination with Dr. Eric Ridings on October 8, 2014. In this evaluation, the claimant stated to Dr. Ridings that he injured his shoulder in a December 19, 2012 slip-and-fall on ice at work. In his report, Dr. Ridings noted a number of discrepancies between the claimant's reported injury and the medical records. Further, Dr. Ridings concluded, "overall, then, the patient has a history of unexplained pain and paresthesia in the right upper extremity (and later unexplained pain at the left shoulder), with the right upper extremity symptoms beginning after a non-work-related injection on March 5, 2014. His workup for those complaints revealed a rotator cuff tear, although the patient's history to that point was not suggestive of that diagnosis . . . In my judgment within a reasonable degree of medical probability there is no connection between the patient's current symptoms and any incident at work, either in September [*sic*] 2012 or the shoveling of the 3" trench (which is not an activity that would be expected to cause a rotator cuff tear in any case)."

17. The deposition of Dr. Eric Ridings was conducted on December 10, 2014. This deposition focused on the issue of causation. Dr. Ridings testified that he had the opportunity to question the claimant as to his job duties over the summer of 2014, including several specific activities. Dr. Ridings had the opportunity to review numerous medical records relating to claimant's condition going back to 2012.

18. Dr. Ridings testified that when he interviewed the claimant, he stated that he injured his shoulder when he fell at work on December 19, 2012 and that his shoulder pain had continued from that time. Dr. Ridings testified that in his review the medical records he found it was unlikely the claimant sustained a shoulder injury at that time. Dr. Ridings opined that, in reviewing the medical records there were no records connecting the claimant's work activities and the development of the tears of his tendons or his labrum. Dr. Ridings also opined that the numerous inconsistencies in the claimant's statements in the medical records indicated it is unlikely injury occurred while on the job.

19. Finally, Dr. Ridings testified that he could not say, within a reasonable degree of medical probability, that any of the claimant's job activities caused him to have a rotator cuff tear. This testimony was based on his review of the claimant's job duties, in which he noted nothing would have been expected to have caused a rotator cuff tear. Dr. Ridings opined that it is equally probable that outside activities off the job could have caused the condition in the claimant's right shoulder.

20. The ALJ finds that the claimant is a poor historian of his medical conditions.

21. The ALJ finds that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury or occupational disease arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201.

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. To the extent the claimant is asserting an injury as opposed to an occupational disease, the claimant must prove by a preponderance of the evidence that at the time of the alleged injury he was performing a service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of

whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

5. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair, supra.*

6. The claimant failed to prove it is more probably true than not that in July 2014 he sustained any work-related injury. The claimant's testimony indicates that he did not suffer a specific injury in July 2014. Instead, the claimant has provided numerous alternate dates of injury. On none of these dates of injury does the claimant point to a specific mechanism of injury.

7. The claimant also testified to any number of arduous tasks conducted in June and July 2014, but the claimant links no specific task or incident to the condition of his right shoulder. The claimant has been thoroughly examined by several physicians, none of whom trace the condition of his right shoulder to a specific action or incident. This includes the claimant's own expert, Dr. Thomas. There is no persuasive evidence to show claimant suffered a compensable work injury in July 2014.

8. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by C.R.S. § 8-40-201(14) as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

9. This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in

everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought.

10. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

11. The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc*., W.C. No. 4-606-563 (I.C.A.O. August 18, 2005).

12. In this case, the claimant failed to prove that he sustained an occupational disease caused, intensified or aggravated by the performance of his duties for the respondent-employer.

13. Dr. Ridings had the opportunity to speak with the claimant regarding his job duties, which he testified would not lead to an occupational disease. Dr. Ridings reviewed the available medical records and testified there was no connection in the records between claimant's work activities and the development of a shoulder injury.

14. The claimant has failed to present sufficient persuasive evidence that he sustained an occupational disease caused, intensified or aggravated by the performance of his duties.

15. The ALJ concludes that the claimant is a poor historian of his medical conditions.

16. The ALJ concludes that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

17. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he suffered an injury or occupational disease arising out of and in the course of his employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 13, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained an injury to his right shoulder arising out of and in the course and scope of his employment with employer on August 1, 2014?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received from Dr. McLaughlin and Dr. Copeland was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment provided by Dr. McLaughlin and Dr. Copeland was authorized medical treatment?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits?

- If claimant has proven a compensable injury, what is claimant's average weekly wage?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

FINDINGS OF FACT

1. Claimant was employed with employer as a CDL driver. Claimant began working for employer on July 21, 2014. Claimant's job duties included distributing oil products to customers of employer, including 55 gallon drums containing oil.

2. Claimant testified he first received his CDL license in 2011. In 2014, prior to claimant being hired, claimant underwent a fitness test to renew his CDL license. Claimant testified the fitness test included pushups, sit ups, planking, a hearing test and an eye test. Claimant testified that following the fitness test, claimant's CDL license was renewed.

3. One week after claimant was hired, on July 28, 2014 claimant missed work. Claimant testified at hearing that he was stranded in Denver and he called

employer to let them know of his situation. Claimant's absence was recorded as a no call/no show incident.

4. Claimant testified that on August 1, 2014, he was assigned to drive a truck and deliver 55 gallon drums of oil to the Sommerset Mine near Paonia. Claimant testified that he was assured before he left that the mine would have a fork lift to assist with the unloading of the drums when he arrived.

5. Claimant testified that he loaded 8 barrels of oil, wrapped the barrels in plastic wrap so the barrels would not shift on the drive and began driving to the mine with Mr. Hoyt, the head of sales for employer. Claimant testified he left at approximately noon. Upon arriving at the mine, claimant and Mr. Hoyt checked in with the security guards, were given a short training session on safety at the mine, and were allowed to proceed up to the area of the mine where the oil was to be delivered.

6. Claimant testified that the road to the mine is steep and slow and he and Mr. Hoyt eventually arrived at the gate. Once they arrived at the gate, claimant got out of the truck to check his route and had Mr. Hoyt be his land guide as he maneuvered the truck to unload the oil. Claimant testified that there were two mine employees standing outside the building that housed the generators where the oil was to be delivered.

7. Claimant testified that after getting the truck situated for unloading, claimant noted that there was not a fork lift to help unload the barrels. Claimant testified that Mr. Hoyt was adamant that the oil barrels be delivered or they may lose the account. Claimant testified he informed Mr. Hoyt that he would try to unload the oil barrels, but if anything happened, he was going to return to Grand Junction without unloading the barrels.

8. Claimant testified he began taking the plastic wrap off the oil barrels and was trying to get the barrels off the pallet to unload the barrels. Claimant testified that while doing this, his shoulder popped out and then back into place right away. Claimant testified that Mr. Hoyt then went about trying to find a fork lift, which was eventually located and brought to the truck.

9. Claimant testified that on the drive back to Grand Junction, he reported to Mr. Hoyt that he had hurt his shoulder while trying to unload the barrels. Claimant testified that when he returned to the shop, he reported to Ms. Veatch, the warehouse manager, that he had injured his shoulder. Claimant testified that Ms. Veatch handed claimant an Axiom card and informed him that if his shoulder got any worse, contact Axiom and they would tell him what to do.

10. Claimant testified that he returned to work on Monday and reported to Ms. Veatch that he needed to see someone for his shoulder. Ms. Veatch and claimant called a nurse with Axiom regarding the injury. Claimant testified that approximately an

hour and a half later, a nurse with Axiom called him back and instructed claimant to go to a physician. Claimant testified he was referred to Dr. McLaughlin by employer.

11. Mr. Hoyt testified at hearing regarding the incident on August 1, 2014. Mr. Hoyt testified that he went with claimant to the mine because the mine is difficult to find, and the delivery of the oil was important. Mr. Hoyt testified that sometimes as a courtesy the mine will provide a forklift to help unload a product, but it is not required to do so.

12. Mr. Hoyt testified that after arriving at the mine, claimant expressed concern with regard to the steepness of the hill and the difficulty of getting the truck situated to make the delivery. Mr. Hoyt testified that claimant was becoming loud and was using foul language in the presence of the mine employees. Mr. Hoyt testified that claimant was using obscenities as he believed he was going to have to unload the barrels across the gravel without the use of a fork lift. Mr. Hoyt testified that claimant threatened to take the truck back to Grand Junction without unloading the barrels. Mr. Hoyt testified he felt claimant's behavior at the mine and use of obscenities was inappropriate.

13. Mr. Hoyt testified he witnessed claimant remove the plastic wrap and then Mr. Hoyt went to see if he could find a fork lift. Mr. Hoyt testified he did not see claimant attempt to walk to the barrels.

14. Mr. Hoyt testified that on the drive back to Grand Junction, claimant was highly upset because he had a 4:00 appointment that he was going to be late for. Mr. Hoyt testified that claimant reported to him on the drive back to Grand Junction that he had tweaked his shoulder, but said he wasn't going to do anything about it.

15. When Mr. Hoyt and claimant arrived back at the shop, Mr. Hoyt testified he informed Ms. Veatch that they needed to speak later regarding claimant's behavior. Mr. Hoyt testified that he later spoke to the owner and Ms. Veatch and informed them of claimant's use of obscene language in front of clients and recommended that claimant be let go.

16. Ms. Veatch testified at hearing in this matter. Ms. Veatch testified that she has hiring and firing responsibilities in association with her position as warehouse manager. Ms. Veatch testified that claimant returned to the shop on August 1, 2014 and reported that he had hurt his shoulder earlier in the day.

17. Ms. Veatch testified that later that day, Mr. Hoyt explained to her claimant's behavior in front of the client. Ms. Veatch testified that she had issues with claimant as an employee, including issues with his attendance and the fact that claimant did not want to learn about the product or how to handle the invoices. Ms. Veatch testified that she determined at lunch on August 1, 2014 that claimant was going to be terminated from his position with employer. Ms. Veatch testified that she communicated

her intent to terminate claimant to the parent office in Albuquerque, New Mexico on the morning of August 4, 2014, and advised claimant of his termination when he returned from the physician's office.

18. Ms. Veatch testified on cross examination that the basis for claimant's termination was his lack of interest in the job, the fact that he was antsy, that he would leave work early and missed work without permission. The ALJ notes that claimant was not warned by employer of the fact that his job with employer was in jeopardy based on his lack of interest in the job and his issues with reliability.

19. Claimant sought medical treatment with Dr. McLaughlin on August 4, 2014. Claimant reported to Dr. McLaughlin that he injured his right shoulder while moving 55 gallon drums of oil for employer on August 1, 2014. Claimant was diagnosed with a right shoulder strain and referred for a magnetic resonance image ("MRI") of the right shoulder. The MRI showed an anterior labral tear and tendonopathy and partial bursal surface tear of the supraspinatus.

20. Claimant returned to Dr. McLaughlin on August 13, 2014. Dr. McLaughlin reviewed the findings of the MRI and referred claimant to Dr. Copland for a surgical consultation.

21. Claimant was examined by Dr. Copeland on August 19, 2014. Claimant reported a consistent accident history of injuring his shoulder while moving a barrel of oil off a pallet. Dr. Copeland performed a physical examination and reviewed the MRI findings. Dr. Copeland recommended claimant consider conservative treatment including physical therapy and provided claimant with lifting restrictions of 10 pounds.

22. Claimant returned to Dr. McLaughlin on August 25, 2014. Dr. McLaughlin noted claimant's ongoing complaints and prescribed physical therapy. Claimant was re-examined by Dr. McLaughlin on September 11, 2014. Dr. McLaughlin noted claimant's continued complaints of pain in his shoulder and recommended six more visits of physical therapy.

23. Claimant returned to Dr. Copeland on September 19, 2014 and was examined by physician's assistant Rexroth. Mr. Rexroth noted claimant presented with continued complaints of pain. Claimant had undergone a course of physical therapy, but reported that he felt he was no longer improving. Dr. Copeland and Mr. Rexroth noted that claimant was a surgical candidate and recommended right shoulder arthroscopy with labral repair, subacromial decompression and rotator cuff debridement.

24. Claimant returned to Dr. McLaughlin on September 23, 2014. Dr. McLaughlin noted the surgical recommendation from Dr. Copeland. Dr. McLaughlin opined that the surgical recommendation was reasonable and took claimant off of work completely until after the recommended surgery.

25. The ALJ finds that claimant's report of an injury occurring at work on August 1, 2014 is consistent with the medical records entered into evidence. Claimant reported the injury to Mr. Hoyt and Ms. Veatch on the date the injury occurred. Claimant sought medical treatment from a physician designated by employer on the next working day following his injury. The ALJ finds that claimant has proven that it is more likely than not that he injured his right shoulder in the course and scope of his employment with employer on August 1, 2014 while moving oil drums.

26. The ALJ finds the medical records from Dr. McLaughlin and Dr. Copeland to be credible and persuasive regarding the issue of the reasonableness and necessity of the medical treatment provided to claimant. The ALJ credits the reports as establishing that the medical treatment was related to a mechanism of injury consistent with claimant's testimony at hearing and finds the treatment to be reasonable and necessary. The ALJ further credits the testimony of claimant and Ms. Veatch and finds that claimant was referred by employer to Dr. McLaughlin for medical treatment. The ALJ credits the medical records from Dr. McLaughlin and determines that Dr. Copeland was a referral from Dr. McLaughlin and is likewise within the proper chain of referrals. Therefore, the ALJ determines that the medical treatment from Dr. McLaughlin and Dr. Copeland is authorized under the Colorado Workers' Compensation Act.

27. The ALJ credits the work restrictions set forth by Dr. McLaughlin and Dr. Copeland and claimant's testimony at hearing and determines that claimant has established that he is not capable of performing his regular job duties with the work restrictions set forth by Dr. McLaughlin on August 4, 2014

28. Respondents argue that claimant was responsible for his termination of employment and is therefore, not entitled to TTD benefits. The ALJ credits the testimony of Ms. Veatch and finds that claimant had issues with regard to his employment including a failure to show up for work, and a lack of interest in the job. The ALJ further credits the testimony of Ms. Veatch and determines that the decision to terminate claimant was made at approximately lunch time on August 1, 2014, prior to claimant's injury.

29. However, claimant was not given any written confirmation regarding his poor work performance. Ms. Veatch testified that when claimant did not appear for work, he was not terminated. According to Ms. Veatch, claimant was terminated for a lack of interest and a lack of reliability.

30. Claimant's testimony regarding his work performance and his behavior at the mine on August 1, 2014 is found to be not credible and is not relied on by the ALJ. However, the decision to terminate claimant was made prior to claimant's actions at the mine, and therefore, the ALJ does not take into consideration claimant's unprofessional behavior at the mine when determining if claimant was responsible for his termination of employment. Because the decision to terminate claimant was made at lunchtime on

August 1, 2014, volitional acts by the claimant made after that time did not lead to his termination of employment.

31. Taking into consideration the evidence presented at the hearing that claimant was terminated for a lack of reliability and a lack of interest in the job, the ALJ finds that respondents have failed to establish that it is more probable than not that claimant committed a volitional act that led to his termination of employment.

32. While the testimony does establish that claimant was not reliable, claimant was not terminated for his failure to appear for work on July 28, 2014. Furthermore, while employer presented evidence that claimant was leaving work on the morning of August 1, 2014 to go to the bank for a personal errand, Ms. Veatch testified that she provided claimant with permission to run this errand. Moreover, the credible evidence presented at hearing established that claimant was terminated for a lack of interest in performing the work required by employer, and not because of a volitional act.

33. Claimant was employed with employer from July 21, 2014 through August 4, 2014. Claimant earned $1,072.50 for this period of 15 days (2 1/7 weeks). This equates to an AWW of $500.50. Claimant argues in his position statement that he worked 9 full days prior to being terminated. Claimant argues that the AWW should be calculated based on claimant's daily wage during the 9 full days of employment. The ALJ is not persuaded.

34. The ALJ notes that claimant did not work for employer for an extended period of time (just over two weeks). The ALJ further notes that during those two weeks claimant missed a day of work due to personal reasons. However, the ALJ concludes that the most fair way to calculate the AWW is to consider the full amount of money claimant was paid during the 2 1/7 weeks he was employed with employer. The ALJ recognizes that this includes claimant's final day when he only worked 4.5 hours, but based on the fact that the ALJ has determined that the decision to terminate claimant had occurred prior to his injury the previous Friday, claimant's AWW should include the final day of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he injured his shoulder on August 1, 2014 while moving the oil barrel.

2. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

5. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has

expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

6. As found, the treatment provided by Dr. McLaughlin and Dr. Copeland was reasonable and necessary to cure and relieve claimant from the effects of her industrial injury. As found, claimant was referred to Dr. McLaughlin by employer after reporting his injury to employer. As found, Dr. McLaughlin subsequently referred claimant to Dr. Copeland for consultation. As found, Dr. McLaughlin and Dr. Copeland are authorized to treat claimant for his injuries arising out of his August 1, 2014 injury.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by Dr. McLaughlin that limited claimant's ability to earn wages. As found, claimant has established that he is entitled to TTD benefits commencing August 5, 2014 and continuing until terminated by law or statute.

9. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In

that context, “fault” requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

10. In this case, Ms. Veatch testified credibly that she had determined that claimant was to be terminated on August 1, 2014 prior to claimant’s injury. Claimant subsequently made the delivery to the mine on behalf of employer and behaved in a manner which was entirely unacceptable in the presence of employees of the client. However, these actions didn’t directly lead to the decision to terminate claimant as that decision had already been made. Instead, claimant was terminated, according to Ms. Veatch, because he was not reliable and had a lack of interest in the position and the product. Respondents have failed to prove that claimant’s reliability issues and lack of interest in the product and position were volitional acts. Therefore, respondents argument that claimant’s right to TTD benefits be denied based on the fact that claimant was responsible for his termination of employment is dismissed.

11. The ALJ must determine an employee’s AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

12. As found, claimant’s AWW for his August 1, 2014 injury is properly calculated at $425.61

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits beginning August 5, 2014 and continuing until terminated by law based on an AWW of $425.61.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 1, 2014 industrial injury provided by Dr. McLaughlin and Dr. Copeland.

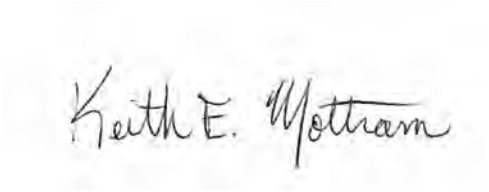
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 15, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

- If claimant has proven a compensable work injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed by employer as an early childhood teacher who works with behaviorally challenged students. Claimant testified at hearing that she began working for employer in 1991. Claimant testified at hearing that the students she works with pre-Kindergarten can, at times, need to be physically restrained in order to keep the child, and other children safe.

2. Over the course of claimant's employment with employer, claimant testified that she has filed many workers' compensation claims with her Employer. She testified that she has sustained numerous minor injuries while working for Employer because of the nature of her work with behavior-challenged children.

3. Claimant testified that her prior claims have included several prior right knee work injuries. Claimant testified that she had a brief period of physical therapy following a 2009 injury when she hit her knee on an electrical box at work. Claimant testified that she did not receive a permanent impairment rating for that injury and did not have any follow-up care. Claimant testified that she had a work injury involving her right knee in 2010 when she slipped on black ice and fell. She testified that she did not have any medical care for that injury.

4. Claimant testified that she has also had prior issues with her neck resulting from work-related injuries. Claimant testified that she never received any permanent impairment ratings to her neck for any of these work injuries.

5. Claimant testified that she also had some non-work-related falls that led to neck symptoms. Claimant testified that she had chiropractic treatment following a fall while at a miniature golf course in 2010 that was non-work related.

6. Claimant's prior medical history includes a course of physical therapy treatment at Mountain View Therapy beginning July 2013 and ending November 2013. Claimant testified that she sought care because her neck was feeling weak and tired, and that she was having neck symptoms when she was flexed forward working with children at work. Claimant testified that she did not have a specific injury, and did not recall a specific onset of neck symptoms. Claimant testified that her symptoms were located at the base of her neck and across her shoulder blades.

7. Claimant testified that following her last visit with the physical therapists on November 27, 2013, she continued performed exercises at home and her neck symptoms improved. Claimant testified that she did not return for physical therapy after November 2013 because her neck felt better. Claimant testified that between November 2013 and February 2014, she did not have any other care involving her neck. claimant testified that just after stopping physical therapy treatment in November 2013, she was doing neck exercises at home three or four times per week and leading up to February 26, 2014, she had reduced her home exercises to twice per week.

8. Claimant testified at hearing that she was no experiencing any symptoms in her left ankle, right knee, or neck on the morning of February 26, 2014. Claimant testified that she arrived at work at approximately 7:30 or 8:00 a.m., met with a co-worker, and then left for Olathe, Colorado where they were going to purchase items from another preschool that was closing its doors. Claimant testified that she and her co-workers arrived at the Olathe preschool and walked around to browse items at the school. Claimant testified she had chosen some items for purchase and was carrying them while walking from a kitchen area and was speaking with Ms. Archuleta, her co-worker. Claimant testified she turned to respond to Ms. Archuleta, and did not see the two to three steps leading downward from the kitchen area. Claimant testified that she fell down the several stairs and landed on her left side on the floor. Claimant testified that she dropped the items she was holding when she fell.

9. Claimant testified that she felt pain in her left ankle and right knee as she stood up. Claimant denied at hearing that she experienced neck symptoms at that time. Claimant testified that she discussed her injury with several coworkers, and reported the injury to employer. Claimant testified that she reported her knee and ankle symptoms but did not mention pain in her neck. Claimant testified she iced her ankle in the truck and filled out an accident report when she got back to the classroom. Claimant testified she mentioned her left ankle and right knee in the accident report, but did not mention her neck.

10. The February 26, 2014 accident report stated that claimant "was carrying items from area to another and missed the steps going down into the other room, landing on my left ankle and falling down." Claimant circled her left ankle and right knee

on the diagram, but did not circle her neck. Claimant testified that she did not have neck symptoms at that time.

11. Claimant testified that in the evening of February 26, 2014, while at home, she began noticing neck symptoms as she watched television. Claimant testified that she had pain at the base of her skull that radiated down the right side of her neck to her shoulder area.

12. Claimant testified that when she woke up the following morning, February 27, 2014, she had a headache and her neck was sore and painful. Claimant sought treatment with Dr. Krebs the morning of February 27, 2014. Claimant testified that Ms. Hunt, the risk manager for employer, had made the appointment with Dr. Krebs for her the day before. Dr. Krebs's report noted that claimant slipped on some steps and fell, landing on her left foot. Dr. Krebs noted that claimant's left ankle, right knee, neck, and upper back were painful. Dr. Krebs also noted that claimant denied any prior right knee trouble, but claimant testified that she had seen Dr. Krebs for work-related right knee issues previously.

13. Dr. Krebs noted that claimant's neck was sore into her shoulder and upper back. Dr. Krebs also noted that claimant had prior neck and shoulder trouble. Dr. Krebs diagnosed claimant with thigh contusion or sprain/strain; left ankle sprain/strain; neck sprain; and thoracic region sprain. Dr. Krebs referred claimant for chiropractic care and released her to return to work full duty.

14. Claimant began a course of chiropractic treatment at Dunnagan Chiropractic on March 4, 2014. Dr. Dunnagain noted that claimant fell at work on February 26, 2014 when she missed steps and fell forward. Dr. Dunnagan noted claimant had neck, left ankle, and right knee symptoms.

15. Dr. Krebs noted on March 17, 2014 that claimant's left ankle and right knee had improved, but her neck remained bothersome. Dr. Krebs recommended additional chiropractic care and again released claimant to full duty.

16. Claimant returned to Dr. Krebs on April 8, 2014. Dr. Krebs noted that claimant continued to have neck symptoms and recommended claimant change from chiropractic care to massage treatment. Dr. Krebs also recommended a neck x-ray. Claimant testified that she and Dr. Krebs discussed the x-ray because her neck symptoms persisted following the injury.

17. Claimant underwent an x-ray on April 18, 2014. The radiologist, Dr. Welsh, noted endplate irregularity and mild disc space narrowing at C6-C7, small anterior osteophytes at C5-C6 and C6-C7, and facet arthropathy at C7-T1. Dr. Welsh's impression was mild degenerative spondylosis.

18. Dr. Krebs reviewed the x-ray results on April 21, 2014. Dr. Krebs again recommended massage therapy and released claimant to full duty. Claimant testified that she continued to work full duty for employer during this time.

19. On May 7, 2014, Dr. Krebs noted that claimant had increased radiating neck pain on the right side of her lower cervical spine. Dr. Krebs indicated that work activity and pulling weight increases her symptoms. Dr. Krebs noted that claimant's school year was nearing the end, and she would have a break in activities that seemed to aggravate her symptoms. Dr. Krebs recommended claimant continue taking ibuprofen and Flexeril.

20. Dr. Krebs noted on May 29, 2014 that claimant had recurring neck discomfort. Dr. Krebs noted that since claimant was now off work, she is more likely to heal since she was no longer caring for children. Dr. Krebs prescribed meidcations and urged claimant to finish massage therapy. Dr. Krebs also recommended a magnetic resonance image ("MRI") of claimant's cervical spine. Claimant testified that she and Dr. Krebs discussed an MRI at that time because her neck symptoms were becoming worse.

21. Claimant underwent an MRI scan on June 16, 2014. Dr. Welsh noted that the reason for the exam was claimant's recent fall and the resulting headaches, neck pain, and bilateral extremity numbness and tingling in her hands. Dr. Welsh noted that claimant had mild degenerative spondylosis most severe at C6-C7, where there was moderately severe left neural foraminal stenosis.

22. Claimant returned to Dr. Krebs on June 3, 2014. Dr. Krebs noted that he discussed claimant's case with Ms. Lindell with insurer and reported in his notes that: "Apparently, [Claimant] has had 12 work comp claims at [Employer]….We discussed the indications of the MR of the neck and it was mainly [] to clear the neck."

23. Claimant again returned to Dr. Krebs on June 18, 2014. Dr. Krebs noted that he had received a lengthy letter from insurer which noted that on February 26, claimant sustained an injury but did not initially complain of neck discomfort. Dr. Krebs noted that claimant had a prior history of neck pain and that while insurer did not dispute that the fall occurred, there was a question as to whether or not the fall caused any new injury or aggravation. Dr. Krebs noted that claimant had neck pain at her initial visit, and had also noted her prior neck pain and treatment. Dr. Krebs noted that claimant made complaints of left ankle, right knee, and neck symptoms when he initially saw her on February 27, 2014 and that claimant's neck symptoms had not resolved.

24. Dr. Krebs noted that he, at that point, did not believe that claimant sustained a new injury or permanent aggravation due to her February 26, 2014 fall based on his review of the MRI scan that did not show any terrible findings. Dr. Krebs opined that claimant was at maximum medical improvement ("MMI") with no permanent impairment that is ratable. Dr. Krebs recommended against maintenance care. At the same time, Dr. Krebs reported that he thought claimant's issues were degenerative, but

with some exacerbation. Dr. Krebs recommended additional physical therapy visits, and noted that claimant could be at MMI within six weeks. Insofar as Dr. Krebs report is ambiguous, the ALJ interprets Dr. Krebs report as indicating that claimant had a pre-existing condition that was exacerbated by the work injury and claimant was not at MMI. This is supported by the hand written physician's report that indicated claimant was not at MMI, but was anticipated to be at MMI in six weeks.

25. Claimant returned to Dr. Krebs on July 1, 2014. Dr. Krebs noted that claimant had not improved much, and was now complaining of numbness in both of her hands, right worse than left. Dr. Krebs noted that her neck remained uncomfortable and further noted that: "I did feel that medically probable new injury happened with [claimant] over her neck in February 2014." Dr. Krebs further noted that he felt claimant had a degenerative issue in her neck which was not unusual for a woman her age and felt it would be beneficial to start physical therapy with home stretching and exercise. Dr. Krebs noted that physical therapy records showed decreased range of motion in claimant's neck and that the goal of physical therapy was to reduce her pain and improve her range of motion. Dr. Krebs reported that he hoped to place claimant at MMI by the end of July.

26. Claimant returned to Dr. Krebs on July 22, 2014. Dr. Krebs noted that claimant was continuing to "move slowly along." Dr. Krebs noted that claimant had a degenerative neck condition that pre-existed her work injury. Dr. Krebs prescribed Flexeril. On August 1, 2014, Dr. Krebs noted that he spoke with claimant over the phone, and that he was recommending additional physical therapy treatment.

27. Claimant testified she had not seen Dr. Krebs since July 22, 2014 for this claim because her claim was denied and additional appointments had been cancelled.

28. Claimant testified at hearing that she sustained a separate work-related shoulder injury on September 2, 2014 unrelated to the present claim. Claimant testified that her neck symptoms were already present from the February 26, 2014 injury, and her right shoulder injury aggravated those symptoms, but that no new injury occurred involving her neck. Following the September 2, 2014 injury, claimant testified she was diagnosed with a right rotator cuff tear and was scheduled for shoulder surgery. Claimant remains under treatment for this separate claim.

29. Claimant testified at hearing that her left ankle symptoms resolved within a few weeks of the February 26, 2014 injury. Claimant testified that she still had right knee symptoms, including swelling and pain. Claimant testified that her right knee symptoms had made it difficult to kneel and squat.

30. Claimant testified that she still has neck symptoms from the February 26, 2014 injury including neck pain, stiffness, and tingling and numbness in her right arm. Claimant testified that her neck symptoms now are different then they were when she had treatment previously, because they have not improved with treatment and exercise. Claimant testified that in the past, she could control and improve her neck symptoms

with physical therapy and exercise, but she has not been able to improve her neck symptoms since the February 26, 2014 injury. Claimant also testified that her current neck symptoms are in a different location than the neck symptoms that caused her to seek physical therapy treatment in 2013: her prior pain was at the base of her neck and along her shoulder blades and her current neck pain begins at the base of her skull and goes down the right side of her neck to her shoulder area. Claimant testified that she has been able to tolerate working for employer by managing her symptoms with ice, a TENS unit at home, medications, and rest. The ALJ finds claimant's testimony regarding her symptoms to be credible and persuasive.

31. Respondents referred claimant to Dr. Sharma for an independent medical evaluation ("IME") on August 14, 2014. Dr. Sharma reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Sharma noted that claimant's neck was not really a part of claimant's claim as it was initially reported as a right knee and left ankle claim. Dr. Sharma noted that claimant's MRI confirmed chronic degenerative changes that were not related to her fall on February 26, 2014. Dr. Sharma opined that claimant was at MMI as of April 1, 2014 and provided claimant with a diagnosis of a left ankle sprain, right knee sprain and a final impairment rating of 0% whole person. Dr. Sharma opined claimant did not need maintenance medical treatment related to her claim.

32. Dr. Sharma testified at hearing in this matter. Dr. Sharma's testimony was consistent with his August 14, 2014 IME report. Dr. Sharma testified that claimant's February 26, 2014 injury involved her right knee and left ankle, and that both of those conditions had resolved. Dr. Sharma testified that there were no objective findings in claimant's neck to explain her symptoms, but testified that claimant had undergone a neck MRI with several findings, including foraminal stenosis. Dr. Sharma testified that claimant sustained an accident on February 26, 2014, but not an injury because there was no disability associated with the event.

33. Dr. Sharma acknowledged on cross-examination that claimant's injury resulted in medical treatment for her knee and ankle, but opined that the treatment for claimant's neck was not related to the claimant's work injury. Instead, Dr. Sharma opined that claimant's neck symptoms that had manifested themselves sporadically prior to claimant's injury developed again after her injury and unrelated to her fall.

34. Dr. Sharma testified about claimant discontinuing her physical therapy care in November 2013. He testified that the therapist's January 22, 2014 note stated that "intervention goals and functional outcomes not achieved," and therefore claimant's neck symptoms must have still been present on February 26, 2014. The ALJ credits claimant's testimony that her neck symptoms had resolved prior to February 26, 2014 over Dr. Sharma's testimony that hypothesized that claimant's neck conditions continued to persist based on his review of the physical therapy records.

35. Dr. Sharma testified that although claimant fell and landed on the floor on February 26, 2014, developed neck pain later in the evening, and reported neck pain to

her doctor the following day, it is more likely that claimant's neck symptoms developed "spontaneously." The ALJ finds Dr. Sharma's testimony in this regard to be not credible.

36. The ALJ finds that claimant has proven that it is more likely than not that she sustained a compensable injury to her left ankle, right knee and neck on February 26, 2014. The ALJ notes that even respondents expert appears to agree that claimant injured her left ankle and right knee on February 26, 2014. Respondents argue that the claim as a whole is not compensable because claimant's injury did not result in a disability. However, on the issue of compensability, claimant needs only to establish that the accident resulted in disability or the need for medical treatment.

37. In this regard, the ALJ credits the medical opinions expressed by Dr. Krebs in his records over the contrary opinions expressed by Dr. Sharma in his report and testimony and finds that claimant has proven that it is more likely than not that she suffered a compensable injury arising out of and in the course of her employment with employer. The ALJ finds claimant's testimony regarding her symptoms to be consistent with the medical records in evidence. The ALJ credits claimant's testimony that she injured her left ankle and right knee just when she fell while working on February 26, 2014. The ALJ further credits claimant's testimony that she did not have neck symptoms in the days prior to February 26, 2014 and did not have neck symptoms on the morning of February 26, 2014 before the injury occurred. The ALJ credits claimant's testimony that she developed neck symptoms after returning home the evening of February 26, 2014 and finds that claimant has proven that it is more likely than not that her neck became symptomatic when she tripped and fell while working on February 26, 2014.

38. The ALJ notes that claimant reported the existence of the neck symptoms to Dr. Krebs less than 24 hours after the accident and finds that claimant has established that it is more likely than not that the fall on February 26, 2014 caused, aggravated, accelerated or combined with her pre-existing condition to result in the need for medical treatment.

39. The ALJ credits the medical opinions expressed by Dr. Krebs in his records and claimant's testimony over the contrary opinions expressed by Dr. Sharma in his report and testimony and finds that claimant has proven that it is more likely than not that the medical treatment she received from Dr. Krebs, Dunnagan Chiropractic, Montrose Massage Therapy, and from the physical therapists on referral from Dr. Krebs was reasonable and necessary to cure and relieve the claimant from the effects of her industrial injury. Specifically, the ALJ finds that the office visits with Dr. Krebs after the February 26, 2014 injury were reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury. Respondents are liable for the medical treatment provided by Dr. Krebs and his referrals pursuant to the Colorado Medical Fee Schedule set forth by the Division of Workers' Compensation.

40. Claimant testified that her monthly pay at the time of the injury was $2,843.75. Claimant testified that she received a pay raise at the beginning of the 2014-2015 school year to $2,913.83 per month. Claimant argues that her AWW should be based on the amount she was paid after her raise at the beginning of the 2014-2015 school year. The ALJ is not persuaded.

41. Claimant's AWW is to be established by the rate at which claimant was paid at the time of the injury. Claimant was earning a monthly salary of $2,843.75 at the time of her injury. This results in an AWW of $656.25 ($2,843.75 x 12 divided by 52).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that she suffered compensable injury arising out of and in the course of his employment with employer when she fell at work on February 26, 2014.

5. Respondents argue at hearing that claimant's claim is not compensable because it did not produce disability. However, case law does not require that an injured worker establish that the injury result in disability where the injury aggravates, accelerates or combines with a pre-existing disease to produce the need for treatment. In fact, the vast majority of work related injuries result in the need for treatment, but not necessarily disability. This does not make these injuries "non-compensable" accidents and holding that there needs to be a finding of "disability" before the claim is determined to be compensable could result in significant issues in which medical treatment is necessary, but the injury doesn't result in a disability. In fact, ijured workers could end up facing the possibility of having to pay out of pocket for medical treatment that is reasonable and necessary if their injury does not result in a "disability". This is not the intent of the Act.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, claimant has established that the medical treatment provided by Dr. Krebs for her ankle, knee and neck symptoms was reasonable and necessary to cure and relieve claimant from the effects of her work related injury. Therefore, respondents are liable for the cost of the medical treatment provided by Dr. Krebs and his referrals pursuant to the Colorado Medical Fee Schedule established by Division of Workers' Compensation.

8. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). The general assembly has established that the phrase "at the time of injury" as used in subsection (2) of Section 8-42-102 refers to the date of the employee's accident. When subsection (2) of Section 8-42-102(2) is used to determine a worker's AWW, the wage on the date of the accident shall be used. Section 8-42-102(5)(a), C.R.S.

9. While the ALJ may still have discretion to use an alternative method for calculating an injured worker's AWW under the statute, the ALJ in this case determines that such discretion is not necessary under the facts of this case.

10. Therefore, the ALJ determines that Claimant's AWW is properly established at the time of her accident as $656.25.

ORDER

It is therefore ordered that:

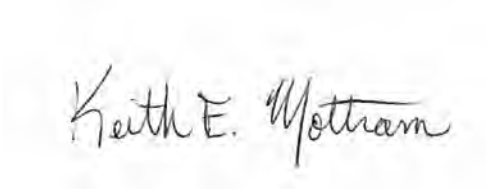
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve the claimant from the effects of her industrial injury provided by Dr. Krebs and his referrals to claimant's left ankle, right knee and neck pursuant to the Colorado Medical Fee Schedule.

2. Claimant's AWW is established to be $656.25.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
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Grand Junction, Colorado 81501

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ISSUES

The issues for determination are:

1. Compensability;

2. Medical benefits;

3. Temporary partial disability benefits;

4. Temporary total disability benefits; and,

5. Whether the right of selection of the authorized treating physician has passed to the claimant.

STIPULATION

The parties stipulated that if the claim were found to be compensable that the claimant's average weekly wage is $556.10.

FINDINGS OF FACT

1. The claimant is a 52-year old cleaner who at the time of the claimed injury on June 10, 2014 worked for the respondent-employer. The claimant was hired by the respondent-employer on September 5, 2011.

2. The claimant's duties consisted of cleaning houses at Schriever Air Force Base for military personnel. Her duties included cleaning kitchens, bathrooms, windows, walls, floor, fixtures, and carpets. She was responsible for carrying all cleaning supplies to and from the houses she cleaned. Her cleaning supplies included a ladder, which she described as heavy. The claimant needed to use the ladder on a daily basis to reach things that needed to be cleaned.

3. The claimant began experiencing pain in her low back in May, 2014 as a result of carrying and working with the ladder.

4. The claimant was off work the week of May 26, 2014. Her low back pain eased during this time.

5. The claimant returned to work on June 2, 2014. Her low back pain increased due to lifting and carrying a ladder.

6. The respondent-employer's maintenance technician, Ed Romero, testified that the claimant told him she was having low back pain as a result of working with the ladder. He was familiar with the type of ladder the claimant used, and considered it to be heavy. The ALJ finds Mr. Romero's testimony to be credible and persuasive.

7. The claimant worked 10 hours on Monday, June 9, 2014. On June 10, 2014, she participated in a "stretch and flex" session at the respondent-employer's direction prior to beginning her work duties. Her low back pain was severe. She reported her low back pain to Steve Oser, the respondent-employer's Safety Manager. She told him her back pain was caused by working with the heavy ladder. The claimant was assigned to count inventory in a warehouse the rest of that day. She worked only 2.5 hours, then left to see a chiropractor.

8. The respondent-employer did not give the claimant a list of physicians to choose from to treat her injury. The respondent-employer did not post notices that a work related injury must be reported in writing.

9. The claimant saw chiropractor Travis Mauzy, D.C., on June 10, 2014. He noted, "…[the claimant] was in my office due to severe acute pain. It is my recommendation that she not work until I can re-evaluate her on Thursday."

10. The claimant was off work as a result of the effects of her injury on Wednesday, June 11 and Thursday, June 12, 2014. She returned to work on Friday, June 13, 2014 and was assigned to return to her regular job as a cleaner.

11. The claimant saw Sonia Seufer, M.D., at Colorado Springs Health Partners on July 31, 2014. Dr. Seufer issued work restrictions. The claimant presented Dr. Seufer's note to the respondent-employer.

12. On August 1, 2014, Dr. Seufer wrote a note indicating, "[The claimant] is under treatment for a back injury and sciatica which I feel is a work related injury." The claimant presented Dr. Seufer's note to the respondent-employer.

13. The respondent-employer provided modified duty work to the claimant beginning August 1, 2014.

14. The claimant presented to Dr. Walter Larimore at Concentra Medical Center on August 4, 2014. Dr. Larimore noted she was "…sent here for a one-time evaluation." He reported, "…51 y/o WWF with no history of back pain or injury who had a lumbar strain WC injury treated here from 10/28/13 until MMI on 11/18/13. Was asymptomatic until Monday, June 2. For the two weeks prior to that was having to carry a very heavy ladder. Was off from 5/29 through 6/1 to see her son graduate. Returned to work on Monday, June 2 and began to have bilateral low back pain that she believes was aggravated by a combination of carrying the heavy ladder and having to work 10 hours or more a day doing house cleaning on the Army post. Initial pain was noted on Monday night, 6/2/14 and worsened over that week. As the pain worsened, it also began to radiated [sic] down the left buttock…" Dr. Larimore diagnosed "lumbar pain with radiation down left leg," and "depression."

15. On August 5, 2014, Dr. Larimore reported, "…In my opinion, based upon her history and physical, there is a [greater than] 50% chance that these problems are due to a NEW work-related injury and NOT to her previous injury." [Emphasis in original]. Dr. Larimore's recommendations included medications, psychological therapy, physical therapy, and work restrictions.

16. Dr. Larimore continued the claimant's work restrictions on September 24, 2014.

17. On October 1, 2014, Kenneth Ginsburg, P.A., at Concentra reported, "…It was and is my opinion that this is a new injury and not related to her low back injury that was cared for under WC from 10/28/13 until 11/18/13. Has finally been approved for care here." PA Ginsburg noted , "...Her symptoms are about the same, she still has left low back pain radiating down her left leg…" PA Ginsburg diagnosed lumbar strain and sacroiliitis.

18. On October 2, 2014, Dr. Randall Jones of Concentra reported, "…This has finally been deemed a new injury. She is working light duty. She has not had MRI or pain specialist yet…" Dr. Jones referred the claimant for pain management with Dr. Jenks; for psychological treatment; and for MRI testing of both the lumbar spine and SI joints to rule out disc pathology.

19. MRI of the lumbar spine on October 21, 2014 revealed a L3-4 disc herniation/protrusion and annular tear displacing the descending nerve roots on the left side.

20. On October 23, 2014, Dr. Jones at Concentra referred the claimant to Dr. Polvi for chiropractic and/or acupuncture treatment. He also referred the claimant to Dr. Jenks "…for consideration of ESI." The referrals were not authorized.

21. The respondent-employer sent a letter to the claimant on October 28, 2014, advising that it "…has run out of meaningful work for you to do as a cleaner that will meet the restrictions presented on the [sic] October 23, 2014. As a result of this, the expectation is that you will file for a leave of absence and not return to work until you can perform the duties of your job." The claimant has been unable to work since then as a result of the effects of her injury.

22. The respondent-insurer arranged for A.C. Lotman, M.D., to perform a medical records review. Dr. Lotman issued a report dated November 5, 2014. Dr. Lotman opined that the medical treatment the claimant has received "…has been reasonable and necessary, and related to the June 10, 2014, DOL." Dr. Lotman opined that the claimant's "…current symptoms are causally related to the DOL of June 10, 2014." The ALJ finds those opinions of Dr. Lotman to be credible and persuasive.

23. Jack Rook, M.D., examined the claimant on November 12, 2014 and issued a report of the same date. Dr. Rook testified consistently with his report. He testified regarding the claimant's symptoms, his findings on physical examination, and his diagnosis. Dr. Rook opined the claimant sustained an injury in the form of an occupational disease, resulting from her working with and carrying the heavy ladder that the claimant described. Dr. Rook opined the claimant's symptoms and objective physical findings are consistent with the pathology demonstrated on her lumbar MRI. Dr. Rook opined the claimant has not reached MMI, and needs additional testing and treatment. The ALJ finds Dr. Rook's opinions to be credible and persuasive.

24. The claimant has selected Dr. Rook to treat her for the effects of her occupational disease.

25. The ALJ finds that the claimant has established that it is more likely than not that she suffered an occupational disease arising out of and in the course of her employment with the respondent-employer. The date of onset of the claimant's disability was June 10, 2014.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury or disease arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, 12 P.3d. at 846.

5. The ALJ finds the claimant to be credible.

COMPENSABILITY OF THE OCCUPATIONAL DISEASE CLAIM

5. An "occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. Under this statute the claimant bears the burden to prove that the disease was "directly and proximately caused" by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

7. Expert opinion is neither necessary nor conclusive on the issue of causation. However, where expert opinions are presented it is for the ALJ to assess their weight and credibility. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The question of whether the claimant has proven causation is one of fact for resolution by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 1999).

8. As found, the claimant proved by a preponderance of the evidence that the disease affecting her lumbar spine was proximately caused, intensified or aggravated by her use, over time, of the heavy ladder in her workplace. The ALJ is persuaded by the opinions of Dr. Lotman and Dr. Rook, as well as they opinions of the Concentra medical personnel, that the cause of the claimant's lumbar spine problems was her work activities for the respondent-employer.

MEDICAL BENEFITS

9. Because this matter is compensable, the respondent-insurer is liable for medical treatment which is reasonably necessary to cure or relieve the the claimant from the effects of her industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). All of the medical treatment the claimant received for her industrial injury, from June 10, 2014 and onward, was reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

RIGHT OF SELECTION OF THE TREATING PHYSICIAN

10. Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the respondent-employer failed to furnish the claimant with a list of authorized physicians. Accordingly, the right of selection passed to the claimant and she selected Jack Rook, M.D., to treat her. Dr. Rook is an authorized treating physician.

TEMPORARY PARTIAL DISABILITY BENEFITS

12. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Here, as a result of the injury the claimant experienced an unspecified partial wage loss beginning June 10, 2014 and continuing through and including October 27, 2014.

TEMPORARY TOTAL DISABILITY BENEFITS

13. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

14. Here, the claimant was working modified duty effective August 1, 2014 until the respondent-employer advised her on October 28, 2014 that it no longer had such work available for her. The claimant has been unable to return to work since that time due to the effects of her occupational disease. The disease caused a disability lasting more than three shifts, claimant left work as a result of the disability, and the disability resulted in actual wage loss. The claimant has established by a preponderance of the evidence that she is entitled to TTD benefits effective October 28, 2014, and continuing until such benefits can be terminated pursuant to law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The date of onset of Claimant's disability is June 10, 2014.

3. The respondent-insurer is liable for payment of all of the treatment received since June 10, 2014 as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

4. Dr. Rook is the claimant's primary authorized treating physician.

5. The respondent-insurer shall pay TPD benefits to the claimant beginning June 10, 2014 and continuing through and including October 27, 2014 to be determined by the parties.

6. The respondent-insurer shall pay TTD benefits to the claimant beginning October 28, 2014, and continuing until such benefits can be terminated pursuant to law.

7. The respondent-insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Garden Associate. His job duties involved unloading bundles of tools from wooden crates, stocking merchandise, assisting customers and cleaning. Claimant was required to squat, bend, kneel, lift, twist and pivot on a daily basis for extended periods of time.

2. Claimant also worked as a free-lance mechanic on an occasional basis prior to and during his employment with Employer. He fixed brakes, timing belts and motor mounts. Claimant performed most of this work in a seated position on the floor or leaning over the engines.

3. Claimant testified that on June 23, 2014 he was removing shovels from crates and stocking them on shelves. He noticed a sharp pain and warmth in his right hip. Claimant reported that the pain quickly subsided and he finished his shift without any further problems.

4. On June 24, 2014 Claimant was unpacking, lifting and stocking lawnmowers for approximately two hours when he noticed a popping sensation in his right hip. Subsequently, a customer requested assistance with loading a lawnmower into his vehicle. Claimant loaded the lawnmower onto a flat cart then into the customer's car. The popping and pain increased as Claimant began walking to the vehicle. As Claimant was returning to the store, he saw a supervisor walking toward him and asked her to feel the popping in his right hip area. The supervisor noticed that the popping was not right and advised him to seek medical attention.

5. On June 24, 2014 Claimant visited Katherine Drapeau, D.O. at OccMed Colorado for an examination. Claimant reported that in the early afternoon of June 23, 2014, after loading and unloading merchandise throughout the day, he noticed warmth and pain in his right hip greater trochanteric area. Dr. Drapeau noted, "[t]his morning when he went to work his hip started making popping sounds every time he stepped." She remarked that Claimant had no prior history of a right hip injury. Dr. Drapeau

summarized that Claimant had tenderness over the right greater trochanter and right hip popping when walking. She diagnosed Claimant with right greater trochanteric bursitis.

6. On July 1, 2014 Jim Keller, PA-C stated that his objective findings were consistent with a work-related mechanism of injury. He diagnosed Claimant with right greater trochanteric bursitis. PA-C Keller referred Claimant to physical therapy, wrote a prescription for Tramadol and recommended continued Ibuprofen.

7. On July 8 and July 22, 2014 Dr. Drapeau's objective findings remained consistent with her initial diagnosis of right greater trochanteric bursitis and a right hip sprain from a work-related mechanism of injury. Dr. Drapeau stated, "[b]ecause of the increase in pain and the palpable popping, I would like to make sure there is nothing wrong with the labrum of the hip joint, and MRI/arthrogram has been ordered."

8. A July 31, 2014 MRI/arthrogram of Claimant's right hip revealed a full thickness 8 to 12 mm anterior labral tear very near the midequatorial line. There were underlying features of femoroacetabular impingement. On August 1, 2014 PA-C Keller referred Claimant to Brian White, M.D. for orthopedic treatment of his hip.

9. On August 19, 2014 Brian White, M.D. evaluated Claimant and recommended right hip arthroscopic surgery to repair Claimant's labral tear. However, he noted that Claimant would need to lose about 40 pounds prior to the surgery.

10. On September 4, 2014 Claimant visited Greg Smith, M.D. for an examination. Dr. Smith noted that on June 23, 2014 Claimant had been unloading, lifting and stocking merchandise weighing up to 100 pounds when he developed pain and popping in his right hip. After conducting a physical examination, Dr. Smith diagnosed Claimant with a right hip sprain/strain, right hip greater trochanteric bursitis and an acute labral tear. He agreed with Dr. White that Claimant required surgery to repair his right hip condition. Dr. Smith remarked that Claimant did not exhibit any signs of prior right hip degeneration or injury. He summarized that "[a]fter going through his review of history and the MRI, I am uncertain how anyone could come to the conclusion that this was not a work-related injury, unless there is something that the insurance company knows previously that is not in the records. This injury did occur on the stated date and is work comp. related, at this point in time."

11. On September 8, 2014 Respondents filed a Notice of Contest challenging Claimant's claim for Workers' Compensation benefits.

12. On October 22, 2014 Claimant underwent an independent medical examination with Edward M. Healey, M.D. He issued a report and testified at the hearing in this matter. He reported that Claimant first experienced a burning sensation in his right hip on June 23, 2014 after stocking tools for Employer for two hours. Dr. Healey remarked that Claimant's pain returned on the following day after moving lawnmowers for one hour. He concluded that Claimant had pre-existing right hip abnormalities including a femoral acetabular impingement with increased alpha angle, pistol grip appearance of the femoral head and neck junction and mild dysplasia. He

noted that the pre-existing condition predisposed Claimant to having a labral tear. Dr. Healey explained that Claimant's repetitive job activities for Employer caused his pre-existing condition to become symptomatic and resulted in a labral tear. He noted that the Impingement/Labral Tear section of the Medical Treatment Guidelines states that impingement abnormalities are usually congenital. However, the condition may be aggravated by repetitive rotational forces such as twisting, squatting and kneeling.

13. Dr. Healey concurred with doctors Smith and White that Claimant had a work-related injury to his right hip that requires surgical correction. Dr. Healey stated that if Claimant does not receive the surgical procedure, he will have increasing, ongoing degenerative changes in the right hip and eventually require a right hip replacement. He noted that Claimant also needs to be referred to a dietician to help him with weight loss so he can reach 240-pounds as recommended by Dr. White. Dr. Healey also maintained that Claimant requires a health club membership with a pool so he can perform pool exercises to help him lose weight. Finally, in regard to right lateral femoral cutaneous nerve neuropathy, Claimant needs further evaluation with an ultrasound and possible cortisone injections. Dr. Healey also commented that it would be beneficial to obtain a lumbar MRI to make sure there is no evidence of an L2-3 disc herniation contributing to Claimant's right hip pain and right thigh numbness.

14. On October 10, 2014 Allison M. Fall conducted an independent medical examination of Claimant and issued a report. On December 3, 2014 the parties conducted the post-hearing evidentiary deposition of Dr. Fall. Dr. Fall explained that Claimant's MRI was not consistent with an overuse-type of injury. The MRI revealed an acute labral tear with no signs of past degeneration. Dr. Fall determined that the MRI showed a configuration of the hip that leads to impingement and tends to wear and tear the labrum. She noted that the type of tear had nothing to do with lifting, walking or other work activities.

15. Dr. Fall determined that Claimant's work duties would not be considered repetitive activities. She noted that his job description included many different types of duties including moving merchandise, helping customers, cleaning and walking down aisles. Dr. Fall testified that Claimant's work involved many different movements and activities throughout the day. She explained that the Medical Treatment Guidelines do not have a chapter for cumulative trauma disorders to the hip because the injury would be unusual.

16. Dr. Fall also noted that there was no evidence to support that Claimant sustained a traumatic, acute labral tear on the morning of June 23, 2014 or the afternoon of June 24, 2014. She commented that Claimant's reports of feeling warmth and momentary pain on June 23, 2014 and popping on June 24, 2014 were instead consistent with the symptoms of a pre-existing labral tear. Dr. Fall testified that Claimant had a pre-existing configuration of the hip that predisposed him to impingement of the hip and led to the labral tear. Therefore, she concluded that Claimant's right hip condition was not caused by his employment for Employer.

17. Claimant has established that it is more probably true than not that he sustained a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer. On June 23, 2014 Claimant was removing shovels from crates and stocking them on shelves. He noticed a sharp pain and warmth in his right hip. Claimant reported that the pain quickly subsided and he finished his shift without any further problems. On the following day Claimant was unpacking, lifting and stocking lawnmowers for approximately two hours when he noticed a popping sensation in his right hip. Claimant's right hip popping subsequently increased as he walked to a customer's car to load a lawnmower. The medical records reflect that Claimant consistently reported his mechanism of injury and suffered an aggravation of his pre-existing right hip condition.

18. Dr. Drapeau initially diagnosed Claimant with right greater trochanteric bursitis and a right hip sprain from a work-related mechanism of injury. Moreover, PA-C Keller also noted that his objective findings were consistent with a work-related mechanism of injury. A July 31, 2014 MRI/arthrogram of Claimant's right hip revealed a full thickness 8 to 12 mm anterior labral tear very near the midequatorial line. There were underlying features of femoroacetabular impingement. Dr. Smith subsequently diagnosed Claimant with a right hip sprain/strain, right hip greater trochanteric bursitis and an acute labral tear. He agreed with Dr. White that Claimant required surgery to repair his right hip condition. Dr. Smith remarked that Claimant did not exhibit any signs of prior hip degeneration or injury. Finally, Dr. Healey concluded that Claimant had pre-existing right hip abnormalities including a femoral acetabular impingement. He noted that the pre-existing condition predisposed Claimant to suffering a labral tear. Dr. Fall also determined that Claimant had a pre-existing configuration of the hip that predisposed him to impingement of the hip and led to the labral tear. However, she concluded that Claimant's right hip condition is not related to his employment for Employer because his job duties were not repetitive and his symptoms were consistent with a pre-existing labral tear. Nevertheless, Dr. Fall's analysis failed to adequately consider the aggravation of a pre-existing right hip condition. Although Claimant suffered from a pre-existing condition, the temporal proximity of his symptoms and medical records reflect that his work activities on June 23-24, 2014 combined with his pre-existing right hip condition to produce a need for medical treatment.

19. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Dr. White recommended right hip surgery and doctors Smith and Healey concurred with the surgical procedure. Accordingly, Claimant is entitled to reasonable and necessary medical treatment in the form of right hip arthroscopic surgery to repair a labral tear as recommended by Dr. White.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he sustained a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer. On June 23, 2014 Claimant was removing shovels from crates and stocking them on shelves. He noticed a sharp pain

and warmth in his right hip. Claimant reported that the pain quickly subsided and he finished his shift without any further problems. On the following day Claimant was unpacking, lifting and stocking lawnmowers for approximately two hours when he noticed a popping sensation in his right hip. Claimant's right hip popping subsequently increased as he walked to a customer's car to load a lawnmower. The medical records reflect that Claimant consistently reported his mechanism of injury and suffered an aggravation of his pre-existing right hip condition.

7. As found, Dr. Drapeau initially diagnosed Claimant with right greater trochanteric bursitis and a right hip sprain from a work-related mechanism of injury. Moreover, PA-C Keller also noted that his objective findings were consistent with a work-related mechanism of injury. A July 31, 2014 MRI/arthrogram of Claimant's right hip revealed a full thickness 8 to 12 mm anterior labral tear very near the midequatorial line. There were underlying features of femoroacetabular impingement. Dr. Smith subsequently diagnosed Claimant with a right hip sprain/strain, right hip greater trochanteric bursitis and an acute labral tear. He agreed with Dr. White that Claimant required surgery to repair his right hip condition. Dr. Smith remarked that Claimant did not exhibit any sign of prior hip degeneration or injury. Finally, Dr. Healey concluded that Claimant had pre-existing right hip abnormalities including a femoral acetabular impingement. He noted that the pre-existing condition predisposed Claimant to suffering a labral tear. Dr. Fall also determined that Claimant had a pre-existing configuration of the hip that predisposed him to impingement of the hip and led to the labral tear. However, she concluded that Claimant's right hip condition is not related to his employment for Employer because his job duties were not repetitive and his symptoms were consistent with a pre-existing labral tear. Nevertheless, Dr. Fall's analysis failed to adequately consider the aggravation of a pre-existing right hip condition. Although Claimant suffered from a pre-existing condition, the temporal proximity of his symptoms and medical records reflect that his work activities on June 23-24, 2014 combined with his pre-existing right hip condition to produce a need for medical treatment.

Medical Benefits

8. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

9. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Dr. White recommended

right hip surgery and doctors Smith and Healey concurred with the surgical procedure. Accordingly, Claimant is entitled to reasonable and necessary medical treatment in the form of right hip arthroscopic surgery to repair a labral tear as recommended by Dr. White.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer.

2. Claimant is entitled to reasonable and necessary medical treatment in the form of right hip arthroscopic surgery to repair a labral tear as recommended by Dr. White.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 26, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

- Did Claimant prove by a preponderance of the evidence that physical therapy treatments provided in the spring of 2014 constituted reasonable and necessary maintenance medical treatment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 8 were received into evidence. Respondents' Exhibits A through C were received into evidence.

2. Claimant seeks an order requiring the Insurer to pay for 8 physical therapy (PT) visits that occurred from April to June 2014. These bills that were incurred at Performax Physical Therapy (Performax) and were for treatment of Claimant's left knee. The total amount billed for these services was $1043.

3. Claimant sustained admitted injuries on October 26, 2006 when she fell on both knees and also injured her back.

4. Claimant's treatment for her injuries included a left total knee arthroplasty (TKA) performed by Philip Stull, M.D. This surgery occurred on April 21, 2008.

5. On May 27, 2010 Insurer filed a Final Admission of Liability (FAL). The FAL admitted Claimant reached maximum medical improvement (MMI) on February 12, 2010. The FAL further admitted for permanent partial disability (PPD) benefits based on 26 percent whole person impairment, 28% of the right lower right lower extremity and 29% of the left lower extremity. The FAL also admitted for post-MMI "maintenance medical benefits" if "reasonable, necessary and related to the compensable injury."

6. Claimant credibly testified that Dr. Stull and Sharon Walker, M.D., were authorized treating physicians (ATP) with respect to her post-MMI medical care.

7. Claimant credibly testified that in March 2014 Dr. Walker referred her to Dr. Stull for examination of the left knee. At that time Claimant's left knee would hyperextend and "give out."

8. On March 21, 2014 Dr. Stull diagnosed "PCL deficiency (L) TKA." He prescribed PT "3 times per week for 8 weeks."

9. On April 11, 2014 Dr. Walker diagnosed "(L) TKA with loosening of joint; PCL deficiency." Dr. Walker referred Claimant to Performax for pool therapy and for "land PT quad strength."

10. On May 12, 2014 John Obermiller, M.D., issued a medical report assessing the reasonableness and necessity of the PT. Dr. Obermiller reviewed Dr. Stull's office note from March 21, 2014. Dr. Stull had written that 6 months previously he prescribed anti-inflammatories and "therapy" but Claimant was still "having some difficulties with left knee" including increased pain and "instability symptoms." Dr. Stull's impression was posterior cruciate (PCL) instability. Dr. Stull considered a surgical referral but stated he felt that "bracing and PT [were] warranted." Dr. Obermiller referred to the Medical Treatment Guidelines (MTG) and opined that the MTG would support PT "five times a week, for four to eight weeks, for an acute injury." However, Dr. Obermiller opined the available medical documentation did not provide "clear objective documentation of treatment rendered recent [sic]." Specifically Dr. Obermiller stated that there was "no clear documentation" of a need for PT for an injury that occurred in 2006. He further opined Claimant should be "well versed in a self-directed home-based exercise program." Based on the MTG and his review of the documentation Dr. Obermiller opined that the request for PT should not be "certified."

11. Claimant credibly testified she underwent 8 sessions of PT at Performax before she learned that further PT was denied. Claimant credibly testified that although the PT at Performax provided some relief of her symptoms it did not make a "major difference." As a result, she sought "advice" from Dr. Arthur. Dr. Arthur told the claimant she had a "loose ligament." She then saw Dr. Miner who recommended she undergo a left knee replacement surgery.

12. On September 30, 2014 Dr. Miner performed surgery described as a "single component (tibial component revision) left total knee arthroplasty." The pre-operative diagnosis included "failed left total knee arthroplasty due to: flexion extension instability, failure of the polyethylene insert with delamination and accelerated wear of the posterior aspect of the polyethylene insert." (Respondents' Exhibit A p. 5).

13. After the September 2014 revision surgery Claimant was again prescribed PT. Claimant attended PT. On January 5, 2015 Claimant advised Dr. Walker that she was improving and no longer experienced the "left knee giving way or locking or clicking." Claimant told Dr. Walker that she did not believe she needed formal PT any longer and wanted to "start using the gym for her therapy."

14. Claimant credibly testified she has experienced a good result from the September 2014 revision surgery.

15. On March 24, 2015 Lawrence Lesnak, D.O., performed an independent medical examination (IME) of Claimant. This IME was performed at the request of Respondents' counsel. Dr. Lesnak is board certified in physical medicine and rehabilitation and is level II accredited.

16. On March 24, 2015 Dr. Lesnak issued a written report concerning the IME. Dr. Lesnak took a history from Claimant, performed a physical examination and reviewed pertinent medical records. Dr. Lesnak wrote that he agreed with Dr. Obermiller that "there was no specific evidence which required formal physical therapy" prior to the September 30, 2014 surgery. Dr. Lesnak explained that "it appeared the patient was having some degree of hardware failure of her left knee prosthesis which ultimately led to surgical intervention." In these circumstances Dr. Lesnak opined that the PT performed in the spring of 2014 before surgery was not "reasonable or necessary, or related to the 10/26/2006 occupational injury."

17. Dr. Lesnak testified at the hearing. Dr. Lesnak stated that in the spring of 2014 Dr. Walker noted it was "likely" Claimant's left knee prosthesis had "loosened." He further noted that Dr. Arthur and Dr. Miner subsequently diagnosed Claimant with a loosening of the "polyethylene component" of her left knee prosthesis. Dr. Lesnak stated the polyethylene component of a prosthetic knee is a "plastic part" that serves as artificial menisci. Dr. Lesnak explained the polyethylene component wears out over time and when it does the patient can experience symptoms of instability in the knee. Dr. Lesnak opined that in light of the failure of the polyethylene component of the prosthesis the PT prescribed to Claimant in the spring of 2014 would not have been beneficial. Dr. Lesnak explained that PT would not help a patient with laxity of the prosthesis and he did not understand Dr. Stull's and Dr. Walker's reasons for prescribing PT. Dr. Lesnak expressed his opinions to a reasonable degree of medical probability.

18. On cross-examination Dr. Lesnak testified that he agreed with Dr. Obermiller that the PT performed in the spring of 2014 was not reasonable and necessary. However, Dr. Lesnak stated that he did not necessarily agree with Dr. Obermiller's reasoning. Dr. Lesnak explained that the MTG for lower extremity pain do not apply to post-MMI maintenance treatment. Therefore, Dr. Lesnak, unlike Dr. Obermiller, did not use the MTG in arriving at his conclusion that the PT was not reasonable and necessary.

19. Claimant failed to prove it is more probably true than not the PT she received at Performax from April through June 2014 was reasonable and necessary to relieve the effects of the industrial injury or prevent deterioration of her condition.

20. Dr. Lesnak credibly and persuasively opined that in the spring of 2014 Claimant's left knee symptoms of pain and instability were related to failure of the polyethylene component of the prosthetic knee. He also credibly opined that PT would be of no benefit for this condition and that bracing and surgery were the indicated treatments.

21. Dr. Lesnak's opinion that Claimant was suffering from laxity caused by failure of the polyethylene component is corroborated by the fact that in the spring of 2014 both Dr. Walker and Dr. Stull diagnosed Claimant with PCL instability. Dr. Arthur and Dr. Miner agreed Claimant should undergo surgery. In September 2014 Dr. Miner performed a revision surgery because of a "failed left total knee arthroplasty due to:

flexion extension instability, failure of the polyethylene insert with delamination and accelerated wear of the posterior aspect of the polyethylene insert."

22. Dr. Lesnak's opinion that PT was not a reasonable and necessary treatment in the spring of 2014 is underscored by Claimant's own actions. Claimant admitted the PT was not alleviating her condition and consequently she sought consultations with Dr. Arthur and Dr. Miner. Indeed, Claimant elected to undergo revision surgery by Dr. Miner in September 2014. Claimant also admitted that the surgery produced a good result.

23. Neither Dr. Stull nor Dr. Walker offered any credible and persuasive explanation of why PT was a reasonable and necessary treatment for Claimant's knee condition in the spring of 2014. Neither did either of them offer a credible and persuasive refutation of Dr. Lesnak's argument that PT was not an effective treatment for instability caused by failure of the polyethylene component of the knee prosthesis.

24. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of the Respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REASONABLENESS AND NECESSITY OF PHYSICAL THERAPY

Claimant contends a preponderance of the evidence establishes that the PT she received from Performax in the spring of 2014 constituted reasonable and necessary treatment for her left knee condition. Respondents, relying on the opinions of Dr. Lesnak and Dr. Obermiller argue the PT was not reasonable and necessary considering that Claimant's diagnosis was PCL laxity and failure of the prosthesis.

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the date of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the Respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Teegardin v. J.C. Penney Co.,* WC 4-748-106-02 (ICAO January 17, 2014). When the Respondents challenge Claimant's request for specific medical treatment Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether Claimant proved that specific treatment was reasonable and necessary to relieve or maintain her condition after MMI is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As determined in Findings of Fact 19 through 23, Claimant failed to prove it is more probably true than not that the PT provided by Performax in the spring of 2014 constituted reasonable and necessary maintenance treatment. Rather, the ALJ credits the opinions of Dr. Lesnak that Claimant was suffering from instability caused by failure of the left knee prosthesis and that PT was not a reasonable and necessary treatment for that condition. The ineffectiveness of PT was emphasized by Claimant's decision to seek consultations with Dr. Arthur and Dr. Miner because the PT was not providing sufficient relief from her ongoing symptoms. Moreover, Claimant ultimately underwent surgery and admitted that she experienced a good result. Dr. Stull and Dr. Walker did not credibly and persuasively refute Dr. Lesnak's opinion that PT was notan appropriate treatment for Claimant's condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for payment of physical therapy expenses in the amount of $1043 is denied.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 8, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that a topical cream containing the drug ketamine constitutes reasonable and necessary post-maximum medical improvement medical treatment designed to relieve ongoing symptoms associated with complex regional pain syndrome?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 7 were admitted into evidence. Respondents' Exhibits A through D were admitted into evidence.

2. Claimant sustained a compensable injury to her right ankle in 2007. Subsequently she underwent at least 7 surgical procedures designed to alleviate ongoing ankle and right lower extremity pain.

3. On April 9, 2011 the Insurer filed a Final Admission of Liability including an admission for ongoing medical benefits after maximum medical improvement (MMI).

4. On March 24, 2014 J. Tashof Bernton, M.D., an authorized treating physician, examined Claimant. He assessed "chronic pain in the right foot and ankle following multiple surgeries." Dr. Bernton expressed concern for potential complex regional pain syndrome (CRPS) given the "appearance of the foot."

5. On May 12, 2014 Claimant underwent an Autonomic Testing Battery that demonstrated a "positive diagnostic assessment" for CRPS.

6. On August 25, 2014 Dr. Bernton noted Claimant had a positive diagnostic response to an initial sympathetic nerve block. Dr. Bernton stated that in conjunction with the results of the Autonomic Testing Battery Claimant met the Colorado Medical Treatment Guidelines (MTG) criteria for CRPS.

7. On September 22, 2014 Dr. Bernton stated Claimant had undergone a second sympathetic block. Dr. Bernton noted Claimant experienced transient improvement of her pain but experienced marked coldness of the entire leg with swelling and dramatic color change. Dr. Bernton stated that he did not want to move

forward with further blocks because Claimant "had a paradoxical response to blocks with some overall worsening of her condition, both subjectively and objectively."

8. On September 30, 2014 Dr. Bernton documented discoloration of Claimant's right leg from foot to mid thigh with evident swelling and "some hyperalgesia to light touch."

9. On December 23, 2014 Dr. Bernton noted that Claimant had CRPS of the right leg with evidence of ipsilateral spread to the right upper extremity. He stated Claimant had done poorly with blocks and suggested she return for a trial of topical analgesia. Dr. Bernton observed Claimant had "really shown the most benefit from this approach."

10. On January 8, 2015 Dr. Bernton documented "significant hypersensitivity and allodynia to the plantar aspect of the foot, more in the heel as well as the lateral aspect of the right foot and the medial aspect of the foot."

11. On January 12, 2015 Claimant reported to Dr. Bernton that she had not received the topical analgesic because the "the insurance company won't pay for it."

12. On January 12, 2015 Dr. Bernton wrote a letter to the Insurer stating that CRPS was "clearly a work-related condition" and that he prescribed topical analgesics in accordance with the MTG for CRPS page 79. Dr. Bernton stated that Claimant's condition was "likely to worsen, potentially irreversibly" as a result of the Insurer's failure to meet its obligation to provide care.

13. On January 29, 2015 Claimant reported to Dr. Bernton that she was in horrible pain with increased pain in the right foot and leg as well as in the right arm. She still had not received medications. Dr. Bernton noted Claimant's right foot and leg were discolored and swollen. Dr. Bernton recorded the presence of "mild hyperalgesia." He also observed mild swelling of the right hand. Dr. Bernton emphasized the importance of getting authorization for the medication and prescribed Gralise (long-acting gabapentin) and Vicodin.

14. On February 2, 2015 Dr. Bernton noted discoloration and in the distal right leg and into the foot. He also noted the dorsum of the right hand exhibited swelling and "some hyperalgesia." Similar findings were noted on February 10, 2015.

15. Claimant credibly testified as follows. In June or July, 2014 Dr. Bernton first prescribed a topical cream containing ketamine. She received the cream in the mail and applied it to painful areas of her right ankle and leg. The cream reduced her pain from 8 on a scale of 10 (8/10) to 4/10. She used the cream until the prescription ran out at the end of September or October 2014. The pharmacy then told her that further prescriptions for this compound had been denied by the Insurer. In January or February, 2015 she requested a prescription for Vicodin because she was in severe pain and had nothing to treat it. She did not need Vicodin when she was using the cream. She prefers the cream to Vicodin because the effects of Vicodin last only 3

hours and she wakes up in pain. Also, Vicodin causes Claimant to feel "groggy" and she fears becoming addicted to it.

16. WCRP 17, Exhibit 7, (G) (7) (j) (v.) (b) pp. 79-80, of the MTG for treatment of CRPS, provides that use of ketamine topical cream is a permissible non-operative treatment for CRPS under certain circumstances. This section of the MTG states that although there is good evidence that low dose ketamine cream (1%) does not relieve neuropathic pain, it is "physiologically possible" that higher doses of topical ketamine could have some effect on neuropathic pain. However, "use of … ketamine should be limited to patients with neuritic and/or sympathetically mediated pain with documented supporting objective findings such as allodynia and/or hyperalgesia." Further use of ketamine topical cream "beyond the initial prescription requires documentation of effectiveness, including functional improvement, and/or decreased use of other medications, particularly decreased use of opiates or other habituating medications."

17. Claimant proved it is more probably true than not that topical ketamine cream is a reasonable and necessary treatment for her CRPS.

18. Dr. Bernton credibly and persuasively opined that the use of ketamine based topical cream is a permissible treatment for CRPS under the MTG. Dr. Bernton credibly and persuasively opined that use of ketamine cream is appropriate under the MTG. In this regard Dr. Bernton has documented the presence of both allodynia and hyperalgesia. He has noted that application of topical medication has been the most effective treatment of Claimant's CRPS. Considering the totality of the evidence, the ALJ gives great weight to Dr. Bernton's testimony that use of ketamine cream is appropriate under the MTG.

19. Claimant credibly testified use of topical ketamine cream significantly reduced her pain before the Insurer stopped payment for the drug. She also credibly testified that after ketamine was stopped she had no effective relief from pain and was forced to request a prescription for Vicodin. The medical records corroborate Claimant's testimony. On December 23, 2014 Dr. Bernton noted Claimant had "shown the most benefit" from topical analgesia and suggested another trial. On January 29, 2015 Claimant reported "horrible" pain and Dr. Bernton prescribed Vicodin. The ALJ infers from this evidence that if Claimant is allowed to use topical ketamine cream there is a reasonable chance that she can reduce consumption of other medication, especially Vicodin.

20. The evidence produced by the Respondents, particularly the January 6, 2015 letter authored by Nicole Peck, R.N., is not persuasive insofar as it argues that ketamine topical cream is not a reasonable and appropriate treatment for Claimant's CRPS. First, this letter/report incorrectly states that the Colorado MTG do not address the "issue" of the use of ketamine cream for treatment of CRPS. As found above, and as mentioned by Dr. Bernton, the Colorado MTG for treatment of CRPS do in fact address this issue and indicate that use of ketamine topical cream may be appropriate under the specified conditions. Second, the January 6 report admits that use of

ketamine is “under study” and has shown “encouraging results” in “non-controlled studies for CRPS 1 and post-herpetic neuralgia.”

21. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers’ Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REASONABLENESS AND NECESSITY OF KETAMINE TOPICAL CREAM

Claimant argues she proved by a preponderance of the evidence that the ketamine topical cream prescribed by Dr. Bernton constitutes reasonable and necessary post-MMI treatment designed to cure and relieve the effects of CRPS. The ALJ agrees with this argument.

Respondents are liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge a claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether a claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ considering the totality of the evidence may determine the weight to be given evidence of compliance or non-compliance with the MTG. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*, § 8-43-201(3), C.R.S.

As determined in Findings of Fact 17 through 20, Claimant proved it is more probably true than not that ketamine topical cream constitutes reasonable and necessary medical treatment to relieve the ongoing effects of injury-related CRPS. As found, Dr. Bernton credibly opined that ketamine topical cream has been the most effective treatment for relieving Claimant's CRPS symptoms. Dr. Bernton also credibly and persuasively opined that the MTG for treatment of CRPS authorize the use of topical ketamine cream under the conditions and circumstances present in this case. As determined in Finding of Fact 18, Claimant credibly testified that use of topical ketamine cream significantly reduced the symptoms of her CRPS. She also credibly testified that when ketamine cream was no longer available her symptoms increased and she was forced to request a prescription for Vicodin. As determined in Finding of Fact 18, the ALJ infers that if Claimant is permitted to use topical ketamine cream there is a reasonable prospect that she can reduce the consumption of other medication including Vicodin. Although respondents presented some evidence to the contrary, the ALJ finds this evidence is not credible and persuasive.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall provide ketamine topical cream as a form of reasonable and necessary post-MMI medical treatment. Insurer shall continue to provide this treatment as long as it remains reasonable and necessary and causally-related to the injury.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-832-903-03 and 4-891-828

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 10, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 6/10/15, Courtroom 1, beginning at 1:30 PM, and ending at 4:30 PM).

W.C. No. 4-832-902-03 concerns a closed case involving an admitted back/neck injury of August 2, 2010. The Claimant filed a Petition to re-Open this case. W.C. No. 4-891-828 concerns a fully contested alleged compensable back/shoulder injury of July 2, 2012.

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. Respondent's Exhibits A through S were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on June 16, 2015. On June 18, 2015, the Respondent filed objections which, to some extent advocated the Respondent's position by adding in more suggested findings into the proposed decision, consistent with the Respondent's overall theory of the case. This is helpful, however, an ALJ is not held to a crystalline

standard in articulating and dealing with each piece of evidence in his findings. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Although certain minute pieces of evidence may not be mentioned in a decision, there is a presumption that the minutae in the evidence was considered unless there is a showing that it was not considered. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined herein concern the Claimant's Petition to Re-Open W.C. No. 4-32-902-03, based on an alleged worsening of condition. The issues in W.C. No. 4-891-828 concern compensability; if compensable, medical benefits, including change of physician and whether the Respondent received reasonable notice of this issue; and, temporary total disability (TTD) benefits from July 2, 2012 and continuing. The Respondent designated the issue of overpayment in W.C. No. 4-832-902-03. The Claimant's theory is there was either a worsening of the closed, admitted claim in W.C. No. 4-832-903-03; or, in the alternative, the Claimant sustained a new compensable injury on July 2, 2012. Claimant also requested a change of authorized physician to Kristin Mason, M.D., as an alternative to Dr. Mason being in the authorized chain of referrals after a refusal to treat for non-medical reasons by Dr. Fall, who was treating in the earlier case, W.C. No. 4-832-902-03, wherein the Petition to Re-Open is denied and dismissed.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues with the exception of overpayment, in which case the Respondent bears the burden, by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant worked for the Employer in the Public Library, specifically as a clerk and driver of the bookmobile. According to the Claimant, there are two bookmobiles, and they depart from the Public Library on a scheduled route each week. The Claimant had served as both a driver and a passenger, though on July 2, 2012, she was the passenger riding in the back seat because she had taken a pain pill that morning for her back pain and determined that she should not drive under the influence of a pain pill.

2. According to the Claimant, each vehicle had a driver and one other person that rode in the back of the bookmobile along the back wall, behind the rear wheels. The bookmobile was a unique vehicle to drive and ride in because of the stiffness of the ride. According to the Claimant, the bookmobile required very stiff springs because of the weight of the books, so the ride from stop to stop was very rough. If the bookmobile went over a bump or a dip in the road the person in the back would bounce up and down even if seat-belted.

3. The Claimant had an admitted injury to her lumbar spine in the course and scope of her employment on August 2, 2010 (W.C. No. 4-832-902-03). She was treated for this injury by Allison Fall, M.D., who placed the Claimant at maximum medical improvement (MMI) on December 10, 2010, with a zero percent impairment rating. The Claimant disagreed with Dr. Fall's rating and sought a Division Independent Medical Examination (DIME). Eramus Morfe, D.O., was selected to perform the DIME. Dr. Morfe agreed with Dr. Fall's date of MMI, however, he disagreed with her zero percent rating. Dr. Morfe rated the Claimant at 11% whole person for her lumbar spine. He did not rate her thoracic spine or cervical spine. Dr. Morfe indicated that maintenance treatment (lumbar steroid injections) was appropriate for the Claimant's lumbar spine.

4. Dr. Fall testified at the hearing that she has seen the Claimant for the maintenance treatment under W.C. No. 4-832-902-03, with the most recent visit in May of 2015. Dr. Fall provided the Claimant with medication and referred her to Osteopathic Dr. Krembs. Dr. Fall's current diagnosis is fibromyalgia, and Dr. Fall stated that she did not have any treatment to offer the Claimant at this time. The Claimant did not agree that Dr. Fall was appropriately treating her for her injury.

5. In addition to Dr. Fall, the Claimant had seen her personal physician at Kaiser several times after her date of MMI for the 2010 injury. The Claimant visited Kaiser-Permanente on December 28, 2011 and complained of headache and right-sided neck pain, thoracic spine pain, tenderness in the thoracic spine, constant right hip pain, stiffness, low back pain, bilateral leg weakness, dull ache in the lower back, and bilateral buttocks pain. According to the medical record, she complained that she felt tension with flexion of the neck, she had discomfort sitting, and that her "butt hurts all the time". Leslie Pearson, M.D., diagnosed cervical radiculopathy, thoracic spine pain, and low back pain, chronic. Dr. Pearson planned to refer the Claimant for physical therapy (PT) and ordered x-rays of the right hip, pelvis, and a lumbar MRI (magnetic resonance imaging) without contrast.

6. The Claimant returned to Kaiser Permanente on January 3, 2012 for a physical therapy evaluation. She repeated many of the complaints stated in the December 28, 2011 Kaiser report. The Claimant returned to Kaiser on June 27, 2012 and again saw Dr. Pearson. She complained of worsening back pain. Dr. Pearson's note stated that the lower back is worst and that there was bilateral buttocks and lower

back mid. Dr. Pearson found tenderness over the lumbar and lower thoracic spines, tender over the paraspinal muscles, right and left lumbar, and bilateral SI joints. Dr. Pearson's diagnosis was again chronic low back pain and again recommended a lumbar MRI without contrast. The Claimant stated on cross examination that she went to Kaiser on June 27, 2012 for the reasons described in Dr. Pearson's note. She also stated that she asked Dr. Pearson about long-term disability because she felt it was becoming difficult to do her job. According to the Claimant, in late June 2012, she was trying to make an appointment to see Dr. Fall because she felt her condition was getting worse.

7. The Claimant continued working, full time, during the course of her Kaiser visits and none of the Kaiser physicians took the Claimant off work during this time.

W.C. No. 4-891-828—The Incident of July 2, 2012

8. According to the Claimant, on July 2, 2012, while working for the Employer on the bookmobile, she significantly aggravated her underlying back condition and sustained new injuries. She stated that, on that day, she was working with Melanie Pierce who was the driver of the bookmobile. The Claimant was sitting in the back seat when the driver hit a pothole that shook the vehicle violently. According to the Claimant, the force of the impact caused her to be jolted up even though she was wearing a seat and lap belt. The books that were on the shelves flew off, and the bookshelf directly across from where she was sitting was cracked by the force of the impact. The Claimant had immediate pain in her cervical area, and her tailbone and lower back. According to the Claimant, this pain was much worse than it had been prior to this incident. The ALJ finds the Claimant's testimony regarding this incident credible and, essentially, undisputed. The Respondent presented **no** witnesses to dispute the veracity of the Claimant's description of the incident or concerning its occurrence.

9. The Claimant reported the incident and alleged injury to her supervisor, Jennifer Hoffman, after the vehicle arrived at its next stop. Jennifer came to get the Claimant in Jennifer's private vehicle so that the Claimant would not have to finish the day.

10. The Claimant was seen at the occupational clinic that is part of Denver Health Medical Center on July 3, 2012. She advised the clinic of her prior injury and reported that she had substantially increased back pain, and "different pain between her shoulder blades." She reported difficulty sitting, in addition to the pain in her upper and lower back. She was taken off work by the physician at the clinic, Lori Szczukowski M.D.

11. The Claimant was off work until she again saw Dr. Szczukowski at the clinic on July 10, 2012. The Claimant reported back and neck pain being the same, however, Dr. Szczukowski indicated in the notes that she told the Claimant that the

claim was not being accepted so she was unable to offer her treatment. Dr. Szczukowski stated that the Claimant could return to full-duty work. Dr. Szczukowski suggested that the Claimant return to see Dr. Fall (who she was scheduled to see for a maintenance visit under W.C. No. 4-832-902-03). There is no indication that the Claimant voluntarily chose Dr. Fall to be her authorized treating physician (ATP) for W.C. No. 4-891-828, rather the records make it clear that the Claimant was sent to Dr. Fall because the Respondent denied care for the alleged new injury and treated the referral to Dr. Fall as a maintenance-care-referral under W.C. No. 4-832-902-03.

12. Between July of 2012 and the time of the hearing in this matter, Dr. Fall continued to see the Claimant for maintenance treatment related to her 2010 injury. Dr. Fall continued to provide the Claimant with small doses of Vicodin and she made a referral to Jordanna Quinn D.O. On cross examination, Dr. Fall stated that she made no referrals for diagnostic testing, an MRI (magnetic resonance imaging), or referrals to any specialists for the Claimant's continued complaints of pain in her hips, back and "sit bones."

13. The Claimant saw Dr. Fall on July 31, 2012 complaining of bilateral pain in the neck between her shoulders, mid back pain, lower back, hip and buttock pain, stabbing pain in the buttocks on the left and painful to sit, with weakness in the legs. She rated her pain 8 out of 10. Previous records of visits with Dr. Fall provided by the Respondent indicated a consistent pain rating of 4 out of 10. (Resp. Ex I**) Dr. Fall recommended that she pursue treatment outside of workers compensation. She did not believe that there was a mechanism of injury to account for her (then) current symptomatology.** Based on this recommendation, the ALJ infers and finds that Dr. Fall declined to treat the Claimant for the 2012 injury, based on her non-medical determination that it was not a compensable injury. Dr. Fall did not provide treatment recommendations. Indeed, the ALJ infers and finds that Dr. Fall offered no meaningful treatment as of the last visit to alleviate the Claimant's condition. The ALJ infers and finds that this fact amounts to a *de facto* refusal to further treat the Claimant to improve her condition.

Independent Medical Examination (IME) by Gretchen Brunworth, M.D.

14. Dr. Brunworth performed an IME at the request of the Respondent. She outlined her review of the records provided to her in her report. It was her opinion that the Claimant remained at MMI for the 2010 injury, that she did not suffer a new injury in 2012, and that she was not in need of further treatment. She categorically agreed with the testimony of Dr. Fall that no further treatment was needed, though she did not dispute that the Claimant was "in pain." The ALJ finds that Dr. Brunworth's opinions are contrary to the weight of the evidence, contrary to the credible opinion of Kristin Mason, M.D. who had been treating the Claimant under the Claimant's health insurance and, therefore, has "no dog in the work-related fight."

Declining of Treatment by Dr. Fall for Non-Medical Reasons and Thereafter

15. When Dr. Fall advised the Claimant to seek treatment from her personal physician for the 2012 incident, the ALJ infers and finds that there was a refusal to treat for non-medical reasons. The Claimant thereupon sought treatment with her personal physician Amber Wobbekind, M.D. Dr. Wobbekind subsequently referred the Claimant to Dr. Kathyrn A Witzeman, M.D. Dr. Witzeman is a specialist in pelvic issues, working at the women's integrative pelvic health clinic. Dr. Witzeman's records indicate that she saw the Claimant on November 19, 2014 and on January 15, 2015. In her report dated January 15, 2015, Dr. Witzeman states that the Claimant has a 2 year history of worsening pelvic floor muscle pain after a coccygeal and sacral trauma that was work-related. She states "I do believe that her pelvic floor dysfunction and pain that has also extended to her lower back is directly related to this injury (the injury of 2012). This is a common coccyx injury. It is a common mechanism for pelvic floor dysfunction". The ALJ finds Dr. Witzeman's opinion on causality to be more persuasive than either Dr. Fall's or Dr. Brunworth's opinions because, among other things, Dr. Witzeman has more specific expertise in pelvic matters, and her opinion is consistent with the totality of the evidence. Indeed, Dr. Witzeman's opinion solidly supports a work-related aggravation and acceleration of a pre-existing pelvic problems, and this occurred on July 2, 2012.

16. Dr. Fall stated that she has no treatment to offer the Claimant. It would be ludicrous to maintain that the Claimant should return to Dr. Fall. The Respondent offered her no other option. The ALJ infers and finds that the Claimant has considerably more confidence in Dr. Witzeman's treatment than in Dr. Fall's treatment. The Claimant has more confidence in Dr. Witzeman's ability to adequately diagnose and treat her condition. Therefore, the ALJ finds that Dr. Witzeman and her referrals are authorized treating physicians for the purposes of this claim. (W.C. No.4-891-828-03).

Medical Benefits

17. All of the medical care and treatment for the Claimant's July 2, 2012 injuries was authorized, within the authorized chain of referrals, causally related and reasonably necessary to cure and relieve the effects of those injuries.

Reasonable Notice of Change of Physician/Authorization of Dr. Witzeman and Dr. Mason as ATPs

18. The Respondent alleges that it did not have sufficient notice of the "change of physician" issue. There is no space for the "change of physician" issue on

the Application for Hearing" form, however, there is a general space for "medical benefits." Based on the denial of the 2012 claim (W.C. No. 4-891-828) and ATP Dr. Fall's ultimate referral of the Claimant to her private physician in the context of the 2012 claim, the ALJ infers and finds that the Respondent had reasonable notice that authorization of Dr. Witzeman and her referrals; and, "change of physician" would be an issue under the general heading of "medical benefits."

19. Indeed, there is no rational reason supporting a return to Dr. Fall as an ATP. On the other hand, the ALJ infers and finds that the Respondent was aware that Kaiser Permanente, Dr. Prusmack, Dr. Witzeman and Dr. Mason were of the opinion that the Claimant's present condition was related to the 2012 injury, and Dr. Prusmack had treatment recommendations for a work-related condition. The ALJ, therefore, infers and finds that the Respondent had reasonable notice, prior to the hearing, that the Claimant was seeking a change of physician to Dr. Prusmack. When the "change of physician" prong of "medical benefits" was brought up at hearing, the Respondent offered no underlying reasons concerning any prejudicial effects of not being provided specific notice. No space for "change of physician" is provided in the "Application" form or the Case Information Sheet form. The ALJ, therefore, infers and finds that the Respondent had reasonable notice that "change of physician" to Kristin Mason, M.D., would be an issue subsumed under the heading of "medical benefits."

Petition to Re-Open

20. The Claimant filed a Petition to Re-Open 4-832-902 to cover all bases. The Petition should be denied because the Finding herein is that a new incident occurred on July 2, 2012, which has caused new injuries as well as substantially aggravating and accelerating any condition for which the Claimant was treating under the earlier claim.

21. The Claimant is currently not working and testified that she does not believe she has worked since approximately July 15, 2012, however, issues concerning the periods of temporary disability owed and offsets applicable should be deferred to a subsequent hearing, if needed, by agreement of the parties.

22. The Respondent seeks recovery of an overpayment in 4-832-902. The Petition to Re-Open that claim being denied, therefore, there are no benefits owed under that claim to offset. The Claimant, however, agrees to recovery of the overpayment as part of the benefits due in 4-891-828.

Ultimate Findings

23. The ALJ finds the Claimant's testimony credible and un-impeached. Further, the ALJ finds the opinions of Dr. Fall and Dr. Brunworth lacking in credibility,

and the opinions of Dr. Witzeman, Dr. Prusmack and Dr. Mason far more credible and persuasive because of her specific expertise.

24. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Mason, Dr. Prusmack and Dr. Witzeman and to reject any opinions to the contrary.

25. The Claimant has proven, by a preponderance of the evidence that she sustained an injury in course and scope of her employment on July 2, 2012 to her neck, upper and lower back, hips and pelvis and coccyx. To the extent that any of these areas were part of an earlier claim the Claimant has proven by a preponderance of the evidence that the incident of July 2, 2012 substantially aggravated and accelerated the underlying injuries to those parts of the body.

26. The Claimant has proven, by preponderant evidence that she should be allowed to proceed with the treatment recommended by Dr. Witzeman or her referrals. Dr. Fall will no longer be considered an authorized treating physician for the purposes of this claim (4-891-828). Indeed, the Respondent had reasonable notice that a change of physician was an issue subsumed under medical benefits. Further, in the earlier case, Dr. Fall refused to further treat the Claimant for non-medical reasons, the Respondent was aware that Kaiser Permanente, Dr. Prusmack, Dr. Witzeman and Dr. Mason (under the Claimant's health insurance) were providing meaningful treatment for the Claimant's July 2, 2012 injuries, and the Respondent offered no treatment alternative to these medical providers.

27. The Claimant is not at MMI for the injuries related to the incident of July 2, 2012.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and un-impeached. Further, the opinions of Dr. Fall and Dr. Brunworth were lacking in credibility, and the opinions of Dr. Prusmack, Dr. Witzeman and Dr. Mason were far more credible and persuasive because of her specific expertise.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Mason, Dr. Witzeman and Dr. Prusmack and to reject any opinions to the contrary.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant sustained compensable injuries on July 2, 2012, when bounced in the Bookmobile.

Medical Benefits

d. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, when Dr. Fall indicated that the new claim was outside the workers' compensation system, under the mistaken belief that it was not work-related, she gave the Claimant carte blanche to select a new treatment provider. The Claimant selected Dr. Prusmack who, ultimately, referred her to Dr. Witzeman. Dr. Mason had been treating the Claimant under the Claimant's health insurance. Consequently, as found, all referrals are in the authorized chain of referrals.

e. To be a compensable benefit, medical care and treatment must be

causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's medical treatment is causally related to the compensable injuries of July 2, 2012. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, as reflected was and is reasonably necessary.

Reasonable Notice of Change of Physician/Authorization of Dr. Witzeman and Dr. Mason as ATPs

f. If the physician selected (Dr. Fall herein) refuses to treat for non-medical reasons, and the insurer fails to appoint a willing ATP after notice of the refusal to treat, the right of selection passes to the injured worker. *Weinmeister v. Cobe Cardiovascular, Inc.,* W.C. No. 4-657-812 [Industrial Claim Appeals Office (ICAO), July 10, 2006]. *Also see Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). As found, the respondent was aware that Dr. Fall had indicated that she had nothing more to offer the Claimant, and that the Claimant was treating with Dr. Mason (under health insurance), Dr. Prusmack and Dr. Witzeman, who had treatment to offer the Claimant, yet the Respondent offered no alternative treatment.

g. "The fundamental requisites of due process are notice and the opportunity to be heard." *Franz v. Indus. Claim Appeals Office,* 250 P.3d 755, 758 (Colo. App. 2010) [quoting *Hendricks v. Indus. Claim Appeals Office,* 809 P.2d 1076, 1077 (Colo. App. 1990)]. Workers' compensation benefits are a constitutionally protected property interest which cannot be taken without the due process guarantees of notice and an opportunity to be heard. *See Whiteside v. Smith,* 67 P.3d 1240, 1247 (Colo. 2003). Notice requirements apply to both parties. Reasonable notice requirements need not specify, in the application for hearing, the exact statute upon which a claimant relies in order to afford adequate notice of the legal basis of a claim. *See Carlee Carson v. Indus. Claim Appeals Office* [(No. 03CA0955, October 7, 2004) (not published), *cert. denied,* February 22, 2005]. A general request for the relief sought will suffice. *See Fang v. Showa Entetsu Co.,* 91 P.3d 419 (Colo. App. 2003). As found, the Respondent had reasonable notice that a change of physician was an issue subsumed under medical benefits. Further, in the earlier case, Dr. Fall refused to further treat the Claimant for non-medical reasons, the Respondent was aware that Kaiser Permanente, Dr. Prusmack, Dr. Witzeman, and Dr. Mason were providing meaningful treatment for the Claimant's July 2, 2012 injuries, and the Respondent offered no treatment alternative to these medical providers. At the hearing, the Claimant requested that Kristin Mason, M.D., be designated the authorized treating physician (ATP). The Respondent had reasonable notice that the "change of physician" issue was subsumed under "medical benefits."

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. C lark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Petition to Re-Open in W.C. No. 4-832-902-03 is hereby denied and dismissed.

B. The Claimant sustained compensable injuries in W.C. No. 4-891-828 and the Respondent is liable for workers' compensation benefits arising out of these injuries.

C. Medical care and treatment provided by Dr. Prusmack, Dr. Witzeman, Dr. Mason (prospectively in the case of Dr. Mason) and their referrals was and is authorized.

D. The Respondent shall pay all the costs of authorized medical treatment arising out of the July 2, 2012 injuries, subject to the Division of Workers Compensation medical Fee Schedule.

E. Any and all issues not determined herein, including overpayment offsets relating to W.C. No. 4-832-902-03 and temporary disability benefits, are reserved for future decision.

DATED this_____day of July 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of July 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- What was the Division Independent Medical Examination physician's "true opinion" concerning whether or not Claimant reached maximum medical improvement on August 17, 2011?

- Was the DIME physician's "true opinion" concerning the date of maximum medical improvement overcome by clear and convincing evidence?

- Are Respondents' liable to pay for a total knee replacement in order to assist the Claimant to reach maximum medical improvement?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 though 19 were received into evidence. Respondents' Exhibits A through H were received into evidence. The depositions of Dr. Annu Ramaswamy and Dr. John Hughes were also received into evidence.

2. On March 25, 2010 Claimant sustained an admitted injury to his right knee.

3. Claimant initially treated with Concentra Medical Centers (Concentra). He was referred for an MRI of the right knee. The MRI was reportedly significant for an "indentation subchondral fracture of the anterior surface of the medial femoral condyle with radiating secondary subchondral microtabular fracture lines. Also noted were a horizontal tear of the posterior horn of the lateral meniscus and a mild ACL sprain. Claimant was referred to orthopedist Gary Hess, M.D., for consultation and treatment.

4. On June 3, 2010 Dr. Hess assessed right knee osteoarthritis and pain. He noted Claimant had failed "most conservative treatments" and recommended he undergo a right total knee replacement (TKR). Dr. Hess stated that he would "seek approval" for surgery "through Workers' Comp." He further noted Claimant would need vascular clearance before surgery.

5. In September 2010 Claimant changed authorized treating physicians (ATP) from Concentra to Rocky Mountain Medical Group (RMMG).

6. On September 24, 2010 Annu Ramaswamy, M.D., examined Claimant at RMMG. Dr. Ramaswamy is board certified in internal medicine and is Level II accredited. Dr. Ramaswamy diagnosed a "history of right knee contusion in the setting of lateral meniscus tear and arthritis." He noted that Dr. Hess had recommended a TKR. Dr. Ramaswamy wrote he needed to contact Dr. Hess regarding "the causality issues in regard" to the proposed TKR. Dr. Ramaswamy wrote that he explained to Claimant that his right knee exhibited "pre-existing arthritis and cartilage degeneration," and that the "lateral meniscus and bone contusions and hematomas" were likely related to the injury of March 25, 2010. Dr. Ramaswamy wrote the proposed TKR would treat all of the knee pathology, not just the "work-related pathology."

7. Dr. Hess examined Claimant in October, 2010. Dr. Hess opined Claimant's pre-existing osteoarthritis had been aggravated by the work-related injury of March 25, 2010. Dr. Hess also stated that because of Claimant's persistent "flexion contracture" that a "total knee replacement procedure" was the "only reasonable course" of treatment. Dr. Hess reiterated that a vascular evaluation was necessary before surgery to insure Claimant's wounds would heal without complication.

8. In an October 15, 2010 report Dr. Ramaswamy noted the opinion of Dr. Hess that the industrial injury aggravated Claimant's pre-existing arthritis and that he needed a TKR considering the nature of the injury and the presence of pre-existing arthritis. Dr. Ramaswamy recommended Claimant obtain a "second opinion."

9. On February 2, 2011, Hendrick Arnold, M.D., performed an independent medical examination (IME) of the Claimant. In his report Dr. Arnold opined that as a result of the March 25, 2010 fall Claimant sustained a subchondral compression fracture of the medial femoral condyle. He further opined that the fall caused "significant permanent aggravation" of the pre-existing degenerative arthritis. Dr. Arnold opined Claimant was not at maximum medical improvement (MMI) and needed to undergo a TKR "pending clearance by a vascular surgeon."

10. On July 11, 2011 Dr. Ramaswamy again examined Claimant. Claimant reported right hip and right knee pain and that the knee pain was worse. He rated the knee pain as 8 on a scale of 10 (8/10) and stated he could not kneel, squat, or climb because of the pain. However, Claimant could perform his job duties as a part-time vehicle driver. Claimant reported he was "not sure he wanted to undergo the total knee replacement" at that time. Dr. Ramaswamy wrote Claimant stated that he "knew quite a few individuals" that had "not done well" with a TKR and he was concerned about chronic pain. Claimant also reported that his "functional level [was] fairly reasonable" and he would "rather hold on such surgery." Dr. Ramaswamy noted that he discussed MMI "status" given that Claimant was "declining surgical intervention." Dr. Ramaswamy also wrote that he "most likely would keep the case open six months to a year after maximum medical improvement to see if the [Claimant's] knee pain worsens to a point where he would consider a total knee replacement."

11. On July 27, 2011 Dr. Ramaswamy examined Claimant. On this occasion Dr. Ramaswamy wrote that at the "last visit [Claimant] decided that he was not

interested in the total knee replacement at this point in time based on his tolerable pain." Dr. Ramaswamy further stated Claimant "might change his mind down the road, especially with the winter if his pain level increases.

12. On August 17, 2011 Dr. Ramaswamy placed Claimant at MMI for all of the injuries caused by the March 25, 2010 industrial injury. He assessed an overall impairment rating that included 18% impairment of the right lower extremity based on the right knee injury. Dr. Ramaswamy wrote that Claimant "felt like he would like to wait on the total knee replacement as he was concerned about complications given his age and vascular history." However Claimant wanted to keep the case "open for awhile to see if he would change his mind" about the TKR. Dr. Ramaswamy wrote that "in regard to medical maintenance, I am keeping the case open for one year to see how he does in terms of his right knee discomfort." Dr. Ramaswamy wrote that if Claimant's "right knee discomfort becomes disabling then he may wish to consider a total knee replacement."

13. On November 16, 2014 Claimant returned to Dr. Ramaswamy for treatment of his right knee. Dr. Ramaswamy took a history from Claimant that the right knee was "doing the same … 8/10 at times in the right knee." Claimant also reported that he received a "final admission of liability" to which he objected, that he had retained an attorney and that he was "possibly getting [a] DIME." Dr. Ramaswamy noted that so far Claimant "wants to hold on right TKR…he is working with an attorney re: length of maintenance care…"

14. On December 30, 2011, John Hughes, M.D., performed a Division-sponsored independent medical examination (DIME) of Claimant. Dr. Hughes took a history, reviewed pertinent medical records and performed a physical examination. Dr. Hughes noted that on August 17, 2011 Dr. Ramaswamy placed Claimant at MMI. Dr. Hughes stated that with respect to "injury-related follow-up Dr. Ramaswamy recommended keeping [Claimant's] case open for a while to see if he would change his mind about the knee replacement." Dr. Hughes agreed with Dr. Ramaswamy that Claimant had "post-traumatic right knee findings with severity in excess of the 'baseline' findings in the left knee." Dr. Hughes wrote that Claimant was considered to have reached MMI as of August 17, 2011. Dr. Hughes also wrote that, "I certainly do endorse total knee arthroplasty" and opined "the need for this surgery was substantially accelerated by the work-related injuries in question here today." Dr. Hughes completed a Division IME Examiner's Summary Sheet (WC 132) on which he wrote that Claimant reached MMI on "8/17/2011."

15. Claimant testified as follows. Prior to August 2011 he was "hesitant" to undergo a TKR because he was aware of several persons, including family members, who experienced severe complications from TKR surgery. These complications included death, amputation and infection. He expressed these concerns to his treating physicians.

16. At hearing Claimant was asked whether he knew he would be put at MMI in August 2011 if did not undergo TKR surgery. Claimant testified that based on his

conversations with Dr. Ramaswamy he believed that if he was put at MMI he would have 6 months to decide whether to undergo the TKR surgery. Claimant also testified that his condition was worsening in 2010 and by "late summer" 2011 he decided he wanted to undergo the TKR procedure.

17. Claimant testified he had a second injury in February 2012. He stated that he slipped on ice and injured his right shoulder and right knee. The knee injury resulted in a fractured patella. Claimant testified that he experienced an increase in right knee symptoms for a short period of time. Claimant further testified that he still desired to undergo the previously recommended TKR at the time of the February 2012 injury. Claimant could not recall whether at the time of the 2012 injury he was aware Insurer was denying his request for a TKR.

18. Dr. Hess examined Claimant on February 14, 2012. Dr. Hess stated x-rays of the right shoulder were negative and x-rays of the right knee demonstrated osteoarthritis and a nondisplaced facture of the right patella.

19. Dr. Ramaswamy examined Claimant on February 15, 2014. On February 15 Dr. Ramaswamy wrote that "by August" Claimant would "decide about tkr." Dr. Ramaswamy also stated the "recent patella fx will aggravate knee condition."

20. On May 16, 2012 Dr. Ramaswamy examined Claimant. On that date Dr. Ramaswamy noted Claimant "would like to undergo the TKR." On July 11, 2014 Dr. Ramaswamy placed Claimant at MMI for the February 2012 injury. Dr. Ramaswamy noted that Claimant's February 2012 right knee patella fracture was completely healed but he was still experiencing "right knee discomfort from preexisting injury."

21. Dr. Hughes testified by deposition on August 12, 2013. Dr. Hughes testified that when he wrote the DIME report on December 30, 2011 he "endorsed" the TKR procedure recommended for Claimant. However, he could not recall if he actually discussed the procedure with Claimant. Dr. Hughes opined the Claimant did not "require" a TKR in December 2011 because the surgery is a "fairly elective thing that is done for comfort and function more than preservation of life." At the time of the deposition Dr. Hughes continued to endorse the TKR procedure.

22. Dr. Hughes testified that when he completed the DIME report in December 2011 it was his opinion Claimant had reached MMI for the March 2010 injury. Dr. Hughes was asked whether Claimant's desire to undergo a TKR would "impact his MMI status." Dr. Hughes replied "yes" because Claimant's desire to undergo surgery "would create a situation where he no longer was at MMI, pending resolution after surgery."

23. Dr. Ramaswamy testified as follows in his post-hearing deposition. He placed Claimant at MMI on August 17, 2011 because a TKR was the only treatment that could "make a significant difference for him" and Claimant "was declining the treatment." If Claimant had expressed a desire to undergo the TKR in August 2011 Dr. Ramaswamy would have kept the case "open" and potentially proceeded to surgery. Because Claimant did not desire to undergo surgery Dr. Ramaswamy explained that he

offered Claimant "maintenance care" in case the knee condition should worsen and Claimant were to "change his mind" about undergoing the TKR. Dr. Ramaswamy saw Claimant on November 16, 2011 and at that time Claimant wanted to "hold" on undergoing a TKR. Dr. Ramaswamy was aware Claimant had objected to an FAL and doesn't recall Claimant's "reasoning" for filing the objection.

24. Dr. Ramaswamy remembered that at some point during "maintenance care" Claimant changed his mind about wanting the TKR. Dr. Ramaswamy pointed out that he saw Claimant on February 15, 2012 and the office note from that date states Claimant would "decide" by August about the TKR. However, on May 16, 2012 Dr. Ramaswamy recorded Claimant wanted to undergo the TKR. Dr. Ramaswamy explained that in May 2012 Claimant's right shoulder condition was "not doing well" and considering Claimant's complicated medical history he "wasn't quite the medical candidate" for a TKR. However, Dr. Ramaswamy noted that in May 2012 he "could have started a process to figure out if [Claimant] would have been a medical candidate" for the TKR.

25. Claimant's argument notwithstanding, the ALJ finds that it is Dr. Hughes's opinion as the DIME physician that Claimant reached MMI on August 17, 2011. At the time Dr. Hughes issued the DIME report on December 30, 2011 he had reviewed the records of Dr. Ramaswamy including the MMI report of August 17, 2011. Thus, Dr. Hughes was aware that Claimant had declined to undergo a recommended TKR and consequently Dr. Ramaswamy placed Claimant at MMI. Having this knowledge Dr. Hughes wrote in his DIME report and on the WC 132 that Claimant reached MMI on August 17, 2011. The ALJ infers Dr. Hughes essentially agreed with Dr. Ramaswamy that Claimant reached MMI on August 17, 2011 because he was refusing the only treatment that had a prospect for improving his condition. Indeed, Dr. Hughes "endorsed" a TKR as reasonable and necessary treatment.

26. Claimant's argument notwithstanding, Dr. Hughes's deposition testimony did not create an "ambiguity" or inconsistency with regards to whether he believed Claimant reached MMI on August 17, 2011. Rather, Dr. Hughes was asked in the deposition whether Claimant's desire to undergo a TKR would impact his MMI "status." Dr. Hughes replied that Claimant's desire to undergo surgery would "*create a situation* where he *no longer* was at MMI." (Emphasis added.) Dr. Hughes did not retract his opinion that Claimant reached MMI on August 17, 2011 when he declined to undergo TKR surgery. Dr. Hughes merely indicated that were the Claimant to change his mind about surgery his "MMI status" would change and he would "no longer" be at MMI. Thus, the ALJ finds that Dr. Hughes cannot be understood to have opined that Claimant's willingness to undergo surgery after August 17, 2011 meant that he did not reach MMI on August 17, 2011.

27. Claimant argues that the ALJ should infer from his testimony that he decided to undergo TKR surgery "soon after the MMI determination was made" by Dr. Ramaswamy. However, the ALJ does not draw that inference. Rather, Dr. Ramaswamy's credible office notes and testimony establish that Claimant did not express a desire to undergo TKR surgery until May 16, 2012. Prior to May 2012 Dr.

Ramaswamy's records, including those from November 16, 2011, and February 15, 2012, document that Claimant continued to decline TKR surgery.

28. Claimant further argues the ALJ should infer that he decided to undergo the TKR procedure soon after August 17, 2011 because he sought a DIME prior to suffering the second injury in February 2012. However, the ALJ does not draw that inference. Rather, the ALJ is persuaded by Dr. Ramaswamy's notes that Claimant did not express a desire to undergo the surgery until after February 15, 2012. Moreover, there is no indication in Dr. Hughes's DIME report that Claimant expressed a desire to undergo TKR surgery so as to negate Dr. Ramaswamy's MMI determination. Indeed Dr. Hughes could not recall that the issue of TKR surgery was even discussed during the DIME. Moreover, the mere act of requesting a DIME does not establish that Claimant had changed his mind about undergoing surgery. Claimant could have sought the DIME for the primary purpose of reviewing Dr. Ramaswamy's impairment rating.

29. Claimant asserts he did not understand the legal consequences of Dr. Ramaswamy's August 17, 2011 MMI determination. Specifically he asserts he would immediately have elected to undergo a TKR if he had understood the MMI finding meant he did not have an additional "6 months to decide" on surgery. The ALJ notes that this assertion is somewhat contrary to the contention that Claimant had recently changed his mind about undergoing TKR surgery and sought the DIME with a view towards displacing Dr. Ramaswamy's MMI determination. In any event, the ALJ concludes that even if Claimant misunderstood the consequences of the MMI determination with respect to surgery that misunderstanding is irrelevant. Claimant essentially alleges, based on his conversations with Dr. Ramaswamy, that he did not understand the *legal effect* of the MMI determination would be termination of his right to additional medical benefits including the right to take an additional 6 months to decide whether to undergo surgery. However, parties, even pro se parties, are presumed to know the law and must bear the consequences of their own legal errors. *Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821 (Colo. App. 2001); *Division of Workers' Compensation v. Sundance Equestrian Center*, (ICAO January 13, 2004).

30. Claimant failed to prove it highly probable and free from serious doubt that Dr. Hughes was mistaken when he placed Claimant at MMI on August 17, 2011. As determined in Finding of Fact 25, Dr. Hughes found Claimant reached MMI on August 17 because he was declining to undergo a TKR, the only medical treatment that offered a reasonable prospect for improving Claimant's condition. Dr. Hughes's opinion that Claimant reached MMI on August 17, 2011 is corroborated by Dr. Ramaswamy's report of August 17, 2011. It is further corroborated by Dr. Ramaswamy's credible testimony that in August 2011 claimant was declining a TKR but wanted to keep the claim "open" in case he changed his mind. Dr. Ramaswamy credibly explained that keeping the case "open" meant he was offering "maintenance care" in case the knee worsened and Claimant changed his mind about the only treatment that could "make a significant difference for him." Claimant cites no credible and persuasive medical opinion that he did not reach MMI on August 17, 2011 when he declined the TKR.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as noted below, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

DIME OPINION CONCERNING MMI

Claimant seeks a finding that he has not reached MMI for the March 25, 2010 industrial injury. He also seeks an order determining that a TKR is reasonable and necessary medical treatment the need for which is causally related to the March 2010 industrial injury. As a corollary to these contentions Claimant argues that the DIME physician's opinion (Dr. Hughes's opinion) concerning MMI was "conditioned on Claimant's desire to undergo" the TKR. Claimant reasons that since he was "pursuing the knee replacement" at the time of the DIME evaluation Dr. Hughes's true opinion is that he never reached MMI. Therefore, Claimant contends Respondents bear the burden to prove by clear and convincing evidence that he reached MMI. The ALJ disagrees with Claimant's argument that Respondents bear the burden of proof on the issue of MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). If a DIME physician issues conflicting or ambiguous opinions concerning whether a claimant has reached MMI the ALJ must resolve the

conflict or ambiguity as a matter of fact. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

With respect to medical benefits, MMI serves as the line of demarcation between the availability of medical treatment designed to cure or improve the claimant's condition and post-MMI medical treatment designed to relieve the ongoing effects of an injury and prevent additional deterioration of the claimant's condition. See *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995); *Gonzales v. Industrial Claim Appeals Office,* 905 P.2d 17 (Colo. App. 1995). Indeed, the legal definition of MMI contained in § 8-40-201(11.5) recognizes that MMI is attained when no treatment is reasonably expected to "improve" a claimant's condition.

A claimant may be found at MMI "as a matter of law" if "he or she refuses to submit to the only treatment currently proposed to improve his or her condition." *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d at 1001; *see also Neidens v. Firewall Forward Aircraft Engines, Inc.,* WC 4-553-056 (ICAO August 10, 2005).

Claimant's argument notwithstanding, the ALJ concludes there is no ambiguity or conflict between the DIME physician's (Dr. Hughes's) written report and his deposition testimony. Rather, as determined in Finding of Fact 25, Dr. Hughes found Claimant reached MMI on August 17, 2011 because Claimant was declining to undergo a TKR, the only medical treatment that offered a reasonable prospect for improving his condition. Put another way, Dr. Hughes found Claimant reached MMI on August 17 as "a matter of law." As determined in Finding of Fact 26 Dr. Hughes's deposition testimony did not establish any ambiguity or conflict with his written report. Rather, Dr. Hughes merely asserted that if, at some future date, Claimant changed his mind about undergoing TKR surgery his MMI "status" would change. Dr. Hughes's testimony did not retract or contradict his December 30, 2011 finding that Claimant was at MMI on August 17, 2011.

It follows that Dr. Hughes, as the DIME physician, found that Claimant reached MMI for his March 2010 industrial injury on August 17, 2011. In these circumstances Claimant bears the burden of proof to overcome Dr. Hughes's opinion by clear and convincing evidence. *Rainwater v. Sutphin*, WC 4-815-042-04 (ICAO September 9, 2014).

OVERCOMING DIME BY CLEAR AND CONVINCING EVIDENCE

Claimant does not advance any persuasive argument that he overcame by clear and convincing evidence Dr. Hughes's opinion that he reached MMI on August 17, 2011. Rather, the bulk of Claimant's argument in his position statement assumes that the Respondents bear the burden of proof to overcome the DIME opinion. Regardless, the ALJ concludes Claimant failed to overcome by clear and convincing evidence Dr. Hughes's opinion that he reached MMI on August 17, 2011.

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc.*

v. Industrial Claim Appeals Office, supra. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As determined in Finding of Fact 30, Claimant did not overcome by clear and convincing evidence Dr. Hughes's finding that he reached MMI on August 17, 2011. Rather, Dr. Hughes essentially found that as of August 11 Claimant reached MMI as a matter of law because he declined a TKR, the only treatment with a reasonable prospect for improving his condition. Dr. Hughes's finding of MMI is corroborated by the credible findings and opinions expressed by Dr. Ramaswamy.

Insofar as Claimant argues he "changed his mind" about undergoing the TKR before the DIME, and therefore he was not at MMI on August 17, 2011, the ALJ disagrees. As a matter of fact the ALJ has determined the Claimant did not "change his mind" until after February 15, 2012. The fact that Claimant changed his mind about surgery after February 15, 2012 does not negate the fact that he reached MMI on August 17, 2011, when he declined the TKR. It is of course possible that Claimant's change of mind, or a change in his condition after August 17, 2011 could support reopening the claim for additional medical treatment under § 8-43-303(1), C.R.S. However, Claimant has not framed the issues to include "reopening" and the ALJ does not consider that question.

For these reasons Claimant's request for an order requiring the Respondents to provide a TKR is denied. In light of this determination the ALJ need not address the other issues raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

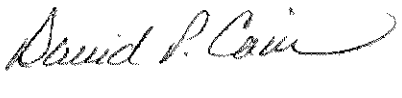
1. The request for an order requiring Respondents to pay for a total knee replacement is denied.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 16, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has proven by a preponderance of the evidence that the proposed multi-level cervical fusion surgery recommended by Dr. Sung is reasonable, necessary and causally related to the admitted work injury.

FINDINGS OF FACT

1. The claimant sustained an admitted work related injury involving his cervical spine on January 17, 2012.

2. The claimant fell backwards down some stairs striking his back, neck and head.

3. The claimant was referred to Emergicare Medical Clinic for treatment related to the cervical spine injury. The authorized treating physician at Emergicare was Dr. Reasoner.

4. Dr. Reasoner referred the claimant for physical therapy and chiropractic therapy. Dr. Reasoner also provided medications and other conservative care in an effort to cure and relieve the effects of the claimant's cervical injury.

5. Despite conservative care, the claimant continued with chronic neck pain, pain and numbness in both upper extremities, with left upper extremity weakness and atrophy. Dr. Reasoner referred the claimant to Dr. Roger Sung, an orthopedic surgeon, for a surgical consultation.

6. Dr. Sung's initial assessment on February 14, 2013 included cervical degenerative disk disease, neck pain and cervical stenosis. Dr. Sung noted that the claimant presented with significant limited range of motion, secondary to pain with atrophy and weakness in the left triceps, and decreased sensation and weak grip strength in the left upper extremity.

7. The claimant returned to Dr. Sung on February 28, 2013. The claimant continued with left arm symptoms including pain and numbness and right upper extremity pain, weakness identified as first, second and third digit pain. In this report, Dr. Sung notes that the claimant "...is still very limited in both extremities."

8. In his medical report of February 28, 2013, Dr. Sung notes prior electro-diagnostic studies demonstrating acute left C7 radiculopathy and mild left ulnar neuropathy. MRI findings demonstrated degenerative changes from C3 to T1 with bulging at every level and severe left neuroforaminal stenosis at C6-7 on the left. At this time, Dr. Sung indicated that he was contemplating performing surgery at the C6-7 level.

9. Dr. Sung's medical report of March 20, 2013 indicates that Dr. Sung and the claimant discussed options of either a one level surgery or doing multiple levels. Dr. Sung indicated that the claimant's request for the multi-level fusion is reasonable.

10. The claimant testified that surgical authorization for a multi or five level cervical fusion was requested subsequent to Dr. Sung's March 20, 2013 evaluation. Surgical authorization was denied by the respondent-insurer.

11. The claimant underwent an independent medical evaluation with Dr. David Wong of Denver Spine Surgeons. The date of evaluation was April 26, 2013.

12. Dr. Wong's medical report notes that the claimant presented with aching and sometimes sharp pain in the neck with radiation to both upper extremities. Dr. Wong further notes the claimant has had treatment through analgesic anti-inflammatory medication, activity modification, physiotherapy and epidural steroids without resolution. Dr. Wong's medical report indicates that the claimant's overall symptom level has not improved and is slightly worse.

13. Dr. Wong assessed that the claimant's surgical options include the C3 to T1 procedure or a two level procedure at C6-7 and C7-T1. Dr. Wong's report states that the pros and cons of the options were reviewed with the claimant and the claimant was leaning towards the multi-level procedure discussed with Dr. Sung. Dr. Wong concludes that either surgical procedure is an option for the claimant's consideration.

14. The respondents referred the claimant to Dr. Klajnbart for an independent medical evaluation. Dr. Klajnbart evaluated the claimant on October 21, 2013. Dr. Klajnbart was deposed on April 15, 2014. Dr. Klajnbart notes that the claimant has failed non-operative treatment including injections, activity modification, manual medicine and medications. Dr. Klajnbart concludes that the proposed surgical fusion procedure involving C3 through T1 is a reasonable approach to address the claimant's neck pain and left upper extremity weakness. More specifically, Dr. Klajnbart states that the proposed procedure is medically reasonable.

15. Dr. Klajnbart acknowledged that performing a five level cervical fusion would be a medical reasonably procedure for the claimant, given his condition. Dr. Klajnbart acknowledged that he is familiar with Dr. Sung, stating that Dr. Sung is a very competent physician.

16. The claimant returned to Dr. Sung on January 29, 2015. At that time, an updated MRI of the cervical spine was available for Dr. Sung's review. Dr. Sung's medical report of that date notes ongoing bilateral arm pain and numbness, particularly pain, numbness and weakness in the left upper extremity. Despite having an ulnar nerve transposition surgery in October, 2014, the claimant continued with significant weakness.

17. Dr. Sung's medical report of January 29, 2015 indicates that x-rays were obtained on that date demonstrating C3-T1 severe degenerative disk disease and varying degrees of stenosis from C3 to T1, most significant at C4-5, C5-6 and C6-7. Dr. Sung's assessment at that time included C3-7 stenosis with degenerative disk disease and multiple herniated nucleus pulposus, left arm weakness and atrophy, and radiculopathy.

18. On January 29, 2015, Dr. Sung again noted significant atrophy and concluded that limiting the surgical fusion to only a few levels would not adequately address the entire problem and would set up the claimant for more complex revision surgery. Dr. Sung recommended addressing all levels, surgically, from C3 to T1.

19. In preparation for surgery, Dr. Sung advised that the claimant would require smoking cessation, further noting that the claimant did quit for the original surgery and is very comfortable that he could stop smoking immediately in preparation for surgery.

20. Dr. Jeffrey Sabin conducted an independent medical evaluation at the request of the respondents on April 22, 2015. As part of the evaluation, Dr. Sabin conducted a records review and also a physical examination of the claimant.

21. As part of the records review, Dr. Sabin references psychological notes from Dr. Evans dated April 1, 2013 in which Dr. Evans notes that there are no obvious psychological factors that would preclude the claimant's candidacy for the proposed surgery. At that time, the proposed surgery was for the multi or five level cervical fusion.

22. Dr. Sabin states that there is no history either through medical records or patient history to establish any preexisting cervical injury, pain or related symptoms to the upper extremities. Dr. Sabin concluded that any symptoms experienced by the claimant would be related to the work injury of January 17, 2012.

23. Dr. Sabin concludes that the claimant's work injury caused his symptomatology. More specifically, Dr. Sabin concludes that within "reasonable degree of medical probability it is the fall which caused an exacerbation of preexisting asymptomatic cervical spondylosis."

24. By deposition, Dr. Sabin testified that it is more likely than not that the claimant would need more surgery if he had just one level done because of the stresses that are going to be imparted to the adjacent levels. Dr. Sabin notes that Dr. Sung initially considered a one level fusion and later recommended a multi-level fusion because of the effect on adjacent levels if only a single level is fused. Dr. Sabin concluded that Dr. Sung's recommendation for the multi-level fusion surgery is reasonable.

25. Dr. Sabin testified that proceeding with a single or multi-level fusion is a very personal, very individualized decision. Dr. Sabin confirmed that the claimant had met with Dr. Sung on at least four or five occasions and there was considerable discussion between Dr. Sung and the claimant regarding the pros and cons of the multi-level fusion surgery. Dr. Sabin further acknowledges that there was nothing in Dr. Sung's medical records to support or suggest that the claimant's desire to go forward with the multi-level fusion surgery was not given due consideration.

26. Dr. Sabin acknowledged that the claimant was cooperative and gave full effort during the examination. Dr. Sabin confirmed that the claimant presented as credible and there was no evidence of any preexisting symptoms or treatment involving the cervical spine or upper extremities.

27. Dr. Sabin agreed that all evaluating physicians, including Dr. Sung, Dr. Wong and Dr. Klajnbart, concluded that the five level cervical fusion was medically reasonable. In this regard, Dr. Sabin acknowledged that the five level cervical fusion is medically reasonable.

28. In his deposition, Dr. Sabin concluded that any cervical symptoms experienced by the claimant would be related to the work injury of January 17, 2012.

29. Dr. Sabin further agreed that the injury sustained by the claimant on January 17, 2012 either aggravated or accelerated or combined with his asymptomatic condition to the cervical spine to cause his need for treatment, including surgery.

30. In regards to the issue of future surgery subsequent to either a single or multi-level surgery, Dr. Sabin admitted that, percent wise, the claimant is more likely to require more surgeries after a one or two level fusion because of the compromised nature of the unfused levels.

31. With regards to the issue of smoking cessation, Dr. Sabin acknowledged that this issue is best left up to Dr. Sung and the claimant and more specifically to the surgeon in regards to whether there has been compliance with smoking cessation.

32. The ALJ finds the opinions and analyses of Dr. Sung and Dr. Sabin to be credible and more persuasive than analyses and opinions to the contrary.

33. The ALJ finds that the claimant has established that it is more likely than not that the multi-level fusion recommended by Dr. Sung is reasonable, necessary and related to the claimant's industrial injury of January 17, 2012.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

3. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936).

6. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker,* W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000)

7. It is solely within the ALJ's discretionary province to weigh the evidence and determine the credibility of expert witnesses. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

8. **The respondents are required to furnish such medical and surgical treatment as may reasonably be needed at the time of injury and thereafter during the disability to cure and relieve the employee from the effects of the injury. (§8-42-101 (1)(a) C.R.S). Respondents assert that they are only liable for that portion of medical benefits that is attributable to the claimant's work related injury and not**

for any portion purportedly attributable to the claimant's preexisting spinal condition. This issue has been addressed on multiple occasions by Colorado Courts, including Resources One, LLC. v. Industrial Claim Appeals Office, 148 P.3d 287 (Colo. App. 2006); National Union and Fire v. Industrial Claims Appeals Office, WC 4-421-787; 4-829-364; Duncan v. Industrial Claims Appeals Office, 107 P.3d 999, (Colo. App. 2004); Geist v. Liberty Mutual Group, (Industrial Claims Appeals Office - WC No. 4-839-225).

9. The Colorado Court of Appeals noted that an employer is generally liable for the entire disability that results from a compensable accident. Resources One, LLC v. Industrial Claims Appeals Office, 149 P.3d 287 (Colo. App. 206) More specifically, where an industrial injury aggravates, accelerates or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. Geist v. Liberty Mutual Group, (Industrial Claims Appeals Office - WC No. 4-839-225), H&H Bicory, 805 P.2d 1167 (Colo. App. 1990). (Cited by Industrial Claims Appeals Office in National Union and Fire, WC 4-421-787, 4-829-364).

10. In this matter, the claimant has no preexisting history of neck pain, upper extremity weakness or pain, or any functional limitations related to his cervical spine. The respondents own independent medical evaluators conclude the claimant's work injury did cause the resulting symptomatology involving the cervical spine, upper extremities and eventual need for cervical fusion surgery. While there is some medical opinion that claimant's work injury caused an acute injury only to the C6-7 level, the respondents remain liable for the entire disability or need for treatment that results from the claimant's compensable injury. Resources One, LLC v. Industrial Claims Appeals Office, 149 P.3d 287 (Colo. App. 206), H&H Bicory, 805 P.2d 1167 (Colo. App. 1990). (Cited by Industrial Claims Appeals Office in National Union and Fire, WC 4-421-787, 4-829-364).

11. The ALJ concludes that the opinions and analyses of Dr. Sung and Dr. Sabin are credible and more persuasive than analyses and opinions to the contrary.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that the multi-level fusion recommended by Dr. Sung is reasonable, necessary and related to the claimant's industrial injury of January 17, 2012.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall authorize and pay for the multi-level fusion surgery as recommended by Dr. Sung.

2. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 23, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
12459 Lake Plaza Dr Ste 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-896-875-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 24, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 6/24/15, Courtroom 4, beginning at 8:30 AM, and ending at 11:35 AM).

Claimant's Exhibits 1 through 16 were admitted into evidence, without objection. Respondent's Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on June 26, 2015. On June 29, 2015, counsel for the respondent indicated no objection as to form. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The matter is set, primarily, on the Respondent's application to overcome the Division Independent Medical Examiner's (DIME's) [Franklin Shih, M.D.] determination that the Claimant sustained a14% whole person impairment to her cervical spine. Additional issues concern whether the Claimant is entitled to a permanent scheduled

rating for her left lower extremity (LLE); whether she is entitled to a permanent scheduled rating for her right upper extremity (RUE); and whether she is entitled to post maximum medical improvement (MMI) maintenance medical benefits (*Grover* medicals).

The Respondent bears the burden of proof, by clear and convincing evidence, to overcome Dr. Shih's DIME opinions on degree of whole person impairment and MMI. The Claimant bears the burden, by preponderant evidence, concerning scheduled ratings for the LLE and RUE, and for entitlement to post-MMI medical maintenance benefits (*Grover* medicals).

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant worked for the Employer as a paraprofessional. As part of her duties, she worked with special needs students, including those with profound disabilities.

2. On August 30, 2012, the Claimant was transporting students after a school program when she was involved in a motor vehicle accident (MVA) at the intersection of Santa Fe Drive (Colorado Highway 85) and Meadows Boulevard in Castle Rock. The Claimant was trapped in the vehicle and was then extricated by Castle Rock Fire and Rescue.

3. The Claimant waited with her students at the accident scene and then went to the Emergency Department (ER) at Castle Rock Adventist Health. She felt pain in her LLE and RUE. X-rays were taken at the hospital. The Claimant was diagnosed as suffering a left comminuted distal radius fracture, left lower leg crush injury, right lower leg laceration, right upper arm strain and right forearm strain.

Medical Treatment

4. The Claimant was referred to Sharon Walker, M.D., who was designated as the authorized treating physician (ATP) by the Respondent. Dr. Walker saw the Claimant the next day on August 31, 2012, noting that the Claimant's complaints involved the neck, left lower back, left wrist, left elbow, right knee, right lower leg, left jaw and right arm. Dr. Walker's records, which were admitted into evidence as Claimant's Exhibit 2 documented pain in those areas. Dr. Walker prescribed Ibuprofen, Cyclobenzaparine, Percocet and gave the Claimant a prescription for a wheelchair. Dr. Walker also referred the Claimant to In Sok Yi, M.D., a hand surgeon for an evaluation.

5. Dr. Yi's diagnosis was left distal radius fracture. The Claimant underwent surgical repair (open reduction and internal fixation) of her left wrist, which was performed by Dr. Yi on September 5, 2012. Dr. Yi's records were admitted into evidence as Claimant's Exhibit 3.

6. The Claimant next saw Dr. Walker on September 7, 2015, and Dr. Walker provided treatment for a left corneal abrasion and referred the Claimant for physical therapy (PT).

7. The Respondent filed its first General Admission of Liability (GAL) on September 12, 2012, admitting for wage indemnity and medical benefits under the Colorado Worker's Compensation Act (Claimant's Exhibit 4, page 17). This GAL admitted for an average weekly wage (AWW) of $369.04, which was subsequently changed to a higher AWW.

8. A MRI (magnetic resonance imaging) was taken of the Claimant's right knee on September 12, 2012. The indication on the MRI was right knee pain, swelling, instability and clicking two weeks after motor vehicle crash. The MRI documented a "significant subcutaneous hematoma formation just anterior to the patellar tendon insertion on the tibial tubercle". The MRI documented an auterolateral tibia impaction injury with bowing on the articular surface. The MRI was negative for gross linear meniscal tear and cruciate ligament disruption (Claimant's Exhibits 3 and 9).

9. Dr. Walker referred the Claimant to Peak Orthopedics. The Claimant was evaluated by Michael Hewitt M.D. on September 26, 2012. Dr. Hewitt diagnosed tibial plateau fracture and noted that the fracture was nondisplaced. He recommended conservative treatment and placed the Claimant into a knee brace (Claimant's Exhibit 7).

10. A Revised GAL was filed on September 26, 2012, admitting for a higher average weekly wage (AWW), $543.39 (Claimant's Exhibit 4, page 16). This AWW was admitted in the Final Admission of Liability (FAL).

11. The Claimant received treatment from chiropractor Dr. Jason Gridley, D.C., from November 14, 2012 through December 19, 2012. She was chiropractically diagnosed as suffering from a cervicothoracic strain with muscle spasm.

12. An Amended GAL was filed on November 7, 2012, reflecting Claimant's return to modified work on October 22, 2012, and variable temporary partial disability (TPD) benefits from October 22, 2012 to "unknown."

Additional Medical Evaluations

13. According to the Claimant, other physicians in Dr. Walker's office provided her with care in late 2012.

14. The Claimant was evaluated by Sander Orent, M.D. on December 3, 2012. Dr. Orent noted that the Claimant continued to have pain complaints in her knee, stiffness in her neck and left wrist. Dr. Orent released the Claimant to work eight hours per day.

15. The Claimant was evaluated on December 17, 2012, by John Raschbacher, M.D., whose assessment was: left radius fracture, right leg laceration and crush injury, left corneal abrasion, cervical strain, with numerous other injuries. Dr. Raschbacher ordered a recheck on January 3, 2013.

16. On January 29, 2013, Dr. Walker saw the Claimant again and Dr. Walker assessed left comminuted distal radius fracture, right lower leg crush injury, right lower leg laceration, right upper arm strain, right forearm strain, left corneal abrasion, cervical strain, right tibial plateau fracture and right leg vascular insufficiency. The Claimant was also noted to have some anxiety related to the MVA and physical therapy was discontinued at that time. The Claimant was continued on modified duty at work.

17. The Claimant's next evaluation with Dr. Walker was on February 26, 2013, at which time the aforementioned diagnoses were identified. Dr. Walker anticipated maximum medical improvement (MMI) in two weeks.

Dr. Walker's Impairment Rating

18. Dr. Walker performed an impairment rating on March 13, 2013. Dr. Walker assigned an 8% scheduled RUE rating and a 0% LLE rating. Dr. Walker assigned no rating for Claimant's cervical spine, despite the fact that pain in the cervical spine was noted as one of the Claimant's chief complaints, and Dr. Walker's assessment included cervical strain. Dr. Walker assigned an MMI date of March 13, 2013. The ALJ infers and finds that Dr. Walker failed to rate the cervical spine due to an oversight.

19. Dr. Walker stated the opinion that for maintenance care, the Claimant should be allowed to continue her gym membership that was already put into place. Dr. Walker also stated that the Claimant's HGV stimulation unit should be purchased and supply should be provided for one year. Dr. Walker further was of the opinion that the Claimant should be allowed to maintenance visits as needed within one year with both Dr. Hewitt and Dr. Yi.

The Final Admission of Liability (FAL)

20. The Respondent filed a FAL on April 12, 2013, admitting for Dr. Walker's MMI date of March 13, 2013,, zero whole person permanent impairment, zero scheduled impairment of the LLE and 8% scheduled impairment of the RUE (Respondent's Exhibit B). The Claimant filed a timely objection and requested a Division independent Medical Examination (DIME).

The Division Independent Medical Examination (DIME)

21. Franklin Shih, M.D. was selected as the DIME and as a member of the DOWC IME panel, Dr. Shih was fully Level II accredited. Dr. Shih evaluated the Claimant on June 11, 2013. At that time, he noted that the Claimant was not at MMI. He recommended further diagnostic testing and treatment. He made a tentative assessment of the Claimant's permanent impairment, assigning an11% whole person impairment for her cervical spine, which included aTable 53 impairment and a loss of range of motion (ROM). Dr. Shih assigned a 2% scheduled impairment to the right knee and a 4% scheduled impairment to the left wrist (Claimant's Exhibit 10 and Respondent's Exhibit D). After his follow up DIME of February 17, 2015, Dr. Shih increased the tentative ratings, after determining that the Claimant had reached MMI on October 15, 2014.

22. The Respondent filed a new GAL on June 5, 2013 and additional treatment was provided to the Claimant (Respondent's Exhibit A).

23. A second MRI of the Claimant's knee was done on October 22, 2013 (Respondent's Exhibit H.) The MRI noted that there was sequelae of the prior anterolateral tibial plateau fracture. Chondral thinning along the far interior margins of the plateau was noted and there was a small area of chondral fissuring with minimal subcortical reactive marrow-type change/residual subcortical cystic change noted. Quadriceps and patellar tendons showed mild tendinosis/tendinopathy change. Mild pre-patellar soft tissue edema was noted (Respondent's Exhibit H).

Subsequent Medical Evaluations and Treatment

24. The Claimant was evaluated on November 5, 2013 by John Sacha, M.D., who diagnosed: (1) cervical facet syndrome; (2) headaches secondary to number 1; (3) left radial wrist fracture resolved; (4) right tibial plateau fracture; and (5) history of facial and extremity contusions and abrasions. Dr. Sacha recommended a right C2-5 intra-articular facet injection to be diagnostic, therapeutic and also for causality (Claimant's Exhibit 11).

25. Neil Pitzer, M.D., saw the Claimant on November 20, 2013 for persistent numbness in her hand and palm. An EMG was performed at that time, which documented no median neuropathy at this forearm (Claimant's Exhibit 12).

26. Dr. Sacha again evaluated the Claimant on April 28, 2014, and he recommended a right C2-5 medial branch block. This was performed on July 3, 2014. Dr. Sacha noted a therapeutic response to the treatment. He also recommended that the Claimant receive PT, which she received at Select Physical Therapy (Claimant's Exhibit 14).

27. Dr. Sacha again examined the Claimant on September 22, 2014, at which time the Claimant reported 70% improvement. MMI was anticipated in approximately three weeks.

28. Dr. Sacha responded to an inquiry sent by the TPA on September 30, 2014, noting that the Claimant had not reached MMI as of that date. The Claimant had just started her PT after the radial frequency protocol for her cervical spine, which was anticipated and completed within three weeks (Claimant's Exhibit 15).

29. Dr. Sacha concluded that the Claimant reached MMI when he examined her on November 3, 2014.

Dr. Shih's Follow Up DIME

30. The Claimant underwent a follow-up DIME, which was performed by Dr. Shih on February 27, 2015. Dr. Shih concluded that Claimant reached MMI as of October 15, 2014 and had a permanent medical impairment of the cervical spine, left upper extremity (LUE) and right lower extremity (RLE). He assigned a 14% whole person impairment of the spine, which included a Table 53 rating of 7% and an additional 8% impairment, based upon range of motion.

31. For the Claimant's LUE, he assigned a 3% scheduled rating.

32. Dr. Shih noted that his analysis for the right knee (RLE) remained the same and she would have no impairment for range of motion. Impairment was warranted given the plateau fracture, with depression noted on imaging. Dr. Shih stated: "I would utilize Table 40, Subsection 5 for arthritis, which I would place at 5% lower extremity . . ."

Independent Medical Examination (IME) by Carlos Cebrian, M.D.

33. The Respondent sent the Claimant for an IME with Dr. Cebrian, which took place on June 4, 2015. Dr. Cebrian was called as a witness by the Respondent at the hearing. He testified as an expert. H he is board certified in family practice and fully Level II Accredited.

34. In his report (Respondent's Exhibit H), Dr. Cebrian noted that the Claimant's current complaints were cervical spine, left wrist and right leg pain. He agreed with Dr. Shih's determination that Claimant reached MMI on October 15, 2014.

With regard to the Claimant's cervical spine, Dr. Cebrian was of the opinion that he would have anticipated the Claimant's impairment rating to be lower, since she received treatment after Dr. Shih's first DIME. Such an opinion is speculative and without foundation in objective medicine. Dr. Cebrian conceded that the ROM testing done by Dr. Shih in his evaluation on February 17, 2015 was valid, pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*, 3rd Ed., Rev. (hereinafter referred to as the "AMA Guides").

35. Dr. Cebrian also disagreed with Dr. Sacha that there was facet pathology which required treatment. According to Dr. Cebrian, the medical records documented pain relief after the facet injection, which Dr. Cebrain acknowledged. Nonetheless, Dr. Cebrian's opinion in this regard is speculative and without foundation in objective medicine.

36. Dr. Cebrian disagreed with Dr. Shih's assessment of a 5% impairment to the Claimant's right knee. He agreed that the ROM did not require an impairment, but he stated the opinion that there was no evidence of post-traumatic arthritis with findings such as inflammation and swelling of the joint. The ALJ finds that Dr. Cebrian's opinion in this regard is partially speculative and without ample support in the totality of the Claimant's medical case. Consequently, Dr. Shih's opinion in this regard is considerably more credible than Dr. Cebrian's opinion.

37. Dr. Cebrian assessed a 2% scheduled impairment rating for the Claimant's left wrist. This represents a mere difference of opinion whereby Dr. Cebrian's opinion is insufficiently supported by the totality of the evidence. The Respondent made a judicial admission that Dr. Shih's 3% rating with regard to the left wrist was supported by a preponderance of the evidence.

38. According to the Claimant, she continues to experience swelling and clicking in the right knee. She estimated that the swelling occurs at least once a week and the clicking occurs when she uses her knee.

39. According to the Claimant, her injuries have limited her activities, including the playing and coaching softball. She has also not been able to participate in water sports, including waterskiing because of her physical limitations.

Ultimate Findings

40. The ALJ finds the Claimant's testimony credible and un-impeached. Further, the ALJ finds the opinions of DIME Dr. Shih more credible and persuasive than the opinions of IME Dr. Cebrian because Dr. Shih's opinions are more consistent with the totality of the medical evidence and the product of a more thorough treatment of the Claimant's medical case.

41. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Shih and to reject any and all opinions to the contrary.

42. The Respondent has failed to prove that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Shih's ultimate opinion, rating the Claimant's whole person impairment for the cervical spine at 14% whole person, with a final MMI date of October 15, 2014, was in error. Therefore, the Respondent failed to overcome Dr. Shih's DIME opinions, in this regard, by clear and convincing evidence. Dr. Cebrian maintains a mere difference of opinion with Dr. Shih, and even that difference of opinion is not that well supported by the aggregate medical record.

43. Dr. Shih, in the follow up DIME, rated the Claimant's LUE at 3% of the LUE, and the respondent made a judicial admission that this rating was appropriate.

44. The Claimant has proven, by preponderant evidence, that Dr. Shih's 5% scheduled rating for the RLE is adequately supported by the totality of the medical record, appropriate and, therefore, the Claimant is entitled to a 5% rating for the RLE.

45. The Claimant has proven, by a preponderance of the evidence, that post-MMI medical maintenance care is warranted in the discretion of the Claimant's ATPs.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or

inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was credible and un-impeached. Further, as found, the opinions of DIME Dr. Shih were more credible and persuasive than the opinions of IME Dr. Cebrian because Dr. Shih's opinions were more consistent with the totality of the medical evidence and the product of a more thorough treatment of the Claimant's medical case.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, The ALJ made a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Shih and to reject any and all opinions to the contrary.

Overcoming the DIME on Degree of Whole Person Impairment

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus.*

*Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Respondent failed to prove that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Shih's ultimate opinion, rating the Claimant's whole person impairment for the cervical spine at 14% whole person, with a final MMI date of October 15, 2014, was in error. Therefore, the Respondent failed to overcome Dr. Shih's DIME opinions, in this regard, by clear and convincing evidence. Dr. Cebrian maintains a mere difference of opinion with Dr. Shih, and even that difference of opinion is not that well supported by the aggregate medical record.

Judicial Admission of 3% LUE Rating

d. A judicial admission is defined as a "formal, deliberate declaration that a party or his or her counsel makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or facts about which there is no real dispute." *Kempter v. Hurd,* 713 P.2d 1274 (Colo. App. 1986); *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP,* 230 P.3d 1275, 1283 (Colo. App. 2010). Judicial admissions must be unequivocal but become binding once they are made. *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000). *Also see Valdez v. Texas Roadhouse,* W.C. No. 4-366-133 [Industrial Claim Appeals Office (ICAO), January 25, 2001]. Stipulations are a form of judicial admission and are binding on the party who makes them. *Maloney v, Brassfield,* 251 P.3d 1097, 1108 (Colo. App. 2010). As found, the Respondent made a

judicial admission that Dr. Shih's 3% rating for the LUE was appropriate. Therefore, the Claimant is entitled to a 3% rating for the LUE.

Scheduled and Whole Person ratings May not be Combined

e. Section 8-42-107 (7) (b) (II), C.R.S., provides that scheduled and whole person losses shall be compensated separately. As found, the Claimant sustained a 14% whole person rating, a 3% LUE rating, and a 5% RLE rating, all of which must be awarded separately, which must be awarded separately.

Post-MMI Maintenance Medical Benefits

f. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily **entitled to a general award of future medical benefits**, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). As found, the Claimant is entitled to maintenance medical care, as determined by her ATPs, which is reasonably necessary to address her injuries.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v.*

Principi, 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to the 3% rating for the LUE; the 5% rating for the RLE; and, with respect to post-MMI maintenance medical benefits as dictated by the Claimant's ATPs.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of all causally related and reasonably necessary post-maximum medical improvement maintenance medical benefits, as determined to be appropriate by her authorized treating physicians, subject to the Division of Workers Compensation medical Fee Schedule.

B. The Respondent shall pay the Claimant permanent whole person medical impairment benefits, based on 14% whole person, attributable to the cervical spine, from October 15, 2014, the date of maximum medical improvement, and continuing until paid in full.

C. The respondent shall pay the Claimant permanent scheduled impairment benefits, based on 3% of the left upper extremity and 5% of the right lower extremity, from October 15, 2014, and continuing until paid in full.

D. The Respondent is entitled to a credit for any permanent scheduled impairment benefits previously paid.

E. The Respondent shall pay the Claimant statutory interest at the rate of eight per cent (8%) per annum on all amounts due and not paid when due.

DATED this_____day of July 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to maintenance medical treatment in the form of a venous Doppler ultrasound, a triple phase bone scan and evaluation by a vascular (vein) specialist as maintenance care. The question to be answered is whether the recommended diagnostic testing and specialist evaluation are reasonable, necessary and related to claimant's November 24, 2012 industrial injury.

II. Whether Claimant is entitled to additional compensation for serious permanent disfigurement.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. McFadden and Thurston, the ALJ enters the following findings of fact:

1. On November 24, 2012 Claimant sustained admitted injuries to her left knee after falling from a ladder at work.

2. A course of conservative care proved unsuccessful in ameliorating Claimant's condition. Consequently, she was referred for an orthopedic evaluation with Dr. Wily Jinkins. On April 18, 2013, Dr. Jinkins performed a diagnostic arthroscopy of the left knee during which the following procedures were performed: a patella chondroplasty, a lateral femoral condyle chondroplasty, microfracture subchondral plate, resection of synovial shelf and injection with primary portal closure.

3. On May 3, 2013 Claimant developed a sudden onset of cramping in her left calf which she was unable to relieve. She sought treatment in the emergency room of Memorial Hospital where a Venous Doppler study revealed a "clot in the left popliteal vein and gastrocutaneous veins." Subsequent pulmonary imaging demonstrated "small bilateral pulmonary emboli" characterized as mild, nonspecific patchy ground glass opacity bilaterally. Claimant was assessed with left lower extremity deep vein thrombosis (DVT) and pulmonary emboli (PE). Dr. William Kimble admitted Claimant to the hospital for additional treatment noting that the DVT and PE were "probably related to her recent left knee surgery."

4. On September 10, 2013, Dr. Jinkins opined that Claimant's DVT was related to her surgery of April 18, 2013. He also felt that Claimant was still in need of further treatment for the same. Claimant was placed on a prolonged course of anti-coagulant medication therapy.

5. A second venous duplex imaging of the left leg on January 10, 2014 revealed no evidence of persistent DVT.

6. At a return appointment dated February 7, 2014 Dr. Jinkins noted that although claimant did not have a great deal of calf pain; she had experienced an episode of chest pain while getting out of the bath. He also noted that he had recommended further imaging one week prior to the February 7, 2014 appointment due to the possibility that claimant was "redeveloping a DVT." Dr. Jinkins renewed his request for a venous Doppler ultrasound as "soon as possible at Penrad." Respondents initially denied the request; however, the study was ultimately approved and claimant underwent the recommended Doppler study on May 6, 2014. The study reflected a "continued absence of deep vein thrombosis."

7. Claimant was placed at MMI on June 17, 2014. Claimant subsequently requested a DIME, which was completed by Dr. Lee McFadden on November 6, 2014. In accordance with the DIME opinion, Respondents filed a Final Admission of Liability on December 5, 2014 admitting for 16% lower extremity impairment and post-MMI care.

8. Claimant has received maintenance medical care for her left knee from Dr. Jinkins. On December 16, 2014, Dr. Jinkins recommended a fourth venous Doppler ultrasound for continued pain and persistent swelling in her left lower leg. Respondents denied authorization for the recommended study requesting further that the recommendation be reviewed by Dr. Lloyd Thurston per W.C.R.P. 16-10.

9. In opining that the requested Doppler ultrasound was not reasonable necessary, or related maintenance care, Dr. Thurston opined that claimant's "only current risk factors for DVT are obesity and a prior episode of DVT and that "she had not suffered any recent trauma to her left lower extremity, had not experienced prolonged bed rest or immobilization, was not taking estrogens or any agents which would induce a hypercoaguable state, and had discontinued smoking in February 2014." Consequently, according to his report, the request for additional Doppler study was not reasonable, necessary or related to claimants admitted work injury.

10. Claimant returned to Dr. Jinkins on February 10, 2015 at which time she complained of burning in her left lower leg down to her foot, discomfort to the slightest pressure and significant calf pain and swelling. Dr. Jinkins noted:

> "I told Laura I would still recommend that a venous Doppler ultrasound be accomplished, however, to date, this has not been approved. I would recommend that she have a 3-phase bone scan. There are some physical findings, but also her history is consistent with a component of her present symptomology being sympathetically mediated."

11. Respondents requested that Dr. Jenkins' recommendation for a 3-phase bone scan be reviewed by Dr. Thurston per W.C.R.P. 16-10. In opining that the 3- phase bone scan was not reasonable, necessary, and related maintenance care, Dr. Thurston opined that Claimant's symptoms do not meet the clinical criteria for chronic regional

pain syndrome (CRPS). He further opined that vague descriptions of physical findings do not adequately document edema or "describe symptoms consistent with true allodynia."

12. Based upon careful review of Dr. Thurston's February 16, 2015 report, the ALJ finds, contrary to Dr. Thurston's assessment that Dr. Jinkins descriptions of claimant's ongoing symptoms are sufficiently specific to adequately document clinical findings consistent with a component of claimant's symptoms emanating from a sympathetically mediated cause. Crediting Dr. Jinkins report that claimant has 2+ edema in addition to "burning" and discomfort with the exertion of light pressure, the ALJ finds that claimant has proven, by a preponderance of the evidence, that a triple phase bone scan is reasonably necessary and related to claimant's work injury to further assess whether claimant's ongoing symptoms are sympathetically mediated as no other diagnosis better explains her current signs and symptoms.

13. Respondents requested the deposition of Dr. Lee McFadden, the DIME physician. This deposition occurred on March 31, 2015 and is marked as Respondents' Exhibit G. During his deposition, Dr. McFadden testified that continued calf and foot swelling constitutes a management of a perfusion problem in the leg, which was outside of his purview as an orthopedist. According to Dr. McFadden, claimant's continued swelling may be related to her prior vein issue but because vascular conditions were outside of his area of expertise management of the same would be addressed by "the vascular guys". Dr. McFadden was asked, "Would you recommend that she have an evaluation with a vein specialist?" He replied, "I don't think it's unreasonable" (Respondents' Exhibit G, page 24, lines 16-25 and page 25-26, lines 1-11).

14. Respondents also took the deposition of Dr. Lloyd Thurston, a Family Medicine Practitioner. During his deposition Dr. Thurston testified that he neither evaluates nor treats sympathetically mediated pain/CRPS, nor does he treat DVT or subsequent vein issues related to DVT. While Dr. Thurston indicated that the requested ultrasound would be reasonable, which opinion the ALJ finds constitutes a deviation from that expressed in his December 26, 2014 report, he testified that he did not feel the need for it was related to claimant's industrial injury. As noted by Dr. Thurston, claimant's risk factors for the development of a subsequent DVT are her obesity and her prior episode of DVT. Considering that claimant's obesity was pre-existing and there is, by Dr. Thurston's account an absence of other risk factors that cause hypercoaguable states, the ALJ finds that claimant's prior work related DVT is the most probable cause of any subsequent DVT and the need for additional diagnostic study, i.e. Doppler ultrasound. Consequently, the ALJ finds Dr. Thurston's opinion that the need for the additional ultrasound is unrelated to the "previous injury" unconvincing.

15. Claimant has residual arthroscopic scarring, described as two (2) red, 3/8 semi-circular scars, on either side of the left knee accompanied by mild swelling of the knee in general which alters the natural appearance of her skin and joint in this area.

16. Claimant's testimony regarding her ongoing symptoms and swelling is credible

and convincing. As noted above, the undersigned ALJ viewed the swelling described by claimant first hand during the disfigurement viewing phase of the hearing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of rights of respondents. §8-43-201, C.R.S. (2005). A preponderance of the evidence is that which leaves the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S. As found, Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case. Furthermore, the ALJ concludes that Dr. Fall's testimony to be contradicted by the more persuasive opinions of Drs. Larimore and Jones.

Medical Benefits

D. The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the claimant's need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and

in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 1997. Based upon the totality of the evidence presented, the ALJ concludes that claimant has proven that the requested diagnostic testing and the need for a vascular evaluation are reasonable, necessary and related to her compensable left knee injury. Although Dr. Thurston opined the request for DVT ultrasound was not reasonable, necessary and related maintenance care, he admitted that Claimant has some risk factors for the development of DVT, including having had a prior DVT culminating in pulmonary emboli (PE) which were treated as work related conditions. Outside of her obesity and having had a prior DVT, Claimant's risk for development of additional DVT appears low based upon the testimony of Dr. Thurston. Yet, Claimant continues to experience symptoms associated with DVT or a sympathetically mediated pain complex. Consequently, the ALJ concludes it is reasonable and necessary, given the morbidity associated with DVT progressing to PE and Claimant's ongoing burning pain and swelling in the skin surrounding her left knee, to proceed with additional diagnostic testing and evaluation in an effort to determine the cause of Claimant's continued symptoms. While the risk for DVT may be low, it does not negate the fact, that the most probable cause of any new DVT is more probably than not related to her prior development of DVT over other causes. Consequently, the ALJ concludes that Claimant has established the requisite causal connection between her need for a Doppler study, a triple phase bone scan and an evaluation with a vascular specialist and her November 24, 2012 industrial injury.

E. The ALJ acknowledges that the Medical Treatment Guidelines (Guidelines) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). While it is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition, *Deets v. Multimedia Audio Visual,* W. C. No. 4-327-591 (March 18, 2005); *see Eldi v. Montgomery Ward* W. C. No. 3-757-021 (October 30, 1998)(medical treatment guidelines are a reasonable source for identifying the diagnostic criteria), the Respondents have not cited any authority, nor is the undersigned aware of any, which requires an ALJ to award or deny medical benefits based on the Guidelines. Indeed the Guidelines permit deviation as individual cases dictate. As noted here, claimant has continuing pain which is disproportionate to any inciting event; she has persistent edema and reports functional decline with the use of her left knee. Thus, while claimant may not meet all criteria as listed in the Guidelines, no other diagnosis, outside of a sympathetically mediated pain complex better explains her ongoing signs and symptoms. Consequently, the ALJ concludes that deviation from the Guidelines to allow for additional diagnostic testing in the form of a 3-phase bone scan is warranted in this case.

F. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the

Court held that the term “disfigurement” as used in the statute, contemplates that there be an “observable impairment of the natural person.” In this case, The ALJ concludes that Claimant’s swelling and scarring constitutes a disfigurement as provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Respondent-Insurer shall pay for all medical expenses to cure and relieve claimant from the effects of her November 24, 2012 left knee injury, including but not limited to the venous Doppler ultrasound, a triple phase bone scan and an evaluation with a vascular specialist as requested by Dr. Wily Jenkins.

2. Respondent-Insurer shall pay Claimant $1,200.00 for her visible disfigurement; however, Respondent-Insurer shall be given credit for any amount of disfigurement previously paid in connection with this claim.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to maintenance medical treatment in the form of a venous Doppler ultrasound, a triple phase bone scan and evaluation by a vascular (vein) specialist as maintenance care. The question to be answered is whether the recommended diagnostic testing and specialist evaluation are reasonable, necessary and related to claimant's November 24, 2012 industrial injury.

II. Whether Claimant is entitled to additional compensation for serious permanent disfigurement.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. McFadden and Thurston, the ALJ enters the following findings of fact:

1. On November 24, 2012 Claimant sustained admitted injuries to her left knee after falling from a ladder at work.

2. A course of conservative care proved unsuccessful in ameliorating Claimant's condition. Consequently, she was referred for an orthopedic evaluation with Dr. Wily Jinkins. On April 18, 2013, Dr. Jinkins performed a diagnostic arthroscopy of the left knee during which the following procedures were performed: a patella chondroplasty, a lateral femoral condyle chondroplasty, microfracture subchondral plate, resection of synovial shelf and injection with primary portal closure.

3. On May 3, 2013 Claimant developed a sudden onset of cramping in her left calf which she was unable to relieve. She sought treatment in the emergency room of Memorial Hospital where a Venous Doppler study revealed a "clot in the left popliteal vein and gastrocutaneous veins." Subsequent pulmonary imaging demonstrated "small bilateral pulmonary emboli" characterized as mild, nonspecific patchy ground glass opacity bilaterally. Claimant was assessed with left lower extremity deep vein thrombosis (DVT) and pulmonary emboli (PE). Dr. William Kimble admitted Claimant to the hospital for additional treatment noting that the DVT and PE were "probably related to her recent left knee surgery."

4. On September 10, 2013, Dr. Jinkins opined that Claimant's DVT was related to her surgery of April 18, 2013. He also felt that Claimant was still in need of further treatment for the same. Claimant was placed on a prolonged course of anti-coagulant medication therapy.

5. A second venous duplex imaging of the left leg on January 10, 2014 revealed no evidence of persistent DVT.

6. At a return appointment dated February 7, 2014 Dr. Jinkins noted that although claimant did not have a great deal of calf pain; she had experienced an episode of chest pain while getting out of the bath. He also noted that he had recommended further imaging one week prior to the February 7, 2014 appointment due to the possibility that claimant was "redeveloping a DVT." Dr. Jinkins renewed his request for a venous Doppler ultrasound as "soon as possible at Penrad." Respondents initially denied the request; however, the study was ultimately approved and claimant underwent the recommended Doppler study on May 6, 2014. The study reflected a "continued absence of deep vein thrombosis."

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8. Claimant has received maintenance medical care for her left knee from Dr. Jinkins. On December 16, 2014, Dr. Jinkins recommended a fourth venous Doppler ultrasound for continued pain and persistent swelling in her left lower leg. Respondents denied authorization for the recommended study requesting further that the recommendation be reviewed by Dr. Lloyd Thurston per W.C.R.P. 16-10.

9. In opining that the requested Doppler ultrasound was not reasonable necessary, or related maintenance care, Dr. Thurston opined that claimant's "only current risk factors for DVT are obesity and a prior episode of DVT and that "she had not suffered any recent trauma to her left lower extremity, had not experienced prolonged bed rest or immobilization, was not taking estrogens or any agents which would induce a hypercoaguable state, and had discontinued smoking in February 2014." Consequently, according to his report, the request for additional Doppler study was not reasonable, necessary or related to claimants admitted work injury.

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11. Respondents requested that Dr. Jenkins' recommendation for a 3-phase bone scan be reviewed by Dr. Thurston per W.C.R.P. 16-10. In opining that the 3- phase bone scan was not reasonable, necessary, and related maintenance care, Dr. Thurston opined that Claimant's symptoms do not meet the clinical criteria for chronic regional

pain syndrome (CRPS). He further opined that vague descriptions of physical findings do not adequately document edema or "describe symptoms consistent with true allodynia."

12. Based upon careful review of Dr. Thurston's February 16, 2015 report, the ALJ finds, contrary to Dr. Thurston's assessment that Dr. Jinkins descriptions of claimant's ongoing symptoms are sufficiently specific to adequately document clinical findings consistent with a component of claimant's symptoms emanating from a sympathetically mediated cause. Crediting Dr. Jinkins report that claimant has 2+ edema in addition to "burning" and discomfort with the exertion of light pressure, the ALJ finds that claimant has proven, by a preponderance of the evidence, that a triple phase bone scan is reasonably necessary and related to claimant's work injury to further assess whether claimant's ongoing symptoms are sympathetically mediated as no other diagnosis better explains her current signs and symptoms.

13. Respondents requested the deposition of Dr. Lee McFadden, the DIME physician. This deposition occurred on March 31, 2015 and is marked as Respondents' Exhibit G. During his deposition, Dr. McFadden testified that continued calf and foot swelling constitutes a management of a perfusion problem in the leg, which was outside of his purview as an orthopedist. According to Dr. McFadden, claimant's continued swelling may be related to her prior vein issue but because vascular conditions were outside of his area of expertise management of the same would be addressed by "the vascular guys". Dr. McFadden was asked, "Would you recommend that she have an evaluation with a vein specialist?" He replied, "I don't think it's unreasonable" (Respondents' Exhibit G, page 24, lines 16-25 and page 25-26, lines 1-11).

14. Respondents also took the deposition of Dr. Lloyd Thurston, a Family Medicine Practitioner. During his deposition Dr. Thurston testified that he neither evaluates nor treats sympathetically mediated pain/CRPS, nor does he treat DVT or subsequent vein issues related to DVT. While Dr. Thurston indicated that the requested ultrasound would be reasonable, which opinion the ALJ finds constitutes a deviation from that expressed in his December 26, 2014 report, he testified that he did not feel the need for it was related to claimant's industrial injury. As noted by Dr. Thurston, claimant's risk factors for the development of a subsequent DVT are her obesity and her prior episode of DVT. Considering that claimant's obesity was pre-existing and there is, by Dr. Thurston's account an absence of other risk factors that cause hypercoaguable states, the ALJ finds that claimant's prior work related DVT is the most probable cause of any subsequent DVT and the need for additional diagnostic study, i.e. Doppler ultrasound. Consequently, the ALJ finds Dr. Thurston's opinion that the need for the additional ultrasound is unrelated to the "previous injury" unconvincing.

15. Claimant has residual arthroscopic scarring, described as two (2) red, 3/8 semi-circular scars, on either side of the left knee accompanied by mild swelling of the knee in general which alters the natural appearance of her skin and joint in this area.

16. Claimant's testimony regarding her ongoing symptoms and swelling is credible

and convincing. As noted above, the undersigned ALJ viewed the swelling described by claimant first hand during the disfigurement viewing phase of the hearing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of rights of respondents. §8-43-201, C.R.S. (2005). A preponderance of the evidence is that which leaves the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S. As found, Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case. Furthermore, the ALJ concludes that Dr. Fall's testimony to be contradicted by the more persuasive opinions of Drs. Larimore and Jones.

Medical Benefits

D. The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the claimant's need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and

in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 1997. Based upon the totality of the evidence presented, the ALJ concludes that claimant has proven that the requested diagnostic testing and the need for a vascular evaluation are reasonable, necessary and related to her compensable left knee injury. Although Dr. Thurston opined the request for DVT ultrasound was not reasonable, necessary and related maintenance care, he admitted that Claimant has some risk factors for the development of DVT, including having had a prior DVT culminating in pulmonary emboli (PE) which were treated as work related conditions. Outside of her obesity and having had a prior DVT, Claimant's risk for development of additional DVT appears low based upon the testimony of Dr. Thurston. Yet, Claimant continues to experience symptoms associated with DVT or a sympathetically mediated pain complex. Consequently, the ALJ concludes it is reasonable and necessary, given the morbidity associated with DVT progressing to PE and Claimant's ongoing burning pain and swelling in the skin surrounding her left knee, to proceed with additional diagnostic testing and evaluation in an effort to determine the cause of Claimant's continued symptoms. While the risk for DVT may be low, it does not negate the fact, that the most probable cause of any new DVT is more probably than not related to her prior development of DVT over other causes. Consequently, the ALJ concludes that Claimant has established the requisite causal connection between her need for a Doppler study, a triple phase bone scan and an evaluation with a vascular specialist and her November 24, 2012 industrial injury.

E. The ALJ acknowledges that the Medical Treatment Guidelines (Guidelines) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). While it is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition, *Deets v. Multimedia Audio Visual,* W. C. No. 4-327-591 (March 18, 2005); *see Eldi v. Montgomery Ward* W. C. No. 3-757-021 (October 30, 1998)(medical treatment guidelines are a reasonable source for identifying the diagnostic criteria), the Respondents have not cited any authority, nor is the undersigned aware of any, which requires an ALJ to award or deny medical benefits based on the Guidelines. Indeed the Guidelines permit deviation as individual cases dictate. As noted here, claimant has continuing pain which is disproportionate to any inciting event; she has persistent edema and reports functional decline with the use of her left knee. Thus, while claimant may not meet all criteria as listed in the Guidelines, no other diagnosis, outside of a sympathetically mediated pain complex better explains her ongoing signs and symptoms. Consequently, the ALJ concludes that deviation from the Guidelines to allow for additional diagnostic testing in the form of a 3-phase bone scan is warranted in this case.

F. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the

Court held that the term “disfigurement” as used in the statute, contemplates that there be an “observable impairment of the natural person.” In this case, The ALJ concludes that Claimant’s swelling and scarring constitutes a disfigurement as provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Respondent-Insurer shall pay for all medical expenses to cure and relieve claimant from the effects of her November 24, 2012 left knee injury, including but not limited to the venous Doppler ultrasound, a triple phase bone scan and an evaluation with a vascular specialist as requested by Dr. Wily Jenkins.

2. Respondent-Insurer shall pay Claimant $1,200.00 for her visible disfigurement; however, Respondent-Insurer shall be given credit for any amount of disfigurement previously paid in connection with this claim.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues for determination are:

1. Post-maximum medical improvement (MMI) or "Grover" medical benefits without limitation.

2. Average weekly wage (AWW).

3. Whether the claimant overcame the division independent medical examination (DIME) opinions regarding MMI and permanent partial disability (PPD) by clear and convincing evidence.

4. In the event the claimant did not overcome the DIME opinions regarding MMI and PPD, whether the claimant proved his claim should be reopened based on a worsening of condition subsequent to MMI.

5. Temporary total disability (TTD) benefits from September 27, 2013, ongoing.

At hearing, the respondents' counsel stated the respondents now admit generally to Grover medical benefits, without the limitation on such medical benefits contained in the respondents' latest FAL, filed on June 12, 2014. Thus, the ALJ concludes this issue is moot. Also at hearing, and regarding AWW, the parties agreed the admitted AWW is $814.86, and that the claimant's weekly cost of continuing his healthcare coverage pursuant to COBRA is $131.97. The parties agreed that if the cost of continuing healthcare coverage is included, the claimant's AWW is $946.83.

FINDINGS OF FACT

1. The claimant sustained a work-related right inguinal hernia injury on December 27, 2012. He received primary treatment at Colorado Springs Health Partners (CSHP). Khurram Khan, M.D., performed hernia surgery on January 23, 2013.

2. On February 19, 2013, Dr. Khan noted the claimant complained he was "…still having a lot of pain, and tightness around surg area." Dr. Khan noted, "…c/o muscle spasm possibly from irritation from securing staples. Prescribed muscle relaxant and fill f/u in 2 weeks if symptoms do not resolve…"

3. The respondents admitted liability for the claimant's injury. The respondents paid temporary total disability (TTD) benefits from January 3, 2013 through March 3, 2013. The claimant returned to work with restrictions but at full wages on March 4, 2013.

4. On March 8, 2013, Dr. Rudderow at CSHP reported the claimant, "…Had surgery Jan 23, 2013. Mesh was implanted. Is in much pain today. R pelvic area…Pain was getting better until started working 3/4/13, then pain started to get worse again. Pt worried something is wrong. Has seen surgeon – told might be muscle strain or staple irritation. Good appetite. More comfortable standing than sitting, but then legs get numb and will give out because on feet for so long…" Work restrictions were continued.

5. On March 18, 2013, Dr. Rudderow reported, "…pain 4/10, goes up to 8-9/10 with bending down. Has appt w/surgeon 4/4/13. Can't lift anything on rt side [secondary to] pain. Pt walking slow. Pain a little better than last time seen. Rt handed. Had surgery on rt inguinal. Other night pt lifted something w/left hand and it causes pain. No known swelling. Still tender. Was taking ultram and naproxen – ran out – they did help with pain. No radiation of pain." Work restrictions were continued.

6. On April 4, 2013, Dr. Khan reported that he "Injected the area of tenderness with anesthetic with some relief. If patient symptoms improve over the next 24 hrs. will consider steroid injection in the area. F/u in 1 week." The claimant was restricted to lifting less than 20 pounds.

7. CT scan on April 16, 2013 revealed no inguinal hernia. An ultrasound on April 19, 2013 revealed no deep vein thrombosis.

8. On May 17, 2013, Dr. Rudderow reported, "…Not feeling well, pain now in rt testicle, had [ultrasound] to r/o clot 2 wks ago, was referred to Dr. Ford for pain mgmt by Dr. Kahn. Ford gave rx Lyrica, ins would not cover, Dr. Khan's office gave pt Gabapentin, makes pt dizzy at work, feels hazy. Told it may affect cog skills. Pt is working FT, doing bending, difficulty getting back up, etc…Pt has burning pain, feels like a bulge under area of surgery. Pain is min at rest and slouching in chair. Shooting pain worse with excessive walking and lifting…" Dr. Rudderow maintained work restrictions, and referred the claimant to "pain management."

9. Dr. Ballard at CSHP saw the claimant on June 12, 2013 and noted, "pt here for groin pain, and testicular pain, pt is also concerned on blood in stool and incontinence." Dr. Ballard reported, "…he has multiple issues and we will do the testing

for the back and the stomach and the melena and we will then address the prostate and the atrophy of the right testicle. At this time [it] is presumed that the right groin pain is a nerve entrapment of scar tissue but he also may have a nerve pain from the back from the scoliosis. The right groin pain is worse when he is sitting not standing."

10. Dr. Rudderow placed the claimant at maximum medical improvement (MMI) on June 20, 2013. The doctor issued permanent work restrictions and recommendations for post-MMI treatment, but opined the claimant sustained no permanent impairment.

11. The respondents filed a final admission of liability (FAL) consistent with Dr. Rudderow's findings on July 17, 2013.

12. On June 27, 2013, Dr. Rudderow reported, "…patient's surgical wounds healed well without complication, however patient has had persistent moderate to severe pain in the right inguinal area which has not significantly improved since surgery. Pt has been treated with pain medications including NSAIDS, narcotics, ultram and neurontin with minimal success….Due to patient's pain, he has not been able to return to full duty…Patient has healed from his surgical wounds, but continues to have chronic pain which is exacerbated by work. His chronic pain may or may not fade with the passage of time. He has no structural defect and improvement is possible but not definite…" Dr. Rudderow noted the claimant reported his pain "at rest" was 7/10.

13. The respondent-employer terminated the claimant's employment on September 26, 2013.

14. The claimant was issued a COBRA letter on October 4, 2013. It advised him that his cost to continue his medical, dental and vision healthcare benefits was $571.88 per month, effective October 1, 2013.

15. The claimant returned to Dr. Ballard on November 12, 2013 and the doctor reported, "…He is here for several reasons and he indicates he is depressed and he has a spot on his arm and he wants to see another surgeon to get the mesh removed…He has anhedonia and he has difficulty with focus and concentration. He is not exercising. He has no libedo {*sic*} and it is not ok with the wife. He has pain with the erection and the orgasm…" From a psychiatric perspective, Dr. Ballard reported, "sleep disturbances, depression, personality change and emotional problems, but not suicidal and no anxiety." Dr. Ballard reported, "…he has depressed affect and mood." Dr. Ballard indicated, "We will start him on fluoxetine [Prozac] since he has had success

with it before and we will refer him to urology for the frequency and noctuia and the pain from the results of the surgery and the testicular atrophy…"

16. Brian Beatty, M.D., performed a division independent medical examination (DIME) on April 29, 2014. Dr. Beatty reported, "…The patient notes that his symptoms have worsened since the injury. He has pain that radiates from his right lower abdomen into his testicle. His discomfort is constant." Dr. Beatty noted, "…The pain drawing reveals a burning pain in the right lower abdomen with a sharp stabbing pain in the inguinal region." He noted the claimant rated his pain "…as a 9 on a 0-10 scale…"

17. Dr. Beatty diagnosed "right inguinal hernia with repair, right ilioinguinal neuroitis." Dr. Beatty agreed the claimant had reached MMI as determined by Dr. Rudderow; however, he recommended that the claimant "…should have a second opinion with a general surgeon well-versed in hernia injuries with postop ilioinguinal nerve disorders. If it is felt the patient would benefit from injections to resolve his problem then I believe these could be done from a maintenance care standpoint. If it is determined that the patient would require a second surgery to remove the mesh or to perform an ilioinguinal neurotomy, then I do not believe he would remain at maximum medical improvement until he recovered from the surgery. Also, an evaluation with a physiatrist, knowledgeable in post surgical ilioinguinal nerve injuries would be appropriate."

18. Dr. Beatty issued a 4% whole-person permanent partial disability (PPD) rating. On June 12, 2014 the respondents admitted liability consistent with Dr. Beatty's findings.

19. The claimant's counsel wrote to Dr. Rudderow on June 3, 2014 regarding Dr. Beatty's recommendations. Dr. Rudderow responded on June 12, 2014, indicating she agreed it was reasonable to send the claimant to both a general surgeon and physiatrist per Dr. Beatty, and that, "…We will need to reopen this case to address your concerns and possibly review the MMI."

20. On July 7, 2014, Dr. Ballard responded to a written inquiry and confirmed that the claimant suffers from depression as a result of his ongoing chronic pain. Dr. Ballard confirmed he prescribed fluoxetine to treat that depression.

21. Dr. Ballard saw the claimant on September 16, 2014 and noted, "…He is now also divorced and is still having pain in the right inguinal area. He is not working and workmans {*sic*} comp is out and he is applying for social security disability…" Dr. Ballard reported, "…He feels that the titanium mesh is the cause of all his discomfort

and he wants it out and plastic product replacing it. He has had injections in the wound area with some benefit but it was only minimal and did not last." Dr. Ballard's diagnosis included chronic postoperative pain, depression, right groin pain and testicular atrophy.

22. Pursuant to Dr. Beatty's recommendations, the respondents arranged for the claimant to see physiatrist John Sacha, M.D., on September 23, 2014. Dr. Sacha reported, "…The patient has pain localized to the right groin that radiates into the right scrotum with burning, numbness, and tingling. He denies any back pain, leg pain, weakness, or pain in other areas." Dr. Sacha noted, "…There is some insomnia secondary to pain. He does have some slight increase in anxiety and depression…" Dr. Sacha opined that, "…the only consideration I would recommend for this patient is doing a one-time right ilioinguinal radiofrequency procedure…"

23. Pursuant to Dr. Beatty's recommendations, the respondents arranged for the claimant to see general surgeon Robert McDonald, M.D., on September 30, 2014. Dr. McDonald reported, "…He has consulted with a pain specialist in the area, and apparently he plans on undergoing a non-surgical procedure that involves nerve ablation. I told the patient I did not have any expertise in this area. I do, however, feel a pain specialist is the most appropriate person to be managing Daniel's pain…"

24. On October 10, 2014, Dr. Sacha performed "right ilioinguinal radiofrequency neurotomy." The claimant credibly testified this procedure was of no benefit whatsoever, and in fact made his pain worse.

25. Urologist Michael Crissey, M.D., saw the claimant on referral from Dr. Ballard on November 17, 2014. Dr. Crissey noted he was seeing the claimant, "…for an urological evaluation for pain involving the right testicle that started approximately 2 years ago following a mesh hernia repair. The pain is more in the inguinal area than in the testis. The patient denies an associated testicular mass or groin adenopathy. He does not have ED [erectile dysfunction], but says that a full erection will aggravate the pain, and an ejaculation even more so. Says he is therefore unable to have sex, and that his wife left him over the issue. There is not associated swelling. He has been treated with Neuronton and Tramadol. He has had an RFA procedure 1 month ago which he says made the pain worse. He has also developed pain in the arch of his right foot which he feels is a result of chronic limping…"

26. The claimant's examination revealed no evidence of hernia, but "…There is extreme tenderness in the right inguinal area, especially on digital exam of external ring." Dr. Crissey's recommendations included, "repeat surgical exploration with lysis

and possible mesh removal," "repeat RFA of inguinial nerve," and, "consider trial of Lyrica."

27. On December 4, 2014, Christa Coolidge, NP, at CSHP saw the claimant and reported, "…Evaluation of chronic right groin pain (hernia mesh repair). Pain right groin radiating to mid inner thigh. Feels like RLE is going to give out…Would like another referral for general surgery. Discussed Dr. Zimmerman." Ms. Coolidge also referred the claimant to Dr. Tyler for pain management.

28. Ms. Coolidge also prescribed a "cane for ambulation" on December 4, 2014. On January 21, 2015, Dr. Ballard confirmed the claimant's need for the cane to assist with ambulation is "directly related to his work injury."

29. Surgeon Peter Zimmer, M.D., saw the claimant on December 15, 2014 on referral from Dr. Ballard. Dr. Zimmer diagnosed "chronic inguinodynia following right inguinal hernia repair." He recommended against mesh removal surgery, but noted, "…I have discussed with him that neurectomy may be of benefit and have given him information about the Lichtenstein Amid Hernia Clinic at UCLA if wishes further evaluation there regarding neurectomy; I do not perform that procedure. MRI may be of possible benefit as well to evaluate for occult recurrence or other problem causing his pain; this can be ordered by Dr. Ballard as necessary…"

30. On January 12, 2015, Dr. Ballard reported, "…He has ongoing pain in the right leg and right lower abd and groin and he indicates he is not sleeping and he finally got ok to see Dr. Tyler and wants to get some relief so he can sleep. Patient rates their health as: poor."

31. The claimant began treating with Dr. Jeffrey Jenks, in lieu of Dr. Tyler, on February 24, 2015. On that date Dr. Jenks noted, "…He describes pain in his right groin region with radiation into the proximal aspect of his right leg. It is aggravated with Valsalva maneuvers. He also has increased pain with weightbearing on his right leg. He did have a right ilioinguinal nerve radiofrequency procedure done by Dr. Sacha on October 10, 2014. He states that following this his pain became much worse and his continued to be worse since then." Dr. Jenks noted, "...Additionally, he has developed significant depression due to the pain. He has seen Dr. Ballard for this. He has been on Prozac for at least 2 years for the depression. He is unsure if it is helping a lot at this point, however…"

32. On examination, Dr. Jenks found, "…There is significant tenderness in the right lower quadrant in the area of the ilioinguinal nerve. He has decreased sensation in

the distribution of the right ilioinguinal nerve…" Dr. Jenks diagnosed "status post right herniorraphy with subsequent right ilioinguinal neuropathy" and "secondary depression." Dr. Jenks started the claimant on Butrans patches; recommended he discontinue gabapentin and start Lyrica. He also changed from Prozac to Cymbalta, "…to continue with his antidepressant treatment, but also to hopefully help his neuropathic pain." Finally, Dr. Jenks referred the claimant to Bruce Ramshaw, M.D., at Advanced Hernia Solutions in Daytona Beach, Florida, noting that "Dr. Ramshaw is known nationally for revision surgery on failed herniorrhaphies with entrapment of the ilioinguinal nerve."

33. Dr. Jenks increased the dosage of the Butrans patches from 5 mcg to 10 mcg on March 24, 2015. On April 21, 2015 he noted the claimant was getting better pain relief with the increased dosage, and increased it again to 15 mcg. Dr. Jenks noted "The patient is ambulating with a cane."

34. Dr. Jenks testified by deposition on May 13, 2015 as an expert in the fields of physical medicine and rehabilitation, and pain medicine. Dr. Jenks explained the claimant has an ilioinguinal nerve problem due to the surgery he had. Dr. Jenks testified regarding the outcome of the claimant's hernia surgery indicating that although the surgery had not failed there were major complications.

35. Dr. Jenks testified that the claimant remains at MMI, but that if the claimant sees Dr. Ramshaw and Dr. Ramshaw recommends further surgery, then the claimant would no longer be at MMI.

36. Dr. Ballard testified by deposition on May 13, 2015 as an expert in the fields of family medicine and psychiatry. Dr. Ballard testified regarding the causes of the claimant's depression:

Q. What caused the pain -- excuse me – the depression?

A. What caused the depression. Chronic pain can cause depression. Not being able to have sexual relations without discomfort can cause depression. Not being able to work effectively can cause depression. Which exactly one of those was more than another, I did not determine.

Q. Was his depression a combination of the effects of all of those things you mentioned?

A. Yes.

37. Dr. Ballard testified regarding the cause of the claimant's sexual dysfunction:

Q. What about the problem with erection and orgasm?

A. That apparently was pain secondary to his inguinal area, compromise of the ilioinguinal nerve.

38. Dr. Ballard confirmed that he did not diagnose the claimant as having any problems with sexual dysfunction or depression prior to November 12, 2013.

39. Dr. Ballard testified that he made referrals to general surgery and for pain management in December, 2014 "because of ongoing difficulties with the right groin pain and continuing pain affecting his life."

40. Dr. Ballard testified regarding the worsening of the claimant's condition:

Q. Did [the claimant's] symptoms change after maximum medical improvement on June 20, 2013?

A. Not for any improvement. They may have worsened with the depression, with sleep deprivation and stuff. So I would say they worsened, yes.

Q. Specifically, what worsened after maximum medical improvement?

A. His depression worsened. He began to have back problems and continued to have pain.

41. Dr. Ballard explained the claimant developed back pain due to age, lack of activity, and weight gain. He explained that, "Well, I assume he limited his activities secondary to the effects of medication, depression and pain."

42. Dr. Ballard testified regarding the worsening of the claimant's leg pain:

Q. Why did you prescribe a cane for [the claimant] on December 4, 2014?

A. Because of his leg pain.

Q. Did his leg pain worsen subsequent to when you first saw him in June of 2013?

A. Yes. From the first to the last visit, it was worse, not better.

43. The ALJ finds the testimony of Drs. Jenks and Ballard to be credible, persuasive, and entitled to greater weight than opinions to the contrary.

44. The claimant testified that after being placed at MMI, his right groin pain began radiating to his genital area. He testified that subsequent to MMI, his pain has "really increased." He described his pain as "burning," and that "most of the time it's excruciating." The pain is in the claimant's right groin area, and radiates to his testicles and penis. The pain radiates to the right upper thigh area. The claimant takes prescribed medications, but very little relieves his pain.

45. The claimant testified he experiences problems with depression. The depression began several months after MMI. Dr. Ballard has prescribed Prozac for depression. Dr. Jenks prescribed Cymbalta, in part to treat depression. The claimant experiences depression as a result of the severe pain in his right groin.

46. The claimant testified he experiences problems with sexual dysfunction. The problems initially began after the hernia surgery. The claimant had some problems with sex due to pain while healing from the hernia surgery. The problems worsened after MMI, to point where the claimant is unable to have sexual relations due to the pain in his groin and genital area. The claimant's wife left him 13-14 months prior to hearing, because he was "unable to perform" sexually. The claimant experienced no problems with sexual dysfunction prior to the work injury.

47. The claimant testified he reviewed the surveillance video the respondents obtained in December 2014. He testified that on the video, he was walking with a limp and using a cane because of pain in his right groin area. He testified his right leg was "giving out more and more." This has caused the claimant to fall down. The claimant testified that prior to MMI, he had a limp, but did not walk in the manner shown in the surveillance video. He did not require the use of a cane. The claimant described his right leg as being the weakest it has ever been in his life. He attributes this to referred pain from his hernia injury.

48. The claimant testified he has not worked since being terminated by the respondent-employer. He testified he cannot work because his pain is too great and he has to use a cane, and "nobody will hire me." The claimant has looked for work and submitted job applications. The claimant survives by borrowing money from relatives.

49. The claimant testified his pain affects his ability to sleep, and he gets only 2-3 hours of sleep per night. The pain wakes him and he has difficulty falling asleep. He described the pain as "excruciating." Prior to MMI, the claimant was able to get 4-6 hours of sleep per night.

50. The claimant testified regarding the radiofrequency procedure performed by Dr. Sacha. The procedure did not help, and in fact made the claimant's pain worse. After the procedure, the claimant's leg gave out more frequently, and his groin pain was worse.

51. The claimant testified his pain is much worse now than even at the time of DIME examination on April 29, 2014. He described it as more of a "burning pain" that is consistent.

52. When Dr. Rudderow placed the claimant at MMI on June 20, 2013, she recommended continued use of Gabapentin and Ultram. The claimant now requires Butrans patches, Lyrica, and Cymbalta. The claimant's medication regimen has changed subsequent to MMI.

53. The ALJ finds the claimant's testimony to be credible and persuasive. The ALJ finds the claimant's condition has worsened since being placed at MMI on June 20, 2013, and that he no longer at MMI effective as of the date of hearing, May 20, 2015.

54. The ALJ finds that the claimant has failed to establish that Dr. Beatty's DIME opinion concerning MMI or PPD were clearly erroneous.

55. The ALJ finds that the claimant has established that it is more likely than not that he is entitled to TTD benefits beginning with the date of hearing, May 20, 2015, and continuing until terminated by operation of law.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Per C.R.S. §8-42-107(8)(b)(III), the findings of the Division independent medical examiner regarding MMI and PPD may be overcome only by clear and convincing evidence. This means evidence which proves that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the DIME physician's rating has been overcome by clear and convincing evidence is a matter of fact for determination by the ALJ. *Metro Moving & Storage*, supra.

5. The ALJ concludes the claimant has failed to prove by clear and convincing evidence that Dr. Beatty's DIME findings regarding MMI and PPD are incorrect. Accordingly, except as to admitted post-MMI treatment, the claimant's claim is closed, subject to reopening.

6. C.R.S. §8-43-303(1) provides in pertinent part that; "At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award…If an award is reopened on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. Any order entered under this subsection (1) shall be subject to review in the same manner as other orders."

7. The ALJ concludes the claimant has proved by a preponderance of the evidence that his condition has worsened since MMI, thus justifying the reopening of his claim. Factors supporting the determination that the claimant's condition has worsened

include the following; the claimant's ability to engage in sexual relations has been greatly curtailed, if not eliminated, due to increased groin pain subsequent to MMI. The claimant experiences depression as a result of the effects of his work injury. His depression was first diagnosed by Dr. Ballard on November 12, 2013, at which time Dr. Ballard prescribed Prozac. The claimant had not been diagnosed with work-related depression, nor was he prescribed medications to treat that condition, prior to November 12, 2013. In his deposition, Dr. Ballard confirmed the claimant's depression has worsened. Dr. Ballard testified the claimant's leg pain worsened subsequent to their first meeting on June 27, 2013. This worsening led Ms. Coolidge in Dr. Ballard's office to prescribe a cane for the claimant to use to assist with his ambulation. The claimant has been unable to find work due to the worsening effects of his work injury. The claimant's pain and dysfunction have increased subsequent to MMI.

8. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

9. The ALJ concludes that the claimant is no longer at MMI effective May 20, 2015 and thus is entitled to TTD benefits beginning that date and continuing until terminated by operation of law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request to overcome the DIME with respect to MMI and PPD is denied and dismissed.

2. The claimant's request to reopen his claim is granted. The claimant's claim is reopened.

3. The respondent-insurer shall pay the claimant TTD benefits beginning May 20, 2015 and ongoing until terminated by operation of law.

4. The claimant's AWW effective October 1, 2013 is $946.83.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 21, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Dr Ste 230
Colorado Springs, CO 80906

STIPULATIONS

1. The parties agreed that the claims adjuster would testify that, pursuant to the Final Admission of Liability filed on February 27, 2014 referencing the DIME report of Dr. Castrejon, Insurer paid permanent partial disability benefits based on an 11% scheduled impairment. The parties further agreed that the claims adjuster would testify that she did not notice the part of Dr. Castrejon's DIME report dealing with apportionment of 10% of the rating to a prior injury and inadvertently paid benefits on the full 11% without accounting for the difference due to apportionment. The parties do not stipulate that the above statements are fact, only that this would have been the testimony of the claims adjuster had she testified.

ISSUES

The following issues were raised for consideration at hearing:

1. Whether the Claimant proved, by a preponderance of the evidence, that the right shoulder surgery recommended by Dr. Hatzidakis is reasonably necessary to cure and relieve the Claimant from the effects of his January 12, 2013 work injury.

2. Whether the Claimant proved, by clear and convincing evidence, that DIME physician Miguel Castrejon, M.D. erred in finding that the Claimant reached MMI on June 4, 2013.

3. Whether the Respondents proved, by clear and convincing evidence, that DIME physician Miguel Castrejon, M.D. erred in finding that the Claimant's right shoulder condition, for which he provided an impairment rating, was causally related to the Claimant's January 12, 2013 work injury.

4. Whether apportionment of the Claimant's impairment rating is applicable pursuant to C.R.S. § 8-42-104(5)(a). If apportionment applies, the appropriate calculation for apportionment.

5. If apportionment is applicable pursuant to C.R.S. § 8-42-104(5)(a), whether Respondents proved that their final admission should be withdrawn, and modified, to permit Respondents to admit to Dr. Castrejon's post apportionment impairment rating of 1% upper

extremity, and claim an overpayment for permanent impairment benefits paid above that amount.

6. Whether Claimant proved by a preponderance of the evidence that he suffered a functional impairment contained off the schedule of injuries set forth at Section 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

7. If the Claimant is at MMI, whether Claimant has proved, by a preponderance of the evidence, that future medical benefits are reasonably necessary to relieve the effects of his injury or prevent deterioration of his condition.

FINDINGS OF FACT

Based upon the evidence presented at hearing and through post-hearing deposition testimony, the ALJ finds as fact:

1. The Claimant is a 52 year old male who worked in construction industries for more than thirty years. The Claimant was hired by Employer on September 28, 2010 to work as a vacuum truck driver and operator. The Claimant's job was a very physical job requiring him to lift and move hoses weighing 75 lbs., if empty, and more if they were full. The Claimant's job required him to suction debris from pits and tanks using the vacuum hose attached to the vacuum truck. At times, the job required Claimant to use other tools, such as picks, shovels and water pressure to free debris off of the sides of tanks. The Claimant would typically work with another worker and his shifts were generally 12 to 16 hours long.

2. The Claimant has a history of right shoulder problems that pre-date the injury that is the subject of this claim and pre-date his employment with Employer.

3. In the 1980s, Claimant had a motorcycle accident, which resulted in a right shoulder injury, an AC joint separation, and a distal clavicle fracture (Hrg. Trans. p. 45, lines 16-24).

4. The Claimant also had a previous right rotator cuff repair and right open reduction of his ulna due to a work related fall. The Claimant testified that he was working on a pole barn and fell about 12 feet onto a concrete floor, shattering his elbow and pulling and tearing the tendons in his shoulder on the right side (Hrg. Trans. pp. 28-29). On March 16, 2002, the Claimant was seen at McKee Medical Center by Mark Durbin, M.D., a surgeon, who noted that Claimant had been working when he fell fourteen feet onto a concrete base. On physical examination for this injury, Dr. Durbin further noted the Claimant's right shoulder had an old injury with a large deformity of the AC joint. Dr. Durbin interpreted right shoulder x-rays as showing an old change from AC joint disruption with significant calcification (Respondents' Exhibit A, p. 1). On March 26,

2002, Dr. Durbin ordered a right shoulder MRI to rule out a rotator cuff tear (Respondents' Exhibit A, p. 5).

5. On April 9, 2002, a right shoulder MRI was read as showing a "large rotator cuff tear with complete detachment of the supraspinatus and infraspinatus tendons as well as a smaller focus of tear of the subscapularis tendon ...." There was also mild atrophy of the infraspinatus and scapularis muscles and mild to moderate atrophy of the supraspinatus muscle. Additionally, there was a medial dislocation of the biceps tendon extending through the full thickness tear of the subscapularis tendon, and a post-traumatic deformity of the acromioclavicular joint (Respondents' Exhibit B).

6. On May 1, 2002, Dr. Durbin operated on the Claimant's right shoulder, performing a diagnostic arthroscopy, arthroscopic acromioplasty, and open right rotator cuff repair (Respondents' Exhibit A, pp, 8-9; Respondents' Exhibit C).

7. The Claimant saw Dr. Durbin on May 9, 2002 and Dr. Durbin noted that the Claimant reported a noticeable significant difference in the pain in his shoulder. Dr. Durbin referred the Claimant for physical therapy (Claimant's Exhibit 7, p. 32; Respondents' Exhibit A, p. 12). On June 28, 2002, Dr. Durbin noted that the Claimant had some improvement in his range of motion, and his plan was to continue Claimant with aggressive range of motion and strengthening. Dr. Durbin anticipated seeing the Claimant in about four weeks for a final release (Claimant's Exhibit 7, p. 34; Respondents' Exhibit A, p. 12).

8. On May 10, 2007, the Claimant was evaluated by Dr. Kenneth Duncan at the Orthopaedic Center of the Rockies, who noted that three weeks earlier the Claimant was putting up sheet rock and had the gradual onset of right-sided neck pain and burning down his right arm. The Claimant reported that the symptoms were gradually getting worse and if he extends his neck it is worse and if he flexes, it is better. The Claimant reported seeing a chiropractor which did not help. The Claimant also reported taking Aleve and Advil which provides temporary improvement. Dr. Duncan opined that the symptoms were most likely related to an HNP involving C7 (Claimant's Exhibit 8; Respondents' Exhibit D).

9. The Claimant testified that on January 12, 2013, a Saturday, he was cleaning out a water jet system. He had run 75 feet of hose inside of a building to clean out a tank that was approximately 3 feet deep by 7-8 feet wide. The Claimant testified that once the corner was cleaned out with the hoses, he and his helper would then get inside the tank and, using shovels, picks and water, they would break up the material that was inside the tank in order to get it to go through the vacuum hoses and into the truck. During the course of this job, the Claimant was taking little swings with the pick to break up the material. Towards the end of this job, the Claimant testified that his shoulder was sore and he advised his coworker that he could hardly swing the pick anymore. The Claimant and his coworker finished the job and put the hoses back on the truck, but the Claimant testified that he could hardly get the hoses back up onto the truck. The Claimant testified that when he got into the truck as he prepared to drive it

back to the yard, he felt pain all down his whole right arm and his shoulder hurt so much, he couldn't lift his arm. The Claimant testified that he had not had this pain prior to January 12, 2013. After that day, the Claimant testified that his shoulder and arm never returned to the way it was before January 12, 2013 (Hrg. Trans., pp. 30-33).

10. The Claimant testified that he waited until Monday to report his injury to his boss, Mark McDonald, because it was his understanding that his boss only worked Monday – Friday. The Claimant testified that he also tried alternating ice and heat to see if he could make the shoulder feel better, but as of Monday morning, he still had to hold his shoulder due to the pain and couldn't even put his hand up to the steering wheel while driving to work (Hrg. Trans. pp. 33-34).

11. On January 14, 2013, Mark McDonald completed the First Report of Injury or Illness listing an injury/illness date of January 12, 2013 and noting that the Claimant, "overworked right shoulder" while cleaning water jets and using the vac, pick and shovel. A witness named Steve Meeks was listed (Claimant's Exhibit 1; Respondents' Exhibit E).

12. The Claimant was first seen by Dr. Michael McKenna at Care Plus Medical Center on January 14, 2013 (Hrg. Trans. p. 34). Dr. McKenna noted that the Claimant reported that,

> While working on Saturday and using a shovel and pick, he had sudden pain and indicates the anterior aspect of the right shoulder. He was really no longer able to use it anywhere near normally whatsoever. He has a significant past history 18 years ago that he did have surgery on the elbow, shoulder and I believe pelvis all on the right side. He has worked construction, etc, since then and states he has had no problems. He denies any other injuries from this incident on Saturday. Increasing pain over the weekend prompted his presentation this morning. He also complains of significant lack of range of motion in that shoulder.

Dr. McKenna diagnosed the Claimant with an acute injury, probable rotator cuff tear and possible supraspinatus issues. Dr. McKenna was not certain that an MRI could be performed due to the metal in the Claimant's shoulder and elbow from the prior injury, so he recommended that Claimant see Dr. Durbin and to check to see if an MRI could be performed. In the meantime, Dr. McKenna provided work restrictions and prescribed pain medication.

13. Dr. Durbin evaluated the Claimant on January 15, 2013. Dr. Durbin noted that the Claimant reported that "he was out doing some ax and pick work and was doing okay. He had a long day to finish and by the time he was done he had overworked it and was unable to raise his arm. He is having a moderate amount of pain in the arm and still cannot raise it up and is still pretty sore." Dr. Durbin stated his belief that the Claimant had "more of a rotator cuff strain than a tear" but was not certain. He recommended gentle range of motion exercises for the Claimant and if there was no

improvement, he would see the Claimant in 2-3 weeks and set up an MRI or consider a cortisone shot (Claimant's Exhibit 10, p. 52; Respondents' Exhibit G, p. 24).

14. From January 13, 2013 through January 22, 2013, the Claimant was off work and received temporary total disability benefits (Claimant's Exhibit 2, p. 3).

15. On January 24, 2013, Dr. McKenna noted that the Claimant reported that he thought his shoulder was less painful than the first visit with Dr. McKenna (Claimant's Exhibit 9, p. 39; Respondents' Exhibit F, p. 22). Dr. McKenna provided work restrictions that enabled the Claimant to return to modified duty with no use of the right upper extremity, and no commercial driving (Claimant's Exhibit 9, p. 38). The Claimant began receiving TPD benefits starting on January 23, 2013 (Claimant's Exhibit 2). He was provided modified duties working in the parts room.

16. On February 7, 2013, the Claimant returned to see Dr. Durbin in follow up from the shoulder injury. Dr. Durbin noted the Claimant was doing a little bit better, "slowly improving," and he was a little bit stronger in his rotator cuff muscles, but still had a little weakness on supraspinatus resistance testing. The Claimant reported that he would get sore with heavier overhead activities, but otherwise he felt he was "significantly improved." Dr. Durbin loosened the Claimant's restrictions to permit lifting up to 50 pounds, but he did not want the Claimant lifting heavy vacuums or performing overhead activities (Claimant's Exhibit 10, p. 56; Respondents' Exhibit G, p. 27).

17. On February 14, 2013, Dr. McKenna reviewed Dr. Durbin's report with the Claimant, and the Claimant concurred with Dr. Durbin's findings and recommendations. Dr. McKenna noted that the Claimant had "good range of motion, etc." on that date. His assessment was "Injury, right shoulder – improved". Dr. McKenna indicated the Claimant would be released to "essentially full duty", with a 50 pound lifting restriction, starting on February 18, 2013. The Claimant was scheduled for follow up with Drs. Durbin and McKenna (Claimant's Exhibit 9, p. 41; Respondents' Exhibit F, p. 23).

18. On February 18, 2013, due to his updated restrictions, the Claimant was placed in a new modified position with Employer driving tanker trucks and dumps. This position required the Claimant to drive a tanker truck to Colorado Springs twice a night. He would hook up a trailer to his truck at one location, drive, and then unhook the trailer at the second location. To hook up the trailer, the Claimant would turn a crank to raise and lower the hitch. He could do this with either arm. The crank was at waist level and when he turned the crank it would come up to eye level which was over his shoulder. The Claimant performed the cranking duty four to eight times per night. The Claimant testified that this activity increased his pain while he was doing it.

19. The Claimant testified that he did not want to keep doing the tanker driver work because it was painful to use the crank and because his pay was cut down to $10 per hour and he was only able to work 40 hours a week. So, overall, the Claimant was not happy with the work situation. He testified that he called his brother who informed the Claimant that he had all kinds of work and the Claimant would be paid $30 per hour.

The Claimant testified that he voluntarily resigned his job with Employer and has worked for his brother ever since February 28, 2013. The Claimant performs construction work including tenant finish, tile work and remodeling. The Claimant characterized this work as less physically demanding than the work he had been performing for Employer. The Claimant testified that he did not have any injuries or accidents to his right shoulder working for his brother (Hrg. Trans. pp. 39-41, also see Respondents' Exhibit H, p. 28).

20. On March 28, 2013, the Claimant failed to show up to his appointment with Dr. McKenna (Claimant's Exhibit 9, p. 41; Respondents' Exhibit I). On March 29, 2013, Insurer's representative called Care Plus, and scheduled a mandatory appointment for April 12, 2013 (Respondents' Exhibit J, p. 30).

21. On April 3, 2013, the Claimant was video recorded working construction with his brother. The video was reviewed in its entirety and in the video the Claimant can be seen performing the following activities, at the following times (as the times are noted on the video recording):

Time	*Activity*
7:56:32 a.m.	Claimant climbs into the back bed of a large truck and moves various pails, and other objects around in his truck bed using both arms, and then he climbs out the back of the truck bed with both arms on the hatch.
8:05:26	unloads objects from another large truck. closes the truck door with right arm.
8:07:13	coils hose, and is able to flex and abduct right arm without difficulty.
8:16:27	Claimant is seen reaching into the bed of the large pick-up truck with both arms over the back of the truck. Claimant pulls objects up and over the back hatch using his right arm, which is flexed greater than 100 degrees. Claimant pulls down the back hatch and pulls out more objects.
8:18	Claimant carries a metal and wood frame/equipment with his right arm (and not his left) while walking into a building.
8:23	Claimant on a second story balcony lifting and carrying work items in both hands.
8:24	Claimant throws a small object over the balcony, stretching his right arm out and down over the railing.
8:26-8:29	Claimant throws large rolls of materials off the balcony with both arms multiple times, using his right arm normally without hesitation; Claimant moves his arms while holding objects, up over his shoulders without apparent trouble. Claimant lifts objects from the floor without apparent trouble.
9:39	Claimant seen sweeping on balcony, moving right arm without apparent trouble.
9:40	Claimant abducts his right arm with broom to sweep debris into shovel.
9:41	Claimant moves a large machine with both arms, twists handles with right arm tightening object onto that machine.

9:47	Claimant moving a metal and wood object attempting to open the object; uses right arm without apparent difficulty.
9:48	Claimant moves large pails with both arm to another location.
9:50	Claimant lifts up tile saw machine with his right arm. Claimant moves object while abducting, flexing and pushing with the right arm to move the machine to the correct location.
9:51	Claimant lifts up a machine with right and left arms and places it in a different locations.
9:52	Claimant working with a tile saw machine, and he sets it up using both hands.
9:54	Claimant takes objects out of pails and sets them down on the ground. Lifts up another pail with water in it with right arm and holds it out.
9:55	Claimant holds another machine in his right arm and then hands it to another worker.
9:56	Claimant moves a saw and table with both arms into another location.
9:57	Claimant grabs two pails; one in each arm and walks into building.
10:04	Claimant comes out of building holding pails in each hand. Both pails are full and appear heavier but are being held in each hand.
10:04	Claimant lifts one of the full pails with his right arm and moves it to a different location.
10:05	Claimant lifts objects with right and left arms. Claimant moves them nearer to building.
10:06	Claimant lifts pail without apparent issue with right arm, and then he assembles a large hand held mixer and moves it to another location.
10:07	Claimant rolls out tarp and drags it into place with both hands.
10:08	Claimant moves pails with right arm without apparent issue and then he pours the contents of pail out.
10:10	Claimant holds the large mixer with both hands and mixes cement; mixer clearly causing vibration to upper arms.
10:11	Claimant uses large mixer again as other worker adds water to the cement mix.
10:16	Claimant comes out of building with pail filled with water in right hand, and he empties water from one pail into another.
10:21	Claimant checks watch and then lifts up mixer and mixes cement in pail again. Claimant then lifts mixer out of the pail using his right arm.
10:23	Claimant lifts up cap with right hand and places it back. Claimant's right arm comes up in >90 degrees of flexion.
10:29	Claimant picks up tile and places it on the tile saw, and then holds the tile in place with both hands.
10:30	Claimant flips a switch on his saw with his right hand and pushes tile through tile saw with both hands. Claimant pulls tile back from saw and takes piece off with right hand.
10:33	Claimant cuts another piece of tile by pushing it through the saw. Takes piece into building. Thereafter, Claimant repeats this numerous times.

10:37	Claimant exits the building with pail filed with water. Claimant picks up the large mixer and mixes cement in pail again. Claimant lifts pail up with cement in right hand and carries into building.
10:56	Claimant repeats tile cutting with saw, using both arms, and applying pressure while pushing tile through machine.
10:57	Claimant comes out of the building with empty pail, puts cement mix from sack into the pail. Claimant then puts water into pail, and then uses the mixer to mix.
10:58:41	Claimant empties more cement mix into pail. Claimant uses the large mixer again. Which he does again at 11:04; thereafter, Claimant uses his right arm to repeat this process, including pushing tile through tile saw process, reaching and stretching with his right arm.
11:21	Claimant reaches behind his back with right arm to put item in back pocket.
11:34	Claimant uses his right arm to reach in a bucket, and brush/scrape material off of tool using his right arm, while holding the tool in his left.
11:42	Claimant again using the large two hand mixer, causing vibrations to upper extremities.

22. During testimony at the hearing, the Claimant agreed that the video shows the Claimant using his left and right arm constantly below the waist, reaching over the trailer of a truck, taking carpet remnants over his shoulder and throwing them off a balcony, using his shoulder to mix grout with a vibrating mixer, and, one time during the video recording, using his arms overhead (Hrg. Trans., pp. 65-66).

23. On April 8, 2013, the Claimant called Dr. McKenna's office and requested that he be seen sooner than April 12, 2013. Care Plus obtained approval from Insurer, and the Claimant's appointment was moved to April 9, 2013 (Respondents' Exhibit J, p. 30). The Claimant could not recall at the hearing why he requested to move up his appointment with Dr. McKenna (Hrg. Trans. p. 67).

24. On April 9, 2013, Dr. McKenna noted that the Claimant had continued improvement. Dr. McKenna noted that the Claimant had last seen Dr. Durbin in February 2013 and Dr. Durbin had recommended a follow up visit with the Claimant in 6 weeks but was anticipating discharge. He was no longer working for Employer and he was not working with any particular restrictions, and while he noticed an occasional pop out of the shoulder, there hadn't been any real pain or discomfort. Dr. McKenna suggested that the Claimant follow-up with Dr. Durbin as scheduled and anticipated discharge with no rating (Respondents' Exhibit J, p. 31).

25. However, only 2 days later, on April 11, 2013, Dr. Durbin evaluated the Claimant and provided a significantly different opinion. In addition, Dr. Durbin noted that, contrary to the report provided to Dr. McKenna, the Claimant stated he had never regained full function to his shoulder, and that he always had pain limitations with abduction. Dr. Durbin recommended a right shoulder MRI "just to document integrity of

his rotator cuff" and scheduled a follow up appointment after the MRI (Claimant's Exhibit 10, p. 58; Respondents' Exhibit L, p. 42).

26. On April 16, 2013, a right shoulder MRI was interpreted as showing (1) a recurrent, complete tear of the supraspinatus and infraspinatus tendons with torn fibers retracted to the glenoid fossa, and subtle fatty atrophy of the infraspinatus muscle, (2) chronic, near full thickness tearing of the subscapularis tendon, and subtle fatty atrophy of the subscapularis muscle, (3) chronic, degenerative appearance of the superior labrum, (4) medial dislocation of the long head of the bicep tendon, and (5) post subacromial decompression and distal clavicular excision changes (Claimant's Exhibit 11, p. 61; Respondents' Exhibit M, p. 43).

27. On April 22, 2013, Dr. Durbin reviewed the MRI, noting that the Claimant had a "massive rotator cuff tear with significant atrophy, chronic-full thickness tearing of the supraspinatus, which has retracted significantly." Dr. Durbin further observed significant atrophy of the infraspinatus and supraspinatus muscles, and a medial dislocation of the long head of the biceps. Dr. Durbin opined the shoulder was "probably unfixable at this point." Dr. Durbin noted the Claimant was doing well functionally, except when he lifts in one certain direction. Dr. Durbin advised the Claimant that, ultimately, he would probably need a shoulder replacement. As the Claimant did not want to do that at the time, Dr. Durbin recommended conservative care, and opined that the Claimant could be placed at MMI (Claimant's Exhibit 10, p. 59; Respondents' Exhibit N, p. 44).

28. On April 26, 2013, the Claimant saw Dr. McKenna. Dr. McKenna reviewed the MRI findings and Dr. Durbin's report with the Claimant. The surgery discussed was a shoulder replacement, or a reverse arthroplasty for rotator cuff arthropathy. Dr. McKenna noted that Dr. Durbin instead recommended conservative therapy and he also noted that the Claimant was not excited about an extensive shoulder replacement surgery. Dr. McKenna concurred with Dr. Durbin that the Claimant was at MMI once a determination was made via Functional Capacity Exam (FCE) to determine the Claimant's range of motion and strength. Dr. McKenna further opined that he believed that the Claimant's restrictions would be made permanent, perhaps with some additional restrictions added per the results of the FCE (Claimant's Exhibit 9, p. 42; Respondents' Exhibit O, p. 45).

29. At the hearing, the Claimant testified that his thoughts, after having the MRI and discussing his condition with his doctors, were that the total shoulder replacement sounded like a lot of pain and he wasn't sure if it would be covered by workers' compensation. So, at that time, the Claimant opted to wait and see if it got better and if it didn't, then see what he needed to do to take care of the shoulder (Hrg. Trans., p. 43).

30. On May 6, 2013, the Claimant underwent an FCE with evaluator Heather Stokes at Physiotherapy Associates. The Claimant's shoulder range of motion and strength was tested and measured during a variety of physical tasks and Ms. Stokes

prepared a written report with the data entry points and a summary of the results (Claimant's Exhibit 12; Respondents' Exhibit P). The test was considered valid and the Claimant demonstrated consistent effort. The Claimant had no positive indicators of poor psychometrics or indicators of exaggerated symptoms. The level of pain was consistent with observed movement patterns. The test was limited by right shoulder pain (Claimant's Exhibit 12, p. 69 and 76; Respondents' Exhibit P, p. 52 and 59). The evaluation placed Claimant in the light work category and recommended maximum occasional and frequent lift of 35 lbs for floor to waist. The Claimant's ability to lift overhead with his right extremity was limited to 2lbs. Lifting with one hand to shoulder was limited to 7 lbs. on the right side (Claimant's Exhibit 12, pp. 69-70; Respondents' Exhibit P, pp. 52-53). The Claimant's right shoulder active range of motion was measured at 145 degrees flexion, 122 degrees abduction (133 degrees with pain), external rotation at 90 degrees with abduction at 75 degrees, and internal rotation at 90 degrees of abduction at 53 degrees. The Claimant's strength was normal, but painful (Claimant's Exhibit 12, p. 75; Respondents' Exhibit P, p. 58).

31. On May 28, 2013, the Claimant saw Dr. McKenna again and confirmed that he did not feel surgical intervention was appropriate at this time as he was not interested in the shoulder replacement. Dr. McKenna reviewed the FCE with the Claimant and discussed MMI and took range of motion shoulder measurements. Per Dr. McKenna's measurements the Claimant had a 19% impairment rating of the right upper extremity which, if converted, would be an 11% whole person impairment. Dr. McKenna indicated he would review the Claimant's full chart and if a rating were appropriate, he would do one. Dr. McKenna noted the restrictions were no use of the right arm above the shoulder level (Claimant's Exhibit 9, pp. 44-45; Respondents' Exhibit Q, pp, 61-62).

32. On June 4, 2013, Dr. McKenna placed the Claimant at MMI for this claim with a 19% right upper extremity rating. Dr. McKenna noted that apportionment may be appropriate if the Claimant had a previous rating secondary to his prior injuries. Dr. McKenna outlined restrictions of no use of the right upper extremity above the shoulder level, and no lifting, pushing, pulling greater than 50 pounds (Claimant's Exhibit 9, p. 48; Respondents' Exhibit Q, p. 63). Dr. McKenna noted that, "no formal maintenance care anticipated" (Claimant's Exhibit 9, p. 47; Respondents' Exhibit Q, p. 64).

33. On July 22, 2013, per Dr. McKenna's chart notes, the Claimant's wife called to see if the Claimant could proceed with the total shoulder replacement surgery. The notes indicate that the Claimant was authorized for a one time evaluation to discuss total shoulder replacement (Claimant's Exhibit 9, pg. 49).

34. On July 30, 2013, Dr. McKenna re-evaluated the Claimant, noting that the Claimant had reconsidered and was now interested in pursuing a surgical option for his shoulder and was requesting a second opinion. Dr. McKenna agreed that a second opinion was appropriate, but noted "I have cautioned him strongly that I am sure he can find a surgeon who is willing to operate but the question the question that he has to ask has to do more with how much improvement, particular in range of motion and strength, that he can possibly obtain versus the potential risk of any surgery." Dr. McKenna

nevertheless provided the referral. Dr. McKenna also noted that there were no changes to the rating or restrictions (Claimant's Exhibit 9, p. 50; Respondents' Exhibit R, p. 65).

35. On September 24, 2013, Insurer filed a final admission consistent with Dr. McKenna's opinions admitting for a 19% upper extremity impairment rating and MMI effective May 28, 2013. Liability for medical treatment and medications after MMI were specifically denied (Claimant's Exhibit 3; Respondents' Exhibit S).

36. On October 17, 2013, Dr. Armodios Hatzidakis performed a second opinion surgical evaluation. Dr. Hatzidakis examined the Claimant's shoulder, noting that on that date the Claimant had significantly limited range of motion, and significant tenderness over the long head of the biceps and over the lesser tuberosity. The Claimant had minimal tenderness over the AC joint. Dr. Hatzidakis reviewed prior medical records, including the right shoulder MRI, and he also reviewed nearly four hours of surveillance (Claimant's Exhibit 13, p. 99; Respondents' Exhibit T, p. 72). In reviewing the video surveillance from April 3, 2013, Dr. Hatzidakis noted that the Claimant worked a full day engaged in activities including, driving, lifting his arms to unload a truck, throwing objects off a balcony, using his right arm to assemble a tile table saw, mixing grout with a motorized mixer, lifting 30-50 lb. bags of cement and hoisting them to his right shoulder and working a sander. Dr. Hatzidakis notes that most of the activities were performed with the Claimant's arm below the shoulder, but while working with the tile cutter, the Claimant "lifts his arm seemingly quite easily multiple times above his shoulder to work the tile saw." Dr. Hatzidakis opined that the Claimant's current limited ability to actively elevate his arm is "in contradistinction to the reviewed video from April 3, 2013." Although, the doctor noted that it could simply be that the Claimant's shoulder has become worse over the last six months (Claimant's Exhibit 13, pp. 99-100; Respondents' Exhibit T, pp. 72-73). Dr. Hatzidakis interpreted the right shoulder MRI as showing grade 2 fatty infiltration. Dr. Hatzidakis also discussed further testing, therapy and surgical options (Claimant's Exhibit 13, pp. 102-103).

37. On November 5, 2013, the Claimant underwent a fluoro-guided right shoulder arthrogram with aspiration (Claimant's Exhibit 14; Respondents' Exhibit U, p. 81). The joint fluid was sent to the lab for analysis and cultures and no organisms were noted (Claimant's Exhibit 13, pp. 105-107). An EMG was conducted on November 14, 2013 and was found to be basically a normal study (Claimant's Exhibit 15, p. 111; Respondents' Exhibit V, p. 82).

38. On November 25, 2013, consistent with recommendations he made in his October 17, 2013 note, Dr. Hatzidakis' office wrote Insurer requesting authorization for a right shoulder arthroscopic rotator cuff repair, longhead biceps tenodesis, subacromial decompression with possible distal clavicle resection and open pectoralis major transfer (Claimant's Exhibit 13, p. 108; Respondents' Exhibit W, p. 84).

39. On December 2, 2013, Dr. Jon Erickson, an orthopedic surgeon, performed a physician advisor review in response to the surgical request from Dr. Hatzidakis. He noted that the Claimant's "medical records are extremely confusing." Dr.

Erickson opined that it was difficult to understand how all the damage seen on the MRI could occur from simple overuse. Dr. Erickson noted that there were "more questions concerning this case that one could reasonably list" and he stated that he had never before seen a case such as this "which begs an IME." Of particular concern to Dr. Erikson was that there were four hours of surveillance showing the Claimant using his shoulder aggressively, but Dr. Hatzidakis did not adequately explain how the Claimant's function had deteriorated so severely between April and October of 2013, other than to say it simply got worse over time. Dr. Erikson recommended denial of the procedure pending the results of an IME of the Claimant to "determine just how severely impaired he is" and "how this shoulder could become so severely involved when there was no clear work-related injury" (Respondents' Exhibit X).

40. On December 5, 2013, the Claimant's attorney was notified that the request for authorization for the surgery recommended by Dr. Hatzidakis was denied (Respondents' Exhibit Y).

41. On January 20, 2014, Dr. Miguel Castrejon performed a Division IME. He reviewed available records, but he did not review the surveillance. He took a history from the Claimant and noted that he found the Claimant to be a reliable historian (Claimant's Exhibit 16, p. 113; Respondents' Exhibit Z, p. 87). Although, the Claimant himself admitted that while he told Dr. Castrejon that working modified duties on the tanker truck aggravated his shoulder condition, he did not tell the doctor that he only worked four or five shifts on the tanker truck performing those duties (Hrg. Trans., p. 72). The Claimant also described to Dr. Castrejon his job duties when he worked the vacuum truck, stating that he worked 12-14 hour days and he used 75-pound vacuum hoses, picks and shovels to break up and remove materials inside tanks and pits (Claimant's Exhibit 16, p. 113; Respondents' Exhibit Z, p. 87). The Claimant advised Dr. Castrejon that, on January 12, 2013, he had been working with a coworker all day using a pick and shovel, but receiving little help from the coworker. The Claimant reported that he noticed discomfort involving the right shoulder but he continued to work as he needed to finish the job. The Claimant further reported to Dr. Castrejon that by the time he had to put the hoses back on the truck at the end of the job, he was having difficulty with this due to weakness and pain in his right shoulder. The Claimant advised Dr. Castrejon that he was concerned about this but could not contact his supervisor until Monday since he did not typically answer the phone on weekends. The Claimant advised that he did report the injury on Monday, January 14, 2013 and was referred for medical care with Dr. Durbin and he was placed on light duty. Dr. Castrejon also noted that the Claimant treated with Dr. McKenna. Through Dr. McKenna's records, Dr. Castrejon was advised of the Claimant's significant past history of right shoulder injury (Claimant's Exhibit 16, p. 114; Respondents' Exhibit Z, p. 88). The Claimant advised that subsequent to the date of injury until February 28, 2013, he worked the modified duty position with the tanker truck. As noted above, the Claimant did not tell Dr. Castrejon that he only worked four or five shifts in that modified position. Dr. Castrejon surmised that the modified work may have aggravated the Claimant's condition because the turning of the crank on the tanker truck "require a moderate amount of force" implicating his right upper limb as the Claimant is right handed (Claimant's Exhibit 16, p.

120; Respondents Exhibit Z, p. 94). Dr. Castrejon notes that the Claimant admitted that after leaving his employment with Employer, his pain symptoms improved.

42. Dr. Castrejon then addressed the surgical recommendation of Dr. Hatzidakis and noted that the Claimant wishes to proceed with this surgical intervention "with the goal of improving strength and motion to his limb" although the Claimant admitted that "his pain has improved and is present only with lifting in an above the shoulder manner" and "he is able to perform his current work activities as he limits any above shoulder activities" (Claimant's Exhibit 16, p. 121; Respondents' Exhibit Z, p. 95). With regard to right shoulder surgery, Dr. Castrejon opined as follows:

> On examination today there is an adequate and functional range of motion. There is no discomfort. There is one grade motor loss yet this does not functionally limit activities of daily living and current work activities. This examiner notes that when evaluated by Dr. Hatzidakis shoulder range of motion was significantly decreased when compared to today's findings. Dr. Hatzidakis documented flexion to 80 degrees, abduction to 80 degrees, and external rotation to 30 degrees. Today his flexion is 156 degrees, abduction is 122 degrees, internal rotation to 65 degrees and external rotation to 75 degrees. Based upon his examination today I question whether proceeding with surgery is appropriate. In this examiner's professional opinion it is unlikely that the Claimant's range of motion and strength will appreciably increase with surgery, given the MRI findings. And, if pain is not an issue, then this would not be considered an indication to proceed with surgery (Claimant's Exhibit 16, pp. 121-122; Respondents' Exhibit Z, pp. 95-96).

43. Dr. Castrejon opined that based upon his physical examination of the Claimant and review of the medical records he concluded that the Claimant was at MMI as of June 4, 2013 and he has remained stable since that date, he found no evidence to support a significant worsening of condition, and he noted that the Claimant's range of motion was very similar to that found during the May 6, 2013 FCE. Dr. Castrejon further noted that the Claimant continued to work in a new position, reporting minimal pain with the primary complaint of weakness and pain with elevation of weight, which he felt was not likely to improve with surgery (Claimant's Exhibit 16, p. 122; Respondents' Exhibit Z, p. 96).

44. Dr. Castrejon assigned a 7% impairment of the upper extremity for loss of range of motion and a 4% impairment for loss of function due to loss of strength (Claimant's Exhibit 16, p. 122; Respondents' Exhibit Z, p. 96). These combined for the upper extremity impairment rating of 11%, which, if converted per table 3, would result in a 7% whole person impairment rating, prior to apportionment.

45. Considering the issue of apportionment, Dr. Castrejon noted the Claimant sustained a prior work related injury to his right shoulder[1] which he opines, "would have been eligible for 10% impairment of upper extremity based upon distal clavical resection. After apportioning 10%, Dr. Castrejon opines a 1% upper extremity (and, if converted, a 1% whole person) impairment rating remains (Respondents' Exhibit Z, p. 97).

46. With respect to the issue of maintenance care, Dr. Castrejon noted that none was recommended by Dr. McKenna. Dr. Castrejon did not make any specific recommendation for maintenance care either, but he did state that, "based upon the Claimant's medical condition, it is reasonable for the claimant to retain access to surgical intervention should he experience a significant change in his condition that is found to be directly related to the industrial condition" (Respondents' Exhibit Z, p. 97).

47. On February 27, 2014, Insurer filed a Final Admission of Liability consistent with Dr. Castrejon's opinion regarding MMI (Claimant's Exhibit 4; Respondents' Exhibit AA). However, in error, the Insurer admitted to the original, unapportioned 11% upper extremity rating, failing to notice the apportionment section of Dr. Castrejon's report. At hearing, the parties stipulated that Insurer claims representative Felicia Hall would testify that Insurer mistakenly admitted to the 11% pre-apportionment upper extremity rating, and not the 1% upper extremity post-apportionment rating (Hrg. Trans. p. 15-16). The difference between the 11% scheduled rating and 1% rating is $5,553.18.

48. On March 12, 2014, Dr. Hatzidakis' office again requested authorization for surgery, including: right shoulder arthroscopic biopsies/cultures, rotator cuff repair, longhead biceps tenodesis, subacromial decompression with possible distal clavical resection and open pectoralis major transfer (Claimant's Exhibit 13, p. 109; Respondents' Exhibit BB, pp. 104).

49. On March 16, 2014, Dr. Erickson was again asked to review and address the surgical authorization requested and opine regarding the DIME report . Dr. Erickson noted Dr. Castrejon failed to address the very important issue of causality and whether the Claimant sustained a work related injury versus a cumulative trauma disorder. Dr. Erikson opined that if the Claimant's claim was a cumulative trauma disorder, then he had serious doubt that his work activities would justify the severe damaged noted on the MRI as a work related condition. Dr. Erickson stated that until the causation issue was properly addressed, he still saw no reason to approve the request for surgery (Respondents' Exhibit CC).

50. On March 17, 2014, Insurer issued a letter again denying Dr. Hatzidakis' surgery request (Claimant's Exhibit 6; Respondents' Exhibit DD).

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[1] In the section of his DIME report on apportionment on the 11th page of his report, Dr. Castrejon refers to a left shoulder work related injury on March 16, 2002. However, in his review of the medical records from 2002 on the 7th and 8th pages of his report, Dr. Castrejon correctly refers to a right shoulder injury.

51. On March 27, 2014, the Claimant applied for hearing on issues that included overcoming the DIME on MMI, medical benefits, namely authorization of the surgery recommended by Dr. Hatzidakis, disfigurement, and permanent partial disability benefits (related to conversion)(Respondents' Exhibit EE).

52. On April 25, 2014, Respondents filed their Response to March 27, 2014 Application for Hearing, indicating as additional issues causation/relatedness, apportionment of the impairment rating, intervening injury/aggravation at subsequent employment, offsets and overpayment, causation of disfigurement and failure to accept modified job offer (Respondents' Exhibit FF).

53. On July 23, 2014, Kathleen D'Angelo issued an IME report. Dr. D'Angelo obtained a detailed history from the Claimant regarding his prior shoulder issues, his work injury, his subsequent modified work for Employer, his subsequent work for his brother, and his ongoing shoulder issues. As part of her IME, Dr. D'Angelo also thoroughly reviewed available medical records, and examined the Claimant. Per the questionnaire completed by the Claimant, the Claimant provided the following mechanism of injury for the incident on January 12, 2013:

> I was using a pick and shovel all day to clean out a water jet tank. During this time I noticed some discomfort in my right shoulder but continued working as we needed to complete the job. At the end of the job I had [sic] difficult time putting the hoses back on the truck due to weakness and pain in right shoulder. When I go in the truck to go back to the yard I had to lift my right hand with my left hand to put it on the gear shift (Respondents' Exhibit GG, p. 114).

54. Dr. D'Angelo reviewed in detail the time period right after his reported injury with the Claimant as well as the period when he worked modified duty and when he left Employer to work for his brother. During the course of the interview, the Claimant indicated to Dr. D'Angelo that he believed working with the tanker truck and having to rotate the crank to raise and lower the trailers was damaging to his shoulder and he should not have been asked to do this. However, Dr. D'Angelo noted that this activity would have occurred prior to the Claimant's February 28, 2013 resignation from Employer. On April 9, 2013, Dr. McKenna noted the Claimant was not having pain and was much improved except for occasional popping. Dr. D'Angelo noted that it wasn't until 2 days after this when the Claimant saw Dr. Durbin that the Claimant complained of persistent, ongoing pain. Thus, she questioned whether the Claimant suffered a new injury between these 2 doctor appointments at a time when he no longer worked for Employer (Respondents' Exhibit GG, pp. 119-120). On physical examination, Dr. D'Angelo noted that range of motion "is full in all directions without apparent distress or pain. Range of motion of the right shoulder and left shoulder are equal" (Respondents' Exhibit GG, p. 125). Upon review of the impressions from the April 16, 2013 MRI, Dr. D'Angelo opined that the MRI revealed "changes which are not acute and do not date from his January 2013 work incident. The radiological study reveals chronic and subacute finding, which do not correspond to the time interval of 3 months." Dr. D'Angelo specifically notes that "fatty infiltration" and "atrophy" are indicative of chronic

tearing and also portend poor prognostic outcome for surgical repair and/or debridement of the tendons (Respondents' Exhibit GG, p. 128).

55. Ultimately, Dr. D'Angelo opined that the Claimant's right shoulder massive rotator cuff tears associated with retraction, atrophy and fatty infiltration were not causally related to his described work incident." She further opined that while she thought it was likely that the Claimant's work duties aggravated Claimant's his underlying degenerative shoulder condition, this was a temporary flare or aggravation, as evidenced by his improvement and reports on April 9, 2013. By that date, Claimant had been working for his brother in a physically demanding position for 6 weeks (Respondents' Exhibit GG, p. 131). Dr. D'Angelo concluded that "[Claimant's] present symptoms related to his right shoulder as well as his massive rotator cuff tears and the need for treatment are independent, and unrelated and incidental to work activities at [Employer]." Dr. D'Angelo opined that Dr. Castrejon erred in finding the Claimant's ongoing right shoulder issues were work related. She indicated Dr. Castrejon failed to take into account the MRI findings, and the interval amount of time it would take to develop those findings. She explained that the reason the Claimant was able to function at a high level with those issues was the length of time he had been compensating for his right shoulder cuff damage. She found that to the extent the Claimant requires any right shoulder surgery, whether for joint replacement or rotator cuff debridement, it is unrelated to a January 2013 work incident, but is rather, related to prior and chronic rotator cuff trauma and tears which predate the 2013 work incident (Respondents' Exhibit GG, p. 132).

56. At the hearing, Scott McDonald testified as the general manager for McDonald Farms. Mr. McDonald testified that he was familiar with the Claimant and had known him since they were both either ten or eleven years old (Hrg. Trans., p. 80). Mr. McDonald testified that he was working on the day that the Claimant stated he was injured and over the course of the weekend had been on the phone for a total of eight hours. He testified that his phone is with him 24/7 and he checks his voice messages regularly (Hrg. Trans., p. 82). Although Mr. McDonald conceded that the Claimant's pay was reduced when he worked in the parts room, the Claimant's pay went back up to his regular rate of pay as soon as he started driving the tanker truck (Hrg. Trans., pp. 83-84). Mr. McDonald testified that the Claimant worked modified duty on the tanker truck between February 18, 2013 and February 26, 2013 (Hrg. Trans., p. 87). During the time frame when the Claimant worked on the tanker truck, Mr. McDonald testified that the Claimant never called him to report that he was having shoulder problems (Hrg. Trans., p. 88). Mr. McDonald also testified that if you put the crank in the low gear, you can crank it with one arm (Hrg. Trans., pp. 89-90). He noted that if the cranking is done in a high gear it can be done very quickly, but it could take 10-15 minutes in the low gear. However, using the low gear requires much less strength (Hrg. Trans., pp. 92-93).

57. Dr. D'Angelo testified at the hearing as an expert in the areas of internal medicine, occupational medicine and as to Level II accreditation matters for workers' compensation. Consistent with her written IME report of July 23, 2014, Dr. D'Angelo testified that her opinion was that the Claimant sustained an aggravation of his

underlying right shoulder inflammatory process due to the mechanism of injury he described to her as occurring in January of 2013. Dr. D'Angelo agreed that there was a basis for a compensable claim due to the January 2013 work injury (Hrg. Trans., p. 117). Dr. D'Angelo testified that subsequently the Claimant was placed at MMI and he remains at MMI. She bases this opinion, in part, on the Claimant's reporting of improvement and on the range of motion measurements taken by her and Dr. Castrejon, which were similar (Hrg. Trans., p. 119). Dr. D'Angelo also testified that in her review of the MRI, in terms of causality, the findings were significant for the fatty infiltration of the torn rotator cuffs, the atrophy and the retraction. She opined that these three findings are seen in chronic rotator cuff tears as opposed to an acute injury (Hrg. Trans., p. 120 see also, pp. 132-133). She based this on medical literature that provides that although you will see fatty infiltration in patients over 68 years old within 2 ½ years following a massive tear. However, for patients under the age of 68, it takes, on average, three to four years before fatty infiltration and atrophy of the musculature develops. Since the Claimant's MRI was performed three ½ months after the injury in January, this would not support the time frame during which fatty infiltration or muscle atrophy is known to occur (Hrg. Trans., pp. 120-121). Dr. D'Angelo also testified that the mechanism of injury that the Claimant described to her was also an indication that the rotator cuff tear seen on the MRI could not be attributed to that activity for a couple of reasons: (1) his pain increased gradually throughout the day and there was no one moment where he could no longer work and, (2) the Claimant was working with a pick but was not doing overhead activity. Therefore, Dr. D'Angelo opined that the activities the Claimant was doing at work on January 12, 2013 would have increased inflammation in a person with the Claimant's long history of degenerative changes in his shoulder which would have caused pain and difficulty with range of motion. However, this is a temporary aggravation which resolves. She found that this conclusion fit the mechanism of injury, the duration of his issues per the medical records and the fact that he recouped his range of motion after a period of time (Hrg. Trans., p. 127-128). With respect to the surgery recommended by Dr. Hatzidakis, Dr. D'Angelo opined that she does not believe it is reasonable and necessary as patients with findings as severe as the Claimant's do not typically respond well to repair of severely damaged and atrophied rotator cuffs and the risk of re-injury is greater. Dr. D'Angelo acknowledged she is not a surgeon but opined that it is within her work and expertise as an internist to render opinions as to whether or not a surgery can benefit a patient (Hrg. Trans., pp. 128-132). Dr. D'Angelo also testified that she agreed with Dr. Castrejon that the Claimant was at MMI for his claim, although she disagrees that Dr. Castrejon's diagnosis is claim related since she finds the Claimant's shoulder condition wholly unrelated to the work incident (Hrg. Trans., p. 140). Thus, she would not have provided the Claimant with an impairment rating as Dr. Castrejon did. Nevertheless, to the extent that he provided an impairment rating, Dr. D'Angelo found no errors with his impairment rating process, including the apportionment (Hrg. Trans., pp. 141-142, see also pp. 145-146). Dr. D'Angelo further opined that Claimant's impairment, if any, should be compensated as a scheduled rating, as there was no indication Claimant had any functional disability outside of the right shoulder joint (Hrg Trans. p. 142).

58. Dr. D'Angelo's testimony was completed by deposition on October 17, 2014. On cross-examination, Dr. D'Angelo testified that at the time of her examination the Claimant had asymmetry of his upper periscapular muscle with atrophy of the right infraspinatus and supraspinatus on examination which are muscles of the rotator cuff located on his scapula which is proximal to the glenohumeral joint and located on his body (Kathy D'Angelo Depo. Trans., pp. 24-25). She also testified that the purpose of the rotator cuff is to assist in the use of the arm. The Claimant has testified that when he uses his arm over head or out to the side while weight bearing he has pain. Dr. D'Angelo also testified that the Claimant indicated he had pain on her examination which would go into his neck and that was when she noted significant atrophy on examination of the thoracic spine area (Kathy D'Angelo Depo. Trans., pp. 39-40). The Claimant's counsel also reviewed the issue of apportionment and argued that the total impairment of the Claimant's shoulder would be 10% for the distal clavical surgery plus the 11% for the range of motion and strength deficits for a 21% pre-apportionment rating and then the 10% would be apportioned from this amount (Kathy D'Angelo Depo. Trans., pp. 33-35). However, Dr. D'Angelo adamantly disagreed and testified that it was her opinion that it is not appropriate, per the AMA Guides, to have added in the 10% for the distal clavicle as it was not an issue in the Claimant's current condition (Kathy D'Angelo Depo. Trans., pp. 33-35). On redirect examination, Dr. D'Angelo again testified that it is her opinion that the rater does not include all prior surgeries in the pre-apportionment rating (Dr. Kathy D'Angelo Depo. Trans., p. 53).

59. Dr. Hatzidakis testified by deposition on January 29, 2015. Dr. Hatzidakis is a board certified orthopedic surgeon who specializes in shoulder surgery (Dr. Armodios Hatzidakis Depo. Trans., p. 3). Dr. Hatzidakis is also Level II accredited by the Division of Worker's Compensation (Dr. Armodios Hatzidakis Depo. Trans., p. 4). Dr. Hatzidakis saw the Claimant for a second opinion regarding medical treatment on October 17, 2013 (Dr. Armodios Hatzidakis Depo. Trans., p. 4). Based on his review of the MRI, Dr. Hatzidakis opined that the Claimant had Grade 2 fatty infiltration, which means that there were significant streaks of fat in the muscle. However, this was not to the level of a Grade 4 fatty infiltration where there is essential no muscle left. Since the fatty infiltration was still not too severe and the Claimant's humeral head wasn't excessively high-riding, Dr. Hatzidakis opined that this could still be consistent with an acute injury (Dr. Armodios Hatzidakis Depo. Trans., pp. 6-7). He did not agree with Dr. D'Angelo that the existence of fatty infiltration in an MRI taken 3 ½ months after the Claimant's work injury meant that the MRI findings could not be acute and related to the work injury (Dr. Armodios Hatzidakis Depo. Trans., p. 7). Dr. Hatzidakis testified that when he evaluated the Claimant he recommended an arthroscopic evaluation, debridement, removal of torn tissue, treatment of the biceps and possibly and open pectoralis major transfer to help the weak subscapularis (Dr. Armodios Hatzidakis Depo. Trans., p. 8). Dr. Hatzidakis testified that he disagrees with Dr. D'Angelo's opinion that the Claimant is not likely to do well with the repair. He further testified that in his practice, he has seen patients with tears like the Claimant who are treated successfully with surgery and have pain relief, improved function, improved range of motion and improved strength. Although he does agree that the prognosis for regaining full strength is less than if the tear were smaller. Yet, Dr. Hatzidakis maintains that the results can be

good and improve a patient's quality of life (Dr. Armodios Hatzidakis Depo. Trans., p. 9). He opined that, "[i]t's well-documented in the literature, repair of extensive rotator cuff tears has been well-documented to have good results. The treatment of biceps lesions with massive cuff tears, even in the state – in the setting of an irreparable rotator cuff, can help the patient's function and pain relief significantly. And even a simple debridement without any repair or treatment of an associated biceps lesion can result in pain relief" (Dr. Armodios Hatzidakis Depo. Trans., p. 11). Dr. Hatzidakis testified that since it had been a year and three months between the time he examined the Claimant and the date of his deposition, he would need to evaluate the Claimant again and he would recommend a repeat MRI to evaluate the progression of the tear and the fatty infiltration (Dr. Armodios Hatzidakis Depo. Trans., p. 14).

60. On cross-examination, Dr. Hatzidakis testified that he was only asked to provide a surgical opinion, and he did not assess causation (Dr. Armodios Hatzidakis Depo. Trans., pp. 19-20). As of the date of his deposition, Dr. Hatzidakis had not been provided with any additional documentation, he never reviewed the reports of Dr. Castrejon or Dr. D'Angelo, and he had not reviewed Dr. D'Angelo's testimony (Dr. Armodios Hatzidakis Depo. Trans., pp. 18-19). Dr. Hatzidakis admitted that his opinion regarding Claimant being a surgical candidate was based upon how Claimant presented to him on October 17, 2013 (Dr. Armodios Hatzidakis Depo. Trans., pp. 21-22). In discussing the video surveillance of the Claimant from April 3, 2013, Dr. Hatzidakis agreed that his function seemed better in the video that it did during the evaluation at Dr. Hatzidakis' office (Dr. Armodios Hatzidakis Depo. Trans., p. 22). Dr. Hatzidakis "absolutely" agreed that the question of whether a patient is a surgical candidate is a question two surgeons seeing the patient on the same date could disagree on. (Dr. Armodios Hatzidakis Depo. Trans., p. 28). Dr. Hatzidakis testified that the considerations that made him decide to recommend surgery on October 17, 2013 were his pain and his shoulder dysfunction (which included limited motion, weakness and pain with motion) (Dr. Armodios Hatzidakis Depo. Trans., pp. 29-29). On cross examination, Dr. Hatzidakis again testified that he didn't think he could currently make an assessment regarding whether the surgery he previously recommended could assist the Claimant with an increase in function since he hadn't seen the Claimant in over a year (Dr. Armodios Hatzidakis Depo. Trans., pp. 31-32).

Ultimate Findings of Fact

61. The Claimant's testimony regarding his mechanism of injury on January 12, 2013 is generally consistent with his reporting of the same to treating and evaluating physicians, is credible, and is found as fact. Specifically, it is found that the Claimant suffered an injury to his right shoulder while performing his job duties using vacuum hoses, a pick and a shovel to remove debris from a water jet tank.

62. The medical records of Drs. McKenna and Durbin and the May 6, 2013 FCE report, along with the video surveillance taken of the Claimant working for a subsequent employer on April 3, 2013, are persuasive in terms of establishing that the

Claimant's right shoulder condition improved significantly subsequent to January 12, 2013.

63. The surgery recommended by Dr. Hatzidakis for which he has submitted two requests for authorization is not reasonably necessary to cure and relieve the Claimant from an injury that he sustained on January 12, 2013. Per the medical records of Drs. McKenna and Durbin, it is more likely than not that the injury suffered by the Claimant on January 12, 2013 was a strain that resolved and the Claimant's function, range of motion and strength returned to his pre-injury baseline. That pre-injury baseline is not a healthy shoulder given that the Claimant sustained a prior work related injury and a non-work related injury to the right shoulder and the Claimant also has degenerative changes secondary to these prior injuries. The opinions of Drs. Castrejon, McKenna, Durbin, Erickson and D'Angelo are found to be more persuasive than that of Dr. Hatzidakis regarding whether the proposed surgery is reasonably necessary.

64. There was no testimony or evidence offered at the hearing or in subsequent deposition testimony of (a) an actual permanent impairment rating from the Claimant's prior work related injury; or (b) that the Claimant received an award or settlement under the Workers' Compensation Act of Colorado or similar act from another state.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits – Causally Related and Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Here, the Claimant's treating and examining physicians for the most part agree that, ultimately, the Claimant will require a shoulder replacement surgery. However, given his current level of function, range of motion and management of pain symptoms, none of the physicians recommend proceeding with this surgery at this time. Even Dr. Hatzidakis acknowledged that he had not evaluated the Claimant since October and November of 2013 and reevaluation would be required before he could opine if the Claimant were a candidate for surgery.

As for the surgical authorization request from Dr. Hatzidakis to perform right shoulder arthroscopic biopsies/cultures, rotator cuff repair, longhead biceps tenodesis, subacromial decompression with possible distal clavical resection and open pectoralis major transfer, Dr. Hatzidakis is alone among the physicians who have treated and evaluated the Claimant in recommending these procedures. All of the other physicians reject these proposed procedures due to questions regarding causation or the likelihood that the proposed procedures are not reasonably necessary to cure and relieve the Claimant of the effects of his work injury, or both. In fact, several physicians have opined that the procedures proposed by Dr. Hatzidakis are not likely to improve the Claimant's condition and may actually cause greater harm. Dr. Durbin, the orthopedic surgeon who performed a right rotator cuff repair in 2002, and was also an authorized treating physician over the course of this claim, opined that the Claimant's shoulder was probably unfixable at this point but that the Claimant was actually doing well functionally except when he lifted in one certain direction. Dr. Durbin recommended conservative care until such time as the Claimant ultimately required a shoulder replacement. The Claimant's other treating physician, Dr. McKenna, strongly cautioned that, given the Claimant's current range of motion and strength, the Claimant had to seriously consider how much he could gain from surgery versus the potential risks. The DIME physician Dr. Castrejon opined that, based upon his physical examination of the Claimant on January 20, 2014, he documented a significantly improved range of motion compared to the measurements documented by Dr. Hatzidakis earlier. He opined that the proposed surgery was not likely to appreciably increase the Claimant's range of motion and strength, so, if pain was not an issue, then he found surgery was not indicated. As for the issue of pain, the Claimant advised Dr. Castrejon, as well as other treating and evaluating physicians, that his pain had improved and was only present with lifting in an above the shoulder manner and the Claimant was able to perform his current work duties and he was not functionally limited in his activities of daily living. Dr. D'Angelo also took range of motion measurements and found the Claimant's range of motion to be full in all directions without apparent distress or pain and noted that range of motion of his right and left shoulders was equal. Based on reports in the medical records, Dr. D'Angelo also concluded that the Claimant's pain symptoms significantly improved between the January 12, 2013 incident and April 9, 2013. She opined that the Claimant's work duties temporarily aggravated his underlying condition and caused inflammation, but that these issues resolved.

Further, while the Claimant's testimony regarding the incidents of January 12, 2013 was credible, and it is found that the events that the Claimant consistently related to his Employer and medical providers did occur as he testified, this is not sufficient to

establish a causal relation to the need for the recommended surgery in light of the conflicting evidence. Per the credible and persuasive opinion of Dr. D'Angelo, as supported by the opinion of Dr. Erickson and the medical records of Drs. McKenna and Durbin, the mechanism of injury described by the Claimant would be more consistent with a strain but would not be consistent with the development of the condition of his shoulder as seen on the April 16, 2013 MRI which was interpreted as showing (1) a recurrent, complete tear of the supraspinatus and infraspinatus tendons with torn fibers retracted to the glenoid fossa, and subtle fatty atrophy of the infraspinatus muscle, (2) chronic, near full thickness tearing of the subscapularis tendon, and subtle fatty atrophy of the subscapularis muscle, (3) chronic, degenerative appearance of the superior labrum, (4) medial dislocation of the long head of the bicep tendon, and (5) post subacromial decompression and distal clavicular excision changes. Both Drs. D'Angelo and Erickson questioned how the mechanism of injury described by the Claimant could have caused, or even aggravated or accelerated, the structural condition of the Claimant's shoulder as shown on the April 16, 2013 MRI images. The fact that subsequent to the January 12, 2013 injury, but before the MRI, the Claimant was seen working at his new job duties for another employer in a manner demonstrating a relatively high level of function further supports the opinions of Drs. D'Angelo and Erickson. A number of actions the Claimant takes on the video using his right upper extremity, including, but not limited to the following, demonstrate the Claimant's improved level of function, range of motion, and apparent lack of pain with right shoulder and arm use:

8:16:27	Claimant is seen reaching into the bed of the large pick-up truck with both arms over the back of the truck. Claimant pulls objects up and over the back hatch using his right arm, which is flexed greater than 100 degrees. Claimant pulls down the back hatch and pulls out more objects.
8:26-8:29	Claimant throws large rolls of materials off the balcony with both arms multiple times, using his right arm normally without hesitation; Claimant moves his arms while holding objects, up over his shoulders without apparent trouble. Claimant lifts objects from the floor without apparent trouble.
9:50	Claimant lifts up tile saw machine with his right arm. Claimant moves object while abducting, flexing and pushing with the right arm to move the machine to the correct location.
9:51	Claimant lifts up a machine with right and left arms and places it in a different locations.
9:52	Claimant working with a tile saw machine, and he sets it up using both hands.
10:11	Claimant uses large mixer again as other worker adds water to the cement mix.

Dr. Castrejon ultimately opined that, as the Claimant continued to work in a new position, reporting minimal pain, with the primary complaint of weakness and pain with elevation of weight, he felt this was not likely to improve with surgery. The opinions of

Dr. Castrejon, Dr. D'Angelo, Dr. Erickson, Dr. Durbin and Dr. McKenna are more persuasive than that of Dr. Hatzidakis regarding the surgical recommendation to repair (rather than replace) the Claimant's right shoulder.

Moreover, the proposed medical treatment consisting of right shoulder arthroscopic biopsies/cultures, rotator cuff repair, longhead biceps tenodesis, subacromial decompression with possible distal clavical resection and open pectoralis major transfer, as recommended by Dr. Hatzidakis, is treatment for a pre-existing condition unrelated to the Claimant's January 12, 2013 industrial incident. The Claimant's January 12, 2013 work injury did not cause, combine with, or aggravate the Claimant's pre-existing right shoulder condition, nor did it accelerate the need for the surgical treatment proposed. As a result, the Claimant's request for medical benefits consisting of right shoulder arthroscopic biopsies/cultures, rotator cuff repair, longhead biceps tenodesis, subacromial decompression with possible distal clavical resection and open pectoralis major transfer is denied.

Burden of Proof to Overcome the MMI Opinion of a DIME Physician

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). The party seeking to overcome that opinion concerning a claimant's MMI status bears the burden of proof by clear and convincing evidence. C.R.S. § 8-42-107(8)(b)(III); *Clark v. Hudick Excavating*, W.C. No. 4-524-162 (November 5, 2004); *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting

medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

On April 22, 2013, Dr. Durbin reviewed the Claimant's MRI, noting that the Claimant had a "massive rotator cuff tear with significant atrophy, chronic-full thickness tearing of the supraspinatus, which has retracted significantly." Dr. Durbin further observed significant atrophy of the infraspinatus and supraspinatus muscles, and a medial dislocation of the long head of the biceps. Dr. Durbin opined the shoulder was "probably unfixable at this point." Dr. Durbin noted the Claimant was doing well functionally, except when he lifts in one certain direction. Dr. Durbin advised the Claimant that, ultimately, he would probably need a shoulder replacement. As the Claimant did not want to do that at the time, Dr. Durbin recommended conservative care, and opined that the Claimant could be placed at MMI. On April 26, 2013, the Claimant saw Dr. McKenna. Dr. McKenna reviewed the MRI findings and Dr. Durbin's report with the Claimant. The surgery discussed was a shoulder replacement, or a reverse arthroplasty for rotator cuff arthropathy. Dr. McKenna noted that Dr. Durbin instead recommended conservative therapy and he also noted that the Claimant was not excited about an extensive shoulder replacement surgery. Dr. McKenna concurred with Dr. Durbin that the Claimant was at MMI once a determination was made via Functional Capacity Exam (FCE) to determine the Claimant's range of motion and strength.

On May 6, 2013, the Claimant underwent an FCE with evaluator Heather Stokes at Physiotherapy Associates. The test was considered valid and the Claimant demonstrated consistent effort. The evaluation placed Claimant in the light work category and recommended maximum occasional and frequent lift of 35 lbs for floor to waist. The Claimant's ability to lift overhead with his right extremity was limited to 2lbs. Lifting with one hand to shoulder was limited to 7 lbs. on the right side. The Claimant's right shoulder active range of motion was measured at 145 degrees flexion, 122 degrees abduction (133 degrees with pain), external rotation at 90 degrees with

abduction at 75 degrees, and internal rotation at 90 degrees of abduction at 53 degrees. The Claimant's strength was normal, but painful.

On May 28, 2013, the Claimant saw Dr. McKenna again and confirmed that he did not feel surgical intervention was appropriate at this time as he was not interested in the shoulder replacement. Dr. McKenna reviewed the FCE with the Claimant and discussed MMI and took range of motion shoulder measurements. On June 4, 2013, Dr. McKenna placed the Claimant at MMI for this claim.

On January 20, 2014, Dr. Miguel Castrejon performed a Division IME. He reviewed available records, but he did not review the surveillance. He took a history from the Claimant and noted that he found the Claimant to be a reliable historian. Through Dr. McKenna's records, Dr. Castrejon was advised of the Claimant's significant past history of right shoulder injury. The Claimant advised that subsequent to the date of injury until February 28, 2013, he worked the modified duty position with the tanker truck. Dr. Castrejon surmised that the modified work may have aggravated the Claimant's condition because the turning of the crank on the tanker truck "require a moderate amount of force" implicating his right upper limb as the Claimant is right handed. Dr. Castrejon noted that the Claimant admitted that after leaving his employment with Employer, his pain symptoms improved. Upon physical examination, Dr. Castrejon noted that the Claimant exhibited adequate and functional range of motion without discomfort. He noted one grade motor loss yet found this did not functionally limit the Claimant's activities of daily living and current work activities. Dr. Castrejon noted that when the Claimant was evaluated by Dr. Hatzidakis, his shoulder range of motion was significantly decreased when compared to Dr. Castrejon's findings. Dr. Hatzidakis documented flexion to 80 degrees, abduction to 80 degrees, and external rotation to 30 degrees. However, Dr. Castrejon measured the Claimant's flexion as 156 degrees, abduction at 122 degrees, internal rotation to 65 degrees and external rotation to 75 degrees. Dr. Castrejon opined that based upon his physical examination of the Claimant and review of the medical records he concluded that the Claimant was at MMI as of June 4, 2013 and he has remained stable since that date, he found no evidence to support a significant worsening of condition, and he noted that the Claimant's range of motion was very similar to that found during the May 6, 2013 FCE. Dr. Castrejon further noted that the Claimant continued to work in a new position, reporting minimal pain with the primary complaint of weakness and pain with elevation of weight. In addressing the surgery proposed by Dr. Hatzidakis, Dr. Castrejon found that surgery to be contraindicated.

Consistent with her written IME report of July 23, 2014, Dr. D'Angelo testified that her opinion was that the Claimant sustained an aggravation of his underlying right shoulder inflammatory process due to the mechanism of injury he described to her as occurring in January of 2013. Dr. D'Angelo agreed that there was a basis for a compensable claim due to the January 2013 work injury. Dr. D'Angelo testified that subsequently the Claimant was placed at MMI and he remains at MMI. She bases this opinion, in part, on the Claimant's reporting of improvement and on the range of motion measurements taken by her and Dr. Castrejon, which were similar.

Claimant's position that Dr. Castrejon is in error regarding whether the Claimant is at maximum medical improvement rests largely on the argument that the Claimant requires the surgery proposed by Dr. Hatzidakis. As set forth above, the recommended procedures were not found to be reasonably necessary to cure and relieve the Claimant from the effects of his work injury. Moreover, per Drs. Castrejon and D'Angelo, the Claimant's range of motion and strength are significantly improved and his condition has been stable since June 4, 2013, and arguably even prior to that date. Thus, the Claimant has failed to prove that Dr. Castrejon's opinion with regard to MMI is in error. Dr. Castrejon's opinion that the Claimant reached MMI as of June 4, 2013 will not be disturbed.

Overcoming the DIME on Impairment – Causation and Apportionment

The apportionment issues in this case involve apportionment of PPD benefits pursuant to C.R.S. § 8-42-104(5)(a). As the PPD benefits hinge on the impairment rating provided by the DIME physician in this case, there is also interplay with § 8-42-107(8)(c) because, since 1991, the medical impairment determination of the DIME is binding unless overcome by clear and convincing evidence. In this case, the DIME physician determined that there was an 11% upper extremity impairment, 7% for range of motions deficits and 4% for loss of function due to loss of strength. The DIME further determined that apportionment applied in this case and opined that because the Claimant had a distal clavical resection as part of his 2002 work-related injury, he would have been entitled to a 10% impairment rating for that procedure. Thus, per Dr. Castrejon, the post-apportionment residual scheduled impairment rating was 1%, which, if converted, would convert to a 1% whole person impairment.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. C.R.S. § 8-42-101(3.7); C.R.S. §8-42-107(8)(c). The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury, including whether the various components of the Claimant's medical condition are causally related to the industrial injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Martinez v. Industrial Claim Appeals Office, 176 P.3d 826* (Colo. App. 2007). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must

be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of an impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Adams v. Manpower, supra*. Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Dr. Castrejon assigned a 7% impairment of the upper extremity for loss of range of motion and a 4% impairment for loss of function due to loss of strength. These combined for the upper extremity impairment rating of 11%, which, if converted per table 3, would result in a 7% whole person impairment rating, prior to apportionment. These calculations resulted in a lower impairment rating than the 19% upper extremity rating provided by Dr. McKenna bases on his range of motion shoulder measurements performed on May 28, 2013.

Respondents argued that Dr. Castrejon erred in finding the Claimant's ongoing right shoulder issues were work related and submitted that the impairment rating for the Claimant's right upper extremity was incorrect. This was based largely on the report and testimony of Dr. D'Angelo. She opined that Dr. Castrejon erred in providing an impairment rating at all. She indicated Dr. Castrejon failed to take into account the MRI findings, and the interval amount of time it would take to develop those findings. However, to the extent that he provided an impairment rating, Dr. D'Angelo testified that he calculated it correctly per the AMA Guides based on the range of motion shoulder measurements that he obtained. With respect to the causation issue, the Respondents offered the contrary opinion of Dr. D'Angelo, but did not establish that the opinion of Dr. Castrejon was in error. The Respondents failed to overcome Dr. Castrejon's finding of a causal relationship between the Claimant's January 12, 2013 injury and the impairment rating that he provided.

At the hearing and in the post-hearing briefs, the Claimant did not take issue with the substantive impairment rating provided by Castrejon of an 11% upper extremity rating (that would convert to a 7% whole person rating, if converted) prior to apportionment. Rather, the Claimant argued that apportionment was not appropriate in

this case. At issue was a 10% apportionment for a distal clavical resection that occurred as a result of the Claimant's 2002 work injury. This would implicate C.R.S. § 8-42-104(5)(a).

Apportionment of Medical Impairment for a Prior Work-Related Condition or Injury

In this case C.R.S. § 8-42-104(5) provides statutory authority for apportioning permanent medical impairment. As the parties arguments rest on interpretation and application of the statute, some history of the statutory scheme is helpful. After the 1991 amendment that implemented medical impairment determinations for PPD benefit awards, apportionment of those benefits was governed by C.R.S. § 8-42-104(2), which continued to refer to apportionment of "disability." Pursuant to *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333 (Colo. 1996), apportionment of medical impairment was governed by a two-step analysis. Respondents first had to show that a prior condition was disabling at the time of the instant work injury. If Respondents met that first step, the second step in the Askew test was whether the prior impairment "has been sufficiently identified, treated, or evaluated to be rated as a contributing factor in the subsequent disability" and whether there was evidence of a reduced capacity to meet the demands of life's activities. The Supreme Court noted that a dormant or asymptomatic condition cannot be adequately evaluated, and thus rejected any apportionment of such a condition as "arbitrary," quoting provisions from the AMA Guides instructing an evaluator not to attempt apportionment in the absence of information to measure prior impairment accurately.

For injuries from July 1, 1991 to July 1, 1999, "apportionment" had to be distinguished from the normal "causation" determinations that were part of the DIME ratings. *Public Service Co. of Colorado v. Industrial Claim Appeals Office,* 40 P.3d 68 (Colo. App. 2001); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Cudo v. Blue Mountain Energy Inc.,* W.C. No. 4-375-278 (Industrial Claim Appeals Office, October 29, 1999). The distinction between "causation" and "apportionment" was drawn in *Johnson v. Christian Living Campus,* W.C. No. 4-354-266 (ICAO, October 5, 1999). Johnson explained that determination of whether an entire component of impairment is due to the industrial injury was a causation determination. Assessing the contribution of occupational factors to a particular aspect of the impairment was an apportionment determination.

Effective July 1, 1999, subsection (2) of C.R.S. § 8-42-104 was renumbered as (2)(a) and applied only to permanent total disability benefits. A new subsection (2)(b) provided, "When benefits are awarded pursuant to section 8-42-107, an award of benefits for an injury shall exclude any previous impairment to the same body part." This amendment rendered irrelevant the previous two-step apportionment analysis under Askew, supra. The existence of previous "disability" was irrelevant. The sole issue was whether claimant had "previous impairment to the same body part." This purely medical determination was part and parcel of the DIME determination of impairment for the work injury. *Martinez v. Industrial Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007).

Then, effective July 1, 2008, C.R.S. § 8-42-104, was extensively amended. Subsection (2) was repealed in its entirety. Subsection (5)(a) was added to provide for apportionment of previous awards or settlements of medical impairment ratings from a previous work injury. Subsection (5)(b) was added and provided for apportionment when an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling. In this case, reference to the facts shows that the Claimant had previously suffered both a non-work related injury and a work-related injury. However, Dr. Castrejon only apportioned the impairment rating with respect to a procedure/specific injury he associated with the 2002 work injury.

Additionally, the Division of Workers' Compensation has adopted WCRP 12 to implement the statutory provisions for impairment rating determinations. WCRP 12-3(B) in pertinent part provides:

> For claims with a date of injury on or after July 1, 2008, the Physician may provide an opinion on apportionment for any preexisting work related or non work-related permanent impairment to the same body part using the AMA Guides, 3rd Edition, Revised, where medical records or other objective evidence substantiate a preexisting impairment. Any such apportionment shall be made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury or occupational disease. The Physician shall explain in their written report the basis of any apportionment. If there is insufficient information to measure the change accurately, the Physician shall not apportion. If the Physician apportions based on a prior non work-related impairment, the Physician must provide an opinion as to whether the previous medical impairment was identified, treated and independently disabling at the time of the work-related injury that is being rated. Identified and treated in this context requires facts reflecting that a medical provider previously noted and provided some level of treatment for the non work-related impairment.
>
> > (1) The effect of the Physician's apportionment determination is limited to the provisions in section 8-42-104. When filing an admission an insurer shall provide documentation reflecting compliance with section 8-42-104.

The Claimant posits, as a matter of law**,** apportionment was not authorized under C.R.S. § 8-42-104(5)(a). The Claimant asserts that the plain language of C.R.S. § 8-42-104(5)(a) precludes apportionment in this case. Although WRCP 12-3(B) would allow for the opinion provided by Dr. Castrejon, the statute limits application of WRCP 12-3(B) by its very terms.

C.R.S. §8-42-104(5)(a) provides:

> In cases of permanent medical impairment, the employee's award or settlement shall be reduced:
>
> When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the 'Workers' Compensation Act of Colorado' or a similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.

It is the Claimant's position that, even if Respondents could provide medical support for apportionment of claimant's prior work-related injury, apportionment is not authorized because Respondents cannot meet the second part of the statutory test, which requires for apportionment of a prior medical impairment that the Claimant has received an award or settlement for the previous injury to the same body part.

When interpreting statutes a court should give words and phrases in a statue their plain and ordinary meanings. This is true because the object of statutory construction is to give effect to the legislative intent of the statute, and the best indicator of legislative intent is contained in the language of the act. Forced and subtle interpretations should be avoided. *Jones v. Industrial Claim Appeals Office,* 87 P.3d 259 (Colo. App. 2004); *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). Further, statutes addressing the same subject matter should be construed together, and an interpretation that renders one clause meaningless should be avoided. *USF Distribution Services, Inc., v. Industrial Claim Appeals Office,* 111 P.3d 529 (Colo. App. 2005). When the legislature speaks with exactitude, we must construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others. *Lunsford v. W. States Life Ins.,* 908 P.2d 79, 84 (Colo.1995). Finally, we note that when it chooses to legislate in a particular area, the General Assembly is presumed to be aware of existing case law precedent. *Pierson v. Black Canyon Aggregates, Inc.,* 48 P.3d 1215, 1219 (Colo.2002).

The statute in question is two sentences long. Both sentences make reference to "award or settlement." In the first sentence, the statute requires proof that a Claimant "*received an award or settlement* under the 'Workers' Compensation Act of Colorado' or a similar act from another state." The second sentence permits apportionment "applicable to the previous injury to the same body part, *established by award or settlement*…." It is abundantly clear from the plain language of the statute, repeated for further clarity, that apportionment is not authorized in the absence of proof of this element.

In considering the issue of apportionment, Dr. Castrejon noted the Claimant sustained a prior work related injury to the same body part which he opines, "would

have been eligible for 10% impairment of upper extremity based upon distal clavical resection. After apportioning 10%, Dr. Castrejon opined a 1% upper extremity (and, if converted, a 1% whole person) impairment rating remains.

The ALJ specifically found that no evidence was presented, in testimony at hearing, deposition testimony, or in the voluminous exhibits admitted into evidence, that the Claimant was compensated by award or settlement for previous injury to the same body part. Rather, Dr. Castrejon merely opined that the Claimant would have been entitled to a 10% scheduled impairment rating for that body part.

Under the plain language of C.R.S. § 8-42-104(5)(a), apportionment is not warranted in this case because Respondents failed to establish that the Claimant received an award or settlement for her prior work related injury. Because the Respondents failed to establish that the Claimant was compensated by award or settlement, the Claimant is entitled as a matter of law to permanent partial medical impairment benefits based on the 11% scheduled rating (which, if converted would equate to a 7% whole person impairment rating) as provided by the DIME physician for the January 12, 2013 work injury, without apportionment to reduce that rating.

Disability Compensation Based on Scheduled Injury vs. Whole Person Impairment

The claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under§ 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4- 662-3 69 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W. C. No. 4-536-198 (ICAO June 20, 2005).

The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996); *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004).

There is no requirement that functional impairment take any particular form in order to be compensable under § 8-42-107(8)(c), C.R.S. Evidence of pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered impairment for this purpose. Aligaze *v. Colorado Cab Co. / Veolio Transportation*; W.C. No. 4-705-940 (ICAO April 29, 2009); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (ICAO November 29, 2004); *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-878 (ICAO November 20, 2001), aff'd., *Pinnacle Glass Co. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA2386, August 22, 2002) (not selected for publication). The courts have held that damage to structures of the "shoulders" may or may not reflect a "functional impairment"

enumerated on the schedule of disabilities. *See Walker v. Jim Fouco Motor Company,* supra*; Strauch v. PSL Swedish Healthcare System,* supra, *Langton v. Rocky Mountain Health Care Corp.,* supra*; Price v. United Airlines,* W.C. No. 4-441-206 (ICAO January 28, 2002); *Johnson-Wood v. City of Colorado Springs,* supra. Pain that causes physical limitations, such as the ability to engage in actions requiring overhead movement has been determined to be a proper basis for a finding of functional impairment justifying a whole person rating. *Martinez v. Pueblo County Sheriff's Office,* W.C. No. 4-806-129 (ICAO December 7, 2011).

In this case, the Claimant's testimony, substantiated by the medical records and opinions of Drs. McKenna, Durbin, Castrejon and Hatzidakis, establishes that the Claimant is entitled to a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S., because he has suffered a functional impairment to a part of the body that is not contained on the schedule. The Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the arm at the shoulder. The Claimant testified credibly that as a result of this right shoulder injury he continues to suffer functional impairments that limit use of his arm overhead or extended out to the side, due to pain occurring in his shoulder. The Claimant was also provided permanent lifting restrictions by Dr. McKenna of: no use of the right upper extremity above the shoulder level, and no lifting, pushing, pulling greater than 50 pounds. The Claimant testified credibly that he can continue to perform his current work duties, but only if he limits overhead use of his right upper extremity.

Based on the testimony and the medical records, the situs of the Claimant's functional impairment is to his right shoulder, including credible and documented continuing complaints of pain and discomfort which were impact his functioning. As the Claimant's functional impairment is contained off the schedule of injuries, the 7% whole person rating (converted from the 11% scheduled upper extremity rating) is the correct impairment rating.

Medical Maintenance Treatment after MMI

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission*

of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

The Claimant was placed at MMI on June 4, 2013, 2013 by Dr. McKenna made no recommendation for maintenance medical care. Dr. Castrejon also noted that no maintenance care was recommended by Dr. McKenna. Dr. Castrejon himself did not make any specific recommendation for maintenance care either, but he did state that, "based upon the Claimant's medical condition, it is reasonable for the claimant to retain access to surgical intervention should he experience a significant change in his condition that is found to be directly related to the industrial condition." At the time that the Claimant saw Dr. D'Angelo for evaluation on July 23, 2014, she noted that her measurements for range of motion were similar to those of Dr. Castrejon. Thus, the Claimant's condition was not deteriorating. Moreover, he continued to work at his job with his brother's company performing the same work that he did at the time of MMI.

The Claimant failed to prove entitlement to medical maintenance care by a preponderance of the evidence as the Claimant did not establish that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore ordered that:

1. The Claimant's request for medical benefits consisting of right shoulder arthroscopic biopsies/cultures, rotator cuff repair, longhead biceps tenodesis, subacromial decompression with possible distal clavical resection and open pectoralis major transfer recommended by Dr. Hatzidakis is not reasonably necessary to cure and relieve the effects of his January 12, 2013 work injury and this claim for medical benefits is denied and dismissed.

2. The Respondents failed to prove, by clear and convincing evidence, that DIME physician Miguel Castrejon, M.D. erred in finding that the Claimant's right shoulder condition, for which he provided an impairment rating, was causally related to the Claimant's January 12, 2013 work injury.

3. The Claimant failed to prove, by clear and convincing evidence, that DIME physician Miguel Castrejon, M.D. erred in his MMI determination. The Claimant reached MMI on June 4, 2013.

4. The Claimant's impairment rating is not subject to apportionment pursuant to C.R.S. § 8-42-104(5)(a).

5. The Claimant proved, by a preponderance of the evidence, that he suffered a functional impairment contained off the schedule of injuries set forth at Section 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating. The Claimant is entitled to a 7% whole person impairment rating.

6. Respondents shall file an amended Final Admission of Liability reflecting a whole person impairment rating of 7% in accordance with Dr. Castrejon's impairment rating report and shall pay permanent partial disability benefits based on the 7% whole person impairment rating.

7. The Claimant failed to prove, by a preponderance of the evidence, that future medical benefits are reasonably necessary to relieve the effects of his injury or prevent deterioration of his condition. The claim for medical benefits is denied and dismissed.

8. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 23, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant's need for treatment to her low back is related to her admitted industrial injury of January 15, 2013; and,

2. If so, is the recommendation of an epidural steroid injection reasonable and necessary to treat that low back condition?

FINDINGS OF FACT

1. The claimant sustained an admitted work injury on January 15, 2013. On that date, the claimant worked as a paraprofessional for the respondent-employer. While walking at work, the claimant tripped and fell walking on an uneven sidewalk in icy conditions. The claimant has treated continuously since January 15, 2013.

2. Dr. Olson treated the claimant for multiple injuries as a result of this incident, including placing the claimant in a CAM boot to help resolve the issue the claimant was having with her ankle.

3. The claimant suffers from scoliosis that pre-exists her work related injury.

4. The claimant has treated for back pain on numerous occasions prior to January 15, 2013 injury, both with chiropractic care and osteopathic care.

5. The claimant began to have back pain as a result of her altered gait form the use of the CAM boot.

6. The claimant informed Dr. Olson of her pain and the claimant was sent to Dr. Sparr for further treatment. Specifically, Dr. Olson requested that the claimant receive trigger point injections and an epidural injection.

7. The claimant received the trigger point injections but did not receive the epidural injection.

8. The respondents denied the epidural injection requested by Dr. Olson.

9. Dr. Olson testified by deposition that he believes that the claimant should still undergo the epidural injection in an attempt to relieve the symptoms that she is having as a result of the use of the CAM boot. Dr. Olson testified that he believes that the claimant suffered an exacerbation of her low back condition as a result of the use of the CAM boot and that further treatment is necessary. Dr. Olson also agreed that the claimant's back pain, if it were from the altered gait should have resolved by now.

10. Dr. Olson conceded the claimant's low back problems "certainly could be" related to her preexisting low back complaint, since she has been out of the CAM walker for a long time yet continues to have low back complaints. He expected once she was out of the CAM walker, a normal gait would follow and problems would have resolved.

11. Mark Paz, M.D. preformed an independent medical examination of the claimant. Dr. Paz does not believe that the claimant's back condition is related to the use of the CAM boot. Dr. Paz believes that the claimant's condition would have gotten better after she discontinued the use of the CAM boot.

12. Dr. Paz opined that the claimant has an "established history of chronic low back pain . . . documented in the medical record prior to the January 15, 2013 date of injury." The Southern Colorado Family Medicine record from February 27, 2012, documents that treatment for the claimant's low back had been "ongoing for years." The claimant had a history of scoliosis with low back pain since she was a teenager, according to the records. The claimant provided a "direct history" during her evaluation with Dr. Paz that "she had no back or low back symptoms prior to the date of injury." The history she provided to Dr. Paz was not consistent with an aggravation of a preexisting condition.

13. Dr. Paz opined, based on a reasonable degree of medical probability, it is "not medically probable that the CAM walker aggravated or accelerated the preexisting back condition of scoliosis in the lumbar spine." The "natural history of a "flare" of chronic back discomfort . . . during use of the CAM walker is that the back condition would improve after the CAM boot is no longer used." In the claimant's case, she reported the symptoms further worsened after the CAM walker was used, which is inconsistent with a history where the CAM boot would have worsened the low back complaints.

14. The claimant has a degenerative disk disease according to Dr. Paz. It is not medically probable that the degenerative disease is related to the work injury. It is

not medically probable to Dr. Paz that the scoliosis or degenerative disk disease was aggravated or accelerated by the January 15, 2013 work injury according to Dr. Paz.

15. The ALJ finds Dr. Paz's opinions are credible and more persuasive than medical opinions to the contrary.

16. The ALJ finds that the claimant has failed to establish that it is more likely than not that her low back condition is causally related to her admitted industrial injury of January 15, 2013.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

2. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

3. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

4. Claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. Respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Even after an admission of liability is filed, respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997).

5. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

6. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

7. The preponderance of persuasive evidence demonstrates that the claimant failed to prove that her January 15, 2013 injury, including treatment for that injury, directly and proximately caused a low back condition for which medical benefits are sought.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for medical benefits for her low back condition is denied and dismissed.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 22, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Dr Ste 230
Colorado Springs, CO 80906

ISSUES

1. Whether the respondents proved by clear and convincing evidence that the Division independent medical examiner's determination regarding Maximum Medical Improvement (MMI) was incorrect and that the claimant was appropriately placed at MMI on June 12, 2014?

2. Whether the claimant proved by a preponderance of the evidence that she is entitled to further medical benefits including the treatment recommended by the DIME physician and Dr. Paul Stanton's recommendation for a lumbar fusion surgery?

FINDINGS OF FACT

1. The claimant was a general manager for the respondent-employer for 14 years at 4 different locations. She was employed at the respondent-employer for 16 years prior to being terminated on August 1, 2013.

2. The claimant injured her back on December 12, 2012 while working at the respondent-employer.

3. On December 12, 2012, the claimant lifted a keg of beer at the respondent-employer's and had immediate onset of low back pain. The claimant told another manager on duty, Pam Stebbenne, that she had injured her back. The claimant did not fill out an incident report because she thought that her back would feel better. The claimant was hoping that it wasn't anything serious.

4. The claimant's back initially felt better a couple weeks later. However, the claimant's pain gradually got more intense between the end of February and beginning of March 2013. On March 24, 2013, the claimant went to the emergency department at Penrose Hospital for the pain in her back.

5. The claimant was eventually evaluated by Dr. Paul Stanton on March 28, 2013. Dr. Stanton ordered an MRI which showed a disk herniation at L5-S1 on the right with mild compression of the S1 nerve root. The MRI also showed moderate degenerative disk disease at L4-L5.

6. Dr. Stanton recommended physical therapy. However, the claimant was unable to complete physical therapy because she was having difficulty walking.

7. Because the claimant was unable to participate in physical therapy and she continued to experience right sciatic and low back pain, Dr. Stanton recommended an L5-S1 discectomy.

8. On April 29, 2013, Dr. Stanton performed an L5-S1 discectomy on the claimant.

9. On May 6, 2013, the claimant returned to Dr. Stanton for a post-surgery follow-up. The claimant reported having new leg and foot pain since having the surgery. During that visit the claimant also told Dr. Stanton that she was uneasy about returning to work because she is a "hands on" manager. Dr. Stanton referred the claimant to physical therapy and wrote an off work note for May 6, 2013 through May 20, 2013.

10. On May 20, 2013, Dr. Stanton allowed the claimant to return to work with restrictions that included "no bending, lifting over 10-20 LBS, no twisting. Return 4 hours a day for the first two weeks then increase to 6 hours for two weeks then full time."

11. On June 11, 2013, Dr. Stanton released the claimant to a full days work with maximum lifting of 10-20 LBS, no prolonged sitting, no prolonged standing, and no repeated bending or twisting.

12. On July 9, 2013, the claimant returned to Dr. Stanton reporting that she is having trouble following her restrictions at work and an escalation in her pain. She also reported having some plantar fasciitis pain on the left side. Dr. Stanton noted that he believed the claimant "did not have an adequate chance to recover. She may have returned to work too early without having fully rehabbed her musculature. . . Ultimately, she may require significant strengthening before returning to work as she may have inflamed her current situation by returning to work at too high a level too soon."

13. On September 12, 2013, Dr. Stanton stated:

> At this point, it seems the patient has had a difficult course. She sustained an injury while at work lifting a heavy keg in December. She ultimately presented to my office with significant nerve pain. She was taken to surgery for discectomy and her symptoms were relieved. Her employer apparently had demanded she return to work. When she did, she was working extremely long hours with a significant amount of heavy lifting and twisting, despite her recent surgery. Eventually she was terminated for poor work performance. It seems clear that her injury was definitely sustained at work. I do not feel she had adequate time to

> recover before returning to work with such a heavy work load. Now I think she is sustaining dynamic foraminal stenosis where her L5-S1 disc is just not competent to maintain her foraminal dimensions and when she is in a standing position she has some recurrence of symptoms on the right side. . . I will see her back in 2 weeks for recheck. If at that time she is not markedly improved or still has recurrent symptoms, we discussed the possibility of reconstructing her L5-S1 segment for permanent resolution of her disc disease. This would also fare better for her obtaining meaningful employment in the future.

14. The respondent-insurer authorized the claimant to see Dr. Stanton for one visit on November 5, 2013. During that visit, Dr. Stanton noted:

> [T]he patient continues to have dynamic stenosis of her L5-S1 segment, which is causing persistent leg pain in the right lower extremity. The fact that her symptoms are relieved when she is supine suggests that this is dynamic in nature and the quality of her disc material is not competent enough to withstand her body weight when she is upright. . . At this point, I would recommend she undergo an L5-S1 epidural injections, as well as bilateral L5-S1 facet injections to see if we can quiet both her leg and back pain. . . I suspect that her symptoms would be short-term in nature as I feel that problem is mainly a structure one and not an inflammatory one. Ultimately, if she had some good results from her epidural and facet injections, she would be a candidate for reconstruction of her L5-S1 segment, which would stabilize her foraminal dimensions, alleviate her leg pain, as well as relieve her facet and ultimately muscular mediated back pain. Apparently, the patient was only approved for one visit today so I will need to see her back on a p.r.n. basis. Should she require further care, I will be glad to continue her treatment.

15. On November 12, 2013, the claimant filed an application for hearing to address medical benefits, reasonable and necessary, authorized provider, temporary total disability benefits, temporary partial disability benefits, and right of selection.

16. On January 20, 2014, the claimant saw Dr. Randall Jones. He recommended more physical therapy, referred the claimant back to Dr. Stanton, referred to pain management with Dr. Jenks for an EMG of right lower extremity, referral to Dr. David Hopkins, clinical psychologist, and if needed, Mr. Beaver for biofeedback, and a repeat MRI.

17. On January 2, 2014, Dr. Fall performed an Independent Medical Examination on the claimant. During that examination, the claimant noted that she currently experiences pain in her lower back. She noted that the pain in her right lower back is a constant aching and weakness, which goes down to her right gluteal area,

hamstring, and lateral hip. She also noted difficulty sleeping. Driving and sitting causes pain in her right calf. She noted that the pain does not go down to the hip as much as it did before the surgery. She also told Dr. Fall that she began experiencing bladder urgency and incontinence around November 2013. The claimant told Dr. Fall that sometimes her foot feels “lazy” and she does not always have control of her bowels.

18. A hearing was held on March 4, 2014. On April 3, 2014, 2014, ALJ Stuber Ordered the respondents to pay for the April 29, 2013 surgery by Dr. Stanton; and for the respondents to pay for reasonably necessary medical treatment by authorized providers, including Dr. Stanton, Dr. Jenks, and Dr. Hopkins.

19. On April 17, 2014, Dr. Albert Hattem examined the claimant. Dr. Hattem scheduled the claimant for a lumbar spine MRI with gadolinium to rule out recurrent disk. He noted that the claimant should return to clinic in one month for likely case closure if the MRI is unrevealing.

20. On April 24, 2014, the claimant underwent an MRI of her lumbar spine with and without contrast. The MRI revealed “Right hemilaminectomy L5-S1 with enhancing granulation tissue surrounding the thecal sac at the site of the surgery without recurrent herniation of stenosis. Mild buldge and endplate spur L4-L5 without significant stenosis.”

21. On June 12, 2014, Dr. Hattem placed the claimant at maximum medical improvement (“MMI”) and gave her a 19% whole person impairment rating. Dr. Hattem informed the claimant that the MRI looked good demonstrating only postsurgical changes without evidence of recurrent disk. He indicated that Dr. Stanton did not schedule a return appointment with the claimant and that the claimant was not a candidate for additional surgery.

22. However, the claimant testified she was not able to schedule a return appointment with Dr. Stanton because the respondent-insurer hadn’t paid the claimant’s medical bills from Dr. Stanton, which was ordered by ALJ Stuber.

23. On July 23, 2014, Dr. Edwin Healey performed an Independent Medical Evaluation of the claimant. Dr. Healey indicated that the claimant’s current diagnosis related to her December 12, 2012, worker’s compensation injury was “1. Acute L5-S1 subligamentous disc herniation with associated radiculitis, status post L5-S1 discectomy, with residual chronic low back and right leg pain. 2. Urinary frequency and urgency; rule out urinary sphincter dyssynergia.”

24. Dr. Healey opined that the claimant is not at MMI. At the time of Dr. Healey's examination, he opined that the claimant needed to undergo another surgical opinion by a surgeon. However, subsequent to Dr. Healey's examination, the claimant was examined by Dr. Stanton and he recommended surgery.

25. Dr. Healey concurred the with 19% whole person impairment rating assessed by Dr. Hattem. Dr. Healey noted that there appeared to be some granulation tissue around the L5-S1 surgical site on the MRI report. Dr. Healey recommended that the claimant undergo a selective L5-S1 epidural steroid injection. Dr. Healey also recommended

> lumbar paraspinal muscle trigger point injection on one occasion with local anesthetic and cortisone. If this does not relieve the pain, then I would recommend L4-L5, L5-S1 facet blocks, if they relieve her pain medical branch blocks and if she gets 80% relief of medial branch blocks then the primary pain generator may be her L4-L5, L5-S1 facets because the lumbar MRI indicates there is arthrosis at these levels. If receives an 80 percent reduction of her pain with medial branch blocks she would be a candidate for radiofrequency neurotomies at the symptomatic levels. [The claimant] is receiving some relief of her pain with gabapentin and I would recommend that it be restarted.

26. On November 7, 2014, Dr. Kenneth Finn performed a Division Independent Medical Examination ("DIME"). Dr. Finn found that the claimant was not at MMI. Dr. Finn indicated that the epidural fibrosis noted on postoperative imaging could be the cause of her pain. Dr. Finn recommended that the claimant be under the care of a physician that can manage her pain and spasms. He recommended that she undergo spinal injections to address the potential nerve irritation based on the scar tissue. In addition, Dr. Finn recommended a spine strengthening and stabilization exercise program and an electrodiagnostic study.

27. On December 23, 2014, the claimant returned to Dr. Stanton for an examination. Dr. Stanton noted that:

> At this point, I think that [the claimant's] symptoms are mainly dynamic in nature. She had a significant disc herniation with loss of disc space material, and the remainder of her disc is not competent to hold up her body weight. This would explain the increase in symptoms when she is upright and improve her symptoms when she is lying supine. She said she has had a recent MRI and will drop it off at the office and I can review if after she had delivered it. . . She may eventually require reconstruction of the L5-S1 segment, but I would like to review her MRI in detail after it is delivered.

28. On February 5, 2015, Dr. Fall performed a follow up independent medical examination for the respondents. Dr. Fall indicated that the claimant:

> reported pain that radiated from the mid lower back through the hip and buttock down the right leg, lower back weakness with feeling of instability, sleep interruption and bladder urgency. [The claimant] reported loss of control of bladder beginning November of 2013. . . [The claimant] describes her back feels unstable, like a clunkiness.

29. Dr. Fall opined that "it is highly unlikely that there is any additional active medical treatment that would lead to any substantial change in [The claimant's] condition.

30. On February 17, 2015, the claimant returned to Dr. Stanton for examination and review of her April 2014 MRI. Dr. Stanton noted that

> At this point, I think [the claimant] will ultimately need a reconstruction of her L5-S1 segment. She has symptoms which are very positional in nature when she is standing upright. She has an increase symptoms when she lays down and she feels better. This indicates that her disc is not competent to hold her body weight when standing. This may be due to her L4-5 segment but I still think that her primary area of disease is L5-S1. Ultimately, if she is able to proceed with surgery I would want an updated MRI of her lumbar spine prior to surgery to reevaluate her L4-5 segment.

31. On February 17, 2015, Dr. Stanton reviewed the claimant's MRI films of her lumbar spine that were taken on April 24, 2014. The MRI demonstrated:

> disc disease at L5-S1 with loss of disc space height, a broad based annular bulge with small annular tear. There is evidence of right sided hemilaminotomy. There is moderate to severe foraminal stenosis, worse on the right side due to facet hypertrophy and loss of disc space height. At L4-5 there are end plate changes with loss of disc space height and a shallow broad based disc herniation causing mild to moderate foraminal stenosis. There is a small amount of foraminal extension of the disc into L4-5 disc space on the right.

32. On March 3, 2015, Dr. Stanton sent a referral for an MRI to the respondent-insurer.

33. On May 14, 2015, a post-hearing deposition of Dr. Paul Stanton was taken. Dr. Stanton was qualified as an expert in the field of spine surgery without objection.

34. Dr. Stanton testified that he performed a microscopic discectomy on the claimant on April 29, 2013.

35. Dr. Stanton opined that the claimant did not recover from the discectomy surgery in regards to strength. He opined that the claimant has dynamic foraminal stenosis where the L5-S1 disc is not competent to maintain her foraminal dimensions.

36. Dr. Stanton opined that:

> [T]he disc is like a shock absorber in between the vertebral bodies. When you stand upright, that shock absorber is exposed to more load. The shock absorber at the disc is responsible for holding open the nerve root window to allow safe passage for the nerve out of the spine. If the disc is incompetent, in other words, will not hold up body weight, when you stand upright and your full body weight is on the disc, it will squat down and lose height, closing the nerve window and pinching the nerve root.
>
> When you're lying down on your back, there's no gravity on that disc, so the stenosis or tightness is resolved and patients usually feel better.

37. Dr. Stanton testified that he recommended the claimant undergo epidural facet injections to see if those help her leg and back pain. Dr. Stanton testified the facet injections would be both therapeutic and diagnostic. He testified that he was hoping the injections would improve the claimant's back and leg pain in the short term. However, Dr. Stanton further explained that if her dynamic stenosis was severe enough, the epidural injection would not provide a full relief. He explained that if the injections provided relief, he would recommend a fusion stabilization surgery to restore the disc height and provide permanent opening for the nerve roots. He testified that to his knowledge, those injections were denied by the respondents.

38. Dr. Stanton testified that the next time he examined the claimant was in February 17, 2015. He testified that during this visit he reviewed the actual films from the claimant's MRI which was performed on April 24, 2014. Dr. Stanton testified that he recommended a reconstruction of the L5-S1 segment, but he wanted to see the L4-L5 segment on a new MRI. He explained that he wanted to see if the L4-L5 segment needed surgery.

39. Dr. Stanton testified that he did not make a referral for back surgery because he ordered the MRI and it was denied. He testified that the next step would be to obtain an updated MRI of the lumbar spine to assess the L4-L5 disc health. He

further testified that at a minimum, the claimant would need a reconstruction of the L5-S1 segment and he would base the treatment of the L4-L5 segment off the current MRI.

40. Dr. Stanton testified that the back surgery that he recommended is likely to improve the claimant's condition.

41. Dr. Stanton testified that it is his opinion, based on a reasonable degree of medical certainty, the back surgery that he recommended is reasonable and necessary to treat the claimant's symptoms for her industrial injury.

42. Dr. Stanton testified that the surgery that he recommended is directly related to the claimant's industrial injury.

43. Dr. Stanton testified that in his opinion, the claimant never reached maximum medical improvement.

44. The ALJ finds that the analyses and opinions of Dr. Healy, Dr. Finn and Dr. Stanton are credible and more persuasive than medical analyses and opinions to the contrary.

45. The ALJ finds that the respondents have failed to establish that Dr. Finn clearly erred in finding the claimant was not at MMI.

46. The ALJ finds that the claimant has established that it is more likely than not that the claimant requires further treatment to cure and relieve her from the effects of her industrial injury, as recommended by Dr. Finn and Dr. Stanton.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondents bear the burden of overcoming the DIME physician's opinions as to MMI by clear and convincing evidence.

5. Section 8-42-107(8)(c), C.R.S. 2006, provides that the DIME physician's findings of maximum medical improvement is binding unless overcome by clear and convincing evidence.

6. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), citing *Dilco v. Koltnow*, 613 P 2.d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010).

7. In order to overcome the DIME report, there must be evidence which proves that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

8. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411(Colo. App. 1995).

9. The decisions of a DIME physician are to be given presumptive effect when provided by the statute. *Cordova v. Industrial Claim Appeals Office*, 55 P. 3d 186 (Colo. App. 2002).

10. While the respondents provided evidence demonstrating a difference in opinion between the DIME physician, Dr. Stanton, Dr. Healey, and their retained independent medical examiner, Dr. Fall, regarding whether the claimant's back injury is

at maximum medical improvement, they did not present clear and convincing evidence that the DIME physician's opinion was incorrect when he demonstrated the claimant's back injury requires additional treatment.

11. The ALJ concludes that the analyses and opinions of Dr. Healy, Dr. Finn, and Dr. Stanton are credible and more persuasive than medical analyses and opinions to the contrary.

12. The ALJ concludes that the respondents have failed to prove by clear and convincing evidence that the DIME physician's findings that the claimant is not at MMI was incorrect and warrants reversal.

13. For a compensable injury, an employer and its insurance company must provide all medical benefits which are reasonably necessary to cure and relieve the injury. C.R.S. 8-42-101 (2010). The respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). Whether such a referral was made in the "normal progression of authorized medical care" is a question of fact for the administrative law judge. *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

14. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the entitlement to benefits. C.R.S. § 8-43-201; See *City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). *People v. M.A.*, 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

15. The claimant has established by preponderance of the evidence that the MRI and back surgery recommended by Dr. Stanton is reasonable, necessary and related to treat the claimant's back injury.

ORDER

It is therefore ordered that:

1. The respondents' request to overcome the DIME opinion that the claimant is not at MMI is denied and dismissed.

2. The claimant is not at MMI.

3. The respondent-insurer shall pay for the claimant's medical care to cure and relieve the claimant from the effects of her industrial injury as recommended by Dr. Finn and Dr. Stanton, including authorization for spinal surgery as recommended by Dr. Stanton.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 6, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues determined herein are as follows:

1. Whether the respondents may reopen the claim due to overpayments and are entitled to an order holding that the claimant must repay the overpayments;

2. Whether the claimant may reopen the claim on the issue of average weekly wage due to mistake or error;

3. If the claimant is allowed to reopen the claim on the issue of average weekly wage, then whether his admitted average weekly wage of $796.50 is correct;

4. Whether the permanent partial disability rating given by the authorized treating physician, Dr. Bradley, is correct; and,

5. Whether the permanent partial disability rating for the left thumb should be converted to a rating for the left hand or the left upper extremity?

FINDINGS OF FACT

1. On May 7, 2013, the claimant was working for the respondent-employer as a rigger. He was cutting a zip tie off of a cable when the knife slipped, lacerating his left thumb.

2. The respondent-insurer admitted to temporary total disability (TTD) benefits for May 8, 2013 through March 18, 2014. Benefits were admitted and paid at a weekly compensation rate of $531.03, which was based on an average weekly wage (AWW) of $796.50 as determined by the respondent-insurer.

3. The claimant reached MMI on March 18, 2014 however; he continued to receive TTD benefits until July 7, 2014.

4. On July 7, 2014, the respondents filed a Final Admission of Liability (FAL). The FAL terminated TTD benefits due to the placement of the claimant at maximum medical improvement (MMI) as of March 18, 2014 by his authorized treating physician

(ATP), Dr. Bradley. The respondent-insurer admitted to the 20% scheduled permanent partial disability (PPD) rating for the left thumb. This had a value of $1,868.86 [.20 x 35 weeks x $266.98]. The respondent-insurer claimed a $8,420.62 overpayment resulting from TTD benefits paid past the MMI date. After offsetting the PPD award against the overpayment, the resulting overpayment was $6,551.76.

5. The claimant filed an Application for Hearing (AFH) on August 7, 2014, endorsing the issues of disfigurement, PPD benefits, post-MMI medical benefits, and conversion of the PPD rating for the thumb to the equivalent rating for the upper extremity or the hand below the wrist.

6. A hearing was set to occur on November 20, 2014 at 1:30 p.m. in Pueblo.

7. On October 14, 2014, the respondents filed an amended FAL in response to a letter from the Division of Workers' Compensation.

8. The claimant filed an AFH on November 13, 2014, endorsing the issue of "Respondents did not have jurisdiction to file a FAL because it was filed beyond 30 days from the first FAL so penalties should begin August 6 2014 and ongoing." The claimant did not set a hearing date.

9. On November 19, 2014, the claimant cancelled the hearing that was set for his August 7, 2014 AFH.

10. The respondents filed an AFH on December 10, 2014 on the issue of overpayments.

11. On December 16, 2014, the claimant filed a Response to the AFH (RAH), endorsing the issues of AWW, petition to reopen the claim, disfigurement, "worsening of condition claimant no longer at MMI," conversion of the PPD rating, and overpayments.

12. At the outset of the hearing the claimant indicated that the issue of worsening of condition claimant no longer at MMI was no longer an issue for hearing.

13. The ALJ finds that the circumstances surrounding the claimant's employment do not fit squarely under the statutory formula for calculating an employee's AWW. Thus, the respondent-insurer was not obligated to follow the normal procedure in determining AWW. The ALJ finds that it is appropriate to calculate the claimant's AWW using an alternative manner that would fairly determine his AWW based on the facts presented.

14. Once the respondent-insurer admitted for a specific AWW in the final admission of liability dated October 14, 2014 the claimant was obligated to object within 30 days and file an application for hearing on the issue of AWW if he believed the admitted AWW was in error. Having failed to do so the ALJ is now without jurisdiction to address the issue of AWW as it is closed. The claimant's assertion that the respondent-insurer was mistaken in their calculations is not the kind of mistake for which the issue of AWW can be reopened.

15. On March 17, 2015, the claimant underwent an Independent Medical Examination (IME) with Douglas Scott, M.D. Dr. Scott examined the claimant's ability to use his left thumb IP joint.

16. Dr. Scott opined that the active IP joint range of motion measured at the FCE was not valid.

17. Dr. Bradley adopted the measurements from the FCE, which led him to assign a 20% scheduled PPD rating.

18. The ALJ finds that Dr. Bradley's assessment of the claimant's permanent partial disability rating is credible and persuasive. The ALJ finds that Dr. Bradley's 20% PPD rating for the thumb, which was based on the FCE measurements, was correct.

19. The value of the 20% rating is $1,868.86 [.20 x 35 weeks x $266.98].

20. The ALJ finds that the claimant was overpaid benefits in the amount of $8,420.62, prior to taking into account PPD benefits owed.

21. The amount of the overpayment ($8,420.62), after offsetting the value of the 20% PPD rating ($1,868.86), is $6,551.76. As found below the claimant is entitled to a payment of $2,000.00 for his disfigurement. Thus, reducing the overpayment to $4,551.76.

22. At the IME, Dr. Scott also evaluated the claimant's ability to use his left hand and left upper extremity to address his claim that the functional situs of his impairment was located at his left hand or left upper extremity.

23. The claimant told Dr. Scott that he had resumed his rock climbing hobby. Dr. Scott found this to be important because rock climbing requires a significant amount of bilateral hand, finger, and upper extremity strength and coordination. As a result, Dr. Scott doubted that the claimant could participate in rock climbing if he had any significant hand or upper extremity dysfunction or impairment.

24. The claimant testified at the hearing that he used his left hand in rock climbing because he thought it would be good therapy for his thumb. He described using his index through pinky fingers to grab some rock holds and using his entire hand to grab other holds.

25. Additionally, Dr. Scott reviewed surveillance footage, dated February 18th, 19th, and 20th, 2015, of a person whom he confirmed to be the same person that he examined on March 17, 2015. The claimant testified multiple times that he was the person depicted in the various scenes in the surveillance footage that were shown at the hearing.

26. Dr. Scott observed that the surveillance footage showed the claimant using his left hand without any signs of dysfunction. Among other activities, the claimant used his left hand to grasp a wrench, lift a propane tank, hold a propane torch, and use tools to work on coin mechanisms.

27. The claimant testified that he chooses to do some activities with his left hand, even though he could also do them with his right hand.

28. Dr. Scott opined that the video demonstrated the claimant using his left hand and left upper extremity without limitation or functional restriction. As a result, Dr. Scott persuasively opined that the functional situs of impairment is limited to the left thumb and that the left hand and left upper extremity are not impaired.

29. The ALJ finds that Dr. Scott's opinion on this issue is credible and persuasive. The ALJ finds that the functional situs of the claimant's impairment is limited to his left thumb and that his left hand and left upper extremity are not impaired. As a result, the ALJ finds that the scheduled PPD rating for the left thumb should not be converted to the equivalent PPD rating for either the left hand and or the left upper extremity.

30. The ALJ finds that as a result of his May 7, 2013 work injury, the claimant has a visible disfigurement to the body consisting of a surgical scar on the inside portion of the left thumb that is approximately two and one-half inches in length and one-eighth of an inch in width with a jagged appearance and being discolored when compared to the surrounding tissue. The left thumb's outer surface has an unusually smooth appearance with a slightly smaller appearance when compared to the opposite thumb. The left thumb also appears to have a permanent fixation when compared to the opposite thumb. The claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to

additional compensation. Section 8-42-108 (1), C.R.S. The ALJ finds that the claimant is entitled to $2,000.00 for his disfigurement.

31. The ALJ finds that the respondents have established that it is more likely than not that the claim should be reopened to recover an overpayment.

32. The ALJ finds that the respondents have established that it is more likely than not that the claimant was overpaid in the amount of $4,551.76, after reducing the overpayment by PPD and disfigurement wards, and that they are entitled to recover that amount.

33. The ALJ finds that the respondents have failed to establish that it is more likely than not that the claimant's thumb should be rated at 5%.

34. The ALJ finds that the claimant has failed to establish that it is more likely than not the claim should be reopened on the issue of AWW.

35. The ALJ finds that the claimant has failed to establish that it is more likely than not the situs of the claimant's disability extends beyond the thumb.

CONCLUSIONS OF LAW

1. Pursuant to C.R.S. §8-43-203(2)(b)(II)(A), a claim is automatically closed as to the issues addressed in the FAL if the claimant does not timely object and request a hearing on any disputed issues that are ripe for hearing. These issues may not be litigated further unless they are reopened pursuant to C.R.S. §8-43-303. *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254, 1256-57 (Colo. App. 2007).

2. The ALJ finds that, by filing the December 10, 2014 AFH on the issue of overpayments, the respondents implicitly petitioned to reopen the claim; additionally, the issue of reopening was endorsed by the claimant and thus addressing reopening of the claim to address overpayments is appropriate.

3. In pertinent part, an overpayment is defined as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive." C.R.S. §8-40-201(15.5).

4. The respondents have the burden of proof on the issue of overpayments. *See* C.R.S. §8-43-303(4) (the party attempting to reopen an issue or claim has the burden of proof on the issue sought to be reopened).

5. Once the respondents have made a prima facie showing that a claimant received overpayments, it is mandatory that a claim be reopened only as to overpayments and that the claimant must repay the overpayment. C.R.S. §8-43-303(1), (2).

6. The ALJ finds that the respondents have made a prima facie showing that the claimant reached MMI on March 18, 2014 and that he continued to receive TTD benefits until July 7, 2014.

7. The ALJ finds that the payment of benefits after March 18, 2014 was an overpayment because TTD benefits should have terminated with the claimant's placement at MMI on that date. *See* C.R.S. §8-42-105(3)(a). The resulting overpayment amount is $8,420.62.

8. As found, the PPD award is worth $1,868.86. When offset against the $8,420.62 overpayment, the remaining amount of the overpayment is $6,551.76. When further reduced by the disfigurement award of $2,000.00 the resulting overpayment is $4,551.76.

9. As found, the correct amount of the overpayment is actually $4,551.76.

10. The ALJ finds that the respondents are entitled to seek repayment of the overpayment from the claimant and that the claimant is required to repay the overpayment.

11. The ALJ finds that the issue of AWW is closed because the claimant did not endorse it as a disputed issue in either his August 7, 2014 or November 13, 2014 AFH. Therefore, his petition to reopen this issue is appropriate.

12. The claimant indicated at the hearing that he was petitioning to reopen the claim on the issue of AWW because the respondents allegedly calculated it incorrectly.

13. At the hearing, the respondents objected to proceeding on reopening the issue of AWW, arguing that the claimant had waived his right to challenge it by not endorsing it as a disputed issue in either his August 7, 2014 or November 13, 2014 AFH.

14. The Industrial Claims Appeals Office (the "Panel") has held that a claimant's failure to apply for a hearing on the issue of AWW does not constitute a waiver of his right to challenge it. It also does not constitute a waiver of his right to

reopen the claim later on the basis of error or mistake. *See Casias v. Interstate Brands Corp. & ACE Am. Ins. Co.*, W.C. No. 4-740-818-02 (I.C.A.O. Mar. 25, 2013).

15. However, the instances in which a claimant has been allowed to reopen his claim on the issue of AWW based on an error or mistake are factually distinguishable from the instant case. For example, the *Casias* claim involved both a Social Security offset and the loss of the claimant's health insurance, both of which affected the calculation of her AWW. The ALJ found that the failure to include the cost of continuing her insurance constituted a mutual error or mistake, both of fact and of law. This was because neither party's counsel previously was aware that the claimant had insurance through the employer and subsequently lost it. The Panel upheld reopening the issue of AWW because the respondents were *statutorily required* to augment the claimant's AWW to include the cost of continuing her insurance.

16. In contrast, in the instant case, there is no error or mistake of fact. Neither party has recently discovered previously unknown information, like in *Casias*. Claimant's wage records were exchanged in 2013 and 2014.

17. Moreover, in the instant case, there is no error or mistake of law. The claimant has not presented any evidence that he had health insurance through the employer, and subsequently lost it, which would statutorily require his AWW to be augmented. Further, the respondents have not argued the applicability of any statutory offsets that would require the claimant's AWW to be adjusted. *See, e.g., Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo. App. 1996).

18. The ALJ has not found any cases indicating that a disagreement between the parties on how a claimant's AWW should be calculated, when it does not involve an adjustment due to an offset or the loss of health insurance, qualifies as an error or mistake of either law or fact.

19. The ALJ finds that the method by which the respondents calculated the AWW was not a mistake of law or fact justifying reopening the issue of AWW.

20. The ALJ finds that the issue of PPD benefits remains open. This is because the claimant timely explicitly endorsed it as a disputed issue in his August 7, 2014 AFH.

21. This claim involves a PPD rating for a scheduled extremity injury. Therefore, neither party was required to apply for a Division Independent Medical Examination ("DIME") to challenge Dr. Bradley's 20% scheduled PPD rating for the thumb. As a result, the ALJ has jurisdiction to resolve disputes over the rating. *See*

McCormick v. Exempla Healthcare, W.C. No. 4-594-683 at 4 (I.C.A.O. Jan. 27, 2006); *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003).

22. As found, Dr. Bradley's 20% PPD rating for the thumb, which was based on the FCE measurements, was correct. The appropriate scheduled PPD rating for the thumb is 20%.

23. When a claimant's injury is enumerated in the statutory schedule of injuries, the claimant is limited to PPD benefits as specified on the schedule. C.R.S. §8-42-107(1)(a), (2). In this context, the term "injury" refers to the situs of the functional impairment. *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo. App. 1997). The term "situs of the functional impairment" means the part of the body that sustained the ultimate loss of function and became disabled or impaired. This is not necessarily the location where the injury actually occurred.

24. As found, the functional situs of the claimant's impairment is limited to his left thumb, and his left hand and left upper extremity are not impaired. As a result, the ALJ finds that the scheduled PPD rating for the left thumb should not be converted to the equivalent PPD rating for either the left hand and or the left upper extremity.

25. The ALJ concludes that the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S. The ALJ finds that the claimant is entitled to $2,000.00 for his disfigurement. The respondent-insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

26. The ALJ concludes that the respondents have established by a preponderance of the evidence that the claim should be reopened to recover an overpayment.

27. The ALJ concludes that the respondents have established by a preponderance of the evidence that the claimant was overpaid in the amount of $4,551.76, after reducing the overpayment by PPD and disfigurement wards, and that they are entitled to recover that amount.

28. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the claimant's thumb should be rated at 5%.

29. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claim should be reopened on the issue of AWW.

30. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the situs of the claimant's disability extends beyond the thumb.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claim is reopened to address the issue of overpayments.

2. The respondents are entitled to payment from the claimant of an overpayment in the amount of $4,551.76.

3. The respondents request to change the admitted PPD rating is denied and dismissed.

4. The claimant's request to reopen the claim on the basis of mistake or error in the admitted AWW is denied and dismissed.

5. The claimant's request to change the scheduled impairment rating is denied and dismissed.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 31, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

Although the Insurer has admitted liability for the claim, the parties framed the issue for hearing as "compensability of the Claimant's left hip injury." Thus, this decision determines whether Claimant's fall on August 26, 2013, while in the course and scope of her employment, caused an injury to Claimant's left hip, or aggravated a pre-existing condition. If the left hip injury is a compensable component of Claimant's claim, the remaining issue is whether Claimant is entitled to medical benefits to treat her left hip, including whether the total hip replacement performed by Dr. John Xenos was reasonable, necessary and related to the claim.

FINDINGS OF FACT

1. The Claimant is 58 years old and has worked for the Employer for 27 years as an account representative.

2. On August 26, 2013, Claimant was running late for a sales call at Parker Adventist Hospital. She was carrying a briefcase, a laptop, and an iPad along with several phone books.

3. While rushing to catch the elevator, Claimant reached for the elevator button, apparently tripped and fell onto her left side. After falling, she gathered her items and went to her appointment.

4. About an hour later, Claimant began noticing neck pain, so she called her manager, Tom Egan, to report the accident. She then returned to Parker Adventist Hospital to report the accident to the building manager. The building manager informed Claimant that she could go to the emergency room, but that she would have to pay for it herself. The Claimant decided against seeking treatment in the emergency room.

5. Following the accident, the Claimant had bruises on her left side from her knee to her hip.

6. Shortly after the accident, the Claimant took two weeks off from work and went on a previously scheduled vacation to visit her sister's family in Loveland. While in Loveland, Claimant testified that she engaged in little activity.

7. When the Claimant returned to work after her vacation, she performed administrative tasks in the office for two days. The Claimant began making sales calls again, and she noticed increased pain in her back and hip. She told Egan about her symptoms. He referred Claimant to HealthOne Occupational Medicine and Rehabilitation.

8. On September 11, 2013, Dr. Elizabeth Bisgard evaluated the Claimant at HealthOne. Claimant reported that on August 26, 2013, she fell and landed primarily on her knees and elbow with most of the impact on her left side. She initially noticed neck pain and limited range of motion in her neck. The Claimant reported that she had pain in her left hip since the fall and had gotten worse particularly when getting in and out of her car. The Claimant told Dr. Bisgard about the left hip labral tear she had surgically repaired in 2010. Claimant reported no residual symptoms in her left hip before the fall on August 26, 2013.

9. Dr. Bisgard diagnosed Claimant with a cervical strain and left hip contusion. Dr. Bisgard imposed work restrictions of no lifting, carrying, pushing or pulling over 5 pounds.

10. Claimant's x-rays revealed no fractures but did show degenerative changes in both of her hips.

11. The Claimant began missing work on September 16, 2013 and has not returned to work since that date. The Insurer filed a general admission on September 26, 2013 admitting for medical benefits and temporary total disability.

12. The Claimant had a labral tear in her left hip prior to the work injury. Dr. John Xenos performed a surgical repair of the tear in 2010. She recovered fully following the surgery and returned to her normal activities.

13. Claimant returned to Dr. Xenos on September 18, 2013 for treatment of her left hip. She was concerned about a re-tear of her labrum and told Dr. Xenos she did feel like the workers' compensation doctors were looking enough at her hip. Claimant did not have a referral to Dr. Xenos at that time.

14. Dr. Bisgard's physician's assistant, Thanh Chau, evaluated the Claimant on September 25, 2013. Mr. Chau documented Claimant's reports of a catching sensation in her left hip, as well as pain with walking and weight bearing.

15. On September 26, 2013, the Respondents filed a General Admission of Liability admitting for reasonable and necessary medical benefits for Claimant's back, neck and left hip, as well as temporary total disability benefits.

16. Claimant had a MRI on October 1, 2013, which showed a possible small labral tear and osteoarthritis in the left hip.

17. On October 4, 2013, Claimant saw Mr. Chau. Mr. Chau went over the MRI findings with the Claimant and referred her to Dr. Xenos for further evaluation of her hip.

18. Claimant returned to Dr. Xenos on October 8, 2013. He discussed non-surgical and surgical options with the Claimant regarding the MRI results. Claimant elected to undergo a total left hip arthroplasty and scheduled it for December 9, 2013.

19. On October 22, 2013, Claimant saw Dr. Bisgard. Dr. Bisgard noted that what she initially believed to be a soft tissue injury to the left hip is now more substantial. Dr. Bisgard stated that Claimant had been working full time and full duty until her fall at work after which she has rapidly deteriorated. Dr. Bisgard opined that the fall permanently aggravated Claimant's pre-existing degenerative joint disease in the left hip.

20. The Claimant testified that she had pain in her left hip from the day of the accident. Dr. Bisgard testified that the Claimant gave a consistent history of pain in the left hip from the day of the accident and ongoing.

21. Dr. Bisgard testified that she was familiar with Dr. Xenos and considered him an accomplished hip surgeon. She agreed with the referral to Dr. Xenos.

22. The Claimant had left hip surgery to repair a labral tear in 2010, but had returned to her regular physical activities without any hip symptoms. These activities included skiing, bowling, dancing, biking, power walking and golf. She engaged in these activities with no left hip symptoms up to the September 26, 2013 fall.

23. The Insurer denied the total hip arthroplasty as unrelated to this claim, but the Claimant proceeded with the surgery on December 9, 2013, under her personal medical insurance.

24. Following the surgery the Claimant's hip symptoms subsided and she and continued to recover from her injuries.

25. The Claimant had physical therapy for her hip beginning on January 7, 2014. A physical therapy record indicated that Claimant fell down some stairs and fractured her pelvis approximately two years earlier. The Claimant admitted that she fell down some stairs in September 2011, but she did not fracture her pelvis and her symptoms subsided within a short period of time. There are no other medical records suggesting Claimant sustained a fractured pelvis.

26. The Claimant continued to treat with Dr. Bisgard until Dr. Bisgard left the HealthOne practice in September 2014.

27. Dr. Barton Goldman took over Claimant's care. The history Claimant gave to Dr. Goldman was consistent with the history she provided to Dr. Bisgard. Dr. Goldman stated in his September 25, 2014 report that the Claimant had made a fairly good recovery from the hip replacement surgery. Dr. Goldman stated that the Claimant had pre-existing osteoarthritis in her left hip which was aggravated by the August 26, 2013 fall.

28. Dr. Bisgard testified that while the Claimant did have pre-existing osteoarthritis in her left hip, it was completely asymptomatic prior to the fall. It was clear to Dr. Bisgard that the Claimant fell on her left side because she still had bruising on her left side when Dr. Bisgard first saw her about 16 days after the accident. She stated that the cause of the bruising was the direct impact on her left side.

29. Dr. Bisgard based her causation opinion on several factors. The MRI showed that the hip was injured. There was a temporal relationship between the hip pain and the trauma in that the Claimant told her she had hip pain from the day of the accident and had no problems with her hip immediately before the accident. Dr. Bisgard could find no intervening factors which would have caused the hip injury or would have made it worse following the fall.

30. Dr. Bisgard stated that it is common for people to have arthritic conditions which have no symptoms until a trauma causes inflammation which causes the previously asymptomatic condition to become symptomatic and disabling.

31. Dr. Bisgard explained that a fall on the left hip can drive the femoral head into the hip socket and cause the pre-existing hip condition to become symptomatic. She testified that this is what happened with the Claimant and that there was no other reasonable explanation for the cause of the Claimant's left hip symptoms. Dr. Bisgard opined that symptoms can progress and may not be immediately apparent on the date of the injury.

32. Dr. Bisgard discounted a physical therapy report that stated the Claimant fell on her right side and rolled onto her left. She based this on the fact that there were no bruises on the right side and that there would have been no bruising on her left side if she had fallen on the right and then rolled to her left. She also testified that the surgery performed by Dr. Xenos appeared to be successful and she deferred to Dr. Xenos on the need for the surgery.

33. On February 19, 2014, Dr. Timothy O'Brien performed an independent medical examination (IME) at the Respondents' request. Dr. O'Brien opined that Claimant sustained only minor injuries on August 26, 2013 because she continued to work after her fall, and because she did not seek medical treatment right away.

34. Dr. O'Brien believes that Claimant suffered only a minor hip contusion when she fell on August 26, 2013. He stated that the minor contusion did not result in an aggravation or acceleration of underlying pre-existing osteoarthritis to the extent that the total hip arthroplasty is indicated. Dr. O'Brien indicated that Dr. Xenos' representation to the contrary is inaccurate.

35. Dr. O'Brien opined in his report that Claimant's candidacy for a left total hip arthroplasty was established based on radiographs which demonstrated joint space narrowing. These radiographic findings take years to become evident. According to Dr. O'Brien, Claimant was a candidate for a left total hip arthroplasty long before to Dr. Xenos' radiographs which were taken on September 18, 2013.

36. Ultimately, Dr. O'Brien opined that Claimant's need for a total left hip arthroplasty was not causally related to the August 26, 2013 work injury. Dr. O'Brien went on to opine that Claimant proceeded with a left hip total arthroplasty to treat her personal health issues and her long-standing pre-existing osteoarthritis in her left hip.

Dr. O'Brien opined that Claimant did not become more of a candidate for left or right total hip arthroplasty as a result of the work injury.

37. Dr. O'Brien completed a supplemental report dated April 16, 2014, after reviewing additional medical records. He stated that his medical opinion had not changed since the February 19, 2014 IME report.

38. Dr. O'Brien further opined that Claimant had a long-standing pre-existing chondromalacia of the acetabulum and left hip joint and this was due to congenital dysplasia of the left hip. Claimant's femoral head was "out of round" thus Claimant's left hip was biomechanically altered from the time of her birth. This pre-existing condition relentlessly progressed between the 2010 surgical intervention and the work injury that occurred on August 26, 2013. Dr. O'Brien indicated that joint space narrowing does not occur acutely as the result of a fall on the outside of the left hip that produced a bruise and a minor contusion, but rather these changes of cartilage thinning and joint space narrowing takes years to become evident. Dr. O'Brien stated that Claimant was a candidate for a total hip arthroplasty on August 25, 2013, one day before her alleged fall on August 26, 2013, and she did not become more of a candidate for a total hip arthroplasty because of her minor fall on August 26, 2013.

39. Dr. Mark Paz performed an IME at the request of Respondents on October 31, 2014. Dr. Paz examined the Claimant and reviewed medical records. In his report, Dr. Paz indicated that he agreed with Dr. O'Brien's opinion that Claimant's left hip surgery was not the result of the fall on August 26, 2013, and that her left hip condition is not work-related. Dr. Paz stated in his report that the mechanism of injury based on the history provided by Claimant was inconsistent with the mechanism of injury documented in Dr. Bisgard's initial evaluation on September 11, 2013.

40. Dr. Paz testified at hearing consistent with his report. Dr. Paz also testified that he listened to the audio recording of the Claimant's IME after the IME and prior to the hearing. Dr. Paz testified that Claimant indicated she developed pain in her hip approximately 2-3 days after the incident on August 26, 2013. Dr. Paz believed the 2-3 day delay in onset of pain was significant. Dr. Paz testified this would not be indicative of an acute traumatic injury to Claimant's left hip.

41. Dr. Paz testified that the initial diagnosis was a contusion and that a worsening of symptoms in the left hip region is inconsistent with a contusion. Dr. Paz stated that left groin pain and restricted motion of the left hip joint are expected clinical findings associated with symptomatic osteoarthritis of the hip. Dr. Paz opined that the findings reported by Dr. Bisgard in the absence of groin pain and restrictive movement of the left hip are clinically inconsistent with an acute traumatic event which caused bruising of the left hip and left lateral thigh.

42. The opinions of Dr. Paz fail to consider that Dr. Bisgard explained that she made a working diagnosis of "left hip contusion." Dr. Bisgard candidly explained that she did not believe she needed to perform left hip range of motion testing on the Claimant during the initial visit because she believed Claimant suffered only a

contusion. She testified that in hindsight she should have done a more thorough examination of Claimant's left hip. After Claimant's symptoms worsened, it became apparent to Dr. Bisgard that Claimant's injury to her left hip was more severe than initially thought.

43. Dr. Paz testified that Claimant's left hip MRI did not reveal a hematoma, which Dr. Paz indicated would be blood accumulating deep and around the hip joint. Dr. Paz testified that the bruising on Claimant's lateral hip was more superficial and progressed down Claimant's hip due to gravity. Dr. Paz testified the bruising Claimant had is more consistent with a soft tissue injury and not an acute traumatic injury to Claimant's left hip joint.

44. Dr. Paz testified that it was not medically probable that Claimant's fall aggravated her pre-existing condition to produce the need for treatment.

45. Dr. Paz's opinions seem to hinge on his credibility evaluation of the Claimant. As such, his opinions are not persuasive. The ALJ finds that Claimant consistently reported the mechanism of injury to various treatment providers. Further, the ALJ places little significance on any alleged delayed pain onset. Dr. Bisgard credibly testified that pain symptoms can evolve and progress with the passage of time especially as activities change.

46. Dr. Bisgard disagreed with the opinions of Dr. O'Brien on causation. She testified that visible bruising 16 days after the fall does not suggest a minor injury, and that Dr. O'Brien's apparent reliance on a "history of bilateral pelvic and hip pain" was misplaced, as the Claimant fully recovered from the prior hip injury and was without symptoms and was not getting treatment before she fell.

47. Dr. Bisgard also disagreed with Dr. Paz's opinions. Dr. Paz heavily relied on what he believed was inconsistent reporting by the Claimant concerning the injury and its effects. Dr. Bisgard said that the history from the Claimant that the pain began on the day of the accident was given to her just 16 days after the injury. Dr. Paz did not see the Claimant until 14 months after the accident. Dr. Bisgard believes, and the ALJ agrees, that the history given right after the accident is more reliable. She also said that the worst pain would not necessarily occur right after the injury and in the case of arthritis; it could get more painful over time as the condition was now made symptomatic, and worsened.

48. The ALJ finds the opinions of Dr. Bisgard and Dr. Goldman to be credible and persuasive. As treating physicians, they had a more extensive relationship with the Claimant and were better able to judge her credibility. Dr. Bisgard took Claimant's history sooner after the accident than did the Respondents' IME doctors. Their opinions regarding causation, particularly the opinion of Dr. Bisgard, are more persuasive than the IME opinions of Drs. O'Brien and Paz.

49. Claimant suffered an aggravation of the pre-existing left hip osteoarthritis when she fell on August 26, 2013, and that the hip replacement surgery was reasonable, necessary and related to her workers' compensation claim.

CONCLUSIONS OF LAW

Based on the evidence presented, the Judge makes the following conclusions of law:

General

1. The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically noted below, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability - Causation

4. The Claimant must prove causation to a reasonable probability. Circumstantial evidence, including lay testimony alone, may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). Ultimately, the question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

5. The Claimant has met her burden of proof. Claimant's pre-existing left hip condition was aggravated when she fell on August 23, 2013. The fall necessitated medical treatment including the left hip arthroplasty. Although Claimant had pre-existing osteoarthritis in her left hip, she had been symptom free for approximately three years. The ALJ is not persuaded by Dr. O'Brien's opinions that Claimant's hip required medical treatment prior to the fall on August 23, 2013. Dr. O'Brien based his opinions on imaging but he failed to consider her clinical presentation or lack thereof for the three-year period between her labral repair surgery and the work injury. Claimant did not have physical symptoms that would have required surgery until after she fell at work.

The ALJ is also not persuaded by Dr. Paz's opinions. Dr. Paz focused on Dr. Bisgard's initial diagnosis of "contusion" and ignored the fact that Dr. Bisgard admittedly erred in diagnosing only a contusion. Dr. Paz also focused on lack of restricted movement in Claimant's hip joint at her first evaluation with Dr. Bisgard; however, Dr. Bisgard admitted that she should have evaluated the Claimant's hip more thoroughly at that visit. Claimant went to Dr. Xenos and complained that HealthOne practitioners were not paying attention to her hip. Further, the ALJ disagrees with Dr. Paz's evaluation of Claimant's credibility. Claimant provided consistent reports of the mechanism of injury to her providers, and any deviation from her reports was minor.

Dr. Bisgard's opinions concerning the history of this claim and causal relatedness of Claimant's left hip condition to the work incident are more persuasive than those of Drs. O'Brien and Paz. Dr. Bisgard credibly explained that a fall on the left hip can drive the femoral head into the hip socket and cause the pre-existing hip condition to become symptomatic. She testified that this is what happened with the Claimant and that there was no other reasonable explanation for the cause of the onset of Claimant's left hip symptoms. Dr. Bisgard opined that symptoms can progress and may not be immediately apparent on the date of the injury.

Medical Benefits

6. Every employer must furnish to employees such treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. *See also Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). It is Claimant's burden to prove a causal connection between the industrial injury and the need for specific medical treatment. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

7. Claimant has proven that the total left hip arthroplasty was reasonable, necessary and related to her work injury. As found, Dr. O'Brien felt the need for a total hip arthroplasty was present in the Claimant regardless of the fall at work. In addition, Dr. Xenos felt the procedure was reasonable and necessary, and Dr. Bisgard deferred to the opinions of Dr. Xenos regarding the need for a left hip arthroplasty. No persuasive opinions were offered to the contrary. Because the Claimant has proven that her pre-existing left hip osteoarthritis was aggravated by the fall at work, the ALJ concludes that the surgery was related to the work injury.

ORDER

It is therefore ordered that:

1. Claimant sustained an aggravation of her pre-existing left hip condition when she fell at work on August 23, 2013. Respondents have already admitted liability for the injury, which shall now include the left hip.

2. Claimant is entitled to medical treatment for the left hip.

3. Respondents are liable for the total left hip arthroplasty Claimant underwent on December 9, 2013.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 28, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on January 17, 2014.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits to cure or relieve the effects of his industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 17, 2014, excluding the period from September 30, 2014 through January 26, 2015, until terminated by statute.

4. Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

5. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant worked for Employer as an Electrician. He drove his personal vehicle to jobsites to perform electrical duties. Claimant testified that he transported necessary supplies and equipment in his truck. He noted that he sometimes used his truck during the course of the day to travel between jobsites and purchase materials from The Home Depot.

2. Dakota Carter worked for Employer as an Apprentice Electrician. During early to mid-January 2014 his car was not working so he received rides to jobsites from co-employee Harold Holland. On January 5, 2014 Mr. Holland was involved in an incident at the Precision job site located at 7076 South Alton Way in the Denver Metropolitan area. Because of the incident, Mr. Holland was prohibited from working at the Precision location and Mr. Carter did not have transportation to the site. Mr. Carter explained that he procured rides to the site from friends and family but missed 2-3 days of work during early to mid-January 2014 because of his inability to get to the job location.

3. On the evening of January 14, 2014 Mr. Carter contacted Claimant through text message to confirm a possible ride to the Precision jobsite. Claimant responded that he could give Mr. Carter a ride to the location but sent a text message to

owner of Employer Ron Burek stating "so I'm picking up Dakota in the morning. Am I supposed to take him with me." Mr. Burek responded to Claimant that "He [Dakota] just texted me. If you want he can go with you." Claimant then told Mr. Carter that he had just gotten off the phone with Mr. Burek and confirmed that he would be driving Mr. Carter to work. Claimant and Mr. Carter then exchanged text messages about the pickup location.

4. Claimant's commute from his home to the Precision jobsite required him to drive the following route: I-70 to I-25 Southbound, I-25 to Arapahoe Road, Arapahoe Road Westbound to Yosemite and South on Yosemite to the jobsite located on Alton Way. To pick up Mr. Carter Claimant deviated from his typical route by exiting I-25 on Santa Fe to pick up Mr. Carter at Broadway and Tufts. Claimant drove Mr. Carter to and from the Precision jobsite on January 15-16, 2014. He also drove with Mr. Carter to The Home Depot and at least one other jobsite on January 15-16, 2014.

5. On January 17, 2014 Claimant was traveling to pick up Mr. Carter but was involved in a motor vehicle accident at approximately 6:30 a.m. Claimant was rear-ended while heading Southbound on Santa Fe at the intersection of Santa Fe and Oxford. Claimant suffered numerous injuries including head trauma, fractured hips, a lumbar strain, PTSD and a cervical strain. He initially received medical treatment at a hospital but then obtained care through Concentra Medical Centers. Concentra physicians prohibited Claimant from working because of his injuries.

6. Mr. Carter testified that Employer was not involved in the driving arrangement he had made with Claimant. He explained that Mr. Burek did not care how he got himself to the jobsite. In fact, Mr. Carter remarked that Mr. Burek did not even care whether he made it to work because his job was simply as an apprentice assisting Claimant. If he did not make it to work Claimant was responsible for completing his job duties without help.

7. Mr. Carter commented that, after Mr. Holland was prohibited from working on the Precision jobsite, Claimant offered to give him a ride to and from work for $15.00 per day. He paid Claimant $15.00 for the first two days of transportation but never received a ride on the third day because Claimant was involved in a motor vehicle accident prior to picking him up for work..

8. Mr. Burek testified that Employer has a policy of not compensating employees for driving their personal vehicles to work in the morning and home in the evening. He noted that the policy has been consistently enforced for the previous 16 years. Mr. Burek explained that no employee has ever included "travel time" in his job description on a time sheet. He emphasized that he has never been involved in how employees get to and from work and has never reimbursed employees for gas, travel or associated expenses for getting to and from jobsites.

9. Mr. Burek explained that he sometimes communicated with employees via text messaging to confirm jobsite addresses. The text message he sent to Claimant on January 14, 2014 simply meant that Claimant could take Mr. Carter to work if he

wanted. He explained that Mr. Carter was working as an apprentice/assistant to Claimant at the time. Mr. Carter was learning the trade and otherwise helping at the jobsite. Mr. Burek remarked that he had enough employees on his jobsites and would not have incurred a detriment if Mr. Carter had not been able to make it to work during the week of January 14, 2014. He denied any involvement in the financial arrangement between Claimant and Mr. Carter regarding transportation to and from work.

10. Claimant maintained that in a telephone conversation Mr. Burek directed him to give Mr. Carter a ride to and from the Precision jobsite. He remarked that Mr. Burek reimbursed him for the deviation from his normal travel route to the jobsite when he picked up Mr. Carter. However, in a recorded statement to Insurer Claimant did not assert that Mr. Burek ordered him to transport Mr. Carter to and from the Precision jobsite. Claimant also acknowledged that he was not reimbursed by Employer to transport Mr. Carter to and from work.

11. Claimant has failed to demonstrate that it is more probably true than not that he suffered compensable industrial injuries during the course and scope of his employment with Employer on January 17, 2014. Applying the *Madden* factors, he has failed to establish an exception to the "traveling to or from work rule" because his travel was not considered the performance of services arising out of and in the course of employment. Initially, Claimant was injured in a motor vehicle accident while on his way to pick up Mr. Carter to transport him to the Precision jobsite. The travel thus did not occur during working hours and was not on Employer's premises. Although Claimant asserted that he was directed by Mr. Burek to transport Claimant to and from the Precision jobsite on January 17, 2014, the record reveals that the transportation agreement existed solely between Claimant and Mr. Carter. Mr. Carter noted that he paid Claimant $15.00 for the first two days of transportation to the Precision location but never received a ride on the third day because Claimant was involved in a motor vehicle accident. Mr. Burek credibly noted that he has never been involved in how employees get to and from work and has never reimbursed employees for gas, travel or associated expenses for getting to and from jobsites.

12. The critical inquiry is whether travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. The record reveals that Claimant's travel was not contemplated by the employment contract. Specifically, Employer did not require Claimant to use his automobile in order to work. Claimant's vehicle was not used to perform job duties and thus did not confer a benefit to Employer beyond his mere arrival at work. Claimant's job was to perform electrician duties at a designated jobsite. Claimant explained that he sometimes used his truck during the course of the day to travel between jobsites and purchase materials from The Home Depot. However, Mr. Burek testified that Employer has a policy of not compensating employees for driving their personal vehicles to work in the morning and home in the evening. He noted that the policy has been consistently enforced for the previous 16 years. Mr. Burek explained that no employee has ever included "travel time" in his job description on a time sheet.

13. The credible evidence reveals that Claimant's contract of employment did not require him to transport his personal vehicle to Employer's job locations during the work day. Claimant merely had to get to the jobsite in order to work for the day. Although Claimant may have chosen to use his truck to travel to jobsites and make trips to The Home Depot, the record reveals that Employer did not receive a benefit beyond Claimant's mere arrival at work. Claimant's decision to give Mr. Carter a ride to work on January 17, 2014 was not at Employer's express or implied request and conferred no benefit to Employer. Because Claimant's injuries occurred prior to his arrival at the jobsite and picking up Mr. Carter was not contemplated by the employment contract, he has failed to establish that "special circumstances" exist justifying an exception to the "traveling to or from work" rule. A review of the *Madden* factors thus reveals that Claimant has failed to demonstrate a nexus between his injuries and his employment for Employer. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of

his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower and requires a claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* at 641-62.

5. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

6. "Special circumstances" may be found where the employment contract contemplates the employee's travel or the employer delineates the employee's travel for special treatment as an inducement. *See Staff Administrators Inc. v. Reynolds,* 977 P.2d 866, 868 (Colo. 1999). "Special circumstances" may also exist when the employee engages in travel with the express or implied consent of the employer and the employer receives a special benefit from the travel in addition to the employee's mere arrival at work. *See National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risks of the travel become the risks of the employment. *Breidenbach v. Black Diamond, Inc.,* W.C. No. 4-761-479 (ICAP, Dec. 30, 2009).

7. In considering whether travel was contemplated by the employment contract, case law reflects that the exception applies when a claimant is required by an employer to come to work in an automobile that is then used to perform job duties. The vehicle confers a benefit to the employer beyond the employee's mere arrival at work. *See Whale Communications v. Osborn,* 759 P.2d 848 (Colo. App. 1988). As explained in 1 A. Larson, *Workmen's Compensation Law*, §17.50 (1985), "[t]he rationale for this exception is that the travel becomes a part of the job since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purposes. Such a requirement causes the job duties to extend beyond the

workplace and makes the vehicle a mandatory part of the work environment." *See In Re Rieks,* W.C. No. 4-921-644 (ICAP, Aug. 12, 2014) (where employer required the claimant to come to work in an automobile to attend appointments and meet with customers, transport of car was contemplated by the employment contract and the claimant's motor vehicle accident on the way to work occurred in the course of and arose out of his employment); *Norman v. Law Offices of Frank Moya,* W.C. No. 4-919-557 ICAP, Apr. 23, 2014) (where attorney was required to use car to travel from work to courthouse and was injured in motor vehicle accident while she was driving to her first court appearance of the day, injuries were compensable because travel was contemplated by employment contract and conferred benefit to employer beyond mere arrival at work); *Lopez v. Labor Ready,* W.C. 4-538-791 (ICAP, Sept. 26, 2003) (where the claimant's job required her to spend large parts of her day in her personal vehicle and she was injured in a motor vehicle accident while driving home for lunch, claim was compensable because it conferred a benefit to the employer beyond the claimant's mere arrival at work). In contrast to the preceding case law, Claimant's use of his vehicle was not contemplated by the employment contract and did not confer a benefit to Employer. He was only required to travel to the jobsite to perform his duties as an Electrician.

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on January 17, 2014. Applying the *Madden* factors, he has failed to establish an exception to the "traveling to or from work rule" because his travel was not considered the performance of services arising out of and in the course of employment. Initially, Claimant was injured in a motor vehicle accident while on his way to pick up Mr. Carter to transport him to the Precision jobsite. The travel thus did not occur during working hours and was not on Employer's premises. Although Claimant asserted that he was directed by Mr. Burek to transport Claimant to and from the Precision jobsite on January 17, 2014, the record reveals that the transportation agreement existed solely between Claimant and Mr. Carter. Mr. Carter noted that he paid Claimant $15.00 for the first two days of transportation to the Precision location but never received a ride on the third day because Claimant was involved in a motor vehicle accident. Mr. Burek credibly noted that he has never been involved in how employees get to and from work and has never reimbursed employees for gas, travel or associated expenses for getting to and from jobsites.

9. As found, the critical inquiry is whether travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. The record reveals that Claimant's travel was not contemplated by the employment contract. Specifically, Employer did not require Claimant to use his automobile in order to work. Claimant's vehicle was not used to perform job duties and thus did not confer a benefit to Employer beyond his mere arrival at work. Claimant's job was to perform electrician duties at a designated jobsite. Claimant explained that he sometimes used his truck during the course of the day to travel between jobsites and purchase materials from The Home Depot. However, Mr. Burek testified that Employer has a policy of not compensating employees for driving their personal vehicles to work in the morning and home in the evening. He noted that the policy has been consistently

enforced for the previous 16 years. Mr. Burek explained that no employee has ever included "travel time" in his job description on a time sheet.

10. As found, the credible evidence reveals that Claimant's contract of employment did not require him to transport his personal vehicle to Employer's job locations during the work day. Claimant merely had to get to the jobsite in order to work for the day. Although Claimant may have chosen to use his truck to travel to jobsites and make trips to The Home Depot, the record reveals that Employer did not receive a benefit beyond Claimant's mere arrival at work. Claimant's decision to give Mr. Carter a ride to work on January 17, 2014 was not at Employer's express or implied request and conferred no benefit to Employer. Because Claimant's injuries occurred prior to his arrival at the jobsite and picking up Mr. Carter was not contemplated by the employment contract, he has failed to establish that "special circumstances" exist justifying an exception to the "traveling to or from work" rule. A review of the *Madden* factors thus reveals that Claimant has failed to demonstrate a nexus between his injuries and his employment for Employer. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed. *See In Re Hall,* W.C. No. 4-689-120 (ICAP, Nov. 7, 2007).(where the claimant had a motor vehicle accident while driving to transport inmates to work in exchange for payment from the inmates and the employer was not involved in the agreement, the claimant's activities were not contemplated by the employment contract).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 24, 2015.

DIGITAL SIGNATURE:

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-946-963-03

ISSUES

- Whether Insurer properly denied prior authorization of chiropractic treatment recommended by Dr. Miguel Castrejon as not being reasonable and necessary and related to the Claimant's March 26, 2015 admitted work related injury?

- Whether Insurer properly denied prior authorization for a SI joint injection as recommended by Dr. Miguel Castrejon as not being reasonable and necessary and related to the Claimant's March 26, 2015 admitted work related injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed as a carpenter by Employer for approximately six to seven months prior to his admitted work related injury of March 26, 2014. On March 26, 2014, Claimant had been lifting concrete forms throughout the day when he experienced pain involving his lower back and lower extremities.

2. Respondents filed a General Admission of Liability (GAL) on April 18, 2014 admitting for medical only. Respondents have not filed further GALs.

3. On August 27, 2014, Claimant applied for a hearing endorsing the following issues: Medical Benefits, Average Weekly Wage (AWW), Temporary Total Disability (TTD), and Penalties. This hearing application addressed the issue of TTD on an ongoing basis, and stated that "Respondents failed to object to 20 day letter dated June 4, 2104 for Claimant to see Dr. Timothy Hall for authorized treating provider (ATP). Respondents refused to pay for treatment with Dr. Timothy Hall." Also addressed was "Penalties for failure to pay benefits when due pursuant to C.R.S. 8-43-304." On October 10, 2104, an Order was entered approving the parties' September 30, 2014 Stipulation. In the Stipulation, the parties agreed that Dr. Miguel Castrejon would be Claimant's ATP; that Respondent would pay Dr. Hall $450.00; that Dr. Hall would have no further involvement with the case; and that Claimant would withdraw his penalty issue up to the date the Stipulation was approved. This Stipulation resolved the issues contained in Claimant's August 27, 2014 Application for Hearing except for AWW and TTD.

4. On January 7, 2014, a Judge approved the parties' December 22, 2014 Stipulation which addressed the remaining issues of AWW and TTD. The parties

stipulated that Claimant's AWW was $1,055.85. The parties also stipulated that the issue of TTD from March 27, 2014 to December 16, 2014 should be resolved by Respondents paying Claimant $25,000.

5. Respondents stated in the Stipulation that they agreed to file an amended GAL admitting to "the stipulated AWW and would admit therein to temporary total disability benefits." To date, although Claimant has continued to receive TTD, Respondents have yet to file the amended GAL based upon the Order of January 7, 2015.

6. On March 26, 2014 Claimant received medical care at Memorial Hospital Emergency Room. The Memorial Emergency Room records reflect that Claimant reported doing heavy lifting when he felt a pop in his low back and had pain in his legs to approximately his knees bilaterally. These records also state that Claimant was incontinent of stool on one occasion and that the Claimant underwent an MRI to rule out cauda equina syndrome.

7. On March 31, 2014, Claimant was seen again in the Memorial Hospital Emergency Room complaining of severe back pain for which medication was provided. The examining physician noted that the MRI revealed disc degeneration as well as some protrusion without nerve impingement.

8. On April 2, 2014 Claimant was seen again for back pain at Memorial Hospital. This report discussed the MRI which revealed a bulging disc but no cauda equina syndrome. The examining physician noted Claimant required outpatient follow-up and pain management.

9. On April 14, 2014, Claimant was evaluated by Dr. Timothy Sandell at Pikes Peak Physical Medicine. Claimant reported the same history he had provided to the emergency room doctors of lifting concrete forms and feeling pain in his low back and down his legs. Dr. Sandell stated Claimant exhibited extensive pain behaviors in the examination and that he was unable to note any neurological abnormalities. Dr. Sandell recommended another MRI and prescribed Claimant a Medrol Dosepak. On May 8, 2014, May 12, 2014, and May 22, 2014, Dr. Sandell's physician's assistant, Daniel Haecker saw Claimant. On June 10, 2014, Mr. Haecker indicated that Claimant had undergone a right L5-S1 epidural steroid injection with no benefit on May 27, 2105 Electrodiagnostic testing was recommended at that time.

10. On July 14, 2014, Dr. Sandell completed electrodiagnostic testing which indicated no evidence of lumbar nerve irritation or lumbar radiculopathy.

11. On July 30, 2014, Dr. Sandell's P.A evaluated Claimant, noting Claimant had undergone a right L5-S1 steroid injection and a right L4-S5 facet joint injection with no benefit. He noted that Claimant had undergone two physical therapy visits, and had been prescribed Gabapentin with no benefit. The P.A. stated, "I discussed this patient's case extensively with Dr. Sandell. At this point, we really have nothing further to offer this patient. No further office visits will be scheduled. Since he had increased pain with physical therapy, I advised him that it would be reasonable to hold

off on physical therapy for now. We recommend reevaluation by another pain medicine office, or else an independent medical evaluation."

12. On August 25, 2015, Dr. Timothy Hall evaluated Claimant. Dr. Hall noted in his report that a lumbar MRI revealed L4-5 facet arthropathy and narrowing of the spinal canal. Dr. Hall also noted at L5-S1 a small cluster of disc protrusion with posterior annular fissure and mild facet joint arthropathy. Dr. Hall recommended proceeding with a right SI joint injection at that time. But, this recommendation was made by Dr. Hall on August 25, 2014, just two days before Claimant filed his application for hearing, Claimant has not received the SI joint injection.

13. On October 10, 2014 ALJ Donald E. Walsh granted the parties' Stipulated Motion. In this Stipulation, as noted above, Respondents and Claimant agreed that Dr. Miguel Castrejon be designated as the Claimant's ATP.

14. On October 15, 2014, Claimant saw Dr. Castrejon for the first time. Dr. Castrejon noted that Claimant had not been under the care of any physician since last seeing Dr. Sandell's office on July 30, 2014 and that Claimant was not taking any medication at that time. Dr. Castrejon noted that the mechanism of injury consisted of lifting concrete forms, subsequent to which Claimant reported onset of back and right leg pain. Dr. Castrejon stated that these symptoms had remained consistent throughout the record and history review. Dr. Castrejon noted that Dr. Sandell had performed spinal injections, epidural and facet, but that they failed to benefit Claimant. He noted that these injections were medically reasonable based upon the MRI findings in conjunction with physical presentation. Dr. Castrejon recognized that Dr. Sandell performed electrodiagnostic testing after Claimant failed to improve, and that testing failed to reveal evidence of central or peripheral lesion.

15. Dr. Castrejon noted that Dr. Sandell did not consider sacroiliac or piriformis mediated pain as possible diagnoses, nor did he consider chemical radiculitis on the basis of the fissure that was seen on MRI. Dr. Castrejon noted that Claimant discussed these possibilities with Dr. Hall, who ultimately recommended proceeding with right SI joint injection. Dr. Castrejon noted many pain behaviors with some findings that were considered to be positive for Waddell's. Nevertheless, Dr. Sandell found that testing for Waddell's in the Latin population is not conclusive given cultural differences that exist between the Latin culture compared to other cultures. He testified that Claimant's behavior was normal within his population. Dr. Castrejon indicated positive examination findings that he found were reproducible involving the right SI joint piriformis. On October 15, 2014 Dr. Castrejon diagnosed Claimant as follows:

- Lumbar musculoligamentous strain/sprain with primarily right SI joint involvement.

- Right lower limb radiculities with no electrodiagnostic evidence of lumbar radiculopahty, consider related to piriformis syndrome vs discogneric.

- MRI evidence of posterior disc protrusion at L5-S1with posterior annular fissure and facet joint arthoropy.

- Right lower limb swelling likely secondary to disuse, with element of neuropathic pain not likely related to complex regional pain syndrome.

- Reactive depression and anxiety.

16. Dr. Castrejon initiated a trial of Cymbalta and Neurontin. He also prescribed a combination of chiropractic and physical therapy, with emphasis on treating the presumed sacroiliac and piriformis conditions. Dr. Castrejon discontinued Claimant's use of crutches and provided him with a cane for assisted ambulation. Dr. Castrejon found Claimant was not at maximum medical improvement (MMI) and considered Claimant temporary totally disabled at that time.

17. On March 26, 2014, and May 13, 2014, Claimant underwent MRI's of his lumbar spine. Dr. Castrejon noted the following regarding the May 13, 2014 MRI:

- it revealed a retrolisthesis at L5-S1, which would imply an inconsistent stacking of the two lower vertebrae, which could suggest instability;

- it identified a small mid-portion tear of the disc that creates instability to the disc, produces pain, andallows the internal contents of the disc to excrete onto the nerve root causing chemical radiculitis. Chemical radiculitis leads to lower limb pain. It can also lead to lower limb numbness and to findings described by the patient as burning pain or even sensation of weakness, if there is enough involvement of the nerve root.; and

- It showed facet joint changes at L4-5 and L5-S1.

18. Dr. Castrejon also noted the indication of a small protrusion in the May 13, 2014 MRI which was also apparent on the March 26, 2014 MRI. Dr. Castrejon noted that it was "medically reasonable based upon the MRI findings in conjunction with the physical presentation" for Dr. Sandell to have proceeded with the epidural and facet injections.

19. Dr. Castrejon testified the MRIs showed Claimant was neurologically intact and did not require other testing at that time. Dr. Castrejon felt that Claimant had received very limited conservative care, and planned to provide chiropractic/physical therapy directed to the SI joint in keeping with the *Guidelines*, and then move toward an SI joint injection, if needed.

20. On October 15, 2014, Dr. Castrejon made consistent, positive, reproducible findings of SI joint dysfunction when examining Claimant. These included pelvic obliquity which implies that there is an unlevel the pelvis; and reproducible joint pain with various maneuvers, including Gaenslen's maneuvers, a SI joint compression maneuver, and a Patrick's maneuver. Dr. Castrejon was aware of other doctors' notes notes indicating difficulty examining Claimant, but Dr. Castrejon had no such

difficulties and was able to rule out facet-loading pain which would be indicative of malingering. All of his findings were consistent with an SI-mediated problem.

21. Dr. Castrejon's November 17, 2014 report stated that Claimant was deriving benefit with chiropractic in terms of mild decrease in pain, and increase in strength, balance and overall function.

22. Dr. Castrejon stated Claimant's last chiropractic appointment was on December 1, 2014. He compared Claimant during treatment as moving better, he seemed in better spirits, and he was actually able to do more, of what I needed him to do, during the examination. After the chiropractic treatment was denied, "he looked like he had digressed, and was looking more the way he did the first time I saw him, where, he was keeping the weight off that leg, using the cane much more, having difficulty getting off -- on the examination table -- was not even sitting anymore. All he could do was stand."

23. On December 11, 2014, Dr. Castrejon formally made the request for the SI joint injection. Dr. Castrejon stated that he made this request "after the patient indicated that, as a result of that flare up, he needed some form of pain control." Dr. Castrejon explained the majority of Claimant's reproducible pain remained in the SI area and he needed to provide a diagnostic and therapeutic injection, and ensure that that actually was the etiology of his problem.

24. Claimant received Respondents denial for chiropractic care on December 12, 2014, and denial for SI joint injection on January 22, 2015. The Claimant was not seen for Respondents' independent medical examination (IME) with Dr. Raschbacher until February 23, 2015. Dr. Raschbacher saw Claimant one time for forty minutes according the audio recording of that date.

25. Dr. Raschbacher indicated in his February 23, 2015 report that he believed that Claimant reached MMI on April 14, 2014. His report states "Given that presentation, one could also reasonably make a case, medically, that 04/14/14 would be a reasonable MMI date given his presentation at that time with what were apparently florid pain behaviors."

26. Dr. Raschbacher stated that within three weeks of the date of the accident, Claimant should not have been entitled to any medical treatment whatsoever. "I think that 4/14/14 would be a reasonable MMI date because of his presentation, and I guess retrospectively you can say that that's been borne out by the imaging tests and his reported response to treatment."

27. Dr. Raschbacher does not believe that Claimant's MRIs s how anything significant: only age related degeneration which would not explain his presentation.

28. Dr. Raschbacher's findings are summarized as follows:

- Claimant was evaluated by physical medicine specialist, Dr. Sandell, who felt he had nothing further to offer. Multiple possible diagnoses were mentioned. More recently, Claimant has come under Dr. Castrejon's care, and he opines that an SI injection on the right side would be appropriate.

- Differential diagnoses include malingering or symptomatic right SI joint dysfunction. SI joint dysfunction or pain would certainly not explain the presentation, which is, with respect to subjective complaints, far out of proportion to the paucity of objective findings. Even if the SI joint were symptomatic, it would not be medically likely that he would present as he does.
- I think that with the presentation exhibited by Mr. Lucero, that there is reasonable likelihood that his primary diagnosis is malingering.

29. Dr. Raschbacher's February 23, 2015 report does not address Dr. Castrejon's recommendation of chiropractic care or Claimant's positive response to same.

30. Dr. Raschbacher makes mention of chiropractic care in his hearing testimony. He recommended against further chiropractic care because Claimant did not have a consistent presentation of SI joint findings from the outset. He further opined, "I think it unlikely that any type of care is going to change his subjective reports and change his presentation."

31. Dr. Raschbacher testified that he recommends SI joint injections "when there is clear evidence of an SI joint dysfunction that has been consistent, and -- basically if I feel that's the correct diagnosis and time [and] conservative care, occasionally chiropractic whatever you're treating it with hasn't resolved it, then it's a reasonable thing to consider for persistent SI joint dysfunction."

32. He testified that he would expect to see medical evidence from the outset that a claimant had consistent localizing tenderness at that joint. He would also expect other diagnoses to not appear to be likely. Facet joint, disc, et cetera. He would not expect florid pain behaviors.

33. Dr. Raschbacher testified that to a reasonable degree of medical certainty he does not believe that Claimant requires SI joint injections.

34. Dr. Castrejon and Dr. Raschbacher disagree on several issues. Dr. Castrejon disagrees with Dr. Raschbacher that Claimant reached MMI on April 14, 2014. Dr. Castrejon states, "at the time that he is indicating that Claimant would have been at MMI, there was still no diagnosis or etiology, etiology to explain his symptoms, nor his presentation, and the guidelines are clear, in stating that we need to determine -- do whatever is needed --to determine what the actual diagnosis is." Claimant had not been adequately diagnosed, he was still very functionally limited, and he had consistent, reproducible findings on examination.

35. Dr. Castrejon also disagrees with Dr. Raschbacher regarding the mechanism of injury. Dr. Raschbacher states "the lifting injury is not one that is particularly likely to cause SI joint injury or dysfunction." Dr. Castrejon concluded otherwise: "this gentleman was performing heavy lifting and at one point, when he had the pain, severe pain, he was actually unable to continue to do the lifting. In my opinion, the lifting and rotational movements, that he was performing, are consistent with the mechanism of injury for an SI condition." Dr. Castrejon's opinion was based in

part on an article written by Dr. Cohen from Johns Hopkins which identifies “all of the different mechanisms that can lead to an SI problem including myofascial pain, including lifting, including lifting and rotation . . . direct impacts onto the hip or the side.”

36. Dr. Castrejon addresses each reason Dr. Raschbacher states that a claimant would require an SI joint injection. Dr. Raschbacher states that “You’d expect that from the outset they would have had localizing tenderness at that joint. You would expect it to be consistent. Dr. Castrejon noted that in 20% of people the SI joint condition is not found until the patient has undergone an entire workup for other issues. Dr. Castrejon was critical of Dr. Raschbacher’s exanination of Claimant’s SI joint, his failure to perform a Gaenslen's maneuver, his failure to look for pelvic obliquity, his failure to do a Patrick's maneuver, and his failure to do SI joint-stressing or evaluate the gluteus medius or maximus.

37. Dr. Raschbacher testified that he did not perform a Gaenslen’s maneuver, a Patrick’s maneuver, or SI joint stressing and that he did not look for obliquity. Dr. Raschbacher said that his evaluation of the gluteus medius or maximus was just watching the Claimant’s gait but acknowledged he does not specifically mention this issue in his report.

38. Dr. Raschbacher opined, “You would also expect other diagnoses to not appear to be likely. Facet joint, disc, et cetera.” Dr. Castrejon disagrees, stating: “People, who have complicated spines, postsurgical spine and even non-surgical spines, will have two or three different diagnoses going on at the same time. And that's the purpose of sometimes doing these selective nerve root blocks or spinal injections, is to weed out which are -- which is actually the overwhelming factor.

39. Dr. Raschbacher states Claimant should not have the SI joint injection due to his “florid pain behaviors.” However, Dr. Castrejon explained that he did not observe such behavior. Rather, he observed consistent pain behaviors, “and they're not any more than I would expect in somebody of the Latin culture.”

40. Dr. Castrejon believes Claimant needs the SI joint injection that he recommended by testifying because he has multiple issues, multiple issues primarily because of the length of time that he has remained in pain, and really limited treatment. Dr. Castrejon noted that while Claimant has undergone some diagnostic testing, his care has been fragmented. He also explained that caused altered spinal and gait mechanics. Further Claimant has developed chronic pain. He recommended physical therapy and good psychological care.

41. Dr. Castrejon addressed that even though prior injections were not successful, he believes the SI joint injection would be different because it targets a different area and could provide diagnostic and therapeutic relief.

42. Dr. Raschbacher has commented why Claimant would not need chiropractic care. Dr. Raschbacher says that Claimant would not need chiropractic care because “Well, I think that going way back to the beginning now, he would have had consistent presentation with for example SI joint findings from the outset.” Dr. Castrejon disagreed, noting, “Chiropractic isn't just used for an SI problem. He has a

chronic lumbar-straining injury that is affecting the sacroiliac joint. So, chiropractic most likely was providing benefit not only to the SI but, also, to the other substantial structures of the spine."

43. Dr. Raschbacher stated another reason Claimant would not need chiropractic care was that Claimant "didn't appear to have localizing SI joint findings at the beginning, and certainly he wouldn't be likely medically to develop SI joint dysfunction later on." Dr. Castrejon disagreed, noting: "usually an SI problem, if it isn't immediate, it will be produced as time goes on, especially in the case of this gentleman, with the altered mechanics that he has in terms of his body movements and activity."

44. Dr. Raschbacher opined, "[Claimant] doesn't require further chiropractic care, and I think it is unlikely that any type of care is going to change his subjective reports and change his presentation." Dr. Castrejon disagreed, expressing frustration over what he perceived as Dr. Raschbacher's bias:

> Well, I disagree, because it appears to me, with all respect, that Dr. Raschbacher has already placed this gentleman into the malingering category, and no matter what question we ask of Dr. Raschbacher, he is going to use that as his support for denying, or not authorizing or not recommending, any ongoing care for [Claimant].

45. Dr. Castrejon opines to a reasonable degree of medical probability that he believes that Claimant requires continuing chiropractic care.

46. Dr. Raschbacher, and Respondents have indicated that Claimant's positive Waddell findings, which would have been 2 out of 5 or 3 out of 5 positive findings by Dr. Castrejon and 5 out of 5 by Dr. Raschbacher are indications that Claimant does not require further chiropractic care or the SI joint injections. Dr. Castrejon has addressed this issue. Dr. Castrejon's report of October 15, 2014, he states "On examination today, there are many pain behaviors with some findings that would be considered positive for Waddell's. Nevertheless, I have found that the testing for Waddell's in the Latin population is not entirely conclusive given the cultural differences that exist."

47. Dr. Castrejon also addresses the issue of Dr. Raschbacher's primary diagnosis of Claimant as malingering. Dr. Castrejon disagrees with this finding, noting consistency in Claimant's pain diagrams, he did not misuse medications, he underwent spinal injections without sedation, he followed every recommendation in his treatment plan, and his examinations have been consistent.

48. Respondents have stated throughout their cross examination of Dr. Castrejon on May 28, 2015 that "Dr. Sandell indicated that no further care was necessary." The ALJ finds that statement to be inaccurate. Dr. Sandell's office has provided a record of July 30, 2014 which states, "I [PA Hacker] discussed this patient's case extensively with Dr. Sandell. At this point, we really have nothing further to offer this patient. No further office visits will be scheduled. Since he had increased pain with physical therapy I advised him that it would be reasonable for him to hold off on

any further physical therapy for now. We recommend reevaluation by another pain medicine office or else an independent medical evaluation." The clear recommendation on July 30, 2014 is a "reevaluation by another pain medicine office."

49. It appears Dr Sandell's office left open the issue that another pain medicine office, not their own, could identify treatment that is being put on hold "for now." Based on this recommendation, Claimant saw Dr. Timothy Hall on August 25, 2014, before Respondents agreed that Dr. Miguel Castrejon would be the ATP in this case. Dr. Hall's August 25, 2014 report indicates objective, significant changes that were reproducible and supported that an industrial injury occurred. Dr. Hall recommended an SI joint injection, and planned a right SI joint injection for diagnostic purposes. Claimant followed up with Dr. Castrejon on October 15, 2014, with a noted SI joint dysfunction and a recommendation of an SI joint injection. Respondents' argument that Dr. Sandell recommended no further treatment is incorrect because he recommended treatment by "another pain management office." The follow up to another pain management office occurred when Claimant sought treatment from Dr. Hall. Dr. Hall's diagnosis supports the need for an SI joint injection and chiropractic treatment.

50. On April 4, 2014, Claimant testified at hearing that he received benefit from chiropractic care until Insurer cancelled the visits for chiropractic care. He noted that it helped his body, it allowed him to walk, and to move better. He testified that one month after he stopped chiropractic he hed more difficulty with range of motion.

51. Claimant testified that he wishes to have the SI joint injection because it was recommended by Dr. Castrejon and he trusts Dr. Castrejon and feels that the SI joint injection would be helpful.

52. Dr. Castrejon believes the Claimant should be entitled to additional chiropractic care and the SI joint injection that has been denied by the Respondents. In his opinion, Claimant has multiple issues primarily because of the length of time that he has remained in pain with only a limited amount of conservative care. This has caused him to develop chronic pain and chronic alterations of his biomechanics.

53. Dr. Castrejon is the agreed upon ATP in this case. He has seen Claimant numerous times since October 15, 2014. He also exhibited a credible and persuasive explanation of Claimant's presentation. The ALJI finds the opinions of Dr. Castrejon to be more persuasive and credible than those of Dr. Rashbacher.

54. Dr. Raschbacher saw the Claimant one time on February 23, 2015 for forty minutes. This was after Respondents' denied chiropractic care and the SI joint injection as not being reasonable and necessary. Dr. Raschbacher made a finding that the Claimant reached MMI on April 14, 2014 only three weeks after the date of his accident which the ALJ does not find to be credible. Dr. Raschbacher did not complete a full examination of Claimant in regard to identifying a SI dysfunction indicating that he was unable to do so. Dr. Raschbacher indicated that he did not do the sufficient testing to determine whether an SI joint injection was reasonable and necessary.

55. Dr. Raschbacher did not mention the chiropractic recommendation in his February 23, 2015 report, and addressed it in his testimony in a limited fashion. Dr.

Raschbacher's main diagnosis of the Claimant is malingering. However, he goes on to say "With respect to differential diagnosis, these include malingering or symptomatic right SI joint dysfunction." Dr. Raschbacher goes on to say, however, that "Even if the SI joint were actually symptomatic, it would not be medically likely that he would present as he does." Dr. Raschbacher states that he was unable to perform the testing necessary to determine an SI dysfunction although the ATP was able to do so. Dr. Raschbacher states that because his opinion is that the Claimant is a malingerer that he is not entitled to the denied medical treatment. The ALJ is not persuaded by Dr. Raschbacher's opinions.

56. Respondents' position is based on the report of Dr. Raschbacher, that the treatment is not reasonable and necessary. As stated, the ALJ is not persuaded by the opinions of Dr. Raschbacher. The ALJ is persuaded by the opinions of Dr. Castrejon, and by Claimant's testimony that he is not malingering and that he had not reached MMI as of April 14, 2014 as Dr. Raschbacher stated. Based on this, the ALJ finds that the opinions of Dr. Raschbacher are not persuasive. To the contrary, the ALJ finds the opinions of Dr. Castrejon to be credible and persuasive.

57. Further, the ALJ finds that Claimant, who the ALJ finds credible, has proven the reasonableness and necessity of continued chiropractic treatment and the SI joint injection. The ALJ further finds find that Respondents have not met their burden of proving otherwise.

58. Claimant's description of the injury and his physical complaints have been consistent throughout his medical records and his testimony is persuasive and credible.

59. Dr. Castrejon's opinions have been persuasive and credible in terms of the reasonableness and necessity of the Claimant's need for chiropractic care and the SI joint injection.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2006).

In deciding whether a party to a workers' compensation dispute has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P3d 1192, 1197 (Colo. App. 2002).

Claimant has the burden of proving that requested medical treatment is reasonable, necessary and related to a work injury. Specifically, C.R.S. § 8-42-101(1)(a) provides the following directive on this issue: "Every employer shall furnish such medical [treatment]. . . as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury."

Preponderance of the evidence means as follows: "Proof by a preponderance of the evidence requires the proponent to establish that the existence of a 'contested fact is more probable than its nonexistence." *Jimenez-Chavez v. Cargill Meat*, W.C. No. 4-704-536 (October 2008); *see Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Pursuant to W.C.R.P 16-10, Respondents bear the burden of proof and must demonstrate by a preponderance of the evidence that a claimant's medical treatment is not reasonably necessary to cure or relieve the effects of the work injury. *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012) (respondents have burden pursuant C.R.S § 8-43-201(1), to prove treatment is not reasonable, necessary or related).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, supra; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. C.R.S. Section 8-43-301(8) Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

ATP Dr. Castrejon has been highly persuasive and credible in his opinions that the Claimant requires chiropractic care and the SI joint injection. The Claimant made

positive steps in regard to strength, range of motion and function with the limited chiropractic treatment that he had. His pain was better, he was able to walk and ambulate better and he was in better spirits while he was having the chiropractic treatment. After the chiropractic treatment was denied the Claimant regressed in all of these areas. Therefore, I am convinced that the chiropractic treatment is both reasonable and necessary. I am also persuaded that an SI joint dysfunction has been identified for the Claimant by Dr. Castrejon and was identified long ago. I am also persuaded that the SI joint injection is necessary for both diagnostic and therapeutic reasons as explained by Dr. Castrejon.

Claimant has proven by a preponderance of the evidence that he is entitled to receive both the recommended chiropractic treatment and the SI joint injection as reasonably necessary to cure or relieve the Claimant from the effects of the admitted work injury.

Respondents have failed to prove by a preponderance of the evidence that the recommended chiropractic treatment and SI joint injection are unreasonable and unnecessary in relation to the admitted work injury.

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. C.R.S. 8-42-101(1)(a), *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994).

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for further chiropractic care as recommended by Dr. Castrejon is GRANTED. Insurer shall provide such care.

2. Claimant's claim for SI joint injections as recommended by Dr. Castrejon is GRANTED. Insurer shall provide such care.

3. Issues not expressly decided herein are reserved to the parties for future determination.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

STIPULATIONS

1. To the extent that Claimant's alleged back injuries are found to be related to the Claimant's April 22, 2014 work injury, the parties stipulate and agree that the Claimant's average weekly wage (AWW) is $736.71 with a corresponding TTD rate of $491.14.

ISSUES

The issues for determination are:

1. Whether the Claimant has proven, by a preponderance of the evidence, that he sustained an injury to his low back on April 22, 2014.

2. If the Claimant's low back claim is compensable, whether the Claimant has proven, by a preponderance of the evidence, that he is entitled to medical treatment to cure and relieve him from the effects of the April 22, 2014 injury.

3. If the Claimant's low back claim is compensable, whether Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability benefits from May 7, 2014 through June 3, 2014.

FINDINGS OF FACT

1. The Claimant worked for Employer as a stocking clerk. In this position, his duties including loading and unloading product from skids to the freezer shelves and to frequently lift between 2 and 30 pounds, bend frequently, and twist frequently. Claimant further testified that this was the position he was working on April 22, 2014. The Claimant's testimony was credible and is found and is found as fact.

2. Claimant was working his shift on April 22, 2014 and was performing the duties of lifting items and placing them on the freezer shelves. Approximately an hour prior to the end of Claimant's shift, Claimant was had placed a package on the freezer shelve and was in the process of bending to pick up more product from the skid. As Claimant bent, he felt and immediate pain in his back that radiated into his legs. Claimant testified that his hands were empty at the time of the injury. The Claimant's testimony regarding his mechanism of injury was credible, not contested, generally consistent with the medical records, and is found as fact.

3. Claimant testified that he had a prior injury in his low back the year before on approximately August 10, 2013 for which he had filed a Workers' Compensation claim. Claimant testified that the previous injury had resolved with physical therapy after approximately 2 months of treatment. Claimant also testified following the previous injury, he did not have medical restrictions and was working at full duty prior to April 22, 2014. The Claimant's testimony regarding his prior low back injury and its resolution was credible and supported by the medical records at Claimant's Exhibits 19 – 23, and is found as fact.

4. Claimant immediately informed Grocery Manager, Austin Icke of what had happened and explained that he was in pain. Mr. Icke asked if Claimant wanted to report the injury as a work accident. Claimant testified that, at that time, he did not want to file a report because he believed that his symptoms would resolve shortly and Claimant returned to finish the remainder of his shift.

5. As Claimant continued his shift, his pain did not resolve and Claimant left his shift approximately 30 minutes early due to his pain. Following his shift, Claimant sought treatment at Kaiser Permanente. Claimant testified he was informed by providers at Kaiser Permanente that because the injury was work related, Claimant would not be able to continue to received medical treatment through that facility should his symptoms continue.

6. Claimant contacted Mr. Icke again and informed Mr. Icke that he wanted to report the injury as a Workers' Compensation Claim and seek medical treatment through a Workers' Compensation doctor.

7. The Claimant's testimony regarding the reporting of his injury to his supervisor is credible, not contested, and is found as fact.

8. Claimant was then sent to Union Medical, PC on April 23, 2014 where he was evaluated by Dr. Paz and Erin Lay, PA C/F. Claimant was given medical restrictions that limited him from lifting more than 10 lbs., carrying more than 10 lbs., and pushing/pulling more than 10 lbs. Based on this evaluation, Dr. Paz opined that his objective findings were consistent with a work related mechanism of injury. Claimant continued to treat with Union Medical, PC until May 7, 2014 and continued to remain on medical restrictions. The Claimant was provided modified light duty at work while he was in physical therapy recommended by Dr. Paz.

9. Respondents filed a Notice of Contest on May 6, 2014 and Claimant was no longer able to continue treating through the Workers' Compensation providers. Claimant attempted to return to work on May 7, 2014 but was sent home because he remained on restricted duty but his claim had been denied. Claimant was not allowed to return to work until he could provide a release to full duty from a medical provider.

10. Claimant continued to follow up with providers at Kaiser Permanente and remained on restrictions. Claimant testified that during that time, he experienced an

aggravation while completing yard work but that the aggravation ultimately improved. On June 2, 2014, Claimant was approved to return to full duty starting on June 3, 2014.

11. Between May 7, 2014 and June 3, 2014, Claimant was not paid wage loss benefits due to the claim being denied.

12. Claimant testified that he returned to full duty as of June 3, 2014 and has continued working since that time. Claimant continues to experience low back pain and symptoms but has not returned to a medical provider for treatment due to the financial expense of doing so.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S §§ 8-40-101, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The Claimant shoulders the burden of proving entitlement benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The fact in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness whether the testimony has been contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Co v. Cline,* 98 Colo. 275, 57 p.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 138 P.3d 684 (Colo. App. 2008; *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising

out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The mechanism of injury described by the Claimant during testimony at the hearing, which is consistent with his description to medical providers, is not contested and, per Dr. Paz, it is a mechanism of injury that is consistent with the physical findings on examination. The injury was significant enough to require work restrictions that caused the Employer to advise the Claimant he could not return to work until he was cleared by a doctor. The injury occurred during Claimant's work shift while he was performing activities that are a specific part of his job duties.

Based upon the Claimant's uncontroverted and supported testimony and the medical records confirming the Claimant's physical condition, it is found that the Claimant suffered a compensable injury.

Medical Benefits – Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101 C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v, Industrial. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence musty establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971): *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Here, Claimant testified credibly that he was working his regular duties on April 22, 2014 when experienced an injury to his low back. Though Claimant had previously been treated for symptoms related to his low back the year before, Claimant credibly testified, and the medical evidence supports, that Claimant had not been on medical restrictions prior to April 22, 2014 and that his previous symptoms resolved after approximately 2 months with physical therapy. Though Claimant was not holding anything in his hands at the time of the injury, his injury and the medical records are consistent with the mechanism of injury of bending and twisting. The Claimant has established that he is entitled to further evaluation of his lower back condition to determine if he requires additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

Temporary Disability Benefits

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result

of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Here, the Claimant suffered a work injury on April 22, 2014. However, the Claimant did not miss work until May 7, 2014. Claimant credibility testified, and the employer records support, that Claimant was not allowed to return to work from May 7, 2014 through June 3, 2014 because of the medical restrictions imposed upon him by his providers. These restrictions resulted in Claimant being unable to perform his regular employment and the restrictions were a direct result of the injury that Claimant sustained while bending and twisting his shift on April 22, 2014.

The total work time missed lasted longer than two weeks and therefore the Claimant is entitled to temporary total disability benefits from the day he left work. The Claimant is entitled to TTD benefits from May 7, 2014 through June 2, 2014 when, by his own testimony, he was released by his physician to return to work and he did, in fact, return to work on June 3, 2014.

ORDER

It is therefore ordered that:

1. The Claimant's suffered a compensable injury on April 22, 2014.

2. The Claimant is entitled to medical benefits to treat his low back and associated symptoms which are causally related to the April 22, 2014 work injury and the Respondent is responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

3. The Claimant is entitled to temporary total disability benefits at the stipulated TTD rate of $491.14 per week, from the time period of May 7, 2014 through June 3, 2014.

4. All compensation not paid when due shall bear interest at the rate of 8% per annum.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1523 Sherman Street, 4th Floor, Denver, Colorado 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301, C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 24, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-950-054-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

NON-INSURED and

Non-Insured and Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 14, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 6/14/15, Courtroom 3, beginning at 8:30 AM, and ending at 12:00 PM).

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection, Non-Insured Employer's Exhibits A through F were admitted into evidence, without objection. Respondent OSF/Pinnacol's Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ deferred ruling on the case for 15 working days to allow the parties to discuss and consider settlement. On June 5, 2015, the Claimant filed a "Status Report," indicating that the parties were continuing to engage in settlement negotiations. On June 12, 2015, the Claimant filed a subsequent "Status Report," indicating that a settlement had **not** been reached, and submitting Claimant's Exhibit 14, which reflects a Medicaid lien of $14, 832.28 by the Colorado Department of Health Care Policy and Financing against the Claimant's workers' compensation medical benefits, pursuant to § 25.5-4-301, C.R.S.

The matter was considered submitted for decision on June 12, 2015, however, due to the untimely final illness and passing of the ALJ's wife, the decision has been delayed until this time.

ISSUES

The issues to be determined by this decision concern whether or not the Employer was and "employer," as defined by the Workers' Compensation Act (hereinafter the "Act"); whether the Claimant was an "employee," as defined by the Act; whether OSF was the Claimant's statutory employer on the date of injury; whether the Employer failed to insure its liability for workers' compensation and is, therefore, subject to a 50% penalty on indemnity benefits; whether Respondent OSF/Pinnacol should be dismissed from the case; whether the Claimant suffered a compensable injury to his left hand on April 17, 2014. If compensable, the additional issues concern medical benefits, average weekly wage (AWW); temporary total disability (TTD) benefits from April 17, 2014 and continuing; and, daily penalties against the Employer for failure to timely admit or contest from May 12, 2014 (21 days after the Employer had notice of more than 3 days disability) through February 9, 2015, the date that the Respondent Employer filed a Response to Application for Hearing, which took a position on the claim, a total 274 days, both dates inclusive.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Stipulations and Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that the Employer was a sole proprietor and was not insured for workers' compensation.

2. The parties further stipulated, and the ALJ finds, that the Employer was not under contract or performing any work for OSF, which was insured by Pinnacol Assurance, and that OSF and its insurance carrier, were not proper parties.

The Injury

3. On April 17, 2014, the Claimant was working as a helper (go-fer) for the Employer when he was cutting a piece of flooring and his left hand got caught in the table saw, thus, mangling the left hand. The Employer was contemporaneously aware of the injury, and the Claimant was immediately transported to Denver Health, where emergency surgery occurred by Kyros Ipaktchi, M.D., and his assistant Christopher Lyons, M.D., hand fellow.

4. Dr. Ipaktchi's pre-operative diagnosis was:

> (1) table saw injury to left hand with zone 2 distal to PIP joint segmental defect and new complete transaction to dorsal skin with bone and soft tissue loss; (2) transaction, near complete, from volar to dorsal skin with a dorsal cortical rim still standing on the long finger in a zone 2 middle phalanx level; and, (3) amputation of the ring finger to the DIP joint with avulsion of soft tissues into the distal pulp.

5. Dr. Ipaktchi's post-operative diagnosis was:

> (1) mangling hand injury to the left hand by a table saw, coming from volar through to the dorsal side with complete amputation of the ring finger through the DIP joint with avulsion of soft tissues into the distal pulp; (2) near complete transection of the middle phalanx level of the long finger with transaction of all flexor tendons as well as radial and ulnar-sided digital artery and nerve as well as segmental bone and skin and soft tissue as well as neurovascular and tendinous subtenon loss; and, (3) index finger oblique table saw injury into the distal phalanx with avulsion of the ulnar-sided neurovascular bundles from the distal phalangeal level at the bifurcation of the vessels.

6. The ALJ observation of the Claimant's left hand illustrated a severely mangled and disfigured left hand.

7. The Claimant was discharged from Denver Health on April 21, 2014. Subsequently, in a follow up at Denver Health on August 19, 2014, Dr. Ipatchi assessed: "near amputation of left index finger, long finger, ring finger with

revasularization of the long finger and completion amputation of the index finger and ring finger…." Dr. Ipaktchi, at Claimant's request, gave him a note allowing a return to "light duty" work, however, no light duty work has been offered by the Employer and the Claimant cannot return to full duty work.

Medical Benefits

8. The Employer did not designate any specific medical provider. Moreover, the Employer facilitated the Claimant's emergency transport to Denver Health and, thus, acquiesced in treatment by Denver Health. The evidence supports the fact, and the ALJ finds that all medical care and treatment for the Claimant's work-related left hand injury was authorized, within the chain of authorized referrals, causally related to the April 17, 2014 injury, and reasonably necessary to cure and relieve the effects of that injury.

Average Weekly Wage (AWW)

9. It was the Claimant's undisputed testimony that the contract of hire with the Employer contemplated full-time, 40-hour a week work at $18 an hour. This hourly rate is corroborated by the testimony of Justin Soderberg, a principal with the Respondent Employer. Therefore, the ALJ hereby finds that the Claimant's AWW is $720. 2/3rds of the AWW, penalized by 50% for failure to insure, equals a TTD benefit of $720 per week, or $102.86 per day, pursuant to Industrial Claim Appeals office approved method of calculating aggregate days of disability.

Temporary Total Disability Benefits

10. The Claimant has not been able to return to regular work since the date of injury nor has he been offered modified work, as permitted by Dr. Ipaktchi's light duty release in August 2014. As of the present time, the Claimant has not been released to return to work without restrictions; he has not actually worked and earned wages; and, he has not been declared to be at maximum medical improvement (MMI). He has been sustaining a 100% temporary wage loss since the date of injury. Consequently, the Claimant has been temporarily and totally disabled from April 18, 2014 through the present time and continuing the present time. The period from April 18, 2014 through the hearing date, May 14, 2015, both dates inclusive, equals a total of 396 days. Aggregate TTD benefits, for this period, penalized 50% for failure to insure, equal $40,732.56.

Daily Penalties for Employer's Failure to Timely Admit or Contest

11. Daily penalties against the Employer for failure to timely admit or contest are from May 12, 2014 (21 days after the Employer had notice of more than 3 days disability) through February 9, 2015, the date that the Respondent Employer filed a

Response to Application for Hearing which took a position on the claim, a total 274 days, both dates inclusive. In light of the stipulations and findings herein above that the Employer was a sole proprietor and was not insured for workers' compensation and that the Employer was not under contract or performing any work for OSF, which was insured by Pinnacol Assurance, and that OSF and its insurance carrier, were not proper parties, the ALJ finds no mitigation to excuse or mitigate the non-insured Employer's obligation to timely admit or contest liability. Therefore, the ALJ finds that an appropriate daily penalty equals the daily TTD rate of $102.86 per day. Therefore, aggregate daily penalties for failure to timely admit or contest for 274 days, equal $28, 183.64.

Ultimate Findings

12. The Claimant's testimony was, essentially, undisputed, straight-forward, and credible. There was no persuasive testimony to the contrary.

13. The ALJ makes a rational choice, between any conflicting testimony and evidence, to accept the Claimant's testimony and reject evidence to the contrary.

14. OSF/Pinnacol were not proper parties to this case because OSF (an insured entity) was not the statutory employer of the Employer herein.

15. The Claimant was an "employee" of the Employer herein on the date of injury, and the "Employer was an 'employer,' as defined by the Act.

16. On April 17, 2014, the Claimant sustained a serious mangling, compensable injury to his left hand, and the injury arose out of the course and scope of his employment for the non-insured Employer herein and was not intentionally self-inflicted.

17. The Employer was contemporaneously aware of the injury and arranged for the emergency transport of the Claimant to Denver Health. The Employer made no specific medical referrals. All referrals emanated from Denver Health and were, therefore, within the authorized chain of referrals, Therefore, all of the Claimant's medical care and treatment for the left hand injury was authorized, causally related to the April 17, 2014 compensable injury, and reasonably necessary to cure and relieve the effects thereof.

18. The Claimant's AWW is $720, thus yielding a 50% penalized TTD rate of $720 per week.

19. The Claimant has been temporarily and totally disabled since April 17, 2014 and continuing.

20. The Employer's failed to timely admit or contest from May 12, 2014 (21 days after the Employer had notice of more than 3 days disability) through February 9, 2015, the date that the Respondent Employer filed a Response to Application for Hearing which took a position on the claim, a total 274 days, both dates inclusive. In light of the stipulations and findings herein above that the Employer was a sole proprietor and was not insured for workers' compensation and that the Employer was not under contract or performing any work for OSF, which was insured by Pinnacol Assurance, and that OSF and its insurance carrier, were not proper parties, the ALJ finds no mitigation to excuse or mitigate the non-insured Employer's obligation to timely admit or contest liability. The Employer did not have any reasonably debatable defense to non-insured liability. Therefore, the ALJ finds that an appropriate daily penalty equals the daily TTD rate of $102.86 per day. Therefore, aggregate daily penalties for failure to timely admit or contest for 274 days, equal $28,183.64.

21. The Claimant has sustained his burden of proof, by preponderant evidence, on all issues.

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CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo.

275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). *Also see, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was, essentially, undisputed, straight-forward, and credible. There was no persuasive testimony to the contrary.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, between any conflicting testimony and evidence, to accept the Claimant's testimony and reject evidence to the contrary.

Non-Insurance and Employee Status

c. Section 8-43-408 (1), C.R.S., provides a 50% penalty of indemnity benefits for failure of an employer to insure its liability for workers compensation. As found, the Employer herein failed to insure its liability for workers' compensation and is, therefore, subject to a 50% increase in all indemnity benefits.

d. As found, the Claimant performed work for hire for the Employer herein and he was an "employee" within the definition of § 8-40-202, C.R.S., at the time of the compensable injury.

Compensability

e. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury to his left hand on April 17, 2014, and this injury arose out of the course and scope of his employment.

Medical

f. Because this matter is compensable, the non-insured Respondent is liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer was contemporaneously aware of the injury and arranged for the emergency transport of the Claimant to Denver Health. The Employer made no specific medical referrals. Therefore, all of the Claimant's medical care and treatment for the left hand injury was authorized, causally related to the April 17, 2014 compensable injury, and reasonably necessary to cure and relieve the effects thereof.

g. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all referrals emanated from Denver health, The Claimant's first selection of a medical provider, and were, therefore, within the authorized chain of referrals.

h. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the left hand, mangling injury of April 17, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the April 17, 2014 compensable injury.

Average Weekly Wage (AWW)

i. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant's AWW is $720 which, ordinarily, would yield an insured TTD benefit of 2/3rds of $720, however, penalized by 50% for failure to insure the weekly TTD benefit is $720 per week, or $102.86 per day.

Penalized Temporary Disability Benefits

j. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). . There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant has not been able to return to regular work since the date of injury nor has he been offered modified work, as permitted by Dr. Ipaktchi's light duty release in August 2014. As of the present time, the Claimant has not been released to return to work without restrictions; he has not actually worked and earned wages; and, he has not been declared to be at maximum medical improvement (MMI). He has been sustaining a 100% temporary wage loss since the date of injury. Consequently, the Claimant has

been temporarily and totally disabled from April 18, 2014 through the present time and continuing the present time. The period from April 18, 2014 through the hearing date, May 14, 2015, both dates inclusive, equals a total of 396 days. Aggregate TTD benefits, for this period, penalized 50% for failure to insure, equal $40,732.56.

Daily Penalty for Failure to Timely Admit or Contest

k. Section 8-43-203 (2) (a), C.R.S., provides for a daily penalty of one day's compensation for each day's failure to timely admit or contest, up to 365 days, 50% payable to the Subsequent Injury Fund and 50% payable to the Claimant. As found, the Employer's failed to timely admit or contest from May 12, 2014 (21 days after the Employer had notice of more than 3 days disability) through February 9, 2015, the date that the Respondent Employer filed a Response to Application for Hearing which took a position on the claim, a total 274 days, both dates inclusive. In light of the stipulations and findings herein above that the Employer was a sole proprietor and was not insured for workers' compensation and that the Employer was not under contract or performing any work for OSF, which was insured by Pinnacol Assurance, and that OSF and its insurance carrier, were not proper parties, the ALJ finds no mitigation to excuse or mitigate the non-insured Employer's obligation to timely admit or contest liability. As found, the Employer lacked any reasonably debatable defense to non-insured employer liability. Therefore, the ALJ finds that an appropriate daily penalty equals the daily TTD rate of $102.86 per day. Therefore, aggregate daily penalties for failure to timely admit or contest for 274 days, equal $28,183.64.

Burden of Proof

l. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its

nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden, by preponderant evidence, on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents OSF Investments, LLC, and their insurance carrier, Pinnacol Assurance, are hereby dismissed as parties, with prejudice.

B. The Respondent Non-Insured Employer, sole proprietor, shall pay all of the costs of medical care and treatment for the Claimant's compensable left hand injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. The Respondent Non-Insured Employer shall pay the Claimant temporary total disability benefits at the rate of $720.00 per week, or $102.86 per day, from April 18, 2014 through May 14, 2015, both dates inclusive (penalized 50% for failure to insure) in the aggregate subtotal amount of $40,732.56, which is payable retroactively and forthwith. From May 15, 2015 and continuing until cessation of temporary indemnity benefits is warranted by law, the Non-Insured Employer shall continue to pay the Claimant $720 per week in temporary total disability benefits.

D. For failing to timely admit or contest, Respondent Non-Insured Employer shall pay daily penalty benefits at the rate of $102.86 per day. For the penalty period from May 12, 2014 through February 9, 2015, both dates inclusive, a total of 274 days, the Non-Insured Respondent shall pay aggregate daily penalties the daily TTD rate of $102.86 per day, in the aggregate amount of $28,183.64., 50%, or $14,091.82, is payable to the Claimant and $14,091.82 is payable to the Subsequent Injury Fund, Division of Workers Compensation. The grand total of indemnity benefits due as of May 14, 2015, equal $68, 916.20. The exact amount of the cost of medical benefits is as of the present time not ascertainable other the Medicaid lien of $14, 82.28, placed on medical benefits by the Colorado Department of Health Care Policy and Financing. Consequently, the grand total of presently ascertainable indemnity and medical benefits equals $83,748.48.

E. The Non-Insured Respondent Employer shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

G. In lieu of payment of the above compensation and benefits to the Claimant, the Respondent property Owner shall:

a. Deposit the sum of $ 83,748.48 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. File a bond in the sum of $ 100,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:
(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado.
The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the on-insured Respondent Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the Non-Insured Respondent Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

DATED this_____day of July 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of July 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
Sue.Sobolik@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-951-860-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 17, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 6/17/15, Courtroom 3, beginning at 8:30 AM, and ending at 12:00 PM). Fayha Suleman served as the official Arabic/English Interpreter.

Claimant's Exhibits 1 through 42 were admitted into evidence, without objection. Claimant's Exhibit 43 was withdrawn. Respondents' Exhibits A through M were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on June 24, 2015. On the same date, the Respondents filed objections requesting more findings including the dates of chiropractic treatment from king Chiropractic and Sean Lloyd, M.D. (an FMLA physician); and, more detailed findings concerning the basis why Kristin Mason, M.D., was designated as the designated medical provider, as detailed in the bench ruling but not included in the proposed decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by the decision concern compensability; if compensable, whether the right to select an authorized treating physician (ATP) passed to the Claimant when Carlos Cebrian, M.D., denied medical treatment for a non-medical reasons, thus, making the Claimant's selection of Kristin D. Mason, M.D. as the new ATP WHEN THE Respondents knew of Dr. Cebrian's opinion and offered no further medical treatment to the Claimant; also, whether the medical treatment rendered by Dr. Mason is reasonably necessary and causally related to the Claimant's injury of September 11, 2013; average weekly wage (AWW); and temporary total disability (TTD) benefits from September 11, 2013 and continuing. The Claimant withdrew the issue of temporary partial disability (TPD) benefits from September 11, 2013 and continuing. The Respondents raised the affirmative defense of "responsibility for termination."

The Claimant bears the burden of proof, by a preponderance of the evidence, on the issues of compensability, ATP, reasonably necessary, AWW, and TTD benefits. The Respondents bear the burden of proof, by a preponderance of the evidence, for the affirmative defense of "responsibility for termination."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. According to the Claimant, he worked for the Employer since March 14, 2011, and he speaks Arabic as his primary language.

2. The parties stipulated, and the ALJ finds, that if the claim is found compensable, the Claimant's AWW is $662.92.

3. The Respondents made a judicial admission that there was a compensable injury on September 11, 2013.

The Injury

4. On September 11, 2013, the Claimant was working at the Employer's plant as a Loin Tail Boner.

5. On September 10, 2013, the Claimant was feeling well with no previous problems or injuries in the low back, buttocks, or legs prior to the incident of September 11, 2013.

6. According to the Claimant, the following events occurred on September 11, 2013. He started work at 5:30 AM and he suffered an injury to his low back when his supervisor asked him to lift a box of meat weighing approximately forty (40) pounds. The Claimant lifted the box of meat, as directed by his supervisor, and as he twisted he felt a pain in his low back. He reported the injury immediately to his supervisor who escorted the Claimant to the Employer's clinic for treatment.

7. At hearing, the Respondents stipulated to the fact that the Claimant suffered a work-related injury on September 11, 2013, and the ALJ so finds.

Medical Treatment at the Employer's Clinic

8. The Claimant received treatment from the Employer's clinic from September 11, 2013 through May 13, 2014.

9. Dr. Cebrian testified at hearing that he holds the position of Onsite Medical Director for the Occupational Health Department, at the Employer's medical clinic, where the Claimant was treated for his low back injury until May 13, 2014.

10. Dr. Cebrian stated that the only treatment provided to the Claimant from September 11, 2013 to May 13, 2014, was ice, stretches, and home exercise education.

11. Kristin Mason, M.D., credibly testified at hearing that the care that the Claimant received at the Employer's clinic from September 11, 2013 to May 13, 2014, was a "passive kind of palliative type care."

12. On October 22, 2013, Dr. Cebrian ordered x-rays of the Claimant's low back.

13. On December 17, 2013, Dr. Cebrian placed the Claimant at maximum medical improvement (MMI).

The Claimant

14. According to the Claimant, from December 17, 2013 to February 26, 2014, his symptoms were getting worse, consisting of pain every day in the low back, buttock, and legs, which he related to the September 11, 2013 incident.

15. On February 26, 2014, the Claimant returned to the Employer's clinic for additional treatment for his low back pain.

16. On February 26, 2014, the Claimant filled out a new Employee Statement of Injury form, with a date of injury of February 20, 2014. According to the Claimant, February 20, 2014, is the date that his low back pain **worsened to a point where he determined the need to return to the Employer's medical clinic** for treatment. He testified, unequivocally, that February 20, 2014, was not a new injury date.

17. On March 17, 2014, **Dr. Cebrian released the Claimant from care, stating the opinion that there was no work related incident that occurred.**

18. On March 17, 2014, the Claimant still had back pain and it was getting worse.

19. According to the Claimant, from March 17, 2014 to May 7, 2014, his low back, buttock and leg symptoms were in the same painful condition, consisting of pain every day in the low back, buttock, and legs, which he related to the September 11, 2013 incident.

20. On May 7, 2014, because his pain in the low back, buttock, and legs was getting worse, the Claimant returned to Dr. Cebrian for treatment.

21. On May 7, 2014, the Claimant was asked to fill out another Employee Statement of Injury form. On the May 7, 2014 form, however, the Claimant testified that he did not fill in the date of entry or time of injury fields, despite the form listing a date of injury of May 7, 2014.

22. **On May 13, 2014, Dr. Cebrian released the Claimant from care for the third time and referred the Claimant to a chiropractor outside the Worker's Compensation system (as a non-work related proposition).**

<u>King Chiropractic</u>

23. According to Respondents' Exhibit F (bates 163-172), the Claimant was seen at King Chiropractic on April 4, 2014 for intake; May 9, 2014, for an adjustment and x-ray; and, May 21, 2014 for an adjustment.

24. The Claimant provided undisputed testimony that on May 19, 2014, he asked his supervisor multiple times for a break so that he could seek medical treatment for his low back pain at the Employer's medical clinic, however, the Claimant was not allowed to leave his post. After lunch, he asked again for a break to see the nurse at the Employer's medical clinic. He then proceeded to the Employer's medical clinic and requested medical treatment for his low back pain. His supervisor told the Employer's clinic not to treat the Claimant because the Employer had a note from a doctor (Dr. Cebrian) stating that the Claimant's injury is not work related. The Claimant then sought

out a union representative, who advised him to document the May 19, 2014 incident. The Claimant then documented the incident.

25. On May 19, 2014, the Claimant's Employer denied him treatment for his low back pain.

26. The fact that from September 11, 2013 to May 13, 2014, the only treatment the Claimant received consisted of ice packs, heat pads, and massage that he performed on himself is reiterated.

27. The Claimant's testimony and the medical records from the Employer's medical clinic support, that from September 11, 2013 to May 13, 2014, the Claimant worked full-duty without any medically-imposed restrictions by his ATP, Dr. Cebrian.

28. According to the Claimant, the Employee Statement of Injury forms, completed on September 11, 2013, February 26, 2014, and May 7, 2014, all relate to the injury that occurred on September 11, 2013.

Family Medical Leave Act (FMLA) Referral to Sean Lloyd, M.D.

29. The Claimant's first visit with Dr. Lloyd was on May 30, 2014, on a FMLA referral (Respondents' Exhibit J, bates 179-206). He saw Dr. Lloyd again on June 3, 2014 for an office visit and an FMLA Report (Respondents' Exhibit J, bates 201-204). He next saw Dr. Lloyd on November 21, 2014 for an FMLA office visit (Respondents' Exhibit J, bates 179-200).

Dr. Cebrian's Final Release and Referral to Physician Outside Workers Compensation System.

30. Dr. Cebrian's December 8, 2014 medical report states, "[h]e is released from care. **He was told to follow-up with his primary care physician outside of the workers' compensation system[,]"** with a MMI date of December 10, 2013.

31. In addition, the Claimant testified that the descriptions of what he was doing at the time the injury occurred, listed on the Employee Statement of Injury forms, *i.e*. "I am carrying back of meat" and "I am carrying box of meat," references the September 11, 2013 incident.

32. The Claimant stated that he communicated to the Employer's medical clinic in English each time he was evaluated.

Selection of Kristin Mason, M.D. as the ATP

33. Dr. Cebrian refused to treat the Claimant's medical condition as a work-related condition as of May 13, 2014, and ultimately referred the Claimant to a private chiropractor, thus, severing his role as the workers' compensation ATP.

34. After Dr. Cebrian's refusal to treat for non-medical reasons, Dr. Mason was the first qualified physician selected to be the Claimant's ATP. She is fully Level 2 accredited. King Chiropractic, and Dr. Lloyd, from Aurora South Medical Center do not qualify as validly selected referrals to be ATPs. King Chiropractic is only an ancillary provider, much like physical therapy, and cannot be considered an ATP for workers' compensation purposes.

35. Additionally, the Claimant was referred to Dr Lloyd of Aurora South Medical Center in regard to his FMLA claim, and not his work-related injury, and Dr. Lloyd is therefore not an appropriate ATP for workers' compensation purposes. Therefore, as of June 5, 2014, Dr. Mason became the Claimant's validly selected ATP for workers' compensation purposes.

Dr. Mason's Treatment and Opinions

36. The Claimant was evaluated and treated by Kristin Mason, M.D., from June 5, 2014 and thereafter, under his private health insurance.

37. According to Dr. Mason, on June 5, 2014, the Claimant complained of low back pain and pain down his right leg, which is consistent with the symptoms the Claimant reported and are documented in the Employer's medical clinic Daily Visit Log.

38. When Dr. Mason treated the Claimant, he reported that his low back and right leg pain complaints were attributed to his September 11, 2014 work-related injury. Dr. Mason also stated that the Claimant never reported any other injury or injury date.

39. On July 3, 2014, Dr. Mason ordered an MRI (magnetic resonance imaging) and x-rays including flexion/extension views of the Claimant's low back to determine if there was a structural reason for his pain.

40. Dr. Mason was of the opinion that "the MRI showed central disc bulges at L4-5 and L5-S1 impinging on the bilateral L5 and S1 nerve roots."

41. Dr. Mason initially treated the Claimant with physical therapy (PT). When the PT failed to resolve the Claimant's symptoms, she ordered imaging. After the imaging, Dr. Mason ordered right-sided epidural steroid injections.

42. Dr. Mason attributed the MRI findings to the Claimant's September 11, 2013 work-related injury. The basis for her opinion is that the Claimant reported no previous history of injuries or back pain prior to lifting something heavy at work.

According to Dr. Mason, a lifting injury is a common mechanism for a disc injury, the Claimant reported persistent similar symptoms since the time of onset of his pain, and the disc bulges were identified as the pain generator when he got over 50% benefit from the epidural injections. Therefore, it made sense that the abnormality on the MRI was caused or exacerbated by the lifting injury. Based on the thoroughness of Dr. Mason's exam and treatment of the Claimant, the ALJ finds her opinions far more persuasive, credible and compelling than any opinions to the contrary.

43. On August 13, 2014, the Claimant received right L4-5 and L5-S1 transforaminal epidural steroid injections by Nicholas Olsen, D.O., on referral from Dr. Mason, which resulted in a greater than 50% decrease in pain in his low back and right leg pain.

44. Dr. Mason's diagnosis of the Claimant is discogenic back pain with some right-sided L5-S1 radicular pain.

45. Dr. Mason's opinion, within a reasonable degree of medical probability, is that the Claimant's condition of discogenic back and right-sided L5-S1 radicular pain was aggravated and accelerated by the work related incident on September 11, 2013, and the ALJ so finds.

46. In Dr. Mason's opinion, the Claimant's condition is causally related to the September 11, 2013 work-related incident for the following reasons: (1) the Claimant provided a straightforward report that he lifted something heavy at work; (2) the Claimant had pain since that time; (3) the Employer medical clinic records demonstrate a continuous and chronic period of time the Claimant continued to have similar complaints following the lifting injury that were voiced to the Employer. Dr. Cebrian refused to continue to treat the Claimant's medical condition as a work-related condition as of May 13, 2014, and referred the Claimant to a private chiropractor. In denying to further treat the Claimant for his condition on the grounds that it is not work-related, Dr. Cebrian severed his role as the ATP; and, (4) the Claimant's complaints were similar to the complaints he presented to Dr. Mason. For those reasons, Dr. Mason concluded the Claimant's complaints were all due to the same injury. The ALJ finds her opinion, in this regard highly persuasive and credible.

47. According to Dr. Mason, the Claimant was not at MMI prior to June 5, 2014, because he continued to be symptomatic and he was not actively treated prior to that date.

48. According to Dr. Mason, all of the medical treatment that the Claimant received from September 11, 2013 through October 23, 2014 was reasonable, necessary and causally related to the September 11, 2013 work-related injury.

49. Dr. Mason is of the opinion that the Claimant reached MMI on October 23, 2014.

Temporary Disability Claim

50. The Claimant continued to work for the Employer at full wages and until November 18, 2014, when he was terminated.

Ultimate Findings

51. The ALJ finds the Claimant's testimony credible and un-impeached. Further, the ALJ finds the opinions of Dr. Cebrian lacking in credibility, and the opinions of Dr. Mason far more credible and persuasive because of her specific expertise, thorough treatment of the Claimant's medical case, and because she was treating the Claimant under his health insurance before being designated as the ATP at the conclusion on the June 17, 2015 hearing, thus, she did not have "a dog in the fight," which makes her opinion more objective and disinterested.

52. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Mason, and to reject the opinions of Dr. Cebrian and any other opinions to the contrary.

53. Dr. Cebrian made a referral to a chiropractor under the mistaken belief that the Claimant's condition was not work-related. At that point, the right of the Claimant to select a qualified ATP came into being. Because a chiropractor provides ancillary services, the chiropractor cannot serve as an ATP on any continuing basis. Also, as found herein above, evaluations and treatments by Dr. Llloyd at Aurora South Medical Center were for FMLA purposes and did not constitute a valid selection of a workers' compensation ATP. Therefore, the Claimant's first selection of a workers' compensation ATP was Dr. Mason. All of the referrals from Dr. Mason, including the steroid injections by Dr. Olsen, were authorized and within the authorized chain of referrals.

54. All of the medical care and treatment for the Claimant's aggravated and accelerated back injuries of September 11, 2013 was and is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

55. The Claimant has proven, by a preponderance of the evidence that he sustained compensable injuries as herein above described in course and scope of his employment on September 11, 2013.

56. As found herein above, the Claimant continued to work for the Employer at full wages and until November 18, 2014, when he was terminated, which was beyond Dr. Mason's MMI date. Therefore, there is no proof of temporary disability.

57. The Claimant has proven, by preponderant evidence that Dr. Cebrian, under the mistaken belief that the Claimant's condition was not work-related, refused to treat the Claimant's condition as work-related after May 13, 2014 for non-medical reasons, the Respondents were aware of this, and the Claimant made a valid first selection of a qualified ATP by selecting Dr. Mason as of June 5, 2014. All of Dr. Mason's referrals were authorized and within the authorized chain of referrals.

58. All of the medical care and treatment for the Claimant's injuries of September 11, 2013 is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

59. The Claimant continued to work for the Employer at full wages until November 18, 2014, when he was terminated. Dr. Mason, the ATP, declared him to be at MMI, effective October 23, 2014. Therefore, the Claimant failed to prove entitlement to temporary disability benefits.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and un-impeached. Further, as found, the opinions of Dr. Cebrian were lacking in credibility, and the opinions of Dr. Mason were far more credible and persuasive because of her specific expertise, thorough treatment of the Claimant's medical case, and because she was treating the Claimant under his health insurance before being designated as the ATP at the conclusion on the June 17, 2015 hearing, thus, she did not have "a dog in the fight", which makes her opinion more objective and disinterested.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Mason, and to reject the opinions of Dr. Cebrian and any other opinions to the contrary.

Refusal of Dr. Cebrian to Treat for Non-Medical Reasons/Selection of Dr. Mason as ATP

c. If the physician selected refuses to treat for non-medical reasons, and the insurer fails to appoint a willing ATP after notice of the refusal to treat, the right of *selection passes to the injured worker. Weinmeister v. Cobe Cardiovascular, Inc., W.C.*

No. 4-657-812 [Industrial Claim Appeals Office (ICAO), July 10, 2006]. Also see Lutz v. Industrial Claim Appeals Office, 24 P.3d 29 (Colo. App. 2000); Ruybal v. University Health Sciences Center, 768 P.2d 1259 (Colo. App. 1988). As found, Dr. Cebrian, under the mistaken belief that the Claimant's condition was not work-related, refused to treat the Claimant's condition as work-related after May 13, 2014 for non-medical reasons, the Respondents were aware of this, and the Claimant made a valid first selection of a qualified ATP by selecting Dr. Mason as of June 5, 2014.

d. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, Dr. Cebrian, under the mistaken belief that the Claimant's condition was not work-related, refused to treat the Claimant's condition as work-related after May 13, 2014 for non-medical reasons and referred him to a chiropractor. As further found, the Claimant made a valid first selection of a qualified ATP by selecting Dr. Mason on June 5, 2014. All referrals by Dr. Mason have been within the authorized chain of referrals.

Medical Treatment

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation of his back condition on September 11, 2013. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his injury.

Temporary Disability

f. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). As found, the Claimant continued to work for the Employer at full wages until November 18, 2014, when he was terminated. Dr. Mason, the ATP, declared him to be at MMI, effective

October 23, 2014. Therefore, the Claimant failed to prove entitlement to temporary disability benefits. Therefore, the Respondents' "responsibility for termination" defense is moot.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden of proof with respect to all issues with the exception of "temporary disability benefits through the date of MMI. Consequently, the Respondents issue of "responsibility for termination" is moot.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. On September 11, 2013, the Claimant sustained compensable low back injuries.

B. Dr. Cebrian is no longer the Claimant's authorized treating physician.

Kristin Mason, M.D., became the Claimant's authorized treating physician on June 5, 2014, and the Respondents are liable for the costs of her work-related treatment, subject to the Division of Workers' Compensation Medical Fee Schedule. The Claimant reached MMI on October 23, 2014.

C. The Respondents shall pay costs of all medical care and treatment, including post maximum medical improvement maintenance care provided or ordered by Dr. Mason and her referrals from June 5, 2014, 2014 and continuing, subject to the Division of Workers' Compensation Medical Fee Schedule

D. Any and all claims for temporary disability are hereby denied and dismissed.

E. Any and all issues not determined herein, including permanent disability, are reserved for future decision.

DATED this_____day of July 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of July 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits?

- The parties stipulated prior to the hearing that if the claim is compensable, claimant's average weekly wage ("AWW") is $1,454.79.

- Whether respondents have proven by a preponderance of the evidence that claimant's benefits should be reduced pursuant to an injurious practice?

- Whether respondents have proven by a preponderance of the evidence that claimant's benefits should be terminated based on an intervening accident?

FINDINGS OF FACT

1. Claimant was employed with employer as a package car driver. Claimant testified at hearing that on May 14, 2014 she was lifting a box when she developed pain in her leg. Claimant was initially seen following her injury by Mr. Fox, a physician's assistant with Cottonwood Holistic Family Health on May 27, 2014. Claimant reported to Mr. Fox that she had pulled her hamstring in 2013 and felt she had injured her leg again using an inversion table. Claimant reported pain in her left inferior gluteal region for about 4-5 weeks. Claimant reported a gradual onset of pain and denied any acute trauma. Claimant also reported pain in her left low back region.

2. Claimant returned to Mr. Fox on May 29, 2014 and reported a lot of pain and tightness in her left calf after working. Mr. Fox noted that claimant's symptoms

were more consistent with left sided sciatic and recommended diagnostic studies of the lumbar spine.

3. Claimant underwent a magnetic resonance image ("MRI") of the lumbar spine on May 31, 2014. The MRI showed moderate sized posterior and left lateral disc extrusions at L4-L5 and L5-S1 with significant foraminal compromise at both levels on the left.

4. Claimant was evaluated by Dr. Weber on June 5, 2014. Claimant reported that she was lifting several 100 boxes on May 5, 2014 when she got hemorrhoids and self treated. Claimant reported she also developed left leg pain about 3 weeks ago and had an MRI that showed disc extrusions at the L4-5 and L5-S1 levels. Dr. Weber referred claimant for physical therapy. Claimant testified she went to Dr. Weber because when she reported her injury she was informed by Mr. Masse that she should go to the physician who performed her Department of Transportation ("DOT") physical.

5. Claimant was subsequently referred by employer to Dr. Jernigan for treatment. Claimant was examined by Dr. Jernigan on June 6, 2014. Dr. Jernigan noted claimant reported developing leg pain on May 14 while working heavily moving 70 pound packages. Claimant reported her symptoms got worse over the ensuing days. Dr. Jernigan recommended work restrictions that limited claimant to no more than 20 pounds. Dr. Jernigan noted that claimant's work was very heavy and noted she reported problems with hemorrhoids after heavy lifting on May 2, 2014 and following that incident she continued to lift upwards of 70 pounds. Dr. Jernigan referred claimant to Spine Colorado for additional treatment and recommended prednisone and physical therapy.

6. Claimant returned to Dr. Jernigan on June 16, 2014 and reported her pain level was unchanged with the prednisone. Dr. Jernigan again recommended a referral to Spine Colorado. Claimant continued to treat conservatively with Dr. Jernigan. Dr. Jernigan opined in his medical records that claimant's condition was related to her work activities with employer.

7. Claimant was examined by Dr. McLaughlin with Animas Spine on July 2, 2014. Dr. McLaughlin noted claimant's accident history that she developed left gluteal and calf pain at work on May 14, 2014 that progressively got worse. Dr. McLaughlin further noted claimant's work history of having to left up to seventy pounds. On physical examination, Dr. McLaughlin noted that claimant had four out of five EHL weakness on the left compared to the right. Dr. McLaughlin diagnosed claimant with left lower extremity radiculopathy secondary to disc extrusion at L4-5 and L5-S1 and

recommended claimant repeat her course of oral steroids. Dr. McLauglin also recommended transforaminal injections.

8. Dr. McLaughlin noted that while claimant did not recall a deciding mechanism of injury for her pain, he still felt her condition was a work related injury given the work that she performed.

9. Claimant returned to Dr. Jernigan on July 15, 2014 with continued complaints of significant pain. Dr. Jernigan noted that claimant was unable to lay down due to severe pain and reported claimant was very depressed due to the constant pain.

10. Claimant testified she took a vacation that had been previously planned in mid-July 2014. Claimant's vacation included driving to Virginia and North Carolina. Claimant continued to complain of significant pain on her vacation and was seen at the emergency room ("ER") at Howard County General Hospital in Columbia, Maryland on July 31, 2014 with complaints of left sided sciatica pain that increased a couple of hours ago. Claimant was given medications and released. Claimant returned to the ER at Mary Washington Hospital in Fredricksburg, Virginia on August 1, 2014 with additional complaints of back pain. Claimant was again given medications and released. Claimant testified at hearing that during the vacation her husband was driving and she was in the back seat. Claimant testified she had a sudden increase in back pain after she shifted her body weight which resulted in her treatment at the ER on August 1, 2014.

11. Claimant was again treated at Beach Medical Care on August 6, 2014 with complaints of low back pain. Claimant noted she was under care of a work injury that developed on May 14, 2014 and had received treatment on July 31 and August 1 during the course of her trip. Claimant was again evaluated and released.

12. Claimant returned to Dr. Jernigan on August 12, 2014. Dr. Jernigan noted that Dr. McLaughlin was recommending an injection, which he agreed with. Dr. Jernigan took claimant off of work completely.

13. Claimant was examined by Mr. Baumchen, the physician's assistant for Dr. Youssef with Spine Colorado on August 19, 2014. Mr. Baumchen examined claimant and recommended she undergo a surgical evaluation.

14. Claimant eventually underwent the transforaminal epidural steroid injection recommended by Dr. McLaughlin on August 21, 2014.

15. Claimant was next evaluated by Dr. Youssef on August 27, 2014. Claimant reported to Dr. Youssef that she had a gradual onset of symptoms that got

particularly worse every time she went to work. Dr. Youssef noted that claimant was not able to walk on her heels because of obvious foot drop and weakness in her EHL and ankle dorsiflexion. Dr. Youssef further noted decreased sensation in the L5 and S1 distribution on the left compared to the right. Dr. Youssef diagnosed claimant with contiguous L4-5 and L5-S1 left sided herniated nucleus pulposus with left sided radiculopathy and neurologic deficit which was failing nonoperative treatment. Dr. Youssef recommended surgery including an L4-5 and L5-S1 microdiscectomy on the left with medial facetectomy and foraminotomy at L4-5 and L5-S1 on the left.

16. Claimant returned to Dr. Jernigan on September 2, 2014. Claimant reported continued complaints of pain radiating into her left lower extremity. Claimant reported relief following the epidural steroid injection including a decrease in her pain from 8 to 2 making her much more comfortable in general. Dr. Jernigan kept claimant off of work and noted that he agreed with Dr. Youssef's surgery recommendation.

17. Claimant returned to Dr. McLaughlin on September 5, 2014. Dr. McLaughlin noted that claimant reported a near 100 percent relief of her calf pain following the injection, but continued to complain of pain in her left gluteal and hip area with weakness in her left toe. Dr. McLaughlin noted that claimant's symptoms were returning and noted that he could provide her with a repeat injection for pain relief until her scheduled September 18, 2014 surgery.

18. Claimant eventually underwent the left sided L4-L5 microdiscectomy with medial facetectomy and foraminotomy at L4-L5 on the left along with left sided L5-S1 microdisectomy with medial facetectomy on the left at L5-S1 under the auspices of Dr. Youssef on September 18, 2014.

19. Claimant followed up with Mr. Hamlin, a physician's assistant, on October 3, 2014. Mr. Hamlin noted that claimant was two weeks post-op and was doing well. Mr. Hamlin noted that claimant's pain was manageable and claimant had been weaning off the medications. Claimant was instructed to begin physical therapy.

20. Claimant continued to treat with Dr. Jernigan following her surgery. Dr. Jernigan kept claimant off of work and noted claimant was undergoing physical therapy.

21. Claimant underwent an independent medical examination ("IME") with Dr. Rauzzino on December 6, 2014. Dr. Rauzzino reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with his IME. Dr. Rauzzino noted the initial accident history claimant presented to Dr. Fox involving a pulled hamstring and the use of an inversion table. Dr. Rauzzino noted that he reviewed a phone conversation from Mr. Evans and a representative of insurer in which Mr. Evans indicated he had lent the inversion table to claimant's husband and

he believed claimant had used the inversion table on one occasion and it had apparently made her symptoms worse. Dr. Rauzzino noted that claimant had reported that she had recently begun jogging before her symptoms developed and she initially thought her symptoms may have been related to running. Claimant reported that she ran 2-3 times per week and had increased her mileage up to about 6 miles. Dr. Rauzzino also noted claimant's need for emergency medical treatment during her trip to the East Coast.

22. Dr. Rauzzino opined in his report that claimant's condition was not related to her work with employer. Dr. Rauzzino indicated in his report that his opinion was based specifically on the report by Mr. Fox of May 27, 2014 where claimant described a history of pain in her left inferior gluteal region for four to five weeks, which would have put the injury outside the reported accident date of May 14, 2014. Dr. Rauzzino also noted that claimant failed to describe any specific trauma and developed as a gradual onset of symptoms. Dr. Rauzzino also noted that the report made no mention of an onset of symptoms related to her work with employer. Dr. Rauzzino noted that the first mention that claimant's injury was work related occurred after her MRI revealed two herniated disks in her lumbar spine. Dr. Rauzzino further opined that the road trip in July 2014 significantly aggravated her low back condition. Dr. Rauzzino opined that the surgery claimant underwent was reasonable, but was not related to any injury at work on May 14, 2014.

23. Dr. Rauzzino testified in this case consistent with his medical report. Dr. Rauzzino noted in his testimony that claimant's running would be an activity that would specifically lead to compression of her disk. Dr. Rauzzino further testified that the inversion table aggravated claimant's pain, based on her report of injury. Dr. Rauzzino testified that claimant's physical examination after her cross country road trip was significantly worse than it was prior to her road trip, with diminished sensation in her leg and foot.

24. Dr. McLaughlin testified at hearing in this matter. Dr. McLaughlin testified he treated claimant with respect to her back injury. Dr. McLaughlin testified when he examined claimant on July 2, 2014 claimant presented with pain radiating into her left hamstring and calf. Dr. McLaughlin testified he diagnosed claimant with 2 herniated discs. Dr. McLaughlin testified it was his opinion that the cause of claimant's 2 lumbar herniated discs was due to her repetitive bending, lifting, twisting and turning related to her work with employer. Dr. McLaughlin testified that it was his opinion that the use of the inversion table would not be a cause of the herniated discs in claimant's back. Dr. McLaughlin noted that prior to claimant's trip to the East Coast, he had documented weakness in claimant's left foot during the July 2, 2014 evaluation. The ALJ finds the testimony of Dr. McLaughlin to be credible and persuasive.

25. Dr. Jernigan testified at hearing in this matter. Dr. Jernigan noted in the course of his testimony the medical care he provided for claimant in relation to her lumbar spine issues. Dr. Jernigan testified he took claimant off of work completely as of July 15, 2014. Dr. Jernigan opined at hearing that claimant's back condition was related to the lifting she performed for employer. Dr. Jernigan further testified that he was aware of claimant's trip to the East Coast and the trip did not violate the work restrictions he had provided to claimant in relation to her back condition.

26. Mr. Van Iderstine testified at hearing in this matter. Mr. Van Iderstine testified that he performed a job analysis of claimant's position with employer. Mr. Van Iderstine testified claimant worked in a heavy to very heavy job. Mr. Van Iderstine's testimony is not credited with determining whether claimant's condition was related to her work with employer and was of limited assistance in reaching the conclusions regarding whether claimant's injury was compensable.

27. Claimant testified at hearing in this case regarding her work with employer. Claimant testified she would drive a truck and perform approximately 100 stops per day. Claimant testified the average package she delivers weighs approximately 45 pounds. Claimant testified her lifting of the packages requires her to squat and reach and twist the package to maneuver it to her "power zone" to lift. Claimant testified that the heavier packages she will slide to the back of the truck, and then use a dolly to deliver the package.

28. Claimant testified that she began to experience symptoms on May 14, 2014 (a Wednesday) and her symptoms gradually got work from there. Claimant denied having any sudden sharp pain with lifting and denied any specific incident. Claimant testified that pain began as a pain in her left hamstring and lower buttocks area and the pain got worse over the next week. Claimant testified she did not originally correlate her symptoms to a back injury and though she had a pulled hamstring. Claimant testified her symptoms increased and she was in significant pain as of July 14, 2014 and could not get to work. Claimant testified that during this time she was not sleeping beyond 2 hours per night. Claimant testified Dr. Jernigan increased her work restrictions and she has not returned to work in any capacity since July 15, 2014. Claimant testified that the weakness in her toe began in late June 2014 and continued to progress until four days prior to her transforaminal epidural steroid injection. The ALJ finds the testimony of claimant to be credible and persuasive in this regard.

29. Mr. Blaine, claimant's supervisor, testified at hearing in this matter. Mr. Blaine testified that claimant accurately testified about safe lifting methods required by employer. Mr. Blaine testified that the purpose of the safe lifting methods is to reduce injuries. Mr. Blaine testified he was familiar with claimant's route which consists of approximately 100 stops and roughly 200 to 300 packages. Mr. Blaine testified

claimant's average weight per package would be approximately 25 pounds. Mr. Blaine testified the work environment claimant is employed in is fast paced. The ALJ finds the testimony of Mr. Blaine to be credible.

30. The ALJ ultimately credits the opinions expressed by Dr. Jernigan and Dr. McLaughlin regarding the cause of claimant's condition over the contrary opinions expressed by Dr. Rauzzino. The ALJ further credits claimant's testimony regarding the onset of her symptoms in this regard. The ALJ notes that claimant's symptoms originally manifested themselves in her hamstring and gluteal area. The ALJ finds the opinions expressed by Dr. Jernigan and Dr. McLaughlin appear to coincide with one another and are supported by the medical records entered into evidence.

31. The ALJ, in crediting the testimony of claimant and the opinions expressed by Dr. Jernigan and Dr. McLaughlin, finds that claimant has proven that it is more likely than not that she sustained a compensable injury arising out of and in the course of her employment with employer.

32. The ALJ credits the testimony and opinions of Dr. Jernigan and Dr. McLaughlin, along with the corresponding medical records, and finds that claimant has proven that it is more likely than not that her medical treatment, including the surgery performed by Dr. Youssef, was reasonable and necessary to cure and relieve the claimant from the effects of her work injury.

33. The ALJ credits claimant's testimony that she has not worked in any capacity since July 15, 2014 and credits the medical records from Dr. Jernigan that took her off of work completely and determines that claimant has shown that it is more likely than not that she is entitled to an award of TTD benefits commencing July 15, 2014 and continuing until terminated by law. Respondents reserve the right to take any allowed statutory offsets against the award for TTD benefits.

34. The ALJ finds respondents have failed to establish that claimant suffered an intervening injury or engaged in an injurious practice by taking the road trip to the East Coast. The ALJ credits Dr. Jernigan's testimony that the road trip would not have exceeded the work restrictions he had established in reaching this conclusion. The ALJ further credits the testimony of Dr. McLaughlin who noted claimant was experiencing weakness in the lower extremity prior to her trip to the East Coast.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has established by a preponderance of the evidence that she suffered a compensable work injury on May 14, 2014 resulting in the need for medical treatment. As found, the testimony of claimant regarding the onset of her symptoms along with the testimony and opinions expressed by Dr. McLaughlin and Dr. Jernigan are found to be credible and persuasive on this issue.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not

change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. As found, the ALJ credits the medical opinions of Dr. Jernigan and finds that claimant has proven by a preponderance of the evidence that the medical treatment she received from the medical providers was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by Dr. Jernigan that limited claimant's ability to earn wages. As found, claimant has established that he is entitled to TTD benefits as a result of her work injury beginning July 15, 2014 and continuing until terminated by law.

9. Section 8-43-404(3), C.R.S. provides in pertinent part that if "any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee."

10. As found, the ALJ credits the testimony of Dr. McLaughlin and claimant's testimony at hearing, and finds that respondents have failed to establish that claimant taking a vacation in July after her work injury that involved an injurious practice under Section 8-43-404(3), C.R.S.

11. The doctrine of intervening injury concerns the effect of a separate injury, which occurs while the claimant is receiving medical and disability benefits for a compensable injury effectively holds that respondents are not liable for injuries which occur subsequent to a compensable injury, and are not a "natural result" of the compensable injury. *Post Printing and Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

12. As found, respondents have failed to prove by a preponderance of the evidence that claimant suffered an intervening injury that would sever their liability for claimant's medical treatment by taking the vacation in mid-July 2014. As found, the testimony of Dr. McLaughlin that claimant had weakness in her left lower extremity as documented by his examination of claimant prior to the trip is found to be credible and persuasive on this point. As found, claimant was complaining of increased pain prior to the trip and the trip did not result in an intervening injury that would sever their liability in this case.

ORDER

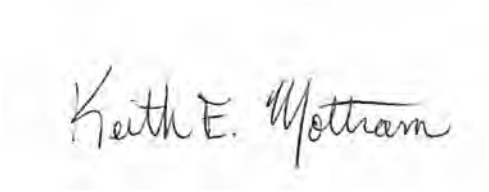
It is therefore ordered that:

The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 21, 2015



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Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether KM has demonstrated by a preponderance of the evidence that she was the common law spouse of Decedent and is thus entitled to receive death benefits as the dependent widow of Decedent pursuant to §8-41-501(1)(a), C.R.S.

2. Whether AP is entitled to receive death benefits as a wholly dependent minor child of Decedent pursuant to §8-41-501(1)(b)-(c), C.R.S.

3. Whether Claimants are financially responsible for Decedent's Oregon child support lien.

STIPULATIONS

The parties agreed to the following:

1. Decedent earned an Average Weekly Wage (AWW) of $500.00;

2. AP is the wholly dependent minor child of Decedent;

3. AP's date of birth is July 7, 1997;

4. Decedent's date of death was July 18, 2014.

FINDINGS OF FACT

1. On July 15, 2014 Decedent began working for Employer as an Installation Technician. On July 17, 2014 Decedent fell from a ladder during the course and scope of his employment. He suffered multiple traumatic head and internal organ injuries. Decedent underwent emergency surgery upon his arrival at Denver Health Medical Center. However, on July 18, 2014 he died as a result of his industrial injuries.

2. At the time of Decedent's death, a child-support lien from the State of Oregon shows he was responsible for a monthly payment of $158.00 or $35.05 per week for AP. The lien also reflects an arrears amount of $1,835.32. The lien utilizes Decedent's Social Security number as to the person responsible for payment. The Oregon administrative order specifies that it applies only to Decedent.

3. KM testified that she had known Decedent for over 20 years. They worked together and were friends. KM was married to another individual at the time but the marriage ended in approximately 2001.

4. In approximately 2010 KM and Decedent reconnected through social media. Approximately one year later they began to communicate through text messaging. Decedent explained to KM that he had left his wife and was moving from Oregon to Colorado to begin a new life. KM remarked that Decedent filed divorce papers in approximately February 2012 but did not know when the divorce became final.

5. Decedent moved into a trailer in his parents' driveway when he arrived in Colorado. KM remained in Oregon but spoke frequently with Decedent on the telephone. KM flew to Colorado in November 2011 to visit Decedent. In January 2012 she moved to Colorado and resided with Decedent in his trailer.

6. KM testified that she and Decedent did not care about the "piece of paper" or marriage license. Nevertheless, Decedent wanted to buy KM an engagement ring. The couple planned to marry in Ireland and take a vacation around the event. KM summarized that the couple intended to purchase an engagement ring, apply for a marriage license and have a formal marriage ceremony in Ireland.

7. KM and Decedent lived together from January 2012 until Decedent's death in July 2014. They purchased furniture and a television using Decedent's credit card. At times each of them was unemployed but supported by the other. For approximately 10 months prior to Decedent's death he was unemployed and KM paid the bills because she was working. Nevertheless, KM acknowledged that the couple never filed joint federal or state tax returns and Decedent listed himself on his 2012 return as "single."

8. KM and Decedent pooled their income into a single bank account owned by Decedent. KM's name was not on the account and she did not have access to the account. KM had a credit card on Decedent's credit card account and could charge to the account. She explained that she was unable to obtain an account at Decedent's credit union because she had a poor credit history from a previous bankruptcy.

9. In July 2012 Decedent bought a home. KM explained that Decedent had used money from the sale of a home in his prior divorce proceedings as a down payment. KM was not listed on the mortgage for the house nor as an owner on the deed. Similarly, Decedent bought a car used by KM. Only Decedent was named on the car loan and the car was only registered in his name. When Decedent died KM had to leave the home and the car was repossessed.

10. Decedent identified KM as his emergency contact for Employer. He listed KM as his "fiancée" and noted that he was "single." On his application for health insurance through Employer Decedent noted that he was "single" although "common law" was an option on the form.

11. KM testified that she considered herself married to Decedent when she moved into the Colorado trailer with him in January 2012. However, Decedent was still married to another woman and thus could not legally marry KM. KM explained that

Decedent and his ex-wife did not file divorce documents until February 2012 and she did not know when the divorce became final.

12. Because KM was listed as an emergency contact she was notified and went to Denver Health Medical Center after Decedent's July 17, 2014 industrial injury. Decedent's parents, brother, sister, aunt, uncle and nephew were also at the hospital. KM explained that the entire family made the decision to remove Decedent from life support. Decedent's mother Linda Poland confirmed that the family collectively made the decision to remove Decedent from life support. Ms. Poland commented that KM was considered part of the family but was not considered "married" to Decedent. Ms. Poland remarked that KM signed the do not resuscitate order because the family knew that she was planning to marry Decedent.

13. Ms. Poland testified that Decedent and KM did everything together and she knew them as boyfriend and girlfriend. Decedent told Ms. Poland that he planned to marry KM at some time in the future when they were more financially stable. Decedent did not tell her that he considered himself married to KM. Decedent referred to KM as his fiancée and planned to purchase an engagement ring when he was financially able. Ms. Poland did not refer to KM as her daughter-in-law.

14. Jean Barringer was Decedent's aunt. Ms. Barringer testified that she was close to Decedent and KM. She described them as a close couple who "acted married." Decedent told her that he planned to buy KM a ring but he did not want to do anything until he purchased the ring. Ms. Barringer was aware of their plans to apply for a marriage license and marry in Ireland.

15. Carl Dyess testified on behalf of AP. Mr. Dyess is Decedent's former father-in-law and AP's maternal grandfather. He initiated the proceedings to act as a conservator for AP concerning Decedent's estate. As conservator Mr. Dyess' duties involved maximizing the return of the estate for AP. The estate was liquidated through a Colorado attorney.

16. After Decedent's death Mr. Dyess was introduced to KM. KM identified herself as Decedent's girlfriend or fiancée. Mr. Dyess knew KM and Decedent were living together at the time of Decedent's death but did not know them to be husband and wife. He was not aware of their intentions to marry in the future but KM mentioned that Decedent had planned to buy her an engagement ring. Mr. Dyess confirmed that KM had not made any claim on Decedent's estate.

17. KM has failed to demonstrate that it is more probably true than not that she was the common law spouse of Decedent and is thus not entitled to receive death benefits as the dependent widow of Decedent pursuant to §8-41-501(1)(a), C.R.S. Although KM and Decedent lived together from January 2012 until Decedent's death in July 2014, the record reveals that there was no general understanding or reputation among persons in the community that KM and Decedent held themselves out as husband and wife. Instead, Decedent intended to purchase an engagement ring for KM. The couple then planned to apply for a marriage license and have a formal

marriage ceremony in Ireland. Although the record reveals a future intent to marry, the indicia of a common law marriage were not present at the time of Decedent's death on July 18, 2014.

18. Decedent and KM never filed joint federal or state tax returns and Decedent listed himself as "single" on his 2012 return. In July 2012 Decedent bought a home. KM explained that Decedent had used money from the sale of a home in his prior divorce proceedings as a down payment. KM was not listed on the mortgage for the house nor as an owner on the deed. Similarly, Decedent bought a car used by KM. Only Decedent was named on the car loan and the vehicle was registered solely in his name. Decedent identified KM as his emergency contact for Employer but listed her as his "fiancée" and noted that he was "single." Moreover, on his application for health insurance through Employer Decedent noted that he was "single" although "common law" was an option on the form.

19. Decedent told his mother Ms. Poland that he planned to marry KM at some time in the future when they were more financially stable. Decedent did not tell her that he considered himself married to KM. Decedent referred to KM as his fiancée and planned to purchase an engagement ring when he was financially able. Ms. Poland did not refer to KM as her daughter-in-law. Although Ms. Barringer described Decedent and KM as a close couple who "acted married," Decedent told her that he planned to buy KM a ring in the future. Finally, KM identified herself to Mr. Dyess as Decedent's girlfriend or fiancée. He was not aware of their intentions to marry in the future but KM mentioned that Decedent had planned to buy her an engagement ring. Accordingly, the bulk of the persuasive evidence reflects Decedent and KM had a future plan to marry but did not generally hold themselves out to the community as husband and wife.

20. At the time of Decedent's death, a child-support lien from the State of Oregon shows he was responsible for a monthly payment of $158.00 or $35.05 per week for AP. The lien also reflects an arrears amount of $1,835.32. The lien utilizes Decedent's Social Security number as to the person responsible for payment. The Oregon administrative order specifies that it applies only to Decedent. Accordingly, the Oregon child support lien is discharged as to benefits payable to AP.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Dependents

4. Pursuant to §8-42-114, C.R.S. death benefits are payable to dependents of a decedent in the amount of two-thirds of the AWW subject to the applicable minimum amount of $218.86. If there are wholly dependent persons at the time of the employee's death, they are entitled to weekly compensation equal to two-thirds of the decedent's AWW. §8-42-115(1)(b), C.R.S.

5. Section 8-41-501(1), C.R.S. designates classes of persons who are presumed to be wholly dependent on a decedent. Section 8-41-501(1)(a) provides that a widow or widower is wholly dependent "unless it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support." The statutory presumption of spousal dependency can thus only be rebutted by demonstrating that the surviving spouse was voluntarily separated and living apart from the decedent or was not dependent upon the decedent for any support. *See Exeter Drilling v. Industrial Claim Appeals Office,* 801 P.2d 20, 21 (Colo. App. 1990); *Michalski v. Industrial Claim Appeals Office,* 781 P.2d 183, 184-85 (Colo. App. 1989).

6. Section 8-41-501, C.R.S. presumes that a decedent's minor children under the age of 18 years are wholly dependent on the decedent. Pursuant to §8-41-501(1)(c), C.R.S. minor children of a decedent who are over 18 years of age and under 21 years of age who are engaged in courses of study as full-time students at accredited schools are also wholly dependent on the decedent. Section 8-42-121, C.R.S. grants discretion to the Director to apportion death benefits among the beneficiaries in the manner the Director deems just and equitable. Because the undersigned ALJ acts on behalf of the Director in determining appropriate apportionment after a hearing, the ALJ is afforded the same power to apportion the benefits.

Common Law Marriage

7. Proof of a common law marriage requires a party to establish mutual agreement of the parties to be husband and wife followed by a mutual and open assumption of the marriage relationship. *People v. Lucero,* 747 P.2d 660, 663 (Colo.

1987); *In Re Marquez*, W.C. No. 4-425-155 (ICAP, Apr. 5, 2001). The agreement must be manifested by conduct that provides evidence of the parties' mutual understanding. *Lucero,* 660 P.2d at 663. The court in *Lucero* noted that the "two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife." *Id.* at 665. The court also listed a number of other "behaviors" that may be considered including the maintenance of joint bank accounts, joint ownership of property, use of the man's surname by the woman and the filing of joint tax returns. *Id.* Disclosures to relatives regarding marital status may also be relevant because it may be reasonably inferred that marriage would be disclosed to certain family members. *In re Emenyonu,* W.C. 4-391-071 (ICAP, Mar. 12, 2001); *see Whitenhill v. Kaiser Permanente,* 940 P.2d 1129 (Colo. App. 1997). Furthermore, a promise to marry in the future is not consistent with a current marital relationship. *In re Emenyonu,* W.C. 4-391-071 (ICAP, Mar. 12, 2001). Ultimately, "there is no single form that any such evidence must take" and the ultimate determination "turns on issues of facts and credibility, which are properly within the trial court's discretion." *Lucero,* 660 P.2d at 665; *see In re Custody of Nugent,* 955 P.2d 584 (Colo. App. 1997).

8. As found, KM has failed to demonstrate by a preponderance of the evidence that she was the common law spouse of Decedent and is thus not entitled to receive death benefits as the dependent widow of Decedent pursuant to §8-41-501(1)(a), C.R.S. Although KM and Decedent lived together from January 2012 until Decedent's death in July 2014, the record reveals that there was no general understanding or reputation among persons in the community that KM and Decedent held themselves out as husband and wife. Instead, Decedent intended to purchase an engagement ring for KM. The couple then planned to apply for a marriage license and have a formal marriage ceremony in Ireland. Although the record reveals a future intent to marry, the indicia of a common law marriage were not present at the time of Decedent's death on July 18, 2014.

9. As found, Decedent and KM never filed joint federal or state tax returns and Decedent listed himself as "single" on his 2012 return. In July 2012 Decedent bought a home. KM explained that Decedent had used money from the sale of a home in his prior divorce proceedings as a down payment. KM was not listed on the mortgage for the house nor as an owner on the deed. Similarly, Decedent bought a car used by KM. Only Decedent was named on the car loan and the vehicle was registered solely in his name. Decedent identified KM as his emergency contact for Employer but listed her as his "fiancée" and noted that he was "single." Moreover, on his application for health insurance through Employer Decedent noted that he was "single" although "common law" was an option on the form.

10. As found, Decedent told his mother Ms. Poland that he planned to marry KM at some time in the future when they were more financially stable. Decedent did not tell her that he considered himself married to KM. Decedent referred to KM as his fiancée and planned to purchase an engagement ring when he was financially able. Ms. Poland did not refer to KM as her daughter-in-law. Although Ms. Barringer described Decedent and KM as a close couple who "acted married," Decedent told her

that he planned to buy KM a ring in the future. Finally, KM identified herself to Mr. Dyess as Decedent's girlfriend or fiancée. He was not aware of their intentions to marry in the future but KM mentioned that Decedent had planned to buy her an engagement ring. Accordingly, the bulk of the persuasive evidence reflects Decedent and KM had a future plan to marry but did not generally hold themselves out to the community as husband and wife.

Oregon Child Support Lien

11. Death benefits are entirely separate and independent from compensation benefits paid to the injured employee. *Hoffman v. Hoffman*, 872 P.2d 1367 (Colo.App. 1994); *Richards v. Richards & Richards*, 664 P.2d 254 (Colo.App. 1983). The legal distinction of death benefits as separate from an injured worker's compensation benefits is called the "rule of independence." *City of Loveland Police Department v. Industrial Claim Appeals Office*, 141 P.3d 943 (Colo. 2006); *Metro Glass & Glazing, Inc. v. Orona*, 868 P.2d 1178 (Colo.App. 1994). A child support lien applies only to benefits payable to the specific injured worker. *See* §8-43-204 (4), C.R.S.

12. As found, at the time of Decedent's death, a child-support lien from the State of Oregon shows he was responsible for a monthly payment of $158.00 or $35.05 per week for AP. The lien also reflects an arrears amount of $1,835.32. The lien utilizes Decedent's Social Security number as to the person responsible for payment. The Oregon administrative order specifies that it applies only to Decedent. Accordingly, the Oregon child support lien is discharged as to benefits payable to AP.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. KM's request for death benefits as the dependent widow of Decedent is denied and dismissed.

2. AP is the wholly dependent minor child of Decedent and is thus entitled to receive death benefits pursuant to statute.

3. The Oregon child support lien is discharged as to benefits payable to AP.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-*

070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 23, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has established by a preponderance of the evidence that on or about July 23, 2014 she sustained a compensable industrial injury arising out of and in the course of her employment with the respondent-employer.

FINDINGS OF FACT

1. The claimant is a 44-year-old woman with a July 15, 1970 date of birth. The claimant was hired by the respondent-employer on April 27, 2011 to work as a customer service manager.

2. The claimant's medical history is significant for chronic right knee problems with a patellar dislocation injury approximately ten years ago and second injury to the right knee approximately five years prior to the incident in question. On the date of the incident, the claimant was utilizing an open patella right knee brace, as was her practice when "her knee was bothering her".

3. On July 23, 2014, the claimant slipped on some water near the self-scan registers and fell. The claimant has given varying descriptions of the July 23, 2014 accident. On July 28, 2014, the claimant described the incident to Physician Assistant Steven Quackenbush as occurring when she stepped into water with her left foot, her right knee twisted inwards and she heard a "pop" with instant pain and swelling. The claimant reported she did not fall down. She denied any hip or back pain associated with the incident.

4. At hearing, and in her discovery responses, the claimant described the incident as occurring when she slipped in water and fell hard hitting the left knee on the ground. The claimant testified she immediately experienced "excruciating pain." According to the claimant, she remained on the ground for up to a minute after the fall and required the assistance of another associate to stand up. The claimant testified she was then helped to the service desk, in extreme pain.

5. The incident was witnessed and captured on in-store security video. Review of the video shows that on July 23, 2014, at approximately 5:55 p.m., the

claimant entered the self-check-out area wearing a brace on her right knee. At 5:55:52 p.m., the claimant turns from the cashier and slips. The claimant catches herself with the left upper extremity. From the video evidence, it does appear that the claimant's left knee made contact with the floor. Immediately after slipping, at 5:55:53 p.m., the claimant very quickly returns to full upright position, with no evidence of injury. The claimant then bends at the waist to exam the floor. At 5:55:58 p.m., the cashier hands the claimant a roll of paper towels. At 5:56 p.m., the claimant begins wiping up the spill with paper towels, using first her left and then her right lower extremities to mop the spill. At 5:56:39 p.m., the claimant is seen to leave the area, unassisted, with no evidence of a limp and no pain behaviors.

6. The claimant completed her work shift on July 23, 2014. The claimant reported the incident on July 23, 2014. Although she described being in excruciating pain immediately following the slip, the claimant did not request medical treatment.

7. On July 26, 2014, the claimant reported an accident and requested medical treatment. The claimant testified that on July 26, 2014, she was in extreme pain and her right knee had swollen to the same size as her thigh.

8. The claimant selected CCOM as the provider designated to treat her injuries. That facility was closed on July 26, 2014. The claimant proceeded to Canyon City Urgent Care where she gave a history of falling on her left knee and her right knee giving out and twisting out. The claimant also reported a history of "right knee pain". On physical exam, the knees were symmetrical and without obvious joint angulation. The right knee was reportedly "slightly swollen". X-rays were taken and read as normal. The treating physician assessed a "strain of the right knee" and referred the claimant to the workers' compensation provider.

9. On July 28, 2014, P.A. Steven Quackenbush evaluated the claimant. On that date, the claimant indicated her average pain related to the incident was at a level 2/10. On physical exam, the claimant did not have any pain with palpation of the spine, right hip, upper leg, foot, or ankle. P.A. Quackenbush described a "mild effusion" without discoloration, increased warmth or redness of the right knee.

10. The claimant returned to CCOM on July 31, 2014, complaining of "severe" and "constant" pain in her right knee. On physical exam, P.A. Quackenbush noted the claimant did not appear to have a contusion, with no discoloration or increased warmth of the right knee. The claimant had full active extension and flexion of the right knee without popping, locking or crepitus. P.A. Quackenbush released the

claimant to return to work, with restrictions. Due to the claimant's subjective pain complaints, P.A. Quackenbush referred the claimant for an MRI of the right knee.

11. The respondent-employer offered the claimant a modified position within the physician-imposed restrictions. The claimant accepted the modified position.

12. MRI of the right knee was performed on August 7, 2014. The right knee MRI was read as normal.

13. Physician Assistant Thomas Shepard evaluated the claimant on August 8, 2014. The claimant was reporting pain at a level 9.9/10. P.A. Shepard noted the normal MRI findings and opined the claimant's pain seemed disproportionate. Despite the normal MRI and the "disproportionate findings", P.A. Shepard ordered physical therapy.

14. The claimant returned to CCOM on August 28, 2014, reporting no improvement from any treatment. On physical exam, the claimant was ambulating without an obvious antalgic gait. There was no obvious swelling, increased warmth, or increased redness of the right knee. The claimant had full active extension and flexion without popping, locking or crepitus. Due to "persistent severe pain in the right knee", "not responding to therapy", P.A. Quackenbush referred the claimant to Dr. Keith Minihane for a surgical consult.

15. Dr. Minihane evaluated the claimant on September 8, 2014. The claimant was again complaining of pain at a level 10/10. Dr. Minihane opined the MRI was consistent with a "soft tissue contusion", although the claimant does not report falling on to the right knee. Dr. Minihane performed a right knee intra-articular injection, which the claimant testified increased her 10/10 pain sevenfold.

16. By September 12, 2014, the claimant was reporting aching, pins and needles, burning, stabbing and "other" pain at a level 11+/10 in her entire right leg. The claimant described the pain as "excruciating". On physical exam, the claimant had "very good" flexion of the right knee to about 135 degrees and full extension. The movements were without pain. The right knee joint did not show "the slightest swelling and there was no tenderness". Dr. Nanes opined the MRI was "quite unremarkable" and the claimant's knee exam was "very benign." He opined the claimant's complaints were "inconsistent with her physical exam".

17. The claimant continued to complain of pain at a level 10+/10, without objective evidence of injury. The claimant demonstrated excessive pain complaints, including grimacing and crying with pain. Dr. Nanes questioned whether there was

"self-limiting going on." Nonetheless, on November 4, 2014, Dr. Nanes restricted the claimant from all work activity "because of her severe pain". Dr. Nanes credibly testified there was no objective evidence to support restricting the claimant's work activities on November 4, 2014.

18. On November 20, 2014, the claimant presented to Dr. Nanes, accompanied by her husband. On that date, the claimant was again complaining of knee pain at a level 10+/10, grimacing and crying with pain. On physical exam, there was no joint redness and no swelling.

19. On November 25, 2014, Dr. Wallace Larson performed an IME at the respondent-insurer's request. The claimant presented to Dr. Larson complaining of pain exceeding level 10/10. On physical exam, the claimant reported decreased sensibility and tingling over the entire right leg and a glove stocking distribution as far proximal as the upper thigh. The claimant reported an inability to sense sharp dull sensation in the same area through her entire leg. On motor testing, she demonstrated very minimal strength of the quadriceps, hamstring, tibialis anterior, extensor halluces longus, extensor digitorum, or gastrocsoleous muscle groups. Dr. Larson credibly testified the claimant's motor testing and strength on physical exam was inconsistent with even the ability to ambulate. The claimant reported extreme tenderness to palpation of the right knee, even to very light touch in an area from 10 cm above the knee to 10 cm below the knee in a relatively global distribution.

20. Dr. Larson noted the claimant demonstrated "a very large amount of pain behavior." There were no skin or trophic changes. The claimant demonstrated cogwheel type of giving way on muscle testing of the upper and lower leg. She demonstrated minimal motor ability, but had no atrophy to either visualization or to direct measurements of the thighs. Dr. Larson opined the claimant had much greater right knee motion on casual exam than she did on direct exam. There was no joint effusion. Dr. Larson was unable to test ligamentous integrity of the right knee because the claimant reported extreme pain to even light touch and would not allow her knee to straighten on direct exam.

21. Dr. Larson opined the claimant has a very large amount of nonphysiologic findings. Her reported symptoms are not supported by any objective findings. There was a very high degree index of symptom magnification or malingering. He advised against knee arthroscopy "in the strongest possible terms." He further opined, the claimant's symptoms cannot be explained by the presence of a medial synovial plica. A medial synovial plica would not result in the symptoms the claimant describes.

22. Dr. Larson credibly opined it is medically probable the claimant's reported symptoms are unrelated to structural injury. Dr. Larson credibly opined the claimant does not have a work-related diagnosis of any specific injury to the right knee. Dr. Larson credibly opined the claimant has not had any objective evidence of injury. Dr. Larson credibly opined the claimant had no objective findings to support an injury. Dr. Larson credibly testified that based on his review of the records and his examination of the claimant, the claimant's most medically probable diagnosis is malingering.

23. Dr. Nanes reviewed Dr. Larson's IME report. Dr. Nanes credibly testified that based on his review of the report, he "completely agrees" with Dr. Larson's opinions and assessment. Dr. Nanes credibly testified that the claimant has given "an inconsistent history as well as an inconsistent physical exam".

24. On February 5, 2015, the claimant presented to Dr. Jennifer Fitzpatrick, as a self-referral. The claimant reported right knee pain with dysesthesia throughout the entire right leg in a stocking glove distribution. The claimant also reported changes in skin color of the right leg. She also reported hip and back pain. On physical exam, there was no knee effusion, no erythema and no ecchymosis. In contrast to Dr. Larson's findings six weeks prior, knee extension and flexion were full and symmetric to 110 degrees. Dr. Fitzpatrick opined the claimant's symptoms were "difficult to interpret" and may be representative of a reflex sympathetic dystrophy type syndrome. Given the claimant's report of hip and back pain, she recommended x-ray and MRI of the lumbar spine. There was no recommendation for treatment of the claimant's right knee symptoms. Dr. Fitzpatrick opined, "At this point, it is difficult for me to link her fall reported in July to her current symptoms."

25. The claimant's care was transferred to Dr. Jorge Klajnbart based on Dr. Nanes' refusal to treat for nonmedical reasons. Dr. Klajnbart evaluated the claimant on February 15, 2015. On that date, the claimant was reporting right knee pain, but no hip or back pain. The claimant did report numbness of the right foot. She denied any kind of mechanical symptoms to include locking, catching and giving way or buckling. Dr. Klajnbart noted the claimant was wearing an orthotic which was "quite tight." He opined, "It is somewhat incongruent to my physical exam as she has acute response to include grimacing and closing her eyes to light touch when she is able to wear her brace quite tightly around her knee." On physical exam, the claimant had full range of knee motion. There were no skin or hair changes indicative of complex regional pain syndrome. Dr. Klajnbart opined that neither the MRI nor the physical examination demonstrated any acute pathology from the alleged injury. He opined the claimant was not a surgical candidate and should be immediately returned to work.

26. Six days later, on February 19, 2015, the claimant returned to Dr. Fitzpatrick with ongoing complaints of hip and back pain, but no complaints of knee pain. Dr. Fitzpatrick did not recommend any treatment for the claimant's right knee. Instead she recommended evaluation by a spine doctor for possible injection of L5-S1 nerve impingement versus other intervention. Dr. Larson credibly testified that the claimant's right hip and low back complaints are not related to the July 23, 2014 slip and treatment for those complaints should be outside the workers' compensation system.

27. The ALJ credits the testimony of authorized provider, Dr. Richard Nanes, and independent examiner, Dr. Wallace Larson, that the claimant's reported symptoms are not supported by any objective findings.

28. The ALJ finds insufficient evidence to establish that it is more likely than not that the claimant suffered an injury arising out of and in the course of her employment with the respondent-employer on July 23, 2014.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

3. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the

employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

4. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

7. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

8. Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." *See* §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne,* 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury."

9. A compensable injury is one which requires medical treatment or causes a disability. It is well established that it is the claimant's initial burden to prove a compensable injury. *City of Boulder v. Payne, supra; Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The determination of whether the claimant proved an injury which required medical treatment or resulted in disability is one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Moreover, the ALJ's findings may be based on reasonable inferences from circumstantial evidence. *Ackerman v. Hilton's Mechanical Men, Inc.*, 914 P.2d 524 (Colo. App. 1996).

10. It is the claimant's burden to prove a causal connection between her employment and the resulting condition for which medical treatment and indemnity benefits are sought. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The determination of whether the claimant sustained that burden of proof is factual in nature. The claimant bears the burden of proof, by a preponderance of the evidence, to establish that an injury arising out of and in the course of the employment was the cause of the disability and need for treatment. The question of whether the claimant has met the burden is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, *supra.*

11. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between her employment and her injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

12. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

13. In the instant claim, there was clearly a slip accident on July 23, 2014, as documented by in-store security video. Despite extensive medical treatment, including diagnostics and surgical referral, no medical provider has identified any objective evidence of an injury requiring medical treatment or resulting in disability.

14. The ALJ concludes that the opinions and analysis of Dr. Larson and Dr. Nanes is credible and persuasive and the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with the respondent-employer on July 23, 2014.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 17, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Dr Ste 230
Colorado Springs, CO 80906

ISSUES

The issues for determination at the hearing were:

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment on December 18, 2013.

2. If the Claimant's claim is compensable, whether the Claimant proved that medical treatment he received was authorized, causally related and reasonably necessary to cure and relieve the effects of the December 18, 2013 industrial injury.

3. If the Claimant's claim is compensable, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits from March 17, 2014 ongoing.

4. If the Claimant is entitled to temporary total disability indemnity benefits, whether the Respondents proved that there are applicable offsets.

5. If the Claimant's claim is compensable, determination of the Claimant's average weekly wage ("AWW").

6. If the Claimant's claim is compensable, whether the Respondents proved, by a preponderance of the evidence, that the Claimant is subject to penalty for failure to timely report his injury.

FINDINGS OF FACT

1. The Claimant testified at the hearing that he had back pain in the past but he had no prior diagnosis of a hernia. He testified that he attributes his current back condition to his work during a heavy work load due to the holiday season. The Claimant testified that, during mid-December of 2013, he was lifting lots of kegs and that is when he started to notice pain. There are no medical records in evidence showing that the Claimant sought treatment in December of 2013. The Claimant placed the date of injury on December 18, 2013 but indicated that he returned to work on December 19, 2013 (Respondents' Exhibit D, p. 11). The Claimant testified that he continued to work for the Employer at the same job duties with no modifications.

2. The Claimant calculated his average weekly wage, including overtime and a health insurance benefit as $1,246.40 (Respondents' Exhibit D, p. 11). Respondents attached wage records from March 15, 2013 through March 14, 2014, the year period

before the Claimant ceased working on March 26, 2014. The Claimant's gross earnings were $61,931.64. $61,931.64 divided by 52 weeks equals $1,190.99 per week. It is not known if this gross earnings amount includes the health insurance benefit, but it is presumed to include the overtime. The health insurance benefit amount was not separately listed by the Claimant in his Worker's Claim for Compensation.

3. The Claimant testified that at some time in December, 2013, he had trouble getting out of bed so he saw Dr. Theiss and complained of back pain but did not state when it happened or that it was work-related because at that time the Claimant wasn't certain that it happened at work the week he was lifting the kegs before Christmas. On cross-examination, the Claimant later testified that he told Dr. Theiss that it was work-related in January of 2014. There is no medical record in evidence to support the Claimant's testimony that he saw Dr. Theiss in December of 2013 complaining of back pain, nor is this medical record discussed in the IME report of Dr. McCranie.

4. The earliest medical record in evidence is from January 23, 2014.[1] The Claimant saw Dr. Thomas D. Mino at Firestone Family and Occupational Medicine complaining of "left calf pain for 6 days." The Claimant reported that he left calf pain was constant since the onset 6 days ago when he woke up. The Claimant reported that could not recall any injury whatsoever. The Claimant described the pain "like a cramp that just won't go away." The pain was described as starting near the posterior knee and radiating towards the Achilles. Dr. Mino noted the Claimant walked without a limp and had full range of motion on the left knee and ankle. The calf was described as "supple" but the Claimant reported tenderness to palpation, medial more than lateral (Respondents' Exhibit M, pp. 78-83). Dr. Mino ordered an ultrasound as the Claimant is diabetic, "to exclude DVT" and noted that if the ultrasound were negative, the Claimant would be treated with heat and compression and over the counter analgesics (Respondents' Exhibit M, p. 78). The ultrasound was normal with no findings of deep vein thrombosis or superficial thromophlebitis (Respondents' Exhibit M, p. 76).

5. The Claimant returned to Firestone Family and Occupational Medicine and saw Dr. Ruth Vanderkooi on January 28, 2014 with continued left leg complaints. The Claimant reported that it hurts behind the knee/calf down to the lateral ankle area and the pain could be 10/10 at times, worse if he is standing and putting weight on it and better if he is lying down. The Claimant was now walking with an antalgic gait. Dr. Vanderkooi noted that the Claimant's pain was unusual with an unclear etiology. She opined that it is possible that it is a referred pain from a lumbar process, but the Claimant declined an MRI due to cost (Respondents' Exhibit M, pp. 71-73).

6. On March 3, 2014 the Claimant saw Dr. Megan Eliassen at the Firestone Family and Occupational Medicine Clinic. She noted that the Claimant reported that he was having more leg pain. He had thought it was going away, but then about 10 days before the appointment the pain came back. The pain is described "like a leg cramp that

[1] There are references to some earlier medical records of the Claimant in the IME report of Dr. McCranie dated April 28, 2015, but no earlier medical records were offered or admitted into evidence in this claim.

won't go away in back of L calf, radiates down to ankle and up to hip." Ice and heat do not help and nothing the chiropractor did changed the pain. The Claimant stated that he is not sure what made the pain better a few weeks ago and not sure what made it worse the previous Saturday. The Claimant offered that maybe the pain was worse because he has to lift heavy things and go up and down stairs at work. The Claimant reported that there was "no trauma /injury that he knows of." The Claimant continued to decline an MRI due to cost (Respondents' Exhibit M, pp. 65-70).

7. On March 17, 2014, the Claimant saw Dr. Nicholee Theiss for a follow up appointment for his diabetes condition. Dr. Theiss notes that the Claimant has chronic diabetes mellitus that is poorly controlled. On this visit, the Claimant also reported low back pain with left-sided radiculopathy. The Claimant reported to Dr. Theiss that he has had the low back pain with leg pain since Christmas and that he had been seen at the Exempla primary care clinic in Firestone. Dr. Theiss noted that the Claimant reported he took Soma and Percocet for the pain and it helped initially, but in the last week the pain has been severe again. Dr. Theiss noted the Claimant had limited range of motion. Dr. Theiss noted that a Medrol Dosepak was provided for the short-term for relieve from acute symptoms. Dr. Theiss indicated that the records from the Exempla clinic would be ordered for review (Respondents' Exhibit G, pp. 32-34).

8. In March 2014, the Claimant testified that he slipped and fell in the restaurant bringing in kegs and he stated that he reported to Greg Miller that he fell down the stairs bringing up kegs. The Claimant testified that he saw Dr. Theiss and reported that he fell on the stairs with kegs. The Claimant testified that he filled out a report with Greg Miller in March 2014 about the fall on the stairs. The Claimant testified that Mr. Miller asked the Claimant if he wanted to see one of their doctors and the Claimant testified that he said, "No, I'm fine" because he was already injured by then. The Claimant testified that he did not fill out a Worker's Claim for Compensation for the March 2014 incident. He testified that there was no reason, he just didn't do it.

9. On March 21, 2014, the Claimant underwent an MRI of the lumbar spine without contrast. The MRI findings included (1) mild disc bulge with moderate sized, broad, left foraminal disc protrusion at L5-S1 which abuts and displaces the left L5 nerve root in the neural foramen and results in moderate left neural foraminal narrowing; (2) mild bilateral neural foraminal narrowing at L4-5, left greater than right; (3) minimal disc bulges in the other intervertebral disc levels in the lumbar spine; and (4) mild facet arthropathy throughout the lumbar spine with no marrow edema or spondylolisthesis (Respondents' Exhibit L, pp. 62-63).

10. The Claimant testified that he stopped working as of March 26, 2014.

11. On March 26, 2014, the Claimant presented to the emergency department at Good Samaritan Medical Center with left lower extremity pain. The Claimant stated that "the pain started in his left leg about 3 months ago" and the pain has gotten worse and now includes low back pain. The Claimant brought a copy of the MRI he had done the previous Friday on DVD. The Claimant denied any new trauma or fall. The pain

medication he was given previously was no longer controlling his pain (Respondents' Exhibit K, p. 52). PA-C Christine Andrea Zakar noted that the Claimant reported "his symptoms initially began in January and have been intermittent up until recently, and now they are persistent." The Claimant's pain was localized to the left posterior let to the lateral aspect of his ankle with no right lower extremity symptoms. The Claimant rated his pain at 10/10 for the leg pain and 4 to 5 / 10 for the back pain (Respondents' Exhibit K, pp. 55-56). The Claimant was also seen by Dr. Kara Beasley who assessed the Claimant with a left L5-S1 disk protrusion and she recommended conservative treatment with physical therapy. The Claimant received an epidural steroid injection, which reduced the Claimant's pain by 50%, and oral pain medication. On discharge, the Claimant was provided a 10 lb. lifting restriction, was referred for physical therapy, and was to follow up with Dr. Beasley in 2-3 weeks. The Claimant was discharged on March 28, 2013 (Respondents' Exhibit K, p. 60).

12. On March 31, 2014, the Claimant saw Dr. Theiss for the purpose of completion of disability paperwork. Dr. Theiss noted that since the last visit on March 17th, the Claimant noted a very slight improvement with the steroid burst, but then his pain became so severe he had to go to the Emergency room. Dr. Theiss assessed a herniated L5-S1 disc which is impinging on the left L5 nerve root with lumbar disc degeneration of L4-5, as well as osteoarthritis throughout his lumbar spine with persistent radiculopathy symptoms into the leg. Dr. Theiss noted that the Claimant would start physical therapy and follow up with Dr. Beasley. Dr. Theiss also completed the disability claim form (Respondent's Exhibit G, pp. 29-31). On the disability claim form, Dr. Theiss noted that he first treated the Claimant on March 17, 2014. He noted that the Claimant "cannot bend, twist, pull, push, or crawl" until cleared by his neurosurgeon. The treatment planned included, "epidural injections, PT, MRI, neurosurgical evaluation, muscle relaxers, anti-inflammatories and narcotic pain relievers (Respondents' Exhibit J, p. 45).

13. On April 14, 2014, the Claimant saw Dr. Kara Beasley for follow up. She noted that the Claimant reported that the ESI on March 27, 2014 "significantly helped his leg pain and the back pain resolved completely." The Claimant also reported that the twice-weekly PT was helping. Dr. Beasley discussed the Claimant's MRI with him and treatment options. At that visit, the Claimant opted to try another injection and continue with PT in an attempt to avoid surgical intervention (Respondents' Exhibit E, p. 18).

14. On May 20, 2014, the Claimant underwent a left L5 transforaminal epidural steroid injection performed by Dr. Greg Arends (Respondents' Exhibit I, p. 39).

15. On June 5, 2014, the Claimant saw Dr. Theiss for follow up regarding his back pain. Dr. Theiss noted the Claimant has undergone three epidural injections on referral from Dr. Kara Beasley. Dr. Theiss noted that the Claimant reported some relief but that the Claimant has not been able to return to work yet. The Claimant was provided with refills for the Oxycodone prescription for pain (Respondents' Exhibit G, pp. 27-28).

16. On June 27, 2013, the Claimant was seen in Dr. Beasley's office by PA-C Christine Zakar. She noted that the Claimant has had 3 epidural steroid injections, the last one on 5/20/2014. The Claimant reported that his leg pain was improved compared to the previous month. Continued conservative care was recommended with a possible referral for another ESI if the pain intensifies, with the understanding that the number of injections be limited to 3-4 per year (Respondents' Exhibit E, p. 12).

17. The Claimant's attorney completed a Worker's Claim for Compensation for the alleged December 18, 2013 injury dated August 4, 2014 stating that the Claimant injured his lower back while "lifting kegs and boxes of wine & spirits upstairs downstairs" (Respondent's Exhibit D, p. 11). On the form, the Claimant does not state that he reported this injury to anyone, but just wrote "NA" in that box. On the form, the Claimant also reports that he had no initial treatment.

18. Respondents filed a Notice of Contest on September 9, 2014 (Respondents' Exhibit B).

19. Dr. Kathy McCranie saw the Claimant for an independent medical examination (IME) and prepared a report dated April 28, 2015. The Claimant reported a five-year history of low back pain to Dr. McCranie. He reported that on December 18, 2013, he was performing his regular job duties of lifting case of wine and kegs up and down stairs and ramps and he noted more pain than usual in his back over the course of that week. The Claimant told Dr. McCranie that he thinks he mentioned this to his employers but he did not file a work injury claim or seek medical care at that time. The Claimant told Dr. McCranie that on December 25 or December 26, he noted a muscle cramp in his left leg. He did not seek medical treatment for this until approximately January 13, 2014 when he was seen at Firestone Exempla Clinic (Respondent's Exhibit A, p. 1). The Claimant reported that he then saw several doctors, including Dr. Theiss, Dr. Beasley and Dr. Arends and he received epidural steroid injections, underwent physical therapy twice a week for three months and was referred to a chiropractor, Dr. Johnson, who he saw twice a month for about 12 sessions of adjustments and electrical stimulation. The Claimant told Dr. McCranie that he did not report a work injury until March of 2014 when he had a separate injury where he slipped and fell and landed on his back. The Claimant stated that he did not seek any medical treatment with respect to this new injury (Respondents' Exhibit A, p. 2). Dr. McCranie provided a thorough review of the Claimant's medical records both prior to his alleged December 2013 injury and since then (Respondents' Exhibit A, pp. 2-5). Dr. McCranie assessed the Claimant with (1) left-sided low back and lower extremity pain; and (2) left-sided lumbar disk protrusion, L5-S1. After taking the Claimant's history and reviewing the medical records, Dr. McCranie opined that she "do[es] not think it is medically probable that the patient had any type of industrial accident." She went on to opine that the Claimant's report of injury is inconsistent with the medical records, having been seen by a doctor on December 22, 2013 and reporting no back pain. Further, Dr. McCranie notes that the reports of calf pain start on January 23, 2014 and, at that time, the Claimant stated that the onset was 6 days prior to the doctor visit. Dr. McCranie notes that, in the medical records, the Claimant cannot recall any injury or trauma and that it is not until March of

2014 that the Claimant mentioned to one of his doctors that he lifted heavy items at work. Ultimately, Dr. McCranie opined that she did not find "any medically probable causal relationship between the onset of the patient's lumbar disc herniation and his work activities of December 18, 2013" (Respondents' Exhibit A, p. 7).

20. When questioned on cross-examination why the Claimant waited until August to fill out a claim, the Claimant testified that at first the pain subsided, but then it got worse again. The Claimant also testified that between March and August, he was on short-term disability and he received about $2,300.00 per month, but that ended at the beginning of August. The Claimant testified that now he is on long-term disability but that is only $1,500.00 per month.

21. The Claimant testified that he was aware of posters around the workplace about reporting injuries but he had never read them or paid attention to them since he hadn't needed to report anything. He testified that he did keep telling Greg Miller that his back was hurting more and more.

22. Greg Miller testified at the hearing that he is the Transportation Manager for the Employer. He managed 78 drivers and is also responsible for the initial filings for all Workers' Compensation claims. He testified that at orientation, all employees are advised about reporting work injuries and there are big posters at the workplace that provide information on work injuries and advise to report injuries to Greg Miller. Mr. Miller testified that when an employee reports an injury to him, they are provided and are to complete the Sedgwick forms. The employee then picks a medical provider as different ones are available all over town. Then, Mr. Miller sends in the Sedgwick forms.

23. Mr. Miller testified credibly that the Claimant never reported an injury in December 2013 to him. Mr. Miller testified that he did not know the Claimant had a work injury and if he had known, he would have had the Claimant fill out the Workers' Compensation paperwork. Mr. Miller likewise testified that he was never advised that the Claimant had a fall in March of 2014. Mr. Miller testified that he was only made aware that the Claimant was off work on short term disability after the fact.

24. On the issue of reporting alleged injuries occurring on either December 18, 2013 or in March of 2014, the testimony of Mr. Miller is found to be more credible and persuasive than that of the Claimant. The Claimant's testimony about reporting back and leg pain due to work injuries is not credible and the medical records do not support acute injuries during these time frames. Moreover, no paperwork was completed and there is no written record of the Claimant having reported work injuries to Mr. Miller.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical

benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. §8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the

discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Ultimately, the evidence does not support Claimant's allegation that he sustained a work injury on December 18, 2013. The Claimant continued to work through March of 2014. He testified that he stopped working as of March 26, 2014. Prior to this, he worked at his regular job with no modifications. He even testified that he had a fall down stairs at work in March of 2014 prior to the date he stopped working. He missed no days from work until the day he presented to the emergency room on March 26, 2014. The Claimant's supervisor testified credibly and persuasively that the Claimant never reported a December 2013 work injury or a March 2014 fall at work to him. There is no paperwork filed with the Employer to initiate a Workers' Compensation claim and receive medical treatment until the Claimant filed his Worker's Claim for Compensation on August 4, 2014. The Claimant's supervisor also testified that he was not even aware that the Claimant was off work on disability leave until after the fact.

Dr. Kathy McCranie saw the Claimant for an independent medical examination (IME) and prepared a report dated April 28, 2015. The Claimant reported a five-year history of low back pain to Dr. McCranie. He reported that on December 18, 2013, he was performing his regular job duties of lifting case of wine and kegs up and down stairs and ramps and he noted more pain than usual in his back over the course of that week. The Claimant told Dr. McCranie that he thinks he mentioned this to his employers but he did not file a work injury claim or seek medical care at that time. The Claimant told Dr. McCranie that on December 25 or December 26, he noted a muscle cramp in his left leg. He did not seek medical treatment for this until approximately January 13, 2014 when he was seen at Firestone Exempla Clinic. The Claimant also told Dr. McCranie that he did not report a work injury until March of 2014 when he had a separate injury where he slipped and fell and landed on his back. The Claimant stated that he did not seek any medical treatment with respect to this new injury. After a thorough review of the medical records and a physical examination, Dr. McCranie assessed the Claimant with (1) left-sided low back and lower extremity pain; and (2) left-sided lumbar disk

protrusion, L5-S1. However, after taking the Claimant's history and reviewing the medical records, Dr. McCranie opined that she "do[es] not think it is medically probable that the patient had any type of industrial accident." She went on to opine that the Claimant's report of injury is inconsistent with the medical records, having been seen by a doctor on December 22, 2013 and reporting no back pain. Further, Dr. McCranie notes that the reports of calf pain start on January 23, 2014 and, at that time, the Claimant stated that the onset was 6 days prior to the doctor visit. Dr. McCranie notes that, in the medical records, the Claimant cannot recall any injury or trauma and that it is not until March of 2014 that the Claimant mentioned to one of his doctors that he lifted heavy items at work. Ultimately, Dr. McCranie opined that she did not find "any medically probable causal relationship between the onset of the patient's lumbar disc herniation and his work activities of December 18, 2013."

The credible and persuasive evidence does not support an injury occurring at work. The Claimant's testimony regarding the mechanism of injury and the facts surrounding an incident occurring at work on December 18, 2013 is at odds with the testimony of Mr. Miller, his supervisor, the documentary evidence and the medical records. The Claimant had a preexisting low back condition. However, the Claimant testified that this pain was different. Yet, with respect to the medical records, there were multiple confusing reports by the Claimant to his various doctors regarding the onset of his symptoms. Moreover, the Claimant continued to perform his physically demanding job for approximately three months following his alleged date of injury. Overall, there is considerable doubt whether the Claimant was actually injured in the manner he has described.

This doubt is not resolved by the Claimant's testimony at the hearing that he also suffered a slip and fall work injury on stairs in March of 2014 while carrying kegs and cases of wine and spirits. While the Claimant testified that he did report this injury, there is no record of this and the testimony of his supervisor is more credible that the Claimant did not report a March 2014 injury. Then, with respect to this March 2014 injury, the Claimant never filed a Worker's Claim for Compensation.

By March 26, 2014, the Claimant has leg pain that is so severe, he goes to the emergency department and he never returns to work. Instead, he files paperwork for short-term disability. However, even at this point, he does not file any paperwork to initiate a Workers' Compensation claim.

The credible and persuasive evidence demonstrates that it is more likely than not that the Claimant was treating a non-work related low back problem. The credible and persuasive evidence shows that it is more likely than not he was missing work for a non-work related low back problem. From that point forward, the Claimant remained in treatment and on restrictions for his low back. Given the circumstances, including the inconsistent statements made by the Claimant regarding the onset of pain, the contrasting and more persuasive testimony of Mr. Miller on the lack of any report of work injury, and the opinion of Dr. Kathy McCranie, the ALJ determines that the Claimant has failed to meet his burden of proof to establish that he sustained a work

injury and his need for treatment is related to his employment or any work-related injury. As such, the Claimant's claim for compensation is denied and dismissed.

Remaining Issues

The Claimant failed to prove that his December 18, 2013 claim is compensable. Therefore, the remaining issues regarding medical benefits and temporary disability benefits are moot.

ORDER

It is, therefore, ordered that:

1. The Claimant has failed to sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury resulting from work activities on December 18, 2013.

2. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Issues raised for consideration were compensability of an August 16, 2014 right shoulder injury and if compensable entitlement to medical benefits including authorized provider and reasonably necessary care. Specifically, Claimant sought an Order requiring respondents to provide physical and massage therapy.

STIPULTION

The parties' stipulated that in the event of a finding of compensability, the authorized treating facility was Centura Centers for Occupational Medicine (CCOM). The parties stipulation regarding identity of the authorized provided is approved.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is employed as a registered nurse (RN) for Employer at their Belmont Lodge Health Care facility.

2. On August 16, 2014 Claimant was "called in" to work due to staff shortages. Upon her arrival at work, she assumed her normal duties of taking care of elderly patients residing in the facility. Claimant asserts that at around 7:00 PM, two hours after arriving, she was walking down a hallway in the facility when the plastic covering of an overhead light fixture fell and struck her on her right shoulder.

3. Claimant testified that she cried out "ouch" and felt immediate pain in her right shoulder area.

4. An unidentified patient, a co-worker (Barbara Miller), and the interim Director of Nursing for Employer (Janet Green) responded to the area of the incident. Ms. Green testified she was approximately fifteen to twenty feet away in another patient's room when she heard a "clang" in the hallway, like something had fallen.

5. Ms. Green testified that she did not see the actual incident. Instead, Ms. Green testified that as she backed out of the patient's room she was in to look into the hallway, she observed the broken light cover on the floor. According to Ms. Green, there were several 3-4 inch pieces of broken plastic on the floor and multiple smaller pieces in the vicinity. Ms. Green also testified that Claimant did not exclaim "ouch", i.e. Claimant did

not cry out from the hallway. Ms. Miller did not testify.

6. Claimant testified that Ms. Green instructed her to retrieve a broom and dustpan from the maintenance closet and clean the broken plastic from the floor. Claimant testified that she complied despite being in pain. Per Claimant's testimony, she used her left arm as it caused her pain to use her right arm.

7. Ms. Green challenges Claimant's recollection, testifying that she did not require Claimant to clean the mess up. Rather, Ms. Green testified that she observed a resident of the facility approach the area and begin to bend over to pick the broken plastic up from the floor. For safety reasons, Ms Green stopped the resident from attempting to clean up the broken cover after which she noticed that Claimant had already retrieved a broom and dust pan and was cleaning up the area using both arms without apparent pain.

8. Ms. Green testified that Claimant did not report that the light cover had struck her on the shoulder at the time and Claimant testified that she did not show Ms. Green any injury.

9. Claimant testified that she attempted to continue her duties over the next twenty minutes, but was unable secondary to pain. She reportedly returned to the nursing station and requested to Ms. Green that she be able to seek immediate medical treatment for her injured shoulder.

10. Ms. Green agreed that Claimant reported that the cover hit her on the shoulder approximately twenty minutes after the incident occurred. At that time, Ms Green testified that she took Claimant's report as a claim for an on the job injury and repeatedly told her to stop working. Specifically, Ms. Green testified that she told the Claimant to stop using her arms if she was claiming an injury to her shoulder. According to Ms. Green, Claimant refused to stop working during which time she observed Claimant reach out and over her head with both arms to retrieve files for charting without limitation or obvious pain.

11. Claimant testified that after she reported her injury, Ms. Green was exasperated and threw the on the job injury incident paperwork at her. According to Claimant, Ms. Green demanded that she complete it immediately or sign a refusal. Ms. Green disputes this, testifying instead that Claimant refused to stop working when instructed to do so. According to Ms. Green, she heard a visitor to the facility ask claimant if she was hit by the light cover and if so that she would be a witness for claimant. Ms. Green claimed to be out of eye-sight, but within earshot of the visitor's comment. Ms. Green testified that within seconds of this alleged interaction between the visitor and Claimant, Claimant came to her asking to make a report of injury and to seek medical treatment. According to Ms. Green's testimony the interaction between Claimant and this visitor put her "on alert" to a likely workers compensation situation.

12. After some confusion on where to report for treatment initially, Claimant reported

to the emergency room (ER) at St. Mary Corwin Medical Center where she was eventually evaluated by Dr. Sara Kruger-Johnson at 12:03 AM on August. Prior to her seeing Dr. Kruger-Johnson, Claimant was triaged by Kathleen Bujanda, RN who documented the following history of injury at 10:24 (2224) PM: "pt states she was ambulating down hallway at work and the covering of the overhead light fell striking her on the r. shoulder . . ."

13. At midnight (0000) Tabatha Wills, RN completed an initial emergency department (ED) Assessment which the undersigned ALJ finds included a visual inspection of the right shoulder after which RN Wills documented "redness noted to shoulder."

14. During her encounter with Claimant, Dr. Kruger-Johnson took a verbal history regarding the mechanism of injury which is documented in her report as: "was walking through a hallway at work when a light fixture fell from the ceiling striking her in the right shoulder." Dr. Kruger-Johnson also completed a physical examination (P.E.) of the extremities the results of which yielded the following documentation from Dr. Kruger-Johnson: "Patient has tenderness about the posterior joint line of the right shoulder. There is some mild erythema and tenderness to palpation over the a.c. joint. Patient has full range of motion with abduction and adduction with some discomfort with full arm extension and internal rotation."

15. On August 19, 2014, Claimant went to CCOM where she was evaluated by PA-C Steven Byrne at which time she complained of having a sore, aching shoulder which was made worse by lifting. PA Byrne assessed "contusion" of the right shoulder noting that the "objective findings are consistent with the history of a work-related etiology." PA Byrne prescribed Bio Freeze and Ibuprofen and imposed restrictions on Claimant's activities tightening a fifteen pound lifting limitation to ten pounds.

16. Claimant returned to CCOM on August 25, 2014 where she saw Dr. Paul Merchant. During this encounter, Claimant reported continued pain of 8/10 associated with decreased right arm range of motion (ROM). Physical examination revealed tenderness to palpation over the AC joint, along the infraspinatus and deltoid as well as limited right shoulder ROM. Dr. Merchant referred Claimant for four weeks of physical and massage therapy. He also modified Claimant's restrictions reducing her lifting capacity to five pounds. Working diagnosis remained contusion of the right shoulder.

17. Claimant was unable to immediately begin her physical or massage therapy due to scheduling issues, but she had scheduled an initial evaluation for September 3, 2015. On September 2, 2014, she again returned to CCOM with no change in diagnosis or treatment plan by Dr. Merchant. He recommended she remain in a sling.

18. On September 3, 2014, Claimant went for her initial evaluation at the Institute for Total Rehab in Pueblo, CO. The physical therapist noted she displayed signs and symptoms of a shoulder contusion. She was given a treatment schedule of two times per week for a minimum four weeks.

19. Claimant was unable to begin continue physical therapy and initiate massage therapy treatment or return to CCOM due to Respondents' decision to contest the claim.

20. At respondents' request, claimant was seen by Dr. Eric Ridings on November 17, 2014 for an Independent Medical Examination (IME). Respondents submitted Dr. Ridings report as evidence at hearing. Dr. Ridings did not testify. The ALJ has reviewed the report of Dr. Ridings submitted by Respondents at hearing and finds it incomplete. Although Respondents contend that the report provides that Dr. Ridings was of the opinion, assuming claimant was struck by the plastic light cover, she suffered a contusion injury which requires no additional treatment; the ALJ finds no such opinions are contained in the report submitted by Respondents given its incomplete nature. For purposes of this Order the ALJ accepts Respondents assertion that Dr. Ridings opined that Claimant's right shoulder contusion requires no additional treatment, including PT and massage therapy because "her marked (and likely self-limited) loss of range of motion at the right shoulder is inconsistent with being struck by a plastic light cover in the anterior shoulder, which [he] would not expect to have any effect on the movement of her arm given her essentially normal x-rays. The ALJ is not convinced, finding the contrary opinions and recommendations of Dr. Merchant more persuasive than those of Dr. Ridings.

21. Based upon the content of RN Bujanda, RN Wills and Dr. Kruger-Johnson's records, the ALJ finds that Claimant has consistently reported that the cover of the light fixture fell from the ceiling striking her on the right shoulder. Moreover, the ALJ finds the visual inspection of RN Wills and the physical examination of Dr. Kruger-Johnson to contain objective findings (redness and warmth) consistent with being struck on the shoulder by a falling object. The ALJ finds it more probable than not that Claimant's described mechanism of injury is the cause of her shoulder pain and limited ROM and that the care required for her shoulder condition is reasonably necessary to cure or relieve Claimant from the ongoing effects/symptoms caused by this injury. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that she suffered a compensable right shoulder injury entitling her to medical benefits, including physical and massage therapy as recommended by Dr. Merchant.

22. Claimant's testimony is credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the Employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. Here, there are some inconsistencies in the testimony of Claimant and Ms. Green. Nonetheless, the ALJ finds many of those inconsistencies immaterial to the threshold issue concerning compensability and resolves the remaining inconsistencies in favor of Claimant to find that her account of the injury and the events thereafter are credible and supported by the record evidence. Consequently, the ALJ concludes that Claimant's testimony concerning the cause of his alleged injury is reliable and persuasive.

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet <u>both</u> requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals,*

supra; Deterts v. Times Publ'g Co., 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that her symptoms occurred in the scope of employment. Rather, based Ms. Green's testimony and Respondents' assertion regarding the content of Dr. Ridings' report, the ALJ concludes that the question for determination is whether Claimant's injuries and consequently, her need for treatment arise out of her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between employment and the alleged injuries. Section 8-43-201, C.R.S. 2013.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). While it is true, under *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989), that an incident which merely elicits pain symptoms without a causal connection to industrial activities does not compel a finding that the claim is compensable, the totality of the persuasive evidence presented establishes that a light cover fell from its mooring onto Claimant's right shoulder while she was engaged in her routine duties as a nurse for Employer. As a consequence Claimant reported that she sustained an injury to her shoulder. As found, the persuasive evidence, including the visual inspection of RN Wills and the physical examination of Dr. Kruger-Johnson, hours after the asserted injury, supports Claimant's assertion. Consequently, the ALJ concludes that a logical causal connection between the Claimant's complaints and her work-related duties exists in this case. The claim is compensable.

Medical Benefits

G. Once a claimant has established a compensable work injury, the claimant is entitled to a general award of medical benefits and respondent's are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo. App.

1999). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

H. Based upon the medical records submitted, including the visual observations of RN Wills and the objective findings of Dr. Kruger-Johnson on physical examination, the ALJ credits the opinions/recommendations of Dr. Merchant to conclude that additional treatment in the form of physical and massage therapy is reasonable and necessary to cure and relieve Claimant of the ongoing effects of her compensable right shoulder injury.

ORDER

It is therefore ordered that:

1. Claimant's August 16, 2014 shoulder injury is deemed compensable and Respondents shall pay for all medical expenses to cure and relieve claimant from the effects the effects of this injury, including but not limited to, additional physical therapy and massage therapy as requested by Dr. Merchant.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 28, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

- The parties stipulated prior to the hearing that Western Medical Associates and Work Partners are designated providers for claimant's work injury.

- The issue of whether claimant failed to timely report his injury in writing to employer was held in abeyance by the parties at the hearing.

FINDINGS OF FACT

1. Claimant was employed with employer as a manager. Claimant testified that on May 22, 2014 he was working on getting the swamp coolers for employer functioning and took an extension ladder and set it up along the building to access the swamp coolers. While working on the ground next to a large overhead door, the wind blew the extension ladder over and the extension ladder struck claimant on the back.

2. Claimant presented the testimony of Mr. Halmark at the hearing. Mr. Halmark was a customer of employer and witnessed the ladder get blown over and strike claimant. Mr. Halmark testified he went over to claimant after he was struck by the ladder and lifted his shirt where he saw substantial red marks and abrasions on claimant's back.

3. Claimant testified he experienced muscle soreness but didn't think he would need medical care initially. Claimant testified he didn't seek medical treatment until June 27, 2014 when he sought treatment with Western Medical Associates and was treated by Ms. Saunders, a nurse practitioner. Claimant reported to Ms. Saunders that he had pain between his shoulder blades and spine on his left side for the previous

2 weeks. Ms. Saunders recommended trigger point injections into the medial side of the scapulis along the 5th to 6th rib.

4. Claimant testified at hearing that he told Ms. Saunders that he was hit by a ladder at work but told her he didn't want to file a workers' compensation claim.

5. Claimant was seen by Dr. Moore on July 6, 2014 on referral from Ms. Saunders. Dr. Moore noted claimant reported he had no obvious injury. Dr. Moore performed manipulations.

6. Claimant was evaluated by Ms. Twardowski, a nurse on July 15, 2014 with complaints of left shoulder pain that he reported felt like a sapasm with severe pains. Claimant reported to Ms. Twardowski that he had left shoulder pain for the last month. Claimant reported that he had a ladder fall on him 1 ½ months ago, but there was no pain at that time. Claimant reported he felt like hi shoulder is cramped and at time he has sharp and stabbing pain. Examination revealed cervical and thoracic motion was restricted. Claimant was provided a prescription for Celebrex.

7. Claimant was examined by Dr. Twardowksi (not to be confused with nurse Twardowski) on August 5, 2014. Dr. Twardowski reported that claimant had left shoulder pain down the back of his arm to his 5th finger, but noted his neck and back pain felt much better. Dr. Twardowski also noted claimant had tenderness at the left first rib and left 4th rib laterally with motion restricted in his cervical and upper thoracic spine. Claimant was diagnosed with neck pain with some radiculopathy and cervicalgia.

8. Claimant was referred for physical therapy and was evaluated by Mr. Olsson with Olsson Physical Therapy on August 13, 2014. Claimant reported to Mr. Olsson that he had been having problems since the beginning of June and didn't know how it started, but did have a ladder fall on his back. Claimant reported intiiatlly he didn't have any problems after the ladder fell on him, but some time after that he started having pain in his left shoulder blade and rib cage area. Claimant reported that the pain was consistent but fluctuated in intensity. Claimant was diagnosed with a left intercostal and rhomboid strain.

9. Claimant eventually reported his injury to employer in writing as a workers' compensation claim on or about August 14, 2014 by filling out a workers' claim for compensation. Claimant testified he spoke to the controller for employer approximately one week before he filled out the form and reported the injury verbally. Claimant was referred to Dr. Winnefeld with Western Medical Associates for treatment.

10. Claimant was evaluated by Dr. Winnefeld on August 14, 2014. Claimant reported to Dr. Winnefeld that he had pain in his shoulder that began after a ladder at

work hit him on the back. Dr. Winnefeld provided claimant with work restrictions of no lifting over 20 pounds. Claimant returned to Mr. Olsson on August 18, 2014. Claimant reported to Mr. Olsson that he had been on prednisone and it had made a big change with less pain than he had experienced in the previous 2 months.

11. Claimant testified he was referred by Dr. Winnefeld to the emergency room ("ER") at some point due to complaints of severe chest pain. Claimant testified he underwent tests in the ER and had asked that insurer pay for the ER visit related to his severe chest pain. The records from this ER visit were not entered into evidence and the ALJ determines that respondents are not responsible for the cost of the ER visit.

12. Claimant was eventually referred for a magnetic resonance image ("MRI") of the left shoulder by Dr. Winnefeld on August 25, 2014. The MRI was essentially normal with only some minor spurring inferiorly from the tip of the acromion being noted. Claimant had a falling out with Dr. Winnefeld after the MRI and his care was transferred to Dr. Heil.

13. Claimant was examined by Dr. Heil on September 5, 2014 as a referral from Dr. Winnefeld. Claimant reported to Dr. Heil the incident of being struck by the ladder and the development of pain. Dr. Heil noted that he believed claimant likely injured his neck when he was hit in the back by the ladder. Dr. Heil noted that claimant had reported pain down the back of his arm, which could be related to a problem with the C8 nerve root. Dr. Heil performed x-rays of the cervical spine and recommended claimant undergo an MRI of the cervical spine.

14. Claimant continued to treat with various providers and was evaluated by Dr. Gustafson with Work Partners on September 25, 2014. Dr. Gustafson noted claimant's accident history of being struck by a ladder in May 2014 and had undergone a course of care since that time that included chiropractic care, acupuncture, massage, x-rays, EKG, MRI of the left shoulder without finding a cause of his pain. Dr. Gustafson noted tenderness present with palpation over rhomboids on the left side along border of scapula. Claimant reported pain with side bending of his neck to the left. Dr. Gustafson noted that no specific cause was known for claimant's pain. Dr. Gustafson also noted that there were signs of radiculopathy of the left upper extremity and recommended an electromyelogram ("EMG").

15. Claimant testified his symptoms were resolving in October 2014, but never fully abated. Claimant testified in January 2015 he contacted insurer regarding getting additional treatment. Claimant also testified he woke up in January 2015 and his hand was numb.

16. Claimant was evaluated by Dr. Richard Price on February 2, 2015. Claimant continued to complain of pain in his shoulder blade region that radiates down the ulnar aspect of the arm with numbness into the 4th and 5th digits with weakness. Dr. Price noted claimant had a significant prior injury to the left wrist and elbow with a partial left wrist fusion. Dr. Price diagnosed claimant with cervical radiculopathy and neck pain of unknown etiology. Dr. Price noted claimant's symptoms seemed to be associated with the C8 nerve root. Dr. Price recommended a cervical MRI and an EMG.

17. Claimant eventually underwent the cervical MRI on February 20, 2015. The cervical MRI revealed multilevel central canal narrowing, greatest at C3-4 and C4-5 along with degenerative retrolisthesis of C6-7 and anterolisthesis of C7-T1 with broad based disc bulges noted at multiple levels.

18. Claimant also underwent an EMG with Dr. Frazho. Dr. Frazho noted on March 5, 2015 that the EMG was abnormal with left likely C8 and possibly some component of C7 radiculopathy. Dr. Frazho recommended a referral to Dr. Clifford or Dr. Gebhard to discuss possible surgical options.

19. Respondents arranged for claimant to undergo an independent medical examination ("IME") with Dr. Lindberg on April 7, 2015. Dr. Lindberg obtained a medical history from claimant, reviewed claimant's medical records and performed a physical examination in connection with his IME. Dr. Lindberg issued a report dated April 7, 2015 that noted claimant's lack of medical treatment between his date of injury (May 22, 2014) and his first medical treatment with a chiropractor in mid June. Dr. Lindberg noted that claimant reported he never had neck pain following the incident and does not have neck pain now. Dr. Lindberg opined in his report that claimant has severe cervical diseases and had a posterior chest wall contusion form the falling ladder. Dr. Lindberg noted that claimant's medical records were silent on the issue of the falling ladder when he first started seeking medical treatment. Dr. Lindberg noted claimant was not complaining of neck pain, and therefore, he disagreed with Dr. Heil's hypothesis that claimant maybe injured his neck when he got hit by the ladder. Dr. Lindberg noted that claimant's pain in his chest wall went away in September 2014, only to return in October 2014 that started another workup. Dr. Lindberg opined that the posterior chest wall contusion (that was mislabeled as a shoulder contusion) had no effect on claimant's cervical spine and resolved. Dr. Lindberg opined that the severe degenerative changes in claimant's cervical spine had no relationship to the alleged ladder contusion. Dr. Lindberg opined that any further care to claimant's left arm, neck or shoulder would be unrelated to the May 22, 2014 work injury.

20. Dr. Lindberg testified at hearing consistent with his report. Dr. Lindberg noted that he did not question claimant having an injury when the ladder fell on him, as the accident was witnessed, but opined that the degenerative changes shown on the

MRI were not related to the incident in which the ladder fell on claimant. Dr. Lindberg testified that if the incident with the ladder had caused an injury to the cervical spine, he would expect claimant to have complained of neck pain following the incident.

21. The ALJ notes that respondents at hearing conceded that with the witness testimony provided at hearing and the testimony of Dr. Lindberg, they were not contesting necessarily that there was a compensable injury when claimant was struck by the ladder, but instead whether the current need for medical treatment, including the cervical MRI and surgical consultation referral to Dr. Clifford or Dr. Gebhard was related to the work injury.

22. The ALJ notes that Dr. Heil was indicating that claimant's injury could involve the C8 nerve root and recommending an MRI of the cervical spine in September 2014, fairly early on in claimant's treatment from his May 22, 2014 injury. The ALJ further notes that Dr. Lindberg opined that claimant's injury was originally mislabeled as a shoulder injury, which may have helped develop the confusion involving his initial treatment for this injury (along with claimant's admitted misstep in not wanting to report his injury as a workers' compensation claim, and providing an inaccurate accident history to his initial providers by telling them he didn't want this injury to be treated as a workers' compensation claim).

23. The credits the reports from Dr. Heil as more credible and persuasive than the contrary opinions expressed by Dr. Lindberg in his report and testimony and finds that claimant has demonstrated that it is more probable than not that the cervical MRI and referral for surgical consultation are reasonable medical treatment necessary to cure and relieve claimant from the effects of the May 22, 2014 injury. The ALJ notes that claimant's diagnosis of having his injury involve a radicular component related to the C8 nerve root was addressed early on in claimant's treatment with Dr. Heil. This evidence is persuasive to the ALJ that the incident with the ladder falling on claimant on May 22, 2014 aggravated, accelerated or combined with claimant's pre-existing condition to cause the need for medical treatment recommended by Dr. Heil in September 2014 and confirmed by Dr. Price and Dr. Frazho in February 2015.

24. Based on the foregoing, the ALJ determines that claimant has demonstrated that it is more likely than not that the recommended medical treatment is related to his compensable May 22, 2014 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he was struck by the ladder.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the claimant has proven by a preponderance of the evidence that the MRI performed in February 20, 2015 and the referral from Dr. Frazho to Dr.

Gebhard or Dr. Clifford for surgical consultation represent reasonable medical treatment that is necessary to cure and relieve the claimant from the effects of the industrial injury.

ORDER

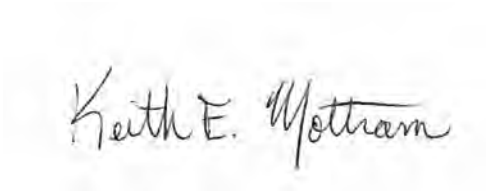
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury, including but not limited to the treatment provided by the physicians authorized to treat claimant for his work injury, and the cervical MRI performed on February 20, 2015.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 30, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C.No. 4-961-975-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondent(s)

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ) on June 18, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Claimant's Exhibits 1-14 were admitted into evidence without objection. Respondents' Exhibits A – C where admitted into evidence without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: The Claimant's opening brief was filed, electronically, on June 23, 2015. The Respondent's answer brief was filed on June 25, 2015. The Claimant's reply brief was filed on June 27, 2015, at which time the matter was deemed submitted for decision. The ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision are whether Claimant sustained compensable injuries, arising out of and in the course of his employment with the Employer, on September 6, 2014; and, if so, medical and disfigurement benefits and temporary total disability benefits from September 6, 2014 and continuing.

FINDINGS OF FACT

Based upon the evidence presented at hearing and by depositions, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds as fact, that the Claimant's average weekly wage (AWW) was $320 per week.

2. The Claimant worked for the Employer, a temporary staffing agency, on the date of his alleged injuries.

3. At all times relevant to this case, the Claimant was assigned by his Employer to work as a materials handler for Communications Test Design, Inc., (hereinafter "CTDI"). CTDI processes and packages cable infrastructure at a warehouse facility in the Denver area.

4. While assigned to CTDI, the Claimant worked full-time (40-hours per week), Monday through Friday, with his shift usually beginning at 6:00 AM and ending at 2:30 PM. Upon CTDI's request, the Claimant worked on Saturday. The Claimant worked a Saturday shift on two separate occasions while assigned to CTDI, with the second of those two Saturdays being the date of Claimant's automobile accident and alleged injury.

The On-Premises Lunchroom

5. CTDI permitted workers, including the Claimant, to take a thirty minute lunch break during each shift. While on lunch break, the Claimant was not responsible for clocking in and out when going to and returning from lunch. Rather, thirty minutes of pay was deducted from the Claimant's wages for each shift to reflect the unpaid nature of the lunch break.

6. CTDI provides a lunchroom or break area on the premises for employees. The lunchroom is located inside of CTDI's warehouse, and it is separated from the warehouse floor by a set of doors that open and close. The lunchroom consists of tables and chairs, two refrigerators, two microwaves, and an assortment of vending machines. Employees may store their lunches in the refrigerators provided in CTDI's lunchroom. While on shorter breaks or lunch break, employees can retrieve, warm/prepare, and enjoy their meals in the lunchroom. In addition to bringing their own lunches, employees

may purchase small foodstuffs from the vending machines provided inside of CTDI's lunchroom. The vending machines contain items such as sandwiches and beverages for purchase. CTDI's lunchroom is open and accessible to employees on workdays, which are generally Monday through Friday, but includes Saturday if employees work those days. The lunchroom is for the mutual benefit of the Employer and employees.

7. According to the Employer's witnesses, CTDI's lunchroom is never locked. It is always accessible to employees while working, even on Saturdays. As testified to by all of Respondent's witnesses (Paul Kelly, Salvador Lopez Cuevas, Anthony Folks, and Maurice Edgerton), the lunchroom's doors have no locking mechanisms and are incapable of being locked.

8. In addition to offering a lunchroom, CTDI also permits a food truck to park on company property. This food truck provides hot meals for purchase to employees during lunch breaks. The food truck parks on the premises from Monday through Friday, and is not present on the Saturdays when employees work.

9. The Claimant usually purchased lunch items from the CTDI's lunchroom vending machines or from the food truck, usually eating in the lunchroom.

The Alleged Work-Related Incident

10. According to the Claimant and Christopher Rangel, a co-worker, on September 6, 2014, a Saturday, the Claimant and Rangel, took a 15-minute break. While on break, the pair went to CTDI's lunchroom because Rangel wanted to purchase an energy drink from a vending machine inside and the Claimant wanted to use the restroom located nearby. According to the Claimant and Rangel, Rangel attempted unsuccessfully to open the doors to the lunchroom. Believing that the doors to CTDI's lunchroom were locked, the Claimant and Rangel exited the warehouse to take a smoke break outside. While outdoors and smoking the duo discovered that the food truck was not on the premises that day either.

The Injury Incident

11. The Claimant allegedly believing that CTDI's lunchroom was inaccessible, and observing that the food truck was absent, chose to leave the jobsite to purchase lunch. The Claimant and several co-workers (Roberto Castillo, Paul Littlejohn, and Christopher Rangel) drove to a nearby Wendy's restaurant. The Claimant rode in the front passenger seat. During the drive to Wendy's, the Claimant and his co-workers were involved in a motor vehicle collision (MVA). Roberto Castillo, the driver, ran a red light and his vehicle was T-boned in an intersection by another automobile. The vehicle rolled several times, and ejected the Claimant onto the pavement. He was transported by ambulance to Denver Health Medical Center, where he was admitted to the Intensive Care Unit.

12. The Respondents' witnesses presented and testified more credibly than the Claimant and Rangel. The Respondents' witnesses had less interest in the outcome than the Claimant and Rangel. Indeed, to accept the Claimant's version of events, the ALJ would be required to find an unusual anomaly, without supporting evidence, that the lunchroom was mysteriously inaccessible on the day in question when there were no locking mechanisms according to all of the Respondents' witnesses. The Claimant's and Rangel's version of events makes no sense unless one would accept a "grand conspiracy theory" to lie on the part of all of the Respondents' witnesses. To do so, without any evidentiary basis, would be arbitrary and capricious on the part of the ALJ. Between conflicting sets of evidence, the ALJ makes a rational choice to accept the credible testimony of the Respondents witnesses, and to reject the ultimate testimony of the Claimant that the lunchroom was inaccessible on the Saturday in question. Indeed, the preponderance of evidence supports the proposition that the lunchroom was incapable of being locked and inaccessible on the Saturday in question. The testimony of Respondents' witnesses was more persuasive and credible than the testimony of the Claimant and Rangel because the Respondents' witnesses, among other things, were more familiar with CTDI's warehouse facility, its lunchroom, and the company's procedures relating to work scheduling as well as the availability of resources. Indeed, the temporary job service was the Claimant's employer and not CTDI, which had no monetary interest in the outcome of the Claimant's workers' compensation claim.

Medical

13. As a result of the collision, the Claimant suffered serious and significant injuries to his head, back, right elbow, arms, and hands. Specifically, his injuries included: "(1) right orbital fracture; (2) right frontal hemorrhagic contusion; (3) right subdural hematoma; (4) occipital degloving; (5) right eyebrow/forehead lacerations; (6) right optic neuropathy; and (7) right open elbow fracture." (Claimant's Exhibit 2, Pages 2-6).

14. The Claimant remained unconscious in the Intensive Care Unit at Denver Health Medical Center from September 6 - 10, 2014. During that span, on September 7, 2014, the Claimant underwent emergency surgery to repair his various injuries.

15. On September 11, 2014, the Claimant was discharged from Denver Health Medical Center. Since that time until the present, the Claimant has visited several doctors and other medical specialists who are assisting him in recuperating from his injuries. Claimant is diligently working towards his recuperative goals.

16. The Claimant suffers lingering impairments as a result of the September 6, 2014 collision. As assess by Susan E. Ladley-O'Brien, M.D., on December 11, 2014, the Claimant endured "a traumatic brain injury with residual cognitive difficulties, headache, fatigue, irritability, loss of vision in the right eye due to optic nerve trauma,

right shoulder bicipital tendinitis, and healing right elbow arthrotomy" (Claimant's Exhibit 9, p. 73).

Ultimate Findings

17. The Respondents' witnesses presented and testified more credibly than the Claimant and Rangel for the reasons specified in paragraph 12 herein above. The Respondents' witnesses had less interest in the outcome than the Claimant and Rangel. Their testimony was more consistent with reason and common sense. The Claimant and Rangel's version that the lunchroom was inaccessible on the Saturday in question is without any visible means of support. Between conflicting sets of evidence, the ALJ makes a rational choice to accept the credible testimony of the Respondents witnesses, and to reject the ultimate testimony of the Claimant that the lunchroom was inaccessible on the Saturday in question.

18. The Claimant has failed to prove, by a preponderance of the evidence, that he sustained an industrial accident resulting in multiple injuries to his body including, but not limited to, his head, back, right elbow, arms, and hands. His medical injuries are therefore not compensable in contemplation of law because he was outside the course and scope of employment, on his way to or from and off-premises lunch break, when the on-premises lunchroom was accessible. Consequently, the Claimant was not in the course and scope of his employment and the resultant injuries and disfigurement suffered as a result of the September 6, 2014 car collision are not work-related.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*. 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned

evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*. 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. See *Prudential Ins. Co. V. Cline*, 98 Colo. 275, 57 P.2d 1205 (1930); CJI, Civil, 3:16 (2005). As found, the Respondents witnesses were more credible than the Claimant and Rangel for the reasons specified in paragraph 12 herein above. As further found the testimony of Respondent's witnesses were more persuasive and credible than the testimony of Claimant's witness because, among other things, the Respondents' witnesses were more familiar with CTDI's warehouse facility, its lunchroom, and the company's procedures relating to work scheduling as well as the availability of resources, critical facts concerning the accessibility of the lunchroom on the Saturday in question.

Substantial Evidence

b. As found, between conflicting sets of evidence, the ALJ made a rational choice to accept the credible testimony of the Respondents' witnesses and to reject the testimony of the Claimant and Rangel. Beyond the testimony, Claimant tendered no substantial evidence to substantiate his assertion that CTDI's lunchroom was locked. If the Claimant offered any persuasive evidence that doors were capable of being locked, his assertion that the doors were locked on a particular day could become more probable and plausible. Lacking such evidence, the ALJ is left to decide the case based on Claimant's and Respondents' conflicting in court testimony, which weighs in favor of the doors being incapable of being locked, thus, making the lunchroom on CDTI's premises accessible on the Saturday in question.

Course and Scope of Employment

c. Off-remises lunchtime travel generally falls within the "to and from work" rule and is not compensable because the claimant was free to do what he wanted at lunchtime. *Perry v. Crawford & Co.,* 677 P.2d 416 (Colo. App. 1983). In *Perry,* the claimant went to lunch at a nearby restaurant and was struck by a car on the trip back to the employer's premises. The court determined that the absence of lunch facilities at work was not a sufficient nexus to the employment to make the claimant's injury compensable. As found, the Claimant's injuries resulting from the auto accident occurred during the drive to Wendy's when the Claimant and his co-workers were involved in a motor vehicle collision (MVA). Roberto Castillo, the driver, ran a red light and his vehicle was T-boned in an intersection by another automobile. The vehicle rolled several times, and ejected the Claimant onto the pavement. As found, the accident occurred "to and from work" to get lunch at Wendy's.

d. A narrow exception to the "to and from" rule was articulated In *City & County of Denver School Dist. No. 1 v. Indus. Comm'n*, 196 Colo. 131, 131, 581 P.2d 1162, 1162 (1978), the Supreme Court of Colorado held that an automobile accident in which school board employees were injured occurred within the scope of the employees' employment, and that the injuries were therefore subject to workers' compensation. In that case, the accident happened when the employees were driving to lunch on a day on which they were later required to be at school for a teachers' meeting. Normally, the teachers had the option of going off the school premises for lunch or eating at the school cafeteria. On the day of the accident, the school cafeteria was closed. The claimants and some of their co-employees decided to drive to a restaurant for lunch. During the trip to the restaurant, the claimants were injured. *Id*. at 132. Applying the totality of the circumstances test, the Court held that there was sufficient evidence in the record to support the finding of the Industrial Commission that claimants were acting within the scope of their employment when injured. *Id*. at 133. As found, the Claimant's testimony that the lunchroom was inaccessible on the Saturday in question was not credible and it made no sense in the context of the totality of the evidence. Indeed, the preponderance of evidence supports the proposition that the lunchroom was incapable of being locked and inaccessible on the Saturday in question. The testimony of Respondents' witnesses was more persuasive and credible than the testimony of the Claimant and Rangel because the Respondents' witnesses, among other things, were more familiar with CTDI's warehouse facility, its lunchroom, and the company's procedures relating to work scheduling as well as the availability of resources. Consequently, the lunch room at CDTI was accessible and available on the day in question, and the Claimant and his co-workers chose to go off the premises to have lunch, thus, the auto accident does **not** fall under the narrow exception enunciated in *City & County of Denver School Dist. No. 1 v. Indus. Comm'n, supra.* The Claimant's injuries resulting from the auto accident, as found, occurred when the Claimant was outside the course and scope of his employment because he was "coming from" work to have lunch at Wendy's.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits §§ 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 884 (Colo. App. 2000)*; Lutz v. Indus. Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000). *Kieckhafter v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). *People v. M.S.*, 104 P. 3d 273 (Colo. App. 200); *Hoster v. Weld County Bi-Products, Inc*. W.C. No.: 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. Also

see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). Preponderance: means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden on the designated issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this _____ day of July 2015.

_____

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2) C.R.S. (As amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.coloado.gov/dpa/oac/forms-WC.htm.

CERTIFICATE OF MAILING

I hereby certify that on I have sent true and correct copies of the foregoing Full Findings of Fact, Conclusions of Law and Order on this _____ day of _____ 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

The following issues were raised for consideration at hearing:

1. Did Claimant prove that he sustained a compensable injury within the course and scope of his employment with Employer?

2. If claimant sustained a compensable injury, did he prove by a preponderance of evidence that the ongoing medical treatment and, specifically, the request for a total hip replacement, is reasonable, necessary and causally related to the work injury?

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant works for Employer as a store manager and had done so for three and a half years.

2. Claimant's duties include all aspects of operating the store. He is required to do paperwork, unloading of inventory, stocking, and inside and outside sales. The inventory that the store receives arrives in large plastic totes. They are supposed to weigh no more than 60 lbs but frequently the totes exceed this weight.

3. On April 8, 2014, Claimant was lifting an overweight tote and he felt a pop in the front of his right hip. Claimant dropped the tote and felt pain in his hip which was constant.

4. Claimant reported the injury to his supervisor, Martin Royer. Mr. Royer instructed Claimant to fill out an accident report, and to report the injury to the risk management and human resources departments. Claimant was directed to go to one of two clinics.

5. Claimant chose HealthOne from the list and went to that clinic where he was treated by Dr. Jeffrey Hawke.

6. Dr. Hawke diagnosed Claimant as having a strain of the right hip and ordered an x-ray. In his April 9, 2014, report, Dr. Hawke stated that the hip injury was work related. Claimant received physical therapy from HealthOne but this did not lessen the pain. After that, Dr. Hawke recommended an MRI of the hip.

7. Claimant had two MRIs. One MRI was without contrast and it did not show any injury to the hip. Dr. Hawke then ordered a MRI with contrast and it showed a labral tear. Dr. Hawke then sent Claimant to Cornerstone Orthopedic where he was seen by Dr. Thomas Mann and Dr. Thomas Eichmann. X-rays were taken which showed mild osteoarthritis in both hips and a labral tear in the right hip. A total hip replacement was recommended.

8. Insurer denied liability for the injury and denied authorization for the hip replacement. Claimant went forward with the surgery and it was paid for by his medical insurance carrier. The surgery occurred on December 15, 2014. Claimant missed five weeks from work as the result of the surgery.

9. Claimant did not have problems with either hip prior to lifting the tote at work. His hobbies have included golfing and hiking and he was able to do all of his activities at work and outside of work without hip problem prior to April 8, 2014.

10. Claimant testified that his symptoms were much better following the surgery and that he continues to improve.

11. Dr. Mann is quoted in Dr. Samuel Chan's November 6, 2014, report as saying that there were degenerative changes in the hip that were exacerbated by the work injury and that the patient may need to have a total hip arthroplasty.

12. Dr. Brooks Conforti provided treatment for Claimant. She stated in her June 18, 2014, report that the patient sustained a strain affecting the muscles of the hip and also the lumbopelvic juncture. She reiterates that Claimant suffered an on-the-job injury to his hip in her June 25, 2014, report. She treated Claimant with osteopathic manipulation and trigger point injections. While seeing Dr. Conforti, Claimant reported slipping on a ladder at work and having pain in his back as a result.

13. Dr. Mann stated in his October 21, 2014, report that Claimant had a labral tear and underlying hip arthritis. He stated that the injury "progressed the labral tear," but that the benefits of an arthroscopy would be short-lived due to the underlying arthritis. Regarding causation, he said it is "multifactorial with the aggravating work injury contributing and possibly progressing the underlying arthritis."

14. Dr. Bisgard performed an independent medical examination at the request of Claimant. She is board certified in occupational medicine and Level II accredited. Part of her education in occupational medicine included training in determining causation of an injury. She has also taught classes on causality analysis. Dr. Bisgard stated that she obtained a history from Claimant which was consistent with the history given to his medical providers.

15. Dr. Bisgard testified that the original MRI of Claimant's hip did not show a labral tear because it was not done with contrast. However, the tear was identified on a

repeat MRI which was done with contrast. She also stated that the x-ray showed that Claimant had arthritis in both of his hips. The fact that there was arthritis in both hips was significant to Dr. Bisgard because only the hip that was injured at work was symptomatic. The left hip remained asymptomatic. She stated that the injury to the right hip likely caused the labral tear and caused a cascade of pain from the labral tear that caused the arthritis to become symptomatic. Dr. Bisgard testified that when the labrum tears there is a reaction causing inflammatory cells to come in which starts a pain pathway. This is enough to cause arthritis to flare and precipitate more pain and inflammation. She said that many people have arthritis from which they suffer no symptoms until there is a trauma.

16. Dr. Bisgard credibly opined that, in Claimant's case, it was the lifting of the heavy tote, combined with lifting and twisting that caused the injury to Claimant's hip and caused the arthritis to become symptomatic. Dr. Bisgard stated that there was no record of Claimant having any right hip symptoms prior to the injury at work.

17. In determining causation, Dr. Bisgard stated that she diagnosed degenerative joint disease and a labral tear. She then looked at the onset of symptoms as it correlated with the diagnosis and to see if the described mechanism could have caused the injury. She credibly opined that it was more than 50% likely that the symptoms were related to the work injury. She stated that it was unlikely that Claimant's preexisting arthritis happened to become symptomatic independent of the injury but at the exact same time as the injury. She cited the *Medical Treatment Guidelines* (Exhibit 20.) which state that "The provider must establish a change in the patient's baseline condition and a relationship to work activities including but not limited to repetitive heavy lifting or specific injury to the hip." Dr. Bisgard opined that Claimant's injury fits within these guidelines as Claimant had a baseline condition of no pain or symptoms and then, as a result of a specific injury, his preexisting osteoarthritis became symptomatic.

18. With regard to the labral tear, Dr. Bisgard credibly opined that if the symptoms were only from the labral tear, the treatment would be to simply repair the tear, but with the underlying arthritis, now symptomatic from the injury, the best course would be to replace the hip. It was her opinion that without the incident of April 8, 2014, Claimant would probably not have needed the hip replacement. She also stated that Claimant had a very good outcome from the surgery and was back to work soon thereafter.

19. On cross examination, Dr. Bisgard confirmed that the radiologist said the labral tear was chronic, but the doctor opined that it was unclear what he meant by chronic since the MRI was taken six months after the injury. According to the doctor, it was uncertain if the radiologist meant that it was of 6 months duration or longer than that. She stated that there was no other explanation why Claimant would suddenly develop pain in his hip that never went away immediately following the episode at work, other than her conclusion that the incident caused the preexisting condition to become symptomatic and require treatment.

20. Dr. Bisgard was questioned about Dr. Conforti statement in her July 28, 2014, report that Claimant reached baseline from his slip at work. Dr. Bisgard said that Dr. Conforti was talking about Claimant's back which was injured when he slipped coming down a ladder at work. This occurred after the August 8, 2014, lifting incident. Dr. Bisgard concluded that the baseline that Dr. Conforti was referring to was Claimant's condition before the slip and not before the lifting incident, as there was no slip during the lifting incident.

21. Dr. Bisgard was directed to a sentence in the *AMA* guides that refers to other causative factors to consider in order to determine if a previous trauma was the cause of the arthritis. Dr. Bisgard credibly opined that the section is clearly speaking of arthritis being caused by trauma and not preexisting arthritis becoming symptomatic due to trauma.

22. The fact that the left hip also shows an arthritic condition was significant to Dr. Bisgard because she could do a side-by-side comparison and observe that both hips have the same condition but there were no symptoms in the left hip and there was pain in the right hip. She stated that the variable was the injury to the right hip while working for the Employer.

23. Dr. Bisgard opined credibly that she frequently sees pre-existing asymptomatic arthritis become symptomatic with trauma and that this is what occurred in Claimant's case.

24. Dr. Wallace Larson testified as an expert witness on behalf of the Respondents. He is board certified as an orthopedic surgeon. He performed an independent medical examination at the request of the Respondents.

25. Dr. Larson testified that according to the radiologist report, the labral tear was complex involving multiple tears. He opined that this meant the labral tears were degenerative in nature and caused by a deformity in the femoral head which tore at the labrum over time. He stated that complex tears are chronic in nature. He opined the mechanism of injury would not cause trauma to the hip joint and the arthritis was not caused by the lifting. He opined the total hip replacement was not work related.

26. Dr. Larson opined that Claimant's work-related injury was a muscle strain, and that he would have certainly recovered from a muscle strain. However, he was unable to explain why the pain had not gone away until after the surgery.

27. The ALJ credits Dr. Bisgard testimony as being more persuasive on the issue of the cause of Claimant's preexisting and previously asymptomatic right hip osteoarthritis becoming symptomatic. It is found that, while Claimant has arthritic conditions in both hips, the cause of the right hip becoming painful and requiring surgery was the injury which occurred at work on August 8, 2014. It is also found that the total hip replacement surgery was performed by an authorized treating

physician and that it was reasonable and necessary to cure and relieve the effects of Claimant's work-related injuries.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals O*ffice, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

4. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo.

210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

5. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicor*y, 805 P.2d 1167 (Colo.App. 1990). In this case, the totality of the evidence supports a conclusion that claimant suffered from a latent pre-existing osteoarthritis in the right hip which manifested after the Claimant lifted an overweight tote at work and felt a pop in his hip. Such injuries are compensable. *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989); *Seifried v. Industrial Commissi*on, 736 P.2d 1262 (Colo.App. 1986). As found, Claimant has proven by a preponderance of the evidence that he suffered a compensable aggravation of a pre-existing condition when he lifted the tote at work. This aggravation made the hip replacement necessary. All of the credible and persuasive evidence supports that the arthritis in the Claimant's hip was asymptomatic up until the lifting episode and then became symptomatic immediately thereafter.

ORDER

It is therefore ordered that:

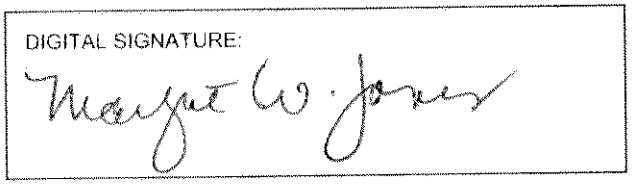
1. Claimant's April 8, 2014, hip injury, including the aggravation of his preexisting right hip arthritis, is compensable.

2. Respondents are liable for reasonably necessary and related medical treatment of the hip injury, including the total hip replacement.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: ___July 23, 2015_____



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

I. The issues addressed in this decision involve Claimant's entitlement to disfigurement benefits and maintenance medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On May 29, 2014, Claimant sustained an admitted injury to his left elbow while employed as a recruit for the Colorado Springs Police Department. During combat training the weight of Claimant's training partner came down on his outstretched arm dislocating his left elbow.

2. Claimant was taken to the emergency room at Memorial Hospital where his elbow was reduced and splinted. Claimant subsequently sought and received medical treatment through the designated treating provider, the City Occupational Health Clinic under the direction of Dr. Miguel Castrejon and Nurse Practioner (NP) Paulette Miksch. As noted, Claimant's elbow was splinted. He was also provided Meloxicam and Norco for pain. Through the authorized chain of referrals, Claimant also received medical treatment from orthopedic specialist Dr. Christopher Jones.

3. Dr. Jones first evaluated claimant on June 6, 2014 and determined at that time that he would treat Claimant non-operatively. Dr. Jones placed Claimant into a hinged elbow brace which blocked his elbow extension at approximately 30 degrees. Claimant was scheduled for follow-up in two weeks at which time Dr. Jones anticipated increasing claimant's extension to a negative 15 degrees. Overall, Dr. Jones anticipated six weeks of splinting.

4. Claimant returned to Dr. Jones on June 23, 2014. Dr. Jones noted that Claimant was doing well with improvement in his pain, although he continued to have a "little neurapraxic pain . . . relative to the superficial radial nerve." Claimant's splinting was adjusted to a negative twenty degree extension block and he was instructed to return to the clinic in two weeks.

5. While receiving treatment from Dr. Jones, Claimant concurrently continued treatment with Dr. Castrejon and NP Miksch.

6. On June 27, 2014, NP Miksch documented that Claimant "may stop Meloxicam and start Ibuprofen 800 mg tid with food" and continue "Norco if needed." Ambien was added to Claimant's medications as he was having difficulty sleeping.

7. By July 28, 2014, due to good progress, Dr. Jones directed Claimant to return to activities as tolerated and permitted Claimant to discontinue use of the hinged brace when he was not participating in physical activity. Dr. Jones intended to "protect" Claimant in this fashion for an additional six weeks after which he would re-evaluate for potential full-release from care.

8. On August 20, 2014, Paulette Miksch documented that Claimant was permitted to judge his own physical restrictions, noting that he experienced a pain level of 1 on a scale of 10 while at rest and upwards of 6/10 with activities. Left elbow range of motion (ROM) was measured at 0-120 degrees and right elbow ROM was measured at 0-140 degrees. Left pronation and supination was painful and mildly limited. Although an MRI, which demonstrated a rupture of the lateral ulnar collateral ligament (LUCL) had been obtained by the date of this visit, Dr. Jones continued to recommend PT and strengthening as surgery was not indicated and "often" resulted in negative outcomes for injuries such as Claimant's.

9. During his August 20, 2014 appointment with NP Miksch, Claimant completed a PATIENT FOLLOW-UP VISIT questionnaire in which Claimant documented that he was currently taking Ibuprofen among other medications. Consequently, while NP Miksch ceases references regarding the need for Ibuprofen and Norco in her notes after July 11, the ALJ finds that Claimant probably continued to take Ibuprofen through his August 20 appointment with NP Miksch as documented in his Patient Follow-Up Visit questionnaire.

10. On September 8, 2014, Claimant was re-evaluated by NP Miksch who added Dermatran Cream with Tramadol for continued pain and trigger points in the elbow and biceps.

11. On September 17, 2014, Claimant returned to NP Miksch who documented continued improvement in Claimant's pain levels and ROM. During this encounter, Claimant reported a "dull ache" in the elbow, but no pain. As noted above, Dermatran with Tramadol had been added to Claimant's treatment regime on September 8, 2014, which Claimant was instructed to continue to use as directed.

12. Claimant returned to Dr. Jones on September 22, 2014. Dr. Jones' medical examination of Claimant that date showed Claimant to have full extension, full pronation and supination, and improved stability of the elbow. He documented that Claimant had "really turned the corner and is starting to feel better. [Claimant] started doing some weights. As soon as he started to do that, the pain started to subside and his strengthen [sic] is starting to improve."

13. Dr. Jones released Claimant to full duty on September 22, 2014. Although Dr. Jones did not recommend specific maintenance care he noted that "[Claimant] will return to see me only as needed."

14. On September 26, 2014, Claimant reported to NP that the Dermatran was helpful for his discomfort. Consequently, NP Miksch documented that Claimant was to "continue Dermatran Cream #6 with Tramadol to elbow and biceps" as directed.

15. On October, 21, 2014, Claimant was instructed to discontinue the Dermatran Cream with Tramadol secondary to development of a rash in the area of the left elbow, biceps and forearm. Additional medications were added to cure his rash.

16. On November 20, 2014, Dr. Castrejon placed claimant at maximum medical improvement, documenting that Claimant had full pronation and supination, no discomfort with pronation and supination, and only a very mild dull ache that did not interfere with Claimant's full duty work activities

17. Dr. Castrejon specifically stated when placing Claimant at MMI that "[m]aintenance care is not indicated." Indeed, Dr. Castrejon did not even recommend that claimant required an ongoing home exercise program. Rather, Dr. Castrejon returned Claimant to full duty without work restrictions. Nevertheless, the PATIENT FOLLOW-UP VISIT questionnaire indicates Claimant's response as "same" to question 3: What are the names of the MEDICATIONS that you are taking? As noted above, the prior Patient Follow-up Visit questionnaire completed August 20, 2014 indicated that Claimant was taking Ibuprofen. Consequently, the ALJ infers and finds from these questionnaires that Claimant, more probably than not, continued his use of Ibuprofen between August 20, 2014 and November 20, 2014 when he was placed at MMI.

18. Respondent filed a final admission of liability (FAL) on December 3, 2014 consistent with Dr. Castrejon's report of MMI in which it denied liability for any maintenance medical care per Dr. Castrejon's specific statement that maintenance care is not indicated.

19. Claimant filed an objection to the FAL and an application for hearing endorsing the issues of medical benefits, reasonably necessary, Grover meds should remain open, and disfigurement.

20. At hearing, claimant testified that he continues to experience left elbow pain for which he takes Ibuprofen from 1 to 3 times per day. He does not know if he should push continued exercise or back off due to persistent pain. Consequently, Claimant testified that he would like to return to Dr. Jones for further evaluation. Claimant testified that the pain he currently experiences "is the same as when [he] last saw Dr. Castrejon." Claimant last saw Dr. Castrejon on November 20, 2014 when he was placed at MMI during which time the ALJ finds that Claimant was using Ibuprofen for pain control. Based upon complete and careful review of the medical records, the ALJ finds support for Claimant's testimony concerning his ongoing symptoms and his

continued need to take Ibuprofen for pain/discomfort related to his admitted work injury. The medical records reveal that over the course of his treatment Claimant has been prescribed various medications, including Ibuprofen and Norco to address the pain problems attendant with his injuries. A self reported listing of Claimant's medications at the time of MMI simply indicates "same" which previously included Ibuprofen. Consequently, the ALJ finds Claimant's testimony regarding the necessity for the use of Ibuprofen to cure and relieve him of ongoing pain associated with his industrial injury credible and convincing. Without ongoing medication, the ALJ finds that Claimant's condition will likely deteriorate.

21. Claimant testified that he understood per Dr. Jones and NP Miksch that he was to return to Dr. Jones after physical therapy if he felt he had not improved. Respondents contend that neither the last record of Dr. Jones dated September 22, 2014 nor any of the reports issued by NP Miksch leading up to Claimant's placement at MMI or the MMI report of Dr. Castrejon reference any recommendation for Claimant to Dr. Jones for reevaluation. The undersigned ALJ is not persuaded. Based upon the totality of the evidence presented, the ALJ finds Respondent's interpretation of Dr. Jones' September 22, 2014 exceedingly narrow. While Dr. Jones' September 22, 2014 report does not use the terms "recommend" or "re-evaluation", it does indicate that Claimant will return to his attention only on an as needed basis. The ALJ infers and finds that Dr. Jones' use of the term "only" was not intended to preclude Claimant from returning for further assessment. Rather, the ALJ finds that the term "only" and the phase in its entirety, more probably meant that Claimant was not going to be scheduled for additional routine appointments and that he "will" return as needed. Accordingly, the ALJ credits Claimant's testimony to find that Dr. Jones, more probably than not, advised Claimant to return for further assessment if symptoms persisted. Because Claimant's symptoms have persisted despite the use of analgesics, a "re-evaluation" with Dr. Jones is warranted, i.e., it is reasonably necessary to maintain and otherwise prevent further deterioration of Claimant's condition.

22. The ALJ credits the medical records and Claimant's testimony to find that he is in need of maintenance medical treatment; including Ibuprofen and a return visit to Dr. Jones for further evaluation regarding the etiology of his ongoing pain and discomfort in order to prevent further deterioration of his condition.

23. Claimant has a visible disfigurement to the body consisting of mild swelling to the lateral portion of the left elbow when compared to the right as a consequence of his left elbow dislocation injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

C. A workers' compensation case is decided on its merits. *Section 8-43-201*. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Maintenance Medical Benefits

D. Claimant is entitled to ongoing medical benefits after MMI if he presents substantial evidence that future medical treatment will be reasonably necessary to relieve the claimant of the effects of the injury or prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

E. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover, supra.* The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the Claimant reaches this threshold, the Court stated that the ALJ should then enter a "general order similar to that described in Grover." Thus, while Claimant does not have to prove the need for a specific medical benefit, he must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra*. The question of whether the claimant met the burden of proof to

establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003).

F. Here, the ALJ concludes that Claimant has met his burden to establish his entitlement to maintenance medical treatment. Substantial persuasive evidence demonstrates that there is a need to treat Claimant's ongoing chronic pain caused by the injuries sustained in this admitted claim. The Claimant was injured in excess of one year ago and has completed a course of physical therapy. Yet, he continues to have persistent pain which he credibly testified is relieved by the use of medications previously provided. Without ongoing treatment and medications, Claimant's present condition will likely deteriorate further. Moreover, the ALJ is not persuaded by Respondent's suggestion that the return to Dr. Jones on an as needed basis constitutes a speculative statement/recommendation supporting a conclusion that Claimant is not entitled to maintenance care because there was "no way to determine whether claimant would actually require a return to Dr. Jones at the time Dr. Jones issued the September 22, 2014 medical treatment record." To the contrary, the ALJ concludes that Claimant proved such "need" to return to Dr. Jones at hearing. Claimant has proven, by a preponderance of the evidence that there is a probable need for treatment post MMI, to maintain MMI and otherwise prevent deterioration of his current condition entitling him to an order for ongoing medical benefits.

G. Claimant is entitled to ongoing medications and follow-up with his authorized treating physicians subject to Respondent's right to challenge any specifically requested future care or form of treatment based on established case law. *See for example, Hanna v. Print Expediters, Inc.* 77 P.3d 863 (Colo. App. 2003). *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

H. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has mild swelling of the lateral portion of his left elbow which the undersigned ALJ concludes constitutes a disfigurement as provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant is entitled to ongoing medical treatment reasonably necessary and related to his May 29, 2014 industrial injury to maintain MMI. Respondents shall pay for the attendant cost associated with Claimant's use of Ibuprofen as well as the attendant cost of reasonably necessary and related follow-up visit(s) with Dr. Jones.

2. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's May 29, 2014 work injury and/or that the recommended treatment is not reasonable or necessary.

3. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Respondent-Employer shall pay Claimant $500.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 23, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established that she suffered a compensable injury to her left upper extremity/shoulder arising out of and in the course of her employment with Employer on September 9, 2014.

2. If the claim is compensable, whether Claimant has established that an MRI of the left shoulder as recommended by Dr. Kawasaki is reasonable, necessary, and related to Claimant's September 9, 2014 work injury.

PROCEDURAL

Claimant endorsed the issue of a neck injury in addition to the left upper extremity/shoulder injury. At the outset of hearing, Claimant withdrew the issue of a neck injury and proceeded solely on the left upper extremity/shoulder issue.

FINDINGS OF FACT

1. Claimant has worked for Employer as an Engineer Technician evaluating well permits for approximately 22 years. Her job duties involve primarily sitting at a computer desk, mousing, keyboarding, and talking on the phone. Claimant has been at her current desk/work station for approximately 18 years without significant changes.

2. Claimant testified that she has had pre-existing problems with her neck for three to four years or possibly longer. Claimant testified that she woke up one morning with some left shoulder pain and didn't really know exactly what it was from. Claimant reported that she noticed at work when she was on the job that she was in an awkward position while keying on the keyboard.

3. Claimant testified that while keying on the keyboard her left arm is above chest level, bent at the elbow, and sticking out to the left in an awkward position. Claimant testified that this is due to a wide keyboard tray and working centered on her mouse. Claimant testified that around early September of 2014 she had a lot of discomfort/pain, and limited mobility in her left arm to the point of being unable to lift it.

4. Claimant testified that other than the awkward keying at work she had not previously injured her left shoulder anytime in 2014 or before. Claimant reported she had not been treated or evaluated for any left shoulder problems or left shoulder pain since she had a tumor removed in the late 1990's.

5. Claimant reported her left shoulder pain to Employer and filled out an Employee Statement of Injury/Exposure form on September 23, 2014. For place of

accident/exposure Claimant reported, “not real sure if work related – just feeling discomfort while doing my job.” For how the injury/exposure occurred Claimant reported, “not sure – have had neck pain and back pain for the past couple of years now having pain from neck to left shoulder to arm.” For the date of injury/exposure Claimant reported, “no specific date, neck issues for past couple years now shoulder and arm since beginning of September, 2014.” *See* Exhibit H.

Prior medical treatment

6. Claimant has had neck pain for more than a couple of years. Claimant has had documented neck pain for approximately 12 years and going back to at least 2003. In 2003 Claimant also reported that she had experienced neck stiffness in the past.

7. Claimant also has had left shoulder and arm pain prior to September of 2014. Claimant has had documented left shoulder/arm pain for approximately 11 years and going back to at least 2004.

8. Two months prior to Claimant’s alleged injury, and on July 14, 2014 Samuel Clinch, M.D. evaluated Claimant. Claimant was diagnosed with bipolar disorder, borderline personality disorder, back and neck pain, poor appetite, and economic and other psychosocial and environmental problems. Claimant reported struggling with anxiety and sleep problems. Claimant reported ongoing economic concerns and bad reviews at work. Claimant also reported neck and back pain. *See* Exhibit G.

9. Approximately one year prior to her claim, and on September 9, 2013 Claimant underwent chiropractic treatment. Claimant reported neck pain and tightness that had been going on for years and that she was not sure what initially caused the pain. Claimant reported pain in her left lower neck and left upper trapezius. *See* Exhibit G.

10. A little over one year prior to her claim, and on July 2, 2013 Claimant was evaluated by Dianne Glenn, M.D. Claimant reported neck pain, *shoulder pain*, and upper back pain that was now *into her left arm*. Claimant reported that *lifting her left arm hurt and that she had numbness and tingling in her left arm* that comes and goes. *See* Exhibit G

11. On April 3, 2009 psychologist Laura Richardson evaluated Claimant. Claimant reported feeling stupid at work, missing major steps, making mistakes, and feeling that her Employer was trying to push her out. Claimant reported struggling to get her work done and getting it wrong. Claimant reported thinking of applying for long term disability because she felt she couldn’t do her job, was afraid of another bad performance review, and because she was unable to transfer jobs. Claimant also reported *numbness/tingling in her thumb and first two fingers of her left hand*. *See* Exhibit G.

12. On March 30, 2004 physician assistant (PA) Michael Borkowski evaluated Claimant. Claimant reported pain between her shoulder blades, in her neck area, and *in her upper arms*. PA Borkowski noted she had recurrent episodes of upper back pain and *paresthesias in the back of her arms*. PA Borkowski noted objectively that Claimant had severe cervical and thoracic paraspinal spasm. *See* Exhibit G.

13. On August 8, 2003 Frances Macdonald, M.D. evaluated Claimant. Claimant reported neck pain and stiffness and *numbness and tingling in the lateral aspect of her left hand to the left wrist and reported her entire left arm felt sore.* Claimant reported to Dr. MacDonald that she had stiffness in her neck in the past. Dr. MacDonald noted objectively that Claimant had full range of motion in her neck with some discomfort on rotation to the left and some discomfort on full flexion. *See* Exhibit G.

14. On June 5, 1998 Claimant underwent surgery on her left shoulder to excise a mature adipose tissue which was removed and found to be consistent with a lipoma. *See* Exhibit G.

Current claim treatment

15. On September 9, 2014 Dr. Glenn evaluated Claimant. Claimant reported pain in the left neck and arm with no history of injury but that the pain was in her arm and worse when Claimant got up. Claimant reported her arm was achy and hurt more when she moved it. Dr. Glenn noted Claimants long history of neck pain. Dr. Glenn questioned whether the pain was work related (? If related to work) and noted that Claimant worked on a computer and was having an ergonomic evaluation. *See* Exhibit G.

16. On September 24, 2014 Julie Parsons, M.D. evaluated Claimant. Claimant reported discomfort in her left arm and left side of her neck for about a month. Claimant reported her work setup was not correct and that her company was working on a new setup. Claimant reported left shoulder, upper arm, and forearm pain that was getting worse. Claimant reported pain in the left lateral neck that radiates to the left shoulder, left upper arm, and left forearm. Dr. Parsons did not place Claimant on any work restrictions and returned Claimant to full work/activity. *See* Exhibit B.

17. On October 20, 2014 Timothy Mazzola, M.D. evaluated Claimant. Claimant reported left sided shoulder and neck pain down into the left arm and into the ulnar side of the forearm with no specific injury to her shoulder. Dr. Mazzola ordered X-rays of her shoulder and C-spine. The shoulder x-rays showed normal left shoulder without joint degenerative changes and a normal acromion. The C-spine X-rays showed degenerative disc disease, mild at C4-5 and more severe at C5-6 and C6-7 before normalizing at C7-T1. *See* Exhibit C.

18. On October 27, 2014 Claimant underwent an MRI of her C-spine that was interpreted by Robert Liebold, M.D. Dr. Liebold found no acute fracture or neoplastic marrow replacement process. His impression was mild to moderate C5-C6 central stenosis with moderate to severe left foraminal stenosis, and mild to moderate C6-7 central stenosis with moderate to severe left and moderate right foraminal stenosis. *See* Exhibit F.

19. On October 29, 2014 Dr. Mazzola evaluated Claimant. Claimant reported cervical spine pain, with less arm pain but that her neck really bothering her. Dr. Mazzola reviewed the C-spine MRI with Claimant and noted it showed central stenosis with moderately severe left sided neuroforaminal stenosis at both C5-6 and C6-7. He found that Claimant indeed had significant left sided neuroforaminal stenosis at C5-6 and C6-7 levels that affected the C6 and C7 nerve roots. *See* Exhibit C.

20. On November 3, 2014 Robert Kawasaki, M.D. performed a physical medical consultation. Claimant reported no specific injury to Dr. Kawasaki and indicated that she had had problems in her neck for a few years. Claimant reported developing pain in her neck, pain in her left shoulder, and pain in her left arm and believed that her work activities caused the problems to develop. Claimant reported while working her left shoulder and arm began having increasing pain. *See* Exhibit A.

21. Dr. Kawasaki indicated Claimant's cervical pain complaints were minimal, that she had weakness in her left shoulder that appeared to be pain generated from lack of shoulder motion, and left shoulder impingement with a firm mechanical block in shoulder abduction. Dr. Kawasaki recommended further investigation of Claimant's prior shoulder tumor resection, an MRI of the left shoulder with arthrogram, and further workup of the shoulder before performing cervical epidural steroid injections. *See* Exhibit A.

22. Dr. Kawasaki opined that Claimant's main pain generator may be the left shoulder. Dr. Kawasaki opined that if Claimant's cervical pathology was causing her symptoms it would be difficult to relate it to her job. Dr. Kawasaki opined that if her shoulder pathology was causing her complaints, then a job description and ergonomic evaluation would be helpful to determine her job activities and risk factors for a cumulative trauma type of injury. *See* Exhibit A.

23. On November 7, 2014 Dr. Parsons evaluated Claimant. Claimant reported intermittent left shoulder pain and that her symptoms had improved. Dr. Parsons assessed left shoulder strain. Dr. Parsons reviewed the ergonomic evaluation that had been performed. After review, Dr. Parsons opined to a reasonable degree of medical probability that Claimant's job duties did not meet criteria for any form of cumulative trauma disorder. *See* Exhibit B.

24. On January 8, 2015 Jack Sylman performed neurodiagnostic studies. Dr. Sylman noted Claimant's history of several months of left neck pain radiating down her left arm occasionally causing tingling of digits 2 and 3. Dr. Sylman provided the

diagnosis of cervical radiculopathy and opined that Claimant had left C5 chronic radiculopathy. *See* Exhibit G.

25. Claimant has not undergone the left shoulder MRI recommended by Dr. Kawasaki as the authorization was denied by Insurer.

Ergonomic evaluations

26. On September 9, 2014 Claimant completed an Ergopoint Self-Assessment. Claimant reported moderate concern with her workstation and identified the areas she had concern with. After identifying the areas of concern Claimant was provided recommendations for reducing ergonomic risk and improving the workstation.

27. On October 2, 2014 Jess Baysinger from the State of Colorado Office of Risk Management performed an ergonomic evaluation. Ms Baysinger recommended that: Claimant get a new ergonomic chair, Claimant not turn her neck to speak with other people entering her cubicle but turn her whole body; Claimant get a different keyboard tray that doesn't have a separation between the mouse and keyboard; Claimant get a different mouse that fits her hand better; Claimant get a headset for telephone use to ease neck and shoulder tension; and that Claimant take stretching breaks twice per day. *See* Exhibit D.

28. On October 28, 2014 Marianne Pullman, R.N. performed a job site evaluation. Ms. Pullman interviewed Claimant regarding her complaints, observed Claimant performing her job, and took photographs. Ms. Pullman identified that Claimant spends 8-9 hours per day on the computer, with the majority of the time spent on mapping activities requiring heavy use of the mouse with her right hand. *See* Exhibit E.

29. Claimant reported to Ms. Pullman having had neck pain for years but noticing left shoulder and left arm pain in early September. Claimant reported feeling the pain continuously even when not working. Ms. Pullman noted Claimant tended to center herself in front of her mouse on the right of her keyboard tray due to the heavy mousing work. Ms. Pullman noted that while seated to the right, Claimant often reaches her left arm across the length of the keyboard try to meet the alpha keys. Ms. Pullman noted that led to an awkward reach to the left which Claimant reported brings immediate pain to her left arm and shoulder. Claimant's left arm, in this position, is winged out from her flank. Ms. Pullman noted Claimant exhibited awkward posture of hands and arms while working on the keyboard. Ms. Pullman made several recommendations similar to those of Ms. Baysinger. *See* Exhibit E.

Credibility

30. Claimant's testimony lacks credibility. Claimant did not report prior pain and symptoms in her left arm/shoulder that pre-date her claim and denied having any pain or symptoms following her lipoma removal surgery in 1998. The medical records

document otherwise, and document several symptoms and reports of pain in the past that are similar to those she testified began in September 2014. Claimant also testified and demonstrated that she has to reach above chest level with her elbow bent to reach her keyboard. This is not credible nor is it reasonable based on Claimant's workstation and the position of her keyboard and mouse. The position in which Claimant demonstrated typing is an extremely unreasonable way to simply reach across to a keyboard. The ergonomic evaluation does not support that the extreme awkward angle that Claimant demonstrated was necessary for her to reach her keyboard or perform her job duties.

31. Dr. Kawasaki's testimony is found credible and persuasive. Dr. Kawasaki was unable to opine that Claimant's left shoulder complaints were work related. Dr. Kawasaki reviewed the job site evaluation and opined that the only activity that implicated the left shoulder was reaching to the side for the keyboard. Dr. Kawasaki opined that would not be an injurious activity and that there was a low probability that just reaching out to the side, even frequently, would cause a shoulder injury.

32. Dr. Kawasaki reviewed medical records and noted Claimant's long history of neck pain going back to 2003. Dr. Kawasaki opined that Claimant's presentation when he saw her included very similar symptoms as far as her neck pain and pain radiating up the left upper extremity that she has had in the past.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals*

Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden to prove by a preponderance of the evidence that she suffered a left upper extremity/shoulder injury proximately caused by her employment. As found above, there was no specific injury or trauma to Claimant's left upper extremity/shoulder. Claimant woke up one morning with pain and was unsure what caused it. Although Claimant reported pain while working and believed her work to be the cause of her pain, she has presented insufficient evidence to support this argument. There is insufficient evidence of an acute injury to the left shoulder/upper extremity. There is also insufficient evidence to support a claim of occupational disease to the left shoulder/upper extremity due to Claimant's job duties. As found above, Claimant had multiple pain complaints prior to the claim related to her left shoulder, arm, fingers on her left hand, and left trapezius area that are similar to the complaints she has following this claim. Claimant's arguments are not found

persuasive. She was not performing job duties at the time of a left shoulder injury. Rather, she woke up with increased pain and the medical records show she has had on and off pain in this same area for many years.

Claimant's testimony is not credible. Claimant reported no left shoulder/left upper extremity problems or symptoms following a lipoma removal surgery in 1998. Yet, the medical records show that on the following occasions she made the following complaints:

September 9, 2013 --	pain in left lower neck and left upper trapezius
July 2, 2013 -	shoulder pain, upper back pain that went into her left arm, pain lifting left arm, numbness/tingling in left arm
April 3, 2009 -	numbness/tingling in her thumb and first two fingers of her left hand
March 30, 2004 -	pain in upper arms with parasthesias in the back of her arms
August 8, 2003 -	numbness and tingling in the lateral aspect of her left hand to the left wrist and entire left arm sore

These symptoms are similar to those Claimant complains of in this claim including her more current complaints of achiness of left arm, tingling of digits 2 and 3 on her left hand, and neck pain that radiates into her left arm. These symptoms all existed prior to this claim despite Claimant's testimony otherwise. Further, Claimant's assertion that she was required to hold her left arm above chest level at an awkward angle to use her keyboard is not credible or persuasive. Although ergonomic recommendations were made, the ergonomic evaluations in this case do not support a conclusion that she was required to wing out her arm in the extremely awkward position she demonstrated in order to reach her keyboard. Claimant's testimony is not reasonable. The pictures support that her keyboard was located close to her, and her chair had wheels to move. There would be no reason to wing out her arm in such an extreme fashion just to get to the keyboard.

The medical providers in this case have not opined that her left shoulder/upper extremity pain is work related. Dr. Kawasaki opined that there was a low probability that just reaching out to the side to reach a keyboard, even frequently, would cause a shoulder injury. Dr. Parsons, after reviewing the ergonomic evaluation opined that Claimant's left shoulder/upper extremity symptoms were not work related. Dr. Parsons did not believe that Claimant's job duties would meet criteria for any kind of cumulative trauma disorder to her left shoulder/upper extremity. Dr. Syllman and Dr. Mazzola point to Claimant's C5-6 and C6-7 problems as the cause. Dr. Glenn initially at the first visit noted it was questionable whether the symptoms were work related. With several medical providers unable to make a causal connection to Claimant's job duties and employment and with Claimant's testimony of onset of symptoms not credible or persuasive, Claimant has failed to meet her burden to show that her employment

proximately caused any injury, aggravation, or acceleration to any symptoms in her left shoulder/upper extremity.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra.* Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Id.* Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, *supra; See* § 8-41-301(1)(c), C.R.S. Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App. 1997).

Claimant seeks an MRI of her left shoulder as recommended by Dr. Kawasaki. Although an MRI of her left shoulder might be a reasonable step to determine if her current pain symptoms are coming from left shoulder pathology or are coming from her C5-6 and C6-7 neck pathology, Claimant has not established proof of causation or that an MRI of her left shoulder would be related to any work injury. Rather, as found above, Claimant is unable to show that any left shoulder/upper extremity symptoms are a result of an occupational injury. Claimant woke up one morning with pain per her reports, although medical records show ongoing problems throughout the years. Claimant's job duties also do not support a causal connection between her work and her symptoms of pain. Dr. Parsons opined that her symptoms were not work related and Dr. Kawasaki opined that there was a low probability that her work and reaching to her keyboard would cause shoulder problems.

Claimant argues that the Division recommends under Rule 17 that initial diagnostic procedures be considered the responsibility of the workers' compensation carrier to ensure that accurate diagnosis and treatment can be established. The Division recommendation is noted, but is a recommendation and is not mandatory nor does it require that an MRI be covered by Respondents in this case. Rather, the case law requires and places the burden on Claimant to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. Claimant is seeking an MRI of her left shoulder, but has failed to meet her burden to show a causal relationship or that her left shoulder complaints were caused by any work related duties. Therefore, her request for MRI is denied.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she suffered a compensable injury to her left shoulder/upper extremity arising out of and in the course of her employment. Her claim is denied and dismissed.

2. Claimant has failed to establish that an MRI of the left shoulder as recommended by Dr. Kawasaki is reasonable, necessary, and related to a work injury. Her request for left shoulder MRI is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

Whether the surgery recommended by Dr. Jinkins is causally related to his September 3, 2014 work injury and medically reasonable and necessary.

FINDINGS OF FACT

1. The claimant is a 44 year old employee of the respondent-employer who injured his right knee on September 3, 2014 while coming down a flight of stairs.

2. The claimant sustained a prior work injury to his right knee on November 29, 2012 while working for the respondent-employer while working as an installer. The respondent-insurer admitted liability for this injury. The claimant received treatment for his 2012 right knee injury from Dr. Daniel Peterson and Dr. Wiley Jinkins

3. The claimant was off of work for this injury from November 30, 2012 through January 13, 2013 and then returned to work as an installer. There is conflict between the medical records of Dr. Peterson and Dr. Jinkins whether he was released to full duty or modified duty but it is apparent that the claimant was in fact working full duty after returning to work after his 2012 injury.

4. The medical records indicate that the claimant did not report much improvement in his condition with time and by April of 2013 Dr. Jinkins began a series of hyaluronic injections (Supartz). The claimant did not report any long term relief from the Supartz injections and in June of 2013 reported pain at a level of 6-7 out of 10. On June 18, 2013, Dr. Jinkins recommended one final injection and if that failed to provide him with relief then surgery, specifically an arthroscopic debridement, would need to be considered.

5. The claimant was eventually placed at maximum medical improvement on August 29, 2013 and was released to full duty to his new position. The claimant returned to work for the respondent-employer for the next year.

6. After injuring his right knee on September 3, 2014, the claimant returned to see Dr. Jinkins on September 23, 2014. At that appointment, the claimant advised Dr. Jinkins that prior to the new incident his knee was doing "so-so" and that he had not

experienced significant relief of his symptoms from the Supartz injections. He stated that he had persistent problems with his right knee from the previous injury and rated his pain level as a 5-6/10 prior to the September 3, 2014 incident. As of the date of the September 23rd exam the pain had escalated to an 8/10. Dr. Jinkins ordered an MRI of the knee and recommended a corticosteroid injection. The claimant inquired about the previously discussed arthroscopic debridement from June of 2013 but Dr. Jinkins advised that this procedure had low predictability and in some cases could actually aggravate the symptoms.

7. On September 29, 2014, Dr. Jinkins stated that there had been no great deal of change in the claimant's knee symptoms. The claimant reported pain at a level of 7/10 and Dr. Jinkins requested authorization for a specialized series of x-rays. On October 15, 2014, Dr. Jinkins requested authorization for a Fulkerson type procedure. At that time, the claimant was still reporting pain at a level of 7/10.

8. At the request of Dr. Jinkins, the claimant was examined by Dr. Derek Purcell on October 30, 2014 for a second opinion to discuss options for his knee. Dr. Purcell reviewed the claimant's records including treatment from the 2012 and 2014 injuries. Dr. Purcell discussed with the claimant various options including continued conservative care, as well as different surgical options. Dr. Purcell ultimately concluded that the Fulkerson osteotomy recommended by Dr. Jinkins would address the claimant's patellofemoral issues but would not provide the claimant long term or short term relief because of the other issues present in the claimant's knee. Dr. Purcell opined that the only surgical intervention that would be appropriate for the claimant would be a total knee arthroplasty.

9. In response to Dr. Jinkins initial request for surgery, the respondent-insurer obtained a Rule 16, records review from Dr. Mark Failinger. On October 22, 2014, Dr. Failinger concluded that a Fulkerson procedure would not solve much or even most of the claimant's pain complaints and recommended additional conservative measures and an IME. Upon receipt of Dr. Purcell's report recommending a total knee arthroplasty, Dr. Failinger completed a follow up records review on November 17, 2014. Dr. Failinger opined that assuming the claimant had completed the appropriate conservative care, then he agreed with Dr. Purcell that the total knee replacement was the more appropriate procedure given the amount of degenerative joint disease (DJD) in the claimant's tibiofemoral compartment. However, he stated it was his strong opinion that the need for the knee replacement was due to the pre-existing DJD rather than the September 3, 2014 incident.

10. Dr. Failinger subsequently completed an independent medical examination of the claimant on March 16, 2015. Dr. Failinger took a history from the claimant, conducted an examination and reviewed additional records. Dr. Failinger requested the actual x-ray or MRI films, but then opined that if the claimant's films confirmed what the written reports documented that the claimant had significant medial and lateral compartment arthritis, then it would not be reasonable to perform the patella realignment procedure being proposed by Dr. Jinkins. In his opinion, such a procedure was only reasonable where the arthritis was strictly limited to the patellafemoral joint. It was also Dr. Failinger's opinion that the recommended procedure was targeting a condition for which the claimant had been treating for 1 ½ years prior to the September 3, 2014 incident and not related to the incident.

11. On April 29, 2015, Dr. Failinger reviewed the actual MRI films of the claimant's right knee which confirmed the presence of both lateral and medial compartment arthritis. The MRI film also showed high grade loss on the central patellar region. Based upon all of these findings, Dr. Failinger re-affirmed his earlier conclusions that a patellofemoral osteotomy would not result in a good outcome for the claimant.

12. The claimant testified on his own behalf and testified that he had no difficulties working full duties after his 2012 work injury and that he could have tolerated continuing to work as an installer. The claimant testified that he approached his employer about the change in positions but that the change was not specifically related to his work-related right knee injury. The claimant further testified that he only experienced symptoms off and on after being placed at MMI for the 2012 injury and that his condition significantly worsened as a result of the September 2014 incident.

13. Dr. Jinkins testified via deposition on behalf of the claimant. Dr. Jinkins opined that the claimant had exhausted all conservative measures and that surgery was the next reasonable treatment option. However, Dr. Jinkins admitted that most of the conservative treatment to which he was referring had been performed in conjunction with the 2012 injury and that the claimant had reported a lack of improvement as a result of that treatment, he did not repeat most of what had been tried after the September 3, 2014 work injury.

14. Dr. Jinkins opined that the claimant's need for surgery was related to his industrial injury of September 3, 2014.

15. Additionally, Dr. Failinger conceded that "…If there was not significant degenerative joint disease in the tibiofemoral joint, then, a Fulkerson-type procedure is

a reasonable option." Dr. Jinkins testified that the claimant's standing view x-rays "…did not show any significant arthritis of the tibiofemoral joint." Thus, under Dr. Failinger's reasoning, the surgery recommended by Dr. Jinkins is "a reasonable option."

16. The ALJ finds Dr. Jinkins' opinions as the authorized treating orthopedic surgeon credible, persuasive, and entitled to greater weight than the contrary opinions of either Dr. Purcell or Dr. Failinger.

17. The ALJ finds that the claimant has established that it is more likely than not that the surgery proposed by Dr. Jinkins is related to the claimant's industrial injury of September 3, 2104 and that the surgery is reasonable and necessary.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. The claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; see *Valley Tree Service v. Jimenez*, 787 P. 2d 658 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

5. The ALJ concludes that the claimant has established by a preponderance of the evidence that he requires the right knee surgery as recommended by Dr. Jinkins. The needed surgery is directly related to the claimant's industrial injury of September 3, 2014. The surgery is reasonably needed to cure and relieve the claimant of the effects of this September 3, 2014 injury. The respondent-insurer is liable for payment of that surgery, as well as all related follow-up treatment necessary to cure and relieve the claimant of the effects of the injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall authorize and pay for the surgery as recommended by Dr. Jinkins.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: July 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Dr Ste 230
Colorado Springs, CO 80906

ISSUES

The threshold issue determined by this order is compensability of an alleged December 1, 2014 hernia. The ALJ also heard testimony concerning several associated issues, including Claimant's entitlement to medical and temporary total disability (TTD) benefits, as well as a request for determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was employed by Employer as a seasonal employee. He was hired on November 10, 2014 as an order picker. Claimant was to work 40 hours per week at on the "1st Shift." He reported to work between the hours of 7:30 a.m. and 4:30 p.m., Monday through Friday with a possible Saturday shift. Claimant was paid $9.25 per hour.

2. Claimant made a total of $877.00 between his date of hire and his last date of work, December 1, 2014. The ALJ finds that there are 20 days between November 11, 2014 and December 1, 2014 for a daily rate of pay equal to $43.85 based upon Claimant's total earnings of $877.00. Consequently the ALJ finds Claimant's average weekly wage (AWW) to equal $306.95. ($877.00 total wages ÷ 20 days employment = $43.85/ day × 7 days/week = $306.95).

3. As a picker, Claimant's duties included, but were not limited to, picking orders from bins at assigned shelf locations, performing cleanup activities in the work area to ensure cleanliness, organizing bins, and pulling product inventories from the rear to the front of bins for easy access. Claimant's position required the ability to lift and carry 50 lbs.

4. On December 1, 2014, at approximately 10:30 a.m., Claimant was retrieving an order from a bin on a bottom row shelf. The inventory was located on a pallet toward the back of the shelf. Consequently, Claimant bent down and moved underneath the shelf in an effort to reach the stock and bring it forward. From a semi forward flexed position with one knee on the pallet and one knee on the floor, Claimant reached forward and attempted to pull what he thought was a stack of 20-30 light bread pans forward. The stack of pans did not move. Claimant vigorously tried to pull the pans forward. Despite Claimant's efforts, the stack still did not move. Thus, Claimant lifted the top two pans to discover that they were made of heavy cast-iron. Claimant proceeded to move the inventory forward as required. As he was bent over moving the

pans, Claimant testified that he began to feel pain in his abdomen.

5. After moving the entire stack of cast-iron pans forward in piecemeal fashion, Claimant backed out from under the shelf and grabbed the metal support beam on an upper shelf to assist in pulling himself upright. As Claimant stood up, he experienced an immediate "shooting" pain in his lower abdomen and groin area. The pain improved but did not completely subside after a minute or two leading Claimant to believe he pulled a muscle in his leg.

6. Claimant testified that the pain was the worst he had ever felt. Consequently, he modified his work activities, slowing his pace of work and being cautious about the weight he lifted, for the remainder of his shift.

7. Claimant finished his shift and returned home. He was hopeful the pain would just "go away" so did not report the incident before leaving work for the evening. When he was hired, Claimant completed paperwork acknowledging that all work related injuries were to be reported immediately to his direct supervisor.

8. Upon retiring for the night, Claimant was unable to sleep because of intense shooting pains in his groin. By the morning of December 2, 2014, Claimant was in severe pain. He noticed swelling in the groin, testifying that he was "blowing up down there". Consequently, Claimant testified that he called into work before his scheduled shift and informed the shift leader that he would not be coming to work because he was "probably going to the emergency room". However, during cross examination, Claimant conceded that he did not report that he had injured himself, had a hernia, or any other condition. He stated only that he was "sick".

9. Claimant went to the Emergency Room at Memorial Hospital where he was evaluated by Dr. Tietz at 8:38 a.m. During his emergency room (ER) visit, Claimant complained of "pain in the right groin". He also reported that he "[did] a lot of heavy lifting, bending, straining". Examination revealed a freely reducible "indirect right inguinal hernia" which was documented simply as "coming on for a while." There is no indication in the ER report of the mechanism of injury described by Claimant at hearing. Claimant was instructed to follow-up with general surgery and discharged from the ER with a note for resumption of light duty work for 4 days.

10. Claimant testified that he informed his shift leader, Elaine Martinez of his restrictions that same morning, December 2, 2014. Claimant testified that he was told not to return to work by Ms. Martinez as there were no light duty positions available. Consequently, Claimant testified that Ms. Martinez informed him that she would push his "termination paperwork through."

11. Elaine Martinez, disputes the aforementioned assertions of Claimant. Ms. Martinez testified that Claimant never spoke with her on the date of his alleged injury, and did not speak to her by phone at any time on December 2, 2014. Rather, she testified that Claimant only left a voicemail indicating simply that he was "sick".

12. Claimant contacted Employer's HR Department on December 3, 2014 regarding his hernia where after he was referred to Employer's designated medical provider, Concentra Urgent Care.

13. Claimant was seen at Concentra on December 5, 2014 where he was evaluated by Physicians Assistant (PA), Kenneth Ginsburg. The history of present injury completed by PA Ginsburg provides the following account of the injury: ". . . states that he knelt down, pulled some boxes off the bottom of a pallet then stood up again without lifting anything and had a sudden onset sharp pain." PA Ginsburg noted that "there was no excessive force exerted to the inguinal canal compared to activities of daily living." PA Ginsburg noted that while it was "possible" that Claimant's work activities caused his symptoms, it was not "necessarily probable". Regarding causation, PA Ginsburg opined that Claimant's "work activities probably irritated his pre-existing inguinal canal defect." The ALJ infers from this report that Claimant likely had a pre-existing inguinal canal defect making him susceptible to the development of a full hernia in the face of strenuous pulling.

14. According to the WC M164 form signed by Dr. Randell Jones, Claimant provided the following description of the accident/injury: "I stood up and pain shot through my pelvis. Pain subsided after 1 min or two". Dr. Jones also checked the "Yes" box to question #3. "Are your objective findings consistent with history and/or work related mechanism of injury/illness".

15. Following his December 5, 2014 evaluation at Concentra, Claimant was placed on restrictions of 20 lbs. for lifting and push/pull limits of 20 lbs. Concentra listed Claimant's activity status as, "Return to modified work/activity today." Respondent did not offer Claimant modified duty. Claimant did not find alternative employment until March. Claimant is seeking Temporary Total Disability benefits from December 2, 2014, through February 4, 2015.

16. On January 9, 2015, Claimant returned to Memorial Hospital for surgery. The surgery was performed by Dr. Larry Butler, who reduced Claimant's right inguinal hernia and repaired it with mesh. Dr. Butler's post-operative instructions directed Claimant to wait until after a follow-up appointment, scheduled 7-10 days out, before returning to work. Regarding the history of injury, Dr. Butler noted as follows: "This man who was doing seasonal work noted sudden onset of groin pain last week after he was pulling from a semi-bent over position". Based upon evidence presented, the ALJ finds Dr. Butler's treatment related to Claimant's industrial injury and reasonably necessary to cure and relieve Claimant of the effects of the same.

17. Claimant was seen for an independent medical examination (IME) with Dr.

Lawrence Lesnak on April 21, 2015. Dr. Lesnak performed a causation analysis opining that there was no evidence from an anatomical perspective that the mechanism of injury (MOI) described by Claimant could cause his hernia or the treatment necessary to repair it. While congenital defects can cause hernias, Dr. Lesnak testified that the primary cause of inguinal hernias is the increased pressure on the contents of the abdominal cavity associated with forceful Valsalva maneuvers. According to Dr. Lesnak, Claimant would not have experienced a Valsalva sufficient to cause a hernia merely by pulling himself up from a squatting position and/or while pulling inventory forward from a kneeling position. Consequently, there is an absence of the movement and other necessary physiological conditions associated with Claimant's work duties to cause a hernia in this case, in Dr. Lesnak's opinion. The ALJ is not convinced for the reasons set forth in paragraph 19 below.

18. Dr. Lesnak also testified that it is important to consider the first reported history of injury provided by the patient to the first medical provider when formulating a causation opinion. In this case, Dr. Lesnak attributed the statement that right inguinal hernia had been "coming on for a while" to Claimant, testifying that this account was inconsistent with Claimant's report to him that the pain came on acutely while returning to an upright position. Consequently, Respondents suggest that Claimant has been inconsistent in his reporting of the injury. Again, the ALJ is not convinced. Based upon review of the medical record in question, the ALJ attributes the statement that the hernia had been "coming on for a while" to the author of the ER report rather than Claimant. More probably than not, the statement reflects what the provider understood was the duration of Claimant's symptoms before he sought treatment. Rather than define that time carefully, the provider in artfully documented that the hernia had been "coming on for some time" leaving interpretation of how long to the reader. As a consequence, Respondents suggest that Claimant's hernia was caused by factors other than his work duties on December 1, 2014. After careful review of the entire record, the ALJ finds that Claimant has consistently reported that his symptoms came on abruptly after pulling and lifting a stack of heavy cast iron pans and returning to an upright position rather than any indication that the hernia had been "coming on for a while". Moreover, Claimant's action in seeking treatment within hours of worsening symptoms militates against the suggestion that the hernia and accompanying symptoms had been coming on over time.

19. The ALJ has considered the totality of the evidence and finds that Dr. Lesnak's opinion that Claimant's condition was not caused, aggravated or accelerated by his work for Employer unpersuasive. While Dr. Lesnak gave no weight to Claimant's indication that the injury was from straining to move a heavy stack of pans while in a semi-bent over or kneeling position reaching to the back of the bottom bin, the ALJ finds PA Ginsburg's causation opinion that Claimant's work activities probably irritated a pre-existing inguinal canal defect more credible than Respondent's suggestion that Claimant's hernia was caused by factors other than his employment. The ALJ finds that,

more probably than not, the strenuous pulling in combination with lifting from an awkward position involved sufficient force to aggravate a small, pre-existing defect (hernia) in the inguinal canal causing it to become symptomatic which in turn prompted Claimant to seek treatment. The ALJ has considered, and hereby rejects all other evidence which is contrary to the above findings.

20. Although there are inconsistencies in the record, the ALJ resolves those inconsistencies in favor of Claimant to find that the totality of the persuasive evidence supports that he sustained a compensable hernia on December 1, 2014 as he has alleged.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the Employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony

and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, there are some inconsistencies in the record concerning Claimant's testimony. Nonetheless, the ALJ resolves those inconsistencies in favor of Claimant to find that his account of the injury and the events thereafter are generally credible and supported by the record evidence. Consequently, the ALJ concludes that Claimant's testimony concerning the cause of his alleged injury is reliable and persuasive.

Compensability

D. Claimant has proven, by a preponderance of the evidence that he suffered a compensable hernia on December 1, 2014. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's injuries arise out of his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between employment and the alleged injuries. Section 8-43-201, C.R.S. 2013.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). While it is true, under *F.R. Orr*

Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989), that an incident which merely elicits pain symptoms without a causal connection to industrial activities does not compel a finding that the claim is compensable, the persuasive evidence presented here establishes that Claimant engaged in physically demanding work activity which, more probably than not, aggravated a pre-existing defect (hernia) in Claimant's inguinal canal causing his symptoms and need for treatment. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). But for Claimant's obligations to his employer combined with the conditions of his employment, specifically the requirement to face product from the back of low lying shelves, necessitating his need to pull and lift from an awkward position, Claimant likely would not have aggravated his pre-existing inguinal canal defect. *See Conlon v. Dillon Companies, Inc. d/b/a King Soopers*, W.C. No. 4-835-313 (November 14, 2011); *City of Brighton v. Rodriquez*, 318 P.3d 496 (Colo. 2014). Consequently, the ALJ concludes that Claimant has established a sufficient causal connection between his injury and his work duties to support a finding that his hernia arises out of his employment. Accordingly, the injury is compensable.

Medical Benefits

G. Once a claimant has established a compensable work injury, the claimant is entitled to a general award of medical benefits and respondent's are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo. App. 1999). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

H. Based upon the medical record, including the credible opinions of PA Ginsburg, the ALJ concludes that the treatment, including Claimant's emergency room treatment and the subsequent surgery performed by Dr. Butler was related to Claimant's December 1, 2014 industrial injury. Moreover, the ALJ concludes that this treatment was reasonably necessary to cure and relieve him from the effects of the same.

Average Weekly Wage

I. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair

approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the wage records submitted into evidence. The ALJ adopts Respondents calculation of Claimant's AWW to find that his AWW is $306.95 as that figure represents the average weekly earnings over the entire period of Claimant's employment. The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his December 1, 2014 compensable work related injury.

Temporary Total Disability

J. To receive temporary disability benefits, a Claimant must prove the injury caused a disability, that he/she leaves work as a consequence of the injury, and the disability is total and lasts more than three regular working days. *C.R.S. § 8-42-103(1); PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d).

K. C.R.S. § 8-42-105(3) provides in pertinent part: Temporary total disability benefits shall continue until the first occurrence of any one of the following:

> (a) The employee reaches maximum medical improvement;
>
> (b) The employee returns to regular or modified employment;
>
> (c) The attending physician gives the employee a written release to return to regular employment; or
>
> (d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

L. From the evidence presented, the ALJ concludes that Claimant was provided with physical restrictions and released to return to work in a modified capacity following his December 2, 2014 ER visit. Moreover, the ALJ is persuaded that Respondents did not accommodate Claimant's restrictions and that Claimant returned to work for a

different employer after February 4, 2015. Thus, the ALJ concludes that Claimant experienced a wage loss lasting more than three regular work days due to his inability to perform regular work duty and Respondents unwillingness to accommodate his work restrictions. Consequently, Claimant was "disabled" within the meaning of the statute and entitled is entitled to receive temporary total disability benefits from December 2, 2014 through February 4, 2015.

ORDER

It is therefore ordered that:

1. Claimant's December 1, 2014 claim for a work related injury is compensable.

2. Respondents shall pay for all reasonable, necessary and related medical expenses to cure and relieve Claimant from the effects of his industrial injury, including but not limited to the Memorial Hospital ER visit as well as the surgery and care associated therewith as obtained through Dr. Butler.

3. Respondent shall pay the Claimant TTD benefits from December 2, 2014 through February 4, 2015, at the appropriate TTD rate associated with Claimant's average weekly wage of $306.95.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 16, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment on November 7, 2014 (W.C. No. 4-970-682-01)?

- Whether claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment on April 6, 2015 (W.C. No. 4-979-719-01)?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the surgery he underwent with Dr. Griggs on April 22, 2015 was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the industrial injury?

- The parties stipulated at the hearing to an average weekly wage ("AWW") of $1,027.70 if the claim is compensable.

FINDINGS OF FACT

1. Claimant was employed as a Waste Water Plant Operator for employer. Claimant testified that on November 7, 2014, he was assembling a twelve inch pipe and was crossing the T section of the pipe when he slipped off the pipe and his knee got wedged between the pipe and the side of the ditch. Claimant was working with a co-worker (Mr. Early) who inquired after the incident if claimant was OK.

2. Claimant went home on November 7, 2014 (a Friday) and iced his knee. Claimant eventually sought medical treatment the next day at the emergency room ("ER") in Gunnison, Colorado.

3. Claimant reported to the ER doctor that he had injured his right knee the previous day when he fell at work. Claimant underwent x-rays of the right knee that showed tricompartmental degenerative joint disease of the right knee, most severe in the lateral compartment and associated with a moderate sized knee joint effusion. Claimant was provided medications and discharged.

4. Claimant had a prior history of treatment to his right knee, including treatment to his knee in December 2013 when he was complaining of right knee pain. Claimant initially injured his knee on August 16, 1988 when he fell 40 feet landing on his

feet. Claimant underwent surgery under the auspices of Dr. Winkler on July 3, 1989 involving an arthroscopy with removal of a medial plica and debridement of chondromalacia and synovitis. Claimant underwent a second surgical procedure on October 3, 1989 which consisted of arthroscopic removal of referormed plica in the medial compartment of his right knee and removal of 25% of the lateral meniscus. Claimant underwent a third surgical procedure, again with Dr. Winkler, on August 14, 1990 that involved additional removal of plica across the suprapatellar pouch and a partial right lateral menisectomy.

5. Claimant testified at hearing that he did not recall receiving medical treatment for his right knee between 1990 and November 2014. Claimant acknowledged that the medical records contained an x-ray of his knee from December 2007, but did not recall the circumstances that led to his getting the x-ray. Claimant testified that his right knee was not 100% but was in good shape and testified that in the autumn of 2014 he had been able to go hunting and had previously participated in activities such as coaching his children.

6. Following claimant's treatment with the ER on November 8, 2014, claimant was evaluated by Dr. Griggs, an orthopedist, on November 10, 2014. Claimant reported a history to Dr. Griggs of falling at work and feeling a pop in his knee. Claimant noted he had four prior knee surgery and had steroid injections into his knee in the past which only lasted a short time. Dr. Griggs diagnosed claimant with suspected degenerative joint disease and a lateral collateral ligament sprain of the right knee. Claimant was referred for a magnetic resonance image ("MRI") of his right knee.

7. Claimant underwent the MRI of the right knee on November 17, 2014. The MRI showed a large joint effusion with synovial osteochondromata in a posterior recess behind the knee laterally. The medial meniscus was noted to be frayed with a horizontal tear in the posterior horn. Bone bruising involving the medial proximal tibia with some osteophytic lipping was also noted. The lateral meniscus showed a tear with no meniscus interposed at the posterior joint space. The anterior cruciate ligament was noted to be torn, perhaps chronically. The radiologist noted that there was a complete tear with loss of the meniscus lateral joint space with degenerative changes in the lateral joint space and at least a grade II injury of the lateral collateral ligament. The radiologist also noted that the findings appeared to be chronic in nature except for the lateral collateral ligament.

8. Claimant returned to Dr. Griggs on November 20, 2014. Dr. Griggs agreed with the radiologist that the findings on MRI appeared to be chronic with the exception of the lateral collateral ligament. Dr. Griggs recommended physical therapy.

9. Claimant was examined by Dr. Thorson on November 20, 2014. Dr. Thorson noted claimant reported he was walking on a pipe and slipped resulting in his right knee being caught between the ditch and the pipe. Claimant reported his knee

was unstable. Dr. Thorson noted claimant would undergo physical therapy and, if he did not improve, he would likely be a surgical candidate.

10. Claimant underwent a course of physical therapy but noted in a visit with Dr. Ward on December 19, 2014 that while he thought he had been getting better, he felt like he tweaked his knee at therapy and noted his knee gives out at times with some locking and catching at other times.

11. Dr. Thorson noted on January 8, 2015 that claimant was being evaluated for surgery. Dr. Thorson noted claimant had an increased risk for cardiac complications due to coronary artery disease, but cleared claimant for surgery. The request for authorization for the surgery to be performed by Dr. Griggs was ultimately denied, however, by Insurer.

12. Claimant continued to treat with Dr. Thorson who noted claimant continued to complain for grinding and popping in the knee when she evaluated him on February 20, 2015.

13. Claimant underwent an independent medical examination ("IME") with Dr. O'Brien on March 18, 2015. Dr. O'Brien reviewed claimant's medical records, obtained a history and performed a physical examination in connection with his IME. Dr. O'Brien issued a report dated April 3, 2015 associated with his IME. Dr. O'Brien noted in his report that claimant's symptoms included weakness, locking, swelling, stabling, giving out, clicking, sharpness, throbbing and catching. Dr. O'Brien opined in the IME report that claimant's November 7, 2014 work injury resulted in a right knee strain/sprain which temporarily aggravated his pre-existing and long-standing tricompartmental degenerative joint disease of his right knee. Dr. O'Brien opined that in accordance with the natural history of healing of minor injuries such as the one claimant sustained, he had an "end of healing" regarding his right knee strain/sprain that was reached on or before the IME on March 18, 2015.

14. Dr. O'Brien testified consistent with his medical report at hearing. Dr. O'Brien agreed on cross-examination that claimant did sustain an injury on November 7, 2014 that required medical care.

15. Claimant continued to work for employer with work restrictions. Claimant testified that on April 6, 2015 he was helping co-workers hook a trailer to a truck when he stepped off the trailer tongue with his right foot, and his heel got hooked in the trailer safety chain. Claimant testified he again felt his knee pop. Claimant testified his employer had him fill out a new workers' compensation claim for the April 6, 2015 injury.

16. Claimant was evaluated by Dr. Griggs the day after the April 6, 2015 incident. Dr. Griggs noted claimant had immediate pain following the incident where he

caught his right leg on the safety chain, even though he was wearing his brace at the time of the incident.

17. Claimant subsequently underwent surgery under the auspices of Dr. Griggs on April 22, 2015. The surgery included a right arthroscopic ACL reconstruction, right arthroscopic partial lateral and medial menisectomy, and right arthroscopic lateral femoral condyle chondroplasty. The surgical report noted that claimant's medial meniscus had a small medial tear, the ACL was completely torn, the medial compartment was grade 1-2 and the patellofemoral joint was grade 1-2 as well. The lateral compartement was noted to be grade 4 mostly, but had a large lateral meniscus tear with small cartilage flaps.

18. Dr. O'Brien testified at hearing that he reviewed the MRI studies and opined that all the findings in the MRI were chronic. Dr. O'Brien testified there were no acute findings on MRI. Dr. O'Brien testified that it was his opinion that the surgery that was performed on April 22, 2015 was not related to claimant's November 7, 2014 injury nor to his April 6, 2015 injury.

19. Claimant testified at hearing that he was not in need of medical treatment for his right knee condition until the injury of November 7, 2014. The ALJ finds this testimony to be credible and persuasive. The ALJ further credits the opinions of Dr. Griggs and the radiologist that noted acute findings of a lateral collateral ligament tear and finds that claimant has demonstrated that he sustained a compensable injury arising out of his employment on November 7, 2014.

20. The ALJ credits the opinions expressed by Dr. Griggs in the medical records over the contrary opinions expressed by Dr. O'Brien in his report and testimony and finds that the surgery recommended by Dr. Griggs and performed on April 22, 2015 was reasonable and necessary to cure and relieve claimant from the effects of the November 7, 2014 work injury.

21. The ALJ notes that claimant was not under active medical care at the time of the work injury and the record is devoid of any credible evidence that claimant was in need of surgery for his pre-existing knee condition until the November 7, 2014 work injury. The ALJ therefore finds that claimant has demonstrated that it is more likely than not that the injury of November 7, 2014 resulted in acute tears to the lateral collateral ligament, aggravating his pre-existing condition and accelerating claimant's need for treatment at the ER following his injury and ultimately surgical intervention. The ALJ credits the reports from Dr. Griggs on this issue that claimant would need the surgery after his course of physical therapy failed to offer claimant relief from his symptoms as credible and persuasive.

22. The ALJ further finds that the April 6, 2015 incident at work was not a compensable injury, as no changes to claimant's underlying condition occurred during

the incident and the incident did not result in the need for additional medical treatment. Instead, the ALJ finds claimant has proven that it is more likely than not that the medical treatment, including the surgery performed on April 22, 2015 was related to claimant's November 7, 2014 work injury with employer.

23. Claimant's claim for benefits related to the April 6, 2015 work injury (W.C. No. 4-979-719-01) is therefore denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he slipped and fell off the pipe on November 7, 2014. As found, the testimony of claimant regarding his symptoms before and after he fell off the pipe and the opinions expressed by Dr. Griggs in his medical records are more credible and persuasive than the contrary opinions expressed by Dr. O'Brien in his report and testimony.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. As found, the medical treatment claimant received from the ER, Dr. Griggs and his referrals, including the surgery performed on April 22, 2015, are found to be reasonable medical treatment necessary to cure and relieve claimant from the effects of his work related injury.

7. As found, claimant has failed to show by a preponderance of the evidence that the incident at work on April 6, 2015 resulted in any new injury to his knee. Therefore, claimant's claim under W.C. No. 4-979-719-01 is denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury, including but not limited to the treatment from the ER on November 8, 2014, Dr. Griggs treatment and referral for physical therapy and the surgery performed on April 22, 2015.

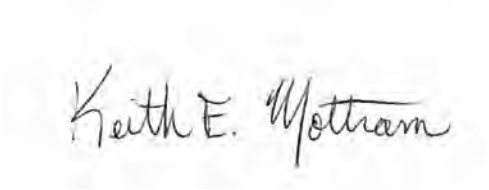
2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury and provided by a physician authorized to treat claimant?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from December 29, 2014 until February 23, 2015 when claimant returned to work for a different employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD") benefits beginning February 24, 2015 and continuing?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employer?

- The parties stipulated at the hearing to an average weekly wage ("AWW") of $1,601.47 that is calculated by combining claimant's earnings of $1,354.31 with Claimant's COBRA increase of $247.16.

FINDINGS OF FACT

1. Claimant was employed with employer as a Systems Operator I on December 27, 2014. Claimant testified his job duties included operating a fork lift and a front end loader. Claimant testified that through his work with employer, he would work shifts from 5:30 p.m. to 6:00 a.m.

2. Claimant testified that he was working on a drilling site in Wyoming on December 27, 2014 when at approximately 9:00 p.m., he slipped and fell on an icy ramp and landed on his right shoulder. Claimant testified he called his supervisor, Mr. Hansen and informed him that he fell. Claimant testified Mr. Hansen told him he would

tell Mr. Chambers, the direct supervisor for the area, of claimant's fall. Claimant testified he continued working and took it easy and was going to see how he felt in the morning.

3. Claimant testified that following his fall, he continued to work, but would use his left arm to lift. Claimant testified he finished his shift with employer and his shoulder was numb and throbbing.

4. Claimant testified that following his shift, he was scheduled to return to work on December 28, 2014 at 5:30 p.m., but was woken up at approximately 2:00 p.m. by Mr. Hansen and was told to pack up because he was going to another job site where he would catch a ride back to his home in Colorado. Claimant testified Mr. Hansen helped him load his belongings, including his tools and a cooler.

5. Claimant testified that while he was in the car with Mr. Hansen, he again mentioned that he hurt his shoulder. Claimant testified Mr. Hansen told him to sleep on it and that he had reported the injury to Mr. Chambers and someone would be getting back to him. Claimant testified he went to the new job site and operated a loader with his left hand. Claimant testified he was at the new job site for approximately 12-13 hours, before leaving the job site on December 29, 2014 at approximately 6:00 a.m.

6. Claimant testified he got a ride back to Colorado with Mr. Rotta and arrived at his home late in the afternoon on December 29, 2014. Claimant testified he did not receive a referral from employer to a physician between December 29, 2014 and January 2, 2015. Claimant testified that during this time, his pain began getting worse.

7. Claimant testified he was advised that he was terminated by employer on January 2, 2015. Claimant testified he then made a medical appointment with his personal physician, Dr. Smith with Roaring Fork Family Physicians.

8. Claimant was examined by Dr. Smith on January 2, 2015. Dr. Smith noted claimant reported he fell and landed on his right shoulder on December 27, 2014. Dr. Smith noted claimant had pain since his fall and documented "a little bruising down into the proximal upper arm". Claimant reported pain with overhead activity. Dr. Smith diagnosed claimant with a likely injury to the rotator cuff and provided claimant with restrictions of no lifting over 10 pounds. Claimant testified at hearing that he had not had an injury to his right shoulder before December 27, 2014.

9. Claimant testified that after his appointment with Dr. Smith, he called Axiom, a medical service provided by employer that allows the employees to call with medical questions involving work related injuries and speak to a nurse. Claimant testified he knew to call Axiom from a co-worker. Claimant testified he spoke with "Jan" at Axiom and asked her if a report had been filed. Claimant testified he was not referred to a physician by Axiom or employer after reporting the injury.

10. Claimant returned to Dr. Smith on January 14, 2015. Claimant noted continued pain in his right shoulder and Dr. Smith recommended claimant obtain a magnetic resonance image ("MRI") of his right shoulder. Claimant was referred by Dr. Smith to Dr. Adams.

11. Dr. Adams evaluated claimant on January 21, 2015 and noted claimant's accident history of slipping at work, landing on the right shoulder. Dr. Adams referred claimant for an MRI of the right shoulder.

12. Claimant returned to Dr. Smith on February 11, 2015. Dr. Smith noted that it was evident that claimant had a torn rotator cuff, but that insurer had denied the request for the MRI. By March 30, 2015, Dr. Smith was noting that claimant had a known rotator cuff tear and would likely need surgery.

13. Mr. Norwood, claimant's co-worker, testified at hearing that he was working with claimant on December 27, 2014 and witnessed claimant fall when he slipped on iron. Mr. Norwood testified claimant was talking on the phone and walking away from him when he stepped on iron, slipped and fell, landing on his right side. Mr. Norwood testified he walked over to claimant and asked him if he was OK, to which claimant replied that he was OK. Mr. Norwood testified he asked claimant several times through the day if he was OK, to which claimant responded that he was OK. Mr. Norwood testified he did not notice any difference in how claimant performed his work.

14. Mr. Norwood testified that he did not work with claimant anymore after the shift in which claimant fell (the shift ending December 28, 2014). Mr. Norwood testified he later saw claimant and his supervisor loading claimant's belongings. Mr. Norwood testified he did not hear claimant complain of right arm pain following his fall.

15. Mr. Hansen testified at hearing in this matter that he had spoken with claimant in December 2014 regarding a tire claimant had blown on the loader. Mr. Hansen confirmed that claimant had told him that he had fallen. Mr. Hansen testified he asked claimant if he was OK, and claimant replied that he was OK. Mr. Hansen testified he did not interpret this as claimant reporting a work related injury.

16. Mr. Hansen testified that the next day he removed claimant from the rig he was working on because of complaints employer had received from the rig owner about claimant. Mr. Hansen testified he moved claimant to a different rig and helped claimant move some of his belongings. Mr. Hansen testified that in the drive to the new rig, claimant did not complain of shoulder pain. Mr. Hansen testified he did not tell Mr. Chambers of claimant having fallen at work.

17. The ALJ credits the testimony of claimant and Mr. Norwood and finds that claimant has established that on December 27, 2014 he slipped and fell on ice at work and landed on his right side. The ALJ credits the medical records from Dr. Smith that

document claimant had bruising on his right shoulder on examination on January 2, 2014 and diagnosed claimant with a possible torn rotator cuff and finds that claimant has proven that it is more likely than not that claimant sustained an injury at work when he slipped and fell on December 27, 2014.

18. The ALJ notes that respondents take issue with the fact that claimant indicated he was OK to co-workers after the fall and did not seek medical treatment immediately after the injury. However, the evidence establishes by a preponderance of the evidence that claimant did sustain an injury when he fell on December 27, 2014 that resulted in the need for medical treatment.

19. Claimant was placed on restrictions by Dr. Smith on January 2, 2015. The ALJ finds that the claimant has demonstrated that it is more likely true than not that the medical restrictions are a result of his December 27, 2014 slip and fall when he landed on his right side and resulted in claimant's subsequent wage loss. The ALJ finds that the wage loss continued until February 24, 2015 when claimant returned to work for a new employer.

20. The ALJ notes that claimant sought TTD benefits beginning December 29, 2014. However, the evidence at hearing establishes that claimant was off of work beginning December 29, 2014 due to his normal scheduled time off. Claimant has failed to establish that it is more likely true than not that his failure to work between December 29, 2014 through January 2, 2015 was related to his work injury.

21. Claimant also argues that he is entitled to TPD benefits beginning February 24, 2015. However, claimant has failed to establish that it is more likely true than not that his earnings after he returned to work for the new employer were related to claimant's work injury. Insufficient evidence was presented at hearing of a wage loss after February 24, 2015 related to claimant's work injury and, therefore, claimant's claim for TPD benefits is denied.

22. Respondents presented the testimony of Mr. Merritt, the Senior Human Resources Operations Partner for employer. Mr. Merritt testified that claimant was fired on January 2, 2015 for failing to attend safety meetings and because the owner of the drilling rig had requested claimant be removed from the job site. Mr. Merritt testified if claimant had attended the safety meetings, he would not have been fired.

23. Claimant testified on rebuttal that he missed some safety meetings because the tool pusher in charge of the safety meetings allowed other workers to smoke during the meetings and he did not like being around the smoke.

24. Mr. Cook testified at hearing in this matter. Mr. Cook is the Principal HSE Official for employer. Mr. Cook testified he first became aware of claimant's injury when he was contacted by Axiom, a service that provides 24 hour care through an 800

number, and advised that an employee had called seeking medical care, on January 3, 2015 between 8:00 to 9:00 a.m. Mr. Cook testified he eventually spoke to Mr. Padgett and found out that claimant was a former employee. Mr. Cook testified he called Axiom back and filled out the first report of injury. Mr. Cook testified he did not call claimant when he found out that claimant was claiming an injury.

25. Significant testimony was presented regarding other issues with claimant's employment, including an incident in which claimant was written up for locking a seatbelt behind him in the truck to circumvent a rule that seatbelts be worn at all times when operating a vehicle. Because the ALJ finds that claimant's termination was not related to this incident (as evidenced by the lack of any write ups for claimant for the incident being entered into evidence at hearing), the ALJ finds these incidents immaterial to the ultimate decision of whether claimant committed a volitional act that resulted in his termination of employment.

26. The ALJ finds based on the testimony that was presented at hearing that claimant was terminated for failing to attend the safety meetings. However, insufficient evidence was presented that demonstrated claimant was aware that his failure to attend the safety meetings would result in his termination of employment. Claimant testified that he was not allowed to stand next to an open door to attend the safety meetings, but would have to be in the room exposed to the second hand smoke to attend the safety meetings.

27. The ALJ finds respondents have failed to demonstrate that claimant was terminated for committing a volitional act that he reasonably knew would lead to his termination of employment. The ALJ notes that despite testimony at hearing that indicated employer used a progressive discipline process, claimant was never warned that his failure to fully attend the safety meetings would lead to his termination of employment. Therefore, the ALJ determines that respondents have failed to prove that claimant reasonably should have known that his actions would lead to his termination of employment.

28. The ALJ further finds that claimant's testimony that he objected to being exposed to second hand smoke in the safety meetings was a reasonable excuse on his part to abstain from the safety meetings absent some kind of written warning from employer or the tool pusher that his failure to attend the meetings would lead to his termination of employment.

29. Furthermore, evidence presented at the hearing indicates Mr. Cook issued an e-mail shortly after claimant reported his injury that indicated claimant was terminated December 31, 2014 for "unsatisfactory job performance" and made no mention of claimant's failure to attend the safety meetings or other insubordination that led to his termination of employment. Therefore, the ALJ concludes that respondents have failed to meet their burden of proof in this regard.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he slipped and fell on his right side injuring his shoulder. The ALJ notes that claimant's co-worker witnessed the fall and Dr. Smith documented claimant having bruising on his right shoulder when he examined claimant on January 2, 2015. The ALJ finds that claimant has proven by a preponderance of the evidence that the fall caused the injury to his right rotator cuff that necessitated the need for medical treatment.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. As found, the treatment provided by Dr. Smith and Dr. Adams, including the recommendation for the MRI of the shoulder is reasonable medical treatment necessary to cure and relieve claimant from the effects of the medical treatment.

7. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. As found, the treatment provided by Dr. Smith on January 2, 2015 was not authorized. As found, claimant initially reported the incident to employer, but didn't express a desire to seek medical treatment. As found, employer was not put on notice of the claimant's desire to seek medical treatment until claimant called Axiom and Axiom informed Mr. Cook of claimant's request for medical treatment.

9. However, after Mr. Cook became aware of the claimant's request for medical treatment, he did not refer claimant to a physician designated to treat claimant for his work injury. Therefore, claimant's treatment with Dr. Smith beginning January 14, 2015 is authorized, as the choice of physician had by then transferred to claimant pursuant to Section 8-43-404(5)(a), C.R.S. As found, Dr. Smith's referral to Dr. Adams is likely deemed authorized as within the chain of referrals.

10. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a

work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

11. As found, claimant has demonstrated that the injury resulted in work restrictions from Dr. Smith as of January 2, 2015. As found, the work restrictions resulted in a wage loss to claimant. As found, claimant is entitled to TTD benefits commencing January 2, 2015 when the restrictions came into place. The ALJ notes that claimant was off of work prior to January 2, 2015 due to his normal scheduled time off. Therefore, claimant's wage loss did not develop until January 2, 2015 and any wage loss prior to January 2, 2015 is not related to the work injury.

12. The mere fact that Dr. Smith was not an authorized provider at the time that he placed claimant on restrictions does not negate the fact that claimant has proven by a preponderance of the evidence that he sustained an injury that resulted in disability and led to an impairment of wage earning capacity. The TTD benefits continue until February 23, 2015 when claimant returned to work for a different employer.

13. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

14. As found, claimant has failed to provide sufficient evidence that he is entitled to an award of TPD benefits. As found, insufficient evidence was presented at hearing that there was a wage loss that occurred when claimant returned to work for the subsequent employer and that the wage loss was attributable to the work injury.

15. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance

context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

16. As found, respondents have failed to demonstrate that claimant committed a volitional act that led to his termination of employment. As found, claimant was terminated for failing to attend the safety meetings, but was not advised by employer that his actions would result in his termination of employment. Moreover, when claimant was terminated, he was simply advised that it was for poor work performance, and not specifically for failing to attend the safety meetings. As such, respondents have failed to prove by a preponderance of the evidence that claimant exercised a degree of control over the circumstances surrounding his termination of employment.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his industrial injury pursuant to the Colorado Medical Fee Schedule after January 14, 2015 from Dr. Smith and Dr. Adams, including but not limited to the recommended MRI scan of the right shoulder.

2. Claimant's claim for payment of the January 2, 2015 medical bill from Dr. Smith is denied as Dr. Smith was not yet authorized to treat claimant for his work related injuries.

3. Respondents shall pay claimant TTD benefits for the period of January 2, 2015 through February 24, 2015 based on the stipulated AWW.

4. Claimant's claim for TPD benefits is denied.

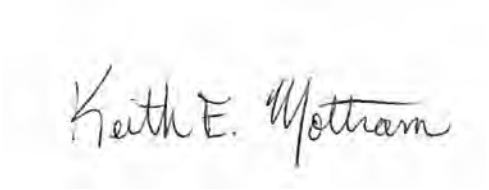
5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 31, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant works for Employer as a cleaner. Claimant performs her cleaning work primarily at Kinder Morgan Day Porter, Cresthill Middle School, and Cougar Run Elementary School.

2. Claimant alleges that she suffered an industrial injury on November 10, 2014.

3. On November 10, 2014 Claimant was earning $9 per hour.

4. On December 5, 2014 Claimant began earning $9.50 per hour for her work as lead cleaner. Claimant continued to earn $9.50 per hour for the months of December, 2014, January, 2015, February, 2015, and March, 2015.

5. Prior to and leading up to her alleged industrial injury, Claimant typically earned $9 per hour with the exception of the month of August, 2014 where she earned $10 per hour on most days and $9 per hour on a few days.

6. Claimant's work involved varied hours per week and on occasion she earned overtime pay.

7. From May 6, 2014 through November 10, 2014 Claimant worked approximately 906.02 hours over 26 and 6/7 weeks, for an average of 33.73 hours per week. During this period of time Claimant earned total gross wages of $8,372.57 for the 906.02 hours, for an average hourly wage of $9.24. Claimant's average hourly wage of $9.24 multiplied by the average number of hours she worked per week of 33.73 comes out to $311.67.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is

that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

The ALJ concludes that the best way to reach a fair approximation of Claimant's wage loss in this matter is to use the total wages Claimant earned in the six months leading up to her alleged industrial injury. For the 27 and 6/7 weeks prior to her injury Claimant earned approximately $9.24 per hour when her wages varied between $9 and $10 per hour. Claimant worked on average 33.73 hours per week during this time period. $9.24 x 33.73 hours equals an average weekly wage of $311.67. As Claimant's hours varied, the number of overtime hours varied, and her hourly wage varied during this time, the ALJ concludes that taking this average for the 6 months prior to and leading up to her alleged industrial injury is the best way to come to a fair approximation of her diminished earning capacity.

Although the ALJ notes that in the month of December Claimant received a raise to $9.50 per hour, it is unclear if Claimant's wages at that rate were expected to continue, or if they were expected to return back to $9 per hour as they did previously when Claimant received a raise from $9 to $10 per hour and then went back to $9 per hour. The evidence is insufficient to support that calculating wages based on $9.50 per hour would be the best way to fairly approximate her diminished earning capacity. Rather, the ALJ finds it most appropriate to use the calculation outlined above and the average weekly wage based on the 6 months prior to the alleged industrial injury. Claimant's average weekly wage is $311.67.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $311.67.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

/s/ Michelle E. Jones

DATED: July 27, 2015

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

Respondent's answer brief was filed on June 3, 2015. On the same date, Claimant indicated that there would be no reply brief. Consequently, the matter was deemed submitted for decision. After a consideration of the briefs, the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's Petition to Re-Open; and, if reopened, medical benefits [including a changing of authorized treating physician (ATP)]. The Respondent alleges that it did not have sufficient notice of the "change of physician" issue. There is no space for the "change of physician" issue of the Application for Hearing" form, however, there is a general space for "medical benefits."

The Claimant bears the burden of proof, by a preponderance of the evidence, on all issues, with the exception of alleged lack of sufficient notice on the "change of physician" issue, in which case the Respondents bears the burden of proof by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant (d.o.b. March 4, 1969), a 14-year employee of the Employer, suffered an admitted compensable low back injury while in the course and scope of employment on April 14, 2013. The Claimant is employed as a firefighter. He underwent conservative treatment for this injury and was eventually placed at maximum medical improvement (MMI) on July 15, 2013.

2. On July 25, 2013, the Claimant authored a memo to his Employer affirming his belief that through treatment he experienced significant improvement in recovering from his injury and that he was ready to return to work. The Claimant returned to work as a firefighter on July 25, 2013, where he remains employed.

3. The Claimant has a pre-injury history of back pain. Both before and during the Claimant's treatment for the admitted April 14, 2013 workplace injury, he repeatedly failed to disclose the full scope and history of related back ailments. Specifically, he did not disclose to the physicians assessing and treating his 2013 workplace injury that he suffered back pain since 2009, which required infrequent chiropractic adjustment.

4. On October 2, 2013, the Respondent filed a Final Admission of Liability (FAL), admitting that the Claimant reached MMI on July 25, 2013, without impairment, and denying post-MMI medical maintenance benefits.

The Change of Condition/Worsening

5. In October of 2014, the Claimant experienced a recurrence and worsening of lower-back and left sciatica pain. He attributes this recurring pain to his April 14, 2013 admitted workplace injury.

6. On October 20, 2014, Chad Prusmack, M.D. evaluated the Claimant to determine the nature and extent of his pain. After a physical examination, and upon reviewing an MRI (magnetic resonance imaging) of the Claimant's back, Dr. Prusmack was of the opinion that the Claimant suffered from an annular tear at L5-S1, and a disc herniation paracentral to the right with some lateral recess stenosis.

7. Dr. Prusmack state the opinion that the Claimant's current lower back pain and left sciatica pain is worse and it is due to the original work-related injury sustained on April 14, 2013. Dr. Prusmack recommends that the Claimant undergo an L3-S1 discectomy and fusion procedure to help remedy the recurrent medial ailment.

The Petition to Re-Open

8. On October 22, 2014, the Claimant informed the Employer of his desire to re-open his claim from April 14, 2013. In addition, the Claimant expressed an interest in having Dr. Prusmack as his ATP, going forward.

9. On October 23, 2014, Respondent contacted the Employer regarding the Claimant's request to reopen the workers' compensation claim. Respondent expressed an unwillingness to voluntarily reopen the claim, given the year-long gap between Claimant achieving MMI and the newly reported injury.

10. On December 2, 2014, the Claimant filed a Petition to Re-open his claim based on change in condition, error, and mistake. He attached to his Petition a report from Dr. Prusmack, in which Dr. Prusmack states the opinion that the Claimant's current injury is worse and this is attributable to the work related injury sustained on April 14, 2013.

11. On December 5, 2014, the Claimant filed an "Application for Hearing and Notice to Set" because his attempt to re-open his workers' compensation claim on October 22, 2014 had been denied.

Medical

12. On December 19, 2014, Giancarlo Checa, M.D., examined the Claimant. Dr. Checa performed a lumbar discogram at L3-L4; L4-L5; L5-S1, finding, in part, that the Claimant suffered the following:

> "- Mild-to-moderate diffuse disc bulge with diffuse grade 4 tearing of the annulus
> at L-4 – L- 5
> - Mild diffuse disc bulge with grade 4 tearing of the annulus anteriority and posteriorly on the right…
> - Mild disc bulge with a shallow central disc protrusion and grade 3 tearing of the anulus posteriorly…
> - Slight convex left curvature on the lumbar spine
> - Slight anterior wedging of L1 vertebral body. This is unchanged from the prior MRI."

13. On December 23, 2014, the Respondent approved the Claimant's request to be examined by the Todd Sweeney, M.D., one of the ATPs for the admitted work-related injury sustained on April 14, 2013.

14. Following the December 23, 2014 examination, Dr. Sweeney noted in his report that he last examined the Claimant in July 2013, at which time the Claimant had reached MMI and returned to work without restrictions. In addition, Dr. Sweeney noted that the Claimant reported a recurrence of sciatica pain down his left and right leg, and that the Claimant recently visited with Dr. Prusmack about this pain. Lastly, Dr. Sweeney stated the opinion that the Claimant's recent symptoms appear chronologically unrelated to previous admitted workplace injury. For the reasons stated herein below, the ALJ finds the opinions of Dr. Prusmack and Dr. Ghazi more persuasive and credible than the opinion of Dr. Sweeney.

15. On April 2, 2015, the Respondent referred Claimant to ATP Usama Ghazi, D.O. After performing a physical examination of the Claimant, and reviewing available medical records, Dr. Ghazi concluded that the Claimant's worsened condition is related to his April 14, 2013 work injury. In his report, Dr. Ghazi stated the following opinion, in pertinent part:

> "- His radicular pain follows the exact same pattern as he complained of prior to
> this and seems to be related to the L4-5 levels.
> - While it has certainly been a long time since he presented with any radicular pain complaints, I still believe his symptoms are related and identical to those that he had in 2013 from his work injury.

- [t]he true nature of radiculopathy and disk injuries is that their symptoms can either recur frequently or remain chronically, or in more rare cases such as Mr. Hanshue's case, they can recur a year or two down the road.
- his onset of radicular symptoms occurred with this injury and his recurrent radicular symptoms are in the same distribution and, therefore, attributable to the same lumbar levels, and as such, his injury and symptomatology is the same for which I saw him back in 2013, and therefore, I believe it is related."

Independent Medical Examination (IME) by Elizabeth Bisgard, M.D.

16. On April 27, 2015, the Respondent's medical expert, Elizabeth Bisgard, M.D., performed an IME of the Claimant, and reviewed available medical records. With this information, Dr. Bisgard prepared a report regarding the Claimant's recurring low back and sciatica pain. In her report, Dr. Bisgard detailed the Claimant's pre-injury medical history as well as the treatment history for the admitted workplace injury. Dr. Bisgard highlighted the fact that the Claimant failed to share relevant pre-injury medical history with the various doctors treating the work injury. In addition, Dr. Bisgard's report emphasizes the differing opinions among the medical professionals who examined the Claimant concerning the cause of his recurrent low back pain—some believed that the Claimant's recurring pain is related to the workplace injury, others did not. Dr. Bisgard requested additional records before reaching a final conclusion regarding the causal relatedness between the Claimant's recurring pain and the admitted workplace injury.

17. On May 20, 2015, Dr. Bisgard prepared an addendum report, following her review of the Claimant's additional medical records. Dr. Bisgard is of the opinion that the Claimant's current symptoms are not causally related to the April 14, 2013, work injury. The ALJ infers and finds that Dr. Bisgard's opinion that the Claimant's recurrent low back and sciatica pain is not causally related to the admitted April 14, 2013 workplace injury is contrary to the weight of the evidence. To accept Dr. Bisgard's opinion in this regard, the ALJ would be required to diminish the seriousness of the admitted injury, and determine that that only a year after MMI the Claimant returned to a baseline of a naturally progressing degeneration of his back, despite the location and nature of his recurrent symptoms. The ALJ infers and finds that such a stretch would be beyond any reasonable bounds.

Notice of "Change of Physician" Issue

18. The Respondent alleges that it did not have sufficient notice of the "change of physician" issue. There is no space for the "change of physician" issue on the Application for Hearing" form, however, there is a general space for "medical benefits." By letter of December 18, 2014, the Respondent denied a change of physician to Dr. Prusmack, and indicated that the Claimant could return to Dr. Sweeney who, in July 2013, was of the opinion that the Claimant's present symptoms (Finding No. 14 herein above) were unrelated to the admitted compensable injury. The ALJ infers and finds that Dr. Sweeney would be in an untenable position to continue to be a workers' compensation ATP, treating the Claimant for non work-related conditions. Indeed, there is no rational reason supporting a return to Dr. Sweeney as an ATP. On the other hand, the ALJ infers and finds that the Respondent was aware that Dr. Prusmack was of the opinion that the Claimant's present condition was work related and Dr. Prusmack had treatment recommendations for a work-related condition. The ALJ, therefore, infers and finds that the Respondent had reasonable notice, prior to the hearing, that the Claimant was seeking a change of physician to Dr. Prusmack. When the "change of physician" prong of "medical benefits" was brought up at hearing, the Respondent offered no underlying reasons concerning any effects of not being provided specific notice, in the form of an articulated sub-category of the "medical" issue, although no space therefore was provided in the "Application" form or the Case Information form. The ALJ, therefore, infers and finds that the Respondent had reasonable notice that "change of physician" would be an issue under the heading of "medical benefits."

Ultimate Findings

19. Considering the totality of the evidence, including the medical records and the Claimant's testimony, the ALJ rejects the opinion of Dr. Bisgard concerning lack of causal relatedness of the Claimant's pain, and instead finds that the opinions and recommendations of Dr. Prusmack, Dr. Checa, and Dr. Ghazi are more consistent with the totality of the evidence. The ALJ finds that the Claimant's recurrent low back and sciatica pain is causally related to the injury of April 14, 2013, and represents a "change of condition" since MMI. Further treatment, as recommended by ATPs, is warranted.

20. The Claimant's testimony, as well as the medical records, establish that the Claimant's need for additional medical treatment and/or surgery is reasonably necessary, causally related to the admitted injury of April 14, 2013, and represents a change of condition since MMI. The ALJ rejects the contrary opinions on lack of causal relatedness, rendered by Dr. Sweeney and Dr. Bisgard.

21. The Respondent had reasonable notice that a "change of physician" request was implicit in the "medical" issues set for hearing.

22. While somewhat scripted and mechanical, the ALJ finds that the Claimant's testimony was credible. Further, the ALJ finds the opinions of ATP Dr. Ghazi, as well as the opinions of Dr. Prusmack and Dr. Checa, to be more significantly more credible than the opinion of Dr. Sweeney and the Respondent's expert, Dr. Bisgard, on the issue of causal relatedness because the opinions of the former are more consistent with the totality of the evidence and the seriousness of the Claimant's admitted back injury.

23. The ALJ makes a rational choice between conflicting opinions, to accept the opinions of Dr. Ghazi, Dr. Prusmack, and Dr. Checa, as based on substantial evidence, and to reject the opinions of Dr. Sweeney and Dr. Bisgard on the issue of causal relatedness of the Claimant's present, worsened condition.

24. The ALJ rejects the Dr. Bisgard's and the Respondent's "age degenerative" theory and finds that the Claimant has proven, by a preponderance of the evidence that his work-related condition has changed and worsened since he reached MMI on July 15, 2013, and that additional medical treatment is reasonably necessary to cure and relieve the effects of the worsened condition, and **not** attributable to the natural progression of pre-existing non-work related back degeneration.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App.

2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible. Further, as found, the opinions of ATP Dr. Ghazi as well as those of Dr. Prusmack and Dr. Checa, were more credible than the opinions of dr. Sweeney and Respondent's expert, Dr. Bisgard, on the issue of causal relatedness of the worsening because the opinions of the former were more consistent with the totality of the evidence and the seriousness of the Claimant's admitted back injury.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice between conflicting opinions, to accept the implicit opinions of Dr. Ghazi, Dr. Prusmack, and Dr. Checa, as based on substantial evidence, and to reject the opinions of Dr. Sweeney and Dr. Bisgard on the issue of causal relatedness of the present, worsened back and sciatica conditions..

Re-Opening

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, an error, a mistake, or **a change in condition**. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S; *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, she must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). As found, the Respondent's "age degeneration" theory was rejected and the Claimant established that his work-related condition changed and worsened since he reached MMI on July 15, 2013, and the recommendations for additional medical treatment and/or surgery are reasonably necessary and **not** attributable to the natural progression of a pre-existing non-work related back degeneration.

Reasonable Notice of "Change of Physician" Issue

d. "The fundamental requisites of due process are notice and the opportunity to be heard." *Franz v. Indus. Claim Appeals Office,* 250 P.3d 755, 758 (Colo. App. 2010) [quoting *Hendricks v. Indus. Claim Appeals Office,* 809 P.2d 1076, 1077 (Colo. App. 1990)]. Workers' compensation benefits are a constitutionally protected property interest which cannot be taken without the due process guarantees of notice and an opportunity to be heard. *See Whiteside v. Smith,* 67 P.3d 1240, 1247 (Colo. 2003). Notice requirements apply to both parties. Reasonable notice requirements need not specify, in the application for hearing, the exact statute upon which a claimant relies in order to afford adequate notice of the legal basis of a claim. *See Carlee Carson v. Indus. Claim Appeals Office* [(No. 03CA0955, October 7, 2004) (not published), *cert. denied,* February 22, 2005]. A general request for the relief sought will suffice. *See Fang v. Showa Entetsu Co.,* 91 P.3d 419 (Colo. App. 2003). As found, the Respondent had reasonable notice that a "change of physician" request was implicit in the "medical" issues set for hearing.

Medical Benefits

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's medical treatment is causally related to the worsening of the originally admitted low back injury of April 14,

2013. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the worsening of the originally admitted back injury.

f. An ALJ may order a **change of physician** if the present treating physician's long-term treatment worsens or does not improve a claimant's condition. *See Ames v. Indus. Claim Appeals office,* 89 P.3d 477 (Colo. App. 2003). Under a recent statutory amendment, a claimant may obtain a one-time change of physicians by filing a written notice on a form designated by the Director of the Division of Workers' Compensation. § 8-43-404 (5) (a) (III), C.R.S. This statutory change illustrates a loosening of provisions providing strict employer-control over authorized treating physicians (ATPs). The fact that a claimant has more faith in a doctor other than the ATP may not be a sufficient reason for a change in the authorized treating physician. *See Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). If, however, the ATP in the workers' compensation system is of the opinion that a claimant's condition , or worsened condition, is not causally related to a work injury, it may plausibly be plausibly inferred that an injured worker seeking work-related treatment has no **faith** in the ATP. An ALJ would be doing such ATP and such claimant a favor by ordering a change of physicians. As Voltaire said, **faith** is 90% of the cure.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to a re-opening and subsequent benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to a re-opening and post-MMI medical benefits, including the recommended additional treatment and/or surgery.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 4-916-350-01 is hereby re-opened.

B. The Claimant's implicit request for a change of physician to Chad Prusmack, M.D., is hereby granted, prospectively, as of the hearing date, May 26, 2015.

C. The Respondent shall pay the costs of all authorized medical care and treatment for the admitted injury of April 14, 2013, including the additional treatment and/or surgery recommended by authorized treating physicians, including Dr. Prusmack, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. Any and all issues not determined herein are reserved for future decision.

DATED this 19 day of June 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

The issues addressed by this Order involve permanent partial disability, conversion of scheduled impairment to impairment of the whole person and entitlement to maintenance medical treatment. The specific questions to be answered are:

I. Whether Claimant is entitled to conversion of her 19% scheduled upper extremity impairment to 11% whole person impairment;

II. Whether Respondents have produced clear and convincing evidence to overcome Dr. Castrejon's Division IME opinion that Claimant sustained 19% scheduled permanent impairment;

III. Whether Claimant is entitled to an award of post-MMI maintenance medical benefits.

FINDINGS OF FACT

Based upon the evidence presented, the ALJ enters the following findings of fact:

1. Claimant works as a store manager for Employer who operates a retail store in Westcliffe, Colorado. She has worked in this capacity for the past 5 ½ years.

2. As the store manager, Claimant's duties vary. She supervises four other employees in the store, is accountable for completing payroll, balancing the budget and taking inventory. While she has administrative responsibilities, Claimant also engages in physical tasks including stocking and unloading freight.

3. The claimant sustained an admittedly compensable on the job injury to her right shoulder on August 19, 2013 when she was unloading the distribution center's truck. The claimant indicated that when unloading the truck, product is rolled down from the back of the semi-truck down rollers and into the building where the product is picked up and put into wheeled metal carts called "boats" for stocking onto the sales floor.

4. On August 19, 2013, Claimant maneuvered a boat stacked with 24 packs of 20 oz. bottles of water from the back of the store to the front of the store to unload the water where a product display was set up. She got about a quarter of the material unloaded when she felt a sharp pain in her right shoulder. She stopped for a while thinking the pain would go away but, since the workers only have a short period of time to unload the truck and get everything set up, Claimant attempted to go back and

complete the job. When she returned to work, Claimant heard a ripping sound in her right shoulder resulting in pain so severe that it took her to her knees. Claimant had another worker finish up while she retired to her office to gather herself together.

5. Claimant reported the injury to the employer's telephone injury report line and was referred by them to CCOM in Canon City where she was evaluated by a physician's assistant (PA), Stephen Quakenbush on August 20, 2013.

6. Claimant completed a pain diagram for PA Quakenbush on August 20, 2014, indicating she was experiencing stabbing pain in the right shoulder and pins and needles in the right finger tips. The claimant rated her pain at a level 8/10. PA Quakenbush diagnosed Claimant with a right shoulder sprain, possible rotator cuff injury, and right paracervical, trapezius, and parascapular muscular strain. PA Quakenbush took Claimant off of work and recommended physical therapy and an MRI.

7. An MRI of the right shoulder was completed on August 22, 2013. The MRI demonstrated mild degenerative changes of the acromioclavicular joint, fluid in the subdeltoid subacromial bursa concerning for bursitis and increased signal in the distal supraspinatus tendon, which may represent a partial thickness tear at the attachment. The infraspinatus and subscapularis tendons appeared intact. The quality of the MRI was limited due to "significant motion artifact."

8. Claimant returned to PA Quakenbush on August 23, 2014 where she completed a pain diagram, indicating pain in the back of the right shoulder, without additional pain complaints documented. The claimant rated her pain at a level 5/10. PA Quakenbush kept the claimant off work and referred her to Dr. Jennifer Fitzpatrick, an orthopedic physician, for evaluation.

9. Claimant began physical therapy with the Custer County Clinic on August 26, 2013.

10. Claimant was examined by Dr. Jennifer FitzPatrick on August 27, 2013. Dr. FitzPatrick diagnosed a partial rotator cuff tear with a marked painful right shoulder. Dr. FitzPatrick provided a cortisone injection and instructed Claimant to follow up in a month.

11. Claimant continued with physical therapy. While the aforementioned cortisone injection helped for approximately five days, Claimant's pain complaints did not completely resolve and remained in the same location.

12. Employer offered the claimant modified employment, within the physician-imposed restrictions, which the claimant accepted. The claimant returned to modified work on August 28, 2014.

13. Claimant's continued to improve with physical therapy. However, on September

6, 2013, while at home, Claimant reached up instinctively to grab a plate that was about to fall going to fall, causing extreme shoulder pain and prompting Claimant to report that she was, "back to square one". Respondents assert that this event constitutes an efficient intervening injury severing the causal connection between Claimant's admitted shoulder injury and her entitlement to benefits including her need for additional treatment, i.e. the surgery performed by Dr. Weinstein.

14. Claimant returned to CCOM and was seen by Dr. Richard Nanes on September 12, 2013. She completed a pain diagram on this date which indicates that she was experiencing pain at a 7/10 level with stabbing in the front of the right shoulder as well as the right and left fingertips. Claimant requested to be seen by Dr. David Weinstein instead of Dr. Fitzpatrick.

15. Claimant was evaluated by Dr. Weinstein on September 27, 2013. Dr. Weinstein diagnosed Claimant with right rotator cuff tendinitis with partial rotator cuff tear, right biceps tendinitis, right acromioclavicular joint inflammation, and right trapezial myofascial inflammation. Dr. Weinstein discussed with the claimant that these diagnoses could heal non-operatively. Consequently, he recommended conservative treatment before considering arthroscopic surgery.

16. Additional therapy proved unsuccessful. Thus, Dr. Weinstein performed surgery on the right shoulder on December 7, 2013. Dr. Weinstein's operative note supports that he performed a "right arthoscopic subacromial decompression;" a "right arthroscopic rotator cuff repair of subscapularis and debridement of supraspinatus tendon tear;" a "right arthroscopic biceps tendodesis;" and a "right arthroscopic distal clavicle resection." As noted above, Respondents assert that Claimant's biceps, infraspinatus and subscapularis tendon tears are explained by her instinctively reaching upwards to grab a plate that was about to fall. As support, Respondents cite that the MRI obtained August 20, 2013 demonstrated the infraspinatus and subscapularis tendons to be intact. The ALJ is not persuaded finding that the MRI was of poor quality secondary to "significant motion artifact." Based upon the evidence presented, including the MRI and the findings in Dr. Weinstein's operative report, the ALJ finds that the infraspinatus, subscapularis, and biceps tearing are, more probably than not related to Claimant's August 19, 2013 admitted right shoulder injury from lifting 24 packs of 20 oz. bottles of water.

17. Claimant underwent an extended course of post-operative physical therapy. On December 26, 2013, Dr. Nanes evaluated the claimant and noted the physical therapist felt the claimant's range of motion was "quite good". He released the claimant to return to modified duty as of January 13, 2014. In her treatment associated pain diagram, Claimant documented only aching pain across the front of the right shoulder.

18. Claimant returned to Dr. Weinstein on March 6, 2014, in follow-up. On March 6, 2014, Dr. Weinstein noted the claimant was doing well with a mild amount of discomfort. On physical exam, Claimant had forward elevation to 170 degrees with external rotation to 50 degrees. Dr. Weinstein opined that Claimant was doing "very well" and anticipated MMI in six weeks.

19. On April 8, 2014, Dr. Nanes evaluated the claimant. He noted that Claimant had pain in the right shoulder, which she considered to be "light". On physical exam, Dr. Nanes noted "excellent and nearly full" range of right shoulder motion, with all movements being pain free.

20. Dr. Weinstein's April 30, 2014 progress report indicates that Claimant was "doing much better" with mild weakness and no other complaints. He noted that she was participating in therapy on a regular basis and had experienced good improvement in her symptoms. On physical exam, Claimant had 170 degrees of forward elevation and internal rotation to L5. Dr. Weinstein recommended continued physical therapy and transition to a home exercise program. Dr. Weinstein released Claimant to return to work, without restrictions, and opined that she was approaching MMI.

21. Dr. Nanes re-examined Claimant on May 6, 2014. During this examination, Claimant described her pain as "almost gone", with pain at a level 0/10. On physical exam, Dr. Nanes documented "excellent", pain free full range of motion of the right shoulder. He noted that Claimant would not need an impairment rating, "as all 6 of her right shoulder motion are completely full". He released the claimant to return to work, without restrictions.

22. Claimant returned to Dr. Nanes for evaluation on June 17, 2014. On physical exam, Dr. Nanes again noted, "excellent and full range of motion of the right shoulder and the movement are without any pain". Dr. Nanes opined that Claimant had an excellent response to surgery and had full range of motion in all six directions. Therefore, he placed the claimant at MMI with no impairment, no restrictions and no need for medical treatment post-MMI.

23. Claimant returned to her regular job as a store manager for the Employer on June 17, 2014. As noted above, Claimant's job duties vary. During her testimony, Claimant described physical requirements of the job as including the ability to lift up to 40 pounds, twisting, turning, kneeling, squatting, reaching overhead, gripping, grasping, keyboarding, unloading trucks, moving merchandise, and stocking. Based upon this testimony, the ALJ finds that while Claimant is the store manager, her job is physically demanding. Claimant has worked her regular job with Employer since being placed at MMI by Dr. Nanes.

24. On June 23, 2014, Respondents filed a Final Admission of Liability (FAL) consistent with the opinions expressed by Dr. Nanes' in his June 17, 2014 MMI report. Claimant filed a timely objection and the matter proceeded to a Division Independent Medical Examination (DIME) performed by Dr. Miguel Castrejon on September 17, 2014.

25. Dr. Castrejon agreed that the claimant reached MMI, consistent with Dr. Nanes' opinions. However, Dr. Castrejon opined Claimant suffered 6% scheduled impairment for loss of shoulder range of motion. Dr. Castrejon also assigned 3% scheduled

impairment for "motor weakness involving the supraspinatus/infraspinatus, which equates to the suprascapular nerve" by application of Tables 14 and 11 of the *AMA Guides to the Evaluation of Permanent Physical Impairment,* 3d Ed., Revised. Finally, Dr. Castrejon assigned 10% impairment per the Division's Rating Tips, for the distal clavicle resection performed by Dr. Weinstein. Dr. Castrejon's combined impairment rating totaled 19% scheduled impairment of the right upper extremity. Nineteen percent scheduled impairment converts to 11% percent whole person impairment. Dr. Castrejon opined no additional medical care is necessary to maintain the claimant at MMI.

26. Respondents objected to Dr. Castrejon's impairment rating and had Claimant evaluated by Dr. Jorge Klajnbart. In his report dated March 15, 2015, Dr. Klajnbart noted that he did not "see any evidence of injury to the suprascapular nerve" and that Claimant's muscular weakness arose postoperatively for which treatment was focused on regaining strength in the subscapularis and supraspinatus. According to Dr. Klajnbart, Claimant demonstrated "symmetric strength in all upper extremity musculature." Consequently, Dr. Klajnbart did not "concur with the assignment of impairment per Tables 14 and 11" of the *AMA Guides to the Evaluation of Permanent Physical Impairment*, 3d Ed. Revised (hereinafter the *AMA Guides*)

27. The ALJ takes judicial notice of the *AMA Guides* to find that Table 11 relates specifically to "determining impairment of the upper extremity due to loss of power and motor function resulting from peripheral nervous system disorders". Table 14 relates specifically to "Specific Unilateral Spinal Nerve Impairment Affecting the Upper Extremity". Dr. Klajnbart testified that Table 11 of the AMA Guides deals with determining impairment based on loss of power and motor deficits which he did not observe during his evaluation.

28. Respondents contend that Dr. Castrejon erred when he included an additional 3% scheduled impairment per Tables 11 and 14 for weakness equating to the suprascapular nerve because Claimant sustained injury to her shoulder injury only, without peripheral nerve involvement. As emphasized, the ALJ finds Respondents argument to stress that there must be some direct nerve injury/condition causing loss of power or weakness in the muscles innervated by the specific nerve affected before it is appropriate to resort to Table 11 and 14 in determining upper extremity impairment. The *AMA Guides* specifically refers to such nerve involvement as "peripheral spinal nerve lesions" supporting Respondents contention that a particular peripheral spinal nerve must be involved and compromised before rating upper extremity impairment through the use of Tables 11 and 14.

29. Based upon the evidence presented, the ALJ finds Claimant's upper extremity weakness and loss of power is, more probably than not, a function of favoring/protecting the injured arm and not the result of any peripheral nerve injury. Indeed, careful review of the medical record does not support a finding that Claimant sustained any injury to a peripheral nerve, either during the initial event or as a consequence of any treatment necessitated thereafter. Accordingly, the ALJ finds the Dr. Castrejon deviated from and misapplied the *AMA Guides* when he rated Claimant for the consequences of a disorder

that she does not have. Based on the evidence presented, the ALJ finds that Claimant's rating for decreased range of motion in the right shoulder addresses the extent of impairment in the shoulder for weakness and loss of power. Consequently, Respondents have proven by clear and convincing evidence that it is highly probable that the DIME physician's opinions concerning permanent impairment are incorrect. Dr. Castrejon's impairment rating has been overcome by clear and convincing evidence.

30. Dr. Klajnbart, in his report of March 15 indicates that he disagrees with Dr. Castrejon regarding the goniometric ratings of the claimant's loss of range of motion slightly but admitted during his deposition that these could be based upon the claimant's activities before the examination. He agreed that the Division of Worker's Compensation rating tips indicated that a 10% rating was required for a distal clavicle resection (excision) but was somewhat confused initially as to whether that was as a whole person or on the schedule in his deposition. Although Dr. Klajnbart did not attach a rating impairment work sheet to his report in his deposition of May 7, 2015, he opined that the claimant sustained an overall impairment of 8% percent as whole person when the scheduled impairments for range of motion loss and the distal clavical resection were combined and converted. Dr. Klajnbart further stated that he was not aware of any need for apportionment.

31. Claimant testified credibly that she has pain in the back of her neck all the way across to the shoulder and pain in the scapula area which is a nonstop, constant pain. She has additional pain in the front that extends from the neck to the shoulder and increases with activity. The pain in the scapula area is constant and never goes away. It is like a dull throb. Claimant described its location as being about 3 inches from the bottom of the armpit towards the back. She stated that, if she attempted to make a golf swing, the pain in the area of the scapula becomes intense like a sharp, stabbing pain. The issues with the pain on top in front of the clavicle occur when she has attempted to do things such as bowling. When she attempted to take the bowling ball behind her, she has a pulling sensation and pain across the top by the neck. The pain is located between her neck and shoulder. The claimant cannot sleep on her right shoulder as the pain in the back and scapula hurts. Claimant still has pain and soreness in the area where dry needling attempts were performed by Dr. Scheper. If Claimant attempts to perform activities such as vacuuming or wiping down a counter, she has pain across the back between the shoulder and neck and her scapula pain increases. If she attempts to unload the trucks at work, the pain in the scapula area increases and she must stop after 10 minutes of work. Claimant has a horse that she can no longer saddle as cinching the saddle on the horse causes intense scapular pain.

32. Based on Dr. Klajnbart's deposition testimony, the ALJ infers and finds that the acromiom and clavical are located on the front of the body, on top of the shoulder proper and medial (more towards the center of the body) to the glenohumeral joint in the sagittal plane. Consequently, the ALJ finds the acromion and clavicle anatomic structures beyond the glenohumeral joint and not part of the arm itself.

33. The preponderance of the persuasive evidence presented demonstrates that

Claimant's permanent impairment extends beyond her left arm. Accordingly, the ALJ finds that conversion of Claimant's scheduled impairment to impairment of the whole person is warranted in this case.

34. The ALJ credits Dr. Klajnbart's impairment rating opinions to find that Claimant has 8% whole person impairment.

35. Based upon the evidence presented, Claimant failed to meet her burden of proving that she requires medical treatment to maintain her condition at MMI.

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the ALJ draws the following conclusions of law:

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000)

B. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S.* However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder. *Langton v. Rocky Mountain Health Care Corp*., 937 P. 2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

C. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or "functional impairment", on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert*

& Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998). Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.

D. It is true, as Claimant points out, that "functional impairment" need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008).* Moreover, as noted by Claimant "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005); Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (ICAO, December 17, 2013). Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of the arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as impairment of the whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his/her "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office, 927 P.2d 1333 (Colo. 1996).* Consequently, an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm at the shoulder. *Walker* v*. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp., supra.*

E. In this case, the ALJ agrees with Claimant that the persuasive evidence warrants conversion of her scheduled impairment to impairment of the whole person. As found, both the acromion and the distal clavicle are structures beyond the "arm." Consequently, the subacromial decompression and distal clavicle resection, which permanently altered these anatomical structures, were performed above and medial to the glenohumeral joint and therefore, above the "arm." *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008)(finding that subacromial decompression was done at the acromion and the coracoacromial ligament to relieve the impingement, which was related to the scapular structures above the level of the glenohumeral joint"); *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO, April 13, 2006) (finding that distal clavicle resections are proximal to the glenohumeral joint and therefore, on the trunk of the body). Furthermore, the consistent and convincing evidence establishes that Claimant suffers from persistent pain and weakness in the scapula and surrounding stabilizing musculature of the upper back (infraspinatus, supraspinatus and subscapularis) which affects her sleep and limits her ability to perform activities, including lifting with the right arm. In concluding that Claimant is entitled to conversion of her scheduled impairment to impairment of the whole person, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Steinhauser v. Azco,*

Inc., W.C. No. 4-808-991 (ICAO, January 11, 2012) and *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (ICAO, March 27, 1986) instructive. In *Steinhauser,* the Panel affirmed the conclusion of the ALJ that pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment. Similarly, in *Franks* pain affecting the trapezius and difficulty sleeping on injured side supported the ALJ's finding of whole person impairment. On the evidence presented, the ALJ concludes that the instant case is analogous to *Steinhauser* and *Franks* in that Claimant has produced convincing evidence that she has persistent scapular pain and weakness in the muscles stabilizing the scapula which limits her functional abilities and her sleep. Accordingly, the ALJ concludes that Claimant has proven by a preponderance of the evidence that she sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which warrants conversion of his scheduled impairment to whole person impairment.

F. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a Division Independent Medical Examination ("DIME") process for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). The heightened burden of proof in Subsection (8) applies only if the threshold determination is made that the impairment is not limited to the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the rating of the DIME. *Webb v. Circuit City Stores, Inc.*, W.C. No. 4-467-005 (ICAO, August 16, 2002). Because the ALJ concludes that Claimant has sustained functional impairment beyond the schedule, the clear and convincing burden to overcome the DIME applies in this case.

G. Section 8-42-107(8), C.R.S., provides that the DIME physician's finding of medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence has been defined as evidence which demonstrates that it is highly probable the DIME physician's determinations are incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (1995). Consequently, to overcome the DIME report, there must be evidence which proves that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co. v. Gussert, supra.* Whether the party challenging the DIME physician's determinations has overcome the report by clear and convincing evidence is generally one of fact for determination by the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *Metro Moving and Storage Co. v. Gussert, supra.*

H. Workers' compensation physicians in Colorado are charged with utilizing the *AMA Guides, Revised 3rd Edition* and the *Division of Workers' Compensation Accreditation Guidelines* in rendering a determination as to a patient's permanent impairment rating stemming from a work related injury. The Division has additionally

propounded *Impairment Rating Tips* to assist rating physicians in assigning permanent impairment ratings. Whether a physician has properly applied the *AMA Guides* in arriving at a Claimant's impairment rating is a question of fact for the ALJ's determination. *See* *Metro Moving & Storage Co. v. Gussert, supra*. As found here, substantial evidence establishes that Dr. Castrejon deviated from and misapplied the *AMA Guides* when he rated Claimant according to Tables 14 and 11 for the consequences of a peripheral nerve that is not contributing to her impairment. Based upon evidence presented, the effect of such deviation resulted in Claimant receiving impairment for weakness when impairment for weakness was taken into account based upon Claimant's impairment for range of motion loss. Consequently, the ALJ concludes that it is highly probable that Dr. Castrejon's opinions concerning permanent impairment are incorrect. As Dr. Castrejon's impairment rating has been overcome and Claimant has functional impairment beyond the arm at the shoulder, the ALJ adopts Dr. Klajnbart's 8% whole person rating as expressed in his deposition testimony.

I. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Citing *Grover*, the Court reaffirmed that "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Thus, while a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment, the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan, supra.* If the claimant reaches this threshold, the court stated, as the second step, that the ALJ should enter "a general order, similar to that described in *Grover*." In this case, the ALJ concludes that Claimant failed to introduce persuasive evidence to substantiate her claim for post MMI maintenance medical benefits. Indeed, no physician has recommended medical benefits to maintain Claimant at MMI for her industrial shoulder injury.

ORDER

It is therefore ordered that:

1. The permanent impairment rating of Dr. Castrejon is set aside and the rating expressed by Dr. Klajnbart during his deposition is adopted.

2. Claimant's request for conversion of the award of scheduled impairment benefits to whole person permanent physical impairment benefits is GRANTED.

3. Insurer shall pay permanent partial disability benefits consistent with a 8% whole person disability rating pursuant to C.R.S. § 8-42-107(8)(d), taking credit for any PPD benefits previously admitted and paid.

4. Claimant's request for an award of medical benefits post-MMI is DENIED AND DISMISSED.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 30, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 South 6th Street, Suite 414, Grand Junction, CO 81501	
In the Matter of the Workers' Compensation Claim of: **JOHN ABEYTA,** Claimant, vs. **MESA COUNTY COLORADO,** Employer, and **TRISTAR RISK MANAGEMENT,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-620-040-04**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hearing in this matter was held on October 1, 2014 and on December 9, 2014 before Keith E. Mottram, Administrative Law Judge.

Claimant was present and represented by Christopher Richter Esq. Respondents Mesa County and Tristar Risk Management were represented by Thomas W. Blake Esq. Respondent Mesa County and Pinnacol Assurance were represented by Jeff Francis, Esq. This matter was digitally recorded in Grand Junction, Colorado from 1:01 p.m. until 5:06 p.m. on October 1, 2014 and from 8:33 a.m. until 3:24 p.m. on December 9, 2014. Claimant's Exhibits 1-17 were admitted at hearing. Respondents Mesa County and Tristar Risk Management Exhibits A-JJ and LL-MM were admitted at hearing. Respondents Mesa County and Pinnacol Assurance Exhibits AAA-VVV were admitted at hearing.

In this order, John Abeyta will be referred to as "Claimant"; Mesa County will be referred to as "Employer"; Pinnacol will be referred to as "Insurer 1" and Tristar Risk Management will be referred to as "Insurer 2."

Also in this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2003); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

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Date: 6/17/2015

/s/Gail Dyet
Court Clerk

#JSRMV2NA0D18CTv

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his use of the medication Provigil is authorized, related, and reasonably necessary to cure and relieve him from the effects of his November 21, 2003 work injury?

- Whether claimant has proven by a preponderance of the evidence that his use of the medication Provigil is authorized, related, and reasonably necessary to cure and relieve him from the effects of his April 11, 2005 work injury?

- Whether Insurer 1 and/or Insurer 2 have proven by a preponderance of the evidence that claimant suffered a subsequent, intervening injury/condition which severs liability for claimant's use of the medication Provigil in whole or in part?

- Whether Insurer 2 has proven by a preponderance of the evidence that liability for claimant's use of the medication Provigil should be apportioned to the November 21, 2003 work injury and/or to claimant's non-work-related conditions?

- Whether Insurer 1 has proven by a preponderance of the evidence that Insurer 2 and/or claimant are barred by the doctrines of issue preclusion (collateral estoppel) and/or law of the case from apportioning liability for claimant's use of the medication Provigil to the November 21, 2003 work injury?

- The parties requested that the Order indicate that all medical bills are to be paid pursuant to the Colorado Medical Fee Schedule.

FINDINGS OF FACT

1. Claimant was employed with employer at the detention center. Claimant testified his job duties for employer required him to handle disruptive or combative inmates and his job involved significant physical activities. Claimant sustained a compensable injury to his cervical spine on November 21, 2003. Insurer 1 admitted liability for this claim which was assigned W.C. No. 4-620-040.

2. Claimant was referred for medical treatment following his November 21, 2003 injury to Dr. Stagg. Dr. Stagg referred claimant to Dr. Copeland for orthopedic evaluation. Dr. Copeland recommended physical therapy. Dr. Stagg also referred claimant to Dr. Gilman for diagnostic testing.

3. Dr. Gilman performed an electromyelogram and nerve conduction study (EMG/NCV) of claimant's right upper extremity on January 19, 2004. The EMG was noted to be normal with no evidence of cervical radiculopathy, but suggestive of borderline carpal tunnel syndrome.

4. Dr. Stagg referred claimant for a magnetic resonance image ("MRI") of the cervical spine on January 27, 2004. The MRI was performed on February 5, 2004 and demonstrated a bulging disc and C5-6 with a smaller disc bulge at C6-7. The radiologist that reviewed the MRI noted that the C5-6 bulge extended into the right C6 foramen and noted potential nerve root compression on the right at C5-6.

5. Claimant was subsequently referred to Dr. Gebhard. Dr. Gebhard evaluated claimant on February 23, 2004. Dr. Gebhard noted claimant's MRI results and diagnosed claimant with a herniated nucleus pulposus at C5-C6 on the right. Dr. Gebhard recommended claimant continue with conservative non-operative treatment. Dr. Gebhard noted that if claimant did not improve, he may be a candidate for a decompressive discectomy and fusion at the C5-C6 level.

6. Claimant was referred to Dr. Janssen for a second opinion regarding his cervical spine on April 6, 2004. Dr. Janssen noted that claimant had a C5-6 cervical disk herniation with right C6 radiculitis, but no evidence of radiculopathy or myelopathy. Dr. Janssen noted claimant had no decreased function and only decreased sensation along the C6 distribution. Dr. Jannsen noted claimant denied wanting to have surgery and recommended claimant return to Dr. Gebhard.

7. Claimant returned to Dr. Stagg on May 20, 2004 and noted he was doing quite a bit better. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Stagg on July 14, 2004. Dr. Stagg provided claimant with a permanent impairment rating of 13% whole person and recommended ongoing medical treatment consisting of nonsteroidal anti-inflammatory medications and continued follow up visits.

8. Insurer 1 filed a final admission of liability ("FAL") admitting for the whole person impairment rating on July 21, 2004. The FAL also admitted for maintenance medical treatment.

9. Claimant continued to follow up with Dr. Stagg after being placed at MMI. Claimant was evaluated by Dr. Stagg on November 18, 2004 and noted he was having difficulty sleeping and reported numbness into his upper extremity. Dr. Stagg noted that when claimant was placed at MMI, there were indications that if claimant's symptoms worsened, he may need additional physical therapy and potentially surgery. Dr. Stagg noted that claimant remained at MMI, but recommended a short course of physical therapy.

10. Claimant sustained his second injury with Employer on April 11, 2005 when he was participating in physical agility testing and was assisting with a tackling dummy. Claimant was injured while catching the tackling dummy.

11. Claimant sought treatment following the injury with Dr. Duke on April 20, 2005. Claimant presented an accident history to Dr. Duke that he had helped his wife with housecleaning and developed a onset of severe upper back pain and left arm pain five days prior. Claimant denied any new injuries. Claimant eventually sought a hearing on this claim to determine if the symptoms were related to a new injury on April 11, 2005. This claim was determined to be compensable by Order of an ALJ on September 8, 2006.

12. Claimant was referred by Dr. Duke to Dr. Janssen. Claimant eventually underwent a microscopic dissection of the spine; intraoperative fluoroscopy for localization at the subaxial spine, an anterior C6-7 cervical discectomy, hemicorpectomy, bilateral spinal cord decompression, removal of extruded disc fragment, with C7 nerve root decompression, and foraminotomy and anterior C6-7 cervical prosthesis of 5 mm extra-large Prodisc reconstructions and an anterior C5-6 cervical arthroplasty on May 25, 2005 under the auspices of Dr. Janssen.

13. Claimant underwent an MRI of the lumbar spine on June 10, 2005. The MRI of the lumbar spine showed moderate left foraminal encroachment at L4-5 secondary to eccentric disc protrusion and facet arthrosis. Claimant returned to Dr. Janssen on June 28, 2005 and noted that his left upper extremity pain had been relieved post surgery. However, claimant was experiencing severe lower extremity pain.

14. Claimant underwent a course of treatment for his lumbar spine with Dr. Janssen including a translaminar lumbar epidural steroid injection on June 28, 2005. Dr. Janssen eventually performed a left sided L5 foraminotomy and nerve root decompression and left-sided L4 formaminotomy and partial discectomy and decompression at the L4-L5 level on September 8, 2005.

15. Claimant also continued to complain to Dr. Janssen of right upper extremity symptoms. Dr. Janssen noted on August 23, 2005 that he was referring claimant for an EMG of his right upper extremity. The EMG was performed by Dr. Leimbach on September 8, 2005. Dr. Leimbach noted that the findings were consistent with a right C6 radiculopathy. Dr. Price testified at hearing that the EMG showed right sided radiculopathy and demonstrated a change from the prior EMG in January 2004.

16. Claimant underwent surgery on his lumbar spine on November 3, 2005 under the auspices of Dr. Janssen.

17. Claimant continued to treat conservatively with physical therapy for his cervical condition. Claimant was referred for a repeat cervical MRI on June 1, 2006 that showed no evidence of cord compression or high grade foraminal narrowing. Claimant also underwent a repeat MRI of the lumbar spine. The MRI of the lumbar spine showed evidence of a recurrent herniation at the L5-S1 level that compromised the neural foramen.

18. Dr. Janssen noted on June 2, 2006 that his review of the MRI's showed no evidence of extradural compressive pathology in the cervical spine. Dr. Janssen did recommend additional lumbar surgery that was performed on October 11, 2006. The surgery consisted of a left sided L4 foraminotomy and nerve root decompression with a left sided L5 foraminotomy and removal of the partial disc herniation at the L5 level. Following the surgery, claimant continued to complain of left leg pain and numbness.

19. With regard to claimant's cervical spine, claimant was referred to Dr. Price for medical treatment. Dr. Price evaluated claimant initially on December 13, 2006. Dr. Price has provided various treatments for claimant, including but not limited to medications (Gabapentin, Lyrica, Lidoderm patches, Cymbalta, Percocet and Oxycontin), acupuncture, stimulation, and physical therapy. Claimant additionally had diagnostic studies during this time including follow up x-rays, and a follow up EMG study. The EMG study showed signs of a C8 radiculopathy on the right side. Dr. Janssen noted that the C8 radiculopathy would correlate with claimant's report of grip weakness in the right hand.

20. Claimant underwent additional MRI's of the lumbar and cervical spine on February 13, 2007. The cervical MRI showed questionable neural foraminal narrowing, but no high grade central stenosis at C5-6. The lumbar MRI showed evidence of claimant's surgical intervention including scarring that extended anteriorly along the left lateral aspect of the thecal sac to surround the left L5 nerve root as it descends into the lateral recess.

21. Claimant returned to Dr. Price on March 6, 2007 and noted that he had not felt better since his cervical spine surgery. Dr. Price noted the results of the EMG study showing a possible C8 radiculopathy and referred claimant to Dr. Bowen for pain management.

22. Claimant was subsequently evaluated by Dr. McLaughlin on March 29, 2007 for an independent medical evaluation ("IME"). Dr. McLaughlin noted that Dr. Price was recommending ongoing treatment including acupuncture and counseling. Dr. McLaughlin noted that in his opinion, claimant was not yet at MMI and provided claimant with a provisional rating of 45% whole person, with 14% being apportioned to the prior injury. Dr. McLaughlin noted the provision rating for the April 11, 2005 injury would then be 36% whole person. Dr. McLaughlin noted that claimant reported he did well

following his 2003 injury, but had some residual discomfort, although he was able to return to work without restrictions. Dr. McLaughlin recommended claimant continue to treat with Dr. Price.

23. Dr. Price testified at hearing that claimant had changes at the C6-7 level between February 2004 and April 20, 2005. Dr. Price testified that the surgical intervention claimant underwent in May 2005 would also change the condition of claimant's C5-6 disk. Dr. Price subsequently testified after reviewing additional records that the surgery performed by Dr. Janssen only involved the C6-7 disk.

24. Dr. Price testified that she began prescribing Provigil for claimant in 2008 due to claimant's depression. Dr. Price testified the Provigil was to replace other anti-depressant medications. Dr. Price testified she would related claimant's Provigil to the C6-7 work injury in 2005. Dr. Price noted that claimant's prescription for Provigil was now being handled through Dr. Mattox in Durango who had taken over claimant's maintenance medical treatment.

25. Dr. Mattox evaluated claimant on January 14, 2008 as part of his psychiatric treatment. Dr. Mattox noted claimant was reporting that he was limited by pain and fatigue. Dr. Mattox noted claimant's current medications included Gabapentin, Cymbalta and Lunesta. Dr. Mattox diagnosed claimant with major depressive disorder and back and neck pain, among other diagnoses. Dr. Mattox did not prescribe claimant's opiate medications, but did begin providing claimant with a prescription for Provigil. Dr. Mattox consistently diagnosed claimant with a major depressive disorder and chronic pain throughout his treatment that has continued through 2014.

26. Insurer 2 obtained a physician advisor report from Dr. Antonelli on February 27, 2013. Dr. Antonelli reviewed the claimant's medical records and issued a report that opined that the use of Provigil was not reasonable, necessary or related to the April 11, 2005 work injury.

27. Claimant was referred for an independent medical examination ("IME") with Dr. Anderson-Osser on September 25, 2013 at the request of Insurer 2. Dr. Anderson-Osser indicated in her IME report that it was her opinion that the Provigil should be apportioned 1/3 to the November 21, 2003 injury, 1/3 to the April 11, 2005 injury and 1/3 to his non-work related factors, including his low back pain and nocturnal hypoxia. Dr. Anderson-Osser opined that claimant's use of the Provigil was related to multiple factors, including his work injuries, chronic pain and possibly underlying sleep apnea.

28. Dr. Anderson-Osser issued a second IME report on March 10, 2014 after reviewing additional medical records. Dr. Anderson-Osser noted in her report that Dr. Price had indicated that claimant's depression was related to not only the November 21,

2003 injury, but also the April 11, 2005 injury. Dr. Anderson-Osser noted that the apportionment of the Provigil between his two work related injuries and his non-work related conditions was very subjective, but maintained that it should be split up between the three factors by equal 1/3 amounts.

29. Claimant underwent a Division sponsored Independent Medical Evaluation ("DIME") with Dr. Hughes on April 1, 2014. Dr. Hughes provided claimant with a permanent impairment rating of 29% whole person, but apportioned claimant's prior impairment rating of 13% whole person and opined that for the April 11, 2005 injury, claimant's impairment rating was 19% whole person. This rating included a 3% whole person impairment rating for claimant's depression. With regard to the Provigil, Dr. Hughes opined that 25% of claimant's use of the Provigil was related to his work related injury of April 11, 2005 and the rest was related to his non-occupational conditions including his lumbar spine and extremity joints. Dr. Hughes opinion regarding claimant's use of the Provigil references the cervical spine injuries, and in that regard, the ALJ interprets Dr. Hughes opinions as referencing both cervical spine injuries.

30. Dr. Price testified at hearing that she would apportion at least 80% of the need for Provigil to the April 2005 injury and subsequent surgery. Dr. Price testified that she was treating claimant for the C6-7 injury and the C5-6 injury, but the C6-7 injury was more involved. Dr. Price testified that when she initially prescribed claimant Provigil on March 14, 2008, she did so to treat his neck pain only. As of March 14, 2008, Dr. Price provided claimant with samples of Provigil 100 mg to be taken in the morning. By September 10, 2008, claimant was taking Provigil 200 mg twice per day. This was being prescribed by Dr. Mattox. Dr. Price testified that she has tried to wean claimant off the Provigil, but it has not worked.

31. The ALJ notes that while Dr. Price testified that Dr. Stagg indicated that he would not provide treatment to claimant after the April 11, 2005 injury, and indicated in her testimony that this supported the opinion that Dr. Stagg believed claimant's April 11, 2005 injury caused the new symptoms in his neck, the ALJ is not persuaded that this is the case. The ALJ notes that when Dr. Stagg began providing treatment for claimant following the April 11, 2005 injury, he did not provide an opinion regarding the compensable nature of claimant's symptoms. Instead, Dr. Stagg noted that the claim had been denied and stopped treating claimant based on that denial, not based on any opinion expressed by Dr. Stagg.

32. Claimant testified at hearing that he is unable to function without the Provigil. The ALJ credits claimant's testimony and the supporting medical records and determines that claimant has demonstrated that his use of Provigil is reasonable and necessary medical treatment related to his industrial injuries.

33. The ALJ finds that claimant was prescribed Provigil in 2008 and finds that there is insufficient evidence of an intervening injury that would sever the causal connection of the prescription for Provigil to the industrial injuries. While claimant subsequently had surgical intervention involving his low back, Dr. Price, who originally prescribed the Provigil, testified that the basis for his Provigil prescription was due to his neck pain.

34. Insurer 1 obtained an IME from Dr. Scott on July 10, 2014. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination of claimant. Dr. Scott noted in his report that Dr. Price's medical records did not explain why she started claimant on Provigil in March 2008. Dr. Scott opined in his September 5, 2014 report that claimant's use of the Provigil was not related to the November 21, 2003 work injury. Dr. Scott based this opinion on the fact that claimant was not prescribed Provigil until after the April 11, 2005 work injury and was used to treat a major depressive disorder that developed after the April 11, 2005 injury.

35. Insurer 1 also argues that the issue of apportionment of the Provigil is barred by issue preclusion based on the prior Order of ALJ Martinez that found claimant suffered a new injury. The ALJ is not persuaded that issue preclusion would apply to the apportionment argument raided by Insurer 2 in this case. Specifically, the ALJ finds that the issue of apportionment of Provigil was not litigated at the prior hearing. Therefore the ALJ determines that the issue of apportionment for maintenance medical benefits is not identical to an issue raised, litigated and decided by the September 8, 2006 Order of ALJ Martinez.

36. The ALJ notes that the issue involving apportionment in this case arises under the law as it existed for the time of the April 11, 2005 and November 21, 2003 work injuries. Insurer 1 argues in their position statement that the court should either refuse to apportion the need for the Provigil or alternatively, find that the use of Provigil is not reasonable, necessary or related to claimant's industrial injuries. Insurer 2 argues that the Provigil should be apportioned 1/3 to the November 21, 2003 work injury, 1/3 to the April 11, 2005 injury and 1/3 to the non-industrial injuries.

37. The ALJ credits the opinion of Dr. Price and the medical records from Dr. Janssen and Dr. Stagg and concludes that claimant's use of the Provigil is related to the April 11, 2005 work injury and not the November 21, 2003 work injury. The ALJ finds that the use of Provigil was originally prescribed by Dr. Price in May 2008 in relation to treatment related to Claimant's April 11, 2005 injury. The ALJ further notes that based on *Resources One, LLC v. Industrial Claim Appeals Office,* 148 P.3d 287 (Colo. App. 2006), it would be improper to apportion the use of Provigil between the work related injury and claimant's non-work related conditions.

38. The ALJ concludes based on the testimony of Dr. Price and claimant's testimony that while claimant's non-work related conditions, including his low back condition, may benefit from claimant's use of the Provigil, the Provigil was originally prescribed and continues to be prescribed as treatment for the effects of claimant's April 11, 2005 work injury. The ALJ further finds and concludes that claimant has demonstrated that it is more probable than not that his continues prescription of Provigil from Dr. Mattox is related to the April 11, 2005 work injury. As such, apportionment is inappropriate in this case.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S, 2008. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus

authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

4. As found, claimant has proven by a preponderance of the evidence that the prescription for Provigil is reasonable medical treatment necessary to prevent further deterioration of claimant's condition.

5. For injuries occurring prior to July 1, 2008, medical benefits may be apportioned between successive industrial injuries or between an industrial injury and a subsequent non-industrial injury where both injuries contribute to the need for additional medical treatment. See, e.g., *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001); *State Compensation Insurance Fund v. Industrial Commission*, 697 P.2d 807 (Colo. App. 1985).

6. However, the Court of Appeals noted in *Resources One, L.L.C. v. Industrial Claim Appeals Office*, 148 P.3d 999 (Colo. App. 2006) that there were three main types of apportionment: (1) between employers, where disability results from successive injuries or exposures; (2) between an employer and a Second or Subsequent Injury Fund; and (3) between an employer and the claimant, when a prior injury or condition contributes to the final disabling result. *Resources One, L.L.C. v. Industrial Claim Appeals Office*, 148 P.3d 999 (Colo. App. 2006), citing *Larson's Workers' Compensation Law* § 90.2 at 90-3. The Court of Appeals noted that unlike in the first two types of apportionment, the third type of apportionment may result in a reduction of claimant's benefits. The Court of Appeals went on to note that the apportionment statutes did not authorize the apportionment of medical and temporary disability benefits. The Court of Appeals in *Resources One, L.L.C.* went on to acknowledge that divisions of the court had previously approved the apportionment of medical and temporary disability benefits, but noted that these decisions involved the apportionment of benefits between successive employers. Insofar as the *Duncan* decision supported a finding that would allow for apportionment between a work related injury and a non-work related condition, this division of the Court of Appeals refused to follow it.

7. The ALJ notes that after the decision in *Resources One, L.L.C.*, the legislature went on to amend the statutory provisions involving apportionment to no longer allow an employer to apportion medical and temporary disability benefits between a work related injury and a non-work related condition.

8. The ALJ finds that reasoning expressed by the Court of Appeals in *Resources One, L.L.C. v. Industrial Claim Appeals Office*, *supra.* to be persuasive, especially in light of the amendments that were then made to the Colorado Workers' Compensation Act in 2008. The ALJ therefore determines that apportioning medical benefits between work related injuries and non-work related conditions is inapplicable.

The Court notes that the exception to this rule carved out by the legislature involving *Anderson v. Brinkhoff*¸ 859 P.2d 819 (Colo. 1993), involved an occupational disease, and not a specific injury and is therefore, inapplicable to the analysis in this case.

9. The ALJ notes prior decisions from the Industrial Claim Appeals Panel including *Lancaster v. Arapahoe County Sherriff Department*, W.C. Nos. 4-744-646 and 4-746-515 (May 12, 2010) that have remanded cases in which the ALJ did not consider apportionment of medical benefits where the medical benefits were related to the combination of a work related injury and a non-work related injury. However, this case can be distinguished from *Lancaster* in that the ALJ in *Lancaster* found that claimant's development of the specific condition for which he was receiving medical treatment (CRPS) was related 50% to the claimant's work injury and 50% to a non-work related injury.

10. In this case, claimant's condition for which he was originally prescribed Provigil was the April 11, 2005 work injury. Furthermore, as found, claimant has proven by a preponderance of the evidence that his continued use of Provigil is related to his April 11, 2005 work injury. The mere fact that claimant's use of Provigil may provide him with some relief of symptoms related to non-work related injuries is not sufficient to allow for this court to apportion the cost of his medication between the compensable work related injury and non-work related event based on the facts of this case.

11. The ALJ notes that this leaves the possibility that the cost of the Provigil could be apportioned between the insurance carriers. However, the ALJ credits the testimony of Claimant and Dr. Price along with the supporting medical records and determines that the Provigil was related to Claimant's April 11, 2005 injury and not the November 21, 2003 injury. In support of this conclusion, the ALJ notes that claimant's April 11, 2005 injury involved a different level of his cervical spine than the November 21, 2003 injury and credits Dr. Price's testimony that her initial prescription of the Provigil was designed to treat claimant for the April 11, 2005 injury.

12. Based on the foregoing determination, the court need not consider Insurer 1's argument that issue preclusion would prohibit an Order finding them responsible for a portion of the cost of the Provigil.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that the Provigil is reasonable and necessary medical treatment related to claimant's April 11, 2005 work injury.

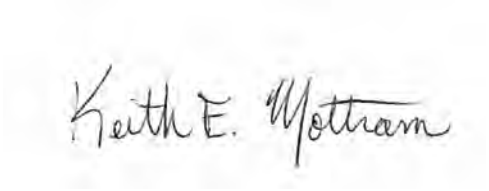
2. Insurer 2 shall pay for claimant's prescription of Provigil being provided by Dr. Mattox.

3. All medical bills shall be paid pursuant to the Colorado Medical Fee Schedule.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 17, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the scope of her employment with Employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period of June 18, 2014 until February 2, 2015?

- Whether respondents have proven by a preponderance of the evidence that claimant is an independent contractor pursuant to Section 8-40-202(2)(b)(II), C.R.S.?

- Whether respondents have proven by a preponderance of the evidence that claimant's benefits are subject to a 50% penalty for a willful violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S.?

- At the commencement of the hearing, claimant sought to add the issue of penalties for failure to obtain workers' compensation insurance to the hearing, but the motion was denied by the ALJ. Therefore, whether Respondent properly obtained workers' compensation insurance is not an issue decided by this Order.

FINDINGS OF FACT

1. Claimant testified at hearing that she ran into Mr. Cintron, owner of Respondent, during the summer of 2014. Claimant testified Mr. Cintron told her he may have some work available for her as a painter over the summer. Claimant testified she subsequently had a meeting with Mr. Cintron in which he inquired as to whether she had insurance and she informed him that she had health insurance. Claimant testified that Mr. Cintron informed claimant that if he had enough work to keep claimant busy, she would need to get liability insurance. Claimant testified Mr. Cintron offered to take the money out of her check for the liability insurance. Claimant testified at hearing that she thought she was being hired as a temporary employee, and if Mr. Cintron hired her full time she would be an independent contractor and would need to get her own insurance. Claimant testified at hearing that she did not have her own liability insurance at the time of her injury.

2. Mr. Cintron testified claimant approached him when he came to pick up his daughter from school on the last day of work. Mr. Cintron testified that claimant asked him if he had any work for her as a painter and he informed her that he did not, but took her phone number in case he had extra work. Mr. Cintron testified he subsequently set up two meetings with claimant, one at her house and one at his house. Mr. Cintron testified he inquired at the first meeting if claimant had insurance and she informed him that she had medical insurance through a concurrent employer. Mr. Cintron testified he informed claimant that "all of my guys carry liability insurance".

3. Mr. Cintron testified that at the second interview he again asked claimant if she had insurance and claimant assured him that she had the necessary insurance. Mr. Cintron apparently did not require claimant to present proof of the insurance, however.

4. Claimant began working for Respondent at the Rocky River Resort project on June 11, 2014. Mr. Cintron testified claimant worked two half days on this site. Claimant testified she was paid $15 per hour for her work with Respondent.

5. Mr. Cintron testified that he normally pays his sub-contractors a percentage of the painting contract. Mr. Cintron testified he paid claimant hourly because he was trying to figure out if claimant could paint and complete a job on her own.

6. Mr. Cintron testified that he does not hire any employees and does not oversee the work performed by his painters. Mr. Cintron testified that if a job is not properly performed by one of his painters, he does not call the painter back for the next job.

7. Mr. Cintron testified that he does not provide tools for his painters, but does provide materials, such as paint, stains, thinner, primer, and ladders. Mr. Cintron testified he provides his contractors 1099 forms at the end of the year unless the contractor does not earn the minimum amount for a 1099 form of $600. Mr. Cintron noted that claimant was not provided a 1099 form because she did not earn the minimum amount of $600 in her work with Respondent.

8. Claimant testified that she was instructed by Respondent to work from 9-3 each day. Mr. Cintron testified he did not instruct claimant to show up at a particular time and she had advised him that she could only work until 3:00 p.m. because she had a second job during the evening.

9. Mr. Cintron testified that during their meetings before painting, claimant informed Mr. Cintron that she was afraid of heights. Claimant testified that she informed Mr. Cintron that she would not go above the twelfth rung on the ladder because she was only being paid $12 per hour. Regardless, on the first job that claimant worked with Respondent, Mr. Cintron secured a ladder to a pole so claimant could climb onto the low roof in order to pain the fascia.

10. Conflicting evidence was presented at hearing regarding the amount of work claimant performed at the first job site. Regardless of the amount of painting claimant completed at the job site, the parties agree that claimant was paid for two days working approximately six hours each day.

11. Claimant testified at hearing that she was paid for her first job by check issued to her directly. Copies of the checks were entered into evidence and are issued from Respondent's business account to claimant individually. Claimant was paid $230 for her work on the first painting project which included $180 for 12 hours of work at $15 per hour and $50 for a bonus.

12. Claimant was issued a second check for her work on the second project that was for $140, representing 10 hours at $14 per hour. This check was made out to claimant individually. Claimant kept track of her own hours and submitted the hours to Respondent to be paid.

13. Mr. Cintron testified at hearing that he did not require claimant to work exclusively for his company. This is evidenced by the fact that claimant had concurrent employment while working for Mr. Cintron.

14. Claimant worked on the second project, a painting job at Wild Goose Lane, on June 16, 2014. Claimant testified she worked June 16, 2014 painting areas on the condominium she could reach with 12 rungs on the ladder. Claimant testified Mr. Cintron was present and instructed the painters on what to do. On June 17, 2014, claimant arrived at work and set up a ladder to paint the peak of an awning at the entrance of the condominium when the ladder collapsed and claimant fell fracturing her right wrist and suffering a laceration on her face.

15. Claimant was taken by another painter from the project site to the emergency room ("ER") where she was treated for her injuries. Claimant underwent x-rays of her right hand and wrist along with computed tomography studies of her face, cervical spine, thoracic spine and head. Claimant was diagnosed with a right comminuted fracture of the distal radius.

16. Following her treatment at the ER, claimant followed up with Dr. Griggs. Dr. Griggs performed surgery on her right distal radius fracture on June 17, 2014. Claimant followed up with Dr. Griggs after her surgery and she was given work restrictions as of July 28, 2014 that limited her lifting to no more than 10 pounds. Claimant's work restrictions were increased to 30 pounds as of September 8, 2014 and to 50 pounds on November 16, 2014. Dr. Griggs eventually placed claimant at maximum medical improvement as of February 2, 2015.

17. Mr. Cintron testified that on June 17, 2014 he noticed the ladder laying on the ground and realized it was the top half of a 24' ladder that did not have the bottom half with the feet on it. Mr. Cintron testified he knew the ladder belonged to another painter and had considered using it until he realized the ladder did not have the feet.

Mr. Cintron testified he moved the ladder back to the owner's truck. Mr. Cintron testified he found out later when standing on the other side of the condominium complex of claimant's fall from the ladder.

18. Conflicting testimony was presented as to whether claimant used brushes on the second job provided by Respondent. Claimant testified she used her own brushes on the first job, but because the second job was an oil based job, and she didn't own oil based brushes, she used brushes belonging to Mr. Cintron. Mr. Cintron denied allowing claimant to use his brushes.

19. Respondent presented the testimony of Mr. Brokos, a friend of Mr. Cintron who was present when Mr. Cintron and claimant in June at Mr. Cintron's residence. Mr. Brokos testified he heard Mr. Cintron ask claimant if she had insurance and heard claimant tell Mr. Cintron she did and that she had insurance through her concurrent employer.

20. Respondent presented the testimony of Mr. Hyatt, a painter for Respondent. Mr. Hyatt testified he works as a sub-contractor for employer. Mr. Hyatt testified that he has also worked as an employee of painting companies and testified the work performed as an employee is different than the work performed as an independent contractor. On cross-examination, Mr. Hyatt noted that his current employer provides brushes, paints, shirts and other materials. Mr. Hyatt testified that as an independent contractor, he provides his own brushes, paints and ladders.

21. Respondent presented the testimony of Mr. McDougal who testified he has worked as an independent contractor for Respondent. Mr. McDougal testified he carries his own general liability insurance and completed paperwork for Respondent. Mr. McDougal testified he has requested Respondent hire his friend as painters in years past, but was told his friend could not be hired because his friend did not have insurance.

22. Claimant testified that following the injury, she was unable to continue working for her concurrent employer. Claimant eventually filed a claim for workers' compensation benefits and a hearing was set on the matter.

23. Conflicting testimony was presented at the hearing as to whether claimant represented to Mr. Cintron that she had liability insurance. Nonetheless, the evidence does establish that Mr. Cintron did not require claimant to provide a certificate of insurance prior to hiring claimant to perform work as a painter. Mr. Cintron paid claimant per hour and made checks payable to claimant directly, and not to a trade name. Mr. Cintron provided claimant with the paint and drop cloths and ladders used to perform the painting. While the paint would be considered material and not tools, the ALJ determines the drop cloths and ladders would be considered tools.

24. Conflicting testimony was presented regarding whether Mr. Cintron provided brushes for claimant to use on the second job. The testimony did establish

that claimant provided her own brushes for the first job. Mr. Cintron denied providing claimant with brushes for the second job, but the ALJ finds claimant's testimony that she did not have oil based brushes for the second job to be credible and persuasive. Claimant's testimony regarding the oil based work performed on the second job is supported by the photographs of the condominium entered into evidence and is found to be credible and persuasive. Therefore, the ALJ finds that claimant's testimony that Respondent provided tools consisting of brushes for the second job is accepted by the ALJ.

25. The ALJ notes that the evidence establishes that claimant was paid in a different method than the other painters who identified as independent contractors. While those contractors were paid a percentage of the painting contract, claimant was paid an hourly rate. Mr. Cintron testified that this occurred because he was gauging whether claimant was a capable enough painter to handle the work, but the evidence leads the trier of fact to determine that claimant's different method of payment leads one to the conclusion that claimant was under an employer-employee relationship with Respondent at the time of her injury.

26. The ALJ concludes from a review of the evidence that claimant has established that it is more probable than not that she was an employee of Respondent at the time of her injury. The ALJ finds that claimant was paid an hourly rate, with checks made directly payable to claimant, and that Respondent provided certain tools for claimant, including ladders, drop cloths and brushes for the second job. The ALJ finds that Respondent oversaw claimant's work as evidenced by the fact that he secured the ladder to the pole at the first job site, allowing claimant access to the fascia that was to be painted.

27. The ALJ concludes that Respondent did not require claimant to work particular hours, but arranged for claimant to work six hour days from 9:00 a.m. until 3:00 p.m. so claimant could continue to work for her concurrent employer. These work hours are established by the fact that claimant worked two days at the first job site for a total of 12 hours and worked an additional 1 ½ days at the second job site before she was injured. The ALJ finds Respondent did not provide training for claimant and could terminate her job at any time by virtue of simply asking her to leave the job site. The ALJ further finds that claimant was not required to work exclusively for Respondent.

28. The ALJ credits the testimony of Mr. Hyatt and claimant and finds that the employment of a painter can take different forms, as either an employee or as an independent contractor. While Mr. Cintron testified he only hired independent contractors, the evidence presented established that some painting contractors will hire employees. Therefore, the ALJ credits the testimony of claimant in this case and finds that the claimant in this case, who had performed painting in the past, was not customarily engaged in an independent trade or business.

29. The ALJ credits the testimony at hearing that claimant had performed painting work previously for a different company in Crested Butte, but did not hold

herself out as a painting contractor and performed other work not associated with painting, including that of a substitute teacher, part time bartender and her work with her concurrent employer.

30. Taking the relationship between claimant and Respondent into account, the ALJ finds claimant was an employee of Respondent and was not an independent contractor.

31. The ALJ credits the medical records and determines that claimant has established that it is more likely true than not that the medical treatment she received from the ER and from Dr. Griggs was reasonable and necessary to cure and relieve claimant from the effects of her industrial injury. The ALJ finds that the claimant has proven that it is more likely true than not that the ER treatment was authorized as emergency treatment as claimant was taken directly to the ER following her injury with a broken wrist.

32. The ALJ credits claimant's testimony that she was unable to continue her work with her concurrent employer after her work injury and finds that claimant is entitled to an award of temporary total disability ("TTD") benefits commencing July 18, 2014 and continuing until she was placed at MMI.

33. Respondent argues that claimant's benefits should be reduced by 50% for claimant's violation of a safety rule. The ALJ is not persuaded. Presumably, the safety rule violation involves claimant using the ladder, or using a ladder without feet. However, there was no credible evidence presented that claimant was ever instructed not to use the ladder. In fact, Mr. Cintron testified he helped claimant use a ladder on the first painting job by securing the ladder to the pole allowing claimant to climb on the roof to access the fascia.

34. The ALJ determines that Respondent has failed to demonstrate that the claimant willfully violated a safety rule resulting in her injury. Respondent's request to have claimant's benefits reduced by 50% is therefore denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2009). A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-41-301, C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S., 2011. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P2d 1205 (1936); CJI, Civil 3:16 (2008).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity" to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. The ALJ credits the testimony of claimant and finds that claimant has proven that she was in the service of Respondent under an implied contract of hire as of June 17, 2014. The ALJ credits the paychecks establishing that claimant was paid for her work with Respondent as evidence of the contract of hire.

6. Respondents have the burden of proving any affirmative defenses raised at hearing by a preponderance of the evidence. In this case, the issue involving claimant's status as an independent contractor requires respondents to meet the appropriate burden of proof. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

7. With regard to claimant's employment status, Respondent argues that Claimant is an independent contractor pursuant to Section 8-40-202. The ALJ is not persuaded.

8. Section 8-40-202(2)(b)(II) sets out a nine part test to establish whether an individual is an independent contractor. Section 8-40-202(2)(b)(II) provides in pertinent part that in order to prove independence it must be shown that the person for whom services are performed does not:

- Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of specified in the document;

- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

- Pay a salary or at an hourly rate instead of a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may be supplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

9. Section 8-40-202(2)(b)(II), C.R.S. allows for these provisions to be proven through a written document. Pursuant to Section 8-40-202(2)(b)(IV), C.R.S. the written agreement then creates a rebuttable presumption that an independent contractor relationship between the parties exists. However, the written agreement must be signed by both parties, must contain a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. Section 8-40-202(2)(b)(IV) also requires that all signatures on any such document must be duly notarized.

10. In this case, no written documentation was presented between the parties, and therefore, the burden of proof remained with Respondent to establish that claimant was an independent contractor.

11. The ALJ makes the following findings regarding the employment relationship between claimant and Respondent:

- Claimant was paid at an hourly rate.
- Claimant was issued checks made personally to her as opposed to payable to a trade or business name.
- Respondent provided tools in the form of ladders, drop cloths at the first and second job site and paint brushes for claimant at the second job site.
- Respondent oversaw the work as it was performed as evidenced by Mr. Cintron securing the ladder to the pole to allow claimant the ability to get on the roof and paint the fascia on the first pain job.

12. As found, the ALJ determines that Respondent has failed to prove by a preponderance of the evidence that claimant was an independent contractor of Respondent. As found, while Mr. Cintron may have wanted to hire claimant as an independent contractor, his actions in paying claimant as an hourly worker and providing claimant with tools to perform her work represents a degree of control over claimant's work that results in claimant being considered an employee of Respondent.

13. As found, claimant has proven by a preponderance of the evidence that the injury resulted in the need for medical treatment from the ER and Dr. Griggs that was reasonable and necessary to cure and relieve claimant from the effects of her work injury. As found, Respondent is liable for the cost of the medical treatment provided by the ER and Dr. Griggs.

14. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete

inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

15. As found, claimant has proven by a preponderance of the evidence that her injury resulted in a wage loss based on the fact that claimant could no longer continue her work for Respondent or for her concurrent employer. As found, claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits for the period of July 18, 2014 through February 2, 2015.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical benefits necessary to cure and relieve claimant from the effects of her work injury including the medical bills from the ER and Dr. Griggs.

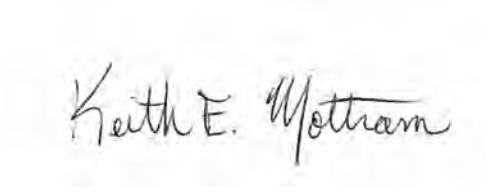
2. Respondent shall pay claimant TTD benefits for the period of July 18, 2014 through February 2, 2015.

3. Respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 29, 2015



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#JGNCW23E0D1DGNv 2

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Claimant prove by a preponderance of the evidence that a topical cream containing the drug ketamine constitutes reasonable and necessary post-maximum medical improvement medical treatment designed to relieve ongoing symptoms associated with complex regional pain syndrome?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 7 were admitted into evidence. Respondents' Exhibits A through D were admitted into evidence.

2. Claimant sustained a compensable injury to her right ankle in 2007. Subsequently she underwent at least 7 surgical procedures designed to alleviate ongoing ankle and right lower extremity pain.

3. On April 9, 2011 the Insurer filed a Final Admission of Liability including an admission for ongoing medical benefits after maximum medical improvement (MMI).

4. On March 24, 2014 J. Tashof Bernton, M.D., an authorized treating physician, examined Claimant. He assessed "chronic pain in the right foot and ankle following multiple surgeries." Dr. Bernton expressed concern for potential complex regional pain syndrome (CRPS) given the "appearance of the foot."

5. On May 12, 2014 Claimant underwent an Autonomic Testing Battery that demonstrated a "positive diagnostic assessment" for CRPS.

6. On August 25, 2014 Dr. Bernton noted Claimant had a positive diagnostic response to an initial sympathetic nerve block. Dr. Bernton stated that in conjunction with the results of the Autonomic Testing Battery Claimant met the Colorado Medical Treatment Guidelines (MTG) criteria for CRPS.

7. On September 22, 2014 Dr. Bernton stated Claimant had undergone a second sympathetic block. Dr. Bernton noted Claimant experienced transient improvement of her pain but experienced marked coldness of the entire leg with swelling and dramatic color change. Dr. Bernton stated that he did not want to move

forward with further blocks because Claimant "had a paradoxical response to blocks with some overall worsening of her condition, both subjectively and objectively."

8. On September 30, 2014 Dr. Bernton documented discoloration of Claimant's right leg from foot to mid thigh with evident swelling and "some hyperalgesia to light touch."

9. On December 23, 2014 Dr. Bernton noted that Claimant had CRPS of the right leg with evidence of ipsilateral spread to the right upper extremity. He stated Claimant had done poorly with blocks and suggested she return for a trial of topical analgesia. Dr. Bernton observed Claimant had "really shown the most benefit from this approach."

10. On January 8, 2015 Dr. Bernton documented "significant hypersensitivity and allodynia to the plantar aspect of the foot, more in the heel as well as the lateral aspect of the right foot and the medial aspect of the foot."

11. On January 12, 2015 Claimant reported to Dr. Bernton that she had not received the topical analgesic because the "the insurance company won't pay for it."

12. On January 12, 2015 Dr. Bernton wrote a letter to the Insurer stating that CRPS was "clearly a work-related condition" and that he prescribed topical analgesics in accordance with the MTG for CRPS page 79. Dr. Bernton stated that Claimant's condition was "likely to worsen, potentially irreversibly" as a result of the Insurer's failure to meet its obligation to provide care.

13. On January 29, 2015 Claimant reported to Dr. Bernton that she was in horrible pain with increased pain in the right foot and leg as well as in the right arm. She still had not received medications. Dr. Bernton noted Claimant's right foot and leg were discolored and swollen. Dr. Bernton recorded the presence of "mild hyperalgesia." He also observed mild swelling of the right hand. Dr. Bernton emphasized the importance of getting authorization for the medication and prescribed Gralise (long-acting gabapentin) and Vicodin.

14. On February 2, 2015 Dr. Bernton noted discoloration and in the distal right leg and into the foot. He also noted the dorsum of the right hand exhibited swelling and "some hyperalgesia." Similar findings were noted on February 10, 2015.

15. Claimant credibly testified as follows. In June or July, 2014 Dr. Bernton first prescribed a topical cream containing ketamine. She received the cream in the mail and applied it to painful areas of her right ankle and leg. The cream reduced her pain from 8 on a scale of 10 (8/10) to 4/10. She used the cream until the prescription ran out at the end of September or October 2014. The pharmacy then told her that further prescriptions for this compound had been denied by the Insurer. In January or February, 2015 she requested a prescription for Vicodin because she was in severe pain and had nothing to treat it. She did not need Vicodin when she was using the cream. She prefers the cream to Vicodin because the effects of Vicodin last only 3

hours and she wakes up in pain. Also, Vicodin causes Claimant to feel "groggy" and she fears becoming addicted to it.

16. WCRP 17, Exhibit 7, (G) (7) (j) (v.) (b) pp. 79-80, of the MTG for treatment of CRPS, provides that use of ketamine topical cream is a permissible non-operative treatment for CRPS under certain circumstances. This section of the MTG states that although there is good evidence that low dose ketamine cream (1%) does not relieve neuropathic pain, it is "physiologically possible" that higher doses of topical ketamine could have some effect on neuropathic pain. However, "use of … ketamine should be limited to patients with neuritic and/or sympathetically mediated pain with documented supporting objective findings such as allodynia and/or hyperalgesia." Further use of ketamine topical cream "beyond the initial prescription requires documentation of effectiveness, including functional improvement, and/or decreased use of other medications, particularly decreased use of opiates or other habituating medications."

17. Claimant proved it is more probably true than not that topical ketamine cream is a reasonable and necessary treatment for her CRPS.

18. Dr. Bernton credibly and persuasively opined that the use of ketamine based topical cream is a permissible treatment for CRPS under the MTG. Dr. Bernton credibly and persuasively opined that use of ketamine cream is appropriate under the MTG. In this regard Dr. Bernton has documented the presence of both allodynia and hyperalgesia. He has noted that application of topical medication has been the most effective treatment of Claimant's CRPS. Considering the totality of the evidence, the ALJ gives great weight to Dr. Bernton's testimony that use of ketamine cream is appropriate under the MTG.

19. Claimant credibly testified use of topical ketamine cream significantly reduced her pain before the Insurer stopped payment for the drug. She also credibly testified that after ketamine was stopped she had no effective relief from pain and was forced to request a prescription for Vicodin. The medical records corroborate Claimant's testimony. On December 23, 2014 Dr. Bernton noted Claimant had "shown the most benefit" from topical analgesia and suggested another trial. On January 29, 2015 Claimant reported "horrible" pain and Dr. Bernton prescribed Vicodin. The ALJ infers from this evidence that if Claimant is allowed to use topical ketamine cream there is a reasonable chance that she can reduce consumption of other medication, especially Vicodin.

20. The evidence produced by the Respondents, particularly the January 6, 2015 letter authored by Nicole Peck, R.N., is not persuasive insofar as it argues that ketamine topical cream is not a reasonable and appropriate treatment for Claimant's CRPS. First, this letter/report incorrectly states that the Colorado MTG do not address the "issue" of the use of ketamine cream for treatment of CRPS. As found above, and as mentioned by Dr. Bernton, the Colorado MTG for treatment of CRPS do in fact address this issue and indicate that use of ketamine topical cream may be appropriate under the specified conditions. Second, the January 6 report admits that use of

ketamine is “under study” and has shown “encouraging results” in “non-controlled studies for CRPS 1 and post-herpetic neuralgia.”

21. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers’ Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REASONABLENESS AND NECESSITY OF KETAMINE TOPICAL CREAM

Claimant argues she proved by a preponderance of the evidence that the ketamine topical cream prescribed by Dr. Bernton constitutes reasonable and necessary post-MMI treatment designed to cure and relieve the effects of CRPS. The ALJ agrees with this argument.

Respondents are liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge a claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether a claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ considering the totality of the evidence may determine the weight to be given evidence of compliance or non-compliance with the MTG. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*, § 8-43-201(3), C.R.S.

As determined in Findings of Fact 17 through 20, Claimant proved it is more probably true than not that ketamine topical cream constitutes reasonable and necessary medical treatment to relieve the ongoing effects of injury-related CRPS. As found, Dr. Bernton credibly opined that ketamine topical cream has been the most effective treatment for relieving Claimant's CRPS symptoms. Dr. Bernton also credibly and persuasively opined that the MTG for treatment of CRPS authorize the use of topical ketamine cream under the conditions and circumstances present in this case. As determined in Finding of Fact 18, Claimant credibly testified that use of topical ketamine cream significantly reduced the symptoms of her CRPS. She also credibly testified that when ketamine cream was no longer available her symptoms increased and she was forced to request a prescription for Vicodin. As determined in Finding of Fact 18, the ALJ infers that if Claimant is permitted to use topical ketamine cream there is a reasonable prospect that she can reduce the consumption of other medication including Vicodin. Although respondents presented some evidence to the contrary, the ALJ finds this evidence is not credible and persuasive.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall provide ketamine topical cream as a form of reasonable and necessary post-MMI medical treatment. Insurer shall continue to provide this treatment as long as it remains reasonable and necessary and causally-related to the injury.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The sole issue presented for hearing is:

1. Whether the Claimant has proven, by a preponderance of the evidence, that she is permanently totally disabled.

Background, Education and Employment History

1. The Claimant was born on August 29, 1963. She is currently 51 years old. The Claimant lives in Aurora, Colorado, and her commutable labor market is the Denver Metropolitan area. The Claimant is currently able to drive herself to medical appointments in Denver, Englewood and Centennial on a regular basis, with round trip commutes of 20-26 miles from her home. Other than these commutes, the Claimant drives locally, within 10-15 miles from her home.

2. The Claimant graduated from high school in Hilliard, Ohio in 1981. The Claimant attended Ohio State College and studied general education courses while working contemporaneously. She did not receive a diploma and is not certain how many college credits she earned.

3. The Claimant began working for the Ohio Division of Wildlife in 1981, working for the Ohio Administrative Code Department, and she assisted with writing rules and laws, performing secretarial and administrative work and scheduling meetings. The Claimant continued to work for the Ohio Division of Wildlife for 18 years, until 1999. She testified that she held various jobs. The last position she held with this employer was as an administrative assistant in the law enforcement/administrative offices. She typed, filed, helped write the Ohio Wildlife Code, wrote and administered the budget, managed the office, placed orders, paid bills and helped with the undercover office to provide the officers what they needed to do their jobs.

4. While working for the Ohio Division of Wildlife, the Claimant also served in the National Guard from 1985 until 1993, which was a part-time program requiring service for two weeks a year and some weekends. She worked on electrical equipment and was responsible for installing cameras and working on radars.

5. The Claimant worked in a sales position at Radio Shack approximately 25 years prior to the hearing. She was hired by her best friend Annette Gordon, who was the manager of the store, and she worked there for one year. Ms. Gordon testified that

she was an excellent employee who was enthusiastic, punctual and excellent with customers. Ms. Gordon has not worked with the Claimant since both of them left that job approximately 24 years prior to the hearing.

6. From approximately 1999 to 2006, the Claimant did not work outside the home, but rather stayed at home with her children. During this time period, the Claimant did study for and receive an Ohio real estate license. The Claimant does not have a Colorado real estate license.

7. The Claimant was employed as an administrative assistant/paralegal in the Colorado Attorney General's Office between 2006 and 2007. The Claimant's former supervisor, Pamela Ponder, testified credibly that the Claimant was a good employee and a reliable team player who was good at communicating, researching, drafting documents, working on the computer and finding solutions. The Claimant left this position to take a job with the Department of Education.

8. The Claimant worked at the State Board of Education as an administrative assistant to the Director from 2007 until the date of her accident on October 15, 2008. Her job duties included making travel arrangements, scheduling monthly meetings, coordinating conventions, setting up legal files, filing briefs, answering phones, answering correspondence, filing court documents and proofreading legal documents.

The Claimant's October 15, 2008 Injury and Initial Emergency Response

9. The Claimant sustained an admitted injury on October 15, 2008 when she was employed as an administrative assistant for the Director of the Colorado State Board of Education. She was performing her normal job duties, filing paperwork at the office of the Colorado Secretary of State, when she was involved in an accident walking across the street in the crosswalk at the intersection of Broadway and 17th Street.

10. During the course of the hearing, there was conflicting evidence presented regarding the details of the Claimant's injury in the various medical records, in discovery and from the Claimant's testimony.

11. At the hearing, the Claimant testified that she came out of the building and started to cross the street near an intersection. She saw the pedestrian light and started across the street and, while in the crosswalk, the light started to flash red with numbers counting down. The Claimant recalled seeing the light flash to 10, but before it flashed to 9, she felt the impact of a vehicle hitting her. She testified that her head hit the windshield of the car. The Claimant testified that she did not entirely realize what was happening at the time, and she was dazed and hazy. She testified that she next recalls lying in the street with people calling her name (from her work name badge). She testified that her clothes were "scrapped up" and that the force of the impact had knocked off her "tie up" tennis shoes. According to the Claimant, "some lady had collected all my stuff, my sunglass, my cell phone, my tennis shoes …." It is not entirely clear what the Claimant means by "scrapped up" clothing, however, the medical records

show that the Claimant had no bruises, bumps, contusions, or outward signs of an injury. The Claimant testified that she could also hear sirens of an approaching ambulance. When the EMTs arrived, she recalls an EMT telling her to control her breathing and she remembers losing control of her hands. The Claimant testified that they strapped her to a board and as they lifted her on the board, she saw the front of the car that struck her and that is how she knows it was a Cadillac. One of her running shoes had come off and someone collected her shoe, briefcase and purse and gave it to the EMTs to put into the ambulance. The Claimant testified that she does not recall talking to the EMTs or early medical providers and does not recall what she said to them about her level of consciousness at the time of the injury. The Claimant testified that she does not remember arriving and unloading at the emergency department. She testified that she does remember that when they entered, they were stopped and her bags were searched. She recalls that she underwent an ultrasound and she was wheeled into an area and left there. She testified that at some point, they put in an IV and she was told she'd be given medicine for pain. She doesn't remember exactly when her husband arrived, but testified that it took some time. She testified that she was not examined and she was not put into a gown until they performed x-rays. The Claimant testified that she does not remember if she was monitored the entire time by hospital personnel or if they asked her questions about her condition. She testified that she did not get up for any balance test and she was not checked for double vision. The Claimant denied being given any type of a motor exam in the ER. She testified that she never got off the gurney or bed until she left the ER. The Claimant testified that she did not receive a mental status examine. She denied having her balance tested. This testimony is inconsistent with her testimony that she was in a daze and she was not clear about the events in the emergency room, and it is not consistent with the emergency room records.

12. In answers to Interrogatories provided on March 19, 2013, the Claimant stated that she hit the driver's windshield with the right side of her head and the rear of her head hit the pavement after she was thrown from the hood of the car. She stated that she was struck by the vehicle on the right rear side and landed on the pavement on her back.

13. A Denver Police report confirms that the Claimant was struck by a car in the left turn lane of southbound Broadway as it was turning onto 17th Street and the Claimant was hit in the crosswalk. The driver of the vehicle stated that the light was green, there was a lot of sun glare, and the driver just didn't see the Claimant.

14. The EMT responding to the auto-pedestrian accident noted that the Claimant's chief complaint was right thigh pain. The EMT reported that the Claimant was struck at less than 5 miles per hour by a full-size sedan that struck the Claimant in her legs, knocking her onto the hood of the car. The EMT noted that the Claimant denied drugs or alcohol, loss of consciousness, vision difficulty, dizziness, abdomen pain, and nausea or vomiting. The Claimant was described as awake and alert, answering questions appropriately, speaking in full sentences without slurred speech, and no facial droop or odor of alcohol on her breath. The EMT also reported that, en

route to the hospital, the Claimant stated that she was having numbness in both of her hands. Her initial trauma score was listed as 14 and her initial GCS (Glasgow Coma Score) was listed as 15 and the severity impression was described as mild.

15. Upon arrival at the emergency department, the initial physician's note reports that the Claimant was involved in a low speed pedestrian vs. motor vehicle accident as the Claimant was crossing the street in a crosswalk. The note states the Claimant remembered being airborne and she rolled or landed on the hood of the car. Per the paramedic, there was no evidence of external trauma. The Claimant had thigh pain and generalized back pain to palpation but no focal points of pain. The Claimant arrived at the emergency department at 16:13 and she was discharged at 21:40 in good condition with prescriptions for Vicodin and Valium. A nursing note at 16:15, shortly after the Claimant's arrival, notes knee, hip and back pain with spasms. The note states the Claimant hit the pavement, but denied loss of consciousness. Another note taken at 16:15 states that the Claimant was hit by an automobile on her right side and fell to the pavement, but she denied hitting her head and there was no trauma. The emergency trauma flow sheet lists the Claimant's pain level at 7/10 as of 16:30 and her mental status was listed as alert, conscious and cooperative. There was no visible trauma to her face or head. By 18:10, the Claimant's pain score was reported as 3/10, per nursing notes, and her GCS remained 15. The Claimant's discharge instructions were to wear a cervical collar for comfort, follow up with her primary care doctor, and return to the emergency department if her condition worsened.

16. On October 16, 2008, the Claimant reported to Dr. Erin Woessner that she was hit from behind by a turning vehicle as she crossed the street. It was noted that the vehicle was "turning left on red after complete stop" which supports that the Claimant was likely hit by a vehicle travelling at a lower speed. Dr. Woessner's note stated that the Claimant had, "a direct hit on her right hip and behind, fell back onto car, brakes slammed, then pt was airborne and fell on the street." The Claimant told Dr. Woessner that she does not think she hit her head and that any loss of consciousness would have been brief.

17. On October 17, 2008, the Claimant reported to Dr. Rick Artist that she was hit by a car and knocked up onto the hood and then slid to the ground. The Claimant denied any loss of consciousness and denied numbness or tingling in her upper extremities. At that point, the Claimant advised that her neck and her back were the most bothersome. She reported that she had a headache at the time of the examination, but not a "migraine type."

18. On December 8, 2008, the Claimant described her injury to Dr. Caroline Gellrick. The Claimant reported that, "she does not remember if she lost consciousness or not. She remembers being hit and she remembers then the ambulance taking her to the hospital. She remembers the ambulance itself, but there is a period of time where she does not recollect what exactly happened. She stated that the vehicle was at a stop and then accelerated and that is when she got hit. She feels it was about 20 miles per hour."

19. On December 30, 2008, the Claimant reported her injury to Walter Torres, Ph.D, as follows:

> She began to walk across the street upon seeing the 10 second pedestrian right-of-way signal, while talking on her cell phone with her husband. She stated that before the countdown hit 9, she was hit. She stated that the individual who struck her had the sun in his eyes and did not see her. She described the incident as feeling that she was being lifted up. She stated that she was struck on the right, rear side of her body, was lifted up onto the car's hood and windshield. She believes that when the driver applied the brakes she went flying and hit the pavement. She remembers people on either side of her yelling at her, asking questions. She stated that she does not know if she incurred any period of consciousness [sic], but that if she did, it would have been brief to momentary. As noted in the neuropsychological testing report she experienced a dazed mental state in the immediate aftermath of the impact and was unsure of what happened. She stated that in the impact's immediate aftermath she could not move her right side, had no control of her legs, and that she felt her body "going into shock," a sense that her arms were drawing into her body. She voiced a complaint about the emergency medical technician in the ambulance as having shown a "nasty disposition" toward her and complained that at Denver Health her injury was not taken very seriously because she was not bleeding and had no fractures.

20. On July 1, 2009, Dr. Torres notes that he conducted EMDR with the Claimant and that "recall of the accident elicited intense anxiety, but she was able to tolerate it and appeared to be processing the traumatic memories. She reached a memory of her head striking the vehicle's windshield, experiencing a sense of bright light and colors, intense pain developing on the right side of her head, followed by darkness and confusion. Her reaching this memory elicited a very intense pain on the right side of her head, which she was not able to free herself of during the course of the procedure."

21. During September 15 and 17, 2009 exams with Dr. Suzanne Kenneally, the Claimant described the accident and remembered "being hit on her right side, rolling up onto the hood of the car and then rolling down onto the street. [The Claimant] reports no loss of consciousness, retrograde amnesia or anterograde amnesia associated with the incident. She stated that she 'felt foggy and could hear people around her yelling.' She was transported to the emergency room where she was examined and released the same evening."

22. On September 12, 2011, the Claimant described her accident to Dr. Judith Weingarten as follows:

> While she was crossing the street, a car went through a red light and she got hit. She stated that she didn't break anything but if she didn't turn at the right time she could have lost both of her legs. She stated that she got hit from the right rear and the right side of her head smashed against the windshield and she went unconscious. She stated that the driver hit the brakes and she went flying off the car and landed on her back and the back of her head smashed on the pavement so that she struck her head twice. She stated that she had a loss of consciousness for a few minutes and remembered that there were a few people calling her name. She states that she remembers parts of the accident. She stated that she would not suggest going to Denver Health for anything because they didn't do anything. She stated that they didn't even do a CAT scan and released her in good condition and tossed a neck brace and a bottle of Vicodin at her and said that she should check with her doctor. She stated that in the first few weeks she was in such pain, that she didn't do a lot of thinking. She states that she has severe injuries to her neck, back and shoulder and pretty much screwed up everything. She states that she had severe whiplash and that the muscles healed in a protective mode. She states that as the initial pain started to wear off, she realized that she also had cognitive problems.

23. The Claimant was evaluated by David W. Zierk, PsyD on January 30, 2013 and March 13, 2013. The Claimant reported her accident to Dr. Zierk as follows:

> The accident involved [the Claimant] crossing the street in a crosswalk and being struck unexpectedly by a vehicle, a black Cadillac, travelling between 5-20 miles per hour. Secondary to this accident, which impacted [the Claimant] on the right rear aspect of her body, she was knocked onto the hood, striking her head against the vehicles windshield and then sliding to the ground, possibly striking her head again. According to the paramedic report at the time of the index event, [the Claimant] did not experience a loss of consciousness. Upon arrival at Denver Health Medical Center, [the Claimant] was examined on an emergent basis, diagnosed with multiple musculoskeletal sprains and contusions along with cervical, thoracic, and lumbar strain, provided medication, given a Glasgow Coma Scale of 15 with no CT scan of the brain being completed (normal CT findings on 10-24-08), and eventually discharged with after-care instructions.

24. The Claimant's report of her accident to Dr. Thwaites on March 8, 2013 contains some significant variations from some of her other reports. Dr. Thwaites' notes state:

> She was walking back to work, crossing what she remembers as being 17th street. She noted that a car turned left on a red light and struck her. She believes that she hit the windshield and then went flying. She recalls impact and all of the events leading up to it. She recalls the vehicle hit her

> in the right rear lower extremity and she recalls striking the right side of her head against the windshield. She saw a flash of colors and then everything went black. Her next personal recollection is of being on somebody's lap and people calling her name (she was wearing her employee badge with her name listed on it). She recalls hearing sirens and knowing they were for her and she recalls the arrival of the Denver Health Medical Center ambulance crew. She recalls being boarded for spinal precautions and seeing the front of the vehicle that hit her. She does appear to have patchy recall of the accident scene after she regained memory/consciousness and she also has patchy recall of the transport.

25. At the hearing, the Claimant testified that her recollection of the accident as of the hearing date is different than what she previously told doctors since she has been through EMDR therapy with Dr. Torres in an effort to more clearly remember details about the accident.

26. The Claimant's husband testified that at the time of the accident, he was speaking to his wife on the telephone. Her husband heard a yell, and the Claimant's phone shut off. The Claimant's husband called back but was unable to get an answer. He called back a second time and was told by the person who answered the phone that the Claimant had been hit by a car. The Claimant's husband stated that the lady who answered the phone stayed on the line until the paramedics arrived, and the paramedics then told the Claimant's husband that they would transport the Claimant to Denver Health. The Claimant's husband testified that he arrived at Denver Health Hospital between 4:45 and 5:00 PM on October 15, 2008. He was permitted to see the Claimant at approximately 6:30 or 7:00 PM. The Claimant's husband testified that the Claimant was crying, confused, slurring her words, and experiencing extreme pain to her head, neck, right arm, right hip, and right leg. He testified that, while at Denver Health, the Claimant recalled being hit and thrown onto the vehicle, hitting the back of her head on the windshield, and ultimately hitting the ground. The Claimant's husband also testified that Claimant could not recall much else. The Claimant's husband testified that Claimant was confused and "[a]t one point she thought it was earlier in the day, and it was probably dark outside." He testified that, while he was present at Denver Health, no medical personnel asked the Claimant about the circumstances of the accident, and she was not asked about being thrown upon the hood of a Cadillac and then being thrown to the street.

Medical Treatment Subsequent to Initial Emergency Response

27. On October 16, 2008, the Claimant was examined by Dr. Erin Woessner, her primary care physician at Kaiser. The diagnoses included a whiplash injury to the neck, headache, hip pain and leg pain. The cause of the injury was noted to be an MVA. Dr. Woessner noted that the Claimant reported that she was hit from behind by a turning vehicle as she crossed the street. The Claimant reported:

> direct hit right hip and behind, fell back onto car, brakes slammed, then pt was airborn [sic] and fell on street. Doesn't think she hit head, may have had LOS [sic], but would have been brief. No head bumps open sores or lacs. Started HA at 7am today; has h/o migraines, this is worse than her normal migraine, more shooting pains in temples, nausea, no emesis, vision: maybe more blurry, but can focus, hearing: no change, no localized weakness/N/T in extremities, denies confusion, memory problems. Now: feels achy everywhere, most severly [sic] in ant neck.

Dr. Woessner noted that the Claimant was provided with a handout on head trauma and "strongly precautioned on signs/symptoms of intracranial bleed." Dr. Woessner also noted that she recommended a head CT non-contrast scan to evaluate for a bleed, but that the Claimant and her husband refused and preferred to monitor closely. The Claimant was advised to return to the emergency department "if N/V/confusion/weakness/numbness/tingling or other worsening in condition."

28. The Claimant saw Dr. Rick Artist at Exempla on October 17, 2008. Dr. Artist described the Claimant as an "alert, pleasant, healthy appearing female who appears to be fairly uncomfortable, sitting very stiffly and not moving all that much." The Claimant's main complaints were her neck and back and her right hip was not as painful. Dr. Artist also noted that the Claimant's right knee and ankle were stiff and sore. There was no bruising. The Claimant denied numbness or tingling in her hands and upper extremities. Her range of motion was somewhat restricted for her neck, back and ankle. Dr. Artist assessed the Claimant with: "sprain right ankle, contusion and sprain right knee, contusion of ribs and low back, strain of the neck, strain of the back." At this initial Worker's Compensation medical evaluation, Dr. Artist advised that her symptoms were likely to resolve but "whether a couple more days, a couple weeks or a couple months is difficult to tell at this point." The Claimant was encouraged to engage in activity as tolerated to a modest degree. He referred the Claimant for physical therapy.

29. On October 20, 2008, the Claimant saw PA Marion Bauer at Exempla. Ms. Bauer noted that the Claimant reported "feeling a little bit better after the weekend." The Claimant reported that she was taking Motrin, Vicodin and Valium in order to resolve her headaches. The Claimant stated that she could not drive while taking the medication and was wondering about work, but otherwise, she was doing well.

30. On October 22, 2008, the Claimant saw Dr. Dave Hnida at Exempla after a physical therapy appointment. The Claimant reported dizziness, difficulty finding words and difficulty processing thoughts. She also reported that she still had neck and lumbar pain. The Claimant reported that she was off medication, except for Ibuprofen. She stated that all of her symptoms were worse and that she now had cognitive symptoms. Dr. Hnida noted that the Claimant moved slowly and changed positions slowly. He noted that the Claimant's mini mental status exam was normal but at times slow. Although, he also reported that the Claimant responded to questions such as her job description and what was performed physical therapy. Dr. Hnida assessed the Claimant with a closed head injury and noted she should be off work. He referred her for a non-contrast CT scan of the head.

31. On October 24, 2008, the Claimant underwent a head CT scan without contrast. The impression was that there was "no traumatic or focal abnormality." There was no fracture, bleed or discrete brain lesion noted.

32. On October 27, 2008, the Claimant reported her overall symptoms improved, but her dizziness was worse. Dr. Artist recommended a neuropsychological evaluation, continued physical therapy and continued medications.

33. On November 10, 2008, the Claimant reported to Dr. Artist that she was trying to be more active but that she fatigued extremely easily. The Claimant's husband accompanied the Claimant to the visit, and he reported that her reflexes and reaction time were markedly slowed and that the Claimant was having difficulty with speech and memory. The Claimant's headaches were better, not as severe, nor as often. The Claimant reported that she was not using Vicodin or Flexeril at all because they made her feel "weird." The Claimant also reported dizziness at times for no good reason. Dr. Artist assessed the Claimant with a closed head injury, concussion, persistent symptoms and poor short term memory, neck and back strain-modestly improved and insomnia and headaches-improved. The Claimant's husband indicated that he would like the Claimant to see more specialists, as it did not seem to him that the Claimant was getting better rapidly. Dr. Artist cautioned that the Claimant's issues required time to resolve and perhaps some neuropsychological cognitive therapy and continued physical therapy would be beneficial.

34. The Claimant was initially referred by Dr. Artist for physical therapy Colorado Athletic Conditioning Clinic (CACC) on October 22, 2008. CACC records demonstrate that the Claimant was compliant with care and did not miss any sessions. Dr. Artist reported on November 10, 2008 that the Claimant showed "modest improvement" with physical therapy and he added massage therapy to the Claimant's treatment regimen.

35. Dr. Artist last saw the Claimant on November 25, 2008. He reported that he had spoken to Dr. Broadhurst who stated that the Claimant should recover completely from her injuries, and that it would likely take sixty to ninety days, possibly longer. He noted that the Claimant was still having sleep interrupted most nights and she still has headaches every day. However, he noted her "speech is a little more clean that the last time she was here." He noted she continued to have memory issues. He reported that the Claimant was "unable to drive motor vehicles."

36. In advance of an evaluation of the Claimant, Dr. Caroline Gellrick was asked to review the Claimant's medical records. She reviewed the initial emergency response records and the records of Dr. Artist. Based on this review, Dr. Gellrick concluded:

> Status post pedestrian motor vehicle accident, right-sided body contusion with closed head injury, concussion with cervical/thoracic/lumbar strain,

cephalagia, mild traumatic brain injury (TBI) with concussion with x-rays showing some degenerative change thoracic spine, computed tomography (CT) of the brain normal with little response to physical therapy seen in the records with issues of insomnia continuing and altered memory processes.

37. The Claimant was initially seen by Dr. Gellrick on December 8, 2008. She reported that she did not have an exact recollection of what occurred at the time of the accident, but that the vehicle that struck her was at a stop and then accelerated and hit her. The Claimant reported that seeing Cadillac commercials on TV caused her distress. The Claimant reported that her appetite was poor, her sleep was disturbed by neck and back pain and she has nonstop headaches. She reported vertigo problems and memory problems, and she stated that she was not driving. Dr. Gellrick noted that the Claimant had a visual acuity of 20/20, together with 20/20 on the right and 20/50 on the left. The Claimant reported to Dr. Gellrick that she had been to her eye doctor and had exams before and since the accident and that, "ophthalmology is not concerned about problems with the vision as a result of the accident at this point in time." Dr. Gellrick assessed the Claimant with, "concussion, mild traumatic brain injury with cervical/thoracic/lumbar strain with vertigo and cephalalgia with evidence of mild depression/some post traumatic stress disorder." Dr. Gellrick referred the Claimant for an MRI of the brain, cervical, thoracic and lumbar spine and to Dr. Torres for psychological evaluation. Dr. Gellrick restricted the claimant to "no driving" and discontinued physical therapy. Dr. Gellrick's December 15, 2008 restrictions continued to include "no driving."

38. The Claimant's December 18, 2008 brain MRI report demonstrated an incidental finding of little or no clinical significance, but was an otherwise normal brain MRI. A cervical spine MRI of the same date showed mild degenerative changes of the cervical spine with mild left-sided foraminal narrowing at C4-C5 and C5-C6. A December 19, 2008 lumbar MRI showed mild degenerative changes at the mid to lower spine without central canal stenosis or nerve root contact at any level. A December 31, 2008 CT guided right shoulder arthrogram was reported to be unremarkable. These results were reviewed with the Claimant by Dr. Gellrick on December 29, 2008 and Dr. Gellrick noted "patient is relieved that the MRIs are essentially normal." Dr. Gellrick also noted that the Claimant was again seen with a family member as "she is afraid to drive long distances." Dr. Gellrick referred the Claimant to Dr. Sheldon Goldberg to consult about the potential traumatic brain injury and to Dr. Eric Hammerberg on the persistence of cephalalgia in a background of migraine headaches. Physical therapy was reinstated twice a week at CACC as the Claimant's spine was determined to be "essentially intact."

39. A December 31, 2008 right shoulder MRI showed infraspinatus tendonitis, mild AC joint fusion, synovitis and a possible Grade 1 slap tear.

40. On January 14, 2009, the Claimant was referred by Dr. Gellrick to Dr. Eric Hammerberg for evaluation of neurological symptoms. The Claimant advised that she

developed daily headaches and vertigo, described as a spinning sensation lasting one to two minutes and aggravated by head movement. Dr. Hammerberg noted that her mental status was intact "scoring 27/30" on the Mini Mental Status Examination. He found her verbal fluency to be "mildly diminished: with a score of 31 on the FAS Task." Her speech was described as "normal with no dysarthria and no aphasia." Dr. Hammerberg assessed "post-concussion syndrome, mild, with post-traumatic vertigo, resolving, and post-traumatic headache, mild and cervical strain." He recommended the Claimant start on a progressively increasing dose of Gabapentin with the objective of weaning her off Ibuprofen and Tylenol. He noted that neuropsychological testing may be indicated in a few months.

41. On January 30, 2009, the Claimant had a follow up appointment with Dr. Gellrick. Dr. Gellrick discussed information received from consulting providers Drs. Hammerberg and Torres. Based on the physical examination, as well as consultation with the other providers, Dr. Gellrick assessed the Claimant with traumatic brain injury, post traumatic stress disorder, depression, cervical strain, cephalalgia, some cognitive dysfunction, thoracic strain, lumbar strain, and symptoms of vertigo.

42. The Claimant saw Dr. Gellrick again on February 13, 2009. The Claimant reported that she felt unsteady and was having some problems sleeping. She reported feeling better in the mornings, but still having problems with concentration. Dr. Gellrick observed, "the patient's speech is belabored. She is having trouble finding words today and it is particularly noticeable today more than other days."

43. On February 13, 2009, Dr. Gellrick completed a form for Nancy Mohler, a Pinnacol return-to-work specialist, stating that the Claimant would be off work for 2 months, per Dr. Torres recommendations.

44. Dr. Gellrick reported on February 26, 2009 that she received two video surveillance DVDs which showed among other things, the Claimant driving. She reported that, "Patient goes on to tell me it shows her driving at times and she drives short distances back and forth from the house. She no longer has dizziness and with her headaches clearing she has been able to tolerate driving. She avoids heavy traffic and freeway driving and when she does not feel safe to drive she asks family members to do so." Dr. Gellrick reported that the Claimant had been to physical therapy 29 times and was making progress with range of motion and that she tracked her dates of appointments correctly. Prior to this appointment and the receipt of the video surveillance, the Claimant had not disclosed to Dr. Gellrick that she had been driving, nor had Dr. Gellrick cleared the Claimant to drive. After the appointment, Dr. Gellrick spent an hour reviewing video surveillance and prepared a written report dated February 28, 2009. Dr. Gellrick essentially noted that the video surveillance confirmed that the Claimant could drive herself short distances and could lift lighter items under 15 pounds. However, as of February 28, 2009, Dr. Gellrick still opined, "I do not want her driving on the freeway quite yet. She is too scared to do that. This will need to be processed more with psychology with Dr. Walter Torres before she attempts this."

45. On March 19, 2009, Dr. Gellrick noted that speech therapy had previously been ordered for the Claimant. Dr. Gellrick spoke with the Claimant's case manager about this, but the speech therapy had not yet started. The Claimant continued in physical therapy with CACC and was working with foam rolls.

46. On March 24, 2009, Dr. Gellrick referred the Claimant to Dr. B. Andrew Castro. The Claimant reported back spasms that were significant but somewhat improved. The Claimant had received a series of trigger point injections with Dr. Gellrick which provided some short-term diagnostic relief, but no sustained relief. Dr. Castro advised the Claimant that "her symptoms likely will resolve with time" and recommended continued conservative management. He did not see the need for a surgical intervention, but noted that the Claimant may consider an injection at T1 as this might be the area causing some spasm in the upper thoracic and shoulder girdle areas.

47. On March 25, 2009, the Claimant was initially assessed for speech-language cognitive issues by Ms. Judith Haddow, a Speech-Language Pathologist. Ms. Haddow noted that the Claimant "exhibits moderate dysfluency in spontaneous speech," but had not experienced any problems with fluency in childhood or as an adult. Ms. Haddow noted that the Claimant reported dizziness with postural changes and recommended a visual-vestibular evaluation. The Claimant also reported functional problems with memory and attention. The Claimant reported feeling overwhelmed by keeping track of her appointments. Ms. Haddow provided a planner system as an external memory aid and to assist with planning to avoid cognitive fatigue. Ms. Haddow noted that the Claimant reported receiving a letter from her employer offering light duty, part time work, but Ms. Haddow opined that the Claimant did not appear ready to return to work in the capacity outlined in the letter because of on-going cognitive deficits, pain complaints and problems with anxiety. Ms. Haddow noted that six sessions were authorized for home-based speech-language treatment addressing fluency, word retrieval, memory, executive control and attention skills.

48. The Claimant saw Dr. Hammerberg for reevaluation on March 31, 2009, reporting the same symptoms, but he noted that the Claimant felt "the symptoms are less troublesome at the present time." He recommended an increase in the dose of Gabapentin to decrease the headache and the Claimant's neck and shoulder pain.

49. On April 1, 2009, Ms. Haddow noted that the Claimant reported that it took her all week to organize tax information that, prior to her injury, would have been completed in one evening. The Claimant was provided with ear filters and printed information on cognitive fatigue. Ms. Haddow also provided the Claimant with simple Sudoku puzzles and simple exercises for word retrieval and fluency that appeared to overwhelm the Claimant, per Ms. Haddow. On April 13, 2009, Ms. Haddow noted that the Claimant had a migraine one afternoon the prior week, and incurred household situations that required repairs. Ms. Haddow stated that the Claimant exhibited "slow but accurate word retrieval skills" and only noted one incidence of fluency problems in conversational speech towards the end of the session. Ms. Haddow opined that the Claimant's fluency difficulties were related to cognitive fatigue and the speed of word

retrieval, as opposed to true stuttering. The Claimant had difficulty following simple procedures that were trained the prior week and consistently required reminders to attend to the procedures. Ms. Haddow recommended referral to a behavioral optometrist familiar with evaluation after TBI. She indicated that Dr. Thomas Politzer would be an appropriate referral.

50. On April 2, 2009, Dr. Gellrick noted that the Claimant had seen, or was scheduled to see, a number of specialists to address the Claimant's various conditions. By this point, Dr. Gellrick noted that she had reports from the Claimant for evaluations by Dr. Castro for her spine, Dr. Morales for her esophageal/swallowing issue, Judith Haddow for speech therapy, Dr. Hammerberg for neurology and cephalalgia, and Dr. Torres for psychological issues. In addition, Dr. Gellrick wanted the Claimant to see Dr. Lipkin for her dizziness and vestibular issues, and noted that follow up with Dr. Kenneally was also scheduled. At this point, Dr. Gellrick noted that the Claimant was experiencing negative side effects from some of her medications, and some were not effective, so she anticipated a period of medication adjustment involving evaluation by several of the Claimant's treating physicians.

51. Dr. Gellrick referred the Claimant to Dr. Alan Lipkin, an otolaryngologist, who initially evaluated the Claimant on April 20, 2009. Dr. Lipkin diagnosed the Claimant with moderate vertigo, tinnitus, lightheadedness, dizziness and headache. Dr. Lipkin recommended additional testing.

52. On May 4, 2009, following an ENG test (electronystagmography), which showed bilateral vestibular weakness plus central findings, Dr. Lipkin opined that the Claimant was likely suffering from post-traumatic vestibular dysfunction and was a candidate for vestibular rehabilitation. Dr. Lipkin recommended that the Claimant avoid muscle relaxants and sedating medications in order to expedite recovery.

53. On her return from the appointment with Dr. Lipkin on May 4, 2009, the Claimant met with Ms. Haddow. The Claimant advised Ms. Haddow that she had borrowed her father's RV and went camping with the family the prior weekend. The Claimant reported that preparation for the trip was overwhelming and she had trouble getting started, so she began with laundry, which is something she knows how to do, and then gradually started to do more tasks related to the trip. Ms. Haddow built on this and encouraged the Claimant to work on breaking larger tasks into smaller components and start with the components she was comfortable performing.

54. Dr. Gellrick referred the Claimant to Dr. Chester Roe, an ophthalmologist. The Claimant completed a Medical History Questionnaire dated May 6, 2009, denying that she was currently having problems with double vision, loss of side vision, and glare/light sensitivity. She did check "yes" to flashes or floaters and dryness, and she placed a question mark in the "yes" box under fluctuation vision. The Claimant reported that she was doing a limited amount of driving and did not have visual difficulties when driving. She did report "having trouble focusing, difficulty reading, constant headaches – sometimes right over eyes." At a May 12, 2009 visit (and in an addendum dated May

13, 2009), Dr. Roe noted that the Claimant was light sensitive even though this was checked negative in the questionnaire. Dr. Roe did not impose any limitations/restrictions for the Claimant and opined that this was a "grossly normal eye exam" which was age appropriate. The Claimant had no convergence insufficiency, no strabismus and no focusing issues related to her injury of October 15, 2008. He reported that the Claimant did not need any eye-related treatment due to her October 15, 2008 injury and that the Claimant did not need eye exercises or vision therapy. After evaluating the Claimant, Dr. Roe reported that he phoned Dr. Gellrick and reviewed his findings with her.

55. On May 14, 2009, Dr. Gellrick provided a written response to a prior request for psychiatric services. Dr. Gellrick explained to the Claimant's nurse case manager that the Claimant "has not responded to psychotropics provided by this examiner at the recommendations of Walter Torres, Ph.D. Therefore, we need further intensive M.D. psychiatry to further evaluate this. Request has been made for referral to Howard Entin, M.D. to review medication management and treatment goals."

56. Dr. Howard Entin began to treat the Claimant on June 9, 2009, per the referral of Dr. Gellrick. The Claimant was still treating with Dr. Entin as of the time of his deposition on May 6, 2013. During his initial evaluation, Dr. Entin diagnosed the Claimant with major depressive disorder, post-concussive syndrome, post-concussive headaches, and a cognitive disorder. Dr. Entin also conducted a mental status examination from which he determined that the Claimant had problems with speech, including stuttering often; difficulty word-finding; and difficulty finishing sentences. Dr. Entin also reported that the Claimant had high levels of anxiety, trouble reading/retaining information, and difficulty with concentration, focus, and memory.

57. On June 17, 2009, Dr. Gellrick reported that the Claimant was receiving therapy at Exempla Wheat Ridge with a vestibular therapist who was also evaluating the Claimant's cervical spine. Dr. Gellrick reported that these therapy sessions were being extended to almost double the length of time because the Claimant traveled from a distance away and that it would be easier for the Claimant to extend her appointments to give her maximum benefit on site. Dr. Gellrick also noted the Claimant was experiencing difficulty during this transition period of medication adjustments and the Claimant "finds that she is angry and irritable…at times she loses it so to speak and breaks down." Dr. Gellrick continued to note that the Claimant "cannot drive with oncoming traffic, as it precipitates problems and is dangerous to the patient."

58. The Claimant saw Dr. Barton Goldman on referral from Dr. Gellrick for an electrodiagnostic evaluation on August 4, 2009. Dr. Goldman noted that the Claimant was "very anxious with strong tendency for inhalation retention, gasping, startle response and hyperventilation…." Dr. Goldman concluded it was an abnormal study, but due to the complexity of the case and the extensive time needed to complete the test and the Claimant's presentation, he was "unable to opine within medical probability if any of the above findings are OJI related," and his impression was that the Claimant had a "pseudothoracic outlet syndrome."

59. On August 4, 2009, the Claimant also had a home therapy session with Ms. Haddow. Ms. Haddow related phone contact with the adjuster for the Insurer who requested an updated treatment plan and had questions about why the Claimant "wasn't making any progress." Ms. Haddow disagreed that the Claimant wasn't making progress and opined that the Claimant was "making significant gains in her ability to apply compensatory strategies to help her manage life demands" and that the Claimant was "extremely cooperative with treatment recommendations but she presented with pain, vestibular problems, headaches and sleep disturbances which can exacerbate cognitive problems in 'real world' settings." Ms. Haddow then outlined the Claimant's short term goals for the next 60 days, with treatment once per week. These goals were:

- Recall 3 tasks she intends to perform in a period of 3 hours
- Recall the topic of a 15 minute conversation after a 45 minute delay
- Successfully develop and follow through with menu planning and meal preparation for her family 4 nights per week
- Sustain attention to cognitive stimuli for 60 minutes without excessive mental fatigue
- Improve speed with basic computer activities by 40%

60. On August 10, 2009, Dr. Gellrick noted that the Claimant was making slow progress with physical therapy for her back and very slow progress with her OT Plus rehabilitation services. The Claimant reported that she tried to do the computer exercises that were given to her but with fast moving objects on the screen, she experienced vertigo. Dr. Gellrick also noted that the Claimant had started EMDR with Dr. Torres and these sessions were very anxiety-producing and draining for the Claimant. As of an August 26, 2009 office visit with Dr. Gellrick, the Claimant reported that she was making slow progress on her physical complaints, but felt stale-mated and overwhelmed regarding the mental issues. On review of OT notes from Judith Haddow, Dr. Gellrick reported that the Claimant's abilities for reading instructions had improved 80% and her word retrieval skills had improved by 50% with a corresponding reduction in stuttering. Per Ms. Haddow's recommendation, Dr. Gellrick reduced the speech therapy from twice a week to once a week for the following 2 – 3 months. Dr. Gellrick also specifically noted the Claimant's frustration with the speed of her progress in achieving her goals, but counseled the Claimant that it is not unusual for closed-head/brain injuries to take a year or two years to resolve. However, Dr. Gellrick opined that the Claimant's prognosis was good.

61. On September 23, 2009, the Claimant reported to Ms. Haddow that she was experiencing increased tension with her family and she was going to visit a friend in Kansas for two weeks to have a break. The Claimant attributed the increase in tension to her frequent headaches, emotional volatility and current difficulty coping with life's demands. In preparation for the trip, Ms. Haddow noted that the Claimant "planned ahead to make sure she has an adequate supply of prescription medications and has made lists of things to pack for the trip. She is attempting to make lists for her family of household chores, so they can help her with chores on a regular basis." Additionally,

Ms. Haddow noted that the Claimant "exhibited improved performance on reasoning tasks that require complex attention to detail."

62. The Claimant also had an office appointment with Dr. Gellrick on September 23, 2009. Dr. Gellrick noted that the testing with Dr. Kenneally was completed, although Dr. Gellrick did not yet have the report. Therapy and medical records were reviewed and, overall, there was very slow progress in all areas. Dr. Gellrick noted that Dr. Entin and Dr. Torres remarked on the Claimant's anxiety levels. There is discussion about the Claimant leaving town to visit a friend in the Midwest for 2 weeks. At this appointment, Dr. Gellrick specifically noted the Claimant's "mood and affect is one of anxiety. She is clinging to a soft object in her hand when this examiner first comes in and repetitively fingering it, but she does let go as we have continued with the exam."

63. On October 21, 2009, the Claimant was seen by Dr. Gellrick who was now in possession of Dr. Kenneally's report, which had also been reviewed by Dr. Entin, who saw the Claimant on October 7, 2009. In this medical note, Dr. Gellrick states, that neuropsychiatric testing shows conscious attempt to fake injury and all interpretation of Dr. Kenneally's data is "suspicious and indicates a minimal level of performance." Dr. Gellrick went on to note that the testing results showed the Claimant "has had a decline in performance since prior history of 11/2008 testing, which is inconsistent with head injury, but more consistent with psychiatric factors or malingering. Testing indicates above. These findings are inconsistent with mild TBI. Psychiatric history indicates increased somatization and histrionic tendencies. Conclusion: no evidence to support traumatic brain injury." Dr. Gellrick also noted that "Dr. Entin is recommending beginning to wind down treatment and indicated he would discuss this with Dr. Torres. Dr. Gellrick noted that the Claimant has not seen Dr. Kenneally yet to review the results of the neuropsychiatric assessment and that the Claimant told her that Dr. Entin did not mention much at all about it when she saw him earlier.

64. On November 4, 2009, Dr. Gellrick again referred the Claimant to Dr. Goldman, this time for a consultation regarding the Claimant's cervical brachial dysfunction and a rehabilitation consultation. Dr. Goldman noted that it was "rather challenging to get a cohesive history from [the Claimant]." Dr. Goldman noted that the Claimant expressed frustration that she has not made much progress and "her number one problem are headaches and neck pain and secondarily bilateral hip pain, sacroiliac joint and low back pain." The Claimant reported that most of her treatments at this point were of a passive nature and that she was not enthusiastic about more active treatment options because they caused her pain. After going over a history with the Claimant and an extensive and thorough record review, along with a physical examination, Dr. Goldman's impression was that that right cervical and shoulder girdle myofascial pain was secondary to the work injury. He found that the Claimant had probable mild to very mild cognitive dysfunction and vestibular dysfunction secondary to her work injury. He deferred to Drs. Entin and Torres as to specific diagnoses, but found the Claimant had anxiety and depressive disorder. Dr. Goldman felt the Claimant had a pain disorder and recommended ruling out factitious disorder, and vascular and tension headaches of

myofascial origin. He noted the Claimant had a positive fibromyalgia screen that was most likely associated with sleep dysfunction and somatization disorders. Dr. Goldman expressed concern that the Claimant had "extensive treatment over at least the last six months with highly qualified professionals….but is noting minimal progress." He opined that there is a "likelihood that overall treatment at this time is inadvertently and iatrogenically re-enforcing some of the patient's dysfunction and identification with the victim role." He found that the Claimant would be a very poor candidate for injections, and recommended winding down the vestibular, physical and speech therapies." In an addendum to this medical note, Dr. Goldman advised against an FCE for the Claimant as it would be unlikely to be helpful or necessary with her type of biopsychosocial presentation, and due to the fact that based on his examination, she would most likely remain in the sedentary to light work category.

65. On November 9, 2009, Dr. Gellrick noted that "the patient is seen to obsess and perseverate on the findings of Dr. Kenneally in her report. The patient essentially feels Dr. Kenneally did not consider all factors presented and that the neuropsychiatric results are not an accurate representation of what she is feeling." The Claimant asked Dr. Gellrick for a handicap sticker for driving. Dr. Gellrick denied the Claimant's request for a handicapped sticker, explaining to the Claimant that she had no problems walking and so does not need a handicap sticker. Dr. Gellrick further noted that with her dizziness, the Claimant should not be driving.

66. Also on November 9, 2009, Ms. Haddow noted that she communicated with Dr. Gellrick about the Claimant's visual skills, which may have been linked to her vestibular problems and dizziness, and recommended an evaluation by a neuro-optometrist or an occupational therapist for visual perception screening. Ms. Haddow noted concern for the Claimant's ability to cope with current life demands and her expression of hopelessness regarding her injury.

67. Dr. Gellrick referred the Claimant to Dr. W. Bruce Wilson, a neuro-ophthalmologist, who evaluated the Claimant on December 1, 2009. Dr. Wilson's evaluation included validity testing, and Dr. Wilson noted that, "she said she is having trouble with her vision in the way of not being able to either hold concentration on what she is reading so that she can read it accurately or is having trouble assimilating information accurately or forgetting it or all three. It is very difficult to get a definite feeling from her in trying to sort this out." While Dr. Wilson noted that the eye examination showed 20/20 vision in soft contacts, he reported that, when changing distances to two meters and using a double sized target and doing a tangent visual field, there was no enlargement, so there was some functional component in regard to visual fields. There was no abnormality to her nerves and retinas or pupil abnormality and the examination of her ocular movements was normal. He ultimately opined that, "it is not convincing that [the Claimant] had any brain damage and probably definitely had no visual system damage that is demonstrable and that some of the visual field examination techniques suggest the possibility that this is functional, although it does not suggest malingering necessarily."

68. On December 8, 2009, Dr. Entin issued a psychiatric report. In his report, he specifically stated that the Claimant had a cognitive disorder. Dr. Entin also noted that reports from family members, friends, and employers were consistent with the doctor's observations, which indicated a dramatic change in the Claimant's functioning from her pre-injury levels.

69. The Claimant was examined by Dr. Gellrick again on December 21, 2009. The Claimant reported that she was still unable to drive due to dizziness and vertigo which continue. In reviewing the recent evaluation reports of Dr. Kenneally, Dr. Goldman and Dr. Entin, Dr. Gellrick clarified that Dr. Entin was on record stating that he did not believe the Claimant was consciously exaggerating her symptoms, nor malingering, but that she is anxious and her psychological state interfered with her function. Dr. Gellrick noted that Dr. Goldman found that the Claimant's worsening of symptoms was not consistent with a head injury, but "more consistent with the emotional sequelae of the same." Dr. Gellrick noted that both Dr. Goldman and Dr. Entin agreed that passive modalities should be discontinued but that the Claimant should continue to receive ongoing psychological support from Dr. Torres and Dr. Entin. Per Dr. Entin's recommendations, Dr. Gellrick recommended that the Claimant be seen by Dr. Schmitz for review of the neuropsychological testing data. The Claimant was also to continue be treated by seeing Dr. Lipkin for the vestibular issues.

70. On December 23, 2009, Dr. Goldman issued another written report based on the review of additional medical records. He pointed out that he had not seen the Claimant since November 4, 2009, but that the Claimant's attorney believed that his report from November 4, 2009 conflicted with some of the additional information that she provided to Dr. Goldman. Therefore, the attorney requested an updated report. In addition to the record review, Dr. Goldman also had an opportunity to consult with Dr. Gellrick and discuss the case again. Dr. Goldman clarified that he did find the Claimant's presentation to him to date to be consistent, nor was it consistent with her presentation to Dr. Torres and Dr. Entin. However, his "chief concern" relative to the Claimant "is whether various aspects of her present temporary disability are being overly emphasized or potentially misunderstood leading to a less than optimal functional recovery." Dr. Goldman still considered that "the psychological and emotional issues the greatest obstacle to recovery for [the Claimant]." He points out that the invalidation of the neuropsychological testing, for whatever reason, prevents objective categorization of what, if any, residual cognitive dysfunction remains for the Claimant, and how that might have been impacting her vocational reentry prognosis. Dr. Goldman noted that, having specifically considered the subjective feedback from associates, co-worker's, friends and family of the Claimant, as well as the medical opinions, his overall opinion remained unchanged from his prior report. Dr. Goldman went on to opine that "from a pain management and rehabilitation perspective, my chief concern is that if in fact [the Claimant's] primary rate-limiting issues are more in the psychosocial than cognitive realm, that if we and the patient overly endorse cognitive issues as being the primary rate-limiting rehabilitation factor to future recover, then in my experience the patient will have a great deal of difficulty in making any further progress relative to cognitive and behavioral interventions that might bear the greatest fruit in terms of facilitating both

physical and cognitive recovery." Dr. Goldman also continued to opine that "there remains subjective aspects (which are certainly quite consistent in presentation) that suggest a much stronger emotional component to the patient's present pain, suffering and disability than there are objective and physical conditions."

71. Dr. Lipkin determined that the Claimant was at MMI for her vestibular condition on January 6, 2010. He assigned an 8% whole person impairment rating from an ENT standpoint. At that visit, the Claimant reported to Dr. Lipkin that she had continued short episodes, seconds to minutes, of dizziness and unsteadiness, that she was unable to drive, and she continued to run into walls and had trouble walking straight. In arriving at the 8% whole person impairment rating, Dr. Lipkin found that the Claimant "is at the more severe end of Class 2 vestibular impairment with objective signs of impairment," although he noted "she has no problems with basic self care." Dr. Lipkin opined that there was no other specific treatment recommended at that point.

72. On January 6, 2010, the Claimant was discharged from speech therapy/cognitive intervention. Ms. Haddow provided final modifications for cognitive strategies to meet daily life demands. Ms. Haddow noted that the Claimant might benefit from short term cognitive intervention (3 to 5 sessions).

73. The Claimant participated in a Functional Capacity Evaluation (FCE) on January 25, 2010 for 7 hours and 30 minutes. In summary, the evaluator, Patrick Coughlan, found that the Claimant demonstrated work tolerance consistent with the "Below Sedentary" PDC level. Although, it was noted that the Claimant's effort was "variable," based on effort measures and clinical observations. Thus, the report should be considered to establish the Claimant's "minimal capabilities." Mr. Coughlan noted that the Claimant's "discomfort seemed to be related to anxiety with lifting and fear of falling more so than pain or strength." Over the course of the testing, the Claimant rated her pain at 8/10. The day following the FCE, the Claimant was instructed to contact the clinic to report her condition. The Claimant reported experiencing "a full blown migraine" and that she slept for 15 hours following the testing.

74. On February 3, 2010, Dr. Gellrick noted that the Claimant had seen Dr. Lindberg on January 8, 2010 for evaluation of her shoulder. Per Dr. Gellrick, Dr. Lindberg did not anticipate surgical intervention but he wanted a physiatry consult. It was also noted that Dr. Lipkin found the Claimant at MMI for the vestibular condition and rated the Claimant's impairment at 8% whole person. Dr. Gellrick also noted that the Claimant had completed an FCE on January 25, 2010 and reviewed the report with the Claimant.

75. The Claimant saw Dr. Gellrick on March 11, 2010 expressing that she was anxious to be able to drive to close places in her neighborhood. She told Dr. Gellrick that she had not been able to engage in her home exercise program at the local gym because she did not have a way to get there. So, she wanted to pass the driving evaluation so she could start driving, although the Claimant did express that she knew that she was not stable to drive on the freeway. Dr. Gellrick noted that her office was

attempting to obtain clearance from Dr. Lipkin's office so that the Claimant could participate in the driving evaluation. Dr. Gellrick noted that the Claimant continues to express "disgruntlement" and "is seen to obsess" about Dr. Kenneally. The Claimant was more satisfied with her contact with Dr. Schmitz.

76. Dr. Gellrick referred the Claimant to Dr. Zimmerman, who initially saw the Claimant for osteopathic manipulation and injections on March 31, 2010. The Claimant reported "constant headaches since the accident" and pain that seemed to originate from the occipitocervical junction that radiated over the top of her head and included bilateral temporal pain. The Claimant also reported neck pain in the cervicothoracic region, radiating into the trapezius and shoulder regions with associated numbness and tingling down the right upper extremity when the shoulder and neck pain was severe. She also reported low back pain that radiated into the upper buttock pain. Dr. Zimmerman diagnosed the Claimant with general myofascial pain of the cervical, thoracic, and lumbar spine with positive fibromyalgia screen; segmental dysfunction of the cervical spine with associated headaches; a history of postconcussive syndrome, anxiety and PTSD with a history of cervical spinous process fractures, stable and a right shoulder injury with evidence of a possible SLAP lesion. Dr. Zimmerman began osteopathic manipulative therapy on the initial visit.

77. At an April 6, 2010 visit with Dr. Zimmerman, the Claimant reported she was mildly sore after her initial manual treatments but that she was fine the following day. She continued to treat with Dr. Zimmerman through April 2010 with no change in her daily headaches or upper cervical pain. Although there was improvement noted on April 27, 2010 to her thoracic, shoulder, hip and lumbar spine, and the Claimant reported increased tolerance for activity such as shopping and being comfortable in a car. On May 3, 2010, the Claimant's level of activity further increased, with the Claimant reporting that she did some mild hiking over the weekend and she "tolerated the uneven terrain and hiking that lasted several hours without difficulty." On May 24, 2010, the Claimant reported that she went hiking over the weekend for a one-hour duration on uneven terrain in Rocky Mountain National Park. Dr. Zimmerman also noted that Dr. Entin was reducing several of the Claimant's medications on a tapering schedule over the next several weeks.

78. On April 29, 2010, Dr. Gellrick noted that the Claimant underwent a driving evaluation and was able to drive short distances, although Dr. Gellrick opined that the Claimant should avoid freeway driving. Dr. Gellrick noted that, per Dr. Schmidt, although the Claimant's performance on his testing was "clearly internally inconsistent" and indicative of nonorganic factors impacting her test behavior, it fell short of a supportable finding of conscious exaggeration. Dr. Gellrick opined that the Claimant was not yet at MMI.

79. On June 2, 2010, Dr. Zimmerman performed medial branch block procedures on the left side at C2-C3, C3-C4, C4-C5 and the third occipital nerve. There was a diagnostic response for the left-sided medial branch blocks with 60-75% relief reported on the left side and no change on the right side, which was not treated. On

June 7, 2010, the Claimant reported her relief lasted two to three hours with soreness the following day and a return to a baseline level of discomfort after. Bilateral medial branch blocks were performed by Dr. Zimmerman on June 9, 2010. In the recovery room, the Claimant reported a 50-75% relief in her headache and a 50% relief in neck pain. On June 14, 2010, the Claimant reported that the relief lasted a couple of days and she demonstrated improved cervical range of motion on examination. On June 21, 2010, Dr. Zimmerman reported that the Claimant "tolerated camping activity over the weekend including collecting firewood and doing short hikes as well as cooking outside. No increase in symptoms. She states her neck pain seems to be improving and the intensity of her headaches is also slowly decreasing, although they are still constant in nature."

80. On June 23, 2010, the Claimant underwent radiofrequency neurotomy at right C2-3, C3-4, C4-5 and right occipital nerve. Dr. Zimmerman noted a diagnostic response in the recovery room and some, although lessening, continued relief. On July 19, 2010, the Claimant reported increased outside stressors to Dr. Zimmerman, including her son getting married in another state. Dr. Zimmerman opined that "[the Claimant] has recently undergone medication changes by Dr. Howard Entin and she is experiencing increased anxiety due to psychosocial stressors at home. This in combination with the complexity of her post concussive syndrome, anxiety, and PTSD disorder. I do not recommend proceeding with RF neurotomy at this time. [The Claimant] is experiencing somatization response and I am concerned that additional RF treatment may not provide net benefit at this time." On July 26, 2010, it was noted that the Claimant was leaving town for a week and she would be driving to Mississippi for her son's wedding. At the next appointment on August 5, 2010, Dr. Zimmerman noted that the Claimant reported that she tolerated the road trip to Mississippi "without any exacerbation in pain," and further reported that "her headaches have been reducing in frequency and are no longer constant." On August 9, 2010, Dr. Zimmerman noted that the Claimant reported her headache frequency and intensity continued to reduce, although the Claimant was active over the past weekend, going camping, although she did not tolerate wearing a camel back with water longer than 15-20 minutes before spasms occurred.

81. On June 29, 2010, the Claimant followed up with Dr. Gellrick, who was then at a new office in Denver, having left the Exempla office in Wheat Ridge since the Claimant's last appointment. The Claimant's symptoms flared since the rhizotomy with Dr. Zimmerman, which was not unanticipated. Overall, the Claimant reported that she trusted the procedure and felt that her headache condition was improving and that the treatment by Dr. Zimmerman had made a big difference in her physical presentation. The Claimant reported that she was driving more and tolerated back streets and side roads for trips of 30-45 minutes, depending on her level of headache. The Claimant reported that she was staying off freeways. The Claimant complained of continued symptoms of photophobia, headaches and memory problems, and tenderness in the thoracic region. Dr. Gellrick noted that the Claimant was "actually upbeat" on the day of the appointment and "very well organized" with a day-keeper with all of her dates and that the Claimant was able to track things well.

82. Dr. Gellrick referred the Claimant to Thomas Politzer, O.D., because, per Dr. Gellrick, the Claimant continued to have complaints of visual problems when she came in to Dr. Gellrick's office and at the OT Plus appointments. The Claimant was initially seen by Dr. Politzer on September 7, 2010. Dr. Politzer noted that the Claimant had visual motion hypersensitivity, convergence insufficiency with episodic double vision, and oculomotor dysfunction. He recommended that the Claimant be refit for both of her contact lenses for distance vision and to help reduce her dizziness symptoms. He also recommended oculomotor therapy with her occupational therapist Judy Haddow.

83. At a follow up visit on September 21, 2010, Dr. Politzer noted that the Claimant reported some improvement with her new lenses with regards to visual motion hypersensitivity. The lenses were further evaluated and modified with a prescription to give enhanced acuity and improvement in visual motion hypersensitivity.

84. On October 14, 2010, the Claimant began to see Shari Barta for occupational therapy, with goals related to visual retraining, cognitive retraining and perception retraining until discharge from O/T services on March 9, 2011.

85. By October 14, 2010, Dr. Zimmerman noted that, "subjectively, [the Claimant's] symptoms seem to have stabilized and she continues to report temporary partial relief from manual medicine from myself, chiropractic/accupuncture treatments, and massage treatments. However by October 25, 2010, the Claimant is reporting to Dr. Zimmerman that she is overall the same with her headache, cervical, thoracic and lumbar pain unchanged and occurring unpredictably." The Claimant felt Dr. Zimmerman's treatments were maintaining her current condition, as opposed to continuing to improve her condition.

86. On October 19, 2010, the Claimant saw Dr. Gellrick for a follow up appointment. The Claimant was seeing Dr. Politzer and Shari Barta for vision therapy, and seeing Dr. Zimmerman and Dr. Gridley for alternating OMT and acupuncture every other week. The Claimant also reported that she was set up at the gym for her home exercise program. Dr. Gellrick noted that the Claimant was not yet at MMI for all conditions, but expected MMI by the end of November. Dr. Gellrick noted that she was going to ask Dr. Entin to do the psychiatric impairment rating, as it appeared that the Claimant was at MMI for this.

87. On November 16, 2010, Dr. Entin issued a Neuropsychiatric MMI/Impairment Report. In that report, Dr. Entin again opined that the Claimant's pedestrian/motor vehicle accident had caused emotional reactions and post-concussive syndrome that affected her cognitive functioning. In the November 16, 2010 report, Dr. Entin gave the Claimant a 10% neurological impairment rating using the AMA Guides 3rd edition for impairment of cerebral function. The doctor stated in his report that the Claimant continued to have trouble with cognitive fatigue, memory problems, difficulty multitasking, organization, etc. He also stated the Claimant "could not return to her previous level of functioning." Dr. Entin stated that it was unclear if the Claimant could

do even fairly simple repetitive jobs on a consistent basis due to cognitive fatigue, disorganization, and chronic pain.

88. On December 6, 2010, the Claimant reported to Dr. Zimmerman that her symptoms were essentially unchanged. She was trying new medications. Her underlying headache was persistent but she noted decreased frequency and intensity of the severe migraines. At this point, the Claimant was alternating chiropractic and acupuncture every other week with OMT/manual medicine. On December 20, 2010, Dr. Zimmerman noted that the Claimant reported a difficult last two weeks due to nausea that she thought was related to Topamax and she has lost 10-pounds. She also reported a cold and upper respiratory viral infection. With respect to musculoskeletal issues, the Claimant reported decreased severe migraines with no change to her underlying headache. Her cervical and thoracic discomfort were better controlled.

89. On December 20, 2010, Dr. Politzer reported that the Claimant was, "improving with regards to her vision" and that vision therapies with Sherry at OT Plus were helping. On January 20, 2011, Dr. Politzer and the Claimant discussed the option of evaluating for Botox because the Claimant was not happy with the side effects of Topamax, even at a reduced dosage.

90. On January 10, 2011, the Claimant participated in a Functional Capacity Evaluation (FCE) administered by Vickie Mallon, OTR. At the time of the testing, the Claimant reported to Ms. Mallon that her pain level that day was a 7/10, which was described as a typical day, at the beginning of the FCE and it was reported to be 9.5/10 at the end of the evaluation. The Claimant's main complaints were headache, neck tightness with muscle spasms, achiness throughout her cervical, thoracic and lumbar spine, tingling in both arms and hands, and a feeling of extreme anxiety. Ms. Mallon noted that the Claimant's job at the time of her injury was administrative assistant to the State Board of Education. The job was identified as most consistent with Dictionary of Occupational Titles job DOT 169.167-010, and is classified in the sedentary work category. The FCE was performed over 4 hours, and the Claimant demonstrated an ability for sustained sitting of approximately 20 minutes with frequent change of positions from sit to stand. Her sustained standing/walking was demonstrated to be 45 minutes. The validity measures indicated that the Claimant may not have put forth consistent effort during the testing. Ms. Mallon concluded that, "the [Claimant] appears to have a hesitant and frustrated perception of her ability to work." With respect to testing for lifting, carrying, pushing and pulling, the Claimant's overall demonstrated abilities were "most consistent with the light work category at this time." It was also noted that, with respect to dexterity testing, the Claimant exhibited decreased manipulative ability with both hands, working at a very slow, noncompetitive rate of speed. The evaluator noted that the Claimant contacted her the day following the FCE to describe her pain and symptoms following testing. The Claimant reported that she took a hot bath following the test and slept most of the afternoon. She reported a strong headache, but not a migraine, and increased cervical pain and right upper extremity pain.

91. On January 17, 2011, the Claimant reported to Dr. Zimmerman that the Topamax did seem to significantly decrease the frequency and severity of her acute migraine headaches. However, the Topamax interferes with her appetite and she continued to have weight loss and was down to about 106 pounds. The Claimant also reported that she had an FCE one week prior and she had "a slight flare-up in left-sided neck pain from a certain activity during the test, and those symptoms are slowly returning to baseline." On January 31, 2011, Dr. Zimmerman noted that, while the Topamax was effective at reducing the Claimant's migraines, the appetite suppressant side-effect persisted, and so, he recommended a nutrition consult, as well as consideration of Botox for migraine treatment to reduce the Topamax needs.

92. Dr. Gellrick evaluated the Claimant on February 8, 2011, and determined MMI. She provided an impairment rating for those conditions not already rated by other treating physicians. Dr. Gellrick assigned a 26% whole person rating for the cervical, thoracic and lumbar spine and a 7% upper extremity rating for the right shoulder. Dr. Gellrick combined this 26% spine impairment rating with the cognitive impairment rating of Dr. Entin of 10% for 33%. The 33% rating was then combined with the 8% vestibular impairment resulting in a 38% whole person. This 38% was then combined with a 4% right shoulder impairment, resulting in a 40% whole person impairment for all conditions rated. Dr. Gellrick's impairment rating report contained an extensive and thorough review of the Claimant's history of present illness and subsequent medical treatment. Dr. Gellrick listed the following final diagnoses for the Claimant: MTBI with cognitive dysfunction; post-concussion syndrome with cephalalgia (headache); cervical strain; thoracic strain; lumbar strain; persistent vertigo; major depressive disorder with generalized anxiety disorder; pain disorder associated with psychological factors and medical conditions; right shoulder impingement; deconditioning; and ongoing emotional dysfunction. In conclusion, Dr. Gellrick noted that although the findings of the most recent Functional Capacity Evaluation put the Claimant in a sedentary work category, "mentally the patient will have good and bad days where she is unable to track her task and be consistent with her performance."

93. On February 28, 2011, the Claimant reported to Dr. Zimmerman that "her overall migraine severity has remained stable, which is significantly improved for the past several months." She completed her Topamax taper and was off this medication.

94. On March 10, 2011, Dr. Gary Zuehlsdorff issued a written opinion after being asked to review the IME of the Claimant and the final impairment rating from Dr. Gellrick provided in February of 2011. Dr. Zuehlsdorff opined that "in reviewing her report and Dr. Howard Entin, the psychiatrist's report, I would concur that the numbers obtained seem to be reasonable, given the gravity of the injury." Dr. Zuehlsdorff did not have disputes with the impairment ratings for the cervical, thoracic, and lumbar spine and the right shoulder or vertigo ratings. Dr. Zuehlsdorff also opined that the 10% rating from Dr. Entin for primarily TBI symptoms with minimal psychiatric components of 10% made sense from a medical standpoint.

95. On March 15, 2011, Dr. Gellrick saw the Claimant for maintenance treatment and, with the Claimant present, completed a 7-page form "courtesy of Barbara Furutani, Esq. regarding permanent needs and set-asides for the patient, …" Dr. Gellrick assigned permanent restrictions via this form, which she later changed. However, in the form, Dr. Gellrick gave the Claimant the following permanent work restrictions after MMI: sitting limited to 20 minutes per episode; walking and standing limited to 20 minutes per episode; with typical breaks where she could sit, stand, and walk. These activities were limited to about 4 hours per episode.

96. Respondents filed a Final Admission of Liability on March 16, 2011, admitting for a 38% whole person rating and a 7% scheduled rating for the shoulder. The Respondents' final admission incorporated the ratings of Drs. Gellrick, Entin and Lipkin, as set out in Dr. Gellrick's February 8, 2011 report.

97. On April 25, 2011, the Claimant reported to Dr. Zimmerman that she hurt everywhere, and was very non-specific in her pain description. She could not clearly articulate the location, timing, intensity or triggers that brought on symptoms in her hips, cervical, thoracic and lumbar spine.

98. The Claimant saw Dr. Adam Wolff on June 21, 2011 for a neurology consultation to consider alternatives for headache relief such as Topamax, which provided benefit for her severe headaches, but also caused side effects at increased dosages for the Claimant. At the first visit, Dr. Wolff recommended Depakote and a trial of Botox. After five days on Depakote, Dr. Wolff reported on June 29, 2011, that the Claimant was tired. The initial treatment with Botulinum Toxin was tried on June 29, 2011. As of August 3, 2011, the Claimant reported to Dr. Wolff that the Botox injection helped but the Claimant was still getting chronic headaches, although they were a little less severe. On September 1, 2011, the Claimant was started on Topamax again. By September 21, 2011, the Claimant received a repeat injection of Botox and was also doing better with her migraines on the Topamax. By October 19, 2011, the Claimant was reporting improvement in her headaches to Dr. Wolff. Dr. Wolff noted She is still getting a headache most days, but they are coming on in the evening. She is feeling somewhat better during the day and she is not getting as many migraines. She describes perhaps 3 or 4 significant migraines over the last month."

99. On November 2, 2011, following a phone call from the Claimant's counsel, Dr. Politzer reported a diagnosis of visual motion sensitivity, for which the Claimant was receiving therapy. He noted that his other initial diagnoses of convergence insufficiency with episodic double vision and oculomotor dysfunction were problematic only because of the motion sensitivity. Dr. Politzer noted that, by taking a conservative approach with regards to equalizing her contact lenses and through occupational therapy, the Claimant's "visual dominance" and "visual motion sensitivity" were reduced.

100. Dr. Gellrick issued a Medical Record Review Special Report and Video Surveillance Review on November 5, 201,1 at which time she updated her opinion of the Claimant's restrictions. In preparation for this report, Dr. Gellrick reviewed IMEs

performed by Dr. Tashof Bernton, Dr. Judith Weingarten and Dr. Armin Feldman, along with video surveillance from August and September of 2011. With respect to the reports of Dr. Bernton, Dr. Gellrick noted that Dr. Bernton found that the Claimant's conditions were consistent with those initially identified by Dr. Rick Artist and ultimately determined that the Claimant was capable of performing in an administrative position and she should not be placed on a disabled status, as she was physically capable of performing vocational activity. Dr. Gellrick also took note of the IME of Dr. Weingarten which took place for 3 hours on September 22, 2011, and was attended by Dr. Armine Feldman (although he did not participate). Dr. Gellrick noted that Dr. Weingarten ultimately concluded that the Claimant's symptoms were consistent with pain disorder, and histrionic personality disorder and that her symptoms were not caused or aggravated by her work injury. Dr. Weingarten found no reason the Claimant could not work and encouraged the Claimant to return to work to help build confidence. Dr. Gellrick noted that Dr. Feldman disagreed with and refuted some of Dr. Weingarten's statements. Dr. Gellrick noted that Dr. Feldman concluded that the Claimant's current medical condition included postconcussion syndrome with cognitive loss, depression and headaches and was a direct result of the auto-pedestrian work injury. Dr. Gellrick generally disagreed with the opinions of Drs. Bernton and Weingarten and agreed with Dr. Feldman. Dr. Gellrick also chronicled her review of portions of the surveillance video. Dr. Gellrick noted that on September 10 and 11 of 2011, the Claimant was able to pick up two one-gallon buckets of paint and carry them to check out and then load them into her vehicle. Dr. Gellrick also reviewed the August 20, 2011 video from the Peach Festival. She notes that the Claimant was basically seen walking for 2 ½ hours with a break of approximately 30 minutes sitting on the ground and then stood and walked again from 1:45 p.m. until leaving at 2:30 p.m. She noted that the Claimant was able to bend at the waist with more range of motion than had been seen at the time of the closure of her claim. She noted that the Claimant was able to lift boxes of Peaches which presumably weighed 15-20 pounds and was able to lift and carry them and that from her prospective, the Claimant's function had improved in terms of the Claimant's ability to lift and carry 15-20 pounds for at least brief periods and able to stand and walk for more time that she was able to do previously. Dr. Gellrick ultimately translated this to a best case scenario where "with improvement in function this patient would function for 3 maybe 4 hours on a job with the ability to sit at will and stand and walk and lift up to 10 to 15 pounds on and occasional basis." However, Dr. Gellrick cautioned that "beyond a 4 hour period though it is doubtful what the patient's function would be based on video surveillance. The patient is anticipated to have good days and bad days. There will be days when the headaches she has experienced will preclude her activity."

101. On November 17, 2011 the Claimant saw Dr. Wolff for follow up and reported that the Botox was wearing off and she was getting more headaches. Dr. Wolf reported that the Claimant was also under increased stress over the last month due to the death of a friend. Dr. Wolf recommended repeating the Botox injections in the facial musculature and avoiding the neck so she would tolerate it better. Then the Claimant would follow up with Dr. Zimmerman for neck injections and treatment.

102. On November 23, 2011, Dr. Lipkin responded to an inquiry from Respondents' counsel regarding the Claimant's vestibular conditions. He noted that, as of her last visit to his office on January 6, 2010, the Claimant was reporting that her balance was improving but she still had difficulty walking in a straight line and she felt unsteady and unable to drive. After communication with Dr. Gellrick's office at a later date, the Claimant was reevaluated to see if she could drive. Dr. Lipkin stated that he had not seen the patient in the office since that time. In response to questioning about her level of functioning (after reviewing surveillance video from the summer of 2011), Dr. Lipkin opined that, "she is capable of a level of functioning that clearly has improved since her January 6, 2010 visit in that she does not have any obvious instability when walking and is capable of driving. Patients with vestibular injuries can have intermittent symptoms, but at least some of the time she appeared to be capable of both sedentary and moderate levels of activity. There would be no otolaryngology contraindication towards her being employed at sedentary or light work, with the understanding that if she does have fluctuating symptoms, periodic breaks could be medically necessary."

103. On December 13, 2011, the Claimant returned to Dr. Zimmerman for medical maintenance treatment. Specifically, Dr. Gellrick requested consideration for a repeat third occipital nerve and cervical RF neurotomy to treat recurrent headache pain. Dr. Zimmerman noted that the Botox injections provided some relief but the Claimant did not tolerate the neck injections due to neck weakness sensation. She is scheduled for repeat face and head injections with Dr. Wolff on 12/20/2011. Dr. Zimmerman notes pain behaviors with full flexion and extension of the shoulder and diffuse shoulder pain. After performing a medical record review, Dr. Zimmerman opined that "the majority of headache relief and increased function came from manual medicine treatments on the left side of her neck and reduced stress in her life. It appears the RF neurotomy treatment on the right side of her neck did not provide any lasting benefit or any increase in function." So, Dr. Zimmerman did not recommend a repeat RF neurotomy as he found no clinical indication that it improved overall headache relief or improved level of function.

104. On January 6, 2012, the Claimant reported to Dr. Gellrick that Botox injections had helped control the headaches overall by 50%. The Claimant was getting headaches almost every week before, and at that point she was getting them every 2 to 2 1/2 weeks. So, Dr. Gellrick found that the Botox appears to have helped along with the concurrent use of Topamax.

105. On February 29, 2012, at an annual comprehensive vision exam, Dr. Politzer reported an improvement in the Claimant's ongoing headaches with the Botox treatment and a lower dose of Topamax. The Claimant reported some deficits with visual tracking but her "double vision has resolved." He reported improvement with headaches and the visual system overall.

106. On April 2, 2012, Dr. Zimmerman reported that the Claimant returned for osteopathic manipulation for the first time in four months. The Claimant reported that her father had recently passed away and she commuted by car to Ohio and back (20

hours each way) which made her cervical, thoracic and lumbar spine sore and there was stress due to the loss of her family member. Dr. Zimmerman noted that the Claimant appeared fatigued and that she lost some weight. However, he also noted that the Claimant showed no signs of sedation, withdrawal or anxiety.

107. The Claimant treated with Dr. Zimmerman for osteopathic manipulations on September 7, 2012 and again on September 24, 2012. On September 24, 2012, the Claimant reported that she was sore after the OMT treatment on September 7, 2012, but experienced significant benefit with the loosening of the cervicothoracic junction and relief in the low back and anterior hip. The Claimant reported that "her tolerance for activity is increased with activities of daily living, and she is starting a walking program one-half mile two times per week" and she was tolerating stairs better at home." Dr. Zimmerman also noted that she only stuttered one time during the visit that day and her speech pattern appeared more relaxed. She was also able to get on and off the examination table with minimal hesitation and stiffness.

108. On September 7, 2012, Dr. Wolf prepared a letter summarizing his treatment of the Claimant for chronic headaches. Dr. Wolf stated that the Claimant had been effectively treated with Imitrex and Botox. He opined that, due to the 3+ years chronicity of the headaches, it was likely these therapies would need to continue indefinitely. He further opined that there was a reasonable degree of medical probability that the Claimant would have chronic headaches as a result of her head trauma.

109. On September 20, 2012, the Claimant saw Dr. Gellrick again for maintenance medical treatment. Dr. Gellrick also noted that after the visit, she was provided with a medical record review prepared by Dr. David Reinhard dated April 16, 2012. She noted that Dr. Reinhard ultimately concluded that based on the lack of objective information regarding reported cognitive deficits, the amount of cognitive impairment would not produce any significant permanent cognitive residual and there would be a negligible long term effect on the Claimant's ability to work. In response, Dr. Gellrick noted that she would defer to the opinions of Dr. Howard Entin and felt that, if anything, the Claimant should be considered for reevaluation and neurocognitive testing follow-up with Dr. Schmitz.

110. On October 15, 2012, the Claimant reported to Dr. Zimmerman that what he was doing for her neck was helping and "the combination of OMT, chiropractic and acupuncture and the work at CACC is providing some significant temporary relief." The Claimant was walking a mile up to three times per week.

111. On November 5, 2012, the Claimant reported that her back and neck symptoms were improved overall in the last two months and she had increased mobility. Her activities were not as painful. Dr. Zimmerman did note that the Claimant appeared somewhat fatigued and occasional stuttered and had word find struggles. He also noted increased muscular tone on physical examination. This was the last medical record of OMT treatment with Dr. Zimmerman submitted into evidence.

112. On February 11, 2013, Dr. Politzer saw the Claimant again for an annual comprehensive exam noting the Claimant still reported difficulty with migraine headaches, blurred vision for distance and near, as well as with reading. Dr. Politzer noted that the Claimant was still not able to achieve her desired level of acuity with bifocal contact lenses and additional lenses were ordered for the Claimant to evaluate.

113. On March 14, 2013, Dr. Politzer completed an Ophthalmological Functional Capacity Questionnaire. He diagnosed the Claimant with convergence insufficiency and ocularmotor dysfunction. Dr. Politzer reported that the Claimant was sensitive to light, had episodic double vision and that her double vision condition caused "eye fatigue" such that the Claimant would need to rest her eyes at unpredictable intervals and, after fixing her gaze on an object, computer screen or printed matter after two hours. At that point, the Claimant would have to close her eyes to rest them for up to 5 to 10 minutes. Dr. Politzer checked that the eye impairment would not impair or preclude the operation of an automobile but it would impair or preclude the operation of a computer. He opined that the Claimant's eye impairment would significantly impair her ability to use tools, coordinate eye-hand movements and see well enough to work with small objects. However, it would not, or only moderately, impair the Claimant's ability to view objects when looking up, down or to the side or straight ahead. He also noted it would not impair her ability to read or to clearly view a computer screen on regular basis for two hour segments. Her condition would not, or only moderately, impair her ability to recognize errors and record information, work with speed and accuracy in the performance of tasks, coordinate eyes and hands rapidly and accurately to make precise movements with speed or impair the Claimant's ability to avoid ordinary hazards.

114. On March 27, 2013, Ms. Haddow prepared a written response to various questions related to the Claimant that were posed by the Claimant's attorney. In her report, Ms. Haddow stated that the Claimant "frequently appeared to forget the question or topic and often provided excessive detail" and she "exhibited moderate problems with fluency." The Claimant advised Ms. Haddow that she had problems with reading and recall, dizziness and balance. The Claimant also reported that she was cleared to drive but was uncomfortable driving more than a mile or two from her home. Ms. Haddow opined that the Claimant's "visual deficits, cognitive deficits, cognitive fatigue and persistent headaches would interfere with her ability to perform reliably and consistently with testing that extended beyond 15 to 30 minutes." Ms. Haddow opined that the Claimant functioned better when she was in a quiet environment rather than noisy, visually stimulating environments if sustained cognitive attention was required. Ms. Haddow stated that she did not observe the Claimant reading and understanding an 8x11 printed page or writing a page of long text as she did not ask the Claimant to attempt these tasks since Ms. Haddow believed they were too difficult for her. Ms. Haddow documented that the Claimant was hypersensitive to noise, startled easily, and had trouble sustaining attention in crowded stores and noisy environments. Ms. Haddow reported that the Claimant had "problems recalling recent events, [and] headaches with any cognitive effort (attempting to read, listen to a conversation, watch a television program, following a recipe, shop for groceries)." Ms. Haddow noted that at the time she

completed her treatment with the Claimant, the Claimant required accommodations for computer work, in order to follow written or spoken directions and to read or write anything. Generally, she required additional time, someone to check for accuracy and frequent breaks. Ms. Haddow ultimately concluded that, based on the March 14, 2013 report of Dr. Politzer, in spite of some improvement in visual functioning, the Claimant would still have difficulty reading and writing on paper or with a computer.

115. On March 28, 2013, Dr. Gellrick completed a form stating that she agreed with Dr. Walter Torres' March 15, 2013 Mental Residual Functional Capacity Statement.

116. Dr. Gellrick testified by evidentiary deposition on May 6, 2013. She testified that she began treating the Claimant on December 8, 2008. She testified that it was significant to her that Dr. Hnida had ordered a CT scan, because due to his experience with combat situations and head trauma, he picked up on the Claimant's dizziness and a probable head trauma where Dr. Artist and the EMTs would not have. Dr. Gellrick testified that she was trained at the Denver Health Emergency Department and in her experience, in a Level 1 trauma emergency room, they will not be as concerned with someone who is not experiencing acute trauma evidenced by bleeding or loss of consciousness. She did not see any evidence that emergency room personnel performed any kind of mental status exam other than the Glasgow Coma Scale. Dr. Gellrick testified that during the golden hour the blood supply goes to the brain and to the heart and the patient may not be aware of some of her injuries. During the first hour to three hours (the time frame varies depending on the patient) the body clamps down and is "capable of doing amazing things to try to survive." Even emergency personnel may not recognize the extent of the patient's injuries. It is not until the patient gets past the golden hour that the patient's injuries will start surfacing. Dr. Gellrick testified that because of the golden hour, the Claimant could have looked good initially. Dr. Gellrick thought (mistakenly) the Claimant had neurologic deficit which was documented in the paramedic report as slurred speech and facial drooping (although review of the record shows these symptoms were listed as negative with a minus symbol). Dr. Gellrick testified that you can have a Glasgow Coma Scale score of 15 and still have a mild traumatic brain injury. Dr. Gellrick testified that Claimant's traumatic brain injury was caused by a bump or blow, as defined by the Division of Workers' Compensation Rule 17, Exhibit 10, Section C, and this does not require a laceration or hematoma. Rather, "you can have a countercoup injury, and the force of the brain being jolted around inside the skull can cause symptoms of mild TBI." Dr. Gellrick testified that Dr. Woessner's recommendation to have a head CT indicates that Dr. Woessner was concerned that the Claimant had a brain injury, even though the Claimant and her husband declined it. Dr. Gellrick noted that under the Mild Traumatic Brain Injury Guidelines, the Claimant had most of the symptoms associated with mild TBI. Dr. Gellrick also testified that, in her training, she learned that there are outliers (approximately ten percent of patients with TBIs) who do not get better. Based on Dr. Gellrick's personal experience, she verified that there are patients with TBIs who never recover. Dr. Gellrick also found that the patients who fall into the 10-20% outlier category may recuperate from depression and other similar diagnosis, however the vestibular symptoms, i.e., dizziness and headaches, may continue. Dr. Gellrick testified that Client has visual blurriness and

difficulty looking at a computer screen. Dr. Gellrick stated that these symptoms fit within the Treatment Guidelines E9 for TBI and that a visual dysfunction in these circumstances is a common problem. Dr. Gellrick testified that fatigue is a common symptom for patients experiencing chronic pain. Dr. Gellrick testified that the Claimant is not the type of person who doesn't want to go back to work: "This patient wanted to go back to work. It's one of the things she said to me when I first evaluated her. . . . This -- is based on work reviews, the Claimant had -- she presented -- according to those comments made by previous . . . employers or supervisors, as more of a -- what we call a type A, a person that's driven to do well and do it correctly and do it perfectly." Dr. Gellrick testified that "I don't see that she would have secondary gain from avoiding work." Dr. Gellrick stated that the Claimant's headaches stemmed from two sources: 1) The MTBI and 2) Cervicogenic pain as a result of the injury to Claimant's neck. Dr. Gellrick testified that Claimant has speech difficulties, including word-finding and stuttering. Dr. Gellrick agreed with Dr. Wolff's report that Claimant's chronic headaches would affect her ability to function. Dr. Gellrick testified that the Claimant would not necessarily be able to work even part-time (15-20 hours per week), because the Claimant suffers from severe headaches that can last over the course of several days. Dr. Gellrick agreed that the Claimant had improved since March of 2011. It was obvious that she can now walk more than two city blocks, she can sit for more than 20 minutes and stand for more than 20 minutes. She agreed that the Claimant can probably sit/stand and walk a little more than four hours in an eight hour day. To the extent that the Claimant would need to lie down that wouldn't necessarily be every single day and could be done at a break such as lunch. Based on her review of the surveillance video, Dr. Gellrick believes that the Claimant was able to lift 20 pounds and the video showed that the Claimant's ability to twist, stoop, bend and crouch, may have gotten better. Dr. Gellrick did not know how often the Claimant gets dizzy spells at this time. Dr. Gellrick testified that Dr. Roe is a competent ophthalmologist and Dr. Wilson is a competent neuro-ophthalmologist. Dr. Gellrick had every confidence in their ability to evaluate the Claimant. Dr. Gellrick would defer to Dr. Lipkin regarding vertigo and dizziness.

117. Dr. Gellrick's evidentiary deposition was completed supplementally on July 24, 2013. Dr. Gellrick testified that she didn't know what the Claimant can do today. If you really want to know what the Claimant can do you should do a repeat FCE. It doesn't change MMI but gives you more objective data. Dr. Gellrick agrees that her opinions about restrictions are guess work. She agrees that the Claimant showed improvement from March through August, 2011 and would have hoped that the Claimant's improvement would have continued through her use of a gym program and continued strengthening. Dr. Gellrick does fall back on the surveillance video since it showed a longer period of time than she normally had a chance to observe the Claimant and at no point did the Claimant appear to be having difficulty or being uncomfortable in the surveillance video from the Peach Festival. At no point did the Claimant appear uncomfortable while walking nor did she appear to be dizzy or have dizzy spells.

Video Surveillance of the Claimant

Multiple CDs with video surveillance were provided as part of the record in this case. From this, a few relevant portions are summarized below:

January 8, 2009

118. At 10:28 a.m. the Claimant is seen exiting her house through the garage and going down to hand outgoing mail to the driver of a mail truck and retrieving that day's mail. After this, the Claimant has a conversation with a woman walking by and she has no apparent difficulty communicating. At 10:48 a.m., the Claimant is seen driving off alone in the minivan and she goes into an office. She is seen exiting the office at 12:36 p.m. walking while talking on her phone. She gets back into her minivan while talking on the phone with no apparent difficulties and drives off. At 12:53 that day, the Claimant is seen out in front of her house talking with a woman who has arrived in a dark gray SUV and the Claimant gets into the passenger side of the vehicle. The woman drives the Claimant to Exempla and the Claimant is at this appointment until approximately 2:05 p.m. when the Claimant and woman exit the building, return to the vehicle and the Claimant enters on the passenger side with no apparent difficulty. The Claimant arrives at her home at about 2:40 p.m.

January 13, 2009

119. The Claimant is seen driving off in the minivan from her home at approximately 9:47 a.m. The Claimant parks and enters a King Soopers at approximately 9:52 a.m. She drives off at 9:59 a.m. and drives home. At 11:13 a.m. that day, she backs the minivan out of her garage again, stopping in the driveway. She exits the vehicle and walks over to the mailbox over a snowy area but exhibits no balance issue or walking difficulty. She reenters the vehicle and drives to Mission Viejo Elementary school and enters the building. She exits the elementary school at approximately 11:18 and reenters the minivan.

January 14, 2009

120. At approximately 7:15 a.m. the Claimant is seen leaving her house in the minivan and she drives to Colorado Athletic Conditioning Clinic. The Claimant is at Colorado Athletic Conditioning Clinic until approximately 9:12 when she exits the building with a gentleman with whom she is conversing. They walk out to his truck and continue to converse. Then, the Claimant enters her minivan which is parked next to the truck at approximately 9:14 a.m. The Claimant continues to talk to the gentleman until she drives off at approximately 9:15 a.m. At 10:16 a.m., the Claimant is seen leaving her house and getting into the passenger side of a dark gray SUV. The Claimant and the woman who drove run errands, stop to eat and go to the grocery store where the Claimant is seen pushing the grocery cart full of groceries and shopping with the assistance of the woman who drove her. They leave the store at approximately 12:27p.m. and both women take bags out of the car and put time into the back of the SUV.

August 20, 2011

121. The Claimant, her husband and another couple, the Morelands, drove to Palisade, Colorado and spent several hours at a Peach Festival. Later in the day she went to a farmer's market, winery, and out to dinner that evening in Fruita, Colorado. Her activities were videotaped. The Claimant is left on her own on and off throughout parts of the day. The Claimant is seen bending over at the waist to look at items being sold at various booths. She is shown conversing with many vendors without any apparent communication problems. Throughout the day the Claimant is shown walking, going from standing to sitting positions, lifting, bending at the waist, crouching/squatting and reaching overhead with both arms. At one point she picks up a large box of Peaches and carries it for a bit. The Claimant testified that the video does not show that she had difficulty carrying it and set it right down for her husband to carry. However, even taking this into consideration, the video surveillance shows a regular and normal amount of activity on the part of the Claimant over the course of the day, including a lengthy car ride and typical activity at the Peach Festival. Despite it being a sunny day, the Claimant doesn't wear sunglasses (except on her forehead). She demonstrates no problems with photophobia. Her interaction with friends and strangers appear normal and comfortable. She demonstrates no balance problems and she exhibits fine motor skills. Contrary to her testimony at the hearing, Rosemary Moreland exhibits no apparent concern about balance issues or dizzy spell and she leaves the Claimant on her own, intermittently throughout the day.

August 26, 2011

122. On this day, the Claimant was videotaped on and off from approximately 9:20 a.m until mid-afternoon. Over the course of the day, the Claimant is seen retrieving her mail while talking on the phone with the phone cradled between her right neck and shoulder. She is next seen driving the family's minivan to the pharmacy to pick up her prescriptions. She is wearing different clothes than those she was wearing in earlier video footage from that day. While at the pharmacy, the Claimant has no apparent problems signing the payment pad and appears able to read the print on her receipt as she looks at it. Later, after returning home, the Claimant comes outside and does some gardening which involves kneeling and crouching. There are no signs of discomfort. She is outside in the sun without sunglasses with no apparent vision or photophobia issues. Still later that day, the Claimant attends an IME with Dr. Bernton. Following that evaluation she is shown carrying on a conversation, smiling and laughing. The Claimant shows no apparent ill effects from the day's activities which included driving to the pharmacy, gardening and attending an IME. She seems animated without any apparent problem with speech, communication or social skills or fatigue.

September 10, 2011

123. On this day, the Claimant drives the minivan to Lowe's at 12:00 p.m. She arrives at Lowe's and is at the customer service window at 12:11 p.m. She has her handbag slung over her shoulder and is on the phone. She picks up two 11 pound cans of paint and carries them to the register and then to her car all while her handbag is slung over her shoulder. She drives home. At no time does she display confusion or

discomfort. The Claimant testified at the hearing that she ran this errand, despite "really not feeling all that well."

September 11, 2011

124. The day after running an errand to Lowe's to pick up paint cans, the Claimant goes to church. She arrives at 8:53 a.m. The family vehicle is parked a good distance from the church. The Claimant is seen walking into the church with a bag slung over her shoulder and a coffee cup in her hand. The Claimant is observed outside the church at 12:09 p.m., about 3 hours and 15 minutes later. Contrary to her and Ms. Moreland's testimony, she does not appear the least bit fatigued from the morning's activities. She is very animated and expressive, carrying on a conversation. She does a little dance. The claimant looks to have good muscle tone without atrophy. At 12:14 p.m. the Claimant, while walking to the car, appears to be carrying 3 or 4 different items at once including a duffle bag or pillow case full of items.

December 7, 2011

125. At 11:36 a.m the claimant is shown outside her house having a conversation. She again appears animated and engaged. While engaged in this conversation at 11:37 a.m., the claimant is bending over and laughing. Later that day, at 1:53 p.m. the Claimant drives the minivan over snow-covered streets to 16900 E. Quincy Avenue and she drives home. At 2:42 p.m. the Claimant again drives her minivan on the snow-covered streets and goes to the chiropractor. She comes out of the chiropractor's at 4:04 p.m. and drives to Michael's, a craft store, where she is seen at 4:14 p.m. She crouches down to look at merchandise. She exits Michael's at 4:20 p.m. carrying a bag of merchandise.

Lay Testimony Related to the Claimant's Abilities and Limitations

126. Over the course of the hearing, the Claimant testified that, as a result of her work-related injury, she suffers from headaches every day. The Claimant testified that the more extreme headaches cause her to feel shooting pains through her head. The Claimant also stated that she experiences extreme headaches whenever the weather patterns change. The Claimant testified that she does not drive on days when she experiences extreme headaches or dizzy spells. The Claimant testified that, on many occasions after the accident, she would have to cancel plans with friends because her headaches were so severe. The Claimant testified that when she feels rushed, she experiences confusion, increased anxiety, and worsening of her headaches. The Claimant testified that as her headaches get worse, she becomes fatigued. This can then cause her to have double vision. She also testified that after 10-15 minutes of sitting at a computer, looking at the lights on the screen causes unbearable headache pain. The Claimant also testified that headaches make it harder for her to focus, and her cognitive functioning decreases. The Claimant further testified that her headaches increase when she gets upset or stressed, and that can cause emotional problems, physical pain and more confusion. The Claimant testified that since the accident, her ability to think, process information, concentrate, and focus is diminished. The Claimant stated that she had been trained by Ms. Haddow, a speech and occupational specialist,

to keep a calendar for medical appointments, personal appointments, mileage, and notes. The Claimant stated that her calendar provided her with constant reminders of appointments, prescription refill requests, and questions that needed to be asked of her physicians. The Claimant also testified that, despite using the calendar as a compensatory device, she continues to experience difficulty remembering details, such as specific questions to ask a physician during an appointment. The Claimant testified that her computer skills have diminished, and even her ability to compose a simple email without mistakes has diminished. She testified that she has the ability to compose short e-mails but often relies on her husband to check them for her for errors. The Claimant testified that since the accident, she has a problem with blurting out statements she does not mean, or that come out in way that she did not intend. She stated that some of her unintended comments have caused difficulties in her relationships with friends and family members. The Claimant testified that the medications she takes makes her feel extremely fatigued and tired.

127. The Claimant testified for a full day on August 16, 2013 and two half days on September 26 and November 22, 2013. The Claimant was present in person for testimony taken at the OAC on April 19, 2013, August 16, 2013, September 26, 2013 and November 22, 2013. In addition the Claimant was present for the deposition testimony of Dr. Schmitz on April 30, 2013, Drs. Gellrick and Entin on May 6, 2013, Dr. Torres on May 7, 2013, Dr. Thwaites on May 9, 2013, Drs. Bernton and Reinhard on May 10, 2013, and Dr. Zierk and Ms. Antcil on December 6, 2013. The Claimant was also present by phone for the testimony of Dr. Weingarten on May 13, 2013. During testimony at the OAC, the ALJ notes that the Claimant demonstrated a great deal of stamina, endurance and mental fortitude. She appeared to be able to follow along with the testimony of other witnesses and she had the ability to respond to questions thoughtfully and otherwise participate meaningfully in the hearing process. In addition, the Claimant also attended most of the days of deposition testimony with the expert witnesses which occurred over seven days. During redirect testimony by the Claimant on November 22, 2013, after participation in previous hearing dates in the matter, the Claimant stated she was bedridden for at least two days following each hearing.

128. Over the course of the hearing, there was testimony that the Claimant reviewed many of the medical records including most or all of the IME reports, and she has read some of the deposition transcripts although she has not read any of them in whole. During testimony, the Claimant was able to recall from memory the names of the multiple medications which she was taking in connection with this claim, as well as when she took them and what they are for. She also demonstrated a good memory of her job history, going back to her teenage years when she worked at a grocery store as a bagger and for a fulfillment company stuffing envelopes. This employment included using a computer/word processor while working out of her house.

129. The Claimant testified to problems with reading and small print, yet was able to read the IME reports of Drs. Bernton, Weingarten, Reinhard and Kenneally and form opinions about whether she thought those reports were accurate. In fact, she prepared a three page ethics complaint against Dr. Kenneally. Further, on cross-

examination, the Claimant prepared nine pages of notes in anticipation of her testimony which were entered into evidence. The notecards were primarily handwritten by the Claimant, although there are some type written notes which are cut and pasted into the exhibit. These were notes that the Claimant testified that she prepared to help her memory. However, the Claimant, by and large, did not need to refer to the notes. She acknowledged her testimony was from memory. All of the handwritten notes were prepared by the Claimant and are in her handwriting. The rest of these notes were prepared on a computer/word processor and they were cut and pasted onto the notecards. The Claimant testified that this was accomplished with her husband's help.

130. The Claimant testified that her hands are continuously busy whether it is continuous wringing of her hands, stuffed animals or a smooth stone. She testified, "my hands are usually busy doing something." However, in surveillance video and during substantial portions of time over 4 days of hearing testimony, the Claimant was often noticed without anything in her hands or without the motion of wringing her hands.

131. The Claimant testified that her previous jobs required a level of detail that she does not believe she is capable of performing now. The Claimant stated that her job at the Department of Education required her to file documents in various buildings. The Claimant stated that she would be unable to do the walking and navigating in downtown that her job required because of the noise, and her anxiety related to the traffic. The Claimant also testified that the noise and number of people associated with the Department of Education job would cause her headaches, which would cause her decreased cognitive ability so that she could not handle the details required in the job. Claimant stated that even bagging or cashiering in a Grocery Store would cause her difficulty. The Claimant testified that the noise and anxiety related to the number of people in a grocery store would be difficult for her to "filter out." The Claimant testified that she feels more fatigued after going to the gym, or following her medical appointments because this requires the use of more energy. The Claimant testified that, following her testimony on April 19, 2013, she experienced a migraine that lasted for several days. the Claimant testified that she spent the following day in bed, and it took her several days to recover from the headache.

132. The Claimant testified that she uses a day planner to stay organized that was provided by Ms. Haddow. The fact that the Claimant uses compensatory measures such as a day planner evidences her ability to adapt and plan. It demonstrates organizational skills. Moreover, even before using the tool, there is evidence that the Claimant maintained some organizational skills as corroborated by Dr. Gellrick's report on February 26, 2009 that the Claimant had been to 29 physical therapy appointments and that she had been able to, "track her appointment dates correctly," which is notable as the Claimant was first seen by Judith Haddow on March 25, 2009, a month later. The medical records demonstrate and the Claimant acknowledged that she was able to consistently keep her physician and therapy appointments. As is exhibited by the pharmacy log, the Claimant picks up her prescriptions on a regular basis. In her answers to interrogatories the Claimant stated that between the date of her injury and the date she reached MMI, approximately 2 1/2 years, she would spend 30 to 40 hours

a week attending appointments. She testified that she kept these medical appointments because, “it was important,” and because she was “dependable.”

133. The Claimant has also engaged in multiple activities that contradict her testimony about her ability to work on the computer, write e-mails and engage in tasks that require cognitive functions. The Claimant prepared mileage logs in which she kept track of medical appointments and prescription pickups. She would calculate her mileage each month and send the log to the claims adjuster with a cover email which she prepared. This demonstrates that the Claimant is capable of calculating miles, preparing an email transmittal as a cover sheet on a pdf format, scan an attachment and email those materials to the claims representative. The Claimant, her husband and another couple owned a rental property in Ohio which they sold in 2013. Notwithstanding her claimed disabilities, the Claimant was responsible for receiving payments and taking care of repairs. The Claimant was able to enter information on an Excel spreadsheet prepared by her husband in connection with her management duties attributable to this property. The Claimant and The Claimant’s husband testified that she could barely balance a checkbook, yet she continued to perform this activity. Further, the Claimant’s emails to Kaiser, post accident, demonstrate the extent of the Claimant’s involvement in her kids’ medical care. After reviewing the Peach Festival’s surveillance video, the Claimant prepared a page and one-half rebuttal statement on October 15, 2011. She was apparently able to review the 120 minute video and then thoughtfully respond to the information in the video. In addition she obtained rebuttal statements from her husband and Mark and Rosemary Moreland.

134. While volunteering at the church daycare, the Claimant worked with infants because she testified that she couldn’t handle the noise of the older kids or pick up the older kids. However, this testimony is inconsistent with some of the other testimony offered by the Claimant over the course of the hearing. Babies cry and make noise which the Claimant has indicated would lead to headaches and migraines and more cognitive dysfunction. Further, according to the Claimant, she would walk around the nursery holding the babies. This is not consistent with the Claimant’s avoidance of a number of activities due to balance problems and claims of intermittent dizzy spells.

135. Much has been made of the Claimant’s attendance at the Peach Festival in August of 2011 with regard to the Claimant’s ability to perform certain activities. At the hearing, the Claimant testified that in August 2011, she attended a Peach Festival on the Western Slope with her husband and some friends, the Morelands. The Claimant stated that before driving to the Peach Festival she had taken extra medication to assist her with managing her symptoms. She testified that the day of the Peach Festival was “not a bad day.” The Claimant testified that she slept during nearly the entire ride, except when they stopped on a couple of occasions to get out and stretch. The Claimant testified that, on the day of the Peach Festival, the weather was warm and her body didn’t hurt as much as it usually did. Also, her headache was not as terrible as usual, for part of the day. The Claimant testified that videos the Respondents took during that day did not show all the times she rested or needed to deal with her dizziness during her time at the Peach Festival. She testified that, when she was dizzy

while at the Peach Festival, she would lean up against a booth or hold onto her husband or Ms. Moreland to steady herself. The Claimant testified that she was able to sit down at the Peach Festival whenever she needed to. The Claimant testified that she sat in the rocking chairs at one booth on multiple occasions, but the video did not show it. The Claimant and her husband testified that, since the accident, she engages in OCD behavior that the Claimant did not perform before the accident. The Claimant and her husband testified that the Claimant's OCD behavior was demonstrated during the Peach Festival when she insisted on sorting the Peaches to ensure she got the best box of Peaches. The Claimant testified that she should not have tried to sort the Peaches, even though she was compelled to do so, because it put extra strain on her neck, arms, and shoulders. The Claimant testified that, because both Mr. and Mrs. Moreland were carrying a box of Peaches, Claimant also wanted to help by carrying her own box of Peaches. The Claimant, her husband and Mrs. Moreland testified that the Claimant was only able to carry the box of Peaches for about ten feet before she had to set the box down. Her husband then carried the Peaches out to the car after the Claimant set them down. However, the video tape did not show the Claimant setting down the box. The Claimant testified that by the end of the Peach Festival she was tired and overwhelmed. The group then made a few stops, returned to the hotel, and the Claimant took an hour-and-a-half nap before dinner. The Claimant testified that the group did not return home from the Peach Festival until the next day. The Claimant testified that she slept in the car on the way home for about eight hours. These statements were corroborated by the Claimant's husband and the Morelands.

136. The Claimant has engaged in travel and camping activities after her injury, prior to MMI, and subsequent to MMI. In the Claimant's answers to interrogatories, she stated that she had only taken one overnight in-state trip since her accident when in fact she had taken multiple trips to Ohio, Kansas, Mississippi and Virginia. The medical records and therapy records also document several times when the Claimant travelled or went on camping trips with her family. More recently, the Claimant flew to Newport News, Virginia by herself on short notice in March of 2013 to take care of her son's infant due to a family medical emergency. She was responsible for taking care of her fifteen month old grandson while her son and daughter in-law were at the hospital with their premature newborn. The Claimant's son and in-laws were aware of the Claimant's condition, yet they trusted that the Claimant could provide the necessary care. The Claimant flew to Ohio and spent a week on her own when her father was sick in March of 2012. She stayed, by herself, at the family home. Notwithstanding the fact that she hadn't lived in the Columbus area for 7 or 8 years, she drove locally, without any apparent problems getting lost. The day after the Claimant flew back to Colorado, her father passed away and the Claimant returned to Ohio in the Suburban, a 20-25 hour road trip each way.

137. The Claimant testified that it was never necessary to schedule an emergency appointment with Dr. Gellrick or any other provider following her out of state trips. She was not required to go to urgent care or the ER following these trips or while on these trips. According to the Claimant's testimony, traveling takes its toll. She stated that it normally takes a couple of weeks for her to recuperate. However, this is not

necessarily reflected in the medical records. It is not seen in the August 26, 2011 surveillance video, which shows the claimant's activities five days after the Peach Festival at which time she drove to the pharmacy, gardened, and attended an IME without any apparent visible difficulties.

138. Prior to the accident, the Claimant's husband testified that Claimant was the life of the party. She conversed well, and she talked nonstop. He also testified that prior the accident the Claimant enjoyed camping, hiking, walking, exercising, assisting with home improvement projects, gardening, and collecting large rocks for the family rock garden. In addition, prior the accident, the Claimant enjoyed Denver Bronco games, family baseball games, photography, and hosting family get-togethers, including cooking elaborate meals and cleaning up afterwards. The Claimant's husband testified that Claimant does not enjoy family camping trips in the same way she did prior to the accident. Prior the accident, Claimant would often camp with her family. The Claimant's husband testified that the family does not take as many camping trips because of Claimant's injury. In addition, The Claimant's husband testified that he takes his kids to go hiking, but that Claimant stays near the campsite. The Claimant's husband testified that she also organized all the family activities and outings before she was injured. He further testified that, prior to the accident, the Claimant passed the Ohio real estate exam, managed the family finances, managed all family real estate transactions and refinancing, and worked easily on a computer. The Claimant's husband testified that, prior to the accident, Claimant weighed approximately 130 pounds, and she had no issues with her weight. In 2012, Claimant's weight plummeted to 99 pounds, although she has regained about 15 pounds since that time. The Claimant's husband testified that, he and Claimant were not able to participate in as many dinner parties and card games with friends after the accident. As a result, The Claimant's husband stated that he and Claimant lost many friendships.

139. The Claimant's husband testified that, the day following the accident, the Claimant experienced a headache and she had difficulty rising from bed. The Claimant's husband testified that this was unusual for his wife, so they made an appointment with the family doctor. The Claimant's husband testified that, following the accident, the Claimant's husband testified that Claimant suffered from a constant headache, pain in her limbs, and difficulty moving. He also testified that her mood changed. She became highly irritable and she stuttered when she spoke. The Claimant's husband testified that, weather fronts, family pressure, stress, and OCD behavior can cause Claimant to suffer from Migraine headaches. The Claimant's husband testified that, on days Claimant suffers from a migraine, she is unable to get out of bed. The Claimant's husband testified that Claimant's migraines can last from several hours to several days, and she experiences severe migraine headaches six or seven days per month. The Claimant's husband testified that, following the accident, Claimant was no longer capable of putting together Sunday brunch for her extended family and was no longer even capable of cooking family meals, other than very simple meals. The Claimant's husband testified that she has extreme difficulty participating in family game night, family get-togethers, baseball games, or concerts because the noise associated with these types of activities, causes migraine headaches for the Claimant. If she tries to do these types of activities

she generally must then lay down afterwards to manage her headaches. The Claimant's husband now manages the family finances as the Claimant is no longer capable of doing this activity. The Claimant's husband also testified that, following the accident, Claimant developed problems with her eyes. The Claimant's husband explained that fast forwarding commercials on the TiVo causes Claimant to jump, so she shuts her eyes whenever The Claimant's husband fast forwards the television. In addition, cars or motorcycles passing Claimant's car from behind cause the Claimant to jump and feel frightened. The Claimant's husband testified Claimant also does not enjoy photography like she used to, because she has difficulty working on the computer.

140. The Claimant's husband testified that prior to the accident, Claimant was a confident driver, following the accident, the Claimant became a very nervous driver. Following the accident, The Claimant's husband testified that Claimant had difficulty finding her words, getting lost in thought, being off-topic, changing the subject abruptly, and misplacing words. The Claimant's husband testified that Claimant had a difficult time recovering from the wedding trip for their son. The Claimant's husband testified that Claimant suffered from bad headaches while they were in Mississippi and that the 20-hour drive was difficult for Claimant each way. The Claimant's husband testified that he created a bed in the back area of his vehicle for the Claimant when the family drove to Mississippi. The Claimant's husband testified that Claimant slept in the back of the vehicle for the majority of the twenty-hour trip. The Claimant's husband testified that Claimant was unable to participate in most of the wedding festivities due to migraine headaches.

141. With regard to the Peach Festival, the Claimant's husband testified that two friends accompanied the Claimant and him to the Peach Festival. The Claimant's husband testified that, Claimant sat in the passenger seat behind the driver's seat of the family Chevy Suburban. The Claimant's husband testified that Claimant leaned against the window with a pillow, closed her eyes, and slept most of the way. The Claimant's husband testified that they took a break from driving, and exited the vehicle in Silverthorne and at a rest stop during the 4-hour trip to the Peach Festival. The Claimant's husband testified that the day of the Peach Festival, the sky was blue, the weather was warm, and no storms were coming in that would bring on a migraine. The Claimant's husband testified that he walked with the Claimant and their two friends around the Peach Festival for about one and a half hours before lunch. During this time, they socialized with their friends, and looked at jewelry booths and different Peach booths to determine from which vendor they wanted to purchase Peaches. The Claimant's husband testified that they then bought lunch from a food vendor and sat in a grassy area for a half hour or so eating their lunch. As the weather was very warm, they decided to move to a shaded area under a tent to finish their lunch. The Claimant's husband testified that they sat in the shady area for another fifteen to twenty minutes. Afterwards, they returned to walking around the Peach Festival for forty-five or fifty minutes and Claimant picked out the Peaches she wished to purchase. The Claimant's husband testified that, since the accident, Claimant suffers from OCD behavior, which was shown when she insisted on picking out the very best Peaches during the Peach Festival. The Claimant's husband testified that the Peach vendor asked Claimant to

stop opening and moving the Peach boxes, but she was ultimately permitted to pick the Peaches she wanted. The Claimant's husband testified that they purchased two boxes of Peaches. Claimant picked up one box, and The Claimant's husband picked up the other. The Claimant's husband testified that Claimant walked with a box of Peaches for about 10-15 steps, but she had to set the box down because she was unable to carry it any further. The Claimant's husband testified that he picked up the second box of Peaches and he carried both boxes to their car. The Claimant's husband testified that the video failed to show Claimant setting the box down or The Claimant's husband's assistance in carrying both boxes of Peaches to the car. The Claimant's husband testified that the video ended abruptly after Claimant took a few steps holding the box of Peaches. The Claimant's husband testified that, after purchasing the Peaches, Claimant and her husband and friends went to their car. The Claimant's husband testified that they had parked in a handicapped spot that was fairly close to the Festival entrance. In total, The Claimant's husband testified that they spent three hours at the Peach Festival, which included a one-half hour lunch. After leaving the Peach Festival, The Claimant's husband testified that they drove towards the hotel. On the way to the hotel, they stopped at a fruit stand. The Claimant's husband testified that Claimant and Ms. Moreland exited the vehicle and looked at fruit for about five minutes. They did not purchase anything, and they got back into the vehicle. They continued down the road, and noticed a winery which Ms. Moreland wished to visit. They stopped and everyone exited the vehicle to visit the winery and gift shop for about 20 minutes. After the winery, they went to the hotel. The Claimant's husband testified that Claimant took some medication and then she slept for an hour and a half. Following Claimant's nap, The Claimant's husband testified that he and Claimant went to dinner with the Morelands at a restaurant a few minutes down the road. The Claimant's husband testified that it had been a long time since they had had such a nice day with another couple. They returned to the hotel about 8:00 PM after dinner. The Claimant's husband testified that the Claimant then went straight to bed. From the time they left home at about 6:00 AM to the time the Claimant went to bed at about 8:00 PM, the Claimant's husband estimated that the Claimant was only awake 5-6 hours out of 14 hours.

142. Ms. Rosemary Moreland testified that she had known the Claimant for about three years after meeting the Claimant at church. Ms. Moreland testified that on August 20, 2011 she and her husband traveled to the Peach Festival in Palisade with the Claimant and her husband. Ms. Moreland testified that the Claimant slept for the majority of the time that they were traveling. Ms. Moreland testified that the Claimant experienced an episode of dizziness while they were looking at jewelry at the Peach Festival and the Claimant had to grab onto Ms. Moreland's arm so she could steady herself. Ms. Moreland testified that it appeared that the Claimant became tired and uncomfortable so they decided to stop and have lunch and rest. Ms. Moreland testified that the Claimant carried a box of Peaches for about ten feet before she had to set it down. Ms. Moreland testified that The Claimant's husband then carried the Peaches to car. Ms. Moreland testified that they left the Peach Festival and drove down the street to a fruit stand. Ms. Moreland testified that, after they left the fruit stand, they drove to winery where they stopped for about 15 minutes. Ms. Moreland testified that after they left the winery, they drove to the hotel. Ms. Moreland testified that they went to dinner at

about 6:30 or 7:00 PM. Following dinner, they returned to the hotel and everyone went to their rooms. Ms. Moreland testified that, the following day, they packed the vehicle, and then they ate at a restaurant. They then left the hotel at approximately 11:00 AM on Sunday morning. Ms. Moreland testified that the Claimant slept for the majority of the time they were driving home.

143. Ms. Moreland testified that the Claimant often fell asleep during social visits. Ms. Moreland testified that the Claimant often cancelled planned social visits due to headaches or doctor appointments. Ms. Moreland testified that the Claimant left church service on occasion due to headaches and dizziness. Ms. Moreland testified that, on occasion, she drove the Claimant to some of her doctor's appointments because the Claimant advised her she was unable to drive due to severe headaches. Ms. Moreland testified that she observed Claimant becoming dizzy on several occasions. Ms. Moreland testified that she observed the Claimant lose her balance and hold onto the wall on several occasions. Ms. Moreland testified that she observed the Claimant's difficulty with reading, stuttering, mispronouncing words, and other speech problems such as inserting the wrong word or making sudden topic changes. Ms. Moreland testified that she observed the Claimant's difficulty with memory. Ms. Moreland stated that Claimant forgot that Ms. Moreland's daughter-in-law was pregnant, despite discussing it on multiple occasions. Ms. Moreland testified that the Claimant often forgets the topic being discussed right in the middle of a conversation. Ms. Moreland testified that she has observed the Claimant become extremely nervous when the Claimant is driving, and when the Claimant is a passenger in a car. Ms. Moreland testified that she has never driven on the highway with the Claimant.

144. Annette Gordon also testified at the hearing in this matter. Ms. Gordon testified that she has been friends with the Claimant for more than 30 years. Ms. Gordon testified that, prior to the accident, the Claimant was a good mother, and an intelligent, quick witted, capable, kind, and thoughtful person and she had no difficulty with home chores such as painting homes, moving, or packing to assist with moving. Ms. Gordon testified that, approximately 25 years earlier, she had hired the Claimant in a sales position at Radio Shack where Ms. Gordon was the manager. Ms. Gordon testified that the Claimant was an excellent employee. According to Ms. Gordon, the Claimant was punctual, enthusiastic, and good at customer service. Ms. Gordon testified, that prior to the accident, the Claimant had no difficulty working on computers or corresponding by email and that the Claimant was a voracious reader and they often swapped books.

145. Ms. Gordon testified that, following the accident, the Claimant began repeating herself so often that they developed a signal to alert the Claimant when she was repeating herself. Ms. Gordon testified that, also following the accident, the Claimant began stuttering and she had difficulty with word finding and that she developed obsessive compulsive type behavior, such as rubbing a stuffed animal or a piece of glass. Ms. Gordon testified that, following the accident, the Claimant communicated with Ms. Gordon mostly in phone conversation rather than by emails. Ms. Gordon testified that when Claimant does send emails, they are mostly inspirational

email forwards. According to Ms. Gordon, she and the claimant speak on the phone two to three hours at a time, pretty frequently. In fact, Ms. Gordon testified that she bought a headset since she could not be stationary when talking to the Claimant. This activity is another indicator of the Claimant's stamina and endurance. Ms. Gordon testified that, following the accident, she believes the Claimant would have significant difficulty drafting substantive emails. Ms. Gordon testified that the Claimant suffers from poor stamina. Her disposition is better so long as she takes a nap each day.

146. Ms. Pamela Ponder testified at the hearing that she is the current office manager for the State Services section of the Colorado Attorney General's Office. Ms. Ponder testified that part of her duties include supervision of three administrative assistants. Ms. Ponder testified that she supervised the Claimant when the Claimant was employed as an administrative assistant in the Colorado Attorney General's Office between 2006 and 2007. This was prior to the Claimant being hired by the Department of Education. Ms. Ponder stated that the Claimant was an energetic, friendly, reliable, team player. Ms. Ponder stated that the Claimant was good at communicating, taking on additional work, finding solutions, researching issues, drafting documents, and working on the computer. Ms. Ponder testified that the Claimant stopped by the Attorney General's office around March, 2010 to visit. Ms. Ponder stated that, at the time of the visit, the Claimant was not herself, the Claimant spoke slowly and with a stutter that she hadn't had before, and the Claimant -had difficulty finishing sentences. Ms. Ponder testified that she would not have initially hired the Claimant for the job of administrative assistant, if the Claimant had presented in an interview the way the Claimant presented during that visit. Ms. Ponder stated she did not have confidence that the Claimant could complete her job competently and she could not rely on her consistently.

The Claimant's Psychological Condition

147. Dr. Artist referred the Claimant for a neuropsychological evaluation which was performed by Thomas Broadhurst, M.A., N.C.C. under the supervision of Dr. Kenneally, PsyD. The referral information provided to Dr. Kenneally and Mr. Broadhurst was that the Claimant's MVA "resulted in postconcussive symptoms including difficulty with short-term memory, difficulty with processing speed, difficulty forming thoughts and complete sentences, as well as a feeling of not being herself. The referral question was to assess her current cognitive functioning, impairments, and to make recommendations as far as further treatment." The Claimant was interviewed and provided a personal history as well as a history of the present illness. The following procedures were administered during the course of testing:

Wechsler Memory Scale, Third Edition (WMS-III)
Wechsler Adult Intelligence Scale, Third Edition (WAIS-III)
Test of Memory Malingering (TOMM)
Beck Depression Inventory II (BDI-II)
PPI
Millon Clinical Multiaxial Inventory III (MCMI-III)

Controlled Oral Word Association Test (COWA)
Trail Making Test A and B
Seashore Rhythm Test
Speech Sounds Perception Test
Computerized Assessment of Response Bias

148. In a November 12, 2008 neuropsychological evaluation report, it was noted that the Claimant was given two psychological tests to assess effort levels and symptom exaggeration. It was reported that, "In both tests, [the Claimant] presented with scores that were significantly below results observed in research samples of individuals with significant brain injuries. This type of profile is suggestive of an individual who is consciously exaggerating the extent and nature of a variety of clinical symptoms or cognitive impairment, and/or an individual who is not putting forth maximum effort." It was noted that because the Claimant exhibits a high level of anxiety in regards to the testing and regarding her injury in general, this likely had an effect on the effort she put into the testing procedure. Thus, taking her high level of anxiety into account, the results of the psychological evaluation were considered valid but it was noted that the Claimant's scores on many of the performance scales were estimated to be in the lower range or her usual or normal capabilities. Dr. Kenneally and Mr. Broadhurst summarized the testing results concluding that "in addition to her somatic complaints, [the Claimant] is exhibiting significant deficits in working memory and processing speed. Additionally, she is exhibiting a high level of stress and anxiety, which she is reluctant to acknowledge at this time." However, the Claimant's symptoms were expected to dissipate and it was expected her cognitive functioning would return to normal. It was again stressed that the psychological evaluation did not represent the Claimant's maximum efforts and that the results represented the "lower echelon" of the Claimant's capabilities. Retesting in six months was recommended.

149. On December 30, 2008, the Claimant saw Walter Torres, Ph.D.., on referral from Dr. Gellrick, for a psychological evaluation. Dr. Torres reviewed the prior neuropsychological evaluation from November 12, 2008 and conducted a psychodiagnostic interview with the Claimant. At this evaluation, the Claimant's speech was organized and of a normal rate and volume, however, Dr. Torres noted a "slight stutter was evident several times during the interview." The Claimant commented on it to Dr. Torres and noted that it had gotten better and she had been stuttering quite a bit in the weeks after the accident. The diagnostic impression offered by Dr. Torres was:

Axis I:	Posttraumatic Stress Disorder Depressive Disorder, NOS Cognitive Disorder, NOS Pain Disorder Associated with Psychological Factors and a General Medical Condition
Axis II:	Deferred

Dr. Torres noted that "in addition to her cognitive dysfunction, she appears to be suffering from and anxiety disorder and mild depression" and her sleep remains

impaired. Dr. Torres recommended psychological counseling aimed at helping the Claimant to accept and manage her cognitive impairments and relieve symptoms of anxiety. He also recommended a low dose of an antidepressant such as Zoloft. He estimated the need for 8 psychological counseling sessions.

150. Dr. Gellrick referred the Claimant to Dr. Howard Entin, a psychiatrist, for a psychiatric evaluation. Dr. Entin initially saw the Claimant on June 9, 2009. The Claimant reported to Dr. Entin that she was struck by a vehicle traveling perhaps 15 miles per hour. The Claimant reported to Dr. Entin that she "probably had a brief loss of consciousness and was quite dazed." Dr. Entin reported that the Claimant told him that after retaining an attorney, Ms. Furutani, a change of physician was instituted and she began seeing Dr. Gellrick. The Claimant advised that the conservative treatment managed by Dr. Artist resulted in no improvement over months. As for physical conditions, the Claimant reported daily headaches with shooting electric pains and occasional migraines once or twice a week. Dr. Entin reported that the Claimant's vision and hearing are okay. Dr. Entin noted that the Claimant advised him that she is overwhelmed and gets no joy out of anything and that she had trouble with motivation. Her anxiety was reported as quite high. Cognitively, the Claimant reports that she has difficulty with speech and finds herself stuttering with difficulty finding words. She has trouble with concentration, focus and memory. Dr. Entin reported that "at this point she is so overwhelmed emotionally and cognitively she does not feel she is capable of working and is not seeking employment." Dr. Entin diagnosed the Claimant with major depressive disorder – moderate, with associated anxiety, cognitive disorder and post concussive syndrome. Dr. Entin recommended continued follow up with Dr. Torres and, as the Claimant's sleep and mood improves, he may begin to add cognitive enhancing medicine such as stimulants or Provigil. He reported that hopefully when the claimant's emotional symptoms improve the cognition will also improve. However, he ultimately concluded the Claimant is likely to have residual impairment.

151. Dr. Gellrick referred the Claimant to Dr. Kenneally again for an neuropsychological assessment on September 15 & 17, 2009 and Dr. Kenneally prepared a written report dated September 25, 2009. In addition to a clinical interview, Dr. Kenneally administered the following procedures during the course of testing:

Wechsler Memory Scale, Third Edition (WMS-III)
Wechsler Adult Intelligence Scale, Third Edition (WAIS-III)
Halstead Reitan Battery
- A. Category test
- B. Seashore Rhythm Test
- C. Speech Sounds Perception Test
- D. Trails A & B

Test of Memory Malingering (TOMM)
Behavioral Dyscontrol Scale (BDS)
Paced Auditory Serial Association Test (PASAT)
Rey 15 Item Test
Controlled Oral Word Association Test (COWAT)

Millon Behavioral Medicine Diagnostic
Millon Clinical Multiaxial Inventory III (MCMI-III)
Pain Presentation Inventory

152. Dr. Kenneally made a number of behavioral observations about the Claimant in her written report of September 25, 2009. She noted the Claimant was not driving per Dr. Gellrick's orders, She was "mentally alert, well oriented to person, place and time and able to communicate her thoughts in a clear manner with no unusual ideation noted. Dr. Kenneally opined that the Claimant's speech rates and motor rates were within normal limits. She did note the Claimant took a small stuffed toy from her purse and played with it in her hands during much of the evaluation. Dr. Kenneally noted that the Claimant's pain behavior was high, consisting of frequent verbal reporting of pain symptoms, anxious movements with her hands and holding her head in her hands and putting her head down on the desk.

153. Relating to validity considerations, Dr. Kenneally noted that the Claimant's neuropsychological test results indicate a marked degree of variability that is atypical. This degree of variability in her test results is inconsistent with the pattern of test results seen in individuals with documented traumatic brain injury. Dr. Kenneally reported that the Claimant's test scores on the TOMM were below those seen in, "institutionalized elderly demented patients." Dr. Kenneally found her performance indicative of the intentional production of wrong answers. Dr. Kenneally opined that failure at this level is actually a complex cognitive task requiring the patient to learn both the right and wrong answers to the test materials; and deciding in real time to provide the incorrect answers. Moreover, on other tests such as the Category test and the Paced Auditory Serial Addition Test, the Claimant performed at the mean or above average. Given that the Claimant performed successfully on these tests, her failure on the simpler measures is inconsistent since the simpler tests cover items considered "building blocks" to the more complex cognitive tasks tested in areas where she performed better. Dr. Kenneally opined that the Claimant's current test results cannot be interpreted in standard fashion given her failure of validity measures, the marked degree of variability in her test scores and the stark contrast between her impaired test scores and her observed and self-reported level of daily functioning. Dr. Kenneally noted that individuals with documented traumatic brain injuries do not obtain this highly variable pattern of test results. Further, the Claimant's test scores on certain measures, if valid, would indicate that her level of impairment would make it impossible for her to sustain a conversation or independently dress or bathe herself on a daily basis. Dr. Kenneally noted that the testing did indicate that Claimant's depression and anxiety appear to be worsening and this may be having a negative impact on cognition, sleep, pain and recovery. She found that the Claimant's test results "indicated a marked translation of psychological distress into physical symptomatology" and Dr. Kenneally advised the Claimant's medical treaters to obtain objective measures of the Claimant's pain symptom report when possible. Ultimately, Dr. Kenneally found "no objective neuropsychological test data to indicate that the Claimant has cognitive deficits resulting from her work injury on October 15, 2008.

154. On October 27, 2009, the Claimant attended a feedback session and Dr. Kenneally noted that she reviewed neuropsychological test results indicating no brain based cognitive sequelae associated with the injury during the session. Dr. Kenneally recommended a review of her antidepressant medications and the Claimant requested that Dr. Kenneally speak with Dr. Entin.

155. On November 11, 2009, Dr. Torres reviewed the psychological testing report of Dr. Kenneally. He noted that he found "the psychological test findings inconsistent with [his] observations of her clinical condition and course. The psychological testing suggests that her depression and anxiety are worse now than they were at the time of her first psychological testing. That is patently not the case. Both depression and anxiety are significantly less severe now than they were from January through at least June of this year. A review of the progress notes of her psychological therapy stands as evidence to this effect." Dr. Torres further found that his observations of the Claimant's cognitive disorder have been consistent and that they are diminishing. He noted that the Claimant "vented" about the report and "felt invalidated and strongly offended by it."

156. On November 19, 2009, Dr. Torres noted that he reviewed written observations made by the Claimant's long-time friend over a recent 14-day visit in Kansas. Dr. Torres found that the behaviors noted by the friend are "generally inconsistent with the notion that her deficits are due to malingering or a factitious disorder." He opined that the "behaviors described may suggest a picture in which deficits of function that do stem from cognitive disorder are aggravated by her shame about these, by emotionally motivated avoidance of situations that elicit awareness of her deficits, as well as by overcompensation for her deficits." Dr. Torres further noted that, "it is my opinion that [the Claimant] suffers from a cognitive disorder….I believe that her cognitive dysfunction is aggravated by posttraumatic anxiety and possibly by performance anxiety, and other stressors. Controversies regarding the validity of her dysfunctions have also impacted her, as they have added a significant layer of stress. I do not see her deteriorating, but the recent controversies have contributed to some degree to the disorganization in her functioning."

157. On December 8, 2009, partially in response to Dr. Goldman's report, Dr. Entin stated that he did not believe the Claimant was consciously exaggerating symptoms nor malingering. Rather, he opined that she is anxious, easily overwhelmed, high-strung and can be easily frustrated, and irritable. He felt that the Claimant's psychological state interferes with her functioning. Dr. Entin admitted that he did not know how to explain the significant variability found in Dr. Keneally's report. He further acknowledged that he did "not have enough expertise in neuropsychological testing to know if severe anxiety and being overwhelmed could explain the variability and invalidate the testing," but he nevertheless suspected that something of this nature occurred during the testing to cause the variability and scatter in the results. Dr. Entin opined it would be useful to have another neuropsychologist review the raw data from Dr. Kenneally to see if the same conclusions would be drawn. He recommended either Dr. Schmitz or Dr. Thwaites.

158. On November 16, 2010, Dr. Entin, in a Neuropsychiatric MMI/Impairment Report, gave a final diagnosis of major depressive disorder largely in remission, generalized anxiety disorder largely in remission, pain disorder and post-concussive syndrome with ongoing headaches, cognitive and emotional symptoms. Dr. Entin found the Claimant was stable and plateaued from a neuropsychiatric perspective with a date of psychiatric MMI of February 1, 2010. Dr. Entin assigned a 10% whole person impairment rating for impairment of the complex integrated cerebral function with an ability to carry out most activities of daily living. He reported that the Claimant could not do complex cognitively demanding jobs and it was unclear if she could even do simple repetitive jobs on a consistent basis due to cognitive fatigue, disorganization and chronic pain. He reported improvement in terms of decreased depression, anxiety, improved sleep, better pain management and better social function, but opined that she still has significant deficits and recommended continued medication and supportive counseling.

159. Dr. Steven Schmitz, a neuropsychologist, saw the Claimant for an initial neuropsychological consultation on April 9, 2010. As part of this evaluation, Dr. Schmitz conducted a thorough medical record review, and he also reviewed letters from the Claimant's family and friends, reviewed the raw test data from the neuropsychological evaluations conducted in 2008 and 2009 and he interviewed Drs. Torres and Entin along with the Claimant and her husband. Dr. Schmitz notes that the Claimant's initial medical records shortly following the injury "were suggestive primarily of orthopedic injuries." He notes that within the first week, the Claimant did report to Dr. Artist of "dizziness, difficulty finding words, and slowed processing of thoughts." Dr. Schmitz finds that it is reasonable to conclude that this does not mean that the symptoms only emerged at that time, but rather that she was experiencing cognitive symptoms earlier in the week closer in proximity to the accident but was not yet demonstrating any psychiatric conditions. He further opines that "given the predominance of the acute and traumatic physical pain conditions following an assault such as is typically associated with a pedestrian/automobile accident….it is not unreasonable to conclude that [the Claimant] did sustain a concussive injury in the accident and that her subsequent cognitive complaints were of a timely nature, related to that injury, and also associated with her pain condition at the time." As for her current condition, Dr. Schmitz believes that it is reasonable to conclude that the Claimant's current condition "is a combination of her physical, emotional, and sleep difficulties. While he supposes that she may still be experiencing the residual effects of a concussive injury, "it would appear that those other factors are much more prominent to her current condition." Dr. Schmitz also opines that there is nothing to support that the Claimant is consciously exaggerating her symptoms or malingering. As part of his April 9, 2010 evaluation, Dr. Schmitz conducted no new psychological testing himself, rather he commented on the data obtained from the 2008 and 2009 testing. He reports that: "my analysis of the neuropsychological test results obtained in November 2008 finds that the patient demonstrated a number of cognitive deficits likely due to a combination of her physical pain, sleep difficulties, emotional distress, medications, and the lingering effects of the concussion she sustained in the accident." Dr. Schmitz opined that while the Claimant's test

performances were influenced by all of those factors, there is no evidence that the Claimant consciously exaggerated her condition. Rather, "her test scores accurately reflected her functional cognitive distress at the time, due from a combination of sources."

160. Also in his April 9, 2010 report, Dr. Schmitz disagrees with Dr. Kenneally's conclusions from the second neuropsychological evaluation in 2009 that the Claimant was demonstrating behavior consistent with a conscious exaggeration of her condition and inconsistent with patients with a documented traumatic brain injury. Dr. Schmitz argues that the Claimant's performance on the TOMM was impacted by her physical pain and sleep disturbance accounting for her poor performance on the validity measure. Further, Dr. Schmitz found it "inappropriate to conclude that a patient's test battery results are invalid on the basis of one single test." He opined that the Claimant's good performance on many of the tests in the battery is "clearly indicative of good effort." Dr. Schmitz found that the Claimant's deterioration in performance from some tests in 2009 compared to her 2008 results is indicative of the impact that the confounding factors, such as chronic pain and sleep difficulties, on her scores. Thus, he disagrees with Dr. Kenneally's conclusion that this decline is not attributable to the effects of the October 2008 injury. Dr. Schmitz also takes issue with Dr. Kenneally's comment that the Claimant's working memory score in the 3rd percentile is equivalent to almost no working memory ability and, if valid, would put the Claimant's level of impairment at a level that would make it impossible for the Claimant to sustain a conversation or independently dress or bathe herself on a daily basis.

161. On November 21, 2012, the Claimant saw Dr. Torres and he noted that the Claimant "struggled to complete the neuropsychological testing" although Dr. Torres also noted that the Claimant "felt Dr. Schmitz's stance was respectful and that it strongly fostered for doing the best she could. She felt that she could therefore be more at peace with the results." Upon reviewing Dr. Schmitz's findings, Dr. Torres noted that, "the behavior which he described raised the question for me as to whether an attention-deficit disorder profile of symptoms is contributing to the highly erratic level of participation in test activities."

162. Dr. Schmitz performed another neuropsychological evaluation and prepared a written report dated November 26, 2012. Dr. Schmitz refers to his prior April 9, 2010 report as well as the reports of Drs. Goldman, Weingarten, Feldman, Gellrick Entin, Torres, Bernton and Reinhard. He notes that the doctors fall into two camps, one of which opines that there is nothing essentially wrong with the Claimant and that she is functional and able to return to work, the other which has concluded that the Claimant experiences ongoing cognitive, physical and emotional difficulties related to the October 15, 2009 injury.

163. Dr. Schmitz noted that the Claimant reported that prior to beginning the testing, the Claimant stated that she knew her effort was going to be assessed and she was concerned that shooting pains she felt in her body were uncontrollable and that they might impact her performance. She also expressed her general paranoia about

being watched since she had recently been videotaped related to this case. The Claimant reported shooting pains, seeing spots in her vision and having a severe headache and she commented on her symptom complaints throughout the day. Other behavioral observations by Dr. Schmitz during the testing included,

> [The Claimant's] effort was suspect throughout much of the testing day. She displayed an attitude of uncaring and a notable lack of engagement.
>
> ....
>
> It was often difficult to engage her in the testing. At various times, for example, she began rummaging through her purse and on one of those occasions was seen flossing her teeth. During the IOVA test she was standing and walking around during the majority of the test and appeared to not be trying.
>
> ....
>
> [On a test of fine motor coordination] At times she appeared to have placed the instrument correctly but then turned it to an incorrect position.
>
> ....
>
> Her performance on purported measures of effort was generally poor and strongly suggestive of her giving incomplete effort. Additionally, many of her performances on the clinical tests were at or below the 1st percentile. Some of her scores had dropped from her previous testing in 2009.
>
> ....
>
> Her performance on the MMPI-2-RF was strongly indicative of the overreporting of somatic, cognitive, and memory complaints.

164. Dr. Schmitz noted under his clinical impression that, "despite being clearly aware of the importance and necessity of providing good effort on the current neuropsychological test battery, [the Claimant's] performance was considerably less than optimal and suggestive of a non-cooperative approach to the assessment process. Unfortunately, as a result it is impossible to offer a definitive determination of the patient's current level of neurocognitive functioning. On the other hand, she did perform quite well on a few of the measures in the battery and most specifically on a test considered very sensitive to the effects of cerebral dysfunction. Her "impaired" performances, however, were confounded by a distinct lack of effort and were therefore uninterpretable." He went on to conclude that "it is likely that her current presentation is reflective of a combination of the conscious and unconscious exaggeration resulting in her actual condition being far worse than would otherwise be expected….While she did apparently sustain an actual physical injury (including a concussion) as a result of the original accident, it would appear that her 'response' to this injury has been quite dramatic and it is likely that these non-organic factors are playing a substantial role in the maintenance of her ongoing complaints."

165. Dr. Schmitz met with the Claimant and her husband on November 29, 2012 to discuss the testing. In spite of his acknowledgement that the Claimant's performance was poor and suggestive of incomplete effort, Dr. Schmitz does not believe the Claimant is malingering in her condition. He opines that "fundamentally, [the Claimant] remains incapacitated from functioning effectively at her pre-accident level. As evidenced on the neuropsychological testing her cognitive functioning fluctuates on a daily or even minute by minute basis. She has developed a self-perception of being totally disabled, which clearly exacerbates any physical pain or cognitive difficulties she may be experiencing." Dr. Schmitz acknowledges that the Claimant represents an "outlier" in her response to a traumatic event, but finds that "but for" the event of October 15, 2008, the Claimant would not be as functionally disabled as she has become. He went on to opine that it is unlikely that the Claimant would experience any considerable improvement in functioning with further treatment and he finds her condition permanent.

166. On March 6, 2013, Dr. Torres reviewed with the Claimant some of the behaviors that Dr. Schmitz identified in his report "which were clearly disruptive to her participation in the neuropsychological testing." With Dr. Torres, the Claimant identified some of what was going on with her during the testing situation and she tried to clarify what she recalls was actually occurring, presenting a notably different perception related to the same behaviors. In looking at the broader context for this behavior, Dr. Torres opined that, "it speaks for deficits in self-regulation that result in significant behavioral dyscontrol and a tendency to produce behavior that is significantly discordant with what a situation calls for." Ultimately, Dr. Torres concluded, "neuropsychological testing batteries may not be the most suitable instruments for evaluating this kind of problem, and may instead simply yield descriptions of her as erratic and uncooperative."

167. Dr. Thwaites performed an Independent Neuropsychological Evaluation on March 8, 2013. He performed a thorough review of the previous medical records which were provided to him, including the earlier record and the prior psychological evaluations along with the treating physician records and IME reports. The record review was exhaustive. He also interviewed the Claimant and administered the following:

Rey 15 Item Test
Word Memory Test
Wechsler Adult Intelligence Scale IV
Benton Judgment of Line Orientation Test
Trail Making Test
Digit Vigilance Test
Seashore Rhythm Test
Rey Complex Figure Test
Boston Naming Test
Multilingual Aphasia Examination (verbal fluency)
Wechsler Memory Scale-IV subtests
California Verbal Learning Test-II (alternate form

Wisconsin Card Sorting Test
Booklet Category Test

168. Dr. Thwaites noted that the Claimant arrived unaccompanied and she exhibited a normal, “narrow-based” gait without any loss of balance or assistance required. She only exhibited a tremor in her hands when Dr. Thwaites advised her she was looking for that. He noted no right/left confusion and no motor asymmetry. She showed “extreme slowing” with fine motor movements with her hands bilaterally, but Dr. Thwaites comments that this “would not be consistent with what is known about her medical history.” He noted that the Claimant’s speech was disfluent and halting, but inconsistent, throughout the interview. He did not observe any loss of cognitive set, impulsivity, or disinhibition during the examination and “no obvious cognitive problems at the conversational level.” Dr. Thwaites found that the Claimant “performed in the significantly impaired range on a formal test of effort and motivation” and he found that her test results, “are not believed to be an accurate depiction of her current abilities.”

169. In his March 8, 2013 report, Dr. Thwaites notes that from a neuropsychological perspective, there are a couple of relevant issues in the Claimant’s case. The first issue is whether or not the Claimant suffered a concussion (which he notes may be used interchangeably with the term “mild traumatic brain injury”). Dr. Thwaites notes that there is a convergence of literature to suggest that this is a neurologic event and the World Health Organization and the National Academy of Neuropsychology recommend diagnosing this injury based on the history and on acute injury parameters and “not by how a person is reporting their symptoms at a later point in time.” Dr. Thwaites notes that relevant injury parameters include “retrograde amnesia, loss of consciousness, altered consciousness, posttraumatic amnesia and the signs and symptoms of concussion are all used to make the diagnosis. The Glasgow coma scale score and neuroimaging (if available) are also helpful diagnostically.” Dr. Thwaites notes the discrepancy between the acute injury parameters and the Claimant’s current self-report about the injury, but opines that “it is most prudent to offer diagnosis of very minor concussion within a reasonable degree of probability” based on the available information.

170. Dr. Thwaites goes on to note that the next neuropsychological issue in this case is one of prognosis from a concussion standpoint. Dr. Thwaites points out that in a minor concussion with no loss of consciousness and brief posttraumatic amnesia with no observable cognitive symptoms in the field and in the early aftermath, there is an excellent prognosis for complete cognitive recovery within days to weeks. It is extremely rare to have symptoms beyond seven to ten days from a cognitive perspective following this level of injury. Of the population that does not have a complete cognitive recovery, it is typical that the individuals have neurologic vulnerability or and advanced age or other confounding factors. A person of the Claimant’s age without other prior concussions or neurologic difficulties (which are not present in the Claimant’s case) are expected to have a good cognitive recovery.

171. The next relevant issue that Dr. Thwaites addresses is that of the Claimant's neuropsychological assessments. He notes that these are used to determine a person's functioning at a later point in time following the initial event. He points out that to understand the brain-related cognitive functioning, the other factors that can contribute to poor test scores must be ruled out. In this vein, Dr. Thwaites notes that the Claimant "has not participated fully in now four different neuropsychological evaluations." He opines that the Claimant's test scores in these evaluations cannot be perceived as an accurate reflection of her true cognitive abilities from a brain functioning standpoint. Further she displayed an onset and course of neurologic symptoms over time that would not be consistent with residuals from a concussion.

172. Dr. Thwaites ultimately concluded on March 8, 2013 that the Claimant's neurologic complaints across time are not associated with a concussion and her neuropsychological test data are not an accurate reflection of her abilities. He opines that she may have mild cognitive error, possibly based on her current medication regimen or based on psychiatric factors and pain. However, Dr. Thwaites concludes that, "we are without objective data that would indicate that she has cognitive impairment within a reasonable degree of probability, even though that is certainly a strong possibility." He finally notes that "it is safe to say that what we are seeing in her presentation does not make sense neurologically based on a minor concussion, a normal MRI, and what is known about her medical history.

173. On March 30, 2013, Dr. Kenneally reported that she found no objective evidence or data to change the clinical opinions included in her neuropsychological evaluation of September 25, 2009. She agreed with Dr. Schmitz's conclusion that non-organic factors are playing a substantial role in the maintenance of her ongoing complaints and she opined that "these psychological factors have been a consistent element of [the Claimant's] presentation since she was first psychologically evaluated in November of 2008." Dr. Kenneally agreed with Dr. Weingarten's conclusions of September 2011 and with her diagnosis of pain disorder with associated psychological factors versus malingering and personality disorder. She agrees with Dr. Reinhard that the Claimant has no permanent cognitive impairment resulting from the subject accident. Dr. Kenneally specifically references and agrees with Dr. Reinhard's conclusion that "the magnitude of cognitive dysfunction this patient displays far exceeds that which originates from the amount of neurological damage stemming from a mild concussion. Her course of recovery is contrary to the pattern of spontaneous neurologic improvement one reliably observes following traumatic brain injury of any severity." Dr. Kenneally concludes that the Claimant has no permanent cognitive impairment from the October 16, 2008 claim. Dr. Kenneally also took issue with "incorrect assumptions" that Dr. Schmitz made in his April 9, 2010 record review about the November 2008 neuropsychological testing of the Claimant and provided a letter she had previously sent to Dr. Schmitz to clarify misconceptions.

174. Dr. Schmitz testified by evidentiary deposition on April 30, 2013. In preparation for his deposition, he reviewed the substantial medical records in this case, the surveillance video taken on August 20th, 26th, September 10th, 11th, December 16th,

17th, 24th and February 9th, 10th, 14th and 18th of 2011. He also reviewed the Claimant's personnel records along with statements of lay witnessed regarding the Claimant's pre-accident functioning. Based upon his review of the initial emergency and medical treatment records, Dr. Schmitz testified that he found that the Claimant met the criteria for suffering a mild traumatic brain injury. He testified that he does not believe that the Claimant could function at a job at her pre-injury levels without a lot of accommodations. Dr. Schmitz testified that he does not feel a diagnosis of malingering is appropriate for the Claimant and he does not believe that any of her treating providers consider the Claimant to be malingering or exaggerating. Rather, the neuropsychological testing performed in his office and on the three other occasions with other providers merely shows that she is performing poorly, suggestive of poor effort, and inconsistent with what the Claimant was doing with Ms. Haddow. Dr. Schmitz testified that he finds that other factors are influencing her performance on the neuropsychological testing such as headache, speech problems, dizziness, emotional distress and sleep difficulties. Nevertheless, Dr. Schmitz did testify that his "neuropsychological test results with respect to the impact on her cognitive functioning are -- are uninterpretable." Even so, Dr. Schmitz opined that this does not support a diagnosis of malingering since, "there are additional and alternative and more expansive explanations of the patient's performances…." Dr. Schmitz characterizes the Claimant's performance on testing as "inconsistent" and "poor effort" and notes that it is "unusual" but he testified that he does not believe this constitutes the intentional production of exaggerated symptoms. He does agree that the Claimant's symptoms have "been expanded upon as she has matured into this injury" but Dr. Schmitz testified that this falls short of grossly exaggerating symptoms since her symptom complaints are consistent with what many people describe following traumatic brain injury. Dr. Schmitz also disagreed that patients always experience a pattern of spontaneous neurologic improvement. He testified that there is improvement that occurs on a physiologic level but even once that is sustained, "it's not the case that they no longer have any cognitive difficulties." With specific reference to the Claimant, Dr. Schmitz testified that she "is impaired and does have cognitive difficulties rendering her disabled." Dr. Schmitz also testified regarding the validity measures during the neuropsychological testing. With respect to the TOMM, he stated that "it only accurately identifies incomplete effort 55 percent of the time." Dr. Schmitz acknowledged that the Claimant's condition and her presentation is unusual, but in looking at her behavior during neuropsychological testing and the marked changes to the Claimant's condition reflective of an impairment of functioning, he still finds that "it does make sense neurologically" in spite of the unusualness. Dr. Schmitz testified that he would classify the Claimant as an "outlier, a person who does not present in a way that is, I'll say, typical of patients who have experienced similar injuries." In terms of the Claimant's abilities and functional restrictions, Dr. Schmitz testified that her ability for recall and remembering would be inconsistent as would her ability to carry out instructions and maintain attention and concentration for extended periods. He further testified that the Claimant would be inconsistent in maintaining regular attendance, punctuality and sustaining an ordinary routine. He opined the Claimant would also inconsistently be able to perform work without distractions or interruptions. Dr. Schmitz also testified that the Claimant would inconsistently be able to interact appropriately with the public, coworkers or supervisors without exhibiting

behavioral extremes. Dr. Schmitz also testified that the Claimant would likely be absent from work three or more times a month due to significant fatigue.

175. On cross-examination at his April 30, 2013 deposition, Dr. Schmitz agreed that his "bottom-line opinion" of the Claimant's condition is that, "based upon her course over the past four years, her prognosis is quite poor. It is unlikely she would experience any considerable improvement in functioning with any further treatment. For all intents and purposes, her condition should be considered permanent." Dr. Schmitz again agreed that the Claimant's case is not "normal or garden-variety" but rather "is a case that has unusual and complicated elements." Dr. Schmitz agreed that "conscious exaggeration" and "malingering" generally mean the same thing. Dr. Schmitz nevertheless does not agree that the Claimant was malingering. He testified that although he "certainly found a lot of behavior that was consistent with what we consider to be incomplete effort," he did not find it "profound" enough to reach a determination that the Claimant was malingering. Although Dr. Schmitz did acknowledge that his threshold for making a determination of malingering is high. On re-direct examination at the deposition, Dr. Schmitz testified that that when he stated in his report that the Claimant was in the "first percentile" this means that the Claimant's performance is at the very lowest end in comparison to women of her age with her level of education who had an absence of any history of neurologic compromise. In other words, 99 percent of women with no history of brain injury performed better than the Claimant on the testing. Overall in the testing performed at his office, Dr. Schmitz testified that the Claimant performed inconsistently with performances across the board, but ultimately, "her effort on the testing made any conclusions to be drawn regarding her cognitive functioning inappropriate." Also during redirect testimony, Dr. Schmitz is referred to the initial emergency medical records and he incorrectly agreed that "incontinence and slurred speech and facial droop" were objective findings that were observed by EMTs. As noted elsewhere in this Order, these symptoms were noted to be negative, thus, not present for the Claimant.

176. Dr. Entin testified by evidentiary deposition on May 6, 2013. With respect to the validity testing on the neuropsychological evaluations, he testified that there are a number of factors that can interfere with the ability to take a test consistently and reliably such as insomnia, pain, anxiety, distraction and medication. This is why Dr. Entin finds that there are problems with validity testing that compares patients with head injuries to people without such injuries. Dr. Entin testified that he performed a mental status exam and finds that, from his perspective, the Claimant has been consistent in how she presents. He testified that there are times when she has difficulty with speech fluency and stutters but, as she gets more comfortable, the stuttering stops. He testified that her word-finding difficulties present similarly. He found that this is how it has been all along. After reviewing the Claimant's history and mental status exam, Dr. Entin testified that he found the Claimant had evidence of a major depressive disorder with a moderate degree of associated anxiety. He also thought she had a cognitive disorder that he labeled "NOS" meaning "not otherwise specified." He testified that this is basically the same thing as a post-concussive syndrome, which he also diagnosed. Dr. Entin testified that he also found she clearly met the criteria for mild traumatic brain

injury. He testified that the mechanism of injury of a pedestrian being hit by a car at 5 miles an hour results in a significant trauma and he finds that the Claimant has describe an altered mental state due to the inability to remember all of the details and the feeling of being somewhat dazed. Dr. Entin discounts the value of the Glasgow Coma Scale, noting it is a gross test and not helpful in assessing the Claimant's cognitive state. Dr. Entin testified that the psychological testing with Dr. Kenneally showed that the Claimant has trouble doing the validity testing and thus, all of the rest of the testing isn't very helpful or useful. He testified that the Claimant was a high functioning individual pre-injury. He believes that due to her perfectionistic tendencies, she tried to fake it and minimized her symptoms for a long time and subjectively reported she was not having terrible depression or anxiety. However, the psychological testing picked up that she was depressed and anxious. As for the diagnosis of somatization, Dr. Entin notes that this means that physical symptoms are not completely explained by objective physical testing and therefore it is determined that unconscious psychological factors are playing a role in a patient's presentation. However, he testified that this doesn't mean it is all psychological, there can be an organic physical component as well. He differentiates this from "malingering" or "facticious disorder" which is purposely faking symptoms for secondary gain. Dr. Entin testified that he does not believe that the Claimant is malingering or has facticious disorder and he does not believe her treating, as opposed to evaluating, physicians find that the Claimant is malingering. He does agree with Dr. Weingarten that the Claimant presents somewhat histrionic. He agrees that you don't develop a personality disorder following an injury and he agrees that the degree of Claimant's cognitive complaints far exceeds what would be expected in a mild brain injury so the Claimant's presentation is not consistent with the usual recovery. However, he does not agree with Dr. Kenneally that research shows mild traumatic brain injury is a short-lived event from which most patients make a full recover. Rather, he testified that 20% of patients do not recover as expected. He characterizes the Claimant as an "outlier" and repeatedly emphasizes that he believes the Claimant is not "intentionally" exaggerating her symptoms. Yet, Dr. Entin does agree that the Claimant is incorrect in asserting that none of her symptoms are improved. In his opinion, there has been significant improvement since he first saw the Claimant, improvement in all parameters, depression is better, anxiety is better, sleep is better, headaches are better, thinking is better and the ability to do tasks has improved. Dr. Entin specifically disagreed with Dr. Thwaites statement that the Claimant has an onset and course of neurologic symptoms over time that would not be consistent with residuals from a concussion. He testified that he thinks, "all of her symptoms are consistent with someone who is an outlier, has ongoing post-concussive symptoms, all of the post-concussive symptoms she has are usual and normal types of symptoms….[although] they don't usually persist in most patients." He does not believe the Claimant presents with bizarre, weird or out of the ordinary symptoms. He finds her symptoms were consistent and that they improved over time. Dr. Entin testified that Drs. Thwaites, Weingarten, Reinhard, Kenneally, Goldman, Bernton and Wilson do not adequately address how the Claimant's ongoing symptoms of chronic headaches, chronic pain, insomnia, anxiousness and mental and physical fatigue could play in the Claimant's presentation.

177. On cross-examination, Dr. Entin agreed that since all the Claimant's neuropsychological testing is invalid, there is no way to objectively quantify the Claimant's neurologic dysfunction. Dr. Entin would defer to Dr. Lipkin on vestibular, vertigo and dizziness issues. Dr. Entin testified that as of MMI, and currently, the Claimant's major depressive disorder and her generalized anxiety disorder are largely in remission and that the Claimant's pain disorder has improved over time. The Claimant's depression and anxiety doesn't significantly interfere with her ability to work. Dr. Entin also conceded that motivation is a factor of what the Claimant can and cannot do, but he pointed out that the Claimant's ability to function on a sustained basis is not largely based on motivation. Dr. Entin does believe the Claimant can drive, including highway driving for short periods of time although he does not think it's a great idea given the Claimant's complaints of visual problems and difficulties with reaction time and her dizziness and difficulties with concentration and attention. In fact, Dr. Entin testified that he would be surprised if there was a driving evaluation that said the Claimant could drive without limitation. Dr. Entin also testified that the Claimant's condition is still stable and plateaued, with little change since MMI and she remains largely on the same medications. In terms of the Claimant's ability to perform work, Dr. Entin opined that the Claimant would "have difficulty doing more than very simple, routine, repetitive tasks and cannot do them consistently. Dr. Entin testified that, in an eight-hour-day, the Claimant would have some level of difficulty with the following: remembering and carrying out short, simple instructions; remembering and carrying out detailed instructions; with attention and concentration for extended periods of time; sustaining an ordinary routine without special supervision; work in coordination with others without being distracted by them; make simple work-related decisions; interact appropriately with the general public; get along with co-workers without distracting them or exhibiting behavior extremes; maintain socially appropriate behavior and appear neat and clean; and travel in unfamiliar places or use public transportation. He did not believe she could work an 8-hour day and was not sure if she could work a 4-hour day. However, if a vocational counselor came up with an in-the-home job where the Claimant could work 15 to 20 hours at her own pace, Dr. Entin testified that he would encourage the Claimant to do this.

178. On May 7, 2013, Dr. Walter Torres testified by evidentiary deposition. Dr. Torres is a clinical psychologist who has treated injured workers with psychological problems for 20 years. Dr. Torres began treating the Claimant about two and a half months after her injury. Dr. Torres testified that, upon his review of the Claimant's medical records and psychological testing up to that date, he was "concerned that her conditions were not being adequately represented." He stated that he believed the Claimant had shown evidence of conditions of anxiety and/or depression that did not result in a diagnosis for either of these conditions. He testified that his concern was that these conditions were "at risk of being ignored" and he opined that these conditions could be affecting the Claimant's presentation. Dr. Torres testified that he diagnosed the Claimant with posttraumatic stress disorder, a depressive disorder, not otherwise specified, a cognitive disorder, not otherwise specified and a pain disorder associated with psychological factors of a general medical condition. Dr. Torres testified that as a result of her posttraumatic stress disorder stemming from her accident, the Claimant

had difficulty with driving. She had difficulty tolerating cars coming towards her from behind whether she was in a vehicle or walking on the sidewalk. Dr. Torres testified about the EMDR he conducted with the Claimant and explained how in EMDR, he asked the Claimant to focus on the circumstances of her accident and notice the emotional reactions, physical reactions and thoughts that she had in reaction to the accident. Dr. Torres testified that while questioning a person about a trauma, they are in a state of hyperarousal, or increased anxiety, and you have them move their eyes left and right for 30-40 seconds and then you stop them and ask "what's there?" and you get them to notice details. Dr. Torres testified that the purpose of EMDR is to expose the person back to thinking about a trauma and develop a greater ability to discriminate what was there. He disagrees that the EMDR process produces false memories. Rather, Dr. Torres testifies that through the EMDR process, people will recall things that they did not previously recall when the person focuses intensively on moments of an accident and details emerge. Ultimately, Dr. Torres explains, the EMDR allows certain experiences that are "vivid" in the present to become more like ordinary memories and their vivid quality recedes which diminishes the vivid, persistent, intrusive quality of the memories. Dr. Torres testified that in the Claimant's case the vivid quality of flashbacks diminished pretty significantly, but she "appeared to have developed as a symptom of her brain injury an inability to tolerate rapidly shifting fields" and this didn't have to be in a car, but could also be rapid movement on the television. Dr. Torres explains that this could be another component to why driving is jarring to the Claimant. Dr. Torres also noted that he had to alter the way he performed EMDR with the Claimant as she could not tolerate the movement of hands in front of her face or the rapid eye movements. So, instead, he would use headphones to alternate sounds from one ear to the other or he tapped on her hands alternating the hands. Interestingly, the Claimant testified that she believed that she never really got the hang of EMDR.

179. During his deposition testimony, Dr. Torres disagreed with Drs. Bernton, Reinhard and Weingarten with respect to a diagnosis of malingering. He testified that he did not note the Claimant exhibiting the intentional production of false or grossly exaggerated physical or psychological symptoms. Dr. Torres testified that in the Claimant's employment records prior to her accident, her work performance is excellent and she is regarded as someone good with detail, organization and bringing order to chaotic situations. He finds this inconsistent with an "accusation" of malingering. Dr. Torres testified that the Claimant developed personality changes as a result of her brain injury, including obsessive-compulsive disorder features and possibly mild hypomanic features, such as a tendency to be expansive in her flow of thought so that when she starts talking about one topic, it expands broadly in a way that is out of control. Dr. Torres also testified that, whereas before her accident, the Claimant's likely "histrionic" personality features made her someone engaging who was able to make things happen, now the features are operating in a different context and having a disruptive effect because the Claimant doesn't have the cognitive organization and the sense of competence that she had before, resulting in disorganized and disruptive behavior. Dr. Torres testified that, contrary to Dr. Weingarten's opinion, the Claimant has improved and the psychotherapy is of benefit to her. Dr. Torres also testified that Claimant exhibited post-concussive symptoms associated with outlier patients who do not recover

from a TBI. Dr. Torres, stated that 10 to 20 percent of patients in his practice do not recover from TBI. Dr. Torres attributes a number of conditions to the Claimant's mild traumatic brain injury in this case, namely: visual disturbance, speech disturbance (stuttering or stammering), word-finding problems, and her confusion and disorientation. Dr. Torres testified that he could not necessarily attribute some of her other symptoms to the head injury as they could be related to physical issues or psychological distress, or a combination of the two. These symptoms included the headaches, the sleep dysfunction, the dizziness and balance and the feeling of being foggy. Dr. Torres testified that with respect to the Claimant's post-injury behavior, she is overwhelmed by information and stimuli and has difficulty multitasking. She is prone to circumlocution, rambling, expansiveness and obsessive-compulsive features. Dr. Torres noted that these behaviors were noted during psychological testing (e.g. the Claimant flossing her teeth), but "it wasn't understood as a probable representation of a psychiatric disorder that was disruptive to her functioning in that situation." Rather it was explained as conscious behavior. Dr. Torres additionally testified that, this resulted in the Claimant failing the effort testing and being characterized as not having applied effort; that she was able to apply effort but she simply didn't. However, Dr. Torres stated that in his opinions "there may be any number of other factors that are disruptive to her functioning in relationship to the effort test" namely, the tendency to become overloaded by demand and interaction that results in disorganized, impulsive and fixating behavior. Dr. Torres finds the neuropsychological testing to be only one component of the gold standard to determine if a person has a mild traumatic brain injury. The overall gold standard would encompass "an adequate set of observations" including treating practitioners as well as persons who observe the Claimant in her daily life. Dr. Torres testified that it is not unusual for the paramedics and DHMC Emergency Department not to conduct an in depth neurological evaluation. Dr. Torres explained that because the ER is dealing with more pressing matters, they only conduct brief neurological screenings to determine if the patient has a condition that must be resolved immediately. Dr. Torres testified that the paramedics and DHMC made some observations that are relevant to a determination of Claimant's cognitive status, but the evaluation was not thorough. With respect to the video surveillance of the Claimant, particularly the days of the Peach Festival, Dr. Torres testified that he did not see activities in the cognitive domain that were inconsistent with what he would expect to see as far as her behavior. Referring to his written report at Claimant's Exhibit 6, pp. 80-81, Dr. Torres testified regarding modifications to his original opinion regarding various interferences with the Claimant's function during an eight-hour workday. In considering a part-time or 4-hour work day, Dr. Torres felt that the interferences with the Claimant's function would be less due to less fatigue and overload. Although he opined that even in her home environment, the Claimant is prone to become overloaded.

180. On cross-examination, when questioned if he would encourage the Claimant to take a job where she could work at home, about 15 to 20 hours a week, at her leisure and take breaks when overloaded or fatigued, Dr. Torres testified that he would encourage the Claimant to try such a position. Dr. Torres defined cognitive overload as "stimuli of a conceptual nature, of a visual nature, of a factual nature that is hard for the person to process." In this context, he testified that he did not think an

environment that included newborn babies and potential for crying and noises that newborn babies make would probably not be an appropriate environment for the Claimant.

181. Dr. Thwaites testified by evidentiary deposition on May 9, 2013. Dr. Thwaites conducted a neuropsychological evaluation of the Claimant on March 8 and 28, 2013. Dr. Thwaites performed a medical record review and took a history from the Claimant, including personally interviewing the Claimant for two hours. His diagnosis is of the Claimant's condition is "cognitive disorder not otherwise specified by self report." During his testimony, Dr. Thwaites outlined the physiology associated with a concussion or mild traumatic brain injury. He testified that, "when sufficient force is transmitted through the head, there's a series of cellular changes that take place….there is an uncoupling of automatic regional cerebral blood flow probably because of an influx of calcium into the intracellular space. So at a time when the brain is working very hard to reestablish homeostasis, there is a lack of automatic regional blood flow that supplies glucose and energy to the brain. And this series of events causes a metabolic or energy crisis to the brain which causes the appearance of a lot of signs and symptoms that we see in the early aftermath [of a brain injury]." A diagnosis of concussion is based on the history, you look at certain signs, symptoms and factors at the time the accident occurred to establish the diagnosis. Neuropsychologists help to establish or refute that diagnosis depending on the facts. Neuropsychological testing is utilized to understand a person's level of functioning at a later point in time. Neuropsychologists try to rule out other factors that could contribute such as pain disorder, medication effect, sleep disorder, mood disorder, psychological factors and lack of participation in the exam. Validity tests were administered to determine if the Claimant could participate fully in the examination. The validity testing for the Claimant showed that she was not able for whatever reason to participate fully in the exam. Prior test results from Drs. Schmitz and Kenneally are also invalid. Testing shows that the Claimant was not able to put forth her best effort. Thus, while it establishes the lowest level of the Claimant's functioning, Dr. Thwaites testified that he believes, as do other evaluators in this case, that the Claimant is actually "functioning at a higher level than her test results would suggest." Referring to his written report, Dr. Thwaites confirms that he did opine that the Claimant sustained "a very minor concussion" in her 2008 accident. Dr. Thwaites testified the basis for this is the Claimant's history and certain diagnostic variables. In this case, Dr. Thwaites testified, "there is a bit of a discrepancy between what the acute records show about those injury parameters and what she has later said about those injury parameters." Dr. Thwaites testified that the pre-ambulance trip did not suggest any retro-grade amnesia, loss of consciousness, altered consciousness, post traumatic amnesia, or impaired cognition although later the Claimant reports these injury parameters. Therefore, Dr. Thwaites testified that he gave the Claimant the benefit of the doubt in diagnosing a concussion. Dr. Thwaites explained that the early medical records in this case are important because, "there is a convergence of literature that suggests that cognitive symptoms and concussion symptoms are worst generally speaking closer to the time of the accident and improve across time." There is animal literature to suggest that the cellular cascade occurs almost immediately within minutes to hours and then improves and resolves by two weeks post injury. There is a sports

concussion literature beginning in the 1990s that shows an immediate onset increased symptoms and decreased cognitive test scores right after the concussion and with serial testing the cognitive symptoms improve rapidly across time. Dr. Thwaites testified that, with this in mind, it was important to note that "when [the Claimant] would have been at her worst from a cognitive perspective, she really wasn't displaying or reporting much in the way of cognitive symptomatology." He further testifies, "the overwhelming majority of individuals do well particularly if they are young, neurologically healthy and this is their first concussion." The small minority of patients whose symptoms persist beyond six months are older populations, people with multiple concussions, people with neurological comorbidity. All human literature about brain functioning after a mild injury shows that it is worst right away and improves across time and then resolves. There is a wide consensus about that among researchers. Although Dr. Thwaites agrees that you can't have human testing at a cellular level because you would have to kill the test subject, "we do have indirect evidence that the energy metabolism issue does start right away and goes away, resolves." Dr. Thwaites testified that this is found in MRI data in Sports Concussion Studies and the Department of Defense Treatment Guidelines says that concussions are generally worse right away and improve across time. This is applicable to mild brain injuries although it would not necessarily be true for severe brain injuries because you have brain bleeds that grow. With more catastrophic injuries you can be up and down. In referring back to the Claimant, Dr. Thwaites agrees that "it is possible she has some cognitive error in her daily routine" due to medications, pain and sleep disturbance. However, he points out, there is no objective testing that her brain is not capable of working in a normal way, that she is not functioning cognitively. Rather, it is based on self report. Dr. Thwaites testified that, he doesn't believe you can only use the Claimant's self report to make a diagnosis that the Claimant has a cognitive disorder.

182. Dr. Thwaites testified that he did rotations at the Denver Health ER. He disagrees with the notion that paramedics and ER doctors did not do a full work up. He testified he also sees a fair number of records from time to time from Denver Health which are not consistent with that conclusion. He has never seen an ER record where they have done a mini mental status exam. It doesn't render the ER records unreliable and does not mean that they did not fully work up the Claimant. Dr. Thwaites has read thousands of paramedic reports and it is pretty common for paramedics to include witnesses' statements of the accident. It can be useful and give qualitative information about the mechanism of injury. Dr. Thwaites disagrees with Drs. Gellrick and Schmitz that the record supports a positive finding of slurred speech and that that constitutes evidence of mild TBI. That's a negative note. She did not have slurred speech or facial droop. The EMTs were thorough, they checked whether she was awake, alert and answering questions appropriately, whether she was speaking in full sentences, whether her head had any signs of trauma, they went through motor asymmetry, they looked for fluidity of speech, and asked her personally about consciousness, headaches, vision changes, dizziness, nausea and vomiting. The report shows that they specifically asked the Claimant if she was confused which she denied. Dr. Thwaites testified that typically people with post traumatic amnesia look dazed and confused and are repeating themselves. Overall, Dr. Thwaites testified that he finds information from

early medical providers helpful in drawing conclusions about whether or not a concussion occurred in a specific case.

183. Dr. Thwaites further testified that when he was with the Claimant for two hours he did not see her lose her train of thought, she wasn't disimpulsive, disinhibitated, and he didn't notice any cognitive errors in his discussion with her. He saw no obvious cognitive problems at the conversational level. Based on the available information, Dr. Thwaites opined that there would be no reason the Claimant would be unable to sit at a computer screen for a sustained amount of time. Dr. Thwaites testified that there was not any objective evidence to suggest that the Claimant couldn't do her prior job from a cognitive perspective. Dr. Thwaites testified that he agrees with the statement found on page 3 of Dr. Schmitz' November 26, 2012 report, where he states that the Claimant's "current presentation is reflective of a combination of conscious and unconscious exaggeration, resulting in her actual condition being far worse than what otherwise would be expected." However, Dr. Thwaites testified that Dr. Schmitz' explanation of the use of the words conscious exaggeration made no sense to Dr. Thwaites. He testified that, "I think that we all understand in neuropsychology what conscious versus unconscious means, I think it's clear." Conscious exaggeration means a person is aware that they are not doing their best or looking more impaired than they typically would be otherwise. Dr. Thwaites "adamantly disagrees" that symptoms following a concussion will appear months later. He has seen people who refuse to report symptoms and will minimize symptoms until they are spiraling and getting worse and then have to tell someone. However, he testified that this is extremely rare. Dr. Thwaites did agree that some concussive symptoms may not surface until several days, such as cognitive fatigue. He testified that, "if a person was in a hospital with multitrauma and they underwent emergency surgery right after their accident, they were unconscious and then highly sedated for a week and really were out of it for a period of time because of artificial sedation, I can see them a week later, going gosh. And they get back to home, noticing some symptoms, yes. That's not really what we're talking about here." In fact, Dr. Thwaites testified that the early responders "didn't diagnose a brain injury" and he felt there was "consensus in that regard." Dr. Thwaites disagrees that there is objective findings related to the Claimant's various cognitive symptoms such as the speech disfluency and her anxiety related behaviors. He testified that her display of these symptoms is "a form of self-report." He notes that she shows them to some providers and not others, and even when she shows the symptoms it is not consistent. Dr. Thwaites did not see any objective testing by Judith Haddow. He characterizes the work with Ms. Haddow as a "cognitive retraining module" but states that it is not objective testing, rather Ms. Haddow provided the Claimant with "tasks." He opined that Ms. Haddow's statement that 30% of patients cannot pass validity measures on neuropsych testing is completely false and misstates the large literature regarding effort and testing.

184. During cross-examination, Dr. Thwaites continued to assert that the Claimant's presentation is unusual and that he doesn't think that it is accurate from a neurologic perspective. He testified that he doesn't believe that, "what [the Claimant] is reporting and portraying is her true level of brain function." He opined that you can get a

blossoming of inflammatory and metabolic factors in the 24-48 hours post injury but disagrees that you can get a worsening neuropathology over weeks or months. With regard to the validity testing, Dr. Thwaites noted that the Claimant scored worse than people with advanced severe Alzheimer's, people with severe traumatic brain injury, catastrophic brain injury, and mental retardation. Dr. Thwaites does not believe it is plausible. While Dr. Thwaites did diagnose the Claimant with a mild traumatic brain injury, he disagrees with some of the Claimant's other medical providers who find that the Claimant continues to have neurogenic-based cognitive difficulties because of her concussion. Moreover, Dr. Thwaites opined that adding symptoms over time is not consistent with a mild traumatic brain injury.

Independent Medical Evaluations of the Claimant

185. The Claimant was evaluated by Dr. Tashof Bernton in an independent medical examination on August 26, 2011. Dr. Bernton took a history from the Claimant and conducted a thorough records review. He noted that the Claimant's presentation to him and in the medical records, "is one of an individual who is extraordinarily disorganized and requires extreme help from others and is essentially unable to function. This is entirely inconsistent with the nature of the accident and the documented medical history." In reviewing the medical records, Dr. Bernton notes that the early records from the paramedics, DHMC, Exempla and Kaiser do not report symptoms which would be consistent with a closed head injury/traumatic brain injury. With respect to the initial evaluation by Dr. Artist, Dr. Bernton notes that, "at this point, two days after the accident, at which point in time organic symptoms due to head injury would have been at worst, there is no notation of any cognitive symptoms. There is no notation of any headache. There is no notation of any confusion and there is no indication on examination of any stuttering or cognitive symptoms. Two days after the accident it was noted specifically that the patient "denies any loss of consciousness." Dr. Bernton opined that he found the assessment of injuries contained in Dr. Artist's initial assessment to be the most accurate and reliable assessment of the injuries the Claimant suffered on October 15, 2008. Dr. Bernton further notes that, the Claimant did return (to Exempla) for re-evaluation on October 20. The reports note that the patient "says she is feeling a little bit better over weekend." The report notes that the patient "says she can't drive when she takes medications and is wondering about work." Again, Dr. Bernton points out there is no notation of any cognitive impairments or abnormalities and the patient is described as "in no apparent distress, healthy appearing female who is alert and oriented x 3. She is appropriate." Dr. Bernton opined that head injury due to organic head trauma symptoms are at their worst at the time of the injury or shortly thereafter, certainly within 24 hours, with the exception of a subdural in which the blood slowly accumulates in the brain with symptoms presenting on a slow and increasing course. However, Dr. Bernton points out that there was no evidence of a subdural hematoma on the Claimant's CT scan. Therefore, Dr. Berton opines that there is simply no way that organic head injury due to the accident could produce the change in symptoms seen in this case. Additionally, although the absence of loss of consciousness does not rule out a mild concussion, it would be extraordinarily unlikely and certainly not medically probable that a trauma of that type could produce long-

lasting, functionally, extremely significant cognitive complaints. Even if such did occur, the patient's problems would be evident immediately. Dr. Bernton found that the Claimant's clinical course is not in any way consistent with that. Dr. Bernton further opined that the Claimant's reported cognitive complaints may be on the basis of conscience representation for external gain (malingering), conscience representation for emotional support (a factitious disorder), or unconscious symptom production including increased symptoms on the basis of anxiety or depression. However, these do not represent organic cognitive complaints, they are not disabling, and do not preclude the Claimant from employment. Thus, Dr. Bernton opines that the Claimant clearly does not have a physical inability on the basis of the accident to return to work. Dr. Bernton opines that the Claimant has not had a head injury, has multiple non-physically-based symptoms and that she would not be prohibited from returning to vocational activities she performed prior to her injury. He opined that it would be counter-therapeutic for the Claimant to be placed in a disabled status as she is physically capable of performing vocational activity.

186. Dr. Bernton also testified by evidentiary deposition on May 10, 2013. Dr. Bernton testified that he frequently evaluates patients for TBI, mostly with mild traumatic brain injuries. He has also been a primary reviewer on the Committee drafting the back, chronic pain and head injury chapters of the Medical Treatment Guidelines. Dr. Bernton testified that while the Claimant may have had a minor concussion, the type of head injury the Claimant had cannot produce, and is not consistent with, the marked deficits that the Claimant demonstrates at this point. Dr. Bernton testified that these complaints are based on malingering or on a very similar diagnosis such as factitious disorder which is the conscious production of symptoms for emotional support. Neither malingering or factitious disorder is an accident related diagnosis. Of these differential diagnoses, factitious disorder is more probable. With factitious disorders, the primary enforcers are not so much financial gain as they are emotional support. With factitious disorder you are more likely to find behaviors that are frequently maintained across a wide variety of circumstances including family and friends. The TOMM (Test of Memory Malingering) is the best information for determining whether the Claimant is giving full effort in a neuropsychological testing. If a patient intentionally does poorly on a neuropsychological test, it is useless. If you can't address the issue of effort there is no value in the testing at all because any individual can simply go in and intentionally do poorly and all you would ever say is "well the brain injury did it." Confounding factors such as anxiety, depression, chronic pain and insomnia are typical conditions associated with TBI patients, so you wouldn't expect them to skew the neuropsychological results. The TOMM testing is relatively insensitive to brain injury but is sensitive to a voluntarily lack of effort. Dr. Bernton testified that he doesn't know one way or the other whether the Claimant had a mild TBI, and he gives the Claimant the benefit of doubt that she has a TBI, but Dr. Bernton opines that it doesn't matter. Dr. Bernton agrees that the Glasgow Coma Score is a gross test as to whether or not the Claimant had a minimal brain injury. However, he testified that when we are talking about a situation in which a patient years later states that she has gross defects that prevent her from functioning on the basis of a head injury, a Glasgow Coma Score of 15 immediately after the accident is extremely useful and important. Because of the risk of

significant head injury, both emergency room personnel and EMTs are taught to assess patients for just those factors because they are quite clinically important. Dr. Bernton testified that the Claimant would not be awake, alert and answering questions appropriately at the time of the incident and then years later be disorganized, non-functional and stuttering. Slurred speech and facial droop in the EMT report represented a negative finding, otherwise other things described such as an odor of alcohol and a pelvic mass would have also been present. Additionally, you would not get a facial droop from a mild TBI. In reviewing the questionnaire the Claimant provided to Dr. Bernton, he testified that her account of the injury on that form was internally inconsistent. Dr. Bernton testified that in the questionnaire, the Claimant stated she struck the front windshield with her head where she was rendered unconscious, then she was thrown from the car to the pavement where she struck the back of her head on the pavement. Specifically, Dr. Bernton notes that if she was unconscious from the first head strike against the windshield, then she would not remember being thrown from the car and an impact with the ground. Dr. Bernton also pointed out that the account of the injury that the Claimant gave him was also inconsistent with the EMT records and the ER records. Dr. Bernton testified that he disagreed with Drs. Gellrick and Schmitz and he opines that in the Kaiser record with Dr. Woessner the day after the injury, when the Claimant says things like she "doesn't think" or "may have," that does not constitute evidence of post traumatic amnesia. Dr. Bernton opines the most likely explanation for the headaches reported on October 16 and 17, is that the Claimant had stress as a result of her accident which would not be unexpected and certainly could trigger a migraine. Even if it was associated with mild TBI, Dr. Bernton testified that it makes no difference. The Claimant's presentation down the road of a dramatic decrease in function is not characteristic of a head injury. When weeks, months, years later progressive neurologic symptoms develop which become disabling and markedly evident on examination preventing the Claimant from functioning, it doesn't happen that way anymore than if you get hit on the head today and six months later have a loss of consciousness. Dr. Bernton testified that there are no accident related impairments or restrictions which prevent the Claimant from returning to her pre-injury job as an administrative assistant. Dr. Bernton disagrees that the Claimant has physical restrictions that would prevent her from working as a result of the October 15, 2008 injury. Specifically, he disagrees that as a result of the injury, she is limited to sitting at a computer for 30 minutes at a time, that she has processing problems and that she has balance issues. Dr. Bernton pointed out that in the August 20, 2011 video, at one point, the Claimant was carrying a cup or something and was able to do so without evidence of balance problems. At one point she carried some food in one hand and ate and walked without evidence or concerns for balance. Dr. Bernton also testified that in another video, the Claimant was carrying a phone against her shoulder while holding mail. Yet, people with balance sensitivity have difficulties with changes in head position. Dr. Bernton testified that he saw the Claimant five days after she had gone to the Peach Festival. She did not disclose that to him nor did she say that she was wiped out as a result of her activities associated with attending the Peach Festival.

187. Dr. Bernton also testified regarding the Claimant's ability to drive. He opined that it does not make sense to say that someone is safe in a certain situation

such as local driving but not highway situations, because although the consequences to the individual in a vehicle may be greater at higher speeds on the highway, complex tasks which put other people at direct risk are clearly present in local, slower speed driving. For example, auto-pedestrian interactions are more common in local, slower speed driving. You don't want someone driving without a neurologic capacity to do so. Either an individual does or does not have capacity for driving. Dr. Bernton testified that "worst at first" applies to brain-injured patients. It is an organ like a liver or a valve. There may be some process of inflammation or swelling which may mean that you'll see the worst deficits within 24 hours. You can't have a psychological reaction to essentially a non-physical event that then becomes absolutely predominant and controls your life. Dr/ Bernton testified that in the Claimant's case her injury was, at best, a physically minor event, particularly in terms of a head injury. In reference to the Medical Treatment Guidelines at page 8, section C(6)(a), and discussing the 10%-20% of brain injury patients that don't respond, Dr. Bernton testified that they tend to be at the more severe end of the minor brain injury which includes unconsciousness up to 30 minutes. They also tend to have comorbid conditions such as preexisting neurologic conditions, previous history of concussions, and other things that put them at risk. And most importantly, according to Dr. Bernton, "even if that were the case, there's still no basis for the patient having symptoms at this point in time that were dramatically greater than the symptoms which were present at the point in time at which symptoms would have been at their worse right after the injury." So, the passage about outliers, in terms of brain injury patients who don't recover as expected still would not explain the Claimant's current status. Dr. Bernton also testified in regard to an abstract by Professor Ron Ruff and multiple clinicians from a June 2004 article. He agreed with the conclusion of the literature that symptom exaggeration and fabrication occurs in a sizable minority of neuropsychological examinees with a greater prevalence in the forensic context, that is, with respect to individuals engaged in a legal process.

188. On cross-examination, Dr. Bernton agreed there are errors in medical records all of the time. However, he further testified that there is nothing in the emergency room records which show that they somehow did an incompetent job and missed a very evident marked brain injury or that there is reason to doubt the observations in terms of the Glasgow Coma Scale. A Glasgow Coma Score of 15 in a period immediately following head injury indicates that the patient did not have a significant or severe head injury, although it doesn't rule out a mild traumatic brain injury. Dr. Bernton also testified that the medical records are very clear that the Claimant denied confusion and memory problems and he rejected an attempt to try to deconstruct the medical note from the day after her accident since he found it clear on its face. Dr. Bernton goes on to testify that if the Claimant has no confusion or memory problems 24 hours after the accident, there is no basis for her to have those problems two years later. Dr. Bernton opined that when the Claimant reported additional symptoms to Dr. Hnida, we were beginning to see the evolution of what could either be psychological or other factors. The symptoms reported by Dr. Hnida are precisely the same symptoms that are manifested by anxiety. Going back to the accuracy of the initial medical records in this case, Dr. Bernton testified that the idea that emergency room physicians don't assess mental status is clearly incorrect. A critical factor of emergency

room evaluation is to look for potentially life or limb threatening conditions. Among life or limb conditions which are important to evaluate are head injuries, particularly in an auto-pedestrian accident. Dr. Bernton testified, "And the idea that one of the primary trauma centers in the State simply doesn't do the evaluation for one of the most important conditions for which they are supposed to be evaluating the patient is nonsense." Specific to this case, Dr. Bernton expressed his opinion that there is documentation of an appropriate and appropriately detailed examination of mental status. And whether or not subtle cognitive symptoms might have been missed is irrelevant to the observations which are present, which is the fact that the patient was described as alert, conscious, answering questions in full sentences, Glasgow Coma Scale of 15, was clearly evaluated for head injury and was found not to have one. During his testimony, Dr. Bernton ultimately concluded, consistent with his prior written report, that "an individual who was noted to have no loss of consciousness by several observations at the time, was noted to have a Glasgow Coma Scale of 15 initially and in the emergency room, was noted to be alert and cooperative, and the day after the accident was noted to have no problems with confusion and memory loss, cannot be said to have an organic head injury several years later which leaves her so confused that she stutters, has balance loss, has inability to function, can't work, that all of these multiple symptoms are not physically present from that accident. And I think that that's entirely consistent with the medical record and demonstrated by it."

189. Dr. Judith Weingarten performed an independent psychiatric evaluation of the Claimant over a three hour period on September 12, 2011 and Dr. Weingarten's opinions are set for the in a written report dated September 22, 2011. Dr. Armin Feldman was also present during the interview with the Claimant during this evaluation, but he observed and did not participate. At the outset of the interview, the Claimant expressed to Dr. Weingarten that she was anxious about this evaluation. Dr. Weingarten took a detailed history (set forth in detail previously in this order). The description of the injury that the Claimant provided to Dr. Weingarten is inconsistent with other accounts and is notable for recollection of two separate instances where the Claimant hit her head and the fact that the Claimant now specifically alleges a loss of consciousness. The Claimant reports to Dr. Weingarten that "she stutters now which she never did before and started slurring her speech and could not put things together or remember things. She states that she has balance issues and has been in vestibular therapy and in and out of physical therapy. She states that she has had a headache for almost four years which are migraines and shooting pains through her head….She states that she is still in pain…and cannot put into words the amount of pain she has had. She states that over three years, her pain has changed. She does not have endurance or physical capabilities that she used to have. She states that she used to take eight hour hikes in the mountains and cannot do that anymore and she's always running into things." The Claimant reported the different therapies tried for pain alleviation, noting that massage therapy would result in her inability to move for three days and acupuncture offered only temporary relief and after 2-3 weeks, she is back to square one. The Claimant reported RF blocks "were a disaster" and now she is trying Botox therapy for her migraines. The Claimant reported that none of her treatments have worked for any length of time, although at one point while she was treating with an

osteopath and had acupuncture and medical massage, she was able to maintain with some pain and they made things a little more bearable, but these treatments stopped once the Claimant reached MMI. The Claimant reported that her current symptoms are poor memory, getting easily overwhelmed, slow processing, headaches, and balance issues. The Claimant did state that her vision is better but her vision brain processing is not. The Claimant stated that she is depressed now whereas before the accident, she was optimistic and didn't believe in depression or anxiety. The Claimant reported to Dr. Weingarten that before MMI, "she would spend her time almost 40 hours per week going to doctors appointments." She reported to Dr. Weingarten that she walks around in circles and just loses track of time. The Claimant reported that she does simple chores, such as laundry, and finds small projects and goes to appointments because she feels she has control when she does. In addition to the interview, Dr. Weingarten performed a record review which she summarized in her written report. During the course of the mental status examination, Dr. Weingarten noted that the Claimant was on time, cooperative and changed positions from sitting to standing every so often. Dr. Weingarten noted the Claimant was talkative and wordy and her speech was vague and she took a while to get to the point. Dr. Weingarten noted that in the beginning of the interview the Claimant was wringing her hands, then she didn't and then at the end of the interview the Claimant did this again. The Claimant's stuttering behavior was similar with some stuttering in the beginning and at the end of the interview, but not during the middle. Dr. Weingarten also noted that she reviewed surveillance video from August 20, 2011 and August 26, 2011. Dr. Weingarten's diagnosis was for pain disorder and histrionic personality disorder. She reports that the claimant describes her symptoms in a very vague and dramatic way. She goes on to report, "I am extremely concerned that even though her treating providers agree that her diagnosis of Pain Disorder and have seen the personality testing, that shows somatization and histrionic features that she is not being treated for Pain Disorder regardless of the question of malingering. Patients with Pain Disorder should not have treatment recommendations on subjective complaints alone, but only on clear objective findings. After a reasonable workup they should not have continued multiple referrals and passive treatments, especially when there is no improvement." Dr. Weingarten expressed concern for a diagnosis of malingering after reviewing surveillance video which showed a marked contrast to the Claimant's presentation in her office and other providers' offices as opposed to how she presents herself in daily life. She notes that the three-days of surveillance video she reviewed shows the claimant doing normal activities without pain behavior which was very different than the Claimant's report of her abilities and symptoms to her providers and me. The Claimant's ability to ride to Palisades is inconsistent with the Claimant's statement that she can barely be a passenger in a car. Dr. Weingarten recommended that the patient's pain disorder be treated by seeing one physician with limited medications and no further referrals of modalities of therapy. She noted that pain disorder rarely improves with psychotherapy, the Claimant was unlikely to improve with EMDR and that she did not recommend that form of treatment. She recommended that the Claimant undergo an MMPI to evaluate for malingering. Dr. Weingarten does not get the sense that the Claimant is vested in returning to work and expressed concern that the Claimant was taken off work based on her subjective complaints. In conclusion, Dr. Weingarten opined that the Claimant's diagnoses of pain disorder or malingering

would not be caused or aggravated by her work injury. Dr. Weingarten goes on to state, "I don't see any reason she could not work. In fact, I would encourage her to return to work as it may help her confidence."

190. On March 26, 2013, Dr. Weingarten provided supplementation to her written report after reviewing additional records from Dr. Reinhard, Dr. Bernton, Dr. Kenneally and Dr. Schmitz. After her review of these records, Dr. Weingarten opined that she continued to believe that there was no psychiatric or cognitive limitations or restrictions on the Claimant's ability to work. She stated that not only did she believe that the Claimant could work but that she should be encouraged to return to work.

191. Dr. Weingarten testified by evidentiary deposition on May 13, 2013. Dr. Weingarten is board certified in neurology and psychiatry and Level II accredited. She has also a Level II EMDR certification. Dr. Weingarten testified that the Claimant had a good memory of her medical history and what happened to her, except that sometimes there was inconsistency between what the Claimant said and what was in the medical records. The Claimant reported that prior to her injury, she was juggling 150 things at once, with 4 kids at home and a lot of people relying on her. Dr. Weingarten felt like the Claimant was at the end of her rope and it seemed like the Claimant's pre-injury activities were overwhelming her. From a mental status exam, Dr. Weingarten opined that the Claimant's memory was intact. Dr. Weingarten's accident diagnosis was a pain disorder associated with psychological factors and a general medical condition, chronic versus malingering. Dr. Weingarten noted that the Claimant did not stutter during the middle of her exam when she was more distracted, when she was talking about more things and not focusing on stuttering. Dr. Weingarten testified that she felt that was consistent with her questioning the diagnosis of malingering. Dr. Weingarten also testified that she observed the Claimant wringing her hands at the beginning and end of her interview but not in the middle when she was distracted, similar to the stuttering and Dr. Weingarten found that when the Claimant was distracted and thinking of other things, she was not attentive to doing those sorts of behaviors. Dr. Weingarten testified regarding her concern with the surveillance video of the Claimant presenting a marked contrast in the way that the Claimant would present herself to Dr. Weingarten and some of her other providers. For example, the Claimant told Dr. Weingarten that she always had to force herself to keep her shoulders down in order to be in a protective mode. Yet, Dr. Weingarten did not observe that in the surveillance video. The Claimant reported that she can't relax, she's always tense, she's always running into things, she couldn't even walk in a straight line which Dr. Weingarten did not observe in the video. She did not observe any pain behaviors. The Claimant reported that she can only do things in 15 minute intervals and had to rest and Dr. Weingarten observed the Claimant doing things for longer than 15 minutes in the video. The Claimant reported that she always had to change positions and there was no evidence of that in the video. The Claimant did not appear to be in distress. The Claimant said she had photophobia, yet she was out in the sun, not wearing sunglasses which you would expect. Dr. Weingarten disagrees with the diagnosis of post traumatic stress disorder. The Claimant was not experiencing PTSD when Dr. Weingarten saw her. Dr. Weingarten testified that if the Claimant did have anxiety disorder or depression it was in remission when she saw the

Claimant. There is a component of conscious exaggeration in the Claimant's diagnosis whether it be malingering or factitious disorder. Dr. Weingarten's Axis II diagnosis for the Claimant was personality disorder with histrionic features. Histrionic means that a person is vague, dramatic and needing to be the center of attention. Dr. Weingarten testified that she disagrees with Dr. Torres' opinion that histrionic features are acquired. Dr. Weingarten opines that rather, this is a part of a personality disorder that develops in early adolescence or early adulthood. Dr. Weingarten also disagrees with Dr. Torres that observation of the patient is more important in determining diagnosis than neuropsychological testing. Dr. Weingarten opined that neuropsychological testing is the gold standard in determining cognitive function. If that testing is invalid, then, Dr. Weingarten opines, "one has to put together the whole history and the medical records and try to make an assessment of why it's invalid." Dr. Weingarten testified that she thinks the Claimant had a "premorbid personality" of doing a lot and she tried to help a lot of people and she was overwhelmed and had to get a job even though she was not particularly invested in the job, even though the Claimant would say that she loved the job. However, based on this, the Claimant was at a high risk for things happening to her to get her to the position where she didn't have to work. Dr. Weingarten noted that although, the Claimant's accident was minor with a musculoskeletal injury and it was "her ticket out of the dilemma of feeling overwhelmed and preferring not to work." Then, things just snowballed from there. Whether or not Dr. Schmitz' use of the word "conscious exaggeration" was inartful (in his opinion), Dr. Weingarten testified that agrees with his use of those words. She also testified that she disagrees with Dr. Torres that a minimal job would be bad for the Claimant's esteem. Dr. Weingarten opined that, "anything that would get her out of the house and have her feel like she was performing a function and help her feel like she is making a contribution would help her self esteem."

192. On cross-examination, Dr. Weingarten testified that, being momentarily dazed after an accident and not remembering everything is not what the Medical Treatment Guidelines are talking about with regards to amnesia. Dr. Weingarten acknowledged that within a week of her accident, the Claimant complained of dizziness, difficulty finding words, and difficulty processing thoughts, and, other than the dizziness, these are possible symptoms associated with cognitive problems. Dr. Weingarten also admitted that a week after her accident the Claimant was exhibiting a number of acute and chronic symptoms that the Medical Treatment Guidelines list as associated with a mild traumatic brain injury. Dr. Weingarten agreed that Dr. Hnida diagnosed the Claimant with a closed-head injury on October 22, 2008 and on October 27, 2008, so did Dr. Artist. In discussing the notation in her written report about the Claimant talking excessively and not getting to the point and not answering questions, Dr. Weingarten testified that it is common for people she sees not to get to the point and talk excessively and not answer questions because they have their own agenda. She further testified that vague and circumstantial speech is very common in personality disorders, especially histrionic, and it's not at all inconsistent with functioning well at a job. Dr. Weingarten testified that this is talking about two completely different things. Dr. Weingarten also testified that she continues to stand by her diagnosis of personality

disorder, although she conceded that she does not have expertise in traumatic brain injuries, but rather, her expertise is in psychiatry.

193. On redirect examination during her deposition and in reviewing Dr. Hnida's medical record, Dr. Weingarten testified that Dr. Hnida did not report PTSD, but rather, closed head injury. Dr. Weingarten testified that when Dr. Hnida reported that the Claimant's mini mental status exam was "normal" that probably means that she got 30 points, a perfect score or maybe 28 and 29. If she had gotten a lot wrong and had obvious memory problems, he would not have reported that as normal. Dr. Weingarten noted that the Claimant did better on Dr. Hnida's mini mental status exam than on Dr. Weingarten's mental status exam and she testified that you would have expected to see better results on Dr. Weingarten's testing. In looking at the initial emergency medical records again, Dr. Weingarten opines that the EMT report does not indicate any loss of cognition and the EMT reports facial droop and slurring in the negative.

194. Dr. David Reinhard completed a thorough records review and prepared a written report dated April 16, 2012. Dr. Reinhard was specifically asked to address whether or not the Claimant suffered any cognitive injuries as a result of her October 15, 2008 pedestrian vs. motor vehicle accident. The records reviewed include the treatment medical records, independent medical evaluations, therapy records, FCEs and records of neuropsychological testing, among other records. After an 8-page summary of the records that Dr. Reinhard found most relevant, he offers his assessment and opinion as follows,

> It is my opinion that there is no cognitive impairment on the basis of a neurological injury. If a concussion occurred and resulted in a brain injury, then this would have been a mild traumatic brain injury at the very mild end of the spectrum of mild traumatic brain injury. The magnitude of the cognitive dysfunction this patient displays far exceeds that which originates from the amount of neurological damage stemming from a mild concussion. Her course of recovery is contrary to the pattern of spontaneous neurological improvement one reliably observes following traumatic brain injury of any severity. Instead of there being cognitive improvement and normalization over time, she reports an ongoing cognitive disability the degree of which far exceeds what one could reasonably expect to see following a mild concussive injury. This type of delayed recovery and the level of cognitive complaints [the Claimant] demonstrates are often results of psychological factors such as anxiety, depression and somatization. When validity measures show a significant lack of effort being put forth then the diagnosis such as factitious disorder and malingering become more reasonable diagnostic considerations.

Ultimately, Dr. Reinhard concludes, "Whether or not a concussion occurred is a question that has been argued a lot, but it is not all that critical in making an assessment of cognitive impairment in this case. That is to say, the amount of organically based cognitive impairment that would have resulted from a mild concussion would not

produce any significant permanent cognitive residual. Furthermore, there would be negligible long term impact in one's ability to work, need for any cognitive restrictions or for one's career longevity."

195. Dr. David Reinhard testified by evidentiary deposition on May 8, 2013. Dr. Reinhard is a board certified physiatrist. He is fellowship trained in traumatic brain injury at the Moss Rehab Hospital and was an assistant professor at the University of Pennsylvania Medical Center in their Division of Neuro Rehabilitation. He was the Medical Director at Spalding Rehabilitation Hospital. He has worked at Centennial Rehab and since joining CROM, about 50% of his practice is treating patients with traumatic brain injuries. Dr. Reinhard testified that he evaluates brain injured patients, orders appropriate tests to evaluate symptoms, prescribes a course of treatment which can include medications, therapeutic injections, physical therapy, occupational therapy, speech therapy and neuropsychological evaluations. Dr. Reinhard testified that most of his work is clinical and 80%-90% of his brain injured patients have mild traumatic brain injury as opposed to moderate or severe traumatic brain injuries. Dr. Reinhard has testified in about 40 cases going back to 2008 with about half of those civil and half workers' compensation cases. Most of those cases had something to do with brain injury and between 70-75% of the time, Dr. Reinhard was testifying for the Plaintiff/Claimant and about 25-30% of thei time he would have been testifying for the Defendant/Respondent. In reviewing his written report of the medical records review that he conducted, Dr. Reinhard testified that he continued to support his ultimate conclusions, including his opinion that, "there is no cognitive impairment on the basis of a neurological injury. If a concussion occurred and resulted in a brain injury, then this would have been a mild traumatic brain injury at the very mild end of the spectrum of mild traumatic brain injury. The magnitude of the cognitive dysfunction this patient displays far exceeds that which originates from the amount of neurological damage stemming from a mild concussion. Her course of recovery is contrary to the pattern of spontaneous neurological improvement one reliably observes following traumatic brain injury of any severity." Dr. Reinhard further testified that, "the concussion itself whether it's mild, moderate or severe, goes back to the initial event, the initial injury and not necessarily the course that follows." Dr. Reinhard testified that based on the initial symptoms here, this injury would be the mild end of a mild TBI. Dr. Reinhard testified that it is difficult to determine that the Claimant even suffered a concussion, but even if it is assumed that the Claimant suffered a concussion, the paramedic report would be evidence of the Claimant's injury being mild. Dr. Reinhard specifically reviewed the report and noted that the dash in the paramedic report was a negative meaning that symptoms of facial droop, slurred speech and odor of alcohol were not present. So, Dr. Reinhard testified, for clinicians to rely on all those symptoms being positive, it would be misleading. Dr. Reinhard testified that the Claimant's lack of confusion in the ER is significant, if she was confused, that would be more in line with things you would see in mild TBI. Word finding difficulties could possibly be due to anxiety, pain medication or pain, those would be the most common things. If it were due to a brain injury you would expect to see it in the ER records. When you are talking about cognitive or neuro-cognitive effects of the brain injury itself, worst first usually applies. Dr. Reinhard testified that he agrees with the Clinical Practice Guideline, Management of

Concussion, Mild Traumatic Brain Injury put out by the VA and the Department of Defense in April of 2009 which states that the vast majority of people recover from mild TBI within one and half months. He testified that, "the initial injury would be the thing most predictive of the course of recovery." So, because it was quite mild, he testified that, "[i]f you're months or years down the road and still have big functional issues, big disability, then it's usually because of other factors such as psychological factors, such as anxiety and depression, or physical factors such as medication effects, pain, and lack of sleep." Dr. Reinhard testified that when the Claimant reported a headache the next day at Kaiser, it's hard to say how that fits in, is it a concussive headache, a cervicogenic headache or just a tension headache? He testified that it would be speculation, in the absence of other pieces, that you would expect to find with a concussion. When asked to respond to opinions of other witnesses in this case as to the issue of whether or not the EMTs and ER personnel sufficiently worked the Claimant up for mild traumatic brain injury or, were instead, preoccupied with her physical injuries, Dr. Reinhard testified that the role of the ER personnel would be to look for emergent and catastrophic situations, son, in doing this, they would evaluate for focal and neurologic deficits to make their determinations, and they would be looking to make sure that someone was safe with discharge. In his opinion, Dr. Reinhard found that, based on the medical records, the ER personnel was not picking up on cognitive brain symptoms. They were likely not seeing post traumatic confusion or post traumatic amnesia. Dr. Reinhard testified that he agrees with the Medical Treatment Guidelines which state that deterioration after mild TBI is uncommon and in those situations where you have worsening complaints, other issues such as psychological or social stressors should be considered in the differential and an unidentified diagnosis. As far as the differential and unidentified diagnosis, Dr. Reinhard testified that the psychological group of factors could include factitious disorder, malingering or somatization.

196. On cross examination, Dr. Reinhard confirmed that he works with Dr. Bernton who is a partner in the medical practice of which he is a part. Dr. Reinhard also testified that he has worked with Dr. Torres, Dr. Entin and Dr. Gellrick before and he is also familiar with Ms. Haddow at OT Plus and he has also referred patients to Dr. Politzer. Dr. Reinhard testified that he respects the abilities of these doctors and Ms. Haddow. Dr. Reinhard testified that he is not familiar with Dr. Weingarten. Dr. Reinhard testified that for the purposes of the Medical Treatment Guidelines, the criteria "loss of memory for events immediately before or after the injury" could be fulfilled by any loss of memory, including someone saying that they don't remember if they hit their head, it could be an example of posttraumatic amnesia. Dr. Reinhard also conceded that blurry vision could be a neurological deficit as well. However, the fact that the Claimant reported dizziness 12 days after the accident doesn't mean it's due to a brain injury. It could be, but Dr. Reinhard testified that it could also be due to an inner ear injury. Dr. Reinhard testified that the symptoms reported by Dr. Artist 12 days after the accident are consistent with having been thrown up onto a car and thrown to the ground. He also agreed that symptoms of having difficulty thinking, finding words and concentrating are cognitive problems. Dr. Reinhard testified that his experience is not consistent with Ms. Haddow who says 30% of patients with TBI are unable to pass validity testing. He testified that he believed Ms. Haddow sees more moderate and severe TBI patients. Dr.

Reinhard testified that most of the patients he treats have passed validity measures, which is why this stands out to him when it's off. Dr. Reinhard admitted that, as Dr. Schmitz has discussed, that it is difficult to determine the reason why a person doesn't pass validity measure due to unknowns. However, a situation where it's more convincing that there is a conscious attempt to exaggerate cognitive weaknesses in a test like the TOMM. Dr. Reinhard testified that the Claimant's development of anxiety and depression could exacerbate symptoms of a mild traumatic brain injury and could "put in motion a number of different problems that can be a big problem for functioning." Dr. Reinhard testified that he doesn't have any doubt that "there was a big change from how [the Claimant] was functioning before this injury to how she was functioning afterward." Dr. Reinhard testified that the most frequently reported post concussive symptoms include headaches, cognitive difficulties and dizziness. Patients may also complaint of irritability, fatigue, photophobia, sonophobia, tinnitus, visual changes, hearing loss and insomnia. Dr. Reinhard also testified that standard diagnostic tests including CTs and MRIs often fail to show abnormalities.

197. On redirect examination, Dr. Reinhard agrees with the Medical Treatment Guidelines section D(1)(b) that the speed of the auto is an important piece of information, as is information from first responders, witnesses, paramedics, etc. to obtain details of the event and the injured person's behavioral and cognitive responses immediately following the injury. In referring to TBI patients who are outliers, Dr. Reinhard agreed that normally when you are looking at the 10%-20% of outliers, you are looking for people with preexisting neurological conditions, someone with a prior concussion, someone of an advanced age, or you are looking for differential diagnosis. Dr. Reinhard testified that this is consistent with the Medical Treatment Guidelines. Dr. Reinhard testified that he did not understand Dr. Schmitz' explanation of the use of the term "conscious exaggeration" in the context of evaluating for malingering or a facticious disorder although Dr. Reinhard opined that "usually there has to be some pretty overwhelming evidence to make the diagnosis or to make it correctly." In Dr. Reinhard's opinion when the Claimant was seen in the ER on October 15, 2008, there weren't any symptoms that would typically trigger getting a CT of the head. Dr. Reinhard also testified that his interpretation of the ER medical records is that the Claimant reported that she did not hit her head without equivocation. Further, he testified that there is nothing to indicate that the Claimant had posttraumatic amnesia about whether or not she hit her head. When the Claimant says without equivocation in the ER that she didn't hit her head, has a clear memory of it, and then the memory becomes less clear on day two saying she doesn't know, Dr. Reinhard would attach more weight on the thing closer in time to the event rather than the subsequent telling. Dr. Reinhard testified that it would be an extraordinarily unusual scenario for the Claimant to have almost no symptoms five days from for her injury as was reported on October 20, 2008 and then two days later appear with an array of new and different symptoms. In terms of the order TBI symptoms would be expected, Dr. Reinhard testified that headache would be "right out of the gates," and disorientation and altered mental status should come on simultaneously with headaches. In the context of videotape review, Dr. Reinhard testified that he did not see no signs or symptoms of vertigo, disequilibrium or balance on the video tapes. In conclusion, Dr. Reinhard stands by the opinion he offered in the

written report for his record review that, to a reasonable degree of medical probability that the Claimant has no cognitive impairment on the basis of neurological injury and that her course of recovery is contrary to the pattern of spontaneous neurological improvement that is reliable observed following a traumatic brain injury of any severity. Dr. Reinhard testified that it is still his opinion that the Claimant has no neurological cognitive deficit that would preclude her from working.

Vocational Assessments and Evaluations

198. David W. Zierck, PsyD. Evaluated the Claimant on January 30, 2013 and March 13, 2013 and issued a written report entitled "Integrated Psychological and Vocational Evaluation" report on March 28, 2013. The Claimant was described by Dr. Zierk as "sufficiently polite, cooperative and friendly throughout the interview and testing process. She was able to communicate her thoughts in a clear manner and normal voice, albeit with infrequent episodes of stuttering and staccato speech patterns with word finding difficulties, and associated self-degrading comments…She was sufficiently oriented to place, time and situation and displayed intelligence consistent with her level of education without exhibiting any overt thought disorders or psychotic symptoms in her verbalizations." Dr. Zierk found that the Claimant displayed average to above average intelligence and did not display signs of psychosis or signs of serious mental illness or grave disability. Dr. Zierck reported that the Claimant's overall personality characteristics are consistent with someone who experienced early childhood parental insensitivity and disengagement that may have resulted in an element of underdeveloped personality with regard to self-image, self-esteem, and internalized validity as a person of worth. Dr. Zierk theorized that the Claimant used her practical intelligence, driven nature, and vocational life as a means of compensating for her history of parental insensitivity. "Thus, the loss of her vocational life due to case-related physical and mental injuries has not only introduced unwanted physical pain and functional limitations, but has essentially robbed her of her core identity and primary organizing principles as a human being. As part of his written report, Dr. Zierk prepared a summary of the portions of the voluminous medical records that he found "most relevant to the issue of [the Claimant's] residual functional capacity, permanent work restrictions, remaining labor market values and capacity to resume and sustain competitive employment under present day circumstances." Dr. Zierk also took into account the Claimant's subjective symptomatic complaints and functional limitations, especially the symptoms and limitations related to the Claimant's tolerance for activities. Dr. Zierk posited that the critical issue for him was whether the Claimant's disability would "allow her to satisfy the performance expectations of prospective employers as related to punctuality, reliability, dependability, and reasonably meet key requirements of a specific job as related to physical, cognitive and environmental demands and essential functions." Dr. Zierck reported that when considering the opinions of treating physician, Dr. Gellrick, the Claimant retained, at best, a capacity for sedentary employment but that when you incorporated discipline-specific functional parameters from Drs. Politzer, Entin, Torres, Wolffe and Ms. Haddow, that the Claimant's "capacity to resume competitive employment on a predictable, sustainable and productive basis, is substantially compromised and consistent with sub-sedentary and non-feasible

residual employability." Alternatively, when considering the medical opinions of Drs. Weingarten, Bernton, Kenneally and Goldman, Dr. Zierk concluded that the Claimant has retained sufficient residual functioning to resume employment in the local labor market in sedentary/light duty categories.

199. Dr. Zierk noted that he administered a number of assessment tools and tests, including:

- Mini-Mental Status Examination (MMSE)
- Health Index Questionaire (HIQ)
- Clinical Assessment of Depression (CAD)
- Perceived Stress Scale (PSS)
- Modified Somatic Perception Questionnaire (MSPQ)
- Oswestry Neck Disability Questionnaire (ONDQ)
- McGill Pain Questionnaire – Short Form (MPQ-SF)
- Illness Intrusiveness Rating Scale (IIRS)
- The Migraine Disability Assessment (MIDAS)
- Minnesota Multiphasic Personality Inventory, Second Edition (MMPI-2)
- Survey of Pain Attitues (SOPA)
- Millon Behavioral Medicine Diagnostic (MBMD)
- Brief Battery for Health Improvement – 2 (BBHI-2)

200. On the Clinical Assessment of Depression (CAD) and the Health Index Questionnaire (HIQ), Dr. Zierk noted the Claimant's scores reflected depressed mood, anxiety and worry, diminished interest and cognitive and physical fatigue. The Claimant scores further reflected moderate to severe functional problems related to depressive symptomatology. The claimant's Modified Symptomatic Perception Questionnaire (MSPQ) indicates that the Claimant's pain complaints "are likely somewhat influenced by symptomatic preoccupation or symptom exaggeration." The Claimant took a Million Behavioral Medicines Diagnosis (MBMD) inventory test which demonstrated among other things, that the Claimant's "capacity to moderate stress appears to be markedly impeded by the combination of illness apprehension, functional deficits, pain sensitivity, and future pessimism" along with "an inadvertent or intentional resistance to following medical recommendations." On the Brief Battery for Health Improvement – 2 (BBHI-2), the Claimant's score, "represented an obvious concern either related to a 'cry for help,' an exaggeration of symptoms for secondary gain, or desire to convince others of the seriousness of her plight….Her level of reported depression can impede physical rehabilitation and recovery." The Claimant's Minnesota Multiphasic Personality Inventory (MMPI-2) profile "presents a clear pattern of symptoms in which somatic reactivity under stress in a primary difficulty." According Dr. Zierck's interpretation of this testing on the PSY-5 scales, the Claimant also is or has become socially introverted and has little capacity to experience joy and pleasure. Ultimately, Dr. Zierck's psychological diagnosis was for Mood Disorder due to General Medical Condition and Pain Disorder

Associated with both Psychological Factors and a General Medical Condition. His Axis II diagnosis was "deferred" and he listed Histrionic, Negativistic and Avoidant Personality Features.

201. Dr. Zierk's vocational evaluation summary takes into account the consideration of five factors related to the Claimant's medical and non-medical issues. In terms of "defining the problem," Dr. Zierk opines that the Claimant's overall disability is multifaceted, variable and unpredictable. "Consequently, the relevant issue related to [the Claimant]'s current employability involves the assessment of her residual functional capacity against the physical/mental demand characteristics associated with alternative work opportunities in the open labor market." Dr. Zierk also notes that the various medical opinions about the Claimant's diagnosis and prognosis contain stark contrasts and the second factor he addressed is the ability to select pertinent information to solve the problem. He notes that on the one hand, Dr. Gellrick's medical restrictions of February 8, 2011 are consistent with the Claimant's resumption of work in a sedentary capacity on a modified basis. However, factoring in Dr. Entin's expressed concerns about the Claimant's ability to perform both complex and fairly simple and repetitive tasks, along with the additional medical opinions of Drs. Wolff, Politzer and Torres and Ms. Haddow, regarding the Claimant functioning, further alters assessment of the Claimant as capable of resuming sedentary work. However, Dr. Zierk also notes that the opinions of Drs. Weingarten, Bernton, Kenneally and Goldman do not attribute any physical or mental functioning difficulties to the October 15, 2008 work injury and/or, there is not sufficient objective evidence to support the ongoing "organicity" to account for the Claimant's markedly disabled presentation. Next, Dr. Zierk addresses the factor of consideration of the Claimant's self-reported symptomatic difficulties and functional problems in the context of the credibility of the Claimant's presentation. Regarding this factor, Dr. Zierk ultimately concludes that, "in light of the interplay between injury variables, neurophysiological and neuropsychological variables, metacognitive and emotional variables, and social and environmental variables, it is opined [the claimant] is likely experiencing a foundation of organic-based physiological distress and chronic and episodically incapacitating pain that is exacerbated by relatively poor adaptive functioning, inadequate coping skills, and insufficient social support." In addressing his fourth factor, Dr. Zierk expressly considers the opinions of the Claimant's treating physicians, including the discipline-specific functional parameters noted by Drs. Politzer, Entin, Torres and Wolff and Ms. Haddow, and in incorporating these opinions into his determination of the Claimant's overall employability equation, Dr. Zierk opines, "it appears her capacity to resume competitive employment on a predictable, sustainable, and productive basis is substantially compromised and consistent with sub-sedentary and non-feasible employability" and she "lacks the ability for quality work performance as well as the capacity for stability of employment performance consistent with everyday work demands that would satisfy reasonable management expectations." Finally, in terms of the fifth factor Dr. Zierk identified, the ability to draw valid conclusions and judge the validity of inferences, Dr. Zierk finds that, as "[the Claimant's] primary care physician, psychiatrist, and psychologist have collectively identified discipline-specific precautions and functional limitations, this consultant concludes that [the Claimant's] residual functional capacity is equivalent with the sub-sedentary category of

employment and that reemployment of any kind is non-feasible….[the Claimant] lacks the capacity to be considered a reasonable candidate for new employment on a sustainable, predictable, and productive basis."

202. Dr. Zierck testified by evidentiary deposition on December 6, 2011. When questioned about the expertise and qualifications of Drs. Thwaites, Schmitz and Kenneally, Dr. Zierk conceded that "they have a lot more years under their belt than I do. So they have a lot more experience and a lot more dealing with issues of high degree of variety. I have three years compared to their whatever. So the distinction is that I like to consider myself as having a very short learning curve and being smart in record time, but I also bow my head down to those people who have substantial [sic] more experience than I do, such as Schmitz, Thwaites, and Kenneally." Dr. Zierk testified that he identified the Claimant as having, "primarily a mood disorder. The mood disorder is expressed with an anxious presentation that she has a preoccupation…with her disability. It's become the primary source of her identity. She has a hard time letting go of it….so that's one of the reasons why you get some of these clinical elevations across different areas that are sensitive to somatic expressions." As a result of this, "there's an element of exaggeration as identified through the MSPQ." Dr. Zierk further testified that he disagrees that the Claimant is malingering or has a factitious disorder, but rather "she falls on the exaggeration continuum" which is one of the reasons he identified her with a pain disorder, which "is a pain condition that's legitimate and organic in nature where a person becomes overly attached to the significance of that pain disorder and begins processing their life around it. If you will, they develop a relationship with their pain….and so the person begins to become more exaggerated in their expressions of their disabilities….and uses their expressions of somatic distress as a plea for help." In this case, Dr. Zierk testified that he believes that this does not translate into a "secondary gain" issue for the Claimant as "there are secondary losses associated with secondary gain. The losses seem to far exceed the gains; and, therefore it doesn't seem to be reasonable that she's trading in all of her hope and talents for her to live the life as a disabled individual. I don't see where the benefit lies." Dr. Zierk testified that his main concern is the Claimant's unpredictability and he opines that, "she can get a job, she can present sufficiently to convince an employer to take a chance on her. But I'm mostly concerned about her ability to stay on job and stay on task on performance." He disagrees with Ms. Patricia Antcil's earlier testimony that there are some jobs out there that would work for the Claimant and testified that, "I can't even get my hands around that. I mean, it's so axiomatic. You have to be predictable in order to stay employed." With respect to the availability of jobs where you can work from home at your own pace, Dr. Zierk testified, "I don't liken it as being competitive employment. I liken that to college kids taking the year off. It's a joke." With respect to jobs with the company Expediter, Dr. Zierk would consider this "a bridge work employment opportunity where there is a heavy level accommodation to see – take an employee out on a trial run to see if they can satisfy the demands of an employer, and if they pass that probationary test, then and only then do they segue or bridge into real employment." Dr. Zierk testified that he would identify the three primary components to the Claimant's disability which lead to her unpredictability as vestibular (per Dr. Lipkin), vision (per Dr. Politzer) and headaches (per Dr. Wolff). Based on the comprehensive

assessments from these providers, Dr. Zierk finds, "that the level of ongoing problems across all three of those areas is such that she is no longer predictable. She's highly unpredictable, as a matter of fact." Thus, even based on the restrictions from Drs. Gellrick and Entin which put the Claimant in the sedentary category of work, Dr. Zierk opines the Claimant cannot do any of the jobs listed in the third paragraph of page 48 of Patricia Antcil's written report, due to the Claimant's "unpredictability, cognitively, physically, as well as interpersonally." Dr. Zierk further testified that "the length of this disability has reached a threshold that has convinced the individual that she's unemployed….the host of providers that have been orchestrating around her…have informed her, and she's that state of mind where she had to find a little bit of peace of mind, if you will, around it. She's accepted the fact that she has a severe incapacitating disability, and as a result of that, her behavior falls in line. She hasn't looked for work as a result of that." When questioned about the video surveillance of the Claimant doing different activities and how he would correlate that with what he saw when he evaluated her, Dr. Zierk testified that it, "didn't change my mind. Good days, bad days, that old expression, if you will." He found that this did not affect the issue of consistency which is important in the vocational setting. Based on the permanent restrictions from Dr. Entin and Dr. Gellrick alone, leaving aside the restrictions from Drs. Wolff and Politzer, Dr. Zierk still finds the Claimant incapable of earning any wages physically and psychiatrically.

203. On cross-examination, Dr. Zierk agreed that the ability to earn wages in the same or other employment would be applicable to part-time, unskilled, and minimum wage employment. He also conceded that according to Drs. Bernton, Weingarten, Reinhard, Kenneally and Goldman (who he identifies as "Camp B"), the Claimant would be capable of earning wages in the same or other employment. Dr. Lipkin, the vestibular specialist, is one of the major components utilized to determine the Claimant's ability to work according to Dr. Zierk. However, Dr. Zierck conceded that he had not seen Dr. Lipkin's November 23, 2011 report indicating that there would be no limitation from an otolaryngological basis for the Claimant being employable in a sedentary or light work based, in part, on the review of the video surveillance of the Peach Festival trip. In light of this, Dr. Zierk agreed that this "increased functionality" and there was "real world evidence that the vestibular issue, balance issue, is not a significant problem as long as you put her into a cautionary, sedentary category." Dr. Zierk also conceded that after reviewing the video surveillance of the Peach Festival trip, Dr. Gellrick also opined that the Claimant was capable of increased exertional capacity so that the Claimant "fell more into the sedentary light category." Dr. Zierck testified that he would have no problems with the Claimant going out to look for work. That would be true as a vocational rehabilitation specialist or as a psychologist. However, Dr. Zierck did not refer the Claimant out for vocational services nor did he conduct a labor market survey on the Claimant's behalf. Now, on cross-examination, rather than the three components affecting the Claimant's unpredictability, Dr. Zierk focuses on the headaches and he testified that the biggest impediment to the Claimant returning to work is headaches. He testified that it is his understanding that visual stimuli associated with looking at a computer screen leads to eye fatigue which contributes to onset of her headaches. Dr. Zierk testified that visual stimulation could include the intensity of lights, peripheral

motion, or a lot of other different stimuli that is no longer static. He agreed peripheral vision can absolutely be an issue when you drive a car. Dr. Zierk also agreed that when you are talking about computer screen brightness, you can dial it down. However, Dr. Zierk testified that he couldn't explain the discrepancy between the Claimant's testimony that she could not tolerate fluorescent lighting as it was like the light from a computer screen to her, but she nevertheless was able to sit in a courtroom for three days under fluorescent lighting and in this deposition which was lit by fluorescent lighting. Dr. Zierk also agreed there is nothing Dr. Politzer's opthamology functional capacity questionnaire that would indicate that the Claimant would have to rest her eyes after fixing her gaze on a computer screen for a period of time shorter than two hours and eye fatigue would not necessarily be an impediment to continuing to look at a computer screen. When questioned about other vision evaluations the Claimant underwent in this case, Dr. Zierck was not aware of Dr. Roe's report or that the Claimant had seen Dr. Roe. Zierck was not aware of the fact that the Claimant saw Dr. Wilson on referral from Dr. Gellrick. If you consider Drs. Roe's and Wilson's opinions, it would not appear that the Claimant had any visual impairment. Diplopia and double vision are the primary vision difficulty that contributes to fatigue and then sets into motion the headaches. Double vision contributes to the Claimant's headaches, however, Zierck has no understanding of the frequency of the Claimant's double vision. Dr. Zierk conceded that if the Claimant's double vision resolved you would have expected headaches to be less of a problem. He had not seen Dr. Politzer's February 29, 2012 report which said that the Claimant's double vision had resolved but he does agree that it's important as "any updated medical information from a treating or informed physician that gives us a better understanding of the ongoing nature, or lack thereof, is informative." Dr. Zierk testified that he wasn't aware that Judith Haddow hadn't seen the Claimant since January 6, 2010, that hit had been so long ago. He testified that the Claimant is capable of writing on an 8 by 11 page of long text but that, whether or not the Claimant was capable of reading an 8 by 11 page of text would depend on what that page looked like, the complexity of the page. Somatoform disorder is one of Dr. Zierck's diagnosis. It is described in the DSM-IV as unconscious exaggeration. Factitious disorder is conscious exaggeration and a factitious disorder you know you are deceiving, you just don't know why and malingering is a conscious disorder where there is an obvious external incentive. In describing the Claimant's memory, Dr. Zierk testified that the Claimant's remote memory is intact, recent memory is episodically disrupted. She does fine in conversation narrative. He saw the claimant twice on January 30 and March 13 and each time, the Claimant was on time, dressed appropriately and drove herself. Dr. Zierk's testing took three hours. He has a difference of opinion with Dr. Entin regarding whether the Claimant's anxiety and depression continues to be in remission. His psychological diagnosis is mood disorder superimposed on preexisting anxiety. Dr. Zierk testified that the Claimant's MSPQ testing, RBS testing, which is a neuro scale in the MMPI shows that the Claimant is sensitive to over reporting of cognitive and memory problems. Zierck agrees that testifying at hearing was "right up there in terms of being as stressful a situation as the Claimant was going to find herself in that would have amplified her symptoms." However, he thought she did variably well in terms of testifying, attentiveness, comprehending questions asked of her and communicating her

answers. Dr. Zierk agreed that the act of driving a vehicle is considered complex from a cognitive standpoint. He testified that, “driving is an executive functioning task.”

204. Ms. Patricia Anctil, a vocational rehabilitation specialist, prepared an Assessment Report on March 20, 2013. Ms. Anctil reviewed pertinent medical records, interviewed the claimant twice and then reviewed approximately 2 1/2 hours of video surveillance covering periods August 20, 2011 through December 7, 2011. Following her review of the medical records, Ms. Antcil drafted summaries of the medical assessments and recommendations. She indicated that “the medical records are extensive and will not be outlined in their entirety in this report.” Rather she focused on the “pertinent medical information used to complete this assessment” as set forth in the summary of the medical aspects of the Claimant’s evaluation from page 2 to page 23. Ms. Ancil also interviewed the Claimant over two meetings, the first conducted in person at the office of the Claimant’s attorney, and the second by telephone with the Claimant and her attorney present in order to complete the interview. During the course of the interview, Ms. Anctil noted that after talking more slowly and regulating her breathing, the Claimant was better able to control her speech and was only “occasionally observed to stutter.” The Claimant reviewed her current medical treatment and medications with Ms. Antcil, noting she sees Drs. Gellrick, Wolff, Entin, Torres and Politzer on a continuing basis. The Claimant indicated that her treatment with Dr. Zimmerman, Dr. Gridley and at Colorado Athletic Conditioning Clinic was not currently active, but that she would like to be treating with these providers as “it made her more functional and her life easier.” The Claimant reported working out at a gym with a trainer but stated that “some days she does not feel well enough to participate in her independent exercise program due to her headaches. With respect to her medical progress and ongoing symptoms, the Claimant reported that she is unable to multi-task and continues to have difficulty finding words. Overall, the Claimant said, “she has not really improved since the accident” with reference to her cognitive difficulties. The Claimant reported that “her ears are blogged and she feels like she is under water. She is distracted by noises.” The Claimant also reported continuing headaches, especially on days when a weather front is coming in. She reported that the Botox and Topamax help but she will also lie in bed when she has a headache. The Claimant reported having a headache every day and one or two migraines every other week. The Claimant also reported numbness and tingling in both arms and painful episodes in her right knee and stated that after sitting for approximately 15 minutes, when she unbends it, “it is as painful as giving birth. I am not exaggerating.” The Claimant reported that she is still having problems with her vision and “referenced her eye and brain not tracking.” The Claimant reported she was wearing multifocal lenses and stated that her “faraway” vision is good and her “reading is not so good” and noted difficulties with small print. The Claimant reported that when her anxiety gets really bad, relaxation techniques provided by Dr. Torres, “do not work real well.” Ms. Anctil’s report included multiple opinions of medical providers regarding her ability to function and her return to work capacity. These opinions range from physical limitations that generally place the Claimant in a sedentary light category, to cognitive performance opinions that run the gamut from “no psychiatric cognitive limitations or restrictions” to questioning if the Claimant can consistently perform even simple cognitive tasks on a recurrent basis. Ms. Antcil also noted her review of the

Claimant's FCE results and the observations made by the evaluators. Ms. Antcil also noted some of the inconsistencies between the Claimant's clinical presentation and what was viewed in the video surveillance. Ultimately, Ms. Antcil noted that the January 2011 FCE results pointed to "overall demonstrated abilities [which] are most consistent with the light work category at this time." In reviewing the surveillance video, Ms. Anctil observed and reported a number of inconsistencies when compared with the Claimant's presentation at her interview. These included:

- She was not holding an item in her hands, which during our meeting included a polished rock and per the records included small stuffed animals.
- Rubbing the left and right side of her forehead.
- Bending at the waist, numerous times, reaching below knee level, leaning forward at the waist, and quickly reaching down to pick up her bottle off the ground – her husband was standing next to her when this occurred.
- Squatting – sustained – observed several times, for 30 to 60 seconds at one time.
- Lift 2 cans of paint, each weighing approximately 10 pounds.
- Multi-tasking, talking on the phone, walking, looking at the mail.
- Simultaneously weeding and watering – use of hands/arms in extended position.
- Walking backward, sideways, walking in crowds.
- Extended reaching with both upper extremities.
- Playful, energetic while talking with people.
- Standing from a seated position, on the ground, with no assist to get up.
- Walking/Standing for approximately 1 ½ hours while wearing sandals.

In going through the Claimant's activities of daily living, Ms. Antcil notes that during the telephone portion of the interview, after approximately an hour, the Claimant's attorney asked the Claimant if she was okay or if she needed a break. Interestingly, although the Claimant responded that she would like to take a break, she also volunteered that "while she was on the telephone, she was walking around and doing things, she got some coffee and let the dogs out," which contradicts her testimony and statements to numerous evaluators that she is unable to multitask or do other things while she is on the phone. In discussing the Claimant's transportation issues, Ms. Antcil noted the Claimant reported that most of her local driving is within 10-15 miles or less and that while she avoids highway driving, there are certain places she will drive for a couple of miles on the highway during non peak hours. The Claimant has gone out with her daughter who has a driver's permit, but this is "nerve-racking" to her and the anxiety is too much to deal with so usually her husband takes her daughter out to accumulate driving hours. Ms. Anctil also conducted vocational research including a transferrable skills analysis. Considering all of the restrictions imposed by Drs. Gellrick and Entin, Ms. Anctil felt that the Claimant would need a selective placement, not sheltered employment, possibly part time work and vocational rehabilitation services to assist her gradual return to work in a sedentary position. In considering the return to work capacity opinions which included physical and cognitive abilities provided by Drs.

Kenneally, Goldman, Lipkin, Bernton, Weingarten and Reinhard, Ms. Anctil identified numerous occupations classified at the sedentary or light levels which would be appropriate for the Claimant including, but not limited to, teacher's aide, contract clerk, administrative assistant, office manager, school secretary, hospital admitting clerk, outpatient admitting clerk, file supervisor, general clerk, customer service representative, and registration clerk. She summarized by reporting that based on the opinions of Drs. Kenneally, Goldman, Lipkin, Bernton, Weingarten and Reinhard, and the 2011 FCE, the Claimant was capable of returning to work in a position she had previously held along with numerous other occupations which had been previously identified in her report.

205. Ms. Anctil testified by evidentiary deposition on December 6, 2013. Ms. Anctil testified that she has been employed as a vocational rehabilitation specialist since October of 1982. She has worked as a supervisor training peers in this field of work. She is a certified rehabilitation counselor, certified disability management, specialized certified case manager and a qualified rehabilitation counselor. She has received referrals from respondents where she has rendered opinions that injured workers are incapable of earning wages in the same or other employment. Ms. Antcil testified generally consistent with her written report. In response to questioning regarding the distinctions between sheltered work and selective placement which may involve vocational services that are available to assist people with situation assessments, trial work periods and on the job evaluations. Ms. Antcil clarified that this is called selective placement, not sheltered work. Ms. Antcil testified, as Dr. Zierk had previously, that this case was more complicated than most from a vocational evaluation standpoint "because of the varying opinions of the medical professionals," which is why Ms. Antcil testified that she focused more on the opinions from the medical records that related to the Claimant's limitations and ability to return to work. Although, Ms. Antcil noted that "knowing the diagnoses is also connected to that." When meeting with the Claimant on March 22, 2013, Ms. Antcil testified that within 10 minutes of the beginning of the meeting, the Claimant began displaying a lot pain behaviors such as rubbing her forehead with her hand, standing up, stuttering and rocking. At this point, Ms. Antcil referenced and recommended Ms. Haddow's compensatory strategies such as breathing techniques and using this strategy, the Claimant was not stuttering as much. The second interview (of approximately three hours) was done by phone on March 27, 2013. The Claimant did not request any breaks until a break was suggested by her attorney an hour into the meeting. The Claimant was stuttering, but Ms. Antcil testified that the Claimant did not have any problems understanding or answering questions and she did not appear to have any memory problems with the materials being discussed. On the ultimate question of whether the Claimant, taking into account her limitations, has the ability to earn any wages in the same or other employment, Ms. Antcil used the same classification of Camp A and Camp B to distinguish the contrasting opinions from each group of physicians. Ms. Antcil testified that in considering the opinions of the Camp B doctors, including Drs. Lipkin, Roe, Wilson, Thwaites, Reinhard, Bernton, Weingarten and maybe one or two others, the Claimant is capable of wages in the same or other employment. On the other hand, Ms. Antcil testified, if you consider the opinion of the Camp A doctors such as Drs. Entin, Gellrick and Torres, the Claimant

would be able to return to selective employment but she would need some assistance in getting back to work. It would be challenging. Ms. Anctil testified that she was informed by DVR counselors of an organization that provides information regarding legitimate at home employment where clients are placed providing part time employment for persons with disabilities that is within their physical capabilities. Ms. Antcil also testified that there is a company called Asurion that provides customer service phone work 3-4 hours a day that can be done at the employees own pace. This company provides virtual reality training and they hire people with disabilities. Asurion provides services for lost or damaged cell phones or road side assistance. The calls are inbound. If a person gets tired they can log out and pick it back up later. The log in and log out time basically determines how many hours a person has worked and how they get paid. Later in redirect testimony, Ms. Antcil reiterated that Asurion is an actual company providing real work opportunities and it is not "sheltered work." She noted that statistics show that there are 1,700 annual job openings for customer service positions in Colorado according to the U.S. Census Bureau. Ms. Antcil also testified that working with Expeditor may be feasible. Expeditor offers bridge work that involves updating customer information from billings or receipts. They are a bridge to other employment and provide on the job training support. After approximately three months depending on performance, they are put on the payroll. Ms. Antcil also testified regarding adaptive measures that could increase the Claimant's ability to sit at a computer screen. Ms. Anctil agrees with Dr. Zierck's testimony that eye fatigue after gazing at a computer for thirty minutes wouldn't necessarily mean that she would be limited to thirty minutes working at a computer. Ms. Antcil also testified that having the right computer screen size and decreasing the brightness would help, as would adjusting ambient noise and light and setting up the work station so that the Claimant could alternate positions. Use of a day planner is another compensatory measure that the Claimant uses. As a vocational rehabilitation specialist, Ms. Antcil testified that, if you're trying to find a job for a client, you definitely take into consideration those compensatory measures. When asked if she agreed with Dr. Zierk that "at home employment is the 'bottom of the barrel'," Ms. Anctil testified that she was shocked. She testified that she is "always shocked when a vocational professional refers to an occupation as bottom of the barrel because people are out there working, making a living, and it's kind of a slap in the face to the people who are out there."

CONCLUSORY FINDINGS OF FACT
Generally

206. A considerable amount of time over the multiple days of hearing was spent presenting lay testimony regarding the Claimant's pre-injury condition and lifestyle. Respondent did not challenge this testimony. Rather, Respondent has argued that, if anything this testimony demonstrates that the Claimant was high functioning neurocognitively prior to the subject claim and therefore would not fit in the category of patients who don't recover predictably (within 90 days) after sustaining an MTBI.

207. There was considerable discrepancy between earlier versions of the October 15, 2008 accident and versions reported later. It is found that the descriptions

of the injury the Claimant provided to Dr. Erin Woessner on October 16, 2008 and to Dr. Rick Artist on April 17, 2008 are likely the most accurate versions. The Claimant reported the incident to these doctors after the initial trauma of that day, but within a short time period after the accident. These two versions of Claimant's report of the injury are also consistent with each other. In reviewing and summarizing these reports, the ALJ finds that the Claimant was hit from behind by a turning vehicle as she crossed the street. The vehicle that hit the Claimant was turning left on red after complete stop which supports the fact that the Claimant was likely hit by a vehicle travelling at a lower speed, probably closer to the 5 mile per hour range. The Claimant experienced a direct hit on her right hip and her buttocks. The Claimant was knocked onto the hood of the car, the car brakes slammed, then the Claimant fell/slid onto the street. More likely than not, the Claimant did not hit or head or experience any loss of consciousness. To the extent that there was a loss of consciousness, it would have been brief.

208. It is noted by the ALJ that Respondent did not challenge the notion that it would not be necessary for the Claimant to strike her head in order to sustain an MTBI. However, regardless of whether she struck her head or not, the Respondent argues that if the Claimant did sustain an MTBI, it is on the "mildest" of the mild spectrum and would not account for the development of cascading subjective complaints over the years. In any event, the weight of the evidence is that the Claimant did not strike her head and she did not lose consciousness. However, regardless, it is found that the Claimant, more likely than not, did sustain a mild traumatic brain injury.

209. There are two groups of medical providers who have evaluated and/or treated the Claimant. Supporting the Claimant's contention that she is permanently and totally disabled are Drs. Gellrick, Torres, Entin and Schmitz, referred to as the "Camp A" medical providers. These providers generally provided ongoing treatment to the Claimant and argue that the Claimant is in a group of 10%-20% of patients with mild traumatic brain injury (MTBI) who don't get better in a predictable period of time (90 days). These opinions are inconsistent with what is prescribed in the Medical Treatment Guidelines (see below). The accepted science with regard to mild traumatic brain injuries is that symptoms are "worse at first" and that MTBI patients fully recover within ninety days. The Camp A physicians argue these two most basic MTBI concepts, regarding onset of symptoms and patterns of recovery are both inapplicable to the Claimant.

210. The second group of medical providers include Drs. Goldman, Lipkin, Kenneally, Roe, Wilson, Thwaites, Bernton, Reinhard and Weingarten and are referred to as the "Camp B" providers. They are generally evaluating medical providers who did not provide ongoing treatment to the Claimant. These Camp B providers subscribe to the MTG and generally agree that the Claimant is not an outlier or exception to the rule and she has sustained little to no loss of earning capacity and that she is employable.

211. The Claimant was present in person for testimony taken at the OAC on April 19, 2013, August 16, 2013, September 26, 2013 and November 22, 2013. In addition the Claimant was present for the deposition testimony of Dr. Schmitz on April

30, 2013, Drs. Gellrick and Entin on May 6, 2013, Dr. Torres on May 7, 2013, Dr. Thwaites on May 9, 2013, Drs. Bernton and Reinhard on May 10, 2013, and Dr. Zierk and Ms. Antcil on December 6, 2013. The Claimant was also present by phone for the testimony of Dr. Weingarten on May 13, 2013. In prosecuting this issue, the Claimant has demonstrated more of her ongoing capabilities than disabilities. She was in the witness stand testifying for a full day and two half day hearings. These hearings were stressful situations for the Claimant, where you would expect her symptoms to be at their worst. Nonetheless, she exhibited the ability to comprehend the questions being asked of her and to articulate intelligent answers. While she exhibited some intermittent stuttering, this did not interfere with her ability to answer questions in a cogent and understandable manner. Word finding issues were not overtly apparent.

212. Overall, the ALJ finds that the Claimant exhibited a great deal of endurance while testifying and being present at OAC hearings and being present at multiple depositions with medical testimony and discussion of complex issues. She was on time for hearings and depositions and her attendance and participation was reliable and consistent. The Claimant was present for three full days total of lay testimony, much of it her own testimony, ostensibly to support her contention that she is unable to earn wages in the same or other employment. However, in a way, her ability to conduct herself in the manner in which she did during the extended hearing time contradicts that very assertion. During testimony of over the four days of hearing at the OAC, the ALJ observed, and documented in notes, the Claimant's presentation. There are significant discrepancies in what the Claimant says she can do and what she has been shown to do during testimony presented at the hearing. Examples of this include:

- On the second day of testimony in the hearing, the Claimant was on the witness stand for a significant portion of the day. The Claimant did alter positions between sitting and standing several times and was noted to rub her hands together gently. The Claimant also occasionally rubbed her neck. On occasion, the Claimant complained of shooting pains and she rubbed her temples, however, the Claimant was able to continue participating in the hearing and did not leave the courtroom. With respect to stuttering, there was a brief period of time at approximately 9:40 AM when the Claimant was stuttering and having a bit of difficulty with testimony but this resolved quickly and she was able to respond to questions with only mild and intermittent stuttering afterwards. The first break was taken from 10:05 AM for approximately 15 minutes. After the break there was an interim witness and the Claimant was in the courtroom at counsel's table listening to the testimony until she resumed her testimony at approximately 11:20 AM. After having a break from testifying, the Claimant was initially observed to be stuttering more frequently than earlier but was able to testify and, as the testimony wore on, her speech became more and more fluid. At 12:10 PM, the Claimant testified that no one could tell how much pain she was in at that point and her head was "splitting" and her neck and back hurt. When asked why it did not appear that she was experiencing that much pain, the Claimant responded that

she didn't need to present with a scrunched up face and she didn't want to show the world she was in constant pain all the time. Thus, even at a time when the Claimant was complaining of a high level of pain, she continued to function and she was cognizant of how she presented to the public. This is contrary to her testimony and that of family and friends who testified that she would blurt things out and she couldn't help but engage in inappropriate social behaviors. In court, she clearly recognized the need to present herself with steady behavior and observe social norms and she was quite capable of doing this for an extended time period. When testifying in the afternoon of the first day, the Claimant was stuttering again, but she was able to talk and convey her point adequately and she often used her hands for emphasis. At one point shortly before 2:00 PM, the Claimant did become emotional and upset when recalling how she found out that she no longer had her job, and the manner in which this was conveyed to her which she clearly deemed to be very impersonal and a disregard for her feelings.

- On the third day of testimony, the Claimant's stuttering was worse when she began testifying at approximately 1:00 PM, but as she became more focused on the testimony, the stuttering subsided and her speech became more fluid over the course of the rest of the afternoon. Between 1:00PM and 1:30 PM, the Claimant alternated between standing and sitting several times and just before 2:00 PM the Claimant was observed standing and swaying slightly with her left hand held up to her neck on her left side. At approximately 2:40, the Claimant asked for a break. After testimony resumed again, the Claimant spend most of the rest of the afternoon sitting while she testified, with significantly less alteration in position between sitting and standing. After the break until the end of testimony on that day, the Claimant was not observed to stutter very often.
- On the fourth day of testimony, the Claimant alternated her position between sitting and standing more at the beginning of the hearing from 1:00 until the first break at 2:40 PM. She would sit for 5 to 15 minutes and then stand for 15-25 minutes at a time alternately. During this testimony, the ALJ observed the Claimant was speaking clearly with only very slight hesitation and/or stuttering and she did not appear to be having any significant word find problems. After returning from a 12 minute break in testimony at 2:52 PM, the Clamant sat and remained sitting while she testified until 4:13 PM when she stood again. During this time frame, just after 3:00 PM, the Claimant stated that she was having difficulty understanding questions and said her head was really hurting and she put her hands to her temples. She was, nevertheless, able to continue with testimony. At approximately 3:48 PM, the Claimant started to hold and press on her neck and at 4:13 she stood up again and remained standing until testimony concluded for the day. Although the Claimant verbally expressed that she was experiencing pain, specifically that her head was hurting, and she exhibited pain behaviors, she was able to continue testifying and was able to understand and respond to questioning.

- The Claimant testified that she had difficulty reading, and in particular, small print. However, it was clear from the testimony that she had read and reviewed many of the medical records in whole or in parts, including the voluminous reports from Drs. Weingarten, Bernton, Thwaites, Reinhard and Kenneally.
- The Claimant demonstrated a high functioning memory, recent and remote, at one time correcting her attorney regarding the chronology of treatment with Dr. Kenneally. She was able to provide an accurate work history with detailed job descriptions, even being able to recall remote military and real estate test scores. She remembered when she took all her meds and what they were for. The Claimant prepared and took notes with her to the witness stand to help jog her memory, but agreed that she was able to testify by and large from memory without using those notes.

The Medical Treatment Guidelines

213. The Claimant's primary argument is that under MTG C.6.a., she is in a category of 10%-20% of MTBI patients who do not recover within 90 days and may continue to report symptoms for several months or years. The Camp A providers opine that the Claimant fits into this patient class which they describe as "outliers." These providers do not address the remaining language contained in this Guideline section which provides in pertinent part:

> Deterioration over time after mild TBI is uncommon and in situations where patients have worsening complaints after mild TBI, other issues such as psychological or social stressors should be considered in the differential or other unidentified diagnosis.

214. There was persuasive testimony that the 10%-20% of people who don't follow the typical recovery pattern are patients with premorbid neurological vulnerability such as prior concussions, stroke and/or advanced age. Specifically, Drs. Reinhard, Bernton and Thwaites testified that when you are looking at the MTBI patients who do not recover in a predictable fashion, you are looking at patients with preexisting neurological conditions. The Claimant doesn't fall into this patient class as the overwhelming weight of the evidence establishes that prior to her injury on October 15, 2008, the Claimant was functioning at a high level cognitively, both at work and outside of work. Drs. Reinhard, Bernton and Thwaites also agree that delayed recovery can be found in patients at the upper end of the mild traumatic brain injury spectrum for those who have had retro grade amnesia or were in a post injury coma of ten or more minutes. However, these symptoms do not apply to the Claimant. MTG D.4.a. recommends consideration of neuropsychological testing patients at the upper end of the MTBI spectrum which would include a coma greater than ten minutes, post traumatic amnesia for greater than six hours, retrograde amnesia for events of more than thirty minutes before the injury and GCS of less than 15 at two hours post injury. As the medical records establish, none of these symptoms apply to the Claimant. Drs.

Thwaites, Reinhard and Bernton opine that, assuming the Claimant even had an MTBI, it would be in the mildest of the mild category.

215. The MTG provides at C.1.c.III. (page 6), that a patient with a more complicated mild traumatic brain injury demonstrates structural damage visualized on acute neuro-imagining which may result in a slower and incomplete recovery. No evidence, imaging or otherwise, has been presented demonstrating that the Claimant sustained any structural damage to her brain.

216. The Claimant recorded a 15 Glasgow Coma Score (GCS) with both the paramedics and at the emergency room. Drs. Gellrick, Entin and others have discounted this as a meaningless test. Dr. Bernton agreed that this is a gross test as to whether or not the Claimant had a minimal brain injury. However, when there is a situation in which a patient later states that she has gross defects that prevent her from functioning on the basis of a head injury years later, a GCS immediately following an accident is important and useful. Dr. Bernton's opinions are consistent with the MTG D.1.c.II. which provides that a "GCS performed in the field or the ER may aide in grading the severity of TBI."

217. The MTG D.1.d. provides that when diagnosing TBI and/or its severity, that:

> In addition to the individual's self-report, practitioners should attempt to obtain and review any external sources of data, including police reports, ambulance reports, emergency department records, eye witnesses reports, etc., the practitioner should utilize this information to establish or verify the probable degree of trauma involved in the incident and the consistency between these reports and current symptoms.

This is the "generally accepted and widely used practice" for obtaining a thorough history prescribed by the Guidelines (MTG D.1). This should be part of a thorough forensic investigation. The MTG doesn't square with the opinions of the Camp A providers who contend that early medical treatment/diagnostic testing is generally incompetent, that the early medical records are generally unreliable and that a GCS of 15 is meaningless.

Initial Emergency Medical Treatment Records

218. The only direct evidence presented by the Claimant regarding what did or did not take place with the EMTs and the ER personnel was her testimony and the testimony of her husband (although admittedly, he did not arrive until somewhat later). On the one hand the Claimant testified that she felt foggy and disoriented during this time and often could not recall what took place in the ER, while on the other hand, she testified that the right questions were not asked and the correct diagnostic testing were not administered in the ER. Her testimony in this regard is inconsistent and unsupported by the documentation contained in the medical records. The records show that the

Claimant was fully worked up and received the treatment one would expect from a Trauma I center. These medical records are a good indicator of the Claimant's condition at that time and there was no persuasive evidence presented to discount the information contained therein. The initial emergency medical treatment records are found to be reliable and adequately document the Claimant's condition and the treatment she received.

Early Medical Treatment

219. With the exception of headaches which were reported to have begun the morning after the subject accident, the early medical records from Kaiser and Exempla are consistent with what was reported at DHMC. The Claimant contends that symptoms first reported to Dr. Hnida on October 22, 2008 were previously missed because the Claimant was medicated. However, when the Claimant was seen by Dr. Artist at Exempla on October 17, 2008, she reported that she hadn't taken any Valium or Vicodin thus far that day.

220. On October 16, 2008, the Claimant reported to Dr. Woessner she sustained a direct hit on her right hip and behind, the she fell back onto car, the brakes slammed, then she was airborne and fell on the street. The Claimant told Dr. Woessner that she doesn't think she hit her head and that any loss of consciousness would have been brief. The Claimant did report that she had a headache that started at 7am the day after the accident. The Claimant described it as worse than her normal migraine. The Claimant specifically denied confusion, memory problems. As of the day after the accident, the Claimant appeared more concerned with physical issues such as back and neck pain. Even when Dr. Woessner recommended a head CT non-contrast scan to evaluate for a bleed, the Claimant and her husband refused and preferred to monitor closely.

221. Similarly, on October 17, 2008, the second day after the accident, the Claimant continued to deny any loss of consciousness and denied numbness or tingling in her upper extremities. At this point, the Claimant advised that her neck and her back were the most bothersome. She reported that she had a headache at the time of the examination, but not a "migraine type." On this day, Dr. Artist described the Claimant as an "alert, pleasant, healthy appearing female who appears to be fairly uncomfortable, sitting very stiffly and not moving all that much." The Claimant's main complaints were her neck and back and her right hip was not as bad. Dr. Artist also noted that the Claimant's right knee and ankle were stiff and sore. There was no bruising at this point. The Claimant denied numbness or tingling into her hands and upper extremities. Her range of motion was somewhat restricted for her neck and back and ankle. Dr. Artist assessed the Claimant with: "sprain right ankle, contusion and sprain right knee, contusion of ribs and low back, strain of the neck, strain of the back." At this initial worker's compensation medical evaluation, Dr. Artist advised that her symptoms were likely to resolve but "whether a couple more days, a couple weeks or a couple months is difficult to tell at this point." Three days later, on October 20, 2008, the Claimant

reported feeling a little bit better after the weekend. The Claimant reported that she was taking Motrin, Vicodin and Valium in order to resolve headaches she was getting.

222. Yet, by October 22, 2008, when the Claimant saw Dr. Dave Hnida, her reported symptoms increased and she now complained of dizziness, difficulty finding words, processing thoughts. She also reported that she still had neck and lumbar pain. The Claimant reported she was off medication except for ibuprofen. Although Dr. Hnida noted that the Claimant's mini mental status exam was normal, if at times slow and although he reported that the Claimant responded to questions such as her job description and what was done at physical therapy, he assessed the Claimant with a closed head injury and noted she should be off work. He referred her for a CT scan non-contrast of the head. This CT scan performed on October 24, 2008 did not demonstrate any traumatic or focal abnormality. There was no fracture, bleed or discrete brain lesion noted. By October 27, 2008, the Claimant reported her overall symptoms improved but the dizziness was worse. Dr. Artist recommended a neuropsychological evaluation, continued physical therapy and continued medications.

223. On November 10, 2008, the Claimant reported to Dr. Artist that she was trying to be more active but that she fatigues extremely easily. The Claimant's husband came with the Claimant to the visit and he reported that her reflexes and reaction time were markedly slowed and that the Claimant was having difficulty with speech and memory. The Claimant's headaches were better, not as severe, nor as often. The Claimant reported that she was not using Vicodin or Flexeril at all because they made her feel weird. The Claimant also reported dizziness at times for no good reason. Dr. Artist assessed the Claimant with a closed head injury, concussion, persistent symptoms and poor short term memory, neck and back strain-modestly improved and insomnia and headaches-improved. The Claimant's husband indicated that he would like the Claimant to see more specialists as it did not seem to him that the Claimant was getting better very rapidly. Dr. Artist cautioned that the Claimant's issues required time to resolve and perhaps some neuropsych cognitive therapy and continued physical therapy.

224. In the first month after her accident, the Claimant's symptoms at first appeared to be gradually improving and then as the original physical symptoms began to subside, the Claimant increasingly reported cognitive symptoms and new physical symptoms, such as dizziness. By the time the Claimant began to treat with Dr. Caroline Gellrick, the new symptoms were not resolved, so Dr. Gellrick began to refer the Claimant out for a considerable amount of diagnostic testing, including the neuropsychological testing. Now, the Claimant argues that the neuropsychological testing is not reliable in her case.

Neuropsychological Testing

225. The neuropsychological testing in this case has been problematic. The Claimant has undergone four separate batteries of neuropsychological testing in 2008, 2009, 2012 and 2013. In addition other treating and evaluating doctors have analyzed

and prepared opinions about the raw testing data. The conclusions are variable and, as Dr. Schmitz has pointed out, the doctors fall into two camps, one of which opines that there is nothing essentially wrong with the Claimant and that she is functional and able to return to work, the other which has concluded that the Claimant experiences ongoing cognitive, physical and emotional difficulties related to the October 15, 2009 injury.

226. In the November 12, 2008 neuropsychological evaluation report, it was noted that the Claimant was given two psychological tests to assess effort levels and symptom exaggeration. It was reported that, "In both tests, [the Claimant] presented with scores that were significantly below results observed in research samples of individuals with significant brain injuries. This type of profile is suggestive of an individual who is consciously exaggerating the extent and nature of a variety of clinical symptoms or cognitive impairment, and/or an individual who is not putting forth maximum effort." Taking her high level of anxiety into account, the results of the psychological evaluation were considered valid but it was noted that the Claimant's scores on many of the performance scales were estimated to be in the lower range or her usual or normal capabilities and did not represent the Claimant's maximum efforts such that the results were found to represent the "lower echelon" of the Claimant's capabilities. Due to the questions regarding effort, retesting in six months was recommended.

227. Dr. Kenneally administered a second neuropsychological assessment on September 15 & 17, 2009 a prepared a written report dated September 25, 2009. Relating to validity considerations, Dr. Kenneally noted that the Claimant's neuropsychological test results indicate a marked degree of variability that is atypical. This degree of variability in her test results is inconsistent with the pattern of test results seen in individuals with documented traumatic brain injury. Dr. Kenneally reported that the Claimant's test scores on the TOMM were below those seen in, "institutionalized elderly demented patients." Dr. Kenneally found her performance indicative of the intentional production of wrong answers and opined that failure at this level is actually a complex cognitive task requiring the patient to learn both the right and wrong answers to the test materials; and deciding in real time to provide the incorrect answers. Moreover, on other tests the Claimant performed at the mean or above average and given that the Claimant performed successfully on these tests, her failure on the simpler measures is inconsistent since the simpler tests cover items considered "building blocks" to the more complex cognitive tasks tested in areas where she performed better. Dr. Kenneally opined that the Claimant's current test results cannot be interpreted in standard fashion given her failure of validity measures, the marked degree of variability in her test scores and the stark contrast between her impaired test scores and her observed and self-reported level of daily functioning. Dr. Kenneally noted that individuals with documented traumatic brain injuries do not obtain this highly variable pattern of test results. Further, the Claimant's test scores on certain measures, if valid, would indicate that her level of impairment would make it impossible for her to sustain a conversation or independently dress or bathe herself on a daily basis. Dr. Kenneally noted that the testing did indicate that Claimant's depression and anxiety appear to be worsening and this may be having a negative impact on cognition, sleep, pain and recovery. She found that the Claimant's

test results “indicated a marked translation of psychological distress into physical symptomatology” and Dr. Kenneally advised the Claimant’s medical treaters to obtain objective measures of the Claimant’s pain symptom report when possible. Ultimately, Dr. Kenneally found “no objective neuropsychological test data to indicate that the Claimant has cognitive deficits resulting from her work injury on October 15, 2008. Dr. Kenneally’s opinions were credible, persuasive and are found as fact.

228. Dr. Schmitz performed another neuropsychological evaluation and prepared a written report dated November 26, 2012. Dr. Schmitz made a number of behavioral observations regarding the testing including his opinion that (1) the Claimant’s effort was suspect, (2) she displayed an attitude of uncaring and a notable lack of engagement, (3) on a test of fine motor coordination, at times she appeared to have placed the instrument correctly but then turned it to an incorrect position, (4) her performance on purported measures of effort was generally poor and strongly suggestive of her giving incomplete effort, (5) many of her performances on the clinical tests were at or below the 1st percentile and some of her scores had dropped from her previous testing in 2009, (6) her performance on the MMPI-2-RF was strongly indicative of the overreporting of somatic, cognitive, and memory complaints, and (7) in spite of being clearly aware of the importance and necessity of providing good effort on the current neuropsychological test battery, the Claimant’s performance was considerably less than optimal and suggestive of a non-cooperative approach to the assessment process. Yet regardless of these observations, Dr. Schmitz does not believe the Claimant is malingering in her condition. He opines that “fundamentally, [the Claimant] remains incapacitated from functioning effectively at her pre-accident level. As evidenced on the neuropsychological testing her cognitive functioning fluctuates on a daily or even minute by minute basis. She has developed a self-perception of being totally disabled, which clearly exacerbates any physical pain or cognitive difficulties she may be experiencing.” Dr. Schmitz acknowledges that the Claimant represents an “outlier” in her response to a traumatic event, but finds that “but for” the event of October 15, 2008, the Claimant would not be as functionally disabled as she has become. He went on to opine that it is unlikely that the Claimant would experience any considerable improvement in functioning with further treatment and he finds her condition permanent. Dr. Schmitz does concede that, unfortunately, as a result the validity concerns over the testing results, it is impossible to offer a definitive determination of the Claimant’s current level of neurocognitive functioning. He opined that while he found the Claimant did apparently sustain an actual physical injury (including a concussion) as a result of the original accident, it would appear that her “response” to this injury has been quite dramatic and it is likely that these non-organic factors are playing a substantial role in the maintenance of her ongoing complaints. At his deposition, Dr. Schmitz testified that the neuropsychological testing performed in his office and on the three other occasions with other providers merely shows that the Claimant is performing poorly, suggestive of poor effort, and inconsistent with what the Claimant was doing with Ms. Haddow. Dr. Schmitz testified that he finds that other factors are influencing her performance on the neuropsychological testing such as headache, speech problems, dizziness, emotional distress and sleep difficulties.

229. Dr. Thwaites performed a fourth Independent Neuropsychological Evaluation on March 8, 2013. Dr. Thwaites found that the Claimant performed in the significantly impaired range on a formal test of effort and motivation. Dr. Thwaites ultimately concluded that the Claimant's neurologic complaints across time are not associated with a concussion and her neuropsychological test data are not an accurate reflection of her abilities. He opines that she may have mild cognitive error, possibly based on her current medication regimen or based on psychiatric factors and pain. However, Dr. Thwaites concludes that, "we are without objective data that would indicate that she has cognitive impairment within a reasonable degree of probability, even though that is certainly a strong possibility." He finally notes that "it is safe to say that what we are seeing in her presentation does not make sense neurologically based on a minor concussion, a normal MRI, and what is known about her medical history. At his deposition, Dr. Thwaites further testified that when he was with the Claimant for two hours he did not see her lose her train of thought, she wasn't disimpulsive, disinhibitated, and he didn't notice any cognitive errors in his discussion with her. He saw no obvious cognitive problems at the conversational level. Based on the available information, Dr. Thwaites opined that there would be no reason the Claimant would be unable to sit at a computer screen for a sustained amount of time. Dr. Thwaites testified that there was not any objective evidence to suggest that the Claimant couldn't do her prior job from a cognitive perspective. Dr. Thwaites testified that he gave the Claimant the benefit of the doubt in diagnosing a concussion. He found that the early medical records in this case are important because, "there is a convergence of literature that suggests that cognitive symptoms and concussion symptoms are worst generally speaking closer to the time of the accident and improve across time." With this in mind, the records demonstrate that when the Claimant would have been at her worst from a cognitive perspective, she really wasn't displaying or reporting much in the way of cognitive symptomatology. Per Dr. Thwaites, the Claimant's presentation is unusual and not accurate from a neurologic perspective. Dr. Thwaites persuasively testified that he doesn't believe that what the Claimant is reporting and portraying is her true level of brain function. With regard to the validity testing, Dr. Thwaites noted that the Claimant scored worst than people with advanced severe Alzheimer's, people with severe traumatic brain injury, catastrophic brain injury, mental retardation. Dr. Thwaites does not believe it is plausible. While Dr. Thwaites did diagnose the Claimant with a mild traumatic brain injury, he disagrees with some of the Claimant's other medical providers who find that the Claimant continues to have neurogenic-based cognitive difficulties because of her concussion. Moreover, Dr. Thwaites opined that adding symptoms over time is not consistent with a mild traumatic brain injury. The ALJ finds the opinions of Dr. Thwaites to be credible and persuasive and they are found as fact.

230. The Claimant has argued that the neuropsychological testing performed in her case was not reliable and is invalid and that the evaluators, and in particular Mr. Broadhurst and Dr. Kenneally, did not consider confounding factors such as anxiety, depression, chronic pain and sleep deprivation. This is not consistent with the medical evidence and it would not explain why the Schmitz and Thwaites evaluations are invalid. In fact, Dr. Torres testifies that patient observation is a more reliable indication of a

traumatic brain injury than neuropsychological testing. The Respondents, on the other hand, point out the MTG provides:

> Neuropsychological assessments are generally accepted and widely used as a valuable component of the diagnosis and management of individuals with TBI. They include sensitive tests that are used to detect cognitive deficits, severity of impairment, and improvement over time.

231. In considering the most persuasive opinions and looking at the 4 separate batteries of neuropsychological testing as a whole, the ALJ determines that, to the extent that the Claimant's neuropsychological evaluations test results lacked validity, it is because she either exaggerated her symptoms or did not give full effort or both. The ALJ does not credit the Claimant's argument and Dr. Torres' opinion that the Claimant's exaggeration of symptoms and her failure to give good effort in neuropsychological testing is actually a symptom of a closed head injury.

The Claimant's Ability to Drive and Travel

232. Following her accident, the Claimant has been able to drive locally, including but not limited to, driving to medical appointments, 10-15 miles from her house. The Claimant has renewed her driver's license online and no driving limitations have been imposed by Spalding Rehabilitation or the Department of Motor Vehicles. At the hearing, the Respondent emphasized the Claimant's ability to drive, including the introduction of a street map and mileage reimbursement information to illustrate the Claimant's ability to drive distances ranging from 10-15 miles round trip to 20-26 miles round trip on a regular basis to attend medical appointments. This emphasis on driving is placed in the context of the MTG which describes driving at K.1. as:

> Independent driving is considered a complex activity of daily living. An individual's potential for safe driving is influenced by an intricate interaction of physical, cognitive, visual and behavioral components.

Driving is categorized in the Guidelines as an Instrumental vs. a Basic ADL. Instrumental ADLs are defined as activities that, "require higher level cognitive skills, including the ability to plan, execute and monitor performance, as well the ability to evaluate the information and make sound judgments." MTG I.2.a. and b.

233. In this context, Dr. Gellrick's February 26, 2009 clinic note is significant. When Dr. Artist last saw the Claimant on November 25, 2008, he reported that she was "unable to drive motor vehicles." Then, Dr. Gellrick imposed a "no driving" restriction when she initially saw the Claimant on December 8, 2008 and again on December 15, 2008. At no time prior to the February 26, 2009 evaluation did Dr. Gellrick lift the no driving restriction, nor did the Claimant report to Dr. Gellrick that she was driving; short distances or otherwise. The Claimant only disclosed that she was driving to Dr. Gellrick after surveillance video demonstrated her ability to drive. At that point, the Claimant reported to Dr. Gellrick that surveillance video showed her driving at times and she

drives short distances back and forth from the house. Dr. Gellrick reported the Claimant no longer had dizziness and with her headaches clearing she has been able to tolerate driving so Dr. Gellrick cleared the Claimant to drive ostensibly because she no longer had dizzy spells and her headaches were dissipating, clearing. However, the Claimant only disclosed that she was driving when surveillance video gave her no choice. Her driving capabilities have only increased and improved since that time. If the Claimant can drive short distances by virtue of no longer having dizziness and clearing headaches, the fact that she can now drive to medical appointments with Drs. Entin (Greenwood Village), Gellrick (Colorado and I-25), Torres (Cherry Creek), and Wolffe (Porter Hospital), shows that, contrary to her testimony, that dizziness and vertigo are no longer a problem which interferes with her ability to function. The Claimant began Botox treatments with Dr. Wolffe, post MMI, and has acknowledged that this treatment has decreased the intensity and duration of her headaches. This is inconsistent with the Claimant's testimony that she continues getting dizzy spells and has not gone a single day subsequent to her accident without a headache.

234. The surveillance video viewed by the ALJ demonstrated that the Claimant, in each instance of driving, was comfortable and capable of driving over time. Contrary to the Claimant's testimony, she drives the family minivan and drives in snow. She passed a driving evaluation test at Spaulding Rehab and renewed her license (online) with no restrictions of any kind, highway or otherwise. She has not had an accident or a moving violation (with the possible exception of a photo red light ticket). She drives her children around and has even taken out her daughter, who had her permit and was learning to drive, although the Claimant did testify that this made her nervous.

235. In addition to driving, the Claimant has been able to travel by air on her own to out of state destinations which include Kansas, Ohio and Virginia. She has traveled out of state on road trips with family members to destinations which include Kansas, Ohio and Mississippi and she has traveled longer distances with friends and family within Colorado.

236. Based on persuasive evidence to the contrary, largely related to the Claimant's ability to drive on a regular basis, and her ability to tolerate travel, the Claimant's testimony regarding the post-MMI severity and impact of her dizziness and headache symptoms is not credible. It is more likely than not that these symptoms are of a lower severity than she is reporting to her physicians and that they have less of an impact on the Claimant's ability to function and engage in activities of daily living that her hearing testimony would indicate.

Surveillance Video

237. A substantial amount of surveillance video from August 20, 2011 through December 7, 2011 has been submitted to the Court and reviewed by the ALJ. The videos do not demonstrate that the Claimant is significantly limited by any disability, whether it be physical, cognitive, vestibular, psychological or otherwise. In the surveillance video, the Claimant presents as a person who is able to interact with family,

friends and strangers. While the Claimant has argued that the video shows only selective times and highlights when the Claimant is having a good day and shows her only when she is functioning at a higher level, the ALJ finds that there was a significant amount of video taken over a number of days and, while the video fails to capture every waking moment of the Claimant, there is a substantial amount of footage from which reasonable inferences can be drawn.

238. The Claimant reported in March of 2013, continuing cervical, thoracic and lumbar spine symptoms with functional disabilities related to chronic pain, incapacitating headaches and numbness in her arms and right shoulder pain and limitations. None of this is observed in the surveillance. She reported to Pat Anctil that she has difficulty with depth perception, problems judging distances and banging into things and sometimes falls while walking. None of this is observed in the surveillance videos. Neurocognitive and psychological problems are difficult to videotape. However, at no time is the Claimant seen losing her balance or having to hold on to family, friends or inanimate objects to steady herself, other than holding a shopping cart while shopping (which does not appear to be a function of balance issues, but rather a normal grocery shopping behavior). In the Peach Festival video surveillance, the Claimant is seen walking through crowds, moving from a standing to a sitting position and vice-versa, while balancing multiple items using both upper extremities. She is not seen carrying and rubbing her stone, stuffed animals or any other objects nor is she seen wringing her hands as she did during the four days of hearing testimony.

239. Overall, the surveillance video presents the Claimant going about activities of daily living over several months in 2011 which contradicts the Claimant's stated abilities during testimony at the hearing. While the Claimant does not engage in any overly strenuous activities, she is regularly seen driving without difficulty, walking, bending, and picking up and carrying items and engaging in activities that do not correlate with the Claimant's descriptions of her physical and mental limitations. In videotapes of her activities for periods covering August 20, 2011 through December 7, 2011 the Claimant does not appear physically, cognitively, vestibularly, visually, psychologically or otherwise disabled. The Claimant does not appear to have any restrictions and she does not engage in any self-limiting behavior. The Claimant presents as a person able to interact without limitations or hesitation with friends, family and strangers. The Claimant appears to be animated and appropriate in her social interactions. The Claimant is seen at various times engaged in activities that are in excess of limitations assigned by medical providers and are in excess of the Claimant's subjective complaints as self-reported and/or testified to limitations. The Claimant is seen lifting, bending at the waist, crouching/squatting and reaching overhead with both arms. The Claimant is seen out in sunny weather without sunglasses, she demonstrates no balance problems, she exhibits fine motor skills, she is able to tolerate large groups of people and is able to navigate throughout crowds of people. She is able to drive and exhibits no problems with dizziness. From this, in concert with other persuasive evidence, the ALJ draws the reasonable inference that the Claimant has not accurately described her abilities and limitations during testimony at the hearing and to her treating and evaluating physicians. The ALJ finds that it is more likely than not that the Claimant

is able to engage in more activities, for longer durations, with fewer negative consequences, than she has represented in testimony and to her doctors.

Medical and Psychological Opinions Regarding the Claimant's Functional Limitations

240. The Claimant's ability to earn wages in the same or other employment is based in large part on whether she has limitations and what those limitations are.

241. The Camp A doctors include, Drs. Gellrick, Entin, Schmitz, Torres and Zierk. Dr. Gellrick initially assigned restrictions on March 15, 2011 when she and the Claimant completed a physical restrictions form provided by the Claimant's attorney. Those restrictions are no longer applicable. Dr. Gellrick has since modified those restrictions and, in her most recent opinion, at her July 24, 2013 supplemental deposition, Dr. Gellrick testified that "I don't know what she can do today" and recommended a repeat FCE. She agreed that her opinions of restrictions were guess work. Dr. Gellrick continues to maintain her opinion that the Claimant should be limited to no more than a 30 minute working at a computer at one sitting. On November 5, 2011, she reports, "Her work would not involve necessarily computer work because of the vestibular problems with ocular motor dysfunction that she still has" relying on Drs. Lipkin and Politzer. Yet, Dr. Lipkin reported on November 23, 2011 that from an otolaryngological basis, the claimant can return to sedentary and light duty work. Even if you credit Dr. Politzer's opinions (over those of Drs. Roe and Wilson), the claimant's limitation for working at a computer is two hours at a time, not 30 minutes. If you credit the opinions of Drs. Wilson and Roe, who are also both Gellrick referrals, the Claimant has no neurocognitive/visual limitations. Dr. Entin assigned a 10% impairment rating based on impairment of the complex integrated cerebral function, a curious rating in view of his deposition testimony that since all neuropsychological testing is invalid, there is no way to objectively quantify the Claimant's neurological dysfunction. In his opinion, the Claimant's primary problems are headaches and mental fatigue. He doesn't know if the Claimant could work up to 4 hours a day based on what the Claimant told him. He would defer to Dr. Lipkin, the otolaryngologist, on limitations attributable to vestibular problems, vertigo and dizziness. Dr. Schmitz' testimony and opinions are inconsistent. He admitted his bias with regard to the psychological diagnosis of malingering and factitious disorder. As was true with Dr. Gellrick, he misreads and relies on a faulty interpretation of whether the Claimant initially had objective neurological symptoms. Specifically, he testified to his reliance on and misconception of reported neurological symptoms of slurred speech, facial droop and incontinence of urine in the EMTs' report. In Dr. Schmitz' neurological testing evaluation report of November 26, he reported, "[the Claimant's] effort was suspect throughout much of the testing day. She displayed an attitude of uncaring and a notable lack of engagement…Her performance on purported measures of effort was generally poor and strongly suggestive of her giving incomplete effort." He further noted that some of the Claimant's scores had dropped from her previous testing in 2009. He also reported that the claimant performed, "very slowly during a test of fine motor coordination…" and, "At times she appeared to have placed the instrument correctly but then turned it to an incorrect position. Although it is clear

that the Claimant did not give full effort during the November 26, 2012 evaluation, as with the three other neuropsychological evaluations, Dr. Schmitz offers a multitude of excuses for the Claimant's behavior, some of which are not consistent with medical literature and the opinions of other more persuasive evaluators. The restrictions assigned by Dr. Torres are also not reliable. He completed a residual functional capacity statement, provided to him by the office of the Claimant's attorney on March 15, 2013. At his May 7, 2013 deposition, only seven weeks later, he significantly altered those restrictions, without basis. There is nothing in the record indicating that he saw the Claimant during this interim period of time. His explanation for his alteration of restrictions is that he does not like the forms provided by the attorney's office. The revisions set forth in his deposition testimony do not reflect independent opinions. Dr. Torres continued to use the same form to which he raised objections and simply changed his opinion regarding restrictions. He moves restriction severity from one category to another. Additionally, in view of the Claimant's multiple trips to Kansas, Ohio, Mississippi and Virginia, Dr. Torres' placement of the Claimant in the most severely restrictive category for travel, further exemplifies the unreliability of his opinions and assigned restrictions. Dr. Torres' diagnosis of post traumatic stress disorder is not shared by Dr. Entin or Dr. Weingarten. Dr. Torres disagrees that the Claimant has a pre-existing (Axis II) diagnoses of histrionic features. This is at odds with Dr. Entin, Dr. Weingarten and Dr. Zierck. Dr. Torres testifies that there is no mention in the EMT and ER records which would demonstrate a thorough observation relevant to the claimant's cognitive status. This testimony does not square with the information contained within those records or the MTG. Lack of dependability and inconsistency are offered by the Camp A providers, as a primary reasons why the Claimant would be unable to return to work. However, the Claimant's dependability has been consistently demonstrated by her ability to keep her medical appointments. Similarly, the claimant was able to attend the Peach Festival because she was, motivated to do so. Moreover, her attendance and participation in at multiple days of hearing and even more days of deposition testimony demonstrate the fallacy of this argument. As a psychologist, Dr. Zierck reported that the Claimant had a somatoform disorder which is an unconscious exaggeration of symptoms. Somatoform is a differential diagnosis for conscious exaggeration and Dr. Zierck's testing was consistent with symptom exaggeration. He opined that the testing demonstrates that the Claimant has become socially introverted and has little capacity to experience joy and pleasure. These characteristics are not seen anywhere in the surveillance video. Dr. Zierck testified that the two most significant vocational limitations are the Claimant's vestibular and ocular problems. However, once he was made aware of Dr. Lipkin's updated opinions, he agreed that the Claimant did not have any vestibular problems, vertigo or dizziness which would preclude her from returning to pre-injury occupations. He agreed that Dr. Lipkin's November 23, 2011 report put Dr. Lipkin in Camp B. Similarly, Dr. Zierck had not reviewed the reports from Drs. Roe and Wilson, both of whom agreed that the Claimant had no visual limitation to returning to work, whether it be brain related or otherwise. Dr. Zierck agrees that Dr. Politzer had only limited the Claimant from fixing her gaze on a computer screen or printed matter for longer than two hours without the need of resting her eyes. He agreed that while Dr. Politzer indicated that the Claimant's eyes may tend to "fatigue" after gazing at a computer screen or printed matter for more than 30

minutes, the bottom line limitation for sitting at a computer was two hours. Eye fatigue in and of itself would not preclude the Claimant from continuing to work at a computer screen or printed matter.

242. Considering the opinions of Drs. Kenneally, Goldman, Lipkin, Thwaites, Bernton, Weingarten, Reinhard, Wilson and Roe (Camp B), the Claimant has little to no limitations of any kind and is able to earn wages in the same or other employment. She can return to pre claim employment. Many of these Camp B physicians evaluated and/or treated the Claimant on referral from Drs. Artist or Gellrick. They are not traditional litigation-type Independent Medical Examinations. They include Drs. Goldman, Lipkin, Roe, Wilson and Kenneally. The Camp B IME reports and testimony are well-reasoned and in line with the Medical Treatment Guidelines and supported by authoritative scientific sources. Based on the totality of the evidence, the opinions of these Camp B providers are overall found by the ALJ to be more compelling and persuasive.

Ultimate Findings

243. There is considerable conflicting expert testimony and opinions regarding the extent of the Claimant's injuries, her limitations and her ability to earn wages in the same or other employment. As found, the Camp B medical providers, including Drs. Goldman, Kenneally, Lipkin, Thwaites, Bernton, Reinhard, Weingarten, Roe and Wilson, are found to be more persuasive, compelling and are afforded more weight than the opinions of the Camp A medical providers on issues which include, but are not limited to, the claimant's restrictions and employability. The Claimant's activities as shown in the surveillance video and as described in testimony, including but not limited to, her driving activities and post injury travel, are found to be more consistent with the opinions assigned by the Camp B providers.

244. With respect to the vocational rehabilitation expert opinions, the opinion of Ms. Patricia Antcil is found to be more persuasive than that of Dr. Zierk.

245. Considering and weighing all of the lay and expert testimony, the hearing submissions, including but not limited to, the surveillance video, it is found that the Claimant has not satisfied her burden of proving that she is unable to earn wages in the same or other employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Permanent Total Disability

Permanent total disability, as defined in § 8-40-201(16.5), C.R.S., means an "employee is unable to earn any wage in the same or other employment." When the statute was amended in 1991, it established a strict definition of permanent total disability. The intention of the amendments was to create a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently and totally disabled. *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115 (Colo. App. 1997). A claimant must also establish that the industrial injury was a significant causative factor by showing a direct causal relationship between the industrial injury and the permanent total disability. *Joslins Dry Goods Co. v. Indus. Claim App. Off*., 21 P.3d 866 (Colo. App. 2001)*; Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App.1986).

It is the claimant's burden of proof to establish that she is permanently totally disabled by a preponderance of the evidence. The question of whether claimant has the ability to earn any wages is one of fact for resolution by the administrative law judge. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In *McKinney* the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. It is not necessary that the claimant be able to return to previous employment. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for the purpose of the statute. *See also Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997). Although, if the evidence establishes that a claimant is not physically able to sustain post-injury employment, or that such employment is unlikely to become

available to a claimant in the future in light of particular circumstances, an ALJ is not required to find a claimant is capable of earning wages. *Joslins,* supra; *Holly Nursing Care Center v. Industrial Claim Appeals Office, 992 P.2d 701, (Colo. App. 1999).*

The determination of whether a claimant is permanently and totally disabled is made on a case by case basis and varies according to the particular abilities and circumstances of the claimant. In determining whether a claimant is permanently totally disabled, the ALJ may consider various "human factors" such as mental capabilities, physical ability, education, vocational training, overall physical condition, former employment, and availability of work a claimant can perform within a commutable labor market. The overall objective is to determine whether employment exists that is reasonably available to a claimant under her particular circumstances. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

A huge volume of testimony and documentary evidence was presented in this case and the reader is referred to the extensive and detailed findings of fact, and most especially the conclusory findings of fact, as set for the above, in lieu of redundant recitation of these facts here. Considering and weighing all of the lay and expert testimony, and the hearing submissions, including, but not limited to, the neuropsychological test results and interpretations, diagnostic imaging and testing, and the surveillance video, it is determined that the Claimant has failed to establish, by a preponderance of the evidence, that the Claimant's work injuries prevent her from earning a wage in her previous employment or any other employment. While the ALJ acknowledges that the Claimant suffers from deficits related to her October 15, 2008 injury which may negatively impact her ability to function and to work, the Claimant has sufficient residual function, ability, training and education to obtain and maintain continuous employment in at least a modified, part-time, sedentary position and such employment is available to the Claimant in her commutable labor market.

ORDER

It is therefore ordered that:

1. The Claimant has failed to establish that she is unable to earn any wages and has failed proven that she is entitled to receive permanent total disability benefits. The Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-

070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 25, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-784-196-12

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for June 18, 2015, 2015, in Denver, Colorado. On June 2, 2015, the respondents filed a Motion for Summary Judgment, which was rejected on the same date for failure to comply with Office of Administrative Court Rules of procedure (OACRP), Rule 17, 1 CCR 104-1. On June 4, 2015, the respondents filed an Amended Motion for Summary Judgment, in compliance with Rule 17. On June 12, 2015, the Self-Represented Claimant filed a Response to Respondents' Amended Motion for Summary Judgment, with at least 100 pages of documents that apparently go the merits of what has been previously adjudicated. On June 16, 2015, the Respondents' Amended Motion and the Claimant's Response were assigned to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for a ruling.

Hereinafter David Valdez shall be referred to as the "Claimant." Alstom, Inc. shall be referred to as the "Employer." All other parties shall be referred to by name.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact concerning whether the Claimant is barred from re-opening his workers' compensation claim when an ALJ previously determined, and the decision was upheld on appeal by the Industrial Claim Appeals Office (ICAO) and the Colorado Court of Appeals, that all of the Claimant's future medical conditions were unrelated to his January 9, 2009 work injury.

The Respondents bear the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant worked as a boilermaker for the Employer. While at work for the Employer on January 9, 2009, the Claimant suffered an admitted aggravation of his pre-existing condition when he fell. Specifically, he sustained admitted compensable aggravations to his neck, back and left shoulder.

2. In December of 2010, the Claimant's authorized treating physician (ATP), Mary F. Burgesser, M.D., placed him at maximum medical improvement (MMI) for the injuries he sustained in 2009. Dr. Burgesser was not a Level II accredited physician and, therefore, Mark Paz, M.D., performed an impairment rating.

3. The Claimant ultimately underwent a Division Independent medical Examination (DIME) with Kathy McCranie, M.D. The DIME physician agreed that the Claimant had reached MMI for his 2009 injuries in December of 2010. Dr. McCranie also provided the following causation determination:

> Based on the evaluation done today, I would agree that [Claimant] has reached maximum medical improvement. I would agree with the date of maximum medical improvement of 12/28/10. I would recommend that he work within the light work category due to his longstanding, chronic pain problems. I do not believe that there is any medical maintenance care required for his injury of 01/09/09, as all of his cervical and lumbar spine complaints, as well as his left shoulder complaints predated his work injury and there are no objective findings to indicate any change in his condition

post injury, any further follow up care should revert back to his only personal physician outside of the Workers' Compensation arena.

4. DIME Dr. McCranie placed the Claimant at MMI on December 28, 2010, with no permanent impairment, determining that any medical conditions were not causally related to the admitted injury after that date.

5. Despite making this definitive causation determination in favor of the Respondents, the DIME nevertheless performed a permanency evaluation with apportionment just to further illustrate that the opinion was correct. Such an evaluation was purely gratuitous. Dr. McCranie ultimately determined that claimant had a 0% impairment rating for the neck and low back and that although there could potentially be a 1% rating for the shoulder, however, she questioned how even that potential rating could be related to the work injury. The ALJ finds that Dr. McCranie's rating exercise was hypothetical in the workers' compensation context.

ALJ Walsh Decision

6. The Claimant did not accept the causation and other opinions provided by the DIME. As a result, a hearing was held in this matter before ALJ Donald Walsh on February 24, 2012. ALJ Walsh provided the following factual findings:

> * "The DIME physician noted that the claimant had returned to base line after the work injury and his ongoing problems were not causally related to the work injury.. . . Even though Dr. McCranie found that the Claimant's ongoing condition was not work-related, she nevertheless performed permanent impairment testing to see if there would be ratings after apportionment. The permanent impairment ratings were essentially 0% after properly performing apportionment."
>
> (ALJ Walsh's Fact Findings, #26 and #27).
>
> * "The ALJ finds the DIME physician's causation, MMI and PPD ratings to be persuasive and the Claimant failed to overcome these opinions by clear and convincing evidence.. . . The Claimant failed to prove an entitlement to ongoing maintenance medical benefits by a preponderance of evidence. Moreover, any treatment that the Claimant requires is causally related to these pre-existing conditions ***as the Claimant returned to his base line condition after the admitted work injury***."

(ALJ Walsh's Fact Findings #35 and #37) (emphasis supplied).

7. As a result, ALJ Walsh specifically made a finding that the Claimant had returned to his baseline condition ***and the ongoing medical conditions were not work-related***. ALJ Walsh also denied the Claimant's request for permanent disability benefits and/ or ongoing workers' compensation benefits.

Appeals of ALJ Walsh Decision

8. The Claimant appealed to the Industrial Claim Appeals Office (ICAO). ICAO affirmed the ruling of the ALJ. In its Order, ICAO held as follows:

> * "In her report, the DIME physician specifically states that "there are no objective findings to indicate any change in his condition post injury.". . . The ALJ interpreted this to mean that claimant returned to baseline from the January 2009 injury and his ongoing problems were not causally related…."

9. After reviewing ALJ Walsh's decision, ICAO specifically affirmed the causation determination made by the ALJ as follows:

> * "The evidence supports the ALJ's finding that the claimant's disabling condition is the result of the pre-existing condition rather than the January 9, 2009 injury and the entirety of the claimant's impairment is attributable to the prior injury.. . . the findings of the ALJ are abundantly supported by the record. Therefore, we are bound by those findings and are not persuaded that the ALJ committed reversible error in finding that the claimant failed to overcome the DIME physician's opinion of permanent impairment."

10. The Claimant subsequently appealed the matter to the Colorado Court of Appeals. In upholding the decisions of ICAO and ALJ Walsh, the Court of Appeals specifically made the following determination:

> "… the DIME physician opined that claimant had not sustained any permanent injuries as a result of the 2009 accident. Her conclusions were corroborated by the employer's retained medical expert. Employer's retained medical expert opined that no objective change in claimant's

> condition could be attributed to the 2009 work-related accident. He also expressly concurred with the DIME physician's methodology in calculating the impairment rating, agreed with the DIME physician's conclusion that claimant sustained a zero percent impairment rating for his 2009 injuries, and noted that the same result would be reached even if claimant's preexisting injuries were assigned a higher impairment rating. This corroborative evidence amply supports the ALJ's finding that the DIME physician's impairment rating was accurate and that claimant's ongoing need for medical care was not causally related to the 2009 accident." (Court of Appeals ruling page 6)

11. The Claimant did not appeal the decision of the Court of Appeals. As a result, the ALJ's original finding that the Claimant did not suffer any permanent injuries and his ongoing medical conditions were pre-existing is final.

Petition to Re-Open

12. On August 8, 2014, the Claimant filed a Petition to Re-Open his 2009, workers' compensation claim due to an alleged change in his medical condition.

13. The Claimant attached a medical report from Robert J. Greenhow, M.D., stating that the Claimant was seen for a follow up with regard to his left shoulder. Dr. Greenhow provided an addendum to his report which states that it was brought to his attention that Claimant's ongoing symptoms are related to an old work injury from 2009.

14. Subsequent to the Claimant filing his Petition to Re-open, he filed an Application for Hearing. In his Application, the Claimant stated that he objected to the Order closing his worker' compensation claim, the he has the legal right to overcome the DIME. In fact, the Claimant attempted to overcome the DIME of Dr. McCranie and ALJ Walsh determined that he failed to do so. ALJ Walsh's decision was affirmed by ICAO and the Court of Appeals. There was **no** timely motion for reconsideration or Petition for a Writ of Certiorari to the Supreme Court. Consequently, ALJ Walsh's decision that the Claimant failed to overcome the DIME of Dr. McCranie became final.

15. The Claimant also alleged that his permanent impairment rating should not have been apportioned with his prior impairment rating. And lastly, he alleges that he has suffered from a change in condition after his MMI date of December 28, 2010.

Ultimate Findings

16. There is no genuine issue of disputed material fact concerning the finally adjudicated fact that the Claimant's medical condition after his MMI date of December 28, 2010 is **not** causally related to the admitted injury of January 9, 2009, thus it follows that it has been finally adjudicated that there was no change in condition or worsening of the admitted work-related injury of January 9, 2009. In sum, there is no work-related matter to re-open.

17. The Claimant's Response to the Respondents' Amended Motion for Summary Judgment, although voluminous, does **not** set forth specific facts rebutting the fact that there has been a final adjudication that the Claimant's medical condition after his MMI date of December 28, 2010, was not causally related to the admitted injury of January 9, 2009.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Amended Motion for Summary Judgment and the Response thereto are supported by documents and/or affidavits.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the Amended Motion, Response and attachments

show that there is no genuine issue of disputed material fact with respect to the concerning the finally adjudicated fact that the Claimant's medical condition after his MMI date of December 28, 2010 is **not** causally related to the admitted injury of January 9, 2009, thus it follows that there was no change in condition or worsening of the admitted work-related injury of January 9, 2009. In sum, there is no work-related matter to re-open.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). An adverse party may not rest upon the mere allegations or denials in its pleadings, but its response by affidavits or other means must set forth specific facts showing that there is a genuine issue of disputed material fact. C.R.C.P., Rule 56(e). Genuine issues of material fact cannot be manufactured and arguments alone will not preclude summary judgment; contentions must be supported. *See Bauer v. Southwest Denver Mental Health Center, Inc.*, 701 P.2d 114 (Colo. App. 1985). As found, the Claimant's Response to the Respondents' Amended Motion for Summary Judgment, although voluminous, does **not** set forth specific facts rebutting the fact that there has been a final adjudication that the Claimant's medical condition after his MMI date of December 28, 2010, was not causally related to the admitted injury of January 9, 2009, and there is not work-related matter that can be re-opened.

Burden of Proof

d. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, there is no genuine issue of disputed material fact concerning the finally adjudicated fact that the Claimant's medical condition after his MMI date of December 28, 2010 is **not** causally related to the admitted injury of January 9, 2009, thus it follows that there was no change in condition or worsening of the admitted work-related injury of January 9, 2009. In sum, there is no work-related matter to re-open. Therefore, the Respondents have sustained their burden of proof by a preponderance of the evidence.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment is hereby granted in the Respondents' favor, and the Claimant's petition to Re-Open is hereby denied and dismissed.

B. Any and all claims for additional workers' compensation benefits are hereby denied and dismissed.

C. The scheduled hearing of June 18,, 2015 is hereby vacated.

DATED this_____day of June 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of June 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.sjord

ISSUE

1. Is the intra-articular steroid injection as requested by Dr. Finn reasonable, necessary, and related to the claimant industrial injury of April 5, 2009?

FINDINGS OF FACT

1. The claimant sustained an admitted injury to her low back while employed with the respondent-employer on April 5, 2009.

2. Initially, the claimant treated with Dr. James Hubbard at Emergicare. Under Dr. Hubbard, the claimant received care to include medication and physical therapy. Dr. Hubbard also referred the claimant to Dr. Michael Sparr.

3. An MRI was performed on May 27, 2009, which revealed a small extruded disc herniation on the right at L5-S1 with indentation of the thecal sac but without nerve compression. There was also desiccated disc bulging at L4-5 with shallow annulus fibrosis tearing.

4. On June 11, 2009, the claimant was seen by Dr. Sparr for persistent low back pain. Physical examination revealed spasming in the left paralumbar musculature, limited lumbar range of motion in forward flexion, left sided lumbar pain, and pain on the left side with right and left lateral rotation. Dr. Sparr opined that the claimant's pain at this point appears to be discogenic related to the disc finding at L4-5 and L5-S1 including an annular tear and extruded fragment. Dr. Sparr recommended an epidural steroid injection (ESI).

5. On July 6, 2009, the claimant underwent an ESI at the L5-S1 level. Dr. Sparr's note of July 23, 2009 indicates that the claimant received no relief from the ESI.

6. The claimant was placed at maximum medical improvement (MMI) on October 2, 2009 with a 15% whole person impairment. On March 31, 2010, ALJ Bruce Friend entered an Order awarding the claimant maintenance medical care after MMI.

7. The claimant returned to Dr. Hubbard on May 6, 2010 at which time he

prescribed more pain medications.

8. The claimant was seen by Dr. John Reasoner on November 10, 2012 for continued low back pain. Dr. Reasoner diagnosed the claimant as having a chronic lumbar strain and prescribed medications. The claimant was seen at Emergicare and seen by Dr. Reasoner or Dr. Dean on December 15, 2012, December 18, 2012, February 20, 2012, and March 27, 2013. On each of these dates, the claimant was experiencing low back pain. Physical examination on these visits revealed tenderness of the low back with loss of range of motion. Dr. Reasoner prescribed medication and on February 20, 2013 gave the claimant an intramuscular injection into the right buttock, and prescribed a Lidoderm patch along with physical therapy.

9. The claimant had physical therapy from February 25, 2013 through March 20, 2013. The medical records show that while the claimant noticed decreased pain it never completely resolved. The claimant was given a TENS unit at the March 20, 2013 physical therapy session.

10. Because the claimant was still having ongoing symptoms in her low back, Dr. Reasoner on March 27, 2013 increased the claimant's Amitriptyline, changed the Ibuprofen to Relafen, and referred her to Dr. Finn for further maintenance care.

11. On January 7, 2014, the claimant was seen by Dr. Finn. At that time, the claimant was having low back pain left greater than right radiating to the hip, buttock, and along the back of the leg halfway to the knee with occasional lateral thigh and calf pain. Upon physical examination, Dr. Finn noted reduced range of motion in the lumbar spine and pain with extension as well as with extension in combination with rotation to either side. Dr. Finn also noted mild to moderate spasms in the left side of the lumbar spine. Dr. Finn's diagnoses were chronic lumbosacral spinal pain, posterior element component, and questionable discogenic component. Dr. Finn felt that some of the claimant's pain may be related to the posterior elements given her pain with facet loading and recommended the claimant undergo a diagnostic facet joint medial branch block and if that fails consider reimaging to rule out any further pathology.

12. On January 22, 2014, the claimant had bilateral L3, L4, and L5 facet joint medial branch blocks. The claimant returned back to Dr. Finn on January 31, 2014 and noted that she failed to have a diagnostic result although she had 24 hours of significant pain relief. Because of this, Dr. Finn recommended an MRI of the lumbar spine.

13. On February 22, 2014, the claimant had an MRI which revealed a small paracentral acute to subacute disc herniation at L3-4 displaced caudally causing severe

right lateral recess effacement with proximal L4 nerve root compression. The interpreting radiologist indicated that this finding was not present in the December 22, 2011 MRI. Dr. Finn in his note dated February 25, 2014 wrote that the MRI also revealed some facet arthropathy for which Dr. Finn recommended an intra-articular facet injection to see if this was the source of the pain.

14. The claimant returned back to Dr. Finn on May 1, 2014 without having had the intra-articular facet injection. Dr. Finn wrote in his office note of this date that while the MRI of February 22, 2014 revealed a new right-sided disc herniation with severe right side lateral recess effacement and proximal, he was not convinced that this new disc herniation is contributing to her symptoms. Dr. Finn opined that the claimant continues to demonstrate evidence of a posterior element component to her pain and that intra-articular corticosteroid injection would be a reasonable option for her. Dr. Finn also opined that her current complaints and physical findings are related to the April 5, 2009 injury and so is his recommended treatment.

15. The claimant testified that she injured her low back on April 5, 2009 and as a result had medical care under a variety of physicians including Dr. Hubbard at Emergicare, Dr. Michael Sparr, and Dr. Kenneth Finn. The claimant said that initially she had care to include medication and physical therapy but eventually ended up having epidural steroid injections which somewhat helped relieve symptoms. The claimant went on to testify that since being placed at MMI on October 2, 2009, she has continued to have pain and stiffness in her low back. The claimant testified that she returned back to Emergicare in May of 2010 because of her continued low back problems. The claimant said that insofar as her low back is concerned she has symptoms which wax and wane and these symptoms increase with prolonged sitting, standing, or walking. The claimant went on to testify that when her symptoms increase she takes medication and/or uses a heating pad in an attempt to reduce said symptoms.

16. Dr. Lloyd Thurston, at the request of the respondents, evaluated the claimant on May 9, 2012 and July 2, 2013. Dr. Thurston reviewed the claimant's medical records from Emergicare and Dr. Sparr. In his reports of the above referenced dates, Dr. Thurston opined that the claimant's present low back problems are not related to the April 5, 2009 work injury but are idiopathic partially due to genetic factors. Nonetheless, Dr. Thurston in his May 9, 2012 report recommended further medical treatment consisting of medications in the form of muscle relaxants, NSAIDS, and Tramadol or narcotic medication for comfort along with home exercises and core strengthening. Dr. Thurston did not feel ESI's would be beneficial.

17. In a Rule 16 Chart Review dated March 8, 2014. Dr. Thurston felt that the

inter-articular facet injection as recommended by Dr. Finn is not related to the admitted April 5, 2009 injury. Dr. Thurston bases this on his review of the May 27, 2009 MRI, the December 22, 2011 MRI, and the May 22, 2014 MRI. Dr. Thurston noted that the February 22, 2014 MRI revealed a small posterior paracentral acute to subacute disc herniation at L3-4 displaced caudally causing severe right lateral recess effacement with proximal L4 nerve root compression, which was not present in the 2009 and 2011 MRI's. Dr. Thurston wrote that this L3-4 disc herniation is consistent with the claimant's current right leg symptoms.

18. Dr. Thurston testified in accordance with his reports and chart review. Dr. Thurston reiterated his opinion that the lumbar epidural injections recommended by Dr. Finn were neither related to the industrial injury nor reasonable and necessary. Dr. Thurston felt that the DOWC Treatment Guidelines for repeat epidural injections are not met in light of the claimant's minimal response to the epidural injections given by Dr. Sparr in 2009. Dr. Thurston felt that the claimant's age and body habitus were major contributors to the claimant's symptom complex. Dr. Thurston admitted on cross examination that Dr. Finn was not requesting authorization for an epidural steroid injection but a facet injection which is designed to identify the pain generator and hopefully reduce pain symptoms. Finally, Dr. Thurston acknowledged that the DOWC Treatment Guidelines are not intended to limit post MMI care.

19. Dr. Finn testified by deposition in which he opined that the claimant's current complaints and physical findings in her low back are related to her April 5, 2009 work injury. Dr. Finn bases his opinion on a variety of factors including a paucity of medical evidence revealing any low back problems prior to the date of the injury, no indication of any reinjury subsequent to the date of the injury, and the fact that the claimant has had consistent low back problems since April 5, 2009. Dr. Finn does not believe that the new herniated disc revealed in the February 22, 2014 MRI is contributing to the claimant's symptoms since the herniation is on the right side at L3-4 which is on the opposite side of her primary complaint. In addition, with a disc herniation, the claimant would have pain bending forward which wasn't consistent with her examination. Dr. Finn found that the claimant had pain bending backwards which is consistent with facet mediated back pain. Dr. Finn went on to explain that the temporal relationship between the trauma and the onset of symptoms bolsters his opinion that the claimant's low back problems are related to the trauma as opposed to genetics, lifestyle or body habitus.

20. Dr. Finn further testified that the claimant did not have a typical response to the medial branch block that was done on January 22, 2014 in that there is usually a much more drastic reduction in pain within the first or second hour with a gradual

recurrence of pain over the subsequent four to five hours. According to Dr. Finn, the claimant's pain gradually lessened over the six hours post injection. However, Dr. Finn went on to testify that he has had other patients with similar results and that not everyone has a textbook response to the injections. Based on this, Dr. Finn believes that a one-time corticosteroid injection would be reasonable to try and provide the claimant with much longer pain relief.

21. Upon cross examination, Dr. Finn recognized that Dr. Thurston's records reveal that the claimant had a negative facet exam in 2013 and 2013. Dr. Finn was unable to explain why there were differences but indicated that facet pain can wax and wane. In addition medication can ameliorate facet pain. Finally, Dr. Finn testified that if the steroid injection he is recommending does not provide a reduction of pain, then the claimant's future treatment would likely consist of medication as recommended by Dr. Thurston along with an exercise program.

22. The ALJ finds Dr. Finn's analysis and opinions to be credible and more persuasive than medical evidence to the contrary.

23. The ALJ finds that the claimant has established that it is more likely than not that the treatment recommended by Dr. Finn is reasonable, necessary, and related to the claimant's industrial injury of April 5, 2009.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

3. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead

to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936).

6. The respondents are liable for medical treatment reasonably necessary to cure and relieve the employee of the effects of the injury. Section 8-42-101, C.R.S.; *Grover v Industrial Commission*, 759 P.2d 703 (Colo. 1988). The claimant must prove by a preponderance of the evidence his or her entitlement to benefits. The facts in a workers' compensation case are not interpreted liberally in favor of the claimant or respondents. Section 8-43-201 C.R.S.

7. A preponderance of the evidence is that which leads the trier of fact after considering the evidence to find that a fact is more probably true then not. *Page v. Clark*, 197 Colo. 706, 592 P.2d 792 (1979).

8. The claimant sustained an admitted injury to her low back on April 5, 2009. Initially the claimant received care to include medication, physical therapy, and an ESI at the L5-S1 level. This injection provided no relief. The claimant was eventually placed at MMI as of October 2, 2009 and given a 15% whole person impairment. Since reaching MMI, the claimant has continued to have ongoing low back pain for which she has received treatment consisting of medication, physical therapy, intramuscular injections, and a TENS unit.

9. Eventually, the claimant was referred to Dr. Finn. Based upon his evaluation, Dr. Finn felt that the claimant had a possible facet problem in the lumbar spine and recommended a diagnostic facet joint medial branch block which was done in January 22. 2014. According to Dr. Finn, the claimant received relief from the branch block but it was atypical. However, Dr. Finn testified that he has had other patients with similar results and not everyone has a textbook response to the injection. In addition, the claimant credibly testified that the medial branch block provided pain relief. Based on this, Dr. Finn believes that it is reasonable for the claimant to have the corticosteroid injection he recommends. If it doesn't work, the claimant will have exhausted her reasonable treatment options except for ongoing medication management.

10. It is recognized that Dr. Thurston believes that the claimant's present low back problems are not related to the work injury.

11. The ALJ concludes that the analysis and opinions of Dr. Finn are credible and entitled to greater weight than medical evidence and opinions to the contrary.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that her present back condition for which Dr. Finn is recommending a corticosteroid injection is related to the initial injury.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that the corticosteroid injection recommended by Dr. Finn is reasonable, necessary, and related to the April 5, 2009 industrial injury.

ORDER

It is therefore ordered that:

The respondent-insurer shall pay for the intra-articular steroid injection as recommended by Dr. Finn

All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-825-435-06

ISSUES

I. The sole issue for determination is whether C.R.S. §8-42-107.5 may be applied to allow Respondents to suspend temporary total disability benefits, and take credit for permanent partial disability benefits previously paid prior to reopening, consistent with the decision announced by the Court of Appeals in *Donald B. Murphy Contractors v. ICAO,* 916 P.2d 611 (Colo.App. 1995).

FINDINGS OF FACT

Based upon the evidence presented at hearing and the parties' stipulation, the ALJ enters the following findings of fact:

1. Claimant's date of injury was September 30, 2009. (Clt. Ex. 8, Stipulation 1)

2. Claimant received temporary partial disability ("TPD") benefits and/or temporary total disability ("TTD") benefits intermittently from June 7, 2010 until April 4, 2012. (Clt. Ex. 8, Stipulation 2; Resp. Exs. C, E, H and L)

3. On April 5, 2012, the primary authorized treating physician, Dr. Michael Dallenbach, placed Claimant at maximum medical improvement ("MMI") with an impairment rating of 23% whole person for her cervical spine, and 8% scheduled impairment for her right shoulder. If combined, the whole person impairment rating would be 27%. Prior to reaching MMI, Claimant underwent a two-level fusion for her cervical spine which was authorized, related and reasonably necessary. (Clt. Ex. 8, Stipulation 3; Resp. Ex. B)

4. On April 17, 2012, Insurer filed a Final Admission of Liability ("FAL") accepting Dr. Dallenbach's impairment ratings, and admitting to permanent partial disability ("PPD") benefits in the total amount of $78,587.70. (Resp. Ex. C) The parties subsequently resolved a shoulder conversion issue, and a disfigurement issue, for a total of $7,500 (Resp. Ex. D); the $7,500 was not further broken down for PPD and disfigurement benefits. However, in a Stipulated Motion to Resolve Issues, signed by the parties and dated June 27, 2012, the parties agreed that this $7,500 was in addition to any previously admitted indemnity benefits, and constituted indemnity benefits for the purposes of the cap established by C.R.S. §8-42-107.5. (Clt. Ex. 8, Stipulation 3; Resp. Ex. D, bns 016, 020)

5. On July 9, 2012, Insurer filed a new FAL consistent with the stipulated motion

and order. (Resp. Ex. E) The FAL was otherwise unchanged from the prior FAL. Critical to the issue at hand, Claimant did not object to the July 9, 2012 FAL, and the claim closed on all issues, including MMI.

6. On July 13, 2012, Claimant filed a Request for Lump Sum Payment, seeking $50,000 in PPD benefits still owing be paid in a lump sum. (Resp. Ex. F, bn 037) Insurer honored this request, and on July 20, 2012, Insurer paid Claimant $50,000 in a lump sum, less the lump sum discount (Resp. Ex. L, bn 070); Insurer then filed a Lump Sum Calculation and Proof of Payment.1 (Resp. Ex. F, bn 038)

7. On September 9, 2012 Insurer filed a Final Payment Notice, documenting that as of that date, $78,587.70 in PPD benefits had been paid. (Resp. Ex. G) Claimant agrees that PPD benefits admitted to were paid in full. (Clt Ex. 8, Stipulation 5) The Final Payment Notice did not reference the $7,500 paid pursuant to the Stipulated Motion to Resolve Issues, and Order granting the same. (Resp. Ex. G)

8. On May 14, 2013 Claimant filed a Petition to Reopen, alleging a worsening of her condition. On September 5, 2013 Insurer filed a General Admission of Liability ("GAL") voluntarily reopening this claim, and authorizing Claimant to undergo a second cervical fusion. Insurer resumed payment of TTD benefits as of May 7, 2013. (Clt. Ex. 8, Stipulation 6)

9. Within the September 5, 2013 GAL, Insurer indicated that it would take credit for PPD previously paid, and it further noted that $86,087.70 represented the previous PPD awarded and paid. (Resp. Ex. H, bns 043, 045) This figure represents the admitted to amount of PPD ($78,587.70), and $7,500 paid pursuant to the June 2012 stipulation and order.

10. Claimant underwent surgery by the authorized surgeon, Dr. Michael Rauzzino on September 23, 2013. The surgery was authorized, related and reasonable and necessary. (Clt. Ex. 8, Stipulation 7)

11. Following the reopening, Respondents continued to pay TTD benefits, to the point that combined TPD, TTD and PPD benefits exceeded $150,000. (Resp. Ex. L)

12. On November 10, 2014, Respondents filed Respondents' Motion to Suspend Temporary Total Disability Benefits, seeking to suspend TTD benefits pursuant to *Donald B. Murphy Contractors v. ICAO*, 916 P.2d 611 (Colo.App. 1995) (Resp. Ex. I) On November 13, 2014, Claimant filed Claimant's Objection to Respondents' Motion to

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1 Claimant requested two lump sums of PPD benefits. The first lump sum request was dated May 2, 2012 and requested $10,000.00. As noted, the second lump sum request was for $50,000.00 and was dated July 13, 2012. The lump sums were paid and included in the admitted $78,587.70 in PPD benefits paid. (Clt. Ex. 8, Stipulation 8)

Suspend Temporary Total Disability Benefits. (Resp. Ex. J) On November 24, 2014, ALJ Henk issued an Order denying Respondents' motion, without prejudice, and indicating Respondents had the right to set the issue for hearing. (Resp. Ex. K)

13. As of the date of this hearing, Claimant continued to receive TTD benefits because she was not at MMI. No authorized treating physician, including the primary authorized treating physician, Dr. Michael Dallenbach, had placed her at MMI as of the date of hearing. (Clt. Ex. 8, Stipulation 9; Resp. Ex. L)

14. The parties stipulated that as of the date of this hearing Claimant had received in excess of $150,000.00 in combined TTD, TPD and PPD benefits.**2** (Clt. Ex. 8, Stipulation 10)

15. The statutory limit of TPD, TTD and PPD benefits under C.R.S. §8-42-107.5 for Claimant's date of injury is $150,000. (Clt. Ex. 8, Stipulation 11; Resp. Ex. M) As such, as of the date of hearing, Claimant had received in excess of $30,000 in indemnity benefits beyond the $150,000 cap available under C.R.S. §8-42-107.5.

16. None of the provisions for termination of TPD and/or TTD benefits pursuant to C.R.S. §8-42-105(3) currently exist. (Clt. Ex. 8, Stipulation 12)

17. At this time, Respondents are not seeking to terminate TTD benefits, nor are Respondents seeking an order requiring Claimant to reimburse Respondents for any alleged overpayment. The sole issue for determination is whether C.R.S. §8-42-107.5 may be applied to allow Respondents to suspend TTD benefits while taking credit for PPD benefits previously paid, consistent with *Donald B. Murphy Contractors v. ICAO,* 916 P.2d. 611 (Colo. App. 1995). (Clt. Ex. 8, Stipulation 13)

18. The massage therapy recommended by Dr. Rauzzino in his report of March 31, 2015 is authorized, reasonable, necessary and related. (Clt. Ex. 8, Stipulation 14)

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the ALJ draws the following conclusions of law:

A. As noted above, the issue for determination is whether, under principles announced in *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office,* 916 P.2d 611 (Colo. App. 1995), Respondents are entitled to suspend payment of additional TTD benefits while taking credit for PPD benefits that Respondents paid in connection with their FAL dated July 9, 2012, in a case where Claimant has already received more than the statutory cap in combined temporary and PPD benefits under

2 According to Insurer's indemnity benefit printout, as of April 8, 2015, Claimant had received **$180,315.02** in combined TPD, TTD, and PPD benefits. (Resp. Ex. L)

C.R.S. §8-42-107.5. Based upon the evidence presented and the relevant legal authority, the ALJ concludes that Respondents are entitled to suspend TTD benefits while taking credit for PPD benefits previously paid in this case.

I. The Relevant Provision of the Act

B. The issue addressed here involves application of C.R.S. §8-42-107.5, and the impact of the principles of *Donald B. Murphy* to an upper cap case, following reopening of a claim for worsening of condition. In relevant part, C.R.S. §8-42-107.5 holds:

> "[n]o claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined in temporary disability payments and permanent partial disability payments. **No claimant whose impairment is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments**." (emphasis added)

II. The Donald B. Murphy Contractors and Reynal Decisions Announced by the Court of Appeals and Industrial Claims Panel

C. The principles articulated in *Donald B. Murphy* are dispositive to the issue before the court. In *Donald B. Murphy* the respondents sought to suspend TTD benefits under the following facts: (1) the claimant had been paid temporary disability benefits, (2) he then reached MMI, (3) he was provided an impairment rating of less than twenty-five percent whole person, (4) he was paid PPD benefits pursuant to that rating, (5) the combined temporary and PPD benefits paid at that point were capped at $60,000 (the lower cap of C.R.S. §8-42-107.5 or the date of injury for that claim), (6) the claim closed on MMI and PPD, subject only to reopening, (7) the claimant's condition worsened, surgery was required, and his claim was reopened, and (8) the claimant then sought additional TTD benefits which the respondents denied.

D. The respondents in *Donald B. Murphy* argued that no "post reopening" TTD benefits were owing because the claimant had already been paid combined temporary and PPD benefits to the lower cap established by the admitted to impairment rating. After that argument was rejected at the hearing level, and subsequently by ICAP, the respondents appealed to the Colorado Court of Appeals. On appeal, the respondents argued that if they must pay additional TTD benefits, they should be permitted to take credit for PPD benefits already paid, rather than ultimately having to seek to recover an overpayment from the claimant when permanent impairment was again established.

E. The Court of Appeals went through a statutory analysis wherein it considered the reopening statute and the legislative purpose of the statutory cap, concluding that "when further benefits are sought after the twenty-five percent or less limit of section 8-42-107.5 has been applied, the petitioners are entitled to offset any permanent partial benefits paid against temporary total disability benefits." *Donald B. Murphy* at p. 614.

F. In support of its' Order, the *Donald B. Murphy* Court noted that their resolution satisfied several listed principles: (1) it maintained the incentive to employers and insurers to settle or provide PPD benefits; (2) it required the claimant to allocate PPD benefits already paid towards his current inability to earn wages; (3) it eliminated the need for further proceedings where the respondents would need to seek to recover the overpayment created by paying benefits beyond the cap; and (4) it was consistent with the stated purpose of the Workers' Compensation Act to provide benefits to injured workers at a reasonable cost to employers, without the necessity of litigation.

G. After careful review of the evidence presented, the ALJ finds the case at hand to be factually consistent with *Donald B. Murphy*, and its stated principles. Here, as in *Donald B. Murphy*, claimant was paid temporary disability benefits, she was then placed at MMI, she received PPD benefits, and her claim closed, thus legally establishing MMI, and the applicable statutory cap (in this case, $150,000). The claim was subsequently reopened for a worsening of condition, TTD benefits were reinstituted, and the claimant received combined temporary disability benefits and PPD benefits beyond the applicable cap established at on the original MMI date.

H. The only difference between *Donald B. Murphy* and the instant case is that when MMI was originally established in the case at hand, the statutory cap established was the upper cap ($150,000), and not the lower cap. The ALJ agrees with Respondents that this is a distinction without a difference, as the holding in *Donald B. Murphy,* and the principles articulated by the Court of Appeals in support of its decision, hold true to "upper cap" cases as well. *See also Reynal v. Home Depot and American Home Assurance*, WC No. 4-585-674 (ICAO 9/13/11).

I. In *Reynal*, ICAP affirmed ALJ Mottram's order permitting the respondents to suspend payment of TTD benefits in an "upper cap" case factually similar to the case at hand. In *Reyna*l, the claimant had been paid temporary disability benefits, and PPD benefits pursuant to a final admission, and the issues of MMI and PPD were closed, as here, subject only to reopening. The claim was subsequently reopened, and TTD benefits were paid to the point that the combination of temporary disability benefits and PPD benefits exceeded the upper cap. The respondents then sought an order permitting the respondents to suspend further payment of TTD benefits, while talking credit for PPD benefits paid. The claimant argued TTD benefits must continue to be paid despite the fact he had been paid combined temporary and PPD benefits beyond the upper cap. ICAP rejected the claimant's arguments, finding *Donald B. Murphy* dispositive, even in upper cap situations.

J. In reaching their conclusion that *Donald B. Murphy* was dispositive, ICAP recognized that allowing respondents to cease paying TTD while taking credit for PPD could work a financial hardship on the claimant, but *Donald B. Murphy* could not be distinguished on the grounds that claimant was not at MMI following the reopening, or that the claimant had a chance to ultimately be determined permanently and totally disabled. Moreover, the ALJ is persuaded that the principles articulated by the Court of Appeals in *Donald B. Murphy* are even more pronounced in an upper cap case, such as *Reynal*, and the case at hand because in those situations where combined PPD and

temporary disability benefits have already been paid beyond the absolute maximum permitted by statute, the continued payment of TTD benefits without allowing credit for PPD benefits previously paid necessarily results in an overpayment - - potentially a massive overpayment of benefits to the claimant. Such unfair windfalls to Claimant represent added costs to respondents, and a stark defeat of the stated principle of the Act to provide injured workers with benefits they are entitled to at a fair cost to the respondents, and without the necessity of litigation. For these reasons, this ALJ finds *Donald B. Murphy* dispositive, and concludes that an order permitting Respondents to suspend payment of TTD benefits while taking credit for PPD benefits previously paid under the facts of this claim is warranted.

III. Claimant's Mistaken Reliance on C.R.S. §8-42-105(3)(a-d)

K. In Claimant's Objection to Respondents Motion to Suspend Temporary Total Disability Benefits and renewed in his post hearing position statement, Claimant argues that there is no factual basis under C.R.S. §8-42-105(3)(a-d) under which TTD can be terminated. Therefore, argues Claimant, TTD benefits must be continue despite the fact that Claimant has been paid indemnity benefits beyond the upper cap. Because Respondents are not seeking an order to terminate TTD benefits, the ALJ rejects this contention.

L. The Respondents here, as in *Donald B. Murphy*, and in *Reynal*, are not seeking to terminate TTD benefits. Respondents recognize and agree that they do not have a basis at this time to terminate TTD benefits under C.R.S. §8-42-105(3) (a-d). Instead, the Respondents, relying on *Donald B. Murphy*, are seeking an order to **suspend** TTD benefits while obtaining credit for PPD benefits already paid. Based upon the principals announced in *Donald B. Murphy*, the ALJ concludes that suspension of TTD benefits under the circumstances presented in the instant case is warranted. Because Respondents are not seeking a termination of TTD benefits, Claimant's argument that Respondents cannot terminate TTD benefits pursuant to C.R.S. §8-42-105(3)(a-d) is moot and rejected.

IV. Claimant's Mistaken Reliance on United Airlines v. ICAO

M. In her Objection to Respondents' Motion to Suspend Temporary Total Disability Benefits, Claimant, relying on *United Airlines v. ICAO*, 312 P.3d 235 (Colo. App. 2013), argued that since the statutory cap cannot be determined until Claimant reaches MMI, and Claimant is not currently at MMI, Respondents must continue to pay TTD benefits beyond the $150,000. Here, as in *Donald B. Murphy*, the claimant reached MMI, the claimant was provided a permanent impairment rating, the claimant was paid PPD benefits, and the claimant's claim closed on the issue of MMI. It is undisputed that here, as in *Donald B. Murphy*, MMI was legally established, and the claim closed, prior to reopening. It was under these circumstances that the *Donald P. Murphy* Court permitted a suspension of TTD.

N. By contrast, *United Airlines* dealt with a factually distinguishable situation. In

United Airlines, the claimant was paid temporary disability benefits beyond the first cap, at which time she was released to return to work. At that time, the clamant had been paid more than $22,000 beyond the first cap, and the respondents sought an order requiring the claimant to repay the difference which they claimed was an overpayment. The Court of Appeals concluded that the cap did not apply to benefits paid **before** the claimant reached MMI, and therefore it affirmed orders denying the respondents' request for repayment of TTD paid beyond the first cap.

O. The Court in *United Airlines* specifically found that *Donald B. Murphy* and *Rogan v. ICAO* 91 P.3d 414 (Colo.App 2003) did not require a different outcome, because in each of those cases, the claimant had reached MMI and had been paid a combination of both PPD and temporary disability benefits beyond the cap, whereas in *United Airlines*, the claimant was never at MMI, and she had not been paid any PPD benefits from which the respondents could take credit against TTD owing. Because *United Airlines* deals with a factually distinguishable situation, the ALJ concludes that Claimant's reliance on that case is misplaced and he is not persuaded to alter his conclusion that under the facts of the instant case Respondents are entitled to suspend TTD benefits and take credit for permanent partial disability benefits previously paid prior to reopening.

V. Laabs v. Integrated Communication Service and Pinnacol Assurance Decision

P. Recently, the ALJ dealt with another case presenting the question of whether Respondents were entitled to suspend TTD benefits and offset previously paid PPD. In the case of *Laabs v. Integrated Communication Service and Pinnacol*, W.C. No. 4-890-061-02 (ICAO 3/19/15), the undersigned ALJ issued an order granting the request. On appeal the Industrial Claims Appeals Panel ("ICAP") found that the statutory cap did not apply under the unique circumstances presented in that case. Because *Laabs* is factually distinguishable from the case at hand, and *Donald B. Murphy*, it does not change the ALJ's conclusion that Respondents can suspend TTD benefits and take credit for PPD benefits paid in this case.

Q. In *Laabs*, the claimant reached MMI, and was provided an impairment rating of 24% whole person. The respondents admitted to that rating, and began paying what they classified as PPD benefits. However, the claimant requested a DIME, and the DIME determined that the claimant was **never** at MMI. The respondents then reinstituted payment of TTD benefits, admitting that claimant was never at MMI in the first instance. Based upon this factual and procedural history, ICAP held that *Donald B. Murphy* was inapplicable, because unlike *Donald B. Murphy*, Mr. Laabs was never at MMI, so PPD benefits were never actually paid, and since PPD benefits were never paid, the respondents could not rely on *Donald B. Murphy* to take credit for PPD benefits previously paid. Again, the case at hand, and *Donald B. Murphy*, involve cases where the claimant reached MMI, was paid a combination of temporary and PPD benefits, the claimant's claim closed, only to later reopen for a worsening of condition. The claimants in those cases received combined PPD and temporary disability benefits beyond the statutory cap, and the respondents sought orders allowing them to suspend temporary benefits while taking credit for PPD benefits paid. A suspension of TTD

benefits while taking credit for PPD benefits is warranted under that scenario and permitted by the decision of the Court of Appeals in *Donald P. Murphy*. In *United Airlines* and *Laabs*, MMI was never legally established. Consequently, no cap was established, and PPD benefits were never paid. Therefore, the claimants were not paid more than the statutory cap in combined temporary and PPD benefits. As noted above, those cases are plainly distinguishable. Accordingly, under the principles enunciated in *Donald B. Murphy*, and for the reasons outlined above, Respondents request to suspend TTD benefits while taking credit for PPD paid is granted.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents may suspend payment of TTD benefits, while taking credit for PPD benefits previously paid.

2. All matters not determined herein are reserved for future determination.

DATED: June 4, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-871-989-02

ISSUES

- Whether Claimant proved by a preponderance of the evidence that a Sleep Number bed is a reasonable, necessary, and related medical benefit?

- Whether Claimant proved by a preponderance of the evidence that EMGs of his bilateral upper and lower extremities are reasonable, necessary, and related medical benefits?

- Whether Claimant proved by a preponderance of the evidence that observation of his home activities is a reasonable, necessary, and related medical benefit?

- Whether Claimant proved by a preponderance of the evidence that cervical and lumbar MRIs are reasonable, necessary, and related medical benefits?

- Whether Respondents proved by a preponderance of the evidence that Claimant directed his medical care?

SUMMARY OF DECISION

Claimant's ATP recommended a Sleep Number bed, an in-home evaluation of Claimant's activities of daily living, EMG studies, and MRI studies. Insurer denied the recommendations. This decision addresses whether the recommendations are reasonable, necessary, and related medical benefits, and concludes they are not.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer employed Claimant as a boiler inspector on November 17, 2011. Claimant was a passenger in a vehicle that his wife was driving to an inspection site. The vehicle was in was involved in a high-speed rollover motor vehicle accident ("MVA"). Claimant sustained injuries as a result of that accident.

2. Dr. Pineiro treated Claimant and supervised his care following the MVA.

Prior Back Problems

3. Claimant experienced an industrial injury in 2002 which resulted in back pain and tingling pain down the inside of his left leg. Claimant attributed his symptoms to driving, from April 2001 through August 2002, a company car that was too small for him. Claimant treated with chiropractic doctor Decklever three times a week from November 2004 through March 2005.

4. On January 31, 2008, Claimant complained of and medically treated with his private primary care physician, Andrew P. Stoddard, M.D., for low back pain with sciatica. Claimant's complaints arose after he began driving a small company car. On

February 20, 2008, Dr. Stoddard documented Claimant's lower extremity pain in the left leg, which caused tingling and trouble walking ("increased pain from left knee to toes with tingling of the toes."). Dr. Stoddard reported that five years prior, Claimant was evaluated for low back pain and had an MRI showing a broad based L-5 herniation with pressure on the S-1 nerve root. On February 20, 2008, Dr. Stoddard reported Claimant's pain was worse. He continued to treat Claimant for low back pain through March 31, 2008.

5. On November 11, 2011, six days before the MVA, Dr. Rosalinda Pineiro performed a Department of Transportation physical evaluation on Claimant. Claimant denied a history of low back pain.

History of Treatment

6. D. Scott Miner, M.D., treated Claimant in the emergency department at Good Samaritan Medical Center and reported that Claimant had rib fractures of ribs 9 and 10 and atrial fibrillation ("A-fib"). Claimant specifically denied neck pain, upper or lower extremity numbness or weakness, and back pain. Dr. Miner reported that Claimant had full musculoskeletal range of motion.

7. On November 19, 2011, Naveed Ismail, M.D. discharged Claimant, identifying Claimant's medical conditions as "rib fracture and a fib." "A-fib, MVA (motor vehicle accident), chest trauma, rib fracture" were listed as other problems.

8. On November 23, 2011, Claimant treated with Rosalinda Pineiro, M.D., at Concentra Medical Centers ("Concentra"). Dr. Pineiro is an authorized treating provider for the work related injuries. At that appointment, Claimant included an "L-5 herniation w/S1 nerve" in his medical history. He complained of broken ribs, A-fib, and a "spot in spine center of shoulder blades."

9. Claimant underwent a considerable amount of cardiac treatment after the MVA, including two "cardioversion" procedures. He also treated musculoskeletal injuries, including chiropractic care by Dr. Stults beginning on December 8, 2011.

10. On February 8, 2012, Jeffrey A. Wunder, M.D., a physiatrist at Concentra, reported that Claimant had a previous work related injury in 2002 to his low back, and had an MRI that revealed a disk protrusion at L5-S1. Dr. Wunder noted Claimant was reporting low back pain with an onset one month prior (six weeks post injury), spontaneous in onset. Dr. Wunder documented that "he has had some low back pain radiating into the left lower extremity to the lateral calf. He reported that these symptoms are exactly the same that he experienced in 2002 although not as severe at this time. He had no numbness or tingling in the left lower extremity." Dr. Wunder opined that Complaints were not related to the MVA and recommended Claimant start an exercise and stabilization program as he was overweight and "quite deconditioned."

11. Between February 2012 and June 2013, Dr. Pineiro, Dr. Wunder, and Claimant's cardiologists all reported Claimant's conditions were improving. Claimant successfully participated in physical therapy. Dr. Pineiro reduced his work restrictions.

12. Dr. Wunder discharged Claimant from his care on June 26, 2013, opining Claimant had no clear findings on physical examination and his pain appeared to be predominantly postural. Dr. Wunder recommended that the claimant focus on good

posture at all times.

13. As of July 25, 2013, Claimant's lifting and pushing restrictions per Dr. Pineiro were 50 pounds. However, Dr. Pineiro changed these on August 21, 2013, to no lifting or pushing over 40 pounds.

14. On September 11, 2013, Claimant saw Dr. Pineiro and complained of shoulder pain with no mention in her report of back pain. Claimant denied numbness or tingling and Dr. Pineiro diagnosed MVA, A-fib, and shoulder pain.

15. Kristin Mason, M.D., performed an eighteen-month Division IME, and issued a report dated September 26, 2013. She opined Claimant had not reached MMI and needed more treatment. Regarding relatedness, she opined: "Low back complaints similar to those in the past that appeared not particularly temporally related to the motor vehicle accident and are not considered to be related. I agree with Dr. Wunder."

16. On March 31, 2014, Dr. Pineiro reported Claimant had bilateral neck issues. She increased his work restrictions to "no activity" based on her concerns about Claimant's cardiovascular issues.

17. Claimant had a pacemaker implanted on May 6, 2014. He began cardio rehabilitation on July 3, 2014. He attended 10 cardio rehabilitation sessions with various therapists and exercise physiologists, all without reports of symptoms or concerns.

18. On July 18, 2014, Dr. Pineiro reported that Claimant "has improved low back pain and SI pain with treatment." Absent from her assessment were neurological or spinal problems. Despite her documentation of improved back pain and the lack of any back pain assessment, Dr. Pineiro wrote a script for "Sleep # bed for back pain after MVA."

19. On August 8, 2014, Dr. Pineiro recommended EMGs, MRIs, and an in-home evaluation of Claimant's activities of daily living. She reported, "Pt with radicular symptoms since accident evaluation to rule out radiculopathy…Pt who states he cannot do what he could do prior [to] accident. He also states he cannot do simple choirs [chores] around the home. I am requesting an evaluation of activities of daily living to document and see what he can and cannot do. . . . Pt has had back and cervical and shoulder issues with the start of this injury since he is more stable we will request EMG of bilateral lower extremities to rule out L4 and at [left] upper extremity to rule out a C6 radiculopathy." Dr. Pineiro reported, "He also is having bilateral numbness at ball of his feet since accident and Lt hand." She noted "C6 radicular symptoms" and "possible L4 bilateral radiculopathy." Her diagnosis included "radicular low back pain" and "cervical radiculopathy at C6."

Sleep Number Bed

20. Claimant contends that Dr. Pineiro's referral for a Sleep Number Bed is a reasonable, necessary, and related medical benefit.

21. Respondents contend that Claimant directed Dr. Pinero's referral for the bed in violation of C.R.S. section 8-43-503. Subsection (3) of that statute provides: "Employers, insurers, claimants, or their representatives shall not dictate to any

physician the type or duration of treatment or degree of physical impairment."

22. On direct examination, Dr. Pineiro testified inconsistently about when she and Claimant discussed her referral for a bed.

- Dr. Pineiro initially testified that she and Claimant discussed the bed before she prescribed it, but she could not remember when.

- On cross-examination, when asked how she came up with a referral for a Sleep Number bed, she responded, "I can't answer that question, because it's not documented and I can't recall."

- Dr. Pineiro finally testified that the first time she spoke with Claimant about a bed was on July 18, 2014, the day she prescribed it.

23. None of Dr. Pineiro's notes reflect discussion of a bed with Claimant.

24. Claimant testified that he and Dr. Pineiro discussed the need for a bed at the very end of his June 27, 2014 appointment. According to Claimant, Dr. Pineiro told him that "a bed was needed;" she cited the parameters that the bed be adjustable, adequate to relieve his pain, and "do the job that it should do." Claimant offered no persuasive evidence of what that "job" was.

25. Claimant testified that he agreed to research beds for Dr. Pineiro to consider. The extent of Claimant's research was visiting a Sleep Number bed store in Loveland, Colorado on July 7, 2014. There, he spoke with sales people, read marketing materials, and tried to provoke his shoulder and back pain on different beds. Claimant testified that later that day, he dropped off the marketing materials at Dr. Pineiro's office. He included a quote for an "i10" California King bed with two remote controls, a mattress pad, support pillows, pillow protectors, and sheet set. The total price was $11,582.95.

26. Although Claimant denied instructing or suggesting to Dr. Pineiro which bed to prescribe, he provided her materials on only one bed.

27. Claimant testified that he needed the i10 bed by referring to the marketing materials included in Exhibit 10, that the i10 was "the only bed on the market clinically proven to reduce back pain."

28. Claimant testified that his problem is getting up and out of bed, because he has to turn and twist; activities that cause low back pain. He offered no persuasive evidence of how a Sleep Number bed would eliminate his having to turn and twist when getting out of bed.

29. Dr. Pineiro testified that Claimant's condition was deteriorating, with increased complaints of back and shoulder pain. However, her testimony is contradicted by her report of the same date which does not indicate that Dr. Pineiro examined Claimant's back, and notes improved low back pain.

30. Dr. Pineiro's testimony about why she prescribed the bed evolved. Initially she testified that she and Claimant spoke about his back and shoulder pain and how a Sleep Number bed could help his condition. She later testified, "Because these beds move, I thought it would be a little better for him, for his activities of daily living, and for

comfort;" that the purpose of her recommendation was to help him with "all of his complaints." She identified the complaints as "some issues with his low back," and that he "was post-surgical with the afib and everything." She eventually limited the purpose of her recommendation to Claimant's "problems sitting up."

31. Dr. Pineiro's ultimate testimony is not supported by the medical records which contain no documentation of Claimant having trouble sitting up.

32. On July 25, 2014, Claimant's counsel sent a letter to Respondents' counsel enclosing the July 7, 2014 Sleep Number bed quote and Dr. Pineiro's script regarding the bed. Claimant's counsel requested that Respondents' counsel "please arrange for the purchase and delivery of the prescribed bed."

33. On July 29, 2014, Shane B. Rowan, M.D., one of Claimant's cardiologists, reported Claimant had excellent resolution of his A-fib symptoms following AV node ablation and a pacemaker. Dr. Rowan documented that Claimant was spending 10 minutes each on various exercise machines and that biking did not cause the claimant's heart rate to increase. Dr. Rowan did not provide Claimant with any physical restrictions.

34. Dr. Cebrian, Respondents' medical expert, opined that a Sleep Number bed was not medically reasonable or necessary to cure or relieve the effects of Claimant's condition, and therefore was not therapeutic. He also opined that a new bed will not do anything to improve a person's level of function.

35. Dr. Cebrian criticized Dr. Pineiro for not attempting to look at other issues related to Claimant's bed, such as what kind of bed he had and what else had been attempted to improve its function. He also criticized her for prescribing the bed without examining – or documenting the examination of – Claimant's back, especially because three weeks earlier Claimant reported pain of 1/10. Dr. Cebrian noted that the Sleep Number bed materials contained in Exhibit 10 did not refer to a legitimate medical study that supports the assertion that Sleep Number beds have a positive impact on back problems. He described the materials as a marketing device that would not be reliable in making a medical determination.

36. Dr. Pineiro testified that Claimant did not tell her to prescribe the bed or attempt to improperly influence her medical decision making, and that she used her independent medical judgment in doing so.

37. However in her nineteen years of practicing occupational medicine, she had never before prescribed a bed.

38. Dr. Pineiro testified that an evaluation of Claimant's ADLs would help her evaluate what type of bed Claimant needs.

39. She stated she was qualified to help Claimant pick a Sleep Number bed based on the proposed evaluation of his ADLs and her expertise as a family practitioner.

40. The ALJ finds it more likely than not that Dr. Pineiro's prescription for a Sleep Number bed was not medically reasonable or necessary to cure or relieve the effects of Claimant's condition.

41. The ALJ finds it more likely than not that Claimant suggested but did not dictate to Dr. Pineiro the type of treatment he wanted to receive. Such conduct is not statutorily proscribed.

Observation of ADLs

42. Claimant contends that observation of his home activities is a reasonable, necessary, and related medical benefit.

43. Claimant first reported problems with ADLs on June 24, 2014. Dr. Pineiro's notes of that visit document that Claimant's cardio condition was improving as expected, and his musculoskeletal complaints were minimal.

44. On August 8, 2014, Dr. Pineiro requested an evaluation of Claimant's ADLs at his home in response to Claimant's statements that he could not perform simple chores around the house.

45. Dr. Pineiro testified that she was worried about Claimant's ADLs "just because he has a cardiovascular condition." Dr. Pineiro acknowledged that she is not treating Claimant's cardiovascular condition and admitted that no cardiologist had recommended the evaluation.

46. Dr. Pineiro testified that Claimant "didn't have a job at that time, and his home was his job." She was unable to identify what validity criteria would be used during the evaluation. She did not contact Claimant's cardiologist regarding her concerns.

47. Dr. Pineiro testified an evaluation would be "the best way to assess how he's progressed." She did not acknowledge that much of the same information could be obtained by reviewing his physical therapy and cardio rehabilitation reports.

48. Dr. Pineiro did not recall talking to or consulting with any of Claimant's cardiologists. She had no knowledge of whether Claimant's cardiologist, Dr. Oldemeyer had placed Claimant on any restrictions. While she was aware Claimant was participating in cardio rehabilitation, she did not read notes of that therapy, nor did she recall requesting them.

49. Claimant testified he has difficulty with: mowing and edging his lawn, shoveling snow, maintaining the outside of his home, carrying a vacuum cleaner up stairs, and heavy scrubbing. He also identified difficulty shaving or standing for long periods to socialize. Dr. Cebrian testified that these are not activities of daily living because there are not done on a daily or regular basis.

50. Claimant testified that his wife will not let him do much at home, because "when they say 'no activity,' they mean 'no activity.'" And he had a "no activity" restriction.

51. Claimant testified that his doctor's no activity restriction meant he could not engage in activity that caused any pain. It was subjective and something that he could judge.

52. Dr. Cebrian reported that an evaluation of activities of daily living is not reasonable, necessary, or related to the November 17, 2011 MVA because Dr. Pineiro had not adequately documented Claimant's function as defined by basic activities of daily living and instrumental activities of daily living. Further, the medical records are inconsistent regarding Claimant's functional ability given that he underwent cardio

rehabilitation without any problems and Dr. Rowan reported that his A-fib had an excellent resolution of symptoms. There is no cardiac report or opinion that Claimant has failed the cardiac treatment provided to him.

53. Dr. Cebrian also explained that in-home evaluations are typically only prescribed for geriatric and brain injured patients.

54. The ALJ finds it more likely true than not that an in-home evaluation of Claimant's ADLs is not a reasonable, necessary, and related medical benefit.

EMG Studies

55. Claimant contends that EMGs of his left upper extremity and bilateral lower extremities are reasonable, necessary, and related medical benefits.

56. On August 8, 2014, Dr. Pineiro recommended electrodiagnostic testing of Claimant's bilateral upper and lower extremities because Claimant reported numbness and tingling in both upper extremities, and problems with weakness and pain in his lower extremities. Dr. Pineiro included "radicular low back pain" and "cervical radiculopathy at C6" as assessment issues.

57. Dr. Cebrian reported that EMGs are not medically reasonable, necessary and related to the November 17, 2011 MVA because they were ordered for medical conditions that are not related to the MVA, specifically Claimant's cervical spine and lumbar spine complaints.

58. J. Tashof Bernton, M.D., performed an independent medical examination of Claimant (not performed at the request of either party in the workers' compensation claim). On October 15, 2014, Dr. Bernton opined that an EMG/NCV is not related to the workers' compensation claim. Dr. Bernton also opined that Claimant's lumbar complaints were not related to the workers' compensation claim.

59. Dr. Pineiro was unable to opine whether Claimant's low back problems were related to his work injuries. She testified that she did not know the cause of his symptoms and therefore she could not have an opinion. She testified, "I would like a little bit more detail on the structural aspects of the back, and see if there is any change with regard to degeneration or any condition."

60. By that time, Dr. Wunder, a physiatrist in Dr. Pineiro's practice, and Dr. Mason, who performed Claimant's 18-month DIME, had each opined that Claimant's low back problems were not related. Claimant's low back problems were preexisting and not temporally related to the MVA.

61. After Insurer denied the studies, Clamant underwent EMG testing of the bilateral upper and lower extremities in October 2014 with the Veterans' Administration. Clamant requests repayment of his $50 co-pay.

62. Dr. Cebrian's November 17, 2014 report specifically opined that Claimant's lumbar spine complaints are independent, unrelated and incidental to the November 17, 2011 MVA. He opined that associated treatment related to the lumbar spine is not medically related to the MVA. Dr. Cebrian's opinion is consistent with those of Dr. Wunder, Dr. Mason, and Dr. Bernton.

63. The ALJ finds that Claimant has not sustained his burden of proving that the EMG studies were reasonable, necessary, and related medical benefits.

Cervical and Lumbar MRIs

64. Claimant contends that cervical and lumbar MRIs are reasonable, necessary, and related medical benefits.

65. The radiologist's impression of both EMG studies was, "This study is essentially normal with only some prolongation of H-reflexes. There is no evidence suggestive of neuropathy or radiculopathy."

66. On November 4, 2014, Dr. Pineiro reviewed the results of the October EMG testing and reported, "Pt due to his positive finding of the EMG I would like MRI of lumbar spine to see if the disk is causing left peroneal motor. Pt also has constant thumb numbness, a cervical MRI is also [warranted]."

67. Dr. Pineiro's recommendation for MRIs is inconsistent with the radiologist's findings of "no evidence suggestive of neuropathy or radiculopathy."

68. After Insurer denied the MRIs, Claimant had them performed at the Veterans' Administration hospital on January 29, 2015. He requests repayment of his $50 co-pay.

69. At hearing, Dr. Pineiro withdrew her recommendation of a cervical spine MRI. However, she recanted her withdrawal towards the end of her testimony. When asked to clarify whether she was recommending a cervical spine MRI, she testified:

> I would have to see – but, like, [Claimant], because it's almost been three weeks since I last seen him. And if his clinical picture in the visit says so, and I think it's indicated, I will recommend it. At this time, without seeing him, I don't feel confident, and I don't feel knowledgeable to do that determination at this time.

70. Dr. Pineiro testified she requested the lumbar MRI based on the EMG to rule out L4 radiculopathy. And, because the EMG showed a slight decrease in conduction velocity, she wanted to see the structure of Claimant's lumbar spine to see if anything was irritating his peroneal motor nerve. Again, this testimony is inconsistent with the EMG findings of no evidence suggestive of neuropathy or radiculopathy.

71. Dr. Cebrian testified in support of his opinion that Claimant's lumbar complaints are not related, that Claimant obtained a lumber MRI and was then evaluated by surgeon, Dr. Widdell in March 2015. Dr. Cebrian testified that Claimant's L5-S1 level had improved in relation to that disc when compared with an MRI taken 12 to 13 years prior, although there was natural degeneration in the facets.

72. Claimant had preexisting lumbar degenerative problems, and a preexisting disc herniation with an S1 radiculopathy. Thus, Dr. Cebrian testified, there was a lack of objective evidence, of any kind, that correlates Claimant's current lumbar condition to the MVA.

73. The ALJ finds that Claimant has not sustained his burden of proving that

the MRI studies were reasonable, necessary, and related medical benefits.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (the "Act"), §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. § 8-42-201(1), C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Claimant contends that he is entitled to an EMG, MRI, Sleep Number bed, and evaluation of his activities of daily living related to the November 17, 2011 MVA. Respondents admit that Claimant sustained injuries in the MVA, including two broken ribs, but deny that the medical conditions leading to the recommendations for the EMG, MRI, Sleep Number bed, and evaluation of his activities of daily living are related to the MVA. Further, Respondents contend that even if Claimant's back pain is related to the MVA, Claimant's request for a Sleep Number bed will not cure and relieve the effects of the injury. Finally, Respondents contend that Claimant directed his medical care.

Claimant has obtained EMGs of his bilateral lower extremities and left upper extremity through the Veteran's Administration. Claimant has obtained MRIs of his cervical spine and low back through the Veteran's Administration. The medical benefits that Claimant is requesting and has not received are a new bed and someone to observe his activities of daily living in his home.

Claimant's neck and back complaints and symptoms of upper extremity and lower extremity numbness and tingling did not arise out of his employment or occur within the course and scope of employment. "For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently

related to those functions to be considered part of the employment contract." *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). Claimant failed to prove that he suffered any disabling injury to his back, and specifically injury to his neck and low back on November 17, 2011, and failed to prove a causal connection between his physical complaints and the MVA.

As found, Claimant had a history of lumbar back pain. Additionally, Claimant did not report low back pain to his authorized treating physicians until over a month after the MVA and his complaints were consistent with his pre-existing complaints. Furthermore, Claimant did not consistently complain of cervical complaints until years after the MVA, and Dr. Pineiro testified at one point that she was no longer requesting a cervical MRI.

Finally, Claimant's reports of inability to perform ADLs are inconsistent with the medical reports of exercise and cardiac ability to perform such activities. "A person claiming benefits under workers' compensation is entitled to such medical benefits as are reasonably necessary to relieve the claimant from the effects of a work-related injury or illness." *Colorado Compensation Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994); *see also* C.R.S. § 8-42-101(1)(a). The request for a Sleep Number bed, EMG, MRI, and observation of ADLs are not reasonably necessary to relieve the claimant from the effects of a work-related injury or illness.

C.R.S. § 8-42-101(1)(a) provides, in pertinent part, that:

> Every employer, regardless of said employer's method of insurance, shall furnish such, medical . . . hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

For the apparatus to be compensable, it must be "medical" in nature; "incidental" to obtaining necessary medical treatment, *see Kuziel v. Pet Fair, Inc.*, 931 P.2d 521 (Colo. App. 1996); and provide therapeutic relief from the effects of the injury. *Cheyenne County Nursing Home v. ICAO*, 892 P.2d 443 (Colo. App. 1995).

The Court of Appeals has narrowly construed C.R.S. § 8-42-101(1)(a) when determining whether a particular apparatus or service is medical in nature. *Major v. Auto Collisions Specialists*, W.C. No. 4-497-652 (Nov. 5, 2008), citing *Kuziel v. Pet Fair, Inc.*, supra. In the *Major* case, the claimant requested a reclining chair and a specific mattress, and a treating physician opined that the chair and mattress constituted a matter of medical necessity. *Major v. Auto Collisions Specialists*, W.C. No. 4-497-652 (Nov. 5, 2008). The ALJ concluded that although the reclining chair and king size mattress sought by the claimant might ease some aspects of his condition, the evidence failed to demonstrate that the apparatuses would provide therapeutic relief. *Id.*

In this case, Dr. Pineiro testified that she recommended an adjustable bed to facilitate Claimant getting in and out of bed. Such request does not evidence how a bed would provide therapeutic relief, and there is no persuasive medical evidence regarding how a bed will specifically provide Claimant therapeutic relief for his work-related conditions.

The Act expressly prohibits Claimant from dictating the care he receives from Dr. Pineiro. *See* § 8-43-503, C.R.S. (stating "employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment"). A claimant is not permitted to issue orders or commands to their treating physician regarding the treatment to be given. *See Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009); *see also York. v. Larchwood Inns*, W.C. No. 4-365-429 (ICAO November 7, 2002). Importantly, courts look to whether communications have the "intent or effect of dictating medical care." *Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009). In determining whether a claimant dictated care, the courts look for evidence showing that a claimant: commanded, ordered, or directed the physician to take part in a specific course of conduct; influenced or compelled the physician to take a specific course of conduct, or; altered the course of treatment. *See Teegardin v. J.C. Penney Co.*, W.C. No 4-748-106-02 (ICAO January 17, 2014); *see also Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009).

Many types of scenarios have been held not to be dictating care. The ALJ concludes Claimant's actions are indistinguishable. *See Provo v. Indus. Claim Appeals Office*, 66 P.3d 138, 144 (Colo. App. 2002) (*aff'd in part and rev'd in part on other issues by Dworkin, Chambers and Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003) (holding that the respondent's counsel's advisement not to pay for ordered chiropractic treatment was not directing care); *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 144 (holding that an insurer's refusal to pay for proposed treatment did not constitute dictation of care); *Teegardin v. J.C. Penney Co.*, W.C. No 4-748-106-02 (ICAO January 17, 2014) (holding that an insurer sending correspondence to a referring physician indicating a referral would be denied because of missing work-relatedness details was not dictating care); *Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009) (holding that it was not dictating care for an insurer to send an authorized treating physician another physician's report placing the claimant at MMI and asking whether the authorized treating physician agrees); *York. v. Larchwood Inns*, W.C. No. 4-365-429 (ICAO November 7, 2002) (holding that insurer did not dictate care when its counsel sent a letter to a DIME physician with background information regarding the claimant's medical history).

Here, Claimant shopped for a Sleep Number bed, a process he defined as performing research. He dropped off at Dr. Pineiro's office marketing materials he acquired from the Sleep Number bed store. Eleven days later, Dr. Pineiro prescribed an unspecified Sleep Number bed. Dr. Pineiro testified that she exercised her own independent judgment in prescribing a Sleep Number bed. Both Claimant and Dr. Pineiro testified that Claimant did not instruct or suggest to Dr. Pineiro which bed to prescribe. And although Claimant provided Dr. Pineiro a price quote for a specific bed, the ALJ concludes such conduct rises only to the level of a suggestion, and not to the level of dictation or ordering of treatment. Claimant's counsel's request -- that Respondents provide a Sleep Number i10 California King with sheets, pillows, two remote controls, etc. -- is not prohibited by statute because it was not directed to a physician.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered:

1. Claimant's claim for a Sleep Number bed is denied, as is the claim for a new bed in general, which the claim was amended to during the hearing.

2. Respondents' claim of direction of medical care is denied.

3. Claimant's claim for EMGs of Claimant's bilateral upper and lower extremities is denied, as is reimbursement for same.

4. Claimant's claim for cervical and lumbar MRIs is denied, as is reimbursement for same.

5. Claimant's claim for observation of ADLs is denied.

DATED: June 8, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has established, by a preponderance of the evidence that she is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of her December 5, 2011, industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of Employer. She began working for Employer in February 1999.

2. Claimant was working as an all purpose clerk for Employer on December 5, 2011 when she sustained a compensable injury. On this date, she was working at the self-checkout desk when she went to help a customer that was accompanied by a service dog. As she turned to return to her desk after helping this customer, she tripped over the service dog sustaining injuries to her neck, her head, and her knees.

3. Claimant began treating with Dr. Daniel Peterson at Concentra the day after the incident on December 6, 2011. Approximately two weeks after her injury, Claimant was returned to work in a modified capacity. Dr. Peterson also referred Claimant to an orthopedist, Dr. Wiley Jinkins, on January 24, 2012 when it became evident that the condition of right her knee was not improving. He also referred Claimant for an MRI of her right knee.

4. The MRI was performed on January 24, 2012. The MRI revealed a radial tear of the posterior horn of the medial meniscus.

5. Dr. Jinkins first examined Claimant on January 31, 2012. On February 14, 2012, Dr. Jinkins recommended performing a patellar realignment procedure. Surgery was performed on March 8, 2012. Twelve days after the surgery, Claimant rated her pain at a level of 8 out of 10, despite taking pain medication as prescribed. She testified at hearing that the pain after the first surgery was "devastating" and that it was "just horrible." By May 22, 2012, Claimant experienced no improvement in her pain describing it as a level of 9 out of 10. According to Claimant, it felt like she just had surgery.

6. Claimant underwent a second surgery on September 20, 2012. On this date, Dr.

Jinkins performed an endoscopic debridement followed by endoscopic bone grafting of the proximal tibia. By October 24, 2012, Claimant described her pain as "better," but still rated it as a level of 6 out of 10. A third surgery, a hardware removal procedure was performed on January 10, 2013.

7. Dr. Jinkins indicated that Claimant's symptoms had not changed appreciably by April 1, 2013 so he performed the first of three hyaluronate injections to the knee on that date. Her pain level dropped to 4 out of 10 by April 10, 2013.

8. Dr. Jinkins' records from April 17 and May 1, 2013, indicate Claimant's pain dropped down to 2 out of 10 after the injections. The last injection was performed on April 17. Claimant disputes that her recorded pain levels dropped that appreciably. At hearing, Claimant testified that she does not recall her pain ever dropping below 5 out of 10.

9. Dr. Albert Hattem placed Claimant at MMI on May 14, 2013. Claimant indicated, at this time, that her pain levels were essentially unchanged despite multiple surgeries. Dr. Hattem provided a 23% extremity rating for the right knee. He stated that Claimant should comply with her permanent work restrictions to prevent aggravation of her condition. He stated she should not squat, crawl, or kneel, and that she should work within the sedentary category of work and be allowed to sit, stand, and walk as tolerated.

10. By July 31, 2013, Claimant's pain increased to 7 out of 10, suggesting that the benefit she experienced from the injections had worn off. Dr. Jinkins performed a follow-up examination on July 9, 2014 during which time Claimant's reported pain at a level of 8 out of 10. Dr. Jinkins noted that, "Overall, she is still significantly symptomatic and does have a pronounced limp." He explained that, in all probability, she is going to need a total knee replacement at some point in time.

11. Claimant underwent a Division Independent Medical Examination with Dr. Thomas Higginbotham on August 28, 2013. Dr. Higginbotham agreed Claimant had reached MMI, but stated that she is in need of chronic pain management. She explained to Dr. Higginbotham than her pain was worse than before and that she was experiencing "horrible, horrible pains."

12. Dr. Higginbotham opined that Claimant's right knee rating was 36% scheduled, and that she also had a 17% whole person rating to the lumbar spine. Claimant testified at hearing that it was her opinion that her altered gait from the knee injury is what was causing her back pain.

13. Claimant was terminated from her position on September 22, 2013, approximately 21 months following her industrial injury. Although she was unable to work following surgery for brief periods, Claimant returned to work for Employer in a modified duty capacity working up to eight hours per day in the 21 month time period, despite reported pain levels of five, six, seven and eight out of ten. Based upon the

evidence presented, the ALJ finds that Claimant has earned wages working full-time in a sedentary capacity despite complaints of pain up to seven to ten out of ten.

14. Upon request, Dr. Jinkins addressed Claimant's ability to work on July 22, 2014. According to Dr. Jenkins, Claimant was able to return to work in a sedentary capacity with no weight bearing until he was able to reevaluate her next month. After evaluation on August 6, 2014, Dr. Jinkins opined that, "[Claimant] is not working at the present time." "There is no light duty available to her and she is in enough discomfort that she is not able to work, even in a sedentary capacity." The ALJ infers from this note that Claimant subjectively reported to Dr. Jenkins that she could not work in a sedentary capacity secondary to her reported pain levels. On September 11, 2013, Dr. Jenkins noted that Claimant was "on 100% sedentary work restrictions.

15. Dr. Jinkins filled out a residual functional capacity questionnaire on January 27, 2015. It was his opinion that Claimant's work restrictions were, in part, as follows:

- Sitting up 8 hours per day. No standing or walking.
- Occasionally lifting up to 10 pounds. Never lifting more than 10 pounds.
- Never bending, squatting, crawling, climbing, stooping, crouching, or kneeling.
- Never driving automotive equipment for work.

16. Dr. Jinkins further indicated that because Claimant's pain was severe, it would preclude "activity precipitating the pain" including work activities. The ALJ rejects Claimant's suggestion that the note should be interpreted as precluding all "work activity." To the contrary, the note specifically indicates that Claimant would be precluded from work activities which precipitate pain.

17. Claimant underwent a vocational evaluation on February 27, 2014 with vocational experts Pat Anctil and Katie Montoya. Claimant indicated her subjective functional tolerances were, in part, as follows:

- Standing for up to 15 to 20 minutes
- No kneeling
- No squatting
- Bending to waist level
- Lifting no more than 8 pounds.

18. Ms. Anctil summarized in her initial report that Claimant's "skills and experience" included computer skills, touch typist, supervisory experience, training employees, cash handling, customer service, and operating office equipment. Claimant testified that she would use a computer "every now and then" while working for employer, but that she had no special training on computers and has no training on Excel or PowerPoint.

19. Ms. Anctil's report also indicates that Claimant prepared income taxes after high

school and that she intended to attend H&R Block's tax prep course in September of 2014.

20. Ms. Anctil concluded in her February 27, 2014 report that Claimant would be capable of earning a wage through potential occupations such as being a cashier or clerk in various fields, an insurance rep, a receptionist, an alarm operator, and a tax preparer.

21. In September 2014, Claimant enrolled in an H&R Block tax training course. The training program only lasted three to four hours per day, and an individual could sit or stand during the training as needed. There was no lifting involved, and Claimant could have used a cane or any other assistive device to help her complete the program.

22. Claimant testified that the training program was so difficult she had to go to the emergency room after attending only three sessions. Claimant testified that she stayed at the hospital all night.

23. Claimant did not submit any medical records at hearing supporting her allegation that she went to the emergency room in September 2014. Claimant also did not provide any documentation of this allegation to either Ms. Anctil or to Ms. Montoya. Additionally, Claimant did not report the incident to Dr. Jinkins at her next appointment with him.

24. The ALJ finds that Claimant's testimony that she went to the emergency room as a result of attending the H&R Block training program unconvincing and unreliable.

25. Claimant holds a National Certification Interior Design Qualified ("NCIDQ") certificate in interior design, and she has received formal and one-on-one training in the field. Claimant owns and operates a registered business, "Pretties", out of her home. Claimant is licensed to sell goods as a wholesaler, and she conducts her business by email and through a third-party website, Celebrityhomes.com. Shortly before her February 2014 meeting with Ms. Anctil, Claimant conducted a sale of home décor items out of her house in which she netted approximately $700.

26. Claimant has experience using fax machines, multi-line telephones, scanners, copiers and calculators. Claimant also uses a laptop at home and has been using laptops for roughly twenty years.

27. Claimant testified that her knee is in constant pain. There are never days that she is completely pain free, but there are days that she describes as "tolerable." Conversely, she also has days that are worse than others and she experiences a constant, throbbing, deep pain. She testified that on days like these, almost all she can do is get up and take a shower.

28. Video footage was taken of Claimant driving on February 25, 2015, February 27, 2015, and February 28, 2015. The video demonstrates Claimant shopping at the commissary for more than two hours. Based upon the video tape, the ALJ finds that

Claimant is capable of driving a car, repeatedly entering and exiting it, and standing for more than twenty (20) minutes. The video tape also demonstrates that Claimant is capable of washing her car with the use of a high pressure wand during which time she did not use a cane. On one day captured in the video footage, Claimant drove to three stores over a period of three-and-a-half hours. Based upon the video tape, the ALJ finds that Claimant is capable of walking outside without the need for a cane or other assistive device.

29. Ms. Anctil testified by deposition on April 17, 2015. She explained that, as of her first interview with Claimant in February of 2014, she was of the opinion that Claimant was capable of earning wages. It was her understanding that the restrictions in place through August 8, 2014, indicated Claimant was able to perform work in no more than a sedentary capacity.

30. Ms. Anctil identified thirty-four job positions Claimant could perform within her restrictions. Ms. Anctil concluded that Claimant still has access to sixty-four percent of the jobs she could have obtained prior to her work injury. Additionally, Ms. Anctil reported that there were more than one hundred occupations currently available to Claimant.

31. Katie Montoya issued her vocational assessment dated February 18, 2015. Ms. Montoya noted that, during her initial interview with Claimant in February of 2014, Claimant indicated she wanted to attend the H&R Block tax prep course and Claimant believed she could do it.

32. Ms. Montoya's February 2015 report documents her follow-up conversation with Claimant. Claimant expressed to her that she did in fact attend the H&R Block tax prep course, but was physically unable to complete the program due to her pain levels. "[Claimant] identified that her pain is worse and that she previously thought her pain would get better and it just has not. The difficulty she had with the H&R Program confirmed to her that she has an inability to return to work."

33. Katie Montoya noted in her report that Dr. Jinkins was of the opinion that Claimant's pain was severe enough to preclude all work activities. As noted above, the ALJ rejects this interpretation of Dr. Jinkins January 27, 2015 report. Ms. Montoya explained in her report that, at the time of the 2014 vocational interview, she thought the H&R Block course was a good plan for Claimant. However, "[Claimant] was unable to be successful in that program."

34. Ms. Montoya testified by deposition on April 3, 2015. She testified that Claimant could not return to her work with Employer because the lifting was too much and the position required more standing and walking than she is capable of. She testified that her physical restrictions would preclude her from performing all of her past relevant work.

35. Ms. Montoya testified that the issue of unscheduled absences is something that

comes up frequently in her line of work and that it is something she has analyzed. She explained that it varies by employer and that, generally, an employer will have less tolerance for a new employee than a tenured employee.

36. Ms. Montoya testified that, with a new employee, employers generally allow no more than two or three absences. "Any more than that would be an issue. Even that, on a prolonged basis, for a new employee is an issue." Ms. Montoya noted that Dr. Jinkins indicated Claimant's pain was "severe," which precluded all work activity; however, even if the pain was only "moderate" resulting in three to five absences per month, it would impact her ability to maintain any work. She also stated that employers are even less tolerating of absences during initial training programs because employees need to have the skills that are learned during the training on order to be able to perform the job.

37. Ms. Montoya stated that Claimant has no transferrable skills from her previous tax prep work because a lot has changed since she performed that job briefly thirty-five years ago.

38. Ms. Montoya ultimately concluded, "I think that the limitations, as noted by Dr. Jinkins, eliminate her ability to be able to maintain employment…." Based upon a totality of the evidence, including the video surveillance tape, the ALJ is not persuaded.

39. The ALJ finds the testimony and opinions of Ms. Anctil credible and more persuasive than the contrary opinions of Ms. Montoya.

40. The ALJ credits the testimony of Ms. Anctil regarding Claimant's vocational skills and employment prospects to find that Claimant is capable of sedentary work within the "semiskilled" and "skilled" employment categories and that Claimant is capable of earning a wage. Consequently, Claimant has failed to prove, by a preponderance of the evidence, that she is permanently totally disabled.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000).

B. The purpose of the "Workers' Compensation Act of Colorado" (hereinafter "Act")

is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence to find that a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Whether a claimant sustained his/her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. *Section 8-43-201, C.R.S.* In this case, the undersigned ALJ concludes that claimant has failed to prove, by a preponderance of the evidence, that she meets the criteria of "permanent total disability" as that term is defined under the Act.

C. Under the applicable law, Ms. Smith is permanently and totally disabled if she is unable to "earn any wages in the same or other employment." *Section 8-40-201(16.5)(a), C.R.S.* The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

D. Moreover, there is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995). Based upon the evidence presented, the ALJ is not persuaded that the restrictions assigned by Dr. Jenkins preclude her from earning a wage in sedentary positions. Claimant's primary argument for her contention that she is unable to work is based on her testimony that she is currently in too much pain to work. However, the ALJ finds this assertion contradicted by evidence presented at hearing including: a) the lack of solid medical evidence to support her current assertions of "severe" pain; b) Claimant earned wages in two different professions after the injury during a period of time when

she testified she was in severe pain; c) the physical activities Claimant demonstrated in the surveillance footage undermine her credibility regarding her complaints of pain; and d) Claimant's own testimony regarding what she is physically able to do. When determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Considering Claimant's unique "human factors", the ALJ is not convinced that she is incapable of earning any wages. Here, both vocational rehabilitation experts involved in this claim have explicitly stated that Claimant possesses the skills necessary to earn a wage in a sedentary capacity. The ALJ credits Ms. Anctil's testimony to find that Claimant retains access to better than 50% (64%) of the jobs she was capable of performing prior to her work injury and that more than one hundred occupations are currently available to Claimant. On the evidence presented, the ALJ is persuaded that the representative sampling of sedentary positions identified by Respondents' vocational expert as being within Claimant's physical/mental capabilities present a number of perspective job positions existing in the local labor market affording Claimant the opportunity to earn a wage. Furthermore, Claimant considers herself an intelligent person who is capable of learning new skills. She is proficient in using a laptop, has some training in secretarial work, and spent two years in a clerical position at the King Soopers pharmacy. Additionally, Claimant has experience in, an aptitude for, and a desire to perform tax preparation. Based upon the evidence presented, the ALJ concludes that she has failed to prove by a preponderance of the evidence that she is incapable of earning a wage.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

DATED: July 7, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-887-035-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 21, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 5/21/15, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM).

Claimant's Exhibits1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through M were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, to be submitted electronically within 5 working days. On May 29, 2015, counsel for the Claimant requested an extension of time until June 3, 2015 within which to submit a proposed decision. Counsel for the Respondents had no objection. The Claimant submitted a proposed decision on June 3, 2015, and the Respondents submitted detailed objections thereto on June 5, 2015, at which time the matter was deemed submitted for decision.

ISSUES

The issues to be determined by this decision concern average weekly wage (AWW), based on multiple employments; and, temporary partial disability (TPD) and

temporary total disability (TTD) benefits from February 13, 2012, the date of the admitted injury, through May 5, 2014, the date of maximum medical improvement (MMI). Respondents designated the issue of an unemployment insurance (UI) benefit offset. The Respondents did **not** designate the issue of "responsibility for termination," nor was it an issue.

The Claimant bears the burden of proof, by preponderant evidence on all issues, with the exception of the UI offset, wherein the Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Respondents admitted liability for injuries sustained by Claimant arising out of a slip and fall accident on February 13, 2012.

2. On July 24, 2014, the Respondents filed a Final Admission of Liability (FAL), admitting for zero temporary disability benefits; a maximum medical improvement (MMI) date of May 5, 2014; 14% whole person permanent medical impairment for a total of $5,852.56 (based on a lower AWW as a component of the formula), however, permanent disability was not designated as an issue nor was it an issue at the hearing, payable at the rate of $150 per week; $40,438.08 in medical benefits to date; and, for causally related and reasonably necessary post-MMI medical maintenance benefits.

3. The Claimant was working as a school bus driver at the time of her injury. Claimant testified that she was able to continue to work as a bus driver but had difficulty performing some of the lifting and reaching duties required of her employment. She continued to work for Employer until she was dismissed from employment on May 22, 2013. The reasons for the Claimant's dismissal are unclear. Suffice it to say, since temporary disability benefits are based on a strict temporary wage loss concept, the Employer, by terminating the Claimant's employment, increased her temporary wage loss.

Medical Status

4. After the admitted injury, the Employer sent the Claimant to Banner Health for treatment, where she was seen by Paulette Carpenter, FNP (Nurse Practitioner). According to the Claimant, Carpenter referred her for an orthopedic evaluation a few months after her injury. Claimant was seen by Robert Benz, M.D., an orthopedic surgeon. According to the Claimant, she was not seen by another physician

until she was seen by Adam Mackintosh, M.D., a Sterling physician, in August 2013. The Claimant denied having been seen by Jeff Bacon, M.D., at Banner Health. The Claimant was also referred to Kenneth Pettine, M.D., Usama Ghazi, D.O., and Gregory Reichhardt, M.D. All of these physicians were within the chain of authorized referrals and, therefore, authorized.

5. The Claimant's medical records from Banner Health reveal that the Claimant was treated by Paulette Carpenter, FPN throughout the course of her medical treatment. With the exception of the period from October 25, 2013 until November 17, 2013, FPN Carpenter indicated Claimant was able to return to full duty work. As found herein below, the ALJ infers and finds that Carpenter's "release to return to full duty work" was improvidently made, based on an inadequate grasp of all of the Claimant's circumstances. The Physician's Reports of Workers' Compensation Injury up until April 16, 2013 were signed by FPN Carpenter. The majority of reports beginning April 16, 2013 were signed or co-signed by Dr. Bacon (who had never seen the Claimant) or Dr. Mackintosh. With the aforementioned exception, all medical reports after April 16, 2013 indicated that the Claimant was able to return to full duty work. Although the Respondents, in lodging objections to the Claimant's proposed findings, rely on these reports to assert that the Claimant had medical full duty releases to return to work almost immediately after the admitted injury of February 13, 2012, the ALJ does not find these "full duty" releases **credible** because they are superseded by the opinions of more credible physicians, including Dr. Mackintosh himself, as found herein below.

6. Dr. Mackintosh testified by deposition on April 10, 2015. He first saw the Claimant in September 2013. He stated that Paulette Carpenter, FNP, provided primary care to Claimant prior to this date. Dr. Mackintosh began seeing the Claimant when nurse practitioners required a physician to sign off on treatment. Dr. Mackintosh stated that he felt the Claimant could perform the regular duties of a bus driver as he understood them to be, and that he was hesitant to place work-restrictions on patients that could impact their employment. Dr. Mackintosh stated that there were physical limitations that the Claimant should have avoided after her injury such as heavier lifting. Dr. Mackintosh did not disagree with the permanent restrictions provided by Dr. Reichhardt because that was Dr. Reichhardt's area of expertise. Dr. Mackintosh stated that the Claimant had medical incapacity after her date of injury and it would not have been unreasonable for the Claimant to have the permanent restrictions provided by Dr. Reichhardt in place from her date of injury until MMI. The ALJ infers and finds that Dr. Mackintosh deferred to Dr. Reichhardt on the issue of medical restrictions, and Dr. Reichhardt, as subsequently inferred and found herein, retrospectively restricted the Claimant to limitation of lifting, pushing, pulling and carrying up to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist to a rare basis four times per hours.

7. The Claimant was seen once by Dr. Benz on or about May 4, 2012 for orthopedic surgical evaluation. In addition to stating the opinion that the Claimant would

not benefit from surgical intervention, Dr. Benz indicated that the Claimant could return to her full duties as a bus driver. For the reasons stated in the findings herein below, the ALJ finds that subsequent medical opinions are more persuasive and credible and these opinions outweigh Dr. Benz's "full duty" release. Therefore, the ALJ does **not** find Dr. Benz's opinion in this regard credible.

8. The Claimant was seen by Kenneth A. Pettine, M.D., on or about March 1, 2013. Dr. Pettine was of the opinion that the Claimant was a candidate for a 2-level fusion procedure. Dr. Pettine also outlined a number of non-operative treatment options. Dr. Pettine stated the opinion that the Claimant should avoid heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. The ALJ finds the opinions of Dr. Pettine to be more credible and persuasive than the opinions of Dr. Benz.

9. The Claimant underwent bilateral L4-5, bilateral L5-S1 facet joint intra-articular injections performed by Scott Hompland, D.O., on September 6, 2012 and December 6, 2012.

10. Claimant was seen by Usama Ghazi, D.O., on or about November 11, 2013. Dr. Ghazi recommended a course of treatment to begin with sacroiliac injections. Dr. Ghazi subsequently performed bilateral sacroiliac injections and a sacrococcygeal joint injection with some improvement. Dr. Ghazi noted that the Claimant was frustrated that her tailbone pain was precluding her from returning to her occupation as a trucker. Although Dr. Ghazi did not specifically comment on work-restrictions, this later evidence of the Claimant's level of function and intensity of treatment is persuasive evidence that she was unable to perform full duty work for the Employer.

11. The Claimant was placed at MMI by Dr. Reichhardt on May 5, 2014. Dr. Reichhardt issued a 10% whole person permanent impairment rating for Claimant's cervical spine and 11% whole person permanent impairment rating for Claimant's lumbar spine (later apportioned to 4%). Dr. Reichhardt recommended 3 years of maintenance treatment and provided permanent work-related restrictions of limited lifting, pushing, pulling and carrying to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist "to a rare basis four times per hours." Dr. Reichhardt deferred any opinion concerning the Claimant's temporary restrictions prior to MMI to the Claimant's authorized treating physicians. The ALJ infers and finds that Dr. Reichhardt's permanent work restrictions, at least, equate to her temporary restrictions before MMI. The opinions of Dr. Reichhardt are credible and persuasive. Additionally, Dr. Pettine had prescribed temporary restrictions of avoiding heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. All of these restrictions would prevent the Claimant from performing the full range of her job duties with the Employer, with Stops, and with Quizno's.

12. Despite temporary restrictions implicitly prescribed by Dr. Pettine and Dr. Reichhardt, retrospectively, the Claimant continued working at her multiple employments in excess of those restrictions, however, the ALJ infers and finds that she was **not** able to adequately properly perform at any of her multiple jobs, thus she minimized her temporary wage loss. The ALJ infers and finds that based on the Claimant's undisputed testimony, she should not have been working, full duty, at any of her multiple employments unless she had been offered modified duties to accommodate those restrictions. She was **not** offered modified duties at any of her employments.

Multiple Employments as of Admitted Date of Injury

13. The Claimant's gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amount to $10, 012.05 divided by 52 = $192.35 per week, as opposed to the admitted AWW of $156.76. This higher AWW would affect the formula for determining permanent medical impairment, however, permanency was **not** a designated issue.

14. On the date of her injury, the Claimant also worked as a driver for Stops Enterprises. She began working for Stops in the early part of 2011 and continued to work for Stops until approximately December 2012. Her job duties at Stops included driving patients to their medical appointments. The Claimant was able to do her job duties after her injury, but had some trouble with longer drives. Her employer stopped sending her assignments in December of 2012. The Claimant implies that the Employer stopped sending her assignments in December of 2012 because of her admitted injury. Regardless of why Stops stopped sending the Claimant assignments, her temporary wage loss increased as of January 1, 2013. Claimant's wage records from Stop Enterprises from July 5, 2011 until January 5, 2012 reveal gross earnings of $2,909.40 for this 185 day period. This would result in a weekly average of $110.09 ($2,909.40 /185 x 7) at Stops.

15. Also on the date of her admitted injury, the Claimant worked at The Reata Petroleum Corporation, which was a Quizno's sandwich shop located at a truck stop. Her job duties were as a sandwich maker. She started working for Quizno's in June 2011 until she stopped working on April 15, 2012. According to the Claimant, she stopped working at Quizno's because she could no longer handle the physical demands of working three (3) jobs. Claimant's employment records from Reata Petroleum Corporation indicate that Claimant started working for Quizno's on June 14, 2011. Her 2011 W-2 from Reata Petroleum (Quizno's) indicates that the Claimant earned $4,512.60 for the tax year of 2011. Based on 201 days from June 14, 2011 until December 31, 2011, these gross earnings would result in a weekly average of $157.16 at Quizno's.

Average Weekly Wage (AWW)

16. As of the admitted date of injury, the Claimant had three concurrent, multiple employments. The Claimant's gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amounts to $10, 012.05 divided by 52 = $192.35 per week. Add $110.09 per week from Stops and $157.16 per week from Quizno's, and an overall AWW of $459.60 results. The ALJ hereby finds that the above described methodology for determining AWW from the Claimant's three multiple employments is the fairest and most objective way of determining the AWW herein. Therefore, the ALJ finds that the Claimant's AWW as of the date of injury was $459.60, which is the baseline from which temporary partial disability (TPD) should be measured, based on temporary wage loss.

Unemployment Insurance (UI) Benefit Offset

17. The Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013 (Claimant's Exhibit 6).

Temporary Disability

18. From the date of the admitted injury of February 13, 2012 until the Claimant was terminated from employment by the Employer herein on May 22, 2013, she continued to earn $192.35 per week from the Employer herein. From February 13, 2012 through December 31, 2012, she continued working for Stops, earning an additional $110.09 per week. From February 13, 2012 through April 15, 2012, she also continued working for Quizno's at $157.16 per week. Consequently, the Claimant had **no** temporary wage loss from February 13, 2012 through April 15, 2012. From April 16, 2012 through December 31, 2012, the Claimant was sustaining a temporary wage loss of $302.44 ($459.60 - $157.16 = $302.44) during this period of time. From January 1, 2013 through May 22, 2013, the Claimant had lost her employment with Stops at $110.09 per week. Consequently, her temporary wage loss during this period of time was $459.60 - $110.09=$349.51 per week. From May 23, 2013 (the date of her termination by the Employer herein) until December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, or a total wage loss of $459.60 per week.

18. In approximately December 2013, the Claimant started to work retail sales for Stage Stores. She continued to work at Stage Stores, averaging between 12-17 hours/week at $8.60 an hour, or an average of 15 hours per week, or $129.00 per week, until after she was placed at MMI on May 5, 2014. From December 2, 2013 through the date of MMI, May 5, 2014, the Claimant was sustaining a temporary wage loss of $330.60 per week ($459.60 - $129.00= $330.60).

Ultimate Findings

19. It is undisputed that Dr. Mackintosh deferred to Dr. Reichhardt on the Claimant's medical restrictions. As inferred and found herein above, Dr. Reichhardt's permanent medical restrictions were at least the Claimant's temporary restrictions after

the admitted injury of February 13, 2012. Also, Dr. Pettine imposed temporary restrictions that would have prevented the Claimant from performing the full range of her duties at her multiple employments. Nonetheless, the Claimant worked at her multiple employments despite her medical restrictions, but she could not perform adequately or properly at any of her multiple jobs. It would be irrational to infer that the Claimant's temporary restrictions before MMI, imposed by Dr. Reichhardt, were less than her permanent restrictions at MMI.

20. The ALJ finds the Claimant's testimony as a whole, credible and un-refuted. Her lay testimony establishes that she could **not** perform properly or adequately at any of her multiple jobs. Also, the ALJ finds the medical opinions of Dr. Pettine and Dr. Reichhardt concerning restrictions persuasive and credible. The ALJ finds the opinion of Dr. Benz lacking in credibility because it is contrary to the weight of the evidence.

21. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Pettine, Dr. Reichhardt and Dr. Mackintosh's ultimate opinion (as found in paragraph 6 herein above), because they are based on substantial evidence, and to reject the opinion of Dr. Benz and FPN Carpenter.

22. The Claimant's AWW from her multiple employments on the date of injury is $459.60, which is the baseline measurement for TPD benefits.

23. From the date of injury, February 13, 2012 through April 15, 2012, the Claimant was working at all three multiple employments and sustained **no** temporary wage loss. As supported by the findings herein above, from April 16, 2012 through December 31, 2012, the Claimant was sustaining a temporary wage loss of $302.44 per week, which yields a TPD rate of $201.62 per week, or $28.80 per day. From January 1, 2013 through May 22, 2013, the date of her termination by the Employer herein, the Claimant was sustaining a temporary wage loss of $349.51 per week, which yields a TPD rate of $233.00 per week, or $33.29 per day. From May 23, 2013 through December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, which yields a temporary total disability (TTD) benefit rate of $306.40 per week, or $43.77 per day. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average of $129.00 per week) through May 4, 2014 the day before her MMI date, the Claimant was sustaining a temporary wage loss of$330.60 per week, which yields a TPD rate $220.40 per week, or $31.49 per day.

24. The Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013 (Claimant's Exhibit 6).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony as a whole, was credible and un-refuted. Also, as found, the medical opinions of Dr. Pettine and Dr. Reichhardt, concerning restrictions, were persuasive and credible. As further found, the opinion of Dr. Benz was lacking in credibility because it was contrary to the weight of the evidence. The ultimate medical opinions of Dr. Mackintosh, Dr. Pettine and Dr. Reichhardt on restrictions are essentially un-contradicted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Pettine, Dr. Reichhardt and Dr. Mackintosh's ultimate opinion (as found in Finding No. 6 herein above), because they are based on substantial evidence, and to reject the opinion of Dr. Benz and FPN Carpenter.

Average Weekly Wage

c. Where an injured worker has arranged **multiple** employments to earn a living, and the injury precludes work altogether, or in one or more employments, a fair computation of the true AWW encompasses all employments. *St. Mary's Church & Mission v. Indus. Comm'n,* 735 P. 2d 902 (Colo. App. 1986); *Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988); *Broadmoor Hotel v. Indus. Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996), *cert. denied* July 14, 1997. An AWW calculation is designed to compensate for temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S
An ALJ has the discretion to determine a claimant's AWW, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, a fair and objective determination of the Claimant's AWW from her multiple employments at the time of the admitted injury is $459.60, which is the baseline from which to measure temporary wage loss.

Temporary Disability

d. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage

loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not her fault but the result of undisclosed reasons. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant worked at her multiple employments despite her medical restrictions, but she could not perform adequately or properly at any of her multiple jobs.

e. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring), modified employment is not made available, and there is no actual return to work, TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, from the date of injury, February 13, 2012 through April 15, 2012, the Claimant was working at all three multiple employments and sustained **no** temporary wage loss. As supported by the findings herein above, from April 16, 2012 through December 31, 2012, the Claimant was sustaining a temporary wage loss of $302.44 per week, which yields a TPD rate of $201.62 per week, or $28.80 per day. From January 1, 2013 through May 22, 2013, the date of her termination by the Employer herein, the Claimant was sustaining a temporary wage loss of $349.51 per week, which yields a TPD rate of $233.00 per week, or $33.29 per day. From May 23, 2013 through December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, which yields a temporary total disability (TTD) benefit rate of $306.40 per week, or $43.77 per day. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average of $129.00 per week) through May 4, 2014 the day before her MMI date, the Claimant was sustaining a temporary wage loss of$330.60 per week, which yields a TPD rate $220.40 per week, or $31.49 per day.

Unemployment Insurance Benefit Offset

f. Section 8-42-103 (1) (f), C.R.S., provides for a 100% offset for UI benefits. As found, the Claimant received UI benefits of $129.00 every two weeks, or $64.50 per week, from June 1, 2013 until November 24, 2013, and the Respondents are entitled to an offset of $64.50 per week during this period of time.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to an increased AWW and temporary disability benefits through the date of MMI, May 5, 2014.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's average weekly wage is hereby re-established at 4459.60.

B. Any and all claims for temporary disability benefits from February 13, 2012 through April 15, 2012, are hereby denied and dismissed.

C. From April 16, 2012 through December 31, 2012, both dates inclusive, a total of 260 days, Respondents shall pay the Claimant , temporary partial disability benefits at rate of $201.62 per week, or $28.80 per day, in the aggregate subtotal amount of $7,488.00, which is payable retroactively and forthwith. From January 1, 2013 through May 22, 2013 (the date of the Claimant's termination by the Employer herein), a subtotal of 142 days, the Respondents shall pay the Claimant temporary partial disability benefits at the rate of $233.00 per week, or $33.29 per day, in the aggregate amount of $4,727.18, which is payable retroactively and forthwith. From May 23, 2013 through May 31, 2013, both dates inclusive, a subtotal of 9 days, the Respondents shall pay the Claimant temporary total disability benefits at the rate of $306.40 per week, or $43.77 per day, in the aggregate subtotal amount of $393.94, which is payable retroactively and forthwith. From June 1, 2013 through November 24, 2013, both dates inclusive, a subtotal of 177 days, the Respondents shall pay the Claimant temporary total disability benefits of $306.40 per week less the UI offset of $64.50 per week, in the net amount of $241.90 per week, or $34.56 per day, in the

aggregate amount of $6,177.12, which is payable retroactively and forthwith. From November 25, 2013 through December 1, 2013, both dates inclusive, a subtotal of 7 days, the Respondents shall pay the Claimant temporary total disability benefits (with no offset) at the rate of $306.40 per week, or $43.77 per day, in the aggregate subtotal amount of $306.39, which is payable retroactively and forthwith. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average of $129.00 per week) through the day before the maximum medical improvement date, May 4, 2014, both dates inclusive, a subtotal of 154 days, the Respondents shall pay the Claimant temporary partial disability benefits at the rate of $220.40 per week, or $31.49 per day, in the aggregate subtotal amount of $4,849.46, which is payable retroactively sand forthwith. In sum, the respondents shall pay the Claimant a grand total of $23,635.70 in net retroactive temporary partial and temporary total disability benefits, including the 100% unemployment insurance benefit offset, through the date of maximum medical improvement, retroactively and forthwith.

D. the Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of June 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

1. Whether the respondents are providing reasonable, necessary, and related medical care to the claimant to cure and relieve her from the effects of her occupational disease.

2. Whether the overpayment alleged by the respondents in their last Final Admission dated December 19, 2014 is accurate.

3. Whether the claimant is owed interest on temporary total disability benefits owed for the period of February 13, 2015 to the date payment was issued by the respondents, May 21, 2015.

STIPULATIONS

1. The parties have stipulated and agreed that the claimant is no longer at maximum medical improvement (MMI) and the respondents have filed a revised general admission admitting for ongoing temporary total disability (TTD) benefits beginning February 13, 2015.

FINDINGS OF FACT

1. The claimant suffered an admitted injury on December 1, 2011. The claimant was placed at maximum medical improvement (MMI) by authorized treating physician Dr. Albert Hattem on August 21, 2014 and assigned a permanent impairment rating. Dr. Hattem did not recommend maintenance treatment. The respondents filed a final admission of liability consistent with Dr. Hattem's impairment rating and claimed an overpayment of $2,158.66.

2. The claimant objected to the final admission of liability and requested a Division Independent Medical Examination (DIME). The DIME was performed by Dr. Miguel Castrejon on November 19, 2014. Dr. Castrejon agreed that the claimant was at MMI as determined by Dr. Hattem. However, Dr. Castrejon recommended that the

claimant undergo additional diagnostic testing as maintenance treatment to either rule out or confirm the diagnosis of chronic regional pain syndrome (CRPS).

3. The respondents filed a final admission for liability on December 19, 2014 consistent with Dr. Castrejon's impairment rating and once again did not admit for maintenance medical benefits. The respondents claimed an overpayment of $3,837.62.

4. Consistent with a referral from Dr. Hattem, the respondents authorized the additional diagnostic testing recommended by Dr. Castrejon.

5. The additional diagnostic testing was positive for the presence of CRPS and the claimant followed up with Dr. Hattem on March 17, 2015. At this evaluation, Dr. Hattem referred the claimant to Dr. Shimon Blau for consideration of a sympathetic block to definitively rule out CRPS. Dr. Hattem also prescribed the claimant 300 mg tablets of Gabapentin 90 tablets, no refills, and did not recommend any other treatment at that time. The claimant's appointment with Dr. Blau was scheduled for May 4, 2015 as this was apparently the earliest available appointment.

6. The appointment with Dr. Blau did proceed on May 4, 2015 and Dr. Blau recommended proceeding with sympathetic blocks. No testimony was presented concerning when the report from Dr. Blau was sent or received by the respondents. However, the report contains a fax time stamp from Rockrimmon Concentra CS of 9:11 a.m. on May 12, 2015. Therefore, it is most likely that the report was faxed at this date and time. The claimant testified that she was notified on May 21, 2015 that the blocks had been authorized. Accordingly, the blocks were timely authorized.

7. The DIME examiner did mention consideration of additional treatment that may include anti-depressive medication, psychological support, and chronic pain management if the claimant was not at MMI. To date, Dr. Hattem has not prescribed any of these treatments and has not yet expressly opined that the claimant is not at MMI despite the stipulation of the parties.

8. No other specific treatment has been requested to date by Dr. Hattem, Dr. Blau or any other authorized treating physician that the respondents have not yet authorized.

9. The claimant has failed to prove that respondents have denied any treatment requested by any authorized treating physician.

10. The claimant was sent an indemnity check for $839.48 for the period December 27, 2013 through January 9, 2014. The claimant did not cash this check but

returned it to the respondent-insurer. The respondent-insurer did not give the claimant credit for this returned check when calculating its FAL of December 19, 2014.

11. The claimant was sent two other checks, each for $839.48, which she cashed but then reimbursed the respondent-insurer by way of a cashier's check made out to the respondent-insurer in the amount of $1,678.96. The respondent-insurer did not give the claimant credit for this reimbursement check when calculating its FAL of December 19, 2014.

12. The ALJ finds that the respondent-insurer paid the claimant $14,977.96 in indemnity benefits up through the filing of the Final Admission of Liability (FAL) on December 19, 2014.

13. Based upon the FAL the respondent-insurer was responsible for paying $15,944.92, which includes a disfigurement award of $1,000.00.

14. The ALJ finds that as of the date of the FAL on December 19, 2014 the respondent-insurer owed the claimant $966.96.

15. The ALJ finds that the respondent-insurer miscalculated the overpayment stated in the FAL of December 19, 2014 and that in actuality they had underpaid the claimant by $966.96.

16. The claimant, per the stipulation of the p[arties, is no longer at MMI as of February 13, 2015. The respondents agree that the claimant was entitled to temporary total disability benefits beginning on that date.

17. Based upon the proffer of counsel the claimant was not paid TTD for the period beginning February 13, 2015 until May 21, 2105.

18. The ALJ finds that the respondent-insurer is liable for interest of 8% on amounts due and not paid when required including the TTD beginning with February 13, 2015 and the underpayment from the FAL of December 19, 2014.

19. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondents are not providing reasonable, necessary, and related medical care for the claimant through her authorized providers.

20. The ALJ finds that the claimant has established that it is more likely than not that the overpayment stated on the December 19, 2014 FAL is incorrect and in fact there is an underpayment of $966.96.

21. The ALJ finds that the claimant has established that it is more likely than not that the respondent-insurer owes the claimant interest at 8% on amounts not paid when due including the underpayment of $966.96 and owed but unpaid TTD beginning with February 13, 2015 until paid.

CONCLUSIONS OF LAW

1. A DIME physician's determination is binding with respect to MMI, impairment, causation and apportionment. Such an opinion must be overcome by clear and convincing evidence. However, a DIME physician is not a treating physician. The DIME physician's treatment recommendations have no binding effect. Once a DIME physician determines a claimant is either at MMI or not at MMI and recommends treatment, the claimant returns to the treating physician and treatment is once again left to the sound discretion of the treating physician. Here, claimant has requested "a blanket order" entitling her to all of the specific treatment recommendations of an independent medical examiner even though no authorized treating provider has requested authorization of any of the treatment at issue. Claimant has offered no legal authority to support such a request. Moreover, the facts do not support this request as Dr. Castrejon only opined that the treatment "may" include the items at issue. He did not state that the treatment shall, should, or must include the items for which claimant is seeking authorization.

2. Case law clearly holds that even after a DIME, claimant bears the burden of proving entitlement to any specific treatment and respondents retain the right to dispute the reasonableness and medical necessity of any specific benefit. *Crowe v. Better Alternative, Inc.,* W.C. 648-372, (February 2, 2007); *See Snyder v. Industrial Claim Appeals Office, 942* P.2d 1337, 1339 (Colo. App. 1997). Respondents' right to challenge specific medical benefits includes those recommended by DIME physicians and a recommendation is not *de facto* reasonable and necessary simply because the DIME doctor recommended it as something that *may* be necessary to bring claimant to MMI.

3. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she is not receiving reasonable, necessary, and related medical care through her authorized providers to cure and relieve her from the effects of her occupational disease.

4. Whether the respondent-insurer erred in calculating the appropriate amounts stated in the FAL is a mathematical calculation based upon the underlying facts of the claimant's periods of disability, her permanent partial disability, and her disfigurement award.

5. The parties do not dispute the periods of disability as stated in the FAL. The ALJ calculates the ultimate amounts based upon the FAL of December 19, 2015 as the previous FAL even if in error is no longer relevant.

6. As found above, the ALJ concludes that the respondent-insurer erred in the calculation of the overpayment stated on the December 19, 2015 FAL because they failed to credit the claimant with the repayment of amounts made by the claimant by returning a check in the amount of $839.48 that was un-negotiated and by sending a cashier's check in the amount of $1,678.96.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent-insurer underpaid the claimant in the amount of $966.96 as of the date of the December 19, 2014 FAL.

8. The statute on interest, section 8-43-410(2), C.R.S. states that interest at eight percent per annum is due upon all sums not paid by either the date fixed by the director or administrative law judge, or the date the employer or insurance carrier became aware of an injury, whichever date is later.

9. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent-insurer is responsible for payment of interest at the rate of 8% on all amounts due but unpaid per the statute.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for a general order concerning provision of medical benefits to the claimant is denied and dismissed.

2. The respondent-insurer shall pay the claimant $966.96 for the underpayment based upon the December 19, 2015 FAL.

3. The respondent-insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 17, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-900-242-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Third Party Administrator (TPA),

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 15, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 4/15/15, Courtroom 1, beginning at 8:30 AM, and ending at 10:00 AM).

Respondents' Exhibits A through E were admitted into evidence, without objection. The Claimant relied on the Respondents' Exhibits.

At the conclusion of the hearing, the ALJ established the deadline of April 27, 2015 within which the Claimant should file a written transcript of the evidentiary deposition of Thomas Mann, M.D. (hereinafter referred to as "Mann Depo.," followed by a page number), which was filed on April 24, 2015, and a briefing schedule. The Claimant's opening brief was filed on May 13, 2015. The Respondents' answer brief was filed on May 21, 2015. The Claimant was given 2 working days after the answer brief within which to file a reply brief, if any, or no later than May 26. No timely reply brief having been filed, the matter was deemed submitted for decision on May 27, 2015.

ISSUE

The sole issue to be determined by this decision concerns the causal relatedness (to the admitted right knee injury of June 19, 2012) of the total right knee replacement recommended by orthopedic surgeon, Thomas Mann, M.D.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Previous Decision by ALJ Richard Lamphere: January 22, 2014

1. The Claimant claimed that on June 19, 2012, she aggravated a pre-existing degenerative condition in her right knee and lumbar spine in an accident that occurred during the course and scope of her employment with the Employer herein. She requested treatment for those injuries, including surgery on her right knee and injection of the right L5-S1 facet joint and the right greater trochanteric bursa. The Respondent admitted the occurrence of a work-related "incident" on June 19, 2012, but denied that the need for the treatment requested was due to the "incident" of June 19, 2012. Moreover, the Respondent asserted that any need for further treatment was solely related to pre-existing degenerative conditions.

2. Following a hearing on December 11, 2013, before ALJ Lamphere, the issues were determined in favor of the Claimant and adversely to the Respondent. ALJ Lamphere found that, "Claimant has proved by a preponderance of the evidence that she suffered a slip and fall as reported on June 19, 2012, striking her right knee and left back on the floor of employer." (Findings of Fact and Conclusions of Law and Order, January 22, 2014, hereinafter "Lamphere Decision").

3. ALJ Lamphere reviewed the medical records and reports of David Orgel, M.D., who treated the Claimant at Concentra, and John Tobey, M.D., a physiatrist who treated her at Spine West. ALJ Lampere noted that "Dr. Orgel and Dr. Tobey have stated that the most likely explanation for Claimant's right knee condition is an **aggravation of her pre-existing arthritic condition resulting from the reported June 19, 2012, incident"** (emphasis supplied) [Lamphere Decision]. ALJ Lamphere also reviewed the medical records and deposition testimony of Allison Fall, M.D., who performed an independent medical examination (IME) of the Claimant at Respondent's request. Dr. Fall was of the opinion that the Claimant's reported incident of June 19, 2012, did not result in an aggravation of her pre-existing arthritic condition.

4. ALJ Lamphere found that "the opinions of Drs. Mann, Orgel and Tobey

regarding aggravation of pre-existing osteoarthritis as an explanation for Claimant's right knee condition are more persuasive that the contrary opinions of Dr. Fall. The Claimant has proven by a preponderance of the evidence that she suffered a compensable aggravation of her pre-existing condition when she slipped and fell on June 19, 2012 and that this aggravation has result in disability and that the need for treatment, including surgery, is related to this aggravation" (Lamphere Decision). ALJ Lamphere also found that the record failed to demonstrate any right knee pain or treatment prior to June 19, 2012, and that the lack of such evidence further supported the finding that the Claimant's pre-existing degenerative condition of her right knee was aggravated by the accident of June 19, 2012 (Lamphere Decision).

5. ALJ Lamphere made the following Conclusion of Law: "In this case, the totality of the evidence supports the conclusion that Claimant suffered from a latent pre-existing osteoarthritis in the right knee which manifested after Claimant struck her right knee on the floor after slipping in water while performing her work duties... As found, the Claimant has proven by a preponderance of the evidence that she suffered a compensable aggravation of her pre-existing condition when she slipped and fell on June 19, 2012, and that this aggravation has resulted in disability and that the need for treatment, including surgery, is related to this aggravation" (Lamphere Decision). ALJ Lamphere therefore ordered that "Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of her industrial injury, including, but not limited to, right knee surgery, as recommended by Dr. Mann, a right L5-S1 facet injection and a right greater trochenteric bursa injection, as recommended by Dr. Tobey (Lamphere Decision).

6. The Claimant was seen by Thomas Mann, M.D. on October 2, 2012, for an orthopedic consult. He recommended arthroscopic surgery to address the meniscal pathology, chondral debris and the small loose body noted. Authorization for the surgery was denied by the Respondent.

7. On December 5, 2012, the Claimant was seen again by David Orgel, M.D. Dr. Orgel noted her to walk with an antalgic gait. He assessed a low back strain and right knee pain with large meniscal tear following a fall. He stated in his note, "I am unsure why there has been such a delay in getting her knee surgery approved." On January 22, 2014, ALJ Lamphere ordered the Respondent to provide the requested surgery.

Evidentiary Deposition of Thomas Mann, M.D., Re: Recommended Total Right Knee Replacement

8. Dr. Mann is an orthopedic surgeon. He routinely operates on knees and examines knees as part of his orthopedic practice (Mann Depo., p. 4). He has a subspecialty in Sports Medicine and Arthroscopic Surgery (Mann Depo., p. 4).

9. Dr. Mann first saw the Claimant on October 2, 2012, following an MRI (magnetic resonance imaging) which was taken on September 28, 2012 (Mann Depo., p. 6). The MRI showed a large complex degenerative flap medial mensicus tear with extrusion and medial compartment arthrosis. Medical compartment arthrosis means there is arthritis in the medial or midline part of the knee (Mann Depo., p. 7). Because of the size of the tear, Dr. Mann recommended arthroscopic surgery to remove the unstable portion of the meniscus.

10. Dr. Mann next saw the Claimant on February 11, 2014. It had been a couple of years since he last saw her (Mann Depo., pp. 7-8). He did repeat radiographs to see what, if anything had changed in the intermediate time. When he saw the new x-rays and saw that the Claimant's medial compartment had now basically totally collapsed, he **changed** his opinion; he didn't think arthroscopic surgery would be effective (Mann Depo., p. 8, lines 6-11). According to his note, Dr. Mann recommended symptomatic treatment for the knee and anticipated that long-term relief would require a knee replacement (Mann Depo., p. 9, lines 4-7). Dr. Mann indicated that the knee replacement was likely not relatable to the aggravating injury in June, 2012 (Mann Depo., p. 9, lines 7-9). He indicated that normally he would think that the need for a knee replacement would not be related to a work-related accident (Mann Depo., p. 9, lines 11-25).

11. Dr. Mann saw the Claimant again on May 8, 2014 He performed a physical examination and found that the Claimant's knee was in varus, meaning that it was bowed in and had some laxity with it and that she was tender along the medial joint line. Dr. Mann did not find varus in his first examination in October, 2012 (Mann Depo., p. 10, lines 17-24). In his opinion, the most likely cause of the varus was the loss of cartilage on the medial side of the knee, the cartilage being both the articulate cartilage and the meniscal cartilage (Mann Depo., p. 11, lines 5-10). Imaging studies now showed nearly complete loss of the medial compartment (Mann Depo., p. 11, lines 11-15).

12. Between the time when Dr. Mann first saw the Claimant on October 2, 2012, and his last physical examination of the Claimant on November 11, 2014, physical findings showed deterioration in her condition (Mann Depo., p. 12, lines 11-20). Dr. Mann observed that it appeared that the Claimant had lost 20 degrees of extension and 5 degrees of flexion; her alignment went more into varus, or more bow-legged (Mann Depo., p. 12, lines 20-25). Dr. Mann identified Claimant's Deposition Exhibit No. 2 as radiographs of both the Claimant's knees looking from an anterior-posterior view taken on October 2, 2012 (Mann Depo., p. 13, lines 8-14). The format of Exhibit 2 is a printed negative on a white piece of paper (Mann Depo., p. 13, lines 15-21). Dr. Mann identified Claimant's Deposition Exhibit No. 3 as a similar photo of a radiograph printed on white paper and dated November 11, 2014. Mann Deposition Exhibits 2 and 3 are x-rays of both the left and right knee taken simultaneously while bearing weight (Mann Depo., p. 14, lines 5-9).

13. According to Dr. Mann, Mann Deposition Exhibit No. 2 showed degenerative changes in both the right knee and the left knee with narrowing of the medical compartment. There was possibly a bit more joint space in the left knee than in the right knee (Mann Depo., p. 14, lines 10-21). Dr. Mann then compared the changes shown on Exhibit 3 to the earlier x-rays on Exhibit 2. He stated that Mann Deposition Exhibit 3 "demonstrates almost complete loss of the medial compartment with complete varus on the radiograph, the changes on the left knee also show some degenerative changes, but not as advanced as the right" (Mann Depo., p.14, lines 22-25; p. 15, lines 1-9).

14. As of October 2, 2012, the Claimant had osteoarthritis or degenerative joint disease in both knees (Mann Depo., p. 15, lines 12-18). According to Dr. Mann, in the absence of the trauma sustained to the Claimant's right knee on June 19, 2012, he would expect symmetrical progression of the arthritis: "You expect both knees to kind of progress similarly" (Mann Depo., p. 15, lines 22-25; p. 16, lines 1-8). Looking at exhibit 3, the arthritis in [Claimant's] right knee appears to have progressed much more rapidly on the right than on the left" (Mann Depo., p. 16, lines 9-13).

15. Dr. Mann was then asked the following hypothetical question with the following response:

Q.

"Assume that [Claimant] was asymptomatic in her right knee prior to June 19, 2012, assume that there is no history of a prior injury to her right knee and no history of prior medical treatment of her right knee before June 19, 2012, and assume further that there has not been any traumatic injury to her right knee since June 19, 2012. Do you have an opinion to a medical probability as to the most probable cause of the acceleration in the progression of arthritis in the right knee as compared to the left knee since June 19, 2012?"

A.

"I would assume that the - - if she had a documented injury that seemed to happen at that time and if it progressed like this, then that's where I think it would have had a probability of contributing – or causing or being the main cause of this accelerated progression." (Mann Depo., p. 16, lines 14-25; p. 17, lines 1-5).

16. On November 11, 2014, Dr. Mann recommended a knee replacement as long-term care of [Claimant's] right knee (Mann Depo., p. 17, lines 6-10). In Dr. Mann's opinion, the progression of the arthritis that he saw in radiographs was likely related to

the aggravation caused by her work-related trauma of June 19, 2012 (Mann Depo., p. 17, lines 11-17). The ALJ finds that Dr. Mann has expressed an opinion, to a reasonable degree of medical probability, that the recommended total right knee replacement is proximately, causally related to the admitted right knee injury of June 19, 2012.

17. Dr. Mann acknowledged that in his note of February 11, 2014, he indicated that long-term relief "will require a knee replacement, which is likely not directly attributable to the aggravating injury of June, 2012", while following his evaluation and x-rays of November 11, 2014, he indicated that in his opinion, "it is more likely than not that the fall significantly impacted her progression of arthritis (Mann Depo., p. 17, lines 18-25; p. 18, lines 1-5). Dr. Mann acknowledged that this was a change of opinion (Mann Depo., p. 18, lines 6-7). Dr. Mann explained the change in his opinion as follows:

Q.

"Can you explain to us how you came to the change of opinion?"

A.

"I guess, you know, my normal opinion was based on the fact that typically when we see injuries like this common, and usually arthritis is arthritis, and someone hurts themselves and they blame their injury on their arthritis. But we know from radiographs that people have arthritis that maybe is not symptomatic and then they have an injury that flares it up, but it's usually not the cause.

And that is what I initially thought after reviewing the case because that's the typical approach. And it's - -you know, arthritis is a multifactorial problem.

But I guess **my opinion changed when I really studied the progression, and it just did not fall in the typical progression of arthritis that I typically see.** And knowing that **she had this injury that led to a meniscal tear that likely then just allowed more rapid progression** (emphasis supplied) is where, if I looked at her over the course of that two and a half years or that time course, I thought that it likely did contribute.

And I still think it's multifactorial, it's not the only cause. But it became, it seems, the sort of the nidus of her rapid progression, and that - - , and so I think it's still a difficult case, but that's - - I think if there is absence any other injuries or any other change, and that it was the - - I tried to make an objective determination based on the accelerated wear I saw in the right knee versus the left knee, which **I don't typically see that significant a change or asymmetrical change without**

some sort of new injury or problem" (emphasis supplied) [Mann Depo., p. 18, lines 8-25; p. 19, lines 1-14].

18. A knee replacement is not part of Dr. Mann's routine practice. He recommended another surgeon to do it. (Mann Depo., p. 20, lines 9-14). He recommended his partner, who shares overhead expense; but he would not receive any direct compensation from the surgery (Mann Depo., p. 20, lines 15-18).

19. Dr. Mann concluded that the arthroscopic surgery he had recommended on October 2, 2012, was no longer a reasonable treatment option due to the progression of the Claimant's arthritis. He recommended symptomatic treatment for the knee and anticipated that "long term relief will require a knee replacement which is not directly relatable to the aggravating injury of June of 2012." (Respondent's Exhibit B).

20. Dr. Mann saw the Claimant again on May 8, 2014. He states the following in his clinical note of that date: "Unfortunately she had underlying arthritis, but it was aggravated by the trauma and now **we can see some progression of the arthritis of the right knee at an increased pace than the left knee** (emphasis supplied)**...** Long-term for pain and limitations is likely a knee replacement, but as noted she had some underlying arthritis prior to the injury. **The injury has just progressed the problem more rapidly** (emphasis supplied)**"** [Respondent's Exhibit B).

Mark Failinger, M.D.

21. The report of Dr. Failinger, who also evaluated the Claimant on March 15, 2015, at Respondent's request, provides further documentation of the extent to which the Claimant's knee condition has deteriorated since her injury. Dr. Failinger states that the Claimant "has a **very antalgic gait with a bent knee and signicant varus** (emphasis supplied) is noted to the right knee. Her **range of motion is extremely poor** (emphasis supplied). She goes from 30 degrees lacking full extension to approximately 60 degrees of flexion." (Respondent's Exhibit E). Dr. Failinger went on to conclude that, "Given that presentation, what I have reviewed in the medical records, her ambulatory status, and her description of pain, **she does appear to be a candidate for a total knee replacement as the only likely possibility of regaining some functionality and a better ambulatory status** (emphasis supplied). She is quite limited here and it is very difficult for most patients to walk with a flexion contracture of 30 degrees, which she appears to have from the limited examination she allowed me to perform." After reaching this conclusion, Dr. Failinger stated, "This appears to be the classic case of exacerbation of a severe preexisting generative joint disease." He then stated the opinion that "it is with a low probability that any new significant pathology was created by the fall, such as a major meniscus tear or worsening of her arthritis."

22. With respect to the latter opinion, the ALJ finds that Dr. Failinger was under the misimpression that the Claimant did not sustain a direct blow to her knee in her fall. Dr. Failinger specifically stated, "I have not seen the films." This is significant, because Dr. Mann's opinion that there has been a significant exacerbation and acceleration of the Claimant's arthritis **is based specifically on a comparison of x-rays** (emphasis supplied)**.**

Respondent's Independent Medical Examiner (IME) Douglas Scott, M.D.

23. Dr. Scott IS board-certified in occupational medicine. . After Dr. Mann prepared his March 25, 2015, report, Dr. Scott reviewed the records of Dr. Mann from February, 2014, and May, 2014, Dr. Chan's impairment rating and Dr. Failinger's report from March 2015.

24. According to Dr. Scott, the MRI of September 28, 2012, demonstrated a large, complex degenerative flap area of the anterior horn, body and posterior horn of the medial meniscus, which he believed were attributable to the June 19, 2012 injury. In Dr. Scott's opinion, the MRI findings not attributable to the injury included "severe arthrosis of the medial compartment, full thickness chondral loss throughout the anterior posterior weight-bearing medial thermal (*sic*) condyle and tibial plateau; degeneration and fraying of the posterior root of the lateral meniscus; Grade 3/4 chondral loss along the lateral patella femoral joint and median eminence of the patella; and the small to moderate joint effusion with synovitis.

25. According to Dr. Scott, arthrosis is essentially the loss of cartilage overlying the femur in the tibial plateau. Dr. Scott attributed this to a long-standing degenerative process. It is not an acute finding, according to Dr. Scott. In Dr. Scott's opinion, the injury of June 19, 2012, did not aggravate or accelerate the radiologist's findings in Number 2 of the MRI report of September 28, 2012. There was also degeneration of the lateral meniscus which pre-existed the accident, according to Dr. Scott. He testified that there was also, under Finding No. 5 in the MRI report of September 28, 2012, small to moderate joint effusion synovitis; this could be related, in his opinion, to osteoarthritis or to the meniscal tear.

26. Dr. Scott noted that there was a tear, disruption, or evulsion of the medial lateral meniscus which occurred as a result of trauma to the menisci from shearing, torsion or an impact injury in the flexed position. In Dr. Scott's opinion, the June 19, 2012, trauma did not accelerate the progression of the Claimant's underlying arthritic condition in the knee.

27. In Dr. Scott's opinion, the June 19, 2012, trauma did not cause the Claimant's pre-existing, but asymptomatic arthritis to become symptomatic. This opinion is contrary to ALJ Lamphere's Finding of Fact in his decision of January 24, 2014. ALJ Lamphere's finding, which was not appealed, is *res judicata* on this fact.

28. On cross-examination, Dr. Scott admitted that he had not reviewed any actual x-rays or imaging studies before writing his IME report; he did review the MRI report of September, 2012, Dr. Mann's x-ray report of September 2, 2012, and Dr. Mann's x-ray report of November 11, 2014. Dr. Scott stated that he would agree with Dr. Failinger and Dr. Mann that the appropriate treatment for the Claimant would be a total knee replacement (Hearing Transcript, p. 39, lines 2-25; p. 40, lines 1-20).

29. On cross-examination, Dr. Scott agreed that a review of the x-ray of the Claimant's knee taken on October 2, 2012, with the x-ray taken on November 11, 2104, would be necessary to determine if there had been some medial compartment loss or narrowing of the medial compartment. Dr. Scott agreed that a comparison of the October 2, 2012, x-ray taken by Dr. Mann with the x-ray taken by Dr. Mann on November 11, 2014, showed a narrowing of the medial compartment space. Dr. Scott also agreed that it could be inferred that the x-rays showed objective evidence of the progression of arthritis following trauma. Dr. Scott indicated that it was his opinion that the Claimant, at the time of her accident of June 19, 2012, had osteoarthritis in both the left knee and the right knee. He admitted that in reaching his opinions, he had made no comparison of the progression of the arthritis in the left knee with the progression of arthritis in the right knee.

30. On cross-examination, Dr. Scott indicated that if one knee has altered biomechanics, the degeneration of arthritis in that knee might accelerate more rapidly than in the other knee. Dr. Scott agreed that the Claimant had altered biomechanics in her right knee due to a large complex degenerative flap tear involving the anterior horn, body and posterior horn to the medial mensicus related to her work-related injury of June 19, 2012. Dr. Scott agreed that an individual with a meniscus tear is at risk for developing osteoarthritis down the line. Dr. Scott agreed that the delay of 14 months between the time that Dr. Mann recommended surgery until the time the Claimant was able to obtain an Order authorizing the surgery may have contributed to the progression of arthritis in her right knee.

Colorado Medical Treatment Guidelines (MTG), Rule 17, Workers' Compensation Rules of Procedure (WCRP), 7 CCR 1101-3

31. The MTG for Lower Extremity Injury, effective September 1, 2009, note on page 60 that knee meniscus injury, *e.g.* a tear, disruption, or avulsion of the medial or lateral meniscus, occurs occupationally as a result of trauma to the menisci from rotational shearing, torsion, and/or **impact injuries while in a flexed position** (emphasis supplied)**.**

32. The MTG note on page 47 that to establish the occupational relationship of aggravated knee osteoarthritis the provider must establish a change in the patient's baseline condition and a relationship to work activities including but not limited to

physical activities such as repetitive kneeling or crawling, squatting and climbing, or heavy lifting. The MTG also note that **another causative factor for aggravated osteoarthritis to consider is previous meniscus damage which predisposes a joint to degenerative changes** (emphasis supplied)**.** To establish that previous trauma causes joint degenerative changes, however, the prior injury should be at least two years from the presentation of new complaints and **there should be a significant increase of pathology on the affected side compared to the original imaging and/or to the opposite un-injured side or extremity** (emphasis supplied).**"**

Ultimate Findings

33. Dr. Mann's opinion that there has been a significant progression of post-traumatic degeneration of the Claimant's right knee since her accident of June 19, 2012, is supported by x-rays and her medical records. Dr. Mann's opinion that such progression was more likely than not caused by the trauma of her accident is credible, logical, and consistent with the evidentiary standards contained in the MTG.

34. While Dr. Mann was inconsistent in expressing his opinion he ultimately reached the right answer. It is otherwise difficult to explain the dramatic deterioration in Claimant's right knee condition in such a short time based only on speculation concerning a normal progression of arthritis. To accept the "natural progression" theory, the ALJ would be required to believe that some extraordinary, unknown factor intervened to aggravate and accelerate the Claimant's right knee degeneration more quickly and seriously than the left knee degeneration. When dealing in the realm of reasonable probabilities, the ALJ infers and finds that it is more reasonably probable that the admitted trauma of June 19, 2012, is the known factor that aggravated and accelerated the need for a total replacement of the right knee.

35. The ALJ finds the ultimate opinion of Dr. Mann on causality (concerning the need for a total right knee replacement) more persuasive and credible than the opinion of IME Dr. Scott for the following reasons: Dr. Mann, an orthopedic surgeon who has dealt extensively with knees, has more specific expertise concerning knee surgery than Dr. Scott; Dr. Mann's ultimate opinion is more consistent with the totality of the evidence and plausible inferences to be drawn there from; and, Dr. Mann has dealt more extensively with the Claimant's medical case than Dr. Scott.

36. Between conflicting medical opinions, the ALJ makes a rational choice to accept the ultimate opinion of Dr. Mann concerning the causal relatedness of the total right knee replacement, and to reject the opinion of IME Dr. Scott.

37. The Claimant has proven, by a preponderance of the evidence that the Claimant's present need for a total right knee replacement has been proximately caused by an aggravation and acceleration of the admitted, compensable right knee injury of June 19, 2012.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the ultimate opinion of Dr. Mann on causality (concerning the need for a total right knee replacement) was more persuasive and credible than the opinion of IME Dr. Scott for the following reasons: Dr. Mann, an orthopedic surgeon who has dealt extensively with knees, has more specific expertise concerning knee surgery than Dr. Scott; Dr. Mann's ultimate opinion is more consistent with the totality of the evidence and plausible inferences to be drawn there from; and, Dr. Mann has dealt more extensively with the Claimant's medical case than Dr. Scott.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the ultimate opinion of Dr. Mann concerning the causal relatedness of the total right knee replacement, and to reject the opinion of IME Dr. Scott.

Causal Relatedness of Present need for Total Right Knee Replacement

c. In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the Claimant has established that the present need for a total right knee replacement is directly and proximately linked to the original, admitted right knee injury of June 19, 2012.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer*

v. Indus. Claim Appeals.Office, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has satisfied her burden with respect to the causal relatedness of the present need for a total right knee replacement.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of all medical treatment for the Claimant's admitted right knee injury of June 19, 2012, including the costs of the total right knee replacement, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You**

may access a form for a petition to review at *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of June 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

Whether Claimant has overcome the Division Independent Medical Examination (DIME) physician's opinion of maximum medical improvement (MMI) and 0% whole person permanent impairment by clear and convincing evidence.

Whether Claimant is entitled to temporary indemnity benefits from June 17, 2014 and ongoing.

Whether the medical treatment recommended by Dr. Healey and Dr. Lichtenberg is reasonable, necessary, and causally related to Claimant's October 6, 2012 work injury.

FINDINGS OF FACT

1. Claimant is a 42 year-old female who worked for Employer as a line cook from 2008 until her date of injury.

2. On October 6, 2012, close to 1:30 a.m., Claimant was cleaning in Employer's kitchen underneath the "line." The "line" is a long metal shelf or counter, approximately five feet tall. Claimant was cleaning under the counter when she raised her head and hit her head on the underside of the "line." Claimant fell backwards, landing on her buttocks and back. Claimant did not lose consciousness.

3. After the incident, Claimant worked the remainder of her shift, between 30 minutes and 90 minutes (varied reports provided by Claimant). She then drove herself home and did not appear confused or disoriented when speaking with her husband after arriving home.

4. Later that day, Claimant sought treatment at approximately 1:00 p.m. at NextCare Urgent Center. *See* Exhibits S, 14.

5. At NextCare, Claimant was evaluated by Debra Salter, M.D. Claimant reported that she hit the top of her head and fell backward at work with no loss of consciousness. Claimant reported she had a moderate headache and pain in the sacrum and coccyx. Dr. Salter noted an unremarkable exam and diagnosed buttock contusion and headache. *See* Exhibits S, 14.

6. Dr. Salter requested and Claimant underwent X-rays of her lumbar spine that showed normal age related degenerative changes. The X-rays showed moderate

degenerative spondylosis of the lumbar spine and multi-level degenerative disc space narrowing, most severe at L4-L5 and L5-S1. No compression fracture or spondylolisthesis was found. *See* Exhibits S, 14.

7. On October 8, 2012 Claimant returned to NextCare and was evaluated by PA-C Marzena Kaczmarczyk. Claimant reported her head pain was getting worse and reported dizziness and double vision. Claimant was sent directly to the emergency department at the Medical Center of Aurora due to her reported symptoms. At the emergency department, Claimant underwent a head CT scan that was negative. *See* Exhibits S, 14.

8. Claimant was evaluated by various providers at NextCare from October 11, 2012 through November 28, 2012. Claimant subjectively reported continued back pain and headache pain that was not improving. Claimant's gait was noted to be normal throughout treatment. Claimant initially reported no radiation of her back pain, and later radiation into her right leg. Claimant's head, ears, eyes, nose, and throat (HEENT) examinations were all normal throughout treatment. Claimant was referred for a neurological examination and was referred to a Level II provider for management. *See* Exhibits S, 14.

9. On December 17, 2012, Braden Reiter, D.O. took over Claimant's care and became her authorized treating provider (ATP).

10. Respondents admitted liability for the October 6, 2012 incident and Respondents have paid for extensive medical treatment and diagnostic testing following the incident.

11. Approximately one month after taking over Claimant's care, Dr. Reiter referred Claimant for psychiatric treatment. Dr. Reiter also noted at that time that he had a guarded prognosis for Claimant's recovery due to multiple issues where her subjective complaints were beyond objective findings. Dr. Reiter believed there were some secondary gain issues, but noted he would continue to work through the specialists' evaluations. *See* Exhibits F, 13.

12. Despite his concern in January of 2013 of secondary gain issues, Dr. Reiter referred Claimant to multiple specialists for evaluation. Based on subjective complaints Claimant reported, the specialists to whom Claimant was referred ordered and performed significant testing to rule out possible conditions.

13. The testing included: CT of her orbits that was normal; MRI of her lumbar spine that showed normal age related mild degenerative disc disease; MRI of her cervical spine that showed normal and minimal age related degenerative changes; MRI of the brain that was normal; and EMG and nerve testing that was normal and showed no evidence of cervical radiculopathy. *See* Exhibits F, 13.

14. Dr. Reiter also referred Claimant for a neurological evaluation. *See* Exhibits F, 13.

15. On January 2, 2013 Claimant was evaluated by Lynn Parry, M.D. Dr. Parry opined based on Claimant's subjective reports that Claimant most likely had suffered a vestibular concussion. Dr. Parry sent Claimant for vestibular testing which showed no abnormalities or evidence of vestibular injury and showed no perilymph fistula. Dr. Perry found no other neurological abnormalities. *See* Exhibits L, 22.

16. On January 21, 2013 Claimant underwent a psychological pain evaluation performed by Rebecca Hawkins, Ph.D. Claimant was assisted by a Spanish language interpreter. Testing performed by Dr. Hawkins suggested Claimant was over reporting and exaggerating her somatic memory and cognitive complaints. Dr. Hawkins opined that symptom magnification could be interfering with Claimant's recovery and that Claimant's presentation was not consistent with the natural history of concussive or mild traumatic brain injury. Dr. Hawkins indicated she wished to rule out malingering versus factitious disorder, but unless there was clear evidence of either, opined that the Claimant would benefit from a course of individual cognitive- behavioral therapy and biofeedback. *See* Exhibits K, 18.

17. Claimant underwent six psychotherapy sessions with Dr. Hawkins but did not yield any subjective or objective benefit from the sessions. Dr. Hawkins did not recommended additional psychotherapy sessions. Dr. Hawkins also opined that transferring care to a different psychologist would not result in further improvement or benefit. *See* Exhibits K, 18.

18. On April 15, 2013 Claimant underwent an Independent Medical Evaluation (IME) performed by Lawrence Lesnak, D.O. Claimant reported to Dr. Lesnak that Dr. Reiter had recently hit her head three times and made her dizzy. She also reported that Dr. Perry told her recently that she had a fracture in her hip. The medical records do not support Claimant's statements. *See* Exhibits B, 9.

19. On examination, Dr. Lesnak noted Claimant exhibited diffuse pain behaviors and non-physiologic findings. She exhibited diffuse entire body cog wheeling, exhibited an inability to stand or walk without assistance from her husband, and appeared to volitionally shake her entire body. Dr. Lesnak noted that examination was difficult at best due to Claimant's unwillingness to participate. When performing rotator cuff testing, Claimant appeared to volitionally almost fall off the stool. Dr. Lesnak opined that Claimant's total body shaking during evaluation made no sense from an anatomic or physiologic standpoint. *See* Exhibits B, 9.

20. Dr. Lesnak opined that Claimant suffered a fairly trivial incident at work with minor initial symptoms and objective findings that dramatically worsened and became much more diffuse within a month or so. Dr. Lesnak opined that Claimant now had a multitude of subjective complaints without any objective findings. Dr. Lesnak opined that Claimant exhibited extensive and diffuse pain behaviors and non-

physiological findings throughout the examination and that a psychological evaluation suggested factitious disorder or malingering. Dr. Lesnak noted despite numerous tests and treatment, Claimant subjectively reported that her symptoms had worsened. *See* Exhibits B, 9.

21. Dr. Lesnak opined that no further diagnostic testing or interventional treatments whatsoever would be necessary or related to the occupational injury. Dr. Lesnak opined that Claimant's subjective complaints were completely unreliable. Therefore, he opined that any recommended treatment or further testing must be based on objective findings and opined that currently Claimant had no objective findings that correlated with her ongoing symptomatology or that were related to the occupational injury. Dr. Lesnak opined that Claimant was clearly at maximum medical improvement (MMI) and that she qualified for no permanent functional impairment related to her injury. *See* Exhibits B, 9.

22. Dr. Lesnak testified by deposition consistent with his IME report. Dr. Lesnak opined that Claimant had progressive, bizarre symptoms that could not be explained even after numerous diagnostic tests. Dr. Lesnak opined that even someone with a severe neurological disorder would not present in the way Claimant presented. He opined that the bump of Claimant's head at work, as she described, was a fairly trivial event while changing positions and standing up a few inches striking an object that didn't move. He opined that the bump of the head was not enough to cause intracranial trauma. He further opined that Claimant's facial swelling on the left, and excessive tearing of her left eye does not make sense as caused by the work injury because there was no soft-tissue injury to the face, vascular compromise, lymphatic compromise, ocular problem, or brain-stem problem caused by the bump to her head.

23. Dr. Lesnak's opinions are found credible and persuasive. His opinions are consistent with other evaluating physicians and are supported by the lack of objective findings that would be consistent with the mechanism of injury Claimant described.

24. On April 22, 2013 Claimant underwent an IME with Stephen A. Moe, M.D. Dr. Moe opined that somatization and excessive illness behavior contributed significantly to the physical symptoms that Claimant attributes to the work injury. Dr. Moe further opined that Claimant's somatization and excessive illness behavior were not caused by the work injury. *See* Exhibits C, 10.

25. Dr. Moe testified by deposition consistent with his IME report. Dr. Moe opined that Claimant's escalation of symptoms was inconsistent with post-concussive syndrome, where symptoms will typically present within hours to days. Dr. Moe further opined that the symptoms of trigeminal autonomic cephalgia (TAC) did not present until approximately five weeks after the work injury, that it was unclear if TAC was work related, and that Dr. Lichtenberg had jumped to a conclusion that TAC was work related and had caused Claimant to have a litany of conditions that were thus also related to the work injury. Dr. Moe further opined that even if TAC were work related, TAC could

only explain some of Claimant's symptoms and not the majority of the progressive bizarre symptoms that she displayed, and that Dr. Lichtenberg was incorrect in attributing all of her bizarre and progressive symptoms to the work injury or to TAC.

26. Dr. Moe's opinions are also found credible and persuasive, are supported by the medical records, and are consistent with several other treating providers.

27. On May 29, 2013 Claimant was evaluated by neurologist Jon Scott, M.D. Claimant reported to Dr. Scott symptoms including memory decline, confusion, reading problems, headaches, depression, insomnia, fatigue, weakness, double vision, blurred vision, speech difficulty, balance problems, shaking and tremors, gait problems, dizziness, numbness, tingling, neck pain, arm pain, back pain, leg pain, bladder incontinence, constipation, and leg swelling. Dr. Scott opined that Claimants level of injury would not cause her subjective and diffuse neurological symptoms. Dr. Scott recommended against further neurologic workup and opined that Claimant's symptoms were not related to the work incident. *See* Exhibits A, J.

28. On June 24, 2013 Claimant underwent an IME with Alan Lichtenberg, M.D. Dr. Lichtenberg made the following work related injury diagnoses: abnormal diagnostics of EMG/NCV of the upper extremities showing evidence of mild bilateral cervical paraspinal muscles compatible with early root irritation; abnormal lumbar spine x-rays showing moderate degenerative spondylosis with disc space narrowing at multiple levels, most severe at L4-5 and L5-S1; post concussion syndrome; post traumatic chronic daily mixed muscle tension and migraine headaches; medication overuse headaches; trigeminal autonomic cephalgia; conversion disorder; astasia-abasia; permanent aggravation of pre-existing lumbar spine degenerative disease; TMJ symptoms due to headache and trigeminal autonomic cephalgia. Dr. Lichtenberg opined that Claimant was not at MMI for the work injury. *See* Exhibit 8.

29. On August 26, 2013 Claimant underwent a Neurologic IME with Marc Treihaft, M.D. Dr. Treihaft gave an impression of concussion with post-concussive syndrome and short-acting unilateral neuralgiform headache with conjunctival injection and tearing. Dr. Treihaft also opined that Claimant had a non-physiologic examination. Dr. Treihaft recommended carotid ultrasound testing to rule out dissection, which Claimant underwent and was negative. Dr. Triehaft noted that Claimant's headaches were improving and did not recommend any further headache treatment, but noted a referral to a headache clinic could be completed if the headaches did not continue to improve. Dr. Triehaft did not perform a causation analysis. *See* Exhibits D, 23.

30. On March 19, 2014 Claimant was evaluated by neurologist Richard Steig, M.D. Dr. Steig opined that Claimant had vascular headaches with some evidence of autonomic dysfunction in the left facial area and conversion or factitious disorder. Dr. Steig opined that there were no physical injuries that resulted from Claimant's work injury in October of 2012. He noted Claimant had undergone very thorough evaluations by multiple specialists with the only objective findings being unrelated imaging and unrelated left Horner's syndrome. He opined the left Horner's syndrome went along

with the diagnosis of vascular headaches and autonomic dysfunction in the left facial area, which was not work related. He recommended Claimant follow up with Dr. Treihaft for treatment of the non-work related vascular headaches and autonomic dysfunction. He opined that Claimant had no physical impairment and was at MMI for the October 2012 injury. *See* Exhibits I, 27.

31. Dr. Steig opined that the constellation of Claimant's symptoms, reviewed with the nature of injury and significant absence of objective findings lended credence to the psychiatric diagnosis of factitious disorder and/or conversion disorder. Dr. Steig opined that further physical testing and treatment would only solidify Claimant's problems. *See* Exhibits I, 27.

32. On June 17, 2014, Dr. Reiter opined that Claimant was at MMI with zero percent impairment. *See* Exhibits F, 13.

33. On June 18, 2014 Claimant underwent an additional neurological evaluation with Alexander Zimmer, M.D. Dr. Zimmer gave an impression of closed head injury in October 2012 that resulted in concussion and post concussion headache syndrome. Dr. Zimmer opined that the intermittent left facial pain with tearing in the left eye was consistent with TAC and opined that this type of facial pain is usually idiopathic. Dr. Zimmer opined that several of Claimant's symptoms including tremulousness, gait abnormalities, and dramatic loss of position sense noted on examination may be on a psychosomatic basis. *See* Exhibits G, 26.

34. On July 14, 2014 Claimant underwent an additional neurological evaluation with Patrick Bushard, M.D. Dr. Bushard opined that Claimant's motor findings and weakness appeared to be if not completely, at least partially psychosomatic in nature given the physical exam findings. He opined that her headaches appeared to be posttraumatic headache with superimposed TAC versus cluster headache. *See* Exhibit 28.

35. On September 19, 2014 Alan Lichtenberg, M.D. performed a medical record review of this case. Dr. Lichtenberg made the following work related injury diagnoses: abnormal diagnostics of EMG/NCV of the upper extremities showing evidence of mild bilateral cervical paraspinal muscles compatible with early root irritation; abnormal lumbar spine x-rays showing moderate degenerative spondylosis with disc space narrowing at multiple levels, most severe at L4-5 and L5-S1; post concussion syndrome; post traumatic chronic daily mixed muscle tension and migraine headaches; medication overuse headaches; trigeminal autonomic cephalgia; conversion disorder; astasia-abasia; permanent aggravation of pre-existing lumbar spine degenerative disease; TMJ symptoms due to headache and trigeminal autonomic cephalgia. Dr. Lichtenberg opined that the October 6, 2012 injury was the proximate cause of all the above diagnoses. *See* Exhibit 8.

36. Dr. Lichtenberg disagreed with the opinions of Dr. Steig and believed Dr. Steig missed the diagnosis of permanent aggravation of pre-existing cervical and

lumbar spondylosis, and was incorrect on a zero permanent impairment rating. Dr. Lichtenberg also disagreed with the opinions of Dr. Reiter and believed Dr. Reiter was incorrect on a zero permanent impairment rating. *See* Exhibit 8.

37. Dr. Lichtenberg opined that Claimant was not at MMI and that Claimant should have further treatment including acupuncture, injection in the lower occipital trigger point at least twice, other injections for spinal pain, a repeat cervical MRI, mental and behavioral counseling by a Spanish speaking female, and referral to a headache clinic. *See* Exhibit 8.

38. Dr. Lichtenberg opined that any provider who states that Claimant should receive no permanent impairment rating is absolutely incorrect. Dr. Lichtenberg opined that Claimant qualified for post-concussion headaches, mental and behavioral disorders, and permanent aggravation of pre-existing cervical lumbar spine disease. *See* Exhibit 8.

39. Dr. Lichtenberg's opinions are a difference of opinion from Dr. Dillon, Dr. Lesnak, Dr. Reiter, Dr. Moe, Dr. Scott, and Dr. Steig. Dr. Lichtenberg's opinions are not found as credible or persuasive as several opinions by other treating physicians who opine that Claimant's injury was more trivial in nature and would not cause the extent of her complaints or symptoms.

40. On November 20, 2014 Jade Dillon, M.D. performed a Division Independent Medical Examination (DIME). Dr. Dillon opined that Claimant reached MMI on June 17, 2014 and that Claimant had a 0% permanent impairment rating as a result of the October 6, 2012 work injury. *See* Exhibits A, 6.

41. At the DIME evaluation, Dr. Dillon reviewed multiple medical records and diagnostic tests including those from several neurologists. Dr. Dillon noted Claimant's continued multiple complaints including constant daily headaches, pain behind her left eyes, redness and watering of the eye, and diffuse all over body pain. *See* Exhibits A, 6.

42. Dr. Dillon agreed with Dr. Reiter as to the date of MMI. Dr. Dillon also agreed with Dr. Steig's opinion that Claimant had vascular headaches with some evidence of autonomic dysfunction in the left facial area. Dr. Dillon agreed with Dr. Steig that the vascular headaches and autonomic dysfunction were not work related. Dr. Dillon opined, similar to Dr. Lesnak and Dr. Scott, that it was not reasonable given the nature and degree of the head injury suffered at work, that Claimant would have such severe unremitting symptoms, unimproved after two years. She also agreed that there was an element of conversion or factitious disorder affecting all symptoms. Dr. Dillon opined that Claimant's headaches and autonomic dysfunction in the left facial area was not a ratable condition and was not work related. *See* Exhibits A, 6.

43. Dr. Dillon opined that Claimant's neck, low back, and lower extremity symptoms showed only subjective complaints with no correlation on diagnostic imaging.

Dr. Dillon opined that complaints in these areas represented at least a gross symptom magnification if not a frank factitious disorder. Dr. Dillon opined that there was no ratable condition for any of these pain complaints. *See* Exhibits A, 6.

44. Dr. Dillon opined that Claimant's shoulder complaints were not related to the work injury in October of 2012. She opined that there was no injury to the shoulders at the time of the occupational injury and that the symptoms appear to be part of the total body pain syndrome. Dr. Dillon opined there was no ratable condition for the shoulders. *See* Exhibits A, 6.

45. Dr. Dillon opined that Claimant's TMJ complaints were not related to the work injury in October of 2012. She opined that the onset of symptoms of TMJ were subsequent to the injury and further opined that there was no TMJ abnormality as Claimant's intra-incisor opening was 35 mm on examination which is considered normal per clinical guidelines. Dr. Dillon opined there was no ratable condition for TMJ. *See* Exhibits A, 6.

46. Dr. Dillon opined that Claimant's visual complaints were not related to the work injury in October of 2012, and additionally, that there was no identifiable abnormality of the eyes shown by testing, and that there was no ratable condition for vision abnormality. *See* Exhibits A, 6.

47. Dr. Dillon's opinions are found credible and persuasive. Dr. Dillon issued her opinions after a total review of the medical records and her opinions are supported by the opinions of Dr. Lesnak, Dr. Moe, Dr. Steig, Dr. Scott and Dr. Reiter. It is not clear that Dr. Dillon erred in her opinions, especially given the support by multiple other treating physicians.

48. On December 31, 2014 Respondents filed a Final Admission of Liability (FAL) consistent with DIME physician Dr. Dillon's report. The FAL admitted for a 0% permanent impairment rating, and provided that Claimant had reached MMI on June 17, 2014. *See* Exhibit 5.

49. On January 15, 2015 Edwin Healey, M.D. performed an examination of Claimant, and provided a provisional impairment rating along with a review of Claimant's case. Dr. Healy noted Claimant reported 10/10 pain to him at examination and he noted Claimant's subjective report of severe debilitating pain. Dr. Healey opined that Claimant was not at MMI and that she needed evaluation and treatment recommended by Dr. Ghazi and Dr. Lichtenberg. Dr. Healey opined that Claimant had post-traumatic headaches caused by her head and neck trauma that she sustained at work on October 6, 2012. He provided a provisional impairment rating of 45% whole person for episodic neurological disorder of such severity as to interfere moderately with the activities of daily living. *See* Exhibit 7.

50. Dr. Healey opined that Claimant's current work related diagnoses were: status post concussion with brief loss of consciousness and post concussive syndrome

manifested by complaints of mild cognitive dysfunction, vertigo, imbalance, and chronic headaches; intermittent left-sided Horner's syndrome with ptosis, increased sweating on the left side of the fact, and conjunctival redness and eye tearing; left occipital nerve neuralgia/neuritis as a cause of post traumatic headaches and trigeminal vascular autonomic cephalgia, rule left C2-C3 facet arthropathy as a cause of her headaches and occipital neuritis; chronic cerviocobrachial myofascial pain with associated autonomic dysfunction; adjustment disorder with depression and anxiety; chronic daily headaches with muscle tension and vascular components; and chronic throacoloumbar pain and coccydynia. *See* Exhibit 7.

51. Dr. Healey noted that Claimant appeared to have a significant psychological overlay, presenting with non-phsysiologic neurological findings including astasia/abasia. He recommended further treatment that included, amongst other things, left C2-C3 facet blocks, and evaluation and treatment with a female Spanish speaking psychologist. *See* Exhibit 7.

52. Dr. Healey offered an opinion that differed from Dr. Dillon. However, Dr. Healey did not address Dr. Dillon's DIME report and Dr. Healey did not opine as to how Dr. Dillon erred in her permanent impairment or MMI assessment.

53. Although many physicians have noted symptoms in Claimant's left eye and cheek area that are consistent TAC, Claimant has presented insufficient evidence to show by clear and convincing evidence that TAC is causally related to her work incident.

54. Claimant is not found credible or persuasive. Claimant initially reported symptoms following her work injury that dramatically increased after approximately one month of treatment without an objective explanation for the increase. This presentation is inconsistent with post concussive syndrome as noted by Dr. Moe and Dr. Hawkins. Further, multiple physicians have opined that Claimant has non-physiological exams and/or psychosomatic findings including: Dr. Lesnak, Dr. Moe, Dr. Hawkins, Dr. Triehaft, Dr. Bushard, Dr. Zimmer, Dr. Ghazi, Dr. Steig, and Dr. Healey. Claimant has exaggerated symptoms on many occasions. Her subjective reports thus cannot be relied upon to any degree of certainty.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2013). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME physician's opinions

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's opinions are incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a Division IME physician's opinion, "there must be evidence establishing that the Division IME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (I.C.A.O., Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the Division IME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (I.C.A.O., July 19, 2004); *see also Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (I.C.A.O., Nov. 17, 2000). Whether or not a party overcomes the Division IME is a question of fact for determination by the ALJ. § 8-43-301(8), C.R.S.; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186

(Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998).

Here, Claimant has failed to meet her burden to show by clear and convincing evidence that DIME physician Dr. Dillon erred by finding Claimant at MMI and finding that Claimant suffered no permanent impairment causally related to the work injury. After review of voluminous medical records, diagnostic testing, and multiple physicians' opinions and treatments Dr. Dillon opined that Claimant had no impairment related to the October 2012 work injury. Although Claimant suffers from likely TAC, Dr. Dillon was able to review the reports of multiple neurologists, some who believed TAC to be work related and some who believed TAC was not work related. Dr. Dillon, after review, determined and opined that Claimant did not suffer from any condition related to her October 2012 work injury. In doing so, Dr. Dillon agreed with some of the physicians who opined similarly. Dr. Moe thought it was unclear as to whether TAC was work related. Dr. Lesnak and Dr. Scott reviewed the trivial nature of the bump to Claimant's head at work and opined that such a bump would not cause such significant symptoms as Claimant was presenting with and opined that Claimant's symptoms were not related to the work injury. Dr. Steig opined that although Claimant had headaches that were vascular in nature with evidence of left autonomic dysfunction and possible Horner's syndrome, the headaches and autonomic dysfunction were not causally related to the work injury. The opinions of Dr. Moe, Dr. Lesnak, and Dr. Scott support the DIME physician's opinion.

Claimant argues and points to various places in the medical records that show support for a diagnosis of TAC. The ALJ agrees that these records exist and that Claimant may have TAC. However, even if Claimant suffers from TAC, Claimant has failed to show a causal connection between her TAC and her work injury by clear and convincing evidence. Neither Dr. Healey nor Dr. Lichtenberg have persuasively opined as to how Dr. Dillon erred in assigning zero impairment rating. Although Dr. Healey and Dr. Lichtenberg clearly disagree with Dr. Dillon, their opinions are merely a difference of opinion as to what complaints or what conditions are causally related to the work injury. The ALJ concludes that the more persuasive opinions, as a whole, come from Dr. Reiter, Dr. Lesnak, Dr. Hawkins, Dr. Steig, and DIME physician Dr. Dillon that Claimant is at MMI for the October 2012 injury, that Claimant suffered no permanent impairment as a result of the work injury, and that the mechanism of injury would not cause such diffuse neurologic complaints. As noted by neurologist Dr. Zimmer, TAC is a condition that is usually idiopathic with unknown causes. Dr. Dillon concurred with Dr. Steig's opinion that Claimant's vascular headaches and left sided autonomic symptoms were not work related. It is clear from a review of the evidence and the many physician opinions in this case that it is difficult to identify what causes TAC, difficult to diagnose TAC, and unclear as to whether TAC or a different variety of autonomic dysfunction is Claimant's true diagnosis. The eventual diagnosis of TAC by some physicians in this case and the diagnostic testing was greatly complicated by Claimant's presentation with other exaggerated and non-explainable symptoms. Here, Claimant has shown that several physicians disagree with whether or not her mechanism of injury could cause TAC. However, she has not shown more than this difference in opinion. Claimant has

therefore not met her burden by clear and convincing evidence to show the DIME physician's opinions were clearly erroneous and the DIME physician's opinions have not been overcome.

Further, as found above, Claimant is not a credible witness. Her subjective reporting cannot be relied upon to any degree of certainty. Claimant over-reports, magnifies, and intentionally displays symptoms that have do not have any objective basis. These exaggerated or false symptoms include volitional shaking during examination, volitional cog-wheeling during examination, purporting to almost fall off a stool during examination, and numerous whole body complaints that are inconsistent with significant diagnostic testing. Claimant also reported that her ATP hit her on the head, that she cannot walk without assistance, and that a neurologist told her she had a broken hip which is not supported by the medical records. Throughout the treatment of the claim, Claimant has presented with numerous inconsistencies noted by multiple physicians. Therefore, although Claimant may indeed suffer from headaches and/or TAC, Claimant's testimony that the TAC related symptoms began shortly after the work injury also cannot be relied upon. The physicians who have opined that TAC is work related do so in part based on Claimant's subjective description of injury, description of symptoms, and Claimant's subjective report of when the onset of TAC symptoms began. Although objective support (facial swelling, left eye tearing) for TAC exists, the correlation between TAC and her work injury is based in part upon her reporting which cannot be found reliable in light of her credibility.

The opinion of DIME physician Dr. Dillon that Claimant is at MMI with no permanent impairment rating for the following conditions is also found persuasive and has not been overcome by clear and convincing evidence: Claimant's neck complaints; Claimant's low back complaints; Claimant's lower extremity complaints; Claimant's shoulder complaints; Claimant's TMJ complaints; Claimant's visual complaints; and psychological impairment. The diagnostic imaging pertaining to the above complaints has not shown any objective findings that are abnormal or that could be causally linked to Claimant's work injury. Claimant has not shown that any additional treatment is likely to improve any of the above conditions and has not shown that DIME physician Dr. Dillon erred by finding her at MMI with no permanent impairment for any of these conditions.

Temporary Total Disability

Temporary disability benefits are based on a worker's lost or impaired earning power and are designed to protect against actual loss of earnings as a result of an industrial injury. *Univ. Park Holiday Inn/Winegardner & Hammons, Inc. v. Brien*, 868 P.2d 1164 (Colo. App. 1994). To receive temporary disability benefits, a claimant must establish a causal connection between the injury and the loss of wages. § 8-43-103(1)(a), C.R.S.. Once a claimant attains MMI, she is no longer entitled to temporary indemnity. *Id.* The claimant bears the burden to prove any entitlement to temporary disability benefits. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, the claimant reached MMI on June 17, 2014 and she has failed to overcome DIME physician Dr. Dillon's opinion of MMI. As such, the claimant has failed to prove that she is entitled to temporary total disability benefits from June 17, 2014 and ongoing.

Medical Benefits

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

Claimant requests ongoing psychological and diagnostic/therapeutic treatment as recommended by Dr. Healey and Dr. Lichtenberg. This treatment was recommended to get Claimant to MMI. However, as found above, Claimant was at MMI as of June 17, 2014 and requires no further treatment to reach MMI status. Therefore, the requested treatment aimed at getting her to MMI is not found reasonable or necessary. The more persuasive opinion is that no further treatment is necessary for Claimant to reach MMI for any work related condition. Therefore, the medical care recommended by Dr. Healey and Dr. Lichtenberg including but not limited to psychological treatment with a Spanish speaking psychologist, and further diagnostic testing and injections is not reasonable, necessary, or causally related to Claimant's work injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME physician's opinion that she reached MMI for her October 6, 2012 work injury on June 17, 2014 by clear and convincing evidence.

2. Claimant has failed to overcome the DIME physician's opinion that she suffers from a 0% permanent impairment rating as a result of her October 6, 2012 work injury by clear and convincing evidence.

3. As Claimant reached MMI on June 17, 2014 she is not entitled to temporary indemnity benefits from June 17, 2014 and ongoing.

4. Claimant is not entitled to the medical treatment recommended by Dr. Healey and Dr. Lichtenberg and the treatment recommended is not reasonable, necessary, or causally related to Claimant's October 6, 2012 work injury.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 5, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that neuropsychological testing and cognitive therapy in Spanish are reasonable, necessary and causally related to her admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer caring for residents in an Alzheimer's facility. She suffered three independent work-related injuries during the course and scope of her employment with Employer. On September 18, 2012 Claimant slipped and fell in an area where air freshener had been sprayed. Claimant struck her head and the right side of her body in the fall. On November 18, 2012 a resident grabbed and violently shook Claimant. Finally, on December 2, 2012 a resident punched, hit and shook Claimant. All three incidents were consolidated for purposes of hearing. As a result of the accidents Claimant has reported headaches, memory loss and dizziness

2. After initially obtaining emergency medical care Claimant received treatment from Authorized Treating Physician (ATP) Franklin Shih, M.D. on January 2, 2013. Claimant reported "headaches and memory problems as her primary concern" as well as a variety of musculoskeletal complaints. Dr. Shih noted that, although Claimant reported significant problems with attention, concentration and learning, it was unlikely that ongoing cognitive deficits were related to her industrial injuries. However, he remarked that if Claimant's cognitive complaints continued he might want her to visit a neuropsychologist.

3. Claimant subsequently returned to Dr. Shih for an examination. He noted Claimant's continuing memory concerns. However, Dr. Shih stated that ongoing memory complaints would be quite atypical and he "would not expect any significant cognitive sequeale in relationship to her fall."

4. Claimant transferred her medical care to ATP W. Rafer Leach, M.D. On January 16, 2013 Claimant visited Dr. Leach for an examination. Dr. Leach diagnosed Claimant with a concussion, a posttraumatic headache, postconcussion syndrome and vertigo. He requested x-rays, physical therapy, chiropractic care, vestibular therapy, injections in the SI joint and a neurological evaluation.

5. Claimant subsequently received neurological treatment with J. Bradley Gibson, M.D. After reviewing Claimant's diagnostic studies he summarized that Claimant suffered from postconcussive syndrome manifested by cognitive dysfunction and associated personality changes. On August 13, 2014 Dr. Gibson discharged Claimant from care because "there is nothing else that I have to offer her from a

neurologic standpoint at this time." Claimant continued to complain of headaches, post concussive symptoms, dizziness and chronic myofascial pain syndrome.

6. On August 5, 2014 Claimant underwent an independent medical examination with Lawrence Lesnak, M.D. Dr. Lesnak concluded that there were no objective findings to support Claimant subjective symptoms. He also determined that a CT scan and brain MRI/MRAs did not correlate with her subjective complaints. Moreover, it was medically inconsistent for Claimant's symptoms from a cerebral concussion or mild closed head injury to have worsened five or six weeks after her injury. Finally, Claimant failed to exhibit signs of improvement over a two year course of treatment. Dr. Lesnak thus concluded that Claimant had reached Maximum Medical Improvement (MMI) without any objective injury. He recommended pain psychology counseling as part of a medical maintenance regimen.

7. On August 11, 2014 and September 8, 2014 clinical psychologist Dennis A. Helffenstein, Ph.D. interviewed Claimant. Claimant had been referred for neuropsychological screening. However, Dr. Helffenstein did not undertake the testing because Claimant suffered a high level of chronic pain, significant fatigue and depression. He noted that the preceding factors would negatively impact Claimant's performance on the neuropsychological screening. Dr. Helffenstein explained:

> [a]t some point in the future, when and if [Claimant's] pain, depression and fatigue are under better control, I would advise against neuropsychological testing utilizing the English language. If at some point formal testing is required to document her cognitive status, it would be possible to administer the testing utilizing a translator. An alternate possibility would be to find a Spanish-speaking neuropsychologist who can administer the testing in her native language.

Dr. Helffenstein also noted that he agreed with Dr. Leach that Claimant warranted cognitive rehabilitation services.

8. On October 16, 2014 Claimant underwent a psychological evaluation with Lupe Ledezma, Ph.D. Dr. Ledezma concluded that Claimant's psychological diagnoses of Major Depression and Generalized Anxiety were related to her industrial injuries. She recommended "neuropsychological testing in Spanish to determine the presence of a neurocognitive disorder and provide treatment recommendations." Dr. Ledezma also remarked that "[i]t is possible that cognitive retraining may be beneficial in improving her ability to learn how to compensate for her cognitive issues."

9. On November 10, 2014 Claimant returned to Dr. Ledezma for an evaluation. Dr. Ledezma reiterated her request for a neuropsychological battery in Spanish and a course of cognitive retraining to address Claimant's complaints.

10. On December 8, 2014 Dr. Lesnak conducted a review of Dr. Ledezma's records. He commented that Claimant's underlying psychosocial factors were influencing her recovery and Claimant did not suffer any physiologic or anatomic

conditions from the industrial injuries. Moreover, Dr. Lesnak explained that cognitive retraining was not warranted because Claimant did not have any symptoms related to a closed head injury and there were no intracranial abnormalities noted in multiple imaging studies.

11. On December 12, 2014 Dr. Ledezma responded to a letter from Respondents' counsel. Dr. Ledezma maintained that neuropsychological testing and cognitive therapy would be reasonable, necessary and related to Claimant's industrial injuries. She explained that Claimant's psychological state had improved but she continued to complain of neurocognitive symptoms.

12. Claimant testified at the hearing in this matter. She remarked that she continues to experience memory problems, balance concerns, dizziness, confusion, headaches and motor control issues on the right side of her body.

13. On April 27, 2015 Dr. Lesnak testified through a post-hearing evidentiary deposition in this matter. He maintained that Claimant's subjective reports are not supported by the medical records. Dr. Lesnak explained that Claimant initially improved following her September 19, 2012 industrial injury but her symptoms began to worsen after October 24, 2012 without explanation. He remarked that the preceding chronology was inconsistent with the typical head injury because symptoms are generally worse at the outset but improve over time. Dr. Lesnak commented that Dr. Shih shared his concerns regarding inconsistent subjective complaints based on the mechanism of injury. He determined that neuropsychological testing would not provide additional information because Claimant simply suffered a mild closed head injury and there are a number of psychosocial factors impacting her condition. Dr. Lesnak stated that cognitive therapy was not warranted because Claimant did not suffer a severe head injury and she has no documented objective findings of a cognitive deficiency. He summarized that neuropsychological testing and cognitive therapy did not constitute reasonable, necessary and related treatment because Claimant did not exhibit evidence of a cognitive deficit or underlying brain disturbance.

14. Dr. Lesnak clarified that neither the November 18, 2012 nor the December 2, 2012 events was responsible for Claimant's worsening condition. Dr. Lesnak noted that Claimant reported worsening symptoms before either event and shaking an adult would not cause a brain injury. He also commented that Claimant had not mentioned either event during his evaluation and the medical records did not reflect that the events caused any aggravation or worsening of symptoms.

15. Claimant has demonstrated that it is more probably true than not that neuropsychological testing and cognitive therapy in Spanish are reasonable, necessary and causally related to her admitted industrial injuries. Subsequent to her industrial injuries Claimant reported headaches, memory concerns and other cognitive deficits. Claimant consistently maintained her complaints during the course of medical treatment. In January 2013 Dr. Leach diagnosed Claimant with a concussion, a posttraumatic headache, postconcussion syndrome and vertigo. He requested x-rays, physical therapy, chiropractic care, vestibular therapy, injections in the SI joint and a

neurological evaluation. By summer 2014 psychologist Dr. Helffenstein could not undertake neuropsychological testing of Claimant because of her high level of chronic pain, significant fatigue and depression. However, he recommended neuropsychological testing in Spanish when her symptoms improved. Dr. Helffenstein also noted that he agreed with Dr. Leach that Claimant warranted cognitive rehabilitation services. Finally, by December 12, 2014 Dr. Ledezma persuasively maintained that neuropsychological testing and cognitive therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. She explained that Claimant's psychological state had improved but she continued to complain of neurocognitive symptoms.

16. In contrast, Dr. Lesnak determined that neuropsychological testing would not provide additional information because Claimant simply suffered a mild closed head injury and there are a number of psychosocial factors impacting her condition. Dr. Lesnak stated that cognitive therapy was not warranted because Claimant did not suffer a severe head injury and she has no documented objective findings of a cognitive deficiency. He summarized that neuropsychological testing and cognitive therapy did not constitute reasonable, necessary and related treatment because Claimant did not exhibit evidence of a cognitive deficit or underlying brain disturbance. However, the overwhelming evidence from psychologists and other authorized medical providers reveals that neuropsychological testing and cognitive therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. Claimant's psychological state has improved but she continues to complain of neurocognitive symptoms. Accordingly, Claimant's need for neuropsychological testing and cognitive therapy in Spanish is reasonable, necessary and causally related to her admitted industrial injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated that it is more probably true than not that neuropsychological testing and cognitive therapy in Spanish are reasonable, necessary and causally related to her admitted industrial injuries. Subsequent to her industrial injuries Claimant reported headaches, memory concerns and other cognitive deficits. Claimant consistently maintained her complaints during the course of medical treatment. In January 2013 Dr. Leach diagnosed Claimant with a concussion, a posttraumatic headache, postconcussion syndrome and vertigo. He requested x-rays, physical therapy, chiropractic care, vestibular therapy, injections in the SI joint and a neurological evaluation. By summer 2014 psychologist Dr. Helffenstein could not undertake neuropsychological testing of Claimant because of her high level of chronic pain, significant fatigue and depression. However, he recommended neuropsychological testing in Spanish when her symptoms improved. Dr. Helffenstein also noted that he agreed with Dr. Leach that Claimant warranted cognitive rehabilitation services. Finally, by December 12, 2014 Dr. Ledezma persuasively maintained that neuropsychological testing and cognitive therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. She explained that Claimant's psychological state had improved but she continued to complain of neurocognitive symptoms.

6. As found, in contrast, Dr. Lesnak determined that neuropsychological testing would not provide additional information because Claimant simply suffered a mild closed head injury and there are a number of psychosocial factors impacting her condition. Dr. Lesnak stated that cognitive therapy was not warranted because Claimant did not suffer a severe head injury and she has no documented objective findings of a cognitive deficiency. He summarized that neuropsychological testing and cognitive therapy did not constitute reasonable, necessary and related treatment because Claimant did not exhibit evidence of a cognitive deficit or underlying brain disturbance. However, the overwhelming evidence from psychologists and other authorized medical providers reveals that neuropsychological testing and cognitive

therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. Claimant's psychological state has improved but she continues to complain of neurocognitive symptoms. Accordingly, Claimant's need for neuropsychological testing and cognitive therapy in Spanish is reasonable, necessary and causally related to her admitted industrial injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's need for neuropsychological testing and cognitive therapy in Spanish is reasonable, necessary and causally related to her admitted industrial injuries.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-916-050-02

ISSUE

- Whether Claimant has demonstrated by a preponderance of the evidence that his low back and lower extremity condition is related to the subject accident of February 22, 2013.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was born on November 24, 1959. He was hired by Employer as a detailer on January 23, 2012.

2. Claimant sustained an admitted left upper extremity injury on February 22, 2013 when he slipped in the company parking lot striking his left elbow and landing on his back. Claimant recalled that he was in the parking lot and the next thing he knew he was looking up at the sky. The first thing Claimant remembered was left arm pain.

3. Shortly after the fall, Employer drove Claimant to the Boulder Medical Center, where he was seen by Dr. Michael Kosta. Dr. Kosta reported that Claimant slipped on ice, fell backwards and landed on his left elbow. Claimant reported pain and swelling in his left elbow but no other areas of pain, including the shoulder, wrist, legs or buttocks. Dr. Kosta assessed Claimant with an elbow contusion, prescribed Norco, and returned him to work. Records of the visit do not indicate that Dr. Kosta evaluated Claimant's back. Dr. Kosta noted that if Claimant's symptoms persisted, he might need to see an orthopedist for a tendon rupture. Claimant was instructed to seek immediate medical attention if his condition worsened in any way after his initial evaluation. Claimant did not seek additional medical care before his next evaluation with Dr. Kosta on February 25, 2013.

4. Claimant's wife, Alicia Higareda, testified that on the night of February 22, 2013 she observed bruising on Claimant's back, mostly on the left side, with a completely swollen and deformed left arm. Ms. Higareda's testimony is not supported by contemporaneous medical documentation.

5. Claimant testified that on February 23, 2013, he woke with pain in his left arm, left shoulder, neck, and back. Claimant testified that he could not get out of bed and had to call out to his wife for help. Claimant testified that he hurt everywhere, including his back, but his left arm bothered him the most.

6. On February 25, 2013 Claimant returned to Dr. Kosta. Dr. Kosta noted that the swelling in Claimant's hand had improved and that Claimant's posterior elbow and proximal forearm were bruised but improved. Claimant reported that he hurt all over. Dr. Kosta did not report any bruising on Claimant's back.

7. On February 26, 2013, Claimant was referred to Dr. Robert Koch, specifically for his left elbow injury. Dr. Koch did not evaluate Claimant's back. Dr. Koch recommended a course of conservative care related to Claimant's left elbow.

8. Dr. Kosta referred Claimant to Pinnacle Physical Therapy for treatment, which began on February 27, 2013. Claimant participated in twelve physical therapy sessions between February 27, 2013 and April 11, 2013. The Pinnacle records contain no report of an injury, symptomology or treatment plan for a low back or lower extremity condition. Kristy Bennett, the therapist, reported Claimant had a sore and painful left shoulder, neck and wrist after falling on ice at work. She reported, "he fell backward and must have broken his fall primarily with the left elbow." She reported that Claimant's neck was stiff due to immobilizing the left arm and left elbow but that Claimant's "Pain levels are Ø if he keeps the hand in the pocket while he is doing light duties at work." Claimant was noted to have a history of right hip bursitis with an exaggerated frontal plane gait. Claimant testified that the focus of his treatment in physical therapy was to rehabilitate his ruptured triceps tendon. Physical therapy did not include treatment of Claimant's back.

9. Claimant spoke to Kendra Welton, Insurer's adjuster, on March 1, 2013. He told her that he fell on his left elbow and that he also had some general soreness through his neck and back which had improved.

10. Claimant's wife testified that on March 11, 2013, she helped Claimant fill out a "Workers Compensation Accident Information Request." Specifically, paragraph 6, asked Claimant to describe the exact area(s) of his body that were injured. Claimant listed left arm, shoulder and elbow, swelling and pain, the whole arm has bruising (dark), shoulder, back . . . . Apparently Claimant's answer was continued onto the back of the form, which was not copied or entered into evidence, thus rendering the word "back" ambiguous, because it is not clear from context whether back was used as a noun or an adjective.

11. Claimant returned to work on February 25, 2013 and worked without interruption until April 11, 2013. During that time, his job duties were limited due to his arm.

12. Claimant's supervisor, Roger Antillon, testified initially that prior to Claimant's injury, Claimant discussed knee, hip, and back problems – old sports injuries – that kept Claimant from working as a mechanic. He also testified that Claimant had a slight limp before the accident; similar to the limp Mr. Antillon observed when he saw Claimant at the first day of hearing. But on further questioning, Mr. Antillon testified that Claimant never complained about his back prior to the accident, only his hip. He further testified that between February 25 and April 11, Claimant did not complain about his back, nor did Mr. Antillon observe anything new or different about Claimant's back. However, on cross examination, Mr. Antillon was asked: "And you testified that he – prior to the incident of February 22, 2013, he complained about back problems?" Mr. Antillon answered equivocally: "We talked about back – about – just injuries in general."

13. Dr. Koch, an orthopedist, performed a left elbow triceps tendon repair on May 1, 2013. He followed Claimant from April 12, 2013 through May 5, 2013. Dr. Koch did not report any low back or lower extremity complaints or symptomology during this

period of time. In his report of April 12, 2013, Dr. Koch reported that Claimant fell directly on his elbow.

14. Claimant's attorneys referred him to Dr. Sander Orent, who became Claimant's authorized treating physician on June 12, 2013. In his initial evaluation report, Dr. Orent reported that Claimant injured other structures of his body that had not been addressed. He reported, "He injured his left shoulder in the course and scope of the fall and he injured his thoracic and cervical spines. He also complains of a sensation of pain running from the greater trochanter of the femur down to the mid-portion of the thigh in both legs." He diagnosed "cervical and thoracic strains unaddressed" and "possible nerve impingement, from surgical positioning, possibly causing symptoms in the lateral femoral cutaneous nerve." The ALJ notes that this report does not refer to problems in Claimant's lumbar spine.

15. Dr. Koch's triceps tendon repair failed and on August 19, 2013, Dr. Conyers performed a repeat triceps tendon reattachment procedure.

16. Dr. Orent saw Claimant in follow-up on September 24, 2013. He reported:

- ever since [Claimant's] first surgery, he has had radiating pain basically from the lateral thigh down to the knee on both sides.
- When I compress the area right around the greater trochanteric bursa, I can produce the pain and numbness that he experiences down the lateral aspect of the leg.
- This sounds very much to be a lateral femoral cutaneous nerve syndrome, again, possibly because of the compression during the initial surgery.
- The patient is quite clear that these symptoms started at the time of the first surgery.

17. On November 9, 2013 Claimant had a lumbar MRI. The radiologist, Dr. Tivorsak's, impression was moderate to severe degenerative disease at L5-S1, with a broad annular bulge and moderate to severe degenerative disc disease in the remainder of the lumbar spine without central canal narrowing or significant nerve root compression.

18. Claimant endorsed Dr. Sander Orent as an expert in occupational medicine and he provided medical opinions regarding Claimant's injuries and requests for treatment of the lumbar spine. Dr. Orent testified based on his knowledge of the medical treatment guidelines and personal knowledge of Claimant and his injuries.

19. Dr. Orent testified that during his initial examination, Claimant arrived in extremis with a very badly damaged left arm. While immediate attention was directed at Claimant's left arm, Claimant "complained about his shoulder hurting; he complained of his back injury, his neck, and his thoracic spine; and then he described this numbness that he had in the front part of both legs starting at about the groin and going distally to that."

20. Dr. Orent testified that it is common for the most severe injury to not only take the patient's primary attention, but the provider's primary attention. By far the greatest concern in this case initially was Claimant's elbow.

21. On November 12, 2013, Dr. Orent reported that the lumbar MRI did not define anything that would clearly explain Claimant's symptomology.

22. Dr. Orent noted difficulty differentiating between radiculopathic and localized pain. He reported Claimant's lumbar MRI showed extensive degenerative changes. Dr. Orent recommended an epidural steroid injection for diagnostic purposes and noted Claimant's positive straight leg raise. On November 19, 2013, Dr. Orent reported that Dr. Wernick performed an injection, which was non-diagnostic for lateral femoral cutaneous nerve compression.

23. On December 4, 2013, in a "SAMMS CONFERENCE NOTE", Dr. Orent reported that causality of the low back was a gray area and that the severity of Claimant's left upper extremity condition may have eclipsed some of Claimant's back symptoms. He reported that when he initially saw Claimant, he thought Claimant had a thoracolumbar strain and that it may be that Claimant had a small herniated disc at L1-2, which could easily be part of the thoracic strain. He recommended an ESI at L1-2.

24. Dr. Orent testified that Claimant's degenerative disc disease was age-appropriate degeneration. Dr. Orent testified that if degenerative disc disease such as Claimant's is asymptomatic until an event like the fall, that the degeneration made him more susceptible to injury.

25. On March 18, 2014, Dr. Orent, contrary to his November 12, 2013 progress note, reported, based on the November 9, 2013 MRI, that he thought the source of Claimant's back symptomology was at L5-S1 where there was a broad annular bulge. He reported, "it only began hurting at the time of the incident and has gotten progressively worse."

26. On April 17, 2014, Dr. Carlos Cebrian performed a Respondents' independent medical examination on Claimant. Dr. Cebrian completed a records review noting in his May 27, 2014 report that, "outside of the unsurprising complaint of his 'body hurt all over' on 2/25/13, there were no complaints related to the lumbar spine or paresthesias in his legs documented until he saw Dr. Orent on 6/12/13. . . Despite multiple injections, medications and evaluations, it is still not clear from the medical records that [Claimant's] medical providers know what the cause of [Claimant's] leg symptoms is." Dr. Cebrian opined that Claimant's current symptoms were "related to lumbar degenerative disc disease and bilateral femoral cutaneous neuropathy and that the need for treatments are independent, unrelated and incidental to the incident of February 22, 2013 or the result of anything that may or may not have happened during Claimant's May 1, 2013 surgery."

27. Dr. Cebrian recommended weight loss and that Claimant undergo an EMG/NCS of his lower extremities outside of the workers' compensation system. Dr. Cebrian opined that lumbar spine surgery was not indicated at that time. He based his causation opinion on (1) Claimant not having lumbar spine complaints until over three months after the incident and (2) his opinion that Claimant's initial complaints were

related to parasthesias in his legs and not specifically the lumbar spine pain. In Dr. Cebrian's opinion, if Claimant had injured his back at the time of the subject accident, "the reasonable expectation would be that the symptoms would have been present within a day or two and continued for the next several months if they were caused by the slip and fall."

28. Dr. Orent testified regarding the spontaneous degenerative injury, and opined that two independent diseases occurring during the same time frame "just doesn't meet the rules of Occam's razor." He testified that the probable cause for the back injury was the fall. Dr. Orent testified that to postulate as the Respondents do that Claimant suddenly developed bilateral nerve impingement in his groin for no reason at all unrelated to the fall would not make sense. (11/24/2015 Hearing Pg. 77)

29. On July 14, 2014, Dr. Kosta reported his clinic notes did not indicate Claimant mentioning any injury other than the left upper extremity at the time he evaluated Claimant and that his "usual and customary questioning during the taking of history always includes allowing any other injury to be expressed other than the symptoms and the main complaints." Dr. Kosta pointed out that he specifically asked Claimant about his wrists, legs and buttocks. Dr. Kosta reported that he physically examined Claimant from his clavicle to his fingers. Dr. Kosta reported that while Dr. Orent had initially diagnosed a lateral femoral cutaneous nerve syndrome, Claimant did not report low back pain until November 5, 2013. Dr. Kosta agreed with Dr. Cebrian's assessment and opinions. Dr. Kosta opined that Claimant's subsequent low back and lower extremity complaints were not related to the February 22, 2013 accident. (R.S. 54-68).

30. On September 30, 2014, Dr. Orent reported that but for Claimant's lumbar spine condition, he was at maximum medical improvement.

31. Dr. Sander Orent testified at the November 24, 2014 hearing. According to Dr. Orent, the mechanism of Claimant's low back condition was that he fell directly on his spine. Dr. Orent acknowledged that Claimant had degenerative disc disease. Dr. Orent testified "if a patient is asymptomatic at the time of the event, then irrespective of what the images show, if the symptoms then arise out of the event, then in my view it may have made him more susceptible to injury." Dr. Orent testified regarding the spontaneous degenerative injury, and opined that two independent diseases occurring during the same time frame "just doesn't meet the rules of Occam's razor." He testified that the probable cause for the back injury was the fall. Dr. Orent testified that to postulate as Respondents do that Claimant suddenly developed bilateral nerve impingement in his groin for no reason at all unrelated to the fall would not make sense.

32. Dr. Orent's opinion on causality is less persuasive because the evidence supports that Claimant fell onto his elbow, and not directly onto his back.

33. According to Dr. Orent, diagnosing the source of Claimant's low back problems was "challenging." He initially thought Claimant's symptoms were due to the way he was positioned during his triceps tendon repair on May 1, 2013. His current diagnosis is lumbar radiculopathy. Dr. Orent admitted that Claimant reported his lower extremity symptoms started, "immediately post operatively to the triceps tendon surgery." His initial diagnosis of a femoral cutaneous nerve impingement syndrome was

based on the history given to him by Claimant that Claimant's lower extremity symptoms started immediately after the surgery. Dr. Orent first diagnosed lumbar radiculopathy on November 13, 2013. The first time Claimant reported to Dr. Orent that he had lumbar pain beginning on the date of injury, was on November 13, 2013. Dr. Orent had reported on September 24, 2013 that he could produce pain and numbness down the lateral aspect of Claimant's thigh when he compressed the trochanteric bursa (femur). This is not a test a doctor would use to diagnose lumbar radiculopathy. Dr. Orent agreed that there was nothing on the November 9, 2013 lumbar MRI which would be clearly diagnostic of a lumbar radiculopathy. He agreed that there was no encroachment or nerve root impingement. Dr. Orent had Claimant undergo an ESI, which was also non diagnostic for lumbar radiculopathy. Dr. Orent acknowledged that after Claimant underwent two diagnostic tests, a lumbar MRI and a lumbar ESI, both of which were non diagnostic for lumbar radiculopathy, he nonetheless changed his opinion that Claimant did not have a lumbar radiculopathy to an opinion that Claimant did have a lumbar radiculopathy.

34. Respondents called Dr. Carlos Cebrian, at the April 13, 2015 hearing to testify that Claimant did not sustain a related back injury. Dr. Cebrian is a board certified family practitioner, a Level II Examiner with the Division of Workers' Compensation, and has practiced occupational medicine exclusively and full-time since 2000. Dr. Cebrian testified that the history Claimant provided was not consistent with Dr. Cebrian's records review. Claimant reported to Dr. Cebrian that he had back symptoms beginning shortly after the subject accident, during the weekend after the subject accident his back was black and blue, and he could not get out of bed without assistance. That Claimant told Insurer's adjuster on March 1, 2013 that his back and neck were sore but that those symptoms improved is consistent with Dr. Cebrian's opinion on causation.

35. Claimant's report of back bruising was inconsistent with Dr. Kosta's records of February 22 and 25, 2015 which bore no indication that Claimant had bruising or contusions of the back, neck or any part of the spine. Nothing in Dr. Koch's records supports the presence of a low back condition or low back complaints, or lower extremity complaints of any kind. The description of Claimant's accident, that he fell directly on his elbow, would not be consistent with a fall directly on the spine. Dr. Kosta's report indicated that Claimant hit his elbow first, which would take the brunt of the impact. After hitting his elbow, gravity would carry Claimant down and he would hit his back, but his back would not be the primary point of impact. It is reasonable to expect that when a person falls, he or she will have aching and pains in different areas of the body which would be consistent with what Claimant reported to Dr. Kosta on February 25, 2013.

36. Kristy Bennett's physical therapy reports do not document low back or lower extremity symptoms. Had Claimant reported low back or lower extremity symptomology to Ms. Bennett, one would expect to see that in her reports. Notably, Claimant reported a pain level of zero in his left upper extremity if he kept his hand in his pocket when he was doing light duty work five days after his fall. This is inconsistent with Claimant's argument that pain from his arm was so severe that it was masking his back pain. If, as Claimant states, the therapist was going to treat Claimant's left upper

extremity and then address the low back later on, one would expect to see that documented.

37. Dr. Cebrian agreed with Dr. Orent's ultimate diagnosis of lumbar radiculopathy at L5-S1.

38. Dr. Orent was able to replicate Claimant's symptoms by tapping on his trochanteric bursa, which is diagnostic of a lateral femoral cutaneous nerve issue but non diagnostic for lumbar radiculopathy. Subsequently, when Dr. Orent ordered the MRI, it showed multi-level degenerative disc disease at multiple levels with some foraminal stenosis but nothing that explained Claimant's symptoms.

39. Dr. Cebrian agreed with Dr. Orent's original opinion that nothing in the November 9, 2013 lumbar MRI explained Claimant's lumbar and lower extremity symptomology. Claimant did not have a positive straight leg test which could be diagnostic for lumbar radiculopathy, until November 19, 2013. The November 9, 2013 lumbar MRI did not show nerve root impingement but did show a broad annular bulge at L5-S1, which is unrelated to Claimant's February 22 fall and is consistent with degenerative changes which would not have been aggravated by the fall, eight and one half months earlier. Claimant's November 9, 2013 lumbar MRI is typical of what one would see in a 59 year old man.

40. Dr. Cebrian agreed with Dr. Orent that L5-S1 injections performed by Dr. Wernick on January 9 and February 19, 2014 were non diagnostic for lumbar radiculopathy. The diagnostic test that Dr. Orent did to recreate the lateral femoral cutaneous nerve irritation, tapping the bursa, was not indicative of radiculopathy at L5 or S1. Dr. Cebrian opined Claimant did have some lateral femoral cutaneous nerve irritation at that time. However, it would not be medically plausible that Claimant's positioning during his elbow surgery would have caused his lateral femoral cutaneous nerve irritation.

41. Dr. Cebrian's ultimate opinion is that Claimant's lumbar spine symptoms and lower leg symptoms are not related to the February 22, 2013 injury. The bases for his opinion is:

- when you look at all the records, the first documentation related to back or leg was on June 12, 2013.
- Dr. Orent diagnosed a lateral femoral cutaneous nerve irritation, which developed immediately after the May 1, 2013 surgery, however, the mechanism of that condition would not be consistent with that surgical procedure.
- Claimant's early complaints were not consistent with or specific to a lumbar radiculopathy.
- There was a significant delay in Claimant's symptoms.

Dr. Cebrian agreed with Dr. Orent that the fall could have potentially led to an injury, but there were no complaints early on. There were no complaints with his back, upper legs or lower legs for several months and with that kind of diagnosis, the reasonable expectation would be that there would have been a complaint much earlier than what was documented by Dr. Orent.

42. Based on the totality of the evidence, the ALJ finds Dr. Cebrian's opinions on causation to be more consistent with the mechanics of Claimant's injury, the inconsistent reports of the timing of Claimant's back problems, and complaints, and delay in diagnosis of radicular radiculopathy.

43. The ALJ finds that Claimant has failed to establish by a preponderance of the evidence that his low back and lower extremity condition is related to the February 22, 2013 accident. The ALJ finds the opinions of Drs. Cebrian and Kosta more persuasive than those of Dr. Orent on issues of medical causation and relatedness.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. Proof of causation is a threshold standard that the Claimant must establish by a preponderance of the evidence §8-42-101 C.R.S. *Faulkner,* at 846.

An injury or condition arises out of employment if "there is a causal connection between the duties of employment and the injuries suffered." *Deterts v.Times Pub. Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976). The Claimant must establish by a preponderance of the evidence that there is a causal connection between his accident of February 22, 2013 and his lumbar condition. *Ringsby Trucklines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971). Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F. R. Ore Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

As found, Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury related to his work accident of February 22, 2013. It is undisputed at this time that Claimant's low back condition and complaints are due to a lumbar radiculopathy at L5-S1. The ALJ finds the testimony of Drs. Cebrian and Kosta, that the Claimant's L5-S1 radiculopathy is the result of underlying, unrelated degenerative disc disease that has progressed over time and which is unrelated to the Claimant's work accident, to be persuasive. Consistent with Dr. Cebrian's opinions and compelling is the fact that there is no documentation of a low back condition in the early medical records from Dr. Kosta, Dr. Koch or from Pinnacle Physical Therapy.

Dr. Orent diagnosed a lateral femoral cutaneous nerve condition on June 22, 2013, based on his diagnostic testing and Claimant's testimony that the onset of lower extremity symptoms started on May 1, 2013, when he had elbow surgery with Dr. Koch. That reported history is inconsistent with the history later reported to Dr. Orent on March 18, 2014, that Claimant's low back began hurting at the time of the accident and has gotten progressively worse. The lack of documentation of a low back condition in the early medical records, coupled with the inconsistent history regarding the onset of symptoms, persuades the undersigned ALJ that Claimant has not met his burden and compels an Order denying and dismissing his claim for benefits associated with his low back condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's lumbar condition is not related to his February 22, 2013 accident and, consequently, all claims for compensation and benefits related to this condition are denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: June 22, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are:

- Has Claimant proven by a preponderance of the evidence that the scheduled impairment rating for his upper extremity should be converted to whole person?
- Whether Respondent overcame the DIME physician's opinion regarding impairment by a preponderance of the evidence?
- What is Claimant's average weekly wage?
- What is Claimant's disfigurement and his award?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes the following findings of fact:

1. On July 29, 2008, Claimant underwent a non-work-related right total shoulder arthroplasty ("TSA"). A medical record dated November 3, 2008 notes Claimant was doing well with excellent motion and continued strengthening.

2. Respondents presented no medical documentation of Claimant's shoulder condition from November 3, 2008 through April 30, 2013.

3. On April 30, 2013, Claimant, a 56 year old male, injured his right shoulder while performing his work activities for Employer.

4. That same day, he presented to Arbor Occupational Medicine where Dr. Sharon Walker evaluated him. Claimant disclosed his 2008 TSA to Dr. Walker and reported he could not describe any limitations, did not notice any difficulties with working out, and did not perceive a reduced range of motion or any pain.

> When asked how his shoulder has been since the total replacement, he states it has been limited, but he cannot really tell me how it is limited. He states he probably has some decreased strength a little bit, but he does go to the gym and does not notice any problem. He thinks probably his range of motion has been limited a little bit, but it has not been noticeable. He has no pain associated with the shoulder prior to this injury. He denies any direct trauma with this [earlier] event.

Dr. Walker concluded, "It is medically probable that [all of] the patient's complaints are the result of [his] job." Given this conclusion, the ALJ infers that Dr. Walker's medical opinion was that Claimant's specific inability to perceive any limitations was more

significant than his general comments, couched in terms of "probably" having limitations.

5. At the hearing, Claimant disagreed with Respondents' counsel's suggestion that Claimant had limitations. Claimant did not recall the conversation with Dr. Walker.

6. Dr. Walker referred Claimant to physical therapy. And when his condition did not significantly improve, she referred Claimant to orthopedic surgeon Dr. Armodios Hatzidakis.

7. Dr. Hatzidakis initially saw Claimant on June 18, 2013. When asked about the condition of his shoulder following his 2008 TSA, Claimant reported "his shoulder did return to 100% normal." Dr. Hatzidakis noted that Claimant's function had returned to normal.

8. Claimant testified that he was not impaired prior to his work injury. He testified that before his 2013 injury, "Nothing bothered me before." Claimant's testimony was consistent with his reports to Drs. Walker and Hatzidakis, and their medical reports.

9. Claimant testified that currently he is unable to care for his lawn and garden, has difficulty with household chores, and can no longer use hand tools. He testified that he had none of those difficulties before his 2013 injury.

10. Claimant testified that before the 2013 injury, he was an exercise fanatic – bicycling daily, lifting his maximum amounts of weight, and working with a trainer twice a week at the gym where he was a member. Since the injury, he has had to cut back on his exercise regimen.

11. Claimant testified he currently feels pain in his right shoulder, up through and across his neck, and down into his back. Claimant's post-revision records document consistent pain complaints; however they are not necessarily located beyond Claimant's shoulder. The ALJ credits Claimant's testimony regarding his current pain status as credible and credits such testimony over the lack of documentation during periods of treatment.

12. On August 7, 2013, Dr. Hatzidakis performed a TSA on Claimant's right shoulder. Because this was the second TSA on that shoulder, it is referred to as a revision.

13. Between November 12, 2013 and January 20, 2013, Claimant reported to Drs. Walker and Hatzidakis that writing and keyboarding increased his right shoulder pain. Claimant advised Dr. Walker that he was doing better after his vacation when he was not using his right arm.

14. On January 20, 2014, Claimant reported to Arbor Occupational that he was unable to use his right arm behind his back.

15. Claimant underwent rehabilitation therapies after his revision TSA including physical therapy, acupuncture, dry needling, functional taping, and intramuscular stimulation. Dr. Gridley performed these therapies between February 12, 2014 and April 16, 2014. Dr. Gridley noted contracture of Claimant's right pectoral girdle, and focused his treatments on Claimant's pectoral region, scapularthoracic

musculature, deltoid, latissimus, teres major and minor, pectoralis minor, rhomboid, levator, and trapezius. During the course of Claimant's treatment Dr Gridley noted "Ropey, tight, and tender muscles at the anterior deltoid, pectoralis minor, and trapezius." Dr. Gridley released Claimant from his care on April 16, 2014. His final report noted limitations with internal and external rotation, consistent with the [revision] arthroplasty."

16. On February 27, 2014, Dr. Jeff Raschbacher, Claimant's then-authorized treating physician (ATP) at Arbor, noted Claimant was progressing but had continued weakness and was using one Oxycodone per day. Acupuncture and therapy were continued. On March 21, 2014 Dr. Raschbacher discontinued Claimant's pool therapy, but continued his land-based physical therapy, and treatments with Dr. Gridley. On April 10, 2014 Dr. Raschbacher continued Claimant on his home exercise program.

17. Dr. Raschbacher placed Claimant at maximum medical improvement (MMI) on April 24, 2014. He noted "no neck tenderness or trapezius tenderness." Dr. Raschbacher rated Claimant's impairment at 36% of the upper extremity, converted to 22% of the whole person. His impairment rating consisted of 30% for diagnosis based impairment for the revision TSA, and 9% for loss of range of motion.

18. Insurer requested Dr. Raschbacher revisit his impairment rating in light of Claimant's initial TSA. In an "Incidental Chart Note" dated May 12, 2014, Dr. Raschbacher apportioned Claimant's rating by backing out the 30% rating for the diagnosis based impairment. He opined Claimant's upper extremity impairment was 6%, which was converted to 4% whole person. The ALJ finds that the revised 6% was a clerical error and should have been the original 9% for loss of range of motion. No persuasive evidence supports a finding that Dr. Raschbacher considered whether Claimant's 2008 TSA was independently disabling on the date of the work injury, as Dr. Raschbacher did not discuss it in his revised rating. He also recommended that the parties check with Dr. Mueller, the medical director of the Division of Workers' Compensation, regarding whether to include the diagnosis based impairment rating.

19. On May 28, 2014 Respondents filed a Final Admission of Liability based on Dr. Raschbacher's second impairment rating.

20. On August 7, 2014, Claimant returned to Dr. Hatzidakis complaining of continued pain in his right shoulder. Even though Claimant's last few evaluations with Dr. Gridley and Dr. Raschbacher revealed essentially no pain, Claimant advised that he believed he was discharged prematurely. Dr. Hatzidakis recommended Claimant increase his strengthening activity. On September 30, 2014, Claimant returned to Dr. Hatzidakis complaining of anterior shoulder pain, along with ongoing numbness and tingling into his fingers. Dr. Hatzidakis assessed Claimant with a painful and dysfunctional right shoulder with a possible ongoing low grade infection.

21. On September 15, 2014 Dr. Christopher Ryan performed a records review, obtained a history from Claimant, and examined him. Dr. Ryan reported Claimant was "doing functionally quite well" following his 2008 arthroplasty. Dr. Ryan noted that Claimant's shoulder had deteriorated dramatically since being placed at MMI, "He has effectively no internal rotation, and significant limitation in flexion, abduction, and adduction. Mild atrophy is noted in the deltoid and rotator cuff musculature." Dr.

Ryan opined that Dr. Raschbacher erred by apportioning the 2008 TSA out from Claimant's rating. He explained that apportionment is only appropriate "when an employee has a non-work-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling." Dr. Ryan concluded: "There is no evidence to show that [Claimant's] non-work-related previous shoulder arthroplasty was independently disabling. Therefore, the impairment rating should not be apportioned."

22. On October 15, 2014, Dr. Stephen Scheper conducted a division independent medical examination (DIME) on Claimant. Dr. Scheper was asked to consider MMI, permanent impairment rating, and apportionment. He reviewed Claimant's medical records, obtained a history from Claimant, and examined Claimant. Claimant's history includes "total shoulder arthroplasty 2008 – after which he did very well without continued pain or functional impairment." On physical exam, Dr. Scheper noted Claimant's right shoulder was depressed with significant scapular protraction; his deltoid, supraspinatus, and infraspinatus were mildly atrophied; and there were trigger points in Claimant's right upper trapezius and rhomboid major.

- **MMI**: Dr. Scheper opined that MMI on April 24, 2014 was reasonable.
- **Permanent Impairment Rating**: Dr. Scheper rated Claimant according to the AMA Guides to the Evaluation of Permanent Impairment, 3rd edition revised. Using Chapter 3 Table 19, Dr. Scheper gave Claimant a 30% upper extremity rating for implant arthroplasty of the shoulder. Dr. Scheper used Figures 38, 41, and 44 to rate Claimant's range of motion deficiencies which combined yielded a 13% range of motion impairment. Dr. Scheper combined the 13% for range of motion impairment with the 30% for arthroplasty, arriving at a 39% upper extremity impairment, which converts to a 23% whole person.
- **Apportionment**: Dr. Scheper agreed with Dr. Ryan that Claimant's arthroplasty from 2008 was not a disabling condition and therefore should not be considered. He remarked, "The claimant had done very well for 5 years after his arthroplasty prior to the injury in question."

23. In November 2014, Respondents challenged the DIME and filed an application for hearing.

24. At the hearing Dr. Barton Goldman testified as Respondents' expert in physical medicine and rehabilitation. Dr. Goldman reviewed Claimant's medical records from February 21, 2007 through October 30, 2014. Dr. Goldman did not examine Claimant, although he testified that physically evaluating a claimant is "certainly preferable."

25. Dr. Goldman issued a report dated February 10, 2015 in which he opined:

- Claimant had a preexisting diagnosis based impairment under the *Guides* of 30% for his 2008 TSA.
- While he had no documentation to support his opinion, he was certain that Claimant had preexisting range of motion deficits.

- Dr. Walker's report of Claimant's "limitations" – which Claimant could not perceive and only "probably" had – "would certainly meet criteria from the Guides perspective of activities of daily living restrictions or limitations."
- Existing reports support the medical likelihood of preexisting "independent disability."
- Claimant did not sustain a functional impairment to a body part not otherwise compensated by the scheduled disabilities.

26. Dr. Goldman testified that a doctor doing an impairment rating for a revision TSA should either not include it in his rating; or include it, but then back it out because it was preexisting. He testified that diagnosis based ratings are given because the authors of the Guides assume that "somewhere down the road" the person will have "a lot more problems than somebody who never had a shoulder replaced."

27. Dr. Goldman acknowledged that Claimant had atrophy of his shoulder musculature, including his anterior and middle deltoid, the posterior cuff musculature at the infraspinatus, and teres major and minor. Dr. Goldman acknowledged that such atrophy was associated with weakness, and acknowledged the atrophy would affect Claimant's ability to use, move, and stabilize his right arm. Dr. Goldman agreed the affected shoulder musculature attaches to the upper back area or the chest area.

28. Dr. Goldman testified that Claimant's 2008 TSA de facto would have rendered Claimant independently disabled. He clarified that while it might be "very mild," that it was "just about unheard of" for an arthroplasty patient not to have some limited range of motion. He testified that it would be medically improbable not to have at least some mild limitations that would increase over time. Dr. Goldman testified that a doctor generally will not release a TSA patient without restrictions of a medium work capacity, and would strongly advise against overhead activity, impact loading, and martial arts.

29. Dr. Goldman opined that Dr. Raschbacher's second impairment rating was correct in terms of the diagnosis based impairment and that Dr. Scheper, the DIME doctor, was incorrect in his handling of the diagnosis based disability.

30. Dr. Goldman acknowledged that he currently teaches doctors to "take into consideration if a condition is independently disabling at the time of the new work-related injury." However, he did not do so here. Rather, he applied a non-rebutable presumption that a patient who had a TSA had to be independently disabled. Rather than weighing Claimant's testimony that he perceived no physical limitations prior to his work-related injury and the multiple medical records in agreement, Dr. Goldman simply presumed Claimant was independently disabled.

31. Dr. Goldman noted that Claimant's testimony of no disability following the original 2008 arthroplasty was solely subjective. The ALJ credits Claimant's testimony over the unidentified study relied on by Dr. Goldman.

32. The ALJ finds that much of Dr. Goldman's testimony misses the mark. The crux issue here is whether Claimant's non-work-related injury was independently disabling to Claimant at the time of the current work-related injury. The Guides define

"disability" as "assessed by nonmedical means, [disability] is an alteration of an individual's capacity to meet personal, social, or occupational demands." Dr. Goldman's opinions address alleged limitations, not disability. The ALJ finds that Dr. Goldman's opinions do not support that Claimant was independently disabled by his non-work injury at the time of his work-related injury.

33. The ALJ finds Dr. Goldman's reasoning to be circular. And finds his opinions to be inconsistent with "Apportionment of Impairment" guidelines, admitted into evidence as Respondents' exhibit AA, which allows for claimants who have previous non-work-related injuries which are identified and treated to not be disabled.

34. Dr. Goldman showed an inherent bias against Claimant.

- Dr. Goldman admitted he was hired by Respondents "to help defend [Claimant's] claim for workers' compensation benefits" – in other words, he viewed his role to be that of an advocate.
- Dr. Goldman's comments in his record review show inherent bias against Claimant. For example, while Dr. Walker reported that Claimant felt best on vacation because he was resting his shoulder, Dr. Goldman offered the following unsupported commentary: "The subjective improvements noted when on vacation indicate a substantial stress component contributing to the patient's perceived pain and disability at this time. Also, the context of this claim versus the patient's prior shoulder surgeries is likely having an unconscious impact in terms of perceived outcome and even unconscious victimization phenomena that are common within disability systems."
- Dr. Goldman accuses Claimant to be acting for secondary gain, although no medical record documents any instance of Claimant exhibiting pain behaviors, magnifying his symptoms, malingering, etc.

35. Dr. Goldman's report contained inaccuracies that diminished his credibility.

- Dr. Goldman's report omitted Dr. Hatzidakis' note that "Claimant returned to 100% normal" following his 2008 TSA. When Claimant's counsel asked him about the omission, Dr. Goldman suggested the omission was of no consequence.
- Dr. Goldman reported Claimant was 62" tall and obese. There is no indication in the medical records to support this. Rather, the record supports a finding that Claimant is 72" tall with proportionate height and weight.
- Dr Goldman assumed without support that Claimant was de-conditioned. Dr. Goldman's assumption was contradicted by persuasive evidence that (1) Dr. Gridley noted Claimant was "well-developed for his age," and (2) Claimant testified that before his work injury he was an "exercise fanatic," bicycling daily, lifting maximum amounts of weight, and working out twice weekly with a personal trainer.
- Dr. Goldman inaccurately noted the date of Claimant's revision surgery.

- Dr. Goldman adopted Dr. Raschbacher's miscalculation of Claimant's range of motion limitation rating when the diagnosis based rating was backed out of his original calculation.

36. Dr. Hatzidakis testified as an expert in the diagnosis and treatment of orthopedic conditions by pre-hearing deposition dated March 10, 2015. He testified that Claimant's report that his shoulder had returned to 100% post the 2008 TSA would indicate that Claimant did not have any disability form the 2008 surgery. He testified that Claimant did not have any symptoms before the April 30 accident.

37. Dr. Hatzidakis testified that he could not contrast the extent of damage to Claimant's musculature from his accident on April 30, 2013, with the condition of his arm prior to that. The ALJ infers from his testimony that such a contrast could not be made.

38. Dr. Hatzidakis noted Claimant's documented difficulty with computer work, keyboarding, and writing. He explained that all of Claimant's shoulder musculature would be implicated in those tasks, including "muscles that attach from the back to the scapula." He also identified the deltoid and the pectoralis, muscles that attach to the chest. Dr. Hatzidakis, referring to Dr. Ryan's report, testified that the muscles Dr. Ryan identified as being functionally involved also attached to Claimant's chest and back.

39. Dr. Hatzidakis testified that he examined Claimant's cervical spine during Claimant's May 22 visit because Claimant continued to have complaints of pain in that area.

40. With respect to limitations form Claimant's 2008 TSA, Dr. Hatzidakis testified that "There are patients who feel like they return to 100%, they feel like it goes back to really good motion. That younger older age group, the people between 55 and 65, tend to do really well because they still have really good musculature and heal well." The ALJ finds this testimony supports Claimant's reports of being unable to perceive any limitations after his 2008 surgery, and his reports of having returned to 100% prior to his injury.

Conversion to Whole Person

41. Claimant seeks to convert his scheduled impairment rating to a whole person rating. To do so, Claimant must establish by a preponderance of the evidence that he sustained functional impairment to a part of the body off the schedule.

42. The ALJ finds Claimant's injury has affected physiological structures beyond the arm at the shoulder, and determines the situs of the functional impairment extends through Claimant' chest and back. Thus, the loss is not one listed on the schedule of disabilities.

43. Based on the totality of the evidence, the ALJ finds it more likely than not that Claimant sustained functional impairment not limited to his upper extremity and that conversion of his impairment rating to a whole person rating is proper.

DIME Impairment Rating

44. Respondent seeks to overcome the DIME physician's opinion regarding impairment. They are required to do so by a preponderance of the evidence.

45. Dr. Scheper, the DIME doctor, opined Claimant's previous arthroplasty was not an independently disabling condition.

46. Dr. Scheper's opinion is supported by those of Dr. Walker, Dr. Hatzidakis, Dr. Raschbacher, and Dr. Ryan, all of whom determined that Claimant was not independently disabled at the time of his work injury.

47. Respondents offered no persuasive prior medical documentation of impairment, range of motion limitations, or restrictions.

48. Dr. Goldman acknowledged inferentially that Claimant's disability did not necessarily exist at the time of his work related injury. He testified: "If you meet one of these diagnosis based criteria, the authors are assuming that somewhere down the road, it may be five years, it may be twenty years, you're going to have a lot more problems than somebody who never had their shoulder replaced."

49. Dr. Goldman opined, contrary to the other doctors, that at the time of Claimant's work related injury, Claimant was independently disabled by his 2008 TSA. The basis for his opinion was that everyone who has a TSA is disabled.

50. This opinion is less persuasive than that of all of the other doctors because it is not based on the more credible actual evidence presented in this case. And it is inconsistent with the Guides and Impairment Rating Tips which recognize and account for the possibility that a claimant could experience a previous, non-work related injury that is identified and treated, yet does not cause a patient to be disabled.

51. The ALJ also finds Dr. Goldman's opinions less persuasive than those of the other doctors because he showed an inherent bias against Claimant, his credibility is diminished by inaccuracies in his report, and he performed only a records review while acknowledging that a physical examination of Claimant would have been preferable.

52. The ALJ finds Dr. Scheper's opinions are consistent with the Guides and Tips; the opinions of Drs. Walker, Hatzidakis, Raschbacher, and Ryan; medical documentation; and Claimant's credible testimony. The ALJ credits the opinions of Dr. Scheper as more credible and persuasive that those of Dr. Goldman.

53. The ALJ finds Respondents have not overcome DIME Dr. Scheper's opinion regarding impairment.

54. Based on the totality of the evidence, the ALJ finds it more likely than not that Dr. Scheper's whole person rating of 23% is proper.

Average Weekly Wage

55. Claimant seeks a determination of his average weekly wage. The correct method of calculating Claimant's AWW would be to divide Claimant's gross yearly wages for the contract period and divide that number by 52 weeks. Claimant's employment contract was from July 1, 2012 through June 30, 2013. The AWW is calculated based on the wages earned during the contract period. Further, while Claimant did not work during various periods of the contract period, Respondent continued to pay benefits, including health insurance, through the entirety of the contract, even during summer months. This evidence supports the finding that Claimant

was under contract during this entire period. Accordingly, with a pay rate of $5447.68 per month, Claimant earned $65,372.16 for the contract period which equals an AWW of $1,257.16.

Disfigurement

56. During the hearing, the ALJ observed a seven inch-long keloidal scar with visible suture marks resulting from his revision surgery.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

Conversion to Whole Person

A claimant is limited to scheduled disability benefits if the claimant suffers an "injury or injuries" described on the schedule. Section 8-42-107(1)(a). If the claimant's "injury or injuries" are not the schedule, the claimant is entitled to whole person benefits. Section 8-42-107(1)(b). "The term 'injury' as used in Section 8-42-107(1)(a) refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Kolar v. ICAO*, 122 P.3d 1075, 1076 (Colo. App. 2005). The Colorado Court of Appeals has held that depending on the particular facts of the claim, damage to structures of the "shoulders" may or may not reflect a "functional impairment" which is enumerated on the schedule of disabilities. *Walker v. Jim Fouco Motor Company*, 942 P.2d 1390 (Colo. App. 1997).

Here, Claimant sustained a physical injury to the muscles supporting and surrounding his shoulder joint which resulted in a loss of range of motion. The ALJ

credits Claimant's testimony that he currently feels pain in his right shoulder up through and across his neck and down into his back. The muscles which cause his pain were documented by Dr. Hatzidakis as causing Claimant chronic cervical pain. Additionally, Dr. Hatzidakis and Dr. Gridley treated musculature in Claimant's chest and back which control Claimant's ability to do computer work, writing, and keyboarding. These include the rotator cuff, the deltoid, and the pectoralis. Dr. Gridley treated Claimant's deltoid and rotator cuff muscles which are very important to power the shoulder and help position the arm in space. Dr. Scheper also noted Claimant's deltoids, supraspinatus, and infraspinatus were atrophied, which would cause weakness, and that there were trigger points in Claimant's upper trapezius and rhomboid major.

Thus, the ALJ concludes that the situs of Claimant's functional impairment and pain extends beyond the glenohumeral joint and into muscles of his neck, chest and back warranting a whole person impairment rating.

DIME Impairment Rating

The ALJ concludes Respondents were not required to overcome by clear and convincing evidence the DIME physician's opinion that the pre-existing TSA was "independently disabling." The ALJ further concludes that a preponderance of the evidence establishes the pre-existing impairment was not "independently disabling" at the time of the April 30, 2013 injury. Therefore, apportionment of the impairment rating is not proper and Claimant is entitled to PPD benefits based on the Dime doctor's 23% whole person impairment. Because Claimant underwent a DIME, the ALJ must first determine whether the impairment is a scheduled injury or non-scheduled one. Whether the Claimant sustained functional impairment to a part of the body off the schedule is a factual question. See *Warthen v. ICAO,* 100 P.3d. 581 (Colo. App. 2004).

Section 8-42-104(5)(b) provides that in cases of permanent medical impairment "the employee's award or settlement shall be reduced:"

> (b) When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury was independently disabling. The percentage of the nonwork-related permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted from the permanent medical impairment rating for the same body part.

Application of § 8-42-104(5)(b) to the facts of this case requires the ALJ to interpret the meaning of the term "independently disabling. " The ALJ notes that neither party cited any current cases that interpret the term. The ALJ is also required to determine whether a DIME physician's opinion that a prior medical impairment was not "independently disabling" must be overcome by clear and convincing evidence.

A court should effect the legislative intent of a statute by first looking to the "plain and ordinary meaning" of the language used in the statute. If the meaning is ambiguous

or unclear the court may look to other aides to interpretation including the legislative history, the context in which the legislation was adopted and the consequences of various interpretations. *See Weld County School District RE-12*, 955 P.2d 550 (Colo. 1998); *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991).

When the General Assembly amends a statute a presumption arises that the legislature intended to change the law as it existed prior to the amendment. *Arenas v. Industrial Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000). There is also a presumption that the General Assembly was cognizant of judicial precedents addressing the subject matter of the inquiry. *Weld County School District RE-12, supra.*

Section 8-42-104(5)(b) was adopted in 2008 and became effective on July 1 of that year. For the period July 1, 1999 to July 1, 2008 § 8-42-104(2)(b), C.R.S., provided that when benefits were awarded pursuant to "section 8-42-107, an award of benefits for an injury shall exclude any previous impairment to the same body part." Section 8-42-104(2)(c) stated that this apportionment applied to awards of permanent partial disability. Prior to July 1, 1999 § 8-42-104(2), C.R.S., provided that in cases of "previous disability" the disability for a "subsequent injury" was to be determined by "computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury." This provision expressly applied to awards of permanent partial disability."

In *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996) the court interpreted the meaning of the term "previous disability" as that term was used in the pre-1999 version of § 8-42-104(2). The court observed that the Act did not define the term "previous disability." However the court stated that § 8-42-107(8)(c), C.R.S., requires the use of the AMA Guides when determining impairment and that the rating of impairment "necessarily includes the decision to apportion such impairment." The court then observed that the AMA Guides define the term "impairment" as "an alteration of an individual's health status that is assessed by medical means." In contrast, the AMA Guides state that "disability" is assessed by nonmedical means and is "an alteration of an individual's capacity to meet personal, social, or occupational demands." The court emphasized that under the AMA Guides "a person who is impaired is not necessarily disabled." *Id.* at 1337.

In *Askew* the respondents sought to apportion an impairment rating for a back injury based on a pre-existing degenerative back condition. However, the facts demonstrated that prior to the industrial injury the degenerative back condition was asymptomatic and did not hinder the claimant's ability to meet any demands. The court reasoned that under the "plain language of § 8-42-104(2)" apportionment was improper. It reasoned that the claimant's preexisting degenerative condition may have been an "impairment" under the AMA Guides, but it was not a "disability" because it did not limit his capacity "to meet the demands of life's activities." *Id.* at 1337; *see also Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656 (Colo. App. 1998).

Later, in *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68 (Colo. App. 2001) the court applied the *Askew* analysis to affirm a denial of apportionment

based on a prior industrial impairment that was not disabling at the time of the subsequent industrial injury. Significantly, the court determined that under the *Askew* decision the "apportionment principles triggered under § 8-42-104(2) do not concern causation, but instead pertain to the status of a claimant's preexisting impairment." Specifically the court was required to determine if the pre-existing impairment rose to the level of a disability that continued to affect the claimant at the time of the subsequent injury. Moreover, the *Public Service* court ruled that the question of whether prior impairment was "disabling" at the time of the subsequent injury presented a question of fact for the ALJ to determine under the preponderance of the evidence standard, and the ALJ was not required to give any "presumptive weight" to the DIME physician's opinion on this issue.

As noted above, the General Assembly amended § 8-42-104(2) effective July 1, 1999. The legislature deleted any reference to the term "disability" and provided an award of PPD benefits was to exclude "previous impairment to the same body part." In *Martinez v. Industrial Claim Appeals Office, supra*, the court of appeals held that the statutory change rendered immaterial the distinction between "the type of apportionment authorized under former § 8-42-104(2) and the type of apportionment required by the AMA Guides as part of the rating process." The court stated that under the July 1, 1999 version of the statute apportionment constituted a "pure medical determination, which when made by the DIME physician is subject to the clear and convincing standard of § 8-42-107(8)." 176 P.3d at 828.

Section 8-42-104 was again amended in 2008 to include the provisions of subsection (5)(b). Subsection (5)(b) conditions apportionment of "nonwork-related previous permanent medical impairment" on a finding that the previous medical impairment was "independently disabling" at the time of the subsequent industrial injury. The ALJ concludes that the 2008 adoption of subsection (5)(b) evidences the General Assembly's intent to alter the law of apportionment as it existed from July 1, 1999 to July 1, 2008, by reincorporating into the statue the requirement that a previous medical impairment be "disabling" at the time of the subsequent industrial injury.

The ALJ further concludes that when the General Assembly used the term "independently disabling" in subsection (5)(b) it did so with full cognizance of the *Askew* decision and its progeny. Specifically, the ALJ infers the legislature was aware that *Askew* held the plain and ordinary meaning of the phrase "previous disability" referred to "an alteration of an individual's capacity to meet personal, social, or occupational demands" as determined by nonmedical means. Consequently, the ALJ infers that in 2008 when the General Assembly reinserted the term "disabling" into subsection (5)(b) its intent was to condition apportionment of pre-existing non work-related medical impairment on a finding that such impairment limited the claimant's capacity to meet personal, social or occupational demands at the time of the subsequent industrial injury. Moreover, the General Assembly intended to legislatively repeal the holding in *Martinez v. Industrial Claim Appeals Office, supra* that apportionment is strictly a "medical determination" and the DIME physician's opinion on apportionment must be overcome by clear and convincing evidence. Rather, use of the term "disability" in subsection (5)(b) signals an intent to readopt the *Askew* court's view that, as provided in the AMA

Guides, the existence of "disability" is determined by nonmedical means. Further the ALJ infers the General Assembly intended to adopt the *Public Service Co.* court's view that the existence of "disability" is determined under the preponderance of the evidence standard and the DIME physician's opinion is not entitled to any "presumptive weight" on this issue.

The ALJ further concludes that the foregoing analysis is consistent with WCRP 12-3(A) and (B). WCRP 12-3(A) pertains to injuries "prior to July 1, 2008" and states the rating physician "shall apportion any preexisting medical impairment, whether work-related or non work-related, from a work-related injury or occupational disease using the" AMA Guides.

In contrast WCRP 12-3(B) applies to dates of injury "on or after July 1, 2008" and states the rating physician "may provide an opinion on apportionment of any preexisting work related or non work-related permanent impairment to the same body part" using the AMA Guides where "medical records or other objective evidence substantiate preexisting impairment." The rule also provides that if the rating physician apportions based on a prior non work-related impairment the physician "must provide an opinion as to whether the previous medical impairment was identified, treated and independently disabling at the time of the work-related injury that is being rated." Significantly, WCRP 12-3(B)(1) states the "effect of the Physician's apportionment determination is limited to the provisions in section 8-42-104."

The ALJ infers from WCRP 12-3(B)(1) that the rule reflects a recognition by the Director of the DOWC that the legal "effect" of a rating physician's opinions concerning apportionment, including an opinion concerning whether a previous impairment was independently disabling at the time of the subsequent industrial injury, can have no more legal consequence than is contemplated by § 8-42-104. As determined above, the ALJ concludes that § 8-42-104(5)(b) contemplates that a DIME physician's opinion concerning whether or not prior medical impairment was "independently disabling" at the time of the industrial injury is not entitled to "presumptive weight" and is of no greater legal consequence than any other physician's opinion on this subject.

A preponderance of the credible and persuasive evidence establishes that Claimant's 39% upper extremity impairment rating cannot be apportioned based on his pre-injury condition because the prior condition was probably not "independently disabling" at the time of the April 30, 2013 injury. As determined, the credible and persuasive evidence establishes Claimant's condition prior to the injury was probably not "independently disabling." Claimant's credible testimony, as corroborated by the history he gave to various medical providers, establishes that by April 30, 2013 he had returned to work at full duty, without any documented restrictions, perceivable limitations, or pain; and was engaged in a vigorous exercise program. Although Dr. Raschbacher opined, after prompting by Insurer, that Claimant's 2008 TSA required him to deduct the 30% diagnosis related impairment, that opinion is not persuasive. Dr. Goldman's opinion that Claimant's impairment rating should be apportioned also is not persuasive for the reasons stated.

The specific issue determined here is that apportionment of the DIME physician's overall rating based on Claimant's pre-existing non work-related medical impairment is not proper under § 8-42-104(5)(b) because the prior impairment was not proven, by a preponderance of the evidence, to be "independently disabling" at the time of the April 30, 2013 injury. Therefore, Claimant is entitled to PPD benefits based on the DIME physician's overall rating of 23% whole person impairment without apportionment.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's AWW based on his earnings at the time of injury as measured by Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Claimant contends he is entitled to the maximum average weekly wage by calculating his gross wages for the school year and dividing that amount by ten months. This is not the most accurate determination. Claimant testified he was under contract for one year with Employer and remained an employee of Employer for the 12 month period. He received payment in the form of one-twelfth of his annual salary and health benefits during the two summer months. Because Claimant received salary and benefits during each of the twelve months, it is most fair and accurate to calculate the average weekly wage by taking Claimant's gross wages for the contract year and dividing by 12 months, the length of the contract. The ALJ concludes that the correct average weekly wage is $1,257.16.

Disfigurement

The ALJ finds and concludes that as a result of Claimant's April 30, 2013, work injury, Claimant has a visible disfigurement to the body consisting of a seven inch-long keloidal scar with visible suture marks. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

The ALJ orders that Insurer shall pay Claimant $2,100 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Insurer shall pay Claimant PPD benefits in accordance with the statutory formula based on a 23% whole person impairment.

4. Insurer shall pay Claimant compensatory benefits based on an average weekly wage of $1,257.16

5. Insurer shall pay Claimant $2,100 for his disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 12, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has established, by a preponderance of the evidence, that his scheduled upper extremity impairment rating should be converted to a whole person impairment rating.

- Whether Claimant has proven, by a preponderance of the evidence, that his portion of his health insurance premium should be considered in the calculation of his Average Weekly Wage (hereinafter "AWW") and, if so, the appropriate method of calculating the revised AWW.

- Whether Claimant is entitled to additional temporary disability benefits based upon an adjustment to his AWW.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained a work-related left shoulder injury on January 3, 2011 while working as a residential driver on a single man trash collection route. On this date, Claimant was dumping a rolling "toter" filled with heavy garbage when he felt a painful pop in his left shoulder.

2. An MRI performed November 4, 2011 demonstrated a full thickness tear of the supraspinatus tendon at its insertion with retraction of the torn fibers, but without muscle belly atrophy. Claimant attempted, but ultimately failed conservative care. Consequently, he underwent surgery with Dr. Ronald Royce on March 13, 2014. During the arthroscopic procedure, Claimant was discovered to have a prominent subacromial bone spur prompting Dr. Royce to perform a subacromial decompression, followed by removal of 5 mm of bone from the anteroinferior portion of the acromion. Arthroscopic evaluation also revealed "prominent hypertrophy and spurring of the distal clavicle" which Dr. Royce elected to remediate by performing a distal clavicle resection to include removal of 11 mm of bone from the distal acromioclavicular joint.

3. Claimant was referred for post surgical rehabilitative care following his March 13, 2014 arthroscopy. Approximately eight months later, Claimant was placed at MMI by his primary authorized treating physician (ATP), Dr. Daniel Peterson on November 4,

2014. Dr. Peterson assigned a 20% scheduled upper extremity impairment rating, which converts to 12% whole person impairment.

4. Prior to being placed at MMI, Respondents referred Claimant to Dr. Ridings for an independent medical examination (IME) on September 29, 2014. Following this examination, Dr. Ridings opined that Claimant was approaching MMI. Dr. Ridings projected that Claimant would reach MMI at the end of October; however, he indicated that he would "defer" to Dr. Peterson should he assign an earlier date of MMI during Claimant's October 22, 2014 follow-up appointment. Dr. Ridings also assigned an "advisory" impairment rating of 19% upper extremity, which converts to 11% whole person impairment. Finally Dr. Ridings opined that Claimant's symptoms and examination did not qualify him for any additional impairment for the cervical spine.

5. Upon careful inspection of Dr. Ridings' impairment rating report, the ALJ finds that Dr. Ridings utilized the same methodology as did Dr. Peterson to compute Claimant's impairment, including the decision to assign 10% scheduled impairment for Claimant's distal clavicle resection. The only difference between the impairment ratings of Dr. Ridings and Dr. Peterson is a slight variation in the range of motion measurements of the shoulder.

6. At the IME with Dr. Ridings, Claimant reported persistent pain in the superior aspect of the left shoulder, specifically in the upper trapezius and extending laterally to the mid cervical region. He also complained of "discomfort", i.e. 2/10 pain at rest and more intense 5/10 pain with use of the left shoulder. Claimant described increased pain with prolonged posturing of the left arm when in any position other than at his side. He also reported that his left arm "goes to sleep" if he sleeps with his shoulder elevated. Finally, he reported weakness of the arm at shoulder level but none distally.

7. Respondents admitted liability for the 20% scheduled impairment assigned by Dr. Peterson. A Final Admission of Liability (FAL) was filed on November 25, 2014. In response, Claimant filed an Application for Hearing and amended the same on December 31, 2014. Claimant endorsed conversion of his scheduled upper extremity impairment rating to impairment of the whole person and requested a determination of his AWW related to termination of his health insurance benefit as issues for hearing.

8. At hearing, Claimant testified that he experiences pain and stiffness on the top of his shoulder that refers laterally to the bottom of his neck with additional pain traveling into his upper back. Claimant described the pain as a discomfort that he works through. Although Claimant testified that he currently has no formal work restrictions, he complained of a 60% reduction in the strength of his left shoulder. Moreover, while the testimony of Fred Kiger confirms that Claimant has returned to work approximately 45 hours per week, Claimant lost his residential trash collection route and is currently working a recycle pick-up route which he testified is "considerably lighter" than picking up trash every day.

9. Claimant testified to having constant neck pain and stiffness. He described this as a "crook" in his neck which limits this range of motion. According to Claimant, he has

difficulty looking over his left shoulder to use his mirrors while driving his trash truck. Claimant testified that he does not feel pain while performing arm curls or other exercises/activities requiring the use of his arms below shoulder level. He is able to care for his children, including a two year old, whom he lifts and plays with. He assists with household chores such as vacuuming and cutting a "little bit of grass here and there." However, anytime Claimant lifts too much above his head he feels clicking and popping pain in his neck.

10. Claimant's medical records from Concentra Medical Centers contain the following references:

- November 4, 2014: "Chief Complaint: The patient presents today with pain in left shoulder and neck." "Review of Systems-Musculoskeletal: "joint pain, muscle pain, back pain, neck pain, joint stiffness, muscle weakness and night pain, but no joint swelling.

- September 22, 2014: "EE c/o some neck stiffness." "Neck pain." "Trouble sleeping at night. "Wakes up with a crook in his neck." "Tenderness … AC joint, bicipital groove, trapezius muscle and supraspinatus muscle"

- May 30, 2014: "The patient presents with complaints of neck pain (left side)." "Sleep is off pt states, uncomfortable for pt to sleep."

- Included in the pain diagrams completed at Concentra wherein Claimant was asked to identify the area of his body where he felt sensations are diagrams dated 7/25/14 and 7/29/13. The ALJ finds these diagrams to depict pain that encompasses the area of the posterior left shoulder between the shoulder and the neck.

11. Based on the aforementioned medical records, the ALJ finds Claimant's testimony regarding his ongoing pain and functional limitation beyond the left shoulder consistent, credible and convincing. While Claimant can work and otherwise engage in child care activities, the ALJ finds the performance of Claimant's current work for Employer and lifting his two year old to require bending his arms at the elbows rather than reaching and lifting overhead. Moreover, vacuuming and cutting the grass are activities performed with the arms below shoulder level. Consequently, the ALJ finds Claimant's ability to engage in the aforementioned activities has no bearing on whether he has functional impairment beyond the arm at the shoulder.

12. Dr. Ridings was offered and accepted as a Level II accredited expert in physical medicine and rehabilitation (PM&R) at hearing. Dr. Ridings testified that the AMA guides allow for impairment of the shoulder to include range of motion loss as well as additional "add on" impairments for crepitus, severe arthritis and/or distal claviculectomies. Dr. Ridings testified that neither he nor Dr. Peterson provided Claimant with an additional rating beyond that provided for shoulder range of motion loss and the impairment for the distal clavicle resection.

13. Dr. Ridings testified that the clavicle "extends from the sternum . . . across to the acromion" where it forms the acromial clavicular (AC) joint "directly in front of the glenohumeral joint. According to Dr. Ridings, the clavicle "has some role in the stability of the shoulder joint particularly as it attaches at the AC joint. Dr. Ridings testified that the clavicle is part of the shoulder and he "would not call it a bone." The ALJ finds that Dr. Ridings probably misspoke when he testified that the clavicle was not a bone based upon the March 13, 2014 operative report of Dr. Royce, an orthopedic specialist, indicating that 11 mm of "bone" was removed from the AC joint region during the distal clavicle resection. Based on Dr. Ridings' testimony that the AC joint is directly in front of the glenohumeral joint, the ALJ infers and finds that the AC joint is located on the front of the body but medial (more towards the center of the body) to the glenohumeral joint in the sagittal plane. Consequently, the ALJ finds that the AC joint and the clavicle are anatomic structures beyond the glenohumeral joint and not part of the arm itself.

14. Based on the evidence presented, the ALJ finds that Claimant suffers from pain extending from the top of the shoulder, into the upper trapezius and cervical musculature. Following his IME, Dr. Ridings documented that "[Claimant's] primary left shoulder pain is in the superior aspect of the shoulder, pointing to the left upper trapezius, extending up to the mid-cervical region laterally." Dr. Ridings' physical examination confirmed that "[Claimant] has tenderness from the base of the left neck across the left upper trapezius to the point of the shoulder" and that "the upper trapezius on the left does have increased myofascial tone." More probably than not, the residuals from Claimant's full thickness supraspinatus tear in addition to his subacrominal decompression and distal clavicle resection are causing referred pain and weakness into the adjacent scapular and cervical musculature. This is consistent with Claimant's hearing testimony and the content of the medical records submitted into evidence. The top of the shoulder as well as the cervical and upper scapular musculature are not part of the "arm." Furthermore, on the evidence presented, the ALJ finds that Claimant's referred pain, stiffness and weakness limits the function of his neck and upper back rather than his arm.

15. The preponderance of the persuasive evidence presented demonstrates that Claimant's permanent impairment extends beyond his left arm. Accordingly, the ALJ finds that conversion of Claimant's scheduled impairment to impairment of the whole person is warranted in this case.

16. At the time of his injury, and thereafter until March 9, 2014, Claimant and his dependents were covered by the Employer's group health insurance plan. Both Claimant and Employer contributed a portion of the monthly health insurance premium. Claimant's portion was deducted from his regular paychecks. When Claimant was taken off work after surgery on March 13, 2014 and placed on TTD, he could not afford to pay his portion of the health insurance premium which was previously paid through payroll deduction. Consequently, Claimant testified that he stopped paying his share of the health insurance premium. Wage records submitted at hearing substantiate that Claimant Employer stopped receiving Claimant's insurance premium payment.

17. Employer sent Claimant several notices beginning May 10, 2014, informing him of his overdue balance for his portion of the health insurance premium. Claimant also received notices in June and July of 2014. The notices informed Claimant that his health insurance would be canceled if he did not pay the accrued balance. The most recent notice, dated July 10, 2014, indicated that a minimum payment of $2,890.36 had to be received by 07-17-2014 to avoid cancellation of coverage. Claimant testified that he was never able to catch up on the past-due insurance premiums. Based upon the evidence presented, the ALJ finds that Claimant's health insurance coverage was canceled due to his failure to pay his portion of the total premium cost.

18. Dora Akers, Employers' Human Resources Manager, testified that Claimant's local "site" continued to "pay" Employer's portion of the health insurance premium throughout the period Claimant was out of work receiving TTD. Ms. Akers explained that the local site paid the corporate parent for the Employers portion of the health insurance premium. Wage records submitted into evidence reflect that Employer continued to pay for their portion of Claimant's health insurance premium without interruption from January 3, 2014 through March 27, 2015.[1] Ms. Akers testified that Employer did not send Claimant a COBRA notice informing him that he was eligible for COBRA due to non-payment.

19. Respondents have admitted to an AWW of $985.00 exclusive of the value of Claimant's health insurance premium. Based upon the evidence presented, Claimant's portion of the health insurance premium was $154 per week when the controversy concerning whether inclusion of his health insurance premium should be considered in the calculation of his AWW. Conversely, Employer's portion was $221.53 per week.

20. Claimant has failed to prove by a preponderance of the evidence, that he is entitled to an increase in his average weekly wage and TTD rate.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I.

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *C.R.S. § 8-40-102(1).* Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. *C.R.S. § 8-43-201*. A

[1] The records submitted indicate that Employer paid $221.53 weekly from 1/3/14 through 1/9/15 for what Ms. Akers testified was the premium cost for Claimant's health insurance. Beginning 1/16/15 the cost increased to $236.54, which amount was paid by Employer through 3/27/15.

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. *C.R.S. § 8-43-201*.

B. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). In determining credibility, the ALJ, acting as fact finder, should consider, among other things, the consistency or inconsistency of a witness's testimony and/or actions; the reasonableness or unreasonableness of a witness's testimony and/or actions; the motives of a witness; whether the testimony has been contradicted and, bias, prejudice or interest. *See, Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). The fact finder is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959).

C. In accordance with section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

II.

Conversion of Claimant's Scheduled Impairment

D. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S.* However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the

shoulder. *Langton v. Rocky Mountain Health Care Corp*., 937 P. 2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

E. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or "functional impairment", on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.*

F. It is true, as Claimant points out, that "functional impairment" need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008).* Moreover, as noted by Claimant "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005); Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (ICAO, December 17, 2013). Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of the arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as impairment of the whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office, 927 P.2d 1333 (Colo. 1996).* Consequently, an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm at the shoulder. *Walker* v*. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp., supra.*

G. In this case, the ALJ agrees with Claimant that the persuasive evidence warrants conversion of his scheduled impairment to impairment of the whole person. As found, both the AC joint and the distal clavicle are structures beyond the "arm." Consequently, the subacromial decompression and distal clavicle resection, which permanently altered these anatomical structures, were performed above the glenohumeral joint and therefore, above the "arm." *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008)(finding that subacromial decompression was done at the

acromion and the coracoacromial ligament to relieve the impingement, which was related to the scapular structures above the level of the glenohumeral joint"); *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO, April 13, 2006) (finding that distal clavicle resections are proximal to the glenohumeral joint and therefore, on the trunk of the body). Furthermore, the consistent and convincing evidence establishes that Claimant suffers from pain, stiffness and weakness on the top of the shoulder, in the musculature of the upper back, including the upper trapezius and the cervical musculature which affects his sleep, limits his ability to perform activity above shoulder level and interferes with his ability to turn his head, particularly when driving his route. In concluding that Claimant is entitled to conversion of his scheduled impairment to impairment of the whole person, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (ICAO, January 11, 2012) and *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (ICAO, March 27, 1986) instructive. In *Steinhauser,* the Panel affirmed the conclusion of the ALJ that pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment. Similarly, in *Franks* pain affecting the trapezius and difficulty sleeping on injured side supported the ALJ's finding of whole person impairment. On the evidence presented, the ALJ concludes that the instant case is analogous to *Steinhauser* and *Franks*. Accordingly, the ALJ concludes that Claimant has proven by a preponderance of the evidence that he sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which warrants conversion of his scheduled impairment to whole person impairment.

III.

Average Weekly Wage

H. AWW is calculated based upon the monthly, weekly, daily, hourly, or other compensation which the injured employee was receiving at the time of the injury in accordance with C.R.S. § 8-42-102. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).* Sections 8-42-102 (3) and (5) (b), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. *R.J.S. Painting v. Industrial Commission of State*, 732 P.2d 239 (Colo. App. 1986).

I. C.R.S § 8-40-201(19)(b), provides: The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan, and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan…. ***If, after the injury, the employer continues to pay any advantage of fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage of the cost of the conversion of health insurance coverage, that advantage or benefits shall not be included in the determination of the employee's wages so long as the employer continues to make payment*** (emphasis added).

J. The Court in *Midboe v. Industrial Claim Appeals Office,* 88 P.3d 643 (Colo.App.2003), construed the definition of "wages" to exclude healthcare benefits when an employer continued to contribute to the insurance premium. The claimant in *Midboe* suffered a substantial injury at work, but he continued to work for his employer after the injury. As a result, the employer continued to pay its share of the claimant's health insurance premium while the claimant paid his share. *Id*. When calculating the claimant's benefits, the ALJ concluded that the claimant's premium payments should be included in his average weekly wage. However, the ICAO reversed. It held that when an employer continues to pay health insurance benefits, the average weekly wage should not include either the employee's or the employer's contribution to the health insurance premium because the "wages" statute explicitly bars such inclusion. Specifically, the ICAO relied on the last sentence of § 8–40–201(19)(b), which states, "If, after the injury, the employer continues to pay ... the cost of health insurance coverage ... such advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make such payment."

K. In *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006), the Colorado Supreme Court granted certiorari to resolve a conflict between the court of appeals decisions in *Midboe* and *Ray.* In overruling Midboe to the extent it was inconsistent with the decision reached in Ray, the Court clarified as follows: "The narrow issue in *Midboe* was simply whether the amount a claimant pays as his share of the premium for group health and dental insurance coverage must be included in the calculation of his average weekly wage when the employer continues to pay its share of the premium. In *Ray* the issue decided was whether C.R.S. § 8-40-201(19)(b) required claimants who lost their jobs to purchase continuing or converted health insurance under the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 in order for their average weekly wage to be increased by the cost of continued health insurance. The Court's holding in *Ray* that C.R.S. § 8-40-201(19)(b) does not require a claimant to purchase continuing coverage or convert to a similar plan does not resolve the question presented here, which is whether Claimant's share of the premium for continued coverage should be included in the average weekly wage when the employer continues to pay its share. The Court in *Ray* expressly stated that the answer to this question is in the negative.

L. Additionally, in *Laura Plute v. Home Depot,* W.C. No. 4-631-629 (ICAO, January 16, 2007) a hearing was held on the "sole issue of whether the claimant's average weekly wage should be increased by the amount of her health insurance premiums." The issue presented to the ALJ in *Pulte* was whether a temporarily disabled Claimant was entitled to an increase in her average weekly wage by the amount of her portion of the health insurance plan premium, where the employer and claimant continued to pay the health insurance premium after claimant was placed on an unpaid leave of absence, and coverage under the plan continued. The ALJ found that the claimant was not "put to any additional expense in order to continue her coverage. Consequently, the ALJ concluded that the claimant's cost of continuing coverage under the health insurance plan during the leave of absence should not be included in her average weekly wage. Relying on their decision in *Salas v. NCR Corp*., W.C. No. 4-166-217 (ICAO, March 26,

1996), and *Midboe*, *supra* the Panel affirmed the ALJ. In *Salas,* claimant was provided with group health insurance coverage. Similar to the instant case, employer paid a portion of the total cost of the group health insurance premium. Claimant was then placed on long term disability, but the employer continued to pay its portion of the premium. Nonetheless, the ALJ concluded that claimant's AWW should include employer's portion of the premium. The Panel reversed stating that the "unambiguous effect of the statute is to exclude from the wage calculation the cost of health insurance if the employer continues to pay its share of the cost after the injury." In reversing, the Panel concluded that the plain and ordinary meaning of the term "any" as used in § 8-40-201(19)(b) meant "one, some, every, or all without specification." *Salas, supra* citing *The American Heritage College Dictionary* (Third Edition 1993). Accordingly, the Panel concluded that "if the employer continues to pay 'some' of the cost of the claimant's health insurance, health insurance is excluded from the average weekly wage calculation until the employer discontinues payment."

M. Claimant argues that *Pulte* and *Salas* are factually distinguishable from the instant case, because there is no proof that the Employer continued to "pay" their portion of the health insurance premium in the sense of actually making premium payments to the health insurance carrier and because, contrary to the situation in Pulte and Salas, Claimant's coverage in this case was canceled for nonpayment. Regarding continued payment by Employer of their potion of the health insurance premium, Claimant asserts that the evidence established simply that Claimant's local site continued to "pay" the corporate parent in an accounting sense. In so doing, Claimant argues that Employer was merely transferring money from one of its accounts to another. Concerning continued coverage, Claimant argues that, unlike the circumstances in *Pulte* and *Salas* his health insurance was not continued since he was unable to pay his portion of the premium and his insurance was canceled. Accordingly, Claimant argues that Employer did not continue to "pay" for his coverage, because the coverage was no longer in effect. Based upon the evidence presented, the ALJ is not persuaded. The ALJ concludes that Respondents established at hearing that they continued to pay their portion of the health insurance plan premium and that the coverage was cancelled because Claimant failed to pay his portion of the premium not vice versa. Because Employer continued to pay "some" of the cost of Claimant's health insurance, the ALJ concludes that C.R.S. § 8-40-201(19)(b), in addition to the decisions announced in *Midboe, Salas* and *Pulte* support a conclusion that Claimant is not entitled to an increase in his average weekly wage.

IV.

Adjustment of TTD benefits

N. Because the Court concludes that Claimant is not entitled to an increase in his AWW based on the cost of his health insurance, the ALJ concludes that he is not entitled to an adjustment in TTD benefits for the admitted period of TTD extending from March 10, 2014 to November 3, 2014.

ORDER

It is therefore ordered that:

1. Claimant's left upper extremity scheduled impairment rating of 20% is converted to 12% whole person impairment.

2. Insurer shall pay permanent partial disability benefits consistent with a 12% whole person disability rating pursuant to C.R.S. § 8-42-107(8)(d).

3. Claimant's request for an increase in his AWW is denied and dismissed as Respondents continued paying their portion of the insurance premium. Consequently, Claimant's request for an adjustment in his TTD rate is also denied and dismissed.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: June 15, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issue for determination is whether the claimant's left lower extremity scheduled rating of 25% should be converted to a whole person rating of 10%.

FINDINGS OF FACT

1. The claimant is a police patrol officer for the respondent-employer and has been employed by the respondent-employer for 17 years.

2. In this position the claimant needs to be physically active while engaged in making arrests and various other police activities.

3. The claimant additionally participates as soldier in the Army Reserves where he is a platoon Sergeant in a Military Police unit. He has been involved in Army activities for almost 20 years.

4. In 2010 the claimant was deployed to Afghanistan with the Army. Prior to his deployment eh claimant had no low back problems and was physically active with no restrictions.

5. In addition to his normal police duties the claimant was also a member of the police department's SWAT unit and would also work out on his own while off duty.

6. Upon the claimant's return from Afghanistan he returned to his full duties with the respondent-employer without any restrictions.

7. On August 16, 2012 the claimant sustained a compensable on-the-job injury to his left knee.

8. The claimant had surgery for this injury and shortly thereafter returned to modified light duty. The claimant ultimately transitioned back to full duty.

9. The claimant reached maximum medical improvement (MMI) for this injury on June 18, 2013. The claimant was given an impairment rating of 14% for the left lower extremity and was released to full duty with no permanent restrictions.

10. On November 22, 2013 the claimant again suffered a compensable industrial injury to his left knee when he slipped on ice while getting into his patrol car.

11. The claimant sustained a complex tear of the posterior horn of the medial meniscus and tearing of the lateral meniscus with an intact ACL graft. The claimant underwent surgery for this second knee injury on December 26, 2013.

12. The claimant reached MMI for this second injury on April 15, 2014.

13. Subsequent to the MMI finding the claimant underwent a division independent medical examination conducted by Jeffrey Jenks, MD.

14. Dr. Jenks determined the claimant sustained a 25% left lower extremity permanent impairment after applying apportionment for his first knee injury. This rating converts to a 10% whole person rating.

15. Dr. Jenks noted that the claimant

16. continues with intermittent left knee pain. He has a lot of pain in the lateral aspect of his left knee. This occurs particularly with running and prolonged standing. At times his knee swells and can become quite stiff. He complains of constant numbness along the lateral aspect of his left knee.

17. The claimant had no significant issues while he was on light duty. When the claimant transitioned back to full duty in the March/April 2014 timeframe the claimant's range of motion deficit affected the way he walked and by extension the way he has to run. The claimant's activities vary from day to day and he cannot predict when or what will affect the functioning of his knee.

18. When the claimant's knee hurts it affects his low back and his back gets stiff.

19. Specifically, when the claimant is running he gets low back pain and aching. This did not occur prior to his injury of November 22, 2103. The claimant states that he has flare-ups approximately 6 times a month.

20. When the claimant has flare-ups it also affects how long he can stand.

21. The claimant's condition has also had an effect upon his military status as he now is under a running profile and is not allowed to run.

22. The ALJ finds the claimant to be credible.

23. The ALJ finds that the claimant has established that it is more likely than not that the situs of the claimant's functional loss extends beyond the lower left extremity and into his low back as well as the functioning of his entire body as it relates to running.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

6. The question of whether the claimant sustained a loss of a leg at a hip joint within the meaning of Section 8-42-107(2)(w), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question the ALJ must determine the situs of

the claimant's functional impairment, and the situs of the functional impairment is not necessarily the situs of the injury itself. *See Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo.App. 1996); *Staunch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App. 1996).

7. The "loss of a leg at the hip joint" is on the schedule of injuries listed under Section 8-42-107 (2)(w), C.R.S. Depending on the particular facts of the claim, damage to the structures of the leg may or may not reflect a functional impairment which is enumerated on the schedule of injuries under Section 8-42-107 (2), C.R.S.

8. An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the claimant sustained a functional impairment beyond the schedule. *Staunch v. PSL Swedish Healthcare System, supra.* Further, pain and discomfort, which limits the claimant's ability to use a portion of the body, may be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *See Vargas v. Excel Corp., W. C. NO. 4-551-161 (April 21, 2005).* Functional impairment of the leg beyond the "leg at the hip joint" is probative evidence of whole person impairment.

9. As found above, the ALJ concludes that the claimant's testimony was credible and supported by the medical record.

10. The ALJ concludes as found above, that as a result of his work-related injury the claimant has functional impairment of the leg, and the claimant has functional impairment in areas beyond the leg. As a result of his work-related injury, the claimant has functional impairment that is located beyond the leg; it is located in the low back and in the entire body as it relates to the claimant's ability to run. As a result of his work-related injuries the claimant's functional impairment is not limited to the leg at the hip joint.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that his lower extremity impairment rating should be converted to a whole person impairment rating.

12. The ALJ concludes that the claimant suffered 10% permanent impairment of the whole person.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant permanent partial disability benefits based upon a 10% whole person impairment rating.

2. The respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has established by clear and convincing evidence that she is not at maximum medical improvement (MMI) for her May 7, 2013 compensable injury.

2. If the claimant is at MMI, whether the claimant has overcome the impairment rating by the Division IME, Dr. McFadden by clear and convincing evidence.

FINDINGS OF FACT

1. The claimant works as a food server and bus aide for the respondent-employer.

2. On May 7, 2013, the claimant sustained a low back strain while twisting and unhooking a student from a seatbelt who was restrained in a bus.

3. On May 24, 2013, the claimant was seen at CCOM by Kenneth Ginsburg, P.A., an authorized provider, who, after taking a history and evaluating claimant, assessed a right sacroiliac strain. The claimant was prescribed medication and referred for chiropractic care.

4. On June 3, 2013, the claimant returned to CCOM, where the records document the following: "Her pain is localized to her right buttocks and there is no radiation to her leg or paresthesia or numbness in her leg."

5. Dr. Terrence Lakin, D.O., an authorized treating physician, evaluated the claimant on June 4, 2013. Dr. Lakin took a history from the claimant, performed a physical examination, and diagnosed a low back strain, right sacroliitis, and a right hip strain.

6. Dr. Lakin ordered an X-ray and MRI of the low back and hip, prescribed medications and a home exercise program, and issued temporary work restrictions. The claimant rated her pain an 8 out of a 10 at that time.

7. The claimant was seen by Dr. Lakin on June 20, 2013, where "she is improved greatly and is not using a walker now. She walks relatively comfortable. She still complains of a catch in her hip."

8. With respect to MRI's, Dr. Lakin noted: "Lumbar shows some L5-S1 disc herniation and crowding of right and left S1 nerves and multilevel mild degenerative changes. She does not have exhibit any significant lumbar issues." (Id.). Dr. Lakin diagnosed WC sacroiliitis, right, and a right hip strain.

9. On July 8, 2013, the claimant was seen by Dr. Charles Hanson, M.D., who took an initial history, evaluated the claimant, and stated: "Presently, the patient complains of fairly constant sharp pain in her right upper buttocks area. The pain is intensified by standing and ambulation. Quiet rest, use of heat, ice and flexeril provides only partial benefit. She has had no radicular leg pain, leg paresthesias, leg weakness or sphincter problems." The claimant began physical therapy in mid-July.

10. On September 17, 2013, the claimant underwent a right SI joint injection with Dr. Finn. The claimant had 90% improvement from the SI injection.

11. Dr. Caughfield performed EMG studies on October 10, 2013, and noted that there was "no evidence of radicular or peripheral nerve entrapment, but he also noted that [the claimant] had bilateral peroneal motor nerve slowing, likely due to foot trauma."

12. On October 16, 2013, Dr. Floyd Ring, M.D., performed a physician advisor review based on a request for an epidural injection at L5-S1. Dr. Ring noted that the MRI "shows evidence of an L5-S1 disc herniation; however, there is no evidence of any nerve root compression or canal stenosis. She was also referred for EMG studies. These were performed on 10/10/13. They showed no evidence of lumbar radiculopathy or peripheral nerve entrapment."

13. Dr. Ring went on to state: "Based upon the fact that the patient has had 90% improvement of her pain complaints following the SI injection this would point more towards a pain generator in that area." Dr. Ring noted that the EMGs and MRIs did not support the need for an epidural injection. He recommended denying the L5-S1 injections and continuing to have therapy that addresses the SI joint.

14. Dr. Lakin also noted that when considering the EMG results that "she has no evidence of lumbar radiculopathy or peripheral nerve entrapment syndromes."

15. The claimant was released without work restrictions on October 29, 2013.

16. On October 30, 2013, Dr. Lakin placed the claimant at maximum medical improvement, without permanent impairment. The claimant's conditions were noted to be improved, and Dr. Lakin states she is doing very well "after her injections by Dr. Finn in the SI joint." Dr. Lakin goes on to state: "She has significant degenerative changes. She has L5-S1 herniated disc with left SI nerve impingement. Degenerative disc disease at multiple levels in her right hip appears like a degenerative tear in the labrum. It does not seem medically likely that both of these injuries were done by her mechanism of injury. She concurs with closing case and returning to full duties."

17. Dr. Lakin stated that the claimant is free to pursue treatment for nonoccupational degenerative changes, and highly encouraged her to work at conditioning and weight loss."

18. The claimant returned to Dr. Finn on October 31, 2013, who administered a right L5-S1 epidural injection. The claimant did not get any relief from the L5-S1 injection.

19. The respondents filed a final admission of liability on October 31, 2013, reflecting $16,988.23 paid in medical benefits, to date.

20. The claimant objected to the final admission of liability and began the Division Independent Medical Examination process.

21. On January 21, 2014, the claimant is seen by Dr. Lakin who notes that her condition has deteriorated and now includes in her diagnoses radiculopathy, muscle weakness, and loss of strength.

22. On January 30, 2014, the claimant returned to Dr. Lakin, who noted lumbar pain with radiculopathy, and an overall increase in pain complaints. Dr. Lakin states: "I have reservations of this [her industrial injury of May 7, 2013] MOI [mechanism of injury] causing L5-S1 disk bulging, and now with advancement of DDD with L3-4 bulge, DDD of right hip labrum with cam defect, she did improve and closed case, then on vacation in Mexico while walking has exacerbation or advancement of symptoms." At this point Dr. Lakin recommended an IME be performed to sort out her causation issues. He also referred the claimant to Dr. Sung for a surgical evaluation.

23. On February 25, 2014, Dr. Jeffery Raschbacher, M.D., performed a physician advisor review. In relevant part, Dr. Raschbacher states: "[t]he medical record indicates that she had a non-work related event, while on vacation. The treating physician, Dr. Lakin, requested an IME. It appears reasonable to conclude that with a non-work-related aggravation that further care should not be on the basis of her workers' compensation injury claim but rather outside of work, as it appears the aggravating event was fairly clearly not work-related." Dr. Raschbacher felt that it would still, however, be reasonable to obtain an IME.

24. On June 9, 2014, Dr. Elizabeth Bisgard, M.D. performed an IME, and issued a report.

25. Dr. Bisgard indicated that the claimant's pain reporting was not consistent with her presentation, and subsequently noted that the ATP, Dr. Lakin, noted this same inconsistency. ("On January 29, 2014, Dr. Lakin reevaluated [the claimant], noting that she was complaining of 10/10 pain and was using a walker but that she appeared to be in no acute distress.")

26. Dr. Bisgard stated that "the initial injury, which involved an SI strain, has now evolved into lumbar radicular pain, which is not consistent with her mechanism of injury or the EMG/NCV." She went on to note that the claimant has well documented degenerative disease in the lumbar spine and hip which, in addition to her obesity and deconditioning, is more likely than not the cause of her worsening condition and objective findings on the MRI.

27. Dr. Bisgard documented via report as follows:

a.) [The claimant] was treated for unrelated right plantar fasciitis and placed in a cast which in and of itself can lead to gait disturbance and SIJ dysfunction, unrelated to her work injury.

b.) [The claimant] was appropriately treated for her SIJ dysfunction related to the unbuckling the child from the harness. I agree with Dr. Ring that with 90% relief after the SIJ injection in September 2013, the likely pain generator was the SIJ and not the lumbar spine. Her symptoms improved and she was appropriately placed at MMI by Dr. Lakin.

c.) I am very concerned by her pain behaviors and nonphysiologic findings, which indicate that there may be a significant somatoform component to her reported pain. She has a preexisting history of depression.

d.) [The claimant] has an undisputed issue with morbid obesity, as well as significant underlying degenerative joint disease in her hip and degenerative disc disease in her back, which clearly predated her work injury and were not aggravated or accelerated by that injury. Her back symptoms were not consistent with her MRI findings, and they substantially worsened after her vacation to Mexico.

e.) [The claimant's] subjective reporting is not reliable or consistent.

28. Lee McFadden, M.D., was selected to perform the Division Independent Medical Examination (DIME), which took place on October 9, 2014. Dr. McFadden examined the claimant and reviewed all the medical records associated with her claim.

29. Dr. McFadden issued a DIME report on October 29, 2014.

30. Dr. McFadden diagnosed the following in his DIME report:

a.) SI joint inflammation, related, on a more probable than not basis, to the industrial injury of May 7, 2013.

b.) Chronic low back pain, unrelated, on a more probable than not basis to the underlying industrial injury May 7, 2013.

c.) Diffuse axial spine spondylosis and degenerative disc disease, pre-existing and unrelated to the industrial injury May 7, 2013, on a more probable than not basis. Neither temporarily nor permanently aggravated by the

industrial injury of May 7, 2013.

d.) Morbid obesity, pre-existing and unrelated to the industrial injury of May 7, 2013.

31. With respect to the issue of maximum medical improvement (MMI), Dr. McFadden states:

> I opine that the claimant has reached maximum medical improvement with regard to her industrial injury of May 7, 2013. Her industrial injury was a relatively innocuous event where she sustained a temporary aggravation or sprain of her right sacroiliac joint. Her low back evaluation was relatively benign at the time of her initial evaluation after her industrial injury of May 7, 2013 and she responded to a sacroiliac joint injection with approximate 90% relief of symptoms. She has had an intervening fall as well as exacerbation of her low back symptoms while vacationing since her industrial injury. She had reached maximum medical improvement and was returned to work without permanent impairment or workplace limitations by Dr. Lakin on October 30, 2013. I agree with this assessment.

32. With respect to the claimant's pain complaints, Dr. McFadden states:

> The claimant currently presents with pain out of proportion to objective findings primarily related to her axial spine. Her axial spine radiographs demonstrate chronic degenerative changes that have not, on a more probable than not basis, been either temporarily or permanently aggravated by her industrial injury of May 7, 2014. Her physical examination had significant pain behaviors and pain out of proportion to objective findings limiting the reproducibility and accuracy of any subjectively impacted measures such as range of motion or strength. Despite the inaccuracy and lack of reproducibility of her objective measures, this is a moot point regarding this evaluation as I opine that she has not sustained any permanent partial impairment with regard to her lumbar spine related to her industrial injury of May 7, 2013.

33. Dr. McFadden concluded his DIME report by noting:

> Her current symptom complex likely represents a combination of natural progression of disease process (diffuse spondlyosis and degenerative disk disease), the impact of morbid obesity on the stresses placed on her skeleton, and chronic pain.
>
> She has no focal findings related to her sacroiliac joint and I do not opine that she would require any further treatment to maintain maximum improvement for her transient SI joint aggravation sustained on May 7, 2013.

34. Dr. Timothy Hall testified at the hearing.

35. Dr. Hall opined as follows:

a.) Dr. Bess's assessment of the claimant was L5-S1 right sided degenerative disk herniation.

b.) Dr. Bess recommended a right sided L5-S1 laminotomy, discectomy, lateral recess decompression, and foraminotomy.

c.) Based on his understanding of the claim, he attributes Dr. Bess's assessment and recommendation for disk surgery to her May 7, 2013, industrial injury.

d.) The claimant was not treating for back problems prior to May 7, 2013.

e.) The claimant did not have any psychiatric history prior to May 7, 2013.

f.) The claimant consistently reported shooting radicular leg pain that has been getting progressively worse, since May 7, 2013.

g.) That he spent "about 20 minutes" reviewing the medical records in this matter, and formed his opinion based on the claimant's subjective history, and the records he reviewed.

36. It is not clear what, if any, records Dr. Bess relied on in forming his surgical opinion, and/or to what extent he relied on the claimant's subjective reporting of her history of injury and symptoms, in forming his opinion.

37. The post-hearing deposition of Dr. Elizabeth Bisgard, M.D., was taken on May 22, 2015.

38. Dr. Bisgard opined as follows:

a.) The claimant's symptoms do not correlate with her MRI findings.

b.) The claimant's symptoms were consistent with right sacroiliitis dysfunction following the May 7, 2013 injury.

c.) The claimant's MRI findings show that she had degenerative changes consistent with age related progression, and that this finding is not uncommon in individuals of her age group.

d.) A herniated disk does not explain her symptoms following the May 7, 2013 industrial injury. Rather, they are more indicative of a SI joint problem.

e.) If the claimant had a symptomatic herniated disk immediately following the industrial injury, we would see far more sensory changes in the S1 distribution, more leg symptoms, more diminished reflexes and strength along the muscles.

f.) The SI injection done by Dr. Finn on September 17, 2013,

provided claimant 90% relief. If the SI joint was not the pain generator and not the issue, she wouldn't have gotten that significant relief. The SI injection confirms that this is a SI joint issue and not a disk issue.

g.) Dr. Hall makes no mention in his testimony anything about her two subsequent intervening events.

h.) She has reviewed the records and agrees that the claimant was appropriately placed at MMI without permanent impairment by the ATP, Dr. Lakin.

i.) She has reviewed the DIME report and agrees with Dr. McFadden that the claimant was appropriately placed at MMI without permanent impairment.

j.) Dr. Hall is incorrect in stating that the claimant was consistently reporting pain shooting into her legs from May 7, 2013. On the contrary, the claimant was not reporting pain shooting into her legs from May 7, 2013. Rather, the claimant reported pain shooting into her legs months later, and after she had two intervening events, including her trip to Mexico where she had an increase in symptoms. Moreover, her condition had improved significantly at the time she was placed at MMI, and later deteriorated.

k.) That she spent three hours reading the detailed medical records. The 20 minutes that Dr. Hall spent to review all of these records, is not an adequate time to get a thorough understanding of this case. Dr. Hall's opinion is based on an inaccurate and/or incomplete understanding of the medical records.

l.) That the claimant had non-physiologic findings, which were also documented by the treating physician, as well as the DIME physician.

m.) Dr. Hall was incorrect in stating that the claimant did not have any psychiatric history. The records demonstrate that the claimant did in fact have a psychiatric history going back 12 years. The claimant was taking medication (Prozac) for this condition.

n.) The claimant's two intervening events, more likely than not, are responsible for her current symptoms, and that the claimant had subjective symptoms that do not match up with her objective findings.

39. The ALJ finds that Dr. Hall's analysis and opinions only rise to the level of establishing a difference of opinion and do not show any clearly erroneous analysis or opinions of the DIME physician Dr. McFadden.

40. The ALJ finds that the opinions of Dr. Bisgard, Dr. Lakin, and Dr. McFadden are more credible and persuasive than medical opinions to the contrary.

41. The totality of the documentary evidence and diagnostic testing is more reliable than the claimant's testimony.

42. The claimant is noted to have non-physiologic findings by the ATP Dr. Lakin, the DIME Dr. McFadden, and the IME Dr. Bisgard.

43. The ALJ finds that the claimant has failed to prove that Dr. McFadden was clearly in error when he opined that the claimant was at MMI on October 30, 2013.

44. The ALJ finds that the claimant has failed to prove that Dr. McFadden was clearly in error when he opined that the claimant suffered no permanent impairment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

3. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

6. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), *citing Dilco v. Koltnow,* 613 P.2d 318 (1980). A mere

difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010).

7. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, (W.C. No. 4-874-745-01, ICAO February 14, 2014); *See also Javalera v. Monte Vista Head Start, Inc.,* (W.C. No. 4-532-166, ICAO July 19, 2004); *Gonzales v. Browning Industries of Colorado*, (W.C. No. 4-350-356, ICAO March 22, 2000).

8. As found above, the ALJ concludes that the medical opinions of the DIME physician, Dr. McFadden, have not been overcome by clear and convincing evidence, as Dr. Hall's opinions only amount to a difference of opinion.

9. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the DIME physician, Dr. McFadden was clearly wrong when he assessed the claimant to be at MMI on October 30, 2013.

10. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the DIME physician, Dr. McFadden was clearly wrong when he assessed that the claimant suffered no permanent impairment as a result of her industrial injury of May 7, 2013.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's challenge to the DIME with respect to MMI and impairment is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 17, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-938-729-01

ISSUES

- Did Claimant prove by a preponderance of the evidence that her lumbar spine problems are related to her claim, and that lumbar-directed injections are reasonable, necessary, or related to her claim?

- Did Claimant prove by a preponderance of the evidence that platelet-rich plasma ("PRP") injections and/or stem-cell injections are reasonable, necessary, or related to her claim?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the judge enters the following findings of fact:

1. Claimant is a 59 year old former employee of Employer. On November 14, 2013, she stood up from her chair and fell on her right hip after her foot was caught in the chair. Brandon Reiter, D.O. evaluated Claimant at HealthOne that day. Claimant complained of pain in her hip and difficulty with weight-bearing. There is no reference to low back pain. X-rays of Claimant's hip were negative. Dr. Reiter diagnosed a right hip strain.

2. On November 20, 2013, Claimant began physical therapy at HealthOne. Claimant's pain complaint was noted to be located in the right hip. Claimant made no recorded complaints as to her back. Treatment is only noted to have been directed to Claimant's right hip.

3. On November 21, 2013, Claimant continued to complain to Dr. Reiter of pain across her hip, into her thigh, and also radiating to her right knee. There is no discussion of back pain. On November 27, 2013, Claimant continued to report severe right hip pain at physical therapy. Therapy was directed to Claimant's right hip, hamstring, quad and IT band.

4. On December 2, 2013, Cheryl Parent, PT noted for the first time Claimant complained of back pain. Despite characterizing the complaints as "continued pain in the right hip, buttock, and back," therapy is noted to actually be directed to the lumbar spine for the first time.

5. On December 16, 2013, Dr. Reiter referred claimant for an MRI of the right hip due to her continued complaints of right hip pain. Dr. Reiter commented on December 30, 2013, that the MRI showed a displaced right femoral neck fracture with some degenerative changes. He referred Claimant to an orthopedist, Michael Hewitt, M.D. On January 6, 2014, Dr. Reiter noted Dr. Hewitt wanted Claimant to stay off her leg and was hopeful the hip would heal on its own without surgery.

6. On February 24, 2014 Claimant complained to Dr. Reiter of tingling and needle sensations in her lateral hip and buttock region on the right side. Dr. Reiter noted Dr. Hewitt had recommended Claimant start physical therapy or pool therapy and that she try to wean off crutches.

7. On March 3, 2014, Dr. Reiter noted for the first time that Claimant complained of pain in her right lumbar paraspinal muscles with decreased range of motion in her lumbar spine. This was on Claimant's tenth visit with Dr. Reiter. Dr. Reiter did not analyze or opine whether he felt Claimant's low back pain was work-related. Claimant also complained of pain in her right hip. Dr. Reiter referred her to pool therapy.

8. On March 27, 2014, Claimant reported continuing spasms in her hip and back to Dr. Reiter. He noted that Dr. Hewitt recently again had recommended continued pool therapy and weaning off crutches. Dr. Reiter referred Claimant for a lumbar MRI on April 10, 2014.

9. The lumbar MRI occurred on April 18, 2014. It showed scoliosis, mild spondylosis, a protrusion at L2-3 resulting in mild left inferior foraminal stenosis, a bulging annulus at L3-4 which was combing with arthritis resulting in stenosis, a foraminal protrusion and annular fissure at L4-5 with mild stenosis, and arthritis at L5-S1. On April 24, 2014, Dr. Reiter noted reviewing the MRI and referred Claimant for a physiatry evaluation with Dr. Usama Ghazi.

10. Dr. Ghazi first evaluated Claimant on April 30, 2014. Dr. Ghazi noted Claimant had a healing right hip fracture, had been referred to pool therapy which caused increased buttock pain that radiated into her lower extremity, and still had pain complaints over her hip, lateral thigh, and radiating pain down her leg. Dr. Ghazi performed an ultrasound which revealed evidence of bursitis with fluid in the subgluteal/trochanteric bursa and fluid around the gluteus medius tendon. Dr. Ghazi diagnosed a right-sided trochanteric and gluteal bursitis, right-sided iliopsoas tendinitis, right-sided lateral femoral cutaneous neuralgia/meralgia paresthetica, and right-sided SI joint pain with piriformis syndrome. Dr. Ghazi referred Claimant for osteophathic treatment and acupuncture, he prescribed Gabapentin and a topical compounding ointment, and he noted bursa injections may be indicated in the future.

11. On June 10, 2014, Dr. Ghazi noted Claimant could not tolerate NSAIDs and had allergies which precluded attempting steroid injections. She had pain over the hip and lower back with tightness at the iliotibial band. He prescribed massage therapy and continued physical and pool therapy.

12. As of August 26, 2014, Dr. Ghazi recommended anesthetic only injections without steroids. Dr. Ghazi noted that, other than the anesthetic-only injections, her "only options" would be PRP injections which Dr. Ghazi noted would require multiple injections and cause post-injection flares of pain "that might be cruel and unusual to have her go through that many injections with increased discomfort." Despite saying PRP and anesthetic-only injections were her only options; he then discussed amniotic stem cell injections as another, more expensive, option. He noted such injections "have been used in studies on inflammatory conditions such as knee arthritis," and he had used them in his clinic.

13. On October 14, 2014 Dr. Ghazi's office requested authorization for two stem cell injections, at an apparent cost of $7,000 per injection. In a letter to Dr. Reiter dated October 15, 2014, Dr. Ghazi recommended the stem cell injections to the trochanteric bursa and gluteal bursa in conjunction with his finding that she had fluid on her ultrasound in that area. He then for the first time noted that, "If all else fails, we can try diagnostic medial branch blocks with anesthetic only and then pursue the rhizotomy from the right side for the lumbar facets and sacroiliac joint." Dr. Ghazi does not appear to have analyzed the relatedness of the back complaints in his treatment notes, nor does he reference any conclusion that he felt the complaints were related.

14. Dr. James Lindberg, M.D. performed a DOWC Rule 16 review of the request for prior authorization of the stem cell injections and issued a report dated October 20, 2014. Dr. Lindberg noted that stem cell injections and PRP injections were not recognized treatments in the *Medical Treatment Guidelines*. He also pointed out that Claimant's continued pain raised some concern as to the presence of nonunion or avascular necrosis, and a repeat MRI should first be done before performing any additional therapies.

15. Dr. Ghazi noted reviewing Dr. Lindberg's recommendation for denial on October 29, 2014. On that date, he documented that Claimant complained of her low back at L4-5 and L5-S1 being her most painful body part, which is expanded from his initial diagnosis of SI pain only. Dr. Ghazi recommended injections into the L4-L5 and L5-S1 facet joints. The ALJ notes that just the appointment before, Dr. Ghazi referred to the medial branch blocks as a potential "last ditch" option if all else failed. While it is not clear to the ALJ why branch blocks to treat a back condition would be a last ditch effort if hip injections failed, Dr. Ghazi shifted course and recommended the branch blocks before completing his pursuit of the hip injections. Dr. Ghazi noted his disagreement with Dr. Lindberg's opinion. He stated Claimant's limited treatment options were stem cell injections or PRP injections. He did state, though, that he would follow-through with Dr. Lindberg's recommendation for a repeat MRI.

16. On October 30, 2014, Dr. Ghazi submitted a request for authorization of L4-L5 and L5-S1 facet injections without steroid or dye. Dr. Lindberg reviewed the requests for authorization and recommended denial of the injections because no MRI had been done to determine the existence of lumbar pathology. He also noted in reference to the hip recommendations that the repeat hip MRI and not yet been done, and a local injection of anesthetic into the bursa had not been done as a diagnostic tool.

17. On November 14, 2014 Claimant's right hip MRI occurred. The MRI was read as normal. Dr. Ghazi next evaluated Claimant on November 26, 2014. He noted the normal MRI findings were "interesting" since he had found fluid in the trochanteric and gluteal bursa during his prior ultrasound examination. Dr. Ghazi administered the anesthetic-only injection into the bursa. He also noted following through with Dr. Lindberg's recommendation to order the lumbar MRI. However, he stated he would proceed with the medial branch blocks once the lumbar spine MRI was completed, without showing any regard to whether the results would affect his opinion. He also stated he would request authorization for the stem cell injections into the trochanteric and gluteal bursa as well once the lumbar MRI was completed. The ALJ notes he

apparently planned to do so without first receiving any report of the effect over time of the anesthetic-only injection.

18. The lumbar MRI occurred on December 11, 2014 and was compared MRI with her April 18, 2014 MRI. The latter showed moderate lumbar scoliosis, normal soft tissues, and no changes since the April 2014 MRI at all levels. The impression was a stable moderate scoliosis with degenerative disc and joint changes and a mild dural sac indentation.

19. On December 19, 2014, Claimant reported to Dr. Ghazi that she received 100% relief from the anesthetic injection for 10 hours. Dr. Ghazi again recommended the stem cell injections. PRP injections were again listed as an alternative treatment option, but he preferred stem cell injections due to the probable lack of a painful inflammatory response. Dr. Ghazi stated Claimant's lumbar MRI showed "facet arthrosis without severe stenosis" and he reiterated his request for lumbar facet injections. He submitted the request for authorization of the stem cells on December 22, 2014.

20. Dr. Lindberg reviewed the new requests on December 26, 2014. He noted the MRI of the hip showed no abnormalities. He stated there was considerable doubt as to whether the stem cell injections, and also possibly PRP injections, would be effective and they were not included in the treatment guidelines. He recommended both be denied, and he recommended a course of specific therapy for IT band stretching and hip muscle strengthening as a better alternative. Dr. Lindberg also noted not having the lumbar MRI results to review, but he felt the injections should continue to be denied until the MRI results could be reviewed by a spine specialist.

21. On January 22, 2015, Dr. Ghazi recommended physical therapy to stretch the iliotibial band and strengthen the hip muscle, but he felt physical therapy had already been attempted without success. He also expressed surprise that Dr. Lindberg had not been able to review the lumbar MRI. He felt his clinical exam was sufficient to diagnosis facet joint pain and the medial branch blocks were indicated regardless of the MRI results.

22. On March 17, 2015, on behalf of Respondents, Dr. Jeffrey Wunder, M.D. performed an IME of Claimant to evaluate the question of both treatment for the hip and the lumbar spine. Claimant described her cumulative pain complaints as 7/10, both on average and at that time. She described her right hip pain and buttock pain as worse than her low back pain. On physical examination, Dr. Wunder identified several non-organic findings. He noted Claimant reported right lumbosacral pain with facet loading to the left and right which "would not be consistent with isolated right-sided facet joint pain." He also noted Claimant had "strong Waddell findings. She had overactive pain behavior . . . diffuse skin tenderness, increased pain with rotation at the knees, and discrepant straight leg raising," as well as a "non-physiologic sensory examination."

23. Dr. Wunder concluded that Claimant's positive response to the anesthetic injection into her bursa indicated she had soft tissue pain which extended into her buttock, trochanter, inguinal ligament, and medial thigh, and there was no intra-articular pain generator. He stated "the only treatment for this would be physical therapy, which has not been extremely successful." He agreed with Dr. Lindberg's recommendation

that Dr. Ghazi's request for use of stem cell or PRP injections should be denied. He also agreed with Dr. Lindberg's recommendation for additional, specifically directed, physical therapy by a therapist experienced in soft tissue gluteal pain, but he was not confident she would receive much additional benefit.

24. Dr. Wunder stated Claimant's lumbar complaints were not likely related to the work-injury. He noted Claimant had undergone multiple physician and physical therapy treatments after the accident without first reporting low back pain. He noted the mechanism of injury would have led to a tissue injury which in turn would have generated an inflammatory pain response within 72 hours. He stated Claimant's reports of lumbar pain first at physical therapy on December 2, 2013, and then to Dr. Reiter for the first time in March 2014, did not establish her symptoms were related to the incident.

25. Dr. Wunder stated he felt Dr. Ghazi's request for medical branch blocks was moot due to the relatedness issue, but he also noted he felt Claimant had a poor prognosis for any treatment, for reasons including her "prominent" Waddell findings. He specifically noted he could not elicit specific facet loading response in relation to the medial branch blocks request, as she had no specific pain produced by facet loading maneuvers on physical examination.

26. On March 23, 2015 Dr. Ghazi evaluated Claimant. He noted Dr. Wunder's recommendation that all treatment other than physical therapy be denied. He expressed support with starting the physical therapy.

27. On April 16, 2015, Dr. Reiter noted Claimant had started physical therapy and dry needling. She had improving range of motion in her right hip in flexion and external rotation with continued pain complaints.

28. Claimant testified at hearing. Claimant testified she hurt initially in her right hip. She also testified that she hurt from the beginning from above her waist into her leg, as well as pain in her mid-back, buttocks, and hip. When asked when she noticed pain beyond the hip, Claimant testified the "concern was ongoing" and she could not pinpoint her pain. Claimant testified she wanted the injections to obtain relief and to help her regain functionality to perform everyday activities. When asked by her counsel about Dr. Ghazi's statements about the concerns he had proceeding with the outlined treatment, Claimant testified "I wasn't aware of anything like what was announced here this morning." She also testified Dr. Ghazi had not told her the PRP treatment could be considered "cruel and unusual" treatment, and she "absolutely [had] never heard that."

29. Dr. Lindberg testified that Claimant's initial injury was a non-displaced neck fracture of the right hip, which healed itself non-operatively, and there were no remaining abnormalities noted in Claimant's most recent November 2014 MRI. He testified Claimant's current pain generator was likely a soft tissue contusion and scarring with a probable element of greater trochanteric bursitis. He explained that when Claimant fell, she likely contused the skin, the fat, her iliotibial band (explained as the band which connects the pelvic crest to the top of the femur), and her bursa (explained as a sliding sack that lets tissues move over each other). However, the November 2014 MRI showed no bursa abnormalities.

30. Dr. Lindberg discussed that an MRI is very sensitive to finding fluid in a bursa. He testified it was possible the fluid seen on Dr. Ghazi's April 2014 ultrasound had resolved itself, which would represent an objective improvement in Claimant's condition. He also testified Dr. Ghazi's recommendations have become more invasive in the same time period as that improvement was seen. Dr. Lindberg testified there was no objective evidence to correlate Claimant's subjective level of complaints, although her complaints of pain in general were an objective finding of continued symptoms.

31. Dr. Lindberg testified the request for stem cell injections and/or PRP injections was not reasonable and necessary treatment. He testified Claimant's successful diagnostic response to the anesthetic only injection to the bursa was not an indicator of success for the requested injections. Significantly, Dr. Lindberg noted Dr. Ghazi had recommended stem cell injections and PRP injections even before the pain generator was identified through the diagnostic injection which he, Dr. Lindberg, had recommended. He testified Dr. Ghazi's recommendation for the injections before identifying the pain generator had been "putting the cart before the horse."

32. He further testified stem cell injections were investigative and experimental, and there were no peer review studies that show Claimant would receive a positive response from the treatment. As to PRP injections, he testified those are also investigational and experimental treatment, and are not considered a standard treatment for a hip bursitis. He testified he recently received from his surgical partner a report that the American Academy of Orthopedic Medicine had recently discussed that additional studies are still needed to determine when and where to use these treatments. He testified he was not aware of any studies that show clinical effectiveness for injecting stem cells or PRP to treat greater trochanteric bursitis. He also testified he was familiar with the Division of Workers' Compensation *Medical Treatment Guidelines*, and neither type of injection was considered accepted treatment under the *Guidelines*. He did not believe either injection was appropriate treatment in any circumstance other than a controlled study group.

33. Dr. Lindberg testified the most important treatment for a greater trochanteric bursitis is stretching the iliotibial band and strengthening the hip muscles, which he has recommended in this claim. He noted both he and Dr. Wunder came to the same conclusions as to Claimant's diagnosis and treatment recommendations for the hip. Dr. Lindberg discussed the non-physiological findings identified by Dr. Wunder on examination. He noted the type of non-physiological findings were those associated with a patient trying to convince a physician she was in pain, and they were red flags and indicators that Claimant would not receive much benefit from any further treatment.

34. The ALJ finds that Claimant did not prove by a preponderance of the evidence that the stem cell or PRP injections constitute reasonable and necessary treatment for her hip condition. Dr. Lindberg persuasively opined that both stem cell and PRP injections are not reasonable and necessary treatment for Claimant's complaints. Dr. Lindberg explained that medical literature contained no support in clinical trials for the proposition that the injections would provide a benefit. Dr. Lindberg and Dr. Wunder were in agreement that no further invasive treatment was needed for Claimant's hip condition other than IT band stretching and hip muscle strengthening.

35. The ALJ finds that Claimant did not prove by a preponderance of the evidence that her lumbar spine complaints are causally related to the November 14, 2013 claim, and also did not prove by a preponderance of the evidence that further lumbar-directed care is reasonable or necessary. Dr. Wunder documented the delay in complaints relating to the low back relative to the expected timeframe for such complaints to arise. Regardless of causation, the ALJ further finds that the lumbar medial branch blocks are also not reasonable and necessary medical treatment based upon Claimant's non-physiological findings and the prognosis of Dr. Wunder that she would likely not receive a verifiable benefit from the injections. Dr. Wunder's opinion that no further care was needed for Claimant's lumbar spine, in conjunction with his findings of prominent Waddell findings and non-specific facet maneuvers, is credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Respondents are required to provide medical benefits reasonably necessary to cure or relieve the effects of the industrial injury. § 8-42-101(1), C.R.S. (2014); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Similarly, the question of

whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa*, 53 P.3d at 1197.

When evaluating the issue of causation and reasonable and necessary medical care the ALJ may consider the provisions of the Colorado *Medical Treatment Guidelines* because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the *Medical Treatment Guidelines* are not dispositive, and the ALJ need not give them more weight than she determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (ICAO, February 23, 2009).

Stem Cell and/or PRP Injections are not Reasonable or Necessary Treatment for Claimant's Right Hip Injury.

The first issue for the ALJ's determination is whether Claimant proved by a preponderance of the evidence that the stem cell or PRP injections recommended by Dr. Ghazi constitute reasonable or necessary treatment for her hip condition. Claimant has failed to meet her burden in this regard.

Dr. Lindberg persuasively testified that both types of injections were investigative and experimental, and there were no peer review studies that show that Claimant would receive a positive response from the treatment. He testified he was not aware of any studies that show clinical effectiveness for stem cell injections or PRP injections to treat greater trochanteric bursitis. Dr. Ghazi's treatment recommendations did not dispute this contention, in that he noted only that he used these types of injections in his practice and they had been used in studies on inflammatory conditions such as knee arthritis. He does not state they have been proven clinically effective, only that they had been used in clinical studies treating a different body part. To the contrary, Dr. Lindberg noted they had been studied, they had not been proven effective, and the American Academy of Orthopedic Medicine had recently determined more studies were needed to determine their efficacy.

Also relevant to the ALJ's consideration is Dr. Lindberg's testimony that neither type of injection was considered accepted treatment under the *Medical Treatment Guidelines.* While the ALJ understands that the *Medical Treatment Guidelines* are not dispositive, they are instructive as to standards of care and accepted medical practice. In conjunction with Dr. Lindberg's testimony as to the still uncertain results from clinical studies of stem cell and PRP injections, their absence as an accepted treatment method in the *Medical Treatment Guidelines* is further evidence that the injections would not constitute accepted reasonable and necessary treatment for Claimant's condition.

The ALJ notes the documented course of Dr. Ghazi's treatment recommendations calls into question the reliability of his recommendations and whether they serve the Claimant's best interests. Of concern, Claimant expressed surprise and a level of fear at being presented with Dr. Ghazi's stated opinion in his notes that PRP injections would constitute "cruel and unusual" treatment due to the likely inflammatory response. She testified she was not aware he had characterized the treatment in that manner, which calls into question the level of communication at which Dr. Ghazi has

engaged Claimant to communicate the actual risks and benefits of his treatment recommendations. The ALJ also credits Dr. Lindberg's testimony that Dr. Ghazi prematurely recommended the injections, even before performing a diagnostic injection to accurately identify a pain generator, which calls into question the underlying basis for the treatment recommendation.

The ALJ further credits the opinions of both Dr. Lindberg and Dr. Wunder that the identification of the pain generator as the greater trochanteric bursa without findings on MRI only required specifically directed physical therapy to stretch the iliotibial band and strengthen the hip muscles. It appears that therapy only recently began, but as of April 16, 2015, Dr. Reiter noted Claimant had improving range of motion. Although Claimant's pain complaints have remained steady, Dr. Lindberg credibly testified the difference between her April 2014 ultrasound and November 2014 MRI possibly represented an improvement in her condition. Conversely, Dr. Ghazi's treatment recommendations have become inexplicably more invasive over that timeframe even after it was confirmed Claimant had no remaining fluid in her bursa, which had originally been one of Dr. Ghazi's primary stated reasons for attempting the injections.

Claimant failed to prove by a preponderance of the evidence that stem cell injections or PRP injections are reasonable and necessary treatment for her hip condition in general, and especially in light of the fact that Claimant has not completed the recommended course of conservative treatment that was agreed upon by both Dr. Lindberg and Dr. Wunder, and ordered by Dr. Ghazi.

Claimant's Lumbar Condition is not Causally Related to this Claim, and the L4-L5, L5-S1 Medial Branch Blocks are Not Reasonable or Necessary Treatment.

The second issue for the ALJ's determination is whether Claimant's lumbar complaints are related to this claim, and if so, whether the L4-L5, L5-S1 medial branch blocks constitute reasonable and necessary treatment. Claimant has failed to meet her burden in either regard.

As to causation, the ALJ notes the first mention of lumbar back pain first arises approximately three weeks after the date of injury in physical therapy notes. Perhaps more instructive, Dr. Reiter did not document any complaints of back pain until almost four months after the injury. In addition, Claimant testified at hearing that her pain was in her mid-back region, not her lumbar region. The ALJ finds credible Dr. Wunder's opinion that Claimant should have felt associated pain in her back within 72 hours of the incident, but it is not reflected in the records that Claimant complained to her treating physician of such pain for almost four months. Although Claimant vaguely testified she had severe pain all over after the fall and she could not pinpoint her pain, the treatment notes document specific pain complaints to different parts once the lumbar pain complaints arise in the records even while she has continued to complain of severe pain. Her pain complaints to her back and hip, once documented, have been distinct with different treatment recommendations for each.

The ALJ also notes that none of the treating physicians in this claim have engaged in any analysis of relatedness, nor is there a medical opinion in evidence contrary to Dr. Wunder's stating the lumbar pain is a related condition. It has simply

been documented and conservatively treated since Claimant's complaints arose. The only evidence in support of Claimant's argument is her subjective complaints.

Claimant's subjective complaints in her lumbar spine appear to have expanded, initially in April 2014 to lead to a diagnosis of SI joint pain by Dr. Ghazi and then months later to include additional higher levels of the lumbar spine. However, the comparison MRI showed her lumbar spine pathology had not changed at all between the MRIs of April 18, 2014 and December 11, 2014. Claimant's expanding complaints so far in time from the date of injury support the conclusion that her low back complaints are not related to the claim. Moreover, Claimant's reliability as a subjective reporter of symptoms is also called into question by Dr. Wunder's finding of multiple "prominent" Waddell signs which Dr. Lindberg testified would be indicative of a patient trying to convince her physician that she was having pain. As found, Claimant has not met her burden of proof to show her lumbar symptoms are causally related to this claim.

Secondarily, the ALJ finds that Claimant has not met her burden in proving the medial branch blocks are reasonable and necessary treatment even if her lumbar complaints were related. The ALJ notes that, as he did with Claimant's hip condition, Dr. Ghazi recommended the medial branch blocks before requesting a current MRI to determine her pathology. He stated in his notes that an MRI was unnecessary based upon his clinical findings alone. However, Dr. Ghazi originally only diagnosed SI joint pain based on his clinical exam on April 30, 2014. He later noted Claimant's back complaints expanded to higher levels, despite objective evidence of no change in her spinal pathology between that April 30, 2014 and December 11, 2014. The ALJ determines Dr. Ghazi's clinical examination is insufficient to identify an injury other than to treat subjective complaints of pain.

As earlier noted, Dr. Lindberg credibly testified and Dr. Wunder credibly documented that there were concerns with Claimant's reliability as a subjective reporter of symptoms. Dr. Wunder noted in general that the extent of "prominent" Waddell findings he documented indicated a poor prognosis for any treatment, including the medial branch blocks. Significantly, Dr. Ghazi discussed reviewing these findings with Claimant, and he provided no counter-argument to Dr. Wunder's findings, nor did he dispute the presence of Waddell findings. Dr. Wunder's opinion in this regard appears to be unchallenged. The ALJ credits Dr. Wunder's findings and opinions. Lumbar medial branch blocks are not reasonable or necessary and Claimant's request for same is denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for right hip stem cell and/or PRP injections are denied as Claimant has failed to prove that this care is reasonable or necessary treatment for this claim.

2. Claimant has failed to prove that her lumbar symptoms are causally related to this claim, or that the L4-L5 and L5-S1 medical branch blocks are reasonable, necessary, or related treatment to this claim.

DATED: June 18, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issues to be determined are compensability, medical benefits, and whether or not Claimant was an employee of Respondent-Employer or an independent contractor on October 29, 2013.

STIPULATION

Prior to the examination of witnesses, the parties reached the following stipulation:

If Claimant's claim is found compensable and if he is entitled to temporary total disability ("TTD") benefits, those benefits should be paid for the period between October 30, 2013 to February 12, 2014.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Background

1. The employer named in this claim is Natural Resources Group, Inc. (hereinafter "NRG") NRG was established in 2000 and in 2010 acquired Energy, Oil and Gas, Inc. (hereinafter "EOG") through an asset purchase.

2. Dwayne Bacon was affiliated with EOG and owned assets in a gas field located in an area close to Claimant's residence. Mr. Bacon's assets were among those NRG purchased in 2010. After the purchase of his assets, Mr. Bacon became an employee of NRG.

3. Gas produced from wells around Claimant's residence is piped to and consolidated at a storage facility known as the Garcia Gas Plant.

4. In September 2008 Claimant was approached by Mr. Bacon and asked if he would be interested in working as a "pumper" for EOG. Pumpers monitor gas wells to ensure that they are staying in production. A pumper's duties include checking the various valves, pipes, compressors and pressure gauges on the equipment used in extracting gas from the ground and pumping it to the Garcia Plant. In addition, pumpers maintain and fix any equipment necessary to keep the well

in production. At the end of the month, Claimant would fill out a log book documenting meter readings for the various wells in the field and sent them along with the hours he worked to Mr. Bacon.

5. Claimant testified that Mr. Bacon "hired" him; however, he presented no evidence of a contract demonstrating the employer-employee relationship he asserts was formed at this time.

6. At the time he was approached in 2008, Claimant informed Mr. Bacon that he knew nothing about the gas business.[1] According to Claimant, Mr. Bacon told him that he would teach him. Mr. Bacon provided training in the form of an overview of how the equipment worked and what to do when common problems arose. Claimant accepted Mr. Bacon's offer and began working for EOG in 2008.

7. Claimant was paid $15.00/hour for his work with EOG. His wages were paid directly by Mr. Bacon and in his name.

8. At first, Claimant relied heavily on Mr. Bacon to trouble shoot the various problems that would arise in the field given his lack of knowledge; however, as his knowledge improved, Claimant was able to rely less on Mr. Bacon for day to day operations. Nonetheless, due to his experience level, Claimant would occasionally require direction and assistance from Mr. Bacon on special problems and repairs which occasionally arose in the field. On these occasions, Mr. Bacon would come down to the field, take control of the situation and direct Claimant in completing the job or repairs required to keep the well in operation. In the alternative, Mr. Bacon would make arrangements for a contractor to come in and assist Claimant to assure that the work was done correctly and on time. This arrangement between Claimant and Mr. Bacon continued after NRG acquired EOG.

9. Based upon the totality of the evidence, the ALJ finds that Claimant was an employee of EOG. Although Claimant did not apply or interview with Mr. Bacon and there is no contract for hire, the ALJ is persuaded that Mr. Bacon "hired" Claimant who was under his control and direction from 2008 until EOG was acquired by NRG in 2010.

10. Claimant continued to perform work for NRG in the capacity of a pumper between 2010 and October 29, 2013 when he sustained injuries to his right hip.

The October 29, 2013 Injury

11. On October 29, 2013, Claimant was working at the Garcia plant as a pumper. While off loading water from a gas storage tank, Claimant turned to check a cooling unit. As he turned, he tripped over an exposed pipe at ground level. Claimant fell, fracturing his right hip.

[1] Claimant had previously worked as a brand inspector for the State Board of Stock Inspectors for thirty (30) years and had retired from this position.

12. After Claimant fell, he was able to get to his truck with the use of a crutch fashioned from a piece of pipe. Claimant then drove approximately two miles to his house. Once at his house Claimant was taken by his wife to Mt. San Rafael Hospital in Trinidad for evaluation. CT scan was obtained which demonstrated findings consistent with intertrochanteric fracture of the right hip.

13. After being examined by the physicians at Mt. San Rafael Hospital, Claimant was transported by ambulance to St. Mary Corwin Hospital where he was evaluated by orthopedic surgeon Dr. Charles Hanson. Dr. Hanson diagnosed Claimant with a post fall related acute right hip injury resulting in a closed, simple, oblique right hip intertrochanteric fracture.

14. On October 30, 2013, Claimant had surgery under Dr. Hanson consisting of an open reduction internal fixation of the right hip. Post surgical care consisted of exercise, medication and follow up visits with Dr. Hanson.

15. Claimant received treatment from the following providers: Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, Charles A. Hanson, M.D. and providers at the Hanson Clinic.

16. The ALJ finds the imaging studies and examination of Dr. Hanson performed within hours of Claimant's trip and fall to contain objective evidence of right hip fracture consistent with the stated mechanism of injury as testified to by Claimant. The ALJ finds more probably than not, that Claimant fractured his right hip when he fell to the ground after tripping on an exposed pipe while attempting to check a cooling unit on a storage tank at the Garcia plant.

17. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury while performing work for NRG.

18. Claimant was unable to perform the usual functions of his job from October 29, 2013 through October 12, 2014 when Dr. Hanson released him to full duty without restriction. No modified duty offers were extended to Claimant during this time. Consequently, Claimant experienced a complete loss of wages as is disabled within the meaning of the law and entitled to temporary total disability (TTD) benefits.

19. Claimant filed a Worker's Claim for Compensation on January 13, 2014. Respondents filed a Notice of Contest on March 6, 2014 denying the claim on the grounds that Claimant was an independent contractor and not an employee of NRG.

Independent Contractor Status

20. Claimant testified that he became an employee of NRG after it acquired EOG

when he was told by Mr. Bacon that "we're going to change this [EOG] over to another company" and that "we're just go ahead and leave you on as an employee." When EOG was acquired by NRG, Mr. Bacon advised Claimant he would get a raise to $20.00 per hour. As found, Claimant continued to rely on Mr. Bacon for assistance and direction following the acquisition of EOG by NRG. The two communicated frequently regarding the condition of the wells and work/repairs that Claimant felt were beyond his capabilities. Claimant testified that he considered Mr. Bacon to be his "boss" or "supervisor" after EOG was acquired by NRG. Consequently, the Judge finds that Claimant remained under Mr. Bacon's control and following NRG's acquisition of EOG.

21. As with EOG, Claimant continued to keep track of his hours and submit them monthly to NRG. NRG continued to pay Claimant by the hour by issuing Claimant a check for the hours submitted in Claimant's name.

22. NRG did not keep track of the hours Claimant worked or require any verification of the hours Claimant asserted he worked; instead, Claimant determined the number of hours he worked each week and wrote down the number in his "little log book." There were no requirements dictating when he needed to submit his monthly hours, in what detail, or in what form.

23. Claimant never entered into a written contact with Respondent-Employer to provide services on a fixed or contract rate. Rather, Paul Laird who is the C.E.O of Respondent-Employer testified that when NRG acquired EOG, Claimant continued working at the Garcia Plant without interruption as he had previously under EOG.

24. Claimant admitted he never filled out an employment application with NRG, never interviewed for a position with NRG, never visited NRG's office, and never filled out any tax documents for NRG to withhold taxes from his pay. However, NRG issued Claimant a 1099 form only for the 2011 tax year.

25. The ALJ finds that the relationship between Claimant and Dwayne Bacon did not fundamentally change and that Claimant was still performing the duties of a pumper under the control and direction of Mr. Bacon, as "operations Manager" for NRG following the acquisition of EOG by NRG in 2010 up to the date of his October 29, 2013 trip and fall.

26. The ALJ also finds no credible evidence establishing that Claimant was directed by Mr. Bacon to contact human resources at NRG to clarify his employment status after NRG acquired EOG. The ALJ finds Claimant's testimony that Mr. Bacon informed him he was being kept on as an employee of NRG credible and persuasive. More probably than not, Claimant relied on the representations of Mr. Bacon and his raise to $20.00/hour to conclude that he was NRG's employee after EOG was acquired. Consequently, the ALJ finds there would be no reason for Claimant to contact anyone from NRG or visit their office to complete a job application, interview for a position and/or complete tax documents.

27. Accordingly, the ALJ finds Respondents' assertion that Claimant is not an employee of NRG based upon the fact that Claimant did not go through NRG's hiring process unconvincing.

28. Claimant and his wife have owned and worked a small 170 acre cattle ranch for years. At the time Claimant was working for NRG, he was also maintaining his ranch. By the time of hearing, Claimant only had ten (10) head of cattle on the ranch due to the drop in price for beef.

29. Claimant testified that no employee of NRG ever told him he could not own or operate his ranch, and Mr. Laird testified that he had no problem with Claimant working on his ranch.

30. Other than his cattle ranch, there was no credible evidence that Claimant worked for anyone else other than Respondent-Employer.

31. The ALJ finds Claimant's work tending cattle on his small ranch to constitute an avocational interest, i.e. a hobby as opposed to a vocational pursuit.

32. As found above, Claimant received some basic training from Mr. Bacon when he first started working as a pumper in 2008. The remainder of his knowledge was learned on the job and through the continued direction/assistance of Mr. Bacon when necessary. Claimant admitted that, after his "initial" training, at EOG he received no additional training from NRG.

33. Employer provided some of the tools to perform his job but Claimant also provided some of his own tools. Claimant testified that it was easier to use his own tools than to have Respondent-Employer provide the tools as he lived a short distance away and had ready access to his tools. There were times when Claimant needed special equipment, like a pressure washer and a back hoe, to complete essential tasks associated with his job. On these occasions, Claimant would talk to Mr. Bacon and get permission to use his own equipment and charge a rental fee to Respondent-Employer. Other times, Respondent- Employer would simply provide the equipment.

34. Employer paid Claimant mileage and provided him with a hard hat, hearing protection and eye protection. Claimant would use his own cell phone at times but Mr. Laird testified that Respondent-Employer provided a cell phone at the Garcia plant for Claimant's use.

35. On occasion, well upkeep required specific parts, like oil filters, pipe fittings, and valves to remain in production. On these occasions, Claimant went to a store called "C & M" and purchased them. Claimant then sent Mr. Bacon an invoice for the cost, which Mr. Bacon paid. Later while Claimant was working for EOG, Mr. Bacon provided Claimant a credit card number to use to purchase these parts. When NRG acquired EOG, NRG set up its own an account at the store. After this, Claimant would go to the store, order the materials, and the store would send the bill directly to NRG. Thus, after

NRG acquired EOG, Claimant did not pay for any well site materials, directly or indirectly.

36. Claimant testified that he went to the well site every day – weather permitting for four years – starting in September 2008 until he was injured in October 2013. He stated that he was not accompanied when he went to the well, and that for the vast majority of the time as outlined above there was no one assisting him: he performed the work himself.

37. Claimant testified he had no set schedule and was able to check the meters at any time he chose. Claimant acknowledged that there was no time clock he was required to use to document his hours and that NRG did not set a number of hours he could or should work.

38. Paul Laird, the C.E.O of NRG testified at hearing. Mr. Laird has worked in the oil and gas industry for more than thirty years. His responsibilities as C.E.O include overseeing the operations of the company and reporting to the board of directors.

39. Mr. Laird testified that, at the time NRG acquired EOG, NRG had only three employees: himself, Mr. Bacon, and Brian Hedberg, who is no longer with the company. Mr. Laird testified that his company was a small entity, and that "every position . . . hired is a major hire for us" and that every decision to hire an employee includes a discussion with the board of directors.

40. According to Mr. Laird he did not hire Claimant. Moreover, Mr. Laird testified that Mr. Bacon never has had the authority to hire a new employee. However, on cross examination, Mr. Laird admitted that Mr. Bacon had authority to take whatever measures were necessary to make sure that the Garcia Gas Plant ran smoothly. This included getting those people necessary to do the job at hand.

41. Mr. Laird stated his company now has five employees, all of whom are salaried and registered on the company's payroll system. Mr. Laird testified that his company currently works with two pumpers. He testified that he does not consider the other pumpers working for NRG employees and, in his thirty years working in the oil and gas industry, has never considered pumpers to be, nor has he ever known pumpers to be, employees of the company owning and operating the well.

42. He testified that pumpers are not on the NRG's payroll and that instead, the company pays them when they receive the invoices the pumpers send in. Mr. Laird further testified that the company categorizes the money paid to salaried employees and the money paid to pumpers differently: employee salaries are pay roll expenses and pumper funds are lease operating expenses.

43. Mr. Laird stated NRG provides health benefits and a 401k package to its employees, but did not provide these to Claimant.

44. Mr. Laird testified that the company had not given Claimant any compensation other than the checks sent to pay the invoices Claimant mailed to the company. Mr. Laird also testified that the company requires new employees to fill out W-2 forms as well as an I-9 form, but that the company did not ask Claimant to fill out those forms.

45. As found, the fact that Claimant did not proceed through the established hiring process to become a payroll employee of NRG is not persuasive that Claimant was not an actual employee of NRG. As presented here, the persuasive evidence demonstrates that Claimant was under the control and direction of Dwayne Bacon as Operations Manager for NRG. Mr. Bacon oversaw the work of Claimant. He exercised control and directed Claimant in completion of complicated tasks in the field. The ALJ finds that Mr. Bacon was essentially engaged in ongoing training of Claimant to learn the intricacies of the pumper position. The ALJ finds the fact that Claimant was able to manage the mundane tasks of a pumper does not mean that he was he was engaged in an independent business, trade or occupation.

46. Mr. Laird testified that the company had no expectation that their pumpers would work exclusively for them, because pumpers commonly work for multiple companies at the same time. Claimant himself acknowledged that, if another gas company had approached him to work as a pumper on one of their wells; he knew he could have done so but would not have.

47. The ALJ finds that Claimant was not required to work exclusively for NRG.

48. Mr. Laird confirmed that it was not Mr. Bacon's role to train pumpers, and that NRG as a company does not train pumpers. Nonetheless, Mr. Bacon continued to provide on the job training for Claimant by directing and assisting him in completing complicated tasks. Without the ongoing education imparted to Claimant by Mr. Bacon in the field, Claimant would not have been able to complete many of the duties expected of a pumper. Mr. Laird's testimony that Claimant's close and regular contact with Mr. Bacon should be characterized as coordination and not training is unpersuasive.

49. Mr. Laird testified that Employer could terminate Claimant's services at any time without penalty. In addition, Mr. Laird testified that Claimant could quit working for NRG at any time without penalty.

50. Respondents have failed to carry their burden of establishing that Claimant is engaged in an independent trade, occupation, profession, or business.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-01, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

C. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Compensability

D. The question of whether the claimant proved the requisite causal relationship between the injury and the conditions or circumstances of employment is one of fact for determination by the ALJ. *Cabela v. Industrial Claim Appeals Office, 198 P.3d 1277 (Colo. App. 2008); Blunt v. Nursecore Management Services, W.C. No. 4-725-754 (ICAO February 15, 2008).* As found here, Claimant was at the Garcia plant performing work for the Respondent –Employer when he tripped over a pipe fracturing his right hip necessitating surgery. At the time he was injured, the persuasive evidence reveals that Claimant was being paid by Respondent-Employer for the work he was performing. There was no credible evidence which shows that Claimant injured himself other than as to what he testified. Moreover, the medical evidence within hours of the alleged incident persuasively demonstrates objective evidence consistent with the described mechanism of injury. Consequently, the ALJ concludes that Claimant has proven by a

preponderance of the evidence that he was injured while performing work for Respondent-Employer. The injury is compensable.

Independent Contractor Status

E. Only employees of an employer are entitled to compensation for work-related injuries. C.R.S. §8-41-301(1)(a), (stating that an injury is compensable if, "at the time of the injury, both employer and employee are subject to the provisions of said articles…"). Individuals who are "free from control and direction in the performance of [a] service" for an employer are not employees. C.R.S. §8-40-202(2)(a). Such individuals are referred to as "independent contractors." *See* C.R.S. §8-40-202.

F. The party asserting that a claimant is an "independent contractor" bears the burden of proving independence by a preponderance of the evidence. The putative employer may establish that the Claimant is an independent contractor because he was free from direction and control and engaged in an independent business or trade by proving the presence of some or all of nine criteria set forth in §8-40-202(2)(b)(II), C.R.S, 2014; *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App.1998).

G. Pursuant to §8-40-202(2)(b)(II) "to prove independence it must be shown that the person for whom services are preformed does not:"

- Require the individual to work exclusively for the person for whom services are preformed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;

- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be preformed;

- Pay a salary or at an hourly rate instead of at a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may be supplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

H. While the ALJ must consider the factors listed in the statute, the fact that the party asserting independence does not prove one of the factors is not conclusive evidence that the claimant was an employee; put another way, the party asserting independence does not have to meet every factor listed above to prove an individual was an independent contractor. *See* C.R.S. §8-40-202(b); *Nelson v. Industrial Claim Appeals Office, supra.*

I. Section 8-40-202(b)(I) and (II) create a "balancing test" requiring the party asserting "independence" to overcome the presumption of an employment contained in section 8-40-202(2)(a) and establish instead independent contractor status. *Nelson v. Industrial Claim Appeals Office, supra*. Once Claimant establishes that he performed services for Respondent-Employer for a wage, the burden shifts to the Respondent to prove the Claimant was not an employee by showing that Claimant was free from control and customarily engaged in an independent trade.

J. Generally an employee is a person who is subject to their employers control over the means and methods of their work, as well as the results. *Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). It is the power to control, and not the fact of control being exercised, which is the primary factor in distinguishing an employee from a contractor. *Industrial Commission of Colorado v. Moynihan*, 94 Colo. 438, 32 P.2d 802 (1934). As found here, Dwayne Bacon oversaw Claimant's work. While Claimant was competent to handle the commonplace duties of a pumper, Mr. Bacon, and thus NRG controlled the means, methods and results of Claimant's work on more complicated tasks which occasionally arose in the field. Thus, the Judge concludes that Claimant was in fact not free from control and direction in the performance of his service for NRG.

K. Moreover, the Judge concludes that consideration of all of the factors regarding "independence" as set forth in §8-40-202(2)(b)(II) tips the scale in favor of Claimant being an employee as opposed to an "independent contractor."

L. In this claim, Claimant never entered into a contract with Respondent-employer to provide certain services for a fixed rate. Claimant was paid by the hour. Claimant submitted his hours to respondent- Employer which then paid him by check made out to him personally. Claimant, received a "raise" from $15.00 to $20.00/hour when E.O.G was acquired by Employee. Claimant does not have a business where he provides services to other oil companies. In fact prior to performing services for EOG and NRG, Claimant knew nothing about working in the oil and gas industry. Rather, he was a brand inspector for the State of Colorado. Claimant was provided training by Duane

Bacon at time he was hired which this ALJ finds continued after EOG was acquired by NRG. Respondent- Employer provided some of the tools for Claimant to use when performing his job. What tools and equipment Claimant provided was done merely out of convenience as Claimant resided close to the field and had ready access to his tools. Had Claimant been unwilling to use his tools, Employer would have been required to supply all of them. Respondent set up an account at a local auto parts store for Claimant to purchase materials to do his job. The account was under Respondent-Employer's name. The bills were sent to Respondent- Employer and in turn paid by them. Respondent-Employer provided Claimant with a hard hat, hearing protection, and eye protection. Respondent-Employer also provided Claimant a cell phone to use while at the Garcia Gas Plant. Finally, Claimant felt he could quit his job at any time without penalty and Respondent- Employer felt it could terminate claimant's services at anytime without penalty.

M. It is recognized that, claimant was issued a 1099 for one year and never had taxes taken out of his check, that Claimant was never restricted from working for another oil or gas company and that he was allowed to determine the hours he worked. However, considering all of the Factors set forth in Section 8-40-202 (2)(b)(II) the ALJ concludes that Claimant is an employee of Respondent-Employer.

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, the respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The ALJ concludes Claimant's treatment from Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, and Charles A. Hanson, M.D. to constitute a bona fide emergency for which treatment could be obtained without prior authorization. The ALJ also concludes that the treatment was otherwise reasonable and necessary to cure and relieve Claimant from the effects of his compensable work injury. As the claim is compensable, Respondents are liable for the medical treatment provided by Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, and Charles A. Hanson, M.D.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury arising out of and in the course of his employment on October 29, 2013.

2. Claimant is an employee of NRG, the Respondent-Employer in this case.

3. Claimant is entitled to medical benefits as provided by Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, and Charles A. Hanson, M.D.

4. Pursuant to the parties stipulation, Respondents shall pay temporary total disability ("TTD") benefits for the period between October 30, 2013 and February 12, 2014.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 17, 2014

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-943-575-02

ISSUES

Whether Claimant has shown by a preponderance of the evidence that she suffered a re-injury of a previously injured body parts while in the course and scope of her employment with Employer.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant has been an employee of Respondent, Employer since 2006.

2. In November 2006, Claimant filed a workers' compensation claim alleging injuries to her hands, arms and neck, and received treatment for those conditions.

3. Ultimately, in August 2007, Claimant was placed at maximum medical improvement, and a subsequent Final Admission was filed without challenge.

4. Claimant's symptoms continued on and off from the 2006, 2007 injury over the course of several years while she continued to be employed at Employer. Claimant has worn wrist splints daily since August, 2007.

5. In 2013, Claimant's job with Employer significantly changed in that she went from being responsible for two lines of jeans in the Employer Men's Department, to being responsible for replenishing and displaying the entire Men's Department. Before 2013, Claimant was responsible for approximately 5,000 pieces of clothing and in 2013 she bacame responsible for approximately 200,000 pieces of clothing. When her job changed, she began experiencing symptoms daily, with new feelings of her finger bones being broken and more intense elbow, shoulder, and neck pain.

6. At around the time Claimant's job duties expanded, Employer changed the display furniture in their Men's Department, replacing lighter tables with much heavier tables.

7. Claimant's responsibilities were increased in that she went from being responsible for "replenishment" of two lines of jeans to being responsible for the entire Men's Department in a "core standard" status.

8. Core standard means not only the handling of merchandise, but stocking tables, moving tables and furniture, and stocking shelves and four-way racks. Claimant cashiers approximately once a day and spends several minutes per day helping customers locate specific merchandise.

9. As of 2013 Claimant was responsible for moving heavy tables on an almost monthly basis as Employer ordered displays of merchandise to be updated.

Although two men and sales associates could help Claimant move the tables, they were often unavailable. Claimant often moved the tables by herself or with one associate.

10. Claimant demonstrated how she turns her hands palm-up and places them under the table's edge to lift the table.

11. Lifting the heavy tables causes increased symptoms in Claimant's hands, wrists, arms, elbows, and shoulders.

12. Prior to her 2013 job change, Claimant had slower times of the day and slower seasons when she could rest and her symptoms would dissipate. But after her job change, she no longer has slow times of day or seasons and she is unable to rest increasing her symptoms.

13. Due to the increase in Claimant's hours on the job, the physical nature of her duties, and the expansion of the duties for which she is solely responsible, she suffered a substantial and permanent aggravation to her upper extremities and neck.

14. Claimant also works at another clothing retailer once or twice a week for a five hour shift. Her job duties there involve greeting customers and loss prevention. These duties do not cause pain in her upper extremities.

15. Respondents called Dr. Craig Davis as an expert in orthopedic surgery. On April 11, 2014, Dr. Davis performed a Respondents' IME on Claimant after reviewing her medical records. In his report, he diagnosed Claimant with carpel tunnel syndrome, lateral epicondylitis, and myofacial pain of the upper extremities, all of which he attributed to her work for Employer with causal origins in 2006 and 2007.

16. The ALJ finds Dr. Davis' hearing testimony supports the finding of substantial and permanent aggravation. For example, Dr. Davis testified:

- A patient with carpel tunnel syndrome can worsen to the point that they will have symptoms even when they are at rest.
- Claimant's experience of symptoms when at rest is "an indication that this condition is worsening."
- He was not aware of changes in Claimant's job duties in 2013, and the details of what her job entailed, "and a lot of activities I wasn't aware of that aggravated the condition.
- "Well, the activities I think - - recent activities here [referring to lifting the heavy tables]. . . I think are responsible for a worsening of the condition she already had."
- Claimant was not at maximum medical improvement.
- Dr. Davis was asked: "if [Claimant] tells you that this furniture moving that she would do on a regular and routine basis has just put her over the max, wouldn't you assume that that then was a new finding, a new injury, a new condition she was not facing before?" He responded: "I would say it's a new activity that I was not aware of that has had a significant aggravating affect on her symptoms."

- He was unaware at the time he wrote his report that Claimant's job involved moving heavy furniture.
- He opined that Claimant's symptoms "worsened considerably in 2013" because of her new job duties.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1) C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201 C.R.S. A preponderance of the evidence is that which leads the trier-of-fact after considering all of the evidence, and to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306,592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents, and a workers' compensation claim shall be decided on its merits. Section 8-43-201 (2008) C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions, and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Claimant has proven by a preponderance of the evidence that she substantially aggravated her existing physical issues involving her neck area and her upper extremities.

Claimant has proved by a preponderance of the evidence that these aggravations of her underlying physical issues arose out of and in the course of her employment. Section 8-41-301(1) C.R.S.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable work related occupational disease while in the course and scope of her employment with Employer. Claimant is entitled to reasonable, necessary and causally connected medical treatment as provided by the authorized treating physician in this matter.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail as long as the certificate of mailing is attached to your Petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301 (2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 24, 2015

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issue addressed by this decision involves Claimant's entitlement to medical benefits. The questions to be answered are:

I. Whether Claimant's need for a right shoulder hemiarthroplasty surgery should be authorized as reasonable, necessary and related to Claimant's admitted industrial injury.

II. Whether Dr. Griffis request for a left shoulder MRI is reasonable, necessary and related to Claimant's admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing as well as the evidence generated at the post hearing deposition of Dr. Klajnbart, the ALJ enters the following Findings of Fact.

Admitted 03/11/14 Work Injury

1. On March 11, 2014, Claimant, a 10-year veteran employee of Respondent-Employer was doing asphalt road maintenance work through his employer's contract for the City of Colorado Springs. He sustained admitted injuries to his right and left shoulder during the execution of those duties. Over the ten-year period of employment and on the aforementioned injury date, Claimant's work for Respondent-Employer required him to, *inter alia,* obtain asphalt mix; deliver it to the site of repair; "cut out" the edges of existing pot holes in the asphalt using a jackhammer and other heavy tools; use demolition saws which necessitated Claimant holding the saw blades against the street edges; shovel hundreds of pounds of asphalt mix into the prepared holes by using large heavy shovels weighing up to 60-80 pounds; move the asphalt mix five feet or more from the dump site location to the pot hole repair site once loaded onto the shovel; pound the newly placed asphalt into place and clear the area of the dump site before moving onto the next repair site. Based upon the description of Claimant's job duties, the ALJ finds the job physically demanding.

2. On the date in question, Claimant estimated nearly 800 pounds of mix had been placed on the ground at a busy intersection in Colorado Springs. After re-directing the traffic, the repair had to be completed quickly due to the traffic congestion. While executing the street repair process, Claimant felt a painful popping sensation in his right shoulder while performing the required heavy work activities. Claimant timely

reported the injury to his employer and the claim was finally admitted by Respondent-Insurer approximately one month later.

3. Respondent filed a General Admission of Liability (GAL) on April 22, 2014 and temporary disability benefits have been admitted from April 4, 2014 and ongoing.

4. Claimant received authorized medical care which included an MRI and right shoulder surgery performed by John Redfern, M.D. on May 12, 2014. The MRI of the right shoulder performed on April 11, 2014 was felt to demonstrate findings including a large tear of the posterior labrum, a SLAP tear, medial subluxation of the long biceps tendon and tendinosis of the rotator cuff involving the supraspinatus, infraspinatus and subscapularis tendons.

5. Dr. Redfern performed a pre-authorized right shoulder arthroscopic biceps tenotomy, right shoulder chondroplasty, limited synovectomy and right shoulder subacromial decompression during the May 12, 2014 surgical procedure.

6. Claimant testified and the records support that following surgery Claimant had no relief and continued with pain, inflammation and instability of the right shoulder following surgery. Consequently, corticosteroid injections were also performed by Dr. Redfern.

7. Additional surgical procedures to improve Claimant's right shoulder condition have been considered. On August 12, 2014 Dr. Redfern noted that Claimant's young age and work as a heavy laborer made a total shoulder arthroplasty contraindicated, but some benefit to improve his post-injury symptoms might be obtained through a hemiarthroplasty.

8. By November 25, 2014, Dr. Redfern noted that as Claimant's range of motion improved with physical therapy, there existed a greater instability in the shoulder joint characterized by catching and popping with movement and with some dropping of the shoulder to the point where Claimant was having difficulty performing simple tasks such as pouring a cup of coffee. Dr. Redfern's opined that "[i]f the patient wishes to return to heavy lifting and heavy duty work, I do not recommend he have a total shoulder arthroplasty and only a hemiarthroplasty. If the patient is going to return to light duty work and not heavy lifting, total shoulder arthroplasty will give him more predictable results in regards to pain relief and shoulder function."

9. On August 6, 2014, William S. Griffis, D.O. recommended an MRI of the left shoulder to rule out a rotator cuff tear versus a labral tear which he also found to be work related.

10. The record demonstrates Respondents were in possession of the original recommendation for shoulder surgery and requested a medical review prior to authorization of the surgery from Dr. Allison Fall.

11. Dr. Allison Fall's report purports the Rule 16 review was performed on August 10, 2014. However, her report cites Dr. Redfern's August 12, 2014 note, which makes this date of report impossible. During her cross-examination, Dr. Fall admitted that the notation at page two of the report "VF#1012-016" (Resp. Ex. E, p. 12) actually demonstrates she created the voice file of her dictation on October 12, 2014 which coincides with the received date stamp of October 13, 2014 by Respondents' counsel, (Resp. Ex. E, p. 11) and which would also coincide with the date stamp purporting to have Dr. Fall's report being sent to Claimant's counsel, the insurance company, and the employer on October 16, 2014. (Resp. Ex. E, p. 11).

12. Respondents' Application for Hearing on the issue of challenging the requested hemiarthroplasty was filed on October 29, 2014.

13. Dr. Fall opines that the request for authorization for a right shoulder hemiarthroplasty is "not medically reasonable and necessary as related" to Claimant's admitted work-related injury. Dr. Fall bases her opinion on Claimant's right shoulder MRI which documents chronic, preexisting, significant degenerative changes including osteophytes and preexisting articular cartilage damage. According to Dr. Fall, the hemiarthroplasty is needed to address the underlying preexisting degenerative changes and not for the increased symptomatology Claimant experienced on March 11, 2014." Moreover, Dr. Fall challenged the opinion of Dr. Redfern "that shoulder arthroplasty may give some pain relief, but he would likely continue to have pain and limitations, as an indication that the procedure is not medically reasonable and necessary treatment for the work-related injury." According to Dr. Fall since there "is no guarantee [Claimant] would have any functional benefit or any significant pain benefit as a result of the hemiarthroplasty, the surgery is not reasonable and necessary treatment.

14. Dr. Hall testified that Claimant's first surgery was "not sufficient to solve the problem" and did not resolve the source of pain caused by the March 11, 2014 admitted work injury. According to Dr. Hall, the second surgery (hemiarthroplasty) was likely improve the pain and loss of function Claimant suffered not only on March 11, 2014, but also as a result of the first surgical procedure which failed to substantially improve his pain complaints.

15. Dr. Klajnbart, who performed an independent medical examination at the request of Respondent testified that in his opinion the first surgical intervention performed on Claimant was reasonable and necessary to cure or relieve Claimant of the effects of the admitted injury (Depo Tr. p. 19:23-20:6), and that it was not only the opinion of the Claimant that the first surgery was not successful, but it was also the opinion of Dr. Klajnbart that this surgery was not successful (Depo Tr. p. 20:20-24). It was also Dr. Klajnbart's opinion that part of the regression of Claimant's condition post-surgery was from the "intervention itself" (Depo Tr. p. 21:7-12). Dr. Klajnbart also suggests the possible surgical option of resurfacing of the humeral head as opposed to the hemiarthroplasty and whether the decision is ultimately made by the treating surgeon to do the hemi, total or resurfacing procedure, there would likely be an increase in Mr. Christian's function based on that surgery (Depo Tr. 23:1-6) and that by

increasing that function the Claimant would then be allowed to return to an ability to work as compared to his current status (Depo Tr. p. 23:7-10).

16. The ALJ finds, based on the evidence presented as a whole, that Claimant, more probably than not, suffers from pre-existing degenerative change in the right shoulder. Nonetheless the ALJ finds that Claimant's work duties on March 11, 2014 not only resulted in Claimant's acute injuries but also aggravated that underlying condition for which Claimant now needs treatment.

17. The ALJ finds the opinions of Dr. Fall unpersuasive and instead credits the testimony of Dr. Hall and Dr. Klajnbart to find that Claimant has proven by a preponderance of the evidence that his need for a right shoulder hemiarthroplasty is reasonable necessary and related to his March 11, 2014 work injury and that said surgery is likely to cure and relieve Claimant of the effects of the aggravation of his underlying pre-existing condition.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

D. An employer must take an employee as it finds him and is responsible for any increased disability resulting from the employee's preexisting weakened condition. *Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992). Thus, when an industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

E. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. Here, the persuasive evidence establishes that the recommended right shoulder arthroplasty, which may include resurfacing, hemi or total replacement based on the treating surgeons conclusions at the time of surgery, is reasonable and necessary, and more probably than not related to his March 11, 2014 work injury.

F. Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

As Claimant has proven, by a preponderance of the evidence that the recommended right shoulder arthroplasty is reasonable, necessary and related to his work injury and likely to cure and relieve its ongoing effects, Respondents are liable for said medical benefits under the Act.

G. Based upon the evidence presented, the ALJ also concludes that claimant has established that that Dr. Griffis request for an MRI of the left shoulder is also reasonable, necessary and related to the March 11, 2014 work injury. The requested MRI is likely to cure and relieve Claimant of the effects of his admitted work injuries. Consequently, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that insurer is liable for the MRI requested by Dr. Griffis.

H. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed, and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). In contrast, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

I. Under the statutory definition of an occupational disease, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). Here, Claimant experienced an accidental injury traceable to a particular time, place and cause as admitted for the March 11, 2014 event, but the surgery performed to cure or relieve Claimant of the effects of said injury served to significantly combine with and worsen the occupational disease created in the shoulder joint as a result of 10 years of heavy labor involved with the performance of the street repairs required in the course and scope of his employment. Respondents offered no nonindustrial cause or extent of its contribution to the underlying disease process to Claimant's bilateral shoulders.

J. Claimant has proven by a preponderance of the evidence that he suffered an admitted injury on March 11, 2014 which necessitated the surgery by Dr. Redfern on May 12, 2014, which combined with an occupational disease to his bilateral shoulders resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work and the surgery performed thereafter. Claimant's job required physical exertion at a heavy and vibratory level beyond what was experienced in Claimant's nonindustrial activities. He likely developed end-stage degenerative joint disease as a result. However, the evidence sufficiently connects the incidents of March 11, 2014 and the care provided thereafter to the need for the additional surgery now being requested by Dr. Redfern. Accordingly, Claimant has proven by a preponderance of the evidence that the admitted March 11, 2014 work injury and care related thereto aggravated claimant's condition so that his pain symptoms from his end-stage degenerative joint disease worsened and caused the need for the anticipated hemi or total arthroplasty. The treatment contemplated by Dr. Redfern and Dr. Griffis is therefore related to Claimant's admitted March 11, 2014 work injury. Respondents are therefore liable for said medical treatment as being reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

K. Based upon the evidence presented, the ALJ concludes that Claimant has established that Respondents are liable for the medical benefits related to the right and left based on causation grounds.

ORDER

It is therefore ordered that:

1. Claimant's aggravation of her pre-existing degenerative right shoulder condition is a compensable consequence of his March 11, 2014 industrial injury.

2. Respondent shall pay, pursuant to the workers compensation fee schedule for all medical expenses to cure and relieve claimant from the effects of his right shoulder condition, including, but not limited to the arthroplasty procedure requested by Dr. Redfern.

3. Respondents shall pay, pursuant to fee schedule for the recommended left shoulder MRI.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 7, 2015

/s/ Richard M. Lamphere
Richard Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

Has the claimant proven by a preponderance of the evidence that the need for a right knee total knee arthroplasty is causally related to her January 6, 2014 industrial injury?

FINDINGS OF FACT

1. The claimant sustained an industrial aggravation of a pre-existing condition to her right knee on January 6, 2014 while performing cashiering services for the respondent-employer. The claimant's injuries occurred when she was working in the photo lab as a cashier, turned toward the cash register, caught her foot on a mat, and twisted her knee.

2. The claimant treated her injuries at the designated provider, Concentra Medical Center, and was referred to orthopedic surgeon, Wiley Jinkins, M.D. The claimant reported to Dr. Jinkins that prior to the incident on January 6, 2014 that her right knee was "asymptomatic." Dr. Jinkins understood that the claimant's right knee was essentially asymptomatic prior to the incident on January 6, 2014 and did not require medical treatment.

3. The claimant underwent an MRI of her right knee on February 25, 2014 which revealed a lateral meniscal tear, small medial meniscal tear, and arthrosis of the femorotibial and patellofemoral compartments.

4. The respondents' expert, Dr. Wallace Larson, testified as an expert in the field of orthopedic surgery. Dr. Larson evaluated the claimant and reviewed her prior medical records and authored reports dated March 26 and May 5, 2015. Dr. Larson observed that the initial MRI performed on February 25, 2014 showed severe degenerative changes of the knee.

5. Dr. Jinkins performed surgery on the claimant's right knee on May 22, 2014. The surgery confirmed pre-existing degenerative findings in two compartments of the claimant's knee, the lateral and patellofemoral compartments. Dr. Larson opined that the first surgery documented severe degenerative changes in claimant's right knee.

6. The claimant continued to experience pain in her right knee post surgery. The claimant underwent another MRI of her right knee on September 11, 2014. The second MRI confirmed degenerative findings that were essentially the same as the MRI findings seen on the February 25, 2014 MRI.

7. Dr. Jinkins conducted a second right knee surgery on October 9, 2014. Dr. Jinkins noticed degeneration in the same compartments as he noted during the first surgery.

8. Dr. Jinkins opined that the degenerative findings as seen in the knee during the second surgery had progressed since the first surgery. Dr. Jinkins was not surprised by the progression of the arthritis between the two surgeries because the level of progression was entirely consistent with the claimant's symptoms and history of arthritic knees.

9. The claimant's right knee pain complaints continued after the second surgery. Dr. Jinkins recommended that the claimant proceed with a right knee arthroplasty.

10. Dr. Jinkins testified via deposition regarding his recommendation for the total knee arthroplasty. Dr. Jinkins agreed that the claimant would have necessitated the total knee arthroplasty at some point even if the January 6, 2014 work injuries had never occurred. Dr. Jinkins opined that the need for the total knee arthroplasty was accelerated as a result of the industrial event on January 6, 2014.

11. The claimant's medical history is found to be significant for pre-existing right knee complaints. The claimant's medical records confirm that she has experienced pain complaints in her bilateral knees dating back to at least 1996. On December 3, 1996, the claimant consulted with Dr. Jinkins for complaints of joint pain in her bilateral knees. Dr. Jinkins was concerned about rheumatoid arthritis and referred the claimant to a specialist.

12. The claimant sustained widespread pain complaints and injuries as a result of a motor vehicle accident that occurred in 1999. In 1999 the claimant developed fibromyalgia, which is a chronic pain condition that results in widespread pain in multiple joints. The claimant agreed that her chronic fibromyalgia had not been cured or abated and that she was continuing to experience this chronic joint pain at the time of her January 6, 2014 work injuries.

13. On March 5, 2004 the claimant complained to her primary care provider at Colorado Springs Health Partners that she was experiencing right knee pain. Right knee arthritis was documented via x-ray.

14. On May 18, 2005, the claimant reported bilateral knee pain to her treating doctors, which she described as making it painful to go up and down stairs. The claimant indicated that she was hearing a lot of noise in her knees when going up and down stairs. The claimant's medical providers noted that she was "almost incapacitated" with pain. The claimant indicated that she was thinking about taking off work the following Fall because of the pain going up and down stairs. She was additionally, contemplating moving into a different house.

15. X-rays of the claimant's right knee taken on May 18, 2005 revealed degenerative changes consistent with chondromalacia.

16. On an intake form from June 2005, the claimant noted areas of pain complaints, which included her right knee. On June 16, 2005, the claimant complained of bilateral knee pain with continued difficulty going up and down stairs and difficulty with prolonged standing. The claimant noted no relief with Flexeril, Darvocet and other conservative modalities. The claimant's doctor, Lawrence Zyskowski, M.D., opined the claimant had evidence of chondromalacia in her bilateral knees, which had been caused by early menopause and a hysterectomy.

17. At an evaluation on April 11, 2006, the claimant continued to complain of bilateral knee pain with popping and buckling. The claimant's treating provider noted that her smoking history had been one and a half packs per day for the past 40 years.

18. The claimant's left knee pain worsened and on July 13, 2006, she underwent an MRI of her left knee which revealed three compartment degenerative changes. The claimant was subsequently diagnosed with osteoarthritis of her bilateral knees on July 20, 2006 by Steven Waskow, M.D.

19. The claimant initially testified at hearing that her right knee did not prevent her from performing any activities of daily living prior to January 6, 2014. This is inconsistent with the claimant's medical records which document prior limitations with standing and going up and down stairs. The claimant agreed on cross examination that prior to January 6, 2014 her pre-existing right knee degenerative arthritis caused her to experience pain with some activities of daily living including bending, squatting, kneeling, and stooping.

20. The claimant has been on anti-inflammatory and pain medications for many years for treatment of chronic pain caused by fibromyalgia, injuries sustained in seven prior motor vehicle accidents, and widespread degenerative osteoarthritis. The claimant agreed that she was taking pain medications and anti-inflammatory medication for pre-existing arthritis at the time she sustained her work injuries in this claim on January 6, 2014.

21. The claimant agreed that prior to sustaining her industrial injury on January 6, 2014 she was experiencing pain complaints in her right knee. The claimant attributed these pain complaints to general wear and tear and getting older. The claimant understood that prior to sustaining her injuries on January 6, 2014 that she suffered from degenerative arthritis and that this was a chronic condition that caused her to suffer from incurable pain. The claimant agreed that her pain complaints in her right knee caused pain when she squatted and bent down at work. The claimant acknowledged that she frequently reported to work in pain prior to January 6, 2014.

22. Dr. Jinkins had not reviewed the claimant's pre-existing medical records predating her date of accident in this claim. Dr. Jinkins testified that the claimant had described to him that she was essentially asymptomatic in her right knee prior to the date of accident and that her right knee pain had not required any medical treatment prior to the date accident. There is no indication that Dr. Jinkins was aware of the claimant's documented pre-existing history of pain complaints in her right knee and medical treatment she received for pain complaints in her right knee.

23. Although this prior right knee medical treatment is documented years before the January 6, 2014 event, the diagnostics, medical evaluations and the claimant's own testimony confirm that the claimant was suffering from chronic pain and incurable arthritis in her right knee at the time she sustained her injuries in this claim. The claimant was medically managing these pain complaints at the time she suffered her injuries in this claim with pain medications and anti-inflammatory medication.

24. As found, Dr. Jinkins' testimony and opinion is not supported by the credible weight of the evidence because Dr. Jinkins did not have a full and accurate understanding of the claimant's medical history. Dr. Jinkins conceded that the claimant would have necessitated a total arthroplasty in her right knee at some point in the future, even if the January 6, 2014 work event had never occurred. Dr. Larson's opinion that there is no standard rate of degeneration that is uniform across the general population is credited. Dr. Larson testified that it is scientifically implausible and purely speculative to reach the conclusion that the claimant's right knee degenerative arthritis

accelerated faster than it otherwise would have if the minor twisting event on January 6, 2014 had never occurred.

25. The claimant's argument that her right knee had only minor degenerative changes at the time of the January 6, 2014 injury is not credible in light of claimant's medical records from 2004 to 2006, which document a clear history of right knee arthritis pain and the diagnosis of osteoarthritis, which then progressed over the next ten years. This opinion is further not supported by Dr. Jinkins' own concession that claimant would have needed a right total knee arthroplasty at some point even if the January 6, 2014 event had never occurred.

26. Dr. Larson testified the need for a total knee arthroplasty is an optional choice for any patient. Dr. Larson opined that claimant would have been a candidate for a total knee arthroplasty even if the January 6, 2014 work injury had never occurred.

27. Dr. Larson's opinion that the need for the claimant's right knee arthroplasty is not causally related to the January 6, 2014 industrial incident is credible and more persuasive than medical evidence to the contrary.

28. The ALJ finds that the claimant has failed to establish that it is more likely than not that her need for total right knee arthroplasty is related to her industrial injury of January 6, 2014.

CONCLUSIONS OF LAW

1. The claimant has the burden of proof, by a preponderance of the evidence, of establishing an entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals* Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals* Office, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office,* 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones,* 688 P.2d 1116 (Colo. 1984).

2. The claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

3. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment the claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

4. The ALJ concludes, as found above, that the claimant has failed to establish by a preponderance that the need for the total knee arthroplasty is causally related to her January 6, 2014 industrial aggravation of her pre-existing arthritic condition.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for a total right knee arthroplasty is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 16, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant received an overpayment of temporary total disability benefits; and

2. Whether Respondents are entitled to an Order for repayment.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. Christine Schelble is the risk manager for Employer and is familiar with Claimant's worker's compensation claim. The evidence established that Claimant received his regular wages while off work, from May 23, 2014, through July 11, 2014, under the Sick & Accident Plan, which is funded by Employer. Claimant received TTD, from May 23, 2014, through July 11, 2014, in error. Claimant was not assessed sick or vacation time during this time frame.

2. Ms. Schelble further testified that it is her belief that the Insurer obtained approval of the Sick & Accident Plan from the Director of the Division of Workers' Compensation (Director).

3. Brittany Swa is the Insurer's workers' compensation claims adjuster for Claimant's claim. During a telephone call with an Employer representative, Ms. Swa discovered Claimant was receiving his regular wages at the same time he was receiving TTD benefits. Claimant did not contact Ms. Swa within 20 days of receiving the overpayments and did not advise Insurer that he was receiving his regular wages while receiving TTD benefits until after Ms. Swa discovered the error and contacted him.

4. Claimant was overpaid $4,587.67 in TTD benefits. Claimant has repaid a portion of the amount owed Employer and that the remaining balance owed is $3,632.07.

5. Ms. Swa testified that it is her belief that the Insurer obtained approval of the Sick & Accident Plan from the Director.

6. Respondents presented credible and persuasive documentary evidence that Respondents obtained approval of the Sick & Accident Plan from the Director as reflected in a February 8, 2006, letter to Nikki Robson, RN, Manager, Medical

Department for Respondent Employer from Mary Ann Whiteside, Director of the Division of Workers' Compensation, Colorado Department of Labor and Employment approving a wage continuation plan for Employer. Accordingly, it is found that Employer's wage continuation plan has the approval of the Director.

7. A Final Admission of Liability (FAL) was filed on September 16, 2014, and Claimant did not object to the FAL. There are no indemnity payments currently owed to Claimant.

CONCLUSIONS OF LAW

1. Respondents contend that they are entitled to an order directing Claimant to repay an overpayment of TTD. The ALJ finds that Respondents are entitled to an order to repay an overpayment of $3,632.07 in TTD. Based on the additional evidence presented at the reopened hearing, it is concluded that Respondents established that Employer's wage continuation plan was approved by the Director and that under that plan Claimant was erroneously paid wages while at the same time receiving TTD. Respondents established by a preponderance of the evidence that Claimant was overpaid TTD and that Respondents are entitled to an order of repayment in the amount of $3,632.07

2. It was established by a preponderance of the evidence that Claimant received an "overpayment" resulting from the payment of wages under a "wage continuation" plan as defined by Section 8-42-124 (2) (a), C.R.S. The statute provides, as follows:

> Any employer who is subject to the provisions of articles 40 to 47 of this title and who, by separate agreement, working agreement, contract of hire, or any other procedure, continues to pay a sum in excess of the temporary total disability benefits prescribed under articles 40 to 47 of this title to any employee disabled as a result of any injury arising out of and in the course of such employee's employment and has not charged the employee with any earned vacation, sick leave or other similar benefits shall be reimbursed if insured by an insurance carrier or shall take credit if self-insured to the extent of all moneys that such employee may be eligible to receive as compensation of benefits for temporary partial or temporary total disability under the provisions of said articles, subject to the approval of the director.

3. The evidence established that the "wage continuation" plan under which Claimant received payment from Employer for the period May 23, 2014, through July 11, 2014, constitutes a "payment" under which the Claimant's TTD benefits are "required to be reduced" within the meaning of Section 8-42-113.5 (1). Respondents proved that the Director approved the Employer's wage continuation plan and Respondents are entitled to repayment of the overpayment as required by law under of Section 8-42-113.5 (1), C.R.S.

5. It is concluded that Respondents are entitled to an order for repayment. As the proponent of the claimed overpayment and right to repayment, the Respondents bear the burden of proof to establish that payments to Claimant under the "wage continuation plan" were of the type that can reduce TTD benefits. *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002); *Barnhill v. City and County of Denver,* WC 4-525-398 (ICAO August 27, 2003) (to take credit for wage continuation respondent required to establish it paid in excess of TTD benefits and did not charge sick leave). Section 8-42-124 (2) (a) provides that wage continuation plans effect a reduction in TTD benefits only when: (1) The amount paid under the plan exceeds the TTD benefits payable for the injury; (2) The employee has not been charged vacation leave, sick leave or other similar benefits; (3) The Director has approved the wage continuation plan. *See* WCRP 1-8 (establishing procedures for Director's approval for wage continuation plans established under Section 8-42-124).

6. WCRP 1-8, pertaining to the approval of a "wage continuation" plan, provides,

> 1-8 EMPLOYER CREDIT FOR WAGES PAID UNDER §8-42-124(2), C.R.S.
>
> (A) An employer who wishes to pay salary or wages in lieu of temporary disability benefits may apply to the Director for authorization to proceed pursuant to §8-42-124(2), C.R.S.
>
> (B) The application to the Director shall contain the following information:
>
> (1) a reference to the contract, agreement, policy, rule or other plan under which the employer wishes to pay salary or wages in excess of the temporary disability benefits required by the act, and
>
> (2) a description of the employees covered by the application and a statement that these employees will not be charged with earned vacation leave, sick leave, or other similar benefits during the period the employer is seeking a credit or reimbursement.
>
> (C) An employer who has received approval from the Director to proceed under §8-42-124(2), C.R.S., shall indicate on the employer's first report of injury form whether the claim is subject to §8-42-124, C.R.S.

7. Here, the evidence established that Employer's wage continuation plan was approved by the Director. Respondents offered the testimony of two witnesses who testified that they believed the "wage continuation plan" was approved by the Director. Respondents' witnesses, a claims adjuster for the Insurer and a risk manager for Employer, were credible and persuasive regarding their belief about the Employer's wage continuation plan and their testimony was supported by documentary evidence, a February 8, 2006, letter from the Director of the Division of Workers' Compensation approving the Employer's wage continuation plan.

ORDER

It is therefore ordered that:

1. Claimant was overpaid TTD in the amount of $4,587.67.

2. Claimant shall repay Respondents overpaid TTD in the amount of $3,632.07.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _July 8, 2015_____

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant proved by a preponderance of the evidence that he sustained a compensable industrial injury arising out of and in the course of his employment with the respondent-employer; and,

2. If so, whether the claimant proved as a result of the industrial injury he required authorized, reasonably necessary and related medical treatment to cure and relieve him from the effects of the industrial injury.

FINDINGS OF FACT

1. The claimant is an employee of the respondent-employer. This company provides professional environmental cleanup services. On the date of injury, June 4, 2014, the claimant was working at a large coal facility in Gillette, Wyoming where the company was performing a "washdown" after an explosion. In order to do this, the claimant was operating a large fire hose used to wash down coal dust.

2. The claimant estimated his typical workweek was six twelve hour days, working anywhere from 40-84 hours per week. His job duties might involve lifting over 100 pounds, and included crouching and crawling.

3. On June 4, 2014 the claimant was operating the hose, which was under significant water pressure. The job began at about 8:00 am that day. By around 9:30, the claimant noticed severe back pain and sought out his supervisor to tell him he did not think he could continue working. Initially he was going to return to his hotel room to rest, but he changed his mind and asked to be taken to an emergency room.

4. 4. The claimant's supervisor Tom Kellogg took him to the local Emergency Room. The claimant arrived in the ER and was seen by James Hawley, MD at 10:24 am. X-rays were ordered, which showed degenerative joint disease with no evidence of acute fractures or dislocation, but which did show straightening of cervical lordosis at L1-S1. The history indicates "Chronic back pain: Resolved., States he has L4 rupture." The physician prescribed Medrol Dosepak, Flexeril10 mg., and Naproxen 500 mg. Once the claimant was stabilized, he was released with limitations of "No work, For 2 days, Light

duty until Tuesday. 6/10/14". The claimant was advised to follow up with his primary care provider within 5-7 days.

5. The claimant took a drug screen after his release from the ER, and was transported back to his home base in Pueblo, Colorado by another crew that was passing through the area.

6. On June 5, 2014, the claimant was seen by occupational physician Dr. Dallenbach in Pueblo. The claimant was accompanied to the appointment by Wendy Cullen, a safety coordinator for the Employer. Dr. Dallenbach's Assessment was:

> Acute lumbar strain; Left SIJ sprain; questionable significant aggravation of preexisting lumbar spondylosis. Within a reasonable degree of medical probability based upon currently available information [the claimant's] current clinical condition is work related in that it is secondary to activity performed within the course and scope of his employment as a Technician at [the respondent-employer].

7. Dr. Dallenbach ordered PT two times per week, continued the Medrol, and prescribed Percocet. He noted, “At this point in time [the claimant] is unable to function safely in the work environment in any gainful capacity.

8. On October 25, 2013, and while working for the same employer, the claimant had a previous back injury. He was also treated for this injury by Dr. Dallenbach. During the course of his treatment for the first injury, Dr. Dallenbach prescribed medications, and made a referral to Drs. Bainbridge and Shoemaker at Denver Back Pain Specialists for pain management.

9. Dr. Bainbridge recommended medications and physical therapy for the first injury. He reviewed X-rays and MRI images. He noted "evidence of a right paracentral disc protrusion, possibly with slightly extruded disc material, small in size at the L4-5 level. This appears to be superimposed on a broad based disc bulge at this level." Later he notes, “a small posterior annular tear at the L5-S-1 disc right of midline."

10. The claimant later saw Dr. Shoemaker who recommended psychological treatment for depression. The claimant continued to receive physical therapy. On March 13, 2014, Dr. Dallenbach released the claimant to full duty and placed him at MMI. He had no permanent impairment and no permanent restrictions from the first injury.

11. The claimant returned to full duty after he was placed at MMI, performing his regular job duties.

12. After the claimant's second injury, Dr. Dallenbach made another referral to Dr. Bainbridge. The claimant saw Dr. Bainbridge on July 22, 2014. Dr. Bainbridge noted his history, stating "From the 10/15/13 injury, [the claimant] was experiencing bilateral low back and left groin pain. He participated in physical therapy for 2 months with excellent benefit, and largely resolve of his symptoms. [The claimant] was able to return to work after this, and believes that he worked for 1.5 to 2 months." Dr. Bainbridge also noted the new June 4, 2014 injury and the mechanism of injury. He recommended bilateral L-5-S-1 injections.

13. Dr. Bainbridge also compared the MRI performed on June 20, 2014 after the second injury, with the MRI taken after the first injury. He wrote, “Lumbar MRI performed at Park West Imaging on 6/20/14 was reviewed and reveals mild to moderate degenerative disc disease with broad bulging from L-3-S-1. At L3-4 there is a broad foraminal disc protrusion to the right > left. There is a mild DJD at L3-4 and L4-5 and to a more significant degree at L5-S-1 bilaterally."

14. The medical records of both Dr. Dallenbach and Dr. Bainbridge show that the claimant, while he had suffered from a previous back injury in 2013, had recovered from that injury and had returned to full duty without incident.

15. Dr. Dallenbach testified at hearing, consistent with his reports, that on June 4, 2014 the claimant suffered from a significant aggravation of a pre-existing back condition that would constitute a new compensable injury.

16. The ALJ finds the claimant to be credible.

17. The ALJ finds that Dr. Dallenbach’s analysis and opinions are credible and persuasive in terms of the claimant suffering a material aggravation of his back condition arising out of and in the course of his employment with the respondent-employer on June 4, 2014.

18. The ALJ finds that the claimant has proven that it is more likely than not that he suffered a compensable worker's compensation injury on June 4, 2014. According to the records of Dr. Dallenbach placed the claimant at MMI for this injury on October 1, 2014.

19. The claimant first presented for treatment for his injury at the emergency room at Platte County Memorial Hospital in Wheatland, Wyoming. He received follow-up treatment for his injury from his ATP Dr. Dallenbach. Dr. Dallenbach ordered diagnostic MRIs, prescribed medications, and made referrals to specialist Dr. Bainbridge and to

physical therapy. The claimant also received psychological counseling from Dr. Evans, on the recommendation of Dr. Bainbridge.

20. The ALJ finds that the claimant has established that it is more likely than not that all of the medical treatment the claimant received from the above-referenced providers is reasonable, necessary, and related treatment for the instant worker's compensation injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (ACT) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. See *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. See §8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

3. A workers' compensation case is decided on its merits. See §8-43-201, C.R.S.

4. The judge's factual findings concern only evidence and inferences found to be crucial of the issues involved; the judge has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and as rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. Industrial Claims Appeals Office, 5* P.3d 385 (Colo App) 2000.

5. In order to prove a compensable injury and entitlement to benefits, a claimant must show by a preponderance of the evidence that his injury was caused by

activities that arose out of and in the course of his employment. See §8-43-201, C.R.S. and §8-41-301(1) (c) C.R.S. "Proof by a preponderance of the evidence requires claimant to establish that the evidence of a "contested fact" is more probable than its non existence." See *Matson v. CLP, Inc.*, W.C. No. 4-722-111 (ICAO August 13, 2009).

6. The claimant must prove by a preponderance of the evidence that the alleged injury was proximately caused by an injury arising out of and in the course of his employment with the employer. See §8-41-301(1)(b-c) C.R.S. See also *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "arising out of" element requires claimant to show a casual connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Triad Painting Co. v. Blair.*

7. The question of whether the claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. See *Faulkner v. ICAO*, 12 P. 3d 844(Colo. App. 2000).

8. Merely feeling pain at work in and of itself is not "compensable." See *Miranda v. Best Western Rio Grande Inn* W.C. No. 4-663-169 (ICAO April 11, 2007) "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the claimant was sustained a compensable injury." See also *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App 1995).

9. Here the claimant has established by a preponderance of the evidence a causal connection between his employment activities and his injury. The claimant presented persuasive evidence that his injury actually is compensable. The claimant's activities of wielding a fire hose under high pressure and the movements required of the claimant while using the fire hose are sufficient to establish that his injury arose from this activity.

10. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that all of the medical treatment received from the ER in Wyoming on

June 4, 2014 and the treatment received through Dr. Dallenbach and his referrals was reasonable, necessary, and related to the claimant's industrial injury hereunder.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of his injury, including all care so found above.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 10, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant's claim of a work related right shoulder injury occurring on January 8, 2010 is barred by the statute of limitations;

2. If not, whether the claimant's right shoulder rotator cuff tear injury is compensable;

3. If compensable, whether the claimant's need for medical treatment after 2010 was caused by the injury; and

4. Whether the treatment, including surgery, provided by Dr. Weinstein was unauthorized.

Based upon the findings and conclusions below that the claim is not related to her industrial injury of January 8, 2010 and that even if it were it is barred by the statute of limitations, the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. On January 8, 2010, the claimant (then age 49), while engaged in her duties for the respondent-employer, felt pain in her right shoulder while pulling on a drawer which had become stuck. The claimant was employed by the respondent-employer as a procurement director at the time and continues to hold the same position.

2. On January 10, 2010, the claimant selected CCOM as the initial authorized treating provider (ATP) from the list of two physicians which the respondent provided.

3. On January 12, 2010, the claimant was seen at CCOM by Richard Nanes, D.O. and reported a 5/10 pain level, which she described as "not severe." Dr. Nanes diagnosed work-related right shoulder tendinitis. Dr. Nanes noted a previous left shoulder surgery, which he interpreted as a non-occupational rotator cuff repair. The claimant testified that she did not recall the specific type of surgery which she underwent, but she confirmed that it was performed in the area of her left shoulder.

4. On January 14, 2010, the claimant underwent a right shoulder x-ray, which did not reveal any fracture or dislocation.

5. On January 18, 2010, the claimant was seen by Jeannine Laforce, P.T. and reported a 3/10 pain level. Ms. Laforce recorded the following right shoulder range of motion (ROM) measurements: flexion of 70 degrees, abduction of 62 degrees, and extension of 43 degrees.

6. On February 16, 2010, Dr. Nanes placed claimant at maximum medical improvement (MMI), without permanent impairment. That same day, the claimant completed an intake form in which she reported a contemporaneous pain level of 2/10, in addition to having pain approximately 20% of the time.

7. On February 26, 2010, the claimant told Jaymie Ludeman, P.T. that she had returned to full activity without pain or restriction. Mr. Ludeman took a final set of ROM measurements, which revealed no limitations.

8. From February 2010 through October 2012, the claimant did not seek or receive any treatment for her right shoulder.

9. On October 15, 2012, the claimant sent an email to the respondent-employer in which she requested additional medical treatment for her right shoulder. In the email, the claimant stated that "the physical therapy appeared to have helped for a while, but my arm is experiencing a lot of pain now."

10. That same day, the claimant was seen by George Schwender, M.D., who referenced a date of injury of October 15, 2012. Dr. Schwender consistently listed October 15, 2012 as the date of injury in his subsequent reports.

11. On October 16, 2012, the claimant was examined Daniel Olson, M.D. and reported having 7/10 to 9/10 pain in her right shoulder 80% of the time. Dr. Olson identified October 15, 2012 as the date of injury, while noting the 2010 incident in summarizing claimant's history.

12. On October 22, 2012, the claimant underwent a right shoulder MRI, which demonstrated a 13 mm full-thickness rotator cuff tear, with 10-11 mm of retraction and overlying bursitis.

13. On October 30, 2012, the claimant underwent a second set of right shoulder x-rays. Unlike the 2010 study, the 2012 x-rays revealed hypertrophic spurring

at the glenohumeral joint and mild flattening of the glenoid, which Curtis Harlow, M.D. interpreted as degenerative changes without any acute injuries.

14. That same day, the claimant was also evaluated by Bruce Taylor, M.D., who noted that her pain had markedly worsened over the past couple of months. Dr. Taylor recommended rotator cuff repair surgery.

15. On January 9, 2013, Dr. Schwender took ROM measurements and recorded 130 degrees of abduction and 140 degrees of flexion.

16. On April 30, 2013, the claimant followed-up with Dr. Taylor and reported a progressive worsening of symptoms.

17. On June 5, 2013, the claimant was examined by Dr. Nanes, who noted that right arm abduction was limited to 90 degrees, and internal rotation was limited to about 10 degrees. Dr. Nanes listed a date of injury of October 15, 2012.

18. On October 16, 2013, Tashof Bernton, M.D. issued a report after reviewing the claimant's medical records. Dr. Bernton concluded that the claimant's need for rotator cuff repair surgery was not work-related. Dr. Bernton also explained that rotator cuff tears can occur acutely or as a chronic degenerative process without any specific injury. Although Dr. Bernton recognized that pulling on a file drawer could cause "a temporary symptomatic aggravation," he stopped short of suggesting that this could cause or permanently aggravate a preexisting rotator cuff tear. Dr. Bernton also noted that the retraction which was identified by the MRI "indicates that the tear was clearly present prior to the reported date of injury of October 15, 2012."

19. On June 11, 2014, the claimant filed a workers' claim for compensation in this case, more than three years after the alleged date of injury.

20. The claimant also filed a separate workers' claim for compensation for the same right shoulder condition, which was the subject of W.C. No. 4-934-402. The claimant testified that she filed this claim because her employer told her that she needed to file a separate claim when she reported her increased symptoms in October 2012. The claimant admitted on cross-examination, however, that she provided an interrogatory answer regarding W.C. No. 4-934-402 in which she stated that her injury in that case happened on October 15, 2012 when she pulled hard on a drawer and felt an impact on her arm. The ALJ finds that the claimant is credible in her testimony that revealed she only indicated that date because she was told to do so. On August 8, 2014, an order dismissing W.C. No. 4-934-402 was entered based on the claimant's willful failure to comply with a discovery order.

21. On October 31, 2014, the claimant underwent arthroscopic subacromial decompression and rotator cuff repair surgery performed by David Weinstein, M.D. The claimant testified that she sought treatment from Dr. Weinstein outside of the workers' compensation system and was not referred him by anyone at CCOM.

22. On March 4, 2015, the claimant was examined by Albert Hattem, M.D., to whom she described a very minor accident ("pulled on a stuck drawer for a few seconds until it finally opened"). The claimant told Dr. Hattem that after the incident she had to ask for help when reaching, working overhead, and lifting heavy objects. Additionally, the claimant reported being unable to play basketball, which she previously played about three times per week. Dr. Hattem concluded that the claimant's rotator cuff tear was most likely caused by the natural degenerative process, because the alleged mechanism of injury was insufficient to cause a new tear or permanently aggravate a preexisting tear; such tears are common in older patients; the claimant's basketball hobby was a very strenuous activity requiring reaching and throwing using both arms; and the claimant uses her right hand for everything besides eating and writing. Dr. Hattem further opined that the symptoms which the claimant has experienced since 2012 are unrelated to the 2010 incident, and the lack of any treatment in the 32 months after the claimant was placed at MMI suggests that her subsequent symptoms were more likely the result of the degenerative process rather than the minor accident.

23. The claimant testified on direct examination that her job duties did not change after the accident, but she admitted on cross-examination that she would rely upon students to lift items for her. The claimant also testified that she loved and frequently played basketball before the accident, but she essentially stopped playing thereafter. The claimant also testified that she never had any doubt that her symptoms since 2010 were related to the accident, she never had any days without pain, and her pain was concerning. The claimant also testified that the respondent-employer paid for her medical treatment in 2010 and she is unaware of any unpaid bills for services rendered in 2010.

24. Michael Dallenbach, M.D. examined the claimant at the request of claimant's counsel on March 20, 2015, but he did not produce a report before testifying. Dr. Dallenbach testified that the claimant's alleged injury is compensable. Dr. Dallenbach testified that it is not possible to determine exactly when the rotator cuff tear occurred, though he agreed with Drs. Hattem and Bernton that it probably occurred long before the MRI was performed. On cross-examination, Dr. Dallenbach testified that his handwritten notes reflect that the claimant was having functional limitations in 2010.

25. Dr. Hattem testified and was accepted as an expert in occupational medicine. Dr. Hattem explained that the alleged mechanism of injury did not cause the rotator cuff tear based on the insufficient mechanism of injury, the claimant's nearly complete resolution of symptoms shortly thereafter, and the frequency of such tears in the older population. Dr. Hattem explained that the claimant's tear was most likely degenerative in nature based on her age, genetic predisposition, and non-occupational activities; and he concluded that the claimant's need for the surgery which was performed by Dr. Weinstein was unrelated to the accident for the same reasons. Dr. Hattem testified that the accident at most temporarily aggravated a preexisting partial tear.

26. The ALJ finds that Dr. Hattem's opinions are credible and more persuasive than medical opinions to the contrary.

27. The ALJ finds that the claimant has failed to establish that it is more likely than not that the rotator cuff tear is related to her industrial injury of January 8, 2010. The ALJ finds that the claimant's rotator cuff tear is more likely than not from a degenerative process.

28. The ALJ finds that even if the claimant's rotator cuff tear was related to her industrial injury of January 8, 2010, that her claim is barred by the statute of limitations.

CONCLUSIONS OF LAW

1. The claimant faces a "preponderance of the evidence" burden of proof on the issue of compensability. *Section 8-43-201, C.R.S.* This standard requires a party to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

2. Not every accident results in an injury. The term "accident" refers to an "unexpected, unusual or undersigned occurrence." *Section 8-40-201(1), C.R.S.* The term "injury" refers to the effect of an accident. *Section 8-40-201(2), C.R.S.*

3. Even if an accident causes an injury, not every injury is compensable. Indeed, an injury is only compensable if it entitles the claimant to disability benefits, regardless of whether medical treatment is needed. *See Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014) (holding that the claimant's injury "did not become compensable" until she lost in excess of three days of work, while declining to address the effects of "a treated, but not-compensable injury" for AWW purposes).

4. A claim for compensation is barred unless it is filed within two years after the date of injury (or three years with a reasonable excuse), pursuant to the statute of limitations established by section 8-43-103(2), C.R.S. (hereinafter "the SOL"). The SOL begins to run on the date which the claimant, as a reasonable person, knew or should have known the "nature, seriousness, and probable compensable character of his injury." *Sanchez v. Western Forge Corp.*, W.C. No. 4-428-933 (May 17, 2001).

5. An entitlement to indemnity benefits is not a prerequisite for the SOL beginning to run. *Ott v. Pediatric Services of America*, W.C. No. 4-705-444 (January 14, 2009).

6. The theory behind *Ott* is equally applicable to this industrial accident claim. Indeed, the same SOL applies to both occupational diseases and industrial injuries, and there is no basis to treat industrial accident claims differently under the same statute.

7. In assessing credibility, the ALJ may consider the consistency or inconsistency of testimony and actions, the reasonableness or unreasonableness of testimony and actions, and personal motives, bias, prejudice, and interests. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

8. The accident did not cause a compensable injury pursuant to the standard established in *Loofbourrow*. This is because the injury was so minor that it did not entitle claimant to any indemnity benefits, as it did not cause any temporary wage loss before she was placed at MMI without impairment. The medical records demonstrate that any related symptoms and need for treatment quickly dissipated. The claimant was nearly pain-free and demonstrating full ROM just six weeks later, and she did not seek or receive any treatment whatsoever for the following thirty-two months. At most, the accident caused a temporary, non-compensable exacerbation of a preexisting condition.

9. The claimant was or should have been aware of the work-related nature of her condition since 2010. The claimant testified that she has always related her subsequent symptoms to the event in 2010. Additionally, all of the medical records from 2010 are focused on the treatment of what is described as a work-related shoulder injury, and the claimant knew that her medical treatment was paid for by the respondent.

10. The claimant was or should have been aware of the seriousness of her condition since 2010. The claimant's testimony demonstrates that she believed something was significantly wrong before the MRI: she has stated she experienced

symptoms every day since the accident, she has always attributed her symptoms the incident, she was concerned about her symptoms, and she altered her job duties and personal activities as a result of them.

11. The ALJ concludes that the claimant's underlying degenerative condition is the most likely cause of her post-2010 symptoms. As outlined above, the alleged mechanism of injury was insufficient to cause or permanently aggravate a rotator cuff tear, and the resulting symptoms quickly resolved. Drs. Bernton and Hattem consistently opined that rotator cuff tears are often the result of degenerative changes, and Dr. Hattem explained that such tears are commonly seen in older patients.

12. The ALJ concludes that the opinions of Dr. Hattem and Dr. Bernton are credible and more persuasive than medical opinions to the contrary.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that need for medical treatment for her right shoulder for a rotator cuff tear is causally related to her industrial injury of January 8, 2010.

14. The ALJ concludes that the respondent has established by a preponderance of the evidence that the claim is barred by the statute of limitations.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado for her right shoulder is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issue presented for determination is whether the Claimant sustained a compensable injury to his neck in June 2013; if so, what medical benefits are reasonable and necessary to cure and relieve the effects of the injury

FINDINGS OF FACT

1. The Claimant is a 47-year old man who began employment with Respondent in 1990. He works with the Public Works Department and is a member of the street paving crew.

2. Claimant generally operates a Caterpillar 434D Vibratory Pavement Roller. This machine travels behind a machine which spreads new asphalt on streets. The Caterpillar 434D Vibratory Pavement Roller ("Caterpillar 434D") is one of several machines that compacts the new asphalt and prepares it for use by motor vehicles.

3. In June 2013, Claimant was operating the Caterpillar 434D during paving operations. He testified that he was on a two-inch thick mat of fresh asphalt when he encountered a truck on the asphalt. He had to drive the Caterpillar off the asphalt and when he did so, he claims he felt his neck jerk back and forth similar to a whiplash type of injury. He alleges that he has had left-sided neck pain ever since this incident.

4. Claimant testified that he told his immediate supervisor about the incident. The supervisor allegedly told Claimant to wait until the end of the paving season to report the injury. Claimant testified that he did not report the injury at the time because he was afraid of losing his job. Claimant formally filed a claim for workers' compensation on December 5, 2013.

5. Claimant had a prior work injury to his neck in 2012 and he did not lose his job as a result. The evidence does not support Claimant's alleged fear of losing his job due to sustaining a work-related injury or filing a workers' compensation claim.

6. After Claimant reported the injury, the Respondent referred the Claimant for medical treatment. Claimant went to Denver Health Center for Occupational Safety and Health ("Denver Health") and was evaluated by Margaret Cook-Shimanek. Claimant was prescribed some medications, and advised about use of heat and a TENS unit he already possessed. Claimant was released to full duty work.

7. Thereafter, the Claimant continued to follow-up at Denver Health with Dr. Cynthia Keuhn. Dr. Keuhn did not render a causation opinion and instead continued to treat Claimant and recommend treatment for his neck symptoms.

8. Dr. Keuhn eventually referred the Claimant to Dr. Robert Kawasaki due to Claimant's persistent neck symptoms. Dr. Kawasaki initially evaluated the Claimant on May 20, 2014. Dr. Kawasaki noted that the mechanism of injury could have caused facetogenic pain but that the timing of the injury and reporting was somewhat suspect. Dr. Kawasaki also noted that Claimant has degenerative changes in his cervical spine which were not caused by the injury.

9. Claimant saw Dr. Kawasaki again on June 11, 2014. Dr. Kawasaki's report noted that he reviewed Claimant's June 2, 2014 MRI of the cervical spine. Dr. Kawasaki noted that Claimant has multi-level degenerative changes including disc bulges, and facetogenic pain at C5-6 and C6-7. Dr. Kawasaki felt it was best to treat the facets by performing injections. He did not specifically address treating the disc bulges. Dr. Kawasaki provided no opinion on causation or relatedness of Claimant's neck condition to the June 2013 work event.

10. Claimant then began seeing Dr. Xavier Moses also at Denver Health. Dr. Moses noted that Respondent had filed a notice of contest and that Claimant should work to have the notice of contest resolved as quickly as possible. Dr. Moses did not render an opinion as to whether the June 2013 work event caused Claimant's ongoing neck symptoms.

11. Claimant's supervisor, Jason Cassell, testified about the operation of the vibratory asphalt roller. Cassell has experience supervising road crews and had operated the asphalt roller some twenty-five times.

12. The Respondent took video footage of Cassell operating the Caterpillar 434D in the customary and usual manner in which all employees should operate the machine. During the hearing, Cassell confirmed that the video demonstrated the normal operation of the same model of asphalt roller at maximum paving speed.

13. Cassell further testified that the video showed him driving off the side of the asphalt mat at an angle, consistent with Claimant's alleged mechanism of injury. Cassell also testified as to how the suspension system under the seat of the asphalt roller functioned, confirming that the video demonstrated both of the possible orientations of the seat while driving over the edge of the asphalt mat.

14. Quinn Campbell is an engineer with an M.S. degree who works for Vector Scientific. He is a Ph.D. candidate at the Colorado School of Mines where he studies biomechanics. His work history includes accident reconstruction and biomechanical investigations. He testified as expert in engineering and biomechanics.

15. Campbell conducted a biomechanical investigation of the incident Claimant described. He reviewed Claimant's answers to interrogatories, Claimant's medical records, and also observed, recorded, and analyzed the movements of an operator of the Caterpillar 434D as it moved on an off a two-inch thick asphalt mat, and viewed the video footage of Cassell operating the Caterpillar 434D.

16. Campbell took detailed measurements of the Caterpillar 434D, and explained the video of the machine operated by Cassell as it drove on and off of a two-inch thick asphalt mat.

17. After reviewing the video, Campbell determined that the Caterpillar 434D travelled at a speed of approximately 2.1 mph during paving operations.

18. Using the measurement and speed of the Caterpillar 434D, Campbell employed recognized mathematical techniques to calculate the acceleration the operator would have experienced while driving off a two-inch think asphalt mat at approximately 2.1 mph.

19. Campbell calculated that the greatest peak acceleration that Claimant could have experienced under the circumstances would be 0.31g[1].

20. Because Claimant's description of the injury was that of a whiplash-like mechanism, Campbell compared the peak acceleration that Claimant could have experienced against the peak acceleration that typically results in whiplash-associated disorders (WAD) most commonly resulting from rear-end automobile impacts.

21. Campbell cited studies that showed that the peak acceleration in a low-speed (2.5 mph) collision is about 1.6g, or five times the greatest peak acceleration that Claimant could have experienced during his alleged injury. In other words, any whiplash that Claimant experienced could be no greater than that experienced in a collision at 0.5 mph.

22. Campbell's testimony was credible and persuasive.

23. Dr. J. Tashof Bernton performed an independent medical examination ("IME") of the Claimant on October 17, 2014. Dr. Bernton examined the Claimant and reviewed Claimant's medical records.

24. Dr. Bernton noted that, and the ALJ finds, Claimant has been experiencing symptom in his neck since as early as 1999. The medical records reflect that Claimant reported to his physician that he had been experiencing "neck tension." In November, 1999, Claimant fell off a truck, striking the back of his head. Several months later, he saw Dr. Joseph Fillmore, who noted that Claimant experienced pain when he tilted his head backward. An x-ray of Claimant's cervical spine showed degenerative changes, including neural foraminal encroachment on a bony basis in the seventh and eighth right neural foramina. Claimant received follow-up treatment for his cervical strain. Again, in September 2003, Claimant reported neck pain after exercising at the gym. On October 17, 2012, Claimant saw his doctor complaining of neck pain. Claimant reported that he had been experiencing ongoing, left-sided neck pain during the month prior to his visit,

[1] Gs are a unit of acceleration equivalent to the acceleration of gravity at the Earth's surface. That is, if an object is dropped near the Earth's surface, it will accelerate toward the earth at approximately 9.8 m/s^2.

and that the pain was exacerbated the day prior to his visit when Claimant rode an asphalt roller over a manhole. Respondent admitted liability for Claimant's injury, and furnished medical benefits to return Claimant to maximum medical improvement ("MMI"). Claimant did not miss any work as a result of the injury, and he was placed at MMI two months later with no impairment.

25. Dr. Bernton concluded after his examination of the Claimant and review of the medical records that Claimant's neck symptoms were not a result of the June 2013 work incident.

26. During the hearing Dr. Bernton testified consistent with his report. He was admitted as an expert in occupational medicine who is also Level II accredited by the DOWC. Dr. Bernton has also studied causation of injuries during his work as an occupational medicine physician.

27. Dr. Bernton reviewed Claimant's medical records, examined Claimant, reviewed Mr. Campbell's October 16, 2014 report, reviewed the video of the Caterpillar 434D, and heard the testimony of the other witnesses in open court.

28. Dr. Bernton found that Claimant had extensive degenerative disease in the cervical spine that is symptomatic, and that Claimant likely has some nerve root impingement as well.

29. On the issue of whether Claimant's pain is a result of his industrial injury, Dr. Bernton concluded to a reasonable degree of medical probability that it is not. In so concluding, Dr. Bernton followed the analysis prescribed in the Guidelines:

> "To establish that a factor *could* have contributed to the impairment, the analysis must include a discussion of the pathophysiology of the particular condition and of pertinent host characteristics. A conclusion that a factor *did* contribute to an impairment must rely on documentation of the circumstances under which the factor was present and verification that the type and magnitude of the factor were sufficient and bore the necessary temporal relationship to the condition."

30. Dr. Bernton applied this analysis and found that neither the magnitude of the force nor the temporal relationship necessary to establish a causal relationship were present. Specifically, he noted that the minor jostling associated with driving over a two-and-a-half-inch drop in an asphalt roller is an insufficient mechanism to result in injury, let alone lasting pain, particularly against the backdrop of Claimant's extensive history of degenerative cervical disc disease.

31. Dr. Bernton noted that he was provided with a great deal of information regarding the alleged mechanism of Claimant's injury. Comparing the information about the movements of the Caterpillar 434D to more severe types of accelerations, Dr. Bernton described the forces associated with driving the Caterpillar 434D off the two-inch thick asphalt mat as almost "trivial".

32. The ALJ finds the testimony of Dr. Bernton credible and persuasive regarding the degenerative condition of Claimant's neck and the expected presence of symptoms regardless of Claimant's job activities.

33. The ALJ also viewed the video of Cassel driving the roller onto and off the mat. The ALJ observed that Cassel experienced very slight bouncing and jostling while operating the roller. While it is true that Claimant is not as tall as Cassel and has a smaller build, the ALJ is not convinced that the Claimant was jostled or whiplashed in such a way that would cause an injury to his neck or aggravate his pre-existing degenerative condition to produce the need for medical treatment. The Claimant has had problems with his neck for quite some time including a workers' compensation claim filed less than a year prior to this incident.

34. The Claimant has failed to meet his burden of proof to show that he suffered an injury to his neck in the course and scope of his employment in June 2013 while operating the Caterpillar 434D.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce disability or the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the evidence in a particular case may establish that the claimant's condition represents the natural and recurrent consequences of a preexisting condition unrelated to the alleged industrial injury. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

6. As found above, the Claimant has failed to prove that he sustained a compensable injury in the summer of 2013. The forces to which Claimant was exposed while operating the Caterpillar 434D were simply insufficient to either cause a new injury to his cervical spine or to aggravate any pre-existing problems with his cervical spine. The ALJ believes that Claimant is suffering from neck symptoms, but the Claimant has not established a causal link between the onset of those symptoms and an incident that occurred in the summer of 2013 especially in light of the six month delay in filing his claim or seeking medical treatment.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation benefits is denied and dismissed, thus the request for medical benefits is also denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 1, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

STIPULATIONS

The parties stipulated to an average weekly wage of $430.08 if the claim is found compensable.

REMAINING ISSUES

I. Whether Claimant sustained a compensable cervical spine injury arising out of and in the course of her employment with Employer on June 30, 2014.

II. Whether Claimant sustained an occupational disease to her cervical spine arising out of her employment with Employer on June 30, 2014.

III. If a compensable injury/occupational disease is found, whether Claimant is entitled to all reasonably necessary and related medical benefits.

IV. If a compensable injury/occupational disease if found, whether the right of selection of the authorized treating physician passed to Claimant.

V. If a compensable injury is found, whether Claimant has proven that she was disabled and entitled to temporary disability benefits.

Because the ALJ finds and concludes that Claimant has failed to prove that she sustained a compensable injury or occupational disease related to her employment with Sedexo, Inc, this order does not address the aforementioned issues of Claimant's entitlement to medical benefits, right of selection, or Claimant's entitlement to temporary disability benefits.

FINDINGS OF FACT

Having considered the evidenced presented, the ALJ enters the following findings of fact:

1. Claimant is employed as a Food Service Worker for Employer. Her title is "Utility Floater" meaning that she performs a variety of jobs from dishwashing to food service. Her position requires an equally varied range of duties. On June 30, 2014, Claimant was assigned to cover two medical lounges frequented by the Doctors and one lounge used by EMS personnel at Memorial Hospital. In order to supply the nutritional needs of the healthcare providers who used the lounges, Claimant's duties required her to serve hot breakfasts and lunches twice per day and stock/ and

periodically replenish the lounges with cases of water, soda and juice, in addition to coffee, bread, fruit, cereal, utensils, condiments, and other dry goods.

2. To complete these duties, Claimant would deliver hot-food pans from the kitchen to the lounges and place them on a steam table. Claimant also had to prepare non-cooked items such as salads, deli meat trays, and cut fruit platters and deliver these items to the lounges. Although Claimant's job required a lifting capacity of 50 pounds, covering the lounges normally involved lifting cases of water and other liquids weighing 15-20 pounds. Covering the lounges required stocking upwards of 10 cases of beverages per shift.

3. When Claimant arrived for work in the morning of June 30, 2014, she clocked-in at 5:27 a.m. Her first task was to turn on the steam tables and distribute food and beverage items that were supposed to have been restocked by personnel on the previous shift. Claimant found that the necessary restocking had not been completed. As a result, Claimant testified that she had to perform not only her food preparation tasks, but also restock the empty shelves and cupboards in the lounges.

4. Claimant testified that the items she had to restock included the typical cases of water, soda, juice and milk. The cases weighed approximately 20 pounds, and had to be broken down to individual cans, bottles, and containers and then placed onto rolling carts for delivery to the lounges and then placed onto shelves from the cart.

5. Claimant testified that as a result of the extra stocking work on June 30, 2014, she essentially performed the work of a 12 hour day in 8 hours. According to Claimant she had performed the work of two people because the personnel on the previous shift had not completed their restocking duties. In order to complete all duties, Claimant worked straight through her work shift without taking a lunch break.

6. Claimant's shift ended and she clocked-out at 2:01 p.m. She testified she was exhausted, hungry and thirsty. Her muscles were "twitching," but she felt no pain at that time, which she attributed to "adrenaline" from constant fast paced physically demanding work since she clocked-in that morning.

7. Upon completion of her shift, Claimant walked to her car, which was parked in a designated area in an on-site hospital parking garage. As she approached her car, she felt what she described as "blinding" neck pain. She got into her car but did not leave immediately due to her initial inability to move her head without pain. Claimant attributed her pain to the extra work she did that day; including lifting product overhead, hauling, bending, and rotating more than usual. Consequently, Claimant called her supervisor from her car to report her symptoms; however, she did not want to fill out an incident report at that time and she did not request medical attention.

8. The following day, July 1, 2014, Claimant telephoned Employer and reported her neck injury. She presented to Memorial's Occupational Health Clinic on July 7, 2014 where she was evaluated by Dr. Steve Castle. Dr. Castle noted she complained of left sided neck pain resulting from "…working hard including stocking and

serving the doctors and EMS lounge." Dr. Castle diagnosed cervical strain and imposed work restrictions. However, Dr. Castle opined that he could not attribute Claimant's neck pain to her work duties as it came on abruptly while she was getting into her car.

9. Claimant then went to her personal care provider, Peak Vista, on July 14, 2014. She reported her neck pain had started after leaving work. She denied any history of trauma. Cervical x-rays were obtained which demonstrated disc space narrowing at C4-5, C5-6, and C6-7, as well as osteophyte formation from C4-5 to T1-2. No acute abnormalities were noted.

10. Claimant has a prior history of neck, upper back and shoulder pain. Medical records dating back to August 16, 1999 indicate that Claimant broke both arms and injured her upper back and neck in a skiing accident in 1996. In August 1999, she developed right sided upper back pain which came on for "no apparent reason" in addition to headaches originating in the neck, moving to the base of the skull and both sides of her head. These symptoms prompted her to seek chiropractic care. Cervical x-rays performed during her initial chiropractic visit on August 16, 1999 demonstrated "early osteophyte lipping and the start of bridging between the anterior aspects of the C4 and C5 vertebral bodies" as well as a significantly narrowed disc space at C6/C7. Claimant was diagnosed with degenerative disc and degenerative joint disease of the cervical spine. She underwent a course of chiropractic treatment.

11. Despite chiropractic treatment, Claimant continued to have chronic pain in her shoulders, neck and arms secondary to her skiing accident as demonstrated by her 2005 medical records.

12. Claimant was involved in a motor vehicle accident on March 2, 2008, causing increased neck and back pain. A questionnaire filled out by Claimant indicates that she had prior injuries to her neck, shoulders, and arms from the skiing accident. Claimant went to the chiropractor for several visits but had to discontinue treatment due to financial reasons.

13. Claimant presented to her personal care provider on January 23, 2013. She continued to have neck pain. She stated her neck did not feel better on days she did not work. She took ibuprofen in the morning and before activity. Claimant returned to her PCP on October 2, 2013. The medical history indicates chronic pain involving her upper shoulders and neck. Moreover, Claimant reported significant work stress and anxiety. She felt discriminated against at work due to her age and high paced job.

14. Claimant returned to Peak Vista on August 5, August 19, November 11 and December 2, 2014 following the June 30, 2014 incident. The latter records indicate very little or no improvement despite chiropractic treatment and medications.

15. Dr. Rook examined Claimant and prepared a report dated November 13, 2014. Dr. Rook testified at hearing as an expert in the fields of pain medicine, physical medicine and rehabilitation, and electro-diagnostics. Dr. Rook opined that Claimant

sustained a cervical strain and because of a "lack of treatment she appears to have developed a myofascial pain syndrome principally involving the left-sided neck and upper back musculature." According to Dr Rook Claimant's condition was a result of the usually heavy lifting and repetitive upper extremity activity she performed on June 30, 2014.

16. Dr. Rook noted, "…It is clear from the patient's history that the work she performed on June 30th was above and beyond what she normally does. She reported that she essentially had to do the work of two work shifts during her eight-hour shift. She did not have time to take a break and she did not have time to eat lunch. By the end of the day she was exhausted and overheated and by the time she got to her car in the parking lot she was experiencing severe neck pain. This neck pain has persisted. This patient was not having severe neck pain when she went to work that day…"

17. Dr. Rook explained that while Claimant may have aggravated an underlying myofascial condition, more likely than not she sustained additional micro-trauma to the muscles in her neck and shoulder region as a result of the unusually heavy and vigorous work activity she performed on June 30, 2014.

18. Dr. Rook testified regarding the findings of a December 4, 2014 MRI of Claimant's cervical spine. He explained that the MRI findings substantiate Claimant's complaints of left sided neck pain, and that her pain likely emanates from the facet joint at the C2-3 level. He testified there was muscle spasm in Claimant's cervical spine upon examination, and that objective findings of pathology are present.

19. The aforementioned MRI demonstrated multilevel degenerative disc disease with moderate to severe foraminal narrowing at C2-3 and C7-T1 and facet changes at C2-3 compatible with arthropathy. There was evidence of facet effusion and soft tissue edema at C2-C3. The effusion was present despite the fact that the MRI was performed more than six months after the date of the alleged onset.

20. Respondents retained Henry Roth, M.D, to examine Claimant and prepare a report. Dr. Roth completed the respondent independent medical examination (RIME) on January 27, 2015. During the examination, Claimant reiterated that she "went above and beyond what [she] usually [had] to do to properly stock lounges" and that as a result she overworked herself. According to Claimant, she aggravated something that day because she had sharp shooting pain in her neck; however, she did not relay a specific injury event or time of symptom onset. She did not experience any discomfort while working. Rather, she experienced the onset of symptoms as she was about to get into her car. Claimant reported she was still in extreme pain. Dr. Roth reviewed the x-rays and MRI reports and opining that they demonstrated wide spread chronic degenerative change commensurate with Claimant's age. Dr. Roth opined that Claimant's symptoms were the result of the natural progression of her pre-existing degenerative condition and/or idiopathic. Dr. Roth further opined that there was no work related mechanisms of injury, and that it was not medically probable that Claimant's work activities on June 30, 2014 caused or aggravated her neck condition.

21. Dr. Roth opined that Dr. Rook "…failed to adhere to any of the principles of Causality Assessment as instructed and outlined by the Colorado Division of Labor." Contrary to Dr. Roth's testimony, the ALJ finds that Dr. Rook completed a causality assessment. Nonetheless, considering Claimant's prior history of neck pain in combination with the extent of degenerative change on Claimant's December 4, 2014 MRI, the ALJ finds Dr. Roth's opinions concerning the cause of Claimant's neck symptoms more persuasive that the contrary opinions of Dr. Rook. Crediting the opinions of Dr. Roth, the ALJ finds that Claimant's neck pain and subsequent disability along with her current need for treatment are more probably than not related to the natural progression of pre-existing degenerative disc and joint disease first diagnosed on August 16, 1999. Accordingly, the ALJ finds that Claimant has failed to prove by a preponderance of the evidence that she sustained an injury to her cervical spine as a result of her work activities on June 30, 2014.

22. Ramon Carr, Claimant's supervisor testified that the restocking did not require any heavy lifting. Most of the materials were light weight such as chips, bread, napkins and utensils. The heaviest items were the cases of water which could be broken down into multiple trips. The most Claimant had to lift was fifteen pounds. This puts Claimant's job in the light category of employment. Mr. Carr also testified that Claimant could request help and that employees were encouraged to obtain help when needed. Mr. Carr spoke to Claimant on the date of the alleged onset but she did not request any help or report any problems completing her job duties. In her testimony, Claimant agreed that she could get help, and that if there was extra inventory, someone else would deliver the stock to the doctors' lounges and she would put it away. While Mr. Carr believes the job of stocking the doctors' lounges was a lot of work, he thinks it can be done in an eight hour shift at a normal pace.

23. Claimant has failed to carry her burden to prove that she sustained a compensable injury to her cervical spine. Consequently, the ALJ finds that there is no need to address her claims of entitlement to medical and temporary disability benefits nor the question concerning selection of the authorized treatment provider further.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. Claimant has failed to prove, by a preponderance of the evidence that she suffered a compensable injury to her cervical spine on June 30, 2014. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v.*

Karanian 32 P.3d 470 (Colo. 2001). The phrases "arising out of “and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). While the ALJ is persuaded that Claimant produced sufficient evidence to support a conclusion that her symptoms occurred in the scope of employment, the ALJ is not convinced that her neck symptoms and current need for treatment “arise out” of her employment.

B. The term "arises out of” refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2013.

C. The fact that claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

D. An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). In contrast, Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

E. The above cited section imposes additional proof requirements beyond

that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997).

F. In this case, Claimant is not alleging an accidental injury because there was no specific injury event. She cannot attribute the onset of her symptoms to any specific time or activity. Rather, Claimant contends that she suffered an occupational disease caused by prolonged exposure to having to work above and beyond what was "normal" for her on June 30, 2014. In addition to June 30, 2014, Claimant testified that there had been several occasions where the doctors' lounges were not stocked properly. Claimant's supervisor, Ramon Carr, testified it was relatively common for the doctors' lounges to run out of supplies and require complete restocking. Claimant had previously complained to her supervisors that her work load was excessive and that her coworkers were not doing their job tasks properly yet she was able to complete all tasks required on previous occasions without the development of symptoms. As stated in her answers to interrogatories Claimant reported that "for a long time prior to my injury, I was doing the job of two people." While Claimant's testimony constitutes some evidence of prolonged exposure to specific work tasks, this undermines Claimant's testimony that she had to work harder than usual on the alleged date of onset. Moreover, based upon the evidence presented, the ALJ concludes that Claimant's work takes varied throughout her shift. Accordingly, the ALJ is not persuaded that Claimant's neck symptoms were proximately caused by the type of prolonged exposure contemplated by the Worker's Compensation Act.

G. In concluding that Claimant has failed to prove that she suffered a compensable work injury, the ALJ has also considered the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989). Under the "special hazard" rule," a claimant may be compensated if his/her preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Id*. The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See National Health Laboratories v. Industrial Claim Appeals Office, supra; Ramsdell v. Horn, supra.*

H. To be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985)(hard level concrete floor not special hazard because it is a condition found in many non-employment locations); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999)(injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). In this case, the ALJ is persuaded that Claimant's neck symptoms are, more probably than not, a consequence of her preexisting nonindustrial degenerative disc and joint disease. Consequently, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to result in a compensable work injury to Claimant's low back. *National Health Laboratories, supra.* At various times throughout this case, Claimant has stated that the onset of her pain occurred while walking down a hallway to the parking lot, getting into her car, and/or turning her head to back out of the parking space. All of these are activities of daily living. Hallways, parking lots and cars are ubiquitous and generally encountered in many non-employment environments. Further, the ALJ is not persuaded that the equipment/tools used by Claimant in the discharge of her duties are "special hazards" of employment likely to increase the probability or extent of injury. Based upon the evidence presented, the ALJ concludes that Claimant failed to prove a concurrence of a pre-existing weakness and a hazard of employment supporting a conclusion that she sustained a compensable neck injury on June 30, 2014. Consequently, her claim for benefits must be denied and dismissed and her further claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits is denied and dismissed
2. All matters not determined herein are reserved for future determination.

DATED: __June 17, 2015_____

/s/ Richard M. Lamphere_____
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did the Claimant prove by a preponderance of the evidence that on July 6, 2014 he suffered a lumbar spine injury proximately caused by the performance of service arising out of and in the course of his employment?

- Did the Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical treatment for the alleged lumbar spine injury?

- Did the Claimant prove by a preponderance of the evidence that he is entitled to awards of temporary total and temporary partial disability benefits as a result of the alleged lumbar spine injury?

- If the Claimant is entitled to an award of temporary total disability benefits are the Respondents entitled to an offset based on the Claimant's receipt of unemployment insurance benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 17 were admitted into evidence. Respondents' Exhibits A through O were received into evidence. The depositions of Dr. John Hughes and Dr. Timothy O'Brien were received into evidence.

STIPULATIONS

2. At hearing the parties stipulated the Claimant's average weekly wage is $1350.

3. At the hearing the parties stipulated the Claimant is not alleging that he sustained any compensable injury to his knees on July 6, 2014.

CLAIMANT'S PRE-INJURY BACK SYMPTOMS AND TREATMENT

4. The Claimant contends that on Sunday, July 6, 2014 he sustained a compensable lumbar spine injury. He further contends that the injury caused a need for medical treatment as well as temporary total disability (TTD) and temporary partial disability (TPD). The Respondents contend that on July 6, 2014 the Claimant sustained a minor hip injury for which they admitted liability, but did not suffer any lumbar injury.

As a result the Respondents argue they are not liable to provide any additional medical or disability benefits.

5. Some evidence and medical records presented at hearing indicate the Claimant suffered from back symptoms prior to July 6, 2014 and received treatment for these symptoms.

6. The Claimant testified that he served in the United States Coast Guard (USCG) from 1969 through 1973. He stated that while serving in 1970 he sustained an injury to his mid-back between the shoulder blades. He explained that he received a disability from the Veterans Administration (VA) as a result of this injury.

7. On October 27, 2009 the Claimant was seen for a complaint of back pain of three weeks' duration. The Claimant reported no specific injury but advised that he had a "hard time lying on his side." The Claimant had "minimal symptoms as far as leg radiation" and the symptoms were "more on the right than the left."

8. On October 28, 2009 the Claimant underwent "three view lumbar spine" x-rays. The radiologist reported hypertrophic changes at L4-5 and L5-S1, endplate sclerosis and osteophyte formation at L5-S1 and "prominent anteriorly directed osteophytes at L4-5 and L2-3." The radiologist's impression was spondylitic change "felt to be most significant at L5-S1."

9. On June 25, 2012 Timothy Soper, M.D., of the Urology Center of the Rockies, PC treated the Claimant for a complaint of back pain of 24 hours' duration. The pain was described as located in the "right flank." Dr. Soper's impressions were "lumbago" and history of urinary calculi.

10. In April 2013 Family Nurse Practitioner (FNP) Robert Weinland examined the Claimant at the VA facility in Cheyenne, Wyoming. The Claimant reported that his "last C&P exam" for his thoracolumbar condition was in 1973 when he was discharged from the USCG. The Claimant described this as a "condition of the thoracic spine, NOT LS-spine." FNP Weinland noted there were no signs of radicular pain or symptoms. FNP Weinland's diagnoses included a "thoracic strain" and "DJD T-spine." He assessed a service connected disability of 10% for "lumbosacral or cervical strain."

CLAIMANT'S TESTIMONY CONCERNING ALLEGED INJURY

11. The Claimant testified as follows concerning the alleged injury. On July 6, 2014 he was working for the employer as a heating, ventilation and air conditioning (HVAC) service technician. On July 6 he and a co-employee were installing a "slot diffuser" in a ceiling. A slot diffuser is a large metal device weighing 100 to 120 pounds. He was standing on a ladder reaching overhead with both hands to patch a piece of broken duct work. He had to "hug around this piece of duct" work while in an "off position kind of to the right side of the ladder" reaching overhead at approximately a 70 degree angle "off of vertical." While repairing the duct work he experienced a sharp pain in the "pocket area" of his right hip. He got off of the ladder, stretched and the pain went away. He completed the day's work and went home. At 2 or 3 o'clock a.m. on

July 7, 2014 he awakened with "bad" pain in the pocket area of his hip. He tried to get out of bed but couldn't walk. At approximately 7 a.m. he sent an email to his supervisor (Gillett), the employer's service manager (Marlow) and the employer's service dispatcher (Thibodeau) saying that he couldn't come to work because of pain in his knees and hip.

12. Claimant's Exhibit 4 is the July 7, 2014 email the Claimant sent to Gillett, Marlow and Thibodeau. This email reveals that the Claimant advised the recipients that he hurt his "knees and hip yesterday" and he would not be into work because the knees and hip hurt too badly. The Claimant also requested to see an "on the job injury doctor."

13. The Claimant's July 7, 2014 email was forwarded to the employer's safety director, Mr. David Dunn (Dunn). The Claimant later spoke to Dunn by telephone. The Claimant requested that he be assigned to a physician in Fort Collins, Colorado where he lives.

14. The Claimant credibly testified concerning a later telephone call from Dunn on July 7, 2014. The Claimant testified that during this telephone conversation Dunn stated the Claimant had not been injured but was "just old basically." Dunn told the claimant to go to his family doctor for treatment. The Claimant's testimony concerning this conversation is corroborated by a July 7, 2014 email that Dunn sent to Mr. Bob Levens stating that "this is considered a non-incident."

15. The Claimant credibly testified that on July 7, 2014 he called his personal physicians at Associates in Family Medicine, P.C. (AFM). However, AFM advised the Claimant that he could not be seen until Tuesday, July 8, 2014. The Claimant then decided to seek treatment at University of Colorado Health Harmony Urgent Care (Urgent Care) in Fort Collins.

TREATMENT SUBSEQUENT TO ALLEGED INJURY

16. On July 7, 2014 Kelby Bethards, M.D., examined the Claimant at Urgent Care. The Claimant gave a history that on July 6, 2014 he was working on a 10 foot ladder reaching over his head when he felt a "sharp pain" in his hip joint. The Claimant also reported that both knees hurt. Dr. Bethards noted there was "no inability to bear weight or loss of motion." Dr. Bethards performed a physical examination (PE) of the right hip. Dr. Bethards noted the Claimant had right hip pain "without radiation." Dr. Bethards recorded there was tenderness in the greater trochanter but no swelling or crepitus. Dr. Bethards diagnosed right "hip pain/strain." Dr. Bethards released the Claimant to light duty and imposed restrictions of no crawling, no kneeling, no squatting and no climbing. Dr. Bethards prescribed tramadol and referred the claimant to follow-up at "OHS" and also to Mason Sidney, M.D., at AFM.

17. On July 8, 2014 the Claimant sent an email to Gillett, Marlow and Thibodeau. The email states the Claimant had gone to the doctor on July 7, 2014 and the doctor put him on light duty and work restrictions. The email also notes the Claimant was unsure what "light duty work" was available but specifically noted the

doctor said “no ladders.” Finally the email states the Claimant had an appointment scheduled on “Thursday” with a “rehab doctor.”

18. The Claimant credibly testified that he did not remember the employer ever gave him a document that allowed him to choose between two independent medical clinics for treatment of his injury. The Claimant credibly testified that the employer did not offer to accommodate his restrictions and that Gillett stated that the employer didn’t have any work for him. The Respondents did not present any credible or persuasive evidence demonstrating that they ever provided the Claimant a “list” of at least two physicians or two medical providers from which the Claimant could select the provider to treat his injury.

19. The Claimant testified that within a “couple of days” after July 6, 2014 he began to experience foot numbness and couldn’t feel his toes. The Claimant testified that the numbness later spread to his ankle, the top of his right foot and calf.

20. On July 9, 2014 Ms. Kathy Johnson (Johnson), the employer’s Human Resources Director, sent an email to the Claimant notifying him that he might qualify for 12 weeks of unpaid, job-protected leave under the Family Medical Leave Act (FMLA).

21. On July 10, 2014 Tracey Stefanon, D.O., of Colorado Health Medical Group (CHMG) examined the Claimant. The Claimant credibly testified that CHMG is also known as Occupational Health Services (OHS). The Claimant’s testimony is corroborated by Dr. Stefanon’s July 10 note stating that the Claimant reported to the “Occupational Health Services Clinic” for evaluation of right hip pain. The ALJ infers that CHMG is the “OHS” to which Dr. Bethards referred the Claimant.

22. On July 10, 2014 the Claimant gave a history to Dr. Stefanon that on July 6, 2014 he was stood on a ladder “with his left hip out to the side” while reaching up into to “tight quarters” to repair duct work. This activity continued for more than one hour. While standing on the ladder the Claimant experienced pain in his “right gluteal region.” The Claimant stated that since the incident he had experienced pain in the right gluteal region with “prolonged walking.” The Claimant also reported that on July 9, 2010 he began to experience “some intermittent numbness under his great toe.” The claimant denied prior injury to the right hip but stated he suffered a “midback muscle strain” when he was 18 years old and in the USCG. The Claimant advised that ever since the USCG incident he has experienced “chronic intermittent mid back pain.” The Claimant denied any prior low back pain or injury. The Claimant also reported a history of injury to both knees and a history of kidney stones with the “last episode 3 years ago.”

23. On July 10, 2014 Dr. Stefanon performed a PE. She noted the Claimant’s back demonstrated good range of motion (ROM). The Claimant reported discomfort in the gluteal region with right-sided bending and rotation. This pain was much greater than that produced by left-sided bending and rotation. The Claimant reported no tenderness to palpation over the SI joints or the spinous processes, but there was tenderness to palpation over the right gluteal region. Dr. Stefanon assessed a right gluteal strain. Dr. Stefanon opined that it was more medically probable than not that the

Claimant sought treatment for "a work-related medical condition" resulting from his "exposure" of July 6. Dr. Stefanon further opined the "mechanism of injury" was "consistent with" the Claimant's "symptomatolgy and poor positioning in a static position." Dr. Stefanon prescribed tramadol for pain, referred the Claimant for physical therapy (PT) and directed him to return for follow-up in two weeks. Dr. Stefanon also imposed restrictions of no lifting greater than 30 pounds and "no ladder climbing." The Claimant was also instructed to "avoid" repetitive bending or twisting at the waist, and to avoid kneeling, crawling and squatting.

24. On July 10, 2014 Paul Braunlin, P.T., initiated the PT prescribed by Dr. Stefanon. P.T. Braunlin noted the Claimant reported some intermittent "paresthesias in his right great toe and right lateral ankle." P.T. Braunlin performed "joint mobilization to the lumbar spine at the L4-5 and L5-S1 facets bilaterally." He also performed right hip mobilization traction rotations and instructed the Claimant concerning home exercises. P.T. Braunlin assessed right hip dysfunction and lumbar facet dysfunction.

25. On July 14, 2014 the Claimant completed a Worker's Claim For Compensation. He reported that on July 6, 2014 he injured his "right hip joint area and both knees" while installing "ducting" in a "very tight work place using a 10 ft ladder."

26. On July 15, 2014 P.T. Braunlin noted there was no change in the Claimant's right buttock pain. However the Claimant reported "numbness" and pain in the right lateral calf/ankle and the lateral foot. There was no low back pain. On July 18, 2014 the Claimant reported to another therapist that he had continuing right buttock pain. He also reported "ache/numbness" of the lateral lower leg, the top of the foot and the bottom of the toes.

27. The claimant credibly testified, consistent with P.T. Braunlin's note, that he was not having low back pain in July 2014. The claimant also credibly testified that he never had low back pain as a result of the July 6, 2014 injury.

28. On July 22, 2014 Ann Yanagi, M.D., examined the Claimant at OHS. Dr. Yanagi recorded the Claimant's chief complaints were right buttock pain and "numbness to the lateral leg and foot." On examination Dr. Yanagi noted right buttock pain directly over the piriformis, but with excellent hip ROM. She did not detect any low back pain but reported a positive right-sided straight-leg raise test. Dr. Yanagi opined the Claimant appeared to have "radicular symptoms" that followed the L4-5 nerve path on the right, and that this could explain his continued gluteal pain. She further opined that although the Claimant might have had a strain with some spasm of the piriformis muscle, the degree of numbness in the left leg was concerning for radicular pain, "possibly at the lower lumbar spine level." Dr. Yanagi assessed right gluteal pain with possible L4-5 radicular pain to the right leg. She recommended an MRI of the lower lumbar spine.

29. On July 22, 2014 Dr. Yanagi also noted the Claimant "reported his right knee as an injury." Dr. Yanagi noted the claimant's right knee had been "bothering him for years" and he had undergone surgery to the left knee. Dr. Yanagi stated that to

consider the claimant's right knee complaints as part of the "Work Comp injury" the "acuteness should have come on at the same time, which it did not." Dr. Yanagi explained to the claimant that she could not treat "chronic right knee pain as part of the acute injury that occurred on July 6, 2014." Dr. Yanagi wrote the Claimant would "withdraw his right knee complaint as part of this particular claim."

30. On July 22, 2014 Dr. Yanagi completed a Physician's Report of Worker's Compensation Injury (WC164). In this form Dr. Yanagi indicated work related diagnoses of "sprain and strain of other specified sites of hip and thigh" and opined that her findings were consistent with the Claimant's "history and/or work related mechanism of injury/illness."

31. The Claimant credibly testified that he continued PT through August 5, 2014, and that an MRI was eventually approved. He also credibly testified that after August 5 he did not return to OHS because the employer "denied the claim" and OHS refused to provide any further treatment.

32. The Claimant applied for FMLA leave. In connection with this application the employer certified that the essential functions of the claimant's job included climbing ladders and lifting in excess of 50 pounds. (Claimant's Exhibit 4 p. 33). On August 1, 2014 Dr. Stefanon completed a health care provider's certification is support of the Claimant's FMLA application. Dr. Stefanon certified that the Claimant's condition rendered him unable to perform the essential functions of his job as a an HVAC service technician because he could not lift more than 30 pounds and could not lift more than 15 pounds repetitively.

33. On August 20, 2014 Johnson notified the Claimant by email that the employer had approved his request for FMLA leave effective July 7, 2014. Johnson also noted that the employer had received his application for unemployment benefits and stated the employer had not terminated him.

34. On September 29, 2014 the Claimant underwent an MRI of the lumbar spine. The radiologist's impressions included chronic-appearing bilateral L5 pars defects with 3 mm anterolisthesis of L5 on S1 and severe bilateral L5-S1 neuroforminal narrowing.

35. On September 29, 2014 Johnson sent an email to the Claimant notifying him that the FMLA leave had expired. She requested the Claimant provide an updated physician's report concerning his ability to return to his job as an HVAC technician. Johnson wrote that the Claimant's job required that he "climb ladders, lift 50+ pounds, stoop, squat, kneel and crawl."

36. On October 1, 2014 John Hughes, M.D., performed an independent medical examination (IME) of the Claimant upon the request of Claimant's counsel. Dr. Hughes took a history, reviewed medical records and performed a PE. Dr. Hughes recorded a history that on July 6, 2014 the Claimant was standing on a ladder, reaching overhead and extending to repair duct work. The Claimant then experienced a "muscle

cramp" that lasted one to two minutes and then "got better." The next morning the Claimant awakened with hip pain that caused him to seek treatment at Urgent Care. The Claimant reported that he continued with "low-grade symptoms" of aching in the posterior right hip and "numbness involving the outside of the right calf, foot, and all of the toes in the right foot."

37. In the October 1, 2014 report Dr. Hughes noted a "positivity to right-sided facet loading in the lumbar spine, and that right-sided lateral flexion was "guarded and reduced." Dr. Hughes reviewed the September 29, 2014 MRI and noted disc dessication at multiple levels from L2-3 to L5-S1 and a central disc protrusion at L5-S1. Dr. Hughes assessed a lumbar spine sprain/strain at work on July 6, 2014 with persistent right lower facet joint arthropathy secondary to the sprain/strain. In support of this opinion Dr. Hughes noted that Dr. Stefanon's findings were similar to his own and consistent with pain generation from the right lower facet joint "probably at L5-S1." Dr. Hughes stated there were "no findings consistent with primary right hip pathology." Dr. Hughes opined the Claimant was not at maximum medical improvement (MMI) and recommended treatment to include a follow-up examination, chiropractic adjustments, traction and possibly medial branch blocks.

38. On October 6, 2014 the Claimant went to AFM where he was seen by Quincy Crane, PAC. PA Crane wrote a letter to Johnson stating the Claimant was still restricted to lifting a maximum of 30 pounds and 15 pounds repetitively. However, the Claimant credibly testified that AFM refused to provide any treatment because "they don't do Workers' Comp."

39. On October 14, 2014 Timothy O'Brien, M.D. performed an IME of the Claimant, apparently at the respondents' request. On November 10, 2014 Dr. O'Brien issued a written report concerning his evaluation of the Claimant. Dr. O'Brien took a history from the Claimant, reviewed medical records and performed a PE. By way of history Dr. O'Brien recorded that the Claimant injured himself on "6-20-14" [sic]. Dr. O'Brien wrote the Claimant was on a ladder looking up into a "2 x 4 space" when he noted "right buttock pain." The Claimant did not experience any radiating pain, numbness or tingling and he had no back pain. The next morning the Claimant reported that he could hardly get up and noted "numbness and tingling" in the lateral four toes. On October 14, 2014 the Claimant reported that he was "95% better because his numbness and tingling was gone." The Claimant also reported his hip pain right buttock pain was "approximately 0 on a scale of 0-10."

40. In the November 10, 2014 report Dr. O'Brien opined the Claimant sustained a "minor" right gluteal strain that did not result in a "disc herniation or sciatic [sic] or radiculopathy." Dr. O'Brien explained that by November 10 the gluteal strain had healed and was resolved. In support of these conclusions Dr. O'Brien stated that when the Claimant sustained the injury he "didn't fall or twist, he was merely standing on a ladder and lifting a heavy part." Dr. O'Brien stated that his "musculoskeletal exam" of the Claimant's lumbosacral spine and hips was normal and the injury did not result in "anything as severe as incurable gluteal strain." Dr. O'Brien wrote the Claimant reached "an end of healing on or before" the October 14, 2014 IME and "returned to his pre-

injury level of function by that time." Dr. O'Brien stated the Claimant was able to return to work with no restrictions.

41. On October 21, 2014 the Claimant sought treatment at First Care Family Physicians (First Care). The Claimant was examined by Thomas Allen, M.D. The Claimant reported to Dr. Allen that he had right hip pain since he "reached high from [a] ladder" on July 6, 2014. The Claimant also reported experiencing tingling into his right foot, right calf, and all toes and "side of calf along with top of foot." Dr. Allen reviewed the MRI results and assessed "BL pars defect and spondylolisthesis which has now reverted to asymptomatic." He diagnosed a "radicular syndrome of lower limbs." Dr. Allen opined the claimant may or may not need surgery to "stabilize" the spine. He further opined that the "onset" of the radicular symptoms was "clearly related to the job incident." Dr. Allen also commented that the issue "may be as to how much he is limited by that incident vs. being limited by his underlying condition which was previously unknown but now may be limiting." Dr. Allen referred the Claimant to "Dr. Benz/Biggs" for a spine consult.

42. The Claimant credibly testified as follows. He made an appointment with Dr. Benz. However, when he arrived for the appointment the "care manger" told him he could not be examined because the case was "in litigation."

43. On November 18, 2014 Michael Janssen, D.O., examined the Claimant at the Center for Spine & Orthopedics. The Claimant explained that Dr. Janssen was a "preferred provider" under his health insurance policy.

44. In the November 18, 2014 report Dr. Janssen recorded a history that on July 6 the claimant was working "overhead on a ladder in a very difficult hyperextended position by report." The claimant then developed "unrelenting leg pain, severe back pain, pain radiating down his right lower extremity, and a sharp sensation." Dr. Janssen noted the claimant reported symptoms of "severe buttock pain, right lower extremity pain, and intermittent decreased sensation in the S1 distribution associated with his back pain." On PE Dr. Janssen noted a "markedly positive stretch root sign." He reviewed the MRI and opined that it "clearly demonstrates bilateral spondylolysis, subacute or acute in nature, with a disc herniation eccentering to the right, compressing the right exiting nerve root at L5 –S1." Dr. Janssen assessed a work related injury, an "unfortunate bilateral pars fracture with instability and a disc extrusion with herniation compressing the right S1 nerve root. Dr. Janssen opined that "this is a clearcut occupation-related injury." He further opined that there is also a "clearcut compressive pathology with an instability associated with the bilateral spondylolysis." Dr. Janssen stated the Claimant should consider conservative management "that would consist of surgical intervention to stabilize the unstable segment at the L5-S1 level."

45. The Claimant credibly testified that he never told Dr. Janssen that he developed back pain and severe leg pain on July 6, 2014. The Claimant stated that he didn't know where Dr. Janssen "got that stuff."

46. On December 5, 2014 the Respondents filed a General Admission of Liability (GAL) for an injury occurring on July 6, 2014. In the remarks section of the GAL the Respondents stated they were admitting liability for "medical benefits only for a Gluteal Strain."

47. On December 14, 2014 Kirby Duvall, M.D., examined the claimant at First Care. Dr. Duvall continued restrictions of no lifting greater than 30 pounds and no repetitive lifting greater than 15 pounds.

48. On January 8, 2015 Dr. O'Brien issued a second written report after reviewing Dr. Janssen's report and the September 29, 2014 MRI scan. Dr. O'Brien wrote the Claimant did not sustain a bilateral pars fracture from "standing on a ladder." He opined the bilateral pars fracture is the result of either "genetic makeup or an early childhood or young adulthood trauma." Dr. O'Brien also noted the MRI findings were "chronic." Dr. O'Brien further opined the injury of July 6, 2014 did not cause the spondylolysis noted on the September MRI. He explained that standing on a ladder, even if the Claimant was also lifting a heavy part, would not "constitute a work-related injury that would result in spondylolysis." Dr. O'Brien further explained that the Claimant did not "behave" as if he had acute spondylolysis because at the time of the injury he did not "immediately complain of pain" and did not immediately note "dysfunction." Dr. O'Brien also stated that based on his review of the records the Claimant did not seek medical treatment until July 10, 2014, four days after the injury. Dr. O'Brien stated that standing on a ladder does "not generate enough energy such that its dissipation into any musculoskeletal structure would result in breakage of that soft tissue or skeletal element."

49. On January 3, 2015 Dr. O'Brien issued a third report after reviewing VA records. Dr. O'Brien stated that the VA records did not affect the opinions he expressed in his prior reports. However they did establish the Claimant had a "preexisting spinal condition and this condition was significant enough that it resulted in disability."

50. Dr. O'Brien testified by deposition on January 23, 2015. Dr. O'Brien is board certified in orthopedic surgery and is level II accredited. Dr. O'Brien opined that on July 6, 2014 the Claimant sustained a "low-energy" injury that resulted in a right-sided gluteal strain. Dr. O'Brien explained that when a patient strains a gluteal muscle the patient typically experiences pain in the buttocks. Dr. O'Brien would expect a gluteal strain to heal within weeks and he opined the Claimant's strain had healed by the time of the October 14, 2014 IME. Dr. O'Brien stated that his examination of the Claimant's back was normal as was the neurologic examination of the lower extremities. Dr. O'Brien pointed out that on October 14 the Claimant reported his numbness, tingling and back pain was gone and he considered himself almost healed.

51. Dr. O'Brien testified that he reviewed the September 29, 2014 MRI. Dr. O'Brien opined that the MRI shows a "chronic," well-corticated fracture in the pars at L5 with a "low degenerative shift" through the fracture. He also stated that the MRI shows the chronic hypertrophy of the facet joints and disc dessication. Dr. O'Brien opined these findings would take years to develop and represent a long-standing process that

is “progressive.” Dr. O’Brien opined that the back conditions seen on the MRI are consistent with a preexisting condition and the development of “episodic pain.”

52. On January 29, 2015 Dr. Allen issued a report stating the Claimant could not return to work as an HVAC technician without restrictions because the job requires lifting more than 30 pounds. Dr. Allen opined the claimant’s condition, slippage of the L-5 vertebra forward on the sacrum, could be corrected through surgery.

53. Dr. Hughes testified by deposition on February 4, 2014. Dr. Hughes is board certified in occupational medicine and level II accredited. Since October 1, 2014 Dr. Hughes reviewed the September 29, 2014 MRI report, the VA medical records and the October 2009 medical reports including the x-rays.

54. Dr. Hughes opined the Claimant’s diagnoses include the following: (1) Occult spondylolysis of L5 as shown by the October 27, 2009 x-rays; (2) Lumbar sprain/strain sustained on July 6, 2014; (3) Persistent symptomatic spondylolisthesis at L5-S1 secondary to the July 6, 2014 sprain/strain; (4) Right lower extremity radiculopathy meriting further evaluation to include neuro-diagnositc evaluation of the right lower extremity. Dr. Hughes explained that the term “spondylolysis” refers to a “pars interarticularis defect” which can result from trauma but is most commonly congenital. He also explained that “spondylolisthesis” refers to “progressive instability allowing the spine to slip at that particular level where the fracture no longer allows support through the pars interarticularis in the spine.”

55. Dr. Hughes opined that when he examined the Claimant on October 1, 2014 he was manifesting symptoms consistent with “symptomatic spondylolisthesis of the lumbar spine” evidenced by positive right-sided facet loading, limited right lateral flexion, and limited lumbar extension and flexion. Dr. Hughes opined that on July 6, 2014 the Claimant suffered an injury that aggravated his preexisting spondylolysis so as to cause a “frank and symptomatic spondylolisthesis of L5-S1 with right lower extremity radiculopathy.” Dr. Hughes explained that the claimant gave a history that on July 6 he was working overhead in a “sustained extended position.” Dr. Hughes opined this constituted an “awkward position” that caused “torque in the lower spine” sufficient to aggravate the spondylolysis and cause it to become symptomatic.

56. Dr. Hughes opined that his causation analysis is consistent with the medical records. He stated that the October 2009 x-rays showed spondylitic changes in the lumbar spine. However, when the Claimant was seen at the VA in April 2013 his lumbar ROM was normal so that in Dr. Hughes’s opinion there was “no evidence of a functional impairment stemming from an L5-S1 spondylolisthesis.” Dr. Hughes explained that after July 6, 2014 the evolution of the claimant’s symptoms, including the pain in the right buttocks, was consistent with a “pars defect progression to spondylolisthesis of L5-S1.” Dr. Hughes explained that the right buttock pain was consistent with the dermatomal path of the L5 and S1 nerves on the right. Dr. Hughes opined that the essentially negative examination noted by Dr. O’Brien on October 14, 2014 is consistent with the “typical waxing and waning of this condition that occurs early on after the condition has been aggravated.”

57. Dr. Hughes opined that if the claimant returned to his regular employment as an HVAC technician he would aggravate the frank segmental instability at L5-S1. He opined that the restrictions imposed by Dr. Allen on January 29, 2015 are appropriate and related to the July 7, 2014 injury.

58. Dr. Hughes opined based on his review of the medical records after July 6, 2014 that the treatment the claimant received was appropriate. Dr. Hughes specifically endorsed the care rendered by OHS (including Dr. Stefanon and Dr. Yanagi), treatment provided by First Care physicians (Dr. Allen and Dr. Duvall) and by Dr. Janssen.

CAUSE OF LOW BACK CONDITION AND RELATED SYMPTOMS

59. The Claimant proved it is more probably true than not that on July 6, 2014 he sustained a low back injury proximately caused by the performance of his duties as an HVAC technician. The Claimant credibly testified as follows. On July 6 he was required to work overhead while standing on a ladder and reaching overhead to repair duct work. While performing this activity he experienced the sudden onset of right buttock cramping while performing this activity. By the next morning he experienced severe buttock pain and was unable to get out of bed. Soon thereafter he began to experience right lower extremity numbness and tingling under his big toe and later in the ankle and calf. The Claimant's testimony concerning this sequence of events is corroborated by the medical history that he gave to several providers including Dr. Stefanon on July 10, 2014, PT Braunlin on July 10, 2014 and Dr. Yanagi on July 22, 2014.

60. Dr. Hughes credibly and persuasively opined that the "awkward posture" that the Claimant assumed on July 6, 2014 probably caused an aggravation of preexisting lumbar spondylolysis seen in the October 2009 x-rays. Dr. Hughes credibly explained that the claimant's overhead activity and awkward posture on July 6 probably caused the spondylolysis to become a symptomatic L5-S1 spondylolisthesis resulting in right-sided radicular symptoms.

61. The opinion of Dr. Hughes is corroborated by the medical records concerning the development of the claimant's symptoms. Although it is true that the claimant had a preexisting degenerative low back condition, Dr. Hughes persuasively argued that the claimant did not exhibit any radicular-type symptoms when he was examined by the VA in April 2013, slightly more than a year before July 6, 2014. However, after July 7, 2014 the claimant began to experience radicular-type symptoms that rapidly evolved. Dr. Hughes persuasively explained that there was no evidence of primary hip pathology, but the Claimant's hip pain was consistent with irritation of the L4-5 and/or L5-S1 nerves where they passed through the "sciatic notch." Moreover, within 3 days of the date of the injury the claimant began to experience radicular-type symptoms in his right big toe and later in his foot, ankle and calf.

62. Dr. Hughes's opinion is corroborated by the credible opinion of Dr. Yanagi. Dr. Yanagi credibly opined on July 22, 2014 that the Claimant appeared to have

"radicular pain" possibly at the "lower lumbar spine level." She assessed right "gluteal pain with possible L4-5 radicular pain to the right leg and recommended a lumbar MRI. Dr. Yanagi credibly reported the Claimant's symptoms were consistent with a work-related mechanism of injury.

63. Dr. Hughes's opinions are further corroborated by the credible opinions of Dr. Allen. Dr. Allen credibly opined that the onset of the Claimant's radicular symptoms was "clearly related to the job incident." Dr. Allen assessed a "radicular syndrome of the lower limbs" which had reverted to an "asymptomatic condition" on October 21, 2014.

64. Dr. O'Brien's opinions are not as persuasive as those expressed by Dr. Hughes, Dr. Yanagi and Dr. Allen. Dr. O'Brien did not persuasively refute Dr, Hughes's argument that there is a temporal relationship between the claimant's activity of July 6, 2014 and the subsequent and rapid onset of radicular symptoms. The ALJ is not persuaded that the onset of the Claimant's symptoms in the right buttock and the right lower extremity represent the natural progression of the claimant's preexisting condition without regard to the events of July 6, 2014. The ALJ is not persuaded by Dr. O'Brien's opinion that the appearance of the radicular symptoms was coincident with the Claimant's July 6 activities but not related to them.

TEMPORARY TOTAL AND TEMPORARY PARTIAL DISABLITY BENEFITS

65. The Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing July 7, 2014 and continuing through November 9, 2014.

66. The Claimant's regular job duties as an HVAC technician required him to left in excess of 50 pounds and climb ladders.

67. The Claimant credibly reported to the employer that on July 7, 2014 he was in too much pain to work because of his hip and his knees. The Claimant left work on July 7, 2014 at least in part because of the injury to his low back on July 6, 2014.

68. On July 10, 2014 Dr. Stefanon credibly and persuasively imposed restrictions of no lifting greater than 30 pounds and no climbing ladders. The ALJ infers that these restrictions were imposed at least in part because of the injury to the Claimant's back. Dr. Stefanon diagnosed a "gluteal strain" and stated that the mechanism of injury was consistent with the claimant's symptoms.

69. The credible opinions of Dr. Duvall, Dr. Allen and Dr. Hughes establish that the Claimant has remained disabled from performing his regular employment as an HVAC technician because he cannot lift more than 30 pounds as a result of the injury-related spondylolisthesis at L5-S1.

70. The Claimant credibly testified that the employer never offered him work within his restrictions.

71. The Claimant credibly testified that he commenced work at “TeleTech” on November 10, 2014. The claimant credibly explained that this is “customer service phone job.” Therefore the ALJ infers the duties of the Teletech job don not exceed the 30-pound lifting restriction imposed on the claimant. The claimant is entitled to temporary partial disability benefits (TPD) commencing November 10, 2014.

72. The Claimant received unemployment insurance benefits for a period of 14 weeks from August 3, 2014 through November 8, 2014. The unemployment records indicate that the gross amount paid to the claimant was $532 per week, or a total of $7448.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers’ Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of a claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY

The Claimant alleges that a preponderance of the evidence establishes that on July 6, 2014 he sustained a compensable injury to his low back. The Respondents contend the Claimant failed to prove that he sustained any injury to the low back on July 6 and the most probable explanation for the claimant’s radicular-type symptoms is the natural progression of his preexisting degenerative low back disease.

The Claimant was required to prove by a preponderance of the evidence that the condition for which he seeks disability benefits and medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-

301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 59 through 64 the claimant proved it is more probably true than not that he sustained an injury to his low back on July 6, 2015. The claimant credibly testified that on July 6, 2015 he was standing on a ladder, working overhead in an awkward posture. Dr. Hughes credibly and persuasively opined that this activity aggravated the Claimant's pre-existing lumbar spondylolysis resulting in a spondylolisthesis and consequent radicular symptoms in the right lower extremity. Dr. Hughes's conclusion is corroborated by the credible opinions of Dr. Yanagi and Dr. Allen.

TEMPORARY TOTAL AND TEMPORARY PARTIAL DISABLITY BENEFITS AND OFFSET

The Claimant contends that he is entitled to an award of TTD benefits commencing July 7, 2014 through November 9, 2014, and a an award of TPD benefits commencing November 10, 2014 and continuing until terminated by law or order. The respondents contend that the Claimant failed to prove that he was disabled by the industrial injury. In the event the Claimant proves entitlement to disability benefits the Respondents seek an offset based on the Claimant's receipt of unemployment compensation benefits.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the Claimant to establish a causal connection between a work-related injury

and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The Claimant need not prove the industrial injury was the sole cause of the wage loss. Rather, temporary benefits may be awarded if the injury contributes in part to the wage loss. *See Horton v. Industrial Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996).

The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Findings of Fact 65 through 70 the Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing July 7, 2014. The Claimant proved that he left work on July 7, 2014 in part because of pain in the right hip caused by the July 6, 2014 injury. The ALJ is also persuaded by the credible medical records showing that the industrial injury to the claimant's low back caused Dr. Stefanon, Dr. Allen and Dr. Hughes to impose restrictions against lifting more than 30 pounds. These credible restrictions disabled the Claimant from performing the regular duties of his employment because the job of HVAC technician requires lifting in excess of 50 pounds.

The Claimant shall be entitled to receive TTD benefits at the statutory rate for the period of July 7, 2014 through July 9, 2014. The ALJ notes that the parties agree the maximum compensation rate for TTD benefits for this injury is $881.65. The Respondents may take an offset of $7448 against their liability for TTD benefits on account of the Claimant's receipt of unemployment insurance benefits. Section 8-42-103(1)(f), C.R.S.

Section 8-42-106(1), C.R.S., provides that in cases of TPD the employee "shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance" of the TPD. The Claimant continued to be disabled when he accepted the job at TeleTech because the industrial injury precluded him from performing his regular job as an HVAC technician. Therefore, the Claimant is entitled to TPD benefits at the rate of sixty-six and two-thirds of the difference between the stipulated average weekly wage of $1350 and the Claimant's average weekly wage at Teletech.

Teletech wage records demonstrate that the Claimant earned $4,983.77 for the period November 10, 2014 through January 25, 2015. This was a period of 76 days or 10.85 weeks. If the claimant had worked his regular job during the same period he would have earned $14,647.50 ($1350 x 10.85 weeks). The difference between $14,647.50 and $4,983.77 is $9,663.73. When $9,663.73 is multiplied by .666 (two-thirds of the difference between average weekly wage and actual earnings at Teletech) the result is $6,436.04. The Claimant is entitled to $6,436.04 in TPD benefits for the period of November 10, 2014 through January 25, 2015. Further, the Respondents shall continue to pay TPD benefits in accordance with the statutory formula until that obligation is terminated by law or order.

MEDICAL BENEFITS

The Claimant seeks an award of medical benefits as a result of the July 6, 2014 injury to his low back. As determined above, the ALJ finds the Claimant sustained a low back injury in the nature of an aggravation of a preexisting low back condition. The injury resulted in a "frank spondylolisthesis" and resulting radicular symptoms in the right lower extremity. The issues then become what medical treatment has the Claimant received that is reasonable, necessary and authorized.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Section 8-43-404(5)(a)(I)(A), C.R.S. gives the Respondents the right in the first instance to select the authorized treating physician (ATP). Authorization refers to a physician's legal status to treat the industrial injury at the Respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Section 8-43-404(5)(a)(I)(A) further provides that the Respondents may select the ATP by providing the Claimant with a list of providers from which the claimant may select the provider to treat the injury. However, the statute further provides that "if the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

Once an ATP has been selected the Claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the Respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Tidwell v. Spencer Technologies*, WC 4-917-514-03 (March 2, 2015).

However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial*

Commission, 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Thus, where an employer directed a claimant to file a PIP claim rather than a workers' compensation claim, the compensation carrier waived any subsequent right to object to a change of physician authorized by the PIP carrier. *McLaughlin-Kramer v. Capital Pacific Homes,* W.C. No. 4-491-883 (ICAO June 20, 2002); *aff'd., Capital Pacific Homes v. Industrial Claim Appeals Office,* (Colo. App. No. 02CA1367, May 15, 2003) (not selected for publication).

Authorized providers also include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the Claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Concerning authorization of medical treatment, the ALJ concludes that the right of selection passed to the Claimant under 8-43-404(5)(a)(I)(A) because the employer failed to provide a list of designated providers. As determined in Finding of Fact 18, the Claimant credibly testified that the employer never provided a list of authorized medical providers after the Claimant reported the injury and requested treatment. The ALJ concludes that, as an initial matter, the Claimant selected Dr. Bethards as the ATP.

As determined in Findings of Fact 14 and 19, Dr. Bethards referred the claimant to "OHS" for follow-up medical treatment. OHS refers to Occupational Health Services where the Claimant received treatment from various providers including Dr. Stefanon, Dr. Yanagi and PT Braunlin. The ALJ concludes all treatment rendered by OHS providers was authorized.

As determined in Finding of Fact 28 and 38, in October 2014 the Claimant "changed" physicians to First Care (Dr. Allen and Dr. Duvall). The ALJ finds and concludes that the employer, by its conduct in this matter, conveyed to the Claimant that he was entitled to choose his own treating physicians and that the employer waived any objection to his choice of physicians. Specifically, after the Claimant requested medical treatment Mr. Dunn told the claimant that he could go to his own doctor because the employer considered the claimant's problems to be age-related. In so doing, Dunn conveyed to the Claimant the impression that the employer did not consider his condition to be work-related and was not interested in designating physicians to treat the condition.

The ALJ further finds that treatment provided by Dr. Janssen was authorized. The Claimant selected Dr. Janssen after Dr. Allen referred him to Dr. Benz for an orthopedic evaluation. Dr. Benz then refused to treat the claimant for the non-medical reason that he did not wish to be involved in a litigated matter. Under these circumstances the Claimant reasonably selected Dr. Janssen to perform the orthopedic evaluation. The employer had already waived objection to the Claimant's selection of physicians to treat the injury.

Based on the credible opinion of Dr. Hughes as well as the medical records, the ALJ concludes the treatment provided at Urgent Care by Dr. Bethards, the treatment provided at OHS, the treatment provided by Dr. Allen and Dr. Duvall and the treatment provided by Dr. Janssen has been reasonable and necessary to cure and relieve the effects of the claimant's low back injury of July 6, 2014.

The ALJ finds that AFM has not provided any treatment causally related to the industrial injury. A physician's assistant did provide a note concerning restrictions, but this was associated with the request for FMLA leave.

Because the ALJ has determined that treatment provided has been reasonable, necessary and authorized, the ALJ need not address the Claimant's request for a change in the authorized treating physician(s).

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay the Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Insurer shall pay the Claimant TTD benefits at the applicable statutory rate from July 7, 2014 through November 9, 2014. Insurer shall pay TPD benefits in the amount of $6,436.04 for the period of November 10, 2014 through January 25, 2015. Thereafter, Insurer shall continue to pay TPD benefits in accordance with the statutory formula until such time as that obligation is terminated by law or order.

3. Insurer may reduce the amount of TTD benefits by taking an unemployment insurance offset in the amount of $7448.

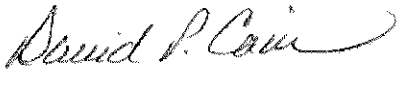
4. Insurer shall pay reasonable and necessary medical expenses for treatment of the Claimant's low back injury. The Insurer shall pay for the treatment already provided by Urgent Care, OHS, First Care and Dr. Janssen.

5. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 17, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did the Claimant prove by a preponderance of the evidence that she sustained any injury proximately caused by the performance of service arising out of and in the course of her employment?

- Did the Claimant prove by a preponderance of the evidence that she is entitled to awards of temporary total disability and temporary partial disability benefits as a result of the alleged injury?

- Did the Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable and necessary medical benefits as a result of the alleged injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 10, with the exception of Exhibit 8 bate stamp 51, were admitted into evidence. Respondents' Exhibits A through H were admitted into evidence. The parties stipulated that if the claim is found compensable that the Claimant's average weekly wage is $336.71.

CLAIMANT'S TESTIMONY CONCERNING INJURY

2. The Claimant testified as follows concerning the events of August 5, 2014. She was employed as a hair stylist by the Employer. Her duties required her to help maintain the salon. She went to the back of the salon to clean the "back shelf." A bottle of developer was holding a shelf up because a peg was missing. When she moved the developer bottle the shelf tilted and caused 12 one liter developer bottles to fall on her. As a result she immediately experienced dizziness and loss of vision. Shortly thereafter a supervisor, Ms. Cruz, arrived at the salon. At the Claimant's request Ms. Cruz called an ambulance.

3. The Claimant testified as follows concerning treatment that she received on August 5, 2014. The ambulance transported her to St. Anthony's Hospital North (St. Anthony's) where she received emergency treatment. Later that day she went to NextCare Urgent Care (NUC), one of the Employer's designated medical providers. At the time she went to NUC she was dizzy and had a headache that made her feel as if her head was in a vice.

4. On cross-examination the Claimant admitted that she had experienced a number of medical problems prior to the alleged injury. She admitted to "longstanding" nystagmus (rapid eye movement), blurry vision when reading, a history of head and neck pain, a history of dizziness and vertigo plus a history of nausea. The Claimant testified that prior to August 5, 2014 she had never lost her vision as she did after she was hit by the bottles of developer. The Claimant further testified that her pre-injury symptoms resolved after she learned she was "pre-diabetic" and changed her diet. Finally, the Claimant testified that after the alleged injury she developed bruises and swelling of her face.

PRE-INJURY SYMPTOMS AND TREATMENT

5. The Claimant's personal care physician is Michael Iannotti, M.D., of Family Medicine Associates (FMA). In approximately August 2008 Dr. Iannotti referred the Claimant to physical therapy (PT) based on diagnoses of cervical strain/sprain and "C-spine DDD."

6. On August 11, 2008 the Claimant underwent a PT evaluation based on Dr. Iannotti's referral. At the evaluation the Claimant reported symptoms of "posterior head/neck pain as well as headaches. She stated that these symptoms had been "ongoing for years." She reported the headaches occurred daily and could last for the entire day. The Claimant further advised that she experienced numbness and tingling in her bilateral upper extremities. The physical therapist noted "decreased mobility in the lower cervical and upper thoracic spine limiting active and passive range of motion."

7. On June 18, 2010 the Claimant was seen at Kaiser Permanente (Kaiser) for complaints of 5 to 6 days of left-sided neck pain and left ear pain and pressure.

8. On February 14, 2011 the Claimant was seen at Kaiser. She reported she was a hairdresser and had experienced headaches and a "kink in neck." The Claimant reported a history that she underwent a "few massages" and noticed "muscle pain worsened with spasm."

9. On December 19, 2013 PA Sara Weltzer examined the Claimant at AFM. The Claimant reported that she felt dizzy, her eyes "weren't quite right," and that she was having headaches. The Claimant advised that she had experienced daily headaches since a back injury 16 years ago. She described the dizziness as a spinning sensation exacerbated when standing or sitting. She had difficulties focusing when reading because the words on the page were blurry.

10. On March 4, 2014 Dr. Iannotti examined the Claimant for complaints of headache associated with nausea. The Claimant advised that she had experienced headaches since an injury at the age of 23. She also related a history of cervical disc disease. Dr. Iannotti suspected myofascial headaches. He recommended chiropractic treatment, massage therapy and prescribed amitriptyline for pain.

11. On July 30, 2014 Dr. Iannotti examined the claimant for complaints of right eye twitching, persistent blurred vision. Dr. Iannotti considered but doubted a diagnosis of "MS." He assessed "eye muscle twitches" and obesity.

12. On July 31, 2014 Brian Abert, O.D., examined the claimant for a complaint of right eye twitching. Dr. Abert noted the Claimant was seeking further testing for "eye/vision-related evidence of multiple sclerosis." Dr. Abert stated that "unwanted eye movements" were "not elicited in office." However, he noted that "visual field testing had revealed a patternless, mild general depression." Dr. Abert recommended a "neurological work-up to explain the mild visual depression."

MEDICAL TREATMENT AFTER ALLEGED INJURY

13. After the alleged injury the Claimant was transported to St. Anthony's where she was examined and treated by Vassily Theodore Eliopoulos, M.D. The Claimant gave a history that a shelf gave way causing a "1L shampoo bottle to fall onto her head." She complained of a mild headache, and a "woozy" sensation with nausea. She also reported a "general sensation of not feeling well." She denied other complaints including neck and back pain. Dr. Eliopoulos noted the Claimant had a "normal neurologic exam" and there was "no apparent traumatic injury on clinical exam." Dr. Eliopoulos determined that no imaging was indicated given the "benign clinical presentation." His "primary impression" was closed head injury (CHI) and he noted differential diagnoses of "fracture, intracranial hemorrhage, as concussive syndrome, malingering." Dr. Eliopoulos prescribed Zofran for nausea and discharged the Claimant home with a recommendation for outpatient follow-up. Dr. Eliopoulos noted that he declined to order "imaging" because of the "minor mechanism of injury and [the Claimant's] normal neurologic exam."

14. Later on August 5, 2014 the Claimant reported to NUC where she was examined by PAC Corinne Hanisch. The Claimant gave a history that she was at work and "many bottles fell and hit [her] in head and neck." She reported severe and constant left lateral neck pain and left posterior neck pain. Pertinent negatives included "incoordinaton, joint pain, muscle spasm, numbness, tingling and weakness." The Claimant reported no "relevant medical, surgical or psychiatric history." The left side of the cervical spine was tender to palpation as was the "left upper trap." There was subjective pain with cervical flexion and extension. There were no "impressive skin lesions present." The Claimant's memory was "intact" and there were no balance or gait problems. PAC Hanisch assessed "cervicalgia" and CHI. She prescribed Ultram.

15. On August 5, 2014 PAC Hanisch completed a Physician's Report of Worker's Compensation Injury form (WC 164). On this form PAC Hanisch recorded that the Claimant reported she was sore, stiff, had a headache and it was "hard to process things." PAC Hanisch checked a box on the form indicating that her "objective findings" were "consistent with history and/or work related mechanism of injury/illness." She imposed restrictions of no lifting, no carrying, no pushing or pulling and no reaching over head.

16. On August 6, 2014 the Claimant returned to NUC and was examined by Cynthia Riegel, M.D. The Claimant reported neck pain radiating to the top of the head as a result of a "direct blow" that occurred at work on August 5, 2014. The pain was reportedly moderate to severe and involved "aching and throbbing." Dr. Riegel noted "pertinent negatives" included "bruising." On that portion of the report captioned as "review of symptoms" the claimant was "positive" for dizziness in the neuro/psychiatric category, and "positive" for decreased mobility, neck pain and spasms in the musculoskeletal category. The claimant was "negative" for bruising in the hematology category. Dr. Riegel assessed an "acute" sprain or strain of the cervical spine. She took the claimant off work for the period of August 6, 2014 through August 12, 2014. Dr. Riegel recommended bed rest until the Claimant's next medical visit.

17. Dr. Iannotti again examined the Claimant on August 7, 2014. Dr. Iannotti noted the claimant had a "concussion from work injury" but stated he was not seeing her for this condition because she was being treated by "workmans comp." Dr. Iannotti noted a medical history of obesity, tobacco dependency, endometriosis, chronic headaches, cervical disc disease "insulin resistance." .The Claimant admitted to symptoms of dizziness, difficulty speaking and balance and coordination problems. Dr. Iannotti assessed "vision abnormalities," dysmetabolic syndrome x and tobacco use disorder. Dr. Iannotti recommended referral to a "neuro-opthalmology specialist" for the visual disorder, less sugar and "carbs," more exercise for the metabolic disorder and to stop smoking.

18. On August 12, 2014 PAC Hanisch again examined the claimant at NUC. The Claimant presented with a headache and associated "dizziness, nausea neurological symptoms and personality change." The claimant reported she felt 50% better although her neck still felt "stiff" and she had intermittent dizziness with nausea. The Claimant also reported that she felt "slow to comprehend" and was having difficulty searching for words. PAC Hanisch assessed dizziness, nausea, cervical strain and CHI. She referred the Claimant to neurology for evaluation and treatment. On August 12 PAC Hanisch completed another WC 164 and released the Claimant to "light duty" with restrictions of no lifting, carrying, pushing and pulling in excess of 5 pounds. PAC Hanisch again checked a box on the WC 164 indicating that her "objective findings" were "consistent with history and/or work related mechanism of injury/illness."

19. On August 19, 2014 PAC Hanisch again examined the Claimant at NUC. The Claimant reported symptoms of "imbalance and spinning" that were aggravated by bending, rapid movement and turning her head from side to side. The Claimant reported nausea as an associated symptom. The Claimant reported she felt 50% better but still felt "off." She requested a release to return to work cutting hair as she was "not getting paid for light duty" and felt safe using shears. PA Hanisch released the Claimant to modified duty and restricted her to no more than 5 hours per day of walking, standing, sitting, crawling, kneeling, squatting and climbing. PAC Hanisch again checked a box on the WC 164 indicating that her "objective findings" were "consistent with history and/or work related mechanism of injury/illness."

20. The next day, August 20, 2014, the Claimant returned to NUC where she was examined by Dr. Riegel. The Claimant reported that August 20 was her first day back to work and that she worked 5 hours. She advised that she developed vertigo while coloring hair and then experienced a severe headache an hour or two later. This was a left-sided throbbing headache with associated symptoms of dizziness and fatigue. Dr. Riegel assessed a concussion "improved," and acute dizziness and headache. She prescribed promethazine for the dizziness.

21. On August 21, 2014 the Respondents filed a Notice of Contest based on the contention that the alleged injury was not work-related.

22. On August 30, 2014 the Claimant returned to Dr. Iannotti wanting "to talk about workman's comp." The claimant gave a history that twelve 1 liter bottles fell from above onto her head, neck, arms and shoulders. She reported she did not lose consciousness and there was no syncope. She advised she was working 4 hours each day cutting hair and "doing her usual job," and that her only restriction was to limit work to 4 hours per day. The Claimant expressed a desire to continue the 4-hour restriction for another 2 weeks. Dr. Iannotti noted the only symptom that had not fully resolved was dizziness. Dr. Iannotti assessed "post-concussive syndrome" and dizziness. He stated the examination did not warrant any imaging or referrals. He advised the Claimant to continue taking prescribed medications for dizziness and stated he would give her a note for part time work from August 30, 2014 to September 13, 2014.

23. On September 2, 2014 the Claimant returned to PAC Hanisch at NUC. The claimant reported she was still experiencing dizziness but this condition was improving. The Claimant denied headaches, nausea, memory problems, speech problems, vision problems and a stiff neck. PAC Hanisch noted that that the case was closed because "work comp" had denied the claim. She referred the Claimant to her "PCP" for further care.

24. On September 16, 2014 the Claimant sought chiropractic treatment. She completed an intake form and listed her main complaint as "headache." She wrote that the headaches were the result of "work stress" and were not attributable to an accident, injury or trauma. On November 17, 2014 the chiropractor noted the claimant was "feeling better" and the headaches had "improved." However, the headaches still continued to come and go.

INDEPENDENT MEDICAL EXAMINATION

25. On January 20, 2015 the Respondents notified the Claimant that she was to attend an independent medical examination (IME) with Lawrence Lesnak, D.O., on February 18, 2015.

26. Dr. Lesnak is board certified in physical medicine and rehabilitation and elctrodiagnosis. Dr. Lesnak is level II accredited.

27. On February 18, 2015 Dr. Lesnak issued a written report concerning the IME. The report reflects that Dr. Lesnak took a history from the Claimant, reviewed

pertinent medical records from before and after the alleged injury and performed a physical examination (PE). The Claimant gave a history that when she was at work on August 5, 2014 "12 bottles of one liter product" rolled off of a shelf and struck her "on the left face/scalp as well as her left suprascapular region." Several minutes later she developed dizziness and nausea and was transported to St. Anthony's emergency room. The Claimant also reported that she developed bruising throughout the left side of her face "for approximately one week." On the date of examination the Claimant reported most of her symptoms had resolved but she reported intermittent short term memory loss and "cracking sensations in her bilateral jaw regions." The Claimant denied any neck symptoms, shoulder symptoms, dizziness, nausea or "other cognitive issues."

28. On PE Dr. Lesnak noted normal cervical spine range of motion without reproduction of any symptoms. The Claimant was "oriented times three." Her speech was fluent "without evidence of semantic or phonemic language errors" and her "abstract thinking" was intact. There was no evidence of audible or palpable crepitus on examination of the jaw. Dr. Lesnak reported that in fact there were "no abnormal exam findings whatsoever identified."

29. In the February 18, 2015 report Dr. Lesnak opined that to a reasonable degree of medical probability the Claimant did not "sustain any type of trauma or injury as it pertains to the alleged incident that occurred" on August 5, 2014. Dr. Lesnak opined that even if one or more bottles struck the Claimant on August 5 she did not require any medical treatment, emergent or otherwise, as a result of the incident. Dr. Lesnak further opined that the August 5 incident did not cause the need for any work restrictions or activity restrictions.

30. In support of these conclusions Dr. Lesnak explained that in his opinion the Claimant is an unreliable historian with respect to her subjective complaints. Dr. Lesnak pointed out that although the Claimant denied to him that she had pre-injury complaints of dizziness, memory loss, neck pain or jaw symptoms, the medical records show that she sustained a head injury in 1995. The medical records also show that she has experienced chronic neck pain and headaches dating back to at least age 23, and that she reported dizziness "at least seven to eight months prior to August 5, 2014." In July 2014 the Claimant was also referred for a neuro-ophtalmologic evaluation because of blurred vision, documented visual field deficits and nystagmus. Dr. Lesnak further noted that although the Claimant reported that the falling bottles caused bruising on her face, the St. Anthony's emergency room report did not mention any "ecchymosis, abrasions, etc." involving the head, neck, shoulders or anywhere else on her body.

31. Dr. Lesnak noted that although the Claimant was complaining of short term memory loss and bilateral jaw crepitus, his examination yielded "absolutely no evidence" of "any gross or focal cognitive abnormalities" or any temporomandibular joint pathology. Indeed, Dr. Lesnak stated that "that there were no abnormal exam findings whatever identified."

32. Dr. Lesnak also opined that emergency room report the Claimant did not need emergent treatment nor did she require treatment of any kind for the alleged events of August 5, 2014. Similarly, Dr. Lesnak opined the incident of August 5 did not require any restrictions or activity limitations.

33. Dr. Lesnak testified at the hearing. For the most part he reiterated the opinions and reasoning expressed in his written report. He added that in cases of soft tissue trauma skin redness appears immediately followed by bruising that appears almost immediately. He noted the Claimant had been examined in the emergency room and by Dr. Iannotti within three days following the date of injury and these providers did not note any bruising or swelling. Dr. Lesnak noted there were two NUC records (presumably from August 5 and 6) but he didn't "know what to make" of them.

34. Although the Claimant proved that she sustained an "accident" at work on August 5, 2014, she failed to prove it is more probably true than not that she sustained a compensable "injury" that caused a need for medical treatment or a "disability."

35. The Claimant credibly testified that on August 5, 2014 twelve 1 liter bottles of developer fell off of a shelf and that some or all of these bottles came into contact with her head and upper body.

36. Insofar as the Claimant's testimony could be interpreted to support a finding that the August 5, 2014 accident caused or aggravated numerous symptoms including headaches, dizziness, memory problems, neck pain and nausea her testimony is not credible and persuasive. Similarly, insofar as the Claimant's testimony could be interpreted to support the inference that the August 5 incident caused a need for medical treatment and disability it is not credible and persuasive.

37. The Claimant's testimony that the bottle incident caused the immediate onset of dizziness and "loss of vision" such that she requested to be taken to the hospital by ambulance is not credible and persuasive. The medical records from St. Anthony's emergency room on August 5, 2014 do not mention "dizziness" or "loss of vision" as symptoms reported by the Claimant. The ALJ infers that if the Claimant had actually "lost her vision" on August 5 she would have reported this dramatic symptom to Dr. Eliopoulos and he would have been documented it. Similarly, the ALJ infers that if the Claimant experienced "dizziness," as she had in the past, she would have reported that symptom to Dr. Eliopoulos and he would have recorded it. Instead, the Claimant reported symptoms of headache, wooziness, nausea and "not feeling well." Moreover, Dr. Eliopoulos reported the Claimant underwent a "normal" neurological evaluation, had "no apparent traumatic injury on clinical exam" and exhibited a "benign clinical presentation." Although Dr. Eliopoulos's primary impression was a CHI, he also listed "malingering" as one of the differential diagnoses. The ALJ infers from the emergency room records that Dr. Eliopoulos thought the claimant's subjective symptoms and reported history were consistent with a CHI, but he could find no objective evidence to support that diagnosis. Indeed, Dr. Eliopoulos declined to do imaging studies in light of his "normal neurologic exam" of the Claimant.

38. The Claimant's testimony is also incredible and unpersuasive because the symptoms she reported to PAC Hanisch on August 5, 2014 are significantly different that those she reported at the emergency room earlier the same day. The Claimant reported to PAC Hanisch that she was suffering from cervical and trapezius pain, a headache and difficulty "processing" things. The emergency room report indicates the Claimant's neck was "supple" and she did not report neck pain. Moreover, the Claimant apparently did not tell PAC Hanisch that she was "dizzy" or had lost her vision after the incident. Indeed the complaint of "dizziness" was not noted until the Claimant saw Dr. Riegel on August 6, 2014, and there are no documented post-injury complaints of "vision problems" until the Claimant saw Dr. Iannotti on August 7, 2014.

39. The Claimant's testimony is also incredible and unpersuasive because she failed to disclose her relevant medical history to PAC Hanisch and Dr. Riegel. When PAC Hanisch first examined the Claimant on August 5, 2014 Hanisch recorded that there was no relevant "medical, surgical or psychiatric history." The ALJ infers from this statement that the Claimant failed to mention her long history of cervical pain, headaches, dizziness and eye problems. This long history is documented in Findings of Fact 5 through 12 and by the Claimant's own testimony on cross-examination (Finding of Fact 4). After August 5 PAC Hanisch and Dr. Riegel periodically reviewed and updated the claimant's medical history, but their notes never mention the Claimant's pre-injury history.

40. The Claimant's testimony is also incredible and unpersuasive because, contrary to her statements at the hearing and to Dr. Lesnak, there is no credible and persuasive evidence to corroborate that she sustained any bruises as a result of the August 5, 2014 incident. On August 5, 2014, no redness, bruises or swelling were noted at the emergency room or by PAC Hanisch. Indeed the emergency room records document a "benign" presentation and "no apparent" traumatic injury." When Dr. Riegel examined the Claimant on August 6, 2014 she was "negative for bruising" and "bruising" was listed under the "negative" category for hematology. The ALJ infers that Dr. Riegel did not observe any bruising or skin discoloration. The ALJ also credits Dr. Lesnak's testimony that if the claimant had been struck in the face hard enough to cause bruises she would have exhibited "red" marks immediately after the August 5 incident and actual bruises within hours afterwards.

41. The Claimant's testimony is also incredible and unpersuasive because most of the symptoms she reported over the month following the incident of August 5, 2014 existed prior to that date. As noted, the Claimant had a long history of neck pain, headaches, nausea and dizziness prior to August 5. On December 19, 2013, less than nine months prior to alleged injury she reported headaches, nausea and eye problems with reading. On March 4, 2014 Dr. Iannotti examined the claimant for complaints of headaches and nausea with a history of "cervical disc disease." Dr. Iannotti prescribed chiropractic treatment, massage therapy and medication. On July 31, 2014, four days prior to the alleged injury Dr. Abert referred the Claimant referred for a "neurological work-up to explain" mild visual field depression. The Claimant's testimony that all of her symptoms had resolved prior to August 5 because she was diagnosed as "pre-diabetic" and changed her diet is not credible. To the contrary, Dr. Iannotti's report of August 7,

2014 indicates that it was on this date that he diagnosed a “dysmetabolic syndrome” and recommended that the claimant eat less sugar and fewer “carbs.”

42. Dr. Lesnak persuasively opined that even if the Claimant was struck by one or more bottles on August 5, 2014 she did not require any medical treatment and did not require any restrictions or limitations as a result of the incident. Dr. Lesnak persuasively opined the Claimant is not a reliable historian for the reasons stated in Finding of Fact 30. He persuasively opined that the medical records do not contain any objective evidence, such as bruising, to establish that the Claimant sustained a “trauma” sufficient to injure her head, neck or body.

43. To the extent that PAC Hanisch and Dr. Riegel opined the Claimant sustained a CHI, neck sprain strain or other injuries as a result of the accident of August 5, 2014, and that the August 5 event caused a need for treatment and medical restrictions, their opinions are not persuasive. The opinions of PAC Hanisch and Dr. Riegel were issued without any apparent knowledge of the Claimant’s medical history prior to August 5, 2014. Therefore their opinions concerning the cause of the various symptoms reported to them by the Claimant is not persuasive. Further, neither of these providers resented a persuasive rebuttal to Dr. Lesnak’s arguments that if the Claimant was struck by bottles on August 5 that event was insufficient to cause a need for treatment or the need for restrictions.

44. To the extent that Dr. Iannotti opined the events of August 5, 2014 caused a “post-concussive syndrome,” his opinion is not persuasive. There is no credible and persuasive indication that Dr. Iannotti reviewed the medical records from the St. Anthony’s emergency room or the records from NUC. Further, Dr. Iannotti did not offer a persuasive rebuttal to the arguments made by Dr. Lesnak.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers’ Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF ALLEGED INJURY

The Claimant contends the evidence establishes that on August 5, 2014 she sustained compensable injuries when bottles of developer fell from a shelf striking her. The Claimant asserts this incident resulted in neck and head injuries including a "post-concussive syndrome." The Respondents contend that the evidence fails to establish that the Claimant sustained any accident at work on August 5. However, in the event a work-related accident occurred, the Respondents argue the Claimant failed to prove that the accident resulted in a work-related "injury."

The Claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury she was performing service arising out of and in the course of the employment, and that her alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

To establish causation the Claimant must prove a causal nexus between the claimed disability and need for treatment and the alleged work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, *supra*; *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 34 through 44, the Claimant failed to prove it is more probably true than not that she sustained a compensable injury, as opposed to a mere accident, that proximately caused any need for medical treatment or any disability. For the reasons stated in Findings of Fact 36 through 41, the Claimant's testimony is incredible and unpersuasive insofar as it would support an inference that the August 5, 2014 accident caused a need for medical treatment or any disability. Specifically, the Claimant's testimony is not credible because she failed to report pertinent medical history to doctors Riegel and Lesnak and to PAC Hanisch. The objective medical findings from August 5, 2014 and thereafter do not persuasively establish that the claimant sustained an injury-causing trauma on August 5. The medical records establish that the vast majority of the symptoms reported by the Claimant were present before August 5. For the reasons stated in Finding of Fact 42 Dr. Lesnak's opinion that the events of August 5 did not cause a need for medical treatment or any disability is credible and persuasive. For the reasons stated in Findings of Fact 43 and 44 the opinions of Dr. Riegel, Dr. Iannotti and PAC Hanisch are not persuasive insofar as they would support an inference that the Claimant sustained a work-related injury that proximately caused or contributed to any need for medical treatment and/or disability.

In light of these findings and conclusions the ALJ need not address the other issues raised by the parties.

ORDER

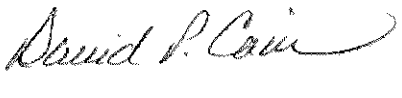
Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in W.C. No. 4-957-818 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 29, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she suffered an industrial injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the injury resulted in claimant obtaining medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of the injury and from a provider who was authorized to treat claimant?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning July 24, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer as a housekeeper beginning her employment on or about August 2006. Claimant testified at hearing that on March 1, 2013 she was descending a flight of stairs when she slipped on a piece of ice and fell to the ground. Claimant testified she fell onto her left side. Claimant testified when she fell she was carrying a basket with cleaning supplies and rags. Claimant testified that after she fell, she had pain in her whole body.

2. Claimant's testimony regarding her fall was supported by the testimony of Mr. Maldonaldo, a co-worker. Mr. Maldonaldo testified that he was informed by Ms. McPike that a guest had witnessed claimant fall and Ms. McPike requested Mr. Maldonaldo to go check on claimant. Mr. Maldonaldo testified that when he found claimant in the room, claimant was crying. Mr. Maldonaldo testified that claimant reported on the date of the injury that she did not want to seek medical care. Mr. Maldonaldo further testified to being in a meeting with claimant and Ms. McPike in which claimant's fall was discussed. Mr. Maldonaldo confirmed that Ms. McPike was the person employees would report work injuries to.

3. Claimant testified that the day after her work injury, she reported her injury to Ms. Suhouski with Mr. Maldonaldo performing interpretation for her. This testimony was supported by the testimony of Mr. Maldonaldo who noted that during the meeting,

claimant reported that she still had pain in her shoulder from her fall. On cross-examination, Mr. Maldonaldo testified that claimant did not request medical treatment following her fall. The ALJ finds the testimony of Mr. Maldonaldo to be credible and persuasive.

4. While respondents maintain claimant testified inconsistently regarding how she fell on March 1, 2013, the testimony and medical records do establish that claimant fell at work on March 1, 2013. This fact is supported by the testimony of claimant and Mr. Maldonaldo. Claimant however, did not receive medical treatment following her fall until 2014.

5. Claimant was examined by Dr. Sauerbry on March 4, 2014 with complaints of left shoulder pain. Claimant noted that she had problems with pain in the shoulder for a couple of years now. Claimant reported she was a housekeeper and did a lot of heavy work that aggravated her pain, but noted it was not a workers' compensation injury. Dr. Suerbrey recommended claimant get a magnetic resonance image ("MRI") of the shoulder.

6. Notably, when claimant reported to Memorial Hospital for the MRI, she reported she injured her shoulder in a fall 1 year ago, and complained of persistent pain and decreased range of motion. The MRI revealed a small localized full thickness tear of the anterior distal supraspinatus tendon along with moderately severe partial thickness tearing of the infraspinatus tendon and remainder of the supraspinatus tendon, along with mild articular surface tearing of the subscapularis tendon. A slap II tear, degenerative acromioclavicular joint with mild to moderate compromise of the acomial outlet and subacromial subdeltoid bursitis was also noted in the MRI findings.

7. Respondents note in their position statement that while claimant reported to the MRI physician, Dr. Lile, that she injured her shoulder in a fall, the records do not indicate that claimant fell at work. However, the testimony of claimant and Mr. Maldonaldo establish that claimant was involved in a fall in March 2013 and the fall was reported to Ms. McPike.

8. Claimant returned to Dr. Sauerbrey on June 25, 2014. Dr. Sauerbrey recommended claimant undergo surgery on her shoulder.

9. Claimant presented the testimony of her adult children, Jose and Erica at hearing. Claimant's children have performed translation services for claimant at various times with her medical providers and her employer. Jose testified at hearing that he translated for claimant at her appointment with Dr. Sauerbrey on March 4, 2014. Jose testified that his girlfriend took claimant to her appointment for the MRI on March 19, 2014.

10. Erica testified that he went with claimant to employer and reported the injury to "Laura" on or about June 25, 2014. Erica testified that Laura could not find the report regarding the fall and would contact Erica when she found the report.

11. Jose testified he returned with claimant in July 2014 and spoke with Laura and “Christine” regarding claimant’s fall. Jose testified that Christine gave claimant an insurance card for the medical appointments and told Jose to have claimant use her sick leave and not come to work.

12. The ALJ credits the testimony of Erica and Jose and finds that when claimant reported the injury to employer on or about June 25, 2014 and advised employer that claimant was seeking medical treatment, claimant was not provided with a list of 2 physicians to choose from.

13. The ALJ notes the W.C.R.P. 8-2 requires the employer to provide claimant with a list of physicians designated to treat the injured worker within 7 days of the date they receive notice of the injury. W.C.R.P. 8-2(E) establishes that if the employer does not provide a list of providers to the injured worker, the injured worker may select a physician of their choosing.

14. The ALJ finds that after claimant’s fall on March 1, 2013, claimant initially denied that she wanted to seek medical treatment. Therefore, employer was not required to provide claimant with a choice of medical providers as employer was not aware of the compensable nature of the injury. However, upon being informed by claimant that she was seeking medical treatment in July 2014, employer was then required to provide claimant with a designated provider list pursuant to W.C.R.P. 8-2. Because employer failed to provide claimant with the designated provider list, the claimant is then allowed to choose a physician to treat her injury. The ALJ finds that this occurred as of June 25, 2014 when she reported to employer that she had injured her shoulder in the fall and was seeking medical treatment.

15. Claimant was examined by Dr. Speer on July 24, 2014. Dr. Speer noted that claimant reported she fell down stairs at work in March 2012 and landed on her right shoulder. Following a letter from claimant to Dr. Speer dated October 9, 2014, Dr. Speer issued an addendum to his report to reflect changes regarding when claimant fell at work.

16. Respondents note that the records from Dr. Speer report an injury occurring in March 2012, and not 2013 as testified to by claimant. However, again, the evidence establishes that claimant fell at work in March 2013 and reported the incident to her employer, following which she reported the injury to Ms. McPike and Mr. Maldonaldo. This fact is established by the testimony of claimant and Mr. Maldonaldo, and was not credibly contradicted by respondents at hearing. The ALJ therefore finds that the discrepancies in the medical records regarding the date of the fall at work are simply discrepancies in the medical records and do not disprove the fact that the fall occurred on March 1, 2013 as testified to by claimant and Mr. Maldonaldo.

17. It was unclear from the testimony as to how claimant came to be seen by Dr. Speer. The ALJ ascertains from the records, however, that Dr. Speer became claimant’s choice of physician to treat with as of the July 24, 2014 appointment.

18. Respondents filed a Notice of Contest on August 25, 2014. Claimant's August 28, 2014 appointment with Dr. Speer was cancelled because insurer had not decided if the claim would be accepted or not. Claimant did not return to Dr. Speer and the ALJ finds that Dr. Speer, by cancelling the August 28, 2014 medical appointment, refused to provide treatment for claimant due to non-medical reasons.

19. On September 16, 2014, Dr. Sauerbrey sent a request to insurer requesting authorization for shoulder surgery consisting of a rotator cuff repair and subacromial decompression.

20. Claimant underwent an independent medical examination ("IME") with Dr. Fall on January 8, 2015. A copy of the audio recording of the IME was entered into evidence at hearing. Dr. Fall issued a report dated January 8, 2015 as a result of the IME.

21. Dr. Fall reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with her IME. Dr. Fall noted in her report that claimant was quite nonspecific and was not able to describe how she fell and the exact mechanism of injury that would lead to a rotator cuff and SLAP tears. Dr. Fall opined that the mechanism of injury described by claimant would not result in the numerous findings on the MRI. Dr. Fall opined that the MRI findings were consistent with age-related degenerative findings. Dr. Fall opined that she was not able to state within a reasonable degree of medical probability that the MRI findings of the shoulder were related to a fall or that the symptoms were related to the fall from March 2013.

22. Dr. Fall testified by deposition in this case consistent with her IME report.

23. The ALJ credits the testimony of claimant and Mr. Maldonaldo and the medical reports from Dr. Sauerbrey and Dr. Speer and finds that claimant has proven that it is more likely than not that she sustained a compensable injury to her left shoulder on March 1, 2013 when she fell at work. The ALJ rejects the opinions expressed by Dr. Fall that are contrary to this finding.

24. The ALJ finds that claimant did not request medical treatment from employer until reporting her injury in June 2014 and advising employer that she was seeking medical treatment. The ALJ finds that employer reported her injury to employer on March 1, 2013, but credits the testimony of Mr. Maldonaldo and finds that claimant advised employer on that date that she was not seeking medical treatment. The ALJ therefore finds that the medical treatment claimant received from Dr. Sauerbrey in 2014, while reasonable and necessary to treat claimant's injury, was not authorized.

25. The ALJ finds that the medical treatment claimant received from Dr. Speer was reasonable and necessary to cure and relieve claimant from the effects of the injury.

26. The ALJ credits the testimony of claimant and Jose and the supporting wage records and finds that claimant was advised by employer to stay at home from work due to her shoulder injury beginning July 24, 2014 and take sick leave. This testimony is supported by the wage records entered into evidence that establish that claimant began taking sick leave during this period of time. The ALJ credits this testimony and finds that claimant has proven that it is more likely than not that she is entitled to TTD benefits commencing July 24, 2014 and continuing until terminated by law.

27. Claimant testified at hearing that while working for employer, she held concurrent employment with another hotel beginning in May 2008. This is supported by the wage records and W-2 forms that document claimant's concurrent employment with employer and Steamboat Ski & Resort Corporation.

28. Claimant argues that the wage records from employer document that claimant was paid $3,723.46 for the time period between January 1, 2013 through February 22, 2013 and that claimant's AWW should be based off of this calculation. The ALJ is not persuaded. Notably, the wage record documents that claimant every two weeks. Therefore, the "year to date" amount does not mean that this covers only the time worked beginning January 1, 2013, but instead the wages paid, including wages paid for time earned prior to January 1, 2013 and covering 10 weeks. The ALJ had previously indicated that this would cover a period of 8 weeks, but the period in question would cover the time period back to December 28, 2014 with a pay check issued on January 4, 2015.

29. It is claimant's burden of proof to establish the AWW. Based on what was entered into evidence at hearing, the ALJ finds the most appropriate way to calculate the AWW with regard to claimant's earnings for employer is to divide the earnings in the paystub by 10 weeks. This results in an AWW for claimant for her work with employer of $372.35.

30. With regard to claimant's work with her concurrent employer, that ALJ determines that the most appropriate method for calculating the AWW is by using the W2 forms for 2012. The ALJ cannot ascertain with certainty claimant's AWW at the time of her injury based upon the records and claimant's testimony regarding the nature of her pay was not sufficient to establish that a different method should be used.

31. Claimant was paid $22,053.02 in wages by Steamboat Ski and Resort for 2012. This equates to an AWW of $424.10. Combining claimant's AWW for her work with employer and her concurrent employer comes to an AWW of $796.45.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that she suffered compensable injury arising out of and in the course of his employment with employer when she fell at work on March 1, 2013. As found, the testimony from claimant and Mr. Maldonaldo are credible and persuasive on this point. As found, the medical records from Dr. Lile in connection with the MRI performed on March 19, 2014 is found to be credible and persuasive regarding the cause of claimant's complaints of shoulder pain.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

7. As found, claimant did not report to employer that the fall caused claimant to need medical treatment until June 2014. As found, claimant's medical treatment with Dr. Sauerbrey prior to this date is not authorized. As found, claimant's medical treatment with Dr. Speer in July 2014 was authorized and reasonable and necessary to cure and relieve claimant from the effects of her work injury.

8. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

9. As found, claimant left work as of July 24, 2014 as a result of her injury. As found, claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits commencing July 24, 2014.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, claimant's AWW for her work with employer and her concurrent employer equates to an AWW of $796.45.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment provided to claimant by Dr. Speer.

2. Claimant's request for payment of the medical treatment from Dr. Sauerbrey is denied as being not authorized under the Colorado Workers' Compensation Act.

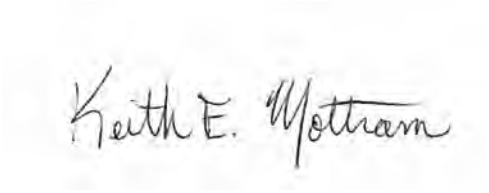
3. Respondents shall pay claimant TTD benefits commencing July 24, 2014 and continuing until terminated by law or statute based on an AWW of $796.45.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 17, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414

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ISSUES

1. Whether treatment of Claimant's left inguinal hernia and umbilical hernia is reasonable, necessary, and related to his August 5, 2014 work injury.

2. Whether Claimant's base average weekly wage (AWW) should be increased to include compensation for the business use of his personal vehicle.

STIPULATIONS

At hearing, the parties stipulated that Claimant's base AWW is $645.83.

FINDINGS OF FACT

1. Claimant works for Employer as a Field Service Representative with duties that include maintaining, repairing, and servicing machines of various sizes and located at various locations.

2. Claimant uses his personal vehicle for business purposes and to travel to various locations where machines are located to service the machines.

3. Claimant was so employed on August 5, 2014 when he suffered a compensable injury to his low back.

4. On August 5, 2014 Claimant was at a Home Depot location servicing a paint tinting machine when he experienced severe left sided hip and leg pain while pulling himself up to a standing position from the floor area where he had been working.

5. Due to his pain, Claimant did not work on August 6 or August 7. Claimant was able to work on August 8 and August 9, but continued to have pain. Claimant worked a half-day on August 11 but went home due to his continued pain.

6. On August 6, 2014 Claimant filled out an accident/injury report describing the sharp pain, muscle spasm, and shooting pain in his lower back. Claimant did not seek immediate medical treatment and noted on the report that he was hopeful resting his back for a day or two will allow the symptoms to subside. *See* Exhibit 6.

7. On August 13, 2014 Claimant was evaluated by Kenneth Hahn, D.O. Claimant reported lifting himself up from where he was seated behind a machine when he felt like the top half of his body lifted but the bottom half did not. Claimant reported

pain in the lower spine area radiating to his hips and down to his knees. Dr. Hahn diagnosed acute radicular low back pain. *See* Exhibit 2.

8. On August 21, 2014 Claimant was at home when he felt a sneeze coming on. Claimant was concerned that the sneeze would increase his low back pain and he attempted to get to a couch to sit down to help brace himself before sneezing. Claimant did not fully make it to the couch or to a sitting position when he sneezed three times. When he sneezed, Claimant was one half standing and one half sitting and was in an awkward twisting position.

9. After sneezing, Claimant noticed a pulling sensation in his left groin area and felt abdominal weakness.

10. On August 27, 2014 Claimant was evaluated again by Dr. Hahn. Claimant reported he had been doing better, but that the pain flared up last Thursday, August 21 after sneezing. Claimant reported that after sneezing he had a few days of severe pain that were as bad as when he was first injured. Claimant thought that he pulled a muscle in his stomach or that he might have a left hernia from sneezing. *See* Exhibit 2.

11. On September 30, 2014 Claimant underwent a health maintenance exam performed by Philip Rosenblum, M.D. Dr. Rosenblum noted that Claimant's most recent health maintenance visit was one year prior. Dr. Rosenblum diagnosed Claimant with an umbilical hernia and a left inguinal hernia and noted Claimant reported the onset of symptoms along with Claimant's recent back injury. Dr. Rosenblum noted that the hernia findings were not previously observed. *See* Exhibit 2.

12. On October 7, 2014 Claimant was evaluated by Dr. Hahn. Dr. Hahn noted that Claimant had a recent wellness exam that found an umbilical and left inguinal hernia that were not present on Claimant's wellness exam one year ago. Dr. Hahn noted Claimant had a sudden onset of abdominal pain following sneezing six weeks prior when he was twisting to sit on a couch, sneezed in the middle of that movement, and felt pulling. Dr. Hahn noted that Claimant did not feel right in the stomach since and had vague abdominal pain since sneezing. Dr. Hahn opined that the hernias were related to the work injury and referred Claimant to a surgeon for repair. *See* Exhibit 2.

13. On October 15, 2014 Claimant was evaluated by Dr. Hahn. Dr. Hahn again noted the left inguinal and umbilical hernias, with sudden onset after Claimant braced himself for a sneeze due to Claimant's recent back injury. Dr. Hahn noted that Claimant felt weak in his core since sneezing. Dr. Hahn again opined that the hernias were related to the work injury and opined that Claimant had sneezed a few weeks after the original injury which caused an exacerbation of Claimant's low back pain and the onset of abdominal symptoms. *See* Exhibit 2.

14. Dr. Hahn testified via deposition consistent with his reports. He opined that Claimant's hernias were probably either caused by the initial injury on August 5, 2014 at work or were made more apparent after the August 21, 2014 sneezing incident. Dr. Hahn opined that sneezing can make an underlying hernia that is not symptomatic

become symptomatic. Dr. Hahn could not recall any patients who had hernias solely due to sneezing, and opined that it was probably a combination of the August 5, 2014 work injury and the August 21, 2014 sneezing incident that caused the hernias. Dr. Hahn opined that due to Claimant's back pain, Claimant was in an awkward position at the time of the sneezing incident. Dr. Hahn opined that the awkward position could have put additional strain on Claimant's abdominal muscles making them more susceptible to hernia injury during the sneezes. Dr. Hahn opined that if Claimant were in an awkward position during a sneeze, there wouldn't be even pressure on the abdominal muscles which might put more pressure on one part of the abdomen versus the other.

15. Dr. Hahn again opined that the hernias were related to the work injury. Dr. Hahn also disagreed with Dr. Hattem's opinion that the mechanism of injury at work on August 5, 2014 would not have caused any type of hernia and opined that the mechanism of injury on August 5, 2014 could have caused a hernia. Dr. Hahn opined that Claimant may have had a hernia and not reported it immediately as Claimant had significant back pain and may have been focused on his back.

16. On January 14, 2015 Claimant underwent an Independent Medical Evaluation (IME) performed by Albert Hattem, M.D. Dr. Hattem noted Claimant's prior medical history included a lumbar discectomy in 2003 and a right inguinal hernia in 2008. Dr. Hattem diagnosed mechanical nonspecific low back pain, umbilical hernia, and left inguinal hernia. *See* Exhibit E.

17. Dr. Hattem opined that the left inguinal hernia and the umbilical hernia were not related to the claim. Dr. Hattem opined that the hernias did not occur on August 5, 2014 as Claimant did not lift or strain and that rising from a seated position will not cause any type of hernia. Dr. Hattem noted that Claimant did not complain of groin pain, umbilical pain, or of any protrusions/masses at his first visit on August 13, 2014 and only complained of back pain. Dr. Hattem opined that if the hernia had occurred on August 5, 2014 he would have expected Claimant would have reported the condition earlier. Dr. Hattem noted that Claimant did not report the hernia until August 27, 2014 after sneezing. *See* Exhibit E.

18. Dr. Hattem opined that sneezing increases intra-abdominal pressure and is the likely cause of the hernias and opined that sneezing is not a work-related condition. *See* Exhibit E.

19. Dr. Hattem testified at hearing consistent with his IME report. Dr. Hattem opined that hernias generally come from an increase of pressure on an abdominal wall and a weak abdomen and that most abdominal weakness is congenital. Dr. Hattem opined that Claimant's prior hernia on the right side from 2008 would make it more likely that Claimant would develop another hernia due to Claimant's weakened abdominal wall. Dr. Hattem opined that a sneeze or a cough combined with a weak abdomen can cause a hernia and that he was not sure if being in an awkward position while sneezing would further increase abdominal pressure. Dr. Hattem believed that the sneezing incident caused the hernias or that small hernias were present for a long time and then

became apparent at the time of the sneezing. Dr. Hattem admitted that it was possible, but not likely, that the hernias developed during the change of position from sitting to standing at work on August 5, 2014. Dr. Hattem reviewed the testimony of Dr. Hahn which did not change any of his opinions.

20. Claimant testified that he has sneezed multiple times throughout his life without developing hernias. This testimony, and Claimant's testimony as a whole, is found credible and persuasive.

21. The opinion of Dr. Hahn that the hernias are causally related to the August 5, 2014 low back injury is found credible and persuasive and is found more credible and persuasive than the opinions of Dr. Hattem. Dr. Hahn identified Claimant's awkward positioning during sneezing and explained how that can increase pressure on the abdomen. Dr. Hahn also persuasively opined that Claimant may have suffered small hernias at the time of the August 5, 2014 work injury that became symptomatic at the time of the sneezes. Dr. Hattem agreed that sneezing could increase abdominal pressure, but was unsure as to awkward positioning. Dr. Hattem also opined that the sneezing either caused the hernias or that they were present for a long time and became apparent at the time of sneezing. The opinion that the hernias may have been present for a long time is not found consistent with Claimant's annual health maintenance exam showing no hernias were present a year prior. Further, Claimant's hernia symptoms and discomfort developed following the sneezing incident on August 21, 2014. After weighing the expert medical opinions, the ALJ finds the opinions of Dr. Hahn more persuasive.

22. On January 23, 2015 Claimant underwent surgery to repair the left inguinal and umbilical hernias. Respondents deny liability for this treatment and believe the hernias are not related to the work injury.

23. Claimant's base average weekly wage is $645.83.

24. On October 22, 2012 Claimant accepted terms of employment with Employer as a Field Service Representative that included an hourly rate of pay, and a bi-weekly auto allowance of $207.69. *See* Exhibit D.

25. On March 13, 2013 Employer issued a Memo for to all full time employees driving personal vehicles for business. This Memo noted that as of April 1, 2013 Employer was deploying Runzheimer's Business Vehicle Program. *See* Exhibit D

26. The Runzheimer plan allowed employees who drive their personal vehicles for business use to receive a cents-per-mile reimbursement for 100% of the business miles reported and to receive a fixed dollar reimbursement each month to offset a reasonable business use portion of their vehicles. *See* Exhibit D

27. The Runzheimer plan provided both the fixed and variable amounts paid to an employee would be paid on a non-taxed basis if the employee followed IRS guidelines and that the payments would not have any withholding or be subject to W-2 reporting. *See* Exhibit D

28. Claimant began receiving reimbursement for the business use of his personal vehicle under this plan in April of 2013, and at that time stopped receiving the bi-weekly auto allowance of $207.69. Claimant was reimbursed for variable operating costs including fuel, recommended maintenance, and tire wear at a variable rate based on the number of actual miles Claimant drove for work purposes. Claimant also was reimbursed for fixed costs including insurance, license and registration fees, taxes, and depreciation calculated based on his geographic area at a monthly fixed cost reimbursement rate.

29. Claimant was paid approximately $181.85 per week for both the variable and fixed costs in using his personal vehicle for business purposes during the six months prior to his work injury. The reimbursement paid to Claimant did not fully reimburse him for the costs associated with the business use of his personal vehicle, but reimbursed him for a majority of the cost to use his personal vehicle.

30. Claimant did not present sufficient evidence to show that he paid taxes on either the fixed or variable amounts paid to him for reimbursement nor did he present sufficient evidence to show that he claimed the reimbursement payments as income.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is

subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994). The Claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Valley Tree Service v. Jimenez*, 787 P.2d 658 (Colo. App. 1990). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Section 8-41-301(1)(c), C.R.S., requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Consistent with this principle Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability the disability is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Price Mine Service, Inc. v. Industrial Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). If the injury leaves the body weakened and subject to an opportunistic infection, and the infection results in disability and need for treatment, the disability and need for treatment are proximate results of the industrial injury. *Johnson v. Industrial Commission,* 148 Colo. 561, 366 P.2d 864 (1961).

Although the ALJ agrees with Dr. Hattem that sneezing did not occur at work nor is sneezing at home generally a work related condition, Claimant has established by a preponderance of the evidence that treatment for his hernias is more likely than not

related to his August 5, 2014 work injury. The ALJ concludes Claimant's hernias were more likely than not caused by a combination of the effects of the initial injury on August 5, 2014, and the sneezing incident on August 21, 2014 and finds Dr. Hahn's opinions credible and persuasive. At the time of the sneezing incident, Claimant was in an awkward twisting position, attempting to brace himself due to back pain from his August 5, 2014 work injury. But for the initial injury to his low back, Claimant more than likely would not have had to assume an awkward, twisting position to prepare for sneezing. Claimant has shown that his positioning during the sneezes more likely than not increased his abdominal pressure to a level greater than it would have been during an otherwise "normal" sneeze, thereby either causing the hernias or causing the hernias to become symptomatic. As found above, Claimant did not have any hernias at his prior annual health exam, Claimant had never previously developed hernias from sneezing, and Claimant's had no prior hernia related symptoms or discomfort. Claimant's hernia discomfort started shortly after the sneezing incident. This sneezing incident was different than a normal sneeze due to Claimant's low back injury and his weakened low back condition.

The ALJ concludes that Dr. Hahn's opinions that the hernias are causally related to the August 5, 2014 work injury to be credible and persuasive and more persuasive than the contrary opinion of Dr. Hattem. Dr. Hahn credibly explained how awkward positioning can increase pressure on the abdomen and that Claimant could have had suffered small hernias from the mechanism of his August 5, 2014 injury that then became symptomatic at the time of the sneezing incident. Dr. Hattem was not persuasive as to whether or not awkward positioning would cause increased abdominal pressure and his opinion that the hernias may have been present for a long time is not consistent with Claimant's annual health examination showing no hernias were present one year prior. After weighing the medical opinions as a whole, the ALJ finds Dr. Hahn more persuasive.

Claimant has shown by a preponderance of the evidence that it is more likely than not that the hernias were proximately caused by his August 5, 2014 work injury to his low back and that the hernias are a compensable consequence of his low back injury. The treatment and surgery to repair both hernias was reasonable and necessary, and was related to his August 5, 2014 work injury.

Average Weekly Wage

The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity resulting from the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Wages shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied. § 8-40-201(19)(a), C.R.S. If the contract of hire provides for an hourly wage, the average weekly wage is calculated by multiplying the hourly rate by the number of hours the employee worked per day at the time of injury. The daily amount is then multiplied by the average number of days per week the employee worked had the injury not

intervened. § 8-42-102(2)(d), C.R.S. If the statutory method of computing the average weekly wage of the employee will not fairly compute or fairly determine an average weekly wage, the ALJ has discretion to determine an average weekly wage that fairly reflects loss of earning capacity. § 8-42-102(3) and (5)(b), C.R.S.

No per diem payment shall be considered wages unless the per diem payment is also considered to be wages for federal income tax purposes. § 8-40-201(19)(c), C.R.S. Any remuneration representing a per diem payment shall be excluded from the calculation of average weekly wages unless such payment is considered wages for federal income tax purposes. § 8-42-102(2), C.R.S.

Exclusion of per diem payments to claimant from calculation of his weekly wages, for purposes of workers' compensation award, does not result in the disparate calculation of wages, but rather, serves to differentiate between payments intended to reimburse the employee for expenses incurred as a result of his employment and those meant to provide economic advantage. *Young v. Industrial Claim Appeals Office*, 969 P.2d 735 (Colo. App. 1998). An employer cannot limit its liability by arbitrarily labeling part of the employee's remuneration as an expense reimbursement if there is no rational or realistic relationship between the actual expenses and the amount claimed as an expense reimbursement. *Sneath v. Express Messenger,* 881 P.2d 453 (Colo. App. 1994)

Here, the Runzheimer reimbursement program was a tax-free reimbursement methodology allowing payments to be made to Claimant without impacting his W-2 income. The reimbursement was for actual expenses incurred in using his personal vehicle for business purposes and was not meant to be compensation paid to Claimant for Claimant's services. Rather, for his services, Claimant was paid compensation hourly and at an hourly rate. In this case Employer has not arbitrarily labeled part of Claimant's compensation as expense reimbursement. Rather, they have laid out a rational and realistic relationship between the expenses Claimant has incurred using his personal vehicle for business purposes and the amounts they have paid Claimant for reimbursement of those expenses. The Runzheimer reimbursement plan reimburses Claimant many of the costs for the business use of his personal vehicle and was intended and designed to do so. It was not intended to compensate Claimant for his services or provide advantages or fringe benefits to Claimant. Rather, it was designed to provide reasonable reimbursement of actual expenses incurred. The reimbursement plan covered most, but not all, of Claimant's actual expenses.

Further, the ALJ finds that the Runzheimer reimbursement program put into place by Employer on April 1, 2013 was a per diem reimbursement program. In this case, Claimant was paid a fixed per diem reimbursement to cover costs such as insurance, license and registration fees, taxes, and depreciation. Claimant was also paid a variable per diem reimbursement based on operating costs to cover costs including fuel, recommended maintenance and normal tire wear. The variable per diem reimbursement depended on the number of actual miles driven. Both the fixed and variable amounts were intended to offset a reasonable business use portion of an

Employees' vehicle. The statute states that these type of per-diem payments, if not reported on federal income taxes, are not included in the calculation of average weekly wage. Here, Employer's March 13, 2013 memo explicitly noted that the reimbursements were being paid on a non-taxed basis and that there would be no withholding of any kind and no W-2 reporting. Claimant also presented insufficient evidence that he paid taxes on the vehicle reimbursement or that he considered the reimbursement to be part of his W-2 income.

The ALJ thus concludes that the proper calculation of Claimant's average weekly wage is as per § 8-42-102(2)(d), C.R.S. The statutory method is adequate to fairly compute and determine Claimant's average weekly wage. The fixed per diem and variable per diem Claimant was paid for the business use of his personal vehicle is not properly included in Claimant's average weekly wage as neither reimbursement rate was considered wages for federal income tax purposes. Further, the ALJ concludes that the reimbursements were not meant to compensate Claimant for his services but were laid out specifically in the Runzheimer plan to reimburse actual expenses incurred in using a personal vehicle. Therefore, Claimant has failed to establish that his average weekly wage shall be increased to include any reimbursements he was paid at the time of his injury for the business use of his personal vehicle.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show that his left inguinal hernia and his umbilical hernia are causally related to his August 5, 2014 work injury. Respondents are liable for medical treatment reasonably necessary to cure or relieve Claimant from the effects of his hernias.

2. Claimants AWW is $645.83. Claimant has failed to meet his burden to show that the base AWW should be increased to include reimbursement amounts paid to Claimant for the business use of his personal vehicle.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 17, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

- The parties stipulated prior to the hearing that if claimant was not responsible for his termination of employment, he would be entitled to temporary total disability ("TTD") benefits beginning January 9, 2015 and continuing.

- The parties stipulated prior to the hearing to an average weekly wage of $579.00.

FINDINGS OF FACT

1. Claimant was employed by employer as a welder. Claimant was injured on August 6, 2014 when a sledge hammer that was placed on top of a tank slid off and struck claimant on the head. Claimant was referred for medical treatment with Dr. Stagg following the accident. Dr. Stagg diagnosed claimant with a closed head injury with mild concussion. Claimant was provided with work restrictions from Dr. Stagg that limited his lifting to 10 pounds and restricted claimant from working at heights.

2. Following claimant's injury, employer instituted a new safety rule that required all employees to wear hard hats when in the tank area. Mr. Salvucci, the manager for employer, testified that the tank area has employees working at heights with tools, and due to the danger of the tools falling on employees working below, the employer required all employees to wear hard hats in this area.

3. Mr. Salvucci testified that he provided claimant with a "bye" from this rule until his head and neck were more stable. Mr. Salvucci testified he allowed claimant to work without a hard hat because claimant said the extra weight of the hard hat made him uncomfortable. Despite Mr. Salvucci providing claimant with a pass from the safety rule, claimant was written up by Mr. Marengo on September 9, 2014 for failing to wear his hard hat.

4. Mr. Salvucci testified that he had hoped that claimant being written up on September 9, 2014 would cause claimant to get something in writing from his doctor exempting him from the hard hat policy. However, claimant did not provide employer with a note from a physician indicating he would be exempt from wearing a hard hat.

5. Despite claimant being written up by Mr. Magengo, Mr. Salvucci continued to provide claimant with a bye from wearing the hard hat. Mr. Salvucci testified that

employer obtained a special hard hat for claimant because his original hard hat was not a universal file with claimant's welding hood. Mr. Salvucci testified that there was friction between the other employees because the rule requiring employees to wear the hard hat was not being enforced on claimant.

6. Mr. Serve testified at hearing for employer. Mr. Serve is a foreman for employer and testified he spoke with claimant regarding employer's policy requiring hard hats. Mr. Serve testified claimant had advised him that Mr. Salvucci had given him a pass excluding him from the hard hat policy. Mr. Serve testified he asked claimant to wear a hard hat again on January 8, 2015 and was advised by claimant that the pass was still in effect. Mr. Serve testified he had a meeting the Mr. Grainy, the owner on January 8, 2015 and Mr. Grainy was mad because claimant was told that he had to go on light duty or comply with the hard hat policy and claimant agreed to comply with the hard hat policy.

7. Mr. Marengo testified at hearing for employer. Mr. Marengo testified that he is the tank shop supervisor and was hired after claimant's injury. Mr. Marengo wrote up claimant for failing to comply with the hard hat policy on September 9, 2014. Mr. Marengo testified claimant told him he had a doctor's excuse that allowed him to keep from wearing a hard hat. Mr. Marengo testified he requested a doctor's note from claimant exempting him from the hard hat policy, but never received a note.

8. Mr. Marengo testified Mr. Grainy was upset with claimant on January 8, 2015 because claimant agreed to wear his hard hat in compliance with policy after claiming he wouldn't be able to wear a hard hat due to his injury. Mr. Marengo testified it was Mr. Grainy's decision to terminate claimant and claimant was terminated for non-compliance.

9. Mr. Marengo testified on cross-examination that he was aware of Mr. Salvucci giving claimant a "bye" from wearing a hard hat. Mr. Salvucci testified he was not aware of when the pass Mr. Salvucci provided to claimant ended.

10. The termination slip in this case dated January 8, 2015 indicates claimant was terminated for non-compliance of company safety policies.

11. Claimant testified at hearing that he was injured on August 6, 2014 and returned to modified work after that date performing welding for employer. Claimant testified he provided employer with his physician notes from Dr. Stagg. Claimant testified Mr. Salvucci had provided him with a bye for the hard hat policy after it was implemented. Claimant testified he was aware of the hard hat policy and would wear a hard hat when in the tank area, but would not wear a hard hat while wearing his welding hood. Claimant testified Mr. Salvucci told him it was OK if he didn't wear a hard hat - welding hood combination so long as he wore a hard hat when not wearing his welding hood.

12. Claimant testified he was called into the office on January 8, 2015 and was asked to wear a hard hat – welding hood combination when working in the tank area. Claimant testified he agreed to wear the hard hat – welding hood combination at that time. Claimant testified he returned to work on January 9, 2015 and worked from 7:00 a.m. until approximately 11:00 a.m. and wore both the welding hood and hard hat while working. Claimant testified he was then called into the office at around 11:00 a.m. and fired.

13. Respondents argue that claimant was terminated because employer felt claimant had deceived them by claiming he had a medical excuse for not complying with the hard hat requirements. However, Mr. Salvucci testified that he provided claimant with an exception to the hard hat rule. While Mr. Salvucci had asked for a medical note, claimant was not fired for failing to produce the note. Moreover, Mr. Salvucci did not testify as to any specific date that he informed claimant that his "bye" for complying with the policy had ended.

14. In fact, when employer pressed the issue and demanded claimant comply with the policy, claimant agreed to try to comply with the policy. Claimant was then terminated because employer felt deceived by claimant's actions in failing to comply with the policy for several months. However, claimant's actions do not rise to the level of deception of the employer. Claimant complained that the hard hat – welding hood combination resulted in his developing headaches, and Mr. Salvucci provided claimant with an unwritten exception to the hard hat policy. Claimant utilizing that exception for a period of months is not a volitional act that claimant could reasonably expect would lead to his termination of employment.

15. Based on the foregoing, the ALJ determines that respondents have failed to demonstrate that claimant committed a volitional act that led to his termination of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

4. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act that led to his termination of employment. As found, claimant was provided with an exception to the rule requiring employees to wear hard hats by Mr. Salvucci. As found, claimant's failure to wear a hard hat when he was provided with an exception to this rule by Mr. Salvucci was not a volitional act that claimant could have reasonably expected to lead to his termination of employment. As found, employer's perception that they were deceived by claimant was not the result of any volitional act on claimant's part, as he was utilizing an exception to the hard hat rule that was provided to him by Mr. Salvucci.

ORDER

It is therefore ordered that:

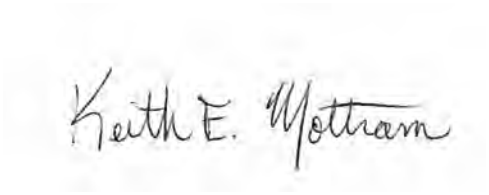
1. Respondents shall pay claimant TTD benefits commencing January 9, 2015 and continuing until terminated by law.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 10, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The issues to be determined by this decision are:

1. Whether the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right knee, specifically, a tear and rupture of her right anterior cruciate ligament (ACL) arising out, and in the course and scope of, her employment on July 29, 2014;

2. Whether, if the claim is found compensable, the claimant has proven by a preponderance of the evidence that the medical treatment for a right knee injury, specifically the right knee ACL surgery proposed by Robert E. Hunter, M.D. on August 26, 2014, is causally related to, and reasonably necessary to treat, the compensable injury arising out, and in the course and scope of, her employment on July 29, 2014;

3. Whether, if the claim is found compensable, the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits beginning July 31, 2014 and ongoing; and

4. Whether the claimant's average weekly wage (AWW) is $457.79, as proposed by claimant.

STIPULATIONS

1. At the onset of the hearing, the respondent represented that, should the claim be deemed compensable, the claimant's right knee ACL surgery proposed by Robert E. Hunter, M.D. on August 26, 2014, is causally related to, and reasonably necessary to treat, the injury arising out, and in the course and scope of, her employment on July 29, 2014.

2. The respondent also submitted that, if the Court finds the claimant has proven a compensable injury, the respondent would pay the claimant TTD benefits beginning July 31, 2014, and continuing.

3. The parties stipulated that if the claim is compensable, Dr. Hunter and Heart of the Rockies Regional Medical Center (HRRMC) are the authorized providers.

4. The claimant reserved the right to later request an increase in her AWW to include the cost of continuing any fringe benefit provided to the claimant by employer.

5. After the hearing concluded, the parties' attorneys stipulated that the claimant's AWW is $457.79 if the Court rules that the claimant's July 29, 2014, alleged injury is compensable.

6. These stipulations are approved and accepted by the ALJ.

7. The approval of these stipulations would resolve issues 2, 3, and 4 if the claim is found compensable.

FINDINGS OF FACT

1. The claimant works as an associate in the bakery department at the respondent-employer's super market in Buena Vista, Colorado. Her regular duties include unloading product from delivery trucks.

2. On July 29, 2014, the claimant unloaded frozen bakery items from a refrigerated truck. While she was unloading the truck, she slipped on a wet spot. Her right leg slid to the side, and stopped abruptly when her foot reached a dry spot on the floor. She felt a "pop" and immediate pain in the knee.

3. Shortly thereafter, the claimant described the incident to a coworker, Kira Jones. Ms. Jones subsequently completed an Employee Incident Witness Form at the request of the respondent-employer. Ms. Jones stated "I ask [sic] if she was okay and as she was kinda rubbing the hurt knee, I asked if it was the previously hurt one. She said yes to both questions. I asked her if she wanted to report it, and said she should report it to Doug or Larry. That same afternoon she came up to me in the deli, pulled up her pant leg. Her knee was swollen. I then asked if she had reported the incident to Larry or Doug and she said they had been busy. I told her that she needed to do it now as something was clearly wrong."

4. The claimant reported the incident to her supervisor, Paula Pratt, the afternoon of July 29, 2014. At that time, Ms. Pratt observed that the claimant's right knee appeared to be swollen.

5. The claimant and Ms. Pratt completed incident reports the following day, July 30, 2014. The claimant reported that "I was pushing the u-boat [stock cart] out of the trailer when I slipped and was wearing my slip free shoe's [sic] so when I tried to catch myself my knee popped." Ms. Pratt stated "[The claimant] came up front around 1:00 pm and told me she slipped and fell in the trailer while pulling the bakery load off the trailer. She showed me her right knee. It was swollen and black and blue."

6. The claimant worked a portion of her shift on July 30, 2014, but went home early due to knee pain and limited mobility.

7. The claimant has a history of previous right knee problems. She had a right knee ACL reconstruction surgery in June 2012 with Dr. Hunter. The procedure was successful, and she returned to work without restrictions or apparent limitations. There is no indication that her capacity to work was limited by her right knee in 2013 or 2014, prior to the July 29, 2014 incident.

8. The claimant saw PA-C Dimino on July 19, 2013 for right knee pain. She reported that "about three wks ago, she was hit by a shopping cart in her Rt knee. She has had anterior pain around her kneecap since, and slight swelling." ACL-specific provocative testing was negative. She was diagnosed with chondromalacia patella, and advised to return "PRN if symptoms persist." The claimant did not seek further treatment for the right knee until after the July 29, 2014 incident at work.

9. After she reported the July 29, 2014 work injury, the respondent-employer provided the claimant a list of designated providers, which included Heart of the Rockies Regional Medical Center (HRRMC).

10. The claimant went to the HRRMC emergency department on July 31, 2014. She reported that she "slipped and twisted knee in trailer at work Tuesday, swelling since w/ pain, HX of injury/surgical repair to right knee." The handwritten ER physician notes indicate "right knee swelling + 'looseness' after twisting." The anatomical drawing in the report reflects symptoms in the anterior portion of the knee. Physical examination showed effusion, a positive drawer sign, and "AC ligament laxity to stress." The physician diagnosed "R knee ligamentus injury." The claimant was given a knee brace, instructed to remain nonweightbearing, and advised to see Dr. Hunter if she was not better in a few days.

11. The claimant was subsequently evaluated by Karli Dimino, Dr. Hunter's PA-C, on August 4, 2014. The report documents that:

> [The claimant] is here today with a new injury that has occurred to her right knee,

> which previously underwent an ACLR on 6/2012. She describes sliding in a trailer in [sic] her right knee popped on 7/29/2014, 6 days ago. She states she had an immediate large amount of swelling which has since subsided slightly, and was seen in the emergency room where x-rays were done. They provided her with a knee immobilizer and crutches and advised her to be nonweightbearing until further follow up with Orthopedics.

Physical examination revealed "Moderate effusion. Positive pivot-shift without much provocation. Positive increased anterior drawer." The claimant was referred for an MRI to assess possible "ACL Tear."

12. A right knee MRI performed on August 26, 2014 revealed a complete tear of the ACL. She was evaluated by Dr. Hunter that same day. She reported "a history of having injured herself at work on July 29, when she slipped in a truck with one leg going one way and her going the other. She had a loud pop at that time and had immediate pain and swelling." Provocative maneuvers testing for an ACL tear continued to be significantly positive. Dr. Hunter diagnosed a "[r]erupture of right knee ACL." Dr. Hunter opined that "given the amount of laxity that she has and her inability to function, she is best served with a revision ACL."

13. The claimant has been unable to work her regular job since July 31, 2014 as a result of the injury.

14. Dr. Cebrian evaluated the claimant at the request of the respondent on November 28, 2014. Dr. Cebrian agreed that the claimant's ACL repair had re-torn, and that she needs surgery. However, Dr. Cebrian opined that the ACL rupture is not causally related to the July 29, 2014 incident.

15. Dr. Hunter testified in deposition on March 13, 2015. Dr. Hunter opined that the claimant's current right ACL rupture is causally related to the July 29, 2014 incident when she slipped in the trailer at work. Dr. Hunter opined that the mechanism of injury reported by the claimant was sufficient to tear her ACL graft. He opined that it is not medically probable that the claimant tore her ACL graft in July 2013 as a result of the shopping cart incident, because the physical examination after that time was negative for an ACL tear.

16. The ALJ finds the claimant to be credible.

17. The ALJ finds Dr. Hunter's analysis and medical opinions to be credible and more persuasive than medical evidence to the contrary.

18. The ALJ finds that the claimant has established that it is more likely than not that on July 29, 2014 she sustained a compensable injury to her right knee arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

2. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

3. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

4. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

5. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the

case. *Colorado Jury Instructions, Civil*, 3:16.

6. The preponderance of persuasive evidence demonstrates that the claimant slipped on a wet floor while performing her work duties on July 29, 2014. As a result of that incident, she tore her previous ACL repair. She required medical treatment and became temporarily disabled as a direct result of the injury. Although she had a pre-existing condition, her work activity aggravated, accelerated, and combined with her pre-existing condition to produce the current disability and need for treatment. Therefore, she suffered a compensable injury to her right knee on July 29, 2014.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado for an injury to her right knee on July 29, 2014 is compensable.

2. Dr. Hunter and Heart of the Rockies Regional Medical Center (HRRMC) are authorized providers.

3. The respondent shall pay for all reasonable, necessary and related medical treatment, including the surgery recommended by Dr. Hunter.

4. The claimant's AWW on the date of injury was $457.79 (excluding health insurance cost, which issue was reserved).

5. The respondent shall pay TTD benefits commencing July 31, 2014 and continuing until terminated by law.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 17, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he was an employee of Respondent on January 30, 2014.

2. If Claimant was an employee of Respondent, whether Claimant is entitled to temporary total disability payments from January 30, 2014 and ongoing until terminated by statute.

3. If Claimant was an employee of Respondent, whether Claimant is entitled to penalties for a failure to timely admit or deny the Workers' Compensation claim in this matter.

4. If Claimant was an employee of Respondent, whether Claimant is entitled to a 50% increase in any indemnity benefits awarded for Respondent's failure to carry workers compensation insurance.

PROCEDURAL HISTORY

Claimant filed a Worker's Claim for Compensation which was received by the Division of Workers' Compensation on September 2 2014. Claimant named Respondent as the employer in this claim. Respondent filed a Notice of Contest that was received by the Division of Workers' Compensation on September 30, 2014 and asserted that Claimant was not an employee of Alpine Management Services. *See* Exhibit 34. The matter was set for hearing and a hearing commenced on March 19, 2015. The parties were unable to complete the testimony of all witnesses and the hearing was rescheduled to continue with additional testimony on May 4, 2015.

At the outset of the continued hearing on May 4, 2015 the parties advised the ALJ that Claimant had filed a new claim the day after the prior hearing on March 20, 2015 based on some of the testimony and information that had been presented at hearing. The parties advised the ALJ that the new claim was filed against Pagosa Pines Condominium Owner's Association (PPCOA) as a potential employer or statutory employer. The parties also advised the ALJ that the newly named Respondent had filed a notice of contest. Neither party wished to add PPCOA to this proceeding or to start this proceeding over and the parties wished to continue the hearing to reach resolution as pertaining to Alpine Management Services as a potential employer. The ALJ agreed, noted it would violate due process of PPCOA to add them to a proceeding half-way through without them having had opportunity to cross-examine prior witnesses, and made it clear to the parties that the order in this case would relate only to the named

Respondent. The ALJ declined to add any other parties and the proceeding continued on May 4, 2015 against Respondent Alpine Management Services.

FINDINGS OF FACT

1. Respondent is a property management company owned and operated by Jace Johnson.

2. The main property complex that Respondent manages, and Respondent's largest customer is Pagosa Pines Condominiums (PPC). In addition to PPC, Respondent provides property management services at other locations in Pagosa Springs, Colorado.

3. Respondent has a small home office and no other business location. Other than a bookkeeper, Respondent had no employees. Respondent is uninsured for Workers' Compensation.

4. On December 1, 2008 Pagosa Pines Condominium Owner's Association (PPCOA) and Jace Johnson, doing business as Alpine Management, Inc. (Respondent) entered into a management agreement. *See* Exhibit C.

5. The agreement provided that Respondent would provide for the day-to-day management of PPCOA. PPCOA appointed Respondent as the agent for PPCOA and the agreement provided that everything done by Respondent for PPCOA under the provisions of the agreement shall be done as Agent for PPCOA. *See* Exhibit C.

6. As PPCOA's agent, Respondent was required to arrange for the maintenance and repair of all common elements and to negotiate and execute contracts for necessary services. *See* Exhibit C.

7. As PPCOA's agent, Respondent was required to take care of the PPCOA financial accounts and was required to collect assessments from condominium owners, deposit the monies collected, and provide an accounting to the board on at least a quarterly basis. *See* Exhibit C.

8. As PPCOA's agent, Respondent was required to disburse funds necessary for the operation and maintenance of the PPCOA property in accordance with the budget adopted by the PPCOA board of directors. Respondent was required to prepare a statement of income and expenses and present it at monthly PPCOA board meetings. *See* Exhibit C.

9. Each year in the fourth quarter, Respondent and the board were required to prepare an operating budget setting forth anticipated income and expense for the upcoming year, which if approved, became the major fiscal document under with Respondent would operate during the next year. As PPCOA's agent, Respondent

would arrange for the maintenance of the property within the budget approved by PPCOA. *See* Exhibit C.

10. Respondent has operated under this agreement as PPCOA's agent since December 1, 2008. As agent for PPCOA, Respondent placed advertisements in the local paper requesting bids for specific contract work. Respondent collected the bids, presented them to the PPCOA board for review, and arranged for the hire of the contractor that the PPCOA board selected. Respondent ensured the work was performed properly by the contractor, issued payment to the contractor from PPCOA accounts, and also ensured the contractor carried proper insurance before beginning service.

11. As agent for PPCOA, Respondent had signatory authority on PPCOA accounts and signed the checks that PPCOA paid to contractors.

12. Contract work was generally for a 6 month period of time and regularly included snow removal during the snow season and flower bed/landscaping during the summer season.

13. In approximately March of 2011, consistent with his agreement with PPCOA, Respondent ran a newspaper advertisement seeking bids for a 6 month contract to perform flowerbed maintenance for PPCOA. The advertisement stated that Pagosa Pines COA was seeking a subcontractor to do light landscaping work.

14. Claimant responded to the advertisement with a resume for his company, "Above and Beyond, LLC." Claimant's resume stated that his objective was to "care for flower beds in the Pines Condos using my experience obtained through my years of owning and running my own landscaping maintenance business….beautifying the flower beds in the Pines Condos for owners and tenants would be my pleasure." *See* Exhibit K.

15. Respondent, as agent for PPCOA, negotiated a monthly contract price for the flowerbed work with Claimant. Claimant was aware that Respondent was the property manager for PPCOA. Claimant began performing flowerbed maintenance at the PPC property during the spring of 2011 at the agreed upon monthly rate.

16. Claimant and Respondent had no written agreement outlining the employment relationship. Claimant and Respondent had only verbal discussions about the rate of pay and what work was expected to be performed at the PPC property.

17. Claimant was paid by PPCOA for the flowerbed maintenance work. *See* Exhibit F.

18. Claimant was able to wear any clothing he wished while working at the PPC property. Claimant was not provided a shirt from Respondent with Respondent's

logo. Claimant was never told he was an employee of Respondent nor was he required to hold himself out as an employee of Respondent.

19. After the completion of the flowerbed contract, and for the next several years, Claimant continued to perform work at the PPC property under a verbal agreement and verbal contract of hire. Respondent, as agent for PPCOA, would ask Claimant if he was able to perform whatever work was needed, they agreed upon an hourly rate, and Claimant performed the work and submitted invoices.

20. For the next several years, the relationship continued with verbal agreements as to work and price per hour. During this time, Claimant continued to be paid by PPCOA. *See* Exhibit F.

21. In 2012 and 2013 for all the work performed at the PPC property, PPCOA issued Claimant 1099-Misc tax documents. *See* Exhibit E.

22. For the next several years, Claimant submitted his invoices to the condominium association, and addressed his invoices either "To: Pines" or "To: Pines Association" with c/o Alpine Management next to or below the address to Pines. *See* Exhibit G.

23. For the next several years, Claimant was authorized to make charges for tools or supplies on PPCOA's accounts at local hardware stores. *See* Exhibit M.

24. During this period of time, in addition to work at the PPC property, Claimant worked for San Juan Motel, Doug Dragoo/Paragon Properties, and Pagosa Opportunity Fund. Claimant also submitted invoices to these entities for his work. Claimant was authorized to make charges at local hardware stores on San Juan Motel's charge account.

25. No formal written contractual arrangement between PPCOA and Claimant ever existed. No formal written contractual arrangement between Respondent and Claimant ever existed.

26. During this period of time, Respondent was required to update PPCOA board as to the monthly expenses and was required to assist in the annual budgets.

27. In 2012, PPCOA decided to begin replacing the siding on the entire condominium complex and approved the budget for this project. Respondent negotiated an hourly rate with Claimant for this work and Claimant began to work on re-siding the entire condominium complex, building by building, subject to the funds available and the budget of PPCOA. Claimant performed siding work for PPCOA for approximately two years.

28. While performing siding work, Claimant fell off a ladder and was injured at the PPC property on January 30, 2014. Claimant suffered a shattered tibia and fractured fibula, and later developed complications from this injury.

29. Claimant has not worked since the date of his injury and remains on work restrictions.

30. Claimant filed a Worker's Claim for Compensation which was received by the Division of Workers' Compensation on September 2 2014. Claimant named Respondent as the Employer in this claim. Claimant did not name PPCOA as the Employer in this claim. *See* Exhibit 32.

31. Respondent filed a Notice of Contest that was received by the Division of Workers' Compensation on September 30, 2014 and asserted that Claimant was not an employee of Alpine Management Services. *See* Exhibit 34.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Contract of Hire

Claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, that he was performing service arising out of and in the course of his employment, and that the injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(a),(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." *See* § 8-40-203(1)(b), C.R.S. Similarly, the term "employee" is defined as including any person in the service of any person or corporation "under any contract of hire, express or implied." *See* § 8-40-202(1)(b), C.R.S. Any individual who performs services for pay for another shall be deemed to be an employee. *See* § 8-40-202(2)(a), C.R.S.

A contract of hire requires competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. However a contract of hire may be formed without every formality attending commercial contractual agreements if the fundamental elements of the contract are present. *Aspen Highlands Skiing Corp. v. Apostolou,* 866 P.2d 1384 (Colo. 1994). A contract of hire may be implied from the circumstances. Where there is conflicting evidence the existence of a contract of hire presents a question of fact for the ALJ. *Rocky Mountain Dairy Products v. Pease,* 161 Colo. 216, 422 P.2d 630 (1966).

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1957). The one for whom the action is to be taken is the principal, and the one who is to act is the agent. Id. § 1(2) and 1(3). Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. Id. § 7. Agency is thus a legal relation having its source in the mutual consent of the parties. The existence of an agency relationship is ordinarily a question of fact. *Marron v. Helmecke*, 100 Colo. 364, 67 P.2d 1034 (1937); *Eckhardt v.*

Greeley Nat'l Bank, 79 Colo. 337, 245 P. 710 (1926); *Schoelkopf v. Leonard*, 8 Colo. 159, 6 P. 209 (1884). A general agent is "an agent authorized to conduct a series of transactions involving a continuity of service," Restatement (Second) of Agency § 3(1), such as one "who is an integral part of a business organization and does not require fresh authorization for each transaction." Id. § 3 comment a. An "agent" is generally one who acts for, or in place of, another, or is entrusted with the business of another. *Victorio Realty Group, Inc*. v. *Ironwood IX*, 713 P.2d 424, (Colo. App. 1985).

In the present case, the ALJ concludes that Respondent was acting as the general agent of PPCOA when entering into a verbal contract with Claimant to perform work at PPC property. As agent for PPCOA, Respondent was authorized to act on behalf of PPCOA and to bind PPCOA to this contractual relationship. Claimant was performing service at PPC property under the contract of hire. The contract of hire was made verbally when Respondent asked Claimant if he would continue to do various work projects around the PPC property and when Claimant and Respondent agreed upon pricing and rates per hour that Claimant could charge for the various work performed. Although Respondent negotiated the contract of hire with Claimant, the Respondent did so pursuant to his contractual requirement with PPCOA and as their agent. The agreement between Respondent and PPCOA required him to find and hire persons to perform various duties, to arrange for the maintenance and repair of common areas, and to act in PPCOA's best interest. Further, as found above, Respondent met with PPCOA board members monthly and was given instruction as to the budget, what projects could be performed, and what work Respondent should have completed on their behalf. Respondent carried out his acts as agent of PPCOA and in doing so, negotiated the contract of hire with Claimant. The contractual agreement between Respondent and PPCOA expressly states that the performance under the agreement and the duties required (including finding persons to perform duties) was to be done as the agent for PPCOA. Although Respondent negotiated this contract of hire, the contractual relationship was between PPCOA and Claimant. Respondent merely acted in accordance with his agreement with PPCOA as their agent to facilitate and hire necessary persons to complete maintenance work around the PPC property.

Further, as found above, all payments for any work performed at the PPC property were required under the agent agreement to be paid by PPCOA out of PPCOA accounts and funds. Consistent with the agent agreement between PPCOA and Respondent, Claimant was in fact paid by PPCOA. Claimant's 1099 tax documents were issued to him by PPCOA. Claimant was also able to make charges at local hardware stores to PPCOA's account. Claimant also submitted all of his invoices to "Pines" or "Pines Association," care of Respondent. The payment arrangement shows that Claimant billed PPCOA and was paid by PPCOA for all of the work he performed at the PPC property. This also supports the conclusion that Claimant was not performing services for pay for Respondent, but was performing services for pay for PPCOA.

The ALJ thus concludes that Claimant has failed to meet his burden of proof as to the threshold issue that a contractual relationship existed between Claimant and Respondent. Claimant has not established by a preponderance of the evidence that

Respondent is subject to the provisions of the Workers' Compensation Act. Rather, the ALJ finds that the totality of the evidence supports the conclusion that Respondent did not engage Claimant to work for Respondent. Rather, acting as the agent for PPCOA, Respondent engaged Claimant to work for PPCOA. The contract of hire was thus not between Claimant and Respondent but was between Claimant and PPCOA. Respondent was merely the agent that facilitated the contract of hire. As such, Claimant has no cause of action under the Workers' Compensation Act against Respondent. [1]

Contract of Hire by Estoppel

Although Claimant does not raise this issue, it is noted by the ALJ that a contract of hire may be implied by estoppel. *Olsen v. Industrial Claim Appeals Office of State of Colo*., 819 P.2d 544 (Colo. App. 1991). In a workers' compensation setting, the requirement of a contract of hire should not be applied in a technical or formal way, but should be interpreted broadly to protect workers. *Romero v. U-Let-Us Skycap Services*, *Inc*., 740 P.2d 1004 (Colo.App.1987); *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966). Under master and servant law, aspects of an employment arrangement may be enforced based on the doctrine of promissory estoppel. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo.1987). A contract of hire may arise even though the employer does not intend to enter one, if the employer's conduct causes the worker reasonably to believe that he or she is being employed. *Olsen v. Industrial Claim Appeals Office of State of Colo., supra*.

Here, the ALJ concludes that Respondent's conduct did not reasonably cause Claimant to believe that Respondent was Claimant's Employer. Claimant was aware that Respondent was the property manager for PPCOA. Claimant was paid by PPCOA. Claimant's tax documents were issued by PPCOA. Claimant was not required to represent Respondent or identify as an employee of Respondent. Although Claimant appeared to be surprised at hearing that his paychecks came from PPCOA and that the charge accounts at the local hardware stores were PPCOA's accounts and not Respondents, this confusion was not caused by Respondent nor did Respondent take any action to induce Claimant into believing the accounts were those of Respondent or that the paychecks came from Respondent. Claimant was simply not reasonable in assuming he was employed by Respondent when the relationship and even payment history over several years establishes otherwise. Therefore, Claimant was not employed by Respondent under a contract for hire by estoppel in this matter as Respondent's conduct did not cause Claimant to reasonably believe he was employed by Respondent.

[1] PPCOA was not a named Respondent in this matter. The ALJ declines to make any determination as to whether Claimant has a cause of action under the Workers' Compensation Act against PPCOA. The ALJ also declines to address whether Claimant is an employee or independent contractor of PPCOA

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that an employment relationship with Respondent existed on January 30, 2014.

2. The claim against Respondent is denied and dismissed. Respondent is not Claimant's Employer.

3. As Claimant has failed to meet his burden to show an employment relationship existed with Respondent, the remaining issues endorsed for hearing need not be addressed.

4. All matters not determined herein, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 23, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

Whether the claimant has established by a preponderance of the evidence that he sustained an injury to his pectoralis major in an incident arising out of and in the course of his employment with the respondent-employer.

FINDINGS OF FACT

1. The claimant is employed as a police officer with the respondent-employer.

2. On September 8, 2014, the claimant was involved in the arrest of a criminal suspect. The claimant actively participated in the physical takedown and handcuffing of the criminal suspect and during this arrest event he felt a pull between his pectoral area and his shoulder.

3. The claimant did not report any injury on September 8, 2014. Cpl. Braun observed that the claimant made a general remark in passing that he had tweaked his shoulder but that the claimant did not have any specific conversation or report to him that he had sustained any injury.

4. The claimant did not seek any medical treatment on September 8, 2014 following the arrest incident. Instead, following the arrest incident, the claimant continued to work his regular duty shift without difficulty, responding to additional calls for service.

5. After the completion of his shift on September 8, 2014, the claimant was on "days off" and was not scheduled to work on September 9 and 10, 2014.

6. During his days off, the claimant was able to go about his usual activities of daily living and take care of household needs.

7. On September 10, 2014, while on his days off, the claimant went to Reps Gym in downtown Pueblo. The claimant pays for his own membership at Reps Gym.

8. The respondent-employer does not require the claimant or any other officer to maintain a gym membership or to work out any certain number of hours or days each week, or to be able to bench press a certain weight.

9. The respondent-employer offers a gym facility to its police officers but the claimant chose to purchase his own membership at the gym of his choice.

10. The claimant agreed that regardless of whether he was a police officer, he would work out at the gym regularly to keep him in shape and would maintain his own gym membership. He further stated that he typically works out four to five times a week.

11. While at the gym on September 10, 2014, the claimant engaged in weightlifting activities in the form of bench pressing approximately 185 pounds of weight. The claimant typically bench presses four sets of 225 pounds. During the bench press activity, when the claimant was pushing the weight back up from his chest, he experienced an immediate and searing pain, lost all strength in his left arm, and was forced to drop the weight because he could not sustain it.

12. The claimant described the sensation that he felt while bench pressing as a muscle tearing or a rubber band breaking and popping. He was in a lot of pain with a pain level of 7-8 on a scale of 10.

13. The claimant sought immediate medical treatment at the Parkview Medical Center Emergency Department where his pain level remained at 7-8 on a scale of 10.

14. Following the arrest incident on September 8, 2014, the claimant did not feel the need to seek medical treatment or to present to the emergency department. The September 8, 2014 incident resulted in a lingering pain much lower on the pain scale than that which he experienced on September 10, 2014 while bench pressing weight.

15. When the claimant presented to the Parkview Medical Center Emergency Department, he denied any other injuries prior to the weightlifting injury.

16. A physical examination of claimant at the Parkview Medical Center Emergency Department revealed that the claimant had no bruising present but rather that his skin was warm, dry, and normal in color.

17. The claimant was unable to work following the injury he sustained while lifting weights at the gym.

18. The claimant didn't start to have bruising until September 12, 2014.

19. The claimant did not report the injury as a work injury until September 12, 2014. On that date, he asked Cpl. Braun to prepare a casualty report (injury report) and told Cpl. Braun that the injury occurred on September 8, 2014 during the arrest event.

20. The claimant was referred to Emergicare as the Designated Provider on September 12, 2014, after Cpl. Braun completed the Casualty Report. He reported to the authorized treating provider, Dr. Elizabeth Arrington that he was weightlifting and felt a sharp pain and bulge over the pectoralis area. The claimant was then subsequently referred to orthopedist Dr. Michael Simpson who diagnosed the claimant as having suffered a torn pectoralis major tendon.

21. On September 17, 2014, Dr. Simpson submitted a request to the respondent for authorization to perform a surgical repair of the torn pectoralis major tendon.

22. The respondent retained Dr. Tashof Bernton to conduct a review of Dr. Simpson's request for authorization to perform surgery pursuant to W.C.R.P. Rule 16. Based on the findings and conclusions of Dr. Bernton, the respondent denied authorization for the surgery as not work related and therefore not reasonable and necessary as part of the workers' compensation claim. Additionally compensability of the claim had not been determined, thus the request for authorization for surgery was also denied on those grounds.

23. Dr. Bernton is Board certified in internal medical and occupational medicine. He is Level II accredited in the Colorado Workers' Compensation system and has been since the accreditation program started.

24. As part of his practice in occupational medicine, Dr. Bernton has evaluated mechanisms of injury, and causation and relatedness of injuries to employment for over 30 years.

25. As part of the Rule 16 review, Dr. Bernton reviewed the claimant's medical treatment records from Parkview Medical Center, Emergicare, Open MRI of Pueblo, Dr.

Michael Simpson, and the Premier Diagnostic Center. He also reviewed photographs submitted by the claimant of the bruising of the claimant's chest and shoulder area.

26. Dr. Bernton also attended the hearing in this matter by telephone and listened to the testimony offered by the claimant and the claimant's witness, Cpl. Braun, in the claimant's case in chief.

27. In his expert medical opinion, after completing his review the records and materials provided and after listening to the testimony offered in the claimant's case in chief, Dr. Bernton concluded that the claimant did not sustain a work related injury on September 8, 2014. Furthermore, he concluded that the injury that claimant sustained on September 10, 2014 was not related to the claimant's work.

28. Dr. Bernton relied on several factors in reaching his expert medical conclusion, to include but not limited to:

a. On September 8, 2014, the claimant did not experience immediate, acute pain following the arrest incident;

b. The claimant was able to complete his usual duty for the remainder of his shift on September 8, 2014;

c. The claimant did not seek medical care on September 8, 9 or 10, 2014 following the arrest incident but prior to the weightlifting incident;

d. A torn pectoralis major tendon would have been debilitating upon its occurrence. If the claimant had sustained a torn pectoralis major tendon on September 8, 2014, he would not have been able to function normally and perform his routine work duty or activities of daily living without significant pain, and he would not have been able to bench press any significant weight because to do so would have been extraordinarily painful.

29. Dr. Bernton further testified that the timeframe for the appearance of the claimant's bruising supports his expert medical conclusion that the claimant did not sustain a work related injury on September 8, 2014. Specifically, Dr. Bernton testified that the color of the bruise helps determine the time an injury originally occurred. Based on the bruising depicted in the photographs provided by claimant, Dr. Bernton was able to ascertain that the claimant did not sustain an injury on September 8, 2014 and,

moreover, that the bruising supports the objective medical conclusion that the claimant's injury was sustained on September 10, 2014.

30. Dr. Bernton also testified that the incident of "tweaking" of the shoulder as the claimant described as having occurred on September 8, 2014 did not predispose the claimant to an injury two days later on September 10, 2014. He explained that a strain or a "tweak" of the muscle is soreness in the muscle that may involve some inflammation around some of the fibers of the tendon, but it does not result in a weakening of the tensile strength. Conversely, a tear is an acute event in which the force exerted on the muscle exceeds the tensile strength of the tendon.

31. Dr. Bernton does not dispute that the claimant sustained a torn left pectoralis tendon. However, Dr. Bernton stated in his report and testified in his post-hearing evidentiary deposition that the medical evidence does not support that this is a work-related injury.

32. The ALJ finds that Dr. Bernton's analysis and opinions are credible and more persuasive then medical evidence to the contrary.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant sustained an injury to his Pectoralis Major in an incident arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo.

App. 2004).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

7. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

8. The ALJ concludes that the claimant has failed to provide sufficient medical or lay evidence that his pectoralis major injury is related to his job duties.

9. The credible medical evidence and opinions indicate that the claimant's condition is not work related. As found above, the ALJ concludes that the opinions of Dr. Bernton are credible and entitled to persuasive weight.

10. The claimant has failed to establish by a preponderance of the evidence that the claimant sustained an injury to his pectoralis major in an incident arising out of and in the course of his employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: June 11, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the scope of her employment with Employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period of June 18, 2014 until February 2, 2015?

- Whether respondents have proven by a preponderance of the evidence that claimant is an independent contractor pursuant to Section 8-40-202(2)(b)(II), C.R.S.?

- Whether respondents have proven by a preponderance of the evidence that claimant's benefits are subject to a 50% penalty for a willful violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S.?

- At the commencement of the hearing, claimant sought to add the issue of penalties for failure to obtain workers' compensation insurance to the hearing, but the motion was denied by the ALJ. Therefore, whether Respondent properly obtained workers' compensation insurance is not an issue decided by this Order.

FINDINGS OF FACT

1. Claimant testified at hearing that she ran into Mr. Cintron, owner of Respondent, during the summer of 2014. Claimant testified Mr. Cintron told her he may have some work available for her as a painter over the summer. Claimant testified she subsequently had a meeting with Mr. Cintron in which he inquired as to whether she had insurance and she informed him that she had health insurance. Claimant testified that Mr. Cintron informed claimant that if he had enough work to keep claimant busy, she would need to get liability insurance. Claimant testified Mr. Cintron offered to take the money out of her check for the liability insurance. Claimant testified at hearing that she thought she was being hired as a temporary employee, and if Mr. Cintron hired her full time she would be an independent contractor and would need to get her own

insurance. Claimant testified at hearing that she did not have her own liability insurance at the time of her injury.

2. Mr. Cintron testified claimant approached him when he came to pick up his daughter from school on the last day of work. Mr. Cintron testified that claimant asked him if he had any work for her as a painter and he informed her that he did not, but took her phone number in case he had extra work. Mr. Cintron testified he subsequently set up two meetings with claimant, one at her house and one at his house. Mr. Cintron testified he inquired at the first meeting if claimant had insurance and she informed him that she had medical insurance through a concurrent employer. Mr. Cintron testified he informed claimant that "all of my guys carry liability insurance".

3. Mr. Cintron testified that at the second interview he again asked claimant if she had insurance and claimant assured him that she had the necessary insurance. Mr. Cintron apparently did not require claimant to present proof of the insurance, however.

4. Claimant began working for Respondent at the Rocky River Resort project on June 11, 2014. Mr. Cintron testified claimant worked two half days on this site. Claimant testified she was paid $15 per hour for her work with Respondent.

5. Mr. Cintron testified that he normally pays his sub-contractors a percentage of the painting contract. Mr. Cintron testified he paid claimant hourly because he was trying to figure out if claimant could paint and complete a job on her own.

6. Mr. Cintron testified that he does not hire any employees and does not oversee the work performed by his painters. Mr. Cintron testified that if a job is not properly performed by one of his painters, he does not call the painter back for the next job.

7. Mr. Cintron testified that he does not provide tools for his painters, but does provide materials, such as paint, stains, thinner, primer, and ladders. Mr. Cintron testified he provides his contractors 1099 forms at the end of the year unless the contractor does not earn the minimum amount for a 1099 form of $600. Mr. Cintron noted that claimant was not provided a 1099 form because she did not earn the minimum amount of $600 in her work with Respondent.

8. Claimant testified that she was instructed by Respondent to work from 9-3 each day. Mr. Cintron testified he did not instruct claimant to show up at a particular time and she had advised him that she could only work until 3:00 p.m. because she had a second job during the evening.

9. Mr. Cintron testified that during their meetings before painting, claimant informed Mr. Cintron that she was afraid of heights. Claimant testified that she informed Mr. Cintron that she would not go above the twelfth rung on the ladder because she was only being paid $12 per hour. Regardless, on the first job that claimant worked with Respondent, Mr. Cintron secured a ladder to a pole so claimant could climb onto the low roof in order to pain the fascia.

10. Conflicting evidence was presented at hearing regarding the amount of work claimant performed at the first job site. Regardless of the amount of painting claimant completed at the job site, the parties agree that claimant was paid for two days working approximately six hours each day.

11. Claimant testified at hearing that she was paid for her first job by check issued to her directly. Copies of the checks were entered into evidence and are issued from Respondent's business account to claimant individually. Claimant was paid $230 for her work on the first painting project which included $180 for 12 hours of work at $15 per hour and $50 for a bonus.

12. Claimant was issued a second check for her work on the second project that was for $140, representing 10 hours at $14 per hour. This check was made out to claimant individually. Claimant kept track of her own hours and submitted the hours to Respondent to be paid.

13. Mr. Cintron testified at hearing that he did not require claimant to work exclusively for his company. This is evidenced by the fact that claimant had concurrent employment while working for Mr. Cintron.

14. Claimant worked on the second project, a painting job at Wild Goose Lane, on June 16, 2014. Claimant testified she worked June 16, 2014 painting areas on the condominium she could reach with 12 rungs on the ladder. Claimant testified Mr. Cintron was present and instructed the painters on what to do. On June 17, 2014, claimant arrived at work and set up a ladder to paint the peak of an awning at the entrance of the condominium when the ladder collapsed and claimant fell fracturing her right wrist and suffering a laceration on her face.

15. Claimant was taken by another painter from the project site to the emergency room ("ER") where she was treated for her injuries. Claimant underwent x-rays of her right hand and wrist along with computed tomography studies of her face, cervical spine, thoracic spine and head. Claimant was diagnosed with a right comminuted fracture of the distal radius.

16. Following her treatment at the ER, claimant followed up with Dr. Griggs. Dr. Griggs performed surgery on her right distal radius fracture on June 17, 2014. Claimant followed up with Dr. Griggs after her surgery and she was given work

restrictions as of July 28, 2014 that limited her lifting to no more than 10 pounds. Claimant's work restrictions were increased to 30 pounds as of September 8, 2014 and to 50 pounds on November 16, 2014. Dr. Griggs eventually placed claimant at maximum medical improvement as of February 2, 2015.

17. Mr. Cintron testified that on June 17, 2014 he noticed the ladder laying on the ground and realized it was the top half of a 24' ladder that did not have the bottom half with the feet on it. Mr. Cintron testified he knew the ladder belonged to another painter and had considered using it until he realized the ladder did not have the feet. Mr. Cintron testified he moved the ladder back to the owner's truck. Mr. Cintron testified he found out later when standing on the other side of the condominium complex of claimant's fall from the ladder.

18. Conflicting testimony was presented as to whether claimant used brushes on the second job provided by Respondent. Claimant testified she used her own brushes on the first job, but because the second job was an oil based job, and she didn't own oil based brushes, she used brushes belonging to Mr. Cintron. Mr. Cintron denied allowing claimant to use his brushes.

19. Respondent presented the testimony of Mr. Brokos, a friend of Mr. Cintron who was present when Mr. Cintron and claimant in June at Mr. Cintron's residence. Mr. Brokos testified he heard Mr. Cintron ask claimant if she had insurance and heard claimant tell Mr. Cintron she did and that she had insurance through her concurrent employer.

20. Respondent presented the testimony of Mr. Hyatt, a painter for Respondent. Mr. Hyatt testified he works as a sub-contractor for employer. Mr. Hyatt testified that he has also worked as an employee of painting companies and testified the work performed as an employee is different than the work performed as an independent contractor. On cross-examination, Mr. Hyatt noted that his current employer provides brushes, paints, shirts and other materials. Mr. Hyatt testified that as an independent contractor, he provides his own brushes, paints and ladders.

21. Respondent presented the testimony of Mr. McDougal who testified he has worked as an independent contractor for Respondent. Mr. McDougal testified he carries his own general liability insurance and completed paperwork for Respondent. Mr. McDougal testified he has requested Respondent hire his friend as painters in years past, but was told his friend could not be hired because his friend did not have insurance.

22. Claimant testified that following the injury, she was unable to continue working for her concurrent employer. Claimant eventually filed a claim for workers' compensation benefits and a hearing was set on the matter.

23. Conflicting testimony was presented at the hearing as to whether claimant represented to Mr. Cintron that she had liability insurance. Nonetheless, the evidence does establish that Mr. Cintron did not require claimant to provide a certificate of insurance prior to hiring claimant to perform work as a painter. Mr. Cintron paid claimant per hour and made checks payable to claimant directly, and not to a trade name. Mr. Cintron provided claimant with the paint and drop cloths and ladders used to perform the painting. While the paint would be considered material and not tools, the ALJ determines the drop cloths and ladders would be considered tools.

24. Conflicting testimony was presented regarding whether Mr. Cintron provided brushes for claimant to use on the second job. The testimony did establish that claimant provided her own brushes for the first job. Mr. Cintron denied providing claimant with brushes for the second job, but the ALJ finds claimant's testimony that she did not have oil based brushes for the second job to be credible and persuasive. Claimant's testimony regarding the oil based work performed on the second job is supported by the photographs of the condominium entered into evidence and is found to be credible and persuasive. Therefore, the ALJ finds that claimant's testimony that Respondent provided tools consisting of brushes for the second job is accepted by the ALJ.

25. The ALJ notes that the evidence establishes that claimant was paid in a different method than the other painters who identified as independent contractors. While those contractors were paid a percentage of the painting contract, claimant was paid an hourly rate. Mr. Cintron testified that this occurred because he was gauging whether claimant was a capable enough painter to handle the work, but the evidence leads the trier of fact to determine that claimant's different method of payment leads one to the conclusion that claimant was under an employer-employee relationship with Respondent at the time of her injury.

26. The ALJ concludes from a review of the evidence that claimant has established that it is more probable than not that she was an employee of Respondent at the time of her injury. The ALJ finds that claimant was paid an hourly rate, with checks made directly payable to claimant, and that Respondent provided certain tools for claimant, including ladders, drop cloths and brushes for the second job. The ALJ finds that Respondent oversaw claimant's work as evidenced by the fact that he secured the ladder to the pole at the first job site, allowing claimant access to the fascia that was to be painted.

27. The ALJ concludes that Respondent did not require claimant to work particular hours, but arranged for claimant to work six hour days from 9:00 a.m. until 3:00 p.m. so claimant could continue to work for her concurrent employer. These work hours are established by the fact that claimant worked two days at the first job site for a total of 12 hours and worked an additional 1 ½ days at the second job site before she was injured. The ALJ finds Respondent did not provide training for claimant and could

terminate her job at any time by virtue of simply asking her to leave the job site. The ALJ further finds that claimant was not required to work exclusively for Respondent.

28. The ALJ credits the testimony of Mr. Hyatt and claimant and finds that the employment of a painter can take different forms, as either an employee or as an independent contractor. While Mr. Cintron testified he only hired independent contractors, the evidence presented established that some painting contractors will hire employees. Therefore, the ALJ credits the testimony of claimant in this case and finds that the claimant in this case, who had performed painting in the past, was not customarily engaged in an independent trade or business.

29. The ALJ credits the testimony at hearing that claimant had performed painting work previously for a different company in Crested Butte, but did not hold herself out as a painting contractor and performed other work not associated with painting, including that of a substitute teacher, part time bartender and her work with her concurrent employer.

30. Taking the relationship between claimant and Respondent into account, the ALJ finds claimant was an employee of Respondent and was not an independent contractor.

31. The ALJ credits the medical records and determines that claimant has established that it is more likely true than not that the medical treatment she received from the ER and from Dr. Griggs was reasonable and necessary to cure and relieve claimant from the effects of her industrial injury. The ALJ finds that the claimant has proven that it is more likely true than not that the ER treatment was authorized as emergency treatment as claimant was taken directly to the ER following her injury with a broken wrist.

32. The ALJ credits claimant's testimony that she was unable to continue her work with her concurrent employer after her work injury and finds that claimant is entitled to an award of temporary total disability ("TTD") benefits commencing July 18, 2014 and continuing until she was placed at MMI.

33. Respondent argues that claimant's benefits should be reduced by 50% for claimant's violation of a safety rule. The ALJ is not persuaded. Presumably, the safety rule violation involves claimant using the ladder, or using a ladder without feet. However, there was no credible evidence presented that claimant was ever instructed not to use the ladder. In fact, Mr. Cintron testified he helped claimant use a ladder on the first painting job by securing the ladder to the pole allowing claimant to climb on the roof to access the fascia.

34. The ALJ determines that Respondent has failed to demonstrate that the claimant willfully violated a safety rule resulting in her injury. Respondent's request to have claimant's benefits reduced by 50% is therefore denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2009). A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-41-301, C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2011. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P2d 1205 (1936); CJI, Civil 3:16 (2008).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity" to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. The ALJ credits the testimony of claimant and finds that claimant has proven that she was in the service of Respondent under an implied contract of hire as of June 17, 2014. The ALJ credits the paychecks establishing that claimant was paid for her work with Respondent as evidence of the contract of hire.

6. Respondents have the burden of proving any affirmative defenses raised at hearing by a preponderance of the evidence. In this case, the issue involving claimant's status as an independent contractor requires respondents to meet the appropriate burden of proof. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

7. With regard to claimant's employment status, Respondent argues that Claimant is an independent contractor pursuant to Section 8-40-202. The ALJ is not persuaded.

8. Section 8-40-202(2)(b)(II) sets out a nine part test to establish whether an individual is an independent contractor. Section 8-40-202(2)(b)(II) provides in pertinent part that in order to prove independence it must be shown that the person for whom services are performed does not:

- Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of specified in the document;

- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

- Pay a salary or at an hourly rate instead of a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may be supplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

9. Section 8-40-202(2)(b)(II), C.R.S. allows for these provisions to be proven through a written document. Pursuant to Section 8-40-202(2)(b)(IV), C.R.S. the written agreement then creates a rebuttable presumption that an independent contractor relationship between the parties exists. However, the written agreement must be signed by both parties, must contain a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. Section 8-40-202(2)(b)(IV) also requires that all signatures on any such document must be duly notarized.

10. In this case, no written documentation was presented between the parties, and therefore, the burden of proof remained with Respondent to establish that claimant was an independent contractor.

11. The ALJ makes the following findings regarding the employment relationship between claimant and Respondent:

- Claimant was paid at an hourly rate.

- Claimant was issued checks made personally to her as opposed to payable to a trade or business name.

- Respondent provided tools in the form of ladders, drop cloths at the first and second job site and paint brushes for claimant at the second job site.

- Respondent oversaw the work as it was performed as evidenced by Mr. Cintron securing the ladder to the pole to allow claimant the ability to get on the roof and paint the fascia on the first pain job.

12. As found, the ALJ determines that Respondent has failed to prove by a preponderance of the evidence that claimant was an independent contractor of Respondent. As found, while Mr. Cintron may have wanted to hire claimant as an

independent contractor, his actions in paying claimant as an hourly worker and providing claimant with tools to perform her work represents a degree of control over claimant's work that results in claimant being considered an employee of Respondent.

13. As found, claimant has proven by a preponderance of the evidence that the injury resulted in the need for medical treatment from the ER and Dr. Griggs that was reasonable and necessary to cure and relieve claimant from the effects of her work injury. As found, Respondent is liable for the cost of the medical treatment provided by the ER and Dr. Griggs.

14. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

15. As found, claimant has proven by a preponderance of the evidence that her injury resulted in a wage loss based on the fact that claimant could no longer continue her work for Respondent or for her concurrent employer.

16.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical benefits necessary to cure and relieve claimant from the effects of her work injury including the medical bills from the ER and Dr. Griggs.

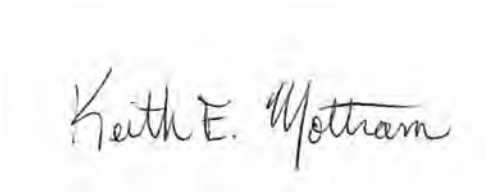
2. Respondent shall pay claimant TTD benefits for the period of July 18, 2014 through February 2, 2015.

3. Respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 24, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving Temporary Total Disability (TTD) benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATIONS

1. Claimant earned an Average Weekly Wage (AWW) of $1,297.96.

2. If Claimant was not responsible for his termination from employment he is entitled to TTD benefits for the period December 13, 2014 through March 29, 2015 subject to any statutory offset for the receipt of unemployment compensation benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a Truck Driver. On September 5, 2014 Claimant injured his shoulder and neck during the course and scope of his employment with Employer.

2. On September 8, 2014 Claimant was assigned a transitional position in Employer's Denver, Colorado terminal. Claimant's light duty assignment for Employer included a 10 pound weight restriction. Claimant's transitional job duties included sweeping and ensuring that hub caps were securely fastened on trucks in the terminal yard. Terminal Manager Ben Van'tHul was Claimant's immediate supervisor.

3. Claimant testified that on December 12, 2014 he arrived at work at approximately 6:30 a.m. After performing various light duty activities Claimant helped Mr. Van'tHul set up the terminal front office reception area for an annual holiday luncheon. Several management representatives from Employer's headquarters located in Spokane, Washington were scheduled to attend. Claimant noted that he began setting up the eating area at approximately 10:30 a.m. and completed the task by about 11:30 a.m. to 11:45 a.m. The executives arrived at the terminal at about 11:45 a.m. or 12:00 p.m.

4. Claimant testified that he normally took his lunch break between 10:30 a.m. and 11:30 a.m. but he waited until 11:45 a.m. on December 12, 2014 because he had to finish preparing the dining area. He remarked that he was required to clock out on a specific computer when taking his lunch break. However, because the computer was located in the area as the holiday luncheon, he was unable to access the computer and clock out for his lunch break.

5. Claimant explained that when he previously had problems clocking in or out on the computer he contacted Stephanie Macabeo in Employer's Spokane, Washington office. Ms. Macabeo had previously corrected Claimant's timesheet issues.

6. Claimant stated that he usually took his lunch break at a desk located in the center of an unheated portion of Employer's warehouse shop adjacent to the terminal front offices. The door to the area was located near the luncheon that had been set up for the visiting management personnel. Claimant remarked that, because the warehouse shop area was unheated, other light duty employees had set up a space heater and a five foot tall cardboard barricade around the desk to retain the heat. Claimant commented that the desk was not visible from the shop entrance door because of the cardboard enclosure.

7. Claimant testified that while taking his lunch break on December 12, 2014 he sat at the shop area desk and listened to music with one headphone. He stated that he typically listens to music while working and on his lunch breaks but had never been reprimanded for the practice. Claimant acknowledged that he might have closed his eyes while listening to music but did not fall asleep while on his lunch break.

8. Employer's President Dennis Williams testified that he visited Employer's Denver terminal on December 12, 2014 and toured the facility from approximately 11:30 a.m. to 12:00 p.m. preceding the holiday luncheon. While touring the shop area he saw Claimant snoring with his eyes closed while sitting at a desk. He maintained that he did not recognize Claimant or know his name. Mr. Williams commented that Employer does not tolerate sleeping on the job and that the offense merits termination. Shortly after touring the terminal Mr. Williams told Mr. Van'tHul that one of his employees was sleeping in the warehouse.

9. Claimant testified that after completing his 30-45 minute lunch break he resumed his typical light duty work until trucks started returning to the terminal. A few hours after he returned to work Mr. Van'tHul advised Claimant that he had a telephone call from Employer's Director of Risk Management Charles Perry. Mr. Perry informed Claimant that he had been terminated for sleeping on the job.

10. Mr. Perry testified that he terminated Claimant on December 12, 2014 for sleeping on the job. He noted that prior to terminating Claimant he reviewed payroll records and determined Claimant was on the clock at the time he was sleeping. Nevertheless, Mr. Perry acknowledged that light duty employees had previously had problems clocking in and out. The proper procedure to correct timecards was to contact Ms. Macabeo in Spokane, Washington. Mr. Perry also acknowledged that he did not ask Claimant whether he was on his lunch break while sleeping. He commented that, if Claimant had been on his lunch break while sleeping, he would not have terminated Claimant.

11. Respondents have failed to establish that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment. On December 12, 2014 Mr. Perry terminated

Claimant for sleeping on the job. The termination was predicated on Mr. Williams' observations of Claimant snoring with his eyes closed while sitting at a desk in the shop area of the terminal. Mr. Williams had been touring the Denver facility prior to a holiday luncheon. As the President of Employer Mr. Williams commented that the company does not tolerate sleeping on the job and the offense merits termination. However, Claimant credibly explained that while taking his lunch break on December 12, 2014 he sat at the shop area desk and listened to music with one headphone. He stated that he typically listens to music while working and on his lunch breaks but had never been reprimanded for the practice. Claimant acknowledged that he might have closed his eyes while listening to music but did not fall asleep on his lunch break. Claimant recognized that he did not clock out for lunch because the computer was located in the same area as the holiday luncheon. He commented that he planned to contact Ms. Macabeo in Employer's Spokane, Washington office because she had previously helped him correct timecard problems. The record thus demonstrates that Claimant's actions of resting while listening to music at a desk in the shop area during his lunch break did not constitute a volitional act that he would reasonably expect to cause the loss of employment. In fact, Mr. Perry acknowledged that he did not ask Claimant whether he was on his lunch break while resting at the desk in the shop area. He commented that, if Claimant had been on his lunch break while sleeping, he would not have terminated Claimant. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. Respondents have failed to establish by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment. On December 12, 2014 Mr. Perry terminated Claimant for sleeping on the job. The termination was predicated on Mr. Williams' observations of Claimant snoring with his eyes closed while sitting at a desk in the shop area of the terminal. Mr. Williams had been touring the Denver facility prior to a holiday luncheon. As the President of Employer Mr. Williams commented that the company does not tolerate sleeping on the job and the offense merits termination. However, Claimant credibly explained that while taking his lunch break on December 5, 2014 he sat at the shop area desk and listened to music with one headphone. He stated that he typically listens to music while working and on his lunch breaks but had never been reprimanded for the practice. Claimant acknowledged that he might have closed his eyes while listening to music but did not fall asleep on his lunch break. Claimant recognized that he did not clock out for lunch because the computer was located in the same area as the holiday luncheon. He commented that he planned to contact Ms. Macabeo in Employer's Spokane, Washington office because she had previously helped him correct timecard problems. The record thus demonstrates that Claimant's actions of resting while listening to music at a desk in the shop area during his lunch break did not constitute a volitional act that he would reasonably expect to cause the loss of employment. In fact, Mr. Perry acknowledged that he did not ask Claimant whether he was on his lunch break while resting at the desk in the shop area. He commented that, if Claimant had been on his lunch break while sleeping, he would not have terminated Claimant. Accordingly, under the totality of the circumstances

Claimant did not commit a volitional act or exercise some control over his termination from employment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant earned an AWW of $1,297.96.

2. Claimant shall receive TTD benefits for the period December 13, 2014 through March 29, 2015 subject to any statutory offset for the receipt of unemployment compensation benefits.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 8, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on October 17, 2014 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

FINDINGS OF FACT

1. Employer operates a property that stores RV's and boats for customers. Vicki Reavis is the owner of Employer. Ms. Reavis' father, Wally Clary, manages Employer's leasing facility.

2. Employer hired Claimant as a Groundskeeper. Claimant had previously worked for MAACO performing auto body work. His job duties for Employer involved completing yard work, checking vehicles and performing other duties as assigned by Mr. Clary.

3. Mr. Clary is involved in the personal hobby of automobile restoration. He has a garage on Employer's property. Mr. Clary is permitted to work on his cars on Employer's premises but also performs automobile restoration at his home.

4. Claimant's scheduled work hours for Employer were from 10:00 a.m. until 3:00 p.m. He lived on Employer's property in an apartment and received a reduced rental fee as part of his compensation from Employer. Claimant also stored his own RV on Employer's property. Finally, Claimant operated a side business working on cars before and after his normal work hours.

5. Claimant explained that in addition to maintaining Employer's property he performs work on Mr. Clary's antique vehicles. Claimant remarked that Mr. Clary directed him to work on the antique vehicles or he would lose his job.

6. On October 16, 2014 Claimant traveled with Mr. Clary to pick up a new radiator for one of Mr. Clary's antique vehicles. On October 17, 2014 Mr. Clary told Claimant to install the new radiator and thermostat in an antique Studebaker truck. Claimant explained that he worked all morning installing the new radiator. He noted that, while he was under the truck, Mr. Clary revved the engine. One of the radiator hoses came loose and sprayed Claimant with boiling radiator fluid.

7. Claimant remarked that Mr. Clary refused to take him to a hospital for medical treatment. Instead, Mr. Clary gave Claimant some cream to apply to his burns.

8. Mr. Clary testified that he paid others to work on his antique cars. Employer did not pay for the work on his personal vehicles. Mr. Clary maintained that Claimant volunteered to install a radiator on the Studebaker truck.

9. Mr. Clary remarked that on October 17, 2014 sometime after 3:00 p.m. he was working on one of his antique vehicles in a garage. He was attempting to start the engine but it began overheating. Mr. Clary explained that Claimant voluntarily entered the garage, stated "I smell gas," moved underneath the vehicle and removed the radiator hose. Hot radiator fluid then came out of the hose and burned Claimant's face and upper body area.

10. On October 19, 2014 Claimant visited the University of Colorado Emergency Room for treatment. He reported that he was "working under a car when a radiator hose became disconnected. [Patient] was hit in head by radiator hose and got some radiator fluid in the mouth." Claimant had been taking Ibuprofen and applying Bacitracin to his wounds but his symptoms continued to progress. The medical report reflects that Claimant "did not initially come to the ED because his boss threatened him."

11. On October 27, 2014 Claimant visited Denver Health Medical Center for treatment. Claimant reported hearing loss after antifreeze exposure on October 17, 2014. The record reflects that Claimant had suffered burns to his face, chest and neck areas as the result of a radiator fluid leak. Physicians diagnosed Claimant with acute otitis media and referred him to an ENT specialist for additional evaluation.

12. Ms. Reavis testified at the hearing in this matter. She explained that Claimant performed maintenance duties including tree trimming, lawn care, changing light bulbs and general cleaning around Employer's property. Although Ms. Reavis acknowledged that Mr. Clary stored approximately 10-12 vehicles on Employer's property, she maintained that Claimant was not hired to work on automobiles for Employer.

13. Claimant has established that it is more probably true than not that he suffered compensable injuries on October 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that, in addition to maintaining Employer's property, he performed work on Mr. Clary's antique vehicles. On October 16, 2014 Claimant traveled with Mr. Clary to pick up a new radiator for one of Mr. Clary's antique vehicles. On October 17, 2014 Mr. Clary told Claimant to install the new radiator and a thermostat in a Studebaker truck. Claimant explained that he worked all morning installing the new radiator. He noted that, while he was under the truck, Mr. Clary revved the engine. One of the radiator hoses came loose and sprayed Claimant with boiling radiator fluid. The medical records reveal that Claimant suffered burn injuries to his face, chest and neck areas as well as hearing loss as a result of the

October 17, 2014 incident. The medical records are consistent with Claimant's account of the incident.

14. In contrast, Mr. Clary testified that Claimant voluntarily entered a garage while he was working on an antique vehicle. Claimant stated "I smell gas," moved underneath the vehicle and removed the radiator hose. However, based on the circumstances surrounding Claimant's injuries, Mr. Clary's account is not credible. Specifically, it is unlikely that an individual would move underneath a vehicle from outside a garage after smelling gas. More generally, Claimant occasionally performed work on Mr. Clary's vehicles at Mr. Clary's direction. Claimant's injuries occurred while he was performing automobile repair work at the direction of Mr. Clary as part of his job duties. Claimant's injuries thus had their origins in his work-related functions for Employer. Accordingly, Claimant's injuries arose out of and occurred within the course and scope of his employment for Employer.

15. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. After the October 17, 2014 accident Claimant sought emergency treatment at the University of Colorado Emergency Room. He subsequently received treatment at the Denver Health Medical Center for hearing loss and was referred to an ENT specialist for an evaluation. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his October 17, 2014 injuries. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower and requires a claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* at 641-62.

5. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries on October 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that, in addition to maintaining Employer's property, he performed work on Mr. Clary's antique vehicles. On October 16, 2014 Claimant traveled with Mr. Clary to pick up a new radiator for one of Mr. Clary's antique vehicles. On October 17, 2014 Mr. Clary told Claimant to install the new radiator and a thermostat in a Studebaker truck. Claimant explained that he worked all morning installing the new radiator. He noted that, while he was under the truck, Mr. Clary revved the engine. One of the radiator hoses came loose and sprayed Claimant with boiling radiator fluid. The medical records reveal that Claimant suffered burn injuries to his face, chest and neck areas as well as hearing loss as a result of the October 17, 2014 incident. The medical records are consistent with Claimant's account of the incident.

6. As found, in contrast, Mr. Clary testified that Claimant voluntarily entered a garage while he was working on an antique vehicle. Claimant stated "I smell gas," moved underneath the vehicle and removed the radiator hose. However, based on the circumstances surrounding Claimant's injuries, Mr. Clary's account is not credible. Specifically, it is unlikely that an individual would move underneath a vehicle from outside a garage after smelling gas. More generally, Claimant occasionally performed work on Mr. Clary's vehicles at Mr. Clary's direction. Claimant's injuries occurred while he was performing automobile repair work at the direction of Mr. Clary as part of his job duties. Claimant's injuries thus had their origins in his work-related functions for Employer. Accordingly, Claimant's injuries arose out of and occurred within the course and scope of his employment for Employer.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. After the October 17, 2014 accident Claimant sought emergency treatment at the University of Colorado Emergency Room. He subsequently received treatment at the Denver Health Medical Center for hearing loss and was referred to an ENT specialist for an evaluation. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his October 17, 2014 injuries. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable injuries during the course and scope of his employment with Employer on October 17, 2014.

2. Employer is financially liable for Claimant's reasonable and necessary medical treatment that is designed to cure or relieve the effects of his October 17, 2014 industrial injuries.

In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $5,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $5,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 17, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period August 7, 2014 through August 24, 2014.

FINDINGS OF FACT

1. Employer is a seasonal gardening business. Betsey Kiehl is the owner of Employer and Claimant was one of her employees.

2. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant was unable to contact Ms. Kiehl. Ms. Kiehl was on an airline flight returning from Vermont. A co-employee thus took Claimant to the Vail Valley Medical Center for emergency treatment. After undergoing x-rays Claimant was diagnosed with a non-displaced fracture of the right third metatarsal. The cost of the emergency room visit was $2061.35. Ms. Kiehl signed a promissory note for the cost of the emergency room services.

3. On August 6, 2014 Employer did not possess Workers' Compensation insurance.

4. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014. Instead, Employer challenges Claimant's medical treatment.

5. On August 13, 2014 Claimant visited John Paul Elton, M.D. at Vail-Summit Orthopaedics in Edwards, Colorado for an examination. He noted that Claimant was wearing a splint and using crutches for her right foot injury. Claimant reported that her foot pain had improved but she was still experiencing intermittent symptoms that became worse with any weight-bearing. Dr. Elton diagnosed Claimant with a right third metatarsal fracture but expressed concerns about a possible Lisfranc injury. He thus

ordered an MRI of the right midfoot to "further examine the ligamentous structures of the Lisfranc complex to develop a safe treatment plan." Dr. Elton directed Claimant to wear a compression stocking in a boot, use crutches and remain non-weight-bearing.

6. On August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics. The MRI revealed a right foot third metatarsal non-displaced fracture. The Lisfranc ligament was "intact and unremarkable." The cost of the MRI was $1837.00.

7. Ms. Kiehl contends that Employer is self-insured and would accept responsibility for Claimant's medical bills if she obtained treatment from the following: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers.

8. On August 21, 2014 Claimant returned to Dr. Elton for an examination. After reviewing the MRI, Dr. Elton remarked that Claimant had a "stable Lisfranc complex with a minimally displaced third metatarsal base fracture." He directed Claimant to continue to use her fracture boot until a follow-up appointment in four to five weeks. Dr. Elton remarked that with her boot in place Claimant could progressively increase her weight-bearing as tolerated.

9. Claimant and her father Jerry Stevens credibly testified that Claimant's August 6, 2014 right foot injury prevented her from returning to work for Employer. Claimant was unable to perform her job duties because she was taking pain medications and wearing a boot on her right foot. On August 25, 2014 Claimant returned to school at the University of Colorado in Boulder. Accordingly, Claimant seeks TTD benefits for the period August 7, 2014 through August 24, 2014.

10. In the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50.

11. Claimant also maintained concurrent employment with Vail Myriad when she was injured on August 6, 2014. She was unable to perform her job duties for Vail Myriad because of her right foot injury. Claimant's earnings from Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by 7 yields an AWW of $321.43.

12. Based on her earnings from Employer and Vail Myriad Claimant earned a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

13. On August 29, 2014 Employer paid Claimant $618.60 to cover wage loss benefits. Employer has also made partial payments for Claimant's medical treatment and diagnostic studies.

14. During the Fall of 2014 Claimant returned to Dr. Elton for follow-up visits. By January 7, 2015 Dr. Elton noted that Claimant's right foot fracture appeared to be healed and she could undertake activities as tolerated.

15. On March 2, 2015 Dr. Elton drafted a letter explaining Claimant's need to obtain an MRI from Vail Summit Orthopedics instead of Touchstone Imaging. He noted that Claimant suffered a right foot injury in August 2014 and he ordered an MRI to evaluate a possible ligamentous injury. Dr. Elton explained that, because of quality limitations at various imaging facilities, he recommended a facility with "optimal imaging capabilities and musculoskeletal trained radiologists." He thus stated "we recommended against Touchstone Imaging and [Claimant's] MRI was performed at Vail Summit Orthopedics in Edwards, CO."

16. Claimant has established that it is more probably true than not that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

17. Claimant has proven that it is more probably true than not that the right of medical selection passed to her because Employer failed to designate at least two medical providers in writing after receiving notice of the August 6, 2014 injury. Claimant informed Employer of the accident and Ms. Kiehl mentioned the following as preferred providers: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers. Accordingly, pursuant to statute and rule the right to select an authorized medical provider passed to Claimant.

18. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. On August 6, 2014 Claimant visited the Vail Valley Medical Center for emergency treatment. Claimant also visited Dr. Elton for medical treatment and diagnosis on several occasions. Finally, on August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics based on the recommendation of Dr. Elton. All of the preceding medical treatment was reasonable, necessary and related to Claimant's August 6, 2014 right foot injury. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of her right foot injury.

19. For the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from

Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

20. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $809.83 by 66.67% yields a weekly TTD rate of $539.91.

21. Employer was not insured on August 6, 2014. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The period covers 18 days. Claimant's TTD rate is $539.91, increased by 50% for a lack of insurance, to a TTD rate of $809.83 each week. Multiplying $809.83 each week for a total period of 18 days yields a total TTD amount of $2,082.42.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996

P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43-404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(D) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

9. As found, Claimant has proven by a preponderance of the evidence that the right of medical selection passed to her because Employer failed to designate at least two medical providers in writing after receiving notice of the August 6, 2014 injury. Claimant informed Employer of the accident and Ms. Kiehl mentioned the following as preferred providers: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers. Accordingly, pursuant to statute and rule the right to select an authorized medical provider passed to Claimant.

10. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. On August 6, 2014 Claimant visited the Vail Valley Medical Center for emergency treatment. Claimant also visited Dr. Elton for medical treatment and diagnosis on several occasions. Finally, on August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics based on the recommendation of Dr. Elton. All of the preceding medical treatment was reasonable, necessary and related to Claimant's August 6, 2014 right foot injury. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of her right foot injury.

Average Weekly Wage

11. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair

approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

12. As found, for the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

13. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

14. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $809.83 by 66.67% yields a weekly TTD rate of $539.91.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

15. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a

trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005).

16. As found, Employer was not insured on August 6, 2014. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The period covers 18 days. Claimant's TTD rate is $539.91, increased by 50% for a lack of insurance, to a TTD rate of $809.83 each week. Multiplying $809.83 each week for a total period of 18 days yields a total TTD amount of $2,082.42.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Employer is financially responsible for payment of Claimant's medical expenses for the treatment of her right foot injury as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her August 6, 2014 industrial injury.

3. Claimant earned an AWW of $809.83.

4. Claimant shall receive TTD benefits for the period August 7, 2014 through August 24, 2014. The period covers 18 days. Claimant is entitled to a TTD rate of $539.91, increased by 50% for a lack of insurance, to a TTD rate of $809.83 each week. Multiplying $809.83 each week for a total period of 18 days yields a total TTD amount of $2,082.42. Accordingly, total TTD benefits due equal $2,082.42.

5. In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $7,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $7,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

6. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period August 7, 2014 through August 24, 2014.

FINDINGS OF FACT

1. Employer is a seasonal gardening business. Betsey Kiehl is the owner of Employer and Claimant was one of her employees.

2. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant was unable to contact Ms. Kiehl. Ms. Kiehl was on an airline flight returning from Vermont. A co-employee thus took Claimant to the Vail Valley Medical Center for emergency treatment. After undergoing x-rays Claimant was diagnosed with a non-displaced fracture of the right third metatarsal. The cost of the emergency room visit was $2061.35. Ms. Kiehl signed a promissory note for the cost of the emergency room services.

3. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014. Instead, Employer challenges Claimant's medical treatment.

4. On August 13, 2014 Claimant visited John Paul Elton, M.D. at Vail-Summit Orthopaedics in Edwards, Colorado for an examination. He noted that Claimant was wearing a splint and using crutches for her right foot injury. Claimant reported that her foot pain had improved but she was still experiencing intermittent symptoms that became worse with any weight-bearing. Dr. Elton diagnosed Claimant with a right third metatarsal fracture but expressed concerns about a possible Lisfranc injury. He thus ordered an MRI of the right midfoot to "further examine the ligamentous structures of the Lisfranc complex to develop a safe treatment plan." Dr. Elton directed Claimant to wear a compression stocking in a boot, use crutches and remain non-weight-bearing.

5. On August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics. The MRI revealed a right foot third metatarsal non-displaced fracture. The Lisfranc ligament was "intact and unremarkable." The cost of the MRI was $1837.00.

6. Ms. Kiehl contends that Employer is self-insured and would accept responsibility for Claimant's medical bills if she obtained treatment from the following: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers.

7. On August 21, 2014 Claimant returned to Dr. Elton for an examination. After reviewing the MRI, Dr. Elton remarked that Claimant had a "stable Lisfranc complex with a minimally displaced third metatarsal base fracture." He directed Claimant to continue to use her fracture boot until a follow-up appointment in four to five weeks. Dr. Elton remarked that with her boot in place Claimant could progressively increase her weight-bearing as tolerated.

8. Claimant and her father Jerry Stevens credibly testified that Claimant's August 6, 2014 right foot injury prevented her from returning to work for Employer. Claimant was unable to perform her job duties because she was taking pain medications and wearing a boot on her right foot. On August 25, 2014 Claimant returned to school at the University of Colorado in Boulder. Accordingly, Claimant seeks TTD benefits for the period August 7, 2014 through August 24, 2014.

9. In the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50.

10. Claimant also maintained concurrent employment with Vail Myriad when she was injured on August 6, 2014. She was unable to perform her job duties for Vail Myriad because of her right foot injury. Claimant's earnings from Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by 7 yields an AWW of $321.43.

11. Based on her earnings from Employer and Vail Myriad Claimant earned a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

12. On August 29, 2014 Employer paid Claimant $618.60 to cover wage loss benefits. Employer has also made partial payments for Claimant's medical treatment and diagnostic studies.

13. During the Fall of 2014 Claimant returned to Dr. Elton for follow-up visits. By January 7, 2015 Dr. Elton noted that Claimant's right foot fracture appeared to be healed and she could undertake activities as tolerated.

14. On March 2, 2015 Dr. Elton drafted a letter explaining Claimant's need to obtain an MRI from Vail Summit Orthopedics instead of Touchstone Imaging. He noted that Claimant suffered a right foot injury in August 2014 and he ordered an MRI to evaluate a possible ligamentous injury. Dr. Elton explained that, because of quality limitations at various imaging facilities, he recommended a facility with "optimal imaging capabilities and musculoskeletal trained radiologists." He thus stated "we recommended against Touchstone Imaging and [Claimant's] MRI was performed at Vail Summit Orthopedics in Edwards, CO."

15. Claimant has established that it is more probably true than not that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

16. Claimant has proven that it is more probably true than not that the right of medical selection passed to her because Employer failed to designate at least two medical providers in writing after receiving notice of the August 6, 2014 injury. Claimant informed Employer of the accident and Ms. Kiehl mentioned the following as preferred providers: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers. Accordingly, pursuant to statute and rule the right to select an authorized medical provider passed to Claimant.

17. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. On August 6, 2014 Claimant visited the Vail Valley Medical Center for emergency treatment. Claimant also visited Dr. Elton for medical treatment and diagnosis on several occasions. Finally, on August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics based on the recommendation of Dr. Elton. All of the preceding medical treatment was reasonable, necessary and related to Claimant's August 6, 2014 right foot injury. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of her right foot injury.

18. For the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

19. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43-404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(D) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

9. As found, Claimant has proven by a preponderance of the evidence that the right of medical selection passed to her because Employer failed to designate at least two medical providers in writing after receiving notice of the August 6, 2014 injury. Claimant informed Employer of the accident and Ms. Kiehl mentioned the following as preferred providers: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers. Accordingly, pursuant to statute and rule the right to select an authorized medical provider passed to Claimant.

10. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. On August 6, 2014 Claimant visited the Vail Valley Medical Center for emergency treatment. Claimant also visited Dr. Elton for medical treatment and diagnosis on several occasions. Finally, on August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics based on the recommendation of Dr. Elton. All of the preceding medical treatment was reasonable, necessary and related to Claimant's August 6, 2014 right foot injury. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of her right foot injury.

Average Weekly Wage

11. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

12. As found, for the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

13. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

14. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Employer is financially responsible for payment of Claimant's medical expenses for the treatment of her right foot injury as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her August 6, 2014 industrial injury.

3. Claimant earned an AWW of $809.83.

4. Claimant shall receive TTD benefits for the period August 7, 2014 through August 24, 2014.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 15, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-966-479-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 26, 2015. The hearing was digitally recorded (reference 4/26/2015, Courtroom 1, from 8:30 AM and 10:30 AM and 12:15 AM). The official Spanish/English Interpreter was David Roberts.

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection. The Claimant's objection to Respondents' Exhibit J was sustained, and the ALJ reserved ruling, allowing portions of J to be used for impeachment purposes.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; and, if compensable; medical benefits; temporary total disability (TTD) benefits from November 11, 2014 to November 13, 2014; and, temporary partial disability (TPD) benefits from November 14, 2014 to February 6, 2015. The Respondents raised the affirmative defense to TTD of "responsibility for termination." The Claimant did not designate the issue of average weekly Wage (AWW), the Respondents declined to agree to an

addition of the AWW issue and therefore, this issue is precluded from this hearing and any determinations concerning TTD and/or TPD would be academic and interlocutory.

The Claimant bears the burden of proof, by a preponderance of the evidence, to establish that a compensable injury occurred on November 1, 2014, while the Claimant was working for the Employer. In addition, the Claimant bears the burden of proof on the issue of TTD benefits from November 1, 2014 through November 13, 2014, as well as TPD benefits from November 14, 2014 through February 6, 2015.

The Respondents bear the burden of proof, by a preponderance of the evidence, the affirmative defense of "responsibility for termination."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant is a 33-year-old male who began working as a dishwasher for the Employer on October 8, 2014. His duties include, washing dishes, some fruit preparation, emptying full trash cans into a dumpster, and taking full linen bags outside to be placed in a bin.

2. On November 2, 2014, the Claimant left work early, due to back pain that the Claimant alleges was a result of a back injury he had sustained while working on November 1, 2014, the previous day. The evidence is unclear whether the Claimant reported the work-related nature of his back pain when he left work early on November 2, however, the Employer became ware, or should have been aware, that the Claimant was claiming work-related back pain prior to November 10, 2014.

3. On November 3, 2014, the Claimant went to Sisters of Charity of Leavenworth Hospital (SCL), and was treated for a back strain. He was released, with instructions that he may return to work on November 5, 2015. This treatment was causally related to the November 1 back strain and it was reasonably necessary to cure and relieve the effects of that injury.

4. On November 8, 2014, the Claimant returned to SCL, and was treated in the emergency room (ER) for back pain. He was released, with instructions that he may return to work on November 12, 2014. This treatment was causally related to the November 1 back strain and it was reasonably necessary to cure and relieve the effects of that injury.

5. On November 10, 2014, the Claimant went to Concentra Medical Center (hereinafter "Concentra"), on referral by his Employer, and was diagnosed with lumbar strain, as well as disorders of the sacrum. Under the care of Elizabeth R. Palmer, PA-C, the Claimant was released, with instructions that he may return to work on November 11, 2014, with restricted activity. The restricted activity included not lifting, pushing, or pulling anything over 10 lbs. In addition, it permitted, occasional bending and walking,

and prohibiting squatting. The Claimant was scheduled for weekly follow up visits, and was given an anticipated date of maximum medical improvement (MMI) of January 10, 2015. The work restrictions remained unchanged until December 16, 2014.

6. On November 10, 2014, the Claimant filed a Claim for Worker's Compensation with the Colorado Division of Workers' Compensation (DOWC).

7. On December 8, 2014, the Respondents filed a Notice of Contest in response to the Claimant's Workers' Claim.

8. On December 16, 2014, the Claimant's lifting, pushing, and pulling related restrictions were changed from a 10 lb restriction, to a 20 lb restriction.

9. The Claimant actually worked from November 5, 2014 through February 5, 2015. The evidence is unclear concerning whether he worked full duty, full hours or restricted duty at lesser hours during this time period. Therefore, the Claimant has failed to prove TPD by preponderant evidence during this period of time.

10. On February 6, 2015, the Claimant was called into a meeting with Joel Glentzer (hereinafter "Glentzer"), the General Manager of the location the Claimant was employed at, and was asked to provide a correct Social Security number. It had been discovered by the Human Resources Department of the Employer that the Claimant had supplied an incorrect Social Security number when hired. The Claimant was given one week to provide a correct number.

11. The Claimant did not return to the Employer after the February 6, 2015 meeting, and he did not provide a correct Social Security number. He was subsequently terminated from employment.

The Injury, According to the Claimant

12. The Claimant alleges that he sustained an injury while working on November 1, 2014. According to the Claimant, he was asked by the acting kitchen manager, Tim Downs (hereinafter "Downs"), to help take out the kitchen trash. The Claimant tried to lift the can, but could not, because it was "too heavy." The Claimant then proceeded to try again, lifting "really hard," and managed to get the trash can to his knee. At this point, the trash can was tipped into the dumpster by 2 other employees. The Claimant described the dumpster as not requiring much lifting, but rather, that you could just tip the trash can into it. He described the trash can as being 3 ft in height, 2 ft around, and weighing approximately 120 lbs. According to the Claimant, it was during the time when he lifted the trash can to his knee that he felt a "pull" in his back. He did not report the injury that day, and continued to work the remainder of his scheduled shift.

13. On the following day, November 2, the Claimant went to work, and worked for a "little while," before reporting to a manager that he "felt bad." He was sent home, and did not finish that shift.

14. On November 3, 2014, the Claimant sought medical attention at SCL, due to the back pain that allegedly resulted from the trash can incident on November 1, 2014.

15. The Claimant reports that he is no longer able to perform normal dishwasher tasks.

16. According to the Claimant, he was working 5 days, or 40 hours, a week. Yet, after the injury, he was only scheduled for 1-2 days a week.

17. On cross examination, the Claimant was asked to account for an earlier deposition that may have implied that there were only 2 other witnesses present: Downs, the kitchen manager, and an employee named José. The Claimant stated that there were 3 witnesses present: Downs, a "white guy," and José. The ALJ notes that this is an inconsistent statement, but finds that the difference between 2 and 3 witnesses does not make a material difference, under the facts of this case. In addition, neither the "white guy," nor José were present to be called as witnesses.

The Injury, According to Respondents' Witness, Tim Downs

18. Tim Downs (hereinafter "Downs") was the acting kitchen manager for the Employer at the time of the alleged injury, and was working with the Claimant when the injury is said to have occurred. Downs is no longer employed by the Employer.

19. Downs stated that he did not recall the actual injury taking place, but did remember opening the door so that the Claimant could take out the trash. It is a policy and procedure of the Employer that at least two employees are present when trash is being taken out: a "certified employee," and "staff". The doors that lead to the dumpster are locked, and require the certified employee to unlock the door, and stay there until the trash has been emptied.

20. Downs stated that even though he did not recall any injury taking place, if he had observed an injury, he would have followed the procedures required by the Employer. The ALJ notes that Downs does **not** assert that he knows whether the Claimant was injured while working on November 1, 2014. Rather, Downs asserts that he does not remember any injury.

Termination of Employment

21. On cross examination, the Claimant admitted that he was terminated from his employment with the Employer due to a ""bad" Social Security card. He further admitted that he does not have a valid United States Social Security card. The

Claimant was reminded by the ALJ that the he had a Fifth Amendment right not to incriminate himself when asked about his true identity, and he chose not to invoke this right.

22. On direct examination, Glentzer, the General Manager of the Employer, confirmed that the Claimant was terminated on February 13, 2015, after failing to provide a valid Social Security number, following a meeting on February 6, 2015, regarding the matter.

Ultimate Findings

23. The ALJ makes a rational choice to accept the Claimant's account of his work-related injury. In addition, although Downs was credible, and had stated that he did not remember witnessing the Claimant injure himself on November 1, 2014, the ALJ sees no rational reason to infer that such an injury did **not** take place. The Claimant was sufficiently credible to sustain his burden of proof with respect to compensability.

24. The Claimant has proven, by a preponderance of the evidence, that he sustained a work-related back injury while working for the Employer on November 1, 2014. Therefore, the Claimant has proven that he sustained a compensable injury, as he alleges.

25. The medical care at SCL on November 3, without an Employer referral, was of an emergent nature. The medical care at SCL on November 8, 2014 was also of an emergent nature although not the result of an Employer referral. The medical care at Concentra was the result of an Employer referral and, therefore, authorized. All of the medical care and treatment for the Claimant's low back strain of November 1, 2014, reflected in the evidence, was causally related and reasonably necessary to cure and relieve the effects thereof.

26. Because the Claimant failed to designate the issue of AWW, as well as provide records for calculation of an AWW, the Claimant provided no persuasive evidence to suggest that he suffered a "wage loss" as a result of his injury. Therefore, his claim for TTD and TPD benefits is incapable of quantification or determination.

27. The Claimant acted volitionally by knowingly providing an invalid Social Security number to the Employer, and he reasonably understood or should have understood that this was a terminable offense.

28. In addition, the Respondents have proven, by a preponderance of the evidence, the affirmative defense of "responsible for termination."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant was sufficiently credible to sustain his burden of proof with respect to compensability. Further, each and every other witness was credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial**

evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, ALJ made a rational choice to accept the fact that the Claimant's medical records, as well as his testimony, provided substantial evidence to support the fact that the Claimant sustained a compensable work-related injury on November 1, 2014.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable work-related injury on November, 1 2014.

Medical Benefits

d. Because this matter is compensable, Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer referred the Claimant to Concentra, which is, therefore, an authorized medical provider.

e. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the first visits to SCL on November 3, 2014 and

November 8 were of an emergent nature and Respondents should be liable for the costs thereof.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the low back strain on November 1, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, as reflected in the evidence, was reasonably necessary.

Temporary Disability Benefits

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). As found, the Claimant **failed** to prove, by a preponderance of the evidence, that he is entitled to TTD benefits from November 1, 2014 through November 13, 2014. There was not persuasive evidence presented that the Claimant suffered wage loss during this period of time. In addition, as noted previously, the Claimant failed to designate the issue of AWW, and did not present any records for calculation. Additionally, the Respondents have proven their affirmative defense of "responsibility for termination" on February 6, 2015. Therefore, TPD from November 14, 2014 through February 6, 2015 is unwarranted.

Responsibility for Termination

h. Section 8-42-105 (4), C.R.S., provides that an employee responsible for his/her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be

through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether the claimant is responsible, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. The Supreme Court has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). As found, the Claimant acted volitionally by knowingly providing an invalid Social Security number to the Employer, and reasonably understood or should have understood that such an act is a terminable offense. *See Ernest Olaes v. Elkhorn Construction Co,* W.C. No. 4-782-977 (ICAO, April 12, 2011). As found, Respondents satisfied their burden of proof on the affirmative defense that Claimant was responsible for his termination through a volitional act on his part and/or that Claimant exercised a degree of control over the circumstances leading to termination.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has satisfied his burden with respect to "compensability." He has failed to satisfy his burden with respect to **ascertainable** temporary disability benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained a compensable low back strain on November 1, 2014.

B. The respondents shall pay the costs of medical care and treatment for the Claimant's low back strain of November 1, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all claims for temporary total and temporary partial disability benefits from November 1, 2014 through May 26, 2015, are hereby denied and dismissed.

D. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** by U.S. Mail, or by e-mail addressed as follows:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Date: _____ _____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on October 29, 2014.

2. If the claim is compensable, whether Claimant has established by a preponderance of the evidence that the bilateral L3-4 transforaminal epidural injections recommended by Roberta Anderson-Oeser, M.D. are reasonable, necessary, and related to Claimant's October 29, 2014 work injury.

STIPULATIONS

1. If the claim is found compensable, Claimant's average weekly wage at the time of his injury was $916.29.

2. If the claim is found compensable, Claimant is entitled to temporary total disability benefits, subject to applicable offsets, from November 5, 2014 and until terminated by statute.

3. If the claim is found compensable, the treatment Claimant has received to date at Health One Occupational Medicine and Rehabilitation, Colorado Chiropractic Sports Injury Specialists, and Colorado Rehabilitation Occupational Medicine including care by Jeffrey Hawke, M.D., Katherine Drapeau, D.O, Paul Raford, M.D. Scott Parker, D.C., and Roberta Anderson-Oeser, M.D. is authorized treatment.

FINDINGS OF FACT

1. Claimant works for Employer as a highway maintenance technician with duties including guardrail maintenance, filling pot holes, plowing, landscaping, and fence repair. Claimant has been employed in this position since October 1, 2007. *See* Exhibit B.

2. On Wednesday, October 29, 2014, Claimant was performing his job duties and was weed whacking on a slope when he lost his footing, his right knee gave out, and he fell to the ground. Claimant landed mostly on his buttocks on the left side with his left leg bent and his right leg straight out in front of him and in a position which he described was similar to a baseball player sliding into a base.

3. At the time of his fall, Claimant was holding onto a weed whacker. Claimant was unable to brace his fall with his hands due to the concern that the metal blade of the weed whacker would cut him if he let it go. As he fell, he attempted to hold the weed whacker off to the right and away from his body so he would not be cut. Although the fall to the ground was not far, Claimant is morbidly obese which caused the un-braced impact with the ground to be significant.

4. After the fall, Claimant had immediate pain in his left elbow, left quadriceps area, right knee, right hip, and on the right side of his back.

5. Although Claimant was working with a crew, no one witnessed his fall. Claimant's fellow employees were working ahead of him with their backs to him.

6. Claimant immediately notified his supervisor of the fall. Claimant also filled out an Employee Incident Statement indicating that his right knee had given out and he had fallen onto his buttocks. Claimant left work early that afternoon.

7. Claimant did not seek immediate medical treatment and believed he would simply be sore for a few days and that the pain would get better on its own.

8. Due to his pain, Claimant took the next day off work. Claimant returned to work on Friday, October 31, 2014 and worked a normal shift. Claimant had the weekend off work and returned to work on Monday November 3, 2014 and Tuesday, November 4, 2014. On Monday and Tuesday, Claimant performed shoveling duties and was bent over for most of the day. His back pain became worse.

9. One week after the fall, Claimant's left elbow, left quadriceps, and right knee pain had resolved on its own. However, Claimant's back pain had not resolved. Claimant decided to request medical treatment from Employer for his continuing back pain.

10. On November 5, 2014, Claimant was evaluated by Jeffrey Hawke, M.D. at Health One Occupational Medicine and Rehabilitation (Health One). Claimant reported that he was using a weed whacker on a sloped abutment when he slipped and fell into a seated position. Claimant reported that he had pain in his left elbow, left quadriceps, right knee, and right hip that had gone away but that he had a nagging pain in the right side of his low back that had not gone away. Claimant reported when laying flat and scooting his weight he gets a stinger into his right buttock and that he had no numbness or tingling into the legs, feet, or toes. *See* Exhibit 4.

11. Claimant reported prior events in the past related to football and wrestling twenty or more years prior where he had strained muscles in his back but always had fully recovered. Claimant also reported a prior work related lower back muscle strain in 2013 and a prior work related right knee medial meniscus tear in 2012. *See* Exhibit 4.

12. On physical examination Claimant was 6'2'' tall and 393 pounds. *See* Exhibit 4.

13. Dr. Hawke diagnosed Claimant with lumbar strain. Dr. Hawke opined that it was work related, and that the objective findings were consistent with history and a work related mechanism of injury. Dr. Hawke provided work restrictions of no lifting, carrying, pushing, or pulling over 10 pounds and indicated Claimant should minimize bending at the waist, stooping, and squatting. *See* Exhibit 4.

14. Employer was unable to accommodate Claimant's restrictions. Claimant has not worked since being placed on restrictions.

15. On December 2, 2014 Claimant was evaluated by Scott Parker, D.C. Claimant reported that after his fall he had immediate left quadriceps pain, right knee pain, and elbow pain that resolved on its own within a week. Claimant reported he also had immediate right sided lower thoracic and lumbar pain that did not resolve. Claimant reported his right sided thoracolumbar pain flares up when rotating his body to the right. Claimant reported while lying supine and shifting hips, he experiences right side shock type sensation in the gluteal and thigh region and reported that after standing or walking for a few minutes he has global bilateral leg "falling asleep" sensations. Dr. Parker opined that Claimant had a thoracolumbar strain and provided treatment. *See* Exhibit 5.

16. Claimant treated with Dr. Parker several times between December 2, 2014 and January 8, 2015 when Claimant was released from treatment. Dr. Parker reported on January 8, 2015 that Claimant had some improvements with treatment but that Claimant had reached a plateau in his thoracolumbar pain that was still right sided and fluctuating between pain levels of 1/10 and 2/10. *See* Exhibit 5.

17. During this period of time, Claimant also continued to treat with Dr. Hawke, and other providers at Health One. Claimant reported that he was still having pain under the rib cage in the middle of the back on the right side, pain that was sharp in the right buttock, low back pain, and bilateral leg pain. All of the providers who evaluated Claimant reported that objective findings were consistent with history and a work related mechanism of injury. *See* Exhibit 4.

18. Claimant was referred by Health One to Roberta Anderson-Oeser, M.D. *See* Exhibit 4.

19. On January 12, 2015 Claimant was evaluated by Dr. Anderson-Oeser. Claimant reported an aching, stabbing sensation in his lower lumbar region, right greater than left and numbness in the posterior aspect of his legs. Claimant reported that twisting or bending to the right aggravated his pain. Dr. Anderson-Oeser noted on examination that Claimant was tender over the lower lumbar facet joints and intradiscal spaces and that his lumbar range of motion was restricted with forward flexion and extension and increased pain with extension and rotation. *See* Exhibit 7.

20. Dr. Anderson-Oeser noted that although Claimant completed a course of physical therapy and chiropractic treatment, his pain and paresthesias had not resolved. Dr. Anderson-Oeser recommended an MRI of the lumbar spine and opined that depending on the results Claimant may or may not be a candidate for injection therapy. *See* Exhibit 7.

21. On January 15, 2015 Claimant underwent an MRI of the lumbar spine that was interpreted by radiologist Brian Ravert, M.D. Dr. Ravert's impression was: L2/3 canal stenosis measuring 6 mm in minimum AP diameter with moderate to severe bilateral foraminal narrowing; L3/4 severe right and moderate to severe left foraminal narrowing with canal stenosis measuring 6 mm in minimum AP diameter; L4/5 moderate right and severe left foraminal narrowing; and L5/S1 moderate bilateral foraminal narrowing. *See* Exhibit 6.

22. Dr. Ravert found an intervertebral disc desiccation with posterior disc bulge and facet and unconvertebral hypertrophy at L3/4, which resulted in the severe right and moderate to severe left foraminal narrowing and canal stenosis at that level. *See* Exhibit 6.

23. On January 28, 2015 Claimant was evaluated by Dr. Anderson-Oeser following his MRI. Claimant continued to report low back pain, primarily right sided in nature, in addition to numbness in his legs while standing and walking. He continued to report that bending or twisting to the right aggravated his pain. Dr. Anderson-Oeser opined that Claimant had lumbar radiculitis, bilateral L3-4 foraminal stenosis, lumbar spondylosis, and degenerative disk disease of the lumbar spine. Dr. Anderson-Oeser recommended Claimant undergo diagnostic/therapeutic bilateral L3-4 transforaminal epidural steroid injections to determine if that was his primary pain generator and was accounting for the numbness and tingling in his lower extremities. *See* Exhibit 7.

24. Dr. Anderson-Oeser submitted a request for authorization for bilateral L3-4 transforaminal epidural injections. The request was denied by Respondents on February 11, 2015. *See* Exhibit 7.

25. On February 27, 2015, Claimant underwent an independent medical examination performed by Stephen Lindenbaum, M.D. Claimant reported his main problem as pain in the right thoracolumbar area and reported at times, when he twists, he gets a stabling feeling. *See* Exhibit F.

26. Dr. Lindenbaum opined that it was hard to determine if Claimant sustained an injury to his back on October 29, 2014 due to the severity of Claimant's chronic thoracolumbar and lumbar disease as well as thoracic degenerative disease. *See* Exhibit F.

27. Dr. Lindenbaum opined that Claimant had significant underlying degenerative disease with severe spinal stenosis that was pre-existing and not caused by the work injury. Dr. Lindenbaum opined that he did not see any evidence of any

acute process in the MRI findings, and that Claimant's fall did not cause or exacerbate the MRI findings. Further, Dr. Lindenbaum opined that the L3-4 transforaminal epidural steroid injections would not significantly improve Claimant's overall process. *See* Exhibit F.

28. In the same report, Dr. Lindenbaum opined that the L3-4 transforaminal epidural steroid injections were actually indicated, but were not related to the work injury and were related to Claimant's severe underlying spinal stenosis. *See* Exhibit F.

29. Dr. Lindenbaum also opined that Claimant's weight of 400 pounds could have generated enough force to cause discomfort during the fall, that it was possible the fall could have irritated the arthritic facet joints, that it was possible that the fall could have irritated Claimant's back and paraspinal muscular areas, and that it was possible that the fall contributed to Claimant's acute discomfort in the upper lumbar area. Although Dr. Lindenbaum opined the above was possible, he concluded it was not probable that it had occurred in this case without objective findings on exam to suggest an acute process. *See* Exhibit F.

30. Dr. Lindenbaum's opinion is not found persuasive. Dr. Lindenbaum's report is inconsistent as to whether the L3-4 transforaminal epidural steroid injections are indicated, does not address the posterior disc bulge shown by MRI at L3-4, and does not address the objective examination findings of Claimant's treating providers regarding his acute tenderness in the lower lumbar area or his restricted range of motion.

31. Claimant's testimony that he was not suffering from any right side low back pain just prior to October 29, 2014 is found credible and persuasive. Claimant was working full duty with no restrictions just prior to October 29, 2014 in a physically demanding job.

32. Claimant credibly reported prior injuries or strains to his lower back while playing football and wrestling that occurred twenty or more years ago that resolved on their own, and also credibly reported two prior work related injuries including a 2012 right knee meniscal injury and a 2013 muscle strain in his lower left back.

33. The evidence also shows that on August 24, 2012 Claimant sought treatment at Kaiser for pain in his right hip/buttocks with no radiation down his leg and that he reported pain if he tried to roll over using his right leg. On September 5, 2012 Claimant followed up with Kaiser and reported he was still sore but was improving. *See* Exhibit D.

34. Although Claimant had this pain in his right hip/buttocks, Claimant reported it was improving in September of 2012 and did not seek any further treatment for pain in these areas until after his October 29, 2014 work injury. Claimant is credible that his current pain is different from any prior pain or strains he has experienced in his back.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Compensability

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of

proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S.

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P.3d 999 (Colo.App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Indus. Comm'n v. Newton Lumber & Mfg. Co.,* 314 P.2d 297 (Colo. 1957). Additionally, if the industrial injury aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. ICAO, supra.*

Claimant has met his burden to show by a preponderance of the evidence that there is a causal relationship between his fall at work on October 29, 2014 while weed whipping and his current low back pain and need for treatment. The medical records and Claimant's recent MRI show that Claimant has degenerative issues throughout his lumbar spine. However, despite any pre-existing degenerative conditions that may have existed at the time of Claimant's fall at work, the fall produced immediate pain, disability, and need for treatment. The ALJ concludes that the fall and the impact of the fall at a minimum aggravated Claimant's pre-existing degenerative condition, if not causing a new acute disc injury. Respondents argue that Claimant's current back pain is unrelated to the fall at work and is simply the natural progression of Claimant's pre-existing degenerative spinal stenosis. This is not found persuasive. The ALJ finds it more likely than not that the fall at work caused an acute injury/aggravation and need for treatment. Claimant is credible that he was not experiencing or suffering from any low back pain leading up to his October 29, 2014 fall. Objective examinations of Claimant noted acute tenderness in the back following the work injury and showed on MRI a disc bulge at L3-4 that contributed, in part, to Claimant's severe right and moderate to severe left foraminal narrowing and canal stenosis. Further, Claimant's treating providers at Health One have all opined that the objective findings are consistent with a work related mechanism of injury. Claimant has shown that the fall at work caused an immediate onset of back pain that did not exist prior to October 29, 2014, objective findings support Claimant's subjective pain complaints, and the fall was the direct cause of his need for treatment.

As found above, Claimant is credible and persuasive. At the time of his October 29, 2014 work injury, Claimant was not under any work restrictions and did not have any existing back pain or limitations. Claimant is credible that although he has had minor strains of his lower back in the past, he had no back pain leading up to his October 29,

2014 work injury. Also, as found above, Claimant's job duties require physical activity on a regular basis and leading up to the October 29, 2014 work injury Claimant had no work restrictions or problems in performing his normal job duties. After the work injury, Claimant was placed on restrictions and remains unable to perform his normal job duties.

Further, as found above, the opinion of Dr. Lindenbaum is not credible or persuasive. Dr. Lindenbaum initially opined that it was hard to determine if Claimant sustained an injury to his back on October 29, 2014 due to the severity of Claimant's chronic thoracolumbar disease, lumbar disease, and thoracic degenerative disease. Dr. Lindenbaum opined overall that it was possible that Claimant's weight could have generated enough force during the fall to cause discomfort, to irritate the already arthritic facet joints, to irritate Claimant's back and paraspinal muscle areas, and to cause Claimant's acute discomfort in the lumbar area. Although acknowledging this possibility, Dr. Lindenbaum disagreed with Claimant's treating providers as to the work relatedness of the lumbar pain and believed it was not probable that the fall caused Claimant's pain complaints. Dr. Lindenbaum's opinion failed to address the objective examination findings of acute tenderness in the lumbar region following the work fall, failed to address the MRI imaging showing at L3-4 a disc bulge, and failed to explain Claimant's subjective acute onset of pain. Further, Dr. Lindenbaum also was inconsistent in whether or not the L3-4 transforaminal epidural steroid injections were indicated in this case. As a whole, Dr. Lindenbaum's opinion is not persuasive, is inconsistent with Claimant's credible reports of acute onset of pain, and is inconsistent with the opinions of Claimant's treating providers who opine that Claimant's pain complaints are work related.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has met his burden to show that the bilateral L3-4 transforaminal epidural steroid injections are reasonable and necessary to cure and relieve the effects of his industrial injury. These injections, as requested by Dr. Anderson-Oeser are specifically intended to address the L3-4 symptoms and back pain that Claimant developed when he fell at work. The Claimant did not have pain in these areas prior to the work fall and, although Claimant had pre-existing degenerative changes as shown by MRI, the work fall caused Claimant's need for treatment as he was otherwise non-symptomatic prior to the work fall. The injections are for diagnostic and therapeutic purposes and to address Claimant's acute pain complaints which are causally related to his work fall. The ALJ defers to the medical opinion of Dr. Anderson-Oeser that the

injections are both reasonable and necessary to treat Claimant's current pain complaints and to provide both diagnostic and therapeutic benefits.

ORDER

It is, therefore, ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his back on October 29, 2014.

2. The bilateral L3-4 transforaminal epidural steroid injections recommended by Dr. Anderson-Oeser are reasonable and necessary to cure and relieve the effects of Claimant's industrial injury and Claimant is entitled to this medical treatment.

3. The medical care rendered at Health One Occupational Medicine and Rehabilitation, Colorado Chiropractic Sports Injury Specialists, and Colorado Rehabilitation and Occupational Medicine is authorized treatment.

4. Claimant's average weekly wage is $916.29.

5. Claimant is entitled to temporary total disability benefits from November 5, 2014 and until terminated by statute, subject to applicable offsets including, but not limited to short term disability benefits.

6. Respondents shall pay Claimant interest at a rate of 8% per annum on all amounts of compensation not paid when due.

7. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 10, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-967-518-01

ISSUE

The sole issue presented for adjudication at the hearing was:

1. Whether Respondent has proven it is entitled to a fifty percent (50%) reduction in compensation because the Claimant's November 18, 2014 injury was caused by a willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case.

2. The Claimant suffered a compensable injury on November 18, 2014, when he slipped on ice while in the process of delivering product for the Employer.

3. The only witness to the accident was the Claimant.

4. On their General Admission of Liability filed on December 3, 2014, the Respondents claimed a safety rule violation and remarked that "50% of TTD to be withheld due to safety rule violation (Claimant's Exhibit 1; Respondents' Exhibit A). The Claimant has challenged this.

5. The Respondents assert that the Claimant violated a safety rule because at the time of the incident he was not aware of his surroundings, which is a rule implemented by the Employer to prevent employee accidents.

6. The Claimant credibly testified that on November 18, 2014, he was delivering product to King Soopers. When he arrived at his delivery destination, the entire parking lot was covered in ice. The Claimant credibly testified that he parked closest to the point of delivery because he believed this would be the safest way to proceed. In his statement of the incident he declared that he "slipped on ice coming down truck ramp with a stack of bagels" (Respondents' Exhibit E, p. 41).

7. The Claimant completed an "Employee's Statement of Incident" and in response to the question, "What advice can you give to prevent this kind of incident/accident in the future?" the Claimant stated that the Employer should "get ramps that aren't so steep or go back to trays" (Respondents' Exhibit E, p. 42).

8. The Claimant credibly testified that the method for unloading his delivery truck previously had been to unload trays and he would be in a flat standing position on

the ground. This has recently been changed and the trays have been replaced with universal baskets. The baskets are stacked onto a dolly and then the dolly has to be manipulated down a steep ramp. He said that during the delivery process there is a downward pulling of the product on the ramp. The Claimant testified that in this particular case, he slipped on ice when he was on the bottom of the ramp.

9. The Respondents called Mr. Rod Nordman, a sales manager for the Employer and a supervisor of the Claimant. Mr. Nordman did not witness the accident but opined that the Claimant could have avoided the accident. He also testified that the Claimant agreed that the accident was avoidable.

10. Mr. Nordman testified that when he visited the King Soopers parking lot on November 20, 2014 to perform a 'root cause investigation', the area where the Claimant had parked his truck was the only area that was icy and the rest of the parking lot was clear. The Claimant did not disagree with Mr. Nordman's characterization on how the lot was on November 20, 2014, but testified that the entire parking lot was iced on the day of the incident and he parked in the safest area.

11. The Claimant also testified that he never told Mr. Nordman that he had violated a safety rule or was purposely not paying attention to his surroundings. Thus, he disagrees with the characterization given by Mr. Nordman concerning their conversation about how the accident occurred and he denies making the admissions that Mr. Nordman attributes to the Claimant.

12. The Claimant's testimony is found credible in light of the totality of circumstances, including his written comments found on the Employer's Incident Report at Respondents' Exhibit E, pp. 41 – 42).

13. The ALJ finds that the Employer adopted a safety rule which was reasonable. This rule required employees to be aware of their surroundings and to work safely. The ALJ finds that this rule is reasonable and is intended to assist in avoiding accidents. However, the facts of this case do not support the imposition of any penalty for violation of the rule.

14. The ALJ finds as fact, that the Claimant's actions on November 18, 2014, were not willful and that his testimony concerning both the icy conditions in the King Soopers parking lot and his intent to safely park where he did is credible.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing that Claimant's injury was caused by a willful violation of a safety rule. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201 (2008) C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

C.R.S. § 8-42-112(1)(a) provides for a 50% reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by the willful failure obey any reasonable rule adopted by the employer for the safety of the employee. The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be "brought home" to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be a cause of the claimant's injury.

Here, the evidence established that the Employer adopted a safety rule requiring employees to be aware of their surroundings and work safely. This is a reasonable rule for the safety of the Employer's employees.

However, the Respondents have failed to establish that the Claimant acted willfully and with deliberate intent. The safety rule penalty is only applicable if the violation is willful. The question of whether the respondents proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). intention. Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946); *In re Alverado,* W.C. No. 4-559-275 (ICAO December 10, 2003). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Here, there was some conflict in the testimony as to whether the Claimant's conduct in parking his vehicle was willful. The Employer's witness testified that the Claimant committed a preventable accident by parking in an area of the parking lot at his delivery destination that was shadowed and iced over. The supervisor further testified that this activity violates the safety rule of 'being aware of his surroundings' and a committee of the Employer found that this was the cause of the accident and elected to discipline the Claimant due to causing a preventable accident since they determined that the Claimant should have parked somewhere safer. On the other hand, the Claimant testified that that he never acknowledged that he committed a preventable accident and, on the company paperwork, and during testimony, the Claimant indicated that he slipped on a truck ramp because the ramp was too steep and instead of using trays to carry products, the company switched to baskets placed on dollies which had to be taken down a ramp at a 45 degree angle. The Claimant further testified that when he arrived at the parking lot of his delivery destination, the entire lot was snow-covered and icy that day, so he chose a parking spot that was closer to the building which he believed to be a safer place to park.

The conflict in evidence was resolved in favor of the Claimant who was the only witness to the accident. The Claimant's supervisor did not view the parking lot where the accident occurred until two days after the incident and, at that point, it is likely that the snow and ice that covered the whole lot had melted and there was only ice in the shaded area where the Claimant had parked the vehicle. As the Claimant's testimony was uncontroverted and he was found to be a credible witness, it was found that his decision to park in the spot that was closer to the building was reasonable and not an indication that he was unaware of his surroundings. It was also found that the Claimant slipped on the ramp and not on ice that was on the ground, and it was not established

that the location where the Claimant parked would have prevented him from slipping on the ramp.

As the Respondents failed to establish that the Claimant's injury resulted from his willful failure to obey a reasonable rule adopted by the Employer for his safety, the Claimant's benefits shall not be reduced by fifty percent.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish that Claimant's injury resulted from his willful failure to obey a reasonable safety rule adopted for the safety of the employees and therefore Respondents are not entitled to a reduction in benefits pursuant to §8-42-112(1).

2. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 29, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

The issues presented for determination are whether the Claimant suffered a compensable injury to his right shoulder; and if so, what treatment is reasonable, necessary and related to the injury.

FINDINGS OF FACT

1. Claimant was born on April 4, 1968 and began work for Respondent in May 1989. He was rehired in May 1999. Claimant works for the Parks and Recreation Department and his duties have included general parks maintenance and upkeep, trimming trees and shrubs, etc.

2. The Claimant has a history of right shoulder problems dating back to 2010. In April 2010, an MRI of Claimant's right shoulder, showed "evidence of a high-grade partial-thickness tear of the supraspinatus tendon, low-grade tendon tear of the infraspinatus, and significant degenerative joint disease of the acromioclavicular joint."

3. On April 15, 2010, Claimant sought treatment for this condition with his physician, Dr. Bradley Vilims of Colorado Pain Specialists, who noted right shoulder pain and a high-grade partial tear of the supraspinatus tendon. Dr. Vilims referred the Claimant to Dr. Noonan who recommended shoulder surgery. Claimant postponed the shoulder surgery indefinitely until he could accumulate a sufficient amount of sick leave.

4. In October 2011, Claimant sought medical care with Complete Care of Colorado for an aching pain in his shoulder. Dr. Gregory Kaczmarczyk noted that Claimant was experiencing aching pain in his shoulder that had set in "years ago" and was not due to any specific injury. Claimant was unable to elevate his arm secondary to pain and weakness, managing only a nine-degree abduction/elevation. Claimant received an injection for the shoulder problems.

5. Claimant followed up with Dr. Kaczmarczyk on May 29, 2012 who reviewed Claimant's numerous medical problems and diagnosed "chronic shoulder pain" among other things. The plan regarding the shoulder included "need to get this repaired" and obtaining records from Dr. Noonan.

6. Several years later, on June 17, 2014, Claimant fell while picking up trash in a ditch. He reported the trip-and-fall to his employer, but he had no lost time. He complained of shoulder pain following the accident, which resolved with conservative treatment. The June 17, 2014 claim was closed on August 1, 2014.

7. On August 24, 2014, Claimant again fell while on the job, suffering a thumb injury and contusions and lacerations to his face, but did not complain of an

injury to his shoulder. Although Claimant did not complain of an injury to his shoulder, he did indicate that he was experiencing an aching pain in his right shoulder. Claimant was treated for the thumb injury and lacerations and reached maximum medical improvement on September 3, 2014, with no impairment rating or maintenance medical treatment indicated.

8. On November 5, 2014, Claimant stepped into an animal burrow, tripped, and fell to the ground. He alleges that the trip-and-fall caused him to tear his rotator cuff, resulting in his present complaints of shoulder pain and weakness. Claimant was carrying a sharp tool in his right hand when he stepped in an animal hole and fell forward. To avoid being stabbed by the tool he was carrying, he put his right arm against his upper chest as he fell. The outside of his right shoulder struck the ground.

9. Claimant testified that he heard a popping sound in his right shoulder when he fell.

10. The Employer referred Claimant to the Denver Health Center for Occupational Safety and Health where Dr. Moses evaluated him on November 6, 2014. Dr. Moses' report indicates that a few months prior, Claimant fell at work and injured his right shoulder, but that the shoulder healed and he had no residual difficulties at work. Dr. Moses' handwritten notes from the November 6 evaluation appear to state that Claimant had residual difficulty working overhead following the fall from a few months prior.

11. On November 26, 2014, Claimant had an MRI of his right shoulder. Dr. Tomsick interpreted the MRI scans and his impressions included:

> "massive rotator cuff tear with complete tears of the subscapularis and supraspinatus tendons. There is extensive full-thickness tearing of the majority of the infraspinatus tendon, with minimal few residual posterior fibers remaining. Teres minor tendon is intact. Subscapularis tendon fibers are retracted and displaced superomedially into the superior joint space. Supraspinatus tendon fibers are retracted nearly to the glenoid joint."

12. Dr. Tomsick also noted significant atrophy of a severe degree involving the subscapularis and infraspinatus musculatures and milder atrophy of the supraspinatus musculature.

13. On December 2, 2014, Dr. Moses, Claimant's authorized treating physician, reviewed the November 26, 2014 MRI report and concluded that Claimant had "massive tears of his rotator cuff tendons which (due to the retraction and muscular atrophy) appear to have occurred some time ago and are chronic in nature." In comparing the MRI report to Claimant's report of having been fully functional in his job the day before the accident, Dr. Moses observed, "given the apparent age of these severe injuries it is unclear to me how that is possible."

14. Dr. Moses noted that Claimant was convinced that his shoulder injuries were work-related whether due to the fall on November 5, 2014, or previous work-related incidents. Dr. Moses told the Claimant that "it is not possible to classify these injuries as related to the 11/05/2014 injury due to the chronic changes that were seen on the MRI." Dr. Moses stated that the prior undocumented falls at work could have caused Claimant's injuries, but because he had no documentation of such falls he could not causally relate the injuries to Claimant's work. Dr. Moses referred Claimant to Dr. Michael Hewitt, for an orthopedic consultation and causality assessment.

15. On January 7, 2015, Dr. Hewitt examined Claimant and reviewed his MRI. Dr. Hewitt commented that the MRI showed only mild atrophy of the supraspinatus musculature but that the other two muscles show more advanced atrophy. On the issue of causation, Dr. Hewitt concluded that atrophy would not be evident on an MRI three weeks after an acute injury. Claimant reported to Dr. Hewitt that had multiple falls prior to November 5, and that he could raise his right arm over his head prior to the November 5 incident. Dr. Hewitt stated Claimant's report suggested an acute-on-chronic injury to his shoulder. Dr. Hewitt felt an attempt a rotator cuff repair surgery was warranted although he felt Claimant was a relatively poor surgical candidate for various reasons.

16. Upon hearing from Claimant that Dr. Hewitt had made a determination of causation, Dr. Moses deferred to Dr. Hewitt on the issue. Both physicians concluded that the majority of the atrophy evident on the MRI precluded a finding that the rotator cuff tears could have resulted from his November 5, 2014 trip-and-fall.

17. Respondent requested that Dr. McBride review Claimant's medical records and render opinions as to whether Claimant's shoulder condition was caused by or due to the effects of the November 5 fall. Dr. McBride reviewed Claimant's medical history, including the most recent MRI. Dr. McBride opined that, "atrophy would not be present in a normal rotator cuff or an acute rotator cuff tear. . . . [H]is rotator cuff injury is an old, chronic injury that has not significantly changed since the fall on November 5, 2014."

18. Dr. Messenbaugh is a Board Certified orthopedic surgeon who has a Level II Accreditation in Orthopedics performed an independent medical examination of Claimant. Dr. Messenbaugh concurred with Drs. Moses and McBride that Claimant's rotator cuff tears were not the result of Claimant's trip-and-fall, stating,

> ""It is my opinion that Mr. Montoya's shoulder pathology predated any events of November 5, 2014 by several years resulting in the severe atrophy noted in the shoulder musculature as well as the severe rotator cuff tendon retractions."

19. Dr. Messenbaugh testified about Claimant's history of shoulder problems and opined that the pathology shown on the November 26, 2014 MRI study pre-dated the November 5, 2014 incident. The significant abnormalities shown on the November 26, 2014 MRI were a natural progression of the rotator cuff tears seen in the April 12,

2010 MRI. Dr. Messenbaugh explained that rotator cuff injuries like those seen in April 2010 do not heal themselves. The tears grow over time resulting in abnormal movement of the humeral head in the glenoid process. This abnormal movement increases the wear on the rotator cuff caused by the acromion and also causes abnormal wear in the labrum.

20. Dr. Messenbaugh testified that the weakness and limited shoulder motion reported in October 2011 were symptoms of a worsening rotator cuff injury. The shoulder injection was intended to reduce swelling and relieve symptoms. However, the injection would not heal the rotator cuff tears.

21. Dr. Messenbaugh explained that the mechanism of the November 5, 2014 fall resulted in pushing the humeral head in against the glenoid process. This would not cause or aggravate rotator cuff tears. The popping sound Claimant heard when his shoulder struck the ground probably was snapping of the acromioclavicular joint or the humeral head striking the labrum.

22. Dr. Messenbaugh testified that the pre-existing degeneration of the right shoulder would primarily affect Claimant's ability to perform overhead work. Claimant's ability to drive and pass a DOT physical examination would not have been affected because driving does not involve overhead activities. Claimant would also have been able to use tools such as limb saws if he did not raise his arm above shoulder level. Dr. Messenbaugh could identify no acute trauma in the right shoulder that could have resulted from the November 5, 2014 incident. Dr. Messenbaugh was puzzled by Claimant's assertion that he could perform all work duties without problem prior to November 5, 2014 or throw a football long distances despite the significant rotator cuff tears and advanced arthritis in the right shoulder.

23. Dr. Messenbaugh explained that Claimant is not a good candidate for a rotator cuff repair surgery due to the advanced deterioration and retraction of the rotator cuff tendons. The only viable alternative is shoulder replacement surgery. However, the shoulder replacement surgery is necessary due to the pre-existing and advanced deterioration of Claimant's shoulder but not due to any problems caused by the November 5, 2014 accident.

24. Both Drs. Messenbaugh and McBride agreed Claimant have sustained a contusion or strain when he fell on November 5, 2014, but a strain or contusion would not result in the need for the invasive procedure Claimant now needs to repair pre-existing rotator cuff tears.

25. The ALJ finds the opinions of Dr. McBride and Dr. Messenbaugh to be credible and persuasive.

26. Claimant has failed to prove by a preponderance of the evidence that the November 5, 2014 incident caused a new injury to his right shoulder or aggravated the pre-existing rotator cuff tears.

CONCLUSIONS OF LAW

Generally

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Compensability

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the participating event and the need for treatment. A preexisting condition does not

disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

6. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009).

7. The Workers' Compensation Act creates a distinction between the terms "accident" and "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), C.R.S. An "injury" refers to the physical trauma cased by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury requires medical treatment or causes a disability.

8. The ALJ acknowledges that Claimant fell on November 5, 2014 while in the course and scope of his employment; however, no injury occurred other than a possible contusion or strain. The credible and persuasive medical evidence reflects that Claimant's chronic and severe shoulder pathology pre-dates the November 5, 2014 fall, and that it is the chronic degenerative condition that has produced the need for medical treatment. Specifically, the medical records reflect that in 2010, Claimant had received a recommendation for shoulder surgery, but he elected not to pursue it at that time. He also received an injection in 2011 after reporting to a physician that he had limited range of motion in his right arm and shoulder. Dr. Messenbaugh credibly explained that an injection would not repair the rotator cuff and the atrophy present is indicative of longstanding problems.

Contrary to Claimant's assertions, Dr. Hewitt did not specifically opine that Claimant suffered new structural damage to the right shoulder as result of the November 5 fall. Rather, Dr. Hewitt noted that Claimant's reports that he could raise his right arm over his head prior to November 5, 2014, combined with the mild atrophy (rather than advanced atrophy present in the other two rotator cuff muscles) of the supraspinatus suggested an "acute on chronic" injury. Moreover, Dr. Hewitt appeared to consider Claimant's other falls which are not part of this claim. Dr. Hewitt did note that atrophy would not be present on MRI three weeks after an acute injury, which suggests that Dr. Hewitt did not believe the November 5 fall caused any structural changes to Claimant's right shoulder.

Based on the foregoing, the Claimant has failed to meet his burden of proof. At most, Claimant fell and suffered a mild contusion or strain but nothing in the record supports that the need for a shoulder replacement is due to the November 5, 2014 fall at work.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. Claimant is not entitled to medical benefits, including shoulder surgery, because the claim is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 12, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined are:

1. What is the claimant's correct average weekly wage (AWW); and,

2. Has the respondent-insurer established by a preponderance of the evidence that the claimant's indemnity benefit should be reduced by 50% for a willful violation of a safety rule?

FINDINGS OF FACT

1. On November 24, 2014, the claimant was an Independent Contractor (IC) under contract with the respondent-employer when she injured her neck and right knee in a motor vehicle accident while in the course and scope of her employment.

2. The claimant first entered into an IC agreement (IC-1) with the respondent-employer on September 10, 2014. IC-1 indicates that the claimant is not an employee of the respondent-employer and that the claimant is not entitled to receive Workers' Compensation benefits traditionally associated with an employee/employer relationship. IC-1 basically reads that the respondent-employer will, for a fee, provide the claimant with a taxicab, governmental permits, access to a dispatching service, and certain confidential information to allow the claimant to operate and build her business as a taxicab driver. IC-1 also indicated that both the respondent-employer and the claimant agree to comply with any service agreement, laws, ordinances, statutes, rules, and regulations including federal, state, county, municipal and any other governmental entities pertaining to the utilization and operation of a taxicab. There is no specific mandate in IC-1 that the claimant wear a safety belt while driving a taxicab. Pursuant to the terms of the IC-1, it is automatically terminated if the claimant enters into any other agreement to operate taxicabs.

3. On October 28, 2014, the claimant signed a second Independent Contractor Agreement (IC-2) to become an owner/operator of a cab. IC-2 reiterates that the claimant is not an employee of the respondent-employer and that the claimant has to provide her own Workers' Compensation insurance. IC-2 in paragraph (4)(d) reads that the IC has "complete discretion" with regard to the operation of the taxicab provided

such operation is within all the parameters set forth in IC-2 and within all applicable federal, state, county, and local statutes, rules, regulations ordinances, and the respondent-employer Certificates of Authority. There is no provision in IC-2 which specifically requires Claimant to wear a safety belt while driving a taxicab.

4. The claimant attended the orientation class on September 9, 2014. At that class, various representatives of the respondent-employer went over being an independent contractor for the respondent-employer and what is asked of each independent contractor. As part of that class, the claimant was told that its independent contractors should follow all of the traffic laws. The claimant said most of the safety rules presented involved how a driver can protect him or herself from getting into dangerous situations. At this same class, the respondent-employer talked about ways to increase your income as an independent contractor such as getting the permits to work at the airport, working the dispatch system, developing your own clientele by giving out your card, keeping your cab clean, maintaining a crisp personal appearance, and learning the city and zones well so as to become more efficient. In addition Yellow Cab presented cab drivers who told the attendees that one can earn up to $1,000 to $1,500 per week being an IC for the respondent-employer.

5. The claimant's injury occurred when she was driving a taxicab westbound on Woodmen Road east of Powers Blvd. As the claimant was driving, her taxicab slipped and she ended up losing control, crossing into the eastbound lanes of Woodmen Road, and colliding head on with another vehicle. As the claimant started to cross over the median she quickly unbuckled her safety belt and therefore was unrestrained at the time of impact. The claimant testified that just before the collision she unbuckled her safety belt out of a fear of being trapped in her vehicle after impact. The claimant explained the reason for unbuckling her safety belt was that when she was a young child, she and her brother were passengers in her mother's vehicle when she was involved in an automobile accident. The vehicle caught fire with the claimant trapped in the vehicle as a result of wearing a safety belt. On cross examination, the claimant knew that under Colorado law she was to wear a safety belt while driving a cab.

6. The claimant, as an independent contractor, and self-employed, did not have a policy safety policy requiring her to wear a seat belt during the operation of her business.

7. The ALJ finds that the respondent-insurer has not established that it is more likely than not that the claimant violated a safety rule adopted by the employer (i.e. the claimant).

8. The claimant's net wages as an IC are determined by looking at the claimant's gross receipts from transporting passengers and then deducting her expenses of driving a cab. Such expenses include but are not limited to payments for the cab, dispatch system, Workers' Compensation insurance, and maintenance.

9. The respondents used the claimant's gross receipts and expenses from October 10, 2014 up to November 19, 2014 and computed an average weekly wage of $336.19. At the time the claimant was injured she had worked as an IC for the respondent-employer for 71 days.

10. Bruce Magnuson, M.A., an expert in the field of vocational rehabilitation, opined as to the median net annual income for a cab driver in the Colorado Springs area based upon the Occupational Employment Survey of Employees conducted in each state by economists contracted by the U.S. Department of Labor. The ALJ finds that the median net annual income is speculative and not relevant to a determination of the claimant's actual average weekly wage.

11. The claimant testified that during her tenure as an IC for the respondent-employer, she was increasing her personal clientele and was learning how to work the dispatch system as well as learn which zones to work in. The claimant also testified that at the orientation meeting, the attendees were told that one could earn $1,000 to $1,500 a week. The claimant's wage records reflect an increase in net wages the longer she worked as an IC.

12. Fred Hair, general manager of the respondent-employer, testified that the claimant, as an IC, is self employed and essentially sets her own rules regarding how to work.

13. Regarding the claimant's AWW, Mr. Hair testified that the claimant's net wages were determined by calculating the claimant's gross receipts and then deducting the associated expenses in driving the cab. Mr. Hair testified that he used the time period of October 10, 2014 through November 15, 2014 to determine the claimant's AWW because it takes time to learn how to be an IC for the respondent-employer. On cross examination, Mr. Hair agreed that as an IC for the respondent-employer, it takes time to build up your clientele, learn how to work the dispatch, learn how to work at the airport, and to learn other tricks of the trade in order to increase ones income.

14. Mr. Hair, based upon his calculations using the above formula, determined the claimant's AWW to be $336.19.

15. The ALJ finds that the claimant's AWW is fairly calculated using the

method described by Mr. Hair.

16. The ALJ finds that the respondent-insurer has established that it is more likely than not that the claimant's AWW is $336.19 per week.

CONCLUSIONS OF LAW

1. Section 8-42-112 (1)(b), C.R.S. provides for a 50% reduction in compensation in cases of "willful failure to obey any reasonable rule" adopted by the employer for the claimant's safety. Under § 8-42-112 (1)(b), C.R.S., it is the respondents' burden to prove every element justifying a reduction in compensation for the willful failure to obey a reasonable safety rule. *Triplett v, Evergreen Builders, Inc.*, W.C. No. 4-576-463 (May 13, 2004). The question of whether, the respondents met their burden to prove a willful safety rule violation is generally one of fact for the determination by the A.L.J. See *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo.App.1995) The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness, and oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968). The respondents are not required to present direct evidence concerning the claimant's state of mind or prove the claimant had the rule in mind when she did the prohibited act. Rather a "willful" violation may be inferred from evidence that the claimant knew the safety rule and did the prohibited act.

2. The first step is to determine whether or not the employer adopted a reasonable "safety rule". A safety rule does not have to be formally adopted, does not have to be in writing, and does not have to be posted. Rather, it is necessary that the safety rule was heard and understood and given by someone generally in authority. *Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246P.2d 902 (Colo. 1952) *McCulloch v. Industrial Commission*, 109 Colo. 123, 123 P.2d 414 (Colo. 1942).

3. This is an unusual case, in that, by statute the named respondent-employer herein, is required to include in their lease with the claimant a provision including the provision of workers' compensation insurance. See generally section 40-11.5-102 C.R.S. Yet, the claimant is, as found above, not an employee of the respondent-employer but a self-employed independent contractor. The ALJ concludes there is insufficient credible evidence that the claimant adopted a safety rule requiring that she wear a safety belt while driving a cab.

4. The ALJ concludes that the respondent-insurer has failed to establish by a

preponderance of the evidence that the claimant willfully violated a safety rule adopted by the employer for the employee's safety.

5. Pursuant to Section 8-42-102 C.R.S. 2013 Average Weekly Wage (AWW) for the purpose of computing benefits under the Workers' Compensation Act of Colorado shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured employee was receiving at the time of the injury.

6. However, section 8-42-102(3) provides that if the prescribed methods will not fairly calculate the wage by reason of the fact that the injured employee has been self employed or had not worked a sufficient length of time, or for any other reason will not fairly compute the AWW the ALJ has discretion to compute the AWW in such other manner and by such other method as will, based upon the facts presented, fairly determine the injured employee's AWW. In this claim, at the time she was injured, the claimant had been self employed as an IC for 71 days. As an IC for the respondent-employer, it is not disputed that the claimant's AWW is computed by totaling her gross receipts and then deducting her expenses. Using this method, Mr. Hair computed the claimant's AWW by using her net receipts from October 10, 2014 through November 19, 2014. By doing this he came up with an AWW of $336.19.

7. Although the claimant had not been self-employed for a long period of time, the ALJ concludes this method fairly computes her AWW being received at the time of the injury.

8. The ALJ concludes that the claimant's AWW is $336.19 per week.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant indemnity benefits based upon the claimant's AWW without any reduction for a safety rule violation.

2. The claimant's AWW is $336.19.

3. The respondent-insurer shall pay indemnity benefits based upon an AWW of $336.19.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

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DATE: June 12, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-968-072-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 2, 2015 and June 15, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 4/2/15, Courtroom 3, beginning at 1:30 PM, and ending at 5:00 PM; and, 6/15/15, Courtroom 3, beginning at 1:40 PM and ending at 2:40 PM).

Claimant's Exhibits 1 through 6 were admitted into evidence, without objection. Respondents' Exhibits A through D were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on June 18, 2015. On the same date, the Respondents filed objections. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

Three telephonic depositions were taken by the Respondents. The telephonic deposition of Priscilla Tumangan was taken on March 17, 2015. The telephonic deposition of Kristen Jacoby was taken on May 5, 2015. The telephonic deposition of Kathleen Cuddihy was taken on May 5, 2015. Written transcripts of the three telephonic

deposition were filed and reviewed by the ALJ prior to the concluding June 15 session of the hearing.

ISSUES

The issues to be determined by this decision concern compensability; causally-related medical benefits; and, reasonably necessary medical treatment including 18 physical therapy visits and ultrasound, recommended by authorized treating physician (ATP) Robert Dupper, M.D.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant began work for Employer in February 2014. Claimant was employed as a qualified medication administration personnel "QMAP," earning $10.50 an hour for 40 hours per week plus time and a half for overtime.

2. Although the Claimant was previously treated at the University of Missouri Medical Center from July 31, 2012 to April 3, 2013, for symptoms relating to epilepsy, PTSD, MS and some other minor issues with her right shoulder, it is undisputed that she did not have any temporary or permanent restrictions prior to being hired by the Employer herein in February 2014. She was assigned to the "dementia unit" at the time of the incident of November 11, 2014.

3. The Employer has a policy that was in effect as of the date of this industrial accident that employees cannot fight back when being attacked by a resident. They can only raise their hands in front of them as their sole and only defense should they be attacked. Respondents' witness, Andrew Paul, confirmed the fact that employees cannot assault or fight back against a resident if attacked but can merely touch them to get them back into their room.

The Incident

4. On November 11, 2014, the Claimant was working a 10 PM to 6 AM shift. The incident in question happened at approximately 1:35 AM. A resident in the dementia unit, by the name of Marlene Blummer, was in an agitated state and out of control at the date and time of the incident. The Claimant was attempting to keep this

resident away from the exit door when the patient attacked her. The Claimant was punched, kicked and grabbed by her hair and was slammed into the exit door. The resident continued to punch the Claimant in her face and head and also tried to bite the Claimant, and the Claimant was bleeding from her face. The resident was approximately five feet tall and weighed approximately 120-135 lbs. and because of her violent actions, the Claimant had contacted her supervisor, Lacey Cox, on two different occasions before the actual incident. Specifically, at 12 AM, the Claimant called Lacey Cox to complain about the resident's very agitated state and wanted directions in terms of how to handle the resident. Lacey Cox instructed the Claimant to call 911 if the resident got out of control and that in fact is what the Claimant did after the incident. The second call was made to Lacey Cox to confirm that the incident occurred.

5. After the incident, Claimant finished her shift as there were no other employees to cover her shift which ended at 6 a.m. When Lacey Cox appeared at the facility at approximately 8 a.m. on November 11, 2014, she requested that the Claimant complete an employee accident report and this report was signed by the Claimant and Lacey Cox. The accident report (Claimant's Exhibit 2) confirmed exactly how the Claimant was attacked on November 11, 2014 while the Claimant was performing her job duties and was trying to keep the resident safely inside the facility. Claimant also depicted multiple body parts which were injured in this incident.

Respondents' Witnesses

6. Andrew Paul was not working in the dementia unit when the incident in question occurred. He confirmed, however, that Marlene Blummer was in an agitated state at the time of the incident, and he observed that Claimant had an injury on her face towards her left eye. According to Paul, the Claimant was given an ice pack for her eye and Paul indicated that multiple injuries could have been sustained based upon the resident being out of control.

7. Michelle Gutierrez also was not working in the dementia unit at the time of the accident, and she was in a completely different part of the facility. Gutierrez was not present at the time of the incident and she doesn't recall the Claimant talking about any of her injuries that were sustained. Gutierrez, however, was aware that the resident attacked the Claimant and Gutierrez was aware that the Claimant sustained injuries at least to her left eye. Even though Gutierrez never saw the incident, she stated that the Claimant, Andrew Paul and another employee were sitting at a table in the cafeteria but Gutierrez never really spoke with the Claimant.

8. Lacey Cox confirmed that the Claimant talked to her on two different occasions on the date and time of the accident and Cox was aware that the resident was out of control and that 911 was called. Cox also confirmed that she requested that the Claimant fill out the employee accident report and Cox signed off on the contents thereof as to how the accident occurred and the injuries sustained.

9. Priscilla Tumangan testified by deposition on March 17, 2015. She stated that she did not see or witness the attack/incident that took place on November 11, 2014. Tumangan, however, was aware of the fact that the resident "went wild" on the night of the incident.

10. Kristen Jacoby testified by deposition that she was not there on the date of the accident or at the time of the accident. She had no first-hand knowledge regarding what transpired during this time because she was simply not on the premises. (*See* Jacoby Depo. Tr. P. 6, lines 18-25; p. 7, lines 1-7). Moreover, Kathleen Cuddihy stated that she did not observe the accident/assault which occurred on November 11, 2014. (*See* Cuddihy Depo. Tr. P. 12, lines 20-25; p. 14, lines 9-11).

Authorized Medical

11. The Claimant was referred by Lacey Cox to the Employer's designated medical facility. The treating provider at Work Well Occupational Medicine Clinic (hereinafter "Work Well"). The authorized treating physician (ATP) at Work Well was Robert Dupper, M.D. The Claimant reported to Work Well on the date of the incident, November 11, 2014, as soon as Lacey Cox referred her to the facility. An evaluation took place at approximately 9:30 or 10:00 AM on November 11, 2014. Within ATP Dr. Dupper's report of November 11, 2014, (Claimant's Exhibit 6), it was once again noted by the Claimant that she was hit, knocked down and kicked by a resident and she had pain located in her neck, left shoulder, low back, hip, left thigh on the posterior aspect and the left knee. The Claimant described symptoms of numbness, sharp shooting, stabbing, swelling, throbbing and tingling. ATP Dr. Dupper once again noted a history of one of the residents becoming very agitated, angry and aggressive and while the Claimant was trying to calm and redirect the resident, the resident became violent and starting hitting her with a metal edged sign. Once again, it was confirmed that the Claimant was knocked to the floor and then hit and kicked on the side of her neck and shoulder. Multiple complaints were noted within this initial report and they are consistent with the Claimant's testimony.

12. ATP Dr. Dupper diagnosed a strain of the left shoulder, contusion of the left shoulder, strain of the acromioclavicular joint, left, contusion, left knee, sprain left knee, left hip contusion, cervical spine strain, lumbar spine sprain and contusion of the buttocks on the left side. Claimant was given prescription medication and further diagnostic studies were ordered.

13. The Claimant was placed on restricted work of seated work only and breaks five minutes every hour to change positions. ATP Dr. Dupper prescribed crutches and a leg brace and the Claimant continued to use the crutches and the brace from November 11, 2014 to the present time and ongoing. On December 16, 2014, ATP Dr. Dupper once again set forth similar diagnoses from the initial evaluation of

November 11, 2014, and noted that the medical causation was related to the Claimant's work activities. Continued restricted duty was ordered but all treatment was denied by the Respondents and ATP Dr. Dupper could not take any further action subsequent to December 16, 2014. Dr. Dupper also recommended 18 physical therapy visits and ultrasound.

Respondents' Independent Medical Examiner (IME), Carlos Cebiran, M.D.

14. IME Dr. Cebrian performed an IME on February 20, 2015. He never spoke with the treating provider, ATP Dr. Dupper. Dr. Cebrian noted the multiple complaints of the Claimant and stated the opinion that the Claimant's medical condition should have improved between the time that ATP Dr. Dupper last evaluated her on December 16, 2014 and the date of Dr. Cebrian's evaluation on February 20, 2015. Dr. Cebrian was of the opinion that the Claimant had **not** sustained any accident or injury for which medical care would be necessary. Based on the totality of the evidence, the ALJ finds that Dr. Cebrian's opinion is contrary to the weight of the evidence, based in part on non-medical credibility factors and, therefore, lacking in credibility.

Ultimate Findings

15. The Claimant presented and testified credibly. None of the Claimant's witnesses were eyewitnesses to the incident nor did they credibly contradict the Claimant's testimony. The Respondents' theory paints a circumstantial case of Respondents' witnesses only seeing facial scratches after the incident. One Respondents' witness, however, saw the Claimant on the ground after the incident. This corroborates the Claimant's version of events. None of the witnesses could see inside the Claimant's anatomy to observe the injuries seen and diagnosed by ATP Dr. Duper on the same day as the incident, November 11, 2014. The opinions of ATP Dr. Dupper are more persuasive and credible than the opinions of Respondents' IME Dr. Cebrian.

16. Between conflicting sets of evidence, the ALJ makes a rational choice to accept the testimony of the Claimant and the opinion of ATP Dr. Dupper and to reject the ultimate causation opinion of IME Dr. Cebrian.

17. The Claimant has proven, by a preponderance of the evidence, that she sustained an work-related accident, arising out of the course and scope of her employment for the Employer, resulting in multiple injuries to her body including injuriesto her left shoulder, left acromioclavicular joint, left knee, left hip, cervical spine, lumbar spine and buttocks on her left side. Medical treatment at the hands of ATP Dr. Dupper and Work Well and any referrals there from are authorized; within the authorized chain of referrals; causally related to the incident of November 11, 2014, and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible. The opinions of ATP Dr. Dupper are more persuasive and credible than the opinions of Respondents' IME Dr. Cebrian.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007).

Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). Between conflicting sets of evidence, the ALJ makes a rational choice to accept the testimony of the Claimant and the opinion of ATP Dr. Dupper and to reject the ultimate causation opinion of IME Dr. Cebrian.

Medical Benefits

c. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the Claimant's medical treatment as reflected in the evidence is causally related to the work-related incident of November 11, 2014.

d. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, including the recommended 18 physical therapy visits and the ultrasound, was and is reasonably necessary to cure and relieve the effects of the work-related injuries..

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on all designated issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant having sustained multiple injuries as a result of the compensable injuries of November 11, 2014, consisting of injuries to her left shoulder, left acromioclavicular joint, left knee, left hip, cervical spine, lumbar spine and left buttocks, the Respondents shall pay the costs of all causally related and reasonably necessary medical care and treatment, including the costs of 18 physical therapy visits

and ultrasound, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of June 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on April 25, 2014.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) and Temporary Total Disability (TTD) benefits for the period June 30, 2014 until terminated by statute.

4. Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant has intermittently worked for Employer since 1999. In late February 2014 Employer hired Claimant as a Foreman to supervise the scaffolding crew. His duties involved driving his crew to various construction sites in the Denver Metropolitan area to construct and remove scaffolding. Claimant picked up a 42 foot flatbed truck from Employer's Commerce City facility in order to transport his crew and materials to jobsites.

2. On April 25, 2014 Claimant arrived at Employer's Commerce City facility at approximately 7:00 a.m. Employer directed Claimant to take a flatbed truck and co-employees Vastian Sanchez and Cesar Aguilar to a jobsite near 137th Street and I-25. Upon arriving at the jobsite Claimant determined that the scaffolding could not be removed because plastering work had not been completed.

3. Claimant explained that at approximately 10:30 a.m. he sent a text message to Employer's Safety Manager Ivan Vilchis. He inquired whether he and his crew could travel to a jobsite in the Denver Tech Center to complete a scaffolding job. Claimant remarked that Mr. Vilchis told him to return the flatbed truck to the Commerce City facility, retrieve safety equipment, collect tools and proceed to the Denver Tech Center project.

4. Claimant testified that he returned to Employer's Commerce City facility, retrieved his safety equipment and collected his tools. He explained that he drove his

personal truck to the Denver Tech Center jobsite because he planned to travel directly home to 2104 South Richfield Way in Aurora after work. He did not take the flatbed truck because he did not want to drive all the way back to the Commerce City facility after he completed his work day. Claimant noted that Mr. Sanchez and Mr. Aguilar traveled to the Denver Tech Center jobsite in a personal vehicle.

5. Claimant drove from Employer's Commerce City facility down to I-70 and then merged onto I-225. He exited the highway at Colfax Avenue to purchase gas. Claimant bought gas at a station approximately four to five blocks west of I-225 on Colfax Avenue near University Hospital. Claimant explained that he then drove east in the right hand lane of Colfax Avenue until he switched to the left hand lane because of construction. Claimant testified that he intended to turn onto the frontage road northbound to take the 17th Place bridge over the highway to merge back onto I-225 northbound. However, if Claimant had continued east on Colfax Avenue and then turned south onto Airport Road he would have reached his home at 2104 South Richfield Way near Buckley Air force base.

6. While waiting at a red light at I-225 and Colfax Avenue Claimant's truck was rear-ended by another vehicle. The accident report reflects that Claimant was in the far left lane or three lanes away from the on-ramp for I-225 South. Claimant commented that he contacted a mechanic at Employer's Commerce City facility and stated that he might need help with his flatbed truck. However, after receiving assistance from a tow truck driver Claimant drove himself to University Hospital to obtain medical treatment.

7. The time cards for Mr. Sanchez and Mr. Aguilar reflect that they worked complete shifts on April 25, 2014. However, Claimant's time card reveals that he only worked until 8:30 a.m. on the day of the motor vehicle accident. Moreover, the time sheet that Claimant submitted to receive pay for the work week encompassing April 25, 2014 did not include any notation that he had been injured at work.

8. Mr. Vilchis denied that he had received a text message from Claimant on April 25, 2014 about performing work at the Denver Tech Center jobsite. Moreover, Mr. Vilchis did not discuss any work at the Denver Tech Center with Claimant or authorize him to perform work at the site. He noted that Claimant and his crew would not have been dispatched to a jobsite without a flatbed truck because they would have been either constructing or removing scaffolding.

9. Mr. Vilchis testified that a couple of days after April 25, 2014 he was informed that Claimant had been involved in a motor vehicle accident. However, Mr. Vilchis was not advised that the motor vehicle accident was associated with Claimant's work activities.

10. In late June 2014 Claimant asked Mr. Vilchis if he could have one week off to travel to Mexico for medical treatment. Mr. Vilchis approved Claimant's request.

11. While in Mexico Claimant contacted Mr. Vilchis and stated that he would be out of work for longer than one week. He remarked that he was unsure when he would return. Claimant did not return from Mexico until the latter half of October 2014.

12. After returning from Mexico Claimant sought to resume work with Employer. However, Employer responded that Claimant's position was no longer available. Claimant subsequently filed a Workers' Claim for Compensation on December 3, 2014.

13. On November 14, 2014 Claimant visited Pamela A. Knight, M.D. at Denver-Vail Orthopedics for an examination. Dr. Knight diagnosed Claimant with cervical whiplash, a disc protrusion at C6-C7 and cervical radiculitis. On December 5, 2014 Dr. Knight referred Claimant to Dr. Solberg for C6-C7 epidural steroid injections. Claimant testified that he has subsequently received three separate neck injections but continues to suffer neck discomfort. Dr. Knight has recommended that Claimant remain off work.

14. Claimant has failed to establish that it is more probably true than not that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on April 25, 2014. On April 25, 2014 Claimant was involved in a motor vehicle accident while driving his personal vehicle as he was waiting at a red light at I-225 and Colfax Avenue. The facts and circumstances of the accident reflect that it did not occur while Claimant was performing work duties for Employer. The critical inquiry is whether travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. Claimant's job duties involved driving his crew to various construction sites in the Denver Metropolitan area to construct and remove scaffolding. Claimant picked up a 42 foot flatbed truck from Employer's Commerce City facility in order to transport his crew and materials to jobsites. Claimant's personal vehicle was not a mandatory part of his work environment for Employer. Employer thus did not receive any benefit from Claimant's use of his personal vehicle other than his mere arrival at work.

15. Claimant was driving his personal vehicle at the time of the motor vehicle accident. Mr. Vilchis credibly noted that Employer's flatbed truck was required to transport scaffolding to and from jobsites. Moreover, Claimant explained that he had received approval from Mr. Vilchis to perform scaffolding work in the Denver Tech Center area on the date of the motor vehicle accident. However, Claimant's timecard for April 25, 2014 reflects that he completed his work for the day at 8:30 a.m. or well before the accident occurred. Mr. Vilchis also credibly denied that he received a text message from Claimant on April 25, 2014 about performing work at the Denver Tech Center jobsite. Furthermore, the accident occurred while Claimant was on Colfax Avenue three lanes away from the on-ramp to southbound I-225. Claimant needed to travel on I-225 to get to the jobsite but could have continued driving east on Colfax and then south on Airport Road to arrive home. The record thus reflects that Claimant was not performing job duties for Employer when he was involved in a motor vehicle accident on April 25, 2014. Accordingly, Claimant has failed to demonstrate a nexus between his injuries and job duties for Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower and requires a claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* at 641-62.

5. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the

injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

6. "Special circumstances" may be found where the employment contract contemplates the employee's travel or the employer delineates the employee's travel for special treatment as an inducement. *See Staff Administrators Inc. v. Reynolds,* 977 P.2d 866, 868 (Colo. 1999). "Special circumstances" may also exist when the employee engages in travel with the express or implied consent of the employer and the employer receives a special benefit from the travel in addition to the employee's mere arrival at work. *See National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risks of the travel become the risks of the employment. *Breidenbach v. Black Diamond, Inc.,* W.C. No. 4-761-479 (ICAP, Dec. 30, 2009).

7. In considering whether travel was contemplated by the employment contract, case law reflects that the exception applies when a claimant is required by an employer to come to work in an automobile that is then used to perform job duties. The vehicle confers a benefit to the employer beyond the employee's mere arrival at work. *See Whale Communications v. Osborn,* 759 P.2d 848 (Colo. App. 1988). As explained in 1 A. Larson, *Workmen's Compensation Law*, §17.50 (1985), "[t]he rationale for this exception is that the travel becomes a part of the job since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purposes. Such a requirement causes the job duties to extend beyond the workplace and makes the vehicle a mandatory part of the work environment."

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on April 25, 2014. On April 25, 2014 Claimant was involved in a motor vehicle accident while driving his personal vehicle as he was waiting at a red light at I-225 and Colfax Avenue. The facts and circumstances of the accident reflect that it did not occur while Claimant was performing work duties for Employer. The critical inquiry is whether travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. Claimant's job duties involved driving his crew to various construction sites in the Denver Metropolitan area to construct and remove scaffolding. Claimant picked up a 42

foot flatbed truck from Employer's Commerce City facility in order to transport his crew and materials to jobsites. Claimant's personal vehicle was not a mandatory part of his work environment for Employer. Employer thus did not receive any benefit from Claimant's use of his personal vehicle other than his mere arrival at work.

9. As found, Claimant was driving his personal vehicle at the time of the motor vehicle accident. Mr. Vilchis credibly noted that Employer's flatbed truck was required to transport scaffolding to and from jobsites. Moreover, Claimant explained that he had received approval from Mr. Vilchis to perform scaffolding work in the Denver Tech Center area on the date of the motor vehicle accident. However, Claimant's timecard for April 25, 2014 reflects that he completed his work for the day at 8:30 a.m. or well before the accident occurred. Mr. Vilchis also credibly denied that he received a text message from Claimant on April 25, 2014 about performing work at the Denver Tech Center jobsite. Furthermore, the accident occurred while Claimant was on Colfax Avenue three lanes away from the on-ramp to southbound I-225. Claimant needed to travel on I-225 to get to the jobsite but could have continued driving east on Colfax and then south on Airport Road to arrive home. The record thus reflects that Claimant was not performing job duties for Employer when he was involved in a motor vehicle accident on April 25, 2014. Accordingly, Claimant has failed to demonstrate a nexus between his injuries and job duties for Employer. *Compare In Re Rieks,* W.C. No. 4-921-644 (ICAP, Aug. 12, 2014) (where employer required the claimant to come to work in an automobile to attend appointments and meet with customers, transport of car was contemplated by the employment contract and the claimant's motor vehicle accident on the way to work occurred in the course of and arose out of his employment); *Lopez v. Labor Ready,* W.C. 4-538-791 (ICAP, Sept. 26, 2003) (where the claimant's job required her to spend large parts of her day in her personal vehicle and she was injured in a motor vehicle accident while driving home for lunch, claim was compensable because it conferred a benefit to the employer beyond the claimant's mere arrival at work).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to*

Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with respondent employer?

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course of his employment with respondent employer?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury or occupational disease, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the compensable injury and/or occupational disease?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury or occupational disease, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from November 14, 2014 and continuing?

- The parties stipulated prior to the hearing to an average weekly wage ("AWW") of $560.00.

FINDINGS OF FACT

1. Claimant was employed with employer as an auto tech beginning approximately August, 2012. Claimant's job duties included changing tires. Claimant had previously been employed with employer in various capacities.

2. Claimant testified at hearing that he was injured on October 20, 2013 when he was lifting a tire and felt something pop in his back. Claimant testified he would bend, stoop and twist to change tires and he performed this most of the day. Claimant testified he reported his injury to Mr. Lucero, but Mr. Lucero paid him no attention. Claimant testified he had pain in his back before the lifting incident, but the pain in his back after the lifting incident was different.

3. Claimant admitted on cross examination that he arrived late to work on October 20, 2014 and informed his employer that he had cancer. Claimant further admitted on cross-examination that he does not have cancer.

4. Claimant was evaluated by Dr. Kurz on October 20, 2014 and reported complaints of back pain. Claimant did not report any specific cause of his back pain to Dr. Kurz. Claimant returned to Dr. Kurz on October 21, 2014 again complaining of low back pain. Claimant reported to Dr. Kurz that the back pain was present for several years and was not due to accident or trauma.

5. Claimant testified at hearing that he reported to Dr. Kurz on October 20, 2014 that he had injured his back lifting a tire. The ALJ credits the reports of Dr. Kurz dated October 20 and October 21, 2014 that denied any specific trauma over claimant's testimony that he reported to Dr. Kurz that he injured himself at work.

6. Claimant underwent x-rays of the lumbar spine on October 31, 2014. The x-rays noted that claimant had degenerative changes in the lumbar spine, most pronounced at L5-S1.

7. Claimant was referred for a magnetic resonance image ("MRI") of the lumbar spine on November 6, 2014. The MRI showed disc bulging at the L5-S1 level with moderate left and mild right facet arthopathy with severe left foraminal narrowing at the L5-S1 level impinging on the exiting left L5 nerve.

8. Claimant returned to Dr. Kurz on November 12, 2014 and Dr. Kurz noted that claimant shared that he was working alone the day before his last visit and felt like the lifting he did that day worsening his condition. Dr. Kurz noted the findings from claimant's MRI and provided claimant with a referral for orthopedic evaluation and provided claimant with work restrictions of no lifting greater the 5 pounds with no bending or squatting.

9. Claimant took the work restrictions to employer. Ms. Smith, one of the owners with employer, testified she found the work restrictions on her desk and determined that they could not accommodate the restrictions. Ms. Smith testified claimant had previous work restrictions of 15 pounds and employer provided claimant with work within his restrictions and made sure claimant did not lift over 15 pounds. However, employer could not accommodate the 5 pound lifting restriction. Ms. Smith testified she was unaware that the restrictions were alleged as part of a work injury.

10. Ms. Smith testified she found out claimant was alleging a work injury when she received a written note from claimant alleging a work injury on October 20, 2014. The ALJ finds the testimony of Ms. Smith to be credible and persuasive.

11. Mr. Lattin testified at hearing in this matter. Mr. Lattin is a co-owner for employer. Mr. Lattin testified that claimant did not report a work injury to Mr. Lattin. Mr. Lattin testified that on October 20, 2014 claimant arrived at work late and told Mr. Lattin he had pancreatic cancer. Mr. Lattin testified claimant did not perform much work that day and was on his cell phone quite a bit making arrangements to see a doctor. Mr.

Lattin testified he did not work on big tires on October 20, 2014 and did not recall if claimant worked on big tires on October 20, 2014.

12. Mr. Lucero testified at hearing in this matter. Mr. Lucero testified claimant was working on heavier tires in the back with Mr. Lattin. Mr. Lucero testified claimant did not report a work injury to him on October 20, 2014.

13. Conflicting evidence was presented regarding whether claimant worked on the bigger tires on October 20, 2014. However, regardless of whether claimant worked with the bigger tires on October 20, 2014, claimant reported to employer only issues involving his potential cancer diagnosis. Most problematic is the fact that claimant did not report a lifting injury to Dr. Kurz when he was evaluated immediately after the injury nor the next day, and specifically denied any trauma leading to the back pain. Instead, claimant noted that the back pain was present for "years".

14. The ALJ rejects claimant's testimony that he reported the injury on October 20, 2014 to Mr. Lucero. The ALJ further finds that the first time claimant reported his injury as being related to his work was to Dr. Kurz on November 12, 2014 and to employer on November 19, 2014.

15. The ALJ finds claimant not credible in this case and instead credits the testimony of Ms. Smith, Mr. Lattin and Mr. Lucero and Mr. Lattin over the testimony of claimant. The ALJ finds that claimant did not complain of a lifting injury to employer on October 20, 2014 and did not report his injury to employer until November 19, 2014 after employer indicated that they could no longer comply with his work restrictions.

16. In discrediting claimant's testimony in this case, the ALJ finds that claimant has failed to prove that it is more probable than not that he sustained a compensable work injury while lifting tires on October 20, 2014. The ALJ notes that claimant did not complain of an injury from lifting to Dr. Kurz on October 20 or October 21, 2014. The October 21, 2014 report notes that claimant's back pain was ongoing for several years.

17. Insofar as the medical records from Dr. Kurz document claimant denying a specific trauma and reporting several years of ongoing pain, the ALJ finds these records more credible than the testimony of claimant and determines claimant has failed to demonstrate that it is more likely than not that he suffered a compensable injury arising out of and in the course of his employment with employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the ALJ credits the records from Dr. Kurz over the testimony of claimant and finds that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with employer.

ORDER

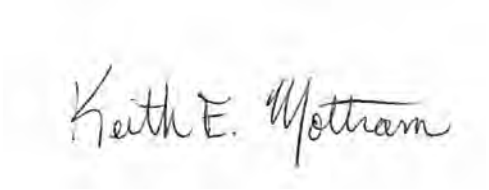
It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The issues for hearing upon the claimant's Application for Expedited Hearing were compensability and medical benefits.

FINDINGS OF FACT

1. The claimant is a 42 year old woman who has been employed by the respondent-employer since October 2007. The claimant has worked from home during the last seven years, functioning as a call center.

2. The claimant began to notice symptoms in her forearms in November/December 2014. There was a sensation of fatigue. This then progressed to pain, tingling, numbness, throbbing, and burning sensations.

3. The claimant's work station consists of a computer with a keyboard and mouse.

4. The claimant has previously been diagnosed with rheumatoid arthritis (RA) and fibromyalgia. The RA has been diagnosed in her wrist and hand only.

5. The claimant has had the fibromyalgia for years and has flare-ups. This occurs only on the back of her thighs and occurs about one to two times a month.

6. She has not previously had symptoms above the wrists and into the arms.

7. The claimant reported her symptoms to her supervisor during the week of December 13, 2014.

8. She was given a list of providers and since the claimant's personal care provider was listed, Dr. Harris, she chose to be treated by him.

9. The respondent-insurer has paid for all of the claimant's visits in relation to her claim up to the point where the claim was denied.

10. The claimant's symptoms occur at work and increase with her work. The symptoms subside when she rests. The symptoms do however, continue at night.

11. Dr. Harris ordered an EMG to see if there was a cervical radiculopathy and the results were normal.

12. A present Dr. Harris does not have a diagnosis for the claimant's symptoms. He is trying to rule out various possibilities.

13. A job site evaluation was conducted by Colleen Waterous, who works for Genex Services, LLC. The evaluation used the Colorado Workers' Compensation Guidelines to determine risk factors. The claimant disagrees with the way the evaluation was conducted observing that she has changed how she uses her work station based upon the recommendations of Dr. Harris.

14. The results of the risk analysis indicate that only one risk factor was present, the use of a mouse for greater than four hours per day. However, that was a check mark under Risk Factor Assessment. The underlying data in the report indicates that the claimant does not use a mouse in excess of four hours per day. The ALJ finds that the totality of the report establishes that the claimant does not use a mouse in excess of four hours per day.

15. Dr. Jonathan Sollender completed a record review of the claimant's case at the request of the respondent-insurer.

16. Dr. Sollender opined that the claimant lacks a diagnosis from the treating physician and that a diagnosis is the first prerequisite under the Guidelines. Additionally, based upon the job demands analysis by Ms Waterous, there was a lack of necessary occupational risk factors from her work.

17. Dr. Sollender opined that based upon the Guidelines, Rule 17, Exhibit 5 (Cumulative Trauma Conditions) the claimant's symptoms are not work related. He opined that the claimant lacked one or more primary risk factors. Additionally, she lacked two or more secondary risk factors.

18. He ultimately opined that the claimant's medical complaints are not work related.

19. The ALJ finds Dr. Sollender's opinions to be credible and persuasive.

20. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffers from an occupational disease arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, “a claimant in a workers’ compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers’ compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers’ compensation case shall be decided on its merits.” *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) (“The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence.”); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) (“The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.”).

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. For an injury to be compensable under the Workers’ Compensation Act, it must “arise out of” and “occur within the course and scope” of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm’n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

7. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

8. The test for distinguishing between an accidental injury and an occupational disease or condition is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside the employment.

9. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, § 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

10. W.C.R.P. Rule 17, Exhibit 5 sets forth the treatment guidelines for Cumulative Trauma Conditions. Rule 17 set forth care that is generally considered reasonable for most injured workers. Further, while an ALJ is not required to utilize

Rule 17 as the sole basis for making determinations as to whether medical treatment is reasonable, necessary and related to an industrial injury, it is appropriate for the ALJ to consider Rule 17 in making such determinations. § 8-43-201(3), C.R.S.

11. The ALJ concludes that the credible and persuasive evidence presented at hearing established that there is not a causal relationship between the claimant's alleged conditions and her work exposure, especially in light of the credible analysis and opinions of Dr. Sollender.

12. Given the foregoing, the ALJ determines and finds that the claimant has not met her burden of proof in establishing that she suffered a compensable occupational injury. Accordingly, the claimant has not demonstrated that the hazards of her employment caused, intensified, or, to a reasonable degree, aggravated her bilateral upper extremity conditions. *Anderson*, 859 P.2d at 824.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant suffers from an occupational disease arising out of and occurring in the performance of her employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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DATE: June 12, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Did the claimant prove by a preponderance of the evidence that her need for bilateral knee replacement surgeries were proximately caused by the industrial injury of February 12, 2003?

- Is the respondent entitled to an order determining the issue of maximum medical improvement?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 12 were received in evidence. Respondent's Exhibits A through R were received in evidence.

2. On February 12, 2003 the claimant was employed by the respondent as a probation officer. On March 4, 2003 the respondent filed a General Admission of Liability admitting the claimant sustained an injury on February 12 and that the respondent is liable for medical benefits "for bilateral knee contusions, left knee bursitis and right knee abrasions." On May 26, 2010 the respondent filed a General Admission of Liability admitting for temporary total disability benefits from May 7, 2003 through June 1, 2003.

3. The claimant testified as follows. On February 12, 2003 she fell on concrete at work and landed on both knees. After this injury she experienced symptoms of constant knee pain, difficulty walking up and down stairs and "limited walking time." She received treatments including cortisone injections, "gel injections" and surgery to one of the knees although she could not recall which one. Although the claimant received some temporary relief from treatment her symptoms have "steadily gotten worse."

4. The claimant testified that she never had these symptoms before the injury. She now desires to undergo bilateral total knee replacement (TKR) surgeries.

5. The claimant was seen by Cynthia Kuehn, M.D., on February 12, 2003. Dr. Kuehn noted the claimant's history was noncontributory with no history of a knee injury. Dr. Kuehn noted "mild swelling and mild diffuse patellar tenderness" of the right knee. There was a "very superficial abrasion" just inferior to the right patella. There was moderate tenderness over the left suprapatellar bursa which was "enlarged." Dr. Kuehn diagnosed bilateral knee contusions, left knee bursitis secondary to trauma and a right knee abrasion.

6. On February 19, 2003 the claimant was seen by David Blair, M.D. Dr. Blair noted slight swelling of the right knee and "a little more in the left knee." There was resolving ecchymosis in the left knee just inferior to the patella. Dr. Blair's impression was "resolving bilateral knee contusions."

7. In March 2003 Dr. Blair's impression was "persistent symptoms of bilateral knee contusions" and he referred the claimant for an orthopedic evaluation.

8. The claimant was seen by orthopedist Christopher Isaacs, D.O., who referred the claimant for MRI's of both knees. The MRI's were performed on April 11, 2003. With respect to the left knee the radiologist's impressions included the following: (1) Subchondral marrow changes within the medial femoral tibial compartment, consistent with areas of osteochondral defects and associated avascular necrosis; (2) Extensive changes of patellofemoral osteoarthritis, with osteochondral defect involving the lateral patellar cartilage, the medial inferior trochlear cartilage, and severe thinning of the patellar cartilage, with near complete denudation; (3) Questionable small nondisplaced partial thickness tear of the posterior horn of the medical meniscus; (4) Prepatellar bursitis and soft tissue edema; (5) Mild pes anserine strain.

9. With respect to the right knee the radiologist's impressions included the following: (1) Severe osteoarthritis of the medial femoral tibial compartment, with large osteochondral defect involving the central weight bearing portion of the medial femoral condyle with full thickness cartilage loss; (2) Moderate to severe patellofemoral osteoarthritis with severe thinning of the patellar cartilage; (3) Degenerative tear of the posterior root of the medial meniscus.

10. On May 7, 2003 Dr. Isaacs performed left knee surgery described as arthroscopy, partial medial meniscectomy, chondroplasty, excision of prepatellar bursa and soft tissue mass. In the operative report "indications" Dr. Isaacs noted his examination was consistent with prepatellar bursitis and torn medical meniscus. He also noted the MRI confirmed these diagnoses as well as revealing the presence of a chondral defect.

11. On May 21, 2003 Dr. Blair referred the claimant for 12 physical therapy (PT) visits.

12. On January 11, 2005 the claimant was seen by a physician at Kaiser and reported experiencing "blurry vision." The claimant advised that she was walking 3 miles per day. She was assessed as having cataracts in both eyes and the physician recommended removal of the right cataract.

13. On June 2, 2005 the claimant completed a health questionnaire. She reported ongoing problems with her back, neck shoulder, vision and that she was experiencing headaches. The claimant reported that her hobbies included "long walks." The claimant also completed a pain diagram that requested her to mark all areas of her body where she felt discomfort. The claimant marked the back of her head, the shoulders, the low back and the back of both legs above the knees. The claimant did

not mark the knees. The claimant did report that she had sustained a work-related fall on "both knees," had surgery on one knee and that surgery was "pending" on the other knee.

14. On June 17, 2005 Stephen Hessl, M.D., examined the claimant for treatment of neck and back pain. Dr. Hessl noted that on June 2, 2005 Dr. Kuehn examined the claimant for reports of neck pain, headaches, back pain and vision problems. Dr. Kuehn recommended an ergonomic evaluation of the claimant's work station. Dr. Hessl assessed myofascial pain syndrome secondary to ergonomic conditions at work. He referred the claimant for PT. Dr. Hessl noted that in the past Mr. Jeff Coverly had provided the claimant PT for a knee injury. Therefore, he "agreed" to refer the claimant to Coverly for treatment of her current condition.

15. In December 2005 the claimant underwent a preoperative physical prior to cataract surgery. The claimant gave a history that she was able to climb a flight of stairs without difficulty and walk 6 city blocks without stopping.

16. On December 27, 2005 the employer notified the claimant she was to be suspended for alleged misconduct relating to the performance of her duties. On March 22, 2006 the claimant resigned from her job with the employer stating that her physicians had advised her to seek employment in a less stressful environment. The claimant's resignation did not mention knee problems.

17. On October 24, 2007 the claimant was seen by Susan Schiff, M.D., for follow-up treatment of her diabetes. Dr. Schiff noted that the claimant was complaining of knee problems "for many years" but the problems were "worse over the last year." The claimant attributed the start of her knee problems to "a fall on concrete about 5 years ago." Dr. Schiff's records do not indicate that she provided any treatment for the knee problems.

18. On February 19, 2010 the claimant returned to Dr. Blair and reported her left knee never returned to the condition that it was prior to the 2003 injury and that her right knee symptoms were worse. Dr. Blair noted that the right knee MRI from April 2003 showed "severe" medial compartment degenerative changes, "moderate to severe" patellofemoral degenerative changes and a degenerative tear to the medial meniscus. Dr. Blair stated that the plan in 2003 had been to operate on the left knee and after rehabilitation proceed with "scoping the right knee." However the claimant's care was "interrupted by problems with her job" and she left the employment in March 2006. The claimant advised she did not know she could continue medical treatment on her claim after she left work. Dr. Blair observed the claimant had a significantly antalgic gait. Mild effusion was detected in both knees. Dr. Blair stated the insurance adjuster had approved an evaluation by Douglas Foulk, M.D., of Panorama Orthopedics. The purpose of the evaluation was to determine what symptoms were "referable to her fall seven years ago at work" and recommend treatment.

19. Dr. Foulk examined the claimant on February 23, 2010. The claimant reported to Dr. Foulk that after the 2003 injury and since the left knee surgery she has

continued to experience "persistent, daily dull and sharp knee pain." Dr. Foulk assessed bilateral osteoarthritis of both knees and bilateral knee pain. He opined the osteoarthritis was "present in 2003 but was exacerbated by [the claimant's] injury at work." He recommended a series of 3 Orthovisc injections. He also stated that if these injections were not successful she might require total knee replacement (TKR).

20. On June 6, 2011 the claimant returned to Dr. Blair. He noted that the claimant reported she had undergone viscosupplementation injections but they "really did not help." He further stated that at "her last visit bilateral total knee replacement was recommended as the only remaining treatment for her symptoms."

21. On December 12, 2011 J. Tashof Bernton, M.D., performed an independent medical examination (IME). Dr. Bernton is board certified in internal medicine and occupational medicine. He took a history from the claimant, reviewed medical records and performed a physical examination. Dr. Bernton opined to a reasonable degree of medical probability that although the claimant does require TKR surgeries the need for them "is not because she slipped and fell on the pavement in 2003." Instead, Dr. Bernton opined the need for surgery is because "she has osteoarthritis which is a progressive disorder." In support of these opinions he noted that the 2003 MRI's showed "severe osteoarthritic changes" that were present before the fall in February 2003 "and were in no way caused by it." Dr. Bernton further opined that although the claimant gave a history of "increasing disability" since the injury that "history is not consistent with the information in the chart." In this regard he noted the claimant was seen by Dr. Hessl in June 2005 and reported to him that she had PT for a past knee injury. However, she did not report any current knee problems. He also observed that after 2005, when the claimant sought treatment for other issues she did not seek treatment for her knees until 2010. Dr. Bernton explained that the claimant's "disease continued to progress, and in 2010 she presented with increasing pain and disability." Dr. Bernton stated that the date of maximum medical improvement (MMI) is difficult to ascertain from the information currently available. However he opined that "at the latest" the claimant reached MMI by February 12, 2004, one year after the date of injury.

22. On March 25, 2012 Dr. Blair issued a report concerning the cause of the claimant's need for bilateral TKR's. Dr. Blair noted that he had reviewed medical records and interviewed the claimant on February 26, 2012 and March 9, 2012. The claimant reported that since the February 12, 2003 injury she had been unable to do many activities that she could do before the injury. These activities included hiking, long walks and attending concerts and sporting events. Dr. Blair noted that medical records from before the injury did not reveal any complaints of knee problems or arthritis. He further noted that in October 2007 while undergoing a diabetic check at Kaiser the claimant complained of "knee problems for many years" that had gotten worse over the last year. Dr. Blair observed that when the claimant sought treatment for neck and back pain in 2005 she completed an intake form stating that in the past she fell on both knees, had surgery on one knee and that surgery on the other knee was pending. Dr. Blair disagreed with Dr. Bernton regarding the cause of the need for TKR's. He stated that while the "degenerative processes were obviously going on for years," the available

evidence indicates the claimant was asymptomatic prior to the 2003 injury. Moreover, Dr. Blair stated that the MRI's revealed bone bruising consistent with the mechanism of the injury and opined that trauma sufficient to produce these MRI findings would be likely to "exacerbate an already existing arthritic process." Dr. Blair opined the claimant sustained a "permanent aggravation of a previously asymptomatic preexisting condition," is not at MMI and needs the bilateral TKR's to reach MMI.

23. On December 9, 2012 Robert Messenbaugh, M.D., issued a report concerning a records review of the claimant's case. Dr. Messenbaugh is board certified in orthopedic surgery and level II accredited. Dr. Messenbaugh's review included the preceding reports of Dr. Bernton and Dr. Blair. Dr. Messenbaugh opined that this is a "difficult and controversial case." Based on his review Dr. Messenbaugh wrote that the claimant had "severe and advanced bilateral knee arthritis prior to her" February 12, 2003 injury. He opined it was "improbable" that the claimant had no symptoms of this condition prior to the injury. Dr. Messenbaugh also opined that the claimant "may well have sustained bilateral knee anterior contusions with the creation or aggravation of the left knee prepatellar bursitis that was surgically treated, but that her preaccident chronic knee osteoarthritis was not created or permanently aggravated by her fall." Dr. Messenbaugh disagreed with Dr. Blair regarding the interpretation of Dr. Foulk's opinion. Dr. Messenbaugh read Dr. Foulk's use of the word "exacerbation" rather than "aggravation" as demonstrating that Dr. Foulk believes the February 12 incident to have resulted in a temporary aggravation of the claimant's pre-existing condition. He opined that the claimant most likely reached MMI for the injury-related conditions by February 12, 2004 and to the extent the claimant reported knee symptoms in 2005 and thereafter they were consistent with the "natural progression and worsening" of the arthritis she had before the fall. Dr. Messenbaugh opined the claimant's TKR surgeries should be provided through her "private insurance."

24. On October 30, 2013 Dr. Messenbaugh performed an IME. In this connection he took a history from the claimant and conducted a physical examination. The claimant told Dr. Messenbaugh that she did not have any knee pains prior to the February 12, 2003 injury. Dr. Messenbaugh stated that the claimant stopped working for the employer in 2006 and that it "sounds as though she stopped working for reasons other than her knees." Dr. Messenbaugh noted that the claimant stated that her job was stressful, she was having visual problems and "her overall health was an issue." Dr. Messenbaugh stated that his opinions regarding the cause of the claimant's need for TKR surgeries remained the same as expressed in his December 2012 report. Specifically, he stated that he believes the claimant's need for TKR's is "due to her severe bilateral knee arthritis which predated her fall of February 12, 2003 and not due to the fall itself or any injuries [the claimant] might have sustained at the time of her fall."

25. On January 7, 2014 Lawrence Varner, D.O., performed an IME. Dr. Varner took a history, performed a physical examination and reviewed medical records. The claimant reported bilateral knee pain "directly related to an on-the-job injury of 02/12/13" when she was walking on an uneven surface and fell forward onto both knees. The claimant reported that the knee pains limited her activity significantly. These activities included going up stairs, walking and standing. Dr. Varner wrote the

claimant left her position as a probation officer "in March 2006 because of ongoing knee pain, which precluded her from fully performing her job duties." Dr. Varner assessed bilateral severe osteoarthritis of the knees with "obvious antalgic gait and clinical varus deformities." He opined the claimant's prognosis is poor without the recommended TKR surgeries. Dr. Varner stated that the claimant "did have degenerative arthritis in bilateral knees preceding" the February 2003 injury. However he opined that although the claimant "would likely have eventually developed some mild symptoms consistent with arthritis," she would not have required the bilateral TKR's recommended after the 2003 injury.

26. On February 19, 2014 Dr. Messenbaugh issued a report concerning his review of Dr. Varner's January 7, 2014 report. Dr. Messenbaugh disagreed with Dr. Varner's opinion concerning the cause of the need for TKR surgeries and stated that the opinions he expressed in the December 2013 report remained unchanged.

27. On August 14, 2013 Caroline Gellrick, M.D., conducted an IME of the claimant. She took a history, reviewed medical records and performed a physical examination. Dr. Gellrick opined the MRI's of the claimant's knees showed pre-existent osteoarthritis. She opined that although the fall on February 12, 2003 caused a temporary aggravation of the osteoarthritis resulting in pain and swelling, the need for the TKR surgeries is "not work comp compensable." In support of her opinions Dr. Gellrick noted that the claimant had been seen in by a physician in January 2005 and reported she was walking 3 miles per day but did not mention any knee symptoms. Dr. Gellrick stated that this record lends "credence that the patient was asymptomatic, particularly in 2005, from her work-related injury of 2003."

28. Dr. Messenbaugh testified at the hearing. His opinions remained consistent with those he expressed in his written reports. He agreed with Dr. Gellrick's opinions. He admitted he saw no medical records indicating that the claimant complained of knee symptoms prior to the injury in February 2013.

29. The claimant failed to prove it is more probably true than not that the need for bilateral TKR surgeries was proximately caused by the industrial injury of February 12, 2003. To the contrary, the credible and persuasive evidence establishes that the need for bilateral TKR surgeries is probably the result of the natural progression of the claimant's pre-existing osteoarthritis.

30. The ALJ credits and gives the most weight to the opinions of Dr. Bernton, Dr. Messenbaugh and Dr. Gellrick. These physicians persuasively opined that the need for the TKR surgeries probably resulted from the claimant's pre-existing arthritis of the knees, and not the effects of the February 2003 injury. These physicians agree that the claimant had significant bilateral degenerative arthritis of the knees that pre-dated the industrial injury. Their opinions in this regard are corroborated by the 2003 MRI reports and even the opinions of Dr. Blair and Dr. Foulk. Doctors Bernton, Messenbaugh and Gellrick persuasively opined that the need for the TKR surgeries is most likely the result of the progression of the pre-existing arthritis and not the industrial injury.

31. Dr. Bernton persuasively noted that although the claimant reported progressive disability after the industrial injury, that report is not supported by the medical records. Dr. Bernton's opinion is corroborated by several medical records. For instance, in January 2005 the claimant told her Kaiser physician that she was walking 3 miles per day. In June 2005 the claimant completed a pain diagram but did not mark the knees as producing any pain, although she reported surgery was "pending" on one of her knees. In December 2005 the claimant reported she was able to climb a flight of stairs without difficulty and walk 6 city blocks without stopping. Moreover, when the claimant resigned her employment in March 2006 she did not mention knee problems but instead attributed her decision to a stressful work environment. As Dr. Bernton noted, between 2005 and the early 2010 (more than 7 years after the date of injury) the claimant did not actually seek any additional treatment for her knees.

32. Dr. Bernton's conclusions are corroborated by the persuasive opinions of Dr. Messenbaugh and Dr. Gellrick.

33. The opinions of Dr. Blair are not given as much weight as those of doctors Bernton, Messenbaugh and Gellrick. Dr. Blair's opinion is partially based on the claimant's history that since the February 2003 injury the claimant had been unable to do many activities she was able to perform before the injury. These activities included hiking and taking long walks. However, as found above, the medical records indicate that in 2005, nearly 2 years after the injury, the claimant was able to walk 3 miles. In June 2005 the claimant reported her hobbies included "long walks." In December 2005 the claimant reported being able to go up a flight of stairs and walk 6 city blocks without stopping. Although Dr. Blair places great emphasis on the absence of symptoms prior to the injury, he does not persuasively explain the claimant's failure to seek any treatment for her knees between 2005 and 2010.

34. The opinions of Dr. Varner are not given as much weight as those of doctors Bernton, Messenbaugh and Gellrick. Dr. Varner's opinions appear to be based on a less than complete understanding of the claimant's true history. As found above, the claimant reported to medical providers that as late as 2005 she was able to take 3 mile hikes, walk up stairs and walk 6 city blocks without stopping. Moreover, contrary to Dr. Varner's report the persuasive evidence establishes that the claimant did not resign her job with the employer because of knee problems. Instead she cited stress. Dr. Varner does not persuasively explain why his opinion is consistent with the claimant's failure to seek any treatment for her knees between 2005 and 2010.

35. The ALJ gives little weight to the opinion of Dr. Foulk insofar as it affects the causation determination. Dr. Foulk's use of the term "exacerbation" makes it difficult to determine whether he agrees with the views of doctors Bernton, Messenbaugh and Gellrick or with those of doctors Blair and Varner.

36. The claimant's testimony that after the injury she experienced a steady worsening of her symptoms that included difficulty climbing stairs and walking is not credible and persuasive. That testimony is inconsistent with medical records

documenting that she was able to walk substantial distances and climb stairs as late as 2005.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

CAUSE OF NEED FOR PROPOSED TKR SURGERIES

The claimant argues she has proven it is more probably true than not that the need for bilateral TKR surgeries was proximately caused by the injuries she sustained on February 12, 2003. In support of this proposition she cites her own testimony and the opinions of Dr. Blair, Dr. Varner and Dr. Foulk. The respondents contend the claimant failed to prove any causal connection between the need for the surgeries and the February 2003 injury. They rely principally on the opinions of Dr. Messenbaugh, Dr. Bernton and Dr. Gellrick.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107

P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001). However, the mere fact that a claimant experiences a symptom after an industrial injury does not require the ALJ to conclude that the symptom was caused, aggravated or accelerated by the industrial injury. Rather, the occurrence of a symptom after an industrial injury may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

For the reasons stated in Findings of Fact 29 through 36, the ALJ concludes the claimant failed to prove it is more probably true than not that her need for bilateral TKR surgeries was caused, aggravated or accelerated by the industrial injury of February 12, 2003. Rather, the ALJ is persuaded by the medical records and the opinions of doctors Bernton, Messenbaugh and Gellrick that the need for the TKR surgeries is most likely the result of the natural progression of the claimant's pre-existing osteoarthritis. The opinions of other physicians are not given as much weight for the reasons stated in Findings of Fact 33 through 35. The claimant's relevant testimony concerning the steady worsening of her symptoms after the date of injury is not credible for the reasons stated in Finding of Fact 36. For these reasons the claim for bilateral TKR surgeries must be denied.

RESPONDENT'S REQUEST FOR A DETERMINATION OF MMI

In its position statement the respondent requests an order finding that the claimant has reached MMI for her industrial injury of February 12, 2003. The respondents rely on the opinions of Dr. Bernton, Gellrick and Messenbaugh for the proposition that all of the injury-related conditions have stabilized and the claimant does not need further treatment to reach MMI. The respondent's request is denied.

At the commencement of the hearing the issues were specifically discussed. Counsel for the respondent stated on the record that it was "correct" that the respondent was not raising the issue of MMI even if some of the evidence might pertain to that issue. Thus, the issue of MMI was not properly submitted for consideration and was affirmatively waived by the respondent.

Even if the issue had been before the ALJ he would have lacked jurisdiction to consider it since there is no credible evidence that an authorized treating physician

(ATP) has placed the claimant at MMI, and there is no credible evidence that the issue of MMI has been submitted to a Division independent medical examiner (DIME) for consideration.

Section 8-40-201(11.5), C.R.S., defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Further, § 8-42-107(8)(b)(I), C.R.S., provides that an "ATP shall make the determination as to when the injured employee reaches" MMI. Section 8-42-107(8)(b)(II), C.R.S., provides for the selection of a DIME physician to contest an ATP's finding of MMI or, in certain circumstances, the ATP's failure to place the claimant at MMI (24-month DIME). Section 8-42-107(8)(b)(III), C.R.S., provides that a "hearing on this matter [MMI] shall not take place until the finding of the independent medical examiner has been filed with the division." Absent an ATP and/or DIME physician's finding of MMI the ALJ lacks jurisdiction to determine a dispute concerning the existence of MMI. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002).

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claimant's request for bilateral total knee replacement surgeries is denied.

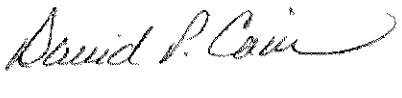
2. The respondent's request for an order determining the issue of maximum medical improvement is denied.

3. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 16, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant is entitled to temporary total disability (TTD) benefits from March 13, 2014, through April 9, 2014?

2. Whether the claimant is entitled to TTD benefits from May 1, 2014, through June 17, 2014?

3. Whether the claimant's injuries include her back and other body parts as mentioned in the opinion of Dr. Timothy Hall, the division sponsored independent medical examiner (DIME)?

4. Whether the issue of the claimant's back being related to this claim was previously litigated and resolved in the claimant's favor?

The ALJ resolved issues 1, 2, and 3 above favorably for the claimant and thus does not render a decision on issue 4 as it is now moot.

FINDINGS OF FACT

1. On March 13, 2014 Dr. Richard Nanes, the claimant's authorized treating physician (ATP) for her work related left knee injury, declared the claimant to be unable to work beginning that date, due to her left knee total knee replacement being quite painful, as well as requiring diagnostic tests to determine the nature of her back pain. Specifically, Dr. Nanes observed that the claimant was "only able to flex her left knee to 90◦ and extension is mildly limited and these movements are very painful for the patient."

2. Dr. Nanes erroneously attributed her back pain at the time to the work injury based upon a misreading of a prior Summary Order issued by this ALJ.

3. Nonetheless, the ALJ finds that the Division independent medical examination (DIME) opinion of Dr. Hall asserts that the back symptomatology is related to the claimant's underlying work related total knee replacement as a result of her altered gait. The ALJ finds that Dr. Hall's opinion on this issue is credible and

persuasive and the ALJ finds that the claimant's back symptoms are related to the claimant's work injury of March 13, 2005.

4. On April 8, 2014 Dr. Nanes returned the claimant to modified duty effective April 10, 2014.

5. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including March 13, 2014 through and including April 9, 2014 as a direct result of her work related injury of March 13, 2005.

6. On May 1, 2014 the claimant's work related left total knee replacement became unstable and while the claimant was hanging curtains from a bed the knee buckled causing the claimant to fall, striking the headboard and injuring her head, neck, and shoulders.

7. This is consistent with the claimant's history of having problems with her knee giving out on her a number of times previously. The knee instability had already been documented previously by the surgeon Shawn Nakamura, M.D., on August 26, 2013, observing: "I definitely think she has flexion instability."; "I also think she tore her PCL…."; and, "She does have slight instability in extension, particularly medial. Positive instability in flexion. Positive anterior and posterior instability in flexion. When she ambulates, when the knee gets into flexion, she feels like she is going to fall." Dr. Nanes also found a lot of play in the knee as of October 23, 2012.

8. The claimant sought treatment on May 1, 2014 at the Emergency Department that same day at the St. Thomas More Hospital. The claimant was referred back to Dr. Nanes.

9. The claimant was seen by Dr. Nanes later that same day. Dr. Nanes took the claimant off of work from and including May 1, 2014 and the claimant was continued off work up to and including June 17, 2014, which was the day prior to the claimant having work related revision surgery on the left knee, and on which day the respondent began paying the claimant TTD benefits as a result of that surgery.

10. Dr. William Ciccone, the respondent's IME doctor, agreed that there was documented knee instability before the claimant's May 1, 2014 fall and that the instability would not have resolved on its own before the June 18, 2014 surgery by Dr. Nakamura.

11. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including May 1, 2014 through and including June 17, 2014 as a direct result of her work related injury of March 13, 2005.

12. Dr. William Ciccone opined that an altered gait from a knee injury could cause back pain. He stated that it would be expected to get worse over time as was determined by Dr. Hall in his report.

13. The ALJ finds that the claimant's back has been injured, along with her head, shoulders, neck, and upper extremities, as a result of the fall that occurred in October of 2012. This was specifically part of the opinion by the DIME physician. The ALJ finds the opinions of Dr. Hall with respect to the relatedness of the back, head, shoulders, neck, and upper extremities, to be credible and persuasive. In addition, as a result of the claimant's latest fall, on May 1, 2014, the claimant suffered further injury to her back. Most likely the back pain stems from a combination of these events. Either way, the ALJ finds that the claimant has established that it is more likely than not that the claimant's current back issues, as well as her head, shoulders, neck, and upper extremities issues, are causally related to her industrial injury of March 13, 2005.

14. The ALJ finds that the claimant has established that it is more likely than not that the claimant's current medical issues with her back, head, neck, and shoulders are related to her industrial injury of March 13, 2005 and that the respondent is responsible for the payment of medical treatment related to these issues.

15. The respondent, at the time of the hearing, had not received a bill for the ED services received by the claimant on May1, 2014 and thus, understandably, had not paid it by the time of the hearing. The ALJ finds that the respondent is responsible for the payment of the May 1, 2014 ED visit as it was causally related to the claimant's industrial injury.

16. The ALJ finds that the respondent has paid for the claimant's MRI of March 26, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S.

2. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

5. A workers' compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1)(c); *Faulkner v. ICAO,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores v. Industrial Claim Appeals Office*, 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). This includes establishing entitlement to medical

treatment. See *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to TTD benefits from and including March 13, 2104 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.

9. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, *supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

10. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the

industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013.

11. The claimant seeks medical benefits in the way of payment for the March 26, 2014 low back MRI and the claimant's May 1, 2014 visit to St. Thomas More Hospital. As found, the respondent paid for the MRI, making that issue moot. It is noted that it has generally been held that payment of medical services is not in itself an admission of liability. *Ashburn v. La Plata School District*, W.C. No. 3-062-779 (May 4, 2007).

12. Payment for the May 1, 2014 hospital visit pivots on whether the fall that morning occurred due to the claimant's left knee buckling as a result of her industrial injury. As found above, the claimant has established by a preponderance of the evidence that the ED visit was as a result of the industrial injury. The ALJ concludes that the respondent is therefore liable for payment of the ED bill.

13. The claimant seeks treatment for her shoulders, neck, headaches, left thumb, and right hand.

14. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that her current issues involving her back, head, shoulders, neck, and upper extremities are related to her industrial injury and that the respondent is responsible for payment of medical care to cure or relive the claimant from the effects of these issues.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant TTD benefits from and including March 13, 2104 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.

2. The respondent shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of her conditions to her back, head, shoulders, neck, and upper extremities as found herein.

3. The respondent shall pay for the claimant's emergency department visit to St. Thomas More Hospital on May 1, 2014.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DAE: March 5, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

PROCEDURAL BACKGROUND

On January 2, 2014 ALJ Harr issued Findings of Fact, Conclusions of Law and Order in this matter. He determined that the Division Independent Medical Examination (DIME) physician had issued equivocal reports regarding the causation of Claimant's right knee chondromalacia patella disease process. After resolving the ambiguity ALJ Harr concluded that the DIME physician ultimately determined the emerging symptoms in Claimant's right knee were not related to her admitted left knee injury. ALJ Harr then reasoned that Claimant failed to overcome the DIME physician's opinion by clear and convincing evidence and to show that any permanent disability from her right knee condition was a component of the admitted left knee injury. Finally, he denied and dismissed Claimant's request for benefits related to the right knee condition.

Claimant appealed ALJ Harr's Order to the Industrial Claim Appeals Office (ICAP). She asserted that ALJ Harr erred in his interpretation of the DIME physician's report. Claimant contended that the DIME physician's ultimate opinion was that her right knee symptoms were attributable to the admitted left knee injury. She also argued that, because Respondents did not contest the DIME physician's right knee findings, ALJ Harr was jurisdictionally barred from considering the issue of the compensability of Claimant's right knee condition. Recognizing the ambiguity in the DIME physician's report, the ICAP rejected Claimant's contention that the DIME report compelled a determination that her right knee condition was attributable to the admitted left knee injury. The ICAP noted that ALJ Harr reasonably concluded that the emerging symptoms from the chondromalacia disease process in Claimant's right knee were not related to her admitted November 1, 2007 left knee injury.

Claimant appealed the ICAP's decision to the Colorado Court of Appeals. On December 11, 2014 the court set aside the ICAP's Order affirming ALJ Harr's decision and remanded the matter with directions. The Court of Appeals concluded that ALJ Harr properly determined that the DIME physician's opinion was ambiguous. However, the court reasoned that the record did not support ALJ Harr's finding that the DIME physician had ultimately excluded Claimant's right knee symptoms as a component of the admitted left knee injury. The court thus remanded the matter with instructions to "(1) reconsider and make record-supported findings regarding the meaning of the follow-up DIME report and (2) conduct such additional proceedings as may thereafter be necessary and appropriate." The ICAP subsequently set aside ALJ Harr's January 2, 2014 Order and remanded the matter for further proceedings consistent with the opinion of the Court of Appeals. Because ALJ Harr is no longer employed by the Office of Administrative Courts, the matter has been assigned to ALJ Peter J. Cannici to issue Findings of Fact, Conclusions of Law and Order on Remand.

ISSUE

Whether the May 28, 2013 follow-up DIME report of Division Independent Medical Examination (DIME) physician William Watson, M.D. reflects that Claimant's right knee injury was a component of her admitted left knee injury.

FINDINGS OF FACT

1. Employer operates a food catering business where Claimant worked as a Catering Manager. On November 1, 2007 Claimant sustained an admitted injury to her left knee. She slipped on a wet or greasy floor and twisted her left knee.

2. Claimant underwent left knee treatment over several years that included two surgical procedures. On June 16, 2010 John S. Hughes, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI).

3. Claimant challenged the MMI determination and sought a DIME. Dr. Watson performed the DIME on November 23, 2010. He concluded that Claimant had not reached MMI and required additional conservative left knee treatment. Dr. Watson also determined that Claimant suffered right knee symptoms that were related to her November 1, 2007 left knee injury. He specifically explained:

> [Claimant] first complained of right knee pain to Dr. Robinson on 02/01/2010 and again on 05/05/2010 to John Hughes, and finally Dr. Lynn Parry on 08/10/2010. Within a reasonable medical probability, I feel the right knee symptoms were due to her altered gait and excessive weightbearing, which were caused from the 11/10/2007 accident. I believe she needs x-rays of the right knee along with MRI and should be seen in followup by her orthopedic surgeon.

4. Claimant subsequently underwent additional left knee treatment that included a third surgery on September 26, 2012 to address her left knee degenerative joint disease. Charles Gottlob, M.D. placed Claimant at MMI on February 28, 2013.

5. On May 28, 2013 Claimant underwent a follow-up DIME with Dr. Watson. Dr. Watson concluded that he agreed with Dr. Gottlob's February 28, 2013 date of MMI. He no longer recommended a right knee evaluation and provided only a left knee impairment rating. Dr. Watson did not condition MMI upon treatment of the right knee. However, he commented that his opinion regarding Claimant's right knee was unchanged from his November 23, 2010 report. Accordingly, Dr. Watson's May 28, 2013 follow-up DIME report was ambiguous.

6. Resolving the ambiguity in the follow-up DIME report reflects that Dr. Watson ultimately determined the emerging symptoms from the chondromalacia patella disease process in Claimant's right knee are related to her left knee injury. In his November 23, 2010 report Dr. Watson explained that Claimant's right knee symptoms were caused by her altered gait and excessive weight-bearing as a result of her November 1, 2007 admitted left knee injury. He also recommended additional

evaluation of Claimant's right knee condition. However, in his follow-up DIME Dr. Watson no longer recommended a right knee evaluation, placed Claimant at MMI and provided only a left knee impairment rating. Dr. Watson did not condition MMI upon treatment of the right knee. Nevertheless, Dr. Watson stated in his follow-up DIME report that his opinion regarding Claimant's right knee was unchanged from his November 23, 2010 report. He thus maintained that Claimant's right knee symptoms were related to the altered gait and excessive weight-bearing that was caused by the November 1, 2007 left knee injury. Accordingly, Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005). If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. As found, resolving the ambiguity in the follow-up DIME report reflects that Dr. Watson ultimately determined the emerging symptoms from the chondromalacia patella disease process in Claimant's right knee are related to her left knee injury. In his November 23, 2010 report Dr. Watson explained that Claimant's right knee symptoms were caused by her altered gait and excessive weight-bearing as a result of her November 1, 2007 admitted left knee injury. He also recommended additional evaluation of Claimant's right knee condition. However, in his follow-up DIME Dr. Watson no longer recommended a right knee evaluation, placed Claimant at MMI and provided only a left knee impairment rating. Dr. Watson did not condition MMI upon treatment of the right knee. Nevertheless, Dr. Watson stated in his follow-up DIME report that his opinion regarding Claimant's right knee was unchanged from his November 23, 2010 report. He thus maintained that Claimant's right knee symptoms were related to the altered gait and excessive weight-bearing that was caused by the November 1, 2007 left knee injury. Accordingly, Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as*

amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his April 24, 2010 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Truck Driver. His duties involved driving and unloading trucks.

2. On April 24, 2010 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. While he was assisting with the unloading of 2,500 pound pipes, the rigging support came loose and the pipes fell. The pipes struck Claimant and he injured his head, face, neck, back, ears and sinuses.

3. Claimant subsequently received medical treatment from Authorized treating Physician (ATP) Cathy Smith, M.D. On May 25, 2010 she diagnosed Claimant with the following: (1) a facial bone fracture that was improving; (2) a closed head injury, including loss of consciousness, headaches and dizziness; (3) a lumbar strain that had resolved and (4) a right shoulder strain and contusion that had resolved. Dr. Smith noted that a CT scan of Claimant's head was normal and a CT scan of his cervical spine was normal. Moreover, an MRI of Claimant's lower back revealed degenerative disc and joint disease but nothing acute.

4. On June 17, 2010 Dr. Smith determined that Claimant had reached Maximum Medical Improvement (MMI) and assigned a 0% impairment rating. She discharged Claimant to medical maintenance follow-up with ENT Specialist Sanjay K. Gupta, M.D. for an evaluation of his nasal fracture and deviated septum. On July 9, 2010 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Smith's MMI and impairment determinations.

5. On October 21, 2010 Claimant underwent surgery with Dr. Gupta to repair his nasal obstruction. He followed-up with Dr. Smith on December 1, 2010 and reported minimal pain. Dr. Smith noted that Claimant had returned to full-duty employment. Claimant subsequently continued to receive maintenance treatment from Drs. Smith and Gupta until August 2011.

6. On August 3, 2011 Dr. Smith again determined that Claimant had reached MMI with no permanent impairment. She recommended maintenance care that consisted of two visits with Dr. Gupta within the next year as well as nasal spray for

three additional months. Dr. Smith remarked that Claimant was working full duty employment.

7. Claimant testified that his April 24, 2010 industrial injuries never completely healed. However, he explained that he learned to accommodate his symptoms and continued to work. After reaching MMI Claimant first worked for A&W Water Supply hauling water to fracking sites. He then worked for MCP Trucking driving, loading and unloading a tractor trailer.

8. Claimant explained that by September 2013 he began suffering episodes of headaches and ringing in his ears. He remarked that he also became clumsy and would spontaneously fall.

9. On March 25, 2014 Claimant's previous counsel drafted a letter to Dr. Gupta inquiring, in part, whether Claimant had suffered a worsening of condition. Dr. Gupta replied that Claimant "continues to have nasal sinus and breathing issues that vary with time. As [Claimant] states his symptoms have not substantially improved. He may benefit for re-evaluation for his claim and impairment evaluation."

10. On November 12, 2014 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall also testified at the hearing in this matter. Dr. Fall explained that on April 24, 2010 Claimant sustained a mild closed head injury, a nasal fracture, a mild lumbar strain and a mild right shoulder strain. On October 21, 2010 Claimant underwent nasal surgery. Claimant acknowledged that, after he reached MMI, he was released to regular duty and returned to work for A&W Water Supply in the capacity of hauling water to fracking sites. He then began driving, loading and unloading a tractor trailer for MCP Trucking. However, Claimant ceased working in September 2013 when he experienced severe symptoms of headaches, vertigo, neck pain, tingling, falling and clumsiness.

11. Despite Claimant's increased symptoms, Dr. Fall determined that Claimant remained at MMI as determined by Dr. Smith on August 3, 2011. She explained that Claimant's September 2013 symptoms were not directly or proximately caused by his April 24, 2010 industrial injury. Dr. Fall noted that Claimant "may require further evaluation to determine the exact diagnosis of his multiple neurological and musculoskeletal symptoms" through his primary care physician. She explained that the medical documentation revealed that Claimant's April 24, 2010 complaints had resolved and he returned to full duty employment. In fact, he continued to work full duty until he suffered acute symptoms in September 2013. Dr. Fall remarked that Claimant's September 2013 symptoms were not related to his April 24, 2010 industrial injury because of the temporal proximity of the symptoms three years after the industrial injury.

12. Claimant has failed to establish that it is more probably true than not that his condition has worsened and he is entitled to benefits. The records reveal that Claimant returned to full duty employment after reaching MMI on August 3, 2011. He continued to work full duty until he experienced acute symptoms in September 2013. The temporal proximity of the symptoms more than two years from the date of MMI suggests that the

onset of acute symptoms was not related to the initial industrial injury on April 24, 2010. Moreover, the March 25, 2014 note from Dr. Gupta does not reflect that Claimant suffered a worsening of symptoms after reaching MMI but instead provides that Claimant's symptoms had not substantially improved. Finally, the persuasive report and testimony of Dr. Fall reflects that Claimant did not suffer a worsening of condition after he reached MMI on August 3, 2011. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a

claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that his condition has worsened and he is entitled to benefits. The records reveal that Claimant returned to full duty employment after reaching MMI on August 3, 2011. He continued to work full duty until he experienced acute symptoms in September 2013. The temporal proximity of the symptoms more than two years from the date of MMI suggests that the onset of acute symptoms was not related to the initial industrial injury on April 24, 2010. Moreover, the March 25, 2014 note from Dr. Gupta does not reflect that Claimant suffered a worsening of symptoms after reaching MMI but instead provides that Claimant's symptoms had not substantially improved. Finally, the persuasive report and testimony of Dr. Fall reflects that Claimant did not suffer a worsening of condition after he reached MMI on August 3, 2011. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request to reopen his April 24, 2010 Workers' Compensation claim is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL BACKGROUND

On December 22, 2014 *nunc pro tunc* December 19, 2014, PALJ Jeffrey A. Goldstein entered an Order that limited the issues for hearing. He ordered that the following issues are stricken from the Claimant's December 4, 2014 Application for Hearing because the Office of Administrative Courts lacks jurisdiction to hear them: compensability, medical benefits (including reasonable and necessary), average weekly wage, disfigurement, permanent partial disability, permanent total disability. He ordered that these issues are closed pursuant to C.R.S. § 8-43-203(2)(b)(II)(A) unless reopened pursuant to C.R.S. § 8-43-303. PALJ further ordered that a hearing shall proceed on the Claimant's most recent Application for Hearing on the issue of temporary disability benefits.

ISSUES

The sole issue remaining for adjudication at hearing is:

1. Whether the Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits, in addition to those already received pursuant to the Amended Final Admission of Liability dated July 30, 2014.

FINDINGS OF FACT

1. The Claimant suffered a compensable injury on March 31, 2010 while in the course and scope of employment with Aspen Skiing Co., LLC.

2. Both the Claimant and Efren Vargas, the Human Resources Director for Aspen Skiing Co., testified that the Claimant voluntarily left the employment of Aspen Skiing CO., LLC on April 10, 2010. The Claimant voluntarily left seasonal employment with the Employer on April 10, 2010 and then moved and worked as a cashier at Mesa Verde National Park.

3. On April 13, 2010, the Claimant advised Dr. Kim Scheur that he was leaving Aspen tomorrow to go to another job near Cortez, Colorado (Exhibit 8).

4. At a July 1, 2010 medical appointment with Dr. Robert Goodman, the Claimant advised that he was working at Mesa Verde at the coffee bar (Exhibit 12). The Claimant testified that once he moved, which occurred right after he left the employ of Employer, he began working at the new job at Mesa Verde and the work was within any work restrictions. The Claimant continued to work at this job until the day before his surgery.

5. The Claimant underwent surgery on July 28, 2010. Beginning on that date, he was paid temporary total disability benefits up to and through May 14, 2014, his date of maximum medical improvement (MMI) (Exhibit 1). The Claimant testified that he received temporary disability benefits throughout the period as set forth in the Amended Final Admission of Liability dated July 30, 2014.

6. Dr. James O. Maher determined the Claimant reached MMI on May 14, 2014 (Exhibit 11).

7. Dr. Linda A Mitchell, MD performed an IME for purposes of an impairment evaluation of the Claimant's shoulder on June 19, 2014 and she agreed with the MMI date of May 14, 2014 (Exhibit 1).

8. Respondents filed an Amended Final Admission of Liability on July 30, 2014 discontinuing temporary disability benefits as of that MMI date (Exhibit 1). The Claimant did not timely challenge the finding of MMI.

9. Temporary disability benefits were discontinued because the Claimant reached MMI on May 14, 2014.

10. The court received no persuasive evidence of entitlement to additional temporary disability benefits after the date of MMI.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. Pursuant to statute, temporary total disability benefits may cease at the first occurrence of any one of the following:

(a) the employee reaches maximum medical improvement;
(b) the employee returns to regular or modified employment;
(c) the attending physician gives the employee a written release to return to regular employment; or

(d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

In this case, the Claimant established that he suffered an injury and that he has missed work and suffered a wage loss. However, pursuant to the Claimant's own testimony, he received TTD benefits related to this wage loss from July 28, 2010 through May 14, 2014 as set forth in the Amended Final Admission of Liability dated July 20, 2014. The Claimant was then placed at MMI by Dr. James O. Maher on May 14, 2014 when Dr. Maher provided an impairment rating for the Claimant. As of the date of MMI, the TTD benefits terminated and the Claimant did not prove that he was entitled to benefits after the day he was placed at MMI. The Claimant did not timely challenge the finding of MMI by invoking the Division IME process after receipt of the Amended Final Admission of Liability of July 30, 2014. Under CRS § 8-43-203(2)(b)(II)(A), the Claimant is therefore estopped from challenging MMI. The court has heard no evidence which would persuade it that any award of temporary disability benefits is due after MMI other than the amounts already admitted in the Amended Final Admission of Liability.

The Claimant also failed to prove that he was entitled to receive TTD benefits at any point prior to July 28, 2010 as he voluntarily left seasonal employment with the Employer on April 10, 2010 and then moved and worked as a cashier at Mesa Verde National Park. On April 13, 2010, the Claimant advised Dr. Kim Scheur that he was leaving Aspen tomorrow to go to another job in another area of Colorado. At a July 1, 2010 medical appointment with Dr. Robert Goodman, the Claimant advised that he was working at Mesa Verde at the coffee bar. The Claimant himself testified that he began this job right after leaving the employ of Employer and worked there continuously until the day before his surgery. Therefore, there was no period of time where the Claimant suffered a wage loss due to his work injury prior to July 28, 2010. Rather, the Claimant was paid through his last day of seasonal employment, then he moved and changed jobs and received wages through July 27, 2010.

ORDER

It is, therefore, ordered that:

1. The Claimant's claim for additional TTD benefits, beyond those set forth in the Amended Final Admission of Liability dated July 30, 2014, is denied and dismissed

2. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 19, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did the respondents prove by clear and convincing evidence that the DIME physician erred in assessing any impairment rating for the claimant's low back injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 4 were received into evidence. Respondents' Exhibits A through K were received into evidence. The depositions of Karen Knight, M.D., and Eric Ridings, M.D., were received into evidence.

2. The claimant was involved in an admitted work-related motor vehicle accident (MVA) on September 6, 2011.

3. The claimant testified as follows. On the date of injury he was driving a flat bed truck. He collided with a Toyota RAV 4 that made an improper left-hand turn in front of him. Later that night he began to experience low back pain. The next morning it hurt worse. He did not have any low back pain prior to the MVA. Since the date of the injury his back pain has gone up and down.

4. The claimant was seen by a chiropractor on September 19, 2011. At that time the claimant reported he felt achy two days after the MVA.

5. The claimant was seen at Premier Urgent Care on September 25, 2011. He told the triage nurse that the accident was on the September 8 and his back pain started on September 10. Apparently the claimant was seen by John Torres, M.D., and referred for physical therapy (PT).

6. On September 28, 2011 the claimant was seen by Miles Hein, PT, at Action Potential Physical Therapy. The claimant gave a history of an MVA on September 6, 2011 followed by the onset of pain 2 days later. PT Hein noted tenderness of the "right SI joint and glute region." Hein noted decreased range of motion (ROM) with "lumbar spine side bending approximately 50%."

7. On December 14, 2011, the claimant reported to the physical therapist that he had "just minor pain" on his right side. On January 4, 2012 the claimant told the physical therapist that his lawyer thought he needed an MRI.

8. The claimant testified that his lawyer sent him for an examination by David Richman, M.D.

9. Dr. Richman examined the claimant on January 24, 2012. The claimant gave a history of the MVA on September 6, 2011 and reported experiencing low back pain approximately one and a half hours after the accident. The claimant reported his pain was 1 to 2 on a scale of 10 (1-2/10) and it was worse with prolonged sitting. However, the claimant continued to work full duty as a truck driver without restrictions. On physical examination the lumbosacral lordosis was slightly reduced. ROM was slightly limited in forward flexion. On extension ROM was "moderately limited" with some increased discomfort." Right and left bending were within normal limits. There were "palpable knots" that were painful which Dr. Richman opined were "muscular/soft tissue" in nature. Dr. Richman assessed "chronic lumbar strain with myofascial pain and trigger points." He also assessed possible "facetogenic pain." Dr. Richman recommended continued PT with "aggressive myofascial approach" and trigger point injections. Dr. Richman referred the claimant to In Motion for PT.

10. Between July 25, 2012 and November 19, 2012 the claimant underwent approximately 25 PT sessions. On November 19, 2012 the claimant was released from physical therapy with therapeutic "goals sufficiently met to allow patient to continue independently." The low back ROM was reported to be 90-100% of normal and pain was "decreased" from 8 to 2.

11. Dr. Richman examined the claimant on November 27, 2012. Dr. Richman noted the claimant reported that his left low back pain "comes and goes" and in the past week he had only 1 mild episode of left low back discomfort. The claimant's pain index was "0" on the date of examination. Dr. Richman's "back exam" was normal, including full active and passive ROM in flexion, extension, lateral flexion and rotation. Dr. Richman's assessed "low back pain resolved." Dr. Richman opined the claimant was at maximum medical improvement (MMI) with no impairment, no restrictions, and no maintenance care needed.

12. On April 19, 2013 Karen Knight, M.D., performed a Division-sponsored independent medical examination (DIME) of the claimant. Dr. Knight has expertise in physiatry and neuromuscular medicine and is Level II accredited. In a DIME report dated May 8, 2013 Dr. Knight reviewed medical records, recorded the history given by the claimant and noted the results of a physical examination. The claimant reported a history of an MVA on September 3, 2012 [sic] (although the Division IME Examiner's Summary Sheet reflects a date of injury of September 6, 2011). The claimant also reported the onset of back pain at the time of the injury and that it was worse the next morning. Left-sided back pain persisted and on the date of examination the claimant rated his pain as 6 on a scale of 10 (6/10). On physical examination the claimant demonstrated "decreased lordosis" of the spine. The claimant was non-tender "and without apparent spasms" over the bilateral buttocks, greater trochanteric bursae, sacro-iliac joints and the paraspinal musculature. Flexion was recorded as 70 degrees, extension was 7 degrees, right lateral flexion was 30 degrees and left lateral flexion was 35 degrees. Straight leg raise was "negative for neural tension bilaterally." X-rays were

performed that reportedly revealed a slight scoliotic curve, advanced degenerative disc disease most severe at L5-S1 and severe facet arthropathy at L4-5 and L5-S1.

13. In the May 2013 DIME report Dr. Knight made the "clinical diagnosis" of low back pain which she stated "may or may not be related to injury." Dr. Knight stated the x-rays showed "advanced degenerative changes which may have been aggravated by the accident." Dr. Knight observed that the claimant made "consistent" pain reports and had "ongoing left sided pain which is life limiting." Dr. Knight opined the claimant had not reached MMI and recommended he undergo an MRI to determine if he has "treatable causes for his left sided low back pain."

14. Dr. Richman was provided with a copy of Dr. Knight's DIME report. On July 4, 2013, Dr. Richman wrote, "MRI is not warranted for uncomplicated low back pain." Dr. Richman opined the claimant did not have instability or radiculopathy and that only conservative treatment was warranted.

15. Despite the views expressed on July 4, 2013, Dr. Richman referred the claimant for a lumbar MRI. The MRI was performed on August 2, 2013. The radiologist's impressions included the following: (1) Mild degenerative changes of the L4-5 disc space with moderate to advanced arthropathy of the facet joints, worse on the right, but without evidence of nerve root impingement; (2) Mild degenerative changes of the facet joints at L5-S1, a normal disc space and no evidence of nerve root impingement.

16. On October 11, 2013 the claimant was seen at Concentra by Daniel Peterson, M.D. Dr. Peterson noted that Dr. Richman had retired and the claimant was seen for a referral to "PM&R for eval and facet blocks." Dr. Peterson noted the MRI was "positive." He assessed "lumbosacral strain" with "evidence of facet syndrome and L sided low back pain." Dr. Peterson referred the claimant to Jeffrey Wunder, M.D., "for injection procedure." Dr. Peterson "anticipated" MMI in 3 months.

17. Dr. Wunder examined the claimant on October 28, 2013. The claimant told Dr. Wunder his pain started on the day of the accident. The claimant reported his pain was in the left lumbar area and he described it as constant, aching and fluctuating. Dr. Wunder noted it was impossible to tell if the claimant had muscle spasms because of "adipose." Dr. Wunder stated that the claimant's facet findings were contradictory with pain on flexion and not extension, but positive findings on left sided facet loading but not right-sided facet loading. Dr. Wunder assessed mechanical low back pain, "underlying degenerative disk disease/spondylosis/facet arthropathy" and morbid obesity. Dr. Wunder noted that because of significant arthrosis in the facet joints he recommended a medial branch block at the left L4-5 facet" that "may result in radiofrequency facet neurotomy."

18. On November 25, 2013 Dr. Wunder reported that he attempted a medial branch block at the left L4-5 facet but the procedure was terminated because the claimant became hypoxic. Dr. Wunder opined the claimant had severe apnea and is

not a candidate for interventional injections. He recommended the claimant return to the DIME physician for reassessment.

19. On February 3, 2014 Dr. Knight conducted a follow-up DIME. The claimant reported his pain was now "only on the left side" and was 3/10 on the date of examination. He further reported his worst pain in the last week was 10/10. On physical examination Dr. Knight noted decreased lordosis of the spine. The claimant was non-tender "and without apparent spasms" over the bilateral buttocks, greater trochanteric bursae, sacro-iliac joints and the paraspinal musculature. Flexion was recorded as 70 degrees, extension was 10 degrees, right lateral flexion was 5 degrees and left lateral flexion was 7 degrees. Straight leg raise was "negative for neural tension bilaterally." Dr. Knight stated the claimant's ROM was worse than on her previous examination. Dr. Knight noted the claimant had undergone a lumbar MRI on August 2, 2013 that showed advanced facet arthropathy at L4-5 and mild degenerative changes of the facet joints at L5-S1. She further noted the claimant had undergone an attempted diagnostic injection that was aborted because of the claimant's sleep apnea and inability to tolerate the prone position. Dr. Knight recorded a "clinical diagnosis" of low back pain. She further stated the claimant has "history, physical exam findings and radiographic findings consistent with low back pain secondary to facet arthropathy." She explained the claimant had no back pain before the injury and his MRI findings were consistent with moderate facet arthropathy at L4-5. However, Dr. Knight acknowledged that "MRI and X-rays do not diagnose pain generators" and consequently the claimant underwent the aborted diagnostic injection. Because the claimant was not able to "undergo interventional treatment of his facet," Dr. Knight stated that "we are unable to confirm that this is his pain generator." Nevertheless. Dr, Knight stated that it would be reasonable to rate him as II.C as "rhizotomy was the road he was going down."

20. Dr. Knight opined the claimant reached MMI on November 25, 2013 because his underlying medical condition did not allow "for further treatment exploration." Dr. Knight assessed 7% impairment for a specific disorder of the lumbar spine based on "II.C L4-5 Facet arthrop" and 16% impairment for reduced ROM in the lumbar spine. The overall combined impairment rating was 22% whole person under the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (AMA Guides).

21. On September 2, 2014 Eric Ridings, M.D., conducted an independent medical examination (IME) of the claimant. The IME was conducted at the respondents' request. Dr. Ridings is board certified in physical medicine and rehabilitation. Dr. Ridings took a history from the claimant, reviewed medical records including the DIME reports and performed a physical examination.

22. In the IME report Dr. Ridings opined the claimant's correct injury-related diagnosis is "a simple lumbar strain complicated by symptom magnification and the patient's comorbidities, including marked obesity." Dr. Ridings agreed with Dr. Richman that the claimant reached MMI for the industrial injury on November 27, 2012. Dr. Ridings noted that on November 27, 2012 Dr. Richman documented the claimant's pain

level at 0/10 with “1 mild episode of left low back discomfort in the past week.” Dr. Ridings further noted that Dr. Richman documented “normal tone in the areas of complaint,” full ROM in all planes of the lumbar spine and that Dr. Richman diagnosed “resolved” low back pain. Dr, Ridings opined that the original modesty of the claimant’s symptoms, the delay in the onset of symptoms of a “couple of days” and his excellent response to physical therapy support the conclusion the claimant suffered a “lumbar strain injury rather than anything more serious.” Dr. Ridings further opined that Dr. Richman correctly assigned 0% impairment because the claimant had “normal muscle tone” and consequently would not have a “Table 53 diagnosis” under the AMA Guides. Dr. Ridings further explained that if there is no Table 53 diagnosis ROM cannot be used in rating impairment of the spine.

23. On physical examination Dr. Ridings noted tenderness to palpation in the left low lumbar area from the L4-5 level down through the L5-S1 level. With relaxation in prone position the claimant “had normal tone throughout his low back.”

24. Dr. Ridings noted that the claimant’s “history to me today was that the worst movement of his back for causing left-sided low back pain is right side bending, followed by lumbar forward flexion.” Dr. Ridings opined that this is “not consistent with left SI joint dysfunction, as both of those movements actually open up the left-sided facets. Facet loading to the left today produced pain in a horizontal band across his left low back, not in a typical distribution I would expect for specific pain coming from the facet joint, which would typically be significant at that particular location and radiate down in to the buttock.”

25. Dr. Ridings wrote that Dr. Knight was “in error in almost every portion of her discussion of the patient’s diagnosis and impairment rating.” Dr. Ridings opined that although Dr. Knight apparently diagnosed the claimant’s pain generator as the L4-5 facet joint, she “did not support this conclusion with any relevant facts.” Dr. Ridings explained that Dr. Knight’s physical examination did not document any tenderness or increased muscle tone which Dr. Ridings would have expected if the claimant had “unremitting pain from facet joint inflammation for 2 ½ years.” Dr. Ridings stated that Dr. Knight correctly remarked that MRI findings and x-ray findings do not diagnose pain generators, but it appeared to Dr. Ridings that Dr. Knight relied “entirely on those imaging studies” to diagnose L4-5 facet arthropathy. This was true even though Dr. Knight acknowledged that she could not confirm that the L4-5 facet was the pain generator. Dr. Ridings opined that the degenerative changes noted on MRI and x-ray findings do not correlate with the claimant’s history or physical examination findings.

26. Dr. Ridings testified by deposition on December 4, 2014. Dr. Ridings explained that in order to rate spinal impairment under Table 53 of the AMA Guides there must be a diagnosis based on objective findings followed by objective findings of impairment. Dr. Ridings opined that Dr. Knight does not “clearly state an opinion” as to the claimant’s pain generator. Dr. Ridings stated that insofar as Dr. Knight assessed low back pain, that condition is a symptom, not a diagnosis. He further opined that insofar as Dr. Knight diagnosed facet mediated pain she failed to support that diagnosis. Dr. Ridings opined there is “no objective evidence” to support the diagnosis of facet

arthropathy as the pain generator, but there are multiple reasons to believe that it is not the pain generator. He explained that on his examination and elsewhere in the medical records the claimant reported more pain when bending forwards, which would typically not cause any pain in the facet joints. Dr. Ridings also stated the claimant has more left-sided low back pain when bending to the right side, which is the opposite of what one would expect if the pain were caused by left-sided facet arthropathy. Dr. Ridings opined his examination was consistent with muscular etiology and inconsistent with pain coming from the facets on the left side.

27. With regard to the MRI findings Dr. Ridings noted that facet arthropathy identified by imaging does not correlate well with the presence or absence of pain as demonstrated by studies involving anesthetic facet blocks. In this case Dr. Ridings pointed out that on MRI the claimant's right-sided L4-5 facet arthropathy is more severe than the left side, although Dr. Knight indicates that the left-side facet is the pain generator.

28. Dr. Ridings testified that the claimant's correct diagnosis is a lumbar strain injury, which would be rated by applying Table 53 II (B) of the AMA Guides. Dr. Ridings explained that in order to assign impairment for a soft tissue injury under Table 53 II (B), the patient must exhibit both 6 months of medically documented pain and "rigidity." Dr. Ridings testified that under Table 53 "rigidity" refers to increased muscle tone and that on his examination the claimant did not exhibit increased muscle tone. Therefore, the claimant is not entitled to an impairment rating under Table 53 II (B). Dr. Ridings also noted that Dr. Knight did not find any increased muscle tone.

29. Dr. Ridings testified that if the claimant does not have a Table 53 diagnosis then it is improper to assign an impairment rating for reduced ROM.

30. Dr. Ridings testified that if a person has a lumbar strain and it resolves the strain "doesn't come back anymore." He further stated "there are many reasons this man had low back pain, particularly his weight." Thus, Dr. Ridings opined that any complaints the claimant currently has are not related to the industrial injury.

31. Dr. Knight testified by deposition on December 8, 2014. Dr. Knight testified that she believes the claimant's correct diagnosis is facet arthropathy leading to axial low back pain. Dr. Knight opined that the claimant's MVA did not cause the facet arthropathy but instead aggravated it. She explained that facet change is a "progressive phenomenon" that people can live with "just fine until they have a precipitating event that can lead to persistent pain."

32. Dr. Knight testified that facet arthropathy is her diagnosis because it is supported by her physical examination, the MRI findings and the x-ray findings and is the "most likely diagnosis" considering the available data. She stated that the diagnosis is supported by the physical examination because the claimant had positive findings on "extension" of the back and on "rotation" of the back. Dr. Knight admitted that the facet pain could not be confirmed as the claimant's pain generator because in the presence

of sleep apnea he was not able to undergo the medial branch block. Dr. Knight admitted that lumbar strain could be the claimant's correct diagnosis.

33. Dr. Knight testified that she stands by her permanent impairment rating of 22% whole person. She opined that her diagnosis of facet pain entitles the claimant to a rating under Table 53 because he was "on the road to rhizotomy." She also opined that based on the claimant's 6 months of documented back pain he would be entitled to a Table 53 rating even if he had undergone the branch block and a rhizotomy was unwarranted. She stated that "rigidity" is not a requirement for a Table 53 rating and she did not consider it in her impairment rating. She explained that rigidity "means no movement." Dr. Knight stated that many people with facet arthropathy do not have hypertonicity. She explained that it is common for persons not to exhibit hypertonicity 12 months out from an MVA.

34. Dr. Knight stated that because an MRI shows facet arthropathy does not mean that the arthropathy is symptomatic.

35. The ALJ takes administrative notice of Table 53 (II) (B) and (C) of the AMA Guides. Specifically, the ALJ notes that both of these sections contain the following statement: "Unoperated with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm." The ALJ further notes that the principle difference between Table 53 (II) (B) and (C) is that section (B) applies when there are "none to minimal" changes on "structural tests" while section (C) applies where there are "moderate to severe" changes on structural tests including an unoperated herniated nucleus pulposus with or without radiculopathy. See CRE 201; *Mendicelli v. Nor-Mar, Inc.*, WC 4-785-226 (ICAO October 6, 2010) (contents of AMA Guides are subject to administrative notice in accordance with CRE 201 and § 8-43-210, C.R.S.).

36. The respondents proved it is highly probable and free from serious doubt that the DIME physician, Dr. Knight, erred in assigning an impairment rating for the claimant's lumbar spine.

37. Dr. Ridings credibly and persuasively testified as follows. Under Table 53 (II) (B) the claimant must exhibit 6 months of pain *and* rigidity in order to receive an impairment rating for a specific disorder of the spine. The term "rigidity" refers to increased muscle tone as demonstrated by physical examination. Dr. Ridings did not find any increased muscle tone and neither did Dr. Knight. Therefore, there is no basis to award a Table 53 (II) (B) impairment rating. Without a specific disorder impairment ratable under Table 53 ROM impairment may not be used to assign an impairment rating. Since the claimant has no Table 53 impairment ROM may not be considered and the claimant's impairment rating is 0%.

38. The ALJ infers from the contents of the AMA Guides (Finding of Fact 35) that Table 53(II) (B) and (C) both require "rigidity" in order to assess an impairment rating. Although Dr. Ridings' and Dr. Knight differed as to whether the claimant's correct diagnosis is a lumbar sprain ratable under Table 53 (II) (B) or facet arthropathy

ratable under Table 53 (II) (C), the distinction is immaterial since either diagnosis requires a finding of "rigidity" to assess an impairment rating. Dr. Ridings credible opinion supports the inference that regardless of the precise diagnosis no impairment may be assigned under Table 53 (II) (B) or (C) because there was no rigidity of 6 months duration.

39. Dr. Ridings' opinion that there is not 6 months of rigidity is supported by his examination of September 2, 2014 in which he found "normal tone in the areas of complaint." Dr. Riding's opinion that the claimant did not display any rigidity is corroborated by Dr. Richman's November 27, 2012 which notes a normal back examination and determines the claimant is not entitled to any impairment rating.

40. Dr. Knight did not document the existence of rigidity as defined by Dr. Ridings. Indeed, Dr. Knight stated that "rigidity" is not a requirement for a Table 53 rating and she did not consider "rigidity" when assigning her impairment rating. Dr. Knight's opinion on this issue is substantially less persuasive than the opinion of Dr. Ridings' opinion concerning the necessity of finding "rigidity." Further, Dr. Knight's opinion that rigidity is not required is contrary to the express language of Table 53 (II) (B) and (C) which both expressly require 6 months of pain and rigidity in order to assess impairment.

41. Dr. Ridings credibly and persuasively opined that the claimant is not entitled to any impairment rating under the circumstances of this case. His opinion is corroborated by Dr. Richman's persuasive report of November 27, 2012. It is highly probable and free from serious doubt that the claimant's impairment rating is 0%.

42. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and

inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

OVERCOMING DIME FINDING REGARDING IMPAIRMENT

The respondents contend that they have overcome the DIME physician's impairment rating by clear and convincing evidence. Relying principally on the opinions of Dr. Ridings they argue that the claimant's correct diagnosis is a lumbar strain injury that does not warrant any impairment rating under Table 53 (II) (B). They also argue that Dr. Ridings correctly determined that the claimant did not display "rigidity" which is a prerequisite to an impairment rating under Table 53, and that without a Table 53 rating ROM may not be used to rate impairment. The ALJ agrees that the respondents proved by clear and convincing evidence that no impairment rating may be assessed in this case.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In the case of *Medina-Weber v. Denver Public Schools*, WC 4-694-444 (ICAO August 27, 2008) the panel applied these general criteria to an ALJ's decision to overturn a DIME physician's finding of cervical impairment under Table 53 of the AMA Guides. In *Medina-Weber* the ALJ found, among other things, that the cervical impairment rating was overcome by clear and convincing evidence because Table 53 requires a finding of "spasm or rigidity" regardless of whether the claimant displays limited ROM. The ALJ found the DIME physician's report did not contain a finding of spasm or rigidity even thought the DIME physician conceded the claimant would not be eligible for a Table 53 rating unless there was a finding of rigidity or spasm.

Deleon v. Whole Foods Market, Inc., W.C. No. 4-600-477 (ICAO, November 16, 2006), addressed the proper evidentiary standard for determining a claimant's impairment rating after an ALJ finds that a portion of the DIME physician's impairment rating has been overcome by clear and convincing evidence. In the *Deleon* case the ALJ determined the respondents overcame by clear and convincing evidence a DIME physician's finding that the claimant sustained 5 percent impairment for lost range of motion in the lumbar spine. However, the ALJ also found that the respondents failed to overcome by clear and convincing evidence the DIME physician's finding that the claimant sustained 5 percent impairment for a specific disorder of the lumbar spine. Consequently the ALJ upheld the specific disorder portion of the rating. The ICAO ruled that once an ALJ determines "the DIME's rating has been overcome in any respect" the ALJ is "free to calculate the claimant's impairment rating based upon the preponderance

of the evidence" standard. The ICAO further stated that when applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence."

As determined in Findings of Fact 36 through 40, the ALJ is persuaded that it is highly probable and free from serious doubt that the DIME physician, Dr. Knight, erred is assessing an impairment rating for a specific disorder of the spine and for lost ROM. Regardless of whether the claimant's correct Table 53 diagnosis falls under section (II) (B) as contended by Dr. Ridings or (II) (C) as contended by Dr. Knight, the credible and persuasive evidence establishes that both sections require a finding of "rigidity" to assess specific disorder impairment. Dr. Ridings credibly and persuasively opined that the evidence does not establish 6 months of rigidity because his findings and those of Dr. Knight do not establish increased muscle tone on examination. Dr. Knight did not persuasively refute that "rigidity" is a requirement for a Table 53 rating, or that rigidity refers to increased muscle tone. Rather, she simply stated that despite the plain language of Table 53 (II) (B) and (C) "rigidity" is not a requirement for a rating and she did not consider it when assigning her rating. Further, Dr. Ridings credibly and persuasively opined that impairment may not be assigned for ROM limitations unless the claimant is entitled to a Table 53 specific disorder impairment.

As determined in Finding of Fact 41, it is highly probable and free from serious doubt that the claimant's correct impairment rating is 0% and he is not entitled to any permanent partial disability benefits. Section 8-42-107(8)(d), C.R.S. In light of these findings ALJ need not consider the respondents' other arguments that the DIME's impairment rating was overcome by clear and convincing evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for permanent partial disability benefits is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 24, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

PROCEDURAL BACKGROUND

On September 4, 2014, pursuant to a telephone prehearing conference with PALJ Patricia Clisham, WC 4-873-873-02 and WC 4-854-583-03 cases were consolidated for hearing purposes.

ISSUES

The issues for determination in WC 4-873-873-02 are:

1. Whether the Claimant proved, by a preponderance of the evidence, that the arthroscopic surgery to the left wrist to debride and repair a central triangular fibrocartilage tear is reasonable, necessary, and related to the admitted October 12, 2011 industrial injury.

2. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary partial disability or temporary total disability benefits from October 12, 2011 and ongoing.

3. If the Claimant proved he suffered a compensable injury and that he is entitled to temporary disability indemnity benefits, whether the Respondents' proved that the Claimant is responsible for his termination of employment and resulting wage loss.

4. The issue of authorized provider was endorsed by Claimant on his Application for Hearing and Notice to Set in this claim, however, no evidence was presented by the parties on this issue and so this issue is deemed withdrawn for the purposes of this Order.

5. The issue of penalties for failure to report and for failure to provide a list of treatment providers was not endorsed in the Claimant's Application for Hearing and Notice to Set in this claim and it does not appear to have been added by motion or order. The penalties issue was raised for the first time in the Claimant's Case Information Sheet filed on October 30, 2014 in Colorado Springs and received on November 12, 2014 by the Denver Office of Administrative Courts. The claim was not properly endorsed and is not considered for the purposes of this Order.

The issues for determination in WC 4-854-583-03 are:

6. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable right knee injury in the course and scope of his employment with the Employer on June 27, 2013.

7. If the Claimant proved he suffered a compensable injury on June 27, 2013, whether the Claimant proved, by a preponderance of the evidence, that he requires medical treatment to cure and relieve the effects of a June 27, 2013 injury.

8. If the Claimant proved he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary partial disability or temporary total disability benefits from June 27, 2013 and ongoing.

9. If the Claimant proved he suffered a compensable injury and that he is entitled to temporary disability indemnity benefits, whether the Respondents' proved that the Claimant is responsible for his termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Claimant is a 37-year old man with a January 13, 1977 date of birth (Respondents' Exhibit E, p. 12).

2. The Claimant is well-muscled and very athletic (Claimant's Exhibit 4, Findings of Fact #1). The Claimant is 5' 10" tall and weighs 285 pounds. He has the build of a weight-lifter (Respondents' Exhibit F, p. 19).

3. The Claimant has played competitive flag football for several years. He primarily plays offensive line, defensive line, and linebacker positions. The flag football games are played without pads. As an offensive lineman, the Claimant primarily blocks the opposing defensive lineman by keeping his arms extended and his wrists dorsiflexed. Once he contacts the opposing defender, he must maintain contact. Claimant also lifts weight, including bench pressing up to 225 pounds (Claimant's Exhibit 4, Findings of Fact #1).

4. On March 17, 2011, the Claimant suffered an admitted injury arising out of, and in the course and scope of his employment with a different employer, Coca Cola Refreshment USA. The injury occurred when the Claimant attempted to move a vending machine by tilting the dolly back towards himself. The vending machine caused an ulnar deviation of the left wrist and also struck the left wrist. Approximately two weeks later, the Claimant reinjured the left wrist when a co-employee slammed a cooler door onto the left wrist. (Claimant's Exhibit 4, Findings of Fact #3).

5. The Claimant was hired by the Respondent Employer on April 22, 2011 to work as a driver/salesman (Respondents' Exhibit D, p. 12).

Pre-Existing Medical Conditions

6. The Claimant has a long history of right knee pain and injuries. On October 9, 2004, the Claimant presented to the Memorial Hospital Emergency

Department complaining of right knee and ankle pain following an accident while employed by Best Buy. According to the Claimant, there was an attempted robbery at the store. The assailant pulled a gun. The Claimant was in the direct line of fire. He dove to get out of the way and rolled his ankle and twisted his knee in the process. The Claimant reported being unable to walk due to the pain. The emergency room physician opined, "He definitely could have injured the metatarsals as well as his knee" (Respondents' Exhibit F, pp. 20-21).

7. The Claimant injured his right foot and knee on September 24, 2007, in the course and scope of his employment with Deep Rock Water. The Claimant reported stepping out of his truck carrying a five gallon container of water, when the step broke resulting in a twisting injury to the knee (Respondents' Exhibit J, pp. 70-71). The Claimant initially treated for the September 24, 2007 injury on October 8, 2007, complaining of right knee pain, right ankle pain, and right arm pain and numbness. The Claimant developed a fever, inflammatory polyarthritis of unclear etiology and joint pain over the next several weeks. The Claimant was diagnosed with polyarthralgias, prescribed Indocin and Dilaudid, and instructed to follow up with Dr. Porterfield (Respondents' Exhibit J, pp. 61-63). On October 15, 2007, the Claimant returned to the hospital complaining of fever, night sweats, and increasing pain in the entire right side of his body, and expanding to the left. The Claimant was admitted to Memorial Hospital for one week, where he underwent a complete work-up. It was eventually determined the Claimant was suffering from poly arthritis, most likely secondary to atypical rheumatoid arthritis versus Stills disease versus other. The medical opinions were conflicting on the relatedness of the Claimant's arthritis to the September 24, 2007 work injury (Respondents' Exhibit J, pp. 64-102).

8. With respect to the September 24, 2007 injury, the Claimant eventually underwent a Division IME, performed by Dr. Edward Fitzgerald on May 23, 2008. Dr. Fitzgerald opined the Claimant suffered a medial collateral ligament sprain and a posterior tibial tendon tear in the September 24, 2007 accident, from which he was not at MMI. Dr. Fitzgerald opined that it was medically plausible that the injury triggered an episode of reactive arthritis. However, Dr. Fitzgerald noted that he was not a specialist in rheumatology and his statements about the inflammatory arthritis were not at a reasonable degree of medical probability, but rather based on his review of relevant literature (Respondents' Exhibit H).

9. On August 5, 2008, the Claimant saw Dr. Timothy O'Brien on referral from Dr. Michael Baker for evaluation of his right knee pain. On examination, Dr. O'Brien noted "subjective complaints of right knee pain and right ankle pain with no objective signs of injury." (Respondents' Exhibit P, pp. 149-152). Dr. O'Brien recommended an MRI of the right knee which he reviewed with the Claimant on October 13, 2008. The MRI was read as showing patellofemoral chondromalacia. He referred the Claimant for viscosupplementation. If that did not work, Dr. O'Brien recommended evaluation by Dr. David Walden for consideration of a tibial tubercle osteotomy. At this point, Dr. O'Brien still could not make a causation determination with respect to his work injury because he had still not been provided with past medical records (Respondents' Exhibit P, p. 153).

10. The Claimant failed to improve. Dr. O'Brien referred the Claimant to orthopedic surgeon, Dr. Michael Simpson. Dr. Simpson initially continued to treat the Claimant conservatively without reported benefit. On February 16, 2009, Dr. Simpson performed an arthroscopy of the right knee with microfracture of the femoral trochlear. He also performed an arthroscopic partial synovectomy with excision of the medial parapatellar plica (Respondents' Exhibit P, pp. 161-162). At the time of surgery, Dr. Simpson identified a Grade III chondral defect of the femoral trochlear, as well as hypertrophic synovitis of the medial plica syndrome (Respondents' Exhibit P, p. 165).

11. On August 12, 2009, Dr. Simpson noted that the Claimant still complained of burning pain in his knee with difficulty squatting and kneeling. This was documented on and FCE. Dr. Simpson advised the Claimant that at his young age, he was not a candidate for a patellofemoral replacement, but if his pain worsened, then that could be something that could be in the future for him. Dr. Simpson noted the Claimant was at MMI (Respondents' Exhibit P, pp. 163-164).

12. On March 10, 2010, the Claimant saw Dr. David Walden to address the reasonableness and necessity of a Fulkerson (tibial tubercle) osteotomy. Dr. Walden noted the Claimant was not happy with the results of his prior knee surgery and that he was a candidate for viscosupplementation as maintenance treatment to provide pain relief and maximize the result from his surgery. Dr. Walden opined that the proposed Fulkerson osteotomy was considered a "salvage procedure" that could improve function in someone more debilitated that the Claimant. Dr. Walden opined that it was not currently contemplated, but could be considered in the future as a work-related procedure if the Claimant's situation deteriorates (Respondents' Exhibit P, pp. 165-168).

13. On May 7, 2010, the Claimant settled his right knee injury claim against Deep Rock, in addition to the benefits previously admitted and paid (Respondents' Exhibit C, P. 11).

14. On June 7, 2010, the Claimant underwent arthroscopic left knee surgery performed by Dr. Wiley Jinkins for a left knee torn lateral meniscus with evidence of chondromalacia (Respondents' Exhibit I).

October 12, 2011 Claim

15. While employed by the Employer, the Claimant delivered and stocked sleeves of 4 half-gallon cartons of ice cream. The Claimant's duties with the Employer required him to use his left arm. In an Order issued by ALJ Stuber in a claim naming both his prior employer Coca Cola and this current Employer, ALJ Stuber found that the Claimant felt sharp pain in his left wrist extending up his forearm from the very first day he stocked ice cream cartons (Claimant's Exhibit 4, Finding of Fact #5).

16. The Claimant did not originally report the left wrist pain to Employer, but instead contacted his prior employer Coca Cola. On May 4, 2011, less than 2 weeks after he began his employment with the Respondent Employer, the Claimant reported the injury to his previous employer Coca Cola and was referred to Concentra where he

was seen by Dr. Suzanne Malis who noted the prior history of an injury with the vending machine (Claimant's Exhibit 4, Findings of Fact #6).

17. Dr. Malis referred the Claimant to Dr. Timothy Hart. Dr. Hart first evaluated the Claimant for his left wrist on June 22, 2011. On that date, the Claimant reported that, "overall, his left wrist is slowly improving over time". The Claimant reported still being able to go to the gym and work out (Respondents' Exhibit P, p. 169). On physical exam, the Claimant's bilateral wrists demonstrated dorsiflexion to 60 degrees, palmer flexion to 60 degrees, 20-30 degrees of radial and ulnar deviation, full supination and pronation, full circumduction, good pinch, grip, and grasp. Based on the physical exam, Dr. Hart noted the only pertinent finding was tenderness to palpation in the area of the FCU tendon. He did not have a specific diagnosis and noted the pain was "persistent but only with very specific activities." Dr. Hart referred the Claimant for an MRI of the left wrist and forearm (Respondents' Exhibit P, p. 170).

18. The MRI of the Claimant's left wrist and forearm performed on July 14, 2011 were read as showing bone edema/effusion of the distal ulna, joint effusion, and mild synovitis of the ulnar and radial joints, and TFCC scarring or sprain, with no evidence of any ligament or TFCC tear (Claimant's Exhibit 4; Respondents' Exhibit P, p. 170).

19. The Claimant continued treatment with Dr. Hart. Subsequently, the Claimant began complaining of severe left elbow pain, worsened when his elbow was in a flexed position. Dr. Hart opined the Claimant suffered from compression of the ulnar nerve at the left elbow, caused by the duties of his employment at the Respondent Employer (Respondents' Exhibit P, p. 174).

20. Dr. Hart referred the Claimant to Dr. William Griffis who saw the Claimant for EMG testing on September 20, 2011 for symptoms of pain radiating through the left elbow and forearm into the hand which had been present for several months, starting when his left wrist was injured by the vending machine. Dr. Griffis diagnosed the Claimant with moderately severe left cubital tunnel syndrome (Respondents' Exhibit L, pp. 108-109).

21. The Claimant subsequently filed two workers' compensation claims, one against Coca Cola and one against Respondents, for his alleged wrist and elbow injuries.

22. On November 15, 2011, the Employer completed an Employer's First Report of Injury with an injury/illness date of 10/12/2011. The report indicates the Claimant reported to his supervisor that while performing normal job duties, he experienced pain in his left wrist and sought medical attention (Respondents' Exhibit D).

23. Coca Cola had the Claimant examined by Dr. Eric Ridings for purposes of an independent medical examination on April 10, 2012. Dr. Ridings opined that the Claimant's cubital tunnel syndrome symptoms were not related to the injuries he had while working at Coca Cola, and that only the wrist injury was related to the May 17,

2011 claim with Coca Cola and the Claimant was at MMI for the wrist injury with no permanent impairment. Dr. Ridings concluded that the mechanism of injury with the injuries at Coca Cola were not related to any ulnar nerve injury at the elbow. With respect to the treatment for the cubital tunnel syndrome, Dr. Ridings suggested the Claimant either pursue this through a new workers' compensation claim against Employer or pursue it outside the workers' compensation system (Claimant's Exhibit 4, Finding of Fact #17; Respondents' Exhibit N).

24. The Respondent Employer had the Claimant examined by Dr. Wallace Larson for purposes of an independent medical examination related to a reported injury to his left wrist. The Claimant reported continued problems with his left wrist after a March 17, 2011 incident where a vending machine he was installing came down on his wrist. Then, about one month later the Claimant reported slamming his left wrist in a vending machine which caused a sharp, shooting pain from the ulnar side of his left wrist up toward his elbow. The Claimant reported that it was getting better and then he left work at Coca Cola and went to work for Employer. With the repetitive use of his left arm to place ice cream into the cooler, the Claimant reported that he began to experience sharp pain in his wrist which shot up into his elbow. The Claimant reported that "he did not have any new pain; he had the same pain that he had experienced while working at Coca Cola." Dr. Larson found the Claimant has "mild residuals of contusion to the left wrist as a result of the work-related injury [at Coca Cola]. Dr. Larson opined that the Claimant does not need a cubital tunnel release surgery as a result of a work-related injury. Dr. Larson opined that cubital tunnel syndrome is typically not work-related, and it was not medically probably that the Claimant's need for medical treatment for this condition was related to his employment at Coca Cola or at the Employer (Claimant's Exhibit 4, Finding of Fact #18; Respondents' Exhibit K).

25. Following a May 20, 2012 hearing on consolidated applications for hearing, involving Coca Cola and this Respondent Employer, ALJ Martin Stuber entered his July 9, 2012 Findings of Fact, Conclusions of Law, and Order holding that the Claimant proved, by a preponderance of the evidence, that he suffered an occupational disease of aggravation of his left wrist in the course and scope of his employment with the Respondent Employer. ALJ Stuber also ordered Blue Bell Creameries to pay for all of Claimant's reasonably necessary medical benefits by authorized providers for the occupational disease to Claimant's left wrist under the WC 4-873-873-01 claim. However, ALJ Stuber further held the Claimant failed to prove, by a preponderance of the evidence, that the left elbow surgery recommended by Dr. Hart was reasonably necessary to cure or relieve the Claimant from the effects of the occupational disease to the left wrist and the claim for authorization of that surgery was denied and dismissed (Claimant's Exhibit 4),

26. The Claimant returned to Dr. Hart on July 23, 2012 reporting ongoing left arm problems. On that exam, the Claimant had some mild ulnar-sided left wrist pain, but this was provoked most significantly with manipulation and purposeful tapping of the left elbow ulnar nerve through the left cubital tunnel. On physical exam, the Claimant had full range of motion of his left wrist. He was very slightly tender to direct palpation of the left wrist, but most of his symptoms resulted from provocative tests of the left elbow. Dr.

Hart notes, “Apparently somewhere along the way, a judge has approved surgery for his left wrist.[1] There was never any intention to do surgery on the left wrist. I think his only predominant injury is at the left cubital tunnel with ulnar nerve compression” (Respondents’ Exhibit P, p. 175).

27. On August 20, 2012, Dr. Hart noted that there was approval for a left elbow ulnar nerve decompression and subcutaneous transposition surgery (Respondent’s Exhibit P, p. 176). On August 21, 2012, Dr. Hart performed a left elbow ulnar nerve decompression and subcutaneous transposition for the diagnosis of left cubital tunnel syndrome (Respondents’ Exhibit P, p. 177-178).

28. On September 5, 2012, Dr. Hart saw the Claimant for post-surgical follow up noting that the Claimant was working in a range of motion program and “the numbness, tingling, and burning in his hand has resolved completely.” Dr. Hart also noted that the Claimant was to continue with a home therapy program because he can no longer afford the therapy “because work comp had denied coverage despite having approved surgery” (Respondents’ Exhibit P, p. 181).

29. On September 17, 2012, the Claimant reported that “the numbness and tingling in his left arm has resolved” and “he has full range of motion of the elbow.” Dr. Hart noted that he had documented approval for the surgery, but “retroactively, after the surgery was completed, they denied coverage for the surgical procedure.” Dr. Hart released the Claimant to return to work with no restrictions and no impairment, with instructions for the Claimant to return on an as needed basis (Respondents’ Exhibit P, p. 182).

30. On September 18, 2012, the Claimant returned from a leave of absence to his regular job with the Employer (Respondents’ Exhibit Q, p. 193).

31. The Claimant continued to work his regular job until he suffered an ACL injury while playing football which was reported on January 27, 2013 (Respondents’ Exhibit Q, p. 195). The Claimant was placed on medical leave of absence, not work related, effective January 28, 2013 (Respondents’ Exhibit Q, p. 197). Per Dr. Wiley Jinkins, the Claimant was unable to work due to a right knee injury until at least April 25, 2013 pending surgery authorization (Respondents’ Exhibit Q, p. 199). On April 24, 2013, the Claimant underwent a recertification DOT physical at Concentra which noted the Claimant had to do a squat test, bending test and anything else needed to see if the Claimant could do all functions of his job (Claimant’s Exhibit 1). The Claimant returned to work from this medical leave of absence effective April 29, 2013 (Respondents’ Exhibit Q, p. 200). At hearing, the Claimant conceded in testimony that he did not lose his job for requiring the leave of absence for this non-work related injury.

[1] To the extent that this refers to ALJ Stuber’s order, this is an incorrect interpretation of Judge Stuber’s July 9, 2012 Order which only ordered the Respondents to pay for treatment that was reasonable, necessary, and related to the October 12, 2011 accident. He did not order left wrist surgery for the residuals of the wrist injury. Additionally, Judge Stuber also specifically found that the cubital tunnel release surgery was not authorized.

32. On July 16, 2013, the Claimant reported a leg injury that allegedly occurred on June 27, 2013 when he slipped and fell on water on the floor in the receiving area at a Safeway store (Claimant's Exhibit 3 – also see below for findings of fact related to this 6/27/13 claim). The Claimant testified at the hearing that he never missed any work for this fall.

33. The Claimant worked his regular job with the Respondent Employer until February 19, 2014, when his employment with the Employer was terminated for "Insubordination resulting in theft of time" (Respondents' Exhibit Q, p. 201).

34. After his employment with Employer was terminated, the Claimant returned to Dr. Hart on March 12, 2014, alleging ongoing complaints of left wrist pain. The Claimant advised Dr. Hart that "he continues to work for [Employer]." The Claimant acknowledged continuing to work out in the gym, but alleged left wrist pain only occurring with work activities, not at the gym. On physical exam, the Claimant had full dorsiflexion, plantar flexion, radial and ulnar deviation, full supination, and pronation, full circumduction, good pinch, grip and grasp. He was not tender or swollen to the ulnar aspect of the left wrist. He had full range of motion of the left wrist. X-rays demonstrated no acute or chronic changes. Despite a completely normal physical exam, Dr. Hart ordered repeat MRI of the left wrist (Respondents' Exhibit P, p. 184-185).

35. At the hearing, when questioned about the gap in medical care and in complaints about left upper extremity pain, the Claimant testified that he did not "push the medical issue" with Employer and pursue a workers' compensation claim actively because he felt that his job was threatened due to a hostile working relationship with his supervisor Cyron. The Claimant conceded that prior workers' compensation claims for injuries and the non-work related leave of absence for the football injury did not result in the termination of his employment, but he nonetheless testified that he felt he would lose his job.

36. After his employment with Employer was terminated, the Claimant applied for a position with Lincare and was hired on May 13, 2014 (Respondents' Exhibit R, p. 222). In May of 2014, the Claimant signed a statement that he could meet the job duties, including the physical demand which would require frequent lifting and moving up to 10 pounds and occasional lifting and moving up to 25 pounds (Respondents' Exhibit R, pp. 212-213). The Claimant testified at the hearing that his employment with Lincare was terminated due to failure to pass a vocabulary test and not due to physical demands.

37. A repeat MRI of the left wrist was performed on October 16, 2014, and was interpreted by musculoskeletal trained radiologist, Dr. Kelly Lindauer, the same radiologist who interpreted the July 14, 2011 MRI. The October 16, 2014 MRI was read as showing a partial thickness tear of the central TFCC disc that had developed since the first MRI with the remainder of the scan essentially unchanged with no cartilage, bone or ligament pathology noted (Respondents' Exhibit G, p. 41).

38. Dr. Hart saw the Claimant in follow up on October 20, 2014 and reviewed the MRI results. On physical exam, the Claimant complained of pain with ulnar deviation. Dr. Hart documented a positive ulnar impaction test. Otherwise, the Claimant's physical exam was completely normal, including full dorsiflexion, palmar flexion, radial and ulnar deviation of the left wrist, good pinch, grip, and grasp. Despite normal physical findings, Dr. Hart requested prior authorization of an arthroscopic surgery of the left wrist to debride and repair the partial thickness TCFF tear in treatment of "wrist pain" (Respondents' Exhibit G, p. 42).

39. On October 30, 2014, Dr. Gwendolyn Henke performed a Rule 16 Review of Dr. Hart's request for prior authorization of a left wrist surgery (Respondents' Exhibit G). Based on her review of the medical records and ALJ Stuber's July 9, 2012 FFCLO, Dr. Henke opined the proposed left wrist surgery is not reasonable, necessary, or related to the occupational injury of October 12, 2011.Dr. Henke opined, "regarding causality, according to the Section of Cumulative Trauma Conditions in the Colorado Division of Workers' Compensation Medical Treatment Guidelines, there is no quality evidence available for specific risk factors for the development of TCFF pathology. Additional non-evidence based risk factors such as occupational repetitive motions must be present for four hours of the workday in order to consider a diagnosis of cumulative trauma condition." Dr. Henke opined that "the finding of a partial thickness central tear of the TFCC is not confirmation of an occupational disorder. Rather, Dr. Henke opined that the Claimant's positive ulnar variance could be associated with this type of tear and the Claimant's many years of weight lifting and playing sports could contribute to degenerative changes caused by ulnar impaction syndrome. Additionally, Dr. Henke opined, that with regard to the proposed surgery being reasonable and necessary, conservative management is always the first treatment for TFCC disorders. This would include a 3-month trial of immobilization, anti-inflammatories and steroid injections, which have not been done (Respondents' Exhibit G).

40. Dr. Henke testified on the second day of the hearing in this matter consistent with the opinions expressed in her report. Dr. Henke further credibly explained that as a result of the Claimant's congenital ulnar impaction syndrome, the TCFF is pinched between the carpal bone and the ulna bone due to the excessive length of the ulna. Over time, this pinching wears a hole in the TCFF cartilage and arthritis can further impact the condition. Dr. Henke testified that surgical repair of the Claimant's TCFF is not reasonable and not necessary. Moreover, Dr. Henke opined that if the TCFF tear were work-related that she would have expected to see ongoing symptoms yet when the Claimant returned to work at Employer after his cubital tunnel release surgery, there is no evidence in the medical records that the Claimant had pain complaints while actually working for Employer. Instead, the Claimant did not return to Dr. Hart with left wrist pain until after his employment was terminated. Dr. Henke credibly testified it is not medically probable the surgery being requested by Dr. Hart is related to the October 12, 2011 occupational disease. Dr. Henke's testimony that it is not medically probable the Claimant's employment with the Respondent Employer caused or substantially and permanently aggravated the Claimant's central partial thickness TCFF tear is credible and persuasive. Dr. Henke's testimony that Dr. Hart failed to explain how the Claimant's employment with the Respondent Employer caused

the new TCFF tear documented on MRI some eight months after the Claimant's employment was terminated is credible and persuasive.

41. Dr. Timothy O'Brien who testified as an expert in orthopedic surgery also addressed Dr. Hart's request for arthroscopic repair of the partial thickness tear of the TCFF in his report and testimony. Dr. O'Brien testified that Dr. Hart is a partner in his practice. Dr. O'Brien credibly testified that, in his opinion, it is not medically probable the new TCFF tear documented on the October 16, 2014 MRI is causally related to the Claimant's employment with Employer. Dr. O'Brien pointed to the medical report of Dr. Hart on September 5, 2012 noting that the numbness, tingling and burning the Claimant had complained of was completely resolved. Dr. O'Brien found that this was evidence that the symptoms caused by the ulnar nerve deviation condition were resolved by the cubital tunnel release. Dr. O'Brien credibly testified that it is medically probable the new TCFF tear documented on October 16, 2014, is related to the Claimant's activities outside of work, including weight-lifting and competitive flag football. He testified that the work activities are insignificant compared to the Claimant's weightlifting activities. Additionally, Dr. O'Brien credibly testified the surgery being requested by Dr. Hart is not reasonable and necessary, for the same reasons given by Dr. Henke. He also opined that the procedure Dr. Hart proposes is to shave off fronds on the partial thickness tear which he does not believe will relieve the Claimant's symptoms or fix the problem.

42. Dr. Hart had released the Claimant to return to work, without restrictions and without impairment, on September 17, 2012. Neither Dr. Hart, nor any physician, has restricted the Claimant's work activities since September 17, 2012, in connection with the October 12, 2011 injury.

43. The Claimant presented no credible evidence that he lost any time from work as a result of the October 12, 2011 injury.

June 27, 2013 Claim

44. The Claimant alleged he injured his right leg and lower back on June 27, 2013, in the course and scope of his employment with the Respondent Employer when he slipped and fell in a pool of water in front of a Safeway store where he was delivering product (Claimant's Exhibit 3; Respondents' Exhibit E).

45. An Employee Injury/Accident Investigation form, including an Employee Statement and Supervisor's Investigation was completed on July 26, 2013 (Claimant's Exhibit 3) as was the Employer's First Report of Injury (Respondents' Exhibit E). It was determined that the Claimant did slip and fall while performing work activities. However, there is no indication that there was a resulting work injury.

46. The Employee Injury/Accident Investigation bears the Claimant's signature in two places. In the employee statement, the Claimant indicates he injured his "right leg", not his right knee, in the accident. In the Supervisor's Investigation section the injury is listed as the right leg/lower back. The Employee Injury/Accident Report

indicates no medical treatment was provided for the alleged injury and the Claimant lost no time as a result of it (Claimant's Exhibit 3).

47. The Claimant did not initially file a worker's claim for compensation. The Claimant alleges he requested medical treatment for his alleged injuries, but was not provided a Rule 8 list of providers. However, in the Employee Injury/Accident Investigation form, the Supervisor's Investigation notes that the Claimant did not receive first aid in house. Was not treated by anyone away from the worksite and was not treated in an emergency room. This form was completed on July 26, 2013 a month after the alleged incident on June 27, 2013 (Claimant's Exhibit 3).

48. The Claimant's testimony regarding the reporting of the alleged injury and his request for medical treatment was equivocal. The Claimant initially testified he did not seek medical treatment for the alleged injury because of conflict with his supervisor, Cyron, and fear that his employment would be terminated if he requested medical treatment.

49. However, the Employer's Branch Manager Kevin McDevitt credibly testified that Cyron had no hiring or firing authority. He also credibly testified that Cyron had not been the Claimant's supervisor since May 2012, some thirteen months prior to the alleged accident of June 27, 2013. The Branch Manager credibly testified that Cyron did not work at the Employer's Colorado Springs location for the five months pre-dating the termination of the Claimant's employment. Moreover, as set forth above in the facts related to the consolidated claim, the Claimant had never been subject to inappropriate work treatment as the result of filing prior claims or requesting medical leaves of absence.

50. The Claimant's testimony that he was fearful his employment with the Respondent Employer would be terminated if he reported an accident and requested medical treatment is not credible. The Claimant reported a contested October 12, 2011 accident with the Respondent Employer, without recourse. The Claimant lost time from work for the non-work-related left elbow surgery from August 20, 2012 through September 18, 2012, without recourse (Respondents' Exhibit Q, p. 192-193(. The Claimant lost time from work for a non-work-related knee injury from January 28, 2013 through April 29, 2013, without recourse (Respondents' Exhibit Q, p. 197, 200).

51. The Claimant's testimony that he consistently requested, and was denied, medical treatment for his alleged June 27, 2013 accident is not credible. Further, the Claimant had health insurance as a term of his employment with the Respondent Insurer (Respondents' Exhibit E).

52. The Claimant suffered an ACL injury while playing football which was reported on January 27, 2013 (Respondents' Exhibit Q, p. 195). The Claimant was placed on medical leave of absence, not work related, effective January 28, 2013 (Respondents' Exhibit Q, p. 197). Per Dr. Wiley Jinkins, the Claimant was unable to

work due to a right knee injury until at least April 25, 2013 pending surgery authorization (Respondents' Exhibit Q, p. 199)..

53. The Claimant returned to work on April 29, 2013 (Respondents' Exhibit Q, p. 200) based on an April 24, 2013 "Commercial Driver Fitness Determination" performed at Concentra Medical Centers (Claimant's Exhibit 1).

54. The Claimant filed an Application for Expedited Hearing on July 28, 2014 listing a June 20, 2013 injury (presumably referring to the alleged June 27, 2013 slip and fall injury).

55. Thus, the Claimant did not file a worker's claim for compensation or seek any medical treatment for his alleged June 27, 2013 injury, within or outside the workers' compensation system until after his employment with the Respondent Employer was terminated on February 19, 2014. The Claimant continued to work his regular job, without restrictions until his employment was terminated for "insubordination resulting in theft of time" (Respondents' Exhibit Q, p. 201). The Claimant did not any lose time from the alleged injury and did not work under any restrictions following this alleged injury until after his employment with the Respondent Employer was terminated.

56. On October 29, 2014, Dr. Timothy O'Brien evaluated the Claimant at Respondents' request. Dr. O'Brien prepared a report dated October 29, 2014 (Respondents' Exhibit F), and testified as an expert in the field of orthopedics and orthopedic surgery on the third day of the hearing in this matter on December 1, 2014. Based on his prior treatment of the Claimant, Dr. O'Brien is in a position to offer opinions on the Claimant's current knee condition as it relates to his prior knee conditions. Based on his familiarity with the Claimant, his review of the medical records, and his October 29, 2014 examination of the Claimant, Dr. O'Brien credibly opined there was no work injury of any significance on June 27, 2013. The incident was so minor, it did not result in the need for medical treatment, and any alleged injury healed or abated within a week of June 27, 2013 (Respondents' Exhibit F, p. 37). At the hearing, Dr. O'Brien testified credibly in accordance with his October 29, 2014 report that the Claimant's current right knee complaints are the result of the natural progression of his pre-existing knee osteoarthritis, documented as Grade III at the time of Dr. Simpson's surgery in 2009. Dr. O'Brien's testimony that knee cartilage cannot be replaced through treatment, and the expected course of the Grade III degeneration is continued degeneration, with, or without treatment, is credible and persuasive. Dr. O'Brien's testimony that the incident of June 27, 2013 did not result in the need for medical treatment, lost time from work, or permanent physical impairment is credible and persuasive.

57. The truck driven by the Claimant is very large, weighing approximately 32,000 pounds, being 35' long and 13' wide. Mr. McDevitt credibly testified it is against the Employer's policies for route drivers to drive their delivery trucks in residential areas. Due to their size, the trucks pose a risk to people and property if driven in residential areas. Driving off route also takes the drivers away from their work duties. As the result of review of the GPS tracking records associated with the Claimant's truck, the

Employer discovered the Claimant had continued to drive his delivery truck off route, and take extended breaks, in violation of his supervisor's instructions. Mr. McDevitt testified that the Claimant's employment records contain evidence of prior verbal warnings not to use a company vehicle for personal reasons. Mr. McDevitt testified credibly that as a result of the GPS records showing the Claimant's truck going to the same off-route address 4 times between January 11, 2014 and February 8, 2014, the Claimant's employment with the Respondent Employer was terminated for "theft of time."

58. Mr. McDevitt testified that when the Claimant was terminated, he made a verbal statement that because he was being fired by Employer, now he is going to have to file a worker's compensation claim. Mr. McDevitt testified that because of this statement, the Claimant's file was reviewed and, at that point, he was first made aware of the alleged June 27, 2013 slip and fall and the investigation report. He testified that there was no indication in the file that the Claimant requested medical treatment for that incident, but if the Claimant had requested medical treatment, the Claimant would have been encouraged to seek treatment.

59. After the termination of his employment with the Respondent Employer, the Claimant worked for "The Cantina" stocking vending machines. He subsequently applied for, and was hired as a salesman, driver, for Lincare, a medical equipment provider. In his application for Lincare, the Claimant indicated he was an "arena football player" (Respondents' Exhibit R, p. 205). In connection with his employment with Lincare, the Claimant acknowledged, under penalty of perjury, that he was capable of performing the physical demands of the job, including lifting up to 25 pounds, frequently standing, walking, and using hands to finger, handle, or feel (Respondents' Exhibit R, P. 213). The Claimant verified under penalty of perjury, that he was not restricted in his employment activity for the position he was applying for and could perform the essential functions of the job (Respondents' Exhibit R, P. 211). In addition to working for The Cantina and Lincare, the Claimant continued to operate his own business, "Your Sports Pack", an online retail company offering a variety of sports memorabilia and clothing. No physician restricted the Claimant's work activities following the June 27, 2013 incident.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be

interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Each of the Claimant's claims will be considered separately below:

October 12, 2011 Claim

Medical Benefits - Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165

Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The October 12, 2011 accident is an admitted claim. Dr. Hart previously attributed the Claimant's wrist complaints to cubital tunnel syndrome and performed a left elbow surgery in treatment of those complaints. According to Dr. Hart's records, the elbow surgery initially resolved the complaints. The Claimant was released to regular duty on September 17, 2012. The Claimant worked his regular job without seeking additional treatment or complaining of pain until after his employment with the Respondent Employer was terminated. During this time, the Claimant continued to lift heavy weights and play competitive football. Although the Respondents' expert witness Dr. O'Brien had issues with causation of the Claimant's initial wrist complaints to the October 12, 2011 accident, the parties agreed that the claim was admitted and compensability is not an issue for this case. The Claimant has received medical treatment for the claim, including left elbow surgery. The Claimant now seeks left wrist surgery recommended by Dr. Hart for debridement and repair of a partial thickness triangular fibrocartilage tear

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

As found, the written opinions and testimony of both Dr. Henke and Dr. O'Brien that the surgery now being requested by Dr. Hart is not reasonable, necessary, or related to the October 12, 2011 work injury are credible and persuasive.

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based

upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office*, N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines*, W.C. 4-785-790 (ICAO September 9, 2011).

Of particular importance in the Claimant's case is analysis of whether or not he has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines and whether or not proposed treatment is calculated to address that cumulative trauma injury.

Rule 17, Exhibit 5 (D)(3) provides that,

> The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is "yes," then the condition is not work-related. If the answer is "no," then the condition is most likely work-related.

The Cumulative Trauma Guidelines then set out the steps the clinician should follow to make a proper causation evaluation. There is a 6-step general causation analysis and a 5-step causation analysis when using risk factors to determine causation.

Per, Rule 17, Exhibit 5 (D)(1)(b), the clinician is responsible for documenting specific information regarding repetition, force, other risk factors and duration of employment. Refer to risk factors as listed in the tables entitled 'Primary Risk Factor Definitions and Diagnosis Based Risk Factors.' A formal jobsite evaluation may be required. Information must be obtained regarding other employment, sports, recreational, and vocational activities that might contribute to, or be impacted by CTC development. Activities such as hand operated video games, crocheting/needlepoint; baseball/softball playing musical instruments, home computer operation, golf, tennis, and gardening are included in this category. Duration of these activities should be documented.

As found, Dr. Henke credibly testified Dr. Hart did not perform this causation analysis required by the Medical Treatment Guidelines and did not explain how the

Claimant's current need for surgery, if any, is related to his employment, which terminated 8 months prior to his request. As found, Dr. Henke and Dr. O'Brien credibly testified the surgery being requested by Dr. Hart is not reasonable and necessary and is outside the Medical Treatment Guidelines for cumulative trauma disorder. The request is denied and the claim dismissed.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

On August 20, 2012, Dr. Hart noted that there was approval for a left elbow ulnar nerve decompression and subcutaneous transposition surgery (Respondent's Exhibit P, p. 176). On August 21, 2012, Dr. Hart performed a left elbow ulnar nerve decompression and subcutaneous transposition for the diagnosis of left cubital tunnel syndrome (Respondents' Exhibit P, p. 177-178). On September 5, 2012, Dr. Hart saw the Claimant for post-surgical follow up noting that the Claimant was working in a range of motion program and "the numbness, tingling, and burning in his hand has resolved completely." Dr. Hart also noted that the Claimant was to continue with a home therapy program because he can no longer afford the therapy "because work comp had denied coverage despite having approved surgery" (Respondents' Exhibit P, p. 181). On September 17, 2012, the Claimant reported that "the numbness and tingling in his left arm has resolved" and "he has full range of motion of the elbow." Dr. Hart noted that he had documented approval for the surgery, but "retroactively, after the surgery was completed, they denied coverage for the surgical procedure." Dr. Hart released the Claimant to return to work with no restrictions and no impairment, with instructions for the Claimant to return on an as needed basis (Respondents' Exhibit P, p. 182). While the Claimant missed work for cubital tunnel release surgery, the requisite causal connection between the October 12, 2011 injury and the time lost from work for this surgery was not established by the Claimant since the credible and persuasive medical professionals in this case find the cubital tunnel syndrome symptoms unrelated to the work injury. Therefore, the time lost due to this surgery was not as a result of any disability caused by the work injury.

On September 18, 2012, the Claimant returned from a leave of absence to his regular job with the Employer (Respondents' Exhibit Q, p. 193). The Claimant continued to work his regular job until he suffered an ACL injury while playing football which was reported on January 27, 2013 (Respondents' Exhibit Q, p. 195).

The Claimant was placed on medical leave of absence, not work related, effective January 28, 2013 (Respondents' Exhibit Q, p. 197). Per Dr. Wiley Jinkins, the Claimant was unable to work due to a right knee injury until at least April 25, 2013 pending surgery authorization (Respondents' Exhibit Q, p. 199). On April 24, 2013, the Claimant underwent a recertification DOT physical at Concentra which noted the Claimant had to do a squat test, bending test and anything else needed to see if the Claimant could do all functions of his job (Claimant's Exhibit 1). The Claimant returned to work from this medical leave of absence effective April 29, 2013 (Respondents' Exhibit Q, p. 200). So, the Claimant did not suffer a wage loss related to this medical leave of absence that is in any way related to any disability he suffered as a result of the October 12, 2011 injury.

Then, on July 16, 2013, the Claimant reported a leg injury that allegedly occurred on June 27, 2013 when he slipped and fell on water on the floor in the receiving area at a Safeway store (Claimant's Exhibit 3 – also see below for findings of fact related to this 6/27/13 claim). The Claimant testified at the hearing that he never missed any work for this fall and he worked his regular job with the Respondent Employer until February 19, 2014, when his employment with the Employer was terminated for "Insubordination resulting in theft of time" (Respondents' Exhibit Q, p. 201).

In any event, after his employment with Employer was terminated, the Claimant applied for a position with Lincare and was hired on May 13, 2014 (Respondents' Exhibit R, p. 222). In May of 2014, the Claimant signed a statement that he could meet the job duties, including the physical demand which would require frequent lifting and moving up to 10 pounds and occasional lifting and moving up to 25 pounds (Respondents' Exhibit R, pp. 212-213). The Claimant testified at the hearing that his employment with Lincare was terminated due to failure to pass a vocabulary test and not due to physical demands.

In conclusion, the need for the Claimant's surgery for cubital tunnel release was not causally related to the Claimant's October 12, 2011 work injury and, so, any time lost from work due to this surgery did not result in wage loss due to a disability caused by the work injury. Since the Claimant was returned to full duty with no restrictions after recovery from the cubital tunnel release surgery as of September 17, 2012, neither Dr. Hart, nor any physician, has restricted the Claimant's work activities in connection with the October 12, 2011 injury. While the Claimant missed time from work for non-work related injuries between September 18, 2012 and the date his employment was terminated on February 19, 2014, none of the wage loss is causally related to the October 12, 2011 work injury Thus, The Claimant presented no credible evidence that he lost any time from work as a result of the October 12, 2011 injury which would entitle him to temporary disability benefits and this claim is denied and dismissed.

July 27, 2013 Claim

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Here, the Claimant failed to present credible medical evidence that the June 27, 2013 incident where he slipped on a wet floor has precluded him from performing his regular work. In fact, the Claimant continued to work his regular job with the Employer for almost eight months, until his employment was terminated. After termination of his employment with the Respondent Employer, the Claimant sought work very similar to the work he performed for the Respondent. No physician has restricted the Claimant from working his regular job. At most, the Claimant sustained only a temporary

aggravation of his pre-existing degenerative knee joint disease as a result of the June 27, 2013 accident. The evidence does not establish that the Claimant requires any further medical treatment from this accident, as distinguished from treatment for his pre-existing degenerative knee joint condition.

The ALJ is not persuaded that the June 27, 2013 industrial accident precluded the Claimant from working or resulted in a disability. Nor is the ALJ persuaded that the industrial injury caused a permanent aggravation of the Claimant's pre-existing condition. See *Eisenach v. Industrial Commission,* 633 P.2d 502 (Colo. App. 1981)(evidence supported finding that Claimant suffered only a temporary aggravation of a preexisting condition**).**

Remaining Issues

The Claimant failed to prove that a slip and fall that he alleges occurred on June 27, 2013 resulted in a compensable injury requiring medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issues regarding temporary disability benefits (including the defense of responsible for termination), medical benefits and penalties are moot. As found, Claimant has failed to prove that he was unable to return to his usual job due to the effects of the work injury. Consequently, Claimant is not "disabled" within the meaning of section 8-42-105, C.R.S. and is not entitled to TTD or TPD benefits. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company,* W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused Claimant to leave work, and Claimant missed more than three regular working days.

ORDER

It is therefore ordered that:

1. The request for approval of the surgical recommendation of Dr. Hart is denied and dismissed. The Claimant has not established that the surgery is related to the admitted October 12, 2011 accident or is reasonably necessary to cure and relieve the Claimant of the effects of the admitted work injury.

2. The Claimant's request for TTD/TPD from October 12, 2011 and ongoing is denied and dismissed.

3. The Claimant's June 27, 2013 accident, W.C. No. 4-854-583, did not result in the need for medical treatment or result in a disability. The claim is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 24, 2015

_____

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

The issues to be determined by this decision are:

1) Whether Claimant's claim for permanent total disability benefits (PTD) is barred by doctrine of claim preclusion;

2) Whether is able to earn any wages; and

3) Whether Respondent is entitled to offset Claimant's PTD based on Claimant's receipt of pension benefits funded by Employer pursuant to a collective bargaining agreement.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On January 26, 2012, while working for Employer, Claimant, an industrial refrigeration technician, injured his right and left shoulders when he slipped down a ladder through a manhole. Claimant had just finished taking readings from a roof top cooler and was descending a vertical ladder when his foot slipped on a rung; he fell approximately six feet. Claimant was able to catch himself on the ladder as he fell. As a result, Claimant's arms were forcefully abducted over his head.

2. On January 30, 2012, Claimant treated with Dr. Christian Updike, who referred Claimant for a right shoulder MRI and to an orthopedic surgeon.

3. On January 31, 2012, Claimant underwent the right shoulder MRI, which revealed a full thickness rotator cuff tear, acromial fracture, and a torn biceps tendon.

4. On February 20, 2012, Claimant treated with Dr. Eric Stahl, an orthopedic surgeon, and reported severe pain in his shoulders; Claimant also reported popping and weakness in his right shoulder. Dr. Stahl reviewed the right shoulder MRI and recommended right shoulder surgery.

5. On March 13, 2012, Dr. Stahl performed arthroscopic rotator cuff repair and a subacromial decompression on Claimant's right shoulder.

6. On April 23, 2012, Dr. Stahl referred Claimant for a left shoulder MRI.

7. On May 3, 2012, Respondent filed a General Admission of Liability admitting to an average weekly wage (AWW) of $1,334.71 and the maximum temporary total disability rate (TTD) of $828.03 per week. However, the Respondent claimed a 50% reduction in TTD benefits for a "safety rule violation." Section 8-42-112(1)(a) and (b). Therefore, Respondent paid Claimant TTD benefits at the rate of $414.02 per week beginning March 13, 2012. Also, on March 13, 2012, Claimant had right shoulder surgery.

8. On May 24, 2012, Claimant underwent a left shoulder MRI, which revealed full thickness tears of the supraspinatus and infraspinatus, high grade tearing of the subscapularis, superior migrating of humeral head, and a biceps tendon tear with retraction.

9. On May 31, 2012, Dr. Stahl reviewed Claimant's left shoulder MRI and noted that Claimant had a massive rotator cuff tear that is not likely repairable. Dr. Stahl added that it is uncertain if Claimant will ever be able to return to his job as a refrigeration technician due to the heavy lifting, pushing, and pulling the job required.

10. On June 28, 2012, Dr. Stahl noted that Claimant continued to have bilateral shoulder pain and that Claimant is unable to lift overhead or perform any type of job responsibilities.

11. On September 5, 2012, Claimant treated with Dr. Stahl, who maintained Claimant's work restrictions, recommended Claimant continue physical therapy, and referred Claimant to Dr. James Johnson.

12. On September 7, 2012, Claimant treated with Dr. Steve Danahey and completed a pain diagram, noting pain in both shoulders, down both arms, and in his upper back and neck. Dr. Danahey noted that Claimant had significantly limited range of motion in both shoulders, recommended Claimant continue physical therapy, and referred Claimant to Dr. Randy Burris.

13. From September 11, 2012, through February 4, 2013, Claimant attended 17 physical therapy sessions.

14. On September 25, 2012, Dr. Burris noted that Claimant had elevated pain in both shoulders and had difficulty with overhead lifting. Dr. Burris noted that Claimant was likely at maximum medical improvement and did not require any additional treatment. Dr. Burris did refer Claimant to a rehabilitation specialist, Dr. Scott Primack, regarding a possible maintenance program.

15. On October 15, 2012, Claimant treated with Dr. Johnson, who took over Claimant's care as Dr. Stahl retired. Dr. Johnson recommended Claimant continue physical therapy.

16. On October 16, 2012, Claimant treated with Dr. Primack, who noted that Claimant had a posttraumatic stiff right shoulder. Dr. Primack recommended Claimant continue physical therapy and undergo a functional capacity evaluation (FCE).

17. On October 23, 2012, Dr. Burris referred Claimant for a FCE and maintained Claimant's work restrictions at no lifting more than 10 pounds and no overhead lifting.

18. On October 31, 2012, Claimant underwent a FCE. Claimant was placed in the light duty work category with work restrictions including lifting ten pounds occasionally from the floor to his waist, lifting five pounds occasionally from his waist to shoulder level, maximum carry of 30 pounds, and maximum push/pull of 50 pounds. The functional testing was valid.

19. On November 14, 2012, Dr. Johnson noted that Claimant's left shoulder presented a very difficult situation and that he was uncertain what could be done to improve Claimant's left shoulder condition. It was determined Claimant's left shoulder is irreparable. Dr. Johnson noted that Claimant aggravated his shoulder lifting 30 pounds during the FCE.

20. On November 20, 2012, Dr. Primack noted that Claimant had stiffness and limited motion in both shoulders. Dr. Primack recommended additional physical therapy.

21. On December 18, 2012, Claimant treated with Dr. Burris, who noted Claimant is at MMI pending release from Dr. Primack. Dr. Burris maintained Claimant's work restrictions of no lifting greater than ten pounds and no reaching above his shoulders.

22. On January 8, 2013, Dr. Primack placed Claimant at MMI and assigned Claimant a 13% right shoulder upper extremity impairment rating based on Claimant's range of motion loss and a 13% left shoulder upper extremity impairment rating based on range of motion loss.

23. On February 11, 2013, Respondent filed a Final Admission (FAL) of Liability based on Dr. Primack's January 8, 2013, MMI report and impairment ratings. Respondent claimed a 50% reduction in Claimant's TTD benefits from March 13, 2012, through December 8, 2012, because of an alleged safety rule violation. Respondent admitted for post-MMI medical benefits.

24. On March 7, 2013, Claimant objected to Respondent's February 11, 2013, FAL and requested a Division independent medical evaluation (DIME). Dr. Caroline Gellrick was selected as the DIME physician.

25. On February 12, 2013, Dr. Burris noted that he agreed with Dr. Primack's MMI date and impairment rating. Dr. Burris gave Claimant permanent work restrictions per the functional capacity evaluation, including no lifting greater than 30 pounds, no pushing or pulling greater than 50 pounds, and limited overhead activities to an occasional basis (less than 33% of the time). Dr. Burris did not recommend any

maintenance treatment. That same day, Claimant completed a pain diagram and reported bilateral shoulder pain, neck and upper back pain, and chest pain.

26. On June 18, 2013, Claimant completed an "Activities of Daily Living" worksheet as part of his application for long-term disability benefits through MetLife. Claimant noted that he takes care of himself and helps around the house with chores and light yard work, with no lifting. Claimant also noted that he walks two miles per day and runs errands.

27. On June 21, 2013, Dr. Gellrick performed the DIME. Dr. Gellrick noted the following symptoms and conditions: that Claimant continues to have pain, discomfort, and weakness in both shoulders; that Claimant has "popping in both shoulders; that Claimant's bilateral shoulder pain extends into Claimant's neck; that Claimant has neck pain; that Claimant "cannot reach out and cannot reach up with his arms to do simple tasking even in the kitchen;" that Claimant "cannot sleep;" that Claimant gave up "activities of heavy lifting;" that he "cannot do yard work like he used to;" and that Claimant is limited in his ability to do daily activities as a result of his ongoing issues with his shoulders and neck.

28. On physical examination, Dr. Gellrick noted the following: that Claimant has scapular winging on the left; that Claimant has tenderness at the base of his cervical spine radiating from both shoulders across his trapeziums to his neck at the C6-7 level; that Claimant has positive crepitus in both shoulders that is audible and palpable; that Claimant has limited cervical range of motion; that Claimant has weakness in both shoulders; and that Claimant has severe limitations in range of motion in both shoulders.

29. Dr. Gellrick agreed with Dr. Burris' regarding Claimant's' MMI date and work restrictions. Dr. Gellrick noted that Claimant was functionally impaired and lacked the ability to reach above shoulder height and work overhead. Dr. Gellrick recommended maintenance treatment, including access to a home exercise program at a local gym and access to NSAIDs through Dr. Burris.

30. Regarding Claimant's right upper extremity impairment, Dr. Gellrick assigned Claimant 19% impairment for range of motion loss, 6% for crepitus and 4% for loss of strength. In regard to Claimant's left shoulder, Dr. Gellrick assigned Claimant 17% impairment for range of motion loss, 6% for crepitus, and 4% for loss of strength.

31. Per the Colorado Division of Workers' Compensation Impairment Rating Tip Guidelines, Dr. Gellrick also found Claimant had impairment to his cervical spine. Dr. Gellrick noted that in accordance with the Impairment Rating Tips, a cervical spine rating can be considered in cases of severe shoulder pathology. Dr. Gellrick noted that Claimant had massive rotator cuff tears in both shoulders and lack of function, thus she assigned Claimant 5% whole person cervical spine impairment for range of motion loss. Dr. Gellrick added that Claimant's shoulders should be considered a whole person injury because of the massive rotator cuff tears and the significant impact on Claimant's

function, with limitations, loss of strength, and lack of ability to work above chest level. Dr. Gellrick assigned Claimant 33% whole person impairment.

32. On July 26, 2013, Claimant completed an Application for the Social Security Administration. Claimant noted that he is disabled from his January 26, 2012, work-related injuries and that he has had four heart attacks. Claimant stated that he wakes up, does personal hygiene, makes coffee and maybe does a few things around the house. Claimant noted that: his shoulder/arm conditions affect his sleep; that he can't pull the cord to start his lawn mower; and that reaching is extremely painful with or without anything in his hands. The Social Security Administration awarded Claimant disability benefits effective October 2013 in the amount of $2,083.00 per month.

33. On October 22, 2013, Claimant filed a Request for Reconsideration with the Social Security Administration. Specifically, Claimant requested the Social Security Administration amend his disability onset date from April 25, 2013, to January 26, 2012.

34. On November 19, 2013, Respondent applied for a hearing to overcome Dr. Gellrick's assigned impairment ratings for crepitus and loss of strength. Respondent did not challenge the range of motion impairment assigned by Dr. Gellrick.

35. On November 27, 2013, Claimant filed a Response to Respondent's Application for Hearing and endorsed disfigurement, whole person conversion, overcoming the DIME, TTD benefits, and safety rule violation, which Respondent had previously claimed against Claimant's TTD benefits.

36. On November 29, 2013, Claimant completed a benefits election form for the Central Pension Fund. The Central Pension Fund consists of contributions made by Employer pursuant to a collective bargaining agreement with the employee's (Claimant's) representative. Claimant selected the "100% Joint and Survivor Annuity," which pays him $1,594.65 per month. That same day, Claimant completed "Application for Conversion from Disability Benefit to Normal, Special or Early Retirement" through the Central Pension Fund. In order to qualify for "Early Retirement," Claimant is required to be at least 55 years old with 10 years of service. On December 4, 2013, Claimant received a $1,779.27 check from the Central Pension Fund. This check covered time period April 1, 2013, through April 30, 2013.

37. On February 27, 2014, hearing was held before ALJ Lamphere on the issues of: a) whether Respondent overcame the permanent partial impairment ratings assigned by the Division IME physician by clear and convincing evidence; b) whether claimant's bilateral shoulder permanent partial impairment ratings should be converted to whole person ratings; c) whether the Respondent has proven by a preponderance of the evidence that Claimant willfully violated a reasonable safety rule adopted by Employer; and d) whether Claimantis entitled to disfigurement benefits under Section 8-42-108, C.R.S.

38. On April 11, 2014, ALJ Lamphere issued Findings of Fact, Conclusions of Law, and Order regarding the February 27, 2014, hearing. ALJ Lamphere found that: Dr. Gellrick did not err when she assigned Claimant additional impairment for crepitus; nor did she deviate from the AMA Guides when she assigned Claimant impairment for loss of strength and impairment for the cervical spine; and Claimant proved by a preponderance of the evidence that he sustained functional impairment beyond the arms entitling him to whole person impairment. ALJ Lamphere noted that Respondent did not present any evidence that Claimant committed a safety rule violation and, thus, found that the Respondent failed to prove by a preponderance of the evidence that Claimant's compensation should be reduced by 50% for a willful violation of a safety rule.

39. On April 28, 2014, Respondent filed a Final Admission of Liability consistent with ALJ Lamphere's April 11, 2014, Findings of Fact, Conclusions of Law, and Order. Respondent admitted for temporary disability benefits, 33% whole person impairment, and post-MMI medical benefits.

40. On May 8, 2014, Claimant objected to the Respondent's April 28, 2014, Final Admission of Liability and applied for a hearing on the issue of PTD. Hearing was initially scheduled for August 27, 2014. Per agreement of the parties, hearing was rescheduled for October 23, 2014. On October 1, 2014, a Prehearing Conference was held before Prehearing Administrative Law Judge (PALJ) Sue Purdie. PALJ Purdie vacated the October 23, 2014, hearing, struck Claimant's May 8, 2014, Application for Hearing without prejudice, and ordered Claimant to refile his Application for Hearing within seven days. On October 7, 2014, Claimant reapplied for a hearing on the issue of PTD. On October 28, 2014, Respondent responded to Claimant's Application for Hearing and endorsed offsets, issue preclusion and claim preclusion.

41. On July 1, 2014, Claimant underwent a vocational evaluation with Ruthe Hannigan, Respondent's retained vocational evaluator. In her July 17, 2014, report, Ms. Hannigan noted that based on Claimant's medical, educational, and employment history, Claimant is able to earn wages in the Denver labor market. Ms. Hannigan notes that Claimant could "upgrade his computer knowledge and skills," which "would amplify his vocational options for many other sedentary and light duty roles, since computers are common to most light duty work roles." Ms. Hannigan noted that she identified certain jobs Claimant may be able to do based on Claimant's work restrictions, including maximum lift of 30 pounds, occasional lifting of ten pounds floor to waist and five pounds waist to shoulder level, and no work above shoulder level. These jobs include security guard, usher, lobby attendant, cashier, counter and rental clerk, retail sales, order clerk, information clerk, parking lot attendant, and gaming cage worker, among others. Ms. Hannigan did not conduct any labor market research or identify any specific jobs within the current Denver labor market that Claimant may be able to work.

42. On September 23, 2014, Dr. Jerry Miklin, Claimant's cardiologist, rendered the opinion that Claimant should permanently avoid lifting more than 25 pounds and avoid highly stressful situations. Dr. Miklin also noted that Claimant should avoid

performing rigorous activity, including pushing and pulling heavy weights, on a regular basis.

43. Claimant credibly testified that he is 56 years old, graduated from Jefferson High School and completed some vocational training. Claimant first started working as an auto mechanic before starting work as an apprentice with heavy duty machinery. Claimant started working for Employer as a mechanic in 1994. In approximately 2004, Claimant was certified as a journeyman refrigeration mechanic and worked primarily at Employer's bakery plant. Claimant has not done office work, computer work, or customer service work. Claimant had four heart attacks and was given 25 pounds permanent lifting restrictions by his cardiologist. Claimant's cardiologist did not provide any overhead working or reaching restrictions. Claimant is a member of a union, the Local 1, and that Employer funded Claimant's pension, through the Central Pension Fund, pursuant to a collective bargaining agreement. Claimant receives $1,594.65 per month for his pension, $2,083.00 per month for Social Security Disability, and $322.26 per month for long-term disability.

44. Claimant credibly testified that his permanent work restrictions are no lifting greater than ten pounds from floor to waist level, no lifting more than five pounds from waist to shoulder level, no outward reaching more than six inches from his body, and no reaching or working above shoulder level. Because of Claimant's work injuries, he is in constant pain and has decreased functional ability. Claimant has lost his strength in his upper extremities. Claimant cannot hold his arms out in front of him for an extended period of time and cannot lift any weight when reaching out away from his body. Claimant is limited in his abilities to perform the activities of daily living. Claimant goes for walks, watches TV, completes some minimal household tasks, and some minimal driving. Claimant cannot put his car into drive with his right arm and cannot do laundry, cannot do much cooking or much household cleaning due to pain. Claimant lacks range of motion and strength in his arms. Claimant cannot shovel snow or mow the lawn. Claimant occasionally helps his wife do yard work picking up discarded sticks, leaves, grass, and other yard debris. Claimant has problems with rotating both arms in or out, as these motions cause increased pain, which inhibits his function. Claimant has not slept through the night since the January 26, 2012, injury. Claimant awakens every two hours because of pain or the need to adjust his position. Claimant's lack of sleep causes him to feel lethargic and affects his judgment. Claimant falls asleep frequently throughout the day.

45. Claimant must be conscious of all activity regarding his arms because of safety concerns. Claimant has to think about what he is doing with his arms before he does anything. Claimant takes longer to do simple tasks than it did prior to the injury. Claimant is unable to work as a result of his bilateral shoulder injuries and related loss of function. Additionally, Claimant is not aware of any jobs within his functional abilities and skill set. The ALJ finds claimant's testimony credible and persuasive.

46. At hearing, Dr. Primack testified regarding the extent of Claimant's shoulder conditions and Claimant's work restrictions. Dr. Primack testified that when considering

work restrictions, he considers the FCE and his examination and that the biggest concern is safety. Dr. Primack testified that pain affects function and that loss of strength affects function, both of which raise safety concerns.

47. At hearing, Ms. Hannigan testified that the sedentary work category requires exerting up to ten pounds of force occasionally and a negligible amount of force frequently. Ms. Hannigan testified that the light work category required exerting up to 20 pounds of force occasionally and up to ten pounds of force frequently. Ms. Hannigan testified that the sedentary and light categories deal specifically with weight and do not address overhead working or reaching restrictions. Ms. Hannigan agreed that Claimant's work restriction per the FCE are no lifting more than ten pounds from floor to waist and no more than five pounds from waist to shoulder level and that these work restrictions are sedentary. Ms. Hannigan testified that Claimant's cardiac work restrictions are more restrictive than Claimant's workers' compensation restrictions. Nevertheless, Ms. Hannigan testified that Claimant's cardiologist did not restrict Claimant from overhead working or reaching. Ms. Hannigan testified that nobody expects Claimant to work overhead. Ms. Hannigan testified that Claimant is not able to work every job within each of the categories she identified and that each potential job was be evaluated to determine whether it requires any overhead reaching or lifting or any prolonged use of the arms away from the body.

48. The ALJ finds that Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled. The ALJ find Claimant's testimony regarding his functional impairment credible and persuasive. Claimant is unable to reach or work overhead as a result of the work injury. Claimant has significant loss of strength in both arms and is unable to do much, if any, work with his arms extended from his body. Claimant testified credibly that he cannot lift a gallon of milk with one arm. Despite Ms. Hannigan's opinion that Claimant is capable of earning a wage, the ALJ finds that Claimant's functional impairment as a result of his work injuries prevents him from sustaining any employment. Ms. Hannigan did not identify any specific jobs within the Denver labor market that Claimant is capable of working. While she did identify certain categories of employment, Ms. Hannigan testified that Claimant is not capable of working any job that requires overhead work or prolonged use of his arms away from his body. The ALJ finds Claimant permanently and totally disabled.

49. The ALJ finds that Respondent is entitled to offset Claimant's permanent total disability benefits by $240.35 per week due to Claimant's receipt of social security disability benefits.

50. The ALJ finds that Respondent is entitled to offset claimant's permanent total disability benefits by $74.44 per week due to Claimant's receipt of long term disability benefits.

51. The ALJ finds that Claimant's benefits through the Central Pension Fund are retirement benefits. The ALJ finds that pursuant to Section 8-42-103(1)(c)(II)(B), C.R.S.

Respondent is not entitled to offset Claimant's permanent disability benefits based on Claimant's receipt of pension benefits through the Central Pension Fund.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1.The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a workers' compensation claim must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness of unreasonableness (probability or improbability) of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); *CJI, Civil* 3:16 (2005). A workers' compensation claim is decided on its merits. Section 8-43-201, C.R.S. The judge's factual findings concern only evidence that is dispositive of the issues involved; the judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385 (Colo. App. 2000).

CLAIM PRECLUSION

3. Respondent contends Claimant's claim for permanent total disability benefits is barred by the defense of claim preclusion. Issue and claim preclusion principles, although developed in the context of judicial proceedings, may be applied to administrative proceedings as well, including workers' compensation matters. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001); *Holnam, Inc. v. Indus. Claim Apps. Office*, 159 P.3d 795, 797 (Colo. App. 2006). Claim preclusion works to bar the relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604 (Colo. 2005). Claim preclusion requires a final judgment that completes the trial court's adjudicatory process. *Younger v. Merritt Equip. Co.*, 2009 Colo. Wrk. Comp. Lexis 220 (W.C. No. 5-326-355, Dec. 30, 2009), *citing Smeal v. Oldenettel*, 814 P.2d 904 (Colo. 1991). Claim preclusion protects "litigants from the burden of relitigating an identical issue with the same party or his privy and…promotes

judicial economy by preventing needless litigation." *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003). For a claim in a second proceeding to be precluded by a previous judgment, there must exist: 1) finality of the first judgment; 2) identity of subject matter; 3) identity of claims for relief; and 4) identity of or privity between parties to the action. *Cruz v. Benine*, 984 P.2d 173, 1176 (Colo. 1999).

4. No dispute exists as to the finality of ALJ Lamphere's April 11, 2014, Findings of Fact, Conclusions of Law, and Order or the privity of the parties in this litigation. Neither party appealed ALJ Lamphere's April 11, 2014, Order, thus making it a final order, and the parties in this Hearing are identical to the parties at the prior April 11, 2014, hearing. Additionally, no dispute exists as to the subject matter of both proceedings, as both proceedings involve the scope of Employer's liability for the injuries that Claimant asserts arose out of the industrial injury. The issue is whether the identity of Claimant's claims for relief exists. The ALJ finds that identify of Claimant's claims for relief does not exist, and, therefore, Claimant's claim for permanent total disability benefits is not barred by the defense of claim preclusion.

5. Claim preclusion seeks to bar the relitigation of identical claims. *Lobato, supra at* 1165-66. In the worker's compensation context, claim preclusion has been used as a defense to bar a second claim arising out of the same, previously litigated injury. In *Holnam*, the Court of Appeals barred a claimant's claim for an occupational disease when Claimant had previously litigated the same injury as an industrial injury. The Court ruled that the claim for an occupational disease was barred because there was no indication that the "injuries [were] separate and cause[d] by an intervening event." *Holnam*, *supra* at 799.

6. In this case, Claimant's claim for permanent total disability benefits is not identical to his claim for permanent partial disability benefits, which was litigated at the February 28, 2014, hearing with ALJ Lamphere. On January 8, 2013, Dr. Primack placed Claimant at MMI and assessed permanent impairment. On February 15, 2013, the Respondent filed a FAL consistent with Dr. Primack's MMI date and impairment rating. On March 7, 2013, Claimant objected to the FAL and requested a DIME. As noted on the face of the FAL, "[i]f an IME is requested, [claimant] is not required to file an application for hearing until after the IME is complete." Additionally, Section 8-43-203(2)(b)(II)(A), C.R.S. provides that "if an [IME] is requested, Claimant is not required to file a request for a hearing on disputed issues until the division's IME process is terminated for any reason." In *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006), the Court of Appeals ruled that claimant's claim for permanent total disability benefits was legally ripe for adjudication once Employer filed a final admission of liability admitting for the MMI date and impairment rating assigned by the Division IME physician

7. In this case, after receiving the Division IME's report, Respondent did not file a FAL, instead, Respondent applied for a hearing challenging the Division IME. Claimant responded to Respondent's Application for Hearing and endorsed overcoming the Division IME. The issue for the February 27, 2014, hearing before ALJ Lamphere was whether the Respondent's overcame the Division IME's findings, not permanent total

disability. The Division IME was complete when ALJ Lamphere issued his April 11, 2014 Findings of Fact, Conclusions of Law, and Order and Respondent filed the April 28, 2014,FAL. Claimant timely objected to Respondent's April 28, 2014, FAL and timely applied for a hearing on the issue of PTD.

8. Claimant's claim for PTD is not barred by the defense of claim preclusion. The issue of PTD became ripe for hearing once the Respondent filed a Final Admission of Liability admitting for the DIME's MMI date and impairment rating. When Claimant requested the DIME, the issues of MMI and Claimant's impairment rating were in dispute. Those issues were not finalized until: a) ALJ Lamphere issued his April 11, 2014, Order; and b) the Respondent filed the April 28, 2014, Final Admission of Liability.

PERMANENT TOTAL DISABILITY BENEFITS

9. Section 8-40-201(16.5)(a), C.R.S. provides that Claimant has the burden to prove that he is "unable to earn any wages in the same or other employment" in order to establish a claim for PTD.

10.To prove a claim that a claimant is permanently and totally disabled, a claimant shoulders the burden of proving by a preponderance of the evidence that he/she is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Apps. Office*, 894 P.2d 42 (Colo. App. 1995). A claimant is not required to prove that an industrial injury is the sole cause of his inability to earn wages. However, a claimant must demonstrate that the industrial injury created some disability that ultimately contributed to claimant's permanent total disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986). A claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD..*Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The question of whether a claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

11.The determination of whether a claimant is permanently and totally disabled is made on a case-by-case basis and varies according to a claimant's particular abilities and circumstance. In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to the claimant under his

particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. Because the burden of proof rests with the claimant, the respondents are not obligated to find a specific job or job offer for the claimant in order to defeat a claim for permanent total disability benefits. *Moua v. Datex Ohmeda,* WC 4-526-873 (ICAO January 30, 2004); *Chavez v. Southland Corp.,* WC 4-139-718 (ICAO September 4, 1998). However, the ALJ may consider the failure to identify specific employment opportunities when assessing the credibility of a vocational expert's opinion that a claimant is employable and can earn wages. *Gomez v. MEI Regis,* WC 4-199-007 (ICAO September 21, 1998), *aff'd., Gomez v. Industrial Claim Appeals Office,* (Colo. App. No. 98CA1998, June 3, 1999) (not selected for publication).

12. As found, Claimant has proven by a preponderance of the evidence that he is unable to earn any wages as a result of his January 26, 2012, bilateral shoulder injuries.

OFFSET OF PENSION BENEFITS

13. Respondent contends that it is entitled to an order permitting offset of Claimant's payments from the Central Pension Fund. Claimant contends that Respondent has no right of offset.

14. Section 8-42-103(1)(c)(II), C.R.S. states:

> (II) In cases where it is determined that periodic benefits are granted by the federal old-age, survivors, and disability insurance act or employer-paid retirement benefits are payable to an individual and the individual's dependents, the aggregate benefits payable for permanent total disability pursuant to this section shall be reduced, but not below zero:
>
> (A)By an amount equal as nearly as practical to one-half such federal benefits; . . .
>
> (B) By an amount determined as a percentage of employer-paid retirement benefits, said percentage to be determined by a weighted average of employer's contributions during the period of covered employment divided by the total contributions during the period of covered employment; except that in permanent total disability cases all contributions made by employer pursuant to a collective bargaining agreement with the employee's representative shall be considered to have been made by the employee.

15. Additionally, Respondent contends it is entitled to an offset under Section 8-42-103 (1)(d)(1), which states:

> [i]n cases where it is determined that periodic disability benefits are payable to an employee under a pension or disability plan financed in whole or in part by Employer, the aggregate benefits payable for …

> permanent total disability pursuant to this section shall be reduced but not below zero, by an amount equal as nearly as practical to Employer pension or disability plan benefits.

16. As found, claimant's initial Social Security Disability award was $2,083.00 per month, Claimant receives $322.56 per month in long-term disability benefits, and Claimant receives $1,594.65 per month in pension or retirement benefits through the Central Pension Funded, a retirement plan funded pursuant to a collective bargaining agreement. Respondent is entitled to offset Claimant's permanent total disability benefits by $240.35 per week due to Claimant's receipt of Social Security benefits. Respondent is entitled to offset claimant's permanent total disability benefits by $74.44 per week claimant's receipt of long-term disability benefits. Respondent's offset for Claimant's receipt of long-term disability shall apply so long as Claimant receives long-term disability benefits. If Claimant stops receiving long-term disability benefits, the Respondent's offset shall end.

17. Since Section 8-42-103 provides that all contributions made by Employer pursuant to a collective bargaining agreement with the employee's representative shall be considered to have been made by the employee, Respondent has no right to offset of funds paid to Claimant from the Central Pension Fund . Claimant's benefits through the Central Pension Fund are retirement benefits. Respondent is not entitled to offset Claimant's permanent total disability benefits due to Claimant's receipt of pension benefits through the Central Pension Fund. Claimant's pension benefits were funded by Employer pursuant to a collective bargaining agreement and, thus, are considered funded entirely by the employee, claimant, pursuant to Section 8-42-103(1)(c)(II)(B), C.R.S.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for permanent total disability benefits is not barred by claim preclusion.

2. Claimant is permanently and totally disabled.

3. Respondent is entitled to offset Claimant's permanent total disability benefits by $240.35 per week based on Claimant's receipt of Social Security Disability benefits.

4. Respondent is entitled to offset Claimant's permanent total disability benefits by $74.44 per week based on Claimant's receipt of long-term disability benefits.

5. Respondent shall pay Claimant permanent total disability benefits at the statutory rate commencing January 9, 2012, and continuing until terminated by law or order. Respondent may take credit against this liability based on any permanent partial disability benefits already paid to Claimant.

6. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

7. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2015

DIGITAL SIGNATURE:
Margot W. Jones

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issue presented for determination is whether the two level cervical disc replacement or arthroplasty surgery requested by Dr. Douglas Beard on June 12, 2014, is reasonable, necessary and related to Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant is presently 53 years old. On December 19, 2011, the Claimant suffered injuries while working for the Employer as a senior network engineer. Claimant fell approximately two feet from an elevated plank to the ground. He landed on his outstretched left arm and rolled to his left side.

2. The Employer referred the Claimant to Concentra Medical Centers. Claimant saw Dr. Rosalinda Piniero at Concentra on December 23, 2011. She initially diagnosed a left shoulder strain and suspected rotator cuff pathology.

3. Claimant underwent a course of physical therapy after the injury. He testified that physical therapy was not effective so it ceased at the beginning of February 2012. Dr. Piniero ordered a MRI of the left shoulder, which demonstrated a massive tear in the supraspinatus. Claimant was referred to Garth Nelson, M.D. for a surgical evaluation.

4. Claimant presented to Dr. Nelson on February 28, 2012. In addition to his shoulder complaints, Claimant informed Dr. Nelson that he had neck pain after the December 19, 2011 injury. At the time of this appointment, Claimant reported that the neck pain resolved. At hearing, Claimant testified that his neck pain got better after physical therapy ceased a month earlier, but that it returned again when the activity demands increased in physical therapy following left shoulder surgery, a fact supported by the post surgical therapy records.

5. Dr. Nelson diagnosed an extensive supraspinatus tear, biceps tendon dysfunction and tearing, and left posttraumatic impingement syndrome. Dr. Nelson recommended arthroscopic repair and noted that it would be five months before even semi-strenuous activity could be attempted, and seven months until strenuous activity could be attempted.

6. On April 25, 2012, Dr. Nelson performed surgery on Claimant's left shoulder. Prior to the procedure, Dr. Nelson again noted that Claimant was having ongoing neck pain since the injury and had also developed numbness in the left hand over the past "few months." Dr. Nelson diagnosed a cervical strain as a component of Claimant's work injury.

7. Physical therapy resumed on June 19, 2012. Shortly thereafter, Claimant consistently experienced difficulty with left upper extremity pronation. After several weeks, he inquired with his therapist about whether the pronation difficulties could be related to the symptoms he had been experiencing in his left neck and upper trapezius. Claimant continued to consistently report neck pain as his shoulder symptoms and dysfunction improved in therapy. He testified that his neck symptoms were worse because of increased demands in therapy as his shoulder got stronger, and he believes that his neck symptoms were more apparent at that time because his shoulder symptoms were resolving following the shoulder surgery.

8. Dr. Nelson re-evaluated Claimant on August 30, 2012. Claimant continued to complain of difficulties with left upper extremity pronation. Claimant also reported left dorsal forearm numbness, which had resolved. Dr. Nelson suspected multiple nerve group dysfunctions and requested an EMG.

9. Dr. Jeffrey Wunder performed the EMG on September 26, 2012. Dr. Wunder concluded that the EMG results were most suggestive of compressive neuropathy at the elbow in the both the ulnar and median nerves. Dr. Wunder noted no evidence of cervical radiculopathy and recommended referral to an upper extremity specialist.

10. Dr. Nelson reviewed the September 26, 2012 EMG that noted a median neuropathy, and commented that condition is “extremely rare.” The EMG results also revealed no evidence of cervical radiculopathy.

11. Shortly after the EMG Dr. Nelson saw Claimant again. Dr. Nelson noted left upper extremity weakness and dysfunction and numbness in the left distal forearm that is worse when his neck pain is worse. He noted intermittent neck pain. He noted painful and limited motion in the cervical spine. Dr. Nelson recommended that Claimant see a neurologist and stated that the neurologist will likely want a cervical MRI.

12. Claimant underwent a cervical MRI on November 28, 2012. It showed severe left foraminal stenosis at C6-7; moderately severe left facet arthropathy with secondary inflammation at C2-3; moderate to severe left foraminal stenosis at C3-4 as well as mild central canal stenosis; a small central disc protrusion at C4-5, and mild bilateral foraminal stenosis; and disc osteophyte complex with mild thecal sac effacement at C5-6.

13. Dr. Nelson opined that this pathology at C6-7 is the probable significant contributor to the left forearm, wrist, and hand weakness and dysethesias. Dr. Nelson recommended a referral to a neurosurgeon and opined, “in all medical probability,” that the neck is related after recalling Claimant’s report of neck symptoms beginning after the injury at the initial February 28, 2012 visit and considering the mechanism of injury. Dr. Piniero also believes the neck is related to Claimant’s work injury according to her December 7, 2012 report as does Dr. Paz.

14. Claimant presented to neurologist, Michael Curiel, M.D. on January 11, 2013 for an evaluation. Dr. Curiel opined that the cervical MRI findings certainly predated this injury, but that this mechanism of injury most likely aggravated the degenerative condition in his neck. Dr. Curiel did not feel that Claimant's left pronator weakness was related to the cervical spine abnormalities viewed on the MRI because there no EMG findings suggestive of cervical radiculopathy.

15. Claimant transferred care from Dr. Piniero to Dr. O'Toole at the beginning of 2013. Dr. O'Toole opined that the conditions for which Claimant is seeking treatment, including cervical pain, is consistent with the mechanism of injury. Dr. O'Toole referred Claimant to Brooke Bennis, D.O. for a physiatry consultation for his neck pain.

16. Based on the credible medical evidence, the ALJ finds that Claimant's neck symptoms are related to the industrial injury. He sustained an aggravation, exacerbation or acceleration of his pre-existing degenerative condition.

17. Dr. Bennis saw Claimant on February 8, 2013. Dr. Bennis noted several positive findings on cervical examination, particularly on the left side. Dr. Bennis' assessment included cervical strain status post fall on outstretched left arm, severe foraminal narrowing at C6-7 with facet syndrome, and cervicogenic headaches. She gave him a prescription for gabapentin to assist with neuropathic pain and scheduled a diagnostic and therapeutic transforaminal epidural steroid injection (TFESI).

18. Rebekah Martin, M.D. performed the TFESI on February 27, 2013. The injection treated the C7 nerve root. Claimant reported improvement in neck and left upper extremity pain afterwards. However, he reported ongoing and significant numbness and tingling in the fourth and fifth digits and ongoing C2-3 neck pain with headaches. Dr. Bennis recommended facet injections or medial branch blocks for the C2-3 symptoms.

19. On May 8, 2013, the Claimant followed up with Dr. Martin concerning the recommendation for medial branch blocks at C2, C3 and C4. Dr. Martin opined that Claimant has high cervical facet syndrome (C2 to C4); and probable lower trunk plexopathy with possible overlapping C7 radiculopathy and severe foraminal narrowing at C6-7 with a helpful epidural steroid injection.

20. Dr. Martin performed the medial branch blocks at C2, C3, and C4 on May 17, 2013. Claimant noted significant relief for eight hours following the medial branch blocks, a diagnostic response. Dr. Bennis noted that while his left upper extremity is getting stronger, Claimant still has difficulty with pushing the mower, riding his bicycle, and shoveling snow. Confirmatory medial branch blocks were scheduled as a precursor to possible radiofrequency neurotomy. Dr. Bennis also considered doing medial branch blocks at C5, C6, and C7, but wanted to wait until after the second set of blocks at C2, C3, and C4.

21. Left C3, C4, and C5 medial branch blocks were performed on June 14, 2013 and were again considered diagnostic. The blocks were followed by a radiofrequency neurotomy at the same levels on July 26, 2013.

22. Claimant returned to see Dr. Bennis on August 12, 2013. He reported that the radiofrequency neurotomies significantly relieved his ongoing pain and resolved his headaches, however, Claimant reported ongoing pain in the lower cervical spine and the musculature surrounding the upper trapezius and supraspinatus muscles. He also was concerned with ongoing, albeit improving, left upper extremity weakness. He noted that the C6-7 TFESI had given him five months of pain relief but had worn off. He was tender over the C5-6 and C6-7 facet joints, worse with extension and rotation around the fulcrum of the facet joints. Dr. Bennis recommended another C6-7 TFESI.

23. Dr. Martin performed the TFESI at C6-7 on September 20, 2013. On October 8, 2013, Claimant reported one-hundred percent relief for seven hours followed by gradual return of pain over the next seven days. The Claimant had tenderness in the upper cervical spine at C3-4 and more predominantly at C6-7.

24. Dr. O'Toole saw Claimant on December 26, 2013. Claimant reported aggravation of cervical symptoms from recent physical therapy treatments. His pain level was four out of ten. Dr. O'Toole referred Claimant to a spine surgeon, and indicated that Claimant may continue working without restrictions.

25. Claimant saw orthopedic spine surgeon, Douglas Beard, M.D. on January 8, 2014. Claimant reported headaches, left sided neck pain, left arm pain, and left hand pain, numbness and tingling. He complained of left upper extremity weakness. His pain ranged from four to seven out of ten. Dr. Beard's physical examination revealed crepitus with range of motion, positive Spurling's maneuver with reproduction of left upper extremity radicular symptoms, and left upper extremity and triceps weakness. Dr. Beard noted that the November 28, 2012 MRI revealed evidence of early degenerative changes at the C2-3 motion segment; disc space narrowing, osteophytic deformation and end plate irregularity at C5-6 and C6-7. At C6-7, on the left, Dr. Beard noted severe neural foraminal stenosis. Dr. Beard opined that Claimant's radicular symptoms originate from the C6-7 stenosis. Dr. Beard stated that a laminoforaminotomy would help his radicular symptoms but may not help the neck pain. He stated that a cervical arthroplasty or a fusion are also options and explained the motion preservation benefit of the arthroplasty. Dr. Beard also noted that C5-6 may also be symptomatic and that a procedure on C6-7 could increase stress on C5-6, making him more symptomatic. Dr. Beard indicated that it is difficult to tell how much of Claimant's pain generates from C5-6 or C6-7 levels alone or together. Ultimately, Dr. Beard believes it is best for Claimant to address both C5-6 and C6-7. Dr. Beard feels a two level cervical arthroplasty is the best option considering that Claimant does not have significant posterior cervical facet arthropathy. Dr. Beard noted that the LDR Artificial Disc has FDA labeling for a two level arthroplasty.

26. Claimant followed up with Dr. O'Toole on January 15, 2014. Claimant expressed to Dr. O'Toole that he would like to undergo the two level disc arthroplasty recommended by Dr. Beard.

27. On February 3, 2014, Dr. Paz performed an independent medical examination at Respondent's request. Dr. Paz concluded that it is medically probable that the foraminal stenosis at the left side of C6-7 is the etiology of the of the left upper extremity parasthesias. Dr. Paz agreed that Claimant's pre-existing cervical degenerative disc and joint disease was aggravated by the December 19, 2011 work injury. Dr. Paz opined that Claimant was not a good surgical candidate at that time because he felt Claimant's clinical symptoms were well controlled. Dr. Paz felt Claimant was at maximum medical improvement but may require maintenance treatment.

28. Claimant presented to Dr. Martin on March 13, 2014 and noted a recurrence of symptoms following the last TFESI at C6-7. He reported pain levels at 4.5 out of 10. The symptoms remained in the C7 distribution. He was interested in knowing Dr. Martin's thoughts were regarding surgery. Dr. Martin responded that due to his ongoing neurologic compromise including weakness and parasthesias, he will likely need surgery at some point in the near future.

29. On April 2, 2014, Dr. Martin performed another TFESI at Claimant's left C6-7.

30. Claimant returned to Dr. Beard on April 11, 2014. Dr. Beard reiterated that his best options were either ACDF or two level arthroplasty. Dr. Beard noted that a laminoforaminotomy is not in Claimant's best interest given his pathology. Dr. Beard recommended a repeat MRI to obtain a cleaner image.

31. Claimant saw Dr. O'Toole on April 17, 2014. He reported left arm and hand pain, numbness, and tingling and left sided neck pain. On the pain scale, Claimant reported his pain levels at 4 out of 10.

32. Claimant had the second MRI done on April 23, 2014, and returned to see Dr. Beard the following day on April 24. Dr. Beard noted that the new MRI clearly demonstrated severe neural foraminal stenosis on the right at C5-6. There is "profound and severe" neural foraminal stenosis at C6-7. Claimant was very frustrated with his ongoing condition and reported that he is suffering at work and therefore decided to take a more aggressive approach. Dr. Beard again expressed concern that if only C6-7 is treated, C5-6 will become symptomatic. Dr. Beard recommended a two level arthroplasty. Dr. Beard opined that the injury likely caused the degenerative conditions in his cervical spine to become symptomatic. Dr. Beard warned Claimant that he may encounter authorization problems with this procedure, but Claimant nevertheless wanted to proceed with the two level arthroplasty.

33. On May 15, 2014, Dr. Beard formally requested authorization for at C5-6 and C6-7 cervical arthroplasty.

34. Claimant saw Dr. O'Toole on May 8, 2014. Claimant reported pain levels at 3 out of 10 on that day. Claimant reported improvement in his symptoms since increasing his dosage of Lyrica. Dr. O'Toole supported Claimant's decision to pursue the two-level arthroplasty, however, he did note that the Division of Workers' Compensation Medical Treatment Guidelines ("MTG") provides for only a single disc arthroplasty. Dr. O'Toole cited to a study pertaining to favorable outcomes for two-level disc arthroplasty in the lumbar spine and also stated that not all reviews of cervical disc arthroplasty were favorable citing to another study.

35. Dr. O'Toole noted that Dr. Jewell's psychological assessment does not preclude Claimant from being a surgical candidate, but that Dr. Jewell is deferring to the surgeon regarding whether to perform surgery. Dr. O'Toole imposed work restrictions during the May 8, 2014 visit. Dr. O'Toole reduced Claimant's work schedule to six hours per day due to the effect Claimant's medications were having on his ability to sleep.

36. Dr. Paz performed a Rule 16 review for Respondent after Dr. Beard requested authorization for the cervical arthroplasty procedure. Dr. Paz concluded that based on the MTG, the surgery requested by Dr. Beard was not reasonable, necessary and causally related to Claimant's injury. Dr. Paz noted that the MTG allows for disc athroplasty at one level and that the spine pathology be limited to one level. Dr. Paz noted that Claimant has multilevel degenerative disc disease and multilevel degenerative joint disease. Dr. Paz also felt that the TFESI at the left C6-7 level performed by Dr. Martin in April 2014 was not documented to be either therapeutic or diagnostic.

37. Respondent denied Dr. Beard's prior authorization request for the C5-6 and C6-7 arthroplasty based on Dr. Paz's June 22, 2014 Rule 16 Utilization Review Report.

38. Claimant presented to Dr. Martin on July 31, 2014 and noted that he did "fairly well" following his last C6-7 TFESI in April 2014, however, after about four months his symptoms steadily returned in the C7 dermatome. Claimant reported that his pain level was 3.5 out of 10. Dr. Martin noted some muscular atrophy in his left triceps. She recommended additional injections to manage Claimant's symptoms while the legal system works out the surgical denial.

39. Dr. O'Toole saw Claimant on August 6, 2014 and noted that Claimant was still suffering from arm pain at the end of the day so Dr. O'Toole increased his Lyrica dosage.

40. Dr. Beard testified by deposition on September 22 and October 29, 2014. Respondents submitted transcripts from both depositions by agreement of the parties. Dr. Beard testified as an expert in orthopedic surgery, for which he has been board certified since 1994. Dr. Beard has been recommending and performing surgery since

1987. From 1987 to 1999, fifty percent of the surgeries he performed were on the spine. His practice has been exclusive to the spine since 1999.

41. Dr. Beard testified that the mechanism of injury to the C5-6 and C6-7 was likely a result of a whiplash type injury sustained by Claimant as he fell down several feet onto his outstretched left upper extremity. Dr. Beard testified that while the November 28, 2012 MRI revealed degenerative findings at C2-3, C5-6, and C6-7, the protrusion at C6-7 could certainly be traumatic. Dr. Beard testified that the pathology at C2 through C4 is related also, as there was no evidence of a preexisting symptomatic condition.

42. Dr. Beard testified that the left upper extremity symptoms are consistent with C5-6 and C6-7 pathology, which is also consistent with a whiplash mechanism of injury. Dr. Beard noted that the triceps atrophy is consistent with C6-7 pathology. There is no evidence of triceps atrophy prior to this injury. Dr. Beard testified that the cervical pathology caused weakness—affecting pronation in his left upper extremity. Claimant's pronation difficulties were discovered shortly after surgery when he started using his left upper extremity in physical therapy.

43. Dr. Beard testified that Dr. Martin's C6-7 TFESI was diagnostic and that the same was a factor in his decision to recommend surgery. While Dr. Beard discussed three surgical options, he believes the C5-6 and C6-7 arthroplasty will be the best for Claimant, who is concerned with motion preservation. While facet arthritis can be a complicating factor for cervical arthroplasty, Dr. Beard noted that Claimant's facet joints at the C5-6 and C6-7 are acceptable to "withstand or to have a satisfactory outcome from having a disk replacement on the front side." Dr. Beard explained that the recommended arthroplasty would open up the neuroforamen and release pressure on the nerve and alleviate the left upper extremity symptoms and neck pain. It will also preserve motion and the breakdown to other levels will accelerate at the usual rate rather than more quickly as is typical after fusion procedures.

44. Dr. Beard testified that FDA studies on the devices do not indicate that they are inappropriate for multiple levels. He explained by stating that the testing done is highly controlled so the response to the procedure can be accurately measured. He acknowledged that these screening criteria often result in guidelines for effective use, but that does not mean they would not be effective in other applications. Dr. Beard stated that limiting the use of the artificial disc to one level does not make common sense. In fact, Dr. Beard noted that the FDA has approved the two-level device that he intends to use on Claimant. Dr. Beard believes that surgeons would be doing these procedures "an awful lot more" if their requests were approved. Further, he absolutely believes that people would be getting multiple level artificial disc replacements but for Medicare and insurance company non-medical constraints.

45. Dr. Beard testified that multi-level disease is not a contraindication for the two level arthroplasty he is recommending. He further explained that the actual contraindication is "multi-compartment disease," which is degenerative disc disease and

very advanced facet arthropathy at the same level. Dr. Beard opined that Claimant does not have arthritic facet joints, rather the facets have mere abnormalities that do not rise to the level of multi-compartmental disease. Dr. Beard stated that Dr. Ridings' opinion that Claimant's pain is coming from the facets is not accurate because of the left upper extremity symptoms, which are symptoms of impingement.

46. Dr. Beard acknowledged that Drs. Paz and Ridings are medical experts, but feels like they have a significant disadvantage when it comes to spine surgery as they do not form these opinions based on experience in practice and in actual surgery. He suggested that anyone making the decision on whether Claimant should have this surgery should be someone who makes these decisions and recommendations frequently.

47. Dr. Beard testified that the C5-6 and C6-7 arthroplasty is reasonable, necessary, and related to the December 19, 2011 work related injury. He testified that Claimant has exhausted conservative care. He believes Claimant made a reasonable and informed decision in choosing to proceed with this procedure.

48. Dr. Beard admittedly reviewed only some of the medical records from Dr. Bennis and Dr. Martin. He reviewed none of the records from Dr. Pineiro or Concentra, and "only a couple from Dr. O'Toole." Dr. Beard's testimony demonstrated that he lacks a clear understanding of the Colorado Division of Workers' Compensation Level II Accreditation Program, or the current MTG. Despite Dr. Beard's speculation to the contrary, the MTG for Cervical Spine Injuries were revised by the Division of Workers' Compensation on February 3, 2014.

49. Dr. Paz was admitted as an occupational medicine expert with full Level II accreditation at hearing. In reviewing the MRI of November 28, 2012, Dr. Paz notes degenerative disc and joint disease with facet arthropathy at multiple levels. Dr. Paz testified regarding the LDR two level disc replacement trial referenced by Dr. Beard. The exclusion criteria set forth for a two level disc replacement by LDR, the manufacturer of the Mobi-C instrumentation, includes as Item 13 "symptomatic DDD [degenerative disc disease] or significant cervical spondylosis at more than two-levels". Dr. Paz opined that Claimant does not meet the surgical criteria established by the instrument manufacturer that Dr. Beard proposes to implant in Claimant.

50. At hearing Dr. Paz confirmed that the MRI requested by Dr. Beard and occurring on April 23, 2014 noted degenerative disc disease at multiple levels. Claimant has multi-level degenerative disc disease to at least three cervical spine levels, and multiple levels of degenerative joint disease. Dr. Paz testified that based upon his medical journal research, the current facts do not support a two level cervical disc replacement. Dr. Paz's testimony is also supported by Respondent's Exhibits T and U. Dr. Paz credibly testified that the Mobi-C trial establishes that Claimant is not a surgical candidate for a two level disc replacement, as he has degenerative disc disease at more than two levels of the cervical spine.

51. According to the Colorado MTG for Cervical Spine Injuries, a contraindication for disc replacements is “multi-level degenerative disc disease (DDD)” and “symptomatic facet joint arthrosis.”

52. At Respondent’s request, Claimant was evaluated by Eric Ridings, M.D. Dr. Ridings evaluated the studies cited by Dr. O’Toole in his May 8, 2014 report. Dr. Ridings expressed “the study quality is often severely limited.” Dr. Ridings went on to note that the literature cited by Dr. O’Toole expresses that cervical disc replacements is indicated in patients with radiculopathy or neurologic symptoms related to disc degeneration at one level, and that contraindications include multi-level disease and severe facet joint pathology.

53. Dr. Ridings further expressed the following: “In this case, it has still not been established that the patient actually has a cervical radiculopathy, which was apparently not definitely seen on the second EMG, and was not present on the first EMG, with nonspecific sensory findings in the left upper extremity and motor findings confined to the triceps. Additionally, the patient has multi-level disease.” Dr. Ridings notes significant degenerative changes at all levels of Claimant’s cervical spine, except C7-T1.

54. Dr. Ridings did conduct research himself, citing the study “Cervical Disc Replacement: A Systematic Review of Med Line Indexed Literature”, completed in 2013. The International Journal of Clinical Medicine looked at controlled trials and concluded that more intermediate and long term follow up studies are needed to prove the safety and efficacy of disc replacement. Dr. Ridings concludes that Claimant is not a candidate for a one level or two level disc replacement surgery.

55. Dr. Paz credibly testified that with the information from the Mobi-C trial, Claimant's cervical MRI findings, the history, and Claimant’s medical treatment to date, Claimant is not a candidate for a one level disc replacement, and is certainly not a candidate for a two level cervical spine disc replacement.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. The evidence establishes that LDR has labeling approval from the FDA for the two level Mobi-C cervical spine disc replacement. But the Mobi-C trials establish that a patient is not a candidate for a two level disc replacement if cervical spine degenerative disc disease exist in excess of two cervical spine levels. The medical evidence in this case indicates that Claimant has degenerative disc disease in multiple areas of the cervical spine.

7. Dr. Ridings opined that Claimant has significant degenerative changes at all levels of the cervical spine with the exception of C7-T1. Dr. Paz opined that Claimant has degenerative disc disease to at least three cervical spine levels. Dr. Beard admits that Claimant has degenerative pathology to at least three cervical spine disc levels. Further, the MRI scans and diagnoses made by Drs. O'Toole and Martin support that Claimant has degenerative changes at multiple levels of his cervical spine.

8. LDR manufactures the instrumentation which Dr. Beard suggests will be utilized in the surgical procedure for which he sought preauthorization on June 12, 2014. Based upon the surgical candidate criteria from LDR, Claimant does not qualify for the surgical procedure requested by Dr. Beard.

9. Dr. Paz also raised concerns about Claimant's lack of a diagnostic response to the April 2, 2014 TFESI at C6-7, and whether Claimant's pain generator(s) have been adequately identified. The medical records that immediately precede and follow the April 2014 TFESI reveal that Claimant's pain levels remained at the same or similar levels ranging from 4.5 out of 10 just before the TFESI on March 13, 2014, and 4 out of 10 just after on April 17, 2014. It does not appear that Claimant had any significant relief from the April 2014 left C6-7 TFESI which supports Dr. Paz's concerns regarding adequate identification of the pain generators.

10. For purposes of medical treatment under the Workers Compensation Act, the MTG developed by the Director shall be used by healthcare practitioners. Section 8-42-101(3)(b), C.R.S. An administrative law judge may consider the MTG in determining whether certain medical treatment is reasonable, necessary and related to the industrial injury, but is not required to utilize the guidelines as the sole basis for the determination. Section 8-43-201(3), C.R.S.

11. In this case, the ALJ has considered the MTG as well as the medical evidence, neither of which support a two level disc replacement procedure for this particular Claimant. As found and concluded above, Claimant's clinical presentation, medical diagnoses, diagnostic studies and the LDR criteria suggest that Claimant would not be a good candidate for a single level disc replacement let alone a two level disc replacement. Accordingly, Dr. Beard's request for authorization for such procedure is denied as unreasonable and unnecessary.

ORDER

It is therefore ordered that:

1) Claimant's request for a two level cervical disc arthroplasty is hereby denied as not reasonable and necessary.

2) All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 19, 2015

DIGITAL SIGNATURE:

L. Broniak

Laura A. Broniak, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffers from a worsened condition causally related to his work injury on March 10, 2012 to allow a reopening of the claim.

2. If Claimant has established a worsening of condition, whether Claimant has established an entitlement to temporary total disability benefits from October 29, 2013 and ongoing.

3. Whether Claimant has established by a preponderance of the evidence that the MRI and epidural steroid injections recommended by Dr. Knight are reasonably necessary and related to Claimant's March 10, 2012 work injury.

FINDINGS OF FACT

1. Claimant works for Employer as a bus driver with duties including driving passengers to/from Employer's facility from Denver International Airport (DIA) and loading passengers' luggage into the shuttle bus. Claimant has been employed by Employer since approximately 2005.

2. On March 10, 2012 Claimant suffered an admitted work-related injury while so employed.

3. Following the work-related injury Claimant underwent conservative treatment at NextCare Urgent Care Center. He was referred by NextCare to Denver-Vail Orthopedics and was also referred for an MRI of his lumbar spine.

4. Claimant began treating with Pamela Knight, M.D. at Denver-Vail Orthopedics.

5. On April 5, 2012 Claimant underwent an MRI of his lumbar spine that was interpreted by Bao Nguyen, M.D. Dr. Nguyen noted that Claimant had mild-moderate central spinal canal stenosis at L4-5 due to a shallow disc bulge and borderline congenital spinal stenosis. Dr. Nguyen noted that the other remaining disc levels from T-11 through L5-S1 were unremarkable. *See* Exhibit 1.

6. On April 12, 2012 Claimant saw Dr. Knight. Claimant reported pain in his lower back that at times radiated down his left, greater than right, lower extremity down

to his calf area. Dr. Knight noted that the MRI showed evidence of a mild disc bulge shallow posteriorly at L4-5 resulting in mild to moderate central canal stenosis and noted mild narrowing of both of Claimant's lateral recesses at the L4-5 level in addition to the subarticular zones of his bilateral foramina at this region resulting in current radiculitis symptomatology. *See* Exhibit D.

7. Dr. Knight noted the MRI of Claimant's lumbar spine showed unremarkable findings at all other levels. *See* Exhibit D.

8. Dr. Knight obtained radiological films in the clinic of Claimant's lumbosacral spine that showed evidence of fairly well-preserved disc spaces with slight narrowing noted at the L4-5 space and with arthritis noted at L4-5 and at L5-S1 levels. *See* Exhibit D.

9. Claimant continued to treat with Dr. Knight. Claimant underwent physical therapy and three epidural steroid injections without improvement in his symptoms. *See* Exhibit D.

10. On August 23, 2012 Dr. Knight opined that Claimant had exhausted all conservative efforts including extensive physical therapy, medications, neuropathic pain medications, activity modification, and oral steroids without any significant relief. Dr. Knight indicated that she had nothing further to offer Claimant for conservative treatment and referred him to Scott Stanley, M.D. for surgical evaluation. *See* Exhibit D.

11. On September 6, 2012 Claimant saw Dr. Stanley Dr. Stanley recommended an L4 laminectomy and noted that Claimant wanted to move forward with this recommended surgical intervention. *See* Exhibit D.

12. Respondents initially denied authorization for the L4 laminectomy.

13. On November 19, 2012, John Douthit, M.D. examined Claimant and opined that Claimant had congenital lumbar spinal stenosis that was aggravated by the work related disc injury. Dr. Douthit opined that the disc injury from work probably caused narrowing of an already compromised congenitally narrowed spinal canal at L4-LL5 causing cauda equine encroachment and claudication. He opined that surgery to decompress the stenosis was appropriate. *See* Exhibit 6.

14. On December 31, 2012 Claimant underwent an L4 laminectomy performed by Dr. Stanley. *See* Exhibit D.

15. On January 21, 2013 Claimant saw Dr. Knight. Claimant reported he was slightly better postoperatively but had pain with sciatica symptoms down both of his lower extremities. *See* Exhibit D.

16. On January 30, 2013 Claimant saw Dr. Stanley. Claimant reported intermittent discomfort into the left gluteal region. *See* Exhibit D.

17. Claimant saw Dr. Knight on February 11, 2013 and April 8, 2013 where he reported severe pain in his left upper buttocks area radiating down his left lower extremity, as well as some sciatica involving his right lower extremity to a lesser extent. *See* Exhibit D.

18. On August 12, 2013 Claimant saw Dr. Knight. Claimant reported he felt stronger and Dr. Knight noted he was making good progress. Dr. Knight planned to set Claimant up for range of motion testing and indicated she would be placing Claimant at maximum medical improvement. She opined that Claimant may require up to four physician visits per year over the next three years, as well as intermittent medication over the next three years. She opined that Claimant may also require intermittent physical therapy visits not to exceed 12 visits total over a three year period. She opined that Claimant's work restrictions would be set at a maximum lifting, pushing, and pulling of 50 pounds. *See* Exhibit D.

19. On September 6, 2013 Dr. Knight noted that she had sent Claimant for range of motion testing for an impairment rating related to placing Claimant at maximum medical improvement. Dr. Knight noted that the impairment rating was not valid and that Claimant needed to repeat range of motion testing for his lumbosacral spine given the lack of range of motion documented for his lumbar extension, lateral flexion in comparison to Claimant's ability as she had seen in the clinic. *See* Exhibit D.

20. Dr. Knight placed Claimant at maximum medical improvement (MMI) on October 29, 2013. Dr. Knight noted that Claimant had three attempts for validity with regards to range of motion for his lumbar spine, and that she was finally able to obtain range of motion and that the impairment rating was complete. Dr. Knight assigned a 22% impairment for range of motion of Claimant's lumbosacral spine. She noted it was combined with a 10% impairment based on Claimant's surgery and continued symptomatology, resulting in a total whole person impairment of 30%. *See* Exhibit D.

21. On January 16, 2014 Respondents filed a Final Admission of Liability, admitting for a 30% whole person impairment rating as well as ongoing post-MMI medical benefits as outlined by Dr. Knights August 12, 2013 report and including up to 4 physician visits per year for 3 years, intermittent medication of gabapentin, anti-inflammatories and tramadol for 3 years, and 12 physical therapy visits over a three year period. *See* Exhibit J.

22. On February 26, 2014 Claimant saw Dr. Knight. Dr. Knight noted she had last seen Claimant on October 29, 2013. Dr. Knight noted that Claimant was still having pain and that Claimant continued to have back pain that radiates down into his tail bone in addition to his lower extremities. She noted upon examination that Claimant was showing some improvement in strength in his lower extremities. She continued his work restrictions of 50 pounds maximum lifting, pushing, or pulling. Dr. Knight noted she would see Claimant back on an as needed basis. *See* Exhibit D.

23. On June 16, 2014 Claimant saw Dr. Knight. Claimant reported he had some intermittent flare ups when he had gone up on his tramadol to six per day, but that generally he took four per day. Dr. Knight noted that Claimant functioned extremely well but had some limitations in range of motion. Dr. Knight provided Claimant a note that under the current dose of tramadol and gabapentin Claimant was not physically or cognitively impaired and would be able to apply for a commercial driver's license. She authored a note stating, "…he can function without any cognitive or physical deficits on both of these medications and has been released to full duty as a commercial driver…" *See* Exhibit 3.

24. On July 21, 2014 Claimant saw Dr. Knight. Claimant continued to report radicular symptomatology down his left lower extremity with buttocks pain and pain over his S1 joint region and facet joint on the left. Dr. Knight performed an epidural injection into his left sciatic notch/SI joint region and indicated that the next step might be a lumbar steroid epidural injection. *See* Exhibit D.

25. On September 30, 2014 Claimant again saw Dr. Knight. Claimant continued to report pain radiating into the left buttocks area and down his left lower extremity including weakness in his lower extremities with pain involving his mid to lower back area. Dr. Knight diagnosed lumbar radiculitis, lumbar degenerative disc, lumbar osteoarthritis, and myositis. *See* Exhibit D.

26. On December 4, 2014 Claimant underwent an MRI of his lumbar spine that was interpreted by Shawn Corey, M.D. Dr. Corey noted that Claimant had minimal bilateral facet joint arthropathy at T11-T12, T12-L1, and L1-2. Additionally Dr. Corey noted a small broad-based disc bulge, endplate osteophytic ridging, and mild facet joint arthropathy cause minimal bilateral neural foraminal narrowing at L2-L3. Dr. Corey also noted at L3-L4 a 2 mm anterolisthesis, an uncovered broad-based disc bulge, endplate osteophytic ridging, and mild to moderate facet joint arthropathy cause mild to moderate bilateral lateral recess stenosis and mild to moderate bilateral neural foraminal narrowing. At L4-L5 Dr. Corey noted a 2.5 mm anterolisthesis, endplate osteophytic ridging, ligamentum flavum thickening, and mild to moderate facet joint arthropathy cause moderate to severe bilateral lateral recess stenosis and moderate bilateral neural foraminal narrowing. He noted at that level a laminectomy defect prevents significant central spinal stenosis and that the bilateral traversing L5 nerve roots were mildly compressed at the lateral recesses. Dr. Corey noted at the L5-S1 level a small to medium sized broad based disc bulge, endplate osteophytic ridging, and mild to moderate facet joint arthropathy cause mild bilateral lateral recess stenosis and mild to moderate bilateral neural foraminal narrowing. He noted a small left lateral recess disc protrusion minimally displacing the traversing left S1 nerve roots. *See* Exhibit 2.

27. On December 11, 2014 Claimant again saw Dr. Knight. Claimant continued to complain of radicular symptomatology left greater than right lower extremity with back pain. Claimant reported the symptoms as moderate to severe. *See* Exhibit 3.

28. On December 18, 2014 Linda Mitchell, M.D. performed an Independent Medical Examination (IME) on behalf of Respondents. Dr. Mitchell noted that Claimant was complaining of low back pain that traveled down the back of the left leg to the knee and occasionally to the right buttock with stiffness and sharp pains in the left buttock. Claimant reported that he was not worse since the surgery, but that he had not gotten better. *See* Exhibit A.

29. Dr. Mitchell opined that Claimant had diffuse multi-level degenerative changes from L2-3 through L5-S1 on the December 4, 2012 MRI that were consistent with progressive degenerative lumbar spine disease and not with a strain type injury sustained 2 ½ years ago. Dr. Mitchell opined that Claimant's current symptoms were of a progressive degenerative nature unrelated to his injury. Dr. Mitchell did not recommend any further medical evaluation or treatment related to the March 10, 2012 injury. *See* Exhibit A.

30. Dr. Mitchell also performed range of motion testing on Claimant at the December 18, 2014 appointment. Claimant's range of motion was considerably better on December 18, 2014 than when Claimant was placed at MMI on October 29, 2013.

31. Dr. Mitchell testified consistent with her IME report and noted that Claimant's condition is not objectively worse at this time based on her physical examination findings, range of motion measurements, and radiographic studies showing degenerative changes unrelated to the work injury. Dr. Mitchell opined that Claimant's symptomatology has been consistent prior to Claimant's surgery, when placed at MMI, and currently and that Claimant had ongoing symptoms both before and after MMI.

32. Dr. Mitchell's IME report and testimony is credible and persuasive.

33. Claimant testified that the pain location had not changed since reaching MMI and admitted that the pain never went away following surgery. Claimant, however, alleges a subjective worsening of pain subsequent to being placed at MMI. Claimant's testimony is not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Reopening and Change of Condition

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

If an industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for

additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

In this case, Claimant has failed to meet his burden to reopen his claim and has not shown that he suffers from a worsened condition. As found above, Claimant continued to have radiculopathy and ongoing symptoms following his surgery and at the time he was placed at MMI. At the time of MMI on October 29, 2014 Dr. Knight awarded Claimant a total whole person impairment rating of 30%, which included 22% for impairment of Claimant's lumbosacral range of motion and 10% for impairment based on Claimant's surgery and continued symptomatology. It is clear from Dr. Knight's award that at the time of MMI Claimant was having continued symptomatology. It is also clear from medical treatment subsequent to MMI that the same symptomatology continued. Following MMI, Dr. Knight next saw Claimant on February 26, 2014 where she noted that he was still having pain and that he continued to have pain radiating down into his tail bone and into his lower extremities.

During the period of time subsequent to MMI where Claimant alleges a worsening of condition, the records show the same symptoms that Claimant had when treating prior to MMI and that he had when placed at MMI. Additionally, Claimant's range of motion improved greatly during the period of time he alleges a worsening. Claimant was not placed on any additional work restrictions during this period of alleged worsening and in fact was given a full duty release to work as a commercial driver during this period of alleged worsening. Dr. Knight also did not retract her opinion of Claimant's MMI date.

Claimant's testimony and the medical reports indicate subjectively that he reported a worsening during this time period. However, Claimant's testimony is not found credible or persuasive. As found above, there were significant discrepancies in the range of motion testing performed when Claimant was being placed at MMI. Even his treating physician, Dr. Knight, noted that she had seen greater ability in the clinic from Claimant than what was reported in the range of motion testing and she sent Claimant back to repeat range of motion testing for his lumbosacral spine. Additionally, while alleging he is suffering a worsening of condition, the range of motion testing performed more recently by Dr. Mitchell shows great improvement from the time Claimant was placed at MMI. Given the discrepancies, and reviewing Claimant's testimony and the evidence as a whole, the ALJ is not convinced that Claimant is credible in explaining his pain, limitations, or his alleged worsening.

Claimant argues that the December 4, 2014 MRI shows unequivocal changes in pathology and shows a worsened condition. Although multiple changes from the April 5, 2012 MRI and the December 4, 2014 MRI are noted, Claimant has failed to show that any changes are due to his admitted work-related injury. Rather, the credible testimony of Dr. Mitchell that the changes shown on December 4, 2014 MRI relate to the natural progression of aging and are degenerative changes is found persuasive. Claimant has not established a causal relationship between his work-related injury and any changes

shown between the two MRIs. Claimant has failed to show that his work-related injury caused or attributed to the degenerative changes shown over the period of two years and eight months between MRIs. Rather, it is just as likely that the changes were related solely to the degenerative process and were not accelerated by or caused by Claimant's work related injury. As found above, Respondents' expert opined credibly that the changes between the MRIs do not relate to Claimant's work-related injury and are merely degenerative changes.

Maintenance Medical Benefits

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, Respondents are challenging the request for medical treatment in the form of an additional MRI and epidural steroid injections recommended by Dr. Knight. Claimant has failed to present substantial evidence to prove that the MRI or epidural steroid injections are reasonable and necessary to maintain Claimant's work-related condition or to relieve his ongoing symptoms. Claimant has failed to present evidence as to the likelihood of success of the requested treatment, and in fact, similar treatment in the past has failed and has not led to any long-term or significant pain relief. Claimant has not shown by a preponderance of the evidence that it is reasonable to be treated again with epidural steroid injections nor has he shown that it is medically necessary to relieve him from the effects of the work injury. In the final admission of liability in this matter filed on January 16, 2014, Respondents admitted for ongoing post-MMI medical benefits as outlined by Dr. Knight's August 12, 2013 report and admitted specifically to: up to four physician visits per year for three years; intermittent medication of gabapentin, anti-inflammatories, and tramadol for three years; and twelve physical therapy visits over a three year period. The medical treatment admitted to in the final admission of liability is not being challenged by Respondents and is ongoing pursuant to

the final admission of liability. However, the Claimant has failed to meet his burden to show the additional and new treatment (MRI, epidural steroid injections) recommended by Dr. Knight is reasonably necessary to relieve the effects of his work-related injury or to prevent deterioration of his work-related condition.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show a worsening of condition. His petition to reopen is denied and dismissed.

2. Claimant has failed to meet his burden to show that the MRI and epidural steroid injections recommended by Dr. Knight are reasonably necessary to relieve the effects of his work-related injury or to prevent deterioration of his work-related condition. His request for this additional medical treatment is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 17, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The following issues were presented for consideration at hearing:

1. Whether Claimant sustained his burden of proof to establish that he is entitled to an order awarding reasonably necessary *Grover* Medical Benefits;

2. Whether Claimant sustained his burden of proof to establish that he is entitled to an order converting Dr. Tracey Stefanon's lower extremity impairment rating to an impairment of the whole person; and

3. Whether an order should be entered apportioning Claimant's impairment rating.

At the hearing, the parties agreed:

1. To hold the issue of disfigurement in abeyance without prejudice; and

2. To litigate the issue of Grover Medical Benefits because it was admitted to by Respondents in their June 30, 2014, Final Admission of Liability.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 55 year-old Sergeant and Detective for Respondent working in the Crimes Against Persons' Unit where he has been employed since January 11, 1999. Prior to his employment with Respondent, Claimant served 22 years in the U.S. Coast Guard. Claimant testified that his position is primarily supervisory in nature with 90 percent of his time spent at his desk.

2. On November 1, 2011, Claimant sustained a work related injury to his left hip while learning ground arrest techniques in a training exercise. The injury was immediately reported and Claimant was referred to Occupational Health Services for medical care. The claim was admitted to by Respondents.

3. Dr. Tracey Stefanon of Occupational Health Services was assigned to serve as Claimant's Authorized Treating Physician (ATP). Claimant was ultimately

diagnosed with a torn labrum of his left hip and underwent a left hip arthroscopy and repair on March 29, 2012, with Dr. Brian White.

4. Following the March 2012 surgical repair, Claimant continued to have pain and dysfunction in his left hip as well as lower back and buttocks. On August 15, 2012, Dr. Tracey Stefanon noted,

> *…He reports that he continues to have numbness in his left lateral thigh that seems to get worse when he does cycling and this has been modified in his physical therapy program…He feels that this is intermittent and seems to get better when the physical therapist works on his lower back…*
>
> *ASSESSMENT:*
>
> 1. *Left hip strain with labral tear now, now 4 – ½ months post-op from surgical intervention including left hip arthroscopy with labral repair – stable.*
> 2. *Radicular symptoms in the left L3, L4 and L5 distribution.*
> 3. *Left SI dysfunction – improved.*

(Claimant's Hearing Exhibit 4, pp 77-78)

5. Claimant continued to receive treatment and care for left hip, left thigh, left buttock and left lower back pain and dysfunction. Dr. Stefanon consistently noted issues in these areas throughout 2012.

6. On October 12, 2012, Dr. Stefanon determined Claimant had reached maximum medical improvement (MMI) assigning a five percent (5%) impairment of the left lower extremity. Dr. Stefanon specifically noted under apportionment that, "[Claimant] has no known prior condition or injury to the left hip which would require apportionment of this current impairment." Respondent filed a Final Admission of Liability (FAL) admitting to Dr. Stefanon's report of MMI and impairment on October 16, 2012

7. Claimant objected to Respondent's October 16, 2012, FAL and requested a Division independent medical examiner (DIME). Dr. Wallace Larson was selected to serve as the DIME physician. Dr. Larson similarly opined that Claimant had reached MMI but indicated that a total left hip replacement surgery would be reasonable, necessary and related should Claimant wish to proceed. Dr. Larson assigned a 25% impairment of the left lower extremity. Respondent admitted to the findings of Dr. Wallace Larson and filed a FAL on April 19, 2013.

8. Claimant's symptoms and pain in his left hip and buttock gradually increased in 2013. Claimant was referred for additional physical therapy in July 2013. At his initial evaluation with Paul Braunlin, P.T., Mr. Braunlin noted the following:

… He injured his left hip during defensive training tactics, subsequently underwent surgical intervention…Bob states he was never 100%, had low grade posterior left gluteal muscle pain with radiation into his left groin and would have setbacks occasionally…I did talk to Dr. Stefanon during today's treatment, who then ordered and wrote a prescription for raised toilet seat and a sock aid or a reacher to help him these functional activities. He has constant left posterior hip pain, which he rates today as a 5 on a 0-10 pain scale. He will have radiation into his left groin and has low back soreness.

(Claimant's Hearing Exhibit 3, pp. 36)

9. Over the next several months, Claimant advised Dr. Stefanon and Mr. Braunlin of buttock, groin and hip pain with pain ranging from to 5-6 on the pain scale.

10. Because of the increased pain and symptoms, Claimant was ultimately referred to Dr. Kirk A. Kindsfater of the Orthopaedic and Spine Center of the Rockies. Dr. Kindsfater noted Claimant continued to suffer from debilitating pain and symptoms associated with his left hip injury and concurred with his prior surgeons that a total left arthroplasty was reasonable.

11. On December 13, 2013, Claimant proceeded with a left total hip arthroplasty with Dr. Kindsfater at Poudre Valley Hospital. On December 13, 2013, Dr. Kindsfater noted that Claimant could no longer perform his activities of daily living without difficulty and that his hip pain and dysfunction was affecting his job.

12. In the months following surgery, Claimant was required to use crutches and then a cane. He continued to have pain in his left hip, groin and buttock with problems completing his activities of daily living and significant pain while moving in his sleep. However, Claimant returned to modified work duty about one month post surgery.

13. Claimant was referred to physical therapy in April 2014. Barbara Walden, P.T. noted at Claimant's Initial Evaluation on April 3, 2014, that, "The patient demonstrates a significant antalgia with trunk compensations bilaterally. He has an increased left iliac crest height in standing. In supine, his left medial malleolus is approximately 1 inch longer than the right." (Claimant's Hearing Exhibit 3, p. 29)

14. Over the course of Claimant's physical therapy treatment in April and May 2014, Ms. Walden noted pain complaints throughout the left hip girdle as well as Claimant's lower back and groin.

15. Claimant's efforts to participate in the course of physical therapy was impeded by lower back, buttock and groin pain and gait changes following his left total hip arthroplasty.

16. On May 15, 2014, two weeks before Claimant was placed at MMI, he advised Dr. Stefanon that his left hip pain was non-existent but that he continued to have soreness elsewhere. Claimant credibly testified that his pain was in his lower back, buttocks and groin.

17. On May 29, 2014, Dr. Stefanon placed Claimant at MMI. Dr. Stefanon determined that Claimant required annual follow-up visits with the orthopedic surgeon as recommended for the arthroplasty. With regards to impairment, her findings were as follows:

CURRENT LEFT HIP:		
Range of motion impairment: Table 41, page 69, flexion of 78 degrees	*4% LEI*	
Table 42, page 70, extension of 10 degrees		*4% LEI*
Table 43, page 70, abduction 33 degrees		*3% LEI*
Table 43, page 70, adduction 24 degrees		*0% LEI*
Table 44, page 70, internal rotation 24 degrees		*4% LEI*
Table 44, page 70, internal rotation 26 degrees		*6% LEI*
LEFT ROM impairment		*21%LEI*
PRIOR LEFT HIP ROM IMPAIRMENT FROM IMPAIRMENT RATING 10/11/12	*3% LEI*	
APPORTIONMENT OF PRIOR RANGE OF MOTION (21% LEI -3% LEI)	*18% LEI*	
TABLE 45 REPLACEMENT HIP ARTHROPLASTY	*20% LEI*	
COMBINED TABLE 45 WITH APPORTIONED ROM	*34% LEI*	
Convert to Whole Person Impairment from Table 46, page 72	*14% WPI*	
There is no permanent psychological impairment due to this injury.		

(Claimant's Hearing Exhibit 4, pp. 40-42)

18. Furthermore, Dr. Stefanon clarified her findings with Respondent on June 25, 2014, that her initial finding of a 37% impairment of the lower extremity was based upon the unapportioned rating. Respondent admitted to the 37% impairment of the left lower extremity. The rating was not eligible for apportionment because the need for hip replacement was not a new injury, but a continuation of the original injury that occurred on November 1, 2011. (Claimant's Hearing Exhibit 2, p. 14)

19. Respondent filed a Final Admission of Liability on June 30, 2014, adopting and admitting to the findings of Dr. Tracey Stefanon. Respondent admitted to the 37% impairment of the left lower extremity, permanent partial disability benefits of $20,055.01 and to a credit for the $13,550.68 paid based upon the impairment rating of Dr. Wallace Larson admitted to in their Final Admission of Liability dated April 19, 2013.

20. At hearing, Claimant's testimony was credible and persuasive. His testimony is consistent with the findings of his medical providers and the medical evidence. Claimant testified that he has constant pain in his lower back and buttocks as a result of his industrial injury and left hip replacement. Claimant further stated that he used to be able to enjoy outdoor activities such as hiking and hunting but that secondary to lower back, left hip, groin and left thigh pain, he has discovered that he can no longer participate in these activities. He also cannot use ladders and scaffolding, he struggles to use stairs or to stand and walk at crime scenes secondary to a severe

increase in lower back, buttock and groin pain. Claimant cannot walk further than a few blocks or his low back pain becomes severe. He testified that his daily morning workouts were shortened because of low back pain and that he can no longer use the stationary bike because it causes a drastic increase in lower back pain.

21. Dr. Stefanon, ATP, credibly testified by deposition. Dr. Stefanon clarified her findings of impairment, concluding that the total computed impairment rating was 37% lower extremity. She testified that the pelvis and hip are not part of the lower extremity. She testified that the pelvis and hip are part of the torso. She testified that, during examinations of Claimant, the pain diagram he completed would note that he had no pain, however, during the course of the exam Claimant would discuss with the doctor parts of his body which were sore, thus contradicting his pain diagram. Dr. Stefanon testified that physical therapy notes reflected that Claimant walked with a limp because his left leg was an inch longer than the right and his iliac crest was higher on the left than on the right. Dr. Stefanon credibly opined that Claimant's left lower extremity injury extends beyond the situs of the injury to the low back and groin areas.

22. The testimony of Dr. Stefanon is credible, persuasive and consistent with the medical records as well as the Claimant's testimony.

23. It is found that the situs of the functional impairment extends past the lower extremity and into the lower back, left buttocks and groin. The record establishes that Claimant's functional and pain issues secondary to his total left hip replacement extend beyond the lower extremity into the trunk, including the lower back, buttocks and groin. It is found that Claimant now has limitations in his ability to walk, work, participate in recreational activities as well as difficulties with activities of daily living due to lower back and groin pain. As such, it is found that Claimant's 37% scheduled impairment should be convert to 15% whole person impairment.

24. The record establishes that Claimant's current and prior impairment ratings all stem from the same injury, which occurred on November 1, 2011, assigned W.C. No. 4-883-279. The record fails to establish that Claimant had any prior injuries to his lower back, groin, buttocks, left lower extremity and left hip which would allow for apportionment. Accordingly, apportionment is inapplicable.

25. Respondent may take a credit for permanent partial disability benefits previously admitted to and paid pursuant to their October 16, 2012, April 19, 2013, and June 30, 2014, Final Admissions of Liability against the 15% impairment of the whole person.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical

benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

3. The Findings of Fact only concern evidence that is dispositive of the issues involved. Not every piece of evidence that would lead to a conflicting conclusion is included. Evidence contrary to the findings was rejected as not persuasive. See Magnetic Engineering, Inc., v. ICAO, 5 P.3d 385(Colo. App. 2000); Boyer v. Wal-Mart Stores, Inc., W. C. No. 4-460-359 [Industrial claim of Appeals Office (ICAO), August 28, 2001].

4. Respondents contend that Claimant's impairment rating should be apportioned based on Dr. Stefanon report that Claimant's prior range of motion measurements provided by Dr. Larsen before the left hip arthroplasty should be deducted from the 37% scheduled impairment to provide an impairment rating of 20%. Claimant contends that his impairment rating should not be apportioned, and, further, that Respondents failed to preserve the issue of apportionment by filing a timely objection to the DIME report. Claimant contends that under Section 8-42-104 (5)(a), C.R.S, Claimant's impairment rating should not be apportioned because apportion under Section 8-42-104 (5)(a), C.R.S is only applicable where there are two distinct injuries to the same body part. Claimant maintains that he never before suffered an injury to his left lower extremity, low back, left buttock and groin and therefore there is no basis upon which to apportion his impairment.

5. Claimant also contends that Respondent was required to affirmatively plead the defense of apportionment and, having failed to do so, the Judge is without authority to consider the issue of apportionment. Respondent contends that it need not affirmatively plead the defense of apportionment because in a case where the DIME physician's impairment rating is challenged the issue of apportionment constitutes an inherent element of a parties' attempt overcome the DIME on the issue of impairment rating. Respondent relies on the ICAP decision in *Hansford v, South Metro Fire Rescue District*, W.C. No. 4-693-447(2007). Claimant argued that the *Hansford, supra*, case is distinguishable from this case in that the respondent in that case seeking to apportion the claimant's impairment rating had filed a timely objection and application for hearing following receipt of the DIME report. Claimant contends that it is under those facts that

the Panel held that apportionment constituted an inherent element of the respondent's attempt to overcome the DIME by clear and convincing evidence. In this case, Claimant contends that Respondent did not file a timely objection and application for hearing, instead Respondent filed a FAL.

6. Section 8-42-107.2(2)(a)(I)(B) and (II)(b), C.R.S. states,

> *For the insurer or self-insured employer, the time for selection of an IME commences with the date on which the disputed finding or determination is mailed or physically delivered to the insurer or self-insured employer*

and

> *If any party disputes of the findings or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request on a form prescribed by the division by rule, and shall propose of entering into negotiations for the selection of an IME. Such notice and proposal is effective upon mailing via United States mail, first-class postage paid, addressed to the division and to the last-known address of each of the other parties. Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division.*

7. In this case, it is concluded that Respondent did not file a timely objection and application for hearing after receiving the DIME report. Nor did Respondent raise the issue of apportionment in its response to Claimant's application for hearing. Instead, Respondent filed a FAL following receipt of the DIME report and filed a response to Claimant's application for hearing that did not raise apportionment as an issue. Since apportionment is an affirmative defense which must be explicitly pled, s*ee Kersting v. Industrial Commission,* 39 Colo. App. 297, 567 P.2d 394 (1977) *Climax Molybdenum Co. v. Walter,* 812 P.2d 1168 (Colo. 1991); *Drywall Products v. Constuble,* 832 P.2d 957 (Colo. App. 1991), Respondent's failure to affirmatively pled apportionment deprives the Judge of jurisdiction to consider the issue.

8. Nonetheless, even if Respondent had the right to raise the apportionment issue, the Judge finds that there is no basis for apportionment of Claimant's impairment rating. Section 8-42-104 (5)(a), C.R.S. states,

> *When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the "*Workers' *Compensation Act of Colorado" or a similar act from another state. The permanent medical impairment rating applicable to the* ***previous injury*** *to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the* ***subsequent injury*** *to the same body part. (emphasis added)*

9. Claimant contends that, under Section 8-42-104(5)(a), there was no credible evidence that Claimant suffered a "previous injury" to the same body parts at issue in the November 1, 2011, claim. As found, the record establishes that the

Claimant's current and prior impairment ratings all stem from the same worker's compensation injury, which occurred on November 1, 2011, assigned W.C. No. 4-883-279. The record fails to establish that the Claimant had any prior injuries to his lower back, groin, buttocks, left lower extremity and left hip, which would allow for apportionment. Accordingly, Respondent's request for an order apportioning Claimant's whole person impairment apportionment is inapplicable.

10. Claimant argues that his impairment rating should be converted from a scheduled rating to a whole person rating because the situs of Claimant's functional impairment extends beyond the left lower extremity to the buttock, groin and low back. Respondent maintains that there is no precedent for the conversion of the left lower extremity scheduled impairment to a whole person impairment rating. Respondent further contends that, even if Claimant's impairment rating was eligible for conversion, Claimant has failed to sustain his burden of proof to establish that the situs of his functional impairment extends beyond the left lower extremity to the torso.

11. The question of whether the Claimant sustained a loss at an extremity within the meaning of Section 8-42-107(2), C.R.S. or a whole person medical impairment compensable under Section 8-42-107 (8)(c), C.R.S. is one of fact for determination by the Judge. In resolving this question the ALJ must determine the situs of the Claimant's functional impairment, and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the Claimant sustained a functional impairment beyond the schedule. *Strauch v. PSL Swedish Healthcare System, supra.* Pain which limits the Claimant's ability to use a portion of the body can be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *Valles v. Arrow Moving and Storage,* W.C. No. 4-265-129 (October 22, 1998); *Brown v. City of Aurora,* W.C. No. 4-452-408 (February 8, 2002); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (June 10, 2004) Where the Claimant suffers an injury not enumerated in Section 8-42-107(2), the Claimant is entitled to whole person impairment benefits under Section 8-42-107(8), C.R.S.

12. As found, the testimony of the Claimant is credible, persuasive and consistent with the record and testimony of Dr. Tracey Stefanon. Claimant sustained his burden of proof to establish that the situs of the functional impairment effects his lower back, buttocks and groin and has severely limited his ability to perform various work, recreational and basic activities of daily living. The situs of Claimant's functional impairment was shown to extend beyond the left lower extremity into the torso. As such, conversion of the impairment from 37% lower extremity to 15% whole person is ordered.

13. As found, Respondent filed a Final Admission of Liability on June 30, 2014, admitting a 37% impairment of the upper extremity and the findings and opinions of Dr. Tracey Stefanon's May 29, 2014, and June 25, 2014, reports of MMI and impairment. Respondent may take a credit for permanent partial disability benefits previously

admitted to and paid pursuant to their October 16, 2012, April 19, 2013, and June 30, 2014, Final Admissions of Liability against the 15% impairment of the whole person.

ORDER

Based upon the preceding findings of fact and conclusions of law the ALJ enters the following order:

1. Claimant established by a preponderance of the evidence that he is entitled to workers' compensation benefits for a 15% whole person impairment rating under Section 8-42-107(8).

2. Respondents are entitled to an offset previously paid permanent partial disability benefits pursuant to their October 16, 2012, April 19, 2013, and June 30, 2014, Final Admissions of Liability against the 15% impairment of the whole person.

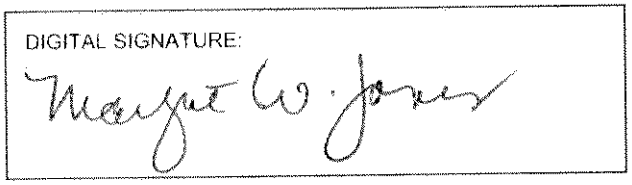
3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: __March 5, 2015_____

DIGITAL SIGNATURE:



Margot W. Jones
Office of Administrative Courts
1525 Sherman St. 4th floor
Denver CO 80203

ISSUES

The issues presented for determination at hearing are:

1. Whether Claimant has proven a Petition to Reopen due to suffering a worsening of condition which was causally related to his April 6, 2012 work injury to his left knee; and

2. Whether the repeat surgery initially proposed by Dr. Rajesh Bazaz is reasonable, necessary, and related to the April 6, 2012 work injury.

Findings of Fact

1. Claimant is a preloader for UPS, which involves loading packages into delivery trucks. On April 6, 2012, Claimant suffered a work-related injury to his left knee while walking backwards and pulling a cart stacked with packages. Claimant felt a "pop" in his knee, which was followed by sudden, severe pain. An MRI taken shortly after the injury revealed a medial meniscal tear and Claimant subsequently underwent meniscal repair surgery with Dr. Joseph Hsin on May 25, 2012. Claimant underwent a course of postoperative physical therapy, reporting 80-90% improvement on the date of his discharge, September 28, 2012.

2. Dr. Rick Artist, the authorized treating physician, placed Claimant at maximum medical improvement (MMI) on November 13, 2012. At the time of MMI, Claimant's only complaint was with difficulty kneeling on his left knee for more than a few minutes. Claimant had no difficulty performing his regular duties at this time. Dr. Artist discharged Claimant to full duty and opined that only Synvisc injections over the next year were appropriate as maintenance care, if necessary. Dr. Artist gave Claimant a 19% lower extremity impairment rating for the left knee. Respondents filed a Final Admission of Liability (FAL) admitting for a 19% scheduled impairment rating of the lower extremity and all reasonable, necessary, and related maintenance medical benefits after MMI on November 26, 2012.

3. On January 15, 2013, Claimant saw Dr. Artist with complaints of increased left knee catching and popping. Claimant reported the symptoms were preventing him from ambulating and Dr. Artist referred Claimant to Dr. Hsin for consideration of Synvisc injections.

4. On February 4, 2013, Claimant returned to Dr. Hsin at the recommendation of Dr. Artist for reevaluation due to complaints of crepitus. Claimant denied any pain. On this date, Dr. Hsin noted that Claimant was relatively asymptomatic and did not recommend further Synvisc injections. Dr. Hsin also stated that Claimant was not a good surgical candidate and opined that most of the current symptoms were related to arthritis. Claimant subsequently did not treat for his left knee for over one year after this visit.

5. At the request of UPS, Claimant went to see Dr. James Rafferty, the new authorized treating physician, due to complaints of worsening knee pain on February 17, 2014. Dr. Rafferty recommended reopening of the claim and referred Claimant to Dr. Hsin for further evaluation. On April 11, 2014, Dr. Hsin found Claimant was having apparent increased symptoms due to chondromalacia in the left knee and suggested additional injection treatments, which were performed during the following weeks. Claimant reported his symptoms were unchanged during a follow-up visit with Dr. Rafferty on April 25, 2014 and was referred to Dr. Rajesh Bazaz, an orthopedic specialist, for surgical evaluation.

6. Dr. Bazaz noted during the June 23, 2014, visit that he did not have medical records related to Claimant's prior surgery and his initial opinion was based upon Claimant's verbal medical history and subjective complaints. In particular, Dr. Bazaz noted that it was difficult to know the amount of arthrosis present at the time of Claimant's surgery with Dr. Hsin in 2012. Dr. Bazaz stated that it was important to know the degree of arthrosis in the knee at this time and stated that arthritis was possibly a more significant factor in the ongoing symptoms than the meniscus. After a repeat MRI study on July 10, 2014, which showed an existing medical meniscal tear with significant patellofemoral chondromalacia and degeneration of the anterior cruciate ligament, Dr. Bazaz recommended arthroscopic surgery on July 21, 2014. On this date, Dr. Bazaz also stated that he did not know the degree of contribution of the meniscal pathology versus the advanced wear to the patellofemoral compartment to Claimant's symptomatology, and expressed concern that the latter may be significantly contributing to the pathology.

7. Claimant underwent an IME with Dr. Eric Ridings on October 16, 2014. Dr. Ridings noted that Claimant weight 343 pounds. Dr. Ridings recorded a history of the injury, as given by Claimant, and indicated in his report that there were inconsistencies between Claimant's account of the progression of his symptoms and the documentation of improvement in the medical records. Specifically, Claimant told Dr. Ridings that he continued to have significantly decreased left knee function from his injury to present, though the medical records reflect that he instead had marked improvement after his surgery and upon reaching MMI. Dr. Ridings noted that Claimant had been working at his own carpet laying business for 20 years, which required kneeling, and for his brother-in-law's construction company for the past five or six years while concurrently working for

UPS. Dr. Ridings opined that, to a reasonable degree of medical probability, Claimant's current complaints of knee pain and the findings on the July 10, 2014 MRI were not related to the April 6, 2012 work injury. Dr. Ridings attributed the current complaints to degenerative arthritis, not the meniscal tear. Dr. Ridings stated that the mechanism of injury, as described by Claimant, could not have caused, aggravated, or accelerated arthritic changes in the left knee. Dr. Ridings instead indicated that it was to be expected that progressive arthritis could be expected in a middle-aged, overweight man, especially given 20 years of carpet installation. While Dr. Ridings disagreed with Dr. Bazaz's opinion that Claimant needed surgery to address complications from the original work injury, he also stated that it appeared this opinion was reasonable in light of what Claimant had conveyed to him verbally and that it was likely that his opinion would change if he were to review the extent of the medical records.

8. Respondents sent a letter to Dr. Bazaz on October 30, 2014, along with additional medical records, to which Dr. Bazaz replied on December 10, 2014. Dr. Bazaz noted that Claimant had repeated complaints of locking of the knee after his May 25, 2012, surgery, in August, September, and November of 2012. Dr. Bazaz indicated that this would relate to arthritis due to the nature and proximity of these symptoms to the surgery. Dr. Bazaz stated that, though the more recent July 10, 2014, MRI showed both meniscal pathology and arthritis, the doctor did not determine which of these two conditions was the cause of Claimant's mechanical symptoms. Bazaz believed that the mechanical difficulties experienced by Claimant were more likely due to arthritis than the meniscal pathology and stated that the previously recommended arthroscopic surgery would not likely be of any significant benefit for this reason. Dr. Bazaz further noted that the additional medical records provided did not evidence any re-injury which would be consistent with a re-tear of the meniscus, resulting in Claimant's current symptoms. The ALJ finds Dr. Bazaz's amended opinion to be credible and persuasive.

9. Claimant testified at hearing that he worked only part time for UPS and had never worked full-time. Claimant testified that he was the owner of a carpet laying business and laid carpet once or twice per month. Claimant also testified that he worked at his brother-in-law's construction business part time. Claimant testified that he was not given any permanent work restrictions upon being placed at MMI on November 13, 2012 and that he continued to work for the carpet business and the construction company, in addition to UPS, after MMI. Claimant testified that in 2014, he requested that UPS modify his job duties to make his job less strenuous. UPS modified Claimant's job duties accordingly.

10. Dr. Ridings also testified at hearing. Dr. Ridings testified that Claimant's significant weight was relevant to his ongoing symptoms, in that such weight would typically cause wear and tear, or arthritis, and loss of cartilage, in the medial compartment of the knee. Dr. Ridings testified that this would result from walking, standing, or any weight bearing activities. Dr. Ridings testified that Dr.

Hsin noted significant arthritis in the knee during Claimant's first surgical repair of the meniscus. Dr. Ridings opined that this must have been preexisting, as arthritis is not a condition which occurs suddenly and could not have been caused by simply walking backwards and experiencing pain. Dr. Ridings testified that the mechanical forces may lead to arthritis, include weight bearing and kneeling. These forces are separate and apart from Claimant's meniscus tear that was promptly repaired. Dr. Ridings testified that there was no existing medical opinion in any of the records which attributed Claimant's current complaints to his meniscal pathology.

11. Dr. Ridings noted that Dr. Hsin opined that Claimant's ongoing complaints were due to degenerative arthritis and should be addressed under Claimant's personal insurance. Dr. Ridings also noted that Dr. Bazaz opined that the current symptoms are due to arthritic changes and that surgery would not be of any benefit to alleviate these symptoms. Dr. Ridings further testified that the history given by Claimant during the IME, in respect to the progression of his symptoms after surgery, was not consistent with the medical records, which indicated 80-90% improvement after surgery and postoperative rehabilitation. Dr. Ridings credibly opined that to a reasonable degree of medical probability the surgery requested by Claimant was not related to the work injury. Dr. Ridings also credibly opined that the current symptomatology was related to arthritis, and not the work injury. The ALJ finds Dr. Ridings' opinion credible and persuasive.

Conclusions of Law

Having entered the foregoing Findings of Fact, the following Conclusions of law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings

concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Claimant petitions to reopen his claim based on a worsening of his condition. An injured worker may seek to reopen his claim at any time within six years from the date of injury or at any time within two years from the date of respondents' last payment of temporary indemnity benefits or the date that the last medical benefits became due and payable. Section 8-43-303(1), (2)(a)-(b), C.R.S. A workers' compensation claimant has the burden of proof in seeking to reopen a claim on the basis of a worsening of condition. *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). For purposes of reopening a workers' compensation claim, a change in condition refers to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury. *Jarosinki v. Industrial Claim Appeals Office of State*, 62 P.3d 1082 (Colo. App. 2002).

4. It is found and concluded that Claimant failed to sustain his burden of proof to establish a worsening of condition casually related to the April 6, 2012, work injury. The ALJ finds Dr. Ridings' opinion regarding both causation of Claimant's current symptomatology and the reasonableness, necessity, and relatedness of the requested surgery credible and persuasive. The ALJ also finds Dr. Bazaz's opinion regarding the need for surgery and the cause of the ongoing symptoms credible and persuasive. The ALJ finds Claimant's testimony regarding the progression of his symptoms during the course of the work injury was less credible than the information contained in Claimant's medical records and the opinions of Drs. Ridings and Bazaz.

5. It is concluded based on the totality of the evidence that Claimant had preexisting, degenerative arthritis, unrelated to the original compensable injury, which was causing the progressive worsening of the symptoms. This opinion is supported by the opinions of Dr. Hsin and, more recently, Dr. Bazaz. Claimant failed to meet his burden of proof to demonstrate that his worsening

6. Dr. Ridings testified credibly and persuasively that the surgery initially requested by Dr. Bazaz, and later rescinded, was not causally related to the work injury. Furthermore, Dr. Bazaz also recanted his original opinion regarding the reasonableness, necessity, and relatedness of the arthroscopic surgery and stated definitively in his December 10, 2014 report that surgery was not likely causally related to the original meniscal pathology, but was also not likely to be of any benefit to Claimant due to degenerative arthritis. No credible or persuasive medical evidence was presented that surgery was related to his compensable injury or was reasonably necessary to relieve his ongoing symptomatology. Accordingly, Claimant has failed to meet his burden

of proof to establish that the requested procedure is reasonable, necessary, and related to his work injury.

Order

The Judge enters the following order:

1.Claimant's Petition to Reopen based on worsening condition is denied and dismissed. Reopening on this basis for additional medical and indemnity benefits is therefore denied.

2. Claimant has failed to prove by a preponderance of the evidence that the requested arthroscopic surgery is reasonable, necessary, and related to the April 6, 2012, work injury. The requested surgical procedure is therefore denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 16, 2015_

DIGITAL SIGNATURE:
Margot W. Jones

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

On Remand, the following issues are considered:

1. Whether Claimant proved by a preponderance of the evidence that his Petition to Reopen based on mistake or worsened condition should be granted;

2. Whether Claimant established by a preponderance of the evidence that he suffered an injury to his left knee and back on May 3, 2012;

3. Whether Claimant sustained his burden of proof to establish that he is entitled to medical benefits;

4. Whether Claimant sustained his burden of proof to establish that he is entitled to indemnity benefits; and

5. What is Claimant's average weekly wage (AWW);

STIPULATION OF FACT

The parties stipulate to the following facts in their August 21, 2013, Stipulation of Finding of Fact:

1. Claimant did not return to work at Respondent Employer after June 12, 2012; and

2. Respondent Employer nevertheless made payments to Claimant from June 13, 2012, through August 15, 2012.

FINDINGS OF FACT

1. On May 3, 2012, Claimant, a 30 year old male, had been employed by Employer for five years in the pest removal/extermination business providing services to its residential customers. Claimant's duties included outside and inside pest extermination activities. These activities required crawling, kneeling and squatting on a daily basis wearing a back pack of chemicals weighing from 45-50 pounds.

2. While at a customer's home on May 3, 2012, Claimant was outside walking on a retaining wall in the backyard when he slipped and fell approximately four and one-half feet onto rocks, striking his left knee with the full weight of his body and back pack absorbed by his knee and back. Claimant felt immediate pain in his left knee and back, attempted to complete his next customer assignment, but was unable to continue performing his work duties because of the pain.

3. Claimant previously sustained a work related injury to his left knee while employed with Employer on April 4, 2011, in claim numbered, WC# 4-853-129. Dr. Greg Smith was the authorized treating physician for this injury. The April 2011 injury involved a significant ACL tear, a tear of the meniscus and arthritic changes.

4. Claimant reported a low back strain resulting from the 2011 injury, however, he never received treatment for his back. Claimant credibly testified that he made this complaint to his physicians of low back pain, however, medical records do not reflect a record of it. Claimant credibly testified that he complained to the insurance adjuster on at least three occasions about a back injury. Claimant's testimony regarding his back pain complaintS was corroborated by the insurance adjuster who testified at hearing that his notes did reflect that Claimant complained of a low back strain. The adjuster testified that he could not recall if Claimant ever received treatment for his back. Claimant credibly testified that during his treatment for the April 2011 claim, when Claimant complained of back pain, his doctor dismissed his concerns promising that his back condition would get better when his knee condition got better.

5. Claimant underwent surgical repair, "a reconstructive surgery" of his left knee on September 19, 2011. Claimant received temporary disability benefits between April 16, 2011, and February 14, 2012. Claimant was given sedentary work restrictions which were accommodated by the Employer. Claimant was placed at maximum medical improvement (MMI) on February 15, 2012. Dr. Smith gave Claimant a 35% lower extremity rating for the left knee and recommended maintenance medical care for a six month period. Claimant was released to return to work with Employer without restrictions on February 15, 2012, by Dr. Smith. Claimant returned to his regular work duties without pain or other problems and continued in that capacity until his fall on May 3, 2012.

6. After Claimant was placed at MMI and his permanent medical impairment rated for the 2011 injury, the Insurer filed a Final Admission of Liability (FAL) dated March 13, 2012, based on Dr. Smith's 35% lower extremity impairment and denying liability for any maintenance medical treatment. That FAL purported to be based on Dr. Smith's report dated February 15, 2012, which provided for maintenance medical reatment. At hearing, Insurer's adjuster testified that the FAL denied Claimant medical maintenance benefits despite its reliance on Dr. Smith's MMI report. Claimant did not object to the FAL with regard to his back injury or Respondents' failure to admit for the maintenance medical care.

7. After the May 3, 2012, work related fall, Claimant received medical treatment from Dr. Smith under the auspices of maintenance treatment for his 2011 work injury. Following the May 2012 injury, Claimant experienced pain at a level of 7-8 on a pain scale of 10, which continued with activity through the date of hearing. When seen by Dr. Smith on May 4, 2012, Claimant's pain was noted on the lateral tibial plateau with observable swelling along the lateral margin of his left knee. Claimant was observed to walk with an antalgic gait and further demonstrated pain while walking on his toes and heels. Dr. Smith released Claimant from his regular employment duties for two days. Upon Claimant's return to Dr. Smith's office where Claimant saw a physician's assistant

on May 7, 2012, Claimant was released to return to work without restrictions. Claimant did return to his regular duties with Employer but when seen on June 12, 2012, Claimant reported that he was having more difficulty performing his full duty job because of pain in his left knee.

8. At the examination on June 12, 2012, Dr. Smith imposed work restrictions. Claimant's work restrictions were confirmed by Dr. Smith on July 11, 2012, when, after review of a functional capacity evaluation (FCE) and Claimant's job description, Dr. Smith imposed permanent work restrictions. Employer was unable to accommodate the work restrictions set on June 12, 2012, and released Claimant from his employment.

9. The parties stipulated that it is at this time, June 12, 2012, Claimant did not return to work. The parties further stipulate that Claimant was nevertheless paid during the period from June 13, 2012, to August 15, 2012.

10. Dr. Smith testified that the medical treatment provided after May 3, 2012, represented maintenance treatment under the April 2011 claim. Dr. Smith testified that Claimant's symptom represented a flare of Claimant's original 2011 injury. Dr. Smith's opinion in this regard was found to be less credible than Claimant's testimony regarding his May 2012 injury. The evidence established that after the April 2011 injury, Claimant returned to full duty with no restrictions on February 15, 2012. The evidence further established that on May 3, 2012, Claimant suffered a new injury to his left knee and low back when, while carrying a 40-50 pound backpack containing extermination chemicals, Claimant fell from a 4 and ½ foot high retaining wall on to his left knee injuring his left knee and low back.

11. Claimant's low back complaints were recorded as reported to Dr. Smith after his May 3, 2012, fall for the first time on August 30, 2012. Dr. Smith urged Claimant to follow up with his primary care provider because Claimant's complaint of a back injury occurring on May 3, 2012, was not considered a part of the claim. Claimant credible testified that he did follow up with a chiropractor for his back complaints after his August 30, 2012, appointment with Dr. Smith. Claimant continued to receive chiropractic manipulation for his back through October 2012.

12. Claimant established by preponderance of the evidence that he suffered a new work related injury to his back and left knee on May 3, 2012. It is found that Claimant's Petition to Reopen in W.C. claim no. 4-853-129-01 is denied because Claimant did not suffer a worsening of the April 2011 work injury.

13. Claimant is entitled to medical benefits to cure and relieve him of the effect of the work related injury to his back and left knee of May 3, 2012.

14. The evidence further established that Claimant was disabled from his usual employment commencing June 12, 2012, and continuing. Based on the parties' stipulation, it is found that during the period from June 13, to August 15, 2012, Claimant did not experience a wage loss because Respondents continued to pay Claimant's wages. Accordingly, it is found that Claimant did not suffer a wage loss and is not

entitled to an award of TTD during the period June 13 to August 15, 2012. Claimant is entitled to TTD benefits commencing August 16, 2012, and continuing.

15. Respondents contend that any award of TTD benefits would end on August 30, 2012, when it is Respondents' position that Dr. Smith placed Claimant at MMI. The ALJ finds no support for the conclusion that Dr. Smith placed Claimant at MMI for the May 3, 2012, work injury involving the back and left knee on August 30, 2012. Dr. Smith provided Claimant maintenance medical treatment for the May 3, 2012, injury as part of the April 2011 claim. Dr. Smith never rendered an opinion regarding whether Claimant was at MMI for a new injury occurring on May 3, 2012, involving Claimant's left knee and back.

16. Claimant's wages were paid based upon a base salary plus commission. Claimant credibly testified that his earnings at Employer fluctuated, increasing in the spring and summer when extermination work increased. Because Claimant was disabled by both the April 2011 and the May 2012 work injuries, the weeks in which he earned wages most accurately reflecting his average earnings was during the period from April 2, 2012, through May 31, 2012. Accordingly, it is found that Claimant's average weekly wage is $1,110.32 based on his earning during the two week pay periods ending April 15, 2012, through May 31, 2012. The pay periods from April 2, 2012, through May 31, 2012, total eight weeks and four days, or 8.6 weeks. Claimant's gross earnings during that period totaled $9,548.77. ($9,548.77 divided by 8.6 weeks = $1,110.32, or Claimant's AWW.)

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. To sustain a finding in Claimant's favor, the Claimant must do more than put the mind of the trier of fact in a state of equilibrium. If the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. *People v. Taylor*, 618 P.2d 1127 (Colo. 1980). *See*

also, Charnes v. Robinson, 772 P.2d 62 (Colo. 1989).

4. Claimant established by a preponderance of the evidence that he suffered a work injury on May 3, 2012, when he fell on his left knee four and one half feet from a retaining wall onto rocks while wearing a 45 to 50 pound backpack containing chemicals resulting in injury to Claimant's left knee and back. Claimant was disabled from his usual employment on June 12, 2012, when his employment was terminated because of Respondents' inability to accommodate Claimant's work restrictions.

5. Claimant contends that he is entitled to an award of TTD. To obtain TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997). A claimant must establish a causal connection between a work-related injury and a subsequent wage loss. Section 8-42-103(1)(a), C.R.S.: *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542, 546, 546 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earnings capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with Section 8-42-105(3)(a)-(d), C.R.S.

6. The parties stipulate that Claimant did not have a wage loss during the period from June 13 through August 15, 2012, because Respondents continued to pay Claimant's wages. Thus, it is concluded that because Claimant did not suffer a wage loss from June 13, to August 15, 2012, he is not entitled to an award of TTD during that period. Claimant established by a preponderance of the evidence that he is entitled to an award of TTD commencing on August 16, 2012, and continuing until terminated by law.

7. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Here, Claimant seeks an award of medical benefits to cure and relieve him of the effects of the industrial injury of May 3, 2012. It is concluded that Claimant presented evidence by a preponderance that he has left knee and back pain caused by the May 3, 2012. Respondents shall be liable for all authorized, reasonably necessary, and related medical treatment to cure and relieve Claimant of the effects of the May 3, 2012, injuries.

8. Section 8-42-102, C.R.S. provides various methods of calculating the AWW at the time of injury. In this case, it is concluded that Claimant's average weekly wage is $1,110.32 based on his earning during the two week pay periods ending April 15, 2012, through May 31, 2012. The pay periods commencing April 2, 2012, through May 31, 2012, total eight weeks and four days, or 8.6 weeks in length. Claimant's gross

earnings during that period totaled $9,548.77. ($9,548.77 divided by 8.6 weeks = $1,110.32, or Claimant's AWW.)

9. Section 8-43-303(1), C.R.S. provides that an award may be reopened on the grounds of a change in condition. The question of whether the claimant has proved that the industrial injury was the cause of the worsened condition is one of fact for determination by the ALJ. *Hennerman v. Blue Mountain Energy*, W.C. No. 4-366-000 (November 8,2001), *citing Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000). In this case, Claimant established by preponderance of the evidence that he suffered a new work related injury to his back and left knee on May 3, 2012. It is concluded that Claimant did not suffer a worsening of the injury occurring in April 2011. Therefore, the Judge concludes that Claimant's Petition to Reopen W.C. claim no. 4-853-129-01 is denied because Claimant did not suffer a worsening of the April 2011 work injury.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen in W.C. claim no. 4-853-129-01 is denied because Claimant did not suffer a worsening of the April 2011 work injury.

2. Respondents shall be liable for TTD benefits from August 16, 2012, and continuing until terminated by law.

3. Claimant is denied TTD benefits during the period from June 12, 2012, through August 15, 2012, because Claimant did not suffer a wage loss.

4. Respondents shall be liable for authorized, reasonably necessary, and related medical treatment for Claimant's left knee and back resulting from the May 3, 2012, work injury.

5. Respondents shall pay workers' compensation benefits based upon an AWW of $1,110.33.

6. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 19, 2015

DIGITAL SIGNATURE:

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-906-018-01

ISSUES

- Whether Respondents proved by a preponderance of the evidence that Claimant's left shoulder condition is not related to her admitted injury?
- Whether the treatment Claimant received for her left shoulder was reasonable and necessary?
- Whether respondents proved by a preponderance of the evidence that Claimant's correct scheduled impairment is 3% of the upper extremity?

STIPULATIONS

- 1. The parties stipulated that Claimant was entitled to the maximum benefit rate based on her AWW.
- 2. Additionally, the parties stipulated that, due to the unique situation of Respondents applying for a hearing rather than submitting a Final Admission, Respondents had the burden of proof at this Hearing.

PROCEDURAL NOTE

At hearing Claimant argued that although Respondents had endorsed the issue of PPD, the issue of impairment was not ripe for hearing because Claimant was not yet entitled to a DIME to determine MMI, and that MMI had to be determined before impairment. Additionally, Claimant argued that the ALJ could not determine an impairment before Claimant went to a DIME on a possible non-scheduled rating, since the shoulder was likely related to the injury and could be converted to whole person, which would affect permanent impairment. The ALJ rejected the arguments and determined that the issues of relatedness and impairment would be heard.

Claimant made a standing objection that any issue or order concerning impairment was premature because Respondents applied for hearing rather than filing a Final Admission based on the ATP's determination of MMI and impairment.

The ALJ is not persuaded. The version of W.C. Rule 5-5 in effect at the time gave Respondents the choice of applying for hearing or filing a final admission based on the ATP's determination of MMI and impairment. The ALJ acknowledges that Respondents' choice to proceed to hearing procedurally precluded Claimant from obtaining a DIME prior to hearing. *See* 8-42-107.2(2)(a)(I)(A) (for the claimant, the time for selection of an IME commences with the date of mailing of a final admission of liability by the insurer . . . that includes an impairment rating issued in accordance with section 8-42-1070). However, under the controlling statute and Rule, the triggering event for Claimant to obtain a DIME has not yet occurred.

Claimant admits that the Rule change did not take effect until January 1, 2015, after the application for hearing was filed, but urged the Court to delay a decision on impairment until after a DIME in accordance with the cases she claims, without citation to authority, led to the formalized rule change.

Claimant argues that applying the then-current version of W.C. Rule 5.5 is particularly onerous because a claimant who has a shoulder injury, such as Claimant alleges here, could have either a scheduled or non-scheduled impairment. Claimant contends that because she was procedurally unable to obtain a DIME, her ability to present evidence which would support conversion or a higher impairment rating is greatly compromised. Claimant contends that to rectify this situation, the ALJ should delay considering the issue of impairment until Claimant obtains a DIME, relying on *Delaney v. ICAO*, 30 P.3d 691 (Colo. App. 2000) and *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO April 26, 2010) which merely cites *Delaney*.

Again, the ALJ is not persuaded. In *Delaney*, a division of the court of appeals decided that where a claimant had undergone a DIME after the respondents had filed a final admission and before the ALJ issued her final order, the ALJ should have considered the DIME as newly discovered evidence. Here, Respondents have not filed a final admission and a DIME has not been performed. The cases are sufficiently dissimilar factually that the ALJ concludes *Delaney* is not applicable.

As of January 1, 2015, Rule 5-5(E)(1)(c) requires that if the respondents choose to dispute the scheduled rating, the respondents are required to provide notice to the claimant so that he or she can move forward to a DIME. The Rule provides

> (E) For those injuries required to be filed with the Division with dates of injury on or after July 1, 1991:
>
> (1) Within 30 days after the date of mailing or delivery of a determination of impairment by an authorized Level II accredited physician, or within 30 days after the date of mailing or delivery of a determination by the authorized treating physician providing primary care that there is no impairment, the insurer shall either:
>
> (a) File an admission of liability consistent with the physician's opinion, or
>
> (b) Request a Division Independent Medical Examination (IME) in accordance with Rule 11-3 and §8-42-107.2, C.R.S.,
>
> (c) In cases involving only a scheduled impairment, an application for hearing or final admission may be filed without a division independent medical examination.
>
> (i) the filing of an application for hearing by the insurer under this provision shall not prevent the claimant from seeking a division independent medical exam on the issues of MMI and/or conversion to whole person impairment. The

> claimant shall have thirty (30) days from the filing of the application for hearing to request an independent medical exam.
>
> (ii) at the time the insurer files an application for hearing under this provision it shall concurrently provide a notification to the claimant that the claimant may request a dime on the issues of MMI and/or conversion to whole person impairment, as well as a copy of the division's notice and proposal form

The ALJ notes that Rule 5-5(E)(1)(c) effective January 1, 2015 applies *only* to a scheduled impairment. Here, Claimant argues for conversion and thus the applicability of the Rule is questionable.

Claimant contends, without citing any authority to support the proposition, that the purpose of Rule 5-5(E)(1)(c) is to protect a claimant in situations like hers where a respondent tries to eliminate a DIME that would add additional credibility to conversion or a higher whole person rating. Importantly, the rule prevents the previous outcome which required the claimant, after pursuing a DIME, to overcome the clear and convincing standard which applies to reopening for error or mistake as outlined in section 8-43-303, CRS.

To the extent that Claimant's restatement of her objections to the ALJ's decision to hear the issue of impairment might be construed as a motion for reconsideration of that ruling at hearing, such motion is denied for the above-stated reasons.

At hearing, Respondents admitted that TTD was due between the time Claimant was laid off and the time she reached MMI, and that they would file an Amended General Admission stating such. Claimant thus withdrew all issues concerning TTD or TPD between May 1 and June 17, 2014, and preserved the issues of AWW and TTD for later dates.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. This is an admitted claim with a date of injury of September 10, 2012. Claimant developed work-related tenosynovitis and DeQuervain's syndrome in her left wrist. Claimant was treated by Dr. John P. Mars and then referred to a surgeon, Dr. Robert Koch, for assessment. On January 18, 2013, Dr. Koch performed left DeQuervains release surgery on Claimant's left wrist and bone spur removal on Claimant's left thumb to treat her injury.

Relatedness and Treatment Reasonable and Necessary

2. Post-surgery, Claimant's authorized treating physician, Dr. John Mars, assigned restrictions on the use of her left hand. She was not allowed to work or to use her left hand from immediately following the January 18, 2013 surgery until March 12, 2014. Claimant's left wrist was initially placed in an Ace wrap and later in a brace. Claimant wore her brace at most times, but could not wear it all

the time because the brace put pressure on her surgical incision which caused additional pain.

3. Claimant is right-handed. She testified that although she was not restricted from doing so, she did not use her left arm while she was off work healing from her surgery. She understood that she was not allowed to use her left hand, and for that reason she did not use her left arm to reach forward or up, because she was not allowed to grab anything. She did not use her left hand to drive or to put on her seatbelt, and she did not cook or clean during this time as her husband performed these tasks. She testified that she choose loose clothing which she was able to put on using only her right hand, and that she did not use her left hand when she had to drive. She did not use her left arm in any manner. Rather, she rested her left arm in the sling/splint or in her lap.

4. On March 12, 2013, Claimant was released back to work on light duty "with no use of L hand." Dr. Mars did not decrease her restrictions until July 3, 2013, at which time Claimant was able to lift no more than one pound with her left hand and type with her left hand for no more than 10 minutes each hour. She was still unable to pinch or grip with her left hand or reach above her shoulder with her left arm. Claimant testified that when she returned to work, she kept her left arm in her lap, except for the minimum amount of time that she used it to type. As she was still not allowed to grip anything or carry more than a pound, she did not use her arm to lift, move her arm above her head, or reach forward to grab anything. Additionally, Claimant stated that she used her brace whenever she performed any activity.

5. After her surgery Claimant started physical therapy for her left hand and wrist. No persuasive evidence indicates that the physical therapist focused on movement of Claimant's left shoulder or elbow at this time.

6. In February and March of 2013, Claimant began feeling achiness in her left arm. That progressed to a feeling of swollenness, then stiffness, and finally her shoulder stopped moving. On March 21, 2013, Claimant reported to her outside chiropractor that she was having pain and stiffness in her left shoulder. She also reported her left shoulder pain to her physical therapist and to Dr. Mars during the same time frame. Dr. Mars' notes state that Claimant had "not been using" her shoulder. On April 27, 2013, Dr. Susskind, Claimant's family practitioner, noted "no use of left hand at work, so now left shoulder pain – about to get shoulder PT via Workers' Comp, saw Workers' Comp yesterday."

7. On June 19, 2014, Dr. Mars diagnosed claimant with adhesive capsulitis in her left shoulder and opined that Claimant's left shoulder condition "is related to her splinting the left arm due to her wrist pain." Dr. Mars noted that Claimant "is no[w] reporting reduced range of motion of the left shoulder as she has not been using it. She had reported some soreness in the shoulder in the past and this seems to have worsened." In his treatment plan, Dr. Mars stated that Claimant "has a frozen shoulder and I want the therapist to start working on this to regain range of motion. She may need to be referred back to the orthopedist for a second opinion." Finally, Dr. Mars stated, "I do feel the frozen shoulder is related

to her splinting the left arm due to her wrist pain. Maximum medical improvement remains unknown at this time as this is quite a setback with the adhesive capsulitis."

8. Dr. Mars referred Claimant to physical therapy for her left shoulder and then back to Dr. Koch for follow-up. Claimant underwent an MRI on her left shoulder which revealed supraspinatus tendonopathy and mild fraying of the superior and posterior labrum. Dr. Koch, after reviewing the MRI, agreed with Dr. Mars that Claimant's shoulder pain, stiffness, and adhesive capsulitis was related to Claimant's wrist surgery.

9. On January 30, 2014, Dr. Allison Fall performed a Respondents' independent medical examination (RIME). Dr. Fall determined Claimant had left shoulder adhesive capsulitis which was related to the immobility of her left arm after the surgery. Dr. Fall specifically stated, "I would relate the left shoulder adhesive capsulitis to the injury as [a] secondary problem which developed after the surgery due to lack of mobility." At hearing, Dr. Fall testified that shoulder stiffness is commonly felt with adhesive capsulitis. She also testified that her determination in her first report was consistent with the relatedness determined by Dr. Mars and Dr. Koch, Claimant's two treating physicians.

10. Dr. Fall later changed her opinion on relatedness when she received Claimant's personal chiropractor, Dr. Kevin Meyer's records. Dr. Fall testified that the chiropractic records showed Claimant had longstanding problems with her shoulders making it more likely that Claimant's adhesive capsulitis was related to those problems than to the wrist surgery and lack of use of her arm.

11. When asked to read particular entries on the chiropractor's chart, Dr. Fall often was unable to do so, answering, for example, "Something, I don't know the next line, then I think I see the word shoulder," ""I can't read what the word is so I can't … so maybe there is 'shoulder', I can't tell," and "I can't read it but for the word shoulder."

12. Those chiropractic records which were legible show one distinct complaint of prior left shoulder *soreness*, on June 29, 2010, as a result of a fall almost three years before Claimant developed adhesive capsulitis. The only other readable mention of the left shoulder prior to Claimant's surgery was a February 7, 2011 note which stated "Left shoulder better." Dr. Fall stated that there was one later note on August 17, 2011, that could be read as either "bilateral" or "right" shoulder. The ALJ determines that the writing is illegible and cannot determine that the left shoulder was included in this note.

13. Despite her admitted inability to read the chiropractic records, Dr. Fall amended her report to state "Based on the records of which I was not aware, there were pre-existing non-work related complaints of shoulder *stiffness*, so I cannot relate current complaints to the surgery at the wrist." Dr. Fall did not explain how Claimant's chiropractic record of left shoulder soreness close to three years prior made it more likely that her adhesive capsulitis was related to Claimant's much earlier fall than to her more recent non-use of her shoulder.

14. Contrary to Dr. Fall's claims in her two reports reversing her opinion on relatedness, the ALJ finds only one discernible mention of shoulder soreness in the chiropractic notes from years prior to the surgery, and finds no mention of left shoulder *stiffness* in the chiropractic records prior to the surgery.

15. To the extent Dr. Fall's initial opinion is consistent with the opinions of the other treating doctors; the ALJ accepts it as more credible and persuasive than her amended reports and testimony, especially as those were based at least in part on records she was unable to read. The ALJ rejects her later, amended opinion on causation as neither credible nor persuasive.

16. Dr. Mars specifically responded to Dr. Fall's report concerning a history of left shoulder stiffness. Dr. Mars wrote, "With some difficulty, I reviewed Kevin Meyer's, DC, handwritten notes. [Claimant] had been treated for neck pain, back pain and right shoulder pain on multiple occasions. The first mention of L shoulder pain is 3/3/13 which is 1½ months after her surgery." He notes on April 8, 2014 "possible adhesive capsulitis, which appears to be a new [diagnosos]. This is near 3 months post op. Therefore my position on this is unchanged and I feel her left shoulder adhesive capsulitis is due to restricted ROM post op."

17. Claimant explained her course of chiropractic care by testifying that she fell in June 2010, causing her upper back, shoulders, and neck to hurt, and so she went to a chiropractor for the first time. After that one treatment, she felt no pain in her left shoulder until a couple of months after her left wrist surgery in 2013, at which time she began feeling pain and stiffness. The ALJ finds that Claimant's testimony as to her left shoulder pain and chiropractic care prior to her left wrist surgery is credible.

18. Claimant's treating physicians, including her surgeon, diagnosed her with adhesive capsulitis as related to the lack of movement of her left shoulder after her left wrist surgery. This is consistent with Claimant's credible testimony that she did not use her left shoulder for months after her surgery because she was restricted from performing any gripping, pinching, or lifting tasks with her left hand and wrist.

19. The ALJ finds and concludes that Dr. Mars' and Dr. Koch's reports, and Dr. Fall's initial report are credible and persuasive on the issue of relatedness of the left shoulder adhesive capsulitis.

20. The ALJ finds that Respondents have failed to establish by a preponderance of the evidence that Claimant's left shoulder condition is not related to her admitted injury.

21. The ALJ finds that Respondents have failed to establish by a preponderance of the evidence that the treatment Claimant received for her left shoulder was unreasonable or unnecessary.

Impairment Rating

22. On June 17, 2014 Dr. Mars placed claimant at MMI and using the AMA Guides To The Evaluation of Permanent Impairment, third edition, revised, (Guides) assigned the following impairment ratings

- 2% upper extremity impairment for lost range of motion of the left thumb
- 5% upper extremity impairment for lost range of motion of the left shoulder
- 12% upper extremity impairment for moderate crepitus of the left shoulder
- 1% upper extremity impairment for decreased sensitivity of the radial nerve distally from the wrist surgical incision
- TOTAL 19% upper extremity impairment using the combined values chart, which converts to an 11% whole person impairment.

23. Claimant offered no further evidence on the issue of impairment, and specifically offered no evidence to support conversion of Claimant's upper extremity rating to a whole person rating.

24. Dr. Fall opined that Claimant's left shoulder range of motion restrictions could not reasonably be associated with Claimant's adhesive capsulitis because there was no previous baseline with which to make a comparison. The ALJ finds nothing in the Guides requiring a comparison to a claimant's previous baseline. Rather, Section 3.1g Shoulder provides a "normal range of motion" which actual measurements are compared against.

25. Dr. Fall also testified that in shoulder cases, the common practice is to take measurements of the contralateral side to use as a baseline to determine actual loss of range of motion. In Dr. Fall's opinion, contralateral measurements would have been very important in light of Claimant's long-standing cervical and thoracic spine issues which would have affected both shoulders, thus providing an accurate view of Claimant's actual baseline range of motion. The ALJ finds nothing in the Guides requiring a rating physician to conform to a subjective "common practice" in measuring range of motion.

26. Dr. Fall also testified that Dr. Mars' rating for crepitus was improper in this case, as no such diagnosis was made. The medical records contradict Dr. Fall's testimony. Dr. Mars noted in his June 17, 2014 examination of Claimant, "She has moderate crepitus of the left shoulder." In addition, Dr. Koch noted "clunking" in her shoulder in his August 28, 2013 report and noted Claimant "did have crepitus on range of motion" in his August 3, 2013 report. The ALJ finds it more likely than not that Claimant was diagnosed with crepitus and thus an impairment rating for crepitus was warranted.

27. Claimant testified that she does not feel her shoulder or wrist is 100%.

28. The ALJ finds Dr. Fall's criticisms of Claimant's impairment rating unpersuasive for the reasons stated in this section.

29. The ALJ finds that Respondents have not met their burden to establish by a preponderance of the evidence that Claimant's correct scheduled impairment is 3% of the upper extremity.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado is to insure the quick and efficient delivery of disability and medical benefits to injured litigation. § 8-40-102(1), C.R.S.

It is the ALJ's sole prerogative to assess the credibility of witnesses and the probative value of the evidence to determine whether a party has met its burden of proof.

A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The requirements of proof for civil non-jury cases in the district courts apply in workers' compensation hearings. § 8-43-210, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App 2000).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). It is the ALJ's prerogative to weigh the evidence, and that the ALJ might have reached a contrary conclusion is immaterial on review. *Mountain Meadows Nursing Center v. Indus. Claim Appeals Office*, 990 P.2d 1090 (Colo. App. 1999). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

An employer is responsible for the direct and natural consequences which flow from a compensable injury. *Vanadium Corp. Of America,* 307 P.2d 454 (Colo. 1957); *Hembry v. ICAO,* 878 P.2d 114, 115 (Colo. App. 1995). Whether a causal connection exists between the work-related injury and subsequent injury is a question of fact. *Baca v. Helm,* 682 P.2d 474 (Colo.1984); *Hembry v. Indus. Claim Appeals Office of State of Colo.*, 878 P.2d 114, 115 (Colo. App. 1994).

There is no dispute that the injury to Claimant's wrist was compensable and that the surgery performed on the wrist was reasonable and related. Whether Claimant's adhesive capsulitis was a direct and natural consequence of the wrist surgery is the issue. Both of Claimant's treating physicians, including the surgeon who performed the wrist surgery, contend that the adhesive capsulitis is compensable because the healing process after surgery required Claimant to refrain from using her left hand and wrist, which resulted in a lack of motion of her left shoulder giving rise to the frozen shoulder.

Claimant credibly testified that she complied with her restrictions for no use or limited use of the left hand during the healing process after the surgery of her left wrist. This is consistent with the treating doctors' conclusions that her frozen shoulder stemmed from the wrist surgery.

As found above, Claimant had only one incident of shoulder soreness prior to her frozen shoulder, which occurred more than two and one-half years before her left wrist surgery. At that time, she did not feel any shoulder stiffness, which is commonly felt with adhesive capsulitis. The ALJ finds and concludes that the adhesive capsulitis that Claimant experienced in her left shoulder was the result of lack of movement of the shoulder following her left wrist shoulder, and not due to some pre-existing condition.

As to impairment the ALJ finds and concludes that the upper extremity impairment rating given by Dr. Mars is appropriate given the evidence presented at hearing.

ORDER

IT IS THEREFORE, ORDERED THAT:

1. Claimant's left shoulder adhesive capsulitis is related to the original workers' compensation injury.

2. The medical care and treatment Claimant received for her left shoulder injury is reasonable and necessary.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Respondents must file a final admission within 20 days of this Order.

5. Issues not expressly decided herein are reserved to the parties for future determination.

6. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 18th day of March, 2015.

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that a spinal cord stimulator trial as recommended by Bryan G. Wernick, M.D. is reasonable, necessary and causally related to her May 17, 2012 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Phlebotomist. On May 17, 2012 Claimant suffered an admitted industrial injury to her right knee during the course and scope of her employment with Employer. When she bent over to pick up blood culture bottles her right knee popped.

2. Claimant initially received conservative medical treatment for her right knee condition. While undergoing treatment for her right knee Claimant's left knee buckled and caused her to fall down stairs at home. She suffered a broken left kneecap as a result of the fall.

3. On January 13, 2013 Claimant underwent surgical repair of her right knee with Michael Wertz, M.D. On June 20, 2013 Claimant underwent surgery to repair her left knee.

4. On July 1, 2013 Claimant visited Dr. Wertz for an evaluation. He noted that Claimant had well-healed surgical incisions and normal sensation, but was "perhaps a little hypersensitive around the bruises." Dr. Wertz referred Claimant to physical therapy and directed her for follow-up in three to four weeks.

5. On July 3, 2013 Claimant visited Authorized Treating Physician (ATP) James Fox, M.D. for an examination. Dr. Fox remarked that Dr. Wertz did not find anything significant. However, Claimant requested a second opinion because she had pain in both knees.

6. On July 10, 2013 Claimant visited Bryan G. Wernick, M.D. for an examination. Dr. Wernick determined that Claimant was suffering post-operative pain and possible Complex Regional Pain Syndrome (CRPS).

7. Dr. Fox referred Claimant for a second orthopedic opinion with Joseph Hsin, M.D. of Cornerstone Orthopedics. On July 16, 2013 Claimant visited Dr. Hsin for an orthopedic evaluation. Although Dr. Hsin noted bruising and swelling in Claimant's left leg he stated that the complications were not uncommon. Dr. Hsin released Claimant for physical therapy and a follow-up visit with Dr. Wertz.

8. Claimant continued to receive conservative treatment from Dr. Wernick. By October 16, 2013 Dr. Wernick determined that Claimant had symptoms consistent with CRPS. Claimant subsequently underwent x-rays, a synvisc injection and a sympathetic nerve block. Diagnostic testing in the form of x-rays and MRI's yielded normal results. Additional conservative measures did not improve Claimant's pain symptoms.

9. Because conservative measures had failed Dr. Wernick recommended a spinal cord stimulator trial. He stated that there were "no further indicated treatment options to pursue otherwise."

10. Dr. Wernick referred Claimant to John Mark Disorbio, Ed.D. for a psychological examination. On June 16, 2014 Claimant underwent an evaluation and testing with Dr. Disorbio. He concluded that there were no "significant characterological or other major issues that would impede her from being able to move forward with a stimulator trial and potential implant."

11. On July 21, 2014 Dr. Wernick requested authorization for a spinal cord stimulator trial for Claimant. He testified that Claimant exhibited a number of symptoms consistent with CRPS. Dr. Wernick specifically noted that Claimant suffered from disproportionate pain, tenderness, swelling and decreased range of motion in her left knee. He explained that a spinal cord stimulator trial should be conducted after conservative measures fail. If the trial was a success, Claimant would be a candidate for the implantation of a spinal cord stimulator.

12. On August 11, 2014 Floyd O. Ring performed a records review of Claimant's case to assess whether she was a candidate for a spinal cord stimulator trial. Dr. Ring remarked that the medical records yielded a lack of objective evidence to support Claimant's diagnosis of CRPS. Although the records revealed scattered reports of discoloration, there was a lack of evidence of trophic changes and allodynia. Moreover, the records lacked any evidence of distinctive hair, skin or nail changes throughout the 21 months of records that Dr. Ring reviewed.

13. Dr. Ring's August 11, 2014 report detailed a lack of objective diagnostic testing as required under the State of Colorado Workers' Compensation Medical Treatment Guidelines (Guidelines) Rule 17, Ex. 7 to support a diagnosis of CRPS. In accordance with the Guidelines, Dr. Ring recommended Claimant undergo a 3-phase bone scan that would be followed by repeat lumbar injections, thermographic evaluation, or QSART testing if positive. In the absence of objective testing in accordance with the Guidelines Dr. Ring determined that Claimant's diagnosis of CRPS was premature and the recommendation for a spinal cord stimulator trial was not reasonable or necessary. Accordingly, Insurer denied authorization for a spinal cord stimulator trial.

14. On August 28, 2014 Dr. Ring performed an independent medical examination of Claimant. He completed a physical examination that was consisted with

his medical records review. He reiterated that Claimant did not have CRPS pursuant to the Guidelines because the requisite diagnostic testing had not been performed.

15. On September 4, 2014 Dr. Wernick issued a report in response to Dr. Ring's independent medical examination. He concluded that Claimant "has been diagnosed with CRPS type 1 by IASP criteria (and also qualifying for IASP Budapest criteria)." Dr. Wernick explained that the CRPS diagnosis was supported by the following findings: (1) continued pain disproportionate to any inciting event; (2) Claimant's reports of hyperesthesia, allodynia, skin temperature changes, skin color changes and swelling; (3) evidence of allodynia, swelling and skin color changes on previous exams; and (4) and there was no better explanation for Claimant's continuing pain symptoms. Dr. Wernick also addressed Dr. Ring's concerns about a single sympathetic nerve block for Claimant. He commented that sympathetic nerve blocks are not diagnostic for CRPS but may show sympathetically mediated pain. Moreover, Dr. Wernick remarked that a three phase bone scan was not diagnostic for CRPS and the results would not change Claimant's diagnosis. He summarized that "QSART testing, quantitative sensory testing, thermography and a variety of other tests are also non-specific and unproven based on current medical literature." Dr. Wernick maintained that a spinal cord stimulator trial would "typically be considered when a patient has reached this point" but the modality is non-specific for CRPS and there is mixed literature to support spinal cord stimulation. Nevertheless, he determined that a spinal cord stimulator trial "would be reasonable at this point."

16. On October 10, 2014 Dr. Fox drafted a letter in response to Dr. Ring's independent medical examination report. Dr. Fox stated that he referred Claimant to Dr. Wernick due to "symptoms in the left lower extremity of bruising, skin mottling, swelling, and significant pain ever since her June 20, 2014 office visit." He noted, "it was the symptoms that led me to refer the patient to Dr. Wernick for further evaluation." In a separate note dated October 10, 2014 Dr. Fox stated that he had reviewed the independent medical examination performed by Dr. Ring and Dr. Wernick's response. He summarized "I am in agreement with Dr. Wernick's assessment and statement on the IME."

17. Claimant testified at the hearing in this matter. She explained that, while awaiting her right knee surgery, her knee locked at home, she fell down stairs and broke her left knee cap. On June 20, 2013 Claimant underwent left knee surgery. After the procedure Claimant experienced significant pain, swelling and discoloration in her left leg for months. She subsequently received conservative medical treatment in the form of physical therapy, medications, water therapy, injections and a home exercise program. However, conservative measures failed to relieve her pain symptoms. Claimant emphasized that she does not want to increase her drug intake as a way to alleviate her symptoms. She maintained that she would like to undertake a spinal cord stimulator trial in an attempt to decrease her pain levels.

18. Dr. Wernick testified at the hearing in this matter. He explained that Claimant has undergone significant conservative treatment for her CRPS. However, because conservative measures have been unsuccessful, a spinal cord stimulator trial

is warranted. Dr. Wernick explained that Claimant suffers from CRPS based on the Budapest Diagnostic Criteria and a clinical examination. He maintained that there is no objective diagnostic test for CRPS, but the Budapest Criteria provide that CRPS is characterized by the following: (1) continuing pain disproportionate to the inciting event; (2) sensory changes such as hyperalgesia or allodynia; (3) vasomotor changes involving skin color and temperature; (4) sudomotor changes involving swelling or sweating; (5) motortrophic changes including weakness and tremors; and (6) trophic changes of the hair, nails or skin. Dr. Wernick commented that clinical symptoms include: (1) disproportionate pain; (2) irritating sensations; (3) temperature and skin color changes; (4) sweating; (5) decreased range of motion and (6) weakness.

19. Dr. Wernick noted that Claimant exhibited disproportionate pain, non-dermatomal pain, tenderness, swelling and decreased range of motion. Claimant also had undergone significant conservative measures including medications, lumbar sympathetic nerve blocks and physical therapy but the treatment did not improve Her condition. Dr. Wernick also remarked that Claimant had undergone a psychological evaluation with Dr. Disorbio. The evaluation cleared Claimant as a candidate for a spinal cord stimulator trial. Dr. Wernick stated that, because Claimant has exhausted conservative treatment without improvement and has been psychologically evaluated, he sought authorization for a spinal cord stimulator trial. He noted that, absent the authorization for a spinal cord stimulator trial, Claimant's treatment is in a holding pattern.

20. Dr. Ring testified at the hearing in this matter consistent with his records review and independent medical evaluation. He emphasized that Claimant has not undergone testing as required under Rule 17, Ex. 7 of the Guidelines to support a diagnosis of CRPS. In fact, Claimant underwent a bone scan that was negative for CRPS. Dr. Ring explained that Claimant suffers from subjective pain but lacks the objective criteria to warrant a diagnosis of CRPS. He thus maintained that a CRPS diagnosis was premature.

21. Dr. Ring stated that Claimant had not exhausted diagnostic modalities. Initially, Claimant's pain reports could simply be consistent with a nerve injury that occurred during surgery. Furthermore, a sympathetic nerve block showed some benefit but was not repeated. Dr. Ring commented that further injections could be performed in accordance with the Guidelines. Moreover, Claimant had received additional conservative treatment in the form of a topical treatment and a Lyrica prescription after the request for a spinal cord stimulator trial. Dr. Ring also noted that Claimant had not undergone sufficient psychological treatment, including biofeedback, which could provide pain relief through the development of coping mechanisms. He summarized that, even if Claimant has CRPS, a spinal cord stimulator is a last resort after all treatment modalities have been explored. Claimant's authorization request for a spinal cord stimulator trial should be denied because she has not received all available conservative treatment modalities.

22. Claimant has demonstrated that it is more probably true than not that a spinal cord stimulator trial as recommended by Dr. Wernick is reasonable, necessary

and causally related to her May 17, 2012 industrial injury. Claimant credibly explained that on June 20, 2013 she underwent left knee surgery. After the procedure Claimant experienced significant pain, swelling and discoloration in her left leg for months. She subsequently received conservative medical treatment in the form of physical therapy, medications, water therapy, injections and a home exercise program. However, conservative measures failed to relieve her pain symptoms. She maintained that she would like to undertake a spinal cord stimulator trial in an attempt to decrease her pain levels. Dr. Wernick agreed that Claimant has undergone significant conservative treatment for her CRPS. However, because conservative measures have been unsuccessful, a spinal cord stimulator trial is warranted.

23. Dr. Wernick detailed that Claimant suffers from CRPS as a result of her May 17, 2012 industrial injury. He explained that Claimant had a CRPS diagnosis based on the Budapest Diagnostic Criteria and a clinical examination. Dr. Wernick maintained that there is no objective diagnostic test for CRPS, but the Budapest Criteria provide that CRPS is characterized by the following: (1) continuing pain disproportionate to the inciting event; (2) sensory changes such as hyperalgesia or allodynia; (3) vasomotor changes involving skin color and temperature; (4) sudomotor changes involving swelling or sweating; (5) motortrophic changes including weakness and tremors; and (6) trophic changes of the hair, nails or skin. He commented that clinical symptoms include: (1) disproportionate pain; (2) irritating sensations; (3) temperature and skin color changes; (4) sweating; (5) decreased range of motion and (6) weakness. Dr. Wernick explained that Claimant's CRPS diagnosis was supported by the following findings: (1) continued pain disproportionate to any inciting event; (2) reports of hyperesthesia, allodynia, skin temperature changes, skin color changes and swelling; (3) evidence of allodynia, swelling and skin color changes on previous exams; and (4) there was no better explanation for Claimant's continuing pain symptoms. Dr. Wernick also remarked that Claimant has undergone a psychological evaluation with Dr. Disorbio. The evaluation cleared Claimant as a candidate for a spinal cord stimulator trial. Dr. Wernick summarized that, because Claimant has exhausted conservative treatment without improvement and has been psychologically evaluated, he sought authorization for a spinal cord stimulator trial.

24. In contrast, Dr. Ring emphasized that Claimant has not undergone testing as required under Rule 17, Ex. 7 of the Guidelines to support a diagnosis of CRPS. Dr. Ring explained that Claimant suffers from subjective pain but lacks the objective criteria to warrant a diagnosis of CRPS. He thus maintained that a CRPS diagnosis was premature. Dr. Ring also stated that Claimant has not exhausted conservative treatment or diagnostic modalities. He summarized that, even if Claimant has CRPS, a spinal cord stimulator is a last resort after all treatment modalities have been explored. However, Dr. Wernick persuasively addressed Dr. Ring's concerns. He commented that sympathetic nerve blocks are not diagnostic for CRPS but may show sympathetically mediated pain. Moreover, a three phase bone scan is not diagnostic for CRPS and the results would not change Claimant's diagnosis. He summarized that "QSART testing, quantitative sensory testing, thermography and a variety of other tests are also non-specific and unproven based on current medical literature." Finally, ATP Dr. Fox stated that he had reviewed the independent medical examination performed by

Dr. Ring and Dr. Wernick's response. He summarized "I am in agreement with Dr. Wernick's assessment and statement on the IME." Based on the persuasive medical evidence from Drs. Wernick and Fox, as well as the failure of numerous conservative measures to alleviate Claimant's pain, Dr. Wernick's request for a spinal cord stimulator trial is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that a spinal cord stimulator trial as recommended by Dr. Wernick is reasonable, necessary and causally related to her May 17, 2012 industrial injury. Claimant credibly

explained that on June 20, 2013 she underwent left knee surgery. After the procedure Claimant experienced significant pain, swelling and discoloration in her left leg for months. She subsequently received conservative medical treatment in the form of physical therapy, medications, water therapy, injections and a home exercise program. However, conservative measures failed to relieve her pain symptoms. She maintained that she would like to undertake a spinal cord stimulator trial in an attempt to decrease her pain levels. Dr. Wernick agreed that Claimant has undergone significant conservative treatment for her CRPS. However, because conservative measures have been unsuccessful, a spinal cord stimulator trial is warranted.

6. As found, Dr. Wernick detailed that Claimant suffers from CRPS as a result of her May 17, 2012 industrial injury. He explained that Claimant had a CRPS diagnosis based on the Budapest Diagnostic Criteria and a clinical examination. Dr. Wernick maintained that there is no objective diagnostic test for CRPS, but the Budapest Criteria provide that CRPS is characterized by the following: (1) continuing pain disproportionate to the inciting event; (2) sensory changes such as hyperalgesia or allodynia; (3) vasomotor changes involving skin color and temperature; (4) sudomotor changes involving swelling or sweating; (5) motortrophic changes including weakness and tremors; and (6) trophic changes of the hair, nails or skin. He commented that clinical symptoms include: (1) disproportionate pain; (2) irritating sensations; (3) temperature and skin color changes; (4) sweating; (5) decreased range of motion and (6) weakness. Dr. Wernick explained that Claimant's CRPS diagnosis was supported by the following findings: (1) continued pain disproportionate to any inciting event; (2) reports of hyperesthesia, allodynia, skin temperature changes, skin color changes and swelling; (3) evidence of allodynia, swelling and skin color changes on previous exams; and (4) there was no better explanation for Claimant's continuing pain symptoms. Dr. Wernick also remarked that Claimant has undergone a psychological evaluation with Dr. Disorbio. The evaluation cleared Claimant as a candidate for a spinal cord stimulator trial. Dr. Wernick summarized that, because Claimant has exhausted conservative treatment without improvement and has been psychologically evaluated, he sought authorization for a spinal cord stimulator trial.

7. As found, in contrast, Dr. Ring emphasized that Claimant has not undergone testing as required under Rule 17, Ex. 7 of the Guidelines to support a diagnosis of CRPS. Dr. Ring explained that Claimant suffers from subjective pain but lacks the objective criteria to warrant a diagnosis of CRPS. He thus maintained that a CRPS diagnosis was premature. Dr. Ring also stated that Claimant has not exhausted conservative treatment or diagnostic modalities. He summarized that, even if Claimant has CRPS, a spinal cord stimulator is a last resort after all treatment modalities have been explored. However, Dr. Wernick persuasively addressed Dr. Ring's concerns. He commented that sympathetic nerve blocks are not diagnostic for CRPS but may show sympathetically mediated pain. Moreover, a three phase bone scan is not diagnostic for CRPS and the results would not change Claimant's diagnosis. He summarized that "QSART testing, quantitative sensory testing, thermography and a variety of other tests are also non-specific and unproven based on current medical literature." Finally, ATP Dr. Fox stated that he had reviewed the independent medical examination performed by Dr. Ring and Dr. Wernick's response. He summarized "I am in agreement with Dr.

Wernick's assessment and statement on the IME." Based on the persuasive medical evidence from Drs. Wernick and Fox, as well as the failure of numerous conservative measures to alleviate Claimant's pain, Dr. Wernick's request for a spinal cord stimulator trial is granted.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for a spinal cord stimulator trial is granted.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issue presented for determination is whether the Claimant is entitled to a permanent partial disability ("PPD") award and the appropriate amount of the award, if any. The Claimant asserts that the permanent impairment rating assigned by authorized treating physician ("ATP") Dr. Katherine Bird is most appropriate whereas the Respondents assert that the impairment rating provided by the Division Independent Medical Examination ("DIME") physician is most appropriate. Neither party is challenging whether or not Claimant reached maximum medical improvement ("MMI"), and neither party, particularly the Claimant, has alleged that he is entitled to a whole person impairment rating.

Because MMI is not in dispute and because the Claimant's alleged PPD is limited to the schedule of disabilities found in §8-42-107(2), C.R.S., the ALJ confirmed with the parties that the Claimant has the burden of proof, by a preponderance of the evidence, to prove entitlement to a PPD award and the appropriate amount or impairment percentage. Despite the parties' agreement concerning the applicable burden of proof, the position statements submitted by both parties state that Claimant bears the burden of proof by clear and convincing evidence. For the reasons set forth below in the conclusions of law, the DIME opinions are not binding and Claimant must merely prove, by a preponderance of the evidence, that he is entitled to an award of PPD, and in what amount.

FINDINGS OF FACT

1. Claimant worked for the Employer as an auto mechanic. On May 17, 2013, the Claimant suffered an industrial injury to his left knee when Claimant was struck by a vehicle and pinned his left foot.

2. Claimant ultimately had left knee surgery on September 3, 2013. Dr. Failinger performed a meniscectomy and chondroplasties at the patella, medial femoral condyle, lateral tibial plateau and removal of loose bodies.

3. Following surgery Claimant had extensive physical therapy followed by pool therapy and a series of various types of injections into Claimant's left knee.

4. Three months post-surgery, Dr. Failinger noted that Claimant had almost full extension in his left knee and 130 degrees flexion.

5. A physical therapy note dated January 20, 2014 reflects Claimant's left knee range of motion was 0 to 120 degrees with pain.

6. On February 11, 2014, Dr. Bird noted passive range of motion in the left knee of 5 to 130 degrees, and active range of motion at 10 to 90 degrees.

7. On February 27, 2014, Dr. Alfred Lotman performed an independent medical examination at Respondents' request. Dr. Lotman examined the Claimant, reviewed medical records, and authored a report. On exam, Dr. Lotman noted that Claimant was only able to flex his left knee to 70 degrees and will not allow further pressure on his knee. Dr. Lotman noted that Claimant "tends to hold his knee in a 20 to 30 degree flexed posture, but can gently be taken up to -10 degrees." Dr. Lotman measured Claimant's thighs and calves to determine if Claimant had atrophy in the muscles on his left side, but Dr. Lotman did not detect any differences. Dr. Lotman observed Claimant walking with a mild left sided limp.

8. Dr. Lotman also reviewed surveillance video taken of an individual purported to be the Claimant. Dr. Lotman observed that the person in the surveillance video did not walk with an abnormal gait and did not demonstrate pain behaviors. The observations in the surveillance video influenced Dr. Lotman's diagnosis and prognosis. He concluded that Claimant's physical examination showed rather marked symptom magnification which was reinforced by the video surveillance.

9. Dr. Lotman opined that Claimant needed no additional medical treatment, and had reached maximum medical improvement with no permanent restrictions. Dr. Lotman concluded his report by stating that Claimant's verbal reports of function and restrictions were inconsistent with the Claimant's behaviors observed in the surveillance video.

10. There was no evidence presented that the individual in the video surveillance was the Claimant and the video was not offered into evidence.

11. Claimant returned to ATP Dr. Kathryn Bird on March 11, 2014. She determined that Claimant had reached maximum medical improvement ("MMI"). She also assigned permanent restrictions that included no climbing stairs or ladders, and no kneeling or squatting.

12. For permanent impairment, Dr. Bird found that Claimant sustained 40% impairment to the left lower extremity. She noted active flexion to 100 degrees and extension to a 30 degree lag. Dr. Bird noted that under Table 39 of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) ("Guides"), the loss of extension amounted to 17% permanent impairment and the loss of flexion amounted to 18% permanent impairment. Dr. Bird also assigned 8% impairment under Table 40 for the meniscectomy and chondroplasty. She determined that the combination of the ratings total 40% impairment of the left lower extremity.

13. Dr. Bird did not specifically describe what instrumentation she used to measure the Claimant's range of motion.

14. Rather than filing a final admission of liability admitting for the PPD based on the permanent impairment rating assigned by Dr. Bird, or setting the matter for

hearing, pursuant to WCRP 5-5(H) (effective January 1, 2014), the Respondents applied for a DIME.

15. Dr. Kevin Nagamani performed the DIME on June 11, 2014. He concurred with Dr. Bird's MMI determination. Dr. Nagamani also concurred with the permanent restrictions Dr. Bird assigned.

16. Dr. Nagamani also noted that Claimant's quadriceps girth on the right was two centimeters larger than on the left. Dr. Lotman measured no difference between Claimant's right and left quadriceps.

17. Dr. Nagamani measured Claimant's range of motion in his bilateral knees, and found that it ranged from 0 to 140 degrees on the right compared to a -2 to 112 degree range on the left. Dr. Nagamani documented that Claimant's effort on range of motion testing was poor and that Claimant guarded quite a bit.

18. He determined that Claimant sustained 18% permanent impairment in his left lower extremity. He assigned 11% for abnormal motion in flexion, a Table 40 impairment of 5% for the partial meniscectomy and 3% for chondromalacia.

19. Dr. Nagamani did not specifically describe what instrumentation he used to measure Claimant's range of motion.

20. Dr. Lotman testified by deposition. He disagreed with Dr. Bird's impairment rating for a number of reasons none of which were particularly persuasive. His issue with Dr. Bird's failure to document the instrumentation defies logic given that Dr. Nagamani did not document which instrument he used either. Further, Dr. Lotman placed far too much emphasis on a surveillance video which was not offered into evidence making his reliance on it unhelpful to this ALJ.

21. Dr. Lotman also took issue with Dr. Bird using only active range of motion measurements; however, the Division of Workers' Compensation Impairment Rating Tips ("Rating Tips") specifically indicate that only active range of motion measurements may be used but passive range of motion may be measured to assess validity of the active range of motion measurements. Further, Dr. Nagamani also did not specifically document whether he merely used active range of motion measurements or if he also measured passive range of motion in Claimant's left knee.

22. Claimant's documented left knee range of motion has varied significantly, but in some of the medical records, it is difficult to ascertain whether the measurements were taken using a goniometer, and whether they were active or passive. However, it is apparent from the medical records that the 30 degree lag in Claimant's extension measured by Dr. Bird is inaccurate. 30 degrees represents the worst range of motion Claimant has ever demonstrated during his visits with medical providers. During most of his post-operative medical appointments, Claimant's extension was almost full or closer to the -2 degrees measured by Dr. Nagamani. Dr. Nagamani did not document a loss of extension because -2 degrees represents hyperextension which is past full

extension. Consequently, the ALJ finds that Claimant has not lost the ability to fully extend his knee, and no impairment may be assessed for loss of extension.

23. Given that Claimant's flexion measurements have varied so greatly, the ALJ adopts Dr. Nagamani's measurements as most accurate. Given that he is the DIME examiner, it is presumed that his opinions are the most neutral. In addition, several medical providers have documented that Claimant has given poor effort during range of motion testing thus making it difficult to determine Claimant's true loss.

24. Table 39 of the Guides provides that if retained active flexion of 110 degrees is found, the impairment is 14% of the lower extremity. If the retained active flexion is 120 degrees, the impairment is 11% of the lower extremity. In this case, Dr. Nagamani measured Claimant's flexion at 112 degrees and chose to round up to the 120 degree impairment of 11% rather than the 14%. Dr. Nagamani provided little explanation for this decision other than noting Claimant's poor effort.

25. Both the Guides and the Rating Tips specifically indicate that the impairment rating should be rounded up or down to the nearest whole number. In this case, the nearest whole number to 112 degrees under Table 39 is 110 degrees rather than 120 degrees. As such, the Claimant has established that he is entitled to an increase in his impairment rating. Under Table 39, Claimant's impairment rating should be 14% rather than 11%.

26. The parties did not seriously dispute the Table 40 impairment of 8% although Dr. Bird and Dr. Nagamani assigned the 8% based on different conditions.

27. Based on the combined values chart in the Guides, 14% for loss of range of motion combines with the Table 40 rating of 8% to produce an impairment rating for Claimant's left lower extremity of 21%.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a DIME process for whole person ratings. In this case, neither party asserted that Claimant was entitled to a whole person impairment rating. Consequently, Subsection (8) is not implicated and the clear and convincing evidence burden does not apply. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo.App. 2000). Claimant must prove entitlement to the scheduled PPD benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

5. As found above, the Claimant has proven that he is entitled to an increase in his impairment rating by 3%, for a total impairment rating of 21%. Claimant has failed to prove that he is entitled to the rating Dr. Bird assigned. The credible and persuasive medical evidence reflects that Claimant's post-operative range of motion measurements have varied greatly making it difficult to ascertain the accuracy of any of the measurements taken. Since Claimant has demonstrated full extension during most of his medical visits, Claimant has failed to prove that he has any loss of extension. Accordingly, the 17% impairment rating Dr. Bird assigned for loss of extension is not persuasive.

6. Further, Dr. Bird's range of motion measurement for loss of flexion is not persuasive. As found, Dr. Nagamani's range of motion measurements are the most accurate; however, the ALJ concludes that pursuant to the Guides and the Rating Tips Dr. Nagamani erred when assigning 11% impairment rather than 14% Claimant's final impairment rating is 21% of the left lower extremity, and he is entitled to a PPD award consistent with that rating.

ORDER

It is therefore ordered that:

1. Claimant is entitled to a PPD award consistent with a scheduled impairment rating of 21% of the left lower extremity.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 26, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-926-710-01

ISSUES

- Whether Claimant sustained a functional limitation beyond the *situs* of his admitted hip injury warranting a whole person impairment?

- What, if any, entitlement Claimant has to disfigurement benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. 1. On October 29, 2011 Claimant, a police officer with the City and County of Denver, sustained an admitted work related injury to his left hip. Claimant tripped over a retention wall, twisted, and landed on his hip.

2. Claimant's history of left hip and low back pain predates the October 2011 injury. On June 9, 2011, Claimant presented to Dr. David Conway of Littleton Internal Medicine reporting symptoms of left hip and low back pain. Dr. Conway noted complaints of left upper leg pain from the hip and groin radiating down to the left knee since approximately June of 2010. Claimant told Dr. Conway that he had been taking medication for this pain. Dr. Conway ordered x-rays of Claimant's low back and hips which revealed moderately severe degenerative changes in Claimant's low back mainly at L5-S1, as well as in his hips, left greater than right.

3. Approximately two months prior to the industrial accident, Claimant saw his family physician and received an x-ray guided steroid injection for his osteoarthritic hip pain

4. On October 31, 2011 Claimant presented to Dr. David Blair regarding the industrial incident. Dr. Blair had x-rays taken of Claimant's hips, which showed left and right hip osteoarthritis, including bone-on-bone and collapse of the articular cartilage, a large osteophyte formation, as well as a possible nondisplaced left subcapital femoral fracture. No fracture was ever discovered. The x-rays also revealed degenerative changes of Claimant's low back, but with no evidence of acute bone injury. Dr. Blair felt that Claimant would eventually need a hip replacement, but that the need for a hip replacement was not work related.

5. On August 13, 2013, after attempts at conservative care were exhausted, Claimant underwent total left hip replacement surgery performed by Dr. Todd Miner. Claimant sustained a slightly discolored, but well healed scar as a result of the surgery. In a bathing suit, approximately four inches of the scar would be visible to the public.

6. In Claimant's pre-operative consultation, Claimant told Dr. Miner that he had not experienced any left hip issues prior to his trip-and-fall on October 29, 2011. [Respondent's J, bates 70] The medical records in evidence dispute this claim. [See,

e.g., Respondent's F, bates 10; Respondent's M, bates 98-100; Respondent's G, bates 14; and Respondent's I, bates 53]

7. Claimant received post-operative physical therapy, but continued complaining of increased pain. Claimant reported back pain due to constant limping throughout the day, sharp pain when standing up from a sitting position, as well as pain when leaning forward.

8. Surveillance video dated April 8, 2014, shows Claimant walking briskly without any apparent distress or antalgia. Surveillance video from April 25, 2014, shows Claimant by a pool, repeatedly standing up and sitting down on a low chair, bending over such that his head was level with the back of his pants, walking about, packing up picnic gear, carrying a bag with his right arm, diving into a pool, and chasing beach balls, all without any apparent distress or antalgia of gait.

9. Claimant's surgeon, Dr. Miner, opined after watching the surveillance that he saw no objective evidence of Claimant having any difficulties in gait or sitting.

10. On May 14, 2014, Dr. Stephen D. Lindenbaum performed a full medical evaluation of Claimant. Dr. Lindenbaum observed Claimant walking in from the parking lot to the office without any limp. However, when Claimant saw Dr. Lindenbaum, he began to exhibit mild limping, which was more pronounced when Claimant was walking out of the examination. Upon examination, Dr. Lindenbaum noted an absence of any thigh or calf atrophy, which one would expect to see if Claimant truly had a limp.

11. On May 14, 2014, Dr. Stephen D. Lindenbaum performed a full medical evaluation of Claimant. Dr. Lindenbaum concluded that Claimant had already reached maximum medical improvement (MMI). Dr. Lindenbaum stated that this was based on the fact that Claimant's subjective complaints and video surveillance were inconsistent with his past medical records and the physical examination showed no objective findings.

12. On May 23, 2014, Claimant reported to Dr. Blair that bicycling aggravated his pain and that he was unable to do much of it. Claimant testified at hearing that he was unable to bicycle more than three or four miles per week, once or twice a month. However, Claimant admitted on cross examination that he rode 63.6 miles that same week as part of a National Bike Challenge.

13. The ALJ finds it more likely that Claimant's limp is engineered for the purpose of secondary gain.

14. On June 30, 2014, Dr. Robert Kawasaki examined Claimant who complained of continued pain in his left hip and low back. Dr. Kawasaki noted no specific lumbar injury, and Claimant had full range of motion in his low back. Dr. Kawasaki placed Claimant at MMI and rated his impairment at 25% of the lower extremity based on a 20% rating for the total hip arthroplasty plus 6% for range of motion loss.

15. On August 1, 2014, Respondent filed a Final Admission of Liability, admitting for 25% impairment for Claimant's leg at the hip, per Dr. Kawasaki's June 30, 2014 report.

16. On January 5, 2015, Dr. John S. Hughes performed a record review of Claimant's medical records per Respondent's request. Dr. Hughes is a Level-II accredited physician with more than 32 years of experience and has chaired the Colorado Medical Society's Worker's Compensation and Personal Injury Advisory Committee for over fifteen years. Dr. Hughes has taught at the University of Colorado Medical School since 1994. Dr. Hughes was qualified as an expert in occupational medicine and testified live at hearing.

17. In his report and testimony, Dr. Hughes agreed with Drs. Lindenbaum and Kawasaki that Claimant had reached MMI with respect to his left-hip injury. He determined that Claimant's pre-existing lumbar spine degenerative disc disease was symptomatic during the year preceding Claimant's October 29, 2011, trip-and-fall, and that no evidence existed showing any connection between Claimant's alleged current/ongoing back pain and his admitted hip injury.

18. Dr. Hughes testified that, while Claimant's industrial injury likely exacerbated his low back, no medical evidence supported a finding of a substantial and permanent aggravation of the preexisting lumbar spine condition as a result of the industrial injury.

19. Dr. Hughes explained that exacerbation is "where symptoms are provoked by a particular activity, but where there is no measurable acceleration of a pathologic process." He explained that in contrast, an aggravation would be "where there became a measurable, objectively quantifiable change in my pathology that had occurred as a result of a certain process. And that aggravation led to a need for treatment, maybe a need for replacement arthroplasty, a permanent change in the condition, is what a substantial and permanent aggravation is." He further explained that a temporary aggravation "is where there's a change in the pathology, but treatment is successful in returning that pathology back to its pre-aggravation state."

20. In a prehearing evidentiary deposition, Dr. Lindenbaum also testified that Claimant had significant problems with his back and hip predating the industrial injury.

21. Dr. Lindenbaum testified that he believed Claimant's hip injury should be converted to a whole person injury. When asked why, he responded,

> Well, I think first of all, in the Guidelines, it's recommended in most cases that these things convert to a whole person rating. But in this particular case, putting aside the question of the validity of whether this actually should be treated at all as far as this rating is concerned, I think it affects every aspect of his life.

Dr. Lindenbaum did not cite any portion of the *AMA Guides* or a statutory basis for conversion to whole person. Such justification has no basis in either the *AMA Guides* or § 8-42-107, C.R.S. *See American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition (Revised)*, Chapter 2.2; § 8-42-107, C.R.S. Because Dr. Lindenbaum did not apply the correct standard for conversion, the ALJ finds his testimony on this point neither credible nor persuasive.

22. By contrast, Dr. Hughes, an expert in occupational medicine, credibly testified that Division rules require physicians to provide both scheduled impairment ratings and whole person ratings. The decision whether an impairment should be converted is a legal one based upon medical evidence and facts, and not a medical determination. Dr. Hughes explained that Claimant had a history of symptomatic lumbar spine pathology for which Claimant received treatment, including, but not limited to, chiropractic care, prior to the industrial injury. The ALJ finds that Claimant's lumbar spine pathology is more likely not related to this claim.

23. Dr. Hughes provided an informed explanation of the legal bases for conversion, and cited relevant and clear evidence for his opinions that Claimant's injury has no medical basis for conversion. Dr. Hughes credibly testified that there was no evidence that Claimant had sustained a loss of function that extended beyond the region of his left hip into the region of his lumbar spine as a result of his hip injury. Dr. Hughes' opinions are therefore given more weight than those of Dr. Lindenbaum.

24. Dr. Hughes also testified there was no medical evidence to support a finding that Claimant's lumbar spine was in any way exacerbated, aggravated, or accelerated by the industrial injury to Claimant's hip. Dr. Hughes concluded that there was no medical basis to convert Claimant's lower extremity impairment rating to whole person. The ALJ finds Dr. Hughes' opinions to be both credible and persuasive.

25. While Claimant established that certain muscles beyond his hip joint are implicated in some of the activities Plaintiff is permanently restricted from doing, he presented no persuasive evidence that any of those implicated muscles are the situs of Claimant's injury.

26. The ALJ concludes that the situs of Claimant's injury is the lower extremity at the hip joint. Thus, converting Claimant's scheduled injury into a whole person injury is not warranted.

27. THE ALJ FINDS AND CONCLUDES that as a result of this work injury, Claimant has sustained disfigurement consisting of a slightly discolored, but well healed approximately four inch long scar as a result of his surgery, which entitles Claimant to additional compensation. Section 8-42-108 (2), C.R.S.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2009. A workers' compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc., v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Colorado Revised Statute § 8-42-107(1) limits a claimant to a scheduled disability award if the injury resulted in a permanent medical impairment that is enumerated on the schedule of disabilities. *Strauch v. PSL Healthcare System*, 917 P.2d 366 (Colo. App. 1996). The schedule of disabilities is a chart that lists how a claimant should be compensated when there is an injury to that claimant's extremities. This differs on how a claimant is compensated for a whole person injury to the trunk of his body, which is a different statutory formula.

5. In the context of § 8-42-107(1), the term "injury" refers to the part or parts of the body, which have been functionally impaired or disabled as a result of the work related accident. The court will examine the parts of the body that sustained the ultimate loss, and not necessarily the location on the body where the injury initially occurred. The issue of conversion is a question of fact for the ALJ. *Delaney v. ICAO*, 30 P.3d 691 (Colo. App. 2000). Therefore, it is the *situs* of the functional impairment that is the relevant inquiry, not the *situs* of the initial harm. Here, because Claimant's hip is enumerated on the schedule of disabilities, he must demonstrate that he sustained a functional impairment beyond his hip and into his torso in order to receive compensation for a whole person injury. Based on the totality of the evidence, the ALJ has found that Claimant did not meet his burden of proving by a preponderance of the evidence that any part of his body above his hip is functionally impaired, and therefore the situs of Claimant's functional impairment is at his hip.

6. Furthermore, the mere presence of pain does not compel the finding of whole person impairment. *Langton v. Rocky Mountain Health Care*, 937 P. 2d 883, 885 (Colo. App. 1996). This pain would have to limit Claimant's ability to use a portion of his body before there is a consideration of a functional impairment for purposes of determining whether an injury is on or off the schedule. *Velasquez v. UPS*, W. C. No. 4-573-459 (April 13, 2006). Here, Claimant presented no persuasive evidence that pain limited his use of any portion of his body other than his hip. While he presented evidence that he was restricted from a few activities that implicated the use of other muscle groups, no credible evidence that those other muscle groups caused or experienced pain.

7. Medical records show that Dr. Lindenbaum observed Claimant walking through Dr. Lindenbaum's parking lot, showing no signs of an antalgic gait until meeting with Dr. Lindenbaum, at which point, Claimant began limping. Furthermore, video-surveillance evidence of Claimant walking about briskly on April 8 and 25, 2014, without any sign of an antalgic gait, is inconsistent with Claimant's claims. Similarly, he is clearly seen sitting down and standing up from a low chair, poolside, again, despite testimony to the contrary. Dr. Lindenbaum observed that Claimant did not display any calf or thigh atrophy, which further reinforces that Claimant did not regularly favor one leg over the other. Finally, Claimant advised Dr. Blair that he was unable to ride his bicycle very much as a result of his alleged pain, but then admitted on the stand that he rode in excess of 60 miles the following week.

8. Claimant has not presented any credible evidence of a functional limitation beyond his lower extremity.

9. Claimant's complaints of pain beyond the *situs* of his injury are not found to be genuine, and cannot form a causal link between Claimant's scheduled hip injury and any back pain from which he may or may not be suffering.

10. In this case, Respondent has provided credible and expert evidence that Claimant's low back and torso complaints predate the industrial injury. Moreover, they have presented credible evidence that Claimant's testimony and subjective reports cannot be trusted at face value.

11. Section 8-42-108(1), C.R.S., provides that an ALJ may grant a disfigurement award for serious, permanent disfigurements "about the head, face, or parts of the body normally exposed to public view." § 8-42-108(1), C.R.S. An award for disfigurement is based on "an observable impairment of the natural appearance of a person." *Arkin v. Industrial Commission of Colorado*, 358 P.2d 879 (1961). Those parts of the body "normally exposed to public view" have been understood to extend as far as all parts of the body visible when in swimming attire. *See Twilight Jones Lounge v. Showers*, 732 P.2d 1230, 1232 (Colo.App.1986).

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant did not sustain a functional limitation beyond the *situs* of his industrial hip injury. Accordingly, his request for a whole person conversion of his injury is denied.
2. Insurer shall pay Claimant $1,000 for this disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2015

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant sustained an injury arising out of and in the course and scope of his employment, and if so;

2. Whether Claimant is entitled to a change of physician based on Respondents' failure to provide a designated provider list.

3. Whether Claimant is entitled to temporary total disability benefits from April 25, 2014 and ongoing.

4. What is Claimant's average weekly wage?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant's date of birth is January 1, 1969. He commenced employment as a delivery driver for Employer on June 12, 2005. Claimant worked as manager of delivery and delivery drivers. His job duties included taking delivery assignment sheets, coordinating deliveries with the other driver and delivering stairs. Claimant's duties included, as necessary, dealing with and communicating with customers.

2. Claimant requested and took two weeks off from work for periods covering March 22, 2013, through April 5, 2013.

3. On the morning of July 1, 2013, Claimant approached John Sellars requesting two weeks of vacation off, immediately, so that he could travel to Mexico. Mr. Sellars, the president of the company, explained to Claimant that he could not have two weeks off at that time because they were in the middle of the busy season and Claimant was the supervisor of the trucks. This discussion escalated into an argument and Claimant became very upset. Claimant used profanity and stormed out of Mr. Sellars' office. Claimant was angry because he could not get the time off. Mr. Sellars credibly testified that he would have terminated the employment of any other employee who acted like Claimant, but he did not terminate Claimant because of their long and amicable relationship. Claimant had not previously argued with Mr. Sellars about taking time off work.

4. After leaving Sellars' office, Claimant began his day delivering stairs. The next time Claimant saw Mr. Sellars was following Claimant's first delivery of July 1, 2013. Claimant reported that he injured himself removing stairs from a truck. Claimant advised that he wanted to see a doctor and was sent to see Nancy Sanders, the office manager. Ms. Sanders completed an Employer's First Report of Injury and Claimant was seen at Concentra Aurora, one of Employers' authorized providers.

5. Claimant was seen by Dr. Draper at Concentra Aurora, an authorized provider, on July 1, 2013. Dr. Draper diagnosed a left-sided lumbrosacral strain with radiculopathy and left upper extremity strain. Claimant was taken off work on July 1, 2013, and returned to work the following day with restrictions of no lifting, pushing or pulling greater than five pounds, no standing or walking greater than 15 minutes, and no bending squatting or kneeling. Claimant was expected to sit 90% of the time. Employer accommodated Claimant's restrictions upon Claimant's return to work on July 2, 2013. Claimant's duties continued to require that he operate a commercial vehicle.

6. At Claimant's next medical appointment, July 16, 2013, Claimant's left upper extremity pain had resolved, but Claimant reported that the commercial driving was causing back pain. Between July 1 and 16, 2013, Claimant never complained to Employer that operating a commercial vehicle caused him pain. Claimant was restricted from operating a commercial vehicle. Claimant relayed his work restrictions to Employer. Since commercial driving was an important part of Claimant's job duties, though Employer could have accommodated the restriction, instead Mr. Sellars permitted Claimant to take the two weeks off that he requested on July 1, 2013.

7. Claimant drove to Durango, Mexico by himself, driving 12 hours per day for two days, both coming and going. Claimant returned to work on August 8, 2013. According to Claimant, driving to Mexico in July did not change his condition. It has always been the same.

8. On August 8, 2013, Claimant was seen by Dr. Draper reporting that his "Symptoms are the same. No new symptoms, improvement or worsening of symptoms." Dr. Draper reported that Claimant was to continue with physical therapy and a home exercise program.

9. The Insurer filed a Notice of Contest on August 30, 2013. Notwithstanding the denial of this claim, Insurer continued to authorize medical care. Claimant continued to receive treatment at Concentra, which included multiple evaluations by Drs. Draper and Miller and other Concentra physicians. In addition, Claimant received medications, physical therapy, and a MRI. Claimant was referred to Dr. Kawasaki, who provided injection therapy and referred Claimant out for chiropractic and acupuncture treatment.

10. On October 7, 2013, Dr. Kawasaki recommended continued strengthening and conditioning exercises. Based on his review of physical therapy notes, he reported that Claimant was functionally able to carry 50 pounds and lift up to 50 pounds with good quality. Dr. Kawasaki recommended increasing Claimant to a medium work duty

category, including 50 pounds maximum lifting, pushing and pulling occasionally, 25 pounds frequently and 10 pounds constantly.

11. On October 17, 2013, Dr. Kawasaki reported that Claimant's EMG/nerve conduction study was negative. He scheduled Claimant for an October 22, 2013, left L4-5 transforaminal ESI, and Claimant did undergo this injection. Dr. Kawasaki reported that he wanted to see Claimant in follow up to this ESI in one to two weeks. Claimant did not follow up and has never returned to see Dr. Kawasaki.

12. Claimant was seen by Dr. Miller on December 19, 2013. He reports that Claimant was still working within his restrictions and tolerating the job well. Claimant reported no change in his pain. Claimant had not followed up with Dr. Kawasaki. Dr. Miller reported, "In fact, he has not been seen for about two months." Claimant unilaterally discontinued all treatment at Concentra and its referrals.

13. Claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment. The testimony offered by Mr. Sellars was more credible and persuasive than the testimony offered by Claimant. It is found that there was a July 1, 2013, argument between Claimant and Mr. Sellars occurring in the early morning hours before Claimant left the office for a delivery. The weight of the credible and persuasive evidence presented at hearing established that Claimant failed to prove by a preponderance of the evidence that a work injury occurred and instead Claimant's report of an injury was due to Claimant's anger with his employer who denied his request for time off on July 1, 2013. Claimant's post-injury actions, including withdrawal from medical care, further persuade the ALJ regarding the legitimacy of this claim. Also, Claimant's ability to sit for long periods of time and drive long distances weighs in favor of finding that Claimant failed to establish a work related low back injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Clam Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009).

4. A compensable injury is one that arises out of and in the course and scope of employment. Section 8-41-301(1)(b), C.R.S. An injury occurs "in the course of" employment where a claimant demonstrates that the injury occurred within the time and place limits of his employment during an activity that has some connection with his work related functions. *See Triad Painting Company v. Blair*, 812 P.2d 638 (Colo. 1991).

5. Claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of or in the course and scope of his employment. It is concluded that Claimant's testimony is unpersuasive and lacks credibility. The testimony offered by Mr. Sellars was more credible and persuasive than the testimony offered by the Claimant. The totality of the evidence compells the conclusion that it is more likely than not that Claimant failed to prove the claim. Factors supporting this conclusion are: Claimant's anger toward the employer on July 1, 2013, because he denied Claimant's request for time off from work; Claimant's post-injury actions, including withdrawal from medical care; and Claimant's ability to sit for long periods of time and drive long distances during his time off from work traveling to Mexico by car.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

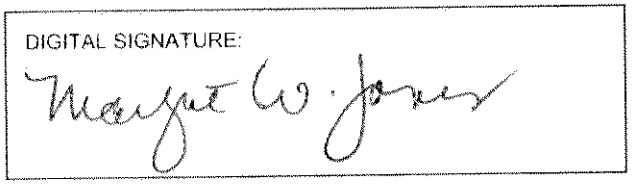
1. Claimant's claim for benefits are denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 12, 2015_

DIGITAL SIGNATURE:



MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment.

2. If the Claimant's claim is compensable, whether he proved, by a preponderance of the evidence, that he is entitled to medical benefits for his right shoulder condition.

FINDINGS OF FACT

1. The Claimant was 23 years old when he worked for the Employer.

2. The Claimant suffered an admitted work injury to his left shoulder while throwing a large truck tire from a truck (Claimant's Exhibit 5, p. 175).

3. The Claimant first saw Dr. Ogrodnick on February 27, 2012 for the left shoulder injury. After examining the Claimant, Dr. Ogrodnick assessed the Claimant with a left shoulder strain and referred the Claimant for a left shoulder MRI (Claimants' Exhibit 1, p. 2; Respondents' Exhibit B, p. 28). On March 5, 2012, Dr. Ogrodnick noted that the MRI revealed multiple labral tears (Claimant's Exhibit 1, p. 8; Respondents' Exhibit B, p. 35).

4. When the Claimant saw Dr. Ogrodnick again on March 9, 2012, the Claimant reported that he was having significant left-sided neck pain and that his "modified duty at work involves moving tires with only his right arm and this eventually causes burning on the left side of his neck." Dr. Ogrodnick returned the Claimant to work with continued work restrictions of no use of the left arm, but provided no restrictions with right arm use (Claimant's Exhibit 1, p. 12; Respondents' Exhibit B; p. 37).

5. On March 13, 2012, the Claimant was evaluated by Dr. David Walden, who noted the MRI confirmed "some serious significant pathology including multiple labral tears, including the anterior superior, posterior superior, and inferior labrum" along with "a longitudinal split in the intraarticular portion of the long head of the biceps with some tendinopathy present." Dr. Walden diagnosed a left shoulder complex SLAP lesion with an extending longitudinal tear into the biceps. Dr. Walden did not feel that conservative treatment would be of benefit due to the heavy labor the Claimant performs and recommended an arthroscopic labral repair with possible biceps tenodesis (Claimant's Exhibit 3, pp. 150-151). Dr. Walden performed the left shoulder surgery on April 6, 2012 (Claimant's Exhibit 3, pp. 158-159).

6. The Claimant continued to follow up with Dr. Walden and Dr. Ogrodnick after the left shoulder surgery and the Claimant underwent physical therapy. Although the shoulder improved, the Claimant continued to report left shoulder pain (Claimant's Exhibits 1, 2 and 3; Respondents' Exhibits B and D).

7. On June 14, 2012, the Claimant saw PA-C Vicki Dihle at Dr. Ogrodnick's clinic for follow up of his left shoulder strain. He was also complaining of right shoulder pain that the Claimant reported started when he was at work. Ms. Dihle noted that the Claimant thought it may be associated with overuse, but that the Claimant denied a specific injury. The Claimant reported that he told his boss about the right shoulder pain and when he was seen by Dr. Walden for a follow-up visit, Dr. Walden stated the Claimant needed to follow up with this clinic. Ms. Dihle noted that "the patient was encouraged to talk with his employer about opening a new claim for his right shoulder, although it does not sound work-related to me" (Claimant's Exhibit 1, pp. 38-39; Respondents' Exhibit B, pp. 51-52).

8. When the Claimant saw Dr. Ogrodnick on June 21, 2012, he reported to Dr. Ogrodnick that he thought his right shoulder strain was related to overusing his right arm while he is recovering from a left arm injury. Dr. Ogrodnick noted that the Claimant was not sure when the symptoms started but felt that around June 8, 2012 the activity that irritated his right arm was when he was lifting tires to gage them using only his right arm. The Claimant had not worked for the previous 4-5 days since the Employer wanted the Claimant's right shoulder evaluated before returning to the jobsite, but the rest time from work did not provide the Claimant with any relief from constant pain. After examination, Dr. Ogrodnick noted that "it is uncertain whether this is a work-related injury." However, Dr. Ogrodnick provided a right UE work restriction of no weight above 15 lbs. (Claimant's Exhibit 1, pp. 43-44; Respondents' Exhibit B, pp. 54-55).

9. On June 27, 2012, the Claimant continued to report right shoulder pain starting around June 8, 2012. The Claimant reported that "he is performing light duty, in which he continues handling tires, but he tries to avoid the largest tires." Dr. Ogrodnick noted full right shoulder range of motion and a negative impingement maneuver with full rotator cuff strength. Dr. Ogrodnick recommended therapy for the right shoulder (Claimant's Exhibit 1, p. 50; Respondents' Exhibit B, p. 61). On June 29, 2012, Dr. Ogrodnick noted that the Claimant reported that "he was 'put off work' because the insurance company decided the right shoulder was not work related and he was told to get a release from his PMD"(Claimant's Exhibit 1, p. 54; Respondents' Exhibit B, p. 65).

10. On July 26, 2012, the Claimant was seen at Memorial Health Urgent Care for right shoulder pain that the Claimant reported had been hurting for a month. The office note indicated that the Claimant "states his physical therapist says he is overcompensating due to surgery on left shoulder 3 months ago" (Respondents' Exhibit C, pp. 77-78).

11. On August 8, 2012, the Claimant reported that he still had right shoulder pain but there were no aggravating activities that he was aware of, because he was not

working. With respect to the left shoulder condition, Dr. Ogrodnick opined that the Claimant has reached MMI and is released to return to work with no limitations. Dr. Ogrodnick provided a 16% left upper extremity impairment rating which would convert to a 10% whole person impairment rating (Claimant's Exhibit 1, p. 60; Respondents' Exhibit B, p. 68).

12. On September 28, 2012, the Claimant saw Dr. Ogrodnick for a one-time visit reporting that his left shoulder pain is getting worse since he was put at MMI. The Claimant reported he was not working and at rest had a 7/10 pain with an intermittent left-sided neck pain. Dr. Ogrodnick prescribed Motrin and Vicodin and recommended a follow up with Dr. Walden to consider a subacromial injection (Claimant's Exhibit 1, p. 65; Respondents' Exhibit B, p. 73).

13. The Claimant was evaluated by Dr. Jeffrey Raschbacher on November 14, 2012 for an IME. Dr. Raschbacher noted that the Claimant put his left shoulder pain on the pain diagram as part of the intake questionnaire, but that he did not put the right shoulder pain since he that was not accepted as part of the claim. Dr. Raschbacher noted that he had the Claimant do the pain diagram over to include all symptoms and body parts (Respondents' Exhibit A, p. 19). The Claimant reported to Dr. Raschbacher that his left shoulder feels worse and he has limited motion and after he was put at MMI he has one additional physical therapy visit but then that stopped and he had no injections, repeat surgery or repeat MRIs. As for the right shoulder, the Claimant reported to Dr. Raschbacher that he first noticed the right shoulder symptoms after about 1 ½ days of light duty work when he was pulling tires off a pile and grading them and then rolling or kicking the tires to the correct pile. The Claimant reported his right shoulder pain was actually getting worse (Respondents' Exhibit A, p. 20). After physical examination and a review of the medical records, Dr. Raschbacher opined that "it is not clear whether [the right shoulder pain complaints] are work-related or not." Dr. Raschbacher recommended an MRI of both shoulders before further comment (Respondents' Exhibit A, p. 23).

14. On January 7, 2013, Dr. Raschbacher prepared an Addendum to the 11-14-12 IME report after review of the Claimant's left and right shoulder MRIs performed on December 11, 2012. As for the right shoulder, Dr. Raschbacher opined that "the right shoulder MRI shows a torn labrum. More likely than not this is degenerative in nature and if it needs treatment, should be treated on a nonwork-related basis" (Respondents' Exhibit A, p. 25).

15. On July 31, 2013, the Claimant filed a Worker's Claim for Compensation stating that he suffered a right arm/shoulder injury on March 10, 2012 when he was throwing tires. He stated that he notified his employer of the injury on March 10, 2012 by reporting it to Dave Kenney (Respondents' Exhibit F). An Application for Hearing filed by the Claimant also lists the date of injury as March 10, 2012 (Respondents' Exhibit J).

16. Dr. Raschbacher performed a second IME on September 23, 2014. The Claimant reported to Dr. Raschbacher that his left shoulder feels worse now than it did

before he had his left shoulder surgery. Nevertheless, the Claimant still wanted to pursue right shoulder surgery (Respondents' Exhibit A, pp. 1-2). The Claimant advised Dr. Raschbacher that after he returned to work following his left shoulder surgery, he did different types of work, he might pick up trash for 30 minutes and he used the wheel crusher for an hour. Then the owner of the company came by and said that he wanted the Claimant to grade tires. The Claimant reported that his occurred his first day back to work after the left tire surgery. The Claimant stated that this was the same work he did before the surgery with the only difference being that they did not have the Claimant load the trucks. He would roll tires to coworkers who would then load them. The Claimant told Dr. Raschbacher that he did this for about 2 months and then he was fired for insubordination although the Claimant stated that he was not insubordinate (Respondents' Exhibit A, p. 4). For this IME report, Dr. Raschbacher reviewed medical records dating back to 1996, including the treatment records of Dr. Walden from 03/13/12 – 08/02/12 and the treatment records of Dr. Ogrodnick from 03/05/12 – 09/28/12, as well as physical therapy notes, and the December 11, 2012 left and right shoulder MRIs (Respondents' Exhibit A, pp. 6-11). Ultimately, Dr. Raschbacher concludes that "it is not clear when exactly [the Claimant] worked in the postoperative period and what work he was doing exactly." Dr. Raschbacher further opines that if the Claimant was, in fact, throwing tires with his right upper extremity, then he likely injured the right shoulder labrum when he was doing this activity. However, if the Claimant was not throwing tires with the right upper extremity, then Dr. Raschbacher found it medically unlikely that any work-related activity would have caused the right shoulder labral tears. Dr. Raschbacher also opined that in an individual as young as the Claimant who has bilateral labral disease and degeneration and tears at the shoulders, "it is fairly clear that he has a disposition to this problem. No specific trauma would be necessary to produce a labral tear as these can occur in the setting of a predisposition without acute trauma." Yet, Dr. Raschbacher still opines that the causation determination for the Claimant's right shoulder condition rests on the type of activity the Claimant was performing with his right upper extremity.

17. Dr. Ogrodnick testified by deposition on October 8, 2014 as an expert in occupational medicine. Dr. Ogrodnick was and authorized treating physician ("ATP") for the Claimant. He testified that he initially saw the Claimant on February 27, 2012 (Depo. Tr. Dr. Ogrodnick, p. 5). Dr. Ogrodnick testified that at the initial visit the Claimant's chief complaint was left shoulder pain. The history that the Claimant provided was that the injury occurred when he was throwing tires into a pile and he felt a painful pop in the left shoulder. A physical examination revealed an impingement of the left shoulder and Dr. Ogrodnick requested a left shoulder MRI, prescribed Motrin and placed work restrictions on the Claimant of no use of the left arm (Depo. Tr. Dr. Ogrodnick, pp. 6-7). Dr. Ogrodnick testified that when he next saw the Claimant on March 5, 2012, the Claimant had the same 7/10 level of pain and, in reviewing the MRI images, Dr. Ogrodnick observed multiple labral tears in his shoulder. Based on this Dr. Ogrodnick referred the Claimant to Dr. David Walden, an orthopedic surgeon and he continued the left arm restrictions. (Depo. Tr. Dr. Ogrodnick, pp. 7-8). Dr. Ogrodnick testified that the Claimant had left shoulder surgery and continued to follow up with Dr. Ogrodnick post-surgery. On June 14, 2012, the Claimant started to complain about problems with his right

shoulder (Depo. Tr. Dr. Ogrodnick, p. 8). The Claimant told Dr. Ogrodnick's PA that he thought the right shoulder pain started at work but was not sure of any specific injury. The PA opined that the right shoulder pain was associated with overuse. When the Claimant saw the PA again on June 21, 2012, the Claimant stated that he was overusing his right arm during his recovery from the left-sided surgery. The Claimant told the PA that he thought the right-sided symptoms started around June 8, 2012 when he was lifting tires (Depo. Tr. Dr. Ogrodnick, pp. 9-10). A physical examination on that day showed full active and passive range of motion of the right upper extremity without tenderness and normal grip strength, reflexes and circulation. The PA sent the Claimant to therapy for the right shoulder although at this time it was uncertain that this was a work-related injury (Depo. Tr. Dr. Ogrodnick, p. 11). Dr. Ogrodnick testified that he next saw the Claimant on June 27, 2012 and the Claimant reported that the right shoulder felt fine at rest, but it was painful during therapy exercises. The Claimant reported difficulty sleeping due to pain in both shoulders but he still had full range of motion of the right shoulder (Depo. Tr. Dr. Ogrodnick, pp. 11-12). Dr. Ogrodnick continued to see the Claimant for his left shoulder until he was placed at maximum medical improvement on August 8, 2012 (Depo. Tr. Dr. Ogrodnick, pp. 15-16). Dr. Ogrodnick testified that throwing heavy tires was a causative factor in the Claimant's left shoulder injury (Depo. Tr. Dr. Ogrodnick, p. 17). Dr. Ogrodnick further testified that if the Claimant was throwing tires with his right arm, then he believed that the cause of the Claimant's right shoulder issues would be the work-related activities of throwing those tires (Depo. Tr. Dr. Ogrodnick, p. 18). On cross-examination, Dr. Ogrodnick agreed that in determining if there is a causal link between the right shoulder symptoms and the job duties that it would be important to have specific information about the modified job duties the Claimant was performing just prior to June 14, 2012 (Depo. Tr. Dr. Ogrodnick, p. 21). Dr. Ogrodnick conceded that he did not have information about the weight, size and circumference of the tires he was working with during modified duties. Nor did Dr. Ogrodnick have specific information about the motions used or how the Claimant was handling the tires, nor did he have information about how frequently the Claimant was performing tasks with his right arm and shoulder (Depo. Tr. Dr. Ogrodnick, pp. 21-22). Dr. Ogrodnick also confirmed that neither he, nor anyone from his office, discussed with the Claimant what activities he was doing outside of work (Depo. Tr. Dr. Ogrodnick, p. 25). Dr. Ogrodnick later testified that he believes that this information is required in order to make a causation determination with respect to the Claimant's right shoulder condition (Depo. Tr. Dr. Ogrodnick, p. 32).Dr. Ogrodnick also testified that initially he had concluded that the Claimant's right shoulder symptoms were not work-related (Depo. Tr. Dr. Ogrodnick, pp. 25-26). Dr. Ogrodnick opined that some of the pathology on the Claimant's December 11, 2012 right shoulder MRI scan was degenerative, however the SLAP tear that was present was more likely an acute situation as opposed to a chronic degenerative condition. Dr. Ogrodnick further testified that there are many potential causes for a SLAP tear (Depo. Tr. Dr. Ogrodnick, pp. 27-28). On redirect examination, Dr. Ogrodnick was asked if the Claimant was lifting, moving and rolling tires that weighed more than 15 pounds repetitively, it is possible that he would have injured his right shoulder and this could lead to labral tears and a SLAP tear (Depo. Tr. Dr. Ogrodnick, pp. 33-37). Dr. Ogrodnick further testified that it is uncommon for a man younger than age 35 to have a degenerative labrum to the extent where it requires

surgery (Depo. Tr. Dr. Ogrodnick, p. 37). Dr. Ogrodnick later testified that the causation determination really hinged on whether or not the Claimant was throwing tires on modified duty and if he was it was more likely work-related, but that if he did not throw tires on modified duty, it was more likely not work-related (Depo. Tr. Dr. Ogrodnick, p. 42).

18. The Claimant testified at the hearing on November 5, 2014. He testified that he believes that he injured his right shoulder around May or June of 2012. The Claimant testified that he was grading tires for the employer. He testified that this task involved picking a tire up to about Claimant's chest height and spinning it around to examine it. The Claimant testified that then he would push on the sidewalls to check for wear and he would push with his right arm. Then after he determined which pile was correct for the tire, he would use a part throwing, part rolling motion down his body and when the tire went by his foot, he would kick it into one of the piles. On redirect testimony, the Claimant further clarified that about 30-40% of the time the tire does not make it to the right pile and you have to go over and pick up the tire and throw it up on the pile which can be up to 15 feet high. The Claimant testified that he had previously injured his left shoulder back in January of 2012 working in the Employer's other yard throwing truck tires high on a pile and he felt a pop in his shoulder. After treatment and surgery on that left shoulder, the Claimant was not to pick up tires with his left arm at all. He testified that he went right back to work after the initial injury, and although it was called modified duty, the Claimant testified that, other than 1 day of picking up trash, it was the same work grading tires as he did before. Then he was off work for a while after surgery. When he returned to work after surgery, on the first day, he was given a job using a machine to crush rusted rims out of tires and then to toss those rims into a waste container. However, the Claimant testified that owner of his Employer said he didn't want the Claimant doing that work and that he needed to be grading tires, so he went right back to that. The Claimant testified that he did not recall ever telling Dr. Ogrodnick that he was working a super-light duty job because his job never actually changed.

19. In May 2012, the Claimant testified that he worked 60-70 hours that month which was about ½ of his normal hours and in June 2012, he testified he worked about 60-70 hours as well. The Claimant testified that he did the same work until his employment was terminated for insubordination, which he said they claimed when he was just joking around like everyone used to do. On cross-examination, the Claimant disputed what Dave Kearney stated was the reason for his termination. When asked if he compared working at modified duty was like paid slavery, the Claimant disputed this. When asked if he was told to stop complaining and he responded, "you can't stop me from complaining," the Claimant disputed this and also testified that he never challenged Mr. Kearney to fire him.

20. After his employment was terminated, the Claimant worked at Premier, a construction clean up company and he swept for them for about 2-3 weeks in December 2012. Then, the Claimant testified that he worked for a construction company called Structures as a laborer and assistant to the carpenters starting in November 2013 for

about 2-3 months. Then, the Claimant testified that he worked as a packer for a moving company starting in July 2014 for about 2 weeks but he couldn't pick things up and so he had to stop working there.

21. When questioned about why he did not report a right shoulder injury sooner, the Claimant testified that he did tell his supervisor and he was waiting for his supervisor to tell him that it was okay to see a doctor since he did not have private insurance and could not afford to see a doctor on his own.

22. The Claimant testified that his current symptoms are an inability to do repetitive work or lift his arm above his head, a burning, aching, stabbing pain, inability to sleep, and when he moves his arm in certain motions, it pops.

23. The Claimant testified that in November 2012, his symptoms affected his activities outside of work. The Claimant has 5 children. In November 2012, his youngest was 6 months and his oldest was 5 years old. He testified that was frustrated because he could not do things with his kids and he had trouble picking them up and it got worse. The Claimant also stopped playing basketball and was frustrated because of this.

24. Mr. Benjamin Estes testified at the hearing. He has worked for the Employer as a tire grader on and off for 40 years. He worked with the Claimant and was aware of the Claimant's left shoulder injury. He testified that he also recalled the Claimant returned to work after he had left shoulder surgery. After he returned to work, Mr. Estes testified that the Claimant had work restrictions and worked modified duty, picking up trash mainly. Mr. Estes testified that the Claimant also worked at sorting and inspecting tires. Mr. Estes testified that the Claimant rolled tires around on the ground and inspected them and then he would roll the tire to a stacker. Mr. Estes testified that if Claimant did pick the tire up, he would not hold it at a 90 degree angle like the Claimant testified, but rather at more of a 45 degree angle since it is too hard to lift it the way the Claimant described. Mr. Estes testified that that is how everyone did it and the Claimant did not perform the work differently. Mr. Estes stated that after returning from surgery, sometimes the Claimant rolled the tires and sometimes he kicked them, but he doesn't recall seeing the Claimant drop-kick a tire in the way that the Claimant described.

25. Mr. David Kenney testified at the hearing. He has been a manager at Employer for 8 years and supervises 2 yards. He also works with the other employees. He is familiar with the Claimant from when the Claimant worked for the Employer. He testified that he was aware of the Claimant's January 2012 left shoulder injury and was aware of the Claimant's work restrictions. After his left shoulder surgery, the Claimant returned to a modified duty job with his left arm immobilized in a sling. Mr. Kenney testified that the Claimant never complained to him that the modified duty was too hard. Mr. Kenney testified that the Claimant mostly picked up trash after his return to work. He only worked for a few hours a day after his return from surgery. It was not until the last day that he worked in June that the Claimant returned to sorting tires. Mr. Kenney testified that the Claimant told him that he hurt his right shoulder towards the end of his employment with Employer. Mr. Kenney testified that the Claimant went to the doctor a

couple of days later. Mr. Kenney does not recall the exact date that the Claimant's employment was terminated because he testified that it was a long time ago.

26. Dr. Jeffrey Raschbacher testified at the hearing as an expert in the areas of occupational medicine, family medicine and Level II Accreditation matters. Dr. Raschbacher saw the Claimant twice for evaluations in this case. He generally testified in accordance with his written reports. At the first evaluation, the Claimant gave a history and explained his symptoms and filled out a questionnaire, possibly with the help of his wife. Dr. Raschbacher testified that there was an issue with the date of the injury because in the paperwork provided to him, it says 3/10/12 for the onset which is different from the Claimant's testimony at hearing. Dr. Raschbacher testified that the Claimant told him he was throwing tires because when a pile got too high, the workers couldn't just roll the tires to the pile and they would have to throw them. Based on the questionnaire and his interview with the Claimant, Dr. Raschbacher testified that he was not aware of any acute event leading to a right shoulder injury. Referring to his prior IME report, Dr. Raschbacher testified in accordance that he opined that the Claimant's labrum is predisposed to injury and tearing and because of that, it is important to understand what the Claimant was doing at work and outside of work. Dr. Raschbacher opined that if the Claimant was actually "throwing" tires, then his right shoulder condition is relate to work activities, but if he was not "throwing" tires, then his right shoulder condition is not work related. By "throwing" tires, Dr. Raschbacher testified that he is specifically referring to the action of "ballistically flinging tires forward" and by "ballistically," Dr. Raschbacher meant a rapid acceleration/deceleration movement, not a steady motion. Dr. Raschbacher testified that he did not find the movement of holding a tire in front of his body with his arm flexed and then "drop kicking" the tire, to be a ballistic motion that would be an unfavorable mechanical position for the Claimant's right shoulder. So, Dr. Raschbacher opined that if that was the motion the Claimant was making, then this is not a mechanism of injury likely to produce a labrum tear. Referring to the Claimant's 12/11/12 MRI, Dr. Raschbacher testified that the Claimant's degenerative changes were progressing and his diagnosis is osteoarthritis and labral tear. Dr. Raschbacher then testified that the labral tear pathology could be insidious and the result of a degenerative condition without a discreet injury having occurred at work. On cross-examination, Dr. Raschbacher conceded that it does not matter how many hours the Claimant was working, but rather the issue came down to the activity the Claimant was performing, whether he was throwing tires or not. Referencing his November 14, 2012 IME report, Dr. Raschbacher testified that even back on that date, there were conflicting reports of right shoulder symptoms in late April. Dr. Raschbacher recalled that the Claimant didn't want to list right shoulder issues because at that point he understood that this was not an accepted part of his claim. However, because he was complaining of right shoulder pain, Dr. Raschbacher had the Claimant go back to his pain chart and add in the right shoulder pain complaints. Dr. Raschbacher also testified that he had trouble understanding why the Claimant wanted the right shoulder surgery since the left shoulder surgery didn't turn out that well.

27. The medical records, employment records and testimony create some controversy as to when the Claimant's alleged work injury occurred, anywhere from

March through June of 2012. While there was some testimony and documentation that characterized the Claimant's injury as an "overuse" injury, the Claimant did not allege that he suffered an occupational disease with respect to his right upper extremity, but rather a work injury.

28. While there was also conflicting testimony as to the nature of the Claimant's job duties when he returned to work following his left shoulder injury, the weight of the evidence does not support that the Claimant was throwing tires during this time period. In considering the testimony of the Claimant, Mr. Estes and Mr. Kenney, the ALJ finds that the Claimant only briefly performed jobs such as picking up trash and crushing tire rims. The rest of the work that the Claimant performed was related to grading tires. However, it is found that the while performing the job of grading tires after returning to work after his left shoulder injury, the Claimant was not a loader anymore and was not required to throw tires onto a pile or into a truck. Rather, the weight of the evidence, including some of the Claimant's own testimony and statements in medical reports, is that the Claimant was rolling or dropkicking tires into piles. Other co-workers would load the tires after the Claimant graded the tire or, if needed, after the Claimant directed a tire to the correct pile of tires for that condition of tire, a coworker would get it to the top of the tire pile. For his part, the Claimant would pick up a tire, spin it, check the sidewalls and then roll or dropkick the tire in a particular direction. He would not throw tires as the term "throw" was described by Dr. Raschbacher.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

In resolving whether the Claimant has met his burden of proof to establish that he suffered a compensable injury, the ALJ must examine the totality of the evidence and consider credibility. An initial issue relates to when the alleged injury occurred. Dr.

Raschbacher noted in his IME reports and testified that due to reporting inconsistencies, he attempted to question the Claimant about the timing of an injury to his right shoulder, but the Claimant was unable to provide him with specific information. In a number of medical reports and during testimony at the hearing, the Claimant has stated that his right shoulder symptoms started in May to June of 2012, and on more than one occasion, the Claimant's medical records list a date of June 8, 2012. This is not in accord with his filing of his claim and his Application for Hearing which lists his injury date as March 10, 2012.

In addition to issues related to the timing of the reporting of the alleged right shoulder work injury, there are some inconsistencies in the Claimant's statements to medical providers, supervisors and in his testimony, and as compared to the testimony of coworkers, regarding the Claimant's actual work duties in the time period when he returned from his left shoulder surgery. However, even the Claimant testified and has previously represented that, unlike his left shoulder injury, he does not relate his right shoulder injuries to any one specific event. Rather, he testified and stated in medical records that his right shoulder pain symptoms seem to have come on more gradually.

On November 14, 2012, the Claimant reported to Dr. Raschbacher that he first noticed the right shoulder symptoms after about 1 ½ days of light duty work when he was pulling tires off a pile and grading them and then rolling or kicking the tires to the correct pile. On September 23, 2014, the Claimant reported essentially the same to Dr. Raschbacher.

On June 27, 2012, the Claimant reported to Dr. Ogrodnick that "he is performing light duty, in which he continues handling tires, but he tries to avoid the largest tires." Then, on July 26, 2012, the Claimant was seen at Memorial Health Urgent Care for right shoulder pain that the Claimant reported had been hurting for a month. The office note indicated that the Claimant "states his physical therapist says he is overcompensating due to surgery on left shoulder 3 months ago."

The Claimant testified at the hearing on November 5, 2014 that he was grading tires for the employer. He testified that this task involved picking a tire up to about Claimant's chest height and spinning it around to examine it. The Claimant testified that then he would push on the sidewalls to check for wear and he would push with his right arm. Then after he determined which pile was correct for the tire, he would use a part throwing, part rolling motion down his body and when the tire went by his foot, he would kick it into one of the piles.

A coworker, Mr. Estes, testified that the Claimant had work restrictions and worked modified duty after returning from left shoulder surgery, picking up trash mainly. Mr. Estes testified that the Claimant also worked at sorting and inspecting tires. Mr. Estes testified that the Claimant rolled tires around on the ground and inspected them and then he would roll the tire to a stacker. Mr. Estes testified that if Claimant did pick the tire up, he would not hold it at a 90 degree angle like the Claimant testified, but rather at more of a 45 degree angle since it is too hard to lift it the way the Claimant

described. Mr. Estes testified that that is how everyone did it and the Claimant did not perform the work differently. Mr. Estes stated that after returning from surgery, sometimes the Claimant rolled the tires and sometimes he kicked them, but he doesn't recall seeing the Claimant drop-kick a tire in the way that the Claimant described.

Dr. Ogrodnick initially during treatment for the right shoulder questioned whether the Claimant's right shoulder condition was work related. Then, Dr. Ogrodnick recommended right shoulder treatment basing this, in part, on an understanding that the Claimant was throwing tires with his right arm. Dr. Ogrodnick further testified that if the Claimant was throwing tires with his right arm, then he believed that the cause of the Claimant's right shoulder issues would be the work-related activities of throwing those tires. However, on cross-examination during deposition testimony, Dr. Ogrodnick agreed that in determining if there is a causal link between the right shoulder symptoms and the job duties that it would be important to have specific information about the modified job duties the Claimant was performing just prior to June 14, 2012. Dr. Ogrodnick conceded that he did not have information about the weight, size and circumference of the tires he was working with during modified duties. Nor did Dr. Ogrodnick have specific information about the motions used or how the Claimant was handling the tires, nor did he have information about how frequently the Claimant was performing tasks with his right arm and shoulder. Dr. Ogrodnick also confirmed that neither he, nor anyone from his office, discussed with the Claimant what activities he was doing outside of work. Dr. Ogrodnick later testified that he believes that this information is required in order to make a causation determination with respect to the Claimant's right shoulder condition. Ultimately, Dr. Ogrodnick opined that the causation determination really hinged on whether or not the Claimant was throwing tires on modified duty and, if he was, it was more likely work-related, but that if he did not throw tires on modified duty, it was more likely not work-related.

Dr. Raschbacher agreed that if the Claimant was actually "throwing" tires, then his right shoulder condition is relate to work activities, but if he was not "throwing" tires, then his right shoulder condition is not work related. By "throwing" tires, Dr. Raschbacher testified that he is specifically referring to the action of "ballistically flinging tires forward" and by "ballistically," Dr. Raschbacher meant a rapid acceleration/deceleration movement, not a steady motion. Dr. Raschbacher testified that he did not find the movement of holding a tire in front of his body with his arm flexed and then "drop kicking" the tire, to be a ballistic motion that would be an unfavorable mechanical position for the Claimant's right shoulder. So, Dr. Raschbacher opined that if that was the motion the Claimant was making, then this is not a mechanism of injury likely to produce a labrum tear. Referring to the Claimant's 12/11/12 MRI, Dr. Raschbacher testified that the Claimant's degenerative changes were progressing and his diagnosis is osteoarthritis and labral tear. Dr. Raschbacher then testified that the labral tear pathology could be insidious and the result of a degenerative condition without a discreet injury having occurred at work.

In considering the testimony of the Claimant, Mr. Estes and statements in the medical records, it was found that while performing the job of grading tires after

returning to work after his left shoulder injury, the Claimant was not a loader anymore and was not required to throw tires onto a pile or into a truck. Rather, the weight of the evidence is that the Claimant was rolling or drop-kicking tires into piles. Other co-workers would load the tires after the Claimant graded the tire or, if needed, after the Claimant directed a tire to the correct pile of tires for that condition of tire, a coworker would get it to the top of the tire pile. For his part, the Claimant would pick up a tire, spin it, check the sidewalls and then roll or dropkick the tire in a particular direction. He would not throw tires as the term "throw" was described by Dr. Raschbacher. Relying on the testimony of both Dr. Ogrodnick and Dr. Raschbacher, since the Claimant was not engaged in a throwing mechanism, his right shoulder condition is not related to his work activities. As such, the Claimant's claims for compensation for WC 4-928-129-01 for his right shoulder condition is denied and dismissed.

Remaining Issues

The Claimant failed to prove that his modified work duties during the period of time after he returned from left shoulder surgery resulted in a compensable right shoulder injury requiring medical treatment or caused a disability that resulted in wage loss due to the inability to work. As such, the remaining issue regarding medical benefits is moot. In weighing the conflicting medical opinions, it was found that the Claimant failed to prove that his right shoulder condition was caused, permanently aggravated, or accelerated by either or both his return to work after his left shoulder surgery and/or overuse of his right upper extremity at his work duties. Therefore, the Claimant has not proven that his left shoulder condition is related to a work injury and he has not established that medical benefits, including right shoulder surgery, are reasonably necessary to cure and relieve the effects of a work injury.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The Claimant's current right shoulder condition was not caused, aggravated or accelerated by a work injury while performing his modified job duties after returning to work from a left shoulder surgery.

2. The Claimant has not proven that he is entitled to medical benefits reasonably necessary to cure and relieve the Claimant from the effects of a work injury to his right shoulder, including, but not limited to, right shoulder surgery.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 4, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATIONS

1. If the Claimant timely filed a claim for workers' compensation in Claim No. WC 4-951-736, the parties agree that the Claimant sustained a compensable injury.

2. If the surgery performed by Dr. Stephen Shogan on April 16, 2014 is found authorized, reasonable, necessary and related, then the parties agree that the Claimant is entitled to receive temporary total disability (TTD) benefits for WC 4-928-690 from April 16, 2014 ongoing based upon an average weekly wage (AWW) of $900.00

ISSUES

Based on the foregoing stipulations, the following issues remained for consideration at hearing:

1. Whether the Claimant proved that the surgery and medical treatment provided to the Claimant by Dr. Stephen Shogan was authorized, causally related and reasonably necessary to cure and relieve the effects of the October 26, 2013 and/or July 25, 2013 industrial injury.

2. Whether the Respondent has proven that the Claimant's claim for benefits in Claim No. WC 4-951-736 is barred by the applicable statute of limitations.

FINDINGS OF FACT

1. The Claimant is the head custodian at a public school operated by her Employer. She was initially hired on January 10, 2004 (or possibly January 10, 2005). She was employed and performing her job duties on October 26, 2011 and on July 25, 2013 (Respondent's Exhibits A and CC). The Claimant testified at the hearing on August 27, 2014 that she has had 3 work injuries in her 10-year work history with the Employer. She suffered a wrist injury in 2009 breaking ice outside of the school where she works. On cross-examination, the Claimant testified that for the 2009 injury, she did not do anything except for seeing a doctor until she felt better. The Claimant subsequently had two additional injuries which are the subject of the consolidated claims in this case.

October 26, 2011 Injury

2. The Claimant testified that she had a second work injury on October 26, 2011 when she had to put away a canopy the day after the night crew didn't clean it after a football game. The canopy was heavy and covered with snow so the Claimant was using a push broom to get the snow off when the canopy fell and hit the Claimant in the back of the head. The Claimant testified that she felt a big headache and ringing in her ears. The Claimant testified that she went into the office and filled out forms with the secretary and the assistant principal, Mr. Roper. The Claimant's testimony regarding the mechanism of injury for the October 26, 2011 injury is consistent with the medical records and was credible and is found as fact.

3. Dr. Bruce Cazden initially saw the Claimant and examined her on October 28, 2011. He assessed the Claimant with a C/T strain and a mild skull contusion (Respondent's Exhibit E). As of November 28, 2011, Dr. Cazden noted that the Claimant was feeling better with respect to her cervicothoracic strain and that she had no muscle spasm. He discharged her from care at MMI with 0% impairment (Respondent's Exhibit G).

4. On December 28, 2011, the Claimant returned to Arbor Occupational Medicine and saw Dr. Sander Orent due to ongoing pain in the thoracolumbar area. Dr. Orent noted that the Claimant was getting better but aggravated her back pain because of an ice chopping incident. Dr. Orent contacted the Claimant's Employer to opine that it is unrealistic to expect the Claimant to shovel the entire high school grounds herself with a snow shovel. He recommended the Claimant have assistance with shoveling in the short term and possibly a snow blower. The Claimant was referred for additional physical therapy (Respondent's Exhibit I).

5. On January 9, 2012, the Claimant saw Dr. Cazden for follow up on the cervical and thoracic strain. The Claimant also reported the onset of some right upper extremity pain over the last few days. Dr. Cazden recommended continued chiropractic and physical therapy and if the right upper extremity pain continued, evaluation for a facet joint injection (Respondent's Exhibit M).

6. On January 23, 2012, Dr. Cazden noted the Claimant was improving and that the chiropractic was helping and the Claimant "has also gotten quite a bit of benefit from Physical Therapy." Dr. Cazden noted some mild neck and mid-back stiffness, but opined that otherwise she was improving and she was nearing MMI (Respondent's Exhibit S).

7. On February 6, 2012, Dr. Cazden saw the Claimant for follow-up on her ongoing neck pain. He noted that she has tried conventional treatments including physical therapy, needling and chiropractic, but continues to have neck pain. A review of the Claimant's x-ray showed underlying arthropathy at the facet joints from C2-C3 to C6-C7 with the worst at C3-4 and C4-5. Dr. Cazden recommended a one-time trial of facet injections with Dr. Sorenson. The Claimant remained on modified duty requiring assistance with snow removal (Respondent's Exhibit V).

8. On February 13, 2012, the Claimant saw Dr. Lief Sorenson for right-sided neck pain into her shoulder. The Claimant reported a pain that was "tight and aching" with some "needle-like pain" between her shoulder blades and back. The Claimant reported that chiropractic helped her to some degree but physical therapy produced very little results without long-term relief. Dr. Sorenson diagnosed the Claimant with "chronic pain syndrome, cervical spondylosis and myalgia myositis." He noted that he spent extensive time reviewing the Claimant's pain history and discussing options for treatment modalities. He scheduled her for an injection on that visit with follow-up to occur with Dr. Cazden. Dr. Sorenson also noted that the Claimant was a candidate for radiofrequency ablation if the injections were helpful diagnostically and possibly a candidate for diagnostic radial branch blocks followed by radiofrequency ablation. Dr. Sorenson also recommended continuation of the Claimant's ongoing conservative modalities. Dr. Sorenson performed a right-sided cervical C3-4 and C4-5 facet injection and noted that the Claimant's post-procedure neurologic exam was unchanged from pre-procedure (Respondent's Exhibit X).

9. On February 17, 2013 Dr. Cazden noted that the Claimant reported partial relief of her neck pain and the radiculopathy was mildly improved. However, the pain was still present and so Dr. Cazden recommended an MRI and continued observation over the next two weeks for improvement with the injections (Respondent's Exhibit Y).

10. The Claimant saw Dr. Sorensen again on March 21, 2012 for right-sided cervical C4-5 and C5-6 facet injections. No complications were noted and the Claimant's post-procedure neurologic exam was unchanged from pre-procedure (Respondent's Exhibit Z).

11. On March 23, 2012, Dr. Cazden responded to questions regarding the Claimant's status and noted she was not at MMI but she was making progress, recently underwent follow-up facet injections and Dr. Cazden opined that she was approaching MMI. He did expect that there may be "some permanent residuals from her injury, although they are not severe." MMI was anticipated within the next six weeks (Respondent's Exhibit AA).

12. On April 9, 2012, Dr. Cazden placed the Claimant at MMI for her cervical strain and noted improved facet arthropathy. She was returned to full duty on April 9, 2012 and Dr. Cazden found no permanent impairment. He recommended one doctor visit as maintenance care as needed over the next 4 months (Claimant's Exhibit 4; Respondent's Exhibit BB).

13. The Claimant testified that she was sent to Arbor Occupational Medicine and saw Dr. Cazden for treatment for the October 2011 injury. The Claimant testified that Dr. Cazden sent her to physical therapy but every time she had physical therapy the pain got worse. The Claimant testified that Dr. Cazden sent her to Dr. Sorenson for injections and it helped a little bit. Then, that was it for treatment. The Claimant testified that she spoke to Dr. Cazden and wanted more treatment because she felt she was still in pain and that Dr. Cazden was not treating her right. She also testified that she felt

that her case for the October 26, 2011 injury was still open and if the pain was worse, she could go back anytime. She testified that she didn't receive anything stating the case was closed. She testified that she just kept working and got used to being in pain. On cross-examination, the Claimant testified that she did not file a claim for worker's compensation because she thought the Employer would file this. For the 2011 injury, the Claimant testified on cross-examination that if she had to leave work for doctor or physical therapy appointments, she would just tell the secretary when she left and when she returned and then the Claimant would stay late to make up the time so she did not miss any work. The Claimant testified that in 2012 she still had moderate neck pain, not all the time, but with heavy lifting. The Claimant testified that after her medical treatment stopped in 2012, she had no work restrictions after that. The Claimant's testimony regarding her treatment for the October 2011 injury and her understanding of the status of this claim was credible and is found as fact.

14. The Claimant completed a Worker's Claim for Compensation for the October 26, 2011 work injury on May 23, 2014 alleging a cervical strain injury due to the canopy tent and snow falling on her head (Respondent's Exhibit A).

15. On June 10, 2014, Respondent filed a Notice of Contest for the October 26, 2011 claim on the grounds that the claim was not filed within the applicable statute of limitations (Respondent's Exhibit B).

16. The Claimant filed an Application for Hearing on June 27, 2014 for the October 26, 2011 injury (Respondent's Exhibit C). Respondent filed its Response to Application for Hearing on July 7, 2014 (Respondent's Exhibit D).

July 25, 2013 Injury

17. The Claimant testified that on July 25, 2013, she was stripping wax in the main hallway with three others and the floor was slippery. The Claimant was holding the "doodlebug" which she described as a pad on a long stick, while another person was using the stripper machine. The Claimant tried to keep from falling but the stick broke and she fell and her head hit the floor. She testified that her hair was wet with chemicals from the wax stripping process. While the Claimant went to take a shower to clean off the stripping chemicals, the secretary got and filled out the forms. The Claimant's testimony regarding the mechanism of injury for the July 25, 2013 accident was credible and is found as fact.

18. The Claimant handwrote an Employee Report of Injury/Incident on July 25, 2013 that was substantially consistent with her testimony regarding the mechanism of injury. The Claimant also noted the names of the three co-workers who witnessed the incident (Claimant's Exhibit 2). On July 30, 2013, the office personnel at the school completed the Supervisor's Accident/Incident Investigation Report also noting the Claimant slipped and fell while stripping the floors of wax when she slipped on the stripping solution. The report notes the Claimant "fell on her back and arm was twisted back" (Claimant's Exhibit 3).

19. An Employer's First Report of Injury was completed on July 31, 2013 that states that the Claimant reported an injury occurring on 07/25/2013 and that the injury occurred when the Claimant slipped on a wet floor and fell. The report lists a witness and notes that the Claimant treated with Arbor Occupational (Respondent's Exhibit CC).

20. The Claimant testified that she asked that she not be required to treat with Dr. Cazden, so she was sent to Dr. Kistler. Then, he retired, so the Claimant started treating with Dr. Koval. The Claimant testified that Dr. Koval sent the Claimant to physical therapy and 1 session of chiropractic. She felt that her condition kept getting worse and her arm became numb. The Claimant testified that after the July 25, 2013 injury, her pain got much worse and headaches started which went down her neck into the arm. She testified that she became depressed and really sick.

21. On July 31, 2013, the Claimant was initially evaluated by Dr. David Kistler at Arbor Occupational Medicine for a chief complaint of neck and right shoulder injury occurring on July 25, 2013. The Claimant reported slipping on a floor that was wet with floor stripper and she fell on her right shoulder and back. The Claimant reported an initial numbness and tingling that had since abated. She did not recall losing consciousness but she did have to be helped up. The Claimant did not recall hitting her head but she reported headaches which seem to originate from her neck. After physical examination, Dr. Kistler assessed the Claimant with "cervical strain, which is a flare of pre-existing due to this injury" and "right shoulder strain." The Claimant was provided with lifting restrictions of no more that 5 lbs. with the right arm and avoiding overhead. He ordered x-rays and indicated that if the shoulder wasn't improving consideration of an MRI (Claimant's Exhibit 5; Respondent's Exhibit II).

22. On July 31, 2013, the Claimant had x-rays of her cervical spine. Dr. Nicholas Wickersham interpreted the images and reported findings. He noted "minimal variation in positioning of C5 on C6 with flexion, suspicious for instability" and "mild bilateral neural foraminal stenosis and multilevel degenerative change" (Claimant's Exhibit 6).

23. On August 21, 2013, the Claimant saw Dr. Kistler reporting a "50% overall subjective improvement" with respect to her cervical and right shoulder sprains. She reported that physical therapy and dry needling was helpful but was not sure about traction. The Claimant reported that she has been asked to do things outside of her restrictions such as move desks. At this point the Claimant was showing improved range of motion in physical therapy with limitations still due to pain and she had 2 facet injections on the right C4-5 and right C5-6 which were noted to be "quite helpful." Dr. Kistler referred the Claimant back to Dr. Sorenson for repeat facet injections (Respondent's Exhibit MM).

24. On September 9, 2013, the Claimant reported that she saw Dr. Bryan Wernick on 08-28-2013 and then on 09-06-13, she had repeat injections with some improvement. Dr. Kistler noted moderate tenderness around C4-C5 on the right

paraspinal with tightness with her cervical range of motion but full range of motion of her right shoulder (Respondent's
Exhibit SS).

25. On September 23, 2013, the Claimant saw Dr. Kistler again reporting continued improvement on her cervical and right shoulder strains, perhaps a 60% overall subjective improvement. Dr. Kistler noted full range of motion of the cervical spine with some tenderness in the bilateral paraspinals in the lower cervical area (Respondents Exhibit VV).

26. On October 7, 2013, the Claimant saw Richard Shouse, PA-C at Arbor Occupational Medicine. Mr. Shouse noted that the Claimant had a problem with her right shoulder and neck three years ago, but it had gotten "somewhat better" until her 07-25-13 slip and fall. On examination, Mr. Shouse noted that the Claimant was tender primarily at the paraspinal region and in the upper thoracic back particularly along the right scapular region. The Claimant's physical therapy was continued and PA-C Shouse noted that since the Claimant was doing well, her physical therapy should get a bit more aggressive to help resolve her symptoms and get case closure (Respondent's Exhibit XX).

27. On October 23, 2013, the Claimant returned to Arbor Occupational Medicine and saw Dr. Alisa Koval. She noted that the Claimant had a pre-existing neck condition that was aggravated by a slip and fall on July 25, 2013. Dr. Koval noted that the Claimant reported that her neck extension is the most difficult motion for her and that she did not have full range of motion of her right shoulder. On examination, Dr. Koval noted full range of motion with the neck but with discomfort on extension. Dr. Koval also noted that the Claimant was not able to fully abduct her right shoulder. Physical therapy was continued and therapeutic dry needling was recommended. The Claimant's work restrictions were limited to lifting no more than 23 pounds.

28. The Claimant testified that she didn't recall missing 10 physical therapy appointments in September and October of 2013, but she agrees that she missed some appointments because she was depressed.

29. On November 19, 2013, the Claimant saw Dr. Koval again and Dr. Koval made a request for the Claimant to be evaluated by Dr. Carbaugh for pain management and mental health. On examination, Dr. Koval found the Claimant to be tender in the cervical and paraspinal regions as well as the right and left trapezius, right worse than left. Dr. Koval assessed the Claimant with cervical and thoracic strains with right sided trapezius involvement and new left-sided trapezius pain that has waxed and waned since the last visit along with possible reactive depression. Dr. Koval also recommended an MRI of the cervical spine "after watching her symptoms wax and wane, and not truly improve very much over the last several visits (Respondent's Exhibit EEE).

30. On November 26, 2013, the Claimant underwent a cervical MRI without contrast. The images were interpreted and reported by Dr. Wayne A. Miller. Dr. Miller noted that "no fractures or dislocations are evident and the cord appeared normal

throughout the cervical region. Dr. Miller's impression was that the MRI showed "C3 through C6 degenerative disc disease" including posterior bulging of the discs at C3 through C6 and mild right foraminal stenosis at C4-C5 and mild bilateral foraminal stenosis at C5-C6 (Claimant's Exhibit 7).

31. On December 3, 2013, the Claimant saw Dr. Koval again and the Claimant reported that overall her condition was stable although improvements lately have been modest and infrequent. Reviewing the MRI, Dr. Koval noted that the results showed manifestations of mild to moderate degenerative disc disease at C3-C6 with posterior bulging of each of those discs and mild stenosis at C4-5 on the right side and at C5-6 bilaterally. Physical therapy and work restrictions were continued (Claimant's Exhibit 8, pp, 9-10; Respondent's Exhibit III).

32. On December 6, 2013, the Claimant saw Ron Carbaugh, Psy.D. for a pain psychology evaluation per the referral of Dr. Koval. Dr. Carbaugh opined that the Claimant is caught between significant psychosocial and family stressors as well as an effort on her part to continue working and provide for herself and her children. He found this stress is likely impacting her pain perception as well as her response to treatment. He ultimately opined that the Claimant would be a fair candidate for surgery, at best (Respondent's Exhibit JJJ).

33. On December 11, 2013, Dr. Bryan Castro evaluated the Claimant for a surgical consultation for a neck injury. Dr. Castro reported that the Claimant describe a primary injury occurring in October 2011 with a re-injury in July 2013. With respect to the re-injury, the Claimant advised Dr. Castro that she was stripping wax on a floor when she had a slip-and-fall injury where she injured her head, and her right arm twisted behind her back. The Claimant reported her pain is predominantly neck pain, headaches and right greater than left shoulder pain with significant thoracic pain. Dr. Castro noted that the Claimant has tried physical therapy, a home traction unit, Flexeril and an epidural injection. He also reviewed the Claimant's MRI, noting mild-to-moderate degenerative changes, some disc bulging centrally at C3-4, C4-5 and C5-6 and disc desiccation without significant foraminal narrowing and without central canal encroachment. Dr. Castro noted that the Claimant was "quite adamant that 'something needs to be done' from a treatment standpoint." However, Dr. Castro opined that it is not clear that there is any surgery that is going to fix her condition and he recommended a continued conservative approach. He informed the Claimant that the majority of symptoms resolve on their own eventually. Dr. Castro noted no instability, no coronal or sagittal plane deformities, and no neural encroachment. Therefore, Dr. Castro opined that surgical intervention in this case is unpredictable and the Claimant could have a poor outcome (Claimant's Exhibit 9; Respondent's Exhibit LLL).

34. The Claimant testified that she saw Dr. Castro who left her with the impression that she was going to get worse and there was nothing he could do to help her. She testified that she was in pain and just wanted to get better. When she left Dr. Castro's office, she testified that she thought she really needed help.

35. On December 13, 2013, Dr. Koval noted that the Claimant reported experiencing increased pain. However, based on his surgical consultation, Dr. Castro "feels strongly that surgery is not the answer at this time. He feels that her changes are degenerative and do not warrant fusion at this point." Dr. Koval noted that this was very upsetting to the Claimant as she is really struggling with her chronic pain. Dr. Koval recommended referral back to Dr. Wernick for a second round of injections (Claimant's Exhibit 8, pp. 11-12; Respondent's Exhibit NNN).

36. On January 9, 2014, the Claimant reported to Dr. Koval that she was overall experiencing decreased pain due to a translaminar epidural cortisone shot that she received on January 6, 2014. Dr. Koval put the Claimant's physical therapy on hold until after she followed up with Dr. Wernick to allow the full effect of the injection to take place (Respondent's Exhibit QQQ).

37. On January 20, 2014, the Claimant saw Dr. Sorensen for follow-up after injections performed on January 6, 2014. The Claimant was reporting over 90% relief for about 10 days with the relief gradually subsiding and leveling off at greater than 50% relieve as of the date of this visit. Based on the results, Dr. Sorenson noted the Claimant would be a candidate for repeat C7-T1 interlaminar ESI in the future should her functionally beneficial pain relief lessen over time (Claimant's Exhibit 10).

38. On January 22, 2014, the Claimant saw Dr. Koval again for follow up and reported significant relief and decreased pain from the translaminar epidural cortisone shot. The Claimant reported an initial 90% relieve which has since decreased to about 50% but the Claimant reported that she was still extremely functional. The Claimant reported that she was sleeping reasonably well and Dr. Koval noted that the Claimant told her that the reasons she occasionally does not sleep well have less to do with her neck and more to do with her life. It was also noted that the Claimant started pain and adjustment counseling with Dr. Carbaugh and his associate Jane Cameron at this point (Respondent's Exhibit SSS).

39. On February 6, 2014, the Claimant saw Dr. Koval again reporting overall decreased pain due to the translaminar epidural cortisone shot. However, with an increased work load recently and more work out in the cold plowing and shoveling snow, she has been having more flare ups. Work restrictions were continued as were ongoing pain and adjustment sessions (Respondent's Exhibit WWW).

40. On February 13, 2014, the Claimant saw Dr. Stephen Shogan for the chief complaint of neck pain present for 2 years after a snow drift fell on her head. The Claimant reported "chronic neck pain that is not as severe as prior to her injection," neck stiffness, headaches and bilateral arm pain right greater than left. As of this visit, Dr. Shogan noted the Claimant had participated in 6 months of PT with short temporary relief and 3 sessions of ESI injections at Avista Hospital with Dr. Sorenson with the last injection on 01/08/2014 with some relief. Dr. Shogan performed a general neurological examination and he reviewed a November 26, 2013 cervical MRI. Dr. Shogan assessed spinal stenosis in the cervical region, cervical spondylosis without myelopathy, cervicalgia and brachial neuritis or radiculitis. Dr. Shogan discussed treatment options

with the Claimant including further conservative care vs. surgical intervention (Claimant's Exhibit 11, pp. 25-26; Respondent's Exhibit YYY).

41. On February 21, 2014, the Claimant followed up again with Dr. Koval reporting that the relief from the translaminar epidural cortisone shot has since diminished. The Claimant advised that she wanted to obtain a second opinion regarding cervical fusion surgery rather than proceed with a second round of injections at this point. The Claimant reported that her pain continues to worsen and be aggravated by work activities. The Claimant reported that she was seeking a longer term solution than injections. The Claimant also reported that the tramadol for pain was less effective over time so Dr. Koval prescribed Percocet for use at night and tramadol for use at work during the day. Dr. Koval referred the Claimant to Dr. Shogan for a second surgical evaluation (although the ALJ notes that the Claimant saw Dr. Shogan on February 13, 2014 prior to this referral) (Claimant's Exhibit 8, pp. 15-16; Respondent's Exhibit AAAA).

42. The Claimant testified that a friend told her about Dr. Shogan and she saw him on February 13, 2014. She testified that she went on her own to see Dr. Shogan for a second opinion. She stated that she did not bring any prior medical records to this appointment on purpose because she wanted his honest opinion. The Claimant agreed that Dr. Shogan gave her two treatment options, surgery or continued conservative treatment. During testimony at the hearing, the Claimant clarified that she decided to get a second opinion, she told Dr. Koval and then she told Dr. Koval that she went to see Dr. Shogan.

43. On March 13, 2014, the Claimant saw Dr. Sander Orent at Arbor Occupational Medicine to talk more about her neck. Dr. Orent noted, "we have two very contrasting opinions regarding whether she should undergo surgery, leave alone the fact that she went on her own to see Dr. Shogun." Dr. Orent further noted that Dr. Shogan opined that the Claimant would benefit from a 3-level fusion while Dr. Castro opined that this would be a mistake because the Claimant does not have the surgical indications. In reviewing the Claimant's two cervical MRIs, Dr. Orent noted that "there has been some significant change between the first and the last one; however, I do not find any physical examination consistent with a cervical radiculopathy." Dr. Orent discussed the nature of cervical degenerative disease and the consequences of a fusion including the long term consequences. Dr. Orent stated that the Claimant is very uncomfortable and desperate to be fixed. However, Dr. Orent cautioned that his concern is that surgery could make her worse and not better and he recommended a SAMMS conference to obtain an independent opinion from another physician. Dr. Orent also advised the Claimant that, "should she choose to undergo the surgery with Dr. Shogan at this point, the surgery would not be authorized by us" (Claimant's Exhibit 12; Respondent's Exhibit CCCC).

44. On March 24, 2014, the Respondent sent a Prior Authorization Denial Letter denying the request for surgery submitted on March 20, 2014. Respondent challenged the reasonableness, necessity and relatedness of the requested procedures (Claimant's Exhibit 13). Also on March 24, 2014, the Respondent filed an Application for Hearing regarding the July 25, 2013 work injury (Respondent's Exhibit DD).

45. On March 27, 2014, Dr. Orent responded to interrogatories from the claims consultant on this case about the surgery request for a C4-C-6 fusion with mosaic plating by Dr. Shogan. Dr. Orent opined that the surgical procedure was not related to an injury date of 07-25-13. Dr. Orent further opined that he shared Dr. Castro's opinion that the Claimant's current cervical complaints are outside of the Workers' Compensation system and he further opines that he does not believe the Claimant has good indications for the surgery and he had concerns about her condition worsening as a result of the surgery and did not believe the cervical fusion should be performed (Respondent's Exhibit EEEE).

46. The Claimant testified that she was referred by Dr. Koval for the surgery. While the Claimant was referred for a second opinion regarding treatment options to Dr. Shogan, the medical records do not reflect that Dr. Koval or any of the physicians at Arbor Occupational Medicine referred the Claimant for surgery or approved or agreed with the surgical treatment option. After obtaining Dr. Shogan's recommendation, the clear indication from the Claimant's authorized treating physicians is that the surgery proposed by Dr. Shogan was not authorized and that the Claimant's treating physicians relied on the opinion of Dr. Castro over Dr. Shogan. While Dr. Koval did make a referral to Dr. Shogan for a consultation, albeit with the misunderstanding that the Claimant had not already previously seen Dr. Shogan, this is very different from making a referral for a surgical procedure. The actions taken by the Claimant's authorized treating physicians subsequent to obtaining the recommendation of Dr. Shogan for surgical intervention very clearly indicate that the proposed treatment was not authorized and that there was no referral to Dr. Shogan for surgery. In considering all of the evidence on the issue of whether Dr. Shogan was an authorized medical provider in this case, the ALJ finds that Dr. Koval only made a referral for an orthopedic consultation. Any orthopedic consultation provided by Dr. Shogan after the referral was made in the ordinary course of treatment was authorized. However, there was no referral for a surgical procedure. Upon obtaining two conflicting orthopedic surgical consultations, the Claimant's authorized treating physicians at Arbor Occupational Medicine recommended further conservative care at that time and specifically stated that the surgical option was not an authorized and valid referral in the event that the Claimant elected to pursue surgery.

47. On April 8, 2014, the Claimant filed a Response to Application for Hearing regarding the July 25, 2013 work injury (Respondent's Exhibit EE).

48. On April 9, 2014, the Claimant interacted with PA-C Adam Baker at Dr. Shogan's office to advise that she has "elected to proceed with C3-6 ACDF instead of C4-6 with mosaic plating (Claimant's Exhibit 11, pp. 27-28; Respondent's Exhibit FFFF).

49. On April 16, 2014, Dr. Shogan performed an anterior cervical disk and spur removal with fusion and mosaic plating at C3-4, C4-5 and C5-6 at HealthOne Rose Medical Center. There were no apparent complications during or immediately after the procedure (Respondent's Exhibit GGGG).

50. The Claimant testified that right after waking up from surgery she felt better and the headaches and the burning in her back and arms was gone. After the

surgery the Claimant testified that she did not have to take any narcotics even though before the surgery she took so many narcotics that it made her sick and she had to see a gastroenterologist. The Claimant testified that before the surgery, she was miserable and had no life and now she has a life again. She testified that for her the surgery was necessary.

51. On May 21, 2014, Dr. Stephen Shogan testified by deposition as an expert witness in the area of neurosurgery (Tr. Depo. Dr. Stephen Shogan, p. 3). Dr. Shogan testified that as of his first examination of the Claimant on February 13, 2014, he was not independently aware that the Claimant's injury was work-related, nor did he recall anything in his notes that reflected a work injury (Tr. Depo. Dr. Stephen Shogan, p. 6). As of the deposition date, Dr. Shogan testified that he did not have enough information to provide a causation determination and he deferred that opinion (Tr. Depo. Dr. Stephen Shogan, pp. 9-10). Dr. Shogan testified that the operative procedure that he performed on the Claimant was reasonable and necessary given the Claimant's underlying pathology and symptoms (Tr. Depo. Dr. Stephen Shogan, p. 10). Dr. Shogun described the procedure as removal of the three discs from in between four bones in her neck and then placing devices that encourage fusion and structural support in the area where the discs used to be and then fusing the four bones together (Tr. Depo. Dr. Stephen Shogan, p. 11). Dr. Shogan testified that he has only seen the Claimant one time post-operatively but at that time, the Claimant told him that her symptoms were better (Tr. Depo. Dr. Stephen Shogan, p. 11). On cross-examination, Dr. Shogan testified that based on his review of intake information, the Claimant was referred to his office from a friend and not a physician (Tr. Depo. Dr. Stephen Shogan, p. 13). Based on the Claimant's November 26, 2013 MRI scan that Dr. Shogan reviewed, he opined that the findings indicated there was nerve root impingement at C4-5 and C5-6 (Tr. Depo. Dr. Stephen Shogan, pp. 14-15). After reviewing a report of a February 27, 2012 cervical MRI, Dr. Shogan testified that, depending on differences in how the radiologist read that MRI, the February 27, 2012 MRI was "pretty similar to the MRI scan that was – that I reviewed from November of 2013" (Tr. Depo. Dr. Stephen Shogan, p. 16). Dr. Shogun conceded that there was not anything in the MRI that he reviewed that led him to believe that the pathology present was trauma-induced versus degenerative, but noted that "frequently it is really impossible to sort that out" (Tr. Depo. Dr. Stephen Shogan, p. 24). When questioned about whether or not the surgery he performed on the Claimant was necessary, Dr. Shogan testified that whether or not surgery is necessary is up to the patient in terms of how much pain they are willing to live with and whether or not they believe the surgical option is appropriate (Tr. Depo. Dr. Stephen Shogan, p. 31).

52. On June 19, 2014, the Claimant saw Dr. Koval for follow-up eight weeks post-cervical fusion. Dr. Koval noted the Claimant reported she was doing very well and her pain levels diminished to where the Claimant no longer used medications and was out of her neck brace. Dr. Koval noted the Claimant was to continue physical therapy and massage therapy and remain on modified duty (Claimant's Exhibit 8, pp. 17-18).

53. On June 29, 2014, Dr. Shogan responded to a June 5, 2014 letter from Claimant's counsel regarding a request for a causation opinion. After evaluation of medical records related to a July 25, 2013 accident and an October 26, 2011 accident,

Dr. Shogan opined that the Claimant's need for continuing treatment and surgery he recommends is related to the incident on July 25, 2013. Dr. Shogan further opined that no apportionment is needed as between the July 25, 2013 accident and the October 26, 2011 accident (Claimant's Exhibit 11, pp. 30-31; Respondent's Exhibit KKKK).

54. On July 1, 2014, Dr. Sander Orent testified by deposition as an expert witness in occupational medicine (Tr. Depo. Dr. Sander Orent, pp. 3-4). Dr. Orent testified that Drs. Kistler and Koval from the same clinic where he practices have treated the Claimant since July 31, 2013. He testified that he has participated in her care as well, primarily with a case review and participation in a SAMMS conference (Tr. Depo. Dr Sander Orent, pp. 4-5). Dr. Orent testified that the Claimant presented with an injury to her cervical spine and shoulder (Tr. Depo. Dr. Sander Orent, p. 5) and that a pre-existing neck condition was aggravated by the July 2013 accident (Tr. Depo. Dr. Sander Orent, p. 6). During the course of her treatment, the Claimant has had physical therapy, modified duty, medications, consultations with pain management specialists and a psychological evaluation (Tr. Depo. Dr. Sander Orent, p. 6). The Claimant also received a C7-T1 epidural steroid injection (Tr. Depo. Dr. Sander Orent, p. 7). Dr. Orent found that an MRI showed mild to moderate degenerative changes in the Claimant's cervical spine with some posterior bulging of the discs but no disc herniations. Dr. Orent characterized this as "age appropriate degenerative change" and found the MRI to be "unremarkable" (Tr. Depo. Dr. Sander Orent, p. 8). The Claimant has also had repeated EMG studies which were negative (Tr. Depo. Dr. Sander Orent, p. 9). The Claimant had reported cervical radiculopathy. However, Dr. Orent was not able to reproduce the symptoms with certain maneuvers used to determine if a nerve is compressing in the neck to cause symptoms into the arm as the Claimant had a negative Spurling's maneuver (Tr. Depo. Dr. Sander Orent, pp. 10-11). With respect to the Colorado Medical Treatment Guidelines (the "Guidelines"), Dr. Orent testified that it is his opinion that while the Guidelines are evidence-based, they are merely guidelines and they do not apply in all cases. He testified that about 80 percent of cases fall within the Guidelines, but they don't have the force of the law, rather they are recommendations for what is reasonable (Tr. Depo. Dr. Sander Orent, pp. 12-14). While Dr. Orent clearly testified that he does not feel that the Guidelines apply in every case and he was critical of the Guidelines in some respects, he ultimately opined that the Claimant was not a surgical candidate because conservative treatment had not been exhausted and she did not meet the criteria of the Guidelines (Tr. Depo. Dr. Sander Orent, pp. 15-18 and p. 21). Dr. Orent opined that there were therapy options that the clinic would have preferred to have explored with the Claimant, including dry-needling, and there were concerns about the Claimant from a psychological perspective (Tr. Depo. Dr. Sander Orent, pp. 22-25). Dr. Orent conceded that post-surgery, the Claimant had been doing well, with her pain levels down and she was off medication and out of her neck brace (Tr. Depo. Dr. Sander Orent, p. 26). However, Dr. Orent testified that while he is happy the Claimant now feels better, he opined that he thinks it is likely that her physicians could have gotten the Claimant there without the surgery (Tr. Depo. Dr. Sander Orent, p. 33). Additionally, Dr. Orent testified that there are still issues down the road because a spinal fusion takes three out of seven levels of the cervical spine in terms of allowing movement. Therefore the levels above and below the fused segments now take the force of the stress that would have been absorbed by the other three levels. Dr. Orent

also testified that commonly with fusions, there is a need to perform revisions due to the wear and tear that occurs on the levels above and below the fusion site (Tr. Depo. Dr. Sander Orent, pp. 26-27). Dr. Orent also reviewed medical records from the prior cervical injury that occurred in 2011 when a heavy canopy with about six inches of snow fall on the Claimant's head. The Claimant had two injections which helped temporarily for about three months, muscle relaxers which did not help and six months of physical therapy which the Claimant quit since it was not helping. Dr. Orent testified that the records indicated that the Claimant just got used to the pain and was still symptomatic from the prior 2011 injury at the time of the July 2013 injury (Tr. Depo. Dr. Sander Orent, pp. 28-29). On cross-examination, Dr. Orent conceded that it seems like the surgery was a good idea because today the Claimant is getting better, but Dr. Orent still holds back from endorsing the surgery as reasonably and necessary because the surgery altered the mechanics of the spine and people with fusions are at significant risk for complications down the road (Tr. Depo. Dr. Sander Orent, pp. 36-37). In any event, when Dr. Orent saw the Claimant about a month after the surgery on May 15, 2014, he found the Claimant was doing well and she had a good outcome from the surgery (Tr. Depo. Dr. Sander Orent, pp. 38-39). Dr. Orent saw the Claimant again on June 5, 2014 and Dr. Koval saw her on June 19, 2014 and on both visits, the Claimant's pain levels were down and she was out of the neck brace and no longer on narcotics (Tr. Depo. Dr. Sander Orent, pp. 39-40). Dr. Orent testified that he respected both Dr. Castro and Dr. Shogan, but he maintained that he still agreed with Dr. Castro and aligns his own ideas about how to approach whether or not someone is a surgical candidate more with Dr. Castro (Tr. Depo. Dr. Sander Orent, pp. 44-45). As for parsing out the 2011 claim with the 2013 injury, because the Claimant was still symptomatic from the 2011 injury at the time of the 2013 injury, Dr. Orent testified that he would not be able to state at this time what percentage of the Claimant's symptoms/condition was related to the earlier claim versus the later claim (Tr. Depo. Dr. Sander Orent, pp. 49-50).

55. On July 3, 2014, the Claimant's Motion was granted to consolidate the two hearings for the October 26, 2011 injury and the July 25, 2013 injury (Respondent's Exhibit GG).

56. On August 29, 2014, Dr. Bryan Castro testified as an expert witness in orthopedic surgery (Tr. Depo. Dr. Bryan Castro, pp. 3-4). Dr. Castro testified that he saw the Claimant one time for an evaluation for a cervical injury. At the time of his evaluation, Dr. Castro's impression was that "she had a cervical injury referred to me for neck and arm symptoms. I didn't think she'd be a good surgical candidate (Tr. Depo. Dr. Bryan Castro, p. 5). Dr. Castro opined that he didn't think the bulging in her neck was causing significant neuro-encroachment and he felt that the surgery for neck pain in the setting of mild to moderate degenerative changes has an unpredictable outcome (Tr. Depo. Dr. Bryan Castro, pp. 5-6). Dr. Castro also testified that he saw no objective findings of significant nerve impingement and did not note any spinal instability (Tr. Depo. Dr. Bryan Castro, pp. 6-7). In reviewing the Guidelines, Dr. Castro found that a number of indications were not met under the criteria of the Guidelines with respect to whether the Claimant was a surgical candidate (Tr. Depo. Dr. Bryan Castro, pp. 8-12). Dr. Castro was advised that the Claimant proceeded with the surgery regardless and that her pain was decreased, she was no longer on narcotics and that she feels better.

Nevertheless, Dr. Castro testified that this information did not change his opinion about the Claimant as a candidate for cervical surgery. Dr. Castro opined that a cervical fusion carries a significantly high risk of possible untoward outcomes and will put significant increased load on the disk below and above which may require further surgeries in the future. He testified that even though the Claimant may be doing better than the 50/50 chance of a good outcome, this is not a predictable result when you are back at the point where you are considering the surgery (Tr. Depo. Dr. Bryan Castro, p. 13). Moreover, a three-level fusion versus a two-level fusion increases the likelihood of additional issued down the road as the fusion permanently alters the structure of the spine. He testified that given that the Claimant is in her 40's she will see the next level below break down in her lifetime. Dr. Castro ultimately confirmed his initial opinion that the cervical fusion surgery in this case was not reasonable and necessary (Tr. Depo. Dr. Bryan Castro, pp. 13-14). On cross-examination, Dr. Castro testified that if a surgical procedure could predictably relieve pain and improve functionality, then it would be reasonable and necessary (Tr. Depo. Dr. Bryan Castro, p. 16). However, regardless of the outcome in this case, Dr. Castro maintains that surgery is not an indicated procedure for neck pain (Tr. Depo. Dr. Bryan Castro, p. 18) and that the Claimant did not need surgery as a result of her injury (Tr. Depo. Dr. Bryan Castro, p. 24). Later on redirect testimony, Dr. Castro testified that it is his opinion that the Claimant's symptoms could have improved without the surgery (Tr. Depo. Dr. Bryan Castro, p. 26).

57. The Claimant testified that she does not understand how the worker's compensation system works and she received no instruction from her Employer. She testified that she thought the Employer would do all the necessary filings for her.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Medical Benefits - Authorized

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment even if the treatment is reasonable, necessary and related. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Johnston v. Hunter Douglas,* W.C. 4-879-066-01 (ICAO April 29, 2014). However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990); *Rogers v. Industrial Claims Appeals Office*, 746, 565 (Colo. App. 1987); *Cabela v. ICAO*, 198 P. 3d 1277 (Colo. pp. 2008); *Roybal v. University of Colorado Health Sciences Center*, 768 P .2d 1249 (Colo. App. 1988).

A physician who commences treatment upon a referral made in the "normal progression of authorized treatment" becomes an authorized treating physician. *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d. 680 (Colo. App. 1999); *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985). The determination of whether there has been a referral in the "normal progression of authorized treatment"

is a question of fact for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995). When a referral is limited in scope and the care provided exceeds the scope of the referral, then such treatment is not authorized. *Kilwein*, supra.

The Claimant suffered a head and cervical injury on October 26, 2011 when a snow covered canopy fell and struck her in the back of the head. The Claimant received conservative treatment for this injury from October 28, 2011 until April 9, 2012 when she was placed at MMI by her ATP Dr. Cazden. The Claimant testified credibly that she wanted more treatment and spoke to Dr. Cazden about this because she was still in pain. However, the Claimant did not file a Worker's Claim for Compensation related to this injury until May 23, 2014. Prior to filing a claim, the Claimant never missed work for this injury or for doctor or physical therapy appointments related to this injury. Rather, she would make up any missed time from work due to any appointments.

On July 25, 2013, the Claimant suffered an admitted work injury when she slipped and fell while stripping a wax floor. The Claimant fell on her right shoulder and back with her arm twisted back. After this injury, the Claimant requested that she not be required to treat with Dr. Cazden who had treated her for her October 26, 2011 injury. Instead, the Claimant treated with Dr. Kistler who retired, so then the Claimant treated with Dr. Koval. From July 31, 2013 through February 6, 2014, the Claimant received conservative treatment, including physical therapy, a home traction unit, injections and pain management counseling.

The Claimant was referred to Dr. Bryan Castro who evaluated her on December 11, 2013 to determine if she was a surgical candidate for her cervical condition. Dr. Castro recommended a continued conservative approach and did not recommend surgical intervention at that time. The Claimant testified that when she left Dr. Castro's office after this visit, she was under the impression that she was going to get worse and there was nothing Dr. Castro could do to help her and she was in pain and just wanted to get better. On December 13, 2013, the Claimant saw her ATP Dr. Koval again and Dr. Koval noted that Dr. Castro's strong opinion that surgery was not the answer at this time was very upsetting to the Claimant because she was struggling with her chronic pain. Dr. Koval recommended referral back to Dr. Wernick for a second round of injections which were done on January 6, 2014. In follow up with Dr. Sorenson on January 20, 2014, the Claimant was noted to be a candidate for repeat injections based on the results from the January 6, 2014 injections. In this time frame, the Claimant was also seeing Dr. Ron Carbaugh and his associate for pain and adjustment counseling.

On February 13, 2014, the Claimant went to see Dr. Stephen Shogan based on the referral from a friend. She did not bring any prior medical records with her to the appointment because she wanted his honest opinion about whether she needed surgery. Dr. Shogan provided the Claimant with two treatment options: (1) continued conservative care, or (2) surgery. Per the medical records and the testimony of the Claimant and Dr. Shogan, the Claimant was not initially referred to Dr. Shogan by a

worker's compensation ATP, nor was Dr. Shogan made aware at the time of the initial visit that the Claimant's injury was work-related.

Only after seeing Dr. Shogan and obtaining recommended treatment options from him did the Claimant request a second surgical consult regarding cervical fusion surgery rather than proceeding with the second round of injections. There is no indication that Dr. Koval already knew that the Claimant had seen Dr. Shogan on February 13, 2014 when Dr. Koval recommended a referral for a surgical evaluation on February 21, 2014. In fact, based on reasonable inferences drawn from the medical records, it is more likely that Dr. Koval did not know that the Claimant had already seen Dr. Shogan at this point.

Subsequently, the Claimant followed up with Dr. Sander Orent on March 13, 2014 to talk about options with respect to treatment for her neck. He noted that the Claimant had two very contrasting opinions about whether or not she was a surgical candidate and also noted that the Claimant "went on her own to see Dr. Shogan." Dr. Orent noted that he made it quite clear to the Claimant at this appointment that if the Claimant chose to undergo the surgery with Dr. Shogan at this point, it would not be authorized by her ATPs at Arbor Occupational Medicine. On March 24, 2014, Respondents denied the prior authorization request for surgery that was submitted on March 20, 2014.

Therefore, after obtaining Dr. Shogan's recommendations, there is a clear indication that the Claimant's ATPs relied on the opinion of Dr. Castro rather than Dr. Shogan regarding the Claimant's surgical candidacy at this point.

In spite of this, the Claimant contacted Dr. Shogan's office on April 9, 2014 to advise that she elected to proceed with Dr. Shogan's surgical recommendation. The surgery was performed by Dr. Shogan on April 16, 2014. Since the surgery, the Claimant's symptoms have been alleviated and she believes that her condition has improved.

At his deposition, Dr. Shogan was rather ambivalent about whether or not the surgery performed on the Claimant was reasonably necessary to cure and relieve the Claimant of her work related injury or injuries. He testified that "frequently it is really impossible to sort that out." In his opinion, whether or not surgery is necessary is up to the patient in terms of how much pain they are willing to live with. In contrast, Dr. Castro testified that regardless of the immediate outcome of the Claimant's surgery in this case, he confirmed his original opinion that surgery was not indicated for the Claimant in this case and that although she has had a good initial outcome, she is now at risk for possible untoward outcomes as the cervical fusion alters her anatomy and places significant increased load on the disks above and below the fusion area. Dr. Orent agreed with Dr. Castro and continued to opine that the surgery was not reasonable and necessary in this case due to the risk for complications down the road as the surgery altered the mechanics of the Claimant's spine. Dr. Orent also felt strongly that

conservative treatment had not been exhausted in this case and he believes her physicians could have brought her to an improved condition without the surgery.

Based on the conduct of the Claimant and her physicians in this case, there was no valid referral to Dr. Shogan in the "normal progression of authorized treatment." While the Claimant managed to secure an after the fact referral to Dr. Shogan for a surgical consultation, this was a limited referral for a second opinion. In light of the prior surgical consultation with Dr. Castro that did not recommend surgery, the consultation referral to Dr. Shogan was clearly not an unconditional referral for treatment. After receiving recommendations from Dr. Shogan, the physicians at Arbor Occupational Medicine specifically advised the Claimant that the surgical option recommended by Dr. Shogan would not be authorized in light of the opinion of Dr. Castro that they found more persuasive. Additionally, Dr. Shogan also provided an option for continued conservative care. However, even with all of this information, the Claimant elected to proceed with surgery. It is the Claimant's right to make this election and proceed with the surgery and it does appear that initially the surgery has a good outcome.

Nevertheless, that does not make the surgery or the treatment provided by Dr. Shogan authorized pursuant to the Act. If the treatment is not authorized and is not provided by an authorized treating physician, then the Respondent is not liable for payment. Based on the facts in this case, to the extent that Dr. Shogan could be considered an authorized treating physician, the referral for consultation was limited in scope to providing a second opinion as to whether or not the Claimant was a surgical candidate. The Claimant's ATPs did not make a referral to Dr. Shogan to commence treatment, up to and including surgery. Rather, upon obtaining the second opinion from Dr. Shogan and considering it in connection with the surgical consultation opinion from Dr. Castro, the Claimant's ATPs recommended a treatment plan in line with Dr. Castro's opinion.

Because Dr. Shogan is not an authorized treating physican in this case and the treatment he provided was not authorized, it is not necessary to consider whether the medical treatment provided by Dr. Shogan was reasonably necessary to cure and relieve the Claimant of either her October 26, 2011 injury or her July 25, 2013 injury.

Remaining Issues

The Claimant failed to prove that the medical treatment that she received from Dr. Stephen Shogan was authorized, except for a limited referral for a second orthopedic surgical consultation. As such, the remaining issues regarding whether or not the medical benefits were reasonably necessary, whether or not the Claimant's claim under WC 4-951-736 is barred by the applicable statute of limitations, and TTD and AWW are moot.

ORDER

It is therefore ordered that:

1. The Claimant failed to prove, by a preponderance of the evidence, that the medical treatment provided by Dr. Shogan was authorized. The surgery performed on the Claimant by Dr. Shogan on April 16, 2014 was outside the scope of any referral from the Claimant's authorized treating physicians and Dr. Shogan was not an authorized treating physician under the Act.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 19, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stephen Lindenbaum, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) because her lower back and hip require further evaluation.

FINDINGS OF FACT

1. Employer is a restaurant. Claimant worked for Employer as a Busser and Hostess. Her job duties involved greeting customers, seating customers and cleaning tables. On October 15, 2013 Claimant slipped on a lemon peel and twisted her ankle while working for Employer.

2. After initially receiving authorized medical treatment Claimant was referred to Arbor Occupational Medicine. On December 19, 2014 Claimant visited Authorized Treating Physician (ATP) John Raschbacher, M.D. at Arbor Occupational medicine for an evaluation. Dr. Raschbacher determined that Claimant suffered a left ankle sprain, a left foot sprain and a lumbar contusion. He ordered an MRI of her foot and ankle and restricted her to working most of the time in a seated position.

3. The MRI revealed the degenerative condition of os trigonum syndrome. The MRI did not reflect a ligament tear or bone contusion. X-rays of Claimant's lumbar spine revealed degenerative changes.

4. Dr. Raschbacher referred Claimant to Scott G. Resig, M.D. at Denver Vail Orthopedics for an evaluation. Dr. Resig initially examined Claimant and administered a left ankle cortisone injection. Dr. Resig subsequently recommended trigonum excision surgery.

5. On April 8, 2014 ALJ Felter conducted a hearing in the matter. He considered whether Claimant suffered injuries to her left foot/ankle, right knee and lower back as a result of the October 15, 2013 incident. On April 21, 2014 ALJ Felter issued Findings of Fact, Conclusions and Law and Order. He concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. Claimant did not appeal the determination and the Order became final on May 11, 2014.

6. On May 9, 2014 Claimant returned to Dr. Raschbacher for an examination. Dr. Raschbacher reviewed ALJ Felter's Findings of Fact, Conclusions of Law and Order and noted Claimant's left ankle injury was compensable but her lower back and right hip were not components of her Workers' Compensation claim. He

noted that Claimant wished to proceed with treatment but, because she was pregnant, further treatment could not be rendered until she came to term. If Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Dr. Raschbacher remarked that Claimant had limitations to her left ankle range of motion but no other impairment. He placed Claimant at MMI and assigned a 6% lower extremity impairment rating. Insurer then filed a Final Admission of Liability (FAL) consistent with Dr. Raschbacher's MMI and impairment determinations.

7. On August 29, 2014 Claimant underwent a Division Independent Medical Examination with Stephen D. Lindenbaum, M.D. Claimant reported that she was still experiencing lower back pain. After reviewing Claimant's medical records he concluded that she had not reached MMI. Dr. Lindenbaum noted that Claimant required additional evaluation but the treatment could not be provided because she was eight months pregnant. He explained that after delivering the baby she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. Dr. Lindenbaum also recommended an MRI of Claimant's lower back. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

8. On October 21, 2014 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Claimant was still pregnant. She reported that while she was performing her job duties for Employer she was walking down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. After considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. He stated that there was "no evidence that [Claimant] sustained any type of injurious event to her back or hip region as a result of the 10/15/2013 incident." He explained that there were no clinical findings to suggest Claimant suffered any "symptomatic pathology" to her body besides the left ankle that was related to the October 15, 2013 incident. Dr. Lesnak determined that it was reasonable for Claimant to consider excision of the os trigonom in her left ankle/foot as recommended by Dr. Resig. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. However, Dr. Lesnak noted that, because Dr. Raschbacher's range of motion measurements for Claimant's left ankle were "submaximal," he questioned their validity.

9. On October 28, 2014 Dr. Lesnak issued an addendum report after reviewing Dr. Lindenbaum's DIME determination. He maintained that Claimant did not suffer any injuries to her back or hip as a result of the October 15, 2013 work incident. Dr. Lesnak thus explained that Dr. Lindenbaum's suggestion that Claimant required additional evaluation for her back and hip was incorrect. The symptoms were "completely unrelated" to the October 15, 2013 accident. Dr. Lesnak noted that Claimant remained at MMI for her left ankle but should undergo a surgical evaluation of the ankle after her pregnancy. He remarked that "there is absolutely no medical evidence to suggest that any of [Claimant's] reported pathology involving her lumbar spine or pelvis is in any way related to the occupational injury of 10/15/13 and clearly Dr. Lindenbaum was in error when he recommended additional medical evaluations

pertaining to these subjective complaints." Dr. Lesnak also commented that Dr. Lindenbaum's recommendation failed to consider ALJ Felter's ruling that Claimant's hip and back were unrelated to the October 15, 2013 work accident.

10. On January 14, 2014 Dr. Lesnak testified through an evidentiary deposition in the present matter. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum thus failed to comply with Table 53 of the of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). He summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. Range of motion abnormalities do not constitute a diagnosis pursuant to Table 53. The diagnosis must be "very specific" that is "related to the injurious event and correlate[ed] with the symptoms and objective findings." Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy. However, he noted that she was "temporarily at MMI, but not completely at MMI." Dr. Lesnak maintained that Claimant did not require additional treatment or testing for her lumbar spine or hip because there were no clinical findings to suggest there were any symptoms related to the areas.

11. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI because her lower back and hip require further evaluation. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On April 8, 2014 ALJ Felter concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

12. After considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. However, he stated that there was no clinical evidence that Claimant sustained any injury to her back or hip region as a result of the incident. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. Dr. Lesnak also determined that it was reasonable for Claimant to consider excision of the os trigonom in her left ankle/foot as recommended by Dr. Resig.

13. Dr. Lesnak specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lesnak summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. Range of motion abnormalities do not constitute a diagnosis pursuant to Table 53. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury. Based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Lesnak, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's determination was incorrect. The persuasive opinion of ATP Dr. Raschbacher reflects that Claimant reached MMI on May 9, 2014 with a 6% lower extremity impairment rating for her left ankle as a result of the October 15, 2013 incident.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial*

Claim Appeals Office, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 7. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI because her lower back and hip require further evaluation. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On April 8, 2014 ALJ Felter concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

8. As found, after considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. However, he stated that there was no clinical evidence that Claimant sustained any injury to her back or hip region as a result of the incident. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. Dr. Lesnak also determined that it was reasonable for Claimant to consider excision of the os trigonom in her left ankle/foot as recommended by Dr. Resig.

9. As found, Dr. Lesnak specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lesnak summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. Range of motion abnormalities do not constitute a diagnosis pursuant to Table 53. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury. Based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Lesnak, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's determination was incorrect. The persuasive opinion of ATP Dr. Raschbacher reflects that Claimant reached MMI on May 9, 2014 with a 6% lower extremity impairment rating for her left ankle as a result of the October 15, 2013 incident.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI because her lower back and hip require further evaluation. Based on Dr. Raschbacher's determination, Claimant reached MMI on May 9, 2014 with a 6% lower extremity impairment rating for her left ankle as a result of the October 15, 2013 incident.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That

you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 27, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant is barred from litigating the issues of average weekly wage and temporary benefits for concurrent employment that was previously explicitly reserved;

2. If the claimant is not barred, whether the claimant is entitled to temporary total disability (TTD) benefits for her concurrent employment with Service Master; and,

3. If so entitled to TTD, whether the claimant has established an average weekly wage for the concurrent employment.

FINDINGS OF FACT

1. The claimant sustained an injury on November 13, 2013.

2. At the time of the injury, the claimant worked for the respondent-employer as a Special Education Assistant.

3. The claimant also held concurrent employment with Service Master at the time of injury.

4. The respondent initially denied liability for the claimant's injury.

5. On January 22, 2014, the claimant filed an application for hearing on compensability, temporary benefits, medical benefits, and average weekly wage.

6. Hearing on the claimant's January 22, 2014 application went forward on May 6, 2014. The claimant proceeded on AWW and "temporary partial and/or temporary total disability benefits from November 13, 2013 and ongoing" but reserved "concurrent employment" for future determination.

7. On May 28, 2014, the undersigned ALJ issued Findings of Fact, Conclusions of Law, and Order finding claimant's injury compensable, ordering the respondent to pay medical benefits, and fixing claimant's AWW at $342.19. Neither party appealed the order.

8. The ALJ denied claimant's claim for temporary benefits. It was specifically found that claimant failed to show by a preponderance of the evidence that she suffered a wage loss as the result of her injury.

9. Respondent subsequently filed a General Admission of Liability on July 18, 2014 admitting for medical benefits and AWW.

10. On November 12, 2014 the claimant filed an Application for Hearing on the issues of AWW, TPD and TTD.

11. The claimant alleges that she is entitled to an increased AWW based on concurrent employment at the time of injury. She further alleges she is entitled to temporary benefits due to her inability to work at her concurrent employment as a result of her injury.

12. The ALJ finds that the claimant was unable to continue her concurrent employment with Service Master as a result of her injury beginning with the date of injury, November 13, 2013 and ongoing. The claimant claims entitlement based on lost wages from Service Master from the date of injury and ongoing.

13. At the current hearing the claimant established that as of May 6, 2014 (the date of the first hearing) she was aware she earned eligible wages from concurrent employment with Service Master. The claimant further testified that as of May 6, 2014 she was aware that she lost wages from Service Master as a result of her November 13, 2014 injury beginning November 13, 2013 and ongoing.

14. The ALJ finds that the AWW and temporary benefits at issue in the current dispute are not identical to the AWW and temporary benefits at issue in the May 6, 2014 hearing.

15. The ALJ finds that the temporary benefits sought as a result of claimant's lost wages from Service Master were specifically reserved at the time of the initial hearing as stated in the order on May 28, 2014.

16. The ALJ finds that claimant is not collaterally estopped from litigating the issues of AWW and entitlement to temporary benefits.

17. The claimant obtained wage records from Service Master after the May 6, 2014 hearing, as indicated by the date of faxing on those records of May 30, 2104.

18. In November of 2013, the claimant was employed by both the respondent-employer and Service Master. She began working for Service Master in the beginning

of August of 2013. She worked Monday through Friday from 7pm until 10pm. Her rate of pay was $7.78 per hour. She worked 3 hours per day, five days per week for a total of 15 hours per week. This equates to an AWW of $116.70.

19. The claimant last worked for Service Master on November 12, 2013, the date before her compensable injury occurred. On November 13, 2013 and up to her recovery from surgery on January 21, 2015 the claimant did not work due to her injury. She has not yet returned to work for Service Master since the surgery.

20. The claimant's typical duties for Service Master included taking out trash, vacuuming, and cleaning. The vacuum was the type that was required to be carried on her back. Her job required her to be on her feet the entire three hour shift, except for her 10 minute break.

21. The claimant was having difficulty walking after her injury. She was on crutches for almost two months and had been wearing a brace since then. She could not go up and down stairs without significant pain, nor could she squat or kneel. This prevented her from performing her job duties at Service Master.

22. The claimant had surgery on her right knee on January 21, 2015 and her knee has been doing well since that date. The claimant's knee remained essentially unchanged between the date of the injury, November 13, 2013, and the date of her surgery, January 21, 2015.

23. The claimant first sought treatment from Dr. Miguel Castrejon on November 13, 2013, the day of the injury. Dr. Castrejon made a determination that the injury was not work related and referred the claimant to Memorial Hospital for x-rays. He did not address any work restrictions.

24. Claimant sought treatment from Memorial Hospital after her visit with Dr. Castrejon. She then followed up with Dr. Charles Waldron on November 22, 2013 per instructions given at Memorial.

25. Dr. Waldron instructed the claimant to not work for three weeks or until further evaluation.

26. The claimant was unable to receive any further treatment in the following months due to the fact that the respondent had contested compensability that was set for determination on May 6, 2014.

27. The claimant's next examination was with Dr. Timothy Hall on July 28, 2014, after a finding of compensability had been made.

28. Dr. Hall determined that the claimant has had restrictions that precluded her from performing her work with Service Master, including no kneeling, no squatting, limited bending, no prolonged standing or walking, and limited lifting from floor to waist of no more than 15 pounds.

29. Dr. Hall explained that her job with Service Master is outside these restrictions, as opposed to her day job with the School District where she is sitting most of the day. Her condition had not improved over time.

30. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to TTD benefits for her concurrent employment only beginning November 13, 2013 and continuing until terminated by operation of law.

31. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to an AWW of $116.70.

32. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to indemnity benefits for periods of time that she was unable to work with Service Master at the AWW of $116.70.

33. The ALJ finds that the claimant has established that it is more likely than not, that she is entitled to an AWW of $342.19 + $116.70 equaling $458.89 for periods of time when the claimant was unable to work for both the respondent and Service Master.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent cites various equitable defenses in opposing the claimant's pursuit of the benefits requested herein. As found above, the issue of concurrent employment was specifically reserved at the previous hearing and subsequent Order. Reserving such issue would be meaningless unless all attendant corollary issues are reserved as well. By finding and concluding that the claimant has established concurrent employment, all benefits flowing from that decision are necessarily included within the reservation of the concurrent employment issue.

5. To receive temporary disability benefits, the claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

6. The claimant was fully able to perform her duties with Service Master from her date of hire through November 12, 2013. It was not until she sustained an injury to her right knee while working for the respondent-employer that she became unable to perform her work with Service Master. Dr. Castrejon was the workers' compensation physician that first examined the claimant on the date of injury. Dr. Castrejon made an erroneous legal determination that the claimant's injury was not compensable. He did not address her work restrictions at that time for this reason. The claimant's work

restrictions were not addressed until November 22, 2013 when she was examined by Dr. Waldron. He took her off of work for a few weeks, but with the assumption that she would receive further evaluation to better determine her ability to work. She did not see another doctor until July 20, 2014 as a result of litigation.

7. The claimant's knee condition remained virtually unchanged between the date of injury until her surgery more than a year later. Dr. Hall, the claimant's ATP, was clear in his assessment of the claimant's work restrictions. He opined that she has been completely unable to perform her job with Service Master because of its physical demands being outside of the restrictions she has had since the injury occurred. It is evident that the claimant is entitled to TTD benefits for her job with Service Master.

8. The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), *See Also* § 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p. 1457. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

9. The claimant earned $7.78 per hour with Service Master. She worked three hours per day, from 7pm to 10pm, Monday through Friday. Her wage records support her testimony. $7.78 per hour, multiplied by 15 hours per week, equals an AWW of $116.70 for her concurrent employer and a TTD rate of $77.80. The claimant's AWW for the respondent-employer is $342.19. Therefore, the claimant's combined AWW is $458.89.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent's defenses are denied and dismissed.

2. The claimant's AWW from concurrent employment is $116.70.

3. The respondent shall pay the claimant temporary total disability benefits based upon her concurrent employment beginning on and including November 13, 2013 and continuing until terminated by operation of law at the AWW of $116.70.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 30, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

Whether the claimant has proven, by a preponderance of the evidence, that he sustained an occupational disease, or injury, arising out of and in the course of his employment with the respondent-employer.

FINDINGS OF FACT

1. The claimant has worked for the respondent-employer as a Machinist since approximately June of 1997.

2. The claimant changed positions in September of 2013 to a Finisher I, in the Finishing Department. There were approximately four to five different jobs that he would rotate through in this department. These included a weighing station, painting of chemicals on disc break, and automatic machine that did the same job as the manual painting of the chemical on the disc break, and the finishing, or adding of the metal parts to the breaks. The claimant could not remember all of the specific jobs in detail. The claimant testified that the only job duty that caused him any issues was the flipping of the disc from one side to the other. Each disc weighed between 13 and 17 lbs.

3. The claimant indicated that he felt "pain" in his thumbs but that the pain that he felt in the Finishing Department was different than that which he previously experienced in the Machinist Department.

4. The claimant indicated that he had seen his family physician, Dr. Steven Milligan for bilateral wrist pain on October 2, 2013.

5. The History in Dr. Milligan's October 2, 2013 Medical Report notes a "52 year old male patient who presents to the office for bilateral wrist and elbow pain for many months."

6. A July 1, 2014 job demands analysis report from Vocational Rehabilitation Expert, Katie Montoya, included job descriptions for the various positions that the claimant performed.

7. Ms. Montoya's Job Demands Analysis Report noted that "awkward posture and repetition/duration: four hours of: wrist flexion > 45°, extension > 30° or

ulnar deviation > 20° was not present." She further went on to state that in the finishing position, "one responsibly was coating. There was a small paintbrush which is utilized for one of the processes. There were also small rollers which are utilized to apply chemicals. This position also required taking weight and rotating and flipping the parts. In the video clips provided you can see the worker spinning the disc with his hands almost in a flip and grab type movement."

8. The Productions Summary information specific to the claimant during his time in question while working in the Finishing Department presented the "average parts process based on actual parts scans." These records show the volume and non-repetitive nature of the job in the Finishing Department. For the "manual oxi" position, the average parts per shift were 35 and parts per hour were four. For the "bake-out" position, the parts per shift assigned were 96 and the parts per hour were ten. For the "auto oxi" position, the parts per shift were 69, the parts per robot load were 30 and the robot loads per shift were two. On the "riveting pre-build" position, the parts per shift were 61 and the parts per hour were six.

9. A videotape that was taken by Vocational Rehabilitation Expert, Katie Montoya, shows the customary procedure for "flipping" or "spinning" the disc break from one side to the other. The claimant, however, disavows the shown procedure and asserts that he used a more thumb specific procedure.

10. Ben Smith is the Machine Shop and Finishing Manager at the respondent-employer's Pueblo facility. Mr. Smith has been with the respondent-employer for six years. He was originally a machine shop engineer when he first began with the company, and was the finishing team lead at the time of the claimant's complaint of injury/occupational disease on or about October 31, 2013. Mr. Smith indicated that he has been familiar with the claimant during the entire time Mr. Smith has been with the company.

11. As the Finishing Team Lead, Mr. Smith is more than familiar with the claimant's job assignments at the respondent-employer both in the Finishing Department and in his prior position in the Machine Shop Department.

12. Mr. Smith was aware of the claimant's prior 1997 workers' compensation claim concerning the claimant's elbows.

13. The claimant was changed to a different crew in 2012 in the Machine Shop Department. The claimant was held out of the grinding station at that time due to his restrictions from the 1997 claim.

14. In September 2013 the claimant was transferred to the Finishing Department where the claimant would be able to complete all of the necessary job duties with his work restrictions from the 1997 claim. Mr. Smith observed that the claimant was not happy about this change.

15. Mr. Smith detailed all the different job duties in the Finishing Department and specifically, the manual coating job where the claimant alleges that his occupational disease/injury occurred. Mr. Smith had seen the videotape that was completed by Vocational Rehabilitation Expert, Katie Montoya, concerning the flipping or spinning of the disc break. Mr. Smith admitted that he does not remember seeing the claimant specifically do this specific task however; he did indicate how it was taught and performed at the respondent-employer. Mr. Smith specifically indicated that the discs are flipped or spun from one side to the other. He has never seen anyone perform the changing of the sides of the disc in the awkward manner as described by the claimant.

16. Mr. Smith has reviewed the July 1, 2014 Jobs Demand Analysis that was completed by Vocational Rehabilitation Expert, Katie Montoya. He noted that he was present when it was performed and that he helped provide the information and data to Ms. Montoya for the completion of the Job Demands Analysis Report. Mr. Smith indicated that he thoroughly reviewed the reports itself and he that he believes it to be quite accurate.

17. Ms. Paula Perea is the Human Resource Manager for the respondent-employer in their Pueblo location. She is familiar with the claimant switching jobs to the Finishing Department in September of 2013. She indicated that the claimant came to her with right wrist complaints initially sometime in the beginning to middle of October of 2013. This was after he had only completed a few shifts in his new Finishing Department position with the respondent-employer.

18. Ms. Perea believed that the claimant told her that his complaints concerning his right wrist started when he was using a spatula at home over the weekend.

19. Dr. Carlos Cebrian testified by evidentiary deposition on January 23, 2015. Dr. Cebrian obtained a thorough occupational history from the claimant. Dr. Cebrian noted that the October 2, 2013 Medical Report from Dr. Milligan noted that the claimant had wrist symptoms for many months before the claimant was seen on October 2, 2013. However, the claimant informed Dr. Cebrian that he did not have any symptoms before he switched positions from the Machinist to the Finisher Department on September 18, 2013.

20. Dr. Cebrian noted that the claimant was seen by Orthopedic Surgeon, Dr. Timothy Hart. Dr. Hart never performed a causation analysis or according to his reports, reviewed any job site analysis concerning the claimant's jobs at the respondent-employer.

21. Dr. Cebrian noted that the claimant had informed Dr. Hart that he had been a Machinist for 16 ½ years with the same company and that was the reason for his symptoms being work-related. He noted that the Division of Workers' Compensation Medical Treatment Guidelines under cumulative trauma lay out the process for determining whether or not something is likely causally related to one's job duties. According to Dr. Cebrian's review of Dr. Hart's medical report, Dr. Cebrian did not believe that Dr. Hart was privy to this specific information in order to complete the detailed causation analysis as outlined in the Medical Treatment Guidelines.

22. Dr. Cebrian diagnosed the claimant with bilateral CMC osteoarthritis of the thumbs which, based upon a reasonable degree of medical probability, he did not find to be causally related to the claimant's work at the respondent-employer.

23. Dr. Cebrian noted that he reviewed the Job Demands Analysis completed by Vocational Rehabilitation Expert, Katie Montoya, the two separate job descriptions of two different Machinists, and the respondent-employer production summary and completed a detailed causation analysis concerning the claimant's bilateral CMC osteoarthritis of

24. Dr. Cebrian noted that "[The claimant] is moving a fair amount during his job. And he wasn't in these awkward postures for long periods of time if he happened to pass through it, which—all of us at some point during our day, when we move, we may move through an awkward posture, but it doesn't have the combination of time factor involved in that period and so going through all of the primary risk factors, [the claimant] did not have any." Dr. Cebrian went through the secondary risk factors and indicated that he did not find any of them present to relate the claimant's bilateral CMC osteoarthritis of the thumbs to his work duties at the respondent-employer.

25. Dr. Cebrian further testified that "it's my medically probable opinion that [the claimant's] bilateral CMC osteoarthritis is not causally related to his work at [the respondent-employer]."

26. As far as an acute injury is concerned, Dr. Cebrian indicated that the claimant's job duties "would not be a mechanism that would cause an injury to the CMC joint or aggravate the CMC joint if there was a preexisting problem." Dr. Cebrian went

on to note that the claimant had been having problems with his thumbs/wrists for several months prior to the October 31, 2013 date of injury/occupation disease.

27. Dr. Cebrian opined that since the claimant's complaints didn't change and there was "no acute swelling or anything like that," he could not confirm that an acute injury took place on or about October 31, 2013 from his review of the medical records.

28. Dr. Cebrian's opinion concerning the acute injury is bolstered by the November 4, 2013 report from Dr. Scott, who made no mention of an acute injury on or about October 31, 2013.

29. Dr. Cebrian also noted that somebody who "has bilateral CMC arthritis—if you're going to do certain activities, that you're going to feel your symptoms, that doesn't make that condition related. It's just there are certain things you do that cause symptoms. It doesn't mean that that's causally related to that (work)."

30. Physician's Assistant Katherine Fitzgerald examined the claimant upon referral from the claimant's primary care physician, Dr. Steven Milligan. PA Fitzgerald did not perform a thorough causation analysis nor was she privy to any Job Demands Analysis, job descriptions, or production summary/information with respect to the claimant's job duties at the respondent-employer. Without this specific detailed information, PA Fitzgerald was not able to complete a through causation analysis in accordance with the Colorado Workers' Compensation Medical Treatment Guidelines.

31. The testimony of Ben Smith, the Machine Shop & Finishing Manager, is more persuasive than the claimant has to how the discs should be turned or flipped. The ALJ finds the testimony of the claimant specifically with respect to how the discs are turned to be less than persuasive.

32. The claimant also alleges that he experienced a "pop" in his left thumb/wrist when turning over a disc on October 31, 2013. However, the November 4, 2014 medical report from authorized treating physician, Dr. Douglas Scott, does not contain any history whatsoever of an event or incident that took place on October 31, 2013. To the contrary, Dr. Scott's history states that "he (claimant) told me that this problem has been ongoing for a long time, but started noticing a worsening in his wrist after he began a new job in the finishing on 09/20/2013."

33. The ALJ finds the deposition testimony of Dr. Cebrian to be credible and his opinions to be thoroughly detailed in accordance with the causation analysis for cumulative trauma conditions outlined in the Colorado Workers' Compensation Medical Treatment Guidelines.

34. The ALJ finds the testimony of both Ben Smith and Paula Perea to be credible and persuasive.

35. The claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease of bilateral CMC osteoarthritis of the thumbs, or any other occupational disease, resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work. Dr. Cebrian's expert opinions are persuasive.

36. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury or occupational disease to his bilateral wrists or thumbs that arose out of and occurred in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; see, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

2. If an industrial injury aggravated, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H &H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

3. The claimant must prove that an injury directly and approximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

4. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a worker's compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-42-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306. 592 P.2d 792 (1979).

5. In this claim, the claimant alleges an occupational disease of bilateral wrist and thumbs. Section 8-40-201(14), C.R.S. defines "occupation disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P2.d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). An accidently injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1992). In contrast, an occupational disease arises not from an accident, but from prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997).

7. Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment, cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. As found, the ALJ concludes that the claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease to his bilateral wrists or thumbs resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work.

9. The claimant has also failed to prove that he sustained an “accidental injury” on or about October 31, 2013. The November 4, 2013 Medical Report from authorized treating physician, Dr. Douglas Scott, does not mention any specific incident or injury that occurred on this date. To the contrary, Dr. Scott indicated that “he told me that the onset was that this problem has been ongoing for a long time, but started noticing a worsening in his wrist after he began a new job in finishing on 09/20/2013.” This information is directly contrary to any assertion that the claimant sustained an industrial injury on October 31, 2013.

10. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 13, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

On October 24, 2013 (hereinafter "first injury" or "claim number WC 4-947-316"), Claimant sustained an admitted injury to his left shoulder while in the course and scope of his employment with Employer A. The Claimant was receiving medical treatment for that injury when he suffered a second injury on November 22, 2013 (hereinafter "second injury" or "claim number WC 4-935-813) while working for Employer B. Respondents B admitted liability for the foot and ankle injuries Claimant sustained, but denied liability for any alleged worsening or aggravation of Claimant's left shoulder condition. Respondents A allege that any additional medical treatment Claimant may need for his left shoulder is not related to the October 24, 2013 admitted claim. Claimant believes the November 2013 injury aggravated his left shoulder, and seeks a determination that he sustained a second left shoulder injury while working for Employer B. Alternatively, Claimant seeks an order finding and concluding that Respondents A are responsible for additional medical treatment for his left shoulder. The Claimant also endorsed temporary total disability benefits, but stated that Claimant continued to receive temporary total disability under claim number WC 4-935-813.

Respondents B endorsed the issue of medical benefits–reasonable and necessary. Based on the position statement Respondents B submitted, Respondents B seek an order determining that Claimant no longer needs any medical care related to the second injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was born on November 25, 1950 and was 63 years of age at the time of the hearing.

2. Claimant worked as stagehand through Union Local 7. Claimant works through Local Union 7 as a union stage hand. He is sent out to work for various employers. His job duties generally consist of heavy physical labor.

3. On October 24, 2014, Claimant worked for Employer A unloading crates at the Colorado Convention Center. As he grabbed a crate and spun it around, he injured his left shoulder.

4. After this incident, Claimant's shoulder was stiff and sore but it was "operational". Respondents A admitted liability for the injury.

5. Claimant testified that he had no shoulder problems before October 24, 2013.

6. Employer referred the Claimant to Concentra for medical treatment. Claimant saw physician's assistant Ron Rasis at Concentra on October 25, 2014. Mr. Rasis prescribed pain and anti-inflammatory medications, physical therapy and imposed work restrictions.

7. Claimant next worked for Employer B after completing the job for Employer A. On November 22, 2014 while working for Employer B, he was 'spotting' a pallet containing approximately 450 lbs. of boxed literature. These boxes were stacked five by about four feet high on the pallet which a forklift was moving. The Claimant was standing next to a guardrail as the forklift moved the pallet out to the loading dock. As it passed by the Claimant, the pallet collapsed, the boxes of literature fell off and onto him. He was knocked to the floor and pinned to the guardrail. He did not remember if he put his left arm out to break the fall or many details of the fall.

8. Claimant injured his ankles, knees, ribs and he testified that that this incident also injured/aggravated/worsened his prior left shoulder injury.

9. Claimant was still undergoing treatment at Concentra for his left shoulder at the time he sustained the second injury.

10. During the second injury, Claimant's most severe injuries were to his bilateral ankles. He suffered fractures, had surgery and was wheelchair bound for some time following the second injury. At that time, Claimant focused on his ankle problems rather than on his shoulder, which was reasonable under the circumstances. Claimant believes the second injury aggravated or worsened his left shoulder condition.

11. Claimant continued to receive treatment for his left shoulder at Concentra under WC 4-947-316-01 following the second injury. The treatment essentially consisted of physical therapy. As of February 25, 2014, the Claimant had reported no improvement in his left shoulder with physical therapy.

12. Claimant was referred to orthopedic surgeon Dr. Joshua Metzl at Steadman Hawkins for evaluation of his ankle injuries.

13. Dr. Metzl performed surgery on Claimant's left ankle on December 4, 2013. Dr. Metzl continued to provide conservative treatment for Claimant's right ankle.

14. On December 12, 2013, Claimant asked Dr. Metzl about his left shoulder. Dr. Metzl examined Claimant's left shoulder and noted that radiographs showed glenohumeral arthritis. Dr. Metzl recommended conservative treatment and follow up with one of Dr. Metzl's practice partners for definitive management once fixation of the ankle fracture was completed.

15. A MRI of Claimant's left shoulder done on March 3, 2014 revealed advanced glenohumeral degenerative changes, some tearing including a SLAP type II tear was suspected in conjunction with mild to moderate distal articular bicipital tendinopathy, and mildly acute inflamed moderate to advanced acromioclavicular degeneration is noted.

16. Claimant followed up with Dr. David Jones at Concentra on March 6, 2014 regarding his left shoulder. Dr. Jones' assessment was left shoulder AC joint osteoarthritis with acute flare. Dr. referred the Claimant to Dr. Michael Hewitt for a consultation.

17. On March 13, 2014, Claimant saw either Gary Sakryd who is Dr. Thomas Noonan's physician's assistant or Dr. Noonan for evaluation of his left shoulder. Dr. Noonan is Dr. Metzl's practice partner at Steadman Hawkins. The March 13, 2014 report noted that a lengthy discussion was had with Claimant regarding the natural history and progression of Claimant's shoulder condition. The provider noted that Claimant was ultimately a candidate for arthroplasty, but could undergo injections for temporary relief.

18. On April 7, 2014, Claimant saw Dr. Hewitt for the orthopedic consultation recommended by Dr. Jones. Dr. Hewitt examined Claimant's left shoulder and documented Claimant's history. He also reviewed Claimant's MRI and x-rays of Claimant's left shoulder. Dr. Hewitt noted that Claimant "understands he has advanced glenohumeral arthritis which would be chronic in nature." Dr. Hewitt also explained to the Claimant that the only surgery that would provide any long term benefit would be a partial or total shoulder replacement. Claimant elected to receive a subacromial injection during that visit.

19. Dr. Steven Horan examined the Claimant and performed a review of Claimant's medical records on behalf of Respondents B. In his September 9, 2014 report, Dr. Horan opined that the first injury exacerbated Claimant's left shoulder issues. Dr. Horan recommended one or two steroid injections over the next couple of years.

20. Dr. Hewitt requested authorization for a second injection, which prompted a WCRP Rule 16 review by Dr. Steven Horan. Dr. Horan issued a second report dated September 25, 2014 in which he stated the shoulder pain Claimant is experiencing was the "expected progression of the severe degenerative joint disease with which he has been previously diagnosed." Furthermore, "what he is experiencing now is the likely degenerative process of his diagnosis. I do not feel that the October or November injuries are causing the patient's symptoms at this time."

21. The credible medical evidence demonstrates that Claimant's left shoulder has advanced degenerative arthritis which was not caused by either work injury.

22. Dr. Kathleen D'Angelo testified as an expert on behalf of Respondents B. Dr. D'Angelo testified that the second injury did not cause, aggravate, accelerate or

exacerbate the pathology in Claimant's left shoulder. Although exacerbation, aggravation or acceleration of the *pathology* is not the applicable legal standard in this case, the ALJ agrees that the second injury did not produce the need for treatment of Claimant's left shoulder.

23. Based on the credible medical evidence the ALJ finds that Claimant's ongoing symptoms in his left shoulder are due to the degenerative disease process. Even if the second injury caused an acute flare of his left shoulder condition as Concentra records and Dr. Horan initially indicated, Claimant's symptoms have improved through the treatment he has received under WC 4-947-316. Claimant has admitted to his treatment providers that he is better than he was in the fall of 2013, but has not returned to his pre-injury status. However, as opined by many treatment providers, Claimant has severe degenerative arthritis in his left shoulder and his symptoms are to be expected regardless of any trauma.

24. Claimant may need additional treatment for his left shoulder problems, but the ALJ could find no credible or persuasive medical opinion that the need for additional treatment is due to either work injury. As such, Claimant has failed to meet his burden of proof that continued medical treatment for his left shoulder should be provided by Respondents A. In addition, the Claimant has failed to prove that he suffered an aggravation, acceleration or exacerbation of his left shoulder condition due to the second injury.

25. Dr. D'Angelo testified and her report states that Claimant is at maximum medical improvement for his second injury. She also testified that Claimant has had an impairment rating for his second injury, specifically for his ankle injuries. There is nothing in the medical records to corroborate Dr. D'Angelo's testimony and opinions in that regard. In addition, no final admission was offered into evidence. The status of Claimant's claim number WC 4-935-813 regarding medical benefits, maximum medical improvement or permanent impairment is entirely unknown to this ALJ. As such, the ALJ is not persuaded by Dr. D'Angelo's opinion that Claimant needs no further medical treatment for any component of his second injury. The ALJ declines to enter an order denying additional medical benefits under claim number WC 4-935-813 at this time.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Medical Benefits Related to Injuries Sustained Under Claim No. WC 4-947-316

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. As found, no persuasive or credible medical evidence suggests that Claimant's ongoing symptoms in his left shoulder are due to anything other than the degenerative disease process. As such, Claimant has failed to meet his burden of proof that Respondents A should be liable for continued medical treatment for his left shoulder.

Compensability of Left Shoulder Condition or Relatedness of Left Shoulder Condition to Injuries Sustained Under Claim No. WC 4-935-813

7. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

8. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792 (1979). A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

9. The credible medical evidence demonstrates that Claimant's left shoulder has advanced degenerative arthritis which was not caused by either work injury. Assuming the second injury caused an acute flare of his left shoulder condition as Concentra records and Dr. Horan indicated, Claimant's symptoms have improved through the treatment he has received under WC 4-947-316. Claimant has admitted to his treatment providers that he is better than he was in the fall of 2013, but that he has not returned to his pre-injury status. However, as opined by many treatment providers, Claimant has severe degenerative arthritis in his left shoulder and his symptoms are to be expected regardless of any trauma. Claimant has failed to prove that the second injury aggravated, accelerated or exacerbated his pre-existing left shoulder condition to produce the need for medical treatment.

Denial of Additional Medical Benefits Under Claim No. WC 4-935-913

10. Respondents B endorsed the issue of medical benefits, but did not provide any explanation at the commencement of hearing regarding what was meant by that endorsement. Respondents B, in their position statement, requested an order denying all future medical benefits under Claim No. WC 4-935-913. Respondents B contend that Claimant failed to meet his burden to prove that he is entitled to ongoing medical benefits. The ALJ disagrees. Dr. D'Angelo testified and her report states that Claimant is at maximum medical improvement for his second injury. She also testified that Claimant has had an impairment rating for his second injury, specifically for his ankle injuries. There is nothing in the medical records to corroborate Dr. D'Angelo's testimony and opinions in that regard. In addition, no final admission was offered into evidence. The status of Claimant's claim number WC 4-935-813 regarding medical benefits, maximum medical improvement or permanent impairment is entirely unknown to this ALJ. As such, the ALJ is not persuaded by Dr. D'Angelo's opinion that Claimant needs no further medical treatment for any component of his second injury. The ALJ declines to enter an order denying medical benefits under claim number WC 4-935-813 at this time.

ORDER

It is therefore ordered that:

1. Claimant's claim for additional medical benefits for his left shoulder under claim number WC 4-947-316 is denied and dismissed.

2. Claimant's claim for workers' compensation benefits for his left shoulder under claim number WC 4-935-813 is denied and dismissed.

3. The request by Respondents' B for an order discontinuing all medical benefits under WC 4-935-813 is denied.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 4, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether Dr. Swarsen and Dr. Stull are authorized treating providers.
- Whether Claimant has made a proper showing for a change of physician

FINDINGS OF FACT

1. Claimant suffered an admitted work related injury to her left shoulder on February 20, 2014 while working for Employer.

2. Claimant reported the injury to Employer and was sent to Braden Reiter, D.O. for treatment.

3. On March 6, 2014, Claimant saw Dr. Reiter. Claimant reported that while throwing a garbage bag into a trash bin she felt a pop in her left shoulder. Claimant did not mention to Dr. Reiter any knee pain or injury to her knee. Claimant filled out a pain diagram that only circled her left shoulder area. *See* Exhibit 7.

4. Dr. Reiter filled out an initial Physician's Report of Worker's Compensation Injury indicating the work related medical diagnosis was left shoulder strain. He placed Claimant on temporary restrictions, recommended physical therapy 2-3 times per week for 2-3 weeks, and prescribed 800 mg ibuprofen. *See* Exhibit 7.

5. On March 13, 2014 Claimant again saw Dr. Reiter. He continued her temporary restrictions, physical therapy, and ibuprofen. He noted that she would be rechecked in two weeks and if there was no improvement he would consider further diagnostic testing. Again, at this appointment, Claimant did not mention any knee pain or knee injury. *See* Exhibit 7.

6. On March 18, 2014 Claimant had a physical therapy appointment with physical therapist (PT) Patricia Dockter. Claimant reported to PT Dockter that her left shoulder/arm symptoms were better. PT Dockter noted that Claimant had had left lower extremity pain/radiating symptoms with an antalgic gait pattern that Claimant reported had started two days prior. Claimant reported to PT Dockter that this new pain must be from her injury. *See* Exhibit 7.

7. On March 27, 2014 Claimant again saw Dr. Reiter. Claimant reported that her shoulder was doing better, but that she still had some pain. Claimant reported she had a lot of pain in her left knee. Dr. Reiter noted that her left shoulder had full range of motion with slight pain over the lateral aspect, a negative drop-arm test, negative impingement test, intact distal sensation, and grip strength of +5/5. *See* Exhibit 7.

8. Dr. Reiter released Claimant to full duty work. Dr. Reiter advised Claimant that he could not treat Claimant's left knee as it was not part of the work injury. Dr. Reiter recommended Claimant follow up with her private physician for evaluation and further treatment of her left knee. Dr. Reiter released Claimant at maximum medical improvement (MMI) with no impairment. *See* Exhibit 7.

9. Dr. Reiter filled out a closing Physician's Report of Worker's Compensation Injury. Dr. Reiter noted that Claimant reached MMI for her work related sprain/strain of the shoulder and upper arm on March 27, 2014, was able to return to full duty work, and had no permanent impairment. Dr. Reiter did not make any referral for treatment or evaluation or check any boxes indicating Claimant needed follow up care or would be referred for any treatment for her work related left shoulder injury. *See* Exhibit 7.

10. Claimant contacted an attorney's office and was referred by the office to Ronald Swarsen, M.D. for treatment.

11. On April 7, 2014 Claimant saw Dr. Swarsen. Claimant reported to Dr. Swarsen that on February 20, 2014 she was throwing a trash bag over the edge of a large trash container when she felt a pop in the left shoulder and slipped. She reported that she hit her left shoulder against the container and then fell forward striking her left knee on debris that was around the base of the container. Claimant reported continued pain in her left shoulder and neck region and in her left knee. *See* Exhibit 8.

12. Claimant's April 7, 2014 report to Dr. Swarsen was the first time she mentioned to any provider that she had struck her left knee.

13. Claimant reported to Dr. Swarsen that she had been seen twice by the physician she was sent to, had 4 physical therapy sessions, and reported that she had no significant benefit from treatment. *See* Exhibit 8.

14. The report to Dr. Swarsen that she had no significant benefit from treatment of her left shoulder is contrary to Claimant's earlier reports to both Dr. Reiter and PT Dockter that her left shoulder symptoms were better.

15. Dr. Swarsen referred Claimant for an MRI of her left knee and left shoulder and also referred Claimant to Phillip Stull, M.D. an orthopedic surgeon. *See* Exhibit 8.

16. On April 11, 2014, Claimant underwent an MRI of her left shoulder and left knee. The MRI was interpreted by Radiologist James Piko. Dr. Piko provided the impression that Claimant had a small non displaced tear at the critical zone of her supraspinatus tendon, subdeltoid bursitis, small joint effusion, no labral tear, and subacromial arch moderate stenosis in her left shoulder. The results of her left knee MRI were not included in evidence. *See* Exhibit 10.

17. On April 17, 2014 Claimant saw Dr. Swarsen for a follow up appointment. Claimant reported that her left knee and left shoulder continued to hurt. Dr. Swarsen reviewed her April 11, 2014 left knee MRI and noted it showed positive results. Dr. Swarsen did not yet have the MRI report for Claimant's left shoulder. *See* Exhibit 8.

18. On April 22, 2014 Respondents issued a letter to Claimant's counsel denying Claimant's request for change of physician to Dr. Swarsen. The letter stated that Respondents would be filing a final admission of liability as Claimant had been placed at MMI. *See* Exhibit D.

19. On April 24, 2014, Respondents filed a final admission of liability, consistent with Dr. Reiter's March 27, 2014 report closing the matter and placing Claimant at MMI. *See* Exhibit 1.

20. On April 24, 2014 Claimant saw Dr. Stull on referral from Dr. Swarsen. Dr. Stull opined that Claimant had a torn medial meniscus and mild chondromalacia of her left knee. Dr. Stull recommended a left knee arthroscopy, partial meniscectomy, and related procedures. Dr. Stull also noted that Claimant had a symptomatic small left rotator cuff tear in her left shoulder that would likely require surgical care. Dr. Stull planned to address the shoulder issue after Claimant recovered from knee surgery. *See* Exhibit 9.

21. Claimant objected to Respondents April 24, 2014 final admission of liability and requested a Division Independent Medical Examination (DIME).

22. On July 15, 2014 Claimant underwent a DIME with Gary Zuehlsdorff, D.O. Dr. Zuehlsdorff opined that Claimant's left shoulder injury was work related. Dr. Zuehlsdorff noted that there were positive findings on an MRI for the left shoulder and that an orthopedist had recommended surgery. Thus, after his review, he opined that Claimant was not at MMI and recommended reopening the claim. Dr. Zuehlsdorff opined that the left knee was not work related and recommended no further evaluation, diagnostics, and/or treatment of the left knee. *See* Exhibit 2, Exhibit 3.

23. On August 8, 2014 Respondents filed a general admission of liability consistent with Dr. Zuehlsdorff's DIME opinion. *See* Exhibit 5.

24. Claimant is not found credible or persuasive. Her reports to medical providers and her hearing testimony are found to be inconsistent and do not persuade the ALJ.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Authorized Treating Provider

Authorization refers to the physician's legal status to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to provide a list of physicians from which the injured employee may select the physician who attends her. However, § 8-43-404(5)(a), C.R.S. implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). Therefore, if the physician selected by the respondents refuses to treat the claimant for non-medical reasons, and the respondents fail to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *Id.*

Whether or not the physician has refused to treat the claimant for non-medical reasons is a question of fact for resolution by the ALJ. *Lutz v. Industrial Claim Appeals*

Office, 24 P.3d 29 (Colo. App. 2000). Here, the evidence establishes that Dr. Reiter discharged the claimant from further treatment for her work related left shoulder injury because he placed her at maximum medical improvement and did not believe that any additional treatment was necessary. Determining when an injured worker has reached maximum medical improvement is a medical determination and Dr. Reiter's discharge was for medical reasons. Therefore, in this case, the right of selection for treatment of Claimant's work related left shoulder injury did not pass to Claimant based on a refusal to treat for non-medical reasons.

Claimant argues that the right to select a physician passed to her when both Dr. Reiter and Employer refused to tender care to her for her work related injury. This is not found persuasive. As found above, Dr. Reiter did not refuse to tender care for Claimant's work related left shoulder injury. Rather, Dr. Reiter refused to provide care for the non work related left knee injury. For the left shoulder injury, Dr. Reiter did provide care. He saw Claimant multiple times, referred her for physical therapy, and ultimately placed her at MMI. Similarly, at no time did Employer refuse Claimant care for her work related left shoulder injury. Employer responded to Claimant's report of left shoulder injury, referred her to Dr. Reiter, and she received treatment from Dr. Reiter. Although both Dr. Reiter and Employer indicated Claimant would have to contact her personal physician for treatment of her left knee injury, there was never a refusal to tender care for Claimant's work related left shoulder injury and thus the right to select a physician to treat her left shoulder never passed to Claimant.

Claimant next argues that Dr. Swarsen and Dr. Stull were within the chain of referral from Dr. Reiter since Dr. Reiter referred her to her personal physician. It is well established that employers are liable for the expenses incurred when, as part of the normal progression of authorized treatment for a compensable injury suffered by a claimant, an authorized treating physician refers a claimant to one or more other physicians. Thus, the designation "authorized treating physician" includes not only those physicians to whom an employer directly refers a claimant, but also those to whom a claimant is referred by an authorized treating physician" *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

Claimant's testimony that Dr. Reiter referred her to her personal physician for treatment of her work related left shoulder injury is not found credible or persuasive. Rather, the medical records and notes are very clear that he only referred her for treatment of her left knee and that there was no further treatment necessary for her work-related left shoulder condition. His March 27, 2014 closing Physician's Report of Worker's Compensation Injury is consistent with his narrative of the appointment. The form indicates Claimant reached MMI with no permanent impairment, that Claimant was able to return to full duty work with no restrictions, and does not indicate that any follow up care or referral is appropriate. It would be entirely inconsistent for Dr. Reiter to have filled out the form indicating he was making no referral for Claimant's left shoulder injury and note the same in his narrative, but at the same time for him to have told Claimant to treat her left shoulder with her personal physician. Rather, Dr. Reiter's reports are clear

that he referred her to her personal physician for her non work related left knee injury only.

This case is thus distinguishable from the case cited by Claimant. In *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), an authorized treating physician (ATP) had been treating the Claimant's knee. The ATP then referred the Claimant to her personal physician for treatment of the knee as he did not believe it to be work related. The knee in that case was later found to be work related and so the referral for treatment of that same body part was found to be in the ordinary course of treatment and the Claimant's personal physician was found to be authorized. Additionally, the surgeon that Claimant's personal physician referred her to was also was found to be in the chain of referral. The court held that the risk of mistake by an ATP in concluding that an injury is non-compensable lies with the employer. *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

In this case, Dr. Reiter did not refer Claimant to her personal physician for treatment of her left shoulder. In fact, he treated her left shoulder until a point where Claimant reported improvement and he believed her to be at MMI. He only referred Claimant to her personal physician for treatment of her left knee, which is not a compensable work related condition. Had Claimant's left knee condition been found work related subsequent to Dr. Reiter's referral to claimant's personal physician for treatment of the left knee condition then this case would be more analogous to the *Cabela* case. However, the facts of this case show that the referral to Claimant's personal physician was for a non work related condition and does not result in the personal physician becoming an ATP for the work related left shoulder condition. Therefore, Dr. Swarsen and Dr. Stull are not in the chain of referral for the work related injury and neither doctor qualifies as an ATP in this claim.

Change of Physician

Section 8-43-404(5)(a), C.R.S. states:

> Upon the proper showing to the Division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee, and in any non-surgical case the employee, with such permission, in lieu of medical aid, may procure any non-medical treatment recognized by the laws of this state as legal, the practitioner administering such treatment to receive such fee therefore under the medical provisions of articles 40 to 47 as this titled as may be fixed by the Division.

While ordering a change of physician is within the discretion of the ALJ, a change may not be based upon arbitrary considerations. *Consolidated Landscape v. Industrial Claim Appeals Office*, 883 P.2d 571 (Colo. App. 1994). Here, although claimant testified that she had confidence in Dr. Stull, she presented no evidence whatsoever to support a change of physician from Dr. Reiter. Claimant did not testify that she lacked

confidence in Dr. Reiter or that there was any type of breakdown in the doctor-patient relationship between herself and Dr. Reiter. The only evidence presented was that Dr. Reiter had placed her at MMI and that she disagreed with this assessment. The proper way to challenge this opinion was not through a change of physician but to pursue a DIME. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). It is not uncommon for ATPs to be mistaken about initial MMI determinations. Indeed, this is the purpose of the DIME process, of which claimant took advantage. Dr. Reiter did not have the benefit of the MRI at the time of his MMI determination and at the time of his MMI determination claimant demonstrated +5/5 of grip strength, full range of motion in her shoulder, and subjectively reported improvement in her shoulder condition to both him and to PT Dockter. Claimant has not returned to Dr. Reiter since the Division IME to obtain any follow up evaluations and has failed to make a proper showing as to why she failed to return to Dr. Reiter and that a change of physician to Dr. Swarsen and Dr. Stull is warranted.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show that Respondents refused to tender care and that the right to select a physician for her work related left shoulder injury passed to her.

2. Claimant has failed to meet her burden to show that Dr. Swarsen and Dr. Stull are within the chain of referral for her work related left shoulder injury. The treatment provided by Dr. Swarsen and Dr. Stull is unauthorized.

3. Claimant has failed to make a proper showing for a request of change of physician to Dr. Swarsen and Dr. Stull. Her request for change of physician is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 27, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable lower back injury on March 8, 2014 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) and Temporary Total Disability (TTD) benefits for the period March 9, 2014 until terminated by statute.

FINDINGS OF FACT

1. Claimant works as a Bartender for Employer. Her job duties involve serving food, bussing tables, making drinks, washing dishes, cleaning tables, changing kegs, stocking alcohol and closing the bar.

2. On Saturday, March 8, 2014 Claimant was changing out an empty beer keg. Claimant noted that an empty beer keg weighs approximately 40 pounds. While in Employer's walk-in cooler Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward and lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." The incident occurred shortly after 5:00 p.m. Claimant's back pain continued to increase throughout the rest of her work shift. She explained that towards the end of her shift she sat down and processed credit card receipts in an effort to reduce her lower back pain.

3. Surveillance videos from two angles in Employer's bar area reflect that Claimant did not appear to be in significant pain from approximately 5:00 p.m. until the conclusion of her shift several hours later at 1:00 a.m. on March 9, 2014. Claimant appears to move fluidly while performing her job duties. She serves drinks and bends as necessary.

4. Claimant testified that she did not explicitly tell any of her co-workers that she had injured her back while lifting a keg on March 8, 2014. She noted that the bar was busy and there was not much time to talk to anyone. Nevertheless she told co-worker Donivan Cano "numerous times that [her] back was hurting worse and worse

and worse . . . ." Claimant acknowledged that she did not tell Mr. Cano that she injured her back while moving a keg.

5. Mr. Cano testified that he also works as a Bartender for Employer. He confirmed that March 8, 2014 was a busy night and he did not recall whether a Budweiser keg had been changed. He remarked that Claimant likely worked her complete shift until 1:00 a.m. and she never told him that she had injured her back while changing a keg. Claimant told him that she was experiencing back pain and needed to sit down. She then sat down and processed credit card receipts.

6. Claimant testified that she was scheduled to open Employer's bar at 11:00 a.m. on March 9, 2014. However, Claimant explained that her "walking and mobility wasn't great" and her breathing was "awful." She thus contacted new employee Noel Martin, told her that she was unable to report for work because she was in pain after injuring her back on the previous night and asked Ms. Martin to cover the shift.

7. Ms. Martin testified at the hearing in this matter. She commented that Claimant never advised her that she had injured her back while changing a keg at work on March 8, 2014. Ms. Martin explained that she had received a text message from Claimant on the morning of March 9, 2014 requesting work coverage. When Ms. Marin arrived at Employer's bar she had a conversation with Claimant in which Claimant stated that she felt poorly but did not elaborate.

8. On Monday, March 10, 2014 Claimant went into work to perform inventory. General Manager Christina Fahey was at the bar because she oversees inventory. Claimant reported that she thought she had hurt her ribs or "popped some ribs out of place changing the Budweiser keg on Saturday night." She commented that she was unable to continue inventory duties because she was having difficulties sitting, breathing and talking. Claimant remarked that Ms. Fahey arranged for another employee to cover the shift and provided her with a list of two designated Workers' Compensation medical providers. Claimant chose HealthOne.

9. Claimant drove to HealthOne Occupational Medicine and Rehabilitation and was evaluated by Deana Halat, FNP. FNP Halat reported that Claimant had attempted to pick up an empty keg at work on March 8, 2014 but experienced pain throughout her back. Claimant mentioned that on the day after the incident

> she was much worse, with increasing shortness of breath, her ribs and back hurt, she has a hard time breathing, her whole back has now started to hurt. She had nausea and terrible vomiting yesterday. She has hardly eaten anything today, just a little bit of yogurt because she is so nauseated…She denies neck pain, chest pain, but she does have shortness of breath. She is clearly in significant pain and is grunting at all times because trying to take a deep breath is so painful for her… She has had diarrhea, last was today… She did not fall at work. The keg did not fall on her…

10. In completing a physical examination of Claimant, FNP Halat explained that there was "no palpable tenderness along the paraspinous muscles in [Claimant's] lower back." She determined that Claimant suffered from "shortness of breath, pain [and] left upper quadrant abdominal pain." FNP Halat remarked that she contacted 9-1-1 to transport Claimant to Swedish Medical Center because Claimant required more extensive evaluation than could be provided at the clinic. She concluded that she could not "with all certainty determine that this is a work-related injury. Additional diagnostics are indicated."

11. Claimant was admitted to Swedish Medical Center because of abdominal pain, flank pain, vomiting and nausea. Claimant reported that her symptoms began three days earlier while lifting a heavy keg at work. A chest x-ray and an abdominal CT scan did not reveal any acute findings. A subsequent CT scan of the lumbar spine was also normal. Doctors thus suspected that Claimant's pain was secondary to a musculoskeletal strain. On March 14, 2014 Claimant was discharged from Swedish Medical Center with a diagnosis of "low back pain, secondary to muscle spasm."

12. On March 17, 2014 Claimant returned to HealthOne for an examination. David Williams, M.D. noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed a lumbar strain and muscle spasms. He also took Claimant off of work. She subsequently attended several other appointments at HealthOne during March and April 2014. She was diagnosed with a lumbar strain and possible torn paraspinous muscles in her lower back. Claimant underwent conservative treatment that included medications and physical therapy.

13. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Finally, Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014. The record thus reveals that Claimant returned to work for Employer in a modified capacity on April 7, 2014.

14. On April 21, 2014 Insurer filed a Notice of Contest challenging Claimant's claim. Claimant explained that she was unable to receive medical treatment through her Workers' compensation physicians and was "left to her own devices" to obtain treatment.

15. On June 9, 2014 Claimant visited personal physician Christopher D'Ambrosio at Advanced Orthopedic & Sports Medicine Specialists for an examination. Dr. D'Ambrosio noted that Claimant suffers from fibromyalgia and chronic pain syndrome. Claimant reported severe pain in her lower back and posterior pelvis. She also had numbness and tingling that radiated down the back of both legs. Dr. D'Ambrosio recorded range of motion measurements that were identical to the deficits he had recorded on February 10, 2014. He commented that Claimant had a normal

lumbar spine MRI earlier in the year but sought a new MRI to "further evaluate her complaints."

16. Claimant's medical records prior to her March 8, 2014 date of injury reflect that she suffers from chronic pain symptoms. On January 6, 2014 Claimant underwent a lumbar spine MRI. The MRI did not reveal any structural abnormalities, protrusions or stenosis. On February 10, 2014 Claimant visited Dr. D'Ambrosio for an examination. Claimant reported pain of "unknown etiology with radicular symptoms out of proportion." She specifically suffered severe lower back pain and pain that radiated down her back. Her range of motion was 10 degrees lateral flexion on the right, 10 degrees extension on the right and 30 degrees flexion on the right. Range of motion testing on the left was 10 degrees lateral flexion. Dr. D'Ambrosio noted that Claimant had severe restrictions on flexion, extension and bending. Claimant reported a lower back pain level of 7/10. At a February 26, 2014 examination with Dr. D'Ambrosio he noted that Claimant suffers from chronic pain syndrome. He specifically commented that Claimant suffers from "fibromyalgia, Sjogren's and other rheumatologic chronic pain symptoms."

17. On June 20, 2014 Claimant underwent a repeat lumbar MRI. The radiology report did not reflect any structural changes in comparison to the January 6, 2014 lumbar MRI.

18. On July 28, 2014 Claimant returned to Dr. D'Ambrosio for an examination. Dr. D'Ambrosio recorded lumbar range of motion measurements that were better than the measurements prior to the workplace incident on March 8, 2014. He recommended physical therapy and a home exercise program.

19. On June 23, 2014 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall issued addendum reports on July 9, 2014, August 8, 2014 and September 8, 2014. Claimant reported that on Saturday, March 8, 2014 she was working for Employer as a bartender and was changing out an empty beer keg. She leaned forward, lifted an empty keg and twisted. Claimant experienced a pain in her lower back that felt "weird." Dr. Fall also reviewed Claimant's medical records and conducted a physical examination. She concluded that Claimant's presentation was consistent with her prior history of worsening back pain and stiffness. Claimant did not suffer a new, specific work-related injury. Dr. Fall noted that during Claimant's initial visit at HealthOne she reported nausea, vomiting, abdominal pain and shortness of breath. Claimant's symptoms were not typical for a lumbar strain. Instead, Dr. Fall maintained that Claimant's symptoms were more consistent with her pre-existing condition.

20. Dr. Fall subsequently determined that additional medical records supported her position that Claimant did not suffer a new lumbar spine injury or the aggravation of a pre-existing condition on March 8, 2014. She remarked that Claimant's symptoms pre-dated the industrial incident because she had been experiencing progressive worsening of her symptoms. In fact, Claimant was suffering leg pain and 7/10 pain levels prior to March 8, 2014.

21. On July 25, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Fall. Dr. Fall maintained that Claimant's presentation was consistent with her prior history of worsening lower back pain and stiffness instead of a new, work-related injury. She noted that Claimant's radicular symptoms upon returning to light duty work were consistent with her pre-existing condition as detailed in the medical records. Dr. Fall remarked that Claimant had normal EMG and MRI studies that suggested her severe pain complaints were inconsistent with the objective findings. She summarized that Claimant had a pre-existing rheumatological condition with progressive worsening and not a new industrial injury. Dr. Fall noted that Claimant did not have any work restrictions that were attributable to the March 8, 2014 incident.

22. Dr. Fall also testified at the hearing in this matter. She maintained that Claimant's symptoms constitute the natural progression of her pre-existing, chronic lower back pain. Dr. Fall noted that there is no objective evidence to suggest that Claimant suffered a new lower back injury on March 8, 2014. She commented that Claimant's lumbar MRI findings did not change between January 6, 2014 and June 20, 2014. After reviewing Dr. D'Ambrosio's medical records, Dr. Fall detailed that Claimant's physical examination findings and medications also did not change before and after the industrial incident on March 8, 2014. Notably, Claimant's lumbar range of motion was identical on February 10, 2014 and June 9, 2014. Moreover, Dr. Fall explained that there are no objective findings to support Claimant's ongoing lower back symptoms. Furthermore, she explained that, although Claimant attributed her continuing pain to undergoing a hysterectomy, hysterectomies typically do not cause lower back symptoms. Accordingly, Dr. Fall concluded that Claimant's lower back symptoms constitute the natural progression of a pre-existing condition.

23. Claimant worked an average of 30 hours per week for Employer. She earned $4.98 each hour plus tips. Claimant had gross earnings of $4,511.24 for the period December 28, 2013 through March 8, 2014. Dividing $4,511.24 by 12 weeks yields an AWW of $375.94.

24. Claimant has established that it is more probably true than not that she sustained a compensable lower back injury on March 8, 2014 during the course and scope of her employment with Employer. However, the March 8, 2014 incident constituted a temporary aggravation of her chronic, pre-existing condition that returned to baseline by March 18, 2014. On March 8, 2014 Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward and lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." Claimant's co-worker Mr. Cano confirmed that Claimant stated that she was experiencing pain and needed to sit down. She then sat down and processed credit card receipts. Claimant subsequently obtained medical treatment through HealthOne. She consistently maintained that she injured her lower back while lifting an empty keg at work. Physicians diagnosed Claimant with a lumbar strain and possible torn paraspinous muscles in her lower back. She underwent conservative treatment that included medications and physical therapy.

25. Dr. Fall maintained that Claimant has suffered a natural progression of her pre-existing, chronic lower back condition. She noted that there is no objective evidence to suggest that Claimant suffered a new, lower back injury on March 8, 2014. Dr. Fall commented that Claimant's lumbar MRI findings did not change between January 6, 2014 and June 20, 2014. After reviewing Dr. D'Ambrosio's medical records Dr. Fall detailed that Claimant's physical examination findings and medications also did not change before and after the industrial incident on March 8, 2014. Notably, Claimant's lumbar range of motion was identical on February 10, 2014 and June 9, 2014. Moreover, Dr. Fall explained that there are no objective findings to support Claimant's ongoing lower back symptoms. She summarized that Claimant had a pre-existing rheumatological condition with progressive worsening. Claimant did not suffer a new industrial injury.

26. Although Dr. Fall maintained that Claimant's symptoms constituted the natural progression of her pre-existing condition, the record reflects that an incident occurred on March 8, 2014 while Claimant was lifting a keg at work. The incident caused a temporary aggravation of her pre-existing condition and prompted her need for medical treatment. However, Claimant's temporary aggravation resolved by March 9, 2014 when her pain symptoms decreased to the levels she had reported prior to her March 8, 2014 industrial injury. Accordingly, Claimant's work activities on March 8, 2014 aggravated, accelerated, or combined with her pre-existing condition to produce a need for medical treatment.

27. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. However, her entitlement to medical benefits ceased by March 18, 2014 when her pain symptoms returned to baseline levels. The lumbar MRI's performed both prior to and after the March 8, 2014 incident showed no disc pathology or neural encroachment. Claimant simply continued to report lower back pain and radicular symptoms that had existed prior to March 8, 2014. The treatment recommendations for Claimant's chronic, lower back pain and radicular symptoms also did not change subsequent to the work incident. Claimant continued to take the same medications. Dr. D'Ambrosia had recommended physical therapy and a home exercise program to Claimant prior to March 8, 2014 and reiterated those recommendations subsequent to the work incident. Moreover, Claimant's lumbar range of motion was the same on February 10, 2014 and June 9, 2014. Claimant's March 8, 2014 work incident thus caused a temporary aggravation of her pre-existing, chronic lower back pain and radicular symptoms. Specifically, on February 10, 2014 Claimant had reported a lower back pain level of 7/10 to Dr. D'Ambrosio. Based upon the medical evidence, any temporary aggravation to Claimant's chronic, preexisting condition thus returned to baseline by March 19, 2014 when Claimant reported a pain level of 7/10 to Dr. Williams at HealthOne. On a pain diagram on March 21, 2014 Claimant again rated her pain level as 6-7/10. Accordingly, Claimant's temporary aggravation resolved by March 19, 2014.

28. **Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period March 9, 2014 through April 6, 2014.**

On March 8, 2014 Claimant suffered a lower back injury at work and was subsequently admitted to Swedish Medical Center until she was discharged on March 14, 2014. On March 17, 2014 Claimant returned to HealthOne for an examination. Dr. Williams noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed her with a lumbar strain and muscle spasms. He also took Claimant off of work. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Finally, Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014. The record thus reveals that Claimant returned to work for Employer in a modified capacity on April 7, 2014. Pursuant to §8-42-105(3)(b), C.R.S. Claimant's TTD benefits ceased by operation of law when she returned to modified employment. Accordingly, Claimant is entitled to TTD benefits for the period March 9, 2014 through April 6, 2014.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising

out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable lower back injury on March 8, 2014 during the course and scope of her employment with Employer. However, the March 8, 2014 incident constituted a temporary aggravation of her chronic, pre-existing condition that returned to baseline by March 18, 2014. On March 8, 2014 Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward and lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." Claimant's co-worker Mr. Cano confirmed that Claimant stated that she was experiencing pain and needed to sit down. She then sat down and processed credit card receipts. Claimant subsequently obtained medical treatment through HealthOne. She consistently maintained that she injured her lower back while lifting an empty keg at work. Physicians diagnosed Claimant with a lumbar strain and possible torn paraspinous muscles in her lower back. She underwent conservative treatment that included medications and physical therapy.

7. As found, Dr. Fall maintained that Claimant has suffered a natural progression of her pre-existing, chronic lower back condition. She noted that there is no objective evidence to suggest that Claimant suffered a new, lower back injury on March 8, 2014. Dr. Fall commented that Claimant's lumbar MRI findings did not change between January 6, 2014 and June 20, 2014. After reviewing Dr. D'Ambrosio's medical records Dr. Fall detailed that Claimant's physical examination findings and medications also did not change before and after the industrial incident on March 8, 2014. Notably, Claimant's lumbar range of motion was identical on February 10, 2014 and June 9, 2014. Moreover, Dr. Fall explained that there are no objective findings to support Claimant's ongoing lower back symptoms. She summarized that Claimant had a pre-existing rheumatological condition with progressive worsening. Claimant did not suffer a new industrial injury.

8. As found, although Dr. Fall maintained that Claimant's symptoms constituted the natural progression of her pre-existing condition, the record reflects that

an incident occurred on March 8, 2014 while Claimant was lifting a keg at work. The incident caused a temporary aggravation of her pre-existing condition and prompted her need for medical treatment. However, Claimant's temporary aggravation resolved by March 9, 2014 when her pain symptoms decreased to the levels she had reported prior to her March 8, 2014 industrial injury. Accordingly, Claimant's work activities on March 8, 2014 aggravated, accelerated, or combined with her pre-existing condition to produce a need for medical treatment.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

10. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. However, her entitlement to medical benefits ceased by March 18, 2014 when her pain symptoms returned to baseline levels. The lumbar MRI's performed both prior to and after the March 8, 2014 incident showed no disc pathology or neural encroachment. Claimant simply continued to report lower back pain and radicular symptoms that had existed prior to March 8, 2014. The treatment recommendations for Claimant's chronic, lower back pain and radicular symptoms also did not change subsequent to the work incident. Claimant continued to take the same medications. Dr. D'Ambrosia had recommended physical therapy and a home exercise program to Claimant prior to March 8, 2014 and reiterated those recommendations subsequent to the work incident. Moreover, Claimant's lumbar range of motion was the same on February 10, 2014 and June 9, 2014. Claimant's March 8, 2014 work incident thus caused a temporary aggravation of her pre-existing, chronic lower back pain and radicular symptoms. Specifically, on February 10, 2014 Claimant had reported a lower back pain level of 7/10 to Dr. D'Ambrosio. Based upon the medical evidence, any temporary aggravation to Claimant's chronic, preexisting condition thus returned to baseline by March 19, 2014 when Claimant reported a pain level of 7/10 to Dr. Williams at HealthOne. On a pain diagram on March 21, 2014 Claimant again rated her pain level as 6-7/10. Accordingly, Claimant's temporary aggravation resolved by March 19, 2014.

Average Weekly Wage

11. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on her earnings at the time of injury. The Judge must calculate the money

rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). As found, an AWW of $375.94 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

TTD and TPD Benefits

12. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). **TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.**

13. **As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period March 9, 2014 through April 6, 2014. On March 8, 2014 Claimant suffered a lower back injury at work and was subsequently admitted to Swedish Medical Center until she was discharged on March 14, 2014. On March 17, 2014 Claimant returned to HealthOne for an examination. Dr. Williams noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed her with a lumbar strain and muscle spasms. He also took Claimant off of work. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Finally, Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014. The record thus reveals that**

Claimant returned to work for Employer in a modified capacity on April 7, 2014. Pursuant to §8-42-105(3)(b), C.R.S. Claimant's TTD benefits ceased by operation of law when she returned to modified employment. Accordingly, Claimant is entitled to TTD benefits for the period March 9, 2014 through April 6, 2014.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable temporary aggravation of her lower back condition while working for Employer on March 8, 2014.

2. Claimant is entitled to medical treatment through March 19, 2014.

3. Claimant earned an AWW of $375.94.

4. **Claimant shall receive TTD benefits for the period March 9, 2014 through April 6, 2014.**

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 11, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined by this decision are the following:

1. Whether the respondents have overcome the opinion of the Division IME by clear and convincing evidence regarding whether claimant is at maximum medical improvement (MMI)?

2. Whether the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 28, 2014 and ongoing when he was released in writing by his treating physician to regular employment on May 21, 2014?

3. Whether the claimant has proven by a preponderance of the evidence that further medical benefits are reasonably necessary and related to the work injury?

4. What is claimant's proper average weekly wage?

FINDINGS OF FACT

1. The claimant sustained an industrial injury to his left knee on February 24, 2014 while working for the respondent-employer. At that time the claimant injured his left knee while securing equipment. There was bad weather that day and the claimant's supervisor asked him to secure the materials from the wind. He picked up a piece of plywood and was blown into a steel beam injuring his left knee. The claimant believes that he blacked out for a few seconds. He suffered a laceration to his left knee.

2. Immediately after sliding into the steel beam, the superintendent came and helped him into his truck and took him to the emergency department.

3. The claimant went to Penrose St. Francis emergency department on February 24, 2014. His left knee was sutured and he was given a knee immobilizer.

4. On February 25, 2014, Dr. Steve DeCoud, at Premier Urgent Care, examined the claimant. He was given temporary work restrictions from February 25,

2014 through February 27, 2014 of no lifting, no pushing or pulling, walking less than two hours per day, no crawling, no squatting, and no climbing.

5. On February 27, 2014, Dr. Robert Magnuson gave the claimant temporary work restrictions from February 27, 2014 through March 6, 2014 of no lifting over ten pounds, no carrying over 10 pounds, no pushing or pulling over ten pounds, walking less than two hours per day, no crawling, no squatting, and no climbing.

6. On March 5, 2014, Dr. Sharma placed the claimant at MMI and released him back to full duty without any restrictions. However, Dr. Sharma evaluated the claimant again on March 28, 2014. On that date, he indicated that he anticipated the claimant would reach MMI on April 11, 2014.

7. On March 28, 2014, the claimant underwent an x-ray on his left knee, which revealed "mild degenerative changes of the medial and patellofemoral compartments."

8. On April 11, 2014, Dr. Sharma evaluated the claimant. He was given a hinged knee brace for his left knee. He was diagnosed with left knee medial meniscus tear. Dr. Sharma referred him to physical therapy and referred for an MRI on his left knee.

9. On April 21, 2014, Dr. Sharma evaluated the claimant again. His diagnosis was changed to Left knee Pre-patellar bursitis with chondromalacia patella. The claimant was referred to orthopedic surgeon, Dr. David Walden.

10. On May 21, 2014, Dr. Sharma placed the claimant at MMI and he did not give him a permanent impairment. Dr. Sharma recommended three injections with Dr. Walden as maintenance care.

11. The respondent-insurer filed a Final Admission of Liability (FAL) on June 5, 2014.

12. The claimant filed a timely objection to the FAL and a notice and proposal for a Division Independent Medical Examination ("Division IME").

13. The claimant underwent a Division IME with Dr. Stephen Scheper on September 9, 2014. In his report, Dr. Scheper opined that the claimant was not at MMI for his left knee injury.

14. Dr. Scheper opined that "[i]n consideration of his long professional career without difficulty, the inciting event on 2/24/2014 resulted in a dramatic change to his functional capacity for gainful employment and deserves further management."

15. The ALJ finds that Dr. Scheper's opinion was that the industrial injury substantially aggravated the claimant's pre-existing knee condition and that the claimant is not yet back to baseline.

16. Dr. Scheper recommended "he be referred back to orthopedic surgery for continued treatment with Dr. Walden, or an additional provider at the claimant's discretion. The specific treatment options should be left to the expertise of his orthopedist at this point."

17. Dr. Scheper noted that "[p]ermanent impairment rating is not applicable at this time. This should be reassessed when he indeed reaches MMI status."

18. The respondents filed an application for hearing on October 17, 2014 to overcome the DIME of Dr. Stephen Scheper.

19. The claimant filed a response to the application for hearing on October 24, 2014 endorsing average weekly wage (AWW), temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, medical benefits, and reasonable and necessary as additional issues.

20. The respondents' retained independent medical record reviewer, Dr. Wallace Larson to review the claimant's medical records. Without examining the claimant, Dr. Larson opined that the claimant is at MMI and does not require any additional treatment.

21. The claimant was able to perform his job duties as a rigger and carpenter before February 27, 2014 without any difficulty. Since his injury the claimant has not been able to perform his full job duties as a result of his industrial injury. Although he did not have work restrictions, the respondent-employer was accommodating the claimant's work by only having him perform light duty work.

22. The claimant was laid off by the respondent-employer on May 28, 2014, shortly after being placed at MMI. It was the claimant's understanding that he was laid

off because his employer didn't have any light duty and he was unable to perform full duty work. The respondent- employer had the claimant on light duty until he was laid off.

23. On April 21, 2014, Dr. Sharma reviewed and signed off on the claimant's "demonstrated physical capabilities." Dr. Sharma agreed that the claimant's work demands lifting from floor to knuckle, knuckle to shoulder, shoulder to overhead all required a capability of lifting over seventy-five pounds. The claimant's work demands an overall carrying capability of over seventy-five pounds. The claimant's actual capability to lift from floor to knuckle was sixty pounds. The claimant's actual capability to lift from knuckle to shoulder was "NT" [not tested]. The claimant's actual capability to lift from shoulder to overhead was "NT" [not tested]. The claimant's actual capability to carry is only fifteen pounds. Only being able to carry fifteen pounds places the claimant in the light category of work.

24. The Claimant began working for the respondent-employer on October 31, 2013. He was paid $20.00 an hour. The wage records indicate that the claimant worked 15 weeks between his start date and the February 28, 2014 pay date. There are two weeks where it appears the claimant did not work or the time was negligible. During the 15 weeks the claimant earned $10,250.00. This equates to an average weekly wage of $683.33.

25. The ALJ finds that there is insufficient medical evidence to establish anything more than a difference of opinion between the DIME physician, Dr. Scheper, and the other physicians who have opined upon the claimant's condition, as such the respondents have failed to establish that Dr. Scheper's findings are clearly erroneous.

26. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to temporary total disability benefits from and including May 28, 2014 and ongoing because the claimant's wage loss is due directly to his industrial injury; that is, but for the consequences of his industrial injury the respondent-employer would not have laid off the claimant.

27. The ALJ finds that the claimant has established that it is more likely than not that he requires additional treatment as determined by Dr. Scheper in order to cure or relieve him from the effects of the industrial injury.

28. The ALJ finds that the claimant has established that it is more likely than not that his average weekly wage is $683.33.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

3. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of a claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

6. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), *citing Dilco v. Koltnow,* 613 P.2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010).

7. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, (W.C. No. 4-

874-745-01, ICAO February 14, 2014); *See also Javalera v. Monte Vista Head Start, Inc.,* (W.C. No. 4-532-166, ICAO July 19, 2004); *Gonzales v. Browning Industries of Colorado*, (W.C. No. 4-350-356, ICAO March 22, 2000).

8. As found above, the ALJ concludes that the medical opinions of the DIME physician, Dr. Scheper, have not been overcome by clear and convincing evidence, as the other physicians opinions only amount to a difference of opinion.

9. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001).

10. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that his wage loss is directly attributable to his industrial injury; therefore, the claimant is entitled to TTD benefits commencing May 28, 2014 and continuing until terminated by operation of law.

11. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker,* W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000)

12. It is solely within the ALJ's discretionary province to weigh the evidence and determine the credibility of expert witnesses. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

13. The ALJ concludes, as found above, that the claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical care to cure or relieve him from the effects of his industrial injury as recommended by Dr. Scheper.

14. The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), See Also Section 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p. 1457. The objective of wage calculation is to reach a fair approximation of the claimant's

actual wage loss and diminished earning capacity. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

15. The ALJ concludes, as found above, that the claimant began working for the respondent-employer on October 31, 2013. The claimant was paid $20.00 an hour. The wage records indicate that the claimant worked 15 weeks between his start date and the February 28, 2014 pay date. There are two weeks where it appears the claimant did not work or the time was negligible. During the 15 weeks the claimant earned $10,250.00. This equates to an average weekly wage of $683.33.

16. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that his AWW is $683.33.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents attempt to overcome the DIME opinion of Dr. Scheper is denied and dismissed.

2. The respondent-insurer shall pay the claimant TTD benefits beginning May 28, 2014 and continuing until terminated by operation of law.

3. The respondent-insurer shall pay for all reasonable and necessary medical care to cure or relieve the claimant from the effects of his industrial injury; and specifically as recommended by Dr. Scheper.

4. The claimant's average weekly wage is $683.33.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: March 9, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

Whether Claimant's average weekly wage (AWW) should be increased by $124.58 per week to include Employer's cost of health insurance.

STIPULATIONS

Claimant's AWW without the increase for health insurance cost is $827.01. If the health insurance cost is found by the ALJ to be included in Claimant's AWW, then the new AWW rate would be $951.59.

FINDINGS OF FACT

1. Claimant was hired by Employer on April 4, 2014 as a general handyman at one of Employer's residential apartment complexes. Claimant's first day of work for Employer was April 7, 2014. *See* Exhibit A.

2. In his letter of hire, Claimant was advised that Employer imposed a 90-day period for all new employees during which they were not entitled to benefits afforded more tenured employees including, but not limited to, group insurance and sick leave. The letter of hire also informed Claimant that during the 90-day period his work productivity and ability to work with co-employees and subcontractors would be examined closely. The letter further advised Claimant that it would be within the sole discretion of Employer to terminate at any time during the 90-day probation period, or at any time thereafter, the employment of any employee for any reason or no reason, with or without notice. Claimant received this letter and signed it. *See* Exhibit A.

3. On June 14, 2014 Claimant suffered an admitted work related injury when he fell down stairs at Employer's property while responding to an on-call emergency at 3:00 a.m. to change the smoke detector battery at one of Employer's residential units. *See* Exhibit 2.

4. On the date of his injury, Claimant was still a probationary employee and had not yet worked 90 days for Employer.

5. Claimant has not worked for Employer since June 14, 2014.

6. Claimant remains an employee of Employer. Employer placed Claimant on a leave of absence, due to the injury, with an effective leave of absence date of June 18, 2014.

7. When Claimant was hired, he elected benefits, which would have become effective after 90 days of active employment, or on July 6, 2014.

8. Employer's 2014 Employee Benefits Handbook states that coverage for benefit elections that an employee makes become effective after the employee has been actively employed by Employer for 90 days. *See* Exhibit G.

9. Employer's Employee Handbook, revised August 1, 2013, states that all full-time employees are eligible for the medical insurance plan on the first day following their initial 90 days of employment. *See* Exhibit F.

10. At the time of his injury, Claimant was not yet eligible for health insurance benefits. Employer had not yet paid for any benefits for Claimant and similarly Claimant had not contributed any amount toward the costs of health insurance benefits.

11. As Claimant did not work for Employer following his June 14, 2014 injury, per company policy, he was not eligible for health insurance benefits on July 6, 2014 when his probationary period would have ended had he remained actively employed.

12. Despite not being eligible for health insurance benefits per company policy, sometime shortly after July 6, 2014 Claimant was issued a health insurance card. Claimant used the health insurance for non-work related medical issues shortly after he received it.

13. The cost to Employer of providing health insurance benefits to Claimant was $124.58 per week. Claimant did not incur any costs for the health insurance benefits.

14. Sometime in October of 2014, Claimant attempted to fill a prescription at Walgreens and was advised by Walgreens that his insurance had been cancelled.

15. Claimant's health insurance benefits were cancelled by Employer on October 10, 2014. Employer did not enter Claimant's leave of absence into their computer system in June of 2014 when Claimant stopped working and went out on a leave of absence due to an internal error.

16. Employer realized the error in October of 2014 and submitted the leave of absence into their computer system. Employer then terminated Claimant's health insurance benefits.

17. On October 21, 2014 Claimant spoke with Employer and was explained that since he had not worked for 90 days, he was not eligible for benefits and that his insurance card had been issued in error.

18. Claimant was the beneficiary of approximately three months of health insurance benefits for which he was not eligible under the contract of hire.

19. Although Claimant was expected to continue actively working for Employer from June 14, 2014 until he reached his 90th day of employment, his employment status was not guaranteed by Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2014). Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2014).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.,*

supra. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

Here, it is clear that at the time of Claimant's injury he was not yet eligible for any health insurance benefits or additional compensation from Employer beyond his wages as he had not yet worked for Employer for 90 days. Claimant's average weekly wage at the time of his injury was $827.01. At the time of his injury, Claimant had not made any contributions for health insurance benefits. Employer was also not providing any health insurance benefits to Claimant nor had Employer made any payments or contributions for health insurance benefits. There was no evidence to support a cost to Claimant to continue a health insurance plan or to convert to a similar or lesser plan after his injury.

The statute requires that Claimant's AWW be based on the earnings at the time of the injury unless for any reason using his actual earnings at the time of the injury would not fairly determine Claimant's AWW. *See* § 8-42-102(2), C.R.S. (2014). The ALJ is not persuaded that using Claimant's actual earnings on the date of his injury would not fairly determine his AWW. Departing from the requirements of § 8-42-102(2), and using the discretionary authority under § 8-42-102(3), to include prospective benefits and a prospective cost to Employer of health insurance benefits is not found appropriate in this case.

The prospective benefits were not in force at the time of the injury and there were no guarantees by Employer that Claimant would remain employed through the probationary period and receive health insurance benefits. Rather, the contract of hire makes it clear that Claimant could be terminated at any time during his probationary period and that only after successful completion would Claimant be eligible for benefits. Claimant did not work for Employer long enough to be eligible for benefits. Claimant also has not worked since the date of his injury. Although he remains an employee, the ALJ finds it persuasive that Claimant did not and has not actively worked for Employer for 90 days. Under the contract of hire, Claimant has never been entitled to health insurance benefits. Therefore, the ALJ does not find it appropriate and does not find that fairness requires adding to Claimant's average weekly wage the prospective cost to Employer of health insurance benefits.

Claimant argues that manifest injustice occurred as a result of Employer issuing him health insurance benefits and then revoking the same. However, as found above, the health insurance benefits were issued in error as Employer failed to note in their computer system that Claimant was no longer working and out on a leave of absence. Rather than suffering a manifest injustice, Claimant was the beneficiary of health insurance for a period of approximately three months that he was not due or owed under the contract of hire.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $827.01. The calculation of AWW shall not be increased to include Employer's cost of health insurance.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 24, 2015

/s/Michelle E. Jones_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on May 23, 2014.

2 Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 24, 2014 until terminated by statute.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $513.00.

2. The medical treatment Claimant received for the May 23, 2014 incident from University of Colorado Hospital, Michael Ladwig, M.D., Nicholas K. Olsen, D.O., Brian Reiss, M.D., Physiotherapy Associates, Health Images, Touchstone Imaging and Rehabilitation Associates was authorized.

3. Respondents have paid Claimant's medical bills from the authorized providers with the possible exception of the University of Colorado Hospital Emergency Room from May 26, 2014. Respondents agree to pay the May 26, 2014 Emergency Room bill.

FINDINGS OF FACT

1. Employer is a janitorial supply and distribution company. Claimant began working for Employer on January 6, 2011 as a Warehouseman. His job duties involved pulling orders, stocking freight, delivering orders and installing dispensers. Claimant's normal work hours were Monday through Friday from 9:00 a.m. until 5:30 p.m.

2. Claimant testified that on Friday morning May 23, 2014 he was loading items into his delivery van at Employer's warehouse. He began experiencing left lower back pain while lifting five gallon buckets of degreaser that each weighed approximately 50 pounds. When he arrived at his destination for delivery of the degreaser Claimant carried the buckets into the customer's facility. Claimant explained that, because of his worsening pain, he carried two buckets at a time in an attempt to balance his load. Claimant described sharp pain that pushed through his back.

3. Claimant completed his delivery duties for the day and returned to Employer's warehouse. At approximately 2:20 p.m. General Manager of Employer

Penny Schreter left early for the Memorial Day weekend. Ms. Schreter instructed Claimant that he could close up and leave early once his co-worker Mark Gurule returned from Colorado Springs. Claimant commented that he thus continued to perform work around the warehouse until he left for the day at 4:15 p.m. Claimant remarked that he moved a couple of 55 gallon drums using a drum lift. He explained that he first maneuvered or "manhandled" the drum to get it to the corner of the pallet. Claimant stood on the pallet, hugged the drum and twisted it around. Claimant noted that by the end of his work day he was suffering significant lower back pain and could hardly bend over.

4. At approximately 4:15 p.m. Mr. Gurule returned to Employer's warehouse from Colorado Springs. Claimant locked up the warehouse and then went home. He explained that his lower back pain started becoming more severe and he developed aching pain down his left leg. Claimant noted that he remained in significant pain throughout the weekend.

5. On Sunday, May 25, 2014 Claimant contacted Ms. Schreter and told her that he was suffering excruciating pain. He believed that he needed to go to an emergency room by ambulance. Claimant stated that he discussed with Ms. Schreter that his pain had started on Friday May 23, 2014 while he was lifting five gallon buckets of degreaser. Ms. Schreter advised Claimant to visit an emergency room if it was necessary.

6. On Monday, May 26, 2014 Claimant was still suffering excruciating pain and went to University Hospital for medical treatment. On admission to the University of Colorado Hospital Emergency Room Claimant informed the nurse that he had been experiencing intermittent lower back pain since December. Claimant denied trauma but reported heavy lifting at work that involved moving five gallon buckets and 55 gallon drums during the preceding week. The physician notes reveal that Claimant had a history of lower back injuries at work that began in December 2013 while pulling 2,500 pound pallets with a pallet jack. Claimant specifically commented that he had been experiencing very severe lower back pain over the last three days after an acute exacerbation. He noted that he was recently moving some five gallon pails at work and climbing ladders at home to move a swamp cooler. Claimant had been using hot packs and trying a back brace but his pain intensified over the weekend.

7. Claimant testified that he mentioned climbing his ladder at home because the physician asked him to describe all the different things he had done with his back. He had experienced some pain or a "tweak" to his lower back days before the May 23, 2014 incident while stretching his leg around and twisting to get on a ladder to descend from his roof at home. Claimant had been cleaning and sealing the swamp cooler on his roof to prepare it for operation. He described removing the cover of the swamp cooler on his roof, sweeping out debris and spraying the interior with sealant. Claimant did not take any parts of the swamp cooler down off his roof. He denied slipping or falling. Claimant did not move the swamp cooler as reflected in the Emergency Room records. In fact, Claimant's neighbor Don Wiles testified that he was able to observe Claimant's roof and remembers when the previous owner of the home installed the

swamp cooler. The same swamp cooler is still there and to his knowledge has never been moved. Claimant noted that the lower back pain was temporary and resolved by the following day. He performed his regular job duties on the day following the swamp cooler incident.

8. Claimant acknowledged that it had not been unusual for him to "tweak" his lower back since the previous winter when he hurt his back moving 2,500 pound pallets of ice melt for Employer. He explained that he could do little things that would cause mild pain or a cramp in his lower back. Claimant would typically have pain for a day or two before improving. He also described another recent incident of back pain in which his foot slipped in a restroom stall when he was installing a toilet tissue dispenser as part of his job duties. Claimant noted that he had never missed work, obtained medical care or sought Workers' Compensation benefits for his lower back symptoms.

9. Ms. Schreter testified to the chronology of events surrounding Claimant's May 23, 2014 incident. She explained that on Wednesday May 21, 2014 at approximately 10:00 a.m. Claimant sought to leave work because it was a light day. He stated that there was something he needed to do at home. Ms. Schreter permitted Claimant to leave Employer's warehouse and go home.

10. Claimant returned to work on Thursday May 22, 2014. He reported to Ms. Schreter that he injured his lower back on the previous day when descending a ladder while repairing the swamp cooler on his roof. Ms. Schreter remarked that Claimant appeared to be experiencing discomfort and was limping. She asked Claimant if he wanted to go home but he replied that he would wear his back brace and be fine. Claimant subsequently wore his back brace throughout his shift.

11. Claimant returned to work on Friday May 23, 2014. He continued to wear his back brace. Because of the upcoming Memorial Day Holiday Claimant had a light delivery schedule and returned to Employer's warehouse facility by approximately 2:00 p.m. Ms. Schreter remarked that when Claimant returned from his deliveries he was still wearing his back brace, did not seem any worse and did not mention any additional back injuries.

12. In contrast to Claimant's testimony, Ms. Schreter maintained that Claimant was not required to move 55 gallon drums when he returned from completing his deliveries on May 23, 2014. She explained that Midwest Motor Freight delivered four pallets of 55 gallon drums at approximately 10:00 a.m. Ms. Schreter received the delivery and rearranged the drums on the pallets so that they were ready for delivery. In fact, they were not scheduled for delivering until the following Tuesday. Ms. Schreter also explained that Claimant had access to a forklift, a pallet jack and a "walkie stacker" lift that could be used to move and lift heavy items. Moreover, Claimant resisted moving large items, including the 55 gallon drums, and Ms. Schreter was the one who generally worked with them. Ms. Schreter noted that Claimant had previously been involved in a spill with the drums and thus did not like to move them.

13. Jo Ann Bertram was a previous employee for Employer. She provided a written statement explaining that on May 22, 2014, Claimant reported to work and appeared in pain and limping. She stated that he had taken off the day before, or Wednesday May 21, 2014, to "get his water cooler ready for summer." Claimant told her that he was climbing down a ladder with a part of a water cooler in his hand when he slipped and twisted his back. Ms. Bertram specifically noted that Claimant was "limping and said his back hurt."

14. Mr. Gurule testified that he worked in the same capacity and performed identical job duties to Claimant. He explained that on Tuesday May 20, 2014 Claimant did not appear to be injured and they made deliveries together. On Wednesday May 21, 2014 Claimant was not at work. On Thursday May 22, 2014 Claimant returned to work wearing a back brace. Claimant told Mr. Gurule that he injured his back on the prior day at home while installing a swamp cooler and climbing up and down a ladder. Mr. Gurule noted that Claimant had previously, occasionally complained of back stiffness and pain. On May 23, 2014 Claimant was still in pain and limping. Mr. Gurule stated that he made deliveries and returned to Employer's facility at about 3:00 p.m. Claimant did not ask for any assistance in moving any drums and commented that they could leave for the weekend.

15. On May 28, 2014 Claimant visited Authorized Treating Physician (ATP) Michael Ladwig, M.D. for an evaluation. Claimant reported that while he was lifting five gallon pails of degreaser at work he felt a sharp pain in his lower back. He also experienced sharp, shooting pains down his left leg. Claimant had difficulty standing and walking for extended periods. Based on Claimant's history, mechanism of injury, and objective findings on examination Dr. Ladwig concluded that Claimant suffered a work-related injury. He took Claimant off work and referred him for an MRI.

16. On June 3, 2014 Claimant underwent an MRI of his lower back. The MRI reflected an apparent disc extrusion causing severe left lateral recess stenosis and left entry zone foraminal compromise at the L3-4 level.

17. On June 9, 2014 Claimant underwent a consultation with Nicholas K. Olsen, D.O. Claimant reported that he initially sprained his back during the previous winter pulling 2,500 pound pallets of ice melt. The symptoms were never great enough that he consulted a physician and he did not report a work injury. On May 23, 2014 Claimant was lifting five gallon pails of degreaser. When he returned to Employer's warehouse he was repackaging 55 gallon drums. Toward the end of the day, Claimant noticed a significant increase in lower back pain. Over the Memorial Day weekend the pain became so great he went to University Hospital. Claimant reported that he was still suffering significant pain and was unable to get any real relief even with oral medications and hot packs. Dr. Olsen determined that Claimant suffered a work-related injury on May 23, 2014 and had acute signs of left L3, L4 radiculitis as noted on both physical examination and supported by MRI findings. Dr. Olsen prescribed pool therapy and subsequently performed transforaminal epidural steroid injections at two levels. However, because Claimant continued to have a high level of pain, Dr. Olsen referred him to Brian Reiss, M.D. on July 2, 2014 for a surgical consultation.

18. On July 17, 2014 Claimant visited Orthopedic Surgeon Dr. Reiss for a consultation. Claimant reported that he was making deliveries and lifting five gallon pails at work when he developed lower back pain. He was later moving 55 gallon barrels and his symptoms worsened. Claimant mentioned that he had irritated his lower back previously moving pallets at work. Dr. Reiss reviewed the MRI films and suspected that the density that had been read as a herniated disc may actually be a hematoma. Dr. Reiss therefore ordered a repeat MRI. The second MRI performed on July 30, 2014 revealed a reduction of the density at the L3-4 level.

19. On December 4, 2014 Dr. Reiss testified through an evidentiary deposition in this matter. Dr. Reiss noted that the change between Claimant's two MRI's confirmed that Claimant had sustained a hematoma at the L3-4 level and not an extruded disc. Dr. Reiss explained that hematomas tend to resolve fairly quickly compared to herniated discs. He also remarked that the hematoma suggested a fairly acute injury. Dr. Reiss explained that a hematoma involves blood and that it likely came from inside Claimant's spinal canal. Dr. Reiss noted that hematomas usually involve acute pain that is more severe than usual if the individual has had a history of back pain associated with lower extremity symptoms. Dr. Reiss concluded that Claimant developed the hematoma at work on Friday, May 23, 2014. He maintained that, even if Claimant came into work on Friday morning and had already tweaked his back, something else happened during the day that significantly worsened Claimant's condition. Based on Claimant's reports Dr. Reiss determined that something severe occurred on Friday May 23, 2014 that led to the worsening of Claimant's condition and new leg pain. Dr. Reiss noted that evidence from coworkers that Claimant was limping prior to his lower back injury did not change his opinion. He concluded that Claimant's lower extremity pain and dysfunction is secondary to the hematoma. Dr. Reiss partially attributed Claimant's back pain to the hematoma and partially attributed it to his pre-existing condition.

20. On November 13, 2014 Dr. Olsen determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned Claimant lifting, carrying, pushing and pulling restrictions not to exceed 10 pounds. Dr. Olsen also stated that Claimant should alternate sitting and standing every 30 minutes. Claimant had previously been restricted from performing any work by Dr. Ladwig. He has not been provided any work from Employer since receiving work restrictions. Dr. Olsen summarized that Claimant sustained a work-related lumbar sprain/strain on May 23, 2014 and serial MRI's demonstrated a resolving hematoma of the lumbar spine. Dr. Olsen also stated that Claimant not only had a hematoma but likely injured the multifidi and smaller muscles that control his vertebral movement.

21. Claimant has demonstrated that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on May 23, 2014. Claimant testified that on Friday morning May 23, 2014 he was loading items into his delivery van at Employer's warehouse. He began experiencing left lower back pain while lifting five gallon buckets of degreaser that each weighed approximately 50 pounds. When he arrived at his destination for delivery of the degreaser Claimant carried the buckets into the customer's facility. Claimant completed his delivery duties for the day and returned to Employer's

warehouse. Claimant remarked that he then moved a couple of 55 gallon drums using a drum lift. He explained that he first maneuvered or "manhandled" the drum to get it to the corner of the pallet. Claimant stood on the pallet, hugged the drum and twisted it around. Claimant noted that by the end of his work day he was suffering significant lower back pain and could hardly bend over. Claimant's lower back pain worsened throughout the weekend and he sought medical treatment. Throughout his medical treatment he consistently maintained that he injured his back at work while lifting five gallon buckets of degreaser and moving 55 gallon drums. Claimant also noted that he "tweaked" his back on May 21, 2014 while cleaning and sealing the swamp cooler on his roof to prepare it for operation. He described removing the cover of the swamp cooler on his roof, sweeping out debris and spraying the interior with sealant. Claimant did not take any parts of the swamp cooler down off his roof. He denied slipping or falling. He specifically noted that he "tweaked" his lower back while stretching his leg around and twisting to get on a ladder to descend from his roof at home.

22. Ms. Schreter testified that when Claimant returned to work on Thursday May 22, 2014 he stated that he injured his lower back on the previous day when descending a ladder while repairing the swamp cooler on his roof. Ms. Schreter remarked that Claimant appeared to be experiencing discomfort and was limping. She asked Claimant if he wanted to go home but he replied that he would wear his back brace and be fine. Moreover, Mr. Gurule testified that while talking to Claimant on May 22, 2014 Claimant stated he injured his back on the prior day at home while installing a swamp cooler and climbing up and down a ladder. Mr. Gurule noted that Claimant was still in pain and limping. Finally, Ms. Bertram remarked that Claimant told her he injured his back climbing down a ladder with a part of a water cooler in his hand when he slipped and twisted his back. Ms. Bertram specifically noted that Claimant was "limping and said his back hurt."

23. The record is replete with evidence that Claimant "tweaked" his back while working on a swamp cooler and descending a ladder at home on May 21, 2014. However, he worked a full shift and completed his job duties on the following day. The persuasive medical records and testimony demonstrate that Claimant aggravated his lower back condition while performing his job duties on May 23, 2014. On May 28, 2014, after considering Claimant's history, mechanism of injury, and objective findings on examination, Dr. Ladwig concluded that Claimant suffered a work-related injury. On June 9, 2014 Dr. Olsen determined that Claimant suffered a work-related injury on May 23, 2014 and had acute signs of left L3, L4 radiculitis as noted on both physical examination and supported by MRI findings. He subsequently summarized that Claimant sustained a work-related lumbar sprain/strain on May 23, 2014 and serial MRI's revealed a resolving hematoma of the lumbar spine. Dr. Olsen also stated that Claimant not only had a hematoma but likely injured the multifidi and smaller muscles that control his vertebral movement. Finally, Dr. Reiss persuasively testified that the change between Claimant's two MRI's confirmed that Claimant had sustained a hematoma at the L3-4 level and not an extruded disc. He explained that a hematoma involves blood and that it likely came from inside Claimant's spinal canal. Dr. Reiss noted that hematomas usually involve acute pain that is more severe than usual if the individual has had a history of back pain associated with lower extremity symptoms. Dr.

Reiss concluded that Claimant developed the hematoma at work on Friday, May 23, 2014. He maintained that, even if Claimant came into work on Friday morning and had already tweaked his back, something else happened during the day that significantly worsened Claimant's condition. Dr. Reiss specifically determined that something severe occurred on Friday May 23, 2014 that led to the worsening of Claimant's condition and new leg pain. He noted that evidence from coworkers that Claimant was limping prior to his May 23, 2014 lower back injury did not change his opinion. Accordingly, based on the persuasive medical records and testimony, Claimant's work activities for Employer on May 23, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

24. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period May 24, 2014 through November 13, 2014. On May 23, 2014 Claimant suffered a lower back injury while working for Employer. On May 28, 2014 Dr. Ladwig took Claimant off of work. On November 13, 2014 Dr. Olsen determined that Claimant had reached MMI. He assigned Claimant lifting, carrying, pushing and pulling restrictions not to exceed 10 pounds. Dr. Olsen also stated that Claimant should alternate sitting and standing every 30 minutes. Pursuant to §8-42-105(3)(a), C.R.S. Claimant's TTD benefits ceased by operation of law when Dr. Olsen determined that he had reached MMI. Accordingly, Claimant is entitled to TTD benefits for the period May 24, 2014 through November 13, 2014.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on May 23, 2014. Claimant testified that on Friday morning May 23, 2014 he was loading items into his delivery van at Employer's warehouse. He began experiencing left lower back pain while lifting five gallon buckets of degreaser that each weighed approximately 50 pounds. When he arrived at his destination for delivery of the degreaser Claimant carried the buckets into the customer's facility. Claimant completed his delivery duties for the day and returned to Employer's warehouse. Claimant remarked that he then moved a couple of 55 gallon drums using a drum lift. He explained that he first maneuvered or "manhandled" the drum to get it to the corner of the pallet. Claimant stood on the pallet, hugged the drum and twisted it around. Claimant noted that by the end of his work day he was suffering significant lower back pain and could hardly bend over. Claimant's lower back pain worsened throughout the weekend and he sought medical treatment. Throughout his medical treatment he consistently maintained that he injured his back at work while lifting five gallon buckets of degreaser and moving 55 gallon drums. Claimant also noted that he "tweaked" his back on May 21, 2014 while cleaning and sealing the swamp cooler on his roof to prepare it for operation. He described removing the cover of the swamp cooler on his roof, sweeping out debris and spraying the interior with sealant. Claimant did not take any parts of the swamp cooler down off his roof. He denied slipping or falling. He specifically noted that he "tweaked" his lower back while stretching his leg around and twisting to get on a ladder to descend from his roof at home.

7. As found, Ms. Schreter testified that when Claimant returned to work on Thursday May 22, 2014 he stated that he injured his lower back on the previous day when descending a ladder while repairing the swamp cooler on his roof. Ms. Schreter remarked that Claimant appeared to be experiencing discomfort and was limping. She asked Claimant if he wanted to go home but he replied that he would wear his back brace and be fine. Moreover, Mr. Gurule testified that while talking to Claimant on May 22, 2014 Claimant stated he injured his back on the prior day at home while installing a swamp cooler and climbing up and down a ladder. Mr. Gurule noted that Claimant was still in pain and limping. Finally, Ms. Bertram remarked that Claimant told her he injured his back climbing down a ladder with a part of a water cooler in his hand when he slipped and twisted his back. Ms. Bertram specifically noted that Claimant was "limping and said his back hurt."

8. As found, The record is replete with evidence that Claimant "tweaked" his back while working on a swamp cooler and descending a ladder at home on May 21, 2014. However, he worked a full shift and completed his job duties on the following day. The persuasive medical records and testimony demonstrate that Claimant aggravated his lower back condition while performing his job duties on May 23, 2014. On May 28, 2014, after considering Claimant's history, mechanism of injury, and objective findings on examination, Dr. Ladwig concluded that Claimant suffered a work-related injury. On June 9, 2014 Dr. Olsen determined that Claimant suffered a work-related injury on May 23, 2014 and had acute signs of left L3, L4 radiculitis as noted on both physical examination and supported by MRI findings. He subsequently summarized that Claimant sustained a work-related lumbar sprain/strain on May 23, 2014 and serial MRI's revealed a resolving hematoma of the lumbar spine. Dr. Olsen also stated that Claimant not only had a hematoma but likely injured the multifidi and smaller muscles that control his vertebral movement. Finally, Dr. Reiss persuasively testified that the change between Claimant's two MRI's confirmed that Claimant had sustained a hematoma at the L3-4 level and not an extruded disc. He explained that a hematoma involves blood and that it likely came from inside Claimant's spinal canal. Dr. Reiss noted that hematomas usually involve acute pain that is more severe than usual if the individual has had a history of back pain associated with lower extremity symptoms. Dr. Reiss concluded that Claimant developed the hematoma at work on Friday, May 23, 2014. He maintained that, even if Claimant came into work on Friday morning and had already tweaked his back, something else happened during the day that significantly worsened Claimant's condition. Dr. Reiss specifically determined that something severe occurred on Friday May 23, 2014 that led to the worsening of Claimant's condition and new leg pain. He noted that evidence from coworkers that Claimant was limping prior to his May 23, 2014 lower back injury did not change his opinion. Accordingly, based on the persuasive medical records and testimony, Claimant's work activities for Employer on May 23, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

Temporary Total Disability Benefits

9. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and

subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

10. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 24, 2014 through November 13, 2014. On May 23, 2014 Claimant suffered a lower back injury while working for Employer. On May 28, 2014 Dr. Ladwig took Claimant off of work. On November 13, 2014 Dr. Olsen determined that Claimant had reached MMI. He assigned Claimant lifting, carrying, pushing and pulling restrictions not to exceed 10 pounds. Dr. Olsen also stated that Claimant should alternate sitting and standing every 30 minutes. Pursuant to §8-42-105(3)(a), C.R.S. Claimant's TTD benefits ceased by operation of law when Dr. Olsen determined that he had reached MMI. Accordingly, Claimant is entitled to TTD benefits for the period May 24, 2014 through November 13, 2014.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a lower back injury during the course and scope of his employment with Employer on May 23, 2014.

2. Claimant earned an AWW of $513.00.

3. The medical treatment Claimant received for the May 23, 2014 incident from University of Colorado Hospital, Michael Ladwig, M.D., Nicholas K. Olsen, D.O., Brian Reiss, M.D., Physiotherapy Associates, Health Images, Touchstone Imaging and Rehabilitation Associates was authorized.

4. Respondents have paid Claimant's medical bills from the authorized providers with the possible exception of the University Hospital Emergency Room from May 26, 2014. Respondents agree to pay the May 26, 2014 Emergency Room bill.

5. Claimant shall receive TTD benefits for the period May 24, 2014 through November 13, 2014.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right knee injury in the course and scope of his employment with Respondent-Employer on July 8, 2014;

2. If the claim is determined to be compensable, whether Claimant has established by a preponderance of the evidence that he received authorized medical treatment that was reasonable and necessary to cure or relieve the effects of his industrial injury;

3. If the claim is determined to be compensable, whether the surgery performed by Dr. David Beard was reasonable, necessary and related to Claimant's work injury of July 8, 2014; and

4. If the claim is found to be compensable, what is Claimant's average weekly wage.

STIPULATIONS

The parties stipulate and agree that if the claim is found compensable, Claimant is entitled to temporary total disability benefits from July 10, 2014, and continuing until terminated pursuant to statute or rule.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a 60 year old male who worked as a Ready-Mix driver for Respondent-Employer starting on March 2, 2007. Claimant worked for Respondent-Employer at their Longmont/Firestone area plant.

2. Respondent-Employer is a concrete company. Byron Maine is the plant manager for Employer's Longmont/Firestone plant, and he has been in that position for twelve years and 18 years total with Respondent-Employer. Jim Hansen is the "Batchman"

for that plant, where he has worked for seven to eight years. Richard "Dick" Feldman is a Ready-Mix driver at that plant, where he has worked for more than five years. Mr. Maine, Mr. Hansen and Mr. Feldman have known Claimant for many years, and Mr. Hansen and Mr. Feldman knew Claimant even before working with him at Respondent-Employer. Mr. Maine, Mr. Hansen and Mr. Feldman all have had cordial, friendly relationships with Claimant over the years.

3. Claimant had a prior left knee workers' compensation claim with Respondent-Employer with a date of injury of July 15, 2013. Under his prior claim, Claimant had left knee surgery. Claimant was off work and receiving TTD benefits under that claim from July 16, 2013, through October 31, 2013. Mr. Maine, Mr. Hansen and Mr. Feldman were aware of Claimant's prior left knee claim, his prior left knee surgery, and that he missed time from work under that claim.

4. Following his left knee surgery, Claimant returned to work for Respondent-Employer on November 1, 2013, and he continued to work his regular position as a Ready-Mix driver until July 3, 2014. As of the date of his alleged injury, Claimant was earning $1,100.51 per week.

5. Claimant did not work between Friday, July 4, 2014, and Sunday, July 6, 2014. During that weekend, Claimant had an accident at home. Claimant was coming down a flight of stairs when he fell, and twisted his right knee.

6. On Monday morning, July 7, 2014, Claimant returned to work limping. That morning, Claimant had separate conversations with Mr. Feldman and Mr. Hansen in a common area where employees clock in, get coffee, take breaks, and where drivers wait for their trucks to be loaded.

7. Mr. Feldman has known Claimant for twenty years, has never had a problem with Claimant, and has maintained a cordial, friendly relationship with Claimant. Mr. Feldman spoke to Claimant on the morning of July 7, 2014, and he remembered the specific details of that conversation. Mr. Feldman and Claimant were in the common area, and Mr. Feldman was sitting down, tying his shoes, while Claimant was in the same common area waiting for his truck to be loaded. Mr. Feldman specifically recalled Claimant was noticeably limping that morning, and that Claimant appeared to be in pain and hurt. Claimant told Mr. Feldman he "screwed" up his knee when he fell down three stairs at home over the weekend. When Mr. Feldman asked Claimant if it was the knee that was fixed, Claimant told him that it was not the knee that was fixed. It was his good knee. Mr. Feldman's testimony regarding this conversation was credible.

8. Mr. Hansen is responsible for getting trucks loaded, coordinating truck movement, coordinating between drivers and dispatch, and handling small problems in conjunction with the plant manager. Mr. Hansen has known Claimant for ten years, and they worked together at a different company prior to working together at Respondent-Employer. Claimant and Mr. Hansen never had problems with each other.

9. Mr. Hansen spoke to Claimant the morning of July 7, 2014, by the coffee pot in the common area. Mr. Hansen had just come back from a week of vacation. Claimant asked him how his vacation went, and Mr. Hansen told Claimant it was not very good, as he got so sick during his vacation that he had to go to the emergency room. Claimant told Mr. Hansen that his weekend wasn't much better, as he had been running down the stairs at his house and missed the bottom two stairs and twisted the "F" out of his other knee. Mr. Hansen's testimony that Claimant told him he twisted his knee at home was credible.

10. Although Claimant recalled talking to co-employees that morning, he could not recall who he spoke to. Claimant admitted that he was limping on the morning of July 7, 2014. Although he could not recall who he spoke to, Claimant testified that he told co-workers that he had a bad weekend, which included falling down stairs at home, and developing gout. Claimant denied that he told anyone that he injured his right knee over the weekend. Claimant indicated the only reason he was limping, was because of the gout. Claimant's testimony that he was limping on July 7, 2014, because of gout, and that he did not tell co-employees that he twisted his knee over the weekend, in light of the testimony of Mr. Feldman and Mr. Hansen, is not credible.

11. On July 8, 2014, Claimant was at work cleaning his assigned truck, when he climbed up a ladder attached to the back of his truck to chip away a piece of concrete. The ladder is a straight, metal ladder, with grips on the rungs of the ladder for better traction. As Claimant reached the fourth or fifth rung of the ladder, he felt a tearing and squishing sensation in his right knee. Claimant admitted he was simply climbing the ladder when he experienced this pain, and that he did not twist or pivot.

12. Claimant worked the rest of July 8, 2014, but he did not report an injury. Claimant returned to work on July 9, 2014. After delivering his first load, Claimant contacted Mr. Hansen, and told him his knee was hurting, and to "chalk him up" as being out for the rest of the day. Mr. Hansen told Claimant to talk to Mr. Maine, the plant manager, when he got back to the plant.

13. When Claimant returned to the plant, he went to Mr. Maine's office, and reported his claim. Claimant indicated he injured his knee climbing a ladder while cleaning his truck. Claimant could not explain exactly how he injured his knee. Mr. Maine gave Claimant paperwork, which included a designated provider sheet, and sent Claimant to ErgoMed.

14. On July 9, 2014, Claimant was seen at ErgoMed, where he was examined by a therapist, who noted that Claimant provided a history of injuring his knee while climbing, and cleaning his truck. Claimant failed to report that he fell down the stairs the prior weekend.

15. On July 10, 2014, Claimant was examined by Dr. Chima Nwizu at Family Physicians of Greeley, the designated provider. Claimant provided a history of injury to his right knee from climbing a ladder at work. Claimant did not reveal that he fell at home that weekend. Dr. Nwizu's recommendations included medications, crutches, a right knee x-ray and a right knee MRI.

16. On July 15, 2014, a right knee MRI was interpreted as showing a flap tear of the body and posterior horn segments of the medial meniscus with mild medial meniscal extrusion. There was also a meniscal flap displaced partially from the undersurface near the junction between the body and posterior horn segments. There was also a cyst associated with the tear, chondromalacia, effusion, and synovitis.

17. On July 17, 2014, Dr. Nwizu reviewed the MRI report, and then referred Claimant to an orthopedics specialist.

18. On July 23, 2014, Claimant was seen by Dr. David Beard, who obtained a history that Claimant was trying to climb up a ladder at work when he had a tearing sensation in the medial aspect of his knee. Again, Claimant made no mention of the at-home accident. Dr. Beard examined Claimant, reviewed his records, reviewed the MRI report, and recommended a right knee arthroscopy for partial medial meniscectomy.

19. At the same time that Claimant started missing work because of the alleged work injury, Mr. Feldman, Mr. Hansen, and third employee learned that Claimant was claiming his right knee injury was work related. Claimant's co-workers notified Mr. Maine that Claimant had told each of them that he injured his right knee at home when he fell down the stairs.

20. On July 28, 2014, Dr. Jon Erickson, an orthopedic surgeon, performed a physician advisor record review. Dr. Erickson was provided a history that Claimant was climbing up a ladder when he felt a squish in his right knee. He noted the right knee MRI showed a fairly substantial tear. Dr. Erickson further noted that he was aware of the July 4, 2014, at-home accident, which he described as Claimant going down some stairs when he slipped on the last two stairs, suffering a twisting injury to his right knee. Dr. Erickson explained that causality was at issue, and he did not believe someone with a normal knee would suffer the injury claimed from climbing a ladder.

21. On July 29, 2014, Respondent-Insurer denied the surgery based upon the condition for which surgery was recommended was not compensable, and the claim being denied. On August 4, 2014, Respondent-Insurer filed a notice of contest.

22. On August 22, 2014, Claimant's right knee was arthroscopically repaired. Dr. Beard's surgery report reflects that the surgery revealed that Claimant had a complex tear of the posterior horn and body of the medial meniscus.

23. Dr. Allison Fall conducted an independent medical evaluation regarding the cause of Claimant's injury. Dr. Fall credibly testified that she paid particular attention to Claimant's alleged mechanism of injury. Claimant reported to Dr. Fall that on July 8,

2014, he started climbing a ladder, which was straight up, on the side of the truck. As he started climbing the ladder, and was on the fourth or fifth rung, he felt a tear or ripping sensation or a squishing in his knee. Dr. Fall also reviewed information regarding Claimant's at-home fall described in Dr. Erickson's physician advisor report and Claimant's answers to interrogatories. Dr. Fall reviewed all available medical records and the right knee MRI report. Finally, Dr. Fall examined Claimant's right knee. Dr. Fall concluded:

> I would agree with the assessment of Dr. Erickson that climbing a ladder straight up would not cause the changes seen on the knee MRI. The slip-and-fall, which occurred over the weekend on the stairs at home, would be much more probable to cause an acute knee injury. Certainly, if one had an acute meniscus injury and were climbing stairs, they may be symptomatic. However, the climbing of the stairs did not alter the underlying physiology. Therefore, in my opinion, this would be considered a non-work-related condition.

24. At hearing, Dr. Fall testified credibly that the mechanism of injury which Claimant provided at hearing was consistent with the mechanism of injury he reported to her during the IME, and that Claimant did not indicate he twisted his knee or pivoted while climbing the ladder. Dr. Fall confirmed that Claimant's pre-operative diagnoses included a complex medial meniscus tear, thinning of the cartilage, and scarring of the medial collateral ligament. Dr. Fall explained that the most common causes of such medial meniscus tears are compression and a rotational type forces, and deep, deep squats below 90 degrees where the hips are lower than the knee on a repetitive basis. Dr. Fall credibly opined that the most likely causes for tears are not consistent with simply climbing a ladder.

25. Dr. Fall credibly opined that Claimant's right knee medial meniscus tear is the sort of tear caused by a forceful torqueing or twisting injury, and that climbing a straight ladder would not cause, aggravate or accelerate a right knee medial meniscus tear, or the complex tear such as what was found on Claimant's surgery. Dr. Fall also credibly testified that it was more likely Claimant would sustain a complex tear while falling down stairs, as opposed to climbing a ladder, and while Claimant may have experienced increased pain while climbing a ladder at work on July 8, 2014, he did not aggravate or accelerate his right knee injury from climbing the ladder.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of*

Boulder v. Streeb, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

2. The term "accident" refers to an "unexpected, unusual or undesigned occurrence." Section 8-40-201(1), C.R.S. The term "injury" refers to the effect of an accident. Section 8-40-201(2), C.R.S. A "compensable" injury is one that requires medical treatment or causes disability. For a claim to be compensable, a claimant must establish the existence of both an "accident" and an "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967).

3. The fact that a work-related incident may elicit an increase in pain is not enough to establish a compensable aggravation or injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo.App.1985); *Barba v. REIJ School District*, W.C. No. 3-038-941 (June 28, 1991); *See also Becher v. City Market*, W.C. Nos. 3-059-095 and 3-108-379 (ICAO September 16, 1994); *Cindy Lou Carlson v. Joslins Dry Goods,* W.C. No. 4-177-843 (ICAO March 31, 2000). The mere experience of symptoms at work does not require a finding that employment proximately caused the underlying condition. *Harris v. Golden Peaks Nursing,* W.C. No. 4-680-878 (June 4, 2008); *Cotts v. Exempla,* W.C. No 4-606-563 (August 18, 2005).

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonable or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. Based on the credible and persuasive evidence presented at hearing, it is concluded that Claimant twisted and injured his right knee in his fall at home over the July 4, 2014 weekend. The testimony of Claimant's two co-employees, Mr. Feldman and Mr. Hansen, was more credible and persuasive than Claimant's testimony.

6. Furthermore, it is concluded that Claimant's right knee complex medial meniscus tear and need for medical treatment for that tear was not caused, aggravated or accelerated on July 8, 2014, when Claimant climbed a ladder on his truck at work. Claimant failed to sustain his burden of proof to establish that climbing the ladder of his truck on July 8, 2014, caused his medial meniscus tear, or aggravated or accelerated the need for care. Dr. Fall credibly opined that Claimant's right knee medial meniscus tear is the sort of

tear caused by a forceful torqueing or twisting injury, and that climbing a straight ladder would not cause, aggravate or accelerate a right knee medial meniscus tear, yet alone a complex tear such as was found on surgery.

7. Claimant seeks an order awarding medical benefits in the form of surgery by Dr. Beard. In order to receive medical benefits for an injury, a claimant must establish, to a reasonable degree of medical probability that the need for medical treatment is proximately caused by a work-related trauma. *Merriman v. I.C.A.O*., 210 P.2d 448 (Colo. 1949); *Rockwell Intn'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). Claimant failed to sustain his burden of proof on the medical benefits issue as it was not established that Claimant's need for surgery was proximately caused by a work-related trauma.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is denied and dismissed with prejudice.

2. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 13, 2015_____

DIGITAL SIGNATURE:
Margot W. Jones

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-957-738-01

ISSUES

- Whether Claimant sustained a compensable injury on June 8, 2014?

- Whether Claimant's need for total knee replacement surgery on his right knee is reasonable, necessary, and related to the alleged June 8, 2014 incident?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed as a firefighter for Respondent on June 8, 2014 and had been so employed for approximately 20 years.

2. Claimant denies any accidents or injuries to his right knee joint other than two incidents while performing his job duties for the Employer on March 20, 2012 and June 8, 2014.

March 20, 2012 Injury

3. On March 20, 2012, Claimant sustained a compensable injury to his right knee in the course and scope of his employment. Dr. Jonathan **Bloch**, D.O., evaluated Claimant a day after the accident and diagnosed a sprained knee. His evaluation is notable for the following findings: No decreased active or passive range of motion; no focal tenderness, deformity, swelling, no bruises. Dr. Bloch did not order any diagnostic testing either in the form of x-ray or MRI, and anticipated Claimant's symptoms would resolve over the next few weeks. Dr. Bloch prescribed physical therapy and a follow up exam, but Claimant did not comply and did not seek any further medical attention for his injury. Claimant testified that he did not follow up with medical treatment because he thought that his knee sprain would heal on its own. Claimant was released to full duty without restrictions, but due to his schedule, he did not return to work for six or seven days. Claimant felt capable of performing his job duties as a firefighter at that time.

4. Dr. Bloch also noted mild consistent patellar crepitation. Dr. McBride testified that the presence of such patellar crepitus in the knee evinces a knee that is already degeneratively arthritic. Therefore, while no doctor performed radiographs or MRIs of Claimant's knee in 2012, Dr. Bloch's report of patellar crepitus supports a finding that Claimant's right knee was already arthritic by early 2012.

5. On May 10, 2012 Claimant's case was closed due to his non-compliance with follow-up care and physical therapy.

6. Claimant's testimony and reports to providers about his post 2012 injury status varied. For example, he testified at hearing that his symptoms never improved, but rather worsened between 2012 and 2014. This testimony is supported by Claimant's inability to complete physical evaluations offered by his department in both 2012 and 2013, secondary to complaints of right knee pain. However, his testimony is contradicted by Claimant's reports to Dr. McBride on November 11, 2014 that he returned to work quickly following his 2012 injury because his knee had started to feel better; he also reported to Dr. McBride that he did not pursue physical therapy or follow up medical appointments because his knee was feeling better. These reports are supported by Claimant's immediate return to work without restrictions, his failure to follow up with medical and physical appointments, and his inability to explain why he did not return for treatment when his symptoms increased over time inconsistently with a sprain and his expectations.

June 8, 2014 Injury

7. On June 8, 2014, Claimant accidentally placed his right foot on another firefighter's bunking boots causing his right knee to twist. He experienced severe pain in his right knee. Claimant was taken to the emergency department of Denver Health Medical Center. Claimant reported he heard a "pop" prior to the onset of and complained of associated right lower extremity weakness and an inability to straighten the right knee without pain. X-rays of Claimant's right knee were taken.

8. On June 9, 2014, Claimant followed up with Dr. James Moses and Dr. James Blair, his primary treating providers at The Center for Occupational Safety and Health. Claimant's work activities were restricted and an MRI of his right knee joint without contrast was performed.

9. The MRI report obtained from Advanced Medical Imaging reflected:

> Severe medial femoral tibial degenerative joint disease with denudation of the majority of the cartilage with subchondral, marrow edema and large marginal osteophytes. There is a large degenerative tear of the posterior horn and body of the medial meniscus with a large horizontal cleavage tear of the posterior horn, with an associated parameniscal cyst. A severely macerated body is present with grade 2 extrusion and the majority of the body is absent. There is a small full-thickness cartilage defect within the posterior weight bearing portion of the lateral femoral condyle. There is chondromalacia patella with moderate generalized cartilage attenuation with superimposed 8 x 5 mm full-thickness defect within the lower medial patellar facet. There is no denudation of the trochlea area also noted. Additionally, there is a moderate size complex joint effusion with synovitis.

10. On June 10, 2014, ATP Dr. Moses reviewed these findings with Claimant and noted the following as Recommendations and Plan of Care:

> The severity of the damage to his right knee and associated degenerative joint disease may indicate that he will require a partial or total arthroplasty. It is likely that some of the damage visualized on the MRI is secondary to the previous work related knee injury that occurred approximately 2 years ago. However, the current injury caused a permanent aggravation of the underlying knee pathology.

11. On June 18, 2014, because the MRI showed significant, advanced osteoarthritis, Claimant was referred to a total joint specialist, Dr. Michael Hewitt**,** who noted the MRI was consistent with significant advanced arthritis of the knee and recommended Claimant proceed with a total knee arthroplasty.

12. On June 30, 2014 Claimant saw Dr. Todd Miner of Colorado Joint Replacement for a second opinion. Dr. Miner agreed a total knee replacement was warranted to restore Claimant's mobility and alleviate his pain symptoms.

13. On July 8, 2014, Dr. Miner re-evaluated Claimant, and agreed that Claimant needed a total knee replacement due to his severe degenerative osteoarthritis. Dr. Miner assessed that Claimant's predominant problem was post traumatic arthritis which had become symptomatic as of the March 20, 2012 injury and had worsened. "He has substantial arthritic change on his MRI." The ALJ finds that because Dr. Miner did not have an earlier MRI to compare with, that his intended meaning was that as of his March 2012 injury, Claimant already suffered from substantial osteoarthritis of his right knee.

14. The ALJ finds that Dr. Hewitt and Dr. Miner recommended right knee replacement because of the MRI findings showing significant advanced osteoarthritis of the right knee.

15. On July 18, 2014, Dr. Stephen Lindenbaum, an orthopedic surgeon, performed a Respondent's independent medical examination (IME) of Claimant. Dr. Lindenbaum opined the June 8, 2014 injury did not cause the present problem of degenerative arthritic changes but also conceded that the twisting incident could have temporarily aggravated the arthritic changes. Moreover, regarding the 2012 incident, Dr. Lindenbaum suggested Claimant most likely aggravated his right knee condition in the 2012 work injury. Dr. Lindenbaum stated that Claimant had been suffering "severe degenerative changes" in the right knee for quite some time, and observed that these changes had been occurring over a "long period of time," "certainly prior to 2012," when Claimant twisted his knee at work in 2012. Dr. Lindenbaum concluded that Claimant had suffered some sort of meniscal damage well in the past. He further reasoned that the fact that Claimant returned to work without restrictions in 2012, one week after the injury, also demonstrated that the 2012 slip and fall did not cause any meniscal damage. Dr. Lindenbaum further elaborated that he did not believe the 2014 slip and fall caused the "significant degenerative changes" in Claimant's knee. Therefore, any injury Claimant may have sustained in 2012 or 2014 was merely a temporary exacerbation of the underlying arthritic condition. Dr. Lindenbaum opined that

Claimant's extreme arthritic condition occurred over a long time, that a knee replacement was indicated, but it was not related to the work injuries.

16. Dr. Miner took issue with IME Dr. Lindenbaum's findings and on July 24, 2014 commented as follows:

> I reviewed Dr. Lindenbaum's report today. I disagree with this report in several aspects. Dr. Lindenbaum opined that prior to the 2012 workers' compensation injury that James sustained to the right while working as a firefighter, that he had been developing degenerative changes. However, the evidence is that [Claimant] was working full duty and in fact able to do the skills evaluation testing, a very strenuous physical drill, better than many other firefighters. He was inadequately and inappropriately treated in 2012 in the sense that no MRI scan was obtained, which undoubtedly would have revealed a significant medial meniscus tear. Being a stoic individual, [Claimant] was disgruntled with the fact that they were not doing much for him and just proceeded to press on with his life in working as a firefighter. He was able, however, to perform full duty, albeit with some symptoms. He performed full duty for two years. After his injury of June 8, 2014, he was unable to perform full duty. Therefore, this current situation is a permanent aggravation of a pre-existing condition. In fact, the preexisting condition is due to another work related injury that was inappropriately treated. Nevertheless, prior to June 8, 2014, [Claimant] was working full duty and now he is not. Therefore, I feel that this is a compensable situation and should have his knee replaced under this claim.

17. The ALJ is not persuaded by Dr. Blair's comments. First, what a 2012 MRI would have revealed, had one been taken, is speculative. Second, Dr. Blair's opinion that Claimant returned to work in 2012 with symptoms is controverted by Claimant's reports to Dr. McBride, his benign 2012 examination, his immediate return to work without restrictions, Claimant's non compliance with medical and physical therapy appointments, and Claimant's failure to seek medical care for over two years. Third, Dr. Blair's comment that Claimant was inadequately and inappropriately treated in 2012 because no MRI was ordered is conclusury and not supported by the record which shows a benign exam not necessarily requiring an MRI. Fourth, the inability to work full duty is not determinative of causation or relatedness. And fifth, Dr. Miner's attributing character traits to Claimant, such as stoicism, renders his comments less than objective.

18. Thus the ALJ finds unpersuasive Dr. Miner's conclusion that Claimant suffers a permanent aggravation of a pre-existing condition, the pre-existing injury being the inappropriately treated 2012 injury.

19. On August 11, 2014 Respondents issued a Notice of Contest, contesting the June 8, 2014 incident was an industrial accident and alleging Claimant's condition/diagnosis was not consistent with the mechanism of injury.

20. On November 11, 2014 Claimant was examined by Dr. John T. McBride, another Respondent's IME, who issued medical findings that same date. At that time Dr. McBride did not have the actual radiographs and MRI to review, but did have the radiology reports. Dr. McBride opined Claimant had arthritis in his right knee joint and that the arthritis had become more progressive and now required a total knee replacement, but it was not related to his occupational injuries of 2012 and 2014.

21. Dr. McBride is an orthopedic surgeon with American Board of Orthopedic Surgery qualifications. He is level II accredited by the Division of Workers' Compensation, and was qualified as an expert in orthopedics and sports medicine. Dr. McBride testified that he reviewed radiographs and the MRI before testifying at the hearing and confirmed his opinion that Claimant's arthritis had progressed and was the only reason for a total knee replacement. He opined Claimant's need for the total knee replacement was not related to the occupational injuries of 2012 and 2014.

22. Dr. McBride opined that any injury Claimant may have sustained in June 2014 at most only aggravated Claimant's preexisting arthritis. At hearing, Dr. McBride explained that this was "based on [Claimant's] obvious effusion on his MRI," emphasizing that the MRI showed "no evidence of an acute fracture" and "no evidence of an acute meniscus tear." Based on his review of Claimant's MRI and radiographs, Dr. McBride opined that Claimant's osteoarthritis "has been going on for quite some time," and that due to the lack of any focal tenderness or laxity, his medial collateral ligament injury predated the injury in March of 2012, and certainly the 2014 incident.

23. Dr. McBride noted Claimant suffers from Pelligrini-Stieda, or ossification of the medial collateral ligament. He explained in order to develop Pelligrini-Stieda, there would have to be evidence of a "fairly significant medial collateral ligament injury." Such indicia would include "swelling, tenderness, and bruising." Dr. McBride noted that none of these indicia were present during Claimant's March 2012 evaluation, meaning Claimant's medial collateral ligament injury must necessarily have predated Claimant's 2012 injury, and is therefore not related to his employment.

24. Dr. McBride also testified Claimant had non-work-related comorbidities which made him more susceptible to a medial meniscal injury. Specifically, Claimant's bilateral knees, but especially his right side, indicated a varus deformity [bowleggedness], which caused added stress pressure on the medial meniscus. And Claimant's height and weight correspond to a BMI which would classify him in the "heavy" range.

25. Also, Dr. McBride explained the Medical Treatment Guidelines' Rule 17. Notably, Dr. McBride demonstrated that under Rule 17, Claimant did not qualify for a finding of an aggravation of preexisting osteoarthritis. Dr. McBride elaborated:

> During the training of a Level II physician, there are the Colorado state workman's [sic] compensation guidelines. Rule 17, lower extremity injury medical treatment guidelines

> is actually very elegant in the way it describes aggravation of arthritis. In order to have an aggravation of arthritis, you have to have an injury that's well documented, the injury has to be related to the work that the injured worker is performing, and with regards to aggravated arthritis, there should be either a meniscectomy, a hemarthrosis at the time of the original injury, MRI or arthroscopic evidence of a ligament tear, and it should be at least two years prior to the complaints of the new complaints of knee pain. So for example, if somebody tears their anterior cruciate ligament, the ACL, or has a major articular cartilage injury or has a meniscus tear, that gets treated, two years or greater and as it says in the guidelines, at least two years, usually more like 10-20 years, they develop arthritis then it can be related to that injury. But without the evidence of a change in the radiographs going from normal to significant abnormal, it is very difficult to prove that the injury caused the arthritis. Clearly from the 2014, and that's like I said, the beauty of having the radiographs 24 hours later, there is no way that those arthritic changes occurred from the accident that happened 24 hours earlier.

26. Dr. McBride added that, even though there is evidence of a meniscal injury in this claim, its mere existence does not qualify for Rule 17 purposes, as at the time of his evaluation with Dr. Bloch in March 2012, Claimant had full range of motion, no point tenderness, and no effusion. "If he'd had significant meniscus tear at that time . . . when he saw Dr. Bloch 24 hours after his injury in 2012, if he had a significant meniscus injury, one would have anticipated a significant effusion, significant point tenderness, possibly some bruising, and a limitation of motion. None of those were found." Dr. Lindenbaum's report is consistent on this issue.

27. Dr. McBride explained that the terminology used by Dr. Lindenbaum essentially meant that it would take more than two years to develop the type of arthritis seen in Claimant's knee, and that Claimant's need for a total knee replacement would have occurred without any workplace incidents in 2014, or even 2012.

28. Moreover, Dr. McBride testified that treatment for a meniscal injury does not generally include a total knee replacement, which is the treatment Claimant is seeking in this matter. Instead, Dr. McBride explained that Claimant's need of total knee replacement in this matter was due to his unrelated and preexisting osteoarthritis.

29. Orthopedic surgeons Drs. Lindenbaum and McBride each independently opined Claimant's degenerative osteoarthritis was inconsistent with twisting incidents that date back approximately two years. Rather, it is a preexisting condition that required years of wear and tear to develop to its current state.

30. While meniscal trauma may, in some instances, temporarily irritate preexisting osteoarthritis, credible and persuasive evidence was presented indicating

the knee would quickly return to pre-meniscal injury status without any permanent complication or aggravation.

31. The ALJ credits Dr. McBride's testimony that while Claimant's 2014 MRI shows an effusion, which may be proof of an aggravation, it was a temporary aggravation because the 2014 MRI showed no evidence of an acute fracture and no evidence of an acute meniscus tear.

32. Based on the totality of the evidence, the ALJ finds Claimant suffers from preexisting osteoarthritis, and his alleged workplace injury in 2014 did not cause and did not permanently aggravate his underlying degenerative condition.

33. While there are no MRI or radiograph records that predate the alleged 2014 incident, Drs. Lindenbaum and McBride both independently emphasized the fact that Claimant returned to work 6 days after his 2012 knee sprain without restrictions. This supports a finding that the 2012 injury caused no meniscal damage.

34. Dr. McBride concluded that Claimant's osteoarthritic condition had been ongoing for at least five to ten years.

35. Dr. McBride further explained that "in order to entertain previous trauma as a cause" of degenerative osteoarthritis, there must be medical documentation of a "meniscectomy," "hemarthrosis," or arthroscopic evidence of meniscus or ACL damage. Dr. McBride stressed that the prior injury must be "at least two years from presentation for the new complaints," and a "significant increase in pathology on the affected side in comparison to the original imaging" must be present. In the present case, Claimant does not have medically documented evidence of a previous hemarthrosis, ligament, or meniscus injury at least two years prior to the June 8, 2014 incident.

36. Dr. McBride testified at hearing that had Claimant suffered from such an aforementioned knee injury in 2012, a physical examination would reveal "significant effusion, significant point tenderness, possibly some bruising, and a limitation of motion." However, Dr. Bloch's 2012 examination revealed none of these symptoms.

37. Nonetheless, even Dr. Blair acknowledges that Claimant's meniscal injury predates the alleged 2014 incident. There is no dispute that the meniscal injury predates the June 8, 2014, accident.

38. Only Dr. Blair, an occupational medicine specialist, supports Claimant's claim that a knee replacement is causally related to Claimant's employment and the incident of June 8, 2014. But even Dr. Blair acknowledges that the arthritis and meniscal tear predate the alleged June 8, 2014, incident.

39. By contrast, two orthopedic surgeons independently concluded based upon accepted medical knowledge and supported by clear and uncontroverted evidence that Claimant's degenerative osteoarthritis and meniscal injury not only preexisted the 2012 and 2014 workplace incidents, but are the reason Claimant requires a total knee replacement.

40. Dr. McBride testified that Claimant suffered some minor aggravation of his right knee on June 8, 2014. However, he made clear that any such aggravation was small, as outlined by the worker's compensation Treatment Guidelines. Dr. McBride

later clarified that there was only evidence of a temporary aggravation of Claimant's arthritic knee as a result of the June 8, 2014, incident. Dr. McBride acknowledged that Claimant *may* require some conservative treatment as a result of the June 8, 2014, incident. However, he limited such treatment to corticosteroid injections, removing the fluid in his knee, and physical therapy, with anticipated resolution in about four weeks.

41. Dr. Lindenbaum, however, stated that no conservative treatment was likely to help Claimant in any way, as the damage to his knee was too severe. To that end, Dr. Lindenbaum opined Claimant was at maximum medical improvement as it related to the June 8, 2014, incident. While a total knee replacement would be appropriate to alleviate Claimant's right knee complaints, such a procedure would not be compensable under worker's compensation.

42. Dr. McBride opined there was no permanent aggravation that could be related to the June 8, 2014, accident, nor was the need for a total knee replacement accelerated or related in any way to the events of that date.

43. Both Drs. Lindenbaum and McBride credibly opine the total knee replacement is not compensable under the Colorado Workers' Compensation Act for an injury occurring on June 8, 2014. The current degenerative condition of Claimant's knee is undisputedly the result of wear and tear over a long period of time, and not the result of an acute and minor twist of the knee that occurred as recently as June 2014.

44. Claimant has the burden to prove entitlement to any benefits he seeks. This includes showing that an incident occurred in the course and scope of his employment on June 8, 2014, and that the incident caused an actual injury requiring medical treatment. Claimant further has the burden of proving that any medical treatment or benefits which he seeks are reasonable, necessary, and related to that same June 8, 2014, injury.

45. The uncontroverted facts of this case, combined with the independent medical diagnoses of two orthopedic experts, demonstrate that Claimant suffers from severe degenerative osteoarthritis, a condition that clearly predates the June 8, 2014 twisting incident to Claimant's right knee. The advanced condition of Claimant's knee degeneration and meniscal injury are simply not consistent with a less than one year old knee sprain.

46. Moreover, even if Claimant did sustain an actual injury to his right knee on June 8, 2014, at best it was only a temporary aggravation of preexisting knee complaints, requiring conservative care at best.

47. The opinions of Drs. Lindenbaum and McBride are found to be more credible and persuasive than that of Dr. Blair. Drs. Lindenbaum and McBride are both orthopedic surgeons. By contrast, Dr. Blair is an occupational medicine physician. It is reasonable that Drs. Lindenbaum and McBride are more qualified to opine on causes of damage in the knee than is Dr. Blair.

48. Based on the totality of the evidence, the ALJ finds Claimant has not met his burden of proof that he suffered an injury as the result of the June 8, 2014, incident.

49. Based on the totality of the evidence, the ALJ finds Claimant has not met his burden of showing that a total knee replacement surgery is reasonable, necessary, or related to the June 8, 2014, accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ makes the following conclusions of Law:

Under the Colorado Workers' Compensation Act, an injury is compensable if the injury arises out of and in the course of the employee's employment. C.R.S. § 8-41-301(1)(c). Stated conversely, an injury that does not arise out of and in the course of employment is not compensable. *See id*.

The Workers' Compensation Act distinguishes between the terms "accident" and "injury". Specifically, "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. "Injury" refers to the physical trauma caused by the accident. Or put another way, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). There are no benefits owed to a victim of an industrial accident unless the accident results in a compensable "injury." *Wherry v. City and County of Denver*, W.C. 4-475-818, (ICAO March 7, 2002). A "compensable" injury is one which results in an injury requiring medical treatment or causing disability. As found above, the ALJ concludes that Claimant's injury, if any, is not the result of the events of June 8, 2014, but rather is the manifestation of his underlying arthritic condition.

Where a claimant's injury is due entirely to a pre-existing condition not traceable to the employment, the injury is not compensable under the Act. The existence of a pre-existing medical condition does not preclude a claimant from proving a compensable injury where an industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, the claimant must prove there was an injury caused by the work activities, and not merely a manifestation of a pre-existing condition. *Robert Gomez v. SMG Denver Convention Complex*, W.C. 4-237-047 and 4-423-132 (ICAO October 23, 2001). For example, in *Brown v. Industrial Commission*, a claimant experienced an on-the-job injury that he alleged to have aggravated his pre-existing degenerative lower back condition. 447 P.2d 694 (Colo. 1968). Though the claimant in *Brown* presented evidence that the on-the-job injury "could have" aggravated the degenerative changes, proving that a possibility existed allowed only for mere speculation, which was insufficient to satisfy the claimant's burden. *Id.* at 695.

Here, Dr. McBride acknowledged that Claimant *may* require some conservative treatment as a result of the June 8, 2014 incident. However, he limited such treatment, if any, to corticosteroid injections, removing the fluid in his knee, and physical therapy, with anticipated resolution in about four weeks. Further, Dr. Lindenbaum stated that no conservative treatment was likely to help Claimant in any way, as the damage to his knee was too severe. To that end, Dr. Lindenbaum opined Claimant was at maximum medical improvement as it related to the June 8, 2014, incident. As the court concluded in *Brown*, here Claimant presented evidence only that the on-the-job injury "could have"

aggravated his degenerative changes; and proving that a possibility existed allowed only for mere speculation, which was insufficient to satisfy the claimant's burden

Where a claimant experiences an accident at work, and subsequently develops a condition that is inconsistent with the mechanism of the accident, but consistent with a pre-existing degenerative condition, ALJs have found the subsequent condition to be unrelated to the accident. *Baca v. Helm*, 682 P.2d 474 (Colo. 1984) (septic arthritis of the shoulder); *Robert Gomez v. SMG Denver Convention Complex*, W.C. 4-237-047 and 4-423-132 (2001) (neck strain superimposed on a pre-existing degenerative neck condition); *Darrel McManigal v. Adolph Coors Company*, W.C. 3-843-696 and 3-868-629 (ICAO July 13, 1990) (osteoarthritis of the knee. *Cf. F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985) (pain during subsequent employment was recurrent consequence of pre-existing condition rather than result of aggravation of injury.). Here, while both doctors McBride and Lindenbaum agreed a total knee replacement would be appropriate to alleviate Claimant's pre-existing right knee condition and pain complaints, both opined such a procedure would not be compensable under worker's compensation.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found, the ALJ concludes that Claimant's testimony, actions, and reports to Dr. McBride were inconsistent, diminishing his credibility. Also as found, the opinions of Dr. McBride and Dr. Lindenbaum were most persuasive based on their training and fields of expertise. In addition, their opinions were the most well-supported and well-reasoned.

In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bondensleck v. Indus, Claim Appeals Office*, 183 p.3d 684 (Colo. App. 2008). The ALJ determines witnesses' credibility. *Arenas v. Indus. Claim Appeals Office*. 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Young v. Indus. Claim Appeals Office,* 297 P.3d 964*,* 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App.2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. See *Prudential Ins. Co. V. Cline*, 98 Colo. 275, 57 P.2d 1205 (1930); CJI, Civil, 3:16 (2005).

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is "that quantum of probative evidence which a rational

fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. V. Gussert,* 914 P.2d 411 (Colo. App.1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. V. Collett,* 33 P. 3d 1230 (Colo. App. 2001.)

An employer must provide an injured worker with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." §8-42-101 (1)(a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by the employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Constriction v. Rinta,* 717 P.2d 965(Colo. App. 1985). A respondent is liable for the "direct and natural consequences" of a work-related injury. The chain of causation, however, can be broken by the occurrence of an independent intervening injury. See 1 A. *Larson, Workers' Compensation Law*, section 13.00 (1997). As found, the Claimant has failed to establish the causal relatedness of his right knee condition to the accident of June 8, 2014.

The ALJ concludes that Claimant has not established by a preponderance of the evidence that he suffered a compensable injury; that is one which results in an injury requiring medical treatment or causing disability.

The ALJ concludes that Claimant has not established by a preponderance of the evidence that the requested total right knee arthroplasty is caused by an industrial injury, if any, occurring on June 8, 2014.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 3, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The following issue was raised for consideration at hearing:

> Whether Respondents established by a preponderance of the evidence that Claimant is precluded from receiving Temporary Total Disability benefits (TTD) because she was responsible for termination from employment under Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S.

STIPULATION OF FACT

The Parties stipulated Claimant's average weekly wage at the time of the injury was $642.27.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer is an assisted living facility that takes care of residents with memory issues, such as dementia and Alzheimer's. Claimant was employed as a caregiver. Claimant worked as a lead caregiver for a period of time prior to her injury, but she stepped down from the lead position and resumed her duties as a caregiver.

2. While working as a caregiver on July 13, 2014, Claimant sustained an admitted injury while lifting a patient.

3. After the July 13, 2014 injury, Claimant worked for the Employer under the restrictions provided by authorized treaters at Concentra. Claimant was treated by several providers at Concentra, including Darla Draper, M.D., Nickolas Curcija, PA-C, and Terrell Webb, M.D. Claimant's restrictions from July 17, 2014 to September 3, 2014 included: no climbing, no lifting over 10 lbs., no bending greater than four times per hour, no pushing or pulling over 10 lbs. of force, no reaching above shoulders, no squatting, and no kneeling. Claimant continued working for the Employer with the restrictions through August 7, 2014, when her employment was terminated.

4. Claimant's providers at Concentra released Claimant to full duty work, without restrictions, on September 4, 2014. Claimant was terminated on August 7, 2014, and was released to full duty work less than a month later.

5. The full duty release on September 4, 2014, came after Claimant underwent an MRI. The MRI revealed no significant work-related pathology. Claimant reported to her provider on September 4, 2014, that she had been performing activities beyond the restrictions provided to her earlier and "tolerating" that increased level of activity. Claimant followed up with Concentra on October 17, 2014. Dr. Webb noted Claimant had "progressed to almost back to baseline." Claimant was advised to follow up with Denver Health for non-work related findings on MRI. Dr. Webb continued Claimant's release to full duty work without restrictions.

6. The Employer, as an assisted living facility, and Claimant, as a qualified medication administration staff member, are regulated by the State of Colorado's Department of Public Health and Environment. Medications are required by law to be administered by qualified medication administration staff members (QMAP) and only upon written order of a licensed physician. Claimant is a QMAP. Claimant, as a QMAP, passed the Colorado State Department of Health's competency evaluation for administration of medication. Claimant completed the QMAP training and was permitted to dispense and process medications for the Employer.

7. Employer hired Claimant to work in one of their Assisted Living residences. The Employer has three residences in Lakewood, Golden and Arvada. Claimant worked in the Arvada residence, where she and other employees took care of eight to ten residents. The residents have memory issues. Claimant cared for the residents with care and devotion. State law and the families of residents in Assisted Living require accountability by those caring for residents.

8. Employer meets all of the requirements of the State. State law requires the tracking of medications and supplements to ensure safe medication administration practices. At any time, a resident can face a life threatening need for medical treatment. Accurate recordkeeping by QMAP can assist in the proper care and treatment for a patient.

9. The Medical Administration Record (MAR) is the official medical record for the patient. This record travels with the patient and informs physicians and family members about the medications administered to a resident.

10. The State of Colorado requires a residential care facility, like Employer, and the QMAP to track every medication, every supplement, every vitamin, every mineral, everything orally administered, and everything that goes in a feeding tube. Food is more generally tracked. The State requires the Employer and QMAP, with precision, to name the "medications" a resident receives. There should be no mistakes with medication administration for residents.

11. QMAP's follow specific rules when writing on a MAR. QMAP's are trained on what can be placed on a MAR. Claimant understood the MAR is part of a resident's

permanent record and it must be accurate. For instance, if a medication cannot be administered because it is not available or it is refused, the QMAP is trained to place a circle in the box for the date and document the exact reason on the reverse side of the MAR. If the MAR does not have marking showing the medication was dispensed, it is considered not administered. If a mistake is made when writing on the MAR, Claimant was trained to circle and initial a mistake.

12. Claimant drew arrows on the MAR of residents to indicate another employee's mistake. Claimant pointed out another employee's mistake because that employee failed to initial a date box for a medication that was to be given. Claimant admitted she drew the arrows on the MAR. Claimant knew from her training that drawing an arrow on a MAR was not the correct procedure for indicating a patient was not given a medication. The correct procedure was to circle the date box and then document the reasons for missing the medication.

13. Claimant drew arrows on three MAR in four locations when she should not have made any markings. Claimant made incorrect markings on the following dates: July 24, 2014, for docusate sodium; July 24, 2014, for lorazepam and Risperdal; and July 21, 2014, for Colace. Claimant admits she did not follow proper procedure by writing on the MAR.

14. Claimant's testimony about Brent Bartlett's role was conflicting, confusing and therefore was not relied upon. Though Claimant admits her markings on the MAR were inappropriate, Claimant testified Brent Bartlett was her supervisor and he told her to make the marks on the MAR.

15. Sheryl Kysar is the Administrator for Employer. As the Administrator, Ms. Kysar oversees operations at the Employer's facilities. Ms. Kysar testified Claimant was employed as a caregiver/QMAP for the Employer; Claimant worked shortly as a lead caregiver, but stepped down in the fall of 2013. Claimant resumed her position as a caregiver in 2013 and 2014. As a lead, Claimant had difficulty coordinating the ordering medications of the residents and keeping the medication cart properly stocked.

16. Ms. Kysar credibly testified Mr. Bartlett was not a lead on July 24, 2014, when Claimant inappropriately drew arrows on four MAR entries. Mr. Bartlett was not in a position where he had the authority to tell Claimant to draw arrows inappropriately on the MAR on July 24, 2014. Mr. Barlett was a caregiver at the time.

17. Ms. Kysar learned about Claimant marking on the MAR inappropriately when Sherrie Bonham, the house manager, brought the marks to her attention. Ms. Bonham supervised Claimant.

18. Ms. Bowman and Kysar investigated the marks on the MAR. Claimant advised the two managers that she did not make the marks. Employer learned Claimant made the marks on the MAR in order to point out other employees who had missed signing the MAR. Claimant had been recently reprimanded for missed signatures and was

asked to be more careful. Claimant made the marks on the MAR highlighting others' missed signatures shortly after she was reprimanded for missing signatures.

19. Around the same time as the MAR being inappropriately marked upon by Claimant, two other problems surfaced. Claimant signed reflecting that she provided a medication to a patient and then miscounted the medication at the end of her shift. Claimant reported there were 14 anti-anxiety tablets left, when the next person on duty and the Employer confirmed there were 15 tablets left. Because there were 15 tablets left and there were 15 left before Claimant started her shift, managers concluded that Claimant's notation that she gave the pill to the resident must have been inaccurate. Claimant miscounted the medication and improperly signed that she had provided the controlled substance to the resident when in fact she did not.

20. Additionally, the Employer documented Claimant had inappropriate contact with a resident's family. Rules regarding contact with residents' family are based on the State's regulations that provides for equal treatment of residents. A personal relationship with a family member can lead to charges of favoritism. If there are problems with care, a personal relationship might keep a family member from reporting problems to protect the friend who is part of the care team for the resident.

21. Staff reported to Employer that Claimant had an off-duty meeting with a family member in which other staff was told to leave the two alone. On another occasion, Claimant was asked by a family member to ride along with that family member and a resident rather than ride on the bus with the rest of the residents. Claimant was asked to ride with the resident's family member because that family member did not know her way around town on a facility outing. Employer rules required Claimant to obtain permission to divert staff to a personal car on this type of outing. Claimant did not receive permission and the bus was without one staff member during the ride to the outing. Claimant came into work on a day off to speak with the family member in the facility. Claimant was aware of the need to avoid personal relationship with family members.

22. Claimant went on vacation shortly after July 25, 2014, when she returned, she met with Ms. Kysar and Ms. Bowman to discuss the problems discovered with the medications and the family member relationship. Ms. Kysar and Bowman discussed their investigation and decided to terminate Claimant's employment because of the seriousness of the problems. On August 7, 2014, when Claimant returned from vacation, the Employer informed Claimant her employment with the Employer was terminated for three grounds: improper recordkeeping; inappropriate contact with resident family members; and inappropriate writing on a resident's MAR.

23. Respondents proved it is more probably true than not that that Claimant engaged in volitional conduct that caused the termination from employment. Therefore, Claimant is responsible for the termination from employment. The ALJ finds the testimony of Ms. Kysar and Ms. Bowman more persuasive and credible than Claimant's testimony.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Act, Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Respondents contend that they sustained their burden of proof to establish that Claimant was responsible for her termination from employment and denying Claimant's request for TTD from August 8, 2014 until September 4, 2014, when Claimant was released to full duty work without restriction. Sections 8-42-103(1)(g), C.R.S., and 8-42-105(4)(a), C.R.S., (termination statutes) provide that if a temporarily disabled employee "is responsible for termination for employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003).

4. When a Claimant is responsible for the termination of her employment, the subsequent wage loss is the result of the Claimant's act leading to the termination, not the injury. *Colorado Springs Disposal v. Martinez*, 58 P.3d 1061 (Colo. App. 2002). As a result, Claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994). A Claimant will be considered responsible if she engaged in a volitional act or exercised control over the circumstances that led to the termination. *Id*.

5. A volitional act does not mean moral or ethical culpability. It simply means that Claimant performed the act that led to her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO, June 13, 1994). As the Panel stated, "we decline the Claimant's invitation to narrowly define the 'volitional act' test so as to exclude all conduct which is inadvertent or negligent." *Gleason* at 2. Negligent or inadvertent conduct may constitute a volitional act and culpability is not required. *Id*.

6. The ALJ concludes Respondents proved it is more probably true than not that Claimant was responsible for the post-injury termination from employment within the meaning of the termination statutes. The Judge concludes that Claimant committed a volitional act that caused her termination when Claimant marked on a MAR improperly, mismarked a controlled medication administration record, miscounted a controlled medication, and engaged in an improper personal relationship with a family member. The ALJ credits the testimony of Ms. Kysar and Ms. Bonham concerning the events surrounding Claimant's termination on August 7, 2014, and discredits the Claimant's testimony insofar as it conflicts with the testimony of Ms. Kysar and Ms. Bonham.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for temporary total disability benefits from August 7, 2014 until properly terminated by law is DENIED and DISMISSED. Claimant is not entitled to temporary total disability benefits beginning August 7, 2014, as she was responsible for her termination from employment.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2015___

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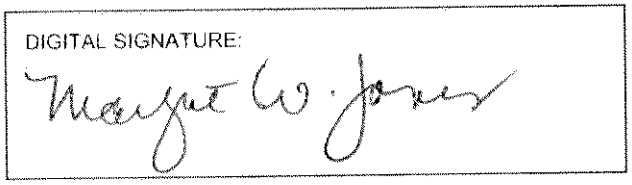

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant established by a preponderance of the evidence that she is entitled to an order awarding a closed period of Temporary Total Disability (TTD) benefits; and

2. Whether Claimant established by a preponderance of the evidence that she is entitled to an order awarding reasonably necessary and related medical benefits.

As a preliminary matter at hearing, Claimant withdrew her claim for medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered an admitted work related ankle injury on September 2, 2014.

2. Respondents filed a General Admission of Liability (GAL) on November 7, 2014. Based on the admission contained in the GAL, Respondents paid Claimant weekly TTD benefits of $881.65 starting September 8, 2014.

3. Respondents filed another GAL on January 28, 2015, whereby weekly TTD benefits of $881.65 starting September 3, 2014, were admitted by Respondents.

4. Claimant asserts that she is owed TTD benefits for the period of October 29, 2014, through November 15, 2014.

5. Claimant's weekly TTD rate is $881.65 and Claimant's daily TTD rate is $125.95.

6. As of the date of the hearing, Claimant had been paid $18,514.65 in TTD benefits. Those benefits covered the period of September 3, 2014, through January 27, 2015.

7. Marchelle Robinson is a claims adjuster for Insurer. Ms. Robinson has worked as a claims adjuster for 16 years. She was assigned as the claims adjuster for Claimant's claim. She credibly testified that she used an online calculator provided by the Division of Workers' Compensation, State of Colorado to

calculate Claimant's benefits during the period September 3, 2014 through January 27, 2015. This is a period of 147 days or 21 weeks.

8. Ms. Robinson calculated the benefits owed Claimant in TTD for a period of 147 days or 21 weeks, which totaled $18,514.65. Ms Robinson testified that this is the amount paid to Claimant.

9. Claimant failed to establish that Respondents improperly calculated her TTD benefits for the period October 29, 2014, through November 15, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). As of the date of hearing, Claimant had been paid $18,514.65 in TTD benefits.

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

4. Claimant contends that Respondents failed to properly pay Claimant TTD during the period from September 3, 2014, through January 27, 2015. Claimant contends that during the period October 29, 2014, through November 15, 2014,

she was not properly paid TTD. Claimant contends that the period September 3, 2014, through January 27, 2015, covers a 23 week period and Respondents argues that it covers a 21 week period.

5. It is found and concluded that the credible and persuasive evidence presented at hearing established that the period from September 3, 2014, through January 27, 2015, covers a 21 week period.

6. Respondents are liable for 21 weeks of TTD from September 3, 2014, through January 27, 2015, at the TTD rate of $881.65 per week, which totals $18,514.65.

7. It is further found and concluded that Claimant has been paid $18,514.65 for the time period from September 3, 2014 through January 27, 2015.

8. Claimant failed to establish by a preponderance of the evidence that Respondents incorrectly paid benefits to her.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for TTD benefits for the time period October 29, 2014, through November 15, 2014, is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 24, 2015

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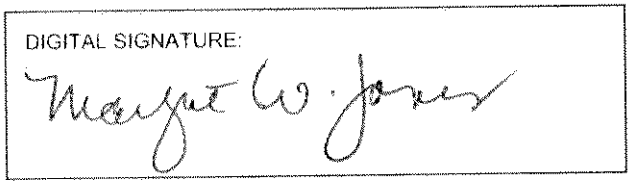

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014.

2. A determination of Claimant's Average Weekly Wage (AWW).

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 1, 2014 until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's TTD benefits should be reduced pursuant to §8-43-102(1)(a), C.R.S. for failing to timely report his injury in writing.

FINDINGS OF FACT

1. Claimant worked for Employer as a Rigger on a pipeline project. His job duties involved manipulating and securing loads of heavy materials to be lowered by a crane into a mineshaft. The materials routinely weighed in excess of several hundred pounds.

2. During the first week of May 2014 Claimant received a pay raise from Employer. Claimant earned aggregate gross wages of $10,452.75 from the pay period ending May 11, 2014 through the pay period ending June 29, 2014. Dividing the gross wages by eight weeks yields an AWW of $1,306.59. An AWW of $1,306.59 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. Claimant testified that while driving into work with coworker Michael Croak on June 30, 2014 he developed discomfort in his lower back and left leg. Upon arriving at work at approximately 5:30 AM Claimant performed several preliminary duties. He also attended a meeting with other members of the crew prior to commencing the tunneling operation for the day.

4. Claimant explained that at approximately 7:00 AM he was tugging on railroad track that weighed approximately 350 pounds to lower it into a mineshaft. Each piece of railroad track was approximately 35 feet in length. Claimant pushed the pieces of track together and aligned them so they would be flat when they reached the ground inside the mineshaft. He forcefully pulled on straps to secure the pieces of track. Claimant testified that he "injured himself right then and there" when pain shot through his left lower back and down his left leg. He remarked that he continued to work until he could no longer walk.

5. James Wiley testified that he worked for Employer as a Crane Operator. He was operating a crane while Claimant was preparing the rigging to lower the railroad tracks into the mineshaft. He explained that Claimant began to limp after strapping materials but could not recall whether the items were railroad tracks. Mr. Wiley noted that Claimant's symptoms worsened over time.

6. Michael Croak testified that he worked for Employer as a Bottom Lander. He unhooked materials from the crane at the bottom of the mineshaft. Mr. Croak stated that Claimant did not inform him of any lower back discomfort on the way to work and he did not witness Claimant develop any symptoms from the bottom of the mineshaft.

7. Employer's General Superintendent at the job site Cal Negley testified that another superintendent told him Claimant was in pain on June 30, 2014 and wanted to visit a doctor. Mr. Negley initially spoke to the other supervisor and then talked to Claimant about his condition. Claimant stated that he awoke in significant pain on that morning and wanted to see a doctor. Mr. Negley noticed that Claimant was limping but he had noticed Claimant limping on prior occasions. He remarked that Claimant did not mention that he injured his back after lifting anything at work.

8. Safety Coordinator James Bennett, who worked for World Wide Safety Consulting, testified that he was informed on June 30, 2014 that Claimant required a ride home because he was injured. He testified that he spoke to Claimant and asked him if the injury was work-related. Claimant responded that the injury was not work-related and his leg was bothering him on the way to work. Mr. Bennett then stated that he gave Claimant a ride home. He commented that Claimant never mentioned a work-lifting incident that caused back or leg pain.

9. Claimant testified that he told his supervisors about being uncomfortable on the drive into work on June 30, 2014 because he wanted to "thoroughly" communicate and be "candid" with Employer. Although Claimant told Employer about experiencing pain in his back and leg on the way into work, he did not tell Employer about a lifting or tugging incident that caused an injury.

10. Claimant explained that after the June 30, 2014 incident he visited the Emergency Room at Memorial Hospital in Colorado Springs because of his back and leg pain. The medical record reveals that Claimant did not mention any lifting or tugging incident that caused his symptoms. Claimant only reported he "works as a hand signal operator for a large crane, and subsequently goes nonstop in the morning until 10 a.m." He "denie[d] any recent trauma."

11. On July 2, 2014 Claimant visited Jeffrey R. Kent, M.D. for an examination. Claimant reported severe left leg pain that had developed on the preceding Monday or June 30, 2014 with no known injury. Dr. Kent restricted Claimant from working between June 30, and July 8, 2014. He also prescribed pain medication and referred Claimant for an MRI. Dr. Kent subsequently remarked that Claimant would require work restrictions.

12. On July 8, 2014 Claimant underwent a lumbar spine MRI. The most prominent finding on the MRI was a left-sided disc extrusion at L3-L4 causing left lateral recess narrowing with L4 nerve root contact. Claimant also exhibited moderate to severe left foraminal narrowing and L3 nerve root impingement. The MRI also revealed degenerative changes at L2-3, L4-5 and L5-S1.

13. On July 11, 2014 Claimant visited Jeffrey P. Jenks, M.D. for an evaluation. Dr. Jenks noted that Claimant's back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." Dr. Jenks' commented that Claimant's MRI from July 8, 2014 showed a left foraminal disc extrusion at L3-4 causing lateral recess narrowing and L4 nerve root contact, moderately severe left foraminal narrowing, L3 nerve root impingement, multilevel degenerative disc disease, canal stenosis at L4-5, moderate L5-S1 foraminal narrowing and L5 nerve root contact. He diagnosed Claimant with lumbar discogenic pain and radicular symptoms.

14. On July 30, 2014 Claimant returned to Dr. Kent for an examination and noted he was dissatisfied with Dr. Jenks. He reported continuing sciatic pain down the left leg that caused him to fall on two occasions. Claimant returned to Dr. Kent on August 2, 2014. Dr. Kent referred him to John H. Bissell, M.D. "to assume care of his physiatry and pain management."

15. On September 11, 2014 Claimant visited Dr. Bissell for an examination. Claimant reported that on the day prior to the June 30, 2014 incident he had performed significant heavy lifting at work but there was no specific event that injured his back. He remarked that on the night of June 29, 2014 he had "his usual back stiffness and baseline soreness" but he did not do anything unusual to cause his back pain to flare up. Claimant stated that on June 30, 2014 he experienced increased soreness in his back on the drive into work. He explained that after he lifted three railroad ties one at a time he suddenly developed left lower back and left leg pain that incapacitated him. Claimant remarked that he did not report the incident as a work injury because he "recall[ed] having some increased soreness in his back that morning and he could not relate that to anything specifically occurring from the day before or that night." After reviewing Claimant's MRI and conducting a physical examination Dr. Bissell concluded that Claimant's condition "represent[ed] a work-related aggravation of a pre-existing condition."

16. On September 16, 2014 Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation. Employer received the formal claim on September 17, 2014 and filed a First Report of Injury with the Division of Workers' Compensation on September 18, 2014.

17. On January 6, 2015 Claimant underwent a Rule 8 independent medical examination with Lloyd J. Thurston, D.O. Claimant reported that on June 30, 2014 he was lifting straps onto pieces of railroad track at work. He explained that while he was separating the tracks to get the straps around them he "pulled on the railroad track and was immediately injured." Claimant described the initial pain as "feeling like he had been 'shot' in the left low back with sudden pain in the left side like the thigh bone was

broken and sticking out." Dr. Thurston performed a physical examination that revealed numerous findings consistent with left lower extremity radiculopathy. He diagnosed Claimant with a left L3-L4 disc extrusion causing left L4 nerve root contact and left L3 nerve root impingement as well as clinical findings of left quadriceps muscle atrophy and left L4 sensory neuropathy consistent with left L4 nerve root compression/compromise. In assessing causation Dr. Thurston concluded:

> [b]ased on [Claimant's] description of his job, his description to me of the sudden dramatic onset of his symptoms while performing his job, and his description of the interaction with his coworkers immediately after the onset of symptoms, the left L4 radiculopathy is more likely than not a result of an acute left L3-L4 disc extrusion compressing the left L4 nerve root.

18. On January 27, 2015 Dr. Bissell testified through an evidentiary deposition in this matter. Dr. Bissell explained that the multilevel degenerative changes on Claimant's MRI likely predated the industrial injury. However, Dr. Bissell further determined that the L3-4 disc extrusion probably did not predate the work incident. Rather, Dr. Bissell stated that "[w]ithin a reasonable degree of medical probability, I'd say that [the L3-4 extrusion] was the reason why he developed left leg pain, and so that was probably work-related due to that lifting episode of the 500-pound metal or railroad ties, whatever it was." Nevertheless, Dr. Bissell acknowledged that it was difficult to determine if the extrusion was preexisting or caused by the lifting incident on June 30, 2014.

19. Claimant has demonstrated that it is more probably true than not that he suffered compensable lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014. Claimant explained that he developed discomfort in his lower back and left leg while driving to work on June 30, 2014. He testified that he pushed pieces of track together and aligned them so they would be flat when they reached the ground inside the mineshaft. While he was pulling on straps to secure the pieces of track he experienced the sudden onset of pain through his left lower back and down his left leg. Crane Operator Mr. Wiley was operating a crane while Claimant was preparing the rigging to lower the railroad tracks into the mineshaft. He explained that Claimant began to limp after strapping materials but could not recall whether the items were railroad tracks. Mr. Wiley noted that Claimant's symptoms worsened over time. Claimant did not immediately report a work-related incident to Employer. Instead, he reported that the injury was not work-related and his left leg had been bothering him on the way to work. When Claimant subsequently obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." The record thus reveals that an incident occurred while Claimant was working for Employer on June 30, 2014 but he did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014.

20. Subsequent medical records reveal that Claimant suffered an aggravation of a pre-existing condition while working for Employer on June 30, 2014. On September 11, 2014 Claimant reported to Dr. Bissell that, after he lifted three railroad ties one at a time, he suddenly developed left lower back and left leg pain that incapacitated him. Claimant remarked that he did not report the incident as a work injury because he "recall[ed] having some increased soreness in his back that morning and he could not relate that to anything specifically occurring from the day before or that night." After reviewing Claimant's MRI and conducting a physical examination Dr. Bissell concluded that Claimant's condition "represent[ed] a work-related aggravation of a pre-existing condition." Dr. Bissell subsequently testified that the multilevel degenerative changes on Claimant's MRI likely predated the industrial injury. However, Dr. Bissell further determined that the L3-4 disc extrusion probably did not predate the work incident. Rather, Dr. Bissell stated that "[w]ithin a reasonable degree of medical probability, I'd say that [the L3-4 extrusion] was the reason why he developed left leg pain, and so that was probably work-related due to that lifting episode of the 500-pound metal or railroad ties, whatever it was." Similarly, Dr. Thurston explained that, based on Claimant's description of the sudden onset of symptoms while performing his job and interaction with his coworkers immediately after the onset of symptoms, Claimant suffered an acute L3-L4 disc extrusion that compressed the L4 nerve root. The persuasive medical reports and testimony of Drs. Bissell and Thurston thus reveal that Claimant's work activities for Employer on June 30, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

21. Claimant has proven that it is more probably true than not he is entitled to receive TTD benefits until terminated by statute. Claimant ceased working on June 30, 2014 because his back and leg pain prevented him from performing his regular job duties. Claimant's work activities involved manipulating and securing loads of heavy materials to be lowered by a crane into a mineshaft. The materials routinely weighed in excess of several hundred pounds. Dr. Kent initially took Claimant off work from June 30 through July 8, 2014 and subsequently remarked that Claimant would require work restrictions. Employer informed Claimant that he could not return to work until he was released by a physician "to come back to work at 100 percent." Moreover, the medical records and Claimant's testimony reveal that he was unable to perform his job duties for Employer after June 30, 2014. Claimant is entitled to an award of TTD benefits because his June 30, 2014 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

22. Respondents have demonstrated that it is more probably true than not that Claimant's TTD benefits should be reduced pursuant to statute for failing to timely report his injury in writing. Claimant did not report his June 30, 2014 industrial injury to Employer until September 17, 2014. The record is replete with evidence that Claimant did not initially report to Employer or medical providers that he suffered a work injury on June 30, 2014. Claimant told Employer's General Superintendent at the job site Mr. Negley that he awoke in significant pain on the morning of June 30, 2014 and wanted to see a doctor. Mr. Bennett testified that he spoke to Claimant and asked him if the injury was work-related. Claimant responded that the injury was not work-related and his leg

was bothering him on the way to work. Mr. Bennett remarked that Claimant never mentioned a work-lifting incident that caused back or leg pain. When Claimant initially obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." Claimant thus did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014. Claimant waited approximately two and one-half months to specifically report that he had suffered an industrial injury while working for Employer. A review of the pertinent factors in considering whether to reduce Claimant's compensation reveals that the long delay in reporting the industrial injury warrants the loss of one day's compensation for each day's failure to report. Accordingly, Respondents are not liable for TTD benefits prior to September 17, 2014. However, Claimant shall receive TTD benefits for the period September 18, 2014 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising

out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014. Claimant explained that he developed discomfort in his lower back and left leg while driving to work on June 30, 2014. He testified that he pushed pieces of track together and aligned them so they would be flat when they reached the ground inside the mineshaft. While he was pulling on straps to secure the pieces of track he experienced the sudden onset of pain through his left lower back and down his left leg. Crane Operator Mr. Wiley was operating a crane while Claimant was preparing the rigging to lower the railroad tracks into the mineshaft. He explained that Claimant began to limp after strapping materials but could not recall whether the items were railroad tracks. Mr. Wiley noted that Claimant's symptoms worsened over time. Claimant did not immediately report a work-related incident to Employer. Instead, he reported that the injury was not work-related and his left leg had been bothering him on the way to work. When Claimant subsequently obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on

June 30, 2014 with "no apparent precipitating injury or event." The record thus reveals that an incident occurred while Claimant was working for Employer on June 30, 2014 but he did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014.

8. As found, subsequent medical records reveal that Claimant suffered an aggravation of a pre-existing condition while working for Employer on June 30, 2014. On September 11, 2014 Claimant reported to Dr. Bissell that, after he lifted three railroad ties one at a time, he suddenly developed left lower back and left leg pain that incapacitated him. Claimant remarked that he did not report the incident as a work injury because he "recall[ed] having some increased soreness in his back that morning and he could not relate that to anything specifically occurring from the day before or that night." After reviewing Claimant's MRI and conducting a physical examination Dr. Bissell concluded that Claimant's condition "represent[ed] a work-related aggravation of a pre-existing condition." Dr. Bissell subsequently testified that the multilevel degenerative changes on Claimant's MRI likely predated the industrial injury. However, Dr. Bissell further determined that the L3-4 disc extrusion probably did not predate the work incident. Rather, Dr. Bissell stated that "[w]ithin a reasonable degree of medical probability, I'd say that [the L3-4 extrusion] was the reason why he developed left leg pain, and so that was probably work-related due to that lifting episode of the 500-pound metal or railroad ties, whatever it was." Similarly, Dr. Thurston explained that, based on Claimant's description of the sudden onset of symptoms while performing his job and interaction with his coworkers immediately after the onset of symptoms, Claimant suffered an acute L3-L4 disc extrusion that compressed the L4 nerve root. The persuasive medical reports and testimony of Drs. Bissell and Thurston thus reveal that Claimant's work activities for Employer on June 30, 2014 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

Average Weekly Wage

9. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

10. As found, during the first week of May 2014 Claimant received a pay raise from Employer. Claimant earned aggregate gross wages of $10,452.75 from the pay period ending May 11, 2014 through the pay period ending June 29, 2014. Dividing the gross wages by eight weeks yields an AWW of $1,306.59. An AWW of $1,306.59 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

11. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits until terminated by statute. Claimant ceased working on June 30, 2014 because his back and leg pain prevented him from performing his regular job duties. Claimant's work activities involved manipulating and securing loads of heavy materials to be lowered by a crane into a mineshaft. The materials routinely weighed in excess of several hundred pounds. Dr. Kent initially took Claimant off work from June 30 through July 8, 2014 and subsequently remarked that Claimant would require work restrictions. Employer informed Claimant that he could not return to work until he was released by a physician "to come back to work at 100 percent." Moreover, the medical records and Claimant's testimony reveal that he was unable to perform his job duties for Employer after June 30, 2014. Claimant is entitled to an award of TTD benefits because his June 30, 2014 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

Failure to Timely Report

13. Section 8-43-102(a), C.R.S. provides that "every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence…if said employee fails to report said injury in writing, said employee may lose up to one day's compensation for each day's failure to so report." Imposition of a penalty for late reporting is discretionary, rather than mandatory, because the statute provides that the claimant "may" lose compensation for failing to timely report the injury in writing. *Tellez v. Wal-Mart Stores*, W.C. No. 4-413-780 (ICAP, Nov. 29, 2001). Pertinent factors to consider when deciding whether to reduce a claimant's compensation include whether the claimant was physically capable

of reporting the injury, whether the claimant orally notified the employer or the employer otherwise had actual notice of the injury, whether the employer had an opportunity to refer the claimant to its physician before the claimant engaged substantial medical treatment or experienced a significant period of disability and whether the lack of a written report prejudiced the employer's ability to defend the claim. *See e.g., Lefou v. Waste Management*, W.C. Nos. 4-519-354 & 4-536-799 (ICAP, Mar. 6, 2003); *Doughty v. Poudre Valley Hospita*l, W.C. No. 4-488-749 (ICAP, Mar. 14, 2002).

14. As found, Respondents have demonstrated by a preponderance of the evidence that Claimant's TTD benefits should be reduced pursuant to statute for failing to timely report his injury in writing. Claimant did not report his June 30, 2014 industrial injury to Employer until September 17, 2014. The record is replete with evidence that Claimant did not initially report to Employer or medical providers that he suffered a work injury on June 30, 2014. Claimant told Employer's General Superintendent at the job site Mr. Negley that he awoke in significant pain on the morning of June 30, 2014 and wanted to see a doctor. Mr. Bennett testified that he spoke to Claimant and asked him if the injury was work-related. Claimant responded that the injury was not work-related and his leg was bothering him on the way to work. Mr. Bennett remarked that Claimant never mentioned a work-lifting incident that caused back or leg pain. When Claimant initially obtained medical treatment he did not report a recent trauma but instead explained that he had developed severe left lower back and left leg pain. By July 11, 2014 when Claimant visited Dr. Jenks, he maintained that his back and leg symptoms began on June 30, 2014 with "no apparent precipitating injury or event." Claimant thus did not initially attribute any increase in his back and left symptoms to the work incident. He instead maintained that the symptoms developed while he was driving into work on June 30, 2014. Claimant waited approximately two and one-half months to specifically report that he had suffered an industrial injury while working for Employer. A review of the pertinent factors in considering whether to reduce Claimant's compensation reveals that the long delay in reporting the industrial injury warrants the loss of one day's compensation for each day's failure to report. Accordingly, Respondents are not liable for TTD benefits prior to September 17, 2014. However, Claimant shall receive TTD benefits for the period September 18, 2014 until terminated by statute.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered lower back and left leg injuries during the course and scope of his employment with Employer on June 30, 2014.

2. Claimant earned an AWW of $1,306.59.

3. Claimant shall receive TTD benefits for the period September 18, 2014 until terminated by statute.

4. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 9, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondent has proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on May 17, 2014 during the course and scope of his employment with Employer.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

4. . Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondent failed to designate a medical provider after receiving notice of his injury.

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute.

6. Whether Employer is subject to penalties pursuant to §8-44-101, C.R.S. for failing to carry Workers' Compensation insurance.

7. Whether Claimant's compensation should be increased by 50% pursuant to §8-43-408(1), C.R.S. for Employer's failure to carry Workers' Compensation insurance on May 17, 2014.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $550.00.

FINDINGS OF FACT

1. On March 28, 2014 Claimant came to Colorado from Puerto Rico. He responded to a job advertisement placed by Employer and was hired on March 31, 2014. Claimant had approximately 16 years' experience in the field of automotive body repair and painting. His job initially entailed automotive body paint preparation and light body work. Employer furnished tools for Claimant's use.

2. Claimant testified that he worked for Employer on Monday through Friday from 8:00 a.m. until 5:30 p.m. He also frequently worked on Saturdays from 8:00 a.m. until 2:00 p.m. Employer initially paid Claimant a salary in cash. However, on May 7, 2014 and May 14, 2014 Employer paid Claimant in checks made payable to him personally.

3. After approximately 1.5 months, Employer assigned Claimant to perform primarily automotive body painting. Employer also gave Claimant a raise. Claimant purchased a paint gun and used his own sander and air blower. He painted approximately 10 different cars per week. Employer did not train Claimant and did not supervise his work performance.

4. Claimant was not employed anywhere else during the time he worked for Employer. He was also not self-employed or customarily engaged in an independent trade related to the services he performed for Employer. There was no written agreement between the parties that established Claimant was an independent contractor.

5. Employer had two separate buildings on its premises known by the addresses "315" and "319." Location 315 consisted of the body shop, paint booth and office. Location 319 was the place where Employer built race cars and made signs. Claimant remarked that he performed work for Employer in both locations.

6. Owner of Employer James J. Keeney testified at the hearing in this matter. He explained that he initially engaged Claimant to specifically perform work on two vehicles. Claimant responded that he could complete the work in four to five weeks. Mr. James Keeney agreed to pay Claimant a flat contact rate of $2,500.00 for his services. He noted that Claimant accepted the arrangement. He maintained that he did not establish a specific schedule in which Claimant was required to perform the work. Mr. James Keeney denied that Claimant was required to work an assigned schedule. In fact, Mr. James Keeney remarked that when Claimant took his paint gun and other tools home, Claimant acknowledged that he was performing auto body work for others. Mr. James Keeney commented that he did not oversee, instruct or train Claimant about performing auto body repair or painting. He agreed that he paid Claimant by cash or personal check for his services.

7. Mr. Jimmy Kenney is the son of Mr. James Keeney. Mr. Jimmy Keeney corroborated that his father hired Claimant to perform specific work on only a Buick and a Corvette. Claimant provided his own tools for auto body repair and painting. He did not require supervision or training in completing his tasks.

8. On May 17, 2014 Claimant arrived for work and asked Mr. James Keeney about the work that should be performed on that day. Mr. James Keeney told Claimant to help his son work on a Subaru. Claimant stated that he had previously worked on the Subaru for Employer. Employer was preparing the Subaru for an upcoming car show. Claimant went to the 319 location and assisted Mr. Jimmy Keeney with work on the

vehicle. He injured his left hand when he grabbed the wheel of the Subaru as it started moving down a small incline.

9. Mr. James Keeney explained that when Claimant arrived at the 315 location on May 17, 2014, he inquired whether any work was available. He responded that the shop was closed Mr. James Keeney maintained that he never directed Claimant to work on the Subaru. In fact, location 319 was a separate facility that was unrelated to the Employer. Mr. James Kenney explained that his son used the 319 location as a workshop for his private vehicles.

10. Mr. Jimmy Kenney explained that 319 is a location where he works on racing cars and vinyl graphics. He maintained that no Employer work is performed at the 319 location. Mr. Jimmy Keeney remarked that on May 17, 2014 he was preparing a Subaru to go to a detailing shop. Claimant entered the 319 location and they discussed Claimant's new car. Mr. Jimmy Keeney maintained that at no time did he ask Claimant to assist him in performing any work on the Subaru. Claimant injured his left hand when he grabbed the front driver's side wheel of the Subaru.

11. Immediately after the injury, Mr. James Keeney drove Claimant to Colorado Springs Health Partners for emergency medical treatment. Employer did not provide Claimant with a list of at least medical providers to treat his injury.

12. On May 17, 2014 Employer did not possess Workers' Compensation insurance. In fact, Employer was uninsured from July 1, 2005 through October 15, 2014.

13. Because of his injury Claimant was unable to earn wages from May 18, 2014 until June 9, 2014. Claimant underwent surgery on June 2, 2014 at Memorial Hospital. He returned to work for Employer on June 9, 2014. Claimant continued to work for Employer until he was terminated on September 10, 2014. He subsequently worked for a different employer from September 19, 2014 until he was laid off on January 1, 2015. Claimant has been unable to return to regular work due to the effects of his May 17, 2014 industrial injury. He has not reached Maximum Medical Improvement (MMI).

14. Respondent has failed to prove that it is more probably true than not that Claimant was an independent contractor pursuant to statute. Employer established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer established that it did not provide more than minimal training or supply all of the necessary tools. However, Claimant did not operate a trade or business and Employer paid him personally by cash or check. In fact, Claimant earned a salary based on a regular work schedule. The record reveals that there was no fixed or contract rate of pay based on the completion of a specific project. Finally, Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the service performed" during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Claimant's income was wholly dependent on his earnings from Employer.

15. Claimant has established that it is more probably true than not that he suffered compensable injuries on May 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that on May 17, 2014 he arrived for work and asked Mr. James Keeney about the work that should be performed on that day. Mr. James Keeney told Claimant to help his son, Jimmy Keeney, work on a Subaru. Claimant went to the 319 location and assisted Mr. Jimmy Keeney with work on the Subaru. He injured his left hand when he grabbed the wheel of the vehicle as it started moving down a small incline. In contrast, owner of Employer Mr. James Keeney and his son Mr. Jimmy Keeney testified that Claimant was not performing services for Employer when he injured his left hand. However, Claimant's credible testimony and the circumstances surrounding the injury reveal that Claimant injured his left hand on the Subaru while performing his job duties for Employer.

16. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. After the injury, Claimant sought emergency treatment at Colorado Springs Health Partners and underwent surgery at Memorial Hospital on June 2, 2014. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his May 17, 2014 left hand injury. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injury.

17. Claimant has established that it is more probably true than not that the right of medical selection passed to him because Respondent failed to designate a medical provider after receiving notice of his injury. Claimant informed Employer of the accident, reported his injuries and sought medical treatment. However, Employer failed to provide Claimant with a list of at least two authorized treating physicians. Because Respondent never designated any medical providers, the right to select a physician passed to Claimant.

18. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute. Claimant was unable to earn wages during the period May 18, 2014 through June 9, 2014 because he was experiencing the effects of his left hand injury. Claimant continued to work for Employer until he was terminated on September 10, 2014. He subsequently worked for a different employer from September 19, 2014 until he was laid-off on January 1, 2015. Claimant has been unable to return to regular work due to the effects of his May 17, 2014 industrial injury. He has not reached MMI for his May 17, 2014 left hand injury.

19. Employer is not subject to additional penalties pursuant to §8-44-101, C.R.S. for failing to carry Workers' Compensation insurance. Respondent was fined by the Director of the Division of Workers' Compensation for failing to carry Workers' Compensation insurance. Respondent was fined a total of $16,970.00 based on $5.00 per day for each of the 3,394 days from July 1, 2005 through October 15, 2014. The fine was issued pursuant to W.C.R.P. 3-6.

20. Claimant has established that Employer was not insured on May 17, 2014. His disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Independent Contractor

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The second prong of §8-40-202(2)(a), C.R.S. as to whether an claimant should be deemed an employee is whether the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011). Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is

paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. As found, Respondent has failed to prove by a preponderance of the evidence that Claimant was an independent contractor pursuant to statute. Employer established some, but not all, of the elements enumerated in §8-40-202(b)(II), C.R.S. For example, Employer established that it did not provide more than minimal training or supply all of the necessary tools. However, Claimant did not operate a trade or business and Employer paid him personally by cash or check. In fact, Claimant earned a salary based on a regular work schedule. The record reveals that there was no fixed or contract rate of pay based on the completion of a specific project. Finally, Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the service performed" during the time he worked for Employer. In fact, while working for Employer, Claimant was not engaged in any independent business. Claimant's income was wholly dependent on his earnings from Employer.

Compensability

7. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

8. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries on May 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that on May 17, 2014 he arrived for work and asked Mr. James Keeney about the work that should be performed on that day. Mr. James Keeney told Claimant to help his son, Jimmy Keeney, work on a Subaru. Claimant went to the 319 location and assisted Mr. Jimmy Keeney with work on the Subaru. He injured his left hand when he grabbed the wheel of the vehicle as it started moving down a small incline. In contrast, owner of Employer Mr. James Keeney and his son Mr. Jimmy Keeney testified that Claimant was not performing services for Employer when he injured his left hand. However, Claimant's credible testimony and the circumstances surrounding the injury reveal that Claimant injured his left hand on the Subaru while performing his job duties for Employer.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

10. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. After the injury, Claimant sought emergency treatment at Colorado Springs Health Partners and underwent surgery at Memorial Hospital on June 2, 2014. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his May 17, 2014 left hand injury. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injury.

Right of Selection

11. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43-404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(D) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or

illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

12. As found, Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondent failed to designate a medical provider after receiving notice of his injury. Claimant informed Employer of the accident, reported his injuries and sought medical treatment. However, Employer failed to provide Claimant with a list of at least two authorized treating physicians. Because Respondent never designated any medical providers, the right to select a physician passed to Claimant.

TTD Benefits

13. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

14. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute. Claimant was unable to earn wages during the period May 18, 2014 through June 9, 2014 because he was experiencing the effects of his left hand injury. Claimant continued to work for Employer until he was terminated on September 10, 2014. He subsequently worked for a different employer from September 19, 2014 until he was laid-off on January 1, 2015. Claimant has been unable to return to regular work due to the effects of his May 17, 2014 industrial injury. He has not reached MMI for his May 17, 2014 left hand injury.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

15. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. However, Employer is not subject to additional penalties pursuant to §8-44-101, C.R.S. for failing to carry Workers' Compensation insurance. Respondent was fined by the Director of the Division of Workers' Compensation for failing to carry Workers' Compensation insurance. Respondent was fined a total of $16,970.00 based on $5.00 per day for each of the 3,394 days from July 1, 2005 through October 15, 2014. The fine was issued pursuant to W.C.R.P. 3-6.

50% Increase in Benefits

16. Claimant seeks penalties against Employer for failing to carry Workers' Compensation insurance pursuant to §8-43-408, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005).

17. As found, Claimant has established that Employer was not insured on May 17, 2014. His disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant worked for Employer as an employee not an independent contractor.

2. Claimant suffered a compensable left hand injury during the course and scope of his employment with Employer on May 17, 2014.

3. Employer is financially liable for Claimant's reasonable and necessary medical treatment that is designed to cure or relieve the effects of his May 17, 2014 industrial injuries.

4. The right of selection passed to Claimant.

5. Claimant earned an AWW of $550.00.

6. Employer shall pay Claimant TTD benefits for the periods May 18, 2014 through June 9, 2014, September 10, 2014 through September 19, 2014 and January 1, 2015 until terminated by statute. There is a 22 day period from May 18, 2014 through June 9, 2014 and a 10 day period from September 10, 2014 through September 19, 2014. Claimant is entitled to a TTD rate of $368.50, increased by 50% for a lack of insurance, to a TTD rate of $550.00 each week. Multiplying $550.00 each week for a total period of 32 days yields a total TTD amount of $2,514.27.

7. Employer shall also pay Claimant TTD benefits for the period January 1, 2015 until terminated by statute. The period consists of 72 days as of the date of this Order. Claimant is entitled to a TTD rate of $368.50, increased by 50% for a lack of

insurance, to a TTD rate of $550.00 each week. Multiplying $550.00 each week for a total period of 72 days yields a total TTD amount of $5,657.14 plus any TTD benefits that accrue until benefits are terminated pursuant to statute. Accordingly, total TTD benefits due as of the date of this Order equal $8,171.41.

In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $8,171.41with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $8,171.41 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

8. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 13, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

FINDINGS OF FACT

1. Claimant testified that he worked for Employer at a Popeye's restaurant in Northglenn, Colorado. On April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead.

2. Claimant explained that, at the recommendation of Employer's Store Manager, he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14.

3. Mr. Nick Amirian submitted documents on Respondent's behalf purportedly reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold.

4. Claimant has established that it is more probably true than not that he sustained compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer. The credible testimony of Claimant reflects that on April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead. Respondent has submitted documents purportedly reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold. However, absent more information about corporate structure and relationships the information does not nullify Claimant's credible testimony that he suffered head injuries while working at a Popeye's restaurant in Northglenn, Colorado.

5. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to

cure or relieve the effects of his industrial injuries. Claimant credibly explained that at the recommendation of Employer's Store Manager he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14. Accordingly, Claimant is entitled to reasonable and necessary medical treatment for his head injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he sustained compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer. The credible testimony of Claimant reflects that on April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead. Respondent has submitted documents purportedly reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold. However, absent more information about corporate structure and relationships the information does not nullify Claimant's credible testimony that he suffered head injuries while working at a Popeye's restaurant in Northglenn, Colorado.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Claimant credibly explained that at the recommendation of Employer's Store Manager he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14. Accordingly, Claimant is entitled to reasonable and necessary medical treatment for his head injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable head injuries on April 15, 2014 during the course and scope of his employment with Employer.

2. Respondent is financially responsible for payment of the April 15, 2014 HealthOne medical bill as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's April 15, 2014 industrial injuries.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 13, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on June 18, 2014.

STIPULATIONS

The parties stipulated on record that if the claim is found compensable, the treatment provided by Dr. Nwizu and any referrals by Dr. Nwizu would be authorized as would the emergent treatment at Mountain View Regional Hospital.

FINDINGS OF FACT

1. Claimant worked for Employer as a "floorer" with duties including assisting the head driller, maintaining Employer's rig, and performing other duties as assigned. Claimant was hired by Employer in November of 2010 in Fruita, Colorado.

2. After being hired Claimant worked on a rig in Platteville, Colorado close to his home in Greeley, Colorado and went home in the evenings. Claimant also went through safety training in Fruita, Colorado. Claimant's home rig was listed as rig number 326 with a location of Fruita, Colorado. *See* Exhibit F

3. In January of 2014, Claimant was assigned by Employer to a new rig in Wyoming and began working on rig number 304, as his permanent or "home rig."

4. Shortly after Claimant began working in Wyoming, Employer completed an Hourly Personnel Action Form noting that Claimant was being transferred from rig 326 with a location noted of Fruita, Colorado to rig number 304 with a location noted of Casper, Wyoming. The effective date of transfer listed on the form was February 6, 2014. *See* Exhibit F.

5. When Claimant was transferred to Wyoming as his home rig, Claimant asked Jerry Stolz, drilling superintendent for Employer, whether he would be provided a per diem for working out of town. Mr. Stolz advised Claimant that he would not be provided a per diem because he would be provided a "man camp" to sleep at. Claimant understood that instead of a per diem, he would be provided sleeping arrangements paid for by Employer.

6. The rig Claimant began working on in January of 2014 was not actually located in Casper, Wyoming. The rig itself was in the middle of land in Wyoming, with Casper being the nearest town. Casper was located approximately two hours driving time from the rig.

7. Claimant's schedule in Wyoming required him to work 14 straight days and 12 ½ hour shifts per day. Claimant then would have 14 days off of work. This cycle repeated with 14 days on and 14 days off.

8. During the entire time Claimant was employed by Employer, he resided in Greeley, Colorado. After being assigned to the Wyoming rig, Claimant would leave Greeley, Colorado at the beginning of his 14 days on and would travel to the rig location. Claimant stayed at the rig location for the entire 14 days on and slept at the Employer provided "man camp" located approximately 100 feet from the actual rig during his 14 days on. At the end of the 14 days on, Claimant then would leave the rig site and return to Greeley, Colorado.

9. Claimant was not paid mileage to travel to/from the rig location from Greeley, Colorado at the start of his 14 day assignment or at the end of his 14 day assignment.

10. At the rig location, two "man camps" existed approximately 100 feet from the actual rig. The men working at the rig location, including Claimant, were assigned to one of the two camps for sleeping during their 14 days on.

11. When Claimant arrived to begin working at the Wyoming rig in January of 2014, he was assigned to one of the camps by Lee Hawkins, the rig manager. Mr. Hawkins designated that Claimant was to spend his evenings after the 12 ½ hour shift in the camp Claimant was assigned to during his 14 days on.

12. Claimant was assigned to a top bunk, approximately eight feet off the ground. The bunk beds did not have ladders, and employees assigned to top bunks had to pull themselves up. The bunk beds were makeshift, narrow, and the top bunk was too close to the ceiling to allow Claimant to fully sit up while in bed.

13. Claimant testified credibly that there was no viable option to sleep elsewhere during his 14 days on as there would not be sufficient time to go home or to the nearest town/hotel, eat, sleep, and get back in time for his next 12 ½ hour shift.

14. Claimant also testified credibly that he was not required to sleep at the man camp and could leave or sleep elsewhere if he wished. Claimant was not charged to sleep at the camp nor was any amount taken out of his paycheck for the use of the camp.

15. Claimant worked a 14 days on 14 days off schedule always sleeping and staying at the camp from January of 2014 until June 19, 2014.

16. On June 18, 2014 Claimant worked his regular 12 ½ hour shift. Claimant then went to the man camp, ate dinner, and went to bed.

17. While asleep, and at an unknown time estimated between 8:00 p.m. and 10:00 p.m. on June 18, 2014, Claimant fell off the top bunk and hit a night stand table that sat beside the bed with his lower back. Claimant does not recall the exact details surrounding his fall and was disoriented afterwards for a period of time.

18. After the fall, Claimant could barely walk and couldn't get back into the top bunk. Claimant spent the remainder of the night sleeping on the couch in the living room of the camp.

19. Claimant showed his direct supervisor, driller Jaime Lechuga, his back. Mr. Lechuga indicated Claimant should go back to sleep and that they would look at his back in the morning.

20. On June 19, 2014 Claimant was supposed to be at the rig at 5:30 a.m. for a safety meeting. Claimant could not walk or get up to attend the meeting and told his coworkers to have Mr. Hawkins to come speak with him.

21. Mr. Hawkins arrived to talk to Claimant and to see if Claimant could work if Claimant took it easy. Claimant advised he could not. Mr. Hawkins advised Claimant that Claimant would need to get a doctor's note to return to work.

22. Claimant spoke with his wife during this period of time. Claimant's wife called Employer's corporate office to complain and several hours later Employer sent an Employee to the rig location to pick up Claimant and to drive Claimant to the nearest hospital.

23. Claimant arrived at Mountain View Regional Hospital in Casper, Wyoming at approximately 12:15 p.m. on June 19, 2014. *See* Exhibit 2.

24. Claimant was treated by Khawaja Waseem, M.D. Dr. Waseem noted Claimant had tenderness, swelling, and a large hematoma on his lower left lumbar region. Dr. Waseem noted a clinical impression of left flank hematoma. Dr. Waseem noted Claimant's history of falling off a bunk bed, hitting a coffee table. Claimant was prescribed voltarin and flexeril and was released from the hospital. *See* Exhibit 2

25. Although Claimant has a history of drinking, Claimant was not drinking on the evening that he fell out of the bunk bed.

26. Claimant's testimony is found credible and persuasive in relating the fall out of the bunk bed, his lack of alcohol use the night of the fall, and the employment relationship with Employer including the conversations surrounding the camps that were provided by Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2014). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

In order to recover benefits the claimant must prove by a preponderance of the evidence that his injury was proximately caused by an incident arising out of and in the course of his employment. Section 8-41-301(1)(b) & (c), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related

functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

Generally, injuries that occur while a claimant is going to or coming from the place of employment are not considered to have arisen out of and in the course of the employment. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). However, the Madden court noted exceptions to that general rule. The Madden court held that "the determination of whether a traveling employee's injury warrants an exception to the going to and from work rule is such a fact-specific analysis that it cannot be limited to a predetermined list of acceptable facts and circumstances." *Id at 864*. Accordingly, the Madden court ruled that the proper approach was to consider a number of factors to determine whether special circumstances warrant recovery under the Act. According to the Madden court, those factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. If only one variable is present, "recovery depends on whether the evidence supporting the variable demonstrates a causal connection between the employment and the injury such that the travel to and from work arises out of and in the course of employment." *Id. at 864-865*. An injury sustained during travel initiated at the direct or implied request of the employer, or during travel that confers a benefit on the employer beyond the employee's mere arrival at work is, barring some deviation, sufficient to satisfy the arising out of and in the course of tests because the travel is contemplated by the employment contract. *Id. at 865*.

The Madden court recognized that travel may be part of the service to the employer if it is at the express or implied request of the employer. In such cases the claimant is said to be in "travel status." *Id. at 865*. When an employee is in travel status the employee is under continuous workers' compensation coverage unless engaged in a distinct departure on a personal errand. *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001); *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). Evidence that an employer paid for transportation or provided lodging and meals is indicative of travel status. *Id at 12*. Additionally, if an employee's travel is at the express or implied request of the employer, or if the travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, the travel is within the scope of employment. *Varsity Contractors and Home Ins. Co. v. Baca* 709 P.2d 55 (Colo. App. 1985); *Loffland Brothers v. Baca*, 651 P.2d 431 (Colo. App. 1982).

Under workers' compensation law, it is generally not necessary for an employee to be actually engaged in work duties at the time of an accident for an injury to be compensable. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994); *Ventura v. Albertson's, Inc*., 856 P.2d 35 (Colo. App. 1992); *Northwest Conejos Fire Protection District v. Industrial Commission*, 566 P.2d 717 (Colo. App. 1977). It is sufficient if the injury arises out of a risk which is reasonably

incidental to the conditions and circumstances of the particular employment. *City of Boulder v. Streeb*, *supra.* This rule, applied to traveling employees, means that the risks associated with the necessity of eating, sleeping, and ministering to personal needs away from home are considered incidental to and within the scope of the traveling employee's employment. *Alexander Film Co. v. Industrial Commission*, 319 P.2d 1074 (Colo. 1957); *Archer Freight Lines, Inc. v. Horn Transportation, Inc*., 514 P.2d 330 (Colo. App. 1973).

In this case, Claimant has met his burden to show that the injury was caused by an incident arising out of and in the course of his employment. After review of the Madden factors and the above cases, the ALJ is persuaded by Claimant's argument that there was a causal connection between Claimant's injury and his employment such that the injury is compensable. When Claimant arrived at the rig to begin his 14 days on, his employment began. Claimant never left the rig location during his entire 14 days on shift and was during this time in continuous "travel status" from which he made no departures. In reviewing the Madden factors, the ALJ is persuaded that although Claimant was off the clock when sleeping and eating at the camp, Claimant nonetheless was on the work premises approximately 100 feet from the rig. Additionally, the travel status while at the rig location for 14 straight days was contemplated by the employment contract and employment agreement between Claimant and Employer. Specifically, Claimant was advised by Employer that in lieu of a per diem, he would be provided sleeping arrangements. Claimant was assigned to a man camp by his drilling supervisor upon his arrival to the rig location. Further, there was no viable option for the workers to sleep in another location during their 14 day shift given the location of the rig in the middle of land with the closest town approximately 2 hours away and given the long work days with 12 ½ hour shifts. The "travel" of the employees who left the rig, walked approximately 100 feet and slept in an Employer provided camp while working for 14 straight days places them in a continuous "travel" status during their entire 14 days on. The travel and sleeping arrangements were initiated at the direct request by the Employer, and the Employer designated the camps for the workers to sleep at. Although the Employer did not force Claimant to sleep at the camp and Claimant could have left if he had chosen to do so, there was no true option to sleep elsewhere and perform the job duties or remain employed.

The travel to the camp and sleeping and eating at the camp also provided a benefit to Employer. Without providing the camp and sleeping arrangements, Employer would be hard pressed to find qualified workers to work the rig, which was located essentially in the middle of nowhere. The employees who were in travel status during their 14 days on were located at the rig site and in travel status at the request of Employer. After reviewing the evidence as a whole, Claimant has met his burden to show he was in travel status from the time he arrived at the rig to begin his 14 day shift and until he left the rig at the end of the 14 days. It is clear from the facts of this case that Claimant was not actually engaged in work duties and was not on the clock at the time of his accident when he was sleeping and fell out of the top bunk bed. However, the injury in this matter arose out of the risk of sleeping at the camp which was a necessity of the job, paid for by Employer, and at the request of Employer. Therefore,

Claimant was in travel status and the injury of falling out of the bunk bed was incidental to his employment and is compensable.

Respondents argue both that Claimant was drinking alcohol the night of the fall out of the bunk bed as well as that there was no evidence the camps were owned or maintained by Employer. Both arguments are not persuasive. First, although the evidence established that Claimant had prior alcohol related offenses and that while off work Claimant drank alcohol, Claimant is found credible that on the evening/early morning in question he was not drinking. Claimant was credible that it would not be safe to do so and that he did not drink while working or while at the rig for his 14 days on. Claimant readily admitted he drinks during his days off. The medical reports cited by Respondent to support the fact that Claimant was a drinker indicate that Claimant reported drinking when not working, consistent with his testimony. Additionally, although Claimant was unable to testify as to who ran, owned, or maintained the camps, Claimant credibly testified as to the fact that the camps were provided by Employer. Claimant was credible when he testified that when he was transferred to Wyoming he was advised by Employer's drilling superintendant Jerry Stolz that he would be given a camp to sleep at. This is consistent with his additional testimony that when he arrived in Wyoming, he was directed to a camp by Employer's rig manager Lee Hawkins. The camp was located approximately 100 yards from the rig. The evidence, when weighed as a whole, overwhelmingly supports that the camp was provided by Employer.

ORDER

It is therefore ordered that:

1. Claimant has met his burden by a preponderance of the evidence to show that he suffered a compensable injury on June 18, 2014 and that his injury occurred while he was in "travel status."

2. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 19, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondent. The proposed decision was filed, electronically, on March 5, 2015. Claimant was given 2 working days within which to file objections. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the medical treatment prescribed by Claimant's authorized treating physician (ATP), Jennifer A. Kempers, M.D., in the form of the provision of narcotic pain medications for the Claimant's low back injury, remains reasonably necessary and/or causally related to the Claimant's work-related injury. The hearing is on the Respondent's Application wherein the Respondent challenges the continued reasonable necessity for ongoing narcotic pain medications. Nonetheless, it is the Claimant's burden, by preponderant evidence to prove that the present level of narcotic pain medications is reasonably necessary and causally related in the workers compensation context.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained a compensable injury to his low back on or about February 4, 2004.

2. The Claimant was originally found to be at maximum medical improvement (MMI) on May 17, 2007 by Cliff Gronseth, M.D. Elizabeth Bisgard, M.D., performed an independent medical examination (IME) of the Claimant at the behest of the Respondent. Dr. Bisgard testified that the only physician that has been following the Claimant for his work injury over the last several years has been Dr. Kempers.

3. Based on Dr. Bisgard's review of Dr. Kempers' medical records, Dr. Bisgard identified the following medications as medications that Dr. Kempers has been prescribing for the Claimant's reports of ongoing low back pain:

- Oxycontin – a slow acting but powerful narcotic
- Oxycodone – a fast acting narcotic for break through pain

- Flexeril – a muscle relaxer

Dr. Kempers also treats the Claimant for other non-work related medical conditions.

4. Dr. Bisgard saw the Claimant for the first time on December 3, 2011. Following her initial evaluation, Dr. Bisgard stated the following in her February 3, 2011 report:

> I also strongly recommend that Dr. Kempers wean [Claimant] from his narcotic medications. His pain levels still range from 6/10 to 10/10. He is doing minimal activity, and per the *Guidelines*, the purpose of narcotics is to increase function. Clearly, he has not had any change in his function, so by the *Guidelines* outlined, he should be tapered off these medications as they are showing no functional benefit. I would refer Dr. Kempers to Rule 17, Exhibit 9, which deals with chronic pain disorder.

5. At hearing, Dr. Bisgard testified that, at the time of her initial evaluation of the Claimant, it was her opinion that the Claimant's continued use of narcotic pain medications was not having any impact on either his level of functioning, or his level of reported pain. Consequently, pursuant to the Medical Treatment Guidelines of the Division of Workers Compensation, continuing the Claimant on narcotic pain medications would no longer be considered reasonably necessary.

6. Also, according to Dr. Bisgard, at the time of her February 3, 2011 evaluation, the Claimant was not suffering from any kind of depression.

7. The Claimant saw Dr. Kempers on May 29, 2013. He presented as very tearful inasmuch as he had lost his wife one month earlier.

Dr. Bisgard's Most Recent Evaluation

8. When Dr. Bisgard saw the Claimant again on June 30, 2014, the Claimant reported to her the fact that his wife had died, and that had been a very difficult loss for him. The Claimant believed that the stress and aggravation caused by his work injury expedited his wife's death. After her evaluation, Dr. Bisgard stated that the Claimant clearly had the diagnosis of significant depression at that time. Unfortunately, according to her review of the medical records, it was Dr. Bisgard's opinion that Dr. Kempers had not been adequately treating the Claimant for his ongoing depression. Specifically, Dr. Bisgard noted that the Claimant was not taking an anti-depressant, nor was he in any kind of ongoing therapy to address his ongoing depression. Dr. Bisgard stated that anti-depressants are completely different from narcotics.

9. Dr. Bisgard is of the opinion that the Claimant's depression is a significant contributor to his ongoing complaints of low back pain at this time. In that regard, Dr. Bisgard stated that the Claimant's depression has resulted in a psychological and emotional cause of his ongoing pain complaints. The narcotic pain medications that Dr. Kempers is prescribing for the Claimant's complaints of low back pain are to address a physiological cause of low back pain. As a result, Dr. Kempers choice of using narcotic pain medications to address the Claimant's pain complaints is not in any way addressing what Dr. Bisgard believes to be a primary reason of the Claimant's ongoing reports of pain, and that is his depression.

10. Dr. Bisgard also is of the opinion that the Claimant has a somatoform disorder, and has had a somatoform disorder for some time. In Dr. Bisgard's opinion the Claimant's somatoform disorder dates back to at least April 2009 when Scott Primack, D.O., as part of his evaluation, expressed concerns about the results of the Distress Risk Assessment Method which indicated a strong psychological component to the Claimant's pain complaints.

11. According to Dr. Bisgard, a somatoform disorder is a psychological condition in which stressors in an individual's life manifest themselves as pain complaints as well as other subjective physical symptomatology. In a somatoform disorder, pain complaints do not have a physiological basis; rather, pain complaints have a psychological basis that is not at the conscious level.

12. According to Dr. Bisgard, it is counter indicated to treat an individual with a somatoform disorder with narcotic pain medications. Again, narcotic pain medications are designed to treat individuals with a physiological basis for pain. Individuals with a somatoform disorder do not necessarily have a physiological basis for pain; rather, the primary cause of their pain is psychological in nature, but not at the conscious level. As a result, no amount of narcotic pain medication will significantly change that individual's pain complaints because those pain complaints are based on a psychological component, not a physical component.

13. Dr. Bisgard was of the opinion that because of the Claimant's depression and somatoform disorder, it was no longer reasonable for Dr. Kempers to continue to treat the Claimant with narcotic pain medications because the primary cause of the Claimant's pain complaints at this time is psychological and emotional in nature. In Dr. Bisgard's opinion, the continued provision of narcotic pain medication to treat the Claimant's pain complaints is not only unreasonable and unnecessary, but counter indicated.

14. Dr. Bisgard also identified other factors in the Claimant's health profile that support her conclusion that Dr. Kempers' ongoing provision of narcotic pain medications to address the Claimant's pain complaints are counter-indicated. Dr. Bisgard noted, based on her review of Dr. Kempers' medical records, that the Claimant has a history of being non-compliant with his medication. The medical records reflect that the Claimant,

on his own and on several occasions, upped his pain medication, which resulted in him filling the prescriptions for his pain medications earlier than scheduled. Dr. Bisgard also noted that the Claimant lacks insight into his medical condition. For example, Dr. Bisgard noted that the Claimant believed that his work injury accelerated his wife's death. Lacking insight into his medical condition, according to Dr. Bisgard, is concerning inasmuch as it is unlikely that the Claimant understands that his complaints of ongoing low back pain are more attributable to his emotional and psychological condition as opposed to a physical cause.

15. Dr. Bisgard further testified as to the potential adverse consequences of the Claimant's ongoing consumption of narcotic pain medications to address his subjective complaints of pain. According to Dr. Bisgard, the Claimant is somewhat in a perfect storm to abuse his pain medications. The Claimant is isolated in his home at this point, with a fundamental lack of medical insight into his condition, which substantially increases the likelihood of an overdose, either intentional or accidental.

16. Ultimately, Dr. Bisgard is of the opinion that the Claimant's ongoing use of narcotic pain medications is no longer reasonably necessary. Dr. Bisgard states that the Claimant needs to be weaned off these medications. Because the Claimant is not on an extremely high dose of narcotic medication, Dr. Bisgard is of the opinion that such weaning can be done on an outpatient basis, without the necessity of inpatient detoxification. Hand in hand with weaning the Claimant off of his pain medication is the need for the Claimant to begin the consumption of anti-depressants to control his depression. Dr. Bisgard also is of the opinion that the Claimant should be encouraged to attend some form of therapy in order to help him cope with his ongoing grief over the loss of his wife. Finally, Dr. Bisgard is of the opinion that the Claimant needs to increase his level of activity.

17. Dr. Bisgard acknowledged that the Claimant does have degenerative disk disease, which could be considered a physiological cause of low back pain. Dr. Bisgard is of the opinion, however, that because of the significant overlay resulting from the Claimant's depression and somatoform disorder, as well as the minimal findings of degenerative changes in the Claimant's lumbar spine, over-the-counter medications such as Ibuprofen or Acetaminophen would be more than adequate to address any pain resulting from any actual physiological cause.

18. Dr. Bisgard is of the opinion that the Claimant can effectively be weaned off his narcotic medications on an outpatient basis in 3-4 weeks.

Ultimate Findings

19. The ALJ finds that Dr. Bisgard's testimony is highly persuasive, compelling and credible. The ALJ further finds that it is no longer reasonably necessary for the ongoing provision of narcotic pain medications to address the Claimant's complaints of low back pain within the context of his work-related injury. The ALJ finds that the

Claimant needs to undergo a weaning process of his narcotic medications which, according to Dr. Bisgard, should take no more than 3-4 weeks to be fully weaned off his narcotic medication. Consequently, the ALJ finds that the only pain medications that the Respondent should be responsible to provide should be the reducing doses of pain medication that the Claimant would need in order to complete his weaning process.

20. The Claimant has failed to prove, by a preponderance of the evidence that the Claimant's ongoing narcotic pain medications are reasonably necessary to cure and relieve the effects of his work-related injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found,

the opinions of Dr. Bisgard are highly persuasive and credible because of her in-depth understanding of the Claimant's medical/psychological condition.

Reasonable Necessity of Ongoing Pain Medications

b. The Respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. The right to workers' compensation benefits, including medical benefits, however, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment is proximately caused by an injury arising out of and in the course of the employment. § 8-41-301 (1) (c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). As found, the ongoing prescription of narcotic pain medications is no longer reasonably necessary to cure and relieve the effects of the Claimant's work-related injury.

c. Although the Respondent is liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, the Respondent may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999). The Claimant bears the continuing burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). As found, Dr. Kempers' ongoing provision of narcotic pain medications to address the Claimant's complaints of low back pain is no longer reasonably necessary. As further found, the Claimant needs to be weaned off of his pain medication. The length of time to undergo this weaning process should be no more than 30-45 days. The Respondent should only be required to pay for pain medications in order to effectuate this weaning process.

d. To facilitate this weaning process, the ALJ concludes that counsel for the Respondent should contact Dr. Kempers and provide her with a copy of this decision. Dr. Kempers should then have 30 days from the date of receipt of this decision to formulate a treatment plan which should provide for the weaning of the Claimant's narcotic pain medications such that the Claimant should be fully weaned off of the narcotic pain medications within 45 days. The Claimant's depression is not related to his work injury. As a result, the ALJ lacks jurisdiction and authority to dictate to Dr. Kempers how she should be treating the Claimant's depression. Nonetheless, it would be important in Dr. Kempers' treatment plan as to how she will attempt to treat the Claimant's depression. Regardless of how Dr. Kempers chooses to treat the Claimant's underlying depression, her provision of pain medication at this time is only reasonably

necessary in the context of prescribing the Claimant reducing doses of these pain medications during the 45-day weaning process.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing continuing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to satisfy his burden with respect to the reasonable necessity of ongoing narcotic pain medications.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Within five days of the date of the issuance of this decision, counsel for the Respondent shall provide a copy of this decision to Dr. Kempers in the context of a request for her to provide a treatment plan consistent with this decision.

B. Dr. Kempers shall, within 30 days of the date of receiving this decision, provide a treatment plan consistent with this decision to wean the Claimant off of his narcotic pain medications within 45 days thereafter.

C. The ALJ shall retain continuing jurisdiction to provide additional Orders should Dr. Kempers be unable or unwilling to provide a treatment plan consistent with the contents of this decision.

D. Any and all issues not determined herein are reserved for future decision.

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DATED this 12 day of March 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

objections, electronically. The proposed decision was filed, electronically, on March 3, 2015. On March 4, 2015, counsel for the Respondent filed objections concerning calculations and dates in the proposed decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Respondent's request to overcome the Division Independent Medical Evaluation (DIME) of Richard L. Stieg, M.D., which determined that the Claimant was not at maximum medical improvement (MMI). The Respondent's burden on this issue is "clear and convincing evidence."

If Dr. Stieg's DIME is not overcome, the additional issues concern average weekly wage (AWW) from multiple employments; whether the Claimant is entitled to temporary partial disability (TPD) benefits and/ or temporary total disability (TTD) benefits commencing on June 10, 2013. Also, if the DIME is not overcome, ancillary issues include a COBRA increase to AWW, effective June 6, 2014. The Claimant's burden on these issues is by a "preponderance of the evidence." There is an additional issue concerning whether the Respondent is entitled to a Federal Social Security Disability (SSDI) benefit offset. It is the respondent's burden by "preponderant evidence" on this issue.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. This is an admitted right shoulder injury of June 9, 2013, which occurred when the Claimant felt a sharp pain in his right shoulder girdle while he was lifting meat at the Employer's store.

2. The Respondent filed a General Admission of Liability (GAL), dated December 20, 2013, admitting for medical benefits and an AWW of $433.36, based on the Claimant's earnings with the Employer herein.

3. At the time of his injury, the Claimant had two jobs, one as a meat cutter for the Employer herein, and the other as a meat cutter for Albertsons.

4. As a result of the admitted injury, the Claimant was unable to continue his job at Albertsons where he established that he had an AWW of $484.15 (*See*

Claimant's Exhibit 15). The Claimant continued to work for the Employer herein, without wage loss until October 2, 2013.

5. The Claimant was referred to Concentra for treatment. He was given restrictions of no use of his right upper extremity (RUE).

6. The Claimant was subsequently referred to John Schwappach, M.D; Armodios Hatzidakis, M.D; and, Scott Falci, M.D. Dr. Hatzidakis documented the Claimant's cervical problems on August 20, 2013, and referred the Claimant for further diagnostic testing (*See* Claimant's Exhibit 13, bate stamp108). This diagnostic testing was performed by William H. Bentley, M.D., at Exempla and it established that the Claimant had a radial plexopathy with most involvement above the upper plexus. (*See* Claimant's Exhibit 11, bate stamp 93).

7. The Claimant was also referred to Dr. Falci who had treated him previously for a thoracic spine cyst removal. Dr. Falci evaluated the Claimant on October 2, 2013, and was of the opinion that the Claimant should undergo cervical surgery as described by his office in a note dated October 3, 2013 (*See* Claimant's Exhibit 14, bate stamp 112). In his report of October 2, 2013, Dr. Falci noted that the Claimant had complained of radicular symptoms following his injury. *Id.*, 114. Dr. Falci took the Claimant off work on October 2, 2013. *Id.*, bate stamp 113. At that juncture, the Claimant had continued being treated at Concentra and was also under the restriction of no use of his right arm.

8. The doctor at Concentra, Scott K. Richardson, M.D., eventually placed the Claimant at MMI on January 28, 2014. *Id.*, bate stamp 32.

Overcoming the Division Independent Medical Examination (DIME) of Richard L. Stieg, M.D.

9. The Claimant underwent a DIME with Dr. Stieg on July 29, 2014. DIME Dr. Stieg was of the opinion that the Claimant was not at MMI and that further medical treatment was required, specifically cervical surgery, which should take place prior to shoulder surgery, as a prerequisite to shoulder surgery. In his report, DIME Dr. Stieg stated:

> It is absolutely correct (Dr. Steinmetz) that this gentlemen has had chronic degenerative problems of the cervical and thoracic spine, shoulders, knees, and hands for a very long time. The point to be made here, however, is that he has gone on working his jobs in the food industry for a very long time until the event of 06/09/13 (as I have described) following which he has had significant and new right

> shoulder and arm pain and numbness and weakness and progressive myelopathy. He had been taking Vicodin on and off for years because of his arthritic pain and that has not increased since the injury. The medical records do not indicate progressive myelopathy or problems with pain, numbness, and weakness in the right and upper extremity prior to 06/09/13.

(Claimant's Exhibit 3, bate stamp 16)

10. In rejecting the opinion of Dr. Steinmetz, DIME Dr. Stieg's ultimate opinion on the treatment needed by the Claimant and MMI were as follows:

> [Claimant] has not reached the point of Maximum Medical Improvement. Exploratory surgery, decompression, and fusion of his cervical spine have been recommended as has subsequent right shoulder surgery. But for the incident of 06/09/13 neither procedure would be currently recommended.

Id., BS 17.

11. Orthopedic surgeon Dr. Schwappach, to whom the Claimant had been sent initially by Concentra, subsequently issued a report on September 18, 2014, in which he stated the opinion that the Claimant "has severe right shoulder rotator cuff tear. He also has severe cervical spine pathology which will require treatment prior to the right shoulder." (Claimant's Exhibit 12, bate stamp 98).

12. Based on the opinions of Dr. Schwappach, Dr. Falci, Dr. Hatzidakis and Dr. Steig that the Claimant needs resolution of his cervical problems before right shoulder surgery should occur, the ALJ finds that the cervical surgery is a medical prerequisite to the right shoulder surgery. DIME Dr. Stieg's report is unambiguous that the need for cervical surgery and shoulder surgery are not separable and the ALJ so finds, despite the opinion of Michael Rauzzino, M.D., to the contrary.

Medical Records Review by Michael Rauzzino, M.D. on behalf of the Respondent

13. Following the DIME, the Respondent objected to the opinion of DIME Dr. Stieg and set this matter for hearing to overcome the DIME.

14. At hearing, the Respondent presented the testimony of Dr. Rauzzino, a neurologist, who issued a report but had not clinically evaluated the Claimant. It was

Dr. Rauzzino's opinion that DIME Dr. Stieg was incorrect concerning his causation analysis of the relationship between the Claimant's need for cervical surgery and his injury of June 9, 2013. Dr. Rauzzino also was of the opinion that the Claimant had not reached MMI on his right shoulder but that treatment on that shoulder could take place without necessary cervical intervention. At the same time, Dr. Rauzzino testified that he would generally defer to an orthopedic surgeon on this and he recognized that Dr. Schwappach, as an orthopedic surgeon, could require cervical surgery before addressing the Claimant's shoulder problems.

15. The ALJ finds that DIME Dr. Stieg is convincingly of the opinion, with medical record support, that the Claimant is not at MMI for either his cervical problems, or his right shoulder problems, and that neither problem is separate from the other.

Medical Records Review by Ronald J. Swarsen, M.D. on behalf of the Claimant

16. Dr. Swarsen is of the opinion that DIME Dr. Stieg had performed the DIME in compliance with the requirements of the Division of Workers Compensation, and that the opinion of DIME Dr. Stieg was supported by substantial medical evidence in the medical record.

Average Weekly Wage and Temporary Disability

17. Based upon the Claimant's multiple employments with the Employer herein and Albertson's, the ALJ finds that his AWW is $917.51, which yields a TTD rate of $611.67 per week, or $87.38 per day.

18. Following his injury on June 9, 2013, the Claimant was not permitted to return to work at Albertsons, where his AWW was $484.15 (his temporary wage loss), because of the disability caused by his right shoulder injury. As a consequence, he was temporarily and partially disabled between June 10, 2013 and October 1, 2013, both dates inclusive, a total of 114 days. Aggregate past due TPD benefits for this period of time are $5,256.43.

19. Between October 2, 2013 and November 30, 2013, both dates inclusive, a total of 60 days, the Claimant was unable to work at either his job with the Employer herein or at Albertsons. During this time his AWW was $917.51 for his concurrent employment. His TTD benefit rate is $611.67, or $87.38. Aggregate past due TTD benefits for this period are $5,242.80.

20. Effective December 1, 2013, the Claimant became entitled to Social Security Disability benefits (SSDI) for which the Respondent is entitled to an offset of $236.08 per week, leaving net TTD benefits past due between December 1, 2013

and June 5, 2014,both dates inclusive, a total of 187 days, of $373.59 per week, or $53.37 per day. Aggregate net past due TTD benefits, including the SSDI offset, for this period equal $9,980.19.

21. On June 6, 2014, the Claimant lost health insurance coverage as confirmed by a COBRA letter (*see* Claimant's Exhibit 15, bate stamp 118). This loss resulted in an increased AWW of $220.85 per week, bringing the AWW up to $1,138.36, which yields a TTD benefit rate of $758.90 per week. After the SSDI offset, the net weekly TTD benefit rate equals $522.82 per week, or $74.69 per day. The period from June 6, 2014 through the hearing date, February 24, 2015, both dates inclusive, is 264 days. Aggregate net past due TTD benefits for this period equal $19, 717.78.

22. Grand total aggregate past due temporary disability benefits as of the February 24, 2015 hearing date equal $40, 197.20.

23. The Claimant has not yet been able to return to any work, he has not earned any wages, and he has not reached MMI. Therefore, he continues to be temporarily and totally disabled.

Ultimate Findings

24. The ALJ finds the opinions of Dr. Schwappach, Dr. Falci, Dr. Hatzidakis and Dr. Steig that the Claimant needs resolution of his cervical problems before right shoulder surgery should occur, as a medical prerequisite to the right shoulder surgery, credible and highly persuasive. The ALJ further finds the opinions of Dr. Rauzzino and Dr. Steinmetz unpersuasive, contrary to the weight of the evidence, and lacking in credibility.

25. Between conflicting medical opinions, the ALJ makes a rational choice, consistent with the substantial weight of the evidence, to accept the opinions of DIME Dr. Stieg, Dr. Schwappach, Dr. Falci and Dr. Hatzidakis, and to reject the opinions of Dr. Rauzzino and Dr. Steinmetz.

26. The Respondent has failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Stieg's opinion that the Claimant has not reached MMI is erroneous. Therefore, the Respondent has failed to overcome DIME Dr. Stieg's opinion by clear and convincing evidence.

27. The Claimant's AWW from multiple employments was $917.51 until he lost his health insurance benefits on June 6, 2014 whereupon the COBRA accretion became operative and his AWW increased to $1,138.36.

28. Between June 10, 2013 and October 1, 2013, both dates inclusive, a total of 114 days, the Claimant was temporarily and partially disabled with a temporary wage loss of $484.15 per week, thus, entitling him to TPD benefits of $322.76 per

week, or $46.11 per day. Aggregate past due TPD benefits for this period of time are $5,256.43.

29. Between October 2, 2013 and November 30, 2013, both dates inclusive, a total of 60 days, the Claimant was unable to work at either his job with the Employer herein or at Albertsons. During this time his AWW was $917.51 from his concurrent employments. He has proven entitlement toTTD benefits of $611.67 per week, or $87.38 per day in the aggregate amount of $5,242.80.

30. As found herein above, effective December 1, 2013, the Claimant became entitled to SSDI benefits for which the Respondent is entitled to an offset of $236.08 per week, leaving net TTD benefits of $373.59 per week, or $53.37 per day. As found herein above, aggregate past due net benefits between December 1, 2013 and June 5, 2014, both dates inclusive, a total of 187 days, for this period equal $9,980.19. The respondent sustained its burden by preponderant evidence on this issue.

31. As found herein above, on June 6, 2014, the Claimant lost health insurance coverage resulting in an increased AWW by $220.85 per week, bringing the AWW up to $1,138.36, which yields a TTD benefit rate of $758.90 per week. After the SSDI offset, the net weekly TTD benefit rate equals $522.82 per week, or $74.69 per day. Consequently, for the period from June 6, 2014 through the hearing date, February 24, 2015, both dates inclusive, a total of 264 days, aggregate net past due TTD benefits equal $19, 717.78.

32. Grand total aggregate past due temporary disability benefits as of the February 24, 2015 hearing date equal $40, 197.20.

33. As found herein above, the Claimant continues to be temporarily and totally disabled.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Schwappach, Dr. Falci, Dr. Hatzidakis and Dr. Steig that the Claimant needs resolution of his cervical problems before right shoulder surgery should occur, as a medical prerequisite to the right shoulder surgery, was credible and highly persuasive. As further found, the opinions of Dr. Rauzzino and Dr. Steinmetz were unpersuasive, contrary to the weight of the evidence, and lacking in credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, consistent with the substantial weight

of the evidence, to accept the opinions of DIME Dr. Stieg, Dr. Schwappach, Dr. Falci and Dr. Hatzidakis, and to reject the opinions of Dr. Rauzzino and Dr. Steinmetz.

Overcoming the DIME of Dr. Stieg

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, The Respondent has failed to demonstrate that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Stieg's opinion that the Claimant has not reached MMI is erroneous. Therefore, the Respondent has failed to overcome DIME Dr. Stieg's opinion by clear and convincing evidence.

Average Weekly Wage

d. Where an injured worker has arranged **multiple** employments to earn a living, and the injury precludes work altogether, a fair computation of the true AWW encompasses all employments. *St. Mary's Church & Mission v. Indus. Comm'n,* 735 P. 2d 902 (Colo. App. 1986); *Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988); *Broadmoor Hotel v. Indus. Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996), *cert. denied* July 14, 1997. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant's AWW from multiple employments was $917.51 until he lost his health insurance benefits on June 6, 2014.

Temporary Disability Benefits

e. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination from his Albertson's job was because of his work related disability, sustained while he was employed by the Employer herein. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id.*

f. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, between June 10, 2013 and October 1, 2013, both dates inclusive, a total of 114 days, the Claimant was temporarily and partially disabled with a temporary wage loss of $484.15 per week, thus, entitling him to TPD benefits of $322.76 per week, or $46.11 per day. Aggregate past due TPD benefits for this period of time are $5,256.43. Between October 2, 2013 and November 30, 2013, both dates inclusive, a total of 60 days, the Claimant was unable to work at either his job with the Employer herein or at Albertsons. During this time his AWW was $917.51 from his concurrent employments. As found, he is entitled to TTD benefits of $611.67 per week, or $87.38 per day, for this period of time. in the aggregate amount of $5,242.80.

Social Security Disability (SSDI) Offset and Net TTD Benefits

g. Section 8-42-103 (1) (c) (I), C.R.S., provides that an insurance carrier is entitled to an offset against indemnity benefits equal to one-half of the weekly SSDI benefit. In this case, the monthly SSDI award is $2,046, which equates to $472.15 per week, thus, establishing a weekly offset of $236.08 against indemnity benefits. As found, effective December 1, 2013, the Claimant became entitled to SSDI benefits for which the Respondent is entitled to an offset of $236.08 per week, leaving net TTD benefits of $373. 59 per week, or $53.37 per day. As further found , aggregate past due net benefits between December 1, 2013 and June 5, 2014,both dates inclusive, a total of 187 days, for this period equal $9,980.19. The amount of the offset is fixed as of the time of the award, and cost-of-living adjustments (COLAs) do not affect the offset amount. *Engelbrecht v. Hartford Acc. and Indem. Co.,* 680 P.2d 231 (Colo. 1984).

Temporary Disability Benefits With COBRA Accretion

h. An ALJ has the discretion to determine a claimant's AWW, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, when the Claimant lost his health insurance

benefits, the COBRA accretion became operative and his AWW increased to $1,138.36. As found, on June 6, 2014, the Claimant lost health insurance coverage resulting in an increased AWW by $220.85 per week, bringing the AWW up to $1,138.36, which yields a TTD benefit rate of $758.90 per week. After the SSDI offset, the net weekly TTD benefit rate equals $522.82 per week, or $74.69 per day. Consequently, for the period from June 6, 2014 through the hearing date, February 24, 2015, both dates inclusive, a total of 264 days, aggregate net (including the SSDI offset) past due TTD benefits equal $19, 717.78.

Grand Total Past Due and Prospective Temporary Disability Benefits

i. As found, grand total aggregate past due temporary disability benefits as of the February 24, 2015 hearing date equal $40, 197.20.

j. As further found, the Claimant continues to be temporarily and totally disabled and entitled to net TTD benefits of $522.82 per week.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits to indemnity and medical benefits prior to MMI having been reached. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v.*

M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven entitlement to the indemnity benefits as herein above specified. Also, as found, the Respondent has sustained its burden with respect to its entitlement to the SSDI offset.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent having failed to overcome the Division Independent Medical Examination of Richard L. Stage, M.D., the Claimant is not at maximum medical improvement, the Claimant is, therefore, not at maximum medical improvement.

B. The Respondent shall pay the Claimant aggregate grand total past due temporary disability benefits, as specified in detail herein above, of $40, 197.20, which is payable retroactively and forthwith.

C. From February 25, 2015 and continuing until termination is warranted by law, the Respondent shall pay the Claimant net Temporary total disability benefits (including the SSDI offset and the COBRA factor) of $522.82 per week.

D. The Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this 5 day of March 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant suffered a compensable injury/occupational disease of a C6-C7 disc herniation, arising out of her employment as an account executive, with an onset date in July 2013, a flare up of October 5, 2013 and a reporting date of October 15, 2013. If compensable, additional issues concern medical benefits (authorized, causally related and reasonably necessary) and degree of permanent partial disability (PPD). Temporary Disability was **not** an issue because the Claimant claimed no temporary disability benefits through the date of maximum medical improvement (MMI), April 9, 2014.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

STIPULATION

The parties stipulated that if the matter is compensable, the Claimant's average weekly wage (AWW) is $894.23.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant is a forty-six year old female who works as an underwriter. Her date of birth is April 24, 1968. She continues to works full-time for the Employer and has worked at the company for almost five years. Prior to October of 2013, the Employer moved locations from Littleton, Colorado to Greenwood Village, Colorado.

2. The Claimant's job consists of sitting for nearly the entirety of her eight hour shift, minus any breaks and lunch, with a great part of her day spent keyboarding on a computer.

3. After the company moved, her work station configuration changed and it was composed of a different desk and chair. The Claimant noticed at the end of July 2013 that she became very uncomfortable using the new desk. She tried four different desk chairs, but ultimately chose to use her chair from the office prior to the move.

4. Prior to the move, the Claimant did not have pain. The pain started in August of 2013 and severe pain started in October of 2013. The Claimant woke up on October 5, 2013 with a stiff neck and whole right sided arm pain. She worked through the end of the week and then went to Exempla Lutheran Southwest, an urgent care facility, on October 11, 2013. Exempla discharged the Claimant with pain medication and instructions to follow up with her primary care physician if she did not feel better within three to five days. The Claimant went to her primary care physician, Jill Quigley, M.D., on October 14, 2013.

The Injury/Occupational Disease

5. On October 15, 2013, the Claimant informed her work supervisor that she sustained an injury (occupational disease) and was planning on filing a worker's compensation claim. She wanted to discuss the possibility of changing the configuration of her work station. Her supervisor referred the Claimant to Arbor Occupational Medicine, and the Claimant came under the care of John Sanidas, M.D., who became her authorized treating physician (ATP).

6. On October 16, 2013, the Claimant saw Dr. Sanidas for a new patient evaluation. Dr. Sanidas gave the Claimant temporary work restrictions of stretching breaks for five to ten minutes every hour when she is sitting at her desk and working. He also referred her to physical therapy (PT) sessions, and continued her on pain killers [Claimant's Ex. 6]. The ALJ infers and finds that Dr. Sanidas is implicitly of the opinion that the Claimant's right C7 and cervical spine conditions are work-related.

7. On December 4, 2013, during a follow up visit with Dr. Sanidas, Dr. Sanidas requested an MRI (magnetic resonance imaging) of the cervical spine. The MRI showed that the Claimant had a C6 disc protrusion and symptoms of the right C7. Dr. Sanidas referred the Claimant to Barry A. Ogin, M.D., who is a board certified physician in Physical Medicine and Rehabilitation and Pain Medicine [Claimant's Ex. 6].

8. Dr. Ogin's impression of the Claimant was that she suffered a right C6-7 herniation; probable right C7 radiculopathy; parascapular myofascial pain; and possible lower cervical facet involvement. Dr. Ogin set the Claimant up with a C7-T1 intralaminar epidural steroid injection [Claimant's Ex. 6]. Based on the four corners of Dr. Ogin's reports, the ALJ infers and finds that Dr. Ogin is of the opinion that the Claimant's conditions, as he described them above, are work-related.

Respondents' Independent Medical Examiner (IME), F. Mark Paz, M.D.

9. On October 5, 2013, THE Respondents' IME, Dr. Paz, performed an IME to which he testified at the hearing. Dr. Paz concluded, based on the Claimant's medical history and evaluation that it was not medically probable that the cervical degenerative

disc disease and right extremity symptoms were causally related to Claimant's reported work exposure or related injury from October 5, 2013 [Respondents' Ex. J].

10. Dr. Paz's ultimate opinion was that the Claimant's injuries were not work related. He based his opinion on his interpretation of the Claimant's medical history and the possibility of her sleeping incorrectly on a pillow. He further was of the opinion that the desk would not exacerbate the Claimant's condition because there was no literature (of an unknown source) to support this finding (Dr. Paz did not mention any specific pieces of literature).

11. Dr. Paz, however, stated that he did not assess the Claimant's permanent disability. He did not take the steps needed to assess a Table 53 diagnosis because in his opinion there was no Table 53 diagnosis.

12. The ALJ finds that Dr. Paz's opinions, for the most part, were conclusory and without adequate explanation of their foundation other than general references to the "medical records" and the "literature." For this reason, the ALJ finds the opinions of the Claimant's ATP, Dr. Sanidas, and Dr. Ogin, the basis of which are clearly explained, to be more credible and persuasive than Dr. Paz's opinions.

Average Weekly Wage (AWW)

13. Based on the Stipulation herein above, which the ALJ accepts, the ALJ finds that the Claimant's AWW is $894.23, Also, which yields a temporary total disability (TTD) and Whole Person PPD benefit rate of $596.15 per week, for purposes of the Whole Person Formula, contained in§ 8-42-107 (8) (d) and (e), C.R.S.

Permanent Partial Disability (PPD)

14. On April 9, 2014, Dr. Sanidas prepared his discharge summary and impairment rating. The impairment rating was accomplished using the *AMA Guides to the Evaluation of Permanent Impairment*, 3rd Ed., Rev. Dr. Sanidas used Table 53, Under Specific Disorders, to conclude that it was appropriate to use II-C, and combined the values to conclude that the Claimant suffers from 12% impairment of the whole person [Claimant's Ex. 6], attributable to the cervical spine. Implicitly, Dr. Sanidas determined that the Claimant reached maximum medical improvement on April 9, 2014, at which time she was 45-years old. Using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S. (12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76. Consequently, aggregate PPD benefits of $37,199.76, at the rate of $596.15 per week from April 9, 2014 and continuing would be due and payable to the Claimant.

Ultimate Findings

15. As found herein above, the opinions of ATP Dr. Sanidas and Dr. Ogin are more credible and persuasive than the opinions of Respondents' IME, Dr. Paz because they are based on a more thorough familiarity with the Claimant's medical case.

16. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of ATP Dr. Sanidas and Dr. Ogin, and to reject the opinions of IME Dr. Paz.

17. The Claimant has proven, by a preponderance of the evidence that her injury/occupational disease, arose out of the course and scope of her employment for the Employer and the conditions of her employment, as opposed to non-work related factors. Therefore, the Claimant has proven a compensable injury/occupational disease.

18. The Claimant's AWW is $894.23.

19. There is no claim for temporary disability benefits through April 9, 2014.

20. The Claimant reached MMI on April 9, 2014, at which time she was 45-years old.

21. The Claimant has proven, by preponderant evidence that she sustained a compensable injury/occupational disease that resulted in PPD of 12% whole person. Using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S. [12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76]. Aggregate PPD benefits equal $37,199.76, payable at the rate of $596.15 per week from April 9, 2014 and continuing are due and payable to the Claimant.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684

(Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of ATP Dr. Sanidas and Dr. Ogin were more credible and persuasive than the opinions of Respondents' IME, Dr. Paz.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting

medical opinions, the ALJ made a rational choice to accept the opinions of ATP Dr. Sanidas and Dr. Ogin, and to reject the opinions of IME Dr. Paz.

Permanent Partial Disability

c. Section 8-42-107 (8), C.R.S., provides that the rating of the ATP is controlling on the degree of PPD unless it is established by other medical evidence to be improbable, or unless it is overcome by a Division Independent Medical Examination (DIME). In this case, the opinions of Dr. Paz, Respondents' IME, did not detract from Dr. Sanidas' rating. Consequently, Dr. Sanidas" rating, which established the Claimant's PPD at 12% whole person, by preponderant evidence, is the degree of her PPD. Also, there was no DIME challenge to Dr. Sanidas' opinion. As found, using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S.[12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76]. Consequently, aggregate PPD benefits of $37,199.76, at the rate of $596.15 per week from April 9, 2014 and continuing would be due and payable to the Claimant.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to compensability at PPD of 12% whole person.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's average weekly wage is $894.23, which yields a whole person permanent partial disability benefit rate of $596.15 per week.

B. Temporary disability benefits through the date of maximum medical improvement, April 9, 2014, are hereby denied and dismissed.

C. The Respondents shall pay the Claimant aggregate permanent partial disability benefits, based on 12% whole person permanent partial disability. Using the formula prescribed by § 8-42-107 (8) (d) and (e), C.R.S.[12% X 1.30 (age factor for 45-year old) X 400 weeks X $596.15=$37, 199.76], aggregate permanent partial disability benefits are $37,199.76, payable at the rate of $596.15 per week from April 9, 2014 and continuing until paid in full.

DATED this 9 day of March 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant to be filed, electronically, giving the Respondents 2 working days within which to file objections. The proposed decision was filed, electronically, on March 24, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable injury to his right knee on July 20, 2014; if so, whether the Claimant is entitled to medical benefits; average weekly wage (AWW); and, temporary total disability (TTD) benefits from January 24, 2015 and continuing.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues. The Respondents raised the issue of 'idiopathic" injury. Once, it is established that the injury occurred within the course and scope of employment, under *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** (Colo. 2014), the burden should shift to the Respondents to prove the "idiopathic injury," or that the injury did not arise out of the conditions of employment. Nonetheless, the ALJ assigns the burden of proof to the Claimant, by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Compensability

1. On July 20, 2014, the Claimant was working as a warehouse order selector for the Employer when he sustained an injury to his right knee while in the process of stepping down from his pallet jack. According to the Claimant, at the time that the incident occurred he was moving at a rapid pace to meet production goals. The Claimant's head was turned to the right as he was stepping down. He felt a snapping, crackling and popping sound in his right knee as he extended it and his right foot hit the floor.

2. The Claimant immediately fell to the ground with right knee pain and he was unable to continue his shift. His Employer eventually sent the Claimant o the doctors at Concentra, which referred the Claimant for an MRI (magnetic resonance imaging) at Heath Images.

3. The Claimant's injury happened around 11:00 PM. By that time, he had pulled between 8 or 9 other orders weighing approximately 2,500 lbs. each.

4. The Claimant was in a position to suffer his right knee injury due to the nature of the work he was required to perform for the Employer as an order selector. Why his right knee went out when he was in the process of descending his pallet jack may only be explainable by his action of stepping down from his pallet jack, which caused the aggravation and acceleration of his dormant right knee arthritis. Regardless, his injury arose out of and in the scope of employment because there is no persuasive evidence that "it would not have occurred but for the fact that the conditions and obligation placed [the] Claimant in the position where he [or she] was injured. Indeed, there is no persuasive evidence here that the Claimant's right knee injury was unrelated to his employment, such as would be the case should there have been a fainting spell, heart disease, or epilepsy. Rather, it arose while he was engaged in a work related activity of moving to load potatoes onto his pallet jack and stepping down from his pallet jack.

5. The nature of the physical activities the Claimant was required to perform stem from a neutral risk and do not amount to an "idiopathic" or "syncopal" event. The Claimant's injury arose out of employment, *i.e.*, it would not have occurred but for the fact that the work he was performing as part of his contract of hire placed him in a position to be injured.

Medical

6. The records from Concentra, completed by Keith Meier during the Claimant's first visit, state that the Claimant had a work related injury within a greater than 50% medical probability (Respondents' Exhibit E, bates stamp 18).

7. The Claimant's MRI of August 11, 2014, showed a large bucket-handle tear of his medial meniscus, as well as an ACL tear (Claimant's Exhibit 4, bates stamp 49).

8. After the MRI, the Claimant was referred to Mark S. Failinger, M.D., who issued a report on August 28, 2014. He described the Claimant's injury history as follows:

> HISTORY OF PRESENT ILLNESS: The patient comes in for evaluation of his right knee. He is accompanied by his mother. He is 33 years old. He injured his right knee as an order selector when he stepped off a pallet. It torqued the leg. It went off to the side. He did feel somewhat of a pop and pain, and he could not straighten his knee. It was on July 28, 2014. He went home and reported this. It was until

> about a week later that he was referred to Concentra, and he had some therapy twice a week. He could not extend his knee at times. In the morning, he cannot straighten his knee. He has to torque it around. On some days it will freeze itself, it would pop, and then suddenly he has a good motion and he can walk on it. Otherwise, he can walk on it. There is no fever, chills, warmth, or redness. No history of injury prior to this. No previous history of any problems.

(Claimant's Exhibit 5, bates stamp 58)

9. Dr. Failinger eventually recommended surgery. The surgery has not yet been performed (*Id.,* BS 56), although the Claimant expressed a willingness to undergo the recommended surgery.

10. While being treated, the Claimant continued working modified duty until January 23, 2014, when his temporary alternate duty ("TAD") was terminated by the Employer (Claimant's Exhibit 7, bates stamp 67). The Claimant has not worked since that date nor has he earned any wages; also, he continues to suffer right knee limitations impacting his ability to work. No authorized treating physician (ATP) has released the Claimant to return to work without restrictions nor has an ATP declared the Claimant to be at maximum medical improvement (MMI).

Average Weekly Wage (AWW)

11. The Claimant's AWW, including night and Sunday premiums, totals $710.00 per week, which yields a TTD benefit rate of $473.33 per week, or $67.62 per day.

Previous Right Knee History

12. According to the Claimant, while he was playing basketball in high school (approximately 15 years ago) he suffered a right knee injury which required arthroscopic intervention. This consisted of cleaning the meniscal area. According to the Claimant's undisputed testimony, there was no ACL involvement.

13. Following his high school arthroscopy, the Claimant was released without permanent restrictions. He was working full duty without restrictions at the time of the present injury on July 20, 2014. In fact, the Claimant's production rate was 39% higher

than the expected amount and he was functioning without any restrictions throughout his work as an order selector.

14. When the Claimant saw Dr. Failinger, the Claimant denied having undergone a prior surgery. At hearing, he readily and straight-forwardly acknowledged that he had made a mistake in this regard. He did not know the importance of this question and considered it in the context of how well he was functioning as of the date of his injury. The ALJ finds that this omission on his part was not an attempt to deliberately conceal this fact. Moreover, the ALJ finds that it is attributable to inadvertence. This is supported by the fact that the Claimant informed the supervisor to whom he reported the injury that he had a prior right knee arthroscopic procedure.

Respondents' Independent Medical Examiner (IME), Timothy O"Brien, M.D.

15. The Respondents presented expert testimony from Dr. O'Brien, an orthopedist. Dr. O'Brien agreed that the surgery recommended by Dr. Failinger was reasonably necessary, but he was of the opinion that it was not causally related to the present injury. The ALJ finds that Dr. O'Brien speculated that the Claimant would have needed surgery at some undetermined time in the future even if he not had the present injury. In Dr. O'Brien's view, the event of July 20, 2014merely accelerated the need for surgery. Indeed, the ALJ finds that Dr. O'Brien's opinion in this regard supports the "acceleration' prong of the "aggravates and accelerates" test for a compensable aggravation of a pre-existing condition, which significantly compromises the credibility of Dr. O'Brien's overall causality opinion. Dr. O'Brien explained that "accelerates" factors into his overall opinion of determining that the Claimant's work related incident was **not** work-related. The ALJ infers and finds that Dr. O'Brien's opinion that the incident "only" accelerated the Claimant's pre-existing right knee condition reveals a defective grasp of the law and, therefore, undermines the credibility of Dr. O"Brien's overall opinion. Dr. O'Brien's opinion was based, in part, on the Claimant's pre-existing condition which Dr. O'Brien admitted was asymptomatic and had not required restrictions.

Ultimate Findings

16. The ALJ finds the medical record, the Claimant's lay testimony and the implied opinions of the ATPs and Dr. Failinger more credible and persuasive than the IME opinion of Dr. O'Brien. Further, for the reasons detailed herein above, the ALJ finds Dr. O"Brien's causality opinion lacking in credibility.

17. The ALJ makes a rational choice, between conflicting opinions, to accept the medical record, the Claimant's lay testimony, and the implied opinions of the Claimant's ATPs; and, to reject the IME opinion of Dr. O'Brien.

18. Based on the totality of the evidence, including the testimony of the Claimant, the ALJ rejects the opinion of Dr. O'Brien on causation and finds that the Claimant has proven, by a preponderance of the evidence that the injury of July 20, 2014, aggravated, accelerated and/or made worse any predisposing right knee condition; triggered the need for surgery; and, caused temporary disability from January 24, 2015 and continuing, this, the Claimant has proven a compensable right knee injury which occurred on July 20, 2014.

19. The Claimant has initially proven, by preponderant evidence that his right knee injury of July 20, 2014, occurred during the course and scope of his employment for the Employer, *i.e.,* it occurred during the Claimant's normal working hours, on the Employer's premises, while the Claimant was performing his job duties.

20. Further, once the "course and scope of employment" has been established, the Claimant has proven, by preponderant evidence that his injury "arose out of his employment, *i.e.,* it was causally connected to the performance of his job duties and it was not an "imported condition" such as a propensity to faint or fall.

21. The Claimant has proven, by preponderant evidence that his Employer referred him to Concentra for medical care, which in turn referred the Claimant for an MRI and to Dr. Failinger, and all of this treatment was authorized and within the authorized chain of referrals. Also, all of the medical treatment for the Claimant's right knee injury has been causally related to the compensable injury of July 20, 2014 and reasonably necessary to cure and relieve the effects of that injury.

22. The Claimant's AWW, including night and Sunday premiums, totals $710.00 per week, which yields a TTD benefit rate of $473.33 per week, or $67.62 per day.

23. The Claimant has proven, by a preponderance of the evidence that he has been temporarily and totally disabled since January 24, 2015 and continuing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines

the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the medical record, the Claimant's lay testimony, and the implied opinions of the ATPs and Dr. Failinger were more credible and persuasive than the IME opinion of Dr. O'Brien [for consideration of lay testimony as a factor, *see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997)]. As further found, Dr. O'Brien's lack of causality opinion was defective and not credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals*

Office, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, The ALJ made a rational choice, between conflicting opinions, to accept the medical record, the Claimant's lay testimony, and the implied opinions of the Claimant's ATPs; and, to reject the IME opinion of Dr. O'Brien.

Compensable Aggravation and Acceleration of Pre-Existing Condition

c. "Course and scope of employment" concerns the time, place and circumstances of a claimant's injury. *Wild West Radio, Inc. v. Indus. Claim Appeals Office,* 905 P.2d 6 (Colo. App. 1995). As found, has proven by preponderant evidence that his right knee injury occurred during his normal working hours, on the Employer's premises, while the Claimant was performing his job duties.

d. "Arising out of employment" deals with the causal connection between the employment and the injury. *General Cable Co. v. Indus. Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1995). As found, once the "course and scope of employment" has been established, the Claimant has proven, by preponderant evidence that his injury "arose out of his employment," *i.e.,* it was causally connected to the performance of his job duties and it was not an "imported condition" such as a propensity to faint or fall. *Also see City of Brighton v. Rodriguez, supra.*

e. If an industrial injury aggravates or accelerates a pre-existing condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory, supra. Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). Indeed, if an injury occurs at work, it is effectively presumed that the injury is work-related unless it is shown that it is attributable to non work-related hazards. *City of Brighton v. Rodriguez, supra.* As found, the Claimant established that there is no cause of his injury other than the work

related fall described in his medical histories and in his testimony; and, as found, the incident of July 20, 2014 aggravated and accelerated the Claimant's underlying arthritis to the point that he required significant medical care and he experienced disability from work.

f. The *City of Brighton* Court identified risks causing an injury as falling into various categories, one of which is a neutral risk. In addressing the neutral risks the Court concluded that an injury which is unexplained necessarily constitutes a neutral risk arising out of employment because it "would **not** (emphasis supplied) have occurred but for employment". *Id .i.e.,* the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of the injury. In the present case, the Claimant was performing order selections while his right knee was injured. As noted by the Court in *City of Brighton,* "some form of the "but-for" test appear to be the approach taken by the majority of states that have addressed unexplained falls." *Id.* 16, The Court relied on *Larson*, 7.04 [1] [a] at 7-24 in examining the extent to which courts are willing to accept this general but-for theory and noted that most courts confronted with the unexplained-fall problem have seen fit to award compensation. The Court went on to explain that it was more persuaded by this approach than the other possible alternatives. In so doing, the Court rejected requiring an employee to rule out idiopathic cause for his injury absent a known idiopathic event such as a stroke or seizure. *Id.*

g. As further found, the Claimant was in a position to suffer his right knee injury due to the nature of the work he was required to perform for the Employer as an order selector. Why his right knee went out when he was in the process of descending his pallet jack may only be explained by his act of stepping down from his pallet jack. Regardless, his injury arose out of and in the scope of employment because there is no evidence that "it would not have occurred but for the fact that the conditions and obligation placed [the] Claimant in the position where he [or she] was injured." *Id. Also see City of Brighton v. Karanian,* 32 P.3d 470, 477 (Colo. 2001). As found, there is no persuasive evidence to outweigh the proposition that the Claimant's right knee injury was causally related to his employment, such as would be the case should there have been a fainting spell, heart disease, or epilepsy. Rather, it arose while he was engaged in the work related activity of moving to load potatoes onto his pallet jack. As further found, the nature of the physical activities the Claimant was required to perform stem from a neutral risk and are not "idiopathic." The Claimant's injury arose out of employment, *i.e.,* it would not have occurred but for the fact that the work he was performing as part of his contract of hire placed him in a position to be injured.

Medical Benefits

h. Because this matter is compensable, the Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of his industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An employer's right of first selection of a medical provider

is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer referred the Claimant to Concentra and he came under the care and treatment of medical providers at Concentra. Therefore, Concentra is an authorized medical provider.

i. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997 As found, the referral for an MRI and the referral to Dr. Failinger were within the authorized chain of referrals and, therefore, authorized.

j. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable, aggravating injury of July 20, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment for the right knee injury was and is reasonably necessary to cure and relieve the effects of that injury.

Average Weekly Wage (AWW)

k. . An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant lost wages from the Employer equal $710 per week, which establishes the Claimant's AWW.

Temporary Total Disability

l. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103 (1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Indeed, there is no

statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish physical disability. See *Lymburn v. Symbois Logic*, *supra*. Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant has been temporarily and totally disabled since January 24, 2015 and continuing. Based on the AWW of $710.00, a TTD benefit rate of $473.33 per week, or $67.62 per day results.

m. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is no longer made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant has been temporarily and totally disabled since January 24, 2015 and continuing.

Burden of Proof

n. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues, including lack of an "idiopathic" cause of his injury. To be clear, the Respondents had **no** burden to sustain.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all authorized, causally related and reasonably necessary medical benefits related to the Claimant's right knee injury of July 20, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents shall pay the Claimant temporary total disability benefits from January 24, 2015 through March 17, 2015, both dates inclusive, a total of 53 days, at the rate of $473.33 per week, or $67.62 per day, in the aggregate amount of $3,583.86, which is payable retroactively and forthwith.

C. From January 25, 2015 and continuing until cessation of temporary disability benefits is warranted by law, the Respondents shall pay the Claimant $473.33 per week in temporary total disability benefits.

D. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this 30 day of March 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the proposed surgery recommended by Dr. Pevny is reasonable, necessary and related to her admitted February 12, 2013 work injury?

FINDINGS OF FACT

1. Claimant was employed as a certified nursing assistance ("CNA") for employer. Claimant testified that on February 12, 2013 she was walking down the hall when she heard a patient yell for help. Claimant went into the patient's room and noticed the patient by the bed, trying to get into the bed. Claimant testified she put her right knee under the patient's bottom and lifted the patient up and twisted her knee when her foot got caught between a pole and the bed. Claimant testified she felt pain in her knee and her knee began to feel hot.

2. Claimant reported her injury to employer and put ice on her knee and elevated her knee for approximately 30 minutes. Claimant testified her knee did not get better and she returned to employer and filled out the necessary paperwork to make a claim for workers' compensation benefits. Claimant's claim was accepted as compensable.

3. Claimant was initially treated by Dr. Gary Knaus on February 12, 2013. Dr. Gary Knaus noted clamant reported she injured her knee when she was transferring a patient and caught her right foot in between the pole next to the bed and fell backwards with a twisting motion on a fixed foot. Dr. Gary Knaus noted a bit of a click on full extension of the knee. Claimant testified at hearing that Dr. Gary Knaus referred her for physical therapy.

4. Claimant returned to Dr. Gary Knaus on February 19, 2013 and noted that she had been off of work for five days and felt like her knee returned to near normal, but after being on her feet the previous day, she experienced some swelling and discomfort with some clicking. Claimant returned to Dr. Gary Knaus on March 5, 2013 and reported her knee would get a bit sore toward the end of the day, but was not swelling at this point. Dr. Gary Knaus noted that claimant continued to report a bit of a click anteriorly with flexion, but it was something she could live with. Dr. Gary Knaus opined that claimant could have a meniscal tear and that it could become more symptomatic as she goes forward. Dr. Gary Knaus noted, however, that claimant was at maximum

medical improvement ("MMI"), but if her knee worsened, she may need a magnetic resonance image ("MRI") in the future.

5. Claimant subsequently returned to Dr. Chad Knaus on June 25, 2013. Dr. Chad Knaus noted claimant's ongoing complaints and recommended claimant undergo an MRI of her knee. The MRI was performed on June 25, 2013 and demonstrated a partial tear of the distal anterior cruciate ligament, a small contusion of the posterior medial tibial plateau, a probably old tear of the proximal lateral collateral ligament, and mild degeneration of articular cartilage of the medial patellar facet. Claimant was referred to Dr. Adams for a surgical consultation.

6. Dr. Adams evaluated claimant on July 3, 2013. Dr. Adams noted that claimant had undergone an MRI of the knee and continued to complain of popping, clicking and grinding. Dr. Adams diagnosed claimant with chondromalacia versus chondral defects of the patella with effusion and pain and discussed conservative options versus arthroscopic evaluation and treatment. Claimant elected conservative treatment in the form of physical therapy and avoiding squatting.

7. Claimant returned to Dr. Adams on September 30, 2013. Dr. Adams noted she had undergone a course of physical therapy that had helped strengthen the knee, but she still had pain and problems. Dr. Adams diagnosed claimant with chondromalacia patella with some patellofemoral maltracking. Based on claimant having failed conservative management, Dr. Adams recommended a right knee arthroscopy.

8. Dr. Adams performed the surgery on October 17, 2013. Dr. Adams noted in the operative report a preoperative diagnosis of chondromalacia of the patella with maltracking. Dr. Adams performed a right knee arthroscopy, chondroplasty of patella and partial lateral menisectomy, with a resection of a notch mass and synovial biopsy. Dr. Adams did not provide a postoperative diagnosis of patella maltracking. The operative report notes that there was a little bit of mild lateral tracking of the patella, but it was not felt that a lateral release was indicated because the changes were more diffuse about the patella.

9. Claimant was examined by Dr. Chad Knaus on October 22, 2013. Dr. Chad Knaus noted claimant had occasional catching of her knee with full extension, but was otherwise doing great. Dr. Chad Knaus provided claimant with work restrictions allowing for light clerical work.

10. Following the surgery, claimant followed up with Dr. Adams on October 23, 2013. Dr. Adams noted that he had performed a synovial biopsy to determine if claimant had rheumatoid arthritis and the pathologist noted that claimant could have

rheumatoid arthritis or it could be regular degenerative arthritis. Dr. Adams recommended therapy and instructed claimant to follow up in 4 to 5 weeks.

11. Claimant was seen again by Dr. Adams on October 29, 2013 after claimant had a big flare up of her knee with swelling. Dr. Adams recommended claimant be set up for an arthritis panel and prescribed Celebrex. Following the arthritis panel, Dr. Adams noted that claimant's rheumatoid factor was negative, but her ANA was positive with a titer of 1:160 and claimant was referred to a rheumatologist.

12. Claimant returned to Dr. Chad Knaus on November 22, 2013 and reported continued issued with her knee cap. Dr. Chad Knaus noted that claimant felt like the tracking of her patella was "off" with occasional popping and crepitus.

13. By December 18, 2013, claimant was continuing to complain of issues with her knee, but Dr. Adams had indicated that her knee looked great with a trace amount of crepitance with range of motion. Dr. Adams noted that claimant could have her workers' comp claim closed and instructed claimant to return on an as needed basis. Dr. Adams released claimant to return to work without restrictions.

14. Claimant returned to Dr. Chad Knaus on December 24, 2013 and reported she was at physical therapy when she had some significant effusion in her right knee after doing some squatting. Dr. Chad Knaus noted claimant had a problem with her patella tracking. Dr. Chad Knaus recommended a follow up MRI and continued claimant on light duty restrictions.

15. Claimant underwent the MRI on December 30, 2013. The MRI showed a small joint effusion and a Baker's cyst, but no meniscal tear, and no high-grade chondral defect.

16. Claimant returned to Dr. Adams on January 7, 2014. Dr. Adams reviewed the MRI scan and noted that the MRI showed evidence of effusion of the knee with a popliteal cyst. Dr. Adams noted he didn't see anything major structurally that would cause the recurrent effusions.

17. Claimant was subsequently referred to Dr. Pevny by Dr. Chad Knaus for a second opinion. Dr. Pevny evaluated claimant on January 21, 2014. Dr. Pevny examined claimant's knee and noted the mild diffusion. Dr. Pevny opined that claimant's pain was from her patellofemoral and noted that claimant had some maltracking and chondral issues at the time of her surgery. Dr. Pevny recommended injections for claimant's knee.

18. Claimant returned to Dr. Pevny on March 4, 2014. Dr. Pevny noted that claimant was complaining of pain over the anterior portion of her knee as well as just

lateral to her patella. Dr. Pevny recommended visco supplementation injections. The first injection took place on March 25, 2014 and her second injection took place on April 1, 2014 with her third injection on April 8, 2014. Claimant did not improve significantly with the injections and Dr. Pevny recommended surgery when claimant returned on May 13, 2014. The surgery was scheduled for May 22, 2014.

19. Claimant returned to Dr. Pevny for the preoperative evaluation on May 16, 2014. Dr. Pevny noted claimant had an arthroscopic chondroplasty of patella, partial lateral meniscectomy and resection with small mass from the notch in October 2013. Dr. Pevny noted that postoperatively, claimant had a recurrent effusion and the repeat MRI did not show any significant structure abnormality. Dr. Pevny noted that his plan was to undergo a right knee diagnostic scope and chondroplasty of the patella with possible medial meniscectomy and lateral release.

20. Respondents obtained a records review independent medical examination ("IME") with Dr. Ciccone on May 20, 2014. Dr. Ciccone noted claimant's history of treatment for her right knee condition and opined that the proposed second knee arthroscopy should be denied as claimant had undergone appropriate treatment for the knee injury by Dr. Adams and had suffered no further work related injury to her knee as evidenced by the second MRI that was read as negative for meniscus or cartilage injury. Dr. Ciccone opined that claimant's persistent patellofemoral pain was not related to her work injury and opined that claimant's maltracking was secondary to her elevated Q angle, what was anatomic and unrelated to any industrial knee injury.

21. The surgery was denied by respondents and therefore was cancelled.

22. Dr. Pevny issued a report dated July 3, 2014 noting that because of claimant's persistent pain and swelling with activity, Dr. Pevny felt a diagnostic scope and checking of the patella tracking with a possible lateral release, chondroplasty would be an appropriate procedure.

23. Dr. Ciccone issued a supplemental report dated July 18, 2014 after reviewing Dr. Pevny's July 3, 2014 report. Dr. Ciccone opined that claimant's further pain and symptoms following her initial surgery were related to mechanical malalignment and possible early degenerative changes within the knee and were not work related.

24. Dr. Pevny issued a report dated January 21, 2015 after reviewing Dr. Ciccone's reports and noted that he had since been able to review claimant's medical records involving an injury to her left knee dating back to 1998. Dr. Pevny opined in this report, after reviewing additional reports that claimant's current pain in her right knee was related to the patellofemoral joint. Dr. Pevny noted that even thought he believed claimant would require surgery after not responding to non-operative treatment, it was

very difficult for him to confirm that this was a work related injury. Dr. Pevny ultimately opined that he concurred with Dr. Ciccone that claimant's current symptoms were not work related.

25. Dr. Ciccone testified by deposition in this case. Dr. Ciccone's testimony was consistent with his medical reports. Dr. Ciccone noted that claimant's symptoms developed after her work related injury, but noted that claimant's underlying condition was degenerative in nature and not related to the work injury.

26. Dr. Chad Knaus testified liver at hearing. Dr. Chad Knaus testified it was his opinion that claimant's ongoing knee complaints were related to her work injury. Dr. Chad Knaus testified that he saw no evidence of claimant complaining of problems with her right knee prior to her work injury and noted that claimant had consistent complaints of pain in her right knee following the work injury.

27. Claimant testified at hearing that her problems with her right knee developed following her work injury. Claimant testified she did not have issues with her right knee prior to her work injury. Claimant testified she noticed that tracking issues when she got out of bed following her surgery with Dr. Adams. Claimant denied having any problems with tracking prior to her surgery.

28. As claimant noted at hearing, there is a strong temporal relationship between the onset of her symptoms and her work injury and subsequent surgery (although Dr. Adams first noted that patellofemoral tracking problems on September 30, 2013). However, the "what came before must have caused what came after" theory of proof has a name: post hoc fallacy or post hoc ergo propter hoc (after this, therefore because of it). This error of reasoning, sometimes referred to as false cause or coincidental correlation is widely discredited because it wrongly assumes that a temporal relation transfers into a causal relation.

29. In this case, the surgeon recommending the operative procedure has indicated that he cannot state that claimant's condition is related to her work injury. Therefore, the ALJ concludes that claimant has failed to establish that it is more likely true than not that the proposed surgery to her knee is related to her admitted work injury. The ALJ relies on the opinions expressed by Dr. Ciccone and Dr. Pevny in coming to this conclusion.

30. Because claimant has failed to establish the proposed surgery is related to her work injury, her claim for medical benefits is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has failed to establish by a preponderance of the evidence that the surgical procedure proposed by Dr. Pevny is related to her work injury. As found, the ALJ relies on the opinions expressed by Dr. Pevny and Dr. Ciccone in coming to this conclusion.

ORDER

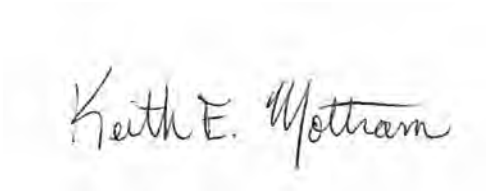
It is therefore ordered that:

1. Claimant's claim for benefits in the form of authorization for the surgery proposed by Dr. Pevny is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 4, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Corenman is reasonable and necessary to cure and relieve the claimant from the effects of his admitted Janaury 13, 2014 industrial injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his low back on January 13, 2014 while in the course and scope of his employment with employer. Claimant testified he was injured when he was lifting a 200 pound lid because it was blocking the way of a fork lift. Claimant testified he felt sharp pain in his back after pulling on the lid to move it.

2. Claimant reported the injury to Mr. Riggins with his employer on the day of the injury. Claimant went home that evening and took over the counter medications. Claimant returned to work the next day and sat at his desk. Claimant testified that by approximately 11:00 a.m., he noticed his left leg was going numb and requested to go to a physician. Claimant was referred to Colorado Mountain Medical on January 14, 2014 and was seen by Ms. Nykreim, a physician's assistant. Claimant provided a consistent accident history of injuring his back while lifting a heavy object at work. Claimant was referred for physical therapy.

3. Claimant returned to Colorado Mountain Medical on January 17, 2014 and was evaluated by Dr. Dent. Dr. Dent recommended continuing physical therapy.

4. Claimant subsequently underwent a magnetic resonance image ("MRI") scan of the lumbar spine on January 28, 2014. The MRI revealed diffuse lumbar degenerative disc disease with a small diffuse superimposed caudal disc extrusion at the L5-S1 level. The MRI further showed diffuse neural foraminal stenosis which was moderate to severe bilaterally at L5-S1 with contact of bilateral exiting L5 nerve roots.

5. Claimant returned to Dr. Dent on January 30, 2014. Dr. Dent reviewed the MRI and noted that the degenerative changes shown on the MRI were not directly related to the recent injury at work. Dr. Dent also opined, however, that the disc extrusion noted on the scan was likely to be an acute finding. Dr. Dent referred claimant to Dr. Raub for consideration of lumbar corticosteroid injections.

6. Dr. Raub recommended physical therapy and performed L5-S1 transforaminal injections on March 14, 2014 and May 12, 2014.

7. Dr. Raub referred claimant to Dr. Treihaft on April 17, 2014 for neurological consultation. Dr. Treihaft noted claimant had developed numbness and tingling in both legs on March 6, 2014, which was new. Dr. Treihaft diagnosed claimant with lumbar spondylosis at the L4-5 and L5-S1 level with bilateral foraminal narrowing and possible L5 nerve root impingement. Dr. Treihaft recommended awaiting claimant's spine surgery consultation with Dr. Corenman.

8. Dr. Corenman had previously treated claimant for problems with his cervical spine that resulted in a cervical fusion surgery. Claimant was under the care of Dr. Corenman for his cervical spine at the time of his January 13, 2014 lumbar spine injury.

9. Dr. Corenman initially evaluated claimant for his lumbar spine injury on May 22, 2014. Dr. Corenman noted that claimant reported his low back complaints were 60% of his symptoms while the numbness and paresthesias represented 40% of his symptoms. Dr. Corenman performed a physical evaluation and offered claimant further treatment in the form of a lumbar fusion surgery. Dr. Corenman noted that with 40% of his symptoms being related to the numbness and paresthesias in his legs, this did not follow the typical symptomotolgy for foraminal stenosis and opined that his symptoms may not necessarily resolve with surgery. Nonetheless, Dr. Corenman indicated that claimant had a 70-80% chance of a reduction of symptoms from the surgery.

10. Dr. Corenman subsequently also recommended claimant undergo a rhizotomy at the L4-5 and L5-S1 level.

11. While the surgery recommendation was pending, Dr. Corenman performed a surgery on claimant's cervical spine involving removal of the plate at the C5-C7 level and revision of the C6-C7 fusion in July 2014.

12. Respondents arranged for claimant to undergo an independent medical examination ("IME") with Dr. Fall on August 13, 2014. Dr. Fall reviewed claimant's medical records, obtained a history and performed a physical examination in connection with her IME. Dr. Fall noted that Dr. Corenman had documented that claimant had a history of an unhealthy relationship with alcohol. Dr. Fall diagnosed claimant with lumbar degenerative disc disease and facet arthropathy without objective findings of acute radiculopathy. Dr. Fall opined that claimant's low back and left leg paresthesias was related to his work injury, but noted that the proposed fusion and L4-5 and L5-S1 rhizotomy were not reasonable or necessary medical treatment related to claimant's January 13, 2014 work injury.

13. Dr. Fall testified by deposition in this matter consistent with her report. Dr. Fall testified that claimant's mechanism of injury did not support a finding that the facet joints were injured during the work incident because the injury did not involve hyperextension of the low back. Dr. Fall opined that the L4-5 and L5-S1 rhizotomies were not reasonable and necessary medical treatment related to the January 13, 2014

injury. Dr. Fall opined that the lumbar fusion at L5-S1 could increase claimant's symptomotology and may not address claimant's lower extremity symptoms. Dr. Fall opined that claimant had unreasonable expectations regarding the prospects of surgery and recommended against the proposed surgical procedure.

14. Claimant testified at hearing that he wishes to proceed with the surgical recommendations expressed by Dr. Corenman. Claimant noted that Dr. Corenman had indicated to him that the surgery may or may not relieve his symptoms.

15. The ALJ credits the testimony of claimant at hearing and the medical records from Dr. Corenman, Dr. Dent and Dr. Raub and finds that claimant has demonstrated that it is more probable than not that the proposed medical treatment recommended by Dr. Corenman is reasonable and necessary and related to claimant's January 13, 2014 work injury.

16. The ALJ notes that claimant's low back condition was asymptomatic prior to the January 13, 2014 work injury and finds that the lifting of the 200 pound lid aggravated or accelerated claimant's pre-existing condition resulting in the need for medical treatment. The ALJ further finds that claimant has demonstrated that it is more likely than not that the proposed medical treatment, including the facet rhizotomies and lumbar fusion are reasonable and necessary medical treatment related to the January 13, 2014 work injury.

17. Based on the testimony of claimant at hearing, and the medical reports and records from Dr. Corenman, Dr. Dent and Dr. Raub, the ALJ determines that claimant has proven that it is more likely true than not that the treatment recommended by Dr. Corenman, including the rhizotomies and surgery, represent reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury.

18. The ALJ notes that Dr. Corenman may not ultimately decide to perform both the rhizotomies and the surgery. It is the ALJ's reading of the records that Dr. Corenman's initial recommendation was for claimant to undergo surgery, and the rhizotomies were recommended as an alternative treatment after the surgery was denied by respondents. Noentheless, insofar as Dr. Corenman is recommending additional medical treatment including either rhizotomies, surgery or both, Claimant has established that it is more likely true than not the such treatment is reasonable, necessary and related to his work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S,

2008. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Once a compensable injury has been established, respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the medical treatment in this case recommended by Dr. Corenman was the result of a compensable accident that aggravated, accelerated or combined with a pre-existing disease or infirmity to produce the need for treatment. As found, the proposed surgery and rhizotomies are reasonably necessary to cure and relieve claimant from the effects of the work injury.

ORDER

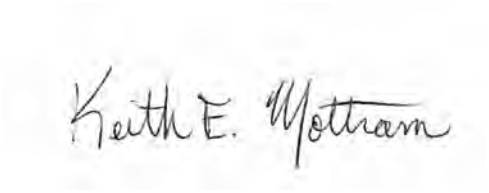
It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment recommended by Dr. Corenman, including the proposed lumbar surgery and rhizotomies pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 23, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment?

II. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability (TTD) benefits?

III. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of medical benefits for her treatment with Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, Penrose-St. Francis emergency room and Southwest Diagnostic Centers?

FINDINGS OF FACT

Based on the evidence presented and the parties' post-hearing pleadings, the ALJ enters the following findings of fact:

1. Claimant worked for Employer as a cashier for approximately six (6) months prior to the date of injury. Although she was originally hired part time, Claimant's hours increased to the point that she was working full time on the date of injury.

2. Claimant testified that customers would normally approach her checkout counter from the left side where she would scan items being purchased. She would have to twist to her right to access the cash register and complete transactions. On average, Claimant would check out approximately 200 people per shift. She would perform the aforementioned twisting motion for every transaction, whether it was cash or a credit transaction.

3. While checking out a customer on June 21, 2014, Claimant scanned a customer's merchandise, turned to the right, and felt an immediate stabbing pain in her lower back. She explained that it felt like she had been "cut in half" by a sharp burning pain similar to if someone stabbed her in the low back. Claimant immediately felt numbness going down the outside of her left thigh. This numbness has persisted through the present time.

4. At the time the incident occurred, Claimant testified it felt like her back

"went out" and that she blurted out "Oh My God" when the injury occurred. Tiffany Salazar, a co-employee of Home Depot, was working as a cashier at the register next to Claimant when this occurred. She heard Claimant's outburst and asked her what was wrong and if she was okay. When Claimant told her that she didn't think she was okay, Ms. Salazar called the head cashier, Amber, to report what had happened. Amber brought Claimant a chair to sit on and requested that she finish her shift because they were shorthanded that day. Claimant was able to complete her shift.

5. No written report was filed by Employer or Claimant on the date of injury. Claimant identified Claimant's Exhibit No. 2 as the statement she wrote on 6/23/14 outlining the circumstances surrounding the injury. She completed this statement at the request of Employer. Claimant was injured on a Saturday and the next two days were her regular days off. She did not contact her employer again until 6/24/14, when she was scheduled to work, because she thought her condition might improve during the time she was off. On 6/24/14, Claimant called her employer and spoke with her assistant manager, Eric, who told her to come into the store to get a list of treating providers. She did so on 6/24/14 and chose Penrose Hospital. Claimant did not seek treatment until 6/27/14 when she was seen in the emergency room. Claimant testified that she was unable to get to the doctor on 6/2514 and 6/26/14 because her car had broken down and she had no transportation. During that time frame, she stayed at home and either iced or placed heat on her lower back to try to control the pain.

6. Dr. Langstaff, the emergency room physician from Penrose-St. Francis noted in her 6/27/14 report that Claimant "accidentally twisted into an awkward position while working as a cashier at Home Depot." Physical examination from the ER visit revealed moderate paraspinal tenderness in both the lumbar and thoracic spine. Dr. Langstaff suspected that Claimant had sustained a myofascial strain of her lumbar spine and provided a diagnosis of "acute back pain." Claimant testified that the emergency room physician took her off work for three days. Claimant notified her supervisor, Connie, of her emergency room visit and was directed by Connie to get in touch with the Human Resources Department. Claimant did so and was referred to Concentra where she began treatment with Dr. Randall Jones on 6/27/14.

7. Dr. Jones examined Claimant and referred her to physical therapy (PT) three times a week for a period of two weeks. On 6/27/14, Dr. Jones imposed physical restrictions of no lifting more than 10 pounds, no pushing or pulling more than 20 pounds, no squatting, no climbing of ladders or stairs or climbing of any kind. Dr. Jones noted in his initial assessment that Claimant was standing behind a cash register and twisted to the right to put money in the register and felt left lower lumbar pain. The Physician's Report of Worker's Compensation Injury authored by Dr. Jones on 6/27/14 notes the objective findings he observed to be consistent with the history and the work related mechanism of injury.

7. Claimant provided Dr. Jones' restrictions to her employer at which time she was informed that her restrictions could not be accommodated. Claimant has not worked for Employer or any other job since 6/21/14.

8. Based upon the evidence presented, the ALJ finds that the Claimant is disabled within the meaning of the workers' compensation statutes and entitled to temporary total disability (TTD) benefits commencing 6/21/04.

9. Dr. Jones saw Claimant again on July 12, 2014. During this visit he noted those objective clinical findings he observed were consistent with the history and/or work related mechanism of injury. He continued Claimant's physical restrictions and added that she be provided a chair with a back adjustable to the proper height to complete her cashiering duties.

10. Claimant began physical therapy on July 16, 2014 at Concentra with Katherine Nikolaus, P.T. Ms. Nikolaus noted mild increased muscle tone in both the right and left paraspinal muscles. She also noted severe tenderness of the paraspinal muscles on the left and moderate tenderness on the right. Her record also reflects that the Claimant was unable to lie on her back. On July 17, 2014, Ms. Nickolaus noted that the Claimant should also be sitting 75% of the time while cashiering. The July 18, 2014 physical therapy notes indicate that Claimant reported increased low back pain, up to 9 out of 10. The July 25, 2014 therapy note indicates that the Claimant reported worsening symptoms and was progressing slower than expected.

11. On August 4, 2014, Dr. Randall Jones saw Claimant and noted that if Claimant did not show significant improvement by the next visit, she would need to be referred for an x-ray, an MRI and to Dr. Zimmerman and Dr. Polvi for chiropractic treatment and acupuncture. He continued her physical restrictions. On August 7, 2014, Dr. Jones discontinued physical therapy and referred Claimant to Dr. Jeffrey Jenks, Absolute Health Center and Southwest Diagnostics for an MRI.

12. Claimant underwent an MRI on August 21, 2014 which revealed a broad-based right foraminal bulge and facet arthrosis at L4-5 and mild right foraminal stenosis. It also revealed a broad based foraminal bulge and left paramedian protrusion at L5-S1 with mild canal and foraminal stenosis.

13. Claimant also saw Dr. Jeffrey Jenks on August 21, 2014. Dr. Jenks recommended a left sacroiliac joint injection.

14. The ALJ finds the treatment rendered by Dr. Jones and his referrals in this case reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury.

15. At the time Claimant was hired at Home Depot, she informed Employer

that she had restrictions with respect to her knees due to a preexisting degenerative knee condition. She also reported pre-existing multiple sclerosis. Claimant's physical restrictions due to these conditions required use of a chair with a back so that she could sit when needed while performing her cashier duties. At the time Claimant was injured, she was standing and only had a stationary stool (without a back) to sit on. The stool's seat did not rotate. The Claimant testified that she had previously spoken to an assistant manager, Andy, in the Spring of 2014 regarding her need for a chair with a back on it. She understood the chair to be on back order. She testified she also talked to Andy about the status of the chair in June of 2014 but still had not received it at the time of her industrial injury.

16. Although Claimant had been seen at Memorial Hospital in the emergency room on April 13, 2014 for burning pain in her shin after receiving a steroid injection to her knee, she had no preexisting lumbar spine conditions nor had she received treatment for her lumbar spine in the year prior to this claim. Claimant explained that the pain she experienced in her shin was not the same kind of pain and numbness that she currently has going down the outside of her left thigh since her June 21, 2014 injury.

17. Claimant was also treated in the emergency room of Penrose St. Francis on April 3, 2014 and April 5, 2014 for knee pain. Moreover, she sought treatment through the emergency room of Memorial Hospital on January 25, 2014 for tooth pain. Claimant explained that even though the emergency room report from this visit noted back and neck pain as well as chronic pain, she had no prior back and neck pain and had not been treated for those conditions prior to her June 21, 2014 industrial injury.

18. Claimant was diagnosed with relapsing and remitting multiple sclerosis (MS) in 2004 after experiencing persistent severe headaches. She did not have any symptoms in her lower back or down her legs associated with her MS. She had a relapse of her MS in 2012 when she lost sight in one of her eyes which eventually returned.

19. Claimant receives social security disability benefits and veteran's administration benefits for her preexisting bilateral knee and ankle issues as well as her multiple sclerosis. At the time of her June 21, 2014 injury, Claimant was taking Oxycodone and Fentanyl for her knee and ankle conditions/pain. She continues to take those pain medications since the injury in this case. She has been given no additional pain medications by Dr. Jones or Dr. Jenks. She also testified that none of her prior medical providers had ever diagnosed her with fibromyalgia.

20. Dr. Allison Fall testified on behalf of the Respondents. Dr. Fall is a Level II accredited physiatrist in the State of Colorado. Dr. Fall opined that Claimant could not have injured her lower back by the mechanism of injury she described. Dr. Fall testified that it would not matter how far or how many times an individual

twisted her in a day–twisting at the waist, according to Dr. Fall would never cause lower back problems since the human body was "meant" to twist at the waist. Absent any additional weight or bending while twisting, an individual could not injure her low back from merely twisting per Dr. Fall. Dr. Fall opined that there was no correlation between Claimant's symptoms and the findings on the MRI scan of 8/20/14. She also testified that she did not find any objective findings on examination of Claimant to substantiate Claimant's pain complaints, although she did admit that Claimant could have had muscle spasms which she would not have been able to see or feel at the time she examined Claimant due to her obesity.

21. Dr. Fall testified that it is possible that asymptomatic degenerative conditions can become symptomatic in the face of a traumatic event. She also conceded that bulging disks can be sources of pain in the lower back and that individuals with foraminal stenosis can develop pain in their lower back. She admittedly did not review any, nor is she aware of any, records prior to 6/27/14 documenting treatment of Claimant's low back. Dr. Fall also admitted that she was not aware of any other records, prior to 6/27/14, where the Claimant was complaining of radiating leg pain or numbness with the exception of the emergency room report of Penrose Hospital from 4/3/14 involving pain down the shin after Claimant received a steroid injection to the knee.

22. Dr. Fall further opined that Claimant had preexisting chronic pain associated with fibromyalgia which was probably the source of her ongoing myofascial back pain. However, on cross-examination, Dr. Fall admitted that the basis for this opinion was information that she gleaned from two previous emergency room records which mentioned fibromyalgia in the past medical history section. One of those records was from February 26. 2013 and one was from March 3, 2014. Dr. Fall admitted that she had no idea where the diagnosis of fibromyalgia had originated, nor did she know what doctor or specialist, if any, made the original diagnosis. Additionally, she was not aware of what symptoms (how many tender points and where they were located), if any, the Claimant presented with which resulted in the diagnosis of fibromyalgia. Based upon the totality of the evidence presented, the ALJ is not convinced that Claimant was formally diagnosed with fibromyalgia. Consequently, the ALJ finds Dr. Falls' testimony regarding fibromyalgia, as the likely cause of Claimant's low back pain unconvincing. Dr. Fall also opined that Claimant had some functional overlay in her symptoms due to the Employer failing to accommodate her prior work restrictions due to her knee condition (prior to this industrial injury).

23. Prior to the issuance of the January 15, 2015 full order, Respondents received updated medical records from Dr. Albert Hattem, Claimant's attending medical provider for treatment she received November 20, 2014 and January 13, 2015. The records were received by Respondents on January 14, 2015.

24. Respondents' counsel sought inclusion of the aforementioned medical records as

part of the record by filing a motion to submit additional evidence prior to the issuance of the requested full order. Respondent's motion was filed with the OAC, via electronic transmission (e-mail) on the afternoon of January 14, 2015. The motion was inadvertently rejected by the Court Clerk as exceeding the number of pages, which could be accepted by the OAC via e-mail. Moreover, the undersigned ALJ was out of Office on January 14, 2015 following a medical procedure performed January 13, 2015. Consequently, the ALJ was unaware of Respondent's motion until he returned to the office on January 15, 2015.

25. On January 15, 2015, the undersigned ALJ issued the full order requested by Respondents. The full order was issued at 11:51 AM. At 4:21 PM on January 15, 2015 a copy of Respondents' motion with medical records attached was received by the OAC via facsimile. The original motion was received by the OAC via US mail on January 20, 2015.

26. Dr. Hattem's records were not reviewed and commented upon by the ALJ in his Full Order because he had issued the full order before the facsimile copy of the motion with the attached records was received.

27. At 4:54 PM on January 15, 2015 Claimant faxed her response to Respondents' motion to the OAC. Claimant objects to the admission of Dr. Hattem's records on finality and procedural due process grounds.

28. On January 16, 2015 Respondents' counsel filed a **"PETITION TO REVIEW AND REQUEST FOR TRANSCRIPT."** In the petition, Respondents' counsel asserts that the ALJ "erred as a matter of law when he did not take into consideration the evidence provided in Respondents' Motion to Submit Additional Evidence Prior to the Issuance of the Specific Findings of Fact, Conclusions of Law and Order.

29. The ALJ was out of the office on Friday, January 16, 2015 and did not return to the office until January 20, 2015, following the Martin Luther King Holiday. Upon his return to the office, the undersigned ALJ reviewed Respondents motion, Claimant's response filed thereto and Respondents' Petition to Review and Request for Transcript.

30. The ALJ finds Respondents' motion for inclusion of Dr. Hattem's medical reports from November 20, 2014 and January 13, 2015 to constitute a request to reopen the record for the submission of additional evidence. After careful consideration of the motion, the ALJ finds it meritorious for the following reasons: 1. The ALJ agrees with Respondents that Dr. Hattem's November 20, 2014 and January 13, 2015 reports constitute relevant evidence, which could not have been produced/presented at the November hearing; and, 2. the reports address a material issue in the case, namely the causal relatedness of Claimant's back injury to her work duties. Consequently, the reports have the potential to be "outcome determinative" concerning the issue of compensability.

31. Respondents' motion is **GRANTED**. The medical reports of Dr. Hattem dated November 20, 2014 and January 13, 2015 are considered evidence in the case.

32. Having admitted the aforementioned records into evidence, the ALJ enters the following supplemental factual findings:

    a. Dr. Hattem did not testify at the November 4, 2014 hearing.

    b. On November 20, 2014, Claimant returned to the offices of Concentra and Dr. Albert Hattem for re-evaluation. At the conclusion of this appointment, Dr. Hattem opined that Claimant's low back pain was not work-related. According to Dr. Hattem, Claimant's low back pain began as she was "standing at her cash register." Dr. Hattem continued, noting that "[a]ll she did was twist while holding a 20 dollar bill. Dr. Hattem concluded by indicating that in his opinion "twisting is a ubiquitous activity, not unique to the workplace" and that "a person is expected to twist as a normal activity of daily living." Consequently, Dr. Hattem noted that "[t]here was no injury described at work." Nonetheless, Dr. Hattem indicated that he wanted to review the IME report of Dr. Fall before placing Claimant at MMI. Accordingly, Dr. Hattem set a return appointment for recheck.

    c. Claimant attended a re-evaluation appointment with Dr. Hattem on January 13, 2015. In the report generated following this encounter, Dr. Hattem references that he received the IME report from Dr. Fall and that Dr. Fall also "opined that there was no mechanism of injury to cause any injury to the lumbar spine that would require medical treatment." Thus, Dr. Hattem indicated that Dr. Fall was "in agreement with my conclusion." Dr. Hattem then discharged Claimant from care and instructed her to "follow up with her personal physician for a non-work related chronic pain condition."

33. After careful inspection of the November 20, 2014 and January 13, 2015 records, the ALJ finds Dr. Hattem's statement that a "person is expected to twist as a normal activity of daily living" to be congruous with Dr. Fall's opinion that the human body was meant to twist at the waist no matter how far or how frequently it was done, which was cited by Dr. Fall as the reason Claimant did not injure her low back. The ALJ finds that Dr. Hattem has not expressed any "new" or "different" opinion regarding causality concerning Claimant's back condition than did Dr. Fall. As noted above, the ALJ finds Dr. Fall's opinions unconvincing. Because he did not deviate from Dr. Fall's unpursuasive opinion, the ALJ finds Dr. Hattem's opinion(s) regarding causality equally unconvincing.

34. The Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of the course and scope of her employment with Home Depot.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Respondents' Motion for Submission of Post-hearing Evidence

A. The ALJ has discretion whether to permit the admission of post-hearing evidence. *IPMC v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). In deciding whether to receive additional evidence after a party has rested his/her case, the ALJ should consider whether the evidence could have been obtained and presented at the hearing through the exercise of due diligence. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991); Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969). Further, the ALJ should consider whether the evidence involves a material issue and; and whether it has the potential to be outcome determinative. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Potomac Insurance Co. v. Industrial Commission*, 744 P.2d 765 (Colo. App. 1987). The ALJ should consider these factors and balance them against the competing interests, i.e. the expense and inconvenience, of the party opposing receipt of the additional evidence so as to guard against the potential for injustice arising from giving finality to an erroneous result. *IPMC v. Industrial Claim Appeals Office, supra; Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996)(reopening authority is evidence of legislative policy that goal of achieving fair and just result overrides litigants' interests in finality); *Gurule v. Board of Developmentally Disabled*, W.C. No. 3-595-093 (February 9, 1995). As found here, the balance for admission of the additional medical records tips in favor of Respondents as the evidence could not have been previously discovered and presented at hearing through the exercise of due diligence since it arose post-hearing. More importantly, the new evidence addresses the material issue in the case, specifically causation. As such, the ALJ concludes that new evidence is potentially outcome determinative concerning the issue of "compensability." Consequently, Claimant's interest in finality is outweighed by the injustice, which may result from giving final effect to an erroneous result. For these reasons, the ALJ concludes that Respondents' motion is meritorious and is, therefore GRANTED.

Supplemental Order & Other General Legal Principals

B. Section 8-43-301(5) provides that in ruling on a petition to review, the ALJ may issue a supplemental order limited to the "matters raised in the petition to review, and, as to those matters, . . . may amend or alter the original order or set the matter for further hearing." Here the ALJ concludes that a Supplemental Order is necessary to address **RESPONDENTS**' **MOTION TO SUBMIT ADDITIONAL EVIDENCE PRIOR TO THE ISSUANCE OF THE SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** and the assertion that the ALJ erred as a matter of law when he failed to consider Respondent's request to submit additional as outlined in the January 16, 2015 **PETITION TO REVIEW AND REQUEST FOR TRANSCRIPT**.

C. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. Section 8-43-201, supra.

D. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

E. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability & Temporary Partial Disability

F. As noted, for an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the

evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

G. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, the evidence demonstrates that Claimant engaged in frequent "twisting" (rotation) of her lumbar spine to complete the duties required of her position as a cashier during her shift. While the ALJ is persuaded that the degenerative findings demonstrated on MRI were not caused by her twisting, the ALJ finds Dr. Fall's testimony–that Claimant could not have injured her low back twisting at the waist because the human body is designed to twist at the waist–unpersuasive. Similarly, the ALJ is not convinced that Claimant did not injure her low back because Dr. Fall was unable to appreciate any objective findings on physical examination which substantiated Claimant's complaints of low back pain or that Claimant's low back pain is chronic and related to preexisting fibromyalgia. The ALJ notes that Dr. Fall's IME was performed on October 8, 2014, in excess of three months after the date of injury. The medical records closer in time to Claimant's date of injury and thereafter during treatment reflect objective findings consistent with lumbar strain and associated left sacroiliac (SI) joint dysfunction. Moreover, Dr. Fall admitted on cross examination that she based her reliance on "fibromyalgia" as a cause of Claimant's low back pain on information gleaned from two ER reports which mention the diagnosis in the past medical history section of the reports. The ALJ credits Claimant's testimony that she has never been diagnosed with "fibromyalgia". Based upon the totality of the evidence presented, the ALJ concludes that, more probably than not, Claimant suffered a myofascial strain of her lumbar spine and left SI joint while having to twist to complete her work duties. Consequently, the ALJ concludes that a logical causal connection exists between the Claimant's complaints and her work-related duties. The claim is compensable.

H. The November 20, 2014 and January 13, 2015 records of Dr. Hattem do not provide a convincing basis to alter the full order issued January 15, 2015. As found, Dr. Hattem did not express any "new" or "different" opinions regarding causality of Claimant's back condition outside of that testified to by Dr. Fall, whose opinions are rejected by the ALJ as unpursuasive. Consequently, the ALJ finds the injury compensable.

Medical Benefits

I. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). As found, the treatment rendered by Dr. Jones and his referrals in this case was reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury. Nonetheless, Respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v.*

Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

J. Authorization refers to a physician's legal status to treat the industrial injury at respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Once an ATP has been designated, a claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office*, 996 p.2d 228 (Colo. App. 1999).

K. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Here, the persuasive record evidence supports that Claimant was given a list of providers from her employer which included Penrose Hospital ER as a choice. After providing the emergency room record to her employer, Claimant was referred to Concentra Medical Centers where she was seen by Dr. Jones who subsequently made referrals to physical therapy, Southwest Diagnostics, Absolute Health Center (Dr. Polvi and Dr. Hill) and Dr. Jeffrey Jenks. Accordingly, the ALJ concludes that Dr. Jones is the designated provider for this claim. Dr. Jones' treatment and the treatment obtained through his referrals, including physical therapy through Concentra, the imaging performed at Southwest Diagnostics, the chiropractic care obtained at Absolute Health Centers and the treatment with Dr. Jenks is authorized.

Disability Benefits

L. Pursuant to §§8-42-103, 8-42-105, C.R.S., a claimant is entitled to an award of Temporary Total Disability (TTD) Benefits, if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001).

M. The term "disability" as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the Claimant's inability to perform his/her prior regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The second element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions which impair a claimant's ability to effectively perform the duties of his regular job. *See Ortiz*

v. Charles J. Murphy & Co., 964 P.2d 595 (Colo. App. 1998). In this case, the persuasive evidence establishes that Dr Jones has continually imposed physical restrictions which have precluded the Claimant from performing the duties of her usual work since July 8, 2014. The evidence also establishes that the Employer chose not to accommodate those restrictions by offering Claimant a modified duty position. Thus, Claimant has been out of work due to her industrial injury and has suffered a wage loss as a direct consequence. Accordingly, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and entitled to TTD benefits. *Culver v. Ace Electric, supra; Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office. June 11, 1999). Because Claimant's disability has lasted longer than two weeks from the day she left work as a result of her industrial injury, TTD benefits are recoverable from the day she left work, specifically June 21, 2014. C.R.S. §8-42-103(1)(b). Respondents shall pay TTD in accordance with C.R.S. §8-42-103(1)(b), i.e. beginning June 21, 2014 at a rate of sixty-six and two-thirds percent of her average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week so long as Claimant's disability is total. C.R.S. §8-42-105(1). Such TTD benefits shall continue until the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3) after which Respondents may terminate such TTD payments.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable industrial injury to her low back/lumbar spine on June 21, 2014.

2. Respondents shall pay all reasonable and necessary medical bills associated with Claimant's treatment from Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, Penrose-St. Francis emergency room and Southwest Diagnostic Center related to her June 21, 2014 injury.

3. Respondents shall pay Temporary Total Disability benefits in accordance with C.R.S. §8-42-103 from June 21, 2014 to the present and ongoing until such time as TTD benefits may be terminated pursuant to any one of the events enumerated in C.R.S. §8-42-105(3).

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Supplemental Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. The petition shall be filed within twenty (20) days after the date of the certificate of mailing of the supplemental order. The petition shall be in writing, shall set forth in detail the particular errors and objections relied

ISSUES

1. Whether the Trustee, Emilio Velarde, failed to comply with prior court orders to repay funds diverted from dependent SV and EV for purchase of Mexican real estate. Whether the Trustee also failed to comply with prior court orders to repay funds that the Trustee received and never transmitted to SV.

2. Whether the Trustee withdrew funds in 2014 from dependent EV's restricted account without court order. If so, whether those funds were used for EV's health, welfare, or education.

3. Method of repayment of funds owed to dependents SV and EV, including the Trustee's proposal at hearing.

FINDINGS OF FACT

1. Claimant worked for Employer when she was killed in a compensable motor vehicle accident on May 12, 2004. Respondents admitted liability for the death claim.

2. On June 9, 2006 ALJ Cain entered an order determining that SV and EV were dependent children of the Claimant and entitled to receive Workers' Compensation death benefits. ALJ Cain appointed SV and EV's uncle, with whom the minors were living, as Trustee for the death benefits.

3. The June 9, 2006 order provided that the court retained jurisdiction to modify the provisions for the payment of death benefits and over all related and ancillary matters concerning the payment of death benefits.

4. On March 24, 2008 ALJ Cain entered an order determining that the Trustee had purchased real estate in Mexico using the dependent children's trust funds.

5. On September 1, 2009 ALJ Margot Jones entered an order determining that the Trustee had failed to provide proper documentation to show that the Mexican real estate transaction benefited the dependent children. ALJ Jones ordered that the Trustee repay $2,000 to SV's trust fund and $3,000 to EV's trust fund to repay the funds used for the Mexican real estate purchase.

6. ALJ Jones further determined that the Trustee also had received $2,000 in benefit payments for SV's health, welfare, and education and had failed to remit the $2,000 in benefit payments to SV, who was living with SV's biological father in Mexico.

The Trustee did not transmit the money to Mexico as he should have. Therefore, ALJ Jones ordered that an additional $2,000 be repaid to SV.

7. ALJ Jones ordered that the Trustee repay SV's trust at $250 per month until the total $4,000 owed to SV was repaid. ALJ Jones ordered that the Trustee repay EV's trust at $250 per month until the total $3,000 owed to EV was repaid.

8. The Trustee did not comply with the September 1, 2009 order. In November of 2010 the parties executed a Stipulation which was approved by order of the court. The Stipulation and Order reduced the monthly payments to $75 per month into each of the minor dependents' accounts until the $4,000 and $3,000 was repaid. The Stipulation and Order also noted that the Trustee had established two restricted Chase Bank accounts (SV – account number 2971365172; EV – account number 2971365008) and that the bank may accept payments from the Trustee, the Insurer, or any other person. The Stipulation and Order also provided that the Bank would permit disbursement of these two accounts only upon further order of the Office of Administrative Courts. See Exhibit 2.

9. Again, the Trustee did not comply with the Stipulation and Order and did not make any payments into the restricted accounts.

10. On March 18, 2014 ALJ Cannici entered an order requiring that the Trustee sell the Mexican real estate within a reasonable time and deposit funds necessary to reimburse the dependents' accounts.

11. Again, the Trustee did not comply with this order. The Trustee has not sold the Mexican real estate nor has he made any repayments to SV or EV.

12. SV's date of birth is June 29, 1993. He is now over the age of 21, no longer presumed to be wholly dependent on decedent, and is no longer entitled to receive current death benefits.

13. EV's date of birth is February 20, 2003. She is twelve years old, remains a minor, and continues to be presumed to be wholly dependent on decedent and continues to be entitled to receive death benefits.

14. As of the date of hearing, Insurer was making quarterly benefit payments for EV in the amount of $2,459.08. These benefit payments were split into two equal amounts. A quarterly payment of $1,229.54 was made into Chase Bank account 3036806937 and was unrestricted. The Trustee was able to use this quarterly payment for EV's health, welfare, and educational needs as he saw fit and was not required to provide an accounting for the use of these funds. The second equal quarterly payment of $1,229.54 was made into restricted Chase Bank account 2971365008. Per the November 2010 Stipulation and Order, no withdrawals of this account were to take place without court order.

15. Chase Bank, in error, failed to honor the restriction placed on account 2971365008. In 2014 the Trustee made several withdrawals from EV's restricted Chase Bank account 2971365008 without an order of the court approving the withdrawal.

16. On June 2, 2014, the Trustee withdrew $800 from EV's restricted account. The Trustee admitted at hearing that he took these funds. *See* Exhibit 3.

17. On August 30, 2014 the Trustee withdrew $1,200 from EV's restricted account. The Trustee admitted at hearing that he took these funds. *See* Exhibit 3.

18. On September 18, 2014 the GAL submitted a letter to Chase Bank regarding EV's restricted account 2971365008 noting that the statements the GAL reviewed showed withdrawals made without court order and asking for clarification. *See* Exhibit 3.

19. On December 8, 2014 the Trustee withdrew $200 from EV's restricted account. The Trustee admitted at hearing that he took these funds. *See* Exhibit 5.

20. On December 23, 2014 the Trustee withdrew $700 from EV's restricted account. The Trustee admitted at hearing that he took these funds. *See* Exhibit 6.

21. On December 24, 2014 the Trustee withdrew $200 from EV's restricted account. The Trustee admitted at hearing that he took these funds. *See* Exhibit 6.

22. On December 27, 2014 the Trustee withdrew $140 from EV's restricted account. The Trustee admitted at hearing that he took these funds. *See* Exhibit 6.

23. The Trustee did not provide sufficient evidence to show that the funds withdrawn from the restricted account were used for EV's health, welfare, or educational benefits. The only evidence presented by the Trustee was that of the $3,240 withdrawn between June and December of 2014, approximately $300 was used to purchase EV a puppy.

24. On January 30, 2015 this hearing was commenced. The Trustee failed to appear at the January 30, 2015 hearing.

25. The hearing was continued to March 13, 2015. An Order to Show Cause was issued and ordered that the Trustee appear at a hearing on March 13, 2015 and that he provide bank statements for 2014 to address the withdrawn funds listed above.

26. The Trustee and his wife appeared at the March 13, 2015 hearing. The Trustee admitted taking $3,240 in funds in 2014 from what was supposed to be a restricted account.

27. The Trustee and his wife, with whom EV still resides, proposed that the unrestricted quarterly payments of $1,229.54 that they currently receive for EV's health, welfare, and education be restricted and used to pay back the amounts the Trustee owes for the Mexican real estate purchase, the failed benefit payments to SV, as well as the more recent 2014 withdrawals from EV's account.

28. The Trustee and his wife testified that they have sufficient income to provide for EV's health, welfare, and education without the quarterly payments.

29. The Trustee was ordered to provide documentation of income and expenses within 30 days of the March 13, 2015 hearing for consideration of the reasonableness of the proposal and to assist the GAL and ALJ in determining if the Trustee has sufficient income to care for the needs of EV.

30. Based on representations at hearing, the GAL proposed that a restriction be placed on the previously unrestricted Chase Bank account 3036806937 pending final order in this matter.

31. On March 17, 2015 an Order Regulating Chase Bank Accounts was signed by the ALJ. This order provided that Chase Bank may accept payments into the accounts from the Trustee, the Insurer, or any other person but that Chase Bank would not permit disbursement of any funds from either account 2971365008 or 3036806937 without further order of the Office of Administrative Courts.

32. The Trustee provided some information on income and expenses to the GAL on May 3, 2015. The information provided suggests that the Trustee is able to provide for EV's health, welfare, and education without use of the quarterly payments. The Trustee and his wife were found credible at hearing that they are able to provide for EV without use of the quarterly payments.

33. The Trustee is in clear violation of multiple prior orders of the Office of Administrative Courts, specifically, orders dated 3/26/08, 9/1/09, 11/9/10, 2/3/12, 5/1/13, and 3/18/14. However, the parties are not asking for penalties against the Trustee at this time and request that the issue of penalties be held in abeyance until all repayment obligations to SV and EV have been satisfied.

CONCLUSIONS OF LAW

Jurisdiction and Authority

Section 8-42-122, C.R.S., provides that in cases where the director deems dependents incapable of fully protecting their own interests, the director may order the deposit of death benefit payments in any type of account insured by the federal deposit insurance corporation, and "may otherwise provide for the manner and method of safeguarding the payments due such dependents in such manner as the director sees fit." This provision confers discretionary authority on the ALJ to provide for the

safeguarding of death benefits paid to dependents, and such authority is continuing. See Truitt v. Industrial Commission, 31 Colo. App. 166, 499 P.2d 623 (1972) (upholding commission's discretionary refusal to grant dependent claimants' request to have benefits released to their adoptive mother); § 8-43-201, C.R.S. (conferring original, concurrent jurisdiction on the director and administrative law judges to hear and decide all matters arising under the Act). The ALJ concludes that she retains jurisdiction to continue to provide for the safeguarding of the death benefits payable to the dependents. As found above, dependent EV was born on February 20, 2003 and is twelve years old. The ALJ concludes due to her minor age, EV is unable to fully protect her own interests and continued safeguarding of EV's benefits is appropriate. Further, the ALJ concludes that at the time funds due to SV were taken for the Mexican real estate purchase, and at the time funds intended for him were not transmitted to him by the Trustee, SV was also a minor and unable to fully protect his own interests. The ALJ concludes that continued orders on repayment of SV's benefits are appropriate and that jurisdiction continues over the funds due SV until repayment is satisfied.

Repayment of Funds

The Trustee has failed to repay any amount of money that was diverted from dependent SV and dependent EV's death benefits for purchase of the Mexican real estate. The Trustee also has failed to remit $2,000 in benefits that he owed to SV for a period of time that SV was living in Mexico with SV's father. Finally, the Trustee also took additional funds from EV's restricted account in 2014 without court order or approval and did not use the funds for EV's health, welfare, or education. The ALJ finds unpersuasive the testimony surrounding $300 spent on a puppy. This expenditure is not found reasonable or necessary for EV's health, welfare, or education.

The ALJ concludes that the Trustee owes the dependents the following amounts: SV - $4,000; EV- $6,240. The Trustee in the past has been ordered on several occasions to repay the funds owed to both SV and EV and has failed to comply with all prior orders regarding repayment. As found above, the Trustee has requested that the current quarterly payments that had been unrestricted for him to withdraw and use for EV's health, welfare, and education be restricted and used toward repayment. The Trustee has presented credible testimony and evidence that he is able to provide for EV without the necessity of the quarterly payments. After review, and after opportunity for the GAL to review, the ALJ finds the proposal to be a reasonable method to repay SV and EV.

Penalties

At this time the parties are withdrawing the request for penalties for failing to comply with prior orders of the court. This matter will be withdrawn, but the Trustee is warned that he is subject to future penalties should he fail to comply with any terms of this order.

ORDER

It is therefore ordered that:

Insurer:

1. Insurer shall continue to make a quarterly payment of $1,229.54 into Chase Bank account 2971365008 and a quarterly payment of $1,229.54 into Chase Bank account 3036806937.

Chase Bank:

2. Chase Bank shall keep the restriction on Chase Bank account 2971365008 and not allow any withdrawals of this account without an order of the court.

3. Chase Bank shall keep the restriction on Chase Bank account 3036806937 until May 1, 2017 and during the period of restriction shall only allow the following two authorized withdrawals:

a. On July 15, 2015, or within three business days thereof, Chase Bank shall allow the Trustee, Emilio Velarde, to make a one-time $2,000 withdrawal.

b. On January 15, 2016, or within three business days thereof, Chase Bank shall allow the Trustee, Emilio Velarde, to make a one-time $2,000 withdrawal.

4. Chase Bank shall transfer funds from restricted account 3036806937 to restricted account 2971365008 on the following dates, or within 3 business days thereof, and in the following amounts:

a. April 15, 2016 --- $2,000 transfer

b. October 15, 2016 --- $2,000 transfer

c. April 15, 2017 --- $2,240 transfer

5. On May 1, 2017 Chase Bank shall lift the restriction on Chase Bank account 3036806937 and the Trustee, Emilio Velarde, shall again be allowed to withdraw funds from this account as needed for EV's health, welfare, and education.

6. Chase Bank shall continue to mail statements for restricted accounts 2971365008 and 3036806937 to the Guardian ad Litem.

Trustee, Emilio Velarde:

7. The Trustee, Emilio Velarde, shall withdraw $2,000 from Chase Bank account 3036806937 on July 15, 2015, or within three business days thereof. The Trustee **SHALL** immediately transfer the $2,000 withdrawal to SV. The Trustee must provide documentation sufficient to show the transfer was made to SV to the GAL by July 25, 2015. If the Trustee provides insufficient documentation to show that the transfer to SV occurred, it is presumed the transfer did not take place and the repayment schedule and this order may be altered and subject to reopening.

8. The Trustee, Emilio Velarde, shall withdraw $2,000 from Chase Bank account 3036806937 on January 15, 2016, or within three business days thereof. The Trustee **SHALL** immediately transfer the $2,000 withdrawal to SV. The Trustee must provide documentation sufficient to show the transfer was made to SV to the GAL by January 25, 2016. If the Trustee provides insufficient documentation to show that the transfer to SV occurred, it is presumed the transfer did not take place and the repayment schedule and this order may be altered and subject to reopening.

9. If the Trustee complies with this order, in its entirety, then on May 1, 2017 the Trustee will again be allowed to withdraw funds from Chase Bank account 3036806937 as needed and without an accounting for EV's health, welfare, and education.

Guardian ad Litem:

10. The GAL shall continue to receive and review statements for both restricted Chase Bank accounts.

11. The GAL shall review documentation from the Trustee to ensure the July 15, 2015 $2,000 withdrawal of funds was transmitted to SV. The GAL shall attempt to independently confirm with SV that SV received the funds. The GAL shall petition the court if the GAL is not satisfied that payment was made to SV.

12. The GAL shall review documentation from the Trustee to ensure the January 15, 2016 $2,000 withdrawal of funds was transmitted to SV. The GAL shall attempt to independently confirm with SV that SV received the funds. The GAL shall petition the court if the GAL is not satisfied that payment was made to SV.

13. The GAL shall ensure that Chase Bank makes transfers from restricted account 3036806937 to restricted account 2971365008 on, or within three business days of, April 15, 2016, October 15, 2016, and April 15, 2017 as outlined above. The GAL shall petition the court if the GAL is not satisfied that Chase Bank has made the appropriate transfers.

General:

The above orders will, within two years, satisfy repayment of $4,000 to SV, and $6,240 to EV. These funds were taken by the Trustee without authorization and were not used for SV or EV's health, welfare, or education. The repayment ordered and outlined above is a reasonable way to ensure the dependents receive death benefits to which they were entitled.

All matters not determined herein including, but not limited to, any future termination of EV's benefits upon a triggering statutory event and any future distribution of funds to EV from restricted account 2971365008 is reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 21, 2015

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for prior authorization of L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation by Michael J. Gesquiere, M.D. is reasonable, necessary and causally related to his May 25, 2009 industrial injury.

FINDINGS OF FACT

1. On May 25, 2009 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. While Claimant was stepping down and back after retrieving an object from a pallet, he experienced a "pop" in his hip or groin area.

2. Claimant received medical treatment from Authorized Treating Physician (ATP) Michael Gesquiere, M.D. He was initially diagnosed with lumbar and groin strains. During 2009 he underwent a femoral hernia repair and hip surgery. Claimant subsequently obtained additional conservative treatment for his industrial injuries.

3. On July 12, 2011 ATP Brian Beatty, D.O. determined that Claimant had reached Maximum Medical Improvement (MMI). Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* Dr. Beatty assigned a 2% whole person impairment rating for injuries to Claimant's illoinguinal nerve.

4. Claimant challenged Dr. Beatty's MMI and impairment determinations and sought a Division Independent Medical Examination (DIME). On January 4, 2012 John Aschberger, M.D. performed the DIME. Dr. Aschberger agreed that Claimant reached MMI on July 12, 2011. However, relying on the *AMA Guides* Dr. Aschberger assigned a 28 percent scheduled impairment to Claimant's lower extremity for loss of range of hip motion and neurological condition. He also assigned an additional 5% whole person impairment for Claimant's iliohypogastric nerve and ilioinguinal nerve impairments. Combining the ratings yielded a 16% whole person impairment.

5. On January 3, 2012 Claimant returned to Dr. Gesquiere for an evaluation. Dr. Gesquiere noted that Claimant suffered from chronic pain syndrome and opioid dependence. Claimant sought to decrease his reliance on narcotic pain medications. Dr. Gesquiere recommended neuromodulation therapy or a spinal cord stimulator in an attempt to decrease pain, improve function and reduce reliance on narcotic pain medications. Dr. Gesquiere subsequently renewed his recommendation for a spinal cord stimulator.

6. On May 18, 2012 Claimant underwent an independent medical examination with J. Tashof Bernton, M.D. Dr. Bernton determined that Claimant's functional status was excellent and his physical examination was "quite benign." He recommended that Claimant should cease treatment with narcotic medications. Dr. Bernton also disagreed with Dr. Gesquiere's request for a spinal cord stimulator.

7. On August 23, 2012 ALJ Friend denied Dr. Gesquiere's request for prior authorization for a spinal cord stimulator. Relying on the testimony and report of Dr. Bernton, ALJ Friend remarked that psychological factors played a role in Claimant's condition.

8. On October 9, 2012 Claimant underwent a spinal cord stimulator trial through his private insurance. Because he reported pain relief of approximately 80% to 90%, Dr. Gesquiere permanently implanted a spinal cord stimulator on December 17, 2012. However, by January 15, 2013 Claimant's pain had returned to an 8/10 level.

9. On June 4, 2013 Dr. Bernton again evaluated Claimant. Claimant reported right hip and groin pain, lower back pain and neck pain. He could not identify any functional improvement since the implantation of the spinal cord stimulator.

10. Following an August 14, 2013 hearing ALJ Henk issued a Summary Order. She concluded that Claimant failed to prove that Morphine ER, Klonopin, Norco or Nucynta were reasonable and necessary medications related to the May 25, 2009 accident.

11. On August 25, 2014 Dr. Gesquiere performed right L3-L4 facet joint blocks, an L3 medial branch nerve block, a right L4-L5 facet joint block and an L5 medial branch block. Claimant reported 50% relief from the blocks.

12. On September 29, 2014 Dr. Gesquiere requested prior authorization for right L3-4, L4-5 and L5-S1 radiofrequency nerve ablations. Insurer denied Dr. Gesquiere's prior authorization request.

13. On November 11, 2014 Dr. Bernton conducted a third independent medical examination of Claimant. He also testified through a post-hearing evidentiary deposition on April 10, 2015. Relying on the *Division of Workers' Compensation Medical Treatment Guidelines* (*Guidelines*) Dr. Bernton concluded that L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation was not reasonable, necessary and causally related to Claimant's May 25, 2009 industrial injury. Dr. Bernton remarked that the *Guidelines* require an 80% response from medial branch blocks in order to proceed with a radiofrequency ablation. A medial branch block is a procedure that involves whether blocking the small nerve that goes to the facet relieves pain. It is used to determine whether the facet is the pain generator. If a patient does not achieve at least 80% pain relief from medial branch blocks the permanent procedure of radiofrequency ablation is not recommended. Because Claimant received only 50% relief the medial branch blocks were non-diagnostic.

14. Dr. Bernton also explained that Claimant would not benefit from L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation. He detailed that Claimant has undergone multiple invasive procedures involving many pain generators. None of the procedures has produced lasting relief. Taking the next step to ablate the nerves would be "extraordinarily unlikely" to provide Claimant with significant relief. Dr. Bernton commented that Claimant would likely experience short-term pain relief that would "almost certainly" be on a "placebo response basis." Similar to previous procedures Claimant would then return to baseline pain levels. He remarked that the likelihood that Claimant would obtain lasting relief from the radiofrequency ablation procedure was "miniscule." Dr. Bernton summarized that psychological factors play a major role in Claimant's condition, his response to blocks has been inconsistent and he has demonstrated a pattern of pain relief followed by the appearance of a new pain generator. He concluded that L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation is not reasonable, necessary and causally related to Claimant's May 25, 2009 industrial injury.

15. Claimant has failed demonstrate that it is more probably true than not that the request for prior authorization of L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation by Dr. Gesquiere is reasonable, necessary and causally related to his May 25, 2009 industrial injury. Initially, the record reveals that Claimant has undergone numerous conservative and diagnostic procedures in an attempt to reduce his lower back pain. Dr. Gesquiere permanently implanted a spinal cord stimulator on December 17, 2012. However, by January 15, 2013 Claimant's pain had returned to an 8/10 level. Claimant subsequently could not identify any functional improvement since the implantation of the spinal cord stimulator.

16. Relying on the *Guidelines* Dr. Bernton persuasively concluded that L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation is not reasonable, necessary and causally related to Claimant's May 25, 2009 industrial injury. He remarked that the *Guidelines* require an 80% response from medial branch blocks in order to proceed with a radiofrequency ablation. If a patient does not achieve at least 80% pain relief from medial branch blocks the permanent procedure of radiofrequency ablation is not recommended. Because Claimant received only 50% relief the medial branch blocks were non-diagnostic.

17. Dr. Bernton also explained that Claimant would not benefit from L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation. He detailed that Claimant has undergone multiple invasive procedures involving many pain generators. None of the procedures has produced lasting relief. Taking the next step to ablate the nerves would be "extraordinarily unlikely" to provide Claimant with significant relief. Dr. Bernton commented that Claimant would likely experience short-term pain relief that would "almost certainly" be on a "placebo response basis." He summarized that psychological factors play a major role in Claimant's condition, his response to blocks has been inconsistent and he has demonstrated a pattern of pain relief followed by the appearance of a new pain generator. Based on the persuasive reports and testimony of Dr. Bernton, L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation is not reasonable, necessary and causally related to Claimant's May 25, 2009 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAP, Mar. 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAP, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying the diagnostic criteria). The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

6. The *Guidelines* reflect that a patient should obtain at least 80% relief with branch and facet blocks to proceed with a more permanent nerve procedure. If a patient obtains less than 80% relief from branch blocks a more permanent procedure such as radiofrequency ablation is not recommended. *See* W.C.R.P. Rule 17, Exhibit 1, p. 58.

7. As found, Claimant has failed demonstrate by a preponderance of the evidence that the request for prior authorization of L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation by Dr. Gesquiere is reasonable, necessary and causally related to his May 25, 2009 industrial injury. Initially, the record reveals that Claimant has undergone numerous conservative and diagnostic procedures in an attempt to reduce his lower back pain. Dr. Gesquiere permanently implanted a spinal cord stimulator on December 17, 2012. However, by January 15, 2013 Claimant's pain had returned to an 8/10 level. Claimant subsequently could not identify any functional improvement since the implantation of the spinal cord stimulator.

8. As found, relying on the *Guidelines* Dr. Bernton persuasively concluded that L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation is not reasonable, necessary and causally related to Claimant's May 25, 2009 industrial injury. He remarked that the *Guidelines* require an 80% response from medial branch blocks in order to proceed with a radiofrequency ablation. If a patient does not achieve at least 80% pain relief from medial branch blocks the permanent procedure of radiofrequency ablation is not recommended. Because Claimant received only 50% relief the medial branch blocks were non-diagnostic.

9. As found, Dr. Bernton also explained that Claimant would not benefit from L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation. He detailed that Claimant has undergone multiple invasive procedures involving many pain generators. None of the procedures has produced lasting relief. Taking the next step to ablate the nerves would be "extraordinarily unlikely" to provide Claimant with significant relief. Dr. Bernton commented that Claimant would likely experience short-term pain relief that would "almost certainly" be on a "placebo response basis." He summarized that psychological factors play a major role in Claimant's condition, his response to blocks has been inconsistent and he has demonstrated a pattern of pain relief followed by the appearance of a new pain generator. Based on the persuasive reports and testimony of Dr. Bernton, L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation is not reasonable, necessary and causally related to Claimant's May 25, 2009 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Dr. Gesquiere's request for prior authorization of L3-L4, L4-L5 and L5-S1 radiofrequency nerve ablation is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 21, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Lippman, Sr. is reasonable and necessary maintenance medical treatment related to her workers' compensation injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on February 13, 2010 to her low back when she slipped on steps on work. Claimant was referred for medical treatment and eventually underwent surgery by Dr. Corenman consisting of a one level fusion at the L5-S1 level. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Lippman on November 6, 2012. Dr. Lippman referred claimant to Dr. Lorah for an impairment rating. Dr. Lorah evaluated claimant and provided with an impairment rating of 19% whole person. Respondents filed a final admission of liability ("FAL") admitting for the impairment rating on December 12, 2012. The FAL also admitted for reasonable, necessary, related medical treatment by an authorized provider.

2. After being placed at MMI continued to treat with Dr. Lippman. Respondents agree that Dr. Lippman is a physician authorized to treat claimant for her industrial injury. Claimant also received a course of physical therapy post MMI through Valley View Hospital Rehabilitation from October 25, 2013 through November 20, 2013.

3. Claimant was referred by respondents to Dr. Fall for an independent medical evaluation ("IME") on December 4, 2014. Dr. Fall reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with her IME. Dr. Fall noted claimant was taking gabapentin, Zoloft, tramadol, and cyclobenzaprine. Dr. Fall diagnosed claimant as status post L5-S1 fusion, stable, with chronic low back pain and chronic depression. Dr. Fall noted that claimant did not relate to her any worsening of her condition since being placed at MMI. Dr. Fall opined that there was no medical indication for ongoing chiropractic treatment and instead recommended claimant increase her independent exercise program. Dr. Fall opined that claimant's prescription for Zoloft would be more appropriately prescribed through her private insurance. Dr. Fall recommended claimant discontinue the tramadol and utilize Aleve over the counter as a substitute. Dr. Fall also recommended claimant wean off the gabapentin. Dr. Fall opined that rare use of cyclobenzaprine as needed for muscle spasms may still be indicated under maintenance care.

4. Dr. Lippman issued a report dated January 15, 2015 that opined that claimant was still at MMI and recommended continued chiropractic care as the independent exercise program would not replace the chiropractic care. Dr. Lippman opined that the continued use of Zoloft was appropriate because claimant's depression was related to her injury. Dr. Lippman indicated he would be willing to try substituting Aleve for tramadol, and wean claimant off the gabapentin, but noted he did not want to make a lot of changes and jeopardize claimant's maintenance program. Dr. Lippman recommended continuing claimant's Flexeril.

5. Claimant testified at hearing in this matter that she continues to treat with Dr. Lippman post MMI approximately every 3 months. Claimant testified that if she doesn't keep up with her physical therapy she gets more pain. Claimant testified she has sought additional chiropractic care as maintenance treatment, but the medical care was denied by respondents. Claimant testified that her medications were discontinued and she has been taking medications when she can afford to take them. Claimant testified that without her medications, she experiences more pain. Claimant testified that without chiropractic care, she experiences more pain.

6. Dr. Fall testified by deposition in this matter. Dr. Fall testified consistent with her IME report. Dr. Fall testified that there was no medical evidence of functional gains from the chiropractic care and indicated that the chiropractic treatment was only passive treatment. Dr. Fall opined that the chiropractic care was not reasonable and necessary to cure and relieve claimant from the effects of her industrial injury and was not necessary to maintain her status at maximum medical improvement. Dr. Fall opined that the gabapentin was not necessary as claimant's records do not indicate a diagnosis of neuropathic pain or an indication of radiculopathy or neuropathic symptoms.

7. The ALJ finds the testimony of claimant to be credible and persuasive. The ALJ notes that claimant's condition is maintained by the treatment recommended by Dr. Lippman and credits claimant's testimony that her condition has worsened without the recommended treatment as persuasive.

8. The ALJ finds the January 15, 2015 report from Dr. Lippman to be more credible and persuasive than the report and testimony of Dr. Fall. The ALJ finds claimant has proven that it is more probable than not that she needs continued treatment to maintain MMI, including the chiropractic care and medications recommended by Dr. Lippman.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2008).

3. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.* Even though an admission of liability is filed, the claimant bears the burden of proof to establish the right to specific medical treatment. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

4. As found, claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. Lippman, including the chiropractic treatment and medications is reasonable and necessary to maintain claimant at maximum medical improvement and prevent further deterioration of her physical condition.

ORDER

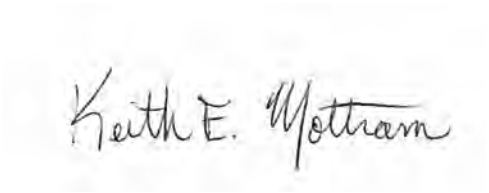
It is therefore ordered that:

1. Respondents shall pay for the medical treatment provided by Dr. Lippman related to her industrial injury including the chiropractic treatment and medications recommended by Dr. Lippman.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has overcome, by clear and convincing evidence, the DIME physician's opinion that her low back pain is not causally related to her May 13, 2010 work injury.

2. Whether Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her low back as a result of the May 13, 2010 work injury.

3. Whether the S1 selective nerve root block injection recommended by Dr. Checa is reasonable and necessary treatment related to Claimant's May 13, 2010 work injury.

4. Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to compensation for disfigurement pursuant to § 8-42-108(1), C.R.S. (2010) and if so the amount of compensation.

5. The ALJ notes that in the December 19, 2014 Order, the ALJ found the Claimant had overcome the DIME opinion on MMI of the right knee and found that the S1 selective nerve root block injection was reasonable, necessary, and related treatment for Claimant's right knee injury. The ALJ acknowledges that performing the analysis sua sponte when the parties did not clearly endorse, identify, or argue the issues of MMI of the right knee and whether the injection was reasonable and necessary treatment of the right knee may have been improper in this case. Thus, the ALJ issues this Supplemental Order confining the analysis to the issues as directly identified and presented by the parties.

FINDINGS OF FACT

1. Claimant was employed by Employer for approximately five years as a bus driver with duties including transporting and assisting handicapped passengers.

2. On May 13, 2010 Claimant sustained a work related injury to her right knee while stooping over to tie down a wheelchair on her bus. At this time, Claimant experienced right knee pain. On the date of injury, Claimant did not mention any back pain.

3. The compensability of the right knee injury was contested by Respondents. Following hearing on August 16, 2011 the injury was found compensable. In the findings of fact, there is no mention of back pain or problems.

4. Following the May 13, 2010 injury, Claimant has undergone significant treatment to her right knee including injections, arthroscopic surgery in 2010, total knee arthroplasty in January of 2012, and right knee revision surgery in May of 2013.

5. Despite this significant treatment, Claimant still suffers from right knee pain and swelling on a regular basis. Claimant's right knee is significantly larger in visual size than her unaffected left knee.

6. As a result of her three right knee surgeries, Claimant has visible scarring to her right knee consisting of one vertical scar, approximately 8 inches in length by 1 inch in width, and two smaller arthroscopic scars approximately ¾ of an inch each in diameter. The scars remain discolored, raised, and uneven with Claimant's normal skin tone.

7. Doctors have performed significant testing on Claimant to try to determine the cause of her continued right knee pain and swelling.

8. Allergy testing showed Claimant was not allergic to the metal or cement used in her total knee replacement. X-ray testing on Claimant's right hip was negative and was found unlikely to be a pain generator.

9. On March 18, 2013 Claimant saw Ronald Hugate, M.D. Dr. Hugate noted that he was not sure what was going on with Claimant's knee. He noted that Claimant was worked up for infection and for metal or cement allergies which were all negative. He injected Claimant's right knee and noted that if she had significant relief he would continue to work her knee up including performing a bone scan of her components. If not, then he indicated he would start working up other sources of pain, including her back. Dr. Hugate noted that Claimant had a history of low back pain, and had an antalgic gait and station favoring her right knee. *See* Exhibit 3.

10. On April 22, 2013 Claimant again saw Dr. Hugate. Dr. Hugate noted a bone scan had been performed and showed increased uptake in the femoral and tibial components which he found unusual. He recommended Claimant undergo an open procedure to check the femoral and tibial components in her right knee to see if there was any evidence of loosening and also to consider upsizing her polyethylene. He noted Claimant was in such pain on a daily basis that she wanted to go ahead with the revision knee arthroplasty surgery, and noted her significant pain with weight bearing. *See* Exhibit 3.

11. In May of 2013 Claimant underwent right knee revision surgery where Dr. Hugate upsized the polyethylene. Following the right knee revision surgery, Claimant's right knee pain improved slightly but did not resolve. *See* Exhibit 3

12. Dr. Hugate still could not explain Claimant's continued right knee pain. He ordered a lumbar MRI which was performed on November 7, 2013 and demonstrated

mild degenerative disc disease and facet arthropathy without stenosis or neural element compromise.

13. On January 27, 2014 Claimant underwent right lower extremity EMG testing which suggested bilateral S1 radiculopathy.

14. On February 26, 2014 Claimant saw Michael Striplin, M.D. for an independent medical examination (IME). Dr. Striplin noted Claimant had undergone extensive physical therapy, arthroscopy of the right knee, a right total knee arthroplasty, and revision of the right total knee arthroplasty but continued to complain of right knee pain. Dr. Striplin noted that infection or allergy to a component of Claimant's knee prosthesis had been eliminated as a cause of her persistent symptoms. Dr. Striplin noted that Dr. Hugate suggested considering lumbar spine problems as a potential source of Claimant's continued pain and agreed that it might be appropriate, however, Dr. Striplin opined that any further lumbar spine evaluation should be accomplished outside the workers' compensation system because there was no indication that Claimant suffered a lumbar spine injury on May 13, 2010. Claimant reported to Dr. Striplin pain in her left lower back with radiation into the left lower extremity and that her back pain began 2.5 years prior. Dr. Striplin opined that Claimant reached maximum medical improvement (MMI) with regard to her right knee injury on November 28, 2013, six months after the revision of her right total knee arthroplasty. *See* Exhibit J.

15. Dr. Hugate still did not know what was going on with Claimant's right knee pain and referred Claimant to Giancarlo Checa, M.D., a pain specialist.

16. On March 20, 2014 Claimant saw Dr. Checa. Claimant at this time still had right knee pain and swelling. Dr. Checa was concerned with the continued pain and swelling one year out from surgery. Dr. Checa noted Claimant's gait was normal and heel to toe walk was normal and that Claimant's lumbar spine had normal flexion, extension, and lateral rotation. Dr. Checa noted Claimant's previous testing for metal allergy was negative. Dr. Checa diagnosed myalgia, sacroilitis, and radiculitis, and found no clinical evidence for chronic regional pain syndrome. Dr. Checa reviewed the January 27, 2014 EMG that implicated S1 radiculopathy. *See* Exhibit K.

17. Dr. Checa recommended a right S1 selective nerve root block injection to determine whether that nerve in Claimant's lower back was a pain generator and was responsible for the continued pain into Claimant's right leg and right knee. *See* Exhibit K.

18. On May 29, 2014 Brian Beatty, D.O. performed a Division Independent Medical Examination (DIME). Dr. Beatty noted Claimant's antalgic gait favoring her right knee, diffuse right knee pain, and mild diffuse swelling. He diagnosed Claimant with degenerative joint disease, right knee with arthroplasty, and with low-back pain of unknown etiology. Dr. Beatty opined that Claimant was at MMI with regard to her right knee injury as of May 29, 2014 based on the fact that Claimant was one year post-op

for a right knee revision arthroplasty with reasonable treatment, physical therapy, and rehabilitation. *See* Exhibit 6.

19. Dr. Beatty found that Claimant's low back pain was not directly or indirectly related to her May 13, 2010 work injury. Dr. Beatty believed Claimant had some mechanical issues that should be addressed with her personal physician. *See* Exhibit 6.

20. On June 2, 2014 Claimant saw Albert Hattem, M.D. Dr. Hattem opined that Claimant's S1 radiculopathy and any back condition were not causally related to her May 13, 2010 injury and that Claimant only injured her right knee and not her low back. Dr. Hattem noted that Claimant's gait was relatively normal and agreed with Dr. Striplin's opinion on MMI as of November 28, 2013. Dr. Hattem noted that if Claimant wanted treatment directed at her lumbar spine, then the treatment may be provided outside of workers compensation. *See* Exhibit N.

21. On June 25, 2014 Dr. Hugate saw Claimant for a follow up visit. Dr. Hugate noted that Claimant was a year out from her revision surgery and that Claimant continued to have right knee pain globally that was worse with activity and swollen on occasion. Dr. Hugate noted the knee was stable with pain to light touch and inferomedial swelling. Dr. Hugate noted he did not see anything intrinsically in the knee that could be causing Claimant's pain. He recommended strongly that Dr. Checa be authorized to perform diagnostic and/or therapeutic injections as necessary to help better define and treat Claimant's pain. *See* Exhibit 3.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2010), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2010). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2012). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo.App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the condition for which she seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Claimant has failed to meet her burden of proof to show she suffered a compensable injury to her low back as a result of the May 13, 2010 work injury. The evidence is insufficient to show an injury to her low back was suffered as a result of the May 13, 2010 incident or as a result of altered gait due to her compensable knee injury. Claimant has failed to establish a causal connection between the low back pain she is suffering and her May 13, 2010 work incident.

Overcoming DIME

The assessment of a permanent impairment rating requires a rating physician to identify and evaluate all losses and restrictions which result from the industrial injury. *Egan v. Indus. Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998); *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995). This includes an assessment of whether the various components of the Claimant's medical condition are causally related to the industrial injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150

(Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo.App. 1998).

Claimant has failed to overcome by clear and convincing evidence the DIME physician's opinion that her low back pain complaints are not causally related to her May 13, 2010 work injury. The medical records, as found above, do not support a conclusion that a low back injury was suffered on May 13, 2010. Claimant did not initially complain of low back pain at the time of the injury or shortly thereafter. Further, although Claimant argues that altered gait as a result of her right knee injury caused her low back complaints, this argument is not found persuasive. Claimant has not presented clear and convincing evidence to demonstrate that she had an altered gait as a result of her right knee injury nor has she presented clear and convincing evidence to show that any altered gait caused her low back problems. Further, no medical provider has opined that an altered gait caused Claimant's low back problems. Rather, the medical records indicate that Claimant has both degenerative changes in her lumbar spine and that she has symptoms from a bilateral S1 radiculopathy. The opinions of DIME physician Dr. Beatty that Claimant did not suffer a low back injury as a result of the May 13, 2010 incident is found credible and persuasive and is supported by the opinions of Dr. Striplin and Dr. Hattem. Claimant has failed to meet her burden to show that her low back pain and the S1 radiculopathy is causally related to her work injury.

Additionally, the DIME physician's opinion is not, as Claimant argues, ambiguous. Rather, DIME physician Dr. Beatty could not relate her low back pain directly to her May 13, 2010 injury nor could he indirectly relate it to her May 13, 2010 injury. It is clear that his opinion is that the low back pain is not related to the May 13, 2010 injury. Claimant has been unable to overcome this opinion by clear and convincing evidence.

S1 selective nerve root block injection

Claimant, at hearing, sought a determination that the S1 selective nerve root block injection requested by Dr. Checa be found reasonable and necessary treatment. Respondents, at the outset of the hearing, clarified that their argument was that the S1 injection was related to the back and that unless Claimant overcome the causality of the back, then the injection would not be related to the claim. Claimant argued in her position statement that she was seeking a determination that the S1 nerve root block injection be considered reasonable and necessary to treat Claimant's lower back injury.

As found above, Claimant has bilateral S1 radiculopathy in her low back demonstrated by EMG testing. It has been recommended that an S1 selective nerve root block injection be performed at this time. The injection will help diagnose and treat the S1 radiculopathy which is not a work related injury. Although the injection may also help diagnose whether it is Claimant's non-work related S1 radiculopathy that is causing the continued pain into her right knee and may provide relief for the continued pain and

swelling into her right knee, the injection is aimed at treating an S1 radiculopathy which is not a work related condition.

The ALJ notes that in the prior order dated December 19, 2014 the ALJ found the injection to be a reasonable, necessary, and related treatment for the right knee injury. The ALJ issues this supplemental order to correct the prior order. The Claimant in this case sought a finding that the injection was reasonable and necessary to treat her lower back condition. The ALJ incorrectly opined that the treatment was reasonable and necessary to treat the right knee and that the right knee was not at MMI, when the issues of right knee MMI and right knee treatment were not clearly before the ALJ. Here, although the S1 injection recommended by Dr. Checa may be reasonable and necessary to treat Claimant's S1 radiculopathy, the radiculopathy is not a work related condition. The opinions of Dr. Beatty, Dr. Hattem, and Dr. Striplin that further treatment for the low back and S1 radiculopathy be done outside of the workers' compensation system is are found persuasive. Here, although the S1 radiculopathy may be a source of Claimant's continued right knee pain and although the S1 injection may incidentally improve her right knee symptoms, the injection is to treat a non work related bilateral S1 radiculopathy that Claimant would have whether or not she suffered a work related right knee injury. Further, after review of the transcript and all of the pleadings, the ALJ realized it was in error to issue an Order addressing MMI of the right knee as that was not clearly identified or presented at hearing. The issue of whether the right knee was at MMI and whether the S1 injection was reasonable and necessary treatment for the right knee was not clearly identified by Claimant as an issue at hearing, and in fact in the position statement was not a determination sought by Claimant. Rather, Claimant sought a determination that the injection be found reasonable and necessary to treat her low back and that her low back be found compensable. As the issues related to MMI and treatment of the right knee were not clearly before the ALJ, the prior order was in error.

Disfigurement

As a result of her May 13, 2010 work injury, Claimant has three visible scars on her knee that remain discolored and raised despite adequate healing time. Claimant's right knee and leg also is visibly larger in appearance, and appears swollen, compared to her unaffected left knee and leg. Claimant has met her burden to show that she sustained serious permanent disfigurements to areas of the body normally exposed to public view, which entitles her to additional compensation pursuant to § 8-42-108(1), C.R.S. (2010).

After viewing the visible scarring on Claimant's right knee and leg as well as the visible difference in size between her right and left legs, the ALJ finds that an award of $3,300.00 is appropriate.

ORDER

1. Claimant has failed to overcome the DIME physician's opinion that her low back pain is not related to a May 13, 2010 work injury by clear and convincing evidence.

2. Claimant has failed to meet her burden to show she suffered a compensable injury to her lower back. The claim for lower back treatment, including the S1 selective nerve root block injection, is denied and dismissed.

3. Insurer shall pay Claimant $3,300.00 for the disfigurements outlined above. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 28, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his case should be reopened pursuant to Section 8-43-303, C.R.S. based on a change of condition?

- If claimant's claim is reopened, whether claimant has proven by a preponderance of the evidence that he is entitled to Temporary Total Disability ("TTD") benefits for the period beginning October 9, 2014 and ongoing?

- Whether claimant has proven by a preponderance of the evidence that the recommended left hip magnetic resonance image ("MRI") recommended by Dr. Purvis and Dr. Heil is reasonable medical treatment necessary to cure and relieve claimant from the effects of his industrial injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury while employed with employer on March 29, 2011. Claimant testified at hearing that he injured his low back on March 29, 2011 when he lifted a 40-pound bag of dog food and twisted. Claimant testified that he felt a pop in his low back, and later developed stinging symptoms in his low back.

2. Claimant testified that he initially sought treatment with Dr. Pulsipher at Surface Creek Family Practice. Claimant was initially evaluated by Dr. Pulsipher on April 1, 2011. Dr. Pulsipher noted that claimant reported no known injury, but claimant had been performing constant heavy lifting and had pain for the past 5 weeks. Dr. Pulsipher noted that claimant reported he was unable to hold his son for long periods of time due to the pain. Claimant returned to Dr. Pulsipher on April 4, 2011 and reported a flare up of his symptoms. Dr. Pulsipher performed manipulations and claimant was released to return to work with restrictions. Claimant again received treatment with Dr. Pulsipher on April 11, 2011 and April 18, 2011 consisting of manipulations of the lumbar spine.

3. Claimant subsequently sought a one-time change of physician to Dr. Smith. Claimant testified at hearing that the sought the change of physician because osteopathic adjustments he received from Dr. Pulsipher worsened his low back symptoms and caused him to have hip symptoms. During claimant's initial evaluation with Dr. Smith on April 29, 2011, Dr. Smith recommended physical therapy. Dr. Smith diagnosed claimant with a low back muscle strain with left hip and mid/upper back pain

after osetopathic manipulation. Dr. Smith also recommended strong anti-inflammatory medication.

4. Claimant subsequently underwent an MRI scan of his lumbar spine on May 18, 2011. The MRI report noted a mild diffuse bulge with slight flattening of the ventral thecal sac and mild degenerative change within facet joints at the L4-L5 level. The MRI report also noted a mild central bulge, a small central annular tear which effaced the central sac, and mild degenerative changes in the facet joints at the L5-S1 level. At the S1-S2 level, the radiologist noted a small central bulge and mild degenerative changes within the facet joints.

5. Dr. Smith recommended a course of conservative care including medications and physical therapy. As of September 6, 2011, claimant was continuing to complain of left hip pain, low back pain (left side greater than right), and pain radiating into the left leg. Dr. Smith referred claimant to Dr. Tipping for an opinion regarding maximum medical improvement ("MMI") and further recommendations for treatment. Dr. Smith also noted that claimant may require neurosurgical consultation and possible epidural injections at some point in the future.

6. Dr. Simon in Dr. Craig Tipping's office evaluated claimant on September 9, 2011. Dr. Simon noted that claimant was not at MMI. Dr. Tipping subsequently evaluated claimant on September 14, 2011. Dr. Tipping also noted that claimant continued to have symptoms, and was not at MMI. Dr. Tipping recommended a nerve conduction study and epidural steroid injections and perhaps selective nerve root injections.

7. Dr. Hehmann performed nerve conduction studies and noted on September 27 and November 22, 2011 that claimant had mild chronic denervation at L4-L5 and mild L5-S1 irritation, and recommended a second MRI scan and epidural steroid injections.

8. Claimant was evaluated by Dr. Faragher on February 8, 2012, who recommended diagnostic injections. On June 8, 2012, Dr. Faragher noted that claimant was having new symptoms of shooting pain in his lower back and left leg when he sneezed, laughed, or coughed, and noted a pinching feeling in his left hip down to the middle toe. Dr. Farahger recommended epidural steroid injections for the low back.

9. Claimant was referred by respondents for an Independent Medical Examination ("IME") with Dr. Mack on April 2, 2012. Dr. Mack reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with his IME. Dr. Mack issued a report and opined that claimant suffered a soft tissue injury to the lumbar spine on March 29, 2011 and opined that claimant's symptoms stemming from the March 29, 2011 accident had resolved. Dr. Mack opined that claimant's current subjective complaints of symptoms were related to claimant's chronic problems associated with claimant's tight hamstrings and weak core

musculature. Dr. Mack opined claimant was at MMI for his work injury as of December 20, 2011 when he underwent the second MRI scan that showed no additional changes from his prior examination.

10. Dr. Faragher eventually performed injections at the L5-S1 level and in the left sacroiliac joint on November 27, 2012. Claimant followed up with Dr. Faragher on December 27, 2012, and noted that his low back and leg pain had improved, but his left hip pain was now bothering him.

11. On January 16, 2013, Dr. Smith noted claimant was reporting more pinching down his left leg, but generally improved low back pain. On February 12, 2013, Dr. Smith reported that she and claimant had a frank discussion regarding his lact of improvement and worsening condition. Dr. Smith noted that she did not feel additional work up or epidural injection would improve his condition and recommended claimant be placed at MMI. Dr. Smith noted that claimant's condition had worsened since his initial injury and recommended continued medical treatment post MMI for his back, left hip and left lower extremity radiculopathy, including medications, therapy, injections and possible referrals. Dr. Smith again referred claimant to Dr. Tipping for an impairment rating.

12. On March 21, 2013, Dr. Tipping evaluated claimant and provided diagnoses of multilevel degenerative disc disease, chronic denervation at L4-L5, and neurogenic left hip pain secondary to denervation of L4-L5 nerve roots. Dr. Tipping provided an impairment rating of 14% whole person. Dr. Tipping opined 7% was attributable to claimant's loss of range of motion and 7% was attributable to a specific disorder under Table 53 of the *AMA Guides*. Dr. Tipping also provided permanent work restrictions that included no lifting greater than 20 pounds, no repetitive lifting greater than 10 pounds, no carrying greater than 20 pounds, and no pushing/pulling greater than 60 pounds.

13. Respondents filed a Final Admission of Liability on May 7, 2013 admitting to a 14% whole person impairment rating and to a general award of post-MMI medical benefits that are medically reasonable, necessary, and related to the industrial injury.

14. After claimant was placed at MMI, Respondents sent a letter to Dr. Smith inquiring about claimant's need for future medical care. Dr. Smith responded on February 26, 2014 that claimant would need ibuprofen, tramadol, and use of a TENS unit every day. Dr. Smith noted that claimant would need additional medical treatment for the remainder of his life.

15. Claimant testified at hearing that after he was rated by Dr. Tipping, he began noticing sharp, stinging pains in his hip and groin area from standing and walking. He testified that the pain in his groin had not been present before. He testified that he was getting sharper pains in the left and right side of his low back, instead of just

the left side as he had before. Claimant testified that these symptoms began to prevent him from walking long distances.

16. Claimant testified that he was referred to Dr. Purvis by Respondents after Dr. Smith closed her practice. Claimant testified he went to see Dr. Purvis because he had pain in his groin area and right lower back area that was not present prior to MMI. Dr. Purvis reported on her initial evaluation on June 17, 2014 that claimant was complaining of constant hip pain and worsening low back pain after the effects of Dr. Faragher's injection wore off. Dr. Purvis provided a left hip injection and prescribed tramadol and Motrin. Dr. Purvis marked on the Physician's Report of Worker's Compensation Injury that claimant was "unable to work," but noted in her narrative report that claimant should avoid lifting and twisting, and should avoid lifting more than 15 pounds.

17. Claimant returned to see Dr. Purvis on August 8, 2014, and Dr. Purvis noted that although the injection given at the prior visit was helpful, claimant had aches in his hip, "charlie horses" in his left leg, and was waking at night with pain. Dr. Purvis recommended neuromuscular therapy and again reported on the physician's report of Workers' Compensation Injury that claimant was unable to work. Dr. Purvis noted in her narrative report that claimant should avoid lifting 10 pounds repetitively and 20 pounds maximum, and avoid lifting and twisting.

18. On September 18, 2014, Dr. Purvis noted that claimant had been "up hunting and hiking around" the past five days, which had aggravated his low back pain. Claimant testified that in September 2014 he went on a hunting trip with his father and uncle. Claimant testified that he walked and did some light hiking in and around their camp, but did not go further than 100 yards away from the campsite. He testified that he did not do any hunting, lift heavy items, squat, carry gear, or carry any game. He testified he mostly assisted with cooking in the camp. Claimant testified he did not have an injury to his low back or incident of low back pain during the hunting trip. Claimant testified that he went to a hunting camp despite Dr. Purvis putting him on work restrictions because he wanted to help out his uncle and father, both of whom were over 60 years of age.

19. Dr. Purvis's September 18, 2014 note also references claimant having a new job at Western Convenience. Claimant testified that he was employed in a convenience store as an overnight clerk, and worked shifts from 10 p.m. to 5 a.m. Claimant testified that the job involved cleaning the store and stocking items, and that sweeping and mopping the store was the most physical task involved with the job. Claimant testified that he took the job despite being on work restrictions issued by Dr. Purvis because it was the only job he could find and he wanted to support his family.

20. Claimant testified that he had tried to perform a tile installation job in February 2014, prior to beginning his care with Dr. Purvis. He testified that he performed two days of work, but was unable to continue. Claimant testified that his

friend completed the job for him. Claimant testified that he took the tile job because he was behind on his bills and was trying to make money for his family. Claimant also testified that prior to seeing Dr. Purvis he helped a friend of his sand down a hood of a truck in the friend's garage.

21. Claimant returned to see Dr. Purvis on October 9, 2014. Dr. Purvis noted claimant was complaining of low back pain and crackling in his back when bending. Dr. Purvis noted that over the past two weeks claimant had left lower back tenderness and left leg pain and shakiness. Dr. Purvis noted claimant had left hip pain into the front groin area and the back of the hip, and burning down left front of left leg with numbness. Dr. Purvis noted that claimant came in for an earlier medical appointment as he could not wait until their scheduled appointment on October 22, 2014.

22. Dr. Purvis ordered a repeat lumbar MRI scan and referred claimant to a neurosurgeon. Dr. Purvis issued a letter dated October 20, 2014 nothing that claimant was off work due to aggravation of his injuries.

23. Claimant testified at hearing that he worked for Western Convenience for approximately three weeks, and that he has not worked for Western Convenience (or any employer) since Dr. Purvis took him off work on October 9, 2014. Claimant testified that he is still an employee of Western Convenience, but is waiting to be released to work duty by a doctor before returning to work.

24. Claimant had the repeat MRI scan on October 16, 2014. The MRI scan showed changes at the L5-S1 as well as the S1-S2 levels that both appear slightly progressed in severity as compared to the previous study. This included a central protrusion with mild to moderate effacement of the central thecal sac at the S1-S2 level, which Dr. Fowler, the radiologist, noted appeared slightly more pronounced as compared to the prior MRI scan.

25. Claimant saw Dr. Fox on December 16, 2014. Dr. Fox noted that claimant had low back problems for the past four years and had been placed at MMI, but recently had increased discomfort in his back. Dr. Fox noted that claimant denied any specific recent injuries. Dr. Fox noted that he had reviewed the 2011, 2012, and 2014 MRI scans and opined that even though claimant had exacerbation in discomfort, he recommended continued nonoperative treatment. Dr. Fox noted, however, that if claimant's radicular symptoms worsen, claimant would need to be reevaluated.

26. Claimant returned to see Dr. Purvis on December 18, 2014. Dr. Purvis noted that Dr. Fox thought claimant had progressed since MMI especially in the disc area and fluid between the discs. Dr. Purvis also noted that claimant had ongoing hip pain, and ordered additional hip x-rays to compare to prior studies. Dr. Purvis referred claimant to an orthopedist for consultation regarding his hip pain and recommended neuromuscular therapy. Dr. Purvis again issued a no-work restriction for one month.

27. Claimant saw Dr. Heil on January 14, 2015. Dr. Heil noted that it was difficult to know where claimant's left hip pain was coming from, and recommended an additional left hip MRI scan.

28. Claimant returned to Dr. Purvis on January 20, 2015 with continued complaints of low back and left leg pain and left hip pain. Dr. Purvis recommended neuromuscular therapy, and placed claimant on a no-work restriction. Dr. Purvis noted that claimant's MMI date was unknown due to his ongoing pain complaints.

29. Respondents obtained an independent medical examination ("IME") of claimant with Dr. Cebrian on January 9, 2015. Dr. Cebrian reviewed claimant's medical records, obtained a history from claimant, and performed a physical examination, and issued a report dated February 13 2015. Dr. Cebrian opined in his report that claimant remained at MMI and that his condition had not worsened since being placed at MMI on February 12, 2013. Dr. Cebrian opined that claimant's functional limitations had not changed since MMI. Dr. Cebrian opined that claimant needed no additional medical treatment for the admitted work injury.

30. Dr. Cebrian testified by deposition on April 10, 2015. Dr. Cebrian testified consistent with his IME report. Dr. Cebrian opined in his deposition that claimant's work injury aggravated a pre-existing, underlying condition, but could not identify any prior back injuries, back treatment, or imaging records.

31. Dr. Cebrian testified that patients he treats can have altered gait secondary to back pain. Dr. Cebrian testified that an altered gait can lead to symptoms in the hips. Dr. Cebrian's report noted that claimant was reported to have an altered gait when he was examined by Dr. Mack on April 2, 2012. Dr. Cebrian testified that claimant's left hip symptoms could be the result of radiculopathy, because the MRI scans have shown the possibility of impingement of the left nerve root in claimant's lower back. Dr. Cebrian also testified that claimant's left groin symptoms were consistent with the finding of a cortical bubble on x-ray.

32. Claimant testified that he would like to return to physical therapy because it helped him in the approximately one year following the initial injury. Claimant testified that he has not had physical therapy recently because he was awaiting the result of the hearing. Claimant testified that the recommended MRI of his hip was denied by respondents.

33. Claimant testified that he had not filed a workers' compensation claim with his new employer, Western Convenience, because he did not sustain an injury, and did not experience any new symptoms as a result of his work as an overnight clerk.

34. Claimant testified that his current symptoms included low back pain, both left and right-sided. Claimant testified that his back pain began on the left side, but had worked its way to the right side. Claimant testified that he had left leg symptoms

involving left hip cramping and stinging pain down to his small toe. Claimant testified that he had pelvic pain and pain in his groin. Claimant testified that he did not have the cramping, the groin pain, or the right-sided back pain prior to MMI. Claimant testified that since reaching MMI, he had lost mobility and was unable to stand for extended periods of time, and had difficulty walking very far. He testified that at the time he reached MMI, he could walk between ¼ and ½ mile without pain. At the time of hearing, he could only walk ¼ mile and had to stop due to pain and cramping. The ALJ finds the testimony of claimant to be credible and persuasive.

35. The ALJ credits the medical reports and opinions of Dr. Purvis over the contrary opinions of Dr. Cebrian. The ALJ finds that Claimant has proven that is more likely than not that his current complaints are related to the March 29, 2011 work injury and his current disability is related to the March 29, 2011 work injury. The ALJ also finds that work restrictions issued by Dr. Purvis are related to the industrial injury. The ALJ credits the medical reports and opinions of Dr. Purvis and the testimony of claimant and finds that claimant has demonstrated that it is more probable than not that he is no longer at MMI. The ALJ credits the medical opinions of Dr. Purvis and the testimony of claimant and finds that claimant has proven that it is more probable than not that his condition has worsened and he is entitled to have his claimant reopened pursuant to Section 8-43-303, C.R.S. The ALJ finds that Claimant is in need of additional medical treatment to cure and relieve claimant from the effects of his industrial injury.

36. The ALJ credits the reports from Dr. Purvis and finds that claimant is restricted from all work activity as a result of a worsening of his condition related to the March 29, 2011 work injury. Dr. Purvis's no-work restriction began on October 9, 2014, when Dr. Purvis noted claimant's worsening symptoms and instructed him to stop working for his new employer, Western Convenience. The ALJ therefore finds that Claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits commencing October 9, 2014 and continuing until terminated by law.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, claimant has proven by a preponderance of the evidence that his condition has changed and he is entitled to have his claim reopened. As found, the opinions expressed by Dr. Purvis are found to be credible and persuasive and claimant has proven that his condition has worsened entitling claimant to reopen his claim.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Even though an admission of liability is filed, the claimant bears the burden of proof to establish the right to specific medical treatment. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

6. As found, claimant has demonstrated that the additional medical treatment recommended by Dr. Purvis, Dr. Fox and Dr. Heil, including the MRI of claimant's hip, is found to be reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1)

Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found, claimant has proven by a preponderance of the evidence that his injury resulted in a worsened condition that is evidenced by the increased work restrictions set forth by Dr. Purvis. As found, the claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning October 9, 2014 and continuing until terminated by law.

ORDER

It is therefore ordered that:

1. Claimant’s claim is reopened pursuant to Section 8-43-303, C.R.S.

2. Respondents shall pay for the reasonable and necessary medical benefits necessary to cure and relieve claimant from the effects of the industrial injury provided by physicians who are authorized to treat claimant, including the hip MRI recommended by Dr. Heil.

3. Respondents shall pay claimant TTD benefits commencing October 9, 2014 and continuing until terminated by law.

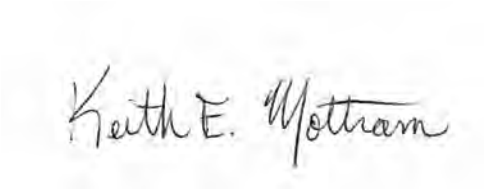
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 20, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did the respondents prove by a preponderance of the evidence that they are entitled to an order terminating the claimant's previously admitted right to receive post-MMI medical benefits?

- Did the claimant prove by a preponderance of the evidence that she is entitled to an award of specific post-MMI medical benefits including acupuncture and medication?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 11 were admitted into evidence. Respondents' Exhibit A was admitted into evidence.

2. On June 2, 2011, the claimant suffered an admitted industrial injury to the low back when she was pulling products on a cart. The cart was off to her side which caused her to be in a twisting position.

3. The claimant testified as follows. At the time of the injury she felt a sharp pain in her low back and this pain went down her right leg. The pain eventually moved into the left leg. She had never had problems with either lower extremity prior to this incident.

4. The claimant was initially treated for this injury by John Fox, M.D. Dr. Fox is level II accredited. Dr. Fox examined the claimant on June 6, 2011. Dr. Fox noted tenderness over the right sacroiliac (SI) joint and that lumbar range of motion (ROM) was decreased and painful with right side bending. Dr. Fox assessed an SI strain, imposed a 10 pound weight restriction and prescribed medications. Apparently the claimant was also referred for physical therapy (PT).

5. On June 20, 2011 Dr. Fox noted that the claimant had transient improvement with PT but was getting worse overall with "frequent pinching pains in the left lower back."

6. On June 27, 2011 the claimant underwent a lumbar MRI. Mild facet arthropathy was noted at L4-5 and L5-S1. There was likely osteoarthritis of the SI joints.

7. Thereafter the claimant underwent additional PT, chiropractic treatment and acupuncture. The claimant reported some transient relief of symptoms as a result of these treatments.

8. On November 29, 2011 John Aschberger, M.D., examined the claimant. This examination was apparently the result of a referral from Dr. Fox. The claimant reported pain located mainly in the left low lumbar area. Dr. Aschberger assessed lumbosacral strain with a suggestion of a component of SI strain. He recommended PT for core stability and SI joint injections.

9. SI joint injections were performed on January 4, 2012. On January 9, 2012 the claimant reported to Dr. Aschberger that the injections resulted in "equivocal gain" and some relief of symptoms. The claimant also reported improvement in functionality.

10. On February 8, 2012 the claimant underwent a functional capacity evaluation (FCE). The claimant reportedly passed 66% of the validity criteria which suggested the possibility of poor effort and borderline invalid results. The claimant was placed in the light to medium duty category.

11. On March 12, 2012 Dr. Fox examined the claimant and reported decreased lumbar ROM in all directions with pain. He noted the claimant was not working because there was no light duty. He opined the claimant would soon be at maximum medical improvement (MMI) unless Dr. Aschberger had additional treatment suggestions.

12. On March 19, 2012 Dr. Aschberger recommended the claimant undergo an SI block and L4-S1 facet blocks on the left. On March 20, 2012 Dr. Fox noted the claimant had made no overall improvement and did not want to undergo the injections recommended by Dr. Aschberger.

13. On April 23, 2012 Dr. Aschberger examined the claimant. She was mildly tender at the left low back and SI areas with no paraspinal tightness. Dr. Aschberger assessed chronic low back pain with SI irritation and possible facet irritation. He opined the claimant was at MMI. He assessed an 8 percent whole person impairment based on 5% impairment of the lumbar spine and 3% reduced ROM in the lumbar spine.

14. On August 9, 2012 the claimant underwent a Division-sponsored independent medical examination (DIME) performed by Douglas Scott, M.D. Dr. Scott agreed with Dr. Aschberger's diagnosis of SI joint dysfunction with joint irritation and noted some findings suggestive of facet joint pain. He also agreed the claimant reached MMI on April 23, 2013. Dr. Scott assessed a 17% whole person impairment based on 5% for a specific disorder of the lumbar spine and 13% for lumbar ROM deficits. However, Dr. Scott expressed doubt about the validity of the ROM impairment stating that the diagnoses of SI joint disorder and/or facet pain would more likely influence lumbar extension than flexion. Therefore, Dr. Scott opined his 4% rating for reduced lumbar flexion might "not reflect a true permanent impairment in flexion." He

also opined, based on the FCE, that the claimant may have given poor effort on the ROM testing. Dr. Scott opined that "maintenance treatment" should include core strengthening exercises and use of a non-steroidal medication such as ibuprofen. He also suggested the claimant "reconsider" the SI joint and facet block injections recommended by Dr. Aschberger and stated these should be considered maintenance treatment.

15. On November 15, 2012 Dr. Fox examined the claimant. The claimant reported "quite a bit of pain in the left hip and left buttock." The lumbar spine was tender with reduced ROM in "all directions." The left SI region was also tender. Dr. Fox assessed a lumbar strain, sciatica and "left hip pain of uncertain etiology." Dr. Fox also reviewed Dr. Scott's DIME report noting the recommendations for additional land-based or pool therapy and "facet and/or sacroiliac injections performed as maintenance therapy." Dr. Fox prescribed Flexeril and "pool therapy 2 times a week." He also referred the claimant to Dr. Aschberger for potential facet and SI injections. Dr. Fox wrote that the claimant remained at MMI and all treatment "will be done as maintenance visits."

16. On December 17, 2012 Dr. Fox noted that the claimant had seen Dr. Aschberger who was recommending epidural steroid injections. On December 17 Dr. Fox also completed a Physician's Report of Workers' Compensation Injury (Form WC 164) listing the "work related medical diagnosis (es)" as a sprain of the low back/lumbosacral, pain/hip and SI dysfunction.

17. Dr. Fox examined the claimant on January 17, 2013. The claimant reported that her back was no better and that she had not received any injections because the case was under litigation. The claimant advised Dr. Fox that she had "back pain 70% of the time." Dr. Fox noted "focal tenderness in the right lower back." The pain was between 6 and 8 on a scale of 10. Dr. Fox prescribed Flexeril.

18. The respondents sought a hearing to overcome the DIME physician's impairment rating. On January 30, 2013 ALJ Cannici issued an order finding that the respondents overcame the DIME physician's impairment rating by clear and convincing evidence. In support of this finding ALJ Cannici cited Dr. Scott's opinion that the claimant may have given less than full effort during ROM testing and Dr. Aschberger's testimony that there was no objective evidence that the industrial injury "caused lumbar flexion or right lateral flexion range of motion loss." ALJ Cannici determined the claimant sustained 8% whole person impairment as a result of the industrial injury. On February 20, 2015 the respondents filed a Final Admission of Liability (FAL) admitting for PPD benefits consistent with ALJ Cannici's order and also admitting for future medical benefits that are reasonable and necessary.

19. On February 19, 2013, the claimant returned to Dr. Fox. The claimant reported she had completed PT and requested additional PT. Dr. Fox also noted that Dr. Aschberger was planning to do injections as soon as they were authorized by the insurer. Dr. Fox's plan was to proceed with injections once they were authorized. Dr. Fox referred the claimant to Robert Kawasaki, M.D., "for left L4-5 L5-S1 facet injections

and left SI joint injection." Additionally Dr. Fox referred the claimant for more PT one to two times per week for one month. On February 19 Dr. Fox also completed a Form WC 164 listing the "work related medical diagnosis (es)" as a sprain of the low back/lumbosacral, pain/hip, SI dysfunction and low back pain with sciatica.

20. On March 8, 2013 Dr. Kawasaki performed left L4-5 and L5-S1 facet injections and a left SI joint injection. Dr. Kawasaki reported that the claimant's "pre-injection VAS pain score of '10/10' was reduced to 5-7 in recovery."

21. Dr. Fox examined the claimant on March 19, 2013. The claimant reported her back pain was no better and she still complained of left hip symptoms. Dr. Fox assessed status post left facet injection and chronic low back pain. He opined she remained at MMI. Dr. Fox prescribed Tramadol and continued PT and pool therapy.

22. Dr. Aschberger examined the claimant on March 21, 2013. The claimant reported that she experienced no "lasting benefit" from the injections performed by Dr. Kawasaki. Dr. Aschberger noted the claimant was tender at the left low back "localized toward the SI area." Dr. Aschberger noted he did not have the claimant scheduled for any follow-up visits.

23. Dr. Fox examined the claimant on April 2, 2013. The claimant reported significantly increased pain in her low hip and buttock since the March 8, 2013 injections. Dr. Fox noted diffuse tenderness in the lumbar region and recommended a repeat MRI. He also prescribed Percocet for severe pain but advised the claimant this was not an appropriate medication of long-term pain management.

24. On April 16, 2013 the claimant underwent a lumbar MRI. The radiologist reported that the MRI showed mild facet arthropathy from L3-L4 through L5-S1. Otherwise the MRI was normal.

25. On April 17, 2013 Dr. Fox examined the claimant and reviewed the MRI results. He noted the MRI showed mild facet arthropathy. He assessed mild facet arthropathy, post-facet injection and chronic low back pain. Dr. Fox opined that therapeutic options were limited given the lack of objective findings on the MRI. He referred the claimant for additional PT and chiropractic treatment and/or acupuncture.

26. On June 21, 2013 the claimant told Dr. Fox that her pain level had "significantly increased recently." She also reported that PT was recently approved and restarted and acupuncture was pending authorization. The claimant was also approved to see "Dr. Kathy McCrea" (presumably Kathy McCranie, M.D.) with whom an appointment was scheduled on June 26, 2013. The claimant reported that tramadol was less effective than it used to be for treating pain and she requested stronger medication. Dr. Fox opined that the claimant remained at MMI and stated he would request that Dr. McCranie manage the claimant's pain and medications.

27. Dr. McCranie performed a "physiatric evaluation" on June 21, 2013. The claimant reported a burning sensation in her left hip and that she was experiencing sharp pains down her left leg, left buttock and lumbar region. On a pain scale of 0 to

10 (with10 being the worst pain) the claimant rated her worst pain at 10 (10/10) and her lowest pain at 6/10. The claimant advised Dr. McCranie that the injections performed by Dr. Kawasaki helped her left leg pain but she continued to have left buttock pain. Dr. McCranie noted the claimant had undergone over 100 PT sessions and that she was currently being treated with ultrasound, traction, dry needling and was taking Tramadol. Dr. McCranie's impressions included low back and posterior left thigh pain and "myofascial involvement of the lumbar and gluteal musculature." Dr. McCranie opined the claimant was a good candidate for trigger point injections.

28. On May 6, 2013 Carlos Cebrian, M.D., performed an independent medical examination (IME) of the claimant. Dr. Cebrian issued a report on July 17, 2013. Dr. Cebrian took a history from the claimant, reviewed pertinent medical records and conducted a physical examination. Dr. Cebrian assessed lumbar spine degenerative disease, subjective complaints "out of proportion to objective findings," right SI joint sprain and bilateral SI pain. Dr. Cebrian stated that the claimant continued to complain of significant pain 2 years after the injury and that her pain was shifting "from side to side." Dr. Cebrian opined this did not speak to "significant pathology nor a permanent condition." Dr. Cebrian also opined that "no future medical" was indicated for the injury of June 2, 2011 and that conservative therapies had failed to provide "sustained functional improvement or reduction in pain." Dr. Cebrian recommended the cessation of all maintenance care.

29. On July 22, 2013 Dr. McCranie administered trigger point injections to the left L5 paraspinals, the left S1 paraspinals, the left upper gluteal region and the left lateral gluteal region. Dr. McCranie also referred the claimant for massage therapy.

30. Dr. Fox examined the claimant on July 25, 2013. The claimant gave a history that she had "recently noted significant improvement in her symptom pattern." She was walking "irregularly" up to 2 miles at a time with minimal discomfort. The claimant had completed 4 visits of chiropractic/acupuncture treatment and felt it was "helping quite a bit." The claimant was also undergoing trigger point injections and massage therapy that began 3 days ago. Dr. Fox recommended continuation of trigger point injections and massage therapy, continued PT/acupuncture and prescribed Flexeril.

31. On July 29, 2013, the claimant returned to Dr. McCranie. The claimant reported some initial soreness after the trigger point injections but after that felt "incredible." The claimant stated that she felt "60% better" and that the trigger point injections "were better than any of the other injections she has had in the past." She rated her pain "on a 0-10 scale at a 6." Dr. McCranie administered trigger point injections to the left L5 paraspinals, the left S1 paraspinals and the left and right upper gluteal regions.

32. On August 5, 2013 the claimant returned to Dr. McCranie. The claimant reported she was doing "77% better" and reported her pain was 3/10. The claimant noted she had pain predominantly in the midline portion of the low back but overall felt the injections had helped bilaterally. The claimant desired to proceed with a third set of

injections. Dr. McCranie administered trigger point injections to the right and left upper gluteal musculatures and the right and left medial gluteal musculatures.

33. On August 9, 2013 the claimant called Dr. Fox's office and reported that the third set of trigger point injections was causing "a lot of pain." The claimant requested "stronger" medication and Dr. Fox wrote a prescription for Percocet.

34. On August 27, 2013 the claimant returned to Dr. McCranie. The claimant reported that after the last injections she developed a bruise which caused her to contact Dr. Fox who prescribed Percocet. However, the symptoms subsided and the claimant reported that her pain now varied between 4-5/10. Dr. McCranie noted the claimant had completed a series of three sets of trigger point injections. The claimant reported improvement from the injections, was decreasing use of Tramadol and was exercising regularly. Dr. McCranie discharged the claimant from treatment and referred her back to Dr. Fox for further maintenance care.

35. On August 28, 2013 the claimant returned to Dr. Fox. Dr. Fox noted that Dr. Cebrian did not believe further treatment was warranted and Dr. Fox opined that therapeutic options were "extremely limited." Dr. Fox noted the claimant was "still getting chiropractic/acupuncture treatments" and felt they were helping somewhat. Dr. Fox recommended the claimant complete scheduled chiropractic treatments and noted a gym membership had been requested. At this time Dr. Fox completed a Form WC 164 listing the "work related medical diagnosis (es)" as a sprain of the low back/lumbosacral, pain/hip, SI dysfunction and low back pain with sciatica.

36. On February 14, 2014 the claimant returned to Dr. Fox. She reported that she had obtained employment as a bank teller and was usually permitted to sit while working. However, she recently was required to stand and since that time had experienced an "exacerbation of her chronic low back pain." The claimant also reported that her injections had "worn off" and she had experienced increased pain since November 2013. The claimant completed a pain diagram showing left low back pain, left buttock pain and left posterior thigh pain. The pain was rated 7/10. Dr. Fox noted the claimant was taking Tramadol "when necessary." Dr. Fox observed the claimant had significant improvement in her symptoms after trigger point injections and requested that she be allowed to obtain additional treatments from Dr. McCranie. Dr. Fox also noted the claimant got relief from acupuncture and was requesting more of this type of treatment. Dr. Fox referred the claimant for acupuncture and to Dr. McCranie for "possible trigger point injections."

37. On March 4, 2014 Dr. McCranie prescribed the drug Tizanidra. The evidence does not contain any medical record concerning the claimant's March 4 visit to Dr. McCranie.

38. On April 28, 2014 Dr. Cebrian performed another IME of the claimant. Dr. Cebrian issued his report on May 31, 2014. In connection with this report Dr. Cebrian took an additional history, performed another physical examination and reviewed additional medical records. Dr. Cebrian reported that on physical examination there

weas no swelling, bruising, redness or trigger points. ROM was reportedly full with pain on flexion and right lateral flexion. With movement the claimant reported pain on the left side of the lumbar spine. Dr. Cebrian assessed lumbar spine degenerative disease, subjective pain out of proportion to objective findings, right SI joint sprain-resolved, and diffuse myofascial pain.

39. In the May 31, 2014 report Dr. Cebrian opined that it is medically probable the claimant does not need any further treatment related to the June 2, 2011 claim. Dr. Cebrian again opined the claimant's reported symptoms are out of proportion to the objective findings, including the MRI findings. Dr. Cebrian recommended termination of all maintenance medical care noting that discharge "from the engagement of medical services will be therapeutic as there will not be the continued dependence on passive medical treatment." Dr. Cebrian opined that injections have not provided "sustained improvement" and medications have not provided increased function.

40. The claimant testified as follows. The maintenance treatments she received after MMI helped relieve her symptoms. The last trigger point injection in August 2013 relieved a lot of her pain. She has not received the acupuncture treatment recommended by Dr. Fox in February 2014 but desires to have it. She visited Dr. McCranie on March 4, 2014 and Dr. McCranie prescribed a "muscle relaxer." Dr. McCranie desired to try the muscle relaxer medication prior to performing additional trigger point injections because the claimant experienced substantial pain during the previous trigger point injections. The respondents have denied all medical treatment and prescriptions since March 4, 2014. The claimant desires to receive treatment from Dr. McCranie.

41. The respondents failed to prove it is more probably true than not that the claimant has no condition that is causally related to the industrial injury.

42. When the claimant was placed at MMI by Dr. Aschberger he diagnosed chronic low back pain, SI joint dysfunction and "possible facet irritation." The DIME physician, Dr. Scott agreed with the diagnosis of SI joint dysfunction and noted some findings consistent with facet joint pain. As shown by the WC Form 164's completed by Dr. Fox he agrees with the diagnosis of injury-related SI joint dysfunction and that the claimant suffers from persistent pain causally-related to the injury of June 2, 2011. Further, each of these physicians opined that the claimant needs one or more forms of post-MMI treatment to relieve the effects of the claimant's ongoing pain. Recommendations for post-MMI treatment have included PT, medications, SI joint and facet blocks, acupuncture, chiropractic and trigger point injections. The ALJ credits and gives substantial weight to the opinions of Dr. Aschberger, Dr. Scott and Dr. Fox insofar as the agree the claimant suffers from injury related medical conditions, including SI joint dysfunction, that are causally-related to the industrial injury and have resulted in ongoing symptoms since the date of MMI.

43. Dr. Cebrian's opinion that the claimant no longer suffers from any injury-related condition is not as persuasive as the opinions of Dr. Aschberger, Dr. Scott and Dr. Fox. Dr. Cebrian's opinion that the claimant does not now suffer from any injury-

related condition is contrary to the great weight of the credible medical opinions cited in Finding of Fact 42. Although Dr. Cebrian cited the absence of "objective findings" to support the existence of an ongoing medical condition, Dr. Aschberger, Dr. Scott, Dr. Fox and Dr. McCranie all have agreed the claimant's clinical picture supports the conclusion that the claimant suffers from ongoing pain which warrants post-MMI treatment. To the extent Dr. Cebrian implies the claimant's reports of pain are not credible because her symptoms have shifted from "side to side," the ALJ finds his reasoning is unpersuasive. In this regard the medical records establish that within 18 days of the injury on June 2, 2011 the claimant reported both right and left sided symptoms. (Findings of Fact 4 and 5). Moreover, since Dr. Aschberger's examination on November 29, 2011, the claimant has reported predominately, although not exclusively, left-sided back and lower extremity symptoms.

44. The respondents failed to prove it is more probably true than not that no additional treatment is or will be reasonable and necessary to relieve the ongoing effects of the industrial injury.

45. Dr. Cebrian's opinion that no treatment is reasonable and necessary to relieve the effects of the injury is unpersuasive. Dr. Cebrian's opinion appears to be based largely on his conclusion that none of the post-MMI treatments have provided the claimant any "sustained" pain relief or increased function. It is not clear from Dr. Cebrian's reports what he believes would constitute sufficiently "sustained" relief to warrant post-MMI medical treatment.

46. Regardless, the claimant credibly testified that the post-MMI treatments have at least temporarily relieved some of her symptoms and the weight of the medical records corroborates her testimony. For instance, on March 21, 2013 the claimant told Dr. Aschberger that the injections performed by Dr. Kawasaki did not provide "lasting relief," she did not say they provided no relief. In fact, on June 21, 2013 the claimant told Dr. McCranie Dr. Kawasaki's injections "helped" her left leg pain. On June 21, 2013 the claimant told Dr. Fox that Tramadol was less effective in relieving her pain than "it used to be." The ALJ infers from this entry that Tramadol was effective in relieving some of the claimant's post-MMI pain although its effectiveness had declined by June 21, 2013. More significantly, on July 25, 2013 the claimant told Dr. Fox that her symptoms had significantly improved and she was able to walk up to 2 miles after 4 chiropractic/acupuncture visits and beginning the trigger point/massage therapy program prescribed by Dr. McCranie. On July 29, 2013 the claimant told Dr. McCranie she felt "incredible" after the first set of trigger point injections and they provided better results than any of the prior injections. On August 27, 2013 the claimant told Dr. McCranie that after the symptoms subsided from the last trigger point injections her pain was at a level 4-5/10, she was decreasing the use of Tramadol and was exercising regularly. On August 28, 2013 Dr. Fox noted the claimant was still undergoing chiropractic/acupuncture treatments and they were helping somewhat.

47. On February 14, 2014 Dr. Fox prescribed additional acupuncture and referred the claimant back to Dr. McCranie for "possible trigger point injections." The ALJ infers from these referrals that Dr. Fox believes this course of treatment has a

reasonable prospect of relieving some of the ongoing effects of the claimant's injuries. The ALJ infers that Dr. Fox's opinion in this regard is based on his prior experiences demonstrating that these treatments provided significant relief of the claimant's symptoms. Dr. Fox's opinion in this regard is credible and persuasive.

48. The claimant proved it is more probably true than not that she is entitled to an award of specific medical benefits in the form of acupuncture treatment and the drug Tizandra.

49. For the reasons stated in Finding of Fact 42 the ALJ credits and gives substantial weight to the opinions of Dr. Aschberger, Dr. Scott and Dr. Fox insofar as the agree the claimant suffers from injury related medical conditions, including SI joint dysfunction, that are causally-related to the industrial injury and have resulted in ongoing symptoms since the date of MMI. The contrary opinion of Dr. Cebrian is not persuasive for the reasons stated in Finding of Fact 43.

50. On February 14, 2015 Dr. Fox credibly opined that the claimant should undergo additional acupuncture treatments. On that date the claimant reported her symptoms had been increasing since at least November 2013. The claimant had previously told Dr. Fox that she benefited from acupuncture treatments. The ALJ infers that the acupuncture prescribed by Dr. Fox offers a reasonable prospect for relieving the claimant's ongoing symptoms related to the industrial injury of June 2, 2011.

51. On March 8, 2014 Dr. McCranie prescribed the drug Tizanidra. The claimant credibly testified that Dr. McCranie wished to try this drug prior to any additional trigger point injections because the claimant had suffered severe pain when undergoing the injections. The ALJ infers from this evidence that Dr. McCranie believes use of Tizanidra may alleviate the claimant's symptoms without subjecting her to the pain associated with injection therapy. The ALJ finds that the prescription for Tizanidra offers a reasonable prospect of relieving the claimant's ongoing symptoms related to the industrial injury of June 2, 2011.

52. The ALJ further finds that the claimant failed to prove it is more probably true than not that trigger point injections constitute reasonable and necessary medical treatment. The ALJ infers from the claimant's testimony and Dr. McCranie's prescription for Tizanidra that Dr. McCranie believes performance of any additional trigger point injections should await the completion of the trial of Tizanidra. Dr. Fox has not actually prescribed additional trigger point injections. Instead Dr. Fox deferred to Dr. McCranie to determine whether the claimant needed injections.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. Section 8-40-102(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

RESPONDENTS' REQUEST TO TERMINATE ALL MAINTENANCE MEDICAL BENEFITS

The respondents, relying principally on the opinions of Dr. Cebrian, contend that all medical maintenance benefits should be terminated because the need for such treatment is not reasonable, necessary or related to the industrial injury of June 2, 2011. The ALJ disagrees that the evidence supports termination of all maintenance medical treatment.

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for ongoing medical benefits after MMI is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. Thus an award of post-MMI medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In cases where the respondents file an FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific post-MMI medical treatment the claimant bears the burden of proof to establish entitlement to

the medical benefit. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009).

In contrast, if the respondents file an FAL admitting for ongoing medical benefits after MMI but subsequently seek an order permanently terminating all such treatment they bear the burden to prove by a preponderance of the evidence that no treatment is or will be reasonably needed to relieve the effects of the injury or prevent deterioration of the claimant's injury-related condition(s). Section 8-43-201(1), C.R.S.; *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838 (ICAO October 1, 2013); *Salisbury v. Prowers County School District RE2*, WC 4-702-144 (ICAO June 5, 2013).

The respondents may terminate all post-MMI medical treatment if they prove by a preponderance of the evidence that the claimant does not now suffer from any injury-related condition. Questions of causation present an issue of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). The respondents may also terminate all post-MMI medical treatment if they prove by a preponderance of the evidence that the claimant does not now and is unlikely in the future to need reasonable and necessary medical treatment to prevent deterioration of her condition or relieve ongoing effects of the injury. The question of whether the respondents proved that the claimant does not need and is not likely to need reasonable and necessary medical treatment to maintain or relieve the effects of her injury-related condition is also a question of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Here, the respondents seek an order terminating the claimant's right to receive any post-MMI medical benefits. Consequently the respondents bear the burden of proof to show that the claimant does not now have any injury-related condition and/or that no medical treatment is currently needed or may reasonably be needed in the future to relieve the effects of the claimant's condition.

As determined in Findings of Fact 41 through 43, the respondents failed to prove the claimant does not now have any injury-related medical condition. The ALJ is persuaded by the opinions of Dr. Aschberger, Dr. Scott, and Dr. Fox that the claimant suffers from injury-related conditions that have continued to produce painful symptoms since the claimant was placed at MMI on April 23, 2012. Dr. Cebrian's contrary opinion is not credible and persuasive for the reasons stated in Finding of Fact 43.

As determined in Findings of Fact 44 through 47 the ALJ finds the respondents failed to prove the claimant does not now and is unlikely in the future to need medical treatment to relieve the ongoing effects of the June 2, 2011 industrial injury. Rather, in accordance with Finding of Fact 46 the ALJ is persuaded by the claimant's testimony, as corroborated by the medical records, that several post-MMI medical treatments have provided significant relief of her back and lower extremity symptoms. Moreover, the ALJ is persuaded by Dr. Fox's February 14, 2014 opinion that the claimant continues to need additional treatment to relieve the ongoing effects of the injury.

Conversely, for the reasons stated in Finding of Fact 46 though 47 the ALJ is not persuaded by Dr. Cebrian's opinion that the claimant does not need any additional treatment to relieve the effects of the injury. Indeed, Dr. Cebrian appears to believe that post-MMI medical treatment must result in "sustained" relief to be considered reasonable and necessary. However, Dr. Cebrian does not define what would constitute "sustained" relief. In any event, there is no legal standard requiring that post-MMI treatment provide "sustained" relief in order to be compensable. Indeed, medical treatment that results in "sustained" relief is more consistent with pre-MMI medical treatment designed to improve and stabilize the claimant's condition. Section 8-40-201(11.5), C.R.S. (MMI exists when injury-related mental and physical impairment is stable and no further treatment is expected to improve the condition). In contrast, post-MMI treatment is not designed to improve the claimant's overall condition. Instead it is designed relieve the ongoing effects of the industrial injury and/or prevent further deterioration of the claimant's condition after it has stabilized. *Grover v. Industrial Commission*, supra; *Stollmeyer v. Industrial Claim Appeals Office, supra*.

The respondents' request to terminate all post-MMI medical treatment is denied.

CLAIMANT'S REQUEST FOR AWARD OF POST-MMI MEDICAL BENEFITS

The claimant requests an award of post-MMI treatment in the form of "possible injections" and acupuncture treatments recommended by Dr. Fox on February 14, 2015. The claimant also requests an award of the Tizanidra, the medication prescribed by Dr. McCranie.

As noted above, when the claimant requests specific post-MMI medical benefits she bears the burden of proof to establish that the need for the treatment is causally related to the industrial injury and that the treatment is reasonable and necessary to relieve the effects of the injury or prevent deterioration of the condition.

As determined in Finding of Fact 42 the claimant proved it is more probably true than not that she needs additional medical treatment to relieve symptoms that are causally related to the injury of June 2, 2011.

As determined in Findings of Fact 50 and 51 the claimant proved it is more probably true than not that acupuncture and Tizanidra constitute reasonable and necessary medical treatment to relieve the ongoing effects of the June 2, 2011 industrial injury. For the reasons stated in Finding of Fact 52 the claimant failed to prove that at this time trigger point injections constitute reasonable and necessary medical treatment. Rather, determination of the reasonableness and necessity of trigger point injections is premature and must await the trial of Tizanidra.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The respondents' request to terminate post-MMI medical benefits is denied. The respondents' shall continue to provide reasonable and necessary medical treatment to relieve symptoms of and prevent deterioration of conditions causally related to the industrial injury of June 2, 2011.

2. The insurer shall provide reasonable and necessary medical treatment in the form of acupuncture treatments and Tizanidra. Insofar as the claimant requests an award of trigger point injections that request is denied as of the date of the hearing, December 11, 2014. This order is not intended to prohibit or deny any future award of trigger point injections or other treatment subsequent to the date of the hearing.

3. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 13, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents timely designated Dr. Greendyke as Claimant's Authorized Treating Physician (ATP) in Idaho once it had some knowledge of facts that would lead a reasonably conscientious manager to believe that Claimant was relocating to Idaho and required continuing medical treatment.

2. Whether Respondents have presented substantial evidence to support a determination that additional medical treatment is not reasonably necessary to relieve the effects of Claimant's June 22, 2011 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On June 22, 2011 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. Claimant injured his left hand while pulling a pallet jack.

2. On June 27, 2012 David W. Yamamoto, M.D. placed Claimant at Maximum Medical Improvement (MMI). He assigned Claimant a 15% left upper extremity impairment rating that converted to a 9% whole person rating. Dr. Yamamoto also recommended medical maintenance treatment.

3. On July 13, 2012 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Yamamoto's MMI and impairment determinations. Respondents noted that Claimant was entitled to receive medical maintenance benefits. Claimant did not seek a Division Independent Medical Examination (DIME) to challenge the admitted MMI date or impairment rating.

4. On January 16, 2013 Claimant visited David Conyers, M.D. for an evaluation. He recommended a left wrist arthroscopy with TFCC debridement and revision of the ulnar shortening.

5. On May 3, 2013 Claimant filed a Petition to Reopen his claim. On December 13, 2013 ALJ Broniak denied the Petition to Reopen.

6. By December 23, 2013 Dr. Yamamoto recommended continued maintenance treatment for up to 12 months. He also remarked that the left wrist surgery proposed by Dr. Conyers' could be undertaken as medical maintenance treatment.

7. On June 20, 2014 Claimant mailed a letter to Insurer stating that he was relocating to Idaho. He requested designation of an Idaho physician. Insurer received Claimant's request on June 23, 2014.

8. Claims Representative for Insurer Daysi Bloethner testified that she delegated the task of locating an Idaho physician to Insurer's Nurse Jo Walker and outside counsel. Nurse Walker explained that she contacted multiple Idaho physicians and sent medical records but was unable to locate a physician who was willing to treat Claimant.

9. On June 24, 2014 Nurse Walker contacted Occupational Medicine in Coeur D'alene, Idaho and spoke to Renee about the transfer of care. Renee remarked that she would need to consult with her manager regarding transfer of care and call back. On June 25, 2014 Nurse Walker received a message from Renee stating that Occupational Medicine would not accept the transfer of care because Claimant's injury was not acute.

10. On June 25, 2014 Nurse Walker contacted Dr. Ludwig's office regarding transfer of care and spoke to Tristin. Tristin commented that there would need to be an agreement to accept the Idaho fee schedule. Nurse Walker then requested a copy of the Idaho fee schedule.

11. On July 8, 2014, while waiting to hear back from Idaho Occupational Medicine Group, Nurse Walker again contacted Tristen from Dr. Ludwig's office. Because Tristen did not recall the prior discussion, Nurse Walker spoke to Dr. Ludwig's Nurse Lynne. Lynne explained that Dr. Ludwig would need to review Claimant's medical records prior to accepting a transfer of medical care.

12. On July 11, 2014 Nurse Walker sent the requested medical records to Dr. Ludwig's office. However, on July 15, 2014 Nurse Walker received a telephone call from Dr. Ludwig's office stating that he would not accept care because the injury occurred so long ago. Dr. Ludwig's office referred Nurse Walker to Scott Magnuson, M.D.

13. On July 15, 2014 Nurse Walker contacted Dr. Maguson's office and spoke to Georgia about becoming Claimant's new Authorized Treating Physician (ATP) in Idaho. Georgia responded that Claimant would need to have a primary care physician in order to be seen by Dr. Maguson. Dr. Magnuson subsequently declined to accept a transfer of care.

14. On July 17, 2014 Nurse Walker contacted U.S. HealthWorks in Spokane Valley and spoke to Julie. Julie noted that her physicians would not be willing to take Claimant's case because his injury was over one year old.

15. On July 23, 2014 Claimant sent a letter to Insurer stating that he relocated to a new Idaho address. The local change of address did not impact Insurer's efforts to locate a treating physician in Idaho.

16. On July 30, 2014 Nurse Walker contacted Dr. Keese but his office would not accept out of state claims. She also contacted Spokane Orthopedics but they did not take out of state claims. Finally, Nurse Walker contacted Dr. Mullen but his office would not treat wrist patients.

17. On July 30, 2014 Nurse Walker spoke to Tammy from Dr. Bowen's office. Dr. Bowen agreed to treat Claimant and requested medical records.

18. On August 1, 2014 Insurer designated Dr. Bowen as Claimant's ATP. Insurer scheduled an appointment for Claimant on August 19, 2014 at 10:15 a.m. in Post Falls, Idaho.

19. Ms. Bloethner commented that, shortly before the August 19, 2014 appointment, Claimant's attorney notified Insurer that Dr. Bowen's office had cancelled the appointment. Dr. Bowen did not wish to treat Claimant for non-medical reasons.

20. On August 26, 2014 Claimant sent a letter to Insurer stating that Dr. Bowen cancelled his medical appointment and refused to treat him. Insurer responded that Respondents were in the process of locating an Idaho physician to treat Claimant.

21. Ms. Bloethner testified that, shortly after learning that Dr. Bowen would not treat Claimant, Insurer located Dr. Greendyke at RiversEdge Orthopedics in Coeur d'Alenei, Idaho. However, Dr. Greendyke's office refused to schedule a medical appointment with Claimant until Insurer agreed to accept the Idaho fee schedule.

22. On August 26, 2015 Nurse Walker ceased attempting to locate an Idaho physician. She noted that "all possible prospects for finding doctor to accept transfer of [Claimant] have been exhausted." However, she remarked that she would pursue new prospects if additional information was obtained.

23. On August 26, 2014 Claimant sent a letter to Respondents stating that "pursuant to statute, the right of selection of the treating physician has passed to [Claimant]. Respondents were notified of the refusal to treat and Respondents have not designated a physician to treat Claimant." Insurer subsequently responded that the right of selection had not passed to Claimant because it had contacted multiple providers who had refused to provide medical treatment. Insurer also noted that it was continuing to attempt to locate an Idaho physician to treat Claimant.

24. Ms. Bloethner explained that she obtained approval from Insurer to accept the Idaho fee schedule and informed Dr. Greendyke's office on August 26, 2014. However, before an appointment could be scheduled Insurer and Dr. Greendyke's office sought to resolve the calculation of medical bills. Furthermore, Dr. Greendyke's office required Insurer to sign an agreement regarding the payment of medical bills.

25. For the period August 27, 2014 through September 13, 2014 Insurer and Dr. Greendyke's office communicated regarding the computation of medical bills. Insurer subsequently scheduled Claimant for a medical appointment with Dr. Greendyke

on September 29, 2014. On September 15, 2014 Insurer notified Claimant of the September 29, 2014 appointment with Dr. Greendyke.

26. On September 18, 2014 Claimant sent a letter to Insurer advising that he had located Michael Whiting, M.D. in Coeur d'Alenei, Idaho to provide treatment. Claimant also noted that Dr. Whiting was an authorized provider for the claim. Finally, Claimant requested transportation to the September 29, 2014 appointment with Dr. Greendyke.

27. On September 23, 2014 Insurer responded that it would not authorize treatment with Dr. Whiting. Ms. Bloethner also stated that Insurer did not have any medical records from Dr. Whiting.

28. Claimant acknowledged that he was aware of the September 29, 2014 appointment with Dr. Greendyke but did not attend the appointment. He explained that he did not receive a mileage check from insurer until two hours after the scheduled commencement of the appointment. However, Insurer sent Claimant a mileage check through overnight mail on September 25, 2014. Ms. Bloethner testified that she received confirmation that Claimant had received the mileage check on September 26, 2014 or three days prior to the scheduled appointment.

29. Respondents submitted medical reports from Jonathan Sollender, M.D. and Brian D. Lambden, M.D. Both reports explained that Claimant should not receive additional medical maintenance benefits. In a December 1, 2014 addendum to an independent medical examination report Dr. Sollender specifically noted that "Claimant should not be afforded any further maintenance care." Similarly, in a November 4, 2014 letter Dr. Lambden determined that "I do not believe medical maintenance care is necessary."

30. Respondents timely designated Dr. Greendyke as Claimant's ATP in Idaho once it had some knowledge of facts that would lead a reasonably conscientious manager to believe that Claimant was relocating to Idaho and would require continuing medical treatment. Despite the passage of more than two months before Respondents designated an Idaho ATP who would treat Claimant, the record reveals that Insurer engaged in significant reasonable efforts in an attempt to locate a physician who was willing to treat Claimant. Nurse Walker contacted numerous Idaho physicians during the summer of 2014 but they refused to provide medical treatment to Claimant because of the age of his industrial injury and for a variety of other reasons. Specifically for the period June 24, 2014 until August 26, 2014 Nurse Walker contacted at least eight physicians who declined to treat Claimant.

31. After learning about Dr. Bowen's refusal to treat Claimant, Respondents immediately searched for a replacement physician in Idaho. Respondents quickly found Dr. Greendyke, but he would not schedule an appointment for Claimant until Insurer agreed to accept the Idaho fee schedule, signed a written agreement and figured out how to compute payment of medical bills using proper coding. Ms. Bloethner did not have the authority to agree to the request but obtained authorization from a superior and

notified Dr. Greendyke's office that Insurer agreed to accept the Idaho fee schedule. For the period August 27, 2014 through September 13, 2014 Insurer and Dr. Greendyke's office communicated regarding the computation of medical bills. On September 15, 2014 Insurer notified Claimant that it had scheduled an appointment with Dr. Greendyke for September 29, 2014 but Claimant failed to attend. The record reveals that Insurer used reasonable efforts but encountered significant difficulties in locating an Idaho physician to treat Claimant. The record is replete with evidence that Insurer repeatedly attempted to obtain an ATP for Claimant in Idaho throughout the summer of 2014. Accordingly, the right of selection has not passed to Claimant and Dr. Greendyke is his ATP.

32. Respondents have presented substantial evidence to support a determination that additional medical treatment is not reasonably necessary to relieve the effects of Claimant's June 22, 2011 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). Initially, Respondents acknowledged that Claimant was entitled to receive maintenance medical benefits in the July 13. 2012 FAL. However, the persuasive evidence reveals that Claimant is no longer entitled to medical maintenance treatment. Both Drs. Sollender and Lambden persuasively concluded that Claimant should not receive additional medical maintenance benefits. In a December 1, 2014 addendum to an independent medical examination report Dr. Sollender specifically remarked that "Claimant should not be afforded any further maintenance care." Similarly, in a November 4, 2014 letter Dr. Lambden determined that "I do not believe medical maintenance care is necessary." Accordingly, Claimant is not entitled to additional medical maintenance benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Change of Physician

4. If an employer is notified of an industrial injury and fails to designate an ATP the right of selection passes to the employee. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565, 567 (Colo. App. 1987). An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

5. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.,* W.C. No. 3-985-493 (ICAP, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

6. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

7. A respondent's duty to designate a medical provider when a claimant moves to another location is triggered when the respondent has some knowledge of facts that would lead a reasonably conscientious manager to believe the claimant was relocating and would require continuing medical treatment. *See Bunch*, 148 P.3d at

383.; *In Re Ries,* W.C. No. 4-674-408 (ICAP, Jan. 12, 2011). The resolution of whether a respondent has timely fulfilled its duty to designate a medical provider in another state is one of fact for resolution by an ALJ. *See Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997); *In Re Ries,* W.C. No. 4-674-408 (ICAP, Jan. 12, 2011).

8. As found, Respondents timely designated Dr. Greendyke as Claimant's ATP in Idaho once it had some knowledge of facts that would lead a reasonably conscientious manager to believe that Claimant was relocating to Idaho and would require continuing medical treatment. Despite the passage of more than two months before Respondents designated an Idaho ATP who would treat Claimant, the record reveals that Insurer engaged in significant reasonable efforts in an attempt to locate a physician who was willing to treat Claimant. Nurse Walker contacted numerous Idaho physicians during the summer of 2014 but they refused to provide medical treatment to Claimant because of the age of his industrial injury and for a variety of other reasons. Specifically for the period June 24, 2014 until August 26, 2014 Nurse Walker contacted at least eight physicians who declined to treat Claimant.

9. As found, after learning about Dr. Bowen's refusal to treat Claimant, Respondents immediately searched for a replacement physician in Idaho. Respondents quickly found Dr. Greendyke, but he would not schedule an appointment for Claimant until Insurer agreed to accept the Idaho fee schedule, signed a written agreement and figured out how to compute payment of medical bills using proper coding. Ms. Bloethner did not have the authority to agree to the request but obtained authorization from a superior and notified Dr. Greendyke's office that Insurer agreed to accept the Idaho fee schedule. For the period August 27, 2014 through September 13, 2014 Insurer and Dr. Greendyke's office communicated regarding the computation of medical bills. On September 15, 2014 Insurer notified Claimant that it had scheduled an appointment with Dr. Greendyke for September 29, 2014 but Claimant failed to attend. The record reveals that Insurer used reasonable efforts but encountered significant difficulties in locating an Idaho physician to treat Claimant. The record is replete with evidence that Insurer repeatedly attempted to obtain an ATP for Claimant in Idaho throughout the summer of 2014. Accordingly, the right of selection has not passed to Claimant and Dr. Greendyke is his ATP.

Medical Maintenance Benefits

10. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of

fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

11. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2013), C.R.S. Respondents admitted that Claimant was entitled to receive medical maintenance benefits as a result of his June 22, 2011 industrial injury. Accordingly, Respondents have the burden of proving by a preponderance of the evidence that additional medical treatment is not reasonably necessary to relieve the effects of Claimant's June 22, 2011 industrial injury or prevent further deterioration of his condition.

12. As found, Respondents have presented substantial evidence to support a determination that additional medical treatment is not reasonably necessary to relieve the effects of Claimant's June 22, 2011 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). Initially, Respondents acknowledged that Claimant was entitled to receive maintenance medical benefits in the July 13. 2012 FAL. However, the persuasive evidence reveals that Claimant is no longer entitled to medical maintenance treatment. Both Drs. Sollender and Lambden persuasively concluded that Claimant should not receive additional medical maintenance benefits. In a December 1, 2014 addendum to an independent medical examination report Dr. Sollender specifically remarked that "Claimant should not be afforded any further maintenance care." Similarly, in a November 4, 2014 letter Dr. Lambden determined that "I do not believe medical maintenance care is necessary." Accordingly, Claimant is not entitled to additional medical maintenance benefits.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. The right of selection has not passed to Claimant. Respondents timely designated Dr. Greendyke as Claimant's ATP.

2. Claimant is not entitled to receive medical maintenance benefits,

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20)

days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 19, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

1. Whether the true opinion of the Division Independent Medical Examination (DIME) physician regarding permanent impairment is 16% whole person or 0% whole person.

2. Whether the opinion of the DIME physician has been overcome by clear and convincing evidence.

3. Whether a prior order finding the July 30, 2010 injury compensable precluded the DIME physician from providing a 0% whole person permanent impairment rating.

PROCEDURAL ISSUES

At the outset of hearing the parties reserved the issue of average weekly wage as well as wages from concurrent employment for future negotiation and potential settlement. The issue of whether the treatment provided by Ricardo Esparza, Ph.D. was authorized, reasonable, and necessary and whether the medical bills of Dr. Esparza should be paid by Respondents was found by the ALJ to not have been properly or fully identified as an issue for hearing and was reserved for future determination without prejudice.

FINDINGS OF FACT

1. Claimant works part-time for Employer as a supervisor in the pre-load area. Claimant's team is responsible for pulling packages from a conveyor belt, scanning and sorting them, and loading them into delivery trucks.

2. On July 30, 2010 while at work, Claimant crossed a conveyer belt with a flashlight in his left rear pocket. Claimant backed up to the belt, butt-first, and rolled across the belt on his back/butt. As he rolled across the belt, he felt a sharp pain in his left lower back/buttock area where the flashlight dug in. Claimant's lower back area went into spasm, and he dropped to one knee due to the pain.

3. Claimant reported the injury to Employer but understood from an August 2, 2010 meeting with Employer that Employer was denying his request for medical attention.

4. From August 3, 2010 through September 3, 2010 Claimant was treated by chiropractor Craig Pearson, D.O. Dr. Pearson's records reflect Claimant's pain complaints were in the left buttock and that Claimant had numbness in his left leg and foot. *See* Exhibit L.

5. Claimant continued to work his normal schedule for Employer as well as a second job as a realtor with no missed time due to the July 2010 incident. Claimant next sought medical treatment related to this incident on March 28, 2012.

6. On March 28, 2012, Claimant saw David Yamamoto, M.D. Claimant filled out a patient questionnaire where he reported left buttock pain and left leg/foot numbness and instability/imbalance. Claimant indicated on the patient questionnaire that when he rolled over the conveyor belt the flashlight compressed into his left buttock causing pain. *See* Exhibit K.

7. Dr. Yamamoto noted that Claimant had chronic pain in the left buttock, diagnosed sciatica and herniated disc syndrome, ordered a lumbar MRI, and opined the injury was work related. *See* Exhibit K.

8. Claimant underwent an MRI on July 11, 2012 that was interpreted by Craig Stewart, M.D. Claimant reported to Dr. Stewart falling two years prior with persistent left buttock pain. The MRI revealed multilevel moderate facet arthropathy of the lower lumbar spine with mild-moderate degenerative disc disease at L4-L5 and L5-S1. Dr. Stewart noted there was at most moderate bilateral neural foraminal narrowing at L5-S1 and noted that a small right central L5-L5 disc protrusion contributed to no definite nerve impingement. *See* Exhibit K.

9. The medical providers agree that the right sided disc protrusion shown on the MRI is not causing Claimant's left sided lower extremity symptoms.

10. On July 10, 2012 Rachel Basse, M.D. performed an Independent Medical Examination (IME). Claimant reported to Dr. Basse that at the time of the injury he had immediate severe pain in the left buttock and that he had continued pain deep in the left buttock, and aching, numbness, tingling, and pins and needles in the left leg from the knee through the foot. Dr. Basse opined that Claimant had left L5 radiculopathy and possible mild left S1 radiculitis. Dr. Basse opined that the July 2010 event is not one which she would expect to cause an injury to the lumbosacral spine. *See* Exhibit J.

11. On July 16, 2012 Claimant underwent an IME with John Hughes, M.D. Dr. Hughes diagnosed contusion of the sciatic nerve on the left and persistent neuropathy followed by the L5 nerve root distribution. Dr. Hughes opined that Claimant's left sciatic nerve contusion/bruise stemmed from the July 30, 2010 injury. *See* Exhibit A.

12. The compensability of the initial claim was contested by Employer and went to hearing.

13. On December 26, 2012 ALJ Harr issued an order determining that Claimant suffered a compensable injury on July 30, 2010. ALJ Harr found that Claimant showed it more probably true than not that he sustained an injury to his lower back that arose out of and within the course of his employment. ALJ Harr also found that Claimant had shown it more probably true that the medical attention provided by Dr. Pearson, Dr. Yamamoto, and by providers to whom Dr. Yamamoto referred Claimant was reasonable and necessary to cure and relieve the effects of the injury. *See* Exhibit A.

14. The issue of permanent medical impairment was not before ALJ Harr and was not litigated at the prior hearing. ALJ Harr made no findings regarding a permanent impairment rating. ALJ Harr's order specifically ordered that "issues not expressly decided herein are reserved to the parties for future determination." The issue of permanent partial disability and permanent medical impairment was thus reserved for future determination.

15. After the injury was found compensable, Claimant began treating with Dr. Yamamoto. Claimant saw Dr. Yamamoto on January 21, 2013, February 18, 2013, March 25, 2013, and May 13, 2013. At each of those appointments, Dr. Yamamoto provided the continued diagnoses of sciatica and herniated disc syndrome. Dr. Yamamoto also noted at all of these appointments that Claimant had normal active range of motion in his back. Dr. Yamamoto also made referrals to Peter Reusswig, M.D. and to Franklin Shih, M.D. *See* Exhibit K.

16. On February 22, 2013 Claimant saw Dr. Reusswig. Claimant reported to Dr. Reusswig that he had pain in his lower back and left leg. However, while describing the pain, Claimant reported the pain started in the mid left buttock, skipped his thigh, and restarted in his left knee and traveled down through his left shin and foot. Claimant saw Dr. Reusswig on March 15, 2013 and May 3, 2013 where he continued to report pain in the buttock on the left side, left leg pain, and left foot pain. *See* Exhibit 7.

17. On June 4, 2013 Claimant underwent an EMG/nerve conduction study performed by Dr. Shih. Claimant reported to Dr. Shih that he had discomfort in the left buttock and lower left extremity. Claimant also complained of depression and balance difficulties. Dr. Shih opined that Claimant's electrodiagnostic findings revealed some abnormalities but that the abnormalities were not related to Claimant's work injury of July, 2010. *See* Exhibit 8.

18. Dr. Shih assessed: multiple nerve conduction abnormalities consistent with diffuse peripheral neuropathy; low back and left lower extremity pain, complex, probable radicular syndrome; distal left peroneal nerve lesion with denervation noted in the extensor digitorum brevis; and left median nerve entrapment at the wrist. *See* Exhibit 8.

19. Dr. Shih opined that although Claimant's clinical presentation was consistent with lumbar radiculopathy, there was no electrodiagnostic evidence of

denervating *lumbar* radiculopathy and no evidence of pathology associated with a denervating lesion at the piriformis. Dr. Shih opined that the electrodiagnostic findings show that if there is pathology related to the lumbar or piriformis area, the pathology *was not* to the point of *causing damage* or denervation of the nerve. Dr. Shih recommended that Claimant follow up with his primary care physician for a routine medical workup to make sure there were no potential treatable causes of Claimant's diffuse peripheral neuropathy such as diabetes, thyroid dysfunction, vitamin deficiencies, etc. *See* Exhibit 8.

20. On June 19, 2013 Claimant again saw Dr. Yamamoto. At this appointment Claimant reported to Dr. Yamamoto that he had been depressed over the past two months, and preferred not to take an antidepressant or to get counseling. Claimant reported he did not want treatment for depression but that he wanted it noted in his chart that he had some mild depression as a result of the workers' compensation injury. Dr. Yamamoto assessed sciatica, herniated disc syndrome, and depressive disorder. Claimant saw Dr. Yamamoto on July 19, 2013, August 19, 2013, and September 18, 2013. Dr. Yamamoto continued to assess sciatica, herniated disc syndrome, and depressive disorder. *See* Exhibit K.

21. During this time, Claimant also continued to see Dr. Reusswig. On July 18, 2013, July 29, 2013, and August 13, 2013 Claimant continued to report to Dr. Reusswig that he had pain in the left buttock, left leg, left foot, and that he had continued left leg parasthesias. *See* Exhibit 7.

22. On September 30, 2013 Allison Fall, M.D. performed a medical records review at Respondents' request. Dr. Fall opined that Claimant's July 30, 2010 incident did not cause an injury to his lumbosacral spine and did not cause any lumbar radiculopathy. Dr. Fall pointed out that the electrodiagnostic evaluation was negative for radiculopathy or sciatic neuropathy from the piriformis and that the general peripheral neuropathy shown by the electrodiagnostic evaluation was not work related. Dr. Fall opined that Claimant was at maximum medical improvement (MMI). *See* Exhibit H.

23. At Claimant's very next appointment with Dr. Yamamoto, on October 18, 2013, Dr. Yamamoto continued his assessment of sciatica, herniated disc syndrome, and depressive disorder but assessed for the first time the diagnosis of low back pain. *See* Exhibit K.

24. On October 21, 2013 Respondents filed a Notice and Proposal to Select an IME for the issues of MMI and permanent impairment. On December 23, 2013 Respondents filed an application for a "24 month DIME" pursuant to 8-42-107(8)(b)(II), C.R.S. Dr. Hattem was eventually selected as the Division Independent Medical Examination (DIME) physician and March 19, 2014 was set as the date for the examination.

25. While the DIME application was pending, Claimant continued to treat with Dr. Yamamoto and Dr. Reusswig. Claimant continued to have pain in the left buttock and left knee to toes. Dr. Reusswig performed multiple injections into Claimant's left buttock and in February of 2014 opined that Claimant had left piriformis syndrome.

26. On December 23, 2013 Claimant underwent an ultrasound of his left gluteal region interpreted by William Berger, M.D. Dr. Berger's impression was negative soft tissue ultrasound exam. Dr. Berger noted the subcutaneous fat and imaged musculature appeared normal. *See* Exhibit K.

27. On January 8, 2014 Claimant saw Ricardo Esparza, Ph.D. for a psychological assessment on referral from Dr. Yamamoto. Dr. Esparza provided provisional diagnoses of: major depression, single episode, without psychosis; pain disorder associated with psychological factors in general medical condition; anxiety disorder; and relational problems associated with mental and medical condition. *See* Exhibit 5.

28. Claimant saw Dr. Esparza on January 22, 2014, January 30, 2014, February 5, 2014, February 25, 2014, March 5, 2014, March 19, 2014, April 3, 2014, April 22, 2014, May 20, 2014, June 20, 2014, and July 1, 2014. Dr. Esparza noted at these visits that Claimant continued to have ups and downs and continued to struggle with depression. At the final appointment, Dr. Esparza noted that Claimant had made an important psychological transition, recognized responsibility for his own happiness and had made a concerted attempt to move away from resentment, projections of blame, and sense of futility in trying to change reality. Dr. Esparza noted the plan was for Claimant to advise if he needed a follow up visit with none planned. *See* Exhibit 5.

29. On February 24, 2014 Claimant was placed at MMI by Dr. Yamamoto. Dr. Yamamoto's report inconsistently noted Claimant's complaints to be lower back pain and left leg pain/numbness, but also listed Claimant's symptoms were only in the left buttock and left leg area with no symptoms in the lower back. Dr. Yamamoto assessed: mechanical low back pain; left leg tingling and numbness, clinically suggestive of an S1 radiculopathy; history of left sciatic nerve contusion; and secondary depression. *See* Exhibit 2.

30. Dr. Yamamoto provided an 18% whole person permanent impairment rating. Dr. Yamamoto's rating included a 15% impairment from Table 53, provided a 1% whole person impairment from Table 49 for the S1 nerve root radiculopathy, and provided a 2% whole person impairment for depression. *See* Exhibit 2.

31. On March 19, 2014 Albert Hattem, M.D. performed a DIME. Claimant reported to Dr. Hattem that he had injured his left lower back on July 30, 2010 when a flashlight dug into his left buttock area. Claimant reported he had not missed any work as a consequence of the injury. Claimant reported at the evaluation that he had pain over the left buttock and left lateral leg from the knee to the foot. Claimant did not report low back pain. *See* Exhibit I.

32. Dr. Hattem diagnosed left buttock contusion. Dr. Hattem opined that Claimant was appropriately placed at MMI on February 24, 2014. Dr. Hattem noted diagnostically that a lumbar MRI demonstrated only age related mild to moderate degenerative changes and that an EMG/nerve conduction study revealed no evidence of lumbar radiculopathy. *See* Exhibit I.

33. Dr. Hattem noted that as of February 24, 2014 Claimant was 43 months post injury and had completed very extensive treatment including physical therapy, massage therapy, acupuncture, medication management, and multiple injections and that despite all the treatments, Claimant's left buttock pain persisted. Dr. Hattem opined that it was unlikely additional treatment would be beneficial. *See* Exhibit I.

34. Dr. Hattem opined that it was not plausible that such a minor incident occurring in July of 2010 with subsequent unrevealing diagnostic tests would cause 4 years of chronic unrelenting pain. Dr. Hattem opined that it was likely that other non work related factors were causing the ongoing subjective complaints. *See* Exhibit I.

35. Despite opining that the July 2010 incident was minor and that the lumbar MRI and EMG/nerve conduction tests revealed no evidence of lumbar impairment due to the injury, Dr. Hattem provided a 16% whole person impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, revised (AMA Guides). Dr. Hattem assigned a 7% impairment for 6 months of medically documented pain with moderate to severe degenerative changes on structural tests, and a 10% impairment for abnormal lumbar range of motion, and combined the ratings for a 16% whole person impairment. *See* Exhibit I.

36. Dr. Hattem differed from Dr. Yamamoto's impairment rating in three ways. Dr. Hattem did not believe a 1% whole person impairment for S1 radiculopathy impairment was appropriate as the EMG/nerve conduction study did not demonstrate that finding. Dr. Hattem also did not believe mental health impairment was appropriate and noted there was no evidence for a significant psychiatric disturbance. Dr. Hattem opined that Claimant's depression was not functionally limiting to warrant a permanent impairment rating. Finally, Dr. Hattem noted he believed a 7% table 53 impairment was more appropriate than the 5% table 53 impairment Dr. Yamamoto provided as the MRI demonstrated moderate degenerative changes. *See* Exhibit I.

37. On August 22, 2014 Dr. Hattem testified via deposition. Dr. Hattem indicated that when he first evaluated Claimant, he questioned causation of a lumbar spine injury but believed the issue had already been decided by ALJ order. Dr. Hattem testified consistent with his DIME report that the flashlight did not come into contact with Claimant's lumbar spine.

38. Dr. Hattem confirmed that Table 53 of the AMA Guides deal with permanent impairment ratings for specific disorders of the spine. Dr. Hattem opined that Claimant does not have permanent impairment of his lumbar spine caused by the

July 2010 incident and is not entitled to a Table 53 permanent impairment rating. Dr. Hattem opined that Claimant did not have an intervertebral disk or soft tissue lesion caused by the July 2010 incident. Dr. Hattem opined the source of Claimant's pain is a localized sciatic nerve-piriformis muscle injury, which is not ratable and does not cause impairment to Claimant's lumbar spine.

39. Dr. Hattem opined that his prior 16% whole person impairment rating was in error, not consistent with the AMA Guides, and that Claimant had no permanent impairment from the July 2010 incident warranting a rating for specific disorder of the spine.

40. Dr. Hattem also confirmed his opinion that Claimant was not entitled to a mental impairment rating and that any psychological problems Claimant was having were not related to rolling over a flashlight four years ago. Although Dr. Hattem believed that any psychological problems Claimant was having were not related to the July 2010 incident, Dr. Hattem also noted that even if they were related, the psychological problems were not limiting Claimant's function sufficient to warrant a permanent impairment rating. Dr. Hattem noted that Claimant had continued to work two jobs from the date of injury until present time without missing time due to depression. Dr. Hattem noted that although Claimant reported to Dr. Esparza that he was withdrawn, isolated, and depressed, that was not reflected in Claimant's ability to continue to function very highly.

41. The deposition opinion of Dr. Hattem that Claimant is not entitled to an impairment rating for his lumbar spine or for his psychological condition, and that Claimant's permanent impairment rating is 0% is the true opinion of the DIME physician.

42. On August 27, 2014 Dr. Fall performed a medical records review and issued a report. Dr. Fall opined that Dr. Hattem's March 19, 2014 DIME report erred in providing a 16% whole person permanent impairment rating for the lumbar spine. Dr. Fall opined that a Table 53 diagnosis must be given first before moving on to range of motion and that Dr. Hattem did not provide a diagnosis meeting the criteria of Table 53. Dr. Fall also opined that Dr. Hattem erred in the date of MMI and opined that Claimant was obviously at MMI at the time she previously saw him in September of 2013. *See* Exhibit H.

43. On March 20, 2015 Dr. Yamamoto testified at deposition. Dr. Yamamoto agreed that the EMG nerve testing did not demonstrate any evidence of radiculopathy from the spine. Dr. Yamamoto agreed that Claimant has piriformis syndrome caused by the work injury and that the pain generator for piriformis syndrome is in the left buttock area where the piriformis crosses over the sciatic nerve. Dr. Yamamoto testified that his diagnosis of mechanical low back pain could have been from stiffness as a result of the piriformis syndrome, but acknowledged it could have other causes.

44. Dr. Yamamoto opined that Table 53 does not permit an impairment rating for piriformis syndrome. However, Dr. Yamamoto opined that in Claimant's case,

Claimant had the buttock or piriformis injury and shortly thereafter developed lower back pain and stiffness and that the injury altered Claimant's movement creating a chronically stiff back which was ratable.

45. Dr. Yamamoto characterized his rating as a difference of opinion with Dr. Hattem. In Dr. Yamamoto's opinion Claimant met the criteria for a permanent impairment rating for his lumbar spine as Claimant had a clearly documented acute injury, initial complaint of buttock pain which was likely the piriformis syndrome, and had clearly documented stiffness of his low back. Dr. Yamamoto opined that Claimant may also have sacroiliac dysfunction that might need to be pursued and that it was a possibility that Claimant had both piriformis and sacroiliac dysfunction. Dr. Yamamoto noted that the sacroiliac joint is considered part of the spine.

46. No medical provider has diagnosed Claimant with sacroiliac dysfunction.

47. Dr. Fall testified at hearing. She opined that Claimant's ongoing pain is more likely than not related to the diffuse and non-work related peripheral neuropathy shown by EMG/nerve testing conducted by Dr. Shih. Dr. Fall opined that Claimant was not entitled to a permanent impairment rating for his lumbar spine and that his incident in July 2010 rolling on the flashlight did not cause lumbar spine impairment. She opined that nerve pain from the left buttock area was not part of the lumbar spine nor did the left buttock pain radiate up to the lumbar spine and opined that the objective medical evidence did not support a whole person impairment rating under Table 53 for specific disorders of the spine.

48. Dr. Fall noted Claimant's non work related conditions to include: fracture of the left leg through the growth plate and a shorter left than right leg; low thyroid; peripheral neuropathy; and peroneal nerve near the lower leg and ankle. Dr. Fall opined that those conditions, taken together would be expected to cause an altered gait.

49. Dr. Fall further opined that that Claimant was not entitled to a permanent impairment rating for mental impairment. She noted that when a person is not involved in activities of daily living or recreation due to pain, it is not ratable but that if they are not involved in activities of daily living or recreation due to depression, it is ratable. She found Claimant to be functional with no significant depression warranting a permanent impairment rating.

50. Dr. Fall's testimony and opinions are found credible and persuasive.

51. Dr. Hattem's testimony and opinions are found credible and persuasive.

52. Dr. Yamamoto's opinions are not found credible or persuasive, were difficult to pinpoint, and are not supported by the overwhelming medical evidence.

53. The conflict between Dr. Yamamoto's rating of permanent impairment and the zero rating provided by Dr. Hattem (and supported by Dr. Fall) amounts, at most, to a difference of medical opinion.

54. The testimony of Claimant at hearing is not found persuasive. Claimant was somewhat evasive, had trouble recalling details, and his testimony was inconsistent with several medical reports, including the location of injections that were performed by Dr. Reusswig on his left buttock and not his lower back.

55. The testimony of Mrs. Niziolek is also not persuasive regarding whether Claimant's injury caused permanent impairment to the lumbar spine warranting a rating and whether Claimant's diagnosed depression qualifies for a permanent impairment rating.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

DIME Opinion

The DIME physician's findings concerning the date of MMI and the degree of medical impairment are binding on the parties unless overcome by clear and convincing evidence. *See* § 8-42-107(8)(b)(III) & (8)(c), C.R.S. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra.* In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005); *see also, Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002). Once the ALJ determines the DIME physician's opinion concerning impairment, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. *Clark v. Hudick Excavating, Inc.*, W.C. No. 4-524-162 (November 5, 2004)

As found above, in his initial report, DIME physician Dr. Hattem questioned the relationship between the injury and Claimant's ongoing pain. However, he nonetheless provided an impairment rating. Dr. Hattem subsequently opined that Claimant was not entitled to an impairment rating under Table 53 as he did not have an intervertebral disc or soft tissue lesion or impairment to the lumbar spine caused by the July 2010 work injury. Dr. Hattem also continued his initial opinion that Claimant was not entitled to any rating for mental impairment. Dr. Hattem opined that his initial 16% whole person impairment rating was not consistent with the AMA Guides and at deposition opined that Claimant's true impairment rating was 0%. Dr. Hattem's deposition testimony that there was no impairment to the lumbar spine is his true opinion. Dr. Hattem is found credible and persuasive in explaining why he initially provided a rating, in error. In this matter, the true opinion of the DIME physician is 0% impairment with no permanent impairment to the lumbar spine and no permanent psychological impairment. Therefore, the burden of proof rests with Claimant to overcome the DIME physician's 0% whole person impairment rating by clear and convincing evidence.

Overcoming the DIME opinion

The DIME physician's findings concerning the date of MMI and the degree of medical impairment are binding on the parties unless overcome by clear and convincing evidence. Sections 8-42-107(8)(b) (III) & (8)(c), C.R.S. "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or

facts highly probable or the converse, and is free from serious or substantial doubt. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). In other words, a DIME physician's findings may be not overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. Whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating has been overcome by clear and convincing evidence are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000). A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004).

Lumbar Spine- Table 53

Claimant has failed to overcome Dr. Hattem's DIME opinion by clear and convincing evidence. Claimant failed to show that it is highly probable that Dr. Hattem's determination of 0% impairment is incorrect. Additionally, the testimony of Dr. Yamamoto confirmed that the rating physician has discretion to provide a permanent impairment rating and that he merely had a difference of medical opinion with Dr. Hattem on whether or not Claimant suffered a permanent impairment to his lumbar spine that was ratable. Dr. Yamamoto admits that piriformis syndrome is not ratable under Table 53 for lumbar spine impairment. However, Dr. Yamamoto believes that the piriformis injury altered Claimant's movement and that shortly after the piriformis injury Claimant developed low back pain and stiffness, and that the mechanical low back pain is ratable. This is inconsistent with the medical reports showing that the pain reported by Claimant was consistently reported to be in the left buttock and left leg following the injury and low back pain and stiffness did not develop shortly after the July 2010 injury. As found above, Dr. Yamamoto did not diagnose mechanical low back pain until October 18, 2013, more than three years after the July 2010 work injury and a few weeks after Dr. Fall opined that Claimant had no injury to the lumbosacral spine. Further, Dr. Yamamoto's testimony included an opinion that Claimant may suffer from sacroiliac dysfunction which would be ratable as it is part of the lumbar spine. This opinion is not supported by any medical evidence and despite significant treatment, Claimant was never diagnosed with sacroiliac dysfunction.

Although Dr. Yamamoto believes that Claimant's mechanical low back pain *could* be caused by altered gait as a result of the left piriformis injury or that Claimant *might* have sacroiliac dysfunction, these opinions are not found persuasive and are not supported by the overall medical documentation in this case. Rather, the medical evidence and opinions of Dr. Hattem and Dr. Fall are persuasive that Claimant has no impairment of his lumbosacral spine warranting a Table 53 rating. Claimant has failed

to present credible and persuasive evidence to establish that Dr. Hattem's 0% impairment rating was incorrect. Dr. Fall agreed with Dr. Hattem's conclusions on the 0% impairment rating providing further support for the DIME physician's opinion. Although Dr. Yamamoto disagrees with Dr. Hattem's DIME conclusion, Dr. Yamamoto's opinion does not suggest that it is highly probable that Dr. Hattem's opinion is incorrect.

Psychological Impairment

Claimant also has failed to overcome the DIME opinion of Dr. Hattem by clear and convincing evidence as it pertains to a 0% permanent mental impairment rating. Although Claimant argues that the DIME physician should have provided an impairment rating for psychological impairment, Claimant failed to present clear and convincing evidence that the DIME physician erred by failing to do so. Here, Dr. Hattem opined that a significant factor showing Claimant was not functionally limited by depression to the point warranting a permanent impairment rating was that Claimant continued to work two jobs, with no missed time due to the injury or depression. Claimant worked for Employer in a supervisory capacity and also ran his own real estate business, showing his functional ability was high. As found above, consistent with the DIME opinion, Dr. Fall also opined that a 0% mental impairment rating was appropriate in this case as there was insufficient evidence to show that Claimant's depression was functionally limiting. Dr. Hattem was able to review the full reports of Dr. Esparza which did not change his opinion as to the appropriateness of a 0% permanent mental impairment rating. Claimant did not present evidence or testimony from Dr. Esparza or Dr. Yamamoto showing that Dr. Hattem erred in applying the AMA Guides for mental impairment to Claimant's function or Claimant's depression diagnosis. The difference in permanent mental impairment rating between Dr. Yamamoto and DIME physician Dr. Hattem and Dr. Fall is merely a difference of opinion on whether Claimant meets the AMA Guides for mental impairment and as to whether Claimant's diagnosed depression was functionally limiting sufficient to warrant a permanent impairment rating. DIME physician Dr. Hattem opined it was not and with no substantial evidence showing this to be in error, Claimant has failed to meet his burden.

Issue Preclusion

Issue preclusion is an equitable doctrine that bars re-litigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78 (Colo. 1999). Issue preclusion bars re-litigation of an issue if: (1) The issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) The party against whom estoppel is asserted has been a party to or is in privity with the party to the prior proceeding; (3) There is a final judgment on the merits in the prior proceeding; and (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). Claimant argues that, because ALJ Harr determined that Claimant sustained a "low back injury" while rolling over the flashlight, Dr. Hattem was either bound to provide an impairment rating for the lumbar spine or was required to determine that the source of the claimant's pain and impairment was

from the lumbar spine or lumbar region. Claimant's argument is unpersuasive, not supported by law, and runs contrary to the established statutory and case law assigning the DIME physician authority to assess impairment and causation.

The issue before ALJ Harr was compensability. ALJ Harr found the July 2010 injury compensable, allowing Claimant to receive further treatment. The treatment Claimant received after this order eventually ruled out the lumbar spine as a source of Claimant's continued pain and ruled out a ratable lumbar spine condition. The issue in the current case is not identical to the issue of compensability determined by ALJ Harr. Rather, the issue in this case is whether Claimant is entitled to a permanent impairment rating under Table 53 of the AMA Guides for impairment of the lumbar spine. Although ALJ Harr ordered generally that the injury in July of 2010 to the lower back was compensable, he made no findings or order regarding permanent impairment to the lumbar spine. The parties at the prior hearing did not have a full and fair opportunity to litigate the issue of permanent impairment as Claimant had not yet received treatment and no medical provider was even close to being able to opine on whether the injury would eventually cause a permanent impairment to Claimant's lumbar spine. Claimant's argument that the DIME physician is required to find a permanent impairment to Claimant's lumbar spine based on an earlier award of general compensability would lead to an absurd result. Not every case where a compensable injury is suffered leads to permanent impairment or a permanent impairment rating. Claimant's argument that the issue here is identical to the issue determined by ALJ Harr and is thus precluded from determination is not persuasive.

ORDER

It is therefore ordered that:

1. The DIME physician's opinion in this matter is that Claimant has a permanent impairment rating of 0% whole person.

2. Claimant has failed to overcome the DIME opinion by clear and convincing evidence. Claimant failed to show by clear and convincing evidence that he is entitled to a Table 53 permanent impairment rating for his lumbar spine. Claimant also failed to show by clear and convincing evidence that he is entitled to a permanent psychological impairment rating.

3. Respondents shall be entitled to file a Final Admission of Liability admitting for a 0% whole person impairment rating.

4. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 14, 2015 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

The following issue was raised for consideration at hearing:

1. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examiner's (DIME) determination regarding maximum medical improvement (MMI) is most probably incorrect.

FINDINGS OF FACT

Based upon the evidence presented at hearing, that ALJ enters the following findings of fact:

1. Claimant was employed by Employer for two and one half years as a commercial truck driver. On February 10, 2012, Claimant sustained an admitted injury to his left shoulder.

2. Claimant was walking around a truck trailer doing a pre-trip check on the vehicle before beginning a driving trip for Employer. As Claimant came around the back of the vehicle and started walking up towards the front, his feet went out from under him when he stepped on some black ice and fell on his left side.

3. Since it was Friday evening when the accident occurred, Claimant could not report the accident because there was no one at Employer to whom to report.

4. Claimant tried to complete his driving trip, which was supposed to go to Grand Junction, Colorado. However, he only made it to Rifle, Colorado. He was having too much pain from his fall. He called the team he was supposed to meet, and they exchanged trailers in Rifle, Colorado.

5. Claimant reported his injury and had his initial medical appointment with authorized treating physician, Michael Ladwig, M.D., on February 14, 2012. The initial diagnosis was contusion of the left humerus.

6. On February 21, 2012, Claimant was referred to have a MRI to rule out occult fracture of the left humerus.

7. The MRI, taken on March 6, 2012, was normal for the humerus, but a MR arthrogram was also done on March 6, 2012, on the left shoulder, which showed a full thickness tear distal supraspinatus tendon with 1 cm retraction, mild osteoarthric changes AC joint and glenohumeral joint,

and subchondral cyst formation at the junction of the rotator cuff tendons.

8. On March 8, 2012, Claimant was referred to Dr. John Papilion, orthopedic surgeon, by Dr. Ladwig. Claimant had his initial appointment with Dr. Papilion on March 20, 2012. Dr. Papilion found that Claimant failed conservative care, and that he was an excellent candidate for arthroscopy subacromial decompression and distal clavicle resection with arthroscopic rotator cuff repair.

9. Claimant had the surgery on June 11, 2012. The post-operative diagnoses were full thickness tear supraspinatus tendon, 2.5 cm, rotator cuff, left shoulder, chronic impingement, left shoulder, acromiculavicular joint arthropathy, left shoulder, and chronic biceps tendon rupture with degenerative tear superior labrum, left shoulder.

10. The operations performed consisted of examination under anesthesia, diagnostic video arthroscopy, arthroscopic debridement of the superior labrum and rotator cuff, arthroscopic subacromial decompression with release of coraccacromial ligament, arthroscopic distal clavicle resection, arthroscopic rotator cuff repair with 4.7-mm Bic-Swivelocks x 4 with fibertape.

11. Claimant was placed in an abduction pillow shoulder immobilizer after the surgery. Claimant had to keep this device on all the time.

12. Claimant was prescribed Percocet upon discharge from the Lowry Surgery Center where the shoulder surgery was performed. The dosage prescribed was 1 – 2 pills by mouth every 4 – 6 hours, as needed.

13. Initially, Claimant took Percocet a few times during the day, one or two pills, depending upon how he felt. Claimant took at least two Percocet at night. When Claimant took the Percocet during the day, he would lie on the couch and nap.

14. Claimant was sleeping on a couch where he would not be able to roll over onto his left side because his arm was in the sling. In the last couple days of June 2012, Claimant fell at home.

15. On the night of the fall, Claimant took two (2) Percocet before or at bedtime. The Percocet prescription was a part of Claimant's medical care prescribed by an authorized treating physician.

16. Around midnight or one a.m., Claimant got up to go to the bathroom, and in the process of returning to the couch as he took a step to the right, he leaned over and fell on a living room chair and ottoman.

17. Claimant landed on his right side when he fell onto the cushioned chair with padded arms and a padded seat. Claimant came down on his right shoulder and hit his nose against the side of the cushion.

18. Claimant's use of the drug Percocet for pain following the first surgery made Claimant feel tired, groggy, and light headed such that he used the wall to steady himself going to and from the bathroom. Claimant's Percocet usage contributed to his fall in late June.

19. Claimant was wearing the shoulder immobilizer sling at the time he fell. Claimant did not feel any increased symptoms in his surgical left arm and shoulder after the fall or the next day.

20. Claimant began physical therapy on July 18, 2012. Claimant's fall occurred before this first physical therapy appointment. In the initial phase of physical therapy, Claimant progressed well. Claimant started to have problems occur as the physical therapy exercises became more difficult.

21. By September 10, 2012, Claimant was experiencing pain in his joint involving his upper arm. Claimant was also experiencing pain with overhead movement. By September 20, 2012, Claimant was experiencing popping in his shoulder. By September 27, 2012, Claimant reported soreness in the left shoulder that was not like the last physical therapy visit. His pain had increased.

22. By October 1, 2012, the pain was so bad that Claimant needed to sleep in a recliner. At the remaining physical therapy visits on October 4, 2012, October 15, 2012, October 22, 2012, October 25, 2012, October 31, 2012, November 1, 2012, November 5, 2012, November 8, 2012, and November 12, 2012, Claimant continued to report pain problems with certain motions of the shoulder.

23. Claimant had a follow up visit with Dr. Papilion on November 1, 2012, where he found that Claimant was almost five (5) months out from the repair of a tear in the rotator cuff and doing only fair. He noted persistent loss of motion and weakness that had plateaued in therapy.

24. Dr. Papilion ordered a post-surgical MRI, which was done on November 8, 2012. The repeat MRI showed a prior central rotator cuff repair but recurrent focal (12 x 10 mm) full-thickness tear of the anterior distal supraspinatus tendon overlying a suture anchor which may be bent or broken at the end sticking out.

25. Claimant had a follow up visit with Dr. Papilion on November 13, 2012, at which time Dr. Papilion found Claimant was a good candidate for repeat arthroscopy and rotator cuff repair.

26. Dr. Papilion's office scheduled the surgery to occur on December 7, 2012, but Respondents refused to authorize the surgery. In denying the request for authorization for surgery, Respondents relied on a record review performed by Dr. Allison Fall dated December 4, 2012. Dr. Fall opined that she was unable to state within a reasonable degree of medical probability that the second shoulder surgery was related to the work injury. She reasoned that the issue was the fall, which occurred three weeks after the first rotator cuff repair surgery. Dr. Fall opined that if this fall did cause the injury to the rotator cuff repair and caused a recurrent tear, this would be an intervening injury.

27. A second medical record review by J. Raschbacher, M.D. was performed on October 21, 2013. He opined that it would appear that a broken anchor would be more likely consistent with a fall rather than a spontaneous breakage or failure of the suture anchor. He did agree with Dr. Papilion that a certain number of rotator cuff repairs simply fail. He also stated that even if there was not a question of broken materials at the repair site, a fall in and of itself would be enough to cause a re-tear of the cuff. Dr. Raschbacher noted that Claimant's risk of surgical failure was higher because he smokes.

28. Claimant reported to Dr. Papilion that he fell three weeks after the first surgery on the right shoulder.

29. Claimant underwent a Division Independent Medical Examination with Dr. Thomas Fry on August 26, 2014. Dr. Fry assessed Claimant not at maximum medical improvement (MMI). Dr. Fry opined that it was unlikely that the fall three weeks post-surgery on the right shoulder re-injured the left shoulder, and the broken shoulder anchor and high surgical failure rate made it reasonable to assign Claimant's condition to a failure to heal from the original injury and surgery, and therefore a work related condition.

30. Dr. Papilion saw Claimant again on September 12, 2013. He found that Claimant had persistent symptoms with a recurrent tear 10 x 12 mm in the rotator cuff of his left shoulder. He also noted Claimant was having pain, loss of function, weakness, and that he was unable to lift. He continued to recommend a repeat examination under anesthesia, arthroscopy, and a revision rotator cuff repair of the left shoulder.

31. Dr. Papilion's deposition was taken by Claimant on March 18, 2014. Dr. Papilion was accepted as an expert in orthopedic surgery. Dr. Papilion

opined that the type of surgical repair that he performed on Claimant can fail without trauma.

32. Dr. Papilion described the shoulder immobilizer with an abduction pillow that Claimant was required to wear after surgery. Dr. Papilion opined that the anchor may not be broken, it could be dislodged. Dr. Papilion stated that a trauma would not necessarily be required for an anchor to pull out.

33. Dr. Papilion opined that a minor fall like that described by Claimant may have caused the rotator cuff to tear; because of its weakened state, in the early postoperative phase, the doctor opined that the shoulder's weakened state was susceptible to any kind of trauma, in physical therapy or a fall. Dr. Papilion's review of physical therapy notes caused him to credibly opine that the surgical failure occurred in the September time frame during the advancing physical therapy regiment.

34. Dr. Papilion provided letters dated September 26, and October 1, 2013, in response to letters sent by counsel. He found that Claimant was not at MMI. He stated that he was not convinced that the presumed second injury was responsible for the recurrent rotator cuff tear since physical therapy records document the advance of symptoms of pain, weakness, and loss of motion concurrent with the advance of physical therapy. Dr. Papilion opined that "There are percentages of rotator cuff repairs that do not heal and remain symptomatic, that require revision surgery." (Claimant Exhibit, pp. 2 – 3.) Dr. Papilion opined that the need for repair of the recurrent rotator cuff tear is related to the original work injury and subsequent surgical intervention.

35. On January 14, 2015, Dr. Hendrick Arnold opined, consistent with the opinions of Dr. Raschbacher and Dr. Fall, that it is within medical probability that the need for surgery is not related to the workers' compensation injury of February 10, 2012. Dr. Arnold found Claimant at MMI as of July 1, 2012. Drs. Arnold and Raschbacher acknowledged that a percentage of rotator cuff repairs fail spontaneously and require repeat surgery. Additionally, both doctors agree that Claimant needs repeat left shoulder surgery.

36. Dr. Arnold mentioned that medical records in 2013 reflect that Claimant had some substance abuse problems, however, Claimant took a drug test after the accident of February 10, 2012, that was negative. And, Claimant while employed by Employer for two and a half years gave random urine analysis samples that were negative for illegal drugs.

37. Claimant also maintained a commercial driver's license to drive for Employer. This license required physical examinations to maintain.

Claimant also took a pre-surgical physical on May 25, 2012, which he passed.

38. The ALJ finds the medical records and the opinions in this case by Dr. Papilion and Dr. Fry are the most credible and persuasive. Drs. Arnold, Fall and Raschbacher presented different theories regarding the cause of the rotator cuff re-tear, however, their opinions do not rise to the level of clear and convincing evidence that the DIME opinion of Dr. Fry on the issue of MMI is most probably incorrect. Respondents failed to present clear and convincing evidence that Claimant's fall at the end of June 2012 was a separate intervening event and therefore not work related.

39. The ALJ finds Drs. Fry and Papilion's opinions are most persuasive that the need for additional surgical repair of the recurrent rotator cuff tear is related to the original work injury and subsequent surgical intervention. Further, Dr. Papilion explains that Claimant's initial tear was large and statistically a significant percentage of repairs do go on to fail for various reasons. Also, the doctor notes that Claimant had increased pain when physical therapy was advanced as corroborated by the physical therapy records and Claimant's testimony of increasing problems as physical therapy exercises progressed.

40. The ALJ finds the DIME opinion of Dr. Fry that Claimant is not at MMI and that the recurrent tear of the left rotator cuff is work related has not been overcome by clear and convincing evidence.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, *et seq.,* C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessary of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents and a workers' compensation case shall be decided on its merits. Section 8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. In this case, Respondents contend that they presented clear and convincing evidence through the medical reports of Drs. Fall, Raschbacher and Arnold that the MMI determination of the DIME physician was most probably incorrect. Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*.

5. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

6. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition

by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

7. In this case, Respondents failed to meet their burden of proof to overcome by clear and convincing evidence Dr. Fry's DIME opinion that Claimant is not at MMI and that the current need for medical treatment and surgery for the left upper extremity is related to the work injury of February 10, 2012. The evidence supplied by Respondents through the reports of Drs. Raschbacher, Fall and Arnold amount to no more than a difference of opinion among experts and do not rise to the level of clear and convincing evidence. Claimant credibly testified regarding the mechanism of the late June 2012 fall onto a chair at home. Claimant was wearing an immobilizing arm sling and he fell on the right side. Relevant evidence was also revealed by Claimant's physical therapy records which showed Claimant's increasing pain and loss of function as physical therapy progressed. Furthermore, Dr. Fry, Arnold, Raschbacher, and Papilion agreed that rotator cuff repair surgery fails at a very high incident rate with or without a precipitating traumatic event.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Respondents failed to sustain their burden of proof to establish that the DIME opinion regarding MMI is most probably incorrect.

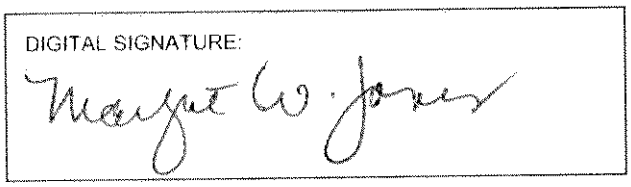
2. Claimant is not at maximum medical improvement.

3. Respondents shall be liable medical treatment to cure and relieve Claimant of the effects of the left shoulder recurrent rotator cuff tear.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th St., Suite 1300, Denver, CO 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the petition to review by mail, as long as a certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8 – 43 – 301 (2), C.R.S. (as amended, SB09 – 070). For further information regarding procedures to follow when filing a Petition to Review, see rule 26, OACRP. You may access a petition to review form at: **http://www.colorado.gov/dpa/oac/forms–WC.htm.**

DATED: May 28, 2015



Margot Jones
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether claimant has proven by a preponderance of the evidence that a follow up visit with Dr. Khan Farooqi is reasonable and necessary medical treatment related to claimant's admitted work injury?

- Whether claimant has proven by a preponderance of the evidence that her right shoulder and neck condition are causally related to the admitted work injury?

- Whether claimant has proven by a preponderance of the evidence that the medical treatment provided by Dr. Adams and Dr. Tice was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on September 30, 2011 while participating in training for employer when her all terrain vehicle ("ATV") hit a rock and rolled. Claimant testified at hearing that when the ATV began to roll, she dove off the ATV and landed on her hands. Claimant was taken from the accident scene to the base camp for the training, and was placed in a cervical collar and transported by ambulance to the emergency room ("ER") where claimant received treatment for an injury to her left foot and ankle.

2. Following claimant's injury, claimant was referred for medical treatment with Dr. Adams. Claimant received a course of medical treatment related to her left foot and ankle. Claimant was initially evaluated by Dr. Adams on October 7, 2011. Dr. Adams noted claimant was experiencing some mid back pain after the accident but not complaining of the pain during his examination. Dr. Adams noted claimant continued to have a lot of tenderness of the dorsum of her foot and both sides of the ankle.

3. Claimant was subsequently referred to Dr. Tice. Claimant was examined by Dr. Tice on November 16, 2011. Dr. Tice noted claimant had previously been examined for a back injury in July that was reasonably stable. Dr. Tice noted claimant was complaining of some neuropathic pain in her foot that Dr. Adams thought could be related to her back. Dr. Tice opined that the pain in her foot was likely not related to her back problem.

4. Claimant continued to treat with Dr. Huene and Dr. Khan-Farooqi for her foot and ankle injuries.

5. Claimant developed symptoms in the ulnar nerve distribution on her right hand. Claimant underwent an electromyelogram ("EMG") in connection with her symptoms under the auspices of Dr. Hehmann. The EMG was noted to be normal across the elbow and through the wrist, but Dr. Hehmann noted on examination that claimant definitely had an ulnar sensory distribution of loss of sensation. Claimant eventually sought a hearing and obtained an order in July 2013 finding the treatment for her ulnar nerve symptoms to be related to the work injury.

6. Claimant returned to Dr. Tice on October 1, 2013. Dr. Tice noted that Dr. Adams was concerned claimant was getting worse. Dr. Tice recommended surgical decompression and transposition of the ulnar nerve.

7. Claimant returned to Dr. Adams on October 24, 2013 with reports of pain radiating from her hand up into her shoulder. Claimant eventually underwent a right ulnar nerve decompression and transposition on November 11, 2013 under the auspices of Dr. Tice. Dr. Tice noted in his surgical report that claimant had a slight compression of the nerve at the cubital tunnel. Claimant returned to Dr. Adams on December 19, 2013 and noted she did not notice any improvement from before the surgery.

8. Claimant returned to Dr. Tice on January 29, 2014. Claimant reported symptoms that included ongoing numbness and weakness in the hand, some tenderness over the transposed ulnar nerve. Dr. Tice noted on examination that claimant had a history of shoulder and neck injury.

9. Claimant returned to Dr. Adams on February 17, 2014 and noted she was still experiencing numbness, tingling, loss of hand strength and pain that radiates up into her neck.

10. Claimant was evaluated by Dr. Tice on March 26, 2014. Dr. Tice noted claimant was having more trouble with hyperesthesias in her right hand and some pain in the shoulder and neck. Dr. Tice noted claimant had a history of shoulder and neck injury and left ankle injury. Dr. Tice noted claimant remained symptomatic from her shoulder pain and neck. Dr. Tice opined claimant's ulnar decompression was doing fairly well.

11. Claimant returned to Dr. Tice on May 1, 2014. Dr. Tice noted claimant was doing better, but still had significant spasm and pin in her right shoulder on occasion. Dr. Tice further noted that the occupational therapist thought some of claimant's problems were radicular in nature and coming from her neck. Dr. Tice noted that he felt claimant had a cervical strain and believed physical therapy with traction would be helpful for her.

12. Respondents referred claimant for an independent medical examination ("IME") with Dr. Nicholas Olsen on June 12, 2014. Dr. Olsen reviewed claimant's medical records, obtained a history from claimant and performed a physical examination

in connection with his IME. Dr. Olsen noted in his June 12, 2014 IME report that claimant did not complain of pain in her neck and shoulder following her injury and opined that claimant was at MMI as of March 26, 2014 when she returned to Dr. Tice for examination and he ordered x-rays of the right shoulder and neck, both of which were normal. Dr. Olsen did not recommend additional treatment for the claimant's neck or shoulder.

13. Dr. Tice responded to an inquiry from claimant's attorney on July 14, 2014. Dr. Tice opined in his report that he believed claimant was experiencing neck and shoulder pain that he related to a minor cervical sprain and also a dysethesia following claimant's right ulnar nerve transposition. Dr. Tice noted that claimant complained of pain in her neck, shoulder and arm following her injury and opined that claimant's neck and shoulder pain was related to her injury. Dr. Tice recommended treatment for the neck and shoulder including therapy and repeat EMG testing.

14. Claimant was examined by Dr. Burnbaum on August 27, 2014. Dr. Burnbaum examined claimant and opined that claimant had provided a good history for an ulnar nerve problem at the elbows, but claimant was not any better on examination. Dr. Burnbaum noted that things just do not add up, as claimant had weakness in multiple muscles throughout the arm, not in a C8 distribution. Dr. Burnbaum noted that there was nothing to suggest a brachial plexopathy or a root compression. Dr. Burnbaum recommended repeat nerve conduction studies.

15. Dr. Burnbaum performed nerve condition studies on October 24, 2014. The studies showed that the ulnar sensory nerve action potential amplitude was diminished on the right, as was the ulnar dorsal cutaneous sensory nerve action potential and even the median antebrachial cutaneous sensory nerve action potential. Dr. Burnbaum noted that he did an ulnar nerve motor study around the elbow, and while the nerve had been transposed, he was able to trace it and there was no ulnar motor slowing around the elbow. Dr. Burnbaum noted that the low-amplitutde sensory nerve action potentials on the right for the ulnar nerve could be coming from the elbow and could be due to movement of the nerve at surgery, but because the median antebrachial cutaneous sensory nerve action potential was also diminished in amplitude, this brought up the possibility that it could be coming from higher up.

16. Claimant was examined by Dr. Matsumura on December 3, 2014. Dr. Matsumura noted claimant was placed at maximum medical improvement ("MMI") by Dr. Stagg on August 16, 2012 and deferred to his impairment rating provided at that time. Dr. Matsumura noted the medical records did not document claimant complaining of neck and shoulder pain following her accident. Dr. Matsumura opined that claimant's examination was not consistent with any specific cervical radiculopathy or myelopathy and opined that these complaints were not related to claimant's injury.

17. Claimant was examined by Dr. Hundley on December 23, 2014. Dr. Hundley noted claimant reported she complained of neck pain following her accident when her husband and an EMT brought her down to the ambulance where a cervical

collar was placed on claimant before they moved her to the ambulance. Dr. Hundley provided claimant with a diagnosis of cervicalgia and lesion of the ulnar nerve. Dr. Hundley recommended conservative treatment. Dr. Hundley noted that she believed claimant's neck and arm pain was related to the work injury based on the history provided by claimant and her examination.

18. Dr. Olsen issued a report in response to an inquiry from Respondents' counsel on January 13, 2015 which noted the new medical records from Dr. Burnbaum and Dr. Tice. Dr. Olsen again noted the significant delay in the development of right upper extremity pain complaints and opined that no further medical treatment was related to claimant's work related injury.

19. Dr. Tice issued a report in response to an inquiry from Respondents' attorney dated January 14, 2015. Dr. Tice indicated in his response that he disagreed with Dr. Matsumura and felt that claimant's condition was related to her work injury as she was thrown from her vehicle, and although she declined care for her neck at the time of the injury, it became apparent in the course of her treatment that her symptoms in her neck were related to her arm, which was work related, as she fell on an outstretched arm in the accident. Dr. Tice also noted that he disagreed with Dr. Matsumura that claimant's shoulder complaints were not related to her work injury. The opinions expressed by Dr. Tice in this January 14, 2015 report are found to be credible and persuasive.

20. Claimant testified at hearing that the pain in her neck and shoulder have been getting worse. Claimant testified she had symptoms in her shoulder and neck prior to her ulnar surgery and her symptoms have worsened in frequency and severity. Claimant testified she has been referred by Dr. Tice to Dr. Khan Farooqi for re-evaluation of her ankle because her ankle continues to roll. The medical records entered into evidence do not contain references to this referral.

21. Dr. Olsen testified by deposition in this matter. Dr. Olsen noted in his deposition that he examined additional medical records and reports after his examination of claimant on June 12, 2014. Dr. Olsen noted it was his opinion that claimant's cervical spine symptoms were not consistent with an ongoing cervical process. Dr. Olsen testified that while claimant was given a cervical spine collar before her ambulance ride, the ER physician cleared claimant's cervical spine and no diagnosis of an injury to the cervical spine was given by the ER physician.

22. Dr. Olsen opined that while claimant may have sustained a minor cervical strain as a result of the accident, her current symptoms, over three years after the accident, were not related to the accident. Dr. Olsen opined that claimant's right shoulder demonstrated a benign examination at the time of his IME and testified that the medical records did not demonstrate any indication that claimant suffered from a right shoulder injury when she fell off the ATV on September 30, 2011. Dr. Olsen further opined that claimant did not need any additional treatment to her left ankle. Dr. Olsen noted that his physical examination of claimant did not reveal any instability of the left

ankle and any intermittent rolling of her left ankle would not necessarily be related to the September 30, 2011 work injury.

23. The ALJ credits the opinions set forth by Dr. Tice in his reports over the contrary opinions expressed by Dr. Olsen and Dr. Matsumura in their reports and the testimony of Dr. Olsen and determines that claimant has demonstrated that it is more probable than not that the ongoing medical treatment recommended by Dr. Tice for claimant's neck and shoulder is reasonable and necessary to cure and relieve claimant from the effects of her industrial injury.

24. In coming to the conclusion the ALJ credits the testimony of claimant as being credible and persuasive regarding the physical complaints she experienced following her industrial injury and finds claimant's testimony supported by the medical records of Dr. Tice.

25. The ALJ further credits the testimony of claimant along with the medical reports from Dr. Tice and Dr. Hundley and find that the medical treatment provided by Dr. Tice and Dr. Hundley is reasonable and necessary to cure and relieve claimant from the effects of her industrial injury.

26. With regard to the referral from Dr. Tice to Dr. Khan-Farooqi for re-evaluation of the ankle, the ALJ notes that the medical records do not document that Dr. Tice made a referral to Dr. Khan Farooqi and, therefore, the ALJ dismisses this issue without prejudice.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance of the evidence that her accident aggravated, accelerated or combined with a preexisting condition to produce her need for treatment to her right shoulder and cervical spine. As found, the claimant's testimony at hearing is credible in this regard. As found, the ALJ credits the medical opinions expressed by Dr. Tice over the contrary medical opinions expressed by Dr. Olsen.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the treatment from Dr. Hundley and Dr. Tice has been reasonable and necessary to cure and relieve the Claimant from the effects of her industrial injury.

ORDER

It is therefore ordered that:

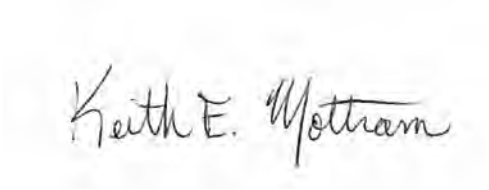
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of her industrial injury, including the medical treatment to claimant's cervical spine and right shoulder provided by Dr. Hundley and Dr. Tice.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 27, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Do the respondents have the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that the claimant's left shoulder impairment was caused by the industrial injury?

- If the respondents were not required to overcome the DIME physician's finding concerning the cause of the left shoulder impairment did the claimant prove by a preponderance of the evidence that her left shoulder impairment was caused by the industrial injury?

- What is the claimant's impairment rating for right upper extremity?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 7 were admitted into evidence. At the hearing Respondents' Exhibits A through C were admitted into evidence.

2. The respondents filed an Application for Hearing listing the issues as permanent partial disability (PPD) benefits and "overcoming the DIME which found the left upper extremity to be work related." At the commencement of the hearing the ALJ inquired of respondents' counsel concerning the issues to be addressed. Respondents' counsel stated the respondents did not seek to overcome the Division-sponsored independent medical examination (DIME) physician's finding regarding maximum medical improvement (MMI). However, the respondents disagreed with the DIME physician's opinion that the claimant's left upper extremity impairment was caused by the admitted industrial injury. Respondents asserted that in these circumstances the claimant had the burden of proof by a preponderance of the evidence to show that the left upper extremity was caused by the industrial injury. On specific inquiry from the ALJ claimant's counsel stated the claimant did not have "any additional issues" but took the position that the respondents were required to overcome by clear and convincing evidence the DIME physician's finding that the left shoulder condition was caused by the industrial injury. Upon specific inquiry by the ALJ claimant's counsel represented the claimant was not seeking an order converting her upper extremity impairment ratings to whole person ratings.

3. The claimant testified as follows. On July 24, 2012 she worked in the employer's decor and flooring unit. She was responsible for the closing shifts that involved a lot of heavy lifting. She lifted cases of tile that weighed approximately 50

pounds. On July 24 she was lifting cases of 16-inch tiles from a pallet to a shelf that was at approximately waist level. She lifted one case to about the level of her knees and she dropped it with her right arm and tried to catch it with her left arm. However, the case fell to the ground and broke the tiles. After the incident the claimant's left shoulder hurt but the right shoulder hurt worse.

4. The claimant further testified as follows. After the incident she did not immediately report any injury to the left shoulder. However, the left shoulder always hurt. She also had pain in the left elbow that was "like an electric current." Eventually the left elbow pain resolved. The employer referred her to a "really small workman's comp" provider that treated her for "sore muscles." Eventually she reported to this provider that her right shoulder was very painful and she was referred to Dr. Otten. An MRI was performed on the right shoulder and she was diagnosed with a partial tear of the rotator cuff. She underwent physical therapy (PT) for the right shoulder and noticed she was "unable to assist" with her left upper extremity. A doctor and physical therapist told her she had a "compensation injury" to the left upper extremity because her right arm was weak. The right shoulder was surgically repaired in December 2013.

5. The claimant testified she did not have any left shoulder problems prior to the industrial injury of July 24, 2012. She also testified that after July 24 she was careful not to injure the left shoulder. Specifically, the claimant allowed her daughter to mow the lawn and to care of their horses.

6. The evidence does not include any medical records dated prior to October 2, 2012.

7. On October 2, 2012 Ryan Otten, M.D., examined the claimant at Workwell Occupational Medicine (Workwell). Dr. Otten recorded a history of present illness involving "longstanding pain located in the R shoulder." The claimant reported that the injury occurred on July 21 [sic] when she was lifting a case of ceramic tile and felt a "sudden sharp pain in the right shoulder." The claimant also reported a "brief period of time where she was experiencing left elbow symptoms, attributed to epicondylitis." The claimant also advised Dr. Otten that she had developed low back pain in the last few days. Dr. Otten's report does not contain any mention that the claimant reported left shoulder symptoms. Dr. Otten assessed right shoulder pain, a right rotator cuff strain r/o labral tear and a sprain of the lumbar spine. Dr. Otten ordered an MRI of the right shoulder, continued naproxen and PT. Dr. Otten released the claimant to "restricted duty" with no use of the right arm.

8. On October 10, 2012 the claimant underwent a right shoulder MRI. The MRI indicated a partial tear of the supraspinatus, anterior glenoid labrum tear, degenerative changes of the labrum and degenerative changes of the AC joint.

9. On October 12, 2012 Dr. Otten reviewed the MRI results and referred the claimant for a surgical consultation with Robert Fitzgibbons, M.D. Dr. Otten's note from this date does not mention any left shoulder complaints.

10. On October 23, 2012 Dr. Otten examined the claimant. He noted that the claimant reported that Dr. Fitzgibbons wanted her to resume PT. Dr. Otten's note from this date does not mention any left shoulder complaints. In addition to the prior restrictions Dr. Otten limited the claimant to working 4 hour shifts.

11. On November 7, 2012 Dr. Otten again examined the claimant. She reported that Dr. Fitzgibbons agreed to surgically repair the right shoulder. Dr. Otten's note from this date does not mention any left shoulder complaints.

12. On November 29, 2012 Dr. Otten again examined the claimant. He noted that the claimant was scheduled for right shoulder arthroscopy to be performed by Dr. Fitzgibbons on December 4, 2012. Dr. Otten's note from this date does not mention any left shoulder complaints.

13. On December 13, 2012 Dr. Otten examined the claimant for the purpose of reevaluating "her right shoulder strain, status post massive rotator cuff tear and repair and tenodesis done on December 4." Dr. Otten noted the claimant was to begin PT for the right shoulder on January 2, 2013. Dr. Otten's note from this date does not mention any left shoulder complaints.

14. In January 2013 the claimant was treated at Workwell by ANP-C William Ford. On February 7, 2013 ANP Ford noted the claimant's "primary problem" was pain in the right shoulder. However, he also noted that the claimant "again brings up her left shoulder, which I feel should be treated outside the Worker's Compensation System."

15. On February 14, 2013 the claimant underwent an imaging study of the left shoulder. The ALJ infers from the report that this was an x-ray study. The radiologist noted mild degenerative changes at the acromioclavicular and glenohumeral joints. The soft tissues "appeared normal." The radiologist opined the small AC spurs "may contribute to impingement type symptoms."

16. On February 22, 2013 the claimant was examined at Workwell by Marc-Andre Chimonas, M.D. Dr. Chimonas noted the claimant reported that she was in PT and felt her right shoulder range of motion (ROM) was improved. He also noted that she was "developing left shoulder pain" and was "having this worked up outside the workers compensation system."

17. On March 4, 2013 Dr. Fitzgibbons examined the claimant for a "follow-up visit after a right shoulder arthroscopic surgery." The claimant reported her right shoulder was improving. On this visit Dr. Fitzgibbons examined both the right and left shoulders. With respect to the left shoulder Dr. Fitzgibbons noted some positive findings on resisted strength testing.

18. On March 11, 2013 the claimant underwent an MRI of the left shoulder upon referral from Dr. Fitzgibbons. The radiologist reported an impression of a full thickness tear of the anterior aspect of the supraspinatus tendon with underlying moderate supraspinatus tendinosis.

19. On March 28, 2013 Dr. Otten noted the claimant went outside the workers' compensation system to have a workup on her left shoulder and had been diagnosed with a supraspinatus tear. The claimant was scheduled for surgery in May to repair this condition. The claimant requested Dr. Otten's opinion as to whether treatment including surgery on the left shoulder should be covered under workers' compensation. Dr. Otten wrote the claimant "was injured when using both arms to lift cases of 16 pound tiles." He noted the "primary discomfort at the time was in the right shoulder but she did complain of some left upper extremity pain." In these circumstances Dr. Otten opined to a reasonable degree of medical probability that the claimant injured her left shoulder rotator cuff at same time that she injured the right shoulder. He opined she should begin PT for the left shoulder and continue PT for the right shoulder.

20. In May 2013 Dr. Fitzgibbons surgically repaired the left supraspinatus tear.

21. On May 29, 2013 Allison Fall, M.D. performed an independent medical examination (IME) at the respondents' request. Dr. Fall is board certified in physical medicine and rehabilitation and is level II accredited. In connection with the IME Dr. Fall took a history, reviewed medical records and performed a physical examination. Dr. Fall issued a written report on May 29, 2013.

22. In the report Dr. Fall noted a history that on July 24, 2012 there were "seven 16-inch tiles, and [the claimant] was lifting and putting them on a shelf at chest level." She "picked up one, and it kind of moved, and her right hand gave out." The claimant reported she felt pain in the upper right arm and across her upper back. She also felt pain in the left elbow. The claimant told Dr. Fall that her left shoulder hurt "the whole time," but "they were concerned with the elbow."

23. Dr. Fall assessed status post work-related right shoulder injury with rotator cuff repair and biceps tenotomy, left lateral epicondylitis resolved and non-work-related left shoulder rotator cuff tear post repair. Dr. Fall opined to a reasonable degree of medical probability that the claimant's left shoulder condition and resulting surgery were not caused by the July 24, 2012 industrial injury. Dr. Fall noted that although the claimant initially had symptoms consistent with left lateral epicondylitis, that condition resolved. She explained there is no medical record documentation of an acute injury to the left shoulder on the day of the injury. Further, there is no documentation of left shoulder complaints until 2013. Dr. Fall opined the left shoulder condition is "most likely a degenerative condition for which [the claimant] underwent the" May 2013 surgery.

24. Dr. Fall opined the claimant was at MMI for the right shoulder and assessed a 4% upper extremity impairment which converted to 2% whole person impairment.

25. On July 10, 2013 Amber Sanders, M.A., authored a report concerning the claimant's treatment at the Longmont Clinic. Ms. Sanders noted she examined the claimant on "February 14." The claimant gave a history that she sustained a work-related injury "sometime before" when she lifted a heavy box with both hands. The box "slipped" and the claimant caught it momentarily before dropping it again. The claimant

reportedly experienced right shoulder pain and felt "less pain in the left elbow and left shoulder area." After the right shoulder surgery the claimant became "more aware" of continuing left shoulder pain. Ms. Sanders wrote that she is "not an orthopedic surgeon or disability Dr." However, Ms. Sanders wrote that she was "pretty incredulous that this kind of accident could an injury [sic] to her right shoulder requiring surgery, and yet not affect the left shoulder at all."

26. Dr. Otten opined the claimant reached MMI on October 14, 2013. He assessed 6 percent impairment of the right upper extremity which converts to 4% whole person impairment. Dr. Otten noted the "compensability" of the claimant's left shoulder condition was still disputed and he did not assign any impairment for the left shoulder. The claimant was released to return to work at regular duty.

27. On October 29, 2013 the respondents filed a Final Admission of Liability (FAL) for permanent partial disability (PPD) benefits based on Dr. Otten's 6 percent right upper extremity impairment rating. The respondents did not admit any liability for PPD benefits based on the left upper extremity.

28. On April 23, 2014 Susan Santilli, M.D., performed a Division-sponsored independent medical examination (DIME). Dr. Santilli took a history from the claimant, reviewed medical records and performed a physical examination. The claimant reported that on July 24, 2012 she was "stacking boxes of tile at the end of the day when her right arm just dropped and then the left went as well." After the incident all of the claimant's upper body muscles were sore "across the chest/shoulders and upper back." The claimant's left elbow had been "pulled and she did have some therapy for that and this resolved." A couple of months later the claimant underwent a right shoulder MRI that revealed a tear in the supraspinatus. The claimant underwent therapy for the right shoulder and ultimately had surgery to repair it in December 2012. The claimant reported that throughout this time her left shoulder hurt but not as much as the right. The claimant reported that Dr. Fitzgibbons thought the left shoulder pain was "due to overuse while the right was healing" but the claimant stated she had this pain before the right shoulder surgery.

29. Dr. Santilli noted that it was "difficult to find any pertinent medical records in the allotted timeframe that addressed [the claimant's] initial presentation, her left elbow, or her progression."

30. Dr. Santilli opined to a reasonable degree of medical probability that the claimant's left shoulder rotator cuff injury was caused by the work-related incident of July 24, 2012 when she dropped the tiles. In support of this opinion Dr. Santilli wrote that after the July 24 incident the claimant had "left epicondylitis" that indicated there was a "left upper extremity injury at that time." Dr. Santilli further explained that since the claimant was "holding the box of tile with both hands and caught it with both hands then similar forces were in play for both upper extremities." Finally Dr. Santilli noted the claimant had no history of left shoulder problems prior to July 24, 2012 and no history of left shoulder injury after July 24, 2012.

31. Dr. Santilli opined the claimant reached MMI on October 14, 2013. She further opined that as a result of the injury the claimant sustained a right upper extremity impairment of 4% that converted to 2% whole person impairment. Dr. Santilli further opined the claimant sustained 3% left upper extremity impairment that converted to 2% whole person impairment. The combined whole person impairment was 4%.

32. On May 8, 2014 Dr. Fall authored a second report after reviewing Dr. Santilli's DIME report. Dr. Fall opined that Dr. Santilli "erred in her causation analysis regarding the left shoulder." Dr. Fall noted that Dr. Santilli's report indicated she did not review any medical records between the date of injury and the October 10, 2012 MRI. Dr. Fall opined that this was a critical failure in Dr. Santilli's causation analysis because the medical records from this time failed to document any reports of a left shoulder injury, and documented there were no initial left shoulder complaints indicating that there was a left shoulder injury "at that time." Dr. Fall also stated that Dr. Santilli made a "faulty assumption" that the claimant "caught" the box of tiles with both hands. Dr. Fall explained that the claimant did not report "catching the box of tile." Further, Dr. Fall stated that Dr. Santilli has no way of knowing what "forces" were applied to either shoulder. Dr. Fall also stated that the fact the claimant did not report any shoulder symptoms prior to the date of injury does not mean the injury caused the left shoulder condition. Dr. Fall explained that tears of rotator cuff muscles are "quite common" in the claimant's age group.

33. Dr. Fall testified at the hearing. Dr. Fall stated the claimant never told her that she caught the falling tiles with her left hand. Dr. Fall noted that the initial medical records indicate the claimant gave a history that her right arm gave out and that she had right shoulder and left elbow symptoms. Dr. Fall noted that the claimant was first seen by Dr. Fitzgibbons on October 16, 2012 and seen again on November 6, 2012. Dr. Fall noted that on both of these occasions Dr. Fitzgibbons examined the claimant's left shoulder and reported that she had no pain and full ROM. Dr. Fall opined that Dr. Fitzgibbon's records indicate the left shoulder was not a problem in October and early November 2012.

34. Dr. Fall testified that with an acute tear of the supraspinatus tendon the patient would experience symptoms. However, with a degenerative process most persons will not have symptoms. Dr. Fall was asked whether the claimant could have torn the left supraspinatus tendon while performing PT and she stated that there was no documentation of any such event.

35. A preponderance of the credible and persuasive evidence establishes that the claimant's left shoulder condition (tear of supraspinatus tendon/ rotator cuff tear) was not proximately caused by the admitted industrial injury of July 24, 2012.

36. Dr. Fall credibly and persuasively opined to a reasonable degree of medical probability that the tear of the claimant's left rotator cuff and consequent surgery were not caused by the industrial injury of July 24, 2012. Dr. Fall persuasively explained that if the claimant suffered an acute tear of the rotator cuff on July 24, 2012 she would have suffered acute symptoms. However, Dr. Fall persuasively argued that

the medical records do not document a temporal relationship between the date of injury and the claimant's first documented complaints of left shoulder symptoms in February 2013. She also persuasively opined that Dr. Fitzgibbon's reports of October 16 and November 6, 2012 document that he examined the left shoulder but there were no complaints of pain and no evidence of reduced ROM. Dr. Fall persuasively opined that the absence of left shoulder findings during Dr. Fitzgibbon's examinations in October and November 2012 shows the claimant's left shoulder was not problematic at that point in time. Dr. Fall also persuasively opined that the medical records do not document any injury to the left shoulder that occurred during PT for the July 24 injury. Dr. Fall persuasively opined that the claimant's left rotator cuff tear was most likely degenerative in nature and that such tears are common in persons of the claimant's age.

37. The claimant's testimony that she has suffered left shoulder symptoms ever since the July 24, 2012 injury is not credible and persuasive. The claimant's testimony that she suffered left shoulder beginning on July 24, 2012 and that these symptoms were always present is not corroborated by the contemporaneous medical records. Rather these records document complaints of right shoulder pain and left elbow pain (then diagnosed as left epicondylitis) that eventually resolved. Dr. Otten's reports between October 2, 2012 and December 13, 2012 do not document any reports of left shoulder pain. Dr. Fitzgibbon's reports in October and November 2012 do not document left shoulder pain or reduced ROM. The ALJ infers that if the claimant actually suffered constant left shoulder pain since the date of injury she would have reported it to her treating physicians and they would have recorded it. As stated above, soon after the date of injury the claimant reported right shoulder and left elbow symptoms and these were duly recorded in the medical records. When claimant developed low back pain she reported it to Dr. Otten and he duly recorded the report in his October 2, 2012 report. However, the first medically documented complaint of left shoulder symptoms does not appear until February 7, 2013, more than six months after the date of the injury.

38. Dr. Otten's opinion that the claimant's left shoulder condition is related to the injury of July 24, 2012 is not as persuasive as Dr. Fall's contrary opinion. Dr. Otten appears to reason that because the claimant reported "left upper extremity pain" at the time of the July 24, 2012 injury she must have sustained the left rotator cuff tear at that time. Dr. Otten's March 28, 2013 opinion does not persuasively explain why the claimant did not report *left shoulder* symptoms at the time of the injury and for many months thereafter. Dr. Otten's mention of "left upper extremity pain" presumably refers to the *left elbow* complaints that subsequently resolved. Dr. Otten does not persuasively explain how left elbow symptoms could be indicative of a torn rotator cuff.

39. Dr. Santilli's opinion that the claimant's left shoulder condition is related to the injury of July 24, 2012 is not as persuasive as Dr. Fall's contrary opinion. Although the report of left elbow symptoms at the time of injury might indicate there was some injury to the "left upper extremity" on July 24, Dr. Santilli did not persuasively explain how the presence of left elbow symptoms near the date of injury indicates or proves that the claimant simultaneously sustained a torn left rotator cuff. Dr. Fall persuasively

argued that Dr. Santilli's opinion does not account for the absence of any recorded left shoulder symptoms until many months after July 24. Dr. Santilli's opinion does not refute Dr. Fall's credible opinion that if the rotator cuff was torn on July 24, 2012 that left shoulder symptoms would have been present at that time, not six months later.

40. The opinion of Amber Sanders is not accorded any substantial weight on the issue of causation. Ms. Sanders concedes she is not a surgeon or "disability" doctor. Further it does not appear that Ms. Sanders is a physician at all. The ALJ finds that whatever qualifications Ms. Sanders has to issue opinions concerning medical causation her opinion is not as persuasive as Dr. Fall's well reasoned opinion. Further, it does not appear that Ms. Sanders reviewed any of the contemporaneous medical records when formulating her opinion on causation.

41. The weight of the credible and persuasive evidence establishes that the claimant sustained 4% impairment of the right upper extremity. Dr. Fall and Dr. Santilli agreed the claimant sustained 4% impairment of the right upper extremity. The ALJ finds their opinions to be credible and persuasive on the issue of the degree of right upper extremity impairment.

42. Evidence and inferences contrary to these findings of fact are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

BURDEN OF PROOF ON SCHEDULED INJURY

As an initial matter the parties disagree concerning which of them has the burden of proof regarding causation and what the standard of proof is. The respondents argue that the cause of the claimant's left upper extremity rotator cuff tear presents a "threshold issue" of "compensability" and the claimant bears the burden of proof to establish causation by a preponderance of the evidence. The claimant argues that the issue of "causation" is determined by the DIME physician. Therefore, the claimant asserts that the respondents have the burden to prove by clear and convincing evidence that the DIME physician incorrectly found the left shoulder rotator cuff tear was caused by the July 24, 2012 industrial injury.

The ALJ disagrees with the respondents' assertion that the cause of the claimant's left upper extremity impairment presents a "threshold" issue of fact for determination by the ALJ under the preponderance of the evidence standard. The respondents cite *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000), and *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002), as authority for their position.

Faulkner does not stand for the proposition that the issue of causation is always decided as a "threshold issue" under the preponderance of the evidence standard. Rather, *Faulkner* holds that where the issue was "whether claimant had sustained any compensable injury arising out of and in the course of her employment" the issue was determinable by the ALJ under the preponderance of the evidence standard. 12 P.3d at 846. The *Faulkner* court also acknowledged that where the issue involves a whole person impairment rating arising under § 8-42-107(8)(c), C.R.S., an "IME physician's opinion concerning the cause of a particular component of the claimant's overall impairment" must be overcome by clear and convincing evidence. *Faulkner* is distinguishable from this case because here the respondents have admitted that the claimant sustained an injury arising out of and in the course of her employment. Consequently, the ALJ is not called upon to make a "threshold determination" concerning the "compensability" of the claim and *Faulkner* is not controlling.

Similarly, *Cordova* is not authority for the proposition that the issue of causation is always decided by the ALJ under the preponderance of the evidence standard. To the contrary, *Cordova* expressly recognizes that determinations of MMI and whole person impairment inherently require a DIME physician to determine whether there is a causal relationship between a particular condition and the compensable injury. 55 P.3d at 189-190. Thus, when the issues involve MMI or the cause of whole person impairment the DIME physician's opinion regarding causation must be overcome by clear and convincing evidence. *Cordova* merely stands for the proposition that when the issue involves reopening based on an alleged worsening of condition the issue is beyond the purview of the DIME physician and the ALJ may determine the cause of the worsening under the preponderance of the evidence standard.

Nevertheless, the ALJ agrees with the respondents that under the circumstances of this case the claimant has the burden of proof to establish the cause of her left shoulder impairment by a preponderance of the evidence. It is well-established that scheduled impairment ratings and non-scheduled whole person impairment ratings are treated differently under the Act. Specifically, scheduled ratings are not subject to the DIME procedure which applies only to whole person impairment ratings assigned under § 8-42-107(8)(c), C.R.S. Section 8-42-107(8)(a), C.R.S.; *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998). It follows that when only a scheduled impairment rating is at issue the DIME physician's opinion concerning the cause of a particular component of the scheduled impairment is not entitled to presumptive weight. Rather, the claimant bears the burden of proof to establish by a preponderance of the evidence that he has sustained a particular scheduled impairment caused by the industrial injury. *See Maestas v. American Furniture Warehouse*, WC 4-662-369 (ICAO June 5, 2007) (where issue is the *extent of scheduled impairment* caused by the industrial injury claimant has the burden of proof by a preponderance of the evidence).

Here, the only issue presented at the hearing was whether the claimant sustained permanent scheduled impairments of the left and right upper extremities as a result of the admitted industrial injury on July 24, 2012. The claimant did not argue that the claimant's impairment should be rated as whole person impairment and did not dispute the DIME physician's MMI determination. Consequently the claimant has the burden of proof to establish by a preponderance of the evidence that her left shoulder impairment was caused the industrial injury.

CAUSE OF SCHEDULED LEFT SHOULDER IMPAIRMENT

The respondents argue that the claimant failed to establish by a preponderance of the evidence that the left shoulder rotator cuff tear was caused by the injury. Therefore, the respondents argue that the claimant is not entitled to a scheduled impairment rating for the left upper extremity. As noted above, the claimant has incorrectly argued that the respondents were required to overcome by clear and convincing evidence the DIME physician's finding that the claimant's left upper extremity impairment was caused by the industrial injury. The ALJ agrees with the respondents' position concerning the left upper extremity scheduled impairment.

Because the claimant did not even contend that she sustained functional impairment beyond the arm at the shoulder, the ALJ must determine whether the claimant proved by a preponderance of the evidence establishes that the left upper extremity scheduled impairment was caused by the injury. *Maestas v. American Furniture Warehouse*, *supra.*

As determined in Findings of Fact 35 through 40, a preponderance of the credible and persuasive evidence establishes that the claimant's left shoulder rotator cuff tear was probably not caused by the July 2012 industrial injury. Rather, the ALJ credits the opinions of Dr. Fall that the left rotator cuff tear was probably not caused by the industrial injury but instead by naturally occurring degeneration of the rotator cuff.

Dr. Fall persuasively opined that there is an insufficient temporal relationship between the occurrence of the injury on July 24, 2012 and the later development of left shoulder symptoms to infer a causal relationship between these events. For the reasons stated in Findings of Fact 37 through 40, the ALJ is not persuaded by the contrary opinions expressed by Dr. Otten, Dr. Santilli and Ms. Sanders. It follows the claimant failed to meet his burden of proof to establish that he is entitled to a scheduled impairment rating for the left shoulder.

RATING FOR SCHEDULED RIGHT SHOULDER IMPAIRMENT

The respondents argue that the parties are bound by the DIME physician's determination that the claimant sustained a 4% scheduled impairment of the right upper extremity. However, for the reasons stated above the ALJ concludes the DIME physician's opinion concerning the degree of a scheduled impairment is not entitled to any special weight under the Act. *Delaney v. Industrial Claim Appeals Office, supra*; *Egan v. Industrial Claim Appeals Office, supra.* Instead the claimant has the burden to prove the degree of impairment caused by the right shoulder injury. *Maestas v. American Furniture Warehouse*, *supra.*

In accordance with Finding of Fact 41 the credible and persuasive evidence establishes the claimant sustained 4% impairment of the right upper extremity. Consequently the insurer shall pay PPD benefits under § 8-42-107(2)(a), C.R.S., based on 4% impairment of the right upper extremity.

The ALJ notes that in her position statement the claimant asserts that the respondents are liable to pay for medical treatment of the left upper extremity. The ALJ recognizes that the claimant endorsed the issue of medical benefits in her response to the application for hearing. However, as determined in Finding of Fact 2 claimant's counsel did not raise any issue of medical benefits at the hearing despite a direct inquiry by the ALJ concerning what issues the claimant wished to raise. The ALJ considers claimant's counsel's representation to the court as an express waiver of consideration of any issue except PPD and a judicial admission that the claimant was not seeking an award of medical benefits as a result of the hearing. Therefore, the ALJ will not address the question of "medical benefits."

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay the claimant interest at the rate of 8% per annum on compensation benefits not paid when due, if any.

2. Insurer shall pay permanent partial disability benefits based on a scheduled impairment of 4% of the right upper extremity.

3. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 6, 2015

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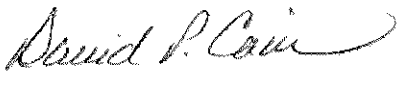

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

The following issue was raised for consideration:

Whether Claimant sustained his burden of proof to establish by a preponderance of the evidence that he is entitled to an order for a change of physician.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered:

1. Claimant injured his low back while working for Employer on November 1, 2012.

2. After Claimant's injury, Claimant was sent to Dr. Robert Nystrom at Concentra Medical Center in Thornton, CO for ongoing care and treatment. Dr. Nystrom became Claimant's authorized treating provider and treated him from November 2012 through December 2013. Claimant resides in Thornton, CO.

3. Claimant failed conservative treatment on his low back and underwent a L5-S1 anterior and posterior lumbar fusion by Dr. Andrew Castro on October 31, 2013.

4. On or around December 2013, Dr. Nystrom left employment at the Concentra facility located in Thornton, CO and moved his practice to a Concentra facility in Greeley, CO. Claimant alleges that he requested to continue to treat with Dr. Nystrom and that his request was denied. Claimant further alleges that Respondents continued to deny Claimant's request to continue care with Dr. Nystrom and instead authorized Dr. Albert Hattem to take over care. Claimant's testimony regarding his request of Respondents to continuing treatment with Dr. Nystrom was not deemed credible or persuasive. Claimant did not establish the date(s) that he communicated his desire to continue care with Dr. Nystrom or the method by which he communicated that desire to Respondents. The only documentary evidence of Claimant's request for a change of physician came on September 24, 2014, when Claimant filed the application for a hearing on the issue of a change of physician.

5. Claimant began treating with Dr. Hattem in the Concentra Stapleton office on March 14, 2014. Dr. Hattem's practice includes focus on patients who have a delayed recovery and more complex cases. Claimant was referred to Dr. Hattem because of these issues. Throughout his course of treatment with Dr. Hattem, Claimant continued to treat with his surgeon, Dr. Andrew Castro. Claimant treated with Dr. Hattem between March 14, 2014, and October 6, 2014, when Dr. Hattem placed Claimant at Maximum Medical Improvement (MMI). .

6. On March 14, 2014, Dr. Hattem recommended Claimant continue physical therapy two times per week at the Thornton clinic. On April 14, 2014, Claimant reported to Dr. Hattem that he does not like to take medication, but takes occasional Ibuprofen. Dr. Hattem noted in his report that Claimant declined medications at that visit. On May 12, 2014, Claimant reported to Dr. Hattem that he did not believe physical therapy was providing significant benefit. Thus, Dr. Hattem held off on prescribing additional physical therapy at that time.

7. Dr. Hattem deferred to Dr. Castro's clinical judgment as to whether Claimant was a candidate for an epidural steroid injection on June 23, 2014. Also, on that date, Dr. Hattem scheduled Claimant for a trial of swimming pool therapy. Dr. Hattem informed Claimant at that time that his case was approaching MMI. Dr. Hattem stated in his report that once swimming pool therapy and potential injections are completed, Dr. Hattem would assign an impairment rating.

8. Dr. Hattem continued to prescribe pool therapy in July and August 2014. Claimant underwent an epidural steroid injection with Dr. Sacha, and responded non-diagnostically. Dr. Hattem opined on August 18, 2014, that Claimant's condition remained the same and that Claimant's case was approaching closure.

9. Also, on August 18, 2014, Dr. Castro noted that Claimant reported no significant benefits from his recent injection. Dr. Castro opined that he could not account for Claimant's ongoing symptoms. Dr. Castro also opined that Claimant would not benefit from further surgical intervention. Dr. Castro recommended Claimant follow up one year from his surgery date in October 2014.

10. Respondents sent correspondence to Dr. Hattem on September 24, 2014, inquiring whether Claimant reached MMI. Dr. Hattem sent return correspondence on September 29, 2014, opining that Claimant was not yet at MMI, but that Claimant would likely be at MMI on September 30, 2014, when Claimant was scheduled to return to Dr. Hattem.

11. Claimant requested a change of physician on September 24, 2014, when he filed the application for hearing in this matter raising the issue of change of physician. Dr. Hattem placed Claimant at MMI on October 6, 2014. Dr. Hattem recommended maintenance medical care for Claimant, including a follow-up visit with Dr. Castro, and ongoing refills of Claimant's Ibuprofen for 9-12 months. Claimant has not returned to Dr. Hattem for his medication refills since Dr. Hattem placed Claimant at MMI and made this recommendation for maintenance care.

12. Claimant contends that his application for hearing on the issue of change of physician concerns the provisions of Section 8-43-404(5)(a)(V) which, provides, that if the authorized treating physician moves from one facility to another, or from one corporate medical provider to another, an injured employee may continue care with the authorized treating physician, and the original facility or corporate medical provider shall provide the injured employee's medical records to the authorized treating physician

within seven days after receipt of the request for medical records from the authorized treating physician. Here, Claimant contends that an order should be entered to permit him to treat with Dr. Nystrom. Despite the nine months of treatment with Dr. Hattem and Dr. Castro between December 2013 and October 2014, and the MMI determination made by Dr. Hattem on October 6, 2014, Claimant contends that under Section 8-43-404(5)(a)(V) he should now be permitted to return to Dr. Nystrom for maintenance treatment.

13. Respondents filed a Final Admission of Liability on December 10, 2014, admitting for reasonable, necessary and authorized maintenance care.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are reached:

1. The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. In this case, Claimant raises the issue of change of physician. Claimant relies on the provision of section 8-43-404(5)(a)(V) arguing that he only need prove that Dr. Nystrom was the authorized treating physician and that Claimant requested that he be permitted to continue care with Dr. Nystrom after the doctor's departure from the Thornton office.

4. However, by contrast, Respondents take the position that this case is one addressing a claimant's request to change physicians under Section 8-43-404(5)(a)(III)

and (IV). Respondents argue that an ALJ holds substantial discretion in determining whether a claimant has made a showing sufficient to authorize a change of physician. *Hoefner v. Russell Stover Candies and Sentry Insurance Company*, (W.C. No. 4-541-518, December 13, 2002). In *Hoefner*, the court held that a breakdown in the doctor-patient relationship may be sufficient to warrant a change of physician to assist in the claimant's recovery. The *Hoefner* court denied the claimant's change of physician request because it found that the authorized treating physician (ATP) rendered a comprehensive course of treatment that included diagnostic procedures, prescription medication, and physical therapy. *Id*.

5. Here, it is concluded that Claimant has not made a proper showing to support his request for a change of physician either under Section 8-43-404(5)(a)(V) or under Sections 8-43-404(5)(a)(III) and (IV). The evidence established that Claimant let nine months elapse between Dr. Nystrom's departure and his request to change physicians pursuant to Section 8-43-404(5)(a)(V). During that nine months, Claimant received care from Dr. Hattem and Dr. Castro regularly and medical notes do not reflect a request from Claimant to return to Dr. Nystrom. The evidence established that it was only as Dr. Hattem started reporting in the medical records that Claimant was approaching MMI that Claimant filed the application for hearing on the change of physician issue.

6. Further, under the change of physician provisions found in Section 8-43-404(5)(a)(III) and (IV) there was no credible or persuasive evidence presented at hearing that rises to the level of a proper showing justifiying an order to change physicians. Instead, it is concluded that the authorized treating physicians for Claimant rendered a comprehensive course of treatment that included diagnostic procedures, injections, prescription medication, surgery and physical therapy. No credible or persuasive evidence was presented that Claimant had a breakdown in the therapeutic relationship with Dr. Hattem or that there was any other reason to conclude that Claimant could not recover from his injury under the care of Dr. Hattem. And, it is further concluded that Claimant did not establish that he made a timely request to change physicians in writing in the manner defined by statute.

ORDER

It is therefore ordered that:

Claimant's claim for a change of physician is denied and dismissed.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: ___May 7, 2015_____

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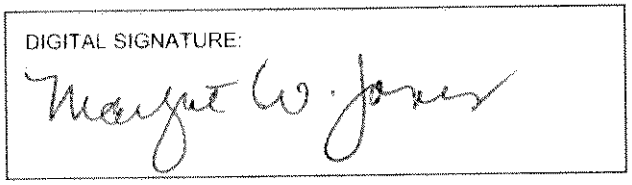


Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant established by a preponderance of the evidence that medical appointments and associated treatment with Dr. Meggan Grant-Nierman on February 2, 2015, and February 11, 2015, were reasonably necessary to relieve the effects of the March 16, 2013, industrial injury or prevent further deterioration of Claimant's condition pursuant to *Grover v. Industrial Comm'n.*, 759 P.2d 705 (Colo. 1988).

2. Whether Claimant established by a preponderance of the evidence that a general award of maintenance medical benefits is reasonably necessary to relieve the effects of her March 16, 2013, industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.*, 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

Having considered the evidence presented at hearing, the Judge enters the following Findings of Fact:

1. Claimant works in Employer's dairy department in Salida, Colorado. She injured her back and left shoulder on March 16, 2013, while working with crates filled with containers of milk weighing 48 pounds in total. Each crate contained six gallon milk containers weighing eight pounds each. On the date of injury, seven crates, each one filled with gallon milk containers, were stack on each other and Claimant was retrieving the top crate.

2. Claimant presented at the emergency room at Heart of the Rockies Regional Medical Center on March 16, 2013, after her injury. The emergency room personnel noted Claimant, "…States that this afternoon at work she was lifting some milk crates when she hurt her back. States lifting/twisting motion. Symptoms have been increasing in severity throughout the night. [Patient] comes to the RN station appearing in extreme pain." It was also noted that Claimant had "Left sided traumatic flank pain, now pain into her left shoulder." The emergency room physician diagnosed low back pain. Claimant was given medications and instructed to follow-up with a physician.

3. Claimant received primary care for her work injury at First Street Family Health. She saw Dr. Joel Schaler on March 18, 2013. He reported, "…She works at

Safeway and was unloading crates of gallon milk containers. They wer [sic] stacked 7 high instead of the usual 5 high and each one weighs about 48 lbs. When she pulled off the top level and brought to the ground she experienced a sharp pain in the left mid back and shoulder. It hurts to sneeze, laugh, cough, and move. It hurts to sleep on her left side." Dr. Schaler noted Claimant was "Tender over the AC joint region and upper pectoralis major…Tenderness along the lower left parathoracic musculature…" He diagnosed "sprain of unspecified site of back; sprains and strains of shoulder and upper arm." Dr. Schaler prescribed medications, took Claimant off work, and recommended physical therapy.

4. Respondent admitted liability for Claimant's March 16, 2013, work injury.

5. Claimant saw Dr. Meggan Grant-Nierman at First Street Family Health on March 20, 2013. First Street Family Health is an authorized medical provider. Dr. Grant-Nierman noted Claimant had recently been light headed, with shortness of breath. Claimant reported also being dizzy, pale, and "sweating with clammyness." The doctor noted claimant "…Has been having a low grade fever from 99-101 each night for the last two weeks (even before the accident)." Dr. Grant-Nierman diagnosed hypoxemia and dyspnea, and recommended Claimant be admitted to the hospital. She was concerned about a potential pulmonary embolism or pneumonia, "…both of which can present with pleuritic chest pain, hypoxemia, fever, and tachycardia."

6. Claimant was transported by Flight for Life to Penrose St. Francis Hospital in Colorado Springs. She was admitted on March 21, 2013. The history and physical report reflects that Claimant had a fever of 99-101.2 degrees typically in the evenings over the past two weeks. It also reflected that, on Saturday, 5 days prior to admission, Claimant injured her back at work. The report further reflects that Claimant works at a dairy and she was taking a crate from a high level down to a lower level and strained her lower back. The pain has been in the left flank area and it hurts to twist, bend, and move. In the "review of symptoms" section, the doctor noted, "…She is short of breath with pleuritic chest pain as above." The admitting doctor diagnosed "acute respiratory failure. I think this is likely secondary to infection with pneumonia," and also diagnosed "Sepsis syndrome. Likely has sepsis syndrome secondary to pneumonia. "

7. In a report dated March 21, 2013, Dr. Clyde Williams noted, "…The patient has a history of having fevers to 101 for 2 weeks, particularly at night and then she developed a left-sided chest pain about 4 days ago, which became progressive. She went to the hospital and was given an analgesic and anti-inflammatory agents. The next day because of the lack of improvement she went to see her doctor. He, likewise, apparently give [sic] her anti-inflammatory agents. Yesterday because of feeling so poorly she went to emergency room and was found to have an abnormal chest x-ray, and abnormal lab…Because of the concern about sepsis she was transferred to Penrose Hospital…" Dr. Williams diagnosed "Left-sided pneumonia with probable early sepsis with renal impairment, and elevated liver enzymes…"

8. Claimant was discharged from Penrose on March 31, 2013, with diagnoses including: "status post septic shock secondary to pneumonia; empyema; and

status post thoracotomy, chest tube placement, pleural decortication, and evacuation of empyema on March 26, 2013." Claimant fully recovered from the effects of those problems approximately four months later. Claimant credibly testified that the symptoms she experienced as a result of her pneumonia and its complications were different, in both quality and duration, from the symptoms she experienced as a result of her work injury.

9. Claimant returned to First Street Family Health for treatment of her work injury. On May 16, 2013, Dr. Grant Nierman reported, "Follow up on left upper back and shoulder strain. Original injury was complicated by the development shortly after of pneumonia and sepsis. That has resolved and she is feeling better bit [sic] she continues to have pain in the left upper back inferior to the scapula and the left shoulder and neck. She says the whole area feels tight." The doctor diagnosed "sprains and strains of shoulder and upper arm; sprain of unspecified site of back." She recommended physical therapy.

10. Respondent arranged for Claimant to be examined by Dr. Mark Paz on September 17, 2013. Dr. Paz opined Claimant did not sustain a work-related injury. He opined that most, if not all, of Claimant's work injury related symptoms were causally related to the left lower lobe pneumonia diagnosed on March 20, 2013. The ALJ finds this opinion not credible or persuasive.

11. Claimant participated in physical therapy beginning October 25, 2013. On that date, the therapist noted the reason for referral was, "…Pt injured @ work, lifting 6 gallons of milk from too high position; immediately noted 'excruciating' pain from R neck to L LB. Cont to experience sxs in upper thoracic and LB…" The therapist noted: "…Plan of care developed and skilled treatment recommended for addressing injuries sustained while trying to lift 48# from too high @ work back in March. [Patient with] thoracic, cervical and SIJ pain…Primarily will address soft tissue dysfunction and chronic positioning while at work…"

12. On November 4, 2013, the therapist noted, "Pt reports SIJ pain is less w/past few visits in PT; educated on position of sacrum, ligaments, ms, etc…"

13. On November 19, 2013, the therapist noted, "…Feeling bad this afternoon after a full, heavy day at work due to holiday season coming up. Discuss w/pt re: prognosis for improvement limited if she continues to lift, carry, etc. at the current level…"

14. Dr. Grant-Nierman saw Claimant on January 22, 2014, and reported, "Has been doing PT for the back from the work comp episode back in March. PT is helping her she has one more appt with PT authorized at this point. Still working with a lot of heavy lifting at her job and still has quite a bit of upper thoracic pain but she is working through it, she is working with PT and doing home exercises at home. Feels she is making progress." Dr. Grant-Nierman noted Claimant was "positive for paraspinal muscle tenderness." She noted the treatment plan was "can do another few months of PT since she is seeing improvement but not completely there yet."

15. On March 28, 2014, the therapist reported, "…Pt making good gains toward goals and decreasing pain; have scheduled two more visits spaced further apart to assess carryover."

16. Claimant attended her final physical therapy session on April 7, 2014, at which time the therapist noted,"…Last approved appt; pt continues to feel pain 0/10, but voicing apprehension over complete d/c from therapy. Told pt if she experiences an increase or relapse, to just communicate this at work…" The therapist contemplated the possibility that Claimant's symptoms could increase or relapse subsequent to discharge.

17. On April 22, 2014, Dr. Grant-Nierman noted Claimant's pain level was down and that she was feeling better. The doctor placed Claimant at maximum medical improvement (MMI) but indicated she should follow-up as needed, contemplating that Claimant should return to her for more treatment if it was needed.

18. Following MMI, Claimant continued performing a home exercise program, utilizing the techniques she was taught in physical therapy. However, she continued to experience pain and difficulty with the effects of the work injury. These problems were particularly noticeable during busy times at work, such as during holiday seasons. Claimant did not sustain a new injury.

19. Claimant underwent a Division independent medical examination (DIME) with Dr. Anjmun Sharma on September 9, 2014. He determined Claimant reached MMI on that date. He issued an 11% whole-person impairment rating for the injury to Claimant's lumbar spine. He opined that "…At this point in time, the patient does not require any maintenance care

20. Respondent filed a Final Admission of Liability on October 29, 2014 admitting liability consistent with Dr. Sharma's findings, but denying liability for medical benefits after MMI.

21. Claimant eventually found the residual effects of her work injury no longer manageable by herself and she returned to Dr. Grant-Nierman on February 2, 2015. She returned pursuant to Dr. Grant-Nierman's recommendation at MMI that Claimant should "follow-up as needed." The doctor noted this visit was in follow-up pertaining to the Claimant's work injury in March 2013. The doctor reported that Claimant's back pain was "miserable again." Claimant reported to the doctor that she has felt good doing physical therapy and now without physical therapy she has back pain at night and is not able to stay asleep. Claimant reported her back pain was at a 5 on a scale of 0 to 10 points. The doctor noted Claimant's shoulder range of motion was normal, but that "Traps paraspinals are very tender." Claimant was again diagnosed with a sprain of the back and the shoulder. The doctor recommended Flexeril medication and another round of physical therapy, but this time with dry needling. She recommended Claimant return for osteopathic manipulations and trigger point injections in order to relax some of the affected region.

22. Respondent arranged for Claimant to be examined by Dr. Paz again on February 10, 2015. Dr. Paz opined Claimant does not require medical maintenance subsequent to the date of MMI.

23. On February 11, 2015, Dr. Grant-Nierman noted, "Trigger points and pains/myalgias in the left upper shoulder / traps worsening over last several months, has done some massage and PT as well. Scheduled to do some dry needling in future." On examination, the doctor noted "TART changes in the entire left side paraspinal muscles in spasm with thicker ropey texture, tender up in the left trap there are several trigger points and tender spots and there is one just below the lower border of the scapula in the paraspinal muscle region." Dr. Grant-Nierman performed osteopathic manipulations and injections. She recommended heat and stretching, and to follow up with physical therapy for dry needling.

24. Respondent denied liability for the treatment Claimant received from Dr. Grant Nierman on February 2 and February 11, 2015. Claimant found that treatment beneficial in relieving the effects of her work injury, and she wishes to continue receiving post-MMI medical treatment from Dr. Grant-Nierman. The treatment Dr. Grant-Nierman provided on February 2 and February 11, 2015, and her recommendation for additional treatment, constitutes substantial evidence of Claimant's need for post-MMI medical treatment.

25. Dr. Paz testified at hearing. He testified it was still his opinion that Claimant did not suffer a work related injury, and that most, if not all, of Claimant's symptoms are attributable to the effects of pneumonia for which she was treated shortly after the industrial injury. He testified Claimant does not require any treatment after MMI. In light of the overwhelming medical evidence confirming that Claimant sustained an industrial injury on March 16, 2013, combined with the fact that Respondent admitted liability for that injury, the ALJ finds Dr. Paz' opinion that there was no work injury not credible and not persuasive. Because Dr. Paz is of the opinion that there was no work injury in the first place, it is logical to assume he would also hold the opinion, that Claimant requires no treatment after she reached MMI for such an injury. The ALJ finds that opinion not credible and not persuasive.

26. Claimant testified regarding her injury, her symptoms, the medical treatment she received, and her need for treatment after MMI. She testified regarding the pneumonia that was diagnosed and treated shortly after the work injury. She explained how the symptoms resulting from her work injury were different from the symptoms she experienced as a result of the pneumonia. Claimant testified regarding the beneficial effects of the post-MMI treatment provided by Dr. Grant-Nierman. The ALJ finds Claimant's testimony credible and persuasive.

27. The ALJ finds there is substantial evidence in the record supporting the reasonableness and necessity for future medical treatment. The ALJ finds Claimant has proved by a preponderance of the evidence she is entitled to a general award of post-MMI medical benefits.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are reached:

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Claimant seeks an order finding that she established by a preponderance of the evidence that she is entitled to an general award of maintenance medical benefits. Specifically, Claimant seeks an order finding that Respondents are liable for treatment rendered by Dr. Grant Nierman on February 2 and February 11, 2015. Respondent contends that Claimant has no need for maintenance medical benefits because her condition and symptoms were not caused by the work incident, but were related to her pneumonia and sepsis syndrome.

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that a claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim*

Appeals Office, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

5. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter a general order, similar to that described in *Grover*.

6. Claimant proved by a preponderance of the evidence that she is entitled to an award of maintenance medical treatment to relieve the effects of her industrial injury or prevent future deterioration of her condition. Substantial evidence showing the need for future medical treatment consists of Claimant's testimony regarding such treatment, as well as Dr. Grant-Nierman's recommendations for, and provision of, such treatment. Opinions to the contrary are rejected as unpersuasive.

ORDER

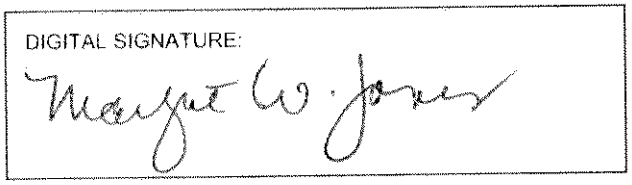
The Judge orders, as follows:

1. Respondent shall pay for all of Claimant's reasonably necessary medical treatment by authorized providers after MMI. This includes the treatment Claimant has already received at First Street Family Health after MMI.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _May 5, 2015_____



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St. 4th Floor
Denver, CO 80203

ISSUES

- Did the respondents prove by a preponderance of the evidence that the failure of claimant's counsel to appear at a hearing scheduled for October 1, 2014 constituted a "waiver" of the claimant's right to contest the issue of permanent partial disability benefits?

- Must a Division-independent medical examiner's opinion that a pre-injury medical impairment was "independently disabling" at the time of a subsequent industrial injury be overcome by clear and convincing evidence in order to avoid apportionment under § 8-42-104(5)(b), C.R.S.?

- Does a preponderance of the evidence establish that the claimant's pre-injury medical impairment was not "independently disabling" at the time of the industrial injury so as to preclude apportionment under § 8-42-104(5)(b), C.R.S.?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 5 and 10 through 13 were admitted into evidence. Respondents' Exhibits A through O were received into evidence.

2. On March 26, 2013 the claimant sustained an admitted industrial injury while performing his job as a forklift operator.

3. The claimant credibly testified that he was driving the forklift onto an elevator when the elevator door malfunctioned causing the forklift to come to an abrupt halt. The abrupt stop caused the forklift to tip forward and "ejected" the claimant upwards into the role cage where he struck the top of his head.

4. The claimant testified as follows concerning his neck problems prior to March 26, 2013. He began to experience neck pain in 2009. This neck pain came on "naturally" and did not result from an accident. In 2011 he underwent a "three-level" surgical procedure that was not a fusion. On October 29, 2012, five months prior to the industrial injury, he underwent a two-level cervical fusion. The claimant explained that he chose to undergo this surgery because his doctor told him he might be paralyzed if he had an automobile accident. As a result of the cervical fusion surgery he was off work approximately 3 months or until late January 2013. He then returned to work performing light-duty office work. Later he returned to full duty driving a forklift. Although somewhat uncertain, the claimant estimated that he performed full duty for

approximately one month prior to the March 26, 2013 industrial injury. On March 26 he was not under any work restrictions. At the time of the March 26 injury the claimant was working 40 hours per week plus overtime on the weekends.

5. The claimant testified that he was feeling "pretty good" after the October 2012 fusion surgery and was not worried about returning to work. He estimated his neck pain was in the range of 2-3/10 just prior to the March 26, 2013 injury. He opined that even though he had some residual neck pain after the cervical fusion surgery it was not causing any "disability" immediately prior to the March 26 injury. The claimant also opined that immediately prior to the March 26 injury he could have found other employment as a forklift driver if the employer had laid him off. Since the March 26 injury the claimant stated that he experiences neck pain in the 7-8/10 range every day. Despite this pain he has returned to work at regular duty. The claimant testified that after the March 26 injury the employer told him he would be terminated him if he did not return to work.

6. On January 18, 2010 the claimant underwent cervical MRI. The radiologist noted multilevel degenerative cervical changes with up to moderate central canal narrowing most pronounced at the C5-6 and C6-7 levels. There was also neural foraminal narrowing most pronounced bilaterally at C5-6 and on the right side at C3-4.

7. On January 28, 2010 the claimant underwent flexion and extension x-rays of the cervical spine. Dr. Stuart Kassan, M.D., reviewed the x-rays and noted mild degenerative changes in the mid and lower cervical spine.

8. On February February 25, 2010, Dr. Kassan noted the claimant was to see a Dr. Wong concerning spinal injections to identify which levels of the spine were most symptomatic. Dr. Kassan assessed cervical spine degenerative disc disease.

9. On March 12, 2010 Cliff Gronseth, M.D., examined the claimant for consideration of an epidural steroid injection. Dr. Gronseth assessed multilevel cervical disc degeneration. He performed a cervical interlaminar epidural steroid injection at C5-6.

10. On March 22, 2010 the claimant underwent a physical medicine examination by David Tanner, M.D. The claimant reported his neck pain was worsening. The frequency of pain was daily and reportedly interfered with the claimant's "home activities and work." Thereafter the claimant continued to undergo treatment including various injections.

11. On August 20, 2010 the claimant was seen by rheumatologist Judy Weiss, M.D., for evaluation of arthritis. The claimant reported pain in his hands, wrists, elbows shoulders, hips, left knee, ankles and feet. He also reported neck pain. At this time the claimant stated he was working long shifts in the employer's brewery up to six days per week. Dr. Weiss opined the claimant sounds as if he could have rheumatoid arthritis.

12. On April 21, 2011 Michael D. Weiss, D.O., of Laser Spine Institute performed surgery described as destruction by thermal ablation of the paravertebral facet joint nerves at bilateral C4-5, right C5-6, and bilateral C6-7. The claimant also underwent a laminotomy and foraminotomy including partial facetectomy with decompression of the left nerve root at C5-6.

13. On August 26, 2011 the claimant advised Dr. Judy Weiss that he was still experiencing significant pain in his neck but was doing "much better in general."

14. On December 8, 2011 John Lankenau, M.D., and Shasta Vansickle, PA-C, evaluated the claimant for his neck pain of 18 months' duration. Dr. Lankenau noted that claimant had a laser surgery at C5-6 earlier in the year. Dr. Lankenau reviewed a cervical MRI and noted that it showed the claimant has congenitally short pedicles and is congenitally tight throughout his cervical spine. Dr. Lankenau also noted foraminal stenosis at C6-7 on the right and moderate stenosis at C3-4 on the right. At C5-6 there was a disk bulge contributing to the foraminal stenosis. Dr. Lankenau assessed multilevel cervical disc degeneration primarily at C5-6, foraminal stenosis at C5-6 bilaterally, left side greater than right, right-sided foraminal stenosis at C6-7 and right-sided foraminal stenosis at C3-4, neuritis and radiculitis of the cervical region, neck pain, and rheumatoid arthritis. Dr. Lankenau recommended additional injections or surgical options.

15. On October 29, 2012 Dr. Lankenau performed a two-level fusion surgery at C5-6 and C6-7. Dr. Lankenau noted the indications for the surgery included an increasing history of cervical radiculopathy dating back several years and the failure of conservative treatment. Dr. Lankenau also cited the most recent MRI results. Dr. Lankenau noted the claimant opted for surgical intervention based on continued symptoms and the failure of conservative treatment.

16. On January 3, 2013 Dr. Judy Weiss noted that the claimant had undergone a cervical fusion and was still experiencing "significant neck pain."

17. On January 3, 2013 Dr. Lankenau examined the claimant at Pinnacle Orthopedics. The claimant advised Dr. Lankenau that he still had neck pain, particularly after physical therapy. Dr. Lankenau opined that overall the claimant was "doing relatively well given how long he had his symptoms prior to surgery."

18. The medical records contain a note from Pinnacle Orthopedics dated February 28, 2013. (Claimant's Exhibit 1). The note contains no signature and the ALJ is unable to determine the author of the note. The notes states the claimant has returned to work and continues in physical therapy. The claimant reported that his neck pain and his arm strength were improved. The claimant's only complaint involved the right knee.

19. On March 26, 2013 the claimant was seen by Anne Schuller, PA-C at the employer's medical clinic. PA Schuller recorded a history of "work related injury." She assessed "cervicalgia."

20. PA Schuller again examined the claimant on April 2, 2013. The claimant reported that his neck pain persisted after he was seen on March 26, 2013. PA Schuller also noted a history of "Cspine fusion 4 months ago." The claimant reported that he was seen by Dr. Lankenau on April 2 and was told his "fusion graft [was] fractured." PA Schuller assessed a cervical strain and an abrasion on the scalp. She imposed restrictions of no driving forklifts, no kneeling, squatting or crawling and no lifting, carrying pushing and pulling in excess of 5 pounds.

21. Philip Smaldone, M.D., examined the claimant at the employer's clinic on April 19, 2013. The claimant reported he was essentially symptom free except at the extremities of right and left rotation at the cervical spine. Dr. Smaldone assessed a "neck strain" and nonunion versus fracture of the C5 graft. The claimant requested to return to work without restrictions on April 22, 2013 and Dr. Smaldone stated this would be appropriate given his clinical status.

22. The claimant underwent a cervical CT scan on May 13, 2013. This scan was apparently ordered by Dr. Smaldone. The CT scan revealed an uncomplicated anterior interbody fusion at C5-6 and C6-7. The scan showed that there was no fracture or other acute osseous abnormality and no alignment abnormality.

23. On June 18, 2013 Mark C. Watts, M.D., examined the claimant for a "routine neurosurgical followup." Dr. Watts noted he was examining the claimant because Dr. Lankenau was not currently available. Dr. Watts recorded a history that clinically the claimant did well after the October 2012 fusion and "returned to normal function." However the claimant was again injured in the forklift accident of March 26, 2013. The claimant reported neck pain up to the base of the skull. Dr. Watts stated that Dr. Lankenau had diagnosed a fracture based on x-ray. Dr. Watts reviewed the CT scan and opined there were "some elements that could potentially represent fracture, but this is so far out from the initial event, the fractures would likely be healing." Dr. Watts opined the claimant was "doing really well" but it was "uncertain how completely he recovered."

24. On August 28, 2013 Dr. Smaldone again examined the claimant. The claimant reported neck pain down the midline and trapezius pain with rotation of the head. This pain reportedly radiated down the bilateral upper back from the neck with flexion. The claimant also reported occasional left lateral arm numbness. The claimant stated that he could "perform the full function of his job with 6/10 pain." Dr. Smaldone placed the claimant at maximum medical improvement (MMI) and referred the claimant to Gary Zuehlsdorff, D.O., for an impairment rating.

25. On September 13, 2013 Dr. Zuehlsdorff examined the claimant for the purpose of assigning an impairment rating. Dr. Zuehlsdorff took a history from the claimant, reviewed medical records commencing with the March 26, 2013 date of injury and performed a physical examination. The claimant told Dr. Zuehlsdorff that he had worked for the employer for 36 years "first as a mechanic and now as a packaging specialist for over 20 years." Dr. Zuehlsdorff noted that in "November 2012" [sic] the claimant had undergone a two level fusion at C5-6 and C6-7 "that was a nonwork-

related incident." The claimant told Dr. Zuehlsdorff that after the fusion surgery and prior to the March 26, 2013 industrial injury he "recovered to a level of about 3/10 neck pain with no longer any arm symptoms." On September 13, 2013 the claimant reported his pain level was 7/10 and he was experiencing numbness in his right and left fourth and fifth fingers. The claimant also reported that he "was at his full-duty position and feels capable of remaining so."

26. Dr. Zuehlsdorff assessed the claimant with the following conditions: (1) Head contusion with secondary cervical strain; (2) Past surgical history of cervical spine two-level fusion at C5-6 and C6-7 ACDF in November of 2012 [sic] with chronic pre-existing low level pain of 3/10 in the cervical region with elimination of bilateral upper extremity dysesthesias; (3) Subjective complaints of continuing pain at approximately 7/10 with bilateral upper extremity intermittent dysesthesias in the bilateral index and fifth fingers since date of work injury; (4) X-rays and MRI possibly concerning for a fracture but no definitive diagnosis of same.

27. Dr. Zuehlsdorff concurred with Dr. Smaldone that the claimant was at MMI.

28. Dr. Zuehlsdorff performed an impairment rating using the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* (AMA Guides) and Division of Workers' Compensation (DOWC) guidelines for apportionment of impairment. Dr. Zuehlsdorff determined that the claimant had 15% whole person impairment based on cervical range of motion (ROM) deficits. However, using DOWC guidelines he determined that 14% of the ROM impairment should be apportioned out to the non-industrial two-level fusion. Thus, Dr. Zuehlsdorff assigned 1% ROM impairment for the March 26, 2013 industrial injury. Dr. Zuehlsdorff also assessed 17% whole person impairment for specific disorders of the spine under Table 53 of the AMA Guides. However, Dr. Zuehlsdorff apportioned out 11% of the Table 53 rating based on the prior non-industrial fusion surgery. Thus, Dr. Zuehlsdorff assigned 6% whole person impairment as the specific disorder rating attributable to the March 26, 2013 industrial injury. Dr. Zuehlsdorff opined that claimant's total impairment attributable to the March 26, 2013 work injury was 7% whole person impairment. Dr. Zuehlsdorff explained that under the DOWC guidelines apportionment was proper because the claimant had "pre-existing pain and discomfort from the previous injury, although non-work-related."

29. The claimant underwent a Division-sponsored independent medical examination (DIME) performed by Susan Santilli, M.D. Dr. Santilli issued a DIME report on February 26, 2014. Dr. Santilli took a history from the claimant, reviewed medical records from both before and after the March 26, 2013 date of injury and performed a physical examination. The claimant reported to Dr. Santilli that on March 26, 2013 he was "performing his usual job" for the employer when he hit his head on the top of the forklift resulting in immediate pain. The claimant advised Dr. Santilli that after the neck surgery in October 2012 he had been doing well, was working full duty and was off pain medication. Prior to the March 26 injury the claimant rated his pain at 2/10. On February 26, 2014 the claimant rated his pain at 7/10 "which is where the pain level was

right after the [March 2013] work injury." The claimant reported he was experiencing bilateral neck pain, numbness and tingling into the lateral two fingers on both hands and down both arms.

30. Dr. Santilli assessed the claimant with the following conditions: (1) Cervical strain with head contusion; (2) Past surgical history of cervical fusion at C5-6 and C6-7; (3) Possible cervical fracture at graft, but no definitive diagnosis of same has been made; (4) History of chronic neck pain and polyarthralgias.

31. Dr. Santilli opined the claimant reached MMI on September 13, 2013.

32. Dr. Santilli performed an impairment rating using the AMA Guides and Division of Workers' Compensation (DOWC) guidelines for apportionment of impairment. Dr. Santilli determined that the claimant had 16% whole person impairment based on cervical ROM deficits. However, using DOWC guidelines she determined that 14% of the ROM impairment should be apportioned out to the non-industrial two-level fusion. Thus, Dr. Santilli assigned 2% ROM impairment for the March 26, 2013 industrial injury. Dr. Santilli also assessed 17% whole person impairment for specific disorders of the spine under Table 53 of the AMA Guides. However, she apportioned out 11% of the Table 53 rating based on the prior non-industrial fusion surgery. Thus, Dr. Santilli assigned 6% whole person impairment as the specific disorder rating attributable to the March 26, 2013 industrial injury. Dr. Santilli opined that claimant's combined impairment rating attributable to the March 26, 2013 work injury was 8% whole person impairment. If the rating had not been apportioned Dr. Santilli indicated the claimant's overall combined impairment rating is 30% whole person.

33. On March 12, 2014 Ellen K. Oakes, OTR of the Division of Workers' Compensation (DOWC) Medical Services Delivery Section Independent Medical Examination Program sent to Dr. Santilli an Incomplete Notice – IME Report as well as a letter. The letter noted that Dr. Santilli had apportioned the claimant's impairment rating based on a "previous non-work related condition." The letter reminded Dr. Santilli that for cases with dates of injury on or after July 1, 2008 there were changes to Rule 12 requiring a rating physician to "establish that the injury meets certain criteria in order to qualify for apportionment." Specifically Dr. Santilli was advised as follows: "These criteria [for apportionment] include the fact that the previous condition to the same body part was identified and treated, met the criteria for permanent impairment and was independently disabling at the time of the current injury." Dr. Santilli was directed to clarify her apportionment and complete an apportionment worksheet.

34. On March 17, 2014 Dr. Santilli completed a "Division Independent Medical Examination Addendum" (Addendum). In the Addendum Dr. Santilli acknowledged the DOWC's request for clarification of her apportionment of the claimant's impairment rating. Dr. Santilli wrote that the claimant underwent a two-level fusion prior to the industrial injury and this "previous condition" was to the same body part (as the industrial injury), was identified and treated and was "independently disabling at the time of the current injury." In support of the decision to apportion Dr. Santilli stated that prior to the March 26, 2013 industrial injury the claimant had ongoing neck pain that he rated

as 2/10. After the industrial injury the claimant reported constant 7/10 pain despite "working full duty as he did prior to the injury." Dr. Santilli wrote that the "change in [the claimant's] subjective pain reports has not caused a change in his work duty capacity." Dr. Santilli reiterated that the claimant's overall impairment is 30% whole person, but the apportioned rating for the industrial injury is 8% whole person impairment. Dr. Santilli included an Apportionment Calculation Guide and marked a box stating the claimant's "previous condition was non-work related and was disabling."

35. On July 31, 2014, Dr. Edwin Healey performed a medical records review at the request of the claimant. Dr. Healey is board certified in occupational medicine and neurology and is level II accredited. Dr. Healey's review of the records included Dr. Zuehlsdorff's impairment rating as well as Dr. Santilli's DIME report and the Addendum. Dr. Healey was requested to address the issue of whether or not the apportioned impairment ratings issued by Dr. Zuehlsdorff and Dr. Santilli "are appropriated based on Rule 12-3B" promulgated by the DOWC. After reviewing the medical records Dr. Healey opined as follows:

> Based on the Rule 12-3B, it is my opinion with a reasonable degree of medical probability, there should be no apportionment of the 30 percent whole person impairment provided by Dr. Santilli in the Division IME of 2/26/14 because [the claimant] did have a prior non-work related injury and even though he was still symptomatic, he was working without restrictions and was not disabled at the time of his 3/26/13 work injury. [The claimant] does meet the criteria for awarding an Impairment Rating for his 3/26/13 work injury without apportionment based on the current Workers Compensation Law and specifically Rule 12-3B."

36. On May 20, 2014 the respondents filed a Final Admission of Liability (FAL). The FAL admitted for permanent partial disability (PPD) benefits based on Dr. Santilli's apportioned impairment rating of 8% whole person.

37. A preponderance of the credible and persuasive evidence establishes that the claimant's pre-injury neck condition, for which he underwent neck fusion surgery in October 2012, was not "independently disabling" at the time of the March 26, 2013 industrial injury. Specifically, the claimant's condition prior to March 26, 2013 probably did not impair his capacity to meet personal, social or occupational demands.

38. Dr. Healey's opinion that the claimant was not "disabled" by his pre-existing condition at the time of the March 26, 2013 industrial injury is credible and persuasive. Dr. Healey correctly pointed out that the claimant had returned to work without restrictions by March 26, 2013. He persuasively opined that the claimant's ability to return to work prior to March 26 demonstrates that whatever symptoms he continued to experience from the prior condition did not disable him from performing his employment without limitation.

39. Dr. Healey's opinion that the claimant was not "disabled" by the prior condition as of March 26, 2013 is corroborated by the claimant's credible testimony. The claimant credibly testified that prior to the March 26 injury his pain level was at 2-3/10, that he had returned to full duty as forklift driver and was not under any work restrictions.

40. The ALJ infers from the claimant's credible testimony that by March 26, 2013 the residual symptoms caused by the claimant's preexisting neck condition were not limiting his ability to meet the physical demands of his employment or life in general. This inference is corroborated by the claimant's reports to various medical providers. Specifically, the February 28, 2013 note from Pinnacle Orthopedics noted the claimant's neck pain and arm strength were improved and his "only complaint" involved the right knee. On June 18, 2013 Dr. Watts noted the claimant did well and "returned to normal function" after the October 2012 fusion surgery. On October 13, 2013 the claimant told Dr. Zuehlsdorff that after the fusion surgery he "recovered" to a "level of 3/10 neck pain with no longer any arm symptoms." The claimant also advised Dr. Zuehlsdorff that despite 7/10 pain levels after the March 26, 2013 injury he continued to work full duty and felt capable of continuing." The claimant reported a similar history to Dr. Santilli who noted that after the October 2012 fusion surgery the claimant had been doing well, was working full duty and was off pain medication. The claimant also advised Dr. Santilli that prior to the March 26, 2013 his pain level was 2/10 but had been 7/10 since March 26. The ALJ infers from the reports to Dr. Zuehlsdorff and Dr. Santilli that the claimant has a high pain tolerance and probably was not functionally limited by the low 2-3/10 pain levels that he was experiencing prior to March 26, 2013.

41. Dr. Santilli's opinion, expressed in the Addendum, that the claimant's pre-existing condition that resulted in the fusion surgery was "independently disabling" at the time of the March 26, 2013 injury is not persuasive. In support of her opinion Dr. Santilli noted that prior to March 26, 2013 the claimant had ongoing neck pain rated at 2/10. However, Dr. Santilli did not explain or cite any examples of how this pre-injury pain impaired the claimant's capacity to meet personal, social or occupational demands. In fact, Dr. Santilli noted that prior to the March 26 injury the claimant was working full duty. Further, she stated the claimant's subjectively increased pain levels after March 26 had "not caused a change in his work duty capacity." Thus, Dr. Santilli's only discussion of how the pre-injury pain was "disabling" at the time of the March 26 injury tends to establish that the pre-injury pain did not impair the claimant's capacity to meet the demands of his employment.

42. Dr. Zuehlsdorff's opinion that the claimant's impairment rating should be apportioned based on the pre-injury neck pain and discomfort is also unpersuasive. Although Dr. Zuehlsdorff reported that apportionment is appropriate under DOWC Guidelines, he did not expressly render an opinion as to whether the claimant's pre-injury pain was "independently disabling" at the time of the March 26, 2013 injury. Thus, he violated the requirements of WCRP 12-3(B), which requires a rating physician to state an opinion on this subject when apportioning based on prior non work-related medical impairment. Moreover Dr. Zuehlsdorff failed to cite specific examples of how

the claimant's pre-injury pain and discomfort impaired his ability to meet personal, social or occupational demands.

43. On October 1, 2014 a hearing was scheduled in this matter before Administrative Law Judge Felter (ALJ Felter). The record does not contain the Application for Hearing or any response that was filed. However, a transcript of the proceedings before ALJ Felter is contained in the record.

44. At the commencement of the October 1, 2014 hearing ALJ Felter noted that the matter was set for 1:30 but the claimant's counsel was not present. ALJ Felter stated that he understood "from our docket section that everyone has been trying to reach" the claimant's counsel but counsel "has not appeared or not advised why she won't be here." ALJ Felter inquired of respondents' counsel whether he had further information." Respondents' counsel replied that someone "called my office at 10:15 and said her car broke down and she couldn't make it." Respondents' counsel advised ALJ Felter that he told his office to "call them back and tell them it doesn't mean you couldn't make it at a hearing that's three and a half, or three hours away, that doesn't make sense to me." Respondents' counsel stated that in his opinion "[y]ou could get a cab or do whatever you needed to do." Respondents' counsel also advised ALJ Felter that "they called again an hour ago to say she couldn't make it" and that he spoke to claimant's counsel's office "maybe 15 minutes ago" and asked for claimant's counsel's cell phone number. However, respondents' counsel was told that that "they don't know where she is" and they "can't get a hold of her."

45. Following this discussion ALJ Felter thanked respondents' counsel for the information and then stated the following: "What's your pleasure? My inclination is to strike the application for hearing, period." Respondents' counsel replied: "Okay. Whatever you think is appropriate, I guess." ALJ Felter then stated that there had to be good cause for a continuance and he didn't see good cause. ALJ Felter further stated that the case is "for now abandoned" and if another application is filed "we'll cross that bridge when we get to it then." ALJ Felter then ordered that the application for hearing was stricken. He further stated that "I couldn't strike it with prejudice anyway, under the circumstances."

46. On October 1, 2014 at 10:39 Daniel Luepschen sent a sent a facsimile (fax) transmission from claimant's counsel's office to the OAC. The fax stated that he conversed with "Merci this morning regarding the hearing" scheduled for 1:30. The fax further states that Mr. Luepschen "told her that [claimant's counsel] was experiencing mechanical issues with her vehicle and would be unable to attend the hearing today."

47. On October 1, 2014 at 11:03 Daniel Luepschen sent a second fax to the OAC stating that he was asked by Merci whether the claimant "would be doing a motion to continue the hearing" or withdrawing his Application for Hearing and filing it again at a later time. Mr. Luepschen added that he was conferring with respondents' counsel's "paralegal to determine which of these options" the respondents' counsel would prefer.

48. On October 13, 2014 claimant's counsel filed the current Application for Hearing listing the issues of penalties, PPD benefits and "Apportionment and overcoming the DIME by clear and convincing evidence."

49. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

WAIVER OF CLAIM FOR PPD BASED ON CLAIMANT'S COUNSEL'S FAILURE TO APPEAR AT HEARING

The respondents argue that the claimant "waived" his right to seek additional PPD benefits because his counsel appeared at the hearing before ALJ Felter on October 1, 2014. The respondents assert the evidence establishes that the claimant's counsel was aware of mechanical problems with her car at least 3 hours prior to the October 1 hearing but failed to take reasonable steps, such as taking public transportation or a cab, to attend the 1:30 p.m. hearing. The respondents further contend that claimant's counsel failed to submit "significant evidence" to document the mechanical problems with her car or to explain her failure to secure alternative transportation to the hearing. The ALJ rejects the respondents' waiver argument for several reasons.

The doctrine of waiver constitutes an "affirmative defense" to a claim. Therefore, the party asserting the defense has the burden of proof to establish the elements of a waiver. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); *Moler v. Colorado Springs Winwater,* WC 4-447-584 (ICAO February 8, 2006). Waiver is the voluntary, knowing and intelligent surrender of a known right. *Johnson v. Industrial Commission, supra*; *Pfaff v. Broadmoor Hotel*, WC 4-105-774 (ICAO October 15, 2003). Waiver may be explicit or established by conduct inconsistent with assertion of the right. However, a waiver implied from conduct should be free of ambiguity concerning the party's intention to surrender the right. *Department of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984); *Pfaff v. Broadmoor Hotel, supra.* A claim of waiver may itself be waived if not asserted in a timely fashion. *Lewis v. Scientific Supply Co.,* 897 P.2d 905 (Colo. App. 1995).

Reduced to its simplest form, the respondents essentially argue that the claim for additional PPD benefits should be dismissed for failure to prosecute the claim. This argument is predicated on the claimant's failure to produce any good reason for her counsel's failure to appear at the October 1, 2014 hearing.

In this regard the respondents could have requested ALJ Felter to issue an order to show cause why the claim should not be dismissed pursuant to § 8-43-207(1)(m), C.R.S. However, when presented an opportunity to argue that the failure to appear justified or would justify issuance of a show cause order and ultimately dismissal of the claim, respondents' counsel simply deferred to ALJ Felter's discretion to design a remedy for the failure to appear. ALJ Felter then elected to dismiss the application for hearing without prejudice. The ALJ concludes that by deferring to ALJ Felter's discretion and failing to raise their "waiver" argument the respondents themselves waived the argument that the claimant failed to prosecute the claim and should now be barred from seeking additional PPD benefits. *Lewis v. Scientific Supply Co., supra*.

Even if the respondents have not waived the argument that the claim for further benefits was "waived" by the claimant's failure to appear at the October 1 hearing, the ALJ concludes that ALJ Felter's ruling that the proper sanction was dismissal of the application for hearing is now the law of the case. Law of the case is a discretionary doctrine holding that courts must generally follow prior legal rulings in the same case. *In re the Estate of Walter*, 97 P.3d 188 (Colo. App. 2003). A second judge may reconsider the prior ruling of a judge if new facts, circumstances or law indicate that reconsideration is appropriate. *In re the Estate of Walter, supra.*

Here, ALJ Felter ruled that the appropriate sanction for claimant's counsel's failure to appear was dismissal of the application for hearing. He did so after offering the respondents the opportunity to argue for any sanction they considered appropriate. In these circumstances the respondents have not presented any compelling reason why the undersigned ALJ should revisit ALJ Felter's ruling and impose the severe sanction of dismissal for her failure to appear and prosecute the claim on October 1, 2014.

Even if the respondents have not waived their argument, and even ALJ Felter's ruling is not law of the case, the ALJ declines to find that claimant's counsel's failure to

appear constituted a waiver of the claimant's right to seek additional PPD benefits. Rather, the undersigned ALJ finds that the respondents failed to carry their burden of proof to establish that the failure of claimant's counsel to appear constituted a voluntary, knowing and intelligent waiver of the right to claim additional benefits.

The respondents' argument is that the claimant's counsel knew of mechanical problems with her car in enough time to arrange alternative means of transportation to the October 1 hearing. However, this argument is based on the unspoken assumption that when the breakdown occurred the claimant's attorney was at a location where she could timely summon appropriate assistance to repair or move the car, arrange alternative transportation from wherever she was located and still timely appear at the 1:30 hearing. Because the respondents have the burden of proof to establish waiver, it was not the burden of the claimant to establish these facts for them and her failure to do so cannot be held against her. Rather, the ALJ finds the evidence establishes only that claimant's counsel suffered a mechanical breakdown at an unknown time and place and through the OAC staff advised the that the breakdown prevented her from appearing at the hearing. In the absence of persuasive evidence establishing that there was no breakdown, or that the breakdown occurred under circumstances that made attendance at the hearing feasible, the ALJ is unable to find that counsel's failure to appear unambiguously decided to waive the claim for additional PPD benefits. The ALJ further declines to infer that claimant's counsel voluntarily, knowingly and intelligently surrendered the claimant's right to appear at the hearing and present evidence in support of the claim.

APPORTIONMENT OF IMPAIRMENT RATING

The claimant contends that he overcame by clear and convincing evidence the DIME physician's (Dr. Santilli's) decision to apportion his impairment rating from 30 % whole person to 8% whole person impairment based on his pre-existing back condition. Relying principally on the opinion of Dr. Healey, the claimant specifically argues that at the time of the March 26, 2013 industrial injury his pre-existing neck condition was not "independently disabling" within the meaning of § 8-42-104(5)(b), C.R.S. The respondents, citing *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007) contend that apportionment is a "medical determination" and the claimant failed to overcome by clear and convincing evidence the DIME physician's decision to apportion the impairment rating. The ALJ concludes the claimant was not required to overcome by clear and convincing evidence the DIME physician's opinion that the pre-existing neck impairment was "independently disabling." The ALJ further concludes that a preponderance of the evidence establishes the pre-existing impairment was not "independently disabling" at the time of the March 26 injury. Therefore, apportionment of the impairment rating was not proper and the claimant is entitled to PPD benefits based on 30% whole person impairment.

Section 8-42-104(5)(b) provides that in cases of permanent medical impairment "the employee's award or settlement shall be reduced:"

> (b) When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury was independently disabling. The percentage of the nonwork-related permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted from the permanent medical impairment rating for the same body part.

Application of § 8-42-104(5)(b) to the facts of this case requires the ALJ to interpret the meaning of the term "independently disabling. " The ALJ notes that neither party cited any current cases that interpret the term. The ALJ is also required to determine whether a DIME physician's opinion that a prior medical impairment was "independently disabling" must be overcome by clear and convincing evidence.

A court should effect the legislative intent of a statute by first looking to the "plain and ordinary meaning" of the language used in the statute. If the meaning is ambiguous or unclear the court may look to other aides to interpretation including the legislative history, the context in which the legislation was adopted and the consequences of various interpretations. *See Weld County School District RE-12*, 955 P.2d 550 (Colo. 1998); *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991).

When the General Assembly amends a statute a presumption arises that the legislature intended to change the law as it existed prior to the amendment. *Arenas v. Industrial Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000). There is also a presumption that the General Assembly was cognizant of judicial precedents addressing the subject matter of the inquiry. *Weld County School District RE-12, supra.*

Section 8-42-104(5)(b) was adopted in 2008 and became effective on July 1 of that year. For the period July 1, 1999 to July 1, 2008 § 8-42-104(2)(b), C.R.S., provided that when benefits were awarded pursuant to "section 8-42-107, an award of benefits for an injury shall exclude any previous impairment to the same body part." Section 8-42-104(2)(c) stated that this apportionment applied to awards of permanent partial disability. Prior to July 1, 1999 § 8-42-104(2), C.R.S., provided that in cases of "previous disability" the disability for a "subsequent injury" was to be determined by "computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury." This provision expressly applied to awards of permanent partial disability."

In *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996) the court interpreted the meaning of the term "previous disability" as that term was used in the pre-1999 version of § 8-42-104(2). The court observed that the Act did not define the term "previous disability." However the court stated that § 8-42-107(8)(c), C.R.S., requires the use of the AMA Guides when determining impairment and that the rating of impairment "necessarily includes the decision to apportion such impairment." The court then observed that the AMA Guides define the term "impairment" as "an alteration of an

individual's health status that is assessed by medical means." In contrast, the AMA Guides state that "disability" is assessed by nonmedical means and is "an alteration of an individual's capacity to meet personal, social, or occupational demands." The court emphasized that under the AMA Guides "a person who is impaired is not necessarily disabled." *Id.* at 1337.

In *Askew* the respondents sought to apportion an impairment rating for a back injury based on a pre-existing degenerative back condition. However, the facts demonstrated that prior to the industrial injury the degenerative back condition was asymptomatic and did not hinder the claimant's ability to meet any demands. The court reasoned that under the "plain language of § 8-42-104(2)" apportionment was improper. It reasoned that the claimant's preexisting degenerative condition may have been an "impairment" under the AMA Guides, but it was not a "disability" because it did not limit his capacity "to meet the demands of life's activities." *Id.* at 1337; *see also Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656 (Colo. App. 1998).

Later, in *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68 (Colo. App. 2001) the court applied the *Askew* analysis to affirm a denial of apportionment based on a prior industrial impairment that was not disabling at the time of the subsequent industrial injury. Significantly, the court determined that under the *Askew* decision the "apportionment principles triggered under § 8-42-104(2) do not concern causation, but instead pertain to the status of a claimant's preexisting impairment." Specifically the court was required to determine if the pre-existing impairment rose to the level of a disability that continued to affect the claimant at the time of the subsequent injury. Moreover, the *Public Service* court ruled that the question of whether prior impairment was "disabling" at the time of the subsequent injury presented a question of fact for the ALJ to determine under the preponderance of the evidence standard, and the ALJ was not required to give any "presumptive weight" to the DIME physician's opinion on this issue.

As noted above, the General Assembly amended § 8-42-104(2) effective July 1, 1999. The legislature deleted any reference to the term "disability" and provided an award of PPD benefits was to exclude "previous impairment to the same body part." In *Martinez v. Industrial Claim Appeals Office, supra*, the case cited by the respondents, the court of appeals held that the statutory change rendered immaterial the distinction between "the type of apportionment authorized under former § 8-42-104(2) and the type of apportionment required by the AMA Guides as part of the rating process." The court stated that under the July 1, 1999 version of the statute apportionment constituted a "pure medical determination, which when made by the DIME physician is subject to the clear and convincing standard of § 8-42-107(8)." 176 P.3d at 828.

Section 8-42-104 was again amended in 2008 to include the provisions of subsection (5)(b). Subsection (5)(b) conditions apportionment of "nonwork-related previous permanent medical impairment" on a finding that the previous medical impairment was "independently disabling" at the time of the subsequent industrial injury. The ALJ concludes that the 2008 adoption of subsection (5)(b) evidences the General Assembly's intent to alter the law of apportionment as it existed from July 1, 1999 to

July 1, 2008, by reincorporating into the statue the requirement that a previous medical impairment be "disabling" at the time of the subsequent industrial injury.

The ALJ further concludes that when the General Assembly used the term "independently disabling" in subsection (5)(b) it did so with full cognizance of the *Askew* decision and its progeny. Specifically, the ALJ infers the legislature was aware that *Askew* held the plain and ordinary meaning of the phrase "previous disability" referred to "an alteration of an individual's capacity to meet personal, social, or occupational demands" as determined by nonmedical means. Consequently, the ALJ infers that in 2008 when the General Assembly reinserted the term "disabling" into subsection (5)(b) its intent was to condition apportionment of pre-existing non work-related medical impairment on a finding that such impairment limited the claimant's capacity to meet personal, social or occupational demands at the time of the subsequent industrial injury. Moreover, the General Assembly intended to legislatively repeal the holding in *Martinez v. Industrial Claim Appeals Office, supra* that apportionment is strictly a "medical determination" and the DIME physician's opinion on apportionment must be overcome by clear and convincing evidence. Rather use of the term "disability" in subsection (5)(b) signals an intent to readopt the *Askew* court's view that, as provided in the AMA Guides, the existence of "disability" is determined by nonmedical means. Further the ALJ infers the General Assembly intended to adopt the *Public Service Co.* court's view that the existence of "disability" is determined under the preponderance of the evidence standard and the DIME physician's opinion is not entitled to any "presumptive weight" on this issue.

The ALJ further concludes that the foregoing analysis is consistent with WCRP 12-3(A) and (B). WCRP 12-3(A) pertains to injuries "prior to July 1, 2008" and states the rating physician "shall apportion any preexisting medical impairment, whether work-related or non work-related, from a work-related injury or occupational disease using the" AMA Guides.

In contrast WCRP 12-3(B) applies to dates of injury "on or after July 1, 2008" and states the rating physician "may provide an opinion on apportionment of any preexisting work related or non work-related permanent impairment to the same body part" using the AMA Guides where "medical records or other objective evidence substantiate preexisting impairment." The rule also provides that if the rating physician apportions based on a prior non work-related impairment the physician "must provide an opinion as to whether the previous medical impairment was identified, treated and independently disabling at the time of the work-related injury that is being rated." Significantly, WCRP 12-3(B)(1) states the "effect of the Physician's apportionment determination is limited to the provisions in section 8-42-104."

The ALJ infers from WCRP 12-3(B)(1) that the rule reflects a recognition by the Director of the DOWC that the legal "effect" of a rating physician's opinions concerning apportionment, including an opinion concerning whether a previous impairment was independently disabling at the time of the subsequent industrial injury, can have no more legal consequence than is contemplated by § 8-42-104. As determined above, the ALJ concludes that § 8-42-104(5)(b) contemplates that a DIME physician's opinion

concerning whether or not prior medical impairment was "independently disabling" at the time of the industrial injury is not entitled to "presumptive weight" and is of no greater legal consequence than any other physician's opinion on this subject.

A preponderance of the credible and persuasive evidence establishes that the claimant's 30% whole person impairment rating cannot be apportioned based on his pre-injury condition because the prior condition was probably not "independently disabling" at the time of the March 26, 2013 injury. As determined in Findings of Fact 37 through 42, the credible and persuasive evidence establishes the claimant's condition prior to the injury on March 26, 2013 was probably not "independently disabling." Dr. Healey credibly opined that the claimant's ability to return to full duty work without restrictions prior to the March 26 injury demonstrates the claimant's condition was probably not "independently disabling" within the meaning of WCRP 12-3(B) and, therefore, § 8-42-104(5)(b). Dr. Healey's report reflects his opinion that the claimant's ability to perform regular employment without any restrictions shows the pre-injury condition was probably not impairing his capacity to meet personal, social or occupational demands. The claimant's credible testimony, as corroborated by the history he gave to various medical providers, establishes that by March 26 he had returned to work at full duty and was experiencing relatively low levels of pain and doing well. Although Dr. Santilli opined, after prompting by the DOWC, that the claimant's pre-injury condition was independently disabling at the time of the March 26 injury, that opinion is not persuasive for the reasons stated in Finding of Fact 41. Dr. Zuehlsdorff's opinion that the claimant's impairment rating should be apportioned is not persuasive for the reasons stated in Finding of Fact 42.

No party has sought to challenge Dr. Santilli's DIME opinion that the claimant sustained ratable impairment as a result of the March 26, 2013 injury, and that her overall impairment rating for body parts injured in the March 26 incident is 30% whole person. This rating is therefore binding on the parties and the ALJ. Section 8-42-107(8)(c), C.R.S. The specific issue determined here is that apportionment of the DIME physician's overall rating based on the claimant's pre-existing non work-related medical impairment is not proper under § 8-42-104(5)(b) because the prior impairment was not "independently disabling" at the time of the March 26 injury. Therefore, the claimant is entitled to PPD benefits based on the DIME physician's overall rating of 30% whole person impairment and without regard to apportionment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. The claimant's right to raise the issue of PPD benefits was not waived by failure of her counsel to appear at the hearing on October 1, 2014.

3. The insurer shall pay the claimant PPD benefits in accordance with the statutory formula based on 30% whole person impairment.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 28, 2014

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did the claimant prove by a preponderance of the evidence that any need for lumbar facet injections was proximately caused by the industrial injury of April 11, 2013?

- Did the claimant prove by a preponderance of the evidence that lumbar facet injections constitute reasonable and necessary medical treatment?

- Did the claimant prove by a preponderance of the evidence that any need for a left elbow MRI was proximately caused by the industrial injury of April 11, 2013?

- Did the claimant prove by a preponderance of the evidence that a left elbow MRI constitutes reasonable and necessary medical treatment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 13 were admitted into evidence. Respondents' Exhibits A through M were admitted into evidence.

2. The claimant testified as follows concerning the injury that occurred on April 11, 2013. She left the employer's store and went to the parking lot to retrieve a binder from her car. As she was returning to the store she stepped on some ice and slipped. She put out her left hand to break the fall but the hand slipped and she landed on her left elbow, left shoulder and left hip. The claimant described the fall as "really hard" and she didn't think about much of anything but her elbow because it hurt badly.

3. The claimant further testified that later on April 11, 2013 she told her supervisor about the injury and jokingly asked him to pull on her arm to get it back in place. The supervisor declined to pull on her arm but directed her to file a report. The employer then referred her to Concentra Medical Centers (Concentra) for treatment. At Concentra the claimant was seen by a physician. The claimant recalled that she told the Concentra doctor about symptoms involving her elbow, shoulder and hip. She also recalled that she mentioned that her back hurt. The claimant recalled that the Concentra physician referred her to Dr. Kavi Sachar, M.D., to evaluate the elbow because that was "the main concern."

4. The claimant testified that she was seen by Dr. Sachar April 12, 2013. Dr. Sachar evaluated the elbow and suggested surgery as soon as the swelling was reduced. The claimant did not recall discussing any symptoms with Dr. Sachar except

the elbow. The claimant testified that she returned to Dr. Sachar six days later to undergo elbow surgery. She recalled that on the date of the elbow surgery she reported to Dr. Sachar that she was experiencing back pain but he "convinced her" that he was "an arm and hand specialist only." The claimant intended to return to Concentra for back treatment but the return visit was denied. The claimant explained that at that point she was desperate and her attorney helped find a physician to treat her.

5. On April 11, 2013 Kirk Holmboe, D.O., examined the claimant at Concentra. Dr. Holmboe recorded the claimant's "chief complaints" as injury to the left elbow, left shoulder and left hip. He recorded a history that the claimant hit some ice and landed "directly on her left arm and her left hip." The claimant reported increasing pain and swelling in her left elbow, some left shoulder pain and "minimal symptoms in her left hip and thigh." The claimant reported a "past history" of a traumatic brain injury from a motor vehicle accident (MVA) ant that she was still recovering from this injury. On examination Dr. Holmboe noted massive swelling and ecchymosis of the posterior aspect of the elbow. Shoulder range of motion (ROM) was not tested. Dr. Holmboe ordered an x-ray that showed a "significant comminuted displaced intraarticular fracture of the olecranon." Dr. Holmboe advised the claimant that her elbow would require surgery and referred her to Hand Surgery Associates (HSA) for evaluation the next morning. Dr. Holmboe's office note makes no mention of injury to the low back or that the claimant reported any low back symptoms.

6. On April 12, 2013, Kavi Sachar, M.D., examined the claimant at HAS. Dr. Sachar took a history that the claimant "slipped and fell on the ice at work landing on her left elbow." Dr. Sachar's impression was a "comminuted displaced left olecranon fracture." Dr. Sachar and the claimant discussed performing surgery described as "open reduction internal fixation with wire." The claimant decided to undergo surgery. Dr. Sachar's note contains no mention that the claimant reported back pain or other back symptoms.

7. On April 16, 2013 Dr. Sachar performed surgery on the claimant's left elbow.

8. On April 24, 2014 Dr. Sachar examined the claimant and took "three view x-rays of the left elbow." The x-rays reportedly showed "excellent position of the hardware and olecranon ORIF." Dr. Sachar referred the claimant for physical therapy (PT) on the left elbow. Dr. Sachar's April 24 note contains no mention that the claimant reported back pain or other back symptoms.

9. On May 1, 2013 the claimant began PT for left her elbow at Select Physical Therapy (Select). On May 20, 2013, almost three weeks later, the physical therapist reported the claimant's "neck is sore and she is having some pain in the right low back." The therapist noted that the claimant was usually wearing a sling for her elbow but this hurt her neck. The therapist recorded that the claimant had been in an MVA "last August and had a fracture in the neck and a head injury."

10. On May 22, 2013 Dr. Sachar examined the claimant. He noted that overall she was doing reasonably well “5 weeks post ORIF left olecranon.” He also noted that the claimant reported “she has had neck and back pain since the time of the injury” and believed the sling made her neck slightly worse. Dr. Sachar also noted the claimant “has not been seeing a primary work comp physician at this time.”

11. July 1, 2013, attended PT for treatment of her elbow. The physical therapist noted the claimant stated that she was continuing “to have problems with her (R) neck and low back as well that are not being addressed."

12. On July 8, 2013 the claimant was examined by neurologist Lynn Parry, M.D. The claimant reported “persistent” left arm, neck and low back problems after the injury of April 11, 2013. The claimant gave a history that on April 11 she slipped on ice while working and fell “full force onto her elbow.” She was treated at Concentra “where she complained of elbow pain as well as neck pain.” The claimant reported that she was involved in an MVA in September 2012 that caused a skull fracture and neck pain for which she received PT, radiofrequency treatment and massage therapy. Dr. Parry noted that she did not have any medical records for the 2012 and 2013 injuries.

13. On physical examination Dr. Parry noted the claimant lacked full extension of the left elbow and had “decreased pinprick” of the third and fourth digits. The claimant’s upper and lower reflexes were abnormal. The claimant had a slightly antalgic gait on the right. She sat with her shoulders behind her pelvis which Dr. Parry described as “indicative of imbalance between anterior and posterior pelvic musculature.” There was “mild tenderness” over the lumbosacral area and over the posterior pelvis in the region of the sacroiliac (SI) joints.

14. Dr. Parry wrote that the claimant has a “history of previous injuries to the neck and back which appear to have been aggravated” by the April 11, 2013 slip and fall. Dr. Parry opined that claimant "certainly could have sustained a flexion-extension injury to the cervical spine as well as a low back strain." Dr. Parry further opined the claimant was not at maximum medical improvement (MMI) on July 8, 2013 because she needed electromyography to assess possible ulnar nerve compression at the elbow and a cervical MRI to rule out possible myelopathy suggested by hyperreflexia. Dr. Parry also referred the claimant for additional PT.

15. Dr. Parry reexamined the claimant on October 9, 2013. Dr. Parry noted the claimant was standing almost continuously work and reported ongoing back pain. The claimant reported she could not lean on her left elbow without experiencing a shooting pain. Dr. Parry obtained and reviewed Dr, Holmboe’s April 11, 2013 office note and Dr. Sachar’s notes. Dr. Parry opined that because the claimant’s “initial presentation was clearly focused on the elbow with an acute and fairly serious fracture” the claimant’s back complaints had not been fully addressed. On physical examination the claimant demonstrated an inability to fully extend her elbow, tenderness along the lateral epicondyle and olecranon and decreased sensation in the fourth and fifth digits. The claimant continued to “demonstrate asymmetric pelvic stability with weakness on the left and tenderness over the left sacroiliac joint.” Dr. Parry opined that when the

claimant fell she "also landed on her left hip and has problems in the back, specifically the left SI joint which would be consistent with her slip and fall."

16. Dr. Parry reexamined the claimant on February 5, 2014. The claimant reported ongoing problems in the left arm, low back pain as well as right-sided arm pain and right-sided headaches. Dr. Parry noted the claimant had "decreased pelvic stability on the left but increased tenderness over the right sacroiliac joint." Dr. Parry opined the "SI joint/pelvic instability" was a "ligamentous type injury" that is difficult to stabilize. Dr. Parry further opined the claimant still had "signs of ulnar nerve dysfunction" with limited motion and increased pain in the left upper extremity. Dr. Parry opined the claimant needed removal of the hardware in her arm.

17. On June 2, 2014 Thomas Fry, M.D., surgically removed the hardware in the claimant's left elbow.

18. On June 12, 2014 the claimant came under the care of Kristin Mason, M.D. Dr. Mason is board certified in physical medicine and rehabilitation and is level II accredited. The claimant gave a history that she fell in April 2013. She put her hand out to brace herself but the left hand slipped causing her to land on the left elbow and left hip. The claimant reported she had "ecchymosis along the entire left side." Dr. Mason noted the claimant suffered an olecranon fracture that was repaired by Dr. Sachar, and that hardware had recently been removed by Dr. Fry. The claimant complained of an "exacerbation of chronic neck pain" and "fairly widespread pain on the right side of her body which she feels is because she is out of whack." The claimant was undergoing PT that included heat, dry needling, some manual treatment and use of a vibration bed. On physical examination Dr. Mason noted decreased flexion and extension ROM in the left elbow. The claimant had normal SI movement on the standing flexion test, mild tenderness over the bilateral trochanteric areas and tenderness over the right SI area. There was also tenderness of the "right paraspinal and periscapular areas. Forward flexion of the lumbar spine was limited. Left side bending was limited and painful compared to right side bending. Dr. Mason assessed the following: (1) Status post left elbow olecranon fracture with ORIF and later hardware removal; (2) Fairly widespread myofascial pain in the lumbar and periscapular areas; (3) Prior history of head injury with skull fracture and upper cervical radiofrequency for headaches; (4) Documentation of left SI dysfunction. Dr. Mason prescribed continued PT and a TENS unit to assist with pain management.

19. Dr. Mason reexamined the claimant on August 18, 2014. Dr. Mason noted that reports of Dr. Fry "referenced normal EMG for the medial ulnar nerves." The claimant complained of upper back pain, lower back pain and elbow pain. The claimant advised that when she was slept on her sides she experienced hip pain that was "really more in the SI area.

20. Dr. Mason reexamined the claimant on September 8, 2014. The claimant reported her elbow was stiff and she could not rest the elbow on anything. The claimant was "concerned about the fact that she has had low back discomfort since the injury that has never really been addressed beyond physical therapy treating it." Dr. Mason

referred the claimant for low back imaging including extension x-rays and an MRI scan. Dr. Mason opined the claimant's back problem had not been "addressed because she had a more significant injury to the left upper extremity but it has persisted."

21. The claimant underwent a lumbar MRI on September 27, 2014. The radiologist reported that there was no fracture. Further there were "multiple small left lateral protrusions at the L2-3, L3-4 and a lesser extent L4-5." The largest protrusion was at L2-3 but did not "overtly compress the exiting or descending nerve roots, though there "was "recess crowding as well as foraminal stenosis."

22. On September 27, 2014 the claimant underwent lumbar spine x-rays. The radiologist described these images as an "unremarkable lumbosacral spine series." There was no fracture, soft tissue swelling or foreign body. The radiologist commented that with "age mild spondylosis can be expected" but there was no severe spondylosis of arthropathy.

23. Dr. Mason reexamined the claimant on October 2, 2014. The claimant reported her pain was 7 on a scale of 10 (7/10). Her elbow was sensitive to pressure or touch. The low back bothered her in most positions, particularly at night. Dr. Mason reviewed the x-ray and MRI studies. Dr. Mason wrote that there were "shallow disc protrusions to the left at L2-3, L3-4 and L4-5 but I think her symptoms may be emanating from facets." Dr. Mason referred the claimant to Nicholas K. Olsen, D.O., for consideration of "injections."

24. Dr. Olsen examined the claimant on October 7, 2014. Dr. Olsen took a history that on April 11, 2013 the claimant fell on "her left side fracturing her left elbow" and also injuring her "neck and upper back as well as her lumbar complaints." Dr. Olsen assessed a "history" of a "slip-and-fall on ice in the parking lot on 4/11/13," a "lumbar sprain/strain secondary to" the fall and "clinical signs of lumbar facet arthropathy versus SI joint dysfunction." Dr. Olsen opined the claimant's "symptoms are most consistent with possible facet arthropathy versus SI joint dysfunction" and the claimant was "more symptomatic on the right side than on the left." Dr. Olsen recommended right sided L4-5 and L5-S1 facet joint injections to "investigate" the facets. He emphasized the "diagnostic aspect" of the facet injections and stated that if they did not "fully diagnose" the claimant's symptoms he might look at "other pain generators including the left side or possibly the right SI joint."

25. Dr. Mason's November 17, 2014, office note states the facet injections recommended by Dr. Olsen had been requested but denied by the insurer. The claimant reported her back pain was worse with time and her arm continued to be "hypersensitive." Dr. Mason assessed a "slip-and-fall on 4/11/13 with low back pain which had not been aggressively addressed during the opening part of her treatment and "ongoing sensitivity" of the elbow. Dr. Mason noted no pain behavior and recommended continued physical therapy for the elbow and back.

26. The claimant testified that she would undergo the injections recommended by Dr. Olsen, if approved, because they might help reduce her pain.

27. Dr. Mason reexamined the claimant on December 15, 2014. The claimant continued to complain of back pain. The claimant reported that she had "more weakness" in her arm especially with prolonged flexion of the elbow. Dr. Mason noted the hardware removal was done "back in June" but the claimant "really continued to have significant complaints." Dr. Mason also stated that an EMG had been done in October 2013 that was "normal for radial and ulnar nerves." On examination Dr. Mason noted the claimant was "fairly weak in the wrist extensor muscles" and was tender over the radial tunnel with some pain radiating into the forearm "on palpation of that area." Dr. Mason assessed persistent left elbow pain with findings "currently suggestive of possible radial nerve involvement" and low back pain radiating into the hip that "has not been aggressively addressed." Dr. Mason recommended the claimant undergo an MRI of the elbow to evaluate "whether there is any other structural damage since she really has not improved as expected following removal of the hardware." On December 15 Dr. Mason also completed a form WC 164 in which she listed the work-related diagnosis of left elbow fracture with a question of radial neuropathy.

28. The claimant testified that she would have undergone the elbow MRI recommended by Dr. Mason but the request was denied.

29. On November 21, 2014 F. Mark Paz, M.D., conducted an independent medical examination (IME) of the claimant. This IME was performed at the request of the respondents. Dr. Paz is an expert in internal medicine and occupational medicine. He is level II accredited.

30. On December 29, 2014 Dr. Paz issued a written report setting forth his findings and opinions. In connection with the IME Dr. Paz took a history from the claimant, reviewed pertinent medical reports and performed a physical examination. The claimant gave a history to Dr. Paz that on April 11, 2013 she slipped and fell on ice. She reported she fell "to her left" and landed on her outstretched left upper extremity. She landed on her left side. The claimant resumed work but later reported the injury to her employer because of swelling and pain in her elbow. The claimant then selected Concentra for treatment. According to the claimant she was evaluated at Concentra for symptoms of low back pain and the elbow pain. The claimant further reported that the Concentra physician referred her to Dr. Sachar to treat the elbow but "he was unable to treat the low back pain."

31. In the written report Dr. Paz opined that based on the claimant's reported history, the review of medical records and the physical examination it is not medically probable that the claimant's back symptoms are related to the industrial injury of April 11, 2013. In this regard Dr. Paz noted that the lumbar spine MRI is "consistent with degenerative changes" including degenerative disc disease and lumbar degenerative joint disease. Dr. Paz opined the degenerative changes most likely pre-date the injury of April 11, 2013, are most likely not related to it and were probably not aggravated by it.

32. In his written report Dr. Paz noted the claimant was complaining of left elbow symptoms from the posterior aspect of the elbow to the posterior surface of the proximal forearm. She also reported a "pins and needles" sensation with light touch

including the "weight of a jacket across the left upper extremity." Dr. Paz noted that during the IME the claimant was sitting in a chair and he observed her "supporting her upper body with the left upper extremity, elbow flexed on the arm of the chair." Dr. Paz opined the claimant's elbow was "clinically stable" and that that no further treatment could reasonably be expected to improve the elbow condition.

33. Dr. Paz testified that he applied the causation analysis he learned in level II training to assess the cause of the claimant's low back symptoms. He explained that the level II methodology for determining causation requires the physician to take a history and perform a physical examination. Based on the information gleaned from the history and examination the physician makes differential diagnoses and then determines the most likely diagnosis (es). Finally the physician, after considering the occupational circumstances and facts surrounding the injury, renders an opinion to a reasonable degree of medical probability whether or not it is likely the diagnosis is work-related.

34. Dr. Paz testified it is not medically probable that there is a causal relationship between the April 11, 2013 industrial injury and the claimant's back symptoms. With regard to the mechanism of injury Dr. Paz opined that based on the claimant's description of the injury to Dr. Holmboe on April 11, 2013, and to him at the IME, she fell on her left side injuring her left hip, not the back. Dr. Paz also explained that if the claimant had injured her back on April 11 she most likely would have experienced back pain on the day of the injury or the next day, not several weeks after the injury. Dr. Paz noted that on April 11, 2013 Dr. Holmboe examined the claimant and documented left hip pain but not low back pain. Further, Dr. Paz did not find medical documentation of low back pain complaints until May 22, 2013 when Dr. Sachar recorded them.

35. With regard to the diagnosis of the claimant's back condition Dr. Paz testified that the treating physicians have not arrived at any consistent diagnosis. He pointed out that Dr. Parry appears to diagnose SI joint problems while Dr. Mason initially diagnosed a myofascial problem.

36. Dr. Paz testified that his examination of the claimant did not produce any "objective findings" to support a diagnosis of a back injury. Rather, on his examination the claimant had diffuse low back complaints. Moreover, Dr. Paz opined the claimant's lumbar MRI is consistent with degenerative disc disease (DDD), a condition that is common among persons of the claimant's age. Dr. Paz noted the medical records show the claimant's complaints of back pain escalated over time which, although it may be consistent with degenerative back disease, is not consistent with an acute injury or aggravation of a pre-existing condition. Dr. Paz explained that acute back injuries are most painful at the time of or soon after the injury.

37. Dr. Paz testified that the significance of the claimant resting her left elbow on the chair during the IME was that it demonstrated an inconsistency between her report of the severity of symptoms and her actual ability. Dr. Paz stated that he did not believe the claimant was attempting to mislead him. Rather he believes that the

claimant has a low tolerance for pain and her ability to function may be greater than her reported symptoms indicate.

38. Dr. Paz testified it would not be unreasonable to do an MRI of the left elbow if the claimant was contemplating surgery to the elbow. However, he opined the claimant is very functional and questioned why the claimant would consider surgery in these circumstances.

39. The claimant failed to prove that her back symptoms, and thus the need for facet injections proposed by Dr. Mason and Dr. Olsen, are causally related to the industrial injury of April 11, 2013. A preponderance of the credible and persuasive evidence establishes that if the claimant has back symptoms they are most probably caused by pre-existing degenerative spine disease that has progressed independently of the April 11, 2013 industrial injury.

40. Dr. Paz credibly and persuasively opined that if the claimant sustained a back injury on April 11, 2013, the symptoms of the injury would have developed either on the day of the injury or within the next day. However, the medical records in this case fail to document any report of back pain until May 20, 2013, more than five weeks after the date of injury. Dr. Paz also credibly opined that the worsening of the claimant's back pain over time is more consistent with the natural progression of the degenerative conditions documented by the lumbar MRI performed in September 2014. Dr. Paz explained that symptoms of an acute back injury are most severe at the time of the injury, not later.

41. The claimant's testimony that she experienced back pain at the time of the injury and reported it to Dr. Holmboe on April 11, 2013 is not credible and persuasive. The claimant's assertion is contradicted by Dr. Holmboe's April 11, 2013 office note which fails to document any report of low back pain by the claimant. The claimant's suggestion that Dr. Holmboe failed to note her report of back pain because the elbow injury was much more serious and of greater concern is not persuasive. In fact, Dr. Holmboe documented the claimant's reports of left hip and thigh pain even though he expressly noted that these symptoms were "mild." The ALJ infers that if the claimant had mentioned even "mild" back pain to Dr. Holmboe he would have recorded the complaint on April 11.

42. Similarly, the claimant's testimony that she reported back symptoms to Dr. Sachar on the date of the elbow surgery, April 16, 2013, is not credible and persuasive. First, the record does not contain any credible and persuasive documentation from the date of surgery, other than Dr. Paz's mention of reviewing an operative report.. Consequently, the claimant's testimony cannot be corroborated or refuted by reference to these documents, if they exist. Moreover, Dr. Sachar's reports prior to May 22, 2013 do not document any reports of back pain. Neither do the physical therapy reports document back pain until May 20, 2013. The ALJ finds it improbable that if the claimant experienced back pain commencing on the date of injury and continuing, as she told Dr. Sachar on May 22, there would be no medical documentation of those reports until May 20, 2013.

43. To the extent Dr. Parry and Dr. Mason and Dr. Olsen assign the claimant's back symptoms to the injury of April 11, 2013, their opinions are not persuasive. As Dr. Paz credibly testified, none of these physicians performed a causation analysis. Rather, they simply assigned the onset of the claimant's back symptoms to the time of the injury consistent with what the claimant told them. However, for the reasons stated in Findings of Fact 40 thorough 42, the ALJ finds it improbable that the claimant experienced back pain on the date of the injury or soon thereafter. As Dr. Paz credibly explained, the assumption that the claimant experienced back pain on the date of the injury is not medically probable. Because Dr. Parry, Dr. Mason and Dr, Olsen rely on this incorrect assumption to arrive at their conclusions regarding causation, their opinions are not persuasive.

44. The claimant proved it is more probably true than not that the need for a left elbow MRI is causally related to the industrial injury of April 11, 2013. The claimant further proved it is more probably true than not that an MRI constitutes reasonable and necessary treatment for the injury.

45. On December 15, 2014 Dr. Mason credibly and persuasively opined that the claimant needs an MRI to determine if there is some previously undetected damage to the claimant's elbow that has caused her to experience ongoing elbow symptoms despite the hardware removal surgery on June 2, 2014. The ALJ infers from Dr. Mason's December 15 note that the purpose of conducting the MRI is to further diagnose and define the exact nature of the claimant's symptoms and to suggest a further course of treatment depending on the results.

46. Dr. Paz's opinion that an MRI is not reasonable and necessary is not as persuasive as the opinion of Dr. Mason. Even Dr. Paz indicates that an MRI might have some diagnostic value, but only if the claimant were to consider surgery. Dr. Paz does not think surgery would be advisable since he considers the claimant's condition to be stable. However, Dr. Mason credibly and persuasively questions the "stability" of the claimant's condition because the claimant has not improved as expected since the hardware removal. In these circumstances the ALJ concludes an MRI is a reasonable and necessary diagnostic procedure that offers a reasonable prospect of further defining the claimant's condition and determining what if any treatment offers a reasonable prospect of curing or relieving the effects of the elbow injury.

47. The claimant proved it is more probably true than not that the need for the MRI is causally related to the industrial injury of April 11, 2013. Dr. Mason's December 15, 2014 report credibly implies it is her opinion that the need for the left elbow MRI is causally related to the April 11, 2013 industrial injury. Dr. Mason listed the left elbow as an injury related diagnosis on the WC 164. Not even Dr. Paz credibly opined that the claimant's elbow symptoms are unrelated to the industrial injury. Rather, Dr. Paz takes the position that the left elbow injury is now "stable" and there is no need for an MRI unless the claimant is considering surgery. As found, Dr. Mason's opinions concerning the reasonableness and necessity of the MRI are more persuasive than Dr. Paz's opinion.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REQEUEST FOR FACET INJECTIONS

The claimant argues the evidence establishes that she sustained a low back injury as a result of the April 23, 2013 low back injury. She further argues that the facet injections recommended by Dr. Mason and Dr. Olsen constitute reasonable and necessary treatment for the low back injury.

The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The mere occurrence of symptoms at work or elsewhere does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work or elsewhere may represent the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,*

WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Further, respondents are liable to provide only such medical treatment as is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ concludes a preponderance of the credible and persuasive evidence establishes that the claimant's reported back symptoms are not causally related to the industrial injury of April 11, 2013. As determined in Findings of Fact 39 through 43 a preponderance of the credible and persuasive evidence establishes that the claimant's back symptoms are not temporally associated with the injury, and that the most likely cause of the symptoms is the natural progression of pre-existing degenerative back disease. As found, the ALJ is persuaded by the causation analysis performed by Dr. Paz. Contrary opinions and evidence are not credible and persuasive for the reasons stated in Findings of Fact 41 through 43.

Because the claimant's back symptoms are not causally related to the industrial injury, it is not necessary to reach the issue of whether the proposed facet injections constitute reasonable and necessary treatment.

REQUEST FOR ELBOW MRI

The claimant argues a preponderance of the evidence establishes that the left elbow MRI proposed by Dr. Mason on December 15, 2014. Relying on the opinions of Dr. Paz the respondents argue the evidence is insufficient to establish any need for an MRI is causally related to the injury, or that an MRI is reasonably necessary.

Diagnostic procedures constitute a compensable medical benefit if they have a reasonable prospect of diagnosing or defining the claimant's condition so as to suggest a course of further treatment. *See Watier-Yerkman v. Da Vita, Inc.,* WC 4-882-157-02 (ICAO January 12, 2015).

As determined in Findings of Fact 44 through 47 the claimant proved it is more probably true than not that an MRI constitutes a reasonable and necessary diagnostic procedure to further diagnose and define the reasons for her ongoing left elbow symptoms. As found, the ALJ credits the opinion of Dr. Mason that the proposed MRI is reasonable and necessary, and that the need for the procedure is related to the April 11, 2013 injury. As found, not even Dr. Paz disputes that the claimant's ongoing elbow symptoms are related to the injury. Dr. Paz merely opines that an MRI is not a reasonable procedure unless the claimant is contemplating surgery.

The respondents shall pay for a left elbow MRI and such further treatment of the elbow as is reasonable and necessary, if any.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claimant's request for lumbar facet injections as a form of medical treatment is denied.

2. The claimant's request for a left elbow MRI as a form of medical treatment is granted. The respondents shall continue to provide reasonable and necessary medical treatment for the claimant's left elbow injury of April 11, 2013.

3. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 18, 2015

DIGITAL SIGNATURE:
David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the Claimant proved, by a preponderance of the evidence, that the medical treatment consisting of additional physical therapy recommended by Dr. Orent is reasonably necessary to cure and relieve the effects of the April 17, 2013 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant is a bus driver who was working for the Respondent on April 17, 2013, the date of her injury. The Claimant was coming to work and walking through the parking lot when she was struck by a vehicle driven by another employee. She was initially diagnosed with a mild concussion, nasal laceration, left knee injury, left ankle injury and blunt abdominal trauma (Respondent's Exhibit B, p. 4).

2. After initial treatment at St. Anthony's Hospital, the Claimant has continually treated with physicians at Arbor Medical Centers since April 22, 2013 (Respondent's Exhibit B, p. 4). The Claimant underwent surgery with Dr. Hsin for repair of her lateral meniscus and patella on May 30, 2013. Before and after this surgery, the Claimant was involved in rehabilitative care including 38 visits for physical therapy with Physical Therapy of Lakewood from May 15, 2013 to March 14, 2014 (Respondent's Exhibit C). Over the course of her physical therapy there, the Claimant met or made significant progress towards many of her short term and long term goals, including tolerating 2 hours of sitting, increasing left knee range of motion, returning to commercial driving, and squatting and lifting, and walking without a limp (Respondent's Exhibit C).

3. The Claimant then began further physical therapy at Alpha Rehabilitation following an evaluation on March 31, 2014. Between March 31, 2014 and October 23, 2014, the Claimant had 49 physical therapy appointments (Respondent's Exhibit D, p. 146) concentrating on core strengthening (Respondent's Exhibit D). As of September 9, 2014, the physical therapist noted that she was hoping the Claimant "would benefit from additional PT – more aggressive strengthening, but unfortunately she's NA to work through the pain" (Respondent's Exhibit D, p. 123). As of October 9, 2014, the therapist noted that it is difficult for the Claimant to fully extend her knee, but there was progress with glute and quad strengthening (Respondent's Exhibit D, p. 142).

4. On May 22, 2014, Dr. Sander Orent authored a written opinion disagreeing with the IME of Dr. Bart Goldman regarding the Claimant's upper extremity, neck, and knee conditions. Dr. Orent specifically opined that the Claimant's mechanism of injury was clear and her head, neck and knee conditions were related to the work-

related injury. With regard to the knee, Dr. Orent noted that the Claimant failed conservative treatment and that Dr. Eickmann had opined if that were the case, she would require an arthroplasty and that would be related to the work-related MVA (Claimant's Exhibit 1, p. 9).

5. In a follow up report on October 9, 2014, Dr. Orent noted that the Claimant requires an arthroplasty because she has significant symptoms that have been unresponsive to conservative treatment. Dr. Orent also responded to comments made by an independent medial evaluator and the physical therapists that the Claimant did not need a knee replacement and that there was nothing further they could do for the Claimant. Dr. Orent opined that these statements are not correct and that the Claimant needs to "continue her therapy twice a week to maintain her strength" pending an affirmative decision on the proposed surgery. Dr. Orent noted the Claimant was a "highly-motivated individual" who is anticipated to have an excellent prognosis from a knee replacement especially as the Claimant has maintained her fitness well in spite of the fact that she has a knee that does not allow her to do much (Claimant's Exhibit 1, pp. 6-7).

6. In October of 2014, Dr. Orent requested prior authorization for 6 additional physical therapy sessions with Alpha Rehabilitation. This request was denied on October 27, 2014 (Respondent's Exhibit A, p. 1). After review of the request, Dr. James Lindberg stated that the Claimant has far exceeded the number of physical therapy visits allowed and should be able to do a home program to maintain her strength. He recommended denying further physical therapy (Respondent's Exhibit A, p. 3).

7. On November 6, 2014, Dr. Orent commented on the denial of a recommended arthroplasty for the Claimant as well as a denial for physical therapy based on exceeding the medical treatment guidelines. Dr. Orent stated "I do feel that as we await a final determination on an arthroplasty for [the Claimant] that she should continue in physical therapy twice a week for maximizing strength and function." As for the need for the arthroplasty, Dr. Orent opines that "this is as clear as these cases ever are in situations like this. Therefore, I would urge that we move forward with an arthroplasty unless the employer can in some way provide evidence that this patient had preexisting symptomatic disease there is no excuse for denying this procedure" (Claimant's Exhibit 1, p. 3).

8. In an undated letter that is stamped "received" by Respondents' counsel on November 24, 2014, Dr. Orent opines that, "the physical therapy is a poor substitute but it is all that we have as long as the arthroplasty is denied. We do find that continuing her physical therapy maintains her quadriceps strength and function and maximizes her ability to ambulate in the face of a denial of a surgical procedure. The benefit that I would anticipate is until this patient is approved for surgery that we will keep her as fit as possible. While I understand that you consider that this would be an indication for Maximum Medical Improvement I do not agree. I feel that this patient cannot be declared at Maximum Medical Improvement until she has undergone her arthroplasty.

9. On December 4, 2014 the Claimant saw Dr. Gary Zuehlsdorff on December 4, 2014 for an Independent Medical Examination. Dr. Zuehlsdorff reviewed the Claimant's medical records noting no prior treatment or knee conditions. The Claimant advised him of some medial left knee pain from 20 years ago when she jumped off a horse that resolved after a few months with no ongoing problems or treatment (Respondent's Exhibit B, pp. 4-5). The Claimant reported that her current knee pain ranged from 2-9/10 with an average pain level of 5/10. Dr. Zuehlsdorff noted that the Claimant was doing physical therapy twice a week but there was minimal relief for a short time with little progress as a result of the continued physical therapy (Respondent's Exhibit B, p. 8). Dr. Zuehlsdorff's physical examination of the knee revealed a swollen medial joint line area with moderate tenderness, diminished range of motion and some atrophy of the left leg as compared to the right. Any maneuver performed caused the Claimant pain primarily in the medial area (Respondent's Exhibit B, pp. 8-9). Regarding the need for additional physical therapy, Dr. Zuehlsdorff opined that given the high number of physical therapy appointments and what he found to be "minimal transient relief," he did not recommend pursuing further physical therapy. However, Dr. Zuehlsdorff does find that the Claimant is not at MMI for her left knee (Respondent's Exhibit B, p. 9). Dr. Zuehlsdorff recommended a follow up consultation with the orthopedist, Dr. Hsin and opined that injections or surgery that is short of a total knee replacement would be recommended (Respondent's Exhibit B, p. 10).

10. On January 12, 2015, Dr. Zuehlsdorff provided a written follow-up to his IME report of December 4, 2014. Dr. Zuehlsdorff noted that he had contacted Dr. Hsin to discuss the case and Dr. Hsin stated that "the patient would be a good candidate for a patellofemoral replacement that would include a resurface of the trochlea. He feels that this would give the patient and 80% chance for significant recovery." Based on his discussion with Dr. Hsin and his 15 years of experience reviewing patient records in the work comp arena, Dr. Zuehlsdorff opined that Dr. Hsin's recommendation "makes medical sense" and Dr. Zuehlsdorff recommends "moving forward with approval for the patellofemoral replacement/resurfacing of the trochlea procedure" (Claimant's Exhibit 2).

11. At the hearing, the Claimant testified that physical therapy increased the strength in her knee and made her more functional. The Claimant further testified that PT decreased her pain. She testified credibly that she is limited in what she can do and the massage and ultrasound that she receives along with doing the exercises at physical therapy help strengthen her leg and knee and provides more benefit. She had been doing a home exercise program since the physical therapy was discontinued, but this doesn't include the massage and ultrasound. The Claimant also testified that she wanted the PT and was willing to undergo the knee surgery recommended by her orthopedic surgeon, Dr. Hsin. The Claimant also stated, after discussing PT and surgery with her ATPs, that it was her understanding that the stronger the knee, the better likelihood that future surgery would be successful.

12. Dr. Zuehlsdorff also testified at the hearing. He is familiar with the Claimant, having reviewed her medical records and having performed an IME with

interview and physical examination. In his opinion, with reference to the Lower Extremity Medical Treatment Guidelines, no additional physical therapy is warranted in this case. He opines that further physical therapy would not result in sustained relieve of her symptoms. Dr. Zuehlsdorff testified that the Claimant is ultimately headed for surgery by Dr. Hsin and the additional physical therapy requested by Dr. Orent is akin to flogging a dead horse. He further opined that, based on the condition of the Claimant's knee, aggressive physical therapy could put the Claimant at risk for injury. He testified that he believes that Dr. Orent is angry that the Claimant isn't approved for surgery so that is why he is requesting more physical therapy for the Claimant.

13. On cross examination, Dr. Zuehlsdorff conceded that the Medical Treatment Guidelines pertaining to PT did outline the intent of PT, among other things, was to strengthen the knee. He further conceded that his opinions regarding Dr. Orent's PT request resulting from him being upset with the Respondent were purely speculative and not based on any personal knowledge. Dr. Zuehlsdorff stated in his report that he "asked directly…if there was any emergency or incident where she had to move quickly and assist children on and off the bus…she admitted that could be an issue." However, upon being asked on cross examination, he was unsure whether or not he actually discussed this issue with Claimant has his notes didn't reflect him asking such a question.

14. The Lower Extremity Injury Medical Treatment Guidelines state, "The Division recognizes that acceptable medical practice may include deviations from these guidelines, as individual cases dictated. Therefore, these guidelines are not relevant as evidence of a provider's legal standard of professional care" (Respondent's Exhibit E, p. 149). The Lower Extremity Injury Medical Treatment Guidelines, section B (5) states, "goals should incorporate patient strength, endurance, flexibility, coordination, and education. This includes functional application in vocational or community settings" (Respondent's Exhibit E, p.150).

15. The ALJ finds that consideration of the Medical Treatment Guidelines is appropriate. However, Dr. Orent, having considered the Guidelines in this case, persuasively presented rationale for a deviation from the typical amount of physical therapy because it is reasonable and necessary to maintain or improve the Claimant's strength and physical conditioning pending a recommended and likely left knee surgery as currently recommended by Dr. Hsin.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits – Reasonably Necessary

Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App.

March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

In this case, although number of physical therapy sessions the Claimant has undergone are in excess of the treatments recommended by the Medical Treatment Guidelines, the treatments have been effective to keep the Claimant stronger and functional and she remains able to perform her job duties. In addition, it is not contemplated that she continue to undergo physical therapy sessions indefinitely. Rather, Dr. Orent recommends the physical therapy prior to a recommended surgery to keep the Claimant in good physical condition so that she has a better anticipated result from the surgery. Because her knee condition otherwise limits what the Claimant can do, the physical therapy, massage and ultrasound keep the Claimant more functional and in better physical shape in preparation for a surgery that the Claimant is likely to ultimately undergo.

While the Medical Treatment Guidelines were appropriately considered, the opinion of Dr. Orent is credible and persuasive and provides a valid rationale for deviation from the Guidelines. Additional physical therapy, including the attendant massage and ultrasound, is found to be reasonably necessary relieve the Claimant from effects of the injury pending a recommended knee surgery.

ORDER

It is therefore ordered that:

1. Per Dr. Orent's assessment of the Claimant's current condition and in light of a pending recommendation by Dr. Hsin for knee surgery, it is reasonable and necessary to continue physical therapy to maintain the Claimant's physical conditioning pending proceeding with a likely surgical intervention.

2. Respondent shall be liable for additional physical therapy including massage and ultrasound treatments as recommended by Dr. Orent that is reasonably necessary to maintain and improve the Claimant's physical conditioning pending a contemplated knee surgery. Respondent shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 6, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffers from a worsened condition causally related to his October 11, 2010 work injury to allow a reopening of WC claim 4-918-977.

2. Whether Claimant has established by a preponderance of the evidence that the treatment provided by Kathy Gutierrez, nurse practitioner, PhD, is authorized.

3. Whether Claimant has established by a preponderance of the evidence that he suffers from a work related occupational disease of his cervical spine.

4. Whether Claimant has established by a preponderance of the evidence that he suffers from a work related occupational disease of his right upper extremity (carpal tunnel).

FINDINGS OF FACT

1. Claimant works for Employer as a duct pipe installer and supervisor and has been employed by Employer for approximately twelve years. Between 2004 and 2007 Claimant performed similar work for a different company and then returned to employment with Employer.

2. Claimant's duties include performing both supervisory work and actual labor work alongside and with those he supervises.

3. As a supervisor, Claimant is responsible every morning for loading up the materials needed at the job site. When he arrives at the site, his crews help unload the materials. Claimant then is responsible for meeting with his crew members, conducting a safety meeting with a safety coordinator, and meeting with the general contractor. Claimant is responsible also for preparing paperwork for the general contractor. Claimant is responsible for ordering materials from suppliers and is required on occasion to drive to pick up the materials from suppliers and to deliver them to the job sites. Claimant makes rounds to review the work performed by his crews, answers questions, and must perform measurements and "take offs" of the job sites so as to inventory materials onsite and materials still needed. Claimant responds daily to phone calls or problems reported by any of his crews and, if necessary, travels to the crew site to assist. Claimant's crews are sometimes all at the same site as him, and sometimes he has crews at different job sites where he will have to drive to the other site to assist.

4. Claimant also performs actual labor work. Claimant works in and around crawl spaces, ceilings, around cables, around lighting, and anywhere that is needed to insulate and install duct pipe. He cuts pieces of insulation or duct with shears, climbs up ladders, fastens the insulation or duct pipe with a staple gun, goes back down the ladders, moves the ladders as needed, and continues that process while performing actual labor work. Claimant is not in one fixed position while performing his work. Claimant also uses a variety of tools during the day, and does not use one tool all day long. Claimant spends approximately 5-6 hours per day doing actual labor and approximately 2-3 hours per day performing supervisory duties. While performing actual labor work, the work and positions vary greatly depending on the project.

5. On October 11, 2010 Claimant suffered a work related injury when a co-worker accidentally dropped a screw gun from 15 feet above Claimant, and the screw gun hit Claimant on his hardhat/head.

6. On October 12, 2010 Claimant saw Brian Beatty, D.O. Claimant described the day prior that he was hit on the head by a drill dropped from 15 feet above him, that he did not lose consciousness, and complained of neck stiffness with right shoulder pain and a mild headache. *See* Exhibit 8.

7. Dr. Beatty noted that an X-ray of the cervical spine was negative and diagnosed mild concussion, cervical strain, spinal somatic dysfunction, and headache. Dr. Beatty's objective findings on physical examination included for cervical range of motion: flexion 60 degrees; extension 30 degrees; right lateral flexion 45 degrees; left lateral flexion 25 degrees; right rotation 45 degrees; and left rotation 50 degrees. Dr. Beatty recommended medication, osteopathic manipulative treatment, and stretches. Dr. Beatty placed Claimant on modified duty work restrictions and indicated the plan for maximum medical improvement status would 4-6 weeks. *See* Exhibit 8.

8. On October 19, 2010 Claimant again saw Dr. Beatty and reported the headaches were better but that he still had some neck and right shoulder pain that radiated down to the right elbow and caused occasional hand numbness. Dr. Beatty continued the treatment plan, continued the modified duty work restrictions, and indicated in the plan that maximum medical improvement status would be 3-4 weeks on the handwritten form and 4-6 weeks on the typewritten report. *See* Exhibit 8.

9. On October 26, 2010 Claimant saw Dr. Beatty. Claimant reported that he was doing much better and that his headaches were intermittent and mild but that he still had some discomfort and a feeling of numbness over the inside of his right elbow. Dr. Beatty's objective findings on physical examination included improved cervical range of motion of: flexion 75 degrees; extension 55 degrees; side bending right 50 degrees; side bending left 50 degrees; right rotation 80 degrees; left rotation 80 degrees. Dr. Beatty continued the treatment plan, noted an additional diagnosis of right medial epicondylitis, released Claimant to full duty work status without restrictions, and indicated that maximum medical improvement status would be 2-3 weeks on the handwritten form and 3-4 weeks on the typewritten report. *See* Exhibit 8.

10. On November 16, 2010 Claimant missed a follow up appointment scheduled with Dr. Beatty. Claimant did not contact Dr. Beatty to reschedule. *See* Exhibit 8. At no time did Dr. Beatty or any other treating provider refuse to treat Claimant for either medical or nonmedical reasons.

11. Dr. Beatty opined that Claimant reached maximum medical improvement on November 16, 2010 and that Claimant suffered no permanent impairment as a result of the October 11, 2010 injury. *See* Exhibit I.

12. Claimant did not seek any medical treatment for approximately two years and three months following his October 26, 2010 appointment. During this time, Claimant continued to work full duty for Employer. Claimant's symptoms never subsided and persisted during this period of time, but Claimant was able to work full duty and deal with the persistent pain and symptoms. In 2013 Claimant's pain worsened and he again sought treatment.

13. On January 17, 2013 Claimant saw Dr. Beatty. Claimant reported neck pain with numbness into his right fingers that had developed over the last 10 months. Dr. Beatty diagnosed cervical strain, indicated it was unknown if it was work related, provided manipulation, a second Medrol dose pack, and indicated no plans to follow up unless Claimant's symptoms persisted. Dr. Beatty did not refuse to further treat Claimant. *See* Exhibit 8.

14. On February 7, 2013 Kathy McCranie, M.D. performed a medical record review at Respondents' request. Dr. McCranie opined that with the significant time gap between the Claimant's last visit to Dr. Beatty and Claimant's report of his symptoms returning, it was not medically probable that there was a relationship between Claimant's October, 2010 injury and the symptoms that Claimant reported beginning in March or the summer of 2012. Dr. McCranie indicated to further assess causality, an Independent Medical Evaluation could be considered. *See* Exhibit L.

15. On February 15, 2013 Claimant saw Kathy Gutierrez, ANP, PhD (refers to herself as Dr. Gutierrez) at Premiere Healthcare Associates, LLC. Claimant was not referred to Dr. Gutierrez by Dr. Beatty or by any other provider but chose to treat with her on his own. Dr. Gutierrez noted that Claimant was a new patient who wished to establish care. Claimant reported that he was injured in October of 2010 and was seen by Rocky Mountain Medical Group, his employers' work compensation provider. Claimant reported he went through physical therapy for two weeks which helped with the discomfort and that he did well for a time. Claimant reported after doing well for a time, the headaches started to reoccur with pain radiating down his neck and upper back. Claimant also reported right wrist pain with numbness and tingling of his 2nd and 3rd fingers. *See* Exhibit K.

16. Dr. Gutierrez diagnosed post-traumatic headache, unspecified, thoracic spine pain, left shoulder pain, and carpal tunnel syndrome right wrist. She planned to get cervical and thoracic spine films and prescribed a right wrist splint. *See* Exhibit K

17. On March 7, 2013 Allison Fall, M.D. performed an Independent Medical Evaluation. Dr. Fall opined that Claimant's October 2010 work injury was not causing his current complaints or symptoms and that his right upper extremity paresthesias and neck pain were of unknown etiology. Dr. Fall reviewed Claimant's job responsibilities and did not identify any repetitive tasks and, therefore, opined that it would be unlikely that a compression neuropathy would be related to his work activities. Dr. Fall noted on physical examination that Claimant reported pain along the left levator scapulae on extension of the cervical spine. Dr. Fall did not complete cervical spine range of motion testing, but noted upon visual inspection, cervical range of motion appeared unrestricted. *See* Exhibit 7.

18. On March 25, 2013 Claimant again saw Dr. Gutierrez. Claimant reported headaches, neck pain, and left shoulder pain. Claimant also reported right wrist pain with numbness and tingling of his 2nd and 3rd fingers. Dr. Gutierrez noted that the x-rays of the cervical spine were unremarkable and that the x-rays for the thoracic spine were also unremarkable. Dr. Gutierrez diagnosed left shoulder pain and carpal tunnel syndrome of the right wrist. She advised Claimant it was in his best interest to see a workers' compensation provider. *See* Exhibit K.

19. April 26, 2013 an EMG and nerve conduction study was performed by Hua Judy Chen, M.D. Dr. Chen identified electrodiagnostic evidence for mild to moderate right carpal tunnel syndrome. Dr. Chen opined there was no evidence of cervical radiculopathy. Dr. Chen indicated that an MRI of the cervical spine would still be needed to rule out central cord lesion. *See* Exhibit 9.

20. On May 8, 2013 Claimant again saw Dr. Gutierrez. Dr. Gutierrez diagnosed radiculitis, right shoulder pain, and brachial plexus lesion. Dr. Gutierrez suspected possible cervical spine involvement in upper extremity symptoms and noted the plan would be to schedule a cervical MRI in the near future. Dr. Gutierrez recommended avoiding overhead work and repetitive motion activities related to the right wrist. *See* Exhibit K.

21. On May 16, 2013 Claimant underwent an MRI of his cervical spine. The MRI showed at C4-5 a mild central disc bulge with mild effacement of ventral thecal sac and mild bilateral neural foraminal stenosis. At the C5-6 level it showed mild left lateral recess disc bulge that contained increased T2 signal intensity consistent with a small annular tear resulting in mild left neural foraminal stenosis. The MRI showed right neural forminen widely patent. At the remaining levels, the MRI was unremarkable. *See* Exhibit K.

22. On May 21, 2013 a Final Admission of Liability was filed by Respondents. The Final Admission denied liability for medical treatments and/or medications after

maximum medical improvement and noted that for the October 11, 2010 injury, Claimant had reached maximum medical improvement on November 16, 2010. *See* Exhibit A.

23. Claimant did not object to the Final Admission.

24. Following the filing of the Final Admission, Claimant continued to treat with Dr. Gutierrez. Claimant saw Dr. Gutierrez on June 10, 2013 and indicated he wanted to pursue a surgical consultation and was going to speak with an attorney regarding his workers' compensation status. *See* Exhibit K.

25. On December 16, 2013 Claimant underwent an Independent Medical Examination with John Hughes, M.D. Claimant reported the October 2010 injury to Dr. Hughes and indicated that he was discharged from care after a couple of weeks. Dr. Hughes noted that Claimant continued to be symptomatic and that his right sided neck pain persisted after Claimant stopped treating with Dr. Beatty. Dr. Hughes opined that Claimant's current symptoms and clinical findings were quite similar to those noted three years ago by Dr. Beatty. Dr. Hughes opined that Claimant's cervical spine injury of October, 2010 persisted and that over time had become medically stable. Dr. Hughes opined Claimant was at maximum medical improvement, performed range of motion testing, provided an 8% whole person impairment rating, and recommended maintenance care of Medrol dose pack and osteopathic manipulative treatment, as well as trigger point injections, and medically directed progressive physical exercise. *See* Exhibit 6.

26. Dr. Hughes assessed: high energy axial compressive trauma sustained on October 11, 2010; closed head injury with brief loss of consciousness, resolved; cervical spine sprain/strain with development of right cervicothoracic regional myofascial pain syndrome with documentation of improvement but with persistence; long-term persistence of right superomedial scapular myofascial pain with current findings of a trigger point and reduced left lateral flexion of the cervical spine, as noted initially by Dr. Beatty; and recent emergence of right carpal tunnel syndrome, unrelated to the work injury on October 11, 2010. *See* Exhibit 6.

27. Dr. Hughes provided range of motion testing that showed Claimant's range of motion was overall worse than the range of motion performed on October 26, 2010, just prior to being placed at maximum medical improvement. On physical examination Dr. Hughes' objection range of motion findings for the cervical spine included: flexion at 60 degrees; extension from 65-71 degrees; right lateral flexion from 35-44 degrees; limited left lateral flexion from 32-36 degrees eliciting right lateral neck pain; and both right and left rotation of the head and neck at 48 and 58 degrees maximally. *See* Exhibit 6.

28. Dr. Hughes opined that Claimant had developed new symptoms in his right upper extremity, and agreed with other providers that the diagnosis was carpal tunnel syndrome. He concluded that this condition was separate from the October 11,

2010 injury but that it was a work related medical condition. He recommended medical treatment consistent with the Colorado Medical Treatment Guidelines and opined that Claimant's carpal tunnel condition was not at maximum medical improvement. *See* Exhibit 6.

29. On January 24, 2014 Claimant filed a workers' claim for compensation listing an injury date of approximately June, 2012. Claimant listed body parts affected as head, neck, back, shoulders, arms, and hands. Claimant indicated "I may have aggravated my 10/11/10 injury," and that the injury occurred by crawling, reaching, and twisting. *See* Exhibit C.

30. On February 11, 2014 Respondents filed a Notice of Contest. *See* Exhibit E.

31. On February 24, 2014 Claimant filed a Petition to Reopen WC case 4-918-977 alleging a change in medical condition. *See* Exhibit F.

32. On July 9, 2014 Dr. Fall performed a second Independent Medical Examination. Claimant reported neck pain, elbow numbness, head pain, shoulder aches, arm ache, and constant headaches. Dr. Fall reviewed in detail Claimant's job duties with him and noted his job duties varied daily depending on the particular jobsite. Claimant reported that every job was different and involved different tasks, his body was often in different positions, he used a staple gun for 3-4 minutes at a time, he carried ladders on occasion, and he used a screw gun on occasion. Dr. Fall opined that Claimant had carpal tunnel syndrome but opined that it was not work related as Claimant did not have risk factors for developing carpal tunnel as an occupational disease since his work and positioning varied frequently. Dr. Fall also opined that Claimant did not have any permanent medical impairment from his October 2010 injury and agreed that Claimant had reached MMI for the October 2010 injury on November 16, 2010. Dr. Fall opined that findings on the cervical MRI were unrelated to the October 2010 work injury and were appropriate multilevel degenerative changes. On physical examination Dr. Fall's objective range of motion findings for the cervical spine revealed mildly reduced range of motion in all planes with the most significant limitation in right rotation, and noted the cervical range of motion revealed near normal range of motion with the exception of decreased right rotation. She noted that Claimant complained of pain along the right lateral cervical spine and across the upper trapezius with all range of motion. *See* Exhibit H.

33. On August 18, 2014 Claimant again saw Dr. Gutierrez. Claimant reported ongoing neck pain, right shoulder pain, and headaches. Claimant reported the discomfort had not changed since his first visit in February of 2013. Claimant indicated he felt strongly that the discomfort started at the time the screw drill fell onto his head and neck in October of 2010. *See* Exhibit K.

34. On December 15, 2014 Dr. Hughes performed a case review. Dr. Hughes noted Claimant's job duties as described by Claimant, noted Claimant had continued

neck pain and headaches, right shoulder pain, and burning-quality pain and numbness of all of his fingers, more right than left sided. Dr. Hughes opined that Claimant suffered from right sided carpal tunnel syndrome secondary to forceful and repetitive grasping at work, as described by Claimant. Dr. Hughes opined, after speaking with Claimant regarding Claimant's essential job functions, that the onset of right-sided carpal tunnel syndrome was a work related occupational disease. Dr. Hughes opined that forceful use of metal hand shears constitutes a quite forceful grasping and repetitive physical exposure that he believed met the criteria for injurious exposure in accordance with the Colorado Division of Workers' Compensation Cumulative Trauma Medical Treatment Guidelines. *See* Exhibit 6.

35. Dr. Hughes did not opine that Claimant suffered an occupational disease of his cervical spine nor did he offer an opinion causally connecting Claimant's cervical spine condition to repetition or repeated job duties.

36. At hearing Dr. Fall testified consistent with her report. Dr. Fall indicated that she took into consideration Claimant's description of his job duties that she reviewed with him in detail. Dr. Fall opined that there was insufficient medical evidence to substantiate a work related occupational disease of the right upper extremity (carpal tunnel). She opined that Claimant's duties would not cause carpal tunnel because Claimant's day is broken up with a wide variety of different tasks and because Claimant does not perform work where he has four to six hours of wrist flexion. Dr. Fall opined that after comparing Claimant's job duties to the Medical Treatment Guidelines Claimant did not meet the criteria for work related carpal tunnel syndrome. She opined within a reasonable degree of medical probability that the carpal tunnel was not work related.

37. Dr. Fall further opined that Claimant did not suffer from a work related occupational disease of the cervical spine. Dr. Fall opined that there was insufficient evidence of repetitive movements of Claimant's neck or holding neck in an awkward position. Dr. Fall opined that one would need to have sustained awkward posturing where a change of position was not possible to support an occupational disease of the cervical spine. Dr. Fall opined within a reasonable degree of medical probability that Claimant does not suffer an occupational disease of his cervical spine.

38. Dr. Fall's opinions and testimony are found credible and persuasive regarding the occupational disease of Claimant's right upper extremity (carpal tunnel) and occupational disease of Claimant's cervical spine. Her opinions are based on a detailed review of Claimant's daily job duties, consistent with Claimant's testimony, and show a complete analysis under the medical treatment guidelines. Her opinion that Claimant does not suffer from an occupational disease of the right upper extremity is more credible and persuasive than the differing opinion of Dr. Hughes. Her opinion that Claimant does not suffer from an occupational disease of his cervical spine is also credible and persuasive and is the only medical opinion addressing occupational disease of the cervical spine.

39. Dr. Fall further opined that Claimant's cervical condition from the October 11, 2010 injury is not objectively worse now than it was on November 16, 2010 when Claimant was placed at maximum medical improvement based on her physical examination findings and range of motion measurements. Dr. Fall opined that Claimant's symptomatology has been consistent from 2010 until now and has not worsened.

40. Dr. Fall's opinion on the worsening of Claimant's cervical condition is not found credible or persuasive and her opinion is not consistent with her own range of motion measurements which showed decreased right rotation in July of 2014 that was not present when Claimant was placed at maximum medical improvement in November of 2010.

41. Claimant's testimony that his pain never went away completely, was persistent following the 2010 injury, and that it got worse prior to seeking medical treatment in 2013 is found credible and persuasive. Claimant worked unrestricted following the 2010 injury for almost 2.5 years without any medical treatment when the pain increased to the point that he needed to seek treatment. Claimant's subjective reports of worsening are found credible and are supported by objective range of motion testing showing that in 2013 his range of motion for the cervical spine was significantly decreased from the range of motion he displayed at the time of maximum medical improvement in November of 2010.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim*

Appeals Office, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reopening and Change of Condition

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

A change in condition, for purposes of the reopening statute, refers to a worsening of the claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The pertinent and necessary inquiry is whether claimant has suffered any deterioration in his work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office, supra.* The reopening authority under the provisions of Section 8-43-303, C.R.S. is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

Claimant has established by a preponderance of the evidence that his condition as a result of the October 11, 2010 work injury has worsened sufficient to reopen the claim. Although the multiple physicians agree that his symptoms persisted following his 2010 injury and continued until he again sought treatment in 2013, when Claimant

treated in 2013 he subjectively had worsened pain and objectively displayed reduced range of motion compared to the range of motion measurements performed in 2010 when he was placed at maximum medical improvement. It is true that Claimant's complaints of pain and symptoms in 2013 were very similar to the same complaints he provided to Dr. Beatty in 2010, and that the location of the complaints was similar. However, Claimant is credible that although the pain complaints and symptoms stayed in the same location and never went away completely following the 2010 injury, they also got worse in 2013 leading him to seek further treatment. This is objectively supported by range of motion testing showing Claimant's range of motion in 2013 was worse than when performed in 2010 by Dr. Beatty.

Claimant's testimony that his symptoms, although persistent from 2010 and located in the same areas of his body, worsened in 2013 is credible and persuasive and supported by the medical records. As found above, when Claimant initially treated with Dr. Beatty he showed reduced range of motion and was placed on modified duty work restrictions. A few weeks later, on October 26, 2010, Dr. Beatty noted Claimant's improvement, released Claimant to full duty work status without restrictions, and noted his cervical range of motion had improved to essentially normal. Although Claimant still had pain complaints at the October 26, 2010 appointment, Claimant was reported by Dr. Beatty to have reached maximum medical improvement on November 16, 2010 with no permanent impairment.

However, although Claimant had improved by October 26, 2010, he was not without pain. The pain and symptoms he reported on October 26, 2010 persisted and continued over the course of the next several years. Claimant continued working for approximately the next 2.5 years without restrictions before the persistent symptoms reached the point where Claimant again sought medical treatment. In February of 2013, Claimant reported to Dr. Gutierrez that he had initially improved after treating with Dr. Beatty, but that his symptoms persisted and were now worse. On December 16, 2013 at the Independent Medical Examination performed by Dr. Hughes, Claimant had range of motion that had gotten worse from the time he was placed at maximum medical improvement. A comparison of the objective range of motion testing of Claimant's cervical spine by Dr. Beatty and Dr. Hughes is compared below.

	Beatty 2010 (MMI)	**Hughes 2013**
Flexion	75	60
Extension	55	65-71
Right lateral flexion	50	35-44
Left lateral flexion	50	32-36
Left rotation	80	48 and 58 maximally
Right rotation	80	48 and 58 maximally

Additionally, Dr. Fall noted in her July 9, 2014 independent medical examination that objectively on physical examination Claimant had mildly reduced cervical spine range of motion in all planes with the most significant limitation in right rotation. As found above, this is a finding different from and worse than the range of motion findings performed by Dr. Beatty in November of 2010 when Claimant was placed at maximum medical improvement. After reviewing the evidence, including Claimant's credible testimony of worsening and the objective medical evidence of reduced range of motion, the ALJ concludes that Claimant has met his burden to show by a preponderance of the evidence that he has suffered a change of condition related to the October 11, 2010 work injury to warrant a reopening of WC case 4-918-977.

Authorized Treatment

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. ICAO,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *Id.* Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997.)

Claimant has failed to establish in this case that the medical treatment rendered by Dr. Gutierrez is authorized medical care. As found above, there was no referral by an authorized provider to Dr. Gutierrez. Rather, Claimant sought treatment with Dr. Gutierrez on his own. As found above, Claimant was never denied medical care by Respondents or Dr. Beatty nor was he denied care for nonmedical reasons. Thus, the choice of physician never passed to him. Rather, Claimant simply decided to seek treatment elsewhere and chose not to return to Dr. Beatty. Therefore, Dr. Gutierrez is not an authorized medical provider in this claim and Respondents are not liable for payment for any treatment provided by her.

Occupational disease

An injury or occupational disease "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer in connection with the contract of employment. *Panera Bread, LLC v. Indus. Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). For an injury to arise out of employment, "the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999).

An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the

employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). C.R.S. § 8-40-201(14) defines "occupational disease" as: "A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment."

Claimant has failed to establish by a preponderance of the evidence that he suffers from an occupational disease of the cervical spine. As found above, there is no credible evidence or medical opinion supporting an occupational disease to his cervical spine. Dr. Fall opined credibly that Claimant's job duties did not show sustained awkward positioning to cause an occupational disease of the neck. Dr. Hughes also opined that Claimant's symptoms in the cervical spine relate directly back to Claimant's 2010 injury and Dr. Hughes does not relate any of Claimant's cervical symptoms to an occupational disease or sustained awkward positioning.

Similarly, Claimant has failed to meet his burden to establish by a preponderance of the evidence that he suffers from an occupational disease of his right upper extremity (carpal tunnel). Dr. Fall's analysis under the Medical Treatment Guidelines and opinion that Claimant's job duties do not meet the criteria for an occupational disease of carpal tunnel is found credible and persuasive and more persuasive than the opinion provided by Dr. Hughes. Dr. Hughes placed a large emphasis on Claimant's use of metal shears, however, as found above Claimant's job duties varied greatly throughout each day and metal shears were not a major component of his job duties. Further, Dr. Hughes did not record how frequently the use of shears occurred throughout a work day, the repetitions per hour with the shears, or the force required to operate the shears. Given Claimant's own description of his work duties throughout the day, and the description provided to Dr. Fall and used in her analysis, Claimant did not have prolonged exposure of awkward wrist flexion sufficient to meet the medical treatment guidelines during the course of his work day. Claimant often changed positions, moved around, and performed different duties throughout the day without awkward sustained posturing, sustained activity, or forceful tool use. Dr. Fall is credible that Claimant's work duties as described are the type that would not cause carpal tunnel syndrome and that Claimant does not meet the threshold requirements for carpal tunnel syndrome as an occupational disease.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show that he suffers from a worsened condition causally related to his October 11, 2010 work injury. His petition to reopen WC No. 4-918-977 is granted.

2. Claimant has failed to meet his burden to show that the treatment provided by Dr. Gutierrez was authorized. Claimant's request for authorization and payment of treatment provided by Dr. Gutierrez is denied and dismissed.

3. Claimant has failed to meet his burden to show that he suffers from a work related occupational disease of his cervical spine. His request for treatment is denied and dismissed.

4. Claimant has failed to meet his burden to show that he suffers from a work related occupational disease of his right upper extremity (carpal tunnel). His request for medical treatment is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 8, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Respondents have proven by clear and convincing evidence that Claimant has reached MMI for his wrist injury on April 26, 2013; and

2. Whether Respondents have proven by clear and convincing evidence that Claimant's shoulder injury is not causally related to the work injury on April 26, 2013.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. At the time of hearing, Claimant was 36 years old and resided in Denver, Colorado. Claimant worked as a General Helper for Employer for several months. His duties included breaking-up cement and smashing cement pipes, which required regular use of sledgehammers and other heavy tools. Claimant worked long hours and at times Claimant worked up to 10 hours a day. Claimant is right-hand dominant.

2. On April 26, 2013, Claimant was injured at work while down in a pit shoveling hardened cement. He was injured when he jammed the shovel into the hardened cement floor and injured his right hand, wrist, arm and shoulder. His injury occurred at the workplace while performing his normal job duties.

3. Claimant told Hanna St. John on May 17, 2013, about his injured right shoulder and reported that he believed he injured the right shoulder at the time he injured his right wrist.

4. Claimant credibly testified that he had no previous right shoulder injury..

5. Claimant could not perform his work duties as General Helper for Employer with a right shoulder injury because his job requires heavy manual labor for up to 10 hours a day. Claimant was not able to swing a sledgehammer or break-up cement with an injured right shoulder.

6. Prior to being hired full-time as a General Helper for Employer, Claimant had a seven month “try-out” period. He performed his job functions so well he was hired full-time.

7. Claimant’s right shoulder still hurts and he has limited range of motion and strength. He cannot perform his normal job duties with his injured right shoulder. Claimant’s physicians recommend surgery on his right shoulder.

8. Claimant was first seen by Concentra Medical Centers on May 14, 2013, for his right wrist injury. Claimant denied any past injury to his right hand. His examination revealed he had a positive Finkelstein’s test with increased pain with thumb extension. He was diagnosed with radial styloid tenosynovitis. He returned to work on May 14, 2013, with a splint.

9. On May 17, 2013, Claimant complained to Hanna St. John at Concentra Medical Centers of right shoulder pain and popping after returning to work.

10. On June 3, 2013, Dr. Kulvinder Sachar, M.D., hand surgeon, saw Claimant and diagnosed Claimant with right de Quervain’s tenosynovitis.

11. On July, 9 2013, Dr. Sachar performed a right first dorsal compartment release of Claimant’s right wrist.

12. On July 15, 2013, Dr. Sachar followed-up with Claimant regarding his right wrist injury.

13. On October 7, 2013, Claimant saw Hanna St. John and he complained of continued right shoulder pain since his work restrictions had changed for his right wrist and he was performing more of his normal job duties. Claimant had trouble lifting more than 10 pounds and his right shoulder continued to pop and click.

14. On October 15, 2013, Claimant was seen at Concentra for final examination and an impairment rating for his right wrist injury. He was seen by Dr. Burrows and given a 4% upper extremity impairment which equals 2% whole person.

15. On October 15, 2013, Claimant was also seen by Hanna St. John and complained of continued right shoulder pain and he was diagnosed with a shoulder sprain. Claimant was given restrictions of no lifting over 10 pounds.

16. On October 16, 2013, Claimant had a MRI on his right shoulder. The MRI indicated the supraspinatus, infraspinatus and subscapularis tendinosis with near full-thickness tear of the supraspinatus at the insertions. The MRI also indicated there was a superior posterior labral tear extending into the biceps anchor.

17. On October 21, 2013, Claimant saw Dr. Mark J. Montano, M.D. Dr. Montano reported that based on Claimant's explanation of the right shoulder injury, it was worked related. Claimant explained to the doctor that his right shoulder "worsened" when he was able to resume normal activities at work and use the right upper extremity. Dr. Montano referred Claimant to an orthopedic physician.

18. On October 23, 2013, Claimant was seen by Christine O'Neal because he was experiencing right shoulder pain. Claimant had been diagnosed with a labrum tear and a supraspinatus tear.

19. On October 29, 2013, Claimant was seen by Dr. Cary Motz, orthopedic surgeon at Concentra Medical Centers, for his right shoulder injury. Dr. Motz indicated his shoulder injury was work-related. Claimant was scheduled for surgery pending approval by insurance.

20. On November, 8 2013, Dr. Wallace Larson, M.D. performed a record review without examination of Claimant. The doctor confirmed that he, and the treating doctor, were in agreement that the right shoulder condition is not work-related. The doctor maintained there was no traumatic event to the right shoulder at the time of the work injury that would explain his right rotator cuff tear. Because the doctor could find no contributing event to explain the right rotator cuff tear, he opined that the right shoulder injury could not be work related. Furthermore, he maintained that Claimant would have experienced pain in the right shoulder from the rotator cuff tear if it occurred during the work incident when Claimant's right wrist was injured.

21. On March 11, 2014, Dr. John Burris felt Claimant reached maximum medical improvement (MMI) on October 15, 2013, with respect to his right wrist injury and confirmed his 4% upper extremity impairment rating.

22. On April 1, 2014, Claimant was evaluated by Dr. Montano at Concentra Medical Centers. Dr. Montano confirmed Claimant's diagnosis of a tear to the rotator cuff and noted limited range of motion of the shoulder with extension, abduction and external rotation. Dr. Montano recommended a return to work on April 1, 2014, with work restrictions that included no lifting over 10 pounds, no pushing or pulling over 20 pounds of force and no reaching above the shoulders.

23. On August 29, 2014, Claimant was seen by Dr. Douglas Scott, M.D., for a Division Independent Medical Examination (DIME). Dr. Scott is an occupational medicine specialist. Dr. Scott evaluated Claimant's right wrist/thumb, effusion of forearm joint and radial styloid tenosynovitis, right shoulder rotator cuff labrum tear, and supraspinatus tear. He also made findings regarding MMI, impairment ratings and apportionment.

24. Dr. Scott disagreed with Dr. Burris and believed Claimant was not at MMI for his right wrist injury as his range of motion and function of his right wrist had worsened since Dr. Burris's determination on October 15, 2013.

25. Dr. Scott recommended Claimant be referred back to Dr. Sachar for re-evaluation and considered for diagnostic testing or surgery.

26. Further, Dr. Scott disagreed with Dr. Burris's impairment rating on Claimant's right wrist. Using the *AMA Guides,* and evaluating the right wrist and thumb for active range of motion with a goniometer, Dr. Scott concluded Claimant had a total right thumb digital impairment of 27%, with a total hand impairment of 11%. Dr. Scott concluded Claimant's total upper extremity impairment equaled 10% at the right hard. Dr. Scott found 9% upper extremity impairment at the right wrist.

27. Dr. Scott also evaluated Claimant's right shoulder. He found Claimant's right shoulder was currently dysfunctional and that his condition was not stable. Dr. Scott felt Claimant needed right shoulder surgery to improve his range of motion and function. Dr. Scott concluded Claimant's shoulder was not at MMI.

28. Dr. Scott stated that Claimant should be referred back to Dr. Motz for a right shoulder evaluation for consideration of right shoulder arthroscopy to repair Claimant's full thickness tear of the rotator cuff.

29. Dr. Scott assigned 19% upper extremity impairment for Claimant's right shoulder injury.

30. Dr. Scott concluded, combining the 10% upper extremity impairment at the hand with 9% upper extremity impairment at the wrist with the 19% upper extremity impairment at the shoulder, equaled a total upper extremity impairment of the right upper extremity of 34%. Dr. Scott converted this 34% upper extremity impairment to a whole person impairment rating of 20%. Dr. Scott found apportionment was not applicable.

31. Dr. Scott noted he did not have any medical records that demonstrated Mr. Cannon had a pre-existing injury or prior dysfunction to the right shoulder.

32. Dr. Scott's DIME opinion was ambiguous regarding the relatedness of the right shoulder injury to the April 26, 2013, work injury. Dr. Scott notes in his DIME report that the relatedness of the right shoulder condition needed to be resolved through litigation. Dr. Scott's report indicates an awareness of Claimant's medical treatment and recites details from the medical records when Claimant did not make right shoulder complaints on April 26, 2013, and May 14, 2013, and when he reported right shoulder pain with popping

on May 17, 2013. Dr. Scott appeared to have a grasp of all the salient facts regarding Claimant's right shoulder and opined regarding Claimant's MMI status and impairment rating for the right shoulder and wrist.

33. Considering the totality of the medical records, Claimant's credible testimony, and Dr. Scott's conclusions that Claimant is not at MMI for his right shoulder, has impairment and requires additional treatment, it is found that the Dr. Scott's DIME opinion is that Claimant's right shoulder condition is work related. Thus, in this matter, it is Respondents' burden of proof to overcome the opinion of Dr. Scott on the issue of the relatedness of the right shoulder injury to the April 26, 2013, work injury by clear and convincing evidence.

34. Respondents failed to sustain that burden of proof. Respondents rely on Dr. Larsen's record review and opinion that Claimant's right shoulder injury was not work related. The DIME physician considered the same facts considered by Dr. Larsen and came to a contrary conclusion. Dr. Scott referenced Dr. Larsen's opinion and its basis and still concluded that Claimant right shoulder injury was work related. The doctors have a difference of opinion, however, Respondents did not present clear and convincing evidence that Dr. Scott is most probably incorrect on the issue of the relatedness of the right shoulder condition.

35. Further, it is found that Respondents did not present clear and convincing evidence that Dr. Scott's opinion on MMI was most probably incorrect.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are reached.

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1) (2013). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-42-101. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. § 8-43-201 (2013). A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201 (2013).

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In this case, Respondents filed an application for hearing challenging the DIME physician's determination of MMI and relatedness. The parties agreed that Dr. Scott, the DIME, concluded that Claimant was not at MMI for the right wrist and right shoulder injuries. As for the right wrist determination of MMI, the Respondents had the burden of proof to establish by clear and convincing evidence that the DIME physician's determination of MMI was most probably incorrect.

5. With regard to the determinations made by the DIME physician regarding the right shoulder, Respondents contend that the DIME did not find the right shoulder injury causally related to the April 26, 2013, work injury. Thus, Respondents argue that Claimant has the burden of proof by clear and convincing evidence to establish that the DIME physician's opinion on the relatedness of the right shoulder injury was most probably incorrect. Respondents further argue that since the right shoulder injury is not related to the April 26, 2013, work injury, the DIME determination of MMI for the right shoulder is incorrect and irrelevant.

6. Claimant argues that Respondents failed meet their burden of proof to establish that the MMI determination of the DIME physician was most probably incorrect. Claimant argues that the DIME determined that Claimant is not at MMI for the right wrist and shoulder injuries. Claimant contends that the DIME determined that the right shoulder is related to the April 26, 2013, work injury and thus it is Respondents' burden of proof by clear and convincing evidence to prove the DIME is most probably incorrect.

7. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

8. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

9. A party has a clear and convincing burden of proof to overcome the medical impairment rating determination of the DIME, Dr. Scott. Section 8-42-107(8), C.R.S. All of the reports and testimony of the DIME are to be considered in deciding what is the determination of the DIME. Then, the party who seeks to overcome that opinion faces a clear and convincing burden of proof. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998).

10. In this case, the DIME recognized, but failed to directly address, the issue of right shoulder relatedness. Where the DIME report contains ambiguities, it is the responsibility of the ALJ to resolve the ambiguities and determine what the DIME actually found. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P .3d 1001, 1005 (Colo. App. 2002); Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000); *Villoch v. Opus Northwest, LLC*, W.C. 4-514-339 (ICAO, June 17, 2005); *Hill v. American Linen*, W.C. 4-375-880 (ICAO, December 2, 2004).

11. Here, it is concluded that the DIME physician's opinion regarding the relatedness of the right shoulder injury is ambiguous. However, based on the totality of the evidence, it is concluded that the DIME physician considered the salient facts, including: the fact that Claimant reported shoulder pain on his second visit to the doctor on May 17, 2013, 21 days after reporting the right wrist injury on April 26, 2013; that, thereafter, Claimant underwent active treatment of the right wrist, including surgery; and that, beginning October 7, 2013, and continuing on multiple visits throughout October, Claimant reported right shoulder pain and limited range of motion after Claimant resumed normal work duties requiring use of the right upper extremity. The DIME physician commented that the right shoulder relatedness question would be resolved through litigation.

12. The ALJ resolves the ambiguity in the DIME opinion on the relatedness issue concluding that Dr. Scott found the right shoulder injury related to the April 26, 2013, work injury. Therefore, it is further concluded that Respondents have the burden of proof by clear and convincing evidence to establish that the DIME physician is most probably incorrect in his determination that the right shoulder is related to the April 26, 2013, injury.

13. Respondents offered the deposition of Dr. Wallace Larsen in support of their position that Dr. Scott is incorrect about the relatedness of the right shoulder injury.

And, while Dr. Larsen does raise relevant questions about the relatedness of the right shoulder, his opinions do not rise to the level of clear and convincing evidence that Dr. Scott's opinion is most probably incorrect. Dr. Larsen's opinion relies on the absence of an immediate report of a right shoulder injury. Dr. Larsen's opinion also relies upon the doctor's opinion that Claimant's reported mechanism of injury would not cause injury to his right shoulder and that Claimant failed to immediately report pain in the right shoulder when it was the doctor's that a rotator cuff tear would cause immediate right shoulder pain.

14. Dr. Scott, as an occupational medicine specialist, in the DIME report, references Dr. Larsen's opinions about the relatedness of the right shoulder injury and opines that Claimant's right shoulder injury is not at MMI and requires additional treatment. Dr. Larsen's opinions and the medical records do not support the conclusion that there is clear and convincing evidence that Dr. Scott is incorrect about the relatedness of the right shoulder condition. Dr. Larsen's opinion is found to be no more than a difference of opinion between doctors and does not rise to the level of clear and convincing evidence of an error on Dr. Scott's part.

15. No credible or persuasive evidence was present to support Respondents' position that Dr. Scott's opinion regarding MMI is incorrect. Respondents, in argument, concede that Claimant has been afforded the treatment recommended by Dr. Scott for the right wrist injury. Dr. Scott opined that Claimant's right wrist and thumb had worsened and that Claimant should be referred to Dr. Sacher for re-evaluation. Respondents argued at hearing that Claimant had undergone the re-evaluation by Dr. Sacher recommended by Dr. Scott. Furthermore, Respondents' argument regarding MMI of the right shoulder was premised on the position that Claimant's right shoulder condition was not related to the April 26, 2013, work injury. No argument or evidence was presented that allowed the conclusion to be reached that, if Claimant's right shoulder condition was found to be work related, Claimant was at MMI. Since Claimant's right shoulder injury has been found to be related to the work injury, the credible and persuasive evidence establishes that he is not at MMI and Dr. Scott's opinion has not been overcome by clear and convincing evidence.

ORDER

It is therefore ordered that:

1. Respondents failed to sustain their burden of proof to establish by clear and convincing evidence that Dr. Scott's DIME opinion on MMI and relatedness were most probably incorrect.

2. Respondents shall be liable for medical treatment to cure and relieve Claimant of the effects of the April 26, 2013, work injury to Claimant's right wrist and right shoulder.

3. Respondents' claim is denied and dismissed.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _May 14, 2015_____

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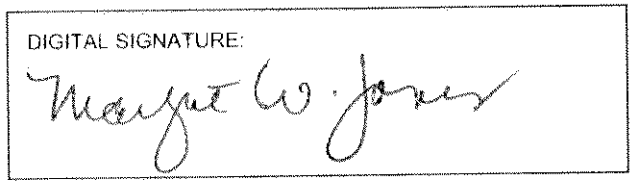


Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Lewis is reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- Whether claimant has proven that respondents have waived the right to contest the proposed medical treatment by failing to contest the medical treatment in writing as required by W.C.R.P. 16-9(G)?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on March 11, 2013 when he was putting away supplies and walked into a storage room and fell through an open grate into the basement. Claimant fell approximately six feet. Claimant was eventually diagnosed with a fracture of his ankle.

2. Claimant came under the care of Dr. Ting following his injury. Claimant reported to Dr. Ting complaints of back pain during his examinations. Claimant was provided with a cast boot for his ankle and prescribed medications and physical therapy. Due to claimant's continued complaints of pain, Dr. Ting referred claimant to Dr. Lewis.

3. Dr. Lewis' office initially evaluated claimant on February 9, 2014. Claimant was diagnosed with chronic cervicalgia, left craniocervical junction soft tissue mass and cervical spondylosis with facet arthropathy and chronic cervicalgia. Mr. Scruton, the physician's assistant in Dr. Lewis' office noted that he reviewed the magnetic resonance image ("MRI") studies of claimant's cervical, thoracic and lumbar spine that had been taken on September 19, 2013 and noted the findings of cervical spondylosis with disc osteophyte complexes along with the degenerative changes in claimant's lumbar spine. Mr. Scruton recommended treatment including a cervical epidural steroid injection.

4. The injections were denied by Respondents.

5. In response to an inquiry from respondents' counsel, Mr. Scruton indicated in a letter dated May 1, 2014 that claimant presented for interventional consideration with reported symptoms of neck and low back pain following claimant's injury. Mr. Scruton indicated that their focus would be the interventional management of claimant's condition and they would not make a determination regarding specific causality.

6. Respondents referred claimant for an independent medical examination ("IME") with Dr. Burnworth on December 3, 2014. Claimant reported to Dr. Brunworth

that his most significant problem was the persistent low back pain. Dr. Brunworth reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her IME. Dr. Brunworth noted that based on the information available, it was her opinion that the accident caused an exacerbation of claimant's pre-existing degenerative disc disease. Dr. Brunworth noted that claimant's records reference a CT scan being performed in 2011, but continued to opine that the injury did cause an exacerbation of claimant's pre-existing condition. Dr. Brunworth recommended medical treatment involving physical therapy and chiropractic treatment.

7. The ALJ credits the opinion of Dr. Brunworth that the injury in this case caused an exacerbation of claimant's pre-existing condition. The ALJ finds that claimant has demonstrated that it is more likely than not that the injury aggravated, accelerated or combined with claimant's pre-existing condition to result in the need for medical treatment. The ALJ finds that claimant has proven that it is more likely than not that the injections recommended by Dr. Lewis and Mr. Scruton are reasonable and necessary medical treatment designed to cure and relieve claimant from the effects of the work injury.

8. The ALJ credits the medical records and finds that claimant was complaining of low back pain following his injury in his initial evaluations with Dr. Ting. The ALJ finds that claimant's increased neck and low back pain is causally related to his March 11, 2013 work injury.

9. The ALJ credits the medical reports from Mr. Scruton in Dr. Lewis' office and finds that claimant has proven that it is more probable than not that the proposed injections are reasonable and necessary to cure and relieve claimant from the effects of his injury. The ALJ notes that Dr. Brunworth indicated alternative treatment involving physical therapy and chiropractic care would be sufficient, but the ALJ is rejecting this opinion. Instead, the ALJ credits the opinions expressed by Dr. Lewis and Mr. Scruton regarding the course of treatment necessary to cure and relieve claimant from the effects of his work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Even though an admission of liability is filed, the claimant bears the burden of proof to establish the right to specific medical treatment. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

5. As found, claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Lewis is reasonable and necessary to cure and relieve claimant from the effects of his injury.

ORDER

It is therefore ordered that:

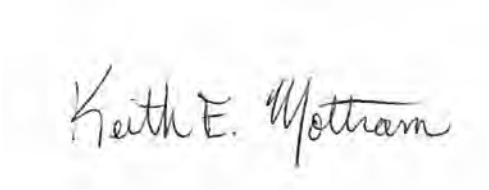
1. Respondents shall pay for the medical treatment recommended by Dr. Lewis including the epidural steroid injections to claimant's cervical and lumbar spine.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 21, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she has suffered a disability that is not contained on the schedule set forth at Section 8-42-107(2), C.R.S.?

- Whether claimant has proven by a preponderance of the evidence that she is entitled to a disfigurement award pursuant to Section 8-42-108, C.R.S.?

FINDINGS OF FACT

1. Claimant is a 58-year-old female and has been employed by employer for approximately seven years. Claimant currently works as manager of employer's store in Clifton, Colorado. Claimant sustained an admitted injury on January 20, 2014 when she was unloading supplies from a delivery truck and tripped over a box, landing on her right shoulder on the concrete floor.

2. Claimant sought medical treatment on the day of the injury at Montrose Memorial Hospital. Dr. Borgo noted that claimant had not had a prior right shoulder injury. Dr. Borgo noted that an initial x-ray did not show a fracture and claimant was provided with a sling and was prescribed percocet.

3. Claimant was referred by employer to Dr. Utt for medical care. On January 21, 2014, Dr. Utt noted that claimant had anterior swelling in the right shoulder along with anterior humeral and subacromial tenderness, limited abduction without pain, and tenderness in the upper arm in the deltoid region. Dr. Utt noted that claimant had symptoms in her neck, including tenderness in the paraspinal muscles and limited range of motion in her neck. Dr. Utt also noted upper back symptoms including tenderness in paraspinal muscles and in the midthoracic upper region, levels T1-T6 on the right.

4. On January 28, 2014, Dr. Utt noted that claimant had ongoing shoulder and upper back symptoms. Dr. Utt reported that claimant was having fairly intense pain and was unable to use her right upper extremity. Dr. Utt noted that the injury may have been more severe than just a sprain and was concerned about a rotator cuff tear, an occult fracture, or bicipital tendon injury. Dr. Utt recommended a magnetic resonance image ("MRI") of claimant's shoulder.

5. Claimant underwent the MRI on February 3, 2014. The radiologist noted mild arthropathy of the acromioclavicular joint wiht lateral downsloping of the acromion, a full-thickness rotator cuff tear involving the supraspinatus and underlying tendinopathy, and a nondisplaced fracture of the greater tuberosity.

6. Following the MRI, claimant was referred to Dr. Vance for an orthopedic consultation. Dr. Vance initially evaluated claimant on February 6, 2014. Dr. Vance had reviewed claimant's February 3, 2014 MRI, and noted that he would be unable to repair the rotator cuff because of the fracture at the preferred point of attachment. Dr. Vance noted that the fracture would need to heal before proceeding with rotator cuff repair surgery. Dr. Vance recommended work restrictions and continued using a sling.

7. Claimant returned to Dr. Utt on February 11 and March 11, 2014. Dr. Utt noted claimant continued to heal from her fracture.

8. On March 13, 2014, Dr. Vance noted that claimant's fracture appeared to have healed well, and he recommended proceeding with right shoulder surgery.

9. On April 9, 2014, Dr. Vance performed surgery, including diagnostic and operative arthroscopy of the right shoulder with intraarticular debridement including capsular release and debridement of rotator cuff and a subacromial decompression. Dr. Vance noted that although the February 3, 2014 MRI indicated a full-thickness rotator cuff tear, he observed only a partial thickness tear, and he debrided tissue to alleviate effects of the tear.

10. Claimant returned to Dr. Vance on April 17, 2014. Dr. Vance noted decreased range of motion in the shoulder and claimant was continuing to complain of quite a bit of pain. Dr. Vance recommended claimant continue with physical therapy and remain off work.

11. Dr. Utt noted on May 5, 2014 that claimant had a stiff shoulder and was making slow progress after surgery. Dr. Utt noted that claimant might have a difficult time getting back to her baseline and recommended claimant return to sedentary work with minimal use of her right arm and shoulder. Dr. Utt also noted that claimant had upper back pain on the right side, including her scapula. Dr. Utt noted that claimant had modest palpable thoracic tenderness and that her scapula was not symmetrical on the right.

12. Dr. Vance noted on May 15, 2014 that claimant continued to complain of constant pain in the scapula and bicep. Dr. Vance also noted that claimant had complained of scapular pain since the time of her injury. Dr. Vance noted that due to her being in a sling for an extended period of time with her fracture and following surgery, she may be in spasm with her continued shoulder pain. Dr. Vance provided a diagnosis of scapular dyskinesis.

13. Dr. Utt noted on May 19, 2014 that claimant continued to have significantly limited range of motion and pain in her right shoulder. Dr. Utt also noted that claimant had upper thoracic paraspinal tenderness on the right side. On June 23, 2014, Dr. Utt noted that claimant was complaining of right-sided upper-back pain as she improved her shoulder motion. Dr. Utt provided a diagnosis that included a thoracic strain. Dr. Utt

noted that claimant's right shoulder motion was improving, but still lacked full range of motion.

14. On June 26, 2014, Dr. Vance likewise noted claimant's complaints of scapular pain. Dr. Vance again provided a diagnosis scapular dyskinesis and adhesive capsulitis.

15. Dr. Utt noted on August 6, 2014 that claimant had improved shoulder pain, but still had range of motion issues. Nonetheless, Dr. Utt noted that claimant was nearing maximum medical improvement ("MMI").

16. On August 7, 2014, Dr. Vance noted that claimant's pain and shoulder range of motion had improved, but that she still had rotator cuff weakness on exam. Dr. Vance noted that claimant could return to work full-time and that no additional follow-up examinations would be required.

17. Dr. Utt placed claimant at MMI and released claimant to full duty on October 15, 2014. On November 3, 2014, Dr. Utt provided an impairment rating of 8% to the upper extremity, converting to 5% of the whole person. Dr. Utt's impairment rating was based on claimant's limited range of motion as measured during the examination.

18. Respondents filed an amended Final Admission of Liability ("FAL") admitting for the 8% upper extremity rating. Claimant filed a timely application for hearing endorsing the issues of PPD benefits and disfigurement.

19. Claimant testified at hearing that she engaged in physical therapy after surgery, with a focus on improving the range of motion in her shoulder. Claimant testified that although her range of motion improved, it never returned to her pre-injury range of motion. Claimant testified she was still limited in overhead movements involving her shoulder. Claimant testified that she had a loss of strength in her arm, and continued to experience pain in her shoulder blade area.

20. Claimant testified that when she performed the range of motion testing for Dr. Utt's impairment rating, she had difficulty performing overhead movements. She testified that she was unable to fully abduct her shoulder, and had to move her body in order to complete the abduction movement.

21. Claimant testified at hearing that her primary complaints were bicep pain and shoulder blade pain. Claimant testified she recalled discussing with Dr. Vance his diagnosis of scapular dyskinesia, and testified that she had never been diagnosed with scapular dyskinesia prior to this work injury. Claimant testified that her shoulder blade pain affected her function, because she had difficulty reaching and lifting overhead and difficulty reaching behind her back to fasten her bra. Claimant testified that she is unable to lift items overhead and that when her work duties involve placing items on high shelves, she now uses a ladder to perform those duties because she cannot lift

overhead. Claimant testified that she had difficulty reaching her right arm behind her head toward the opposite shoulder, had difficulty shrugging her shoulder up and down, and had difficulty shrugging her shoulder forward and backward because of pain in her shoulder blade area.

22. Respondents obtained an independent medical examination ("IME") of claimant with Dr. Bernton. Dr. Bernton reviewed claimant's medical records, obtained a history from the claimant and performed a physical examination. Dr. Bernton prepared a report in connection with his IME dated March 25, 2015. Dr. Bernton opined in his report that claimant did not have functional impairment "beyond the right arm at the shoulder" from the work injury.

23. Dr. Bernton testified at hearing consistent with his report. Dr. Bernton testified that claimant had rotator cuff pathology as the result of the work injury. He testified that the rotator cuff is composed of four tendons that connect to muscles that originate at and attach to the scapula. He testified that Dr. Vance had diagnosed claimant with scapular dyskinesia. Dr. Bernton testified that scapular dyskinesia is a change in the motion of the scapula.

24. The ALJ credits claimant's testimony at hearing insofar as it is consistent with the medical records in this case that claimant continued experiencing problems with her right shoulder, including the right shoulder blade area, following the injury and surgery. This testimony is supported by the medical records that note claimant has scapular pain and dysfunction and difficulty with overhead range of motion.

25. The ALJ credits claimant's testimony at hearing regarding her functional impairment, including her testimony regarding the pain in her shoulder blade area and her difficulty using the shoulder because of scapular pain. The ALJ finds this testimony is supported by the medical records which document claimant's reports of subjective pain in areas not contained on the schedule of impairments set forth at Section 8-42-107(2), C.R.S. The ALJ finds that claimant has proven that it is more probable than not that she is entitled to a whole person impairment rating pursuant to Section 8-42-107(8), C.R.S.

26. As a result of claimant's surgery, claimant has three arthroscopic scars on her right shoulder. Claimant's scars measured ¼ inch by 1/8 inch on the front of her right shoulder, ¼ inch by 1/8 inch on the side of her right shoulder and ¼ inch by 1/8 inch on the back of her right shoulder.

27. The ALJ finds that claimant has proven that it is more probable than not that her injury has resulted in a disfigurement that is normally exposed to public view and is entitled to a disfigurement award pursuant to Section 8-42-108.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should soncider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

4. As found, claimant has suffered a "functional impairment" to a part of the body that is not contained on the schedule. Therefore, claimant is entitled to a whole person impairment award pursuant to Section 8-42-107(8), C.R.S. The ALJ credits the testimony of the claimant at hearing and the medical records taken as a whole in finding that claimant has proven he suffered a functional impairment to a part of the body that is not contained on the schedule.

5. Pursuant to the medical records in this case, claimant was provided with an impairment rating of 8% of the upper extremity, which converts to a 5% whole person impairment rating.

6. Pursuant to Section 8-42-108, C.R.S., 2013 claimant is entitled to a discretionary award up to $4,640.90 for his serious and permanent bodily disfigurement that is normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the ALJ concludes claimant is entitled to disfigurement benefits in the amount of $174.03, payable in one lump sum.

ORDER

It is therefore ordered that:

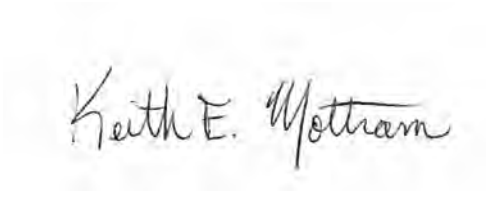
1. Respondents shall pay claimant PPD benefits based on a 5% whole person impairment rating.

2. Respondents shall pay claimant $174.03 for disfigurement. Respondents are entitled to a credit for any disfigurement award already paid to claimant under this claim.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 21, 2015



Keith E. Mottram
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether Claimant has established by a preponderance of the evidence that his left knee injury was work related.

- If Claimant has met his burden on proving compensability, whether Claimant has established by a preponderance of the evidence that Concentra, Dr. Foulk, and their referrals are authorized.

- If Claimant has met his burden of proving compensability, whether Claimant has established he is entitled to TTD between February 18, 2014 and August 10, 2014.

- **STIPULATION**

The parties stipulated that the issue of TPD is reserved.

The parties stipulated that the Claimant's ASWW is $1,000.00.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a nine year employee of Employer.

2. Claimant testified that on February 5, 2014, he was pushing a Dodge Viper off a dynometer when he when he felt strain in his left knee, resulting in soreness. Claimant testified that he reported his sore knee to his supervisor, Aaron Reek, but did not seek medical treatment and continued to work. Mr. Reek's communications do not support that Claimant reported any distinct event, but rather that Claimant's knee was "bothering him." There was no report of any "pop" to the knee.

3. Claimant also testified that on February 6, 2014, rather than pursuing a workers' compensation claim, he sought medical attention at North Suburban Medical Center. Claimant told the doctors at North Suburban that he had injured his left knee while pushing a vehicle on the street several days earlier. He also reported that the accident "occurred at home." Notes from the ER also state, "Initial pain and discomfort to left knee started when trying to push car out of snow . . . increasingly

worsening yesterday and today." Notes from Claimant's physical exam at North Suburban Medical Center report "No ligamentous laxity present." Claimant was discharged with a diagnosis of "muscle strain left knee" and was advised to seek follow-up care if not well after one week.

4. Claimant returned to work on February 10, 2014 and when questioned by Employer reported his knee injury as work related. In his Report of Injury, Claimant reported two mechanisms of injury: (1) that his left knee was sore after pushing the Viper, and (2) that he "felt a very sharp pain in the back and side of left knee" when he stepped out of another vehicle later that same day. While Claimant reported that stepping out of the vehicle caused his greater pain, Claimant did not testify at hearing about that mechanism of injury. In addition, he did not report this mechanism of injury to his treatment providers at North Suburban Medical Center.

5. Claimant admitted on cross examination that he gave a recorded statement to Insurer. In that recorded statement, he testified that he was actually injured while exiting a vehicle, not while pushing the Viper. Claimant admitted on cross examination that he provided a different mechanism of injury to Insurer from what he testified to at hearing.

6. Claimant testified that his knee pain did not resolve within the week, and on February 11, 2014, rather than seeking treatment through the workers' compensation system, he self-referred to Dr. Foulk, an orthopedist with whom he had treated three years earlier for a shoulder injury. Claimant reported to Dr. Foulk that his knee injury was not work related and that it occurred when he was pushing a stuck car. Claimant marked "No" in response to the question "Is this a work related injury?"

7. Claimant was cross-examined extensively about why he reported to North Suburban and Dr. Foulk that his injury did not occur at work. Claimant testified that he did so to avoid "the hassles" he anticipated with a workers' compensation claim.

8. The ALJ is not persuaded by this testimony. Claimant reported to his Employer the day before seeing Dr. Foulk that the alleged injury was work related, therefore Claimant reporting to Dr Foulk after that date that the alleged injury was not work-related could not serve the purpose of avoiding the workers' compensation system. Rather, the ALJ finds it more reasonable that Claimant would report most accurately to the physician with whom he had a previous relationship and whom he sought out for treatment.

9. At Dr. Foulk's February 11, 2014 evaluation he diagnosed Claimant as suffering an anterior cruciate ligament tear, "based on his history and physical exam." The ALJ notes that the history Claimant gave to Dr. Foulk is not consistent with his report of injury in that Claimant told Dr. Foulk that the injury occurred outside of work and failed to advise Dr. Faulk that his

major pain onset was upon exiting a vehicle later in the day. Further, Dr. Faulk's report does not include any notes from Claimant's examination which support his diagnosis.

10. On February 12, 2014, one day later, Claimant was examined at Concentra by Michelle Honsinger, PA. Claimant reported his injury as occurring at work, and that he felt some soreness in his knee after pushing a vehicle that increased to a sharp pain and twisting injury when he stepped out of another vehicle. Reports that there was a twisting injury are inconsistent with Claimant's Report of Injury to his Employer. PA Honsinger noted on physical examination of Claimant's left knee, "No obvious laxity." She diagnosed Claimant as having a knee strain, the same diagnosis he received from North Suburban Medical Center.

11. The ALJ finds Claimant's testimony to be inconsistent with his reports to his employer, reports to his treatment providers, and statements made to Insurer. On that basis, the ALJ finds Claimant to be not credible.

12. Based on the totality of the evidence, including Claimant's inconsistent reports of the mechanism(s) of his injury, Claimant's inconsistent reports of when the injury occurred, and Claimant's inconsistent and unexplained reports of where the injury occurred, the ALJ finds it more likely that Claimant did not sustain a work related injury to his left knee on February 5, 2014.

13. The ALJ finds that Claimant has not satisfied his burden of proving by a preponderance of the evidence that his injury is compensable.

14. In light of these findings, the ALJ need not address the remaining issues.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The ALJ finds Claimant not credible based on the inconsistency of his testimony as compared with his reports of his injury to treatment providers, his Employer, and Insurer. The ALJ also found Claimant's stated reason for some of his inconsistencies to be unreasonable. The ALJ therefore finds and concludes that Claimant failed to sustain his burden of establishing that he sustained an injury at work. On that basis, the ALJ finds and concludes that Claimant's injury is not compensable.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claims for medical and compensatory benefits are denied and dismissed.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 5, 2015

/s/ Kimberly Turnbow
Error! Reference source not found.
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether the Claimant proved he suffered a compensable injury on April 28, 2014 while performing services arising out of and in the course of his employment with Employer.

FINDINGS OF FACT

1. The Claimant is a firefighter working for Employer for the past 25 years. For the last 3 years, the Claimant has been assigned as an EMT to Medic Unit 46, providing paramedic services (Hearing Tr., p. 11).

2. The Claimant testified, and the medical records confirm, that the Claimant had been experiencing symptoms of numbness and tingling in both of his hands. As of the morning of April 28, 2014, the Claimant testified that he had a "pins and needles" sensation in his hands while driving. Prior to this date, the Claimant had mentioned these symptoms to the mother of his child and she recommended that he see Dr. Mark Treihaft. The Claimant had made an appointment with Dr. Treihaft for evaluation of the numbness and tingling symptoms prior to April 28, 2014 (Hearing Tr., p. 12).

3. The Claimant's past medical history includes a fractured left elbow from 8 years prior, a C5-6 herniated disk and bilateral shoulder reconstructive surgeries, but no prior trauma or conditions related to his hands, wrists or forearms (Claimant's Exhibit 4, p. 27; Respondent's Exhibit C, p. 17).

4. On April 28, 2014, the Claimant's medic unit was dispatched to a cardiac event involving a good-sized gentleman in his 60's. The patient was placed on the floor and an airway was established and the Claimant started performing chest compressions. While performing chest compressions, the Claimant was kneeling with his arms at a 90 degree angle with his hands, one over the other, pressing down hard. As this was occurring, the Claimant's hands went completely numb, but he didn't want to switch out with another paramedic because this could harm the patient and he was still able to grip and push. After a time, another EMT took over the chest compressions and the Claimant moved to the bag. Between the chest compressions and bagging the patient, the Claimant was working on the patient for about 20 minutes (Claimant's Exhibit 1, p. 1 and Exhibit 7, p. 47; Respondent's Exhibit D, p. 30 and Exhibit A, p. 3).

5. There was some inconsistency between the Claimant's stated level of pain while he performed chest compressions on the patient on April 28, 2014. The Claimant first testified on cross-examination that the pain level was up to a "nine," but he agreed that he had previously responded to Interrogatories and stated that his pain level was

between four and six (Hearing Tr., p. 25; Claimant's Exhibit 11). The ALJ finds the prior statement made in response to the Interrogatories to be more reliable.

6. There was also some inconsistency in the evidence as to how long the Claimant's symptoms persisted after performing the compressions. The Claimant testified that prior to the April 28th incident, his symptoms were only intermittent and afterwards, they were constant and his hands never returned to the level they were as of the morning of April 28th (Hearing Tr., p. 16). The Claimant initially testified that it took 4-5 minutes to get his hands from completely numb back to a tingling feeling. He did not recall stating to his physicians that his symptoms returned to baseline after 4-5 minutes (Hearing Tr., pp. 16-17). Dr. Scott's June 6, 2014 medical record indicates that the Claimant's numbness and tingling lasted for 4 minutes after arriving back at the emergency room and "then the numbness and tingling returned to the constant baseline tingling" (Claimant's Exhibit 7, p. 49; Respondent's Exhibit A, p. 5). After listening to a portion of the audio recording of the IME visit with Dr. Scott, the Claimant agreed that he told Dr. Scott that his symptoms returned to baseline about 4 minutes after arriving at the ER (Hearing Tr., pp. 26-27). The ALJ finds that, consistent with his prior statements to Dr. Scott, the Claimant's symptoms did return to his baseline on April 28, 2014 after the Claimant had returned to the ER following the chest compression incident.

7. The Claimant saw Dr. Marc Treihaft on May 9, 2014 for evaluation of his bilateral numbness and tingling. Dr. Treihaft noted that the Claimant reported the symptoms had been ongoing for three weeks. Dr. Treihaft further noted that the Claimant's numbness involved digits one to four and it woke the Claimant up at night and bothered him while playing bagpipes or driving his car. Nowhere in the narrative report of the evaluation and the EMG and nerve conduction studies is there any mention of an incident on April 28, 2014 or any mention that the Claimant's symptoms increased or changed as of April 28, 2014 (Claimant's Exhibit 4; Respondent's Exhibit C). Based on the diagnostic testing, Dr. Treihaft opined that the Claimant had "moderately severe carpal tunnel syndromes" (Claimant's Exhibit 4, p. 28 and 29; Respondent's Exhibit C, p. 12 and 18). Although there was no mention of a specific incident on April 28, 2014 involving applying chest compressions, Dr. Treihaft does note that "work-relatedness was reviewed. He will speak with HR at the fire department" (Claimant's Exhibit 4, p. 28; Respondent's Exhibit C, p. 18).

8. Per the Employer's First Report of Injury, the Claimant notified his Employer of an injury on May 12, 2014 reporting that he had carpal tunnel and that he was injured on April 28, 2014 from "performing chest compressions on a prolonged resuscitation (APR)" (Respondent's Exhibit E, p. 36).

9. The Claimant was initially evaluated for bilateral hand numbness and tingling by Dr. Elizabeth Bisgard on May 13, 2014. She noted that the Claimant was well known to her through his annual physicals and his work with Employer. Dr. Bisgard noted that the Claimant reported that "about three months ago he developed some numbness and tingling in his bilateral hands. It was happening intermittently. It would occasionally wake him up at night, and he would notice it when driving or playing the

bagpipes, but it never interfered with his activities. He was tolerating the symptoms. They were not progressing." Then, Dr. Bisgard reported that after the April 28, 2014 prolonged resuscitation event doing chest compressions for about twenty minutes, the Claimant's hands were completely numb and although the sensation gradually returned to his hands, "since that episode he has had constant numbness and tingling" (Claimant's Exhibit 1, p. 1; Respondent's Exhibit D, p. 30). Dr. Bisgard did not have the EMG and nerve conduction studies as of this visit, but was expecting them from Dr. Treihaft's office later that day. Dr. Bisgard recommended an evaluation and anticipated surgery very shortly. Dr. Bisgard opined that, "in reviewing his history and outside factors, although he had some symptoms prior to April 28, 2014, clearly there was a substantial change after a prolonged period of resuscitation on an individual. Therefore, it is my opinion based on a reasonable degree of medical probability that this is a work-related carpal tunnel syndrome" (Claimant's Exhibit 1, pp. 2-3; Respondent's Exhibit D, p. 31-32).

10. The Claimant saw Dr. Douglas Scott on May 22, 2014 and Dr. Scott prepared a written IME report dated June 6, 2014. Dr. Scott noted a mechanism of injury consistent with the Claimant's testimony in this case and with his report to Dr. Bisgard and other treating physicians. Dr. Scott noted that the Claimant had reported bilateral hand numbness and tingling for three weeks and noted that Dr. Bisgard (in her May 13, 2014 evaluation) noted that the symptoms had started three months prior which would put the onset of symptoms in February of 2014 (Claimant's Exhibit 7; Respondent's Exhibit A). Dr. Scott noted that the Claimant reported to him that "for about 3 month before the April 28, 2014 resuscitation incident, his hands had pins and needles sensation with aching" (Claimant's Exhibit 7, p. 49; Respondent's Exhibit A, p. 5). Based in large part on the Claimant's statements to Dr. Scott that the numbness he experienced during the 20 minutes of chest compression subsided within 4 minutes of arriving at the emergency room with the patient and he returned to his baseline, Dr. Scott opined that the carpal tunnel syndrome was not work-related. Dr. Scott opined that on April 28, 2014, the Claimant may have suffered from a temporary exacerbation of his underlying and pre-existing median nerve neuropathy at both carpal tunnels (Claimant's Exhibit 7, p. 52; Respondent's Exhibit A, p.8).

11. The Claimant was evaluated by Dr. In Sok Yi on June 30, 2014 for "progressive numbness and tingling in both of his hands, left side worse than right" with an onset of four to five months prior. Dr. Yi noted that the Claimant reported that the numbness and tingling became worse after a 5/28/2014 (sic) incident. Dr. Li diagnosed bilateral carpal tunnel syndrome as verified by nerve conduction studies. Dr. Yi recommended a left endoscopic carpal tunnel release and to continue to treat the right upper extremity conservatively (Respondent's Exhibit B, p. 11).

12. On July 11, 2014, Dr. Bisgard authored a written opinion after reviewing Dr. Treihaft's report and Dr. Scott's report. Dr. Bisgard noted that she disagreed with Dr. Scott's causality assessment. Dr. Bisgard opined that performing CPR requires a great deal of force applied repeatedly while the hands are in an awkward position. Dr. Bisgard also opined that, although the Claimant was experiencing carpal tunnel symptoms prior

to April 28, 2014, the resuscitation was the incident that put the Claimant over the edge. Dr. Bisgard maintains that but for the April 28, 2014 incident, the Claimant would not be needing the carpal tunnel surgery at this time (Claimant's Exhibit 2, p. 18; Respondent's Exhibit D, p. 21).

13. The Claimant ultimately underwent surgery for the bilateral hands, with Dr. Yi performing the right endoscopic carpal tunnel release six days following the left endoscopic tunnel release. As of August 12, 2014, the numbness and tingling was significantly better and there was an improvement in palmar opposition strength (Claimant's Exhibit 6, p. 38; Respondent's Exhibit B, p. 10).

14. The Claimant was seen by PA-C Thahn Chau on August 29, 2014 and evaluated for duty and he was released to return to full duty work on September 3, 2014 (Claimant's Exhibit 3, pp. 25-26; Respondent's Exhibit D, pp. 19-20).

15. At a follow up visit on September 15, 2014, Dr. Yi noted the numbness and tingling was gone and although the Claimant still had some soreness in the left hand, he was able to return regular work (Claimant's Exhibit 6, p. 37; Respondent's Exhibit B, p. 9).

16. Dr. Douglas Scott testified at the hearing regarding his evaluation of the Claimant. He noted that he had reviewed additional medical records since his report including a letter from Dr. Bisgard dated July 11, 2014 and the post-operative records of Dr. Yi (Hearing Tr., p. 33). After reviewing the results of the nerve conduction study, Dr. Scott opined that the abnormal findings on the study preexisted the April 28, 2014 incident based on the Claimant's description of the earlier onset of his symptoms and because the Claimant exhibited a level of both sensory and motor nerve neuropathy which indicates a progressive preexisiting condition (Hearing Tr., pp. 38-40). Dr. Scott testified that in order for a worker to experience occupational carpal tunnel syndrome, adequate repetition, duration and force must be present (Hearing Tr., p. 42). Dr. Scott opined that the chest compression incident described by the Claimant "doesn't involve forceful hand gripping or grasping" so it is not the right kind of force. Nor does the 20 minute time frame described meet the duration requirement or even come close to the 6-hour time frame (with no rest period) found in the studies on work related carpal tunnel syndrome (Hearing Tr., p. 44-46). Dr. Scott also disagreed with Dr. Bisgard's statement that the Claimant fell under the "fragile egg model" of a person with preexisting symptoms when the April 28, 2014 incident "caused the ultimate breaking of the egg that resulted in his need for surgery." Dr. Scott primarily disagreed because the Claimant's symptoms went back to his baseline (Hearing Tr., pp. 54-55). Rather, Dr. Scott finds that the Claimant experienced a temporary exacerbation of his condition in the period of time that he performed chest compressions and for some minutes after that. However, Dr. Scott finds that the temporary exacerbation of symptoms resolved on its own when the Claimant stopped performing the activity that was exacerbating his symptoms (Hearing Tr., pp. 56-57). On cross-examination, Dr. Scott agreed that carpal tunnel syndrome can be cause by a singular injury such as a wrist fracture, as well as by compression of the median nerve due to cumulative trauma (Hearing Tr., p. 60).

However, Dr. Scott nevertheless found that no part of the Claimant's moderate to severe carpal tunnel syndrome was caused by the chest compression incident on April 28, 2014 (Hearing Tr., p. 62).

17. The Claimant testified that prior to April 28, 2014, he was able to perform his work and leisure activities, including playing bagpipes, with some discomfort, but after that, the Claimant's abilities were more limited (Hearing Tr., p. 70).

18. As a consequence of the inconsistency between the Claimant's stated level of pain while he performed chest compressions on a patient on April 28, 2014, ranging from 4-6/10 to a 9/10, and the inconsistency in the evidence as to how long the Claimant's symptoms persisted after performing the compressions, the Claimant's testimony at hearing was not found to be as reliable as his earlier statements. In viewing this along with the nerve conduction studies and a physical examination, Dr. Scott opined at the hearing that the Claimant's bilateral carpal tunnel syndrome was not work-related. This is in contrast with Dr. Bisgard who had previously opined that the April 28, 2014 incident pushed the Claimant over the edge with respect to his symptoms and caused the need for his surgeries. The opinions of these two physicians are weighed in the overall context of the Claimant's medical records and the other testimony and evidence presented at hearing, and the opinion of Dr. Scott is found to be more persuasive than that of Dr. Bisgard.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents, and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Ctr. v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for

the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The totality of the evidence does not support that the Claimant suffered a compensable injury on April 28, 2014 while performing chest compressions for approximately 20 minutes on a patient who had gone into cardiac arrest. There is no controversy that the Claimant did indeed perform the chest compressions on the patient as he testified, consistent with prior medical records. However, the weight of the evidence establishes that the onset of the numbness and tingling in the Claimant's bilateral hands was approximately February of 2014. The symptoms persisted and progressed to the point that the Claimant had made an appointment with Dr. Treihaft for evaluation prior to the incident on April 28, 2014 although the appointment was not until May 9, 2014.

On April 28, 2014, the Claimant did experience a change in the numbness and tingling symptoms in his bilateral hands while he was performing chest compressions. Yet, the Claimant had previously reported to physicians that the symptoms subsided shortly after returning to the emergency department and the Claimant's symptoms returned to his baseline.

The Claimant ultimately underwent surgery for the bilateral hands, with Dr. Yi performing the right endoscopic carpal tunnel release six days following the left endoscopic tunnel release, even though Dr. Yi had only initially recommended surgery for the left hand and continued conservative care for the right. In any event, the surgeries were successful and by September of 2014, the Claimant no longer had the tingling and numbness symptoms.

Dr. Bisgard also opined that, although the Claimant was experiencing carpal tunnel symptoms prior to April 28, 2014, the resuscitation was the incident that put the Claimant over the edge. Dr. Bisgard maintained that but for the April 28, 2014 incident the Claimant would not have needed the carpal tunnel surgery at this time. In contrast, Dr. Scott opined that the abnormal findings on the Claimant's nerve conduction study preexisted the April 28, 2014 incident based on the Claimant's description of the earlier onset of his symptoms and because the Claimant exhibited a level of both sensory and motor nerve neuropathy which indicates a progressive preexisiting condition. Dr. Scott also disagreed with Dr. Bisgard's statement that the Claimant fell under the "fragile egg model" of a person with preexisting symptoms when the April 28, 2014 incident "caused the ultimate breaking of the egg that resulted in his need for surgery." Dr. Scott primarily disagreed because the Claimant's symptoms went back to his baseline. Thus, Dr. Scott opined that the Claimant experienced a temporary exacerbation of his condition in the period of time that he performed chest compressions and for some minutes after that, but the temporary exacerbation of symptoms resolved on its own when the Claimant stopped performing the activity that was exacerbating his symptoms. Dr. Scott found that no part of the Claimant's moderate to severe carpal tunnel syndrome was caused by the chest compression incident on April 28, 2014.

When the opinions of Dr. Scott and Dr. Bisgard were weighed in the overall context of the Claimant's medical records and the other testimony and evidence presented at hearing, and the opinion of Dr. Scott was more persuasive than that of Dr. Bisgard. The Claimant has failed to meet his burden of proving that he suffered a compensable injury while performing services arising out of and in the course of his employment in this case. The work duties performed by the Claimant on April 28, 2014 did not cause, aggravate, accelerate, or combine with a preexisting disease or infirmity to produce the need for treatment.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant has failed to meet his burden of proving a compensable injury by a preponderance of the evidence by establishing that his bilateral carpal tunnel syndrome was caused by a work injury occurring on April 28, 2014.

2. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is therefore denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 18, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she suffered an industrial injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the injury resulted in claimant obtaining medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of the injury and from a provider who was authorized to treat claimant?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning July 24, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer as a housekeeper beginning her employment on or about August 2006. Claimant testified at hearing that on March 1, 2013 she was descending a flight of stairs when she slipped on a piece of ice and fell to the ground. Claimant testified she fell onto her left side. Claimant testified when she fell she was carrying a basket with cleaning supplies and rags. Claimant testified that after she fell, she had pain in her whole body.

2. Claimant's testimony regarding her fall was supported by the testimony of Mr. Maldonaldo, a co-worker. Mr. Maldonaldo testified that he was informed by Ms. McPike that a guest had witnessed claimant fall and Ms. McPike requested Mr. Maldonaldo to go check on claimant. Mr. Maldonaldo testified that when he found claimant in the room, claimant was crying. Mr. Maldonaldo testified that claimant reported on the date of the injury that she did not want to seek medical care. Mr. Maldonaldo further testified to being in a meeting with claimant and Ms. McPike in which claimant's fall was discussed. Mr. Maldonaldo confirmed that Ms. McPike was the person employees would report work injuries to.

3. Claimant testified that the day after her work injury, she reported her injury to Ms. Suhouski with Mr. Maldonaldo performing interpretation for her. This testimony was supported by the testimony of Mr. Maldonaldo who noted that during the meeting,

claimant reported that she still had pain in her shoulder from her fall. On cross-examination, Mr. Maldonaldo testified that claimant did not request medical treatment following her fall. The ALJ finds the testimony of Mr. Maldonaldo to be credible and persuasive.

4. While respondents maintain claimant testified inconsistently regarding how she fell on March 1, 2013, the testimony and medical records do establish that claimant fell at work on March 1, 2013. This fact is supported by the testimony of claimant and Mr. Maldonaldo. Claimant however, did not receive medical treatment following her fall until 2014.

5. Claimant was examined by Dr. Sauerbry on March 4, 2014 with complaints of left shoulder pain. Claimant noted that she had problems with pain in the shoulder for a couple of years now. Claimant reported she was a housekeeper and did a lot of heavy work that aggravated her pain, but noted it was not a workers' compensation injury. Dr. Suerbrey recommended claimant get a magnetic resonance image ("MRI") of the shoulder.

6. Notably, when claimant reported to Memorial Hospital for the MRI, she reported she injured her shoulder in a fall 1 year ago, and complained of persistent pain and decreased range of motion. The MRI revealed a small localized full thickness tear of the anterior distal supraspinatus tendon along with moderately severe partial thickness tearing of the infraspinatus tendon and remainder of the supraspinatus tendon, along with mild articular surface tearing of the subscapularis tendon. A slap II tear, degenerative acromioclavicular joint with mild to moderate compromise of the acomial outlet and subacromial subdeltoid bursitis was also noted in the MRI findings.

7. Respondents note in their position statement that while claimant reported to the MRI physician, Dr. Lile, that she injured her shoulder in a fall, the records do not indicate that claimant fell at work. However, the testimony of claimant and Mr. Maldonaldo establish that claimant was involved in a fall in March 2013 and the fall was reported to Ms. McPike.

8. Claimant returned to Dr. Sauerbrey on June 25, 2014. Dr. Sauerbrey recommended claimant undergo surgery on her shoulder.

9. Claimant presented the testimony of her adult children, Jose and Erica at hearing. Claimant's children have performed translation services for claimant at various times with her medical providers and her employer. Jose testified at hearing that he translated for claimant at her appointment with Dr. Sauerbrey on March 4, 2014. Jose testified that his girlfriend took claimant to her appointment for the MRI on March 19, 2014.

10. Erica testified that he went with claimant to employer and reported the injury to "Laura" on or about June 25, 2014. Erica testified that Laura could not find the report regarding the fall and would contact Erica when she found the report.

11. Jose testified he returned with claimant in July 2014 and spoke with Laura and “Christine” regarding claimant’s fall. Jose testified that Christine gave claimant an insurance card for the medical appointments and told Jose to have claimant use her sick leave and not come to work.

12. The ALJ credits the testimony of Erica and Jose and finds that when claimant reported the injury to employer on or about June 25, 2014 and advised employer that claimant was seeking medical treatment, claimant was not provided with a list of 2 physicians to choose from.

13. The ALJ notes the W.C.R.P. 8-2 requires the employer to provide claimant with a list of physicians designated to treat the injured worker within 7 days of the date they receive notice of the injury. W.C.R.P. 8-2(E) establishes that if the employer does not provide a list of providers to the injured worker, the injured worker may select a physician of their choosing.

14. The ALJ finds that after claimant’s fall on March 1, 2013, claimant initially denied that she wanted to seek medical treatment. Therefore, employer was not required to provide claimant with a choice of medical providers as employer was not aware of the compensable nature of the injury. However, upon being informed by claimant that she was seeking medical treatment in July 2014, employer was then required to provide claimant with a designated provider list pursuant to W.C.R.P. 8-2. Because employer failed to provide claimant with the designated provider list, the claimant is then allowed to choose a physician to treat her injury. The ALJ finds that this occurred as of June 25, 2014 when she reported to employer that she had injured her shoulder in the fall and was seeking medical treatment.

15. Claimant was examined by Dr. Speer on July 24, 2014. Dr. Speer noted that claimant reported she fell down stairs at work in March 2012 and landed on her right shoulder. Following a letter from claimant to Dr. Speer dated October 9, 2014, Dr. Speer issued an addendum to his report to reflect changes regarding when claimant fell at work.

16. Respondents note that the records from Dr. Speer report an injury occurring in March 2012, and not 2013 as testified to by claimant. However, again, the evidence establishes that claimant fell at work in March 2013 and reported the incident to her employer, following which she reported the injury to Ms. McPike and Mr. Maldonaldo. This fact is established by the testimony of claimant and Mr. Maldonaldo, and was not credibly contradicted by respondents at hearing. The ALJ therefore finds that the discrepancies in the medical records regarding the date of the fall at work are simply discrepancies in the medical records and do not disprove the fact that the fall occurred on March 1, 2013 as testified to by claimant and Mr. Maldonaldo.

17. It was unclear from the testimony as to how claimant came to be seen by Dr. Speer. The ALJ ascertains from the records, however, that Dr. Speer became claimant’s choice of physician to treat with as of the July 24, 2014 appointment.

18. Respondents filed a Notice of Contest on August 25, 2014. Claimant's August 28, 2014 appointment with Dr. Speer was cancelled because insurer had not decided if the claim would be accepted or not. Claimant did not return to Dr. Speer and the ALJ finds that Dr. Speer, by cancelling the August 28, 2014 medical appointment, refused to provide treatment for claimant due to non-medical reasons.

19. On September 16, 2014, Dr. Sauerbrey sent a request to insurer requesting authorization for shoulder surgery consisting of a rotator cuff repair and subacromial decompression.

20. Claimant underwent an independent medical examination ("IME") with Dr. Fall on January 8, 2015. A copy of the audio recording of the IME was entered into evidence at hearing. Dr. Fall issued a report dated January 8, 2015 as a result of the IME.

21. Dr. Fall reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with her IME. Dr. Fall noted in her report that claimant was quite nonspecific and was not able to describe how she fell and the exact mechanism of injury that would lead to a rotator cuff and SLAP tears. Dr. Fall opined that the mechanism of injury described by claimant would not result in the numerous findings on the MRI. Dr. Fall opined that the MRI findings were consistent with age-related degenerative findings. Dr. Fall opined that she was not able to state within a reasonable degree of medical probability that the MRI findings of the shoulder were related to a fall or that the symptoms were related to the fall from March 2013.

22. Dr. Fall testified by deposition in this case consistent with her IME report.

23. The ALJ credits the testimony of claimant and Mr. Maldonaldo and the medical reports from Dr. Sauerbrey and Dr. Speer and finds that claimant has proven that it is more likely than not that she sustained a compensable injury to her left shoulder on March 1, 2013 when she fell at work. The ALJ rejects the opinions expressed by Dr. Fall that are contrary to this finding.

24. The ALJ finds that claimant did not request medical treatment from employer until reporting her injury in June 2014 and advising employer that she was seeking medical treatment. The ALJ finds that employer reported her injury to employer on March 1, 2013, but credits the testimony of Mr. Maldonaldo and finds that claimant advised employer on that date that she was not seeking medical treatment. The ALJ therefore finds that the medical treatment claimant received from Dr. Sauerbrey in 2014, while reasonable and necessary to treat claimant's injury, was not authorized.

25. The ALJ finds that the medical treatment claimant received from Dr. Speer was reasonable and necessary to cure and relieve claimant from the effects of the injury.

26. The ALJ credits the testimony of claimant and Jose and the supporting wage records and finds that claimant was advised by employer to stay at home from work due to her shoulder injury beginning July 24, 2014 and take sick leave. This testimony is supported by the wage records entered into evidence that establish that claimant began taking sick leave during this period of time. The ALJ credits this testimony and finds that claimant has proven that it is more likely than not that she is entitled to TTD benefits commencing July 24, 2014 and continuing until terminated by law.

27. Claimant testified at hearing that while working for employer, she held concurrent employment with another hotel beginning in May 2008. This is supported by the wage records and W-2 forms that document claimant's concurrent employment with employer and Steamboat Ski & Resort Corporation.

28. Claimant argues that the wage records from employer document that claimant was paid $3,723.46 for the time period between January 1, 2013 through February 22, 2013 and that claimant's AWW should be based off of this calculation. The ALJ is not persuaded. Notably, the wage record documents that claimant every two weeks. Therefore, the "year to date" amount does not mean that this covers only the time worked beginning January 1, 2013, but instead the wages paid, including wages paid for time earned prior to January 1, 2013 and covering 8 weeks.

29. It is claimant's burden of proof to establish the AWW. Based on what was entered into evidence at hearing, the ALJ finds the most appropriate way to calculate the AWW with regard to claimant's earnings for employer is to divide the earnings in the paystub by 8 weeks. This results in an AWW for claimant for her work with employer of $465.43.

30. With regard to claimant's work with her concurrent employer, that ALJ determines that the most appropriate method for calculating the AWW is by using the W2 forms for 2012. The ALJ cannot ascertain with certainty claimant's AWW at the time of her injury based upon the records and claimant's testimony regarding the nature of her pay was not sufficient to establish that a different method should be used.

31. Claimant was paid $22,053.02 in wages by Steamboat Ski and Resort for 2012. This equates to an AWW of $424.10. Combining claimant's AWW for her work with employer and her concurrent employer comes to an AWW of $889.53.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of

the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that she suffered compensable injury arising out of and in the course of his employment with employer when she fell at work on March 1, 2013. As found, the testimony from claimant and Mr. Maldonaldo are credible and persuasive on this point. As found, the medical records from Dr. Lile in connection with the MRI performed on March 19, 2014 is found to be credible and persuasive regarding the cause of claimant's complaints of shoulder pain.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-

437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

7. As found, claimant did not report to employer that the fall caused claimant to need medical treatment until June 2014. As found, claimant's medical treatment with Dr. Sauerbrey prior to this date is not authorized. As found, claimant's medical treatment with Dr. Speer in July 2014 was authorized and reasonable and necessary to cure and relieve claimant from the effects of her work injury.

8. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

9. As found, claimant left work as of July 24, 2014 as a result of her injury. As found, claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits commencing July 24, 2014.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, claimant's AWW for her work with employer and her concurrent employer equates to an AWW of $889.53.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment provided to claimant by Dr. Speer.

2. Claimant's request for payment of the medical treatment from Dr. Sauerbrey is denied as being not authorized under the Colorado Workers' Compensation Act.

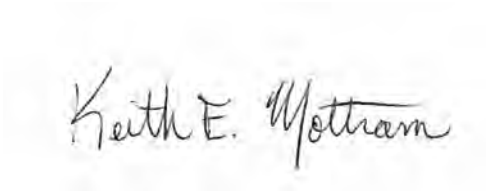
3. Respondents shall pay claimant TTD benefits commencing July 24, 2014 and continuing until terminated by law or statute based on an AWW of $889.53.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado

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ISSUES

1. Whether Insurer has demonstrated by a preponderance of the evidence that Claimant rejected Workers' Compensation coverage pursuant to §8-41-202(1), C.R.S. prior to his July 22, 2014 motor vehicle accident.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on July 22, 2014.

FINDINGS OF FACT

1. Claimant owns and operates two plumbing businesses. Elite Drain Solutions dba Broken Arrow is a plumbing and drain cleaning business that he started in 2006. Employer is a commercial plumbing business that Claimant started in 2013 and services commercial accounts. Claimant was at all relevant times the President of Employer.

2. Richard Mann has been a self-employed insurance agent for Insurer since 2006. Mr. Mann sells all types of commercial and business insurance including home, auto and life lines. Mr. Mann earns a commission based on the premiums received by Insurer.

3. Mr. Mann has written numerous insurance policies for Claimant since 2007. They include a general liability and business automobile policy for Broken Arrow as well as personal lines for Claimant. Claimant has never asked Mr. Mann to write a Workers' Compensation policy for Broken Arrow.

4. In writing insurance policies for Broken Arrow Mr. Mann dealt primarily with Claimant's brother P.K. In March 2013 Claimant contacted Mr. Mann and advised him that he was starting Employer. Claimant clarified that Employer was a completely separate entity from Broken Arrow and his brother P.K. was not part of the new company. He sought to obtain a general liability policy for Employer.

5. In April 2013 Claimant contacted Mr. Mann and stated that he needed a Workers' Compensation insurance policy for Employer. Claimant noted that he required the policy so that he could submit bids on commercial projects.

6. Mr. Mann gathered information from Claimant, obtained approval for a Workers' Compensation policy with Insurer and received an estimated quote. Claimant advised Mr. Mann that Employer had one employee Ryan Unruh. Mr. Unruh was a plumber and the policy was based on his payroll earnings of approximately $35,000 per year.

7. After Mr. Mann obtained approval, he asked Claimant whether he wanted to be included on the Workers' Compensation policy. Mr. Mann told Claimant that he was permitted to "opt out" of Workers' Compensation coverage as a corporate officer. He then explained that Claimant's insurance premium would increase by approximately $3,000 per year if he wanted to be included on the policy. Claimant declined Workers' Compensation coverage for himself.

8. Mr. Mann completed an Application for Insurance that included Rejection of Coverage by Corporate Officers in parts A and B for Claimant to sign. Mr. Mann completed insurance documents based on the information Claimant had provided. The documents listed Claimant as President with 100% ownership of Employer and Ryan Unruh as the sole employee.

9. On April 26, 2013 Mr. Mann transported the documents to Claimant's place of business for review. Mr. Mann advised Claimant that if he did not sign the rejection forms he would automatically be covered under Employer's Workers' Compensation insurance policy. Claimant elected to sign the documents and exclude himself from Workers' Compensation coverage. Mr. Mann explained that he personally observed Claimant sign the Application for Insurance and Rejection of Coverage. Mr. Mann subsequently returned to his office, told notary Coylene Mann that he had personally observed Claimant sign the Rejection of Coverage documents and had Claimant's signature notarized.

10. Claimant denies that he signed parts A and B of the Rejection of Coverage documents. He testified that there were several inaccuracies in the documents including that he was only a 40% and not a 100% owner, the phone number on the documents was not Employer's business phone and the business description was incorrect. Moreover, he contends that the Rejection of Coverage was ineffective because his signature was not properly notarized. Claimant testified that he thought he had Workers' Compensation coverage through Employer.

11. Mr. Mann submitted the Application electronically to Insurer's Commercial Lines Division in St. Joseph, Missouri. He sent a hard copy of the Rejection of Coverage documents to Insurer's office through certified mail.

12. Tina Turner is a Commercial Underwriter for Insurer in St. Joseph, Missouri. Her job duties include analyzing risks, determining insurance eligibility and developing pricing for policies. Ms. Turner was the Underwriter for Employer's Workers' Compensation policy number 05-XU0827-90-0000.

13. Insurer electronically received Employer's Application for Insurance on April 26, 2013. Insurer received Employer's Rejection of Coverage documents, parts A and B, through certified mail on May 3, 2013.

14. Insurer issued a policy of Workers' Compensation Insurance for Employer that covered the period from April 26, 2013 to April 26, 2014. The Rejection of Coverage paperwork was delayed and not processed until after the policy was issued.

The policy thus reflected a total payroll of $83,500 that consisted of Mr. Unruh's employee salary of $35,000 and $48,500 for Claimant as the payroll amount required for a corporate officer. The initial policy premium, based on a payroll of $83,500, was $5,213.

15. Ms. Turner explained that Insurer does not issue Workers' Compensation policies that only cover owners of companies. If Claimant was the only person listed on the Application for Insurance it would have been rejected.

16. On May 3, 2013 Insurer issued a Policy Information Page that included a "Change Endorsement" and "Partners, Officers and Other Exclusion Endorsement." The documents revealed that effective May 3, 2013 Claimant was excluded from the policy as a corporate officer and his payroll was deducted from the premium basis for the policy. The total estimated payroll for the policy was thus reduced from $83,500 to $35,000. The original premium of $5,213 was then reduced by $2,826 to $2,387. The exclusion was processed on June 4, 2013 and was sent to Employer on June 6, 2013.

17. Insurer issued monthly billing statements to Employer. On July 1, 2013 Insurer issued a billing statement in the amount of $1,789.50 that reflected the June 4, 2013 premium deduction based on Claimant's exclusion from the policy. Employer has continued to pay the premiums for the Workers' Compensation policy

18. In April 2014 Insurer issued a renewed Workers' Compensation Policy for Employer that covered the policy period of April 26, 2014 through April 26, 2015. The payroll of $35,000 and the corresponding premium of $2,353 documented on the Declaration Page were consistent with the payroll and premium charged after the Claimant had been excluded from the prior year policy.

19. On July 22, 2014 Claimant was involved in a motor vehicle accident while traveling north on I-25 in Thornton, CO. Donald Vaughn was driving the vehicle and Claimant was a passenger. Mr. Vaughn was insured by Safeco. Claimant explained that they were traveling to consider purchasing a new vehicle for Employer and visit a jobsite in Fort Morgan, Colorado.

20. Claimant was initially hospitalized at Exempla Good Samaritan Medical Center. Safeco Auto Insurance and Freedom Life Insurance Company were listed as the primary and secondary insurers for coverage of the hospital bills. Claimant's wife Jacquelyn Quint was listed as a subscriber for the Freedom policy. Subsequent Good Samaritan forms dated September 18, 2014 and September 22, 2014 list Safeco and Freedom as the insurers responsible for Claimant's July 22, 2014 injuries. There is no documentation in the Good Samaritan records stating that Claimant had a Workers' Compensation policy in force with Insurer that would cover Claimant's medical bills related to the motor vehicle accident.

21. Claimant was transferred to Boulder Community Hospital for care and treatment beginning on July 24, 2014. Insurers listed as responsible for coverage and payment of Claimant's injuries at Boulder Community Hospital included National

Foundation Life Insurance and CIGNA Insurance. There is no documentation in the Boulder Community Hospital records that Claimant had a Workers' Compensation insurance policy with Insurer that would cover his medical bills related to the July 22, 2014 motor vehicle accident.

22. Insurer has demonstrated that it is more probably true than not that Claimant rejected Workers' Compensation coverage pursuant to §8-41-202(1), C.R.S. prior to his July 22, 2014 motor vehicle accident. In April 2013 Claimant contacted Mr. Mann and stated that he needed a Workers' Compensation insurance policy for Employer so that he could bid on commercial projects. After Mr. Mann obtained policy approval, he asked Claimant whether he wanted to be included on the Workers' Compensation policy. Mr. Mann told Claimant that he was permitted to "opt out" of Workers' Compensation coverage as a corporate officer. He then explained that Claimant's insurance premium would increase by approximately $3,000 per year if he wanted to be included on the policy. Claimant declined Workers' Compensation coverage for himself. Mr. Mann credibly explained that on April 26, 2013 he transported the insurance documents to Claimant's place of business for review. Mr. Mann advised Claimant that if he did not sign the rejection forms he would automatically be covered under Employer's Workers' Compensation insurance policy. Claimant elected to sign the documents and exclude himself from Workers' Compensation coverage. Mr. Mann credibly remarked that he personally observed Claimant sign the Application for Insurance and Rejection of Coverage. Moreover, Ms. Turner corroborated Mr. Mann's testimony that Claimant exercised his right as a corporate officer to reject Workers' Compensation coverage for himself. On May 3, 2013 Insurer issued a Policy Information Page that included a "Change Endorsement" and "Partners, Officers and Other Exclusion Endorsement." The documents revealed that effective May 3, 2013 Claimant was excluded from the policy as a corporate officer and his payroll was deducted from the premium basis for the policy.

23. In contrast, Claimant denies that he signed parts A and B of the Rejection of Coverage documents. He contends that the Rejection of Coverage was ineffective based on inaccuracies and an improperly notarized signature. Claimant remarked that he believed he possessed Workers' Compensation coverage on the date of his motor vehicle accident. However, the record demonstrates that he knowingly and intentionally rejected Workers' Compensation coverage for himself as a corporate officer of Employer. The written form rejecting coverage utilized by Insurer was substantially equivalent to the form required by Workers' Compensation Rule 3-4. Claimant was a corporate officer and sought to reject Workers' Compensation coverage for himself. Claimant took the affirmative step to reject Workers' Compensation coverage to avoid burdensome premiums. When Claimant rejected coverage the total estimated payroll for Employer's Workers' Compensation policy was reduced from $83,500 to $35,000. The original premium of $5,213 the decreased by $2,826 to $2,387. Furthermore, Employer has continued to pay insurance premiums based on Claimant's exclusion from the Workers' Compensation policy. Finally, Claimant's actions after the motor vehicle accident reflect that he did not believe he had Workers' Compensation coverage through Insurer. Claimant made multiple claims with other insurers attempting to obtain coverage and payment of his medical bills from Good Samaritan Exempla Hospital and

Boulder Community Hospital. Accordingly, Claimant did not possess Workers' Compensation coverage through Insurer on July 22, 2014. His claim for benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-41-202(1), C.R.S. permits a corporate officer to reject Workers' Compensation coverage. The section provides, in relevant part,

> Notwithstanding any provisions of articles 40 to 47 of this title to the contrary, a corporate officer of a corporation or a member of a limited liability company may elect to reject the provisions of articles 40 to 47 of this title. If so elected, said corporate officer or member shall provide written notice on a form approved by the division through a rule promulgated by the director of such election to the worker's compensation insurer of the employing corporation or company, if any, by certified mail.

Section 8-41-202(2), C.R.S. specifies that the preceding election shall continue in effect so long as the corporation's or company's insurance policy is in effect or until the officer provides written notice to the insurer to revoke the election to reject coverage.

5. Workers' Compensation Rule of Procedure 3-4(A), addresses the election to reject coverage and provides as follows:

> An officer of a corporation or a member of a Limited Liability Company who elects to reject the provisions of the Act under §8-41-202, C.R.S., shall complete the Division prescribed form and send it or a substantial equivalent, to the insurance carrier for the corporation's or company's other employees, if any, by certified mail.

6. A corporate officer and owner who exercises his right to reject coverage under §8-41-202, C.R.S. is not considered an employee under the Act. *Kelly v. Mile Hi Single Ply, Inc.* 890 P.2d 1161 (Colo. 1995). Although the Workers' Compensation Act is intended to provide exclusive remedies for all employees injured on the job, the General Assembly has authorized corporate officers the option to reject Workers' Compensation coverage. *Kelly,* 890 P.2d at 1164. The exception was introduced in response to small business owners' complaints that the self-coverage requirement under the Act unduly burdened their operations. The 1983 amendment provided small business owners with two benefits: (1) the right to reject compensation coverage and to avoid its premiums; and (2) the corresponding right to choose their coverage without unnecessary duplication from the compensation scheme. *Id.*

7. As found, Insurer has demonstrated by a preponderance of the evidence that Claimant rejected Workers' Compensation coverage pursuant to §8-41-202(1), C.R.S. prior to his July 22, 2014 motor vehicle accident. In April 2013 Claimant contacted Mr. Mann and stated that he needed a Workers' Compensation insurance policy for Employer so that he could bid on commercial projects. After Mr. Mann obtained policy approval, he asked Claimant whether he wanted to be included on the Workers' Compensation policy. Mr. Mann told Claimant that he was permitted to "opt out" of Workers' Compensation coverage as a corporate officer. He then explained that Claimant's insurance premium would increase by approximately $3,000 per year if he wanted to be included on the policy. Claimant declined Workers' Compensation coverage for himself. Mr. Mann credibly explained that on April 26, 2013 he transported the insurance documents to Claimant's place of business for review. Mr. Mann advised Claimant that if he did not sign the rejection forms he would automatically be covered under Employer's Workers' Compensation insurance policy. Claimant elected to sign the documents and exclude himself from Workers' Compensation coverage. Mr. Mann credibly remarked that he personally observed Claimant sign the Application for Insurance and Rejection of Coverage. Moreover, Ms. Turner corroborated Mr. Mann's testimony that Claimant exercised his right as a corporate officer to reject Workers' Compensation coverage for himself. On May 3, 2013 Insurer issued a Policy Information Page that included a "Change Endorsement" and "Partners, Officers and Other Exclusion Endorsement." The documents revealed that effective May 3, 2013 Claimant was excluded from the policy as a corporate officer and his payroll was deducted from the premium basis for the policy.

8. As found, in contrast, Claimant denies that he signed parts A and B of the Rejection of Coverage documents. He contends that the Rejection of Coverage was

ineffective based on inaccuracies and an improperly notarized signature. Claimant remarked that he believed he possessed Workers' Compensation coverage on the date of his motor vehicle accident. However, the record demonstrates that he knowingly and intentionally rejected Workers' Compensation coverage for himself as a corporate officer of Employer. The written form rejecting coverage utilized by Insurer was substantially equivalent to the form required by Workers' Compensation Rule 3-4. Claimant was a corporate officer and sought to reject Workers' Compensation coverage for himself. Claimant took the affirmative step to reject Workers' Compensation coverage to avoid burdensome premiums. When Claimant rejected coverage the total estimated payroll for Employer's Workers' Compensation policy was reduced from $83,500 to $35,000. The original premium of $5,213 the decreased by $2,826 to $2,387. Furthermore, Employer has continued to pay insurance premiums based on Claimant's exclusion from the Workers' Compensation policy. Finally, Claimant's actions after the motor vehicle accident reflect that he did not believe he had Workers' Compensation coverage through Insurer. Claimant made multiple claims with other insurers attempting to obtain coverage and payment of his medical bills from Good Samaritan Exempla Hospital and Boulder Community Hospital. Accordingly, Claimant did not possess Workers' Compensation coverage through Insurer on July 22, 2014. His claim for benefits is thus denied and dismissed. *See Boyle v. Red Mountain Builders, Inc.* W.C. No. 4-778-626 (ICAP, Feb. 18, 2010).(reasoning that the claimant properly rejected Workers' Compensation coverage as an owner/corporate officer of the employer pursuant to §8-41-202(1), C.R.S. and Rule 3-4 despite the lack of notarized signature).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 28, 2015.

DIGITAL SIGNATURE:

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-963-189-01

ISSUES

- Whether Claimant proved by a preponderance of the evidence that she suffered a compensable injury that arose out of and in the course and scope of her employment with Employer?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to medical treatment to cure and relieve the effects of the industrial injury?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 30, 2014 and continuing until terminated by operation of law?

- If Claimant has proven a compensable injury, who are authorized treating physicians?

STIPULATION

The parties stipulate that Claimant's average weekly wage is $572.53.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Reports of Injury

1. Claimant is a 26 year old female who works as a pharmacy technician for Respondent.

2. She alleges she injured her back at work on September 29, 2014. At hearing, Claimant testified that the injury occurred after the store had received its order for the day when she bent to pick up five handled shopping baskets, turned, and felt and heard a "pop" in her left lower back.

3. Claimant reported the mechanism of her injury differently to her numerous medical providers. For example, Claimant made the following varied reports:

    - On September 29, 2014, when Claimant first reported to Concentra, she reported that her injury occurred while she "was lifting and and [sic] unpacking boxes when she twisted to the left and felt a snap in her lower

back. . . . Patient states she has a history of sciatica to left lower back but has not bothered her in years."

- When she reported to Dr. So, Claimant did not include any mention of turning or twisting. Rather, she stated that she "went to pick up some baskets took a step heard a pop in [her] lower left back and also felt it." Additionally, this report indicates that Claimant was injured as she approached the baskets, before she picked them up.

- On October 10, 2014, Claimant reported to Dr. Gary Ghiselli that she was taking some very light baskets from the pharmacy to the front of the store when she noticed a twinge in her back with radiation down into the anterior portion of her of her left leg.

- On October 13, 2014, Claimant reported to Dr. Rossi at Concentra that she "was unloading an order when she bent down to pick up a basket and put it outside when she had a sudden snap in her back."

- In her Worker's Claim for Compensation dated October 28, 2014, Claimant described that just before the accident; Claimant was "setting 10 delivery totes on the floor that weighed 10 to 50 pounds each."

- On October 30, 2014, Claimant reported to Physiotherapy Associates that, "She was lifting several baskets at work from the floor, took a step, to the side and heard a pop, felt stabbing pain in her back."

- On November 21, 2014, Dr. Jeffrey Sabin evaluated Claimant. To him she reported her injury occurred while "she was moving heavy baskets she felt a pop in her back followed by pain."

4. Claimant testified she had never been in so much pain and that her legs were going numb. Claimant testified on cross-examination that her immediate pain was 5/10, and that by the end of her shift her pain was 11/10. Claimant testified that she continued to work out her shift hunched over, took numerous breaks to sit, and "had never been in so much pain." The ALJ finds it unreasonable that Claimant could continue working with pain approaching 11/10.

5. While Claimant acknowledged that a pharmacist was working in the same area at the time, she did not present any persuasive evidence that anyone, including the pharmacist, witnessed her injury or her working in such excruciating pain. Despite being in the "worst pain she ever felt," Claimant finished her shift before reporting the alleged injury to her store manager. The ALJ finds it unreasonable that Claimant's excruciating pain went un-witnessed, especially given the proximity of the pharmacist.

6. Respondent called Sarah King who testified by telephone. Ms. King is the store director or manager to whom Claimant reported her injury. Ms. King testified that

Claimant reported to her that she had picked up baskets and hurt her back. Ms. King testified that the handled shopping baskets Claimant picked up weighed 1.6 pounds each, and that Claimant did not appear to be in distress when she reported her injury. The ALJ credits the testimony of Ms. King as being more consistent with the evidence than that of Claimant.

7. Claimant testified she did not receive a choice of provider form, however, a copy was mailed to her on October 1, 2014.

Previous Back Problems

8. Claimant testified that she had previously experienced sciatica in her low back for which she treated with Chiropractor Dr. Peter So. Claimant testified that her last treatment had been five years before her work injury, lasted only a couple of months at most, and that she had no lower back problems between that treatment and her alleged work injury.

9. Dr. So's records are inconsistent with Claimant's testimony. His medical records reflect that

    - Claimant treated with Dr. So on April 23, 2008 for acute left sided lower back pain radiating into her buttocks, and that the pain was aggravated by walking, getting up, and standing. Claimant also treated on April 26, 2008, and May 3, 2008 for those problems.

    - On January 7, 2011 Claimant began treating with Dr. So again for left-sided L5-S1 complaints with radiating back of leg pain. Claimant continued treatment on January 10, 2011; January 12, 2011; January 14, 2011; January 18, 2011; January 21, 2011; January 29, 2011; February 12, 2011; February 26, 2011; March 18, 2011; April 4, 2011; and April 11, 2011, for a total of twelve times.

    - On July 27, 2012, Claimant returned to Dr. So for treatment of right-sided L5-S1 symptoms.

10. On cross examination, Claimant recalled seeing Dr. So three times in early 2008 for pain with walking, sitting, and standing. However, she did not recall seeing him for twelve visits in 2011 for the same complaints. She admitted seeing Dr. So in 2012.

11. Claimant testified that she did not tell any of her treatment providers that she had chiropractic care for the same back issues within approximately two years of her alleged work injury. Despite her extensive chiropractic care in 2011 and her chiropractic visit in July 2012, Claimant told her treatment providers that she last had treatment for low back pain five years prior to her alleged work injury.

12. Claimant acknowledged that she was involved in a motor vehicle accident (MVA) on October 12, 2014 – less than two weeks after her date of injury -- in which her

car sustained $2000 in damages. Claimant did not report the MVA to any of her treatment providers. She testified that she did not sustain any injuries as a result of the accident.

13. Claimant's testimony was again contradicted by that of Ms. King, who testified that she saw Claimant the day after the MVA when Claimant came into Ms. King's office with medical paperwork including a release to work with restrictions. Ms. King testified that during that meeting Claimant said she was in a lot of pain because of the MVA. Ms. King did not recall the details of the MVA, but was clear that Claimant attributed her pain to the MVA and not to her alleged work injury.

Course of Treatment

14. Claimant's first treatment was at Concentra the night of September 29, 2014. On September 30, 2014, Claimant returned to Concentra where Dr. Lori Rossi reported that Claimant presented with worsening back pain; that muscle relaxants and NSAID did not provide relief; and that radiculopathy increased when Claimant sat for any extended period of time.

15. Claimant sought treatment from Dr. So on October 1, 2014, and reported difficulty standing, walking, bending, and lifting. Dr. So's impression was lumbar strain or sprain; nonallopathic lesions, lumbar and sacral; and sciatica. Claimant returned on October 17, 2014 and on October 20, 2014, with little improvement.

16. On October 3, 2014, Dr. John McArthur reported Claimant's lumbar spine x-rays were essentially normal, with no evidence of acute injury or significant degenerative change. Dr. Steven Abrams reviewed flexion and extension views of the lumbar spine that he read to reflect a minimal grade 1 anterolisthesis of L5 over S1, without instability. Dr. Rossi referred Claimant to orthopedic specialist Dr. Gary Ghiselli.

17. On October 10, 2014, orthopedic specialist, Dr. Ghiselli, reported Claimant presented with a previous back history with exacerbation of pain after a rather insignificant injury at work. Dr. Ghiselli noted significant pain behaviors during portions of his physical examination. He opined Claimant more than likely had a preexisting spondylolisthesis with a possible spondylosis at the L5 level. "There will be difficulty attributing this injury to anything that happened while lifting up like grocery baskets, and it is more than likely has a preexisting condition as she has been treated for back problems in the past with chiropractic treatment approximately 5 years ago…I think it would be difficult [for the] workers' comp system to accept this as a work-related injury." He recommended physical therapy.

18. On October 15, 2014, Dr. Rossi responded to questions from Respondent's counsel and agreed "with Dr. Ghiselli's assessment."

19. On October 23, 2014, Respondents filed a Notice of Contest based on (1) medical reports from Dr. Rossi and Dr. Ghiselli that the claim was not work related and (2) Claimant's reports of a medical history of back problems approximately 5 years prior for which she saw a chiropractor.

20. Claimant participated in physical therapy at Physiotherapy Associates from October 30, 2014, through January 27, 2015. Her therapist noted that Claimant "made very minimal progress since beginning PT and is limited by pain which is preventing the progression of exercises." Claimant was instructed to continue her home exercises and update Ms. Condas in three weeks on her status.

21. Claimant's primary care physician, Stephanie Kuenn PA-C, referred her to Dr. Sabin. On November 21, 2014, Claimant saw Dr. Sabin who noted a history of "moving heavy baskets" when she felt a pop in her back followed by pain. She rated her pain at about five to six over ten. Dr. Sabin reviewed two x-rays which showed "well-preserved disc spaces" and "minimal anterolisthesis L5-S1." Dr. Sabin recommended continued core strengthening and stabilization through physical therapy and yoga.

22. On December 19, 2014, Claimant again saw Dr. Sabin and reported her pain level as six and a half over ten in her left lower back. She reported that she attended physical therapy with little improvement. She described her pain as localized back pain with activity and right buttock and thigh pain. Dr. Sabin's impression was spondylolisthesis L5-S1; and exacerbation of lower back pain following injury at work.

23. On December 20, 2014, an MRI of Claimant's low spine was read to reflect degenerative changes with a small disc herniation at L5-S1 and mild bilateral foraminal impingement but no spinal stenosis or listhesis.

24. On December 29, 2014, PA Menshenfriend noted that Claimant "continues to complain of alternating buttock and leg symptoms."

25. On January 23, 2015, Dr. Sabin's office called Claimant "after a failed transforaminal epidural injection." Claimant had earlier undergone an epidural steroid injection of the right L5 nerve root on January 13, 2015 with Dr. Engen. Dr. Sabin did not see any surgical indication and felt conservative management was most appropriate. Claimant was instructed to follow up with her primary care physician if she wanted to continue pain management.

26. On February 11, 2015, Dr. Sabin noted that Claimant's MRI reflected a small left-sided bulge but without nerve root compromise or spinal stenosis. He clarified that her complaint was back pain and not radiculopathy. Also, he noted that the Claimant underwent epidural steroid injections at L5-S1 without success. He was unable to identify any surgical indications, and noted that Claimant was okay to return to work from his standpoint and that her "restrictions" were self-imposed. He opined Claimant was likely at maximum medical improvement and

he planned to discharge her back to her primary care physician. Claimant's attorney requested a letter from Dr. Sabin so he could transfer her care to another physician.

27. Claimant testified that medical treatment after her work injury included physical therapy, injections, massage, acupuncture, and medications all of which provided very little, if any, relief. In fact, her condition worsened even though she did not return to work. Claimant's attorney referred Claimant to Dr. Knight for additional injections.

28. Dr. Jack Rook performed a medical examination at Claimant's request. He related Claimant's condition to work. Dr. Rook, however, relied on Claimant's (1) reports of her prior back problems resolving five years prior to her work injury; (2) her report that the mechanism of her injury involved twisting; and (3) her failure to report her MVA. Claimant represented to Dr. Rook that she did not experience low back pain or symptoms for five years prior to the incident on September 29, 2014, despite Dr. So's records and Claimant's admission at hearing that she actually received chiropractic treatment for low back pain and sciatica in 2008, 2011 and 2012. Dr. Rook relied on Claimant's false report that "there were no other traumatic events . . . such as a motor vehicle accident." Dr. Rook opined that Claimant's December 20, 2014 MRI was abnormal and demonstrated disc herniation at L5-S1 that most likely happened on the date of the incident when she heard her back "pop." Dr. Rook's opinion was contradicted by Dr. Sabin's interpretation of the MRI: that it reflected a small left-sided bulge without nerve root compromise or spinal stenosis and the fact that Claimant's epidural steroid injection provided no relief. Dr. Rook's opinion regarding Claimant's disc herniation was also contradicted by Dr. Rossi who testified by telephone that a disc herniation does not make an audible sound.

29. Dr. Rossi testified at hearing. Dr. Rossi evaluated and treated Claimant two times in 2014. She referred Claimant to Dr. Ghiselli and other medical providers. Dr. Rossi analyzed causation and agreed with Dr. Ghiselli's opinion that it is difficult to attribute Claimant's injury to lifting grocery baskets at work and it is more likely that her problems are due to her preexisting back condition for which she treated with a chiropractor. Dr. Rossi testified to several important factors for an accurate causation analysis including: knowledge of the full extent of Claimant's history of back problems and treatment in 2008, 2011, and 2012, because the more recent the complaints and treatment, the more likely Claimant's preexisting condition did not resolve and her condition relates back to her non-work condition; five years ago, on April 23, 2008; Claimant reported her pain was aggravated by walking, getting up and standing and those are the same aggravating factors now; the mechanism of injury is not significant enough to cause a new injury because lifting baskets that cumulatively weigh 8 pounds and turning is inconsistent with the force necessary to cause Claimant's problems in a twenty something year old individual; it is very unlikely that the small left-sided disc bulge is the cause of her problems because the MRI reflected no nerve root compromise or spinal stenosis; objective tests were all normal; and Claimant's

condition has not improved as expected despite all of the treatment and the fact Claimant has not returned to work.

30. Dr. Rossi disagreed with Dr. Rook's causation analysis. She testified that Dr. Rook did not understand Claimant's medical history correctly because Claimant incorrectly represented to him that she did not experience low back pain or symptoms for five years prior to the September 29, 2014, work incident when in fact Claimant treated in 2011 and 2012. Also, Claimant did not tell Dr. Rook about her October 2014 auto accident. And, Dr. Rook related Claimant's back problems to the small disc bulge; however, the MRI does not reflect nerve root compromise and injections were not diagnostic. Finally, discs are a deep structure and do not make a popping sound when compromised; rather that sound is more typical of a tendon.

31. The ALJ finds that Claimant did not respond to any treatment including muscle relaxants, NSAIDs, acupuncture, massage, physical therapy, epidural steroid injections, transforaminal steroid injections, and not working.

32. The ALJ finds Claimant's reports of her injury to be inconsistent, exaggerated, and not supported by persuasive evidence.

33. The ALJ credits the testimony of Ms. King over that of Claimant with respect to Claimant's condition when she reported her alleged work injury, and Claimant attributing her pain to her MVA. The ALJ finds that Ms. King's testimony is more consistent with the evidence, particularly the fact that no one witnessed Claimant working in excruciating pain on the day of her alleged work injury; and Ms. King's testimony that the baskets Claimant testified she picked up weighed only 1.6 pounds each.

34. The ALJ finds Claimant inconsistently reported the mechanism of her alleged injury to her treatment providers; failed to accurately report her prior chiropractic treatment; and failed to report her MVA which occurred two weeks after her alleged work injury. The ALJ further finds that Claimant's inaccurate and incomplete reporting were material to the diagnosis and treatment she received.

35. Based on the totality of evidence, the ALJ finds that Dr. Rook's opinion on the relatedness of Claimant's injury to her employment is not persuasive because it is based on incorrect and incomplete information. The ALJ finds the opinions of Dr. Rossi to be based on a fuller and more accurate understanding of Claimant's medical situation. Therefore, the ALJ finds the opinions of Dr. Rossi to be more credible and persuasive than the opinions of Dr. Rook.

36. The ALJ finds Claimant failed to demonstrate that her job duties caused an injury to her back or aggravated her back condition. The ALJ finds it more likely than not that Claimant's problems are due to her preexisting back condition.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201. A Workers' Compensation case is decided on its merits. Section 8-43-201.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. An employee is entitled to worker's compensation benefits if injured performing service arising out of and in the course of employment. C.R.S. §8-41-301(1)(b)(c); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). Injuries "arise out of" the employment when the activity giving rise to the injuries is sufficiently interrelated to the conditions and circumstances under which the claimant generally performs his or her job, that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). In other words, the job or the injury placed the individual in a position where injury resulted. The "course of employment" requirement is met when the injuries occur during the time and place limits of the employment. *Popovich v. Irlando*, supra. There must be a direct causal relationship between the employment and the injuries. *See* C.R.S. §8-41-301 and *Ramsdale v. Horn*, 781 P.2d 150 (Colo. 1989).

4. Claimant failed to demonstrate that her job duties caused an injury to her back or aggravated her back condition. The ALJ credits the opinions expressed by Dr. Rossi and Dr. Ghiselli over the contrary opinion expressed by Dr. Rook in coming to this conclusion. Claimant's medical history supports the likelihood that her

problems are due to her preexisting back condition for which she treated with a chiropractor. Claimant failed to accurately report her medical history to most of her providers and to her independent medical examiner, Dr. Rook. Claimant incorrectly represented that she did not experience low back pain or symptoms for five years prior to the September 29, 2014, work incident when in fact Claimant treated in 2008, 2011, and 2012. Also, Dr. Rook was not aware of Claimant's October 2014 auto accident. Dr. Rossi pointed out that the more recent the complaints and treatment, the more likely Claimant's preexisting condition did not resolve and her condition relates back to her non-work condition. Finally, Claimant reported in 2008 that her pain was aggravated by walking, getting up, and standing and those are the same aggravating factors that she complained of following her alleged work accident.

5. The mechanism of injury does not support a work injury. Dr. Ghiselli, reported Claimant presented after a rather insignificant injury at work. Dr. Rossi testified that lifting baskets that weigh 8 pounds and turning is inconsistent with the force necessary to cause back problems in a twenty something year old individual.

6. The objective medical evidence does not correlate to the finding of an injury. Dr. Rossi credibly opined that it is very unlikely that the small left-sided disc bulge identified on MRI is the cause of Claimant's problems because, as Dr. Sabin noted, the MRI reflected no nerve root compromise or spinal stenosis. Also, discs are a deep structure and do not make a popping sound when compromised. In addition, all objective tests were essentially normal including x-rays, injections, and MRI. Claimant's orthopedist, Dr. Sabin, placed Claimant at maximum medical improvement and discharged her from his care despite her subjective complaints. Finally, Claimant's condition did not improve as expected despite all of her treatment and the fact Claimant had not returned to work. Physical therapy, injections, massage, acupuncture, and medications including muscle relaxants and NSAIDs provided very little, if any, relief and do not support a new injury.

7. Claimant's clinical examinations do not support a new injury. Medical records reflect mid and low back/buttock discomfort along with left upper leg numbness in 2008 that are similar to Claimant's complaints on October 1, 2014, when chiropractor Dr. So noted acute/constant moderate to severe low back, hip, and groin pain and tingling sensation in left her upper leg.

8. Claimant's seemingly exaggerated presentation to her physicians, failure to provide an accurate history, and unimproved symptoms despite medical treatment over a long period of time support a finding of non-work relatedness. For example, on a scale of 1 – 10, Claimant's pain was a 5 when her back popped and an 11 at the end of the day. Claimant failed to accurately disclose her medical history to her physicians and only reluctantly acknowledged she continued to treat for low back and buttock pain after 2008, after she was shown Dr. So's medical records on cross examination. Claimant admitted that she was in a car accident on October 12, 2014; however, she failed to mention the

accident to Dr. Rook. Claimant testified that she was not injured in the auto accident; however, she admitted that damage was done to her vehicle and she filed a small claims action against the other driver.

9. Ms. King's credibly testified that Claimant did not appear to be in a lot of pain on the date of the alleged work incident, however, several days later, Claimant returned to work after a non-work related motor vehicle accident and appeared to be in a great deal of pain and also told Ms. King that she was rear-ended and was in a lot of pain.

10. Dr. Rossi, Dr. Ghiselli, and Dr. Sabin could not identify a pain generator because all objective tests were essentially normal. Claimant testified that all activities aggravate her pain including standing, walking, and getting up and sitting.

11. In summary, the ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate her condition resulted from a specific injury to her back at work.

12. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999).

13. The employer/insurer has the right in the first instance to select the physician who attends the injured worker, however, the employer/insurer is required to designate two authorized medical providers at two distinct locations and provide that information to Claimant within seven business days following notice or knowledge of the injury. Failure to provide Claimant with a choice of two authorized medical providers allows Claimant to make the choice of medical provider with whom he wants to treat.

14. In this case, Claimant testified she did not receive a choice of provider form, however, on October 1, 2014; Respondents mailed Claimant a choice of medical provider form along with medical authorization releases. Claimant chose to treat and did treat at Concentra. The medical providers at Concentra and their referrals, including Dr. Rossi and Dr. Ghiselli, are authorized.

15. On November 21, 2014, Claimant saw Dr. Sabin to whom she was referred by her primary care physician, Stephanie Kuenn PA-C. Dr. Sabin is not authorized. Dr. Sabin reported that Claimant was likely at maximum medical improvement, he planned to discharge her back to her primary care physician, and that Claimant's attorney wanted a letter so that he could transfer her care to another physician. Then, as Claimant testified, her attorney referred Claimant to Dr. Knight for additional injections. Dr. Knight is not authorized.

16. Claimant does not require medical treatment for a work related back injury. Medical benefits for Claimant's alleged back injury are neither reasonably necessary nor related to the September 29, 2014 alleged work injury. Therefore, the ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate she needs medical care to cure and relieve the effects of a work related injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for compensatory benefits is denied and dismissed.

2. The medical providers at Concentra and their referrals, including Dr. Rossi and Dr. Ghiselli, are authorized. Dr. Sabin is not authorized. Dr. Knight is not authorized.

3. Claimant does not require medical treatment for a work related back injury. Therefore, medical benefits are denied and dismissed.

4. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 25, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury to her left knee during the course and scope of her employment with Employer on September 17, 2014.

FINDINGS OF FACT

1. Claimant worked for Employer as a Medical Supply Chain Technician. In February 2011 Claimant tripped over a step stool while working for Employer and injured her left knee. She subsequently underwent an arthroscopic procedure for her injury with Mark S. Failinger, M.D. He noted that Claimant's left knee demonstrated "considerable arthritic changes."

2. On September 17, 2014 Claimant was walking around a corner while coworker Ryan Modica was pushing a supply cart around the same corner. The cart struck Claimant in the lower extremities below the knees. Claimant reacted in pain. She suffered a contusion, bruising and laceration on her right shin. Claimant remarked that the impact hyperextended her left knee.

3. Mr. Modica explained that he was pushing a flatbed cart that was approximately eight to ten inches above the ground. The cart was made of plastic and had front wheels similar to those on a shopping cart. Mr. Modica described the incident as a bump and did not strike Claimant's shins with any significant force.

4. On September 17, 2014 Claimant mentioned the cart incident to Employer's Manager of Supply Chain Denise Rowley. Nevertheless, Claimant performed her regular job duties during the following week.

5. On September 28, 2014 Claimant reported that she had injured her left knee as a result of the September 17, 2014 incident. Claimant specified that the flatbed cart struck her on the left knee. Based on Claimant's continuing pain Employer referred her to Authorized Treating Physician (ATP) John Fox, M.D. for an evaluation.

6. On September 29, 2014 Claimant visited Dr. Fox for an examination. Dr. Fox recommended an MRI and released Claimant to full duty employment.

7. On October 3, 2014 Claimant returned to Dr. Fox for an evaluation. Claimant reported that a "co-worker hit her in the left shin with a cart and she has had significantly increased pain ever since." Dr. Fox noted that Claimant also reported "pain radiating down the shin and numbness in her toes." Dr. Fox attributed Claimant's left lower extremity condition to her work activities. He placed Claimant on restricted work duty, prescribed a knee brace and again ordered a left knee MRI.

8. On October 14, 2014 Claimant underwent an MRI of her left knee. The MRI revealed the following: (1) a degenerative medial meniscus without evidence of tearing; (2) a probable degenerative tear of the anterior horn of the lateral meniscus; (3) three compartment chondromalacia and (4) a small joint effusion.

9. On October 15, 2014 Claimant returned to Dr. Fox for an examination. After reviewing the MRI Dr. Fox remarked "MRI of the left knee showed extensive degenerative changes including some degenerative tearing of the lateral meniscus. No acute abnormalities were appreciated."

10. In addressing causation Dr. Fox commented:

> I discussed causality with the patient and it is difficult if not impossible to state with any degree of certainty how much of her pathology is attributed to her prior knee injury. At any rate, patient states that she was essentially asymptomatic until the recent incident where she was hit by a cart. None of the pathology seen on the MRI seems to be attributable to the most recent incident but appears to be more chronic in nature and could have been at least partially accelerated by her prior [2011] knee injury.

11. Dr. Fox referred Claimant to Cornerstone Orthopedics for an evaluation. On October 28, 2014 Claimant underwent an examination with William Ciccone, M.D. Dr. Ciccone remarked that Claimant's left knee MRI revealed a "degenerative medial meniscus without evidence of tear with probable degenerative tearing of the anterior horn of the lateral meniscus with three compartment chondromalacia." In addressing Claimant's September 17, 2014 accident Dr. Ciccone commented that she "seemed to suffer a small injury to her pre-tibial area. She did not have significant injury to her knee."

12. Claimant returned to Dr. Ciccone for examinations on November 21, 2014 and December 5, 2014. In evaluating Claimant's left knee condition he noted that "I believe a lot of her symptoms are coming from the degenerative changes within her knee." Dr. Ciccone also commented that Claimant's "pain is really diffuse in nature and appears to be more arthritic."

13. On February 13, 2015 Claimant visited Dr. Failinger for an evaluation. He diagnosed chondromalacia of the left knee.

14. On February 27, 2015 Claimant visited Todd M. Milner, M.D. for an examination. Dr. Milner noted that Dr. Failinger had referred Claimant for a "second opinion evaluation of chronic and worsening left knee pain, stiffness and declining mobility." Claimant reported her prior left knee treatment that included a 2011 arthroscopic procedure. The procedure revealed "considerable arthritic changes." Dr. Milner commented that ""over the past couple of years [Claimant's] chronic diffuse left knee pain has become markedly worse." He also remarked that Claimant "has had dramatically worsening left knee pain and stiffness over the past couple of years." Dr.

Milner summarized that radiographic evidence, a clinical examination and an arthroscopic evaluation revealed “advanced osteoarthritic change of the knee.”

15. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury to her left knee during the course and scope of her employment with Employer on September 17, 2014. The consistent reports of Claimant’s physicians reveal that her left knee symptoms were not related to her September 17, 2014 accident but constituted a chronic worsening of her left knee condition.

16. Although Dr. Fox initially attributed Claimant’s left knee symptoms to her work activities a subsequent MRI revealed extensive degenerative changes. After reviewing the MRI Dr. Fox noted that “none of the pathology on the MRI was attributable to the September 17, 2014 accident but “appear[ed] to be more chronic in nature “ Dr. Ciccone also determined that Claimant’s diffuse left knee symptoms were caused by arthritic changes. Finally, Dr. Milner summarized that radiographic evidence, clinical examination and an arthroscopic evaluation revealed “advanced osteoarthritic change of the knee.” He detailed that Claimant has experienced chronic, diffuse left knee pain over the past two years that “has become markedly worse.” The persuasive medical evidence thus reveals that Claimant has suffered degenerative, worsening and diffuse left knee pain over the past two years. Although there was a temporal correlation between the September 17, 2014 incident and Claimant’s left knee symptoms, any increased pain constituted the logical and recurrent consequences of her pre-existing left knee condition. Accordingly, the September 17, 2014 incident did not aggravate, accelerate, or combine with Claimant’s pre-existing left knee condition to produce a need for medical treatment. .

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury to her left knee during the course and scope of her employment with Employer on September 17, 2014. The consistent reports of Claimant's physicians reveal that her left knee symptoms were not related to her September 17, 2014 accident but constituted a chronic worsening of her left knee condition.

8. As found, although Dr. Fox initially attributed Claimant's left knee symptoms to her work activities a subsequent MRI revealed extensive degenerative changes. After reviewing the MRI Dr. Fox noted that "none of the pathology on the MRI was attributable to the September 17, 2014 accident but "appear[ed] to be more chronic in nature " Dr. Ciccone also determined that Claimant's diffuse left knee symptoms were caused by arthritic changes. Finally, Dr. Milner summarized that radiographic evidence, clinical examination and an arthroscopic evaluation revealed "advanced osteoarthritic change of the knee." He detailed that Claimant has experienced chronic, diffuse left knee pain over the past two years that "has become markedly worse." The persuasive medical evidence thus reveals that Claimant has suffered degenerative, worsening and diffuse left knee pain over the past two years. Although there was a temporal correlation between the September 17, 2014 incident and Claimant's left knee symptoms, any increased pain constituted the logical and recurrent consequences of her pre-existing left knee condition. Accordingly, the September 17, 2014 incident did not aggravate, accelerate, or combine with Claimant's pre-existing left knee condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 22, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from October 17, 2014 through December 16, 2014, subject to offsets.

- The parties stipulated that if the claim is found compensable, the Respondents shall designate a physician to treat claimant for his work injury?

- The parties stipulated to an average weekly wage ("AWW") of $565.31.

FINDINGS OF FACT

1. Claimant is employed as a mechanic for employer. Claimant testified at hearing that he has been employed with employer for 18 ½ years. Claimant testified that his job duties include working on cars and performing general mechanic duties including repairing transmissions and engines. Claimant testified that on a daily basis he will lift items weighing more than thirty five (35) pounds.

2. Claimant testified that he had noticed a hernia in his abdomen previously that would pop out on occasion. Claimant testified that when he noticed his hernia pop out, he would pop it back in manually. Claimant testified that the hernia developed after doing some front end work on a car in April 2014.

3. Claimant testified that on October 16, 2014, he was working on a Jeep that was brought in to change out the front end axels. Claimant testified he pulled out the back axle by himself and experienced abdominal pain when he lifted the rear axle. Claimant testified he then asked of assistance with the front axle from a co-worker. Claimant testified he was hurting pretty good, but continued to work.

4. Claimant testified that his pain level increased significantly after October 16, 2014 and he began vomiting around 7:00 p.m. that evening after he got home. Claimant sought treatment at an Urgent Care facility and was referred to the Emergency Room ("ER") at Community Hospital. Claimant subsequently underwent surgery on October 17, 2014 under the auspices of Dr. Morse.

5. The medical records from the ER note that claimant reported with a history of abdominal pain for one day in the epigastric region. Claimant reported a history of a ventral hernia from a previous surgery and bowel resection and noted that he was unable to reduce the hernia yesterday as usual. Claimant reported he was finally able to push it back in, but had increased pain. The prior surgery was noted to be a right colon resection with appendectomy performed in 2011 for a benign colon tumor.

6. Dr. Morse issued a letter dated November 18, 2014 that noted that claimant had undergone an incisional hernia repair. Dr. Morse noted that claimant described that the hernia occurred at the site of a previous surgical incision, but that did not mean that the hernia was a direct result of the original surgery. Dr. Morse noted that claimant described the hernia occurring with acute strangulation while lifting at work. Dr. Morse opined that per the history provided by claimant, he believed the injury should be covered by workers' compensation.

7. Respondents obtained a medical records review independent medical examination ("IME") from Dr. Thurston on March 13, 2015. The IME report noted claimant's history and Dr. Thurston opined that claimant did not sustain an "accident" or work-related injury. Dr. Thurston noted that claimant had an incisional hernia resulting from incomplete healing following his 2011 surgery. Dr. Thurston further noted that the surgical report indicated that there was scarring and adhesion that would have occurred over days, weeks or even months, and would not have happened in one day.

8. The ALJ credits the medical opinions of Dr. Morse over the contrary medical opinions expressed by Dr. Thurston and along with claimant's testimony at hearing and finds that claimant has demonstrated that he sustained a compensable injury arising out of and in the course of his employment with employer. The ALJ credits claimant's testimony that his hernia was significantly worsened resulting in the need for surgery after his lifting at work on October 16, 2014 as credible and persuasive. The ALJ further credits the medical opinion expressed by Dr. Morse that claimant provided this accident history to him as occurring while lifting at work

9. Claimant testified at hearing that he was taken off of work following his surgery and returned to work on December 17, 2014. However, the medical records from Dr. Morse entered into evidence by Claimant at hearing contain a report releasing claimant to return to regular work as of December 1, 2014.

10. The ALJ finds that claimant has proven that it is more likely than not that he is entitled to TTD benefits commencing October 17, 2014 and continuing until December 1, 2014. The ALJ denies claimant's request for an order allowing for TTD benefits through December 16, 2014.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer on October 16, 2014. As found, the ALJ credits the testimony of claimant along with the medical opinions expressed by Dr. Morse in finding the claimant has proven a compensable injury arising out of and in the course of his employment with employer.

5. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM*

Molding, Inc. v. Stanberg, supra. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

6. As found, claimant has proven by a preponderance of the evidence that his injury resulted disability that impaired his wage earning capacity as demonstrated by claimant's inability to resume his prior work.

7. Section 8-42-105(3)(c), C.R.S. provides that TTD benefits shall continue until the attending physician gives the employee a written release to return to regular employment.

8. As found, Dr. Morse issued a release returning claimant to regular employment as of December 1, 2014. While claimant testified at hearing that he did not return to work for employer until December 17, 2014, the written release from Dr. Morse indicates claimant was released for regular employment as of December 1, 2014 and respondents are therefore able to cut off TTD benefits pursuant to Section 8-42-105(3)(c), C.R.S. as of December 1, 2014.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his industrial injury.

2. Respondents shall pay claimant TTD benefits for the period of October 17, 2014 through December 1, 2014 based on the stipulated AWW of $565.31.

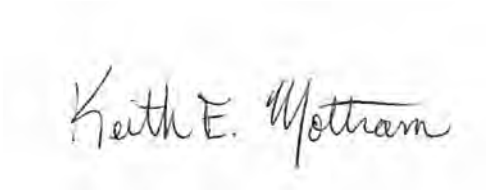
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits commencing October 18, 2014 and continuing until terminated by law or statute?

- Whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to her termination of employment?

- The parties stipulated prior to hearing that claimant's average weekly wage ("AWW") for her injury is $1,141.37. The parties' stipulation includes claimant's cost of converting her employer funded health insurance.

FINDINGS OF FACT

1. Claimant was employed with employer as an assistant manager. Claimant had been employed with employer for approximately 16 years, having worked previously for employer in a different state. Claimant testified that she was working the overnight shift starting on October 11, 2014 at 7:30 p.m. Claimant testified that at approximately 12:30 a.m. to 1:00 a.m. on October 12, 2014, she was pulling a pallet up a ramp when she injured her low back.

2. Claimant testified she finished pulling pallets off the truck, then went to the assistant manager's office to lie down for a while, but lying down did not alleviate her pain. Claimant tested her boss, Mr. Meade at approximately 3:00 a.m. to 3:30 a.m. regarding her injury. Claimant testified Mr. Meade called claimant back and she informed Mr. Meade that she had hurt her back. Claimant testified Mr. Meade told claimant not to go to the doctor right away and to wait for a support manager to relieve her.

3. Claimant testified Mr. Meade arrived at the store at approximately 7:00 a.m. to 7:30 a.m. Claimant testified she was sitting on an electric cart when Mr. Meade arrived and he inquired how she was feeling. Claimant testified she informed Mr. Meade she was still hurting. Claimant testified after Mr. Meade relieved her, she went home, took pain medications and laid down, but she could not sleep.

4. Claimant testified that she was scheduled to go back to work at 7:30 p.m. on Sunday (October 12, 2014) for a shift that would last until 8:00 a.m. Monday morning. Claimant testified she called Mr. Meade at 4:00 p.m. to report that she could not return to work. Claimant testified that Mr. Meade returned her call approximately

15-20 minutes later, and told claimant that she would do this all the time when inventory needed to be done or Black Friday and claimant should think about whether or not she wants to be an assistant manager. Claimant testified that Mr. Meade called back later and told claimant to turn her keys and discount car in to human resources. Claimant asked Mr. Meade if he was firing her, and Mr. Meade said "yes".

5. Claimant then drove to employer's store and dropped off her badge, keys and discount card on the assistant manager's desk.

6. Claimant testified as to several more conversations between her and Mr. Meade in which Mr. Meade called and inquired as to how claimant was doing, and she informed Mr. Meade that she was still in pain and expressed anger over Mr. Meade firing her. Claimant testified as to multiple instances in which Mr. Meade inquired as to why she was not at work, and she claimant explained it was because she had been fired.

7. Claimant testified on cross-examination that when Mr. Meade called her and inquired as to why she was not at work, she realized she had not been fired and still had a job with employer. Claimant testified that she told Mr. Meade that she was going to take a shower and would then come into work. Claimant testified that while she was in the shower, she realized Mr. Meade was playing mind games with her and decided she was not going to go into work. Claimant testified that she felt Mr. Meade was argumentative, was playing mind games and was raising his voice, and she took offense with how she was treated by Mr. Meade.

8. Respondents presented the testimony of Ms. Palmer, the human resources manager for employer. Ms. Palmer testified that she investigated the situation involving Mr. Meade and claimant. Ms. Palmer spoke with Mr. Meade regarding the incident and then spoke with claimant regarding the incident. Ms. Palmer testified she terminated claimant after determining that claimant had abandoned her job. Ms. Palmer testified that she could have offered coaching for claimant that would not have resulted in her termination, but decided to terminate claimant because she this involved a gross display of job abandonment.

9. According to the termination notice completed by employer claimant was terminated when she "did not show up to work on the night of October 12, 2014. When contacted by the store (claimant) stated that she placed her name badge and other work items on the desk in the assistant mangers office. We accept her resignation without a two week notice." Ms. Palmer testified at hearing that this was completed by Ms. Simon with employer

10. Ms. Palmer testified on cross-examination that she was aware that claimant was injured on October 12, 2014. Ms. Palmer further testified that claimant had called in sick for the shift from 7:30 p.m. October 12, 2014 until 8:00 a.m. October 13, 2014.

11. The ALJ notes that although Ms. Palmer indicated to Mr. Meade in on October 15, 2014 that they needed to document everything, very little documentation was kept with regard to Ms. Palmer's investigation and her interviews with Mr. Meade. Ms. Palmer testified that she put her notes into an e-mail draft, but was unable to find the e-mail.

12. Regardless, Ms. Palmer testified on cross-examination that Mr. Meade's behavior was unprofessional. Ms. Palmer testified that Mr. Meade had informed her that he had lost his temper and had told claimant he wanted to fire her.

13. Claimant presented to Dr. Mordi on October 13, 2014 at 8:23 a.m. with reports of injuring her back while pulling a pallet jack. Dr. Mordi diagnosed claimant with a low back strain and provided claimant with medications including Flexeril and a Medrol dosepak. Claimant also restricted from any lifting or carrying and was instructed to follow up in 10 days.

14. Ms. Palmer testified at hearing that employer could have provided work within the restrictions set forth by Dr. Mordi. However, respondents refused to offer claimant coaching or work within her restrictions, and instead terminated claimant from her employment with employer based on job abandonment.

15. The ALJ credits claimant's testimony at hearing that she was experiencing pain in her low back following the October 12, 2014 work injury as persuasive. The ALJ credits claimant's testimony that the pain was significant enough that in the morning of October 12, 2014 she was utilizing an electric cart while finishing her shift for employer. The ALJ finds this testimony supported by the medical records of Dr. Mordi that document claimant reporting pain in her low back on October 13, 2014 significant enough that Dr. Mordi provided claimant with work restrictions that included no lifting.

16. The ALJ credits claimant's testimony and the medical records of Dr. Mordi and determines that claimant was restricted from working in her regular job with employer as a result of her work injury.

17. Respondents maintain in their position statement that it is inconsistent for claimant to have driven to employer's store to drop off her badge and keys if she were in pain. Respondents fail to explain how this is inconsistent if claimant was instructed to drop of her keys and badge by her supervisor for her to follow this instruction. Respondents maintain that claimant could not have been in the amount of pain she claimed to be in if she was willing to travel to employer's store to drop off her badge and keys. However, compensability is not at issue here, and the ALJ fails to see how claimant following the instructions of her supervisor would be inconsistent in this case.

18. While employer maintains that claimant was terminated for job abandonment, based on the fact that claimant had a conversation with Mr. Meade at approximately 8:13 p.m. in which claimant was told to come to work and she informed

her supervisor (Mr. Meade) that she would take a shower and then come to work, Ms. Palmer testified that she was aware that claimant had attempted to call in sick prior to this phone call.

19. Moreover, according to the written statement contained in the file by Mr. Clavery, he saw claimant at the store at approximately 6:00 p.m. on October 12, 2014 when she told him that she had put her stuff on the desk. This is consistent with claimant's testimony that Mr. Meade had terminated her, and she had taken her things to the store as instructed. The ALJ determines that claimant's employment was terminated by Mr. Meade in his conversation with claimant prior to 6:00 p.m. on October 12, 2014. The ALJ further finds that it was reasonable for claimant to believe Mr. Meade had taken necessary steps to terminate her employment and to follow his instructions, as her supervisor, to turn in her badge, keys and discount card.

20. Ms. Palmer testified that as a result of claimant not coming into work, another assistant manager, Mr. Clavery, had to work a 24 hour shift. Ms. Palmer testified that if Mr. Meade had known claimant was not going to show up for work, Mr. Meade could have worked claimant's scheduled shift so Mr. Clavery would not have worked a full 24 hour shift.

21. However, Mr. Meade was aware on the evening of October 12, 2014 that his conversations with claimant had resulted in her advising him that she believed she was fired. Moreover, Mr. Meade was aware that claimant had attempted to call in sick for her scheduled shift. There was no credible evidence presented that Mr. Meade made any attempts to cover claimant's shift when he was aware that she had called in sick and was under the impression that she was fired, other than to pressure claimant into coming into work. Moreover, Mr. Meade was aware that claimant was alleging a work injury on her prior shift.

22. The fact that Mr. Meade did not make arrangements for claimant's shift to be covered when she called in sick does not result in a finding that claimant committed a volitional act that led to her termination of employment. If Mr. Meade had made arrangements for claimant's shift to be covered when she initially called in sick, the issue with Mr. Claverly working a 24 hour shift would not have occurred. More importantly, Ms. Palmer testified that claimant had attempted to call in sick prior to missing her shift. Under the facts of this case, the ALJ does not find that claimant's actions of not appearing for work after attempting to call in sick following a work injury (which resulted in significant confusion as to whether claimant was terminated) establish that the injured worker committed a volitional act that resulted in her termination of employment.

23. Respondents presented no credible evidence that indicated claimant would be prohibited from calling in sick for her October 12 to October 13, 2014 shift. While employer noted that inventory was taking place during this time, there was also evidence that claimant's shift could have been covered by an assistant manager for a

different store. Additionally, while some evidence was presented that claimant had previously missed time from work during inventory or Black Friday, no credible evidence was presented as to whether this was a regular occurrence or to what degree it had occurred. Respondents effectively maintain that if claimant attempts to call in sick, and is pressured by her supervisor to appear for work, then agrees to appear for work, but ultimately decides to stay home, *after having previously called in sick*, claimant has abandoned her job. In the present case, the ALJ disagrees.

24. The ALJ credits the testimony of claimant and determines that Mr. Meade in the present case pressured claimant to appear at work after claimant called in sick. This testimony is supported by the telephone records entered into evidence and by the testimony of Ms. Palmer, who testified she was aware claimant had attempted to call in sick for her October 12, to October 13, 2014 shift. Claimant was then terminated after she failed to appear for her shift for which she had called in sick. The ALJ determines that respondents have failed to establish that claimant committed a volitional act that resulted in her termination of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. Likewise, Respondents have the burden of proving any affirmative defenses raised at hearing by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P2d 1205 (1936); CJI, Civil 3:16 (2008).

3. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

4. The ALJ credits the medical records from Dr. Mordi along with the testimony of claimant and determines that claimant has established that it is more probable than not that she is entitled to an award of TTD benefits beginning October 13, 2014 when she was placed on restrictions by Dr. Mordi.

5. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

6. As found, respondents have failed to establish that claimant committed a volitional act that resulted in her termination of employment. As found, claimant was terminated for job abandonment after she called in sick to her employer. As found, no credible evidence was presented that claimant voluntarily abandoned her job. Instead, claimant attempted to call in sick, was informed by her supervisor she was fired, dropped off her keys and badge, was then informed by her supervisor she had not been

fired and should show up for work. After claimant agreed to show up for work, then decided not to show up for work, and having already called in sick, claimant was terminated. Under the facts of this case, the ALJ fails to find that claimant committed a volitional act by abandoning her job with employer.

ORDER

It is therefore ordered that:

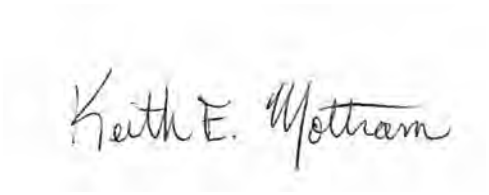
1. Respondents shall pay claimant TTD benefits commending October 13, 2014 and continuing until terminated by law or statute based on the stipulated AWW.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 28, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the claimant from the effects of the work injury and was provided by a physician authorized to treat claimant for his injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary partial disability ("TPD") for the period of September 12, 2014 through October 25, 2014??

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") from October 26, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage?

FINDINGS OF FACT

1. Claimant was employed with employer working in construction. Claimant testified that in September 2014 he was doing frame work for houses when he was picking up windows and felt pain in his low back. Claimant testified that his date of injury was September 11, 2014.

2. Claimant testified he told his two supervisors, "Carlos" and Mr. Alcaraz about his injury. Claimant testified he did not seek medical treatment on the day of the injury. Claimant returned to employer the day following the injury, but did not work all day. Claimant eventually sought medical treatment at the emergency room ("ER") on September 13, 2014 and reported he had moderate back pain that radiated into his left buttock. Claimant reported to the ER that he injured his back lifting, turning and bending. Claimant noted that the pain was similar to prior episodes. The ER physician, Dr. Walker, referred claimant for physical therapy.

3. Mr. Ringstad testified at hearing that the first he became aware of claimant's injury was when he was contacted by someone from the ER who reported to him that claimant was in for medical treatment. Mr. Ringstad testified at hearing that claimant reported his injury to him in person on Tuesday, September 16, 2014. Mr. Ringstad testified that he was unaware of an injury to claimant prior to September 13, 2014 when he was contacted by the ER.

4. Respondents presented the testimony of Mr. Alcaraz, claimant's supervisor. Mr. Alcaraz testified that claimant did not suggest to him on September 11, 2014 that he had injured his back. Mr. Alcaraz further testified that he was not working with claimant on September 11, 2014 as he was on a different job site that day. On cross examination, although Mr. Alcaraz consistently maintained that he did not work with claimant on September 11, 2014, he could not recall which dates he did work with claimant or which dates he worked on particular job sites. Mr. Alcaraz further established that employer was in the process of moving windows as claimant described in his direct examination during September 2014, but could not identify specific dates that such work would have been performed. Mr. Alcaraz's testimony is found to be less than credible as he appeared to have a very selective memory with regard to when work was being performed. Mr. Alcaraz would only offer testimony regarding specific dates that was designed to bolster respondents' case, while claiming ignorance to any questions involving dates that would allow the fact finder to ascertain the truth involving claimant's alleged injury. Mr. Alcaraz's testimony appeared designed to confuse the issues involving claimant's injury and frustrate the process of developing the truth. For this purpose, Mr. Alcaraz's testimony is completely disregarded by the ALJ.

5. Claimant was evaluated at Mountain View Therapy on September 16, 2014. Claimant reported complaints of constant pain in his mid to left lumbar area with occasional sharp shooting pain down his left leg. Claimant reported he had fallen about 4 months ago following which he treated at the ER for back pain and returned to work without seeing a physical therapist. Claimant reported to the therapist that he experienced sharp pain down his left leg after lifting a heavy window frame and returned to the emergency room. Claimant reported his pain was worse following the lifting incident.

6. Claimant was referred for medical treatment with Dr. O'Meara. Dr. O'Meara evaluated claimant on October 22, 2014. Dr. O'Meara noted claimant's prior back injury in April 2014 and noted that claimant reported he was injured again on September 13, 2014 in the same area of the low back when he was lifting windows. Dr. O'Meara noted that claimant could remain at full duty "while we determine causality". Dr. O'Meara noted that based on the records provided and the history, it was unclear whether or not "this is truly related to the workplace or simply a recurrent low back strain."

7. Dr. O'Meara's records indicate claimant was a "no show" for his visit on October 27, 2014 and claimant was discharged from care based on the claim being a "non-occupational injury"

8. Respondents authorized claimant to continue medical care with the Telluride Medical Center. Claimant was evaluated by Ms. Cattell, a physician's assistant, on October 27, 2014. Ms. Cattell noted claimant reported radiation of pain down the left leg to the foot after he was hurt at work when he was lifting windows. Ms. Cattell noted that claimant denied any previous injury to his low back and also complained of numbness down his right leg. Claimant reported he did not feel he could work anymore due to his pain. Ms. Cattell took claimant off of work for the period of October 27, 2014 thought November 11, 2014.

9. Claimant returned to Ms. Cattell on November 10, 2014. Claimant reported to Ms. Cattell that he continued to undergo physical therapy and felt his back was slowly improving. Claimant was taking Percocet for the pain. Ms. Cattell recommended claimant continue physical therapy and remain off work.

10. Claimant returned to Ms. Cattell on December 1, 2014. Ms. Cattell noted claimant continued to complain of pain down his left leg to the foot. Claimant was provided with an injection of Tordol and continued with a prescription for Percocet. Ms. Cattell continued claimant off of work.

11. Claimant returned to Ms. Cattell on December 15, 2014. Ms. Cattell noted claimant reported through a translator that he had injured his back earlier in the year and attempted to work through it after being evaluated at Montrose Memorial Hospital. Claimant then reinjured his back in September and was again seen again at Montrose Memorial Hospital. Ms. Cattell noted that claimant had been taking medications and performing physical therapy for 8 weeks with no improvement and she felt it was reasonable to refer claimant for a magnetic resonance image ("MRI"). Claimant was again taken off of work.

12. Claimant was referred by respondents for an independent medical examination ("IME") with Dr. Fall on February 17, 2015. Dr. Fall reviewed claimant's medical records, obtained a medical history and performed a physical examination of claimant. Claimant reported to Dr. Fall that he had previously injured his back a few months prior to September 11, 2014 when he slipped on ice and fell backwards. Claimant reported to Dr. Fall that he was injured in September 2014 when he lifted a window while at work. Dr. Fall noted that claimant exhibited significant pain behaviors and had positive Waddell signs. Dr. Fall opined that claimant's current symptoms were not consistent with the alleged mechanism of injury and not consistent with physical examination findings. Dr. Fall opined that she was unable to state within a reasonable degree of medical probability that claimant suffered an injury at work on September 11,

2014, and that if an incident did occur, it was a temporary aggravation of a pre-existing condition.

13. Claimant testified at hearing consistent with her report. Dr. Fall noted that claimant complained of right hand pain that had no correlation to his alleged work injury. Dr. Fall noted claimant's description of his injury was vague and non-specific. Dr. Fall noted that the evaluation showed no evidence of a lumbar strain and no need for medical treatment. Dr. Fall opined that an MRI was not medically necessary as there were no objective findings on examination.

14. The ALJ credits the medical records in this case, along with claimant's testimony at hearing that he suffered an onset of back pain after lifting windows on September 11, 2014 as being persuasive to the issue of whether claimant suffered a compensable injury at work. The ALJ notes that conflicting evidence was presented at hearing as to whether claimant was working with Mr. Alcaraz on September 11, 2014, but the ALJ resolves this conflict in favor of claimant and against respondents.

15. In finding the claim compensable, the ALJ credits the medical records from the treating physicians including Ms. Cattell regarding the cause of claimant's condition over the conflicting opinion expressed by Dr. Fall in her report and testimony. The ALJ notes that while Ms. Cattell was not apparently aware of claimant's prior accident in April 2014, claimant did report this incident to her eventually in December 2014.

16. The ALJ notes that claimant has provided a consistent accident history to his medical providers of his injury occurring at work while lifting windows. The ALJ further finds that despite Mr. Alcaraz's testimony that claimant was not working with him on September 11, 2014, there was work involving windows being performed in September 2014 for employer. The ALJ credits claimant's testimony that he had a new onset of symptoms following the incident lifting the windows and determines that claimant has established that he suffered a compensable injury on September 11, 2014.

17. The ALJ notes that claimant had a prior injury occurring in April 2014. However, claimant was treated for this injury and was not under active medical care at the time of the September 11, 2014 work injury. The ALJ credits that medical records and determines that claimant has demonstrated that it is more probable than not that the incident lifting windows on September 11, 2014 aggravated, accelerated or combined with claimant's pre-existing condition to cause the need for medical treatment.

18. The ALJ notes that claimant sought care with the ER following his injury. The ALJ does not find that the treatment with the ER was true "emergency" medical care. The ALJ notes that claimant had previously sought medical care through an ER and does not find respondents responsible for the care through the ER. Claimant

returned to work the day after his injury and did not seek medical treatment until the weekend, several days after his injury. Under these circumstances, the ALJ finds claimant's treatment with the ER to be unauthorized medical treatment.

19. The ALJ does find claimant's treatment with Dr. O'Meara and Telluride Medical Center ("Ms. Cattell") to be within the authorized chain of referrals. The ALJ credits the testimony at hearing that claimant was allowed to treat with the Telluride Medical Center in Telluride pursuant to his request from employer.

20. The ALJ finds that the employment records document that in the 14 weeks that include claimant's date of injury, claimant earned $8,198.50. The ALJ determines that claimant's AWW is properly established at $585.61. The ALJ does not include claimant's earning prior to the June 27, 2014 pay period as it appears from the medical records that claimant had undergone medical treatment to his right foot during this period of time including a surgery to his foot on or about early June 2014, which could explain the lower earnings reflected in the June 13, 2014 paycheck.

21. The ALJ finds that claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to an award for TPD benefits for the period of September 12, 2014 through October 25, 2014. The ALJ notes that claimant was not under work restrictions during this time and the wage records establish that for part of that period of time, claimant was able to continue working full time (earning more than his AWW for the paycheck issued October 17, 2014). Claimant has failed to establish that any wage loss during the September 12, 2014 through October 25, 2014 pay period would be related to his injury.

22. The ALJ finds that claimant was taken off of work completely by Ms. Cattell effective October 27, 2014 and finds that claimant has demonstrated that he is entitled to TTD benefits commencing October 27, 2014 and continuing until terminated by law or statute. The ALJ credits the reports of Dr. Cattell in making this finding.

23. The ALJ notes that the period of TTD endorsed by claimant was for October 26, 2014 and continuing, but finds that Ms. Cattell did not take claimant off of work until October 27, 2014.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo.

306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. As found, claimant has proven that lifting windows on September 11, 2014 caused an injury that aggravated , accelerated or combined with claimant's preexisting condition to produce the disability and need for treatment.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the

time of the injury, the employee shall have the right to select a physician or chiropractor."

7. In *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990), the Colorado Court of Appeals held that in cases of medical emergency, the injured worker does not need to seek authorization from the employer or insurer before obtaining medical treatment from an unauthorized provider. However, a question may be raised as to whether a bona fide emergency exists that would justify treatment at an emergency room. *See Timko v. Cub Foods*, W.C. No. 3-969-031 (June 29, 2005).

8. In the present case, as found, claimant has failed to establish by a preponderance of the evidence that his treatment at the ER on September 13, 2014 was a bona fide emergency.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. As found, claimant has proven by a preponderance of the evidence that he sustained an injury that led to a medical incapacity in his ability to work as evidenced by the work restrictions set forth by Ms. Cattell beginning October 27, 2014. As found, respondents are liable for TTD benefits beginning October 27, 2014 and continuing until terminated by law or statute.

11. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). As found, claimant has failed to establish that his work injury contributed to some degree of a temporary wage loss for the period of September 12, 2014 through October 25, 2014.

12. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

13. As found, claimant's AWW for his September 11, 2014 work injury is established to be $585.61 based on the payroll records entered into evidence.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury from Dr. O'Meara and Telluride Medical Center.

2. Claimant's claim for payment of the medical bills from the ER at Montrose Memorial Hospital is denied and dismissed.

3. Respondents shall pay claimant TTD benefits commencing October 27, 2014 and continuing until terminated by law or statute based on an AWW of $585.61.

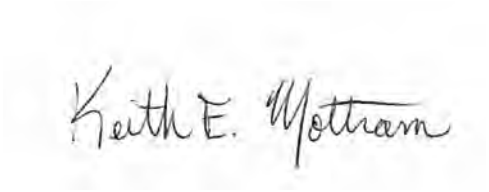
4. Claimant's request for TPD benefits is denied and dismissed.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 6, 2015



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Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Did the claimant establish by a preponderance of the evidence that the claimant's left knee revision surgery on September 8, 2014 was causally related to her industrial injury of December 14, 2007.

2. Did the claimant establish by a preponderance of the evidence that the claimant's need for medical care of her bilateral foot and ankle conditions was causally related to her industrial injury of December 14, 2007.

FINDINGS OF FACT

1. The claimant was injured in an admitted industrial injury on December 14, 2007, wherein she suffered an injury to her *left* knee caused by a twisting motion.

2. The claimant was seen by the respondent-employer's designated medical providers. Dr. Daniel Olson cared for the claimant most of that time with referrals to Dr. Davis and Dr. Xenos.

3. It was eventually determined medically that the claimant was in need of a total *left* knee replacement.

4. By an Order dated April 4, 2013 there was a determination made that the claimant's need for a total left knee replacement was reasonable, necessary, and related to her industrial injury of December 14, 2007.

5. The claimant eventually underwent the total *left* knee replacement surgery by Dr. Xenos on February 25, 2013 and was doing well post-operatively but did struggle with pain and range of motion issues early on.

6. Subsequent to this total knee replacement surgery on January 3, 2014 the claimant's *right* knee buckled causing the claimant to fall and injure her *left* knee.

7. As a result of this fall the claimant ultimately underwent a revision surgery to the left knee by Dr. Xenos. This surgery occurred on September 8, 2014.

8. Dr. Xenos opined that the damage to the left knee, and the need for revision surgery, as a result of the January 3, 2014 fall was totally distinct from, and unrelated to, the industrial injury of December 14, 2007.

9. The ALJ finds Dr. Xenos opinions to be credible and persuasive.

10. The ALJ finds that there is insufficient medical or lay evidence to establish that any bilateral foot or ankle conditions suffered by the claimant are causally related to the claimant's industrial injury of December 14, 2007.

11. The claimant has failed to establish that it is more likely than not that her need for revision surgery on her left knee is causally related to her industrial injury of December 14, 2007.

12. The claimant has failed to establish that it is more likely than not that her need for treatment for her bilateral foot or ankle conditions is causally related to her industrial injury of December 14, 2007.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2012), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

2. A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. The respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. 2009; *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999).

5. The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Additionally, the claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998). A preponderance of the evidence is that quantum of evidence that makes a fact or facts more reasonably probable or improbable, than not. *Page v. Clark,* 519 P.2d 792, (1979).

6. Even if a claimant suffers a compensable injury in the first instance, the ALJ may still deny a claim for workers' compensation benefits if the claimant fails to establish that the current and ongoing need for medical treatment or disability is proximately caused by an injury arising out of and in the course of the employment. See *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. Ct. App. 1997). The claimant has the burden to prove that any medical benefits sought are reasonable, necessary, and related to the work injury.

7. The question of whether a need for treatment is causally connected to an industrial injury is a question of fact. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

8. Dr. John Xenos the claimant's treating surgeon opines that the claimant's need for left knee revision surgery on September 8, 2014 was totally distinct from and unrelated to her industrial injury of December 14, 2007.

9. The ALJ concludes that Dr. Xenos' opinions are credible and persuasive.

10. The ALJ concludes that the facts demonstrate that the left knee revision surgery performed by Dr. Xenos on September 8, 2014 was not related to the claimant's industrial injury of September 8, 2007.

11. The ALJ concludes, as found above, that the claimant's need for bilateral foot and ankle treatment is insufficiently supported in the record based upon a totality of the evidence submitted.

12. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant's need for left knee revision surgery performed on September 8, 2014 was related to her industrial injury of December 14, 2007.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant's need for bilateral foot and ankle treatment is related to her industrial injury of December 14, 2007.

ORDER

It is therefore ordered that:

1. The claimant's request for medical benefits for the surgery performed by Dr. Xenos on September 8, 2014 is denied and dismissed.

2. The claimant's request for medical benefits for bilateral foot and ankle treatment is denied and dismissed.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 7, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issue presented at hearing was whether the claimant's left shoulder injury resulted in functional impairment at a site on her body not set forth on the schedule of injuries, C.R.S. §8-42-107(2); that is, "beyond the arm at the shoulder" and therefore payable as whole person rating under C.R.S. §8-42-107(8).

FINDINGS OF FACT

1. On January 7, 2013, the claimant suffered an admitted industrial injury to her left shoulder arising out of and in the course of her employment with the respondent-employer.

2. On August 29, 2014, Dr. Terrence Lakin placed the claimant at maximum medical improvement (MMI) and assigned her a 19% scheduled impairment for her left shoulder impairment which he converted to an 11% whole person rating. She was assigned permanent restrictions as follows:

a. to limit above shoulder height activity to occasional;

b. avoid crawling activities;

c. upper extremity repetitive motion activity manipulating light weight objects between waist and chest height demonstrates left upper extremity tolerance to occasional, 5 min. at a time, up to 20 min. in any one hour time period;

d. frequent level tolerance using right upper extremity;

e. lifting/carrying capabilities between sedentary and sedentary light levels at and below shoulder height; and,

f. unable to lift sedentary level weight overhead.

3. On October 1, 2014, the respondent-insurer admitted to Dr. Lakin's 19% scheduled impairment.

4. On October 30, 2014, the claimant filed an application for hearing on the issue of conversion of her 19% scheduled impairment to an 11% whole person rating.

5. At hearing the claimant credibly testified that she experienced constant sharp and burning pain from her left shoulder. Her pain radiates into her clavicle, the left side of her neck, down the left side of her back over her scapula, and from the clavicle into her left armpit and to the side of her left breast. She also testified that she is unable to do left arm activities above her shoulder. She is unable to do every day activities such as combing or washing her hair with her left upper extremity because of the pain in her shoulder. Her pain in the shoulder and into her trunk is constant and is aggravated by use of her arm. At night, the pain in her neck and shoulder wake her up and she finds it hard to find a comfortable position.

6. Dr. Carlos Cebrian testified for the respondents that he did not find any specific basis for a whole person rating and that the claimant had no ratable functional impairment beyond her injury at the claimant's left upper extremity; however, his IME report noted the claimant's complaints beyond the shoulder consisting of upper back, neck and headaches and his physical examination did find evidence of tenderness to palpation over the left trapezius with pain into her scapular region.

7. Dr. Cebrian identified the claimant's Exhibit 13 as an accurate representation of the trapezius muscle. The illustration shows the trapezius covers the neck up to the base of the head, extending bilaterally to shoulder joints and down below the scapulae to mid-back. When asked to show where the claimant's tenderness was located on Exhibit 13, Dr. Cebrian marked a large circle over the top of the trapezius extending well beyond the shoulder toward the neck.

8. Dr. Cebrian interpreted the abbreviation "sig" made by Dr. Lakin in the record multiple times: "sig trigger point left trap with radiating pain" as "significant". He further testified that trigger points are medically objective evidence.

9. The claimant's symptoms or referred pain from her left shoulder injury beyond the arm at the shoulder are corroborated by the medical records following her injury and after her two surgeries and other medical treatment modalities.

10. On physical exams February 13, March 6, March 27, April 8, April 13 and April 30, 2013, Dr. Lakin noted "sig[nificant] trigger point left trap[ezius] with radiating pain."

11. On March 12, 2013, the claimant saw Charles A. Hanson, an orthopedic surgeon, who examined her and noted that in addition to burning and stabbing pain on her left shoulder, she was experiencing pain on her posterior paracervical area with headaches. The surgeon's physical exam showed tenderness in the left posterior paracervical area. He diagnosed impingement tendonitis, subacromial bursitis and subdeltoid bursitis causing consistent burning and stabbing pain and recommended a left shoulder decompression with possible but doubtful rotator cuff repair.

12. On June 7, 2013, Dr. Hanson performed a left shoulder decompression with incision of coracoacromial ligament and excision of the anterior inferior half of the very distal clavicle, acromiclaviclular joint and acromion.

13. After her surgery, the claimant's symptoms beyond her shoulder continued. On July 12, 2013, Dr. Lakin noted on physical exam occasional pain over the left scapular region.

14. On August 21, 2013, Dr. Lakin in his physical examination of the claimant's neck noted "extremely tight left trapezius with trigger points" in his muscular skeletal exam he noted tight paracervical muscles, left more than right into left parathoracic.

15. On September 12, 2013, the claimant continued with tenderness and muscle stiffness from the left side of her neck into her shoulder.

16. On October 3, 2013, on physical exam Dr. Lakin continued to document tightness in the claimant's trapezius and paracervical muscles with trigger points.

17. The claimant's symptoms beyond her left shoulder persisted. On November 7, 2013, she presented complaining she had been awakened at night by her pain two days before and her pain, described as severe, continued from the base of her neck into her left shoulder. The physical exam by Terry Schwartz, PA-C, confirmed Dr. Lakin's previous examinations. It showed the claimant: "very tender Lt paraspinal muscles, across superior aspect of shoulder, even to light touch." His impression included: "…acute spasms in cervical and Lt shoulder." He recommended ice down for

her shoulder and neck. He ordered Toradol for pain, Valium up to three times per day to stop her neck and shoulder spasms.

18. On December 16, 2013, the claimant was seen by Dr. Lakin, who continued to note on physical exam of her neck, significant tenderness in the claimant's neck and left paraspinal muscles across into the superior aspect of her shoulder, even to light touch.

19. On January 6, January 29, and February 18, 2014, Dr. Lakin's physical exam findings regarding the claimant's symptoms of her left paraspinal muscles did not change.

20. On January 9, 2014, Dr. D. K. Caughfield performed an electrodiagnostic study. The claimant was complaining of lateral left neck pain into her shoulder and into her arm. The physical examination and impression showed a persistent symptomatic acromioclavicular across body impingement.

21. On January 28, 2014, Stephen Davis, M.D., of Bentonville, Arkansas, conducted a record review of the claimant's condition. His review noted the claimant's November and December 2013, symptoms of neck pain radiating to the left shoulder.

22. On March 17, 2014, the claimant underwent a second surgery on her left shoulder: left shoulder arthroscopic debridement for a partial thickness articular sided subscapularis tear and type 1 SLAP tear, a second left shoulder arthroscopic clavicle resection and subacromial decompression.

23. Two months after her second surgery, on May 19, 2014, the claimant's symptoms beyond the shoulder continued. She presented at physical therapy "very emotional and upset, stating that she had increased cervical, UT [upper thoracic] pain as well as bilat shlds … She complained of joint stiffness and even an ear ache from her neck hurting so bad."

24. The ALJ finds the claimant's testimony of symptom's beyond the arm at the shoulder and into her trunk credible. They are corroborated by the medical records before and after her surgeries.

25. The ALJ finds that the credible medical evidence of record establishes that it is more likely than not that the functional situs of the claimant's impairment extends beyond the shoulder area and, *inter alia*, into the neck and trapezius.

CONCLUSIONS OF LAW

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8- 40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A*., 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. An ALJ's factual findings concern only evidence that is dispositive of the issues involved; an ALJ need not address every piece of evidence that might lead to a conflicting conclusion and has rejects evidence contrary to findings of fact. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Determining whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of §8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment, " and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Whether the claimant has sustained functional impairment beyond the arm at the shoulder depends on the particular circumstances of the individual case. *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390 (Colo. App. 1997). Functional impairment need not take any particular form. The claimant's pain, including referred pain, limiting the claimant's use of a portion of her body beyond the

arm at the shoulder may appropriately constitute "functional impairment." *See Salaz v. Phase II et. al.*, W.C. No. 4-240-376 (November 19, 1997), *aff'd., Phase II v. Industrial Claim Appeals Office*, (Colo. App. No. 97CA2099, September 3, 1998)(not selected for publication); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), *aff'd, Mader v. Popejoy Construction Co., Inc.*, (Colo. App. No. 96CA1508, February 13, 1997) (not selected for publication).

5. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant suffers a functional impairment beyond a loss of the arm at the shoulder and is entitled to a whole person rating.

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant permanent partial disability benefits based upon the 11% whole person impairment rating provided by Dr. Lakin.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues for determination are:

1. Whether the claimant has established by a preponderance of the evidence that her extremity impairment rating should be converted to a whole person rating; and,

2. Whether the claimant has established by a preponderance of the evidence that she is entitled to a general award of post-maximum medical improvement maintenance medical care.

FINDINGS OF FACT

1. The claimant is a dental hygienist for the respondent-employer, and has been in his employ for 20 years.

2. On October 23, 2013 the claimant suffered an injury while dismissing a patient and tripping. She fell into a wall in front of her causing her to dislocate her right shoulder.

3. The claimant was seen at Emergicare initially, but then was seen by Dr. Duffy approximately two and a half hours later.

4. Dr. Duffy reduced the claimant's shoulder.

5. The claimant then entered a regimen of physical therapy to help strengthen her shoulder.

6. The claimant experienced pain at the back of her neck and also in the trapezius area.

7. The claimant was also treated with dry needling and chiropractic care.

8. The dry needling was able to relieve the claimant knots in her deep muscle tissue which other modalities of treatment failed to do.

9. The claimant has symptoms including pain at the base of the neck; pain down the right side of the shoulder to where the muscles meet the shoulder blade and

inside the shoulder blade; pain in the back area; and, pain under the scapula. The claimant also experiences occasional headaches due to the way she has to hold her arm while working on patients.

10. The claimant continues to have difficulty reaching up to adjust the overhead light for use with her patients. So much so that the claimant purchased an expensive light that is attached to her head in lieu of reaching overhead.

11. The claimant has not been given any work restrictions.

12. When the claimant's neck is painful it limits her ability to turn her head to the right. The dry needling was helpful in relieving the neck pain. The claimant believes that the dry needling was one of the few modalities of treatment that helped relieve her pain that no other modality can provide.

13. The claimant currently takes over the counter ibuprofen. The claimant's pain is a fairly consistent 3 of 10 with 10 being the worst.

14. The claimant's current pain is worse than it was when she was undergoing the dry needling.

15. The claimant is able to undertake all of her activities of daily living. She only has trouble with overhead objects if they are heavy.

16. The claimant had an independent medical evaluation done by Dr. Timothy Hall.

17. Dr. Hall opined that the claimant's functional limitations extend beyond the shoulder joint. Dr. Hall observed that most of the claimant's symptoms are in the parascapular, upper back, trapezius, and lateral neck. This has resulted in some range of motion reduction in her neck as well as side bending to the right.

18. Dr. Hall also opined that the claimant would benefit from post-MMI maintenance medical treatment involving dry needling.

19. The ALJ finds Dr. Hall's opinions to be credible.

20. The ALJ finds that the claimant has established that it is more likely than not that her functional impairment extends beyond the shoulder joint.

21. The ALJ finds that the claimant has established that it is more likely than not that she requires maintenance medical care to be determined by her authorized treating physician.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The question of whether the claimant sustained a loss of an arm at the shoulder within the meaning of Section 8-42-107 (2) (a), C.R.S. or a whole person medical impairment compensable under Section 8-42-107 (8) (c), C.R.S. is one of fact for determination by the ALJ. In resolving this question the ALJ must determine the situs of the claimant's functional impairment, and the situs of the functional impairment is not necessarily the situs of the injury itself. *See Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo.App. 1996); *Staunch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App. 1996).

5. The "loss of arm at the shoulder" is on the schedule of injuries listed under

Section 8-42-107 (2),C.R.S. *Maree v. Jefferson County Sheriff's Department*, W. C. 4-260-536 (August 6, 1998). Depending on the particular facts of the claim, damage to the structures of the shoulder may or may not reflect a functional impairment which is enumerated on the schedule of injuries under Section 8-42-107 (2), C.R.S. *Id.*

6. An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the claimant sustained a functional impairment beyond the schedule. *Staunch v. PSL Swedish Healthcare System, supra.* Further, pain and discomfort, which limits the claimant's ability to use a portion of the body, may be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *See Vargas v. Excel Corp., W. C. NO. 4-551-161 (April 21, 2005).* Functional impairment of the shoulder joint beyond the "the arm at the shoulder" is probative evidence of whole person impairment. *Id.*

7. As found above, the ALJ concludes that the claimant's testimony was credible and supported by the medical record.

8. As found above the ALJ concludes that Dr. Hall's opinions are credible and entitled to great weight.

9. The ALJ concludes as found above, that as a result of her work-related injury the claimant has functional impairment of the shoulder, and the claimant has functional impairment in areas beyond the shoulder. As a result of her work-related injury, the claimant has functional impairment that is located beyond the arm; it is located in the shoulder and in areas beyond the shoulder. As a result of her work-related injuries the claimant's functional impairment is not limited to the arm at the shoulder.

10. The ALJ concludes that the claimant has established by a preponderance of the evidence that her upper extremity impairment ratings should be converted into a whole person impairment rating.

11. Medical benefits after MMI may be ordered when they are necessary to cure or relieve the employee from the effects of the injury. *§ 8-42-101, C.R.S.; Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*. Before an Order for Grover medical benefits may be entered, there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease*. Grover Id.*

12. The employee need not demonstrate the need for any specific medical benefit at the time of the hearing and respondents remain free in the future to contest the reasonable necessity of any future treatment specifically requested*. Milco Construction v. Cowan, 860 P.2d 539 (Colo. App. 1992); Hanna v. Print Expediters, Inc.*

77 P.3d 863 (Colo. App. 2003).

13. In the instance case, the more credible medical and lay evidence establishes that the claimant is in need of a general order of medical maintenance care to maintain her MMI status.

14. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to post-MMI maintenance medical care.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant permanent partial disability benefits based upon the DIME physician's whole person rating of 5%.

2. The respondent-insurer shall pay for the claimant's maintenance medical care as determined by the claimant's authorized treating physician.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 5, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issue to be determined by this decision is the following:

Whether the claimant established, by a preponderance of the evidence, that she sustained an occupational disease to her bilateral upper extremities arising out of and in the course of her employment.

FINDINGS OF FACT

1. The claimant has worked for the respondent-employer since at least 2005 in the Meat and Seafood Department. The claimant works five days a week, 8 hours a day. Usually she works the 7:00 A.M. to 8:00 P.M. shift but will also work the 10:30 A.M. to 7:00 P.M. shift as well.

2. The claimant's duties in the Meat and Seafood Department include opening boxes and plastic tubs, lifting and carrying food products, stocking shelves, scanning items for inventory purposes, cleaning, wrapping food and, on occasion, cutting meat and seafood. Much of this work is done in a walk in cooler and around refrigerated cases where food products are displayed. In a typical day, the claimant will spend an hour stocking, 1 to1½ hours scanning, 2 hours opening boxes, and 30 to 45 minutes cleaning. The rest of the time is spent stocking shelves in all parts of the store, cleaning up the Meat and Seafood Department, stocking meat and seafood all on an as needed basis. In doing her work the claimant will spend approximately four hours in the walk in cooler. On any given day she will spend approximately ten minutes in the walk in freezer.

3. The claimant's duties in opening up boxes, some of which weigh up to 30 to 35 pounds, involve picking them up and then using a box cutter to open them. In using the box cutter, the claimant would use her left hand to steady the box and use her right hand to cut the box open. She would then take out the packages in the boxes which could be prepackaged lunch meat, hamburger, roasts, chicken, and seafood. The individual packets could weigh anywhere from a few ounces up to several pounds. The claimant would then take these packages out to the retail area and put them in the refrigerated display cases. Nearly all of the food products the claimant distributed to the display cases were refrigerated and/or frozen.

4. In distributing the prepackaged lunch meats to the refrigerated display cases, she would put the lunch meat in a cart and pull it to the retail display case. In putting the lunch meat in the display case the claimant would use her hand to push back a spring loaded plate and then lock it into place. After doing this, the claimant would then, using her hands, grasp the individual packages of lunch meat and put them into the display case in front of the spring loaded plate after which she would unlock the spring mechanism. In performing this job the claimant would have her hand in the refrigerator which has a temperature of 32 to 40 degrees. In addition to distributing the other products, the claimant would have to put the meat onto a "U boat" and then push/pull it out to the retail floor after which she would use her hands to put the individual packages of meat and seafood into the refrigerated display cases. Like the lunch meat packages, the meat and seafood was cold. In addition, the display case for meat and seafood has a temperature of 32 to 40 degrees and the claimant had to put her hand into these units while stocking the food. The claimant would have to stock the lunch meat and other meat products several times per shift.

5. In using a scanner, the claimant would hold it with her right hand and hold the printer with her left. She would then squeeze the trigger to complete the scan of the product. She would do this on a repetitive basis. The scan gun weighed around two pounds and the printer around one pound.

6. The claimant's job cleaning involved using her hands to wipe down counter tops and display cases, clean glass, counter fronts, along with sweeping and mopping. In wiping down display cases, the claimant would have to exert a significant amount of force in order to get sticky fluids off a surface.

7. According to Section G of the Job Description for the claimant's job, as promulgated by the respondent-employer, she is required to use her hands 81-100% of her shift. Also 61-80% of her shift involves bending and twisting her wrists along with squeezing of her hands. The claimant's job also requires her to lift up to 25 pounds 41-60% of her shift.

8. The claimant started noticing symptoms in her bilateral upper extremities in approximately September 2012. She was initially seen by her primary care physician, Dr. Heather Autry on September 18, 2012 for right wrist pain, the claimant told Dr. Autry on this date that she does a lot of heavy lifting at her job at the respondent-employer which aggravates her symptoms. Dr. Autry diagnosed DeQuervains tenosynovitis. Dr. Autry gave the claimant an injection and told the claimant to use a thumb spica splint with activity, and to use NSAIDS along with ice.

9. On December 10, 2012 the claimant returned back to Dr. Autry with complaints of left wrist pain. The claimant told Dr. Autry that her left wrist pain flared up while "babying her right wrist." Dr. Autry diagnosed DeQuervains tenosynovitis and injected the left wrist.

10. The claimant was seen on January 15, 2013 by Dr. Randall Hoffman for left wrist pain. Dr. Hoffman diagnosed DeQuervains tenosynovitis and was given an injection. She was seen by Dr. Hoffman in follow up at which time her wrist symptoms had cleared up.

11. On September 3, 2014 the claimant was seen by Dr. Kurt Weaver with pain in both wrists. The claimant told Dr. Weaver that her work at the respondent-employer involves lots of grasping and manipulating. Dr. Weaver diagnosed the claimant with Carpel Tunnel Syndrome and DeQuervains tenosynovitis. In a note dated September 15, 2014, Dr. Weaver opined that the claimant's DeQuervains tenosynovitis had a relationship to her work since it happens when people use their wrist and thumb too much in certain ways like grasping or grabbing objects.

12. On September 4, 2014 the claimant reported to the respondent-employer that she had bilateral wrist problems as a result of repetitive motion from stocking spring loaded cold cut holders, lifting "luggers," and heavy boxes.

13. On September 5, 2014 the claimant presented herself to Memorial Occupational Health where she was evaluated by Dr. Stephen Castle. The claimant gave Dr. Castle a history of having worked for the respondent-employer for the past 9 years over which time her work demands have increased. She described hand intensive activities including stocking the sliced lunch meats in spring loaded cases which she constantly has to push back. She also told Dr. Castle that she cuts meat and loads/unloads boxes. Dr. Castle noted that the claimant has used wrist braces in the past, and over the last year developed numbness into her thumb, index, and middle fingers of both hands. Dr. Castle performed a physical examination and in his report gave work related medical diagnoses of bilateral carpel tunnel syndrome and bilateral DeQuervains tenosynovitis. Dr. Castle put the claimant on modified duty and referred the claimant for an EMG and occupational therapy.

14. On September 23, 2014 the claimant presented to Dr. William Griffis for an EMG/NCV the results of which revealed electrodiagnostic evidence of bilateral carpel tunnel syndrome and bilateral cubital tunnel syndrome. Dr. Griffis indicated in his record of this date that, from a clinical standpoint, the claimant also has bilateral DeQuervains tenosynovitis.

15. On October 6, 2014 the claimant was seen by orthopedic surgeon Dr. Karl Larsen for evaluation of bilateral wrist pain and hand numbness and tingling. The claimant told Dr. Larsen that she cuts fish and meat as well as stocks food products. The claimant related the onset of symptoms to heavy knife gripping, cutting, and other activities at work. The claimant told Dr. Larsen that she has had hand and wrist symptoms since around October, 2012. Dr. Larsen examined the claimant and found an obvious fullness over the front dorsal compartment bilaterally with a more nodular appearance to the right side than the left side. Dr. Larsen also found a positive tinel's sign, right much worse than left over the superficial radial nerve. Dr. Larsen's diagnosis was bilateral carpal tunnel syndrome, cubital tunnel syndrome, and DeQuervains tenosynovitis. Because the claimant did not have lasting resolution of her symptoms with the use of braces and injections, Dr. Larsen recommended carpal and cubital tunnel surgery as well as a first dorsal compartment release on the right side. Dr. Larsen indicated in his report that once the right side settles down after the surgery, the claimant can then have surgery on her left side.

16. On October 30, 2014 the claimant had the surgery on her right extremity as recommended by Dr. Larsen. In a post operative visit on November 12, 2014 the claimant was doing well as evidenced by the resolution of her numbness and tingling. However, Dr. Larsen noted that the claimant was still having some tenderness over her first dorsal compartment.

17. At request of respondent, the claimant underwent an evaluation with Dr. Carlos Cebrian on November 20, 2014. As part of his evaluation, he reviewed the claimant's medical records dating back to 2007. Dr. Cebrian took a history which included what the claimant's job duties were at the respondent-employer. After evaluating the claimant, Dr. Cebrian diagnosed her as having bilateral carpel tunnel syndrome, bilateral cubital tunnel syndrome, and bilateral DeQuervains tenosynovitis. Dr. Cebrian further opined that the claimant's diagnoses involving her arms, wrists and hands are not related to her work at the respondent-employer. In reaching his conclusion Dr. Cebrian relied upon Rule 17, Exhibit 5 of the DOWC Cumulative Trauma Guidelines (Guidelines).

18. On December, 23, 2014 the claimant had the surgery in her left extremity as recommended by Dr. Larsen.

19. On January 20, 2015 the claimant was evaluated by Dr. Jack Rook. Dr. Rook reviewed various medical records from various health care providers including Colorado Springs Health Partners, Memorial Occupational Health, Dr. Cebrian's evaluation, North Springs Surgical Associates, and TCM Healing Points Acupuncture

Clinic. Dr. Rook took a history which included the claimant's job duties at the respondent-employer, and performed a physical examination. Dr. Rook diagnosed the claimant as having bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and bilateral DeQuervains tenosynovitis. Dr. Rook opined that the claimant's diagnoses are related to her job duties at the respondent-employer. Dr. Rook in formulating his opinion relied upon Rule 17, Exhibit 5 of the Guidelines.

20. The claimant testified that the surgeries helped and that the symptoms in her right and left hands have improved considerably such that she was released to full duty work on February 23, 2015. In her testimony, the claimant went over her job duties all of which involve extensive and constant use of her hand and arms. Specifically, the claimant testified that she spends several hours a day opening boxes and luggers using a box cutter after which she takes the product out to the display cases for stocking. When stocking the lunch meat, the claimant has to push a spring loaded plate back with one hand, lock it into place, and then load the packages on a shelf. She also has to cut meat and fish on occasion using a dull knife. The claimant also testified that in performing her cleaning duties she uses a scrub brush and a scraper tool, which requires significant force, to properly clean the display cases. She also has to use a broom and mop. Cleaning can take up to an hour or so each day. The claimant testified that she uses her hand and arms on a repetitive basis all day long. She also testified that she has to work in a walk in refrigerator for four hours per day and the meat and fish products she handles are either refrigerated or frozen. The claimant testified that prior to 2012 she did not have problems with her hand and wrists. The claimant testified that in 2007 she played tennis and had some shoulder problems but they resolved after a few months of care. The claimant testified as to the hobbies and activities she engages in outside her work place which include gardening, raising chickens, and hiking. In tending her garden, the claimant has to plant seeds and water the area but her partner does the heavy work. The claimant also said that she raises chickens. In doing so, she uses a scoop to feed them on a daily basis and every two months sets out hay which the chickens spread themselves. She also collects eggs once a day which involves minimal use of her hands. The claimant no longer plays tennis and has no other hobbies or non-work activities which entail, any extensive use of her hands. Regarding house work, the claimant acknowledges she mops, sweep, and dusts. However, she does this once a week and splits the duties with her partner on a 50/50 basis.

21. Dr. Carlos Cebrian testified that in his opinion the claimant's carpel tunnel syndrome, cubital tunnel syndrome, and DeQuervains tenosynovitis is not related to her work at the respondent-employer. Dr. Cebrian based his opinion on his application and

interpretation of the Guidelines. Dr. Cebrian explained that the Guidelines require a multistep algorithm to determine if it is likely that the claimant's job duties would lead to the development of carpal tunnel syndrome, cubital tunnel syndrome, and a DeQuervains tenosynovitis. Dr. Cebrian went through the claimant's diagnoses and then using the Guidelines determined what the primary and secondary risk factors were for each of the claimant's diagnoses. Then, looking at the risk factor definitions he went through the claimant's job duties as given by the claimant in her testimony and in the medical records. Once that was done, he used the Guidelines to determine if the nature of the claimant's job duties met any of the primary or secondary risk factors for the development of the claimant's diagnoses. Based on this analysis Dr. Cebrian did not find the claimant's job duties either qualitatively or quantitatively met the criteria set forth in the Guidelines for the development of carpal tunnel syndrome, cubital tunnel syndrome, or DeQuervains tenosynovitis.

22. Dr. Cebrian went on to opine that the claimant's problems are the result of genetics, age, and other non-work related factors. Upon cross examination Dr. Cebrian agreed that the Guidelines are essentially guidelines and not everyone neatly falls under them. He believes while the guidelines are important a physician has to look at all the factors and use his or her best judgment in coming up with an opinion as to etiology or causation. Dr. Cebrian's testimony was in accordance with his report dated November 21, 2014. Finally, Dr. Cebrian agreed that the care the claimant had, including surgery, regardless of etiology, was reasonable and necessary.

23. Dr. Rook testified by Deposition and opined that the claimant's upper extremity diagnoses are due to her job duties at the respondent-employer. Dr. Rook in reaching his opinion used the Guidelines. Dr. Rook said that the claimant's duties as described to him by the claimant and through the respondent-employer's documents involve using her hands, bending her wrists, twisting her wrists, and squeezing her hands 81 to 100% of her work day. Dr. Rook testified that the claimant's job duties fulfill at least one or two primary risk factors and at least one of the secondary risk factors for each of the diagnoses given for the claimant's upper extremities. Dr. Rook went on to testify that the primary risk factors for these diagnoses are a combination of force, repetition, and pressure for up to six hours per day. If there is wrist posturing for four hours per day this is also a primary risk factor. Dr. Rook believes that using a mop, cutting open a box, pushing a spring loaded shelf, and cutting fish or meat with a dull knife involves constant movement of the wrists and fingers. In addition, Dr. Rook believes that working in a cold environment for four hours a day is a secondary risk factor for the claimant. Couple this with the temporal relationship between the work and the onset of symptoms leads Dr. Rook to the conclusion that the claimant's cumulative

trauma disorders are as a result of her work at the respondent-employer. Dr. Rook also testified that he took the claimant's non-work activities, such as sewing and gardening into account and does not believe any of these are contributing factors as they do not involve extensive use of the upper extremities.

24. The ALJ finds the analysis and opinions of Dr. Cebrian to be the more credible and persuasive medical evidence and gives it greater weight than medical opinions to the contrary.

25. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffers from an occupational disease of her bilateral upper extremities that arose out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

2. In determining whether the claimant suffered a compensable injury in this case, the credibility of the witnesses and the probative value of the evidence must be assessed in order to determine whether the claimant has met her burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

3. The test for distinguishing between an accidental injury and an occupational disease or condition is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside the employment.

4. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, § 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

5. W.C.R.P. Rule 17, Exhibit 5 sets forth the treatment guidelines for Cumulative Trauma Conditions. Rule 17 set forth care that is generally considered reasonable for most injured workers. Further, while an ALJ is not required to utilize Rule 17 as the sole basis for making determinations as to whether medical treatment is reasonable, necessary and related to an industrial injury, it is appropriate for the ALJ to consider Rule 17 in making such determinations. § 8-43-201(3), C.R.S.

6. The credible and persuasive evidence presented at hearing established that there is not a causal relationship between the claimant's alleged conditions and her work exposure, especially in light of the credible analysis and opinions of Dr. Cebrian. Accordingly, the claimant failed to prove a compensable occupational injury based in part on the following reasons:

A. The claimant has the burden to establish a causal relationship between her alleged injury and her employment.

B. As found, the totality of the evidence in this case demonstrates that the claimant's job duties are numerous and varied throughout each shift. The claimant does not perform job duties which involve significant computer or mouse work, handheld vibratory tools, handheld tools weighing in excess of two pounds, or lift up to ten pounds more than sixty times per hour. Further, the claimant failed to prove that her job duties required her to sustain continuous awkward posture for significant periods of time. Rather, the totality of the evidence was persuasive that the claimant performed several different types of job tasks that required the use of one, or the other, or both upper extremities at different times. Of note, repetition alone is not a risk factor under Rule 17. As such, a review of her job duties reflects that there was not requisite force or repetition to cause her conditions.

C. Pursuant to Rule 17, a specific set of steps should be followed to determine if the claimant's conditions are work related. In this instance, Dr. Cebrian performed a causation analysis pursuant to the Division's Rule 17 and his conclusions are credible and persuasive and establish that the claimant's conditions are not work related.

D. As found, there is insufficient persuasive credible evidence that the claimant's treating physicians performed a causation analysis consistent with and required by Rule 17 in this case with regard to any of her diagnoses.

E. As found, the totality of the evidence is that claimant's job duties do not meet any primary or secondary risk factor known to be physiologically related to the claimant's diagnoses.

8. Given the foregoing, the ALJ determines and finds that the claimant has not met her burden of proof in establishing that she suffered a compensable occupational injury. Accordingly, the claimant has not demonstrated that the hazards of her employment caused, intensified, or, to a reasonable degree, aggravated her bilateral upper extremity conditions. *Anderson*, 859 P.2d at 824.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: May 27, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right hip and groin on July 5, 2014.

2. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her left hip on October 5, 2014.

3. Whether Claimant has established by a preponderance of the evidence that she aggravated her right hip on October 5, 2014.

4. Whether Claimant has established by a preponderance of the evidence that she aggravated both her right and her left hip on October 20, 2015.

5. If compensable, determination of Claimant's average weekly wage.

STIPULATIONS

If the claim is compensable:

Claimant is entitled to temporary total disability benefits from November 21, 2014 and ongoing until terminated by law; the providers at Colorado Plains Medical Group are authorized providers, including Dr. Manchester; the medical treatment provided and recommended by the providers at Colorado Plains Medical Group is reasonable and necessary; and the issue of applicable offsets is reserved for future determination.

FINDINGS OF FACT

1. Claimant has worked for Employer since November 11, 2013. Claimant initially worked as a lab technician with duties that primarily involved testing food products produced by Employer.

2. On June 15, 2014 Claimant began working as a wet mix operator. Her duties involved: taking samples from the production floor to the lab; data entry; climbing ladders; lifting up to 50 pound salt bags overhead to dump into salter; changing out screens, pulling off grates; lifting hoses; and tearing down, cleaning, and assembling equipment. Claimant frequently had to lift amounts up to 50 pounds, squat, bend, twist, and crawl.

3. On July 3, 2014 Claimant was evaluated by Laura Cieslik, M.D. Claimant complained of pelvic pain for the past several weeks on the right side. Claimant also reported a bulge in her right groin area and complained of pain in the right groin area on palpation. Dr. Cieslik referred Claimant to a general surgeon for possible inguinal hernia. *See* Exhibit I.

4. On July 5, 2014 Claimant was at work and attempted to hook up a production line to begin cheese production. Claimant was unable to line up the pipes by using her arms. Claimant placed her right thigh underneath a pipe and used her leg to push up on the pipe to align it in place. Claimant alleges that she felt a ripping burning sensation in her lower groin.

5. Claimant left work early on July 5, 2014 and reported to a supervisor that her hernia was bothering her and that she needed to go home. *See* Exhibit R.

6. On July 6, 2014 Claimant called in to work reporting she would not be in because her hernia was bothering her. *See* Exhibit R.

7. On July 7, 2014 Warren Welker contacted Claimant after he heard she had gone home early on July 5, 2014 after feeling a pull in her right groin. Claimant reported to him that she had scheduled an ultrasound for the issue and that it was a previous non work related injury. Mr. Welker explained to Claimant that if the issue was work related they needed to follow protocol and the ultrasound would need to be scheduled through workers' compensation. Claimant reassured Mr. Welker that the issue was not related to workers' compensation. *See* Exhibit S.

8. On July 7, 2014 Claimant underwent an ultrasound of the right groin for suspected right inguinal hernia due to her right groin pain. The ultrasound was interpreted by Paul Johnson, M.D. who opined that it was an unremarkable right groin ultrasound. *See* Exhibit 3.

9. On July 9, 2014 Claimant was evaluated by Thomas Manchester, M.D. Claimant reported to Dr. Manchester that she has had burning pain at the right side of her c-section incision for the past two years. She also reported lifting a heavy pipe at work and starting to sweat and have pain at the right groin. Dr. Manchester assessed musculoskeletal pain at the inner thigh. *See* Exhibit 3.

10. On July 21, 2014 Claimant reported the July 5, 2014 incident as a work related incident. Claimant filled out an Employee Statement. Claimant reported that she knelt down by the wet mixer to unhook the fines line and was holding up the line with her right knee and pushed up. Claimant reported that while kneeling she felt a tight pull and instant burning in her right groin area and that when she stood up she felt hot and dizzy. Claimant reported that she told a supervisor what had happened, tried to continue working, but went home approximately an hour later. Claimant reported that she did not desire or need medical treatment. *See* Exhibit S.

11. On July 21, 2014 Barry Anspach sent an email to Warren Walker regarding Claimant's alleged injury. Mr. Anspach indicated that Claimant reported that she had a hernia that she got outside of work and had a doctor's note that she could train as long as she didn't lift anything. Mr. Anspach reported that on July 5, 2014 at 6:15 a.m. Claimant reported to a supervisor that she had bent down and when she stood back up she had pain in her side and that she reported she had strained her hernia. On July 5, 2014, her supervisor advised Mr. Anspach what had happened in Claimant's presence and advised Mr. Anspach that Claimant might need to go home if she felt more discomfort. Mr. Anspach reported that an hour later, Claimant came to him and asked to go home because the pain was getting too bad. See Exhibit R.

12. On October 5, 2014 Claimant was cleaning the inside of the wet mixer and was either standing or dangling her legs on or over a pipe while leaning forward to reach the base of the mixer. Claimant's hips and lower abdomen were against the mixer's outer rim. Claimant alleges that this caused extreme popping in her left hip and groin area and a burning sensation to shoot across her abdomen and that it also caused pain in her right groin.

13. On that date, Claimant reported the pain to her supervisor. Claimant reported that she did not desire any medical treatment for her pelvic are pain and that she did not want to make a formal report of injury, but just wanted her supervisor to be aware of the incident. *See* Exhibit T.

14 Her supervisor filled out a written statement indicating that on October 5, 2014 Claimant reported that she may have reinjured her groin area. His statement indicated that Claimant reported that the injury was not work related. Claimant reported while removing the steam injectors from the wet mixer she was bent over and felt pain in her lower left side and thought she may have reinjured herself. Her supervisor reported that Claimant was training another operator that night so he told her to take it easy for the rest of the night and let the trainee do most of the physical work. *See* Exhibit T.

15. On October 20, 2014 Claimant was at work and attempting to tilt a wheelbarrow like cart to drain water for cheese add-back. Claimant alleges she felt a burning, ripping sensation between her hips and across her lower pelvic area.

16. On October 20, 2014 Claimant stopped a supervisor in the hallway. Claimant was in tears and stated that she was in a lot of pain in her abdominal area from adding re-work back on line 2 and that it was causing her pain to bend down and pull cheese from the barrels. *See* Exhibit T.

17. On October 23, 2014 Claimant was evaluated by Marshal Unrein, PA-C. Claimant reported intermittent pain in her right inguinal area and lower abdominal area with lifting at work since July. Claimant reported that she has worsening symptoms on October 2014. Claimant reported that on October 20, 2014 she was lifting a heavy item when she felt sharp pain in her right inguinal area and lower abdomen and that she has

had pain since. PA Unrein assessed abdominal muscle strain and questioned whether it was abdominal muscle strain versus inguinal hernia or incisional hernia. PA Unrein opined that Claimant's symptoms were aggravated by work and recommended work restrictions. Claimant did not report to PA Unrein that she had any popping or ripping sensations in either hip with any of the work incidents. *See* Exhibit 3.

18. On October 30, 2014 Claimant was again evaluated by PA Unrein. Claimant continued to complain of intermittent discomfort, worsening with abdominal pressure. Physical examination revealed tenderness in the right lower quadrant near the inguinal canal and in the area of Claimant's abdominal incision. PA Unrein continued the assessment of abdominal muscle strain. *See* Exhibit K.

19. On November 3, 2014 Claimant underwent a CT scan of her abdomen and pelvis interpreted by Michael Geraghty, M.D. as unremarkable. *See* Exhibit 3.

20. On November 7, 2014 Claimant was evaluated by PA Unrein. He assessed continued abdominal pain, noted that the claim had been denied by workers' compensation, and noted that Claimant was at maximum medical improvement with no impairment and no restrictions. He recommended that Claimant follow up with her primary care provider. *See* Exhibit 3.

21. On November 7, 2014 Claimant was also evaluated by Lauren Melancon, NP. Claimant reported having a bulge and pain in her right groin after lifting a pipe with her knee at work. Claimant reported her pain had worsened over the past 2-4 weeks and that she had pain in both groins and into the lower pelvis. NP Melancon noted on examination that Claimant was tender over her bilateral lower quadrants and just above her pubic bone over area of scar and tender into the bilateral groin. NP Melancon took Claimant off work for a few days. *See* Exhibit K.

22. On November 21, 2014 Claimant returned to Dr. Cieslik. Dr. Cieslik noted that she had seen Claimant on July 3, 2014 for pelvic pain and hot flashes and that at the prior visit Claimant had complained of pelvic pain for several weeks on the right side. Claimant reported at this appointment that other physicians told her that her pain could be gynecologic in origin. Dr. Cieslik opined that Claimant's pain was not gynecologic in origin. *See* Exhibit 3.

23. On December 29, 2014 Claimant was evaluated by Dave Keller, PA. Claimant reported that after starting a new position in June she started having diffuse discomfort in her lower abdomen and groin area. Claimant reported an incident in early July supporting a heavy pipe with her legs when she felt immediate pain and a tearing sensation in her right groin region. She also reported a second injury in early October when she reached in an awkward position and had pain shooting across her left groin through her abdomen and pelvic area. Claimant reported about a week later she had another injury resulting again in worsening pain and a tearing sensation at the left hip area. Claimant reported her current symptoms were primarily left sided with mechanical popping and catching and that her right hip had gotten better was but that she still had

discomfort and it was achy. Claimant reported that her physical therapist suspected a labrum tear. Claimant denied any previous groin or hip pain. PA Keller ordered a left hip MRI arthrogram. *See* Exhibit 3.

24. On December 30, 2014 Claimant underwent an MRI arthrogram of her left hip that was interpreted by Gregory Beyer, M.D. Dr. Beyer noted findings felt to represent a small labral tear in the lateral superior labrum. *See* Exhibit 3.

25. On January 13, 2015 Claimant was evaluated by PA Keller. PA Keller noted the MRI was read as a labral tear and opined that the MRI correlated with Claimant's mechanism and symptoms. He recommended consultation with a hip specialist for consideration of a hip arthroscopic debridement of a hip labral tear. *See* Exhibit 3.

26. On January 22, 2015 Claimant was evaluated by PA Keller. Claimant reported that she had a few instances at work where she had pain and discomfort in the left hip. PA Keller noted that Claimant an MRI that revealed a labral tear in the left hip. Claimant wanted to discuss the possibility of obtaining a right hip MRI and wanted to know if this particular type of injury could correlate with her reported mechanism of injury. PA Keller opined that it was difficult to say exactly when the labral tear occurred but that it seemed to correlate well with Claimant's description of the work related incident. PA Keller opined that with regards to Claimant's right hip, a future MRI would be needed if Claimant's symptoms persisted or if the mechanical component increased. PA Keller recommended waiting on the right hip until the left hip surgical consultation was obtained. *See* Exhibit 3.

27. On February 9, 2015 Claimant was evaluated by Shawn Karns, PA-C. Claimant reported that on July 5, 2014 she was lifting something heavy at work with her right leg when she felt a pop deep in the groin on the right side with immediate pain. Claimant reported that in October she was leaning over and felt a similar pain develop on the left hip deep in the groin as well. PA Karns noted that X-rays performed that day showed underlying coxa profunda morphology to the acetabuli predisposing Claimant to pincer-type femoral acetabular impingement (FAI) and that Claimant had reactive CAM morphology over the femoral necks bilaterally. He recommended bilateral hip diagnostic injections coupled with an MRI of the right side. He opined that if Claimant received relief with the diagnostic injections then she would be a candidate for hip arthroscopy in the future. *See* Exhibit 6.

28. On February 17, 2015 Claimant underwent a MRI of the right hip that was interpreted by Jeffry P. Weingardt, M.D. Dr. Weingardt found a vertical labrum tear at the base of the mid and posterior portions of the superior labrum with mild superior labral hypertrophy. He also found a prominent cyst arising in the right adnexal area. *See* Exhibit P.

29. On February 19, 2015 PA Karns issued a report indicating he had reviewed bilateral hip MRIs with Dr. White who confirmed that Claimant had labral tears

on both sides. He also noted that Claimant had a right adnexal cyst on her right hip MRI. He noted Claimant's diagnostic hip injections provided over 60% relief on the left side but that the right hip injection did not provide much of a change. He opined that Claimant was a candidate for left hip arthroscopy and noted he called Claimant and discussed surgery with her. *See* Exhibit 6.

30. On February 25, 2015 Claimant was evaluated by Brian White, M.D. Dr. White assessed bilateral labral tears with coxa profunda type or pincer type impingement with reactive CAM Morphology, left greater than right. He noted Claimant had failed non-operative measures and opined that it was reasonable to move forward with hip arthroscopy with extensive acetabular rim trimming and femoral osteoplasty, likely labral reconstruction. *See* Exhibit 6.

31. On May 8, 2015 Claimant underwent an Independent Medical Evaluation performed by Edwin Healey, M.D. Claimant reported that while working in cheese production she developed acute episodes of right and left hip pain while performing her duties. Dr. Healey provided diagnoses related to Claimant's injury while employed by Employer as including: left hip and groin pain with MRI demonstrating left superior small labral tear; right hip and groin pain with MRI demonstrating vertical tear at the base and mid-portions of the superior labrum; prominent cyst in the right adnexal area; recurrent and intermittent low back and left sacroiliac joint dysfunction; and bilateral hip coxa profunda femoral acetabular impingement preexisting and asymptomatic that was permanently aggravated by work related injuries. *See* Exhibit 8.

32. Claimant reported to Dr. Healey that she had no prior history of bilateral groin pain of a similar nature until the injuries at work. Dr. Healey opined that even though Claimant had preexisting congenital and developmental hip pathology that predisposed her to the development of labral tears, it was the activities performed while working that resulted in permanent aggravation of her preexisting and asymptomatic hip conditions. Dr. Healey opined that Claimant's right adnexal prominent cyst should be investigated further by her gynecologist to determine if it is a pain generator for her right groin pain and if not, then Claimant should have a second right hip injection to ensure the right groin pain is caused by the labral tear. He opined that Claimant should undergo the procedure for her bilateral hips recommended by Dr. White. Dr. Healey further opined that Claimant's altered gait resulted in aggravation of her left sacroiliac joint dysfunction. He opined ultimately that Claimant required bilateral hip arthroscopy. *See* Exhibit 8.

33. Dr. Healey opined that Claimant was asymptomatic and that she sustained separate injury episodes which resulted in hip labral tears and permanent aggravation of her pre-existing bilateral hip congenital and developmental condition. *See* Exhibit 8.

34. On June 10, 2015 Claimant underwent an Independent Medical Evaluation performed by Carlos Cebrian, M.D. Claimant reported: deep pain and throbbing in her bilateral groin and hips; buttock and leg cramping with numbness and

tingling; difficulty walking; difficulty sleeping; and extremely tight muscles all over her body. Claimant reported that after her transfer to the cheese department on June 15, 2014 she noticed some soreness in her right groin and saw her OB/GYN on July 3, 2014 to make sure she did not have a tear from a previous surgery. She reported that her doctor thought she had an inguinal hernia and referred her for ultrasound and to a general surgeon, Dr. Manchester. *See* Exhibit A.

35. Claimant reported to Dr. Cebrian that on July 5, 2014 she was in training and unhooking and switching pipes when she squatted down on the front side of the wet mixer against a wall to disconnect a pipe. Claimant reported that the pipes rarely aligned properly and that she knelt on her left knee and hoisted the pipe up with her right knee. Claimant reported that her right knee was bent at a 90 degree angle with her right foot on the ground and that as she pushed, she felt a deep stabbing and excruciating pain with burning in her right groin. Claimant reported that she went home and had swelling in her right groin in the front. *See* Exhibit A.

36. Claimant reported that she returned to work and continued to have pain which was constant and deep in the right groin. Claimant reported that on October 5, 2014 and October 20, 2014 her symptoms worsened. *See* Exhibit A.

37. Claimant reported that on October 5, 2014 when she reached the steam injectors by leaning on top of the wet mixer against her lower abdomen, she had a stabbing and burning sensation across her lower abdomen and felt a lot of symptoms in her left hip. Claimant reported she was in a lot of pain that day and kept getting nauseated and was sweating. Claimant reported that over the next few weeks it was uncomfortable to climb and get on equipment and that the left side of her groin started bothering her more than the right side. *See* Exhibit A.

38. Claimant reported that on October 20, 2014 she lifted a cart to drain water for cheese add back when she experienced a ripping, burning , stabling sensation along her lower abdominal area and felt a click in her left groin. Claimant reported feeling flushed, nauseated, and hot. *See* Exhibit A.

39. Dr. Cebrian opined that Claimant's bilateral femoral acetabular impingement (FAI) secondary to pincer type morphology with reactive CAM morphology over the femoral necks and labral tears and the need for treatment was independent, unrelated, and incidental to work activities performed on July 5, 2014, October 5, 2014 and October 20, 2014. Dr. Cebrian opined that the mechanisms of injury as described by Claimant were minimal and not associated with bilateral hip events nor were they mechanisms of significant force to the hips to aggravate any underlying pathology or to cause labral tears. Dr. Cebrian opined that Claimant's bilateral FAI of her hips is associated with labral tears and pathology and no exogenous event is necessary. Dr. Cebrian opined that the spontaneous onset and symptoms that Claimant was experiencing is ordinary as most pain from FAI and labral pathology presents spontaneously. *See* Exhibit A.

40. Dr. Cebrian opined that FAI progresses gradually and can injure the labrum and the articular cartilage of the hip and that FAI is a common cause of labral injury. Dr. Cebrian opined that FAI can be congenital or developmental. He opined that patients with FAI typically have anterolateral hip pain and pain that can worsen with prolonged sitting, rising from a seat, getting into or out of a car, or leaning forward and that the pain is gradual and progressive. He opined that patients can be misdiagnosed and managed as having such conditions as groin strain, osteoarthritis, low back disorder, or inguinal hernia. He opined that Claimant's impingement disorder and labral tears were caused by her pre-existing anatomy and were not the result of trauma. *See* Exhibit A.

Medical treatment prior to July, 2014

41. Claimant suffered a prior alleged work injury on October 10, 2011. Claimant was treated by Gregory Reichhardt, M.D. Claimant underwent treatment for that alleged injury that included a lumbar MRI, lumbosacral spine X-rays, bilateral lower extremity electro diagnostic evaluation and left SI injection and right-sided trigger point injection. The testing and injections did not show any acute abnormalities or provide any lasting improvement in her reported symptoms. Dr. Reichhardt noted that Claimant had chronic low back pain with an unclear etiology, possible SI dysfunction, and possible facet involvement. *See* Exhibit D.

42. On April 23, 2012 after approximately 6 months of treatment, Claimant was evaluated by Dr. Reichhardt. Claimant reported continued pain in her low back and reported her pain as 7-8/10 with stiffness and inflammation. Claimant requested additional chiropractic visits and wanted an additional muscle relaxer. Claimant demonstrated tenderness to palpation in the lumbar spine on physical examination. *See* Exhibit D.

43. On May 7, 2012 Claimant was evaluated by Dr. Reichhardt with reported low back pain of 6-7/10. Claimant requested additional chiropractic care. Dr. Reichhardt placed Claimant at maximum medical improvement, and discussed work restrictions with Claimant. Dr. Reichhardt noted that he and Claimant agreed on work restrictions of: limiting lifting, pushing, pulling, or carrying to 20 pounds and to limit bending and twisting at the waist to an occasional basis. He provided Claimant with a 12% whole person impairment rating. *See* Exhibit D.

44. On July 27, 2012 Claimant presented to physical therapy. Claimant reported pain on her left sacroiliac joint and reported that the pain was greatest after sitting or standing too long and that she was unable to sit or stand for prolonged periods. Claimant reported that occasionally the pain/numbness would shoot down her left lower extremity and that the pain was deep, dull, and stiff. Ceri Middlemist, PT noted Claimant had left posteriorly rotated innominate which altered her range of motion in the lumbar spine and left hip creating a deep pressure pain at end range. PT Middlemist noted that Claimant had decreased strength in her hips and abdominals. *See* Exhibit E.

45. On October 10, 2012 Claimant presented to the emergency department of Colorado Plains Medical Center complaining of pain in her lower abdomen that began 3-4 weeks prior. Claimant reported that she was unable to sleep due to the pain and believed it felt like previous cysts, but that she no longer had ovaries. It was noted on examination that Claimant had tenderness in palpation to the bilateral lower quadrants/pelvic region. *See* Exhibit G.

46. On April 30, 2013 Claimant was evaluated by Dr. Reichhardt. Claimant reported pain of 0/10 and that recently she raked all day long, bent and lifted up stones while seeding a new lawn. Claimant reported she had been lifting feed bags weighing 120 to 125 pounds without any difficulty or pain and was not taking any medications. Dr. Reichhardt noted that Claimant appeared to be doing very well and that Claimant wanted to be released to full duty to apply for a job with the Weld County Sheriff's Department. Dr. Reichhardt released Claimant to full duty work with no restrictions. *See* Exhibit D.

Testimony

47. Dr. Healey testified at hearing consistent with his report. He acknowledged that congenital abnormalities like FAI can manifest at any time even without a specific injury. Dr. Healey opined that Claimant was pre-disposed to labral tears and was a "fragile eggshell" type of employee because most workers wouldn't have these types of injuries. He again concluded that her work activity caused an aggravation of her pre-existing condition.

48. Dr. Healey opined that the July 5, 2014 incident could have caused the labral tear or could have increased the size of an existing tear. Dr. Healey acknowledged that he could not specifically state when the labral tears occurred, but opined that most occur acutely and people feel immediate sensation. He opined that he takes patients at their word when they report when their symptoms began. He acknowledged that labrum tears are often misdiagnosed and that Claimant had pain in her groin area prior to July 5, 2014.

49. Dr. Healey's testimony, overall, is not found credible and persuasive and is based mostly on Claimant's subjective reports and on his belief that Claimant was asymptomatic prior to July 5, 2014. However, this is inconsistent with medical reports showing Claimant was not asymptomatic and had several complaints consistent with labral tears prior to July 5, 2014.

50. The testimony and reports of Dr. Cebrian are found more credible and persuasive in this matter. Dr. Cebrian testified at hearing consistent with his report. He opined that Claimant's bilateral labral tears and any need for surgery resulted from Claimant's preexisting developmental and congenital hip condition and was not aggravated by or caused by any of the three work incidents.

51. Dr. Cebrian credibly pointed out various parts of the medical records, including an appointment just days prior to Claimant's first alleged work injury, where she had symptoms consistent with labral tears. He pointed out that Claimant suffers from two types of FAI that are not work related and that can cause labral tears. Dr. Cebrian pointed out that labral tears are often misdiagnosed as groin pain, thigh pain, back pain, and pelvic pain. He opined and the medical records support that Claimant had symptoms prior to July 5, 2014 that were consistent with bilateral labral tears.

52. Dr. Cebrian further opined that the Medical Treatment Guidelines do not support the claim in this case unless there is a repetitive rotational force or some type of high energy trauma. Dr. Cebrian opined there was neither in any of the alleged dates of injuries in this case. He opined the act of lifting up a pipe with a leg wouldn't have caused or aggravated a labrum tear as there is minimal force to the hip in that movement. He opined that bending over the side of the wet mixer similarly would not cause injury to the hip or cause or aggravate a labrum tear. He further opined that performing the cheese add back and lifting a cart would not impact the hips or qualify as trauma to the hips and that most of the pressure is in the back and the arms.

53. Dr. Cebrian also opined that the fact that Claimant's labrum tears are bilateral supports the conclusion that they are congenital and not caused by work and that it would be very unusual to have two incidents sufficient enough to cause trauma of the degree that would cause a labral tear within a couple of weeks of one another. He also opined that the two alleged mechanisms of injury to the left hip were very minor mechanisms of injury and would not have caused a labral tear on the left.

54. Dr. Cebrian is found credible and persuasive. His opinions take into account Claimant's past medical history and he clearly explained the prior medical records, prior pain that was consistent with labral tears, and the developmental and congenital condition of Claimant's bilateral hips. His opinions are also consistent with the Medical Treatment Guidelines.

55. Claimant's testimony, overall, lacks credibility. Claimant reported to her Employer on multiple occasions that her injury was pre-existing and that she did not want medical treatment. At hearing, she alleges new injuries and conditions and that she was denied medical treatment. This is inconsistent with her contemporaneous reports to supervisors, which are found more credible. Here, the medical records document pain consistent with bilateral labral tears prior to July 5, 2014 and Claimant's reports of pain on the three alleged dates of injury as new, acute, and different from any pain she experienced previously is not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical

benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a

pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Division's Medical Treatment Guidelines are generally accepted as professional standards for medical care under the Act and are to be used by health care providers when providing care. *See* §8-42-101(3)(b), C.R.S.; *Hall v. ICAO*, 74 P.3d 459 (Colo. App. 2003). Although the ALJ is not required to grant or deny medical benefits based on the Guidelines, the ALJ may appropriately consider the Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. No. 4-665-873 (Jan. 25, 2011); *Thomas v. Four Corners Health Care,* W.C. No. 4-484-220 (Apr. 27, 2009).

Claimant has failed to meet her burden to prove by a preponderance of the evidence that she suffered bilateral labral tears proximately caused by her employment on July 5, 2014, October 5, 2014, or October 20, 2014. She has failed to show, more likely than not, that any symptoms she experienced at work on the above dates were causally related to her employment. Rather, it is more likely that any symptoms she experienced while at work were the result of the natural progression of her pre-existing condition unrelated to her employment. Here, all providers agree that Claimant has underlying bilateral congenital developmental hip conditions, and FAI. Claimant also had symptoms in her bilateral hips consistent with labral tears for several years prior to the first alleged work incident on July 5, 2014. Dr. Cebrian is credible that the symptoms associated with labral tears can often be misdiagnosed and that labrum tears can be expressed as groin pain, pelvic pain, leg pain, or low back pain. Claimant had symptoms of pain in all these areas prior to July 5, 2014.

Claimant's testimony is also not found credible or persuasive. Although Claimant may have had the occurrence of symptoms at work, she was not asymptomatic prior to beginning the position in the cheese department. Rather, she had a history of several years of reported pain consistent with labral tears. The mere occurrence of her continued symptoms while at work does not establish that the employment aggravated or accelerated her pre-existing conditions. Rather, it is more likely that any symptoms Claimant experienced at work were the result of the natural progression of her pre-existing condition that is unrelated to her employment. Dr. Cebrian's testimony in this regard is credible and persuasive. Just a few days prior to her first alleged work injury, Claimant complained of right pelvic pain for the past several weeks. In October of 2012 Claimant was in such extreme pain that she reported to the emergency department complaining of pain in her bilateral lower abdomen and pelvic region. Claimant also reported to Dr. Manchester in July of 2014 that she had burning pain at the right side of her c-section incision for the past two years. Dr. Cebrian credibly opined that these consistent symptoms reported by Claimant are consistent with labral tears. Further, Dr. Cebrian credibly opined that none of the incidents reported by Claimant were sufficient to cause trauma to her hips to indicate labral tears occurred at work. His opinions are

consistent with the Medical Treatment Guidelines and are persuasive. The ALJ finds the persuasive evidence and testimony supports the conclusion that Claimant suffered no acute injury or aggravation to her pre-existing conditions on July 5, 2014, October 5, 2014, or October 20, 2014 and that she simply continues to suffer from symptoms that she has had for several years. Further, the mechanisms of injury as described by Claimant would not be sufficient enough to cause labral tears. Although Claimant reports subjectively that her symptoms of groin and pelvic pain have increased since July of 2014, the pain she is experiencing is located in the same areas and is similar to pain she has had for several years. Even if the pain has increased, it is more likely due to the natural progression of her pre-existing condition than due to a work injury. Claimant has failed to meet her burden to show that her employment aggravated or caused her bilateral labral tears.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she suffered compensable injuries to her bilateral hips arising out of or in the course of her employment on July 5, 2014, October 5, 2014 or October 20, 2014. Her claims in WC cases 4-966-229-01, 4-980-046-01, and 4-980-045-01 are denied and dismissed.

2. Claimant is not entitled to medical benefits or treatment for her bilateral hips as the claim is not compensable.

3. Determination of average weekly wage is moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 4, 2015 /s/ Michelle E. Jones

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Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment on April 24, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits and that treatment he received was authorized, and reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

FINDINGS OF FACT

1. The Claimant worked for Employer as an operator and rig hand. In this position, his duties included labor work, picking up heavy pipes, going up and down the snubbing unit ladder and going up and down rig derricks. The Claimant testified that he first started working for Employer as a rig hand for 15 months and had no problems with his knees during that time. After 15 months, the Claimant's job changed to operator where he would stand in one place on the rig for his normal shift of approximately 10 hours. As of April 24, 2015, the Claimant testified that he was again working as a rig hand. The Claimant's testimony regarding this employment and duties with Employer was credible and is found as fact.

2. The Claimant worked the night shift on April 24, 2015, and was performing the duties of a rig hand by repeatedly climbing up and down the snubbing unit ladder. Between 7:00 p.m. and 8:00 p.m. on April 24, 2015, approximately 1-2 hours into his shift, the Claimant testified that he was going up the snubbing unit ladder and grabbing the rail with his right hand with a wrench in his left hand when he felt an immediate sensation of pain with a pop of his knee. The pain then increased over the next ½ hour and the Claimant stated that he never felt anything like that before. The Claimant's testimony regarding his mechanism of injury was credible and consistent with the medical records, and is found as fact.

3. The Claimant testified that he was able to work for approximately half an hour after he felt the pop and experienced the initial pain on the ladder, but that his pain increased and he was unable to bear any weight on his left knee. The Claimant testified that he first notified his operator, Alfonzo "Cowboy" Lopez, that he hurt his left leg on the snubbing unit ladder and asked him to notify Rusty Loya, the tool pusher, that he was injured. The Claimant testified that he was not present during the time that Mr. Lopez and Mr. Loya spoke over the phone regarding his injury; however, the Claimant later

also personally spoke to Mr. Loya over the phone and informed him that he hurt his left knee on the snubbing unit ladder. The Claimant further testified that after he reported his injury to Mr. Lopez and Mr. Loya, that Mr. Loya asked him to write a report stating that the injury was not work-related. The Claimant also testified that he was not directed to any medical care or able to return to his normal work duties thereafter.

4. The Claimant testified that after refusing to write a report stating that his injury was not work-related, Mr. Loya asked him to run the pipe wrangler on Rig 31. The Claimant testified that he went to Rig 31, but upon arrival at Rig 31, he was unable to get out of the truck and had to grab onto the side of the truck with his left hand since he could not put any pressure on his left knee. Upon realization that he was completely unable to work due to his inability to bear any weight on his left knee, Claimant waited for the Rig 31 operator, Mr. Mesa, and told him that he had an incident on Rig 34 and that he was sent to him to run pipe wrangler but that he was unable to do so because he could not stand up at all. The Claimant further testified that he asked Mr. Mesa to contact Mr. Loya to let him know and that he went home thereafter. The Claimant's testimony with respect to the events that occurred at Rig 31 was credible and is found as fact.

5. The Claimant tried to sleep when he got home. The Claimant testified that the next day he woke up and his knee was swollen and in pain he sought treatment at Platte Valley Medical Center. On April 25, 2015, the Claimant's wife transported him to Platte Valley Medical Center and the Claimant was advised that he was unable to return to work until he was cleared by "Ortho/Work Comp." On April 25, 2015, the Claimant was diagnosed with internal derangement of his left knee. On that day, the Claimant reported to Lane Looka, N.P. at Platte Valley Medical Center that he was 'on ladders yesterday' and that while he walked up stairs he felt and heard pop to his left knee with swelling and was unable to bear weight. The Claimant was referred to a work comp provider and told that he needed an outpatient MRI (Claimant's Exhibit 7, pp. 22-23).

6. The Claimant testified that he brought a yellow piece of paper (of which Exhibit 7, p. 22 is a copy) to Skip the Safety Manager on the Monday after April 24, 2015. The Claimant testified that he did not tell Skip or anyone else at his Employer that he injured himself at home. Rather, he testified that he consistently told them that his knee injury happened at work. The Claimant completed a written statement describing the events of April 24, 2015 and provided it to his Employer on April 27, 2015. In his statement, the Claimant provides the following:

> Went to work on Friday 4/24/15 night shift. Went to work on Friday 4/24/15 night shift. Went up snubbing unit ladder to rig up tongs + bells + elevators. Was constantly going up and down the snubbers ladder to the floor to get some tools. I got to the point were [sic] my knee started to aggrivate [sic] me. Kept on working. It got to the point where I couldn't put any weight on my leg. Told the operator. Operator got a hold of pusher, Rusty. By that time my knee was swalled [sic]. Was ask [sic] by the pusher

what had happened. Told pusher aggrivated [sic] my knee walking up and down ladder….. (Claimant's Exhibit 4; Respondents' Exhibit E).

7. On April 30, 2015, the Claimant sought treatment with Dr. Aaron Baxter at Mountain View Orthopedics. The Claimant advised Dr. Baxter that he was going up and down a ladder when he felt a sharp pop on the medial aspect of the knee and that his knee continues to be very painful. Dr. Baxter noted the Claimant was treated in the emergency department and was placed in a knee immobilizer and used crutches to avoid putting weight on his leg. Dr. Baxter diagnosed the Claimant with a left medial meniscus tear and referred him for a left knee MRI (Claimant's Exhibit 5, pp. 18-19).

8. On May 7, 2015, the Claimant underwent an MRI of his left knee. The MRI findings included (1) moderate radial tear medial meniscal body. Moderate to severe medial compartment osteoarthritis. (2) Mild contusion anterior lateral tibial plateau. (3) Large knee effusion with synovitis. (4) Prepatellar and infrapatellar subcutaneous edema with adventitial bursitis. (5) Possible grade 1 sprain of the ACL without tear (Claimant's Exhibit 6, pp. 20-21; Respondents' Exhibit H, pp. 17-18).

9. Respondents filed a Notice of Contest on May 12, 2015 (Claimant's Exhibit 1) and the Claimant has continued receiving medical treatment through his personal health insurance.

10. On May 28, 2015, Dr. Baxter performed a left knee arthroscopy and partial medial meniscectomy to repair the Claimant's left knee medial meniscal tear (Claimant's Exhibit 5, pp. 10-11; Respondents' Exhibit H, pp. 20-21).

11. The Claimant testified that he has not been asked to return to work since his date of injury of April 24, 2015 nor has any physician or medical provider told him that he could return to work full duty. The Claimant's testimony regarding his inability to return to work in any capacity is credible, not contested and is found as fact. The Claimant continues to experience left knee pain.

12. The Claimant saw Robert Botnick, PA-C at Mountain View Orthopedics for a post-operative follow up visit. Mr. Botnick noted the Claimant's surgical sutures and staples were removed and the Claimant was provided with arthroscopic photos from his surgery and they were explained to him. The Claimant was referred for physical therapy (Claimant's Exhibit 5, p. 9).

13. With respect to knee pain prior to April 24, 2015, the Claimant testified that he previously sought medical treatment on March 25, 2015, for left knee pain. The Claimant testified that he told Brian Drake, PA-C at Greeley Med Care that he had left knee pain as a result of the motion of how he runs the rig with his right hand and right side which requires him to twist and rotate his body on a constant basis (Claimant's Exhibit 8, pp. 34-35). The Claimant testified that he was able to continue bearing weight on his left knee, that he did not have work restrictions and that he was working at full duty after March 25, 2015, and immediately before his date of injury on April 24, 2015, which is supported by the Claimant's payroll records for that time period (Claimant's

Exhibits 2, pp. 2-3). The Claimant's testimony regarding his prior left knee pain and his ability to work without restrictions at full duty was credible and is found as fact as it is supported by the paystubs which document that he worked his full hours and is also supported by the medical records.

14. Rusty Loya, was a rig supervisor for Employer, testified by telephone on the second day of hearing in this matter. He testified that he was familiar with the Claimant and had been the Claimant's rig supervisor for 1-2 months. The Claimant was assigned to his rig on April 24, 2015. Mr. Loya testified that on the night of April 24, 2015, the Claimant informed him that his knees were bothering him and that he wanted to go home. Mr. Loya subsequently called his supervisor, Jason Anderson, and reported that the Claimant was stating that his knees were hurting and then asked the Claimant if he wanted to do some light duty work and if he would be willing to write a statement about not being hurt on the job site. Mr. Loya testified that Claimant told him he would not make a statement saying he did not get hurt at on the job site because he experienced a similar situation with Employer years before regarding his broken finger and he never got appropriate medical treatment for that because he "took one for the team." Mr. Loya testified that that the Claimant refused to make a statement alleging that he was not hurt on the job but that he accepted his offer of light duty and so Mr. Loya sent the Claimant to perform different work for the night. Mr. Loya testified that he told the Claimant he could not go to the doctors if he injured himself at work because if it happened at work, he needed to inform his bosses right away. Mr. Loya testified that he did not believe the Claimant sustained a work-related injury because, from what he saw, the Claimant was walking just fine.

15. On cross-examination, Mr. Loya testified he was the nighttime supervisor for the rig where Claimant's crew Alfonzo "Cowboy" Lopez; Florentino Ibarra and Leonardo Solis were stationed. Mr. Loya testified that as the nighttime supervisor for that rig, he arrived at about 5:30 p.m. and that Claimant reported his knee injury at approximately 11:00 p.m. on April 24, 2015. Mr. Loya testified that Claimant worked from approximately 6:00 p.m. to 11:00 p.m. Mr. Loya testified that he believes Claimant returned to work on the rig floor; however, he did not personally observe Claimant immediately after the work incident since Mr. Loya was not present on the jobsite for the hours between Claimant's initial reporting of his injury to Mr. Lopez and his arrival at the jobsite some time later. Mr. Loya testified that in 2015, approximately twelve people (two crews and two people) were laid off from Employer. Mr. Loya testified that he prepared the incident report for his records because he was incident-free and he did not want there to be an incident on his rig if one had not actually occurred. Mr. Loya further testified that a serious incident on his rig could shut it down and result in an OSHA investigation.

16. On redirect examination at the hearing, Mr. Loya testified again that he believed that the Claimant was able to bear weight on his leg because he went to get his gear. Mr. Loya testified that the Claimant did not finish out his shift and that he had no further contact with Claimant after April 24, 2015.

17. Mr. Loya's testimony regarding the unrelatedness of the Claimant's work injury is not persuasive. Mr. Loya testified that the Claimant reported his knee injury, that he asked the Claimant to make a statement saying he was not hurt on the job site and that there was an incentive to avoid reporting incidents on his rig. Although Mr. Loya testified that he witnessed the Claimant able to bear weight on his leg, credible evidence presented at the hearing established that Mr. Loya did not come into contact with the Claimant for several hours after the Claimant initially reported an injury to his supervisor Mr. Lopez. Further, the testimony of Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the reporting and mechanism of his injury, and the Claimant's inability to bear weight on his leg.

18. Jason Anderson, Field Supervisor at Employer, testified at the hearing that he was made aware of the Claimant's knee injury when Mr. Loya called and notified him that Claimant was complaining of knee pain from going up and down the ladder and that he wanted to go to the hospital. Mr. Anderson testified that at no point in time did he personally see or meet with Claimant on the evening of April 24, 2015, or the morning of April 25, 2015. Mr. Anderson stated it was approximately 1:00 a.m. on April 25, 2015, and he did not go to the Claimant's jobsite. Mr. Anderson also testified that he asked Mr. Loya to ask the Claimant to write a statement saying nothing happened at work and that the Claimant was leaving on his own will to go to the hospital to get his knees checked since, if Claimant left the jobsite, he would be required to notify the Safety Department. Mr. Anderson testified that after he was made aware of Claimant's refusal to give a written statement saying he was not hurt at work, he transferred Claimant to another rig where he would be on ground level and more stationary. Mr. Anderson testified that he did not notify the Safety Department regarding this particular matter because, according to his personal knowledge, no incident happened at work since other employees were telling him that they didn't see any incident involving the Claimant on location.

19. Mr. Anderson testified that employees get training to report work injuries to rig supervisors and Mr. Anderson acknowledged that the Claimant did notify his operator, Alfonzo "Cowboy" Lopez and tool pusher Rusty Loya about a problem. Mr. Anderson testified that after Claimant properly reported his knee condition to Mr. Lopez and Mr. Loya, Mr. Loya contacted Mr. Anderson regarding the incident. Mr. Anderson testified that he did not personally meet with or see the Claimant until Monday, April 27, 2015, when the Claimant showed up at the shop in a leg splint and crutches. Mr. Anderson testified that his encounter with the Claimant on April 27, 2015, was the only personal encounter he had with the Claimant regarding the injury that is the subject of this case. Mr. Anderson testified that on April 27, 2015, he spoke with Claimant's crew Alfonzo "Cowboy" Lopez; Florentino Ibarra and Leonardo Solis and tried to get them to do a written statement regarding Claimant's incident.

20. Mr. Anderson's testimony regarding the unrelatedness of the Claimant's work injury is not persuasive. Mr. Anderson testified that the Claimant properly reported his knee injury (although Mr. Anderson concurrently testified that it was not a work

injury, but something that happened outside of work). He further admitted that he asked the Claimant to make a statement saying he was not hurt on the jobsite through Rusty Loya and that he did not notify the Safety Department regarding this particular matter because, according to his personal knowledge, no incident happened at work. However, at no point in time during the evening of April 24, 2015, or the morning of April 25, 2015, did Mr. Anderson personally meet or speak with the Claimant regarding the work incident. The testimony of Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the relatedness and mechanism of his injury.

21. Ronald Scott Laird, HSE Coordinator at Employer, testified at the hearing as to his belief that the Claimant did not report a work injury. Mr. Laird testified that on the morning of April 25, 2015, the Claimant contacted him by phone stating that his knees hurt and had been hurting for 8-10 weeks and he did not recall an instant at work that he hurt his knee. Mr. Laird testified that up to that point, he had not spoken to anyone regarding Claimant's work injury and that this was the first notification he received regarding the same. Neither Rusty Loya nor Jason Anderson had reported an incident for Claimant as of that time. Mr. Laird testified that the Claimant told him he was going to a personal physician since he had an appointment on the Wednesday after April 24, 2015. Mr. Laird further testified that he advised the Claimant to receive treatment through his personal health insurance if he persisted to have knee problems over the weekend. Mr. Laird testified that Employer's protocol regarding an injured worker is that the injured worker is to advise the tool pusher of their injury and, if they are not present, to contact field supervisor Jason Anderson wherein either the tool pusher or Jason Anderson will contact HSE so they can go to the location immediately. Mr. Laird testified that the Claimant returned to work on Monday, April 27, 2015 on crutches with a knee immobilizer brace and provided paperwork from the emergency department visit.

22. On cross-examination, Mr. Laird agreed that if the Claimant had been unable to bear weight on his leg prior to April 24, 2015, he would not have been able to do his job. Mr. Laird also testified that Employer has laid off about 200 workers between January 2015 and September 2, 2015 (the date of his testimony). Mr. Laird testified that he does not know the Claimant's work status and the last time he saw the Claimant was on Monday, April 27, 2015.

23. Mr. Laird's testimony as it relates the Claimant's reporting of his injury is not found persuasive. Mr. Laird testified that he did not speak to the Claimant regarding his work incident until the day after, on April 25, 2015, and that the Claimant had not reported a work injury that occurred on April 24, 2015. However, the testimony of the Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the reporting and mechanism of his injury.

24. Skip Bolding, HSE Coordinator at Employer, testified as to his belief that the Claimant did not sustain a work-related injury. Mr. Bolding testified that he learned

of the Claimant's incident on April 27, 2015, when the Claimant presented at Employer's facility in Littleton in a leg immobilizer and crutches with his son at approximately 8:30 a.m. or 9:00 a.m. Mr. Bolding testified that the Claimant searched specifically for him and that the Claimant handed him paperwork stating that he had been taken off work due to a work-related injury. Mr. Bolding testified that upon receipt of the Claimant's work restrictions, he questioned the Claimant regarding the specifics of his work incident. Mr. Bolding testified that the Claimant advised him he worked the night of Friday, April 24, 2015, and hurt his knee. Mr. Bolding testified that the Claimant advised him he already had a doctor appointment scheduled and that he asked the Claimant why he did not properly report the injury by circumventing company policy by going to the doctor without advising someone. Mr. Bolding testified that the Claimant told him he already had an appointment to get his other knee checked out. Mr. Bolding testified that, based on his knowledge, there were no complaints or reported incidents prior to April 24, 2015, and that he first learned of the Claimant's left knee medial meniscal tear on Monday, April 27, 2015. Mr. Bolding reiterated prior testimony, and testimony of other witnesses, that Employer's incident notification protocol requires injured workers to immediately notify their supervisor of an injury and that the supervisor in turn notifies the agency or personnel on call or on staff supervising that particular area. When asked whether the Claimant's supervisor Rusty Loya should have notified Mr. Bolding, Mr. Bolding testified that Mr. Loya only had to notify him if Mr. Loya had been notified and the immediate supervisor had been notified. Mr. Bolding stated that he could not answer whether or not he ever filed a First Report of Injury in this case. Although Respondents contend through Mr. Bolding and others that the Claimant did not follow proper protocol in reporting his injury, the weight of the evidence clearly establishes that the Claimant notified his operator, Mr. Lopez and his tool pusher, Mr. Loya and that Mr. Loya should have advised field supervisor, Jason Anderson and the Safety Department of the Claimant's knee injury.

25. Mr. Bolding testified to having knowledge that, per Colorado Workers' Compensation law, injured workers are only required to report injuries to their supervisors and that it would have been up to him to notify the Division of Workers' Compensation by filing an Employer's First Report of Injury after being notified of a work injury. Mr. Bolding also testified that either himself or his fellow HSE Coordinator, Scott Laird, are the people to whom work restrictions are generally provided.

26. Mr. Bolding's testimony regarding the unrelatedness of the Claimant's work injury is not persuasive. Mr. Bolding testified and confirmed that Claimant properly reported his knee injury and that he was prompted to question the validity and relatedness of Claimant's knee injury due to not having specific information that field supervisor Jason Anderson and tool pusher Rusty Loya should have provided him on the date of the injury. The testimony of Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the reporting and mechanism of his injury.

27. Leonardo Solis, Derrick Hand at Employer and the Claimant's co-worker, testified as to his belief that the Claimant sustained a work-related injury. Mr. Solis

credibly testified that prior to April 24, 2015, he never saw Claimant ambulate with a limp. The Claimant drove a crew truck and picked Mr. Solis up for work every day, including April 24, 2015. Mr. Solis credibly testified that on April 24, 2015, around 7:00-8:00 p.m. the Claimant informed him he got hurt and that he had a lot of knee pain. Mr. Solis testified that he advised the Claimant to follow Employer's policies by reporting the injury to their supervisor and operator immediately. Mr. Solis credibly testified that he personally witnessed the Claimant report his injury to their operator, Alfonzo "Cowboy" Lopez. Mr. Solis further testified that he personally provided the Claimant with HSE Coordinator Scott Laird's phone number and witnessed the Claimant attempt to contact him to report his injury but that Mr. Laird did not answer his phone. Mr. Solis also testified that Mr. Loya was not on the jobsite at the time Claimant reported his injury to Mr. Lopez. Mr. Solis testified that prior to tool pusher, Rusty Loya, arriving at the scene of the incident, the Claimant could not bear any weight on his leg and that he had to assist the Claimant by essentially carrying the weight of his body by allowing the Claimant to lean on him. Mr. Solis credibly testified that Mr. Loya arrived at the scene of the incident hours after the initial reporting and that he was the only co-worker who personally witnessed the Claimant's inability to bear weight on his leg for the hours between the Claimant's initial reporting of his injury to Mr. Lopez and the time Mr. Loya arrived at the scene of the incident. Mr. Solis further testified that by the time Mr. Loya showed up, the Claimant was getting worse and he had to help the Claimant to the truck because the Claimant couldn't put weight on the leg and Mr. Loya was trying to send him to another location.

28. During the hearing testimony of Mr. Solis, Claimant's Exhibit 10 was offered and entered into evidence as proof of Mr. Solis being asked to sign a document that he did not understand, author or agree with the contents. Mr. Solis testified that the document was written in English and although he speaks English, he cannot read and write in English sufficient to understand the contents of Exhibit 10. When portions of the document were read out loud to Mr. Solis at the hearing, Mr. Solis was asked if it was true that the Claimant did not state he was hurt on the jobsite and Mr. Solis testified that it was not true because he saw the Claimant telling Mr. Lopez and saw the Claimant trying not to walk because he was hurt. Mr. Solis credibly testified that he signed Exhibit 10 only after Mr. Loya informed him, Alfonzo "Cowboy" Lopez and Florentino Ibarra that the Claimant and all of them would be fired unless they signed a statement saying that Claimant did not suffer a work-related injury. Mr. Solis testified that he merely signed the document because he felt intimidated stating that if he did not sign it, he was afraid that he would be fired.

29. Mr. Solis' testimony regarding the relatedness of the Claimant's left knee injury is persuasive as Mr. Solis is the only witness who testified against his own personal interest as a present employee of Employer. The testimony of Mr. Solis and the Claimant is found more credible and persuasive surrounding the reporting and mechanism of Claimant's injury.

30. The Claimant's testimony overall is credible and persuasive and supported by the medical records. Based on his testimony, the testimony of Mr. Solis and the

medical records, it is more likely than not that the Claimant hurt his knee going up and down the snubbing ladder at Employer's worksite while performing his normal work duties.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the right of the Claimant nor in favor of the rights of the Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

In this case, the ALJ finds that the Claimant's testimony was generally credible and persuasive and supported by the medical records in evidence. His testimony was also supported by Mr. Solis and, when taken together and viewed in context with the medical records, their testimony represents the most likely version presented of the facts surrounding the mechanism of Claimant's injury and his reporting of the injury to supervisors with the Employer. The Employer witnesses Rusty Loya, Jason Anderson, Scott Laird and Skip Bolding were not as persuasive or credible and there were motives present for these witnesses to insist the Claimant did not suffer a work injury, even if he had. Further, none of these witnesses were actually present at the time of the Claimant's injury or shortly thereafter, although Mr. Loya apparently arrived on the scene a couple of hours later. Rather than following the company procedures that these witnesses testified were policy when an employee reports an injury, some of the

Employer witnesses apparently intimidated Mr. Solis and other employees to sign a written statement to the effect that the Claimant was not injured at work and instead had told them that he was injured at home. Overall, in reviewing the evidence as a whole, the ALJ finds that the Employer witnesses were not credible with respect to the location, timing and nature of the Claimant's injury or his reporting of that injury to supervisors.

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo.App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

The mechanism of injury described by the Claimant during testimony at hearing, which is consistent with his description to medical providers, is a mechanism of injury that is consistent with the physical findings on examination and the meniscal tear on his MRI. The Claimant's left knee injury was significant enough to require work restrictions which would prevent him from working for Employer due to the need to avoid putting any weight on the leg prior to surgery and in post-operative recovery. The injury

occurred during Claimant's work shift while he was performing activities that are a specific part of his job duties. Based upon the Claimant's supported testimony and the medical records confirming Claimant's physical condition, it is found that the Claimant suffered a left knee medial meniscal tear while in the course and scope of his employment with Employer. This is supported by Mr. Solis' testimony that he never saw Claimant ambulate with a limp prior to April 24, 2015, and that it was only immediately after Claimant's knee injury on April 24, 2015, that he witnessed Claimant's inability to bear any weight on his left knee. Although it is likely that the Claimant suffered from a preexisting arthritic knee condition, the work activities on April 24, 2015 permanently aggravated, accelerated and combined with his condition to produce the need for immediate and ongoing treatment.

Based upon the Claimant's supported testimony and the medical records confirming the Claimant's physical condition, it is found that the Claimant suffered a compensable injury on April 24, 2015.

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101 C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v, Industrial. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971): *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat

the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Authorized providers also include those medical providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Emergency Medical Care

Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

However, in an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing medical service and the employer then has the right to select a physician. *Sims v. Industrial Claim Appeals Office of State of Colo*., 797 P.2d 777 (Colo. App. 1990).

Awards of emergency medical treatment have been upheld where the claimant's condition was so acute, and the need for treatment so immediate, that the claimant could not reasonably wait for authorization or a hearing to obtain permission for the treatment. See *Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995); *Ashley v. Art Gutterson*, W.C. No. 3-893-674 (January 29, 1992). However, compensable emergency treatment is not restricted to such circumstances. *Lutz v. Western Pacific Airlines, Inc*., W.C. No. 3-333-031 (ICAO, December 27, 1999). There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether the claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. An ALJ's determination whether there was a bona fide emergency or not will be upheld if supported by substantial evidence. *Hoffman v. Wal-mart Stores, Inc*., W.C. No. 4-774-720 (ICAO, January 12, 2010); *Timko v. Cub Foods*, W. C. No. 3-969-031 (ICAO, June 29, 2005).

Application of the Law to the Fact of this Case

After reporting an injury to his supervisors onsite on the night of April 24, 2015 when he suffered his compensable injury, the Claimant was ultimately sent home and was not provided any referrals for medical treatment with workers' compensation physicians. In fact, per the testimony of Employer witness, Mr. Laird, the Claimant contacted him by phone on the morning of April 25, 2015 and Mr. Laird told him that this was not a workers' compensation matter since no specific incident was reported to his supervisors and that the Claimant should seek treatment through private health insurance if his knee continued to bother him over the weekend.

The Claimant testified that on April 25, 2015, his knee was swollen and in pain and so he sought treatment at Platte Valley Medical Center. On April 25, 2015, the Claimant's wife transported him to Platte Valley Medical Center and the Claimant was advised that he was unable to return to work until he was cleared by "Ortho/Work Comp." On April 25, 2015, the Claimant was diagnosed with internal derangement of his left knee. On that day, the Claimant reported to Lane Looka, N.P. at Platte Valley Medical Center that he was 'on ladders yesterday' and that while he walked up stairs he felt and heard pop to his left knee with swelling and was unable to bear weight. The Claimant was referred to a work comp provider and told that he needed an outpatient MRI.

The Claimant testified that he brought a yellow piece of paper (of which Exhibit 7, p. 22 is a copy) to Skip the Safety Manager on the Monday after April 24, 2015. The Claimant testified that he did not tell Skip or anyone else at his Employer that he injured himself at home. Rather, he testified that he consistently told them that his knee injury happened at work, including his written statement provided on April 27, 2015. However, the Employer did not provide the Claimant with a designated provider list at this time.

On April 30, 2015, the Claimant sought treatment with Dr. Aaron Baxter at Mountain View Orthopedics. The Claimant advised Dr. Baxter that he was going up and down a ladder when he felt a sharp pop on the medial aspect of the knee and that his knee continues to be very painful. Dr. Baxter noted the Claimant was treated in the emergency department and was placed in a knee immobilizer and used crutches to avoid putting weight on his leg. Dr. Baxter diagnosed the Claimant with a left medial meniscus tear and referred him for a left knee MRI. On May 7, 2015, the Claimant underwent an MRI of his left knee. The MRI findings included (1) moderate radial tear medial meniscal body. Moderate to severe medial compartment osteoarthritis. (2) Mild contusion anterior lateral tibial plateau. (3) Large knee effusion with synovitis. (4) Prepatellar and infrapatellar subcutaneous edema with adventitial bursitis. (5) Possible grade 1 sprain of the ACL without tear.

After this, the Respondents filed a Notice of Contest on May 12, 2015 and the Claimant continued receiving medical treatment through his personal health insurance.

On May 28, 2015, Dr. Baxter performed a left knee arthroscopy and partial medial meniscectomy to repair the Claimant's left knee medial meniscal tear. The Claimant was not returned to work since his date of injury of April 24, 2015 nor has any physician or medical provider told him that he could return to work full duty. The Claimant continues to experience left knee pain. The Claimant saw Robert Botnick, PA-C at Mountain View Orthopedics on June 5, 2015 for a post-operative follow up visit. Mr. Botnick noted the Claimant's surgical sutures and staples were removed and the Claimant was provided with arthroscopic photos from his surgery and they were explained to him. The Claimant was referred for physical therapy.

With respect to whether the emergency department treatment was a "bona fide emergency" on April 25, 2015, the ALJ finds that the visit to Platte Valley Medical Center did constitute a bona fide emergency. A Claimant should not fear repercussions for obtaining emergency medical care when there is a reasonable and authentic belief that a medical condition is worsening due to an escalation of symptoms. Here, the Claimant credibly testified that his knee was continuing to swell and he was not able to place weight on his leg without pain. He received no alternative referral of medical care from his Employer. In looking at the whole picture over the course of the Claimant's treatment, seeking emergency treatment at Platte Valley Medical Center is found to be reasonable and necessary. This was the one and only emergency care visit over the course of the Claimant's treatment for this work injury and the evidence does not support an inference that the Claimant was attempting to circumvent the workers' compensation scheme to obtain inappropriate treatment.

In fact, the information gleaned as a result of the emergency room visit was ultimately incorporated by Dr. Baxter, who participated in the diagnosis and continued care of the Claimant. Because he was not provided with medical treatment for his left knee injury, the Claimant treated with Dr. Baxter who diagnosed a medial meniscus tear and performed surgery. The Claimant then followed up with the Mountain View Orthopedics clinic and was referred for physical therapy. At the hearing the Claimant testified that he continues to have knee pain. There was no testimony from medical professionals in this case, so the medical opinions are only those expressed in the admitted medical records and the Claimant's own testimony regarding his condition.

The conservative medical care and the surgical care that the Claimant received to date from the physicians and medical personnel at Mountain View Orthopedics, and any referrals, is also reasonably necessary to treat the Claimant's work-related condition. The medical records do not indicate that the Claimant's authorized treating physicians have placed the Claimant at MMI or released him to return to work without restrictions. The Claimant has established that he is entitled to further evaluation of his left knee condition to determine if he requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

ORDER

It is therefore ordered that:

1. The Claimant proved that he suffered a compensable work injury on

2. Medical treatment provided by Platte Valley Medical Center and Mountain View Orthopedics (and any referrals from the providers there) was reasonably necessary to cure and relieve Claimant from the effects of his injury and Respondents shall be liable for payment for this medical treatment.

3. The Claimant is entitled to further medical benefits to treat his symptoms of his left knee condition which are causally related to the April 24, 2015 work injury, if any, as determined by his authorized treating physicians, and the Respondents is responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

4. All matters not determined herein are reserved for future

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 9, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for additional lumbar fusion surgery by Jeffrey B. Kleiner, M.D. is reasonable, necessary and causally related to his September 8, 1989 industrial injury.

FINDINGS OF FACT

1. On September 8, 1989 Claimant suffered a compensable industrial injury to his lower back. On March 2, 1993 he underwent fusion surgery at L2-L3 and L3-L4 with Orderia Mitchell, M.D.

2. On May 17, 1996 Claimant reached Maximum Medical Improvement (MMI) and received a 34% whole person impairment rating. On April 11, 1997 Respondents filed a Final Admission of Liability (FAL). Claimant has continued to receive medical maintenance benefits.

3. Claimant subsequently sought an anterior/posterior interbody fusion at L5-S1. The parties proceeded to a hearing on April 19, 2000. On May 17, 2000 Claimant's request for surgical intervention was denied because it was not reasonable or necessary. Numerous physicians noted that Claimant was only a marginal surgical candidate from a psychological perspective.

4. Approximately five years later Claimant sought authorization for disc replacement surgery recommended by Jeffrey B. Kleiner, M.D. An August 23, 2005 order denied Claimant's request for surgery. The ALJ concluded that Claimant was not an appropriate surgical candidate for both physical and psychological reasons.

5. In the 10 years since Claimant's request for disc replacement surgery was denied, he has continued to receive treatment from Richard Stieg, M.D. and psychiatrist Bert Furmansky, M.D. During the period Claimant suffered a psychotic breakdown and was diagnosed with a psychotic disorder that has been treated with psychotropic medications.

6. Dr. Steig referred Claimant back to Dr. Kleiner in 2015. On April 8, 2015 Dr. Kleiner remarked that Claimant's CT scan revealed a pseudarthrosis at the L2-L3 level, a solid fusion at the L3-L4 level, disc space collapse at the L5-S1 level and degenerative changes at the L4-L5 level. Dr. Kleiner recommended a surgical procedure that included an anterior spinal fusion at the L4-L5 and L5-S1 levels as well as a repair of the L2-L3 level with segmental fixation.

7. Brian Reiss, M.D. evaluated Claimant in 2005 and 2015. In 2005 Dr. Reiss reviewed a CAT scan and determined that Claimant had a solid fusion at both the L4-L5 and L5-S1 levels. He also remarked that Claimant did not have a pseudoarthrosis. The CAT scan showed bone formation in the anterior column at both the L2-L3 and L3-L4 levels. Dr. Reiss concluded that Claimant was a poor surgical candidate.

8. Claimant also visited Thomas Puschak, M.D. at Panorama Orthopedics. Dr. Puschak determined that Claimant had a solid fusion from L2-L4 and did not recommend any additional surgery.

9. When Dr. Reiss evaluated Claimant in 2015 he reviewed an updated MRI and CAT scan. He determined that there was no pseudoarthrosis and the radiology report reflected a solid fusion. Dr. Reiss noted that it would be extremely unreasonable to consider a fusion between L4 and the sacrum because the procedure would convert the prior two level failed fusion into a four level fusion. Dr. Reiss explained that, considering Claimant's widespread degeneration and lack of response to a prior fusion surgery, additional surgery would be extremely unlikely to decrease Claimant's pain or increase his function. Accordingly, the surgery proposed by Dr. Kleiner does not constitute reasonable and necessary medical care relating to Claimant's industrial injury.

10. Dr. Reiss commented that the proposed fusion would also not be reasonable and necessary under the Colorado Medical Treatment Guidelines (Guidelines). He remarked that the Guidelines require the completion of all appropriate conservative care but Claimant has never completed a conservative care program and has refused to participate in a conservative treatment program. The Guidelines also require a psychological evaluation. However, Claimant's psychological treatment reveals "major psychological concerns that are a distinct roadblock to consideration of any surgical intervention at all." Dr. Reiss explained that Claimant's continued complaints of lower back pain are unrealistic, out of proportion to his objective findings and represent a deconditioned state over a long period of time. He noted that Claimant also has unrealistic expectations about his surgical outcome.

11. Claimant has not worked since 1990. Other than visiting Drs. Furmansky and Stieg on a regular basis and receiving psychotropic medication, Claimant has not undergone any other medical treatment in the previous 10 years. Dr. Furmansky noted that Claimant is "focusing on the desire for surgery" and although his pain remains at the same level, he "still want[s] to go through surgery."

12. On July 15, 2015 Claimant was evaluated by psychiatrist Gary S. Gutterman, M.D. Dr. Gutterman confirmed that as early as 2005 numerous physicians noted that Claimant was exhibiting an odd and bizarre presentation characteristic of a psychiatric process. In 2009 Dr. Stieg had determined that Claimant suffered from a psychotic disorder that was unrelated to his Workers' Compensation claim. Dr. Gutterman summarized that Claimant has a Schizotypal personality disorder that includes passive dependent character traits. He also has a chronic pain disorder

resulting in pain complaints that are considerably out of proportion to physical findings. Claimant has been highly attached to his symptoms of pain and maintained a passive dependent "professional injured patient" stance in the Workers' Compensation system. Dr. Gutterman concluded that Claimant's Schizotypal personality disorder, prior psychotic expressions, need for antipsychotic medication and marked somatization are unrelated to his September 8, 1989 industrial injury.

13. Claimant has failed to demonstrate that it is more probably true than not that the request for additional lumbar fusion surgery by Dr. Kleiner is reasonable, necessary and causally related to his September 8, 1989 industrial injury. Dr. Reiss persuasively explained that Claimant does not suffer from a pseudoarthrosis and the radiology report reflected a solid fusion. He noted that it would be extremely unreasonable to consider a fusion between L4 and the sacrum because it would convert the prior two level failed fusion into a four level fusion. Dr. Reiss explained that, considering Claimant's widespread degeneration and lack of response to a prior fusion surgery, additional surgery would be extremely unlikely to decrease Claimant's pain or increase his function. He maintained that the proposed fusion would also not be reasonable and necessary under the Guidelines because they require the completion of all appropriate conservative care but Claimant has never completed a conservative care program. Moreover, Claimant's psychological treatment reveals "major psychological concerns that are a distinct roadblock to consideration of any surgical intervention at all." Dr. Reiss explained that Claimant's continued complaints of lower back pain are unrealistic, out of proportion to his objective findings and represent a deconditioned state over a long period of time.

14. Dr. Gutterman determined that Claimant is not a surgical candidate from a psychological perspective. Claimant suffers from a Schizotypal personality disorder that includes passive dependent character traits. He also has a chronic pain disorder resulting in pain complaints that are considerably out of proportion to physical findings. Claimant has been highly attached to his symptoms of pain and has maintained a passive dependent "professional injured patient" stance in the Workers' Compensation system. Dr. Gutterman concluded that Claimant's Schizotypal personality disorder, prior psychotic expressions, need for antipsychotic medication and marked somatization are unrelated to his September 8, 1989 industrial injury. Based on the persuasive opinions of Drs. Reiss and Gutterman, Claimant's request for additional lumbar fusion surgery as proposed by Dr. Kleiner is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the request for additional lumbar fusion surgery by Dr. Kleiner is reasonable, necessary and causally related to his September 8, 1989 industrial injury. Dr. Reiss persuasively explained that Claimant does not suffer from a pseudoarthrosis and the radiology report reflected a solid fusion. He noted that it would be extremely unreasonable to consider a fusion between L4 and the sacrum because it would convert the prior two level failed fusion into a four level fusion. Dr. Reiss explained that, considering Claimant's widespread degeneration and lack of response to a prior fusion surgery, additional surgery would be extremely unlikely to decrease Claimant's pain or increase his function. He maintained that the proposed fusion would also not be reasonable and necessary under the Guidelines because they require the completion of all appropriate conservative care but Claimant has never completed a conservative care program. Moreover, Claimant's psychological treatment reveals "major psychological concerns that are a distinct roadblock to consideration of any surgical intervention at all." Dr. Reiss explained that Claimant's continued complaints of lower back pain are unrealistic, out of proportion to his objective findings and represent a deconditioned state over a long period of time.

6. As found, Dr. Gutterman determined that Claimant is not a surgical candidate from a psychological perspective. Claimant suffers from a Schizotypal personality disorder that includes passive dependent character traits. He also has a chronic pain disorder resulting in pain complaints that are considerably out of proportion to physical findings. Claimant has been highly attached to his symptoms of pain and has maintained a passive dependent "professional injured patient" stance in the Workers' Compensation system. Dr. Gutterman concluded that Claimant's Schizotypal personality disorder, prior psychotic expressions, need for antipsychotic medication and marked somatization are unrelated to his September 8, 1989 industrial injury. Based on the persuasive opinions of Drs. Reiss and Gutterman, Claimant's request for additional lumbar fusion surgery as proposed by Dr. Kleiner is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for additional fusion surgery is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 6, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-499-370-07

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 17, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 11/17/15, Courtroom 4, beginning at 1:34 PM, and ending at 3:50 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through N were admitted into evidence, without objection. A transcript of the evidentiary deposition of Guadalupe Ledezma, Ph.D., clinical psychologist, was received in lieu of Dr. Ledezma's testimony at hearing.

At the commencement of the hearing, the Claimant withdrew the issue of medical maintenance benefits and penalties against the Respondents. Also, the parties agreed to strike the Final Admission of Liability (FAL), dated November 4, 2011. The parties further stipulated to reasonably necessary and causally related medical maintenance care by ATPs, with the exception of ongoing care by Dr. Ledezma, and the ongoing prescription of Zoloft, an anti-depressant.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, giving the Respondents 2 working days within which to object as to form. The proposed decision was filed on

November 30, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the Claimant's ongoing psychological care and medication recommended by her authorized treating physician (ATP), Lon Noel, M.D., and her authorized treating psychologist, Dr. Ledezma, is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of August 31, 2000; and, is it causally related thereto.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On August 31, 2000, the Claimant sustained admitted injuries to her right wrist and hand during the course and scope of her employment. As a result of her right upper extremity (RUE) injury, in 2001, the Claimant developed an injury in her left upper extremity (LUE) (Claimant's Exhibit 1).

2. On April 24, 2001, ATP Dr. Noel noted that the Claimant was quite frustrated and was having mental problems secondary to the injury. He referred her to Cynthia Johnsrud, Psy.D., a clinical psychologist, for an evaluation of her functional state and depression related to the Claimant's bilateral wrist injuries (Claimant's Exhibit 2).

3. On May 15, 2001, Dr. Johnsrud diagnosed the Claimant as having an adjustment disorder with somatic reactivity and characteristics of a dependent personality (Claimant's Exhibit 3).

4. On January 11, 2002, the Claimant met with her personal physician, Alicia Vasquez, M.D. Dr. Vasquez reported that the Claimant was feeling depressed and experiencing crying spells. Dr. Vasquez diagnosed the Claimant with depression and started her on 50 mg of Zoloft (Claimant's Exhibit 4).

5. On January 18, 2002, the Claimant returned to see Dr. Johnsrud. Dr. Johnsrud diagnosed the Claimant with a mild depression and stated the opinion that psychotherapy (4-6 sessions) would be beneficial for her" (Claimant's Exhibit 3).

6. In March 2003, Dr. Vasquez reported that the Claimant "wants to try being off Zoloft as per the medical examiner's recommendation (evaluation done as part of her workman's comp exam)." After approximately six weeks, in April 2003, Dr. Vasquez reported that the Claimant's depression had worsened since being taken off Zoloft. Additionally, the Claimant now had anxiety, as well. Dr. Vasquez started the Claimant on 20 mg of Prozac (Claimant's Exhibit 4)

7. On May 2, 2003, Dr. Noel confirmed that the Claimant had begun having anxiety attacks after weaning her off antidepressant medication. Dr. Noel referred the Claimant to Dr. Ledezma for a psychological evaluation Claimant's (Exhibit 2). During her testimony, the Claimant could not recall being weaned off Zoloft because, as she stated, she "has taken Zoloft for such a long time." Nonetheless, the Claimant recalled that at one time she had been prescribed Prozac. She stated that her body "could not take it [Prozac]" and that "it agitated her real bad."

8. On May 9, 2003, Dr. Ledezma recommended that the Claimant's medication be switched back to Zoloft since the Claimant felt increased nervousness, irritability, and continued depression while on Prozac. Dr. Ledezma also noted that when the Claimant's pain was high, she often became depressed and irritable, despite the use of Prozac (Claimant's Exhibit 6).

9. On May 20, 2003, J. Stephen Gray, M.D., a Division Independent Medical Examiner (DIME), reported that the Claimant was seeing Dr. Ledezma for her depression and anxiety. Dr. Gray stated that it was appropriate to allow further treatment under the maintenance care rubric. According to Dr. Gray, "it is this examiner's opinion that [Claimant's] depression is related to her work-related problems. She had no history of prior depression" (Claimant's Exhibit 7).

10. After Dr. Gray's report, Dr. Noel restarted the Claimant's prescription of Zoloft on May 30, 2003 (Claimant's Exhibit 2).

11. After the Claimant began taking Zoloft, Dr. Ledezma reported that the Claimant was doing well overall and was responding well to Zoloft (Claimant's Exhibit 6).

12. On September 29, 2003, Dr. Ledezma reported that the Claimant was making considerable progress in her psychological state and anticipated the following session to focus on preparing the Claimant for discharge from treatment (Claimant's Exhibit 6).

13. On January 29, 2004, Dr. Noel referred the Claimant for "psych follow-up, 4-6 additional visits with Dr. Ledezma" (Claimant's Exhibit 2).

14. On October 13, 2004, the undersigned ALJ issued Specific Findings of Fact, Conclusions of Law and Order stating, "Respondents shall pay the costs of continuing maintenance medical benefits, under the *Grover* case, to maintain medical stability as recommended by Dr. Gray and prescribed by Dr. Noel including maintenance psychological treatment under Dr. Ledezma" (Claimant's Exhibit 8).

The Present Situation

15. The Claimant testified, however, that she had not sought further treatment from Dr. Ledezma after the October 2004 hearing because she did not know that she had the option of seeing Dr. Ledezma after what she considered the conclusion of her case.

16. On November 11, 2014, Dr. Noel noted that an interaction that Claimant had with the insurance carrier, wherein the adjuster enquired whether the Claimant had a re-injury, created a lot of stress, which caused an increase in symptoms (Claimant's Exhibit 2). The increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The ALJ draws a plausible inference and finds that the Claimant's fear and anxiety about losing her source of income triggered the renewed visits to Dr. Ledezma in 2015.

17. During her testimony, the Claimant confirmed this interaction and her resultant increase in stress because she believed she may have been at risk of losing her benefits.

18. According to the Claimant, after her interaction with the Insurance carrier, she discovered that she was still represented by counsel and contacted her attorney. The Claimant verbalized to her attorney that she was having difficulty coping with her pain. Her attorney informed her that she could return to see Dr. Ledezma pursuant to a court order.

19. On May 12, 2015, Dr. Noel reported that Claimant had some depressive affect (Claimant's Exhibit 2).

20. On May 14, 2015, Dr. Ledezma noted that the Claimant returned for psychotherapy after several years. Dr. Ledezma noted that a court ruling provided the Claimant with long-term psychotherapy treatment when she requires additional psychological assistance. Dr. Ledezma noted that the Claimant had been having more anxiety and emotional upset in the past months. Dr. Ledezma recommended that the Claimant's dose of Zoloft be increased since she was having increased psychological distress. On May 26, 2015, Dr. Ledezma continued to recommend that the Claimant's dose of Zoloft be increased (Claimant's Exhibit 6).

21. On June 2, 2015, Dr. Noel noted that the Claimant returned to see her authorized treating psychotherapist, Dr. Ledezma, for a post-maximum medical improvement (MMI) psychological reevaluation and follow-up visit. Dr. Noel issued a referral, stating, "My current referral was to cover the 05/14/2015 visit and to approve the 4 to 6 total maintenance followups [*sic*] pertaining to her work-related injury" (Claimant's Exhibit 2)

22. On June 16, 2015, Dr. Noel noted that the Claimant had another appointment scheduled with Dr. Ledezma, and that her appointments with Dr. Ledezma had been "okayed" per an adjudication judge. Dr. Noel reported that the Claimant was demonstrating some depressive affect. He noted that there were a few tears shed as she talked about her case, and she appeared to be upset and worried about the future. Dr. Noel increased the Claimant's Zoloft to 75 mg daily (Claimant's Exhibit 2).

Independent Medical Examination by Stephen Moe, M.D.

23. The Respondents contested the referral to and treatment from Dr. Ledezma. The Respondents requested an IME, which was performed by Dr. Moe, a psychiatrist. Dr. Moe is of the opinion that the Claimant's current psychological status is not causally related to her work injuries of 2000 and 2001.

24. Dr. Moe did not offer a persuasive opinion concerning whether ongoing psychological/psychiatric care for the Claimant, if not causally related, is reasonably necessary to cure the Claimant's chronic pain and depression nor did he offer a persuasive opinion concerning the Zoloft prescription.

25. The Claimant testified, however, that she needs care from Dr. Ledezma to cope with the pain and decreased functionality caused by her injuries. She stated, "Every day is hard for me dealing with my injuries, doing tasks with my hands. It's hard coping with the pain part, not being able to function the way a person functions that has the mobility in her hands." The Claimant complained that even simple household tasks require much effort on her part.

Dr. Ledezma's Evidentiary Deposition

26. On October 22, 2015, the evidentiary deposition of Dr. Ledezma was taken. Dr. Ledezma testified that anybody living with chronic pain and physical limitations will likely have times when their psychological state deteriorates, and therefore may require ongoing psychological treatment for the rest of the person's life if there continues to be problems that occur that will cause that regression in the person's functioning (Ledezma Depo. pp. 25-26, lines 21-25 & 1-2).

27. Dr. Ledezma testified that the treatment she provided in May and June of 2015 was strictly limited to issues related to the Claimant's work-related injuries and

chronic pain (Ledezma Depo. p. 8, lines 9-13; p. 10, lines 17-22; p. 11, lines 19-22; p. 51, lines 23-25; p. 66, lines 13-4).

28. According to Dr. Ledezma, the Claimant's situation is chronic by nature. She stated that the depression and anxiety that the Claimant is having is primarily related to issues around being physically limited and having to depend on other people for assistance with a lot of activities of daily living, and feeling basically that there is no sense of improvement forthcoming. Dr. Ledezma stated that this has been really emotionally devastating for the Claimant (Ledezma Depo. pp. 8-9, lines 25 & 1-9; pp. 56-57, lines 19-25 & 1; p. 57, lines 7-8).

29. According to Dr. Ledezma, it's not necessarily one specific thing that will cause the Claimant to have more depression or problems sleeping. It is a cumulative effect of basically realizing that as time goes on, she's noticing more and more problems here and there that are impacting her self-esteem, her quality of life, etc. (Ledezma Depo. p. 51, lines 13-18).

30. Dr. Ledezma stated that when she saw the Claimant in September of 2003, the Claimant was functioning fairly well, and she would consider the way she was functioning then to be her general baseline (Ledezma Depo. p. 58, lines 2-5).

31. Dr. Ledezma stated that when the Claimant came back into treatment in 2015, she was no longer at psychological baseline. There was a regression and deterioration in her psychological functioning. Dr. Ledezma stated that part of maintenance care is to maintain that baseline level, which at the time she saw the Claimant, she was not at baseline level in her opinion (Ledezma Depo. p. 13, lines 11-18; pp. 17-18, lines 25 & 1-4; pp. 22-23, lines 24-25 & 1-3; p. 43, lines 9-10).

32. Dr. Ledezma recommended ongoing maintenance care, which included the treatment she received in May and June 2015. Her recommendation, which is based upon her last visit in June 2015, would have been six to eight visits over the course of a year, more or less. Dr. Ledezma stated that that recommendation was consistent with her reading of the "medical treatment guidelines" [Division of Workers' Compensation Medical Treatment Guidelines]. Dr. Ledezma also stated that the possible treatment requirements for the future are something that she may need to assess on an as-needed basis, depending on what is going on with the Claimant. (Ledezma Depo. p. 13, lines 2-10; p. 14, lines 2-15; p. 54, lines 21-23; p. 57, lines 9-13; p. 66, lines 10-11).

33. According to Dr. Ledezma, if the Claimant's current functioning is the way she presented at her last session in June 2015, she would need ongoing treatment of some kind (Ledezma Depo. p. 18, lines 11-13).

34. In fact, Dr. Ledezma observed the Claimant's demeanor during the deposition and stated that it was more likely than not that the Claimant was still having symptoms of depression that had not been resolved or treated. Dr. Ledezma recommended possibly more psychological treatment, definitely ongoing medication, with a possible increase of medication, and a psychiatric referral (Ledezma Depo. p. 62, lines 15-20; p. 63, lines 14-20).

The Claimant's Testimony at Hearing

35. The Claimant testified that she has continuously been taking Zoloft from 2002 to the present and that Dr. Noel has continued to renew her prescription of Zoloft.

36. The Claimant also testified that on one occasion she discovered by accident that she cannot take the generic form of Zoloft. According to her testimony, Dr. Noel forgot to indicate on the prescription that the Claimant could not substitute the generic brand of Zoloft for the name brand. Consequently, she was dispensed Zoloft in generic form. The Claimant testified that she took it for approximately three months and the generic Zoloft did not work for her. The Claimant felt it did not stabilize her mood the same way that the name brand Zoloft did.

37. Dr. Moe testified that there is no consensus in the medical literature regarding the efficacy of generic versus name brand drugs. Dr. Moe also testified that it is a commonly reported phenomenon that some patients do not tolerate or do not do well on generic brands.

38. Dr. Moe was of the opinion that the Claimant has suffered from chronic disorder involving a blend of depression and anxiety since the mid-1990s, where she presented with symptoms associated with stress. It was recommended at that time that the Claimant get treatment and she declined.

39. According to Dr. Moe it is **possible** (emphasis supplied) that the Claimant could have been benefited from Zoloft even without the work injury. Dr. Moe, however, could not testify that this opinion was within a reasonable degree of psychological probability because the Claimant had not taken nor was prescribed any antidepressant medication prior to her work injury. The ALJ infers and finds that this is sheer speculation on Dr. Moe's part.

40. Based on her review of the records, however, Dr. Ledezma stated the opinion that the disorder has been persistent since the early aftermath of the Claimant's work injury. Dr. Ledezma stated, "Her depression has been present since the time that she was injured and was unable to return to her previous level of functioning, which makes it a chronic depression" (Ledezma Depo. p. 16, lines 19-24; p. 17, lines 1-4).

41. Dr. Ledezma further stated that there was no indication of any ongoing prior psychological issues or problems that were treated or identified prior to her 2000 injury, other than a medical report from 1995 that noted that the Claimant was taking care of her diabetic and blind mother and the death of Claimant's brother (Ledezma Depo. p. 16, lines 16-18; p. 17, lines 11-13).

42. According to Dr. Ledezma, the situation [in 1995] would have been a stressor that might have created a limited situational depression; however, she would expect there to be a lot of medical records if the depression had significantly continued, and the lack of records indicated to her that once the situational stressor was resolved, the Claimant's symptoms would also resolve (Ledezma Depo. p. 59, lines 6-20). Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and ATP Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible.

43. During his testimony, Dr. Moe agreed that the death of the Claimant's brother and the disabling condition of her mother could cause a situational depression and that it is not unusual for patients who suffer from chronic pain to experience depression and anxiety.

44. According to Dr. Ledezma, she did not see any indication that there would be any reason for the Claimant's depression other than her deep-rooted depression and anxiety from this injury (Ledezma Depo. p. 17, lines 17-21).

45. Dr. Ledezma is of the opinion that the Claimant's psychological state would worsen if the psychological care and the antidepressant medication were taken away from her (Ledezma Depo. p. 26, lines 20-24).

46. Dr. Ledezma stated that her goal is to bring the Claimant to a level of stable functioning where she's at a baseline level that she feels she can cope on a day-to-day basis with all the issues that she's facing (Ledezma Depo. p. 23, lines 19-22).

47. Dr. Ledezma stated that all of her opinions were within a reasonable degree of psychological probability (Ledezma Depo. pp. 26-27, lines 25 & 1-2).

Ultimate Findings

48. Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a

thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

49. Between conflicting psychiatric/psychological opinions, the ALJ makes a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

50. The Claimant has proven, by a preponderance of the evidence that her continuing need for psychological treatment and the Zoloft prescription is reasonably necessary to maintain her at MMI and to prevent a deterioration of her work-related psychological condition. The Claimant did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

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CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or

inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting psychiatric/psychological opinions, the ALJ made a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

Pre-Existing Condition

c. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). Despite

the Respondents' argument that the Claimant could easily have benefited from psychotherapy treatment and medication, and been on Zoloft for the past 20 years, she did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

Maintenance Medical Care (*Grover Medicals*)/Psycholgical/Zoloft Prescription

d. A claimant has suffered a compensable injury if the industrial accident is the proximate cause of the claimant's need for medical treatment or disability. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law*, § 13.00 (1997). As found, the increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The call from the adjuster in 2014 and ongoing uncertainly about the possible loss of her benefits increased the Claimant's anxiety. As found, The ALJ drew a plausible inference and found that fear and anxiety about the Claimant losing her source of income triggered the renewed visits to Dr. Ledezma in 2015. There is no persuasive evidence that the Claimant's need for psychological treatment is based on a subsequent intervening event. The totality of the evidence, including the Claimant's testimony, demonstrated that the need for psychotherapy treatment and medication recommended by Dr. Ledezma and ATP Dr. Noel are reasonably necessary and causally related to the admitted injury of 2000 and the sequelae thereof

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld*

County Bi-Products, Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the ongoing need for psychological treatment and the Zoloft prescription.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The respondents shall pay the costs of ongoing psychological care at the hands of Guadalupe Ledezma, Ph.D., Licensed Clinical Psychologist, and Lon Noel, M.D., including the continuing costs of the Claimant's Zoloft prescription, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-512-905-03

PROCEDURAL HISTORY

This matter proceeded to hearing on December 3, 2014, with the record remaining open until January 12, 2015 for the submission of position statements and the deposition transcript of Dr. Jorge Klajnbart. The ALJ issued a Summary Order on February 20, 2015. The ALJ considered the Summary Order final as of March 6, 2015 because the Office of Administrative Courts (OAC) received no timely request for a full order from either party.

On September 15, 2015, Claimant's counsel advised the ALJ that he was still awaiting a full order based upon a request Respondents had apparently filed on February 23, 2015. Because the OAC never received such a request, the OAC had purged the file and considered it closed. Ultimately, both parties agreed that Respondents timely filed a request for a full order, and that they anticipated issuance of a full order despite the passage of seven months without any notification to the OAC concerning the status of the full order.

On September 21, 2015, the ALJ held a telephonic conference with counsel for both parties. Respondents' counsel agreed to re-create the record and submit it to the OAC. The ALJ received the complete record as of October 23, 2015.

ISSUES

The issue presented for determination is whether the Claimant's request for a right total shoulder replacement is reasonable, necessary and related to his work injury.

At the commencement of hearing, the Respondents stated that they had the burden of proof because they had filed an admission of liability admitting for maintenance medical treatment. In Respondents' brief, the Respondents averred that Claimant had the burden of proof. In this decision, the burden of proof was assigned to the Claimant.

FINDINGS OF FACT

1. The Claimant sustained a compensable injury to his right shoulder in 2001 when a U-Haul truck rolled over him. He sustained injuries to various parts of his body including his right shoulder.

2. The Claimant has received medical treatment for his shoulder over the past 13 years including two surgeries performed by Dr. Phillip Stull. Claimant was eventually placed at maximum medical improvement on June 4, 2008.

3. A December 19, 2001 MRI of Claimant's right shoulder showed an intact infraspinatus with some fatty infiltration but no significant atrophy of the infraspinatus. The MRI also showed a superior subluxation of the humeral head and apparent non-union of an acromion fracture and changes in the AC joint region which the radiologist presumed to be post-traumatic. The radiologist also noted disruption of the supraspinatus with extensive retraction.

4. When Dr. Stull performed surgery to repair the Claimant's right shoulder on April 11, 2002, his post-operative diagnosis was "chronic massive retracted right rotator cuff tear with impingement and AC joint arthritis as well as acromion nonunion plus complex SLAP lesion."

5. Dr. Stull also noted and repaired a non-union fracture in the acromion, a type III slap lesion, a bucket handle tear of the labrum with detachment and an unstable bicep complex, all of which were caused by the August 2001 accident.

6. Dr. Stull initially considered the rotator cuff irreparable because it was "quite retracted due to chronicity of the tear." Dr. Stull ultimately repaired the tears in the infraspinatus and supraspinatus tendons.

7. Claimant testified that his shoulder felt much better after surgery than he had been following the August 23, 2001 accident.

8. Over the subsequent years, Dr. Stull has continued to treat Claimant's right shoulder, excising a cyst in 2008 and administering intermittent injections.

9. Despite the various forms of medical treatment Claimant has received, he remains symptomatic in his right shoulder.

10. On March 16, 2011, Claimant reported to Stull that he was experiencing increasing right shoulder pain over the prior six to eight weeks. Claimant elected to proceed with conservative treatment at that time which included an injection. Dr. Stull noted that he would refer Claimant for an MRI if he didn't get any improvement in six weeks.

11. By August 24, 2011, Claimant had the MRI and visited with Dr. Stull to review the results. Dr. Stull noted that the MRI shows early cuff tear arthritis and with and irreparable massive joint cuff [tear] and fatty atrophy. Dr. Stull opined that Claimant may need reverse arthroplasty but that Claimant continued to prefer conservative treatment. Dr. Stull injected Claimant's shoulder and referred him to physical therapy.

12. On November 16, 2012, Dr. Stull noted that Claimant continued to suffer from right shoulder pain but that he had reasonable function. Dr. Stull's impression was: osteoarthritis, right shoulder and cuff tear arthritis. Dr. Stull performed another injection into Claimant's right shoulder.

13. Claimant returned to see Dr. Stull on September 13, 2013. Claimant reported increasing right shoulder pain over the prior month or two, and loss of motion. He reported good relief from the last injection performed in November 2012 and requested that Dr. Stull perform another injection, and Dr. Stull did.

14. On December 20, 2013, Claimant saw Dr. Stull again and complained of increasing pain in his right shoulder as well as increasing popping, reduced motion and pain that interrupted his sleep. Dr. Stull referred Claimant for a new MRI.

15. The January 15, 2014 MRI showed a large full thickness tear of the supraspinatus with marked fatty atrophy and mild fatty atrophy on the infraspinatus and, for the first time, evidence of mild fatty atrophy of the teres minor muscles, which had not even been mentioned in either the MRI report or in any medical records around the time of the August 23, 2001 accident.

16. Other new findings on the January 15, 2014 MRI include partial tearing of the subscapulus tendon with subluxation of the long head of the biceps tendon out of the bicipital groove, a widening of the AC joint and superior subluxation of the humeral head with marginal osteophytes slightly progressed from a 2011 MRI.

17. Based on the MRI finds and Claimant's clinical presentation, Dr. Stull recommended a right reverse total shoulder replacement. Claimant's pain had become more severe and his function progressively compromised.

18. Dr. Stull pursued a request for authorization with the Insurer, and no further evidence concerning the outcome of this request was offered into evidence. The ALJ infers that the Insurer denied the request which resulted in Claimant pursuing a hearing.

19. Claimant has been living with significant shoulder pain for the past two years. He is still able to work as a mechanic but it has been more difficult.

20. Dr. Stull has opined that not only does Claimant need a reverse shoulder replacement, but that such need is directly related to his 2001 work injury. Dr. Stull stated the need for surgery is due to advanced cuff tear arthritis which is related to the injury-related surgery he performed on the Claimant in 2002.

21. The Respondents referred the Claimant to Dr. Jorge Klajnbart for an independent medical examination. Dr. Klajnbart performed an examination of the Claimant and reviewed Claimant's medical records. Dr. Klajnbart opined that a reverse shoulder replacement surgery is not necessary in Claimant's case and that even if he needed the surgery, it is due to a chronic rotator cuff tear that pre-existed the Claimant's work injury. Dr. Klajnbart opined that there is no objective medical evidence that the work injury caused the rotator cuff tears. Dr. Klajnbart agreed that the shoulder surgery is reasonable.

22. According to Dr. Klajnbart, the findings on the MRI done in December 2001 reflect chronic changes. Dr. Klajnbart also noted two medical records that referenced rotator cuff problems that pre-existed Claimant's work injury. He provided little detail concerning the content of these records and neither of these records were offered into evidence.

23. Claimant did not remember having any problem with his right shoulder prior to the August 23, 2001 accident and the record lacks any meaningful information concerning any pre-existing rotator cuff problems other than the December 2001 MRI findings.

24. There is no persuasive evidence in the record that Claimant had any medical treatment for any rotator cuff problems. There are no medical records prior to August 23, 2001 which indicate that Claimant had a recommendation for surgical repair of his right rotator cuff.

25. Claimant's right shoulder symptoms have increased since 2010 and Claimant has reduced range of motion and strength and increased, constant pain.

26. Dr. Stull is of the opinion that this worsening is the result of the normal history of a failed repair of a massive chronic rotator cuff tear.

27. Dr. Stull is also of the opinion that the need for the original rotator cuff repair and the other things caused solely by the accident which he repaired in 2002 was related to and caused by the industrial accident.

28. Finally, Dr. Stull believes that the reverse shoulder replacement needed to treat the cuff tear arthritis now is more likely due to the industrial accident than to any other factor.

29. The Claimant has proven that he is entitled to the reverse shoulder replacement surgery recommended by Dr. Stull. Although the December 2001 MRI showed some pre-existing problems with his right shoulder, the ALJ finds that such problems were exacerbated by the work injury. The ALJ is not persuaded by Dr. Klajnbart's opinions that all of Claimant's right rotator cuff problems flow from a pre-existing condition completely unrelated to his work injury. The medical record does not support such a finding or conclusion given at the lack of meaningful information concerning any pre-existing clinical findings.

30. The ALJ credits the opinions of Dr. Stull who has been treating the Claimant for the past 13 plus years. Dr. Stull performed a rotator cuff repair, considered work-related at that time, which has now failed. The medical records document a gradual deterioration of Claimant's right shoulder condition over the past few years and the reverse total arthroplasty will prevent further deterioration.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of

causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

7. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). Resolution of that issue is one of fact for the ALJ. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

8. As found above, the Claimant has proven that he is entitled to the reverse shoulder replacement surgery recommended by Dr. Stull. Although the December 2001 MRI showed some pre-existing problems with his right shoulder, the ALJ finds that such problems were exacerbated by the work injury. The ALJ is not persuaded by Dr. Klajnbart's opinions that all of Claimant's right rotator cuff problems flow from a pre-existing condition completely unrelated to his work injury. The medical record does not support such a finding or conclusion. There is no persuasive evidence in the record to support that Claimant had any significant clinical symptoms related to a right rotator cuff tear or that he had received any medical treatment. The ALJ credits the opinions of Dr. Stull who has been treating the Claimant for the past 13 plus years. He has opined that the need for the right shoulder replacement is due to cuff tear arthritis, a condition he relates to the work injury particularly in light of the work-related rotator cuff repair surgery performed in 2002.

ORDER

It is therefore ordered that:

1. Respondents are liable for the right total reverse arthroplasty recommended by Dr. Stull because it is a reasonable and necessary treatment related to and designed to prevent further deterioration of Claimant's work-related right shoulder condition.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 6, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

#JJK1M0500D106Rv 2

ISSUES

The issue raised for consideration at hearing is whether Claimant proved by a preponderance of the evidence that he is entitled to an order awarding medical benefits. Specifically, whether Claimant proved by a preponderance of the evidence that Dr. Huser's recommendation for referral to an ear, nose and throat (ENT) specialist for evaluation is a reasonably necessary and related medical benefit.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 57 year old man who suffered an admitted injury to his left ankle in the course and scope of his employment with Employer on July 22, 2003.

2. As a result of the admitted injury, Claimant underwent multiple surgeries including multiple attempts at ankle fusion. Claimant developed complications with infections and eventually had a below the knee amputation of his left leg on May 2, 2012.

3. Claimant has treated with many different providers from the date of his injury in 2003 until now and is currently being treated by David J. Schneider, M.D. at Panorama Orthopedics and Spine Center, and Chris Huser, M.D., at MD Pain, Comprehensive Pain Management.

4. Claimant is currently using a prosthetic device below the knee on his left leg. Claimant is currently experiencing significant pain and has trouble bearing weight on his prosthesis, with an average pain rating of 7-8/10 when weight bearing. Claimant is unable to walk without significant pain and often uses crutches or a wheelchair.

5. Claimant had osteoarthritis of the left knee prior to his below the knee amputation. This osteoarthritis was asymptomatic prior to his injury and his use of the prosthesis.

6. Following his below the knee amputation, Claimant suffered a fall that required surgery to repair his right quadriceps tendon. This surgery was performed on October 23, 2012, by Jared Foran, M.D. of Panorama Orthopedics & Spine Center. Following surgery, Claimant developed a complication with infection that required further treatment.

7. On January 6, 2014, Claimant had surgery for neurectomy of the left saphenous nerve neuroma to relieve sharp burning nerve pain on the bottom of his stump that was performed by Mark Conklin, M.D. of Panorama Orthopedics & Spine Center.

8. Claimant had several follow up appointments with Dr. Conklin after the left saphenous nerve neuroma surgery. Dr. Conklin noted on April 23, 2014, that Claimant presented to the clinic in a wheelchair. Dr. Conklin also noted Claimant was seeing Dr. Schneider for his knee.

9. Claimant has had multiple different prosthetic devices and numerous different sockets. He also has had multiple injections to his knee as well as a neurectomy of the left saphenous nerve neuroma all in attempts to relieve his pain. These more conservative treatments have failed to relieve Claimant of severe pain when ambulating.

10. Claimant's physician, ATP Chris Huser, has been providing Claimant with narcotic and non-narcotic medications for a prolonged period of time to address the pain from his injury and following his multiple surgeries. Those medications have included and include among others, codeine, Gabapentin, and Mexalon.

11. On May 28, 2015, ATP Huser made a referral to Jeff Chain, M.D., "to consult on [Claimant's] tinnitus." That request was denied by Respondents, even though ATP Huser noted that Claimant had a "one year history of increasing bilateral tinnitus." *See* Claimant's Submission Tab 1, BS 16.

12. Dr. Olsen opined that, although tinnitus could be caused by Gabapentin and/or possibly a combination of the medications Claimant has been taking for his admitted workplace injury, because Claimant had been on medications for such a long period of time it was Dr. Olsen's opinion that the tinnitus was unrelated to the medications and was rather an age related event.

14. Claimant testified that he was not seeking treatment, rather at the present he was seeking the consultation requested by ATP Huser so a determination could be made regarding what causes the tinnitus.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2003). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

ATP Huser's referral was clearly in the nature of a diagnostic evaluation, to establish Claimant's future medical needs as it relates to his tinnitus condition. *Moon Far Restaurant v.* ICAO, 862 P. 2d 1026 (Colo. App. 1993). Diagnostic evaluations are compensable medical benefits under the Act. See *Public Service Co., v. ICAO*, 979 P. 2d 584 (Colo. App. 1999). Respondents' expert, Dr. Olsen, opined in testimony that tinnitus can be caused by the medication Claimant is currently using for his admitted workplace injury.

Claimant proved by a preponderance of the evidence that he is entitled to the medical benefit of an evaluation with Jeff Chain, M.D. Claimant established that it was more probably true than not that ATP Huser's request for evaluation is authorized, reasonable and necessary. Claimant established that it is more probably true than not that ATP Huser's referral for an ENT evaluation is reasonable, necessary and should be authorized by Respondents. Insurer shall pay pursuant to the fee schedule for an evaluation with Jeff Chain, M.D., for an evaluation that is reasonable, necessary and related to Claimant's admitted industrial injury.

ORDER

It is therefore ordered that:

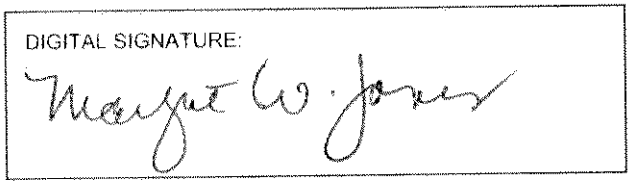
1. Accordingly, it is ordered that Respondents shall authorize Dr. Huser's recommendation for Claimant's referral to an ENT for evaluation.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: __November 18, 2015_____

DIGITAL SIGNATURE:



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

#J8D0C9P50D0V6Uv 2

ISSUES

- Whether claimant has proven by a preponderance of the evidence that Dr. James is authorized to provide claimant with medical treatment?

- Whether claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. James, including the SI joint injections at the L5-S1 level, are reasonable and necessary medical treatment related to claimant's industrial injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury while employed with employer on September 26, 2004 when he fell from the cab of his truck and landed on the left side of his body. Claimant was initially diagnosed with a left hip fracture, a T12 compression fracture, a bruised coccyx. Claimant also complained of pain initially in his low back, upper back, left shoulder and neck.

2. Claimant's medical records document that he received treatment for low back pain prior to his injury dating back to June 2002. Claimant had a magnetic resonance image ("MRI") performed on March 20, 2003 that revealed lower disc and facet degeneration.

3. Following claimant's September 26, 2004 injury, claimant underwent an x-ray of his lumbar spine on September 27, 2004 (along with x-rays of his pelvis, cervical spine, and left hand). The x-rays showed anterolateral osteophytes at the L4 level (and to a lesser degree at the L3 and L5 levels). No acute injuries were noted on the x-rays.

4. Claimant was eventually placed at maximum medical improvement ("MMI") for his injuries on March 15, 2006 by Dr. Ryan. Claimant was provided with a PPD rating by Dr. Ryan of 35% whole person, including a rating of 17% for the cervical spine, 18% for the lumbar spine and 5% for a brain injury. Respondents filed a final admission of liability ("FAL") on June 16, 2006 admitting for the 35% whole person impairment rating.

5. Claimant treated with Dr. Told following MMI for maintenance treatment. Dr. Told was also claimant's family physician. Dr. Told referred to Dr. Kinder for continuing maintenance medical treatment related to his work related injury in an undated "To Whom it May Concern" letter that appears to have been drafted on or about August 2009. In the same letter, Dr. Told refers claimant for ongoing care to Dr. Ryan. Dr. Told specifically references claimant's treatment of his low back in the letter, along with treatment involving claimant's head, neck and shoulder.

6. Claimant subsequently went to hearing on the issue of the compensable nature of his right hip condition. A Summary Order was issued on January 9, 2009 that found claimant's right hip condition was not related to his September 26, 2004 injury. Claimant underwent a right total hip arthroplasty in December 2008 regarding this condition.

7. Claimant testified at hearing that after he was placed at MMI, he continued to have symptoms in his low back. Claimant testified at hearing that prior to his work injury, he had received medical treatment to his low back, including one injection to treat his low back pain.

8. Claimant sought treatment on October 28, 2008 from Dr. Copeland. Dr. Copeland's initial report mentions Dr. Told on the first page and is addressed "Dear Tom". Claimant testified at hearing that Dr. Told had recommended Dr. Copeland to treat claimant for his low back pain. Other records from Dr. Copeland refer to Dr. Told as the "referring physician". The ALJ finds Dr. Copeland is within the chain of referrals from Dr. Told.

9. Dr. Copeland subsequently treated claimant for his right hip and low back pain. The right hip condition, as mentioned above, was found to be not related to claimant's work injury. Dr. Copeland also was treating claimant for his cervical spine through 2010. The ALJ notes that Dr. Copeland's treatment for claimant's hip was not related to the work injury, however, the treatment for claimant's cervical spine would be related to the work injury and would be within the chain of referrals, as this was a referral from Dr. Told.

10. Claimant was evaluated by Dr. Mistry on June 27, 2013. Dr. Mistry noted claimant was complaining of lumbar spine pain that was described as sharp and stabbing. Dr. Mistry recommended an MRI of the lumbar spine. The MRI again showed mild degenerative disc disease. Dr. Mistry recommended physical therapy and referred claimant to Dr. Langston for pain management.

11. Claimant was evaluated by Dr. Langston on July 15, 2013 for pain in his low back and around his right hip down his right leg to his knee. Dr. Langston noted that claimant was seen as a referral from Dr. Copeland. Dr. Langston noted that claimant could consider an epidural steroid injection ("ESI").

12. Claimant testified that the injections into his back were effective in relieving claimant's pain in his low back. Claimant testified that Dr. James eventually purchased Dr. Langston's practice and claimant continued to treat with Dr. James. The ALJ credits the testimony of claimant at hearing and finds that Dr. James is authorized to treat claimant as the physician who took over Dr. Langston's practice.

13. Claimant was initially evaluated by Dr. James on March 19, 2015. Dr. James noted claimant was seen by Dr. Langston several years ago and did have some relief from injection therapy. Dr. James noted claimant had lower lumbar pain on the right side. Claimant also reported pain radiating into the buttocks and occasionally

down the left leg. Dr. James reviewed claimant's medical records and recommended a left ESI and SI joint injection. Dr. James noted claimant's right SI joint was the most symptomatic and recommended a right SI joint injection (times 2).

14. Respondents obtained a records review independent medical evaluation ("IME") with Dr. Lesnak on October 7, 2015. Dr. Lesnak had previously performed an IME of claimant in 2008 in connection with his right hip condition. Dr. Lesnak noted in his October 7, 2015 report that claimant had low back complaints that predated his work injury. Dr. Lesnak also noted that he had previously opined that claimant's right buttock, hip, and groin symptoms were not related to the September 26, 2004 work injury. Dr. Lesnak opined that no medical evidence was made available that would suggest that claimant's more recent diagnosis of sacroiliitis or lumbosacral radiculitis was in any way related to the September 26, 2004 work injury. Dr. Lesnak noted that when he evaluated claimant on April 10, 2008, more than 3 ½ years after his occupational injury, claimant had no clinical evidence of symptomatic SI joint dysfunction or sacroiliitis or lumbar or sacral radiculitis.

15. Dr. Lesnak testified consistent with his IME report at hearing. Dr. Lesnak testified on cross examination he did not believe claimant injured his low back during the work injury. Dr. Lesnak testified that Dr. James did not perform a causation analysis regarding claimant's current back complaints and that he was not certain if Dr. James had reviewed claimant's prior medical records. Dr. Lesnak testified it appeared that claimant's treatment recommendations were based off of claimant's clinical presentation.

16. The ALJ credits the medical records from Dr. James, Dr. Told and claimant's treating physicians over the contrary medical opinions expressed by Dr. Lesnak and finds that claimant has proven that it is more likely than not that the treatment recommended for his low back condition by Dr. James, including the injections, is related to the September 26, 2004 work injury. The ALJ notes that claimant had a low back injury as rated by Dr. Ryan and that the current medical treatment recommended by Dr. James can reasonably be traced back to claimant's September 26, 2004 work injury by a close review of the medical records.

17. The ALJ further finds that Dr. James is authorized to treat claimant as a physician within the chain of referrals as he came to treat claimant through a referral from Dr. Copeland who was an authorized physician by referral from Dr. Told.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page*

v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2008).

3. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

4. As found, claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. James, including the ESI and SI joint injection are reasonable medical treatment necessary to prevent further deterioration of claimant's physical medication condition.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

6. When the authorized treating physician refers the claimant to another health care provider, the treatment rendered by the referred provider is compensable as part of the legal chain of authorization. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1029 (Colo. App. 1993) (*citing Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985)).

7. As found, Dr. James is determined to be authorized in this case as a physician in the chain of referrals from Dr. Told (through Dr. Copeland).

ORDER

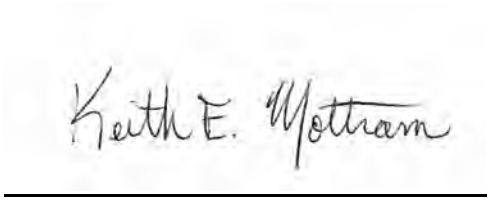
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to prevent further deterioration of claimant's condition related to the September 26, 2004 work injury, including the ESI and SI joint injections recommended by Dr. James.

2. Dr. James is hereby determined to be an authorized provider for medical treatment related to claimant's September 26, 2004 compensable work injury.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 27, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

Whether the respondent proved by a preponderance of the evidence that the claimant no longer needs medical maintenance treatment for his December 6, 2005 industrial injury.

FINDINGS OF FACT

1. The claimant was employed as a Correctional Officer with the respondent-employer on December 6, 2005 when he sustained an admitted injury to his back while running up some stairs to a backup call.

2. The claimant had a prior work related injury to his back with the respondent-employer on April 21, 2003 when he was involved in a takedown of an inmate.

3. The claimant described his injury on December 6, 2005 to a physician's assistant at CCOM as feeling a twinge in his lower back. In that report, PA Schultz notes that the claimant has had ongoing back pain since his 2003 injury for which he was undergoing chiropractic treatment 1-2 times per week. Physical examination on December 6, 2005 revealed full range of motion of the claimant's back including forward flexion to his fingertips touching his toes. "He relates that he has pain in his back with range of motion and that was present prior to the incident yesterday." The claimant was diagnosed with low back pain with a history of chronic low back pain. PA Schultz did not anticipate any permanent impairment as a result of the claimant's 2005 injury. The claimant was released to return to work with no restrictions.

4. The claimant was placed at maximum medical improvement (MMI) for his 2005 injury on August 3, 2007. Dr. Olson recommended medical maintenance treatment in the form of medications for the next 6-12 months, periodic medical evaluation, and continued chiropractic adjustment over the next 6 months. A Final Admission of Liability was filed on August 28, 2007 admitting for medical maintenance benefits.

5. The claimant underwent an Independent Medical Evaluation with Dr. Bernton on December 2, 2005. Dr. Bernton compared MRI reports from 2006, 2010, 2012, and 2014 and noted increased degenerative changes on each. Dr. Bernton opined that the claimant's persistent lumbar and thoracic pain was associated with his progressive degenerative disk disease in his lumbar and thoracic spine. Dr. Bernton further opined, within a reasonable degree of medical probability, that the claimant's condition would be the same with or without the occupational injury on December 6, 2005. With regard to ongoing medical maintenance treatment, Dr. Bernton noted that Dr. Olson's recommendations for 6-12 months of maintenance treatment was sufficient to address any exacerbation of the claimant's underlying and preexisting degenerative disk disease which occurred as a result of the claimant's December 6, 2005 industrial injury. Dr. Bernton opined that any ongoing maintenance treatment needed for the claimant's preexisting degenerative disk disease was not the result of the claimant's December 6, 2005 injury.

6. On February 9, 2015, Dr. Sandell, an authorized treating physician, agreed with Dr. Bernton's assessment that "issues related to the December 6, 2005 workers' compensation claim likely stabilized." Dr. Sandell went on to discuss the more serious injury the claimant sustained to his back in 2003 which the claimant was treating for and "continues to treat for."

7. Dr. Sandell testified for the claimant.

8. The respondents argue that Dr. Sandell testified as a lay witness.

9. Dr. Sandell was identified as a medical doctor with expertise in Physical Medicine and Rehabilitation. While the pro se claimant did not specifically ask that Dr. Sandell be offered as an expert the ALJ so recognizes Dr. Sandell's testimony as it meets the criteria of Rule 702, CRE.

10. Dr. Sandell has been treating the claimant since 2007. When he first began to treat the claimant the diagnosis was chronic lumbar pain.

11. The claimant has had two injuries to his lumbar spine with overlay, occurring in 2003 and 2005 respectively.

12. As a result of the claimant's 2005 injury he experienced severe pain in the buttocks and numbness in his feet. This indicates that there is possibly an injury.

13. Even if the 2005 injury is part of the 2003 injury and aggravated that injury it is difficult to tell how much is as a result of the older injury and how much is a result of the newer injury.

14. There is a possibility that exercise can exacerbate or irritate the back.

15. Dr. Sandell has stated that, in part, he agrees with Dr. Bernton's assessment that the December 6, 2005 workers' compensation injury likely stabilized. Dr. Sandell's emphasizes, however, that Dr. Bernton fails to mention there was a more serious workers' compensation injury in 2003 that the claimant was treated for and continues to treat for.

16. Dr. Sandell opines that it is hard to objectively establish causality.

17. He further opines that the claimant's back is getting worse.

18. Dr. Sandell agrees that the claimant had prior degenerative disk disease.

19. Dr. Sandell is unaware of the mechanism of injury for the claimant's 2003 injury but is aware that the 2005 injury occurred when the claimant was running up stairs on an emergency call when he felt a pull in his back and felt leg symptoms. Dr. Sandell opines that this was a traumatic event since there was an acute onset of back pain with associated leg symptoms.

20. Dr. Sandell states that the claimant was receiving treatment for the 2003 injury at the time of the occurrence of the 2005 injury. Dr. Sandell states that the claimant has a disk protrusion and he doesn't know if the disk protrusion was present prior to the 2005 event.

21. Dr. Sandell opines that it is possible, although he cannot say probable, that there was permanent damage caused by the 2005 injury.

22. He agrees that the initial diagnosis was musculoskeletal strain but that he was not the claimant's doctor at the time. The condition stabilized to the point of no further work-up but still requiring medical treatment. Dr. Sandell opines that it is probable that the claimant's treatment needs are for the 2005 injury. He goes on to say that differentiation is not possible to tell if the treatment required is for the 2003 versus the 2005 injury. He does agree that the medical records in the case can help to differentiate.

23. Dr. Sandell agrees that degenerative disk disease is potentially an issue.

24. Dr. Bernton credibly and persuasively opined that the claimant's MRIs, which were taken serially over time, are consistent with the progression of degenerative disk disease and that there is no evidence that either the claimant's 2003 injury or his 2005 injury produced a structural change that would alter the progression of the degenerative disk process. Dr. Bernton credibly and persuasively opined that the probability that the claimant would be any different in terms of his medical needs or the care that he requires at this point in time had he not had the December 5, 2006 industrial injury is extraordinarily high.

25. The ALJ finds that the respondent has established that it is more likely than not that the claimant no longer requires medical maintenance treatment for his December 6, 2005 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App.

1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). However, after an injured worker reaches maximum medical improvement, the injured worker may obtain future medical benefits only to maintain maximum medical improvement or to prevent deterioration of his condition. *See Grover v. Industrial Commission*, 759 P.2d 705, 711 (Colo. 1988). The injured worker is therefore entitled to *Grover*-type medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary "to relieve a claimant from the effects of an [industrial] injury" or prevent further deterioration of the injured worker's condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992); *Jones v. Estes Express Lines*, W.C. No. 4-651-658 (April 25, 2008).

5. In cases where the respondent has filed a Final Admission of Liability admitting for medical maintenance benefits, they retain the right to challenge the relatedness, reasonableness, and necessity of ongoing medical benefits. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). When the respondent seeks an order terminating all medical maintenance benefits, the respondent bears the burden to prove by a preponderance of the evidence that no treatment is or will be reasonably needed to relieve the effects of the injury or prevent deterioration of the claimant's injury-related condition(s). Section 8-43-201(1), C.R.S.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013); *Salisbury v. Prowers County School District RE2,* W.C. No. 4-702-144 (June 5, 2013). Whether a party has sustained their burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Questions of causation and relatedness and whether ongoing treatment is reasonably necessary present issues of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *See Kroupa v. Industrial Claim Appels Office*, 53 P.3d 1192 (Colo. App. 2002). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004).

6. As found, the respondent has proved by a preponderance of the evidence that additional medical maintenance treatment is not causally related to the claimant's December 6, 2005 industrial injury. Dr. Bernton's opinion that the claimant requires ongoing medical treatment for his progressive degenerative disk disease and not because of his December 6, 2005 industrial injury is credible and persuasive. Accordingly, the claimant is not entitled to additional medical maintenance benefits under this claim.

ORDER

It is therefore ordered that:

1. The respondent's request to terminate medical maintenance benefits is granted. The claimant is not entitled to receive additional medical maintenance benefits under this claim.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 23, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his August 6, 2009 and September 29, 2010 Workers' Compensation claims based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the requests for fusion surgery by Douglas W. Beard, M.D. are reasonable, necessary and causally related to his August 6, 2009 and September 29, 2010 industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period April 14, 2014 until terminated by statute.

STIPULATIONS

The parties agreed to the following:

1. Douglas Beard, M.D. is Claimant's Authorized Treating Physician (ATP).

2. Claimant was not responsible for his April 14, 2014 separation from employment.

3. Claimant earned $884.98 each week and received $357.55 in COBRA benefits. He thus earned a total Average Weekly Wage (AWW) of $1,242.53.

FINDINGS OF FACT

1. Claimant is a 56 year old male. He worked for Employer as a Material Handler.

2. On August 6, 2009 Claimant sustained an admitted lower back injury in case number 4-800-916 during the course and scope of his employment with Employer. On August 14, 2009 Timothy Wirt, M.D. performed a semihemilaminectomy and discectomy to Claimant's lumbar spine at the L4-L5 level. On November 19, 2009 Claimant underwent a dynamic stabilization at the same level.

3. Although Claimant continued to report lower back pain, he reached Maximum Medical Improvement (MMI) on March 12, 2010. He was assigned a 20% whole person impairment rating for his lower back condition. Insurer filed a Final

Admission of Liability (FAL) on April 8, 2010. Claimant's claim subsequently closed by operation of law.

4. On September 29, 2010 Claimant sustained a second admitted lower back injury in case number 4-837-106 during the course and scope of his employment with Employer. He reached MMI with no permanent impairment on May 18, 2011. Claimant received work restrictions of no lifting in excess of 30 pounds. He also received sitting, standing, stooping and bending limitations. Respondents filed a FAL and acknowledged reasonable, necessary and related medical maintenance benefits. Claimant's claim subsequently closed by operation of law.

5. Claimant continued to receive medical maintenance treatment for his lower back condition from various medical providers. On October 24, 2012 Claimant visited orthopedic surgeon Bryan Castro, M.D. for an examination. After reviewing Claimant's MRI and EMG, he determined that Claimant was not a surgical candidate. Dr. Castro recommended epidural injections for symptom relief.

6. On December 18, 2012 Claimant visited Rosalinda Pineiro, M.D. for an evaluation. Because Claimant was not a surgical candidate, Dr. Pineiro concluded that Claimant remained at MMI with no change in his permanent impairment rating. She continued Claimant's medical maintenance medications.

7. On May 9, 2013 Claimant reported to the Poudre Valley Hospital Emergency Room for treatment. He noted a significant increase in lower back pain after experiencing a "pop" while lifting at work on May 6, 2013. Dr. Pineiro subsequently commented that the Emergency Room lumbar spine MRI did not reflect any acute findings.

8. On September 18, 2013 Claimant returned to Dr. Pineiro for an examination. Dr. Pineiro noted that Claimant had suffered an exacerbation of lower back symptoms but had returned to his baseline condition. She commented that Claimant continued to remain at MMI with no new impairment or restrictions.

9. On February 7, 2014 Claimant visited Hope Edmonds, M.D. at Workwell and reported increasing lower back pain over the prior two weeks. She assigned Claimant a 10 pound lifting restriction and referred him to the Poudre Valley Emergency Room for an evaluation. The Emergency Room physician noted that Claimant's symptoms were similar to his lower back pain on May 9, 2013 and referred him back to Dr. Wirt for an examination.

10. On February 18, 2014 Claimant underwent a lumbar MRI. On February 20, 2014 Dr. Edmonds reviewed the MRI and remarked that there were no changes compared to Claimant's October 10, 2012 MRI. Dr. Edmonds maintained that Claimant was not a surgical candidate. She noted that Claimant remained at MMI and recommended pain management care.

11. On April 14, 2014 Claimant ceased working for Employer. Claimant was not responsible for his separation from employment.

12. Claimant subsequently underwent pain management care from Alicia Feldman, M.D. On August 20, 2014 Dr. Feldman remarked that Claimant suffered from chronic lower back pain. Because injections had not provided Claimant with any pain relief, he sought a surgical consultation. On September 22, 2014 Dr. Feldman noted that Claimant would likely continue to suffer chronic lower back pain regardless of any surgical procedure.

13. On September 15, 2014 Claimant underwent a surgical consultation with Douglas W. Beard, M.D. Claimant reported that his symptoms had waxed and waned since his November 2009 lower back surgery but his symptoms had recently become more severe. Dr. Beard recommended a CT scan to determine whether Claimant's dynamic stabilization hardware was stable and a discography to identify his pain generator.

14. On November 6, 2014 Dr. Beard recorded that he had reviewed Claimant's CT scan and could not identify Claimant's pain generator. He commented that the CT scan revealed degenerative disc disease. Claimant sought to move forward with hardware removal and extend his fusion up and down one level.

15. On December 3, 2014 Claimant filed a Petition to Reopen his August 6, 2009 {W.C. No. 4-800-916) and September 29, 2010 (W.C. No. 4-837-106) Workers' Compensation claims. The Petition to Reopen was predicated on Dr. Beard's September 15, 2014 medical report.

16. On February 28, 2015 Claimant underwent an independent medical examination with Michael J. Rauzzino, M.D. After conducting an extensive review of Claimant's medical records, Dr. Rauzzino performed a physical examination. In evaluating Dr. Beard's surgical request, Dr. Rauzzino referred to the *Medical Treatment Guidelines* (*Guidelines*). He explained that the *Guidelines* require a clearly identifiable pain generator prior to proceeding with surgery. Dr. Rauzzino determined that Claimant lacked a clearly identifiable pain generator and has experienced lower back pain since his original 2009 injury. He summarized that Claimant more likely suffered from failed back syndrome rather than new progressive complaints at the L5-S1 and L3-L4 levels.

17. Dr. Edmonds reviewed Dr. Rauzzino's report. She determined that Claimant remained at MMI until his source of pain could be connected to his original industrial injury.

18. Claimant subsequently underwent a discogram to identify his pain generator. He was symptomatic at all levels of his back.

19. On June 25, 2015 Claimant returned to Dr. Beard for an examination. Dr. Beard noted that Claimant's discogram was "equivocal" and revealed symptoms at all levels. After discussing various surgical options, Dr. Beard proposed a "hybrid"

procedure in which Claimant would undergo an exploration at L4-L5, a fusion from L4-S1 and an arthroplasty at L3-L4.

20. On July 9, 2015 Dr. Rauzzino issued a Supplemental Report. After reviewing additional medical records and Dr. Beard's June 25, 2015 request for surgical authorization, Dr. Rauzzino noted that the request was inconsistent with the *Guidelines.* He explained that Dr. Beard's proposed procedure constituted a three level fusion on top of an already-fused segment to produce a four level fusion. The *Guidelines* limit fusions to two levels because studies have shown that the rates of success for fusing additional levels are much lower and do not improve functional outcomes. Moreover, Dr. Rauzzino maintained that the proposed surgery would address pre=existing degenerative disc disease independent of adjacent level disease. Finally, based on the discogram Dr. Rauzzino determined that Claimant suffered from pain at all levels of his back and thus an additional lumbar fusion would not be medically reasonable or necessary.

21. On July 22, 2015 Dr. Beard responded to Dr. Rauzzino's July 9, 2015 letter and provided additional details regarding the hybrid surgical option. Dr. Beard noted that the requested procedure involved extending Claimant's arthrodesis to L5-S1 distally, exploration of the L4-L5 level and an arthroplasty at the L3-L4 motion segment.

22. On August 5, 2015 Claimant visited Roberta P. Anderson-Oeser, M.D. at Workwell. He reported severe lower back pain three weeks earlier and sought emergency room treatment. Claimant received medications and was discharged to return home. Dr. Anderson-Oeser continued Claimant on restricted duty and did not retract his MMI status.

23. Claimant testified at the hearing in this matter. He explained that he has suffered from chronic lower back pain since his initial industrial injury on August 6, 2009. In fact, when asked whether his lower back condition worsened in February 2014, he responded that it had "basically been pretty much the same." Claimant recognized that his lower back symptoms have waxed and waned since his initial industrial injury. He attributed his flare-ups to his work activities.

24. On September 14, 2015 Dr. Beard testified through an evidentiary deposition in this matter. He detailed that the best treatment for Claimant involved a "hybrid" surgical procedure. The procedure would involve the insertion of an artificial disc at the L3-L4 level, removing hardware, possibly fusing the L4-L5 level and fusing the L5-S1 level. Dr. Beard maintained that Claimant has suffered a substantial deterioration of his lower back condition because of his work activities.

25. Dr. Beard explained that Claimant has suffered from lower back pain since the early 2000s. He noted that patients with lower back pain will always struggle with the waxing and waning of symptoms. Despite Dr. Beard's surgical recommendation he acknowledged that the discogram revealed pain reproduction at all levels and all of the levels reflected degenerative changes. Moreover, Claimant's February 18, 2014 lumbar MRI did not demonstrate any changes relative to his previous MRI's. Finally, Dr. Beard

recognized that none of his proposed surgical procedures satisfy the criteria delineated in the *Guidelines*.

26. On September 28, 2015 Dr. Rauzzino testified through an evidentiary deposition in this matter. Dr. Rauzzino maintained that Claimant's work-related condition has not worsened but instead his symptoms are related to multilevel disc degeneration. He detailed that Claimant not only has degeneration of the discs adjacent to the level of his fusion, but also at the non-adjacent level above the fusion. The degeneration at the adjacent levels was thus more likely caused by the natural aging process than his previous fusion surgery at the L4-L5 level.

27. Dr. Rauzzino also explained that Dr, Beard's proposed surgical procedure was not reasonable, necessary or related to Claimant's industrial lower back injuries. Initially, Claimant's discogram revealed pain at all levels of his back and did not identify a distinct pain generator. After reviewing additional medical records and Dr. Beard's June 25, 2015 request for surgical intervention, Dr. Rauzzino explained that the request was inconsistent with the *Guidelines.* Finally, Dr. Rauzzino explained that the proposed "hybrid" procedure constituted an experimental technique and there is not much data available about the performance of an artificial disc above a two level fusion.

27. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his August 6, 2009 and September 29, 2010 Workers' Compensation claims based on a change in condition. He has not demonstrated that his condition has worsened or that he is entitled to benefits.

28. On August 6, 2009 Claimant sustained an admitted lower back injury in case number 4-800-916, underwent lumbar surgery at the L4-L5 level and reached MMI with a 20% whole person impairment rating on March 12, 2010. On September 29, 2010 Claimant sustained a second admitted lower back injury in case number 4-837-106 and reached MMI with no permanent impairment on May 18, 2011. After Respondents filed FAL's in both cases, they closed by operation of law. On December 3, 2014 Claimant filed a Petition to Reopen both of his claims. The Petition to Reopen was predicated on Dr. Beard's September 15, 2014 medical report. On September 15, 2014 Claimant underwent a surgical consultation with Dr. Beard and reported that his symptoms had waxed and waned since his November 2009 lower back surgery but his symptoms had recently become more severe. Dr. Beard ultimately recommended a "hybrid" surgical procedure for Claimant. The procedure would involve the insertion of an artificial disc at the L3-L4 level, removing hardware and possibly fusing both the L4-L5 and L5-S1 levels. Dr. Beard maintained that Claimant has suffered a substantial deterioration of his lower back condition because of his work activities.

29. In contrast to Dr. Beard's surgical request, the medical records are replete with evidence that Claimant has suffered from chronic waxing and waning lower back pain since his initial industrial injury on August 6, 2009. In fact, Claimant recognized that his lower back symptoms have waxed and waned since his initial industrial injury. Claimant's symptoms flared both while he was working for Employer and after he ceased employment on April 14, 2014. Multiple treating physicians have

maintained that Claimant reached MMI and have not retracted the MMI determination. Although Claimant's lifting restrictions were increased from 30 pounds to 10 pounds on February 7, 2014 by Dr. Edmonds at Workwell because he had reported increasing lower back pain over the prior two weeks, he remained at MMI. Furthermore, Dr. Edmonds reviewed a February 18, 2014 MRI and remarked that there were no changes compared to Claimant's October 10, 2012 MRI. Multiple doctors have also noted that there have been no objective changes in Claimant's lumbar MRI's since he reached MMI.

30. Dr. Rauzzino maintained that Claimant's work-related condition has not worsened but instead his symptoms are related to multilevel disc degeneration. He detailed that Claimant has degeneration of the discs adjacent to the level of his fusion, but also at the non-adjacent level above the fusion. The degeneration at the adjacent levels was thus more likely caused by the natural aging process than his previous fusion surgery at the L4-L5 level. Finally, Claimant's Petition to Reopen was predicated on a September 14, 2014 date of worsening of condition. However, Claimant ceased working for Employer on April 14, 2014. The temporal proximity of Claimant's date of worsening several months after he ceased working for Employer suggests that any onset of acute symptoms was not related to his work activities for Employer. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

31. Claimant has failed to demonstrate that it is more probably true than not that Dr. Beard's requested fusion surgery is reasonable, necessary and causally related to his August 6, 2009 and September 29, 2010 industrial injuries. Initially, Claimant's discogram revealed pain at all levels of his back and thus an additional lumbar fusion would not be medically reasonable or necessary. Furthermore, Dr. Rauzzino explained that the proposed surgical procedure is inconsistent with the *Guidelines*. Finally, Dr. Rauzzino remarked that the proposed "hybrid" procedure constituted an experimental technique and there is not much data available about the performance of an artificial disc above a two level fusion.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-203(2)(b)(II) C.R.S. provides that issues admitted in an FAL are automatically closed unless the claimant contests the FAL in writing and requests a hearing on any disputed issues that are ripe for hearing within 30 days. C.R.S. 8-43-203(2)(b)(II); *Quintana v. Earle M. Jorgensen Co*., W.C. No 4-543-106 (ICAP, Sept. 16, 2004). The purpose of the requirement is to encourage prompt adjudication of issues involving a legitimate controversy and close issues over which there is no dispute. *Id*; see also *Dyrkopp v. ICAO*, 30 P.3d 821 (Colo. App. 2001); *Drinkhouse v. Mountain Board Cooperative Education Services*, W.C. No. 4-368-354 (ICAP, Feb. 7, 2003). The timely filing of an objection and application for hearing on a disputed issue are jurisdictional prerequisites to a hearing on that issue. See *Peregoy v. ICAO*, 87 P.3d 261 (Colo. App. 2004); *Dalco Industries, Inc. v. Garcia*, 867 P.2d 156 (Colo. App. 1993)

5. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

6. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual

determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

7. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his August 6, 2009 and September 29, 2010 Workers' Compensation claims based on a change in condition. He has not demonstrated that his condition has worsened or that he is entitled to benefits.

8. As found, on August 6, 2009 Claimant sustained an admitted lower back injury in case number 4-800-916, underwent lumbar surgery at the L4-L5 level and reached MMI with a 20% whole person impairment rating on March 12, 2010. On September 29, 2010 Claimant sustained a second admitted lower back injury in case number 4-837-106 and reached MMI with no permanent impairment on May 18, 2011. After Respondents filed FAL's in both cases, they closed by operation of law. On December 3, 2014 Claimant filed a Petition to Reopen both of his claims. The Petition to Reopen was predicated on Dr. Beard's September 15, 2014 medical report. On September 15, 2014 Claimant underwent a surgical consultation with Dr. Beard and reported that his symptoms had waxed and waned since his November 2009 lower back surgery but his symptoms had recently become more severe. Dr. Beard ultimately recommended a "hybrid" surgical procedure for Claimant. The procedure would involve the insertion of an artificial disc at the L3-L4 level, removing hardware and possibly fusing both the L4-L5 and L5-S1 levels. Dr. Beard maintained that Claimant has suffered a substantial deterioration of his lower back condition because of his work activities.

9. As found, in contrast to Dr. Beard's surgical request, the medical records are replete with evidence that Claimant has suffered from chronic waxing and waning lower back pain since his initial industrial injury on August 6, 2009. In fact, Claimant recognized that his lower back symptoms have waxed and waned since his initial industrial injury. Claimant's symptoms flared both while he was working for Employer and after he ceased employment on April 14, 2014. Multiple treating physicians have maintained that Claimant reached MMI and have not retracted the MMI determination. Although Claimant's lifting restrictions were increased from 30 pounds to 10 pounds on February 7, 2014 by Dr. Edmonds at Workwell because he had reported increasing lower back pain over the prior two weeks, he remained at MMI. Furthermore, Dr. Edmonds reviewed a February 18, 2014 MRI and remarked that there were no changes compared to Claimant's October 10, 2012 MRI. Multiple doctors have also noted that there have been no objective changes in Claimant's lumbar MRI's since he reached MMI.

10. As found, Dr. Rauzzino maintained that Claimant's work-related condition has not worsened but instead his symptoms are related to multilevel disc degeneration. He detailed that Claimant has degeneration of the discs adjacent to the level of his fusion, but also at the non-adjacent level above the fusion. The degeneration at the adjacent levels was thus more likely caused by the natural aging process than his previous fusion surgery at the L4-L5 level. Finally, Claimant's Petition to Reopen was predicated on a September 14, 2014 date of worsening of condition. However,

Claimant ceased working for Employer on April 14, 2014. The temporal proximity of Claimant's date of worsening several months after he ceased working for Employer suggests that any onset of acute symptoms was not related to his work activities for Employer. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

11. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Dr. Beard's requested fusion surgery is reasonable, necessary and causally related to his August 6, 2009 and September 29, 2010 industrial injuries. Initially, Claimant's discogram revealed pain at all levels of his back and thus an additional lumbar fusion would not be medically reasonable or necessary. Furthermore, Dr. Rauzzino explained that the proposed surgical procedure is inconsistent with the *Guidelines*. Finally, Dr. Rauzzino remarked that the proposed "hybrid" procedure constituted an experimental technique and there is not much data available about the performance of an artificial disc above a two level fusion.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

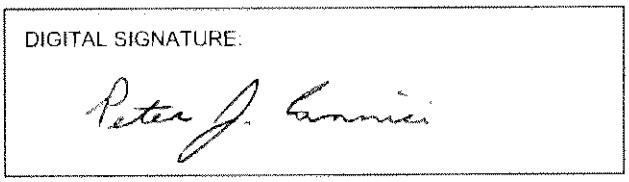
1. Claimant's request to reopen his April 24, 2010 Workers' Compensation claim is denied and dismissed.

2. Claimant's request for additional fusion surgery as proposed by Dr. Beard is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 19, 2015.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are as follows:

- Whether Claimant suffered a change in her medical condition or there was an error which would allow Claimant to reopen her claim;

- Whether the Claimant is entitled to additional permanent partial disability benefits beyond those originally admitted and paid by Respondents;

- Whether Claimant is entitled to an award of permanent total disability, which claim was previously denied by Order of Judge Jones on January 25, 2013;

- Whether the Claimant is entitled to payment of or an award of specific medical benefits;

- Whether the medical benefits requested by Claimant are through authorized treating physicians.

- Although the Claimant listed issues of compensability and death benefits in the Application for Hearing, those issues were not heard, by agreement, as the Claimant is not deceased; therefore, death benefits are not a ripe issue for hearing and the claim is an admitted case and, therefore, compensability is not an issue that needs to be resolved. Additionally, these issues were stricken by Prehearing Order of PALJ Barbo dated June 3, 2015.

- The Claimant elected to proceed *pro se*. She was advised by the undersigned Judge that she had the right to obtain an attorney and that if she chose to proceed without an attorney, she would be held to the same standards as if represented. After this was explained to Claimant, she chose to proceed without an attorney but requested that her husband, Eliazar Aguirre, be allowed to assist her. This request was granted, without objection by Respondents, based on the OAC Hearing Notice that allows the parties to be represented by an attorney or other person of their choice at the hearing. Case law would also support the Claimant's husband representing her in an administrative proceeding.

- Jesse Torrez, a professional interpreter, was given the interpreter's oath and acted as the Claimant's interpreter throughout the hearing process.

PROCEDURAL MATTERS

During the hearing, the ALJ gave both parties the opportunity to offer exhibits into evidence. The Claimant offered Exhibit 1, consisting of five pages. Respondents offered only Exhibit F, consisting of the Summary Order from Judge Margot W. Jones dated January 25, 2013. The ALJ admitted both exhibits into evidence. Respondents declined to offer Claimant's medical records into evidence. Claimant also failed to offer any of her medical records into evidence other than the documents found in Exhibit 1. Based on the evidence admitted and the testimony of the Claimant and her husband, the ALJ found and concluded that Claimant failed to meet her burden of proof regarding all issues endorsed. The ALJ entered a ruling from the bench and requested that Respondents' counsel prepare a proposed order.

After the hearing, on October 9, 2015, the Claimant submitted to the ALJ a large packet of medical records accompanied by a note requesting that the ALJ consider those records. The note also accused Respondents' counsel of refusing to provide Claimant's medical records to the ALJ, and basically asks that the ALJ consider these records now. While the ALJ appreciates the efforts made by Claimant to provide additional medical records, the hearing record was closed as of October 6, 2015. Further, the Respondents were under no obligation to submit records to the ALJ on behalf of the Claimant. It was up to Claimant to present her case at the time of the hearing. Finally, it does not appear that the Claimant sent copies of these specific medical to the Respondents' counsel. The ALJ may not consider the additional records without providing the Respondents a chance to object to the records or to question witnesses about the records. To the extent, Claimant's note and the additional medical records could be construed as a request to reopen the hearing record, the request is denied and the bench ruling of the ALJ entered on October 6, 2015 stands. This Findings of Fact, Conclusions of Law, and Order is entered pursuant to the bench ruling.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds as facts:

1. The Respondents admitted liability Claimant's August 25, 2009 workers' compensation claim. She received medical treatment and the matter closed in 2012.

2. On January 14, 2013, the Claimant proceeded to a hearing on several issues, including permanent total disability benefits, and medical benefits.

3. ALJ Margot Jones presided at the January 14, 2013, and entered a Summary Order on January 25, 2013. ALJ Jones found that the Respondents filed a final admission of liability on July 16, 2012, that admitted for maintenance medical benefits.

4. ALJ Jones ordered that the Claimant failed to present evidence that she is unable to earn any wages. The testimony of Sara Nowotny, an expert in vocational rehabilitation, and Dr. Brian Lambden, a Level II accredited physician specializing in physical medicine and rehabilitation, was found to be more credible and persuasive than the testimony of Claimant and her witness, her spouse.

5. ALJ Jones also found that the Claimant failed to establish that she was entitled to an order awarding specific medical benefits.

6. The Claimant currently feels pain from the elbow and wrist in her right arm. She has cramps in her arm.

7. Claimant needs medications for the pain and cramps in her arm. She does not feel that she can be without medications.

8. Medicaid is no longer paying for the Claimant's medications and treatment. The Claimant is now required to pay for some portion of her medical treatment and/or medications.

9. The Claimant is requesting that the Respondents pay for her pain medicine and her psychologist.

10. The Respondents have admitted liability for maintenance medical benefits. The Respondents have refused to pay for medical treatment provided by physicians who are not authorized treating physicians under the workers' compensation system.

11. The Claimant complained that the workers' compensation doctors never found anything on her and that Social Security did find something. The ALJ is unclear what the Claimant meant by this testimony.

12. The Claimant is receiving some sort of Social Security benefits, and is now being covered by Medicare rather than Medicaid. Apparently, Medicare does not cover all of Claimant's prescription medications, including Cymbalta.

13. The Claimant's husband, Eliazar Aguirre, in addition to acting as her representative, also provided testimony in the claim. Mr. Aguirre testified that the Claimant had attempted suicide on two occasions. However, he admitted that those events took place prior to the previous hearing and Order by Judge Jones. He feels that the Claimant still needs to see psychiatrists and that she still has problems with her arm.

14. Claimant's evidence includes a three-page copy of the drug warnings associated with the prescription Cymbalta. This was issued through Denver Health on October 5, 2015, at a cost of $463.13. There is no evidence presented that Denver Health is an authorized treating facility.

15. There was no evidence that the prescription drug Cymbalta was prescribed for symptoms related to Claimant's work injury.

16. Claimant also presented evidence that she has future appointments throughout the months of October and early November with providers through the Denver Health system. There has been no evidence presented that any referral was made to these providers by authorized treating physicians, that these physicians are authorized treating physicians, or that Claimant has ever received an Order changing physicians. There was no evidence that the treatment Claimant continues to seek through Denver Health is related to her work injury.

17. It is also found that the Claimant was seen by Herbert Fried, M.D. Based on his report, the Claimant has received evaluations through the orthopedics and neurology physicians at Denver Health Medical Center. She has received steroids and obtained a cervical spine MRI, which was reviewed as completely normal. She had occupational therapy and an EMG in 2013 by Dr. Ladley-O'Brien, with no evidence of carpal tunnel syndrom, no evidence of ulnar neuropathy and no evidence of radiculopathy. Dr. Fried did not think that he had anything to offer the patient and felt that she should be seen by the hand service.

18. There is no evidence that Dr. Fried is an authorized treating physician or received authorization for the evaluation he performed.

19. Claimant chose to treat outside the authorized treating physicians and obtain treatment through Denver Health, including physical and psychological evaluations, therapy, tests, and medications. Said treatment was originally paid for by Medicaid. When Claimant received Social Security disability, she lost Medicaid. She now has Medicare, which does not pay for all of her treatment and medications.

20. Claimant did not present evidence that an authorized doctor had recommended the treatment she is receiving. There is no evidence from an authorized physician of a need for ongoing psychological treatment and no sufficient showing that the treatment Claimant has received is connected to the claim, authorized, or that it would be denied by workers' compensation. Further, there is no evidence that the workers' compensation physician will no longer see the patient or provide her care and treatment. There is also no evidence that the Claimant has endeavored to pursue additional treatment, since the Order of Judge Jones, through the workers' compensation system.

21. Claimant has failed to provide evidence of a worsening of her medical condition since the Order of Judge Jones. She has testified to treatment which was ongoing at the time of the Order and continues to date. Claimant has failed to provide any evidence of a change or worsening of her condition.

22. The ALJ understands that Claimant feels she needs additional medical treatment related to her 2009 workers' compensation injury, but the Claimant has not provided any proper proof (through records admitted at hearing or through witness testimony) that her requests for treatment have any relationship to her work injury. In addition, Claimant essentially asks that the ALJ disregard the rules and law allow her to receive treatment with any medical provider she chooses without making any attempt to

pursue treatment through the workers' compensation system. The ALJ is without authority to disregard the law and enter such an order.

CONCLUSIONS OF LAW

General

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Petition to Reopen

In this case, Respondents filed a Final Admission of Liability on July 6, 2012. Ultimately, an Order of Administrative Law Judge Jones on January 25, 2013, addressed Claimant's challenges to the Final Admission. Judge Jones determined Claimant's average weekly wage and awarded disfigurement. Judge Jones denied permanent total disability and a claim for specific medical benefits beyond the maintenance medical benefits admitted by Respondents in the Final Admission. There is no evidence of an appeal of that Order or other challenge to the Respondents' Final Admission of Liability. The case would be closed as to all issues other than maintenance medical benefits left open by the Final Admission of Liability. Once a claim is closed, as here, it is not subject to further litigation or receipt of benefits unless it is reopened under § 8-43-303, C.R.S. 2014. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005).

To reopen a claim. a claimant must show error, mistake, or change in condition. § 8-43-303(1); *Berg*, 128 P.3d at 272.

> A "change in condition" . . . means "a change in the claimant's physical or mental condition resulting from the compensable injury." Thus, "change in condition" refers either to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury.

Chavez v. Indus. Comm'n, 714 P.2d 1328, 1330 (Colo. App. 1985) (quoting *Lucero v. Indus. Comm'n*, 710 P.2d 1191, 1192 (Colo. App. 1985)). "Reopening is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted." *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756, 758 (Colo. App. 2000).

The party attempting to reopen a claim "shall bear the burden of proof as to any issues sought to be reopened." § 8-43-303(4). Thus, claimant bore the burden of demonstrating that she had experienced a worsening of her condition which was attributable to the work-related injury for her petition to reopen to be successful. *See, Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002) (claimant bears the burden of proof on reopening, including burden of demonstrating a causal link to the initial injury.)

The Claimant has failed to provide evidence to sustain her burden of proving a change or worsening of her condition that would entitle her to a reopening of this claim. The testimony of Claimant and her husband indicated that the Claimant continues to pursue the same treatment she has been pursuing since before the filing of the previous Final Admission of Liability and entry of ALJ Jones' Order. There was no medical evidence that the Claimant's condition had worsened since the date of the previous Admission and Order, or that she has experienced any change in her medical condition that is related to her workers' compensation injury. Claimant has failed to prove that her claim should be reopened.

Absent a reopening of the claim, the issues of permanent partial disability and permanent total disability are moot, as those issues were resolved by the previous Final Admission of Liability and Order of ALJ Jones.

Medical Treatment

Respondents are liable for medical treatment that is reasonable and necessary to cure or relieve the employee from the effects of the injury. § 8-42-101. C.R.S.; *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Claimant has the burden to prove that an injury directly or proximately caused the condition for which benefits are sought. *Wal-Mar Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The claimant is entitled to maintenance medical benefits where there is substantial

evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of the industrial injury or prevent further deterioration of the claimant's condition. *Stollmeyer v. Indus. Claim Appeals Office*, 969 P.2d 609 (Colo. App. 1995). Respondents retain the right to contest the compensability of a particular treatment on the grounds the treating physician is not authorized to treat the injury, or the treatment is not reasonable or related to the industrial injury. The Admission for maintenance medical treatment does not vitiate the Respondents' right to dispute the relatedness of treatment. The Respondents have raised the issue of whether the medical treatment requested by the Claimant is by and through authorized treating providers.

Although the Respondents have admitted for maintenance medical treatment, Claimant has failed to establish a connection between the treatment to which she claims she needs and the claim itself. Claimant has also failed to present evidence that would establish that an authorized doctor has recommended the ongoing treatment. Claimant has further failed to produce evidence that the ongoing need for treatment is connected to the claim or that a need for ongoing psychiatric treatment is related to the work injury. Claimant has failed to provide evidence that she cannot be seen by the workers' compensation physician or that she has actively pursued treatment through the authorized physicians. Claimant has failed to establish that she is entitled to an Order awarding any specific medical benefits.

ORDER

It is therefore ordered that:

A. The Claimant has failed to satisfy her burden of proving a mistake, change or worsening of condition that would entitle her to a reopening of her claim.

B. The issues of permanent partial and permanent total disability are denied and dismissed as moot based on the Claimant's failure to prove a right to reopen the claim.

C. The claim for specific medical treatment, including but not limited to medical services and prescriptions through Denver Health Medical Center, is denied and dismissed based on the Claimant's failure to prove that the treatment is necessary, related, or through authorized treating physicians.

D. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 2, 2015

DIGITAL SIGNATURE:

L. Broniak

Laura A. Broniak
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-837-612-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKER'S COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 4, 2015 and continued to a second day on October 23, 2015 in Denver, Colorado. The hearings were digitally recorded (reference 6/4/2015, beginning at 8:30 a.m. and ending at 1:08 p.m. and reference 10/23/2015, beginning at 8:30 a.m. and ending at 3:30 p.m.).

Claimant's Exhibits 1 through 25 and 27 were admitted without objection. There was no exhibit 26 that was submitted. Claimant's exhibits 28 and 29 were not admitted into evidence because the ALJ sustained the Respondents' objections thereto. Respondents' Exhibits A through G were admitted into evidence without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents to be filed, electronically, within five (5) business days and giving the Claimant two (2) working days after receipt thereof within which to file objections, electronically. The proposed decision was filed, electronically, on October 30, 2015. No copy of the proposal was noted to counsel for the Claimant. Consequently, the Office of Administrative Courts (OAC) emailed a copy of the proposed decision to Claimant's counsel on November 9, 2015. No timely objections were filed. .After consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether a spinal cord stimulator trial is reasonably necessary to treat Claimant's work-related injury. The resolution of "spinal cord stimulator" issue was, potentially, a prerequisite to a determination of maximum medical improvement (MMI) unless the spinal cord stimulator is deemed post-MMI maintenance medical care (*Grover* medicals). The Claimant's burden on the reasonable necessity and whether the stimulator is maintenance medical care is by "a preponderance of the evidence."

The issue concerning the Claimant's request to overcome the Division Independent Medical Evaluation (DIME) of Karen Ksiazek, M.D., which determined Claimant had reached MMI on January 14, 2014, and assigned the Claimant a 17% whole person impairment rating, which Dr. Ksiazek later corrected in her evidentiary deposition to 18% whole person impairment. The Claimant's burden on this issue is by "clear and convincing evidence."

If the DIME opinion concerning MMI is overcome, the Claimant designated the issue of temporary total disability (TTD) benefits from January 14, 2014 and continuing. The Claimant's burden on this issue is by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. This is an admitted low back injury of September 9, 2010.

2. The Claimant was referred to Concentra for treatment. Claimant treated for low back pain and right leg pain with David Yamamoto, M.D. and was also treated or evaluated by Frederic Zimmerman, D.O., Steve Shogan, M.D., Christopher Ryan, M.D., Sanjay Jatana, M.D., Bennett Machanic, M.D., Peter Reusswig, M.D., Giancarlo Barolat, M.D., Ron Carbaugh, Psy.D., and Walter Torres, Ph.D

3. The Claimant underwent a L5-S1 anterior fusion surgery on November 3, 2011, with Dr. Jatana. Claimant underwent a posterior fusion surgery to L5-S1 with Dr. Jatana on January 31, 2013 (Claimant's Exhibit. 2).

4. The Claimant continued treating for his low back and leg pain. He was referred to Dr. Reusswig on November 15, 2013, who recommended a spinal cord stimulator trial (Claimant's Exhibit 6).

5. The Claimant underwent an Independent Medical Examination (IME) with Lawrence Lesnak, D.O., at the Respondents' request on January 14, 2014. Dr. Lesnak stated the opinion that the Claimant was not a candidate for a spinal cord stimulator trial from either a physical or psychological standpoint and he placed the Claimant at maximum medical improvement (MMI) as January 14, 2014 (Respondents' Exhibit C). The Respondents filed an Application for a 24-Month Division Independent Medical Examination (DIME) on February 20, 2014.

6. The Claimant underwent a DIME Karen Ksiazek, M.D., on June 23, 2014. Dr. Ksiazek placed the Claimant at MMI as of January 14, 2014, and ultimately assigned him an18% whole person impairment.

7. The Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Ksiazek's report. The Claimant objected to it and filed an Application for Hearing to overcome the DIME and on the issues of the reasonable necessity of a spinal cord stimulator and permanent total disability. The issue of permanent total disability was stayed pending the outcome of this hearing.

Reasonable Necessity of a Trial Spinal Cord Stimulator

8. Dr. Jatana, an orthopedic spine surgeon, performed hardware removal surgery on the Claimant on June 9, 2015. Dr. Jatana saw the Claimant for a follow up on September 14, 2015. During this visit, Dr. Jatana noted improvement in the Claimant's back pain but noted that right lower extremity pain persists. Dr. Jatana recommended a spinal cord stimulator trial to address the residual lower extremity pain.

9. Dr. Jatana's recommendation for a spinal cord stimulator has been consistent before and after the hardware removal surgery (Claimant's Exhibit 2).

10. A spinal cord stimulator trial was recommended by Dr. Yamamoto, Dr. Reusswig, and Dr. Machanic (Claimant's Exhibits 3-4, and 6).

11. Claimant was also referred to Dr. Barolat who recommended a spinal cord stimulator trial (Claimant's Exhibit 1).

12. During his evidentiary deposition, Dr. Barolat indicated that he would not recommend a spinal cord stimulator trial for an individual with the following personality traits and presentation:

a. A psychological Axis II Diagnosis of personality disorder with dependant schizotypal, narcissistic and borderline personality.
b. A mental health professional saying the patients' profile is strongly indicative of someone who's a poor psychological candidate for an invasive procedure.

c. A mental health professional saying that the patient would probably not respond well to invasive procedures or would develop persistent and peculiar complications to these procedures (Barolat Depo. Trans. 19:10 – 20:16).

13. The hypothetical listed above tracks Dr. Torres' psychological conclusions concerning the Claimant (Respondents' Exhibit D), which psychological conclusions, as found herein below, are **not** credible. The hypothetical, based on Dr. Torres' psychological conclusions, does not track the psychological conclusions of Dr. Carbaugh concerning the Claimant because, while noting concerns, Dr. Carbaugh found the Claimant to be a fair candidate for invasive procedures (Claimant's Exhibit 5).

14. Dr. Barolat was presented Dr. Carbaugh's scenario as a hypothetical. On re-direct examination, Dr. Barolat re-affirmed that he thought a spinal cord stimulator was reasonable and necessary for the Claimant (Barolat Depo. Trans. 25:16-21).

Psychological Evaluations

15. The Claimant underwent a psychological evaluation with Dr. Torres on January 13, 2013. Dr. Torres assessed the Claimant with depression and a personality disorder and was of the opinion that the Claimant was a poor candidate for a spinal cord stimulator or other invasive procedures (Respondents' Exhibit D).

16. The Claimant underwent a psychological profile with Dr. Carbaugh. Dr. Carbaugh stated that the Claimant's behavioral presentation caused him concerns, including dramatic pain behavior and cognitive difficulties, however, Dr. Carbaugh was of the opinion that the Claimant was a **fair candidate** for a spinal cord stimulator trial or any invasive procedure (Claimant's Exhibit 5).

Opinions Contra a Trial Spinal Cord Stimulator

17. Dr. Ryan, DIME Dr. Ksiazek, IME Dr. Goldman, and IME Dr. Lesnak recommended against a trial spinal cord stimulator trial (Respondents' Exhibits. A-C, E).

Opinions in Favor of a Trial Spinal Cord Stimulator

18. The Claimant underwent a hardware removal surgery on June 9, 2015. According to the Claimant, his low back pain had almost entirely dissipated after the hardware removal surgery but his right lower extremity pain persisted.

19. The Claimant stated that he had difficulty sitting due to pain in his lower extremities, from his buttocks down his thigh, right worse than left. During the last session of the hearing, the ALJ observed the Claimant sitting, standing

and kneeling at the witness box and at counsel table. The ALJ infers and finds that the Claimant's posturing behavior was genuine, not staged, and it supports his testimony concerning his difficulty sitting.

20. Dr. Machanic and Dr. Barolat testified during their evidentiary depositions that a spinal cord stimulator is used primarily to relieve nerve pain associated with lower extremity radiculopathy (Machanic Depo Trans.15:5-15; Barolat Depo Trans. 9:16-10:6).

21. Dr. Barolat noted that the hardware removal would have no effect on the leg pain experienced by the Claimant (Barolat Depo. 8:7-9:13). He further stated that the spinal cord stimulator would serve to mask the leg pain that Claimant experiences (*Id*. at 14:16-15:2). The spinal cord stimulator does **not cure** the pain. Consequently, it does not improve a claimant's structural/anatomical condition. Therefore, in the present case, the spinal cord stimulator would be to maintain the Claimant at the plateau of MMI and to prevent a deterioration of his condition.

22. Dr. Goldman was of the opinion that a spinal cord stimulator would be unlikely to relieve the pain associated with sitting. The ALJ finds this opinion contrary to the weight of the opinions of experts with considerably more expertise concerning spinal cord stimulators than Dr. Goldman possesses. Therefore, the ALJ does not find Dr. Goldman's opinion credible in this regard. Also, the ALJ makes a rational choice to reject Dr. Goldman's opinion in this regard and accept the contrary opinions favoring a trial spinal cord stimulator.

Overcoming the Division Independent Medical Examination (DIME) of Karen Ksiazek, M.D.

23. The Claimant underwent a DIME with Dr. Ksiazek on June 23, 2014. Dr. Ksiazek found that a spinal cord stimulator was not prudently indicated, citing Claimant's mechanical factors, lack of demonstrable fibrosis of nerve roots, and the psychological evaluations of Dr. Carbaugh and Dr. Torres. Dr. Ksiazek was of the opinion that the Claimant had reached MMI on January 14, 2014.

24. Dr. Ksiazek first assigned the Claimant a 17% whole person impairment rating. During her evidentiary deposition testimony on March 23, 2015, Dr. Ksiazek corrected her impairment rating and assigned the Claimant an 18% whole person rating.

25. The Claimant underwent a hardware block, a diagnostic injection to determine the source of the pain generator, on March 9, 2015, with Dr. Jatana (Claimant's Exhibit 2).

26. At a March 12, 2015, follow-up visit with Dr. Jatana, the Claimant reported pain relief from the hardware block. Thereafter, the Claimant underwent hardware removal surgery performed by Dr. Jatana on June 9, 2015 (Claimant's Exhibit 2).

27. Dr. Jatana provided a letter to the ALJ that the results of the Claimant's hardware removal surgery would be known six weeks after the surgery (Claimant's Exhibit 27).

28. According to Dr. Goldman, the Claimant's condition was stable as of January 14, 2014. Dr. Goldman was of the opinion that the Claimant may have been removed from MMI as of the date of the hardware removal surgery of June 9, 2015, but returned in any event to MMI six weeks after the surgery, or as of July 21, 2015.

29. The ALJ rejects the notion that a claimant can be taken off MMI and placed back on MMI. There is but one MMI per injury unless a case is re-opened, based on a changed condition (wherein the case is a brand new "ballgame" after the re-opening). The Claimant's need for the hardware removal surgery to substantially improve his condition supports the proposition that the Claimant had not reached MMI, at any time, before that procedure. The ALJ finds that the Claimant reached the one and solitary date of MMI six weeks after the hardware removal.

30. The ALJ rejects DIME Dr. Ksiazek's initial determination that the Claimant was at MMI as of January 14, 2014 because it is contrary to the weight of the credible evidence. Stability in the Claimant's condition following the hardware removal surgery allows consideration of MMI at a later date. It is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Ksiazek's January 14, 2014 MMI date is erroneous.

31. Indeed, the ALJ has considered the totality of Dr. Ksiazek's report and testimony, as well as the totality all of the evidence in this matter, including all opinions offered by all the medical experts, and finds that the Claimant's date of MMI was six weeks after the Claimant 's hardware removal of June 9, 2015, or **July 21, 2015**, which the ALJ hereby determines is the Claimant's MMI date.

32. Dr. Ksiazek was fully Level II accredited at the time of the Claimant's DIME, but she is no longer Level II accredited.

33. The ALJ has considered all opinions to the contrary, including those of Drs. Yamamoto and Machanic, that claimant is not at MMI. The ALJ rejects the opinions of Drs. Yamamoto and Machanic and finds that the Claimant reached MMI on July 21, 2015. At the session of the hearing on October 23, 2015, the Claimant testified that the hardware removal surgery had dramatically improved his back pain, and his back pain is now minimal. The Claimant also testified that he had substantially greater functional improvement after the hardware removal surgery and he described the improvement in his function in terms of his activities of daily living. The Claimant testified that because his back condition is alleviated, he was looking forward to returning to work after he receives a spinal cord stimulator.

Temporary Total Disability

34. The Claimant has not worked or earned wages in the job market since January 14, 2014. As of that date, the Claimant was and is receiving Federal Social Security Disability (SSDI) benefits, which after offset yielded an admitted TTD benefit rate of $576.28 per week, or $82.33 per day. The period from January 14, 2014 through July 21, 2015, the day before MMI, both dates inclusive equals 554 days. At the admitted TTD rate, aggregate past due TTD benefits from January 14, 2014 through July 21, 2015 equal $45, 610.82.

Ultimate Findings

35. Regarding the trial spinal cord stimulator, between conflicting medical opinions, the ALJ finds the opinions of Dr. Jatana, Dr. Yamamoto, Dr. Machanic, and Dr. Barolat, recommending a trial spinal cord stimulator (and Dr. Carbaugh's psychological opinion that the Claimant was a **fair** candidate for a spinal cord stimulator) more persuasive and credible than the opinions of Dr. Ryan, Dr. Ksiazek, Dr. Torres, Dr. Goldman, and Dr. Lesnak.

36. Between conflicting medical opinions that ALJ makes a rational choice to accept the opinions of Dr. Jatana, Dr. Yamamoto, Dr. Machanic, and Dr. Barolat, recommending a trial spinal cord stimulator, and to reject the opinions of Dr. Ryan, Dr. Ksiazek, Dr. Torres (psychological), Dr. Goldman, and Dr. Lesnak.

37. As found herein above, the Claimant has met his burden of proof, by preponderant evidence that a trial spinal cord stimulator is reasonably necessary to maintain the Claimant at MMI and to prevent a deterioration of his condition.

38. Through testimony and supporting medical records, the Claimant has shown substantial improvement due to the hardware removal surgery. In fact, he has testified that his back is essentially pain free and he has significantly greater functionality after the removal.

39. The ALJ finds that the totality of the evidence, including the latest opinions of Dr. Ksiazek, Dr. Goldman, and Dr. Jatana support the proposition that the Claimant reached MMI six weeks after the hardware removal surgery. This is corroborated by Claimant's testimony that he experienced substantial improvement a month after the surgery and was essentially pain free in his low back as of the date of hearing. As found herein above, the Claimant reached MMI six weeks after the June 9, 2015, hardware removal surgery, or on July 21, 2015.

40. Because Dr. Ksiazek's erroneous MMI date was January 14, 2014, her prior impairment rating is no longer valid because the Claimant has undergone an additional procedure and his condition has improved. The

Claimant cannot return to Dr. Ksiazek, however, for the purposes of a follow-up impairment rating because Dr. Ksiazek is no longer Level II accredited.

41. As found herein above, the Claimant has proven, by preponderant evidence that he is entitled to TTD benefits (with the SSDI offset) of $576.28 per week, or $82.33 per day, from January 14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days, in the aggregate amount of $45, 610.82.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. *2008);Kroupa v. Indus. Claim Appeals* Office, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074 (9th Cir. 1977).

b. The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964**,** 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals* Office, 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Jatana, Dr. Machanic, Dr. Barolat, and Dr. Yamamoto that a trial spinal cord stimulator is recommended

were more persuasive and credible than the opinions to the contrary. As found, concerning MMI, the weight of the evidence, including but not limited to the persuasive opinion of Dr. Goldman that the Claimant reached MMI six weeks post-hardware removal surgery, most persuasive and, as found, the claimant reached MMI as of July 21, 2015. As further found, the ALJ rejected the opinions of Dr. Machanic, Dr. Yamamoto and all other contrary evidence, contrary to a date of MMI as of July 21, 2015.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals* Office, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals* Office, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals* Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals* Office, 224 P.3d 397, 399-400 (Colo. App.2009). As found, between conflicting medical opinions, the ALJ made a rational choice, consistent with substantial evidence, to accept the opinions of Dr. Jatana, Dr. Machanic, Dr. Barolat, Dr. Carbaugh, and Dr. Yamamoto concerning the recommendation for a trial spinal cord stimulator. As further found, the ALJ made a rational choice, consistent with substantial evidence, to accept the opinions supporting the Claimant's date of MMI of six weeks after the hardware removal surgery, or July 21, 2015.

Medical Benefits – Reasonableness Necessity of a Trial Spinal Cord Stimulator

d. The Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. §8-42-101(1) (a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The obligation to provide treatment to "cure" or improve the claimant's condition terminates when the claimant reaches MMI. § 8-40-201(11.5), C.R.S.; *Gonzales v. Indus. Claim Appeals Office*, 905 P.2d 16 (Colo. Ct. App. 1995). Treatment to relieve the effects of an industrial injury or prevent further deterioration of the claimant's condition is generally defined as maintenance treatment. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Respondents, however, are only responsible for medical treatment which is

reasonably necessary to cure or relieve the effects of the industrial injury and a claimant bears the burden to prove the causal connection between a particular treatment and the industrial injury. § 8-42-101(1) (a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); see also *Hanna v. Print Expediters*, Inc., 77 P.3d 863 (Colo. App. 2003) (concerning *Grover* medical benefits). Accordingly, where the Respondents contest liability for a particular medical benefit, the Claimant must prove that it is reasonably necessary to treat the industrial injury. *See Grover v. Indus. Comm'n*, *supra*. The question of whether a proposed treatment is reasonably necessary is generally one of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999); and *White v. Eastman Kodak*, W.C. No. 4-204-799 (ICAO March 25, 2010). As found, the Claimant proved by preponderant evidence that a trial spinal cord stimulator is reasonably necessary to treat his work-related injury. Dr. Barolat's opinion details the appropriateness of the spinal cord stimulator as maintenance treatment. In that opinion, Dr. Barolat notes that the spinal cord stimulator will not cure the Claimant's condition, rather it will mask the pain (Barolat Depo. 14:14-15:6).

Overcoming the DIME of Dr. Ksiazek

e. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage* Co. v. *Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage* Co. v. *Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380560 (ICAO, Nov. 17, 2000). As found, the Claimant has proven by clear and convincing evidence that DIME Dr. Ksiazek's opinion that Claimant reached MMI on January 14, 2014 is erroneous. Subsequent to the

DIME exam, the Claimant underwent hardware removal surgery which was not a consideration at the time of the exam with DIME Dr. Ksiazek. The Claimant's low back pain significantly improved to the point it is essentially resolved due to the subsequent hardware removal surgery and his function also similarly significantly improved. The ALJ weighed the evidence and found that the Claimant met his burden of proof, by clear and convincing evidence that he experienced additional significant improvement after being placed at MMI and, therefore, he overcame the DIME opinion by DIME Dr. Ksiazek that he had reached MMI on January 14, 2014. The totality of the persuasive evidence, including but not limited to Dr. Goldman's testimony established that the Claimant reached MMI six weeks after hardware removal surgery, which was July 21, 2015.

Post-MMI Medical Maintenance Medical Care

f. An injured worker is entitled to reasonably necessary and causally related post-MMI medical maintenance care to maintain him at MMI and to prevent a deterioration of his condition. As found, Dr. Barolat, Dr. Jatana, and Dr. Machanic were of the opinion that a spinal cord stimulator would not cure the Claimant's pain but would only reduce or relieve the effects of it be masking the pain. Dr. Goldman also stated that a spinal cord stimulator is not curative treatment. The ALJ credits the opinion of Dr. Goldman, as supported by medical evidence, that the spinal cord stimulator and all related treatment thereto is a post-MMI medical maintenance treatment. The trial spinal cord stimulator may be performed as maintenance medical treatment.

Temporary Total Disability (TTD) Benefits

g. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant has neither worked nor earned wages since January 14, 2014, and he did not reach MMI until July 22, 2015. He was temporarily and totally disabled from January 14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days.

h. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, and there is no actual return to work,

TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant is entitled to TTD benefits (including the SSDI offset) of $576.28 per week, or $82.33 per day, from January 14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days, in the aggregate amount of $45, 610.82.

Burden of Proof on Issues Requiring Preponderant Evidence

i. The injured worker has the burden of proof, by a preponderance of the evidence of establishing entitlement to benefits, beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues requiring preponderant evidence.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of a trial spinal cord stimulator trial and all other post-maximum medical improvement maintenance medical benefits, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The original date of maximum medical improvement provided by Karen Ksiazek, M.D., of January 14, 2014, is hereby vacated. The Claimant reached maximum medical improvement on July 22, 2015. The trial spinal cord stimulator shall be performed as medical maintenance treatment.

C. the Respondents shall pay the Claimant temporary total disability benefits of $576.38 per week, or $82 33 per day, from January b14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days, in the aggregate amount of $45, 610. 82, to be paid retroactively and forthwith.

D. The Respondents are entitled to a credit for all amounts of permanent partial disability benefits paid pursuant to the Final Admission, dated August8, 2014.

E. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. A new Division Independent Medical Examination Panel shall be constituted for the sole purpose of determining the degree of the Claimant's permanent medical impairment as of the date of maximum medical improvement, July 22, 2015.

G. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of November 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at *http://www.colorado.gov/dpa/oac/forms-WC.htm*.**

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above **Full Findings of Fact, Conclusions of Law and Order** were **sent electronically, PDF format** on this____day of November 2015 addressed as follows:

Division of Workers' Compensation
cindy.beck@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmsted@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

The issues for determination in this case are as follows:

1. Whether the claimant has established, by a preponderance of the evidence, a worsening of her work-related knee condition;

2. If so, whether, in the discretion of the ALJ, the claim should be reopened; and,

3. If so, whether the claimant has established, by a preponderance of the evidence, that the left total knee replacement procedure recommended by Dr. Lee McFadden is reasonable and necessary medical treatment which is causally related to the work-injury.

FINDINGS OF FACT

1. The claimant was employed as a cosmetologist for the respondent-employer from February 2003 to January 2011.

2. The claimant suffered no preexisting bilateral knee or wrist symptoms.

3. On September 25, 2010, the claimant suffered an admitted work injury when she tripped and fell while carrying a chair for the respondent-employer. She landed on her bilateral knees and right arm.

4. On September 29, 2010, Dr. Williams examined the claimant, who reported the work injury to her bilateral knees and right arm. Dr. Williams obtained x-rays of the bilateral knees and right arm, which were negative for fractures or dislocations. He diagnosed right wrist pain, bilateral knee pain, contusions of the knees and forearm, sprain of the right wrist, and knee abrasions. He prescribed naproxen and imposed restrictions against lifting over 20 pounds or 15 pounds repetitively and prohibited any crawling, kneeling, or squatting.

5. The claimant returned to work at her regular job duties for the employer.

6. On December 1, 2010, the claimant proceeded with her next appointment with Dr. Williams. The claimant reported continued pain in her right wrist and knees. She also reported some loss of range of motion of the right wrist and intermittent numbness in the right hand. She reported that physical therapy and climbing stairs increased her symptoms. She reported that she had stopped physical therapy and the naproxen.

7. Dr. Williams determined that claimant was at MMI without impairment or the need for additional medical treatment. He noted full range of motion of the wrist and knees, but took no formal measurements. Dr. Williams reported that he had nothing more to offer claimant, but noted that she may continue to have knee symptoms due to degenerative changes.

8. On December 6, 2010, the insurer filed a final admission of liability (FAL) denying liability for any permanent disability benefits or additional medical benefits.

9. On April 13, 2011, Dr. Watson performed a Division Independent Medical Examination (DIME). Dr. Watson obtained x-rays of the right wrist and bilateral knees. He reported that the x-rays showed normal right wrist structures, but medial and lateral osteoarthritis and bone-on-bone condition of the right patellofemoral joint and degenerative joint disease of the left knee. He diagnosed contusion of the right forearm, dorsiflexion injury of the right wrist, decreased sensation in the right ulnar nerve distribution, degenerative arthritis of the right knee, and chondromalacia of the left knee. Dr. Watson determined the claimant was not at MMI and needed an MRI of the right wrist, an EMG of the right wrist, and a referral to an orthopedic surgeon for evaluation of the bilateral knees.

10. The respondent-insurer challenged the DIME physician's determinations and the case went to hearing before ALJ Stuber, who determined that the respondent-insurer failed to overcome the DIME physician's findings.

11. On January 17, 2012, Dr. Caughfield began authorized treatment of the claimant. He referred the claimant for MRI scans, the EMG of the right wrist, and evaluation by Dr. Weinstein and Dr. Karl Larsen.

12. The February 28, 2012 MRI of the right knee showed patellofemoral osteochondromalacia with subcortical cysts. The MRI of the left knee that same day showed severe chondromalacia of the patella and lateral femoral condyle with moderate

chondromalacia in the medial facet, mild injury of the medial collateral ligament, and a Baker's cyst.

13. On May 25, 2012, Dr. Weinstein began treatment of the claimant's bilateral knees. He administered injections and referred the claimant for physical therapy. He subsequently tried a series of viscosupplementation injections without much success.

14. On March 5, 2013, Dr. Caughfield determined that claimant was at MMI. He referred her for a functional capacity evaluation (FCE).

15. On March 6, 2013, Dr. Weinstein discharged the claimant from his care with directions to continue home exercises, ibuprofen, and to consider knee braces. He continued to diagnose aggravation of patellofemoral osteoarthritis.

16. On April 11, 2013, Dr. Caughfield determined 9% impairment of the right upper extremity based upon right wrist range of motion loss and supination loss. Dr. Caughfield also determined 24% impairment of the right lower extremity based upon 20% loss of right knee flexion combined with 5% for mild chondromalacia. Dr. Caughfield determined 24% impairment of the left lower extremity based upon 20% loss of left knee flexion combined with 5% for mild chondromalacia. Dr. Caughfield reported that claimant's restrictions based upon the FCE as occasional lifting 20 pounds to shoulder height and 25 pounds overhead, repetitive use of upper extremities to tolerance with anticipated unrestricted use, no kneeling or crouching, and frequent standing of four to six hours per day. He noted that frequent lifting limits would be half of the occasional limits.

17. On June 11, 2013 Dr. Watson performed a follow-up DIME. He determined that claimant was at MMI on March 15, 2013. Dr. Watson measured left knee flexion of 100 degrees, resulting in 18% impairment. He determined 7% impairment for moderate to advanced degenerative changes of the patella. He combined the ratings to determine 24% impairment of the left lower extremity. Dr. Watson also measured right knee flexion of 105 degrees, which resulted in 16% impairment. He combined the ratings to determine 24% impairment of the left lower extremity. Dr. Watson also measured the right knee flexion of 105 degrees, which resulted in 16% impairment. He combined that rating with 5% for mild chondromalacia of the patella, resulting in 20% impairment of the lower extremity. Dr. Watson also determined 7% impairment of the upper extremity due to loss of wrist and elbow range

of motion. He agreed with the maintenance care and restrictions recommended by Dr. Caughfield.

18. On October 16, 2013, Dr. Wallace Larson performed an independent medical examination for the respondent-insurer. He disagreed with the DIME determination of permanent impairment to the bilateral knees. He thought the claimant suffered only abrasions and contusions.

19. A second hearing was held before ALJ Stuber in March 2014 wherein he upheld the determination of the DIME physician, finding the claimant suffered work aggravations of her preexisting bilateral knee degenerative conditions. She was asymptomatic before the work injury, but remained symptomatic thereafter.

20. Subsequent to the Order issued by ALJ Stuber on April 10, 2014, the claimant continued to treat for her work-related and ongoing bilateral knee condition.

21. Subsequent to the determination of MMI the claimant's left knee has begun to give out on her causing her to fall. She is now severely limited in her functionality and that she can no longer tolerate the pain.

22. On July 28, 2014, Dr. David Weinstein notes that "Her left knee is particularly painful and has slowly increased to the point where she is extremely limited in activity." Dr. Weinstein recommended that the claimant be referred to his partner, Dr. Lee McFadden, for consideration of a left total knee replacement. The claimant was examined by Dr. McFadden on September 24, 2014. Dr. McFadden notes a "history of increasing bilateral knee pain" with the "most severe pain in her left knee." Based upon this presentation, as well as an updated MRI, Dr. McFadden recommended a left total knee replacement procedure.

23. The respondent-insurer denied the procedure asserting that the need for the left total knee replacement surgery was not causally related to the compensable injury.

24. On May 6, 2015, the respondent-insurer had Dr. Mark Failinger perform an IME. Dr. Failinger opined that the work-injury aggravated the pre-existing arthritis in the claimant's knees. He opined that the viscosupplementation procedures which were performed were intended to calm down the work-related aggravation of the pre-existing arthritis. Dr. Failinger opined that the viscosupplementation was reasonable and necessary medical treatment and that it was claim related. Dr. Failinger noted that this

viscosupplementation had been unsuccessful. Dr. Failinger further opined that the need for the left total knee replacement was not related to the work-injury. Dr. Failinger's opinion is summarized in his report as follows:

> It is extremely common to have an event cause symptomatology from severe preexisting arthritis were there was no or some milder symptoms previously. All attempts to settle this down with physical therapy and injections have been performed, as well as anti-inflammatories and relative rest. Unfortunately, she has ongoing symptomatology subjectively and it would appear with medical probability that the need for treatment of degenerative joint disease is for the preexisting arthritis rather than any new pathology created in the incident of September 25, 2010.

25. On September 15, 2015, the parties took the deposition of Dr. William Watson, the DIME physician in this case. Dr. Watson testified that he had reviewed the treatment notes from the Colorado Center of Orthopedic Excellence which were generated subsequent to his last examination of the claimant. Dr. Watson testified that, at the time of MMI, he opined that the work-injury caused a permanent aggravation of the claimant's pre-existing arthritis. He opined that the claimant's ongoing bilateral knee symptoms were caused by the work-injury which permanently aggravated the pre-existing arthritis. Dr. Watson opined that work-injury caused the symptoms for which the left total knee replacement surgery was being recommended. Dr. Watson opined that the need for the left total knee replacement surgery was caused by the work-injury.

26. The ALJ finds that the analyses and opinions of Dr. Watson are credible and more persuasive than medical analyses and opinions to the contrary.

27. The claimant has established that it is more likely than not that the claimant's condition in her knees has worsened from the time the claimant was placed at MMI and this worsening is as a result of the permanent aggravation of the claimant's pre-existing condition. This permanent aggravation is causally related to the claimant's industrial injury.

28. The ALJ finds that the claimant has established that the claim should be reopened.

29. The ALJ finds that the claimant has established that it is more likely than not that the claimant's need for left total knee replacement is reasonable, necessary, and related to the claimant's industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004) The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bi-as, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P .2d 1205 (1936); CJI, Civil 3:16 (2007).

4. C.R.S. §8-43-303(1) provides in pertinent part that; "At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award…If an award is reopened on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. Any order entered under this subsection (1) shall be subject to review in the same manner as other orders."

5. In this case, the ALJ concludes that the claimant has established, by a preponderance of the evidence, that she suffered a worsening of her work-related medical condition. The evidence which supports this finding is contained in the medical records of The Colorado Center of Orthopedic Excellence. These records document that the claimant continued to purse treatment for her work-related knee condition after she was found to be at MMI in April of 2013. On July 28, 2014, Dr. David Weinstein notes that "Her left knee is particularly painful and has slowly increased to the point where she is extremely limited in activity." Dr. Weinstein recommended that the claimant be referred to his partner, Dr. Lee McFadden, for consideration of a left total knee replacement. The claimant was examined by Dr. McFadden on September 24, 2014. Dr. McFadden notes a "history of increasing bilateral knee pain" with the "most severe pain in her left knee." Based upon the clinical presentation, as well as an updated MRI, Dr. McFadden recommended a left total knee replacement procedure.

6. Support for the ALJ's finding that the claimant has suffered a worsening of her work-related knee condition is also found in the claimant's testimony at hearing. The claimant had no pain or functional limitations in either knee prior to the work-related injury occurring on September 25, 2010. The claimant had pain and functional limitations in both knee from the date of injury up until she was placed at MMI in April of 2013. The claimant observed that since being placed at MMI, her work-related knee condition has gotten worse. Her left knee has begun to give out on her causing her to fall and she is now severely limited in her functionality and can no longer tolerate the pain.

7. Given that the claimant has established a worsening of her work-related medical condition, it is within the discretion of the ALJ to reopen that case. The ALJ finds good cause to reopen the claim.

8. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required.

Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

9. In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

10. In this case, the ALJ concludes that the claimant has established by a preponderance of the evidence, that the left total knee replacement is reasonable and necessary medical treatment for her work-related left knee condition. Support for this finding can be found in the treatment notes of the Colorado Center for Orthopedic Excellence as well as the opinions of Dr. Watson who served as the DIME doctor in this matter.

11. This ALJ concludes that the opinions and analyses of Dr. Watson are more credible than the opinions of Dr. Failinger in regards to whether the need for the total knee replacement procedure was caused by the work-injury. Both physicians agree that the claimant’s pre-injury baseline, relative to her bilateral knees, was asymptomatic pre-existing arthritis. Both physicians believe that the work-injury aggravated the previously asymptomatic arthritis causing it to become symptomatic. Both physicians agree that the viscosupplementation, which was undertaken was an attempt to calm down the permanently aggravated arthritis, was properly claim related. Both physicians opined that the claimant has not, since suffering the work-injury, returned to her pre-injury baseline. All of these facts lead to the conclusion that the need for the total knee replacement procedure is causally related to the work-injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's workers' compensation claim is reopened.

2. The claimant has established, by a preponderance of the evidence, that the left total knee replacement procedure recommended by Dr. Lee McFadden is reasonable and necessary medical treatment which is causally related to the work-injury.

3. The parties stipulated that Dr. Lee McFadden is an authorized treating provider for this claim and it is so ordered.

4. The respondent-insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 6, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover an overpayment of Temporary Total Disability (TTD) benefits from Claimant in the amount of $13,721.35.

2. The rate at which Respondents may recover any overpayment.

FINDINGS OF FACT

1. On October 18, 2011 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. While Claimant was loading pallets into his truck they fell and struck him in the head and cervical spine. Claimant reported his injuries to Employer and received medical treatment from authorized treating physicians.

2. Claimant underwent an extensive course of treatment that included C5-C6 fusion surgery and cervical spine surgery. During his rehabilitation he received Temporary Total Disability (TTD) benefits for the periods from October 19, 2011 through January 26, 2014 and November 26, 2014 through March 11, 2015.

3. On April 15, 2013 Claimant's treating physicians placed him at Maximum Medical Improvement (MMI). Respondents subsequently filed a Final Admission of Liability (FAL).

4. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME). Clarence Henke, M.D. was selected to perform the DIME. He initially evaluated Claimant on September 18, 2013 and concluded that Claimant had not reached MMI. Dr. Henke recommended additional medical treatment for Claimant's cervical spine.

5. In May 2014 Claimant's treating physicians determined that he had again reached MMI. However, on July 17, 2014 Claimant returned to Dr. Henke for a follow-up DIME. Dr. Henke again concluded that Claimant had not reached MMI and recommended additional medical treatment.

6. Respondents filed an Amended General Admission of Liability (GAL) and restarted TTD benefits with additional medical treatment based on Dr. Henke's recommendations. Dr. Henke had instructed Claimant to follow-up with his treating dentist for evaluation of his jaw and his treating physician for additional cervical spine treatment.

7. On September 24, 2014 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian determined that Claimant was progressing very well and had regained range of motion throughout his cervical spine. Dr. Cebrian remarked that Claimant's condition had stabilized after his cervical spine surgeries. He assigned Claimant a 20% whole person impairment rating.

8. Claimant's treating physicians again placed him at MMI and referred him back to Dr. Henke for a third DIME. On February 4, 2015 Dr. Henke examined Claimant and determined that he had reached MMI on November 26, 2014. Dr. Henke agreed with Dr. Cebrian and assigned Claimant a 20% whole person impairment rating.

9. On March 19, 2015 Respondents filed a new FAL based on Dr. Henke's February 4, 2015 DIME determination. Respondents noted that Claimant had received an overpayment of TTD benefits in the amount of $13,721.35. The excess TTD benefits were based on payments after the November 26, 2014 date of MMI. Claimant received total TTD benefits in the amount of $113,438.37. The FAL also recognized an Average Weekly Wage (AWW) of $1,822.88. Finally, the FAL left open medical maintenance benefits that are reasonable, necessary and related to Claimant's October 18, 2011 industrial injury.

10. At the hearing in this matter the parties agreed that the only remaining issue to be determined was Respondents' request to recover the $13,721.35 overpayment of TTD benefits noted in the March 19, 2015 FAL. The parties noted that Claimant is still working for Employer.

11. Claimant's 20% whole person impairment rating had a value of $70,216.94. However, because the impairment rating was less than 25% Claimant reached the $75,000 statutory cap. Claimant thus could not recover based on the 20% whole person impairment rating and have the $13,721.35 credited against a Permanent Partial Disability (PPD) award.

12. Respondents have proven that it is more probably true than not that they are entitled to recover an overpayment of TTD benefits from Claimant in the amount of $13,721.35. At Claimant's third DIME on February 4, 2015 Dr. Henke determined that he had reached MMI on November 26, 2014. However, because of the retroactive MMI determination, Claimant had received TTD benefits from November 26, 2014 through March 11, 2015. Because Claimant should not have received TTD benefits after he reached MMI, the $13,721.35 that Respondents paid after November 26, 2014 constituted an overpayment. Claimant shall thus repay Respondents a total of $13,721.35.

13. Claimant requested at hearing that a total of $50/month be paid to Respondents in the event repayment is ordered. Respondents replied that the repayment of $13,721.35 at $50/month would take almost 23 years. Respondents instead proposed that Claimant should be ordered to repay $250/month. At that rate Claimant would repay the $13,721.35 in overpaid benefits in approximately 4 ½ years. A payment of $250/month is reasonable based on Claimant's admitted AWW of

$1,822.88. Claimant's AWW equals a monthly income of $7,899.15. Accordingly, Claimant shall repay Respondents $250/month in overpaid TTD benefits until recovered in full.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents contend that the amount of $13,721.35 paid in TTD benefits since MMI constitutes an overpayment that should be repaid. In support of their argument, Respondents cite to the recent cases of *Haney v. Shaw, Stone & Webster*, W.C. No. 4-790-763 (ICAP, July 28, 2011) and *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013). In contrast, Claimant claims that there is no "overpayment." He contends that because the payment of TTD benefits by Respondents was made at a point where they were required by law, instead of by mistake, they cannot be characterized as an "overpayment" as described by §8-40-201(15.5), C.R.S.

5. In 1997 the General Assembly amended §§8-43-303(1), C.R.S. and 8-43-303(2)(a), C.R.S. to permit the reopening of a claim on the grounds of "fraud" or "overpayment" in addition to the traditional grounds of error, mistake or change in condition. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011). The 1997 legislation is designated as an act "concerning the recovery from claimants of Workers' Compensation benefits to which such claimants are not entitled." *Id.* The statutes

provide that reopening may not "affect moneys already" paid except in cases of fraud or overpayment. *In Re Stroman,* W.C. No. 4-366-989 (ICAP, Aug. 31, 1999). The statute contemplates that in the case of an overpayment the ALJ has the authority to remedy the situation. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011)

6. Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." There are thus three categories of possible overpayment pursuant to §8-40-201(15.5). *In Re Grandestaff,* No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

7. Sections 8-42-107.2(4), C.R.S. and 8-43-203(b)(II)(A), C.R.S. provide that when a report from a DIME is received, the respondents shall file a FAL based on that report or else request a hearing. *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013). Absent a request to challenge the DIME's findings, the FAL controls. *Id.*

8. In *In Re Haney*, W.C. No. 4-790-763 (ICAP, July 28, 2011) excess temporary benefits were subject to recovery from the claimant as an overpayment. The claimant was terminated from work by the employer based on his failure to pass a drug test. The respondents had previously filed an admission for ongoing temporary benefits. At a hearing conducted several months after the claimant had been terminated, the ALJ found that the claimant was responsible for the loss of his job pursuant to §8-42-105(4)(a), C.R.S. The ALJ required the claimant to repay to the respondents the temporary benefits paid between the date of the termination and the date of his order. The ICAP affirmed. The ICAP opinion was premised on the Court of Appeals' analysis in *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev 'd in part on unrelated grounds*, 232 P.3d 777 (Colo. 2010). In *Simpson*, the Court pointed to the 1997 statutory amendments to §8-43-303(1) & (2)(a), C.R.S. and to the definition of 'overpayment' in §8-40-201(15.5), C.R.S. The amendment to §8-43-303(1) & (2)(a), C.R.S. stated that, upon a showing that the claimant received overpayments, an award could be reopened "and repayment shall be ordered."

9. In *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013) the DIME physician assigned the claimant a permanent impairment rating lower than that determined by her treating physician. The Authorized Treating Physician (ATP) assigned the claimant a 16% lower extremity impairment rating. The respondents filed an FAL and paid the claimant $8,490.73 in PPD benefits. However, the DIME physician subsequently assigned the claimant a 12% lower extremity impairment rating. The respondents filed an amended FAL and awarded the claimant PPD benefits in the amount of $6,368.05. The respondents filed an application for

hearing and sought to recover an overpayment in PPD benefits of $2,122.60. The ALJ agreed with the respondents and ordered the claimant to repay an overpayment of $2,122.60. The ICAP affirmed because an overpayment may result even though it did not "exist at the time the claimant received disability or death benefits."

10. The reasoning and analysis in *Haney* and *Mattorano* are controlling in the present matter. As found, Respondents have proven that it is more probably true than not that they are entitled to recover an overpayment of TTD benefits from Claimant in the amount of $13,721.35. At Claimant's third DIME on February 4, 2015 Dr. Henke determined that he had reached MMI on November 26, 2014. However, because of the retroactive MMI determination, Claimant had received TTD benefits from November 26, 2014 through March 11, 2015. Because Claimant should not have received TTD benefits after he reached MMI, the $13,721.35 that Respondents paid after November 26, 2014 constituted an overpayment. Claimant shall thus repay Respondents a total of $13,721.35.

11. As found, Claimant requested at hearing that a total of $50/month be paid to Respondents in the event repayment is ordered. Respondents replied that the repayment of $13,721.35 at $50/month would take almost 23 years. Respondents instead proposed that Claimant should be ordered to re-pay $250/month. At that rate Claimant would repay the $13,721.35 in overpaid benefits in approximately 4 ½ years. A payment of $250/month is reasonable based on Claimant's admitted AWW of $1,822.88. Claimant's AWW equals a monthly income of $7,899.15. Accordingly, Claimant shall repay Respondents $250/month in overpaid TTD benefits until recovered in full.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant shall repay Respondents an overpayment in the amount of $13,721.35.

2. Claimant shall repay Respondents $250/month in overpaid TTD benefits until recovered in full.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge;

and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 13, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

The issues addressed by this decision involve Claimant's entitlement to ongoing medical benefits. The questions to be answered are:

I. Whether Claimant's need for ongoing lumbar epidural steroid injections and opioid medications are reasonable, necessary and causally related to Claimant's December 5, 2011 admitted work injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On December 5, 2011, Claimant sustained a complex left subtrochanteric hip fracture as a consequence of a work related slip and fall. Claimant required open reduction and internal fixation (ORIF) with intermedullary rod placement to treat his hip fracture. Claimant was able to advance to a weightbearing as tolerated status after which he was referred to post surgical physical therapy (PT).

2. Claimant's recovery was complicated by the development of left knee pain and his report of "episodes of feeling as though his leg was giving out". MRI of the left knee completed May 14, 2012 demonstrated a medial meniscal tear and grade 2 chrondromalacia of the medial femoral condyle which were attended to surgically by Dr. Wallace Larson on July 12, 2012. According to Dr. Larson, Claimant's 12/5/11 slip and fall probably injured his left knee in addition to causing his femur fracture. Consequently, Dr. Larson opined that Claimant's left knee "arthroscopic evaluation and treatment" performed July 12, 2012 "would be considered work-related".

3. Claimant was returned to PT to address rehabilitation of his hip and knee. On December 19, 2012 Dr. Larson opined that Claimant had reached MMI for his hip and released him from care.

4. On January 14, 2013, Claimant returned to Dr. Larson complaining of "significant left-sided lower back pain". X-rays were obtained and an MRI ordered. X-rays demonstrated "degenerative changes at T-10, T-11 and T-12". The MRI obtained January 22, 2013 revealed "mild central spinal canal stenosis with mild bilateral recess stenosis at L-4-5" along with bilateral moderate foraminal stenosis at L2-3, L3-4 and L4-

5. The MRI also demonstrated contact with disk osteophyte complexes by "several exiting nerve roots".[1]

5. On March 14, 2013 Claimant was evaluated by Dr. Albert Hattem of Concentra Medical Centers. During this visit Claimant reported "persistent low back pain that he [rated] at 2 to 3 out of 10 associated with constant leg numbness". Dr. Hattem informed Claimant that his MRI demonstrated "diffuse age-related degenerative changes; however, because of Claimant's complaint of left leg numbness, Dr. Hattem ordered an EMG/nerve conduction study.

6. Claimant's left hip, knee, back and leg pain has been addressed by issuance of prescriptions for opioid medication, including oxycotin, oxycodone, hydrocodone and Butrans patches.

7. On April 1, 2013, Claimant was seen for a physiatric consultation to "address [his] low back pain. Claimant was evaluated by Dr. Jeffery Wunder. Dr. Wunder addressed the cause of Claimant's low back pain opining that it was "unlikely within reasonable medical probability" that Claimant's low back pain was related to his December 5, 2011 industrial injury and his antalgic gait related to both his hip and knee injuries. As support for his opinion, Dr. Wunder noted that multiple studies regarding the relationship between gait dysfunction and low back pain failed to produce any clear relationship between the two. Nonetheless, Dr. Wunder recommended proceeding with the EMG given his concern that referred anterior thigh pain is common with chronic hip pain, noting that Claimant's femur fracture was at the femoral neck. The ALJ infers from this note, that Dr. Wunder was concerned that Claimant's anterior thigh pain may be emanating from his hip and that Claimant's femur fracture may the cause.

8. On May 14, 2013, Claimant was evaluated by Dr. Mitchell. Dr. Mitchell noted that the MRI obtained January 22, 2013 demonstrated "findings consistent with multiple level DDD (degenerative disc disease), foraminal stenosis at L3-4 and L4-5, instability and stenosis at L4-5 and facet arthropathy at multiple levels". Dr. Mitchell did not address the cause of Claimant's lumbar spine conditions; however, he referred Claimant to PT for "core strengthening and flexibility" and recommended a trial of ESI's (epidural steroid injections) at the L4-5 level as well as NSAID's (non-steroidal anti-inflammatory drugs).

9. On May 23, 2013, Claimant returned for a follow-up examination with Dr. Hattem. At that time, Dr. Hattem noted that the EMG study completed on April 9, 2013 by Dr. Wunder was devoid of evidence for radiculopathy. He also noted that following Dr. Wunder's examination, Insurer "denied additional treatment directed at the patient's low back". Dr. Hattem placed Claimant at maximum medical improvement (MMI) with

[1] During Claimant's follow-up visit with Dr. Larson on March 19, 2013, Dr. Larson documented similar findings and referred Claimant to Dr. Orderia Mitchell for consultation regarding treatment recommendations, although Dr. Larson felt that the likelihood that Claimant may require lumbar epidural steroid injections or selective nerve root blocks was "relatively high".

impairment of the left hip and knee associated with Claimant's December 5, 2011 work injury. Dr. Hattem did not recommend maintenance medical care.

10. Claimant requested a Division sponsored Independent Medical Examination (DIME). While the process to identify a DIME physician to complete the requested evaluation was underway, Respondents set an appointment for Claimant with Dr. Allison Fall.

11. Dr. Fall completed a Respondent Independent Medical Examination (RIME) on September 5, 2013. Following a records review and physical examination, Dr. Fall concluded that Claimant's low back complaints were unrelated to his December 5, 2011 industrial injury. She was unable to discern any correlating objective findings to complaints of low back pain during her physical exanimation. Based upon her review of the medical records, Dr. Fall questioned whether there was any symptomatic pathology in the lumbar spine.

12. On October 16, 2013, Dr. Stephen Lindenbaum completed Claimant's requested DIME. Concerning the relationship of Claimant's low back pain to his December 5, 2011 industrial injury, Dr. Lindenbaum opined as follows: "At this point, I am really not able to substantiate any relationship between his low back symptoms and his prior injury". This is similar to the finds (sic) of Dr. Fall's. Regardless, Dr. Lindenbaum felt Claimant required involvement in a chronic pain program because of his difficulties with activities secondary to chronic pain.

13. Respondents filed a Final Admission of Liability (FAL) consistent with the opinions expressed by Dr. Lindenbaum concerning impairment on November 8, 2013. The FAL also admitted for "Reasonable and necessary medical care related to this claim per authorization from authorized treating physicians".

14. Claimant returned to Concentra Medical Centers on November 21, 2013 for a recheck. He was evaluated by Dr. Daniel Peterson on this date. During this visit, Claimant reported worsening low back symptoms. Dr. Peterson prescribed Percocet 5/325, instructing Claimant to take one tab qid (four times a day) PRN to last him until he came under the care of a pain management specialist. Claimant was referred to Dr. Jeffrey Jenks for pain management.

15. Dr. Jenks evaluated Claimant on November 26, 2013. Following a physical examination, Dr. Jenks opined that Claimant's low back and left leg pain was "likely secondary to lumbar spinal stenosis. He did not address the relationship of Claimant's stenosis to his December 5, 2011 industrial injury. Dr. Jenks recommended a left L4-5 epidural injection and started Claimant on a Butrans 5 mg patch for pain; instructing Claimant to discontinue his use of oxycodone. Dr. Jenks also wrote a prescription for Neurontin.

16. On December 4, 2013, Respondents' requested that Dr. Fall review Claimant's records and respond to Dr. Jenks request for authorization for the L4-5 epidural injection per WCRP Rule 16. Following her records review, Dr. Fall recommended that

Dr. Jenks' request be denied as there is "no documentation that [Claimant's] lumbar condition is causally related to the work-related injury from two years ago". Consequently, the ESI was, in Dr. Fall's opinion, "not medical reasonable and necessary and related to the work-related injury".

17. On December 30, 2013, Dr. Jenks renewed his recommendation for an L4-5 ESI. He changed Claimant's Butrans patch from 5 mcg to 10 mcg and increased Claimant's Neurontin adding one tablet in the AM to Claimant's overall use. Dr. Jenks also recommended continued use of a Flector patch which had been previously prescribed.

18. On January 27, 2014 Claimant returned for follow-up with Dr. Jenks. In addition to the above mentioned medication regime, Dr. Jenks noted that Claimant was using oxycodone when he experienced left trochanter pain. Claimant received left lateral piriformis and gluteus medius injections on this visit and was prescribed a "compounded analgesic ointment" for continued pain to apply to the lateral piriformis and gluteus medius.

19. On March 18, 2014, Claimant's Butrans pain patch was increased to 20 mcg q.7 days in anticipation of his becoming more active as the weather warmed with the onset of spring. Despite Claimant's use of Butrans for pain management at this level, he reported increased episodes of breakthrough pain requiring him to use 10 mg of oxycodone up to three times a day.

20. On May 9, 2015, Respondents requested a records review of Claimant's medication usage by Dr. Fall. Dr. Fall had previously opined that Claimant's initial use of Butrans appeared reasonably necessary and related to Claimant's industrial injury. After reviewing the subsequent records, Dr. Fall noted an escalation in Claimant's use of pain medication in the face of increasing pain. Dr. Fall opined that there was no indication for continued prescription medication as a result of the work-related injury to the left hip and left knee for the following reasons: First, Dr. Fall noted that "[p]ain from the femur fracture would not be expected to increase over time". She concluded that Claimant's increasing pain/symptoms were more plausibly related to the degenerative changes and stenosis present in Claimant's lumbar spine. Thus, she opined that any need for continued pain medications were unrelated to Claimant's admitted industrial injury to the left hip and knee and should; therefore, be prescribed outside the workers' compensation system. Secondly, Dr. Fall noted that there was "no objective documentation of any functional improvement as a result of decreased pain from the femur as a result of taking the medications". Thus, Dr. Fall concluded that continued use of "opioid medications were not medically reasonable and necessary according to the medical treatment guidelines".

21. Claimant was evaluated, at the request of Respondents by Dr. Bernton in an independent medical examination (IME) setting on July 31, 2015. Dr. Bernton completed a comprehensive records review and a physical examination. Following his IME Dr. Bernton issued a written report wherein he agreed with Drs. Wunder, Hattem, Fall and Lindenbaum that Claimant's low back complaints were/are not work-related. Rather, according to Dr. Bernton, Claimant's low back pain is attributable to progressive

multi-level degenerative disk disease and osteoarthritis in the lumbar spine as documented on MRI. Based upon the evidentiary record as a whole, the ALJ credits the opinion of Dr. Bernton over the contrary opinions of Dr. Timothy Hall. Specifically, the ALJ finds that the evolution of Claimant's symptoms, which required increasing amounts of medication and lumbar ESI's to treat, coupled with an EMG finding which went from normal in 2013 to abnormal in 2014, supports Dr. Bernton's opinion that Claimant's current symptoms are emanating from non-occupationally induced multi-level progressive degenerative disk disease rather than Claimant's increased use of the leg for functional activity as espoused by Dr. Hall.

22. Dr. Bernton testified consistently with his report, namely that Claimant's femur fracture was not in a location likely to lead to arthritis and chronic pain. To the contrary, the fracture was below the hip joint on the shaft of the femur. According to Dr. Bernton, Claimant's femur fracture has healed completely and is not the source of his chronic pain. Moreover, Dr. Bernton testified that Claimant's left meniscus tear was successfully treated and is not the source of his chronic pain. Based upon Claimant's pain complaints as documented in the medical records submitted in this case, the ALJ credits Dr. Bernton's opinions to find that neither the left femur nor the left knee are the source of Claimant's chronic pain. As noted above, the evidence presented persuades the ALJ that the source of Claimant's chronic pain, and consequently, his need for treatment, more probably than not, springs from the progressive nature of the degenerative condition in his low back.

23. Respondents have established, by a preponderance of the evidence, that Claimant's need for ongoing medications, including narcotics and additional epidural injections are no longer reasonable, necessary or related to his December 5, 2011 industrial left femur and knee injuries. Nonetheless, as Claimant has been using opioid medications for a lengthy period of time to treat the effects of his industrial injuries, the ALJ credits the opinion of Dr. Bernton, to find that it is medically contraindicated to abruptly cut Claimant off all narcotic medication. Rather, according to Dr. Bernton, Claimant will require a "reasonable" period of time to wean himself from his opioid medications. Based upon the evidence presented, the ALJ finds that Dr. Jenks has begun that weaning process. Claimant has been tapering his use of opioid medication since June 29, 2015. Nevertheless, Dr. Bernton testified that Claimant will require additional time to taper his use further. According to Dr. Bernton's un-rebutted testimony, it is reasonable to extend the time for Claimant to wean himself from his narcotic medications by approximately 4 months to March 1, 2016 after which date further treatment/medications would no longer be related to Claimant's industrial injuries and the obligation of Insurer to provide such treatment would terminate completely. As noted above, Claimant's need for ESI's to manage his chronic low back pain is also un-related to his industrial injuries. Therefore, Insurer is not obligated to authorize or pay for any such treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of Colorado's Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A workers' compensation claim is decided on its merits. *Section 8-43-201(1), C.R.S.*

B. The ALJ determines the credibility of the witnesses. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI (2005). In this case, the ALJ concludes the testimony of Dr. Bernton to be credible and persuasive. His opinions are supported by sound medical principal and the medical records themselves.

C. In deciding whether a party to a workers' compensation dispute has met their burden of proof, the ALJ is empowered to, "resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See, Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence to the above-findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

D. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Section 8-41-301(1)(c), C.R.S.* The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*.

Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case, the persuasive evidence establishes that Claimant's need for ESI's and opioid medications are to address the symptoms caused by the natural progression of his preexisting, non-work related degenerative disk disease of the lumbar spine and not to treat any condition related to the June 3, 2011 industrial injury. However, as Claimant has become habituated to the opioid medications which were used originally to cure and relieve him of the pain associated with his left femur fracture and left knee meniscal tear, the continued need for such medications while Claimant undergoes tapering remains reasonable, necessary and related to Claimant's December 5, 2011 industrial injury. As found, that weaning process is likely to take an additional 4 months after which the ALJ concludes that the continued need for opioid medications would no longer be related to Claimant's industrial injury. Because Claimant's need for ESI's is not causally related to his December 5, 2011 industrial injury, Respondents' are not obligated to authorize and pay for such care. In the case of Claimant's opioids, Respondents are liable to provide and pay for such medications through March 1, 2016 after which such liability terminates.

ORDER

It is therefore ordered that:

1. Claimant's request for lumbar epidural steroid injections is denied and dismissed as the need for these injections is not causally related to Claimant's December 5, 2011 workers' compensation injury.

2. Respondents shall provide and pay for continued opioid medication through March 1, 2016 while Claimant completes his tapering program. The basis for this order is that Claimant's ongoing need is related to his dependence on said medication which was necessary to treat the pain associated with his left femur fracture and left knee meniscal tear originally. Respondents' liability to provide and pay for such opioid medications after March 1, 2016 terminates because the need for such medication would no longer be related to Claimant's industrial injuries.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 18, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury to her lower back while undergoing physical therapy on March 26, 2015 for her March 11, 2011 admitted left leg injury.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

FINDINGS OF FACT

1. Claimant is a 57 year old female who worked as an Administrative Representative for Employer. On March 11, 2011 she suffered an admitted industrial injury to her left Achilles tendon while in the course and scope of her employment for Employer. Claimant cut her Achilles heel while exiting a vehicle.

2. Claimant subsequently underwent four surgeries to repair her Achilles tendon. On January 19, 2015 Eric Lindberg, M.D. performed the fourth surgery. Claimant also received physical therapy to strengthen her left leg.

3. Claimant testified that on March 26, 2015 while undergoing physical therapy with Christi Campanella, PT she injured her lower back when operating a glider exercise machine. For her first therapeutic exercise of the day, PT Campanella directed Claimant to a glider machine and instructed her to use her left leg only to press on the foot plate. Lying prone on the glider machine, Claimant exerted force on the foot plate, but was unable to move it. Claimant remarked that she advised PT Campanella that she could not move the plate and PT Campanella responded that she should use both legs to push the foot plate. As Claimant attempted to use both legs to push the foot plate she immediately experienced sharp pains in her lower back and right leg. Claimant noted that she advised PT Campanella about her pain.

4. In contrast to Claimant's testimony, PT Campanella's physical therapy note does not document any lower back injury. PT Campanella stated that Claimant did well and was putting more weight on her foot. She specifically remarked that Claimant "was able to do very light resistance on the foot on the shuttle today without the boot."

5. Claimant explained that she subsequently experienced worsening lower back and right leg pain. On March 29, 2015 she visited the Rose Medical Center Emergency Room. The medical record reflects that Claimant had undergone surgery in January to repair her left Achilles tendon and had been experiencing increased right leg

pain since undergoing physical therapy. The emergency room report also provided that Claimant began experiencing nausea and vomiting three hours earlier.

6. On March 31, 2015 Claimant visited primary care physician Mark Nathanson, D.O. at Family Practice in Aurora for an evaluation. Dr. Nathanson recorded that Claimant had fallen off a leg scooter several months ago and "back has bothered her off and on." He recommended an MRI if Claimant's lower back symptoms did not improve.

7. Based on a referral from Dr. Nathanson Claimant visited the Medical Center of Aurora for an examination on April 3, 2015. She reported back pain, vomiting and diarrhea for the past five days. Jennifer Morris, R.N. recorded "pt here with low back pain for several months, reports diarrhea and vomiting for last 5 days. Seen by Nathanson today, after what sounds like SLR exam, sent here for eval of back pain and NVD."

8. In an April 3, 2015 report Anthony Carcella, PAC noted that Claimant had been lifting her left leg and felt a "pop" in her right lower back. He remarked "now right leg hurts."

9. On April 14, 2015 Claimant visited Sara J. Meadows, D.O. for an evaluation. Dr. Meadows recorded that Claimant had a flare-up of lower back pain while in physical therapy on March 26, 2015 for her left Achilles work-related injuries. Dr. Meadows did not conduct a causation analysis of Claimant's lower back symptoms.

10. On June 1, 2015 Claimant visited Stephen D. Johnson, M.D. for a neurosurgical consultation. Dr. Johnson stated that Claimant "was pushing a glider in early April of this year as part of her physical therapy when she felt a pull in her low back area and then pain radiating into her right leg." After reviewing imaging studies of Claimant's lower back Dr. Johnson was hopeful that her lumbar symptoms would improve with conservative treatment. He recommended a second epidural steroid injection before considering lower back surgery.

11. On June 17, 2015 Claimant visited Dr. Lindberg for an examination. In considering the cause of Claimant's lower back symptoms, Dr. Lindberg explained that her condition was likely "related to an event on one of the physical therapy pieces of equipment, where she states that she had pain after that. This seems reasonable to me, given her low level of activities, doing most other things in life."

12. On June 23, 2015 Claimant returned to Dr. Meadows for an examination. Dr. Meadows noted that Claimant experienced the sudden onset of severe lower back pain and right leg symptoms with subsequent weakness on May 16, 2015. A lumbar spine MRI had revealed a large L4-L5 disc extrusion.

13. On June 11, 2015 Claimant underwent an independent medical examination with Allison M. Fall, M.D. After reviewing medical records and performing a

physical examination Dr. Fall concluded that Claimant's lower back injury was not related to her physical therapy activities on March 26, 2015. Dr. Fall summarized:

> In my opinion and within a reasonable degree of medical probability, her lumbar spine condition and leg complaints are unrelated to the Achilles tendon injury. There was no mechanism of injury from the initial injury to cause a lumbar spine injury. There was no mechanism of injury from the activities in physical therapy for a disc extrusion. The biggest risk factor she has for a lumbar spine condition is her overweight status.

14. On July 31, 2015 Dr. Fall reviewed additional medical records. She maintained that Claimant's lower back condition was unrelated to her March 26, 2015 physical therapy session. Dr. Fall detailed:

> What [Claimant] describes in physical therapy would not be a typical mechanism of injury to cause the MRI findings. She was essentially lying flat on her back and pushing a light weight with her left leg. Also, the emergency department report did not mention anything about this event but talks about her seeing her primary care physician and also associated nausea and vomiting. Therefore, my opinions remain unchanged.

15. Dr. Fall testified at the hearing in this matter. Before the hearing, Dr. Fall was under the impression that Claimant had been performing a leg press on the glide machine at physical therapy. Dr. Fall remarked that a leg press involves the upper legs, gluts and hamstrings. However, at the hearing Claimant testified that she was performing a calf raise where her back was in a protected position at her March 26, 2015 physical therapy session. Claimant was essentially lying flat on her back exercising her calf. Dr. Fall explained that the exercise would not have caused a lumbar spine injury. Accordingly, Dr. Fall determined that Claimant's need for lumbar spine surgery is unrelated to her physical therapy exercises on March 26, 2015.

16. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury to her lower back while undergoing physical therapy on March 26, 2015 for her March 11, 2011 admitted left leg injury. Claimant testified that on March 26, 2015 while undergoing physical therapy with PT Campanella she injured her lower back when operating a glider exercise machine. As Claimant attempted to use both legs to push the foot plate she immediately experienced sharp pains in her lower back and right leg. Despite Claimant's testimony, the bulk of the medical records and the persuasive analysis of Dr. Fall reflect that Claimant did not suffer a lower back injury while undergoing physical therapy during the quasi-course of her employment.

17. Initially, PT Campanella's physical therapy note did not document any lower back injury. Second, a March 29, 2015 report from the Rose Medical Center Emergency Room reflects that Claimant had undergone surgery in

January to repair her left Achilles tendon and was experiencing increased right leg pain since undergoing physical therapy. The report does not suggest that Claimant was experiencing any lower back symptoms. Furthermore, on March 31, 2015 Claimant visited primary care physician Dr. Nathanson. He recorded that Claimant had fallen off a leg scooter several months ago and "back has bothered her off and on." Moreover, an April 3, 2015 record from the Medical Center of Aurora reveals that Claimant had been experiencing back pain for several months. Finally, on June 23, 2015 Dr. Meadows noted that Claimant experienced the sudden onset of severe lower back pain and right leg symptoms with subsequent weakness on May 16, 2015.

18. Dr. Fall persuasively concluded that Claimant's lower back symptoms were not caused by her March 26, 2015 activities during physical therapy. She explained that Claimant's description of her activities on the glider machine at physical therapy did not constitute a typical mechanism of injury to cause the MRI findings. Dr. Fall remarked that a leg press involves the upper legs, gluts and hamstrings. Claimant was performing a calf raise at her March 26, 2015 physical therapy session.where her back was in a protected position. Claimant was essentially lying flat on her back exercising her calf. Dr. Fall explained that the exercise would not have caused a lumbar spine injury.

19. In contrast, Drs. Meadows, Johnson, and Lindberg noted that it was reasonable that Claimant may have injured her lower back during physical therapy. However, the doctors did not perform a causation analysis. Moreover, the inconsistencies in the medical records suggest that Claimant had been suffering intermittent lower back symptoms from a variety of causes for several months. Accordingly, Claimant's activities at her March 26, 2015 physical therapy session did not aggravate, accelerate, or combine with her pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. Under the quasi-course of employment doctrine, injuries incurred while undergoing authorized medical treatment for an industrial injury are considered compensable even though they occur outside the ordinary time and place limitations of "normal employment." *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1993). The rationale for the doctrine is that, because the employer is required to provide reasonable and necessary medical treatment and the claimant is required to submit to it or risk suspension or termination of benefits, treatment by the physician becomes an implied part of the employment contract. *See Employers Fire Insurance Co. v. Lumbermen's Mutual Casualty Co.,* 964 P.2d 591 (Colo. App. 1998)*; Shreiber v. Brown & Root, Inc.,* 888 P.2d 274 (Colo. App. 1993).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury to her lower back while undergoing physical therapy on March 26, 2015 for her March 11, 2011 admitted left leg injury. Claimant testified that on March 26, 2015 while undergoing physical therapy with PT Campanella she injured her lower back when operating a glider exercise machine. As Claimant attempted to use both legs to push the foot plate she immediately experienced sharp pains in her lower back and right leg. Despite Claimant's testimony, the bulk of

the medical records and the persuasive analysis of Dr. Fall reflect that Claimant did not suffer a lower back injury while undergoing physical therapy during the quasi-course of her employment.

8. As found, initially, PT Campanella's physical therapy note did not document any lower back injury. Second, a March 29, 2015 report from the Rose Medical Center Emergency Room reflects that Claimant had undergone surgery in January to repair her left Achilles tendon and was experiencing increased right leg pain since undergoing physical therapy. The report does not suggest that Claimant was experiencing any lower back symptoms. Furthermore, on March 31, 2015 Claimant visited primary care physician Dr. Nathanson. He recorded that Claimant had fallen off a leg scooter several months ago and "back has bothered her off and on." Moreover, an April 3, 2015 record from the Medical Center of Aurora reveals that Claimant had been experiencing back pain for several months. Finally, on June 23, 2015 Dr. Meadows noted that Claimant experienced the sudden onset of severe lower back pain and right leg symptoms with subsequent weakness on May 16, 2015.

9. As found, Dr. Fall persuasively concluded that Claimant's lower back symptoms were not caused by her March 26, 2015 activities during physical therapy. She explained that Claimant's description of her activities on the glider machine at physical therapy did not constitute a typical mechanism of injury to cause the MRI findings. Dr. Fall remarked that a leg press involves the upper legs, gluts and hamstrings. Claimant was performing a calf raise at her March 26, 2015 physical therapy session.where her back was in a protected position. Claimant was essentially lying flat on her back exercising her calf. Dr. Fall explained that the exercise would not have caused a lumbar spine injury.

10. As found, in contrast, Drs. Meadows, Johnson, and Lindberg noted that it was reasonable that Claimant may have injured her lower back during physical therapy. However, the doctors did not perform a causation analysis. Moreover, the inconsistencies in the medical records suggest that Claimant had been suffering intermittent lower back symptoms from a variety of causes for several months. Accordingly, Claimant's activities at her March 26, 2015 physical therapy session did not aggravate, accelerate, or combine with her pre-existing condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 4, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

1. Whether the viscosupplementation injections and/or total knee replacement surgery recommended by Dr. Duffey is reasonable, necessary, and related to the claimant's May 29, 2012 industrial injury; and,

2. Whether the respondents can withdraw their General Admission of Liability due to change in condition.

PRELIMINARY MATTERS

1. The claimant filed a Claimant's Motion for Summary Judgment on January 23, 2015.

2. The respondents filed a Response to Motion for Summary Judgement that was received on February 9, 2015, the day before the hearing in this matter.

3. The ALJ deferred ruling on the Motion until after the hearing.

4. The ALJ hereby denies the Claimant's Motion for Summary Judgment as there are factual matters in dispute that render granting the motion inappropriate.

FINDINGS OF FACT

1. The claimant was employed as a housekeeper for the respondent-employer on May 29, 2012.

2. On May 29, 2012, the claimant sustained an injury to her left knee in an accident at work. While at work, the claimant slipped on the edge of a metallic stair and fell twisting her left knee and landing on her buttocks.

3. Prior to this injury, the claimant suffered two injuries to her left knee. The first injury occurred at home while the claimant walked up the stairs in 2010. She tore her meniscus and required surgical intervention. The second injury occurred while the claimant worked as a housekeeper for Radisson Hotel in 2011. She underwent

treatment for this injury as well and was eventually released with a 15% impairment rating and was not given restrictions.

4. On May 29, 2012, the claimant began descending the stairwell outside the hotel in order to return from her smoking break. No specific objects, impediments or moisture were noted by witnesses. The stairs were metallic. As the claimant descended her left leg slipped on the edge of the metallic stair causing her to fall. The fall was witnessed by Gailon Scritchfield. At a previous hearing, Mr. Scritchfield testified that he saw the claimant descend the stairs and that he saw her foot slip off the edge of the stair.

5. The respondent-insurer filed a Notice of Contest on August 8, 2012.

6. A hearing was held on December 18, 2012, on the issue of compensability, and in particular, the respondents attempt to challenge whether the claimant's injury arose out of her employment at the respondent-employer.

7. The ALJ entered an Order finding the claimant's injury was compensable.

8. On May 20, 2014, the respondent-insurer filed a General Admission of Liability.

9. On October 29, 2014, the claimant filed an Application for hearing on the issues of medical benefits, reasonably necessary, Rule 8-43-304 for willful and continuing failure to pay mileage at the correct rate, denial of medical procedure, specifically knee injections. On January 26, 2015, the ALJ issued an Order granting the claimant's unopposed motion to add the issue of denial of medical benefits specifically relating to the total knee replacement surgery recommended by Dr. Duffey.

10. The respondents filed a Response to the claimant's Application for Hearing endorsing the issues of compensability, causation, credits, cure, 8-43-201(1), 8-43-304(1) and 8-43-304(4), the respondents seek to withdraw General Admission Liability, and, Waiver.

11. Prior to May 20, 2014, the claimant received limited treatment for her left knee injury due to her claim being denied, litigated, and challenged.

12. The claimant was initially treated for her knee injury at Emergicare by Dr. Gayle Humm. The claimant was diagnosed with a contusion to right arm and sprain to the left knee. The claimant was initially assigned temporary work restrictions of no lifting or carrying over fifteen pounds, and no kneeling or squatting.

13. On June 3, 2014, Dr. David Walden, at Premier Orthopedics, examined the claimant for the first time for this injury. He opined that:

> Clearly, the patient's most recent injury did not cause her osteoarthritis. However, she does report deterioration in her level of function and an increase in her level of pain following this incident. That is not at all unusual. I have had a chance to review her previous arthroscopy pictures from 2011 and find bone-on-bone contact in the lateral compartment with essentially no lateral meniscus, and, therefore, the tearing that is noted on the residual tissue is probably not of significance. It is similar to the finding on the previous MRI scan as well. There is perhaps no way to make the lateral compartment any worse, since it is already bone-on-bone. Although there is a possible new small medial tear, that is dwarfed in significance, likely, by the severe osteoarthritis in the knee, and therefore, addressing that would be unlikely to benefit the patient.
>
> I would recommend that the patient from a clinical standpoint is a candidate for a total knee arthroplasty. I talked to her about that. I am not certain whether or not this would be considered work-related and it is somewhat complicated based on two previous work-related injuries, both as housekeepers after relatively short employment. The arthritic changes, however, that I saw at the time of the arthroscopy are probably quite chronic in nature, although the original meniscus tear was likely caused by the injury that she sustained in 2011. This most recent injury may or may not have caused a minor tear of the medial meniscus and I do not believe that is of clinical significance.
>
> In summary, the patient is a candidate for total knee arthroplasty. We will investigate the possibility of doing so. She could potentially pursue viscosupplementation if she so chooses, however, her function is very limited, and her symptoms are quite severe.

14. On June 17, 2014, Dr. James Duffey of Premiere Orthopedics examined the claimant based on a referral from Dr. Walden. Dr. Duffey agreed with Dr. Walden that the claimant is a candidate for a total knee arthroplasty. Dr. Duffey noted that he would see the claimant back for a preoperative visit.

15. On June 18, 2014, the claimant returned to Dr. Lund at Emergicare. Dr. Lund noted that the claimant was having difficulty weight bearing and doing any tasks that required standing and walking due to left knee pain. Dr. Lund noted that both Dr. Duffey and Dr. Walden recommended a total knee replacement. Dr. Lund noted that the claimant was "awaiting insurer approval for surgery, TKR left knee. Some knee arthritis was pre-existing, but permanently aggravated by last WC injury.

16. Dr. Lund maintained the claimant's temporary work restrictions of limited to seated or sedentary work and no squatting, kneeling or crawling as of June 18, 2014. Dr. Lund also instructed the claimant to continue use of walker or cane or crutch when weight bearing.

17. On August 4, 2014, Dr. Wallace Larson performed an independent medical evaluation of the claimant. Dr. Larson opined that the claimant's diagnosis is "pre-existing, nonwork related, osteoarthritis of her left knee." He did not recommend any further evaluation, treatment, or diagnostic studies for the claimant's left knee.

18. On October 22, 2014, the claimant was examined by Dr. Lund at Emergicare. Dr. Lund again noted that the claimant had marked aggravation of underlying arthritis and new meniscus tears. Dr. Lund noted that she was waiting for the respondent-insurer to approve the requested Synvisc injection or similar joint injections for the left knee. Dr. Lund adjusted the claimant's temporary work restrictions to "alternate seated duty with stand/walk as tolerated. No squatting, no kneeling, no crouching. Limited stair climbing. No ladders. Limit lift/carry to ten pounds."

19. On January 13, 2015, Dr. Timothy Hall performed an independent medical evaluation on the claimant. Dr. Hall's impression was that the claimant suffered from "[l]eft knee pain related to meniscus tears and events and degenerative changes made symptomatic by a May 29, 2012 event at work while walking down the stairs." Dr. Hall opined that the claimant needs a total knee replacement at this point. According to Dr. Hall, "[t]he total knee replacement is needed as a consequence of the May 29, 2012 work related injury."

20. Dr. Hall based his opinion that the total knee replacement is related to the May 29, 2012 work related injury, on the fact that no physicians were anticipating in the months prior to the May 29, 2012 event having to do a knee replacement. Dr. Hall noted that "[the physician's] were not recommending this intervention because one does not do knee replacements because of degenerative changes in the knees. Knee replacements are done due to pain, which is often related to degenerative changes, but it is the pain that necessitates the intervention not the presences of degenerative changes."

21. Dr. Hall further noted that that Dr. Larson's opinion that the claimant had no injury to her knee on May 29, 2012 differs from everyone else who has evaluated the claimant.

22. Dr. Hall opined that "[t]here may have been a time following this injury when she might have been treated with less aggressive intervention such as local injection, viscosupplementation or even a lesser intervention surgically, but that time has certainly passed."

23. The claimant began working for the respondent-employer in April 2012. When the claimant started working for the respondent-employer she did not have any bending or lifting restrictions. She was able to carry out all of the tasks of that job. She was also able to engage in recreational activities when she began working for the respondent-employer.

24. Subsequent to the injury of May 29, 2012, the claimant observed that her left knee felt different. "During physical therapy it wasn't getting better. It seemed to irritate it more. And I was relaying this to the physical therapist, Rebecca, and that's when they sent me for an MRI in July of 2012, and it showed the two new tears."

25. Because the claim was initially denied by the respondent-insurer the claimant did not start receiving treatment again for her injury until May 2014.

26. At hearing, the claimant described the pain in her left knee as "[s]ometimes it's a sharp stabbing, and it's all around my knee, like above my knee and below my knee also. A sharp stabbing. It will come like up from underneath my kneecap, I'm assuming, to the sides - - on both sides, the top. Sometimes it's like fire. Sometimes I get the sensation that it's leaking, and I check every time, and it's not, but that is the sensation I get. I can't stand on it too long. I can't sit too long. I - - it's very aggravating and very uncomfortable."

27. The claimant was made aware that Dr. Duffey requested a total knee replacement surgery and it was denied by the insurance company. No one recommended a total knee replacement surgery prior to the May 29, 2012 industrial injury. She further agreed that she wants to have the total knee replacement surgery recommended by Dr. Duffey.

28. A post-hearing deposition of Dr. Wallace Larson took place on February 19, 2015 and August 18, 2015.

29. Dr. Larson testified consistent with his IME report.

30. Dr. Larson testified that he agrees that the claimant recovered from her 2011 surgery.

31. A post-hearing deposition of Dr. James Duffey took place on May 5, 2015 and August 4, 2015.

32. Dr. Duffey testified that “We never tell a patient that it’s time to do your knee replacement.” He further explained that “[we] tell a patient that based on their imaging studies, potentially previous inspection of the joint at the time of an arthroscopic surgery and failure to control symptoms adequately that they are a candidate to have a knee replacement whenever they feel they are no longer willing to accept pain and disability as it is.”

33. Dr. Duffey testified that there is a tear of the meniscus present on the July 2012 MRI that was not present on the March 2011 MRI which was taken prior to this industrial injury.

34. Dr. Duffey testified that he disagrees with Dr. Larson’s opinion that the claimant’s knee is arthritic process and the injury had no effect of it. Dr. Duffey explained that he disagrees “[b]ecause based on the information available to me that [the claimant] was doing relatively well at the time of the work-related injury and then had an exacerbation… I think clearly that the last injury, one in question on 5/29/2012, did make her symptoms worse for the time being and potentially accelerated the timing on the knee replacement. But looking at the history from the beginning, it’s a relatively small factor. ” Dr. Duffey testified that he disagrees with Dr. Larson’s opinion and testified that he believes the work-related injury was a factor in the claimant needing a total knee replacement.

35. Dr. Duffey testified that regarding the claimant’s need for a total knee replacement that “ . . . clearly work is very important part of this. If you can no longer do the things you need to do to earn a living, that would certainly qualify as a level of disability that’s not tolerable.”

36. Dr. Duffey agreed that the claimant’s injury was the “straw that broke the camel’s back.” Dr. Duffey testified that “Yes, but I would say that for most of my arthritis patients, there is a straw that breaks the camel’s back, and it’s not necessarily an acute injury.” Dr. Duffey testified that he often times looks to the complaints of pain and disability in determining whether a patient is a candidate for a total knee replacement. He further testified that the complaints of pain and disability often times come on suddenly and not always with an explanation.

37. Dr. Duffey testified that he agrees with Dr. Hall's impression of "Left knee pain related to meniscal tears and events and degenerative changes made symptomatic by a May 29th, 2012 event at work while walking down the stairs."

38. Dr. Duffey also testified that the viscosupplementation injections are a reasonable thing to try, but patients with advanced degenerative changes are less likely to have a positive outcome.

39. The ALJ finds the claimant to be credible.

40. The ALJ finds Dr. Duffey's analyses and opinions to be more credible than medical analyses and opinions to the contrary.

41. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to viscosupplementation injections and/or total knee replacement surgery for her left knee as determined by the claimant and Dr. Duffey.

42. The ALJ finds that the respondents have failed to establish that it is more likely than not that the General Admission of Liability should be allowed to be withdrawn.

43. As to the remaining issues the ALJ finds that they have been abandoned by the parties as there were no factual recitations or arguments in either party's Position Statement concerning the remaining issues.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301 (1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo.App. 2001).

2. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

3. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or respondents. Section 8-43-201, C.R.S.

4. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

5. An injury occurs "in the course of' employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting* Co. *v. Blair,* 812 P.2d 638 (Colo. 1991). The "arising out of' requirement is narrower and requires The claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

6. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the General Admission of Liability should be allowed to be withdrawn. The ALJ is not persuaded by Dr. Larson's opinion that the claimant did not suffer a compensable injury to her left knee on May 29, 2012.

7. For a compensable injury, the respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2010). The respondents are liable for reasonable and necessary medical treatment by a physician to whom the claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). The claimant has the burden of proving entitlement to specific medical benefits. *See* § 8-43-201(1), C.R.S; *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29, 31 (Colo. App. 2000). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

8. The ALJ finds that the claimant has established by preponderance of the evidence that the viscosupplementation injections and/or total knee arthroplasty surgery recommended by Dr. Walden and Dr. Duffey are reasonable, necessary, and related to the May 29, 2012 compensable claim.

9. The ALJ concludes that Dr. Duffey's analyses and opinions are more credible than medical analyses and opinions to the contrary.

10. “[I]f a disability were 95% attributable to a pre-existing, but stable condition, and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.” *Seifried v. Industrial Com’n of State of Colo.*, 736 P.2d 1262, 1263 (Colo. App. 1986).

11. It is clear that the claimant’s injury on May 29, 2012 severely aggravated the preexisting arthritis in the claimant’s left knee. The ALJ concludes that the severe aggravation of preexisting arthritis accelerated the claimant’s need for a total knee replacement surgery. This is evidenced on the severe increase in pain and disability after the May 29, 2012 injury.

12. The ALJ concludes that the claimant’s testimony is credible.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to viscosupplementation injections and/or total knee replacement surgery for her left knee as determined by the claimant and Dr. Duffey.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents' request to withdraw the General Admission of Liability is denied and dismissed.

2. The respondent-insurer shall authorize and pay for the viscosupplementation injections and/or total knee replacement surgery for the claimant's left knee as determined by the claimant and Dr. Duffey.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 24, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 4-899-034-02 and 4-893-399-02

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer on August 17, 2011 and August 23, 2011?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits for the period of August 24, 2011 through August 29, 2011?

- Prior to the hearing, the parties stipulated to an average weekly wage ("AWW") of $373.18.

FINDINGS OF FACT

1. Claimant was employed with employer as a housekeeper beginning on April 10, 2011. Claimant testified that on August 17, 2011, while working for employer, she was making a bed when she tried to pull out a sheet and slipped and fell onto her bottom and left hand. Claimant testified that she felt pain in her low back after she fell. Claimant testified she informed her supervisor (Joy) about her fall when she came out of the room at approximately 1:00 p.m. Claimant testified her supervisor offered her pain medication. Following the incident, a report was filled out by employer noting that claimant had fallen and injured her back.

2. Claimant testified she did not work from August 17, 2011 until August 23, 2011. Claimant testified she returned to work on August 23, 2011 and lifted a bed side table when she experienced incontinence. Claimant testified she went home to rest after the incontinence and returned to work on August 24, 2011 and reported the incident to Ms. Zibrillo. Claimant testified Ms. Zibrillo told claimant she needed to see a doctor and sent her home while she arranged for a medical appointment.

3. Claimant was taken by employer to the Cortez Memorial Hospital Emergency Room ("ER") on August 25, 2011. Claimant was evaluated by Dr. Heyl at the ER. Claimant reported to the ER that she was out of work for 3 days and went back to work and while stooping over, had low back pain again. Claimant was diagnosed with generalized low back pain and referred for x-rays of the lumbar spine. The x-rays

were negative and claimant was released with instructions to rest, use ice and avoid heavy lifting. Claimant was taken off of work by Dr. Heyl until August 29, 2011.

4. Claimant testified that she returned to work for employer on August 29, 2011 and continued to work for employer until October 13, 2011. Claimant testified she continued to experience problems with her back while she worked for employer through October 13, 2011. Claimant testified

5. Claimant presented the testimony of Ms. Sterling, a co-worker. Ms. Sterling testified that she was aware claimant sustained an injury on August 17, 2011 as she was told of the injury by claimant when it occurred and was present on August 17, 2011 when claimant filled out the accident report. Ms. Sterling further testified that claimant reported to her that she was still experiencing severe pain in her low back during the fall of 2011. Ms. Sterling testified she was claimant's roommate during this period of time and was aware of claimant's ongoing complaints. The ALJ finds the testimony of Ms. Sterling to be credible and persuasive.

6. Respondents presented the testimony of Ms. Kelly, the Human Resources Manager for employer, at hearing. Ms. Kelly testified claimant last worked for employer on October 13, 2011 and was scheduled to work until the end of the season which would have lasted until October 31, 2011, but claimant left early for "personal reasons". Ms. Kelly testified she was aware of claimant's work injury and had received the report of injury from Ms. Zurillo. Ms. Kelly testified claimant was taken off of work for August 25 through August 29, 2011 and claimant was already scheduled to be off for August 27 and August 28, 2011 for the weekend. Ms. Kelly testified she was unaware of any lost time prior to August 25, 2011 related to claimant's back injury.

7. Claimant testified that after October 13, 2011 she moved to Florida where she lived until June 2012. Claimant testified she called employer in April 2012 seeking medical treatment but was told her claim was closed. Claimant testified she moved back to Steamboat Springs, Colorado in June 2012 where she began working with a new employer, again working in housekeeping.

8. Claimant eventually sought medical treatment again from Dr. Sisk in Steamboat Springs on January 25, 2013. Claimant reported she had sustained an injury in August 2011 when she was working in Mesa Verde and was changing out a room when she tripped on some bedding and fell twisting her back. Claimant reported she was currently attempting to work, but continued to battle low back pain. Dr. Sisk recommended physical therapy and placed claimant on a Medrol dose pack.

9. Claimant returned to Dr. Sisk on March 5, 2013 and noted that the Medrol dose pack provided her some temporary relief, but no long term relief. Dr. Sisk reviewed claimant's magnetic resonance image ("MRI") and noted there was degenerative disk disease, mild foraminal stenosis, canal stenosis that was mainly at the L4-5 and L5-S1 level. Dr. Sisk referred claimant to Dr. Seigel for consideration of an epidural steroid injection ("ESI") or a facet injection.

10. Claimant was evaluated by Dr. Siegel on March 25, 2013. Claimant reported an accident history to Dr. Siegel of falling while at work in August 2011 followed by ongoing back pain and occasional leg pain since that incident. Dr. Siegel examined claimant and reviewed her MRI and provided claimant with an ESI.

11. Dr. Sisk responded to a letter from claimant's attorney on or about March 26, 2013 and indicated it was his opinion that claimant's condition was causally related to both her August 17, 2011 work injury and her August 23, 2011 work injury.

12. Claimant returned to Dr. Siegel on May 13, 2013 and reported she experienced approximately 50% pain relief following her ESI, but continued to experience non radiating low back pain at a level of 7 out of 10. Dr. Siegel performed medial branch nerve blocks at the L4-5 and L5-S1 levels. Claimant returned to Dr. Siegel on June 18, 2013 and reported one week of 90% relief following the medial branch blocks. Dr. Siegel therefore performed a second set of medical branch nerve blocks. Claimant again returned to Dr. Siegel on July 30, 2013 and reported at least 80% pain relief following the second set of medial branch nerve blocks. Dr. Siegel then performed a radiofrequency medial branch neurolysis at the L4-L5 level and L5-S1 level bilaterally and referred claimant for physical therapy.

13. Claimant underwent an independent medical examination ("IME") at the request of respondents on August 26, 2013 with Dr. Scott. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott opined in his report that claimant's fall on August 17, 2011 caused low back pain, possibly due to a sprain of a facet joint. Dr. Scott opined that the lifting incident could have aggravated a pre-existent sprain of her facet joint.

14. Dr. Scott opined in his report that claimant would have been at maximum medical improvement ("MMI") for her August 17, 2011 and August 23, 2011 incidents by the end of August 2011. Dr. Scott noted that claimant reported to him that her pain increased after she started working for her new employer in Steamboat Springs.

15. Dr. Scott testified in this case consistent with his IME report[1]. Dr. Scott testified that it was his opinion that the claimant's condition had stabilized following the emergency room visit and that the treatment beginning in January 2013 for claimant's low back condition was not causally related to her industrial injury.

16. Claimant returned to Dr. Siegel on October 2, 2013 and noted that she continued to experience pain in her low back. Claimant reported to Dr. Siegel that she had a habit of not doing anything after work, other than to kick her feet up and alternating ice and heat to her feet, ankles and low back. Dr. Siegel increased

[1] Claimant's counsel, during the deposition, moved to strike the testimony of Dr. Scott for his failure to provide claimant's counsel with an audio recording of the IME. Dr. Scott noted in the deposition that the request for the audio recording was made a considerable amount of time following the IME and the audio recording was not available. For the record, the ALJ overrules claimant's motion to strike the testimony of Dr. Scott.

claimant's prescription for hydrocodone and added trazodone and instructed claimant to return in one month.

17. Claimant was examined by Dr. Corenman on October 7, 2013. Claimant testified at hearing that she was referred to Dr. Corenman by Dr. Siegel. Claimant reported to Dr. Corenman that her back pain was the result of an injury on August 17, 2011. Dr. Corenman reviewed claimant's imaging studies and performed a physical examination. Dr. Corenman noted that there was some evidence of symptom magnification on examination and opined that claimant was not a surgical candidate.

18. Claimant subsequently underwent a course of physical therapy with Johnson and Johnson physical therapy. Claimant testified she was referred to Johnson and Johnson physical therapy by Dr. Corenman.

19. Claimant returned to Dr. Siegel on December 16, 2013 and underwent another ESI into her lumbar spine.

20. Claimant was examined by Dr. Fabian on January 21, 2014 as a referral from Dr. Siegel. Dr. Fabian noted that claimant did not have a definable surgical pathology. Claimant was examined by Dr. Tobey on February 7, 2014 as a referral from Dr. Fabian. Dr. Tobey noted that claimant's back pain could be related to the L4-5 facet effusions, but would not explain her reports of radicular pain or her left ankle/heel pain. Claimant underwent an electromyelogram ("EMG") that was normal.

21. Claimant returned to Dr. Siegel on April 17, 2014. Dr. Siegel noted claimant had mixed results with the injections. Dr. Siegel recommended claimant continue her use of medications and prescribed Norco.

22. Claimant testified at hearing that her medical expenses have been submitted to her group health insurance carrier with claimant paying co-pays for the medical care while the health insurance covers some of the costs.

23. The ALJ credits the testimony of claimant at hearing and finds that claimant has proven that the she sustained a compensable injury arising out of and in the course of her employment with employer on August 17, 2011. The ALJ credits claimant's testimony as it is supported by the ER records from Southwest Memorial Hospital and finds that claimant was off of work for at least 3 scheduled working days following the August 17, 2011 injury before returning to work on August 23, 2011. The ALJ finds that the incident at work on August 23, 2011 relates back to the August 17, 2011 injury and is not a new injury. The ALJ notes that the finding that claimant sustained a work injury on August 17, 2011 that required medical treatment is supported by the opinion of respondents' IME physician Dr. Scott who opined that claimant did sustain a compensable injury, but expressed the opinion that claimant would have been at MMI by the end of August 2011.

24. The ALJ finds that claimant has proven that it is more probable than not that her medical treatment, including the ER visit on August 23, 2011 and the medical

treatment for her low back pain when she returned to Colorado in January 2013 is causally related to her compensable August 17, 2011 work injury. The ALJ credits the medical records entered into evidence at hearing as being persuasive on this issue.

25. The ALJ credits claimant's testimony that she was off of work from August 25, 2011 through August 29, 2011 after her trip to the ER. The ALJ notes that this testimony is supported by the ER records entered into evidence in this case that took claimant off of work. The ALJ finds that claimant has proven that it is more likely than not that she is entitled to an award of TTD benefits for the period of August 25, 2011 through August 29, 2011. The ALJ finds that the 3 day waiting period was satisfied by claimant missing work from August 17, 2011 through August 22, 2011.

26. The ALJ credits claimant's testimony and the corresponding medical records and finds that claimant has proven that it is more likely than not that her medical treatment from Dr. Sisk, Dr. Siegel, Dr. Corenman, Dr. Fabian, Dr. Tobey and her physical therapy was reasonable medical treatment necessary to cure and relieve the claimant from the effects of her August 17, 2011 work injury.

27. The ALJ finds the medical opinions expressed by Dr. Sisk and Dr. Siegel in their reports are credible and persuasive on this issue. The ALJ credits these opinions over the contrary opinions expressed by Dr. Scott in his report and testimony.

28. Although it was not addressed as an issue at the commencement of the hearing, the ALJ finds that claimant's treatment with Dr. Sisk, Dr. Siegel, Dr. Corenman, Dr. Fabian, Dr. Tobey and Johnson and Johnson Physical Therapy are authorized to treat claimant for her injuries. The ALJ credits claimant's testimony at hearing that she was not provided with a choice of physicians and credits claimant's testimony that the physicians were within the chain of referrals from her initial treatment with Dr. Sisk beginning in January 2013.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that she suffered compensable injury arising out of and in the course of his employment with employer on August 17, 2011. As found, the alleged injury on August 23, 2011 did not result in the need for any medical treatment, as the ER visit was related to the August 17, 2011 incident, and, therefore, claimant has failed to establish that the August 23, 2011 incident is a compensable work injury.

5. As found, claimant has proven by a preponderance of the evidence that the medical treatment she received beginning in January 2013 from Dr. Sisk and his referrals, was reasonable and necessary to cure and relieve the claimant from the effects of the work injury. As found, claimant has proven by a preponderance of the evidence that her medical treatment from Dr. Sisk, Dr. Siegel, Dr. Corenman, Dr. Fabian, Dr. Tobey and her physical therapy was reasonable medical treatment necessary to cure and relieve the claimant from the effects of her August 17, 2011 work injury.

6. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The

impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

7. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

8. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by Dr. Heyl at the ER. As found, claimant was off of work from August 25, 2011 through August 29, 2011. The ALJ further finds that claimant’s three day waiting period was met by the time she missed between her initial injury on August 17, 2011 to when she returned to work on August 23, 2011.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical benefits necessary to cure and relieve claimant from the effects of the industrial injury.

2. Respondents shall pay claimant TTD benefits for the period of August 25, 2011 through August 29, 2011 based on the stipulated AWW of $373.18.

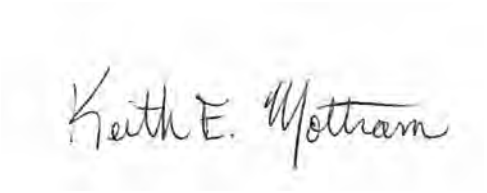
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 10, 2015



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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-907-989-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 15, 2015 and November 6, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/15/15, Courtroom 3, beginning at 1:30 PM, and ending at 2:15 PM; and, 11/6/15, Courtroom 3, beginning at 8:30 AM, and ending at 9:00 AM).

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection, Respondents' Exhibits A through G were admitted into evidence, without objection. A written transcript of the August 5, 2015 Evidentiary Deposition of Brian Reiss, M.D., was filed at the commencement of the first session of the hearing.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on November 12, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The sole issue to be determined by this decision concerns the causal relatedness of the recommendation of Eric C. Parker, M.D., the Claimant's referred authorized treating surgeon for C5/6 discectomy surgery.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On January 8, 2013, the Claimant sustained a work-related motor vehicle accident, causing injury to his cervical spine and bilateral shoulders while in the course and scope of his employment with Respondents.

2. The Respondents filed a General Admission of Liability (GAL), dated January 25, 2013, admitting for an average weekly wage (AWW) of $1,509.33, medical benefits, and temporary total disability (TTD) benefits of $848.82 per week from January 16, 2003 and "ongoing" (a period of two and three-quarter years to date).

Findings

3. Following the Claimant's motor vehicle accident, he underwent odontoid screw fixation on August 14, 2013 by Dennis G. Vollmer, M.D. The Claimant continued to complain of neck stiffness, intermittent paresthesias in the left hand, and balance issues, for which he used a cane for ambulation.

4. An MRI (magnetic resonance imaging) scan of the cervical spine was performed on December 22, 2014, and it indicated significant spondylosis at C5-6 with disc-osteophyte complex causing moderate to severe canal stenosis and cord compression. Despite this degenerative condition in an individual over 60-years of age (d.o.b. July 31, 1950), the ALJ infers and finds that the totality of the evidence supports an aggravation and acceleration of the Claimant's underlying asymptomatic cervical condition, and the ALJ so finds.

5. As a result of the MRI findings, on February 13, 2015, Albert Hattem, M.D. the Claimant's authorized treating physician (ATP), referred the Claimant to Dr. Parker (a spine specialist) for a consultation.

6. On March 24, 2015, Dr. Parker was of the opinion that because of the significant findings on the cervical MRI scan and the Claimant's increasing balance issues, a C5-6 anterior cervical discectomy and fusion was indicated. The ALJ infers and finds that underlying Dr. Parker's surgery recommendation is his opinion that the recommended surgery is causally related to the admitted injury of January 8, 2013.

Independent Medical Examination (IME) by Brian Reiss, M.D.

7. An Independent Medical Examination (IME) was performed by Dr. Reiss on June 17, 2015, and Dr. Reiss' evidentiary deposition was taken subsequently by the parties. Dr. Reiss was of the opinion that the need for surgery was apparent, but Dr. Reiss was further of the opinion that the procedure was **not** related to the work injury. The ALJ finds the implicit opinion of the authorized referred surgeon, Dr. Parker, and the Claimant's "before-and-after" testimony, on the causal relatedness of the recommended surgery more persuasive and credible than the opinion of IME Dr. Reiss.

The Claimant's Hearing Testimony

8. The Claimant testified live at hearing, stating that the weakness and numbness in the left upper extremity (LUE) began after the work injury. According to the Claimant, he had some minor balance issues prior to the work injury, but his major complaints and symptoms began subsequent to the work injury. The Claimant would like to proceed with the recommended surgery. The ALJ finds the Claimant's testimony, concerning before and after the admitted injury is essentially undisputed, highly persuasive and credible than the opinion of IME Dr. Reiss. The Claimant's undisputed before-and-after testimony is compelling and it outweighs IME Dr. Reiss' opinions to the contrary.

Ultimate Findings

9. The Claimant's undisputed lay testimony concerning his condition before and after the admitted injury of January 8, 2013 is more persuasive and credible than the opinion of IME Dr. Reiss. Also, the implicit opinion of Surgeon Dr. Parker is more persuasive and credible than the opinion of IME Dr. Reiss.

10. Between conflicting testimonies, the ALJ makes a rational choice to accept the opinion of Surgeon Dr. Parker and the undisputed lay testimony of the Claimant and to reject the lack of causal relatedness opinion of IME Dr. Reiss.

11. The Claimant has proven, by a preponderance of the evidence that the admitted cervical injury of January 8, 2013, aggravated and accelerated previously dormant, degenerative conditions and, as admitted, amounted to a new compensable event. Further, the Claimant has proven by preponderant evidence that the surgery recommended by Dr. Parker is causally related to the admitted injury of January 8, 2013 and reasonably necessary to cure and relieve the effects of that injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's lay testimony about his condition before-and-after the admitted injury is essentially undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the

Claimant's undisputed lay testimony concerning his condition before and after the admitted injury of January 8, 2013 is more persuasive and credible than the opinion of IME Dr. Reiss. Also, the implicit opinion of Surgeon Dr. Parker is more persuasive and credible than the opinion of IME Dr. Reiss.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies, the ALJ made a rational choice to accept the opinion of Surgeon Dr. Parker and the undisputed lay testimony of the Claimant and to reject the lack of causal relatedness opinion of IME Dr. Reiss.

The Effect of the Claimant's Undisputed Lay Testimony

c. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, the Claimant's undisputed before-and-after testimony was compelling and it outweighed IME Dr. Reiss' opinions to the contrary.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, contested by the insurance carrier. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim*

Appeals.Office, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to the causal relatedness and reasonable necessity of the C5/6 anterior cervical discectomy surgery recommended by Dr. Parker.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The General Admission of Liability, dated January 25, 2013, shall remain in full force and effect.

B. The Respondents shall pay the costs of the C5/6 anterior discectomy surgery recommended by Erik C. Parker, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of November 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of November 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

1. Whether the claimant is entitled to penalties against the respondent-insurer because it improperly terminated temporary total disability (TTD) benefits by filing a final admission of liability without stating a position on permanency; and,

2. Whether the claimant is entitled to penalties against the respondent-insurer because it failed to mail out a final admission of liability on the date indicated in the certificate of mailing?

FINDINGS OF FACT

1. The claimant sustained a compensable work injury to his right hand on January 8, 2013, while employed with the respondent-employer.

2. The respondent-insurer filed an admission and paid ongoing temporary total disability (TTD) and medical benefits.

3. The claimant's attending treating physician for the claim is Daniel Olson, M.D., who works as a physician at the Centers for Occupational Medicine.

4. The respondent-insurer sent a letter to Dr. Olson, dated January 13, 2015, asking Dr. Olson whether the claimant had reached maximum medical improvement (MMI). Dr. Olson provided the respondent-insurer with a response stating, "The claimant would be placed at MMI on his next visit."

5. The claimant was seen by Dr. Olson on January 16, 2015. Dr. Olson provided that he would "see claimant in the next month and if the problem with sutures is [taken] care of and no further surgery is authorized, then I will place him at maximum medical improvement."

6. The respondent-insurer was still paying TTD and medical benefits pursuant to a General Admission of Liability as of February 6, 2015.

7. The claimant attended a follow up appointment at Centers for Occupational Medicine on February 6, 2015.

8. The February 6, 2015, report provides that the claimant's "recommended activity restrictions" are regular employment.

9. A physician's report of workers' compensation injury, or M-164 form, was provided to the respondent-insurer on February 6, 2015, along with the treatment note. The M-164 provides that the claimant is at maximum medical improvement on February 6, 2015, that the claimant has no permanent restrictions and no medical maintenance treatment. As a result, the claimant was released to regular employment.

10. The M-164 form also has a "0" marked in the middle of the form suggesting that no impairment rating was necessary.

11. The M-164 form was signed by both PA Steve Byrne and the attending treating physician, Daniel Olson, M.D. Both signatures were included on the report.

12. The respondent-insurer received the treatment notes and M-164 form from Centers for Occupational Medicine by facsimile on February 6, 2015.

13. The respondent had no reason to question the determination that the claimant was placed at maximum medical improvement (MMI) and released to regular employment as it was reflected in the M-164 form.

14. PA Byrne specifically stated in his February 6, 2015, report that he was placing the claimant at MMI per Dr. Olson's previous note indicating that the claimant was at MMI once the suture issue was resolved. As a result, the report was consistent with Dr. Olson's prior opinions on the case.

15. The claims adjuster on the case, Zac Bamfield, immediately filed a Final Admission of Liability on February 6, 2015 after receiving the M-164 form. Mr. Bamfield testified that he thought the zero across the middle of the M-164 form indicated that claimant had a 0% permanent impairment.

16. Regardless of whether the M-164 form actually indicated that claimant had a 0% rating, the Final Admission of Liability also terminated temporary total disability benefits pursuant to the release to regular employment. Specifically, the respondents terminated TTD benefits and Mr. Bamfield attached the M-164 form to the admission.

17. Even though the claimant was released to regular employment on February 6, 2015, he continued to receive TTD checks through February 12, 2015.

18. Mr. Bamfield subsequently was presented with concerns over whether the Final Admission of Liability should have included a 0% rating. Specifically, there was a

concern whether the “0” in the middle of the M-164 form actually meant that claimant had a 0% impairment rating. After speaking with defense attorneys, it was determined that a General Admission needed to be filed to confirm that the file was still open until the impairment rating issue was resolved.

19. Mr. Bamfield immediately filed a revised General Admission of Liability on February 17, 2015. The GAL confirmed that the claim was still open as an impairment rating may not have been established yet.

20. The GAL on February 17, 2015 was filed without any prior notification or error letter from the Division or the claimant’s attorney that the “0” on the M-164 form did not reflect a 0% impairment rating.

21. The General Admission of Liability, filed on February 17, 2015, confirmed that temporary total disability benefits were in fact previously terminated on February 6, 2015 pursuant to the prior admission filed on that date.

22. The General Admission was not filed to terminate TTD benefits. The TTD benefits had already been terminated when the prior admission was filed on February 6, 2015 with the M-164 attached confirming the regular employment release.

23. Subsequent to the filing of the General Admission of Liability on February 17, 2015, the respondents received a letter from the claimant’s attorney. The respondents received the letter on February 23, 2015.

24. The letter from claimant’s attorney indicated that the claimant would need to be seen by a Level II accredited physician for an impairment rating, that Dr. Olson was not in the office on February 6, 2015, and that the signature on the M-164 form the respondents received was a stamped signature.

25. This letter was received by the respondents on February 23, 2015, after the Final Admission of Liability had been filed on February 6, 2015 and the General Admission of Liability had been filed on February 17, 2015.

26. The facsimile from the claimant’s attorney also contained a letter from Daniel Olson, M.D. The letter, directed to the claimant’s counsel, states that Dr. Olson was out of the state when claimant was seen at his office on February 6, 2015. The claimant had been seen by PA Byrne and the signature on the M-164 form was a stamp of his signature that is placed on all of the physician assistant notes. Dr. Olson indicated that the claimant would need to return in order to be provided with permanent work restrictions and a permanent impairment rating.

27. Dr. Olson did not comment on the issue of maximum medical improvement in the letter; creating an ambiguity as to whether his stamped signature indicated concurrence with the PA's report of February 6, 2015, especially in light of his comment that the claimant needed to return for an impairment rating, which would not be necessary, unless the claimant was at MMI.

28. Thus, the respondent-insurer properly terminated TTD benefits with an admission that was filed on February 6, 2015 based upon a report that was valid on its face. It is undisputed that the admission had the M-164 form attached which detailed a regular employment release.

29. The claimant has argued that the admission filed on February 6, 2015 was actually not sent out or filed until February 19, 2015. If there was a violation it was self-cured prior to the filing of an Application for Hearing.

30. The respondents did re-instate temporary total disability the same day Dr. Olson issued a new medical report with the claimant's restrictions and his permanent impairment rating.

31. Specifically, the claimant returned to Dr. Olson for assignment of a permanent impairment rating on April 2, 2015. Dr. Olson determined claimant reached maximum medical improvement as of March 9, 2015. Dr. Olson assigned a permanent impairment rating of 27% upper extremity. The respondents received this report from Dr. Olson and filed a General Admission of Liability, dated April 2, 2015.

32. The April 2, 2015, General Admission of Liability filed by the respondent-insurer, admitted temporary total disability benefits beginning August 22, 2014 and ongoing. Indicating, that temporary disability benefits were re-instated for the entire time period between February 6, 2015 and April 2, 2015. The payment was made on April 14, 2015.

33. The respondent-insurer sent a check for temporary disability benefits to the claimant covering the dates February 13, 2015 up through April 2, 2015. The respondent-insurer continued to pay claimant temporary total disability benefits until the respondent-insurer discovered that the claimant had returned to work within his restrictions at the respondent-employer.

34. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

35. The ALJ finds that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

CONCLUSIONS OF LAW

1. Section 8-43-304 states in pertinent part as follows:

> Violations - penalty - offset for benefits obtained through fraud - rules.
>
> (1) Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112(7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.
>
> (4) In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

2. Under the circumstances here, the ALJ concludes that the respondents cured any potential violation by filing the GAL on February 17, 2015 seven days before the filing of the claimant’s Application for Hearing.

3. The record contains scant evidence that the respondents knew or reasonably should have known that they were in violation of any provisions of the Act or rules. To the extent that one should argue an inference of knowledge the ALJ declines to infer such under the facts of this case.

4. The ALJ concludes that the filing of the FAL dated February 6, 2015, which terminated the claimant's TTD payments, did not violate the Act or any rules there under.

5. Assuming *arguendo*, that there was a violation of the Act, the violation was self-cured on February 17, 2015 by the filing of the GAL.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

7. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for penalties is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 25, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

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2. Whether the claimant is entitled to penalties against the respondent-insurer because it failed to mail out a final admission of liability on the date indicated in the certificate of mailing?

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1. The claimant sustained a compensable work injury to his right hand on January 8, 2013, while employed with the respondent-employer.

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34. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

35. The ALJ finds that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

CONCLUSIONS OF LAW

1. Section 8-43-304 states in pertinent part as follows:

> Violations - penalty - offset for benefits obtained through fraud - rules.
>
> (1) Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112(7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.
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> (4) In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

2. Under the circumstances here, the ALJ concludes that the respondents cured any potential violation by filing the GAL on February 17, 2015 seven days before the filing of the claimant’s Application for Hearing.

3. The record contains scant evidence that the respondents knew or reasonably should have known that they were in violation of any provisions of the Act or rules. To the extent that one should argue an inference of knowledge the ALJ declines to infer such under the facts of this case.

4. The ALJ concludes that the filing of the FAL dated February 6, 2015, which terminated the claimant's TTD payments, did not violate the Act or any rules there under.

5. Assuming *arguendo*, that there was a violation of the Act, the violation was self-cured on February 17, 2015 by the filing of the GAL.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

7. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for penalties is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 2, 2014

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stephen D. Lindenbaum, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) for her left ankle condition.

FINDINGS OF FACT

1. Employer is a restaurant. Claimant worked for Employer as a Busser and Hostess. Her job duties involved greeting customers, seating customers and cleaning tables. On October 15, 2013 Claimant slipped on a lemon peel and twisted her ankle while working for Employer.

2. After initially receiving authorized medical treatment Claimant was referred to Arbor Occupational Medicine. On December 19, 2014 Claimant visited Authorized Treating Physician (ATP) John Raschbacher, M.D. at Arbor Occupational Medicine for an evaluation. Dr. Raschbacher determined that Claimant suffered a left ankle sprain, a left foot sprain and a lumbar contusion. He ordered an MRI of her foot and ankle and restricted her to working most of the time in a seated position.

3. The MRI revealed the degenerative condition of os trigonum syndrome. The MRI did not reflect a ligament tear or bone contusion. X-rays of Claimant's lumbar spine revealed degenerative changes.

4. Dr. Raschbacher referred Claimant to Scott G. Resig, M.D. at Denver Vail Orthopedics for an evaluation. Dr. Resig initially examined Claimant and administered a left ankle cortisone injection. Dr. Resig subsequently recommended trigonum excision surgery.

5. On April 8, 2014 ALJ Felter conducted a hearing in the matter. He considered whether Claimant suffered injuries to her left foot/ankle, right knee and lower back as a result of the October 15, 2013 incident. On April 21, 2014 ALJ Felter issued Findings of Fact, Conclusions and Law and Order. He concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. Claimant did not appeal the determination and the Order became final on May 11, 2014.

6. On May 9, 2014 Claimant returned to Dr. Raschbacher for an examination. Dr. Raschbacher reviewed ALJ Felter's Findings of Fact, Conclusions of Law and Order and noted Claimant's left ankle injury was compensable but her lower back and right hip were not components of her Workers' Compensation claim. He

noted that Claimant wished to proceed with treatment but, because she was pregnant, further treatment could not be rendered until she came to term. If Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Dr. Raschbacher remarked that Claimant had limitations to her left ankle range of motion but no other impairment. He placed Claimant at MMI and assigned a 6% lower extremity impairment rating. Insurer then filed a Final Admission of Liability (FAL) consistent with Dr. Raschbacher's MMI and impairment determinations.

7. On August 29, 2014 Claimant underwent a DIMEwith Stephen D. Lindenbaum, M.D. Claimant reported that she was still experiencing lower back pain. After reviewing Claimant's medical records he concluded that she had not reached MMI. In ascertaining Claimant's left ankle range of motion measurements Dr. Lindenbaum recorded 10 degrees of dorsiflexion, 30 degrees of plantarflexion, 25 degrees of inversion and 10 degrees of eversion. Dr. Lindenbaum noted that Claimant required additional evaluation but the treatment could not be provided because she was eight months pregnant. He explained that after delivering the baby she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

8. On October 21, 2014 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Claimant was still pregnant. She reported that while she was performing her job duties for Employer she was walking down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. After considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. He stated that there was "no evidence that [Claimant] sustained any type of injurious event to her back or hip region as a result of the 10/15/2013 incident." He explained that there were no clinical findings to suggest Claimant suffered any "symptomatic pathology" to her body besides the left ankle that was related to the October 15, 2013 incident. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. However, Dr. Lesnak noted that, because Dr. Raschbacher's range of motion measurements for Claimant's left ankle were "submaximal," he questioned their validity.

9. On October 28, 2014 Dr. Lesnak issued an addendum report after reviewing Dr. Lindenbaum's DIME determination. He maintained that Claimant did not suffer any injuries to her back or hip as a result of the October 15, 2013 work incident. Dr. Lesnak thus explained that Dr. Lindenbaum's suggestion that Claimant required additional evaluation for her back and hip was incorrect. Dr. Lesnak noted that Claimant remained at least "temporarily" at MMI for her left ankle but should undergo a surgical evaluation of the ankle after her pregnancy. He remarked that "there is absolutely no medical evidence to suggest that any of [Claimant's] reported pathology involving her lumbar spine or pelvis is in any way related to the occupational injury of

10/15/13 and clearly Dr. Lindenbaum was in error when he recommended additional medical evaluations pertaining to these subjective complaints."

10. On January 14, 2014 Dr. Lesnak testified through an evidentiary deposition in the present matter. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum thus failed to comply with Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). He summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. The diagnosis must be "very specific" that is "related to the injurious event and correlate[ed] with the symptoms and objective findings." Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy. However, he noted that she was "temporarily at MMI, but not completely at MMI." Dr. Lesnak "absolutely agree[d]" with Dr. Lindenbaum that after Claimant delivered her baby she should follow-up with her treating physicians to determine appropriate left ankle treatment. He noted that if Claimant's treating physicians recommended left ankle surgery she would not be at MMI during her post-surgical recovery period.

11. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI for her left ankle condition. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

12. Dr. Lesnak conducted an independent medical examination and specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury.

13. The opinions of Drs. Rasbacher and Lesnak do not constitute unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's MMI determination regarding Claimant's left ankle was incorrect. Dr. Rasbacher acknowledged that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Furthermore, although Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy, he noted that she was "temporarily at MMI, but not completely at MMI." Moreover, Dr. Lesnak "absolutely agree[d]" with Dr. Lindenbaum that after Claimant delivered her baby she should follow-up with her treating physicians to determine appropriate left ankle treatment. He noted that if Claimant's treating physicians recommended left ankle surgery she would not be at MMI during her post-surgical recovery period. There are thus diagnostic procedures that present a reasonable prospect for revealing treatments that may cure or relieve the effects of Claimant's October 15, 2013 left ankle injury. Accordingly, the opinions of Drs. Raschbacher and Lesnak do not reflect that it is highly probable that Dr. Lindenbaum's MMI determination was incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's

determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

7. MMI exists "when any medically determinable physical or mental impairment as a result of an injury becomes stable and no additional treatment is reasonably expected to improve the condition. §8-40-301 (11.5), C.R.S.; *see Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). MMI does not exist if diagnostic procedures present a reasonable prospect for revealing treatments that may cure or relive the effects of the injury. *Eby v. Wal-Mart Stores, Inc.* W.C. No. 4-350-176 (ICAP, Feb. 14, 2001).

. 8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI for her left ankle condition. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo

additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

9. As found, Dr. Lesnak conducted an independent medical examination and specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury.

10. As found, the opinions of Drs. Rasbacher and Lesnak do not constitute unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's MMI determination regarding Claimant's left ankle was incorrect. Dr. Rasbacher acknowledged that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Furthermore, although Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy, he noted that she was "temporarily at MMI, but not completely at MMI." Moreover, Dr. Lesnak "absolutely agree[d] with Dr. Lindenbaum that after Claimant delivered her baby she should follow-up with her treating physicians to determine appropriate left ankle treatment. He noted that if Claimant's treating physicians recommended left ankle surgery she would not be at MMI during her post-surgical recovery period. There are thus diagnostic procedures that present a reasonable prospect for revealing treatments that may cure or relieve the effects of Claimant's October 15, 2013 left ankle injury. Accordingly, the opinions of Drs. Raschbacher and Lesnak do not reflect that it is highly probable that Dr. Lindenbaum's MMI determination was incorrect.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI for her left ankle condition.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20)

days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 9, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

- Did Claimant prove by a preponderance of the evidence that on October 9, 2013 she sustained a compensable injury arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and related medical benefits as a result of the alleged injury?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits as a result of the alleged injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 3 were admitted into evidence. Respondents' Exhibits A and B were admitted into evidence.

2. Claimant seeks medical benefits and temporary total disability benefits as a result of an alleged work-related injury to her left ankle on October 9, 2013.

3. Claimant testified as follows. On October 9, 2013 Claimant was at work pulling a heavy "cage." The cage rolled into her left ankle. She did not think the incident was "that bad" and did not immediately report any injury to her Employer. Two and one-half weeks later her left foot was getting "black" and swelling. At this time Claimant feared she had "internal bleeding" but did not associate these problems with the October 9 incident at work. On October 29, 2013 she decided to go to her personal physician (PCP) for treatment. The PCP referred Claimant to a dermatologist and eventually to an orthopedist.

4. Claimant further testified that in the beginning of December 2013 she saw an orthopedic physician named Dr. Ng. According to Claimant Dr. Ng performed an x-ray and wrapped her left leg. Dr. Ng also recommended an MRI. Claimant had to get permission from her health insurance to obtain the MRI. An MRI was performed and once again her leg was wrapped.

5. Claimant believes she reported a work-related injury to the Employer on January 17, 2014. This is consistent with date of reporting reflected on the Employer's

First Report of Injury. Claimant testified the Employer referred her to Concentra for medical treatment.

6. On January 27, 2014 Respondents filed a Notice of Contest on grounds that the Claimant's alleged injury or illness was not work-related.

7. Claimant testified that between March and early May 2014 she wore a cast on the left foot. At one point she also wore a cast on her right foot. She explained that the casts were prescribed by "Dr. Christensen." Claimant did not explain how she came under the care of Dr. Christensen. The Claimant stated that the cast on the right foot was merely to protect it from injury and she was not making any claim for injury to her right foot.

8. Claimant admitted that on April 14, 2014 she sustained another injury at work when a heavy bag of coins fell off of a cage and struck her left ankle. Claimant testified that this incident made her left ankle condition worse than it was before. She underwent a second MRI and learned that her "main ligament" was "torn apart."

9. Claimant testified that she continued working for the Employer after October 9, 2013 although she was "walking around like Frankenstein." Despite being in pain Claimant continued to work for the Employer until she underwent surgery in October 2014. The October 2014 surgery was performed by "Dr. Motz."

10. Claimant testified she was off of work during October, November and December 2014. She was released to return to work in January 2015. However, when she returned to the Employer she was told that she no longer worked there. Claimant seeks temporary total disability (TTD) benefits for the period of time she was off work.

11. At hearing Claimant called Haneefa Issah (Issah) as a witness. Issah testified that she recalled observing an incident at 5:30 to 6:00 a.m. when Claimant was pulling a heavy cage stacked with money. The cage hit Claimant in the leg and Issah noticed Claimant appeared to be in pain. Claimant told Issah she was going to the restroom to see if she was bleeding or hurt. When Claimant returned Issah asked Claimant two or three times whether she wanted to report an injury. Issah recalled that Claimant declined to report the incident because she didn't think it was serious.

12. Claimant admitted that she is friends with Issah and that they drove to the hearing together. Issah also helped Claimant prepare some of her paperwork for the hearing.

13. Claimant did not introduce into evidence any medical records from her PCP, the dermatologist, Dr. Christensen or Dr. Motz.

14. On December 12, 2013 Alan Ng, DPM, examined Claimant at Advanced Orthopedic and Sports Medicine Specialists, P.C. (Advanced Orthopedic). According to Dr. Ng's office note Claimant was complaining of "pain in the distal tibia." The pain was "discovered more recently" over the last month and had gotten "progressively

worse" so as to cause "significant discomfort." Dr. Ng. recorded that three "views of the ankle does show some positive the lateral aspect of the tibia [sic]." Dr. Ng assessed a possible stress fracture and recommended that Claimant undergo an MRI. He placed Claimant "in a boot."

15. On December 30, 2014 Claimant underwent an MRI of her left lower extremity as requested Dr. Ng. The "history" for the study was noted to be "trauma" to lower left tibia with persistent pain. The radiologist's impressions were moderate deep soft tissue edema of the anteromedial mid to distal left lower leg that may relate to sequelae of trauma with soft tissue contusion. There was no bone marrow contusion or fracture. Tendinous structures appeared unremarkable.

16. Dr. Ng again examined Claimant on January 9, 2014. The office note states Claimant was referred to Dr. Ng by Dr. Mervyn Lifschitz. Dr. Ng wrote Claimant had undergone an MRI that showed "a significant stress contusion to the skin followed with the bone secondary to the part [sic] that hit her leg so essentially causing a stress injury to the soft tissue on the anterior medial distal tibia." Dr. Ng further wrote "this has not occurred since October and still giving her significant discomfort was no damage to the bone on the distal tibia but primarily the soft tissue severely contused." Dr. Ng prescribed topical medication to see "if the area will be resolved."

17. On January 23, 2014 Claimant PA-C Patrick Freeman examined Claimant at Concentra. The office note lists the date of injury as January 20, 2013. PA-C Freeman recorded that Claimant gave a history that on the date of injury she was "pulling some cages full of money when one of the cages continued to roll on the bottom edge of the cage at the inside of her left ankle." Claimant reported that on the day of the injury she had soreness but no wound, bruising or swelling. Consequently she continued to work and did not report any injury. Claimant soaked her foot for three days but the "skin on the inside of he left ankle started to turn black." Consequently Claimant went to her PCP who in turn referred her to a dermatologist and a podiatrist. On examination of the left ankle PA-C Freeman noted edema that was more significant than on the right side and there was a "patch of discolored skin over the medial proximal ankle."

18. On January 23, 2014 PA-C Freeman planned to review records from the PCP and podiatrist and review the MRI. He diagnosed a "left ankle contusion" and suspected an "occult underlying health condition as [a] contributing factor." PA-C Freeman prescribed physical therapy, released her to full duty and instructed her to return in "7-10 days for recheck." PA-C Freeman opined the injury was "recordable" and opined it was work related "as patient describes the mechanism of injury and nature of her work."

19. Dr. Ng again examined Claimant on January 30, 2014. He assessed a "continued" contusion and stated that "this may also be contributed to the fact she has significant amount of lower extremity edema secondary to venous stasis." Dr. Ng recommended a compression dressing to the lower extremity. If that did not help Dr. Ng

was considering a “steroid injection into the contusion area” to reduce symptomatology. Dr. Ng prescribed Ultram.

20. On February 13, 2014 Dr. Ng noted Claimant was seen in follow-up for a “contusion to the lower extremity [that] was complicated by secondary venous insufficiency.” Dr. Ng stated Claimant had been placed in compression wraps and this had “significantly improved from previous.” Dr. Ng opined that this result verified the previous diagnosis of “a venous stasis type of area that is not healing due to the venous pooling.” Dr. Ng assessed an unspecified peripheral venous insufficiency and recommended Claimant wear compression hose for three to four weeks.

21. On March 13, 2014 Claimant returned to Dr. Ng. On this occasion Dr. Ng wrote that Claimant presented “after being hit by a money cart at work and injured the lower one third of her tibia and incurred a wound on the medial aspect of her tibia.” Dr. Ng stated that this incident occurred “at work approximately 30-40 days ago.” Dr. Ng commented that Claimant’s wound had not changed in over 30 days despite the use of compression stockings and topical medications. Dr. Ng referred Claimant to the “wound care center” at Presbyterian St. Luke’s to assess the wound and address the venous insufficiency.

22. Claimant proved it is more probably true than not that on October 9, 2013 she sustained an injury arising out of and in the course of her employment. Claimant also proved that this was a “compensable” injury in the sense that it proximately caused a need for reasonable and necessary medical treatment.

23. Claimant credibly testified that on October 9, 2013 a heavy cart rolled into her left ankle while she was at work performing the duties of her employment. The ALJ is persuaded that although the Claimant did not initially sustain a visible wound or other obvious injury, she did experience pain that caused her to go to the restroom. The Claimant’s testimony regarding the occurrence of this event was corroborated by Issah’s credible testimony.

24. The Claimant credibly testified that in the days following the October 9, 2013 incident she developed discoloration and swelling in her left ankle, and that this caused her to seek treatment from her PCP approximately two and one-half weeks after the injury. Claimant credibly testified that the PCP then referred her to a dermatologist and an orthopedic provider. The ALJ infers Dr. Ng. is the “orthopedic provider” since he is a doctor of podiatry at Advanced Orthopedic. Claimant’s testimony concerning this sequence of events is corroborated by and consistent with the history she provided to PA-C Freeman when she was referred to him in January 2014. This history is also largely consistent with the history which Dr. Ng recorded in his various office notes. Dr. Ng has consistently diagnosed a contusion to the left lower extremity. Further, on March 13, 2014 Dr. Ng recorded a history that is consistent with Claimant’s testimony that she was struck by a cart.

25. Dr. Ng credibly and persuasively explained that the contusion resulting from the cart incident, coupled with Claimant’s underlying venous insufficiency, resulted

in a wound that failed to heal properly. The existence of the contusion is corroborated by the MRI results. Dr. Ng's opinion that the venous insufficiency contributed to the Claimant's failure to heal properly is corroborated by the note of PA-C Freeman. PA-C Freeman diagnosed a work-related contusion with an "occult underlying health condition as [a] contributing factor."

26. Dr. Ng's reports establish that the work-related contusion coupled with the venous insufficiency caused a need for medical treatment. Dr. Ng examined Claimant and made recommendations for treatment including wrapping the leg, prescribing medication and referring Claimant to a wound clinic. The Claimant's need for medical treatment as a result of the work-related contusion is also supported by PA-C Freeman's recommendations for treatment and physical therapy.

27. Claimant failed to prove it is more probably true than not that any of the medical treatment she received, except for that provided at Concentra, was authorized.

28. Issah credibly testified that on October 9, 2013 she was aware Claimant had been hit by the cage and experienced enough pain that Claimant went to the bathroom to check for injuries. When Claimant returned Issah asked Claimant two or three times whether Claimant wanted to report an injury. Issah credibly testified that Claimant did not want to report an injury because she "didn't think it was serious."

29. Based on Issah's credible testimony, the ALJ finds that Claimant did not report an "injury" to the Employer on October 9, 2013. A reasonably prudent manager would not, under the circumstances described by Issah, have reasonably expected the October 9 incident to result in a claim for workers' compensation benefits. To the contrary, at the time of the incident Claimant minimized its significance and continued to work. As determined in Finding of Fact 6 the credible and persuasive evidence establishes Claimant did not report her injury to the employer until January 17, 2014. Claimant admitted that when she reported the injury the Employer referred her to Concentra for treatment.

30. Claimant failed to prove it is more probably true than not the industrial injury of October 9, 2013 proximately caused her alleged disability in October, November and December 2014. Specifically, the ALJ is persuaded that it is more likely than not that the need for the October 2014 surgery, and the consequent temporary disability, was proximately caused by an intervening injury on April 14, 2014.

31. The Claimant credibly testified she did not lose any time from work until she underwent surgery in October 2014. She also admitted that after October 9, 2013 she sustained a second industrial injury on April 14, 2014. Claimant testified that this incident "tore apart" a ligament in her ankle. There is no credible or persuasive evidence that prior to April 14, 2014 there was any recommendation for surgery, or even the contemplation of surgery. Claimant failed to prove by credible and persuasive evidence the type of surgery she underwent in October 2014 surgery. Similarly she failed to prove by credible and persuasive evidence the cause of the need for that procedure. In these circumstances the ALJ infers it is more likely than not that the need

for surgery in October 2014, and any consequent disability, was proximately caused by the intervening injury of April 14, 2014 rather than the October 9, 2014 injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY

Claimant contends that she proved by a preponderance of the evidence that on October 9, 2013 she sustained a compensable injury to her left lower extremity when she was struck by a rolling "cage." The Respondents argue the Claimant failed to prove that she suffered any event at work on October 9, 2013. Respondents further argue that if the Claimant proved that she sustained an event at work she failed to prove that the event was the proximate cause of any disability or need for medical treatment. The ALJ concludes Claimant proved it is more probable than not that she sustained a compensable injury.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999

(Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

As determined in Findings of Fact 22 through 26, the ALJ concludes that Claimant proved it is more probably true than not that on October 9, 2013 she sustained a compensable injury. As found, the evidence establishes that on October 9, 2013 Claimant was at work for the Employer performing her duties when a heavy "cage" rolled into her left lower extremity. The ALJ is persuaded that this incident caused a contusion to Claimant's left lower extremity, and that the contusion combined with Claimant's pre-existing vascular insufficiency so as to produce discoloration and delayed healing. As established by the reports of Dr. Ng, the delayed healing of the contusion necessitated medical treatment including medication and referral to a wound clinic.

COMPENSABILITY OF MEDICAL TREATMENT

Claimant contends that she should be reimbursed for out of pocket medical expenses (co-pays) mileage expenses and prescriptions associated with medical treatment rendered by multiple providers. In support of this argument Claimant contends that she reported her injury to Issah on October 9, 2013, but the Employer failed to provide a list of designated medical providers as required by the statute currently codified at § 8-43-404(5)(a)(I)(A), C.R.S. The ALJ disagrees with Claimant's argument.

The Respondents are not liable to pay for medical treatment unless it is provided by an authorized treating physician (ATP). Section 8-43-404(7), C.R.S.; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Section 8-43-404(5)(a)(I)(A) provides that the "right of selection" passes to the "employee" if the "services of a physician are not tendered at the time of injury." For

purposes of this statute the "time of injury" means the point in time when an employer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.2d 381 (Colo. App. 2006); *Freiberg v. Dow Chemical,* WC 4-524-325 (ICAO September 9, 2005). This rule applies to an employer's obligation to provide a claimant with a list of authorized providers. *Gutierrez v. Premium Pet Foods, LLC,* WC 4-834-947 (ICAO September 6, 2011).

Generally, authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers a claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

Claimant's argument notwithstanding, she failed to prove it is more probably true than not that any medical provider, other than PA-C Freeman at Concentra, was an ATP. As determined in Findings of Fact 27 through 29 Claimant did not report any injury to her Employer until January 17, 2014. Claimant admitted that when she reported the injury on January 17 she was referred to Concentra by the Employer.

There is no credible and persuasive evidence that Concentra refused to treat the Claimant after January 23, 2014. Similarly, there is no credible or persuasive evidence that any treatment Claimant received after January 17, 2014, with the exception of the Concentra treatment, was the result of a referral by the Employer or a Concentra provider. Therefore none of this treatment, including any referrals made by Dr. Ng and the surgery performed by Dr. Motz, may be considered compensable.

It follows Claimant is not entitled to any reimbursement for medical expenses, prescriptions or travel expenses except for treatment by Concentra. Claims for reimbursement, other than for any expenses associated with the Concentra visit on January 23, 2014, are denied as not authorized. In light of this determination the ALJ need not consider whether any treatment rendered after January 23, 2014 was reasonable and necessary to treat the injury of October 9, 2013.

CLAIM FOR TTD BENEFITS

Claimant seeks an award of TTD benefits for the months of October, November and December 2014. Claimant alleges that during this time she was disabled from performing her regular employment as a result of undergoing surgery with Dr. Motz. The ALJ is not persuaded by this argument.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954

P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The claimant was required to prove by a preponderance of the evidence that the disability for which she seeks compensation was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). No compensability exists if the disability and need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

As determined in Finding of Fact 31, Claimant failed to prove it is more probably true than not the industrial injury of October 9, 2013 proximately caused her alleged disability in October, November and December 2014. Rather, the ALJ is persuaded that it is more likely than not that the need for surgery in October 2014 was proximately caused by an intervening industrial injury in April 2014. Consequently, it is more likely than not that Claimant's alleged temporary disability commencing in October 2014 was proximately caused by the intervening injury in April 2014. It follows that Claimant failed to prove the alleged TTD was proximately caused by the October 9, 2013 injury that is at issue in this case.

OTHER ISSUES

Claimant sought a determination of her average weekly wage (AWW). Since the ALJ has not awarded any benefits that are dependent on determination of the AWW that issue is reserved for future determination.

Claimant's position statement seeks a determination of her entitlement to permanent partial disability benefits. However, the ALJ concludes consideration of this issue is premature because there is no credible and persuasive evidence that Claimant has been placed at maximum medical improvement (MMI) for the October 9, 2013 injury. Determination of permanent partial disability benefits cannot precede a determination of MMI. In any event, this issue was not raised when the issues for determination were discussed at the time of the hearing. Consequently this issue is reserved for future determination.

Claimant's position statement raises and issue of disfigurement. However, this issue was not raised when the issues for determination were discussed at the time of the hearing. Consequently this issue is reserved for future determination.

Claimant has argued she is entitled to compensation for "wrongful termination" from employment. However, the Workers' Compensation Act does not authorize payment of benefits for "wrongful termination" from employment. Consequently, this issue is beyond the ALJ's jurisdiction.

Because the ALJ has not awarded any TTD benefits Respondents' claim for a "penalty" based on late reporting of the injury is moot. See § 8-43-102(1)(a), C.R.S. (allowing loss of up to one day's compensation for each day's failure timely to report injury).

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall provide reasonable, necessary and related medical benefits for treatment of the industrial injury sustained on October 9, 2014.

2. Claimant's request to be reimbursed for medical and mileage expenses other than those provided by Concentra is denied and dismissed.

3. Claimant's claim for temporary total disability benefits is denied and dismissed.

4. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2015

DIGITAL SIGNATURE:

_____

#JS941IHK0D16T7v 2

ISSUES

- Are Respondents liable to pay Claimant workers' compensation death benefits?
- What was the Decedent's average weekly wage on the date of death?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing counsel for Claimant and counsel for Respondents stipulated to the following facts and legal conclusions.

2. On September 25, 2013 Decedent was killed in an accident arising out of and in the course of his employment. On the date of death Sanchez Trucking, Inc. (Employer) was Decedent's statutory employer. Pinnacol Assurance (Insurer) is liable to pay death benefits as Sanchez Trucking Inc.'s insurer.

3. On September 15, 2013 Claimant was "wholly dependent" on Decedent. Claimant was the only person who was "wholly dependent" on the Decedent.

4. On September 15, 2013 Claimant's mother, Griselda Ruiz, had been divorced from Decedent since July 2010 and was not supported by or dependent on the Decedent. On September 15, 2013 Decedent's daughter Daisy Liliana Ruiz was 24 years old and not wholly dependent on the Decedent. On September 15, 2013 Decedent's daughter Tatiana Griselda Ruiz Apodaca was 20 years old, was not attending an accredited educational institution and was not wholly dependent on Decedent.

5. Claimant's Exhibits 1 through 6 were admitted into evidence without objection.

6. Decedent's average weekly wage on September 25, 2013 was $425.

CONCLUSIONS OF LAW

Insurer is liable to pay workers' compensation death benefits to Claimant. The amount of such benefits shall be based on the Decedent's stipulated average weekly wage as provided in § 8-42-114, C.R.S.

The ALJ notes that Claimant submitted a proposed order that directs the insurer to pay the death benefits to Claimant's attorney, who would then withdrawal his fees and costs and pass the balance to Claimant's mother. Claimant's mother would then deposit the remaining balance of the funds in a federally insured, interest bearing account for the use and benefit of Claimant. The ALJ is of the opinion that he may not order the benefits paid to Claimant's attorney for the purpose of withdrawing fees and costs. The ALJ concludes that such an arrangement would impermissibly impose an attorney fee lien on the Claimant's workers' compensation death benefits. Section 8-42-124(1), C.R.S.; *Freemyer v. Industrial Claim Appeals Office*, 32 P.3d 564 (Colo. App. 2000). The ALJ further notes that at the hearing Claimant's counsel did not propose to have the benefits paid to him in the first instance and Respondents did not stipulate to such an arrangement.

The ALJ should not be understood to express any opinions concerning Claimant's obligation to pay reasonable attorney fees and costs. The ALJ merely rules that the method of paying attorney fees contained in the proposed order is not permissible.

However, the Respondents expressed no objection to an order requiring them to pay the death benefits to Claimant's mother who would then deposit them in a federally insured, interest bearing account for the use and benefit of Claimant. Such an order is within the ALJ's jurisdiction under § 8-42-122, C.R.S.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. Insurer shall pay Claimant workers' compensation death benefits in accordance with § 8-42-114. These benefits shall continue until such time as Claimant is no longer entitled to receive them pursuant to applicable law.

3. The workers' compensation death benefits shall be paid to Claimant's mother Griselda Ruiz. Griselda Ruiz shall deposit the benefits in a separate, federally insured, interest bearing account for the use and benefit of

Claimant. Upon reaching the age of eighteen years old the Claimant shall have unrestricted access to the funds in said account.

4. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 3, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

#JVY8SXZN0D16T7v 2

ISSUE

1. Whether Respondent is entitled to recover an overpayment.

2. Whether Respondent is entitled to Modify Compensation for the period of April 10, 2014 ongoing.

STIPULATIONS

1. The parties rest on admitted exhibits and stipulations.

2. The parties agree the Claimant's Average Weekly Wage (AWW) is $999.75.

3. The parties agree that there is no fraud on the part of the Claimant with respect to the Respondents' overpayment claim.

4. At the hearing, the parties agreed that the Average Weekly Wage listed on the October 20, 2014 Amended General Admission of Liability of $1,086.83 contained a mistake because that admitted AWW included the $87.08 Average Weekly Wage that Claimant was earning from a concurrent employer, Kohls, and the Claimant was still working and earning wages at Kohls.

FINDINGS OF FACT

1. On September 2, 2014, legal counsel for Claimant advised legal counsel for Respondents that the Claimant was working contemporaneously for Employer and a second employer, Kohls. Counsel further advised that the Claimant's estimated Average Weekly Wage from her Kohls employment was $87.08 and that she had suffered no wage loss from the Kohls job as her employer was able to accommodate her restrictions (Respondents' Exhibit A).

2. On September 25, 2014, legal counsel for Claimant sent correspondence to legal counsel for Respondents memorializing an agreement that the Claimant's Average Weekly Wage with Employer is $999.75 (Claimant's Exhibit 2, p. 9; Respondents' Exhibit D, p. 7).

3. On September 26, 2014, the Respondent Insurer filed a General Admission of Liability admitting for medical benefits and temporary total disability

benefits. The Average Weekly Wage was reported as $999.75 and the disability TTD rate was listed as $666.50 per week (Claimant's Exhibit 2, p. 10; Respondents' Exhibit B, p. 2).

4. On October 20, 2014, an Amended General Admission of Liability was filed by Respondent Insurer ostensibly to modify the admission from temporary total disability benefits to temporary partial disability benefits. In this Amended GAL, the Claimant's Average Weekly Wage was reported as $1,086.83. However the admitted disability rate remained listed as $666.50 - which is 2/3 of $999.75, and NOT 2/3 of the amended AWW of $1,086.83. In the "Remarks" section the Respondents noted "UPS AWW $999.75 – WCR $666.50. Kohl's AWW $87.08 – WCR $58.5. Combined AWW $1086.83 – WCR $724.55. Thus, on the face of the document, it appears that although the Respondents amended the Average Weekly Wage to $1086.83, the disability benefits were nevertheless calculated based only on the UPS Average Weekly Wage of $999.75 (Respondents' Exhibit C).

5. On January 22, 2015 Respondents filed an Amended General Admission of Liability, noting that the Claimant returned to work, regular duty, on January 14, 2015, but had been paid TPD benefits from 1/14/15 – 1/16/15 resulting in an overpayment of $285.64. The admitted Average Weekly Wage in this Amended General Admission of Liability is still reported as $1,086.83. However, as with the October 20, 2014 Amended General Admission of Liability, the admitted disability rate remained listed as $666.50 - which is 2/3 of $999.75, and NOT 2/3 of the amended AWW of $1,086.83. Thus, on the face of the document, it appears that although the Respondents amended the Average Weekly Wage to $1086.83, the disability benefits were nevertheless calculated based only on the UPS Average Weekly Wage of $999.75 (Claimant's Exhibit 2, p. 10; Respondents' Exhibit D, p. 8)

6. Based on the Amended GAL dated January 22, 2015, Respondents paid the Claimant at the TPD rate of $666.50 from 4/10/14 – 8/13/14 and again from 8/25/14 – 1/16/15 (although this should have terminated on 1/13/15). Based on information listed on the face of the document, the TPD rate was calculated based on the correct UPS AWW of $999.75 and was not calculated with the $87.08 Kohls AWW added in to the total.

7. On March 4, 2015, Respondent Insurer filed a Petition to Modify Compensation for the period from April 10, 2014 to ongoing based on the following stated facts:

> Claimant is concurrently employed. The parties agreed to an AWW of $999.75 (Exhibit A). The AWW admitted in all admissions, including the current GAL (Exhibit B), is $1,086.83. This was in error. Respondents paid TPD in accordance with the erroneous AWW for the duration of the claim. Claimant is not working for UPS and Respondents must file an Amended GAL. Respondents request to file an Amended GAL with the $999.75

AWW and correct TPD rates (see addendum). This includes reducing future compensation to collect overpayment, by reduction/suspension of TPD or against future PPD owed.

Respondents relied upon WRCP 6-4(A) in support of the Petition to Modify Compensation (Claimant's Exhibit 2; Respondents' Exhibit D).

8. On March 5, 2015, the Claimant filed an Objection to the Petition to Modify, Terminate or Suspend Compensation, stating, "Respondents' Motion is not supported by facts or law (Claimant's Exhibit 3).

9. On March 20, 2015, the Division of Workers' Compensation denied the Petition to Modify, Terminate or Suspend Compensation benefits in this claim, noting that, "if you wish to pursue this issue you will need to apply for a hearing (Respondents' Exhibit E).

10. Respondent filed an Application for Hearing on June 8, 2015 regarding the denial of the Petition to Modify TTD/TPD and asserting an overpayment. Claimant filed a Response on June 9, 2015 objecting to any asserted overpayment.

11. At the hearing on September 24, 2015, the parties elected not to call listed witnesses, but instead rested on the admitted exhibits and stipulations.

12. Although the Amended General Admissions of Liability dated October 20, 2014 and January 22, 2015 listed an Average Weekly Wage of $1,086.83, which, at the hearing, the parties both agree included the $87.08 AWW from Claimant's concurrent employment at Kohls, the ALJ finds that this is harmless error because the disability benefit was not calculated based on multiplying $1,086.83 by 2/3. Rather, the disability benefit was calculated based on multiplying the correct, agreed upon Average Weekly Wage of $999.75, resulting in an admission and payment of the correct disability benefit payment of $666.50 per week.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant generally shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. However, in this case, the Respondent is seeking to prove the proposition that it is entitled to recovery of an overpayment. Therefore, Respondent bears the burden of proof by a preponderance of the evidence. *Rocky Mountain Cardiology v. Industrial Claim Appeals Office,* 94 P.3d 1182, 1186 (Colo. App. 2004); *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162, 1164 (Colo. App. 2002). A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979)

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).2

Statutory Construction

When interpreting statutes, a court should give words and phrases in a statute their plain and ordinary meanings. This is true because the object of statutory construction is to give effect to the legislative intent of the statute, and the best indicator of legislative intent is contained in the language of the act. Forced and subtle interpretations should be avoided. *Jones v. Industrial Claim Appeals Office,* 87 P.3d 259 (Colo. App. 2004); *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). However, statutes addressing the same subject matter should be construed together. *USF Distribution Services, Inc., v. Industrial Claim Appeals Office,* 111 P.3d 529 (Colo. App. 2005). In doing so, mandatory language in one statute should be found to be stronger than permissive language in another statute. *United Airlines v. Industrial Claim Appeals Office,* 312 P.3d 235, 239-240 (Colo. App. 2013). The term "may" is generally permissive and the term "shall" is generally mandatory, unless it is necessary to interpret the term "may" as mandatory to prevent an unconstitutional or absurd result. *Danielson v. Castle Meadows, Inc.,* 791 P.2d 1106 (Colo. 1990).

Overpayment and Petition to Modify

The main issue for this hearing is whether or not temporary disability payments made by the Respondents to the Claimant included an "overpayment." The Claimant relies on *Vargo v. Colorado Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981) for the proposition that even to an extent that an overpayment exists, the Respondent may only be granted prospective relief and not retroactive relief.

The Respondent argues that the *Vargo* case is inapplicable as the 1997 amendments to the Act changed the law and relies instead on the case of *Garrett v. Trinidad Drilling U.S.A., Inc.,* W.C. No. 4-704-929 (ICAO January 16, 2008) for the proposition that a respondent is entitled to amend an admission on the grounds of mistake and is further entitled to recover an overpayment for amounts paid in error by means of an offset against future workers' compensation benefits to which the Claimant may be entitled.

Based on the findings of fact made in this case, both parties have missed the mark. The parties both appear to assume that the Claimant was, in fact, paid temporary disability benefits in excess of the amount she should have received. However, as the ALJ found above, "although the Amended General Admissions of Liability dated October 20, 2014 and January 22, 2015 listed an Average Weekly Wage of $1,086.83, which, at the hearing, the parties both agree included the $87.08 AWW from Claimant's concurrent employment at Kohls, the ALJ found that this was harmless error because the disability benefit was not calculated based on multiplying $1,086.83 by 2/3. Rather, the disability benefit was calculated based on multiplying the correct, agreed upon Average Weekly Wage of $999.75, resulting in an admission and payment of the correct disability benefit payment of $666.50 per week."

The term "overpayment" is defined in C.R.S. § 8-40-201(15.5), as,

> money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

"Generally, an 'overpayment' is anything that has been 'paid' but is not 'owing as a matter of law.'" *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005). Further, in *Simpson*, the Court considered the statutory definition of "overpayment" in § 8-40-201(15.5) and found it provided for three distinct categories of overpayment:

> The statute makes clear that the phrases are disjunctive such that three categories of possible overpayment are included in the statutory definition: one category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money received that a "claimant was not entitled to receive"; and the final category is for money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. § 8-40-201(15.5). See *Simpson*, 219 P.3d 359.

Here, based on the documentation provided to the ALJ, the Claimant did not received money to which she was not entitled. Rather, she received temporary benefits calculated based upon the figure of $999.75, which is the amount the parties agreed was the Claimant's Average Weekly Wage for her employment with UPS. Although the General Admissions of Liability were amended by the Respondent to list an incorrect Average Weekly Wage of $1,086.83 in the top portion of the admissions documents, this Average Weekly Wage of $1,086.83 was not used to actually calculate the disability benefit. Either the Kohl's wage of $87.08 was first subtracted as an offset OR the AWW

of $1,086.83 was disregarded and substituted with the $999.75 UPS-only AWW. In either case, the ultimate calculation of the Claimant's disability payment was correct and there was no money received by the Claimant that exceeds the amount that should have been paid pursuant to C.R.S. §8-40-201(15.5) and the stipulation and prior agreement of the parties that the Claimant's AWW was $999.75.

ORDER

It is therefore ordered that:

1. The Average Weekly Wage of $1,086.83 listed in Amended General Admissions of Liability dated October 20, 2014 and January 22, 2015 is in error and Respondents are directed to file a further Amended General Admission of Liability admitting to the stipulated Average Weekly Wage of $999.75.

2. The prior mistaken admission to an Average Weekly Wage of $1,086.83 did not result in any error or mistake in the calculation of the Claimant's temporary disability benefit in this case. In spite of admitting to an Average Weekly Wage of $1,086.83, the temporary disability benefit was nevertheless calculated based on an AWW of $999.75 multiplied by 2/3.

3. The Respondents failed to establish that the Claimant received any amounts to which she was not entitled or which exceeded the amounts that should have been paid. Thus, there is no overpayment pursuant to § 8-40-201(15.5), C.R.S.

4. The Respondents' claim for recovery of an overpayment is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 5, 2015

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Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

- Did Claimant establish by a preponderance of the evidence that the proposed cervical spinal surgery (Anterior Cervical Discectomy and Fusion) was reasonable and necessary, as well as causally related to the industrial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant had a significant history of injuries prior to his industrial injury which occurred on March 6, 2014. In particular, he had a skiing injury in 1994 when he landed on his head. Claimant had spinal steroid injections in 2004 and 2009. He was also injured in a motorcycle accident on August 30, 2012. Claimant confirmed that he required treatment for these prior injuries in his hearing testimony.

2. Claimant had an MRI on August 30, 2012 in which Brian Steele, M.D. noted a C5-6 right paracentral foraminal disc protrusion leading to severe right sided foraminal stenosis, with some cord compression. Also, bilateral C6/7 foraminal stenosis due to osteophytes and protruding disc material was noted. A small right paracentral disc protrusion at T3/4 was also seen.

3. Claimant treated at Panorama Orthopedics and Spine Center for his injuries after the motorcycle accident and on September 12, 2012 was evaluated by Justin Green, M.D. as he was complaining of pain and tenderness in the thoracic spine. Dr. Green's impression was multiple trauma; minimal pain from thumb fracture; thoracic pain secondary to disk herniation; no objective evidence of thoracic compression fracture; C5-6 disk protrusion; rule out bilateral upper extremity radiculopathy; no definitive findings for cervical myelopathy. Claimant was to start physical therapy, have an MRI of the thoracic spine and an injection of the cervical spine was considered.

4. On September 20, 2012, Claimant was diagnosed with an exacerbation of cervical degenerative disc disease by Nathan Yournal, PA. At that time, he was experiencing interscapular pain and bilateral upper extremity radicular pain after being injured in a MVA. He described the pain as being in his back, noting 85% was in his back and 15% was in his arms. Various treatment options including surgery were discussed with Claimant and he received an epidural steroid injection that day. Claimant had continuing pain complaints and received an intralaminar epidural steroid

injection at C6-7 administered by Karen Knight, M.D. on October 10, 2012. He received another injection at this level on November 11, 2012.

5. Claimant had developed degenerative disc disease in his cervical and thoracic spine as of 2012. He was diagnosed with degenerative disc disease at C5-6 and C6-7, along with radiculitis and required treatment. On December 18, 2012, he received an intralaminar epidural steroid injection at C7-T1 and Dr. Knight's diagnosis was debilitating neck pain, cervical degenerative disc disease, foraminal stenosis of the cervical spine and cervical radiculitis.

6. After the motorcycle accident, Claimant worked full time as a cook at Montauk which required him to stand on the line, as well as lift boxes that weighed 50-75 pounds. Claimant testified that he did not require treatment for approximately fifteen (15) months prior to the March 6, 2014 industrial injury. Claimant was able to work with the degenerative conditions in his cervical and thoracic spine and had no formal restrictions, including for his job with Respondent-Employer.

7. Claimant suffered an admitted industrial injury on the March 6, 2014 while working for Employer. He grabbed a box of frozen chicken off a stack in a freezer. The box broke and in an effort to catch it, he lunged forward. This pulled his neck and back. Claimant felt immediate pain in his neck and back.

8. Claimant was evaluated by Steve Yarberry, M.D. at Colorado Mountain Medical on March 6th and was complaining of neck stiffness, which was located at the midline of neck, upper shoulders and left lateral neck. Back pain was also noted. He also complained of pain in the left paraspinal and thoracic area. Dr. Yarberry described the work related problem as neck strain and disc degeneration was also noted. Claimant was started on physical therapy and taken off work at that time. Dr. Yarberry's note also documented Claimant's prior medical history.

9. Claimant was next examined by Dr. Yarberry on March 13, 2014, who described his work-related health problem as: neck strain. Current symptoms also included back pain. Upon examination, Claimant had pain in the left rhomboid area, with radiating pains around the chest wall and weakness in his left arm. He had burning pain in the right and left trapezius area. Dr. Yarberry kept Claimant off work.

10. Claimant returned to Dr. Yarberry on March 18, 2014. His pain was reported to be much better, but said physical therapy reaggravated his pain[1]. Claimant moved stiffly and carefully, in moderate pain. Degenerative disc disease was noted in Claimant's thoracic spine, along with degeneration of cervical intervertebral disc. Claimant's work-related problem was described as an injury to the thoracic spine. He was referred to Dr. David Karli.

[1] The ALJ notes there was extensive discussion and analysis about whether Claimant could have been hurt in physical therapy. Dr. Douthit also commented about this in his report and testified about it. The ALJ concludes that this treatment note stated physical therapy caused Claimant to feel increased pain (which can occur), although it did not rise to the level of an injury.

11. Claimant was evaluated by David Karli, M.D. on March 25, 2014. (The treatment note was completed by James Stanley, M.S., ATC, OTC.) At that time, he was complaining of stabbing pain between his shoulder blades[2]. It was also noted that he had chronic cervical pain, which was active. (A copy of Dr. Karli's report detailing the physical examination, impression and plan was not submitted to the ALJ.)

12. An MRI was done on Claimant's thoracic spine on March 25, 2014 and the films were read by Charles Ho, M.D. Dr. Ho noted a moderate disc extrusion at T9-T10, measuring 5-6 mm by 11mm, which flattened the anterior thoracic cord. Mild multilevel thoracic degenerative disc disease was found with posterior annular bulges and small disc protrusions at the T4-5 and T6-7 levels, with no foraminal narrowing or thecal sac narrowing at those levels. Mild multilevel spondylosis was present manifested by mild facet joint and costovertebral junction arthrosis and degenerative disc changes, as described above.

13. Dr. Yarberry next saw Claimant on May 9, 2014. He noted that an MRI had been done in interim, which showed many abnormalities in the thoracic spine. Claimant had been going to PT three times per week, which he said aggravated his pain. Upon examination, decreased range of motion with some midline tenderness and paraspinal spasms was found at the neck, with tenderness noted at C7 and about T-4 in the thoracic spine. He had moderately/severe rhomboid spasms and tenderness. Dr. Yarberry decided to try different meds/muscle relaxants. Claimant's 5 lb. lifting restriction was continued.

14. Claimant returned to Dr. Yarberry on May 15, 2015, who observed that Claimant moved slowly, had midline tenderness in the lower neck and at C7, along with paraspinal spasm in the neck. Decreased ROM of the neck was also noted. In the thoracic spine, lots of rhomboid spasm was detected, along with tenderness in the upper thoracic area. Dr. Yarberry set a follow-up appointment in two weeks.

15. Dr. Karli re-examined Claimant on May 16, 2014. Claimant's primary complaint was listed as thoracic pain, but he also had a history of chronic cervical discomfort, which was active. Claimant had tenderness with flexion and extension in the thoracolumbar junction. Rotation also was uncomfortable but did not produce any radicular or myelopathic-type symptoms. Dr. Karli noted that given the lack of improvement with conservative management, it was appropriate to consider thoracic epidural steroid injections. He referred Claimant to his partner (Dr. Evans) for an interlaminar ESI for the thoracic spine.

16. A T10-11 interlaminar epidural steroid injection was administered by Dr. Evans on May 28, 2014. Claimant reported a significant decrease in his overall thoracic back pain.

[2] In this note, Claimant described an incident in which he sneezed while shopping and felt the "worst" pain he had ever experienced in his thoracic spine. It was noted that in the few months leading up to the work comp injury he had been doing extremely well.

17. Claimant returned to Dr. Karli on June 11, 2014 with his chief complaints listed as thoracic and neck pain. The thoracic ESI gave him some transient/diagnostic relief related to a well-identified disc herniation and cord compression. Claimant was noted to be getting some flare of his chronic neck discomfort, which had responded favorably to epidurals in the past. Dr. Karli felt it was reasonable to consider a surgical consultation and wanted to wait on the cervical injection.

18. The Claimant also saw Dr. Yarberry on June 11, 2014. At that time, he was noted to be in mild to moderate pain/distress. His neck had some midline tenderness, along with paraspinal muscle spasms and tenderness, especially in the trapezius along rhomboid spasm. Claimant had intact sensation in the upper extremities, with some proximal motor weakness in the left arm. It was noted that his spine specialist recommended surgery at that T-10 level, which did not respond to the steroid injection. Dr. Yarberry agreed with the surgery recommendation and took Claimant off work for a period of one month.

19. John Douthit, M.D. performed an IME at Respondents' request on July 9, 2014. At that time, Claimant had complaints of neck pain, as well as pain radiating into the left shoulder and arm, as well as into the mid-spine going around to his chest. On physical examination, Dr. Douthit noted hyperreflexia in the upper and lower extremities, along with one- two beats of clonus in both ankles. Claimant had restricted range of motion in his neck. Otherwise, Claimant had good grip strength and equal measurements.

20. Dr. Douthit noted that he did not have the MRI (presumably the actual films), but had the report. He felt constrained to comment on the surgical recommendation. Dr. Douthit[3] concluded that the 3-6-14 incident aggravated Claimant's degenerative disease of the thoracic and cervical spine. The diagnosis was protruding disc of the thoracic spine, aggravation of degenerative disease of the cervical spine.

21. Claimant returned to Dr. Yarberry on August 7, 2014. At that time, he continued have moderate to severe thoracic spine pain in the mid and upper T spine. He also had pain in his left arm and problems sleeping. Tenderness in the neck and right/left paraspinal muscles was also documented. Claimant had gone down for an evaluation in Denver and was awaiting the results. Tramadol was restarted, along with Gabapentin. Dr. Yarberry continued Claimant's 5 pound lifting, repetitive lifting, carrying and pushing/pulling work restrictions. He was restricted from crawling, kneeling, squatting and climbing.

22. Dr. Yarberry examined Claimant on August 21, 2014. Tenderness on the c-spine, as well as paraspinal muscles in the neck (spasm) was noted. He had mid-line and right paraspinous tenderness/spasm in the thoracic spine. His thoracic pain was noted to be better with his medications; however, Dr. Yarberry thought he may have

[3] Dr. Douthit described Claimant as argumentative concerning the etiology of his symptoms and suggested a psychological evaluations and drug testing before considering surgical intervention.

some cord issues and now some SI muscle weakness. Dr. Yarberry referred Claimant to Gary Ghiselli, M.D. Claimant's restrictions remained the same as the 8/7/14 appointment.

23. Claimant was evaluated by Dr. Ghiselli on September 16, 2014. Claimant stated that his pain was in the mid thoracic region radiating into the anterior chest, stabbing in nature. The pain was radiating around the rib cage, right equal to left. Claimant also had positive Hoffman's signs (bilaterally), complaints of dropping things more often, handwriting getting worse and his balance slightly off. Upon examination, Claimant was very tender to palpation from approximately T5-10 levels. Dr. Ghiselli's assessment was: history of injury and stabbing pain, along with cord compression at T9-T10 and possible cervical cord compression; cervical spondylosis with myelopathy-thoracic region; intervertebral thoracic disc disorder with myelopathy-thoracic region; and pain in thoracic spine. Dr. Ghiselli ordered a cervical MRI to assess cord compression, as well as a repeat thoracic MRI.

24. An MRI of Claimant's cervical and thoracic spine (without contrast) was done on October 2, 2014. David Solsberg M.D. identified spondylosis throughout the cervical spine, most pronounced at C5-6 and C6-7. No protrusions/stenosis was seen at C2-3, C3-4 and C4-5. At C5-6, a right foraminal protrusion and osteophyte complex was identified, measuring 4mm. Severe right foraminal stenosis was described. At C6-7, a right foraminal 3mm protrusion was seen and a left foraminal 4mm protrusion was identified. No cord lesion or demylenation was detected.

25. Diffuse spondylosis was noted in the MRI of the thoracic spine, with a small central protrusion seen at T3-4. Increased signal intensity was noted at T4-5, consistent with demylenation or prior myelomacia. A left central protrusion was seen and T5-6, with a disc extrusion seen at T6-7, which compressed the cord. A small central protrusion was seen at T8-9, as well as a left central protrusion at T9-10, which compressed the cord. Dr. Solsberg compared this MRI with a one done on 3-25-14 and opined that the protrusions/extrusions were unchanged allowing for differences in technique. A gastroesophageal reflux and hiatus hernia were also identified. A CT was done of the thoracic spine and Dr. Solsberg noted that the protrusions seen on the MRI were less conspicuous than on the CT scan. Diffuse spondylosis was seen.

26. Claimant returned to Dr. Ghiselli on October 2, 2014. At that time, he had ongoing complaints of central pain in the mid thoracic region and pain throughout his left upper extremity. He also had neurological symptoms, such as dropping things, worsening handwriting and balance. Dr. Ghiselli's assessment was severe left C6-C7 foraminal compression, which had become myelopathic both by symptomatology and physical examination. Dr. Ghiselli was recommending a transforaminal epidural steroid injection and if relief was provided, an anterior cervical discectomy and fusion at C6-7 would be pursued.

27. Claimant underwent a left C6-7 TF ESI with local SNRB, which was administered by Dr. Karli on October 13, 2014. The indications were cervical degenerative disc disease and cervical radiculitis. There were no complications from

the procedure; however, Dr. Karli's notes did not indicate the degree to which the ESI provided relief to Claimant.

28. Claimant returned to Dr. Ghiselli on November 4, 2015. A copy of Dr. Ghiselli's report was not in either Claimant's or Respondent's exhibits admitted at hearing. However, Dr. Ghiselli referred to it in his deposition, *infra*[4]. Dr. Ghiselli recommended surgery on Claimant's cervical spine.

29. Dr. Douthit issued a second report on November 6, 2014, after reviewing the audio recording of his 7-9-14 evaluation, additional records and the surveillance video. Dr. Douthit concluded that Dr. Ghiselli's surgery recommendation was appropriate and reasonable. Claimant had radicular like symptoms and the MRI supported the possibility of nerve root compression. Dr. Douthit also opined that he was less convinced on causation based upon what he described as changing pain complaints (thoracic to cervical), the alleged injury in physical therapy and the surveillance video. Dr. Douthit recommended a review of the physical therapy records and deposing the therapist to determine if there was a provocative event. The ALJ is not persuaded by the causation opinion, as Claimant had cervical spine complaints from the outset as documented in Dr. Yarberry's March 6th note and which continued throughout his treatment. Dr. Douthit did not address the significant increase in Claimant's cervical symptoms after the industrial injury and the lack of analysis concerning the degenerative changes in Claimant's spine reduced Dr. Douthit's credibility on the causation issue.

30. The denial of the request for authorization for outpatient C6-C7 anterior cervical discectomy and fusion was sent on November 10, 2014 by Insurer. The request for surgery was denied pursuant to W.C. R.P. Rule 16-10 (B).

31. Claimant was examined by Dr. Yarberry on November 14, 2014 and it was noted that he was considering surgery on the cervical spine. He had an ESI and that helped his neck pain, but still had some parasthesias mostly on the left arm. Claimant had normal sensation to the touch in the upper extremities and thoracic spine tenderness in the interscapular area, with rhomboid tenderness/spasm noted. In the impression section, Dr. Yarberry noted that whether the slip and fall at work reinjured his cervical spine was a "very complicated issue". He noted that Claimant had myelopathic signs with clonus and hyperreflexia in the lower worse than the upper extremities. However, Dr. Yarberry did not provide an opinion as to whether he concluded that Claimant required surgery to his cervical spine.

32. Claimant returned to Dr. Yarberry for follow-up on June 24, 2015 at which time he noted that his thoracic and cervical pain was better. Upon examination, his neck was tender on the midline, with some restriction in his range of motion. His thoracic spine was tender at one spot in between his scapulae at about T6, with paraspinal spasm and tenderness to palpation also noted. A physical therapy evaluation and treatment was recommended. Claimant's restrictions were 20 pounds

[4] Dr. Douthit also referred to Dr. Ghiselli's 11-4-14 evaluation in his report, dated 11-6-14.

lifting, repetitive lifting and carrying. He was released to light duty. The ALJ infers that Dr. Yarberry concluded Claimant had improved, resulting in reduced restrictions and a return to light duty.

33. Dr. Yarberry evaluated Claimant on August 6, 2015. Claimant reported that his thoracic pain was better and that he rarely had pain. He still got cramps in his hands, which Dr. Yarberry felt that, given his multiple hand surgeries, these were not related to his work injury. On examination, no midline tenderness was noted. Minimal paraspinal muscle spasm was seen. Dr. Yarberry stated Claimant's symptoms were much better and he was close to MMI. Claimant was to continue physical therapy evaluation and treatment. The ALJ infers that Dr. Yarberry was not recommending surgery at the time of this appointment since Claimant was approaching MMI.

34. No record of any medical evaluation after August 6, 2015 was admitted at hearing.

35. The ALJ finds that Claimant was not at MMI as of the date of hearing, as no ATP has made this determination.

36. Claimant testified that he continued to have upper extremity complaints, which he attributed to the injury to his cervical spine. Although his symptoms have improved as of late, Claimant expressed a concern that his cervical spine symptoms would increase, once he returned to work. He wanted undergo the cervical spine procedure, as he thought it would reduce his symptoms. He also believed that the surgery would increase his level of functioning.

37. The ALJ found Claimant to be a credible witness when discussing his symptoms and course of treatment. Claimant's testimony that his symptoms have improved was consistent with Dr. Yarberry;'s findings in the October/November evaluations and buttressed the conclusion that he is approaching MMI.

38. Dr. Ghiselli testified as an expert in orthopedic surgery and as a Level II accredited physician pursuant to the W.C.R.P. Dr. Ghiselli testified that the reason for the surgery was to relieve the compression of the C7 nerve root on the left. (Ghiselli deposition page 16:9-13). Dr. Ghiselli opined that it was more likely that Claimant's symptoms were coming from his cervical spine, as opposed to the thoracic spine. (Ghiselli deposition page 23:1-3). Dr. Ghiselli did not specifically remember Claimant because it had been some time since he had examined him. Dr. Ghiselli has not examined Claimant in almost one (1) year. Dr. Ghiselli did not recall reviewing Dr. Douthit's November 6, 2014 report. (Ghiselli deposition page 13:1-4.)

39. Dr. Ghiselli testified that Claimant underwent the ESI injection on 10-13-14. Dr. Ghiselli did not know what was compressing the nerve root and causing Claimant's radicular symptoms. Dr. Ghiselli's lack of recollection concerning the Claimant, the MRI-s and Dr. Douthit's report makes him less credible. Dr. Ghiselli also did not provide a strong opinion on causation, saying only that the industrial injury "could have" caused the need for surgery and it depended on why he had ceased

treatment after the motorcycle accident. (Ghiselli deposition, page 14:1-2, 19-22.) "If he had no symptoms before the injury at work, then the work caused the injury. If he had symptoms that were significant and at the same time he was working, then I would opine that work probably exacerbated it but probably didn't cause it." (Ghiselli deposition, page 14:24-15:5.) That description does not precisely describe Claimant's course of treatment after the motorcycle accident, as the records documented he had symptoms for a period of time. Dr. Ghiselli did not offer a clear opinion regarding the role Claimant's degenerative disc disease played in his current symptoms. Absent more analysis, his opinion on causation is not persuasive.

40. Dr. Douthit testified as an expert in orthopedic surgery and as a Level II accredited physician pursuant to the W.C.R.P. Dr. Douthit stated the there was no noticeable difference between the 2012 cervical MRI and the 2014 cervical MRI. Both MRIs show degenerative changes at the C5-6 and C6-7. He believed that the osteophyte complexes in Claimant's cervical spine were causing the disc protrusions and the nerve root compression. Dr. Douthit opined that the there were degenerative changes in Claimant's spine, which was the basis for his opinion that pre-existing degenerative disc disease was why Claimant required surgery.

41. The ALJ reviewed a DVD video of Claimant (Exhibit M), which documented his activities over several days, including June 17, 18, 25 and 26, 2014. The video surveillance shows Claimant doing various activities, including walking, taking out the trash and riding his motorcycle. More particularly, the video surveillance shows:

- 6-17-15: Claimant walked out of house, pushed a trash can out and rode his motorcycle (twice). The motorcycle was driven on the highway.

- 6-18-15: Claimant was cleaning his motorcycle, which included wiping it with his left hand, shaking the rag out and bending over. He picked some things off the ground and put in the trash can. At one point, he rotates his head from side to side without difficulty. He also rides his motorcycle an indefinite distance.

- 6-25-15: Claimant got gas for the motorcycle (used one hand to take off the cap and the other hand to put gas in the tank.) He also was seen walking with a back pack and may have gone hiking.

- 6-26-15: Claimant was seen riding his motorcycle, making a stop and getting back on the motorcycle.

42. The aforementioned video was taken fifteen (15) months before the hearing. Claimant was not depicted exceeding his restrictions and indeed he told Dr. Yarberry that the motorcycle was his only means of transportation. The ALJ concludes that the video demonstrates that at that time Claimant did not have a degree of symptoms that precluded him from riding the motorcycle. Claimant did not exhibit pain behaviors while doing the activities depicted in the surveillance video. Also, it is possible that the motorcycle riding could cause an increase in Claimant's symptoms.

However, the ALJ notes the surveillance video did not significantly reduce Claimant's credibility, as Claimant never denied riding the motorcycle. As found, Claimant did not deny that his symptoms improved while he was off work.

43. The ALJ is not persuaded that the proposed ACDF is necessary at this time, given the documented improvement in Claimant's condition.

44. The ALJ finds that Claimant has not met his burden of proof abd has not proven that the proposed cervical surgery is necessary at this juncture based upon the most recent reports for Dr. Yarberry.

45. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). Whether the Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

Causation Issue

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The question of whether the Claimant met his burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). In this case, there is no question that Claimant suffered prior injuries to his cervical spine. As a result of these injuries, there were objective degenerative changes and abnormalities present in his spine prior to his industrial injury. Claimant required treatment for these degenerative conditions prior to the industrial injury. There was also evidence in the record of this treatment, which included epidural steroid injections. The question before the ALJ is whether the admitted industrial injury of March 6, 2014 aggravated and/or accelerated the condition of his cervical spine to the degree that surgery is now required.

Claimant argued that the industrial injury worsened the pre-existing degenerative changes in his cervical and thoracic spine. In support, Claimant stated that he required treatment and was given work restrictions following his 3-6-14 injury. Claimant also pointed to the fact that he had never had a surgical recommendation prior to March 6, 2014 as proof that the injury accelerated the degenerative changes in the cervical spine. Finally, Claimant contended that Respondents' expert (Dr. Douthit) agreed with the conclusion that surgery was reasonable and necessary.

Respondents averred that Claimant's need for the proposed cervical surgery was the result of his pre-existing condition, not the industrial injury. Respondents argued that there was not a significant difference between the 2012 and 2014 MRI scans. Respondents also contended that the foraminal stenosis in Claimant's cervical spine was causing his symptoms and the need for surgery. Respondents also relied upon

the testimony of Dr. Douthit, on the issue of causation to support their argument that the surgery should not be authorized.

In order to determine the issues concerning the proposed cervical surgery, the ALJ has employed a two-step analysis, starting first with an evaluation of the degree to which the industrial injury caused an increase in Claimant's symptoms and required treatment. It was undisputed that Claimant had degenerative disc disease and there was objective evidence of degenerative changes in the spine. (Finding of Fact Nos. 2, 4-5). However, Claimant was able to work without formal restrictions up to March 6, 2014. Claimant's testimony and the medical records also establish that Claimant did not receive treatment for injuries sustained in the 8-30-12 motorcycle accident after approximately January, 2013. Claimant's reports of symptoms after the industrial injury (which he described at hearing) as well as the findings made upon examination on 3-6-14 by Dr. Yarberry establish this. Also, the records of Drs. Yarberry and Karli after the injury which documented the course of treatment are replete with objective findings related to Claimant's cervical spine, including tenderness, tightness and spasm. The ALJ concludes that Claimant satisfied his burden of proof on this issue and established that the subject injury aggravated and /or accelerated the condition of his cervical and thoracic spine. (Finding of Fact Nos. 8-9).

The ALJ concludes that Claimant required medical treatment both immediately after his injury, as well as the months that followed for an exacerbation of the preexisting condition in his cervical and thoracic spine. The Claimant required this treatment to cure and relieve his symptoms directly resulting from the industrial injury. In particular, this includes the evaluation and treatment of Claimant's cervical spine symptoms. Therefore, Respondents were required to provide these medical benefits, which included the various examinations, physical therapy, injections, MRI scans and the surgical evaluations.

Reasonableness and Necessity of Proposed Surgery

Second, the ALJ has considered whether the proposed ACDF procedure was reasonable and necessary. This represents a much closer question. As a starting point, when making the referral to Dr. Ghiselli, Dr. Karli opined that Claimant needed to consider all options and it was reasonable to have a surgical evaluation. Dr. Ghiselli recommended the cervical surgery in order relieve the compression of the C7 nerve root. (Finding of Fact No. 38). Because of Claimant's continued symptoms, Dr. Ghiselli recommended the ACDF procedure to address the compression in Claimant's cervical spine. In addition, Respondents' expert, Dr. Douthit, opined that the proposed surgery was reasonable and necessary, disagreeing on the issue of causation. (Finding of Fact No. 29). Thus, the ALJ concludes that the proposed surgery is reasonable. However, the ALJ concludes that the present necessity of the surgical procedure has not been shown.

In this regard, Dr. Ghiselli has not examined Claimant for more than a year (November, 2014). Dr. Ghiselli's June 2015 testimony did not provide a lot of detail concerning why the ACDF procedure was necessary at that point in time. There was no

evidence that he reviewed Dr. Yarberry's most recent reports and no opinion was offered regarding Claimant's improvement. Dr. Douthit's opinion regarding the reasonableness and necessity of the proposed surgical procedure was also before Dr. Yarberry's most recent evaluations.

Accordingly, the ALJ concludes that Claimant did not satisfy his burden of proof and has not proven that the surgery was necessary as of the date of hearing. The most recent examinations by Dr. Yarberry persuaded the ALJ that surgery was not necessary at the time of hearing. Claimant's significant improvement as documented by Dr. Yarberry and the conclusion that he was approaching MMI belied any conclusion that he requires the surgery to reach MMI. Therefore, the ALJ finds that Claimant has not met his burden of proof that the proposed cervical surgery is necessary at this time.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the Anterior Cervical Discectomy and Fusion procedure is denied without prejudice.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 17, 2015

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-948-599-02

ISSUES

- Whether Claimant has proven, by a preponderance of the evidence, that the request for hip surgery was reasonable, necessary, and causally related to the admitted work injury?

- Whether Claimant has proven, by a preponderance of the evidence that the surgery was authorized?

- Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to temporary indemnity benefits between August 22, 2014 and October 2, 2014.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Background

1. Claimant worked as a resident care associate for Employer beginning on August 24, 2009. In that position, Claimant was responsible for assisting residents with activities of daily living, including bathing, dressing, grooming, toileting, transferring and getting to and from activities and meals according to their individual service plans.

2. At hearing, Claimant testified that she injured herself helping a resident push up to the dining table, she was using her legs and arms to push because the chair was stuck. She testified further that the resident was heavy and she had to exert force to get the resident placed at the table.

3. Claimant's reports of her mechanism of injury were varied and often inconsistent:

    - On February 22, 2014, Claimant reported to Boulder Community Hospital's emergency department that she was injured "while pushing a heavy object at work."

    - On Employer's First Report of Injury dated February 24, 2014, Claimant reported "I was pushing a resident in at a table, chair got stuck on carpet would not slide on carpet."

- The record of Claimant's February 24, 2014, visit to Concentra, reads, "[Claimant] was wheeling a resident back from the dining hall when she had to lift and twist the wheelchair to get it over the transition from carpet to other flooring."

- Dr. Meza's "Report of Workers' Compensation Injury" dated March 1, 2014 provides, "Patient states: 'push resident in chair up to dining room table.'"

- On March 6, 2014, Claimant reported at her first physical therapy visit that she was moving a resident in a chair in the dining hall when she twisted and injured her left hip. "Patient reports that the chair did not have sliders on the bottom of it and it got stuck on the carpet."

- On April 14, 2014, Claimant reported to Dr. Hsin that her injury occurred while she was "pushing a resident in a high back chair on carpet. She twisted and pivoted" when she felt a sharp pain.

- On Claimant's Claim for Compensation dated April 22, 2014, Claimant states her injury occurred "pushing a resident in a wheel chair that wasn't moving easily, rocking, and pushing the chair."

- On June 6, 2014, Claimant reported to Dr. Sorensen that she "was pushing a resident into the dining room and when she tried to shift the patient's wheelchair, she felt a shooting pain."

- On August 11, 2014, Claimant reported to Lief Sorensen, MD, that the mechanism of her injury was "pushing a resident into the dining room and when she tried to shift the patient's wheel chair, she felt a shooting pain down her [left] leg."

- On October 29, 2014, Claimant reported to Dr. White that her injury occurred when she "was pushing a resident who was seated in a chair up to the table."

- Additional varying mechanisms of injury are included below.

4. Respondents performed surveillance on Claimant at work on March 15, 2014. The video shows Claimant assisting residents in the dining room. Some residents are in wheelchairs and some are in dining chairs. Notably, the dining area shown on the video tape has hard surface flooring. Windows on the side of the dining room opposite the videographer reflect brightly on a smooth, hard surface floor. Claimant offered no persuasive evidence to support a finding that the flooring in the dining room was carpeted on the date of Claimant's alleged injury or that the flooring was replaced in the three weeks following her alleged injury. The Judge draws the reasonable inference that there was no carpeting in the dining room at the time Claimant allegedly injured her left hip.

Medical Treatment

5. On February 22, 2014, Claimant presented to Boulder Community Hospital where David Kruger, DO, evaluated her. Claimant reported injuring herself pushing a heavy object at work. Claimant presented in no distress and physical examination revealed tenderness in the medial upper [left] thigh and lateral upper thigh area, with limited range of motion with flexion of the hip secondary to pain. A pelvic x-ray was obtained and read as normal by Dr. Kruger. The radiologist, Richard Finer, MD, also read the x-ray as normal, finding, "Osseous structures are intact without fracture. The hip joint spaces are normal. Soft tissues are unremarkable." Claimant was diagnosed with a hip strain.

6. Claimant was discharged within one hour of admission with instructions to limit weight bearing, and to ice the affected area. She was advised to follow-up with a workers' compensation doctor.

7. Claimant testified that prior to February 22, 2014, she did not have any similar symptoms, she had received no treatment for similar symptoms, and she had missed no work, and was under no work restrictions for similar symptoms.

8. On February 24, 2014, Claimant presented at Concentra, her workers' compensation provider. PA-C Jeffrey Winkler, who is supervised by Felix Meza, MD, evaluated Claimant. Claimant reported inconsistent mechanisms of injury at this visit. While she initially reported pushing a resident in a chair up to the dining room table, she later reported more specifically that she was wheeling a resident back from the dining hall when she had to lift and twist the wheelchair to get it over a transition from carpet to other flooring. At the visit Claimant also denied limited movement and popping symptoms. On physical examination Claimant had left hip pain on passive range of motion, moderate pain on motion in all directions, and walked with a moderate limp. Claimant "lay with her hip shortened, flexed, and internally rotated." Mr. Winkler diagnosed Claimant with sprain/strain of her hip/thigh. He gave her work restrictions, started her in physical therapy (PT), and considered her diagnosis to be work related.

9. On March 4, 2014, Claimant returned to Concentra where three additional x-rays were performed. Radiologist Steven Abrams, MD, read them as normal, showing no bony lesions, normal joint spaces and anatomical relationships, with the visualized pelvic bones appearing unremarkable. Claimant was assessed with left groin pain, with differential diagnoses of hip strain and labral tear. Although Claimant denied any prior surgeries, Dr. Meza, who performed the physical examination, noted "small, healed incisions along supra-pubic region." Claimant also later admitted to knee replacement surgery.

10. On March 6, 2014, Claimant reported at her first physical therapy visit that she was moving a resident in a chair in the dining hall when she twisted and injured her left hip. Further, "patient reports that the chair did not have sliders on the bottom of it and it got stuck on the carpet." Claimant reported current pain at 6/10 and her worst pain at 10/10. Claimant presented with an antalgic gait pattern and was unable to complete a number of assessments due to reported pain.

11. On March 17, 2014 Claimant was assessed at Concentra where she added reports of popping and clicking in her left hip. An MRI arthrogram was ordered to rule out internal derangement.

12. On March 31, 2014, Claimant was assessed with hip pain and concern for internal derangement.

13. On April 7, 2014, Mr. Winkler re-evaluated Claimant, noting that she was walking with a moderate limp. Claimant filled out a pain diagram at the visit indicating that her pain was zero over ten. Claimant's work restrictions required that she be sitting 50% of the time, and perform no lifting over ten pounds.

14. On April 11, 2014, Tanya Tivorsak, MD, at Health Images Boulder, performed an MR Arthrogram with contrast of Claimant's left hip (MRI). Dr. Tivorsak found the following:

    - Tear of the lateral labrum with partial detachment;
    - Degeneration of the anterior labrum with a mild partial detachment;
    - A small sulcus in the posterior inferior labrum;
    - Subchondral cysts in the anterior acetabulum with mild partial thickness chondral loss;
    - Mild sclerosis along the superior acetabulum;
    - Notably, Dr. Tivorsak observed normal morphology of the femoral head; and
    - No acetabular dysplasia.

15. Respondents surveiled Claimant on April 11, 12, and 15, 2014. A video of same was admitted as exhibit O. The video of April 11, 2014 shows Claimant in heeled boots walking without a limp, pumping gas, and entering her car without apparent guarding or indication of pain. The video shows Claimant, between the hours of 9:00 p.m. and 12:07 a.m. walking without limp and standing in heeled boots on what appears to be a date. Claimant stood while eating and drinking. On April 12, 2014, Claimant walks from her car into a

residence without a limp; walks from her car into and through a retail store without a limp. She carried approximately six shopping bags, one of which contained a bag of potting soil, from her car into her apartment. However, on April 15, 2014, Claimant is seen at work with a noticeable limp. A portion of the video shows Claimant at work in the dining room. The area of the dining room videotaped on April 15 clearly has no carpet but rather a hard, smooth surfaced flooring which reflects the light from windows in the dining room.

16. On April 11-15, 2014, Claimant was under work restrictions which limited her to sitting 50% of the time.

17. Claimant testified that the MRI had hurt her hip. After the MRI but before she went out, she drank alcoholic beverages and took Vicodin which alleviated her pain.

18. On April 14, 2014, Claimant consulted with Dr. Hsin who assessed femoroacetabular impingement of the left hip with labral tear. Claimant reported to Dr. Hsin that she injured her hip "pushing a resident in a high back chair on carpet. She twisted and pivoted" when she felt pain. Dr. Hsin noted that Claimant was limping, and noted, "[t]he patient does have some pain out of proportion to exam and some nonorganic findings." He noted specifically that Claimant had a positive response to his FABER test "with pain out of proportion to exam." He also noted that upon inspection of Claimant's left hip she experienced "maximum tenderness." These findings did not alter Dr. Hsin's diagnosis of femoroacetabular impingement of the left hip or prevent him from scheduling outpatient surgery.

19. Dr. Hsin testified at hearing by telephone as an expert in orthopedic surgery. He elaborated that at one point during his examination of Claimant, she "jumped off the table" exhibiting more pain than he expected from the exam. Dr. Hsin specifically testified that he did not evaluate the work-relatedness of Claimant's condition. Additionally, he opined that Claimant's negative response to injection was inconsistent with the diagnosis of labral tears and indicated that her pain probably did not originate with her hip. Based on his review of the surveillance videos he would not give her work restrictions and would not perform a hip arthroscopy without additional information.

20. On April 15, 2014, Claimant returned to see Dr. Meza at Concentra. She reported increased pain after her MRI, with worsening pain and discomfort associated with the injection. She had also been seen by Dr. Hsin, an orthopedic surgeon, who recommended hip arthroscopy. Claimant reported pain of nine to ten over ten. Dr. Meza attributed Claimant's increased pain to the MRI. He prescribed Vicodin and suggested that Claimant might be a candidate for cortisone injections prior to her arthroscopy which was scheduled for May 22, 2014. Her work restrictions were increased to "should be sitting 75% of the time."

21. On April 24, 2014, Dr. Hsin's office requested authorization for left hip arthroscopy with labral repair.

22. On April 28, 2014, Claimant returned to Concentra with worsening left hip pain. Claimant was not able to work with restrictions due to her pain.

23. On May 5, 2014, Respondents denied authorization of the surgery for medical and nonmedical reasons.

24. On May 14, 2014, Insurer filed a notice of contest for further investigation of the claim.

25. On May 19, 2014, Dr. Hsin responded to Respondents' counsel's request that he view and comment on the video surveillance taken of Claimant on April 11, 12, and 15, 2014. Dr. Hsin stated, "[Claimant's] presentation on April 11 and 12th are not consistent with her visit with me on April 14th in which she did come in with a limp."

26. Surgery scheduled for May 22, 2014 did not occur. On June 9, 2014, Claimant returned to Dr. Meza with complaints of sharp left hip pain. Dr. Meza recommended diagnostic and possibly therapeutic hip injections. At that visit, Dr. Meza reported Claimant was not limping; however, Claimant rated her pain at ten over ten.

27. On June 9, 2014, Dr. Meza dictated a response to Respondents' counsel's request that he view and comment on the video surveillance taken of Claimant on April 11, 12, and 15, 2014. Dr. Meza stated what he observed in the video and commented that he had "no further opinion at this time after reviewing the video other than those contained within my notes." Dr. Meza did not alter his diagnosis or proposed treatment plan which recommended arthroscopic surgery.

28. On July 7, 2014, Dr. Meza referred Claimant to Dr. Sorenson, a pain management physician. Claimant reported continued symptoms and rated her pain at four and five over ten.

29. On July 18, 2014, Respondents contested Dr. Meza's referral to Dr. Sorenson for medical and nonmedical reasons.

30. On July 21, 2014, Claimant returned to Concentra with reports of pain of 3.5-4/10 and an antalgic gait.

31. On August 4, 2014, Claimant reported constant sharp pain of moderate severity in her left hip. Dr. Meza continued to recommend cortisone/lidocaine injection of Claimant's hip as diagnostic and therapeutic treatment. Claimant reported her pain as 4/10 and Dr. Meza noted she was not limping.

32. On August 5, 2014, Claimant underwent a Respondents' IME with Dr. O'Brien. Claimant reported to Dr. O'Brien that her injury occurred when she twisted while positioning a chair with a person in it. On exam, Dr. O'Brien noted that Claimant had difficulty moving from a seated to standing position and demonstrated significant pain behavior; she became tearful as soon as she began to participate in the exam. Notably, "[Claimant] indicated, even when I was not touching her leg, that I was hurting her leg during the exam."

33. Dr. O'Brien has testified as an expert ten times, seven of which have been for Respondents' law firm. Dr. O'Brien accepts his medical/legal work through a referral service owned by his wife.

34. On August 11, 2014, Claimant reported to Lief Sorensen, MD, who assessed Claimant with chronic pain syndrome and hip pain. Claimant reported her mechanism of injury as "pushing a resident into the dining room and when she tried to shift the patient's wheel chair, she felt a shooting pain down her [left] leg." Dr. Sorensen noted that Claimant was limping.

35. Also on August 11, 2014, Dr. O'Brien issued his report of his Respondents' Independent Medical Evaluation of Claimant which he conducted on August 5, 2014. Dr. O'Brien noted significant pain behaviors during the exam. He reviewed the video surveillance of Claimant before writing his report. His notes regarding the surveillance can be summarized as follows:

- On April 11, 2014, for several hours beginning at 8:23 p.m., Claimant moved briskly and fluidly and performed numerous activities in heeled shoes with no apparent discomfort or limp. For example, Claimant turned, twisted, bent down, walked on uneven surfaces, and walked and stood for significant periods of time.

- On April 12, 2014, Claimant shopped at a number of stores, walking up and down curbs and up inclines. She carried bags of groceries and moved fluidly without apparent pain and with no limp.

- On April 15, 2014, Claimant is filmed at work walking with a limp and stiff knee.

Dr. O'Brien opined:

- Claimant's mechanism of injury was not substantial enough to have resulted in a labral tear.

- Claimant's MRI findings, specifically the subchondral cysts and chondral degeneration, are chronic and take years to develop.

- Claimant had documented nonorganic pain and "once nonorganic pain is documented, all medical treatment should be discontinued, as nonorganic

pain does not respond to true traditional operative and nonoperative modalities. Ongoing care in the presence of nonorganic pain only serves to inappropriately validate those subjective complaints of pain which, in fact, have no anatomic foundation and in so doing create or enhance the specter of disability which, in fact, does not exist."

- Dr. O'Brien relied on Dr. Hsin's documentation of nonorganic findings at his April 14, 2014 evaluation, and on his own observation that Claimant "demonstrated profoundly positive nonorganic physical findings" during his physical exam.

- Dr. O'Brien concluded that Claimant was misrepresenting her current level of pain and dysfunction. He determined the only way to reconcile his and Dr. Hsin's exam findings with the surveillance video were by "implicating nonorganic findings as its etiology."

- Dr. Hsin's recommendation for arthroscopic surgery was not reasonable because Claimant's injury was minor and not related to need for surgery.

- Dr. Hsin's recommendation for surgery was contraindicated because Claimant's pain was inorganic.

- Dr. O'Brien determined that Claimant's labral tears and chondromalacia were not clinically significant and were not generating pain.

36. On August 27, 2014, Insurer admitted liability for medical benefits only. Respondents attached a note to the admission stating:

> Respondents admit that claimant suffered a minor work injury on February 22, 104. Temporary disability benefits are not being paid . . . because claimant was not disabled from performing her job duties and has been accommodated by the employer . . . claimant's presentation has revealed nonorganic findings as documented in medical reports and in surveillance; and Dr. O'Brien found that claimant's ongoing condition after April 14, 2014 is not work-related.

37. On August 29, 2014, Respondents denied for medical and nonmedical reasons Dr. Meza's request for authorization for a second orthopedic opinion.

38. Also on August 29, 2014, Claimant returned to Dr. Sorensen and reported she "has now been granted medical options." Dr. Sorensen refilled Claimant's Norco prescription. Claimant reported as significant a weight loss of two pounds.

39. On September 4, 2014, Claimant returned to Concentra with unchanged symptoms and pain reports. Dr. Meza noted that Claimant could no longer

afford Celebrex and Dr. Sorenson had prescribed Vicodin. Dr. Meza also noted, “no limping” and a positive FABER test.

40. On October 6, 2014, Respondents denied for medical and nonmedical reasons Dr. Sorenson’s referral of Claimant to Dr. Brian White.

41. On October 9, 2014, Claimant was seen at Concentra’s pain clinic where she was prescribed Celebrex and her Norco prescription was refilled.

42. On October 29, 2014, Brian White, MD, evaluated Claimant. Claimant reported her injury occurred as she was pushing a seated resident up to a table when she felt a pop and pain deep in her groin. Claimant denied long term relief from rest, ice, activity modifications, anti-inflammatories, physical therapy, and narcotic pain medication. Dr. White noted antalgic gait. After physical exam and imaging, Dr. White assessed findings consistent with femoral acetabular impingement and labral tear and overall well preserved joint space. He specifically noted “mild hip dysplasia” and “no evidence of osteoarthritis,” and that the MRI showed evidence of labral tear. Dr. White recommended hip arthroscopy with labral reconstruction.

43. On December 22, 2014, Respondents filed an Application for Hearing pursuant to Rule 16 after denying the surgery as not reasonably necessary or related to Claimant’s injury.

44. On January 15, 2015, Dr. O’Brien issued a supplement report after reviewing Dr. White’s October 29, 2014 evaluation. Dr. O’Brien wrote that Dr. White’s evaluation in no way altered his own opinions expressed in his August 11, 2014 report. He opined that Claimant’s labral tear was not the result of her work activity, but rather to her congenital hip dysplasia. Dr. O’Brien related Claimant’s condition to “her personal health.” He reported, “a diagnostic injection of the hip, could potentially act therapeutically, and should be considered prior to proceeding with surgical intervention, regardless of causation.”

45. On May 19, 2015, Dr. White performed a left hip arthroscopy with femoral osteoplasty, limited acetabular rim trimming, microfracture procedure to the edge of the acetabulum, acetabular labral reconstruction, and capsular closure.

46. Dr. White’s preoperative diagnosis was, “Left hip mild hip dysplasia with lateral center edge angle of 28 degrees and cam morphology of the proximal femur, with a history of probable hip subluxation and labral tear.”

47. Dr. White’s postoperative diagnosis included the following:

- Cam-type femoral acetabular impingement;

- Indentation on femoral head medial to the head and neck junction consistent with probable previous subluxation injury;

- Mild hip dysplasia with underdevelopment of the acetabulum;

- Extensive tearing of the acetabular labrum with poor quality labral tissue;

- Full-thickness buckle injury to the cartilage on the edge of the acetabulum consistent with a grade 4 type of cartilage delamination; and

- Joint instability in the peripheral compartment from deficient labrum.

Expert Opinions

48. Dr. White was deposed on January 21, 2015, and testified as an expert in hip surgery. Dr. White treats hips exclusively and remarked that the last ten years in the field have been marked by rapid advancements in treatment. Dr. White opined:

    - Claimant had preexisting CAM-type impingement and dysplasia which predisposed her to a torn labrum with even a low energy injury.

    - Claimant had sustained a rotational injury while pushing a patient, and that her history and exam findings were consistent with the occupational relationship described. Ninety percent of labral tears result from femoral acetabular impingement which Claimant has.

    - Claimant met the criteria for surgery in the AMA Guides because she had functional limits after eight weeks of treatment, and he was satisfied that Claimant would benefit from the arthroscopic procedure.

    - The delay in Claimant's surgery harmed Claimant because generally the longer a person has a dysfunction; the harder it becomes to rebalance their muscles. Also, in theory, an increase in a labral tear results in a more severe cartilage injury, which in turn leads to arthritis.

    - The surgery he recommended would not address Claimant's dysplasia, but would reshape the femur and repair her labrum.

    - Regarding the surveillance video, Dr. White explained that "people can cover/compensate for their disability where it is mandated." He also stated, "I do not, nor will I ever, use video surveillance to determine whether or not someone needs surgery or not."

    - Pain is subjective and Claimant's pain complaints fell within the bell-curve he would expect.

49. Dr. O'Brien testified as an expert in orthopedic surgery by depositions dated July 15, 2015, and September 18, 2015. He no longer performs surgery, but performed approximately 60 hip arthroscopies during his career, the last in 2013. Dr. O'Brien never performed the type of surgery Dr. White performed on Claimant. Dr. O'Brien opined:

- Claimant has congenital problems, specifically a too-shallow acetabular cup, which has caused the loss of cartilage making Claimant more susceptible to pain with a low energy injury. The loss of cartilage also caused Claimant's labrum to disintegrate and subchondral cysts to form over time.

- Claimant suffers from arthritis which is her main pain generator, contrary to the opinion of Dr. White that her torn labrum was her man pain generator.

- Nonorganic findings mean the absence of sustained effort or the absence of anatomic or physiologic explanation for an exam finding.

- Claimant's "end of healing" occurred when Dr. Hsin found exaggerated pain, and treatment of nonorganic pain is never effective.

- Dr. White's opinion that labral tears are painful is unfounded and unscientific.

- With respect to subluxation, the April 2014 MRI did not show an indentation of the femoral head, and there was no evidence of bruising. Also, Dr. White failed to substantiate his finding that Claimant experienced subluxation while Claimant was under anesthesia during her surgery and had not provided him intraoperative photos showing the femoral head indention. However, Dr. O'Brien testified that dislocating a hip is an "amazingly vigorous undertaking."

- All of the pathology Dr. White wanted to address in surgery was preexisting and degenerative. The surgery suggested would not be successful.

- Claimant's mechanism of injury, which Dr. O'Brien understood to be twisting while positioning a chair with a person in it, could not cause Claimant's injury because the force was insufficient to cause an injury and that Claimant's hip was biomechanically "bankrupt" ten years earlier.

- The delay in surgery did not make the procedure more difficult because the degenerative process had been life-long and a delay of a number of months would not affect the surgical outcome.

50. Dr. White submitted a final report on August 19, 2015, in response to Dr. O'Brien's trial testimony. He opined that pain associated with labral tears is equal to the pain associated with end stage osteoarthrosis. Contrary to Dr. O'Brien's opinion, Claimant did not have osteoarthritis evidenced by x-ray and intraoperative observation. Dr. White stated, "Quite possibly, if we would have had the opportunity to perform the hip arthroscopy on her sooner the degree of delamination would have been significantly less."

51. Dr. White opined that Claimant experienced a subluxation event when she was "pushing in the resident" because she had immediate pain and intra-operatively she "had an indentation over the anterior aspect of the femoral head consistent with a subluxation event."

52. With respect to the surveillance video, Dr. White stated, "I think this is cruel. I do not think that it is a measure at all of reality."

53. Based on the totality of the evidence, the ALJ finds Claimant not to be a credible historian. She reported numerous and inconsistent mechanisms of injury. To the extent some involved a dining chair sticking on carpet in the dining room, Claimant presented no persuasive evidence that the dining room was carpeted, and a video of the dining room taken shortly after Claimant's alleged injury shows smooth, hard surfaced flooring, not carpet.

54. Based on the totality of the evidence, the ALJ finds Claimant not to be credible in her reports to medical providers. She was found to have significant pain behaviors, nonorganic pain, and indicated that Dr. O'Brien was hurting her leg during an exam even when he was not touching her leg. In addition, Claimant's behavior observed on surveillance was inconsistent with her presentation with medical providers and while at work. Her behavior observed on surveillance was also inconsistent with the need for any work restrictions.

55. Based on the totality of the evidence, the ALJ credits the opinions and testimony of Dr. O'Brien that Claimant's hip pathology as seen on MRI was degenerative in nature and pre-existed the industrial injury.

56. Based on the totality of the evidence, the ALJ finds that Claimant's labral tear was not caused by an acute injury. The ALJ also finds that the labral tear was the result of chronic degeneration. As such, the ALJ finds and determines that the labral tear was not caused by the work incident of February 22, 2014. In so finding, the ALJ credits the testimony of Dr. O'Brien and finds his testimony that Claimant's hip pathology was degenerative in nature to be more persuasive than the testimony of Dr. Hsin and Dr. White on this issue.

57. Dr. O'Brien opined that there was no indication to proceed with an arthroscopic surgery – recommended by either Dr. Hsin or Dr. White –

because there was no causal relationship between Claimant's minor hip strain and the degenerative changes in her hip that required surgery. Dr. O'Brien persuasively testified that the labral tear was not caused by the work incident of February 22, 2014 but rather was the result of degeneration over many years. Dr. O'Brien further testified that the proposed surgery was directed at repairing not the injury arising out of the February 22, 2014 incident – the hip strain – but rather it was directed at repairing pathology that pre-existed the work injury. The ALJ finds Dr. O'Brien's opinions on this issue most persuasive.

58. The ALJ finds that Claimant did not meet her burden of proving it more likely true than not that her labral tear was caused by the work injury of February 22, 2014.

59. Because the work injury did not cause the labral tear, the ALJ finds Claimant has not proven by a preponderance of the evidence that the left hip arthroscopy aimed at repairing the labral tear is causally related, reasonable, or necessary to cure the effects of the February 22, 2014 work injury.

60. Based on the totality of the evidence, the ALJ finds Claimant has not proven by a preponderance of the evidence that she is entitled to temporary indemnity benefits between August 22, 2014 and October 2, 2014.

Thus, the ALJ need not address the issue of average weekly wage.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The ALJ must assess the credibility of the witnesses and the probative value of the evidence to determine whether the Claimant has met his/her burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

As found, Claimant is not a credible historian, nor is she credible in her reports to medical providers. As found, Claimant's testimony regarding her levels of function was inconsistent with her presentation on surveillance. As the finder of fact, the ALJ finds that Claimant's testimony regarding her levels of function to be not credible or persuasive.

ALJ Has Jurisdiction to Decide Whether the Requested Treatment is Reasonable, Necessary and Causally Related to the Industrial Injury

A lack of procedural compliance with regard to a prior authorization request pursuant to Rule 16-10 will not defeat the Rule's purpose to focus on reasonableness and necessity. Specifically, in *Lichtenberg v. J.C. Penney Corporation*, the Panel found that "although the rule refers to 'authorization,' [the courts] have previously noted that [Rule 16]'s purpose is to establish the reasonableness and necessity of treatment provided by the authorized treating physician." W.C. Nos. 4-814-897 & 4-842-012 (I.C.A.O., Jul. 19, 2012). Therefore, Rule 16 "should not be construed to deprive the ALJ of jurisdiction to resolve the parties' dispute" regarding these issues arising under the Act. *Id.* As a result, the Panel found in *Lichtenberg*, that procedural noncompliance with Rule 16-10 does not preclude an ALJ from reviewing whether the requested treatment was appropriate under the Act. *Id.*

Consequently, regardless of whether Respondents failed to timely or properly file its contest of Dr. Hsin's request under Rule 16, the ALJ may decide whether the underlying disputed medical treatment is reasonably, necessary and causally related to the industrial injury. § 8-47-107, C.R.S. Because this jurisdiction survives Rule 16, the

failure to procedurally comply with Rule 16 cannot render a treatment automatically "authorized" under Rule 16-10(E) where the disputed treatment is not reasonable, necessary or causally related to the industrial injury. *See Lichtenberg*, W.C. Nos. 4-814-897 & 4-842-012. This ALJ retains jurisdiction to determine whether the underlying disputed medical treatment is reasonable, necessary, and causally related to the work injury.

Claimant Failed to Prove that the Hip Arthroscopy was Reasonable, Necessary, or Causally Related to the Industrial Injury

Regardless of the filing of an admission for medical benefits or an order containing a general award of medical benefits, respondents retain the right to dispute liability for medical treatment on grounds the treatment is not authorized or reasonably necessary. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Indus. Comm'n*, 723 P.2d 749 (Colo. App. 1986). The filing of an admission does not prevent respondents from contesting whether a claimant is in need of any continued medical treatment as a result of the compensable injury. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (I.C.A.O., Feb. 12, 2009). Respondents remain free to dispute the cause of the need for medical treatment, and respondents' election to do so does not shift the burden of proof away from the claimant. *See Snyder,* 942 P.2d 1337; *Velarde v. Sunland Construction*, W.C. No. 4-412-975 (I.C.A.O., Dec. 4, 2001). This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *Cf. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990) (filing of admission does not vitiate respondents' right to litigate disputed issues on a prospective basis).

It is the claimant's burden to establish entitlement to medical treatment and he/she must do so through a preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant's MRI established that her hip pathology was degenerative and not caused by the minor hip strain that occurred on February 4, 2014. Because the labral tear was found not to have been caused by the work injury, it follows that the need for surgery to repair the labrum is not causally related to the work injury. In so finding, the ALJ credits the testimony of Dr. O'Brien and found his testimony to be more persuasive than that of Drs. White or Hsin. In particular, the ALJ finds the following persuasive:

- Intraoperatively, the labrum was shown to have been disintegrated and eroded, which Dr. O'Brien credibly testified would have occurred over a long period of time;
- Credible testimony that Claimant's hip pathology was the result of her congenital hip dysplasia rather than an acute incident; and

- Credibly testimony that the MRI did not show evidence of any acute subluxation injury, including, but not limited to, bruising or indentation on the femoral head.

As such, Claimant has not established, by a preponderance of the evidence, that the left hip arthroscopy recommended by Drs. Hsin and White was causally related, reasonable, or necessary to cure and relieve the effects of the February 22, 2014 work injury, if any. Consequently, Claimant's request for this treatment is denied and dismissed.

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ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for surgery (performed by Dr. White) is not reasonable, necessary, or causally related to the admitted injury. Claimant's request for surgery is denied and dismissed with prejudice.

2. Claimant's request for temporary indemnity benefits between August 22, 2014 and October 2, 2014 is denied and dismissed with prejudice.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 12, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether respondents have overcome the Division-sponsored Independent Medical Examination ("DIME") physician's finding that claimant's neck condition is causally related to claimant's admitted March 6, 2014 workers' compensation injury by clear and convincing evidence?

- The parties stipulated at the commencement of the hearing that if respondents are successful in overcoming the DIME physician's finding regarding the causal connection of claimant's neck condition to his work injury, claimant would be at maximum medical improvement ("MMI") as of March 17, 2014 with a 0% impairment for the admitted injuries to claimant's lumbar spine and right wrist.

FINDINGS OF FACT

1. Claimant was employed by employer as a recreational basketball referee. Claimant testified that in addition to his work as a basketball referee, he also works as a baseball and softball umpire. Claimant testified that while working as a basketball referee for a youth game on March 6, 2014, he tossed the ball to begin the basketball game, back up and tripped over a child that was on one of the teams playing. Claimant testified he fell to the ground on his back and fell on his right wrist.

2. Claimant sought treatment following his injury with Dr. Lorah on March 7, 2014. Claimant reported he tripped over a child while refereeing a basketball game and fell. Claimant was diagnosed with a right wrist sprain and a low back sprain. Dr. Lorah recommended claimant use a splint for his wrist and treat with ice and rest. Dr. Lorah prescribed medications for claimant' back including naprosyn, flexeril, and vicodin.

3. Claimant testified he then went to California for a previously planned trip to visit his son, leaving the evening on March 7, 2014.

4. After claimant returned from his trip, he was evaluated by Dr. Faught on March 17, 2014. Dr. Faught noted claimant's right wrist sprain and low back strain had resolved and discharged claimant from further care.

5. Claimant returned to Dr. Faught on April 1, 2014 with complaints of pain between his shoulders and right triceps pain. Dr. Faught noted that claimant noticed this pain 5 days ago upon wakening and that his pain was worse with tilting his head back. Claimant also reported left triceps pain while shaving. Dr. Faught provided claimant with work restrictions that included no heavy lifting above his shoulders and continued claimant's prescriptions, including the naprosyn, flexerial and hydrocodone.

6. Claimant testified at hearing that when he went to Dr. Faught on March 17, 2014 he was doing great and did not believe he had a neck problem. Claimant testified that he didn't recall specifically if he struck his head on the ground when he fell, but believed that he had. Claimant testified that his medical history of developing pain in his shoulders and left tricep that he reported to Dr. Faught on April 1, 2014 was correct based on his recollection. Claimant testified he felt things were going well with his treatment up until he work up with pain in his shoulders and left arm.

7. Claimant continued to treat with Dr. Faught and was eventually referred for a cervical spine magnetic resonance image ("MRI") on April 15, 2014. The MRI was performed on April 28, 2014 and demonstrated midline protrusion at the C3-C4, C4-C5 and C5-C6 levels with foraminal narrowing on the right at C4-C5 due to bony encroachment.

8. Claimant returned to Dr. Lorah on April 29, 2014 for re-evaluation. Dr. Lorah noted that despite claimant reporting symptoms into his left upper extremities, the MRI did not show significant neural impingement on the left. Dr. Lorah referred claimant to Dr. Hahn for evaluation.

9. Dr. Hahn evaluated claimant initially on May 9, 2014. Dr. Hahn noted that claimant had fallen on March 6, 2014 while refereeing a basketball game and had developed left sided neck pain shortly thereafter. Dr. Hahn noted claimant's symptoms included arm symptoms including pain into claimant's left triceps down in to his arm and including his 4th and 5th digit. Dr. Hahn reviewed the MRI and opined claimant had a C7-T1 disc herniation on the left. Dr. Hahn diagnosed claimant with a C8 radiculopathy secondary to C7 T1 disc herniation. Dr. Hahn recommended an intralaminar epidural steroid injection ("ESI") on the left at the C7-T1 level.

10. Claimant returned to Dr. Lorah on May 14, 2014. Dr. Lorah noted that based on the revised MRI reading, claimant does have an anatomic lesion at the C7-T1 level that would correspond with his symptoms. Dr. Lorah refilled claimant's medications and noted that Dr. Hahn was recommending an injection. Claimant returned to Dr. Lorah on June 4, 2014. Dr. Lorah noted he was again recommending claimant proceed with the ESI and noted claimant had a positive Spurling test on his left. Dr. Lorah refilled claimant's prescription medications

11. The injection was eventually performed on June 10, 2014.

12. Following the ESI, claimant returned to Dr. Lorah on June 27, 2014. Dr. Lorah noted some improvement with regard to his numbness and weakness following the injection. Dr. Lorah recommended claimant consult with Dr. Krauth regarding a neurosurgical consultation.

13. Claimant was evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth noted that claimant reported he fell during a basketball game resulting in some pain in the base of his neck. Dr. Krauth noted that over the ensuing 24-48 hours, his pain localized under his left scapula and was piercing and radiating down the left arm into the fourth

and fifth fingers of the left hand. Dr. Krauth noted claimant reported that over the next several weeks he was almost incapacitated by constant, boring, interscapular pain radiating down into the arm and hand. Dr. Krauth further noted that he had reviewed the MRI scans and opined that they showed without question a small free fragment of disc in the C8 neuroforamen on the left impinging on the C8 nerve root. Dr. Krauth recommended claimant undergo a second ESI and, if claimant's radicular symptoms persisted, claimant could be a candidate for decompression of the nerve root.

14. Claimant underwent a second ESI on July 8, 2014 and returned to Dr. Krauth on July 15, 2014. Claimant reported the ESI did not help him at all and felt the pain could be worse than when he was initially evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth performed a physical examination and recommended claimant undergo a lateral C7-T1 foraminotomy to decompress his C8 nerve root.

15. Respondents referred claimant for an independent medical examination ("IME") with Dr. Raschbacher on October 27, 2014. Dr. Raschbacher reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Raschbacher noted that when claimant was examined on March 17, 2014, 11 days of the injury claim date, claimant had no complaints at the lumbar spine, the right wrist and presumably no symptoms in his neck. Dr. Raschbacher also noted that the initial radiologic interpretation of the MRI was negative for any herniated disc.

16. Dr. Raschbacher took issue with the report of symptoms noted in Dr. Krauth's records that claimant developed symptoms within 24-48 hours of the fall and recommended denying treatment for the cervical spine as it was not related to claimant's fall on March 6, 2014.

17. Respondents obtained a records review IME with Dr. Rauzzino on December 15, 2014. Dr. Rauzzino reviewed the MRI study and agreed that there was a focal disc protrusion between C7 and T1 on the left which could affect the exiting nerve root. Dr. Rauzzino noted claimant's history of reporting no pain in his neck or arm until his examination on April 1, 2014 and opined that the disc herniation shown on the MRI was not related to claimant's work injury on March 6, 2014.

18. Respondents' filed a final admission of liability ("FAL") on December 23, 2014 admitting for a 0% impairment rating and denying further maintenance medical treatment. Respondents attached a copy of Dr. Faught's March 17, 2014 medical report to the FAL. Claimant objected to the FAL and requested a DIME.

19. Dr. Krauth issued a letter on February 17, 2015 to claimant's counsel in connection with this case. Dr. Krauth noted that he saw claimant in church on Sunday March 16, 2014 and noted that in speaking with claimant following the church service, claimant complained of pain in his neck and left arm. Dr. Krauth indicated in his report that as of March 16, 2014 he came to the realization that claimant was suffering from an acute cervical radiculopathy on the left.

20. Claimant underwent a DIME with Dr. Shea on April 14, 2015. Dr. Shea reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Shea noted in his report that when he was seen at Glenwood Medical Associates on March 17, 2014, he did not mention any neck or arm symptoms. Dr. Shea's report further notes claimant developed neck pain, according to the medical records, five days prior to the April 1, 2014 medical appointment.

21. Dr. Shea reviewed the IME reports from Dr. Raschbacher and Dr. Rauzzino that called into question the temporary relationship of claimant's neck symptoms and recommended no further medical treatment to the neck as the symptoms were not related to the March 6, 2014 work injury. Dr. Shea indicated in his report, however, that he considered the cervical injury as part of the original workplace injury for the following reasons: (1) claimant had a very awkward fall on March 6, 2014 when he fell backwards, twisting and landing hard on the right arm; (2) in Dr. Shea's clinical experience, when there is an awkward fall, there can be a delay of symptomatology onset of significant proportions (up to 4-6 weeks after the original accident); (3) Dr. Lorah, who treated claimant immediately after the incident and watched the whole sequence unfold from the day after claimant's falling incident concluded that the neck condition was causally related to claimant's work injury; and (4) Dr. Krauth mentioned seeing claimant on March 16, 2014 and noting that claimant was having difficulty with his left arm on that date.

22. Dr. Shea opined that claimant was not at MMI and recommended further medical treatment to include a return to Dr. Krauth and consideration of a microdiskectomy. Dr. Shea provided claimant with a provisional impairment of 11% whole person and noted that if surgery was not an option, claimant would need maintenance medical treatment including physical therapy and massage.

23. Dr. Rauzzino testified by deposition in this matter consistent with his medical report. Dr. Rauzzino noted that pursuant to the medical records, claimant's symptoms involving his left arm and neck did not develop until approximately March 25, or March 26, 2014. Dr. Rauzzino opined that in his practice, most disc herniations result spontaneously and noted that there does not need to be a traumatic injury for a disc to become herniated. Dr. Rauzzino noted that according to the medical records, claimant did not have symptoms in his left arm and neck as of March 17, 2014 when he was released from care by Dr. Faught. Dr. Rauzzino opined that if claimant's fall had resulted in an acute herniation of his cervical disk, claimant would have presented with symptoms to Dr. Lorah or Dr. Faught in the medical appointments he received after his injury. Dr. Rauzzino opined that claimant's fall on March 6, 2014 did not result in an injury to his cervical spine.

24. The ALJ credits the opinions expressed by Dr. Shea in his DIME report as being reasonable and supported by the medical records entered into evidence. The ALJ finds that the contrary opinions expressed by Dr. Rauzzino and Dr. Raschbacher do not overcome the opinion of Dr. Shea that claimant's cervical spine condition is related to the March 6, 2014 fall at work.

25. The ALJ credits the testimony of claimant at hearing regarding his work injury and the onset of his symptoms to be credible and persuasive and finds that this testimony is consistent with the accident history he provided to Dr. Shea and relied upon by Dr. Shea in formulating his opinions regarding the cause of claimant's cervical spine condition.

26. The ALJ therefore determines that respondents have failed to overcome the finding of Dr. Shea that claimant's cervical condition is related to his March 6, 2014 work injury by clear and convincing evidence.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence that claimant's neck condition is causally related to the admitted March 6, 2014 work injury. As found, Dr. Shea's opinion that

claimant sustained a compensable injury to his neck and that claimant is not at MMI for his work injury is found to be credible and persuasive.

6. The ALJ considers the contrary opinions expressed by Dr. Rauzzino in his report and testimony, but finds the opinions expressed by Dr. Shea to be more credible and persuasive and concludes that respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence.

ORDER

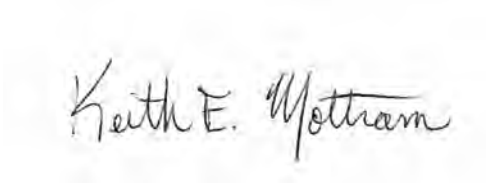
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury, including the treatment to claimant's cervical spine.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 13, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-950-181-01

ISSUES

1. Whether Claimant suffered a compensable injury on December 11, 2013.

2. Whether Claimant was an employee or independent contractor of Employer on December 11, 2013.

3. Whether Employer was Claimant's statutory employer on December 11, 2013.

STIPULATIONS

The parties reached the following stipulations to be entered if the claim is found compensable: the medical treatment Claimant received in relation to his injury was reasonable and necessary; Claimant's average weekly wage at the time of his injury was $1200; Claimant would be entitled to temporary total disability from December 11, 2013, to the present and until terminated by statute; and Respondents would be entitled to an offset for any benefits Claimant receives from Social Security Administration.

PROCEDURAL HISTORY

An initial hearing in this matter took place on September 18, 2014. The ALJ issued an order on November 18, 2014. The matter was appealed. On May 4, 2015 the Industrial Claims Appeals Office (ICAO) issued a remand. On May 11, 2015 ICAO issued a corrected order of remand. On August 25, 2015 the ALJ issued a procedural order limiting the issues to be heard at the remand hearing consistent with the corrected order of remand. On September 11, 2015 Respondents filed a motion for summary judgment. On September 21, 2015 the motion for summary judgment was denied. The remand hearing was set for October 5, 2015. On October 1, 2015 Claimant filed an opposed motion for extension of time to commence hearing. On October 2, 2015 Claimant's request was denied. The matter proceeded to remand hearing on October 5, 2015.

REMAND HEARING

The hearing pursuant to the remand order commenced on October 5, 2015. At the outset, Claimant's renewed request for continuance was denied. Claimant was given one week following the hearing to submit any proposed exhibits that he believed were relevant to the limited issues on remand. Respondents were provided one week following Claimant's submissions to respond with any objections. Also at the outset of hearing, Respondents' objection to the proceeding was noted and overruled.

Respondents requested a standing objection to the proceeding which was noted. The ALJ understood the Respondents' position, but given the procedural posture of the case, the ALJ was not inclined to ignore the remand order. The ALJ noted on the record that at the initial hearing, the evidence was not limited by the ALJ in any fashion. The ALJ noted that any paucity of evidence from the first proceeding was due to the parties' failure to present the evidence, not due to limitations on evidence imposed by the court. At the initial proceeding, the evidence established a document signed by both parties that created a rebuttable presumption that Claimant was an independent contractor. At the initial hearing, the Claimant failed to present sufficient evidence to rebut this presumption. Nonetheless, ICAO ordered a new evidentiary proceeding take place and provided Claimant with an opportunity to present additional evidence to again attempt to rebut the presumption of the relationship between the parties. The ALJ noted that the order of ICAO would be followed over Respondents' objection that this was an opportunity to provide Claimant a "second bite at the apple," and reminded the parties that the evidence at the remand hearing would be limited consistent with the remand order.

FINDINGS OF FACT

1. Claimant worked for Employer as a service technician from June of 2008 until March of 2009 when he was laid off.

2. In early March of 2009, Claimant and 16 other service technicians were laid off. Claimant and 8 other service technicians were offered the opportunity to provide services for Employer as independent contractors.

3. When Claimant was informed that he was being laid off, Claimant decided to establish his own business, CP Window Service. Claimant accepted Employer's offer to work as an independent contractor through his new business, and began performing service for Employer under his new business CP Window Service on March 12, 2009.

4. Claimant had experience installing and repairing windows and doors and at this time he could have chosen to seek employment elsewhere. Instead, Claimant made the voluntary decision to accept Employer's offer to perform work as an independent contractor and made the voluntary decision to register and create his own company.

5. On March 4, 2012 Claimant registered a "statement of trade name of an individual" with the Secretary of State listing his business as CP Window Service. Claimant also obtained a W-9 listing an employer identification number for CP Window Service. Claimant also obtained general liability insurance for CP Window Service.

6. Claimant also purchased a truck and tools for his business, CP Window Service. The truck and tools were purchased from Employer. Claimant was responsible for the truck and tools as well as any repairs/replacements to them after he purchased them. Claimant also obtained a computer, phone, and paid for necessary

internet and phone fees and costs for his business. Claimant also on all of his filings listed a business address and phone number separate from that of Employer's.

7. While Claimant was registering and setting up his business, he continued to work for Employer as their employee and did so until March 12, 2009.

8. On March 12, 2009 Claimant attended a meeting with Employer where Claimant chose to accept Employer's offer to perform services for Employer as an independent contractor.

9. Claimant signed the "Master Service Subcontract Agreement" to reflect his acceptance of independent contractor work. This document was notarized. Claimant also presented to Employer the general liability insurance, W-9, and employer identification number that he had obtained for his new business, CP Window Service.

10. At the March 12, 2009 meeting, Claimant signed a rejection of worker's compensation coverage. Claimant was aware that he was responsible for providing or purchasing his own worker's compensation coverage for his business CP Window Service and that he could purchase insurance to cover himself. He chose not to purchase such insurance. *See* Exhibit 8.

11. The "Master Service Subcontract Agreement" signed by Claimant and Employer on March 12, 2009 specifically noted that Claimant was accepting an offer to work as an independent contractor for Employer. It provided that Claimant was not restricted from working for any other companies and was free to accept or refuse any work offered to him by Employer. It noted that Claimant was to perform the services according to the specifications provided by Employer and that all services were to be provided in accordance with all manufacturer and industry standards, as well as laws and regulations. The agreement indicated that Claimant was required to furnish all his own tools but that Employer would provide all the required service parts to Claimant. The agreement indicated that Claimant would be paid per job and that he had to submit an invoice to Employer listing which jobs he had accepted and completed prior to being paid for his services. The agreement also advised Claimant that he was responsible for payment of all federal, state, and local taxes and had to acquire and maintain his own general liability, auto, and workers' compensation insurance. The agreement stated that Claimant was required wear proper attire at all times while performing services for Employer. The agreement also stated that Employer could not terminate the agreement during Claimant's performance of a service unless Claimant breached or violated the agreement. The agreement also provided a termination section stating that Employer may terminate the agreement without liability to Claimant at any time and for any and no reason by giving 30 days written notice to Claimant, as well as providing that Claimant could terminate the agreement by giving 30 days written notice to Employer. *See* Exhibit 8.

12. At the March 12, 2009 meeting Claimant also signed a subcontract agreement form as an attachment to the "Master Service Subcontract Agreement." The

attachment agreement specifically stated that Employer required all its subcontractors to be covered by workers' compensation insurance. The agreement noted that Employer was aware that independent contractors had the right to reject workers' compensation coverage, but noted that it was not Employer's intent to be responsible for the workers' compensation claims of its subcontractors. The agreement noted, therefore, that it was the responsibility of each individual subcontractor to have workers' compensation coverage. The agreement also indicated that if Claimant was an independent contractor or sole proprietor and did not have workers' compensation insurance, then he agreed to complete a declaration of independent contractor status. Claimant signed this document. *See* Exhibit H.

13. Another attachment to the Master Service Agreement Claimant signed by Claimant on March 12, 2009, was an "Independent Contractor Addendum for Workers' Compensation Coverage." The addendum indicated that Claimant, as an independent contractor, had to provide proof of workers' compensation insurance coverage. It also noted, however, that sole proprietors were not required to carry workers' compensation coverage. In that situation, Claimant was required to sign a subcontract agreement and an independent contractor/statutory employer form. *See* Exhibit H.

14. The day following this meeting and on March 13, 2009, Claimant had the form noting his rejection of workers' compensation benefits notarized. *See* Exhibit 8.

15. On March 13, 2009 Claimant signed a form titled "Declaration of Independent Contractor Status." The form advised Claimant that as an independent contractor he was not entitled to any workers' compensation benefits in the event he was injured while performing services for Employer. The form advised Claimant that he was obligated to pay all federal, and state income taxes on any money he earned while performing services for Employer. It also advised Claimant that he would be required to provide workers' compensation insurance for any workers that Claimant hired. These advisements were listed on the form in bold, underlined, capital letter print. Claimant signed the form and it was notarized by a notary public. *See* Exhibit H.

16. On March 13, 2009 Claimant also signed and filed with the Department of Labor and Employment a "Rejection of Coverage by Partners and Sole Proprietors Performing Construction Work on Construction Sites." The form noted that Claimant had a registered trade name and was the sole proprietor of CP Window Service. Claimant checked a box on the second page of the rejection form indicating that he was electing to reject workers' compensation insurance coverage based on C.R.S. § 8-41-404. The section where Claimant marked that he was rejecting coverage noted in bold print that "[b]y signing this form, you are acknowledging your rejection of *all benefits* under the Workers' Compensation Act." The section also required Claimant to confirm that he was rejecting coverage voluntarily. Again, Claimant signed this document. *See* Exhibit A.

17. On July 20, 2009 Claimant filed a second rejection of workers' compensation coverage with the Department of Labor and Employment. Again the

rejection indicated that Claimant was the sole proprietor of CP Window Service and that he was knowingly and voluntarily rejecting all benefits under the Workers' Compensation Act and was signed by Claimant. *See* Exhibit B.

18. After March 12, 2009 when Claimant and Employer both signed the "Master Service Subcontract Agreement," Claimant, and CP Window Service, became one of Employer's independent contractors. Claimant argues his employment did not change and that he became an independent contractor in name only. However, several changes occurred after March 12, 2009.

19. Prior to March 12, 2009 and while employed as an employee, Claimant was paid by the hour. Claimant was provided a Pella uniform that he was required to wear. Claimant was provided a Pella vehicle to drive as well as a Pella computer to use. Claimant was also provided Pella tools to use to perform service work.

20. After March 12, 2009, Claimant's business, CP Window Service was paid a contract rate per job. Claimant was offered jobs on a weekly basis that he was free to accept or decline. Claimant was able to wear whatever clothing he chose as long as it appeared professional. Claimant used his own vehicle that he purchased specifically for his business CP Window Service. Claimant also used his own tools that he purchased specifically for his business CP Window Service. Claimant also used his own computer for his business CP Window Service. Claimant had to pay for and provide his own internet and phone services and he maintained his own business address and phone listing separate from Employer's.

21. After March 12, 2009 Claimant was not an hourly employee performing whatever jobs Employer told him to perform at a set hourly rate. Rather, after March 12, 2009 Claimant was offered jobs by Employer. The jobs were offered at a set price per job. Claimant was able to accept all the jobs offered, some of the jobs offered, or none of the jobs offered and could accept or reject the offers as he saw fit.

22. After March 12, 2009 Claimant would load a 'job spec and allowance' form from Employer. The form listed the number of service trips being offered to him, the number of chargeable service hours scheduled, and the number of warranty service hours scheduled. The form also listed the total Pella service contractor amount that Claimant could bill for the offered jobs. Claimant could either accept or reject the jobs offered. If he accepted, Claimant signed the bottom of the form, where it stated subcontractor signature. Directly above subcontractor signature, the form stated: "I accept the job specified above. I agree to service all products in accordance with PWD specifications. I agree to invoice upon job completion, rendering the order number above. The signed worksheet must be returned before any work commences. Any changes not contained herein will not be paid without an approved change order." *See* Exhibit 7.

23. After March 12, 2009, Claimant signed these 'job spec and allowance' forms accepting jobs offered by Employer. Claimant testified that he was not able to

reject some jobs and accept others. This testimony contradicts testimony provided by Mr. McHugh and is inconsistent with the written agreement between the parties and is not found persuasive. Claimant was free to accept or reject jobs as he saw fit.

24. After March 12, 2009, Claimant was no longer paid hourly or personally. Rather, Claimant started being paid per job at contracted rates for jobs that were offered to him and that he accepted. Payment and checks were issued to CP Window Service after CP Window Service submitted invoices to Employer outlining the jobs that had been accepted and completed. Claimant began submitting weekly invoices from CP Window Service to Employer. The amount of time that it took to complete a job varied from appointment to appointment and after accepting or rejecting the offer and the contract rate per job, Claimant billed for the jobs he had completed. Independent contractors, including Claimant, were free to bill weekly, monthly, etc. as they saw fit.

25. After March 12, 2009 Employer did not take out any withholdings from CP Window Service's checks, nor did they pay any taxes for Claimant or his business. Employer no longer issued W-2's to Claimant personally, but issued 1099's to CP Window Service.

26. After March 12, 2009, Claimant was not restricted from working for other companies. Although the "Master Service Subcontract Agreement" stated that Claimant was not restricted from working for other companies, Claimant made the independent business decision to work only for Employer.

27. Employer was not aware, nor should they have been reasonably aware that Claimant was working exclusively for Employer based on the number of jobs that Claimant was performing or based on their working relationship with Claimant. Employer had other independent contractors who performed more service work than Claimant performed for them and that earned more money than Claimant. Employer would not reasonably have known based on the jobs Claimant accepted that he was not also working or accepting jobs elsewhere. Employer encouraged all their independent contractors, including Claimant, to work elsewhere in addition to performing work for Employer. *See* Exhibit N, Exhibit O.

28. Claimant was able to hire his own employees to assist him with the jobs offered by Employer. Some of Employer's independent contractors had assistants that they hired to help with work and some worked as individuals. Claimant made the independent business decision to work as an individual and to not hire any employees for CP Window Service, although he was aware of other contractors for Employer who had decided to hire employees.

29. After March 12, 2009, Claimant was able to work any days that he wished or reject any jobs that he could not perform. As Claimant requested regular job offers from Employer, if Claimant wanted a day off or to go on vacation, Employer asked that Claimant advise them one week ahead of time that he would not be accepting any job offers for that period of time he wanted to take off. Employer had no control over which

days Claimant chose to work or how many days he wished to take off of work.

30. When Claimant accepted job offers from Employer, Employer sent Claimant a list of the jobs scheduled for the day of work that Claimant had accepted with customers' names and phone numbers attached. Claimant called the customers directly from his own business phone to schedule a time frame during that day for him to arrive at their home and perform the service work. Employer listed customers' preference on the list, but ultimately, Claimant was able to set the day's schedule as Claimant saw fit.

31. After March 12, 2009, Employer occasionally provided materials necessary for service work that could include, depending on the job, extension ladders, scaffolding, and silicone. After March 12, 2009, Employer did not provide any tools, suction cups, or glass cutters as Claimant had purchased those with the truck that he purchased for his business.

32. To get the required materials for the jobs Claimant accepted, Claimant went to Employer's warehouse building. The warehouse was staffed by three employees of Employer who provided Claimant the needed materials for Claimant's accepted service jobs. On occasion, if the warehouse was understaffed, Claimant entered the warehouse and gathered his own materials.

33. After March 12, 2009, Employer provided minimal training once per year where a person from Pella Manufacturing came to Colorado to go over new product lines and discuss problems with current products or installation. All the independent contractors who performed service work for Employer were invited and able to attend if they wished. Claimant attended these annual trainings.

34. Prior to March 12, 2009 Claimant underwent initial training when hired as an employee of Employer in Arizona. After March 12, 2009 Claimant did not undergo any initial training or training other than attending the once per year Pella Manufacturing training.

35. The quality of work Claimant performed inspected by Mike Schlaughter who occasionally rode with different service technicians to inspect their work. Mr. Schlaughter was an employee of Employer. Mr. Schlaughter did not direct how Claimant performed service jobs. Claimant worked independently without direction or oversight in performing his window and door service work from March 12, 2009 until his injury in 2013, with only occasional inspection by Mr. Schlaughter. Employer did not control or direct how Claimant performed his work.

36. Claimant's business operations were never combined in any way with Employer's business operations.

37. After March 12, 2009, the service work performed by Claimant and the 8 other independent contractors accounted for less than three percent of Employer's total

business operations.

38. After March 12, 2009 Claimant performed work under his business name CP Window Service. Claimant renewed this trade name with the Secretary of State in March of 2010 and March of 2011. In April of 2012 Claimant filed a new "Statement of Trade Name of an Individual" with the Secretary of State as he had missed the renewal deadline, and again listed his trade name as CP Window Service. Claimant again renewed this trade name in April of 2013. Each time Claimant registered his business, he provided a business address and telephone number. *See* Exhibit K.

39. Employer issued CP Window Service IRS 1099 forms at the end of each year, documenting the amounts paid to CP Window Service. In 2012, CP Window Service was paid $72,185.49. In 2013, CP Window Service was paid $66,152.47. *See* Exhibit J.

40. After March 12, 2009 and in 2009, 2010, and 2012, Claimant filed tax returns for his business CP Window Service. Claimant noted on his taxes after March 12, 2009 that he was self-employed. He listed a business address. After March 12, 2009, Claimant listed deductions for car and truck expenses of his business and insurance expenses of his business. Claimant noted that he placed his vehicle in service for business purposes on March 9, 2009. Claimant also claimed a second vehicle that was used more than 50% of the time for his business was placed into service for business purposes on March 15, 2010 and noted that he used both vehicles for his business, with one vehicle reported as used 82.24% of the time for business/investment use, and the other vehicle being used 100% of the time for business/investment use. *See* Exhibit J.

41. On December 11, 2013, Claimant was severely injured performing a job. Claimant fell out of a second story window onto a concrete patio. As a result of the fall Claimant has been rendered a complete paraplegic.

42. Claimant's medical records following his injury refer to his employment in several places.

43. On December 15, 2013, Claimant reported to his examining physicians that he did contract work. *See* Exhibit E, Exhibit F.

44. On December 17, 2013 Claimant informed a case manager at Swedish Medical Center that he was self-employed at the time of his injury and that he was working as an independent contractor for the job he was on. Claimant also informed the case worker that there was no possibility of him receiving workers' compensation coverage. *See* Exhibit E.

45. On December 27, 2013, Claimant informed the clinical liaison at Craig Hospital that at the time of his injury, he was working as an independent contractor for Employer. *See* Exhibit F.

46. On January 8, 2014, claimant informed Jeffrey Berliner, M.D., that at the time of his accident, he was working as an independent contractor for Employer. *See* Exhibit F.

47. On January 13, 2014 Claimant's admission form for Swedish Medical Center listed that Claimant was self-employed. *See* Exhibit E.

48. In January of 2013 Claimant applied for Social Security Disability benefits and listed his employment history as self-employed window installer from January of 2009 through December of 2013. *See* Exhibit F.

49. Claimant filed a claim for workers' compensation on May 5, 2014 and argues he is an employee of Employer not an independent contractor. Respondents filed a notice of contest on May 28, 2014 denying the claim and argue Claimant was an independent contractor and is not an employee or a statutory employee.

50. The testimony of Employer representative Mr. McHugh is found credible and persuasive. The testimony of Claimant, overall, is not found as credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals*

Office, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Independent Contractor v. Employee

Section 8-40-202(2)(a), C.R.S. provides that an individual performing services for pay is deemed to be an employee, "unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The putative employer may establish that the claimant was free from direction and control and engaged in an independent business or trade by use of a written document, or by proving the presences of some or all of the nine criteria set forth in § 8-40-202(2)(b)(II), C.R.S.

In this case the parties agree that Claimant performed services for pay for Employer but there is a dispute as to whether the services were performed as an independent contractor or as an employee. If Respondents establish that Claimant is an independent contractor, then Claimant has no cause of action and is not entitled to benefits under the Workers' Compensation Act. *See* § 8-41-401(3), C.R.S.

A document may satisfy Respondents' burden to prove Claimant's status as an independent contractor and that Claimant is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of his services. A document creates a "rebuttable presumption of an independent contractor relationship between the parties where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship." *See* § 8-42-202(2)(b)(IV), C.R.S. As found above, a document containing the above information required by statute was signed by both Claimant and Employer on March 12, 2009 and was notarized. In this case, Respondents have initially established through this document that the relationship presumed between the parties is that of independent contractor and Employer. The document signed by both Claimant and Employer creates a presumption that Claimant was engaged in an independent trade, occupation, profession, or business and that he

was free from control and direction in the performance of his services. The burden in this case thus shifts to Claimant to overcome the rebuttable presumption that he was working as an independent contractor. Claimant can overcome the rebuttable presumption by proving as a matter of law that he was not free from control and direction in the performance of service and was not customarily engaged in an independent trade or business. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO August 26, 2005). In this case, Claimant has failed to present sufficient evidence to rebut the presumption of the relationship status.

Claimant failed at the initial hearing to present sufficient evidence to rebut the presumption that he was working as an independent contractor for Respondents. Claimant was not limited in the evidence he was allowed to introduce to attempt to rebut the presumption. After the initial hearing, the ALJ ruled that Claimant had failed to present sufficient evidence to rebut the presumption of an independent contractor relationship. The ALJ also ruled that the relationship between the parties changed greatly after March 12, 2009 and rejected Claimant's argument that the relationship changed in name only. After this ruling, and despite Claimant's failure to present sufficient evidence to rebut the presumption of the relationship status created by the written document, the matter was remanded to allow Claimant an additional evidentiary proceeding. After remand hearing, the ALJ concludes, again, that Claimant has failed to present sufficient evidence to rebut the presumption that he was working as an independent contractor at the time of his injury. Claimant has failed to show, by preponderant evidence, that he was not free from control and direction in the performance of his services and he has also failed to show that he was not customarily engaged in an independent trade or business. Rather, after weighing all the evidence and testimony from both the first hearing and the remand hearing, the ALJ once again concludes that Claimant was free from Employer's control and direction in performing his service work, and also that Claimant was customarily engaged in his independent window service trade, under his business CP Window Service.

Free from control and direction in the performance of the service

Under § 8-40-202(2)(b)(I);(II), C.R.S., to prove that an individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service and therefore an independent contractor, it must be shown by a preponderance of the evidence that the person for whom services are performed does not:

A. Require the individual to work exclusively for the person for whom services are performed; except that the individual, however, may choose to work exclusively for such person;
B. Establish a quality standard for the individual; except that the person may provide plans and specifications but cannot oversee the actual work or instruct the individual as to how the work will be performed;
C. Pay a salary or an hourly rate instead of a fixed or contract rate;

D. Terminate the work of the individual during the contract period unless the individual violated the terms of the contract or fails to produce a result that meets the specifications of the contract;
E. Provide the individual more than minimal training;
F. Provide the individual tools or benefits; except that materials and equipment may be supplied;
G. Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;
H. Pay the individual personally instead of making checks payable to the individual's business name; and
I. Combine the business operations of the person for whom service is provided in any way with the individual's business operations instead of maintaining all operations separately and distinctly.

The existence of any one of these factors is not conclusive evidence that an individual is an employee, nor does the statute require satisfaction of all nine criteria to prove that the individual is an independent contractor. *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998). When a majority of the factors favor a finding of an independent contractor relationship, there is no legal barrier to finding the claimant was an independent contractor. *Id.* See also *Gerlock v. Stoehr Drive-In Cleaners*, W.C. No. 4-451-606 (ICAO, July 23, 2001). The existence of two of the nine factors does not compel a finding that claimant was an employee. *Nelson, supra*. In the present case, a majority of the factors favor a finding that Claimant was an independent contractor on the date of his injury.

The first factor favors a finding that Claimant was an independent contractor. After March of 2009, Claimant was not required to work exclusively for Employer. This fact is specifically noted in the independent contractor agreement Claimant signed, and was acknowledged by Claimant in his testimony. Claimant was free to perform service work or window work under his business CP Window Service for anyone. However, Claimant chose to work exclusively for Employer and made this independent business decision while operating CP Window Service. Some of the independent contractors that performed work for Employer worked more hours and jobs than Claimant and some worked fewer. Some worked for other Employers and some worked exclusively for Employer. Employer was not aware that Claimant was working exclusively for them nor would they reasonably have been aware based solely on the schedule and number of jobs that Claimant performed since some contractors performed many more jobs than Claimant. Employer had no way of knowing whether or not Claimant was performing similar work for other companies while also performing service work for them. Employer encouraged all of their independent contractors to work elsewhere in addition to the work performed for them. The court has expressly disapproved the notion that the lack of work for someone other than the putative employer is dispositive proof of an employee-employer relationship, and the fact that Claimant did not work for any other company while performing his services as an independent contractor does not require a finding that Claimant was an employee. *Indus. Claim Appeals Off. v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014); *Gould v. Stover, Ecotreck, Dry*

Masters Restoration, Epic Flood, W.C. 4-880-589-03 (ICAO June 26, 2014). Here, although Claimant made an independent business decision to only work for Employer, Claimant was not required to work exclusively for Employer and Employer would not reasonably have been aware that Claimant was working exclusively for them. Respondents explained credibly that many of their independent contractors performed a much larger number of jobs per day and that Claimant could have reasonably been working elsewhere at the same time with the schedule he averaged. Additionally, many contractors worked weekends and Employer had no reason to suspect Claimant was not doing the same and working elsewhere on the weekends.

The second factor favors a finding that Claimant was an independent contractor. Claimant was required to perform his work to industry standards and there was no evidence that Employer oversaw the actual work performed by Claimant or instructed Claimant on how the work was to be performed. Conflicting testimony existed as to whether Claimant's work was ever inspected by Mr. Schlaughter. Even crediting Claimant's testimony that Mr. Schlaughter on occasion rode along with different service technicians to inspect the work being performed, the testimony and evidence leads the ALJ to a conclusion that this was a quality inspection ride along and the evidence failed to establish that Mr. Schlaughter oversaw the work performed or instructed Claimant on how to perform the work. Rather, Claimant picked up materials and went to job sites daily for over 4.5 years by himself and performed the work by himself to industry standards with only occasional inspection and ride along by Mr. Schlaughter. Case law has established that the fact that an independent contractor's final product may be inspected to insure quality does not establish the level of control required to prove that a person is not an independent contractor. *Nelson, supra.*

It is not disputed that after March 12, 2009, Claimant was no longer paid an hourly rate but was paid a fixed contract rate per job that he accepted and completed. After March 12, 2009 Claimant submitted invoices from CP Window Service to Employer outlining and billing for the jobs he had accepted and completed. The third factor also favors a finding that after March 12, 2009 Claimant was an independent contractor.

The fourth factor presented conflicting evidence as to whether or not the work of Claimant could be terminated during the contract period. The Master Subcontractor Service Agreement states both Employer could not and would not terminate Claimant's contract unless Claimant violated the contract or failed to produce a result that met the specifications of the contract and it also provides that Employer may terminate the agreement without liability to Claimant at any time and for any and no reason by giving 30 days written notice to Claimant. The credible testimony of Employer representative was that the contract would not be terminated unless Claimant failed to perform to their expectations. The fourth factor, with conflicting evidence, does not persuade the ALJ either way as to whether Claimant was performing services as an independent contractor or employee.

The fifth factor favors a finding that Claimant was an independent contractor. As

found above, after March 12, 2009 Claimant was not provided with more than minimal training by Employer. Claimant merely attended an optional once a year training when a member of Pella Manufacturing would come to Colorado to go over new products and installation questions. After becoming an independent contractor in March of 2009, Claimant was not provided any training beyond this annual update. This training was minimal.

The sixth factor favors a finding that Claimant was an independent contractor. After March 12, 2009 Employer no longer provided Claimant with benefits or tools. Before March 12, 2009 and while an employee, Claimant was provided a company vehicle, company computer, and some tools. When Claimant decided to create his own business and accept the offer of becoming an independent contractor for Employer, Claimant purchased his own vehicle for his business, purchased his own tools for his business, had to replace his own tools, had to purchase his own computer for his business, and had to procure insurance for his business. Claimant continued to be provided materials necessary for the jobs he accepted that included, on occasion, scaffolding, scaffolding and ladders. The sixth factor states that it must be shown that the person for whom services are performed does not provide tools or benefits, but can supply materials and equipment. Here, after March 12, 2009 Employer not longer provided Claimant with any tools or benefits, but merely provided materials on occasion. Thus, the sixth factor also favors a finding of an independent contractor relationship.

The seventh factor favors a finding that Claimant was an independent contractor. Employer in this case did not dictate or control the time of Claimant's performance of the work. As found above, Employer offered Claimant jobs for a particular date that Claimant could accept or reject. Claimant was able to accept any or all the jobs offered to him. If he accepted all, Claimant then was able to call the customers for each job he accepted and set up a time window for performance of the job. Claimant was able to schedule these time slots as he saw fit. Although Claimant attempted to accommodate customers' preferences, Claimant was still able to set his own schedule for service. Claimant also had complete control over which jobs he accepted, which days he worked, which days he took off from work, and how many days he wished to accept jobs in any given time period. Claimant was free to work whatever hours he chose and was free to work on other projects for persons other than Employer.

The eighth factor favors a finding that Claimant was an independent contractor. All of the money paid to Claimant after March 12, 2009 was paid to CP Window Service and not to Claimant personally. Employer did not take out any withholdings or taxes from these checks. Claimant, as found above, paid his own business taxes, claimed business deductions, and CP Window Service received 1099s each year from 2009 to 2013 from Employer.

Finally, the ninth factor also favors a finding that Claimant was an independent contractor. There was no persuasive evidence that Employer and Claimant combined business operations in any manner.

After reviewing the nine factors, the ALJ concludes that Claimant has failed to show through the nine factors that he was not free from control and direction in the performance of his services for Employer. Rather, after weighing all nine factors, the ALJ concludes that they support the conclusion that Claimant performing services for Employer as an independent contractor. Consistent with the statutory requirements, the evidence presented at the initial hearing as well as the remand hearing establishes that the nine factors weigh in favor of an independent contractor relationship and therefore prove, more likely than not, that Claimant was engaged in an independent trade, occupation, profession, or business and that he was free from control and direction in the performance of his services at all times after March 12, 2009 and at the time of his injury. The evidence surrounding the nine factors weighs heavily in favor of Respondents and as the putative employer, Respondents have established that the claimant was free from direction and control and engaged in an independent business or trade by proving the presence of most all of the nine criteria set forth by § 8-40-202(2)(b)(II), C.R.S. Claimant thus has failed to rebut the presumption of the relationship status through the nine factors.

Customarily Engaged in an Independent Trade or Business.

Although the written document in this case establishes a rebuttable presumption of an independent contractor relationship and although the nine criteria set forth by § 8-40-202(2)(b)(II) also establishes in this case that Claimant was customarily engaged in an independent trade or business, the ALJ also concludes that Claimant was in fact engaged in an independent trade or business. After examining all relevant factors and the nature of the working relationship between Claimant and Employer, the relationship still is more likely than not that of independent contractor/Employer. Here, Claimant had an independent business address and phone number listed on various documents he filed when initially applying for and later renewing his business name, CP Window Service. Claimant also provided these on various tax forms filed on and after March 12, 2009. Claimant had financial investment in the form of the vehicles he purchased and used for his business (claimed on his tax returns), the computer he purchased for his business, his phone and internet charges he needed for his business, and the liability insurance he chose to purchase for his business. Claimant also purchased and used his own tools in his business. After March 12, 2009 Claimant was able to accept/reject job offers at the contracted prices offered by Employer as he saw fit. Claimant was able to employ others to assist him and to work for CP Window Service if he so chose and other independent contractors performing work for Employer did so. Here, Claimant chose not to take on other customers. Employer did not require or expect this. Employer in this case did not know nor would they reasonably have known that Claimant was working exclusively for them. Based on the number of service jobs performed by Claimant compared to other independent contractors who performed more jobs, Employer did not reasonably know that Claimant was not working elsewhere while Claimant was performing work for them. Based on the working relationship between Employer and Claimant, Employer would have no reason to suspect Claimant was not engaged in an independent business. The invoices submitted by Claimant for his business CP Window Service, the amount of jobs Claimant accepted and performed, and the comparison of Claimant to other contractors performing much higher amounts of jobs would not lead Employer to reasonably believe

Claimant was working exclusively for them. Claimant made this choice, but the decision was made entirely by Claimant and neither expected by Employer nor reasonably known by Employer.

Additionally, Claimant's argument that the relationship changed in name only on March 12, 2009 is not persuasive. The entire nature of the working relationship between Claimant and Employer changed greatly on March 12, 2009. The numerous and significant changes included: Claimant's control of which jobs he performed and accepted; Claimant no longer being paid hourly and personally but being paid at a contract rate to CP Window Service; Claimant submitting invoices under his business name for the work he had completed; Claimant no longer being provided a company car, computer, or tools; Claimant's complete control over which days he worked and accepted jobs as well as how many days he wished to take off; and Claimant's establishment and renewal of his own business entity as well as the tax forms issued to and filed by claimant as a self-employed independent contractor. After March 12, 2009, Claimant was free from the direction and control in the performance of his services and was engaged in an independent trade of window installer for his own company CP Window Service. Claimant has failed to rebut the presumption of an independent contractor relationship established by the master service subcontractor agreement that both he and Employer signed and agreed to. Claimant has been engaged in an independent trade, profession, or business as an independent window and door installer/service technician since March 12, 2009. Therefore, pursuant to § 8-40-202 and § 8-41-401(3) Claimant does not have a cause of action under the Workers' Compensation Act.

Softrock, Longview, and US Dept. of Labor

In the case *Industrial Claim Appeals Office v. Softrock Geological Services,* 325 P.3d 560 (Colo. 2014), the Supreme Court revised the standard previously used when analyzing whether or not an employee is customarily engaged in an independent trade or business. The previous standard sought to simply ask if the employee had customers other than the employer. If not, it was reasoned that the employee was not engaged in an independent business and would necessarily be a covered employee. In *Softrock* the court rejected that this was dispositive proof of an employer-employee relationship and directed the fact finder to conduct an inquiry into the nature of the working relationship considering not only the nine factors but any other relevant factors. An example of other factors that could be considered was shown in *Long View Systems Corp. v. Industrial Claims Appeals Office,* 197 P.3d 295 (Colo. App. 2008). The analysis of the nature of the working relationship including any other relevant factors was meant to limit the problems presented by the single factor test prior to *Softrock*.

Here, the ALJ has conducted an inquiry and made extensive findings as to the nature of the working relationship. The ALJ concludes, again, that the nature of the working relationship in this case shows that it was an independent contractor/employer relationship. Even after remand hearing and allowing Claimant to present additional evidence, and considering all of the evidence surrounding the relationship between the

parties, the ALJ concludes that Claimant was an independent contractor. Claimant had a phone and business address listing, a business name and registration he created and renewed annually, financial investment in his cars, tools, computer, phone, insurance, and business filings, liability insurance, and made the decision not to work for others as his own business decision made entirely by him and not expected by the Employer. When looking at the relationship and how it worked day to day, Claimant was offered contract jobs at set prices and could either accept or reject any or all of the jobs. Claimant was subject to risk of loss if he accepted a job and it took him a long amount of time as he was still paid the same contract rate. Employer had no knowledge or reason to believe Claimant was working exclusively for them based on Claimant's schedule and the number of jobs he completed. Claimant made his own business decisions as to how many jobs to accept, request, and whether or not to hire any assistants to help him with his work. When viewing the relationship, as a whole, and the many changes that took place on March 12, 2009 the ALJ has weighed all of the evidence and concludes that at all times on and after March 12, 2009 the relationship between the parties was more likely than not that of independent contractor/employer.

Claimant argues that the US Department of Labor Wage and Hour Division's Administrators opinion no. 2015-1 supports his argument that he is an employee and not an independent contractor. The ALJ rejects this argument. The Administrators opinion is intended to provide guidance regarding the application of the standards for determining who is an employee under the Fair Labor Standards Act. Although it is intended to provide guidance, it is not determinative nor is any one of its factors determinative as to whether a worker is an employee. The factors to consider per the Administrators opinion include: whether the work is an integral part of the employers business; whether the workers managerial skill affects the workers opportunity for profit or loss; the workers relative investment compared to the employer investment; whether the work performed required special skill or initiative; whether the relationship between the worker and the employer was permanent or indefinite; and the nature and degree of the employers control.

Viewing the factors outlined by the Administrators opinion, the ALJ concludes that analyzing the facts of this case and applying them to the guideline factors, the factors come out mixed and do not establish more likely than not that Claimant is an employee. The service work was an integral part of Employer's contract to sell and provide Pella products and was required to be done. Claimant did have the ability to affect his own profit or loss in his business by using his managerial skills. Claimant was able to accept more or less jobs, was able to reject jobs he thought would take too much time, was able to hire others, purchase additional tools or equipment, and was able to advertise for CP Window Service. Claimant purchased at least two vehicles for his business as well as several tools, computer, and internet/phone services to help him profit. The decisions not to hire employees, advertise, etc. were managerial decisions that Claimant made which impacted his bottom line. Claimant's investment compared to the investment of Employer was not as great, but Claimant did have a significant investment in his business by way of: vehicles; tools; computer; phone; internet and phone costs; insurance costs; and registration/filing fees for his business. Claimant

maintained these investments for his business from 2009 through 2013 when he was injured. Claimant's work required specialized skill and he performed his specialized skills installing and repairing windows and doors independently with no oversight from Employer. Claimant's contract had no term and was indefinite or permanent. Finally Employer did not have significant control over any meaningful aspects of Claimant's work. Claimant was free to accept/reject jobs as he saw fit. Claimant was able to contact customers to schedule the time of the job as he saw fit. Claimant performed the jobs with no oversight from Employer. Even viewing the guideline provided by the Administrators opinion, it fails to establish more likely than not that Claimant qualifies as an employee. The guideline factors applied to the facts of this case come out mixed and do not persuasively show that Claimant is an employee.

Statutory Employer

§ 8-41-401(3) C.R.S. provides that an individual who is excluded from the definition of employee shall not have any cause of action of any kind under the Workers' Compensation Act. See also *Pulsifer v. Pueblo Professional Contractors, Inc.*, 161 P.3d 656 (Colo. 2007). Independent contractors who have the option of obtaining workers' compensation insurance but fail to do so are barred from having a claim under the Workers' Compensation Act. *Stampados v. Colorado D&S Enterprises, Inc.*, 833 P.2d 815 (Colo. App. 1992). The court has held that the purpose of § 8-41-401(3) is "to encourage participation in the workers' compensation system and limit the exposure of those contractors who obtain coverage from lawsuits or claims brought by uncovered independent contractors who are injured on the job." *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210 (Colo. App. Div 5 2009). The limitation on damages set by the general assembly was "premised on the belief that when an individual 'chooses to opt out of Work[ers'] Comp[ensation] [he or she] can't have the best of both worlds." *Id*.

§ 8-41-404(1)(a), C.R.S. states that every person performing construction work on a construction site shall be covered by worker's compensation insurance and a person who contracts for the performance of construction work on a construction site shall either provide workers' compensation coverage for or require proof of workers' compensation coverage from, every person with whom he has a direct contract to perform construction work on the construction site. However, the statute also states that the section shall not apply to a sole proprietor who has filed a statement of trade name and has filed with the Division a form rejecting workers' compensation coverage. § 8-41-404(4)(a)(VI). A sole proprietor is entitled to elect workers' compensation coverage regardless of whether the sole proprietor employs any other person under any contract of hire, and may obtain workers' compensation coverage for himself. § 8-40-302(5)(b), C.R.S.; *Cavaleri v. Anderson*, 298 P.3d 237 (Colo. App. Div 3 2012).

In this case, Claimant was an independent contractor performing work for Employer. Claimant, as the sole proprietor of CP Window Service, was entitled to get workers' compensation coverage for himself. Although he had the option to obtain such insurance, Claimant chose to opt out. Since Claimant was not an employee at the time of his injury, he is not entitled to workers' compensation benefits. Additionally, since

Claimant was an independent contractor who opted out of coverage he also is not entitled to workers' compensation benefits.

The ALJ finds that Claimant understood the nature of the "Master Subcontractor Service Agreement" when he signed it on March 12, 2009. Prior to signing the agreement and prior to the meeting with Employer, Claimant had procured general liability insurance and had filed and registered CP Window Service with the Secretary of State. Claimant signed the agreement on March 12, 2009 and the following day after even more time to think it over and understand what he was doing, Claimant again expressly rejected workers' compensation coverage. Claimant again rejected workers' compensation coverage four months later in July of 2009. Additionally, Claimant reported to multiple medical providers and on his application for Social Security Disability benefits that he was a contract worker, self employed, and/or that he was unable to file a workers' compensation claim. This supports the conclusion that Claimant was aware of the relationship he was entering into with Employer and knowingly chose to decline workers' compensation coverage.

According to § 8-41-401(1)(a)(I), C.R.S. any company operating any business by contracting out any part of the work to any contractor, shall be construed to be an employer as defined by articles 40 to 47 of the Act and shall be liable to pay compensation for an injury resulting from said work to any contractor or employee of any contractor. However, § 8-41-401(3), C.R.S. provides that notwithstanding any provision of this section or section 8-41-402 to the contrary, any individual who is excluded from the definition of employee pursuant to section 8-40-202(2), or a working general partner or sole proprietor who is not covered under a policy of workers' compensation insurance…shall not have any cause of action of any kind under articles 40 to 47 of this title. In this case the ALJ concludes that Claimant is excluded from the definition of employee, is an independent contractor and sole proprietor who rejected coverage of workers' compensation insurance and thus Claimant has no cause of action under the Workers' Compensation Act and has failed to establish that he is a statutory employee of Employer.

ORDER

It is therefore ordered that:

1. Claimant was an independent contractor of Employer on December 11, 2013.

2. Employer was not Claimant's statutory employer on December 11, 2013.

3. Claimant therefore did not suffer a compensable injury on December 11, 2013 and his claim for workers' compensation benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 25, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

- Did Claimant establish by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course and scope of her employment on April 30, 2014?

- Did the Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and related medical benefits?

- If compensable, was the right shoulder surgery Claimant underwent reasonable, necessary and related to her industrial injury?

- If Claimant suffered a compensable injury, what was her average weekly wage?

- Did the Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits from May 1, 2014 until terminated by law or order?

FINDINGS OF FACT

1. On April 30, 2014, Claimant was employed by as a recreation instructor by Respondent, City and County of Denver. Claimant was hired by Respondent in 2012. This was a part-time position and Claimant worked at Swansea Elementary School in Denver.

2. In this position, Claimant would serve snacks to the children, including setting up the tables, serving the snack and then doing the clean up. She would set-up and pick up art supplies at the tables, as well as participate in sport activities, including volleyball, tetherball and basketball.

3. Some of Claimant's payroll records from 2014 were admitted into evidence. Claimant's hourly wage was $13.441346 per hour.

4. On April 30, 2014, Claimant went with a new employee to get snacks from the refrigerator. She was showing the new employee how to do this task. She picked up a crate that had milk cartons in it. Claimant estimated that the crate had 45-50 milk cartons in it. On top of the crate was a tray that had crackers on it. Claimant turned and was walking to a cart when she felt pain in her right shoulder, which caused her to

drop the crate.[1] The co-employee picked up the milk cartons from the ground and Claimant finished working that day.

5. Claimant testified that she reported the injury to Kurt Russell, whom she described as her supervisor at Community Parks and Rec. She also called the "Ouchline" to report her injury[2]. Claimant was referred to Concentra for treatment. Concentra was the designated ATP for Employer.

6. Claimant testified that she had not injured her right shoulder before April 30, 2014. There was no record of a prior injury to the right shoulder before the ALJ. The ALJ concludes Claimant suffered a compensable injury on April 30, 2014.

7. Claimant's medical history was significant for chronic low back pain including two (2) surgeries, prior carpal tunnel syndrome and mental health issues. In this regard, medical records from Denver Health, Concentra and Swedish Medical Center from 1997-2014 were admitted into evidence. Claimant was diagnosed with mental health and related issues by physicians at Denver Health. A history of substance abuse was noted in these records. She received treatment for right and left carpal tunnel syndrome at Concentra in 2007-08. She treated for chronic low back at Swedish Medical Center.

8. Aurora Ovalla testified on behalf of Respondent. She was hired in February, 2014 and worked with Claimant. She held the same instructor position as Claimant and stated they worked seventeen (17) hours per week. She was also present when Claimant registered a number of physical complaints for various parts of her body. She did not witness the alleged injury, but Claimant told her that she told her that she had pain in her right shoulder. Ms. Ovalla confirmed that the crate which held the milk cartons weighed 20-30 pounds. The tray on top could weight 5-10 pounds.

9. Claimant testified that she returned to work the following day, but was sent home because she was taking Percocet. Claimant confirmed that she took Percocet for an unrelated medical condition.

10. Claimant was examined on May 1, 2014 by Steve Danahey, M.D at Concentra. At that time, Claimant was noted to have pain in the right anterior and posterior shoulder, over the AC joint and the upper part of deltoid and trapezius muscles. Claimant's pain radiated to the right side of her neck. Slight swellin was noted on the frontal view exam. Dr. Danahey's assessment was shoulder pain (acute, strain of shoulder, trapezius strain). Dr. Danahey issued work restrictions of no lifting over 5 lbs; no pushing and/or pulling over 10 lbs; and no repetitive right shoulder motion.

[1] The ALJ notes that Claimant provided the same description of her injury on the Patient Information form completed at Concentra on May 1, 2015. [Exhibit 2, page 11].

[2] Documents from the Ouchline were admitted at hearing. [Exhibit I, page 149].

11. The ALJ draws the inference that Dr. Danahey's restrictions precluded Claimant from performing her job duties, which included lifting the crates full of milk cartons. Because of these restrictions Claimant missed more than three shifts of work.

12. X-rays were taken of Claimant's right shoulder on May 1, 2014. The osseous alignment was normal at the glenohumeral joint. No acute injury or significant degenerative change was seen.

13. A physical therapy evaluation of Claimant was done on May 5, 2014 by Angela Wilt, PT. At that time, pain was noted along the suprascapular process. Claimant began physical therapy, which was to be 2x/wk for 2 weeks.

14. Dr. Danahey also examined Claimant on May 5, 2014. Claimant was unable to tolerate ROM tasks for her right shoulder due to pain complaints. Dr. Danahey's diagnoses and lifting restrictions were the same as the May 1st appointment. However, he ordered no use of the right arm. He also ordered an MRI.

15. Claimant returned for physical therapy on May 8, 2014. She reported no change in her right shoulder pain, but found the meds and sling helpful. No modified duty was available at work. Restrictions in Claimant's range of motion were noted by Angelo Wilt, PT. Some modalities of treatment were provided and home exercises were recommended.

16. Claimant had an MRI of the right shoulder on May 9, 2014. The films were read by Kevin Woolley, M.D., whose impression was acromial morphology which predisposes to rotator cuff impingement; tendinosis of the distal supraspinatus and infraspinatus tendons; no rotator cuff tendon tear; minimal subdeltoid bursitis; irregularity of the superior glenoid labrum which likely represents chronic degenerative tearing of the labrum, doubtful clinical significance, clinical correlation is advised.

17. Claimant returned to Dr. Danahey on May 13, 2014. She stated that she had upper back pain and right lateral shoulder pain to a degree that she had to take Oxycodone during the day. Limitations in range of motion, as well as weakness were noted on the right upper extremity. Dr. Danahey noted an MRI had been obtained showing tendinitis and bursitis, no RC tear, morphology predisposing impingement. Dr. Danahey thought an injection may need to be considered. He issued restrictions of no repetitive lifting over 5 pounds, no pushing/pulling over 10 pounds, no reaching above the shoulders.

18. An Employer's First Report of Injury (E-1) was filed on May 14, 2014. The E-1 listed the date of injury as 4/30/14. An individual named "Rose" (no last name) was listed as a witness and the injury was reported to Curtis Garrett. The E-1 described the injury as follows: "Claimant had bent over and lifted two crates, one had approx. 48 milk cartons, the other steel crate had crackers. She lifted both them out of the fridge. While walking to place them on the cart, she dropped them because she got R/shoulder pain." Claimant's average weekly wage was listed as $228.48.

19. Respondent filed a Notice of Contest on May 15, 2014. The reason the claim was being contested was listed as “further investigation for medical records and additional information”.

20. Claimant was evaluated by Dr. Danahey on May 20, 2014, at which time she was complaining of shoulder pain. Dr. Danahey recorded that Claimant wanted additional Percocet and was narcotics seeking. Claimant reported that she was taking Percocet per her PCP for her back, which she had not previously reported. Dr. Danahey stated Claimant was to get no additional narcotics. Dr. Danahey issued restrictions of no repetitive lifting over 10 pounds, no pushing/pulling over 15 pounds and noted she should continue to PT as scheduled. Claimant was referred for an orthopedic evaluation to consider an injection. MMI was anticipated in six weeks.

21. Respondent submitted a DVD documenting Claimant’s activities on May 28 and 29, 2014. (Exhibit M). Claimant was observed doing a number of activities, including entering and exiting a vehicle, walking and sitting. More particularly, the DVD documented the following:

May 28, 2014

12:17 p.m.: Claimant exited a house wearing a sling; kept right arm close to side.

12:38 p.m.: Claimant walking without a sling, held right arm close to side.

14:01 p.m.: Claimant was walking with no sling; was able to move right arm back and forth, then straightened it.

14:20-14:38: Claimant closed the car door with right hand, walked into store and was moving right arm and hand while using cell phone.

May 29, 2014

9:29 a.m.: Claimant walked to car with a purse in her left hand, paper in right (no sling). Claimant opened door with right hand.

9:43 a.m.: Claimant had purse on right arm, closed car door with right arm (no sling).

13:07 p.m.: Claimant was at a shopping mall, not wearing sling. Her purse was over her right shoulder and she was seen gesturing with the right hand, as well as using her right arm. At one point, she puts her hand down at her side.

13:42 p.m.: Claimant at jewelry store using right arm freely.

14:00 p.m.: Claimant opened car door with right hand/arm.

In summary, with the exception of the one segment where Claimant was seen wearing her sling (taken off 30 minutes later); she was able to move and use her right arm. There was no evidence that the right shoulder motion was restricted or that she was in pain. The ALJ infers that Claimant had significant improvement in her symptoms as evidenced by her activities on May 28-29, 2014.

22. Claimant was seen in consultation by Mark Failinger, M.D. on May 29, 2014. At that time, Claimant reported and pain and numbness in her right shoulder. Dr. Failinger noted pain with abduction isolated in the supraspinatus, with good external rotation strength. Dr. Failinger's impression was right shoulder rotator cuff tendinosis and degenerative labrum. Dr. Failinger did not impingement in Claimant's shoulder. Dr. Failinger stated that the pain Claimant was experiencing was "OUT OF PROPORTION to what I saw in the MRI" and thought it could be related to the high doses of narcotics Claimant was taking. Dr. Failinger recommended an injection, which Claimant wanted to try. Her right shoulder was injected at the May 29th visit.

23. The ALJ credits Dr. Failinger's opinion that Claimant was exaggerating her pain complaints, particularly given her activities as documented on the DVD. The ALJ also notes that Dr. Failinger's report provides support for the conclusion that Claimant had improved by May 29th.

24. Claimant returned to Ms. Wilt for physical therapy on June 2, 2014. At that time, she reported she received a cortisone injection on Friday and felt significant relief of right shoulder pain. She reported some soreness today "from using her arm this weekend, may be too much". Sharp pain in the anterosuperior shoulder joint region was noted at the evaluation. Claimant's diagnosis was shoulder pain (acute), and strain of shoulder, right and trapezius strain. Claimant was to continue therapy per treatment plan.

25. Claimant admitted at hearing that the reference in the medical records to using her arm too much over the weekend was accurate. These activities were not related to her employment with Employer. The ALJ infers that the increase in Claimant's symptoms was the result of an injury or aggravation that occurred over the weekend.

26. There were no additional records admitted into evidence which documented a return by Claimant to Concentra for completion of the physical therapy. The ALJ has no record that Claimant returned to Dr. Danahey.

27. An IME was performed on August 21, 2014 by Mark Paz, M.D. at Respondent's request. Dr. Paz noted tenderness on palpation of the right supraclavicular fossa and the sternoclavicular junction. Full range of motion was noted in her cervical spine. On Claimant's right shoulder, tenderness was noted over the clavicle and AC joint.

28. Dr. Paz' assessment was right shoulder pain, right shoulder rotator cuff strain, right shoulder impingement syndrome, right upper extremity parasthesias, polysubstance dependence, history of; drug abuse, history of; obstructive sleep apnea

obesity; depression; migraine headaches; lumbar degenerative disc disease; sciatica; hypothyroidism; panic attacks and fibromyalgia.

29. On the issue of causation, Dr. Paz concluded that based upon the direct history, the medical records (including MRI) it was medically probable that the right shoulder tendinosis was associated with the 4-30-14 event. Dr. Paz reviewed Claimant's prior medical records and noted she had no documented history of a right shoulder injury. Dr. Paz opined that Claimant was at MMI.

30. Claimant was examined by David Ziegler, M.D. at Denver Health on October 17, 2014. At that time, she was complaining of sharp pain radiating into the anterior portion of the arm. Claimant stated she had a history of pain for six (6) months after suffering and injury at work. She had conservative treatment including PT, RICE, NSAIDs, and TENS unit; none of which helped the pain. Dr. Ziegler noted mild tenderness to palpation along the right biceps tendon. Dr. Ziegler's assessment was right shoulder rotator cuff tendinopathy and impingement. He started her on a home exercise program and Claimant received a subacromial injection at this appointment.

31. Claimant returned to Dr. Ziegler on November 11, 2014. She reported pain relief from the injection for about one (1) week, but the pain returned. Claimant had tenderness over the right biceps tendon and AC joint on examination. She had positive Neer's and Hawkin's. Dr. Ziegler assessment was right shoulder pain secondary to rotator cuff tendinopathy, subacromial impingement and biceps tendonopathy and referred her for a surgical consultation.

32. Claimant had a surgical consultation with Jamie Stambaugh, M.D. and Jarrod King, M.D. at Denver Health on December 11, 2014. Dr. Stambaugh's report indicated that Claimant had started on conservative care at the Nonop Clinic, including PT and injections. She had pain over the anterior and superior portion of the right shoulder, along with tenderness over the greater tuberosity. On examination, she had positive impingement findings, positive Neer's and Hawkin's tests. The impression of the physicians was right shoulder impingement. Surgical options were discussed (including right shoulder scope, subacromial decompression, evaluation of rotator cuff and biceps tenodesis) with the Claimant and she elected to go forward with surgery.

33. The ALJ finds that Claimant's pain complaints were more extensive than those noted on May 29th, the last time Dr. Danahey examined her. In particular, Claimant had pain associated with rotator cuff tendinopathy and shoulder impingement. Although Claimant's history of an injury was documented, no opinion was provided by Dr. Ziegler or King that the right shoulder impingement was the result of the injury.

34. Claimant underwent surgery on her right shoulder on February 18, 2015, which was performed by Dr. King. Dr. King's preoperative diagnoses were right shoulder pain and right shoulder impingement. The surgical procedures performed included arthroscopic subacromial decompression and acromioplasty; arthroscopic lysis of adhesions and release of glenohumeral arthrofibrosis; and arthroscopic debridement of partial articular-sided supraspinatus tendon avulsion. Dr. King's post-operative

diagnoses were right shoulder subacromial bursitis, right shoulder glenohumeral arthrofibrosis, and right shoulder partial articular-sided supraspinatus tendon avulsion (less than 5% of the tendon involved).

35. Dr. Paz testified as an expert in internal medicine and was Level II accredited pursuant to the W.C.R.P. Dr. Paz described the anatomy of the shoulder in connection with Claimant's injury and surgery. He noted that the acromion bone is a projection off of the scapula, is joined by ligaments to the clavicle. That forms the roof of this pathway for the supraspinatus to pass through to join the humerus., which is otherwise a confined space. Over time and with repetitive injury and recurrent injury, along with arthritis, the space can narrow and compress the supraspinatus muscle in particular. Dr. Paz went on to describe the small fluid-filled sac called the bursa, observing that the bursa can become inflamed when pressure and repetitive motion irritate it. Normally it is paper thin and it is just a lubricating surface. However, with inflammation it fills with fluid and it causes more compression within this tunnel pathway for the suprasinatus and it will compress the supraspinatus. Dr. Paz concluded that this mechanism of injury did not involve elevation above the shoulder and would not cause impingement syndrome

36. Dr. Paz opined that impingement syndrome is not typically caused by an acute injury. Instead, with impingement syndrome, the patient will present with symptoms of increasing shoulder discomfort. . Dr. Paz described impingement as a "chronically evolving condition" that was typically insidious.

37. The ALJ finds Dr. Paz' explanation persuasive and notes that Claimant was not performing a task for Employer on April 30, 2014 that would have caused impingement syndrome. The mechanism of injury led her to develop tendinosis, but not the impingement. The ALJ further concludes that Claimant's need for surgery was not related to the industrial injury, as it was for the shoulder impingement.

38. The ALJ finds that Claimant developed impingement syndrome in the right shoulder as a result of either a repetitive injury or degeneration over time or a traumatic event while reaching overhead. However, the injury of April 30th did not cause the impingement syndrome. The surgery Claimant underwent on 2-28-15 was to treat right shoulder impingement.

39. The surgery Claimant underwent requires prior authorization, pursuant to the W.C.R.P. The ALJ takes administrative notice of the W.C.R.P. The ALJ finds that no request for authorization was made prior to the shoulder surgery.

40. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." *See CF & I Steel Corp. v. Industrial Commission,* 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. (term "injury" includes disability resulting from accident or occupational disease.

The question of whether the Claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000) (proof of causation is threshold requirement that must be established before

any compensation is awarded); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999) (Claimant seeking benefits for occupational disease must establish existence of the disease and that it was directly and proximately caused the conditions of employment).

As determined in Findings of Fact 4-6, Claimant satisfied her burden of proof that she suffered an injury arising out of and in the course and scope of her employment. The ALJ notes first, Claimant made a timely report of the injury and that her description of the incident was consistent both in what she reported on the Ouchline and Dr. Danahey, as well as her testimony at hearing. Dr. Danahey's notes and the physical therapy records establish that Claimant suffered a shoulder strain/sprain and sprain of the trapezius. Slight swelling was noted by Dr. Danahey when he first evaluated Claimant. The act of lifting and carrying the milk cartons could cause an injury of this type and under the circumstances described, Claimant proved that it was more probable than not that she was injured in this fashion.

Second, the ALJ determined that Claimant established that she was performing the task of lifting the crates when she was injured. Support for this conclusion was found in the Employer's First Report of Injury, which documented the incident and noted there was a witness ("Rose"). No evidence was submitted by Respondent which directly contradicted Claimant's version of events on April 30th. No independent witness or documentary evidence dispelled the conclusion that Claimant suffered an injury on April 30, 2014.

Third, the ALJ notes that Dr. Paz concluded that there was no evidence of a prior injury to Claimant's right shoulder before April 30, 2014. The ALJ was persuaded that it was more probable than not that her right shoulder tendinosis was associated with her work activities that day. Therefore, the ALJ finds that Claimant suffered a compensable industrial injury that day.

Subsequent Intervening Injury

The ALJ concluded Claimant suffered a compensable injury arising out of her employment. However, this does not end the inquiry. While Claimant suffered a compensable injury, the evidence presented at hearing leads to the conclusion that any disability resulting for this was short-lived. After receiving treatment at Concentra for approximately one (1) month, although Claimant continued to subjectively report significant pain, she had far less by way of objective findings. Dr. Failinger's May 20th report is evidence of this. Also, the surveillance video admitted into evidence documented use of her right arm and shoulder with no evidence of pain and/or restriction with this use.

More importantly, the medical records document that Claimant suffered and intervening injury and/or aggravation of her right shoulder over the weekend of May 31-June 1, 2014. This was documented in the physical therapy note of June 2nd. Finding of Fact 24. Claimant's testimony at hearing confirmed this fact. Finding of Fact 25. The Colorado Worker's Compensation Act provides that all results proximately and

naturally flowing from an industrial injury are compensable. *Standard Metals Corp. v. Ball,* 172 Colo.510, 474 P.2d 622, 625 (Colo. 1970). However, when Claimant suffers a later accident or injury, the law does not contemplate that Claimant would receive additional compensation or medical treatment if it resulted from the subsequent or intervening injury. *Post Printing Publishing Co. v. Erickson,* 94 Colo.382, 384 (Colo. 1934). Whether a particular condition is the result of an independent intervening cause is a question of fact to be resolved by the ALJ. *Owens v. ICAO,* 49 P.3d 1187, 1188-1189 [citing *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, *supra].*

In the case at bench, Claimant was engaged in activities over the weekend of May 31-June 1 that caused either a new injury or aggravation of her right shoulder condition. This constituted a subsequent intervening event that serves to terminate the liability of Respondent. This is similar to *Post Printing Publishing Co. v. Erickson, supra,* 94 Colo. at 383-384. In that case, Claimant originally sustained a compensable injury to his right knee, then broke his right ankle after slipping on an icy sidewalk. Rejecting the argument that the compensable injury weakened his condition and should be considered a natural and proximate development of the original injury, the Colorado Supreme Court concluded that the second injury was the result of an efficient intervening cause and the employee was not entitled to additional compensation. *Id.*

This is distinguished from the situation in *Standard Metals Corp. v. Ball, supra*, 474 P.2d at 624-625 where Claimant suffered a fracture to his leg and then re-fractured the leg. The Colorado Supreme Court determined that the industrial injury directly caused a weakness in the leg bone, noting that expert testimony supported the finding that a direct causal connection was present. This weakness caused the re-fracture, which was found to be compensable. *Id.*

In the present case, Claimant's activities over the May 31-June 1 weekend caused additional symptoms. The injury and/or aggravation sustained at that time constituted an intervening injury. Claimant then received medical treatment almost six (6) months later. She was subsequently diagnosed with impingement of the right shoulder and underwent surgery for the impingement. Dr. Paz opined that the impingement was not related to the industrial injury. Findings of Fact 35-36. Claimant proffered no evidence to the contrary to rebut this opinion. Therefore, the ALJ determines that the injury and/or aggravation constituted an intervening injury and was not a result of the industrial injury. Claimant is not entitled to additional compensation or medical benefits.

Medical Benefits

Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, surgical, dental, nursing, and hospital treatment, medical, hospital and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Under this provision of the Act, Claimant has the burden of proving his/her entitlement to medical benefits. If Claimant meets this burden, Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). There are multiple issues in the case at bench, starting is whether Claimant established that she required medical treatment to cure and relieve the effects of the April 30th injury. Also the ALJ must determine whether the shoulder surgery was reasonable, necessary and related to her industrial injury, as well as whether this procedure was authorized.

As found, Claimant sustained an admitted industrial injury on April 30, 2014 and is therefore entitled to receive medical treatment that will cure and relieve the effects of said injury. Respondent provided treatment when it sent Claimant to its ATP at Concentra. Respondents are liable for said treatment.

As to Claimant's treatment at Denver Health, including the surgery performed on the right shoulder, the question is whether the need for treatment was caused by the injury. Where the Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of proof is generally a factual question for resolution by this ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). This ALJ's factual determination must be supported by substantial evidence and plausible interferences drawn from the record. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

As found, Claimant's activities over the weekend (May 30-June 1) were the cause of a significant increase in her pain complaints, including her inability to participate in some of the physical therapy exercises. Any treatment Claimant required to address this increase in symptoms is not causally related to the industrial injury.

Moreover, the testimony of Dr. Paz persuaded the ALJ that the surgery Claimant underwent was not related to her industrial injury. He opined that to the extent that the surgery addressed impingement syndrome, it was not related to the April 30th injury.

Last, there was no evidence that Claimant's treating physicians at Denver Health requested prior authorization for the February 28, 2015 surgery. This was required by the W.C.R.P. Respondent is not liable for said treatment absent a request for prior authorization.

Therefore, Claimant is not entitled to medical benefits after May 30, 2014.

AWW

As found, Claimant's hourly wage was $13.441346 per hour. There was contradictory testimony as to the number of hours those instructors working for

Employer worked per week. The ALJ utilized the actual payroll records from Employer [Exhibit 4]. These records are summarized as follows:

Period	Paycheck date	Total hours	Total pay
2/9/14-2/22/14	2/28/14	43.5	$584.70
2/23/14-3/8/14	3/14/14	33.0	$443.56
4/6/14-4/19/14	4/25/14	15.5	$208.34
4/20/14-5/3/14[3]	5/9/14	34.75	$467.09
			$1,703.69

Each of the aforementioned pay periods covered approximately two (2) weeks [13 days per period]. Using the actual wages for all of the payroll records admitted, the ALJ calculated Claimant's average weekly wage to be $212.96 per week [$1,703.69/ 8=$212.96]. However, the period of 4/6/14-4/19/14 appears to be an outlier, which reduces the AWW.

The ALJ also considered the average number of hours Claimant worked for the three periods in which she worked the full period. Using this method of calculation, Claimant worked an average of 18.54 hours per week [111.25 hours /6= 18.54] X $13.441346=$249.22. The ALJ has concluded that this is a fair calculation of the AWW given Claimant and Ms. Ovalla's testimony. Therefore, the ALJ finds that Claimant's AWW was $249.22.[4]

TTD

Claimant testified that she returned to work the day after the injury and was sent home because she was taking Percocet. Claimant took this medication for a condition unrelated to her industrial injury. She did not work after she was injured. Respondent argued that no TTD benefits should be awarded because it was a non-industrial condition which precluded Claimant from working. However, the ALJ concludes that Claimant's shoulder injury caused Claimant to sustain a wage loss.

As found, Claimant was given work restrictions by the ATP, Dr. Danahey on May 1, 2014. These restrictions included a lifting restriction of no lifting over 5 lbs; no pushing and/or pulling over 10 lbs; and no repetitive right shoulder motion. These restrictions precluded Claimant from working as an instructor for Employer. The impairment of earning capacity may be evidenced by a complete inability to work or by

[3] Even though this period included the date of injury, Claimant averaged 17.37 hours for each of these weeks.

[4] Respondent argued that Claimant's AWW was $275.10, which was described as the state minimum AWW. However, this was scheduled impairment rate on 4/30/14.

restrictions which impair Claimant's ability to effectively and properly perform her regular employment. *Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595 (Colo. App. 1998). Dr. Danahey continued Claimant's work restrictions when subsequently examined her. Therefore, Claimant is entitled to TTD based upon the fact that her restrictions precluded her from performing the instructor job, at least through May 30, 2014.

As noted *supra,* Claimant either aggravated her industrial injury or suffered a new injury on the weekend of May 31-June 1, 2014. Claimant was engaged in physical activity which caused her right shoulder additional injury. That new injury and or aggravation was the cause of any disability following starting May 31, 2014. There was no evidence that Claimant continued to be disabled after that time as Claimant did not return to Respondent's designated ATP. Absent evidence that she continued to have an impairment of earning capacity related to the industrial injury, Claimant is not entitled to recover TTD benefits. The intervening injury serves to cut-off any liability of Respondent for TTD after May 30, 2014

In addition, the ALJ concluded that the impingement syndrome was not a result of her Claimant's industrial injury. The evidence established that the surgery she underwent in February, 2015 was not to address the results of the industrial injury. As such she is not entitled to temporary disability benefits following the surgery. Therefore, Claimant is not entitled to receive TTD benefits after May 30, 2014.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury arising out of and in the course and scope of employment on April 30, 2014.

2. Respondent shall pay Claimant TTD benefits from May 1- May 30, 2014 at the rate of $166.15 per week.

3. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

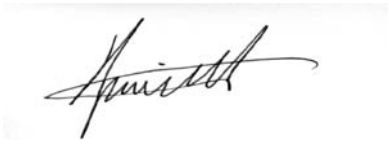
4. Claimant's request for an order requiring Respondent to pay for medical benefits related to the treatment Claimant received at Denver Health is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 25, 2015



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-950-990-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 15, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/15/15, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection. Respondents' Exhibits A through D were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post hearing briefing schedule. The Claimant's opening brief was filed, electronically, on October 19, 2015. The respondents' answer brief was filed, electronically, on October 21, 2015. The Claimant was given the option of filing a reply brief within 2 days of the answer brief, or by October 23, 2015. No timely reply brief was filed and the matter was deemed submitted for decision on October 26, 2015.

ISSUE

The issue to be determined by this decision concerns a conversion from a scheduled rating to a whole person rating, specifically, whether the Claimant sustained functional impairment beyond the arm at the shoulder so as to justify conversion of his admitted 16% left upper extremity (LUE) scheduled impairment rating to a 10% whole person impairment? The Claimant accepts the four corners of authorized treating physician John D. Sanidas, M.D., May 27, 2015 medical opinions and is not seeking to overcome opinions concerning maximum medical improvement (MMI), degree of permanent impairment, or causal relatedness of related conditions. Consequently, the Claimant's burden of proof is by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. Prior to February 8, 2014, the Claimant had no symptoms or functional limitations in his left shoulder, trapezius, or left neck muscles.

2. On February 8, 2014, the Claimant sustained an admitted compensable injury to his left shoulder in his employment as a split shift worker, where he worked part of his time as a car washer/vehicle fueler and part-time as a primary sorter for the Employer. The Claimant was injured while attempting with a co-worker to lift a 50 pound box onto a conveyor belt that was at the Claimant's eye level and he felt something in his left shoulder.

3. The Claimant underwent a course of medical treatment which resulted in surgery on July 1, 2014, performed by authorized treating physician (ATP) Michael Hewitt, M.D [*See* Claimant's Submission Tab 5, Bate Stamp (BS) 17-19]. On July 1, 2014, the Claimant underwent the following procedures:

   a. Left shoulder arthroscopic rotator cuff repair;
   b. Arthroscopic subacromial decompression;
   c. Distal clavicle co-planing; and,
   d. Examination under anesthesia, left shoulder.

Id.

4. On the Claimant's demonstrative Exhibit 11, Claimant's retained expert Ronald Swarsen, M.D., diagramed on a representation of the shoulder where the Claimant's operations occurred. Dr. Swarsen demonstrated the left shoulder arthroscopic rotator cuff repair on Claimant's Exhibit 11 in red ink, the arthroscopic subacromial decompression in blue ink, and the distal clavicle co-planing in orange ink. Dr. Swarsen then placed a green line which demarcated the glenohumeral joint and he testified that the Claimant's medical procedures all occurred above the glenohumeral joint.

5. Following the Claimant's surgery, and subsequent to physical therapy, the Claimant was placed at maximum medical improvement (MMI) by ATP Dr. Sanidas on May 27, 2015. ATP Dr. Sanidas assigned the Claimant a 16% LUE impairment rating which he converted to a 10% whole person impairment rating, as required by the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment,* 3rd. Ed., Rev (hereinafter the "*Guides"*).

6. On June 12, 2015, the Respondents filed a Final Admission of Liability (FAL) accepting ATP Sanidas' 16% LUE and admitting to maintenance medical benefits.

7. On July 2, 2015, the Claimant filed an Application for Hearing requesting conversion of the 16% extremity rating into a 10% whole person rating "based upon the site of permanent functional impairment."

8. On July 30, 2015, the Respondents filed a Response to Application for Hearing, indicating that that only issue for consideration was that "injury appropriate as scheduled rating."

Conversion

9. Prior to the hearing, the Claimant was evaluated by the Respondents' retained expert Lawrence Lesnak, D.O., who issued an initial report on March 24, 2015 and an addendum on March 25, 2015 (*See* Claimant's Exhibits 9 and 10).

10. At hearing, the Claimant, Ronald Swarsen, M.D. (the Claimant's retained expert) and Lawrence Lesnak, D.O., testified.

The Claimant

11. The Claimant's testimony about his pain and discomfort was essentially undisputed. In fact, the Respondents' expert, Dr. Lesnak, was of the opinion that the Claimant "exhibited no pain behaviors or non-physiologic findings."

12. As a result of his admitted left shoulder injury, the Claimant wakes up at night when he rolls on his left shoulder.

13. As a result of the associated pain with his left shoulder injury, the Claimant has to turn his entire body and cannot turn his neck as he did prior to his injury to look

over this left shoulder when changing lanes in traffic or looking over his shoulder to back up his truck. Additionally, the Claimant has changed how he puts on his shirts, due to pain in the shoulder.

14. The Claimant has aching pain in the left shoulder which he describes as "in the shoulder area." He also has tightness in the trapezius muscle and left side of the body and he indicated that he has radiating pain from the seam of the shoulder into the base of the neck.

15. The Claimant experiences pain in his shoulder when he raises his left arm above his body, then maintains it there for any period of time.

16. Although the Claimant has no permanent restrictions, he still deals with pain on a daily basis and chooses to work through the pain.

17. The Claimant experiences pain at the left shoulder from the seam up into the base of the neck and in the back between the spine in the area of the scapula when he moves the arm in various planes.

Ronald Swarsen, M.D. –Claimant's Independent Medical Examiner (IME)

18. At the Claimant's request, Ronald Swarsen, M.D., performed a medical records review and testified at hearing. Dr. Swarsen expressed the opinion that the surgery performed by ATP Dr. Hewitt, was to structures above the glenohumeral joint (which is **above** the shoulder and not **at** or **below** the shoulder). Dr. Swarsen's opinions corroborate the opinions of ATPs Jay Raschbacher, M.D., Dr. Hewitt, and Dr. Sanidas. Dr. Swarsen's opinions are based on a thorough study of the medical records. The ALJ infers and finds that an actual physical examination of the Claimant by Dr. Swarsen was unnecessary and would not have added to the bases of his opinions.

19. Dr. Swarsen illustrated his testimony by marking the sites that make up the muscles of the shoulder on the Claimant's Exhibit 11, which consists of an anatomical chart of the shoulder and the surrounding structures. Dr. Swarsen stated the opinion that the areas where the Claimant complains of pain correctly belong to the shoulder and not the arm. Dr. Swarsen is of the opinion that the Claimant's complaints of ongoing pain are localized to the muscles and structures of the shoulder. Dr. Swarsen stated that it was common for a patient with the Claimant's injury and surgery to have the Claimant's type of pain complaints.

Respondents' IME, Lawrence Lesnak, D.O.

20. Dr. Lesnak, at the request of the Respondents, performed an examination, medical records review and testified at hearing. Dr. Lesnak stated the opinion that "there is absolutely no evidence that [Claimant] has any type of functional limitation proximal to his left shoulder joint and left upper extremity" (*See* Claimant's Exhibit 9, BS 60).

21. Dr. Lesnak's opinion, however, is directly contrary to the subjective complaints he took from the Claimant following his examination on March 24, 2015. This fact significantly undermines the overall credibility of Dr. Lesnak's opinion that "there is

absolutely (emphasis supplied) no evidence that [Claimant] has any type of functional limitation proximal to his left shoulder joint and left upper extremity." In that examination Dr. Lesnak noted that:

> "[Claimant] complains of frequent left-sided subscapular pains that occur with any type of lifting of his left arm. He also has nearly constant mild pain and aching sensations throughout his anterior, lateral, and posterior shoulder region that do not appear to be associated at this point in time with any activities. He states that he has persistent numbness in his left upper or lateral arm that began after the surgical procedure took place on 07/01/2014. Sometime in November, 2014, he developed some left scapular numbness. He states that he has difficulties sleeping on his left shoulder because of his symptoms and he states that his symptoms seem to be worse with any type of activities at or above the shoulder level."

(See Claimant's Exhibit 9, BS 57).

22. Dr. Lesnak's description of the Claimant's symptoms are consistent with the Claimant's testimony at hearing, as well as the medical records tendered by the parties. His opinion that the impairment is only to the arm, however, is contrary to that of ATP Sanidas, who is of the opinion that the Claimant's impairment is to the left shoulder (*See* Claimant's Exhibit 3, BS 11-13), ATP Raschbacher, who on January 26, 2015 gave the opinion that "the situs of impairment is and would be the shoulder itself" (*See* Claimant's Exhibit 7, BS 49), and Michael Hewitt, M.D.'s, operative report which only addresses surgery to the "left shoulder" (*See* Claimant's Exhibit 5, BS 17-19).

Ultimate Findings

23. The ALJ finds the Claimant's testimony about his physical complaints credible and virtually undisputed. Further, the ALJ finds the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewitt and Dr. Raschbacher more persuasive and credible than the opinions of Dr. Lesnak. Indeed, the ultimate opinion of Dr. Lesnak is inconsistent with his observations as illustrated in Finding No. 21 herein above and his opinion is contrary to the weight of the evidence. Therefore, Dr. Lesnak's opinions are neither persuasive nor credible.

24. Between conflicting opinions, the ALJ makes a rational choice to accept the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewiit and Dr. Raschbacher, and to reject the opinions of Dr. Lesnak.

25. Accepting the four corners of ATP Dr. Sanidas' rating report, the ALJ finds that the totality of the evidence supports the proposition that Dr. Sanidas' converted rating of 10% whole person is the appropriate rating because the site of the Claimant's functional impairment transcends the shoulder.

26. The Claimant has proven, by a preponderance of the evidence that the site of his functional impairment is above the left shoulder not at or below the left shoulder. Indeed, the Claimant has proven, by preponderant evidence that the admitted injury of February 8, 2014, caused anatomical, structural injury above the shoulder and not **at** or **below** the left shoulder.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the

Claimant's testimony is, essentially, undisputed.*See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewitt and Dr. Raschbacher were more persuasive and credible than the opinions of Dr. Lesnak. Indeed, the ultimate opinion of Dr. Lesnak was inconsistent with his observations as illustrated in Finding No. 21 herein above and his opinion was contrary to the weight of the evidence. Therefore, as found, Dr. Lesnak's opinions were neither persuasive nor credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice to accept the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewitt and Dr. Raschbacher, and to reject the opinions of Dr. Lesnak.

Conversion

c. Where a claimant suffers an injury not enumerated in § 8-42-107 (2), C.R.S., the claimant is entitled to whole person impairment benefits under § 8-42-107 (8), C.R.S. In the context of § 8-42-107(1), C.R.S., the term "injury" refers to the manifestation in a part or parts of the body which have been functionally impaired or disabled as a result of the industrial accident. *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996)*; Martinez v. Albertsons*, W.C. No. 4-692-947 [Indus. Claim Appeals Office (ICAO), June 30, 2008]. The determination of the site of functional impairment is distinct from a claimant's medical impairment rating; and, upper extremity impairment ratings contained in the AMA *Guides* may, or may not, be consistent with the scheduled injury ratings contained in § 8-42-107(2), C.R.S. *See Mountain City Meat Co. v. Oqueda,* 919 P.2d 246 (Colo.1996). Indeed, there is a

disconnect between the statutory schedule ("at or below the shoulder") and the AMA *Guides.* Apparently, for this reason, the ICAO and the Court of Appeals came up with "the site of functional impairment" test.

d. When an injury results in a permanent medical impairment not set forth on a schedule of disabilities, an employee is entitled to medical impairment benefits paid as a whole person. See § 8-42-107 (8) (c), C.R.S. Section 8-42-107(1) (a), C.R.S., limits medical impairment benefits to those provided in section (2) where a claimant's injury is one enumerated in the schedule. The schedule of injuries includes the loss of the "*arm at the shoulder"*. See § 8-42-107(2) (a), C.R.S. The "shoulder," and "above the shoulder" is not listed in the schedule of impairments. See *Martinez v. Albertsons*, *supra*; *Maree v. Jefferson County Sheriff's Department*, W.C.No. 4-260-536 (ICAO, August 6, 1998); *Bolin v. Wacholtz*, W.C.No. 4-240-315 (ICAO, June 11, 1998).

e. Although § 8-42-107(2) (a), C.R.S., does not define a "shoulder" injury, a dispositive issue is whether the Claimant has sustained a functional impairment to a portion of the body listed on the schedule of disabilities. See *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366 (Colo. App. 1996). It is the function of the ALJ to determine, as an evidentiary proposition, the site of functional impairment, not necessarily the site of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities, or whether it transcends the extremity listed on the schedule. As found, the Claimant's injury transcends the left shoulder.

f. Whether a claimant has suffered the loss of an arm at his shoulder within the meaning of § 8-42-107(2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8) (c), C.R.S., is for a factual determination on a case by case basis. See *DeLaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Martinez v. Albertson's, supra*; *Keebler Company v. Indus. Claim Appeals Office*, 02CA1391 (Colo. App. 2003) (NSOP).

g. Pain and discomfort which limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. See *Langton v. Rocky Mountain Healthcare Corp.*, 937 P.2d 883 (Colo. App. 1996); *Eidy v. Pioneer Freightways*, W.C.No. 4-291-940 (ICAO, August 4, 1998); *Beck v. Mile Hi Express, Incorporated*, W.C. No. 4-238-483 (ICAO, February 11, 1997).

h. As found, the Claimant suffers pain at the top of his left shoulder, which limits his ability to perform the function of lifting above the head, sleeping and turning his head, a potential job hazard in his work of moving the Employer's trucks from the wash bay to the gas pumps. As found, the Claimant functional impairment is above the arm and not on the schedule of impairments. *See Phase II Company v. ICAO*, [97 CA 2099 (Colo. App. September 3, 1998)] (NSOP)

i. As found , the Claimant's credible and virtually undisputed testimony confirms that the presence of pain, discomfort, and loss of function to the structures of his left shoulder and not his arm. There is substantial evidence that the Claimant has suffered a functional impairment beyond or above the arm at the shoulder. See *City*

Market v. Indus. Claim Appeals Office, 68 P.3d 601 (Colo. App. 2003). Specifically, the Claimant suffers a functional loss in the left trapezius muscle and the area of the left shoulder joint, which are beyond the arm and are to the shoulder girdle. Thus, a whole person award is appropriate. *See Brown v. City of Aurora,* W.C. No. 4-452-408, (ICAO, Oct. 9, 2002). The Claimant's left shoulder causes pain and reduced function in the structures which are above the shoulder joint.

j. The Claimant's shoulder causes pain and reduced function in structures which are above the shoulder joint. Thus, his injury should be compensated as a whole person, because the site of his functional impairment is **off** the schedule. *See Velasquez v. UPS*, W.C.No. 4-573-459 (ICAO April 13, 2006); *Heredia v. Marriot*, W.C.No. 4-508-205 (ICAO, September 17, 2004); *see also Smith v. Neoplan USA Corporation*, W.C.No. 4-421-202 (ICAO, October 1, 2002); *Colton v. Tire World*, W.C.No. 4-449-005 (ICAO, April 11, 2002); *Guillotte v. Pinnacle Glass Company*, W.C.No. 4-443-878 (ICAO, November 20, 2001); *Copp v. City of Colorado Springs*, W.C.No. 4-271-758; 4-337-778 (ICAO, January 24, 2001); *Olson v. Foley's*, W.C.No. 4-326-898 (ICAO, September 12, 2000); *Gonzales v. City and County of Denver*, W.C.No. 4-296-588 (ICAO, September 10, 1998).

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden of proving that his permanent impairment is 10% whole person.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the Claimant permanent partial disability benefits, based on 10% whole person permanent medical impairment, from May 27, 2015 and continuing until paid in full.

B. The Respondents are entitled to a credit for all scheduled disability benefits paid pursuant to the Final Admission of Liability, dated June 12, 2015.

C. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this_____day of November 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of November 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

Whether the claimant carried her burden to establish by a preponderance of the evidence that the medical benefits at issue, specifically the bills associated with emergency room visits at Penrose St. Francis Hospital in May 2015 and the dental treatment she received in April 2015 and June 2015, were related to and reasonable and necessary for the work-related injury.

FINDINGS OF FACT

1. On May 19, 2014, the claimant sustained an admitted industrial injury while vacuuming in the course of her employment as a housekeeper. The claimant's accident happened when the vacuum's plug came out of an electrical socket and she struck her head on a shelf when she arose after reaching down to pick up the cord.

2. On May 19, 2014, the claimant underwent a CT scan of the head, which was negative for any acute intercranial injury.

3. On June 12, 2014, the claimant was seen by neurologist Adam Graham, M.D., who diagnosed a concussion, but opined that her ongoing symptoms, which have reportedly included nausea, dizziness, blurred vision, vertigo, and falls, were disproportionate to the accident and might be explained by her preexisting fibromyalgia.

4. On June 30, 2014, the claimant underwent a second CT scan of the head, which was also negative for evidence of any brain injury.

5. On July 2, 2014, the claimant was seen by Ingrid Carlson, M.D., who noted that she was theatrically stumbling in the waiting room before the examination. Dr. Carlson opined that the claimant's symptoms were disproportionate to the accident and there were no objective findings to explain her reported visual disturbances. Dr. Carlson recommended a personality evaluation and counseling.

6. On August 14, 2014, the claimant followed-up with Dr. Graham, who again opined that her symptoms were disproportionate to the accident.

7. In March or April 2015, the claimant fell and struck her mouth against a door frame in her residence, causing injuries to her mouth and teeth. The claimant contends that she fell due to dizziness stemming from the work-related injury. The claimant contacted the adjuster in her workers' compensation claim and the claimant was told to see Dr. James.

8. On April 10, 2015 the claimant was seen by Dr. James who noted that the claimant was reporting that she was getting dressed normally, then fell against a door frame and hit her mouth and broke her teeth. No specific date for this incident was provided.

9. On April 30, 2015, the claimant was seen at Rocky Mountain Prosthetic Dentistry, where her medical provider diagnosed a broken denture and recommended a remake of the denture and endodontic treatment of tooth number 27.

10. The claimant testified that she developed an infection in her mouth due to her dental injuries, which made it difficult for her to eat and therefore led to dehydration. The claimant visited the emergency room at Penrose St. Francis Hospital twice due to these problems between May 25, 2015 and May 28, 2015.

11. On May 5, 2015, Jeff Raschbacher, M.D. issued a report in which he opined that he could not clearly relate the claimant's syncopal episodes to the work-related injury, because patients with mild traumatic brain injuries typically improve over time.

12. On June 3, 2015, Al Hattem, M.D. issued a report in which he also questioned the causal relationship between the work-related injury and the claimant's cognitive symptoms, because patients with head injuries typically improve over time.

13. On June 8, 2015, the claimant was examined by John Hildebrandt, DDS and reported needing to have six teeth removed. Dr. Hildebrandt observed that x-rays were negative for any bony pathology, however, and instead opined that the claimant's denture simply did not fit well. Dr. Hildebrandt referred the claimant to Dr. Todd Pickle to evaluate the denture, in addition to recommending a psychiatric evaluation. The claimant testified that she saw Dr. Pickle on June 9, 2015, who rendered the corresponding dental treatment.

14. On August 6, 2015, the claimant was evaluated by neurologist Stanley Ginsburg, M.D., who diagnosed a minor closed-head injury and recommended a psychiatric evaluation. Dr. Ginsburg opined that most head injuries improve or stabilize,

but the claimant's has deteriorated; her constellation of symptoms is unusual; and there is evidence to suggest that some of her findings may be non-physiological.

15. The claimant testified that she uses marijuana on a daily basis for headaches.

16. Dr. Ginsburg testified that it is not probable that the claimant's alleged fall in March 2015 was caused by the work-related injury. To this end, Dr. Ginsburg explained that 90% of patients with similar injuries stabilize or improve; most people get better quickly; he would expect a recovery over a reasonable amount of time even with a more significant head injury; it is highly unusual to develop additional symptoms as the claimant has reported; his examination of the claimant's cranial nerves demonstrated that her eye movements were normal; the CT scan results did not reveal a significant brain injury; and the claimant's gait is abnormal, but in a very non-physiological way. Dr. Ginsburg further testified that it would be highly unusual for someone to sustain dental injuries by falling mouth-first into an object in the absence of some force from behind.

17. The ALJ finds the opinions of Dr. Ginsburg to be credible and more persuasive than medical evidence and opinions to the contrary.

18. The ALJ finds that the claimant has failed to establish that it is more likely than not that any injuries occurring as a result of a fall into a door frame in the March or April 2015 time frame were causally related to her industrial injury of May 19, 2014.

CONCLUSIONS OF LAW

1. The claimant had the burden to prove her entitlement to the medical benefits at issue by a preponderance of the evidence. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which would lead the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

2. An employer is responsible for the direct and natural consequences which flow from a compensable injury. *Travelers Ins. Co. v. Savio,* 706 P.2d 1258 (Colo. 1985).

3. Even after an admission is filed, however, the respondents retain the right to dispute the relatedness of continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all

subsequent conditions and treatments were caused by the admitted injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO,* 942 P.2d 1337 (Colo. App. 1997).

4. The respondents are only liable for those medical benefits which are related to and reasonable and necessary for the work-related injury. *Section 8-42-101(1)(a), C.R.S.*

5. Based on the Findings of Fact, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that her need for the medical benefits at issue, specifically the bills from the emergency room visits at Penrose St. Francis Hospital in May 2015 and the dental treatment she received in April 2015 and June 2015, was caused by or a natural consequence of the work-related injury. As a result, the claimant's claims for the medical benefits at issue must be denied and dismissed.

ORDER

It is therefore ordered that:

1. The claimant's claim for medical benefits at issue herein is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 24, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Claimant has established by a preponderance of the evidence that left knee arthroscopy is reasonable, necessary, and causally related to her May 18, 2014 work injury.

FINDINGS OF FACT

1. Claimant works for Employer as a certified nursing assistant. On May 18, 2014 she suffered an admitted injury to her left knee while attempting to transfer a patient from a wheelchair to a bed.

2. On May 18, 2014 Claimant felt an immediate onset of pain and received subsequent medical treatment. Claimant was eventually referred to an orthopedic surgeon for evaluation.

3. On December 15, 2014 Claimant was evaluated by Michael Hewitt, M.D. Claimant reported injuring her knee on May 18, 2014 while working as a certified nursing assistant and while transferring a patient from a wheelchair to a bed. Claimant reported pivoting with her left knee and noting an immediate onset of pain. Claimant reported persistent popping and catching with activity and pain in the anteromedial aspect of the knee. Dr. Hewitt noted on examination that Claimant had a reproducible catch as she entered full extension. Dr. Hewitt assessed left knee twisting injury with a clinical examination concerning for medial meniscal tear. Dr. Hewitt noted that the first MRI performed had poor quality images and was done on an open scanner. Dr. Hewitt recommended repeat imaging in a closed scanner to better assess for medial meniscal tear. *See* Exhibit 2.

4. On December 29, 2014 Claimant underwent an MRI of her left knee that was interpreted by Gen Maruyama, M.D. Dr. Maruyama identified in the medial compartment no evidence of meniscal tear or bone marrow edema. His impression was focal chodromalacia involving the mid femoral condyle articular cartilage toward the intercondylar notch, a focal area of chondral fissuring extending to the subchondral cortical bone, and mild fraying of the free edge margin of the medial meniscus root attachment without a discrete meniscal tear. *See* Exhibit 2.

5. On February 23, 2015 Claimant was evaluated by John Aschberger, M.D. Dr. Aschberger noted Claimant had continued pain and irritation in her left knee. Dr. Aschberger noted that Claimant's physical examination was fairly impressive regarding the pop and restrictions that occurred throughout range of motion. He noted her

significant continued pop going from flexion to extension at the medial knee that was uncomfortable. Dr. Aschberger noted the option of proceeding with arthroscopic intervention. Dr. Aschberger opined that the MRI was not that impressive, but that Claimant's examination suggested pathology that was resulting in her symptomatology. *See* Exhibit 1.

6. On June 1, 2015 Claimant was evaluated by Dr. Hewitt. Dr. Hewitt noted he had previously submitted for viscosupplementation injections which were not approved. Dr. Hewitt noted Claimant's continued mechanical catch as she straightened her knee. Dr. Hewitt opined that with her persistent reproducible mechanical symptoms, he felt her final treatment option was that of a knee arthroscopy. He opined that Claimant was one year out from a documented work injury with persistent mechanical symptoms that had not responded to conservative management. He noted that Claimant wished to proceed with a knee arthroscopy. Dr. Hewitt noted that the knee would be visualized entering extension to see and assess for soft tissue or bone impingement that could be causing the mechanical catch. *See* Exhibit 2.

7. On September 23, 2015 the parties performed an evidentiary deposition of Allison Fall, M.D. Dr. Fall had previously examined Claimant. Dr. Fall noted on examination the audible popping in Claimant's left knee. Dr. Fall tried to reproduce the popping with different positions to determine what was causing it. When Dr. Fall stabilized the patella so that it wouldn't track out of alignment, the popping would go away. Dr. Fall opined that Claimant had poor VMO tone and noted that the VMO is one of the quadriceps muscles that helps with patellar tracking. Dr. Fall opined that Claimant was overweight. Dr. Fall opined that on MRI there was nothing showing an acute injury requiring surgery.

8. Dr. Fall opined that the medical treatment guidelines and studies show that when patients have underlying degenerative changes, arthroscopic surgery typically doesn't improve the patient's outcome, doesn't decrease pain, and doesn't increase function. Dr. Fall opined that the likelihood of a scope helping a patient was very minimal and she disagreed with the recommendation for left knee arthroplasty in Claimant's case. Dr. Fall opined that Claimant has grade 2 arthritis noted by MRI. Dr. Fall opined that Claimant should decrease her weight and strengthen the muscles around her knee, which could be done without medical supervision in order to help with tracking of the patella in the groove. Dr. Fall noted that Claimant was previously prescribed or recommended a home exercise program but performed minimally with it and recommended that Claimant increase her exercise.

9. Dr. Fall noted she could not find any reasons in this case to deviate from the medical treatment guidelines or find any reason for the recommendation of surgery made by Dr. Hewitt. Dr. Fall opined that the left knee arthroscopy would not help Claimant with her pain or with anything. Dr. Fall reiterated that she did not know why Dr. Hewitt was recommending the surgery.

10. On October 7, 2015 the parties performed an evidentiary deposition of Dr. Aschberger. Dr. Aschberger opined that Claimant had significant findings on examination that were not well explained by the MRI scan. Dr. Aschberger opined that one way to clarify the findings that were not explained by MRI would to be to proceed with arthroscopic surgery. Dr. Aschberger opined that with surgery they could go in and look to see if there is something inside Claimant's knee causing the pop and discomfort. Dr. Aschberger opined that imaging is not one hundred percent and that although surgeons prefer to go in after finding something specific on an MRI, in Claimant's case, they would go in and look to see what they could find and if there is an explanation then fix it, if reasonable.

11. Dr. Aschberger opined that Claimant's presentation was reliable, that she was not exaggerating pain behaviors, and that her physical examination was consistent and replicable. Dr. Aschberger opined that if Claimant had a torn meniscus that was not clarified by the MRI and they were able to resect or repair the meniscus then it would help with Claimant's pain. Dr. Aschberger also opined that if they went in and found nothing, they would then be satisfied that there was not much different they could do for Claimant.

12. Dr. Aschberger opined that if patellar tracking was a major issue, she would have gone through standard rehab with intensive strengthening of the quad, but that the problem was that Claimant was not able to tolerate very much in the way of strengthening and that they had already attempted rehab without Claimant doing much better. He opined that Claimant would rehab better if there was something in the knee that they could clear up. Dr. Aschberger opined that he could not predict whether or not they would find anything during the procedure or whether or not the procedure would improve Claimant's function.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw

plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ concludes that Claimant has failed to meet her burden to show that left knee arthroscopy is reasonable and necessary treatment for her May 18, 2014 work injury. Although there is a chance that the doctor might find something in her left knee that can be fixed when they go in for surgery, Claimant has failed to show more likely than not, that the surgery is necessary to cure and relieve the effects of her injury. The left knee arthroscopy recommended by Dr. Hewitt has not been shown to be needed or essential to cure and relieve the effects of her injury and even Claimant's own expert Dr. Aschberger is unsure as to whether the surgery will help at all. Although Claimant continues to have left knee symptoms, a surgery that is speculative as to whether it will find anything and whether it will improve any symptoms is not a necessary surgery. As found above, the objective MRI testing did not show any injury exists in her left knee that would likely be repaired by arthroscopic surgery. Claimant also has grade 2 arthritis in her left knee and as noted by the medical treatment guidelines even with a documented meniscal tear (which Claimant does not have), there is little likelihood of surgery helping Claimant with that level of arthritis in her knee. The opinion of Dr. Fall that the surgery is not reasonable and necessary is found credible and persuasive. The recommended surgery falls outside the medical treatment guidelines, and neither Dr. Hewitt nor Dr. Aschberger have given a persuasive opinion as to why they believe the

surgery is necessary and as to why it will help cure and reliever Claimant of the effects of her injury in this case. Rather, they both appear to be speculating that they might find something in the knee when they go in for arthroscopy. Weighing all the evidence and testimony, the ALJ concludes that Claimant has failed to meet her burden to show the surgery is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show that a left knee arthroscopy is reasonable and necessary. Claimant's request for left knee arthroscopy is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 20, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

The following issues were raised for consideration at hearing:

1. Whether the lumbar MRI is reasonable, necessary and related medical treatment?

2. Whether the right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment?

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are reached.

1. Claimant is a 36 year old man who worked for Employer as a laborer starting on November 25, 2013.

2. On September 21, 2014, Claimant was working in the course and scope of his employment for Employer. Claimant suffered an admitted injury when he was in the rear passenger seat of an automobile involved in a motor vehicle accident. The vehicle Claimant was riding in flipped over and Claimant suffered an injury to his lower back.

3. Respondents filed a General Admission of Liability on August 27, 2015.

4. On October 2, 2014, Larry Decker, a physician's assistant (P.A. Decker), prepared a report in which he states Claimant has low back pain with right gluteal leg pain and recommends an MRI.

5. On October 7, 2014, the MRI showed central disc protrusion at L4-5 with annular tear and L5 showed a chronic anterior disc protrusion simulating an avulsion.

6. On October 13, 2014, P.A. Decker returned Claimant to full duty. P.A. Decker notes that Claimant has pain shooting down his right leg but has very good flexion and extension. He notes straight leg test is negative.

7. On October 28, 2014, Claimant visited Durango Orthopedics and saw Clayton LaBaume, a physician's assistant (P.A. LaBaume). He recommended an MRI of

Claimant's pelvis. Claimant was given restrictions of lifting no more than 25 lbs. and was placed at light duty.

8. On November 6, 2014, P.A. LaBaume recommended right-side SI joint injections as well as physical therapy. Claimant was given restrictions of: no repetitive bending, lifting, or twisting; no kneeling or squatting; no prolonged sitting greater than 60 minutes at a time; no lifting greater than 25 lbs.; and no operation of vibratory or mechanical equipment.

9. On December 1, 2014 Claimant received a right sacroiliac joint injection by Dr. Bohachevsky.

10. On December 30, 2014, P.A. LaBaume reported that Claimant benefited from a sacroiliac joint injection for approximately four days. P.A. LaBaume notes that Claimant has questions about work restrictions and returning to work. P.A. LaBaume deferred to the judgment of Dr. Jernigan.

11. On January 16, 2015, Claimant received a right sacroiliac joint injection by Dr. Bohachevsky

12. On March 16, 2015, P.A. LaBaume noted tenderness over Claimant's L4-5 and L5-S1 facets and opined that it might be contributing to Claimant's pain. P.A. LaBaume recommended medial branch blocks on the right.

13. On March 20, 2015, Claimant received right-sided L4-5, L5-S1 medial branch blocks by Dr. Bohachevsky.

14. On April 24, 2015, P.A. LaBaume notes that when Claimant drives or sits for extended periods of time Claimant begins having pain extend down the buttocks and the posterior thigh on the right. P.A. LaBaume states that he plans to review Claimant's case with a surgeon.

15. On May 7, 2015, P.A. LaBaume states that he talked to Dr. Orndorff and Dr. Bohachevsky, and the annular tear could be causing radiculitis. He notes despite the fact that there is no neuroforaminal stenosis, sometimes epidural steroid injections can improve pain. He recommends a right L4 transforaminal epidural steroid injection.

16. On June 11, 2015, Dr. Welling reported that Claimant did not tolerate fentanyl and recommended that Claimant double up on the Norco.

17. On July 7, 2015, Dr. Welling notes that Claimant now has chronic back pain and he is able to forward flex only a few degrees and only a few degrees of lateral bending.

18. On August 12, 2015, Dr. Welling notes that Claimant ambulates with a very painful gait and moves very slowly. He states that Claimant is only able to forward flex a few degrees and lateral bending maybe 5 degrees and has significant buttock pain. Dr. Welling takes Claimant off of work.

19. On August 20, 2015, P.A. LaBaume notes that Claimant has ongoing pain that is severely affecting Claimant's life. He states Claimant has problems sleeping and the pain is affecting his sex life. He notes Claimant continues to take Norco and utilize a Butrans Patch without much relief. On physical exam, he notes, inspection of the lumbar spine does reveal significant tenderness over the bilateral L4-5 and L5 area. He notes Babinski response is with downgoing toes, straight leg raise test is positive for causing back pain, and FABER test is positive bilaterally. P.A. LaBaume reports that Claimant's last MRI was completed approximately ten months ago and "I do believe the patient appears to be in worse pain than when I have seen him previously." P.A. LaBaume states "because of the patient's ongoing and what I believe is worsening pain, I would like to refer the patient for MRI of the lumbar spine to further evaluate his symptomatology.

20. On September 28, 2015, Dr. Welling reports that a repeat MRI was denied and that Claimant needs another consultation with a neurosurgeon.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, *supra*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary

to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Here, the Claimant has proven by a preponderance of the evidence that the need for the lumbar MRI is reasonable, necessary and related medical treatment. Claimant's pain and physical examination findings have become worse since the last MRI. Claimant's MRI on October 7, 2014, showed a central disc protrusion at L4-5 with annular tear and a chronic anterior disc protrusion simulating an avulsion at L5. After numerous injections, Claimant continued to experience pain. Dr. Welling noted on July 7, 2015, that Claimant now has chronic back pain and was only able to forward flex a few degrees and a few degrees of lateral bending. This physical examination finding was different than previous physical findings of no limitation on bending. On August 12, 2015, Dr. Welling took Claimant off of work, noting that Claimant ambulates with very painful gait and moves very slowly. This was the first time Claimant was taken off work completely. Finally, on August 20, 2015, P.A. LaBaume noted that Claimant's ongoing pain was severely affecting his life including causing problems sleeping and effecting his sex life. He notes Norco and a Butrans Patch provided little relief, and on physical exam the Babinski response was with downgoing toes, the straight raise leg test was positive for causing back pain, and the FABER test was positive bilaterally. The physical findings on examination all demonstrate a worsening since the last MRI. P.A. LaBaume notes that Claimant was in worse pain than when he had previously seen the Claimant and recommends a repeat MRI. The authorized treating physician is able to make referrals for diagnostic purposes and to research what is causing a patient's pain. This referral is reasonable, necessary and related and it is order that Respondents shall authorize the lumbar MRI.

Claimant has also proven by a preponderance of the evidence that the right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment. On May 7, 2015, P.A. LaBaume consulted with both Dr. Orndorff and Dr. Bohacheveky and notes the annular tear could be causing radiculitis. He notes despite the fact that there is no neuroforaminal stenosis, sometimes epidural steroid injections can improve pain. He recommends a right L4 transforaminal epidural steroid injection. Claimant proved by a preponderance of the evidence that the right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment.

ORDER

It is therefore ordered that:

1. The lumbar MRI is reasonable, necessary and related medical treatment and shall be authorized by Respondents.

2. The right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment and shall be authorized by Respondents.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 18, 2015

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

- Did Claimant prove by a preponderance of the evidence that she was Decedent's common law spouse and is therefore entitled to workers' compensation death benefits?

- If Claimant was not the common law spouse of Decedent is she entitled to receive death benefits as a putative spouse?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 13 were admitted into evidence. Respondents' Exhibits A though E were admitted into evidence.

2. Claimant contends she was the common law spouse of the Decedent and is entitled to workers' compensation death benefits as Decedent's widow.

3. Decedent worked for the Employer as a driver and laborer. He was hired by the Employer in March 2012.

4. Decedent's date of birth was July 18, 1986.

5. Decedent died on April 16, 2014 as a result of injuries arising out of and in the course of his employment. On October 10, 2014 Respondents filed a Fatal Case Final Admission admitting that a minor child (JBJ) is entitled to death benefits.

6. In August 2014 Claimant filed a Dependent's Notice and Claim for Compensation alleging that she is entitled to death benefits as the Decedent's surviving spouse.

7. Claimant's date of birth was October 13, 1995. Thus, she was 18 years of age at the time of decedent's fatal accident.

8. Decedent testified as follows. She was born in Mexico. In January 2011 she met her "husband," the Decedent , at a funeral in Mexico. After the funeral the Decedent went to talk to Claimant's parents because Decedent said they "were going to get married." Decedent then asked Claimant's mother for Claimant's hand in marriage. Claimant's mother agreed to the marriage. Claimant has considered herself married to Decedent since January 2011.

9. Respondents' objected to admission of any statements allegedly made by Decedent to Claimant and statements Decedent allegedly made to Claimant's parents. The Respondents argued Claimant's testimony concerning statements made by the Decedent is barred by § 13-90-102, C.R.S. (dead man's statute). The ALJ permitted Claimant to testify to Decedent's statements but reserved for future determination whether the statements would ultimately be admitted into evidence.

10. Claimant testified that after the January 2011 funeral Decedent returned to the United States but she remained in Mexico. Claimant testified that Decedent then began sending her money to support herself.

11. Claimant testified that shortly after returning to the United States Decedent was arrested for transporting marihuana. According to Claimant these charges resulted in Decedent's incarceration from January 2012 until December 2012.

12. Claimant testified that after Decedent was released from jail in December 2012 she came to Colorado to live with the Decedent. She stated that she lived with Decedent at his mother's home. However, Decedent's mother (Josefa Avila Soto, hereinafter Soto) was charging rent and Decedent did not have enough money to support Claimant. Consequently, Claimant returned to Mexico on January 4, 2013.

13. Claimant testified that her Facebook page listed her as married to Decedent, and that this listing continued through the date of his death. In this regard the ALJ notes that on February 15, 2013 Claimant's Facebook page listed her as "married" to Decedent. On February 16, 2013 Claimant's Facebook page listed her as "engaged" to the Decedent. Claimant explained that the Decedent had gone on her Facebook page and changed her relationship status from married to engaged. Claimant readily conceded that Decedent had access to her Facebook page. Therefore, the ALJ finds Claimant's Facebook page is not a reliable indicator of how Claimant was representing her marital status to family, friends and community.

14. Claimant testified that Decedent's Facebook page lists him as married to her. The ALJ notes that on February 16, 2013 Decedent's Facebook page listed him as "engaged" to Claimant. On March 31, 2013 Decedent's Facebook page listed him as "married" to Claimant. The ALJ assigns little weight to these postings insofar as they would permit the inference that Decedent was holding himself out as married to Claimant. Claimant admitted that she had access to Decedent's Facebook page and made postings on Decedent's page. Therefore, the ALJ finds Decedent's Facebook page is not a reliable indicator of how Decedent was representing his marital status to family, friends and community.

15. Claimant testified as follows. She returned to the Colorado in March 2013 and again lived with Decedent at Soto's house. In July 2013 Decedent and Claimant left Soto's house and moved together to an apartment in Westminster, Colorado.

16. Respondents' Exhibit C is an Apartment Lease Contract (lease) dated July 8, 2013. The lease states that the lease is between the Decedent and Pinnacle Real

Estate Management for Apartment 2-105, 6980 Stuart Street, Westminster, Colorado. The lease recites there are no "occupants" of the premises other than Decedent and Claimant's name does not appear on the lease.

17. Claimant testified her name does not appear on the lease because she was a "minor" at the time the lease was signed.

18. Claimant testified that at the apartment she cooked and cleaned house while Decedent worked and brought home money for expenses. Claimant stated that she never had a job while residing in the United States.

19. Claimant testified that she and the Decedent rented a television together.

20. Claimant's Exhibit 11 consists of three documents from "Rent-A-Center, Inc." There is a customer "information" document listing the decedent and "Jennifer Mitchet" as the customers and showing they reside at apartment 2-105, 6980 Stuart Street, Westminster, Colorado. Although "Jennifer Mitchet" is not Claimant's name, it is very close to her actual name of "Yenifer Michel." One Document is a "Payment History" showing that the Decedent leased a television set in March 2014 and made several lease payments. This documentation corroborates Claimant's testimony that she and the Decedent leased a television "together."

21. Claimant testified that she turned 18 year of age on October 13, 2013, and that there was a birthday party held at Decedent's mother's house.

22. Claimant testified that she was pregnant at the time of decedent's death and the decedent was the father of the child. Claimant explained the child was conceived in the "marital home" and was born to Claimant on July 23, 2014. The child is JBJ.

23. Claimant testified that she told friends and family that she was married to the Decedent.

24. Claimant testified that after Decedent's death she went to the funeral home and provided some information that was included in the Decedent's Death Certificate. Specifically, she stated that she advised a funeral home representative that she was the wife of the Decedent. Claimant further testified that Soto provided the information to the funeral home that is contained in the Decedent's obituary.

25. Decedent's Death Certificate lists Claimant as the Decedent's "spouse." The funeral director signed the Death Certificate which lists Soto as the "Informant."

26. Decedent's Obituary, which was apparently posted by the funeral home on its website, states that the Decedent is survived by his wife [the Claimant].

27. Eloy Larza (Larza) is Claimant's father. Mr. Larza testified as follows. Claimant met Decedent at a funeral in Mexico. Decedent came to him after the funeral and expressed his intention to marry Claimant. Eventually Claimant moved to the

United States to live with Decedent. Decedent financially supported Claimant after she moved. Larza did not provide support to Claimant after she moved in with Decedent. After Decedent died Claimant had no means of support so he and his wife moved to Denver, Colorado to provide support to her.

28. Respondents objected to Mr. Larza's testimony insofar as he discussed statements made to him by the Decedent. Respondents argued that Larza's testimony is inadmissible because he is "interested" in the litigation within the meaning of the dead man's statute.

29. Lilliana Arellano (Arellano) testified for Claimant. Arellano considers herself married to Decedent's cousin, Roy Rogelio. Arellano explained that Decedent and Rogelio were close friends before Decedent met Claimant. Arellano testified she attended family events at which Decedent and Claimant were present. She thought of them as married and stated that Decedent would call Claimant "his lady."

30. Savilo Avilla (Avilla) is Decedent's uncle. Mr. Avilla testified he has known Decedent since he was born and has known Claimant since Decedent brought her to the United States. Avilla testified that he observed Claimant and Decedent together at various family events and Decedent treated Claimant as a wife. He also knew that Decedent and Claimant lived together in an apartment.

31. Avilla further testified that Decedent said he was "thinking about" getting married but wanted to buy a house first. Avilla testified that he told Decedent and Claimant that they should get married. However, Decedent and Claimant said they wanted to buy a house and get married afterwards. On re-direct examination Avilla explained that when he told Decedent and Claimant they should get "married" he was referring to an official ceremony with a license.

32. Soto testified at the request of Respondents. Soto testified that her son met Claimant at a funeral in Mexico. Soto was present at the funeral. At the time of the funeral Decedent did not tell Soto that he was in love with "a girl" or that he married Claimant or intended to marry her.

33. Soto testified that her son commented that Claimant's parents were going to bring Claimant to Colorado and leave her here. Soto stated that she told Claimant's parents that Claimant was a minor and they couldn't leave her. Nevertheless Claimant's parents left her. Decedent and Claimant then lived in Soto's home for about 5 months. During this 5 month period of time Decedent did not tell Soto that he was married to Claimant and Claimant did not tell Soto that she considered herself married to Decedent. Soto further testified Decedent did not refer to Claimant as his wife but did refer to Claimant was his "old lady." After 5 months Claimant and Decedent moved out to rent an apartment together.

34. Soto testified that she recalled that Decedent gave Claimant a ring with a heart on it. Soto thinks that Decedent gave the ring to Claimant for her birthday.

35. Soto testified that she made all of the arrangements for Decedent's funeral including supplying the information contained in the obituary. However, Soto denied that she told the funeral home that Decedent was survived by his wife, the Claimant. Soto did not know who told the funeral home that Decedent was survived by his wife. However, she testified that Claimant and her father went to the funeral home on "the last day" that funeral arrangements were being made. However, Soto also testified that the funeral arrangements were completed by April 18, 2014, and at that time Claimant's father was still in Mexico.

36. Ernest Romero (Romero) testified as follows. He was close friends with the Decedent. He first met Decedent in the early 2000's and they worked together at Deep Rock. Later Romero worked with Claimant at the Employer. Romero helped Decedent get his citizenship. Decedent dated different girls when he worked at Deep Rock. Romero knew that Decedent went to a funeral in Mexico. When Decedent returned from the funeral he told Romero that he had met a girl. At one point Decedent stated that he was always broke because he was sending money to Mexico to "help out" Claimant and her parents. Romero was aware that Claimant moved into Soto's home in March 2013 and that Claimant and Decedent got an apartment together in July 2013. Romero knew Claimant did not work and that Decedent was supporting her. Romero testified that Decedent did not say he was married to Claimant or refer to Claimant as his "wife." However, Decedent did refer to Claimant as "my lady."

37. Sylvia Atencio-Jesperson (Atencio-Jesperson) testified as follows. She is the vice president in charge of operations for Employer. Her duties include hiring and firing of employees and dealing with employment-related paperwork including health insurance benefits. Decedent was listed as "single" under the Employer's health insurance plan. Atencio-Jesperson explained that a single employee's "girlfriend" can be covered under the Employer's health insurance plan if the employee completes a form designating the "girlfriend" as his common law spouse. Decedent did not add Claimant to the health insurance plan after she became pregnant. Decedent never told Atencio-Jesperson that he was married.

38. On March 6, 2012 Decedent completed a W-4 (Withholding Allowance Certificate). Decedent placed an "x" in a box indicating he was single and claimed one withholding allowance. Decedent claimed a second withholding allowance by listing himself as "head of household." The W-4 contains printed instructions stating that the taxpayer may claim "head of household" status if the taxpayer is "unmarried" and pays "more than 50% of the costs of keeping up a home for yourself and your dependents."

39. On August 5, 2013 Decedent completed another W-4. Decedent placed an "x" in a box indicating he was single and claimed one withholding allowance based on this status.

40. Respondents called attorney Todd Stahly (Stahly) as a witness. Stahly was qualified as an expert in family law, domestic relations, and common-law marriage. On July 21, 2015 the ALJ entered an Order Regarding Expert Testimony that limited the scope of Stahly's testimony. Specifically, the ALJ ruled that he would not consider

Stahly's testimony insofar as it described the "legal criteria for common law marriage" and expressed Stahly's opinion that the "facts in the case do not support the existence of a common law marriage." However, the ALJ admitted Stahly's testimony for the limited purpose of helping the ALJ to understand the "significance of tax documents and employer records" in the context of common law marriage.

41. Stahly opined the W-4 forms completed by decedent were very significant in determining the existence of a common law marriage in this case. Specifically, he pointed out that on both W-4 forms Decedent indicated that his marital status was "single" rather than "married." Further, Stahly pointed out that the W-4 forms are the only documents he reviewed that were under oath. Stahly also opined that it is significant that Decedent did not list Claimant as his "emergency contact" when he applied for employment with the Employer.

42. Claimant proved it is more probably true than not that she became Decedent's common law spouse after she turned 18 and before Decedent's death on April 16, 2014.

43. The weight of the credible evidence establishes that Claimant cohabited with the Decedent before and after she reached the age of 18. Claimant credibly testified that she moved into an apartment with the Decedent in July 2013 and was still living there at the time of his death. The fact of Claimant and Decedent's cohabitation was well known to friends and family as shown by the testimony of Soto, Larza, Avilla and Romero.

44. The Claimant proved it is more probably true that she and Decedent had agreed to live as a married couple and that this was their reputation among family, friends and community.

45. Decedent's intention to be married to Claimant is evidenced by several facts. Decedent declared his intention to be married to Claimant when he met with Claimant's father and mother in January 2011 and asked for Claimant's hand in marriage. Decedent also told Claimant of his desire to be married and Claimant credibly testified that she considered herself married to decedent in January 2011.

46. Decedent provided financial support to Claimant even before she moved to the United States to live with him. Claimant credibly testified that she never worked when she was in the United States and that Decedent provided financial support to her after they moved to the apartment. The ALJ finds that Decedent's long history of providing financial support to Claimant is a strong indicator of his intent to be married to her and an acknowledgement of his obligation to support her. Indeed, Decedent confided to Romero that he was often broke because he was providing support to Claimant.

47. Decedent and Claimant conceived a child at the apartment where they lived. The child was born after Decedent's death but is acknowledged to be the Decedent's child. The ALJ infers that the act of conceiving the child evidences the

agreement of Claimant and Decedent to live together as husband and wife and to start a family together.

48. The weight of the evidence establishes that Decedent represented to his family and community that he was married to Claimant. Although Decedent did not often, if ever, refer to Claimant as his "wife," he told his mother that Claimant was his "old lady," he told Romero that Claimant was "my lady," and he told Arellano that Claimant was "his lady." The ALJ finds that, in context, the words "my old lady" and "my lady" and "lady" are colloquial synonyms for the words "my wife." Thus, Decedent's use of these terms evidences his agreement to be married to Claimant and that he represented to his community that he was married to her.

49. Soto credibly testified that Decedent gave Claimant a ring "with a heart on it" for her birthday. The ALJ infers from Claimant's testimony that the ring was given to her on October 13, 2013, when Claimant celebrated her 18th birthday at Soto's house. The ALJ finds that Claimant was not in the United States for any birthday prior to her 18th birthday on October 13, 2013. The ALJ infers from the Decedent's action in giving the Claimant a heart-shaped ring on her 18th birthday that Decedent was presenting a concrete acknowledgement of his marital commitment to Claimant.

50. In March 2014, shortly before Decedent's death, Claimant and Decedent went together to lease a television set. The TV was used in the apartment which Claimant and Decedent shared.

51. Although Soto made the funeral preparations for Decedent's funeral, the death certificate lists Claimant as Decedent's spouse. The death certificate lists Soto as the "informant" and is signed by the funeral director. The ALJ infers from this document that Soto told the funeral director that Claimant was Decedent's spouse. The ALJ finds that the death certificate represents a public acknowledgement by Soto that she considered the Decedent and Claimant to be married. Further the death certificate represents credible evidence that at the time of death Claimant and Decedent were representing to friends and family that they were married.

52. Soto's testimony that she did not tell the funeral home that Claimant was married to Decedent is not credible. Soto's testimony is persuasively rebutted by the death certificate. The evidence fails to establish any plausible motive for the funeral director to list the Claimant as Decedent's spouse and Soto as the "informant" if these factual representations were not true. Moreover, Soto herself admitted that she made all the arrangements for Decedent's funeral and that these arrangements were completed by April 18, 2014, before Claimant and her father went to the funeral home. It is not plausible that Claimant made all of the funeral arrangements but did not tell the funeral home representatives that Claimant was Decedent's spouse. As shown by the death certificate and the obituary, the fact that the Decedent was survived by a spouse is of both legal and sentimental significance. The ALJ infers that a representative of the funeral home asked Soto about the Decedent and she told the representative that Decedent was married to Claimant. Although Claimant also told the funeral home that

she was Decedent's spouse, the ALJ infers that Claimant provided this information after Soto had already do so.

53. The ALJ acknowledges that Decedent completed W-4 forms that listed his marital status as "single" rather than married. However, the ALJ concludes this evidence is not particularly persuasive in light of evidence that both Decedent and Claimant were aware of Claimant's minority status at the time the W-4's were completed. The parties' awareness of Claimant's minority status prior to October 13, 2013 is evidenced by Claimant's credible testimony that her name was not on the apartment lease because she was a "minor." The ALJ infers that Decedent did not acknowledge that he was married on the W-4 forms because these were official documents and he was afraid that listing Claimant as his spouse might trigger legal difficulties for him and Claimant.

54. Avilla's testimony that Decedent and Claimant told him they did not want to get "married" until they purchased a house is not persuasive evidence that they did not consider themselves married. Arellano credibly explained that from his observations Decedent treated Claimant as a wife. Moreover, Arellano credibly explained that when he spoke to Decedent and Claimant about getting "married" he was referring to a formal marriage with a license.

55. Evidence inconsistent with these findings is not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and

inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

LEGAL VALIDITY OF COMMON LAW MARRIAGE BETWEEN DECEDENT AND CLAIMANT

Claimant argues that the evidence establishes that she entered into a valid common law marriage with Decedent as early as January 2011. Respondents, citing § 14-2-109.5, C.R.S., argue that Claimant was too young to enter a valid common law marriage. Respondents further argue that Claimant could not "ratify" the common law marriage after she turned 18 on October 13, 2013. The ALJ agrees with Respondents that Claimant could not contract a valid common law marriage prior to October 13, 2013, but disagrees that she was precluded from entering into a valid common law marriage after that date.

Insofar as pertinent, § 14-2-109.5 (1)(a), C.R.S., provides that a common law marriage after September 1, 2006 "shall not be recognized as a valid marriage in the state unless, at the time the common law marriage is entered into" each party is "eighteen years of age or older." Respondents contend that this statute renders "void" the Claimant's alleged common law marriage to Decedent. Moreover, relying on principles of contract law, Respondents assert that the statute precluded Claimant from "ratifying" her common law marriage after she turned 18.

Statutes should be interpreted to effectuate the legislative intent. Where the statutory language is unambiguous, there is no need to resort to rules of statutory construction because the General Assembly is presumed to have meant what it clearly said. *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002). Further, when the General Assembly enacts legislation in a particular area it is presumed to be aware of pertinent judicial precedent. *Dependable Cleaners v. Vasquez*, 883 P.2d 583 (Colo. App.1994).

The Court of Appeals issued its opinion in the case of *In re Marriage of J.M.H.*, 143 P.3d 116 (Colo. App. 2006) on June 10, 2006, prior to the effective date of § 14-2-109.5 (1)(a). In *J.M.H.* the court was required to determine whether a female could enter into a valid common law marriage at the age of 15. The J.M.H. court noted that Colorado recognizes "common law marriage" and that Colorado appellate courts had not previously "determined the age of consent for a valid common law marriage." The *J.M.H.* court stated that the "General Assembly's authority to modify or abrogate the common law" will not be recognized unless the intent to do so is "clearly expressed." Therefore, the court concluded that in the absence of any provision voiding common law marriages marriages between parties of certain ages "all marriages regularly made according to common law are valid and binding." Because *J.M.H.* was decided when there was no statute prescribing the age of consent to a common law the court applied the "common law age of consent for common law marriage." The common law age of consent was determined to be fourteen for a male and twelve for a female.

The language of § 14-2-109.5 (1)(a) clearly and plainly establishes that the General Assembly intended to abrogate the common law right of persons to contract a common law marriage prior to the time both of them have reached their eighteenth birthdays. Therefore, the ALJ agrees with Respondents that the statute prohibited Claimant from consenting to a valid common law marriage with Decedent prior to her 18th birthday on October 13, 2014.

However, § 14-2-109.5 (1)(a) contains no language suggesting that the General Assembly intended to deprive citizens of their common law right to consent to common law marriage *after* they reach the age of 18. Moreover, if the General Assembly had intended to deprive some citizens, such as persons in Claimant's circumstances, of their right to consent to common law marriage after the age of 18 it was required to expressly state that intent. *In re Marriage of J.M.H.*, *supra*. However, the General Assembly expressed no such intent and the ALJ may not simply infer it had such intent. For these reasons the ALJ rejects Respondents' argument that because Claimant could not consent to common law marriage before she reached 18 years of age she is statutorily barred from doing so after she reached the age of 18.

Moreover, the ALJ does not consider this interpretation of § 14-2-109.5 (1)(a) as authorizing retroactive "ratification" of an otherwise invalid marriage. Rather, a party arguing for the existence of a common law marriage must prove the presence of all elements of a common law marriage *after* both of parties reach the age of 18. Cf. *Rocky Mountain Fuel Co. v. Reed,* 110 Colo. 88, 130 P.2d 1049 (Colo. 1942) (cohabitation after removal of an obstacle to marriage raises "presumption" of marriage; mutual consent may be established by conduct as well as words; because law deprecates illegal relations and favors legal ones a slight change in circumstance may establish transition from former to later). The fact that a party proves the existence of all criteria for a valid common law marriage after both parties reach the age of 18 says nothing about whether or not the party could consent to a common law marriage prior to age 18. Indeed, in this case the ALJ has found that Claimant was statutorily precluded from entering into a common law marriage before her 18th birthday. The ALJ does not hold that any purported common law marriage attempted by Claimant before she reached the age of 18 has any legal force or effect.

EXISTENCE OF COMMON LAW MARRIAGE ON OR AFTER OCTOBER 13, 2013

Claimant contends that a preponderance of the evidence establishes that she was Decedent's common law spouse and is now his widow. Therefore, she claims to be the Decedents' presumed dependent for purposes of § 8-41-501(1)(a), C.R.S. The ALJ agrees with this contention.

Section 8-41-503(1), C.R.S., provides that dependency "shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions…" Thus, the issue in this case is whether Claimant proved she was Decedent's common law spouse after she turned 18 and before Decedent's death on April 16, 2014.

The existence of a common law marriage "is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship." *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987). The "agreement" of the parties to be married need not be expressed in words but may be "tacitly expressed." *Id.* at 664. Where the existence of an agreement is disputed the agreement may be inferred from "evidence of cohabitation and general repute." *Id.* at 664. The two most important factors demonstrating the parties' agreement to be married are "cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife." *Id*. 665. Moreover, the parties' agreement to be married may be evidenced by "any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife." *Id*. at 665. Numerous "behaviors" may be considered as evidence of the parties' intention, but none is determinative.

The Respondents cite *Employers Mutual Liability Insurance Co. of Wisconsin v. Industrial Commission,* 124 Colo. 68, 234 P.2d 901, 903 (Colo. 1951) for the proposition that evidence supporting the existence of a common law marriage should be "clear, consistent and convincing." They suggest that if the evidence regarding the existence of a common law marriage is "conflicting" that courts typically hold that no common law marriage existed.

However, in *People v. Lucero*, *supra*, our Supreme Court stated in footnote 6 that the cited language from the *Employers Mutual* case "was not chosen to establish a higher burden of proof for those attempting to prove a common law marriage, but instead merely stresses that the parties must present more than vague claims unsupported by competent evidence." *People v. Lucero*, 747 P.2d at

Ultimately the question of whether a party has established the existence of a common law marriage is one of fact for determination by the ALJ. *Sutphin v. Pinnacol Assurance*, WC 4-815-042-04 (ICAO September 9, 2014). Resolution of the issue turns on issues of fact and credibility. *People v. Lucero*, 747 P.2d at 667, n.6.

As determined in Findings of Fact 42 through 54, Claimant proved is more probably true than not that she was Decedent's common law spouse on the date of death. As found, the evidence establishes that Decedent and Claimant cohabited both before and after Claimant reached the age of 18. The parties' agreement to be married is supported by evidence of Claimant's and decedent's conduct. Decedent sought permission from Claimant's parents to marry Claimant and Claimant considered herself married to Decedent as early as January 2011. Decedent financially supported Claimant both before and after she reached the age of 18. Decedent and Claimant conceived a child together thereby evidencing their agreement to live as man and wife and to raise a family together. Decedent's referred to Claimant as his "lady" and his "old lady". As found, the ALJ concludes that use of these terms represents a colloquial acknowledgement by Decedent that he considered Claimant to be his "wife." The Decedent's death certificate constitutes credible evidence that he and Claimant were

holding themselves out to be married and that this status was acknowledged by family members including Decedent's own mother.

The ALJ acknowledges that the evidence concerning the existence of a common law marriage was conflicting. However, the weight of the credible and persuasive evidence establishes that a common law marriage existed between Decedent and Claimant after Claimant turned 18 and before Decedent's death. In light of this determination the AL need not consider Claimant's arguments concerning the applicability of the "putative spouse" statute.

APPLICABILITY OF DEAD MAN'S STATUTE

Respondents argue that testimony by Claimant and her father concerning statements made to them by the Decedent is inadmissible under the dead man's statute. Specifically, Respondents object to Claimant's testimony insofar as she stated that the Decedent: (1) Talked to her parents about wanting to marry her; (2) Asked Claimant's mother's permission to marry her; (3) Told Claimant he thought they were married; (4) Told friends and family he thought they were married. Respondents also assert that Larza was an "interested person" within the meaning of the dead man's statute and therefore not competent to corroborate Claimant's testimony concerning Decedent's request to marry Claimant.

Section 13-90-102(1) C.R.S., provides in part that:

> Subject to the law of evidence, in any civil action or proceeding in which an oral statement of a person incapable of testifying is sought to be admitted into evidence, each party and person in interest with a party shall be allowed to testify regarding the oral statement if:
>
> (b) The testimony concerning the oral statement is corroborated by material evidence of a trustworthy nature;

Section 13-90-102 (3)(a), C.R.S., provides as follows:

> "Corroborated by material evidence" means corroborated by evidence that supports one or more of the material allegations or issues that are raised by the pleadings and to which the witness whose evidence must be corroborated will testify. Such evidence may come from any other competent witness or other admissible source, including trustworthy documentary evidence, and such evidence need not be sufficient standing alone to support the verdict but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth.

Section 13-90-102 (3)(c), C.R.S., provides as follows:

> "Person in interest with a party" means a person having a direct financial interest in the outcome of the civil action or proceeding, or having any other significant and non-speculative financial interest that makes the person's testimony, standing alone, untrustworthy.

Respondents' arguments notwithstanding, the ALJ concludes that Claimant's testimony concerning statements made by Decedent to her, her parents and other persons was "corroborated" by "material evidence of a trustworthy nature" and is therefore admissible under § 13-90-102(1)(b). *Cf. Glover v. Innis,* 252 P.3d 1204 (Colo. App. 2011) (in case involving real estate conveyance matter remanded to trial court with instructions to determine whether defendants' statements concerning remarks made by deceased person were "sufficiently corroborated" by an affidavit of a disinterested third party). In this regard the ALJ notes that the dead man's statute does not require that a party's testimony concerning a statement made by a deceased person be "corroborated" by testimony of a disinterested witness that the witness personally heard the deceased person make the disputed statement. Rather, the dead man's statute requires only that the corroborating evidence be "material" to an underlying issue and tend to confirm, strengthen and show the probable truthfulness of the party's testimony concerning the incapable person's statement.

Claimant's testimony that Decedent spoke to her parents about wanting to get married and asked her mother for permission to marry is corroborated by Soto's testimony that Decedent met Claimant at a wedding in Mexico and that Claimant's parents brought her to the United States to live with the Decedent. The testimony is further corroborated by Romero's testimony that when Decedent returned from the funeral in Mexico Decedent stated that he had "met a girl." The testimony is also corroborated by Romero's testimony that Decedent told him that he was sending money to help out Claimant and her parents.

Claimant's testimony that Decedent told her he considered himself married to her and that Decedent held himself out as married to third parties is corroborated by the evidence cited in the previous paragraph. Claimant's testimony is also corroborated by competent evidence that Decedent cohabited with Claimant, fathered Claimant's child provided financial support to Claimant and gave Claimant a heart shaped ring on her 18th birthday. Claimant's testimony is further corroborated by the testimony of Arellano, Romero and Soto that Decedent variously referred to Claimant as his "lady" and his "old lady." The Claimant's testimony is also supported by the Death certificate which lists Claimant as Decedent's spouse and Soto as the "informant."

It follows that even if Larza is considered a "person in interest with a party" his testimony is not excluded under the dead man's statute. Larza testified that Decedent expressed his intention to marry Larza's daughter (Claimant). The ALJ concludes that Larza's testimony concerning Decedent's alleged statement is "corroborated by material

evidence" for most of the same reasons that Claimant's testimony is found to be corroborated.

Finally, even if the specific testimony that Respondents seek to exclude is inadmissible under the dead man's statute, the ALJ would still find that the remaining evidence set forth in Findings of Fact 42 through 54 is sufficient to establish that Claimant was Decedent's common law spouse after she turned 18 and before Decedent's death.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Claimant is Decedent's dependent for purposes of § 8-41-501(1)(a), C.R.S.

2. Issues not resolved by this order are reserved for future determination.

3. Claimant's counsel shall, after consultation with Respondents' counsel and the GAL, set a hearing to determine the remaining issues including allocation of death benefits between the dependents, proper safeguarding and disposition of the minor child's benefits and payment of the GAL's attorney fees. The hearing shall be set for one-half day on a non-trailing docket before the undersigned ALJ. The hearing shall be set to occur within 60 days of the date this order is served.

DATED: November 18, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

The issues presented for determination are as follows:

1. Whether Claimant suffered a compensable injury or occupational disease on or about October 19, 2014.

2. If Claimant suffered a compensable injury or occupational disease, whether right hip and lumbar symptoms are related to the injury.

STIPULATIONS

The parties entered into the following stipulations should the claim be found compensable:

1. Claimant's average weekly wage is $478.20.

2. Claimant's authorized treating provider is HealthOne Occupational Clinic and Dr. Braden Reiter.

3. Respondents agree to reimburse Claimant for co-pays that Claimant incurred for claim-related treatment at Kaiser.

4. If and Kaiser seeks to collect from Claimant or Respondents the costs for reasonable, necessary, and claim-related medical treatment, Respondents will, subject to the fee schedule, pay the costs of reasonable, necessary, and claim-related medical treatment that Claimant incurred at Kaiser.

5. Claimant's last worked for the Employer on October 20, 2014.

FINDINGS OF FACT

1. Claimant was 51 years old at the time of the hearing. He began working for the Employer as a ramp agent in June 2012.

2. Claimant is six feet two inches tall and weighs 285 pounds. Claimant has weighed about 285 pounds for the last five years.

3. Claimant's job duties include loading and unloading baggage from aircraft luggage bins. When loading aircraft luggage, Claimant lifts luggage from baggage carts onto the conveyor belts that carry baggage to aircraft luggage bins. Once baggage reaches the aircraft bin, Claimant's job duties include moving and stacking luggage at various points in the bin. When unloading luggage from aircraft bins, Claimant moves

stacked luggage to a conveyor belt leading from the luggage bin to baggage carts on the ground. In addition to baggage loading activities, Claimant's job duties include walking and climbing stairs.

4. Claimant's duties also require him to guide aircrafts in the gate area, unload bags and cargo from arriving flights, and load bags and cargo for departing flights.

5. The weight of the bags ranges from very light to 99 pounds. On an average flight, the Claimant loads and unloads an average of 100 bags. The job also requires the loading and unloading of cargo which often weighs more than the individual bags.

6. During one 8-hour shift, the Claimant services six to seven flights. However, due to changes in flight schedules and manpower, he sometimes services more. The Claimant is employed as a "zone assist" which he described as a floater assigned to work the heavier flights or when they are short staffed.

7. Claimant does most of his lifting from a kneeling position in the cargo bin. He must kneel because the ceiling is too low for him to stand. He has to bend over and lift the luggage with his arm out almost straight, and then swing it from right to left and try to toss it as close to the bin wall as possible. He has to lift the bags above his shoulders and stack them up to the top of the ceiling.

8. The Claimant calculated that during a shift, he does cumulative lifting of almost 100,000 pounds.

9. In early October 2014, the Claimant began experiencing symptoms, particularly pain, in his left hip/buttocks down his left leg to his foot while working. He described the symptoms as having a gradual onset over a two to three week period prior to October 19, 2014. He testified that it was a shooting, stabbing pain in the back of his buttocks going down the back of his leg and then from the front of the leg to the top of his foot.

10. The Claimant reported his injury/symptoms to his supervisor on October 19, 2014 at the end of his shift. Claimant's supervisor referred him to HealthOne in Aurora, where he saw Dr. Braden Reiter. Claimant filled out a pain diagram where he circled his left hip and indicated pain going down his left leg, and indicated his pain level was 8 out of 10. Dr. Reiter's report stated that Claimant "over the last 3 weeks has been getting increasing pain in his left hip" that got worse the previous day.

11. Dr. Reiter issued restrictions of no lifting over 20 pounds. The Employer could not accommodate Claimant's restrictions and he has returned to work since October 20, 2014.

12. On October 22, 2014, Claimant saw physical therapist, Cheryl Parent, at HealthOne. She noted that Claimant complained of left hip pain which has an unknown

etiology. She reported that Claimant's left hip pain was made worse by twisting, standing, sitting, lying on the left side, climbing, driving, pulling, "using it," and bending. Walking was listed as an activity that improved symptoms. He felt the pain was worse at night and in the afternoon depending on activity level. Ms. Parent's assessment included "positive signs and symptoms with left hip strain with potential lumbopelvic dysfunction and potential disc pathology at L4/5 and L5/S1. Treatment goals included restoring both Claimant's left hip and back to full strength.

13. Claimant returned to see Dr. Reiter on October 27, 2014. Claimant reported improvement in his pain levels to a 3-4 out of 10.

14. On October 30, 2014, Claimant, fell off of a ladder at home from a "waist high" height onto his left knee and knee cap. As a result of the incident, Claimant had to have fluid drained from his knee.

15. Claimant returned to see Dr. Reiter on November 3, 2014. Dr. Reiter reported that Claimant's left hip was getting better and that therapy was helping. Claimant reported pain with going up stairs, putting pressure on his left leg, and getting up from a seated position.

16. Dr. Reiter stated in his October 20, 2014 report that he believed the objective findings were consistent with the work-related mechanism of injury. He repeated this opinion on October 27 and November 3, 2014 and diagnosed a left hip strain.

17. On November 4, 2014, Claimant reported to his physical therapist that his left hip was "more stiff than anything" and he could not sit or stay in one position for a long period of time.

18. On November 5, 2014, the Respondents issued a Notice of Contest so Claimant pursued medical treatment under his personal health insurance through Kaiser Permanente.

19. On November 10, 2014, Kaiser physician, Dr. Erik Reite, evaluated the Claimant. Dr. Reite noted that Claimant had left hip and left leg pain that seemed to be worse when sitting for a long time and improved with moving around. Dr. Reite noted "no back pain." Regarding diagnostic films, Dr. Reite opined that imaging results showed "no acute abnormality" but that Claimant had "signs of mild arthritis in his hip." Dr. Reite diagnosed left piriformis syndrome. Dr. Reite continued work restrictions including no work until November 28, 2014.

20. A November 13, 2014 physical therapy note from Kaiser states that Claimant reported that he injured his low back at work in early October. Claimant complained of bilateral low back pain with radiation to the left posterior thigh, lower leg and foot.

21. On November 28, 2014, Dr. Reite noted that Claimant's BMI (body mass index) was 35-39.9 and that Claimant was suffering from obesity. Dr. Reite recommended that Claimant lose weight**.**

22. An MRI of Claimant's left hip done on December 15, 2014 revealed mild to moderate osteoarthritic change of the left hip with superior and posterior labral degeneration as well as a large paralabral cyst. The radiologist also noted "insertional tendinosis of the bilateral conjoint gluteal tendons."

23. On December 17, 2014, Dr. Reite reviewed Claimant's left-hip MRI results and opined that Claimant was suffering from moderate left hip arthritis and a "degeneration/cyst" of the labrum.

24. On December 29, 2014, Dr. Reite noted that Claimant continued to experience left hip pain and that he had an upcoming appointment with "ortho" for further evaluation and treatment of "moderate arthritic and left hip labral abnormalities on MRI . . ."

25. On January 20, 2015, Claimant had a lumbar MRI. Dr. Hari Reddy interpreted the MRI as evidencing "multilevel degenerative changes and developmentally small spinal canal causing mild spinal stenosis at L5-S1, L3-4, L2-3. Multilevel lateral recess stenosis as described above."

26. Claimant saw Dr. Rupert Galvez at Kaiser Permanente on January 29, 2015. Dr. Galvez issued a letter stating that Claimant has low back and hip issues and the he was restricted from lifting of more than 20 pounds with no stooping, bending, or twisting at the lumbar spine. Dr. Galvez diagnosed lumbar spondylosis, lumbosacral radiculopathy and osteoarthritis in the left hip. He recommended that Claimant try anti-inflammatory medications, and physical therapy for his low back; and weight loss, activity modifications and exercises and intermittent injection therapy for his left hip.

27. On February 4, 2015, Dr. Terri Baker evaluated the Claimant. Her report stated that Claimant's pain began in October of 2014 with "with pain into both legs that radiated into his feet." Dr. Baker noted that Claimant's pain was significantly worse with sitting for extended periods of time and that Claimant denied worsening of symptoms with walking. Dr. Baker diagnosed a lumbar disc herniation at L5-S1 with bilateral radiculopathy in the lower extremities.

28. Dr. Christopher Ryan performed an independent medical examination at the request of the Claimant. In his May 19, 2015 report, Dr. Ryan diagnosed the Claimant as having left hip arthritis aggravated by the work unloading and loading cargo compartments for the Employer. He also stated that the Claimant had probable aggravation of right hip osteoarthritis and probable aggravation of lumbar spondylosis. Dr. Ryan opined that loading and unloading aircraft is very heavy work and this work is certainly sufficient to have caused an aggravation of Claimant's bilateral hip osteoarthritis and low back.

29. During the hearing, Dr. Ryan testified that he considered Claimant's work heavy especially because Claimant had to work in awkward positions. Claimant reported to Dr. Ryan that he began experiencing worsening pain in his left hip, buttocks and groin which radiated down his leg into his foot.

30. Dr. Ryan explained that the MRI showed narrowing of the nerve canal in the upper lumbar region at L2-3, and L3-4 as well as right-sided narrowing at L4-5 and narrowing on both sides of L5-S1. He stated that the Claimant's symptoms are consistent with the MRI findings. He testified that someone can have this condition throughout his life without symptoms but that anything that puts pressure on discs that are less than healthy can cause inflammation, swelling and nerve root irritation. He said that within a reasonable degree of medical probability, the Claimant's pre-existing condition was aggravated by the heavy work that he was doing.

31. When asked about the onset of Claimant's low back and right leg symptoms approximately one month after Claimant stopped working, Dr. Ryan explained that once the disc condition was aggravated, the pain and symptoms could cascade with as little as an altered gate due to the hip symptoms. Dr. Ryan also stated that there was nothing in the medical records prior to the date of injury which showed the Claimant had any back problems or received any back treatment. He noted that the first mention of back complaints was with the first physical therapy appointment on October 31, 2014, which was 11 days after the Claimant left work It was also mentioned in a physical therapy note of November 10, 2014.

32. Dr. Fall examined the Claimant on May 28, 2015. Claimant described to Dr. Fall his job duties, medical treatment, and the chronology of his symptoms and treatment. Dr. Fall opined that Claimant had not suffered an occupational disease injury at work.

33. As support for her opinion that Claimant did not suffer an injury at work, Dr. Fall stated that Claimant did not attribute symptoms to a particular job activity and that Claimant's symptoms proliferated and worsened after Claimant was taken off of work and removed from workplace exposures. Further, Dr. Fall noted that Claimant's symptoms were made worse with sitting, which is not a job activity, and improved with walking, which is a job activity.

34. Claimant, however, reported to Dr. Fall that he began experiencing the pain in his left hip while performing his job duties.

35. Claimant testified that his initial symptoms were left hip and left lower-extremity pain beginning in October and that right hip and low-back pain did not arise until December 2014 or January 2015.

36. Dr. Fall testified that if Claimant's job activities injured or aggravated Claimant's left hip, Claimant would have, likely, been able to associate symptoms with a particular job activity, and the fact that Claimant did not make such an association argues against Claimant's work being the cause of symptoms.

37. As to the appearance of right hip and low-back symptoms after Claimant stopped working for the Employer, Dr. Fall testified that this argues against Claimant's job being the cause of symptoms.

38. Dr. Fall also stated that the pain down the Claimant's leg can be caused by a disc injury. She also admitted that the *Division of Workers Compensation Medical Treatment Guidelines* state that both osteoarthritis and back pain can be aggravated or caused by repeated heavy lifting over time. She also agreed that the Claimant complained of the pain down his legs on the first visit to the doctor.

39. On June 2, 2015, Dr. Larson examined Claimant and he opined that Claimant had not suffered an accidental injury or occupational disease injury at work. Dr. Larson concluded that symptoms and findings in Claimant's left hip, including a labral tear, are the result of degenerative arthritis and not an occupational injury or exposure.

40. Dr. Larson testified that Claimant's body mass index or BMI and age are risk factors for the development of arthritis in the hip.

41. Dr. Larson testified that the lifting Claimant performed for the Employer would be considered intermittent. He stated that such intermittent forces Claimant encountered at work have not been shown to be detrimental to joints or to cause or aggravate arthritis in joints**.** Dr. Larson opined that Claimant's left hip symptoms were consistent with the natural onset and progression of degenerative arthritis, and that for greater than 95% of the people with hip arthritis the cause of arthritis is idiopathic.

42. Regarding Claimant's right hip symptoms that arose after Claimant stopped working for the Employer, Dr. Larson testified that if Claimant's job activities caused right-hip symptoms, Claimant would have, likely, manifested symptoms while he was still working, and the emergence or right-hip symptoms after Claimant stopped working supports the opinion that Claimant had naturally progressing degenerative arthritis in his hips where the right hip was "just a bit behind the progression of degenerative arthritis in his left hip."

43. Dr. Larson testified that Claimant's lumbar MRI showed degenerative disc disease and some narrowing of the spinal canal, and that nothing in the lumbar MRI suggested that degenerative spinal conditions had been aggravated. Dr. Larson testified that if Claimant had suffered a lumbar injury at work, Claimant would have, likely, had symptoms while he was working and significant relief of symptoms when he was not working.

44. Dr. Larson, however, admitted that the *Guidelines*, state that arthritis can be aggravated by heavy lifting. Dr. Larson attempted to differentiate between heavy lifting mentioned in the *Guidelines,* and the lifting that the Claimant did on his job. He stated that the Claimant's job required intermittent heavy lifting rather than continuous heavy lifting, although the *Guidelines* do not state that the lifting had to be continuous. He also admitted that the *Guidelines* state that heavy lifting can cause back pain over

time when a worker is lifting 50 – 55 pounds 10 – 15 times per day over cumulative years of exposure.

45. It is essentially undisputed that the findings on Claimant's MRI scans are degenerative in nature and have been present for some time prior to Claimant experiencing symptoms in October 2014. Claimant attributes the onset of symptoms to the heavy lifting he does at work, and Dr. Ryan agrees that Claimant's job duties aggravated his underlying degenerative condition to produce the need for medical treatment. Drs. Larson and Fall have opined that Claimant would have experienced symptoms regardless of his job duties. The ALJ disagrees. Claimant engaged in heavy and prolonged lifting on a regular basis at his job with the Employer. No evidence refuted Claimant's description of his job duties, and he credibly testified. In addition, the *Guidelines* support Claimant's contention that heavy lifting can aggravate arthritis. As such, the Claimant has proven that the work he performed for the Employer aggravated his preexisting and previously asymptomatic degenerative conditions in his left hip and back. The ALJ acknowledges that Claimant's low back pain did not arise until after he discontinued working for the Employer, however, early medical records document radiating leg pain which the medical experts agree is stemming from Claimant's low back rather than his left hip. As such, it is apparent that Claimant was suffering from symptoms related to his low back much earlier than the time he started experiencing low back pain.

46. The Claimant has not proven a relationship to the onset of right hip symptoms to the work exposure. The hip symptoms manifested at least two months after Claimant discontinued working for the Employer and the ALJ is not persuaded by Dr. Ryan's opinions that any right hip symptom is a result of an altered gait. There is no evidence Claimant has had an altered gait due to his left leg or low back symptoms. Insofar as Claimant is suffering from right leg pain associated with his low back condition, such symptoms would be related to his work-related back condition. To the extent Claimant's right leg symptoms are associated with a right hip condition, such symptoms are specifically found not related to this claim.

47. No authorized treating provider has placed the Claimant at maximum medical improvement.

48. The occupational disease has resulted in work restrictions that have rendered the Claimant unable to perform his duties for the Employer from October 21, 2014 and ongoing.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Compensability

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

5. "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards

associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

7. As found above, it is essentially undisputed that the Claimant had preexisting degenerative conditions in his spine and left hip. However, prior to October 2014, the Claimant had no symptoms from these conditions. Dr. Ryan testified that a degenerative condition could exist and never become symptomatic. This was true with the Clamant up until October 2014 when Claimant began to experience left hip and left leg symptoms while working.

8. Claimant attributes the onset of his symptoms to the heavy lifting he does at work. The Claimant provided uncontested and credible testimony that he lifted approximately 100,000 pounds per day at his job. While Dr. Larson called this intermittent lifting, Claimant's testimony seemed to indicate otherwise. Dr. Ryan characterized Claimant's job as "heavy" and the ALJ agrees. The lifting, throwing and stacking of luggage consistently throughout a work day is unique to Claimant's job as a ramp agent or baggage handler. Such activities are not encountered every day outside of Claimant's industry.

9. The *Medical Treatment Guidelines* state that repetitive heavy lifting can aggravate hip osteoarthritis and cause back pain. Dr. Ryan opined, and the ALJ agrees, that Claimant's job duties (consisting of fairly constant heavy lifting) aggravated his underlying degenerative condition in his left hip and low back to produce the need for medical treatment. The opinions of Drs. Larson and Fall are not as persuasive as those of Dr. Ryan. They both have opined that Claimant would have experienced symptoms regardless of his job duties. They both disregard the fact that Claimant engaged in heavy and prolonged lifting on a regular basis at his job with the Employer. Instead, they believe that genetics and Claimant's elevated BMI are the cause of his present condition. While it is true that Claimant had a high BMI and that his conditions pre-existed the onset of symptoms, the ALJ concludes that it is more probably true than not that it is the heavy lifting rather than genetics or BMI that brought on Claimant's symptoms.

10. Based on the foregoing, Claimant has proven that the work he performed for the Employer aggravated his preexisting and previously asymptomatic degenerative conditions in his left hip and back. The ALJ acknowledges that Claimant's low back

pain did not arise until after he discontinued working for the Employer, however, early medical records document radiating leg pain which both Dr. Fall and Dr. Ryan agree is stemming from Claimant's low back rather than his left hip. As such, it is apparent that Claimant was suffering from symptoms related to his low back much earlier than the time he started experiencing low back pain.

11. The Claimant, however, has not proven a relationship to the onset of right hip symptoms to the work exposure. The hip symptoms arose at least two months after Claimant discontinued working for the Employer and the ALJ is not persuaded by Dr. Ryan's opinions that any right hip symptom is a result of an altered gait. There is no persuasive evidence that Claimant has had an altered gait due to his left leg or low back symptoms. Insofar as Claimant is suffering from right leg pain associated with his low back condition, such symptoms would be related to his work-related back condition. To the extent Claimant's right leg symptoms are associated with a right hip condition, such symptoms are specifically found not related to this claim.

Medical Benefits

12. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.

13. The parties have stipulated that HealthOne is the authorized facility for treatment of the Claimant's injuries. Therefore, the Claimant is entitled to treatment at HealthOne and at other clinics and doctors to whom HealthOne staff refers Claimant, to cure and relieve the effects of the Claimant's occupational disease to his left hip and low back.

Temporary Total Disability Benefits

14. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz, supra.*

15. In this case, the Claimant has been disabled from work since October 20, 2014. He has not reached maximum medical improvement, has not been released to full duty and the Employer has not offered the Claimant a job within his restrictions. Therefore he is entitled to temporary total disability at the rate of $318.80 per week, which is two-thirds of the stipulated average weekly wage.

ORDER

It is therefore ordered that:

1. Respondents shall pay temporary total disability benefits from October 21, 2014 and ongoing at the rate of $318.80 per week until terminated by operation of law.

2. Respondents shall provide medical benefits to the Claimant to cure and relieve the effects of his occupational disease to his left hip and low back.

3. Claimant's claim regarding his right hip is denied and dismissed.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 18, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

The issues addressed in this decision concern compensability and Claimant's entitlement to medical and temporary disability benefits. The specific questions answered are:

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable work related injury to his right ankle on October 22, 2014.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of medical benefits.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of TTD benefits from July 2, 2015 through September 7, 2015.

STIPULATION

Prior to the commencement of hearing the parties stipulated that Claimant's average weekly wage (AWW) is $965.43. The stipulation is approved.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of Respondent-Employer having worked for the college for 29 years. For the past 3-4 years, Claimant's job title has been that of Structural Trades III worker. In this position, Claimant's duties include supervising the custodial staff and performing general maintenance work such as building/grounds repair, weed-eating, lock repair/replacement and shoveling snow. Claimant works eight (8) hours per day and spends as much as 95% of this time on his feet. The duties associated with Claimant's position require frequent walking up and down hills, as well as over uneven terrain, in addition to frequent stair and ladder climbing. Based upon the evidence presented, the ALJ finds Claimant's job physically demanding.

2. Claimant has a history of prior injuries to his right ankle in the past. In 1995, Claimant had some table tops weighing approximately 300 pounds fall onto his right ankle at work. On April 15, 2004, Claimant sustained an eversion injury to his right ankle when his foot slipped while stepping off a ladder. Later on June 3, 2004, Claimant sustained additional injury after he sharply planter-flexed his right ankle after stepping

on a handicapped ramp. Following these injuries, Claimant developed instability in the right ankle, reporting to Dr. O'Brien that the ankle "occasionally [gave] out on him". Consequently, Dr. Timothy O'Brien performed a lateral ligament reconstruction of the right ankle on January 18, 2015.

3. According to a post surgical note from Dr. O'Brien's dated June 22, 2005, Claimant felt "quite good" 5.5 months post surgery. Claimant was placed at maximum medical improvement (MMI) for his April 15, 2004 injury on August 26, 2005. No permanent work restrictions were assigned at the time; however, Claimant was instructed to "use care with his activities and avoid overuse of the ankle".

4. Claimant testified that while his right ankle would hurt occasionally, he did not receive any ongoing treatment for his right ankle after being released from care in 2005. Furthermore, Claimant testified that he was able to perform his full range of work duties following his return to work.

5. Claimant testified that on October 22, 2014 he and a co-worker, identified as Dan Jolly were working on a project that required the application of wooden frames to the walls of a building on campus. Claimant testified that he had to cut the material for these frames in the shop and then transport the pieces to the designated building for final installation. Claimant explained that while he was carrying and loading 1"x 4" boards into his truck, he stepped onto an 8 inch drain, injuring his right ankle. According to Claimant's testimony, he was "BS'ing" with Dan Jolly as he was walking with what he estimated was five boards over his shoulder and not paying attention where he was walking. Claimant testified that he stepped onto the end of a drain cover which popped up causing him to roll his ankle.

6. Mr. Jolly testified that he and Claimant were carrying 1"x 4"x 8' pieces of wood out of the wood shop at the college. According to Mr. Jolly, he was directly behind Claimant, approximately 5 feet away when he observed Claimant step on a floor drain. Per Mr. Jolly's testimony, the drain cover "kicked out" causing Claimant to misstep. Mr. Jolly testified that he observed Claimant limping following this incident and he could tell that Claimant was in pain.

7. Mr. Jolly testified that he has known Claimant for 25 years. He has worked under Claimant for the past three (3) years and spends approximately seven hours per day with Claimant. Mr. Jolly testified that did not see Claimant exhibit any behavior indicative of right ankle pain in the days, weeks or months leading up to the October 22, 2014 incident.

8. Claimant reported his injury to Lorrie Velasquez, Director of Human Resources. A first report of injury was completed by Ms. Velasquez on October 23, 2014. Claimant admitted that he did not tell Ms. Velasquez anything about a floor drain causing his injury. Rather, Claimant testified that he recalled telling Ms. Velasquez that he "stepped wrong." Ms. Velasquez testified consistently with this, confirming that Claimant simply told her he was carrying some 1x4s when he stepped wrong twisting his right ankle. When asked if she told Claimant to be as detailed as possible concerning the cause of

his injury, Ms. Velasquez stated, “I cannot say that for sure.” Ms. Velasquez does not know if she asked Claimant about whether or not he stepped on anything. She just knows that it was documented that Claimant “stepped wrong.”

9. Claimant sought treatment from Mt. Caramel Health and Wellness Clinic on October 23, 2015. On this date, he was evaluated by Family Nurse Practitioner (FNP), Cindi McIntosh. The report generated from this visit documents that Claimant injured himself “yesterday at work” and that he injured his right ankle “[c]arrying 1x4s and stepped wrong (describes stepping straight, no turning of ankle, but felt pain on top of foot at ankle joint)….” Claimant admitted that he did not tell FNP McIntosh, that he stepped onto a floor drain causing his right ankle injury and FNP McIntosh did not include anything about a floor drain causing Claimant’s injury in her report. X-rays were obtained on this date. The x-rays failed to reveal radiologic evidence suggestive of “acute injury” per the report of Dr. William Bufkin, the radiologist interpreting the images. FNP McIntosh simply reiterated the radiologic impression of Dr. Bufkin in her report (Exhibit G, bate stamp 27); however, she went on to provide her assessment concerning Claimant’s ankle injury as: “arthritis (R) foot/ankle, intra-articular finding on x-ray, **acute injury**, elevated BP 2nd to pain and situation- need reeval”. (Exhibit G, bate stamp page 29)(emphasis added).

10. Claimant provided a recorded statement to the adjuster administering his alleged workers’ compensation claim. During cross examination, Claimant admitted that he did not tell the adjuster anything about a floor drain causing his injury. Rather, Claimant admitted that he told the adjuster he did not know what happened, that he just stepped wrong. He was carrying 1x4s to his truck and he just stepped wrong. He did not twist it, he just stepped wrong.

11. FNP McIntosh referred Claimant back to Dr. O’Brien for further evaluation and treatment. Claimant saw Dr. O’Brien on November 6, 2014. During this appointment, Dr. O’Brien noted that Claimant was carrying 1x4s when he placed his right foot on the ground and his ankle gave away. There is no mention of Claimant stepping on a drain causing injury in the November 6, 2014 report from Dr. O’Brien. Dr. O’Brien noted further that Claimant had been experiencing achy pain in the right ankle prior to the October 22, 2014 incident when something precipitously happened on October 22, 2014 to worsen that pain. According to the November 6, 2014 note, Claimant reported that he was walking with lumber on his shoulder when he “nearly went to the ground” after which he had pain like he had never had before. Dr. O’Brien diagnosed Claimant with “posttraumatic postsurgical degenerative joint disease with large kissing lesions anteriorly”. Dr. O’Brien specifically noted that he was unable to render an opinion on causation as he did not have a full set of medical records in his possession. Dr. O’Brien referred Claimant to Dr. Michael Simpson for further evaluation.

12. Claimant saw Dr. Simpson on November 24, 2014. Dr. Simpson documented that Claimant was recently carrying 1x4s when he stepped on the ground and his ankle gave away giving rise to increasing pain like her never had before; however, Dr. Simpson also noted that Claimant had been experiencing increasing pain prior to the October 22, 2014 incident. Regarding causality, Dr. Simpson opined that while

Claimant did not have a significant traumatic injury at that time of the October 22, 2014 incident, he exacerbated an underlying pre-existing arthritic condition in the right ankle. Specifically, Dr. Simpson documented the following: "[T]his injury does appear causally related to his work place exposure." Dr. Simpson explained that Claimant had a prior injury to his ankle 10 years ago that required surgery. He stated that the surgery 10 years ago caused Claimant to develop "posttraumatic changes in his arthritis with anterior osteophytes and a dorsal talar osteophyte". Dr. Simpson elaborated further indicating: "This represents progression of arthritic changes in his ankle from his prior work related injury now with an acute exacerbation on top of it. Therefore, whether this is treated as an acute exacerbation of preexisting condition or whether it is treated as chronic progression of his prior work place injury, this appears causally related to his employment and therefore it is compensable. . ." Following an MRI, Dr. Simpson recommended surgery and sought authorization to perform the same from Respondent.

13. Respondent contested liability for the injury and denied authorization for further care to Claimant's right ankle. Consequently, Claimant's private insurance paid for his right ankle surgery which was performed by Dr. Simpson on July 2, 2015. Claimant underwent a second surgery on July 23, 2015 to remove additional loose bodies. Claimant testified that he missed work from July 2, 2015 through September 7, 2015 following his surgeries. Claimant returned to work on September 8, 2015.

14. Claimant underwent an independent medical examination (IME) at the request of Respondent with Dr. Douglas Scott on September 17, 2015. Claimant reported to Dr. Scott that he stepped into a floor drain while carrying 1x4s at work. This history represents the first report by Claimant to anyone connected with this claim that he accidentally stepped onto a drain and twisted his right ankle. As noted above, there is no documentation in any of the records that the floor drain popped up as Claimant testified to at hearing. Dr. Scott noted that Claimant's report to him of stepping into a floor drain was substantially different than his descriptions to his employer, Ms. McIntosh, Dr. O'Brien, and Dr. Simpson. Consequently, Respondent argues that Claimant's testimony about stepping on an unsecured drain cover which popped up and caused him to twist his ankle should be rejected as incredible. The ALJ is not persuaded.

15. Based upon the evidence presented, the ALJ finds that Claimant consistently reported to his employer, the adjuster and his medical providers that he simply stepped wrong. Claimant admitted as much and Ms. Velasquez, the employer representative admitted that she was not familiar with what a "ubiquitous condition" is and had no reason to inquire further as to whether Claimant stepped on anything in particular or if his ankle simply gave out while walking. The totality of the evidence presented persuades the ALJ that the difference in the history obtained by Dr. Scott is likely explained by the fact that Dr. Scott, during completion of an IME to address causality, asked Claimant to be specific in what he believed caused his injuries. Consequently, the ALJ credits Claimants testimony that he had no reason to think he needed to elaborate on the specifics of how he stepped wrong, to find that his simple report of

"stepping wrong" likely meant the more descriptive statement that he stepped onto an unsecured drain cover which popped up causing a twisting injury to his right ankle.

16. Based upon the evidence presented, including Mr. Jolly's eye witness account, the ALJ finds that Claimant's right ankle pain, more likely than not, was proximately caused by an acute sprain after stepping onto an unsecured drain cover, which "kicked out", i.e. popped up causing him to roll his right ankle. In so finding, the ALJ rejects, as speculative, Dr. Scott's conclusions that Claimant's injury was not compensable because the injury "could have happened by stepping at home" and "would have happened regardless of his being at work at that time carrying 1x4 boards". Consequently, Claimant has proven by a preponderance of the evidence that he sustained a work related injury to his right ankle on October 22, 2014. Accordingly, the questions of whether Claimant established by a preponderance of the evidence that he is entitled to an award of medical benefits and an award of TTD benefits from July 2, 2015 through September 7, 2015 must be addressed.

17. Based upon the evidence presented, the ALJ finds that the conservative care provided by FNP McIntosh, as well as her referral to Dr. O'Brien and his subsequent referral to Dr. Simpson for evaluation, was reasonable, necessary and occasioned by the acute right ankle sprain Claimant sustained on October 22, 2014.

18. Regarding Claimant's July 2, 2015 surgery, Dr. Scott opined that the procedure performed by Dr. Simpson was necessitated by and related to the effects of progressive and chronic osteoarthritis in the right ankle. (Exhibit 11, bate stamp page 79). Careful review of Dr. Simpson's pre-surgical admission history and physical report dated July 2, 2015 indicates that Claimant had undergone a lateral ligament reconstruction procedure following a work related injury over ten years prior and had done well following that procedure. Nonetheless, the history also indicates that Claimant reported increasing pain "over the past couple of years" prior to October 22, 2014 and July 2, 2015. Following physical examination, Dr. Simpson provided the following assessment: "Posttraumatic arthritis of the right ankle with multiple loose bodies".

19. The July 2, 2015 "Report of Operation" indicates that Claimant's pre and post-operative diagnosis were "anterior ankle impingement with anterior compartment arthritis, right ankle, loose body medial gutter, and partial thickness tear of the posterior tibial tendon". For these conditions, Dr. Simpson preformed an arthroscopy consisting of extensive debridement, loose body removal and a tenosynovectomy and debridement of the posterior tibial tendon endoscopically.

20. Based on the evidence presented, the ALJ finds Claimant's July 2, 2015 surgery, while reasonable, unrelated to his October 22, 2014 ankle injury. Rather, the evidence presented persuades the ALJ that while the Claimant likely suffered an acute right ankle sprain on October 22, 2014, his right ankle was already symptomatic and those symptoms were progressively worsening before October 22, 2014 when he stepped on a floor drain rolling his right ankle. More likely than not, Claimant's pre October 22, 2014 symptoms were associated with the natural progression of his pre-

existing degenerative ankle arthritis. Thus, while Claimant sustained an acute ankle sprain resulting in increased pain and the need for conservative care, the ALJ is not persuaded that the October 22, 2014 injury caused Claimant's subsequent need for surgery. Rather, the ALJ credits the opinions of Dr's. Scott and O'Brien to find that the July 2, 2015 athroscopy was performed to "temporize", i.e. delay the symptoms related to Claimant's "incurable and relentlessly progressive" pre-existing degenerative right ankle arthritis. Simply put, the October 22, 2014 work injury did not cause, aggravate or accelerate Claimant's underlying pre-existing ankle arthritis leading to his July 2, 2015 surgery. The contrary opinions of Dr. Simpson regarding causality and Claimant's need for treatment, including surgery, are unconvincing when the medical record is considered as a whole.

21. Based upon the evidence presented, the ALJ finds that Claimant was completely unable to perform the duties associated with his regular work following his July 2, 2015 arthroscopic surgery performed by Dr. Simpson. Thus, Claimant established that he was temporarily totally disabled from July 2, 2015 through September 7, 2015. Although Claimant established that he was disabled within the meaning of section C.R.S. § 8-42-105, the evidence presented persuades the ALJ that Claimant failed to prove that his need for surgery was related to his October 22, 2014 ankle sprain, as found above. Consequently, the ALJ finds that Claimant's "disability" is not causally connected to his October 22, 2014 right ankle injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant sustained an injury to his right ankle "arising out of" his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the*

decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

G. Nonetheless, the totality of the evidence presented in this case persuades the ALJ that Claimant has established the requisite causal connection between his work duties and his right ankle injury. In concluding as much, the ALJ agrees with Claimant that Respondent's compensability defense rests largely on semantics and speculation. As found above, the only individuals present at the time of the injury testified under oath that Claimant stepped on a floor drain while carrying a stack of boards, the drain cover "popped up" i.e. "kicked out" on Claimant, and that he rolled his ankle and had severe right ankle pain immediately thereafter necessitating his visit to Mt. Caramel Health and Wellness Clinic on October 23, 2015. Claimant does not recall stating anything other than that he "stepped wrong" at the time of the incident. As he testified, he had no reason to think he needed to elaborate and discuss the specifics of exactly how he stepped wrong, i.e., stepping onto a unsecured floor drain cover. Additionally, Ms. Velasquez acknowledged that she could not recall whether she advised Claimant to be as detailed as possible in his reporting of the incident. She readily acknowledged that she did not know what a ubiquitous condition is and therefore had no reason to inquire further of Claimant as to the *exact* mechanism of his injury. Consequently, the discrepancy between the mechanism of injury reported to Ms. Velasquez and Dr. Scott is likely explained by the fact that Dr. Scott asked Claimant to be specific in what he believed caused his injuries during Dr. Scott's IME.

H. Moreover, as found above, Dr. Scott's conclusions that Claimant's injury is not compensable because it "could have happened by stepping at home" and "would have happened regardless of his being at work at that time carrying 1x4 boards" is unpersuasive. Merely because Claimant was engaged in activity, specifically walking which is performed many times a day outside of work does not compel a finding that his subsequent injuries are not work-related. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v.*

Faulk, 158 Colo. 441, 407 P.2d 348 (1965). Here, the evidence presented persuades the ALJ that Claimant's employment caused him to suffer an acute ankle sprain because it obligated him to carry cut material across a floor possessing a hidden defect, i.e. an unsecured floor drain cover. Contrary to Respondent's suggestion, such defect is not a "ubiquitous condition" encountered everywhere. In keeping with the decision announced in *City of Brighton*, the ALJ concludes that Claimant's ankle sprain would not have occurred "but for" the conditions and obligations of Claimant's employment. Accordingly, the ALJ finds that Claimant has established that his injury arose out of his employment. As Claimant has established the requisite causal connection between his injuries and his work duties, the injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

J. As found here, the evidence demonstrates that Claimant's initial care from FNP McIntosh and her referrals, including the evaluations performed by Dr. O'Brien and Dr. Simpson was reasonable, necessary and related to his acute ankle sprain Claimant sustained on October 22, 2014. FNP McIntosh's care and treatment was necessary to assess and treat, i.e. relieve Claimant from the acute effects of the sprain. Additionally, the specialist referrals were reasonable and necessary to determine an exact diagnosis and future treatment plan in light of Claimant's prior surgical history. Nonetheless, Claimant failed to meet his burden to establish that the October 22, 2014 work injury proximately caused his need for the arthroscopy performed by Dr. Simpson on July 2, 2015. Specifically, Claimant failed to prove that the industrial injury aggravated, accelerated or combined with his preexisting degenerative arthritis so as to cause the

need for surgery. In this case, the persuasive evidence establishes that Claimant's right ankle was symptomatic prior to October 22, 2014 as a consequence of his pre-existing arthritis. More importantly, the evidence presented persuades the ALJ that Claimant's July 2, 2015 surgery was necessary to delay the worsening symptoms caused by the natural progression of Claimant's relentless degenerative right ankle arthritis and not to treat any condition related to the October 22, 2014 industrial injury. Consequently, Claimant failed to establish a causal relationship between his compensable work injury and his need for a right ankle arthroscopy. Because Claimant failed to prove by a preponderance of the evidence that his July 2, 2015 surgery was causally related to his industrial injury, Respondents' were not obligated to provide or pay for it.

Temporary Total Disability (TTD)

K. To receive temporary disability benefits, Claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). The question of whether Claimant proved disability, including proof that the injury impaired his ability to perform his pre-injury employment is one of fact for determination by the ALJ. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. APP. 1997)(claimant need not produce medical evidence to prove disability). While the ALJ is persuaded that Claimant proved he was disabled as a consequence of his arthroscopic surgery, from July 2, 2015 through September 7, 2015, the ALJ concludes that that disability was not proximately caused by Claimant's compensable right ankle sprain. Rather, the convincing evidence establishes that Claimant's "disability" flows directly from a medical condition and subsequent operation that Claimant failed to connect to his October 22, 2014 work injury. Consequently, Claimant's claim for TTD benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's October 22, 2014 right ankle injury is compensable.

2. Respondent shall pay for all authorized reasonable and necessary medical treatment, resulting from the Claimants October 22, 2014 right ankle injury including but not limited to the care provided by FNP McIntosh, all diagnostic treatment, i.e. x-rays provided under the direction of FNP McIntosh and the evaluations by Dr. O'Brien and Dr. Simpson.

3. Claimant's request for provision of and payment for his right ankle arthroscopy performed by Dr. Simpson on July 2, 2015 is denied and dismissed as the need for surgery was not causally related to Claimant's October 22, 2014 industrial injury.

4. Claimant's claim for TTD benefits from July 2, 2015 through September 7, 2015 is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 16, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant established by preponderance of the evidence that he sustained a compensable low back injury on or about October 29, 2014 and/or October 31, 2014, and if so;

II. Whether Claimant demonstrated by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits to cure or relieve him from the effects of this industrial injury, and;

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary total disability (TTD) benefits for the period of November 4, 2014 through and including February 24, 2015.

Because the ALJ finds that Claimant failed to establish that he sustained a compensable injury, this order does not address his claims for medical and temporary disability benefits.

STIPULATION

At the outset of hearing, the parties stipulated to an average weekly wage (AWW) of $792.13.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Rauzzino, the ALJ enters the following findings of fact:

Claimant's Job Duties & Prior Medical History

1. Claimant is employed by Respondent-Employer as a transportation maintenance worker. His job duties consist of general highway maintenance, including maintaining guardrails; signage and fences, filling pot holes and plowing snow. The work associated with Claimant's position is physically demanding requiring long hours driving a snowplow and heavy lifting.

2. Around October 20, 2011, Claimant sustained a low back injury while replacing a bent highway fence post. Claimant was pulling on the post to remove it from the ground when he suddenly developed sharp pain in his low back. Claimant presented to Rio Grande Hospital on October 24, 2011. The hand written notes from this visit are difficult to decipher; however, the emergency nursing triage note reflects that Claimant developed pain acutely in the face of injury. In addition to stiffness,

Claimant complained of sharp pinching low back pain extending down his right leg which would come and go following this incident. According to the report, by the time Claimant's presented to the emergency room, he had been in pain for 4 days.

3. Following this injury Claimant, undertook a lengthy course of conservative treatment at Rio Grande Hospital Clinic under the care of Olixn Adams, D.O. On October, 25, 2011, Dr. Adams assessed a mild to moderate low back strain. He recommended "continued supportive care" including initiation of naproxyn which had been prescribed in the emergency room the day before.

4. Claimant subsequently developed persistent centralized low back pain. Consequently, on November 21, 2011, Dr. Adams referred him to physical therapy (PT).

5. Claimant initiated PT on December 7, 2015 under the direction of Ron Muhlhauser, PT. Mr. Muhlhauser documented complaints of symptoms in the "center of low back above the belt line as well as associated symptoms into [the] right and left buttock which [Claimant] described as sore sometimes sharp, intermittent and superficial". Claimant's pain symptoms varied from a 7/10 at its worst to 0/10 at its best.

6. Claimant continued his PT making progress to approximately 80% of his pre-injury baseline; however, by January 30, 2012, Claimant reported feeling about the same as he had for the "past several weeks". He reported "several good days each week, then a few days of mild discomfort" without "true pain" only "mild discomfort".

7. Claimant returned to Dr. Adams for a follow-up visit on February 17, 2012 with continued complaints of back pain. He had finished his course of PT by this visit, reporting that he was "not better". Although Claimant had returned to approximately 80% of his pre-injury baseline, Dr. Adams documented that he had not made "any significant progress over the past 6-8 weeks". Because Claimant continued to express "mild intermittent pain at least half of the days out of the week" which was "exacerbated by flexion or being in awkward positions when working on equipment", Dr. Adams recommended x-rays and an MRI of the lumbar spine.

8. X-ray views obtained February 17, 2012 were interpreted as negative. An MRI of the lumbar spine obtained 2/29/2012 revealed "minimal degenerative changes, degenerative disk disease at L5-5 and L5-S1. In addition, a "trace disk bulge/small herniation/small protrusion" was present at the L5-S1 level.

9. On March 5, 2012 Claimant returned to Dr. Adams who commented on the results of Claimant's MRI, noting the study to be "unremarkable". As Claimant continued to complain of 4/10, on again off again pain with bending and "twisting-type motions", Dr. Adams recommended chiropractic treatment.

10. Claimant initiated chiropractic treatment with Aaron Polzin, D.C. on May 15, 2012. Dr. Polzin performed a physical examination during which he tested Claimant's facet joints. He also commented on Claimant's 2/17/2012 x-ray, noted that it

demonstrated a “pars interarticularis defect”. According to Dr. Polzin, Claimant’s clinical symptoms were consistent with “mechanical lower back pain” caused by a “multitude” of elements including the par defect, the disc bulging, Claimant’s increased facet loading and his poor core strength, all of which were being aggravated by repetitive use situations. Dr. Polzin proposed a 4-6 week treatment plan consisting of approximately one visit per week to focus on manipulative procedures of the lumbar facet joints, the SI joint and Claimant’s poor core strength. Given the objective condition of Claimant’s lumbar spine, Dr. Polzin was optimistic that Claimant’s symptoms would resolve but that he may have “intermittent functional aggravations in the future.”

11. Claimant made modest progress regarding his symptoms with chiropractic care; however, on June 1, 2012 he suffered a setback. On this date, Claimant reported to Dr. Adams that he had been pain free until he worked in the front end loader which he felt may have “aggravated his back”. With additional chiropractic care, Claimant’s symptoms returned to base-line and he was placed at maximum medical improvement (MMI) without permanent impairment on June 18, 2012.

12. Claimant continued his chiropractic care on a maintence basis and returned to Dr. Polzin for a “routine adjustment” on October 22, 2012. On this date Claimant described increased stiffness and soreness in the lower lumbar, mid thoracic and radial lumbar areas. Claimant attributed his increased stiffness and soreness to hunting the previous week. Claimant was adjusted and instructed to return to the office on an “as-needed basis”.

13. Claimant returned to Dr. Polzin on March 8, 2013, with complaints of tightness in the lower back and mid and upper thoracic area. Claimant associated his increased symptoms to his 12-14 hour shifts operating a snowplow. Claimant was assessed as having a “flareup of segmental dysfunction with resulting decreased range of motion and mild spasm activity.” Claimant’s exacerbation was treated with spinal manipulation of the lumbar spine and instructed to return on a PRN basis.

14. Claimant changed chiropractors and began treating with Terry L. Wiley, D.C. beginning April 2013. On April 2, 2013 Claimant is seen by Dr. Wiley for 3/10 visual analogue scale (VAS) pain in the lower, mid, and upper back. No precipitating cause for Claimant to seek treatment with Dr. Wiley is documented. Dr. Wiley scheduled Claimant for additional treatment two times per week for three months.

15. Over the 16 month period in between April 2013 and October 2014 Claimant had 14 visits with Dr. Wiley. Claimant pursued these visits with Dr. Wiley because he felt it alleviated the back pain he would feel. Claimant noted there were definitely times when his work activities would cause his back pain to increase. For instance, in Dr. Wiley’s note of May 1, 2013 Claimant reported that he low back was sore from “fencing”. Furthermore, Dr. Wiley noted on December 6, 2013, that Claimant complained that he was spending long hours on the pass snowplowing. Again on January 13, 2014 Claimant noted that his low back hurt from driving long shifts.

Similarly, on February 10, 2014 and April 16, 2014 Dr. Wiley's notes reflect that Claimant's back was hurting from long shifts driving the snowplow.

16. Dr. Wiley's records also reflect during 3 office visits that Claimant's back became more painful from non-work related activities. On September 19, 2013 Claimant had been moving firewood prior to his back hurting. Also, on August 27, 2014 Claimant complained of neck and low back pain from spending long hours at the hospital waiting for his babies to be born.

17. The aforementioned notes reflect low back pain levels on a visual analog scale (VAS) ranging from 3/10 to 6/10. The records also reflect that Claimant received chiropractic treatment outside of the low back to include his neck, upper back, pelvis, scarum, elbows and forearms.

Claimant's Alleged October 29, 2014 Injury

18. On October 29, 2014 Claimant was working with 2 other CDOT employees. They were moving sign trailers at the top shop of Wolf Creek Pass. Claimant testified that he sustained an injury to his low back "when disconnecting a trailer" with Jay Brush on October 29, 2014. He further testified that he felt a sharp pain in his low back when they "lifted tongue up to move it over to side four inches."

19. Claimant continued to work Thursday, October 30, 2014 and Friday, October 31, 2014. On the morning of the 31st Claimant was moving multiple stacks of traffic cones to a different location for lane diversion and traffic control. In order to do this he had to bend over and pick up a stack of traffic cones, straighten up, walk with the pile of cones over his shoulder, then bend down and place the cones on the ground. The repetitive leaning over and placing the stack of traffic cones on the ground exacerbated the low back pain Claimant developed on October 29, 2014. Claimant reported his injury to his supervisor, George Hudran, on October 31, 2014 at approximately noon when Mr. Hudran returned to the worksite.

20. Claimant then completed an Employee Incident Statement on October 31, 2014 noting the date of the incident with the trailer on October 29, 2014 as the cause of his injury. Claimant's incident statement reflects that he was lifting and removing a trailer at the time he felt pain in his low back. However, a witness statement obtained from Mr. Brush regarding the incident includes the following passage:

> Brett, Brandon & myself pulled up to top shop in Tweener to hook up arrow trailer. Brandon & myself got out and backed up Brett to trailer. Brandon and me lifted up tongue of trailer to put on hitch. After we placed on hitch Brandon commented "that lifting that trailer kind of hurt." I asked what? and he said he tweeked his back.

21. The witness statement from Jay Brush, directly contradicts the testimony of Claimant. Mr. Brush's statement specifically notes that they were connecting, or putting the arrow board trailer "on (the) hitch". The testimony of the claimant indicated that they were "disconnecting" the trailer and "lifted tongue up to move it over". The ALJ finds this inconsistency immaterial in light of the fact that both Claimant and Mr. Brush have indicated that they were lifting the trailer tongue when Claimant reportedly developed low back pain.

22. On October 31, 2015 Mr. Hudran asked Claimant if he wanted to see a doctor concerning his back. Claimant informed Mr. Hudran that it was only a twinge and that he thought it would get better. George Hudran told Claimant that if he didn't go to the doctor, he couldn't use his back as an excuse as to why he couldn't work.

23. Through October 31, 2014 Claimant was on the "summer schedule". His work schedule was Monday through Friday, approximately 8 AM to 5 PM. On Saturday, November 1, 2014 Claimant was switched to the "winter schedule" which required him to work Monday through Friday, approximately 2:30 PM to 11 PM.

24. Claimant was not scheduled to work Saturday, November 1, 2014 or Sunday, November 2, 2014. However, because of snow, Claimant was on call. He came in to work on Sunday, November 2, 2014 and plowed snow on Wolf Creek Pass from 4 PM to midnight.

25. On November 3, 2014 Claimant went into work in the afternoon a little bit before his shift was scheduled to start. At that time, he spoke with George Hudran. Claimant told Mr. Hudran that he wanted to seek medical help for his low back pain because plowing for 8 hours on Sunday made it worse than it had been the prior few days at work. Claimant was provided with a list of authorized treating physicians. Claimant selected Rio Grande Hospital Clinic where he has received most of his treatment under the direction of Tiffany Ward, M.D. Claimant's first visit with Dr. Ward was November 3, 2014. At that time, Dr. Ward diagnosed Claimant with a low back strain and provided restrictions including no lifting greater than 20 pounds, no bending forward or backward.

26. Claimant returned to work following his appointment with Dr. Ward to speak with George Hudran. Claimant was told that his position could not be accommodated given the aforementioned restrictions. Mr. Hudran sent Claimant home. Claimant did not return to his position until he received a full duty release to return to work on February 25, 2015. Claimant's first day back at work was February 26, 2016. Claimant was not yet been placed at maximum medical improvement.

27. Nine days prior to the trailer lifting incident (October 20, 2014), Claimant saw Dr. Wiley for arm pain and low back pain. Dr. Wiley's record reflects that Claimant's lower back was sore from gathering firewood. (Claimant's Exhibit 1, page 30). Claimant reported 5/10 pain in the low back, elbows and forearms. When questioned about this chiropractic visit, Claimant testified that it was mainly with respect to his elbows. Based

upon the evidence presented, the ALJ finds record support for this testimony. The pain diagram from this visit contains markings on the elbows and forearms only. There is no indication on the pain diagram of complaints in the low back or any indication that treatment was specifically directed to that area, although the report indicates that "subluxations were addressed with chiropractic adjustment in the cervical, thoracic, lumbar and pelvic areas of the spine". Review of Dr. Wiley's records reflects this notation or ones similar to it are common throughout his records. Based upon the evidence presented, the ALJ finds that this statement probably reflects that these spinal areas are routinely adjusted by Dr. Wiley when Claimant presents to his clinic.

28. George Hudran, testified by telephone. Mr. Hudran and Claimant concurred that in the middle of October, 2014, about 2 weeks prior to the trailer lifting incident, Claimant requested time off from work from November 1 through November 5. Both Mr. Hudran and Claimant testified that the request was denied as there were already two other employees scheduled to be out that weekend.[1] Claimant testified that he had family coming into town, including a brother who was going hunting. Claimant testified that he did not go "hunting" in 2014.

29. Mr. Hudran testified that Claimant specifically requested to take November 1-5 off for "hunting season". According to Mr. Hudran, Claimant informed him that he had a license and there was a discussion between Mr. Hudran and Claimant about whether or not Claimant was going to turn his license back in due to the fact that his time off request was denied. Mr. Hudran reportedly instructed Claimant on how to turn in his hunting license. Claimant denies that he requested time off to go hunting and that he had a license to do so. Mr. Hudran testified that when Claimant returned from Dr. Ward's office on November 3, 2014 with his work restrictions, Claimant told him that he "did some spotting" for his brother. Mr. Hudran further testified that he has hunted all his life and that the Claimant specifically mentioned "spotting" concerning his brother's hunting. According to Mr. Hudran, Claimant appeared to be upset that he couldn't have the requested time off.

30. As noted above, Claimant denies that he had a license to go hunting. Careful review of the evidence persuades the ALJ that Claimant never held a hunting license for 2014. A notarized copy of the Claimant Colorado Parks and Wildlife Records reflecting all applications and licenses purchased by Claimant since 1993 reflects that the only license Claimant applied for and purchased in 2014 was an annual fishing license issued on May 9, 2014. There is no indication in the Colorado Parks and Wildlife record that Claimant ever held a hunting license for the fall of 2014, or that such a license was surrendered.

31. While Mr. Hudran implied that Claimant falsified his injury of October 29, 2014 in order to go hunting, that allegation is not supported by the record. Rather, Mr. Hudran confirmed that Claimant not only worked all shifts as scheduled, he came in and worked an unscheduled 8 hour shift on Sunday, November 2, 2014. Mr. Hudran stated

[1] As November 1st marks the beginning of the winter schedule and snow plowing season, no more than two persons from the crew can be off at the same time.

that Claimant fulfilled all of his work duties. Mr. Hudran's suggestion is also not supported by the Colorado Parks and Wildlife records. Rather, those records support Claimant's statement that he did not have a hunting license at all in 2014. The only time Claimant left work during the November 1 through November 5, 2014 for which he had earlier requested time off was at the direction of George Hudran after receiving modified duty work restrictions. Based upon the evidence presented, the ALJ finds Mr. Hudran's testimony regarding Claimant's motivation to take time off work and his indication that Claimant reported spotting for his brother unpersuasive.

32. At his November 3, 2014 appointment with Dr. Ward, Claimant reported feeling immediate sharp pain in his low back as well as tingling and numbness into his buttocks during the incident in question. During neurologic physical exam, Dr. Ward documented complaints of numbness both in Claimant's low back and buttocks, greater on the right side. The ALJ finds these new symptoms, previously unrecorded in the prior treatment records following Claimant's 2011 injury, including the October 20, 2014 report of Dr. Wiley, nine days before the incident with the trailer on October 29, 2014.

33. Based on Dr. Ward's referral, Claimant underwent a second MRI of the lumbar spine on December 16, 2014. This MRI revealed a circumferential disc bulge with left-sided predominance and tiny left foraminal protrusion at L4 – 5 and a very small broad-based posterior disc bulge with annular tearing at L5 – S1.

34. At the request of Respondents, Claimant attended an independent medical exam with Dr. Michael Rauzzino of Front Range Spine and Neurology. Dr. Rauzzino opined that Claimant did not suffer a new injury to his lumbar spine outside perhaps a temporary exacerbation of his chronic back pain on October 29, 2014. Dr. Rauzzino went on to state that Claimant's symptoms were no different on October 20, 2014 after moving firewood than they were on November 3, 2014 after the work injury. In the final paragraph of his report, Dr. Rauzzino states the above as follows: "given that there was no structural injury to his spine and he has had chronic back pain all along, I do not see anything different about the character of his back pain or the location of his back pain from what he reported before the injury. I therefore do not believe that there is a new work-related claim here."

35. Dr. Rauzzino testified by deposition on August 31, 2015. Dr. Rauzzino testified that he personally reviewed both the February 29, 2012 and December 16, 2014 lumbar MRIs indicating: "I would tell you as a board-certified, fellowship-trained neurosurgeon who reviewed both films directly myself, I felt that the findings were very similar…I would say there was no significant difference in the x-rays (MRIs) that would account for any new symptoms that he would have except - - and you also have to account for the fact that the x-rays are different in two years in time. So he has time for his spine to degenerate also in time. There is some time for some changes. But I don't see an acute new structural difference to his spine." (Rauzzino, p. 50, l. 5-24) The ALJ infers from this testimony that Dr. Rauzzino assumes that any differences between the February 29, 2012 and December 16, 2014 MRI's are subtle and explained as additional degenerative changes occurring over the ensuing 34 months.

36. Dr. Rauzzino, when discussing the two MRIs, noted that the films were taken at two separate facilities. "There is always going to be slight variance in the way the machine takes the pictures. So if I had a patient that I put through an MRI today at one of the machines at one of the hospitals, and I had to come back and take an MRI a week later at a different machine in a different hospital, depending on how they took the cuts, how the machine was reading, they may look slightly different, but they will be the same overall appearance. And that's what I was trying to get to with the report, that in my mind, having looked at the pictures directly, I did not see a significant difference in the two studies. I did not see an acute injury on either study." (Rauzzino, pp. 54-55, l. 23-10)

37. The ALJ has considered the totality of the evidence and finds the opinions expressed by Dr. Michael Rauzzino credible and persuasive. Based upon the evidence presented, the ALJ finds that Dr. Rauzzino is the only physician who has had the opportunity to review the entirety of Claimant's medical treatment, including Claimant's extensive chiropractic treatment over the years prior to his alleged October 29, 2014 and October 31, 2014 incidents. Dr. Rauzzino's testimony and opinions are consistent with the record of evidence concerning Claimant's pre-existing low back injury and chronic low back condition.

38. To the contrary, Dr. Tiffany Ward, who saw the claimant on November 3, 2014 noted no prior history of any back complaints prior to October 29, 2014 and therefore, did not have a complete medical history or information in which to provide an informed causation analysis. Dr. Ward's November 3, 2014 report is void of any history or information that pre-existed the alleged event of October 29, 2014.

39. Based upon the totality of the evidence, including the chiropractic records the ALJ finds that Claimant has been treated repeatedly and aggressively for complaints of low back pain, since his 2011 industrial injury; sometimes due to an occupational trigger sometimes not. Despite this and as predicted by Dr. Polzin, Claimant has continued to suffer from "intermittent functional aggravations" likely caused by further degeneration of his lumbar facets and discs resulting in frequent episodes of low back pain only partially alleviated by chiropractic treatment. Consequently, the ALJ finds that Claimant's current symptoms likely represent the natural progression of his degenerative disc disease. Furthermore, the ALJ is persuaded that the subtle differences between Claimant's MRI's are attributable to this degenerative process and the progression of this degeneration accounts for Claimant's current numbness and tingling. Simply put, the ALJ is not convinced that Claimant suffers from new "neurologic and/or radicular" symptoms caused by an injury occurring October 29, 2014 when he lifted the trailer tongue or moved traffic cones as he claims. Consequently, the ALJ finds that Claimant's need for treatment following the October 29, 2014 incident was, more probably than not, directly caused by the natural progression of his degenerative lumbar spine and disc disease and not the October 29, 2014 lifting incident involving a trailer tongue or the October 31, 2014 incident involving the relocation of traffic cones as described by Claimant.

40. The ALJ finds that although Claimant had an "accident" while performing his work duties, he failed to prove that he suffered a compensable "injury" resulting in disability or the need for treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability

D. As noted, Claimant bears the burden to prove that he suffered a compensable injury. To sustain that burden, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); §8-41-301(I)(c), C.R.S. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

E. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

F. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where Claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As found above, the ALJ is not persuaded that Claimant's need for low back treatment was caused by his lifting a trailer tongue on October 29, 2014 or relocating traffic cones on October, 31, 2014. To the contrary, the totality of the evidence presented persuades the ALJ that Claimant's current symptoms, including his numbness and tingling are a consequence of the natural progression of his multi-level degenerative disc and lumbar spine disease. Accordingly, the ALJ is not convinced that Claimant sustained a new injury resulting in new or different "neurologic or radicular" symptoms attributable to lifting the trailer tongue of moving traffic cones. Consequently, Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting condition for which medical

treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim is dismissed. Accordingly, his claims for medical and temporary disability benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 2, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether the Claimant's permanent partial impairment shall be paid based on an extremity or whole person rating.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 63 years of age and works for Employer as a construction field inspector.

2. On January 23, 2014, Claimant suffered a compensable and admitted on-the-job injury to his right shoulder when he slipped and fell while walking across ice.

3. Claimant tried to work through the pain in the hopes that it would get better, but when the pain persisted, he sought care for his injury. On October 15, 2014, he reported neck pain, among other things, to Candice Sandiski, M.D.

4. Claimant received conservative treatment which included physical therapy and anti-inflammatory medication. During his treatment at Concentra, Claimant was diagnosed with a trapezius strain.

5. When Claimant failed to improve, he was referred to Dr. John Papillion for an orthopedic evaluation.

6. Dr. Papillion diagnosed Claimant as having a rotator cuff tear, and a type 4 SLAP tear.

7. On November 24, 2014, Dr. Papillion performed a distal clavicle resection and repaired Claimant's torn rotator cuff.

8. Claimant missed one week of work after the surgery and was paid temporary total disability benefits from November 27, 2014 through November 30, 2014.

9. On January 13, 2015, Claimant physical therapist observed Claimant exhibited moderate right shoulder elevation and "tenderness to palpation of the superior, anterior, and lateral shoulder," and "tender right upper trapezius." Soft tissue manipulation was performed to those areas and Claimant relief of symptoms as a result. On January 27, 2015, soft tissue manipulation was also performed on Claimant's right pectoralis muscles.

10. On March 17, 2015, a physical therapist noted tightness in Claimant's right scapular elevators and right trapezius into the neck. On March 26, 2015 and April 1, 2015, a physical therapist performed manual therapy on Claimant's thoracic region and scapula with Claimant noting a decrease in his overall pain.

11. On April 22, 2015, Dr. John Aschberger placed Claimant at maximum medical improvement. His notes provide that Claimant had "tightness at the trapezius and into the neck." Dr. Aschberger assigned an impairment rating of 24% of the right upper extremity which he converted to 14% as a whole person. Dr. Aschberger prescribed massage therapy for maintenance medical treatment.

12. Also on April 22, 2015, Scott Richardson, M.D., of Concentra also noted tenderness in Claimant's rhomboid and trapezius muscles.

13. On May 15, 2015, Respondents filed a final admission admitting for permanent partial disability benefits based upon the 24% extremity rating. A number of massages were ordered post MMI.

14. On May 18, 2015, Matthew G. Miller, M.D. filed a Physician's Report of Workers' Compensation Injury. The report indicates that Claimant's impairment rating is 14% whole person.

15. On June 19, 2015, Claimant continued to complain of pain at 3-4/10. The massage therapist noted hypertonicity, tenderness, tightness, and guarding to Claimant's right shoulder and periscapular area. Claimant's massage covered several muscles extending towards his torso and back beyond the glenohumeral joint. Four additional massage therapy sessions were ordered.

16. Claimant has continued to have symptoms from his injury since returning to work one week after the surgery. He testified credibly that he has pain in his shoulder which radiates into his neck. He has stiffness in his neck and has a hard time turning his neck from left to right. He also has difficulty looking up for more than a short period. He testified that he has stiffness on the back of his shoulder between his neck and his arm and down his back.

17. To compensate for the stiffness in his neck, Claimant has glued convex mirrors on both the right and left rearview mirrors in his car and his truck. This allows Claimant to see behind him without having to turn his head too far.

18. As part of his duties as an inspector, Claimant is required look up at the ceiling at a construction site. However, he no longer looks up for long periods but just glances up repeatedly for a few seconds at a time. This has allowed him to continue to work for Employer at his pre-injury job.

19. Claimant was involved in an auto accident in approximately 1995 while working for the City of El Paso. He testified that he was in a neck brace for about a week and recovered completely from that injury with no permanent restrictions. At the time of the January 23, 2014 fall, he was having no symptoms from the prior accident.

20. Dr. Aschberger performed an examination when he placed the Claimant at MMI. He stated that Claimant had restrictions for cervical extension and lateral flexion. He also found that Claimant had a prominent right trapezius which is tender to palpitation and with radiation into the neck. This is consistent with Claimant's testimony regarding his neck symptoms.

21. Dr. Christopher Ryan performed a Claimant's IME. Claimant reported having pain throughout his right upper quarter and into his neck since the date of injury. Dr. Ryan stated in his report of July 30, 2015 that Claimant had significant tightness of the right much more than the left scapular elevators and the paraspinous muscles in the cervical and thoracic spines. During the interview portion of the evaluation, Claimant reported, "difficulty with neck motion, and this impacts any activity that he has to use his neck for, including driving, looking upward for more than a few seconds, repetitive turning, and moving his head into awkward positions, and static head positioning." Dr. Ryan opined that the functional impact of this on Claimant's daily life "includes limitation of cervical range of motion." He concluded that Claimant's function limitation "clearly extends into the torso." He opined that the impact of the injury on Claimant included a loss of cervical range of motion.

22. Dr. John Burris examined Claimant at Respondents' request. In his July 27, 2015 report, Dr. Burris stated that Claimant reported pain along the superior aspect of his right shoulder which extends into the neck region. The pain was described as from pins and needles to stabbing in nature.

23. In spite of these findings, Dr. Burris found no functional impairment that extended beyond the right upper extremity and concluded that the impairment should be scheduled and not a whole person.

24. Respondents called Dr. Burris as a witness at the hearing. On direct examination he reiterated his position that Claimant should receive an extremity rating only. His reasoning was that the injury was to Claimant's shoulder and not his torso or neck.

25. On cross-examination, Dr. Burris acknowledged that it is common for someone with this injury and surgery to have pain and stiffness in his or her trapezius. He testified that the trapezius muscle runs from the base of the neck to the shoulder joint and also down the back. He also conceded that Claimant had pain and stiffness in the trapezius muscle as a result of his injury.

26. Dr. Burris stated on cross-examination that pain and stiffness in the trapezius muscle can cause pain and a loss of range of motion in the neck and that Claimant did have pain in his neck accompanied by a loss of range of motion as a result of the injury.

27. Dr. Ryan's conclusions and opinions to be more persuasive than those of Dr. Burris. Dr. Ryan's findings of cervical pain and stiffness were supported by Dr. Aschberger who was an authorized treating physician, and even by Dr. Burris who

performed Respondents' IME. Dr. Burris' conclusions and opinions that the extremity rating should apply and that no functional impairment extends beyond the arm is inconsistent with Claimant's credible testimony and pain complaints, and also the findings of Dr. Aschberger and Dr. Ryan. Dr. Burris' conclusions and opinions that the extremity rating should apply is also inconsistent with Dr. Burris' own testimony that Claimant's trapezius is inflamed and stiff as a result of the injury and that this has caused pain and a loss of range of motion in the Claimant's neck.

28. Based on the totality of the evidence, the ALJ finds that Claimant has established by a preponderance of the evidence that he is entitled to a whole person impairment of 14% due to ongoing pain and stiffness in Claimant's trapezius and neck and that this is the appropriate measure of the Claimant's impairment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Permanent Impairment

The law concerning the conversion of upper extremity ratings to whole person ratings in cases of shoulder injuries is well established. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ.

The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *See Langton v. Rocky Mountain Healthcare Corp.,* supra*; Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996).

Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the "arm at the shoulder." Claimant has problems with his neck range of motion as a result of the injury. This is confirmed by his treating physician, Dr. Aschberger, and also by Claimant's IME physician, Dr. Ryan, and by Respondents' IME physician, Dr. Burris. Claimant testified credibly to this point and put convex mirrors on his vehicles so he does no't have to turn his head so far to see what is behind him.

Based upon the situs of Claimant's impairment being in the neck, evidenced by pain and a loss or range of motion, the ALJ concludes that Claimant should receive permanent disability benefits based upon a whole person rating pursuant to §8-42-107(8) C.R.S.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay permanent partial disability benefits based upon the 14% whole person rating given by Dr. Aschberger in his MMI report of April 17, 2015.

2. Respondents shall receive credit for any permanent disability previously paid.

3. Interest at the rate of 8% shall be paid on all compensatory benefits not paid when due.

4. Any issues not decided by this order are reserved for future determination if necessary.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant established by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on September 21, 2014 in an incident arising out of and in the course of her employment with the respondent-employer.

FINDINGS OF FACT

1. The claimant was employed by the respondent-employer department store on September 21, 2014. On that date she was assigned to the customer service area of the store where returns of merchandise were made. On that date the claimant picked up a box containing a mattress pad weighing approximately 10 pounds. The claimant asserts that she injured her right shoulder while doing so. The claimant's shift concluded at approximately 2:00 p.m. that afternoon.

2. The claimant went to the emergency room at Penrose St. Francis on September 21, 2014. The intake form lists arrival time as 16:58 (4:58 pm) and states that she injured her arm lifting a box. The location of the incident is identified as "home." The hand written notes indicate the claimant was seen at 19:15 (7:15 pm). She reported she was lifting a box when she felt a "pop." The report does not indicate that this occurred during a work related event.

3. In discussing the alleged incident with her medical providers, the claimant initially reported that she lifted the box from the countertop of the customer service area. Surveillance video of the store work area on September 21, 2014, commencing at 12:18 p.m., shows the claimant working. During this timeframe, from approximately 12:18-12:27, an interaction with a customer that appears to be returning a Serta mattress topper can be seen wherein the claimant picks up a mattress topper box from the floor at approximately 12:27 and carries it off screen.

4. Dr. Eric Ridings reviewed the surveillance video in its totality and the video was also admitted into evidence. Dr. Ridings indicated that from 12:18-2:04 the claimant can be seen working without any apparent discomfort, using her upper extremities normally, and not displaying any difficulties or non-verbal indications of discomfort.

5. The claimant's supervisor, Marie Hutchins, worked with the claimant in the customer service department on September 21, 2014. The claimant was adamant that she specifically told Ms. Hutchins "ouch that hurt" when she picked up the mattress topper box. Ms. Hutchins testified the she recalled the claimant making a comment that the box was "heavy" but that the claimant did not use the words "ouch" or "hurt" or give any indication that she had injured herself by lifting the box. Ms. Hutchins testified that as a supervisor, had the claimant reported the box injured her, even in passing, she would have insisted an incident report be filled out. Ms. Hutchins testified that she worked in the customer service area with the claimant for the remainder of her shift and that the claimant never displayed any difficulty in performing her work functions or complained about her right shoulder.

6. Mr. Lindberg testified that she spoke with the claimant during a store opening meeting on the morning of September 22, 2014. The claimant presented that morning wearing a sling on her right arm. Mr. Lindberg asked the claimant what happened to her shoulder and the claimant made statements to him that she had injured the right shoulder during an altercation with a bar patron while watching the Broncos game. Mr. Lindberg testified he did not believe that the claimant meant these statements in a joking manner. Mr. Lindberg also testified that the claimant did not mention any incident concerning lifting the mattress pad topper box to him during this conversation on the morning on September 22, 2014.

7. Ronda Romero testified that she also spoke with the claimant the morning of September 22, 2014 when the claimant walked by Ms. Romero's desk with the sling on her right shoulder visible. Mr. Romero testified that the claimant also told her that she injured the right shoulder while watching the Broncos game.

8. Dr. Eric Ridings performed an independent medical examination of the claimant on August 12, 2015. He also provided testimony at the hearing. In Dr. Riding's medical opinion, lifting a 10-pound box in the manner in which the claimant described during her hearing testimony, bending down and lifting with both hands, is an insufficient causal mechanism to cause, aggravate, or accelerate any injury to the right shoulder. Dr. Ridings testified that biomechanically one cannot cause injury to the shoulder with the body positioning that the claimant, by her own self report, utilized in the lifting of a 10-pound box. Dr. Ridings opined that a 10-pound box, lifted with two hands, is simply insufficient to cause any objective injury to the right shoulder. Dr. Ridings further opined that the current diagnosis of frozen shoulder on the right is not caused, aggravated, or accelerated by the alleged incident of September 21, 2014.

9. Dr. Ridings testified that wearing a sling during the period of time that the claimant described (limiting the sling to working hours, removing it at home and for sleep) is insufficient to cause frozen shoulder/adhesive capsulitis. Dr. Ridings also testified that the claimant has a history of a frozen shoulder diagnosis on the left hand side.

10. The claimant denied any prior right arm or shoulder symptoms. However, medical records from November 14, 2012 document a fall with a diagnosis of contusion and right sided chest wall bruising. The claimant reported intermittent right arm numbness and tingling. The claimant also reported radiating pain into the right arm during an evaluation on February 26, 2014 at Peak Vista.

11. The MRI findings of October 11, 2014 documented mild thickening of the synovium most consistent with adhesive capsulitis. Mild bursitis, mild tendonitis of the biceps and infraspinatus were also noted. The MRI was negative for rotator cuff tear. Dr. Ridings testified that the findings on the MRI were degenerative in nature and could not reasonably be related to the alleged incident of lifting a 10-pound box on September 21, 2014.

12. The claimant reportedly experienced immediate onset of pain and a tearing/popping sensation in her right shoulder, yet she continued to work the remainder of her shift without any indication of pain or physical distress.

13. The ALJ finds Dr. Ridings' testimony credible and persuasive. Dr. Ridings testified that biomechanically lifting a 10-pound box in the manner the claimant described is insufficient to cause, aggravate, or accelerate any injury to the claimant's right shoulder. This medical testimony was not contradicted by any expert witness on behalf of the claimant. As explained by Dr. Ridings, the claimant's report of experiencing a pop or tearing sensation when lifting the box is inconsistent with the objective MRI findings that indicate no rotator cuff or labral tears.

14. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffered an injury on September 21m, 2014 arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. A preexisting condition does not disqualify a claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of

symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. The claimant testified that she experienced a pop and tearing sensation with immediate onset of right shoulder pain on September 21, 2014, however she is shown on surveillance video to lift the box in question with no visible evidence of discomfort. She continued to work the remainder of her shift in a similar fashion. She had a supervisor, Marie Hutchins, working with her at the time of the incident.

7. The medical testimony of Dr. Eric Ridings supports a conclusion that lifting a 10-pound box from either the counter or the floor with two hands is insufficient to cause, aggravate, or accelerate any injury to the right shoulder. Dr. Ridings was the only medical provider to perform a causation assessment in this matter and it appears that he was the only medical provider who was told the "heavy" box in question actually weighed 10 pounds. The ALJ finds Dr. Ridings' testimony credible and persuasive on the issue of causation.

8. Based on the preceding findings of fact, the ALJ concludes that the claimant has failed to sustain her burden of proof to demonstrate by a preponderance of the evidence that she sustained any injury to her right shoulder on September 21, 2014.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 25, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that the need for a total shoulder arthroplasty was proximately caused by the admitted industrial injury of November 22, 2014?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 5 were admitted into evidence. Respondent's Exhibits A through O were admitted into evidence.

2. Claimant was employed as a police officer. He sustained an admitted injury on November 22, 2014.

3. On Saturday, November 22, 2014 Claimant was the supervisor of the police "mounted unit." As part of his duties Claimant lifted bales of hay that weighed approximately 70 pounds. He also lifted saddles that weighed 35 to 40 pounds. During a shift Claimant mounted and dismounted his horse roughly 10 to 15 times and used both arms to pull himself into the saddle.

4. Claimant credibly testified as follows concerning the events of November 22, 2014. As part of his duties he was cleaning a horse run. A horse charged at him and Claimant attempted to climb over a 6 to 7 foot fence in order to escape. Claimant got both of his hands on top of the fence but the horse struck him from behind and pushed him against the fence. Claimant lost his footing at the bottom of the fence and was left dangling by both arms. He then fell into the run on "all fours."

5. On Monday November 24, 2014 Claimant reported the injury to Employer. Claimant reported he suffered from right shoulder pain, right rib pain and right hip pain. Employer referred Claimant to Concentra Medical Centers (Concentra) for treatment.

6. Claimant previously injured his right shoulder while working for Employer in 1997. As a result of the 1997 injury Claimant underwent surgical repair of the right rotator cuff. Approximately 1 year and 9 months after the 1997 injury Claimant was released to return to work at full duty. He also testified that after he was released for the 1997 injury and prior to the November 22, 2014 injury he experienced a "pinching" sensation in the front of the right shoulder once every "couple of months." Claimant testified he did not seek medical treatment for his right shoulder between the date he was released and November 22, 2014. Claimant testified that after he was released he was not limited in performing any of his usual activities that included martial arts, lifting

weights and playing softball. Claimant further testified that after he was released to return to work he was able to perform strenuous job-related activities such as arresting combative persons, taking and teaching classes in arrest control and taking and teaching classes in a specialized fighting technique.

7. Claimant testified that since the November 22, 2014 injury he has experienced new symptoms in his right upper extremity which are different than the "pinching" he felt previously. These new symptoms include pain in the "cap area" of the right shoulder that radiates from the shoulder down his right arm. The pain is "constant" rather than intermittent. Claimant also stated that he now experiences numbness and tingling down his arm to the hand and constant pain. Claimant testified that since the November 22, 2014 injury he has had to curtail strenuous physical activities such as martial arts, lifting weights, arresting persons and taking and teaching classes in fighting technique.

8. On November 24, 2014 PA-C Elizabeth Palmer examined Claimant at Concentra. Claimant reported pain in the right side of his ribs and hip as well as pain in both shoulders. Claimant stated he was having a "hard time sleeping" because of pain in his "right scapula/AC joint." PA-C Palmer assessed right shoulder pain, injury of the right scapular region and contusions of the ribs and right hip. She referred Claimant for x-rays of the right shoulder and a CT scan of the right scapular region to rule out "scapular fracture." PA-C Palmer also prescribed medications.

9. On November 24, 2014 Claimant underwent x-rays of the right shoulder. The radiologist noted no acute fracture or dislocation. The radiologist also noted marked narrowing of the glenohumeral joint with associated bony ebumation of the humeral head and glenoid. Prominent marginal osteophytes were observed around the humeral head and glenoid. There was slight superior subluxation of the humeral head with associated narrowing of the acromiohumeral distance. The radiologist noted that this type of subluxation "can be seen with chronic rotator cuff tear."

10. On November 24, 2014 Claimant underwent a CT scan of the right scapula. Audrey Krosnowski, M.D., read the scan and found no fracturing of the scapula. Dr. Krosnowski wrote that the "most significant findings" were "rather advanced chronic-appearing glenohumeral degenerative changes" with "mild to moderate degree of posterior subluxation."

11. On November 26, 2014 PA-C Palmer referred Claimant for physical therapy (PT) and to an "orthopedic specialist." PA-C Palmer placed Claimant on a "no work" status.

12. On December 3, 2014 PA-C Chelsea Rasis examined Claimant at Concentra for a complaint of right shoulder pain that he rated 6 on a scale of 10 (6/10). Claimant gave a history of a "previous" right shoulder injury that required "repair." PA-C Rasis noted that Claimant stated that he "does live with some pain in the R shoulder normally, but has no limitations." PA-C Rasis assessed right shoulder pain and injury to the right scapular region. She referred Claimant for an MR arthrogram. PA-C Rasis

restricted Claimant to no lifting in excess of 5 pounds, and pushing and pulling up to 5 pounds with the right arm. Claimant was prohibited from reaching above the shoulder with the right arm.

13. On December 5, 2014 Claimant underwent a right shoulder MR arthrogram. The radiologist's impressions included the following: (1) Advanced glenohumeral joint arthritis with multiple large intra-articular bodies; (2) Bony glenoid retroversion and significant glenoid wear, with mild posterior subluxation of the humeral head; (3) Attenuated and tendinotic rotator cuff tendons without evidence of significant partial or full-thickness rotator cuff tear; (4) Postoperative changes of rotator cuff repair and acromioplasty.

14. Upon referral from PA-C Rasis, orthopedic surgeon Michael Hewitt, M.D., examined Claimant on December 8, 2014. Claimant reported that after a horse struck him on November 22, 2014 he fell to the ground and experienced the immediate onset of right shoulder pain. Claimant gave a history of a prior work-related right shoulder injury that resulted in a rotator cuff repair in "2001." Claimant reported "persistent" shoulder discomfort after the 2001 surgery but he was able to return to work at full duty. Dr. Hewitt performed a physical examination and reviewed the December 5, 2014 MRI. According to Dr. Hewitt the MRI demonstrates evidence of a prior rotator cuff repair without significant rotator cuff atrophy. There was no evidence of a recurrent rotator cuff tear. Dr. Hewitt opined the MRI reveals "advanced glenohumeral arthritis with multiple large loose bodies." Dr. Hewitt assessed a "significant fall with increased right shoulder pain" and physical examination and MRI results "consistent with advanced glenohumeral arthritis." Dr. Hewitt wrote that Claimant understood he had advanced arthritis that "would most likely require a hemiarthroplasty to address the significant deformation." Dr. Hewitt further advised Claimant that the "findings of advanced arthritis or [sic] more likely related to his previous shoulder surgery which is also work-related."

15. Concentra physician Stephen Danahey, M.D., referred Claimant to Armodios Hatzidakis, M.D., for the purpose of obtaining a second opinion and surgical evaluation.

16. Dr. Hatzidakis examined Claimant on January 22, 2015. Dr. Hatzidakis took a history from Claimant. Claimant attributed the onset of his right shoulder "pain and dysfunction" to the incident on November 22, 2014 when a horse "squashed" him against a fence and "he started to fall and caught his weight with his arm." Claimant admitted to a prior right shoulder surgery in 1998 or 1999. Claimant advised Dr. Hatzidakis that after he had surgery his shoulder "returned to normal with occasional pain since then but nothing like he has had since" the November 22, 2014 incident. Dr. Hatzidakis reviewed the December 5, 2014 MRI and opined that is showed "glenohumeral degenerative joint disease with some loose bodies along with posterior glenoid bone loss." He also took x-rays that showed "severe end-stage osteoarthritis with a change in the shape of the humeral head and large inferior osteophyte formation of the humeral head with no joint space visible on the AP view or the axillary view."

17. Dr. Hatzidakis assessed right shoulder "end-stage degenerative joint disease of the glenohumeral joint with traumatic onset of pain from work-related injury, with possible low-grade infection from previous surgery." After discussing various treatment options Claimant expressed an interest in surgery described as a "total shoulder arthroplasty" (TSA).

18. On January 22, 2015 Dr. Hatzidakis authored a letter to Dr. Danahey. Dr. Hatzidakis wrote that causality "often comes up in cases such as" Claimant's. Dr. Hatzidakis opined that Claimant did not develop osteoarthritis of the right shoulder since the November 22, 2014 injury. However, Dr. Hatzidakis noted that according to the history Claimant was "dealing well with his glenohumeral osteoarthritis until he had" the work-related injury of November 22, 2014. Consequently Dr. Hatzidakis opined that it is "more likely than not this recent injury is directly causal for his current symptoms and requirement of additional surgical treatment to address those symptoms."

19. Following Dr. Hatzidakis's recommendation for surgery Respondent provided Claimant's medical records to orthopedic surgeon John McBride Jr., M.D. Dr. McBride reviewed medical records for treatment of Claimant's work-related right shoulder injury that occurred on October 28, 1997. Dr. McBride also reviewed medical records concerning the treatment provided for Claimant's November 22, 2014 injury.

20. Dr. McBride issued a report dated February 4, 2015 in which he made numerous observations concerning Claimant's medical records. Dr. McBride noted that radiographs of Claimant's right shoulder dated October 29, 1997 showed significant osteoarthritis with an inferior humeral head osteophyte and cartilage that had been worn down to about half the normal cartilage depth. In August 1998 Claimant underwent arthroscopic debridement of a partial rotator cuff. The operative report noted significant degenerative changes and grade III chondral changes of the entire humeral head and glenoid. Dr. McBride compared this information to Claimant's records and imaging studies developed after the November 22, 2014 industrial injury. Dr. McBride wrote that Claimant's arthritis is not related to the November 22, 2014 injury. Instead, Dr. McBride opined Claimant's arthritis is a "congenital process" that has progressed over time and was "well identified" on radiographs taken the day after the October 28, 1997 injury. Dr. McBride further opined that the 2014 "scout" CT scan shows both of Claimant's shoulders and both shoulders exhibit "significant degenerative arthritis."

21. Dr. McBride also cited the Shoulder Injury Medical Treatment Guidelines (MTG) WCRP 17, Exhibit 4, for the proposition that TSA is "indicated" for "posttraumatic arthritis or for trauma resulting from a severe humeral head fracture." However, Dr. McBride opined Claimant had "degenerative arthritis" in the shoulder in 1997 and that condition has "continued to progress until 2014."

22. On April 1, 2015 Dr. McBride performed an independent medical examination (IME) of Claimant at the request of Respondent. Dr. McBride again reviewed medical records and imaging studies and he performed a physical examination. Dr. McBride diagnosed bilateral osteoarthritis of the shoulders "right greater than left." Dr. McBride opined Claimant is a candidate for TSA "based on his

exam and loss of motion." However, Dr. McBride stated the need for surgery "is not related" to the November 22, 2014 injury. Rather, Dr. McBride again opined that the condition of Claimant's right shoulder is the result of a "congenital abnormality" of the glenoid and "wear and tear of his shoulder over the past 17" years. Dr. McBride stated that the November 22 injury was a mere contusion of the shoulder "which may have aggravated [Claimant's] pre-existing arthritis briefly." Dr. McBride opined that the condition of Claimant's right shoulder is not related to the 1997 injury and consequent surgery because the "rotator cuff is still intact according to the MRI."

23. On May 13, 2015 Dr. Hatzidakis authored a letter answering questions posed in writing by Claimant's counsel. Dr. Hatzidakis wrote that he could not "state with certainty" that Claimant has "nothing more than a worn out shoulder" as argued by Dr. McBride. Dr. Hatzidakis explained that Claimant does not have a "type C glenoid" but instead a "type B2 glenoid" that is not the result of a "congenital condition." Dr. Hatzidakis disagreed with Dr. McBride that the November 22, 2014 injury "caused noting more than a temporary aggravation" of Claimant's pre-existing arthritis. Dr. Hatzidakis inferred a causal relationship between the November 22 injury and Claimant's need for surgery based on the Claimant's history of doing well before November 22 and experiencing "markedly exacerbated" symptoms after November 22. Dr. Hatzidakis emphasized that before the November 22 injury Claimant was "functionally doing well and he had not sought significant medical treatment for any right shoulder problem" before the November 22 injury. Dr. Hatzidakis agreed with Dr. McBride that the "scout" CT scans show osteoarthritis in Claimant's left shoulder but opined this is of "no relevance." Dr. Hatzidakis agreed with Dr. McBride that the recent radiographic studies do not demonstrate evidence of "an acute injury." However, Dr. Hatzidakis reiterated that he believes the Claimant had a "significant exacerbation" of his shoulder condition because of the November 22, 2014 injury.

24. On June 10, 2015 Dr. Danahey examined Claimant. Claimant reported "no changes" in the condition of his shoulder. Dr. Danahey assessed "right shoulder pain." He imposed restrictions of occasional lifting up to 5 pounds and occasional pushing and pulling up to 5 pounds occasionally.

25. Dr. McBride testified at the hearing. His testimony was generally consistent with the opinions he expressed in his written reports. Dr. McBride reiterated that based on his review of the medical records and imaging studies the Claimant has long-standing congenital osteoarthritis of the right shoulder.

26. Dr. McBride reiterated his opinion that the November 22, 2014 did not cause the degenerative or "wear and tear" arthritis in Claimant's shoulder. Dr. McBride further testified that based on his interpretation of the MTG the November 22, 2014 injury did not "aggravate" or "accelerate" Claimant's pre-existing arthritis so as to cause the need for a TSA. Dr. McBride explained that the shoulder MTG do not address the circumstances under which "aggravation" of pre-existing shoulder arthritis may be considered the cause of a need for TSA. However, Dr. McBride stated that the Lower Extremity Injury MTG address the circumstances under which "aggravation" of pre-existing arthritis may be considered a compensable consequence of an industrial injury.

Dr. McBride testified that the lower extremity MTG provide that a work-related injury "aggravates" pre-existing arthritis if radiographs show a significant change that occurs at least 2 years after the date of injury. Dr. McBride opined that the lower extremity MTG analysis should apply when the question is whether an industrial injury caused an aggravation pre-existing "wear and tear" arthritis of the shoulder joint.

27. On cross-examination Dr. McBride was asked to explain that portion of his April 1, 2015 report stating that the November 22, 2014 "may have aggravated [Claimant's] pre-existing arthritis briefly." Dr. McBride explained that the November 22 accident may have aggravated the arthritis by causing pain. Dr. McBride asked when the pain from the aggravation stopped. He replied that if the Claimant had undergone a corticosteroid injection it may have reduced "inflammation" and returned Claimant to his pre-injury "baseline."

28. Respondents' Exhibit M is a copy of certain provisions of the Shoulder Injury MTG (Effective February 1, 2015). Incorporated within this exhibit is WCRP 17, Exhibit 4, (G) (6) (b), p. 159, concerning the "Occupational Relationship" of work and the need for TSA. This section provides as follows: "Usually from post-traumatic arthritis, or from trauma resulting in severe humeral head fractures."

29. Respondents' Exhibit N is a copy of certain provisions of the Lower Extremity Injury MTG (Effective September 1, 2009). Incorporated within this exhibit is WCRP 17, Exhibit 6, (E) (2) (a) (i) and (ii), p. 47, concerning the "Occupational Relationship" between work and "Aggravated Osteoarthritis" of the knee. These sections provide as follows:

> Description/Definition: Swelling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint. Age greater than 50 and morning stiffness lasting less than 30 minutes are frequently associated. The lifetime risk for symptomatic knee arthritis is probably around 45% and is higher among obese persons.
>
> Occupational Relationship: The provider must establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities such as repetitive kneeling, crawling, squatting and climbing, or heavy lifting.
>
> Other causative factors to consider- Previous meniscus or AC: damage may predispose a joint to degenerative changes. In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: menisectomy, hemarthrosis at the time of the

> original injury; or evidence of MRI or arthroscopic meniscus or ACL damage. The prior injury should have been at least 2 years from the presentation for the new complaints and there should be a significant increase of pathology on the affected side in comparison to the original imaging or operative reports and/or the opposite un-injured side or extremity.

30. Claimant proved it is more probably true than not that his need for TSA was proximately caused by the November 22, 2014 work-related injury. Specifically, Claimant proved it is more probably true than not that the November 22 injury aggravated pre-existing right shoulder osteoarthritis so as to cause the need for surgery.

31. The ALJ is persuaded that prior to both the November 22, 2014 injury and the 1997 injury Claimant's right shoulder exhibited significant degenerative osteoarthritis. Dr. Hatzidakis and Dr. McBride agree that Claimant suffered right shoulder osteoarthritis that pre-dated the November 22, 2014 injury. Dr. Hatzidakis acknowledged the pre-existing nature of the osteoarthritis when he commented that Claimant was "dealing well with his glenohumeral osteoarthritis until" the November 22 injury. Dr. McBride credibly opined that the pre-existing nature of the arthritis is documented by the October 29, 1997 radiograph showing "significant osteoarthritis" and the 1998 operative report that documented grade III changes of the glenoid and humeral head. Dr. McBride credibly opined that this 1997 x-ray showed "significant osteoarthritis with an inferior humeral head osteophyte and cartilage that had been worn down to about half the normal cartilage depth."

32. Claimant credibly testified concerning his activity level after he was released for the 1997 injury. Claimant was able to perform strenuous activities including martial arts and weight lifting. He was also able to perform strenuous job-related activities including arresting combative persons and taking and teaching classes in fighting technique. Claimant credibly testified that since the November 22, 2014 right shoulder injury he has not been able to perform these strenuous activities.

33. Claimant also credibly testified that after he was released for the 1997 injury his right shoulder symptoms were limited to an occasional "pinching" sensation. He credibly testified that after he was released for the 1997 injury he did not seek treatment for the right shoulder until November 22, 2014. However, after the November 2014 injury he experiences constant pain that radiates into his right shoulder into the upper extremity. He also experiences numbness and tingling in the right upper extremity.

34. Claimant's testimony concerning the scope and timing of his symptoms is generally corroborated by the medical records introduced into evidence. There are no credible medical records showing that Claimant sought treatment for right shoulder symptoms between the time he was released for the 1997 injury and November 22, 2014. Moreover, after the November 22, 2014 injury Claimant did not attempt to

conceal the 1997 shoulder injury and consequent rotator cuff repair surgery. Claimant disclosed the prior injury and surgery to PAC-Rasis on December 3, 2014, Dr. Hewitt on December 8, 2014 and Dr. Hatzidakis on January 22, 2015. Moreover, the medical records document that after November 22, 2014 Claimant reported persistent pain in the right shoulder and sought ongoing treatment for the shoulder. Also, Claimant was placed under rather severe restrictions regarding use of the right arm.

35. Dr. Hatzidakis credibly and persuasively opines that the November 22, 2014 injury is more likely than not "causal for [Claimant's] current symptoms and requirement of additional surgical treatment to address those symptoms." Dr. Hatzidakis acknowledges Claimant suffered from right shoulder osteoarthritis prior to the November 22 injury. However, Dr. Hatzidakis persuasively opined that Claimant's medical history argues for finding a causal link between the November 22, 2014 injury and the subsequent need for TSA. Dr. Hatzidakis correctly noted that prior to November 22 Claimant was "functionally doing well and he had not sought significant medical treatment for any right shoulder problem." Dr. Hatzidakis persuasively argues the Claimant's symptoms were "markedly exacerbated" by the November 22 injury this evidences a "significant exacerbation" of the injury.

36. As found, Dr. Hatzidakis's opinion concerning the cause of the need for the TSA is both logical and supported by the medical evidence. For this reason the ALJ rejects the Respondent's assertion that Dr. Hatzidakis's opinion is not credible because it is motivated by his financial interest in performing the recommended TSA.

37. Dr. McBride's opinions that the November 22, 2014 injury is not a cause of Claimant's need for TSA, and that the November 22 injury did not aggravate Claimant's pre-existing osteoarthritis are not persuasive. Dr. McBride did not persuasively refute Dr. Hatzidakis's argument that a review of Claimant's history of symptoms and activity levels supports the conclusion that the pre-existing osteoarthritis was aggravated by the November 22 injury. Even Dr. McBride acknowledged in his April 1, 2015 report that the November 22 incident could have caused a "brief" aggravation of the osteoarthritis. During his testimony Dr. McBride acknowledged that this aggravation would have been evidenced by increased pain in the shoulder. Moreover, Dr. McBride did not persuasively explain when the pain from the "brief" aggravation ended and the pain caused by the pre-existing osteoarthritis became so predominant that it became the cause of the need for TSA.

38. The ALJ is not persuaded by Dr. McBride's opinions insofar as he states that the MTG prohibit finding a causal relationship between a work-related injury and the need for TSA unless there is evidence of posttraumatic arthritis or severe fracturing of the humeral head. Dr. McBride's interpretation of the MTG notwithstanding, the Shoulder Injury MTG state that a causal relationship between work and the need for TSA is "usually" established by posttraumatic arthritis or fracturing of the humeral head. (See Finding of Fact 28). The ALJ infers that use of the word "usually" posits that there are some circumstances other than posttraumatic arthritis and fracturing of the humeral head that will support a finding that work has caused a need of TSA.

39. Neither is the ALJ persuaded by Dr. McBride's opinion that a work-related "aggravation" of pre-existing osteoarthritis may not be found unless radiographs show a deterioration of the arthritis occurring over two years after the date of injury. As noted in Finding of Fact 29, the Lower Extremity MTG define "aggravated osteoarthritis" as "swelling and/or pain" in the knee due to an "aggravating activity in a patient with pre-existing degenerative change in a joint." Thus, to the extent the Lower Extremity MTG may be applied to the shoulder, they define "pain" as one of the primary symptomatic features of "aggravated osteoarthritis." Here, Claimant argues that increased pain in his right shoulder evidences the "aggravation" of the pre-existing osteoarthritis caused by the November 22, 2014 injury. Thus, contrary to Dr. McBride's interpretation, Claimant's allegation that the November 22 injury aggravated the pre-existing osteoarthritis by causing pain is consistent with the Lower Extremity MTG. Moreover, this provision of the MTG supports Dr. Hatzidakis's opinion that a change in pain levels associated with a work-related event (November 22, 2014 injury) is a factor to be considered when determining the cause of an "aggravation" of pre-existing osteoarthritis.

40. Further, the Lower Extremity MTG indicate that an "occupational relationship" between work and "aggravated osteoarthritis" must be established by a "change in baseline condition" and a "relationship to work activities including but not limited to physical activities." This section does not require that the "change in baseline condition" be evidenced by radiographs showing changes that occurred during the two years after the date of injury. Rather, the Lower Extremity MTG reference to a change in radiographs appears in the section that addresses "other factors" which may have caused aggravation of osteoarthritis. The "other factors" section refers to "previous injury" of the knee and requires that radiographs show a change over 2 years before such a previous injury may be considered the cause of an aggravation of pre-existing osteoarthritis of the knee.

41. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

CAUSE OF NEED FOR TOTAL SHOULDER ARTHROPLASTY

Claimant seeks an order determining that Respondent is obligated to pay for the TSA recommended by Dr. Hatzidakis. Claimant argues the credible and persuasive evidence establishes that the November 22, 2014 has caused symptoms and shoulder dysfunction which is a legal cause of his need for surgery. Respondent does not dispute that Claimant sustained a compensable injury on November 22, 2014. Neither does Respondent dispute that TSA constitutes reasonable and necessary medical treatment for the Claimant's right shoulder condition. However, Respondent contends Claimant failed to prove that his need for TSA is causally related to the November 2014 injury. Relying principally on the opinions expressed by Dr. McBride, Respondent argues the "unequivocal" weight of the evidence establishes that the Claimant's need for TSA was caused by pre-existing osteoarthritis, not the November 14, 2014 industrial injury. The ALJ agrees with Claimant.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying pre-existing condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Breeds v. North Suburban Medical Center,* WC 4-727-439

(ICAO August 10, 2010). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

When evaluating whether or not the need for medical treatment is causally related to an industrial injury the ALJ may consider the provisions of the MTG. However, the ALJ is not required to utilize the MTG as the sole basis for determining causation. Section 8-43-201(3), C.R.S. Rather the ALJ may weigh the MTG and give them only so much weight as he determines they are entitled in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined in Findings of Fact 30 through 40, Claimant proved it is more probably true than not that the need for the TSA was proximately caused by the November 22, 2014 industrial injury. As found, Claimant had osteoarthritis of the right shoulder that significantly pre-dated the November 22, 2014 injury. However, after the November 22 injury the Claimant experienced new right shoulder symptoms and an increase in the frequency and severity of right shoulder symptoms. The effects of the November 22, 2014 injury led to a decline in Claimant's ability to perform personal and work-related functions. As determined in Findings of Fact 35 and 36, Dr. Hatzidakis credibly and persuasively opined that it is more likely than not the November 22, 2014 injury caused the Claimant's current symptoms and therefore the need for TSA. The contrary opinions of Dr. McBride are not persuasive for the reasons stated in Findings of Fact 37 through 40.

The Respondent concedes that the proposed TSA constitutes reasonable and necessary treatment for the Claimant's shoulder condition. The ALJ finds that the need for the surgery is causally related to the admitted industrial injury of November 22, 2014. For this reason the Respondent is liable to pay for the TSA surgery recommended by Dr. Hatzidakis.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

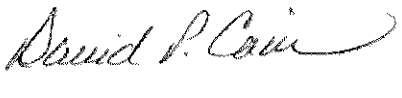
1. Respondent shall pay for the total shoulder arthroplasty procedure recommended by Dr. Hatzidakis.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 6, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

1. Whether the claimant has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment, with the respondent-employer;

2. If so, whether the claimant has established by a preponderance of the evidence that he is entitled to reasonably necessary and related medical benefits;

3. If so, whether the claimant has established by a preponderance of the evidence that he is entitled to temporary disability benefits; and,

4. If so, whether the respondents have established by a preponderance of the evidence that the claimant was properly terminated for cause.

FINDINGS OF FACT

1. The claimant was employed with the respondent-employer on September 24, 2014 as a laborer who was responsible for watching a machine sort material, when he had to clear clay off the machine with a shovel.

2. This machine was a rather large piece of machinery that lacked any scaffolding or ways for him to safely climb up the machine when he was required to tend to the machine.

3. On September 24, 2014, the claimant climbed up the machine by climbing up I-beams.

4. After clearing the chute, the claimant began his descent, where he stepped from a top I-beam, to a lower I-beam which was high off the ground.

5. After standing on the second I-beam, the claimant jumped off, where he landed on a rock, twisting his ankle and injuring his low back.

6. Immediately after this incident, the claimant began limping towards the location of his supervisor, Mike Emmick, who was located approximately a half a

city block away from where the claimant was instructed to work.

7. The claimant testified that the policies of his employer were not to immediately report to a medical provider, but rather to call an emergency number where they would essentially provide first aid assistance.

8. The claimant contacted this number, and he was sent home because he was unable to finish his shift.

9. The next day, the claimant self-reported to the emergency room complaining of low back pain.

10. The claimant has never had any prior low back injuries or symptoms similar to what he was feeling now after jumping off the I-beam. The claimant was now experiencing severe pain in his low back with numbness and tingling that radiated down his leg.

11. The next day, September 26, 2015, the claimant followed up with CCOM, the designated provider for the respondent-employer. That physician placed the claimant on a five pound lifting restriction; however, the claimant was returned to full duty.

12. The claimant was given medications and referred for physical therapy.

13. The claimant had a follow-up at CCOM on September 30, 2015 where he was again placed on full duty.

14. The next follow-up at CCOM occurred on October 21, 2015 where the claimant was put at maximum medical improvement with no permanent restrictions and returned to full duty.

15. The CCOM physician opined that the claimant did not require any further medical treatment other than completing previously prescribed physical therapy.

16. The claimant did attend physical therapy appointments, which were helpful, but ultimately the claimant was still symptomatic by the time he returned back to work in late October.

17. The claimant was seen by Dr. Anjmun Sharma for an Independent Medical Exam on July 2, 2014.

18. Dr. Sharma reported that there is no doubt that he had a fall, but he was

unable to determine how high based off the medical records. However, Dr. Sharma did testify that it would be reasonable for the claimant to receive the medical treatment he did, such as the medications, and the physical therapy.

19. Dr. Sharma concluded that the claimant had reached MMI, had suffered no permanent impairment, did not require any permanent work restrictions, and did not need any further medical treatment.

20. The respondent-employer paid the claimant full wages after the injury up until the point of his termination, even though the claimant did not show up for work despite having been released to full duty.

21. The claimant did not dispute the fact that the respondent-employer paid him after the injury.

22. The claimant returned to work and on October 27, 2015 violated instructions from his supervisor and was terminated from his employment.

23. Mr. Emmick testified that on the day the claimant returned to work, he and his boss met with the claimant and informed him that they had built a walkway with handrails, a "catwalk," to access the piece of machinery.

24. Mr. Emmick testified that he specifically told the claimant not to climb onto the I-beams.

25. Two or three hours after Mr. Emmick told the claimant to use the catwalk and not the I-beams, he saw the claimant climbing on the I-beams.

26. The respondent-employer terminated the claimant's employment for "insubordination, failing to follow direct orders by supervisor, [for taking] action [which] could result in injury."

27. The ALJ finds that the claimant has established that it is more likely than not that he suffered an injury arising out of and in the course of his employment with the respondent-employer.

28. The ALJ finds that the respondent established that it is more likely than not that the claimant's compensable injury resulted in a medical-only claim.

29. The ALJ finds that the respondent established that it is more likely than not that the claimant was responsible for his termination from employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions;

the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

5. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

6. A claimant in a workers' compensation claim bears the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201 (2015).

7. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001).

8. As found above, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he suffered any wage loss directly attributable to his industrial injury; therefore, the claimant is not entitled to TTD benefits.

9. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker,* W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000)

10. It is solely within the ALJ's discretionary province to weigh the evidence and determine the credibility of expert witnesses. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

11. The ALJ concludes, as found above, that the claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical care to cure or relieve him from the effects of his industrial injury.

12. A claimant who is terminated from the employer is not entitled to temporary indemnity benefits for time lost if he is responsible for his own termination. C.R.S. §8-42-105(4)(a).

13. The respondent bears the burden of showing by a preponderance of the evidence that the claimant was responsible for his employment termination.

14. The respondents have met their burden of proof in showing that the claimant was responsible for his termination. Mr. Emmick testified that he specifically told the claimant not to climb on the I-beams of the piece of machinery, and shortly afterward, the claimant climbed onto the I-beams of the piece of machinery in contravention of his supervisor's direction.

15. In determining whether the claimant was responsible for his termination, an ALJ will consider whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination. See *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

16. The claimant acted volitionally when he chose to climb onto the beams of the piece of machinery instead of climbing onto the catwalk as he had been instructed to do.

17. The ALJ concludes that the claimant has established by a preponderance of the evidence that he suffered a compensable medical-only claim as a result of his industrial injury of September 24, 2015.

18. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled reasonable, necessary, and related medical care to cure or relieve him from the effects of his industrial injury.

19. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he is entitled to temporary indemnity benefits.

20. The ALJ concludes that the respondents have established by a preponderance of the evidence that the claimant was properly terminated for cause and was responsible for his termination.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim is compensable under the Workers' Compensation Act of Colorado.

2. The respondent-insurer is responsible for the payment of the claimant's reasonable, necessary, and related medical care for his industrial injury of September 24, 2014.

3. The claimant's request for temporary disability benefits is denied and dismissed.

4. The claimant is responsible for his termination from employment with the respondent-employer.

5. Any and all issues not determined herein, and not closed by operation of law, are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 24, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has established by a preponderance of the evidence that on December 23, 2014 she sustained an injury arising out of and in the course of her employment with the respondent-employer;

2. If so, whether the claimant is entitled to a general award of any and all reasonable and necessary medical benefits for the December 23, 2014 injury;

3. If so, whether the respondent is liable for the medical care provided at CCOM on December 24, 2014, and January 7, 2015, as reasonable and necessary medical care related to the date of loss; and,

4. If so, whether the right of selection of an authorized treating physician has passed to the claimant.

FINDINGS OF FACT

1. The claimant was employed by the respondent-employer as a medical records director at a veteran's residential living facility, at Florence, Colorado.

2. On December 23, 2014, around nine in the morning, the claimant was standing in the doorway of the office of a co-worker, Vickie Gallegos, engaged in a conversation with Ms. Gallegos. Another co-worker, Anita Schumacher, approached the claimant from behind and as a greeting, bopped the claimant on the top of her head with a paper file.

3. The claimant's back was turned to Ms. Schumacher at the time of this incident. The claimant was not aware of Ms. Schumacher's approach and was surprised. The claimant felt "burning" on the top of her head but no pain in her neck or other symptoms.

4. The claimant and Ms. Schumacher exchanged a few words. Ms. Schumacher stated that she just wanted to "harass" the claimant because she did not get to see her very often. Ms. Schumacher asked the claimant how she was doing. Ms. Schumacher was very excited because she had just received good news about the sale of her home in Wisconsin. At the time of this incident, Ms. Schumacher did not realize the claimant was in a deep conversation with Ms. Gallegos. She then realized

that she was intruding so she went on her way. The claimant expected an immediate apology (per Mr. Cole's testimony), but Ms. Schumacher was unaware that she had caused offense. She "honestly didn't think much of the situation" at that time.

5. The claimant testified that she was upset, so she sat down in Ms. Gallegos' office, prayed and tried to calm herself down, and continued her conversation with Ms. Gallegos. She said she was initially scared and "it kind of bothered" her. She was also angry and considered the incident to be an instance of violence in the workplace.

6. Immediately after this incident, the claimant did not tell Ms. Gallegos that she was injured or upset, and the claimant did not indicate there was any problem. Ms. Gallegos did not comment on what had just transpired because the claimant did not say anything about it and she did not know that the claimant was upset. The claimant and Ms. Gallegos simply carried on their conversation.

7. The claimant worked her entire shift on December 23, 2014. Later that day, the claimant reported the incident to David McCartney and she discussed it with Barbara Moore, who is the home's administrator, by telephone. The claimant also discussed the incident later that day with Mary Hughes, who is the assistant nursing director, Vickie Gallegos, and claimant's colleagues Carol Kindsfater and Al Cole. The claimant was upset by the incident itself, but she did not report an injury to any of these people on that day. In fact, Mr. Cole stated that she specifically denied any injury or pain to him. She did not seek medical treatment that day because she did not feel she had been injured. Mr. Cole testified that he and the claimant were more focused on documenting the incident and on whether the employer's code of conduct had been violated by Ms. Schumacher. Mr. Cole said that the claimant "exercised (her) right to wait" on seeking medical treatment.

8. When the claimant complained to Ms. Hughes about this incident, she was visibly upset. Ms. Hughes advised Ms. Schumacher that the claimant was upset, so Ms. Schumacher attempted to apologize that same day. Ms. Schumacher told the claimant she was really sorry and had not meant to offend her. However, the claimant felt the apology was not sincere. Ms. Schumacher testified that the claimant never told her she had been injured while she was apologizing.

9. Contrary to Ms. Schumacher's testimony that she apologized to the claimant on the day of the incident, the claimant told Dr. Gary Gutterman, an independent psychiatric examiner, that Ms. Schumacher did not apologize until a week

later via a written letter, and she was puzzled why Ms. Schumacher did not apologize right away.

10. The claimant also told Dr. Gutterman she was disappointed with some of the responses by the employer's staff to the incident.

11. When the claimant initially reported this event to her employer, she contended that the file was between one and two inches thick. The claimant reported to Ms. Hughes that the chart with which she was struck was a "patient chart" which Ms. Hughes took to mean a hard plastic "4 inch ring" chart, but this proved to be incorrect. When the claimant reported to Dave McCartney that the incident had caused an injury, she told him the file was 1-1/2 inches thick. The claimant told Barbara Moore that the file was 1 ½ inches thick, and the claimant likewise told Al Cole in their initial conversation about the incident that the file was 1½ inches thick. In her answers to interrogatories, the claimant continued to report that the file was 1 ½ inches thick.

12. In a second conversation the claimant had with Al Cole about this incident, she told him that the file was one-inch thick. However, when he asked her to draw a line to demonstrate the thickness of the file, the line she drew measured 5/8 inches thick.

13. The claimant subsequently reported to Barbara Moore on December 29, 2014, that she had looked at a ruler and felt that she misstated the size the folder. She stated it was not 1½ inches thick but probably ¼ - ½ inch thick.

14. At hearing the claimant indicated that she never possessed the file, never inspected the file, never measured it, and "never got a really good look at it." She only saw it for a "brief moment." Further she testified, she "never told anyone that a large file is what hurt me" – it was "the assault" that hurt her.

15. Ms. Schumacher's job is MDS coordinator. Her job requires her to assess residents at the home for Medicare and to coordinate their care. Ms. Schumacher testified that the file in her hand contained "MDS" sheets or "cheat sheets," which were forms containing data about individual residents in the home. She testified that there was one sheet for each resident that she was monitoring, and that the file probably contained 17-18 sheets of paper, and no more than twenty papers. The papers were contained in a lightweight manila folder approximately 8 ½ by 11 inches.

16. Ms. Gallegos, who witnessed the December 23rd incident, estimated that the file was 1/8 inch thick.

17. The claimant testified that the file was large enough that Ms. Schumacher "needed to hold it with two hands," but Ms. Schumacher and Ms. Gallegos testified that Ms. Schumacher held the file with only one hand. The ALJ finds that Ms. Schumacher's and Ms. Gallegos' testimony is more credible because the claimant's back was turned to Ms. Schumacher at the time of the incident and she did not see Ms. Schumacher wield the file.

18. The claimant testified that she did not experience any pain until the evening of December 23, 2014, at which time she not only had burning her neck, but also low back pain.

19. The claimant reported to her employer the next day that she was injured, so she went to Centura Center for Occupational Medicine (CCOM).

20. The claimant was examined by Dr. Daniel Olson. The claimant told Dr. Olson that she was struck with a 1-2" paper chart by another employee.

21. Dr. Olson diagnosed strain of the cervical spine and pain in the lumbar spine. On examination, he noted, not only tenderness in the cervical spine area but also "tightness and discomfort across her left lower lumbosacral region, and some pain with right lateral flexion. He released the claimant to full duties with no restrictions.

The claimant continued to work her regular job.

22. Ms. Moore, the living center's administrator, testified that on December 29, 2014, the claimant seemed to be feeling comfortable with treatment being provided. She did not complain of pain and she did not appear to be in pain. However, the claimant was still very angry and her emotions were still very strong regarding the incident with Ms. Schumacher. The claimant's focus was on Ms. Schumacher's action rather than her medical condition.

23. The claimant returned to Dr. Olson on January 7, 2015. She filled out a pain diagram that showed 0% pain, and she told Dr. Olson she was feeling much better and her pain level was zero. Dr. Olson placed her maximum medical improvement with no restrictions and no permanent medical.

24. On Friday, January 9, 2015, the claimant met with Linda Thompson, the HR and Safety Coordinator, at the claimant's request. The claimant was still upset about the December 23 incident and repeatedly asked "why did Anita do that to me?" She was highly emotional, upset and crying. At least three times Ms. Thompson asked the claimant whether she was okay physically and the claimant responded yes, "but I

don't understand why she did this to me." Ms. Thompson commented that the incident was horseplay and inappropriate but concluded that the important thing was that the claimant was okay physically, and the claimant agreed that she was.

25. Likewise, Mr. Cole testified that the claimant could not understand why Ms. Schumacher hit her on the head with the file. She raised this concern on three or four different occasions with him.

26. The claimant testified that she asked Ms. Thompson on January 9, 2015, a Friday, to be sent back to CCOM for additional treatment, but Ms. Thompson stated that this request was not made until Monday, January 12th. On Friday, the claimant denied that she had any physical problems, but the following Monday, the claimant looked exhausted and reported that over the weekend she started having burning in her neck. She wanted to go back to Dr. Olson. Ms. Thompson relayed this request to the adjuster, but the request was denied because the claimant had been placed at maximum medical improvement and the claimant had not yet provided requested medical information.

27. The claimant went to her family medical provider, Eagleridge Family Medicine, who referred her first for a CT scan and then a MRI. Although the claimant denied at hearing that she initiated request for a MRI, Physician's Assistant Brooke DeWeese's 1/28/15 chart note states: "She is requesting to have an MRI of her C-spine today due to her persistent symptoms." Ms. DeWeese's assessment was, in relevant part, "Pain – Etiology unclear." The assessment remains the same on March 2, 2015 when Ms. DeWeese wrote "Back pain – etiology unclear."

28. The January 15, 2015 CT scan report indicated no acute fracture, but there was degenerative disc disease at C5-6, and minimal grade 1 retrolisthesis of C5 on C6. Ms. DeWeese characterized these results as "unremarkable except for DJD in C5-C6."

29. The January 31, 2015 MRI report identified degenerative disc disease at C5-6 with mild grade 1 retrolisthesis of C5 resulting in moderate central spinal stenosis and mild left neuroforaminal stenosis, but no evidence of cord or nerve root compression.

30. On June 5, 2015, Dr. Jade Norton stated: "CT and MRI of the C-spine have not shown pathology." Dr. Norton also wrote that the assessment was: "Chronic Cervical Spine Pain – Etiology unclear. MRI and CT both reveal DDD at C5-C6 and a mild retrolisthesis of C5 on C6. Not clear if this is contributing to her symptoms. This

initially was a work comp case but apparently they said she reached 100% MMI and dismissed her. She has hired an attorney due to the fact she thinks her symptoms are due to an injury that occurred at work and she thinks WC should be responsible. Nevertheless it is not a WC now…"

31. Ms. Moore testified that the claimant appeared to be in pain around January 12-13, 2015 when she asked to be reevaluated by the doctor. The claimant was worried there was something wrong with her. After the claimant was advised that the scans showed no significant pathology, she was more relaxed and never again complained of pain to Ms. Moore.

32. The claimant resigned from her job as of June 15, 2015. She testified that she had been thinking about quitting for quite some time. She resigned because of the "toxic, cancerous work environment" which included employees who were disrespectful, unprofessional, and did not want to be there. This situation existed from the first day she started working at the living center, the claimant said. She testified that she was trained for one hour on the first day of her job by her predecessor, and then the "state survey team walked in." Employee turnover increased her workload. She also complained of the "witch hunt" and "everything just compounded on me."

33. Dr. Kathy McCranie conducted an independent medical examination on May 14, 2015. She also attended the hearing and heard all of the lay testimony, including testimony about the size of the file ant the force of the slap on the claimant's head.

34. Dr. McCranie stated that the claimant was uncooperative at times during the interview, refusing to answer questions. Dr. McCranie testified that this interfered with her ability to assess the claimant's condition and its potential causes.

35. Dr. McCranie noted some inconsistencies in the claimant's physical examination. For example, she testified as follows regarding her assessment of the claimant's strength:

> The claimant demonstrated "slight breakaway to weakness in her motor examination of the upper extremities, and this was seen especially in shoulder abduction intermittently.... so instead of getting a smooth resistance to the -- essentially to testing muscle strength, what I've seen is more of a jerky type movement. That's an indication of lack of full effort, rather than a true neurological condition… so I wanted to find out whether or not she truly had any weakness in those areas. When she was distracted, I tested her in a different fashion and found that she had full strength, again, an indication that when she

was – knew that she was being tested, she wasn't giving the full strength." This indicated that the claimant was manipulated this testing.

36. Dr. McCranie testified that it was anatomically impossible for the injury as described by the claimant to have caused low back pain, which was initially reported by the claimant in addition to her neck pain. In fact, Dr. McCranie testified, one of the Waddell's signs that identify a psychological component to pain or symptom magnification is when a patient reports low back pain caused by axial loading, which consists of placing pressure on the top of the patient's head. If low back pain is reported, this is indicative of non-anatomic symptoms. Dr. McCranie saw this case in a similar way. "She had a minor slap, essentially, on the top of her head which would not cause forces to go into the lumbar spine, and the fact that she would complain of low back pain essentially makes one think that there may be psychological component to her condition."

37. Dr. McCranie testified that the flimsy file of the size described by Ms. Schumacher and Ms. Gallegos would be incapable of causing a cervical spine injury no matter how forcefully it was wielded. A feather, no matter how forcefully wielded, will not cause an injury, she said.

38. Dr. McCranie could not find an objective basis for injury related to the December 33, 2014 incident. Although Dr. Olson had diagnosed a cervical strain, which implies that there has been tendon or muscle damage and which is identified by a decrease in range of motion and muscle spasms, those things were not seen on either Dr. Olson's or Dr. McCranie's examination. Further, the claimant reported no symptoms initially.

39. The neurological examination conducted by Dr. McCranie was within normal limits and the examination did not show any evidence of cervical facet involvement.

40. Even though the CT scan and the MRI showed evidence of degenerative changes at the C5-6 level of the spine, they did not identify any trauma such as a fracture or herniated disc. It was not medically probable that the degenerative changes were caused or aggravated by the December 23, 2014 incident. Furthermore, it was unlikely that the degenerative changes in the claimant's cervical spine were causing the pain of which she complains.

41. Dr. McCranie's impression of the claimant's condition was cervicalgia, chronic daily headaches, and degenerative disc disease at C5-6, none of which are work-related.

42. The ALJ finds the medical analyses and opinions of Dr. McCranie to be credible and more persuasive than medical analyses and opinions to the contrary.

43. The ALJ finds that the claimant has failed to establish that it is more likely than not that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

5. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

6. The ALJ concludes, as found above, that the medical analyses and opinions of Dr. McCranie are more persuasive than medical analyses and opinions to the contrary.

7. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant suffered an injury arising out of and in the course of her employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issue presented for determination is whether the Claimant is entitled to medical benefits, specifically whether the surgery recommended by Dr. Garth Nelson is reasonable, necessary and related to Claimant's admitted workers' compensation claim.

FINDINGS OF FACT

1. The Claimant is a 30-year old woman. She suffered an admitted work related injury to her left shoulder on April 7, 2014 while lifting a suitcase containing supplies related to her health screening job duties.

2. On April 10, 2014, Claimant began receiving medical treatment with Garth Nelson, M.D. The Claimant described her injury to Dr. Nelson as follows: She was lifting a box weighing approximately 75 pounds into a Chevrolet Suburban when she felt a pop accompanied by pain in her left shoulder. Dr. Nelson recommended Claimant undergo physical therapy.

3. On May 19, 2014, Dr. Nelson's report indicates that Claimant is "improving" and engaging in physical therapy one time per week due to her work travel schedule.

4. On June 5, 2014, Dr. Nelson noted that Claimant is "improving." He also noted a slight left labral grind compared with the right shoulder. She had tenderness in the IT groove. Dr. Nelson's diagnosis was "left impingement, longhead biceps tendinosis."

5. On June 23, 2014, Claimant returned to Dr. Nelson. She reported "anterior left shoulder sore with moderate L hook in boxing." Dr. Nelson's exam noted slight bilateral labral grind and tenderness in the left IT groove. He diagnosed improving left impingement and long head biceps tendinosis.

6. On August 26, 2014, Dr. Nelson noted that Claimant can lift 35 pounds without pain, but he diagnosed, "L impingement, longhead biceps tendinosis. Pec major strain improving." He recommended that Claimant avoid "hook punches in boxing."

7. On October 13, 2014, Dr. Nelson recommended that Claimant have an MRI of her left shoulder. He noted moderate left labral grind compared with the right and severe tenderness in the left long head biceps in IT groove. He diagnosed, "L impingement, long head biceps tendinosis/SLAP II."

8. Claimant returned to see Dr. Nelson on October 20, 2014. Dr. Nelson noted that Claimant continues to have left anterior shoulder pain/weakness. He stated that if Claimant does too much activity, her shoulder worsens; and that she cannot perform her regular job duties, specifically lifting. Dr. Nelson reviewed Claimant's MRI and noted that it showed severe anterolateral impingement; no AC spur: No DJD; moderate supraspinatus tendinosis in the anterior one half; and a SLAP II/biceps base tendinosis. He noted that a motion artifact obscures the detail.

9. Dr. Nelson recommended surgery on Claimant's left shoulder because Claimant had failed to improve after six months of physical therapy and based on her MRI results. Specifically, Dr. Nelson wishes to perform an outpatient scope debridement, acromioplasty, and extraarticular longhead biceps tenodesis.

10. Claimant's work restrictions improved to a 40-pound weight limit as of September 22, 2014, and have never changed since then. Claimant's job duties require her to lift 65-75 pounds.

11. The request for surgery was denied by the Insurer based on a WCRP 16 review performed by Scott Primack, D.O. Dr. Primack felt Claimant's left shoulder problems were related to boxing rather to her work activities.

12. On November 20, 2014, Dr. Nelson expressed his disagreement with Dr. Primack's decision. Dr. Nelson stated that Claimant had no problem sport boxing prior to her work injury, and since her injury she cannot box at the same intensity. Claimant also cannot lift the heavier boxes she could lift prior to her work injury. Dr. Nelson concluded that Claimant's MRI and exam are consistent with a "posttraumatic impingement, supraspinatus tendinosis and a SLAP II/biceps base tear."

13. Dr. Nelson reiterated his opinions on December 18, 2014, when he stated that he "would not expect her to improve without a scope decompression, biceps tenodesis." He reiterated his opinions again on February 26, 2015, and on June 15, 2015.

14. Dr. Primack testified by deposition on September 15, 2015. He stated that Claimant made fairly significant functional gains from physical therapy; however, none of Claimant's physical therapy records were offered into evidence.

15. Dr. Primack's said that he did not see any evidence of any type of SLAP lesion on the MRI.

16. Dr. Primack stated that Claimant had been boxing since her work related injury. Based on Dr. Primack's personal experience engaging in boxing, he opined that there is a considerable amount of load which goes into the shoulder. Dr. Primack testified that boxing in and of itself can cause subacromial/subdeltoid bursal fluid.

17. Dr. Primack did not comment on his understanding of the type of boxing Claimant had been engaging in. During his deposition, Dr. Primack made a comment

about Claimant possibly engaging in “more formal boxing” making it apparent that he did not know.

18. Dr. Primack stated that Claimant may have required an acromioplasty at one time, in the lateral aspect of the acromion, and that there is some impingement at that level. However, he does not feel that the impingement is related to her work injury.

19. At his deposition, Dr. Primack testified that when boxing, there is a lot of repetitive motion in the shoulders. There is one tendon gliding over another when hitting a bag or hitting gloves, and there is a higher probability of creating a bursitis or an overuse phenomena when boxing than when lifting a weight.

20. Dr. Primack also testified that impingement is considered an encroachment of soft tissue, which is the tendinosis of the supraspinatus, as well as the bursitis, which does not occur from a one-time lift. It most often occurs from repetition, and most of the time from repetition on a continuum. Dr. Primack did not explain in which situations impingement could occurs without repetition.

21. Dr. Primack was aware of the mechanism of injury, as described by Claimant at Hearing, and he maintained his opinion that any need for surgery was not related to this matter.

22. Dr. Primack believes that Dr. Nelson’s records actually show an improvement in Claimant’s subjective complaints and a decrease in her work restrictions. The ALJ acknowledges that Claimant made some gains in physical therapy and that her restrictions lessened over time, but she has not returned to her pre-injury status.

23. Dr. Primack never examined the Claimant. He testified that he could not diagnose impingement because he had never examined the Claimant and such a diagnosis is based on clinical findings.

24. Dr. Primack admitted that Claimant could have injured herself in the way she described, by lifting a case, but he testified that she did not significantly injure herself in that manner.

25. Claimant admitted at hearing that she continued boxing at Title Boxing after her work related injury and that she was there on average 3-4 times a week after November 2014.

26. Claimant credibly testified that she modified her boxing activities to avoid hard left hook punches or left hook punches entirely as needed.

27. In August 2015, Claimant participated in a ‘Rugged Maniac’ 5K Obstacle Race. The event involved many obstacles which involved extensive use of both arms and shoulders, including carrying heavy sandbags, crawling on her belly on hands and knees through a mud pit, climbing hand over hand up a cargo rope ladder, getting

pulled up and over a large inclined ramp by her hands and walking across a balance beam with her arms outstretched for balance.

28. Claimant credibly testified that she modified her activities during the Rugged Maniac to avoid use of her left arm or to minimize use of her left arm.

29. The Claimant had no left shoulder symptoms prior to April 7, 2014. Claimant engaged in sport boxing for fitness for seven months prior to April 7, 2014 without symptoms in her left shoulder. Claimant then sustained an admitted injury to her left shoulder on April 7, 2014, and has been symptomatic ever since. The fact that she continued to engage in physical activity following her injury does not negate the injury or its effects.

30. Dr. Nelson's opinion is credible and persuasive. He has had the opportunity to evaluate the Claimant multiple times and to monitor her progress and condition. Dr. Nelson has made it very clear that he feels Claimant's condition could be improved with surgery and that he relates the need for surgery to the admitted work injury.

31. Dr. Primack's opinions are unpersuasive. He did not examine the Claimant yet he maintains the opinion that any impingement (which he could not diagnose) is unrelated to her injury. He also stresses that he could see nothing on the MRI regarding the biceps tendon, but Dr. Nelson apparently did see something on the MRI regarding the biceps tendon. Dr. Primack's opinions also seem to assume that Claimant has been boxing for a significant period of time when she had only been boxing for seven months prior to the work injury, and not on a daily basis.

32. Assuming Dr. Primack's opinions that Claimant's left shoulder problems are degenerative in nature are correct, Claimant was asymptomatic until April 7, 2014 when sustained the work injury. As such, the work injury caused an aggravation or exacerbation of the degenerative condition to produce the need for medical treatment.

33. Claimant has proven that the surgery recommended by Dr. Nelson is reasonable, necessary and related to the admitted work injury she sustained on April 7, 2014.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. In this case, the Respondents dispute the medical necessity and relatedness of the surgical procedure recommended by Dr. Nelson. The Respondents rely upon the opinions of Dr. Primack in support of the surgery denial. As found above, the ALJ relies upon the opinions of Dr. Nelson as more persuasive than those of Dr. Primack. Dr. Nelson has had ample opportunity to examine the Claimant and gain a full understanding of her symptoms. Dr. Primack did not examine the Claimant yet he maintains the opinion that any impingement (which he could not diagnose) is unrelated to her injury. He also stresses that he could see nothing on the MRI regarding the biceps tendon, but Dr. Nelson apparently did see something on the MRI regarding the biceps tendon. This constitutes a mere difference of medical opinion and the ALJ gives Dr. Nelson's opinion more weight. Dr. Primack's opinions also seem to assume that Claimant has been boxing for a significant period of time when she had only been boxing for seven months prior to the work injury, and not on a daily basis. Assuming Dr. Primack's opinions that Claimant's left shoulder problems are degenerative in nature are true, Claimant was asymptomatic until April 7, 2014 when sustained the work injury. As such, the work injury caused an aggravation or exacerbation of the degenerative condition to produce the need for medical treatment.

ORDER

It is therefore ordered that:

1. The Respondents are liable for the left shoulder surgery recommended by Dr. Garth Nelson.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

#JARO3S3X0D13P1v 2

ISSUES

Whether the claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. Romero is reasonable, necessary and casually related for treatment of the claimant's admitted industrial injuries.

FINDINGS OF FACT

1. On October 8, 2014, the claimant, a security guard, was called by a co-worker to open a personal locker because she locked her keys inside the locker. The claimant had to use a bolt cutter to cut the lock and open the locker. When the lock gave way, the claimant fell about one to two feet to his knees. The claimant did not seek treatment on the date of injury.

2. The claimant first sought treatment with CCOM two days later, on October 10, 2014. The examination of his right knee established that there was no pain on motion, no abrasions, no bruising, no erythema, no swelling, and normal range of motion. The claimant was diagnosed with a right knee contusion and released to work full duties.

3. Two days later, the claimant was evaluated at St. Mary Corwin Hospital. Again, no swelling was noted. The examiner also noted that there was no locking or giving out of the knee during physical exam.

4. Although the claimant had symptoms of swelling during the initial course of his treatment, his complaints were not seen or documented by his ATP. Rather, the claimant's ATP documented that there was no swelling, bruising, pain on motion, or range of motion difficulties with the right knee throughout October, November and December. The ATP even noted that the examination of the claimant's right knee was unremarkable.

5. An MRI was performed on November 24, 2014 and established diffuse degenerative intra-articular changes. Specifically, the study established patellofemoral degenerative changes with chondromalacia, soft tissue swelling of above the knee, and a chronic osteochondral lesion.

6. Dr. Daniel Olson, an ATP in this case, testified that "most of the stuff on the MRI scan is preexisting" and that the only acute finding was the soft tissue swelling.

7. Dr. Lawrence Lesnak performed an IME in this case on April 7, 2015. He opined that the claimant's MRI did not show any abnormalities that could be related to the October 8, 2014 industrial injury other than potentially the patellar swelling.

8. Dr. Lesnak testified that the MRI showed "some degenerative changes, signal changes in the posterior horn of the medial meniscus, [which is] a very common place that gets degenerated over time. There was some edema or swelling of the kneecap, which the radiologist remarked appeared to be degenerative in nature. And there was a bone lesion on the non-weight bearing surface of the posterior...lateral distal end of the thigh bone."

9. Dr. Lesnak also testified that the MRI, which was taken only six weeks after the industrial injury, did not show evidence of joint effusion that one would expect in an acute trauma to the knee. He testified that a joint effusion is reactive swelling and increased fluid inside the joint itself. He credibly testified that an MRI is very sensitive to these types of findings. Dr. Lesnak persuasively testified that the absence of a joint effusion on the MRI scan is evidence that there had been no acute intra-articular trauma within the right knee joint within the past three months.

10. Dr. Lesnak, as part of his IME, performed a physical examination. In addition to the absence of a joint effusion on MRI, Dr. Lesnak testified that his physical exam of the claimant's right knee was essentially unremarkable without any evidence of joint effusion. Dr. Lesnak further testified that his examination did not show any evidence of symptomatic meniscus, ligamentous pathology or instability of the joint.

11. Dr. Lesnak opined that one would expect joint effusions where there is an intra-articular abnormality. He observed that the only documentation of the presence of any joint effusion was on October 12, 2014 where a "hint of a joint effusion" was documented in the physical examination portion of the emergency room records. However, Dr. Lesnak credibly testified that it would be impossible to detect joint effusion on October 12, 2014 because of the reported soft tissue swelling of the knee generally and that he doubted that finding. Specifically, Dr. Lesnak testified "you would have to have literally no edema of the soft tissues to identify any joint effusions. Because the joint effusion that would [be] coming from structures under the soft tissues."

12. Dr. Lesnak persuasively testified that if a joint effusion was truly detected during the October 12, 2014 physical examination, it would have been visible on the

MRI performed on November 24, 2014, six weeks after the injury. Specifically, Dr. Lesnak testified that, while joint effusions can get better if you address the pathology causing the effusion, "effusions from intra-articular trauma will never be better in six weeks." Because of this, Dr. Lesnak testified that the absence of a joint effusion on the MRI performed six weeks after the injury establishes that there was no intra-articular trauma to the knee joint. No other doctor documented the presence of any joint effusion.

13. On November 26, 2014, the claimant was evaluated at St. Mary Corwin Hospital. As part of the physical examination of the right knee, it is noted that the claimant has "decreased thigh muscle mass and tone." Dr. Lesnak testified that this physical finding was evidence of a long-standing lower extremity problem. Specifically, Dr. Lesnak testified that this finding was evidence of muscle atrophy in the right leg, which in this case, would have arisen from relative disuse bilaterally. Dr. Lesnak testified that this finding would only arise with disuse of the leg over many years, not just two months.

14. On March 31, 2015, the claimant received a cortisone injection of his right knee. According to the claimant, this injection made his symptoms worse. Dr. Lesnak credibly opined that this physical finding – a worsening of symptoms post-injection – was evidence that the intra-articular portion of the knee was not the problem. Specifically, Dr. Lesnak observed that because joints are "not used to" having fluid in it, if one injects a joint that does not have intra-articular symptoms, the joint becomes painful because of the fluid introduced to it. Dr. Lesnak later testified that this physical finding established there were no symptoms in the intra-articular knee that needed to be surgically addressed.

15. The ATPs and Dr. Lesnak agree that the claimant has significant underlying and pre-existing degeneration in his right knee. Dr. Alex Romero, a surgeon, opined that the claimant had a right knee injury with osteoarthritis and mechanical symptoms.

16. Dr. Olson opined that the October 8, 2014 knee contusion resulted in an aggravation of a pre-existing knee condition "that was not overly symptomatic before [the claimant] fell onto his knees."

17. Dr. Lesnak testified, however, that even if the incident in question was an aggravation, a joint effusion would need to be present to prove such an aggravation. However, the MRI conclusively established that there was no joint effusion. Further, Dr. Lesnak testified that there was insufficient evidence that there was any joint effusion

present on physical examination. He additionally indicated that the non-diagnostic response to the cortisone injection was evidence that there was no aggravation to the claimant's underlying degenerative condition. This was because, if there was an acute problem, one would have expected an anesthetic result which would have resulted in a significant temporary alleviation of pain rather than, as reported, a worsening. As such, Dr. Lesnak opined that the industrial injury of October 8, 2014 – a contusion – did not result in an aggravation of the claimant's pre-existing degenerative conditions.

18. Dr. Lesnak opined that the incident of October 8, 2014 in no way changed the intra-articular structures of the claimant's knee. Specifically, Dr. Lesnak observed that while the claimant experienced a contusion of the soft tissues of his knee on October 8, 2014, there was no aggravation, acceleration, or contribution to the underlying degenerative changes in the claimant's knee as a result of the admitted knee contusion.

19. The ALJ finds the analyses, opinions, and testimony of Dr. Lesnak to be more persuasive and credible than medical analyses, opinions, and testimony to the contrary. The ALJ finds that the incident of October 8, 2014 did not aggravate, accelerate, or contribute to the pre-existing degenerative changes within the claimant's knee.

20. Dr. Olson testified that Dr. Romero's proposed surgery was aimed at addressing mechanical findings in the claimant's knee. He clarified that the mechanical findings that required surgery were the claimant's pre-existing problems – a patellofemoral problem or a loose body. Dr. Olson further testified that the only acute finding related to the October 8, 2014 incident as seen on MRI was soft tissue swelling and that the surgery was not aimed at correcting that soft tissue issue.

21. Dr. Lesnak agreed that Dr. Romero's proposed surgery was directed at pre-existing intra-articular joint issues. However, because of the lack of joint effusion and other acute and sub-acute findings on MRI indicative of an acute trauma, Dr. Lesnak persuasively opined that the MRI findings were not causally related to the work injury and were not the result of an aggravation, acceleration, or contribution to the degenerative changes. Dr. Lesnak persuasively opined that the need for surgery to allegedly repair those issues, therefore, was not causally related to a work injury.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that the need for surgery as proposed by Dr. Romero was causally related to the October 8, 2014 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act, §§ 8-40-101, *et seq.*, C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. § 8-43-201, C.R.S.

2. The ALJ must assess the credibility of the witnesses and the probative value of the evidence to determine whether the claimant has met his burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

4. Regardless of the filing of an admission for medical benefits or an order containing a general award of medical benefits, respondents retain the right to dispute liability for medical treatment on grounds that the treatment is not authorized or reasonably necessary. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Indus. Comm'n*, 723 P.2d 749 (Colo. App. 1986). The filing of an admission does not prevent respondents from contesting whether a claimant is in need of any continued medical treatment as a result of the compensable injury. *Ford v. Regional Transp. Dist.*, W.C. No. 4-309-217 (I.C.A.O., Feb. 12, 2009). Respondents remain free to dispute the cause of the need for medical treatment, and respondents' election to do so does not shift the burden of proof away from the claimant. *See Snyder, supra*; *Velarde v. Sunland Construction*, W.C. No. 4-412-975 (I.C.A.O., Dec. 4, 2001). This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *Cf. HLJ Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990) (filing

of admission does not vitiate respondents' right to litigate disputed issues on a prospective basis).

5. A claimant must prove a causal relationship between the work injury and the medical treatment for which he is seeking benefits. *Snyder,* 942 P.2d at 1339. Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). The claimant shoulder this burden and must establish his entitlement to benefits by a preponderance of the evidence. *Snyder*, 942 P.2d at 1339. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is *more* probably true than not. *Page v. Clark*, 592 P.2d 792 (1979).

6. As found, the claimant failed to establish by a preponderance of the evidence that the proposed right knee surgery recommended by Dr. Romero was causally related to the admitted work injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for surgery as recommended by Dr. Romero is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: November 25, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues to be determined by this decision are:

I. Whether claimant has proven by a preponderance of the evidence entitlement to temporary disability benefits from October 21, 2014 ongoing.

II. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a formerly employed food service worker. She last worked for Employer in December 2014 at La Junta Intermediate School. Claimant's employment contract ran for the academic school year, i.e. from August through May.

2. Claimant testified that she informed her supervisor, Amanda Cobb that she planned on resigning her position at the end of the first school term in December 2014 to take care of her grandchildren. Claimant testified that the last school day for the first semester was either December 18 or 19, 2014. Claimant informed Ms. Cobb about her intention of resigning at the start of the school year, i.e. in August 2014. (Hrg. 27:40; 29:12; 31:05).

3. Claimant testified that she changed her mind about resigning her position and therefore did not quit her job. (Hrg. 28:21). Claimant testified that she had decided that she wanted to work on an on-call basis. Claimant admitted that she did not inform her employer that she changed her mind about resigning. (Hrg. 31:28-38).

4. On October 21, 2014, Claimant stepped on a cardboard tube and fell, injuring her right shoulder. A medical only General Admission of Liability was filed on October 14, 2015.

5. Claimant has a prior history of right shoulder injuries and has had three prior surgeries to the right shoulder. Consequently, she was presented to Arkansas Valley Regional Medical Center (AVRMC) where she was evaluation by Dr. William Jurgens within thirty minutes of her fall. Dr. Jergens imposed restrictions, provided medications, including Narco and instructed Claimant to follow-up with the work comp provider.

6. On October 28, 2014, Claimant was seen at AVRMC by Family Nurse Practioner (FNP) Veronica Bartlett for the initial workers compensation medical appointment. FNP Bartlett completed a physical examination and assessed "derangement of the right shoulder". She ordered an MRI and referred Claimant to Dr. Bruce Taylor for an orthopedic evaluation. During her encounter with FNP Bartlett, Claimant insisted that she be removed from work. (Resp. Ex. A, pg. 1). When Ms. Bartlett declined, noting that Claimant had been off of work for almost a full week. Claimant then requested she be removed from work until the following week so she "could start fresh". (Resp. Ex. A, pg. 1-2). Despite Claimant's repeated requests to be removed from work, FNP Bartlett imposed work restrictions and returned Claimant to modified duty. (Resp. Ex. A, pg. 2).

7. Claimant was placed her on light duty and Employer was able to accommodate her restrictions by placing her in the office shredding paper and completing other office tasks. However, Claimant testified that she missed some days from work in October and November due to her injury, but she did not recall how many days she missed, and was unable to recall if she was paid for her time off. (Hrg. 24:16-24:30; 25:03).

8. Although Claimant testified that she missed days from work in October and November, she did not provide, as noted above, any evidence substantiating the number of days she missed. (Hrg. 24:30-24:39). Similarly, Claimant provided general testimony that she worked fewer hours in October and November, but she failed to provide evidence establishing the number of hours she worked before the injury compared with the number of hours she worked after October 21, 2014. (Hrg. 25:05). Based upon the evidence presented, the ALJ finds that Claimant failed to prove her entitlement to temporary disability benefits during the time period from October 21, 2014 through December 2, 2014.

9. Claimant returned for follow-up evaluation with FNP Bartlett on November 11, 2014. During this encounter, Claimant reported having "a lot of pain" and requested an MRI "as soon as possible". Claimant's husband accompanied her to this visit. Claimant husband was frustrated with the pace at which the MRI was being done and confronted FNP Bartlett regarding Claimant's work status, stating the returning Claimant to work was a "waste of time, that all she does is sit there, and that she could just sit at home". Claimant's husband later informed FNP Bartlett that Claimant should not be returned to work because she only had one hand and that she could slip and fall sustaining additional injury. He then pointedly reiterated that should Claimant slip and fall again, that they would sue. (Resp. Ex. A, pg. 3). Claimant's husband then reported to FNP Bartlett that Claimant was continuing to work in the kitchen. Claimant failed to correct this misleading report and inform FNP Bartlett that she was no longer working there. To verify Claimant's work status, FNP Bartlett contacted Employer. During a conversation with Claimant's supervisor, FNP Bartlett was able to confirm that Claimant was actually performing office work, in a seated position, and not working the in kitchen as Claimant's husband had reported. (Resp. Ex. A, pg. 3). FNP Bartlett noted that

Claimant's husband was very threatening, aggressive, and confrontational about Claimant being returned to work. He also questioned FNP Bartlett's decision to perform a physical examination of the shoulder, "yelling at FNP Bartlett not to touch Claimant because an MRI had not been completed. (Resp. Ex. A, pg 4). Despite these repeated threats, FNP completed her examination and returned Claimant to modified duty work. As Dr. Taylor had relocated out of state, FNP had sent a referral for orthopedic evaluation to Dr. Michael Morley.

10. Claimant was evaluated by Dr. Morley on November 24, 2014. As the requested MRI had not been done, Dr. Morley set a follow-up appointment for Claimant after her MRI.

11. Claimant's MRI was performed on November 28, 2014 and compared to a prior study from March 6, 2012. After comparison, the radiologist felt that Claimant had suffered an acute "focal full thickness tear of the supraspinatus tendon near the insertion with undersurface delamination but no retraction".

12. On December 3, 2014, Dr. Morley removed Claimant from work pending further evaluation of Claimant by Dr. Rickland Likes, her prior surgeon. (Resp. Ex. B, pg. 5). After her appointment on December 3, 2014, Claimant returned to work and provided Ms. Cobb with her restrictions- that she would be off work until further notice.

13. At some point after December, Claimant testified that she called Employer and spoke to another supervisor, Erin (last name unknown). Erin told Claimant that she was no longer on the payroll. Claimant took this to mean that she no longer had a job and that she had been let go or fired. Claimant's assumption that she had been fired contradicts her testimony that she was not fired.

14. On February 4, 2015, Claimant presented to Dr. Likes for an evaluation. At this appointment, Claimant reported to Dr. Likes she was still working in the kitchen. During questioning at hearing Claimant admitted that she told Dr. Likes that she was working in the kitchen even though she had not worked there since her October 21, 2014 injury. (Hrg. 34:36-41).

15. Dr. Likes indicated that Claimant should discontinue her work in the kitchen. However, Dr. Likes stated that she could work light duty or office work. (Resp. Ex. C, pg. 6-7). In fact, Dr. Likes completed a letter for Claimant's employer, outlining her return to office work. (Resp. Ex. C, pg. 8).

16. Claimant acknowledged that Dr. Likes returned her to office work as of February 4, 2015. (Hrg. 35:17 – 33:33) (Resp. Ex. C, pg. 8). Yet, Claimant admitted she did not take her new work restrictions from Dr. Likes to Ms. Cobb or her employer as she had previously done when she had been returned to modified duty and placed on the schedule. (Hrg. 35:55-36:03). The ALJ finds that Claimant's admitted failure to provide the new restrictions to her employer and return to work some evidence that Claimant had resigned her position as of December 3, 2014.

17. Claimant testified that if she had not been removed from work by Dr. Morley on December 3, 2014 that she would have returned to work in January 2015 because she had changed her mind about quitting. (Hrg. 29:24-39). Claimant admitted that she never returned to work after her December 3, 2014.

18. Ms. Cobb testified that it is the employer's policy to accommodate work restrictions in order to eliminate lost time. (Hrg. 44:40) Claimant testified that after her injury in October, she returned to work and presented her work restrictions to Ms. Cobb. (Hrg. 31:44-32:12). Claimant conceded that Employer accommodated her restrictions and she returned to work after her October 21, 2014 injury. (Hrg. 31:48-53).

19. Ms. Cobb testified that Claimant never informed her that she had changed her mind about quitting. Rather, Ms. Cobb testified that Claimant informed her that she would not be returning to employment after Dr. Morley removed her from work on December 3, 2014. (Hrg. 47:14-39). This testimony was confirmed by Claimant. (Hrg. 28:04-14).

20. Despite conceding she told her employer that she would not be returning to employment after December 3, 2014, Claimant denied that she quit her job. (Hrg. 36:18-36). However, when Claimant was allegedly informed later by "Erin" that she was no longer on the payroll, Claimant did not contact Ms. Cobb to inquire why she was no longer employed. (Hrg. 37:17-46). Instead, Claimant testified that she just assumed she had been terminated which, as noted above, contradicts her earlier testimony that she had not been fired. Claimant's explanation for her lack of contact with her employer, namely her assumption that she had been fired is not credible.

21. The ALJ finds Claimant's testimony that she intended to return to work after the semester break incredible for the following reasons: First, Claimant never informed Employer of her alleged change of mind about quitting her job at any time up to and including the time period after December 3, 2014 when she was taken out of work by Dr. Morley. In fact, the evidence persuades the ALJ that Claimant confirmed with Ms. Cobb that her resignation would be effective December 3, 2014. Furthermore, Claimant admitted that she did not take her new work restrictions from Dr. Likes to Ms. Cobb or her employer as she had previously done when she had been returned to modified duty and placed on the schedule. Finally, after Claimant was allegedly informed by "Erin" that she was no longer on the payroll, Claimant did not contact Employer to inquire as to why she was no longer employed, since she had not quit or been fired. The ALJ finds these actions inconsistent with Claimant's testimony that she intended to return to work after the semester break. Claimant's professed intention is not supported by the weight of the opposing evidence establishing that she, of her own volition, resigned from further employment effective December 3, 2014 to care for her grandchildren. Based upon the evidence presented, the ALJ finds that Claimant's resignation was not compelled by the natural consequences of her work injury, but rather her conscious and voluntary choice to quit.

22. Based upon the evidence presented, the ALJ finds that Respondents have proven, by a preponderance of the evidence, that Claimant is responsible for her termination of employment and the resulting wage loss beginning December 3, 2014 and ongoing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Except as noted below the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004); See also *Ackerman v. Hilton's Mechanical Men, Inc.,* 914 P.2d 524 (Colo. App. 1996)(ALJ's findings may be based on reasonable inferences from circumstantial evidence). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found, Claimant's testimony is inconsistent with her actions and contradicted by the testimony of Ms. Cobb. Based upon the evidence presented, the ALJ determines Claimant's testimony to be unreliable and unpursuasive.

D. To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the

Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

As found at paragraphs 7-8 of the Findings of Fact above, Claimant failed to establish her entitlement to temporary disability benefits from October 21, 2014 through December 2, 2014. Indeed, Claimant did not establish any specific time period for her claim for lost wage benefits nor did she establish an actual wage loss, testifying instead that she did not recall if she had been paid for any lost time from work between October 21, 2014 and December 2, 2014. Consequently, Claimant's claim for temporary disability benefits for this time period must be denied and dismissed.

E. Claimant's injury in this case was after July 1, 1999. Consequently, §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S., collectively referred to as the "termination statutes", apply to assertions that Claimant is responsible for her wage loss. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, a claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for the termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004). As a result, the claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994).

F. Because the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office, 20 P.3d 1209 (Colo. App. 2000).*

G. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" for their termination if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act which led to his/her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO, June 13, 1994). Thus, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, Respondents assert that Claimant is responsible for her wage loss after December 3, 2014 because she voluntarily resigned her employment effective that date. Nevertheless, *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (Industrial Claim Appeals Office, November 3, 2003), held that a claimant's voluntary resignation is not dispositive of the issue of whether he was responsible for termination of his employment. Rather, *Blair,* held that the pertinent issue is the reason the claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO April 24, 2002). According to *Blair, "*if the claimant was compelled to resign from this employment such that it can be said the termination was a necessary and natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination." Based upon the totality of the evidence presented in the instant case, the ALJ agrees with Respondents that Claimant is responsible for her wage loss beginning December 3, 2014.

H. As found here, Claimant's actions following her removal from work on December 3, 2014 persuades the ALJ that it was Claimant's subjective choice to resign rather than the effects of her injury that lead to her wage loss. Simply put, the ALJ concludes that Claimant was not compelled to resign as a necessary and natural consequence of the work injury. Rather, Claimant had decided to resign from her position as far back as August 2014 to take care of her grandchildren. The evidence presented convinces the ALJ that Claimant simply followed through with that plan early by reporting to Ms. Cobb on December 3, 2014 that she was quitting and would not be returning to work. Accordingly, the ALJ concludes that Claimant committed a volitional act and otherwise

exercised a degree of control over the circumstances resulting in her termination of employment. by voluntarily resigning her position effective December 3, 2014. As such, she is "responsible" for her termination of employment and her claim for TTD benefits is barred. *Longmont Toyota, Inc.*, *supra*.

ORDER

It is therefore ordered that:

1. Claimant's claim for disability indemnity benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Claimant established by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course of her employment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed as a bilingual claims adjustor for Employer in its call center from June 2008 until she was terminated on April 7, 2015.

2. Claimant is 60 years old and is 4'11" tall. She is right hand dominant. She was diagnosed with hypothyroidism in June 2014.

3. In 2004, while working for a prior employer, Claimant experienced pain in her arms and hands. A Concentra doctor evaluated her and gave her a left elbow injection. That employer also provided Claimant with a drop-down, adjustable keyboard tray. Her symptoms resolved after minimal treatment and ergonomic modifications to her workstation.

4. While at Employer, Claimant worked a 7 hour, 20 minute shift with a 45 minute lunch break and two other breaks totaling 25 minutes. Claimant worked almost exclusively at her computer station, which featured two screens, a keyboard, and a mouse. Although she occasionally retrieved faxes and made copies, Claimant could not be away from her station for more than two minutes at a time. Claimant testified that she "typed all the time" because she took notes on every claim, and she took calls regarding claims all day. She operated her mouse with her right hand only.

5. In 2010, Claimant's hand pain returned. Her symptoms resolved when Employer installed an adjustable keyboard tray and changed in her chair.

6. In February 2014, Employer replaced the call center desks and computer stations with ones that were higher than Claimant's elbow level. Employer provided Claimant a new chair, but she was unable to raise it high enough to fit the new desk and the armrests could not fit under the desk.

7. The new desks could be used in a sitting or standing position. Claimant testified that she could raise the desk and work in the standing position without experiencing any problems with her wrists. She raised her desk to stand while working for "a few hours" a day, and only experienced problems when sitting which she claimed

caused her to have awkward posturing with her wrists. Claimant reported to Dr. Carlos Cebrian in a later Respondents' independent medical evaluation that "she would stand up to four or five hours per day, and when she was standing she would not have difficulty with her arms."

8. Soon after the new desks were installed, Claimant reported to Employer pain in her fingers and elbows, her hands became numb, and she developed a needling feeling in her fingers.

9. Claimant reported to Dr. Cebrian that she reported her symptoms to Employer again in June and July of 2014 because "she states that she was in terrible pain." However, although she reported a worsening of symptoms, Claimant waited until February, 2015 to make a formal complaint and seek treatment.

10. On January 26, 2015, Jennifer Arnold, M.D., Claimant's primary care physician (PCP), evaluated Claimant for hypertension and GERD. On review of symptoms, Claimant was positive for headaches, vertigo, anxiety, feelings of stress, and insomnia. However, Claimant did not report any symptoms of pain, tingling, or numbness in her bilateral wrists, hands, or fingers.

11. On or about February 11, 2015, Claimant reported numbness and tingling in both of her hands lasting more than four hours. After several conversations with her manager, Claimant again requested an ergonomic workplace evaluation. Employer determined that the new desks could not accommodate a retractable keyboard tray as Claimant requested, and told her to see a doctor.

12. On February 13, 2015, Karen Matusik, PA-C, at Arbor Occupational Medicine, evaluated Claimant and diagnosed her with symptoms of carpal tunnel versus cervical radiculopathy. Ms. Matusik ordered message and physical therapy. Ms. Matusik found that "[t]here is a greater than 51% causality that her current workplace setting is the etiology of the bilateral hand numbness in that after they had given her the retractable keyboard, ergonomic mouse and her old desk, she was totally fine. The new changed [sic]." Ms. Matusik did not document any opinion as to causality or analysis of Claimant's job duties under Rule 17 of the AMA Guides.

13. On February 19, 2015, PCP Dr. Arnold reexamined Claimant and noted Claimant's problems included hypertension, classic migraine, chronic daily headaches, anxiety, and insomnia. Dr. Arnold noted that Claimant asked her to complete FMLA forms. Claimant stated that she could not focus on her job and her boss told her to apply for FMLA in case Claimant needed to leave work early or call out sick. Claimant did not report, nor did Dr. Arnold note, any symptoms of pain, tingling, or numbness in her bilateral wrists, hands, or fingers.

14. Later in February 2015, Employer filed a workers' compensation claim on Claimant's behalf.

15. Claimant's job duties did not include common activities associated with carpel tunnel syndrome such as lifting over 10 pounds, using handheld tools, or using vibrating tools.

16. Claimant has hypothyroidism and a family history of diabetes; both factors are associated with carpal tunnel diagnosis.

17. On March 2, 2015, Joseph Blythe performed a vocational evaluation of Claimant's worksite. Mr. Blythe observed Claimant for three-and-a-half hours. Based upon his observations, he extrapolated that Claimant used a keyboard for 1.52 hours per day (12.66 minutes per hour), and a mouse for 2.8 hours a day (22.8 minutes per hour). Thus, he determined that Claimant's job duties involved no primary or secondary risk factors as outlined in the Cumulative Trauma Conditions Medical Treatment Guidelines, found at WCRP 17, Exhibit 5. Mr. Blythe found that the risk factors of awkward posture and repetition/duration also were not present.

18. Also on March 2, 2015, Alisa Koval, M.D. (Ms. Matusik's supervising physician) evaluated Claimant. Claimant indicated her symptoms remained the same. Dr. Koval provided Claimant with wrist braces and told her to take five minute breaks for every 20-30 minutes of work. Dr. Koval diagnosed symptoms of carpal tunnel versus cervical radiculopathy. Dr. Koval did not document her opinion as to causality or analysis of Claimant's job duties under Rule 17.

19. On April 8, 2015, Ms. Matusik reevaluated Claimant for persistent numbness and tingling in both hands. Claimant stated that her symptoms remained essentially unchanged. Ms. Matusik diagnosed symptoms of carpal tunnel syndrome, but again did not document her opinion as to causality or analysis of Claimant's job duties under Rule 17. Additionally, Ms. Matusik is not a physician, and therefore is not Level II accredited per the Colorado Division of Workers' Compensation.

20. On April 14, 2015, Dr. Koval and Ms. Matusik opined that Claimant's current symptoms were related to her job activities. Dr. Koval stated that "[e]ven though [Claimant] may not meet all the criteria for Rule 17, the past history of a similar complaint which was easily remedied by the lower retractable keyboard tray and chair warranted a request for both of those and an ergonomic workplace evaluation."

21. On April 21, 2015, John Hughes, M.D. performed a Claimant's independent medical examination. Dr. Hughes diagnosed diffuse myofascial pain with clinical findings consistent with left greater than right carpal tunnel and cubital tunnel syndrome. Dr. Hughes noted that his preliminary opinion was that Claimant's bilateral upper extremity symptoms reflected the work related onset of diffuse myofascial pain and early entrapment neuropathies of the ulnar and median nerves secondary to abnormal workplace posture. However, Dr. Hughes did not perform a causality analysis of Claimant's job duties under Rule 17 because Claimant had not yet been finally diagnosed with carpal tunnel which required electrodiagnostic testing.

22. Dr. Hughes commented that Mr. Blythe's report did not document any job site ergonomic risk factors such as an elevated desktop. However, Mr. Blythe did evaluate for awkward posture and reported none rose to the level of a primary or secondary risk factor. In addition, Dr. Cebrian testified that an elevated desktop would not affect Claimant's wrists, hands, and fingers; it would affect her shoulders.

23. On May 5, 2015, Dr. Jonathan Sollender reviewed Claimant's medical records at Respondents' request. Relying on the vocational evaluation findings, Dr. Sollender opined that Claimant's medical conditions were not causally related to her occupational activities.

24. On June 2, 2015, PCP Dr. Arnold reexamined Claimant for dizziness, anxiety, and hypertension. Claimant also stated that she had carpal tunnel due to work, reporting that in February 2015, she felt numbness in her fingers. This was Claimant's first mention to her PCP that she had carpal tunnel syndrome.

25. On June 9 2015, Claimant underwent occupational therapy. The therapist noted that Claimant reported that the onset of her symptoms was about 2 years ago, but her symptoms had gradually worsened. Based on this record, Claimant's onset of symptoms would be in June 2013, before Employer changed the call center desks and work stations. Claimant testified at hearing that this report was in error.

26. On July 6, 2015, Dr. Hughes reviewed Dr. Sollender's report and repeated his opinion that Claimant's pain was work-related.

27. On July 9, 2015, Dr. Jack Sylman performed an EMG and diagnosed Claimant with "mild to moderate right median neuropathy at the wrist (carpal tunnel syndrome)" and "mild left median neuropathy at the wrist (carpel tunnel syndrome.)" Dr. Hughes testified that based upon this EMG, he agreed with and adopted this diagnosis.

28. On September 17, 2015, Dr. Carlos Cebrian performed a Respondents' independent medical examination of Claimant. Dr. Cebrian noted Claimant reported that she worked in a standing position between four and five hours a day. Dr. Cebrian noted that Claimant's treatment providers had not performed causality assessments, and after performing his own assessment, he concluded it was not medically probable that Claimant's bilateral carpel tunnel syndrome was directly or indirectly related to or caused by her work activities. Like Dr. Sollender, Dr. Cebrian relied principally upon the findings contained in Mr. Blythe's vocational report. Dr. Cebrian testified that Claimant did not meet any of the primary or secondary risk factors and therefore there was no causal relationship between Claimant's carpel tunnel syndrome and her job duties.

29. At the time Dr. Cebrian examined Claimant, she understood that surgery was the only treatment for her condition but stated that she did not want surgery because she was changing careers. At hearing, Claimant explained she would like to proceed with surgery because she plans to pursue a master's degree.

30. Dr. Cebrian opined that the absence of any non work related risk factor, association, or activity does not establish a causal relationship between work and the diagnosis. Dr. Cebrian noted that for a causal relationship to be established between work and the diagnosis, the causal analysis provided by the Division in Rule 17 must be followed. Dr. Cebrian opined that based on the information available, it was not medically probable that Claimant's bilateral carpal tunnel syndrome was directly or indirectly related to her work activities at the Employer nor was it the proximate result of her work activities.

31. Dr. Cebrian testified that females, older individuals, people with hypothyroidism, people with a family history of diabetes mellitus, people with arthritis, and people who are obese are at an increased risk to developing carpal tunnel syndrome. Dr. Cebrian testified that Claimant has some of the risk factors, including being female, increased age, history of hypothyroidism, and familial history of diabetes mellitus.

32. Dr. Cebrian persuasively testified that a physician must apply Rule 17 to determine the work relatedness of the injury because the Guidelines are based on evidence-based medicine. Dr. Cebrian testified that if a physician is going to deviate from the Guidelines there should be a very good reason why the physician failed to apply the Guidelines and the reason should be documented as to why the physician felt he or she could ignore all the medical literature and do something else.

33. During his testimony, Dr. Hughes addressed the fact that he did not perform a causality assessment, noting first that there had not been a diagnosis when he evaluated Claimant. Second, Dr. Hughes testified that Claimant's history of complaints suggests that there existed a strong "dose relationship" between injurious exposure, which includes repetition and posture, and the onset of symptoms that ultimately came to be diagnosed as stemming from carpal tunnel syndrome. Dr. Hughes described this relationship as follows: when the dose or exposure is high, symptoms are high; when exposure is decreased, symptoms are decreased. This relationship exists until the exposure causes irreversible nerve damage. He opined that the evidence showed when the work station was not modified after her complaints in February 2014; Claimant had a fifteen-month period of working at an ergonomically incorrect workstation. This, he opined, explained why Claimant's symptoms had not improved after she stopped working. Dr. Hughes also noted that his causality determination was supported by the fact that Claimant, being right hand dominant, used her right hand more than left doing her job duties, and, unsurprisingly, the neuro-diagnostic tests showed worse pathology on the right as compared to the left. However, the testing results were opposite of Dr. Hughes' exam in which he diagnosed diffuse myofascial pain with clinical findings consistent with left greater than right carpal tunnel syndrome.

34. Dr. Hughes concluded that Claimant had a predilection for developing carpel tunnel because of her gender, age, and, in particular, hypothyroidism; and that her pathology was accelerated by work at a faster degree due to these factors. In short,

Claimant was vulnerable to job tasks that, although they fell well below the Guideline's causation threshold, still caused her occupational disease.

35. Dr. Hughes acknowledged that Claimant did not meet any of the risk factors pursuant to the March 2, 2015 job demands analysis report. He testified that hypothyroidism, a familial history of diabetes, and gender are independent risk factors for the development of carpal tunnel syndrome. Dr. Hughes also testified that hypothetically, a woman who is 60 and has hypothyroidism could develop carpal tunnel syndrome without performing any job duties.

36. Based on the totality of the evidence the ALJ finds and determines that Claimant did not experience symptoms and her work station was not ergonomically incorrect when she worked in a standing position which she did between three and five hours per day.

37. Based on the totality of the evidence the ALJ finds and determines that none of Claimant's treating physicians documented any causation analysis as required by Rule 17 prior to issuing their opinions of work relatedness. The ALJ further finds that Dr. Hughes did not perform a causation analysis as required by Rule 17 prior to issuing his opinion on work relatedness. Moreover, Dr. Hughes ultimately agreed that Claimant did not have any work-related risk factors to cause her condition, and that Claimant's gender, age, hypothyroidism, and a familial history of diabetes could independently cause carpal tunnel syndrome.

38. Based on the totality of the evidence the ALJ finds Dr. Cebrian's testimony on the issue of causation to be to be more persuasive than that of the other doctors. The ALJ further finds that Claimant's job duties, as analyzed under Rule 17, did not accelerate, cause, or aggravate the bilateral carpal tunnel syndrome. The ALJ finds Dr. Cebrian's testimony to be more persuasive and credible than the testimony of Dr. Hughes in that Claimant did not sustain a work related cumulative trauma condition. The ALJ also credits the testimony of Dr. Cebrian and Dr. Hughes that females, older individuals, people with hypothyroidism, people with a family history of diabetes mellitus, people with arthritis, and people who are obese, are at an increased risk at developing carpal tunnel syndrome. The ALJ finds Claimant has some of the risk factors to develop carpal tunnel syndrome, including, being female, increased age, history of hypothyroidism, and familial history of diabetes mellitus.

39. Based on the totality of the evidence the ALJ also finds that the alleged ergonomic mismatch of Claimant's desk height and lack of adjustable keyboard tray did not cause Claimant's carpal tunnel syndrome because there were no identifiable primary or secondary risk factors and no risk factors related to awkward posture. The ALJ finds that the evidence regarding Claimant's varied work duties does not establish causation or relatedness of her condition to her job duties pursuant to the risk factors set forth in Rule 17.

40. Based on the totality of the evidence the ALJ also credits Dr. Sollender's report, in which Dr. Sollender performed a Rule 17 analysis and found that Claimant did not meet any of the risk factors under Rule 17.

41. Based on the totality of the evidence the ALJ finds that Claimant has not proven by a preponderance of the evidence that her bilateral carpal tunnel syndrome is a compensable work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Subject to the exceptions noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

The test for distinguishing between an accidental injury and an occupational disease or condition is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside the employment.

A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, § 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*,

859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

W.C.R.P. Rule 17, Exhibit 5 sets forth the treatment guidelines for Cumulative Trauma Conditions. Rule 17 sets forth care that is generally considered reasonable for most injured workers. Further, while an ALJ is not required to utilize Rule 17 as the sole basis for making determinations as to whether medical treatment is reasonable, necessary and related to an industrial injury, it is appropriate for the ALJ to consider Rule 17 in making such determinations. § 8-43-201(3), C.R.S.

The credible and persuasive evidence presented at hearing established that there is not a causal relationship between Claimant's alleged conditions and her work exposure. Accordingly, Claimant failed to prove a compensable occupational injury based in part on the following reasons:

A. Claimant has the burden to establish a causal relationship between her alleged injury and her employment.

B. As found, the totality of the evidence in this case demonstrates that Claimant's job duties are numerous and varied. Claimant does not perform job duties which involve significant keyboarding up to 7 hours a day or continuous mouse work up to 4 hours per day. Additionally, Claimant does not perform job duties which involve handheld vibratory tools, handheld tools weighing in excess of two pounds, or lift up to ten pounds more than sixty times per hour. As found, there was a lack of persuasive evidence that Claimant's job duties required her to sustain continuous awkward posture for significant periods of time. Rather, the totality of the evidence was persuasive that Claimant performed several different types of job tasks that required the use of one, or the other, or both upper extremities at different times. Of note, repetition alone is not a risk factor under Rule 17. As such, a review of her job duties reflects that there was not requisite force or repetition to cause her conditions.

C. Pursuant to Rule 17, a specific set of steps should be followed to determine if Claimant's conditions are work related. In this instance, Dr. Cebrian and Dr. Sollender both performed a causation analysis pursuant to the Division's Rule 17 and their conclusions are credible and persuasive and establish that Claimant's conditions are not work related.

D. As found, there is insufficient persuasive credible evidence that Claimant's treating physicians or Claimant's IME physician, Dr. Hughes,

performed a causation analysis consistent with and required by Rule 17 in this case with regard to any of her diagnoses.

E. As found, the totality of the evidence is that claimant's job duties do not meet any primary or secondary risk factor known to be physiologically related to the claimant's diagnoses.

Given the foregoing, the ALJ determines and finds that Claimant has not met her burden of proof in establishing that she suffered a compensable occupational injury. Accordingly, Claimant has not demonstrated that the hazards of her employment caused, intensified, or, to a reasonable degree, aggravated her bilateral upper extremity conditions. *Anderson*, 859 P.2d at 824.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for workers' compensation benefits is denied and dismissed with prejudice.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 18, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained compensable lower back injuries on December 30, 2014 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period December 30, 2014 through April 12, 2015.

STIPULATIONS

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $350.00.

FINDINGS OF FACT

1. Employer is a cleaning service provider owned by Denise Schellinger. Claimant's job duties involved cleaning houses for Employer.

2. On December 30, 2014 Claimant was driving her personal vehicle when she was involved in a motor vehicle accident during the course and scope of her employment with Employer. Claimant suffered lower back injuries as a result of the incident.

3. On December 30, 2014 Employer did not possess Workers' Compensation insurance.

4. Employer did not dispute that Claimant suffered lower back injuries during the course and scope of her employment on December 30, 2014. Employer also acknowledged that Claimant is entitled to receive medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

5. Claimant has received limited medical treatment and physical therapy through Arbor Occupational Medicine. However, because Employer did not possess Workers' Compensation coverage, Arbor declined treatment after two appointments. Ms. Schellinger has contacted Arbor and stated that she is financially responsible for Claimant's medical treatment but has not received a response.

6. Claimant has also received chiropractic treatment. Ms. Schellinger contacted Claimant's chiropractor and advised that Employer is financially responsible for the treatment. Claimant's chiropractor subsequently billed Employer and Ms. Schellinger has paid the bills.

7. Claimant seeks Temporary Total Disability (TTD) benefits for the period December 30, 2014 through April 12, 2015. She asserts that she was going to begin a new job on January 5, 2015 but could not perform her work duties because of her lower back condition. Claimant testified that she was unable to work because of the December 30, 2014 accident until she began employment with a new Employer on April 13, 2015. However, the record does not reveal that Arbor assigned Claimant work restrictions as a result of her lower back injury.

8. Claimant has established that it is more probably true than not that she sustained compensable lower back injuries on December 30, 2014 during the course and scope of her employment with Employer. On December 30, 2014 Claimant was involved in a motor vehicle accident while performing her job duties and suffered lower back injuries.

9. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries. Employer did not dispute that Claimant suffered lower back injuries during the course and scope of her employment on December 30, 2014. Employer also acknowledged that Claimant is entitled to receive medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries.

10. The parties agreed that Claimant earned an AWW of $350.00. An AWW of $350.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

11. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period December 30, 2014 through April 12, 2015. The record does not reveal that Arbor assigned Claimant work restrictions as a result of her lower back injury. However, Claimant's credible testimony reflects that she was unable to perform her job duties between December 30, 2014 and April 12, 2015. Claimant attempted to receive treatment for her lower back injuries, but was denied care after two visits. She is entitled to an award of TTD benefits because her December 30, 2014 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $350.00 by 66.67% yields a weekly TTD rate of $233.35.

12. Employer was not insured on December 30, 2014. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period December 30, 2014 through April 12, 2015. The period covers 104 days.

Claimant's TTD rate is $233.35, increased by 50% for a lack of insurance, to a TTD rate of $350.00 each week. Multiplying $350.00 each week for a total period of 104 days yields a total TTD amount of $5,200.00.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences

symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that she sustained compensable lower back injuries on December 30, 2014 during the course and scope of her employment with Employer. On December 30, 2014 Claimant was involved in a motor vehicle accident while performing her job duties and suffered lower back injuries.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries. Employer did not dispute that Claimant suffered lower back injuries during the course and scope of her employment on December 30, 2014. Employer also acknowledged that Claimant is entitled to receive medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries.

Average Weekly Wage

9. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant’s wages

based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

10. As found, the parties agreed that Claimant earned an AWW of $350.00. An AWW of $350.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

11. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

12. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period December 30, 2014 through April 12, 2015. The record does not reveal that Arbor assigned Claimant work restrictions as a result of her lower back injury. However, Claimant's credible testimony reflects that she was unable to perform her job duties between December 30, 2014 and April 12, 2015. Claimant attempted to receive treatment for her lower back injuries, but was denied care after two visits. She is entitled to an award of TTD benefits because her December 30, 2014 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Multiplying Claimant's AWW of $350.00 by 66.67% yields a weekly TTD rate of $233.35.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

13. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005).

14. As found, Employer was not insured on December 30, 2014. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply

with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period December 30, 2014 through April 12, 2015. The period covers 104 days. Claimant's TTD rate is $233.35, increased by 50% for a lack of insurance, to a TTD rate of $350.00 each week. Multiplying $350.00 each week for a total period of 104 days yields a total TTD amount of $5,200.00.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable lower back injury on December 30, 2014 during the course and scope of her employment with Employer.

2. Employer is financially responsible for payment of Claimant's medical expenses for the treatment of her lower back injury as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her December 30, 2014 industrial injury.

3. Claimant earned an AWW of $350.00

4. Respondent shall pay Claimant TTD benefits in the amount of $5,200.00.

5. In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $7,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $7,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

6. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 25, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-976-398-01

ISSUES

- Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for his termination of employment, and are therefore excused from paying temporary total disability ("TTD") benefits (for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015) or temporary partial disability ("TPD") benefits (for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law)?

STIPULATIONS

1. Claimant's average weekly wage ("AWW") at the time of injury was $1,101.84. The parties stipulated that the total AWW was made up of $925.88 in weekly wages and $175.96 in the value of housing benefits provided to Claimant by Employer.

2. Should the ALJ find that Claimant was not responsible for his termination, the parties agreed that Respondents will pay TTD and TPD benefits as follows: TTD benefits for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015, and TPD benefits for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 43-year-old male who was employed by Employer as a ditch rider between August 2006 and May 2015. Claimant testified at hearing that Employer is an irrigation utility that delivers water to farms and other users in the Montrose, Delta, and Olathe areas. Claimant testified that in the summer, the job involved being sure water was delivered properly to customers. He testified that in the winter months the job involved cleaning out drained ditches, including burning brush that accumulated, and performing maintenance on ditches and equipment. Claimant testified he also worked as a mechanic, and that at times he would spend time working in the shop repairing equipment and vehicles after his water route was done for the day.

2. Claimant sustained an admitted work injury to his low back on February 14, 2015.

3. Claimant testified that he had a prior work injury to his low back that was never formalized into a claim. Claimant testified that when he reported the prior low

back injury to his supervisor, Aaron English, he was ridiculed and told to take a few days off. Claimant testified that Mr. English told him he was "hung like a horse," and that "your d*** is too big, it threw your back out, that's all your problem is. Take a few days off, we will see what happens."

4. Mr. English, water master for Employer, testified at hearing. He testified he has worked as water master for four years. He testified that working as water master involves overseeing nine ditch riders and ensuring proper repairs take place, adequate water is in canals, and that water reaches customers in the correct amounts. Mr. English testified that ditch riders are responsible for their own sections of ditches, including opening and closing head gates, cleaning trash and debris out of the ditches, and taking phone calls and orders from customers.

5. Mr. English testified that he had been employed with Employer for 16 years. Mr. English testified that he liked a workplace to be fun. He testified that this involved "messing around," "horsing around," and "cracking jokes" with coworkers. He testified that this included engaging in pranks, and that he himself performed pranks on his coworkers during his time working for Employer. He testified that he performed pranks on coworkers for at least his first 10 years on the job, but that he did not perform pranks anymore.

6. Claimant testified that he had problems with Mr. English since before 2009, stemming from a series of incidents that Mr. English called "pranks." Claimant testified that he disagreed with Employer's promotion of Mr. English to water master. Claimant testified that he originally applied for the water master position, but withdrew his application. Claimant testified that it was "unbelievable" that Mr. English was promoted to water master given his history of pranks.

7. Mr. English testified that his pranks included using a "potato gun" made out of PVC pipe on work time. Mr. English testified that he shot golf balls and bottles of caulking out of the potato gun. He testified that he never shot the gun toward coworkers, and he did not believe that he shot the gun toward areas where coworkers were working.

8. However, Claimant testified that on one occasion he and a co-worker, Pat McWilliams, were working on a structure in a ditch when he saw Mr. English first shooting golf balls with the potato gun. Claimant testified that later Mr. English was shooting other items, including tubes of caulking or tubes of chalk, toward him and Mr. McWilliams as they worked.

9. Mr. English testified that he brought an Airsoft gun to use on work time. He testified that he fired plastic bee bees at coworkers. He testified that he did not recall shooting Claimant with the Airsoft gun. However, Claimant testified that Mr. English had shot him with a bee bee with the Airsoft gun at work.

10. Mr. English testified that he built bombs on company time and with company materials that were set to detonate when his co-workers got into the truck and

turned the ignition switch on. When asked how many times he had done that, he testified, “A couple, that I recall.” He testified that he had wired a bomb to explode when a coworker started a truck on more than one occasion.

11. Claimant testified about a specific incident when a bomb constructed by Mr. English detonated when another employee, Josh Guard, started a company truck. Claimant testified that the truck was perhaps five feet from his right ear when the bomb exploded. He testified that the bomb exploded with enough force to buckle the hood of the truck, and Claimant testified that the explosion damaged his right ear. Claimant testified that he has had right ear problems since that explosion.

12. Mr. English testified the bombs he built were generally milk jugs full of acetylene. He testified they would explode when hooked to a spark plug ignition system. After testifying about the manner in which the bombs he built would explode, the ALJ advised Mr. English of his Fifth Amendment rights.

13. Claimant testified that Mr. English built bombs out of four-inch PVC pipe using welding gas, gluing the caps on the ends, and using silicone to put wires into the inside of the bomb. Claimant testified that Mr. English would detonate those bombs with a battery charger. He testified that Mr. English would put pipe bombs out in the shop’s driveway, bring the leads across the driveway, and then detonate the bomb using the battery charger when coworkers drove by.

14. Claimant testified that he witnessed a pipe bomb explode while Mr. English was building it on a welding bench at work. Claimant testified that the bomb went off with enough force to put shrapnel from the PVC pipe into the shop’s ceiling. Claimant testified he recalled Mr. English laughed because he was “glad it didn’t blow his arms off.”

15. Mr. English testified that he had filled milk jugs with an accelerant and that he would hide them in ditch banks so that when coworkers were clearing brush from the ditch banks using blowtorches, the jugs would explode into flame. Claimant testified that this happened to him when he was burning a ditch that was covered in weeds. He testified that he was fortunate that the “whoosh” of flames after the explosion moved away from him. Claimant testified that Mr. English laughed about the incident, but that Claimant took the event very personally because the flames could have moved toward him.

16. Claimant testified that in the winter it was not uncommon to have a fire on the ditch bank so that employees could stay warm while they worked. Claimant testified that he saw Mr. English put several flammable and explosive items into the fire, including cans of spray foam and 55-gallon barrels of tar.

17. Mr. English testified that spray foam is sometimes used in the workplace, and that spray foam is flammable. He testified that, although he did not remember specifically, he “was sure” he had taped together tubes of spray foam and put them into

a fire at work. He also testified that, although he did not remember specifically, he "was sure" he had also thrown gallons of gas into fires at work.

18. Mr. English testified that he has put his own feces in a bag and put the bag into a coworker's lunch. Mr. English testified that he has sat on a catwalk above a ditch and defecated toward a coworker in the ditch below him.

19. Mr. English testified that his and Claimant's personalities clashed. He testified Claimant did not like his pranks. Mr. English testified he did not know whether Claimant was nearby during any of the incidents when a truck bomb detonated.

20. Mr. English testified that in approximately 2009, when he was working as a ditch rider, Steve Fletcher had spoken to him about building bombs on company time. Mr. English testified that Mr. Fletcher asked him to stop building bombs because there had been complaints. When asked whether he built an additional bomb after Mr. Fletcher spoke to him, Mr. English testified: "I don't think I did."

21. Mr. English testified that he supervised Claimant beginning November 2011 when he was promoted to foreman. Mr. English first testified that he stopped performing pranks once he was promoted to a supervisory position in 2009. He later testified that as a crew foreman, he might have "play[ed] with [his] crew a little bit." He testified that he would continue to "shoot the potato gun, something like that." He testified he "did not recall" performing other pranks as a crew foreman. He testified that the pranks "all stopped" when he became water master in 2011.

22. Claimant testified that just after Mr. English was promoted to crew foreman, Mr. English told Claimant that he did not have any agricultural background. Mr. English told Claimant that Employer was hiring employees who did not know anything about farming, and that it appeared that Employer was hiring on "the buddy system." Claimant testified that Mr. English told him that Claimant got his job through Steve Martinez, and "that s*** is going to stop right now." Claimant testified Mr. English told him that he would do everything he could to get ditch riders with farming experience. Claimant testified he interpreted that conversation as "intimidation."

23. Steve Fletcher, general manager of Employer for four years, testified at hearing. He testified he supervised both Mr. English and Claimant. Mr. Fletcher testified that prior to Mr. English becoming water master in 2011; he had information that Mr. English and Claimant had some prior issues. Mr. Fletcher testified he knew about some of Mr. English's "pranks" and promoted him anyway.

24. Mr. Fletcher disagreed with the use of the word "bomb" with regard to the explosives Mr. English built. He first testified that, to him, a "bomb" is a life-threatening explosive, including a pipe bomb. He testified that what Mr. English was doing was putting acetylene into soda cans or milk jugs so that they would explode and make a loud "bang," not a massive explosion.

25. However, Mr. Fletcher later testified that he was not aware that one of the explosions set off by Mr. English dented a company truck. He testified he was not

aware that Mr. English built and detonated pipe bombs made out of PVC pipe. Mr. Fletcher was asked about Mr. English's practice of hiding jugs of acetylene in ditch banks so that they would explode when coworkers used blowtorches to clear ditches. He testified that an employee could have been injured or killed by such explosions.

26. Mr. Fletcher acknowledged that Mr. English was not an explosives or pyrotechnics expert. Mr. Fletcher testified that he was aware that Mr. English was creating dangerous situations involving fire in the workplace. Mr. Fletcher first characterized the "bombs" Mr. Fletcher built and detonated as only creating "loud bangs," but testified that for a "loud bang" to occur, there had to have been an explosion. Mr. Fletcher testified that Mr. English intentionally creating explosions and intentionally setting flammable substances on fire was dangerous conduct. He testified that that kind of conduct is unacceptable "in the position [Mr. English] was in."

27. Mr. Fletcher first testified that he knew that the kind of conduct Mr. English engaged in "goes on in the workplace in a lot of different areas." Mr. Fletcher testified that he had worked in mines previously where some of this type of conduct took place. He testified that explosions also took place in his mining job. However, he acknowledged that in a mine, explosions are for work purposes and are performed by explosives experts. He testified that explosives set off in the workplace by non-experts generally do not happen in the workplace, because they are unsafe.

28. Mr. Fletcher also testified that he had worked other jobs where employees shot coworkers with bee bee guns. He testified that employees shooting bee bee guns at each other is not acceptable behavior.

29. Mr. English testified that once he became water master, Claimant was required to report to him, which included calling in readings from Claimant's canals and giving clearance to supply water after a customer paid a late account. Mr. English testified that Claimant was required to call the office every day and speak either with Mr. English or Dennis Veo, the other water master.

30. When asked whether he was less concerned about Mr. English once he became a supervisor and was not out in the field, Claimant testified that "there was still plenty of game-playing" after Mr. English was promoted. Claimant testified that Mr. English would go out into the field and alter Claimant's water route. Claimant testified this included turning head gates on and off, and altering the proper flow of water to customers. Claimant testified that this at times affected the level of water that was delivered to customers, including to some members of Employer's board of directors, and made it look as if he was not performing his job correctly.

31. The ALJ discredits Mr. English's testimony that all of his "pranks" stopped in 2011, and credits Claimant's testimony about Mr. English's post-2011 conduct. Mr. English was only told to stop building bombs and admitted to still shooting his potato gun at work after his promotion to crew chief. In addition, Mr. English had no incentive to stop his "pranks" because Mr. Fletcher did not find his other conduct to be fireable offences, and in fact promoted Mr. English with awareness of such conduct.

32. Mr. Fletcher testified that in January 2013, Claimant approached him with complaints about Mr. English. Mr. Fletcher testified that Claimant asked that Mr. Fletcher terminate Mr. English, or in the alternative to allow Claimant to not have any contact with Mr. English.

33. Claimant testified he accumulated and brought information to Mr. Fletcher and other managers in January 2013 about Mr. English's conduct. Claimant testified that he did this after speaking with other ditch riders who wanted to come forward to management with issues they were having with Mr. English. Claimant testified that the other ditch riders agreed that if Claimant would come forward with complaints, then the other ditch riders would. Claimant testified that he went forward with his complaints because he could not see his job getting any easier. He testified that Mr. English was then his direct supervisor and could control his water route, and was making his job more difficult.

34. Claimant testified that after he brought his complaints to managers and the board, Mr. Veo, the other water master, asked him what could be done to rectify the situation. Claimant testified he told Mr. Veo: "[I]f it were me, I would fire him." Claimant testified he asked for Mr. English to be fired because he was afraid for his life and the lives of his coworkers. When asked why he did not bring these complaints to his superiors earlier if he was afraid for his life, Claimant testified that he had in fact been bringing complaints to his superiors for approximately eight years, but nothing had ever been done about his complaints.

35. Mr. Fletcher testified he reviewed Claimant's complaints, but told Claimant that those incidents occurred prior to Mr. English becoming a supervisor, and that type of conduct by Mr. English would no longer happen. Mr. Fletcher testified he told Claimant that he would not terminate Mr. English, and told Claimant that he would continue having contact with Mr. English.

36. Mr. English testified about Claimant's phone calls with him over time. Mr. English testified from his notes about a phone call with Claimant on June 13, 2014. Mr. English recalled that Claimant told him he did not want to speak with him anymore. Mr. English recalled that Claimant told him he might need to "go outside the company to get some satisfaction." Mr. English testified from his notes about a phone call on July 19, 2014, and recalled that Claimant again told him he did not want to speak with him, and gave Mr. English a phone number to call for the Colorado Department of Labor. Mr. English testified from his notes he did not know whether Claimant referenced the Department of Labor because of the explosions that Mr. English set off at work. Mr. English testified from his notes about a phone call on July 22, 2014, wherein he recalled Claimant again stating he did not want to speak with Mr. English, and asked for another person in the office to call him.

37. Claimant testified that he sent an email dated August 23, 2014 to Mr. Fletcher and George Etchart, the president of Employer's board of directors, with information about Mr. English's conduct. Claimant testified that he sent the email because he had come forward to management with complaints about Mr. English, and

that nothing happened. He testified that he believed management took his complaints lightly, and would not help him. He testified that as 2014 went on, he had a lot of things happen to his water route that he believed Mr. English was involved in. He testified that he believed it was an effort to force him to quit. Claimant testified that he was reaching a point where he was mentally unable to handle the things that had happened with Mr. English. He testified that he felt physically ill when he had contact with Mr. English. Claimant testified that he believed making a written complaint to the board and requesting for no contact with Mr. English was his last chance to ask for help.

38. Claimant testified that per Employer's personnel policies, if an employee could not rectify a problem with management, the employee should approach the board of directors. He testified that he believed that employees were encouraged to notify the board of directors in writing, which is why he wrote the email. Employer's Personnel Policies state as follows: "The Board of Directors will serve as the appropriate individuals for the purpose of hearing any complaint and/or grievance that cannot be resolved with the Manager. The employee is asked to provide the Board with a written summary of his or her complaint or grievance." Claimant's Exhibits, p. 62.

39. Claimant testified that he initially wrote the contents of the email by hand, and showed the draft to Zack Ahlberg, a member of Employer's board of directors. Claimant testified he asked Mr. Ahlberg if he thought it would cause Claimant to lose his job. Claimant testified that Mr. Ahlberg advised him to send the email, because the board needed to know what was going on. The August 23, 2014 email was entered into evidence. Claimant's Exhibit 4, p. 35.

40. Mr. Fletcher testified that in response to Claimant's August 23, 2014 email he and assistant manager Ed Suppes went to Claimant's residence in September 2014. Mr. Fletcher testified that he told Claimant that Mr. English was his immediate supervisor, and that he needed to communicate with Mr. English on a professional level. Mr. Fletcher testified that that "pranks" that Mr. English had engaged in were "in the past." Mr. Fletcher testified he told Claimant that he could either communicate with Mr. English or find a different job. Mr. Fletcher testified that Claimant said he would "look forward" to his communications with Mr. English.

41. Mr. Fletcher testified that he knew in September 2014 that there was a rift between Claimant and Mr. English. He testified that Claimant had asked on separate occasions to not have to speak to Mr. English anymore. He testified that one of these requests was in writing. He testified that Claimant told him that he felt unsafe at work because of Mr. English's conduct. Mr. Fletcher testified that Claimant told him that he was seeking counseling because of the stress he experienced dealing with Mr. English. Mr. Fletcher testified that, notwithstanding all of these factors, he still required Claimant to have contact with Mr. English.

42. Claimant testified that typically he would try to call into the office early enough to speak with and relay information with Mr. Veo so that he would not have to speak with Mr. English. He testified that this happened a majority of workdays. Claimant testified that prior to his meeting with Mr. Fletcher and Mr. Suppes in

September 2014, he had been exclusively communicating with Mr. Veo instead of Mr. English. Claimant testified that Mr. Veo knew that Claimant did not want to speak with Mr. English, so Mr. Veo came to work earlier to receive Claimant's calls.

43. Mr. Fletcher testified that after his discussion with Claimant in September 2014, for a time he stopped receiving reports from Mr. English about his and Claimant's communications.

44. Mr. English testified from his notes that Claimant called into the office the morning of October 13, 2014, and hung up when he heard Mr. English's voice. Mr. English testified from his notes that the same thing happened on October 14, 2014. Claimant testified that these few times, he would hear Mr. English's voice, "chicken out," and hang up. Claimant testified that he was not being confrontational, but was trying to deal with the problem, and to deal with Mr. English being his supervisor and get on with his job. Claimant testified that if he did not speak with Mr. English, he still called in his readings to another coworker, and did not fail to perform his job duties.

45. Mr. English testified that beginning approximately November 1, 2014, the ditch riding activity decreased for the winter season, so Claimant was not required to call into the office every day.

46. Mr. English testified that Claimant drove by his residence on March 14, 2015, and "flipped [him] the bird." Mr. English testified that Claimant took the same road later that afternoon, and "flipped [him] the bird once more."

47. Mr. English testified that Claimant would drive on Highway 348, approximately one block from Mr. English's home, on his way home. Mr. English testified that Highway 348 was "the main drag," and that lots of cars use Highway 348. Mr. English testified that Claimant was driving a white Chevy Tahoe.

48. Claimant testified that he did not drive by Mr. English's house and "flip him the bird." Claimant testified that, contrary to Mr. English's testimony, that during that time period he was not driving his Chevy Tahoe because it was parked for several months because of poor performance. He testified that during that time period he was driving his company truck.

49. Claimant also testified that he was seeing a counselor at the time to deal with his anxiety surrounding Mr. English. He testified that the counselor advised him to avoid Mr. English completely as much as possible, and so often Claimant would take a different route that would not go past Mr. English's house on Highway 348.

50. The ALJ finds Claimant's account of these incidents more probably true than that of Mr. English.

51. Claimant testified that he purchased an audio recorder in January 2015. He testified that the recorder was of poor quality, because he purchased the cheapest recorder he could find. He testified that he was unhappy with the recorder's

performance. He testified that he did not alter or delete any recordings, and would not have the expertise to know how to alter any recordings.

52. He testified that he did tell Mr. English ahead of time that he would be recording phone conversations between the two of them, but did not recall telling Mr. English that conversations were recorded prior to January 2015. He testified he did not record every phone conversation. He testified that he did not record phone conversations prior to April 2015.

53. Mr. English testified that he believed phone conversations between Claimant and him were being recorded "all the time," because Claimant had indicated to him on one occasion that he was recording phone conversations. Mr. English testified he had not reviewed any recordings other than the recordings entered into evidence at hearing.

54. Mr. English testified from his notes about a phone call with Claimant on April 18, 2015. Mr. English recalled calling Claimant with readings, and that Claimant asked him how many bombs he built while working for Employer, and how many bombs he had detonated close to other coworkers. Claimant agreed at hearing that he asked Mr. English those questions. Mr. English recalled Claimant also asking him whether he had killed somebody "in the hills with a shovel." Mr. English recalled saying he did not recall, and told Claimant he "would not do this with [Claimant] this morning."

55. Mr. English first testified that he did not know why Claimant asked those questions. Later though he testified that he had in fact built bombs on company time. When asked to clarify, Mr. English testified he was surprised by the question about killing another person, not about building bombs on company time.

56. Claimant testified that a farmer came to him and reported that Mr. English had told the farmer that he had killed a man in the mountains with a shovel. Claimant testified that he asked Mr. English about that incident, because if it were true, he would not want to work with an individual who had killed someone.

57. Mr. English testified from his notes about a phone call with Claimant on April 25, 2015. Mr. English recalled that the two discussed a clearance, and at the end of the conversation, Claimant said: "F*** you, mother*****," just before Claimant hung up. However, the recording in evidence from that conversation does not contain any expletives. The recording in evidence contains dialogue as follows:

Mr. English: "Got some work in a subdivision. And that's it."

Claimant: "What else?"

Mr. English: "That's all we got, man."

Claimant: "Seeya."

Mr. English: "Have a good one."

Claimant's Exhibit 9(c). Respondents' attorney stipulated on the record that the recording did not contain any expletives. Mr. English testified that, although the recording did not contain the language, that after Claimant said, "Seeya," and Mr. English said, "Have a good one," Claimant used the word "f***." Claimant testified that he did not use foul language with Mr. English on April 25, 2015. The ALJ finds Claimant's account more probably true than that of Mr. English.

58. Mr. English testified from his notes about a phone call with Claimant on April 28, 2015. Mr. English recalled Claimant asked him "how to get a promotion around here." When Mr. English answered that he didn't know, Mr. English testified that Claimant asked him whether "blowing s*** up" would help with a promotion. Claimant testified he also asked Mr. English whether "terrorizing other employees" would help with a promotion.

59. Mr. English testified that Claimant asked him about a sick day he took the day before, because Claimant saw Mr. English walking out of a convenience store. Mr. English testified that Claimant asked him whether he was aware that there was a policy against abusing sick leave. Mr. English testified he answered that he was aware of the policy.

60. Mr. English testified that he took Claimant's questions during these conversations to be "insubordination" by Claimant, and reported them to Steve Fletcher.

61. Mr. Fletcher testified, given the actions of Mr. English, he could understand why Claimant would be upset with Mr. English. Mr. Fletcher testified that Claimant was "obviously…dwelling in the past."

62. Claimant testified that he began professional counseling after his request to the board in August 2014 to stop contact with Mr. English was denied. Claimant testified that he sought outside help to learn how to cope with having contact with Mr. English. Claimant testified that he also wanted to tell someone his story and all the things that had happened with Mr. English.

63. Claimant testified that his counselor suggested that he first try to avoid Mr. English completely, because even speaking with Mr. English caused him a great deal of anxiety. Claimant testified that he felt physically ill when he was around Mr. English or had contact with Mr. English. Claimant testified that his counselor also recommended that Claimant ask Mr. English why he did the things he did.

64. Claimant testified that he had been instructed by Mr. Fletcher to speak with Mr. English and to deal with him professionally. Claimant testified that he had never been told that he could not ask Mr. English questions about his conduct.

65. Claimant testified that he asked Mr. English about bomb building because he wanted to know why Mr. English would want to build bombs at work and around other employees. Claimant testified that he asked Mr. English about potentially killing another person because if it were true then he would not want to work with Mr. English. Claimant testified it was important to know the extent of Mr. English's activities because

it was therapeutic. He testified that he was acting on the advice of his counselor, who advised him that if he had to work with Mr. English, he should ask Mr. English why he had acted the way he did.

66. Claimant testified he did not feel that the conversations and interactions he had with Mr. English were inappropriate. Claimant testified that asking someone about potential criminal acts, or about violation of company policies, were not acts of aggression. Claimant testified that he was not fearful of losing his job due to the questions he asked Mr. English. He testified that because Mr. English "got away with" doing so many inappropriate things, he thought that he could ask Mr. English questions about things he had done without any fear of losing his job. He testified that he did not feel he was out of line. He testified that he asked the questions he did because he was trying to "better [him]self" and make things work.

67. Claimant testified that although he could have spoken with Mr. English without asking him questions about things that he had done, that Claimant had difficulty controlling his anxiety and his fear for his and his coworkers' safety. Claimant testified that nothing had ever been done to Mr. English despite all the dangerous conduct he had engaged in at work. Claimant testified that he felt unsafe and in danger at work. Claimant testified that he still feared for his safety and the safety of his family leading up to and following the hearing date.

68. Mr. Fletcher testified that he decided to terminate Claimant, and did so on May 4, 2015. Claimant testified that he received a phone call from Mr. Fletcher while he was working asking him to meet in the office. When Claimant asked what the meeting was about, Mr. Fletcher said he would rather talk about it in person. Claimant testified that on the way into Mr. Fletcher's office, he asked the head mechanic what he knew about the meeting, and that the mechanic had heard news that Employer was going to promote him to the shop job. Claimant testified that when he went to Mr. Fletcher's office, he was expecting to receive a promotion. Claimant testified that Mr. Fletcher instead informed him that he was terminated.

69. Mr. Fletcher testified that he did not give Claimant the reason for his termination during their meeting. He testified he had spoken with Employer's attorney, Victor Rouschar, prior to the termination meeting, and that the attorney advised Mr. Fletcher to not give a reason for Claimant's termination. The attorney advised Mr. Fletcher to tell Claimant that Employer was an at-will employer, and Claimant was an at-will employee, and that Employer "really didn't need a reason" to terminate Claimant.

70. Mr. Fletcher testified that Claimant specifically asked him why he was being fired, and Mr. Fletcher specifically told Claimant he did not have to give a reason. Mr. Fletcher testified that Claimant specifically asked whether his firing had anything to do with his complaints or his conversations about Mr. English, and that Mr. Fletcher declined to answer that question.

71. Claimant recorded parts of the termination meeting. *See* Claimant's Exhibits 9(d) – (e). Claimant's Exhibit 9(d) contains dialogue as follows:

Claimant: So, no reason why you're letting me go?

Mr. Fletcher: Like I said, I really don't need one, so.

Claimant: Not any of the discussions I've been having with English, has nothing to do with this?

Mr. Fletcher: I'm not going to comment.

72. Claimant testified that he asked for a reason in hopes that there was something he could do to save his job. Claimant testified that he was about to leave the office, but then realized he was still living in a house owned and provided by Employer. He returned to speak with Mr. Fletcher. Mr. Fletcher first gave Claimant two weeks to vacate the house, but agreed to allow Claimant and his family 30 days to vacate per Claimant's request. Mr. Fletcher did state that: "Technically, I don't need to." Claimant's Exhibit 9(e).

73. Claimant also asked if there was anything he could do to save his job, or to perform alternate work, per the dialogue on Claimant's Exhibit 9(e) as follows:

Claimant: Nothing I can do to try to make things right and keep my job? Possibly get in the shop for you, or anything like that?

Mr. Fletcher: Not right now.

Claimant: Ok.

Mr. Fletcher: [Inaudible]

Claimant: Well, I sure hate to lose my job. And I hate to leave this company. But I understand you guys have to make your choices.

74. Claimant testified that he said he hated to lose his job because the ditch rider position was the best job he had in his life. He testified that moving into the shop would be his "dream job," and that he would want to do it for the rest of his life.

75. Mr. Fletcher testified that prior to terminating Claimant he thought that Claimant was a good employee, and a very good mechanic. He testified he had "high hopes" to move Claimant into Employer's shop as the head mechanic.

76. Mr. Fletcher testified that a ditch rider setting off an explosion close to another employee could be a fireable offense. However, Mr. Fletcher acknowledged that Mr. English set off explosions many times, but was never terminated. Mr. Fletcher agreed that allowing some employees to act in a certain way, but not others, could result in a rift in the workplace.

77. Mr. Fletcher testified that Claimant's lack of communication with Mr. English was a fireable offense. He testified that setting off explosions close to employees could be a fireable offense, but that it depended on the "severity of the explosions." He testified that setting fires on purpose was not a fireable offense. When asked whether putting one's feces in a coworker's lunch was a fireable offense, Mr. Fletcher testified that "there [are] always pranks, and I have seen that happen before in different places." He testified that defecating into a coworker's lunch is not a fireable offense. He testified that defecating towards another employee in the field is not a fireable offense, but could be "if it continue[d]."

78. Mr. Fletcher agreed that course language was commonplace at Employer's facility. He testified that personal rivalries were also common. He testified that in the case of Claimant, his communication issues with Mr. English constituted a fireable offense, but that the conduct that Mr. English engaged in was not sufficient to warrant termination.

79. Mr. Fletcher testified that between his conversation with Claimant in September 2014 and Claimant's termination in May 2015, he did not give Claimant any other warnings about his communications with Mr. English. Mr. Fletcher testified in the months prior to Claimant's termination, there was a discussion about promoting Claimant to head mechanic.

80. Mr. Fletcher testified that he agreed that Claimant, on several occasions verbally and in writing, reported to Employer potentially illegal acts performed by Mr. English. Mr. Fletcher testified that Claimant asked for accommodation because of those complaints, but that the accommodation Claimant requested – not having contact with Mr. English – was denied.

81. Mr. Fletcher testified that several other employees made complaints about Mr. English when he was promoted to water master. Mr. Fletcher testified the list of employees included, but was not limited to, Nick Moore, Gary Cooper (an equipment boss), and Steve Martinez (former crew boss). Mr. Fletcher testified that no other employee that had complained about Mr. English had been terminated, but no employee other than Claimant complained in writing about Mr. English.

82. Mr. Fletcher testified that other employees who had complained about Mr. English were able to continue communicating with Mr. English at work, but that none of these employees requested to not have contact with Mr. English. Mr. Fletcher testified that Claimant was not able to deal with Mr. English as cleanly as those other employees. Mr. Fletcher testified that, in his practice as a manager, employees are not required to "just get over" dealing with coworkers' questionable or dangerous conduct. He did testify, however, that he wrote a letter regarding Claimant's termination indicating that Claimant was unable to "forgive and forget" with regard to Mr. English's conduct.

83. Claimant testified that he did not know why he was terminated at the time of his termination, and was not told why. Claimant testified he was surprised when he was terminated because he "did not see it coming at all." Claimant testified that, based

on earlier conversations with Mr. Fletcher, he believed that he was going to be promoted. Claimant testified that he did not receive notice of the reasons for his termination until he received a letter from Mr. Fletcher through his attorney, stating that he was fired for insubordination. Claimant testified he was never made aware of the reasons for his firing at any time before receiving the letter. Claimant testified that other than his meeting with managers in September 2014 about his communications with Mr. English, he was never given a verbal or written warning up to and including the date he was terminated. He testified that he did not believe that he was at fault for his termination because he was just asking Mr. English questions.

84. Considering the totality of the evidence, the ALJ credits Claimant's testimony and the testimony of the witnesses that Mr. English

- built and set off pipe bombs and acetylene bombs to explode when coworkers started company trucks,
- hid accelerants in areas where workers were using blow torches,
- shot coworkers with bee bees,
- used a potato gun to shoot golf balls and tubes of caulk at coworkers,
- added accelerants and explosives to warming fires used by coworkers,
- defecated into coworkers' lunches, and
- defecated above ditches where coworkers were working.

85. The ALJ credits Claimant's testimony that he did not use profanity in conversations with Mr. English and that he did not "flip off" Mr. English. The ALJ finds it more probably true that these events did not occur.

86. Considering the totality of the evidence, the ALJ finds that Claimant did not precipitated the employment termination by a volitional act, which he would reasonably expect to result in the loss of employment. This finding is supported by Employer's failure to warn or discipline Claimant for his conduct between September 2014 and May 4, 2015, and Employer's tolerance of far more egregious behavior from other employees.

87. The ALJ finds it more probably true than not that "insubordination" was a pretext for firing Claimant given that:

- The following were NOT fireable offenses: setting off explosions near coworkers, placing accelerants in areas where coworkers were using blowtorches, defecating into coworkers' lunches; but being unable to "forgive and forget" such activities was grounds for termination;

- No credible evidence was presented that would support a conclusion that Claimant was not satisfactorily performing all of his job duties;

- Terminating Claimant without warning and the delay in providing an explanation for such termination;

- Mr. Fletcher's testimony that he discussed promoting Claimant to head mechanic in the months before firing him, that Claimant was a good employee, a very good mechanic and that Mr. Fletcher had "high hopes" to move Claimant into Employer's shop as the head mechanic; and

- Mr. English's comments to Claimant about the size of his genitals causing his work injury when Claimant reported his February 14, 2015 admitted back injury.

88. Considering the totality of the evidence, the ALJ finds Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that he would reasonably expect to result in loss of employment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

To prove entitlement to temporary partial disability (TPD) benefits, a claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. ("the termination statutes"), provide that where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for his termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000).

An employee is "responsible" if the employee precipitated the employment termination by a volitional act, which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Given the situation at Employer's worksite and Claimant's reasonable expectation that his conduct would not result in the loss of employment, the ALJ finds and concludes that Claimant was not responsible for his termination.

As found, Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that he would reasonably expect to result in loss of employment. Therefore, the ALJ determines that Claimant has established that he is entitled to TTD benefits and TPD benefits for the periods set forth in the Stipulations and in the Order.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay Claimant TTD benefits based on an average weekly wage of $1,101.84 from for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015.

2. Respondents shall pay Claimant TPD benefits based on an average weekly wage of $1,101.84 for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 12, 2015

Kimberly B. Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that a left total hip arthroplasty is causally related to his March 5, 2015 work injury.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately twenty three years as a pickup and delivery driver with duties including loading and unloading freight and packages from a semi-tractor trailer at both commercial and residential locations.

2. On March 5, 2015 Claimant was so employed when he suffered an admitted work related injury to his left hip and low back. Although the claim was admitted, Respondents are of the position that the need for a left total hip arthroplasty is related to Claimant's pre-existing osteoarthritis and not due to any hip strain or hip injury suffered on March 5, 2015.

3. Prior to March 5, 2015 Claimant performed his job duties without restrictions. Claimant was also active riding his bicycle on a regular basis and snowshoeing several times a year. Claimant on occasion rode his bicycle 21 miles each way to work. Claimant had regular gout flare-ups where his activities would be limited and he would miss work during the period of flare-up. Prior to March 5, 2015 Claimant had no reported pain complaints in his left hip.

4. On March 5, 2015 Claimant was lifting the trailer door on his truck while delivering products to the Larimer County Jail in Fort Collins, Colorado. Claimant used his left hand to reach across his body, bent down, and pulled up on the trailer door. The door stuck, Claimant pulled harder, and felt his left hip pop. Claimant had immediate pain in his left hip and left lower back.

5. Claimant continued to work the remainder of his shift that day and went home that evening.

6. The next day, March 6, 2015 Claimant worked his regular shift. Claimant felt pain in his left hip but hoped it would go away over the weekend with rest. At the end of his shift, Claimant reported the injury to Employer.

7. On March 6, 2015 Claimant filled out an Employee Notice of Injury form indicating that the injury occurred on March 5, 2015 in the a.m. He indicated on the form that he did not report the injury immediately because it felt like a strain. He reported the injury occurred in route to Fort Collins when he was opening the trailer door

and that he injured his left hip and left lower back. Claimant reported that the trailer door was hard to open when describing other conditions/hazards that contributed to the injury. Claimant also reported he did not require medical treatment. *See* Exhibit 9.

8. On March 6, 2015 Claimant's supervisor, Jeremy Thomas, filled out a Supervisor's Injury Investigation Report. Unlike the report Claimant filled out on the same day, Mr. Thomas indicated that Claimant reported the specific site where the injury occurred was unknown and that Claimant reported no specific incident that could be identified as causing the pain. Mr. Thomas noted that Claimant noticed charlie-horse pain in the middle of the day. Mr. Thomas also noted that Claimant reported having lower back pain for years that could possibly be related. *See* Exhibit D.

9. Claimant hoped that with rest over the weekend his pain would get better. On Monday, March 9, 2015 Claimant's pain continued and he sought medical treatment.

10. Claimant was evaluated on March 9, 2015 by Kevin Page, PA. Claimant reported that on March 5, 2015 he twisted his low back and hip area after lifting the overhead door of his semi. Claimant reported developing pain in his left lower back and left hip. Claimant reported a history of low back pain for roughly the last three years and pre-existing right-sided sciatica. PA Page noted Claimant had a non-antalgic gait, tenderness over the greater trochanter and lateral hip, but that he had 5/5 hip motion and strength. PA Page noted no signs of trauma, but noted hip pain on the left side with deep tendon reflexes and straight leg raises. PA Page assessed lower lumbar strain and hip strain. He anticipated maximum medical improvement in three weeks. *See* Exhibit 4.

11. On March 11, 2015 Claimant was evaluated by Jonathan Bloch, D.O. Dr. Bloch noted that Claimant was doing about the same and had left hip pain and left low back pain. Dr. Bloch noted that flexion of Claimant's left hip was limited due to pain. He assessed lower lumbar strain and hip strain. He indicated Claimant would start physical therapy. *See* Exhibit 4.

12. On March 18, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported overall that he was feeling better but Dr. Bloch noted on examination it appeared Claimant was walking worse. Dr. Bloch noted that Trendelenburg was positive but could be subjective due to effort. Dr. Bloch noted Claimant was a little bit tender to palpation at the lateral trochanteric bursa and that the straight leg raise was difficult secondary to the pain behavior Claimant displayed. He continued to assess lower lumbar strain and hip strain. Dr. Bloch opined that the objective examination was not necessarily physiologic and supportive of the need for narcotic pain medications. Dr. Bloch noted that just to be sure there was nothing more going on he would order an MRI of the hip to look for any internal pathology or derangement. *See* Exhibit 4.

13. On March 24, 2015 Claimant underwent an MRI of his left hip without contrast that was interpreted by Todd Greenberg, M.D. Dr. Greenberg found asymmetric severe left hip osteoarthropathy. He found cystic elements, synovitis,

capsulitis, and large proliferative spurs. He noted the features may represent isolated osteoarthropathy with femoroacetabular impingement. However, given the degree of swelling, Dr. Greenberg opined that strong consideration should be given to a monoarticular inflammatory arthropathy including an atypical presentation of rheumatoid arthritis, gout, or CPPD arthropathy. He concluded that Claimant had asymmetric severe left hip osteoarthropathy and that the underlying features were compatible with femoroacetabular impingement but concluded that a mixed proliferative and inflammatory arthropathy may be considered. *See* Exhibit 5.

14. On March 31, 2015 Claimant was evaluated by PA Page. PA Page reviewed the MRI results. PA Page noted that on examination Clamant had tenderness over the greater trochanter and tenderness to axial loading of his left hip and internal and external rotation with significant pain behaviors. He assessed lower lumbar strain, hip strain, and severe left hip arthritis. PA Page noted he would refer Claimant to Dr. White, hip specialist, and opined that Claimant's hip arthritis obviously had a pre-existing component to it but noted that Claimant reported that he was not having this type of pain or symptomatology prior to the fall. *See* Exhibit 4.

15. On April 15, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported he was not doing any better. Dr. Bloch noted that Claimant's gait was minimally without antalgia but that Claimant had a gross limp that came from the left hip. Dr. Bloch noted tenderness to palpation at the ASOS and acetabular and greater trochanteric regions. He noted range of motion was limited due to pain and stiffness. Dr. Bloch noted the recent MRI results. Dr. Bloch opined that causation of an ongoing basis was questionable. Dr. Bloch opined that the mechanism of injury of lifting the truck gate really did not seem to match the pathology identified on MRI, and opined that it was most likely that the MRI findings and subjective complaints were more consistent with chronic arthritic conditions, as well as chronic low back pain, than an actually injury that occurred on March 5, 2015 which seemed very mild in comparison to what was going on anatomically and objectively. *See* Exhibit E.

16. On April 16, 2015 Claimant was evaluated by Shawn Karns, PA. Claimant reported having issues with his left hip since March 5, 2015 when he was opening a trailer door and felt a pop in his left hip. Claimant reported since then he has had pain in the groin and over the lateral aspect of his hip that was gradually worsening. PA Karns noted limited left hip flexion with significant discomfort on rotational motion to the hip. PA Karns noted that x-rays taken showed severe degenerative changes to the left hip with bone-on-bone degenerative osteoarthritis and significant subchondral cystic change. PA Karns opined that at this point, due to the extent of Claimant's degenerative changes and based on Claimant's limitations, he would likely be a candidate for total hip replacement moving forward. PA Karns noted that Claimant wanted to move forward with surgical intervention and PA Karns noted he would review this with Dr. White and would recommend that Claimant make an appointment with Dr. White for further evaluation, but that Claimant could go ahead with scheduling for a total hip. Neither PA Karns nor Dr. White provided an opinion on the mechanism of injury or a causation analysis. *See* Exhibit 6.

17. On May 5, 2015 Claimant was evaluated by Edward Parks, M.D. Claimant reported that he was lifting a trailer door on March 5, 2015 when he sustained an acute injury to his left hip. Claimant reported having no prior pain. Dr. Parks reviewed the x-rays performed on April 16, 2015 and noted that Claimant had a complete collapse of the femoral head with bone on bone changes. Dr. Parks gave the impression of posttraumatic arthritis left hip and noted in plans and recommendations that he believed the best surgical solution for Claimant would be a hip replacement for this work related injury. *See* Exhibit 6.

18. On May 11, 2015 William Ciccone, M.D. performed a Rule 16 – Medical Record Review. Dr. Ciccone opined that Claimant suffered a minor sprain/strain to his low back and hip region while lifting the overhead door on the trailer. Dr. Ciccone opined that Claimant suffered no significant twisting mechanism and did not fall or suffer any type of impact to the hip or back. Dr. Ciccone opined that it was unlikely that the minor injury at work significantly aggravated or accelerated the chronic degenerative process in the left hip and noted that the hip arthrogram revealed no acute injury, labral tear, or loose body. He further opined that the collapse of the femoral head noted on radiographs can only be attributed to Claimant's severe arthritis as there was no impact in the work injury. Dr. Ciccone noted that he agreed with Dr. Bloch that the work relatedness was questionable and opined that Claimant's symptoms were consistent with Claimant's severe hip arthritis and that there was no acute work related injury. Dr. Ciccone opined that Claimant's pain was related to the natural history of the arthritic process and not the work injury and opined that the hip replacement should not be performed under workers' compensation. *See* Exhibit 7.

19. On May 27, 2015 Claimant was evaluated by Dr. Bloch. Dr. Bloch noted that Insurer had denied the total hip replacement. Dr. Bloch opined that his examination findings were consistent with chronic osteoarthritis of the hip and not with an acute injury, that the diagnostic studies were consistent with chronic arthritis and not an acute injury, and that the diagnosis was consistent with chronic arthritis and not an acute injury. Dr. Bloch opined that there was no significant mechanism of injury with bending over to pull up a trailer door. Dr. Bloch placed Claimant at maximum medical improvement (MMI) and released him from care with no work restrictions from a workers' compensation point of view. *See* Exhibit E.

20. May 29, 2015 Claimant was evaluated by Greg Smith, D.O. Dr. Smith noted he was asked to determine if the case had been put at MMI too soon. Dr. Smith reviewed the medical records and noted he did not have much difficulty with Dr. Ciccone's opinions. However, Dr. Smith thought that Claimant needed to undergo a functional capacity examination before MMI, and he also noted that other doctors believed the injury was work related. Dr. Smith opined that he would like to get a final review from a third hip specialist before the case was fully closed. Dr. Smith opined that opening a trailer door most likely did not cause a significant injury, however, he felt it reasonable and necessary for an additional evaluation and a functional capacity examination before the case was closed. *See* Exhibit E.

21. On June 17, 2015 counsel for Claimant submitted a letter to Dr. Smith indicating that it was his hope that Dr. Smith learned in his training for level II that if an individual is asymptomatic and becomes symptomatic from events at work, the need for care to return them to baseline is the responsibility of the workers' compensation carrier. Counsel for Claimant attached a recent order from an ALJ on the issue of pre-existing asymptomatic conditions. *See* Exhibit J.

22. On June 29, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith noted that Claimant had an upcoming hearing and opined that in his level II training he was taught that in Colorado if an individual is asymptomatic and becomes symptomatic from events at work then the need for care to return to baseline is the responsibility of the workers' compensation carrier. Dr. Smith opined that Claimant was previously asymptomatic. Dr. Smith noted that Claimant had been seen by two surgeons who both felt that Claimant had a work-related injury. Dr. Smith noted, if need be, that they would send Claimant to the University of Colorado for a third opinion in that regard. On examination Dr. Smith noted pain with palpation at the trochanteric margin with some swelling and mild warmth. Dr. Smith noted difficulty with abduction or internal or external rotation of the left hip and decreased muscle strength. Dr. Smith assessed left hip fracture, noted by MRI, ostoarthropathy with femoral acetabular impingement including dysplasia of the femoral head and neck junction, retroversion, and small pseudocyst representing a sealed paralabral cyst. Dr. Smith opined that Claimant qualified to undergo surgical repair as a workers' compensation injury. *See* Exhibit 4.

23. On August 10, 2015 Dr. Ciccone provided a supplemental report that included medical records he did not previously have at the time of his prior review. Dr. Ciccone continued to opine that lifting a trailer door is not consistent with a mechanism of injury that one would expect to cause a significant hip injury requiring surgery. He continued to opine that Claimant's symptoms and restrictions were related to his hip arthritis which was not work related. He opined that it is not uncommon for symptomatic hip arthritis to present with low back and buttock pain and noted that Claimant had been on chronic pain medications for three years for his left sided low back pain. *See* Exhibit H.

24. On August 24, 2015 Claimant was evaluated by Dr. Smith. Claimant reported left hip pain and left low back pain. Dr. Smith reiterated that Claimant reported he had no pain before his work injury. Dr. Smith opined that Claimant was biking and walking and had no problems before the work injury. Dr. Smith noted pre-existing arthritis but opined that Claimant had no pain before the injury and that after the injury the arthritis flared. Dr. Smith noted that Claimant still had a significant amount of pain and that Claimant most likely had some labral damage as well. He assessed low back pain with left hip pathology and strain. *See* Exhibit 4.

Prior medical history

25. On December 27, 2007 Claimant was evaluated at Kaiser Permanente by Kelly Jeong, M.D. Claimant reported right knee pain for eight days that felt like a gout attack. Claimant reported never having a gout attack in his knee and that he usually got them in his toes. It was noted that Claimant had approximately 8-10 gout attacks per year. *See* Exhibit I.

26. On August 5, 2008 Claimant underwent an MRI of his lumbar spine performed at Kaiser Permanente. The MRI showed bilateral lysis at L5 with anterior listehsis of L5 on S1 resulting in severe neural foraminal compromise in a position to be affecting the L5 nerve roots bilaterally. It was noted that disc material compresses the ventral thecal sac and displaces the left6 S1 nerve root posteriorly. It was also noted that asymmetric bulging disc at L4-5 worse off to the left side was compressing the left L5 root axilla. *See* Exhibit I.

27. On August 6, 2008 Dr. Jeong contacted Claimant and advised him of the significant abnormal lumbar spine MRI as the likely cause of Claimant's left leg pain. Dr. Jeong referred Claimant to neurosurgery for an evaluation. *See* Exhibit I.

28. Claimant was evaluated on September 26, 2008 by Deborah Nuccio, PA. Claimant reported five months of lower back pain and lower left extremity pain. Claimant reported that sometimes walking exacerbated his symptoms and at other times he could walk several miles without problems. PA Nuccio noted the option for surgery or injections and Claimant reported he did not want to consider either. *See* Exhibit I.

29. On January 30, 2009 Claimant spoke with Gayle Hutchinson, RN. Claimant reported that he would like to pursue injections as previously discussed with neurosurgery in September and reported he was having a lot of pain and felt he needed to do something about it. *See* Exhibit I.

30. On February 19, 2009 Claimant underwent an epidural steroid injection at L4/5 performed by Sandra Fritz, M.D. *See* Exhibit I.

31. On June 1, 2009 Claimant was evaluated by Dr. Fritz. Claimant reported 80% pain relief for two weeks from the last epidural steroid injection. Dr. Fritz performed another injection at L4/5. *See* Exhibit I.

32. On January 18, 2012 Claimant was evaluated by Dr. Jeong. Claimant reported one month of a gout attack in his left knee. Dr. Jeong noted Claimant had a history of gout attacks in his left knee, about 3-4 per year on average. Dr. Jeong noted Claimant was limping *See* Exhibit I.

33. During 2013 Claimant was evaluate a number of times for knee pain, gout in his knees, and osteoarthritis of his knees. *See* Exhibit I.

34. On May 29, 2014 Claimant was evaluated by Tyson Hagen, M.D. Dr. Hagen noted the history of gout and osteoarthritis. Claimant reported pain in his hands and knuckles and that he had pain with gripping and driving. Claimant also reported knee pain for 5 to 6 years and osteoarthritis in both knees. Claimant reported neck pain and stiffness for a few months, and diffuse muscle aches at times. Claimant reported he usually got a gout flare once per month. Claimant also reported radiculopathy pain in the left leg and Dr. Hagen noted he was chronically on gabapentin. Dr. Hagen performed an examination and noted pain in Claimant's left hip with flexion. Dr. Hagen also noted in the right hip no groin pain and full range of motion. *See* Exhibit I.

35. Dr. Hagen opined that some of Claimant's joint pain could be chronic gout. Dr. Hagen also noted the possibility that Claimant had seronegative RA but noted that the MRI of Claimant's knee in the past did not show changes consistent with rheumatoid arthritis. Dr. Hagen opined that chronic gout can cause RA like symptoms with symmetric inflammation and pain in multiple joints that is not as severe as the original gout flares. *See* Exhibit I.

36. On September 16, 2014 Claimant emailed Dr. Jeong. Claimant reported experiencing severe to debilitating joint pain that was starting to interfere with his job to the point that he had to miss 1-2 days per week at work. Claimant asked Dr. Jeong to confer with Dr. Hagen and get back to him with a treatment plan and to schedule an appointment. *See* Exhibit I.

37. On September 17, 2014 Claimant emailed Dr. Hagen. Claimant reported severe joint pain that was to the point that he was suffering debilitating symptoms and that it was so bad he had to miss 2-3 days per week at work. Claimant reported that he hurt from the inside out and literally couldn't move. Claimant asked that Dr. Hagen contact him to talk and schedule an appointment. *See* Exhibit I.

38. On September 30, 2014 Claimant emailed Dr. Hagen. Claimant reported that he saw his test results but felt like what he had at the time of the test was not gout. Claimant reported that he could not function at his job and that his pain was making daily life very uncomfortable. *See* Exhibit I.

39. During this period of time in September Claimant was taking time off work due to his knee joint and gout pain. Once this pain resolved, Claimant did not require medical attention and did not have any problems until his work injury in March of 2015.

40. Claimant returned to his regular level of activity after the September 2014 gout flare and again began riding bicycles, snow shoeing, and being active.

41. Prior to March 5, 2015 Claimant did not seek medical treatment for his left hip.

42. Claimant's testimony, overall, is found credible and persuasive. Claimant did not have daily or constant hip pain or hip symptoms prior to the March 5, 2015 work

injury. Although Claimant had a history of severe gout attacks/pain as well as left lower back pain and radiculopathy, Claimant remained active before and after gout attacks. After March 5, 2015 Claimant's activity level severely decreased due to his persistent left hip pain that was not present prior to March 5, 2015.

43. The opinions of Dr. Bloch and Dr. Ciccone have been considered and rejected. Dr. Bloch bases his opinion on a mechanism of injury that involved no twisting or force. As found, the injury involved twisting across Claimant's body and significant pulling when the trailer door stuck. Dr. Ciccone also initially based his opinion on a mechanism of injury that involved no twisting or force. Although he testified that if the injury occurred the way Claimant described, it would not change his opinion this is not found persuasive. The medical records also do not support Dr. Ciccone's opinion that Claimant's left hip was likely symptomatic before the March 5, 2015 injury nor does Claimant's credible testimony support the opinion that his left hip was symptomatic.

44. The opinions of Dr. Smith and Dr. Parks are found persuasive. The ALJ agrees and the medical records support that Claimant experienced no left hip symptoms or left hip pain prior to the work injury. As the injury caused immediate and significant limitations and pain in Claimant's left hip that were not present prior to the injury, it aggravated Claimant's underlying and pre-existing osteoarthritis and accelerated Claimant's need for treatment and need for a left total hip replacement.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to show, more likely than not, that the left total hip replacement is reasonable and necessary and causally related to his work injury. Although the MRI reflects that Claimant had pre-existing and significant osteoarthritis of his left hip, the work injury on March 5, 2015 aggravated Claimant's underlying osteoarthritis and accelerated his need for a left total hip replacement. Prior to March 5, 2015 Claimant was able to work full duty without restrictions, Claimant had no pain complaints specific to his left hip, and Claimant had not sought any medical treatment specific to his left hip. Claimant also was able to maintain a fairly high activity level prior to March 5, 2015. Although the records reflect at one medical appointment approximately one year prior to his work injury that he had pain with flexion in his left

hip, Claimant has met his burden to show, more likely than not, that he did not have significant limitations or pain in his left hip prior to March 5, 2014. The medical records reflect extensive treatment for gout, left knee pain/gout, and low back pain. Based on his history, the ALJ infers that Claimant is not one to shy away from medical treatment when he experiences pain. However, the records show that Claimant did not seek medical treatment at all for left hip pain complaints prior to his work injury. This supports Claimant's credible testimony that prior to the work injury, he was not suffering from left hip pain.

Claimant is also credible in explaining that the mechanism of injury involved twisting across his body while pulling up on a stuck trailer door. Dr. Bloch and Dr. Ciccone had an incorrect mechanism of injury and their opinions, in part, were based on the incorrect mechanism of injury. Although Dr. Ciccone testified that even if the door stuck and Claimant twisted, it still would not have caused the need for a left total hip replacement, the ALJ rejects this opinion. The ALJ concludes that the need for a left total hip replacement is due to Claimant's underlying severe osteoarthritis and due to his work injury which significantly aggravated his asymptomatic underlying osteoarthritis and accelerated his need for treatment. Although Claimant may have needed a left total hip replacement in the future based on his severe osteoarthritis, Claimant has established that he was asymptomatic in his left hip until the work injury on March 5, 2015. Therefore, the ALJ concludes that Claimant has met his burden to show, more likely than not, that the need for a left total hip replacement was aggravated and accelerated by his work injury and that the treatment is causally related to his work injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that a left total hip arthroplasty is causally related to his March 5, 2015 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 9, 2015 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the medical treatment she received to her left knee including the surgery performed by Dr. Kopich was reasonable and necessary to cure and relieve the claimant from the effects of her admitted work injury?

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FINDINGS OF FACT

1. Claimant sustained an admitted work injury on February 27, 2015 when she slipped and fell in the parking lot of her employer. Respondent admitted for the injury and authorized medical treatment to claimant's left shoulder and low back.

2. Claimant was initially evaluated following her work injury by Mr. Zimmerman, a physician's assistant with Grand River Health and Safety, on February 27, 2015. Claimant noted she slipped on some ice and fell and complained of pain in her low back and left shoulder. Mr. Zimmerman diagnosed claimant with a low back strain and left shoulder pain and recommended conservative treatment including ice and ibuprofen.

3. Claimant returned to Mr. Zimmerman on March 9, 2015 and continued to complain of pain in her low back. Mr. Zimmerman recommended claimant undergo a course of physical therapy and referred claimant for an x-ray of the lumbar spine.

4. Claimant reported to her physical therapist on March 19, 2015 that her leg kept going to sleep and giving out on her. Claimant reported that her symptoms were originally in her back, but that about a week after her injury, her knee began bothering her more.

5. On March 31, 2015, claimant reported that the physical therapy resolved and was no longer a problem, but noted she was now experiencing pain in the medial aspect of her left knee. The medical records noted some concern for a possible meniscus tear and claimant was referred for a magnetic resonance image ("MRI") of her left knee.

6. Respondent filed a General Admission of Liability on April 6, 2015 admitting for a closed period of temporary partial disability ("TPD") benefits.

7. The MRI was performed on April 10, 2015 and showed a non-displaced subchondral fracture involving the medial tibial plateau and a complex tear involving the medial meniscus posterior horn with both vertical and horizontal components.

8. Claimant was examined by Dr. Kopich on April 21, 2015 with regard to her left knee. Dr. Kopich diagnosed claimant with an acute medial meniscus tear. Dr. Kopich noted that claimant had failed conservative treatment and claimant wished to have an arthroscopy like she had on her other knee. Claimant underwent surgery under the auspices of Dr. Kopich on April 27, 2015. Dr. Kopich performed a diagnostic arthroscopy and partial medial menisectomy.

9. Dr. O'Brien performed a medical records review independent medical evaluation ("IME") on July 13, 2015. Dr. O'Brien noted in his report that as a result of claimant's slip and fall, she sustained injuries that were limited to a minor lumbosacral strain/sprain and a minor left shoulder strain/sprain. Dr. O'Brien noted that claimant's MRI showed a meniscal tear but opined that there was no evidence of an acute tear. Dr. O'Brien noted that claimant's medical records did not document claimant reporting knee pain in her initial evaluations. Dr. O'Brien opined that if claimant had sustained a knee injury on February 27, 2015, claimant would have been able to detect pain at that site. Dr. O'Brien reviewed Dr. Kopich's operative report and opined that the report documented the degenerative nature of claimant's medical meniscus tear and the presence of grade IV chondromalacia of the medial femoral condyle. Dr. O'Brien ultimately opined that claimant's knee condition was not causally related to the work incident of February 27, 2015.

10. No testimony was presented at hearing in this matter.

11. The ALJ finds the report of Dr. O'Brien to be credible and persuasive and finds that claimant has failed to establish by a preponderance of the evidence that her knee condition is causally related to her admitted February 27, 2015 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that her medical treatment to her left knee are causally related to her admitted February 27, 2015 work injury.

ORDER

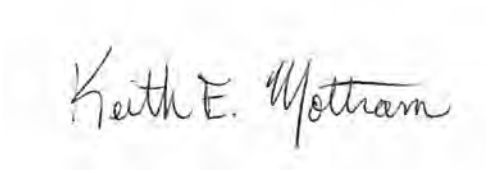
It is therefore ordered that:

1. Claimant has failed to establish that the medical treatment to her left knee is reasonable, necessary or related to her admitted February 27, 2015 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S.- For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 23, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Respondent has proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on March 21, 2015 during the course and scope of his employment with Employer.

PROCEDURAL MATTER

During Claimant's case-in-chief, he did not present any evidence as to whether Employer carried Workers' Compensation insurance on March 21, 2015. The Administrative Law Judge thus granted Respondent's motion for directed verdict and dismissed Claimant's request for a 50% increase in penalties pursuant to §8-43-408(1), C.R.S. for Employer's failure to carry Workers' Compensation insurance on March 21, 2015.

FINDINGS OF FACT

1. Employer is a small night club that has provided alcoholic beverages to its clientele for over 20 years. Joe King and Terrie Baker own the business. Employer retains disc jockeys (DJs) to provide music to patrons on Friday, Saturday and Sunday nights. In approximately 1990 Claimant began providing DJ services for Employer on Friday nights and continued to perform as a DJ through March 21, 2015. Employer did not provide any training to Claimant.

2. Claimant also worked full-time as a baggage handler for Frontier Airlines. His job involved fueling airplanes, uploading and downloading aircraft and taxi duties. Claimant worked 32 hours each week and earned $10.00 per hour.

3. In addition to working his full-time job as a baggage handler and performing as a DJ for Employer, Claimant also provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant's e-mail address is BKExpress@hotmail.com. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals and was "operating a business as a DJ under the name DJ Express." Mr. King testified that he informed several individuals of Claimant's DJ services and Claimant accepted the work. Claimant also testified that he would mix music CDs and give them to individuals after writing "BK Expressions" on the CDs.

4. For approximately the past 10 years Claimant has performed DJ services for Employer on Friday nights. DJ Chazz provided DJ services for Employer on Saturday nights and a third DJ worked on Sunday nights. Each DJ was required to bring his own music to Employer to play for the customers because Employer had no music of its own.

5. Employer initially kept a "mixer" behind the DJ booth for use by the DJs to play their music. However, approximately seven years ago the mixer broke or became obsolete and was not replaced. Instead, Employer informed the DJs that they would have to utilize their own equipment to perform their DJ services. Claimant testified that BK Express and DJ Chazz jointly purchased a mixer that they "donated" to Employer for use by the DJs. The DJs kept the mixer behind the DJ stand for use on Friday or Saturday nights. However, if a DJ had an independent "gig" on a different night, the DJ would take the mixer from Employer and use it on the DJ's independent gig. Although the mixer may have resided at Employer for use by the DJs while performing their services for Employer, it remained the property of BK Express and DJ Chazz. However, approximately four years ago the donated mixer broke, and Claimant provided his own mixer whenever he worked for Employer. Claimant and all other DJs also were required to purchase their own music to play because Employer did not have any music.

6. Claimant was responsible for deciding what music to purchase for use in his DJ business, and for determining the "mix" of that music in order to entertain Employer's customers. Employer did not oversee the actual DJ services or instruct Claimant as to how to perform his DJ services. Each DJ was responsible for making his own independent decision as to appropriate music. Employer did not control the music selection other than to make sure customers were happy and not complaining. Claimant also acknowledged that Employer did not prohibit him from drinking alcohol while performing his DJ services. In contrast, Employer's bartenders, serving staff and all other workers were prohibited from drinking alcohol during working hours.

7. Claimant received a fixed contract rate of $135.00 each night he performed DJ services for Employer. Mr. King testified that he paid all DJs in cash on Mondays. Claimant's DJ performance lasted from 9:00 p.m. until closing time or approximately 2:00 a.m. Employer did not require Claimant to arrive at a specific time to set up his equipment. Whether Claimant arrived at 8:15 p.m. or 8:45 p.m. and left at 2:30 a.m. or 3:00 a.m. he received $135.00 for his services.

8. Employer did not require Claimant to perform DJ services on Friday nights. Instead, Claimant was free to accept other DJ "gigs" on a Friday night if the other gig paid more money than Employer. On those occasions when Claimant performed DJ services elsewhere, both Employer and Claimant would attempt to find another DJ. On a few occasions Claimant sent a DJ previously unknown to Employer to perform DJ services.

9. From 1989 through approximately 2008 Employer hired a janitor to clean and stock the bar each morning before opening. Sometime in approximately 2008 Employer could no longer afford the janitor. When Mr. King announced to the workers

that he could not afford the janitor, the workers decided that they could split the duties amongst themselves at the end of each night. Over time the DJs began mopping the dance floor, the bar area and the bathrooms at the end of the night. Mr. King and Ms. Baker both testified that mopping was a voluntary activity that DJs were not required to perform. In fact, Mr. King and Ms. Baker remarked that Claimant did not mop at the end of every shift because he sometimes left immediately after the end of his DJ performance.

10. On August 29, 2011 or approximately three years after Claimant began the additional tasks of mopping at the end of his DJ performance, Claimant signed a document stating that he was a contract laborer for Employer. The document specified that Claimant would be responsible for all Federal, State and unemployment taxes. The document reflects the intent of the parties to memorialize Claimant's status as an independent contractor even after he voluntarily assumed the additional tasks of mopping at the end of his DJ performance.

11. On March 21, 2015 Claimant was completing his DJ duties and announced that the lounge was closing. He directed three patrons that were in front of his DJ booth to proceed to the main bar area with all bottles and glasses because it was closing time. As Claimant was putting away his DJ equipment he noticed one of the patrons coming across the dance floor stating something that he could not understand. Claimant came out from behind the DJ booth to determine what the patron wanted. The patron took a swing at Claimant and an altercation ensued.

12. As a result of the altercation Claimant suffered a fractured left ankle. He received emergency treatment at the University of Colorado Hospital. Claimant ultimately underwent left ankle surgery to repair his fracture.

13. Ms. Baker testified that she was present at the lounge on the night of the altercation between Claimant and the unidentified assailant. Ms. Baker testified that after Claimant and the customer were separated, the patron shouted that Claimant owed him money and quickly left the lounge. Immediately afterwards, Ms. Baker went to Claimant to assist him and Claimant stated "Wow, I owe him money." Ms. Baker explained that neither Claimant nor any other individuals made any additional statements regarding the fight.

14. Respondent has proven that it is more probably true than not that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Respondent has demonstrated that Claimant was free from direction and control in the services he performed, both under the contract for performance of service and in fact. Based on the evidence presented at hearing, Claimant was not required to work exclusively for Employer. In addition to working his full-time job as a baggage handler and performing as a DJ for Employer, Claimant also provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals. Furthermore, on August 29, 2011 Claimant signed

a document stating that he was a contract laborer for Employer. The document specified that Claimant would be responsible for all Federal, State and unemployment taxes. The document reflects the intent of the parties to memorialize Claimant's status as an independent contractor.

15. Employer did not establish a quality standard for Claimant's DJ performances. Claimant was responsible for deciding music to purchase, use and "mix" in order to entertain Employer's customers. Employer did not oversee the actual DJ services or instruct Claimant as to how to perform his DJ services. Third, Employer did not pay Claimant a salary or hourly rate but instead paid Claimant $135.00 in cash for each DJ performances. Employer also did not provide training to Claimant about DJ services. Claimant had significant DJ experience and did not require supervision of his DJ services. Moreover, Employer did not provide tools or benefits to Claimant. Claimant has provided his own mixer for approximately four years whenever he works for Employer. Claimant and all other DJs also were required to purchase their own music to play because Employer did not have any music. Employer did not provide tools or benefits to facilitate Claimant's DJ performance. Finally, Employer did not combine its business operations with BK Expressions or Claimant.

16. Respondent has demonstrated that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Claimant provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant's e-mail address is BKExpress@hotmail.com. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals and was "operating a business as a DJ under the name DJ Express." Mr. King testified that he informed several individuals of Claimant's DJ services and Claimant accepted the work. Claimant also testified that he would mix music CDs and give them to individuals after writing "BK Expressions" on the CDs. Thus, Claimant was customarily engaged in the independent trade of a DJ and received payment for DJ services from multiple individuals and business in addition to the fixed contract rate he received from Employer.

17. Claimant's additional task of mopping at the end of a DJ performance did not change the fundamental nature of the services he performed for Employer. Claimant spent a fraction of his time performing janitorial duties and the vast majority of his time performing DJ services for Employer. Claimant was engaged in an independent business and was not wholly dependent on Employer for his income. The nature of the working relationship between Claimant and Employer reflects that Claimant was customarily engaged in the independent trade of a DJ while working for Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The second prong of §8-40-202(2)(a), C.R.S. as to whether an claimant should be deemed an employee is whether the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011). Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of

whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. As found, Respondent has proven that it is more probably true than not that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Respondent has demonstrated that Claimant was free from direction and control in the services he performed, both under the contract for performance of service and in fact. Based on the evidence presented at hearing, Claimant was not required to work exclusively for Employer. In addition to working his full-time job as a baggage handler and performing as a DJ for Employer, Claimant also provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals. Furthermore, on August 29, 2011 Claimant signed a document stating that he was a contract laborer for Employer. The document specified that Claimant would be responsible for all Federal, State and unemployment taxes. The document reflects the intent of the parties to memorialize Claimant's status as an independent contractor.

7. As found, Employer did not establish a quality standard for Claimant's DJ performances. Claimant was responsible for deciding music to purchase, use and "mix" in order to entertain Employer's customers. Employer did not oversee the actual DJ services or instruct Claimant as to how to perform his DJ services. Third, Employer did not pay Claimant a salary or hourly rate but instead paid Claimant $135.00 in cash for each DJ performances. Employer also did not provide training to Claimant about DJ services. Claimant had significant DJ experience and did not require supervision of his DJ services. Moreover, Employer did not provide tools or benefits to Claimant. Claimant has provided his own mixer for approximately four years whenever he works for Employer. Claimant and all other DJs also were required to purchase their own music to play because Employer did not have any music. Employer did not provide tools or benefits to facilitate Claimant's DJ performance. Finally, Employer did not combine its business operations with BK Expressions or Claimant.

8. As found, Respondent has demonstrated that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Claimant provided DJ services for pay to other individuals and

businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant's e-mail address is BKExpress@hotmail.com. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals and was "operating a business as a DJ under the name DJ Express." Mr. King testified that he informed several individuals of Claimant's DJ services and Claimant accepted the work. Claimant also testified that he would mix music CDs and give them to individuals after writing "BK Expressions" on the CDs. Thus, Claimant was customarily engaged in the independent trade of a DJ and received payment for DJ services from multiple individuals and business in addition to the fixed contract rate he received from Employer.

9. As found, Claimant's additional task of mopping at the end of a DJ performance did not change the fundamental nature of the services he performed for Employer. Claimant spent a fraction of his time performing janitorial duties and the vast majority of his time performing DJ services for Employer. Claimant was engaged in an independent business and was not wholly dependent on Employer for his income. The nature of the working relationship between Claimant and Employer reflects that Claimant was customarily engaged in the independent trade of a DJ while working for Employer. *See Industrial Claim Appeals Office v. Softrock Geological Services, Inc*., 325 P.3d 560 (Colo. 2015) (whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

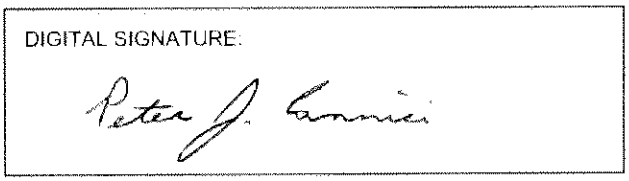
1. Claimant worked for Employer as an independent contractor. His request for Workers' Compensation benefits is thus denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to*

Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 12, 2015.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

I. Whether Claimant was terminated for cause on May 15, 2015, and if so;

II. Whether Claimant's Temporary Total Disability Benefits should be terminated.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was injured on April 6, 2015 during the course and scope of her employment while performing duties arising out of her employment. Claimant slipped and fell on ice in the break-room. She timely reported the injury to her supervisor. Respondents filed a General Admission of Liability (GAL) on April 17, 2015. The GAL admitted for TTD beginning April 7, 2015 at a rate of $329.51 per week based on an Average Weekly Wage (AWW) of $494.24.

2. Claimant sought treatment for her injuries on April 7, 2015 at CCOM. She was diagnosed with a sprain of the lumbar spine, sprains to the MCL of both knees, and a strain of the left rotator cuff. Dr. Johnson provided that Claimant was to remain off work at least until her next appointment on April 9. The next appointment actually occurred on April 13, 2015 with Joseph Mullen, PA-C. Claimant was to continue to remain off of work until April 19, with a reassessment on April 20.

3. Mr. Mullen reexamined Claimant on April 23, 2015. Mr. Mullen released Claimant to work with modified restrictions of requiring a change of position from sitting to standing 30 minutes per hour, no lifting more than 10 pounds, and no working more than 8 hours per day as Claimant's typical shifts were 10 hours. Claimant's restrictions as of April 27, 2015 were the same as April 23, aside from Mr. Mullen no longer mentioning the 8 hour restriction.

4. The claims adjuster for Travelers sent a letter to Dr. Johnson on April 27, 2015. The letter inquired as to whether Dr. Johnson thought Claimant would be able to perform a modified job.

5. A letter dated April 27, 2015 was sent to Claimant, stating that she was to return to work on May 1. There is no certificate of mailing indicating the date the letter was sent. The modified job offer did not include a statement from Claimant's physician that this job offer was within her restrictions.

6. Claimant testified at hearing that the first time her employer attempted to contact

her about returning to work was the letter dated April 27, 2015. Claimant is not sure exactly what date she received the letter, but she does remember it was “really close” between the time she received the letter and the date she was told to return to work.

7. Claimant contacted her direct supervisor, Alicia Beer, after receiving the letter. She testified that the first conversation she had with Ms. Beer was mostly about Ms. Beer not knowing exactly what Claimant was supposed to do in regard to returning to work because Ms. Beer had been out of the office recently.

8. Claimant testified that she was also contacted by Sharia King the same day. She explained that Ms. King told her that they were still working out the details of her return to work and that the sit/stand desk was not currently available. She does not recall Ms. King telling her when she needed to return to work. She does not recall receiving any other calls from her employer.

9. The next contact Claimant had with her employer was when she received a letter from her employer dated May 11, 2015.

10. The letter from Respondents dated May 11, 2015 stated that Claimant had until Noon on May 13, 2015 to respond to the letter or she would be terminated. The letter was not delivered to Claimant until 9:58am on May 13, 2015, a mere two hours before she was required to respond before losing her job.

11. Michael Chandler testified on behalf of Respondents in his capacity as a Human Resource Consultant for Respondent-Employer. He testified that it was his intention to terminate Claimant if she had not responded to the May 11 letter by 12:01pm on May 13. Mr. Chandler testified that he had personally only attempted to contact Claimant twice during the entire relevant time period: one voicemail and one email on May 8, 2015.

12. Mr. Chandler testified at hearing that it was his understanding that Claimant’s return to work date had been extended from May 1 to May 8. Mr. Chandler testified that “[Claimant] received a letter from Sharia King, and also, Sharia King called out to her and informed her of her return-to-work date.”

13. Mr. Chandler typed out a timeline of his recollection of events. Mr. Chandler acknowledged at hearing that he does not personally know if a letter was ever sent, and documentation of the sending of the letter is not noted in his recollection of events. This alleged letter is not in the record.

14. Ms. Alicia Beer testified on behalf of Respondents in her capacity as the Call Center Supervisor for Respondent-Employer. She testified that Claimant had been an employee for approximately 11 months. She testified that she did not contact Claimant until the day before she was set to return to work.

15. Ms. Beer testified that she did not contact Claimant again prior to her alleged

new return to work date of May 8. Ms. Beer testified that Claimant contacted her at 10am after Claimant received the May 11 letter just minutes before. Ms. Beer inquired as to why Claimant had not returned to work on May 8, and Claimant explained that she was confused because she had been told by somebody else that the adjustable sit/stand desk was no longer available.

16. Ms. Beer testified that she told Claimant she could return to work. Ms. Beer acknowledged that she never sent any written modified job offer to Claimant. She never personally attempted to contact Claimant between May 1 and May 10. She has no independent knowledge if anybody else left Claimant any voicemails during this time. Ms. Beer did not put anything in writing about Claimant allegedly being required to return to work on May 15. Ms. Beer did not inform Claimant that she would be subject to termination if she did not return to work on May 15th.

17. Claimant was terminated May 15, 2015. The only person that allegedly made multiple attempts to contact Claimant before terminating her was Ms. Sharia King. Ms. King did not testify at hearing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. Because Claimant's injury in this case was after July 1, 1999, §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply to assertions that Claimant is responsible for her wage loss. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if claimant is responsible for her termination from employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004) Respondents shoulder the burden of proving, by a preponderance of the evidence, that claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office, 20 P.3d 1209 (Colo. App. 2000).*

B. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether

claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, Respondents assert that Claimant was terminated for cause on May 15, 2015 due to violation of Employer's attendance policies and that Claimant "quit" her job in any event.

C. Claimant argues that Respondents terminated her based upon internal attendance policies and in so doing ignored the sections of the Workers' Compensation Act and Rules of Procedure addressing the requirements to follow when temporary disability benefits may be terminated when a claimant is capable of returning to work in a modified capacity. Simply put, Claimant asserts that Respondents elevated their internal attendance policies above the Act and Rules of Procedure when they terminated Claimant for a failure to follow attendance policies. Based upon the evidence presented, the ALJ agrees. Here, the evidence supports a finding that Claimant was on a leave of absence while Respondents attempted to accommodate her restrictions. While the evidence presented demonstrates that Claimant was aware of her employer's attendance policies and had used them to facilitate her leave of absence, the evidence also persuades the ALJ that substantial confusion surrounded Claimant's return to work date, because of ineffective communication and the failure of Employer to provide her with adequate notice of a specific modified job duty offer consistent with the Act and Rules of Procedure. The ALJ finds that use of internal attendance policies as a pre-text to a termination for cause argument is ineffective when the Act and the Rules of Procedure have not been followed. Even if Claimant violated Employers' attendance policies, the evidence in this case persuades the ALJ that Claimant had no duty under the Act to return to work as she had been restricted to modified duty work and was not provided with a modified duty offer consistent with the Act and Rules of Procedure. Here, the evidence supports a conclusion that Claimant did not know what her modified job duties would be and when and where she was to start them. The ALJ rejects Respondents' contention that Claimant committed a volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. Based upon the totality of the evidence presented, the ALJ concludes that Claimant is not responsible for the loss of her employment.

ORDER

It is therefore ordered that:

1. Respondents shall pay ongoing temporary total disability benefits from April 6, 2015 and ongoing until terminated according to law.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 27, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether respondents have proven by a preponderance of the evidence that claimant willfully violated a safety rule in violation of Section 8-42-112(1)(b)?

- The parties stipulated prior to the hearing that claimant's average weekly wage ("AWW") is $1,162.28 based on $985.28 in wages and $177.00 per week in COBRA contributions.

FINDINGS OF FACT

1. Claimant was employed with employer as a locate technician. Claimant's job duties required him to travel in a company vehicle to various job sites and locate utility lines.

2. Claimant testified that he was in a motor vehicle accident in the company vehicle on December 17, 2013 and was ticketed for careless driving. This motor vehicle accident did not result in injuries that are subject to the present claim.

3. Claimant testified he went to work on April 10, 2015 at the 5th Street hub (also referred to in testimony as "the shed"), which is a storage area owned by employer. Claimant testified he went to the 5th Street hub to log onto his computer to check his work ticket and called Mr. Seriaini to arrange to meet Mr. Seriaini at the job site. Claimant testified he spoke to Mr. Seriaini and made arrangements to meet him at the job site at approximately 8:30 a.m. or 9:00 a.m. Claimant testified he had originally planned on being at the job site at 8:00 a.m. According to the phone records, the phone call was made at 7:32 a.m. and lasted for 8 minutes. Claimant testified he went to the 5th Street hub in order to log into his computer and clock in for work.

4. While speaking with Mr. Seriaini, Claimant drove to his son's elementary school to drop off money for his son. Claimant testified he arrived at the school, dropped off the money for his son, then sent pictures from his personal phone to his son via text message. According to the records entered into evidence, the pictures were sent at 7:59 a.m.

5. Claimant testified he then began driving from his son's school to the job site to meet Mr. Seriani. Claimant testified as he drove down the road, he noticed a car approaching from the north (traveling south) over the railroad tracks and was concerned that the car was not going to stop at the stop sign. Claimant testified he checked his rear view mirror to determine if the sun was in the eyes of the driver crossing the railroad tracks. Claimant ended up rear ending the vehicle in front of him without breaking.

6. The accident occurred, according the records entered into evidence, at approximately 8:03 a.m. This is documented by the GPS records associated with the company vehicle which demonstrates that the vehicle was in motion at 8:02:56 and was not in motion at 8:03:57. According to claimant's cell phone records, he received a return text from his son at 8:03 a.m.

7. Claimant was issued a ticket as a result of the motor vehicle accident for careless driving. Claimant was not issued a ticket for texting and driving.

8. Claimant testified that it is against company policy to use the company vehicle for personal use. Claimant testified it is against company policy to use a phone while driving a company vehicle. Claimant testified he was ultimately fired by employer, but denied being told why he was fired.

9. Mr. Galvasini, claimant's supervisor, testified at hearing that claimant was terminated for using the company vehicle for personal reasons. Mr. Galvasini testified claimant argued with him when Mr. Galvasini told claimant he was terminated stating that Mr. Galvasini should have gone to bat for claimant with employer. Mr. Galvasini further testified that it is against company policy to use a personal phone or the company phone while the company vehicle is in motion. Mr. Galvasini testified that if an employee receives a phone call while operating a company vehicle, they are instructed to pull over in a safe spot to take the phone call. The ALJ finds the testimony of Mr. Galvasini to be credible.

10. Claimant testified at hearing that he was not looking at his phone when he rear ended the car in front of him. Respondents theory of the case is that claimant violated a safety rule by texting and driving resulting in the motor vehicle accident.

11. While the evidence demonstrates that claimant could have been texting and driving, the ALJ cannot state that the evidence establishes that claimant was texting at the time of the accident. A text came in to claimant's phone at the same time as the accident. However, no testimony establishes that claimant was looking at his phone at the time of the accident and the circumstantial evidence in this case does not establish that it is more probable than not that claimant was texting and driving at the time of the accident.

12. Notably, claimant was not cited for texting and driving by the police following the accident. Additionally, claimant's testimony at hearing regarding his actions immediately prior to the accident are consistent with his statements to the police and his employer immediately following the accident.

13. Because the evidence does not establish that it is more likely than not that claimant was texting and driving at the time of the motor vehicle accident, respondents request to reduce claimant's indemnity benefits for a violation of a safety rule is denied.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents argue that claimant’s injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of an injured worker’s "willful failure to obey any reasonable rule" adopted by the employer for the employee's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.,* 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial*

Commission v. Golden Cycle Corp., 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. Before getting to the consideration of whether the claimant's conduct in this case was "willful", respondents must first establish that claimant violated a safety rule. In this case, circumstantial evidence was presented that claimant was texting and driving at the time of the motor vehicle accident. However, the evidence does not establish that it is more probable than not that claimant was texting and driving. Therefore, respondents request to reduce claimant's indemnity benefits based on a violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S. is denied.

ORDER

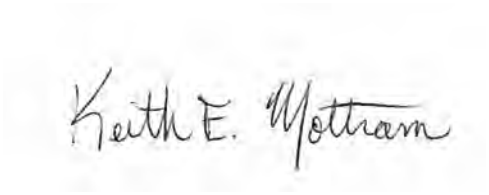
It is therefore ordered that:

1. Respondents request to reduce claimant's indemnity benefits based on a violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S. is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-981-344-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer, Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 13, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/13/15, Courtroom 4, beginning at 8:30 AM, and ending at 11:30 AM).

Claimant's Exhibits 1 through 15 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ directed counsel for Claimant and counsel for Respondents to file briefs addressing the following question: What happens when an insurance carrier files an admission based on an authorized treating physician's (ATP's) evaluations but then later seeks to withdraw the admission after an independent medical examiner (IME) indicates that the Claimant did not sustain a compensable injury. On October 21, 2015, the Respondents and the Claimant filed briefs. After considering the briefs, the ALJ hereby issues the following decision.

ISSUES

The hearing was initiated by the Respondents' Application for Hearing, designating the issue of "withdrawal of admission." The issues to be determined by this decision concern whether the Respondents have proven that the Claimant did **not**

sustain a compensable occupational injury and as such may withdrawal the General Admission of Liability (GAL), dated June 11, 2015.

The Respondent bears the burden of proof, by a preponderance of the evidence, to prove that the Claimant did **not** sustain a compensable injury in order to withdraw the GAL.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant was a production worker, working on windows and doors and was exposed to heavy lifting over a period of time. In November 2014, the Claimant noticed tingling and numbness in his left hand and reported this injury/occupational disease to his supervisor on November 17, 2014.

2. The Claimant visited the University of Colorado Hospital (UCHSC) Emergency Room (ER) on November 29, 2014 and was treated by Barbara K. Blok, M.D. Dr. Blok found that the Claimant suffered from a lesion of the ulnar nerve and diagnosed ulnar neuropathy causing symptoms due to overuse of arm. Dr. Blok suggested that the Claimant seek further treatment and only perform light duty work until follow up with an authorized treating physician (ATP) [Claimant's Exhibit 10].

3. The Claimant started treatment at OccMed Colorado on December 1, 2014 with Greg Smith, D.O. At OccMed Colorado, the Claimant was examined on numerous occasions by Dr. Smith and Jonathan Bloch, D.O., the primary care physician and authorized treating physician (ATP), from December 2014 through July 2015. Both Dr. Smith and Dr. Bloch consistently reported ulnar neuropathy of the Claimant's left elbow and created a treatment plan that involved massage therapy, steroid injections, and acupuncture. (Claimant's Exhibit 5). The Claimant was referred to Brian Fuller, M.D. for an EMG analysis and steroid injections. In the January 5, 2015 EMG analysis, Dr. Fuller concluded the results were abnormal. (Respondents' Exhibit A, Bates No. 0002).

4. Because the Claimant's lengthy course of treatment rendered pain complaints essentially unchanged, the Claimant was referred to In Sok Yi, M.D. Dr. Yi examined the Claimant on June 6, 2015 and he found that the EMG verified mild ulnar nerve compression and the physical exam demonstrated instability of the ulnar nerve. On this date, Dr. Yi suggested surgery and scheduled the surgery (Claimant's Exhibit 5).

5. The Claimant revisited Dr. Bloch on June 25, 2015 and July 9, 2015. During this time, the Respondents had not approved the ulnar release surgery. Dr. Bloch emphasized that he did not think causation was an issue because it was consistent with working two years in repetitive duties involving awkward arm motions

as well as forceful use of the arm. Further, he supported the surgery based on the mechanism of injury of chronic repetitive overuse of tools and motions required to do window repair (Claimant's Exhibit 5). The ALJ finds that the ATP, Dr. Bloch, has rendered an opinion that the Claimant's ulnar nerve compression is causally related to his work duties with the Employer over a period of time and the need for the surgery is causally related to work. Indeed, there is no persuasive evidence of any plausible alternative explanation for the cause of the Claimant's ulnar condition.

6. The Respondents' filed a GAL on June 11, 2015 for medical benefits and temporary total disability (TTD) benefits from May 27, 2015 and "ongoing". (Claimant's Exhibit 13).

7. Dr. Yi performed a left cubital tunnel release with anterior subcutaneous transposition surgery on July 22, 2015 (Respondents' Exhibit B, Bates No. 0010).

Job Demands Analysis ("JDA")

8. At the request of the Respondents, Joseph B. Blythe, MA, CRC (Certified Rehabilitation Counselor), performed the JDA on June 23, 2015 and it lasted a total of four hours. Because the Claimant was on work restrictions, another employee performed the duties while Blythe observed. Notably, the time-sheet evaluation indicated that the Claimant worked more than 10 hours a day, 79% of the time, and on average took a 30 minute lunch break. The JDA evaluated the amount of "Force Time" the Claimant spends in his job position, finding an average of 10.5 minutes of "Force Time" per one hour. The JDA also evaluated the amount of "Left Elbow Flexion Time," finding an average of 4.2 minutes per one hour, totaling between 39.9 and 48.3 minutes per an average day of work, meaning 10+ hours (Respondents' Exhibit I).

9. The JDA job description includes lifting, transferring, carrying, pulling, pushing, standing, walking, bending, reaching, and handling windows frequently or occasionally (Respondents' Exhibit I, Bates Nos. 0073-0075).

10. Blythe's JDA was utilized by the Respondents' IME in formulating his opinion.

Independent Medical Examination (IME) by Jonathan L. Sollender, M.D.

11. The Respondents referred the Claimant to Dr. Sollender for an IME on August 3, 2015. Dr. Sollender was of the opinion that the ATP and other treating physicians were inaccurate in the diagnosis because there had been no causation analysis as the Division of Workers' Compensation Medical Treatment Guidelines (MTG) allegedly required (Respondents' Exhibit A, Bates No. 0003). The ALJ specifically notes that the MTG are not rules of requirement but rather **guidelines** to be considered by treating physicians. Dr. Sollender also included a Distress Risk and Assessment Method evaluation ("DRAM") raising concerns regarding the

Claimant's psychological health or "mental well being" (Respondent's Exhibit A, Bates No. 0006). Essentially, Dr. Sollender is a plastic surgeon and not a psychiatrist. None of the other physicians who have treated the Claimant raised similar concerns. The ALJ finds Dr. Sollender's opinion in this regard not persuasive and lacking in credibility.

12. Dr. Sollender's examination took place over 51 minutes in which he was unable to physically examine the Claimant's left arm due to the fact that it was still dressed in post-surgery dressings and splinted. Dr. Sollender examined the Claimant's right arm (Respondents' Exhibit A, Bates No. 0004-0005).

13. In his testimony, Dr. Sollender stated that the work the Claimant performed could not be repetitive enough, awkward enough, or forced enough to rise to the level of a cumulative trauma condition, contradicting almost every other treating physician, and most notably, ATP. Dr. Sollender's explanation of what was **not** enough was somewhat nebulous and presumably based on Joseph Blythe's JDA. The ALJ finds Dr. Sollender's explanation in this regard lacking in credibility and unpersuasive.

14. Dr. Sollender offered no persuasive, plausible alternative cause of the Claimant's ulnar condition to which the Claimant may have been equally exposed outside of work.

Ultimate Findings

15. The ALJ finds the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller, and Dr. Yi more credible than the opinions of Dr. Sollender because their opinions are based on a lengthier course of treatment, especially Dr. Bloch as an ATP. Dr. Sollender only saw the Claimant one time for a 51-minute IME. For the reasons stated herein above, the ALJ finds Dr. Sollender's IME opinion lacking in credibility.

16. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller and Dr. Yi for the reasons stated herein above, and to reject the opinions of Dr. Sollender's.

17. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant did **not** suffer a compensable injury or occupational disease resulting from his work in window production. Indeed, the Respondents failed to prove that the Claimant's ulnar condition was **not** caused by his factors of his work and not by factors to which he was equally exposed outside of work. The Respondents have failed to prove that the Claimant's condition **cannot** be fairly traced to the conditions of his employment as a proximate cause not from a hazard to which the Claimant would have been equally exposed outside his employment, with a pinpointed onset of November 17, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); s*ee Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684, 687 (Colo. App. 2008); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1076 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000). The weight and credibility of evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 338 P. 2d 284, 285 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* C.R.S. § 8-43-210; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501, 506 (Colo. App. 1995). As found, the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller, and Dr. Yi are more credible than Dr. Sollender's opinions because of their lengthier treating relationships and knowledge of the Claimant's condition.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429, 431 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254, 1256 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411, 414 (Colo. App. 1995). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230, 1234 (Colo. App. 2001). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller and Dr. Yi, and to reject the opinions of Dr. Sollender's.

Withdrawal of Admission Standard

c. An employer is required to continue paying pursuant to an admission of liability and may not unilaterally withhold payment until a hearing is held to determine if there is sufficient evidence to permit withdrawal of the admission. *Rocky Mountain Cardiology v. Indus. Claims Appeals Office*, 94 P.3d 1182, 1185 (Colo. App. 2004)

(citing *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001)). "Hearings may be set to determine any matter, but, if any liability is admitted, payments shall continue according to admitted liability." § 8-43-203(2) (d), C.R.S.

d. Section 8-43-203(2) (d), C.R.S., does not require a showing of "fraud, mistake, or excusable neglect," in order to withdraw a general admission of liability. *See In the Matter of the Claim of Sherry Faulkner v. Alexander Dawson School*, W.C. No. 4-294-162 1999 WL 398050 *1, at *2-3 [Indus. Claim Appeals Office (ICAO), May 21, 1999]. A respondent, who has all the facts pertinent to a claimant's claim, cannot withdraw a general admission of liability. *Indus. Comm'n v. Johnson Pontiac*, *Inc.*, 344 P.2d 186, 187-88 (Colo. 1959); *Continental Casualty Co. v. Indus. Comm'n*, 367 P.2d 355, 358 (Colo. 1961). Giving the benefit of the doubt to the Respondents, they arguably did not have all the facts, *i.e.,* the benefit of Dr. Sollender's after-the-fact IME which, ultimately was rejected by the ALJ. If accepted, the Respondents could have withdrawn the GAL.

e. The Claimant argues that this case falls within the purview of § 8-43-303, C.R.S (Claimant's Brief, p.1). A case is only eligible for reopening, however, pursuant to that section if it has been closed by a final admission, or otherwise dispositively settled. *See In the Matter of Sherry Faulkner*, 1999 WL 398050 at *3 citing *Cibola Construction v. Indus. Claim Appeals Office*, 971 p.2d 666 (Colo. App. 1990). A general admission of liability cannot be subject to reopening because it is not dispositive. *Id.* As found, the GAL herein could be subject to withdrawal if the Respondents could prove, by a preponderance of the evidence that the Claimant did **not** suffer a compensable injury, a burden that the Respondents failed to sustain.

Occupational Disease

f. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). the Respondents failed to prove that the Claimant's ulnar condition was **not** caused by his factors of his work and not by factors to which he was equally exposed outside of work. The Respondents have failed to prove that the Claimant's condition **cannot** be fairly traced to the conditions of his employment as a proximate cause not from a hazard to which the Claimant would have been equally exposed outside his employment, with a pinpointed onset of November 17, 2014. *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.**

Burden of Proof

g. A party seeking to modify an issue within, or withdrawal, either a general or final admission, must prove by a preponderance of the evidence that the admitted award was inappropriate. *See City of Brighton v. Rodriguez*, 318 P.3d 496, 507-08 (Colo. 2014). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 592 P.2d 792, 800 (1979); *People v. Hung Ma,* 104 P.3d 273, 275 (Colo. App. 2004). As found, the Respondents failed to demonstrate that it is more probable than not that the Claimant's injury was **not** compensable. Therefore, the Respondents have failed to prove by a preponderance of the evidence that withdrawal of admission is appropriate because they failed to prove that the Claimant did **not** sustain a compensable injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents may not withdrawal the General Admission of Liability, dated June 11, 2015.

B. The Respondents shall continue paying the Claimant medical benefits and temporary total disability benefits of $466.04 per week from May 27, 2015 and 'ongoing," pursuant to the General Admission of Liability, dated June 11, 2015

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of November 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of November 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

STIPULATIONS

I. The parties stipulated that although the claim was fully contested, an injury did occur on January 29, 2015, and said injury arose out of and in the course and scope of Claimant's employment as a psych tech for the CMHIP. This stipulation is approved. Consequently, the ALJ finds and concludes that Claimant sustained a compensable injury to his low back on January 29, 2015 and this order does not address that issue further.

II. The parties also stipulated that in the event of a determination that Claimant's compensable low back injury caused a disability resulting in Claimant's inability to work; his average weekly wage is $1,274.49.

III. Finally the parties stipulated that if it is proven that Claimant's low back injury led to his lost time from work, the dates Claimant was off work due to his compensable injury were January 29, 2015, through January 31, 2015; April 21, 2015; and April 23, 2015, through June 22, 2015.

REMAINING ISSUES

Given the above stipulations, the remaining issues for determination involve Claimant's entitlement to medical and temporary total disability benefits. The specific questions answered herein are:

A. Whether the Claimant's medical treatment after April 19, 2015, including the requested lumbar spine surgery is related to Claimant's January 29, 2015 industrial injury, and;

B. Whether Claimant's January 29, 2015 injury or an intervening event is the cause of Claimant's lost time from work.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is employed as a psychiatric technician at the Colorado Mental Health Institute in Pueblo. His duties occasionally call on him to lead and/or assist in restraining agitated, combative patients.

2. On January 29, 2015, Claimant was involved in restraining a patient when he was head-butted in the face and head two to three times. Claimant suffered injuries on the right side of his head in the area between his eye and temple. The patient was then taken to the ground and restrained during which Claimant injured his low back.

3. Claimant reported the incident and was referred to Centura Centers for Occupational Medicine (CCOM) for medical treatment. Claimant was evaluated on January 29, 2015 by Dr. Brian McIntryre. Dr. McIntyre removed Claimant from work until February 2, 2015. Claimant was returned to modified work on February 2, 2015 following a follow-up evaluation with Physician Assistant Steven Byrne. PA Byrne imposed restrictions of no lifting, pushing or pulling over 20 pounds. PA Byrne restricted Claimant from "direct physical management of patients" and instructed Claimant to alternate between sitting, standing and walking. Claimant was also referred to physical therapy (PT) for strengthening for return to unrestricted duty.

4. Claimant continued to follow with CCOM for his January 29, 2015 injury. On February 12, 2015, Claimant returned to CCOM where he was seen by Dr. Murray. Dr. Murray documented Claimant's primary problem as intense aching low back pain. Claimant self reported a pain level of 4/10 describing his pain as "constant" and "aching". Claimant was returned to modified duty without change in his restrictions.

5. On February 26, 2015 Claimant was re-evaluated by PA Byrne. Claimant reported he was doing much better. Although he reported a pain level of 4/10, Claimant noted that he pain was non-radiating and located in the center of his buttocks on both sides. Claimant's PT was continued and he was released to full duty work.

6. During a follow-up appointment on March 12, 2015, Claimant reported pain located in his lower back at a 3/10 level. Claimant reported that he was doing much better. His pain was again reported to be in the center of his buttocks on both sides without radiation. Claimant's PT and massage therapy were continued and he was returned to full duty work.

7. On March 26, 2015, Claimant was evaluated by Dr. Merchant during which encounter, Claimant reported little improvement in his symptoms since his last visit. His pain had increased and returned to 4/10 in intensity and noted to be present 40 percent of the time. Dr. Merchant noted that Claimant had been discharged from physical therapy on March 5, 2015 with what the therapy discharge note was "inconsistent improvement in objective measurements". Dr. Merchant noted that Claimant's recovery had "stalled". Valium was added to Claimant's treatment plan to assist with his sleep and an MRI ordered to "rule out structural pathology". The stated reason for the MRI is documented as follows: "Persistent low back pain S/P patient takedown Nov 2014".

8. Claimant then went on vacation from April 10, 2015, through April 19, 2015. He spent five days of that vacation in Cancun, Mexico with his girlfriend. Claimant had requested the time off to go on vacation and purchased his tickets in January 2015, before his industrial injury. Claimant testified that he took a 24 × 15 inch wheeled

suitcase weighing approximately 10 pounds with him to Mexico. Claimant explained while he was in Mexico he relaxed on the beach, soaked in a hot tub, went out to eat and went on a dinner/drinks cruise. He denies any injury while in Cancun.

9. As noted above, prior to leaving on vacation, Claimant was working full duty for Respondent-Employer, although he testified that he had been transferred to a different, less combative unit.

10. Shortly after his return from vacation Claimant underwent the MRI which had been ordered by Dr. Merchant on March 26, 2015. The MRI was completed on April 21, 2015 and revealed a "broad based and slightly eccentric left-sided disk herniation" causing "central canal stenosis" at the L4-5 spinal level. The ALJ finds that Claimant likely was unable to complete the requested MRI before leaving for vacation, choosing instead to schedule it for shortly after his return.

11. On April 23, 2015, Claimant returned to the treating physician reporting increased pain at a 6/10 level present approximately 60 percent of the time. He was also reporting increasing difficulty with work secondary to pain. Claimant was provided with a prescription for Percocet, referred to Dr. James Sceats for a neurosurgical evaluation and given work restrictions. Claimant went off work as of April 23, 2015 and remained out of work until June 22, 2015.

12. Dr. Sceats evaluated Claimant on May 5, 2015. Dr. Sceats noted the predominantly left-sided disc herniation at L4-5 causing significant stenosis superimposed on pre-existing congenital spinal stenosis. He felt the Claimant would benefit from an L4-5 microdiskectomy on the left.

13. Wendy Stalkfleet, a claims adjuster for Broadspire, the third party administrator for Respondent-Employer, began adjusting this claim in April of 2015. As part of her investigation into the worsening of Claimant's condition in April of 2015, Ms. Stalkfleet contacted Claimant. She asked Claimant on April 24, 2015, about his vacation. He told her that he had put in for vacation in January. He told her he was down due to back pain and did nothing.

14. Claimant admitted that he had been called by Ms. Stalkfleet in April of 2015. He admitted that he told her that he had taken time off but that he was down due to back pain and did nothing. He did not tell the adjuster about the trip to Mexico.

15. Claimant testified that he was having significant problems at work prior to his vacation in April of 2015. Respondent challenges this assertion. In support of their position Respondent-Employer called Kim Ortiz, Claimant's lead nurse as a witness at hearing. Ms. Ortiz testified that she was Claimant's supervisor from mid-March through the vacation in April. She saw him on a daily basis. He was able to do his full job duties, without problems. She did not see any signs of pain, and Claimant did not complain to her of pain. Claimant testified that he tried to be stoic and not show evidence of his pain for fear of being marked for subsequent attack by combative

patients. The ALJ finds Claimant's testimony in this regard reasonable in light of the safety concerns for other staff and patients alike. In its totality, the ALJ finds Claimant's testimony credible, convincing and consistent with the content of the medical records.

16. Anthony Cordova, who handles workers' compensation claims on behalf of Respondent-Employer was involved with this claim. He was aware that the Claimant had been returned to work shortly after the incident and had been working full duty prior to his vacation. Mr. Cordova testified that he found the imposition of restrictions and Claimant's removal from work immediately after his vacation, due to a worsening of symptoms, suspicious. The ALJ infers from the evidence presented that Mr. Cordova was concerned that Claimant's worsening condition was due to an intervening injury/event.

17. Mr. Cordova acted upon his suspicions by checking Facebook. According to Mr. Cordova's testimony, he found a Facebook page for Claimant's girlfriend. In reading this Facebook page, Mr. Cordova learned that Claimant and his girlfriend had gone on vacation to Cancun, Mexico. The pertinent Facebook pages associated with Claimant's girlfriend were printed and admitted into evidence as Respondent's Exhibit I. The Facebook pages contain pictures which the ALJ finds consistent with Claimant's testimony that he relaxed on the beach during his trip to Mexico. Specifically, the pictures depict a tropical landscape with palm trees, a beach and some lounge chairs under an umbrella. There is also a picture of a couple of drinks on a table. Based upon the Facebook pages submitted, the ALJ finds no support for Respondent's suggestion that Claimant suffered an intervening injury while on vacation.

18. Based upon the evidence presented, the ALJ finds that Claimant, more probably than not, suffered an L4-5 disc herniation while he fought with and restrained a combative patient on January 29, 2015. Moreover, the evidence presented persuades the ALJ that Claimant's disc herniation was not caused or aggravated by an event occurring while Claimant was on vacation in Mexico.

19. Respondent's contrary suggestion, i.e. that Claimant's disc herniation, and therefore, his disability and need for treatment, including the recommended back surgery was caused or aggravated by an intervening event is not supported by the evidence presented. While Respondents established that Claimant did go on vacation, there is a dearth of evidence to support their conclusion that he was injured on that vacation. Rather, the evidence presented persuades the ALJ that Claimant was demonstrating signs consistent disc herniation prior to leaving for vacation. Indeed, Claimant had a positive straight leg raise test, centralized buttock pain, leg pain and a modest increase in that pain before leaving for vacation. As a consequence, Dr. Merchant ordered an MRI and documented that Claimant's recovery had stalled. Based upon the evidence presented, the ALJ finds the increase in Claimant's symptoms over time, more probably than not, due to the natural progression of symptoms associated with an untreated disc herniation and not an intervening injury as suggested by respondents. Consequently, the ALJ finds that Claimant has proven that his need for

treatment after April 19, 2015 is directly related to and caused by his January 29, 2015 work-related low back injury.

20. The Claimant's time off work from January 29, 2015 through January 30, 2015 and April 21, 2015 is directly related to his compensable low back injury occurring on January 29, 2015. Moreover, Claimant's lost work time from April 23, 2015, through June 22, 2015, was caused by the disability associated with the worsening symptoms of his work related condition. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits for these time periods.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principles

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. *Section 8-43-201, C.R.S*. A Workers' Compensation case is decided on its merits. *Section 8-43-201, C.R.S.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004); See also *Ackerman v. Hilton's Mechanical Men, Inc.,* 914 P.2d 524 (Colo. App. 1996)(ALJ's findings may be based on reasonable inferences from circumstantial evidence). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions; the motives of the witness; whether the testimony has been contradicted by

other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. *Colorado Jury Instructions, Civil,* 3:16. As found, there are some inconsistencies in the record concerning Claimant's testimony.

Medical and Indemnity Benefits

D. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *Section 8-42-101(1)* (a), C.R.S. The Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the Claimant's need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v.* Ball, 172 Colo. 510, 474 P.2d 622 (1970); *Section 8-41-301(1)(c), C.R.S.* The Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The Claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. *Section 8-43-201, C.R.S.* Respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. *Section 8-42-101((1)(a), C.R.S.*

E. Furthermore, any natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents contend that such an injury occurred in this case while Claimant was on vacation in Mexico. While Respondent's concede that Claimant's need for treatment up to April 21, 2015 is related to his January 29, 2015 work injury, they argue that the claimed intervening injury was sufficient to sever the causal connection between Claimant's compensable back injury and his need for treatment beginning April 21, 2015 and continuing, including the recommendation for low back surgery. Moreover, Respondents, while conceding that Claimant's time off of work immediately after the incident of January 29, 2015, through February 1, 2015, appears related to the work injury, assert that the claimed intervening injury is sufficient to cut off any entitlement to compensation on April 21, 2015, and from April 23, 2015, through June 22, 2015, because Claimant's disability and lost time is unrelated to his January 29, 2015 work injury. As found, the ALJ is not persuaded primarily as a consequence of Respondent's failure to persuade the ALJ that an intervening injury occurred. Because Claimant has proven that his need for treatment after April 19, 2015

is directly related to and caused by his January 29, 2015 work-related low back injury and Respondents did not challenge the reasonableness or necessity of such treatment, Respondents are obligated to provide it. *Section 8-42-101(1)* (a), C.R.S. Finally, because the evidence presented establishes that Claimant was unable to return to his usual job due to the effects of his compensable work related injury, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and entitled to temporary disability benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Respondents shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-103(1)(b), for the time periods stipulated to by the parties at the outset of the hearing in this matter at a rate of sixty-six and two-thirds percent of his stipulated AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week.

ORDER

It is therefore ordered that:

Claimant's average weekly wage, by stipulation, is $1,274.49.

1. Claimant has proven by a preponderance of the evidence that his need for treatment after April 19, 2015, including the microdiskectomy procedure recommended by Dr. Sceats is related to his January 29, 2015 compensable low back injury. Consequently, Respondent shall pay for all medical treatment provided to Claimant after April 19, 2015, by providers at CCOM, including their referrals, including but not limited to the MRI and the low back surgery recommended by Dr. Sceats.

2. Claimant has proven by a preponderance of the evidence that he suffered work injury related wage loss for the time periods of January 29, 2015 through February 1, 2015, April 21, 2015, and April 23, 2015, through June 22, 2015. Consequently, respondents shall pay temporary disability benefits for these time periods in accordance with C.R.S. § 8-42-103(1)(b), at a rate of sixty-six and two-thirds percent of his stipulated AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of his injury, Respondents request for application of the three-day waiting period to the temporary benefits ordered to be paid herein is denied and dismissed. *Section 8-42-103(1)(b), C.R.S.*

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 20, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right biceps tendon on May 17, 2015.

2. Whether Claimant has established by a preponderance of the evidence that the medical treatment he has received for his right biceps tendon is causally related to his May 17, 2015 work injury.

3. Whether Claimant has established by a preponderance of the evidence that the medical treatment he received on May 17, 2015 at ExitCare First Choice Emergency Room and on May 18, 2015 at Panorama Orthopedics was emergent treatment.

STIPULATIONS

1. Claimant's average weekly wage is $953.04.

2. If the claim is found compensable, Claimant would be entitled to temporary total disability benefits from June 24, 2015 through July 4, 2015.

3. If the claim is found compensable, Claimant would be entitled to temporary partial disability benefits from July 5, 2015 through August 3, 2015.

FINDINGS OF FACT

1. Claimant works for Employer as a tool technician.

2. Prior to May 17, 2015 Claimant had no problems with his upper extremities.

3. On May 17, 2015 Claimant was asked by Employer to help out in the tool department as Employer was short-handed. Claimant began assisting customers with checking in and checking out tools as well as assisting customers with loading and unloading tools.

4. Claimant began work on May 17, 2015 at approximately 10:00 a.m. At approximately 11:30 a.m. Claimant assisted a customer with unloading a wood chipper

from the back of the customer's pick-up truck. The wood chipper weighed approximately 250 to 300 pounds and was approximately 4.5 feet tall by 2.5 feet wide.

5. As Claimant and the customer were attempting to unload the wood chipper, Claimant took the brunt of the weight of the machine and felt an immediate pop and tingle up his right arm.

6. Claimant left work approximately 5-10 minutes later and advised his Employer that he was not feeling well. Claimant did not report the injury.

7. Claimant was afraid to report the injury because he had recently ingested edible marijuana. Claimant knew Employer had a policy of drug-testing employees when an injury was reported and Claimant did not want to lose his job or have a positive drug test.

8. Claimant left work and began to drive home, intending to ice and rest his arm. On the drive home and while attempting to turn the steering wheel, Claimant felt excruciating pain. Claimant stopped at an urgent care center that was on his way home.

9. On May 17, 2015 Claimant was evaluated at ExitCare First Choice Emergency Room by Michael Fallon, M.D. Claimant was diagnosed with a tendon injury. His discharge instructions indicated a distal biceps tendon disruption and that Claimant was to follow up with orthopedics and to wear a splint until he was evaluated by orthopedics. Claimant was referred to Panorama Orthopedics. *See* Exhibit 5.

10. On May 18, 2015 Claimant was scheduled to work for Employer in the afternoon. Claimant called in the morning and spoke to a supervisor. Claimant reported he would not be in to work that afternoon and that he had suffered an injury outside of work. Claimant admittedly lied to the supervisor and reported that he was not injured at work.

11. On May 18, 2015 Claimant was evaluated at Panorama Orthopedics by David Schneider, M.D. Claimant reported to Dr. Schneider that he lifted a wood chipper at work when he felt a burning sensation down his arm with pain in his biceps tendon. Dr. Schneider noted weakness with elbow flexion and an obvious palpable defect in the right elbow that was very consistent with a biceps tendon rupture. Dr. Schneider recommended an MRI of the right elbow. Dr. Schneider noted that Claimant was going to go back to work to file a workers' compensation claim and noted Claimant was still within his appropriate time window. *See* Exhibit 6.

12. At the appointment with Dr. Schneider Claimant advised Dr. Schneider that he had initially not reported it as a work injury because of his fear that he would be drug tested and fired. Dr. Schneider advised Claimant it was in his best interest to report the injury.

13. After his appointment with Dr. Schneider Claimant decided to go to Home Depot to report the injury. Claimant arrived at Home Depot and asked to speak with the supervisor he had spoken with earlier that day on the phone. She had left for the day. Claimant then spoke with supervisor Ruiz. Claimant told supervisor Ruiz that he had called in that morning and reported that he had gotten hurt helping a friend move yesterday. Claimant reported, however, that he had really gotten hurt at work helping a customer load a wood chipper. Claimant asked supervisor Ruiz whether he would have to take a drug test and told supervisor Ruiz that he had taken marijuana pills for his back. Supervisor Ruiz advised Claimant he would have to file paperwork and send Claimant for a drug test. *See* Exhibit C.

14. While at Home Depot, Claimant filled out an Incident Witness Statement. Claimant reported that at 11:30 a.m. on May 17, he was unloading a wood chipper from the back of a customer's pickup truck with the help of the customer when the tool came off the back of the truck fast. Claimant reported he tried to catch the tool to keep it from hitting the ground and that he felt a pull and a tingle up his arm. Claimant reported he felt sick and asked to leave and went to an urgent care. Claimant reported that he didn't want to say anything about it happening on the job because he knew he would have to go for a drug test. Claimant reported he had used edible marijuana for back pain, as pain pills made him sick. Claimant reported that he saw an orthopedic surgeon who was sending him to have an MRI done tomorrow. Claimant reported that it was a very small amount of marijuana that he used and that he was not a frequent user. *See* Exhibit 7.

15. Employer referred Claimant to one of their authorized providers for medical treatment and also sent Claimant for drug testing.

16. On May 19, 2015 Claimant was evaluated at Midtown Occupational Health Services by Craig Anderson, M.D. Claimant reported injuring his right elbow lifting a wood chipper out of a truck. Claimant reported a pop, pain, and tingling in his distal biceps area radiating up to his right shoulder along with severe weakness. Dr. Anderson noted on examination that Claimant's right distal arm at the distal biceps showed bunching and palpable defect of the distal biceps tendon. Dr. Anderson requested an MRI of Claimant's right elbow and referred Claimant to Dr. Schneider, orthopedist. *See* Exhibit 9.

17. On May 19, 2015 Claimant underwent an MRI of his right elbow joint without contrast that was interpreted by David Cosper, M.D. Dr. Cosper identified a full thickness complete tear of the biceps tendon with surrounding hemorrhage and edema. *See* Exhibit 10.

18. On May 19, 2015 Claimant underwent drug testing that resulted in a clean test.

19. On May 21, 2015 Claimant was evaluated by Dr. Anderson. Dr. Anderson noted that the MRI revealed a complete rupture of the distal biceps tendon, that

Claimant would need surgery, and that Claimant had been referred to Dr. Schneider. *See* Exhibit 9.

20. On June 3, 2015 Claimant was evaluated by Dr. Schneider. Dr. Schneider recommended that Claimant undergo right distal biceps repair and noted that the surgery would be scheduled as soon as possible. *See* Exhibit 11.

21. On June 17, 2015 Claimant was evaluated by Dr. Anderson. Dr. Anderson noted that Claimant had learned his claim was under denial and advised Claimant that he needed to have the tendon repaired as soon as possible and to discuss having it done under his own insurance. *See* Exhibit 9.

22. On June 25, 2015 Claimant underwent right distal biceps repair surgery. On July 1, 2015 it was noted by Ashley Nicholson, PA, that Claimant was healing well following surgery and that Claimant would start physical therapy. *See* Exhibit 11.

23. On September 16, 2015 Claimant underwent an Independent Medical Examination performed by Allison Fall, M.D. Dr. Fall opined that the treatment Claimant had received to date was medically reasonable, necessary, and appropriate for the injury. Dr. Fall opined that both the report of acute onset while at Home Depot lowering a wood chipper machine as well as the other reported mechanism of injury of helping a roommate move would be consistent with causing the type of injury Claimant suffered. *See* Exhibit 12.

24. Claimant's testimony is found credible and persuasive. Although Claimant admits he purposefully lied to Employer when first reporting how he was injured, Claimant is credible in explaining his false report and his fear of termination for his past use of marijuana.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden. Claimant is found credible in explaining his job duties as well as the act of assisting a customer unload a wood chipper when he suffered an acute injury to his right biceps. The mechanism of injury described by Claimant is consistent with the injury he suffered and the opinion of Dr. Fall in this regard is found persuasive. Although Claimant provided a false report to Employer and indicated initially that he had been injured helping a roommate move, Claimant is credible in explaining why he provided a false report. Claimant had used marijuana in the past and knew Employer had a policy of drug testing their employees upon report of an injury. Claimant was fearful of a positive drug test and was fearful of reporting his injury as he believed he might lose his job if his drug test came back positive. However, the day after the injury Claimant realized his injury was significant and realized that he needed to accurately report the injury and seek treatment. Claimant admitted his initial false report in the Incident Witness Statement he filled out. Claimant admitted that he didn’t report the injury because of drug testing and Claimant appears to still be concerned with losing his job while filling out the Incident Witness Statement as he wrote that he used marijuana for back pain and only used a small amount and was not a

frequent user. Although Claimant indeed provided a false report, Claimant is credible in explaining the false report, his reason for providing the false report, and is credible in explaining how the injury actually occurred.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Claimant has met his burden to show a causal connection between the work injury that he suffered on May 17, 2015 and his subsequent treatment. The ALJ finds Claimant credible in explaining the mechanism of injury and it is not disputed that the treatment has been reasonable and necessary. As the injury is found work related Claimant has established a causal relationship between his injury and his treatment.

Emergency Treatment

Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Of course, the claimant may obtain "authorized treatment" without giving notice and obtaining a referral from the employer if the treatment is necessitated by a bona fide emergency. Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

Claimant has established that the medical treatment he sought on his way home from Home Depot on May 17, 2015 at ExitCare First Choice Emergency Room qualifies as authorized emergent treatment. Claimant is credible that he planned on going home and icing his right arm but that on the drive home his pain was excruciating, causing him to stop at ExitCare which was on his way home. The ALJ concludes that the excruciating pain Claimant suffered qualified as an emergency and that therefore the emergent treatment was authorized. However, the Claimant has failed to establish that the treatment he received on May 18, 2015 at Panorama Orthopedics was emergent treatment. The emergency and pain immediately following his injury that he

experienced on the drive home had ended, he had already been seen by a medical professional, and he had received a referral for orthopedics. There was no "emergency" requiring immediate treatment prior to notifying Employer of the potential claim. On May 18, 2015 prior to attending the appointment with Panorama Orthopedics, Claimant should have reported the injury to Employer and allowed Employer to refer Claimant for treatment rather than seeking unauthorized treatment on his own.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right biceps tendon on May 17, 2015.

2. Claimant has established by a preponderance of the evidence that the medical treatment he has received for his right biceps tendon is causally related to his May 17, 2015 work injury.

3. Claimant has established by a preponderance of the evidence that the medical treatment he received on May 17, 2015 at ExitCare First Choice Emergency Room qualifies as authorized emergent treatment.

4. Claimant has failed to establish by a preponderance of the evidence that the medical treatment he received on May 18, 2015 at Panorama Orthopedics qualifies as authorized emergent treatment.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 17, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge

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ISSUES

- Did Claimant prove by a preponderance of the evidence that the admitted industrial injury of January 3, 2014 proximately caused injuries to his neck and back?

- Did Claimant prove by a preponderance of the evidence that he needs reasonable and necessary medical treatment for the alleged injuries to his neck and back?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 18 were admitted into evidence. Respondents' Exhibits A through R were admitted into evidence. The depositions of Anthony Euser, M.D., Amit Agarwala, M.D., and Rachel Basse, M.D. were admitted into evidence.

2. On January 3, 2014 Claimant sustained admitted injuries while working for the Employer at Ivinson Memorial Hospital (IMH) in Laramie, Wyoming. The dispute in this case concerns whether or not the January 3 accident caused injuries to Claimant's neck and back.

CLAIMANT'S TESTIMONY

3. Claimant testified as follows concerning the events of January 3, 2014. Claimant was employed as a "helper" at the IMH work site. Claimant's foreman, who weighed approximately 300 pounds, was standing at the top of a 28 foot extension ladder holding the upper end of a "panel" while Claimant held the bottom of the panel. The foreman shouted at Claimant to "watch out" and Claimant saw the shadow of something coming towards him. The ladder then "swung around" with the foreman still at the top. A rung of the ladder then struck the Claimant three times in the face causing his head to "shoot back." The weight of the ladder and the foreman then crashed down on Claimant's body. Claimant fell backwards with the weight of the ladder and foreman on top of the Claimant.

4. Claimant testified that he felt "tons of pain" everywhere including his face, neck and low back. Claimant experienced the low back pain where his tool belt and hammer "jabbed" him as he fell down.

5. Claimant testified as follows concerning a January 16, 2013 industrial injury that he sustained while working for the Employer. He fell off of a roof and hit his head. He injured his neck, back, head, right hip, right jaw, right ear and tail bone. As a result of the head injury he still has difficulties with memory and speech.

6. Claimant recalled that he was eventually placed at maximum medical improvement (MMI) for the 2013 industrial injury. When placed at MMI he had no ongoing neck pain. However, he experienced occasional ongoing low back pain in the area of the tail bone. Claimant described this pain as lower than the back pain he experienced after the January 3, 2014 injury.

7. Claimant requested a Division-sponsored independent medical examination (DIME) to challenge the authorized treating physician's (ATP) determination that he reached MMI for the 2013 injury and the impairment rating issued by the (ATP). Claimant testified the ATP did not assign any impairment rating for his neck and back, but he did receive a 28% impairment rating for his right ear.

8. Before a DIME was conducted Claimant settled the claim for the 2013 industrial injury. The settlement documents reflect that claimant alleged he sustained injuries to his back, neck, head, brain mouth, jaw, ears and other body parts in the January 16, 2013 industrial injury. The Claimant received $30,000 in settlement of the claim. The settlement was approved by Order of the Director of the Division of Workers' Compensation dated December 6, 2013.

EVIDENCE CONCERNING TREATMENT FOR JANUARY 16, 2013 INDUSTRIAL INJURY

9. On January 13, 2013 Claimant underwent a CT scan of the cervical spine. The radiologist's impressions included "loss of normal cervical lordosis, possibly related to a cervical stabilization collar, and C5-6 disc space degeneration leading to probable mild bilateral foraminal stenosis.

10. Following the January 2013 industrial injury Linda Mitchell, M.D., acted as Claimant's authorized treating physician. Dr. Mitchell is level II accredited.

11. Dr. Mitchell first examined Claimant on February 13, 2013. Dr. Mitchell noted a history that Claimant fell off of a roof and sustained a "traumatic brain injury, subarachnoid hemorrhage, epidural hematoma, and pulmonary contusions." Claimant's chief complaints were rib pain, dizziness and headaches. Claimant also reported some "mid and lower back pain" that was improving with therapy. Dr. Mitchell assessed the following: (1) Skull fracture with epidural hematoma; (2) Subdural hematoma; (3) Chest wall contusion; (4) Post-traumatic headache; (5) Lung contusion; (6) Vertigo.

12. On March 1, 2013 Claimant's chief complaints were headaches, dizziness, chest wall pain and low back pain. Claimant reported that he recently experienced spontaneous pain "shooting from his shoulder to his right hand."

13. On March 15, 2013 Claimant reported to Dr. Mitchell that his back pain was better with physical therapy (PT). On April 5, 2013 Claimant advised Dr. Mitchell that his back was improving "although he woke up with a knot in his neck."

14. On April 19, 2013 Claimant reported that his biggest concerns were "neck pain and jaw pain." Dr. Mitchell referred Claimant for chiropractic treatment of the neck and jaw.

15. On May 10, 2013 Claimant reported to Dr. Mitchell his neck pain was "much better after one chiropractic treatment" but he still had some pain and tightness. Claimant was still complaining of headaches, memory problems and jaw pain.

16. On May 17, 2013 Claimant sought treatment from Dr. Mitchell on "an urgent basis." Claimant reported severe headache, vertigo and nausea over the past two days. Dr. Mitchell prescribed PT and referred Claimant to Suzanne Kenneally, Psy.D., for a neuropsychological evaluation.

17. On May 29, 2013 Claimant reported to Dr. Mitchell that he experienced "left neck pain" that radiated to his left thumb and index finger and tingling in those digits. Claimant also reported left lower thoracic and lumbar pain that radiated to his lateral left thigh and sometimes to the right thigh and knee.

18. On June 4, 2013 Claimant reported to Dr. Mitchell that his vertigo was triggered by looking up and down. He also complained of low back spasms and neck pain and diffuse "lightning like pain throughout his body."

19. On June 19, 2013 Claimant advised Dr. Mitchell that his pain level was 6 on a scale of 10 (6/10), but Cymbalta had decreased some of his "lightening pains." Claimant also reported that his back pain was worse with standing for more than one hour and his tailbone pain was "worse with sitting." Claimant reported numerous other symptoms including jaw pain, vertigo, short term memory problems, bilateral wrist pain, shoulder pain and neck pain.

20. On June 18, 2013 Dr. Kenneally performed a neuropsychological evaluation of Claimant. Dr. Kenneally issued a written report on June 25, 2014. Dr. Kenneally took a history from Claimant, reviewed medical records and conducted psychological testing. Claimant reported to Dr. Kenneally that he had difficulties with spelling, speech, memory and maintaining his "train of thought in conversations." Claimant reported that his physical symptoms, from "worst to least" were: "neck pain and stiffness; vertigo 'always dizzy;' tailbone pain; TMJ pain; constant headache 'intensity varies over the day;' lower back pain with radiation down the left leg; left knee pain; left hand pain."

21. In the written report Dr. Kenneally noted Claimant's performance on the Test of Memory Malingering "indicated intentionally poor effort" that was "below the range of institutionalized Alzheimer's patients." Claimant also performed "below 95% of traumatic brain injury patients on the Word Choice subtest of the WAIS-IV" and "below

chance" on the "Rey 15 item test." Dr. Kenneally stated that in order to score at Claimant's level, "it is necessary to learn both the right and the wrong answers, and in real time, choose to provide the incorrect answer." Dr. Kenneally further stated that using "Laribee's statistical process" Claimant's "failure of three validity measures at this level has a 95% certainty of intentionally poor effort or malingering." Dr. Kenneally opined the Claimant's ability to intentionally choose the wrong answers represents a "complex cognitive task" indicating Claimant "was back at pre-injury baseline functioning regarding cognitive functioning." Dr. Kenneally reported Claimant's results on psychological tests are "associated with non-credible reporting of somatic and cognitive symptomatology." Dr. Kenneally recommended that "all medical treaters" obtain objective assessments of Claimant's "symptom reports."

22. On July 24, 2013, Claimant returned to Dr. Mitchell. Claimant reported pains in his elbows and knees, right ankle and foot pain and "electrical shocks" in his great right toe when driving. Dr. Mitchell reviewed Dr. Kenneally's June 25, 2014 report and discussed the report with Claimant. Dr. Mitchell told Claimant "it was Dr. Kenneally's and my impressions that he is malingering." Dr. Mitchell wrote that the conclusion Claimant was malingering was "consistent with his vague, varied and subjectively worsening complaints over the past month or so." Dr. Mitchell placed Claimant at MMI without impairment and without restrictions.

23. On October 17, 2013 Thomas Politzer, O.D., examined Claimant. Claimant reported that vertigo was still an issue and that he was "intermittently bumping into objects." Claimant stated his headaches were improving but were "still quite impairing." Dr. Politzer noted that Claimant "remains with pain in his back and his hips."

EVIDENCE CONCERNING TREATMENT FOR JANUARY 3, 2014 INJURY

24. After the January 3, 2014 injury Claimant was taken to the IMH emergency room (ER) for treatment. Claimant was first examined by Gary Pearson, M.D., at 10:32 a.m. The ER notes reflect a history that Claimant was struck in the face by a ladder and absorbed most of the trauma to his face. Claimant did not lose consciousness. Claimant sustained "obvious facial injuries with lacerations of his nose, especially the tip of his nose." Claimant did not have any other apparent injuries. The Claimant was placed in a cervical collar, but on physical examination (PE) the cervical spine was "non-tender and there [was] no pain with active range of motion." There was no "thoracic or lumbar spine or paraspinal tenderness." Hydromorphone (Dilaudid) was first administered to Claimant at 10:50 a.m. After consultation Dr. Pearson decided Claimant should be transferred to the Medical Center of the Rockies (MCR) trauma unit in Loveland, Colorado.

25. While still at IMH on January 3, 2014 Claimant underwent a CT scan of the cervical spine. The radiologist noted the following: (1) Mild degenerative changes of the cervical spine but no evidence of acute fractures or subluxations; (2) Bulging discs from C3 through C7; (3) Straightening of the normal cervical lordosis which "may be

related to muscle spasm." Dr. Pearson also reviewed the cervical CT scan and described the results as "normal except for some multi-level DJD."

26. Claimant was seen at the MCR ER on January 3, 2014. He was evaluated by Eric Olsen, M.D. Dr. Olsen noted Claimant's neck was non-tender and there was no "evidence of C-spine injury by trauma." Claimant was admitted to the "Trauma Service" where he was evaluated by Steven Dubs, M.D. Claimant's admission diagnoses included multiple trauma, multiple facial fractures, nasal laceration, hypoxia, tobacco abuse and reactive airway. On PE Claimant's back was non-tender and his neck exhibited full range of motion (ROM) without tenderness. Aric Murphy, D.D.S., M.D., evaluated Claimant the on January 4, 2014. He noted that during his neurologic exam, the "C-spine was clear" and there was "no evidence of C-spine damage." Dr. Murphy sutured or otherwise treated several facial wounds. Claimant was discharged from MCR on January 5, 2014.

27. On January 6, 2014 Heather Roth, PA-C evaluated Claimant at Injury Care of Colorado (ICC). On this date PA-C Roth's review of symptoms reflects that Claimant reported "irritation and vision change." However, review of symptom does not mention that Claimant reported neck or back pain. On PE PA-C Roth recorded Claimant's neck was "supple" with full ROM. The back demonstrated "normal curvature." PA-C Roth noted abrasions on the bridge and tip of Claimant's nose and bilateral retinal hemorrhage. She also noted that Claimant had "painful cervical range of motion." PA-C Roth assessed an injury of the head, face and neck. She referred Claimant for an ophthalmology examination.

28. On January 9, 2014 Dr. Dubs examined Claimant. At that time Dr. Dubs noted the Claimant's neck exhibited normal ROM and was "supple." The musculoskeletal system exhibited normal ROM and Claimant did not exhibit any edema.

29. On January 10, 2014, PA-C Roth again evaluated Claimant. Claimant reported symptoms of eye irritation, visual disturbances, nose/sinus problems, chipped teeth, muscle aches, arthralgias/joint pain, back pain without weakness, dizziness and frequent headaches. On PE Claimant exhibited full ROM in the neck but there was pain with cervical ROM. The thoracolumbar spine demonstrated "normal curvature."

30. On February 3, 2014 PA-C Roth conducted another examination. Claimant reported symptoms of eye irritation, visual disturbances, runny nose and sinus pressure, dizziness and frequent headaches. There is no mention that Claimant experienced pain with cervical ROM. On examination the neck was supple with full range of motion. The Claimant reported no back pain and the thoracolumbar spine demonstrated "normal curvature."

31. On February 12, 2014 Peter Schmid, D.O., evaluated Claimant concerning surgical revision of his facial scarring. Claimant reported to Dr. Schmid that he was experiencing "neck discomfort since the" January 3, 2014 injury. Claimant also reported some paresthesias to the left upper arm and "generalized neck tenderness." Dr. Schmid noted Claimant's history of discogenic disease and recommended he be

evaluated by a spine surgeon. Dr. Schmid also recommended that claimant undergo "reconstructive septorhinoplasty and possibly an alar rim graft, as a well as "dermabrasion of the nasal scars." Dr. Schmid wrote that he "would first like to have cervical clearance prior to any surgical intervention."

32. On February 14, 2014 PA-C Roth conducted another examination. Claimant again reported symptoms of eye irritation, visual disturbances, runny nose and sinus pressure, dizziness and frequent headaches. Claimant also reported pain in the cervical spine with numbness radiating into the upper extremities and low back pain. On PE PA-C Roth noted tenderness of the paracervicals and tenderness of the C3 transverse process. She also noted tenderness of the C3 through C7 spinal processes and that left and right lateral flexion was limited to 5 degrees. PA-C Roth wrote that Claimant demonstrated a "new onset neck pain, numbness and burning sensation in shoulders radiating down L>>R arm, occasional shooting pain/stinging – neck injury believed to be a r/t whiplash from ladder/man falling on patient." PA-C Roth referred Claimant for bilateral EMG nerve conduction studies to assess the "radicular symptoms."

33. On April 8, 2014 Kathryn Polovitz, M.D., performed the bilateral upper extremity EMG and nerve conduction studies. Dr. Polovitz reported that the studies showed evidence of mild left ulnar neuropathy at the elbow, but no electrophysiologic evidence of any cervical radiculopathy. Dr. Polovitz recommended Claimant wear an elbow pad at night. She further noted that Claimant's examination demonstrated muscle spasm in the paraspinal muscles that "is most likely consistent with a whiplash injury."

34. On April 18, 2014 Christi Burge FNP-C examined Claimant at ICC. Claimant reported sharp "thoracic pain" rated 8/10. He also reported neck pain rated 7/10. FNP-C Bruge assessed cervical radiculopathy and referred claimant for an MRI of the cervical spine and for PT. FNP-C Bruge also assessed low back pain.

35. On April 26, 2014 Claimant underwent a cervical MRI. The radiologist's impression was "multilevel degenerative changes of the cervical spine" greatest in severity at C5-6. At C5-6 the radiologist noted moderate to severe disc space narrowing with posterior disc-osteophyte complex more prominent right posterolaterally causing central canal stenosis. The complex also encroached on the right lateral recess and there was mild right foraminal stenosis. The C6-7 and C7-T1 levels were normal.

36. O May 8, 2014 Claimant commenced a course of PT for treatment of cervical complaints.

37. On May 16, 2014 PAC-Roth noted Claimant continued to have neck pain with numbness and burning radiating into the upper extremities. She further noted that low back pain was "causing a lot of pain and radicular sxs in L4-L5-S1 region." PAC-Roth referred Claimant for a lumbar MRI.

38. On May 22, 2014 orthopedic surgeon Amit Agarwala, M.D., evaluated Claimant for "cervical spine pain." Claimant gave a history that he experienced the onset of neck pain five months ago, the pain was severe and it had not changed. Claimant also reported that the pain was radiating into the right arm. Dr. Agarwala reviewed the cervical MRI and performed a PE. Dr. Agarwala stated that the MRI showed a right "C6-7 HNP." He noted a positive Spurling's test on the right. Dr. Agarwala recommended Claimant undergo a cervical fusion at C5-6 "as he has failed 5 months of conservative treatment."

39. On May 29, 2014 Claimant underwent a lumbar MRI. The radiologist's impressions were: (1) Left paracentral and lateral disc extrusion at T12-L1 causing mild narrowing of the inferior aspect of the left neural foramen; (2) Mild diffuse disc bulge at L4-5 without evidence of stenosis; (3) Mild facet arthropathy at L5-S1.

40. On June 6, 2014 Rachel Basse, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Dr. Basse is board certified in physical medicine and rehabilitation and pain medicine. She is level II accredited. In connection with the IME Dr. Basse took a history from Claimant, reviewed pertinent medical records and performed a PE.

41. Claimant reported to Dr. Basse that he sustained injuries on January 16, 2013 and January 3, 2014. Claimant stated that when the ladder fell on him in January 2014 he felt "extreme severe pain in his face and neck" and also pain in his low back where "his tool belt was jabbing him." Claimant also told Dr. Basse that his "low back soreness" began while he was hospitalized at MCR in Colorado. Claimant could not remember when his upper extremity symptoms began but thought they also started during the MCR hospitalization. Claimant stated his cervical pain fluctuated between 7-8/10 and 9/10. He also reported random shooting pains in his arms that he describes as feeling like a "lightning bolt." He rated his low back pain as fluctuating between 3/10 and 6/10. Claimant reported his neck and low back pain from his 2013 claim resolved at the same time Dr. Mitchell released him from care.

42. Dr. Basse noted Claimant had multiple "musculoskeletal symptoms" after the January 2013 injury. Dr. Basse opined these symptoms were "variable and odd in description and appear to reflect a symptom concern." Dr. Basse stated that her observations were "consistent with the diagnosis of Pain Disorder as noted by Dr. Kenneally."

43. Dr. Basse wrote that when determining "medical legal causality" a physician must consider "mechanism, diagnosis, ability of mechanism to cause diagnosis, temporal relationship and presence of other more biological plausible explanations."

44. Dr. Basse addressed the cause of Claimant's neck and upper extremity symptoms after the January 3, 2014 injury. Dr. Basse noted that according to the medical records available to her "cervical and upper extremity symptoms" were first documented on February 12, 2014. Dr. Basse opined that the report of these symptoms

greater than one month and one week after the January 3, 2014 injury "does not represent a temporal relationship needed to establish causality." Dr. Basse stated she might change her opinion if unavailable medical records showed Claimant had cervical and upper extremity symptoms on January 17, 2014. Dr. Basse also opined that the diagnosis of Claimant's neck symptoms is "unclear." Dr. Basse noted the cervical MRI showed "moderate to severe degenerative changes at C5-6" with "central stenoisis." However, Dr. Basse stated Claimant's PE was not consistent with central stenosis at C5-6, and he was non-tender at that level. Dr. Basse also opined Claimant had no clinical signs of upper extremity radiculopathy, which is consistent with the normal EMG. Dr. Basse also opined that the MRI findings may be incidental and/or old findings. She further opined that Claimant's 2013 mechanism of injury (falling on his head) is more consistent with his MRI findings than the 2014 mechanism of injury.

45. Dr. Basse opined Claimant is not a good candidate for surgery given his reports of high pain levels that are inconsistent with his presentation, normal physical exam, normal EMG, negative Spurling's and minimal treatment without patient education to date.

46. Dr. Basse addressed the cause of Claimant's low back pain after the January 3, 2014 injury. Dr. Basse stated that the medical records do not mention low back pain "for the first three and-a-half months after" the date of injury. Dr. Basse opined there was no relationship in time to the on-the-job injury and, therefore, not causally related." Dr. Basse also stated that on her examination Claimant's symptoms were "more thoracolumbar than lumbosacral and may be related to MRI findings." However, Dr. Basse explained that Claimant had "symptoms in this area prior to 01/03/14 and continuation represents a more biologically plausible explanation for his current symptoms."

47. On June 20, 2014 PA-C Roth noted Claimant continued to have neck pains, numbness and burning in the shoulders radiating down the upper extremities and low back pain and radicular symptoms in the L4-5 and L5-S1 region. PA-C Roth noted the spinal surgeon would not perform surgery until the Claimant quits smoking and the "ENT will not perform nasal surgery until spinal surgery" is complete.

48. On July 25, 2014 PA-C Roth noted that Claimant had undergone an "IME" because the "insurance believes the neck injury was not from his most recent accident." PA-C Roth opined that if this is the case Claimant's "old claim should be reopened." PA-C Roth further noted that the IME had "questioned malingering" but Roth stated the MRI showed "central canal stenosis" that "clinically correlated" with his symptoms. PAC-Roth further stated that: "IME stated that neck injury was not mentioned until 1 month post-injury but I suspect this was because [Claimant] had several injuries that required more immediate attention." PA-C Roth transferred Claimant's care to Anthony Euser, D.O., because Roth was "unable to get [Claimant's] issues addressed."

49. On August 15, 2014 Edwin Healey, M.D., performed an IME at Claimant's request. Dr. Healey is board certified in occupational medicine/neurology. He is level II accredited. In connection with the IME Dr. Healey took a history from Claimant,

reviewed pertinent medical records and performed a PE. Dr. Healey reviewed Dr. Basse's IME report.

50. Dr. Healey diagnosed numerous conditions that he believes are related to the January 3, 2014. Among these diagnoses are; (1) Post-traumatic headaches due to nasal injury and cervical sprain/strain; (2) Cervicobrachial myofascial pain with secondary headaches; (3) Intermittent cervical pain, with MRI showing multilevel degenerative changes, particularly at C5-C6, with encroachment of a posterior disc-osteophyte complex on the right lateral recess; (4) Chronic low back pain, with MRI showing left paracentral lateral disc protrusion at T12-L1 causing mild narrowing of the inferior aspect of the left neural foramen and evidence of facet arthropathy at L5-S1 and mild diffuse disc bulge at L4-5.

51. Dr. Healey noted that Claimant gave a history that he reported cervical pain and intermittent right upper extremity problems throughout his clinical course, but there was a "delay" in treatment. Dr. Healey observed that PA-C Roth's note dated January 6, 2014 states Claimant had painful cervical ROM, and that PA-C Roth documented the same complaint on January 10, 2014. Dr. Healey further noted that on February 14, 2014 PA-C Roth recorded both "low back pain and intervertebral disc disorder of the cervical region." Based on Dr. Healey's observations the ALJ infers that Dr. Healey believes there is a sufficient temporal relationship between the January 3, 2014 injury and the subsequent cervical and low back complaints to conclude there is a causal relationship between them.

52. Dr. Healey opined Claimant has not reached MMI for the January 2014 industrial injury. With regard to the cervical and upper trapezius myofascial pain and secondary headaches Dr. Healey opined Claimant would "benefit from a trial of occipital nerve blocks and upper trapezius trigger point injections followed by deep tissue massage." If Claimant benefits from these therapies Dr. Healey recommends that Claimant obtain a second opinion as to whether surgery is appropriate.

53. Concerning Claimant's low back pain Dr. Healey opined there are "both subjective and objective findings plus a specific causal factor, i.e., falling on his tool belt over the T12-L1 area." Dr. Healey opined that this "area of pain may have been preexisting, but it certainly has been permanently aggravated by" the January 3, 2014 injury. Dr. Healey recommended Claimant receive further treatment for his back to include epidural steroid injection and a lumbar facet block.

54. Dr. Healey noted that he was "surprised" that "so much weight" was given to Dr. Kenneally's neuropsychological evaluation in determining that Claimant was "not eligible for higher impairment for his other multiple problems, including headaches and cervical and thoracolumbar pain after his January 16, 2013, injury."

55. On August 26, 2014 Dr. Euser saw the Claimant at ICC. Dr. Euser noted Claimant was present for follow-up of a "nasal fracture, neck pain and disc disorder in the low back, an injury that occurred while at work on" January 3, 2014. Claimant reported he was experiencing neck pain, back pain and headaches. Dr. Euser did not

record any PE results. Dr. Euser noted that PA-C Roth reviewed Claimant's records from the January 16, 2013 injury and believed that Claimant's symptoms were related to the January 3, 2014 injury. Dr. Euser agreed with PA-C Roth that Claimant's symptoms were related to the January 2014 injury. Dr. Euser referred Claimant to Dr. Agarwala for treatment of his back. Dr. Euser also referred Claimant for additional PT to treat the neck pain.

56. Dr. Euser again saw Claimant on September 30, 2014. Claimant reported that the pain in his neck and lower back was getting worse. On PE Dr. Euser noted reduced ROM in the cervical and lumbar spine, tenderness of the right and left transverse processes at L1 and "abnormal spasm." Dr. Euser stated the Claimant needed to follow-up with Dr. Agarwala "to get clearance to have his nose surgery." Dr. Euser recommended Claimant start PT for low back pain.

57. On December 2, 2014 Dr. Euser wrote the Claimant felt like "he is getting worse and worse due to the insurance company denying everything." Dr. Euser further stated that "the insurance company has denied everything for this case that we have tried to put in."

DEPOSITION TESTIMONY OF DR. EUSER

58. Dr. Euser testified by deposition on May 7, 2015. Dr. Euser is board certified in family medicine and level II accredited.

59. Dr. Euser testified that he has been unable to get approval for Claimant to return to the orthopedic surgeon. Dr. Euser stated that Claimant needs to be examined for his cervical and lumbar spine, although the "biggest" concern is with the cervical spine. Dr. Euser explained the Claimant needs to return to the orthopedic surgeon to get cervical "clearance" for the ENT physician to perform nasal surgery and to determine whether Claimant's spine exhibits any operable condition.

60. Dr. Euser testified extensively concerning the cause of the Claimant's alleged cervical and back injuries. Dr. Euser acknowledged that he had not reviewed all of the medical records pertaining to Claimant's January 2013 injury and couldn't specifically identify what records he had reviewed. Dr. Euser was generally aware that Claimant had reported cervical and lower back pain in connection with the 2013 injury.

61. Dr. Euser testified he had some conversation with Claimant concerning symptoms associated with the January 2013 injury but had not "gone into marked detail on that." Dr. Euser opined that when determining the cause of Claimant's symptoms "it would help" to have a detailed discussion with Claimant concerning resolution of previous symptoms and the medical records generated prior to January 3, 2014. Dr. Euser stated that he believed Claimant told him the symptoms from the 2013 injury resolved prior to January 3, 2014 injury. However, there was no discussion as to precisely when the previous symptoms resolved.

62. Dr. Euser testified that he was "primarily relying on" Claimant's "subjective statement of symptoms" as the basis for concluding that Claimant has cervical and lumbar symptoms and that those symptoms appeared "contemporaneous with" the January 3, 2014 injury.

63. At the deposition Dr. Euser was presented with Dr. Kenneally's June 25, 2013 neuropsychological report. Dr. Euser did not recall seeing the report prior the deposition. After reviewing Dr. Kenneally's conclusions Dr. Euser testified the report caused him some level of concern in relying upon Claimant's subjective complaints. Dr. Euser also reviewed Dr. Mitchell's July 24, 2013 report in which Dr. Mitchell agreed with Dr. Kenneally that the Claimant was malingering. Dr. Euser testified that Dr. Mitchell's opinion caused him to "become more suspicious" concerning the "origin" of Claimant's "neck and back injury component."

64. Dr. Euser agreed the January 3, 2014 IMH ER record documenting that Claimant's cervical spine was non-tender and there was no pain with active ROM does not correspond with Claimant's "subjective" report that he suffered immediate neck pain at the time of the injury. He also agreed the MCR records showing a pain free ROM without tenderness constitute evidence that Claimant was not complaining of neck pain.

65. At the deposition Dr. Euser was shown several March 24, 2015 surveillance video clips taken of Claimant while at work. Dr. Euser testified the surveillance video depicted Claimant exhibiting greater cervical and lumbar ROM than he demonstrated during Dr. Euser's 2015 clinical examinations. Dr. Euser testified the surveillance video caused him concern as to the "validity" of Claimant's presentation on PE. Dr. Euser further testified the video shows that Claimant did not have any apparent functional deficits. Dr. Euser testified that, "we wouldn't want to do surgery on someone who's functional."

66. Dr. Euser stated that Claimant first complained of upper extremity symptoms on February 14, 2014. Dr. Euser opined the lapse of time between January 3, 2014 and February 14 would be at the "long range" of when he would expect symptoms to appear if they were related to the January 2014 injury. Dr. Euser also acknowledged that on January 6, 2014 PA-C Roth documented pain with cervical ROM.

DEPOSITION TESTIMONY OF DR. AGARWALA

67. Dr. Agarwala testified by deposition on May 12, 2015. Dr. Agarwala is board certified in orthopedic surgery and performs many surgeries including spinal surgeries.

68. Dr. Agarwala stated that he examined the Claimant on May 22, 2014 and had reviewed his office note from that date. Dr. Agarwala had no specific recollection of examining the Claimant. Dr. Agarwala reviewed the cervical MRI and stated that it evidenced a right-sided herniated disc at C6-7 and mild degenerative changes at C5-6 and C6-7. Dr. Agarwala assessed cervical radiculopathy.

69. Dr. Agarwala testified that he doesn't know what caused the Claimant's radicular pain but he stated that a ladder falling on the Claimant "with a heavy person, heavy enough to fracture the nose certainly is reasonable to suggest that may have led to [Claimant's] symptoms." Dr. Agarwala stated that the "timeline of [Claimant's] symptoms is a better way to discern causation" and opined that "if his symptoms started after an injury it is reasonable to assume the two are related." Dr. Agarwala also stated it wouldn't be unusual for "complain of arm pain" until several months after the date of injury.

70. On cross-examination Dr. Agarwala stated that his notes do not "reflect the history and timeline of [Claimant's] pain presentation" and therefore he was not "really able to" express an opinion on the cause of Claimant's neck and arm pain.

71. Dr. Agarwala testified that the spinal surgery he has recommended is reasonable and necessary to treat Claimant's symptoms. Dr. Agarwala admitted that when he proposed surgery he believed Claimant had failed 5 months of conservative treatments such as PT, injections, chiropractic, massage and electrical stimulation. Dr. Agarwala testified that typically he would not recommend surgery unless a patient had failed at least three months of conservative treatment.

DEPOSITION TESTIMONY OF DR. BASSE

72. Dr. Basse testified by deposition on May 21, 2015. In connection with her testimony Dr. Basse reviewed medical records developed after the date of her IME as well as the depositions of Dr. Euser and Dr. Agarwala,

73. Dr. Basse opined that the Claimant did not sustain any neck or back injuries as a result of the January 3, 2014 accident. She further opined that even if Claimant sustained injuries to his neck and/or back on January 3 the injuries were so minor that they did not require any medical treatment or cause any disability.

74. In contrast to her June 2014 IME report, Dr. Basse testified that medical records from ICC documented that Claimant reported neck pain on January 6, 2014, and back pain on January 10, 2014. However, these notations did not alter Dr. Basse's opinion that Claimant did not sustain any neck or back injuries on January 3, 2014. Dr. Basse explained that in her opinion comprehensive physical evaluations were performed at IMH and MCR, and that these examinations did not document any neck symptoms or abnormalities. Dr. Basse considered this significant since Claimant told Dr. Basse that after the ladder incident he experienced the immediate onset of neck pain. Dr. Basse noted that after January 3, 2014 Claimant's symptoms tended to wax and wane and tended to migrate from one upper extremity to the other. Dr. Basse pointed out that on January 9, 2014, three days after Claimant was first seen an ICC, he was examined by Dr. Dubs who noted normal cervical ROM and did not document any complaints of neck or back pain. Dr. Basse further pointed out that on February 14, 2014 claimant was seen by at ICC and PA-C Roth documented "new" complaints of neck pain with radiation into the upper extremities. Dr. Basse opined that because

these “new” symptoms were not related to the January 3, 2014 accident because they appeared more than a month after the date of injury.

75. Dr. Basse testified that Dr. Kenneally’s opinion that Claimant was malingering and the neuropsychological report documenting Claimant’s failure on “three separate validity measures” causes her to “cautiously” interpret Claimant’s reports of subjective symptoms. Dr. Basse also stated that Dr. Mitchell’s opinion that the Claimant was malingering after the 2013 injury causes her to be cautious when interpreting the Claimant’s subjective symptoms in 2014. Dr. Basse also testified that Dr. Euser’s testimony concerning the differences between Claimant’s clinical presentation and his activities shown on the surveillance video is a “red flag” concerning the reliability of Claimant’s subjective complaints.

FINDINGS CONCERNING CAUSE OF NECK AND BACK CONDITIONS

76. Claimant failed to prove it is more probably true than not that he sustained any injuries to his neck and or back proximately caused by the admitted industrial injury of January 3, 2014. Claimant also failed to prove it is more probably true than not that the January 3, 2014 injury aggravated or accelerated any pre-existing condition or conditions.

77. The Claimant’s testimony that on January 3, 2014 he suffered the onset of severe neck and low back pain immediately after the ladder and coworker fell on him is not credible and persuasive. The ALJ notes that Claimant’s testimony concerning the immediate onset of neck and low back pain is similar to the history he gave to Dr. Basse when she examined him on June 6, 2014. However, as explained by Dr. Basse, Claimant’s statements that he experienced the immediate onset of neck and back pain are contradicted by the IMH and MCR emergency room reports that were recorded on January 3, 2014. Neither of these reports documents any reports or findings of pain or injury to the neck and/or low back. To the contrary, these reports demonstrate that on January 3 the neck and back were examined at both hospitals and there was no report of symptoms and no abnormalities observed by the examiners. The ALJ finds it implausible that Claimant actually experienced the onset of severe neck and low back symptoms immediately after the ladder incident but failed to report these symptoms at the IMH and MCR emergency rooms.

78. Claimant argues that the ALJ should infer there is persuasive temporal relationship between the January 3, 2014 injury and Claimant’s subsequent report of neck symptoms on January 6, 2014 and the report of low back symptoms on January 10, 2014. However, the ALJ declines to draw such an inference. First, the suggestion that Claimant experienced a delayed onset of neck and back symptoms is contrary to his own testimony that the symptoms were severe and developed immediately after the accident.

79. Moreover, Claimant’s reports of neck and low back symptoms after January 3, 2014 are not credible and cannot be relied upon to establish a temporal relationship to the January 3, 2014 injury. Dr. Basse credibly and persuasively opined

that that from a medical perspective Claimant's subjective reports of neck and low back symptoms are not reliable. Dr. Basse credibly explained that she would be very "cautious" in relying on Claimant's reports of symptoms because he was diagnosed as a malingerer after the 2013 injury and failed three validity tests on neuropsychological testing. Dr. Basse also credibly opined that Dr. Euser's testimony that Claimant's clinical presentation significantly differed from the activity level shown on the surveillance video presents a "red flag" concerning Claimant's reliability.

80. Dr. Basse credibly opined that there is not a persuasive temporal relationship between the onset of Claimant's neck and back pain symptoms and the January 3, 2014 industrial injury. As pointed out by Dr. Basse in her IME report, in determining causation a physician must consider the temporal relationship between the occurrence of the injury and the development of symptoms allegedly caused by the injury. Dr. Basse explained that here the Claimant did not report any neck symptoms to PA-C Roth until January 6, 2014, and did not mention any back symptoms to PAC-Roth until January 10, 2014. However, when Claimant was examined by Dr. Dubs on January 9, 2014, the neck exhibited full ROM and there was no mention of any neck or back symptoms. It was not until February 14, 2014, more than a month and a week after the alleged date of injury, that PAC-Roth reported the Claimant had "new" symptoms of neck pain with radiation into the upper extremities. After January 10, 2014, the medical records do not document any reports of low back pain until February 14, 2014.

81. Dr. Basse's opinion that the medical records do not document any consistent reports of neck and back pain after January 3, 2014 is corroborated by PA-C Roth's records from the February 3, 2014 examination. On February 3 PA-C Roth did not document any reports of back pain or neck pain. Instead, PA-C Roth noted Claimant's neck was supple with full ROM and there was no mention of pain. It was not until February 12, 2014 that Dr. Schmid again documented neck pain with "paresthesias to the left upper arm."

82. Moreover, Dr. Basse correctly noted Claimant that prior to January 2014 Claimant had reported neck and back pain in connection with the January 2013 injury. Indeed, the settlement documents show that Claimant alleged he had sustained neck and low back injuries in the 2013 incident. The 2013 medical records also show complaints of low back pain, neck pain and pain radiating into Claimant's upper extremities. On October 17, 2013, less than 3 months prior to the January 2014 injury, Claimant told Dr. Politzer he had hip and back pain.

83. The ALJ is not persuaded by Dr. Healey's opinion that Claimant's low back, neck and upper extremity symptoms were caused by the January 3, 2014 injury, or at least by a January 3 "aggravation" of some pre-existing condition(s). Dr. Healey's opinion appears to be based in part on Claimant's assertion that he reported all of these symptoms throughout the course of his treatment after January 3, but treatment was delayed. However, Dr. Healey does not persuasively explain why Claimant did not report these symptoms at the two emergency rooms where he was seen on January 3, 2014. Further, the emergency room records do contain any mention that Claimant fell

on his tool belt as he told Dr. Healey. Dr. Healey did not persuasively explain why the medical records show that after January 3, 2014 Claimant reported symptoms on some occasions and not others. Further, contrary to Dr. Healey's opinion, the ALJ is persuaded by the testimony of Dr. Basse and Dr. Euser that the results of the 2013 neuropsychological testing are a significant medical factor to be considered when determining whether Claimant's 2014 reports of symptoms should be relied upon when evaluating the cause of the symptoms.

84. To the extent Dr. Euser opined that Claimant's neck, upper extremity and low back symptoms are causally related to the industrial injury of January 3, 2014, the ALJ finds Dr. Euser's opinion is not persuasive. Dr. Euser admitted at his deposition that he had little familiarity with records documenting Claimant's treatment for the 2013 injury. Dr. Euser also testified that when evaluating the cause of Claimant's symptoms he relied on Claimant's subjective report that the symptoms appeared contemporaneously with the January 3 incident. However Dr. Euser admitted that prior to the deposition he was unaware of the 2013 neuropsychological testing that showed evidence of malingering, and he was also unaware of Dr. Mitchell's opinion that Claimant was malingering. Dr. Euser admitted that he considered this information to be significant when evaluating the reliability of Claimant's reported symptoms after the January 3, 2014 accident. Dr. Euser also testified that video surveillance showed Claimant performing activity that was inconsistent with his clinical presentation and that this fact cast further doubt on the reliability of Claimant's reported symptoms.

85. To the extent that Dr. Agarwala opined that the January 3, 2014 incident could have caused Claimant's neck and upper extremity paint that opinion is given little weight. Similarly Dr. Agarwala's statement that it is reasonable to assume a causal relationship between the injury and symptoms if the symptoms began after the injury is given little weight. At his deposition Dr. Agarwala expressly declined to render any opinion concerning the cause of the Claimant's symptoms. At the deposition Dr. Agarwala admitted that he had not reviewed the medical records from the 2013 injury, and had reviewed only his own record concerning the January 2014 injury. Therefore, Dr. Agarwala does not have an adequate factual basis to render a persuasive opinion regarding the cause of Claimant's various symptoms.

86. To the extent Claimant relies on the causation opinions of PA-C Roth, the ALJ finds that Roth's opinions on the issue are not persuasive. There is no credible or persuasive evidence that PA-C Roth has been trained in applying the causation analysis required of a level II accredited physician. Further, the ALJ infers that Roth's opinions are not as persuasive as those of a physician trained in applying level II causation analysis.

87. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

CAUSE OF NECK, UPPER EXTREMITY AND LOW BACK SYMPTOMS

Claimant argues that he has established by a preponderance of the evidence that his neck, upper extremity and low back symptoms were proximately caused by the January 3, 2014 injury, or proximately caused by a January 3, 2014 aggravation of his pre-existing condition(s). In support of these arguments Claimant cites his own testimony and the opinions of Dr. Euser, PA-C Roth, Dr. Agarwala and Dr. Healey. Respondents argue Claimant's testimony is not credible and that the opinions expressed by Dr. Basse are the most persuasive.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes Claimant failed to prove it is more probably true than not that on January 3, 2014 Claimant sustained any injury or injuries to his neck and his low back. As determined in Findings of Fact 76 and 77, Claimant's testimony that he sustained the immediate onset of neck and low back pain as a result of the January 3, 2014 accident is not credible and persuasive. Claimant's testimony is inconsistent with the IMH and MCR emergency room reports.

As determined in Findings of Fact 78 through 82, the evidence does not establish a credible or persuasive basis for inferring that there is a meaningful temporal relationship between the Claimant's reports of neck and back symptoms and the January 3, 2014 injury. The ALJ has discredited Claimant's testimony that he experienced an immediate onset of neck and back symptoms after the ladder incident. Moreover, as determined in Findings of Fact 78 and 79, the evidence does not demonstrate Claimant experienced a "delayed" onset of symptoms because that inference is contrary to Claimant's own testimony.

Further, the ALJ has credited Dr. Basse's opinion that the medical records and testimony do not establish that there is persuasive temporal relationship between Claimant's reported symptoms and the January 3, 2014 injury. As determined in Finding of Fact 80, Dr. Basse credibly and persuasively opined that after January 3, 2014 Claimant did not report any neck symptoms until January 6, 2014, and did not report any back symptoms until January 10, 2014. Dr. Basse persuasively opined that the medical records do not document any such reported symptoms when Claimant was seen by Dr. Dubs on January 9, 2014 and that thereafter Claimant's symptoms tended to "wax and wane." Dr. Basse credibly explained that on February 14, 2014 Claimant reported "new" symptoms of neck pain radiating into the upper extremities. Most significantly Dr. Basse credibly opined that Claimant's subjective reports of symptoms cannot be relied upon when assessing causality. Dr. Basse explained that Claimant's unreliability is established by the evidence of malingering after the January 2013 injury and Dr. Euser's observation that Claimant's activity level on the surveillance video was inconsistent with Claimant's clinical examination. Dr. Basse's opinions were corroborated Dr. Euser who testified that the evidence of malingering in 2013 caused him to be "suspicious" of the "origin" of Claimant's symptoms in 2014 and to question the validity of Claimant's clinical presentation.

The ALJ notes that Claimant asserts in his position statement that the evidence of malingering in 2013 constitutes "improper character evidence." However, Claimant did not object to the admission of the malingering evidence and may not do so now because there was not contemporaneous objection. C.R.E. 103(a)(1).

For the reasons stated in Findings of Fact 83 through 86 the opinions of Dr. Healey, Dr. Euser, Dr. Agarwala and PA-C Roth are not persuasive insofar as they tend to suggest a causal relationship between the January 3, 2014 injury and Claimant's subsequent neck and back symptoms.

The claim for medical treatment of Claimant's neck and back symptoms is denied because Claimant failed to prove that these conditions were caused by the January 3,

2014 injury or that the January 3, 2014 injury aggravated or accelerated any pre-existing back or neck condition. In light of this determination the ALJ need not address the other issues raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

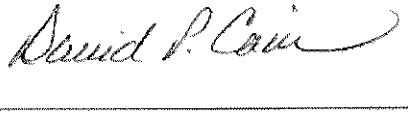
1. The Claimant failed to prove it is more probably true than not that his alleged neck and back conditions were proximately caused by the industrial injury of January 3, 2014. Therefore the claim for benefits, including medical benefits, based on the neck and back injuries is denied.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 6, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor

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ISSUE

1. Whether Claimant is entitled to temporary total disability benefits from March 27, 2015 and ongoing.

FINDINGS OF FACT

1. On June 18, 2014 Claimant began working part time for Employer in the position of floor staff. Claimant's job duties included pushing carts of parts around a warehouse and her job required standing, walking, reaching, lifting, and pushing/pulling. Claimant was scheduled to work 4-5 hour shifts, five days a week, for a total of approximately 20-25 hours per week. *See* Exhibit 3.

2. On June 27, 2014 Claimant suffered an injury to her right ankle. Claimant was pulling a metal cart full of car parts across the warehouse when she heard a forklift driver honk their horn. Claimant came stopped immediately and the cart she was pushing hit her right ankle.

3. Claimant was transported to University Hospital Emergency Room where she received stitches for an Achilles tendon laceration. Claimant later received treatment including wearing a boot for two months and undergoing physical therapy.

4. On June 28, 2014, Claimant was evaluated by Jennifer Huldin, M.D. Dr. Huldin assessed laceration of the lower leg and Achilles rupture. Dr. Huldin provided Claimant with a return to work release with restrictions of seated work only, requirement to wear boot, and included in the treatment plan that Claimant should elevate foot to the level of the heart or higher when seated and when sleeping. *See* Exhibit J

5. From the date of her injury and through February 19, 2015 Employer was unable to accommodate Claimant's restrictions. Claimant was off work, at home, and received temporary total disability (TTD) benefits.

6. On February 19, 2015 Claimant received a written offer of modified employment from Employer. The letter noted that they had matched her restrictions with an offsite light duty work opportunity allowing her to recondition herself without exceeding her limitations. The work was at Pinnacle Hospice Care and included light office work. The letter noted that although the light duty assignment was offsite at a local volunteer organization, Claimant remained an employee of Employer and the offer of modified employment was made by Employer. *See* Exhibit H.

7. On February 20, 2015 Claimant returned to modified employment. Claimant worked within her restrictions at Pinnacle Hospice Care through March 17, 2015. During this period of time, Claimant was paid wages by Employer and also continued to receive TTD benefits.

8. On March 16, 2015 Claimant was evaluated by Carrie Burns, M.D. Dr. Burns provided Claimant with a return to work release with restrictions of no climbing stairs or ladders. *See* Exhibit I.

9. On March 18, 2015 Claimant returned to work onsite at Employer's facility. Claimant continued to work in modified employment within her work restrictions. Employer had a policy requiring that employees in the warehouse wear steel toed boots. On March 27, 2015 Claimant reported to Employer that she was in pain due to the boots and needed to see her doctor before continuing working.

10. On April 6, 2015 Claimant was evaluated by Dr. Burns. Dr. Burns noted Claimant had increased pain due to her daughter being in the hospital and because Claimant was doing a lot more walking. Dr. Burns noted Claimant had seen Dr. Blau on March 11, 2015 and that he felt she may have CRPS. Dr. Burns noted that Claimant would hopefully be scheduled to undergo a thermogram and a triple phase bone scan soon. Dr. Burns continued Claimant's work restrictions of no climbing stairs or ladders and added the restriction of needing a 10 minute break every 2 hours to rest and elevate her foot. *See* Exhibit 1.

11. Claimant testified that at the April 6, 2015 appointment Dr. Burns advised her she had to either be completely off work or that she had to return to Pinnacle Hospice Care. Claimant's responses to interrogatories indicates that the intent of the doctor was that she either wouldn't work or would do alternative work at Pinnacle Hospice Care until she could get the results of the CRPS testing back and get a new treatment plan in place. Claimant's testimony and her response to interrogatories surrounding Dr. Burns' plan is inconsistent with Dr. Burns' medical report and the work restrictions that Dr. Burns provided on April 6, 2015.

12. On April 7, 2015 Claimant's supervisor spoke with Claimant via telephone and advised Claimant that Employer could continue to accommodate her in modified employment and that the one new restriction of needing a 10 minute break every two hours would be accommodated and that Claimant was expected to report to work the following day. Claimant understood this conversation and was aware that Employer would still accommodate her in her modified employment.

13. Claimant subjectively believed she was incapable of the work and incredibly believed that her work restrictions were much greater than what was provided by Dr. Burns on April 6, 2015.

14. On April 8, 2015 Claimant did not report to work.

15. Claimant indicated in her response to interrogatories that after the phone conversation with her supervisor, she attempted several times to contact Dr. Burns and left messages over the next few days but did not receive a call back. This is not found credible or persuasive. Claimant reported that after multiple attempts to contact her doctor to sort out her true work restrictions, she then received a letter stating that she had resigned from Employer so she found another job. *See* Exhibit D.

16. On April 14, 2015 Claimant's supervisor contacted Claimant and left a voice message regarding her absence from Employment. He also sent her an email. Claimant did not respond to the voice message or to the email.

17. On April 20, 2015 Claimant's supervisor sent Claimant a letter via certified mail. The letter provided that Claimant's lack of notification (3 day no call no show) constituted a voluntary resignation. The letter provided that Claimant's last day worked was March 27, 2015. The letter provided that Claimants' workers compensation claim remained open so that she could maintain treatment and provided that if she had questions to contact her supervisor. *See* Exhibit F.

18. On April 24, 2015 Claimant was evaluated by Dr. Burns. Dr. Burns provided continued work restrictions of no climbing stairs or ladders and provided the additional restriction of requiring a 10 minute break every hour to rest and elevate her foot, and noted that Claimant may work up to a 4 hour shift. Dr. Burns did not indicate in her report that Claimant had to be entirely off work or that Claimant had to return to work at Pinnacle Hospice Care. *See* Exhibit 1.

19. On May 10, 2015 Claimant began working part time for Melissa's Petsitting and More, LLC as a dog walker. Claimant walks 3-4 dogs per day with the walks averaging 23-27 minutes. She is able to perform this work within her work restrictions.

20. Despite returning to modified employment on February 20, 2015 and continuing to work in modified employment until March 27, 2015, Claimant was paid both wages and TTD benefits during this period of time.

21. Claimant has continued to receive TTD benefits from March 27, 2015 through the date of hearing in this matter despite beginning employment with Melissa's Petsitting and More, LLC on May 10, 2015.

22. Respondents are requesting termination of TTD benefits as of March 27, 2015 due to Claimant's responsibility for termination and argue that being absent for three or more shifts without proper documentation and failing to contact a supervisor violated company policy.

23. Employer's attendance policy provides that employees are required to be reliable and punctual when reporting for scheduled work. The policy provides that three infractions within 90 days for absenteeism or tardiness without proper documentation

are grounds for termination. It also provides that failure to contact your supervisor if you are going to be late or absent may result in immediate termination. *See* Exhibit L.

24. Claimant received a written offer of modified employment on February 19, 2015. She also had actual notice that her modified employment continued to be available to her after the one new work restriction she received on April 6, 2015. However, even after being advised on the phone that her modified employment continued, Claimant failed to show up for work or further contact Employer.

25. Claimant's testimony overall is not found credible or persuasive. Claimant's contention that Dr. Burns advised her at the April 6, 2015 appointment that she either needed to be completely off work or return to work at the Pinnacle Hospice Center is inconsistent with Dr. Burns' own medical report of April 6, 2015 where Dr. Burns only adds one minor additional work restriction of a 10 minute break every two hours (essentially once per Claimant's normal part-time shift). Additionally, Claimant's testimony is inconsistent with Dr. Burns' medical reports of April 24, 2015 where again Dr. Burns does not mention that Claimant was required to be completely off work or return to Pinnacle Hospice Care. Claimant's testimony that after she spoke with her supervisor on April 7, 2015 she attempted multiple times to contact Dr. Burns to clarify restrictions before receiving her termination letter April 20, 2015 is also not credible or persuasive .

26. Claimant's failure to report to work on April 8, 2014 despite having been told that her one new restriction would continue to be accommodated in her modified employment was unreasonable. Claimant's failure to contact her employer between April 8, 2014 and April 20, 2014 and failure to respond to Employer's voice message and email on April 14, 2014 was also unreasonable.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S. (2013).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until the first occurrence of any one of the following: the employee reaches maximum medical improvement; the employee returns to regular or modified employment; the attending physician gives the employee a written release to return to regular employment; or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. § 8-42-105(3), C.R.S.

As a threshold issue, Claimant must establish an entitlement to TTD benefits. As found above, Employer made a modified employment offer to Claimant in writing on February 19, 2015. Claimant accepted this offer and returned from being entirely off work and from being totally disabled on February 20, 2015 when she began modified employment. On February 20, 2015, the provisions of §8-42-105(3)(b), C.R.S. were met and Claimant's *entitlement to* TTD terminated. Although Respondents continued to pay TTD benefits to Claimant subsequent to this date and while she worked in modified employment from February 20, 2015 through March 27, 2015 and have continued to pay her TTD benefits, Claimant's entitlement to the benefits terminated pursuant to statute on February 20, 2015.

The provisions of §8-42-105(3)(d)(I), C.R.S. would be implicated if Claimant had failed to return to work after the offer of modified employment that was made by Employer on February 19, 2015. However, as she accepted the offer and returned to

modified employment, the provisions of §8-42-105(3)(b), C.R.S. are applicable in this case. As of the date of her return to modified employment with Employer, Claimant was aware that modified employment was available, accepted the modified employment, and her entitlement to TTD benefits ceased. It is arguable that a situation may occur where, subsequent to a return to modified employment, a Claimant might receive increased work restrictions outside of their modified employment rendering them once again totally disabled. However, that did not occur in this case. Here, after Claimant returned to modified employment with Employer on February 20, 2015, she had only slight changes in her work restrictions. Claimant argues that each time a slight change in work restrictions occurs, Employer must make a new offer of modified employment to Claimant in writing. This is not found persuasive. The requirements of §8-42-105(3)(d)(I), C.R.S. to terminate TTD benefits is for someone who is temporarily totally disabled and who has been unable to work at all. This section may have applied to Claimant in early February before her return to work. However, Claimant was no longer temporarily totally disabled as of February 20, 2015 when she returned to modified employment and the provisions of §8-42-105(3)(b), C.R.S. ended her entitlement to TTD benefits. Therefore, Claimant cannot show any entitlement to TTD benefits on March 27, 2015.

Claimant's appointment with Dr. Burns on April 6, 2015 only provided one slight change to her work restrictions by requiring a 10 minute break every 2 hours to rest/elevate her leg. This one new restriction did not return Claimant to being temporarily totally disabled nor was it outside the offer of modified employment that she had accepted in February. Further, Claimant spoke with her supervisor on April 7, 2015 and he advised her that this one new restriction would be accommodated and that her modified employment continued to be available. Claimant had actual knowledge that she would continue to be accommodated in modified employment as she had been since February 20, 2015. Although §8-42-105(3)(d)(II), C.R.S. is specific to temporary help contracting firms, it is instructive on the overall intent of §8-42-105, C.R.S. It provides that "once the employee has received one written offer of modified employment…the employee shall be deemed to be on notice that modified employment is available. Subsequent offers of modified employment need not be in writing so long as the job requirements of within the restrictions given the employee by the employee's attending physician…" Here, Claimant had received and accepted a written offer of modified employment and started such modified employment on February 20, 2015. She had actual knowledge that modified employment through Employer within her restrictions was available as of that date. Her further contact with her supervisor on April 6, 2015 assured her that she would continue to be accommodated within the one slight new restriction given by her authorized treating provider.

Claimant's argument that 7 CCR 1101-3, Rule 6-1(A)(4) applies in this case is also not persuasive. That rule provides the requirements for an Insurer when an Insurer wishes to terminate TTD benefits without hearing by filing an admission of liability. Here, Insurer is not attempting to terminate TTD by filing an admission of liability. If they were, then they would have to follow the requirements of the rule, including sending a letter to Claimant certified mailed with an offer of modified employment, and a statement from an authorized treating physician that the employment offered is within

Claimant's physical restrictions. This rule outlines the requirements to terminate TTD by filing an admission of liability and is not a general requirement for any and all offers of modified employment. The modified employment offer made to Claimant on February 19, 2015 was sufficient and she accepted the offer and began modified employment on February 20, 2015 thus ending her entitlement to TTD benefits. Therefore, Claimant is unable to establish, as a threshold issue, that she was entitled to TTD benefits on March 27, 2015 or thereafter.

Responsible for Termination

Claimant contends that she is owed TTD benefits for the period of time following her March 27, 2015 termination and ongoing. Although the ALJ concludes that Claimant cannot meet the threshold requirement of showing any entitlement to TTD benefits on March 27, 2015 or thereafter, the ALJ examines in the alternative Respondent's contention that Claimant would be precluded from receiving TTD benefits because she was responsible for her termination. The ALJ concludes that even if Claimant had a valid claim for TTD benefits from March 27, 2015 and ongoing, Respondents have met their burden to establish that Claimant was responsible for the termination of her employment.

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office, supra; Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). A claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*.

Respondents have met their burden to establish that Claimant was responsible for the termination of her employment. Claimant is therefore barred from recovering TTD benefits subsequent to March 27, 2015. Claimant was not terminated in this case due to her injury. The evidence shows that Employer continued to employ Claimant after her injury and kept her off work paying her TTD benefits after her injury and during

her recovery. On February 19, 2015 Employer offered Claimant modified light duty work. Claimant accepted the modified employment and worked for Employer in modified employment from February 20, 2015 through March 27, 2015. On March 27, 2015 Claimant reported that the steel toed boots were causing her pain and that she needed to see her doctor before continuing working. Again, Employer accommodated Claimant's request and waited to see the outcome of her upcoming doctor's appointment. After her appointment on April 6, 2015 Claimant's doctor provided one additional restriction of a 10 minute break every two hours to rest/elevate her foot. The very next day, Claimant's supervisor advised her by phone that they could continue to accommodate her restrictions in her modified duty employment and that she needed to come back to work.

Claimant had actual notice during that phone conversation that she would continue to be accommodated in her modified employment. Claimant had been working in modified employment for Employer since February 20, 2015. Claimant alleges that Dr. Burns' restrictions from the April 6, 2015 appointment were much greater and required her to either be off work or to work at Pinnacle Hospice Center, but this is not credible or persuasive. Even at her April 24, 2015 appointment Claimant was not required to be completely off work or to work at Pinnacle Hospice Center. Claimant's reports are incredible. Claimant had actual knowledge that she would continue to be accommodated in her modified employment within her work restrictions, yet she failed to return to work. Claimant also failed to remain in contact with Employer or her supervisor. Claimant failed to respond to voice mail and email messages on April 14, 2015. Finally, after several weeks without contact from Claimant and without any indication from a medical provider that Claimant in fact had greater work restrictions that fell outside of the modified employment Claimant had been working within since February 20, 2015, Employer sent Claimant a letter terminating her employment.

The ALJ concludes that Claimant's termination from employment was due to her lack of contact with Employer and her failure to report to work for several weeks. These were volitional and unreasonable acts of Claimant and she was therefore responsible for her termination. Any wage loss suffered by Claimant from March 27, 2015 and ongoing was due to her volitional and unreasonable conduct and her subjective belief that she could not work in the modified employment, despite it being within her work restrictions. Therefore, although Claimant initially failed to establish an entitlement to TTD on March 27, 2015 even if she were still entitled to TTD on that date, Respondents have met their burden to show that TTD should cease as of March 27, 2015 as any wage loss subsequent to that date was due to Claimant's termination for which she was responsible.

ORDER

It is therefore ordered that:

1. Claimant is not entitled to TTD benefits from March 27, 2015 and ongoing.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 2, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he is entitled to an order awarding increased average weekly wage (AWW);

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to a general award of maintenance medical benefits;

3. Whether Claimant proved by a preponderance of the evidence that the medical recommendations of Dr. Stull for intermittent cortisone or Visco supplementation injections were reasonably necessary medical benefits; and

4. Whether Claimant proved by a preponderance of the evidence that he entitled to an order awarding temporary total disability benefits (TTD) from March 17, 2014, until April 29, 2014, based on the increased AWW.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. Claimant sustained an admitted industrial injury to his right knee arising out of his employment with Employer on September 6, 2011.

2. Claimant underwent a first surgery on his right knee performed by Dr. Roger Greenberg on January 19, 2012.

3. Claimant was originally placed at maximum medical improvement (MMI) by authorized treating physician, Dr. David Zieg on April 5, 2012. Dr. Zieg issued a permanent impairment rating of 16% of the right lower extremity, no permanent restrictions and no maintenance benefits were suggested.

4. Claimant continued to work for Employer while reporting ongoing pain and symptoms involving his right knee.

5. On November 21, 2013, Claimant was seen for a maintenance visit by Dr. Zieg for ongoing right knee pain. Dr. Zieg opined that Claimant's condition was likely an exacerbation of underlying arthrosis associated with the industrial injury,

nothing to suggest a new injury and referred Claimant to Dr. Greenberg for evaluation/injection and a course of physical therapy.

6. On November 25, 2013, Claimant was seen for a maintenance visit by Dr. Greenberg who performed a steroid injection and prescribed an unloader brace. Dr. Greenberg recommended a Synvisc injection.

7. On January 9, 2014, Dr. Harold Hunt performed a Synvisc injection. Dr. Hunt indicated Claimant could follow up every 3-4 months for injection therapies.
8. Claimant credibly testified at hearing that the injections provided a period of improvement for his right knee pain.

9. Claimant was evaluated by Dr. Philip Stull, orthopedic surgeon, on February 19, 2014. Dr. Stull had previously performed surgery on Claimant's left knee in 2007 with a good result. Dr. Stull recommended an MRI.

10. Claimant underwent a MRI of his right knee on February 21, 2014, which revealed severe arthritis of the medial compartment of the right knee with subchondral edema and eburnation, tear of the posterior horn of the medial meniscus, and mild chondromalacia/arthritis of the patellofemoral joint and lateral compartment.

11. On March 17, 2014, Claimant underwent right knee arthroscopy with partial medial meniscectomy, extensive arthroscopic debridement of the knee and chondroplasty performed by Dr. Stull. Claimant pursued the second surgery with Dr. Stull under his private insurance.

12. On April 29, 2014, Claimant was seen for post-operative follow up by Dr. Stull. Claimant reported his knee was doing well and he was significantly improved over his pre-operative status. Claimant reported returning to work with minimal symptoms. Dr. Stull opined that Claimant was at or approaching MMI. Dr. Stull opined that maintenance care would be reasonable to include intermittent cortisone or Visco supplementation injections at a minimum. Dr. Stull recommended that Claimant would need to be seen if he had increasing pain or symptoms of his knee joint. The opinions of Dr. Stull on the issue of maintenance medical treatment are found credible and persuasive.

13. Respondents re-opened the present claim, filing a General Admission of Liability on May 15, 2014, admitting liability for benefits including, but not limited to, TTD from March 17, 2014, until April 29, 2014, at an AWW of $765.96.

14. Claimant was seen in follow up by Dr. Zieg on June 12, 2014. Claimant reported his knee felt better than it had since the injury, noting only a minor ache in the knee intermittently. Dr. Zeig placed Claimant at MMI with no additional impairment, no restrictions and no maintenance care recommended. The opinion of Dr. Zieg with regard to maintenance is found to be less credible or persuasive

than the opinion of Dr. Stull, who was the orthopedic surgeon who performed Claimant's surgery.

15. Claimant's hourly wage and resulting income from Employer at the time of his surgery had increased to $814.80 since the date of injury. Claimant's right knee condition following his second surgery improved, and continued to improve, after he returned to work. Claimant was off work from the date of surgery until he returned to full duty work and wages on April 29, 2014. Claimant credibly testified that his knee pain has gradually worsened since MMI, but he reported no intervening injury. Claimant sought treatment outside the workers' compensation system since being placed at MMI as treatment had been denied. Claimant request additional maintenance treatment under his workers' compensation claim including injections recommended by Dr. Stull.

16. Claimant's wage records introduced into evidence at hearing demonstrated Claimant was earning $814.80 per week in gross wages at the time of his subsequent period of disability on March 17, 2014, following his second surgery until his return to work on April 29, 2014. Claimant is entitled to an award of increased TTD for this period of work related disability.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

GENERAL

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592, P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385,389 (Colo. App. 2000).

2. The ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensieck v. ICAO*, 183 P.3d

684 (Colo. App. 2008); *Kroupa v. ICAO*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

AWW/TTD

3. Claimant contends that he is entitled to an order awarding increased AWW. Claimant argues that Respondents admitted liability for an AWW based on the September 6, 2011, date of injury. Claimant maintains that the evidence established he had a second period of disability, from March 17, 2014, following his second surgery until his return to work on April 29, 2014, at which time his wages had increased. Claimant contends his AWW should be increased to $814.80. Respondents argue Claimant is not entitled to increased AWW and the admitted wage is correct. It is found and concluded that Claimant is entitled to increased AWW to $814.80. Furthermore, it is concluded that Claimant is entitled to TTD from March 17, 2014, following his second surgery until his return to work on April 29, 2014, based on the increased AWW of $814.80.

4. "Wages" is defined as the "money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Section 8-40-201 (19(a), C.R.S. The objective of wage calculation is to arrive at a fair approximation of the Claimant's wage loss determined from the employee's wage at the time of injury. Section 8-42-102(3), C.R.S.; *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo.App. 1993); see *Williams Brother, Incorporated v. Grimm,* 88 Colo. 416, 197 P.1003 (1931); *Vigil v. Industrial Claim Appeals Office,* 841 P.2d 335 (Colo. App. 1992). According to *Washburn v. Academy School District No.20*, W.C. No. 4-491-308 (Industrial Claim Appeals Office (ICAO), September 16, 2002), Section 8-4-102(3), C.R.S. "grants the ALJ authority to use discretion in calculating that average weekly wage when the prescribed methods will not, for any reason, fairly compute the claimant's wage."

5. Claimant's original admitted AWW of $765.96 was based on Claimant's AWW at the time of his injury in September 2011. Claimant subsequent period of admitted disability following re-opening was from March 17, 2014, to April 29, 2014, approximately 2 ½ years later. As found, Claimant's AWW from the wage records submitted supports an AWW on March 17, 2014, of $814.80. To compensate Claimant fairly for the Claimant's actual loss of income, his average weekly wage should be determined based on his earnings at the time of each period of

disablement. *Campbell v. IBM Corporation*, 867 P.2d 77, supra (citing *Henderson v. RSI, Inc*., 824 P.2d 91 (Colo. App. 1991).

6. As found, Claimant established by a preponderance of the evidence that Claimant's correct AWW at the time of his subsequent disability commencing March 17, 2014, is $814.80. Claimant further proved, consistent with Respondents' July 15, 2014, Amended Final Admission of Liability, that he was disabled from his usual employment and entitled to TTD from March 17, 2014, to April 29, 2014, Respondents shall pay Claimant TTD from March 17, 2014 to April 29, 2014 at a TTD rate of $543.20, with credit for TTD benefits previously paid to Claimant for this period of disability.

MAINTENANCE MEDICAL BENEFITS/INJECTION THERAPIES AND CLINICAL FOLLOWUP

7. Claimant contends that he established by a preponderance of the evidence that he is entitled a general award of maintenance medical benefits, and that, specifically, the maintenance benefits recommended by Dr. Stull are reasonably necessary. Respondents contend that no maintenance benefits were admitted and that the record does not support such an award. As found, it is concluded that Claimant sustained his burden of proof by a preponderance of the evidence to establish that he is entitled to a general award of maintenance medical benefits and further that the recommendations for maintenance medical benefits made by Dr. Stull are reasonably necessary.

8. The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988*); Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). An award for Grover medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993). An award of Grover medical benefits should be general in nature. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003).

9. In this matter, Dr. Stull credibly testified that maintenance medical benefits in the present claim were reasonable, specifically, citing the need for injection therapies and clinical follow up at a minimum. It is noted that Dr. Stull is an orthopedic specialist, who performed Claimant's successful second surgery. It is also noted

that Claimant underwent prior injections as maintenance medical care with reported improvement. Also, another orthopedic specialist, Dr. Hunt, also recommended further injection therapies every 3-4 months. Claimant established by a preponderance of the evidence that he is entitled to an order awarding maintenance medical benefits, including, but not limited to the recommendations of Dr. Stull, which were shown to be reasonable and necessary medical benefits to prevent deterioration of his condition.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant's AWW as of March 17, 2014, is $814.80, with a corresponding TTD rate of $543.20.

2. Respondents shall pay Claimant the previously admitted TTD benefits from March 17, 2014, until April 29, 2014 at a TTD rate of $543.20 with a credit for actual TTD benefits previously paid by Respondents to Claimant for this period.

3. Claimant's request for a general maintenance award is granted.

4. The maintenance treatment recommendations by Dr. Stull are found reasonable and necessary.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _10/27/15____

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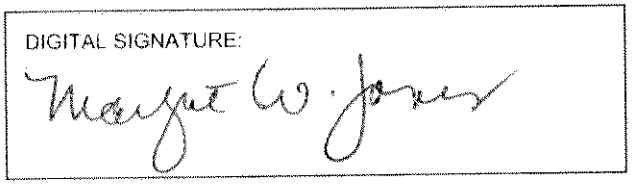
DIGITAL SIGNATURE:



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Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

1. Whether Claimant has presented substantial evidence to support a determination that medical maintenance treatment in the form of Botox injections is causally related, reasonable and necessary to relieve the effects of her April 12, 2004 admitted industrial injuries or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. for Respondents' violation of W.C.R.P. 16-10 (F) for unreasonable delay or denial of prior authorization.

FINDINGS OF FACT

1. Claimant is a 58 year old female who worked for Employer as an Insurance Litigation Consultant. On April 12, 2004 Claimant reported bilateral hand pain that she attributed to typing, telephone use, mail processing, punching holes in paper and filing while at work. She was initially diagnosed with bilateral Carpal Tunnel Syndrome (CTS) based on the repetitive use of her upper extremities while working for Employer.

2. On April 15, 2007 Claimant reached Maximum Medical Improvement (MMI). On August 29, 2007 Claimant underwent a Division Independent Medical Examination (DIME) with Justin D. Green, M.D. He agreed that Claimant had reached MMI on April 15, 2007. Dr. Green diagnosed Claimant with bilateral CTS, myofascial neck pain and a history of carpal-metacarpal arthropathy. He also noted that Claimant had undergone multiple carpal tunnel releases and left ulnar release surgery. Dr. Green assigned a 31% whole person impairment rating.

3. On October 1, 2007 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Green's determinations. Respondents agreed to provide Claimant with authorized, reasonable and necessary medical maintenance benefits related to her industrial injuries.

4. On April 3, 2008 the parties executed a partial settlement agreement to resolve outstanding issues regarding indemnity benefits. The parties specifically stipulated that Respondents only retained an obligation to pay for "all authorized, reasonable/necessary medical care causally related to the industrial injury."

5. On December 13, 2007 Bennett Machanic, M.D. performed an EMG/NCV on Claimant. The study revealed findings consistent with bilateral chronic CTS, lower brachial plexus pathology on the left and thoracic outlet syndrome on the right.

6. On December 21, 2007 Yechiel Kleen, M.D. initiated treatment for Claimant's chronic pain. He subsequently administered a number of trigger point injections.

7. In June 2011 Dr. Kleen transferred Claimant's medical care to Bradley Vilims, M.D. Dr. Vilims provided a series of trigger point injections for Claimant's chronic pain. By November 26, 2013 he began administering Botox injections.

8. On December 2, 2014 Claimant underwent her fourth EMG study. The second and third EMG studies had revealed "worsening of distal median neuropathic dysfunction" bilaterally. The December 2, 2014 study reflected widespread axonal dysfunction on all nerves tested. Dr. Machanic noted that the new EMG findings raised "a question as to whether [Claimant] has developed a medical problem superimposed on the pre-existing issues, thus "mak[ing] everything worse." He explained that the new axonal problems constituted a "complex new disease process superimposed upon the old, and she may very well have a peripheral neuropathy due to metabolic processes, such as diabetes or vitamin deficiencies."

9. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections by faxing a request to Respondents. He sought to administer the injections to Claimant every three to four months.

10. Respondents forwarded Dr. Vilims' request to Henry Roth, M.D. for review. On February 6, 2015 Dr. Roth determined that the request should be denied for medical reasons. Dr. Roth specifically noted that the proposed treatment was not directed at treating conditions consistent with Claimant's admitted industrial injuries. Instead, the injections were focused on treating Claimant's idiopathic conditions including axonal dysfunction.

11. On February 12, 2015 Respondents sent a letter to Dr. Vilims denying his request for prior authorization and attached Dr. Roth's report. Respondents denied the request for medical and non-medical reasons under W.C.R.P. 16-10(A) and (B). Respondents noted that the requested services "may not be related to the admitted injury." The denial letter included a certification that the letter was sent to Dr. Vilims, Claimant and Claimant's counsel.

12. In addition to providing a denial letter Respondents also filed an Application for Hearing on February 12, 2015. Respondents endorsed the denial of Dr. Vilims' request for Botox injections and the reasonableness, necessity and relatedness of continuing medical benefits. Filing the Application for Hearing constituted a second action to contest a request for prior authorization pursuant to Rule 16-10(E)(1)-(2).

13. On April 20, 2015 Neil Pitzer, M.D. conducted a records review of Claimant's claim. He noted that Claimant had been diagnosed with CTS and undergone carpal tunnel releases that provided temporary benefit. However, Claimant subsequently underwent multiple nerve releases that were not related to her CTS and did not provide significant improvement. Dr. Pitzer recounted that Claimant has received trigger point and Botox injections without improvement or documented changes in function. He remarked that Claimant has not worked since 2004 and has not been exposed to any work activities over the previous 10 years. Dr. Pitzer determined that there was no clinical reason for "continued Botox injections or other physical therapy for her myofascial symptoms as these have not improved and are likely related to her underlying rheumatologic condition and not to her work exposure."

14. Claimant testified at the hearing in the present matter. She explained that the Botox injections provide functional improvement. Claimant noted that within one to two weeks of the injections her pain symptoms decrease and her muscles relax. She can then perform activities without pain.

15. On August 31, 2015 Dr. Machanic testified through an evidentiary deposition in this matter. Dr. Machanic explained that Botox is an appropriate treatment for Claimant's thoracic outlet conditions and pain in the major and minor pectoralis muscles. He stated "[w]ell, it's one of many treatments and it's appropriate." Dr. Machanic remarked that Botox is reasonable and necessary to relieve the symptoms of Claimant's condition. He summarized that Dr. Vilims should be permitted to treat Claimant because the interventions "have provided increased stability for [Claimant] to function. In other words, it's helped symptoms and its helped activities of daily living and quality of life."

16. On June 22, 2015 the parties conducted the evidentiary deposition of Henry Roth, M.D. Dr. Roth explained that the proposed Botox injections were not related to Claimant's April 12, 2004 industrial injuries but were instead designed to treat her non-work-related conditions. He explained:

> Where we find ourselves now is the request for Botox injections to relieve discomfort that she has in her neck and upper back, as well as the consideration of more treatment she has in her upper extremities. All of these things are explained by her personal medical disorders, the inflammatory disease that she had, the very potent medications that she takes. None of these things, and certainly not an axonal neuropathy, are explained by mechanical exposures that are at this point incredibly removed from the onset.

He further testified that the Botox injections were aimed at conditions that were not related to Claimant's work activities.

17. Dr. Roth testified that none of Claimant's current medical treatment, including pool therapy, medications, Botox injections and massage therapy, was "with any probability related to the notion of a cumulative trauma disorder 11 years ago." He

maintained that the current treatment was aimed at conditions in the neck, shoulders, and upper back and could not have been caused by the admitted CTS problems in the bilateral wrists.

18. Dr. Roth further explained that when providing treatment for Claimant's condition of rheumatoid or psoriatic arthritis

> it is ordinary to see chronic diffuse bilateral symmetrical myofascial disorders. That's what she's presenting with. That's what the doctors are trying to treat. Whether it's called myogenic thoracic outlet or myofascial pain or fibromyalgia, that is common, ordinary, and part and parcel of these rheumatoid diseases. It is not part of carpal tunnel syndrome.

Dr. Roth summarized that "the treatments that [Claimant] is pursuing are a reflection of the idiopathic medical conditions, not mechanically sustained work-related disorders."

19. On June 23, 2015 the parties conducted the evidentiary deposition of Dr. Pitzer. He maintained that the requested Botox injections were not related to her work exposure but were instead directed to her underlying rheumatologic condition. Dr. Pitzer commented that Claimant has received multiple Botox injections but has not received long-term improvement.

20. Dr. Pitzer also explained that the proposed Botox injections did not constitute reasonable and necessary medical treatment for Claimant's condition. He recounted that in December 2013 Claimant reported immediate relief after receiving a Botox injection. However, Dr. Pitzer noted that Botox injections do not provide immediate relief because they do not involve the administration of a local anesthetic. Instead, Botox injections take up to one week to provide noticeable relief. Therefore, Claimant's immediate relief constituted a non-physiologic response that did not support continued injections.

21. Dr. Pitzer testified that there is long-term toxicity associated with Botox injections and the muscles become weaker with repetitive injections. The toxicity would not help Claimant's arthritic or muscle pain conditions. Dr. Pitzer summarized that Botox constituted an "invasive potentially toxic treatment" that should not be continued unless there are well-documented functional gains.

22. Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of Botox injections is causally related, reasonable and necessary to relieve the effects of her April 12, 2004 admitted industrial injury or prevent further deterioration of her condition. On April 12, 2004 Claimant sustained admitted industrial injuries including bilateral CTS, myofascial neck pain and a history of carpal-metacarpal arthropathy. On October 1, 2007 Respondents filed a FAL and agreed to provide Claimant with authorized, reasonable and necessary medical maintenance benefits related to her industrial injuries. Claimant subsequently received a variety of medical maintenance benefits including Botox injections. On February 3, 2015 Dr. Vilims requested prior authorization for Botox

injections to be administered every three to four months. Dr. Pitzer and Dr. Roth persuasively explained that the requested Botox injections were not related to Claimant's industrial injuries but were instead designed to treat her underlying rheumatologic condition. Claimant suffers from widespread axonal dysfunction of her nerves that was not caused by the April 12, 2004 work exposure. Moreover, Claimant has received trigger point and Botox injections without improvement or documented changes in function. Dr. Pitzer also explained that the proposed Botox injections do not constitute reasonable and necessary medical treatment for Claimant's condition. Finally, he testified that there is long-term toxicity associated with Botox injections and the muscles become weaker with repetitive injections.

23. In contrast, Dr. Machanic remarked that Botox is reasonable and necessary to relieve the symptoms of Claimant's condition. He summarized that Dr. Vilims should be permitted to treat Claimant because his interventions have reduced symptoms and improved Claimant's function. However, the medical records, in conjunction with the persuasive testimony of Drs. Roth and Pitzer reveal that the proposed Botox injections are not related to Claimant's April 12, 2004 industrial injuries but were instead designed to treat her underlying rheumatologic condition. Accordingly, Dr. Vilims' February 3, 2015 request for Botox injections is denied and dismissed.

24. Claimant has failed to demonstrate that it is more probably true than not that she is entitled to penalties pursuant to §8-43-304(1), C.R.S. for the violation of W.C.R.P. 16-10(F) for unreasonable delay or denial of prior authorization. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections to be administered every three to four months. Respondents submitted the request to Dr. Roth for review and on February 6, 2015 he concluded that the request should be denied for medical reasons. He specifically explained that the proposed treatment was not directed at treating conditions consistent with Claimant's admitted industrial injuries. Instead, the injections were focused on treating Claimant's idiopathic conditions including axonal dysfunction. On February 12, 2015 Respondents sent a letter to Dr. Vilims denying his request for prior authorization and attached Dr. Roth's report. Respondents denied the request for medical and non-medical reasons under W.C.R.P. 16-10(A) and (B). Based on the persuasive report of Dr. Roth, Respondents had a good faith basis for the denial of Dr. Vilims' request. Furthermore, Respondents filed an Application for Hearing on February 12, 2015. Respondents endorsed the denial of Dr. Vilims' request for Botox injections and the reasonableness, necessity and relatedness on continuing medical benefits. Filing the Application for Hearing constituted a second action to contest a request for prior authorization pursuant to Rule 16-10(E)(1)-(2). Respondents complied with Rule 16 and had a good faith basis for denying Claimant's prior authorization request for Botox injections. Accordingly, Claimant has failed to demonstrate that Respondents' denial of the prior authorization request was unreasonable.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Maintenance Benefits

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has failed to present substantial evidence to support a determination that medical maintenance treatment in the form of Botox injections is causally related, reasonable and necessary to relieve the effects of her April 12, 2004 admitted industrial injury or prevent further deterioration of her condition. On April 12, 2004 Claimant sustained admitted industrial injuries including bilateral CTS, myofascial neck pain and a history of carpal-metacarpal arthropathy. On October 1, 2007 Respondents filed a FAL and agreed to provide Claimant with authorized, reasonable and necessary medical maintenance benefits related to her industrial injuries. Claimant subsequently received a variety of medical maintenance benefits including Botox

injections. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections to be administered every three to four months. Dr. Pitzer and Dr. Roth persuasively explained that the requested Botox injections were not related to Claimant's industrial injuries but were instead designed to treat her underlying rheumatologic condition. Claimant suffers from widespread axonal dysfunction of her nerves that was not caused by the April 12, 2004 work exposure. Moreover, Claimant has received trigger point and Botox injections without improvement or documented changes in function. Dr. Pitzer also explained that the proposed Botox injections do not constitute reasonable and necessary medical treatment for Claimant's condition. Finally, he testified that there is long-term toxicity associated with Botox injections and the muscles become weaker with repetitive injections.

6. As found, in contrast, Dr. Machanic remarked that Botox is reasonable and necessary to relieve the symptoms of Claimant's condition. He summarized that Dr. Vilims should be permitted to treat Claimant because his interventions have reduced symptoms and improved Claimant's function. However, the medical records, in conjunction with the persuasive testimony of Drs. Roth and Pitzer reveal that the proposed Botox injections are not related to Claimant's April 12, 2004 industrial injuries but were instead designed to treat her underlying rheumatologic condition. Accordingly, Dr. Vilims' February 3, 2015 request for Botox injections is denied and dismissed.

Penalties

7. A party may be penalized under §8-43-304(1), C.R.S. for up to $1,000 day for any failure, neglect or refusal to obey and lawful order made by the director or panel. *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. Ct. App. 2003). The moving party for a penalty bears the burden of proving that a party failed to take an action that a reasonable party would have taken. *City of County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164-65 (Colo. Ct. App. 2002). Once the prima facie showing of unreasonableness has been made, the burden of persuasion shifts to the party who committed the alleged penalty to show that the conduct was reasonable under the circumstances. *See e.g. Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Postlewait v. Midwest Barricade*, 905 P.2d 21, 23 (Colo. App. 1995).

8. Claimant claims that penalties should be assessed against Respondents pursuant to §8-43-304(1), C.R.S. and W.C.R.P. 16-10(F) for unreasonable delay or denial of prior authorization. She asserts that Respondents' acted unreasonably in denying Dr. Vilims' prior authorization request for Botox injections.

9. Rule 16-10 contains two separate penalty provisions. Under paragraph (E), the penalty is that the requested treatment shall be deemed authorized. However, the penalty can be avoided if: (1) a hearing is requested within seven business days from the request; and (2) the provider is notified that the request is being contested and the matter is going to hearing. Paragraph (F) contains a completely separate penalty

provision. Under this paragraph, the ALJ may assess penalties under the general penalty statute for unreasonable delays or the denial of prior authorization.

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to penalties pursuant to §8-43-304(1), C.R.S. for the violation of W.C.R.P. 16-10(F) for unreasonable delay or denial of prior authorization. On February 3, 2015 Dr. Vilims requested prior authorization for Botox injections to be administered every three to four months. Respondents submitted the request to Dr. Roth for review and on February 6, 2015 he concluded that the request should be denied for medical reasons. He specifically explained that the proposed treatment was not directed at treating conditions consistent with Claimant's admitted industrial injuries. Instead, the injections were focused on treating Claimant's idiopathic conditions including axonal dysfunction. On February 12, 2015 Respondents sent a letter to Dr. Vilims denying his request for prior authorization and attached Dr. Roth's report. Respondents denied the request for medical and non-medical reasons under W.C.R.P. 16-10(A) and (B). Based on the persuasive report of Dr. Roth, Respondents had a good faith basis for the denial of Dr. Vilims' request. Furthermore, Respondents filed an Application for Hearing on February 12, 2015. Respondents endorsed the denial of Dr. Vilims' request for Botox injections and the reasonableness, necessity and relatedness on continuing medical benefits. Filing the Application for Hearing constituted a second action to contest a request for prior authorization pursuant to Rule 16-10(E)(1)-(2). Respondents complied with Rule 16 and had a good faith basis for denying Claimant's prior authorization request for Botox injections. Accordingly, Claimant has failed to demonstrate that Respondents' denial of the prior authorization request was unreasonable.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for medical maintenance benefits in the form of Botox injections is denied and dismissed.

2. Claimant's request for penalties is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to*

Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 15, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-657-243-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on July 30, 2015 and September 21, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 7/30/15, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM; and, 9/21/15, Courtroom 3, beginning at 1:30 PM, and ending at 3:10 PM).

Claimant's Exhibits 1 and 2 were admitted into evidence, without objection. Respondents' Exhibits A through S were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed on September 28, 2015. On September 30, 2015, the Respondents filed detailed objections and a proposed counter decision, which argues the Respondents' spin on the evidence and seeks a re-weighing of the evidence. While such an approach may be appropriate for an appellate brief, it is not a proper approach to objections as to form. On October 1, 2015, the Claimant, through counsel, filed her disagreement with the Respondents' objections. After a consideration of the proposed decision and the objections thereto (most of which are rejected), the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the recommendation of the Claimants authorized treating physician (ATP), Christopher B. Ryan, M.D., for a motorized scooter and whether the motorized scooter is reasonably necessary to cure and relieve the effects of the admitted right ankle injury of July 13, 2005.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant sustained an admitted injury to her right foot and ankle in the course and scope of her employment with the Respondents on July 13, 2005. The Claimant testified, and the ALJ finds that she has undergone extensive treatment, including 8 surgeries on her foot, until being placed at maximum medical improvement (MMI) by Dr. Ryan and Steven Dworetsky, M.D., in 2014.

2. The Claimant experiences severe pain in her foot regularly. Dr. Dworetsky has diagnosed her with severe depression due to the pain she has experienced. (Claimant's Exhibit 2, Bates 0024). The pain is well documented by Dr. Ryan who has been her ATP. The ALJ infers and finds that the Claimant's depression is highly relevant to the pain she experiences from the admitted ankle injury with almost ten years of sequelae.

3. The Claimant has good days and bad days. She stated that she is able to walk around for short distances on her foot. She said that she uses a walker for support if she is going for a longer distance. She has difficulty walking around the house and falls. She reports that she has considerable pain in the foot all the time.

4. Dr. Ryan states in his report of February 25, 2015 that he is trying to taper the Claimant's medication but that it is difficult to do so given her report of no difference in her pain level.

5. In his report of September 3, 2014. Dr. Ryan recommended that the Claimant have mobility assistance. He reports that she simply finds it too painful to walk on the foot. He states, " I believe that she most likely will benefit from an electric scooter or some other mobility assist, so that she can get out. This will allow her more functionality, and will have a significant psychological benefit."(Claimant's Exhibit 1, Bates 0011).

6. The Respondents admitted liability for almost nine years of temporary total disability (from July 14, 2005 through May 15, 2014), which is inconsistent with the Respondents' argument minimizing the Claimant's physical condition, and the Respondents' thrust arguing for an apparent "life hardening" program involving the use of a walker and cane and weaning the Claimant off of these assistive devices.

Steven Dworetsky, M.D., Psychiatrist

7. Dr. Dworetsky, a psychiatrist, examined the Claimant on October 12, 2014. He noted that at the time of the admitted injury, the Claimant was a door-to-door salesperson, who tripped, fell onto the ground and sustained a severe injury to her right ankle. She was unable to get up. She was initially diagnosed with an ankle sprain but eventually a bone chip was noticed. Thereafter, problems ensued with bone healing, scar tissue and severe pain. There were at least 6 additional surgeries and the Claimant ended up with an ankle fusion. Her condition led to Dr. Dworetsky diagnosing a "major depressive disorder secondary to her work injury." The Claimant had no previous psychiatric treatment.

The Videotape of the Claimant in Dardano's Shoe Store

8. The film depicts the Claimant standing while leaning on a counter and walking some –all in the span of 20-minutes—in a smaller store that does not compare to a supermarket. The videotape is consistent with the Claimant's testimony that she has good days and bad days, and that she is able to do a little un-assisted walking.

9. In an apparent effort to imply that the Claimant wanted "to take the Respondents for a ride," the Respondents offered a Dardano's printout of an estimate for orthopedic shoes, totaling $1,159.03 (Respondents' Exhibit R, admitted without objection). Respondents argued that the estimate was inconsistent with Dr. Ryan's prescription for orthopedic shoes 9respndents' Exhibit S). The ALJ infers and finds that these pieces of evidence are of borderline relevance t5o the central issues in this case. Indeed, they are of peripheral relevance to collateral credibility issues.

Independent Medical Examination (IME) by L. Barton Goldman, M.D.

10. The Respondents referred the Claimant to Dr. Goldman for an IME. Dr. Goldman was of the opinion that the Claimant needed to be weaned off her medications and not use anything other than her walker for mobility. In his testimony at the first hearing held in July 30, 2015, Dr. Goldman stated the opinion that the Claimant needed to try to work toward not using assistive devices. The ALJ specifically finds that the Claimant has had eight surgeries and has had many years to attempt to walk on her injured foot without assistive devices-- without success. Dr. Ryan's opinion on this issue is more persuasive than Dr. Goldman's opinion.

11. Dr. Ryan's report of March 15, 2015 discusses his difference of opinion with Dr. Goldman. It relates the difficult time the Claimant has had with mobility and her depression related to her inability to get out of the house due to pain. Dr. Ryan states that he does not believe that they will be able to taper, much less discontinue her medications without some mobility assistance. The Claimant's use of the mobility assistance, here a scooter, will have a therapeutic benefit that relieves the effects of the injury. Indeed, the ALJ finds that it will help restore the Claimant's pre-injury quality of life, thus, preventing a deterioration of her condition and maintaining her stabilized plateau of MMI.

Ultimate Findings

12. Despite the Respondents' efforts to impeach the Claimant with collateral matters allegedly leading to inferences that the Clamant is not credible, the ALJ finds the Claimant's overall testimony concerning her need for a motorized scooter to be credible.

13. The ALJ finds the opinions of Dr. Ryan more credible than the opinions of Dr. Goldman because Dr. Ryan's opinions are based on a lengthier course of treatment as an ATP and Dr. Goldman was a "one-shot" IME.

14. Between conflicting medical opinions, the ALJ makes a rational choice to accept Dr. Ryan's opinions for the reasons stated herein above, and to reject Dr. Goldman's opinions.

15. A motorized scooter is a legitimate medical apparatus, contemplated as a medical benefit under the Worker's Compensation Act.

16. The Claimant has proven, by a preponderance of the evidence that her ATP's prescription for a motorized scooter is causally related to the admitted injury of July 13, 2005, and it is reasonably necessary to maintain the Claimant at MMI and to prevent deterioration of her condition.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684

(Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, despite the Respondents' efforts to impeach the Claimant with collateral matters allegedly leading to inferences that the Clamant is not credible, the ALJ finds the Claimant's overall testimony concerning her need for a motorized scooter to be credible. Also, as found, the opinions of Dr. Ryan were more credible than the opinions of Dr. Goldman because Dr. Ryan's opinions are based on a lengthier course of treatment as an ATP and Dr. Goldman was a "one-shot" IME.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a

particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept Dr. Ryan's opinions and to reject Dr. Goldman's opinions.

Medical Benefits –Motorized Scooter

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's need for a motorized scooter is causally related medical treatment. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's need for a motorized scooter is a reasonably necessary, medical apparatus to maintain her at MMI and to prevent a deterioration of her work-related condition.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. In addition to all other medical benefits admitted and paid, the Respondents shall pay the costs of a motorized scooter, as prescribed by the Claimant's ATP, Dr. Ryan, as a post maximum medical improvement maintenance benefit, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-679-322-05

ISSUES

The sole issue determined herein is whether summary judgment[1] is proper on Claimant's Application for Hearing on the petition to reopen.

PROCEDURAL STATUS

The Findings of Fact, Conclusions of Law and Order granting Respondents' Motion for Summary Judgment was issued on October 5, 2015. The remained pending a hearing scheduled for October 16, 2015 in Greeley, Colorado on Claimant's Petition to Reopen and request for additional permanent partial disability benefits. The parties participated in a status conference on October 14, 2015 before the undersigned ALJ, at which time an oral motion for an amendment of the findings of fact, conclusions of law and order was made. That motion was granted and the instant Amended Findings of Fact, Conclusions of Law and Order resolves the remaining issues set for determination at hearing.

UNDISPUTED FACTS

1. Claimant sustained an admitted back injury on April 8, 2005. On July 7, 2006, Respondents filed a Final Admission of Liability (FAL) admitting for permanent partial disability (PPD) benefits based upon the 5% whole person impairment rating issued by the Division independent medical examination (DIME) physician, John Aschberger, M.D. The FAL denied liability for post-maximum medical improvement (MMI) medical benefits.

2. On December 7, 2007, the parties entered into a written Stipulation Regarding Reopening and a follow-up DIME. The stipulation specified Claimant had filed a petition to reopen in August 2007. The stipulation provided that the "parties have agreed this claim was reopened on March 26, 2007", and that the Claimant was back at MMI with no additional impairment as of May 21, 2007. The stipulation also provided Claimant would undergo another DIME with Dr. Aschberger within 30 days of the date the stipulation was approved. ALJ Harr approved the stipulation by Order dated December 7, 2007.

3. Dr. Aschberger conducted a second DIME on January 30, 2008. In a report issued on February 11, 2008, Dr. Aschberger opined that Claimant was at MMI on February 28, 2006 with no additional impairment.

[1] Even though the instant motion is denominated "Motion for Summary Judgment", it is more properly construed as a Motion for Partial Summary Judgment, as it does not dispose of all issues in the case and the claim remains open for maintenance medical benefits.

4. On March 27, 2008, Respondents filed an amended FAL pursuant to Dr. Aschberger's February 11, 2008 report. The FAL did not admit for additional PPD benefits. The FAL also denied liability for post-MMI medical benefits. There was no record that Claimant filed an objection to the FAL.

5. On March 28, 2011, Claimant's counsel filed a petition to reopen the claim. This petition alleged a "change in medical condition." On July 25, 2011, Claimant's counsel filed an Application for Hearing and Notice to Set, which listed as the issue for determination: petition to reopen the claim.

6. On December 22, 2011, Claimant's counsel and Respondents' counsel entered into a signed "Stipulation". Paragraph 1 of the stipulation stated that Claimant filed a petition to reopen the claim for the April 8, 2005 injury, as well as a new claim that listed the date of injury as July 27, 2010. The stipulation stated these claims had been consolidated for purposes of a hearing and the issues involved "compensability, causality, and relatedness." Paragraph 2 of the stipulation stated that Claimant filed a timely petition to reopen the 2005 claim and that the parties "stipulate and agree that Claimant will continue to receive reasonable, necessary and related medical care to maintain maximum medical improvement for the 2005 claim by way of authorized treating physician, Dr. Cathy Smith". Paragraph 3 of the stipulation specified the parties stipulated and agreed the evidence does not support a "new injury to the lumbar spine on July 27, 2010" and the Claimant agreed to withdraw the claim for that alleged injury. The stipulation provided that the claim for a July 2010 injury shall only be reopened for fraud or mutual mistake of material fact. Finally, paragraph 3 stated that: "All other issues are hereby reserved."

7. On January 5, 2012, PALJ Purdie signed an "Order Granting Stipulation." That Order incorporated the language concerning *Grover* medical benefits, which would be provided by Dr. Smith and the withdrawal of the July 2010 claim.

8. On July 23, 2012, Claimant filed an Application For Hearing And Notice To Set in the claim for the April 8, 2005 injury. The only issue listed was permanent partial disability benefits. Respondents filed a Response listing issues of jurisdiction, ripeness, whether "PPD is closed and whether Claimant has to establish a right to reopen before the court can address PPD."

9. On December 7, 2012, ALJ Broniak conducted a hearing concerning the Claimant's July 2012 application. On February 8, 2013 ALJ Broniak entered Findings of Fact, Conclusions of Law, and Order (FFCL). The FFCL stated the issue for determination is "whether the Claimant is entitled to an increased permanent impairment rating." However, ALJ Broniak concluded she lacked "authority" to resolve this issue because Claimant had not obtained a DIME to challenge the ATP's rating as required by § 8-42-107(8)(c), C.R.S. and § 8-42-107.2, C.R.S.

10. On April 16, 2013, the Claimant's counsel filed an Application for a Division Independent Medical Examination. The body parts listed for examination were

low back and any other area deemed related by the examiner. A DIME was scheduled for July 2, 2013.

11. On June 6, 2013, Respondents' counsel filed Respondents' Motion to Strike Claimant's Application for a Division IME. This Motion took the position that the claim was closed pursuant to the March 27, 2008 FAL and had never been reopened.

12. Claimant filed an objection to the Respondents' Motion to Strike the DIME application. Citing ALJ Broniak's FFCL, Claimant argued that the claim had in fact been reopened.

13. PALJ Purdie granted Respondents' Motion to Strike on June 25, 2013, stating that there had been no Response to the Motion. Claimant filed a Motion to Reconsider this ruling since he had in fact filed a response.

14. Dr. Shea performed the DIME on July 2, 2013 despite the fact that PALJ had granted Respondents' Motion to Strike. Dr. Shea opined the Claimant reached MMI on February 28, 2006 and that he sustained a 19% whole person impairment rating.

15. On July 10, 2013, PALJ Purdie denied Claimant's Motion to Reconsider her June 25, 2012 Order. PALJ Purdie wrote the following: "Paragraph 2 of the parties' December 22, 2011 Stipulation affirms that Claimant was at MMI as of that date (or earlier) and was receiving maintenance benefits. Claimant abandoned the petition to reopen by canceling the hearing. The claim remains closed except for maintenance medical benefits."

16. On August 7, 2013, Respondents filed an Application for Hearing and Notice to Set endorsing the issues of PPD, penalties for failure to comply with ALJ Purdie's June 25, 2012 and July 10, 2012 orders, petition to reopen if necessary, and if necessary the Respondents' motion to overcome the opinion of the "Division evaluator." Claimant filed a response to the application endorsing the issues of PPD, issue preclusion and appeal of PALJ Purdie's order of July 10, 2013.

17. After a prehearing conference, Judge Goldstein issued an order on October 24, 2013 concluding that the issues of PPD and penalties "should be bifurcated from issues set to be determined at the hearing scheduled to commence on November 8, 2013." Judge Goldstein concluded that it would be a waste of judicial and party resources to address these issues while there are "genuine issues of law and fact" concerning (1) whether the December 22, 2011 stipulation of the parties included an agreement to reopen the claim, (2) whether ALJ Brondiak's [sic] order confirmed that the matter was reopened, as opposed to only ruling that a DIME would be jurisdictionally required 'if' the matter had been reopened, (3) whether, if the claim was reopened, Respondents had a duty to file a final admission of liability or notice and proposal within thirty (30) days of Dr. Smith's November 12, 2012 report; whether, if they had that duty, they should now be compelled to file a final admission of liability; and

whether, in the absence of the FAL, Claimant is jurisdictionally barred from pursuing the DIME."

18. The case was submitted to ALJ Cain on stipulated facts and position statements. On December 12, 2013, ALJ Cain entered Findings of Fact, Conclusions of Law, and Order (FFCL)[2] and concluded that the December 22, 2011 stipulation was ambiguous as to whether the parties agreed to reopen the claim and did not unequivocally establish that they intended to do so. ALJ Cain concluded that the claim for benefits in WC 4-679-322-03 was not reopened by the stipulation of the parties dated December 22, 2011; that the Order of ALJ Broniak dated February 8, 2013 did not determine that the claim was reopened; and that the claim for the April 2005 injury remained closed pursuant to the Final Admission of Liability filed on March 27, 2008.

19. Claimant filed an Application for Hearing and Notice to Set on April 23, 2015, listing as the issues to be determined: medical benefits, petition to re-open claim, permanent partial benefits and *Grover* medicals. Respondents filed a Response to Application for Hearing, listing statute of limitations, waiver, estoppel and *res judicata* as the issues to be determined. The Response also specified "case is closed; a petition to reopen is necessary and whether the issues endorsed by Claimant are ripe for adjudication".

20. The ALJ finds that it has been seven (7) years and one month since the last indemnity payment.

21. The ALJ concludes that the FFCL issued by ALJ Cain determined the issue of reopening and the claim remains closed pursuant to the FAL issued on March 27, 2008. The ALJ also determines that when ALJ Cain made this decision both Claimant and Respondents were represented at the hearing and presented evidence on the March 28, 2011 petition to reopen and December 22, 2011 stipulation.

22. The ALJ finds that Claimant is not entitled to additional permanent partial disability benefits since his petition to reopen it has been denied.

23. The ALJ concludes that Claimant continues to have a right to receive *Grover* medical benefits, provided by Dr. Smith.

CONCLUSIONS OF LAW

Respondent seeks summary judgment dismissing Claimant's claim for reopening. OACRP 17 permits summary judgment when there are no disputed issues of material fact. *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231, 232 (Colo. App. 2007). Colorado courts have held that C.R.C.P. 56 also applies in workers' compensation proceedings. *Morphew v. Ridge Crane Service, Inc.*, 902 P.2d 848

[2] The undersigned ALJ took administrative notice of the Findings of Fact, Conclusions of Law and Order issued by ALJ Cain, as well as the orders issued by and PALJ Purdie and Goldstein. The Findings of Fact, Conclusions of Law and Order issued by ALJ Broniak was included in Respondents' Motion for Summary Judgment.

(Colo. App. 1995); *Nova v. Industrial Claims Appeals Office*, 75 P.2d 800 (Colo. App. 1988) [the Colorado Rules of Civil Procedure apply insofar as these are not inconsistent with the procedural or statutory provisions of the Act]. Summary judgment is a drastic remedy and is appropriate only if the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999).

All doubts as to the existence of disputed facts must be resolved against the moving party and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp,* 741 P.2d 714 (Colo. App. 1987). Once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

In the instant Motion for Summary Judgment, Respondents contended that there was no disputed issue of material fact with regard to Claimant's petition to reopen. Respondents asserted that 8-40-301, C.R.S. bars reopening and as part of their proof, submitted the Affidavit of Jacob Brejcha (claims adjuster) which confirmed that no indemnity benefits had been paid for more than seven years. Respondents also relied upon the previous rulings in the case, particularly the FFCL issued by ALJ Broniak to support their contention that there was no disputed issue of material fact.

In his objection, Claimant argued that the petition to reopen filed on March 28, 2011 was timely and the claim has remained open since that time. Claimant asserted that no hearing or order has resolved the petition to reopen and there was no determination whether Claimant's condition has worsened. The ALJ has considered these arguments, the extensive procedural history in the case (including multiple orders which have been issued) and determined summary judgment is properly granted for three reasons. First, based upon previous orders issued in the case, including the FFCL issued by ALJ Cain (December 12, 2013) the claim remains closed. The FFCL dated December 12, 2013 contained an extensive recitation of the procedural history of the case, including all orders issued by both ALJ's and PALJ in the case. None of those orders are in dispute and leads to the conclusion that the case remained closed as of December 12, 2013.

More importantly, it was incumbent on Claimant to present evidence which would create a triable issue of material fact. *Gifford v. City of Colorado Springs*, *supra*, 815 P.2d at 1011. Claimant's Objection to the Motion for Summary Judgment needed to create a triable issue of material fact. More particularly, ALJ Cain concluded that the parties' stipulation, dated December 22, 2011, did not reopen the April 8, 2005 injury. In his decision, ALJ Cain considered and rejected the argument that the claim was reopened by virtue of the stipulation. Claimant's objection does not create a triable issue in this case.

Implicit in the FFCL issued by ALJ Cain was the conclusion that the claim was not reopened by virtue of the March 28, 2011 petition to reopen. ALJ Cain noted that the March 28, 2011 petition to reopen was filed, but did not deem that to be conclusive and he decided that the claim remained closed. Claimant's primary argument in response to the instant motion was that the claim remained open by virtue of the March, 2011 petition to reopen. However, this is simply not supported by a review of ALJ Cain's decision. Had ALJ Cain determined that the March 28, 2011 petition to reopen actually reopened the claim, his FFCL would have stated as much. Claimant has not presented any evidence to support the allegation that the claim was actually reopened and therefore, this claim remains closed as of the FAL in 2008. As such, summary judgment is properly granted in favor of Respondents.

Second, the FFCL issued by ALJ Cain constitutes the law of the case. Under this doctrine, a court will generally adhere to a prior ruling on a question of law that it made at an earlier stage of the same litigation. *Giampapa v. Am. Family Mut. Ins. Co.,* 64 P.3d 230, 243 (Colo. 2003). There is discretion to deviate from this law of the case principle, if the court determines that the prior ruling at issue was no longer sound because of changed conditions, factual errors, intervening changes in the law or resulting manifest injustice. *Id; People of the City of Aurora, ex rel. State v. Allen, 885 P.2d 207, 212 (Colo. 1994).* Considered as a question of law, the undisputed facts establish that ALJ Cain held that the claim was not reopened by the stipulation entered into the parties. ALJ Cain concluded as a matter of law that Claimant's case was not reopened by virtue of the stipulation of the parties. This conclusion is buttressed by the fact that Claimant has not received indemnity benefits for more than seven years. Accordingly, this claim remains closed and under the law of the case doctrine, there is no reason to disturb this prior ruling. As such, reopening is barred.

Third, the doctrine of issue preclusion bars relitigation of Claimant's petition to reopen. Although the principles of issue or claim preclusion[3] were developed in the context of judicial proceedings, these doctrines are applicable in workers' compensation matters. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44,47 (Colo. 2001); *Feeley v. Industrial Claim Appeals Office*,195 P. 3d 1154 (Colo. App. 2008). Issue preclusion is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999); *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005). The purpose of the doctrine is to relieve parties of the burden of multiple lawsuits, to conserve judicial resources, and to promote reliance upon and confidence in the judicial system by preventing inconsistent decisions. *Id.* Issue preclusion operates to bar the relitigation of matters that have already been decided as well as matters that could have been raised in prior proceedings. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.,* 109 P.3d 604 (Colo. 2005).

[3] The doctrines of "issue preclusion" and "claim preclusion" generally refer to the preclusive doctrines formerly called "collateral estoppel" and "res judicata". *Gallegos v. Colorado Groundwater Commission,* 147 P.3d 20, 24, n2 (Colo. 2006).

The doctrine of issue preclusion prevents relitigation of an issue when the following apply: "(1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *Sunny Acres Villa, Inc.*, 25 P.3d at 47

In the case at bench, the identical issue of reopening was considered and decided. The identical issue was previously before ALJ Cain, who issued an order thereon. Claimant did not appeal the order issued by ALJ Cain when he determined that the claim was closed. There was an identity of parties that litigated this issue at the hearing before ALJ Cain. ALJ Cain's FFCL was final. Claimant had a full and fair opportunity to litigate this issue in the prior hearing and appeal the ALJ's FFCL if dissatisfied. No petition to review was taken and the decision is final. Therefore, the doctrine of claim preclusion bars a retrial of issues already litigated by the parties. *State Compensation Ins. Fund v. Luna*, 156 Colo. 106, 397 P.2d 231 (Colo. 1964).

Based upon the foregoing, the undersigned ALJ determines that there is no triable issue of material fact. Respondents' motion for summary judgment is properly granted on Claimant's petition to reopen.

ORDER

It is therefore ordered that:

1. Respondents' Motion for Summary Judgment is granted.

2. Claimant's Petition to Reopen is denied and dismissed.

3. Claimant's claim for additional permanent partial disability benefits is denied and dismissed.

4. The hearing set for October 16, 2015 to in Greeley, Colorado is vacated.

5. This Order does not affect Claimant's right to *Grover* medical benefits.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 19, 2015

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

- Did Claimant prove by a preponderance of the evidence that proposed disc replacement surgery constitutes reasonable and necessary medical treatment for the Claimant's industrial injury?

- Did Claimant prove by a preponderance of the evidence that the alleged need for disc replacement surgery was proximately caused by the industrial injury?

- Did Claimant prove by a preponderance of the evidence that Michael Janssen, D.O., is an authorized treating physician?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 11 were admitted into evidence. Respondents' Exhibits A through P were admitted into evidence.

2. On May 12, 2006 Claimant reported to the St. Anthony Hospital North emergency room (ER) that she awoke with lower back pain. Claimant had a negative straight-leg test but had "exquisite tenderness to even light palpation along her mid lumbar spine." Lumbar x-rays were taken and "degenerative disc disease" (DDD) was noted. The Claimant as admitted to the hospital in "fair condition."

3. While at St. Anthony North Claimant was treated by Michele Pennington, M.D., and Elizabeth McClard, M.D. Claimant reported that she had experienced back pain for 5 days. The Claimant was reportedly doing "light house work" when her back began to feel tight. These physicians noted "exquisite tenderness" from L4 to S1 along the spine, but no paraspinal muscle tenderness or spasm. They assessed low back pain of unknown etiology, "likely musculoskeletal but cannot rule out paraspinal abscess."

4. Claimant allegedly suffered a low back injury while working for the employer on November 8, 2008. This injury allegedly resulted from lifting bags of chicken and cooking chicken.

5. From November 2008 through December 8, 2008 David Schaut, M.D., of Concentra treated Claimant for the alleged back injury. On November 13, 2008 Dr. Schaut treated Claimant for a chief complaint of "back pain." Dr. Schaut assessed a "lumbar strain, improved." Dr. Schaut noted that the day before Claimant had undergone an injection for back pain. Dr. Schaut imposed work restrictions and referred

Claimant for chiropractic treatment. On November 20, 2008 Claimant advised Dr. Schaut that she was undergoing chiropractic treatment and was "significantly better." Claimant asked to be relieved of work restrictions and Dr. Schaut complied.

6. On December 9, 2008 Dr. Schaut noted Claimant did well with chiropractic treatment and believed she could be discharged. Dr. Schaut opined that Claimant reached maximum medical improvement (MMI) with no impairment.

7. On March 19, 2009 Claimant underwent lumbar spine x-rays at the request of her primary care physician (PCP), Mark Englestad, M.D. The radiologist noted L4-5 disc space narrowing with mild endplate spurring "consistent with" degenerative disc disease (DDD). The radiologist also noted "slightly lesser changes" at L3-4. The radiologist assessed mild to moderate multilevel DDD greatest at L3-4 and L4-5.

8. Dr. Englestad examined Claimant on March 27, 2009. Claimant gave a history that her back had been hurting for three days. Dr. Englestad prescribed Percocet.

9. Based on Dr. Engelstad's referral Claimant underwent a lumbar MRI on April 2, 2009. The radiologist noted mild bilateral facet arthropathy at L1-2, L2-3 and L5-S1. At L3-4 the radiologist noted "diffuse disk bulging" and mild bilateral facet arthropathy. At L4-5 the radiologist noted "mild diffuse disk bulging," bilateral facet arthropathy resulting in "moderate right and mild left neural foraminal narrowing including abutment of the exiting right L4 nerve root" and a "focal high intensity zone in the posterior disc." The radiologist assessed mild diffuse L4-5 disk bulging "asymmetric to the right" abutting the L4 nerve root and a "small annular tear in the posterior disk."

10. On April 8, 2009 Hua Judy Chen, M.D., performed a neurological evaluation of Claimant. Dr. Englestad referred Claimant to Dr. Chen based on reported left leg weakness. Claimant gave a history of back pain "probably for many years" and reported that on one occasion her back pain required treatment. However, Claimant also told Dr. Chen "all of her problems are few months." Dr. Chen opined Claimant was a "very poor historian." Dr. Chen's impressions included multiple symptoms "that I can not [sic] explain from local disc problem from the back." Dr. Chen opined Claimant needed treatment for her low back pain to be arranged by Dr. Englestad or a specialist.

11. On May14, 2009 Dr. Chen performed electrodiagnostic testing of the left lower extremity. Dr. Chen noted "mild distal motor latency but non-specific." Dr. Chen stated there was no peripheral neuropathy or lumbar radiculopathy to explain the weakness.

12. On May 30, 2009 Claimant was referred Claimant for orthopedic examination at "Panorama."

13. On June 10, 2009 Lonnie Loutzenhiser, M.D., of Panorama Orthopedics and Spine Center examined Claimant. Claimant reported her low back pain had

"gradually worsened over the last few months" and that the pain occasionally radiated into her buttocks bilaterally. Dr. Loutzenhiser reviewed the MRI results. He assessed spondylosis without myelopathy at L4-5 and L5-S1, a "herniated disc" at L4-5 and bilateral foraminal stenosis at L4-5 greater on the right than the left. Dr. Loutzenhiser recommended a lumbar epidural steroid injection (ESI).

14. On June 18, 2009 Claimant underwent an L4-5 transforaminal ESI. The history for this procedure was listed as "low back pain." On July 15, 2009 Claimant reported to Dr. Loutzenhiser that she received approximately 2 weeks of relief from the injection. However, her back and buttocks pain had returned. Dr. Loutzenhiser referred Claimant for physical therapy (PT) and prescribed NSAIDS. On August 18, 2009 Dr. Loutzenhiser noted that Claimant stated she did not respond to PT and NSAIDS.

15. On August 22, 2009 Claimant went to the emergency room with a complaint of back pain. Dr. Englestad was contacted and requested that Claimant be put on stronger medication (Dilaudid) and that she follow-up with him within 2 to 3 days.

16. On August 24, 2009 Dr. Englestad released Claimant from work until November 30, 2009.

17. On September 4, 2009 Claimant underwent another L4-5 transforaminal ESI. The history for this procedure was listed as "low back pain." However, on September 9 she reported (apparently to Dr. Englestad) that she "couldn't sit up" unless "something was behind her."

18. On September 16, 2009 Claimant filed a claim for benefits associated with the November 8, 2008 injury.

19. On September 28, 2009 Amit Agarwala, M.D., examined Claimant on referral from Dr. Englestad. Claimant reported back pain that occasionally spread into her buttocks bilaterally but denied "radiating symptoms in to her lower extremities." Dr. Agarwala reviewed the April 2009 MRI and noted a "diffuse disc bulge at L4/5." Dr. Agarwala assessed degenerative lumbar disc without myelopathy. He noted no radicular pain and stated that his exam was "consistent with muscular back pain." He recommended PT, NSAIDS, muscle relaxants and pain management. Dr. Agarwala made no mention of surgery as a possible treatment.

20. On October 6, 2009 was apparently seen by Dr. Englestad. There is a notation in this record that indicates there could be some relationship between the November 8, 2008 injury and Claimant's ongoing back pain. The handwriting on this note is almost illegible and is difficult to decipher.

21. Between January 2010 and July 2014 Dr. Englestad frequently treated the claimant for a variety of medical issues including chronic low back pain. During this period of time Dr. Englestad regularly prescribed narcotic medications including oxycodone and fentanyl.

22. On January 12, 2010 George Kohake, M.D., examined Claimant at Concentra. Dr. Kohake performed this examination at the request of the insurance adjuster and was asked to evaluate the cause of Claimant's "chronic low back pain symptoms." On examination Dr. Kohake noted "no sciatic symptoms with nerve tension maneuvers" and that Claimant had "5/5 Waddell signs with scalp compression, light touch, pseudorotation, non-physiologic exam findings, and excessive symptom response."

23. On January 20, 2010 and March 17, 2010 the claim proceeded to hearing before ALJ Felter. Claimant sought a determination that she sustained a compensable low back injury on November 8, 2008, medical benefits and temporary total disability benefits commencing August 24, 2010.

24. On May 10, 2010 ALJ Felter entered Corrected Full Findings of Fact, Conclusions of Law and Order (FFCL). ALJ Felter found that Claimant sustained a compensable low back injury on November 8, 2008. ALJ Felter expressly found that "removing the chicken from the bags, coupled with Claimant's stress by virtue of employees leaving the job, was sufficient to aggravate [Claimant's] underlying low back condition." ALJ Felter also found that Claimant's back condition worsened after she was placed at MMI on December 9, 2009 and this worsening "was due to the natural progression of the November 8, 2008, injury." ALJ Felter concluded Claimant was entitled to TTD benefits commencing August 24, 2009, when Dr. Englestad restricted her from returning to work.

25. On August 24, 2010 Dr. Englestad noted that Claimant had symptoms of right leg pain and back pain of two years' duration. Dr. Englestad opined these symptoms were "work comp related."

26. Respondents appealed ALJ Felter's FFCL to the Industrial Claim Appeals Office (ICAO). On October 7, 2010 the ICAO affirmed ALJ Felter's determination that Claimant sustained a compensable injury in November 2008. However, the ICAO set aside the award of TTD benefits. The ICAO concluded that Claimant was not entitled to TTD benefits because she was placed at MMI by an ATP in December 2008. The ICAO reasoned that no TTD benefits could be awarded after MMI until a Division-independent medical examination (DIME) was conducted to review the ATP's MMI determination. Claimant and Respondents both appealed the ICAO's rulings to the Court of Appeals.

27. On December 16, 2010 Dr. Englestad noted that he saw Claimant for "Workmans [sic] Comp" involving a "Herniated disc 08/08." He noted chronic problems of "LUMB/LUMBOSAC DISC DEGEN" and "LUMBAR DISC DISPLACEMENT."

28. On June 23, 2011 Dr. Englestad reported Claimant's back pain was "improving" although it was "aggravated by daily activities."

29. In an opinion announced October 13, 2011 the Court of Appeals ruled that there was substantial evidence in the record to uphold ALJ Felter's findings that the Claimant sustained a compensable injury in November 2008 and suffered a "worsening

of that condition in August 2009." However, the Court of Appeals set aside the ICAO's ruling that Claimant was precluded from receiving an award of TTD benefits commencing August 24, 2009. The court ruled that the Act does not preclude a "post-MMI worsening of condition in an open claim, particularly where such change would be sufficient to support a petition to reopen had the claim been closed" by a final admission of liability. The Respondents sought Supreme Court review of this ruling.

30. On September 19, 2011 Dr. Englestad noted that Claimant had lower back pain that "radiated to the bilateral hips and legs."

31. On January 5, 2012 counsel for Respondents sent a letter to Dr. Englestad advising him that the Respondents accepted "liability for your medical treatment related to" the November 8, 2008 injury and that he was "authorized to provide all treatment this is reasonable, necessary and related" to the injury.

32. On January 9, 2012 Dr. Englestad noted Claimant had pain in the lower back and L4-5. Dr. Englestad referred Claimant back to Dr. Agarwala. Dr. Englestad also requested another MRI.

33. On February 14, 2012 Claimant underwent a lumbar MRI. At L3-4 the radiologist noted mild "broad based disc bulging" that "abuts traversing L4 nerve roots but does compress or displace them." There was mild to moderate facet arthropathy. At L4-5 the radiologist noted broad-based "disc bulging which comes into close proximity with traversing right L5 nerve root but does not compress it or displace it." The radiologist opined there was no significant interval change since the MRI of April 2, 2009. He further opined there were multilevel "degenerative changes."

34. On February 23, 2012 Claimant returned to Dr. Agarwala. Claimant reported stabbing pain in her low back which occasionally radiated into her buttocks bilaterally. She described the pain as moderate to severe with associated muscle spasms. Dr. Agarwala reviewed the February 2012 MRI and conducted lumbar x-rays. Dr. Agarwala assessed spondylosis of the lumbar spine without myelopathy. His impressions included chronic lumbar pain with no radicular pain. The examination was "consistent with muscular back pain." He again recommended PT, NSAIDS, muscle relaxants and pain management.

35. On December 26, 2012 Dr. Englestad recorded that the Claimant's back pain was "fluctuating and persistent." The pain reportedly "radiated to the left thigh." The symptoms were "aggravated by activities of daily living."

36. On July 6, 2013 Dr. Englestad noted Claimant's back pain was "improving." He noted that the pain had "radiated into the bilateral hip and left leg." Symptoms were reportedly relieved by "pain meds/drugs."

37. Claimant was injured in a motorcycle accident on July 13, 2013. She was a passenger on the back of a motorcycle that crashed at a high rate of speed. She had a questionable loss of consciousness. She complained of lacerations to her head, left

clavicle and shoulder pain, right-hand pain and a laceration to her right knee. A CT scan of the head and cervical spine showed a subarachnoid hemorrhage and a nasal fracture and a possible hematoma or mass in her bladder. There was an extensive soft tissue injury to the right knee. She was diagnosed with closed head injury with subarachnoid hemorrhage, facial lacerations, knee injury, blunt abdominal trauma, and hematuria.

38. On October 31, 2013 Claimant was examined by PA Jeffrey Hilburn. In the history of present illness PA Hilburn noted Claimant's back pain was "acute on chronic." PA Hilburn further recorded that Claimant's "L-S" pain was "exacerbated" by the motor vehicle accident of July 13, 2013.

39. In an opinion issued January 27, 2014 the Supreme Court affirmed the judgment of the Court of Appeals. The Supreme Court reviewed the statutory scheme and concluded that a finding of MMI "has no applicability or significance for injuries insufficiently serious to entail disability indemnity compensation in the first place." The court reasoned that Claimant's failure to obtain a DIME to review the ATP's finding of MMI was inconsequential because Claimant's "injury did not become compensable until her condition worsened and she was forced to lose in excess of three days of work time."

40. On May 6, 2014 Dr. Englestad saw the Claimant for "workmans comp, back pain and medication refill." Dr. Englestad reported Claimant's pain was in the "lower back" and was "stable." There was "some pain" down the left leg. Dr. Englestad noted that he discussed MMI with Claimant" and that she "would like to see Dr. Morreale" to consider injections. Dr. Englestad discussed with Claimant the "importance of quitting smoking" and advised Claimant to begin exercising.

41. On July 11, 2014 Dr. Englestad assessed low back pain and prescribed Percocet and ibuprofen. Dr. Englestad wrote stated "spine doc in next 1 month – expect MMI 1 - 2 months." Dr. Englestad advised Claimant to "quit tobacco completely."

42. On August 13, 2014 Claimant underwent another lumbar MRI. The results of August 2013 MRI were compared to the February 14, 2012 MRI. The radiologist opined there was "no significant change from 2/14/2012." The radiologist further noted an L4-5 disc bulge, which abuts but does not displace the traversing right L5 nerve root." The mild to moderate right and mild left foraminal stenosis was "unchanged."

43. On August 21, 2014 Dr. Englestad noted Claimant "is set up to see spine specialist on 9/11/14." Claimant reported she was smoking less and wanted to quit smoking "after the first of the year."

44. On September 11, 2014 Michael Janssen, D.O., examined Claimant. In his report Dr. Janssen noted a history that Claimant sustained a work-related back injury in 2008 and had been unable to work since 2009. Dr. Janssen stated Claimant "had to go through a variety of legal hoops to get appropriate definitive medical/surgical treatment" and had "severe, unrelenting radicular pain." On physical examination Dr.

Janssen recorded that "repetitive standing on the right and left lower extremities was "+5/5 in all major muscle groups." The Claimant had a "negative stretch root sign posteriorly and severe axial back pain." Dr. Janssen reviewed the MRI "imaging" from February 14, 2012 and August 13, 2013. Dr. Janssen opined the imaging studies demonstrate "vertical instability, collapse, and a disc herniation with Modic changes at the L4-5 level." He assessed a disc herniation "eccentering to the left with vertical instability, disease, and significant collapse at L4-L5."

45. Dr. Janssen wrote that Claimant could treat her problem anatomically by a "minimally invasive" micro decompressive procedure at L4-5 or a "definitive procedure" such as an arthrodesis or arthroplasty. Based on Claimant's smoking history and weight of 183 pounds Dr. Janssen recommended Claimant undergo a "total disc arthroplasty at L4-5 with complete disc space evacuation." Dr. Janssen opined that Claimant's "outcome is clearly unfortunately parallel due to the long legal system it took for her to get to this point."

46. On November 8, 2014 Michael Rauzzino, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Dr. Rauzzino is board certified in neurosurgery and is level II accredited. In connection with the IME Dr. Rauzzino took a history from Claimant, performed a physical examination and reviewed extensive medical records.

47. In his written report Dr. Rauzzino opined that Claimant suffered no acute "structural injury" to her lumbar spine as a result of the November 8, 2008 work injury. Rather he opined Claimant sustained a flare of chronic degenerative disease for which she was treated in the past and that she had an acute episode of lumbar strain which had resolved by December 2008 when she would have reached MMI. In support of this opinion Dr. Rauzzino stated that his review of the lumbar spine MRI imaging revealed "chronic degenerative changes" of the lumbar spine without "fracture or large acute disc herniation."

48. Dr. Rauzzino opined that the arthroplasty proposed by Dr. Janssen is not related to the November 2008 industrial injury and is not "reasonable and necessary." Dr. Rauzzino stated that Janssen did not "accurately" report Claimant's "complaints" or her radiographic findings. Dr. Rauzzino explained that although Dr. Janssen reported that Claimant has unrelenting L5 radicular pain he also noted normal strength and sensation in the L5 dermatome. Dr. Rauzzino further opined that the pain Claimant reported in her buttocks is not "clearly in an L5 radicular pattern" and that Claimant's "basic complaint" is axial back pain rather than radicular pain. Dr. Rauzzino also stated there is "no recent evidence" that the L4-5 level is a "specific pain generator that might require surgical treatment." He stated that Claimant has not had "recent therapy," she has not undergone diagnostic injections and does not have a radicular component to her pain that localizes to the L4-5 level. Dr. Rauzzino opined Claimant clearly "does not meet the workers' compensation guidelines for having a pain generator identified and treated conservatively prior to proceeding with lumbar fusion." Dr. Rauzzino also stated that Claimant would have to stop smoking in order to undergo "any sort of large

surgery." He noted that on the date of examination Claimant continued smoking one pack of cigarettes despite suffering a heart attack.

49. On May 19, 2015 PA Jeffrey Woody examined Claimant for several problems including abdominal pain and back pain. PA Woody noted that he reviewed the PDMP and this revealed Claimant had been "getting opiate Rxs from a number of medical providers" including percocet from a "Paul Suding in 2/15." PA Woody also noted Claimant had a history of coming into the "clinic early for refills." PA Woody noted Claimant had a "medication agreement" with the practice. Claimant denied that she had a "problem" with opiate abuse or that she was "seeking these medications." Claimant refused a referral to see substance abuse provider. PA Woody discussed the case with Dr. Englestad and it was agreed that the office would no longer prescribe pain medications to Claimant. Although Claimant was not formally dismissed from treatment she stated that she would consider finding a new PCP.

50. Dr. Rauzzino testified at the hearing. Generally, Dr. Rauzzino's testimony was consistent with the opinions he expressed in his written report.

51. Dr. Rauzzino testified that he disagrees with Dr. Janssen's diagnosis of L4-5 radiculopathy as a basis for performing a disc replacement surgery. Dr. Rauzzino stated that L5 radiculopathy would result from compression of a nerve root and cause pain running down the back of the leg to the top of the foot with accompanying foot numbness and weakness. However, Dr. Rauzzino explained that based on his review of the medical records and his own examination Claimant described "at least 90 percent axial pain meaning that the primary problem was pain in the back, not down the leg." Dr. Rauzzino further testified that he reviewed the MRI images taken since November 2008 and, contrary to Dr. Janssen's opinion, they do not reveal a "herniated disc" as L4-5. Dr. Rauzzino explained that the term "disc herniation" is different from "disc bulge" and that none of the radiologists who reviewed the post-injury MRI's indicated the presence of a "herniated disc" at L4-5. Dr. Rauzzino explained that treating radiculopathy with surgery has a high rate of success because a specific anatomical structure is pressing against an identifiable nerve root. However, he opined that treating axial back pain with surgery is much more "problematic." Dr. Rauzzino explained there are many structures is the back that can generate back pain and unless the specific pain generator can be identified surgery for treatment of axial back pain has a "fairly high" rate of failure.

52. Dr. Rauzzino further opined that Claimant's "subjective complaints were difficult to correlate anatomically." Dr. Rauzzino testified that he performed "Wadell testing" as part of his examination in order to help determine whether Claimant was accurately reporting her symptoms. Dr. Rauzzino noted that Claimant reportedly experienced increased pain when Dr. Rauzzino pressed on her head and when he "lightly touched her back." Dr. Rauzzino explained that these maneuvers did not place pressure on the discs and would not have resulted in increased pain if a disc was the actual pain generator. Dr. Rauzzino noted that Dr. Kohake and Dr. Chen reported similar findings when they examined Claimant.

53. Dr. Rauzzino reiterated that he did not see any "structural problem" that explains the Claimant's symptoms. Dr. Rauzzino stated that Dr. Janssen's diagnosis of "vertical instability" did not make any sense. Dr. Rauzzino explained that the term "vertical instability" is not commonly used in medical practice and was not noted on any of the "x-ray studies."

54. Dr. Rauzzino testified that he disagreed with Dr. Janssen that Claimant has "collapse" of the L4-5 disc. Dr. Rauzzino explained that if the disc had collapsed there would "not be a lot of cushion between the two bones" and the collapsed space would "look a lot smaller" compared to other disc spaces. However, Dr. Rauzzino explained that when he "looked at the pictures" (presumably the MRI's and x-rays) and "none of the disc heights looked dramatically different." Dr. Rauzzino also noted that none of the radiologists had assessed "disc space collapse."

55. Dr. Rauzzino opined that the Claimant does not satisfy the Medical Treatment Guidelines (MTG) guidelines for the performance of disc replacement surgery. Dr. Rauzzino explained that although surgeons have a "fair bit of discretion" when deciding to perform surgery, the MTG "provide a set of guidelines to determine which patients might have the best chance in benefitting from such a surgery." Dr. Rauzzino testified that the MTG criteria for disc replacement surgery are the same as those for lumbar fusion surgery. Dr. Rauzzino explained that the MTG require that the patient have disease confined to a "single level" and that a pain generator be "specifically identified." Further, the MTG require that prior to surgery all other therapies must be exhausted. Dr. Rauzzino opined that the MRI's demonstrate the Claimant has pathology at more than one level. Further, Dr. Rauzzino testified that a specific pain generator has not been identified and that he was unable to find a specific pain generator on his examination. Finally, Dr. Rauzzino opined Claimant has not exhausted conservative therapy.

56. Dr. Rauzzino testified that Claimant's inability to completely stop smoking is a negative indication for surgery under the MTG. Dr. Rauzzino explained that smoking can inhibit the "ingrowth of bone" required for successful surgery. Further, the inability to stop smoking is an indicator that the patient will not have the discipline to comply with the rehabilitation program necessary to recover from surgery.

57. At Respondents' implicit request (as reflected by their position statement) the ALJ takes administrative notice of certain provisions of WCRP 17, Exhibit 1, Low Back Pain Medical Treatment Guidelines.

58. The ALJ notices that WCRP 17, Exhibit 1, G (11) is the provision of the MTG that addresses "Artificial Lumbar Disc Replacement." WCRP 17, Exhibit 1,G (11) (a) provides that:

> General selection criteria for lumbar disc replacement includes symptomatic one-level degenerative disc disease. The patient must also meet fusion surgery criteria, and if the

> patient is not a candidate for fusion, a disc replacement procedure should not be considered.

59. The ALJ notices that WCRP 17, Exhibit 1,G (11) (c) provides that surgical indications for disc replacement surgery include but are not limited to the following:

> Symptomatic one level degenerative disc disease established by objective testing (CT or MRI scan followed by [positive provocation discogram]);
>
> All pain generators are adequately defined and treated;
>
> Spine pathology limited to one level; and
>
> Psychosocial evaluation with confounding issues addressed.

60. The ALJ notices that WCRP 17, Exhibit 1,G (11) (d) provides that contraindications for disc replacement surgery include but are not limited to the following"

> Multiple-level degenerative disc disease (DDD).

61. The ALJ notices that WCRP 17, Exhibit 1,G (4)(e)(vi), concerning lumbar fusion surgery provides that injured worker refrain from smoking for at least six weeks prior to the surgery and during the period of fusion healing.

62. Claimant failed to prove it is more probably true than not that the disc replacement surgery proposed by Dr. Janssen constitutes reasonable and necessary medical treatment for the industrial injury. To the contrary, the weight of the credible and persuasive evidence establishes that the proposed surgery is not reasonable and necessary to treat Claimant's symptoms.

63. The ALJ credits Dr. Rauzzino's opinion that Claimant does not have any "structural injury" that would justify performance of the disc replacement surgery recommended by Dr. Janssen. Dr. Rauzzino reviewed the MRI studies performed after November 2008 and opined they do not show a "herniated disc" at L4-5. Dr. Rauzzino also credibly and persuasively testified that based on his examination and review of the medical records Claimant has reported substantially more "axial back pain" than radicular pain.

64. Dr. Rauzzino's opinion that the Claimant does not have an L4-5 disc herniation is corroborated by the radiologists' reports of April 2, 2009, February 14, 2012 and August 13, 2014. In April 2009 the radiologist described L4-5 as exhibiting "mild diffuse disk bulging" that was asymmetric to the right. The radiologist did not report a disc "herniation" at L4-5. In February 2014 the radiologist described L4-5 as

exhibiting “disc bulging that comes into close proximity with the traversing right L5 nerve root but does not compress it or displace it.” The radiologist did not report a disc “herniation” at L4-5. In August 2014 the radiologist described L4-5 as exhibiting a “disc bulge” abutting but not displacing the right L5 nerve root.” The radiologist did not report a disc “herniation” at L4-5. Dr. Rauzzino’s opinion is further supported by Dr. Agarwala who reviewed the April 2009 MRI and reported only a “diffuse disc bulge” at L4-5.

65. Dr. Janssen’s opinion that Claimant has an L4-5 disc herniation is not persuasive. Dr. Janssen described the alleged herniation as “eccentering to the left” and producing L5 radiculopathy. However, the radiologists who performed the MRI’s have described L4-5 as exhibiting “diffuse” disc bulging and “broad based disc bulging” that abuts but does not displace the *right* L5 nerve root. (Emphasis added.) Dr. Janssen did not persuasively explain a basis for the differences between his opinions and those of the radiologists. Neither did Dr. Janssen persuasively refute Dr. Rauzzino’s opinion that Claimant does not have a “disc herniation” at L4-5.

66. To the extent Dr. Englestad and Dr. Loutzenhiser opined the claimant has a “herniated disc” at L4-5 they did not credibly and persuasively explain why their opinions are different than those of the radiologists, Dr. Agarwala and Dr. Rauzzino.

67. Dr. Rauzzino credibly and persuasively opined that Claimant does not have “severe, unrelenting L5 radiculopathy” as diagnosed by Dr. Janssen. Dr. Rauzzino correctly and persuasively observed that Dr. Janssen’s own physical examination of Claimant resulted in findings of normal strength and sensation in the L5 dermatomes. Dr. Rauzzino persuasively opined, based on his examination of Claimant and review of the medical records that the vast majority of Claimant’s pain has been “axial” rather than “radicular” in nature. The ALJ finds from the medical records that, although the Claimant occasionally reported radicular-type symptoms of pain radiating into her buttocks and legs, it is also true Claimant frequently did not report any radicular symptoms. For instance, on September 28, 2009 Dr. Agarwala noted there was no radicular pain. On January 12, 2010 Dr. Kohake noted there were no sciatic symptoms with nerve tension maneuvers. On February 23, 2012 Dr. Agarwala again reported claimant had lumbar pain with no radicular pain. The ALJ further finds that even Dr. Janssen acknowledged in his report that Claimant has severe axial back pain in addition to the alleged radicular pain. No physician, except Dr. Janssen, has opined that Claimant suffers L5 radiculopathy that should be treated with surgery.

68. Moreover, Dr. Rauzzino credibly and persuasively opined that Claimant’s reports that she suffers from symptoms are not reliable. Dr. Rauzzino explained that on Waddell testing Claimant reported experiencing increased symptoms when he performed maneuvers that did not place any pressure on the disc space, Dr, Rauzzino’s opinion that Claimant cannot be relied upon to accurately report symptoms is corroborated by the opinions notes of Dr. Kohake and Dr. Chen.

69. Dr. Rauzzino credibly and persuasively opined that Claimant does not have a “collapsed disc” at L4-5. Dr. Rauzzino persuasively explained that the term

"collapsed" disc has a specific meaning and is evidenced by notable loss of height in the disc space when compared to other discs spaces. Dr. Rauzzino persuasively testified that he reviewed the MRI's and they do not demonstrate collapse of the L4-5 disc space. Dr. Rauzzino's opinion is corroborated by the three radiologists who reviewed the serial MRI's taken since Claimant's 2008 injury. None of the radiologists opined that Claimant has a "collapse" of the L4-5 disc space. Instead, the radiologists have described disc "bulging" at L4-5.

70. Dr. Rauzzino persuasively opined that Dr. Janssen's diagnosis of "vertical instability" lacks a meaningful medical definition. The ALJ notes that no physician except Dr Janssen has suggested a diagnosis of "vertical instability." None of the radiologists opined that the MRI's exhibit spinal "instability" of any type.

71. Based on these findings the ALJ determines that Dr. Janssen is proposing to perform disc replacement surgery to correct symptoms caused by diagnoses that do not exist. Further, Dr. Rauzzino persuasively explained that performance of disc replacement surgery to treat primarily axial back pain has a high rate of failure. The ALJ finds it is not reasonable or necessary to perform disc replacement surgery based on incorrect diagnoses because there is a significant possibility that the surgery will not relieve the Claimant's symptoms and may even complicate Claimant's condition.

72. Dr. Rauzzino credibly and persuasively opined that performance of the surgery recommended by Dr. Janssen would contravene the MTG criteria applicable to disc replacement surgery Dr. Rauzzino credibly and persuasively opined that the MTG require that in order to perform disc replacement surgery the patient should have disease restricted to one level with a specifically identified pain generator. Dr. Rauzzino correctly noted that MRI's demonstrate spinal disease at multiple levels and that no specific pain generator has been identified. As explained by Dr. Rauzzino, there is no confirmation that L4-5 is generating Claimant's pain. Indeed, the MRI's establish that Claimant has DDD at multiple levels of the lumbar spine. Dr. Janssen did not offer any credible and persuasive explanation of why the proposed surgery complies with the MTG.

73. The ALJ finds that Dr. Janssen's failure to comply with the MTG for disc replacement surgery constitutes highly persuasive evidence that performance of the surgery is not reasonable and necessary under the facts of this case.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation

case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REASONABLENESS AND NECESSITY OF PERFORMING SURGERY

Claimant argues a preponderance of the evidence establishes that it is reasonable and necessary to perform the disc replacement surgery proposed by Dr. Janssen. Claimant further argues that the need for this surgery was proximately caused by the November 2008 industrial injury. The ALJ concludes that a preponderance of the credible evidence establishes that the proposed surgery is not reasonable and necessary to treat Claimant's condition.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions of the MTG. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of whether medical treatment is reasonable and necessary. Section 8-43-201(3), C.R.S. Rather, the ALJ may weigh evidence of compliance or non-compliance with the MTG and give it such weight as he determines is appropriate considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009).

As determined in Findings of Fact 62 though 73 the ALJ finds that a preponderance of the credible and persuasive evidence establishes that performance of the disc replacement surgery recommended by Dr. Janssen is not reasonable and necessary to treat the effects of the industrial injury. The ALJ is persuaded by Dr. Rauzzino's testimony and opinions that the Claimant does not actually have any of the conditions diagnosed by Dr. Janssen. The ALJ is further persuaded by Dr. Rauzzino's opinion that under these circumstances performance of the disc replacement surgery is not reasonable and necessary to treat the Claimant's injury. The ALJ is further persuaded that performance of the surgery would contravene the applicable MTG

because Claimant has multi-level disc disease and no specific pain generator has been identified. As determined in Finding of Fact 73, the ALJ places great weight on the evidence establishing that the surgery would be contrary to the MTG for disc replacement surgery.

The ALJ notes that Claimant has argued Dr. Rauzzino's testimony should not be found persuasive because it was "in direct opposition" to ALJ Felter's finding that Claimant's "low back condition worsened on August 24, 2009." At the hearing Claimant's counsel suggested that it is "law of the case" that Claimant sustained a compensable injury.

The ALJ understands that Claimant's reference to "law of the case" as constituting an argument that ALJ Felter's order creates "issue preclusion" with regard to the question of whether the proposed surgery is reasonable and necessary to treat the Claimant's injury. The ALJ disagrees with this assertion.

The elements of issue preclusion are: "the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. App. 2001).

The ALJ concludes that the issue of whether disc replacement surgery is reasonable and necessary to treat the conditions diagnosed by Dr. Janssen was not determined by ALJ Felter's order. It may be that Dr. Rauzzino disagrees with ALJ Felter concerning the exact nature of the Claimant's initial "injury." Regardless, ALJ Felter did not find that the Claimant's "worsened condition" resulted from an L4-5 disc herniation, L5 radiculopathy, disc collapse and/or "vertical instability." Consequently, ALJ Felter was not asked to determine and did not determine whether Claimant had any of these conditions or whether it would be reasonable and necessary to operate on these conditions. Consequently, the ALJ concludes that ALJ Felter's order has no preclusive effect with regard to the factual and legal issues determined by this order.

In light of these conclusions the ALJ need not determine the other issues raised by the parties.

MOTION TO ADMIT ADDITIONAL EVIDENCE

On October 21, 2015 Respondents filed an opposed motion to submit additional evidence. The ALJ denies this motion.

First of all, the Respondents have prevailed on the merits so their request to submit additional evidence is essentially moot.

Even if the motion were not moot the ALJ finds Respondents failed to show good cause to submit additional evidence. The ALJ has reviewed the proposed evidence and finds that it is only modestly relevant to the Claimant's credibility on a rather tangential issue. Consequently, the ALJ concludes this evidence is unlikely to have had much influence on the outcome of the case, and the Respondents have obtained a favorable result without consideration of the evidence. Moreover, the ALJ concludes the value of this evidence to Respondents' case is outweighed by the inconvenience and expense to the Claimant of having to respond to the proffered evidence at this very late stage of the proceedings.

The motion to submit additional evidence is denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The Claimant's request to undergo the disc replacement surgery proposed by Dr. Janssen is denied because the surgery is not reasonable and necessary.

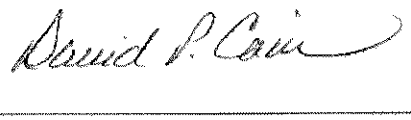
2. The Respondents' motion to submit additional evidence is denied.

3. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 22, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge

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ISSUES

The issues presented for determination are as follows:

- Whether a Ketamine infusion recommended by Claimant's physicians is reasonable, necessary and related medical treatment.

- Claimant also alleged that Respondent committed a violation of WCRP Rule 16 by failing to timely deny an authorized medical provider's request for the Ketamine infusion. Respondent contends that it never received a proper Rule 16 request thus the Rule 16 deadlines were never triggered.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on September 18, 2009 while working in the course and scope of her employment. At the time of her injury Claimant worked as a police officer for the Employer.

2. Claimant has treated with Drs. Koval, Kistler, Hemler, Orent, and Gesquiere for her industrial injury. Claimant also testified that all her treating doctors are in agreement that she currently suffers from systemic (full body) Complex Regional Pain Syndrome ("CRPS").

3. In a report dated December 28, 2010 Dr. Kistler confirms that Dr. Gottlob is convinced Claimant has RSD (also known as Regional Sympathetic Dystrophy now known as CRPS.)

4. Dr. Kistler's report of April 13, 2011 outlines that Claimant "states almost any activity with the left arm tends to flare her up. Now she is getting a new sensation of heat in the left hand. This occurred in the shower. She thought surely she had touched a hot curling iron, but it turns out that the curling iron was not on at all. She has had this several times, three in the last week each lasting about five seconds. She still gets the cold sweats in the left arm. There is numbness and tingling in the area of the right trapezius, but not so much pain."

5. Claimant has undergone a bone scan, thermogram, and ganglion blocks. Based on the results of those procedures her treating doctors have confirmed her diagnosis of CRPS.

6. Claimant was placed at maximum medical improvement ("MMI") on May 31, 2011. On the Final Admission of Liability dated February 13, 2012 Respondents specifically state "Respondents admit for future medical care that is reasonable,

necessary, and related to the injury of 9/18/2009 as outlined in the attached report from Dr. Kistler dated 5/31/2011."

7. In his rating report of May 31, 2011 Dr. Kistler outlines that during the course of her treatment for her admitted workers' compensation injury, Claimant was diagnosed and treated for CRPS. Dr. Kistler further states, "Dr. Hemler did a series of five injections. After sympathetic block, she indicated she had an amazing response feeling like she was in heaven. Unfortunately, that only lasted a few days, but given her clinical circumstances, confirms CRPS." As a result of the CRPS diagnosis, Dr. Kistler assigned a 20% whole person rating for "Non-preferred Extremity Difficulty with Self Care due to CRPS" pursuant to Table 1, page 109 of the AMA guides.

8. Respondent filed a Final Admission of Liability that admitted for the rating attributed to Claimant's CRPS diagnosis, and specifically referenced Dr. Kistler's May 31, 2011 report. Respondent, therefore, admitted that Claimant's diagnosis of CRPS was related to her workers' compensation claim.

9. In his report of November 11, 2011 Dr. Hemler states that Claimant "returns today in follow-up, having recently completed a stress thermogram of both upper extremities. The study was positive in all three aspects regarding complex regional pain syndrome."

10. In a letter dated January 9, 2012 Dr. Kistler stated that Claimant's left shoulder injury led to severe CRPS that has not responded to standard therapy.

11. The May 8, 2012 report from Dr. Kistler notes Claimant "still has the fiery pain not only in the bilateral upper extremities but now some in the legs as well."

12. Per his December 5, 2013 report, Dr. Sander Orent assumed Claimant's care. He noted that he reviewed Dr. Hemler's notes and a good part of Claimant's medical record. Dr. Orent made two recommendations – laboratory tests to rule out inflammatory arthritis; and the possibility of exploring "a low-dosage ketamine infusion." Dr. Orent noted that the Claimant would think about it and research it a bit, and if she wanted to move forward Dr. Orent would work with Dr. Hemler to "orchestrate a consultation with Dr. Michael Gesquiere who does this procedure in Denver."

13. Dr. Hemler's February 5, 2014 report documents Claimant's diagnosis of CRPS, and that Claimant wished to pursue the ketamine infusion consultation. Dr. Hemler noted that he spoke to Dr. Orent about the ketamine infusion and that Dr. Orent supported a referral to Dr. Gesqueri.

14. In a February 13, 2014 M-164 form, Dr. Koval states a diagnosis of "systemic CRPS." Dr. Koval also states "approval requested for ketamine."

15. Dr. Koval's February 13, 2014 report states "At this point, low-dose ketamine infusion is being explored and her Pain Management specialist, Dr. Hemler, is attempting to obtain approval for this." Dr. Koval's report also states, "We await

approval for the aforementioned procedures (i.e. ketamine infusion and referral to a nationally recognized pain clinic)."

16. Dr. Hemler states in his report of March 5, 2014, "The patient returns today in follow-up for ongoing pain associated with complex regional pain syndrome of the left upper extremity/shoulder with noncontiguous spread throughout the body."

17. A fax cover sheet note dated March 5, 2014 documents that Dr. Hemler called and left the adjuster, Sandra O'Brien a voice mail requesting approval for a ketamine infusion consultation with Dr. Gesquiere. The note also asks that O'Brien respond and let Dr. Hemler's office know if Claimant is permitted to keep an appointment with Dr. Gesquiere. Dr. Hemler's office attached seven pages, including Dr. Hemler's February 5, 2014 report.

18. Dr. Orent's April 3, 2014 M-164 form report again states "CRPS – ketamine pending." In his narrative report from that date, Dr. Orent notes that Claimant "is not working, but states she would if the ketamine were to have substantial benefits. If she could go back to work, she would certainly be willing to do this. I would not rule this out at this time because ketamine has on occasion been extremely effective in reversing this condition, basically re-setting the sympathetic nervous system. If this were to happen, this would be a significant change in our long-term planning; however, if the best we got is significant pain relief, then we will be pleased with that." Dr. Orent noted Claimant had been approved for a ketamine consultation, and would be seeing Dr. Gesquiere within the next couple of weeks.

19. On June 25, 2014 Dr. Michael Gesquiere evaluated Claimant regarding the ketamine infusion. In his report, Dr. Gesquiere noted that reviewed Claimant's workup. Dr. Gesquiere concluded that he agrees with Drs. Hemler and Orent that the Claimant had exhausted conservative treatment for her CRPS. He stated that Claimant is an excellent candidate for Stamford infusion protocol therapy. Dr. Gesquiere discussed the therapy at length with the Claimant and she elected to proceed.

20. In Dr. Koval's July 29, 2014 report, she stated that Claimant had a consultation with Dr. Gesquiere regarding the ketamine infusion treatment, and that Dr. Gesquiere had requested authorization from the Respondent. Dr. Koval intended to ask her clinic manager to contact the Respondent on behalf of the Claimant regarding the authorization for the ketamine infusion.

21. Dr. Koval's report dated August 26, 2014 states again that Claimant had a consultation with Dr. Gesquiere and that he agreed the ketamine infusion treatment was a good option for her. Dr. Koval noted that, "Authorization has been requested from Workers' Compensation but nothing has happened yet."

22. Claimant's attorney issued a letter to Drs. Orent and Koval dated September 10, 2014. The letter contains specific questions in order to clarify the request for the ketamine infusion, as well as to explain the reasonableness and the

medical necessity of the requested treatment. Drs. Orent and Koval answered the letter and signed their responses dated September 18, 2014.

23. The September 10, 2014 letter and the responses dated September 18, 2014 from Drs. Orent and Koval states as follows:

> 1. What is [Claimant's] current diagnosis?
> Systemic CRPS (complex regional pain syndrome)
>
> 2. What are [Claimant's] current treatment needs/recommendations?
> Pain control: acupuncture 2-3x/wk, massage therapy 1x/wk, medications (per Pain Mgmt. specialist) – Cymbalta, Topamax, Marinol
> Ketamine infusion (pending)
>
> 3. Specifically, can you clarify [Claimant's] need for a Ketamine infusion and what consequences could result if such infusion is not authorized quickly?
> [Claimant's] pain symptoms are worsening with time, and generalizing to other parts of her body. She is also spending more time with less functionality secondary to pain. Her condition will likely continue to worsen.
>
> 4. What are [Claimant's] current work restrictions?
> Unable to work.
>
> 5. Are [Claimant's] current diagnosis, treatment needs/recommendations, and restrictions related to her workers' compensation injury?
> Yes.
>
> 6. Has [Claimant's] condition worsened since she was placed at MMI on May 31, 2012? If so please explain how [Claimant's] condition has worsened.
>
> Yes. What was originally a complex regional pain syndrome that began to generalize (2011) to her right side from the left, and into her lower extremities as well (2012). At this point, she has migrating pain that spares no body part.
>
> 7. Is there anything else you feel is relevant to [Claimant's] situation you would to clarify or add?
>
> In our clinic, 2 other patients with similar conditions have benefitted greatly from ketamine infusion, for which [Claimant] is considered an excellent candidate, per Dr. Gesquiere. One patient was able to stop all narcotic pain meds (15 years of use) after ketamine; another was able to undergo surgery for knee & hip injuries once ketamine was given, as surgery would

> not have been possible in the systemic CRPS state. We are confident that the nervous system "reset" provided by this procedure can help [Claimant] tremendously.

24. On October 27, 2014, Dr. Hemler authored a report which stated that Claimant's "most recent issues are an evolving pattern of dystonia which is a characteristic of CRPS. I highly support Dr. Orent's plan for this patient to undergo a trial of ketamine-based therapy as an option. Science on ketamine is reasonably good and would be reasonable for this patient."

25. Dr. Koval's report dated November 13, 2014 again confirms the diagnosis of systemic CRPS and documents that authorization for ketamine infusions is pending.

26. On May 28, 2015, Dr. Orent evaluated the Claimant. In his report he stated the following:

> I continue to believe that [Claimant] would benefit from ketamine infusion. I think she is a hardy enough person that she would tolerate this well and the procedure has become much better over the last couple of years. It is my understanding that a hearing is scheduled for June 21. I will simply say that I support the contention that she does indeed need ketamine and would be happy to testify to such at a hearing should I be asked to. [Claimant] overall is relatively stable. I think, however, that because we know so little about the course of generalized dysautonomia that I would be concerned that there is certainly the risk for a flare or worsening of conditioning with this disease. Therefore, this is why I am anxious to see her undergo the trial of ketamine. From the standpoint of work, she is not able to work. This is due to her medications. I would like to see her back after the hearing when we will have a better idea of what the legal system is going to allow us to do.

27. Claimant testified that her current symptoms include deep bone pain, pain in her joints, nausea, and vomiting. Claimant's pain can be debilitating as her symptoms wax and wane. The extensive medical record corroborates Claimant's testimony.

28. Claimant testified that she has comprehensively discussed the ketamine infusion with Drs. Hemler and Gesquiere. Claimant feels she is properly educated as to the ketamine infusion and potential side effects.

29. Claimant understands that she has exhausted all other treatment options. During the course of her treatment she has been prescribed the following: Amitriptyline, Fentanyl patches, Neurontin, Cymbalta, Nucynta, psychological counseling, MRI, biofeedback, sympathetic stellate ganglion blocks, physical therapy, Opana,

Methadone, Keppra, Baclofen, BuSpar, Dilaudid, Gabapentin,Tramadol, Trental, massage therapy, and acupuncture.

30. Claimant wishes to proceed with the ketamine infusion because her life is miserable and she would like to proceed in order to improve her function with the potential of long-term symptom relief.

31. As found above, Sandra O'Brien is an adjuster for the third party administrator. O'Brien testified that she has never received an authorization request for ketamine infusion treatment. She also testified that she did not receive a verbal request because if she had, she would have informed the provider to submit a written request.

32. O'Brien was aware of Claimant's appointment with Dr. Gesquiere on June 10, 2014 because she authorized the appointment. O'Brien was also aware that the appointment was for a consultation regarding the ketamine infusion.

33. O'Brien testified that she expects to receive a separate written request for any procedure she is asked to authorize because it would be a "nightmare" to review all the medical records she receives to determine if she should follow the requirements found in WCRP Rule 16. She explained that physicians frequently make treatment suggestions in medical reports, and that without receiving a separate written request for authorization, she would not even know if the claimants wanted the treatment being recommended.

34. O'Brien admitted that she received a report from Dr. Koval dated July 29, 2014 that stated Claimant "has undergone ketamine consultation and this treatment has indeed been recommended for her. We are awaiting news on authorization. She also received Drs. Orent and Koval's responses dated September 18. 2014.

35. O'Brien was aware that the report issued by Dr. Roth regarding the ketamine infusion is dated March 23, 2015.

36. It is essentially undisputed that Dr. Gesquiere is the provider of the ketamine infusion treatment. Dr. Gesquiere did not submit a written prior authorization request to the Respondent or third party administrator.

37. Respondent retained Dr. Henry Roth to perform an independent medical examination. Dr. Roth issued his report on March 23, 2015. He ultimately opined that there were insufficient clinical findings to diagnose the Claimant with CRPS.

38. Dr. Roth testified that if a patient has two positive diagnostic tests it is appropriate to diagnosis CRPS. Dr. Roth agreed that Claimant's positive thermogram and bone scan would technically fulfill the criteria to diagnosis Claimant with CRPS. Dr. Roth then testified that Claimant's positive results from the stellate ganglion blocks would also be supportive of her CRPS diagnosis. Dr. Roth agreed that all of Claimant's treating doctors have confirmed Claimant's CRPS diagnosis.

39. Dr. Roth testified that the thermogram is the most reliable test related to a CRPS diagnosis, and that Claimant's thermogram was indeed positive for CRPS.

40. Dr. Roth did not feel that Claimant's clinical presentation was indicative of CRPS. He recommended a repeat workup and evaluation of CRPS.

41. Regarding the ketamine infusion, Dr. Roth testified that his research indicated that recent findings have been encouraging, optimistic, and that it is becoming a more popular form of treatment. However, he also explained that ketamine is experimental because there are inadequate published studies plus it is outside the Colorado Workers' Compensation Medical Treatment Guidelines for that reason.

42. Dr. Roth testified that Claimant is "up against a wall" regarding her treatment options. Dr. Roth further testified that the ketamine infusion is "something that is out there that is getting some ballyhoo that they [Claimant's treating doctors] think is worth trying and she's willing to take the risk and I'm good with all that."

43. Dr. Roth then testified that the ketamine infusion is "not an unreasonable thing for her to pursue." Dr. Roth testified that the third party administrator can authorize "anything they want" even though the ketamine infusion is not found in the current workers' compensation medical treatment guidelines.

44. In his report Dr. Roth states, "Multiple medications have been tried and failed. Narcotics, muscle relaxers, neuropathics helped to relax her but did not relieve pain."

45. Although Dr. Roth raises questions about Claimant's CRPS diagnosis, he states in his report that "the most important evidence at this point in time is not whether the patient has CRPS, but what are the pros and cons and strength of the evidence for the ketamine infusion protocol."

46. Claimant has proven by a preponderance of the evidence that the ketamine infusion is reasonable, necessary, and related to her industrial injury. The medical record demonstrates that Claimant has exhausted all conservative treatment modalities related to her condition. Furthermore, the medical record is clear that each of Claimant's treating doctors (Drs. Koval, Orent, Gesquiere, and Hemler) all agree with the ketamine recommendation. The Judge credits the opinions of Claimant's treating physicians concerning Claimant's diagnosis as well as the reasonableness and necessity of the ketamine infusion.

47. Dr. Roth's opinions are not persuasive. Dr. Roth admitted that Claimant has met the diagnosis criteria for CRPS (positive bone scan, thermogram, and response to stellate block), but then suggested that she have another full workup for CRPS because he felt she lacked clinical findings. Furthermore, the extensive medical records generated by Claimant's treating doctors of over four years do not support Dr. Roth's observations of Claimant's symptoms or conclusions. Finally, in his testimony Dr. Roth states that the ketamine is not unreasonable for Claimant to pursue, and that if

her doctors believe it's worth trying and Claimant is willing to take the risks he is "all good with that." Dr. Roth's opinions rely heavily on the fact that ketamine is not included in the Colorado Medical Treatment Guidelines.

48. The ALJ finds that the Claimant's providers did not technically comply with Rule 16-9 because no provider made a separate written request for authorization of the ketamine infusions. However, multiple references to pending authorization for the ketamine treatment were found within the medical records that O'Brien possessed. Given that the ALJ has granted the Claimant's request for ketamine treatment on other grounds, the ALJ declines to reach a determination as to whether an adjuster should construe such comments or references as a Rule 16 request.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. Claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

7. While it is appropriate for the ALJ to consider the Medical Treatment Guidelines in determining whether certain medical treatment is reasonable, necessary and related to the claimant's injury, the ALJ is not required to solely rely on the Guidelines when making such determinations. Section 8-43-201(3), C.R.S.

8. As found, the Claimant has proven that the ketamine infusion treatment is reasonable, necessary and related to her industrial injury. The ALJ is persuaded by the significant documentation of CRPS by all of her treating providers and the objective testing performed to confirm the diagnosis of CRPS. Further, Drs. Koval, Orent, Hemler and Gesquiere all agree that the ketamine infusion treatment could greatly benefit the Claimant. Dr. Roth's opinions to the contrary are not as persuasive. The Claimant has considered the negative effects the ketamine may cause, but she nevertheless wishes to pursue the treatment. The overwhelming evidence supports her request.

9. WCRP 16 requires a Respondent to authorize or deny an authorization request within seven business days after its receipt. In this case, the ALJ cannot find that a proper authorization request for ketamine infusion treatment was made to the third party administrator. Thus, Respondent did not commit a violation of Rule 16 and no penalties, including Claimant's request for reasonable costs, shall be imposed.

ORDER

It is therefore ordered that:

1. The Claimant is entitled to the ketamine infusion treatment recommended by Dr. Michael Gesquiere.

2. The Claimant is not entitled to penalties or costs based on an alleged Rule 16 violation.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 30, 2015

DIGITAL SIGNATURE:

L. Broniak

Laura A. Broniak, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

#JQ9O0XM70D1C1Cv 2

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the minimally invasive sacroiliac fusion recommended by Dr. Tice is reasonable and necessary medical treatment related to claimant's industrial injury?

- Whether claimant has proven by a preponderance of the evidence that her workers' compensation claim should be reopened based on a change of condition pursuant to Section 8-43-303, C.R.S.?

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her low back on January 9, 20120 while in the course and scope of her employment with respondent employer. Claimant testified at hearing that she was injured while pulling a pallet.

2. Claimant came under the care of Dr. Stagg for her work injury. Dr. Stagg placed claimant at maximum medical improvement ("MMI") for her work injury on November 18, 2010 and provided claimant with an 11% impairment rating. Respondents admitted liability for the impairment rating and admitted for post-MMI maintenance medical benefits by virtue of a December 16, 2010 final admission of liability ("FAL").

3. Claimant continued to receive post-MMI medical treatment through Dr. Lewis. Claimant underwent a left side sacroiliac ("SI") joint injection on April 2, 2013 as part of her maintenance medical treatment. The medical records indicate Dr. Lewis was evaluating to determine if claimant's left SI joint could be a pain generator responsible for her ongoing complaints. Claimant returned to Dr. Lewis on April 9, 2013 and reported a pain decrease following the SI injection. Claimant returned to Dr. Lewis on May 7, 2013 for a second injection. Dr. Lewis noted after the second injection, claimant reported initial relief and went home and fell asleep, which prevented her from being able to provide a strong degree of diagnostic response to the injection. Dr. Lewis further noted that claimant had not experienced substantial lasting therapeutic benefits from the injection.

4. Claimant underwent another diagnostic SI injection on June 7, 2013. Claimant reported a 100% decrease in her pain following the injection, but the pain relief did not last for a full 4-6 hours following the injection.

5. Claimant underwent a radiofrequency ablation neurotomy to the left SI joint on July 24, 2013 under the auspices of Dr. Lewis. Claimant returned to Dr. Lewis on August 29, 2013 and noted some improvement following the procedure, but also

complained of some right sided symptoms that were becoming stronger. Claimant returned to Dr. Lewis on September 26, 2013. Dr. Lewis noted claimant unfortunately denied any substantial improvement in her pain and noted claimant's frustration.

6. Dr. Lewis subsequently performed a left L5 transverse process injection on October 8, 2013. Claimant returned on October 15, 2013 and Dr. Lewis noted that through a course of interventional management, they were able to reduce her pain significantly, but claimant complained of a persisting discomfort in the left side of her lumbosacral junction following her last radiofrequency ablation.

7. Claimant underwent another procedure to her low back with Dr. Lewis on December 4, 2013 designed to treat her left sided SI pain that involved a left L5-S1 transverse process to sacral ala cooled radiofrequency ablation neurotomy as well as repeat denervation at the left L4 and L5 medial branch anatomy.

8. Claimant eventually underwent an L4 selective nerve block on July 17, 2014. Claimant initially reported 0/10 pain, but again developed a gradual return of her symptoms by July 31, 2014. Dr. Lewis offered claimant another transforaminal injection with a stronger dose of steroids to determine if they could further alleviate her symptoms.

9. Dr. Lewis referred claimant to Dr. Tice for evaluation in October 2014.

10. Dr. Tice evaluated claimant on October 14, 2014. Dr. Tice noted claimant was complaining of back problems and examination revealed claimant to be significantly tender over the left sacroiliac joint. Dr. Tice provided a diagnosis of left sacroiliac joint pain with questionable instability, lumbar spondylosis, left sciatica, and multiple sclerosis. Dr. Tice noted claimant's radiofrequency rhizotomy did not help much. Dr. Tice referred claimant for a magnetic resonance image ("MRI") of the pelvis. Claimant underwent the MRI on October 20, 2014 and showed findings of mild sacroiliitis bilaterally. Claimant was subsequently referred for a computed tomography ("CT") scan of the pelvis on December 4, 2014. The CT scan showed findings consisting with mild sacroiliitis.

11. Claimant returned to Dr. Tice on November 19, 2014. Dr. Tice reviewed the MRI scan and noted inflammation around the sacroiliac joint. Dr. Tice noted claimant had evidence of sacroiliac joint pain and indicated she could be a candidate for sacroiliac joint fusion.

12. Claimant returned to Dr. Tice on January 8, 2015. Dr. Tice noted claimant's ongoing problems with her lumbar spine and recommended a selective nerve root block at L5 to see if her symptoms would resolve. Dr. Tice again noted claimant may be a candidate for an SI joint fusion.

13. Dr. Tice subsequently recommended claimant be referred to Dr. Burnbaum for electrophysiological studies and an MRI scan of the lumbar spine. The MRI scan was performed on March 4, 2015 and demonstrated moderate degenerative

changes at the L4-5 level with no significant spinal stenosis or neural foraminal narrowing of the spine.

14. Claimant returned to Dr. Tice on April 7, 2015. Dr. Tice noted claimant's continued complaints and found claimant had failed conservative treatment. Dr. Tice recommended claimant consider a minimally invasive sacroiliac fusion.

15. Respondents obtained a records review independent medical examination ("IME") with Dr. Bernton on July 10, 2015. Dr. Bernton had previously examined claimant in connection with this case on April 14, 2011. Dr. Bernton issued a report dated July 10, 2015 that summarized claimant's medical records and noted that it was Dr. Bernton's opinion that the proposed sacroiliac joint fusion was not medically appropriate and unlikely to result in improvement in claimant's symptoms. Dr. Bernton noted that the medical treatment guidelines indicate that sacroiliac joint fusion may be indicated for stabilization of a traumatic severe disruption of the pelvic ring, but would not be recommended for mechanical low back pain.

16. Claimant testified at hearing in this matter that her current pain will range between 4 out of 10 and 10 out of 10. Claimant testified she has hot stabbing pain that is on the left side two inches below her belt line. Claimant testified that since being placed at MMI, her condition has progressively gotten worse and she now can not walk more than one block. Claimant testified she does not want surgery, but she has no option and would like to become more active.

17. Dr. Tice testified at hearing that he disagreed with Dr. Berton's opinion regarding the reasonableness and necessity of the proposed surgery. Dr. Tice testified he would have agreed with Dr. Tice a few years ago, but has seen better than expected results with the few times he has performed the surgery. Dr. Tice testified he expects claimant to get better, but no surgery is 100%. Dr. Tice noted on cross examination that according to the North American Spine Society, unilateral pain is one of the criteria listed for surgical considerations. Dr. Tice testified claimant complains of bilateral pain, but noted this was a difficult area as some people have bilateral pain that is improved with a unilateral sided fusion.

18. Dr. Bernton testified at hearing in this matter. Dr. Bernton testified that it was his opinion that claimant's surgery was not reasonable or necessary. Dr. Bernton noted that claimant's injury and initial treatment was not originally to the SI joint, but even if the SI joint was related to the injury, the fusion surgery is not indicated.

19. The ALJ credits the opinions expressed by Dr. Bernton and finds that claimant has failed to demonstrate that the surgery proposed by Dr. Tice involving a minimally invasive SI joint fusion is reasonable and necessary to cure and relieve claimant from the effects of her injury. The ALJ notes that claimant's complaints are bilateral in nature and finds claimant has failed to demonstrate that it is more probable than not that the proposed surgery would cure or relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

4. As found, claimant has failed to prove by a preponderance of the evidence that the proposed minimally invasive sacroiliac fusion is reasonable and necessary medical treatment to cure and relieve claimant from the effects of the work injury. As found, the opinions expressed by Dr. Bernton regarding the reasonableness and necessity of the proposed sacroiliac fusion are found to be credible and persuasive on this issue.

5. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d

222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that her condition has worsened since being placed at MMI. As found, the testimony of Dr. Bernton is found to be credible and persuasive regarding the issue of whether the surgery proposed by Dr. Tice would be reasonable and necessary to cure and relieve claimant from the effects of the work injury. As found, claimant has failed to prove by a preponderance of the evidence that her claim should be reopened based on a change of condition.

ORDER

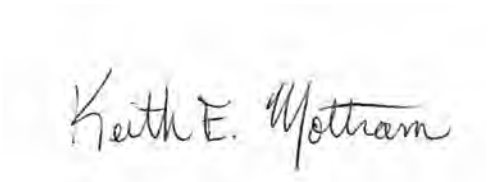
It is therefore ordered that:

1. Claimant's request for an Order requiring respondents to pay for the proposed minimally invasive sacroiliac fusion is denied.

2. Claimant's request for an Order reopening her claim is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 9, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Claimant's Petition to Reopen his claim;
- Claimant's request for reconsideration of PALJ Barbo's July 29, 2015 Prehearing Conference Order;
- Claimant's request for penalties for Employer's alleged failure to produce employment records; and
- Claimant's request for sanctions against Independent Medical Examiners and/or notification to the Division Independent Medical Examination Unit with regard to said practitioners.

❖ On October 27, 2015, Claimant filed a packet of documents with the Office of Administrative Courts. The cover sheet states, "I am attaching more evidence so that my case will be reopened and heard." To the extent that such filing could be construed as a motion to supplement the record, it is denied. Evidence closed at the September 24, 2015 hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Petition to Reopen

1. On March 4, 2011, Claimant filed a worker's claim for compensation alleging a March 2, 2010 injury in the nature of an occupational disease, including annular tears and bulges in lumbar discs with pain radiating down his right leg into his foot with numbness. He alleged these injuries developed over time and were caused by his normal job duties of driving a shuttle bus, including sitting, bouncing, standing, bending, and lifting.

2. On May 13, 2015, Claimant filed an application for hearing on the issues of compensability, medical benefits, authorized provider, reasonably necessary, petition to reopen claim, temporary total benefits from March 2, 2010 to ongoing, permanent total disability benefits, and a number of alleged penalties. Claimant did not file a separate petition to reopen.

3. On May 24, 2011, hearing was held before Administrative Law Judge Margo W. Jones, on this claim and WC 4-820-488. On June 1, 2011, ALJ Jones issued a Summary Order finding and concluding that Claimant failed to establish that he

suffered an occupational disease or injury in the course and scope of his employment for the employer. No request for specific findings of fact and conclusions of law was filed, and the Summary Order became final.

4. At the hearing on September 24, 2015, the ALJ asked Claimant numerous times whether he was claiming his condition from the alleged March 2, 2010 occupational disease had worsened as the basis for his Petition to Reopen. Claimant repeatedly stated through the interpreter that his condition was the same during the entire period of time and that he did not claim that he was seeking to reopen his case based upon a change in condition or a worsened condition. Based upon this, the ALJ specifically finds and concludes Claimant does not claim a worsening or change in condition as a basis of his Petition to Reopen.

5. The ALJ has considered all the exhibits submitted by Claimant and admitted into evidence at the September 24, 2015 hearing, including medical records for this and other dates of alleged injury and other conditions, employment records, Employer's first report of injury, PALJ Barbo's prehearing conference order dated July 29, 2015, correspondence from Yvonne Lynah at the US Department of Labor, Judge Jones's summary order of June 1, 2011, a worker's claim for compensation and an employer's first report of injury for a date of injury of January 5, 2010.

6. The ALJ finds that none of the exhibits submitted into evidence persuasively establish Claimant's claim should be reopened on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition.

7. Based upon Claimant's statements and review of his submissions, the ALJ specifically finds and concludes Claimant does not seek to reopen his case on any basis that would support a granting of a Petition to Reopen. Therefore, Claimant has failed to meet his burden of proof to establish that his claim should be reopened.

PALJ Barbo's Prehearing Order and Claimant's Request for Penalties

8. Claimant seeks review of PALJ Barbo's Order denying Claimant's Motion to Compel Respondents to produce his employment records on the grounds he believes Employer has more records than have been provided to him. Claimant also seeks penalties against Employer for failure to provide him with additional records he believes exist. Claimant does not specify what additional records exist that have not been provided.

9. The ALJ has considered Claimant's request that PALJ Barbo's Order denying his Motion to Compel Respondents to produce his employment records be reversed. The ALJ finds PALJ Barbo's Order to be proper and affirms it. Claimant's representation that he thinks there are more records, without more, is insufficient to have PALJ Barbo or this ALJ issue an Order to Compel.

10. Claimant has failed to prove that an Order to Compel Respondents to produce employment records should be issued.

11. Claimant also has failed to prove he is entitled to penalties against Respondents for failure to produce employment records.

Sanctions Against Independent Medical Examiners

12. Claimant requests sanctions against the Independent Medical Examiners involved in this claim. Claimant specifically requested among other things that the ALJ revoke the licenses of the medical practitioners, have the medical practitioners jailed, and advise the Director of the Division Independent Medical Examination (DIME) Unit to be careful with regard to these healthcare providers.

13. Claimant has failed to prove any sanctions permitted by the Colorado Workers' Compensation Act are appropriate.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, et seq., C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). This

decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Petition to Reopen

A workers' compensation "award" may be reopened within six years after the date of injury on the ground of fraud, an overpayment, an error, a mistake, or change in condition. Section 8-43-303(1), C.R.S. The party seeking to reopen an issue or claim bears the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S. The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo.App.1996).

Considering all the evidence, the ALJ concludes Claimant has failed to meet his burden of proof to establish that his claim should be reopened.

PALJ Barbo's Prehearing Order and Claimant's Request for Penalties

Section 8-43-304(1), C.R.S., provides for penalties against "[a]ny employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court . . .."

Considering all the evidence, the ALJ concludes Claimant has failed to prove he is entitled to penalties against Respondents for failure to produce employment records.

Sanctions Against Independent Medical Examiners

Claimant requests sanctions against Independent Medical Examiners, including, but not limited to, revoking the licenses of the medical practitioners, having the medical practitioners jailed, and advising the Director of the Division Independent Medical Examination (DIME) Unit to be careful with regard to these healthcare providers.

The Administrative Law Judge's jurisdiction is limited by the Colorado Worker's Compensation Act. In connection with workers' compensation hearings, administrative law judges are empowered to:

> (a) In the name of the division, issue subpoenas for witnesses and documentary evidence which shall be served in the same manner as subpoenas in the district court;
>
> (b) Administer oaths;

(c) Make evidentiary rulings;

(d) Limit or exclude cumulative or repetitive proof or examination;

(e) Upon written motion and for good cause shown, permit parties to engage in discovery; except that permission need not be sought if each party is represented by an attorney. The director or administrative law judge may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery.

(f) Upon written motion and for good cause shown, conduct prehearing conferences for the settlement or simplification of issues;

(g) Dispose of procedural requests upon written motion or on written briefs or oral arguments as determined appropriate;

(h) Control the course of the hearing and the conduct of persons in the hearing room;

(i) Upon written motion and for good cause shown, grant reasonable extensions of time for the taking of any action contained in this article;

(j) Upon good cause shown, adjourn any hearing to a later date for the taking of additional evidence;

(k) Issue orders;

(l) Appoint guardians ad litem, as appropriate, in matters involving dependents' claims, and assess the reasonable fees and costs, therefore, from one or more of the parties;

(m) Determine the competency of witnesses who testify in a workers' compensation hearing or proceeding and the competency of parties that have entered into settlement agreements pursuant to section 8-43-204. Such competency determinations shall only be for the purpose of the particular workers' compensation proceeding.

(n) Dismiss all issues in the case except as to resolved issues and except as to benefits already received, upon thirty days notice to all the parties, for failure to prosecute the case unless good cause is shown why such issues should not be dismissed. For purposes of this paragraph (n), it shall be deemed a failure to prosecute if there has been no activity by the parties in the case for a period of at least six months.

(o) Set aside all or any part of any fee for medical services rendered pursuant to articles 40 to 47 of this title if an administrative law judge determines after a hearing that, based upon a review of the medical

necessity and appropriateness of care provided pursuant to said articles, any such fee is excessive or that the treatment rendered was not necessary or appropriate under the circumstances. If all or part of any fee for medical services is set aside pursuant to this paragraph (o), the provider of any such services shall not contract with, bill, or charge the claimant for such fees and shall not attempt in any way to collect any such charges from the claimant. No fee for medical services shall be set aside pursuant to this paragraph (o) if the treatment was authorized in writing by the insurer or employer.

(p) Impose the sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40 to 47 of this title;

(q) Require repayment of overpayments.

The ALJ concludes she lacks subject matter jurisdiction to provide the remedies requested by Claimant, including revoking the licenses of the medical practitioners, having the medical practitioners jailed, and advising the Director of the Division Independent Medical Examination (DIME) Unit to be careful with regard to these healthcare providers.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's petition to reopen is denied and dismissed.

2. Claimant's request that PALJ Barbo's Order denying Claimant's Motion to Compel be reversed is denied and dismissed.

3. Claimant's request for penalties based upon Respondents' alleged failure to produce employment records is denied and dismissed.

4. Claimant's request for sanctions against the Independent Medical Examiners is denied and dismissed.

5. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. ***For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.***

DATED: October 28, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

#JVC305690D11V2v 1

ISSUES

The following issue was raised for consideration at hearing:

1. Whether the Respondents have overcome, by clear and convincing evidence, the DIME opinion of Dr. Joseph Morreale regarding the Claimant's status related to maximum medical improvement ("MMI").

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant sustained a work injury to his low back on August 24, 2011 while employed as a tree trimmer by Employer. The Claimant experienced lumbar pain while twisting as he was exiting his vehicle. After initial conservative treatment did not resolve the Claimant's issues, the Claimant underwent an L5-S1 discectomy and laminectomy.

2. In follow up after his surgery, the Claimant saw Dr. Kevin O'Connell, who took over care as Claimant's authorized treating physician. Due to a lack of progress over an extended time, Dr. O'Connell referred the Claimant back to Dr. Benz for re-evaluation. At that time, Dr. Benz advised the Claimant that if his pain were intolerable, his options were artificial disc replacement or fusion.

3. Prior to surgery, Dr. Benz suggested bilateral facet injections which were performed by Dr. Rebekah Martin on March 27, 2013. On April 19, 2013, the Claimant saw Dr. Benz for reevaluation. The Claimant reported no relief from the injections performed by Dr. Martin. Dr. Benz also acknowledged Dr. Coester's opinion from March 11, 2013 that the Claimant's chances for improvement with surgery were around 50% and there was a substantial chance the surgery could make the Claimant's symptoms worse. Dr. Benz agreed with Dr. Coester's assessment but advised the Claimant that if his symptoms were intolerable, he offered surgical intervention. Dr. Benz's projected chance of success is 50-60% chance of making substantial improvement in the Claimant's pain with a fusion, slightly higher with disc replacement. Based on discussion that Dr. Benz had with the Claimant at that visit, Dr. Benz noted that the Claimant wanted to pursue surgery, specifically an artificial disc replacement (Claimant's Exhibit 2, p. 21).

4. The Claimant saw Dr. Brian Reiss on May 29, 2013 for an independent medical evaluation. Dr. Reiss opined that he did not believe any surgical intervention would help the Claimant's leg pain and he felt it was questionable whether or not the proposed procedure would help with the back pain. Dr. Reiss recommended an

intensive core strengthening program (Respondents' Exhibit D, pp. 37-42).

5. After a previous hearing in this matter, an Order dated December 17, 2013 was issued. Crediting the opinions of Dr. Coester and Dr. Reiss, it was found that, at that juncture, the Claimant had not established that the proposed artificial disc replacement surgery was reasonably necessary to cure and relieve the Claimant from the effects of his August 24, 2011 work injury. Relying on the medical records and the opinion of Dr. Reiss, it was held that the Claimant had not yet undergone a full course of intensive core strengthening. It was ordered that, prior to further consideration of the surgical intervention recommended by Dr. Benz, the Claimant was to undergo and complete sufficient physical therapy and active modalities unless, after commencing an active exercise regime and physical therapy and adequately addressing increased pain complaints, his authorized treating physician(s) determine that continued participation in such modalities were detrimental to the Claimant (Respondents' Exhibit C).

6. On January 16, 2014, the Claimant followed up with Dr. O'Connell who noted that the Claimant received approval to begin a water therapy program to improve flexibility prior to launching a MedX physical therapy program. Dr. O'Connell noted that the Claimant was evaluated on January 15, 2014 by the physical therapist that made this recommendation and the Claimant would begin water therapy the following week. At this point, the Claimant's pain level was reported 5/10 and work restrictions were continued (Claimant's Exhibit 3, pp. 77-79; Respondents' Exhibit F, pp. 55-57).

7. On February 24, 2014, Dr. O'Connell noted that the Claimant had been going to warm water pool therapy with slight improvement. Dr. O'Connell agreed with the physical therapist's recommendation for increasing the physical therapy prescription to include pool therapy 2 times per week to complement his other therapy, stretching and strengthening (Claimant's Exhibit 3, pp. 81-84; Respondents' Exhibit F, pp. 58-62).

8. As of the Claimant's March 24, 2014 office visit with Dr. O'Connell, the Claimant reported minimal change in symptoms as far as pain is concerned. The Claimant reported that the warm water therapy followed by PT felt good and was beneficial in improving his range of motion. As the Claimant's improvement with physical therapy was slow, Dr. O'Connell recommended gravity lumbar traction and explained the therapy modality to the Claimant (Claimant's Exhibit 3, pp. 85-88; Respondents' Exhibit F, pp. 63-66).

9. On June 17, 2014, the Claimant reported to Dr. O'Connell that the physical therapy has been helpful in providing partial relief from low back pain and there was been advancement with the Claimant's lumbar range of motion. The Claimant had continued with water therapy and acupuncture with electrical stimulation. He also increased his home traction treatment from 1 to 2 times per day on an every other day basis. Dr. O'Connell also talked about the MedX spine program with the Claimant again but advised that he did not think the Claimant was likely to be a suitable candidate as the advancement of his recovery with therapy had been limited. Dr. O'Connell opined

that the Claimant's low back would not stand up to the vigorous intense lumbar spine rehabilitation due to the resistance and repetition required by the program. Dr. O'Connell did not anticipate that the Claimant would be able return to a high level of heavy lifting or repetitive bending or stooping. Dr. O'Connell instead requested lumbar spine range of motion measurements from the therapist for determination of the Claimant's impairment (Claimant's Exhibit 3, pp. 89-92; Respondents' Exhibit 67-70).

10. On July 14, 2014, Dr. O'Connell noted the Claimant completed his physical therapy and made progress in reducing his pain and increasing his range of motion. The Claimant reported that he was interested in progressing to the MedX spine program to see if he could further improve ROM and strength. Dr. O'Connell continued to note apprehension about the Claimant's ability to engage in a vigorous program such as MedX. Dr. O'Connell also advised the Claimant that he did not believe the Claimant was a candidate for surgical intervention at this point. Dr. O'Connell did recommend proceeding to a spine strengthening and work conditioning program with his current physical therapist (Respondents' Exhibit F, pp. 73-75).

11. The Claimant brought up the question of whether he could be a candidate for the MedX spine program with Dr. O'Connell again on September 2, 2014 and Dr. O'Connell again advised that he is not going to recommend it because it is a vigorous program with the expectation of a high level of physical demand. After discussing it with the Claimant's physical therapist, Dr. O'Connell felt that the Claimant could continue to advance his physical activity but at a lower level than required by the MedX program. Dr. O'Connell advised the Claimant that his current PT regiment was adequate for the Claimant for strengthening, conditioning and work simulation for the stated goals of lifting 40 lbs. infrequently and 25 lbs. on a more frequent basis. Dr. O'Connell noted that he expected the Claimant to be at MMI in about 4 more weeks (Claimant's Exhibit 3, pp. 93-96; Respondents' Exhibit F, pp. 78-81).

12. On October 14, 2014, Dr. O'Connell noted that the Claimant reported that his back pain was stable and rated his pain at 3/10. The pain intermittently radiates into the Claimant's left leg, but there is no weakness. The Claimant advises he continued to use a home lumbar traction unit and perform his home exercise stretches daily. He completed his physical therapy conditioning program and a lift test was done on October 7, 2014 and he was able to lift and carry 25 pounds at waist level for 10 repetitions. He could demonstrate a 40 pound lift at waist level for 1 repetition but it caused low back discomfort. He could not lift from the floor or overhead. The Claimant's functional rating did improve from the onset of the conditioning program (Respondents' Exhibit F, p. 84). Dr. O'Connell noted that the Claimant had previously received lumbar ESIs and bilateral facet injections with no significant improvement. He also noted that Dr. Benz had recommended 2 surgical options (artificial disk replacement or fusion), but that Dr. Hans Coester provided a second opinion that these surgeries were not likely to reduce the Claimant's pain. He noted an IME physician, Dr. Reiss, recommended a lumbar spine conditioning/core strengthening program prior to considering surgical options. Dr. O'Connell noted that the Claimant made gradual progress but eventually

plateaued in his physical therapy program (Respondents' Exhibit F, p. 85). Dr. O'Connell also noted that lumbar range of motion measurements from July 10, 2014 did not change at this October 14, 2014 exam. Dr. O'Connell assigned a 10% impairment for the Claimant's specific disorder of the lumbar spine and a 9% impairment for lumbar spine range of motion deficits for a combined impairment rating of 18%. Dr. O'Connell provided permanent restrictions of lifting a maximum of 40 pounds infrequently and 25 pounds frequently. Dr. O'Connell provided a carrying restriction of 25 pounds and pushing and pulling restrictions of 40 pounds. He noted the Claimant had limited bending ability restricted to 2 hours and he could walk, stand or sit for 8 hours but if seated at work, needed to change positions every 15 minutes and he was limited to 1 hour for crawling or kneeling and 2 hours for partial squatting or climbing stairs. Generally, Dr. O'Connell opined the Claimant was capable of performing work involving light to moderate physical activity. Dr. O'Connell discharged the Claimant from care and placed him at MMI (Respondents' Exhibit F, pp. 86-87).

13. The Respondents filed a Final Admission of Liability on November 4, 2014 admitting for the 18% whole person impairment and for post-MMI treatment by the ATP that is reasonable, necessary and related to the injury. Dr. O'Connell's October 14, 2014 report was provided as the basis for the admission (Respondents' Exhibit B).

14. The Claimant sought a Division IME and this was performed by Dr. Joseph Morreale on March 2, 2015 and he issued a written report (Claimant's Exhibit 1; Respondents' Exhibit E). After examination, Dr. Morreale provided a provisional impairment rating of 22% whole person, including a 12% for range of motion deficits, a 10% impairment rating for specific disorder and a 1% neurologic rating. However, Dr. Morreale opined that the Claimant was not at MMI. He opined that the Claimant's sacroiliac joint is problematic and may be the cause of pseudo sciatica which is why the Claimant failed to have significant relief from any procedures so far. Dr. Morreale recommended a trial of injections in the Claimant's left sacroiliac joint and more physical therapy with the stress on the Claimant's sacroiliac joint. He opined that if this failed, Dr. Benz surgical recommendations should be reconsidered after obtaining new imaging studies (Claimant's Exhibit 1, p. 5; Respondents' Exhibit E, p. 44).

15. The Claimant saw Dr. Reiss for a repeat IME on May 6, 2015. In reviewing the medical notes of Dr. O'Connell since Dr. Reiss' prior IME in 2013, Dr. Reiss makes several critical comments with regard to Dr. O'Connell's approach to the Claimant's physical therapy referrals (Respondents' Exhibit D). Dr. Reiss disagreed with Dr. O'Connell's June 17, 2014 opinion that the Claimant would not be a candidate for the MedX spine program. Dr. Reiss opined that the Claimant needed a core strengthening, stretching and aerobic conditioning program and noted passive modalities should only be used as an adjunct to this, not as the primary treatment (Respondents' Exhibit D, p. 32). Dr. Reiss made several observations that Dr. O'Connell was not recommending an appropriate core strengthening program and opined that traction and stretching were not the answer to the Claimant's back complaints. Rather, Dr. Reiss opined that a core strengthening program and a psychological evaluation, both of which could be carried

out as maintenance care, are the appropriate rehabilitation measures for the Claimant. Dr. Reiss also noted, “there is the possibility that his impairment rating could change, decrease, after making progress in his rehabilitation program” (Respondents’ Exhibit D, p. 33). With regard to the DIME report of Dr. Morreale, Dr. Reiss opined that, “it is not very likely that [the Claimant’s] sacroiliac joint is the source of his pain.” Rather, Dr. Reiss opined that the MRI findings were typical of degenerative change associated with the previous injury and surgical intervention. Dr. Reiss found that the Claimant’s subjective complaints were out of proportion to his objective findings and did not detect any significant sacroiliac irritation. Dr. Reiss concludes that the Claimant “has simple lower back pain most likely perpetuated by his deconditioned state” (Respondents’ Exhibit D, p. 33). Dr. Reiss again opines that “all appropriate conservative care be completed prior to considering surgical intervention and in this case that has not been accomplished.” He points out that a pain generator must also be clearly defined and that the likelihood of improvement of his condition be greater with surgical intervention than with continued nonsurgical care. However, Dr. Reiss argued that the opposite is true in the Claimant’s case. Ultimately, in his written report, Dr. Reiss opined that the Claimant was at MMI and any additional treatment can be considered maintenance. He did opine that the ongoing back pain was probably still related to the Claimant’s work injury along with his deconditioned state and he disagreed that it was sacroiliitis (Respondents’ Exhibit D, p. 34).

16. At the hearing, Dr. Reiss testified as an expert in orthopedics with a subspecialty in spine. Dr. Reiss testified that the DIME opinion of Dr. Morreale is incorrect. Specifically, he opined that the SI is unlikely to be a pain generator for the Claimant and noted that neither Dr. Coester nor Dr. Benz had identified the sacroiliac joint as an issue. Dr. Reiss testified that his physical examination of the Claimant did not reproduce pain at the SI joint. He also noted that it is impossible to isolate the SI joint, therefore Dr. Morreale was speculating about SI joint pain. Dr. Reiss testified that the Claimant is not supporting his back in a way that protects it; he needs a strong core to share the load. Dr. Reiss noted that when the Claimant did participate in an exercise program he did improve, but he still hasn’t participated in an aggressive core strengthening program. Dr. Reiss continues to opine that surgery is not a good option in this case because the pain generator has not been identified and the Claimant has no instability, only degeneration. Moreover, Dr. Reiss finds the Claimant has unrealistic expectations from surgery and he still has not participated in an appropriate core strengthening program, so conservative care has not been completed. Finally, the Claimant has not undergone a psychological evaluation. Dr. Reiss ultimately opines that the Claimant now needs only maintenance care to include a more aggressive exercise program. On cross-examination, Dr. Reiss agreed that the Claimant would likely improve his level of functioning if he continued with a core strengthening program. Dr. Reiss agreed that the Claimant has had no new diagnostic testing since 2013 to determine if the Claimant is a candidate for surgical intervention. However, as for the diagnostics recommended by Dr. Morreale, Dr. Reiss reiterated that no new imaging or diagnostics is necessary since it is not likely an MRI would show anything new. If the symptoms are unchanged, there is no need for new imaging, per Dr. Reiss.

17. The Claimant testified at the hearing that he did engage in physical therapy and exercise since the time of his first hearing. He testified that when he was in the water therapy and during physical therapy, he experienced some relief, but it was not long term, it was only temporary. He also used a traction unit two times per week. The whole time that he was in physical therapy the Claimant tried to do the extreme core strengthening program but he was not physically able to do this. The Claimant testified that his current symptoms are a sharp low back pain with spasms and leg pain when he steps or lifts his foot. The Claimant felt the evaluation with the DIME physician was thorough and he would like to follow up with the imaging and further consideration for Dr. Benz' surgery recommendation to see if this is still a treatment option.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Burden of Proof for Challenging an Opinion on MMI Rendered by a DIME Physician

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME

which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

The Claimant sustained a low back injury on August 24, 2011 and initial conservative treatment did not resolve his pain. He then underwent and L5-S1 discectomy and laminectomy surgery performed by Dr. Benz. The results of the surgery did not meet the Claimant's expectations in terms of pain relief and after that, little progress was made towards pain relief and increased function. The Claimant's authorized treating physician Dr. O'Connell referred the Claimant back to Dr. Benz for reevaluation and Dr. Benz offered two surgical options. The Claimant was also evaluated by Dr. Coester who opined that the Claimant's chances for improvement with surgery were around 50% and there was a substantial chance that the surgery would

make the Claimant's symptoms worse. Dr. Benz generally agreed with Dr. Coester's assessment but advised the Claimant if his symptoms were "intolerable" he offered the surgical option. Dr. Reiss then performed an IME and opined that surgical intervention would not help the Claimant's leg pain and it was questionable whether the surgery would help with the back pain. Instead, he recommended an intensive core strengthening program.

Relying on the medical records and the opinion of Dr. Reiss, it was held that the Claimant had not yet undergone a full course of intensive core strengthening. It was previously ordered that, prior to further consideration of the surgical intervention recommended by Dr. Benz, the Claimant was to undergo and complete sufficient physical therapy and active modalities unless, after commencing an active exercise regime and physical therapy and adequately addressing increased pain complaints, his authorized treating physician(s) determine that continued participation in such modalities were detrimental to the Claimant. The Claimant continued to treat with Dr. O'Connell throughout 2014. A MedX physical therapy program, the type of intensive core strengthening program recommended by Dr. Reiss, was considered. However, Dr. O'Connell repeatedly opined that the Claimant was not a suitable candidate for this type of program as it was too vigorous for the Claimant's physical state and the physical demand was too high. The Claimant was directed to a water therapy and physical therapy regimen coupled with traction and passive modalities. Upon completion of this therapy, Dr. O'Connell noted that the Claimant had slowly improved in terms of pain levels and functioning and then stabilized or plateaued. Dr. O'Connell still did not believe the Claimant was a candidate for the more aggressive MedX program. When he placed the Claimant at MMI, Dr. O'Connell noted the Claimant's pain complaint was 3 out of 10. Dr. Reiss testified that this level of pain is not consistent with the Medical Treatment Guidelines' provisions for surgery. Dr. O'Connell discharged the Claimant from care as of October 14, 2014 and provided an impairment rating.

The Claimant then proceeded to a DIME with Dr. Morreale, who opined that the Claimant was not at MMI. He opined that the Claimant's sacroiliac joint is problematic and may be the cause of pseudo sciatica which is why the Claimant failed to have significant relief from any procedures so far. Dr. Morreale recommended a trial of injections in the Claimant's left sacroiliac joint and more physical therapy with the stress on the Claimant's sacroiliac joint. Dr. Morreale's written report does not go into much detail about how he came to this conclusion, which was not previously raised by any treating or evaluating physician. Dr. Morreale opined that if the trial of SI injections failed, Dr. Benz surgical recommendations should be reconsidered after obtaining new imaging studies.

After this, the Claimant saw Dr. Reiss for a repeat IME on May 6, 2015. In reviewing the medical notes of Dr. O'Connell since Dr. Reiss' prior IME in 2013, Dr. Reiss makes several critical comments with regard to Dr. O'Connell's approach to the Claimant's physical therapy referrals, specifically disagreeing with Dr. O'Connell's June 17, 2014 opinion that the Claimant would not be a candidate for the MedX spine program. Dr. Reiss continued to opine that the Claimant needed a core strengthening,

stretching and aerobic conditioning program and noted passive modalities should only be used as an adjunct to this, not as the primary treatment. With regard to the DIME report of Dr. Morreale, Dr. Reiss opined that," it is not very likely that [the Claimant's] sacroiliac joint is the source of his pain." Rather, Dr. Reiss opined that the MRI findings were typical of degenerative change associated with the previous injury and surgical intervention. Dr. Reiss found that the Claimant's subjective complaints were out of proportion to his objective findings and did not detect any significant sacroiliac irritation. Dr. Reiss concluded that the Claimant "has simple lower back pain most likely perpetuated by his deconditioned state." Dr. Reiss also pointed out that for the Claimant to be a surgical candidate, a pain generator must also be clearly defined and that the likelihood of improvement of the Claimant's condition be greater with surgical intervention than with continued nonsurgical care. However, Dr. Reiss argued that the opposite is true in the Claimant's case. Ultimately, in his written report, Dr. Reiss opined that the Claimant was at MMI and any additional treatment would be considered maintenance.

At the hearing, Dr. Reiss testified that the DIME opinion of Dr. Morreale is incorrect. Specifically, he opined that the SI is unlikely to be a pain generator for the Claimant and noted that neither Dr. Coester nor Dr. Benz had identified the sacroiliac joint as an issue. Dr. Reiss testified that his physical examination of the Claimant did not reproduce pain at the SI joint. He also noted that it is impossible to isolate the SI joint, therefore Dr. Morreale was speculating about SI joint pain. Dr. Reiss testified that the Claimant is not supporting his back in a way that protects it; he needs a strong core to share the load. Dr. Reiss noted that when the Claimant did participate in an exercise program he did improve, but he still hasn't participated in an aggressive core strengthening program. Dr. Reiss continues to opine that surgery is not a good option in this case because the pain generator has not been identified and the Claimant has no instability, only degeneration. Moreover, Dr. Reiss finds the Claimant has unrealistic expectations from surgery and he still has not participated in an appropriate core strengthening program, so conservative care has not been completed. Finally, the Claimant has not undergone a psychological evaluation. Dr. Reiss ultimately opines that the Claimant now needs only maintenance care which should include a more aggressive exercise program. Dr. Reiss agreed that the Claimant has had no new diagnostic testing since 2013 to determine if the Claimant is a candidate for surgical intervention. However, as for the diagnostics recommended by Dr. Morreale, Dr. Reiss reiterated that no new imaging or diagnostics is necessary since it is not likely an MRI would show anything new. If the symptoms are unchanged, there is no need for new imaging, per Dr. Reiss.

The Claimant testified at the hearing that he did engage in physical therapy and exercise since the time of his first hearing. He testified that when he was in the water therapy and during physical therapy, he experienced some relief, but it was not long term, it was only temporary. He also used a traction unit two times per week. The Claimant testified that the whole time that he was in physical therapy, he tried to do the extreme core strengthening program, but he was not physically able to do this. The

Claimant testified that his current symptoms are a sharp low back pain with spasms and leg pain when he steps or lifts his foot.

The ALJ is persuaded, in large part by the opinion of Dr. Reiss, and supported by the finding of Dr. O'Connell, that the Claimant has reached maximum medical improvement. There are no recommendations which would be reasonably expected to cure and relieve the claimant's condition. Rather, the recommended continued therapy would be considered maintenance care. While the Claimant may benefit from a continuing exercise program, if he is not able to progress to a more aggressive core strengthening program and his pain level has stabilized at about 3/10, at this point, the additional treatment would be maintenance. The Claimant himself testified that he attempted the extreme core strengthening exercises but was unable to do them, so it is not likely that he will progress to a more aggressive physical therapy program.

The opinions of Dr. Reiss and Dr. O'Connell are more credible and persuasive concerning the issue of maximum medical improvement than those of Dr. Morreale. The ALJ is persuaded that Dr. Morreale's opinions are incorrect given the protracted history of this case and the Claimant's delayed recovery, coupled with the likelihood that the diagnoses offered by Dr. Morreale are likely incorrect. Moreover, the Claimant's back pain had decreased with the conservative care to a reported 3 out of 10 level at MMI. This would not generally be considered "intolerable" pain to justify surgery that Dr. Benz previously recommended. The opinions of Dr. O'Connell, Dr. Benz, Dr. Coester and Dr. Reiss, when taken in the context of the entire medical record in this case, establish that it is highly probable and free from substantial and serious doubt that Dr. Morreale is incorrect in his diagnosis of Claimant's condition and his opinion regarding maximum medical improvement in this case.

Ultimately, the lack of explanation as to his findings and examination results, and the lack of attention to detail in his report, cast serious doubt on the opinions expressed by Dr. Morreale, especially in light of the contrary and persuasive opinion of Dr. Reiss. Respondents have therefore overcome the opinion of Dr. Morreale by clear and convincing evidence. The Claimant remains at maximum medical improvement as of October 14, 2014.

ORDER

It is therefore ordered that:

1. The Respondents have established that it is highly probable and free from serious or substantial doubt that the opinion of the DIME physician, Dr. Morreale, is incorrect. Respondents have overcome the DIME opinion of Dr. Joseph Morreale regarding the Claimant's status related to maximum medical improvement ("MMI") by clear and convincing evidence.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 20, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the issue of mileage reimbursement is closed pursuant to the Final Admission of Liability dated April 14, 2014.

2. Whether the Administrative Law Judge has jurisdiction to determine the issue of mileage from August 12, 2012 through April 4, 2014.

3. Has claimant proven by a preponderance of the evidence that she is entitled to mileage reimbursement from August 12, 2012 through April 4, 2014?

4. Whether the issue of mileage reimbursement from August 12, 2012 through April 4, 2014 was ripe at the time the claimant's Application for Hearing was filed on April 20, 2015.

FINDINGS OF FACT

1. Respondent filed a Final Admission of Liability on April 8, 2014. (Exhibit A)

2. Claimant filed an objection to the Final Admission of Liability and Notice and Proposal for a Division IME on April 14, 2014. (Exhibit B)

3. Claimant submitted a request for mileage reimbursement for 8,652 miles for dates ranging from August 12, 2012 through May 9, 2014 on May 12, 2014. (Exhibit C)

4. Adjuster, Matthew Knipple, responded on May 13, 2014 asking Claimant to provide the addresses of her appointments. (Exhibit D)

5. Claimant did not respond to the May 13, 2014 letter from the adjuster.

6. On May 19, 2014, adjuster Matthew Knipple sent a letter to claimant's attorney requesting claimant provide the addresses for reimbursement to verify mileage stated. (Exhibit E)

7. Claimant's attorney did not respond to the May 19, 2014 letter.

8. On July 14, 2014, claimant's attorney's paralegal emailed respondent's attorney's paralegal requesting the status of the mileage reimbursement.

9. On July 22, 2014, respondent's attorney's paralegal emailed claimant's attorney's paralegal indicating the adjuster again requested the addresses of the appointments to verify mileage.

10. Claimant did not respond to the July 22, 2014 request for additional information.

11. On August 5, 2014, claimant formally withdrew her Notice and proposal for the DIME. (Exhibit F).

12. On December 1, 2014, claimant resubmitted her mileage request and added mileage from May 27, 2014 through December 1, 2014. (Exhibit G).

13. Respondent replied on December 30, 2014 denying liability for mileage from August 12, 2012 through April 4, 2014. Respondent paid mileage from April 11, 2014 forward. (Exhibit H)

14. Claimant filed an Application for Hearing on April 20, 2015 endorsing the issue of mileage reimbursement. (Exhibit I)

15. Respondent filed a Response on April 23, 2015 endorsing the additional issues of case being closed, ripe issues, jurisdiction, attorney fees. (Exhibit J).

16. Prehearing Conference Order. (Exhibit K)

17. The parties agree that the issue of attorney fees will be reserved for future determination.

18. The parties agree to submit position statements no later than October 5, 2015.

CONCLUSIONS OF LAW

1. C.R.S. 8-43-203(2)(b)(II)(A) provides in part:

> If an independent medical examination is requested pursuant to §8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are

ripe for hearing until the Division's Independent Medical Examination process is terminated for any reason.

2. The issue of mileage reimbursement for mileage incurred between August 12, 2012 and April 4, 2014 was ripe for hearing when the Final Admission of Liability was filed on April 8, 2014. All of the mileage requested was incurred prior to filing of the Final Admission of Liability. Since claimant timely filed a Notice and Proposal for DIME, the claimant was not required to file an Application for Hearing on ripe issues during the time the DIME was pending. The claimant did send a written request to the adjuster for reimbursement of mileage and the adjuster appropriately asked for additional information to verify the mileage. Claimant did not respond to the adjuster's request for additional information. The claimant formally withdrew the Notice and Proposal for DIME on August 5, 2014. At the latest, claimant had thirty (30) days after withdrawing her Notice and Proposal for DIME or until September 4, 2014 to file an Application for Hearing on all ripe issues that resulted from the filing of the Final Admission of Liability in April of 2014. Claimant did not do so.

3. The plain language of the statute expressly provides that the case will be automatically closed as to the issues admitted in the Final Admission of Liability if the claimant does not, within thirty (30) days after date of the Final Admission of Liability, contest the Final Admission of Liability in writing and request a hearing on any disputed issues that are ripe for hearing. When claimant terminated the DIME process on August 5, 2014, claimant's obligation to file an Application for Hearing within thirty (30) days, on any disputed issues admitted the April 8, 2014 Final Admission of Liability arose. Claimant did not file the Application for Hearing until April 15, 2015.

4. Mileage expenses to and from authorized medical treatment are a compensable medical benefit. *Sigman Meat Company v. Industrial Claim Appeals Office,* 761 P.2d 265 (Colo. App. 1998). In *Newbrey v. Valley Excavating, Inc.,* (ICAO January 18, 2006), the Industrial Claim Appeals Office held that where a claimant failed to file the Application for Hearing within thirty (30) days of the Final Admission of Liability, "the admitted issue" of medical benefits and specifically, mileage, closed.

5. Subject matter jurisdiction relates to the power or authority of the court to deal with a particular case. The Administrative Law Judge's authority is strictly statutory and without subject matter jurisdiction, the Administrative Law Judge has no authority to act. *Reed v. Industrial Claim Appeals Office,* 13 P.3d 810 (Colo. App. 2000). Subject matter jurisdiction is created in and limited by the Workers' Compensation Act. *Compton v. Industrial Claim Appeals Office,* 13 P.3d 844 (Colo. App. 2000). When

claimant terminated the DIME process, claimant had thirty (30) days to file an Application for Hearing all ripe issues as set forth in C.R.S. 8-43-203(2)(b)(II)(A).

6. Ripeness tests whether an issue is real, immediate, and fit for adjudication. There was no legal impediment to litigating the mileage issue at the time the Final Admission of Liability was filed. The only reason that claimant was not required to file an Application for Hearing within thirty (30) days of the April 8, 2014 Final Admission is that claimant requested a DIME. When claimant withdrew the request for a DIME, claimant had an obligation to file an Application for Hearing on any ripe issues. Claimant did not do so.

7. The phrase "ripe for hearing" is not defined by statute. The statutory language in §8-43-203(2)(b)(2) was part of a comprehensive bill which established procedures and time limitations for the selection of a Division Independent Medical Examination. An issue is ripe for hearing if the issue is addressed in the Final Admission of Liability and the legal prerequisites to adjudication of the issue are complete. The issue of ripeness concerns whether or not an issue is subject to adjudication under the statute, not whether a party is prepared to litigate the issue. In *Chavez v. Cargill,* W.C. No. 4-421-748, (ICAO November 1, 2002), the ICAO held that where a claimant filed an Application for Hearing on the issue of average weekly wage outside of the thirty (30) days after the Final Admission of Liability, that the issue of average weekly wage was not ripe because there was no legal impediment to adjudication of the average weekly wage at the time the Final Admission of Liability was filed. The ICAO went on to say that the ALJ was without power to reopen the closed issue except as provided under §8-43-303.

8. The ALJ concludes that the respondent has established by a preponderance of the evidence that the issue of reimbursement for mileage incurred from August 12, 2012 through April 4, 2014 was closed by operation of law 30-days subsequent to the Notice of Withdrawal and acceptance of the Final Admission of Liability, dated August 5, 2014.

9. The ALJ concludes that the ALJ lacks jurisdiction to determine the issue of mileage from August 12, 2012 through April 4, 2014; and, thus makes no determination thereof.

10. The ALJ concludes that the issue of mileage from August 12, 2012 through April 4, 2014, which was endorsed as an issue on the claimant's Application for Hearing and Notice to Set dated April 20, 2015 was not ripe at the time of the filing of the application.

ORDER

It is therefore ordered that:

1. The claimant's claim for mileage from August 12, 2012 through April 4, 2014 is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: October 29, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for left shoulder arthroscopic rotator cuff surgery by David Schneider, M.D. is reasonable, necessary and causally related to his March 14, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant was employed as a Food Service Worker for Employer. On March 14, 2013 he was carrying two cans of meatballs in each hand when his left knee locked and he fell onto his right knee. While still holding the cans of meatballs he then landed on his left elbow.

2. After Claimant visited an emergency room, he was directed to Concentra Medical Centers for treatment. On March 18, 2013 Claimant was diagnosed with a left knee contusion. Upon examination, Claimant's left elbow demonstrated full range of motion. Claimant did not report any left shoulder pain.

3. Claimant returned to Concentra for medical treatment but did not report any left shoulder symptoms. However, on May 7, 2013 Claimant reported left shoulder pain. When PA-C Nickolas Curcija questioned Claimant about the cause of the pain, he reported his left shoulder began hurting the previous week when he was lifting a 35 pound container of oil. PA-C Curcija advised Claimant that he needed to report a new Workers' Compensation claim. However, Claimant reported that his left shoulder had been symptomatic since his March 14, 2013 accident but he had expected the pain to resolve. PA-C Curcija recorded that Claimant had not previously mentioned left shoulder pain either verbally or through a pain diagram.

4. After additional conservative treatment through Concentra Claimant obtained a change of physician to Caroline Gellrick, M.D. During his initial evaluation with Dr. Gellrick on July 25, 2013 Claimant reported that he had been experiencing left shoulder pain since his March 14, 2013 accident but Concentra had refused to treat his symptoms. Dr. Gellrick recorded that Claimant had positive impingement signs and questioned whether he suffered from rotator cuff pathology. She diagnosed Claimant with a left shoulder strain and contusion from the jolt of falling.

5. Claimant continued to receive medical treatment from Dr. Gellrick. On August 28, 2013 Dr. Gellrick noted that Claimant's pain complaints had not resolved. Dr. Gellrick thus requested a second opinion regarding Claimant's knee and left shoulder conditions from Orthopedic Surgeon David Schneider, M.D.

6. On October 11, 2013 Claimant visited Dr. Schneider for an examination. Dr. Schneider remarked that Claimant's mechanism of injury was consistent with a left shoulder injury. He suspected a possible SLAP tear and requested an MRI. Dr. Schneider reported that Claimant suffered pain, weakness and instability in his left shoulder.

7. On October 28, 2013 Claimant underwent a left shoulder MRI. The MRI revealed roughening of the articular surface of the supraspinatus tendon as well as minor signal changes within the tendon. The MRI findings were consistent with tendinopathy.

8. On October 30, 2013 Claimant returned to Dr. Schneider for an examination. Dr. Schneider remarked that the MRI revealed an intact rotator cuff and mild supraspinatus tendinopathy. He recommended conservative left shoulder treatment. Dr. Schneider noted that "I doubt he will need surgical intervention at any time on this shoulder."

9. On November 13, 2013 Claimant returned to Dr. Gellrick for an examination. She reported that Claimant's left shoulder MRI revealed an intact rotator cuff with supraspinatus tendinopathy, mild hypertrophic AC joint arthropathy and abnormal acromial configuration. Dr. Gellrick commented that Dr. Schneider had recommended conservative left shoulder treatment.

10. On February 24, 2014 Claimant underwent and independent medical examination with Kathleen D'Angelo, M.D. After conducting a detailed records review and physical examination, Dr. D'Angelo determined that Claimant only suffered left elbow and knee contusions as a result of the March 14, 2013 accident. She explained that Claimant's left shoulder complaints were not work-related because symptoms of acute trauma are worse in the immediate post-injury period and peak less than 72 hours after the incident. Claimant's delayed onset of left shoulder symptoms is inconsistent with a March 14, 2013 acute injury.

11. On March 9, 2014 Respondents filed a General Admission of Liability (GAL) acknowledging that Claimant was entitled to receive Temporary Total Disability (TTD) benefits for the period January 28, 2014 through March 6, 2014. Claimant resumed full duty employment on March 6, 2014.

12. On May 1, 2014 Claimant returned to Dr. Gellrick for left knee and shoulder symptoms. She referred Claimant for a second left shoulder surgical evaluation.

13. On May 22, 2014 Dr. Gellrick concluded that Claimant had reached Maximum Medical Improvement (MMI). She assigned Claimant a 4% upper extremity impairment rating for his left shoulder and a 7% lower extremity impairment rating for his left knee. Dr. Gellrick also recommended maintenance care in the form of physical therapy and injections.

14. On July 19, 2014 the parties executed a stipulation in which Respondents acknowledged that Claimant was entitled to reasonable, necessary and related medical care. However, Respondents preserved all rights under the law to challenge Claimant's need for future care.

15. On August 4, 2014 Respondents filed a Final Admission of Liability (FAL). The FAL was consistent with Dr. Gellrick's MMI and impairment determinations. The FAL also acknowledged reasonable and necessary medical maintenance benefits. On August 20, 2014 Respondents filed an Amended FAL to correct a calculation error in Claimant's permanent Partial Disability (PPD) award.

16. On September 19, 2014 Claimant underwent a left shoulder MRI. The MRI revealed a normal acromioclavicular joint. The supraspinatus and infraspinatus tendons remained in continuity. The subscapularis tendon was normal. The long head of the biceps tendon was intact without sublaxation or tear. There was no labral tear or rotator cuff tendon tear.

17. On September 29, 2014 Claimant returned to Dr. Schneider for an examination. Dr. Schneider recounted that Claimant's September 19, 2014 left shoulder MRI revealed bursal-sided tendinopathy of the supraspinatus, but was otherwise normal. He performed a subacromial steroid injection and recommended additional physical therapy.

18. On November 17, 2014 Dr. Schneider reported that Claimant did not benefit from the subacromial steroid injection. He recommended a left shoulder arthroscopic rotator cuff repair.

19. On December 2, 2015 Respondents denied Dr. Schneider's surgical request. On January 2, 2015 Dr. Schneider again requested authorization for left rotator cuff repair. He noted that all conservative care, including injections, physical therapy, rest and exercise had been exhausted.

20. On March 15, 2015 Wallace K. Larson, M.D. conducted a medical records review. He concluded that Claimant did not sustain a work-related left shoulder injury on March 14, 2013. Claimant specifically did not suffer a left shoulder rotator cuff tear warranting surgery. Moreover, the proposed surgery was not reasonable or necessary because Claimant's left shoulder MRI did not demonstrate any traumatic changes or specific pathology.

21. On August 26, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Larson. Dr. Larson maintained that Claimant did not sustain a work-related rotator cuff tear warranting surgical intervention. He explained that the 2013 and 2014 MRI films were "quite reassuring in terms of the anatomic integrity of his – the shoulder." Claimant's left shoulder MRIs in 2013 and 2014 simply did not support the need for surgery. Although the 2013 MRI demonstrated mild roughening of the articular

surface consistent with tendinopathy, Dr. Larson commented that shoulder MRI's tend to reflect some degree of tendinopathy that does not constitute a true abnormality. Dr. Larson thus agreed with the radiologist that Claimant did not exhibit a left rotator cuff tear.

22. On June 25, 2015 Dr. Gellrick authored a special report in response to Dr. Larson's medical records review. She emphasized Dr. Schneider's opinion that, although it had been almost two years since Claimant's accident, the January 2015 MRI still showed a high degree of tendinopathy. Dr. Gellrick noted that Dr. Schneider believed Claimant's tendinopathy was consistent with bursal-sided tearing of the rotator cuff. She specifically noted that Claimant "could very well have tearing on the bursal side of the rotator cuff with the tendinopathy." Moreover, Dr. Gellrick explained that Claimant has failed conservative treatment including injections, therapy, rest and exercise. She summarized that all conservative measures have been exhausted and Claimant requires left shoulder surgery.

23. On July 17, 2015 Dr. Schneider authored a special report in response to Dr. Larson's medical records review. He explained that delayed presentation is common. His report specified that "[o]ften times the primary complaint arises from the contusion injury to the elbow, but as time passes, the shoulder becomes the main area of complaint. This is associated with a stretch injury of the rotator cuff tendon and/or direct contusion of the cuff tendon to the underside of the acromion in the shoulder. Therefore, I do believe this injury is work related." Dr. Schneider also disagreed with Dr. Larson's opinion that the MRI scans were negative. He reported that "there is a high degree of tendinopathy of [Claimant's] cuff tendons."

24. Dr. Larson testified that Claimant reported no benefit from the subacromial injection. He remarked that a subacromial injection is an important diagnostic tool designed to determine whether a patient's pain generator is the rotator cuff. If a patient receives no benefit from the injection, a rotator cuff diagnosis is most likely incorrect. Furthermore, because Claimant did not report immediate pain in his left shoulder after the fall on March 14, 2013, it is unlikely that Claimant sustained any traumatic injury to his left shoulder. Dr. Larson summarized that Claimant's lack of reported pain symptoms for six weeks following the injury and absence of clinical findings over time that have not strongly reflected a rotator cuff tear, suggests that Claimant has not sustained an injury to his left rotator cuff necessitating surgical intervention.

25. Dr. Larson concluded that it is not reasonable to perform exploratory surgery on Claimant's left shoulder simply based on complains of pain. There needs to be a positive and supportable reason for the surgery instead of an absence of reasons not to do the surgery. Dr. Larson noted that every surgery has risks and Dr. Schneider's proposed surgery has the potential for joint irritation or damage. He concluded that the likelihood of finding a traumatic injury in Claimant's shoulder that could be improved with surgery is very low.

26. Claimant has demonstrated that it is more probably true than not that the request for left shoulder arthroscopic rotator cuff surgery by Dr. Schneider is

reasonable, necessary and causally related to his March 14, 2013 admitted industrial injury. On March 14, 2013 Claimant fell onto a hard surface and struck his left elbow. Although Claimant did not initially report left shoulder pain to medical providers, on May 7, 2013 he mentioned that his left shoulder had been symptomatic since his March 14, 2013 accident but he had expected the pain to resolve. On July 25, 2013 Claimant began receiving medical treatment from Dr. Gellrick. She recorded that Claimant had positive impingement signs and questioned whether he suffered from rotator cuff pathology. Dr. Gellrick diagnosed Claimant with a left shoulder strain and contusion from the jolt of falling. On October 11, 2013 Dr. Schneider remarked that Claimant's mechanism of injury was consistent with a left shoulder injury. He suspected a possible SLAP tear and requested an MRI. An October 28, 2013 MRI revealed roughening of the articular surface of the supraspinatus tendon as well as minor signal changes within the tendon. The MRI findings were consistent with tendinopathy.

27. On September 29, 2014 Dr. Schneider recounted that Claimant's September 19, 2014 left shoulder MRI revealed bursal-sided tendinopathy of the supraspinatus. He performed a subacromial steroid injection and recommended additional physical therapy. On November 17, 2014 Dr. Schneider reported that Claimant had not benefitted from the subacromial steroid injection and recommended a left shoulder arthroscopic rotator cuff repair. Dr. Schneider subsequently explained that all conservative care, including injections, physical therapy, rest and exercise had been exhausted.

28. In contrast to Dr. Schneider's surgical request, Dr. Larson determined that Claimant did not suffer a left shoulder rotator cuff tear warranting surgery. Moreover, the proposed surgery was not reasonable or necessary because Claimant's left shoulder MRI's did not demonstrate any traumatic changes or specific pathology. Dr. Larson summarized that Claimant's lack of reported pain symptoms for six weeks following the injury and absence of clinical findings strongly reflecting a rotator cuff tear suggested that Claimant had not sustained an injury to his left rotator cuff necessitating surgical intervention. Finally, because Claimant did not benefit from a subacromial injection, a rotator cuff diagnosis is most likely incorrect. However, Dr. Gellrick persuasively maintained that Claimant warranted the left shoulder surgery requested by Dr. Schneider. Although it had been almost two years since Claimant's accident, the January 2015 MRI showed a high degree of tendinopathy. She explained that Claimant "could very well have tearing on the bursal side of the rotator cuff with the tendinopathy." Moreover, Dr. Gellrick explained that Claimant has failed conservative treatment including injections, therapy, rest and exercise. Furthermore, Dr. Schneider explained that Claimant's delayed presentation was common. He explained that, although a patient may initially present with an elbow contusion, the shoulder becomes the main area of complaint over time. Dr. Schneider remarked that Claimant's left shoulder injury was work-related because Claimant's symptoms were associated with a stretch injury of the rotator cuff tendon or a direct contusion of the cuff tendon to the underside of the acromion in the shoulder. Based on the medical records and persuasive opinions of Drs. Gellrick and Schneider, left shoulder arthroscopic rotator

cuff surgery is reasonable, necessary and related to Claimant's March 14, 2013 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that the request for left shoulder arthroscopic rotator cuff surgery by Dr. Schneider is reasonable, necessary and causally related to his March 14, 2013 admitted industrial injury. On March 14, 2013 Claimant fell onto a hard surface and struck his left elbow. Although Claimant did not initially report left shoulder pain to medical providers, on May 7, 2013 he mentioned that his left shoulder had been symptomatic since his March 14,

2013 accident but he had expected the pain to resolve. On July 25, 2013 Claimant began receiving medical treatment from Dr. Gellrick. She recorded that Claimant had positive impingement signs and questioned whether he suffered from rotator cuff pathology. Dr. Gellrick diagnosed Claimant with a left shoulder strain and contusion from the jolt of falling. On October 11, 2013 Dr. Schneider remarked that Claimant's mechanism of injury was consistent with a left shoulder injury. He suspected a possible SLAP tear and requested an MRI. An October 28, 2013 MRI revealed roughening of the articular surface of the supraspinatus tendon as well as minor signal changes within the tendon. The MRI findings were consistent with tendinopathy.

6. As found, on September 29, 2014 Dr. Schneider recounted that Claimant's September 19, 2014 left shoulder MRI revealed bursal-sided tendinopathy of the supraspinatus. He performed a subacromial steroid injection and recommended additional physical therapy. On November 17, 2014 Dr. Schneider reported that Claimant had not benefitted from the subacromial steroid injection and recommended a left shoulder arthroscopic rotator cuff repair. Dr. Schneider subsequently explained that all conservative care, including injections, physical therapy, rest and exercise had been exhausted.

7. As found, in contrast to Dr. Schneider's surgical request, Dr. Larson determined that Claimant did not suffer a left shoulder rotator cuff tear warranting surgery. Moreover, the proposed surgery was not reasonable or necessary because Claimant's left shoulder MRI's did not demonstrate any traumatic changes or specific pathology. Dr. Larson summarized that Claimant's lack of reported pain symptoms for six weeks following the injury and absence of clinical findings strongly reflecting a rotator cuff tear suggested that Claimant had not sustained an injury to his left rotator cuff necessitating surgical intervention. Finally, because Claimant did not benefit from a subacromial injection, a rotator cuff diagnosis is most likely incorrect. However, Dr. Gellrick persuasively maintained that Claimant warranted the left shoulder surgery requested by Dr. Schneider. Although it had been almost two years since Claimant's accident, the January 2015 MRI showed a high degree of tendinopathy. She explained that Claimant "could very well have tearing on the bursal side of the rotator cuff with the tendinopathy." Moreover, Dr. Gellrick explained that Claimant has failed conservative treatment including injections, therapy, rest and exercise. Furthermore, Dr. Schneider explained that Claimant's delayed presentation was common. He explained that, although a patient may initially present with an elbow contusion, the shoulder becomes the main area of complaint over time. Dr. Schneider remarked that Claimant's left shoulder injury was work-related because Claimant's symptoms were associated with a stretch injury of the rotator cuff tendon or a direct contusion of the cuff tendon to the underside of the acromion in the shoulder. Based on the medical records and persuasive opinions of Drs. Gellrick and Schneider, left shoulder arthroscopic rotator cuff surgery is reasonable, necessary and related to Claimant's March 14, 2013 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for left shoulder arthroscopic rotator cuff surgery is granted.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 7, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **JOE MARQUEZ,** Claimant, vs. **EASTERN COLORADO AGGRETATES,** Employer, and **PINNACOL ASSURANCE,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-917-947-03**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hearing in this matter was held on July 14, 2015 before Administrative Law Judge (ALJ) Donald E. Walsh.

The claimant was present and represented by Nicole B. Smith Esq. The respondents were represented by Vito A. Racanelli Esq. This matter was digitally recorded in the Office of Administrative Courts' conference room in Colorado Springs, Colorado from 1:50 pm to 2:30 pm.

In this order, Joe Marquez will be referred to as the "claimant"; Eastern Colorado Aggretates will be referred to as the "respondent-employer"; and Pinnacol Assurance will be referred to as the "respondent-insurer."

Also in this order, if used, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2014); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

The claimant offered exhibits 1 through 14 into evidence and they were admitted without objection.

The respondents offered exhibits A through I into evidence and they were admitted without objection.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

Nicole Smith Esq	wcservice@mcdivittlaw.com
Vito A. Racanelli Esq	RS3@rs3legal.com
Division of Workers' Compensation	cdle_wcoac_orders@state.co.us

DATE: October 5, 2015

/s/ original signed by:
Angela Heckman-Cowles
Court Clerk

ISSUES

Whether the claimant has established an entitlement to right knee surgery as being reasonable, necessary, and related to his industrial injury of April 20, 2013.

FINDINGS OF FACT

1. On April 20, 2013, the claimant was involved in a work-related accident which occurred when the lower portion of his right leg became pinned between a large pipe and a "saddle structure." The claimant's right fibula snapped when he fell backwards over the saddle structure, which was six to eight inches tall and acted as a fulcrum.

2. The claimant heard a "pop" during the accident, but he was unsure where the sound resonated from.

3. The claimant did not have a history of pain in his right knee prior to his industrial injury on April 20, 2013.

4. On April 26, 2013, the claimant was seen by Michael Morley, D.O., who documented a "non twisting injury" of the right fibula.

5. On May 10, 2013, the claimant was placed in a walking boot, at which time he was not bearing any weight on the right leg. Before he began using the walking boot, the right leg had been immobilized in a splint.

6. On June 7, 2013, the claimant followed-up with Dr. Morley, who noted that his swelling had resolved and pain had decreased.

7. The claimant returned to modified work in mid-June 2013 and those job duties required him to sit, stand, and walk.

8. The claimant stopped using crutches in August 2013.

9. On December 19, 2013, Dr. Morley recommended a MRI based on reported posterior lateral right knee pain.

10. On December 30, 2013, the claimant underwent a right knee MRI, the results of which suggested the existence of a complete tear of the anterior cruciate ligament ("ACL") and a possible lateral meniscus tear.

11. On January 29, 2014, Dr. Abbott described the ACL tear as "old."

12. On March 31, 2014, Christopher Jones, M.D. recommended a right knee arthroscopy to address the possible meniscus tear.

13. On April 25, 2014, Gary Zuehlsdorff, D.O. issued a report after reviewing the claimant's medical records several times, in which he concluded that the right knee condition is not work-related. Dr. Zuehlsdorff based his opinion on the lack of any documented knee symptoms until December 19, 2013, and the physical therapy records from June 20, 2013 and August 6, 2013 which demonstrate that the claimant's right knee was feeling great and he was experiencing only ankle pain.

14. On March 5, 2015, the claimant was examined by Allison Fall, M.D., who agreed with Dr. Zuehldorff's opinion that the right knee condition is not work-related. Dr. Fall based her opinion on the lack of any acute signs of a right knee injury, and she observed that a proper causation analysis was not contemporaneously performed when the claimant's knee pain first arose.

15. A post-hearing deposition of Dr. Fall was taken on August 12, 2015. Dr. Fall testified consisted with her IME report. She testified that a right knee injury was possible based on the claimant's mechanism of injury, but did not think that the medical records supported a knee injury.

16. An evidentiary deposition of Dr. Michael Morley took place on March 23, 2015. Dr. Morley was admitted as an expert in the field of orthopedic surgery.

17. Dr. Morley initially saw the claimant for an injury to his ankle and leg. He observed that the claimant's mechanism of injury was "[claimant] had a crushing injury to his leg while he was at work. And my understanding was there are several barrels or large containers that crushed his ankle, his right ankle." Dr. Morley further indicated that the barrels impacted the claimant's entire lower extremity on the right side.

18. Dr. Morley opined that the ankle and leg were initially treated non-operatively with splinting, casting, and an Exogen bone stimulator. Dr. Morley observed that the claimant was on crutches for about four or five months. Dr. Morley indicated that when the claimant began weight bearing it was initially toe-touch weight bearing.

Dr. Morley explained he “began with toe-touch weightbearing, which means using assisted devices, crutches, and he may not experience knee pain at that point.”

19. Dr. Morley opined that the claimant did not initially complain of right knee pain “because the focus was on the swelling. [The claimant] had a crush injury to his right ankle, his right leg. So initially the focus was on the right ankle and the lower part of his leg. He did not complain of knee pain until later in the process when he was trying to ambulate.”

20. Dr. Morley opined that the ACL and lateral meniscus tear are related to the work injury that the claimant suffered on April 20, 2013. He further testified that in his opinion the right ACL and lateral meniscus tear are consistent with the claimant’s mechanism of injury. Dr. Morley explained that “when [the claimant] had a crushing injury to his ankle, the body twisted and he sustained an injury to his knee. He sustained a ligamentous injury to his knee.”

21. Dr. Morley opined that it is medically reasonable to perform the right knee arthroscopy with partial meniscectomy and possible ACL reconstruction surgery on the claimant’s right knee. Dr. Morley explained that the surgery is reasonable because the claimant “is a younger man. He had a ligamentous injury to his knee. It would be reasonable to reconstruct that to allow him to continue with his work and his daily activities.”

22. Dr. Timothy Hall performed an independent medical evaluation on December 16, 2014.

23. Dr. Hall opined that “within a reasonable degree of medical probability that [the claimant’s] right knee pathology/symptomatology and need for intervention is the direct consequence of his 04/20/2013 injury while at work.”

24. The ALJ finds the analysis and opinions of Dr. Morley to be credible and more persuasive than medical opinions to the contrary.

25. The claimant has established that it is more likely than not that his need for surgery to his right knee is reasonable, necessary, and related to his industrial injury of April 20, 2013.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals*

Office, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

5. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

6. As found above the ALJ concludes that the medical analyses and opinions of Dr. Morley are credible and more persuasive than medical evidence to the contrary.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the right knee derangement is related to the industrial injury that he sustained on April 20, 2013. The claimant has established by preponderance of the evidence that the right knee surgery recommended by Dr. Jones is reasonable, necessary, and related and is the responsibility of the respondent-insurer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall authorize and pay for the arthroscopic surgery as recommended by Dr. Jones.

2. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: October 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The parties agreed prior to the hearing that the only issue to be decided by the ALJ was compensability.

FINDINGS OF FACT

1. The claimant timely reported an injury to his left knee that he stated occurred on April 15, 2013 at work while performing his normal duties. The claimant was cleaning the glass doors to the library at the respondent-employer, moved to allow students through the door, and felt a pop in his left knee. The claimant indicated that the onset of pain occurred when he "pivoted." Pivot is defined as "a turning movement on a pivot or while standing in place."

2. On April 16, 2013, the claimant was seen by Dr. William Watson, with whom the claimant had previously treated for both knees. Dr. Watson had previously taken x-rays of the claimant's left knee on February 26, 2013, which "look(ed) very good." The February 26, 2013 x-rays "show(ed) some mild degenerative changes in the lateral compartment but the medial compartment (was) well maintained." On April 16, 2013, the day after the claimant felt a pop in his left knee, however, Dr. Watson became "concerned about a medial meniscal tear," and noted that now the claimant "has true locking and catching and giving way."

3. On April 19, 2013, the claimant was seen by Bernice Barnes, NP, at CCOM. Nurse Barnes assessed the claimant with a "Left knee strain," and noted that, based on the claimant's visit that day, "the history of this knee injury is vague." Nurse Barnes did not opine that the injury was work-related, however.

4. On April 24, 2013, the claimant was seen by Dr. George Schwender at CCOM. Dr. Schwender opined: "In my opinion, the patient's left knee injury is work related as the objective findings are consistent with his history and a work related mechanism of injury."

5. On May 7, 2013, the claimant was seen by Dr. Watson, who reported that the MRI performed on May 1, 2013 showed "a posterior horn tear of the medial meniscus."

6. On May 13 and 29, 2013, the claimant was seen by Dr. Mark Porter of Parkview Orthopedics, per Dr. Watson's referral for a second opinion regarding surgery. Dr. Porter assessed a "Degenerative tear of posterior horn of medial meniscus."

7. On May 15, 2013, the claimant was seen by Dr. Richard Nanes of CCOM, who noted that the claimant was scheduled for a left knee arthroscopic surgery on June 8, 2013, with Dr. Porter, but that the surgery was in limbo due to personal financial issues. Dr. Nanes concurred with the torn meniscus diagnosis.

8. On May 29, 2013, the respondent filed a Notice of Contest in this matter.

9. On August 7, 2013, the claimant was seen by Dr. Nanes, who placed the claimant at MMI and issued the following impairment ratings: 10% lower extremity; 4% whole person. Dr. Nanes noted a permanent impairment and ordered permanent restrictions, but did not authorize maintenance care.

10. The respondent caused the claimant to undergo an Independent Medical Examination by Dr. Nicholas Olsen, which was completed on February 24, 2014.

11. Upon the conclusion of the IME, which included a review of claimant's medical treatment records, obtaining a personal history from claimant, and performing his own physical examination of claimant, Dr. Olsen concluded that claimant's problems with his left knee are degenerative in nature and not due to a work injury.

12. Dr. Olsen further opined that the events on April 15, 2013, as described by the claimant, were not a sufficient enough mechanism of injury to aggravate a prior degenerative condition. By the claimant's own report, there was no acute event that would have led to an aggravation, temporary or permanent.

13. At hearing on August 13, 2015, the claimant testified as to the mechanism of his injury - that he was cleaning the glass doors to the library at the respondent-employer, moved by pivoting "real fast" on his left knee to allow students through the door, twisting his knee, and felt a pop in his left knee.

14. Prior to the date of hearing the claimant does not appear to have described a twisting of his knee. In his first visit to CCOM on April 19, 2013 the claimant described the mechanism of injury as occurring while "bending and squating {sic}" while cleaning the windows. In the subjective narrative the nurse practitioner notes:

> [The claimant] states that he has pain in his left knee due to bending and stooping while he is washing windows. He states that he is required to wash the windows on doors that are used by the students who smudge them. He states

> that he has to move quickly when the students are traversing the doors where he is washing the windows and maybe this movement has caused some kind of twisting of his knee. He states that the injury is as a result of the fast-paced movement of stepping away from students passing through the doorways. He also believes that the crouching stooping and standing which is the repetitive movement has caused the pain in his knee. He cannot however describe a specific time when he felt acute knee pain.

15. The ALJ finds it significant that the claimant first saw his own physician, Dr. Watson, after feeling pain in his knee subsequent to the reported date of injury and that Dr. Watson's notes do not indicate that there is a work related connection.

16. The ALJ finds it significant that, Dr. Porter, to whom the claimant was referred by Dr. Watson, indicated that the claimant's condition was from degenerative arthritis of the left knee and a degenerative tear of the posterior horn of the medial meniscus.

17. The ALJ finds it significant that the claimant, on his first visit to CCOM several days subsequent to the reported date of injury, could not describe a specific time when he felt acute pain, and in fact mused over several possible scenarios as to how his condition 'might' have come about.

18. The ALJ does not find the claimant's testimony to be credible.

19. The ALJ finds that the opinions and analyses of Dr. Olsen are credible and more persuasive than opinions and analyses to the contrary.

20. The ALJ finds that the claimant has failed to establish that it is more likely than not that on April 15, 2013 he sustained a compensable injury arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant shoulders the burden of proving by a preponderance of the evidence that he sustained an injury arising out of and within the course of his employment and that he is entitled to benefits under the Act. §§ 8-43-201(1) and 8-41-301(1), C.R.S.*; see City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals* Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals* Office, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office,* 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the

evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones,* 688 P.2d 1116 (Colo. 1984).

2. As established by a preponderance of the credible evidence in this matter, the claimant failed to meet his burden of proof that he sustained a compensable industrial injury on April 15, 2013. By his own report, the claimant was not involved in any type of traumatic event on April 15, 2013: he did not trip, he did not fall, and he did not hit or bang his knee. He merely experienced some pain while at work. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

3. The medical treatment records in this case are very clear that claimant suffers from a pre-existing condition of degenerative osteoarthritis and that the medial meniscal tear identified on the MRI scan taken on May 1, 2013 predated the April 15, 2013 reported date of injury. Dr Porter concluded that claimant suffers from degenerative osteoarthritis and a degenerative medial meniscus tear.

4. The ALJ concludes that the claimant is not credible.

5. Additionally, Dr. Olsen's credible and persuasive analyses indicate that the claimant did not suffer an injury or an aggravation of a pre-existing condition and that the claimant merely manifested symptoms of his underlying degenerative condition.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that on April 15, 2013 he sustained a compensable injury arising out of and in the course of his employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: October 22, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Respondent overcome the opinion of the DIME physician (David Orgel, M.D.) that Claimant was not at MMI by clear and convincing evidence.
- If Respondent overcame the DIME physician's opinion on MMI, what is Claimant's medical impairment rating.
- Is the hip arthroscopy surgery proposed by Derek Johnson, M.D. reasonable, necessary and related to Claimant's December 27, 2012 injury.
- Whether the hip arthroscopy surgery proposed by Dr. Johnson should be authorized pursuant to W.C.R.P. 16-10(E).

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on December 27, 2012 while working as an overnight grocery clerk for Respondent-Employer. She was walking in the backroom of the store when she tripped over baling wire and fell forward. In the medical records, Claimant described falling forward with her arms outstretched and onto her left side. Claimant fell onto her left shoulder and left lateral thigh[1], experiencing pain in those areas of her body.

2. On December 27, 2012, Claimant was evaluated by Jennifer Hammond, M.D. at Concentra, the ATP for Respondent. She had pain on palpation of the long head biceps tendon with biceps flexion (with resistance) and mild swelling was noted in the left lateral thigh, along with tenderness to palpation. Claimant's history was noted to be non-contributory. The assessment was left biceps strain and contusion-left lateral thigh. She was restricted from reaching above the shoulders and required to wear a sling while at work.

3. Claimant returned to Concentra on December 31, 2012 and was evaluated by Juan Miranda-Seijo, M.D. She complained of pain mainly in the left shoulder (anterior). The x-ray of her shoulder was negative for fractures. The diagnosis was left shoulder strain. Dr. Miranda-Seijo issued restrictions of no lifting over 15 pounds to waist level and no overhead lifting. The plan was for Claimant to mobilize off sling, do self exercises and to take ibuprofen. There was no reference to an examination of Claimant's hip or thigh by Dr. Miranda-Seijo.

[1] In Dr. Paz' IME report, it was noted that Claimant had an iPad over her right shoulder, which draped over her left side and she fell on it. The presence of the iPad was also noted by Dr. Bisgard.

4. Dr. Miranda-Seijo re-examined Claimant on January 16, 2013. Claimant continued to have pain in her left shoulder which was positive for impingement. The diagnosis was shoulder strain and rotator cuff injury. Claimant was working within restrictions, taking Vicodin and doing PT. Dr. Miranda-Seijo noted impingement and pain on examination. He changed Claimant's medications and ordered an MRI.

5. Dr. Miranda-Seijo evaluated Claimant on January 22, 2013, at which time his physical findings were similar to the 1/16/13 appointment. Positive impingement was noted for the left shoulder. The results of the MRI were pending and Claimant's restrictions were maintained.

6. An MRI of the left shoulder (without contrast) was done on January 24, 2013. Michael Otte, M.D. noted a contusion in the greater tuberosity of the humerus. No linear fracture line was detected, but Dr. Otte suspected involvement especially at the superior facet for supraspinatus implantation. Claimant's rotator cuff was intact and the MRI was negative for labral tear or long head biceps instability. The anterior and posterior labrum was intact.

7. Claimant was next seen on January 28, 2013, at which time Dr. Miranda-Seijo stated the MRI showed a bone contusion only at the level of the supraspinatus, which would explain her pain on abduction. Claimant was to continue her PT and her restrictions were continued.

8. Claimant returned to Concentra on February 19, 2013. At that time, her pain was noted to be getting better. On examination of the left shoulder, impingement, O'Briens and Jobes were all noted to be negative. The diagnosis was shoulder contusion. Claimant was to continue to PT for an additional three weeks and a flector patch was prescribed by Dr. Miranda-Seijo.

9. Dr. Miranda-Seijo examined Claimant on March 12, 2013 and noted her left shoulder was unchanged. He referred Claimant to Dr. Sacha (physiatrist) and maintained her restrictions.

10. Claimant was evaluated by Dr. Sacha on April 1, 2013. Her symptoms were documented as pain localized to the left anterolateral shoulder, which was worse with overhead activity and pain over the left lateral hip. Dr. Sacha's impression was humeral head contusion, with some secondary impingement and left greater trochanteric bursitis. He recommended an ultrasound-guided injection of the left subacromial bursa of the shoulder, a left greater trochanter injection and x-rays of the hip.

11. X-rays of Claimant's pelvis were taken on April 1, 2013. The x-rays showed normal and symmetric hip joints bilaterally, with no evidence of joint effusion or arthritic changes. No soft tissue abnormalities were seen and Claimant's left hip joint remained symmetric. The impression was normal left hip.

12. Claimant was examined by Dr. Sacha on April 16, 2013. Claimant related that she had 100% temporary relief after the greater trochanteric bursa injection and 90% lasting relief. No tenderness was noted over the hip or illotibial band. There was some pain noted in the shoulder, along with crepitus. Dr. Sacha's impression was shoulder impingement and hip bursitis. Dr. Sacha wrote a prescription for chiropractic and acupuncture for the shoulder, as Claimant was having pain in the proximal arm and left anterior shoulder.

13. Claimant returned to Dr. Miranda-Seijo for a follow-up evaluation on April 22, 2013. At that time, she reported that most of the pain in the posterior portion of her shoulder had resolved, although she had pain over the biceps groove. The injections with Dr. Sacha had helped the posterior pain, but not the anterior pain. The left shoulder was described as "unchanged". Claimant was to start chiropractic and acupuncture per Dr. Sacha.

14. Dr. Sacha referred Claimant to Jason Gridley, D.C., who examined her on April 30, 2013. Claimant was noted to have fallen on her outstretched left arm and suffered a contusion to her left hip. On physical examination of the shoulder, no bruising, swelling or joint effusion was noted. Claimant had subacromial discomfort and some radiating pain down the anterior left shoulder, along with discomfort upon resisted internal rotation with pain in the same pattern. Claimant was very tight in the posterior capsule, with multiple adhesions noted at the infraspinatus, tere major and minor, subscaplaris, pectoralis minor, anterior deltoids and supraspinatus. Dr. Gridley's impressions were left shoulder sprain/strain with mild impingement; mild somatic dysfunction of the left GH complex, with associated muscle spasm and myofacial adhesions as outlined in the examination. He recommended an initial trial of the active release techniques, joint manipulation, dry needling, biomedical acupuncture and NMR functional taping protocols.

15. Claimant was examined by Dr. Miranda-Seijo on May 29, 2013, at which time she reported the pain in her shoulder was better. She was doing chiropractic and acupuncture with Dr. Gridley and was going to see Dr. Sacha. Mild impingement was noted for the left shoulder. Dr. Miranda-Seijo's diagnosis remained shoulder contusion and he planned to see Claimant in follow-up. The ALJ infers that Dr. Miranda-Seijo was aware that Claimant was receiving chiropractic and acupuncture treatment for her shoulder; however, there was no specific reference to hip treatment in Dr. Miranda-Seijo's records admitted at hearing.

16. The ALJ finds that Dr. Miranda-Seijo did not treat Claimant's left lower extremity injury and there was no reference to any examination of her left hip by Dr. Miranda-Seijo. The ALJ also notes that the records Miranda-Seijo do not reference any complaints of pain in the hip or leg area, although the Concentra records appear to use a template whereby Claimant's pain complaints were repeated or copied into the report of each evaluation by Dr. Miranda-Seijo. Dr. Miranda-Seijo also made no reference to the reports he received from Dr. Sacha which referenced Claimant's treatment for hip symptoms.

17. Claimant returned to Dr. Sacha on June 4, 2013. Tenderness was noted over left hip and, as well as the illotibial band. Dr. Sacha's impression was hip bursitis, shoulder impingement that was resolving. At that time, he performed a left hip greater trochanteric bursa corticosteroid injection with ultrasound-guidance. Claimant was to have PT, chiropractic and acupuncture. This report was sent to Dr. Miranda-Seijo.

18. Dr. Sacha re-evaluated Claimant on June 18, 2013, at which time he noted a slightly antalgic gait to the left side. There was tenderness over the greater left trochanter, as well as the illotibial band. Dr. Sacha's impression was hip bursitis, rule out internal derangement of the hip, and shoulder pain (resolved). He recommended an MRI of the left hip. The ALJ notes that this report was sent to Dr. Miranda-Seijo.

19. An MRI of Claimant's left hip (without contrast) was done on June 24, 2013. Andrew Sonin, M.D. reviewed the films and noted: "as far as the intracapsular structures that Claimant's cartilage was intact and appropriate in thickness for the patient's age, with no significant joint effusion or synovitis". There was "a well-defined cleft at the base of the anterior superior labrum". Dr. Sonin opined: "This could represent a labral tear but the adjacent labrum is currently normal looking otherwise and therefore this likely represents a congenital variant." Dr. Sonin's impression was essentially normal MRI of the left hip, with a well-defined linear defect at the base of the anterior superior left acetabular labrum, which he deemed "more likely a congenital cleft than a pathological tear".

20. Claimant was examined by Dr. Sacha on July 9, 2013. She complained of continued pain in her left lateral thigh region. The pain symptoms were worse with squatting and improved with acupuncture. A left hip trochanteric bursa steroid/lidocaine injection was performed by Dr. Sacha. He recommended a gym and pool pass to help with an independent exercise program.

21. Claimant was seen by Dr. Gridley and received treatment as outlined in his initial report. She had her fifth treatment session on July 11, 2013, at which time she reported her left shoulder symptoms were almost entirely resolved. Dr. Gridley noted that he addressed Claimant's left lateral hip and thigh pain, using some vasopneumatic [c]upping, dry needling and acupuncture. Her left hip had responded to treatment; she was able to squat without pain and walk without discomfort.

22. Claimant returned to Dr. Gridley on July 18, 2013, at which time he noted that her shoulder was significantly better. Claimant had one focal area of discomfort on the anterior deltoid and the insertion of the supraspinatus. She received manipulation and cupping treatment for both the shoulder and the hip. Dr. Gridley's assessment was left shoulder sprain/strain with mild scapulothoracic involvement, improved/likely reached maximum therapeutic benefit; left lateral thigh myofacial pain and adhesions.

23. Dr. Sacha saw Claimant for a re-evaluation on July 30, 2013. He noted that she had completed seven months of care, including medications, physical therapy, strengthening and conditioning, injections and manual medicine. More particularly, she had one shoulder and three hip injections. Dr. Sacha's impression was shoulder

impingement and hip pain, resolved. Dr. Sacha found Claimant to have reached MMI as of 7/30/13, which needed to be confirmed by Dr. Miranda-Seijo. She had no work restrictions and for maintenance care, she was to be provided a gym and pool pass. Dr. Sacha felt she may need further costicosteroid injections for the hip or shoulder, if her symptoms worsened. Dr. Sacha assigned a 8% upper extremity impairment due to a loss of range of motion and no impairment for the hip.

24. The ALJ has no information that Claimant returned to Dr. Miranda-Seijo for confirmation of MMI and impairment.

25. Respondent filed a FAL on August 21, 2013, admitting for Dr. Sacha's 8% extremity rating. Respondent's FAL admitted to post-MMI medical treatment that was reasonable, necessary and causally connected.

26. Claimant returned to Dr. Sacha on September 10, 2013. In his examination, he noted mild tenderness over the left greater trochanter, as well as illotibial band. His impression was hip greater trochanter bursitis and left shoulder impingement. Dr. Sacha recommended left hip greater trochanteric bursa corticosteroid injection with ultrasound-guidance, which Dr Sacha performed in his office. Claimant noted 100% temporary relief indicating a diagnostic response to this procedure.

27. Dr. Sacha saw Claimant for a re-evaluation on October 1, 2013. At that time, she reported hip pain, which was worsening as the weather had gotten colder. She was having ongoing symptoms in her proximal left leg and Dr. Sacha noted tenderness over the trochanteric bursa, well as illotibial band. Dr. Sacha's impression was hip bursitis, rule out internal derangement of the hip vs. femur contusion, and shoulder impingement. Dr. Sacha concluded Claimant remained in MMI and required x-rays of her hip, as well as proximal leg. He recommended consideration of a trial of physical therapy vs. intraarticular costicosteroid injection of the hip. Dr. Sacha characterized this as maintenance care.

28. X-rays were taken of Claimant's femur and hip on October 1, 2013. David Solsberg, M.D. reviewed these films and noted the hip joint spaces were well maintained. There was mild sclerosis and regularity around the margin of the pubic synthesis. No hip joint arthritis was seen. Claimant's left femur showed a popcorn-like coarse calcification in the distal diaphysis of the femur. Repeat x-rays were taken on October 3, 2013. No fracture was identified and the distal of femoral diaphyseal lesion was thought to be consistent with an enchondroma.

29. Dr. Sacha saw Claimant for a follow-up on October 7, 2013 and she brought in the x-ray films. Dr. Sacha noted the x-rays showed evidence of some joint line thinning and mild degenerative changes at the hip. This was different than what was read by the radiologist. Dr. Sacha opined that with her history of not just the lateral greater trochanteric bursa pain, but also being worse when it is cold, this could be a strain of the internal part of the joint, which was causing some secondary greater trochanteric bursitis. Dr. Sacha noted tenderness over the greater trochanteric bursa,

with mild diminished range of motion with hip internal rotation compression. He recommended a one-time corticosteroid injection.

30. A Division of Workers' Compensation Independent Medical Examination was conducted by David Orgel, M. D. on January 10, 2014. At that time, Claimant had fairly minimal complaints regarding her left shoulder. She developed an ache in her left shoulder when she did extensive lifting at or above the shoulder height. Her primary complaint related to her left hip with persistent mild tenderness over her mid lateral thigh. Dr. Orgel noted that Claimant's had a persistent mildly tender lump around her lateral leg. Claimant reported a burning sensation into her lateral leg with prolonged ambulation, along with significant discomfort in her hip.

31. Dr. Orgel concluded that Claimant was at MMI for her left shoulder, but not for her left hip. He noted that the MRI was concerning for a labral abnormality. He recommended that Claimant be evaluated by an orthopedist for her hip pathology before proceeding to an MR arthrogram. Dr. Orgel assigned a 10% scheduled impairment for the upper extremity and 10% scheduled impairment for the lower extremity.

32. In his report dated 2-18-14, Dr. Sacha reviewed the DIME report from Dr. Orgel in which he opined that Claimant was not at MMI for the hip. Dr. Orgel recommended an orthopedic consultation for the hip, which Dr. Sacha felt was reasonable, along with the MRI arthrogram of the hip. Dr. Orgel also recommended gym and pool pass as maintenance and Dr. Sacha agreed. Dr. Sacha noted that Claimant's case did not need to be reopened because they were not sure whether there would be actually any type of active or interventional care.

33. Dr. Sacha examined Claimant on March 11, 2014. He noted that Claimant had been recommended for an MRI arthrogram of the left hip, as well as a gym and pool pass, but these were not authorized. He also noted that back in June, 2013, "we did suspect labral pathology". Dr. Sacha noted that Dr. Orgel conducted a DIME and he agreed with the MRI arthrogram, as well as the gym/pool pass recommendations. On examination Claimant was noted to have tenderness over the greater trochanter. Dr. Sacha's impression was hip pain; rule out labral tear; and shoulder impingement. Claiamnt was to have the MRI arthrogram and he referred Claimant for an orthopedic exam (Dr. Motz).

34. Dr. Sacha referred Claimant to Cary Motz, M.D., who evaluated her on April 4, 2014. Claimant reported pain localized to the groin and into the anterior region of the joint. Increased pain was noted with prolonged walking by Claimant, along with improvement with intraarticular and trochanteric bursal injections. Tenderness and mild limitations in ROM of the left hip were noted by Dr. Motz. Dr. Motz' assessment was hip pain, left trochanteric bursitis and left labral tear. Dr. Motz suspected that she needed a scope and referred Claimant to Dr. Johnson, who performed arthroscopies. The ALJ infers that Dr. Motz believed that Claimant's hip symptoms were related to her work injury.

35. An MRI (CT guided gadolinium) of the left hip was done on March 24, 2014, which was read by Arash Momeni, M.D. Dr. Momeni's impressions were subtle heterogeneity of the labrum at 10:00 and 12:00 positions, likely representative of an anterosuperior labral tear; right-sided greater trochanteric bursitis which also may be a source of pain.

36. Dr. Sacha re-evaluated Claimant on April 7, 2014. He reviewed the MRI of the hip which showed evidence of left hip superior anterior tear of the labrum and some mild degenerative changes; also evidence of greater trochanter bursitis. Dr. Sacha also noted that Claimant had been referred to Dr. Motz who felt that Claimant may need an arthroscopic hip procedure and recommended Dr. Johnson. Claimant was noted to have tenderness over the greater trochanter and walked with an antlagic gait. Dr. Sacha discussed possible surgical intervention with her and noted the case will be reopened as of the date of surgery.

37. The ALJ infers that the 3/24/14 MRI (with gladinium) would tend to illuminate Claimant's hip and the surrounding tissues in greater detail that than the MRI-scan done on 6/24/13.

38. Claimant was examined by Derek Johnson, M.D. on April 22, 2014 for persistent left hip pain, which she described as getting worse. Dr. Johnson's assessment was left hip pain, left labral tear of hip, femoracetabular impingement, trochanteric bursitis and left tendinitis of the hip/pelvic area. Dr. Johnson treated Claimant by arthrocentesis (injection) of her left hip, after which Claimant reported significant decrease in trochanteric bursa pain. Claimant was a candidate for arthroscopy of the left hip with femoroplasty, acetabuloplasty and labral repair.

39. Dr. Sacha examined Claimant on May 19, 2014, who noted pain localized to the hip and groin. He noted that Claimant had undergone an injection with another provider[2]. Dr. Sacha stated that Claimant had a history of greater trochanteric bursitis but also because of what was described as "their repetitive and recurrent nature", she likely had some pathology within the hip itself. Dr. Sacha's impression was greater trochanteric bursitis and rule out internal derangement of hip. He recommended a staged trochanteric injection and intraarticular injection.

40. Claimant returned to Dr. Sacha on September 9, 2014, at which time she reported that her hip had worsened since the last visit. Dr. Sacha noted that a left greater trochanteric injection and intraarticular injection was done four months ago and provided relief. Since Claimant had a history of a labral tear, Dr. Sacha felt it was quite likely that this was becoming more symptomatic. Dr. Sacha noted tenderness over the greater trochanter. She had positive hip rotation and compression test on the left side. His impression was internal derangement of the hip consistent with labral tear and hip bursitis. Claimant was going to be a re-evaluated by an orthopedic hip specialist (described as reasonable) and Dr. Sacha planned to see her after that.

[2] This references a knee injection, which appears to be a typographical error, since the balance of Dr. Sacha's note refers to Claimant's hip.

41. On October 8, 2014, PA Kristine Genson of Denver-Vail Orthopedics requested x-ray guided steroid injection for Claimant's left hip, which was described as a diagnostic test. The diagnosis was hip pain with possible labral tear.

42. Dr. Sacha saw Claimant in what was described as a maintenance follow-up visit on October 21, 2014. She was noted to have a slight antalgic gait to the left and equivocal hip internal rotation and compression testing. Dr. Sacha's impression was internal derangement of the hip and greater trochanteric bursitis. He renewed Claimant's medications and noted she remained at MMI.

43. Respondent requested an independent medical evaluation with Mark Paz, M.D. on September 22, 2014. Dr. Paz noted Claimant had numbness of the left upper extremity, which was positive for weakness of the left shoulder. Claimant described left hip symptoms, as well as symptoms in the left groin region and left lateral aspect of the hip. He noted tenderness to palpation about the bursal region of the greater left trochanter. No crepitus was found with internal and external rotation of the right or left hip. Dr. Paz' assessment was left hip pain, left greater trochanteric bursitis, left labral defect, left shoulder pain, left shoulder impingement syndrome, nocturia, left upper extremity parasthesias, osteopenia.

44. Dr. Paz opined that given the medical records prior to 7/30/13, considering the subjective symptoms, findings on physical examination and response to treatment; all of these were consistent with a diagnosis of left greater trochanteric bursitis. He felt that it was not medically probable that the left hip labral tear was causally related to the 12/27/12 injury. Dr. Paz noted that Claimant may require access to medical maintenance in the form of corticosteroid injections for the left greater trochanteric bursitis. He felt the surgical treatment of the left labral hip tear might be reasonable necessary, but in his opinion this was not causally related to the industrial injury.

45. Dr. Sacha examined Claimant on November 18, 2014. He noted tenderness over the greater trochanteric bursa, along with equivocal hip internal rotation and compression testing. His impression was internal derangement of the hip, greater trochanteric bursitis and left shoulder impingement. Claimant was to continue the home exercise program and had a follow-up with Dr. Johnson.

46. Dr. Sacha issued a letter, dated November 18, 2014, in response to an inquiry from Ms. Jensen at Sedgwick Insurance. He reviewed Dr. Paz' report and stated that he felt all along that MMI should never have been reversed. Dr. Sacha opined that the orthopedic evaluation, the MR arthrogram of the hip, the corticosteroid injection of the hip and the home exercise program were all appropriate as maintenance care. He noted Claimant had not improved despite the above care, which solidified his opinion with regard to MMI.

47. In response to the inquiry about causality, Dr. Sacha described this as a more difficult issue. He noted Claimant had a fall which was the cause of her injury. She had hip pain, shoulder pain and arm pain after this occurred, which continued to the present. Dr. Sacha noted that Claimant had no prior hip issues. Dr. Sacha stated:

"Based on this, I cannot see how there can be a differentiation with a traumatic fall and the bursitis being work related but the labrum is not. I do not think you can make that distinction. So, based on my evaluation of this patient, if the hip is being accepted as part of this Workers' Compensation claim and there is no medical data that support prior injuries or trauma that would cause this labral tear, then I would state that all hip pain and pathology would be related to this Workman's [sic] Compensation claim, the date of which is 12/27/12".

48. Dr. Johnson saw Claimant in a follow-up evaluation on February 10, 2015. Improvement in her pain was noted and Dr. Johnson's assessment was the same as the 4/22/14 evaluation. Claimant was to receive another intraarticular hip injection in April and if her pain worsened, they would consider hip arthroscopy.

49. Dr. Orgel saw Claimant for a follow-up DIME on February 19, 2015. The ALJ notes that he had the reports of Drs. Paz and Sacha concerning Claimant's hip. On the question of whether the hip was work-related, Dr. Orgel concurred with Dr. Sacha. He noted that the MRI showed a labral defect either of "congenital or trauma-related etiology". Dr. Orgel noted that there was no evidence to suggest that she had a pre-existing labral abnormality and the mechanism of injury with a fall after catching her foot on a cord certainly could have caused the labral abnormality, as well as the greater trochanteric injury. He opined that it was "clear that this is reasonably related to her injury and is work related". Dr. Orgel determined that she was not at MMI because of her continued hip complaints.

50. Dr. Orgel concluded Claimant sustained a 14% upper extremity impairment and 8% lower extremity impairment.

51. The ALJ finds that it is significant that Dr. Orgel concluded on both occasions that he examined Claimant that she was not at MMI because of her hip.

52. On June 3, 2015, Dr. Paz issued a supplemental report. Dr. Paz reviewed Dr. Orgel's 2/19/15 report, but noted there were no changes in his 10/15/14 opinion.

53. On June 22, 2015, Claimant was examined by Elizabeth Bisgard, M.D. The ALJ notes that Dr. Bisgard's report indicated she is board-certified in occupational medicine and is Level II accredited pursuant to the W.C.R.P[3]. Claimant reported interior groin pain with flexion of her left hip. She had pain over her greater trochanteric bursa with abduction. Tenderness to palpation over the greater trochanteric bursa and anterior groin was noted. Dr. Bisgard diagnosed left shoulder contusion and impingement, left trochanteric bursitis and left hip labral tear. Dr. Bisgard opined that Claimant's current symptoms were consistent with a labral tear as a result of her work-related injury. Although there was evidence of a degenerative tear, her left hip was clearly asymptomatic until the work-related fall.

[3] One of the arguments raised by Respondent is that Dr. Bisgard did not have a full set of Claimant's treatment records. The ALJ notes that Dr. Bisgard reviewed Dr. Orgel's DIME reports, as well as Dr. Sacha's records both of which summarized Claimant's course of treatment following her injury.

54. Timothy O'Brien, M.D. testified as an expert in orthopedic surgery, as well as a Level II accredited physician pursuant to the W.C.R.P. He has performed approximately 1800 total hip replacements, 3000 total knee replacements and somewhere between 50 and 75 hip arthroscopies. Dr. O'Brien reviewed Claimant's treatment records and issued a report, dated August 21, 2015. He did not examine Claimant.

55. Dr. O'Brien concluded that the diagnosis of a greater trochanteric bursitis was a discrete and new diagnosis, not related to the work injury. This was based on the fact that Dr. Hammond initially diagnosed a thigh contusion and there was a distinction between the thigh and hip. (O'Brien deposition page 10:5-24). Dr. O'Brien described this contusion as minor. (O'Brien deposition page 7:25-8:2). Dr. O'Brien testified that the thigh contusion would have resolved by the end of December, 2013. Dr. O'Brien opined that a thigh contusion did not lead to greater trochanteric bursitis. (O'Brien deposition page 11:18-12:17). He also stated that the labral tear, which was noted in the MRI scan of 2014, was a new diagnosis. Dr. O'Brien described the MRI in June 2103 as normal. However, Dr. O'Brien did not provide an explanation for the labral defect noted in the MRI scan of June, 2013. (O'Brien deposition page 13:19-14:11).

56. Dr. O'Brien stated that a fall of this type who was not the kind of injury mechanism that produces a labral tear. He believed that if the injury was bad enough to produce a clinically significant bruise to the outside of the hip, there would have been swelling on the MRI scan. Dr. O'Brien stated Claimant was at MMI for her work related injuries.

57. The ALJ finds that there is no credible and persuasive evidence, including medical records, to show that Claimant ever complained of or sought treatment for left hip symptoms prior to the prior to her industrial injury of 12/27/12. The ALJ also finds that Dr. O'Brien's opinion that the labral tear noted on the MRI scan of 2014 was a new diagnosis is not supported by the evidence.

58. The ALJ credits the opinions of Drs. Orgel, Sacha and Bisgard on the issue of whether Claimant's left trochanteric pain and the need for treatment was related to the work injury. Further, the ALJ credits the opinions of Drs. Orgel, Sacha and Bisgard as to whether the labral tear was related to the work injury.

59. The ALJ has concluded that Claimant injured her left hip on December 27, 2012, which required medical treatment.

60. The ALJ finds that the opinions of Dr. O'Brien and Dr. Paz were not sufficiently persuasive to overcome the opinions of the DIME Physician, Dr. Orgel. While Dr. O'Brien distinguished between a thigh bruise and an injury to Claimant's hip, his report and deposition testimony did not provide an explanation for the fact that Claimant had no prior symptoms until the industrial injury and the presence of a labral tear was confirmed by both MRI scans. The ALJ is not convinced that Claimant's hip symptoms were the result of a new injury. In addition, Dr. O'Brien's opinions are undercut by the fact that he did not examine the Claimant. The ALJ was not persuaded

by Dr. Paz' opinion that Claimant's left greater trochanteric bursitis was related to the industrial injury, but not the labral tear.

61. The ALJ finds that Respondent has not met its burden of proof and did not overcome the opinions of the DIME physician with regard to MMI.

62. The ALJ finds that Claimant has met her burden of proof and established that the proposed hip surgery is reasonable and necessary, as well as related to the subject injury.

63. The ALJ finds that Respondent is liable for the hip surgery proposed by Dr. Johnson, however, a request for authorization of said surgery is not before the ALJ.

64. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The DIME physician's opinion on MMI, causation and impairment are binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). The party seeking to overcome the DIME physician's finding

regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In this case, Respondent bears the burden of overcoming Dr. Orgel's findings by clear and convincing evidence. The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, *supra.*

Overcoming the DIME On the Issues of MMI and Causation

Respondent contends that Dr. Orgel, the DIME physician, erred in determining that Claimant's hip injuries were causally related to the 1/27/12 fall. Respondent also takes issue with Dr. Orgel's conclusion that Claimant was not at MMI and required additional treatment for her hip. The ALJ concludes that this requires a two-part analysis, starting first with the question of causation. The ALJ has considered both evaluations of Claimant performed by Dr. Orgel and her course of treatment with the authorized treating physicians. The ALJ has also considered the independent medical evaluations obtained by Respondent (Dr. O'Brien and Dr. Paz), as well as Dr. O'Brien's testimony. The ALJ disagrees that Respondent has made the requisite showing on this issue.

Following the first DIME, Dr. Orgel concluded that Claimant needed an orthopedic evaluation and implicit in his conclusions was the opinion that Claimant's hip symptoms were caused by the industrial injury. After examining Claimant in February, 2015, Dr. Orgel concretized his conclusions on causation, noting that her fall that could have caused the labral abnormality, as well as the greater trochanteric injury. Dr. Orgel opined this was clearly related to her injury and work-related. [Finding of Fact No. 49].

In addition, Dr. Sacha offered his opinion that the trochanteric symptoms and labral injury was caused by Claimant's fall. As a treating physician who treated the Claimant since April, 2013, Dr. Sacha had the opportunity to evaluate Claimant on multiple occasions. His opinion concerning the left hip labral tear and the cause of that tear was persuasive to the ALJ. Dr. Sacha's opinions regarding causation articulated on 11-18-14 are particularly apposite here, when he noted:

"[I]f the hip is being accepted as part of this Workers' Compensation claim and there is no medical data that support prior injuries or trauma that would cause this labral tear, then I would state that all hip pain and pathology would be related to this Workman's Compensation claim, the date of which is 12/27/12." [Finding of Fact No. 47].

Dr. Orgel's follow-up DIME specifically referenced and adopted those findings. Likewise, Dr. Bisgard's causation analysis concerning Claimant's hip was also persuasive. Respondent offered the opinion of Dr. O'Briean, who testified in the deposition that the hip and associate symptoms were not caused by Claimant's fall. Dr. O'Brien characterized the trachanteric and labral injuries as new diagnoses, however, there was no evidence that Claimant suffered a subsequent injury. Dr. O'Brien did not provide a credible explanation for Claimant's continuing symptoms in the hip. Likewise, Dr. Paz' opinion that the trochanteric injury was caused by the fall, but not the labral tear did not convince the ALJ that Dr. Orgel's were erroneous concerning the hip injury. Therefore, but the ALJ concludes that Claimant's fall on 12/27/12 was the cause of her hip injury, which included trochanteric bursitis and a labral tear.

Turning to the question of MMI, the ALJ notes that the evidence submitted by Respondent contrary to the DIME opinion on MMI did not rise to the clear and convincing evidence standard. Respondent offered the opinions of Dr. Paz and Dr. O'Brien, which were conflicting, but did not rise to the level that overcame Dr. Orgel's conclusions.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute, MMI is primarily a medical determination involving diagnosis of the Claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the Claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO March 2, 2000).

Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Furthermore, the DIME physician's opinions on these issues are binding unless

overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In this case, the DIME physician (Dr. Orgel) opined that Claimant was not at MMI because she continued to require treatment for her hip condition. As part of his opinion, Dr. Orgel concluded that Claimant continued to require treatment for the left trochanteric bursitis, as well as the labral tear.

The ALJ finds the opinions of Dr. Orgel credible and persuasive. He examined the Claimant on two occasions and concluded she was not at MMI. After his first examination, Dr. Orgel felt that Claimant required an evaluation by an orthopedic surgeon, which Dr. Sacha also felt was reasonable. Dr. Orgel opined this could be completed before an MR arthrogram. [Finding of Fact No. 31]. There was no evidence submitted to ALJ that led to the conclusion that these recommendations were erroneous. After his second examination of the Claimant, Dr. Orgel provided a clear statement of his opinion on causation and also concluded that Claimant was not at MMI because she required further treatment. [Finding of Fact No. 49]. As the DIME physician, Dr. Orgel's opinions concerning MMI were entitled to deference, which comports with the holding of *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 and *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, *supra.*

His rationale was that because of the hip condition, Claimant required further treatment and/or diagnostic testing. Dr. Orgel's opinion was supported by Drs. Sacha and Bisgard. Specific evidence supporting Claimant's need for additional treatment (hip arthroscopy) was also provided by Drs. Motz and Johnson. Finally, Dr. Sacha specifically noted that if Claimant was to have the surgery, she would no longer be at MMI.

Respondent has not produced convincing evidence that is free from doubt on the question of MMI. As noted above, Dr. Orgel provided an explanation as to the basis of his opinions and had the opportunity to evaluate Claimant on two occasions. As found, Drs. Sacha and Bisgard concurred in Dr. Orgel's recommendations. The opinion of Respondent's experts constituted a difference of opinion. As determined in Findings of Fact 56 through 59, the Respondent failed to prove by clear and convincing evidence that the DIME physician was incorrect in determining the Claimant was not at MMI. Therefore, the ALJ concludes that Respondent failed to meet their burden of proof to establish that Dr. Orgel was incorrect in determining that Claimant had not reached MMI.

Since the ALJ concluded that Claimant is not at MMI, as found by Dr. Orgel, no finding is made concerning Claimant's permanent medical impairment.

Medical Benefits-Hip Arthroscopy

In the "Amended" Response to Application for Hearing (filed on or about April 28, 2015), Respondent cited W.C.R.P. Rule 16-10(E). However, ALJ notes that no evidence concerning a request for prior authorization or a denial of a request for prior

authorization was admitted into evidence at the hearing. Based upon Medical Treatment Guidelines, the proposed left hip arthroscopy would require prior authorization.

As noted above, the ALJ has concluded that a Claimant is not at MMI for her industrial injury. The weight of the evidence leads to the conclusion that Claimant requires arthroscopic repair of the labral tear in her left hip. First, the opinions of Dr. Sacha with regard to Claimant's need for this treatment is persuasive. Conservative treatment options with regard to the hip have been exhausted and therefore, the proposed hip surgery is required to cure and relieve the effects of Claimant's industrial injury.

Second, Dr. Johnson's opinions with regard to the proposed surgery persuaded the ALJ that it is reasonable and necessary.

However, the ALJ does not have a current request for authorization of the hip arthroscopy before him. Although there are references in the medical records that Claimant is desirous of this procedure, there was no testimony to this effect. Accordingly, the ALJ has determined that the authorization issue is not ripe at the present time.

ORDER

It is therefore ordered that:

1. As found by Dr. Orgel, Claimant is not at MMI for injuries suffered on 12-27-12.

2. Respondent shall provide reasonable and necessary medical treatment to Claimant, including the left hip arthroscopy proposed by Dr. Johnson if a request for authorization is made.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 30, 2015

Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of David Orgel, M.D. that she reached Maximum Medical Improvement (MMI) on January 8, 2015 with a 25% whole person impairment rating.

FINDINGS OF FACT

1. On August 26, 2013 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. She injured her lower back while lifting 50 pound retaining wall blocks.

2. Claimant received medical treatment for her lower back condition from various physicians. During the course of treatment Authorized Treating Physician (ATP) John Aschberger, M.D. referred Claimant to Mark C. Winslow, D.O. for osteopathic manipulation. On January 10, 2014 Claimant received a cane from Dr. Winslow's office because of her continuing lower back symptoms. By January 24, 2014 Claimant reported "[n]oticing that I have to put a lot of pressure on cane by the afternoon, just for balance in morning."

3. On June 27, 2014 Dr. Aschberger determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned an 18% whole person impairment rating for Claimant's lower back condition. Claimant remarked that she had added the designations of right wrist and right knee to her pain diagrams at Dr. Aschberger's office but he had failed to examine her right wrist. Dr. Aschberger did not note any right wrist complaints or assign any impairment rating for Claimant's right wrist.

4. Claimant testified regarding the development of a trigger condition in her right thumb in approximately 2011. She received a steroid injection that caused an infection and required surgery. Claimant noted that she recovered and did not experience wrist pain in connection with her thumb condition. She maintained that she did not suffer any right wrist symptoms prior to using a cane in connection with her admitted lower back injury.

5. On September 15, 2014 Claimant filed an Application for a Division Independent Medical Examination (DIME) challenging Dr. Aschberger's MMI and impairment determinations. The Application sought a DIME to evaluate Claimant's lower back, SI joints, pelvis, groin-hernia, right wrist pain from cane use and right knee pain from antalgic gait. The Application specified that "maintenance therapies" should be addressed by the DIME physician.

6. On October 15, 2014 Claimant visited personal medical provider Kaiser Permanente. She reported chronic back pain from her injury, “pain in the right wrist from cane” and a number of other symptoms.

7. On October 20, 2014 Claimant returned to Dr. Winslow for an evaluation. Dr. Winslow remarked that Claimant’s primary complaint involved her lower back injury while working for Employer on August 26, 2013. He commented that she had not received any treatment from him since February 2014 and her overall symptoms remained relatively unchanged. Claimant did not mention any right wrist pain from cane use.

8. On January 8, 2015 Claimant underwent a DIME with David Orgel, M.D. Dr. Orgel reviewed Claimant’s medical records and conducted a physical examination. He concluded that Claimant had reached MMI on the date of his examination. He assigned Claimant a 25% whole person impairment rating. The rating consisted of a 7% whole person impairment for her spine and 19% for range of motion deficits.

9. Claimant testified that she completed a pain diagram at the DIME noting symptoms in her lower back, right hip, right leg and right wrist. She explained that Dr. Orgel did not examine her right wrist and instead inquired about the history of her right thumb condition. Dr. Orgel reported that Claimant had a prior, severe infection of her right hand and thumb. He remarked that she had limited range of motion of her thumb “with pain in her right finger and into the thumb and wrist and radiating into her forearm and shoulder.” Dr. Orgel noted that Claimant walked with a cane but did not note that Claimant had any right wrist symptoms. He limited medical maintenance benefits to psychological visits for chronic pain.

10. In his report Dr. Orgel commented that the medical records he had reviewed were “quite incomplete.” He noted that he did not have the impairment rating performed by Dr. Aschberger or a copy of the original MRI. Dr. Orgel stated that Claimant reported “she has been seeing Dr. Winslow, and I don’t have any information from him.

11. On February 27, 2015 Claimant returned to Dr. Aschberger for an examination. Dr. Aschberger noted that Claimant continued to experience soreness in her back but was again walking without her cane. He explained that prior to her Workers’ Compensation injury she “had management for chronic pain for her right hand and thumb.” She continues with irritation there as well, but that seems to be controlled with the Oxycodone.”

12. On March 13, 2015 Claimant returned to Dr. Aschberger for an examination. He remarked that Claimant’s lower back symptoms had improved with opioid management. The report does not mention any right wrist symptoms.

13. On April 10, 2015 Claimant returned to Kaiser for an evaluation. Erika L. Freebern, M.D. noted that Claimant had worsening right wrist pain from using her cane because of lower back pain. Dr. Freebern remarked that Claimant had been using the

cane for over one year and had developed right wrist symptoms approximately two and one-half to three months earlier. She diagnosed Claimant with possible DeQuervain's Tenosynovitis and referred her to orthopedics for an injection.

14. On May 1, 2015 Claimant returned to Dr. Aschberger for an examination. Claimant did not mention any right wrist symptoms.

15. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Orgel that she reached MMI on January 8, 2015 with a 25% whole person impairment rating. Claimant specifically asserts that Dr. Orgel did not address her right wrist symptoms. She contends that the symptoms arose from her use of a cane because of her August 26, 2013 lower back injury. Claimant maintains that she told Dr. Orgel about her right wrist symptoms but he did not examine her wrist.

16. Dr. Orgel reported that Claimant had a prior, severe infection of her right hand and thumb. He remarked that she had limited range of motion of her thumb "with pain in her right finger and into the thumb and wrist and radiating into her forearm and shoulder." Dr. Orgel noted that Claimant walked with a cane but did not mention any right wrist symptoms. He limited medical maintenance benefits to psychological visits for chronic pain. Dr. Orgel acknowledged that the medical records were incomplete because he lacked the impairment rating of Dr. Aschberger and the medical records of Dr. Winslow. However, the record demonstrates that Dr. Aschberger assigned Claimant an 18% whole person impairment rating for her lower back condition. Dr. Aschberger did not note any right wrist complaints or provide any impairment rating for Claimant's right wrist. Moreover, Claimant's only mention of her right wrist to Dr. Winslow occurred on January 24, 2014 when she noted pressure on her wrist from cane use. Finally, after Claimant's January 8, 2015 DIME with Dr. Orgel the medical records are devoid of any mention of right wrist symptoms until Claimant noted the development of right wrist pain approximately two and one-half to three months prior to her April 10, 2015 Kaiser visit.

17. Dr. Orgel reviewed Claimant's medical records, conducted a thorough physical examination and did not document any right wrist symptoms. Similarly, when Dr. Aschberger determined that Claimant had reached MMI he did not mention any right wrist complaints or assign any impairment rating for the wrist. Claimant has not presented persuasive evidence that Dr. Orgel failed to evaluate her wrist or deviated from the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Orgel's DIME determination was incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear

and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Orgel that she reached MMI on January 8, 2015 with a 25% whole person impairment rating. Claimant specifically asserts that Dr. Orgel did not address her right wrist symptoms. She contends that the symptoms arose from her use of a cane because of her August 26, 2013 lower back injury. Claimant maintains that she told Dr. Orgel about her right wrist symptoms but he did not examine her wrist.

8. As found, Dr. Orgel reported that Claimant had a prior, severe infection of her right hand and thumb. He remarked that she had limited range of motion of her thumb "with pain in her right finger and into the thumb and wrist and radiating into her forearm and shoulder." Dr. Orgel noted that Claimant walked with a cane but did not mention any right wrist symptoms. He limited medical maintenance benefits to psychological visits for chronic pain. Dr. Orgel acknowledged that the medical records were incomplete because he lacked the impairment rating of Dr. Aschberger and the medical records of Dr. Winslow. However, the record demonstrates that Dr. Aschberger assigned Claimant an 18% whole person impairment rating for her lower back condition. Dr. Aschberger did not note any right wrist complaints or provide any impairment rating for Claimant's right wrist. Moreover, Claimant's only mention of her right wrist to Dr. Winslow occurred on January 24, 2014 when she noted pressure on her wrist from cane use. Finally, after Claimant's January 8, 2015 DIME with Dr. Orgel the medical records are devoid of any mention of right wrist symptoms until Claimant noted the development of right wrist pain approximately two and one-half to three months prior to her April 10, 2015 Kaiser visit.

9. As found, Dr. Orgel reviewed Claimant's medical records, conducted a thorough physical examination and did not document any right wrist symptoms. Similarly, when Dr. Aschberger determined that Claimant had reached MMI he did not mention any right wrist complaints or assign any impairment rating for the wrist. Claimant has not presented persuasive evidence that Dr. Orgel failed to evaluate her wrist or deviated from the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Orgel's DIME determination was incorrect. *Compare In Re Lafont*, W.C. No. 4-914-378 (ICAP, June 25, 2015) (concluding that the claimant had overcome the DIME determination because the DIME physician had failed to perform an adequate examination and comply with *AMA Guides* based on an expert physician's opinion).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome the DIME opinion of Dr. Orgel.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 19, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that a proposed cervical MRI is reasonable and necessary and causally related to this claim; and

2. Whether Claimant proved by a preponderance of the evidence that proposed lumbar discography is reasonable or necessary.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered:

1. Claimant has a medical history of low back problems, including a 2010 back injury with radiation down his right leg from lifting heavy equipment, and a 2012 back injury for which he was in medical care, but he abandoned medical care, after being incarcerated.

2. Claimant worked as a material handler and builder for Employer. After being hired, Claimant was incarcerated for seven months, and on September 5, 2013, he was released from jail on work release.

3. On October 10, 2013, Claimant sustained a work-related injury while lifting a wall off of a conveyor line. Claimant reported low back pain, with radiating pain into his right leg. Claimant's thoracic pain started the day after his injury.

4. Following his injury on October 10, 2013, Claimant received medical care through Concentra, where he was usually seen by Dr. Kirk Nelson. Claimant's primary complaints were low back and mid-back pain. Dr. Nelson repeatedly documented that Claimant's effort on clinical examination was inconsistent, that Claimant's variable effort and pain complaints were out of proportion to clinical findings, and that Claimant moved better when he was not aware he was being observed. On December 3, 2013, Dr. Nelson referred Claimant for a lumbar MRI, and to Dr. John Aschberger for a physiatry evaluation. On December 4, 2013, Dr. Aschberger provided an assessment of low back pain with a suggestion of lumbar radiculitis. Dr. Aschberger also noted Claimant's seemingly excessive pain behaviors on examination.

5. On December 6, 2013, a lumbar MRI was obtained, and interpreted as showing a right paracentral disc protrusion mildly impinging the right SI nerve root at L5-S1, a left paracentral disc protrusion impinging the left L5 nerve root at L4-5, and lower lumbar mild spondylosis. On December 12, 2013, Dr. Aschberger reviewed the MRI findings, and he recommended a lumbar selective nerve root block.

6. After December 19, 2013, Claimant's care was transferred from Concentra to Dr. Rafer Leach, and, on January 6, 2014, Claimant started treating with Dr. Leach. Claimant's complaints that day were low back and mid-back pain. He did not complain of neck or upper extremity pain.

Cervical MRI Request

9. Between October 10, 2013 and January 8, 2015, Claimant's medical care focused on his low back and mid-back. Despite substantial medical documentation during that period, there is a paucity of references to neck issues.

10. On July 22, 2014, Dr. Leach identified "cervicalgia" as one of Claimant's diagnoses. Before that date, none of Claimant's workers' compensation providers diagnosed a cervical condition. On August 14, 2014, when Dr. Leach provided a medical recommendation summary, he made no mention of the neck condition. On September 25, 2014, when Dr. Leach issued a "Response to Insurance Independent Medical Examination," he made no reference to a neck condition. On November 11, 2014, Dr. Leach made no reference to a neck condition. On January 8, 2015, Dr. Leach noted Claimant had a pericervical muscular spasm, but he did not indicate what caused that issue. Dr. Leach never opined that the "cervicalgia" was related to the work injury.

11. Dr. Leach's associate, Dr. James Benoist, first diagnosed Claimant as having a cervical issue on August 8, 2014. Starting on August 8, 2014, Dr. Benoist identified "cervicothoracic pain" or "cervicalgia" in his assessments, but he never opined the cervical conditions were related to the work injury. He simply provided diagnoses without a causal explanation.

12. Dr. Benoist is now recommending a cervical MRI for Claimant's upper extremity paresthesias. Dr. Benoist first documented Claimant's complaint of upper extremity paresthesias on April 15, 2015, more than eighteen months after the work injury. Dr. Benoist has not opined that the upper extremity paresthesias are work injury related, nor has he explained why that condition or the proposed MRI should come under this claim.

13. After Dr. Benoist recommended the MRI, Respondents had Dr. Franklin Shih, Dr. Michael Janssen, and Dr. Brian Reiss review records, and provide opinions on the need for that MRI. On May 28, 2015, Dr. Janssen opined that the proposed MRI did not have a direct relation to the work injury. On July 7, 2015, Dr. Shih opined that Claimant's history was not consistent with a cervical injury, and even if it was, it would be difficult to make any specific treatment recommendation based upon MRI findings.

On July 27, 2015, Dr. Reiss opined that the cervical MRI was for conditions unrelated to the work injury. At hearing, Dr. Shih further explained his opinion that the proposed cervical MRI was not reasonable and necessary, as it was unlikely to provide any useful information for the treatment of the work injury related conditions, and because he could not relate the cervical condition to the work injury.

14. Claimant testified that he had hand numbness and tingling since one or two weeks after his work injury. Claimant's claim of having upper extremity numbness and tingling prior to April 2015 is not supported by the medical records, and the Administrative Law Judge does not find it credible.

15. There is an absence of persuasive evidence supporting Dr. Benoist's recommendation of a cervical MRI. Dr. Leach, Claimant's authorized treating physician, credibly testified that he would not recommend a cervical MRI, noting Claimant's issues are with his low back and mid-back. Drs. Shih, Reiss and Janssen persuasively opined that the proposed cervical MRI is for conditions not causally related to this claim, and that the MRI is not reasonable and necessary as it is unlikely to provide any useful information.

Lumbar Discogram

16. Claimant's complaints and treatment course have been focused on his low back and mid-back areas. Claimant's complaints are diffuse, non-physiologic, and include complaints of whole body pain in all levels of his spine, and both legs and arms. Because of his diffuse complaints, Claimant has obtained numerous injections, in numerous areas of his body.

17. Specifically, on January 15, 2014, Claimant received a right SI joint injection from Dr. Zimmerman. On February 7, 2014, Claimant received multiple trigger point injections (TPI) to his right trapezius, right iliocostalis thoracic, right levator, and right rhomboid areas, by Dr. Moorer. On March 21, 2014, Dr. Benoist administered right SI dorsal ligament and sulcus steroid injections and a right piriformis muscle injection. On April 4, 2014, Dr. Benoist administered TPIs in Claimant's thoracic musculature. On May 29, 2014, Dr. Leach administered additional TPIs to the perilumbar region, the right piriformis region, and the gluteal maximus region. On June 10, 2015, Dr. Kenneth Allan administered right L5-S1 and right S1 epidural steroid injections (ESI). On February 10, 2015, Claimant underwent bilateral T6-7, and T7-8 ESIs, again administered by Dr. Allan.

18. On August 4, 2014, Dr. Leach identified Claimant's pain complaints as being axial lumbar pain, right leg (radicular) pain, and axial thoracic pain. Dr. Leach suggested Claimant may have a multifactorial pain generator.

19. During his IME on August 26, 2014, Claimant notified Dr. Franklin Shih that each injection he had received through that date, regardless of the type or location, provided him with almost complete body pain relief. At hearing, Claimant confirmed that

all of the injections received to date, regardless of the type or location, provided him the same result of complete but temporary pain relief.

20. On August 26, 2014, Dr. Shih concluded that he "would not consider further injections to be reasonable and necessary given [Claimant's] positive response to injections in multiple different areas with reported near complete relief of all of his pain complaints with each of the injections. [He] would also be quite hesitant regarding any surgical plan given the nonspecific response to injections and nonspecific clinical presentation." Dr. Shih testified it is impossible for a medical provider to identify a pain generator based upon the patient reporting the same result from two completely different injections to different body parts.

21. On September 25, 2014, Dr. Leach issued a "Response to Insurance Independent Medical Evaluation", within which he indicated that in his opinion, pain generators had been identified, and they included Claimant's lumbar discs, lumbar nerve roots, and sacroiliac joint.

22. On October 23, 2014, Dr. Benoist recommended L3-4, L4-5, and L5-S1 provocative discography. Dr. Benoist noted the SI joint and piriformis region were secondary pain generators based upon Claimant's response to injections in those areas. Dr. Benoist rendered that opinion after previously opining the Claimant's response to the SI joint injection and piriformis injection led him to conclude those were Claimant's primary pain generators. Dr. Benoist changed his opinion concerning Claimant's primary pain generator. Since October 23, 2014, Dr. Benoist has continuously recommended discography.

23. On November 15, 2014, Dr. Robert Kleinman, a Level II accredited psychiatrist, issued a psychiatric report. Dr. Kleinman noted Claimant is not an accurate historian, he embellishes his history, he minimizes his past legal problems, and he has behavioral problems and substance use problems. Dr. Kleinman concluded Claimant cannot be relied upon to provide accurate information. Dr. Kleinman further opined that "[w]ith this history and his response to treatment thus far, and some nonspecific findings on examination, he is a poor surgical candidate."

24. On December 16, 2014, Dr. Nicholas Olsen provided a report regarding the proposed lumbar discogram. Dr. Olsen noted that Claimant "had inconsistent response to interventional procedures in the past that do not lead to a specific diagnostic pattern," which led Dr. Olsen to conclude that lumbar discography was not medically necessary.

25. On January 28, 2015, Dr. Brian Reiss, an orthopaedic spine surgeon, performed an IME. With regard to the proposed lumbar discogram, Dr. Reiss opined "I certainly would not be suggesting discograms, because one he is not a surgical candidate and two the results are unlikely to be definitive/reliable given his history." Dr. Reiss explained that Claimant's complaints were out of proportion and not well correlated with objective examination including radiological findings. Dr. Reiss opined

that as a surgeon, he "would suggest avoiding any invasive procedure in this gentleman."

26. On March 5, 2015, David Whatmore, Dr. Prusmack's physician assistant, obtained a history and recommended lumbar discography. Prior to that evaluation, Claimant filled out a face sheet and a pain diagram within which he provided an inaccurate and incomplete history with regard to the injections he received to date. Mr. Whatmore is a non-physician, whose discography recommendation was based upon incomplete information and is therefore not deemed credible.

27. On April 21, 2015, Dr. Shih reviewed interval medical records for care and evaluations since his August 2014 IME, and he recommended against lumbar discography and lumbar surgery, noting (1) Claimant's history and exam were more consistent with a pain syndrome, (2) the location of a pain generator and the degree it was contributing was indeterminate, (3) the prognosis with surgery in an ideal patient was guarded, but Claimant was not an ideal patient, (4) discography in a straightforward case was of limited use, and the Medical Treatment Guidelines (MTG) indicated that discography was rarely indicated, and extremely controversial, and (5) in this case, it is impossible to interpret a positive response to discography, noting that Claimant's response to all prior procedures would lead to different diagnostic conclusions.

28. On May 28, 2015, Dr. Michael Janssen, an orthopedic spine surgeon, issued a report noting that Claimant had a number of credibility issues (past behavior, illicit drug usage, longstanding smoking history), lumbar discography had limited usage, and that Claimant was not an ideal candidate for discography.

29. Surveillance was obtained of Claimant on several dates between March 30, 2015, and May 31, 2015, depicting Claimant smoking, bending, looking down and side to side, fixing a fence/gate with hand tools, carrying a bag of ice, crouching, squatting, picking up a child, and walking.

30. On July 7, 2015, Dr. Shih reported that he had reviewed the reports from Drs. Kleinman, Reiss and Janssen. Dr. Shih concurred with the opinions expressed by those experts. He also reiterated his concerns regarding any invasive procedure. The March and May 2015 surveillance was provided to Dr. Shih. In a report dated July 17, 2015, Dr. Shih noted that the video showed Claimant having normal daily motion with various activities, which was consistent with his presentation while not being examined, and inconsistent with activities when being examined.

31. On July 27, 2015, Dr. Reiss reported that he reviewed additional reports from Dr. Leach, Dr. Benoist, Dr. Prusmack's PA, Dr. Janssen, Dr. Shih, and the March and May 2015 surveillance. Dr. Reiss agreed with the continued denial of discography. Dr. Reiss documented his surveillance observations, and indicated "these video segments clearly demonstrate a patient functioning quite well without any observed pain behaviors. These findings on these video segments augment my opinion and conclusions."

32. Additional surveillance obtained of Claimant on June 19, 2015, and July 12, 2015 depicts Claimant carrying two five gallon buckets and a tool belt, lifting a child, carrying that child, lifting a swing set over a fence with another man, moving a small refrigerator with a dolly, helping move a piano with a dolly, smoking, fixing the fence/gate with hand tools, lifting the gate, bending, reaching, twisting, squatting, crouching, kneeling, looking down, turning his head from side to side, and carrying a large black trash bag, all without noticeable pain behaviors.

33. On July 29, 2015, Dr. Shih reported that he reviewed that surveillance, and that the video was remarkable for Claimant having fluid active range of motion without pain behaviors, which was consistent with his presentation when not being examined, but inconsistent with his presentation when examined. Dr. Shih stated that "[t]his would suggest a conscious effort to magnify his complaints."

34. Dr. Leach testified that he believes Claimant needs lumbar surgery, although he is not a surgeon, and he defers surgical opinions to spine surgeons. Dr. Leach testified that in his opinion, lumbar discography is reasonable to identify Claimant's pain generators, and provide stronger evidence of where Claimant's pain is coming from, to assist in surgical planning. Inconsistent with that testimony, however, Dr. Leach also opined that Claimant's pain generators have already been identified, and are in three entirely different areas - - Claimant's lumbar discs, his lumbar nerve roots and his SI joint - - all of which is based upon Claimant's positive diagnostic response to injections in each of those areas. Claimant has had injections in several other areas as well. Dr. Leach conceded that not even one of the numerous injections administered to date has resulted in a negative result, calling this "surgical disease," suggesting this result is explained by the fact that Claimant needs surgery. Dr. Leach's opinions regarding the pain generators being identified by virtue of prior injection results, and his conclusion that those results show Claimant to be a surgical candidate, are incredible, and unpersuasive.

35. Dr. Leach examined Claimant twice after July 22, 2014, and he had not seen Claimant clinically between January 8, 2015 and the hearing date. Dr. Leach did not review, or could not recall, most of the information generated from sources outside of his office, including the medical reports from Dr. Kleinman, Dr. Olsen, Dr. Reiss, Dr. Janssen, and Dr. Shih, or any of the 2015 surveillance. Dr. Leach's opinion that Claimant is a surgical candidate and that discography is reasonable and necessary to help to identify pain generators for surgery is not persuasive and therefore, rejected.

36. Dr. Shih is a Level II accredited PM&R physician who is a lecturer for the Division on issues varying between the upper extremities and the spine. Dr. Shih is familiar with the MTGs utilized in workers' compensation in Colorado. Dr. Shih confirmed that since his original IME, he had reviewed additional records from Dr. Leach, Dr. Benoist, Dr. Allan, Mr. Whatmore (Dr. Prusmack's PA), Dr. Kleinman, Dr. Olsen, Dr. Reiss, and Dr. Janssen, as well as the surveillance of Claimant. Dr. Shih's opinions, when compared to those of Dr. Leach, are based upon a more thorough review of available information and documentation.

37. Dr. Shih testified that lumbar discography is done when the provider is suspicious there is a predominant disc pain generator, after the provider has already decided the patient is a surgical candidate, to help nail down the levels of surgery. If the patient is not a surgical candidate, discography is not reasonable or necessary. Dr. Shih confirmed the information contained in the MTGs on lumbar discography, that discography is rarely indicated, extremely controversial, and has a significant false positive rate. Dr. Shih also indicated medical providers are moving away from discography as a useful diagnostic tool for those reasons, and because the medical community is moving away from fusions for discogenic pain.

38. Dr. Shih opined that lumbar discography is not even a good test in an ideal patient, and he explained in detail that Claimant is not an ideal patient for numerous reasons, including his diffuse whole body pain, his inexplicable positive response to all prior injections, his smoking history, his numerous psychosocial factors, and the contrast between his clinical presentation and his functional ability when he is observed while not being examined.

39. Dr. Shih opined Claimant is not a surgical candidate, and performing surgery on this Claimant either with the benefit of discography, or without the benefit of discography, would not be recommended. Dr. Shih's opinions are consistent with the opinions of Dr. Kleinman, Dr. Olsen, as well as two spinal surgeons, Dr. Reiss and Dr. Janssen. For the reasons outlined by Drs. Kleinman, Olsen, Janssen and Shih, Claimant is not a lumbar surgical candidate. As Dr. Shih articulated, if Claimant is not a surgical candidate, lumbar discography is not reasonable and necessary. The opinions of Drs. Kleinman, Olsen, Janssen and Shih are credible, and persuasive. It is found that lumbar discography is unreasonable and unnecessary.

CONCLUSIONS OF LAW

1. Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

2. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. M*agnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d, 385 (Colo. App. 2000).

3. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 204). The facts in a Workers' Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

4. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See K*roupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

5. If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. Section 8-42-101 C.R.S.; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-42-101, C.R.S.; See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Where liability for a particular medical benefit is contested, the claimant must prove that it is reasonably necessary to treat and is causally related to the industrial injury. *Id*.; See *Grover v. Industrial Commission,* 759 P2d 705 (Colo. 1988). The record must distinctly reflect that the medical treatment was necessary and designed to cure or relieve the effects of the work injury. *Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.,* 979 P.2d 584, 585 (Colo. Ct. App. 1999). Whether services are medically necessary for treatment of a claimant's injuries or incidental to obtaining such treatment is a question of fact to be determined by the ALJ. *Bellone v. Indus. Claim Appeals Office of the State,* 940 P.2d 1116 (Colo. Ct. App. 1997).

Proposed Cervical MRI is Not Reasonable, Necessary, nor Causally Relate

6. The first issue for the ALJ's determination is whether Dr. Benoist's proposed cervical MRI for Claimant's progressive upper extremity paresthesias is reasonable or necessary and related to this claim. Following his work injury, and prior to July 22, 2014, Claimant had only an occasional documented complaint of neck stiffness, which was never related by his providers to this claim. After July 22, 2014, Claimant was provided with "cervicalgia" as a diagnosis, but, again, that condition was never related by his providers to this claim. Claimant's bilateral upper extremity paresthesias were first documented eighteen months after his work injury, and have never been causally related to his claim.

7. Dr. Leach, Claimant's authorized treating physician, credibly testified that he would not argue for a cervical MRI, noting Claimant's issues are with his low back and mid-back. Drs. Shih, Reiss, and Janssen have all persuasively opined that the

proposed cervical MRI is for conditions not causally related to this claim, and that the MRI is also not reasonable or necessary as it is unlikely to provide any useful information. The Administrative Law Judge has accepted these opinions and Claimant's request for the cervical MRI is denied.

Proposed Lumbar Discogram is Not Reasonable and Necessary

8. As found, Claimant has failed to meet his burden of proof that lumbar discography is a reasonable or necessary. As found, for the reasons outlined by Drs. Kleinman, Olsen, Janssen and Shih, Claimant is not a lumbar surgical candidate, making lumbar discography unreasonable and unnecessary.

ORDER

IT IS THEREFORE ORDERED THAT:

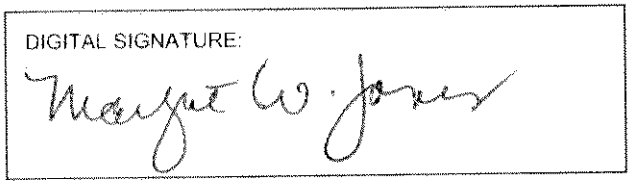
1. The medical benefit requested by Claimant of a proposed cervical MRI prescribed by Dr. Benoist is denied.

2. The medical benefit requested by Claimant of a proposed lumbar discogram prescribed by Dr. Benoist is denied.

3. All other issues not determined by this order are reserved for future determination, if necessary.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _October 15, 2015_____



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-939-675-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 30, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/30/15, Courtroom 4, beginning at 8:30 AM, and ending at 9:30 AM).

Claimant's Exhibits 1 and 2 were admitted into evidence, without objection. The Respondents offered no exhibits.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on October 7, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns average weekly wage (AWW). The issues of temporary total disability (TTD) benefits and termination for cause are stricken without prejudice.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant sustained an admitted injury to his low back and right shoulder on January 12, 2014, while putting chains on a tractor.

2. The Respondents filed a General Admission of Liability (GAL) on January 29, 2014, which admitted to medical benefits and ongoing TTD benefits from January 13, 2014 at a rate of $546.16 per week or $78.02 per day, based on an admitted AWW of $819.20. In admitting an AWW, the adjuster used the hourly rate of $20.48 and failed to take into account the "health and welfare" add-on of $4.78 an hour, whereby the actual AWW totals $25.26 an hour, which the ALJ finds is the correct hourly rate.

3. The Respondents filed an amended GAL on April 28, 2014, which admitted to TTD benefits between January 13, 2014 and January 29, 2014.

4. The Claimant testified at hearing he worked 60-70 hours per week and earned $25.26 per hour. His testimony concerning the number of hours per week worked is refuted by the documentary evidence offered by the Claimant (Claimant's Exhibit 2). Consequently, the ALJ finds that his testimony concerning work of 60-70 hours per week is not credible. The wage records support an hourly rate of $25.26 and the Claimant's testimony in this regard is credible.

5. The wage records presented at hearing reflect that the Claimant worked an average of 40 hours per week and earned $25.26 per hour (Claimant's Exhibit 2), and the ALJ so finds.

6. The Claimant's AWW is hereby established at $1,010.40, which yields a TTD rate of $673.60 per week or $78.02 per day.

7. The Claimant is entitled to 17 days of TTD benefits, as admitted in the Respondents' April 28, 2014 GAL.

8. The Claimant is entitled to $1,635, 91 in TTD benefits for the period admitted in the April 28, 2014 GAL. The Claimant already received $1,326.39 in TTD benefits. Therefore, the Claimant is owed the differential of $309.50 in TTD benefits.

Ultimate Findings

9. The ALJ finds the wage records admitted into evidence more persuasive and credible than the Claimant's testimony regarding the number of hours per week worked (*See* Claimant's Exhibit 2). Therefore, as found herein above, the Claimant's AWW is $1,010.40, which yields a TTD rate of $673.60 per week or $78.02 per day.

10. The ALJ makes a rational decision to resolve the conflict between the Claimant's testimony on hours worked in favor of the documentary evidence and against the Claimant's testimony.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, the wage records admitted into evidence were more persuasive and credible than the Claimant's testimony regarding the number of hours per week worked.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Also see Martinez v. Indus. Claim Appeals Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational decision to resolve the conflict between the Claimant's testimony on hours worked in favor of the documentary evidence and against the Claimant's testimony.

Average Weekly Wage (AWW)

c. Section 8-42-102 (2), C.R.S., provides that in the case of hourly employees, AWW should be determined by multiplying the number of hours worked during a week times the hourly rate. As found, the Claimant's AWW is $1,010.40, which yields a TTD rate of $673.60 per week or $78.02 per day.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden of proving that his AWW is $1,010.40.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the Claimant benefits based on an average weekly wage of $1,010.40, which yields a temporary total disability benefit rate of $673.60 per week or $78.02 per day.

B. The Respondents shall pay the Claimant, based on $1,635, 91 in temporary total disability benefits for the period admitted in the April 28, 2014 General Admission of Liability. The Claimant already received $1,326.39 in TTD benefits. Therefore, the respondents shall pay the Claimant the differential of $309.50 in temporary total disability benefits, retroactively and forthwith

C. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

D. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Did Claimant prove by a preponderance of the evidence that medical services provided by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 were reasonable and necessary to cure and relieve the effects of the industrial injury?

- Are Respondents entitled to an order finding that any future treatment provided by Dr. Kawasaki will be unreasonable and unnecessary, or is this issue not ripe for determination?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 and 2 were received in evidence. Respondents' Exhibits A through F and H through U were admitted in evidence. Respondents' Exhibit G page 35 was admitted without objection. The remainder of Exhibit G (pages 36 through 47) was excluded subject to foundation. Exhibit G pages 36 through 47 was never reoffered and was never admitted into evidence.

2. On February 4, 2014 Claimant sustained an industrial injury when she fell and cut her left hand.

3. On March 12, 2014 Insurer filed a General Admission of Liability (GAL) admitting liability for temporary total disability benefits and medical benefits.

4. Shortly after the accident claimant began authorized medical treatment with Concentra.

5. In March 2014 Claimant underwent surgery described as a left ring finger distal nerve repair. The surgery was performed by Kavi Sachar, M.D.

6. Following surgery Claimant continued to experience problems with her left hand. These problems included hypersensitivity in the ulnar aspect of the ring finger and radial aspect of the small finger, swelling and some darkness and hypersensitivity of the skin. Dr. Sachar referred Claimant to Robert Kawasaki, M.D., for a physical medicine consultation regarding these problems.

7. Dr. Kawasaki first examined Claimant on April 29, 2014. Dr. Kawasaki referred the Claimant for a thermogram to rule out complex regional pain syndrome

(CRPS). He also advised Claimant to continue physical therapy and prescribed Percocet.

8. On June 3, 2014 Dr. Kawasaki noted the thermogram was positive for CRPS. He advised Claimant that this was a condition that needed to be treated aggressively. Dr. Kawasaki recommended Claimant undergo a stellate ganglion block (SGB) and continue with her medications including a compounding cream, gabapentin and Percocet. Dr. Kawasaki referred Claimant to John Sacha, M.D., to perform the SGB.

9. Dr. Sacha performed an SGB on July 24, 2014. On August 12, 2014 Dr. Kawasaki noted the Claimant's symptoms improved after the SGB.

10. At some point John Burris, M.D., began to treat Claimant at Concentra.

11. On September 26, 2014 Dr. Kawasaki referred Claimant for another SGB.

12. On October 15, 2014 Dr. Burris examined Claimant at Concentra. Dr. Burris wrote that Claimant had been referred to him "for delayed recovery issues regarding her left hand complaints." Dr. Burris noted Claimant had a diagnosis of CRPS but stated that "clinically there are no manifestations of this on today's evaluation." Dr. Burris stated Claimant had an "administrative type job" and opined she could return to work in that job.

13. On October 15, 2014 Dr. Burris authored a second note stating that upon discharge Claimant "took issue with being released to full work activities" and requested to have her restrictions reassigned. Dr. Burris imposed restrictions of "sedentary work with a maximum 2-handed lift of 10 pounds." Dr. Burris opined Claimant demonstrated "clear secondary gain" and psychosomatic overlay. Dr. Burris noted he offered Claimant a "possible change of provider." He further stated that he wanted Claimant to continue her follow-up with Dr. Kawasaki.

14. On November 18, 2014 Dr. Kawasaki reported that Claimant had a good response to the second SGB. Dr. Kawasaki also noted that Claimant stated that Dr. Burris wanted Dr. Kawasaki to "take over" Claimant's medication. However, Dr. Kawasaki stated that he would not prescribe oxycodone on November 18 because Claimant declined to undergo a urine toxicology test. Dr. Kawasaki continued the prescription of topical cream and also prescribed occupational therapy (OT). He also referred Claimant to Dr. Sacha for a third SGB.

15. On December 8, 2014 Claimant applied for a hearing and endorsed the issue of "authorized provider."

16. Claimant testified that she applied for a hearing because she wanted to accept the change of physician offered by Dr. Burris.

17. On December 16, 2014 Dr. Kawasaki stated that Claimant would undergo a urine toxicology test and sign an opioid agreement. Dr. Kawasaki advised the Claimant of the "dangers" of oxycodone and stated Claimant would be kept on a "low dose." Dr. Kawasaki also prescribed Lyrica, a topical cream and OT. He continued the restrictions imposed by Dr Burris.

18. On February 10, 2015 Claimant reported to Dr. Kawasaki that she had the third SGB "with good success." However, her pain was returning. On examination Dr. Kawasaki noted hypersensitivity along the index finger, continued swelling in the hand and "mild discoloration" of the hand. Dr. Kawasaki stated the Claimant's "final option" might be to undergo a stellate ganglion radiofrequency neurotomy (RF procedure). He indicated he would request authorization to perform the RF procedure.

19. On February 18, 2015 Floyd Ring, M.D., conducted a paper review of the RF procedure proposed by Dr. Kawasaki. Dr. Ring recommended that the request for authorization be denied because there was insufficient documentation of Claimant's response to the SGB procedures.

20. On March 17, 2015 Dr. Kawasaki noted that based on Dr. Ring's opinion the Insurer had denied authorization for the RF procedure. Dr. Kawasaki stated that Claimant had brought in her "pain diaries" and these documents showed that after the first day of each SGB she had very little pain the hand. Dr. Kawasaki continued to recommend the RF procedure and stated he would appeal the denial.

21. A hearing was set for March 24, 2015 to determine the issues raised by Claimant's December 2014 Application for Hearing. However, on March 19, 2015 the parties submitted a Stipulation and Motion for Approval. This motion advised that the parties had "agreed to designate Greg Reichhardt, M.D., as Claimant's authorized treating physician (ATP)" and that they further agreed Dr. Kawasaki was "also authorized." The Claimant agreed that the stipulation resolved all issues indorsed in the December 8, 2014 Application for Hearing and that the scheduled hearing could be vacated.

22. On March 23, 2015 the ALJ signed an Order granting the parties' stipulation and motion for approval. The order provided that Claimant's ATP "from this date forward for this claim shall [sic] Greg Reichhardt, M.D." and that "Robert Kawasaki M.D. is also an authorized provider for this claim."

23. On April 9, 2015 Claimant filed an Application for Hearing and endorsed the issues of "medical benefits" and "reasonably necessary." On May 11, 2015 Respondents filed a Response to Application for Hearing and endorsed numerous issues including "reasonableness, necessity and relatedness of any and all medical care sought and/or received."

24. On April 14, 2015 Dr. Kawasaki noted Claimant had increasing pain in the left upper extremity and indicated that she was "regressing." Dr. Kawasaki stated he was still trying to get authorization for the RF procedure but Insurer had denied the

request “based on a peer review” by Nicolas Olsen, D.O. Dr. Kawasaki stated that he would refer the Claimant for another SGB and additional OT for “edema control and stress loading.” Dr. Kawasaki also continued the prescription for the “compounding cream” and noted Claimant did not need a refill of her opioid medication because she was “trying to cut back.” Dr. Kawasaki stated he would see Claimant for follow-up in four weeks.

25. On April 14, 2015 Dr. Kawasaki also wrote that Claimant was being “transferred to Dr. Reichhardt.” Dr. Kawasaki advised Claimant he would “not have much of a role” in her treatment “as Dr. Reichhardt is a physiatrist.” The Claimant advised Dr. Kawasaki that she wanted to keep him involved in her treatment. Dr. Kawasaki noted that this “would need to be straightened out.”

26. On April 29, 2015 Dr. Reichhardt, who is board certified in physical medicine and rehabilitation as well as elctrodiagnostic medicine, examined Claimant for the first time. Dr. Reichhardt took a history, performed a physical examination and reviewed Claimant’s medical records. Dr. Reichhardt noted Claimant was scheduled for another SGB and opined that this was “reasonable.” He also noted Claimant was getting medications from Dr. Kawasaki and stated that after a more thorough review of these medications he “would determine whether other medication trials might be indicated.” Dr. Reichhardt noted the Medical Treatment Guidelines indicate that the RF procedure is not “generally accepted or widely used” to treat CRPS and that he lacked experience with the procedure. Consequently, Dr. Reichhardt referred Claimant to Scott Hompland, D.O., to obtain a second opinion “from an anesthesiologist experienced in treating CRPS.” Dr. Reichhardt sent a copy of this note to Dr. Kawasaki.

27. Dr. Reichhardt examined Claimant on May 13, 2015. He noted Claimant continued to have pain in the left hand and was taking one to two tablets of oxycodone per day and also using a pain cream. Dr. Reichhardt opined that if Claimant received “significant benefit” from the next SGB it would be reasonable to do another course of OT.

28. Dr. Kawasaki examined the Claimant in “follow-up” on May 26, 2015. Dr. Kawasaki noted Claimant had undergone a fourth SGB on May 14, 2015 and she reported it worked well. Dr. Kawasaki also noted Claimant had seen Dr. Reichhardt who was “taking over as her primary care physician.” Dr. Kawasaki also noted Dr. Reichhardt had referred Claimant to Dr. Hompland. Claimant was occasionally using oxycodone and needed to refill the medication. She was also using “topical medications.” Dr. Kawasaki refilled the medications. Dr. Kawasaki advised Claimant that Dr. Reichhardt was now her primary care physician and also a physiatrist. Dr. Kawasaki wrote that the services he was providing and those being provided by Dr. Reichhardt were “somewhat redundant.” Claimant told Dr. Kawasaki that she wanted to continue to see him and Dr. Kawasaki wrote that he had “no problem” with seeing Claimant “as long as it is okay with Dr. Reichhardt.”

29. On May 27, 2015 Dr. Hompland examined the Claimant. Dr. Hompland reviewed various treatment options, including the proposed RF procedure. Dr.

Hompland recommended treatment by maximizing “medical management” but noted Claimant was “quite opposed” to that approach.

30. Dr. Reichhardt examined Claimant on May 27, 2014. Claimant reported she had a “good visit” with Dr. Hompland and that they had discussed “other medications” including antidepressants. Dr. Reichhardt discussed the possibility of prescribing Cymbalta but Claimant wanted to “think about” this option. Dr. Reichhardt sent a copy of this note to Dr. Kawasaki.

31. Dr. Reichhardt examined Claimant on June 10, 2015. Claimant reported that she received pain relief from the most recent SGB but the effects of the injection had worn off and subsequently her pain had increased. Dr. Reichhardt discussed Dr. Hompland’s report with Claimant. Claimant agreed to a trial of Cymbalta. Dr. Reichhardt sent a copy of this note to Dr. Kawasaki.

32. Dr. Kawasaki examined the Claimant in “follow-up” on June 23, 2015. Dr. Kawasaki noted that he was waiting to see Dr. Hompland’s second opinion evaluation. He stated that Claimant remained on an opioid management protocol and was to continue with oxycodone. Dr. Kawasaki noted that claimant was experiencing side effects from the use of Cymbalta prescribed by Dr. Reichhardt. However, Dr. Kawasaki did not alter this medication because Claimant was scheduled to visit Dr. Reichhardt the following day. Dr. Kawasaki stated that he would see the Claimant for follow-up in four weeks. Dr. Kawasaki sent a copy of this report to Dr. Reichhardt.

33. Dr. Reichhardt examined Claimant on June 24, 2015. Claimant was reportedly “doing about the same” as she was before. She was taking and tolerating Cymbalta. She was also using pain cream three times per day and taking oxycodone as needed. Dr. Reichhardt recommended “repeating the block one more time w33ith therapy pre-scheduled to start as soon after the block as feasible.” Dr. Kawasaki sent a copy of this report to Dr. Reichhardt.

34. Dr. Ring testified at the hearing. Dr. Ring is level II accredited and is an expert in pain management. Dr. Ring testified that Dr. Kawasaki and Dr. Reichhardt are both specialists in physical medicine and rehabilitation. Dr. Ring opined that the treatments being provided by Dr. Kawasaki and Dr. Reichhardt are redundant. Dr. Ring opined that the Claimant needs a primary care doctor who acts as a “gatekeeper.” Dr. Ring further opined the “gatekeeper” should probably specialize in occupational medicine.

35. Dr. Ring opined it is not reasonable and necessary for the Claimant to be treated by two physiatrists at the same time. He explained that it might be appropriate for two physiatrists to treat a single patient if one of the physiatrists was limited to offering a one-time “second opinion.”

36. Dr. Ring opined that when the Claimant treats with two physicians at the same time there is a potential “pharmacological disaster” if the physicians are not consulting one another.

37. Claimant testified that she did not schedule any of her appointments with Dr. Kawasaki. Rather, Dr. Kawasaki scheduled appointments with her. At hearing Claimant testified that she did not have any future appointments scheduled with Dr. Kawasaki. She explained that she had cancelled an appointment that Dr. Kawasaki scheduled subsequent to June 23, 2015 because she was satisfied with the treatment recommendations of Dr. Reichhardt and Dr. Hompland.

38. Claimant testified that Dr. Kawasaki has prescribed oxycodone and topical creams. Claimant testified that she has benefited from these medications.

39. Claimant proved it is more probably true than not that the services provided by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 10, 2015 were reasonable and necessary to cure and relieve the effects of her injury-related CRPS.

40. Claimant credibly testified that the April 14, 2015, May 26, 2015 and June 23, 2015 appointments were scheduled by Dr. Kawasaki and not by her. By April 14, 2015 Dr. Kawasaki had been an authorized treating physician for more than a year. During that year Dr. Kawasaki rendered or prescribed numerous treatments including therapy, narcotic medications, topical medications and referrals for injections. Dr. Reichhardt became authorized to treat the Claimant by order of March 23, 2015. However, Dr. Reichhardt did not examine Claimant until April 29, 2015. In these circumstances it was not unreasonable for Claimant to attend the April 14 appointment scheduled by her long time authorized treating physician, Dr. Kawasaki. It was not until the April 14, 2015 visit that Dr. Kawasaki raised with Claimant the possibility that his treatment might become "redundant" in light of Dr. Reichhardt's designation as an authorized provider. Moreover, Claimant credibly testified that she benefited from the compounding cream that Dr. Kawasaki prescribed on April 14, 2015. From these facts the ALJ finds that the treatment rendered on April 14, 2015 was reasonable and necessary and was in no way "redundant" to any treatment provided by Dr. Reichhardt.

41. The services provided by Dr. Kawasaki on May 26, 2015 were reasonable and necessary to cure and relieve the effects of the CRPS. By May 26, 2015 Claimant had seen Dr. Reichhardt on at least two occasions. On April 29, 2015 Dr. Reichhardt was aware that someone (presumably Dr. Kawasaki) had referred Claimant for another SGB. Dr. Reichhardt opined that this referral was "reasonable." On May 13, 2015 Dr. Reichhardt noted that Dr. Kawasaki was continuing to prescribe medications including oxycodone and a topical cream. However, Dr. Reichhardt voiced no objection to Dr. Kawasaki's prescriptions. Rather, on April 19, 2015 Dr. Reichhardt noted that he would review Claimant's records and determine whether other medication trials might be indicated. Claimant credibly testified that she benefited from the compounding cream and narcotic medication prescribed by Dr. Kawasaki on May 26, 2015. From these circumstances the ALJ infers that Dr. Reichhardt considered it appropriate for Claimant to continue to see Dr. Kawasaki and for Dr. Kawasaki to prescribe medications to treat the CRPS.

42. The services provided by Dr. Kawasaki on June 23, 2015 were reasonable and necessary to cure and relieve the effects of the Claimant's CRPS. On June 23,

2015 Dr. Kawasaki continued to prescribe oxycodone under the "opioid management protocol." Claimant credibly testified that she benefited from this medication. There is no credible or persuasive evidence that Dr. Reichhardt disagreed with the prescription for oxycodone or expressed the view that Dr. Kawasaki was acting inappropriately when he prescribed the drug. Rather, on June 24, 2015 Dr. Reichhardt again noted Claimant was using oxycodone and a "pain cream." However, Dr. Reichhardt did not voice any disagreement with these prescriptions or Dr. Kawasaki's continued participation in Claimant's treatment. The ALJ infers from this evidence that by June 23, 2015 Dr. Kawasaki was not providing services that were purely redundant to those rendered by Dr. Reichhardt. Rather, the ALJ finds that the two physicians were providing related services on an informed and cooperative basis.

43. The ALJ is not persuaded by the views of Dr. Ring insofar as he expressed the opinion that because Dr. Reichhardt and Dr. Kawasaki are both physiatrists the treatments they render are "redundant" and therefore unreasonable and/or unnecessary.

44. As determined in Finding of Fact 42, the evolution of Claimant's treatment provided after Dr. Reichhardt's March 23, 2015 designation as an ATP has demonstrated a cooperative division of labor between Dr. Reichhardt and Dr. Kawasaki On April 14, 2015 Dr. Kawasaki expressly recognized that Claimant's care was "transferred" to Dr. Reichhardt. On May 26, 2015 Dr. Kawasaki indicated that, although the treatment he provided was "somewhat" redundant to that of Dr. Reichhardt he would continue to treat Claimant if it was "okay" with Dr. Reichhardt. Thus, the ALJ infers that Dr. Kawasaki recognizes Dr. Reichhardt as the "gatekeeper" in this case and that he provides treatment at Dr. Reichhardt's discretion. After his appointment as ATP Dr. Reichhardt was aware that Dr. Kawasaki continued to examine Claimant and provide treatment recommendations and services including topical cream and the management of Claimant's opioid usage. While Dr. Reichhardt provided various treatment recommendations of his own, including the referral to Dr. Hompland, he never indicated or opined that it was improper or "redundant" for Dr. Kawasaki to continue prescribing medications and managing the opioid usage. Dr. Reichhardt did not opine that it was unreasonable and/or unnecessary for Dr. Kawasaki to continue providing services. The ALJ infers from this series of events that, in the words of Dr. Kawasaki, the treatment responsibilities of the two physicians has been "straightened out."

45. The ALJ is not persuaded by Dr. Ring's opinion that allowing Dr. Kawasaki to manage some of Claimant's medications is unreasonable or unnecessary because it offers the prospect of a "pharmacological disaster." Dr. Ring himself acknowledged that both Dr. Kawasaki and Dr. Reichhardt are board-certified physicians "capable of managing medications." The ALJ infers from this acknowledgment that Dr. Kawasaki is fully aware of drug interactions, overdoses and other complications that may arise where a patient is being prescribed medications by more than one physician. Indeed, it appears that Dr. Kawasaki was demonstrably conscious of these potential difficulties on June 23, 2015 when he instructed Claimant to continue taking Cymbalta prescribed by Dr. Reichhardt despite Claimant's complaints about side effects. Instead of altering the

prescription Dr. Kawasaki deferred to Dr. Reichhardt who was scheduled to see Claimant the next day. Moreover, the ALJ infers the risks arising when a claimant is treated by more than one physician are not limited to the situation where the physicians share the same specialty. Rather, these risks arise in all cases where a claimant is treated by more than one physician. The ALJ finds that management of this risk is best left to the exercise of professional skill and judgment by the physicians involved in the individual case.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REASONABLENESS AND NECESSITY OF VISITS TO DR. KAWASAKI

Respondents argue that Claimant failed to prove that her visits to Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 constituted "reasonable and necessary" medical treatment. To the contrary the respondents argue the evidence establishes that the treatment provided by Dr. Kawasaki on these dates was "redundant" to that provided by Dr. Reichhardt. In support of this view Respondents cite the opinions of Dr. Ring as well as Dr. Kawasaki's statement that the services he was providing were "somewhat redundant" to those provided by Dr. Reichhardt.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and

necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As determined in Findings of Fact 39 through 45 Claimant proved it is more probably true than not that the medical treatment provided by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 was reasonable and necessary to cure and relieve the effects of the industrial injury. As found, Dr. Kawasaki provided services that included the prescription of topical cream and the management of Claimant's use of opioid medication. Claimant credibly testified that these services were beneficial to her. As determined in 44 through 46 the ALJ is not persuaded that the services rendered by Dr. Kawasaki on these dates were unreasonable and/or unnecessary because they were "redundant" and presented an unacceptable risk of medication mismanagement.

The respondents concede that Dr. Kawasaki is legally "authorized" to provide treatment. Because the treatments rendered by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015 are found to be reasonable and necessary the Insurer is liable to pay for these treatments.

RIPENESS OF REQEUST FOR ORDER FINDING FUTURE CARE BY DR. KAWASAKI TO BE UNREASONABLE AND UNNECESSARY

Respondents request that the ALJ enter an order finding that "additional medical care provided by Dr. Kawasaki is not reasonable and necessary." In support of this request Respondents reiterate their argument that any treatment provided by Dr. Kawasaki is and will be "redundant" to that provided by Dr. Reichhardt. Claimant argues, among other things, that Respondents' request for an order determining that future treatment provided by Dr. Kawasaki will not be "reasonable and necessary" is "speculative." Claimant reasons that to issue such an order would be premature because no future treatment by Dr. Kawasaki has been "recommended or even sought." Although Claimant's position statement does not tether this argument to a specific legal theory, the ALJ understands Claimant to be asserting that the issue raised by Respondents is not legally "ripe" for determination. The ALJ agrees with Claimant's position.

Generally, the term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication." Our courts have held that under this doctrine adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur. *Youngs v. Industrial Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012); *Franz v. Industrial Claim Appeals Office,* 250 P.3d 1284 (Colo. App. 2010); *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006) (holding claim for permanent total disability is ripe for adjudication when respondents file FAL admitting for permanent impairment). In determining ripeness of an issue courts have considered the hardship to the parties if adjudication is withheld. In addition, courts consider whether the issue is fit for adjudication in the sense that there is an adequate record to permit effective review. *Stell v. Boulder County Department of Social Services,* 92 P.3d 910 (Colo. 2004).

Of course there is a distinction between sufficiency of the evidence to prove a fact in issue and the "ripeness" of the issue. An issue may be "ripe" in the sense that there is no "legal impediment" to its determination even though a party lacks sufficient evidence to prove the issue. The issue of ripeness is not to be confused with the question of whether an issue is groundless and frivolous. *See McMeekin v. Memorial Gardens,* WC 4-384-910 (ICAO September 30, 2014).

The ALJ has only such jurisdiction as is created by the provisions of the Workers' Compensation Act (Act). *Lewis v. Scientific Supply Co., Inc.,* 897 P.2d 905 (Colo. App. 1995). The ALJ notes that several provisions of the Act imply that an ALJ does not have statutory jurisdiction to enter orders concerning issues that are not "ripe" for hearing. Section 8-43-211(2)(b), C.R.S., provides the OAC shall set a hearing within one hundred twenty days after "any party requests a hearing on issues ripe for adjudication by filing a written request." Section 8-43-211(3), C.R.S., provides that if "an attorney requests a hearing or files a notice to set a hearing on an issue that is not ripe for adjudication at the time such request or filing is made" the attorney may be assessed reasonable fees and costs incurred by the opposing party when preparing for the hearing. Section 8-43-203(2)(b)(II)(A), C.R.S., requires a party to object to an FAL and file an application for hearing on disputed issues "that are ripe for hearing" or accept closure of such issues. *See Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004). Most importantly, § 8-43-207(1), C.R.S., grants an ALJ authority to conduct hearings "to determine any *controversy* concerning any issue arising under articles 40 to 47 of this title." (Emphasis added).

Moreover, our courts have held that the doctrine of "ripeness" applies in workers' compensation proceedings. In *BCW Enterprises v. Industrial Claim Appeals Office,* 964 P.2d 533 (Colo. App. 1997) the court of appeals held that the doctrine of "ripeness" precluded an ALJ from considering the issue of penalties against an insurer for filing an allegedly frivolous appeal while that appeal was still pending in the court system. Similarly, in *Youngs v. Industrial Claim Appeals Office*, *supra*, the court held that a petition to reopen a claim for permanent total disability benefits was not ripe while the direct appeal from the denial of the claim was still pending.

It follows that a "controversy concerning any issue arising under the Act" that justifies a hearing under § 8-43-207(1), refers to a "ripe" issue. If the issue is not "ripe" it does not present a "controversy" sufficient to trigger the ALJ's statutory jurisdiction to conduct a hearing and decide the issue.

Here, the ALJ concludes that Respondents' request to enter an order finding that any future treatment rendered by Dr. Kawasaki would be unreasonable and unnecessary is not "ripe" for determination. This is true because the ALJ does not know, and cannot determine what specific treatment Dr. Kawasaki may recommend or render in the future. Consequently, any ruling that such hypothetical treatment would be "redundant" to treatment provided by Dr. Reichhardt does not present a real and immediate controversy that is fit for adjudication.

Respondents have admitted liability for reasonable and necessary medical benefits to treat Claimant's industrial injury. Consequently they are bound by that admission and must provide treatment accordingly. Section 8-43-203(2)(d), C.R.S. Of course, Respondents retain the right to dispute whether the need for any additional treatment was proximately caused by the admitted industrial injury, whether medical treatment should be terminated because the injury has been "cured" and whether particular treatment was rendered by an "authorized" provider, and whether "particular treatment" is unnecessary and/or unreasonable. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Claim Appeals Office,* 723 P.2d 749 (Colo. App. 1986).

Respondents do not assert that Claimant's need for treatment is unrelated to the admitted injury, or that the injury had been cured or that Dr. Kawasaki is not authorized to provide treatment. Instead, they assert that Dr. Kawasaki will never be able to provide any reasonable and necessary treatment. Respondents predicate this argument on the factual assertion that any future treatment provided by Dr. Kawasaki will necessarily be "redundant" to that provided by Dr. Reichhardt.

However, it is possible that Dr. Kawasaki will never recommend or provide any additional treatment. Consequently Respondents are not raising a real and immediate controversy. Rather, Respondents are speculating about a future course of events and posit a potential injury that may never occur. In this sense the issue raised by Respondents is not "ripe."

Moreover, the ALJ concludes that the issue raised by Respondents is not currently "fit for adjudication" in the sense that there is a legal barriers to its determination. Section 8-43-101(1)(a) requires Respondents to provide medical care and equipment that "may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve" the effects of the injury. As determined above, the mere fact that Dr. Reichhardt and Dr. Kawasaki share the same medical specialty does not compel the factual conclusion that they are unreasonably or unnecessarily providing "redundant" treatments. Instead, a finding of redundancy, and hence a finding that the service is unreasonable and unnecessary, depends on ascertaining what services Dr. Kawasaki is providing and comparing them to the services provided by Dr. Reichhardt. Because the ALJ cannot predict the course of treatment that may be recommended by Dr. Kawasaki and Dr. Reichhardt in the future, it is not legally possible to perform the requisite factual inquiry and determine whether Dr. Kawasaki's hypothetical treatment will be reasonable and necessary.

Because the ALJ has found the Respondents' request for an order regarding future treatment is not ripe, the issue is beyond his jurisdiction to decide. For this reason the request must be denied. Section 8-43-207(1). In light of this determination the ALJ need not address the other arguments raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer is liable to pay for the medical treatment rendered by Dr. Kawasaki on April 14, 2015, May 26, 2015 and June 23, 2015.

2. Respondents' request for an order finding that future medical treatment by Dr. Kawasaki will be unreasonable and unnecessary is denied.

3. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 30, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-957-378-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 30, 2015 and September 28, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 4/30/15, Courtroom 1, beginning at 8:30 AM, and ending at 11:31 AM; and, 9/28/15, Courtroom 2, beginning at 1:30 PM, and ending at 3:45 PM). The Spanish/English Interpreter at the April 3oth session of the hearing was Nina Izquierdo. The Spanish/English Interpreter at the September 28th

Claimant's Exhibits 3 through 5 were admitted into evidence, without objection. The Respondents' objected to Claimant's Exhibits 1, 2, and 6 (Claimant's Salvadorean birth certificate, a driver's license from Veracruz, Mexico, and the adjuster's notes, respectively). The ALJ reserved ruling on these exhibits and subsequently admitted them into evidence at the conclusion of the hearing. Claimant's Exhibit 6 (the adjuster's notes) was withdrawn. Respondents' Exhibits A through H were admitted into evidence, without objection. The evidentiary deposition of Thai Van Nguyen was admitted in lieu of live testimony.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The primary issue to be determined by this decision concerns whether the Claimant sustained a compensable injury to his right knee and back in August 2014, arising out of the course and scope of his employment with the Employer herein.. If so, additional issues involve medical benefits, average weekly wage (AWW), and temporary total disability (TTD) benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Stipulations and Findings

1. The parties stipulated, if compensable, to an AWW of $603.02, and the ALJ so finds.

2. If compensable, the parties stipulated at the April 30, 2015 session of the hearing that the period for TTD benefits runs from August 1, 2014 until the present with a corresponding TTD rate of $402.01 per week, and the ALJ so finds.

3. At the hearing on September 28, 2015 session of the hearing, the parties did not object to the ALJ's indication that while the Claimant misrepresented his identity to the Employer, the misrepresentation was not material to his employment, nor was the Claimant hired under false representation.

Preliminary Findings

4. The Claimant is now an 18-year-old male, born on November 13, 1996, with the given the name of "Salvador Ernesto Olivorio Menjivar." He emigrated from El Salvador to the United States when he was 14-years old.

5. In order to obtain employment, the Claimant gave the Employer the name and birth date of his cousin, "Cristian Amilcar Mejivar" (DOB 02/26/1995), because the Claimant was not yet old enough to work.

6. The Employer hired the Claimant on April 15, 2011, as a prep-cook and dishwasher. The Claimant worked for Employer fairly regularly until August 1, 2014; although there was testimony that there were a few periods where Claimant quit and was rehired (*See* Deposition of Thai Van Nguyen, pp. 19, ¶¶ 14–25).

7. As part of the Claimant's daily duties, he used and cleaned the meat slicers at the restaurant.

The Alleged Incident

8. On August 1, 2014, a meat slicer at the Employer's restaurant broke. The restaurant owner, Thai Van Nguyen, was not present that day, but Jenny Nguyen, manager of the front-of-the-house (dining area as opposed to kitchen area), was present.

9. The Claimant and the Employer witnesses significantly disagree about what occurred after the meat slicer broke.

The Claimant Version of Events

10. There were two meat slicers, one was heavy (about 160 pounds) and the other was smaller (about 50 pounds); the heavier meat slicer is the one that broke, according to the Claimant.

11. According to the Claimant, Ryan Nguyen (known to the Claimant as "Brian"), brother of Thai Nguyen, asked the Claimant and Viet QuocTran (known to the Claimant as "Vick"), waiter for the Employer, to take the meat slicer out of the restaurant and put it into a van for repair. According to the Claimant, while Tran and the Claimant were taking the meat slicer out to the van, Tran was called back into the restaurant and Tran left the Claimant holding the meat slicer on his own.

12. Ryan Nguyen and Tran deny that this occurred and have no recollection of these alleged events.

13. According to the Claimant, he was unable to carry the load by himself and upon reaching a doorway, slipped and fell on water or oil. He stated that he hit his right shoulder on the door frame as he fell. He further stated that he then fell to the floor and landed on his buttocks and back. According to the Claimant, the meat slicer fell onto his right knee and he stated that he was in severe pain and got up very slowly. According to the University Hospital emergency room (ER) records of August 1, 2014, Kristen E. Nordenholz, M.D., state an impression of: "back pain, knee **contusion** (emphasis supplied). There is no evidence for dislocation, fracture, joint effusion, sprain…." The ALJ infers and finds that if a metal meat slicer weighing over 100 pounds fell on the Claimant's right k nee as he stated, injury to the right knee would be more severe than "contusions." For this reason, the ALJ finds that the Claimant's version of events, compared with the contemporaneous medical record, does not measure up to reason and common sense. Consequently, the ALJ finds that Claimant's version of the alleged injury as lacking in credibility.

14. According to the Claimant, Ryan Nguyen heard the noise of the machine falling, but ignored the Claimant. No one else witnessed the event. According to the Claimant, he then told Ryan Nguyen that he needed a doctor because he had an accident. According to the Claimant, Ryan Nguyen responded that the Claimant should go home and never comeback because. Jenny Nguyen didn't like Claimant. Ryan Nguyen categorically denies each of the Claimant's contentions in this regard.

15. The Claimant then went to University of Colorado Hospital for treatment with his friend, Walter Rodriguez, who spoke English and could translate for the Claimant.

16. According to the Claimant, Rodriguez returned to the restaurant on the afternoon of August 3, 2014, to pick up Claimant's paycheck, but did not get it.

17. According to the Claimant, around 10:00 P.M., on August 3, 2014, he and Rodriguez met Thai Nguyen at the restaurant to get the Claimant's final pay check. Rodriguez translated for the Claimant in this exchange to get the money and describe the injury.

18. For the reasons herein below given, the ALJ finds the Claimant's version of events lacking in credibility.

19. The Claimant returned to University of Colorado Hospital on August 11, 2014, and the ER recommended that the Claimant see an orthopedist, though Claimant never saw an orthopedist.

20. Claimant was then advised by his attorney to see David Yamamoto, M.D., regarding his injuries.

Employer, Employees, and Family Members of the Employer's Version of Events,

21. The restaurant has two meat slicers; both are equally large in size. Tran testified that the slicers were "very large items." Jenny Nguyen testified that the slicers were "the same size," "very heavy," and that they were "never moved" because of their weight. Son Nguyen ("Teo"), the handy-man for the Employer, testified that the slicers were each about "200 pounds." Considering "Teo's" expertise concerning these meat slicers, the ALJ finds his testimony concerning the weight of the slicers more credible than the Claimant's or anyone else's testimony concerning the weight of the meat slicers. Therefore, the ALJ finds that each meat slicer weighed approximately 200 lbs.

22. Both of the meat slicers were broken on August 1, 2014. According to Jenny Nguyen, both machines were broken and the machines were essential to the running the restaurant, so that is why she called Son Nguyen to fix them. Son Nguyen verified that both machines were malfunctioning. He stated that one of the meat slicers was put back together improperly and the other needed a new electrical switch.

23. Upon finding out that the meat slicers were broken around 3:00 – 4:00 P.M., Jenny Nguyen called Son Nguyen to come over and repair the slicers. Son Nguyen's testimony verified that Jenny Nguyen called him to come fix both of the meat slicers.

24. Jenny Nguyen then went next door where Ryan Nguyen was working to remodel a building. Jenny Nguyen asked Ryan Nguyen to come and look at the meat slicers. Ryan Nguyen testified that he was next door remodeling when Jenny Nguyen came by and asked him to take a look at the meat slicers around 3:00 – 4:00 P.M.

25. Ryan Nguyen and Son Nguyen both arrived at the restaurant. While Son Nguyen was trying to fix the slicers, Jenny Nguyen became frustrated with the Claimant because the Claimant had not told her when the first meat slicer broke, which she thought was irresponsible. According to Jenny Nguyen, the Claimant became enraged at her and tried to hit her two or three times. Ryan Nguyen and Son Nguyen were able to stop the Claimant from trying to hit Jenny Nguyen. Son Nguyen, Ryan Nguyen, and Jenny Nguyen all testified consistently to this altercation and the stopping the altercation. The Claimant denies that any of this ever happened. Either. Ryan, Son and Jenny Nguyen are engaging in a concerted conspiracy to make the Claimant look bad, or the Claimant is not being truthful. The ALJ infers and finds that the Claimant is not being truthful in this regard.

26. After the altercation stopped, according to the Nguyens, the Claimant left the restaurant. The ALJ infers and finds that neither meat slicer was ever lifted and that the Claimant sustained no injuries at work during the times in question.

27. Son Nguyen verified that the slicers were never lifted. He testified he put one of the meat slicers back together properly and then it was fixed. Son Nguyen also stated that he was able to fix the second meat slicer by going to the store and buying a new electrical switch. He came back and installed the switch without ever moving the slicer. Regarding the Claimant's alleged injury, Son Nguyen stated that the Claimant "never carried the machine, how can he be injured?"

28. Tran testified that he never carried the slicer with the Claimant. The ALJ finds Tran's testimony credible.

29. According to Jenny Nguyen, the Claimant never reported an injury or lifted the machine. Jenny Nguyen testified that after Claimant stormed out following the altercation, she did not see him again.

30. Ryan Nguyen verified that the machine was never lifted. He testified that he never asked the Claimant to move the machine, never heard the machine falling, and did not see the Claimant sustain any injury whatsoever on August 1, 2014. The ALJ finds Ryan Nguyen's testimony persuasive and credible, thus, making it highly unlikely that the machine fell on the Claimant as the Claimant alleges.

31. On August 3, 2014, at around 4:30 P.M., Rodriguez came to the restaurant to ask for the Claimant's last paycheck. Thai Nguyen and Dorris Nguyen, Thai Nguyen's sister-in-law, were eating Pho when Rodriguez arrived. Rodriguez explained to Thai Nguyen and Dorris Nguyen that the Claimant felt embarrassed about the altercation he had with Jenny Nguyen, but the Claimant had a difficult time working with her. Thai Nguyen told. Rodriguez that he (Thai) preferred to speak with the Claimant in-person. Dorris Nguyen and Thai Nguyen testified consistently about this conversation with Rodriguez. The ALJ finds this version of events more credible than the Claimant's version of events.

32. On August 3, 2014, at 10:30 P.M. when the restaurant closed, the Claimant and Rodriguez returned to the restaurant. Thai Nguyen paid the Claimant. Claimant and Rodriguez explained that the Claimant was injured, but would not say where the injury was or show Thai Nguyen any medical bills or paperwork. The Claimant and Rodriguez only requested that Thai Nguyen pay for the injuries. Thai Nguyen paid the Claimant money for his work and did not see him again. The ALJ finds the above approach of the Claimant and Rodriguez to Thai Nguyen, without presenting medical bills but asking that Thai pay for the injury to severely compromise the Claimant's overall credibility.

Claimant's Medical Records (Exhibits 4 and 5)

33. Claimant's Exhibits 4 and 5 indicate that the Claimant suffers from a strain in the lumbar region, strain in the thoracic region, contusion of knee, and sprain of shoulder. The Claimant insisted that the injuries were a result of dropping the meat slicer. The Claimant's alleged cause of these injuries is **not** credible because it contradicts natural laws of physics, body mechanics, and the probability that the alleged incident would cause only minor injuries if the subject of the incident did not happen to be made of iron.

34. Regardless of exactly how large the meat slicer was, somewhere between 160 and 200 pounds according to the testimony, the ALJ finds that such a large metal object falling would likely have caused substantially more than a contusion of the Claimant's knee. Therefore, the ALJ finds the Claimant's testimony concerning the incident lacking in credibility.

The Claimant's Credibility

35. While the Claimant's misrepresentation of his identity was concededly not material to his employment, the ALJ finds the misrepresentations calls into question his credibility. For example, in Exhibit 1 (Claimant's Birth Certificate) his date of birth is November 13, 19**96**. However, in Exhibit 4-1 through 4-18 (Claimant's Workers' Compensation Medical Records from Dr. Yamamoto), Claimant's date of birth is listed as 02/ Exhibit 5-10 through 5-18 (Claimant's Emergency Room Records from University Hospital), his date of birth is listed as February 26, 1992. In Exhibit C-7, ¶ 19 (Interrogatories), the Claimant listed his date of birth as February 21, 1992. Furthermore, the Claimant filed this workers' compensation claim under his cousin's (Christian Amilcar "2/26/1995. In *Exhibit 4-19* through *4-21* (also Claimant's Workers' Compensation Medical Records from Dr. Yamamoto), the Claimant's date of birth is listed as February 21, 19**92**. In Mejivar" (*sic)*, name. These discrepancies illustrate the Claimant's tendency to be less than honest and, thus, compromise his credibility.

Ultimate Findings

36. *While Exhibits 4 and 5* indicate that the Claimant suffered some minor injuries, the ALJ finds his testimony that the injuries occurred while working for Employer is unsubstantiated, contradicted by several Employer witnesses, in defiance of natural laws of bio-mechanics and, therefore, substantially lacking in credibility. Consequently, the ALJ finds that the Claimant's allegations that sustained a work-related injury while working for the Employer herein are not **credible. On** the other hand, the Employer witnesses testified consistently with one another about the events of August 1, 2014. All six of the Employer's witnesses were sequestered, instructed not to discuss their testimony among each other and yet all testified consistently and credibly.

37. The ALJ makes a rational choice to accept the testimony of the six Employer witnesses and the reject the Claimant's testimony.

38. The Claimant has not proven by a preponderance of the evidence that any injuries sustained occurred during the course of his employment with Employer.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). . As found, while Exhibits 4 and 5 indicate that the Claimant suffered some minor injuries, the Claimant's testimony that the injuries occurred while working for the Employer is unsubstantiated, contradicted by several Employer witnesses, in defiance of natural laws of bio-mechanics and, therefore, substantially lacking in credibility. Consequently, as found, the Claimant's allegations that he sustained a work-related injury while working for the Employer herein are not **credible. On** the other hand, the Employer witnesses testified consistently with one another about the events of August 1, 2014. All six of the Employer's witnesses were sequestered, instructed not to discuss their testimony among each other and yet all testified consistently and credibly.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice to accept the testimony of the six Employer witnesses and the reject the Claimant's testimony.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to establish that the cause of his contusions was work-related, thus, he failed to prove compensable injuries.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592

P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

The issues presented for determination are as follows:

- Whether Claimant suffered a new, compensable injury on June 17, 2013 (WC 4-958-107);

- In the alternative, whether the Division Independent Medical Examination (DIME) physician erred in his opinion that Claimant has reached maximum medical improvement (MMI) for her July 31, 2012 industrial injury (WC 4-932-919);

- Whether Claimant is entitled to temporary total (TTD) disability benefits from August 4, 2014 and ongoing;

- Whether Claimant is entitled to temporary partial disability (TPD) benefits for periods of time in 2012 and 2013.

- Whether the MRI arthrogram recommended by Dr. Hugh Macaulay is reasonable, necessary and related to Claimant's industrial injury.

- The Claimant listed average weekly wage (AWW) on her case information sheet, but neither party endorsed average weekly as an issue. The ALJ identified AWW as an issue for hearing and neither party objected. Based on the record, including evidence offered by the Claimant regarding AWW, the ALJ concludes the issue was tried by the consent of the parties.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant suffered a compensable injury to her right SC joint on July 31, 2012 while working for the Employer in Housekeeping. At the time of the injury, Claimant's primary duties involved cleaning hotel rooms.

2. Subsequent to her July 31, 2012 injury, Claimant received treatment from various physicians within Concentra Medical Center including Drs. Villavicencio and Dixon.

3. The medical records from Concentra lack specific details of Claimant's initial pain complaints. The diagnoses provided by the Concentra physicians included: upper

arm/shoulder strain, shoulder pain, sternum strain and sternoclavicular ("SC") joint strain. Claimant's medical treatment primarily included work restrictions, physical therapy and pain medication.

4. The physical therapy records reflect that treatment was directed at pain at the right SC joint, and along the clavicle. The treatment included stretches and exercises for multiple muscles around the shoulder joint.

5. On September 24, 2012, Claimant returned to regular duty with Employer.

6. By October 30, 2012, Claimant had responded to the conservative treatment measures and reported two pain free days to Dr. Samuel Chan. At that visit, Dr. Chan did not note any visible abnormalities, nor did he document any loss of range of motion.

7. At a physical therapy appointment on November 6, 2012, Claimant reported no pain in the right upper extremity. The physical therapist, Catherine Kent documented the same range of motion in the right shoulder as in the left. Claimant reported that she continued to take medication on a daily basis every morning.

8. On November 6, 2012, Dr. Dixon placed Claimant at maximum medical improvement (MMI) without impairment, restrictions or recommendations for maintenance care.

9. Claimant became a supervisor sometime around November 2012 which did not require her to do as much work with her arms.

10. Claimant testified that while she experienced some pain in her right upper extremity, she never sought medical treatment.

11. The Employer lost the contract with the hotel to which Claimant was assigned. The contract ended effective June 17, 2013. In the week or so leading up to June 17, 2013, Claimant moved supplies and equipment out of the hotel.

12. While moving supplies, Claimant experienced increased pain in her right shoulder and upper chest. Claimant testified that she reported the injury to Maria Juliet, a receptionist for Employer. Ms. Juliet referred Claimant back to Concentra for treatment.

13. Records from Concentra Medical Centers indicate that Claimant returned for treatment on June 25, 2013, which is consistent with Claimant's testimony concerning Ms. Juliet's referral back to Concentra.

14. Dr. Villavicencio evaluated the Claimant at Concentra on June 25, 2013. Dr. Villavicencio recommended restrictions of no lifting over 10 pounds. He also prescribed medications, but the records do not reflect what type or dosage.

15. It is apparent from the medical records that Dr. Villavicencio and Concentra treated Claimant's recurrent symptoms as part of her July 31, 2012 claim.

16. On July 16, 2013, Claimant saw Dr. Chan. Dr. Chan noted that prior to the appointment on July 2, 2013, Claimant had complained of severe pain in her right shoulder and at the SC joint. He noted that he performed a subacromial space injection which had been rather beneficial. The Claimant reported no pain.

17. Claimant saw Dr. Villavicencio on July 23, 2013 for follow up. Claimant reported increased symptoms in the SC joint due to increased workplace activities. Dr. Villavicencio noted a mild visible deformity at the SC joint.

18. Dr. Villavicencio imposed work restrictions that included no use of the right arm. Dr. Villvicencio referred the Claimant for an evaluation by an orthopedic specialist. He diagnosed shoulder pain and SC joint sprain; recurring pain at SC, improved in AC.

19. On August 16, 2013, Claimant saw Dr. Rajesh Bazaz, for the orthopedic evaluation. Dr. Bazaz noted "a little bit of swelling over the SC joint but no gross deformity." He documented pain on palpation at the SC joint and very minimal positive impingement findings. Dr. Bazaz felt that there were no good surgical options for the SC joint, but that an injection at the SC joint could be done under fluoroscopic or CT guidance. He noted that Claimant would consider this treatment and follow up if she chose to undergo the injection.

20. Following her visit with Dr. Bazaz, Claimant continued with physical therapy.

21. On September 24, 2013, Claimant returned to see Dr. Villavicencio. She had declined to undergo the injection Dr. Bazaz had recommended, and because there were no further treatment options, Dr. Villavicencio placed Claimant at MMI. For maintenance care he recommended finishing physical therapy, six months of Naproxen, and follow up visits with Dr. Chan for six months. Dr. Villavicencio did not recommend permanent restrictions. With regard to permanent impairment, Dr. Villavicencio assigned Claimant a 6% upper extremity rating for lost range of motion.

22. Respondents filed a Final Admission of Liability consistent with Dr. Villavicencio's opinion and Claimant timely requested a DIME. Ultimately, Dr. Brian Beatty was selected as the DIME physician.

23. On October 15, 2013, Claimant returned to see Dr. Chan. Dr. Chan noted that since September 24, 2013, the Claimant has had progressive pain over the entire right shoulder girdle area without radiation, numbness or tingling. On examination, Dr. Chan noted tenderness to palpation over the right AC joint and subacromial space, and a positive impingement sign. Dr. Chan performed an injection into the subacromial space.

24. Claimant returned to see Dr. Villavicencio on November 7, 2013. She complained of a three to four week history of pain in the right paraspinous cervical and trapezius along with persisting SC pain. Dr. Villavicencio recommended reopening the claim and made a referral to Dr. Burris due to Claimant's delayed recovery. Dr. Villavicencio also indicated that if the case was reopened the Claimant's work hours should be modified to six hours per day, and that she should return to physical therapy.

25. Dr. Beatty performed the DIME on March 5, 2014. Claimant reported to him that her symptoms had worsened. She reported pain radiating from her shoulder down into her elbow and to her chest and upper back. During his physical examination of the Claimant, Dr. Beatty noted tenderness to palpation over the SC joint and shoulder girdle including the rhomboids, pectoralis, infraspinatus, trapezius, supraspinatus and teres minor.

26. In his report, Dr. Beatty noted that on November 6, 2012, Claimant was "pain free and functioning normal." He concluded that Claimant's current symptomatology was unrelated to her July 31, 2012 claim because Claimant's pain did not return for almost one year and that her constellation of symptoms suggested other problems such as tendinitis and impingement of her shoulder inconsistent with a SC strain.

27. Dr. Beatty noted a 14% upper extremity rating which he did not attribute to the admitted work injury.

28. Claimant testified that around the end of July 2014, she could no longer continue working for Employer due to the pain in her right shoulder. She resigned her position with the Employer. She has not returned to work since leaving work for Employer.

29. Claimant retained Dr. Hugh Macaulay to conduct an IME which occurred on September 30, 2014. Claimant reported to Dr. Macaulay that she had neck pain, right arm pain, shoulder pain, depression and inability to sleep.

30. Dr. Macaulay noted that Claimant's range of motion had worsened since Dr. Beatty's evaluation. Dr. Macaulay determined that Claimant's current impairment rating would be 16% of the upper extremity.

31. Dr. Macaulay concluded that Claimant suffered from chronic instability of the SC joint with anterior subluxation of the clavicle. He recommended an MRI arthrogram of the shoulder to help define any underlying derangement.

32. During the hearing, Dr. Macaulay testified that he disagreed with Dr. Beatty's opinion that Claimant's newer right shoulder symptoms would be unrelated to an injury to the SC joint. Dr. Macaulay explained the role and physiology of the SC joint. He explained that the SC joint and the clavicle serve as the buttress to the shoulder and that instability at the SC joint would lead to instability of the shoulder. He directly attributed Claimant's loss of function in the shoulder to lost function in the SC joint. He

concluded that Claimant required an MRI arthrogram of the right shoulder in order to determine the extent and nature of the right shoulder problem.

33. Dr. Macaulay also explained that once an individual sustains a subluxation of the SC joint, they are more prone to future subluxations.

34. Dr. Macaulay opined that Dr. Beatty erred in his conclusion that Claimant was at MMI. Dr. Macaulay also testified that Dr. Beatty erred in concluding that Claimant's right shoulder symptoms were not caused by the subluxation of her SC joint.

35. The ALJ credits the opinions of Drs. Macaulay and Villavicencio as more persuasive than those of Dr. Beatty. Dr. Macaulay provided a detailed explanation concerning how Claimant's newer symptoms relate back to the original injury. In addition Dr. Villavicencio believed that Claimant's presentation in June 2013 related back to the original injury and he even recommended reopening the claim in November 2013. Dr. Beatty opined that Claimant's symptoms in June 2013 could not be related to the original injury because "almost 1 year" had elapsed between the time Claimant reported resolution of her symptoms and the resurfacing of similar symptoms. He also believes that because Claimant suffers from some newer symptoms in addition to SC joint pain, that none of the symptoms are related to the original injury. The ALJ is not persuaded that Claimant's lack of symptoms for seven months (rather than one year) somehow severs the causal connection between the original injury and the resurfacing of similar symptoms. Claimant's job duties had changed causing her to use her arms less which plausibly explains why her symptoms had subsided for seven months then returned when her activities increased.

36. Dr. Beatty's opinion also ignored that the Claimant specifically complained to him about recurrent SC joint pain, a symptom consistently related to the original injury throughout the records.

37. Clear and convincing evidence demonstrates that Claimant's ongoing symptoms are related to her initial industrial injury, and that Dr. Beatty's determination to the contrary was wrong. Dr. Villavicencio's November 2013 recommendation to reopen WC 4-932-919 supports the finding that Claimant's recurrent symptoms relate back to the initial injury.

38. Dr. Macaulay opined, and the ALJ agrees, that Claimant is not at MMI. She needs additional treatment to cure and relieve her of the effects of July 2012 industrial injury.

39. The Claimant has failed to prove, by a preponderance of the evidence, that she sustained a new, compensable injury to her right upper extremity on June 17, 2013 (W.C. No. 4-958-107). As found above, the Claimant's recurrent symptoms relate back to the initial injury.

40. The Respondents admitted for an AWW of $375.66. The Respondents, however, assert that the wage records admitted into evidence reflect an AWW of $318.73. The Respondents calculated that over an 86-week period of time from March 15, 2012 through November 8, 2013, the Claimant earned $27,464.74 making her AWW $318.73. The ALJ is not persuaded to reduce the AWW based on wages Claimant earned months after her injury. Further, the ALJ is not persuaded that the AWW should be adjusted at this time. Thus, the admitted wage of $375.66 remains in effect.

41. The Claimant has failed to prove entitlement to any temporary partial disability for the period of time from July 31, 2012 and November 6, 2012; or for the period of time from June 17, 2013 through August 3, 2014. The Claimant presented no persuasive evidence that she experienced a partial wage loss as a result of her industrial injury.

42. Claimant's job duties for the Employer included cleaning hotel rooms, making beds, vacuuming, and cleaning bathrooms. Claimant resigned her position with the Employer because she could not clean anymore. Prior to Claimant's resignation on November 7, 2013, Dr. Villavicencio had recommended Claimant work modified duty with no more than six hours of work per day.

43. On September 30, 2014, Dr. Macaulay recommended that Claimant work sedentary duty due to her right shoulder. According to Dr. Macaulay's report, Claimant last worked on August 4, 2014.

44. The Claimant has proven, by a preponderance of the evidence, that she was temporarily and totally disabled as of August 5, 2014 and continuing. The period from August 5, 2014 through the hearing date, both dates inclusive, equals 41 weeks and 3 days. Claimant's admitted TTD rate is $250.44. As of the date of the hearing, past due TTD benefits totaled $10,375.37.

CONCLUSIONS OF LAW

General

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Compensability of W.C. 4-958-107 Injury (June 17, 2013)

A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. § 8-41-301(1)(c), C.R.S.; *Parra v. Ideal Concrete*, W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 7, 1998].

As found, the Claimant failed to prove that she sustained a compensable injury to her right upper extremity on June 17, 2013 (W.C. No. 4-958-107).

Overcoming the DIME for W.C. 4-932-919

Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097

(ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

As found, Claimant has established by clear and convincing evidence, that it is "highly probable" that Dr. Beatty erred in concluding that Claimant is at MMI because her ongoing right shoulder complaints were unrelated to her industrial injury. Claimant is not at MMI and requires additional treatment to cure and relieve the effects of her industrial injury.

Medical Benefits

To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P.2d 583 (Colo. App. 1994). Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Morey Mercantile v. Flynt,* 47 P.2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

Claimant has established that she is entitled to reasonable and necessary medical treatment related to her right shoulder injury. Specifically, the MRI arthrogram recommended by Dr. Macaulay is reasonable, necessary and related to Claimant's industrial injury. However, any additional treatment must be performed by authorized medical providers within the chain of referral.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

The Respondents urge the ALJ to reduce Claimant's admitted AWW based on wages Claimant earned both before and well after her industrial injury. As found above,

the ALJ is not persuaded to reduce the Claimant's AWW based on the evidence presented. Thus, the admitted wage of $375.66 remains in effect.

Temporary Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury or disease caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. Section 8-42-103, C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). There is no statutory requirement that a claimant must present medical opinion evidence from an attending physician to establish her physical disability. *Lymburn v. Symbois Logic,* 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary disability. *Id.*

Claimant made little or no effort to present evidence regarding temporary partial disability benefits. To the extent the Claimant expects the ALJ to review the wage records admitted into evidence and determine that she suffered a partial wage loss, such request is unreasonable. Claimant offered no testimony concerning any partial wage loss in 2012 or 2013. As such, her request for TPD is denied.

Claimant has established by a preponderance of the evidence that she is entitled to TTD beginning on August 5, 2014 until terminated by law. Claimant has demonstrated that her work injury has contributed to her wage loss. According to Dr. Villavicencio's report dated November 7, 2013, Claimant required reduced work hours due to her work injury. In addition, Dr. Macaulay opined that Claimant should work sedentary duty. Claimant's testimony that she could no longer perform her job duties due to her shoulder pain was credible and persuasive. As such, Claimant became temporarily and totally disabled on August 5, 2014, the day after she resigned her position. Claimant continues to be temporarily and totally disabled, especially since she has had no meaningful medical treatment for over a year.

ORDER

It is therefore ordered that:

A. The Claimant failed to prove that she sustained a compensable injury to her right upper extremity on June 17, 2013 (WC No. 9-958-107).

B. Claimant has proven by clear and convincing evidence that the DIME physician erred when placing her at MMI for the July 31, 2012 injury (WC

4-932-919) and finding that none of her recurrent symptoms were related to that injury.

C. Respondents shall pay the costs of medical treatment, designed to cure and relieve the effects of the July 31, 2012 injury.

D. Claimant's AWW remains $375.66, with a corresponding TTD rate of $250.44. Respondents' request to modify the AWW is denied.

E. Claimant's request for TPD is denied.

F. Respondents shall pay the Claimant temporary total disability benefits from August 5, 2014 and ongoing at the admitted TTD rate of $250.44. As of the date of the hearing, past due TTD benefits totaled $10,375.37.

G. Respondents shall continue to pay the Claimant temporary total disability benefits of $250.44 per week from May 21, 2015 and continuing until terminated pursuant to law.

H. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

I. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 9, 2015

DIGITAL SIGNATURE:

L. Broniak

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-958-164-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 7, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/7/15, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 and 2 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on October 19, 2015. On October 19, 2015, the Respondents filed objections, which essentially argue for the Respondents' additional spin on the facts, requesting supplementation of the Findings. Some objections are meritorious and incorporated into the final version of the decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The paramount issue to be determined by this decision concerns the Respondents request to overcome the Division Independent Medical Examination (DIME) of Jonathan Bloch, D.O., whose opinion is that the Claimant is not at maximum medical improvement (MMI). If the DIME is not overcome, medical benefits (to improve the Claimant's condition) and average weekly wage (AWW) are at issue. The parties agreed that the issues of temporary disability benefits and the recommended reverse total shoulder arthroplasty should be reserved.

At the commencement of the hearing, the Respondents raised the threshold issue that DIME Dr. Bloch had a conflict because he had treated the Claimant a couple of times before performing the DIME. Division of Workers Compensation Rules of Procedure (WCRP), Rule 11 (H), 7 CCR 1101-3, provides disqualification of a DIME if the appearance of or an actual conflict of interest exists, as defined by subsection (1) – (3). Having treated the Claimant a couple of times in the past and the treatment relationship having been severed after a sufficient passage of time, the ALJ determines that neither an appearance of nor an actual conflict exists in this case, however, since Dr. Bloch may have to perform a follow up DIME, the ALJ determined that another authorized treating physician (ATP), who is not with Concentra (Dr. Bloch's organization) should be selected by the Respondents. On October 8, 2014, the Respondents designated John Raschbacher, M.D. (who is not with Concentra) as the Claimant's new ATP.

The Respondents bear the burden of proof, by clear and convincing evidence to overcome the DIME.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that the Claimant's AWW is $524.17.

2. The Claimant is a 63 year old worker who sustained a compensable injury to his left shoulder on June 9, 2014, when he picked up a roughly 35 lbs. round piece of scrap metal about 2 feet in diameter and dense, grabbing from the waist level to throw it into a bin around shoulder level. He felt his left shoulder pop with immediate focal sharp anterolateral stabbing/burning pain and slight hot nerve pain radiating to the bicep region.

3. Upon timely reporting of the incident, the Employer sent the Claimant to Concentra Medical Center. At Concentra, the Claimant treated with Glenn Petersen, PA (Physician's Assistant); Jonathan Bloch, D.O; Steven A. Abrams, M.D; Robert Dixon, M.D; Mark S. Failinger, M.D; Keith A. Meier NP (Nurse Practitioner); John D. Papillion, M.D; Syketha Sprague RN (Registered Nurse); Darla Draper,. M.D; Diane K. Adams, D.O; Terrell Webb, M.D; Valerie Maes PA-C; and, Bryan Counts, M.D.

4. The Claimant treated conservatively for his left shoulder. On two occasions Dr. Bloch treated the Claimant, June 14, 2014 and August 14, 2014. Dr. Bloch addressed Dr. Papillion's opinion on August 14, 2014.

5. On November 6, 2014 Dr. Papillion stated, "[Claimant] has a massive rotator cuff tear with rotator cuff arthopathy in his left shoulder. I would recommend reverse total shoulder arthroplasty. We will get the surgery authorized and contact his daughter for dates. I will see him postop. No use of the Left arm."

6. The proposed surgery never occurred. Instead, on December 1, 2014, Valerie Maes, PA-C wrote: "Patient is returning for a recheck of injuries stated below left shoulder pain from rotator cuff tear and severe osteoarthritis (as evidenced by MRI which I reviewed) ***patient presents today for re-evaluation despite being told by Dr. Counts over the telephone on 11/17/2014 that his shoulder injury has been determined to be non work related and that his case has been closed*** (emphasis supplied)***.*** He states (through an interpreter) that he does not know what to do now. I advised him that he needs to follow-up with Dr. Papillion through his private insurance for further evaluation and care" (Exhibit 2, page 8).

7. On December 4, 2014, Dr. Counts placed the Claimant at MMI without impairment, which in the opinion of James Lindberg, M.D., the Respondents' Independent Medical Examiner (IME), was done because it was communicated to Dr. Counts that the Claimant's shoulder injury was "non work related and that his (Claimant's) case has been closed." "Maximum Medical Improvement" is defined as a "point in time when any medically determinable physical…impairment has become stable and no further treatment is reasonably expected to improve the condition. § 8-40-201 (11.5), C.R.S. Apparently, Dr. Counts abdicated his independent medical judgment in favor of the insurance carrier's determination that he Claimant's injury was **not work related** (emphasis supplied). Consequently, Dr. Counts' opinion concerning MMI is entitled to **no** weight whatsoever.

8. The Respondents filed a Final Admission of Liability (FAL), based on Dr. Counts' opinion, on December 10, 2014, admitting for medical benefits only and fixing an MMI date of December 1, 2014.

9. The Claimant timely objected to the Final Admission and, through counsel, applied for a DIME. Through the strike process Jonathon Bloch, D.O., was selected.

10. Dr. Bloch conducted the DIME on April 17, 2015. In reviewing the DIME report, the ALJ infers and finds that it is more probable than not that Dr. Bloch did not recognize Claimant, or realize that the Claimant had previously treated with him. The Respondents argue that this is speculative and, therefore, Dr. Bloch's opinion should be discredited. Au contraire, Dr. Bloch is a Level 2 accredited physician with the Division of Workers' Compensation and would not have been allowed to perform a DIME if he were not Level 2 accredited. The ALJ, therefore, accords a presumption of integrity and propriety to Dr. Bloch, which the Respondents have failed to overcome.

11. Dr. Bloch concluded that the Claimant was not at MMI. Although the Claimant had sustained a previous shoulder injury in 2006 with the same employer, "it got better without ongoing pain or problems whatsoever and MMI occurred only a week after the 2006 injury. The 2006 injury resolved quickly and completely without any interim pain, limitations or need for medical care until this new injury" (Respondents' Exhibit B, page 6).

12. Dr. Bloch explained, "[Claimant] has worked full heavy duty without pain, limitations or need for medical care on an ongoing basis for roughly 12 years, until his shoulder injury on 06/06/14. [Claimant] now has severe left shoulder damage for which reverse total shoulder arthroscopy surgery is his most advanced option. [Claimant's] current condition is not associated to anything pre-existing, nor would his current prognosis exist had he not sustained this industrial shoulder injury. His current problems stem from massive rotator cuff tearing that occurred when he was throwing metal overhead as part of his work duties on 04/09/14 [sic]."

Respondents' Independent Medical Examinations (IMEs)

13. Wallace K. Larson, M.D., performed a medical record review of the Claimant's treatment records on September 1, 2014. Dr. Larson was of the opinion that the Claimant sustained a mild shoulder strain for which he is at MMI without impairment. To the extent that Dr. Larson's opinion contradicts the opinions of Dr. Bloch they are far less persuasive than dr. Bloch's opinions.

14. James Lindberg, M.D., performed an IME of the Claimant on August 11, 2015. Dr. Lindberg stated the following opinion: "It appears that his rotator cuff tear was a chronic situation that had a mild exacerbation. He has improved significantly in his range of motion since his IME (DIME) by Dr. Bloch and I see no upside doing a reverse shoulder arthroplasty. I would agree with Dr. Failinger that his rotator cuff tear is probably not repairable. I think for all intents and purposes that he is at MMI as of this date." To the extent that Dr. Lindberg's opinion contradicts the opinions of Dr. Bloch they do not rise to the level of making it highly probable, unmistakable and free from

serious and substantial doubt that Dr. Bloch's opinion that the Claimant is not at MMI is in error.

15. Dr. Lindberg testified at hearing. Although Dr. Lindberg testified that the reverse total shoulder surgery was not recommended, Dr. Lindberg testified that placing Claimant at MMI on December 4, 2014 was improper. He testified that further medications to control pain, inflammation and muscle spasms would be appropriate. Dr. Lindberg further testified that additional physical therapy would have been appropriate in December 2014. It was Dr. Lindberg's opinion, however, that further treatment would be related to the Claimant's underlying condition and not the admitted injury herein. For the reasons stated herein above, the ALJ rejects this causal opinion concerning the need for further treatment.

16. Dr. Bloch, in his DIME report, recommended medications, physical therapy, massage therapy, acupuncture, steroidal shoulder injections, and evaluation with an orthopedic surgeon for consideration of a reverse total shoulder surgery (Respondents' Exhibit B, page 7). Consequently, it would be premature to consider the issue of reverse total arthroplasty until another independent orthopedic surgeon (other than Dr. Papillion) evaluates the Claimant

17. Other than having treated the Claimant two times previously, the Respondents pointed to no other persuasive evidence that a direct and substantial conflict of interest was present at the time of the DIME with Dr. Bloch. The Claimant treated with numerous providers at Concentra. In their objections, the Respondents speculate that Dr. Bloch may have a financial incentive not to place the Claimant at MMI so he could further treat the Claimant. This assertion implies a violation of the Hippocratic Oath and it is unfounded. This rank speculation has no place in our system of jurisprudence. Nonetheless, the point is moot because the Respondents have designated Dr. Raschbacher, who is not with Concentra, to prospectively be the Claimant's authorized treating physician (ATP), which the ALJ ordered during the hearing.

18. Because Dr. Bloch continues to be the selected DIME in this claim, Concentra is no longer authorized to treat the Claimant.

Ultimate Findings

19. The ALJ finds Dr. Counts and Dr. Larson's opinions as significantly lacking in credibility for the reasons herein above described. While IME Dr. Lindberg was credible, the ALJ finds DIME Dr. Bloch's opinions on causality and the fact that the Claimant is not at MMI from the admitted injury of June 9, 2014 more credible and controlling herein.

20. Between conflicting opinions on causality and MMI, the ALJ makes a rational choice to accept the opinions of DIME Dr. Bloch and to reject all other opinions to the contrary.

21. The Respondents have failed to demonstrate that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Bloch's opinion that Claimant is not at MMI from the admitted injury is in error.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Counts and Dr. Larson's opinions as significantly lacking in credibility for the reasons herein above described. While IME Dr. Lindberg was credible, the ALJ finds DIME Dr.

Bloch's opinions on causality and the fact that the Claimant is not at MMI from the admitted injury of June 9, 2014 more credible and controlling herein.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions on causality and MMI, the ALJ made a rational choice to accept the opinions of DIME Dr. Bloch and to reject all other opinions to the contrary.

Overcoming the Division Independent Medical Examination (DIME)

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office, supra*; *Eller v. Indus. Claim Appeals Office, supra* at 400. "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME

physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Respondents failed to demonstrate that it was highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Bloch's opinion that Claimant is not at MMI from the admitted injury was in error.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents, having failed to overcome the Division Independent Medical Examination opinion of Jonathan Bloch, D.O., the Claimant is not at maximum medical improvement.

B. Any and all issues not determined herein, including the appropriateness of the reverse total shoulder arthroplasty, are reserved for future decision.

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

The issues determined in this decision involve compensability and Claimant's entitlement to medical benefits for an alleged left knee injury. The specific questions answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained an acute left knee meniscal tear, in the course and scope of his employment on April 18, 2014; and if so,

II. Whether Claimant established, by a preponderance of the evidence, that the arthroscopic surgery, specifically the left meniscal tear debridement procedure, performed by Dr. Romero was reasonably necessary and causally related to the April 18, 2014 injury.

STIPULATIONS

The parties reached the following stipulations prior to the commencement of hearing:

I. Should the claim be found compensable, the parties stipulated that Claimant's average weekly wage is $922.16.

II. Claimant withdrew, with Respondent's concurrence, the endorsed issues of temporary total disability and temporary partial disability without prejudice.

III. Claimant withdrew, with prejudice and Respondents concurrence, the endorsed issue of "Right of Selection".

IV. Respondent reserved the Workers' Compensation medical fee schedule for any medical benefit awarded or ordered.

The parties' oral stipulations are approved by the ALJ.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition testimony of Nathan Walter and Alex Romero, M.D., the ALJ enters the following findings of fact:

1. Claimant is a long term employee of Respondent-Employer. He has worked in the capacity of a correctional officer for the past 15 years. His position requires that he

make security rounds every 30 minutes during an 8.5 hour shift. To complete a round, Claimant must ascend and descend four flights of stairs containing 20 steps each.

2. Claimant was assigned to the graveyard shift during April 2014. On April 17, 2014, after completing his fifth set of rounds at approximately 11:45 p.m., Claimant testified that his left leg felt "tight".

3. As Claimant began his sixth set of rounds at approximately 12:15 a.m. on April 18, 2014, he developed left knee pain. Claimant testified that as he put his left foot down on the fourth step of the first flight of stairs and readied himself to ascend this stair; he heard a pop and felt a burning sensation in his left knee. He testified he had immediate pain and his knee began to swell.

4. Claimant denied having pain or prior left knee injuries before this alleged incident. Claimant testified that he was simply walking forward up the stairs when the injury occurred. He was not twisting and denied stumbling or falling.

5. Claimant testified he finished his rounds with difficulty, and upon returning to his work station called his supervisor, Captain Nathan Walter to report the incident. He told Capt. Walter that his knee hurt, and that he could not continue to work. Claimant reported swelling of the knee and that he showed Capt. Walter that swelling. Claimant then left work.

6. Capt. Walter testified by deposition on July 28, 2015. Capt. Walter testified that Claimant reported an injury to him sometime between 11:00 p.m. and midnight. He stated Claimant, "[C]alled me up and said that his knee was hurting him; that he had been going up and down the stairs as part of his duties that he was assigned to that night." (Walter depo. pgs. 5-6: 19-2). "He said, basically, in his words, if I remember right, Boss, I've been trying to do it, but my knee's killing me. I don't know if I can keep going up the stairs anymore tonight." (Walter depo. pg. 17: 18-21). "[H]e just said, I tried going up the stairs, and it just started killing me." (Walter depo. pg. 18: 6-7). Claimant said it started hurting him when he was going up the stairs (Walter depo. pg. 18: 14). Capt. Walter testified that he did not <u>remember</u> Claimant "saying anything about a pop in his knee" at the time he spoke with Claimant. (Walter depo. pg. 18: 21-23)(emphasis added). Capt. Walter testified that he went to see Claimant following this incident during which time Claimant showed him his left knee. According to Capt. Walter's testimony, Claimant's left knee appeared swollen. (Walter depo. pg. 7: 18-23).

7. After meeting with Claimant, Capt. Walter directed him to fill out a first report of injury with Lieutenant Sheryl Salazar. (Walter depo. pg. 6: 5-21). According to Capt. Walter, Lt. Salazar is diligent about completing the necessary required paperwork associated with work place injuries so that the matter is reported to Human Resources (HR). Per the testimony of Capt. Walter, Lt. Salazar does not report work injuries directly to Human Resources (HR). Rather, she simply takes the report from the injured worker and completes the first report of injury paperwork for delivery to the staff "resource coordinator" who in turn, forwards it to HR. Capt. Walter testified that Lt.

Salazar would not delay the completion of the necessary paperwork associated with an injury claim. To the contrary, per Captain Walter's testimony, Lt. Salazar took the claim "that night", because he called and spoke to her about it. (Walter depo. pg. 14: 8-22).

8. Claimant testified that he completed the paperwork with Lt. Salazar on Tuesday, April 22, 2014. Claimant testified that he was unable to go to a doctor for about a month following the injury because he was waiting for a call from HR to send him to an appointment with a work comp doctor. (Id., p. 24). Claimant testified that he had to fill out a second incident report because the first one was lost.

9. Based upon the evidence presented, including Captain Walter's testimony that Claimant completed the first report of injury paperwork with Lt. Salazar (Walter depo. pg. 6: 15-21) combined with his testimony that Lt. Salazar took Claimant's report of injury, the ALJ credits Claimant's testimony to find that the original report of injury, more probably than not, was completed on April 22 and subsequently misplaced either by the resource coordinator or HR. The ALJ finds further that this resulted in Claimant's need to complete a second incident report on May 22, 2014 and a delay in his referral to an authorized provider. Consequently, the ALJ rejects Respondents suggestion that Claimant's testimony regarding the date he completed a first report of injury with Lt. Salazar is incredible. Based upon the evidence presented, the ALJ finds that Respondent-Employer had notice of the claim before May 22, 2014.

10. On June 10, 2014, Claimant was evaluated by Dr. Douglas Scott at Centura Centers for Occupational Medicine (CCOM)(Claimant's Exhibit 9, pg. 44). The treatment note from this encounter indicates that Claimant provided a history of constant, burning, stabbing pain in both knees, made worse by stairs. There is no report of Claimant hearing a "pop" as he was ascending the stairs documented in the report. Dr. Scott noted that a prior MRI of the right knee demonstrated "patellofemoral chondromalacia". He opined that Claimant's symptoms were likely emanating from patellofemoral syndrome caused by "pre-existing chondromalacia patella aggravated with walking up and down stairs". The ALJ infers from his report that Dr. Scott felt that Claimant's left knee symptoms were caused by pre-existing patellofemoral chondromalacia because he had symptoms of the same in the right knee, which condition was confirmed by the prior MRI. Dr. Scott referred Claimant to physical therapy (PT).

11. Conservative care, including the abovementioned PT failed to result in lasting improvement. By July 10, 2014, Claimant had completed his initial round of PT without "significant objective improvement." (Claimant's Exhibit 9, pg. 53 & Exhibit 10, pg. 72). He reported worsening bilateral knee pain during a follow-up appointment at CCOM with Dr. Paul Merchant on July 17, 2014. Although the report generated from this appointment indicates that Claimant had bilateral knee pain, the report indicates that Claimant only had difficulty in transferring on and off the exam table secondary to left knee pain. Directed examination of the left knee revealed mild diffuse swelling, pain laterally to palpation, pain at the extremes of range of motion, crepitus under the left patella and 1+ pitting edema over the left shin. Dr. Merchant ordered an MRI of the left knee to rule out (r/o) left knee patellofemoral syndrome (PFS).

12. Claimant underwent an MRI of his left knee at Pueblo Imaging Center on July 28, 2014 (Claimant's Exhibit 7). The MRI revealed: "1. Acute radial tear posterior horn medial meniscus; 2. Acute grade I-II injury medial collateral ligament; 3. Probable mild chronic proximal patellar tendinosis; 4. Joint effusion". Regarding the patellofemoral compartment the MRI report notes: "Evaluation of the patelleofemoral compartment shows fluid accumulation but no other significant abnormality".

13. Claimant was referred to Dr. Robert William Nolan for orthopedic consult regarding his left knee following his MRI. Dr. Nolan evaluated Claimant on August 1, 2014 documenting the following:

> . . . [W]ork-related injury when he was walking up and down [stairs] experienced acute pain in both knees swelling left and right knees the right knee a lot better then left knee pain is continued since April. He said no injections. MR study confirmed complex tear posterior horn medial meniscus and chondromalacia changes, intact ligaments, no bone bruise.

Dr. Nolan opined that the tear of the posterior horn of the medial meniscus was both "complex" and "degenerative" in nature. He gave Claimant a left knee intra-articular cortisone injection. He recommended post-injection therapy and a follow-up appointment in 3-4 weeks for consideration of additional treatment options, including possible arthroscopic intervention should Claimant's pain persist. (Resp. Ex. D., pg. 32). Dr. Nolan's report does not state that Claimant heard or felt a pop in his left knee while ascending a stair at work, and there is nothing stating or alluding to a traumatic injury in this report.

14. Claimant returned to CCOM on August 4, 2014 during which time he was re-evaluated by Dr. Merchant who noted Claimant's MRI findings. Regarding the mechanism of injury Dr. Merchant documented the following: "[Claimant] reported significant swelling of both knees in April associated with stair climbing at work. There was no single precipitating event described by the employee". Based on his testimony, the ALJ finds that Claimant disputes that there was no work related cause precipitating his left knee symptoms. Rather, he testified that he told Capt. Walter, his CCOM providers, Dr. Nolan and his physical therapist that his knee popped as he was ascending the stairs which pop was followed by burning pain. As noted above, Capt. Walter could not recall whether Claimant mentioned that his knee popped. Moreover, while the initial medical record for Dr. Scott does not document a "pop", it reflects a report by Claimant of burning pain and an objective finding of joint swelling, as testified to by Claimant and in the case of swelling, observed by Capt. Walter. Based upon the evidence presented, including the objective findings on MRI coupled with Dr. Romero's testimony, the ALJ credits the testimony of Claimant to find that, more probably than not he heard a pop in his left knee as he was ascending the stairs in the early morning hours of April 18, 2014. Consequently, the ALJ rejects Respondents contention that

Claimant changed his story of the injury's occurrence to include hearing a "pop" to better support his claim.

15. On August 25, 2014, Claimant returned to Dr. Nolan for a post-injection follow up. (Claimant's Exhibit 5, pg. 23-25). Claimant indicated that the injection did not help and he was still having a lot of pain. (Id.).

16. On September 24, 2014, Dr. Nolan examined Claimant. Dr. Nolan noted that Claimant had:

> Continued left knee posterior medial joint line pain due [to] work related posterior horn medial meniscal tear, anterior patellofemoral pain possible plica and/or chondromalacia patella both conditions work-related nature and failed to improve with nonsurgical treatment.
> (Claimant's Exhibit 5, pg. 27).

Claimant expressed a desire to proceed with surgery and Dr. Nolan sought authorization from Respondent-Employer noting as follows: "In my opinion medical necessity for left knee surgery is a direct consequence of his work-related injury in April this year[.]" (Claimant's Exhibit 5, pg. 27).

17. On November 24, 2014, Claimant underwent an x-ray of his left knee. The x-ray revealed mild tricompartmental degenerative changes. (Claimant's Exhibit 4).

18. On December 9, 2014, Claimant was examined by Dr. Alex Romero, M.D. (Claimant's Exhibit 5, p. 33). Dr. Romero noted that:

> Today I am seeing this patient for first evaluation of a left knee injury that occurred on [2/18/2014]. He works for DOC. He was walking he stepped wrong and felt a pop. He's been seeing Dr. Nolan for this for the last several months. He has failed intra-articular cortisone and physical therapy. Is not taking anything for the pain. He an MRI which suggested a meniscus tear.
> (Claimant's Exhibit 5, pg. 34).

19. After reviewing Claimant's x-rays and MRI films, Dr. Romero recommended that Claimant undergo an arthroscopic debridement of his meniscus tear. (Claimant's Exhibit 5, p. 33 & 36). The request for authorization to proceed was denied and Respondent requested that Anjmun Sharma, M.D., a level II accredited, board certified family practice physician who has been practicing occupational medicine primarily since 2005, perform an independent medical examination (IME) to assess the cause of Claimant's left knee's meniscus tear and its relatedness to the alleged injury asserted in this claim.

20. Dr. Sharma, completed the requested IME on April 30, 2015. He opined in writing and later through his hearing testimony that Claimant's left meniscus tear and his

need for a left partial medial meniscectomy were unrelated to his alleged injury event of walking up a stair at work on April 18, 2014. He testified and wrote that while Claimant gave a very clear history of an injury occurring while ascending stairs when he saw Dr. Sharma, "[T]here is no actual mechanism of injury that would account for the level and degeneration of tear in the left knee." (Resp. Ex. A, pg. 7). Claimant did not state that he planted or twisted his knee or his leg, "[W]hich is characteristic and typical as a mechanism of injury for most meniscal injuries." (Id.) Dr. Sharma found the medical records did not contain any documentation that an actual injury occurred on April 18, 2014 (Id.). Dr. Sharma concluded, "I do not believe that the patient sustained a work injury that was alleged to have occurred on April 18, 2014." (Resp. Ex. A, pg. 9) He felt Claimant's left knee condition was due to a long-standing degenerative disease process of arthritis and chondromalacia as seen on the left knee MRI, and diagnosed by Dr. Nolan (Resp. Ex. A, pg. 10). Dr. Sharma testified that Claimant's arthritis and chrondromalacia were pre-existing condition and was not caused or aggravated by his work activity of walking up stairs on April 18, 2014 (Resp. Ex. A, pg. 10). He found it important and informative that Claimant had the same diagnoses and symptoms in his right knee, which he opined supported a conclusion that the condition of the left knee was due to age and a degenerative process (Id.). According to Dr. Sharma, this degenerative process caused Claimant's meniscal tear and his need for medical benefits, including surgery. Dr. Sharma testified simply walking up stairs could not and did not cause Claimant's left knee's meniscus tear because that activity places no force or strain on the meniscus. It is akin to walking, which is an everyday, ubiquitous activity. He further opined that Claimant was predisposed for developing his left knee condition due to [refereeing] sports, coaching sports, running and other recreational activities that the Claimant regularly participated in.

21. On May 7, 2015, Dr. Romero performed a left knee arthroscopy with partial medial meniscectomy. (Claimant's Exhibit 12). The surgical report reflects that inspection of the trochlea was remarkable for a "small 5 × 5 mm area of grade 4 chrondromalacia at the very superomedial aspect" of the left knee in addition to global grade 2 chrondromalacia in the medial compartment of the left knee. The left medial meniscus was remarkable for a "large radial tear at the junction of the posterior body and medial body" which was "debrided back to a stabilized base".

22. Dr. Romero testified by post hearing deposition held August 17, 2015. The ALJ accepts Dr. Romero as a board certified, fellowship trained expert in the field of orthopedic medicine and orthopedic surgery. Dr. Romero is not level II accredited.

23. Dr. Romero testified that Claimant was initially treated by his partner, Dr. Nolan, who treated him conservatively with cortisone injection and physical therapy. (Romero depo. pg. 8). He testified that his focus, when he saw Claimant was on treatment, and not on the cause of the meniscal tear. Regarding the relatedness of the meniscal tear, Dr. Romero also testified, that Claimant's described mechanism of injury "makes it less likely that there would be a high degree of suspicion for a meniscal tear" as simply walking upstairs is not the "most common" way to tear a meniscus. Dr. Romero agreed that the most common way a meniscus is torn is by planting and twisting (Romero depo.

pg. 12: 24-25; pg. 20: 21-25). Nonetheless, Dr. Romero testified meniscus tears are caused by other means. (Romero depo. pg. 12). Furthermore, Dr. Romero testified that in his experience a meniscus tear can be caused by Claimant's description of stepping down on the foot and hearing a pop and that the popping sound that Claimant described was consistent with a meniscus tear. (Romero depo. pg. 12 & 13).

24. Dr. Sharma admitted that that hearing a pop in a knee when planting a foot followed by immediate swelling and pain, as well as heat, could be a sign of some type of internal derangement, but he couldn't say with certainty whether it would be a meniscus tear. Dr. Sharma agreed that a meniscus tear is a type of internal derangement.

25. Dr. Romero testified that while he could not tell if the tear was acute by the time he performed surgery, the MRI revealed an acute meniscus tear and it was unusual to see a tear described as such on MRI. (Romero depo. pg. 8: 17-25 & pg. 9: 1-2). He opined that Claimant's "imaging and his examination were consistent with the described injury, and that after failing conservative measures with physical therapy and cortisone injections, that the next reasonable step to treat his injury would be an arthroscopy. (Romero depo. pg. 9).

26. Dr. Romero testified that when he performed the arthroscopic surgery on Claimant he found some chondromalacia in the medial compartment of Claimant's knee. (Romero depo. pg. 15-16). However, Dr. Romero further testified that these findings did not affect the meniscus. (Id., pg. 16). Moreover, the surgical report indicates that Claimant had sustained a radial tear of the meniscus, not as complex tear as described by Dr. Nolan. As Dr. Romero performed the surgery and visualized the actual tear, the ALJ finds his description of the tear more persuasive than Dr. Nolan's. Based upon the surgical report, the ALJ finds the limited area of severe degenerative change unlikely to be causative of Claimant's meniscal tear. More probably than not, Claimant's meniscal tear was independent of, and unrelated to the degenerative changes noted on the articular surfaces of Claimant's left knee.

27. Dr. Romero testified that based on the mechanism of injury described and his review of the medical records, that it is medically probable that Claimant suffered a meniscus tear while walking up the stairs. (Romero depo. pg. 12). The ALJ infers from this opinion that Dr. Romero believes that Claimant suffered an acute meniscal tear while ascending the stairs to complete his work duties and that the tear is directly related to the conditions of Claimant's employment for Respondent. Based upon a totality of the evidence presented, including the MRI report and Dr. Romero's surgical report, the ALJ finds record support for this opinion.

28. Dr. Romero testified that in his opinion, based on a reasonable degree of medical probability, the arthroscopic knee surgery that he performed was related to the meniscal injury that Claimant sustained on April 18, 2014 and that the surgery was reasonable and necessary based upon his repose to conservative care. (Romero depo. pg. 13-14).

29. Based upon the evidence presented, the ALJ finds the opinions of Dr. Romero credible and more persuasive than the contrary opinions of Dr. Sharma. Accordingly, the ALJ finds that Claimant has proven by a preponderance of the evidence that his employment duties were the proximate cause of his left knee injury and that his need for left knee arthroscopy was related to that compensable industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. *C.R.S. § 8-40-102(1).*

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. *C.R.S. § 8-43-210.* In this case, the ALJ resolves the inconsistencies in the record in favor of Claimant and credits his testimony regarding the events surrounding the incident, the reporting of the incident to Capt. Walter and Lt. Salazar, and the manifestations/symptoms he felt during and after the incident. Furthermore, the ALJ concludes Dr. Sharma's testimony to be contradicted by the weight of the objective findings on the MRI and the more persuasive opinions of Dr. Romero.

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-

related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's injuries arise out of his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. *C.R.S. § 8-43-201.*

G. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum*

Company, W.C. No. 3-850-024 (December 14, 1989). In this case, Claimant has established the requisite causal connection between his work duties and his left knee injury. In concluding that Claimant has proven that he suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a pop in her left knee and felt severe pain. Similar to Mr. Gomez, Ms. Bastian did not "slip, fall, or trip." Also akin to Mr. Gomez, Ms. Bastian was diagnosed with a meniscus tear and "incidental arthritis." Following a hearing, the claim was found compensable. On appeal the respondents argued that the ALJ erred in part on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis. The same is true of the instant case.

H. While Mr. Gomez was found to have degenerative changes in his left knee, he is not asserting that his injuries arose out of the aggravation or acceleration of a pre-existing condition. Rather, Claimant asserts that he suffered a discrete injury to his left meniscus when he placed his foot down on a step and began to ascend the stair. Indeed, Respondents admit in their position statement that the special hazard doctrine articulated in *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo.App. 1992), has no applicability in this case. Consequently, this order does not address whether the stairs at Claimant's workplace constitute a special hazard of employment.

I. Concerning compensability, Respondent argues principally that the described mechanism of injury, specifically the everyday act of ascending stairs, does not place stress, strain, or force on the meniscus sufficient to cause an acute tear. Accordingly, Respondent asserts that Claimant's meniscal tear is either degenerative in nature, as suggested by Dr. Sharma, or idiopathic. In any case, Respondent contends that the tear is not work related, because it does not arise out of claimant's employment. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). The undersigned ALJ is not persuaded. As noted above, the ALJ rejects Dr. Sharma's opinions as unconvincing. Furthermore, the ALJ is not persuaded that Claimant's meniscal tear is "idiopathic", i.e. of unknown cause. Rather, as found, Dr. Romero credibly and persuasively testified that Claimant's imaging and physical examination were consistent with the described injury and that Claimant's act of placing his foot down and preparing to ascend a step to complete his security rounds likely caused an acute meniscal tear in the left knee. Consequently, the ALJ is persuaded that the act of ascending the stairs is causative of Claimant's left knee injury.

J. In reaching this conclusion, the ALJ finds Claimant's activities analogous to

the activity causing injury in *Bastian,* expressly the act of ascending a stair. Merely because Claimant was engaged in activity which is performed many times a day outside of work, does not compel a finding that his subsequent injuries are not work-related. To the contrary, Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Here, the evidence presented persuades the ALJ that Claimant's employment caused his meniscal tear because it obligated him to ascend multiple flights of stairs every 30 minutes to complete his security rounds. In keeping with the decision announced in *City of Brighton*, the ALJ concludes that Claimant's meniscal tear would not have occurred "but for" these conditions and obligations of employment. Accordingly, the ALJ finds that the evidence presented supports a conclusion that Claimant's injury arose out of his employment because it would not have occurred but for his employment. *City of Brighton, supra.* Claimant has established the requisite causal connection between his injuries and his work duties. Thus, his injuries are compensable.

Medical Benefits

K. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of the his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). As found, Claimant has established that his need for arthroscopy was directly related to his compensable left knee injury. Nonetheless, the question of whether the arthroscopy was reasonable and necessary must be addressed.

L. The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that the left knee medial meniscus debridement was reasonable and necessary. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Nolan and Dr. Romero to recommend arthroscopy. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that Claimant's left knee arthroscopic procedure was reasonable and necessary to cure and relieve him of the going effects of his injury.

ORDER

It is therefore ordered that:

1. Claimant has established by preponderance of the evidence that he suffered a compensable claim to his left knee on April 18, 2014.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his left knee condition, including, but not limited to the left knee arthroscopic procedure performed by Dr. Romero May 7, 2015.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 27, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-960-460-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 8, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/8/15, Courtroom 1, beginning at 1:30 PM, and ending at 2:30 PM).

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. Respondents' Exhibits A and B were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on October 13, 2015. On October 19, 2015, the Respondents indicated no objections to the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns compensability.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant 9d.o.b. 5/18/50) worked as an office manager for the Employer on the date of injury, February 14, 2014, when his back and right upper extremity (RUE) injuries occurred.

2. During the afternoon of February 14, 2014, the Claimant observed a snow storm picking up outside his office. He walked out to the Employer-provided parking lot at approximately 4:15 PM to clean his windshield of snow. At the time, he was still within normal working hours.

3. The Claimant's only present co-worker that day was a doctor of audiology. The Claimant offered to clean her windshield of snow as well. When he finished clearing the snow from both vehicles, he noticed that his windshield had accumulated ice. He then opened the driver side door, and reached for his ice scraper that lay on the passenger seat. At that point, he slipped and fell, causing injury to his right shoulder and low back.

4. The Claimant then finished scrapping the ice, and returned back into his office to finish the workday.

5. According to the Claimant, he would not have been able to safely operate his vehicle if the snow and ice had not been cleared. The parking lot was used by employees of the Employer and was a benefit of the job. This fact was not disputed by the Respondents. Nor did the Respondents dispute that the Claimant was injured during work hours in the parking lot attached to the Employer's building.

Medical

6. The Claimant was seen by Donna Brogmus, M.D., at the Banner Occupational Health Clinic, on February 6, 2014. Dr. Brogmus diagnosed pain in the lumbar spine, a bilateral shoulder strain and pain in the right hip. The Claimant gave Dr. Brogmus a history of his slip-and-fall injury in the Employer's parking lot two days earlier.

7. On September 15, 2014, the Claimant was evaluated by Nicholas K. Olsen, D.O. The Claimant gave Dr. Olsen a consistent history of the parking lot slip and fall incident. Dr. Olsen diagnosed a right L4 and L5 radiculopathy and a disc protrusion at L4/5.

Ultimate Findings

8. The Claimant's testimony is credible and undisputed.

9. The Claimant's actions of scraping snow off his windshield was during working hours in an Employer-provided parking lot served the interests of the Employer because the Claimant's efforts provided an incidental mutual benefit to the Employer and the Claimant by ensuring the health and safety of the Claimant and his co-employee in order that they may safely drive home from work.

10. The Claimant has proven, by a preponderance of the evidence that he sustained compensable injuries to his low back, shoulders and right hip, arising out of the course and scope of his employment for the Employer herein.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Personal Comfort/Dual Purpose Doctrine

b. Because the health and welfare of an employee is of incidental mutual benefit to an employer, the "personal comfort" doctrine applies herein. *See Ocean Accident & Guaranty Corp. v. Pallaro,* 66 Colo. 190, 180 P. 95 (1919). Thus, the "personal comfort" doctrine, among other things, applies to getting wood for heating a cabin and cooking food [*Ocean Accident & Guaranty Corp. v. Pallaro, supra*] and taking a shower after work [*Divelbiss v. Indus. Comm'n,* 140 Colo. 452, 344 P.2d 1084 (1959)], by extension, as found, it applies to scraping snow off car windshields, during working hours, in an Employer-provided parking lot.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Thereupon, it is incumbent that it be shown that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained compensable injuries on February 4, 2014, arising out of the course and scope of his employment for the Employer herein..

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the

existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained a compensable injury on February 4, 2014, arising out of the course and scope of his employment for the Employer.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-961-697-02 AND 4-960-653

ISSUES

1. Whether the Claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and occurring within the course of her employment with Respondent-Employer.

2. Whether the Claimant has proven by a preponderance of the evidence that she is entitled to medical treatment.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits from September 16, 2014 ongoing.

STIPULATIONS

1. Claimant's Average Weekly Wage is $376.99

2. WC No. 4-960-653 is consolidated into WC No. 4-961-697.

FINDINGS OF FACT

1. The Claimant testified that she began working for Respondent-Employer in its meat packing plant on March 12, 2014 and worked there until her last day of work on September 16, 2014. She testified that she has not received formal notice of termination from this job. The Claimant worked in the Meat Wrapper position, where she was responsible for wrapping, weighing, pricing and labeling meat and related products for retail sale in Respondent's retail grocery stores (see job description at Claimant's Exhibit 6; Respondent's Exhibit B). .

2. Meat Wrappers may work in one of two rooms, the beef room (a/k/a retail room) or the pork room. Employer has only one job description for the Meat Wrapper position, regardless of whether the position is performed in the beef room or the pork room. Both the beef room and the pork room have cement floors.

3. Meat Wrappers working a shift in the beef room would rotate between three different positions during a shift: "bagging off", "feeding the machine", and "packing off." During testimony at the hearing, the Claimant described the details of each position: "Bagging off" required the employee to grab the cuts of meat off of a conveyor belt and place them in bags. "Feeding the machine" required the employee to stand in one position and grab the cuts of meat off of a conveyor belt and feed them into a machine. "Packing off" required the employee to grab previously-bagged cuts of meat off of a conveyor belt and place them on a crate, and then to move the crate

(which weighed about 10-20 pounds) onto a pallet when the crate was full. The employees in the beef room rotate between the stations multiple times per day.

4. Although Meat Wrappers in the beef room would rotate between three different positions, the Claimant testified that the physical duties of the Meat Wrapper position in the beef room and the pork room essentially were the same. It was just that the employees would rotate to different types of machines in the beef room and in the pork room, the employees rotated machines, but it was all the same "packing off" function.

5. Despite the Claimant's testimony that she worked 3-4 shifts per week in the pork room, Employer's Timekeeper records establish that from Claimant's first shift in the pork room on April 5, 2014, through her last date of work on August 18, 2014 (a total of 25 weeks), the Claimant, on average, worked quite a bit less than that in the pork room. See below:

Week End	Shifts in Pork Room	Hours in Pork Room	Total Hrs. worked for the week (Beef & Pork room)	Exhibit
3/15/2014	0	0	23.3	Ex C, p. 17
3/22/2014	0	0	36.1	Ex C, p. 18
3/29/2014	0	0	32.7	Ex C, p. 19
4/5/2014	1	1.8	36.1	Ex C, p. 20
4/12/2014	1	2.0	36.3	Ex C, p. 21
4/19/2014	1	1.2	31.9	Ex C, p. 22
4/26/2014	3	17.2	32.8	Ex C, p. 23
5/3/2014	4	14.8	43.6	Ex C, p. 24
5/10/2014	0	0	34.8	Ex C, p. 25
5/17/2014	2	16	39.3	Ex C, p. 26
5/24/2014	1	7.5	48.8	Ex C, p. 27
5/31/2014	0	0	38	Ex C, p. 28
6/7/2014	1	9.9	44.1	Ex C, p. 29
6/14/2014	1	7.9	46.88	Ex C, p. 30
6/21/2014	0	0	34	Ex C, p. 31
6/28/2014	1	9.7	45	Ex C, p. 32
7/5/2014	1	9.2	59.5	Ex C, p. 33
7/12/2014	1	8.2	39.5	Ex C, p. 34
7/19/2014	0	0	25.4	Ex C, p. 35
7/26/2014	3	11.3	41.9	Ex C, p. 36
8/2/2014	0	0	33.3	Ex C, p. 37
8/9/2014	0	0	36.3	Ex C, p. 38
8/16/2014	0	0	42	Ex C, p. 39
8/23/2014	2	2.2	8.6	Ex C, p. 40
8/30/2014	0	0	28.9	Ex C, p. 41
9/6/2014	1	1.5	31.1	Ex C, p. 42
9/13/2014	3	4.1	24.6	Ex C, p. 43
9/20/2014	1	1	8.4	Ex C, p. 44
Total	**28**	**125.5**	**983.18**	

6. The Claimant testified that she began to experience pain in her right heel while at work, which she likened to a nail going into her heel. She next felt pain in her left hip and then the back pain came after that. She testified that the pain started a month to two months into the job when she was working in the pork room.

7. The Claimant testified that she told her "leads" of the pain she was experiencing.

8. The Claimant initially treated with Amber Wobbekind, M.D., of the Denver Health Medical Center Westside Family Health Center, her primary care physician. On July 18, 2014, the Claimant was seen by Family Nurse Practitioner Amy M. Quinones of Denver Health Medical Center (DHMC), who documented complaints of right heel pain for "one week" with intermittent radiation of pain up to her calf. FNP Quinones documented that the Claimant reported that she thinks she may have had the same symptoms to her left foot years ago, which resolved. The medical record does not note any complaints of left hip pain or low back pain at that visit (Claimant's Exhibit 10, p. 53; Respondents' Exhibit L, p. 93).

9. On August 14, 2014, the Claimant returned to DHMC, where she was seen by Judy Conrad, NP. Ms. Conrad documented that that Claimant complained of a "ball on her back for over a year with 'no pain'", left hip pain for two months and right foot pain. NP Conrad also documented a history of left plantar fasciitis that had improved. Ms. Conrad referred Claimant for a left hip x-ray and to a podiatrist (Claimant's Exhibit 10, p. 51).

10. On August 19, 2014, Amber Wobbekind, M.D., authored a letter/report addressed "To whom it may concern" stating that she was treating the Claimant for her hip condition and that the Claimant's trochanteric bursitis of her hip was "particularly exacerbated by working the pork room." Dr. Wobbekind also restricted the Claimant from lifting weight over 10 pounds. There were no reasons provided as to why the pork room, in particular, would exacerbate the Claimant's condition. Nor is there any causation analysis connecting any of the Claimant's work duties with her current condition (Claimant's Exhibit 11, p. 57). A second letter/report was authored by Dr. Wobbekind on August 20, 2014 which again imposes a work restriction limiting lifting to 10 pounds and, in addition, imposes a restriction that the Claimant "may not bend from the hip to reach items on or near the floor more than 10 times per day" and also continues to restrict the Claimant from working in the pork room during either of the 2 restricted activities as this seems to "really exacerbate her condition." The restrictions were to remain in place for the next 8 weeks (Claimant's Exhibit 11, p. 56). Then, on August 22, 2014, a third letter/report authored by Dr. Wobbekind listed the Claimant's restrictions due to trochanteric bursitis as not bending from the hip to reach items on or near the floor more than 10 times per day and not working in the pork room. The lifting restriction of 10 pounds no longer appears, nor is there any replacement lifting restriction for items of any weight whatsoever (Claimant's Exhibit 11, p. 55).

11. It is not clearly established that Dr. Wobbekind's actually saw or examined the Claimant prior to authoring the three conflicting letters within the span of

4 days. The only DHMC documentation in the admitted exhibits of any interaction between the Claimant and Dr. Wobbekind on August 19, 2014, is contained in Claimant's Exhibit 10, p. 50, which indicates telephone encounters on August 19, 2014, August 20, 2014 and August 21, 2014. However, the Claimant testified on cross-examination that she did see Dr. Wobbekind on August 19, 2014. She stated that after leaving work at 5:33 AM, only 33 minutes after first arriving, she later went to go see the doctor that day, The Claimant testified that she did not tell Dr. Wobbekind that she thought her pain was from working in the pork room. Rather, the Claimant testified that she merely explained to Dr. Wobbekind what kind of work activities she did and Dr. Wobbekind came to that conclusion. The Claimant further testified that she told Flerida Watson and other people at the Employer that working in the pork room was causing her pain.

12. There is e-mail documentation from Mark Hines, who was a "lead" for Employer who worked with the Claimant during this time frame. In the e-mail dated August 20, 2014, Mr. Hines reported that,

> On Tuesday August 19, 2014 [the Claimant] was asked to work in the pork room by Flerida Watson. Flerida informed me that Irene said she couldn't work in pork because it hurt her back. I talked to [the Claimant] and told her that we could have her feed a wrapping machine. [The Claimant] told me that she would rather go home than work in the pork room, I then told [the Claimant] that if she went home that we needed some form of documentation from a doctor when she came back to work. (Respondent's Exhibit F).

13. Mark Hines testified at the hearing that he was a "lead" for Employer as of March 2014 and in June of 2014 he was promoted to foreman. He testified that he did not have a lot of contact with the Claimant but is familiar with the positions in the beef room and the pork room. He testified that he recalled discussions with the Claimant on August 19, 2014 about working in the pork room. As he recalled, the Claimant told him that she would rather go home than work in the pork room. He told her that he needed her to work in the pork room, but she said it hurt her back. He offered to place her at the "feeding the machine" station which is not physically demanding and she would only have to stand in one spot and put trays onto the machine that are then automatically fed into the wrap machine. Mr. Hines testified that the Claimant told him that she would rather go home. He testified that he then told her that she would need to bring in documentation from her doctor that she was unable to perform certain duties.

14. The Claimant testified that when she brought in work restrictions, she was told that if she requires work restrictions from her own doctor then she cannot work. She was told if she seeks modified duty for work restrictions related to a work injury or condition, the Claimant would have to see a workers' compensation doctor. She testified that because of this, she went to see Dr. Kohake.

15. The Claimant completed a report for Work Related Injury / Illness dated August 25, 2014. The Claimant reported lower back, right foot and left hip strain from "lifting and placing baskets on pallets" in the pork room. She listed the date of injury as August 15, 2014. The Claimant described the injury as follows"

> It all started when they started putting me in the pork room. The bending and turning really messed with my hip and back. Also I progressively got planters fasciitis [sic] in my foot from being on my feet all day. Even after getting good shoes and insoles the pain still not going away. Went to Dr. got injected in my foot and still hurts (Claimant's Exhibit 1, p. 1).

16. The Claimant saw Dr. George Kohake for an initial evaluation on August 25, 2014. The Claimant denied any specific injury and reported an onset of symptoms 3-4 months ago (which differs a bit from the 1-week prior onset that the Claimant had reported to FNP Quinones at DHMC on July 18, 2014). The Claimant reported that she has to stand all day and do bending and lifting, sometimes up to 20-30 pounds. The Claimant reported that the pain started with right foot/heel soreness, then left hip pain and now she has pain in her low back with some intermittent radiation of pain/tingling down her right leg. The Claimant reported that she has to work the pork room a lot, which is very vast pack off work duties involving a lot of twisting and bending quickly. The Claimant reported that she felt it was not as hard on her body to work the "retail area" because they rotate different work duties. On her pain diagram, the Claimant circled her right foot, her left hip and the middle of her back. The Claimant provided a past medical history of left plantar fasciitis 4-5 years ago. Dr. Kohake assessed, "right heel pain, probably plantar fasciitis. Left hip pain, possibly trochanteric bursitis versus hip strain. Low back pain with some left leg symptoms but doubt HNP." As to causation, Dr. Kohake opined that "at this point [causation] is undetermined. I want the old records from Denver Health to review." He noted that they would treat the Claimant but that he was not making a positive causation determination pending further review of medical records and information regarding the history of her injury (Claimant's Exhibit 12; Respondent's Exhibit J).

17. On August 29, 2014, the Claimant returned to DHMC and was treated by Brian Boley, PA-C. The medical notes states that the Claimant has been diagnosed with bursitis and plantar fasciitis. The note contains care and treatment instructions, but nothing to indicate any causation analysis tying these conditions to work activities (Claimant's Exhibit 10, p. 48).

18. The Claimant testified that since her pain started she has been in pain constantly. With no activity, her heel pain is a 7/10, her back pain is an 8/10 and her hip pain is a 6/10. Her pain increases with activity. She testified that she is not working at all now, but her pain levels are about the same.

19. Dr. Timothy O'Brien performed an Independent Medical Examination of the Claimant on December 10, 2014 and prepared a written report dated December 26, 2014. The Claimant attributed her hip, foot and back pain to work in the "pork station" where she would take pork from one area and then stack it into crates. The Claimant

told Dr. O'Brien that she worked in the pork station 3-4 times per week for 8-10 hours per day.[1] The Claimant told Dr. O'Brien that she was afraid of losing her job so she didn't really report the injury, although she was advised to do so. She stated that when she couldn't take the pain anymore, she saw her PCP and an occupational health doctor and was taken off work due to light duty restrictions that were not recommended by an occupational health doctor. The Claimant complained of low back pain, lateral left hip pain and pain in the sole of her right heel. The Claimant rated her pain a 7/10. The Claimant reported a 1-2 hour tolerance for standing and sitting and a 1 hour tolerance for walking (Claimant's Exhibit 13, p. 67). After physical examination and review of medical records, Dr. O'Brien opines that none of the Claimant's diagnoses, plantar fasciitis, greater trochanteric bursitis and low back pain, are the result of the Claimant's work activities. Dr. O'Brien opines, that each is a manifestation of her personal health and deconditioned state. He notes that the Claimant's work at Employer was neither physically demanding nor repetitive enough to be a material causative factor for her conditions (Claimant's Exhibit 13, p. 72). In addition he opines that the fact that the Claimant's occupational activities have been restricted (or nonexistent) since August 2014 and yet she still continues to have pain symptoms as of December 2014 is further substantiation that the work activities are not contributing to her condition (Claimant's Exhibit 13, p. 73).

20. Dr. O'Brien also testified as an expert witness by evidentiary deposition on July 16, 2015. He is board certified in orthopedic surgery and underwent fellowship training in the foot and ankle through the American Academy of Foot and Ankle Fellowships. He has treated numerous patients with plantar fasciitis, trochanteric bursitis and back pain and is Level II accredited (Depo. Tr. Timothy O'Brien, MD, pp. 5-6 and pp. 8-9). Dr. O'Brien testified that Claimant has three separate diagnoses: plantar fasciitis of the right foot, greater trochanteric bursitis of the left hip, and low back pain/lumbosacral spondylosis (Depo. Tr. Timothy O'Brien, MD, pp. 14-15).

21. Dr. O'Brien testified that the plantar fascia is a band of collagen in the sole of the foot that connects on the sole of the foot and underneath the heel, and works to keep the arch bowed to maintain the arch. A patient with plantar fasciitis experiences inflammation of the plantar fascia, which almost always occurs under the heel (Depo. Tr. Timothy O'Brien, MD, pp. 16-17). Dr. O'Brien testified that Claimant's duties as a Meat Wrapper would not have caused or aggravated her plantar fasciitis because "there's an absence of studies that supports that. So, when we do occupational health studies, not one study that's ever been performed has scientifically been able to implicate standing or running or climbing stairs or ladders -- we don't have any valid science that implicates any one activity at work as being causative of plantar fasciitis" (Depo. Tr. Timothy O'Brien, MD, pp. 18-19). Dr. O'Brien testified that plantar fasciitis is a result of genetics, age, physical deconditioning, and may be related to nicotine use or diabetes. He stated it makes no logical sense that Claimant's standing

[1] This statement contrasts with the data taken from the Claimant's employment records as set forth in the chart at paragraph 5 (above) which shows the Claimant working primarily in the beef room, with more limited exposure to the pork room.

or walking on concrete floors would have caused or aggravated her plantar fasciitis for two reasons. Moreover if standing on concrete floors was an issue, there should be no difference between the pork room and beef room as both had concrete floors. Thus, Dr. O'Brien testified that within a reasonable degree of medical probability Claimant's duties at work did not cause or aggravate her plantar fasciitis (Depo. Tr. Timothy O'Brien, MD, pp. 18-23).

22. Dr. O'Brien testified that the greater trochanter is the bony bump at the top of the femur on the outside of the hip. The greater trochanter is covered by a bursa which lays flat over the greater trochanter to create a cushion for the iliotibial band, which is a strap of collagen which runs from the ilium bone at the top of the pelvis across the trochanter and down below the knee joint, attaching at the top of the tibia. When the iliotibial band becomes tight, it creates increased pressure on the bursa at the greater trochanter, which causes inflammation of the bursa. This is known as trochanteric bursitis (Depo. Tr. Timothy O'Brien, MD, pp. 23-25). Dr. O'Brien testified that, other than traumatic causes not applicable to the Claimant's condition, almost all iliotibial tightness is caused by aging – as the body gets older, the tissues of the body lose water and dessicate, which causes them to contract and become tighter. Dr. O'Brien testified that within a reasonable degree of medical probability the Claimant's trochanteric bursitis is caused by aging, physical deconditioning/sedentary lifestyle, and possibly her gender, and not by her work duties. Dr. O'Brien testified that there is a complete absence of medical literature or science linking standing, walking or sitting to trochanteric bursitis (Depo. Tr. Timothy O'Brien, MD, pp. 26-29). Dr. O'Brien also testified that if standing, walking or repetitive duties at work did aggravate the Claimant's trochanteric bursitis, then cessation of those duties necessarily would have alleviated her pain. However, the Claimant has not worked for over a year, and yet remains in just as much pain as she was in when she was performing these duties for the employer so this points to a personal health issue as opposed to a work issue (Depo. Tr. Timothy O'Brien, MD, pp. 31-32). Dr. O' Brien specifically testified that Dr. Wobbekind's opinion that the Claimant's trochanteric bursitis may have been caused or aggravated by repetitive motion is not credible because trochanteric bursitis is just as common in the sedentary population (workers not exposed to repetitive motion) (Depo. Tr. Timothy O'Brien, MD, pp. 35-36).

23. Dr. O'Brien testified that the Claimant's MRI was normal given her age (Depo. Tr. Timothy O'Brien, MD, p. 32). Dr. O'Brien opined that Claimant's low back pain is not related to an isolated injury or due to any occupational injury (Depo. Tr. Timothy O'Brien, MD, p. 39).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. §8-40-102(1). The claimant shoulders the burden of proving

entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. §8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

To the extent that the Claimant seeks a finding of compensability based on repetitive motion/occupational disease as opposed to an acute injury, the Claimant still has the burden to establish the causal relationship. An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, supra.

C.R.S. § 8-40-201(14) defines “occupational disease” as:

> “A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment.”

The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. Id. Where the disease for which a claimant is seeking compensation is

produced solely by some extrinsic or independent cause, it is not compensable. *Anderson* at 824. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once such a showing has been made, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The hazardous conditions of employment need not be the sole cause of the disease. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Under either an injury or occupational disease theory, the Claimant has failed to establish a causal link between her foot, hip and back conditions and her work duties for Employer. Dr. O'Brien credibly testified that there is an absence of studies supporting the proposition that plantar fasciitis is caused by standing or walking on concrete floors. Dr. O'Brien further testified that plantar fasciitis is a result of genetics, age, physical deconditioning, an inappropriate height/weight ratio, or obesity, and that it makes no logical sense that the Claimant's standing or walking on concrete floors would have caused or aggravated her plantar fasciitis because if those activities did aggravate or accelerate her plantar fasciitis, then cessation of standing on her feet necessarily would have alleviated her pain. However, the Claimant has not worked for over a year, and yet remains in just as much pain as she was in when she was standing and walking on concrete floors. In addition, as documented in the July 18, 2014, and August 14, 2014, DHMC medical reports, the Claimant already has a documented pre-existing history of plantar fasciitis in her left foot, which started years before Claimant began working for Employer and walking on concrete floors.. The Administrative Law Judge concludes that Claimant failed to prove by a preponderance of the evidence that her employment or working conditions caused, aggravated or accelerated her plantar fasciitis.

Dr. O'Brien also credibly testified that, other than traumatic causes not applicable to Claimant's condition, almost all iliotibial tightness is caused by aging – as the body gets older, the tissues of the body lose water and desiccate, which causes them to contract and become tighter – and that within a reasonable degree of medical probability the Claimant's trochanteric bursitis is caused by aging, and not by her work duties. As support, Dr. O'Brien credibly opined that there is no medical science that has ever been published that in any way indicates or would implicate the work activities that Claimant performed as being causative of greater trochanteric bursitis. Furthermore, Dr. O'Brien credibly testified that if standing, walking or repetitive duties

at work did aggravate the Claimant's trochanteric bursitis, then cessation of those duties necessarily would have alleviated her pain. However, the Claimant has not worked for over a year, and yet remains in just as much pain as she was in when she was performing these duties for the employer. Almost the entirety of Claimant's case rests on her testimony that her pain began while working in the pork room along with Dr. Wobbekind's vague and unsupported letter dated August 19, 2014. The Administrative Law Judge concludes that the Claimant failed to prove by a preponderance of the evidence that her employment or working conditions caused, aggravated or accelerated her trochanteric bursitis.

Finally, Dr. O'Brien credibly testified that the Claimant's MRI was normal given her age and that the Claimant's low back pain is a manifestation of her personal health and physically deconditioned state (i.e. overweight, aerobically unfit, lacking flexibility and core strength). Dr. O'Brien further opined that the Claimant's work at Employer was neither of long enough duration nor physically demanding and repetitive enough to be considered a material causative factor that contributed to the onset and progression of her back pain, and that, if there were a direct causal relationship between the Claimant's work and her musculoskeletal symptomatology, then cessation of her work activities should have resulted in cessation of her symptoms. Yet, it did not, proving that the Claimant's work was not a factor contributing to her current condition. The Administrative Law Judge concludes that Claimant has failed to prove by a preponderance of the evidence that her employment or working conditions caused, aggravated or accelerated her low back pain.

Ultimately, the evidence does not support Claimant's allegations that she sustained a work injury or occupational disease that is causally related to her heel, hip and low back conditions and any related need for medical treatment. As such, the Claimant's consolidated claim for compensation is denied and dismissed.

Remaining Issues

The Claimant failed to prove that her claim is compensable. Therefore, the remaining issues regarding medical benefits and temporary disability benefits are moot.

ORDER

It is, therefore, ordered that:

1. The Claimant has failed to sustain her burden of proving by a preponderance of the evidence that she suffered a compensable injury resulting from work activities in June of 2014 or August of 2014 for the conditions of plantar fasciitis, trochanteric bursitis and/or low back pain.

2. The Claimant's consolidated claim for benefits under the Workers' Compensation Act of Colorado for the conditions of plantar

fasciitis, trochanteric bursitis and/or low back pain is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 27, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

#JMJZQOD60D1BOFv

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-962-497-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on, in Denver, Colorado. The hearing was digitally recorded (reference: 10/21/15, Courtroom 3, beginning at 8:30 AM, and ending at 10:35 AM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, on October 28, 2015. On October 29, 2015, counsel for the Claimant filed suggested revisions to the proposed decision, some of which are well taken and some of which are not. After a consideration of the proposed decision and the suggested revisions thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; and, if compensable, medical benefits and temporary total disability (TTD) benefits from August 21, 2014 and ongoing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant's date of birth is October 2, 1954. He was employed as a gas fitter/apprentice with the Employer and was with the company for approximately eight years.

2. On August 21, 2014, the Claimant drove to Denver for work in a company vehicle. He arrived back at the Employer campus at approximately 3:30 PM. He alleges that while reaching back to get a bag out of his car the bag stuck, pulling his right arm out of the socket. According to the Claimant, this resulted in "tremendous pain" to his right shoulder. There were no witnesses to the alleged accident.

3. The Claimant went into the office after the alleged accident occurred and spoke to the lead fitter, Phil Severence. According to the Claimant, Severence did not ask him how he was injured and the Claimant did not tell him about the accident. Severence asked the Claimant if he was going to file a workers' compensation claim and the Claimant indicated that he was not going to file a claim. The Claimant did not feel that it was work-related since it had occurred after 3:30 PM. while he was off the clock.

4. The Claimant went to work on August 22, 2014 and spoke to a supervisor, Pat Kreager. Kreager asked the Claimant how he was injured and the Claimant advised him that he was "not sure." The Claimant testified that he was in shock from the injury and had nerve damage from his neck injury with numbness in his hands and fingers, and this is why he did not tell Kreager how he was injured. He stated that he was not in shock when the accident happened, but went into shock either that evening or the next day. The ALJ finds this version of "shock" improbable and contrary to reason and common sense.

5. The Claimant was seen by his family physician, Phillip Rhoads, M.D., at 1:00 PM on August 22, 2014. The Claimant did not advise Dr. Rhoads how he was

injured as he “wasn’t sure” and was “cloudy” when he saw Dr. Rhoads. Dr. Rhoads’ records indicate that there was unclear etiology of pain with no injury and that the Claimant’s right shoulder had started hurting the night before (Respondents’ Exhibit A, p. 30).

6. Dr. Rhoads referred the Claimant to an orthopedic surgeon, Mark Durbin, M.D., who evaluated the Claimant on August 25, 2014. The Claimant advised Dr. Durbin that he did not remember any specific injury or trauma to his shoulder. He told Dr. Durbin that his shoulder “started hurting while driving” (Respondents’ Exhibit B, pp. 49-51)

7. Approximately two weeks after the alleged accident occurred, the Claimant claims that he then remembered that he had been injured at work and the details of the accident. When he was contacted by his supervisor, Joe Reyes, he reported the accident to him and was then advised that he must be seen by a workers’ compensation physician. The ALJ finds this recovery of delayed memory unlikely in light of the fact that the Claimant had seen two physicians shortly after the alleged incident and made no mention of the “bag lifting” incident.

8. The Claimant was evaluated by Hope Edmonds, M.D. on September 4, 2014. At that time he advised Dr. Edmonds that he had injured his right shoulder when he went to retrieve a bag of equipment from the backseat of his vehicle. The Claimant denied any head or neck symptoms. Dr. Edmonds noted that the Claimant had been seen by Dr. Durbin a few days after the injury but that she did not have those notes available. The Claimant advised Dr. Edmonds that he did not realize he needed to come into a workers’ compensation provider to be seen (Respondents’ Exhibit G, p. 85).

9. In February of 2015, Dr. Edmonds was provided with the records of Dr. Rhoads and Dr. Durbin. At that time, she stated that the omission of the mechanism of injury called into question the work-relatedness of the Claimant’s claim. At that time, the Claimant mentioned to Dr. Edmonds that he “fears he may have had a stroke at some point, making him unable to remember how the shoulder injury occurred” (Respondents’ Exhibit G, p. 73). There is no medical evidence indicating that the Claimant may have had a stroke. The ALJ infers and finds that the Claimant came up with a plausible explanation for not reporting the alleged mechanism of the injury earlier and the ALJ does not find this explanation credible in light of the totality of the evidence.

10. In February of 2015, the Claimant first mentioned neck and left upper extremity problems to Dr. Edmonds. She was of the opinion that the neck injury for which he was seeking care was not work-related. She also voiced concerns about the fact that the reports of Dr. Rhoads and Dr. Durbin did not mention the mechanism of injury of pulling a bag out of a vehicle and she felt that the Claimant should seek care outside of the workers’ compensation system (Respondents’ Exhibit G, p. 67).

The Respondents' Witnesses

11. Testimony was taken from Phillip Severence, who was the lead fitter serviceman on August 21, 2014. Severence is presently retired from the Employer. He has "no dog in the fight" so to speak. On the date in question, Severence saw the Claimant at approximately 5:00 PM. At that time, the Claimant notified him that his shoulder was hurting and that he had been **injured at home while working on one of his vehicles.** On the other hand, the Claimant testified that he had hurt himself but did not tell Severence how he had hurt himself. The ALJ finds Severence testimony in this regard more credible than the Claimant's testimony. Severence's testimony squarely contradicts the Claimant's version of a "compensable" injury.

12. Severence contacted his supervisor, Pat Kreager, to let him know that the Claimant had been injured at home and would be out of work.

13. The Claimant came to Severence's home approximately three weeks prior to the hearing. Severence testified that at that time the Claimant told him that he had been injured at work and insisted that he had previously advised Severence of this and that they had gone to report this to a supervisor. Severence testified that this was not accurate and he asked the Claimant to leave.

14. Pat Kreager, the Manager of the Design Department, received a call on August 22, 2014 from Severence. At that time, Severence advised Kreager that the Claimant had hurt his shoulder and was going to the doctor. Kreager asked if this was work-related and Severence stated that the Claimant had advised him that it was not work-related.

15. Kreager saw the Claimant in the office on August 25, 2014. At that time, he asked the Claimant how he had injured himself and the Claimant told him that he had injured himself at home. The ALJ infers that the Claimant, without any basis, is advancing a "conspiracy theory' whereby Severence and Kreager, in corroborating each other, must have somehow been "out to get" the Claimant. The ALJ rejects this implied conspiracy theory and finds that Kreager's corroboration of Severence increases the credibility of both individuals.

16. Joe Reyes is the supervisor in the Gas Construction department. He was at work on August 21, 2014 and saw the Claimant at approximately 3:45 PM. The Claimant , however, did not report an injury to him. Reyes was aware the next day, on August 22, 2014, that the Claimant was off work due to a shoulder injury because he had been advised of this by Kreager.

17. Reyes was briefing the new manager, Greg Sorter, on September 2, 2014. There were two employees off sick that day including the Claimant. Reyes and Sorter

contacted the Claimant by telephone to discuss his time off from work. At that time, the Claimant told them that he had been injured at work. Reyes advised the Claimant that he had to be seen by a workers' compensation doctor.

18. On August 22, 2014, the Claimant alleged that he was in shock and could not remember how the accident occurred and therefore did not report this as work-related. The Claimant testified, however, that he specifically remembers that he did not advise Severence or Kreager that he had been hurt at home. The ALJ finds this convenient denial is a contradiction to the Claimant's theory of being in "shock." as the reason that he could not remember the alleged work-related incident. The Claimant's selective memory, while he was in 'shock," significantly undermines his overall credibility.

19. The ALJ finds the testimony of Severence to be the most credible. Severence is a critical witness. He is retired from the Employer and has no conceivable motivation to lie about what the Claimant advised him on August 21, 2014. The Claimant offered no evidence of "bad blood" between Severence and the Claimant as a potential motivation for Severence to be untruthful. In addition, Severence's testimony is corroborated by Kreager who was also advised by the Claimant that he had been injured at home.

20. There is nothing in the medical records to substantiate the Claimant's allegation of either a stroke or memory problems that would have prevented him from remembering that he had been injured at work and then remembering the accident two weeks later, yet contemporaneously remembering that he did **not** tell Severence or Kreager that he had injured himself at home.

Ultimate Findings

21. The ALJ finds the testimony of Severence and Kreager to be far more credible than that of the Claimant. Indeed, the ALJ finds that Claimant's testimony fraught with inconsistencies and improbabilities and, therefore, finds his testimony wholly lacking in credibility.

22. It is an understatement to state that the ALJ makes a rational choice, between conflicting testimony, to accept the testimony of Severence and Kreager and to reject the testimony of the Claimant.

23. The Claimant has failed to prove that it is more likely than not that he sustained a work-related injury on August 21, 2014 as he alleges. Consequently, the Claimant has failed to prove a compensable injury by preponderant evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85**The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005 As found, the testimony of Severence and Kreager is far more credible than that of the Claimant. Indeed, as found, Claimant's testimony is fraught with inconsistencies and improbabilities and, therefore, his testimony is wholly lacking in credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a

particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, between conflicting testimony, to accept the testimony of Severence and Kreager and to reject the testimony of the Claimant.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to prove, by a preponderance of the evidence that he sustained a work-related injury on August 21, 2014 as he alleges.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established that he suffered a compensable injury to his low back.

2. Whether Claimant is entitled to authorized medical treatment reasonably necessary to cure and relieve the effects of his injury.

3. Whether Claimant has established an entitlement to temporary total disability (TTD) benefits.

4. Whether Claimant has established an entitlement to temporary partial disability (TPD) benefits.

5. Determination of Claimant's average weekly wage.

6. Whether penalties are owed due to a violation of PALJ McBride's Order compelling discovery responses.

7. Whether Respondents are entitled to offsets and applicable credits against any temporary indemnity benefits, including the severance payments made to Claimant and unemployment benefits received by Claimant.

PROCEDURAL ISSUES

At the outset of hearing, Respondents' Motion to Reconsider Vacation of the Order Striking Claimant's December 31, 2014 Application for Hearing with Prejudice, dated June 16, 2015 was denied. At the time of the Settlement Agreement, Claimant had an existing workers' compensation claim. The Settlement Agreement purported to include and cover the workers' compensation claim and was thus subject to approval by an administrative law judge or by the Division of Workers' Compensation. Approval was not received nor was the settlement submitted for approval. Therefore, Respondent's motion was denied pursuant to § 8-43-204, C.R.S.

At the outset of hearing, a request was made to allow for two agents of ISG Investigations to testify. This request was granted. On June 5, 2015 an opposed motion was granted by ALJ Felter and allowed that a representative from ISG Investigations could be added as a witness for hearing. At hearing, Respondents presented with two different investigators from ISG who had both performed investigation of Claimant. Claimant objected arguing that ALJ Felter's order allowed

only one representative to testify. This was not found persuasive. Claimant had sufficient time to review the contents of the investigative report and to prepare a defense. Whether the contents of the report were written by one or two separate individuals is not crucial.

The video of surveillance was excluded from evidence as not timely exchanged during the discovery process. Despite the parties having exchanged the investigative reports with sufficient time for review, the actual video was not timely exchanged prior to hearing to provide Claimant with a sufficient opportunity to review and/or present a response.

Respondents' Opposed Motion to Add Issue dated June 19, 2015 was granted in part. It is noted that the written motion requested to add the issue of penalties for violation of PALJ McBride's April 16, 2015 Order regarding discovery responses and requested to add the issue of attorney's fees. Verbally at the outset of hearing, Respondent's requested adding not only the two issues outlined above, but also that the court find and order penalties as a sanction against Claimant for insufficient interrogatory responses. The request to add the issue of penalties and attorneys fees as issues for hearing was granted. The request for any type of sanction for alleged insufficient interrogatory responses was denied. Respondents did not submit any motion to compel further responses to interrogatories and had sufficient time to do so prior to hearing if they felt that the responses were insufficient.

Mid-Hearing, Respondents' Motion for Directed Verdict and Claimant's Counter-Motion for Directed Verdict were both denied.

FINDINGS OF FACT

1. Claimant began working for Employer in approximately May of 2013 as a medical supply delivery driver. Claimant's duties included loading carts of medical supplies onto a delivery truck, driving the delivery truck to different medical buildings, unloading the carts, pushing the carts full of supplies to the destination, and loading the carts back onto the truck.

2. The carts that Claimant loaded and delivered were hand carts and varied in weight depending on the medical supplies that were being delivered. The heaviest carts were the carts that were stacked with IV solution that could weigh up to 2,000 pounds.

3. In approximately July of 2014 Claimant began experiencing low back pain while at work and while pushing and pulling the carts.

4. On September 30, 2014 Claimant's back pain had become unbearable and he reported it as a work injury.

5. Claimant alleges that as a result of working for Employer and due to the frequent pushing, pulling, and force required to move the carts, he developed low back pain as an occupational disease.

6. Claimant admitted that he had prior low back pain while working at Abra Auto Body approximately five years ago. At that time Claimant was detailing cars and his job required frequent bending. He developed low back pain at Abra, was treated with physical therapy, and his low back pain resolved. Claimant was able to work full duty with no restrictions after his low back pain resolved and has had no low back pain between the occurrence at Abra and the occurrence while employed by Employer.

7. After reporting his injury, Claimant was sent by Employer to Aviation & Occupational Medicine for treatment.

8. On October 2, 2014 Claimant was evaluated at Aviation & Occupational Medicine by Michael Ladwig, M.D. Claimant reported pushing carts with IV fluids that weighed 2,000 pounds constantly through parking lots and that it had caused a mid-low back injury. Claimant also reported having had issues with his lower back in the past. Dr. Ladwig noted X-rays were taken of the dorsal and lumbar spine and were negative for acute changes. On examination Dr. Ladwig noted that the dorsal and lumbar spine inspection noted mild tenderness at T10-S1 bilaterally and that Claimant's forward flexion showed decreased range of motion. Dr. Ladwig assessed dorsal strain and lumbosacral strain and opined that based on the patient history, mechanism of injury, and objective findings on examination there was greater than a 51% probability that the back injury was a work related injury or condition. *See* Exhibit 4.

9. Dr. Ladwig provided a return to work release with work restrictions of no lifting over 10-20 pounds, and no pushing or pulling over 50-60 pounds. Dr. Ladwig also referred Claimant for physical therapy evaluation and treatment. *See* Exhibit 4.

10. Claimant returned to work consistent with the work restrictions imposed by Dr. Ladwig. Employer placed Claimant in a STAT delivery car where his duties changed from loading, unloading, and driving a delivery truck full of carts with medical supplies to driving a Prius-type vehicle with smaller coolers or smaller medical supply items for delivery.

11. Claimant continued to receive his normal wages during this time period and received his normal wages through December 31, 2014. From January 1, 2014 through December 31, 2014 Claimant was paid total gross wages of $31,110.74. *See* Exhibit 7, Exhibit P.

12. As a STAT driver, there was frequent "down time" between delivering items. During this "down time" employees were required to check in with Employer's dispatcher and advise they had completed a delivery and were free for the next delivery. If no new delivery was ready, the drivers would read and/or do other things in their "down time."

13. Sometime in October or November of 2014, Claimant's supervisor approached his STAT car to verbally reprimand Claimant for reading when Claimant had not checked back in with the dispatcher advising the dispatcher he was free. Claimant maintains he did contact the dispatcher to check in. His supervisor maintains that he did not. The dispatcher was not called as a witness. The reprimand was not put in writing or made party of Claimant's employment file.

14. On October 20, 2014 Respondents filed a Notice of Contest based on further investigation for Claimant statement medical records. *See* Exhibit 3.

15. On October 22, 2014 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig continued Claimant's work restrictions and provided a referral to Rehabilitation Associates of Colorado for further evaluation and treatment of Claimant's low back. *See* Exhibit 4.

16. On October 29, 2014 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted that the insurance company had denied Claimant's claim and that Claimant did not go see the specialist. Dr. Ladwig opined that Claimant needed a specialist referral. Dr. Ladwig continued Claimant's work restriction of lifting no greater than 10-20 pounds. *See* Exhibit 4.

17. On November 12, 2014 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted that the claim was still being contested and that the referral could not be processed. Dr. Ladwig noted that Claimant reported working on the patio and that he may have re-aggravated the injury. Dr. Ladwig continued the work restriction of no lifting greater than 20 pounds and added a new restriction of avoiding forward bending. *See* Exhibit 4.

18. On November 21, 2014 Claimant's supervisor advised him that he would need to report to the mailroom starting on November 24, 2014 to sort mail and to work within his work restrictions. *See* Exhibit J.

19. On December 1, 2014 Employer provided Claimant a written modified duty job offer. The modified duty entailed: sorting all incoming and outgoing mail; administrative duties such as putting labels on files, creating mailing lists from business cards of doctors; preparing mail tubs for route drivers; assisting with paperwork; and putting stat tickets on bins at the other end of the warehouse. Dr. Ladwig signed off on the modified duty job offer and noted his approval and that Claimant needed to avoid forward bending and needs position changes sit/stand/walk every 30 minutes. *See* Exhibit K.

20. Claimant worked in the mail room until December 17, 2014.

21. On December 3, 2014, while working in the mail room, Claimant received an Employee Warning Notice. Claimant had a box-cutter knife in his possession. The

description of the incident indicated that Claimant had a knife in his possession while sorting mail in the mail room which was a violation of company policy regarding weapons in the workplace. It was noted that Claimant was instructed to leave any type of knife or weapon out of the office and that a violation of this type in the future or a violation of any other company policy might result in additional disciplinary action up to and including job consequences and or termination. It was noted that this was a first warning for Claimant. *See* Exhibit L.

22. Claimant testified that the weapon was a box cutter and that he used it while in the mail room to cut plastic wrapping. Claimant testified that as soon as he received the warning, he discontinued bringing the box-cutter to work.

23. On December 10, 2014 Claimant received an Employee Warning Notice for substandard work. The description of the incident indicated that Claimant was not sorting the mail the way he was trained, had been combining the flaps up and sealed mail, was mixing the stamped mail in with the unmetered mail, and mixing the typed mail with the hand written mail. Claimant's supervisor indicated he had verbally instructed and showed Claimant several times how to correct the problems and that Claimant would pay closer attention and take more time to ensure proper mail sorting. *See* Exhibit M.

24. On December 17, 2014 Claimant was laid off from employment. Claimant was laid off by Employer as Employer was no longer to accommodate Claimant's work restrictions. Claimant was paid his normal wages through December 31, 2014.

25. On December 23, 2014 Claimant and Employer signed a Separation Agreement. The agreement provided Claimant's employment ended on December 17, 2014, that Employer was submitting a check to Claimant for wages between December 16, 2014 and December 31, 2014 even though Claimant worked only 2 days during that pay period, and that the separation would be documented by Employer as a permanent layoff. *See* Exhibit N.

26. The Separation Agreement provided that in exchange for Claimant's agreement to the Separation Agreement, Employer would pay Claimant severance pay in the gross amount of $4,000.00, to be paid in one installment on January 5, 2015. The Separation Agreement provided that Claimant released Employer from any and all causes of actions, claims, demands, damages, expenses, charges, complaints, obligations, and liability of any nature or kind whatsoever on account of, or in any way growing out of, his employment with or separation from employment with Employer, whether such liability or damages are accrued or un-accrued, known or unknown at this time…and that Claimant is giving up any right to sue Employer for any reason, including those related to Claimant's employment with Employer or the conclusion of that Employment. *See* Exhibit N.

27. At the time the Separation Agreement was signed by the parties, Claimant had an open workers' compensation claim that was under contest and he had been

receiving treatment. Employer intended for the Separation Agreement to include the release from liability for any workers' compensation claim responsibility. Despite this intent, the Separation Agreement was not filed with the Division of Workers' Compensation nor was it approved by the Division or an ALJ.

28. Claimant was very relieved and happy to receive his normal wages through the end of December as well as the $4,000.00 severance pay.

29. Claimant looked for other employment within his work restrictions and immediately found a position performing security duties.

30. On January 4, 2015 Claimant was hired to perform security services for the National Western Stock Show in Denver, Colorado. Claimant was able to perform his job duties within his work restrictions. Claimant worked, riding in a golf cart around the property, for the entire month of January. From January 5, 2015 through January 18, 2015 Claimant was paid total gross wages of $1,978.11. From January 19, 2015 through February 1, 2015 Claimant was paid total gross wages of $1,211.68. *See* Exhibit E.

31. On February 12, 2015 Claimant underwent an Independent Medical Evaluation performed by Gretchen Brunworth, M.D. Claimant reported four to five years prior he had achy low back pain while working for Abra Auto Body. Claimant reported that after physical therapy his problem resolved and he went back to full duty with no problems. Claimant reported that in July of 2014 after working for Employer for approximately one year and four months, he developed achiness in his low back and breathing problems when he had to perform heavy pushing activities. Claimant reported while loading and unloading trucks he did quite a bit of lifting and pushing/pulling of heavy carts. Claimant reported from July to September his pain waxed and waned but by September 30, 2014 it became too much and he reported it to his supervisor. Claimant reported he continued to have fairly constant pain across his low back that is worse with bending forward. *See* Exhibit 6.

32. Claimant reported his job involved lifting up to 45 pounds and pushing/pulling a cart that could weigh up to 2,500 pounds. Claimant reported he inspected the carts and supplies, loaded them onto his truck, and drove around town making deliveries. Claimant reported on a busy day he made 19 to 20 deliveries and on a light day he made 6 to 7 deliveries. *See* Exhibit 6.

33. On physical examination Dr. Brunworth noted that Claimant had minimal soreness on palpation of the bilateral lumbar paraspinal muscles, the lower lumbar facet joints and the bilateral PSIS with no muscle spasms. Dr. Brunworth noted that Claimant had moderate deficits in flexion with significant low back pain with flexion and minimal deficits in extension and lateral flexion. Dr. Brunworth diagnosed low back pain with complaints suggestive of L4 radiculopathy. Dr. Brunworth opined that it was probable that Claimant's low back condition is related to his work activity and possible that he has pathology at the L3-4 level. She recommended proceeding with an MRI and noted that

further treatment would be dependent upon the results of the MRI. Dr. Brunworth opined that treatment for the lumbar strain is related to the work injury, that Claimant could return to work with a restriction of maximum lifting of 20 pounds and that Claimant was not yet at maximum medical improvement. *See* Exhibit 6.

34. In late April and early May of 2015, surveillance was conducted on Claimant. Claimant was observed mowing two different lawns, pushing and helping lift/unload a carpet cleaning machine, shopping, and otherwise performing normal activities of daily living without difficulty. It is unclear if any force or weights of items lifted by Claimant were in excess of his 20 pound lifting restriction.

35. On April 16, 2015 a Prehearing Conference Order issued by PALJ McBride was served upon the parties. The Order required that Claimant respond to discovery no later than seven days following the date the order was served on Claimant's counsel. *See* Exhibit D.

36. On June 5, 2015 Claimant provided Claimant's Answer to Respondents' Interrogatories and Request for Essential Information. The responses were due pursuant to PALJ McBride's Order on April 23, 2015. The responses were thus 43 days late.

37. Claimant's testimony overall is found credible and persuasive. Although Claimant provided some inconsistencies in reports to medical providers surrounding the heaviest carts that he pushed and pulled, Claimant was credible and forthcoming in his hearing testimony that the carts weighed anywhere from 200 to 2000 pounds depending on the items being delivered. Claimant presented consistently, credibly, and openly discussed prior injuries and his current pain.

38. The testimony of Claimant's supervisor is not found as credible or persuasive.

39. The medical opinions of Dr. Ladwig and Dr. Brunworth that the injury to Claimant's low back is work related is also found credible and persuasive. There is sufficient medical documentation to support their conclusions.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934

P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner, supra*.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "occupational disease" means disease which results directly from the employment of the conditions under which work was performed, which can be seen to have followed as a natural incident of the work, and as a result of the exposure occasioned by the nature of the employment, and which be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would been equally exposed outside of the employment. *See* § 8-40-201(14) C.R.S. This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.*

Claimant has established by a preponderance of the evidence that his low back condition resulted directly from his employment and the conditions under which he performed his job. The medical opinions of Dr. Ladwig and Dr. Brunworth are found credible and persuasive that Claimant's low back symptoms and pain, more likely than not, was caused by his employment. In his employment Claimant regularly pushed carts full of medical supplies and loaded the carts onto and off of a delivery truck. The carts weighed between 200 and 2,000 pounds when fully loaded for deliveries. The repetitive pushing and pulling of the carts more likely than not caused Claimant's back to become symptomatic over time and leading up to September 30, 2014. Regularly pushing and pulling stacked carts full of medical supplies and using significant force is not something Claimant would normally do or be exposed to in everyday life. Rather, the repetitive pushing and pulling heavy carts was particular to this job and his job requirements of delivering medical supplies. Claimant has therefore met his burden to show that his job duties proximately caused his low back pain. Although Claimant had low back pain previously, at the time he began employment with Employer he was asymptomatic and did not have any symptoms of low back pain until over one year after he began pushing and pulling the carts full of medical supplies. The ALJ defers to the medical opinions provided by Dr. Ladwig and Dr. Brunworth that given the duties and the diagnosis, it is more likely than not that Claimant's injury is work related.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Donavan*, 939 P .2d 496 (Colo. App. 1997).

Claimant has established that he suffered a compensable injury to his low back. Therefore, the Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Claimant has received treatment from Employer's authorized provider Dr. Ladwig. Claimant has shown that he is entitled to continue to receive treatment with this authorized provider and that Respondents remain liable to provide treatment including any further referrals or testing that are reasonably necessary to cure and relieve the effects of his industrial injury.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Section 8-42-105(3), C.R.S. provides that temporary total disability benefits shall continue until the first occurrence of any one of the following: the employee reaches maximum medical improvement; the employee returns to regular or modified employment; the attending physician gives the employee a written release to return to

regular employment; or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails such employment.

Claimant has failed to meet his burden to show an entitlement to TTD benefits. Initially, Claimant has failed to establish that he suffered a wage loss at any point while employed by Employer subsequent to reporting his injury. Rather, after reporting his injury and receiving work restrictions from Dr. Ladwig, Employer accommodated those restrictions and paid Claimant normal wages. Claimant did not suffer any wage loss and returned to modified employment immediately following his report of the work injury. Claimant ceased working for Employer on December 17, 2014, but Employer continued to pay Claimant his normal wages through December 31, 2014. Therefore, Claimant has failed to establish that he suffered any wage loss causally connected to his work related injury through December 31, 2014.

As found above, as of December 17, 2014 Employer was unable to continue to accommodate Claimant's work restrictions. For that reason Claimant was laid off and Employer and Claimant entered into a separation agreement. Had Claimant been unable to find employment within his work restrictions after his separation agreement and had he suffered wage loss in January, he would arguably have an entitlement to TTD benefits beginning January 1, 2015 since his Employer terminated his employment as they were unable to accommodate his restrictions. However, as found above, Claimant began employment with the National Western Stock Show on January 4, 2015. Claimant essentially never became temporarily totally disabled. After being paid full wages through December 31, 2014 by Employer, Claimant again started earning wages just a few days later when he began employment with the National Western Stock Show. Claimant's injury did not cause him to miss more than three work shifts nor did it cause him to suffer lost wages and he did not become temporarily and totally disabled due to his injury. Although Claimant has not shown an entitlement to TTD benefits, nevertheless, any entitlement would have ended upon his return to regular or modified employment per § 8-42-205(3), C.R.S. when he started work on January 4, 2015 at the National Western Stock Show.

On his application for hearing Claimant requested TTD benefits from September 30, 2014 and ongoing. In his argument he requested TTD benefits from December 17, 2015 and ongoing. Claimant has failed to establish by a preponderance of the evidence that he is entitled to TTD benefits from September 30, 2014 and ongoing or from December 17, 2015 and ongoing. It is noted that Claimant suffered no wage loss through December 31, 2014. Further, he continued to be employed even after Employer laid him off for being unable to accommodate his work restrictions. Claimant not only returned to modified duty with Employer immediately after reporting his work injury, but even after Employer was no longer able to accommodate his restrictions, he returned to modified duty when hired on January 4, 2015 by the National Western Stock Show. Claimant has failed to show by a preponderance of the evidence that he is temporarily totally disabled, incapable of earning wages within his work restrictions, or that he is entitled to TTD benefits.

Temporary Partial Disability

Claimant has also failed to establish an entitlement to TPD benefits. Claimant did not suffer any difference between his average weekly wage at the time he reported the injury on September 30, 2014 and during his continued employment with Employer through December 17, 2014. Claimant continued to work, within his work restrictions, his full schedule and he received his full wages. Claimant continued to receive full wages through December 31, 2014. After Claimant's employment ended as Employer could no longer accommodate his restrictions, Claimant immediately began new employment with a different employer, also within his work restrictions, and Claimant earned more money at the new employment than he had while working for Employer. Claimant has failed to establish that his work restrictions caused him to suffer any loss of or difference between his average weekly wage at the time of his injury and his average weekly wage during any continuance of temporary partial disability.

Temporary partial disability payments ordinarily continue until either Claimant reaches maximum medical improvement or an attending physician gives Claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. *See* 8-42-106, C.R.S. Here, Claimant began modified employment immediately after reporting his work injury and in his modified employment he worked his full schedule and received full wages. Claimant also continued to work within his work restrictions at a different employer beginning in early January of 2015 with no loss of wages, and in fact an increase in wages. Claimant has failed to establish that he was entitled to TPD at any point during his claim or ongoing as he is not temporarily partially disabled nor has he shown that his work restrictions prevent him from obtaining employment. Claimant has failed to establish that his injury caused him to be temporarily disabled and unable to earn wages, either totally or partially. Rather, there is substantial evidence that despite suffering a compensable injury, Claimant was capable of earning wages immediately after reporting his injury and continuing for several months and that he continues to be capable of earning wages. Therefore, Claimant has failed to establish any entitlement to disability benefits.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The parties submitted wage records as evidence but did not outline their positions in position statements as to their suggested or proposed average weekly wage. From the evidence submitted by the parties, Claimant earned a total of $31,110.74 from January 1, 2014 through December 31, 2014. Claimant's was paid hourly and his average weekly wage varied from week to week based on the number of regular and overtime hours that he worked. The ALJ concludes that to reach a fair approximation of his average weekly wage it is proper to take Claimant's total gross earnings during this year and divide by 52 weeks. This amounts to an AWW of $598.28 which is a fair approximation of what Claimant earned weekly.

Penalties and Attorney's Fees

Section 8-43-304(1) authorizes the imposition of penalties of not more than $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* § 8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if he leaves undone that which is mandated by an order. A person refuses to comply with an order if he withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003).

As found above, PALJ McBride issued an Order on April 16, 2015 requiring that Claimant provide responses to discovery by April 23, 2015. Claimant did not comply with the order, and submitted his response to interrogatories on June 5, 2015, 43 days past the deadline. This is a violation of § 8-43-304(1). Claimant failed to offer a reasonable explanation for his delay and his failure to comply with PALJ McBride's Order. Claimant's actions in failing to comply with the Order were objectively unreasonable. The violation of the Order and the delay, although objectively unreasonable, is not found to be significant. Although Respondents argue that this violation affected the Respondents' ability to properly prepare for the June 25, 2015 hearing, this is not persuasive. The late responses provided in Claimant's response to interrogatories contained information that for the most part had been previously contained in medical reports, reports to the Employer, and for the most part the information was already in Respondents' possession. Although the delay was a violation of an order, the penalties that are appropriate for the type of violation are minimal. The ALJ determines that a penalty of $5/day for a total penalty of $215 is appropriate in this case. The penalty shall be apportioned between the Respondent and the Workers' Compensation Cash Fund with 50 percent of the penalty paid to Respondents and 50 percent paid to the Workers' Compensation Cash Fund.

Respondents did not present sufficient information for the ALJ to impose any attorney's fees. The only document that could purport to be appropriate for imposition of attorneys fees is the very short motion requesting the same. The ALJ concludes, absent sufficient evidence, that there is no basis to impose attorney's fees in this matter.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show that he suffered a compensable injury to his low back.

2. Claimant is entitled to authorized medical treatment that is reasonably necessary to cure and relieve the effects of his low back injury.

3. Claimant has failed to establish an entitlement to temporary total disability benefits. His claim for temporary total disability is denied and dismissed.

4. Claimant has failed to establish an entitlement to temporary partial disability benefits. His claim for temporary partial disability is denied and dismissed.

5. Claimant's average weekly wage is $ 598.28.

6. Respondents have established that Claimant violated the order of PALJ McBride and is subject to penalties pursuant to § 8-43-304(1) C.R.S. Penalties in the amount of $215.00 are ordered.

7. Claimant shall pay a penalty of $107.50 to Respondents.

8. Claimant shall pay a penalty of $107.50 to the Workers' Compensation Cash Fund. Claimant shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: Claimant shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

9. Respondents' request for attorney's fees is denied and dismissed.

10. Respondents' request for offsets and applicable credits against any temporary indemnity benefits ordered is denied as moot as no temporary total or temporary partial disability benefits are owed in this matter.

10. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 9, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury to his right knee during the course and scope of her employment with Employer on October 8, 2014.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits for his October 8, 2014 industrial injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 9, 2014 until May 27, 2014.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATIONS

The parties agreed to the following:

1. On September 23, 2014 Claimant sustained a compensable lower back injury during the course and scope of his employment with Employer.

2. Claimant received reasonable, necessary and related medical treatment for his September 23, 2014 lower back injury.

3. Claimant earned an Average Weekly Wage (AWW) of $1,165.25.

FINDINGS OF FACT

1. Claimant is a 63 year old male who was employed by Employer as a Sheet Rock Worker and Painter. On September 23, 2014 Claimant suffered an admitted industrial injury to his lower back when he fell backwards and tripped over tools at a job site (Case No. 4-964-211).

2. Claimant obtained medical treatment from Craig Anderson, M.D. at Midtown Occupational Medicine. He was diagnosed with an acute lumbar strain. Dr. Anderson assigned work restrictions that included no climbing.

3. Claimant did not miss any time from work. Owner of Employer and Safety Manager Beth Lundquist confirmed that Claimant did not miss work after his September 23, 2014 lower back injury.

4. When Ms. Lundquist became aware that Claimant had work restrictions and was reducing his hours, she prepared a modified job offer. She presented the modified job offer to Claimant on October 2, 2014 and the position had a start date of October 10, 2014. The modified position was based on the restrictions that had been assigned by Claimant's treating physicians. Dr. Anderson approved the various job duties delineated in the modified job offer.

5. On October 8, 2014 Claimant visited Marc Steinmetz, M.D. at Midtown Occupational Medicine for an evaluation of his lower back condition. However, Claimant reported that he had been suffering from a fever for four days and was experiencing right knee pain (Case No. 4-965-372). The record does not reveal that Claimant associated his right knee symptoms with his work activities for Employer. Dr. Steinmetz determined that Claimant might be suffering from a sepsis and an infected right knee. He directed Claimant to the Denver Health Emergency Room for an examination.

6. Claimant visited the Denver Health Emergency Room and reported right knee pain, fever and urinary incontinence. A physical examination revealed redness, warmth, pain and swelling associated with Claimant's right knee. Claimant was diagnosed with a right knee septic bursitis and received antibiotics. The medical records do not reflect any association between Claimant's right knee symptoms and his work activities for Employer.

7. On October 9, 2014 Claimant returned to Dr. Steinmetz for an examination. Claimant related his right knee symptoms to the onset of his fever. He reported that he had received antibiotics at the Denver Health Emergency Room and his incontinence had resolved. Dr. Steinmetz diagnosed Claimant with a right knee bursitis infection that was not work-related. He explained that Claimant "has not been doing regular work or kneeling for several weeks and he did not hurt his knee when he fell." Dr. Steinmetz instructed Claimant to remain mostly sitting at work until a primary care physician released him to full duty employment. Ms. Lundquist was present at the evaluation and aware of the instructions.

8. Although Claimant was required to obtain medical clearance for his right knee condition before he could return to work, he repeatedly reported to Employer without a medical release for his right knee and sought to work in his modified capacity. Employer responded that Claimant was required to produce a release from a physician before he could return to work. Nevertheless, Claimant returned to work approximately every other day for 10 days without providing the documentation.

9. On October 27, 2014 Ms. Lundquist terminated Claimant from employment because he failed to provide a medical release for his right knee condition. She noted that Claimant was eligible to be rehired by Employer if he returned with the

documentation. The reason for the termination was documented as “no show/no call.” The termination was retroactive to October 8, 2014.

10. On January 12, 2015 Claimant underwent an evaluation with Larry Lesnak, D.O. Claimant associated his development of right knee symptoms with climbing scaffolding while performing his job duties. He specifically reported that he was attempting to climb scaffolding by placing direct pressure on his right knee on a scaffolding bar. Claimant noted that he immediately experienced right knee pain and swelling. Upon examination Claimant did not exhibit any right knee joint effusions and had full range of motion. Dr. Lesnak characterized Claimant’s right knee symptoms as “subjective complaints of occasional right lateral/medial knee pains.” He diagnosed Claimant with “possible intermittent symptomatic right knee osteoarthritis” and concluded that his right knee condition was not work-related.

11. On March 3, 2015 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes diagnosed Claimant with the idiopathic onset of a right knee prepatellar bursal infection that resolved with antibiotics. He explained that the condition was idiopathic because it was not likely caused by climbing scaffolding. Dr. Hughes noted that Claimant’s type of bursal infection can occur suddenly and spontaneously. The infections are located most commonly over the “olecranon bursa of the elbow and the prepatellar bursa of the knee.” Dr. Hughes determined that Claimant’s right knee symptoms did not constitute a work-related condition. He summarized that Claimant’s “right knee prepatellar bursal infection was idiopathic and not related to his fall on September 23, 2014 or to other work-related activities proximate to the onset of this problem on October 8, 2014.”

12. On March 18, 2015 Claimant underwent an independent medical examination with Caroline Gellrick, M.D. He reported that he was required to use his right knee to kneel on the scaffolding at work because of his lower back injury. Dr. Gellrick determined that Claimant sustained an injury to his right knee as a result of kneeling on the scaffolding at work. She detailed that kneeling on the scaffolding flared Claimant’s right knee bursitis and underlying degenerative changes to cause septic bursitis. Claimant was thus required to obtain medical treatment from Denver Health. Dr. Gellrick remarked that the treatment was reasonable, necessary and related to his work-related right knee injury.

13. Claimant did not work after his termination until he reached Maximum Medical Improvement (MMI) for his lower back condition and was released to full duty on May 28, 2015. He received unemployment benefits of $700.00 every two weeks for approximately two months from a previous employer.

14. Claimant testified at the hearing in this matter. He maintained that he injured his right knee at work because he was required to use his right knee to climb scaffolding as a result of his September 23, 2014 admitted lower back injury. Claimant also remarked that he did not know he could be terminated for failing to obtain a medical release from a physician for his right knee condition.

15. Ms. Lundquist testified at the hearing in this matter. She explained that there were handrails on the relatively short scaffolding that Claimant used to complete his job duties. Therefore, Claimant was not required to apply pressure to his right knee in ascending the scaffolding. Ms. Lundquist also commented that she repeatedly told Claimant that he needed to provide a fitness-for-duty release for his right knee condition prior to returning to work for Employer. She gave Claimant two weeks but he failed to supply the medical release and was terminated.

16. Dr. Hughes testified at the hearing in this matter. He maintained that Claimant's right knee prepatellar bursal infection was not caused by his work activities for Employer. He explained that Claimant had not suffered any trauma or aggravation to his right knee while working on the scaffolding that was sufficient to cause bursitis and an infection. Dr. Hughes acknowledged that jobs such as a tile setter or carpet layer can cause bursitis. However, nothing in Claimant's description of his work activities on October 8, 2014 constituted a sufficient exposure to cause his right knee prepatellar bursal infection. Dr. Hughes also commented that Claimant was not suffering from a pre-existing condition that was aggravated by his work activities on October 8, 2014. He noted that Claimant's right knee prepatellar bursal infection likely arose spontaneously. Dr. Hughes remarked that a spontaneous infection of the knee bursa, in the absence of aggravating factors, is a common presentation.

17. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right knee injury during the course and scope of his employment with Employer on October 8, 2014. Claimant attributed his right knee symptoms to climbing scaffolding while performing his job duties. He specifically reported that he was attempting to climb scaffolding by placing direct pressure on his right knee on a scaffolding bar. Claimant noted that he was required to use his right knee to kneel on the scaffolding at work because of his lower back injury. However, Ms. Lundquist credibly explained that there were handrails on the relatively short scaffolding that Claimant used to complete his job duties. Therefore, Claimant was not required to apply pressure to his right knee in ascending the scaffolding. Moreover, Claimant's initial medical records do not reflect any connection between Claimant's right knee symptoms and his work activities for Employer.

18. The medical evidence also demonstrates that Claimant's work activities for Employer did not cause his right knee condition. Dr. Hughes persuasively maintained that Claimant's right knee prepatellar bursal infection was not caused by his work activities for Employer. He explained that Claimant had not suffered any trauma or aggravation to his right knee while working on the scaffolding that was sufficient to cause bursitis and an infection. Dr. Hughes acknowledged that jobs such as a tile setter or carpet layer can cause bursitis. However, nothing in Claimant's description of his work activities on October 8, 2014 constituted a sufficient exposure to cause his right knee prepatellar bursal infection. Dr. Hughes also commented that Claimant's knee condition was likely idiopathic and any pre-existing condition was not aggravated by his work activities for Employer. Furthermore, Drs. Steinmetz and Lesnak concluded that

Claimant's right knee infection was not caused by his work activities for Employer on October 8, 2014.

19. In contrast, Dr. Gellrick determined that Claimant's right knee symptoms were caused by his work activities. Dr. Gellrick explained that Claimant sustained an injury to his right knee as a result of kneeling on the scaffolding at work. She detailed that kneeling on the scaffolding flared Claimant's right knee bursitis and underlying degenerative changes to cause septic bursitis. However, Dr. Gellrick's analysis is speculative because it fails to consider the actual mechanics of Claimant's activities in climbing the scaffolding. As Dr. Hughes remarked, a spontaneous infection of the knee bursa in the absence of aggravating factors, is a common presentation. The coincidental correlation between Claimant's work and his symptoms is insufficient to establish a causal connection between his injury and work activities. Accordingly, the persuasive testimony and medical records reveal that Claimant's work activities on October 8, 2014 did not aggravate, accelerate or combine with any pre-existing right knee condition to cause a need for medical treatment.

20. Respondents have established that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under the termination statutes. On October 9, 2014 Dr. Steinmetz instructed Claimant to remain mostly sitting at work until a primary care physician released him to full duty employment. Ms. Lundquist was present at the evaluation and aware of the instructions. Although Claimant was required to obtain medical clearance for his right knee condition before he could return to work, he repeatedly reported to Employer without a medical release and sought to work in his modified capacity. Employer responded that Claimant was required to produce a release from a physician before he could return to work. Ms. Lundquist commented that she repeatedly told Claimant that he needed to provide a fitness-for-duty release for his right knee condition prior to returning to work for Employer. Nevertheless, Claimant returned to work approximately every other day for 10 days without a medical release for his right knee condition. On October 27, 2014 Ms. Lundquist terminated Claimant from employment because he failed to provide a medical release for his right knee condition. She noted that Claimant was eligible to be rehired by Employer if he returned with a medical release for his right knee. The termination was retroactive to October 8, 2014. Although Claimant testified that he did not know he could be terminated for failing to obtain a medical release from a physician, the record contains significant credible evidence that Claimant was repeatedly apprised that he needed to obtain a physician's release or he could not work for Employer. Claimant precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence"

of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on October 8, 2014. Claimant attributed his right knee symptoms to climbing scaffolding while performing his job duties. He specifically reported that he was attempting to climb scaffolding by placing direct pressure on his right knee on a scaffolding bar. Claimant noted that he was required to use his right knee to kneel on the scaffolding at work because of his lower back injury. However, Ms. Lundquist credibly explained that there were handrails on the relatively short scaffolding that Claimant used to complete his job duties. Therefore, Claimant was not required to apply pressure to his right knee in ascending the scaffolding. Moreover, Claimant's initial medical records do not reflect any connection between Claimant's right knee symptoms and his work activities for Employer.

8. As found, the medical evidence also demonstrates that Claimant's work activities for Employer did not cause his right knee condition. Dr. Hughes persuasively maintained that Claimant's right knee prepatellar bursal infection was not caused by his work activities for Employer. He explained that Claimant had not suffered any trauma or aggravation to his right knee while working on the scaffolding that was sufficient to cause bursitis and an infection. Dr. Hughes acknowledged that jobs such as a tile setter or carpet layer can cause bursitis. However, nothing in Claimant's description of his work activities on October 8, 2014 constituted a sufficient exposure to cause his right knee prepatellar bursal infection. Dr. Hughes also commented that Claimant's knee condition was likely idiopathic and any pre-existing condition was not aggravated by his work activities for Employer. Furthermore, Drs. Steinmetz and Lesnak concluded that Claimant's right knee infection was not caused by his work activities for Employer on October 8, 2014.

9. As found, in contrast, Dr. Gellrick determined that Claimant's right knee symptoms were caused by his work activities. Dr. Gellrick explained that Claimant sustained an injury to his right knee as a result of kneeling on the scaffolding at work. She detailed that kneeling on the scaffolding flared Claimant's right knee bursitis and underlying degenerative changes to cause septic bursitis. However, Dr. Gellrick's analysis is speculative because it fails to consider the actual mechanics of Claimant's activities in climbing the scaffolding. As Dr. Hughes remarked, a spontaneous infection of the knee bursa in the absence of aggravating factors, is a common presentation. The coincidental correlation between Claimant's work and his symptoms is insufficient to establish a causal connection between his injury and work activities. Accordingly, the

persuasive testimony and medical records reveal that Claimant's work activities on October 8, 2014 did not aggravate, accelerate or combine with any pre-existing right knee condition to cause a need for medical treatment.

Responsible for Termination

10. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

11. As found, Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under the termination statutes. On October 9, 2014 Dr. Steinmetz instructed Claimant to remain mostly sitting at work until a primary care physician released him to full duty employment. Ms. Lundquist was present at the evaluation and aware of the instructions. Although Claimant was required to obtain medical clearance for his right knee condition before he could return to work, he repeatedly reported to Employer without a medical release and sought to work in his modified capacity. Employer responded that Claimant was required to produce a release from a physician before he could return to work. Ms. Lundquist commented that she repeatedly told Claimant that he needed to provide a fitness-for-duty release for his right knee condition prior to returning to work for Employer. Nevertheless, Claimant returned to work approximately every other day for 10 days without a medical release for his right knee condition. On October 27, 2014 Ms. Lundquist terminated Claimant from employment because he failed to provide a medical release for his right knee condition. She noted that Claimant was eligible to be rehired by Employer if he returned with a medical release for his right knee. The termination was retroactive to October 8, 2014. Although Claimant testified that he did not know he could be terminated for failing to obtain a medical release from a physician, the record

contains significant credible evidence that Claimant was repeatedly apprised that he needed to obtain a physician's release or he could not work for Employer. Claimant precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Workers' Compensation benefits for his October 8, 2014 right knee condition is denied and dismissed (Case No. 4-965-372).

2. Claimant is precluded from receiving TTD benefits after October 8, 2014 because he was responsible for his termination from employment.

3. Claimant earned an AWW of $1,165.25.

4. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 22, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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_____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-966-545-01

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee and ankle on March 15, 2014.Whether Claimant sustained compensable injuries during the course and scope of her employment with Employer.

2. Whether Claimant is entitled to reasonable and necessary medical treatment.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage was $378.46.

FINDINGS OF FACT

1. Claimant is employed by Interstate Cleaning Corporation as a janitorial worker and was working there at all times relevant to this proceeding. Claimant's primary language is Spanish, and she does not speak English.

2. On March 15, 2014, Claimant was operating a "scrubber" machine to scrub the floors of a Target store. As she was stepping off the scrubber to change the water, she fell, twisted her right ankle and felt pain in her right knee.

3. Claimant did not immediately report the accident to anyone other than her husband, Eugenio Alvarado, who also worked there at the time. He heard her yell, saw her on the ground on her left side, and helped her get up.

4. Claimant kept working and finished her shift after this incident. She continued to work for six months before reporting her injury to Employer, hoping during that time that her knee and ankle pain would improve. Her pain worsened, however, especially in her knee.

5. Claimant did not report the injury sooner because she was afraid she would lose her job. She was an undocumented worker at that time, and she feared she would lose her job if Employer discovered that fact. Also, Claimant was the lead janitorial worker of a crew that was made up entirely of her close family members. She did not report her injury sooner because she feared their jobs may be put in jeopardy as well.

6. On August 15, 2014, Claimant had an appointment with her primary care physician, Dr. Elisa Melendez, for knee pain. Claimant did not tell Dr. Melendez that she hurt herself at work during that appointment.

7. Dr. Melendez requested an MRI of Claimant's knee, which Claimant underwent on September 8, 2014 at St. Joseph hospital. The MRI report states that Claimant had an "incomplete vertical tear in the anterior horn and body segment junction of medial meniscus."

8. Claimant saw Dr. Melendez again on or around September 25, 2014 to follow up on the MRI. Dr. Melendez's report from that appointment states:

> The patient reports that 6 months ago she sustained an injury to her right foot/knee after stepping down from a rider scrubber while at work. Patient reports that since that date of her injury, she has been experiencing increased knee/ankle pain and difficulty walking as well. She was sent to get an MRI of her knee which notes a medial meniscal tear.

9. Claimant first reported her injury to Employer in late September of 2014.

10. Henry Ariza was Claimant's supervisor. He credibly testified that as a lead worker, Claimant would have been trained on how to report workers' compensation claims, and would have known that employees are supposed to call him immediately when they have been injured on the job.

11. Prior to Claimant's March 15, 2014 injury, she had non-work related medical issues. Mr. Ariza was accommodating of those medical appointments.

12. Mr. Ariza further credibly testified that Clamant was a good employee and that Employer had treated her fairly in the past.

13. Mr. Ariza is not allowed to hire undocumented workers. If he were to discover that one of the employees he supervises was undocumented, he would have to report that fact to Employer.

14. After Claimant reported the March 15, 2014 injury to Mr. Ariza, Employer, through Mr. Ariza, immediately authorized Claimant to treat at Concentra Medical Center in Thornton, Colorado ("Concentra").

15. Claimant was seen by a physician at Concentra on October 1, 2014. The Concentra medical record for that appointment states:

> Injury history: Injury date: 3/15/14. This is the result of a fall and twisting. Occurred while at work. She stepped down off of riding waxing machine onto squeegee and twisted right ankle and right knee . . . Saw her PCP and reports she had an MRI of the knee showing a meniscus tear – sent here. 10/10 pain in right knee

> (anteromedial area) and 8/10 pain in right ankle (medial > lateral). Denies prior injuries to the areas. Still working. Radiology results: right foot – navicular fracture is old. Right ankle – old navicular fracture.

16. Claimant also had an x-ray of her right foot on October 1, 2014. The results indicated "…no evidence of fracture . . . no arthritic change…"

17. An October 7, 2014 Concentra report concerning Claimant stated:

> mechanism of injury: Pt reports that she was using a scooter at work. While getting off of it, her right foot twisted and she fell to the ground. She never reported her injury until recently. The injury occurred 3/15/14, but her knee pain got worse about two months ago….She had an MRI of the right knee that shows a partial medial meniscus tear and an x-ray of the foot that shows an old navicular fracture.

18. On November 10, 2014, Claimant saw Dr. Thomas Mann, an orthopedic surgeon at Cornerstone Orthopaedic and Sports Medicine, P.C., ("Cornerstone") who stated that she would be a candidate for arthroscopic repair of the medial meniscus, with debridement and chrondoplasty of the right knee joint.

19. Dr. Daniel L. Ocel, an orthopedic surgeon at Cornerstone, reviewed Claimant's first MRI. He recommended another MRI, which was performed on December 19, 2014 at North Denver Integrated Imaging. The second MRI report stated "a chronic complete tear of the anterior talofibular ligament is present."

20. On January 29, 2015, Claimant saw another Concentra physician, Dr. John Burris. Dr. Burris's report states in pertinent part:

> Patient states that she was stepping off a waxing machine at work on 3/15/2014 when she slipped striking her right foot against the machine. She did not fall to the ground. She did not seek medical attention until approximately 7 months later when she presented to her primary care physician for reported knee complaints. MRI was performed through her private insurance on September 8, 2014, showing incomplete vertical tear of the medial meniscus with chrondromalacia of the medial compartment and patellofemoral arthritis . . . It is difficult to believe that the event that she described on 3/15/2014 is the cause of her present pain complaints. All diagnostic testing has been consistent with degenerative changes and her overall deconditioning and body habitus.

21. Dr. Burris continued: "After today's encounter [1/29/2015], it is clear that this patient is heavily engaged in a secondary gain with regard to reported work event. As stated above, it is difficult for me to relate her present complaints with the reportedly minor event that occurred 10 months ago. Subsequent diagnostic testing has only shown degenerative changes consistent with her body habitus and was not likely caused by the event given the significant delay in seeking medical care."

22. Dr. Burris concluded: "I cannot causally relate her present pain with the reported history of striking her foot on an adjacent machine."

23. Claimant did not strike her foot on an adjacent machine.

24. Dr. Mark Paz performed an IME on Claimant on behalf of Respondents. Dr. Paz is Level II accredited, and was deemed an expert in occupational and internal medicine at hearing. On March 11, 2015, Dr. Paz met with Claimant, and afterward he reviewed her medical records.

25. In his report Dr. Paz wrote "on March 15, 2014 she was operating a floor cleaning machine called a green machine. To operate it she had to sit on it and drive it. As she was stepping off of it she slipped and fell to the floor. The machine is 2 feet above the ground and she has to jump off the machine. It does not have a step to get off of it."

26. Dr. Paz assessed Claimant with right knee degenerative joint disease and right knee medial meniscal tear.

27. Concerning causation, Dr. Paz concluded that:

> Considering the direct history provided by [Claimant] during today's evaluation, findings on physical examination, and review of the prior medical records, based on reasonable medical probability, it is not medically probable that the right ankle sprain is causally related to the March 15, 2014 reported event.

28. Dr. Paz further concluded that Claimant's right knee symptoms were not causally related to the March 15, 2014 incident, based on reasonable medical probability.

29. Dr. Paz explained that "considering the direct history provided by [Claimant], the history documented in the medical record, and the documentation available from the office of Dr. Melendez, if she did sustain a right ankle injury on or about March 15, 2014, the injury did not require medical treatment at that time. The right ankle and right knee symptoms which are referenced in Dr. Melendez's September 24, 2014 report are inconsistent with an injury sustained on or about March 15, 2014."

30. Dr. Paz testified that his medical conclusions were to a reasonable degree of medical certainty.

31. Dr. Paz testified that at the IME Claimant could not stand due to right knee pain.

32. Dr. Paz did not review Claimant's actual MRI images, just the MRI reports.

33. Dr. Paz did not have Claimant's medical records from Dr. Melendez when he conducted the IME. Rather, he used the history Claimant told him about her appointments with Dr. Melendez.

34. Dr. Paz did not have an MRI report of Claimant's right knee when he wrote his IME.

35. Throughout the majority of Claimant's medical appointments, beginning with Dr. Melendez and including her Concentra appointments, specialist appointments, and the IME, Claimant consistently reported a high level of pain in her right knee and/or right ankle. At times she used a crutch and was unable to walk without the crutch due to the high level of pain.

36. Although the medical records seem to indicate that Claimant does not have a fracture of her right ankle, Dr. Melendez and other physicians indicated in the medical records that she had a sprain of her right ankle.

37. Claimant's testimony at hearing was credible and persuasive.

38. Dr. Burris's medical report was not credible or persuasive.

39. Dr. Paz's report and testimony were not credible or pursausive.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S.

2. For a claim to be compensable under the Act, a claimant has the burden of proving by a preponderance of the evidence that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. § 8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006).

3. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. *Id.*

4. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990).

5. The ALJ is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). Finally, the ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See, e.g.* § 8-43-210, C.R.S.; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

6. An ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion, and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

7. An injury occurs "in the course of" employment when the employee demonstrates that the injury occurred within the time and place of his or her employment and during an activity that had some connection with his or her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

8. The "arising out of" element is narrower than the course of employment element, and requires a claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *Triad*; *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). It is generally sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9 (Colo. App. 1995). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the

circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996).

9. Claimant has proven by a preponderance of the evidence that her right knee and ankle injuries occurred in the course of her employment with Employer. She credibly testified that she was working for Employer at Target on March 15, 2014 when she twisted her right ankle and felt pain in her right knee. Claimant's injury occurred during an activity that had some connection with her work-related functions: operating the scrubber machine to wash Target's floors. Claimant is a janitorial worker, and operating a scrubber to clean floors is certainly part of her work-related functions. Therefore, Claimant has proven by a preponderance of the evidence that her right knee and ankle injuries occurred in the course of her employment with Employer.

10. Claimant has likewise proven by a preponderance of the evidence that her right knee and ankle injuries arose out of her employment with Employer. Dr. Burris and Dr. Paz based their conclusions that Claimant's injuries were not related to the March 15, 2014 incident in part on the fact that she waited so long to report the injury. However, Claimant credibly testified that the reason she did not report her injury was because she was fearful of losing her job, and she was fearful her family members would lose their jobs. Mr. Ariza credibly testified that Employer had treated her well, the implication being that Employer had never given Claimant any reason to fear losing her job. The ALJ concludes, however, that the reason Claimant was fearful was not necessarily because of anything Employer had done or said, but because of Claimant's undocumented status. Mr. Ariza's own testimony supports that conclusion, when he stated that if he discovered one of his employees was undocumented, he would have to report that fact to Employer. Claimant's fears were not unreasonable given Mr. Ariza's testimony. Her reasons for waiting six months to report the injury are credible, and therefore the ALJ concludes that Claimant's delay in reporting her injury is not persuasive evidence of anything other than her fear of her legal status becoming public knowledge. The delay is not persuasive evidence that Claimant's injury is not related to the March 15, 2014 incident.

11. Furthermore, the ALJ does not find Dr. Paz's opinion that "if she did sustain a right ankle injury on or about March 15, 2014, the injury did not require medical treatment at that time" persuasive evidence that Claimant's injuries did not arise out of her employment with Employer. Since Claimant did not seek medical treatment until August 15, 2014, there are no medical records at or near the time of March 15, 2014. Thus, it is unclear how Dr. Paz could conclude the injury did not require medical treatment at that time since no records exist indicating anything whatsoever, either in Claimant's favor or in Respondents' favor.

12. Similarly, the ALJ does not find Dr. Burris' conclusions persuasive. He remarks that it is difficult for him to relate Claimant's complaints with "the reportedly

minor event that occurred 10 months ago." Again, no medical records exist near the time of Claimant's accident. Also, it is unlikely Claimant reported to Dr. Burris that the event was minor, given her consistent reports of high pain levels. Additionally, Dr. Burris wrote that Claimant told him she hurt herself by striking her right foot against an adjacent machine. Claimant was entirely consistent in telling every other physician how she hurt herself, and never once stated she hurt herself by striking an adjacent machine. The ALJ found Claimant credible at hearing, and therefore finds it unlikely that Claimant told Dr. Burris she struck her foot on an adjacent machine. Because of these problems with Dr. Burris's report, the ALJ does not find his conclusions persuasive that Claimant's injuries were not causally related to the March 15, 2014 incident.

13. Finally, the medical evidence supports the fact that Claimant had injuries in her right knee and right ankle that arose out of her employment with Employer. The MRI from September 8, 2014, indicated that Claimant had an "incomplete vertical tear in the anterior horn and body segment junction of medial meniscus." The second MRI from December 19, 2014 confirmed that "a chronic complete tear of the anterior talofibular ligament is present." The medical records indicated she also had a right ankle sprain. That the injuries arose out of the incident that occurred on March 15, 2014 is supported by the fact that Claimant consistently related to multiple physicians that she twisted her right ankle and felt pain in her right knee when she slipped off the scrubber. On September 25, 2014, Dr. Melendez reports that Claimant told her "she sustained an injury to her right foot/knee after stepping down from a rider scrubber while at work. Patient reports that since that date of her injury, she has been experiencing increased knee/ankle pain and difficulty walking as well." On October 1, 2014, Claimant told a Concentra physician that "she stepped down off of riding waxing machine onto squeegee and twisted right ankle and right knee." On October 7, 2014, she told another Concentra physician "Pt reports that she was using a scooter at work. While getting off of it, her right foot twisted and she fell to the ground." Dr. Paz wrote "on March 15, 2014 she was operating a floor cleaning machine called a green machine. To operate it she had to sit on it and drive it. As she was stepping off of it she slipped and fell to the floor." Her husband credibly testified that he heard Claimant yell and helped her off of the floor after she fell. Claimant twisted her right ankle and felt pain in her right knee on March 15, 2014 while at work. As detailed above, she suffered right knee and ankle injuries as confirmed by MRI reports and multiple physicians. Based on all of the above, the ALJ concludes that Claimant has met her burden of proof that her right knee and ankle injuries arouse of out her employment with Employer and are therefore compensable.

ORDER

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee and ankle on March 15, 2014.

2. Claimant is entitled to reasonable and necessary medical treatment.

DATED: October 22, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that Dr. Hehman is authorized to treat claimant for his injuries?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant testified he began working for Employer in May 2008. Claimant testified that employer is a commercial construction business that at times specializes in building hydroelectric plants. Claimant testified that he has been employed as a foreman since 2012, when he moved from Washington to Colorado to work on hydroelectric plants.

2. Claimant testified that he had a work injury to his neck that occurred on January 31, 2011 with employer. Claimant testified he was pulling apart sheets of metal decking material that were frozen together and felt a pop in his neck. Claimant eventually underwent a C3-C4 diskectomy and fusion surgery performed by Dr. Atteberry on February 15, 2012. Claimant testified that after surgery, he worked as a welding instructor for a short time, because the work was not as physical as his work with employer. Claimant was released to full work duty and provided a permanent impairment rating by his treating physician in Washington on April 26, 2012. Claimant testified he returned to work for employer in his normal job without restrictions following the January 31, 2011 work injury.

3. Claimant testified that approximately six months after being released to full work duty, he returned to work for employer. Claimant testified that initially he worked for employer in Washington, before being transferred to Colorado to work as a foreman on hydroelectric projects in the Montrose area.

4. Claimant testified that he had some continuing neck pain in late 2012 and early 2013 when he returned to physical labor for Employer. Claimant testified that he wondered if the fusion had failed due to that physical labor. Claimant testified that he requested to reopen his Washington workers' compensation claim on that basis. He testified that he appealed a denial of reopening in February 2013 because he still believed that the fusion had potentially failed. He testified that the claim did not reopen.

5. Claimant testified that he underwent a computed tomography ("CT") scan of his neck in August 2013 at his own expense. Claimant testified that after his attempt to reopen his January 2011 claim was denied, he was still having some aches and pains in his neck, and he wanted to ensure that the fusion had not failed.

6. The medical records indicate that claimant's surgeon, Dr. Atteberry, recommended that claimant obtain a primary doctor in Colorado so that he could have traction treatment, prescription medication, or potentially physical therapy. Claimant testified that he did not get any of these treatments or obtain a primary physician prior to September 2014. Claimant testified that, at the time, he believed his neck pain was something he would either "live with" or that it would go away. He testified that his neck pain went away eventually. He testified that he did not pursue any other care in early 2013 because his symptoms eventually went away in 2013. He testified that the reason there were no medical records discussing his neck between August 2013 and September 2014 was that he did not have any ongoing serious problems in his neck.

7. Claimant testified about a December 11, 2013 medical record from Montrose Memorial Hospital. Claimant testified that he sought medical care for chest pain after he was wrestling around with his co-worker but that he did not seek care for neck symptoms because he was not having them. Medical providers at Montrose Memorial Hospital noted that claimant has had chronic neck pain and chronic left fifth finger numbness. The medical records from Memorial Hospital also noted that claimant had a normal inspection of the neck.

8. Claimant testified that he did not have any neck problems either at work or outside of work after the August 2, 2013 CT scan up until September 2014. Claimant denied having symptoms in his left hand or left arm between June 2013 and September 2014.

9. Claimant testified that on September 23, 2014, he woke up without any particular neck symptoms. Claimant testified that he went to work, and that morning was shaping metal penstock with a 16-foot-tall bottle jack along with a coworker who was welding. Claimant testified that that as he was lifting the bottle jack to his coworker above him, he began having increased neck pain. Claimant testified that he was later stripping plywood forms off of concrete and his neck pain worsened. Claimant testified that after stripping the concrete forms, he had difficulty moving his neck. Claimant testified that these symptoms worsened over the course of the day. Claimant testified that he could not identify a particular jolt of pain with a particular activity, but that his symptoms developed over the course of the workday. The ALJ finds claimant's testimony in this regard to be credible.

10. Claimant testified that he reported his neck pain that day to his supervisor, Mr. Ben Sartain. Claimant testified that Mr. Ben Sartain recommended that claimant go home for the day. Claimant testified he told Mr. Ben Sartain that he felt well enough to continue working.

11. Mr. Sartain authored a Supervisor's Report of Accident/Injury on September 23, 2014. Mr. Sartain noted that claimant was "stripping the deep intake walls" at the time of the accident. The Supervisor's Report of Acciden/Injury noes that claimant "does not [know] when it happen[ed]. He said his neck was find in the morning and does not know what he did." Mr. Sartain also noted: "He was stripping the intake walls and hurt his neck. He does not know when or how he did it. He just came to me and said his neck was all jacked up, but he was fine to keep working." With regard to witnesses, Mr. Sartain noted that "nobody knows when he did hurt his neck." With regard to how the accident could have been prevented, Mr. Sartain noted it was an "old injury."

12. Claimant testified that Mr. Ben Sartain was on the job with him when the January 31, 2011 work injury took place. Claimant testified that he talked about his neck injury with Mr. Ben Sartain, including the August 2013 CT scan, and that he told Mr. Ben Sartain about his prior neck problems after the September 23, 2014 injury happened. Claimant testified that he believed Mr. Ben Sartain filled out the report with a reference to an prior workers' compensation claim because Mr. Ben Sartain assumed that claimant's injury on September 23, 2014 was related to the old injury.

13. Claimant also filled out an Employee Report of Accident/Incident on September 24, 2014. Claimant noted that he was "stripping deep intake" when the injury occurred. Claimant noted that he had injured his neck, and the description of the injury was "neck pain." Claimant also indicated that he had injured his neck before, and had seen a doctor about that injury, and that information about how that injury occurred "should be on file at the office." Claimant testified that he answered questions about seeing a doctor and how the injury occurred the way he did because he had the mistaken belief that those questions referred to his prior injury in 2011.

14. Claimant testified that he went to Montrose Memorial Hospital on September 23, 2014 due to severe neck pain. Claimant testified that Mr. Ben Sartain knew he was seeking care at Montrose Memorial Hospital, and that Mr. Ben Sartain came to his home to watch his children so that claimant and his wife could go to the emergency room. Claimant testified that he was not advised by Mr. Ben Sartain, or anyone else at employer, to go to a specific doctor.

15. The hospital record noted that Insurer was the insurance company to be billed. Dr. Borgo evaluated claimant in the emergency department. Dr. Borgo noted that claimant had severe neck pain that began gradually that day while he was at work. Dr. Borgo referred claimant to Dr. Faragher and to Dr. Tice.

16. Dr. Borgo noted that claimant denied an injury. Claimant testified that he may have stated he didn't have an injury, because he did not have a broken leg, or a

cut, or any specific incident. Claimant testified that he had an increase in neck pain with work activity as he described, but that he did not associate his neck pain with a specific incident while working on September 23, 2014.

17. Claimant saw Dr. Tice on October 13, 2014. Dr. Tice summarized claimant's history, including the history of his prior work injury in Washington. Dr. Tice noted that on or about September 23, 2014 claimant was doing his usual job and began having recurrent symptoms of neck and left arm pain, similar to what he had previously but more intense. Dr. Tice noted that claimant had been able to continue to work, but he was much worse in the morning with severe pain. Dr. Tice also noted that claimant had numbness in his left small finger and had some weakness in his hand. Dr. Tice noted that claimant had cervical radiculopathy with findings of ulnar neuropathy. Dr. Tice recommended an MRI scan and x-rays of the neck with flexion and extension. Dr. Tice also referred claimant to Dr. Hehmann.

18. Claimant testified that he eventually learned he had to see a doctor pre-authorized by Respondents. Claimant testified that neither himself nor Mr. Ben Sartain knew that claimant needed to see a doctor from a list of pre-approved doctors.

19. Claimant first saw Dr. Frazzetta on October 30, 2014 after being referred by Insurer. Dr. Frazzetta noted that on September 23, 2014, claimant was performing his regular job, helping to lift a jack when he noticed some acute neck pain in the lower part of the cervical spine. The doctor noted that as the day progressed, claimant's pain became worse, and became severe enough that claimant went to the emergency room that day. Dr. Frazzetta noted that claimant saw Dr. Tice who recommended an MRI and x-rays, but that claimant had not yet seen a primary physician. Dr. Frazzetta noted that claimant had left lower neck pain, upper shoulder pain, some chest pain, numbness in his left little finger, and numbness in the left elbow. Dr. Frazzetta noted that claimant had been working his regular job as a foreman, being careful to not "overdo things." Dr. Frazzetta recommended a magnetic resonance image ("MRI").

20. Claimant had an MRI performed on his neck on October 30, 2014. The MRI showed mild flattening of the thecal sac at the C3-C4 level, disc dehydration and modest central bulge without impingement at the C5-C6 level, and a left eccentric bulge with mild flattening of the thecal sac without neural impingement.

21. Claimant returned to see Dr. Frazzetta on January 13, 2015. Dr. Frazzetta noted claimant had ongoing neck pain, and that his worker's compensation claim had been denied. Dr. Frazetta reviewed claimant's MRI, and referred claimant to Dr. Tice.

22. Claimant returned to see Dr. Tice on February 24, 2015. Dr. Tice noted that claimant continued to have neck and upper extremity symptoms, but that his worker's compensation claim had been denied. Dr. Tice noted that claimant might be a candidate for surgery or epidural injections due to his ongoing symptoms. Dr. Tice also noted: "I do think with reasonable medical certainty that the patient was doing well until

he had his injury in September, which was a new injury on his superimposed problem of previous cervical spine problem."

23. Claimant returned to see Dr. Frazzetta on April 20, 2015. Dr. Frazzetta noted that claimant still had ongoing pain from his September 23, 2014 injury. Dr. Frazzetta noted that claimant should follow-up with Dr. Tice and Dr. Hehmann. Dr. Frazzetta noted that claimant was waiting to have electromyelogram ("EMG") studies done with Dr. Hehmann.

24. Claimant testified that he had seen Dr. Hehmann once, but that Dr. Hehmann had recommended a nerve conduction test that had not yet taken place. Claimant testified the test had not taken place because his claim had been denied.

25. Claimant testified that after the injury he spoke with Ms. Mertz, claims representative for Insurer, and told her that he had had a prior slight cervical spine bulge, which had "finally [given] out." Claimant testified that he told Ms. Mertz that at times prior to the September 23, 2014 injury he would have some soreness in the mornings, but that the soreness was nothing like he had after the September 23, 2014 injury.

26. Claimant testified at hearing that he continued to have constant, sharp pain in his neck. Claimant testified that his pain radiated to his left shoulder blade, and into his left upper chest. Claimant testified that he had an achy sensation in his left elbow, constant numbness in his left pinky finger, and occasional left hand numbness. He testified that if he stayed in the same position for a prolonged period of time, he could have some numbness in his right hand. Claimant testified that he did not have those symptoms the day before his September 23, 2014 injury. Claimant testified that he had not had a symptom-free day since September 23, 2014. The ALJ finds claimant's testimony regarding his symptoms after September 23, 2014 to be credible.

27. When asked to compare his neck symptoms in August 2013 when he had the CT scan, and after the September 23, 2014 injury, claimant testified that he had only aches and pains in his neck in August 2013, and that his symptoms after September 23, 2014 were much worse than those in August 2013.

28. Mr. Rick Sartain, Operations Manager of employer, testified at hearing on behalf of claimant. Mr. Rick Sartain testified by phone from employer's location in Sunnyside, Washington. Mr. Rick Sartain testified he had known claimant since he was hired by employer in 2008, and knew that claimant was a reliable and trusted employee. Mr. Rick Sartain testified that he was testifying in court in order to clear up confusion that he believed had led respondents to deny claimant's worker's compensation claim.

29. Mr. Rick Sartain testified that claimant had a prior workers' compensation injury to his neck in the state of Washington in 2011. Mr. Rick Sartain was aware that claimant had a surgery to repair his neck, and that he had at least a partial recovery following that surgery.

30. Mr. Rick Sartain testified that he was aware that claimant attempted to reopen his Washington workers' compensation case in 2012 and 2013. Mr. Rick Sartain testified he did not know many details of the reopening attempt, because in Washington claimants attempting to reopen their cases deal directly with the state without much input from the employer.

31. Mr. Rick Sartain testified that claimant returned to work with employer after a brief absence when he worked elsewhere. Mr. Rick Sartain testified that claimant returned to work for Employer with "no problems" with his neck, and testified specifically that claimant had "no limitations" when he returned to work. Mr. Rick Sartain testified that claimant worked a lighter duty job so that he would not be in a compromising spot after his initial neck injury. Mr. Rick Sartain testified that claimant was able to perform his job duties without any problems. Mr. Rick Sartain testified that he did not have any conversations with claimant regarding any neck symptoms leading up to September 23, 2014.

32. Mr. Rick Sartain testified he became aware that claimant reported a work injury when he received word that Ben Sartain, claimant's supervisor, reported that claimant had injured his neck. Mr. Rick Sartain testified that he was aware that claimant had been working in an intake shaft with penstock, and potentially had been "looking up all the time" when he hurt his neck. Mr. Rick Sartain testified that his understanding was that the September 23, 2014 neck injury was "unrelated" to the prior neck injury that occurred in Washington.

33. When asked about the Supervisor's Report of Accident/Injury filled out by Mr. Ben Sartain, and specifically the reference to an "old injury," Mr. Rick Sartain testified that there was "rustration that the report did not have as much detail as he would have liked. Mr. Rick Sartain testified that Ben Sartain was fully aware that claimant had a 2011 neck injury, and testified that Ben Sartain was probably making the assumption that the new incident was related to the 2011 claim.

34. Mr. Rick Sartain testified that he saw claimant a week prior to September 23, 2014 and a week after September 23, 2014. Mr. Rick Sartain testified that claimant looked much worse a week after September 23 than he did a week prior.

35. When Mr. Rick Sartain was asked whether claimant's report of an incident on September 23, 2014 was a work injury, Mr. Rick Sartain testified that he was relatively sure something happened to claimant's neck on September 23, 2014.

36. Mr. Mark Wyatt, the Safety Director of employer, testified at hearing in this matter. Mr. Wyatt also testified by phone from Employer's location in Washington. Mr. Wyatt testified that he knew about claimant's September 23, 2014 claim because he received a phone call from Ben Sartain that indicated that claimant had hurt his neck and sought medical care at Montrose Memorial Hospital. Mr. Wyatt testified that he filled out Employer's First Report of Injury, dated September 24, 2014. The First Report noted no specific incident or event and that claimant had neck pain that developed during the day with the claimant eventually seeking medical treatment after work at

Montrose Memorial Hospital. Mr. Wyatt testified he filled the First Report out in that manner based on written statements of Ben Sartain and claimant.

37. Respondents obtained an independent medical examination ("IME") of claimant with Dr. John McBride on June 2, 2015. Dr. McBride reviewed claimant's medical records, obtained a history from the claimant and performed a physical examination. Dr. McBride also produced reports on June 27, July 6, and August 1, 2015 after reviewing additional medical records. Dr. McBride opined that claimant's neck pain and left upper extremity neuropathy never resolved after the 2011 work injury, and that claimant's current neck and left upper extremity complaints were not related to the September 23, 2014 event. Dr. McBride opined that there was no acute injury on September 23, 2014. Dr. McBride based his opinion, in part, on his contention that claimant's complaints when he requested to reopen his worker's compensation injury [in 2013 were the same as his present complaints. Dr. McBride did indicate that claimant had an aggravation of his previous work injury, but opined that claimant did not have a new injury.

38. Dr. McBride testified at deposition on September 17, 2015. His testimony was consistent with his reports.

39. Dr. McBride testified that claimant's symptoms became progressively worse after the February 15, 2012 neck surgery. Dr. McBride testified that between Dr. Atteberry's May 29, 2013 report, and the Montrose Memorial Hospital record dated September 23, 2014, the date of the new injury, the only medical treatment claimant sought was the CT scan on August 2, 2013. Dr. McBride testified there were not any medical records between August 2, 2013 and September 23, 2014 indicating claimant sought medical care for neck problems. Dr. McBride testified that, per claimant's report, he did not have any neck symptoms in 2014 whatsoever up until the September 23, 2014 injury. Dr. McBride also testified that claimant reported to him that he did not have any neck problems in the year prior to September 23, 2014, did not miss any work in 2014 due to neck problems, and did not identify any incidents in 2013 or 2014 that led to an increase in neck pain. Dr. McBride testified that 99% of the time, physicians give their patients the benefit of the doubt when they describe their symptoms.

40. Dr. McBride testified that patients who are asymptomatic may have MRI findings in their spine, and that patients who are symptomatic may have MRI findings in their spine. Dr. McBride testified that the difference between patients who are asymptomatic and patients who are symptomatic is a product of pain level and function. Dr. McBride testified that pathology in the spine that is apparent on MRI, but not causing symptoms, can be made symptomatic with trauma.

41. Dr. McBride also testified that he did not believe claimant's injury to be work-related because the findings seen on the October 30, 2014 MRI scan (after the September 23, 2014 date of injury) were signs of "ongoing degeneration from his previous injury." Dr. McBride testified that he would expect claimant to have had neck symptoms over 2013 and 2014 prior to the most recent event, but that he would have to rely on the records for information about claimant's condition. Dr. McBride agreed that

in a medical record dated December 11, 2013, medical providers noted that claimant had a "normal inspection" of his neck, which meant that claimant did not have loss of range of motion or tenderness of the neck, and that claimant was not complaining of neck pain. Dr. McBride testified that claimant's reports of his neck pain going away prior to 2014 were not as accurate as the medical records.

42. Dr. McBride testified that claimant had an onset of his neck pain on September 23, 2014. Dr. McBride admitted in his testimony that the symptoms claimant complained of following September 23, 2014 probably required medical care. Dr. McBride testified that if claimant did not have a new onset of symptoms on September 23, 2014, he would not have required medical care.

43. Claimant testified that he disagreed with Dr. McBride's opinions that he did not sustain a new injury on September 23, 2014, the symptoms he had after September 23, 2014 were all related to the 2011 work injury, and that his neck pain never resolved after the 2011 work injury and had not changed since the 2011 work injury. Claimant testified that he disagreed because his symptoms following the 2011 work injury in fact did resolve, and that he remained asymptomatic until the September 23, 2014 injury.

44. The ALJ finds that claimant has proven that it is more likely than not that he sustained a compensable injury to his neck on September 23, 2014. The ALJ notes that even Dr. McBride's testimony establishes that claimant's neck symptoms were aggravated and required treatment as the result of the work injury on September 23, 2014. On the issue of compensability, the ALJ finds that claimant has established that it is more probable than not that claimant sustained an injury on September 23, 2014 arising out of and in the course of his employment with employer that required medical treatment to cure and relieve the claimant from the effects of the injury.

45. In this regard, the ALJ credits the medical opinions expressed by physicians and providers at Montrose Memorial Hospital, Dr. Tice, and Dr. Frazzetta in the medical records over the contrary opinions expressed by Dr. McBride in his IME report and testimony, and finds that claimant has proven that it is more likely than not that he suffered a compensable injury arising out of and in the course of his employment with Employer. The ALJ finds claimant's testimony regarding his symptoms to be consistent with the medical records in evidence. The ALJ credits claimant's testimony that he injured his neck when he lifted a bottle jack and stripped concrete forms while working on September 23, 2014. The ALJ further credits claimant's testimony that although he had a prior neck injury that involved upper extremity radiculopathy, claimant was not experiencing neck or upper extremity symptoms and he did not require medical treatment before the September 23, 2014 injury occurred. The ALJ credits claimant's testimony and finds that claimant has proven that it is more likely than not that his neck and upper extremity symptoms began when his asymptomatic preexisting neck condition was aggravated or exacerbated when he lifted a bottle jack and stripped concrete forms while working on September 23, 2014.

46. The ALJ notes that Rick Sartain's testimony supports claimant's testimony that he was not experiencing neck or upper extremity symptoms before the September 23, 2014 injury. The ALJ credits Rick Sartain's testimony that claimant seemed to be symptom-free in the weeks prior to the September 23, 2014 injury, but had worsened the week after the date of injury. The ALJ credits Rick Sartain's testimony that claimant sustained a new injury on September 23, 2014.

47. The ALJ credits the medical opinions expressed by the various medical providers in the records and claimant's testimony and finds that claimant has proven that it is more likely than not that the medical treatment he received from Montrose Memorial Hospital on September 23, 2014 was reasonable and necessary to cure and relieve the claimant from the effects of his industrial injury. Specifically, the ALJ finds that claimant sought care with Montrose Memorial Hospital on September 23, 2014 on an emergent basis for his neck pain. The ALJ also notes that claimant sought care with the tacit approval of Employer, because claimant's supervisor Ben Sartain knew claimant was seeking medical care, and helped watch claimant's children to allow claimant to seek medical care on September 23, 2014.

48. The ALJ further finds that the medical care provided by Dr. Tice on October 13, 2014 was authorized care, and was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury. The ALJ credits claimant's testimony that neither he nor his supervisor Ben Sartain knew that claimant needed to see a specific pre-authorized medical provider. The ALJ finds that claimant was not advised by his Employer to see a specific, pre-authorized medical provider, and was therefore entitled to choose his own physician. Moreover, the ALJ finds that Dr. Borgo referred claimant in writing to Dr. Tice on September 23, 2014.

49. The ALJ notes that claimant argues that Dr. Tice became an authorized treating physician by virtue of a written referral from Dr. Frazzetta on January 13, 2015. However, because Dr. Tice was already authorized, the referral from Dr. Frazzetta does not "reauthorize" Dr. Tice. The ALJ also finds that Dr. Hehmann is an authorized treating provider by virtue of written referrals from Dr. Frazzetta and Dr. Tice, both authorized treating physicians. The ALJ further finds that the EMG study proposed by Drs. Frazzetta, Tice, and Hehmann is reasonable medical care reasonable and necessary to cure and relieve claimant from the effects of the industrial injury.

50. The ALJ finds that Respondents are liable for the medical treatment provided by Montrose Memorial Hospital (Dr. Borgo), Dr. Tice, Dr. Farragher, and Dr. Hehmann pursuant to the Colorado Medical Fee Schedule set forth by the Division of Workers' Compensation.

51. Wage records entered into evidence establish that claimant earned $53,218.25 in the 52 weeks prior to this injury (time period of September 23, 2013 through September 21, 2014). The ALJ credits the wage records and finds that claimant has established that it is more likely than not that his AWW should properly be established as $1,023.43.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he injured his neck on September 23, 2014.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

7. As found, respondents did not designate a physician to treat claimant for his work injuries and claimant chose to treat with Dr. Borgo. Because respondents did not designate a physician, the choice of physician fell to claimant. As found, Dr. Borgo referred claimant to Dr. Faragher and Dr. Tice. Dr. Tice eventually referred claimant to Dr. Hehmann.

8. As found, respondents eventually designated Dr. Frazzetta who initially evaluated claimant on October 30, 2014, but that does not negate the fact that the treatment with Dr. Tice, Dr. Faragher and Dr. Hehmann was already authorized.

9. As found, the treatment provided by Dr. Tice, Dr. Faragher, Dr. Hehmann, Dr. Frazzetta and Dr. Borgo are found to be reasonable necessary and related to claimant's injury. Additionally, Dr. Hehmann, Dr. Tice and Dr. Frazzetta are all found to be within the proper chain of referrals and are thereby authorized to treat claimant for his work injury.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, claimant earned $53,218.25 in the 52 weeks prior to his compensable work injury. As found, claimant's AWW is determined to be $1,023.43.

ORDER

It is therefore ordered that:

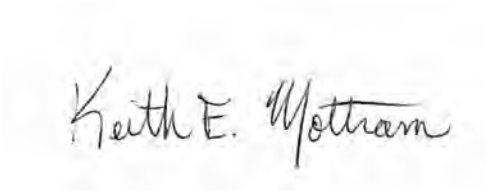
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve the claimant from the effects of the September 23, 2014 work injury from physicians authorized to treat claimant for his injury, including but not limited to Dr. Hehmann, Dr. Tice, Dr. Faragher, and Dr. Frazzetta.

2. Claimant's AWW for his September 23, 2014 work injury is $1,023.43.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 27, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

STIPULATION

1. The parties stipulated that, should the claim be found compensable and the Claimant proves he is entitled to temporary disability benefits, the Claimant is a maximum wage earner and his wage is the maximum amount for his date of injury of October 17, 2014 which corresponds to a TTD rate of $881.65 per week.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer on October 17, 2014.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits and that treatment he received was authorized, and reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits in this claim.

FINDINGS OF FACT

1. The Claimant has been employed in the produce department for Employer for approximately seven years. His job duties include selecting produce (Hrg. Tr., p. 7). The Claimant works at the distribution center. He wears an ear piece through which he receives orders for produce and he has to lift them from the floor up. The weight of the containers of produce varies from 10 lbs. to 50 lbs and in between (Hrg. Tr., p. 21). The Claimant has two 15 minute breaks and a 30 minute break during his shift (Hrg. Tr., p. 22). The Claimant testified that he was injured on October 17, 2014 while lifting a box of broccoli. His back immediately hurt a lot and he was not able to stand up straight (Hrg. Tr., p. 12).

2. The Claimant testified that he reported the October 17, 2014 incident to his supervisor "Brock" and to Rich Powelsick (Hrg. Tr., p. 12). The Claimant testified that neither of them sent him for medical care (Hrg. Tr., pp. 12-13). Mr. Powelsick told the Claimant that he could go home and rest. The Claimant did not return to work until

three months later. He wasn't feeling good when he returned to work and he testified that he still does not feel good (Hrg. Tr., p. 13). The Claimant testified that he saw his personal physician at Kaiser Permanente and received work restrictions limiting him to 10 lbs. of lifting. His employer did not offer a modified job that limited his lifting to 10lbs., so, a couple days after returning to work, he stopped working again and stayed home after about February 3, 2015 (Hrg. Tr., p. 14). The Claimant testified that he thinks he returned to work again on March 13, 2015 and his job requirements are that he must complete 100% of his job, but he states that he can't do it (Hrg. Tr., p. 15). While the Claimant's statement about a 100% completion requirement for his production target would seem to be hyperbole, the Employer's records fully support the Claimant's testimony, as reflected in Respondent's Exhibit H wherein the Claimant has received reprimands and warnings for miniscule offenses, including, a failure to meet his production goal by 0.52% or clocking in approximately 1 minute before the scheduled time (see references to Employer records below).

3. On October 21, 2014, the Claimant saw Dr. Angie Martinez at Kaiser Permanente and was diagnosed with "acute back pain due to muscle spasm." Dr. Martinez advised the Claimant to discuss this case with his supervisor due to the onset of symptoms at work while lifting a crate of broccoli. Dr. Martinez recommended "better pain management for muscle support and physical therapy" (Claimant's Exhibit 3, p. 7).

4. On October 31, 2014, the Claimant saw Dr. Emily Merrick at Kaiser Permanente. The Claimant was referred to a massage therapist and for physical therapy (Claimant's Exhibit 5, p. 18). Dr. Merrick also provided the Claimant with a letter verifying that the Claimant was treated at Kaiser on October 31, 2014 and that the Claimant could return to work on November 3, 2014 with a 10 lb restriction for lifting, pushing and pulling (Claimant's Exhibit 5, p. 17; Respondent's Exhibit E, p. 17).

5. The Respondent filed a Notice of Contest on December 17, 2014 denying liability for the October 17, 2014 injury as not work-related (Respondent's Exhibit A, p. 1).

6. The Claimant testified that he has had prior injuries. In May, about five years ago he was in a car accident where he injured his neck. The Claimant testified that he fully recovered from this and was able to return to his employment and perform all of his job duties (Hrg. Tr., p. 15). He also testified that he injured himself while helping his brother lift a refrigerator at home in May of 2014 (Hrg. Tr., p. 16). He testified that he last saw a doctor for that injury in July of 2014 and he returned to work full duty after this (Hrg. Tr., p. 17 and pp. 27-28).

7. Employer records show the Claimant was absent from work from August 25, 2011 through September 7, 2011 and returned to work on September 8, 2011. The Warehouse Manager noted the Claimant was unable to work his scheduled shifts during that time period due to a car accident (Respondent's Exhibit H; pp. 25-27).

8. On September 2, 2011, the Claimant provided a doctor note from Aim High Chiropractic stating that the Claimant was receiving care from the chiropractor for neck pain and low back pain due to a motor vehicle accident. The note provided the Claimant could return to work as of September 4, 2011 but the Claimant was to limit lifting to no more than 50 lbs. and work at a slow pace (Respondent's Exhibit Hi, p. 24).

9. The medical records document that the Claimant received medical treatment for a back strain and muscle spasm for a work incident on July 17, 2013. He was initially evaluated by Dr. Marc Steinmetz on July 22, 2013 and the Claimant reported he was injured when lifting a 40-50 lb. object the previous Friday. He tried ice, rest and Advil but the pain persisted. The Claimant did not have any leg complaints. Dr. Steinmetz placed the Claimant on light duty with a 10 lb. lifting restriction and gave him a back support and cold pack (Claimant's Exhibit 4, pp. 14-16). The Claimant last saw a doctor for this injury on July 29, 2013 when he saw Dr. Steinmetz again at Midtown Occupational Health. Dr. Steinmetz found the Claimant at MMI on that date as the Claimant reported he had no pain or stiffness and was all better and did not need any medications. Dr. Steinmetz returned the Claimant to work full duty, with no restrictions, impairment, follow up or maintenance treatment (Claimant's Exhibit 4, pp. 11-13).

10. On May 27, 2014, the Claimant was seen at Kaiser Permanente by Nurse Practitioner Karen Stockman for a lumbar muscle strain. He was given medication for muscle spasm and ibuprofen for pain and inflammation. The medical record notes that the Claimant had "intermittent back pain" for the past two weeks in the center of his low back and in his buttocks. The Claimant reported that at times he cannot straighten up. NP Stockman noted that the Claimant works as a produce selector and he lifts 60 lb boxes (Respondent's Exhibit G, pp. 11-12).

11. Employer records show the Claimant was absent from work from July 14, 2014 until July 21, 2014. There are no additional notes on the form indicating the reason for the absence (Respondent's Exhibit H, pp. 30-31).

12. On July 14, 2014, the Claimant saw Nurse Practitioner Debra Brew for left foot pain and continued low back pain. The Claimant reported that he was seen in May for the low back pain and he received a prescription for Robaxin and Ibuprofen which helped. The Claimant told NP Brew that his pain started when he moved a refrigerator in May. He also told her that is started having numbness in his left shoulder and arm the day before this visit. The Claimant was requesting a note for work because his job requires lifting 50 lb. boxes. Based on a relatively normal physical examination, NP Brew determined that a lumbar spine x-ray was not indicated. The Claimant was advised to rest and apply alternating cold and heat and to take medications for pain and to relax his muscles. A longer term plan of a home back care exercise program and proper lifting techniques was discussed. It was noted that physical therapy and x-ray studies would be considered if the Claimant was not improving. The Claimant received a note for work (Respondent's Exhibit E, pp. 15-16).

A note was provided that stated the Claimant received treatment on July 14, 2014 and could resume work with no restrictions on July 22, 2014 (Claimant's Exhibit 9, p. 19).

13. Employer records document that on August 15, 2014, the Claimant received a daily production reprimand for unsatisfactory production. It was noted that his daily production was 91.48% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 37).

14. Employer records document that on August 24, 2014, the Claimant received a daily production reprimand for unsatisfactory production. It was noted that his daily production was 89.59% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 35). He also received a verbal warning for clocking in at 14.98 instead of 15.00 and was told that there are no exceptions for punching in prior to 15.00 (Respondent's Exhibit H, p. 36).

15. Employer records document that on August 31, 2014, the Claimant received a record of verbal reprimand for low production. It was noted that on the week ending August 30, 2014, the Claimant failed to achieve his minimum production of 100%, achieving an average of 89.56% which was found to be unacceptable and warranted a verbal warning-level one (Respondent's Exhibit H, p. 34).

16. There are no records in evidence after August 31, 2014 through October 17, 2014 reprimanding the Claimant for failure to achieve daily production requirements or his 100% weekly minimum production requirement. As the Employer clearly issues reprimands to the Claimant for even the most miniscule deviations from the production requirement (e.g. the 0.52% shortage for his August 15, 2014 daily requirement), the ALJ infers that the Claimant did, in fact, meet 100% of his production goals in the period from August 31, 2014 through October 17, 2014 and was able to perform all of the functions of his job, as the Claimant testified. Thus, the Claimant was not symptomatic during this time period for his low back for any preexisting condition or prior injury to a level that had an impact on his ability to perform his job duties.

17. Employer records show the Claimant was absent from October 17, 2014 for 78 days and returned to work on January 9, 2015. It was noted by the supervisor that the leave was "FMLA." There is a supervisor comment on a second page stating "non occupational" (Respondent's Exhibit H, pp. 31-32).

18. Employer records are conflicting and confusing with respect to the Claimant's absenteeism. On January 16, 2015 a letter was provided to the Claimant noting that he was counseled on December 8, 2014 and December 21, 2014 for excessive absences, even though these were dates that the Claimant was off work on FMLA according to other records. The January 16, 2015 letter also indicates that the Claimant has 6 excused absences over the past 12 months. The Claimant was advised in writing that if he failed to substantially reduce his absentee rate within the next 30 days, his record would be reviewed again to determine if he should be continued to be employed by Employer (Respondent's Exhibit H, p. 41).

19. On February 1, 2015, the Claimant received a written warning that he signed off his last order at 23:18 and did not clock out until 23.30. He was reminded that Employer procedures require employees to clock out no longer than 5 minutes after he completed his last order (Respondent's Exhibit Hi, p. 44).

20. On February 25, 2015, the Claimant underwent an MRI of his lumbar spine. A slight dextro levo convexity curvature of the thoracolumbar spine was noted under vertebral alignment. Lumbar levels L1-2 through L4-5 were unremarkable and there was no significant neuroforaminal narrowing, spinal stenosis or discogenic degenerative changes noted. At L5-S-1 a small left paracentral disk protrusion with annular tear was noted. The protrusion abuts the descending left S1 nerve root without significant visualized mass effect. Minimal, left greater than right, bilateral inferior neural foraminal narrowing was noted with no spinal stenosis (Claimant's Exhibit 2, pp. 5-5; Respondent's Exhibit F, pp. 18-19).

21. Employer records document that on March 30, 2015, the Claimant received a daily production reprimand for unsatisfactory production. It was noted that his daily production was 87.20% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 45).

22. The Claimant testified that the pain he now has is different than the pain he had after the refrigerator incident. With the refrigerator it was only a feeling of muscles that were hurting and inflamed. Now, his back and buttocks hurt and he cannot stand or sit for too long and the pain travels part way down his right leg from the hip along the side of the leg (Hrg. Tr., pp. 17-18). The Claimant also testified that now he even feels the pain when he tries to lay down to sleep and the pain keeps him from sleeping (Hrg. Tr., p. 26).

23. On cross-examination, the Claimant testified that he was off work from October 17, 2014 until January 9, 2015 (Hrg. Tr., p. 19). The Claimant also testified that he was working full duty as of April 1, 2015 at the time of a medical examination with Dr. Mitchell (Hrg. Tr., pp. 20-21). After the appointment with Dr. Mitchell, the Claimant went off work again on FMLA (Hrg. Tr., p. 22).

24. During his cross-examination testimony, the Claimant was also presented with an incident report dated October 17, 2014 (Respondent's Exhibit H, p. 38) and he identified that the Employee Signature as his own (Hrg. Tr., p. 23). The Claimant testified that he disagrees with the description of the injury on the form which states "repeated motion" selecting produce caused a back strain. The Claimant testified that he only lifted or grabbed one box of broccoli and that is how he injured his back (Hrg. Tr., p. 23). The ALJ notes that, although the form states it is to be completed by the employee, the Claimant does not speak English. Additionally, the handwriting on the form (other than the signature of the Claimant) appears to match the handwriting of the supervisor Brad Davis and the ALJ finds that it is more likely than not that Mr. Davis (or

some person other than the Claimant) completed this form and the Claimant did not complete the form, but rather, he only provided the "Employee Signature" next to an "x" that was placed on the form. The form indicates that this incident report was "for information only" (Respondent's Exhibit H, p. 38). A second Employer form is also in the admitted exhibits and it provides that if an injury is "Information Only," the form is to be completed at the time of the injury report. The injury is again described as "repeated motion" and it is noted that the questions asking "What may have prevented this accident/injury or near miss?" was answered not applicable or "N/A." The ALJ finds that it is more likely than not that this form also was not completed by the Claimant, but instead by Mr. Davis (or some person other than the Claimant)(Respondent's Exhibit H, p. 39). The paperwork at pp. 38-39 of Respondent's Exhibit H nevertheless supports the Claimant's testimony that he had an injury and that he reported it to supervisors on October 17, 2014. It further supports his testimony that he was not provided with the information for obtaining any medical treatment for his back injury. With respect to the mechanism of injury, the Claimant's testimony that he injured himself lifting a single box of broccoli is found to be credible and persuasive and consistent with the Claimant's reporting of the injury to medical providers. It is found that the mechanism of the Claimant's injury was the lift of the box of broccoli described by the Claimant rather than a repetitive motion injury as noted on the Employer's forms.

25. The Claimant saw Dr. Linda Mitchell on April 1, 2015 for a Rule 8 independent medical examination (IME). Dr. Mitchell prepared a written report dated April 16, 2015 summarizing a medical record review, a physical examination, and an interview with the Claimant about the history of present illness/injury, current complaints, and past history (Respondent's Exhibit D). Dr. Mitchell noted that the Claimant reported that on October 17, 2014, he was picking up a box of broccoli and felt pain in the right low back. The Claimant reported this to his supervisor and did light duty work for the rest of the day. The Claimant reported that he went to see his primary care physician on the following Tuesday. The Claimant reported having 2 sessions of physical therapy and used ice and medications. The Claimant also reported undergoing MRIs in December 2014 and February 2015 (Respondent's Exhibit D, p. 7).

26. Medical records summarized by Dr. Mitchell in her IME report include prior complaints of low back problems. On June 29, 2013, the Claimant was seen at Midtown Occupational Health Services for back strain and spasm. He reported he was doing better with no pain or stiffness and no back tenderness, spasm or trigger points were noted. The Claimant reported he was ready to go back to work full duty and he had full lumbar range of motion. He was placed at MMI and released to full duty with no restrictions, impairment, follow up or maintenance treatment. On May 27, 2014, the Claimant was seen at Kaiser Permanent for "intermittent back pain for two weeks at the center of the mid low back to both buttocks." The Claimant reported he had been lifting 60 lb. boxes. He was assessed with lumbar strain and treated with medications. On July 17, 2014, the Claimant reported he still had low back pain due to moving a refrigerator in May. The Claimant complained of numbness in the left shoulder an arm.

He deferred physical therapy and instead discussed proper lifting technique and a home back exercise care program (Respondent's Exhibit D, p. 8).

27. The Claimant completed a pain diagram for Dr. Mitchell noting pain from the lower left scapula to the left buttock, although Dr. Mitchell noted that verbally, the Claimant stated it was on his right side. He reported a pain level of 10 and occasional numbness and tingling down the lateral aspect of the right leg down to the ankle. The Claimant complained of trouble sleeping that he cannot lift things overhead and a lack of strength in his back (Respondent's Exhibit D, p. 8). On physical examination, Dr. Mitchell noted that the Claimant's had scoliosis and there was a tightness in the right paraspinous lumbar musculature and the right lumbar to gluteal musculature (Respondent's Exhibit D, p. 9).

28. In response to specific interrogatories posed to Dr. Mitchell, she opined that the Claimant's low back pain and intermittent radicular symptoms date back to at least July 17, 2013. She further opined that the Claimant's low back pain is due to an underlying degenerative condition which might be temporarily aggravated by work activities but, long term, is not due to a work injury. Dr. Mitchell finds that, at most, the Claimant sustained a temporary aggravation of his chronic preexisting low back pain. She reported that gaps in the medical record make it difficult to state when the Claimant achieved his baseline status. However, because the October 31, 2014 medical record references back pain he attributes to moving a refrigerator in May of 2014 and he doesn't mention an October 17, 2014 injury, then by the October 31, 2014 medical visit, Dr. Mitchell would find him at MMI for any temporary aggravation due to work duties (Respondent's Exhibit D, p. 10).

29. Dr. Christopher Ryan performed an IME evaluation of the Claimant on April 8, 2015 and also prepared a written report (Claimant's Exhibit 1; Respondent's Exhibit G). Dr. Ryan interviewed the Claimant who reported that the Claimant stated,

> On the date of injury, he was having no difficulty at all, he tells me, and was able to work at this fairly heavy job, without symptoms and without restrictions. However, he tells me on the date of injury he had to reach forward quite a ways, to lift a fairly heavy box. He experienced sharp pain in his low back centrally, which extended into his buttocks, right more than left (Claimant's Exhibit 1, p. 1; Respondent's Exhibit G, p. 20).

30. Dr. Ryan also reviewed the Claimant's medical records prior to and subsequent to the October 17, 2014 injury date. Dr. Ryan notes that the Claimant had been seen on May 27, 2014, prior to his reported injury, with a diagnosis of lumbar muscle strain which had been present for two weeks prior to the visit. The Claimant had full range of motion in extension and flexion and was given Robaxin and ibuprofen (Claimant's Exhibit 1, p. 2; Respondent's Exhibit G; p. 21). Dr. Ryan notes the Claimant was seen again on July 14, 2014 for left foot pain and persistent low back pain from moving a refrigerator in May. The Claimant was provided a note to be off work for a

week (Claimant's Exhibit 1, p. 2; Respondent's Exhibit G, p. 21). Dr. Ryan notes the Claimant received medical treatment again on August 27, 2014, but there were no complaints of foot pain or back pain. Rather, the Claimant was treated for abdominal pain and vomiting. Dr. Ryan noted that the next medical record was dated October 21, 2014 and it was for the injury that is a part of the claim (Claimant's Exhibit 1, p. 2; Respondent's Exhibit G, p. 21).

31. Dr. Ryan noted an abnormal finding at the lumbosacral disc level on the Claimant's MRI report which he opined "may be part of his pain generation" and also felt "appears to be a more acute finding" as opposed to being consistent with a chronic process. Although, Dr. Ryan did state that he did not review the MRI image, but was relying on the report of the radiologist (Claimant's Exhibit 1, p. 3; Respondent's Exhibit G, p. 22).

32. On physical examination, Dr. Ryan found decreased range of motion. Dr. Ryan noted a lack of mobility related to the left sacroiliac joint and hypertonicity of the right lumbar paraspinous muscles. Dr. Ryan opines that this is consistent with his impression of asymmetry of mobility at the lumbopelvic articulation which he finds to be related to the Claimant's right-sided pain and decreased range of motion. He further opines that the injury that occurred on October 17, 2014 resulted in the mechanical injury to the Claimant's low back in the form of asymmetric lumbopelvic articulation and sacroiliac pain (Claimant's Exhibit 1, p. 3; Respondent's Exhibit G, p. 22).

33. Dr. Ryan recommended conservative treatment including physical therapy and modalities to control muscle spasm, coupled with work restrictions to prevent further exacerbation of his condition (Claimant's Exhibit 1, p. 4; Respondent's Exhibit G, p. 23).

34. Dr. Linda Mitchell testified by evidentiary deposition on May 11, 2015 (mistakenly noted as May 11, 2013 on the deposition transcript cover page). Dr. Mitchell testified as an expert in the area of occupational medicine and regarding Level II accreditation matters for Workers' Compensation cases (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, pp. 4-5). Dr. Mitchell testified that she also reviewed the IME report of Dr. Ryan and that the Claimant gave them both consistent histories of his work injury lifting a heavy box of broccoli (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 6). During her testimony, Dr. Mitchell makes much of the Claimant reporting a 10 out of 10 pain level and opines that this would be so incapacitating that the Claimant could not work (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 7). While the Claimant was actually working at that time, it should be noted that on March 30, 2015 (2 days before the IME), the Claimant received his first daily production reprimand for unsatisfactory production since August of 2014. It was noted on March 30, 2015, that the Claimant's daily production was 87.20% and his minimum production requirement was 92% (Respondent's Exhibit H, p. 45). Thus, at this point in time, the Claimant's pain was interfering with his ability to perform his job duties. Dr. Mitchell also testified that on examination she noted some tightness in the Claimant's right lumbar musculature (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 9). Dr. Mitchell testified

that although the Claimant complained of diffuse low back pain, the provocative maneuvers that she performed on the Claimant did not illicit localized pain which would have indicated a pain generator (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, pp. 11-12). Dr. Mitchell testified that her review of the Claimant's MRI findings showed mild degenerative findings at L5-S1 with an annular tear with a protrusion of the disk to the left (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 12). Dr. Mitchell also testified that she reviewed Dr. Ryan's IME report and noted that the Claimant stated to Dr. Ryan that he had never injured his back which was what the Claimant initially told Dr. Mitchell at her examination (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 14). In comparing her physical examination of the Claimant to that of Dr. Ryan, Dr. Mitchell testified that they both found tightness in the right lumbar musculature but Dr. Ryan also noted poor mobility of the left SI joint, which Dr. Mitchell did not find. (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 15). Dr. Mitchell testified that she disagrees with Dr. Ryan's opinion that the injury that occurred on October 17, 2014 resulted from a mechanical injury to the Claimant's low back in the form of an asymmetric lumbopelvic articulation. Dr. Mitchell disagreed because she could not reconcile the reported pain on the right side with the abnormality Dr. Ryan noted in the left SI joint (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 16). Dr. Mitchell also disagreed with Dr. Ryan's opinion that the February 15th MRI showed an acute finding of a rupture rather than a chronic process. Rather, Dr. Mitchell opined that because the MRI references degenerative disk changes, to her that indicates a chronic process and not an acute rupture of the disk (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, p. 17). Consistent with her written IME report, Dr. Mitchell does not find the Claimant's low back pain is due to a work injury and that he has returned to his baseline condition (Depo. Tr. Linda Mitchell, M.D., May 11, 2015, pp. 17-18).

35. Dr. Christopher Ryan testified at the hearing as an expert witness in the area of physical medicine and rehabilitation and regarding Level II accreditation matters for Workers' Compensation cases (Hrg. Tr., pp. 29-30). Dr. Ryan testified that the Claimant had complaints of low back pain extending into the buttocks. He testified that the history of the injury the Claimant provided him on the date of his IME was consistent with the Claimant's testimony on the day of hearing, specifically that the Claimant attributed the injury to lifting while at work (Hrg. Tr., pp. 30-31). Dr. Ryan testified that on physical examination, the Claimant had limited range of motion, especially in lumbar extension. He testified that what stood out the most was the asymmetry of articulation of the sacroiliac joints where the spine and pelvis connect and the Claimant's posture when standing (Hrg. Tr., p. 31). Dr. Ryan opined that these findings were consistent with the Claimant's complaints and could correlate with the abnormality in the lumbosacral disc that was noted in the MRI report (Hrg. Tr., p. 32). Overall, Dr. Ryan finds that the Claimant has mechanical back pain most likely due to sacroiliac dysfunction and asymmetric articulation at the connection between the spine and pelvis with a possible element of discogenic pain which would require more information to determine. Dr. Ryan testified that once the dysfunction at the SI joint regained its symmetry and the muscle overlay normalized, then the discogenic pain could be explored (Hrg. Tr., pp. 33-34). The Claimant's prior back pain attributed to

moving a refrigerator in May of 2014 as documented in the Kaiser medical records and through the Claimant's testimony does not change Dr. Ryan's opinion regarding the October 17, 2014 mechanism of injury being the cause of his current low back issues. He testified that this is mainly because the pain was in a different area and with respect to the May 2014 incident, the Claimant had full range of motion and was able to return to work by July of 2014 (Hrg. Tr., p. 36). Dr. Ryan disagreed with Dr. Mitchell's opinion that the Claimant sustained a temporary aggravation of a chronic preexisting condition. He testified that the Claimant's condition isn't temporary; rather, his condition has been persistent in terms of pain and limitation of functional ability since the injury on October 17, 2014. Dr. Ryan also found the characterization of the Claimant's condition as preexisting to be absurd as the Claimant has never received a definitive diagnosis related to his back pain, only working diagnoses, or presumptive diagnoses, such as back strain (Hrg. Tr., pp. 38-39).

36. On cross-examination, Dr. Ryan testified that the acute finding he noted on the MRI report was an annular tear at one level where discs at all of the other levels were completely normal (Hrg. Tr., p. 52). With respect to the finding of mild discogenic degeneration changes at L5-S1, Dr. Ryan opines that this is general and not very precise language which is generally explained by a lack of context for the radiologist and therefore he does not give this statement much weight (Hrg. Tr., pp. 53-54).

37. Overall, the testimony of Dr. Ryan, supported by prior medical records, the Claimant's employment records and the testimony of the Claimant, is found to be more persuasive than that of Dr. Mitchell. It is found as fact that the Claimant's injury on October 17, 2014 caused, permanently aggravated and accelerated the Claimant's low back condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University*

Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by

crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

With respect to the factual testimony and evidence regarding the Claimant's mechanism of injury, the ALJ found the Claimant's testimony to be credible and further found that the medical and employment records support the finding that the Claimant suffered an injury to his low back on October 17, 2014 while lifting an approximately 50 lb. box of broccoli. In regards to conflicting evidence in the form of an Incident Report dated October 17, 2014 that described the injury on the form as one of "repeated motion," this evidence was not found to be as credible or persuasive as the Claimant's testimony that he only lifted or grabbed one box of broccoli and that is how he injured his back. While the details of the mechanism of injury contained Incident Report are found to be inaccurate, pp. 38-39 of Respondent's Exhibit H supports the Claimant's testimony that he had an injury and that he reported it to supervisors on October 17, 2014.

Then, in considering the conflicting medical opinions regarding the Claimant's condition and a low back injury on October 17, 2014, 2014, the ALJ credits the medical opinions expressed by Dr. Christopher Ryan over the contrary opinions expressed by Dr. Linda Mitchell in her IME report and testimony. The ALJ found that the Claimant has proven that it is more likely than not that he suffered an injury arising out of and in the course of his employment with Employer. The ALJ found the Claimant's testimony regarding his symptoms to be consistent with the medical records in evidence. The ALJ credited the Claimant's testimony that he injured his low back when he lifted the box of broccoli while working on October 17, 2014 and has proven that it is more likely than

not that his low back and buttock symptoms were caused, aggravated or accelerated when he lifted the box of broccoli at work that day.

The ALJ also credited the Claimant's testimony that, although he had received medical treatment for back strains in the past, just prior to October 17, 2014, the Claimant was not experiencing symptoms that required medical treatment or that prevented him from performing 100% of his job duties. This testimony was supported by the fact that there are no records in evidence after August 31, 2014 through October 17, 2014 reprimanding the Claimant for failure to achieve daily production requirements or his 100% weekly minimum production requirement. As the evidence established that the Employer issues reprimands to the Claimant for even the most miniscule deviations from the production requirement (e.g. the 0.52% shortage for his August 15, 2014 daily requirement), from the lack of any written reprimands between August 31, 2017 and October 17, 2014, the ALJ infers that the Claimant did, in fact, meet 100% of his production goals in this time period and was able to perform all of the functions of his job, as the Claimant testified. Thus, the Claimant was not symptomatic during this time period for his low back for any preexisting condition or prior injury to a level that had an impact on his ability to perform his job duties.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on October 17, 2014 caused or permanently aggravated, accelerated or combined with his preexisting low back condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101 C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v, Industrial. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971): *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997).

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Authorized providers also include those medical providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

The Claimant testified that he reported the October 17, 2014 incident to his supervisor "Brock" and to Rich Powelsick. The Claimant testified that neither of them sent him for medical care. Mr. Powelsick told the Claimant that he could go home and rest. An Incident Report was completed for the Claimant's injury and the form indicated that the incident report was "for information only." A second Employer form is also in the admitted exhibits and it provided that if an injury is "Information Only," the form is to be completed at the time of the injury report. The paperwork at pp. 38-39 of Respondent's Exhibit H supports the Claimant's testimony that he had an injury and that he reported it to supervisors on October 17, 2014. It further supports his testimony that he was not provided with the information for obtaining any medical treatment for his back injury. There was no paperwork or testimony presented in this case that representatives of the Respondent provided the Claimant with medical treatment or referrals for care. Thus, the right of selection of a physician passed to the Claimant.

Because he was not provided with medical treatment for his low back injury, the Claimant testified that he saw his personal physician at Kaiser Permanente and received work restrictions limiting him to 10 lbs. of lifting. The medical records show that on October 21, 2014, the Claimant saw Dr. Angie Martinez at Kaiser Permanente and was diagnosed with "acute back pain due to muscle spasm." Dr. Martinez advised the Claimant to discuss this case with his supervisor due to the onset of symptoms at work while lifting a crate of broccoli. Dr. Martinez recommended "better pain

management for muscle support and physical therapy." On October 31, 2014, the Claimant saw Dr. Emily Merrick at Kaiser Permanente. The Claimant was referred to a massage therapist and for physical therapy. Dr. Merrick also provided the Claimant with a letter verifying that the Claimant was treated at Kaiser on October 31, 2014 and that the Claimant could return to work on November 3, 2014 with a 10 lb restriction for lifting, pushing and pulling.

Before the October 17, 2014 work injury, the last prior medical treatment the Claimant had received for his low back occurred on July 14, 2014. At that time, the Claimant was provided with a medical note that he could resume work with no restrictions on July 22, 2014. Thus, between July 22, 2014 and October 17, 2014, the Claimant was not on medical restrictions, nor did the Claimant miss work due to low back problems.

The conservative medical care that the Claimant received to date from the physicians at Kaiser Permanente, and any referrals, was reasonably necessary to treat the Claimant's work-related condition. The medical records do not indicate that the Claimant's authorized treating physicians have placed the Claimant at MMI or released him to return to work without restrictions. The Claimant testified that he felt the onset of pain immediately upon lifting the box of broccoli on October 17, 2014 and he still does not feel good. The pain he now has is different than the pain he had after the refrigerator incident. With the refrigerator it was only a feeling of muscles that were hurting and inflamed. Now, his back and buttocks hurt and he cannot stand or sit for too long and the pain travels part way down his right leg from the hip along the side of the leg. The Claimant also testified credibly that now he even feels the pain when he tries to lay down to sleep and the pain keeps him from sleeping. The Claimant testified that his condition keeps him from performing 100% of his job duties as required by his Employer.

The credible and persuasive testimony of Dr. Ryan proves that, more likely than not, the Claimant has mechanical back pain most likely due to sacroiliac dysfunction and asymmetric articulation at the connection between the spine and pelvis with a possible element of discogenic pain which would require more information to determine. Dr. Ryan testified that once the dysfunction at the SI joint regained its symmetry and the muscle overlay normalized, then the discogenic pain could be explored. Dr. Ryan testified that the Claimant's condition isn't temporary; rather, his condition has been persistent in terms of pain and limitation of functional ability since the October 17, 2014 injury.

The Claimant has established that he is entitled to further evaluation of his lower back condition to determine if he requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

Temporary Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Employer records show the Claimant was absent starting October 18, 2014 until returning to work on January 9, 2015. The Claimant testified that he returned to work but his Employer did not offer a modified job, so, a little while after returning to work, he stopped working again and stayed home from about February 3, 2015 until March 13, 2015. He returned to work on March 13, 2014 but testified that his job requirements are that he must complete 100% of his production goal, yet, he can’t do it.

The Claimant’s work-related disability resulted in him missing more than 3 work shifts and he has missed work shifts for more than two weeks resulting in a wage loss. Therefore the Claimant is entitled to temporary total disability benefits for the entire

time he missed work due to his work injury. The Claimant is entitled to TTD benefits from October 18, 2014 until January 8, 2015 and again from February 3, 2015 through March 12, 2015.

ORDER

It is therefore ordered that:

1. The Claimant proved that he suffered a compensable work injury on October 17, 2014.

2. Medical treatment provided by Kaiser Permanente (and any referrals from the Kaiser physicians) was reasonably necessary to cure and relieve Claimant from the effects of his October 17, 2014 injury and Respondent shall be liable for payment for this medical treatment.

3. The Claimant is entitled to further medical benefits to treat his low back and associated symptoms which are causally related to the October 17, 2014 work injury, if any, as determined by his authorized treating physicians, and the Respondent is responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

4. Claimant's AWW is the maximum for injuries occurring on October 17, 2014, per stipulation of the parties which was approved by the ALJ; and his corresponding TTD rate is $881.65 per week.

5. Respondents shall pay Claimant temporary total disability benefits for the periods of October 18, 2014 until January 8, 2015 and again from February 3, 2015 through March 12, 2015.

6. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to

Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 15, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUE

Whether Claimant has established by a preponderance of the evidence that a right total hip arthroplasty is reasonable, necessary, and causally related to his November 26, 2014 work injury.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately five years as head car painter, with duties including sanding and painting cars in a paint booth.

2. On November 26, 2014 Claimant sustained an admitted left knee and cervical spine injury when he fell approximately twelve feet from the top of a paint booth. Claimant had attempted to climb a ladder to the top of the paint booth to manually release a stuck door, when the ladder slipped and he fell.

3. When Claimant fell twelve feet from the top of the paint booth, he landed primarily on his left leg and his left knee was in extreme pain. Claimant was sent to Concentra for treatment.

4. At Concentra, Claimant was evaluated on November 26, 2014 by Elizabeth Palmer, PA. Claimant reported that he was on the top of the roof coming down a ladder when the ladder started to sway, became off balance, and fell. Claimant reported falling approximately twelve feet and that he landed on a hyper extended left knee before falling to the ground. Claimant reported some neck soreness along the left lateral neck, and complained of left knee pain that he rated as 7/10. Claimant denied abdominal, shoulder, or hip pain. PA Palmer assessed accidental fall, left knee pain, internal derangement of knee, and cervical strain. PA Palmer referred Claimant to an orthopedic specialist for likely ACL/LCL tear. *See* Exhibit 4.

5. On December 1, 2014 Claimant returned to Concentra and was evaluated by Rosalie Einspahr, PA. PA Einspahr noted that Claimant was returning for a recheck of his neck injury and left leg injury. She found that his neck was swollen and tender, and that his left knee was tender diffusely in the anteromedial aspect, mid portion of the patella tendon, proximal patella tendon, medial patellar retinaculum, and quadriceps tendon. She noted that an MRI showed a lateral meniscal small or immature tear of red-white posterior horn, multiple loose bodies, and extensive capsulusynovitis. She continued the assessments and again referred Claimant for an orthopedic consultation. PA Einspahr noted that Claimant must use crutches. *See* Exhibit 4.

6. On December 1, 2014 Claimant underwent physical therapy with Angela Wilt, PT. Claimant reported coming down a ladder when it fell out from underneath him. Claimant reported landing mostly on his left leg. Claimant reported left knee pain, clicking in his neck when turning his head to the left, and reported pain all over and in his bilateral hips with prolonged sitting. *See* Exhibit I.

7. On December 5, 2014 Claimant was evaluated at Concentra by PA Palmer. PA Palmer noted that Claimant was returning for follow up of his left knee injury, hip injury, cervical strain/pain, and back pain. Claimant reported 7/10 pain in his left knee as well as left sided cervical muscle pain and popping and right hip pain. PA Palmer noted that Claimant was tender to palpation over the iliac crest of his right hip, but had full range of motion in his hip and was not tender to palpation in the groin. She also noted that Claimant had some right lower lumbar tenderness to palpation, and right knee tenderness to palpation. PA Palmer noted that the radiology results showed no acute fracture to Claimant's right hip. She assessed left knee pain, medical meniscus tear, loose bodies in the knee, cervical strain, acute hip pain, and accidental fall. *See* Exhibit 4.

8. On December 23, 2014 Claimant was evaluated at Concentra by Chelsea Rasis, PA. Claimant reported continued left knee pain, and increased bilateral hip pain, right worse than left. Claimant reported the hip pain had been present since the initial injury but that he had thought that he was just sore. Claimant reported he thought the hip pain seemed worse with overcompensation for the left knee pain and he noted the pain was in the bilateral hips especially in the right lateral groin. Claimant also reported cervical pain on the left side. PA Rasis noted that on examination Claimant was tender to palpation over the iliac crest with no groin tenderness to palpation. *See* Exhibit 4.

9. On December 29, 2014 Claimant was evaluated by PA Rasis. Claimant reported continued right hip pain that hurt all the time and reported that his hip now hurt worse than his left knee. Claimant reported his cervical strain was improving and that the left knee was improving slightly. PA Rasis ordered a MRI of the hip without contrast. *See* Exhibit 4.

10. On January 5, 2015 Claimant was evaluated by Stephen Danahey, M.D. Dr. Danahey noted Claimant was awaiting the right hip MRI and Dr. Danahey referred Claimant to an orthopedic specialist for his hip complaints. *See* Exhibit 4.

11. On January 6, 2015 Claimant underwent an MRI without contrast of his right hip that was interpreted by Charles Wennogle, M.D. Dr. Wennogle noted no acute fracture, apparent bilateral fat-containing indirect inguinal hernias, mild right osteoarthritic changes with subchondral cyst formation of the superior acetabulum and probable superior labral tear, and noted a prominent right femoral head/neck junction that may predispose to femoral acetabular impingement on the right. *See* Exhibit 5.

12. On January 15, 2015 Claimant was evaluated at Denver Metro Orthopedics by John Schwappach, M.D. Claimant reported right hip pain since a work

related injury when he fell off a 12 foot paint booth. Dr. Schwappach noted that Claimant had a limp and reduced range of motion in his right hip. He opined that Claimant had a labral tear in the right hip coupled with osteoarthritis. He noted it was causing Claimant daily pain and difficulty walking. Dr. Schwappach discussed with Claimant various treatment options including doing nothing, physical therapy, injections, NSAIDS, and surgery. Claimant elected to proceed with Mobic 7.5 mg po BID and with a right hip steroid injection. *See* Exhibit 6.

13. On February 10, 2015 Claimant underwent an intra-articular steroid injection of his right hip, performed by Shane Wheeler, M.D. Claimant reported the injection provided no relief.

14. On February 11, 2015 Claimant was evaluated by John Sacha, M.D. Claimant reported he had slipped off a ladder while working on a paint stand 12 feet off the floor. Claimant reported landing on first his left leg, then falling to his knees with an acute onset of left knee pain and left neck soreness. Dr. Sacha noted that at the third follow up appointment Claimant started noticing right and left hip pain, and later over a month after the injury, that he developed low back pain. Dr. Sacha noted that Claimant had pain localized to the right anterior superior and posterior hip, worse with walking. Dr. Sacha noted on examination of the right hip that Claimant had a positive hip rotation and compression test. Dr. Sacha opined that from a causality standpoint, only the issues complained of early in the case and put on the pain diagrams would likely be work related. Dr. Sacha opined that there seemed to be some non-physiologic versus secondary gain issues. Dr. Sacha prescribed a butrans patch. *See* Exhibit 7.

15. On February 12, 2012 Claimant reported to the emergency room of Swedish Medical Center Southwest. Claimant reported starting a butrans patch that day and then developing tongue swelling, wheezing, chest tightness, and an itchy rash. The patch was removed in the emergency department. *See* Exhibit 8.

16. On February 17, 2015 Dr. Sacha issued a special report. The report noted that over the weekend Claimant had a rash and shortness of breath from the butrans patch, and that Claimant went to the emergency room where he received opioid analgesics which broke his medication agreement. Dr. Sacha reported that Claimant was not a candidate for opioid analgesics or controlled substances from this point on and after advising Claimant of this on the telephone, Claimant became belligerent and hung up. Dr. Sacha noted that he had received all the medical records for Claimant and after reviewing them, he opined that the only areas work related were the neck and the left knee. He opined that Claimant's other expansive complaints including the low back, legs, hips, arms, and other areas were not work related. *See* Exhibit 7.

17. On February 20, 2015 Claimant was evaluated by Dr. Schwappach. Claimant reported continued right hip pain. Claimant reported that the steroid injection provided no relief and that he had continued worsened pain in the lateral and anterior hip. Claimant reported having an allergic reaction to the Butrans patch that Dr. Sacha gave him. Dr. Schwappach continued to assess right hip pain and noted Claimant's

difficulty with the left knee and neck which may also be contributing to Claimant's overall pain and discomfort. *See* Exhibit 6.

18. On April 6, 2015 Claimant was evaluated by Dr. Schwappach. Claimant reported being extremely upset and frustrated at his lack of progress. Claimant again reported that the steroid injection in his hip provided no relief. Dr. Schwappach opined that Claimant had degenerative joint disease of the right hip and that he had right hip osteoarthritis confirmed by radiographs. Dr. Schwappach opined that Claimant was not a candidate for hip arthroscopy. He noted that he discussed with Claimant various options including doing nothing, physical therapy, injections, NSAIDS, and surgery. He noted that Claimant decided to proceed with right total hip replacement and that the surgery would be requested through workers' compensation. *See* Exhibit 6.

19. On August 5, 2015 Claimant underwent an Independent Medical Evaluation performed by James Lindberg, M.D. Claimant reported constant right hip pain. Claimant reported that on November 26, 2014 he fell and landed on his left side with his knee flexed and thought his left knee was broken. Claimant reported prior to this injury he had normal aches and pains but no injuries. Claimant reported he had no prior hip pain. Claimant reported he had an injection in his right hip on February 10, 2015 that provided no help short or long term. Claimant reported that Dr. Schwappach had recommended a total hip arthroplasty. *See* Exhibit 10.

20. Dr. Lindberg opined that x-rays of Claimant's hip and pelvis performed on January 15, 2015 were within normal limits. He opined that an MRI of Claimant's hip on January 6, 2015 showed no degenerative changes but showed a posterior bump on the femoral neck with a pistol grip deformity signifying femoral acetabular impingement syndrome and a questionable superior labral tear. Dr. Lindberg opined that Claimant had pre-existing femoral acetabular impingement that was the cause of his superior labral tear, and that the fall from the ladder was not the cause of the superior labral tear. Dr. Lindberg opined that if Claimant had a significant injury to his hip that caused a labral tear at the time of the incident, Claimant would have had immediate complaints of hip pain. *See* Exhibit 10.

21. Dr. Lindberg opined that surgical intervention should not be done under workman's compensation. He opined that Claimant did not land on or injure his right hip in the incident and that Claimant had a pre-existing congenital abnormality that resulted in femoral acetabular impingement in his right hip. Dr. Lindberg further opined that there was no indication for a total hip arthroplasty since Claimant received no relief from the intra-articular hip injection. Dr. Lindberg opined that the injection ruled out intra-articular pathology as the cause of Claimant's pain. *See* Exhibit 10.

22. The Medical Treatment Guideline address total hip replacements and list the surgical indications and considerations as being: severe osteoarthritis, all reasonable conservative measures exhausted, and other reasonable surgical options considered or implemented. *See* Exhibit L.

23. Dr. Lindberg testified at hearing consistent with his report. Dr. Lindberg opined that Claimant did not sustain a labral tear on November 26, 2014 and noted that if Claimant had sustained an acute labral tear he would have complained of intense pain to his hip joint and would not have been able to bear weight on his right lower extremity. Dr. Lindberg opined that Claimant's use of crutches to compensate for his left knee pain and the lack of any immediate right hip pain cut against Claimant having sustained a labral tear. Dr. Lindberg further opined that the right hip x-ray was within normal limits, that the MRI showed no degenerative changes except for a small acetabular cyst, and that it showed no changes in the articular cartilage of the hip joint.

24. Dr. Lindberg opined that a total hip replacement would be performed to treat a patient with osteoarthritis of the hip or a questionable labral tear that caused intra-articular pain. Dr. Lindberg opined that Claimant did not have intra-articular pain and that Claimant's pain was more likely generated outside the hip capsule, making a total hip replacement unwarranted. Dr. Lindberg opined that if Claimant's pain was intra-articular, Claimant would have received significant relief from the intra-articular injection. However, since Claimant reported no relief, it was unlikely that the pain was intra-articular.

25. Dr. Lindberg opined that under the medical treatment guidelines, Claimant did not sustain any repetitive rotational force or trauma or high energy trauma to his right hip when he fell which would have caused the labral tear.

26. Claimant's testimony is found credible and persuasive. Claimant did not have any hip problems or symptoms prior to the November 26, 2014 work injury. Claimant immediately had soreness all over and severe left knee pain. Within 5 days of the injury and on December 1, 2015 Claimant first reported bilateral hip pain while at physical therapy. Claimant is credible that he initially thought he was just sore all over from the fall, but several days later realized the pain in his right hip had not gone away and was getting worse.

27. The testimony and opinions of Dr. Lindberg are found credible in part. Dr. Lindberg is persuasive and credible in opining that Claimant does not need a total hip replacement and that a total hip replacement is not reasonable and necessary. Claimant did not receive any relief from an intra-articular hip injection which, as credibly opined by Dr. Lindberg, points to his source of pain as not being intra-articular.

28. Dr. Lindberg, however, is not credible in his opinion that Claimant's right hip pain and symptoms are unrelated to the work injury. The ALJ finds persuasive that Claimant suffered a substantial fall on November 26, 2014, that Claimant had a significant injury to his left knee which took the brunt of the fall, and that Claimant also within several days had reports of right hip pain. Dr. Sacha and Dr. Lindberg both base a large part of their opinions on the idea that Claimant would have complained immediately of right hip pain if he injured his right hip in the fall. However, the ALJ finds more persuasive that Claimant was so focused on his knee injury and just believed he was sore all over until five days later when his hip continued to bother him and he

reported it to the physical therapist. Claimant made a report within several days of his fall, he had no prior symptoms in his hip, and the ALJ finds persuasive that he suffered a hip injury on November 26, 2014.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a),

C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003).

Claimant has met his burden to show, more likely than not, that treatment of his right hip is causally related to the injury he suffered on November 26, 2014. Claimant is credible that prior to that date he had no symptoms or history of right hip pain. Claimant reported right hip pain on December 1, 2015, just five days after his fall. Claimant is credible that he initially believed he was just sore all over but that the hip pain did not go away. The opinions of Dr. Sacha and Dr. Lindberg that the right hip pain is not causally related to the work injury are based heavily on the lack of initial complaints of right hip pain when Claimant was first seen on November 26, 2014. However, the ALJ finds Claimant persuasive that he had hip pain immediately but believed he was just sore and had pain all over. The ALJ also finds it persuasive that he was concerned with the extreme pain in his left knee initially. Within a couple of days of the injury, Claimant realized his right hip pain had not gone away and reported it at physical therapy and at his next medical appointments. Therefore, the Claimant has established that right hip treatment is causally related to the claim. Although Claimant has established that treatment of his right hip is causally related to the claim, he has failed to establish at this point that a right total hip replacement is reasonable and necessary to cure and relieve him from the effects of his right hip injury.

The medical records and Claimant's reports support that fact that the right hip intra-articular injection provided Claimant with no relief. Dr. Lindberg is persuasive that this points against the need for a total hip replacement as a total hip replacement would not be necessary if the pain was from an extra-articular source. Here, Dr. Lindberg credibly opined that the injection ruled out an intra-articular source of Claimant's pain. Further, the Claimant does not meet the medical treatment guidelines for a total hip replacement. He does not have severe osteoarthritis and the medical providers have not yet exhausted all reasonable conservative measures or explored reasonable surgical options. Dr. Schwappach's request for right total hip replacement is not detailed nor does it provide an explanation for the recommendation for a total hip replacement even after a non-diagnostic response to the intra-articular hip injection. For these reasons, Claimant has failed to meet his burden to show that a right total hip replacement is reasonable and necessary. Performing a total hip replacement at this point when the diagnostic injection does not support it is not reasonable or necessary.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that treatment of his right hip is causally related to the November 26, 2014 work injury.

2. However, Claimant has failed to establish by a preponderance of the evidence that a right total hip arthroplasty is reasonable and necessary. His request for right total hip arthroplasty is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 30, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that his January 29, 2015 approved Full and Final Settlement Agreement with Respondents should be reopened based on fraud.

FINDINGS OF FACT

1. Claimant worked for Employer as a Security Guard. Claimant asserted that on approximately May 1, 2014 he suffered compensable injuries to body parts that included his right and left shoulders.

2. Because the parties wished to avoid the expense and uncertainty of litigation, they executed a Full and Final Settlement Agreement on January 29, 2015. The Agreement provided that Claimant would receive $10,000 from Respondents in exchange for a full and final settlement of his May 1, 2014 Workers' Compensation claim.

3. The Settlement Agreement included the "Standard Settlement Agreement for Unrepresented Claimants" and the "Standard Settlement Order" as required by Workers' Compensation Rule of Procedure 7-2. Because Claimant was unrepresented a settlement proceeding was conducted on February 6, 2015 before Pre-Hearing Administrative Law Judge (PALJ) Michael Barbo.

4. At the settlement proceeding Claimant acknowledged that he had signed the documents that PALJ Barbo was considering for approval. Claimant noted that he had read the Settlement Agreement prior to signing it. He remarked that he had no questions about the Settlement Agreement.

5. Claimant informed PALJ Barbo that he understood the $10,000 payment from Respondents constituted a complete settlement of his May 1, 2014 claims. PALJ Barbo explained to Claimant that, if the Settlement was approved and he later changed his mind and did not want to settle, he would still be bound by the Settlement Agreement. Claimant responded, "Yes, sir, I understand that, Your Honor."

6. PALJ Barbo advised Claimant that he had the right to stop the proceeding if he wanted to obtain the advice of counsel. Claimant stated that he did not want to postpone approval of the Settlement Agreement in order to consult with an attorney. He represented that he wanted the Settlement Agreement finalized that day.

7. PALJ Barbo inquired whether Claimant was under the influence of any medications that might interfere with his ability to understand the proceedings. Claimant responded that he was not under the influence of any medication.

8. Claimant told PALJ Barbo that he did not feel forced to sign the Settlement Agreement. He explained that he was voluntarily settling his claim on a full and final basis.

9. Claimant acknowledged that he would not be able to obtain medical benefits from Respondents for injuries sustained on May 1, 2014 if PALJ Barbo approved the Settlement Agreement. He also recognized that he would not be entitled to receive medical maintenance benefits if the Settlement Agreement was approved. Finally, Claimant agreed that, if he could not work again, he was releasing Respondents from paying potential Permanent Total Disability (PTD) benefits.

10. PALJ Barbo inquired whether Claimant still wanted him to approve the Settlement Agreement. Claimant responded that he wanted PALJ Barbo to sign and approve the Agreement.

11. On February 6, 2015 PALJ Barbo approved the Settlement Agreement executed by Claimant and Respondents. PALJ Barbo's signed Order required Respondents to make payments in accordance with the Settlement Agreement.

12. While PALJ Barbo was signing the order approving the Settlement Agreement, Claimant and a representative for Respondents discussed the disbursement of the $10,000 settlement check. Claimant inquired whether he could pick up the check from Insurer within the next 20 minutes. Claimant subsequently picked up the $10,000 settlement check from Insurer.

13. On June 15, 2015 Claimant filed an Application for Hearing seeking to rescind the approved Settlement Agreement resolving his May 1, 2014 Workers' Compensation claims. Claimant also filed a Petition to Reopen alleging "fraud" as the basis for reopening.

14. Claimant based his allegations of fraud on Employer's actions prior to the settlement of his claim. He essentially asserted that he was fraudulently induced to sign a document for Employer stating he would not pursue a Workers' Compensation claim. Claimant contended that the document waived his right to make a claim for his May 1, 2014 injuries.

15. In response to Claimant's request to rescind the approved Settlement Agreement and reopen the claim, Respondents informed Claimant they would not voluntarily reopen his claim. Respondents advised Claimant that the statement he signed with Employer prior to the settlement of his claim did not constitute a binding agreement that barred him from pursuing his claim. In fact, Claimant pursued his claim and settled the matter on a full and final basis in exchange for $10,000.

16. Claimant has failed to demonstrate that it is more probably true than not that his January 29, 2015 approved Full and Final Settlement Agreement with Respondents should be reopened based on fraud. Claimant bases his allegations of fraud on Employer's actions prior to the settlement of his claim. He essentially asserts that he was fraudulently induced to sign a document for Employer stating he would not pursue a Workers' Compensation claim. Claimant contends that the document waived his right to make a claim for his May 1, 2014 injuries. However, Claimant pursued his claim and received valuable consideration in the form of $10,000 when he executed the Settlement Agreement. The Settlement Agreement does not contain any reference to a document waiving his right to pursue a claim and constitutes the entire agreement of the parties.

17. The terms of the Settlement Agreement approved by PALJ Barbo were clear and unambiguous. The Settlement Agreement thus must be enforced as written without reference to extrinsic evidence. Claimant's statements to PALJ Barbo reflect a clear intent to proceed with a full and final settlement of his May 1, 2014 claims. He specifically expressed that he was not coerced to sign the Settlement Agreement. Moreover, the Settlement Agreement reveals that Claimant executed the document of his own free will and without force, pressure or coercion. Claimant acknowledged that the "settlement agreement contains the entire agreement between the parties and shall be binding upon the parties when approved." He also recognized that he would not be entitled to receive medical maintenance benefits if the Settlement Agreement was approved. Finally, Claimant agreed that if he could not work again he was releasing Respondents from paying potential PTD benefits. Accordingly, Claimant's Petition to Reopen his January 29, 2015 approved Full and Final Settlement Agreement with Respondents is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. A settlement agreement is in the nature of a written contract that must be interpreted in accordance with the general rules that apply to the construction of contracts. *In Re Hickam,* W.C. No. 4-441-053 (ICAP, Jan. 15, 2004); *see Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117, 118 (Colo. App. 1993). The general rules of contract interpretation provide that when the contract terms are clear and unambiguous the contract must be enforced as written. *Cary,* 867 P.2d at 119. In determining whether the settlement agreement is ambiguous "the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions." *Fibreglas Fabricators, Inc. v. Kylberg,* 799 P.2d 371, 374 (Colo. App. 1990). Evidence that the parties ascribe different meanings to contract terms does not compel the conclusion that the contract is ambiguous. *Dorman v. Petrol Aspen, Inc.* 914 P.2d 909, 912 (Colo. 1996).

5. An order approving a settlement agreement effectively closes a claimant¹s Workers¹ Compensation case. *See Industrial Claim Appeals Office v. Orth*, 965 P.2d 1246, 1255 (Colo. 1998). Section 8-43-303(1), C.R.S., provides that a settlement may be reopened at any time on the ground of fraud. The party seeking to reopen an award bears the burden of proof to establish the appropriate grounds to reopen. To reopen a Workers' Compensation claim based on fraud, a claimant must prove that the respondents made false representations on which the claimant relied to settle the claim. *Trimble v. City and County of Denver,* 697 P.2d 716, 724 (Colo. 1985); *In Re Hickam,* W.C. No. 4-441-053 (ICAP, Jan. 15, 2004). The elements of fraud are: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it was false; (3) ignorance on the part of the one to whom the representation was made of its falsity; (4) the representation was made with an intention that it be acted on; and (5) the representation resulted in damage. *Concord Realty Co. v. Continental Funding Corp*., 776 P.2d 1114, 1117-18 (Colo. 1989); *Beeson v. Albertson's, Inc.*, W.C. No. 3-968-056 (ICAP, Apr. 30, 1996).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that his January 29, 2015 approved Full and Final Settlement Agreement with Respondents should be reopened based on fraud. Claimant bases his allegations of fraud on Employer's actions prior to the settlement of his claim. He essentially asserts that he was fraudulently induced to sign a document for Employer stating he would not pursue a Workers' Compensation claim. Claimant contends that the document waived his right to make a claim for his May 1, 2014 injuries. However, Claimant pursued his claim and received valuable consideration in the form of $10,000 when he executed the Settlement Agreement. The Settlement Agreement does not contain any reference to a

document waiving his right to pursue a claim and constitutes the entire agreement of the parties.

7. As found, the terms of the Settlement Agreement approved by PALJ Barbo were clear and unambiguous. The Settlement Agreement thus must be enforced as written without reference to extrinsic evidence. Claimant's statements to PALJ Barbo reflect a clear intent to proceed with a full and final settlement of his May 1, 2014 claims. He specifically expressed that he was not coerced to sign the Settlement Agreement. Moreover, the Settlement Agreement reveals that Claimant executed the document of his own free will and without force, pressure or coercion. Claimant acknowledged that the "settlement agreement contains the entire agreement between the parties and shall be binding upon the parties when approved." He also recognized that he would not be entitled to receive medical maintenance benefits if the Settlement Agreement was approved. Finally, Claimant agreed that if he could not work again he was releasing Respondents from paying potential PTD benefits. Accordingly, Claimant's Petition to Reopen his January 29, 2015 approved Full and Final Settlement Agreement with Respondents is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's Petition to Reopen his January 29, 2015 approved Full and Final Settlement Agreement with Respondents is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 27, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination at hearing were:

1. Whether Claimant has proven by a preponderance of evidence that she is entitled to PPD benefits for a scheduled right lower extremity impairment rating for her December 13, 2013 injury, and, if so, the correct impairment rating.

2. Whether the Claimant has proved by a preponderance of the evidence that future medical benefits are reasonably necessary to relieve the effects of her December 13, 2013 injury or prevent deterioration of her condition and maintain maximum medical improvement

3. Whether the Claimant has proven by a preponderance of the evidence that she is entitled to penalties pursuant to C.R.S. §§8-43-304(1) and 8-42-104(5)(a) for failing to properly apportion permanent partial disability benefits from December 18, 2014 ongoing.

FINDINGS OF FACT

1. The Claimant was employed by Employer as a student advocate for at-risk middle school students. She began working in this position in August 2012 and is still employed there (Hrg. Tr., p. 17).

2. At the hearing, the Claimant testified that she injured her right leg on December 13, 2013. She also testified that she previously suffered a prior injury to the same knee in July of 2007 (Hrg. Tr., p. 17).

3. The Claimant testified that her prior injury occurred when she was working in a restaurant and fell on a wet floor. She underwent two surgeries as a result of the July 2007 injury. The Claimant testified that at the conclusion of that injury she received an impairment rating from Dr. Krebs for a 23% lower extremity impairment. She then proceeded to DIME evaluation with Dr. Gellrick who provided a 22% lower extremity impairment rating (Hrg. Tr., pp. 18-19). The Claimant testified that as the 2007 knee claim was coming to a close, Dr. Bynam and others advised the Claimant that some time in the future, the Claimant would need to have her knee replaced (Hrg. Tr., p. 19). The Claimant's testimony in this regard is in accord with the medical records admitted in this case, is credible, and is found as fact.

4. The Claimant testified that on December 13, 2013 she was on her way into the school and she hit a patch of ice, lost her balance and fell. She testified that she

knew immediately that she hurt her leg (Hrg. Tr., p. 19). She was taken to the ER for x-rays and an MRI and she requested to see Dr. Bynam. The Claimant stated that she saw him two days later and he put her in one of the braces she had from her prior injury and she was placed on crutches (Hrg. Tr., p. 20). This testimony is consistent with the medical records, is credible, and is found as fact.

5. The Claimant testified that just before her December 13, 2013 injury, the condition of her knee involved constant pain in her hamstring area and swelling with normal activities along with her knee popping (Hrg. Tr., pp. 20-21). The Claimant testified that these symptoms remained consistent and stable since she had been placed at MMI for the 2007 injury (Hrg. Tr., p. 21).

6. After the December 13, 2013 injury, the Claimant testified that the symptoms are the same type as before, but the swelling is worse with "pulling on the left side" at the hamstring. The hamstring pain and the popping remain (Hrg. Tr., p. 22).

7. The Claimant testified that it is her understanding that Dr. Bynum is stating that the Claimant needs a future knee replacement but that he attributes the need for this to the earlier 2007 injury. She further testified that in terms of any medical care that she might need for the December 2013 injury, she would defer to Dr. Bynam and whatever he has said in the record (Hrg. Tr., p. 23). The Claimant testified that she trusts Dr. Bynam's opinion that her future treatment is related to her first injury, that she has arthritis as a result of her first injury and that she has returned to the baseline level where she was before the second injury (Hrg. Tr., pp. 26-27). The Claimant agrees that she needs a total knee replacement but, per Dr. Bynam's recommendation, she is waiting as long as she can because she is young for a knee replacement surgery (Hrg. Tr., p. 27).

July 1, 2007 Knee Injury

8. The Claimant first saw Dr. C. Kelly Bynum on October 14, 2008 related to a July 1, 2007 injury to the right knee when the Claimant fell on wet tile. Dr. Bynam noted that the Claimant had a lateral tibial plateau fracture that was treated without operation. She subsequently underwent right knee surgery performed by Dr. Dwyer on January 16, 2008, after which the Claimant was reporting right knee ache and popping with no true instability but occasional hyperextension going down stairs. The Claimant also reported a history of right knee ACL reconstruction performed by Dr. Winkler in 1983. The Claimant reported that her knee was stable and functioned well after the 1983 procedure until the 2007 injury. On physical examination, Dr. Bynum noted right quad atrophy as compared to the left. Dr. Bynum characterized the Claimant's symptoms as more "aching" than "instability" with ACL and MCL laxity. Dr. Bynum recommended a quad conditioning program, a functional knee brace and an injection. Dr. Bynum noted that in the long term, the Claimant is "looking at a total knee arthroplasty" (Claimant's Exhibit 1, pp. 1-2; Respondent's Exhibit A, pp. 1-2).

9. As of November 18, 2008, Dr. Bynam noted that the Claimant would pursue right knee ACL reconstruction, medial collateral advancement and repair in order to reestablish functional stability versus doing a total knee arthroplasty at that point. Dr. Bynam noted that the Claimant "does understand that this may fail and she could come to a total knee arthroplasty in the short term as well" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit A, p. 3).

10. The Claimant continued to treat with Dr. Bynam and, as of March 10, 2009, the Claimant was still considering her surgical options as she found it unacceptable to live with the current condition of her knee. By this date, the Claimant wanted to undergo right knee diagnostic arthroscopy with likely allograft ACL reconstruction and medial collateral ligament repair. Dr. Bynam noted that this would help with stability and pain from instability but not the underlying arthritic aching. As of this appointment, the Claimant did not want to undergo a total knee arthroscopy and Dr. Bynam did not recommend it specifically, although Dr. Bynam is clear that the TKR is in the Claimant's long-term future (Claimant's Exhibit 1, p. 6; Respondents' Exhibit A, p. 6).

11. On April 20, 2009, the Claimant underwent a right knee arthroscopic allograft tibialis anterior ACL reconstruction, partial medial menisectomy and chondroplasty of the patellar separate compartment. During the surgery, Dr. Bynam determined that MCL repair was not warranted (Claimant's Exhibit 1, pp. 8-11; Respondents' Exhibit A, pp. 8-11). After the surgery, there was some swelling and pain and concerns about infection, but cultures taken were ultimately negative. The swelling and hamstring pain persisted post-surgery through August 4, 2009 (Claimant's Exhibit 1, p. 18; Respondents' Exhibit A, p. 17). By October 7, 2009, the Claimant had undergone several knee aspirations secondary to persistent swelling, but cultures were negative until the most recent aspiration that was positive for gout. The Claimant was started on allopurinol, 200 mg a day to treat the gout. Dr. Bynam noted that "long term, she is at risk for developing worsening arthritis…the right knee could have a series of Synvisc injections, long-term needing total knee" (Claimant's Exhibit 1, p. 23; Respondents' Exhibit A, p. 20).

12. As of May 12, 2010, Dr. Bynam noted the Claimant had improved after Synvisc injections but her symptoms were not fully resolved. The Claimant reported no longer having the instability symptoms although she did have post menisectomy syndrome, postinjury arthritis and chondral changes. Dr. Bynam opined the Claimant was at MMI at this point, but noted, "long term I do think she may need future treatment, including future steroid injections, possible therapy and total knee arthroplasty" (Claimant's Exhibit 1, p. 29; Respondents' Exhibit A, p. 26).

13. Dr. Caroline Gellrick performed a Division Independent Medical Examination (DIME) with an examination date of March 4, 2011 related to the Claimant's July 1, 2007 injury (Respondents' Exhibit F). Dr. Gellrick agreed with Dr. Bynam that the Claimant was at MMI for the right knee injury (Respondents' Exhibit F, p. 80). Dr. Gellrick provided a lower right extremity rating of 22% (which would equate to

a 9% whole person impairment rating) due to the lateral meniscus menisectomy, partial, medial meniscus menisectomy and ACL reconstruction, along with loss of range of motion (Respondents' Exhibit F, pp. 81-82).

14. The insurer for the 2007 injury filed a Final Admission of Liability for the July 1, 2007 injury on April 4, 2011 in accordance with Dr. Gellrick's DIME report admitting for a 22% scheduled impairment (Respondents' Exhibit K, p. 122).

December 13, 2013 Knee Injury

15. Dr. Bynam saw the Claimant again on December 16, 2013 for a December 13, 2013 injury to her right knee. The Claimant reported that she was at work and slipped and fell on ice outside and fell on her right knee. The Claimant was able to get up and walk but experienced an immediate onset of pain. She was seen in the emergency room and an MRI showed a fracture. Dr. Bynam noted the MRI showed an effusion with an intact ACL reconstruction. Dr. Bynam also noted the MRI showed chondral wear and tear and some changes about her meniscus along with a nondisplaced lateral tibial plateau fracture (Claimant's Exhibit 1, pp. 30-32; Respondents' Exhibit A, pp. 27-28).

16. The Claimant was first evaluated and treated by Dr. Craig Tipping on December 20, 2013 for her December 13, 2013 knee injury due to the fall on ice. He noted that the Claimant had been seen at the emergency department for this injury. Dr. Tipping also noted the Claimant's prior knee injuries including a 1982 skiing accident with an ACL tear followed by surgery performed by Dr. Winkler, and then a 2008 meniscal repair by Dr. Dwyer and ACL reconstruction by Dr. Bynam (Claimant's Exhibit 3, p. 79). Dr. Tipping assessed the Claimant with right posterolateral tibial plateau fracture, nondisplaced, prior ACL cadaver graft – intact, degenerative menisci to the right knee and possible PTSD and depression secondary to multiple injuries to the right knee and anticipation of a long recovery (Claimant's Exhibit 3, p. 80). Dr. Tipping provided the Claimant with work restrictions of limiting walking and standing to 1 hour per day, sitting to 8 hours per day, and noting the Claimant must use crutches and be non-weight bearing on her right leg. She was referred to Dr. Bynam for evaluation (Claimant's Exhibit 3, p. 81). The Claimant followed up with Dr. Tipping on January 17, 20014 and he continued her work restrictions (Claimant's Exhibit 3, p. 84). The Claimant's condition continued to improve through February 28, 2014 and she was tapering off crutches gradually (Claimant's Exhibit 3, pp. 85-90).

17. The Claimant went on a planned trip to Europe with her daughter after the injury and on returning home, Dr. Bynam recommended physical therapy which the Claimant did in January and February of 2014. By March 3, 2014, the Claimant reported a worsening of her symptoms with a pain level of 7/10. The Claimant also reported that the day before, she was just standing on her right knee when it seemed to buckle and caused immediate medial pain and continued pain with ambulating (Claimant's Exhibit 1, p. 42; Respondents' Exhibit A, p. 36).

18. On March 14, 2014, the Claimant reported a new incident to Dr. Tipping when she was standing on her right leg while putting on pants and she had a valgus stress to the knee and felt immediate pain. She was evaluated by Dr. Bynam after this and he put her back into a knee brace for six weeks. Dr. Tipping noted the fracture did not seem to be aggravated by the recent fall (Claimant's Exhibit 3, p. 91).

19. As of March 26, 2014, the Claimant reported to Dr. Bynam that she had significant improvement of her knee symptoms but ankle pain due to a recent ankle twist incident on March 23, 2014 (Claimant's Exhibit 1, p. 46; Respondents' Exhibit A, p. 38).

20. As of April 11, 2014, the Claimant reported another injury to the right leg when she was taking the trash out and tripped in her carport twisting her ankle and causing a valgus deformity to her right knee. The Claimant was without crutches or a cane at that visit but Dr. Bynam had put the Claimant into an ankle brace (Claimant's Exhibit 3, p. 94). On May 2, 2014, Dr. Tipping noted the Claimant was doing much better. He noted that although she still had pain and was limping, she was no longer using a cane, crutches or a brace (Claimant's Exhibit 3, p. 97). Dr. Tipping noted that the Claimant's care was being transferred to Dr. Olson and that she would also continue with Dr. Bynam (Claimant's Exhibit 3, pp. 98-99).

21. The Claimant first saw Dr. Daniel Olson for treatment for her December 13, 2013 injury on May 12, 2014. Dr. Olson noted that "due to instability and disuse," the Claimant reinjured the same knee and sprained her ankle, although the Insurer was denying liability for the ankle (Claimant's Exhibit 2, p. 63). On June 24, 2014, Dr. Olson noted the Claimant was making "very slow but detectable progress" (Claimant's Exhibit 2, p 70). By October 2, 2014, Dr. Olson reported that the Claimant was making good progress and noted that an IME doctor opined the Claimant was at MMI and that her ankle sprain was not related to the work injury. Dr. Olson noted that Dr. Bynam wanted to see the Claimant one more time. Dr. Olson also disagreed with the insurance company stance that the Claimant's ankle and knee sprains were unrelated to the work injury (Claimant's Exhibit 2, pp. 74-75). Dr. Olson placed the Claimant at MMI as of October 2, 2014 with a maintenance care visit with Dr. Bynam. Dr. Olson referred the Claimant to Dr. O'Meara for an impairment rating (Claimant's Exhibit 2, p. 76).

22. When the Claimant saw Dr. Bynam on June 23, 2014, Dr. Bynam noted a significant improvement in the symptoms. There was still some hamstring pain in the leg and the Claimant had concerns that the knee might give out when she is on hills, but it had not done so. Dr. Bynam opined that she expected the Claimant to be at MMI in a couple of months after a self-directed exercise program. However, Dr. Bynam noted that the Claimant "will need long term considerations for potential knee replacement (Claimant's Exhibit 1, pp. 53-54; Respondents' Exhibit A, pp. 43-44).

23. On August 19, 2014, Dr. James Lindberg performed a record review beginning with the January 16, 2008 operative note of Dr. Thomas Dwyer through a medical note of Dr. Olson on July 24, 2014. From the written review, it is not clear if Dr.

Lindberg had all of the medical notes between those dates or if he was only in possession of select records in that time frame. Dr. Lindberg opined that the December 13, 2013 injury diagnosed as a nondisplaced tibial plateau fracture would be expected to heal in six weeks. As of the date of his review, Dr. Lindberg opined the Claimant had reached MMI and had no permanent impairment from this injury. He further opined that, the Claimant's "pre-existing arthritis and other issues predated these injuries" and "the non-displaced tibial plateau fracture has no bearing on causing the need for a total knee replacement" rather this would result from the ACL surgery done after the 2007 injury (Respondents' Exhibit C).

24. On October 20, 2014, the Claimant saw Dr. Bynam for follow up and, in discussing a record review report prepared by Dr. Lindberg dated August 19, 2014, Dr. Bynam concurs that the Claimant's "need for potential total knee in the future should be related to her primary ACL injury and meniscus injuries." In the treatment plan, Dr. Bynam discusses that the Claimant is at MMI and that, although the Claimant may need future treatments, injections, therapy and potential knee replacement, "that should be directed back to her initial knee injury" (Claimant's Exhibit 1, p. 59; Respondents' Exhibit A, p. 49).

25. The Claimant saw Dr. Patrick O'Meara for an impairment rating and placement at MMI on December 2, 2014 for her December 13, 2013 injury. The Claimant reported her mechanism of injury of falling on an ice patch while walking across the parking lot. After x-rays, the Claimant was initially told that nothing was broken, but when the MRI came back, she was advised that she had a tibial plateau fracture. The Claimant advised Dr. O'Meara of her two previous knee surgeries with Drs. Dwyer and Bynum. She also reported to Dr. O'Meara that she has continued aching in the knee, especially posteriorly, in her hamstrings. She also reported swelling and pain that is constant but gets progressively worse with use and is at its worst at the end of the day (Claimant's Exhibit 5, p. 110; Respondents' Exhibit B, p. 51). Dr. O'Meara reviewed the Claimant's 12/13/13 x-rays and MRIs from 12/13/13, 09/17//09 and 10/17/07 and conducted a physical examination. He also reviewed medical records from the current injury as well as older records from 2007 – 2010. Dr. O'Meara assessed the Claimant with degenerative joint disease with grade IV chondral loss, ACL rupture with repair, tibial plateau fracture, medial and lateral meniscus injuries, status post partial medial menisectomy, right MCL sprain, resolved, and right anterior talafibular ligament sprain, non-occupational, resolved. Dr. O'Meara concurred with Dr. Bynam that the Claimant was at MMI for the December 13, 2013 injury as of June 23, 2014. He noted that the Claimant does have restrictions due to her knee dysfunction, but found this was "due to her prior degenerative changes, not due to her 12/13/13 tibial plateau fracture" (Claimant's Exhibit 5, pp. 115; Respondents' Exhibit B, p. 56). Dr. O'Meara noted that the Claimant will need future medical care, including a likely total knee arthroplasty, but also states that "this was recommended before her placement at MMI for her 07/02/07 injury and was considered to be inevitable." Dr. O'Meara provided the Claimant with an impairment rating for her lower extremity for the specific disorders and range of motion deficits of 40% which would convert to a 16% whole person impairment. However Dr. O'Meara opined that apportionment was appropriate and

noted that a “corrected” prior impairment from her prior 07/02/07 injury is 16%, thus a 0% impairment remains after subtracting the 16% impairment from the 16% impairment from the 12/13/13 injury (Claimants’ Exhibit 5, p. 116; Respondents’ Exhibit B, p. 57).

26. The Respondents filed a Final Admission of Liability on December 18, 2014 for the December 13, 2013 injury admitting for 0% scheduled or whole person impairment and stating a position that denied liability for medical treatment or medications after MMI (Claimant’s Exhibit 6, p. 120).

27. On January 6, 2015, the Claimant wrote to Dr. Bynam and asked for clarification on medical reports related to her July 1, 2007 and December 13, 2013 injuries. Specifically, the Claimant stated, “I know that I will most likely need a knee replacement in the future, along with other possible treatments, but since this injury involves 2 separate insurance companies, I am wondering which one I will need to pursue when it is time to consider these potential medical treatments. Could you please write me a letter stating what your view is on who should pay for future care regarding my right knee?” (Claimant’s Exhibit 1, pp. 60-61). Dr. Bynam responded in writing on January 7, 2015, stating, “…in my opinion, I feel that [the Claimant] is likely to need total knee replacement in the future. Given her age she may need a revision and I do feel her initial work injury with surgery 04/2009 is the primary driver of this condition” (Claimant’s Exhibit 1, p. 62; Respondents’ Exhibit A, p. 50).

28. On January 12, 2015, the Division of Workers’ Compensation sent the Respondents correspondence requesting an immediate response. Upon receipt of the December 18, 2015 Final Admission of Liability filed by the Respondents, the Division determined that additional documentation was required to support the position on MMI and/or permanent impairment pursuant to Rule 5-5(A). The Division requested that Respondents file an amended FAL within 20 days with documentation to establish the prior impairment or settlement award for the same body part when apportionment was at issue (Respondents’ Exhibit L, p. 144).

29. On January 16, 2015, the Respondents filed a Final Admission of Liability for the December 13, 2013 injury admitting for 0% scheduled or whole person impairment and stating a position that denied liability for medical treatment or medications after MMI. This FAL was filed with Dr. O’Meara’s impairment rating and evaluation of December 2, 2014 (Respondents’ Exhibit L).

30. On February 2, 2015, the attorney for the Claimant sent written correspondence to the adjuster for the insurer on the July 1, 2007 claim advising them of the current claim related to the December 13, 2013 injury. Legal counsel references Dr. Bynam’s January 7, 2015 letter opining that the Claimant’s need for total knee arthroplasty surgery in the future is driven by the July 1, 2007 injury. However counsel also stated his opinion that the Claimant “has knee symptoms related to the newer December 13, 2013 work injury and is seeking to keep her medical benefits open on the newer claim, also.” Insurer for the prior July 1, 2007 claim was invited to take part in

upcoming proceedings related to the December 13, 2013 claim (Respondents' Exhibit J).

31. Dr. Bynam testified by evidentiary deposition on April 23, 2015. Dr. Bynam testified that he is an orthopedic surgeon who treated the Claimant for two separate worker's compensation claims (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, pp. 3 and 5). Dr. Bynam testified the first injury occurred in 2007 and he first saw the Claimant on October 14, 2008 (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 5). Dr. Bynam's partner, Dr. Dwyer had performed arthroscopic surgery in 2008 on the Claimant's knee. Dr. Bynam performed arthroscopic surgery on the Claimant's knee in 2009. Dr. Bynam testified that there was evidence of arthritis in the knee as of his 2009 surgery that had developed since Dr. Dwyer's earlier surgery as evidenced by a difference in the status of her joint surface between the two surgeries (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 7). By the time Dr. Bynam saw the Claimant for treatment, the Claimant had developed narrowing of the joint space consistent with arthritis (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 9). Dr. Bynam testified that this arthritis was likely to lead to the need for a total knee replacement and this would be related to the 2007 injury (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 10). On cross-examination, Dr. Bynam agreed that he also treated the Claimant for an injury she sustained in December 2013 to the same knee as before (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 13). Dr. Bynam did not perform any surgery in connection with the December 2013 injury (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 14). Dr. Bynam testified that the primary driver for her anticipated need for total knee replacement surgery would relate back to the 2007 injury and resulting arthritic changes. He testified that the Claimant "regained her baseline level of function that existed prior to the more recent tibial plateau fracture" and so, having recovered from this more recent fracture, "treatment now is primarily due to the arthritic changes from the 2007 injury" (Tr. Depo. Christopher Kelly Bynam, M.D., April 23, 2015, p. 16).

32. On April 28, 2015, Dr. Patrick O'Meara testified by evidentiary deposition as an expert witness in family medicine with Level II accreditation as to workers' compensation matters (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 5). Dr. O'Meara testified that the Claimant was referred by the Claimant's designated provider for an impairment rating (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 6). He testified that he was given extensive medical records for this review, including records from the December 2013 injury as well as records from the prior July 2, 2007 injury along with some very old records regarding a knee surgery the Claimant had many years ago (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 7). Dr. O'Meara testified that the degenerative and arthritic changes in the Claimant's knee were advanced and well established by the time the Claimant was through the treatment for her 2007 injury and he attributes the degenerative changes to that prior 2007 injury (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp. 8-9). He opines that the impairment rating provided for the 2007 injury should have included a rating for the degenerative arthritis and that Dr. Krebs, who performed the impairment, overlooked that part of the Claimant's knee dysfunction (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp. 9-10). Dr. O'Meara

testified that in providing the Claimant's impairment rating, his understanding of the Colorado Division of Workers' Compensation Guidelines for performing impairment ratings requires him to establish everything that is impaired in the subject body part (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 11). He then completed and followed an algorithm for apportionment (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 11-12). Dr. O'Meara opined that his training for calculating impairments requires that "you do your impairment rating as an overall rating to get every – and try to get every bit of impairment possible; look at every dysfunction that the patient has, and put that into the rating." In this case, Dr. O'Meara noted all of the impairment related to arthritis that was "well-established and documented" for the Claimant's knee, to the point that a total knee arthroplasty was recommended at the time of the prior injury and rating for that injury. However, as Dr. O'Meara notes, the arthritis was not included in the prior rating, although, in his opinion, it should have been (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 13). In revisiting the Claimant's impairment rating for the 2007 injury, Dr. O'Meara opined that combining the ratings for the specific diagnoses of partial menisectomy and ACL repair and loss of motion with the addition of a rating for the arthritic condition and chondral loss, the result would be a 41% lower extremity rating which converts to a 16% whole person rating (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp.14-16). In looking at this issue in a different way, Dr. O'Meara agreed that, from a causation standpoint, the current injury involved a tibial plateau fracture that completely healed, and "all other dysfunction in the knee was preexisting (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 17). On cross-examination, Dr. O'Meara testified that what he was attempting to do was to reach a final impairment that accurately reflected the Claimant's ongoing impairment and to what injury he attributed the impairment. Ultimately, Dr. O'Meara testified that he found 0% of the Claimant's total impairment attributed to the December 2013 impairment (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, p. 23). On redirect, Dr. O'Meara further testified that, per the Division worksheet, it is his understanding that he is to calculate the current total impairment, including prior impairment. Then, he is to attempt to reconcile his findings with the findings of prior physicians. This is what Dr. O'Meara testified that he was attempting to do with the manner in which he calculated and apportioned the Claimant's impairment (Tr. Depo. Patrick O'Meara, D.O., April 28, 2015, pp. 24-25).

33. Regardless of the terminology used in expressing medical opinions, the substantial weight of the evidence, including most persuasively the opinions of Dr. Bynam and Dr. O'Meara, establishes that the Claimant's December 13, 2013 work injury resulted in no permanent impairment to her right lower extremity. Rather, the Claimant fully healed from the December 13, 2013 non-displaced tibial plateau injury and returned to her baseline condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical

benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Permanent Partial Disability Benefits – Scheduled Injury – Causation/Relatedness

When an injury results in permanent medical impairment, and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section. C.R.S. §8-42-107(1). Where the scheduled injury causes the loss of, loss of use of, or partial loss of use of any member, the amount of permanent partial disability shall be the proportionate share of the amount stated in the schedule for the total loss of that member. C.R.S. §8-42-107(7)(b)(II).

The Claimant bears the burden of proof to establish that her scheduled injury is causally related to her work injury. When there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ has jurisdiction to resolve that dispute absent a Division IME. *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998). Per C.R.S. § 8-43-201, in any dispute arising under the Act, the Claimant bears burden of proving entitlement to benefits by a preponderance of the evidence.

The right to workers' compensation benefits arises only when an injured employee establishes by a preponderance of the evidence that an injury arises out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with

reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).* Moreover, the weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

In order to prove a causal relationship, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Claimant appears to be arguing that the application of C.R.S. § 8-42-104(5)(a) supersedes the causation determination which is a threshold matter for entitlement to benefits. Because the prior impairment ratings for the Claimant's lower extremity for her 2007 injury did not include the rating for arthritis and degeneration that the treating and evaluating physicians all attribute to the Claimant's prior 2007 injury, Claimant argues that the rating for this impairment cannot be apportioned pursuant to the statute when considering the Claimant's total impairment situation as of the date she reached MMI for the 2013 work injury. Claimant argues that application of C.R.S. § 8-42-104(5)(a) and the Workers' Compensation Rules of Procedure and the Division-

promulgated Impairment Rating Tips preclude the rating physician in this case from retroactively adjusting the rating from the 2007 injury and then apportioning that adjusted impairment rating from the Claimant's current total impairment rating to reach the result that 0% impairment remains attributable to the 2013 work injury.

In considering the Claimant's argument, it is important to note that when interpreting statutes a court should give words and phrases in a statue their plain and ordinary meanings. Forced and subtle interpretations should be avoided. The statutory scheme should be construed to give consistent, harmonious and sensible effect to all of its parts. *Jones v. Industrial Claim Appeals Office,* 87 P.3d 259 (Colo. App. 2004); *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). Statutes addressing the same subject matter should be construed together. *USF Distribution Services, Inc., v. Industrial Claim Appeals Office,* 111 P.3d 529 (Colo. App. 2005).

Respondents correctly argue that, in this case, the apportionment statute is not necessary for resolution where the Claimant has not met the threshold burden of establishing a causal relationship between her disabling condition and the work injury at issue. Respondents rely on a reasonable interpretation of C.R.S. § 8-42-104(5)(a), which provides, in pertinent part:

> In cases of permanent medical impairment, the employee's award or settlement shall be reduced:
>
> When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the "Workers' Compensation Act of Colorado" or a similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.

The Claimant makes the assumption that this is a case of "permanent medical impairment" and jumps forward into the remainder of the statute which sets forth the rule for calculating the deduction or apportionment due to a prior impairment rating. Yet, as Respondents argue, it cannot be merely assumed that a case is one of permanent medical impairment. For the statute to apply there must be a permanent medical impairment related to the current injury. Thus, the rating physician must first make a determination as to the causal relationship of any existing impairment to the work injury at issue. If the evidence supports a finding that the entirety of the Claimant's present disabling condition is the result of a preexisting injury rather than the current injury being rated, then the Claimant did not suffer any impairment or change in condition and there is not a permanent medical impairment attributable to the work injury that the rating physician is addressing. See, *Valdez v. Alstrom, Inc.,* W.C. No. 4-784-196 (ICAO October 18, 2012); *Trusty v. Big Lots Stores, Inc.,* W.C. No. 4-770-446 (ICAO March 25, 2011).

In this case, the Claimant sustained a slip and fall injury to her right knee on July 1, 2007. She subsequently underwent right knee surgery performed by Dr. Dwyer on January 16, 2008, after which the Claimant was reporting right knee ache and popping with no true instability but occasional hyperextension going down stairs. The Claimant then began treating with Dr. Bynum for the July 1, 2007 injury and, at this point, he noted that in the long term, the Claimant was looking at a total knee arthroplasty. Dr. Bynam treated the Claimant conservatively until the point that Claimant found it unacceptable to live with the current condition of her knee. Dr. Bynam recommended a right knee diagnostic arthroscopy with likely allograft ACL reconstruction and medial collateral ligament repair and he noted that this would help with stability and pain from instability but not the underlying arthritic aching. Dr. Bynam's opinion remained clear that the TKR is in the Claimant's long-term future even though the recommended arthroscopic surgery might forestall the knee replacement. On April 20, 2009, the Claimant underwent a right knee arthroscopic allograft tibialis anterior ACL reconstruction, partial medial menisectomy and chondroplasty of the patellar separate compartment. As of May 12, 2010, Dr. Bynam noted the Claimant had improved after Synvisc injections but her symptoms were not fully resolved. The Claimant reported no longer having the instability symptoms although she did have post menisectomy syndrome, postinjury arthritis and chondral changes. Dr. Bynam opined the Claimant was at MMI at this point, but again clearly opined that in the long term she would need future treatment related to the 2007 injury, including future steroid injections, possible therapy and total knee arthroplasty.

Dr. Caroline Gellrick performed a Division Independent Medical Examination (DIME) with an examination date of March 4, 2011 related to the Claimant's July 1, 2007 injury. Dr. Gellrick agreed with Dr. Bynam that the Claimant was at MMI for the right knee injury. Dr. Gellrick provided a lower right extremity rating of 22% (which would equate to a 9% whole person impairment rating) due to the lateral meniscus menisectomy, partial, medial meniscus menisectomy and ACL reconstruction, along with loss of range of motion. She did not provide an impairment rating for arthritis related to the 2007 injury although there was substantial documentation of the same in the medical records up to that point. The insurer for the 2007 injury filed a Final Admission of Liability for the July 1, 2007 injury on April 4, 2011 in accordance with Dr. Gellrick's DIME report admitting for a 22% scheduled impairment.

The Claimant unfortunately injured her right knee again on December 13, 2013 when she slipped and fell on ice outside of her workplace and fell on her right knee. The Claimant was able to get up and walk but experienced an immediate onset of pain. She was seen in the emergency room where an MRI was ordered. Dr. Bynam noted the MRI showed an effusion with an intact ACL reconstruction. Dr. Bynam also noted the MRI showed chondral wear and tear and some changes about her meniscus along with a nondisplaced lateral tibial plateau fracture. The Claimant treated with Drs. Tipping, Olson and Bynam for this new work injury. On August 19, 2014, Dr. James Lindberg performed a record and opined the Claimant had reached MMI and had no permanent impairment from this injury. He further opined that, the Claimant's "pre-existing arthritis and other issues predated these injuries" and "the non-displaced tibial plateau fracture

has no bearing on causing the need for a total knee replacement" rather this would result from the ACL surgery done after the 2007 injury. On October 20, 2014, the Claimant saw Dr. Bynam for follow up and, in discussing a record review report prepared by Dr. Lindberg dated August 19, 2014, Dr. Bynam concurred that the Claimant's "need for potential total knee in the future should be related to her primary ACL injury and meniscus injuries." In the treatment plan, Dr. Bynam agreed the Claimant was at MMI and that, although the Claimant may need future treatments, injections, therapy and potential knee replacement, opined "that should be directed back to her initial knee injury."

The Claimant saw Dr. Patrick O'Meara on December 2, 2013 for an impairment rating and placement at MMI for her December 13, 2013 injury. Dr. O'Meara concurred with Dr. Bynam that the Claimant was at MMI for the December 13, 2013 injury as of June 23, 2014. He noted that the Claimant had restrictions due to her knee dysfunction, but found this was "due to her prior degenerative changes, not due to her 12/13/13 tibial plateau fracture." Dr. O'Meara noted that the Claimant will need future medical care, including a likely total knee arthroplasty, but also states that "this was recommended before her placement at MMI for her 07/02/07 injury and was considered to be inevitable." Dr. O'Meara provided the Claimant with an impairment rating for her lower extremity for the specific disorders and range of motion deficits of 40% which would convert to a 16% whole person impairment. However Dr. O'Meara opined that apportionment was appropriate and noted that a "corrected" prior impairment from her prior 07/02/07 injury is 16%, thus a 0% impairment remains after subtracting the 16% impairment from the 16% impairment from the 12/13/13 injury. While Dr. O'Meara used the language of apportionment for his opinion, in essence, Dr. O'Meara was opining that none of the Claimant's right lower extremity condition at the time of MMI was causally related to the December 13, 2013 injury. Rather, based on his examination and the medical records, he found the entirety of the Claimant's right knee condition to be the result of her July 1, 2007 injury.

On January 6, 2015, the Claimant wrote to Dr. Bynam and asked for clarification on medical reports related to her July 1, 2007 and December 13, 2013 injuries. Specifically, the Claimant stated, "I know that I will most likely need a knee replacement in the future, along with other possible treatments, but since this injury involves 2 separate insurance companies, I am wondering which one I will need to pursue when it is time to consider these potential medical treatments. Could you please write me a letter stating what your view is on who should pay for future care regarding my right knee?" Dr. Bynam responded in writing on January 7, 2015, stating, "…in my opinion, I feel that [the Claimant] is likely to need total knee replacement in the future. Given her age she may need a revision and I do feel her initial work injury with surgery 04/2009 is the primary driver of this condition."

Dr. Bynam further clarified and elaborated on his opinion in testimony by deposition on April 23, 2015. Dr. Bynam's partner, Dr. Dwyer had performed arthroscopic surgery in 2008 on the Claimant's knee. Dr. Bynam performed arthroscopic surgery on the Claimant's knee in 2009. Dr. Bynam testified that there was evidence of

arthritis in the knee as of his 2009 surgery that had developed since Dr. Dwyer's earlier surgery as evidenced by a difference in the status of her joint surface between the two surgeries. By the time Dr. Bynam saw the Claimant for treatment, he found that the Claimant had developed narrowing of the joint space consistent with arthritis and he testified that this arthritis was likely to lead to the need for a total knee replacement and this would be related to the 2007 injury. Dr. Bynam testified that the primary driver for her anticipated need for total knee replacement surgery would related back to the 2007 injury and resulting arthritic changes. He testified that the Claimant "regained her baseline level of function that existed prior to the more recent tibial plateau fracture" and so, having recovered from this more recent fracture, "treatment now is primarily due to the arthritic changes from the 2007 injury."

In reliance upon the credible and persuasive opinions of Drs. Bynam and O'Meara, which are further supported by the weight of the medical records in this case, the ALJ found that the Claimant's December 13, 2013 work injury resulted in no permanent impairment to her right lower extremity. Rather, the Claimant fully healed from the December 13, 2013 non-displaced tibial plateau injury and returned to her baseline condition. The Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits for her right lower extremity in this claim because she has failed to establish that any impairment to her right lower extremity is causally related to the December 13, 2013 work injury. Thus, it is unnecessary to consider the issue of apportionment for resolution of this case.

Medical Maintenance Treatment after MMI

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart*

Stores, Inc., 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In this case, the Claimant has not met her burden of proof to establish that continuing care, up to, and including, but not limited to, total knee replacement surgery, is reasonable and necessary to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition. Per the persuasive and credible testimony of Dr. Bynam, the primary driver for the Claimant's anticipated need for total knee replacement surgery would related back to the 2007 injury and resulting arthritic changes. He further testified that the Claimant "regained her baseline level of function that existed prior to the more recent tibial plateau fracture" and so, having recovered from this more recent fracture, "treatment now is primarily due to the arthritic changes from the 2007 injury." In reliance upon the opinion of Dr. Bynam, to whom the Claimant herself defers on issues of medical treatment, it is found that any further treatment that the Claimant requires for her right lower extremity is unrelated to the December 2013 work injury. It is noted that Dr. Bynam's opinion is further supported by the credible and persuasive opinion of Dr. Lindberg, who is also an orthopedic surgeon, who opined that the future need for treatment of the Claimant's right knee relates back to the Claimant's 2007 work injury. The Claimant's claim for medical maintenance treatment after MMI for the December 2013 work injury is therefore denied and dismissed.

Remaining Issues – Penalty Claim

In light of the above findings and conclusions, any remaining issues, including the Claimant's claim for penalties, are moot. Respondents appropriately filed a Final Admission of Liability consistent with the medical report of Dr. O'Meara which determined that no permanent impairment was attributable to the December 2013 work injury.

C.R.S §8-43-304(1), as amended on August 11, 2010, provides that an insurer or self-insured employer who "violates any provision" of Articles 40 to 47 of Title 8 "or does any act prohibited thereby….for which no penalty has been specifically provided….shall . . . be punished by a fine of not more than one thousand dollars per day for each such offense." C.R.S. §8-43-304(1) further requires that the fine imposed is to be apportioned, in whole or in part, by the ALJ between the aggrieved party and the workers' compensation cash fund created in C.R.S §8-44-112(7)(a), except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed. Section 3 of Chapter 287, Session Laws of Colorado 2010 provides that the amendment "applies to conduct occurring on or after August 11, 2010."

The failure to comply with the Workers' Compensation Rules of Procedure has been determined to constitute a failure to perform a "duty lawfully enjoined" within the meaning of C.R.S. §8-43-304(1). *Paint Connection Plus v. Industrial Claim Appeals* Office, 240 P.3d 429 (Colo. App. 2010); Diversified *Veterans Corporation Center v. Hewuse,* 942 P.2d. 1312 (Colo. App. 1997).

Before penalties may be imposed under §8-43-304(1), an ALJ must apply a two-step analysis. First, the ALJ must determine whether the disputed conduct constituted a violation of the Act, or of a duty lawfully enjoined, or of an order. If the ALJ concludes that there is such violation, the ALJ shall impose penalties if the second factor is also met, that the insurer's actions were objectively unreasonable. *City Market, Inc. v. Industrial Claim Appeals* Office, 68 P.3d 601 (Colo. App. 2003); Allison *v. Indus. Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995).

In this case, the Claimant has failed to establish that the Respondents' conduct constituted a violation of the Act, of a duty that Respondents' owed or of an order. There was no duty to admit for an impairment rating for a condition that the rating physician found to be causally unrelated to the December 2013 injury. Nor did the Claimant prove a violation of the Act, as it was found that the apportionment statute was not applicable in the resolution of this case where the Claimant failed to establish that any permanent medical impairment was attributable to the December 2013 work injury. Therefore, the Claimants claim for penalties is denied and dismissed.

ORDER

It is therefore ordered that:

1. The Claimant bears the burden of proof to establish that conditions for which she seeks benefits are causally related to the work injury. The Claimant has not met her burden of proof to establish that her arthritis condition was caused by, aggravated by, or accelerated by her December 13, 2013 work injury. The Claimant is not entitled to benefits in this case related to the arthritis and degenerative changes in her right knee as no part of the Claimant's condition is causally related to the Claimant's December 13, 2013 work injury. The Claimant's claim for permanent partial disability benefits for her December 13, 2013 work injury is denied and dismissed.

2. The Claimant has failed to meet her burden of proof regarding maintenance medical treatment. Ongoing treatment, including, but not limited to, total knee replacement surgery, is not related and is not reasonable and necessary to cure and relieve the of the Claimant's December 13, 2013 industrial injury or to prevent further deterioration of any condition related to that injury. The claim for ongoing medical benefits for surgery or other treatment for the Claimant's right lower extremity is denied and dismissed.

3. The Claimant's claim for penalties is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 8, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-971-057-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 23, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/23/15, Courtroom 3, beginning at 1:30 PM, and ending at 4:30 PM).

Claimant's Exhibits 1 through 10 and 12 were admitted into evidence without objection. Claimant's Exhibit 11, Bates page 182 was admitted without objection. The remainder of Claimant's Exhibit 11 was withdrawn after an Objection by Respondents' counsel. Respondents' Exhibits A through I (as in Isaac) were admitted into evidence without objection. The evidentiary deposition of Timothy O'Brien, M.D., was admitted in lieu of his live testimony.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on October 2, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable right shoulder injury on September 27, 2014. If so, was the surgery performed by William P. Cooney, M.D., causally related and reasonably necessary.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues designated for hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant, now 41 years old, is a registered nurse (RN), who works in the Intensive Care Unit (ICU) at the Employer's hospital. She has been employed in that capacity since 2004. On September 27, 2014, one of her ICU patients attempted to extubate himself while he was being weaned off essential medications. While the patient had been sedated and was resting quietly on a hospital bed, he awoke suddenly and immediately began attempting to remove an endotracheal tube. Removal of the tube endangered the patient's life, and the Claimant engaged in a protracted struggle with the patient to prevent extubation.

2. The patient was male, weighed roughly 175 pounds and appeared to be in his early sixties. While the patient had been placed in wrist restraints, his legs were free. During the course of the struggle, the patient repeatedly attempted to grab and remove the tube. He rolled back and forth on the bed as he attempted to bring the tube within reach of his restrained arms. He sat up repeatedly. He kicked and hit the Claimant and was in general violently combative.

3. The Claimant, who was 40 at the time, "fought with" the patient for roughly three to five minutes before two co-employees, Dea Carranco and Lynda Garcia, arrived to help the Claimant. It took all three employees to subdue the patient. During the course of the struggle, the Claimant moved back and forth alongside the patient's bed. At times, she had to hold down his legs and at other times she had to hold his arms and upper-body. She had to lean over the patient repeatedly during the struggle. She used both her arms and her upper body to gain leverage and to put pressure on the patient so that he would return the prone position he had been in before he awoke. Finally, at various times, the Claimant arms were extended away from her body in such

a manner that her arms and hands would be above her head had she been standing erect. The Claimant's testimony concerning the struggle is undisputed and it is credible. Her testimony was also corroborated by witness statements introduced as Claimant's Exhibit 12.

4. Within 24 hours, the Claimant felt some soreness in approximately the same area of her right shoulder where she had been kicked by the patient. She initially attributed the soreness to being kicked during the struggle.

5. September 27, 2014 was a Saturday. At some point during the week of September 28, 2014, the Claimant mentioned the shoulder soreness to her supervisor, Kristy L. Murphy (See Claimant's Exhibit No. 11, Bates No. page No 182). On October 7, 2014, the Claimant filled out an "Associate Event" report, formally reporting that she had sustained an injury to her right shoulder during the struggle. The Claimant sought medical treatment on October 24, 2014.

In-House Medical Treatment

6. The Employer maintains an in-house clinic for the treatment of its injured workers. Cathy Stringer is a RN who works in that clinic. Stringer referred the Claimant to physical therapy (PT) and for an evaluation with William Woo, M.D., who also works in the clinic. Dr. Woo examined the Claimant and referred her for an MRI (magnetic resonance imaging) of the right shoulder. The MRI was read as being negative. Dr. Woo also referred the Claimant to Nicholas K. Olsen, D.O., a physiatrist, and William Ciccone II, M.D., an orthopedic surgeon. Dr. Ciccone examined the Claimant, injected her right shoulder and ultimately recommended that she undergo exploratory arthroscopic surgery. Because the MRI had been read as negative, Dr. Woo and Dr. Olsen believed that the Claimant should treat the shoulder injury with therapy and medications. Dr. Woo also referred the Claimant to Dr. Cooney, an orthopedic surgeon, for a second opinion. Dr. Cooney examined the Claimant, injected her shoulder a second time and ultimately recommended surgery. The Claimant's early diagnoses included shoulder strain and impingement.

7. While the Claimant was being seen and examined by the above-mentioned physicians, she was also undergoing PT and taking medication to treat her right shoulder. Her symptoms worsened over time. The Claimant received temporary relief from the injections performed by Dr. Ciccone and Dr. Cooney. Because she was not satisfied with the care she was receiving from Dr. Woo and because Dr. Woo did not want the Claimant to undergo surgery, the Claimant requested a change of physician. By agreement with the Respondent, the Claimant's care was transferred to Sander Orent, M.D. Dr. Orent agreed with Dr. Ciccone and Dr. Cooney that the Claimant needed surgery.

8. Ultimately, Dr. Cooney requested authorization for surgery. The request for authorization was denied. By that time, the Respondent had also filed a Notice of Contest. Because her condition had continued to worsen, the Claimant elected to go forward with surgery on her own.

The Claimant's Medical Condition

9. The Claimant had been diagnosed with impingement syndrome by numerous physicians and Dr. Cooney and Dr. Ciccone believed it was necessary to perform surgery despite the allegedly negative MRI. Dr. Cooney performed surgery on Claimant's right shoulder in April 2015. During the course of the procedure, Dr. Cooney identified substantive pathology in the Claimant's shoulder including, but not limited to:

> (1) "… high grade partial thickness tearing and fraying throughout the distal portion of the intra articular aspect" of the Claimant's biceps; and (2) a "… longitudinal split in the *mid to posterior aspect of the supraspinatus."*

In addition to repairing the tears, Dr. Cooney performed a sub-acromial decompression to treat the impingement syndrome.

The Claimant

10. After the injury, despite being symptomatic, the Claimant continued working for a few months without restrictions. After the surgery, the Claimant missed work for a few months, but eventually returned to work with restrictions. As of the hearing date, the Claimant had been released by Dr. Cooney and had returned to work full time and at full duty. According to the Claimant, her pre-surgery symptoms have improved dramatically since the surgery.

11. The Claimant continued working after the injury because she had to support her family, despite the fact that she was having pain in her right shoulder and despite the fact that her condition was gradually worsening. She remained symptomatic when she returned to work after the surgery, but she returned to work again because she had to support her family. The Claimant's testimony is undisputed, persuasive and highly credible.

Telephonic Evidentiary Deposition of Timothy O'Brien, M.D.—Respondent's Independent Medical Examiner (IME)

12. The Respondent retained Dr. O'Brien to perform an IME. Dr. O'Brien issued a report that was submitted into evidence and he testified by telephonic evidentiary deposition. Dr. O'Brien was of the opinion: (1) that the Claimant sustained nothing more than a contusion during the struggle with the patient; and (2) that tears

identified during surgery were “normal” and “age-related.” On cross-examination, however, Dr. O’Brien conceded that he did not have any literature to support the claim that the tears were either “normal” or “age related” for a forty year old woman.

13. Dr. O’Brien also was of the opinion that – at least according to his understanding – the Claimant’s right shoulder was never placed in what he called “the impingement zone” during the struggle and that a direct, frontal blow to the shoulder from a kick cannot cause rotator cuff tearing unless a person’s arm/should is in the “impingement zone” when the blow lands. Further, it was Dr. O’Brien’s opinion that the Claimant had not suffered “true” rotator cuff tears.

14. Dr. O’Brien was asked if the Claimant could have injured her shoulder and suffered the rotator cuff tears during the struggle, even if she wasn’t injured – and didn’t she suffer rotator cuff tears – when she was kicked. Dr. O’Brien’s answer was evasive. He noted that he had asked the Claimant if she had struggled with other patients without injuring herself. When she noted that she had engaged in other struggles without injuring herself, his analysis of that possibility concluded further inquiry.

15. Dr. O’Brien was of the opinion that Claimant’s post-struggle “behavior” proved that she hadn’t been injured. According to Dr. O’Brien, because the Claimant didn’t report the injury for two weeks, because she didn’t have severe pain at the time of the struggle and because she continued working, the Claimant could not have sustained anything more than a contusion (As noted previously, the Claimant reported her injury to her supervisor, Kristy Murphy, within a week). Dr. O’Brien’s inaccurate history regarding the reporting of the injury makes his recounting of the history suspect and impacts his credibility in a negative sense.

16. In his report, Dr. O’Brien agreed that it was reasonable for Dr. Cooney to perform the surgery on Claimant’s shoulder, however, he implies that the need for the surgery was not causally related to the incident in question. Underlying this opinion is Dr. O’Brien’s discredited opinion (by the ALJ) that the need for the surgery was “age-related.”

17. Dr. Cooney reviewed Dr. O’Brien’s report. Dr. Cooney disagreed with Dr.O’Brien’s opinions and analysis. With respect to the issue of the struggle with the patient – even if not when kicked -- Dr. Cooney had this to say:

> “To be very clear, I believe that Dr. Obrien’s (*sic*) opinion regarding causation is not accurate. Again, as stated above, [Claimant] clearly is not capable of determining how her shoulder was injured during a combative struggle with a patient. The fact that she reports having been kicked and then Dr. Obrien’s focus on this kick rather than the restraining of the patient and ignoring the restraining of the patient as being perhaps potential causation for this is

> **disingenuous** (emphasis supplied)…" (Claimant's Exhibit 4, Bates No. 78.)

18. Dr. Cooney's opinion concerning causation was summarized as follows:

> The patient clearly states that the arm was sore the day following this event and in light of her not having had any prior shoulder injury, it seems in my opinion to be absolutely clear, that this work related event (whether it was wrestling, kicking or a combination of the two), is solely responsible for the ultimate findings that were identified at the time of the surger." (Claimant's Exhibit 4, Bates No. 77.)

Dr. Cooney's opinions concerning the issue of causation are considerably more thorough, persuasive and credible than the opinions of Dr. O'Brien.

Sander Orent, M.D.

19. Dr. Orent reviewed Dr. O'Brien's report and deposition testimony. Dr. Orent disagreed with Dr. O'Brien's opinions concerning causation. Dr. Orent testified that, in his opinion, the tears in the Claimant's shoulder were neither "normal" nor "age-related" for a forty year old woman, like the Claimant. Dr. Orent is of the opinion that the tears in the Claimant's shoulder are related to the struggle with the patient. He further is of the opinion that the Claimant developed impingement syndrome is a result of the struggle; that a "negative" MRI proves nothing about the existence of pathology because they MRIs are fallible; that the surgery performed by Dr. Cooney was reasonably necessary and comported with the Medical Treatment Guidelines (MTG) [found under Division of Workers' Compensation (DOWC) Rules of procedure (WCRP), Rule 17, Exhibit 5, 7 CCR 1101-3; that any degeneration of the tears in the Claimant's shoulder had occurred between the time she was injured and the date of surgery and that the worsening of Claimant's symptoms was in part attributable to the fact that the Claimant continued working. Dr. Orent's opinions concerning causation are considerably more persuasive and credible than the opinions of of Dr. O'Brien.

20. The Claimant has seen a chiropractor on and off for many years. She was involved in an automobile accident in March of 2014 and treated with her chiropractor for a whiplash injury sustained in that accident. Claimant testified that she did have some stiffness in the upper back which radiated out towards her shoulders, bilaterally. Dr. O'Brien interpreted the chiropractic records as proof that the Claimant may have had a chronic right shoulder condition. The ALJ interprets Dr. O'Brien's "rush to judgment" on this history as an easy substitute for further medical pursuit and therefore lacking in persuasiveness and credibility. Dr. Orent reviewed the chiropractic records and rendered the following opinion:

(1) that they do not include symptoms consistent with the injury – impingement syndrome and rotator cuff tears -- Claimant sustained on September 27, 2014; and (2) that the records of treatment after the March, 2014 automobile accident demonstrate only that Claimant has symptoms in the area of her thoracic spine.

With respect to the issue of whether the Claimant suffered from any chronic, pre-existing condition in her right shoulder, Dr. Orent's opinions are far more credible than the opinions of Dr. O'Brien.

Ultimate Findings

21. For the reasons detailed herein above, the ALJ finds the opinions of Dr. Ciccone, Dr. Cooney and Dr. Orent on compensability, the causal relatedness of the Claimant's need for the right shoulder surgery and the reasonable necessity thereof, are more persuasive and credible than the opinions of Dr. O'Brien. Indeed, the ALJ finds the opinions of Dr. O'Brien significantly lacking in credibility. Further, the ALJ finds the Claimant's testimony credible and undisputed.

22. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Ciccone, Dr. Cooney and Dr, Orent and to reject the opinions of Dr. O'Brien.

23. The Claimant sustained a compensable injury to her right shoulder on September 27, 2014, arising out of the course and scope of her employment for the Employer herein.

24. The right shoulder surgery, performed by Dr. Cooney, was causally related to the compensable right shoulder injury of September 27, 2014; and, it was reasonably necessary to cure and relieve the effects of that injury.

25. The Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on September 27, 2014, arising out of the course and scope of her employment for the Employer herein.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was credible and undisputed. As further found, the opinions of Dr. Ciccone, Dr. Cooney and Dr. Orent on compensability, the causal relatedness of the Claimant's need for the right shoulder surgery and the reasonable necessity thereof were more persuasive and credible than the opinions of Dr. O'Brien. Indeed, as found, the opinions of Dr. O'Brien were significantly lacking in credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Ciccone, Dr. Cooney and Dr, Orent and to reject the opinions of Dr. O'Brien.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant established that her right shoulder injury occurred during the course and scope of her employment on September 27, 2014.

Medical

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment for her right shoulder is causally related to a patient kicking her and her bodily maneuvers

to subdue the patient on September 27, 2014 Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of her injury.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to compensability and entitlement to medical benefits, including the surgery performed by Dr. Cooney.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay all of the costs of medical care and treatment for the Claimant's compensable right shoulder injury, including the costs of surgery performed by William P Cooney, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of October 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease in the form of bilateral Carpal Tunnel Syndrome (CTS) during the course and scope of her employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her work-related injuries.

3. Whether Claimant's claim is barred by the two year statute of limitations delineated in §8-43-103(2), C.R.S.

FINDINGS OF FACT

1. Claimant is a 55 year old female who worked for Employer as a Loan Assistant II. Her job duties involved a variety of tasks including the attending meetings, ordering reports, speaking on the telephone and using a keyboard and mouse. Claimant's job duties specifically included the following: (1) keyboarding/writing/pinching for 34-66% of the time or two and one-half to five hours per day; (2) handling for 1-33% of the time or up to two and one-half hours per day; (3) standing/walking for 1-33% of the time or up to two and one-half hours per day; and (4) talking on the telephone for 24-66% of the time or two and one-half to five hours per day. Claimant was not exposed to extreme temperatures or vibratory tools while working for Employer.

2. Claimant asserted that on March 3, 2014 she sustained wrist and neck injuries as a result of repetitive motion while performing her job duties for Employer. She visited private physician Richard Glassman, D.O. for an examination. Claimant reported that she had been suffering from bilateral arm pain for the previous three to four months. She also noted "general achiness from the wrist up the forearms up the arms and sometimes down both axillae and down the lateral chest." Dr. Glassman suspected "tendinitis and/or repetitive motion syndrome." However, he doubted that Claimant clinically suffered from CTS.

3. The medical records reveal that Claimant continued to report recurrent neck and arm pain. She underwent extensive physical therapy

4. On October 24, 2014 Claimant visited Alireza T. Alijani, M.D. for an evaluation. She reported moderate to severe numbness, paresthesias and pain in both hands. The numbness was localized to the palm, thumb and index finger. Dr. Alijani

diagnosed Claimant with bilateral CTS. He also referred Claimant for an EMG to rule out peripheral neuropathy and cervical radiculopathy.

5. On November 24, 2014 Claimant returned to Dr. Alijani for an evaluation. After reviewing the EMG results and performing a physical examination, Dr. Alijani determined that Claimant was a candidate for a carpal tunnel release. However, Dr. Alijani noted that Claimant did not exhibit clinical findings of CTS.

6. Dr. Alijani referred Claimant to Usama Ghazi, D.O. for an examination. On January 6, 2015 Claimant visited Dr. Ghazi. Dr. Ghazi determined that the EMG revealed bilateral CTS. However, he remarked that there were no symptomatic findings of CTS on examination and Claimant exhibited an intact medial nerve.

7. On January 15, 2015 Allison M. Fall, M.D. conducted a medical records review of Claimant's condition. She determined that Claimant did not suffer any injuries that were caused by her job duties for Employer. Dr. Fall explained that Claimant had undergone physical therapy and her lateral epicondylitis had resolved. Claimant's cervical strain was related to her May 9, 2012 motor vehicle accident. Dr. Fall remarked that Claimant did not demonstrate physical examination findings consistent with CTS. She summarized that the "mild slowing of the median nerve on electrodiagnostic testing [was] more likely related to her underlying thyroid disease, but it [was] not consistent with her symptomatology. Accordingly, Dr. Fall did not recommend additional medical treatment.

8. On March 11, 2015 Claimant visited Thomas Fry, M.D. for an examination. Claimant reported bilateral hand pain and swelling. She noted that she began developing intermittent symptoms in 2010 and 2011 when her work duties significantly increased. Dr. Fry commented that Claimant's EMG reflected mild changes consistent with CTS. He summarized that Claimant exhibited relatively minimal findings on physical examination, somewhat diffuse historical findings and mild electrical changes. Dr. Fry thus recommended a trial of right-sided carpal tunnel injections.

9. On August 27, 2015 the parties conducted the evidentiary deposition of Dr. Fall. Dr. Fall testified that she relied on the *Division of Workers' Compensation Medical Treatment Guidelines (Guidelines)* in performing a causation analysis. She explained that in order to perform a medical causation assessment for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis. The next step is to evaluate causation of the diagnosis, including defining the job duties, and identifying whether any of the duties meet the delineated risk factors in the *Guidelines*. Dr. Fall concluded that there was no causal connection between Claimant's job duties and her symptoms or diagnosis. She commented that none of Claimant's treating physicians had utilized the *Guidelines* to perform a causation analysis.

10. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward

Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

11. Claimant has failed to establish that it is more probably true than not that she sustained a compensable occupational disease in the form of bilateral CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Loan Assistant II while working for Employer caused her to develop CTS in both upper extremities. However, relying on the *Guidelines,* Dr. Fall persuasively determined that Claimant's duties while working for Employer failed to meet the causational requirements for CTS outlined in the *Guidelines.* She remarked that Claimant did not demonstrate physical examination findings consistent with CTS. Dr. Fall summarized that the mild slowing of the median nerve was more likely related to her underlying thyroid disease. She commented that none of Claimant's treating physicians had utilized the *Guidelines* to perform a causation analysis.

12. The record reveals that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5 of the *Guidelines*. Claimant's job duties specifically included the following: (1) keyboarding/writing/pinching for 34-66% of the time or two and one-half to five hours per day; (2) handling for 1-33% of the time or up to two and one-half hours per day; (3) standing/walking for 1-33% of the time or up to two and one-half hours per day; and (4) talking on the telephone for 24-66% of the time or two and one-half to five hours per day. She was not exposed to extreme temperatures or vibratory tools while working for Employer. The preceding job duties do not meet the primary or secondary risk factors as outlined in the *Guidelines*. The *Guidelines* specify activities including computer work, using handheld vibratory power tools, working in cold environments, a combination of force and repetition (e.g. six hours of graded and 50% of individual maximum force with task cycles of 30 seconds or less), use of handheld tools weighing two pounds or greater and awkward posture and duration. Repetition alone is not a risk factor for CTS and there must be a proven combination of repetition, force and cycle time in order to meet the causational requirements. Claimant's job activities did not meet the minimum thresholds for force, repetition or duration to establish an occupational disease pursuant to the *Guidelines*. Accordingly, Claimant has failed to demonstrated that the hazards of employment caused, intensified, or, to a reasonable degree, aggravated her upper extremity conditions.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to

development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

8. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable occupational disease in the form of bilateral CTS during the course and scope of her employment with Employer. Claimant asserted that her repetitive job activities as a Loan Assistant II while working for Employer caused her to develop CTS in both upper extremities. However, relying on the *Guidelines,* Dr. Fall persuasively determined that Claimant's duties while working for Employer failed to meet the causational requirements for CTS outlined in the *Guidelines.* She remarked that Claimant did not demonstrate physical examination findings consistent with CTS. Dr. Fall summarized that the mild slowing of the median nerve was more likely related to her underlying thyroid disease. She commented that none of Claimant's treating physicians had utilized the *Guidelines* to perform a causation analysis.

9. As found, the record reveals that Claimant's job duties required performance of various tasks and no single activity met the criteria outlined in Rule 17, Exhibit 5 of the *Guidelines*. Claimant's job duties specifically included the following: (1) keyboarding/writing/pinching for 34-66% of the time or two and one-half to five hours per day; (2) handling for 1-33% of the time or up to two and one-half hours per day; (3) standing/walking for 1-33% of the time or up to two and one-half hours per day; and (4) talking on the telephone for 24-66% of the time or two and one-half to five hours per

day. She was not exposed to extreme temperatures or vibratory tools while working for Employer. The preceding job duties do not meet the primary or secondary risk factors as outlined in the *Guidelines*. The *Guidelines* specify activities including computer work, using handheld vibratory power tools, working in cold environments, a combination of force and repetition (e.g. six hours of graded and 50% of individual maximum force with task cycles of 30 seconds or less), use of handheld tools weighing two pounds or greater and awkward posture and duration. Repetition alone is not a risk factor for CTS and there must be a proven combination of repetition, force and cycle time in order to meet the causational requirements. Claimant's job activities did not meet the minimum thresholds for force, repetition or duration to establish an occupational disease pursuant to the *Guidelines*. Accordingly, Claimant has failed to demonstrated that the hazards of employment caused, intensified, or, to a reasonable degree, aggravated her upper extremity conditions.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 30, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

#JU3PCO120D11BJv 2

1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues determined by this decision involve Claimant's entitlement to death benefits, as a dependent surviving spouse, following the death of her husband on August 30, 2014. There is no question raised as to Claimant's dependency status; rather the dispute involves a question of compensability. The specific question to be answered is:

I. Whether Claimant has proven by a preponderance of the evidence that Esquiel Montoya's death on August 30, 2014, was related to pulmonary fibrosis which was caused by an occupational exposure to wood and Corian dust over the years while working as a cabinet and countertop installer.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr.'s Storms and Jacobs, the ALJ enters the following findings of fact:

1. The decedent had a history of breathing difficulties dating back to 1970 when, according to his personal physician James E. Edwards, M.D., he was first treated for asthma symptoms. In 1978, Dr. Edwards referred claimant to Dr. Blakely for treatment of asthma. (Resp. Ex. M, pg. 435) Dr. Blakely, ultimately referred Mr. Montoya to Dr. William Storms for treatment in 1978. Dr. Storms, an allergy and asthma specialist, diagnosed claimant with mixed asthma and idiopathic pulmonary fibrosis in 1978.

2. Mr. Montoya made a claim for a compensable injury on February 27, 1984. On July 1, 1985 an ALJ found the claim compensable. In determining that the claim was compensable, the ALJ noted, "… the claimant sustained an admitted compensable injury on February 27, 1984 as a result of inhaling dust particles while cutting counter parts, which exposure resulted in an aggravation of a preexisting condition diagnosed as asthma…. Medical opinions of Dr. Repsher and Dr. Storms support the claim for compensation and medical benefits based upon work exposure to dust resulting in an aggravation of a preexisting condition, namely, asthma". Claimant's Exhibit 2, page 2 (hereinafter C's Ex.2 p.2)

3. On November 11, 1988 a hearing was convened regarding Mr. Montoya's entitlement to permanent total disability (PTD) benefits secondary to the debilitating effects of his proven occupational asthma. ALJ Cullen Wheelock determined that Mr. Montoya was permanently totally disabled and in so doing relied, in part, upon the following medical statement of Dr. William W. Storms:

> ". . . because of his chronic asthmatic lung disease, I feel that He is not suitable for gainful employment. This is based not only Upon his respiratory impairment and his lack of ability to work because of this, but also because of the fact that he would have many sick days due to his asthma, and would be out of work a large percentage of the time" C's Ex.3 p.5.

4. The order issued by ALJ Wheelock following Mr. Montoya's PTD hearing references a sole occupational disease, namely aggravation of pre-existing asthma, as the basis for Mr. Montoya's inability to work. Based upon the evidence presented, the undersigned ALJ finds that Mr. Montoya never alleged, and his medical providers never opined, that his previously diagnosed pulmonary fibrosis was due to his work. Nor did Mr. Montoya allege that he worked with countertops containing Corian. Rather, the evidence submitted reflects that that he was exposed to and inhaled wood and Formica countertop dust. There was never any decision, order, or admission that his idiopathic pulmonary fibrosis was caused by, aggravated by, or involved in the claim for PTD benefits despite its known existence based upon Dr. Storms' diagnosis in 1978.

5. Mr. Montoya received permanent total disability benefits from November 18, 1988 until his death on August 30, 2014. C's Ex.1 p.1.

6. Mr. Montoya's Certificate of Death indicates that the immediate cause of death was "due to or as a consequence of Pulmonary Fibrosis with 50 years plus of interval between onset and death. Other significant conditions listed as contributing but not related to the immediate cause included CHF (congestive heart failure), and asthma. No autopsy was done C's Ex.1 p.1 l.33.

7. Respondents submitted additional medical evidence, including the testimony of Dr's Schwartz and Jacob, suggesting that Mr. Montoya's pulmonary fibrosis was likely present while he was serving in the United States' military during the 1950s. Claimant had a chest x-ray in 1952 that he was told was abnormal. He was rejected for employment at the steel mill in Pueblo in the 1950s after a physical which included a chest x-ray demonstrated pathology in the lungs. A chest x-ray done in June 1951 revealed, "Fibro-calcific scarring in the right apex, probably due to old healed chronic pulmonary inflammatory disease." A chest x-ray preformed during a hospitalization on April 2, 1954, showed old parenchymal lesions with plural reactions. On June 11, 1954, a negative of a chest x-ray was found to show calcific densities in the right apex and the right first interspace and blunting of the left costophrenic angle. (Clt's Ex. 22, pgs. 58-60; Resp. Ex. C, pgs. 108-109) In 2012, Mr. Montoya pursued medical benefits for his idiopathic pulmonary fibrosis from the Veterans' Administration, alleging that this disease arose in and due to his military service. Mrs. Montoya sought Dr. Storms' help with that application and allegation (Resp. Ex. C, pg. 191), and reported that claimant had succeeded and that the Veterans' Administration would provide benefits as claimant's pulmonary fibrosis was due to his military service (Resp. Ex. C, pg. 96).

8. Dr. Storms was Mr. Montoya's primary authorized treating physician under the

occupational asthma claim. Dr. Storms is board certified in internal medicine and is an expert in allergy/immunology medicine. He was qualified as an expert in pulmonary medicine (Storms Deposition, p.6 ll.10-20). Nonetheless, Dr. Storms admitted during his deposition testimony that he is not accredited as a Level II provider. He testified that he does not treat pulmonary fibrosis, instead referring patients including Mr. Montoya to pulmonary specialists for evaluation, diagnosis and treatment of that disease. Dr. Storms does not hold himself out as, or consider himself an expert in, pulmonary fibrosis. Dr. Storms testified he did not have any knowledge of any lung disease or exposures to lung disease causing illnesses or environments during Mr. Montoya's military service, or any knowledge of his chest and lung x-rays in the 1950s while in the military. He did not know Mr. Montoya had applied for work in a steel mill, or any additional detail about his occupational history. He did not know what materials and wood products Mr. Montoya worked with while he performed work as a cabinet/countertop installer. He did not know whether Mr. Montoya wore a mask while working installing cabinets/countertops, what type of mask he wore, and how often he wore that mask while working. Dr. Storms was apparently unaware that he diagnosed Mr. Montoya with idiopathic pulmonary fibrosis when he began treating him in 1978, testifying that the diagnosis was made in 2003 while Mr. Montoya was evaluated for lung problems at National Jewish Hospital.

9. Dr. William Storms opined during his deposition testimony Mr. Montoya's death was not due to or in any way related to his asthma (Storms Deposition, p. 76: 13-16). This comports with the opinions of Dr. Schwartz, and Dr. Jacobs. All agree that Mr. Montoya's death was caused by his pulmonary fibrosis. Regarding the cause of Mr. Montoya's pulmonary fibrosis Dr. Storms opined that the progressive scarring in Mr. Montoya's lungs leading to interstitial lung disease (pulmonary fibrosis) was caused by his occupational exposure to wood and Corian dust and was not idiopathic as has been reported by Dr. Schwartz and Dr. Jacobs. In support of this conclusion, Dr. Storms cites several medical articles which he testified supports a causal connection between Mr. Montoya's exposure to wood and Corian dust and his interstitial lung disease, in addition to Mr. Montoya having a history, physical findings, and progression of disease that fits occupationally-induced pulmonary fibrosis. Dr. Storms' opinion that Mr. Montoya suffered from occupationally-induced pulmonary fibrosis is inconsistent with and contradictory to his prior diagnosis made in 1978 that Mr. Montoya had idiopathic pulmonary fibrosis.

10. No other medical provider who evaluated Mr. Montoya, treated Mr. Montoya, reviewed his medical records, or performed a medical evaluation or IME in this claim concluded his pulmonary fibrosis was due to or related to his work as a cabinet/countertop installer. Instead, they uniformly concluded claimant's pulmonary fibrosis was idiopathic. Dr. Schwartz stated that Mr. Montoya's pulmonary fibrosis was not related to any work condition and therefore his death was not due to his work related condition. C's Ex.20 pp.50-51. Dr. Jacobs stated that Mr. Montoya's respiratory problems were never related to an industrial or work pathogen but related to his progressive idiopathic pulmonary fibrosis. C's Ex.21 p.57. Similarly, after extensive studies, evaluations, and investigation, Mr. Montoya's pulmonary fibrosis was deemed

idiopathic, and not due to any workplace exposure, by his providers at National Jewish Hospital. This was after occupational exposure was considered as a differential diagnosis, but rejected as an actual diagnosis for Mr. Montoya's pulmonary fibrosis. Finally, the reports from a reviewer through the Veterans' Administration also concluded Mr. Montoya's pulmonary fibrosis was idiopathic. (Resp. Ex. C, pg. 124) As that reviewer wrote, and as Dr. Jacobs and Dr. Schwartz testified, the cause of idiopathic pulmonary fibrosis in not known and is not caused by any known exposure or event Mr. Montoya received during his lifetime, and work for employer.

11. Based upon careful review of the articles submitted, the ALJ finds that they do not stand for the proposition that there is a verifiable link between exposure to wood and Corian dust and pulmonary fibrosis as suggested by Dr. Storms. Rather, the articles merely raise the possibility that working with wood and having exposure to Aluminum Trihydrate may be risk factors for the development of pulmonary fibrosis. While the undersigned agrees with the comments provided in the articles that providers "should consider occupational exposures in any new patient with ILD without an obvious cause and certainly before defining an individual patient's disease as idiopathic" and that the diagnosis of Idiopathic Pulmonary Fibrosis is one of exclusion of other known causes[1], the ALJ credits the testimony of Dr's. Schwartz and Jacobs, to find that these general principals do not substantiate a causal link between exposure to wood and Corian dust and the development of pulmonary fibrosis. In the absence of additional persuasive evidence, the ALJ finds Dr. Storms' testimony that Mr. Montoya's pulmonary fibrosis was caused by exposure to wood and Corian dust speculative.

12. Based upon the evidence presented, the ALJ finds that at the time his death Mr. Montoya suffered from two separate and distinct medical conditions, specifically asthma and secondly, interstitial lung disease (pulmonary fibrosis). A preponderance of the persuasive evidence supports that his pulmonary fibrosis was likely idiopathic and unrelated to his occupation as a cabinet and countertop installer. In this case the convincing evidence demonstrates that Mr. Montoya, more probably than not, demonstrated the first radiographic signs of pulmonary fibrosis in the 1950's while in the military long before his work as a cabinet/countertop installer. As is consistent with progressive nature of idiopathic pulmonary fibrosis, Mr. Montoya's lung function continued to deteriorate over time despite not working in the more than 26 years before his death.

13. Based upon the evidence presented, the ALJ finds that Dr. Storms lacks the knowledge, expertise, or understanding of Mr. Montoya's medical and occupational history to provide a persuasive opinion on whether Mr. Montoya's death on August 30, 2014, was related to pulmonary fibrosis which was caused by an occupational exposure to wood and Corian dust over the years while working as a cabinet and countertop

[1] See *Occupational Interstitial Lung Disease*, Clinics in Chest Medicine, Vol. 25 (2005), pp. 467-478 and The American Thoracic Society Documents entitled An Official ATS/ERS/JRS/ALAT Statement: *Idiopathic Pulmonary Fibrosis: Evidence-based Guidelines for Diagnosis and Management, that the "diagnosis of Idiopathic,* Am. J. Respir. Crit. Care Med, Vol. 183, pp. 788-824, 2011

installer. Dr. Storm's opinion that Mr. Montoya's pulmonary fibrosis was related to his work is contradicted by substantial credible evidence, including the prior radiographic evidence, that demonstrates that Mr. Montoya's pulmonary fibrosis was present before long before he began work as a cabinet/countertop installer, nor is it consistent with his prior indication in 1978 that Mr. Montoya had "idiopathic pulmonary fibrosis". As noted above, the ALJ credits the opinions of Dr. Schwartz and Dr. Jacobs to find that Mr. Montoya, more probably than not, had pulmonary fibrosis in the early 1950's and than the cause for the development his interstitial lung disease is unknown, i.e. it is idiopathic.

14. Claimant has failed to establish the requisite causal connection between the death of Mr. Montoya and his work which would entitle her to ongoing death benefits.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Causation

C. To recover death benefits Claimant must prove that Mr. Montoya's death arose out of and in the course of employment. *Section 8-41-301(1)(b), C.R.S*. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957)(mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). Rather, it is claimant's burden to prove by a preponderance of the

evidence that there is a direct causal relationship between the employment and death. *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo.App. 1985)(no causal connection found between workers employment and his fatal injuries resulting from idiopathic fall).

D. Whether the industrial injury or disease was a significant causative factor in the death of decedent is a question of fact for the ALJ to resolve by a finding supported by substantial evidence. *Durocher v. Industrial Claim Appeals Office*, 905 P.2d 4 (Colo. App. 1995).

E. In this claim for benefits, Claimant alleges that Mr. Montoya was exposed to wood and Corian dust which caused pulmonary fibrosis, and in turn his death. For death resulting from occupational exposure, Claimant must prove the death was precipitated by that exposure. *Claimant's of Rumsey v. State Compensation Insurance Authority*, 162 Colo. 545, 427 P.2d 694(1964). Consequently Claimant's case involves a question of whether Mr. Montoya developed an "occupational disease" occasioned by his exposure to dust (wood/Corian) which caused his death. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). In contrast, an occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he/she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

F. As found here, Claimant has failed to meet her burden to establish that Mr. Montoya's pulmonary fibrosis and subsequent death were caused or hastened by the hazards of his employment as a cabinet/countertop installer, namely exposure to wood and/or Corian dust.. To the contrary, the persuasive medical evidence establishes that

while Mr. Montoya's death was caused by pulmonary fibrosis, the cause of his pulmonary fibrosis was unrelated to his work as a cabinet/countertop installer. Speculative testimony that wood and/or Corian dust may be risk factors for the development of pulmonary fibrosis is insufficient to prove a causal connection between Mr. Montoya's death and his exposure. See *Claimant's of Rumsey, supra.*

ORDER

It is therefore ordered that:

1. Claimant's claim for death benefits is denied and dismissed

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 14, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that Dr. Eicher is a physician authorized to treat claimant for his work injuries?

- Whether claimant has proven by a preponderance of the evidence that he is entitled to a change of physician to Dr. Eicher as the authorized treating physician?

FINDINGS OF FACT

1. Claimant sustained an admitted injury while employed with employer on Friday, February 19, 2015. Claimant testified at hearing that he was injured when a 900 pound catwalk crushed claimant trapping his hand against a tank. Claimant testified the catwalk crushed his upper body and his face was bleeding. Claimant testified that he was unconscious for approximately thirty (30) seconds following the injury. The injury was witnessed by Mr. Weed, a co-worker.

2. Claimant testified he spoke with a nurse at Axiom following his injury on February 19, 2015 and continued working. Claimant testified he worked approximately 20 to 30 more minutes before driving home.

3. Respondents filed an employer's first report of injury on February 23, 2015 noting that claimant's injury included a concussion.

4. Claimant was referred for medical treatment with Grand River Health and Safety Center. Claimant was initially evaluated by Mr. Zimmerman a physician's assistant, on February 23, 2015. Mr. Zimmerman noted that claimant has injured when a catwalk fell striking him and crushing him between the tank and the catwalk. Claimant reported he was having pain on the left side of his face, neck, right elbow and both shoulders. Mr. Zimmerman noted ecchymosis on the left side of his face. Mr. Zimmerman noted claimant wanted him to prescribe some additional pain medication but since claimant was already getting pain medication from another physician for a previous back problem, Mr. Zimmerman declined to prescribe additional medications. Mr. Zimmerman noted claimant was upset with him regarding this issue.

5. Claimant testified he requested to be seen by Dr. Coleman with Grand River Health and Safety Center after his appointment with Mr. Zimmerman due to the bad experience he had with his evaluation with Mr. Zimmerman.

6. Claimant was evaluated by Dr. Coleman on March 3, 2015. Dr. Coleman noted claimant was presenting for neck pain along with a strain of his right shoulder. Dr. Coleman recommended claimant undergo a magnetic resonance image ("MRI") of

his cervical spine and right shoulder and to follow up after completion of the diagnostic exams. Dr. Coleman also recommended claimant get his pain meds "per family Doc".

7. Claimant testified at hearing that he was treating with Dr. Eicher for a prior workers' compensation injury. Claimant testified he told Dr. Coleman of his pain contract with Dr. Eicher and Dr. Coleman instructed claimant that if he needed pain medications, he needed to receive them through Dr. Eicher.

8. Claimant testified he went to Dr. Eicher and Dr. Eicher modified his medications to increase his Oxycontin, Celebrex and Gapapentin among other modifications. Claimant testified at hearing that insurer was paying for claimant's medications from Dr. Eicher, but not for the medical appointments with Dr. Eicher.

9. Claimant returned to Dr. Coleman on March 30, 2015. Claimant was referred for occupational therapy. The Occupational Therapist noted on April 10, 2015 that claimant would be assessed for his concussion symptoms by Ms. Mullaney.

10. Claimant testified at hearing that part of his frustration with Dr. Coleman was his failure to treat his concussion symptoms. However, the medical records document that some consideration was given to claimant's concussion symptoms from the medical providers.

11. Claimant testified that Dr. Eicher recommended that claimant be sent to a neurologist. Dr. Coleman eventually referred claimant to a neurologist, although claimant testified this referral took 3 months to occur.

12. Claimant was evaluated by Dr. Eicher on April 27, 2015. Dr. Eicher noted that claimant could not get treatment due to the transfer approval not being done yet. Dr. Eicher issued a "To Whom it May Concern" letter on June 26, 2015 regarding claimant. The letter noted claimant continued to complain of headaches and blurred vision and noted claimant was not getting any treatment for his concussion and traumatic brain injury. Claimant was also complaining of shoulder and knee pain. Dr. Eicher recommended claimant return to Dr. Coleman and request a neurological workup.

13. Claimant entered into evidence recordings of visits and phone calls with adjusters and medical providers that he recorded serendipitously including recordings with Ms. Kitts, the adjuster and Dr. Coleman. The ALJ finds that the recordings establish that claimant's case was handled in an appropriate manner in this case. Nothing in the recordings leads the ALJ to believe that his claim was handled in an inappropriate way. Claimant appears to lead the conversations with the treating physicians where he wants the conversations to go and in his conversation with Ms. Arthur on March 23, 2015 miscontrues his discussions with Dr. Kopich on March 19, 2015. Claimant informed Ms. Arthur that Dr. Kopich replied he wished patients wouldn't be provided with their MRI reports after claimant inquired with Dr. Kopich about his cervical MRI. However, Dr. Kopich's response to claimant involving the MRI being given to patients was in response to claimant's inquiry about his shoulder MRI.

14. Claimant also claimed in the recorded conversation with Ms. Arthur that Dr. Kopich told him the physical therapy would repair the damage to the discs in his neck. At no point during Dr. Kopich's exam did he state that the physical therapy would fix the discs in claimant's neck. Dr. Kopich stated he felt time would improve claimant's neck symptoms, but never indicated the physical therapy would improve his cervical discs.

15. Moreover, claimant indicated to Ms. Arthur that he had concerns with his memory. Claimant did not complain significantly about his memory or alleged post concussive symptoms to Dr. Kopich in his examination 4 days prior. When claimant complained of his memory problems to Ms. Arthur, Ms. Arthur instructed claimant that he should return to the doctor. When claimant raised issues with regard to his appointment with Ms. Arthur, she again instructed claimant to return to Dr. Coleman as soon as possible.

16. While claimant testified he was recording the conversations because of his memory problems, the ALJ finds the recordings were made without the knowledge of all parties involved. If claimant were truly using the recordings because of memory issues, there would be no reason for claimant to fail to inform the parties of his intent to record the conversations.

17. The ALJ finds that claimant was referred by Dr. Coleman to Dr. Eicher for medical treatment, including his medications. The ALJ relies on the testimony of claimant along with the records from Dr. Coleman that provided claimant with a referral to Dr. Eicher for treatment, including the managing of his medications. The ALJ notes that it is understandable that Dr. Coleman did not want to provide medications to claimant when he was previously receiving medications from Dr. Eicher, which explains the referral to Dr. Eicher for medications. It is also understandable that claimant would need to be evaluated by Dr. Eicher for his continued receipt of medications, and the ALJ finds that this medical treatment is within the chain of referrals from Dr. Coleman.

18. The ALJ finds claimant has failed to present evidence sufficient to substantiate a change of physician to Dr. Eicher as the authorized treating physician. The ALJ notes that while Dr. Coleman didn't immediately provide claimant with treatment for his alleged concussion, he has considered the recommendations of claimant and other physicians and has provided claimant with the referral to a neurologist to treat his symptoms. The ALJ finds that Dr. Coleman's treatment has been reasonable considering the complicated nature of this case and finds that there is no need to change claimant's treating physician from Dr. Coleman.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.

A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

4. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

5. As found, Dr. Eicher is authorized as a referral from Dr. Coleman to provide evaluation and treatment including medications for claimant for his work injury. As found, Dr. Coleman indicated to claimant that he should receive his medications from Dr. Eicher and made a referral for claimant to receive medical treatment including the medications through Dr. Eicher.

6. Upon proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), *supra.* Claimant may procure a change of physician where she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts are reluctant to allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

7. In deciding whether to grant a change in physician, the ALJ should consider the need to insure that the claimant is provided with reasonable and necessary medical treatment as required by § 8-42-101(1), *supra*, while also protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be held liable. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO 11/27/07); s*ee Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). Moreover, the ALJ is not required to approve a change in physician because of a claimant's personal reasons, including mere dissatisfaction. *See Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

8. As found, claimant has failed to demonstrate that he is entitled to a change of physician to Dr. Eicher as the authorized treating physician in this case.

ORDER

It is therefore ordered that:

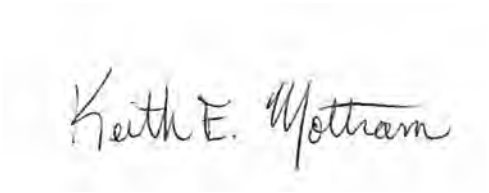
1. Dr. Eicher is a physician authorized to treat claimant for his work related injury as a referral from Dr. Coleman. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his industrial injury from Dr. Eicher.

2. Claimant's request to have Dr. Eicher become the authorized medical provider to handle his workers' compensation claim is denied.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 14, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with Employer on March 12, 2015.

STIPULATIONS

1. If the claim is found compensable, Claimant's average weekly wage at the time of injury was $1,043.61.

2. If the claim is found compensable, Claimant is entitled to temporary total disability benefits, subject to applicable offsets, from April 1, 2015 through April 18, 2015.

3. If the claim is found compensable, the treatment Claimant has received to date at Concentra is authorized treatment. Respondent lost its right of selection as of March 27, 2015. Claimant elected to obtain treatment from Aurora Internal Medicine Clinic and T. Scott Gilmer, M.D. Treatment Claimant received from Aurora Internal Medicine Clinic and referrals from Aurora Internal Medicine Clinic related to Claimant's lower right extremity after March 27, 2015 is authorized.

FINDINGS OF FACT

1. Claimant works for Employer as a mental health clinician II at a mental health facility located at Fort Logan, Colorado. Claimant has been so employed for over twenty years.

2. As a mental health clinician II Claimant has duties that involve supervising residents of the facility to ensure they do not cause harm to themselves, harm to other residents, or harm to employees.

3. As part of her duties Claimant supervised residents when they received haircuts at the facility and accompanied them into a room where the hairdresser would perform several haircuts. Policy required that a staff member be present for the duration of the haircut. *See* Exhibit 3.

4. On March 12, 2015 Claimant was supervising residents who were getting haircuts in the dayroom. There is a couch in the dayroom that is approximately 13 inches off the ground. Claimant was sitting on this couch and she stood up to get the

next inmate ready for his haircut and to help sweep up hair clippings when she felt and heard a pop in the back of her right knee.

5. Claimant testified that the couch in the dayroom is lower than an average couch so that if a resident falls off the couch, the distance to the ground is less and will hopefully minimize any potential injuries. Claimant testified that the couch at her home is approximately 17 inches off the ground.

6. On March 12, 2015 Claimant reported the incident to her supervisor. Claimant filled out an Injury/Exposure on the Job form (IOJ). In the IOJ form Claimant indicated she was monitoring haircuts in the day area when she stood up from a low couch and felt and heard a pop in the back of her right knee. *See* Exhibit 4.

7. Claimant did not report pain or injury to her right hamstring, but only to the back of her right knee on the initial form she filled out.

8. Claimant's supervisor filled out a form the same day indicating that Claimant reported she was sitting on a low couch in the day room when she stood up and felt a sharp pain and heard a pop behind her knee. Claimant's supervisor indicated Claimant continued to feel pain and had difficulty walking, that the couches in the day room are lower to the ground, and that Claimant was being sent to Concentra for treatment. *See* Exhibit 4.

9. On March 12, 2015 Claimant was evaluated at Concentra by NP Rosalie Einspahr. Claimant reported to NP Einspahr that she got up from a low couch and heard a pop in her posterior right knee area and that she had knee pain and lower leg pain. NP Einspahr noted on examination that Claimant's right knee had limited range of motion and was painful in all planes, that Claimant had tenderness in the posterior knee, and that Claimant had a positive Lachman's test. NP Einspahr also noted that Claimant's right lower leg had posterior tenderness and restricted range of motion. NP Einspahr assessed strain of right knee and leg. NP Einspahr provided Claimant a cane, planned for her to use an ace wrap, and took her off work until an appointment Monday morning March 16, 2015. *See* Exhibit 8.

10. On March 16, 2015 Claimant was evaluated at Concentra by Pa-C Valerie Maes. Claimant reported she had been unable to work due to the pain and that she needed to be able to walk and react to patients. Claimant reported she had been taking her own Vicodin for pain relief. Claimant reported at the time of injury she felt and heard a loud pop in the back of her knee and she complained of continued knee pain. PA Maes noted Claimant's symptoms were in the right posterior knee and that the pain radiated to the right lower leg. PA Maes noted on examination that Claimant's right knee was swollen in the medial aspect and popliteal fossa, that Claimant had diffuse medial knee and posterior knee tenderness, and that Claimant had limited and painful range of motion in all planes. PA Maes also noted Claimant had a positive Lachman's test and positive posterior drawer sign and that her right lower leg had posterior tenderness and restricted range of motion. PA Maes also assessed strain of right knee

and leg and referred Claimant to physical therapy. PA Maes returned Claimant to modified work status with restrictions of using a cane, no squatting, no kneeling, wearing splint/brace on right lower extremity, no walking on uneven terrain, no climbing stairs, no climbing ladders, and weight bearing as tolerated. *See* Exhibit 8.

11. On March 18, 2015 Claimant underwent physical therapy with Kyle Primeau, DPT. Claimant reported she had gone from a sit to stand position on and off a low chair when she felt a pop in the back of her knee. Claimant reported posterior knee pain and some right patellar pain. PT Primeau noted during the course of physical therapy that Claimant had pain in the lateral hamstring following a hamstring stretch and with resisted lateral hamstring. *See* Exhibit 8.

12. On March 18, 2015 a Workers Compensation – First Report of Injury or Illness form was filled out. The form indicated that Claimant felt a sharp pain and heard a pop behind her knee when standing up from a couch. *See* Exhibit 5.

13. On March 23, 2015 Claimant was evaluated by PA Maes. PA Maes noted Claimant was returning for a recheck of her right knee injury and Claimant reported her knee was improving with medications and physical therapy. PA Maes noted the symptoms were still located in the right posterior knee. PA Maes noted on examination that the right knee appeared normal with no swelling but continued to be diffusely tender in the medial and posterior knee. PA Maes noted that range of motion was now painless in all planes and that Claimant had a negative Lachman's test and negative posterior drawer signs. PA Maes noted that Claimant's right lower leg now appeared normal with no tenderness. *See* Exhibit 8.

14. On March 23, 2015 Claimant also underwent physical therapy performed by PT Sidway McKay. PT McKay noted that Claimant had felt pain in her lateral hamstring following hamstring stretching on March 18, 2015. PT McKay recommended as part of the plan that Claimant continue therapeutic exercises such as stretching, strengthening, aerobic conditioning, and balance activities to address the impairments of range of motion, muscle performance, de-conditioning, and balance. *See* Exhibit 8.

15. On March 25, 2015 Claimant again underwent physical therapy. Claimant reported that she did too much on Monday and had a large increase in pain. Claimant reported during physical therapy that she had more pain in her hamstring than in her anterior knee. *See* Exhibit 8.

16. Respondents provided medical treatment until March 27, 2015 when they filed a Notice of Contest indicating that liability for the claim was being contested/denied for the reason of the injury/illness not being work related. *See* Exhibit 6.

17. In a letter sent to Claimant on March 27, 2015 Respondents informed Claimant of the denial and advised Claimant that they were willing to pay for conservative treatment with Employer's authorized medical provider until March 27,

2015. The letter further advised Claimant that any treatment after March 27, 2015 would be considered her responsibility. *See* Exhibit 7.

18. On March 31, 2015 Claimant was evaluated at Aurora Internal Medicine Clinic by Lisa Lumley, FNP-C. Claimant reported she was there for right knee pain from an injury that happened at work when she stood up from a couch and heard a pop behind her knee. Claimant reported initially that she went to a workman's comp clinic for evaluation, but that her claim was denied. Claimant reported being upset that the claim was denied. NP Lumley noted on examination that Claimant's right knee showed mild ballotment and mild posterior bulge with chronic 3 inch round soft lipoma proximal to the medial right knee. NP Lumley noted negative Lachmans/Drawer tests, and a positive pattelar grind. NP Lumley diagnosed right knee pain and provided a differential diagnosis of osteoarthritis, baker's cyst, and secondary deep vein thrombosis. NP Lumley ordered a right knee x-ray and right lower extremity ultrasound and indicated she would discuss the plan with Claimant after imaging. *See* Exhibit 9.

19. On March 31, 2015 Claimant underwent right knee x-rays that were interpreted by Joseph Tan, M.D. Dr. Tan provided an impression that the radiographs were negative for acute bony abnormality, that Claimant had mild to moderate tri-compartmental osteoarthritis greatest along the lateral compartment, and that Claimant had moderate joint effusion. *See* Exhibit G.

20. On April 7, 2015 Claimant was evaluated by NP Lumley. NP Lumley noted Claimant was there for follow up with complaints of right lower extremity pain and right knee swelling. NP Lumley noted that Claimant's right knee x-ray showed tri-compartment osteoarthritis with moderate effusion and that the right lower extremity ultrasound showed chronic deep vein thrombosis at the peroneal trunk, right tibial, and right peroneal. NP Lumley noted a follow up ultrasound was done that morning with no change from last week. NP Lumley diagnosed deep venous thrombosis. *See* Exhibit E.

21. On April 13, 2015 Claimant was evaluated at Aurora Internal Medicine Clinic by T Scott Gilmer, M.D. Dr. Gilmer noted Claimant was there for follow up of her right knee issues. Claimant reported her knee was starting to improve and that she wanted Dr. Gilmer to sign her return to work papers. Dr. Gilmer noted Claimant had much less instability in the right knee and that exactly what happened was not clear. Dr. Gilmer noted that post injury claimant had chronic deep vein thrombosis in the right calf and that an attempt to immobilize with a right knee brace provoked the deep vein thrombosis. Dr. Gilmer diagnosed: deep vein thrombosis likely provoked from brace given to her; pain in joint, lower leg with an exact injury unclear and suspicion that Claimant ruptured a bakers cyst that could have been associated with inflammation that caused the chronic deep vein thrombosis; and primary localized osteoarthrosis, lower leg. Dr. Gilmer referred Claimant to Dr. Fitzgerald for a second opinion regarding Claimant's significant osteoarthrosis. Dr. Gilmer recommended treating with weight loss, "weightless" exercise, and quad strengthening. *See* Exhibit E.

22. On April 19, 2015 Claimant returned to full duty work.

23. On April 23, 2015 Claimant was evaluated by Dr. Fitzgerald's P.A., Heather Cresmen. Claimant reported right knee pain. Claimant reported suffering a fall fifteen to eighteen years ago that was treated with arthroscopic partial meniscectomy and debridement and that she occasionally had some aching soreness in the knee. Claimant reported her knee pain was more severe since an injury that occurred at work on March 12, 2015 when she attempted to stand from a seated position and had sharp pain over the posterior aspect of the right knee. Claimant reported her pain was moderate, sharp and achy, and constant since March 12, 2015. PA Cresmen noted on examination that there was moderate tenderness to palpation over the lateral joint line and medial joint line and crepitus throughout range of motion. PA Cresmen noted negative Lachman's and posterior drawer. PA Cresmen reviewed the March 31, 2015 x-rays that showed moderate tri-compartmental degenerative arthritis. She provided an impression of right knee degenerative arthritis. PA Cresmen performed a corticosteroid injection intra-articularly. PA Cresmen discussed other future treatment options and recommended lifestyle modifications including diet, exercise, and proper shoe wear. *See* Exhibit H.

24. On August 19, 2015 Claimant underwent an Independent Medical Evaluation (IME) performed by Timothy O'Brien, M.D. Claimant reported to Dr. O'Brien that on March 12, 2015 she was standing up from a low couch when she felt a pull and pop in her hamstring tendon. Claimant pointed to an area posterior in the thigh above the knee and lateral to the outside of the mid aspect of the thigh. Claimant reported to Dr. O'Brien that she did not have a knee injury but rather that she had a hamstring pull. Claimant reported she discontinued the knee brace because she was told she did not have a workers' compensation injury because of a pre-existing condition. Claimant reported still having pain that could drop below the knee. Claimant reported she could tell the difference between her hamstring injury and her pre-existing knee arthritis and reported her belief that the hamstring injury aggravated her knee arthritis due to compensation and limping. *See* Exhibit I.

25. Claimant reported to Dr. O'Brien that her private doctor referred her to Dr. Fitzgerald and that she received a knee injection for her osteoarthritis which was a pre-existing condition. Claimant reported 15 years ago she had surgery and the meniscus or pad on the inside of her knee was removed and that she really did not have much trouble and healed from that surgery. Claimant reported that she had not had any ongoing discussions with her primary care doctor about her knee pain and she did not recall any need for treatment for her knee condition. *See* Exhibit I.

26. Dr. O'Brien opined that the onset of right knee pain that Claimant noted while at work was a manifestation of her personal health and a reflection of her longstanding and underlying moderately-advanced osteoarthritis in the right knee and thus no work injury occurred on March 12, 2015. Dr. O'Brien opined that arising from a seated position is not an injury mechanism, but is a daily activity. Dr. O'Brien noted that the fact that Claimant noted pain was not unexpected but rather predictable and expected given her obesity, age, and underlying longstanding osteoarthritis in the knee.

Dr. O'Brien opined that she would be expected to have knee pain at unpredictable times that can wax and wane. Dr. O'Brien opined that her underlying condition can manifest not only as pain but also as stiffness, swelling, cracking, and crunching or clicking. *See* Exhibit I.

27. Dr. O'Brien opined that Claimant had longstanding knee pain as the result of a prior injury and an arthroscopic meniscectomy which is to be expected. He opined that when an arthroscopy removes meniscal tissues, progressive and premature osteoarthritis of the knee is expected and predictable and that this is a pre-existing condition not in any way causally related to an occupational exposure. Dr. O'Brien opined that Claimant had end-stage osteoarthritis of the knee and was a candidate for a total knee arthroplasty when her pain becomes so severe as to impair her lifestyle to an extent that she cannot tolerate. He opined that Claimant did not become a candidate for knee replacement in a more precipitous fashion because of her work or because of the March 12, 2015 incident. Dr. O'Brien opined that episodic right knee pain in Claimant's life is expected and predictable consequence of her age, her body habitus and her pre-existing history of osteoarthritis due to her genetic makeup and her prior knee injury and arthroscopic meniscectomy. *See* Exhibit I.

28. Dr. O'Brien's opinions are credible and persuasive and consistent with an extensive medical history of right knee issues dating back to 1999.

29. Prior to the March 12, 2015 incident, Claimant had received significant treatment to her right knee and had ongoing complaints in her right knee.

30. On March 6, 2015 just six days prior to her incident at work, Claimant sought treatment with Dr. Gilmer. Claimant reported having problems with arthritis in both of her knees. Dr. Gilmore noted this was a chronic recurring problem and that Claimant regularly had issues with it. Claimant requested a refill of her pain medications for her knee pain. Dr. Gilmer diagnosed osteoarthritis of the knee, with both chondromalacia patellae and degenerative joint disease, especially on the right knee. Dr. Gilmer encouraged Claimant to lose weight and suspected that Claimant had some meniscal damage. Claimant reported that she did not want to have a knee scope. Dr. Gilmer refilled a prescription for hydrocodone-acetaminophen. *See* Exhibit E.

31. On November 15, 2013 Claimant was evaluated by Dr. Gilmer. Dr. Gilmer noted her problems included chronic lower leg osteoarthritis and Claimant reported that her arthritis was acting up. Dr. Gilmer noted this was a long term problem and diagnosed osteoarthritis both knees, worse on the right. Dr. Gilmer provider patient education regarding osteoarthritis and how to cope with pain, how to manage pain, and noninvasive treatment options. *See* Exhibit E.

32. On May 31, 2013 Claimant was evaluated by Dr. Gilmer. Dr. Gilmer diagnosed osteoarthritis of the knee and opined that Claimant would probably knee total knee arthroplasty at some point. For her knees, he refilled her prescription for diclofenance. *See* Exhibit E.

33. On May 19, 2006 Claimant was evaluated by Dr. Gilmer. Claimant reported continued problems with right knee bursitis and Dr. Gilmer opined it was probably due to her underlying degenerative changes and the particular way she exercises. *See* Exhibit E.

34. On May 26, 2006 Claimant underwent an ultrasound guided aspiration and injection of her right knee performed by Michael Otte, M.D. See Exhibit G.

35. On March 17, 2006 Claimant was evaluated by Dr. Gilmer. Claimant reported continued problems with her right knee clicking, popping, and having dysfunction. Claimant reported the right knee occasionally catches. Dr. Gilmer noted that Claimant had a right knee arthroscopy in 1999 that showed condoromalacia patellae and he opined it was likely continuing. *See* Exhibit E.

36. On October 31, 2003 Claimant was evaluated by Dr. Gilmer. Dr. Gilmer assessed knee arthritis and discussed switching Claimant from Daypro to Voltaren. *See* Exhibit E.

37. On April 5, 2002 Claimant was evaluated by Dr. Gilmer. She reported that due to the arthritis in her ankles and knees she had difficulty exercising. Dr. Gilmer assessed osteoarthritis of the knees. *See* Exhibit E.

38. Claimant's testimony, overall, is not found credible or persuasive. Her claim that on March 12, 2015 she suffered a right hamstring injury is not persuasive and is inconsistent with her initial reports of injury both to Employer and to medical providers that the pain, popping, and injury was to her right knee. There was no mention of any hamstring pain until March 18, 2015 when after stretching at physical therapy she reported pain in her hamstring. Additionally, her testimony that prior to March 12, 2015 she had no problems with and no symptoms in her right knee or her right lower extremity is also inconsistent with the medical records. From 1999 when she underwent right knee surgery and until six days prior to her work incident, Claimant consistently complained of right knee arthritic pain. Claimant received multiple medication prescriptions over the years to address the pain in her knees, particularly the right knee including a refill of hydrocodone-acetaminophen just six days prior to her work incident.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of requirement is satisfied when it is shown that there is a causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P.3d 999 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Indus. Comm'n v. Newton Lumber & Mfg. Co.*, 314 P.2d 297 (Colo. 1957).

Claimant has established that the incident of increased right knee pain on March 12, 2015 occurred during her normal working hours and in her normal place of employment. However, Claimant has not met her burden to show that she suffered an injury that arose out of her employment with Employer. She has failed to establish a causal connection between her employment duties and her increased right knee pain. *See Horne v. St. Mary-Corwin* Hospital, W.C. No. 4-205-014 (April 14, 1995); *Crass v. Cobe Laboratories*, W.C. No. 3-960-622 (October 10, 1991); *Gutierrez v. Wal-Mart Stores, Inc.*, W.C. No. 4-432-838 (November 30, 2000). The precipitating cause of Claimant's injury in this case was her pre-existing knee condition. *See Alexander v. Emergency Courier Services*, W.C. No. 4-971-156 (October 14, 2014); *Gutierrez v. Wal-Mart Stores, Inc.*, W.C. No. 4-432-838 (November 30, 2000). The origin and cause of Claimant's injury and increased right knee pain on March 12, 2015 was not due to her employment or her employment duties. Rather the origin and cause of her injury was her significant underlying osteoarthritis. The opinion of Dr. O'Brien in this regard is found credible and persuasive. Claimant did not suffer from an unexplained injury. Rather, on March 12, 2015 she suffered expected pain in her right knee due to her significant pre-existing osteoarthritis. This increased pain would have occurred whether or not Claimant was employed and her knee became painful due to her underlying condition and not due to her employment duties. As found above, in May of 2013 Dr. Gilmer noted that Claimant would likely need a total knee arthroplasty. Claimant also reported knee pain at an appointment with Dr. Gilmore just six days before the alleged work injury. Dr. O'Brien is persuasive that her pain that waxed/waned over several years is expected, is not unexplained, and is due to her underlying non work related osteoarthritis. Here, the increased right knee pain would have occurred regardless of whether Claimant was employed as a continuation of her underlying condition and Claimant has failed to establish a causal connection to her employment.

Special Hazard

Additionally, the argument that the low couch in the day room was a special hazard is not found persuasive. Where the precipitating cause of an injury is a preexisting condition suffered by the claimant, the injury is not compensable unless a "special hazard" of the employment combines with the preexisting condition to cause or increase the degree of injury. *National Health Laboratories v. Industrial Claim Appeals* Office, 844 P.2d 763 (Colo. App. 1992). This principle is known as the "special hazard" rule. *Ramsdale v. Horn,* 781 P.2d 150 (Colo. App. 1989). In addition, to be considered

an employment hazard for this purpose, the employment condition must not be a ubiquitous one: it must be a special hazard not generally encountered. *Id.* (high scaffold constituted special employment hazard to worker who suffered epileptic seizure and fell: *Gates Rubber Co. v. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations).

Here, Claimant heard and felt a pop behind her right knee while standing up from a seated position. Although the testimony and evidence established that the couch in the day room that she was sitting on was slightly lower than an "average" couch, the couch is not found to be a special hazard. Seats of varying heights and sizes including couches, chairs, and benches are ubiquitous and generally encountered in everyday life and in many non-employment locations. The couch Claimant was sitting on was not a special hazard of employment but a ubiquitous condition which Claimant could have encountered off the job. *See Horne v. St. Mary-Corwin* Hospital, W.C. No. 4-205-014 (April 14, 1995) and *Crass v. Cobe Laboratories*, W.C. No. 3-960-622 (October 10, 1991). Here, Claimant's underlying condition was the precipitating cause of her injury and increased right knee pain and there was no special hazard that combined with her underlying condition to either cause or increase the degree of her injury.

Medical Treatment at Concentra prior to March 27, 2015

Claimant received medical treatment at Concentra, Employer's authorized provider, until March 27, 2015 when a Notice of Contest was filed. When an employer or carrier has furnished medical treatment they may not recover the cost of care form a claimant except in the case of fraud. *See* § 8-42-101(6)(a), C.R.S. Here, there has been no showing of fraud and Respondents are liable for the costs of medical treatment up to March 27, 2015.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden of proof to establish that she suffered a compensable injury on March 12, 2015. Her claim for benefits is denied and dismissed.

2. Respondents shall pay for the cost of medical treatment from March 12, 2015 until March 27, 2015 when a Notice of Contest was filed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 16, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

The issues to be determined by this decision are the following:

1. Whether the claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course and scope of her employment with employer on or about December 27, 2014;

2. Whether the claimant, if she has proven she sustained a compensable injury, has proven by a preponderance of the evidence that the medical benefits requested are related to his alleged work injury on or about December 27, 2014;

3. Whether the claimant, if she has proven she sustained a compensable injury, has established by a preponderance of the evidence that she is entitled to the right of selection of her authorized treating physician; and,

4. Whether, if the claimant has proven a compensable injury, the claimant has proven she should receive TTD benefits from respondent beginning July 8, 2015.

FINDINGS OF FACT

1. The claimant was injured in the early morning hours of December 27, 2014 while working for the respondent-employer as an assistant manager. On that date, the claimant lifted a tote weighing over fifty pounds which was located in the back office. The tote was filled with bags of dog food as well as other items that needed to be stocked on the store shelves. When the claimant picked up the tote and moved it onto a cart, she felt immediate pain in her lower back. A co-employee, Scott H., was in the office with the claimant at the time it happened as he was just getting off of his night shift. The claimant told Scott her back was hurting and she then rolled the tote out into the aisles of the store to restock the shelves. She completed her scheduled shift.

2. The claimant informed her store manager, Janine Hendricks, about the injury to her lower back the next day and Ms. Hendricks told her that she needed to file an Incident Report. Ms. Hendricks provided her with an Employee Incident Report which the claimant filled out on 12/28/14. When the claimant filled out the form, she first wrote down the date of injury as 12/27/14 but changed it to 12/28/14 at the request of

Ms. Hendricks, because 12/28/14 was the date the claimant filled out the report. When asked about the incident time noted on the incident report, the claimant clarified that 10:30 a.m. was the time she filled out the report on 12/28/14 rather than the time the actual incident occurred on 12/27/14. The claimant observed that she had received no training, even as an assistant manager, as to what should be done in the event of an on-the-job injury.

3. The claimant testified that she began having right shoulder pain a few days after 10/27/14 as well as numbness in her right wrist and hand. At that point in time, the claimant still had not been directed by the respondent-employer as to where to seek medical care. The claimant testified that she asked Ms. Hendricks numerous times where she should seek medical treatment but was not directed where to go until March 4, 2015.

4. The claimant testified that her shoulder pain began to significantly worsen over the next several weeks. By February 12, 2015, when she went to her primary care provider, Dr. Jeffrey Snyder, for a cough and sore throat she also spoke to him about her increasing shoulder pain. The claimant explained that she did not complain about her back to Dr. Snyder because she was waiting for the respondent-employer to direct her as to where to seek treatment. She only mentioned her right shoulder because it had gotten to a point where she was having trouble with any use of her right arm. With regards to her right shoulder, Dr. Snyder referred the claimant to Dr. Harroll, who is apparently Mountain View Medical Group's sports medicine physician. Dr. Harroll saw the claimant on February 20, 2015 and referred the claimant for an MRI of her shoulder. He also recommended the claimant be placed on light duty and restricted her lifting to no more than ten (10) pounds. The claimant testified that she took Dr. Harroll's restrictions to Ms. Hendricks immediately.

5. On March 4, 2015 Ms. Hendricks called corporate because she did not know what to do regarding the claimant's injuries and was directed by Vic Gustafson, the respondent-employer's risk manager, to fill out an Associate Incident In-Store Investigation Report, an Employee Incident Questionable Claim Form, and an Employee Incident Video Report. He also directed the claimant to fill out an Associate Work Related Injury/Illness Report at that time and provided the claimant with the Worker's Compensation Designated Provider List. The claimant testified that she had never seen this document prior to March 4, 2015. Ms. Hendricks admitted on cross examination that this specific document was not posted anywhere in the store. The only posters on the walls of the store were the general worker's compensation posters directing employees regarding protocol for reporting a work-related injury.

6. After receiving the Designated Provider List from Ms. Hendricks on 3/4/15, the claimant selected Penrose Mountain Urgent Care as her authorized treating provider (ATP) and sought treatment at that facility which happened to be located at the Penrose Hospital emergency room in Woodland Park. They, in turn, sent the claimant to CCOM.

7. When the claimant learned the claim had been denied by the insurance carrier, she then returned to her primary care physician, Dr. Snyder on 5/6/15. Dr. Snyder noted in that examination that the claimant had lumbar spine pain with a positive straight leg test. He recommended x-rays of the claimant's lumbar spine and referral to a back specialist. On 6/5/15, the claimant was seen by Dr. Phillip Falender, an orthopedic specialist, who noted tenderness along her spinous process and paraspinal muscles, limited range of motion and diffusely diminished deep tendon reflexes in the bilateral lower extremities. He also recommended continued physical therapy and an MRI scan due to the claimant's feeling of heaviness and weakness in her legs.

8. Janine Hendricks, the store manager at the respondent-employer's store where the claimant was employed, testified that on December 28, 2014, the claimant notified her that she had hurt her back the day before (12/27/14) lifting a heavy tote with dog food in it. She testified that she insisted that the claimant fill out the Employee Report. Ms. Hendricks testified that this was merely a formality because the claimant insisted that her injury was not a "big deal" and that she did not want to get treatment. She testified that it was only after the claimant gave her a copy of her restrictions from Dr. Harroll which placed a 10 pound weight restriction on the claimant and when the claimant insisted that she needed treatment that she started calling the corporate office and risk management to find out what she needed to do.

9. She testified that the claimant never asked her where she should seek treatment or even notified her that she wanted to seek treatment between 12/28/14 and 3/4/15. Ms. Hendricks did testify though, that even though she did not think the claimant was "really hurt," she made sure that the claimant did not have to lift anything heavy between 12/28/14 and 3/4/15 to accommodate the claimant. She also made sure that other individuals were available when the claimant needed to lift anything heavy. She claimed that she did this out of "respect" for the claimant.

10. Ms. Hendricks admitted that failed to follow company protocol when she failed to notify corporate of claimant's injury on December 28, 2014. She testified that she has since had a long conversation with Vic Gustafson, risk manager, which included more training as to what to do when an employee reports an injury.

11. Vic Gustafson, a risk and safety manager for the respondent-employer testified that all the documents which are needed to report an on the job injury are on a main company server which can be accessed by the managers and assistant managers. He testified that all managers and assistant managers receive training as to what should be done when an employee notifies them of an on-the-job injury. Mr. Gustafson testified that he had never personally seen the worker's compensation posters in the Woodland Park store but knows that it is corporate policy that the posters (as what to do when you sustain a work-related injury) be put up on the walls in plain view.

12. Dr. Snyder, the claimant's PCP, saw the claimant on July 8, 2015, subsequent to the claim being denied by the respondent, and ordered the claimant be excused from work. Since then she has not been returned to work.

13. Dr. Eric Ridings testified for the Respondents. Dr. Ridings concluded that the claimant did not injure her lower back or right shoulder on December 27, 2014 for a myriad of reasons, including but not limited to, the fact that the claimant did not immediately seek treatment for injuries which should have caused her immediate pain, she kept working in a fairly heavy job throughout January and February, the first medical records from Dr. Snyder and Dr. Harroll do not reflect low back pain or consistency with her date of injury (12/27/14), and his own examination of the claimant in August 2015 did not show muscle spasm in her lumbar spine nor pain in the area of her shoulder where he would have expected her to have pain.

14. The crux of Dr. Ridings opinions determining that the back injury is non-work related seems to stem from his opinion concerning the claimant's credibility.

15. The ALJ finds that the claimant is credible with respect to her back injury.

16. The ALJ finds that the claimant has consistently complained of the back condition from the date of injury onward, with the exception of the first reports rendered by Dr. Snyder and Dr. Harroll, for which the ALJ finds the claimant's explanation plausible.

17. Subsequent to the respondent's denial of the claim the claimant was denied continuing treatment with the authorized providers for non-medical reasons. The claimant then went back to her own physician (Dr. Snyder) at Mountain View Medical Group. The ALJ finds that the right of selection passed to the claimant subsequent to the date of the Notice of Contest, 3/27/15. The ALJ finds that Dr, Snyder assumed the role of the claimant's ATP at this point and the respondent is liable for medical treatment

from Dr. Snyder and any referrals he has made since the end of 3/27/15. The ALJ finds that the respondent is bound by Dr. Snyder's 7/8/15 opinion that the claimant could not return to work until a formal evaluation by a worker's compensation physician was completed. The ALJ finds therefore that the respondent is liable temporary total disability benefits from 7/8/15 until such time as the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3), after which the respondents may terminate such TTD payments.

18. The ALJ finds that the opinions and analyses of Dr. Ridings, with respect to the claimant's shoulder condition are credible and more persuasive than medical opinions and analyses to the contrary.

19. The ALJ finds that the claimant has established that it is more likely than not that she suffered an injury to her low back on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

20. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffered an injury to her right shoulder on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

21. The ALJ finds that the claimant has established that it is more likely than not that the respondent is responsible for medical care received by the claimant for her back injury.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondent is responsible for medical care received by the claimant for her right shoulder condition.

23. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to temporary total disability benefits commencing on July 8, 2015 and continuing until terminated by operation of law.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S.

2. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things: the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

5. "Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

6. A compensable injury is one that arises out of and in the course of employment. § 8-41-301 (1) (b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); *see also*, *Industrial Commission v. London & Lancashire Indemnity Co.*, 135 Colo. 372, 311 P.2d 705 (1957). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance

of the evidence before any compensation is awarded. C.R.S. § 8-41-301 (1) (c); *Faulkner v. ICAO,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

7. A compensable industrial accident is one which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988) The question of whether claimant had proven a causal relationship between employment and the alleged injury or disease is one of fact for determination of the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Metro Moving & Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995)

8. The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms. *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985).

9. The employer has the right, upon being notified of an industrial injury or occupational disease, to designate the authorized physician to the injured employee in order to initially select the treating physician. C.R.S. § 8-43-404 (5); *Rogers v ICAO*, 746 P.2d 565 (Colo. App. 1987) Respondent is therefore only liable for medical benefits from authorized treating physicians. C.R.S. § 8-43-404 (7); *Wishbone Restaurant v. Moya,* 424 P.2d 119 (Colo. 1967); *Heffner v. El Paso County School Dist. 11*, W.C. 3-926-982 (ICAO August 24, 1990). When an injured employee incurs unauthorized medical expenses, respondent is not liable for such expenses. *Pickett v. Colorado State Hospital,* 513 P.2d 228 (Colo. App. 1973).

10. To establish an entitlement to temporary disability benefits, claimant must prove by a preponderance of the evidence that the industrial injury or disease caused a disability, that he left work as a result of the disability, that he was disabled for more than three regular work days and that he suffered an actual wage loss. C.R.S. § 8-42-103 (1) (b); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

11. As found above, the crux of Dr. Ridings opinions determining that the back injury is non-work related seems to stem from his opinion concerning the claimant's credibility.

12. The ALJ concludes that the claimant is credible with respect to her back injury.

13. The ALJ concludes that the claimant has consistently complained of the back condition from the date of injury onward, with the exception of the first reports rendered by Dr. Snyder and Dr. Harroll, for which the ALJ finds the claimant's explanation plausible.

14. Subsequent to the respondent's denial of the claim the claimant was denied continuing treatment with the authorized providers for non-medical reasons. The claimant then went back to her own physician (Dr. Snyder) at Mountain View Medical Group. The ALJ finds that the right of selection passed to the claimant subsequent to the date of the Notice of Contest, 3/27/15. Section 8-43-404(5), C.R.S.

15. The ALJ finds that Dr, Snyder assumed the role of the claimant's ATP at this point and the respondent is liable for medical treatment from Dr. Snyder and any referrals he has made since the end of 3/27/15.

16. The ALJ finds that the respondent is bound by Dr. Snyder's 7/8/15 opinion that the claimant could not return to work until a formal evaluation by a worker's compensation physician was completed.

17. The ALJ finds therefore that the respondent is liable temporary total disability benefits from 7/8/15 until such time as the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3), after which the respondents may terminate such TTD payments.

18. The ALJ concludes that the opinions and analyses of Dr. Ridings, with respect to the claimant's shoulder condition are credible and more persuasive than medical opinions and analyses to the contrary.

19. The ALJ concludes that the claimant has established by a preponderance of the evidence that she suffered an injury to her low back on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

20. The ALJ concludes that the claimant has failed to establish by a

preponderance of the evidence that she suffered an injury to her right shoulder on or about December 27, 2014 that arose out of and occurred in the course of her employment with the respondent-employer.

21. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent is responsible for medical care received by the claimant for her back injury.

22. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the respondent is responsible for medical care received by the claimant for her right shoulder condition.

23. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits commencing on July 8, 2015 and continuing until terminated by operation of law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for her low back injury is compensable.

2. The respondent shall pay for all benefits accruing pursuant to the Workers' Compensation Act of Colorado.

3. The respondent shall pay for all reasonable, necessary, and related medical care received to cure or relieve the claimant from the effects of her low back injury.

4. The claimant's claim for her right shoulder injury is denied and dismissed.

5. The respondent is not responsible for medical care received for the claimant's right shoulder injury.

6. The claimant's authorized treating physician is Dr. Snyder.

7. The respondent shall pay the claimant temporary total disability benefits commencing on July 8, 2015 and continuing until terminated by operation of law.

8. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: October 27, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Respondents haves established by a preponderance of the evidence that Claimant is precluded from receiving Temporary Total Disability (TTD) benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATION

The parties agreed that Claimant initially earned an Average Weekly Wage (AWW) of $1,320.87. However, as of April 1, 2015 Claimant's AWW increased by $106.91 to $1,427.78 to reflect his replacement cost of health insurance benefits.

FINDINGS OF FACT

1. Claimant worked as a Loader Operator for Employer. His job duties included operating equipment to stockpile concrete aggregate material that came off a crush conveyor belt. He also performed maintenance on the equipment and conveyor belt. Claimant additionally changed metal screens that were used to ensure the aggregate material was the appropriate size.

2. In early December 2014 Claimant reported that he had been shaking out a screen to be hoisted to the wash plant when he experienced a "pop" in his right shoulder area. Although Claimant stated that he reported the injury to supervisor James Idris, there is no documentation of the incident. Claimant continued performing his regular job duties for Employer and did not seek medical treatment.

3. On January 20, 2014 Claimant was pushing one of the screens up toward the wash plant and again experienced pain in his right shoulder area. Claimant reported the injury and Employer prepared an incident report. On January 21, 2014 Aggregate Manager Ivan Geer transported Claimant to Work Partners for medical treatment.

4. Claimant returned to light duty work for Employer consistent with his physical restrictions. He initially performed office duties including copying documents and assembling binders.

5. On February 27, 2014 Claimant's light duty work restrictions were relaxed to permit him to operate machinery. However, when he reported to the aggregate pit he was directed to perform maintenance work. Because the job exceeded Claimant's work restrictions, Foreman James Idris instructed him to sit in his truck.

6. Mr. Geer was subsequently advised that Claimant had been sleeping in his truck. After investigating the incident he was unable to determine "who was right and who was wrong." Mr. Geer thus did not discipline either Claimant or Mr. Idris.

7. On March 10, 2015 Claimant was performing light duty work operating machinery. An incident occurred in which Claimant damaged the canopy of a truck with the bucket of his loader. Because of the incident Claimant was required to submit to a drug screen. Mr. Geer drove Claimant from the work site to Work Partners for the drug screen. When they returned to the job site Claimant completed an incident report with Mr. Geer and Mr. Idris.

8. While completing the incident report Claimant asked Mr. Geer whether the loader accident would result in his termination. Mr. Geer responded that a decision rested with his superiors and he was uncertain of the outcome. He informed Claimant that he was Claimant's "best advocate" for navigating the process. While the conversation was winding down Claimant became "heated," threw his glasses on the ground and began cursing. Claimant ultimately exclaimed that Mr. Geer could take the incident report and "shove it up his ass." Mr. Geer noted that Claimant then entered his truck, spun out his tires and left the work site.

9. Later in the evening Mr. Geer and Claimant discussed the incident over the telephone. Mr. Geer informed Claimant that his behavior was unacceptable and unprofessional. Claimant apologized for his outburst and recognized that his behavior was unprofessional. Mr. Geer told Claimant that Employer would make a decision about his job status after it received the drug screen results.

10. Mr. Geer testified that he subsequently discussed the March 10, 2014 incident with upper management. He decided he needed to terminate Claimant for insubordination. Mr. Geer noted that he could not tolerate Claimant's type of behavior in his department.

11. On March 12, 2015 Mr. Geer called Claimant to inform him that he had been terminated. The termination paperwork reveals that Claimant cursed at a Division Manager in an aggressive manner. The documentation reflects that Claimant repeatedly cursed at the Division Manager, threatened repercussions and drove his vehicle off the job site in an aggressive manner at an excessive speed. The specific reasons for Claimant's termination were "rude or offensive behavior" and "insubordination." Mr. Geer explained that insubordination constitutes grounds for termination from Employer.

12. Claimant testified that prior to March 10, 2015 there was no time when he felt his job with Employer was at risk. He remarked that he was surprised by his termination because he believed his job was safe as long as his drug screen result was negative. Claimant explained that he used coarse language with Mr. Geer on March 10, 2015 because he was upset with the chain of events that gave supervisors and co-workers an inaccurate view of his work ethic. He was specifically upset with the implication that he was taking advantage of his work restrictions by sitting in his truck

during work hours. Claimant remarked that he was "pushed to [his] limits" and Employer's "actions led to [his] reaction." He regretted his actions and coarse language with Mr. Geer on March 10, 2015.

13. Mr. Geer acknowledged that coarse language that was not directed at a particular individual was common among workers in the field. Moreover, it was not unusual to be questioned by an employee about his handling of a particular situation. However, Claimant's specific language in an aggressive fashion during a fit of anger on March 10, 2015 is not something Mr. Geer had ever experienced from an employee. Mr. Geer terminated Claimant because he did not want the type of conduct to proliferate.

14. Respondents have established that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under the termination statutes. The record reflects that, while completing an incident report about the March 10, 2015 loader accident, Claimant asked Mr. Geer whether the accident would result in his termination. Mr. Geer responded that a decision rested with his superiors and he was uncertain of the outcome. While the conversation was winding down Claimant became "heated," threw his glasses on the ground and began cursing. Claimant ultimately exclaimed that Mr. Geer could take the incident report and "shove it up his ass." Termination documentation reflects that Claimant repeatedly cursed at Division Manager Mr. Geer, threatened repercussions and drove his vehicle off the job site in an aggressive manner at an excessive speed. The specific reasons for Claimant's termination were "rude or offensive behavior" and "insubordination." Claimant remarked that he was surprised by his termination because he believed his job was safe as long as his drug screen result was negative. Claimant explained that he used coarse language with Mr. Geer on March 10, 2015 because he was upset with the chain of events that gave supervisors and co-workers an inaccurate view of his work ethic. Although Claimant regretted his actions and coarse language on March 10, 2015, the record reveals that Mr. Geer ultimately terminated Claimant because he did not want the type of conduct to proliferate. Under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Claimant precipitated the employment termination by the volitional acts of cursing and aggressive behavior that he would reasonably expect to cause the loss of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents assert that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under the termination statutes. The record reflects that, while completing an incident report about the March 10, 2015 loader accident, Claimant asked Mr. Geer whether the accident would result in his termination. Mr. Geer responded that a decision rested with his superiors and he was uncertain of the outcome. While the conversation was winding down Claimant became "heated," threw his glasses on the ground and began cursing. Claimant ultimately exclaimed that Mr. Geer could take the incident report and "shove it up his ass." Termination

documentation reflects that Claimant repeatedly cursed at Division Manager Mr. Geer, threatened repercussions and drove his vehicle off the job site in an aggressive manner at an excessive speed. The specific reasons for Claimant's termination were "rude or offensive behavior" and "insubordination." Claimant remarked that he was surprised by his termination because he believed his job was safe as long as his drug screen result was negative. Claimant explained that he used coarse language with Mr. Geer on March 10, 2015 because he was upset with the chain of events that gave supervisors and co-workers an inaccurate view of his work ethic. Although Claimant regretted his actions and coarse language on March 10, 2015, the record reveals that Mr. Geer ultimately terminated Claimant because he did not want the type of conduct to proliferate. Under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Claimant precipitated the employment termination by the volitional acts of cursing and aggressive behavior that he would reasonably expect to cause the loss of employment

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is precluded from receiving TTD benefits because he was responsible for her termination from employment.

2. Claimant initially earned an AWW of $1,320.87. However, as of April 1, 2015 Claimant's AWW increased by $106.91 to $1,427.78 to reflect his replacement cost of health insurance benefits.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-010-01

ISSUES

- Whether Claimant suffered an occupational left shoulder injury with a Report of Injury dated December 3, 2014.

- Whether Claimant is entitled to treatment at COSH.

At the commencement of the hearing the parties stipulated that the Claimant's average weekly wage is $960.64.

FINDINGS OF FACT

1. Claimant is a civilian employee of the Denver Police Department where she has been employed since September 2008.

2. Claimant works in the National Crime Information section of the Police Department where she handles a variety of record-keeping tasks. According to Claimant's testimony and the reports of Scott Washam, MA, and Joseph Blythe, MA, Claimant's job duties are basically sedentary.

3. Claimant described her job duties to include researching warrants and recording information about pawn shops (1-2 days per week), transcription (1 day per week), mail (1 day per week), on-line work (1 day per week), working on auto thefts (1 day per week), and scanning (1-2 days a week). Claimant would rotate among several work stations to perform these tasks. Claimant works five days a week, but her testimony about the time she spends on her work tasks would require that she work six to eight days per week.

4. In August, 2010, Kaiser diagnosed Claimant with myofascial pain syndrome with findings of upper back tightness and soreness with neck stiffness. In January 2011, Kaiser noted a history of myofascial pain. In February 2012, Kaiser records noted that for the last three years, Claimant had been awakened by sharp-left-sided upper back pain that radiated to the front of the chest and sometimes down the left arm. Claimant had been diagnosed with a seizure disorder, irritable bowel syndrome, migraines, and asthma.

5. Claimant's asthma was thought to be triggered by fragrances and odorants, and Respondent had accommodated her sensitivity by adopting a no fragrance policy in Claimant's area and providing Claimant with a separated work space. Claimant disputed whether Respondent reasonably accommodated her sensitivity during her alleged work injury. Claimant missed weeks of work attributable to this unrelated dispute.

6. In March 2014, Respondent obtained new scanners. The new scanners were initially placed somewhat above and slightly behind the workstation which required Claimant to reach above and behind her back to feed papers into the scanner.

7. Claimant testified that she began experiencing pain in her shoulder in September 2014. She took no immediate action. On December 3, 2014, Claimant called the "Ouch-Line" at work and reported left shoulder muscle pain that migrated down her arm.

8. On December 4, 2014, Claimant saw Dr. Szczukowski at the Center for Occupational Safety and Heath ("COSH"). Dr. Szczukowski diagnosed left shoulder pain secondary to impingement and ordered an ergonomic worksite evaluation. Dr. Szczukowski noted that Claimant had been seeing a chiropractor weekly for one year for low back and hip pain. She returned Claimant to work with temporary restrictions. She also ordered physical therapy twice a week "to help with muscle spasm in the neck, to improve her posture, and to decrease her shoulder pain." Claimant did not report muscle spasms in her neck or poor posture as part of her alleged work injury and Dr. Szczukowski's order for physical therapy for those conditions does not appear to be related to her claim.

9. Claimant did not provide Dr. Szczukowski her history of myofascial pain syndrome with left upper back tightness. Dr. Szczukowski did not review Kaiser medical records which documented Claimant's medical history of myofascial pain syndrome and left upper back tightness.

10. Claimant inconsistently reported to her treatment providers how much time she spent scanning documents. On December 4, 2014, she reported to Dr. Szczukowski that she was required to do eight hours of scanning one to two days a week. On February 5, 2015, she told Dr. Szczukowski that she used the scanners three days at a time. Claimant reported to Dr. Fall that she scans 100 to 150 documents one day per week over an eight hour shift during which time she also answers the phones. At the hearing, Claimant testified that she spent one to three days a week scanning documents.

11. On December 8, 2014, Scott Washam performed a worksite ergonomic evaluation. Claimant reported to Mr. Washam that she performed approximately six hours of multitasking which included computer use, answering phones, and scanning tasks. He noted that Claimant's scanning workstation required left shoulder external rotation and abduction to place documents in and to remove them from the scanner. In addition, he noted the placement of the keyboard in the desk surface caused shoulder hiking and upper extremity reaching.

12. Mr. Washam recommended that the scanner be lowered to a height which would eliminate vertical reaching. He also advised Claimant to be attentive to her work habits.

13. On December 18, 2014, Claimant returned to Dr. Szczukowski at COSH and reported improvement after attending four physical therapy sessions and not performing any scanning. Dr. Szczukowski reviewed Dr. Washam's report and diagnosed left shoulder strain with symptoms of impingement, work-related secondary to poor ergonomics.

14. On February 5, 2015, Claimant saw Dr. Szczukowski again and stated that her shoulder felt much better. Claimant complained that when she awakens from sleeping with her left arm above her head, she will have a lot of pain in her left shoulder. Claimant has reported the same pain complaint for several years preceding her alleged work injury. She reported that the scanner had been placed on a lower shelf and that she and a colleague alternated doing scanning work every hour. Dr. Szczukowski diagnosed left shoulder strain compatible with impingement, improving.

15. On March 3, 2015, Claimant saw Dr. Dickson at COSH on March 3, 2015 and reported that she was off work for two and a half weeks due to asthma and Respondent's inability to accommodate her fragrance sensitivity. She did not attend any physical therapy sessions during that time. Dr. Dickson noted that despite being off work for this period, Claimant had not noticed full resolution of her symptoms.

16. Dr. Dickson's examination on that date revealed that the maximum tenderness was along the medial margin of the anterior aspect of the deltoid just below the clavicle. Dr. Dickson referred Claimant to Dr. Hewitt for a possible shoulder injection.

17. On March 13, 2015, Claimant saw orthopedic surgeon Dr. Hewitt. She provided, for the first and only time, a history of lifting at work. Dr. Hewitt's note mentioned a history of "chronic back pain," but did not mention Claimant's history of sharp left-sided upper back pain that radiated to the front of the chest and sometimes down the left arm. Dr. Hewitt diagnosed subacromial impingement and provided an injection of Depo-Medrol and Lidocaine.

18. On March 19, 2015, Claimant saw Dr. Blair at COSH. Clamant said the ergonomic changes had "made a big difference" and that she felt that work restrictions were unnecessary. Claimant could abduct to "virtually 180 degrees" without guarding. Dr. Blair advised Claimant that he expected to put her at MMI in one month.

19. Claimant was often not compliant with treatment:

- She did not attend physical therapy during the weeks she was off work due to her dispute with Respondent over accommodating her asthmatic condition.

- She did not take Naproxen, the medication prescribed by her physician during that same time.

- She missed physical therapy appointments between December 4, 2014, and January 8, 2015, to which she attributed a worsening of her symptoms

- She did not follow her work restrictions which required her to take five minute stretching breaks every hour at work.

20. On April 23, 2015, Claimant returned to Dr. Szczukowski and reported that pain had returned with activities like vacuuming and reaching behind her back. There was tenderness on the left trapezius, left pectoralis, and over the coracoids. Dr. Szczukowski noted full range of motion. Dr. Szczukowski stated that the etiology of Claimant's persistent shoulder pain was unclear at this point.

21. On May 27, 2015, Joe Blythe, MA, performed a job-site analysis of the workspace to which Claimant had been assigned to accommodate her asthmatic condition. On page 3 of his report, he stated that Claimant had to work at shoulder level less than 10% of the time. Shoulder-level work was performed when using the scanner, telephone headset, and completing mail duties. Mr. Blythe took pictures during his job analysis and noted that the scanner, when in the position it was in prior to Respondent's ergonomic changes, was in an awkward position for the left upper extremity. Mr. Blythe noted that eleven common risk factors were not present at Claimant's job site.

22. At Claimant's request, Mr. Blythe specifically measured the amount of time Claimant spent performing scanning duties. He concluded that she spent 2.2 minutes per hour or 17.6 minutes per day performing scanning duties.

23. The ALJ finds Mr. Blythe's conclusion that Claimant spent 17.6 minutes per day scanning to be more credible and persuasive than Claimant's inconsistent and vague testimony and reports on that issue.

24. The Addendum to Mr. Blythe's report states, "[Claimant] requested this vocational evaluator document the awkward position of the left upper extremity when using scanner. See pictures 1-5 for details." Mr. Blythe indicated that at Claimant's request the photos were taken at a work station that had not been modified.

25. Claimant alleges that Mr. Blythe made her continue to work even when she reported left shoulder pain, and forced her to work after she requested to stop. Contrary to Claimant's testimony, the timed study was performed at a different workstation where the scanner was waist-high on Claimant when she was seated.

26. The ALJ finds Joe Blythe's report to be more credible and persuasive than Claimant's testimony and reports on this topic.

27. On June 15, 2015, Claimant presented to Dr. Krefft for shoulder pain she alleged was caused by Mr. Blythe's May 27, 2015 work site evaluation. Claimant reported that she had hoped her pain would go away, but instead it worsened over the next few days to weeks. On June 13, 2015, Claimant reported to urgent care. By the

following day, Claimant reported to Dr. Krefft that her pain had improved and her recorded pain scale was 0/10.

28. At that appointment, Claimant reported that her symptoms increased when she was moved to a different workstation to avoid contact with odorants and fragrances. The new workstation did not have an adjustable keyboard or keyboard tray but had a lowered scanner and swivel chair. Claimant told Dr. Krefft about the jobsite evaluation Mr. Blythe performed on May 27, 2015 and claimed she worked in a "non-ergonomic fashion" for 1 ½ hours, causing an increase in her shoulder pain. Claimant reported to Dr. Krefft that she scanned approximately 45 documents during Mr. Blythe's work site evaluation, acknowledging the scanner was lower than it had been in December 2014.

29. Dr. Krefft noted that Claimant had tenderness in the long head of the biceps tendon. Claimant had full range of motion, but mild pain between 70 and 130 degrees of abduction. Dr. Krefft diagnosed biceps tendonitis, probably secondary to activities during the May 27, 2015 jobsite evaluation.

30. At the time of her diagnosis, Dr. Krefft did not have a copy of Mr. Blythe's jobsite evaluation report.

31. At no time were the reaching motions Claimant made to feed paper into the printer forceful. Claimant held pieces of paper in her hand and the reaching motions did not involve lifting any appreciable weight.

32. Dr. Allison Fall performed an examination at the request of Respondent. At the hearing, Dr. Fall was accepted as an expert in the area of physical medicine and rehabilitation who is board-certified in that specialty and is Level II accredited. Dr. Fall reviewed all the medical records as well as the reports from Mr. Washam and Mr. Blythe.

33. In her testimony, Dr. Fall explained that she relied in part upon the diagnostic algorithm found in the Cumulative Trauma Disorder Medical Treatment Guidelines, Rule 17, Exhibit 5. Dr. Fall agreed that shoulder impingement problems are not specifically addressed in Rule 17, Exhibit 5, but opined that assessment of risk factors as described in that Exhibit are a valid method of determining whether Claimant suffered an occupational disease in her left shoulder.

34. Dr. Fall's report noted Claimant's history of myofascial pain disorder with upper back tightness. Claimant also had a history of being awakened by sharp left-sided upper back pain that radiated into the front of the chest and sometimes the left arm. Claimant reported to Dr. Fall that her physical therapist had commented on Claimant's "horrible posture."

35. Dr. Fall's examination of the left shoulder showed no visible abnormalities with unrestricted range of motion for flexion, extension, abduction, adduction, and internal and external rotation. Importantly, no impingement signs were present. Although tests for bicipital tendinitis were not positive, Claimant had some tenderness at

the bicipital groove with moderate palpation. Claimant was neurologically intact and her reflexes and muscle strength were normal.

36. Dr. Fall diagnosed left shoulder myofascial pain complaint with previously noted impingement symptoms, resolved. Dr. Fall opined that Claimant has not suffered an occupational disease as a result of her work at the Police Department. Dr. Fall opined that Claimant's symptoms were due to a number of factors including her age, prior history of a car accident, myofascial pain in the area of the shoulder, and possible somatic factors.

37. Dr. Fall opined that Claimant's activities during the May 27, 2015 jobsite analysis did not cause any new injury or aggravation of a prior injury.

38. The ALJ finds the opinions of Dr. Fall to be more credible and persuasive than those of Dr. Szczukowski on the issue of whether Claimant had a work related injury or disease. Dr. Fall had access to medical records which supported a finding that Caimant had a long-standing history of certain symptoms she attributed to her alleged work injury. On Dr. Fall's physical examination, Claimant had no signs of shoulder impingement and had full range of motion.

39. The ALJ finds it more probably true than not that Claimant did not suffer a work related injury or disease because she delayed seeking treatment by months and she was not compliant with her treatment.

40. Based on the totality of the evidence, the ALJ finds it more probably true than not that Claimant's symptoms were due to her age, prior history of a car accident, myofascial pain in the area of the shoulder, and possible somatic factors as identified by Dr. Fall; and also to Claimant's frustration with Respondent over issues related to her fragrance sensitivity.

41. Claimant has failed to establish by a preponderance of the evidence that she suffered an occupational disease of her left shoulder as a result of work at the Police Department.

CONCLUSIONS OF LAW

Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2006).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office*, 878 P.2d 118 (Colo. App. 1994).

Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the participating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

However, the evidence in a particular case may establish that the claimant's condition represents the natural and recurrent consequences of a preexisting condition unrelated to the alleged industrial injury. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

C.R.S. 8-40-201(14) defines "occupational disease" as follows:

> "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

As found, Claimant has a history of myofascial pain in her left upper back. Many of her pain complaints were in the same areas affected by the previously diagnosed myofascial pain. Use of the new scanner did not require forceful movements or lifting any appreciable weight. Use of the scanner did not meet recognized injury risk factors. Claimant did not use the scanner every day. On days she used the scanner, her average use was 17.6 minutes per day.

Therefore, Claimant's alleged shoulder problems do not meet the definition of occupational disease set forth in C.R.S. 8-40-201(14).

ORDER

1. It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. As such, Claimant's request for medical benefits is also denied.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 9, 2015

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- The issues for hearing were compensability, medical benefits-authorized provider, medical benefits-reasonably needed, and average weekly wage.

STIPULATIONS

- The parties stipulated to an average weekly wage of $452.06.
- The parties stipulated that one of the issues for hearing was denial of an MRI.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant has been employed by Employer as an accounts receivable clerk since 2009.

2. Claimant testified that on December 29, 2014, while returning from making a work related deposit at a neighboring bank, she slipped on ice in Employer's parking lot and fell.

3. Claimant testified that when she fell, her feet went out from underneath her and she landed on her buttocks with both hands striking the ground palms down. She caught herself with her hands at her side. Claimant did not immediately report the injury because she "didn't really feel bad." She testified that her symptoms worsened the following day, at which time she did report the fall.

4. When Claimant reported the injury, she told Employer she did not think she needed to go to a doctor. Employer had Claimant call the nurse's hotline.

5. The nurse's hotline note indicates that Claimant slipped and fell on ice onto her hands and buttocks and had "pain in left shoulder." The nurse's note also reflects that "the pain does not shot [sic-shoot] to any other area." Claimant followed the nurse's recommendation that she to take Advil and ice the area. The nurse advised Claimant that she might continue to feel pain for two to three weeks.

6. Claimant testified that although her symptoms improved, her shoulder continued to pop and crack if she used her left arm overhead. And, although her pain had decreased, it did not completely resolve. Claimant testified that she did not report these symptoms to her supervisor because she was able to continue to do her job.

7. Claimant testified that in late March, she awoke with intense pain in her left shoulder that spread down her arm, and restricted range of motion. When asked what caused the increase in her symptoms, Claimant responded, "I don't know."

8. Claimant reported her increased pain to Employer. Claimant again called the nurse hotline and was instructed to see a doctor.

9. On April 3, 2015, Claimant went to Mountain Peaks Urgent Care where she was evaluated by Physician Assistant Elizabeth Singleton. At this visit, Claimant reported a different mechanism of injury for her December 29 fall. Rather than reporting than she landed on her buttocks as she had initially reported, Claimant reported that when she slid on ice at work, she "landed on her left shoulder when trying to catch herself." The PA's note of that date stated that her "pain is going all the way down arm, started about 4 days ago and is hard to move shoulder. No recent trauma per pt." Claimant reported her pain as 9/10 and she was given Valium. She also underwent left shoulder x-rays which were negative for fracture, dislocation, and degenerative changes.

10. On April 9, 2015, Claimant saw Dr. Jeffrey Krebs. Per his medical report, Claimant gave a history of how she slipped on ice in the parking lot and that: "Pain seemed to have subsided then on 3/23/15, she woke up with pain in her L shoulder." He went on to note "She has intense shoulder pain." Dr. Krebs refilled Claimant's Valium prescription. Dr. Krebs believed that Claimant had a left shoulder rotator cuff syndrome or impingement syndrome and requested an MRI.

11. Insurer denied the MRI and further medical treatment.

12. Claimant testified that the symptoms she experienced on or about March 23, 2015, involved pain extending into her arm, which was different from the pain she experienced initially after she fell on December 29, 2014, which was limited to the shoulder.

13. On April 7, 2015, Claimant gave a statement to the insurance adjuster, Sheryl Weber. Claimant reviewed the transcript of the statement and agreed it was accurate.

14. In the statement, Claimant discussed her initial symptoms and her call with the nurse' hotline, at which time she was told it might hurt up to "2 or 3, you know, 2 weeks. And after that I should feel better. And, you know, it, it, I guess I was sort of back to normal, but something happened a couple of weeks ago, and it's just. I can't like. I was losing. I had limited mobility in my arm. My shoulder. I can't move it. There was an intense burning pain."

15. Claimant testified that when she went to Mountain Peaks Urgent Care, the doctor told her that carrying her toddler may have aggravated her shoulder.

16. When Claimant saw Dr. Krebs, she filled out a "Patient Injury History Sheet," and on the line for "date of injury or onset," listed two dates, one being December 29, 2014, and a second incident on March 23, 2015.

17. The ALJ finds, considering the totality of the evidence, that Claimant established by a preponderance of the evidence an initial compensable injury when she slipped and fell on December 29, 2014. However, her symptoms were minor and subsided, and Claimant was essentially symptom-free for almost three months. During that time, she lost no time at work and worked full duty without restrictions. She did not seek any medical treatment because none was necessary, and she reported that her symptoms had resolved.

18. The symptoms Claimant experienced on March 23, 2015, were significantly different and more severe than the initial symptoms she experienced on December 29, 2014. The pain was very intense – 9/10 – and required narcotics to control. Rather than being localized as before, Claimant's pain extended down into her arm. Claimant also reported for the first time that the pain was "burning." Claimant offered no persuasive evidence that the symptoms she experienced on March 23, 2015, were causally related to her job duties or the December 29, 2014 event.

19. Considering the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that the symptoms she began experiencing on approximately March 23, 2015, were related to the incident of December 29, 2014, or were related to her work with Employer.

20. The ALJ finds that the MRI requested by Claimant is not related to a compensable injury, and any further medical treatment related to her left shoulder is denied.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act in Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of the Respondents. § 8-43-201(1). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. §8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the claimant's need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). The symptoms Claimant experienced on March 23, 2015, were significantly different and more severe than the initial symptoms she experienced on December 29, 2014. The pain was very intense – 9/10 – and required narcotics to control. Rather than being localized as before, Claimant's pain extended down into her arm. Claimant also reported for the first time that the pain was "burning." Claimant offered no persuasive evidence that the symptoms she experienced on March 23, 2015, were causally related to her job duties or the December 29, 2014 event.

Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 1997. Claimant failed to establish by a preponderance of the evidence that the symptoms she began experiencing on approximately March 23, 2015, were related to the incident of December 29, 2014, or were related to her work with Employer. Rather, the evidence supports the finding that Claimant's December 29, 2014 injury was so minor it required only limited self-care, and had resolved months before she began experiencing different symptoms in late March, 2015.

Based upon the totality of the evidence the ALJ concludes that Claimant did fall on December 29, 2014 and needed limited medical care which she self-provided. The ALJ concludes any medical care on or after March 23, 2015 is not related to the December 29, 2014 injury and is not related to any other compensable injury.

ORDER

IT IS HEREBY ORDERED:

1. Claimant experienced a compensable injury on December 29, 2014, for which she sought limited or no medical treatment. Any medical treatment sought on or after March 23, 2015, is denied and dismissed, including the MRI recommended by Dr. Krebs.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 14, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman St., 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **AARON HOPKINS,** Claimant, vs. **NORTHWEST DISTRIBUTION, INC.,** Employer, and **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-980-185-01**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A Hearing in this matter was held on July 24, 2015, before Administrative Law Judge Michelle E. Jones at the Office of Administrative Courts in Denver, Colorado. Claimant appeared in person and was represented by Bob Ring, Esq. Respondents, Northwest Distribution, Inc. and Travelers Indemnity Company of Connecticut were represented by Jonathan S. Robbins Esq. The hearing was digitally recorded in Courtroom 3 starting at approximately 9:00 a.m.

In this Order, Aaron Hopkins will be referred to as "Claimant," Northwest Distribution, Inc. will be referred to as "Employer," and Travelers Indemnity Company of Connecticut will be referred to as "Insurer." Employer and Insurer will be referred to collectively as "Respondents."

Also in this Order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2015), "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

At hearing, Claimant's Exhibits 1-15 were admitted into evidence as were Respondents' Exhibits A-F. The matter was held open for submission of post hearing position statements which were received by the ALJ on August 18, 2015.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by e-mail addressed as follows:

Bob Ring, Esq.
cramirez@ringlegal.com

Jonathan Robbins, Esq.
jsrobbin@travelers.com

Division of Workers' Compensation
CDLE_WCOAC_ORDERS@state.co.us

Date: **10/1/15**

Gabriela Chavez
Court Clerk

#JJYP12L10D1KDOv

ISSUES

1. Whether Claimant suffered a compensable injury on April 1, 2015.

2. Whether Claimant was an employee or independent contractor of Employer on April 1, 2015.

3. Whether Claimant department from the scope of his employment by engaging in horseplay on April 1, 2015.

FINDINGS OF FACT

1. Claimant responded to an employment advertisement on Craigslist in early March of 2015. Claimant arrived at Employer's office, was interviewed by an officer manager, and was hired on the spot.

2. The office manager explained to Claimant that the job was a sales job selling Kirby vacuum cleaners. The officer manager explained to Claimant that he would go through training before being sent out to sell vacuums. She briefly explained several documents to Claimant and pointed out to him where to sign on each page. Claimant did not read any of the documents prior to signing them. The following morning, the office manager called Claimant and gave him his training schedule.

3. On March 7, 2015 Claimant signed a "Kirby Independent Dealer Agreement." The agreement provided that Employer was a "distributor" engaged in the business of selling Kirby vacuum systems at wholesale to independent Kirby dealers for resale to consumer end-users through in-home demonstrations. It provided that Claimant was a "dealer" and desired to engage in his own business of buying and reselling Kirby systems to consumer end-users through in-home demonstrations as an independent dealer associated with distributor. *See* Exhibit A.

4. The agreement provided that Claimant understood that he was engaged in an independent business or occupation, that he would not be engaged in personal services for Employer, and that his activities would not be integrated into those of Employer. It provided that Claimant would use his best efforts in his retail sales activities during his association with Employer. Best effort meant spending 50% or more of Claimant's activities in the active retail sales of the Kirby systems whether it be by canvassing, appointment setting, or crew leader activities. *See* Exhibit A.

5. The agreement provided that Claimant would pay Employer the wholesale purchase price of Kirby systems and that at Employer's option, Employer could consign Kirby systems to Claimant for resale to the consumer end-user. If consignment occurred, then the money collected by Claimant would be held in trust for Employer and Claimant's profits/commissions would be measured by the difference between the price paid by the consumer end-user and the wholesale price established by Employer and Claimant for the system. *See* Exhibit A.

6. The agreement provided that Claimant would at all time hold himself out as an independent contractor and would operate as an independent merchant not subject to direction and control by Employer with respect to his selling activities. It provided that Claimant would establish his own place from which to work, times to work, territory to be worked, and was free to engage in other activities including representing competitive product lines. It provided that Claimant was not an agent or employee of Employer. It provided that no taxes would be withheld from Claimant's profits and that Claimant would not be treated as an employee with respect to any services for federal, state, local taxes and workers' compensation purposes which Claimant may elect to obtain on his own as an independent contractor or for unemployment compensation purposes as direct sellers of consumer products. It provided that Claimant understood as an independent contractor that he may incur a loss in his activities and all costs and expenses including providing all tools and equipment associated with Claimant's activities shall be born by Claimant. *See* Exhibit A.

7. The agreement provided that it was for a term of one year and indicated that Claimant's activities were not integrated into those of Employer. It provided that either party could cancel the agreement at any time upon notice to the other party based on any breach of the terms and conditions of the agreement. *See* Exhibit A.

8. The agreement was not notarized, nor were any of the provisions bold or italicized. *See* Exhibit A.

9. Claimant also signed an addendum to the Kirby Independent Dealer Agreement that provided he understood any resale other than to a consumer end-user through an in-home demonstration was a violation and would result in immediate termination of the agreement including sales through e-bay, to wholesalers, or online sales. *See* Exhibit B.

10. Claimant signed a sales contracts/financing form. The form provided that all sales shall clearly identify Claimant by name and phone number, and if the vacuum was consigned by Claimant, then the sale shall provide Employer's name, address, and phone number. The form indicated that Claimant was free to negotiate price discounts based on such things as receiving referrals from a customer, taking a trade-in, receiving credit for a contest, etc but provided that any discounts negotiated by Claimant in making sales of Kirby products to consumer end-users shall not be below the Claimant's consigned cost. It provided that Claimant could arrange his own financing arrangements with the customer and that Claimant was encouraged to seek any

assistance he deemed necessary from Employer prior to, at the time of, or following the sale of the product including, but not limited to, financing options. It provided that Claimant shall provide prospective consumers with business cards identifying himself by name and phone number as an independent contractor furthering his own business purpose. *See* Exhibit C.

11. Claimant signed a consignment agreement electing to consign equipment from Employer. Claimant acknowledged he was financially responsible for the equipment as part of the investment into Claimant's own independent business. Claimant agreed to keep the consigned equipment clean and in good repair and to immediately return the consigned equipment to Employer in the event their relationship ceased. *See* Exhibit D.

12. Claimant signed an agreement as to joint canvassing. The agreement provided that Claimant understood and agreed that participating in a joint sales program involving other dealers on a vehicle was voluntary and not required by Employer and that as an independent dealer he could create his own appointments to maximize the means of achieving retail sales. Claimant's signature acknowledged his agreement that that in the event he wished to engage other dealers to assist him in sales activities ("a helper") he did so independently of Employer and any compensation paid to said helper would be determined by and between Claimant and the helper and not subject to prior approval by Employer. The agreement provided that any such compensation to be paid to a helper shall be disclosed to Employer and paid to the helper in keeping with Employer's normal payment practices, it being further understood by Claimant and the helper that in all instances it is the primary job of the helper/dealer's to be actively engaged in the retail sales of the product and that at all times the helper shall spend fifty percent or more of his time engaged in retail sales activities. It provided that otherwise someone providing only support services for Claimant's retail sales activities may be considered to be an employee of Claimant subjecting him to payment of wages to the helper under state and federal laws. It provided that joint canvassing was Claimant's option in that at all times he could: cold call by himself, advertise, door hang, pre-set appointments, and solicit prospective customers at booths and shows. The agreement stated that if Claimant elected to ride on vehicles with other dealers, he was encouraged to be present at Employer's offices no later than 9:00 a.m. so that the dealers could meet to discuss joint canvassing opportunities. It provided that if Claimant no longer elected to engage in retail sales, he could elect to immediately cease doing so. It also provided that decisions as to what areas the vehicle will be operating will be made by Claimant and other voluntary participant dealers. *See* Exhibit E.

13. Despite what was outlined in all the documents signed by Claimant on March 7, 2014, the actual relationship between Claimant and Employer operated very differently from what was in the signed agreements.

14. When Claimant was hired, he was advised that he would be required to undergo training. Employer contacted Claimant and provided him a training schedule

and told him what times to be present for training. Claimant underwent five total days of training required by and provided by Employer.

15. The first three days were classroom type training sessions that covered a nine step program of what to say and how to present the Kirby vacuums during in-home presentations. The training was outlined by a boot camp packet that each salesperson received. Employer advised Claimant that he had to follow the nine step program during his in-home sales presentations, and that if he did not stick to the sales pitch he would be fired.

16. The next two days of training were in the field where Claimant was required to observe other salespersons.

17. After completing five days of training, Employer advised Claimant that he could begin sales work. Claimant was told to report to Employer's office at 10:00 a.m.

18. Claimant reported at 10:00 a.m. to Employer's office location the following day, and each day thereafter until he suffered an injury. Claimant worked 7 days per week for Employer, averaging 12-14 hours of work per day. Each morning after arriving at Employer's office, Employer went over the training and the required nine point program on how to sell the vacuums to "pump up" the salespersons for the day of selling.

19. Employer advised Claimant that to be on the sales team Claimant needed to be there 7 days per week and had to report to Employer's office in the mornings. Claimant could not set his own schedule. If Claimant wanted a day off, he was required to make a request to Employer two days in advance.

20. Employer provided a company van driven by one of Employer's more senior salespersons, Benjamin Hurd. Employer's owner, Wade Kinnewall, and Mr. Hurd chose the location where the van would go for the day. Claimant had no say in the decision of where the van was heading.

21. Claimant did not set the price of the Kirby vacuums he sold. Rather, after demonstrating to a customer, Claimant called Mr. Hurd to request the price be lowered. Mr. Hurd told Claimant what price Claimant could offer to the customers. Claimant also did not have a say in establishing the wholesale price that he would be required to reimburse Employer for in the event he sold a vacuum.

22. Claimant worked both on his own and with a partner when out for the day. Mr. Hurd made decisions to partner salespersons for the day to hopefully achieve higher sales volumes by having them work in pairs. Claimant had no say in who he would be partnered with during a sales day and the decision was made by Mr. Hurd.

23. Claimant did not set his own financing terms with customers or provide his own financing agreement. If a customer wanted to finance a vacuum, the financing options were provided by Employer.

24. Claimant did not provide any of his own tools and the vacuums and van were provided by Employer.

25. While out for the day in Employer's van, Mr. Hurd was the "team lead" for the salespersons in the van. Mr. Hurd received a portion of the commission from each salespersons sale of a Kirby vacuum. Claimant did not establish the amount that Mr. Hurd would receive if Claimant sold a vacuum. Mr. Hurd drove the van slowly down the sales routes as the salespersons knocked on doors and retrieved the vacuums from the back of the van as needed for demonstrations.

26. Claimant did not establish his own business entity selling vacuums. Claimant did not have a business name, business card, business address, phone listing, liability insurance, and did not sell Kirby vacuums in any manner other than riding along in Employer's van 7 days a week and 12-14 hours per day.

27. Employer paid Claimant personally. Claimant's pay was based on commissions and was not hourly. Claimant's overall pay was based on the sale price of the vacuum, less the wholesale price of the vacuum established by Employer, less the payout to the team lead. Claimant did not set the sales price of the vacuum, did not set the wholesale price he would buy the vacuum for, and did not establish the amount he paid out to his team lead.

28. Employer required that Claimant wear a button-down shirt and maintain a professional appearance.

29. On April 1, 2015 at approximately 5:30 p.m. Claimant was out in the company van performing vacuum sales work. Mr. Hurd was the team lead and was driving Employer's van while Claimant and three other salespersons went door to door attempting to sell Kirby vacuums.

30. Per normal practice, if a customer was interested in viewing a demonstration, the salesperson would go back to the van, take out a Kirby vacuum and return to put on an in-home demonstration.

31. Claimant loaded a Kirby vacuum into the back of Employer's van after performing an in-home demonstration. Claimant then took off running toward two of the salespersons who were walking in the road in front of him. As he was running, Claimant grabbed the hat off of one of the other salespersons head, and attempted to run off with the hat when he lost his balance, fell, and was struck by Employer's van driven by Mr. Hurd.

32. The van ran over Claimant's right leg and ankle and caused Claimant significant injuries for which he has undergone four separate surgeries.

33. At the time of the injury the salespersons were crossing the street on a diagonal to move into the next neighborhood. All the salespersons were in the road heading toward the next neighborhood while Mr. Hurd was driving the van toward the next neighborhood.

34. Horseplay activities were frequent in the course of sales work for Employer. The salespersons in the van on a daily basis were all young men working 7 days per week and 12-14 hours per day. They frequently threw snowballs at one another, joked around, pushed each other into bushes, performed pull-ups on tree branches, and performed push-ups in the middle of the roadway. The team lead also engaged in horseplay. Occasionally, if the team lead thought the horseplay had gotten out of hand or if he believed a customer might be watching, he told the salespersons to "knock it off."

35. Claimant is 23 years old, has no college degree, and is not sophisticated in business dealings. Claimant responded to an employment advertisement, began employment, and followed the instructions of Employer.

36. Mr. Hurd testified as to his belief that he and the other salespersons were independent dealers. He testified that some salespersons sold vacuums part-time through Employer and had other jobs. He testified that some salespersons were not required to sell from the van and went out independently, including one salesperson who took Kirby vacuums on a road trip to another state. He testified that new employees were only encouraged to go out in the van as a good way to learn how to sell. He testified that they were similarly encouraged, but not required, to dress a certain way. He also testified that each salesperson could set the price of the vacuum as they saw fit and that he only provided advice or suggestions to the salespersons in his van.

37. Mr. Hurd's testimony, overall, is not found persuasive. The testimony of Claimant is found more credible and persuasive surrounding the requirement to go out in the van to sell vacuums, the requirement to dress in a certain way, and that the price of the vacuum was set by Employer and the team lead.

38. Claimant's testimony overall is credible and persuasive. Claimant was forthright an open in his explanations of his employment relationship, the requirements of the job explained to him by Employer, and his actions of flipping a hat off of a co-worker.

39. Claimant was not just provided with guidelines on how to operate his independent vacuum selling business. Claimant was trained and advised on exactly how he was to sell Kirby vacuums, was required to ride in Employer's van in order to be

part of the sales team, and was required to work the hours and schedule Employer provided.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Independent Contractor v. Employee

Section 8-40-202(2)(a), C.R.S. provides that an individual performing services for pay is deemed to be an employee, "unless such individual is free from control and direction in the performance of the service, both under the contract for performance of

service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." In this case Claimant performed services for pay for Employer but there is a dispute as to whether the services were performed as an independent contractor or as an employee. Since the Claimant performed services for pay for Employer, Respondents in this case bear the burden of proof to prove the existence of an independent contractor relationship. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo.App. 1992); *Frank C. Klein v. Colorado Compensation Insurance Auth.*, 859 P.2d 323 (Colo. App. 1993). If Respondents establish that Claimant is an independent contractor, then Claimant has no cause of action and is not entitled to benefits under the Workers' Compensation Act. *See* § 8-41-401(3), C.R.S.

A document may satisfy Respondents' burden to prove Claimant's status as an independent contractor. A document creates a "rebuttable presumption of an independent contractor relationship between the parties where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship." *See* § 8-42-202(2)(b)(IV), C.R.S. Although Claimant signed a "Kirby Independent Dealer Agreement" on March 7, 2015 the document did not contain the required disclosure in larger type or in bold-faced or underlined type. Therefore, the document signed on March 7, 2015 did not create a rebuttable presumption of an independent contractor relationship between the parties and the burden of proof remains with Respondent to establish that the relationship is that of an independent contractor. In this case, Respondent has failed to meet their burden.

Free from control and direction

To be deemed an independent contractor, an individual has to be free from control and direction in the performance of the service both under the contract for performance of service and in fact. The person also must be customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Under § 8-40-202(2)(b)(II), C.R.S., to prove a person is free from control and direction in the performance of the service and, therefore, an independent contractor, it must be shown by a preponderance of the evidence that the person for whom services are performed does not:

A. Require the individual to work exclusively for the person for whom services are performed; except that the individual, however, may choose to work exclusively for such person;
B. Establish a quality standard for the individual; except that the person may provide plans and specifications but cannot oversee the actual work or instruct the individual as to how the work will be performed;
C. Pay a salary or an hourly rate instead of a fixed or contract rate;

D. Terminate the work of the individual during the contract period unless the individual violated the terms of the contract or fails to produce a result that meets the specifications of the contract;
E. Provide the individual more than minimal training;
F. Provide the individual tools or benefits; except that materials and equipment may be supplied;
G. Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;
H. Pay the individual personally instead of making checks payable to the individual's business name; and
I. Combine the business operations of the person for whom service is provided in any way with the individual's business operations instead of maintaining all operations separately and distinctly.

The existence of any one of the factors is not conclusive evidence that an individual is an employee, nor does the statute require satisfaction of all nine factors to prove that the individual is an independent contractor. *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998). In the present case, after weighing the nine factors and examining the relationship as a whole, Respondents have failed to show that Claimant was free from control and direction in performing services.

Employer required Claimant to work 7 days per week with an average of 12-14 hours per day. Claimant was told when hired that this was the schedule and that if he wished to be part of the sales team, he was required to show up daily to go out in Employer's van. Employer thus dictated the time of performance and Claimant had no choice in his hours or schedule as a salesperson. Employer provided Claimant with substantial training prior to allowing him to begin sales work. Employer established a quality standard for Claimant and instructed Claimant that he had to perform his sales duties using the 9 steps outlined in Claimant's training and in the boot camp booklet. Employer provided a daily refresh of the training and went over the 9 sales steps each morning to "pump up" the salespersons before they went out to sell for the day. Mr. Hurd and Employer's owner decided where the van would go for the day and Claimant had no choice in the sales territory that would be covered each day. Claimant's sales work was monitored by Mr. Hurd the team lead. Claimant was often paired up with another salesperson for the day with no choice in the pairings. Employer provided the van as well as the vacuums used for demonstration. Claimant was also paid personally by Employer after Employer took out the wholesale price of the vacuum, and paid out the team lead.

Claimant signed a number of documents on the date he was hired without reading them. As found above, Claimant is 23 years old, without a college degree, and is unsophisticated in business dealings. Although the documents Claimant signed on March 7, 2015 and the contract of performance purport to establish that Claimant was free from control and direction in the performance of his duties, in fact Claimant was not. After examining the relationship and the 9 factors of § 8-202(2)(b)(II), C.R.S. to determine whether Claimant was in fact free from Employer's control and direction, the

ALJ concludes that Claimant was not. Rather, Claimant simply followed the directions of Employer, showed up to work when told, performed sales work following the mandatory sales script and 9 steps, and followed Employer's instructions as to what location he would sell in, who he would be paired with, what price he could sell the vacuums for, and what to wear. Respondents have therefore failed to show more likely than not that Claimant was free from control and direction in the performance of sales duties and that the relationship was that of an independent contractor.

Customarily engaged in an independent trade, occupation, profession, or business

For Claimant to be deemed an independent contractor, Respondents also must show that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. In this case, a preponderance of the evidence does not show that Claimant was engaged in the independent business of vacuum sales. Claimant did not have his own business entity, business name, business cards, business address, business phone listing, his own tools, any financial investment subject to a risk of loss, or liability insurance. Claimant did not set the price of the vacuums he sold, but was advised by Employer and Employer's team lead as to how much he could mark down the price of a vacuum to close a sale. Claimant did not prepare or submit invoices for Employer. Employer also was reasonably aware that Claimant was not engaged in an independent business based on the working relationship Employer had with Claimant. Employer knew that Claimant reported to their office 7 days a week and worked 12-14 hours per day, thus leaving no time for outside employment or for Claimant to independently sell vacuums on his own. Claimant did not have an independent trade, occupation, profession, or business selling vacuums. Rather, he responded to an employment advertisement and showed up to work doing as he was told by Employer. Claimant took no steps to create his own trade or business and simply followed the instructions of Employer. Although Claimant signed documents purporting to acknowledge he had an independent trade, occupation, profession, or business the true nature of the relationship fails to establish that Claimant was customarily engaged in an independent trade, occupation, profession, or business.

In *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not 'engaged' in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court declared "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in § 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015. The *Softrock* Court pointed as an example the

decision in *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008). In *Long View* the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. See *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015. In the present case, analyzing the nature of the working relationship, the nine factors of § 8-202(2)(b)(II), C.R.S., the *Long View* factors, and the overall relationship, the ALJ concludes that Claimant is not customarily engaged in an independent trade or business and that Respondent reasonably knew Claimant was not engaged in an independent trade or business based on their working relationship with Claimant. Employer expected Claimant not to take on other customers and required Claimant to work full time, 7 days a week, 12-14 hours per day for Employer.

Horseplay Doctrine

To establish that an injury is compensable, Claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with employer. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.* It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly considered as arising out of and in the course of the employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006).

If the claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of the claimant's employment that the activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Industrial Commission,* 728 P.2d 746 (Colo. App. 1986). Where, the alleged deviation from employment involves "horseplay," our courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's*

Family Dining v. Industrial Claim Appeals Office, 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

> (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved and abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.

No single factor is determinative, and the claimant need not prove the existence of every factor in order to establish compensability. Ultimately, resolution of the issue is one of fact for determination by the ALJ. *Panera Bread, LLC v. Industrial Claim Appeals Office, supra.*

Claimant has met his burden to show that he suffered an injury arising out of and in the course of his employment with Employer. Claimant did not substantially deviate from the circumstances and conditions of his employment by engaging in horseplay to make his injury outside the scope of his employment. The deviation was slight and not serious and was commingled with the performance of his job duties. While continuing to walk door to door to sell vacuums, and after having just loaded a demonstration vacuum into Employer's van, Claimant made the mistake of running to knock a hat off of a co-worker. Although this was a deviation from the act of selling vacuums, it was a slight deviation and occurred while moving through the neighborhood in furtherance of knocking on more doors to sell vacuums and was commingled with the job duty of walking the neighborhood. Additionally, as found above, horseplay amongst Employer's salespersons, including Employer's team lead was an accepted part of the employment. The salespersons who spent 7 days per week and 12-14 hours per day walking neighborhoods and riding in a shared van regularly engaged in horseplay including: throwing snowballs at one another, doing pull-ups on tree branches; doing pushups in the middle of roadways; and joking amongst each other. The act of Claimant running to flip a hat off of one of his co-workers was part of the camaraderie and accepted horseplay that had been part of the employment. Further, the nature of the employment with long hours and several young salespersons together 7 days per week was generally expected to include some horseplay. In reviewing the four-part test surrounding the horseplay in this case, Claimant did not substantially deviate from employment to make his injury outside the course and scope of his employment. Claimant has established that the injury arose out of and occurred in the course of his employment and is compensable.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on April 1, 2015.

2. Claimant was an Employee of Employer on April 1, 2015.

3. Claimant's horseplay activity at the time of the injury did not constitute such a substantial deviation from the conditions of his employment to take his injury outside the course and scope of his employment.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 1, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

- Whether claimant has proven by a preponderance of the evidence that the proposed RT300-S system represents reasonable medical treatment necessary to maintain claimant at maximum medical improvement ("MMI") subject to an award as maintenance medical treatment?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on June 13, 1997 when she was involved in a hit and run motor vehicle accident while employed with employer. As a result of the injury, claimant was rendered an incomplete tetraplegic. Claimant testified at hearing that she has use of both arms, one hand, some use of her right leg and no use of her left leg.

2. Claimant lives in Montrose, Colorado. Claimant has undergone extensive rehabilitation as a result of her injury through Craig Hospital in Englewood, Colorado. On June 24, 2014, claimant returned to Craig Hospital for outpatient physical therapy. The physical therapist noted that claimant had ordered and received an Easy Stand at her last re-evaluation, but had not been using it. The therapist noted that the benefits of standing were reviewed with claimant and she recommended claimant start standing regularly.

3. Claimant testified at hearing that during her June 2014 occupational therapy with Craig Hospital, she used a RT300-S FES-CE system bike that helps claimant build up muscle mass. Claimant testified she used the bike one time during this visit. Claimant testified she believes the bike will help her use her right leg more and could help claimant with her muscle spasms.

4. Claimant's nurse practitioner, Ms. Preston, issued a letter dated June 27, 2014 requesting claimant be provided with the FES-CE system. Ms. Preston noted in the letter that the FDA had cleared the product for different treatment including relaxation of muscle spasms, prevention or retardation of disuse atrophy of lower extremity musculature, increasing local blood circulation, and maintaining or increasing range of motion. Ms. Preston indicated that claimant had been evaluated for prescription use of the RT300-S system by the SCI clinical team under her supervision at Craig Hospital and indicted that the program is medically indicated for claimant and there were no contraindications for the use of FES-CE.

5. Claimant testified at hearing that due to her location in Montrose, Colorado, she cannot reasonably travel to Craig Hospital in Englewood, Colorado to use the RT300-S system on a regular basis. Therefore, claimant requests that she be

provided with her own system. The ALJ notes that the distance claimant would need to travel from Montrose, Colorado to Craig Hospital would involve over five hours of travel time each way. The ALJ finds that the concern expressed by Ms. Preston involving disuse atrophy and relaxation of muscle spasms represents reasonable concerns regarding claimant's condition as a result of the June 13, 1997 work injury and finds that the recommendations for use of the RT300-S system to be reasonable to protect against this deterioration.

6. Respondents obtained a physician advisor report dated September 15, 2014 from Dr. Lewis. Dr. Lewis noted that Colorado guidelines do not address the issue of the RT300-S FES-CE system. Dr. Lewis noted that Aetna would consider the device only after certain criteria were met, including completion of a training program consisting of 32 physical therapy sessions over a 3 month period. Dr. Lewis also noted that Cigna did not consider the FES-CE system to be appropriate medical treatment as it was still experimental and investigational. Dr. Lewis recommended non-certification.

7. The ALJ credits claimant's testimony and determines that the RT300-S system is reasonable medical treatment necessary to maintain claimant at MMI. The ALJ finds claimant's testimony regarding the benefits of the use of the RT300-S system as persuasive regarding this issue. The ALJ finds the testimony of claimant along with the recommendations of Ms. Preston as more credible and persuasive than the contrary opinions expressed in the report of Dr. Lewis on this issue.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2008).

3. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

4. As found, claimant has proven by a preponderance of the evidence that the use of the RT-300S system will help prevent the further deterioration of her physical condition. As found, claimant has proven by a preponderance of the evidence that the use of the RT-300S system at her home is reasonable maintenance medical treatment.

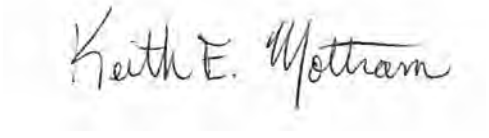
ORDER

It is therefore ordered that:

1. Respondents shall pay for the RT-300S system recommended by Ms. Preston pursuant to the Colorado Medical Fee Schedule.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 11, 2015



Keith E. Mottram

Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

Whether Claimant has established by a preponderance of the evidence that the medication Subsys prescribed by Dr. Jeffrey Kesten is reasonable, necessary, and related to her January 22, 1999 work injury.

FINDINGS OF FACT

1. Claimant worked for Employer performing ski-lift maintenance and dispatching duties from approximately 1983 to 2001.

2. On January 19, 1988 Claimant suffered a work related injury to her low back at the L5-S1 region while shoveling snow.

3. On February 24, 1993 Claimant suffered another work related injury while working for Employer due to a slip and fall that was noted to exacerbate her back symptoms.

4. On April 22, 1994 Claimant underwent an Independent Medical Examination (IME) performed by John Hughes, M.D. He noted that Claimant had a history of thoracic pain consistent with reactive thoracic spine facet joint syndrome and opined that was commonly seen post lumbar spondylosis. He opined that treatment would fall under palliative care provisions in the low back pain guides. *See* Exhibit B.

5. On March 15, 1995 Claimant was evaluated by Fred Teal, M.D. He noted that Claimant had upper back pain localized to the T6-7 area at the bra strap line and that the pain was associated with paravertebral muscles in this area. He noted the upper back pain was not associated with any specific event, but developed during the course of Claimant's recovery from her lumbar disc surgery. *See* Exhibit B.

6. On December 7, 1995 Claimant was evaluated by Scott Primack, M.D. Dr. Primack noted Claimant's ongoing mid back pains and that she still had discomfort in her thoracolumbar spine region. *See* Exhibit B.

7. On September 22, 1998 Claimant was evaluated by her personal care physician Dr. Arnold. Dr. Arnold recommended that Claimant's prior workers' compensation case be reopened because of her recurrent upper back pain. Dr. Arnold noted that Claimant was concerned that she never really received much evaluation of her upper back. *See* Exhibit B.

8. On January 22, 1999, Dr. Hughes performed a follow up IME. Dr. Hughes noted that he had initially evaluated Claimant on April 22, of 1994 following her February 1993 slip and fall injury. He noted that in April of 1994 Claimant had symptoms consistent with lumbar spondylosis and post disk herniation at L5-S1 necessitating a laminectomy. Dr. Hughes noted that in April of 1994 Claimant also had mild persistent S1 radiculopathy as well as reactive thoracic facet joint syndrome and that her primary concern in April of 1994 was her mid back pain. *See* Exhibit A.

9. Dr. Hughes noted that Claimant had received manual therapy and treatment for her mid back pain in the T6-T7 area and had done well from 1994 until September 22, 1998 when her mid back tightness and pain had returned. Dr. Hughes noted that Claimant was quite active in the winter, handling snowmobiles and climbing around on uneven and slippery surfaces in the course of her work in lift maintenance. At the IME Dr. Hughes noted that Claimant had two recent periods of increased mid back symptoms in September and December. *See* Exhibit A.

10. At the IME, Dr. Hughes opined that Claimant's lumbar spine condition was now stable and that there was no evidence of lumbar radiculitis or radiculopathy. Dr. Hughes opined with respect to Claimant's mid-back pain that it had gotten worse. Dr. Hughes noted that the worsening of Claimant's mid-back pain could be arguably a new injury due to her ongoing work activities. Under his recommendations, Dr. Hughes listed: consider substantial aggravation of long-standing mid-back pain to have occurred most recently during December of 1998. *See* Exhibit A.

11. On February 8, 1999 Claimant filed a Petition to Reopen her February 24, 1993 claim based on a change in physical condition and attached the IME report of Dr. Hughes as support. *See* Exhibit A.

12. On March 16, 1999 Respondents filed a General Admission of Liability (GAL) listing an injury date of January 22, 1999 (the date of Dr. Hughes' IME report) and admitting liability for medical benefits. Respondents noted on the GAL that they were not voluntarily reopening Claimant's 1993 injury in workers' compensation case number 4-292-984, but were admitting liability for a new January 22, 1999 date of injury. *See* Exhibit A.

13. Under the GAL Claimant has received significant treatment aimed at her thoracic spine.

14. On August 18, 2000 Pamela Knight, M.D. performed an impairment rating of Claimant's thoracic spine and placed Claimant at maximum medical improvement. Dr. Knight opined that Claimant would most likely need intermittent medical care over the next 5-10 years and would most likely require medications, and even possibly thoracic epidural injections. Dr. Knight noted that they would try to avoid surgery, if possible. *See* Exhibit A.

15. Claimant's MMI status was eventually withdrawn and Claimant continued to receive treatment aimed at her thoracic spine. Claimant underwent surgery including a thoracic spine fusion at T8-T11, thoracic fusion hardware removal, and thoracic spine stimulator implant. Despite these surgeries and significant treatment, Claimant continues to suffer from constant pain in her thoracic spine.

16. On January 9, 2008 it was noted by Dr. Piccone that Claimant had a lot of pain and discomfort and that she had very obvious muscle spasm upon examination. On May 27, 2008 Dr. Barolat opined that Claimant was suffering from a chronic severe thoracic neuritis and that she had persistent neuropathic pain which also caused her severe muscle spasm. On May 5, 2010 Dr. Barolat evaluated Claimant following the implantation of three externalized thoracic peripheral nerve stimulator electrodes and noted that Claimant was continuing to have muscle spasm despite the use of the peripheral stimulator device. *See* Exhibit B.

17. Claimant takes significant amounts medications currently in an attempt to cure and relieve her thoracic spine pain that she first experienced following her 1993 work injury, that got worse in late 1998, and that she has had significant surgical and non surgical treatment for.

18. Claimant is currently using a narcotic pain patch, Fentanyl, which delivers opioid narcotics to her via patch constantly. Claimant also uses Oxycodone in pill form for breakthrough pain.

19. Claimant's constant pain is 4-5 out of 10 when she is on medications, and 10 out of 10 when she is un-medicated. Claimant experiences muscle spasms in the thoracic region several times per day, which is described as breakthrough pain.

20. When Claimant experiences breakthrough pain due to muscle spasms in the thoracic region, her pain increases in intensity. Claimant often vomits, urinates, and defecates during these periods of muscle spasms. Claimant has resorted to wearing adult diapers. The episodes of breakthrough pain significantly limit Claimant's ability to function.

21. During the breakthrough pain, Claimant takes Oxycodone in pill form. Claimant often vomits the pill up. The Oxycodone takes approximately 25 to 30 minutes to kick in before Claimant experiences relief.

22. Claimant has been treating with Jeffrey Kesten, M.D. since 2009 for her persistent thoracic pain. Dr. Kesten is board certified in physical medicine and rehabilitation, pain medicine, and addiction medicine. In 2014 Dr. Kesten prescribed Claimant Subsys to better address Claimant's breakthrough pain and thoracic spasms. The request for Subsys was denied by Insurer. Despite the denial, Claimant was able to use Subsys via vouchers for approximately three months out of the last year in place of Oxycodone for her breakthrough pain.

23. During the period of time that Claimant used Subsys, it was used in place of Oxycodone. The Subsys Claimant used was sprayed into her mouth and it provided Claimant instant pain relief. Claimant had no trouble with vomiting the spray. Claimant was able to live a more normal life and have less worry about being incapacitated due to intense breakthrough pain while using Subsys.

24. Due to the increased instant relief and easier use of the Subsys and because of Insurer's denial, Claimant seeks an order finding that Subsys is reasonable and necessary to cure and relieve the effects of her admitted industrial injury and seeks to replace Oxycodone with Subsys for her breakthrough pain.

25. The issue at hearing was limited to whether Subsys is reasonable and necessary to cure and relieve the effects of Claimant's admitted industrial injury. The broader question of whether Claimant suffered a compensable injury and/or whether Claimant should be weaned completely from all narcotic medications was not before the ALJ. Respondents did not seek to withdraw the GAL.

26. Dating back to the early 1990's, Claimant has had ongoing psychological issues for which she has received treatment.

27. On June 6, 2012 Claimant underwent a psychiatric IME performed by Robert Kleinman, M.D. Dr. Kleinman diagnosed pain disorder that was associated with psychological factors and associated with a medical condition. He also diagnosed major depressive disorder. Dr. Kleinman opined that Claimant was using too high a dose of breakthrough medication and that the combination of narcotics and muscle relaxants was interfering with her ability to think clearly. Dr. Kleinman opined that Claimant's pain medication and muscle relaxants should be reconsidered. *See* Exhibit B.

28. On July 27, 2013 Steven Dworetsky, M.D. wrote a letter that opined that Claimant developed a major depressive disorder due to her chronic pain, physical limitations, and chronic pain medication. *See* Exhibit 4.

29. On December 11, 2013 Gary Gutterman, M.D. performed a psychiatric consultation for an IME. Dr. Gutterman opined that Claimant has experienced a major depressive disorder as well as a pain disorder associated with psychological factors and a medical condition. Dr. Gutterman believed there were a number of factors, including pain, contributing to her major depressive disorder. He opined that Claimant's pain complaints were enhanced by underlying unconscious psychological factors. He opined that her pain appeared both physiologic and non physiologic and that being unable to be active and athletic had contributed to her depression. Dr. Gutterman noted that Claimant clearly had several surgeries certainly contributing to her pain complaints but that underlying psychological factors and vulnerabilities contributed to her pain complaints and led to non physiological findings. He highly recommended titrating Claimant off narcotics and a referral to a physician specializing in detoxification. He opined that continuing on narcotics probably had both a harmful effect from a cognitive

and psychological perspective since narcotics can impact and impair cognitive function, alter mood, and add to depression. *See* Exhibit 3.

30. On June 24, 2014 Lawrence Lesnack, D.O. performed an IME. Dr. Lesnack opined that Claimant was extremely emotionally labile during the evaluation. He noted her subjective complaints of mid thoracic spine pain and severe muscle spasms. Dr. Lesnack opined that Claimant exhibited numerous pain behaviors and non-physiologic findings during evaluation and noted that despite the significant treatment received over the past 20 plus years, Claimant has not received any relief of symptoms or improvement in function. *See* Exhibit B.

31. Dr. Lesnack noted that treatments were based solely on Claimant's subjective complaints without correlating objective findings and that it was not surprising that her symptoms and functional status had not improved. Dr. Lesnack noted that given the lack of objective findings to explain Claimant's ongoing and progressive chronic pain complaints that she is not a candidate for the ongoing use of opioid pain medications and that she should be weaned from her current opioid pain medications. Dr. Lesnack opined that Claimant's chronic complaints of muscle spasms most likely stemmed from a psychologic standpoint rather than from any type of anatomic or physiologic standpoint. He recommended weaning from all controlled substance medications over the next several months in an inpatient detoxification program under the close supervision of a psychiatrist. *See* Exhibit B.

32. On February 17, 2015 Dr. Kesten performed a follow up medical evaluation. Dr. Kesten noted that Claimant had markedly improved symptom management when consuming Subsys as compared to Oxycodone. He noted Claimant would be undergoing a hearing regarding authorization for Subsys. *See* Exhibit 1.

33. On March 9, 2015 Dr. Lesnack authored an IME addendum. Dr. Lesnack noted that following the IME he performed in June of 2014, Dr. Kesten recommended that Claimant discontinue Oxycodone 5-10 mg four times per day as needed for breakthrough pain and instead recommended switching Claimant to Subsys 400 mcg up to four times per day as needed for breakthrough pain. *See* Exhibit B.

34. Dr. Lesnack noted that Subsys was intended to be used only in the care of cancer patients and by oncologists and pain specialists. He opined that since Claimant was not undergoing treatment for cancer pain the use of Subsys for breakthrough pain was not indicated. He continued to opine that Claimant should be weaned off all her current opioid pain medications in an inpatient detoxification program. He opined that the use of Subsys was not reasonable, necessary, or related to her occupational injury. *See* Exhibit B.

35. On March 17, 2015 Dr. Kesten performed a follow up medical evaluation. Dr. Kesten opined that Subsys was reasonable, medically necessary, and related to Claimant's work related injury. He noted that Dr. Lesnack believed the Subsys to be inappropriate as it was intended only in the care of cancer patients, but referred to off-

label prescribing as an ethical, legal, and common practice among physicians especially in pain management. Dr. Kesten noted that it is estimated that one in five prescriptions is off-label use and that an off label use may provide the best available intervention for a patient. Dr. Kesten noted that scientific and clinical considerations influenced his decision to prescribe Subsys to Claimant including the characteristics of Claimant's breakthrough pain, the pharmacokinetic profile of Subsys, and the failure of traditional short-acting opioids to effectively manage her breakthrough pain. He again requested that Subsys be authorized for Claimant's use. *See* Exhibit 1.

36. On March 31, 2015 Dr. Lesnack authored another IME addendum. He continued to opine that Claimant did not require the use of Subsys and that she should be weaned from all controlled substance medication. He recommended Dr. Kesten take into consideration the unreliability of Claimant's subjective complaints when recommending treatments. He noted in this case, the Claimant's significant psychiatric diagnosis/disorders may make her subjective complaints unreliable. *See* Exhibit B.

37. Dr. Kesten testified via deposition consistent with his reports and treatment records. Dr. Kesten opined that Subsys was the best medication to treat Claimant's symptoms and to optimize her functional status. He opined that he had exhausted all other options in regard to managing her debilitating muscle spasms and associated pain and that Subsys was distinctly the most superior pharmacologic choice.

38. Dr. Kesten noted that he implements the strictest and soundest of risk mitigation regarding substance abuse and was not concerned with Claimant. He opined that Claimant did not exhibit drug seeking behavior through the course of her treatment with him. He opined that Claimant's presentation was never suggestive of symptom magnification and her occasional demonstration of grimacing, groaning, and posturing were as a result of what he considered to be substantiated pathophysiology.

39. Dr. Kesten opined that Subsys takes effect more rapidly than any other option shy of intravenous use and due to the clinical presentation of Claimant's pain which spikes in a matter of minutes and becomes debilitating for her Subsys was by far the best choice with no other option available that would offer her the same benefit. Dr. Kesten opined that Oxycodone has a duration that is significantly longer than Subsys, and Oxycodone is at four to six hours which subjects Claimant to adverse side effects when she might not need that medication on board as long. He opined thus that Subsys had the pharmacokinetic profile with how her breakthrough pain presents that enabled getting the medication on board when she needs it and not to have it stay on board longer than she needs it. He noted that Claimant had the opportunity to trial Subsys and reported it to be the best analgesic option in managing her severe breakthrough pain. He agreed that Claimant was psychologically unstable, but disagreed with Dr. Lesnak's opinion that Claimant's symptoms were rooted almost entirely from a psychological standpoint. Rather, he opined emphatically that using Subsys would help Claimant with her physiologic chronic pain and would also mitigate some of her psychological symptoms as well. *See* Exhibit D.

40. Dr. Lesnak testified at hearing consistent with his IME reports. Dr. Lesnak opined that Claimant should be treated for depression and that opioids do not treat depression. He opined that Claimant should be weaned off all opioid medications slowly as inpatient detoxification. He opined that taking the amount of medications that Claimant has been taking over the years would cause her to have a decreased threshold for pain.

41. Dr. Lesnak opined that Claimant had functionally worsened despite significant treatment and medications. Dr. Lesnak opined that Claimant was taking a lot of medications that exceed recommended doses, including opioids. Dr. Lesnak noted that Subsys was an immediate short acting opioid and that Dr. Kesten had prescribed both Subsys and Oxycodone which also is a short acting medicine. Dr. Lesnak opined that you don't want to use two short acting and very potent opioids at the same time.

41. The opinion of Dr. Kesten is more credible and persuasive than the opinion of Dr. Lesnak. While Claimant also has psychiatric aspects to her pain, the opinion of Dr. Kesten that she suffers physiologic pain is credible and supported by the significant medical treatment records and the opinions of Dr. Gutterman, Dr. Piccone, and Dr. Barolat. The opinion of Dr. Lesnak that Claimant's pain is mostly psychological is not persuasive and it has been opined by many physicians that she has physiologic sources for her pain including thoracic muscle spasms which are the cause of her breakthrough pain.

42. Although Dr. Lesnak opined that Claimant should be weaned from all opioid medications, weaning cannot be performed immediately. Further, the issue of whether or not Fentanyl (long acting opioid patch Claimant uses) is reasonably necessary to cure and relieve the effects of Claimant's industrial injury was not at issue.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ concludes that Claimant has met her burden to show that Subsys is reasonable and necessary to cure and relieve the effects of her industrial injury. As found above, Claimant displayed thoracic symptoms shortly after her admitted 1993 industrial injury. Dr. Hughes noted in April of 1994 that Claimant had a history of thoracic pain consistent with reactive thoracic spine facet joint syndrome and opined that was commonly seen post lumbar spondylosis and that treatment would fall under care provisions in the low back pain guides. Claimant then suffered recurrent and worsening thoracic spine symptoms in late 1998. After a new IME was performed by Dr. Hughes in 1999, Respondents filed a new GAL with an injury date of January 22, 1999 (the date of Dr. Hughes' report) admitting for medical benefits. Dr. Hughes had noted in the 1999 IME that Claimant's symptoms were arguably a new injury but were recurrent. Following the GAL, Claimant underwent significant treatment aimed at her thoracic spine including fusion surgery and implantation of a spinal stimulator. Despite this significant treatment, she continues to be in constant pain. Claimant's has shown that her continued constant thoracic spine pain is causally related to her industrial injury.

Claimant also has met her burden to show she in fact suffers from physiologic pain and not just psychological pain. Although Respondents argue that Claimant's pain is entirely caused by her psychological issues and is not physiologic, this is not found

persuasive. Claimant has established that she suffers from physiologic pain as opined by Dr. Kesten, as noted in part by Dr. Gutterman, and as found through examination and notations of thoracic muscle spasms by Dr. Piccone and Dr. Barolat. Claimant has had multiple surgeries and treatment aimed at her thoracic spine. Although Claimant likely also has a psychological component to her continued pain symptoms, she has true physiologic pain and the opinion of Dr. Kesten is found persuasive.

Respondents also argue that Claimant should be weaned from all opioid medications. Although complete weaning may be an appropriate treatment plan to determine if it can alleviate Claimant's symptoms, it does not remedy Claimant's immediate problem with breakthrough pain. Claimant has established the most effective way to treat her breakthrough pain is through the use of Subsys in place of Oxycodone. She has established, more likely than not, that Subsys is both reasonable and necessary to treat her breakthrough pain. Subsys acts much more immediately than Oxycodone, does not stay in her system as long as Oxycodone, and is not thrown up by her like Oxycodone. Claimant has established that whether or not she weans from all opioid medications in the future Subsys is at this time reasonable and necessary to cure and relieve the effects of her industrial injury. Claimant's past use of Subsys allowed her to be more functional. Subsys does not stay in her system as long as Oxycodone which will also alleviate some of the problems with having Oxycodone on board constantly. It will deliver the opioids for her breakthrough pain more quickly allowing her more instant relief and the opinion of Dr. Kesten that it is the best option, short of IV for Claimant is found persuasive.

Although Respondents presented evidence that a total weaning from all opioids has been recommended by multiple physicians, the issue at hearing was limited to whether or not Subsys is reasonable and necessary to cure and relieve the effects of the industrial injury. The issue of weaning from all opioids, including Fentanyl patches, was not at issue. Making a determination that complete weaning from all opioid medicine is required would be outside the scope of issues identified by the parties for hearing. Here, the opinion of Dr. Kesten is credible and persuasive that Subsys is delivered more quickly, stays in the system for a shorter amount of time, and is a better option for Claimant than Oxycodone. The ALJ defers to his opinion as Claimant's treating provider that this is both a reasonable and necessary treatment option for Claimant. Dr. Kesten's opinions as a board certified physician in pain management, physical medicine and rehabilitation, and addiction medicine is found persuasive. His explanation for off-label use of Subsys as an appropriate usage in Claimant's specific case is found persuasive. Although Dr. Lesnak disagrees with the use of Subsys, the alternative would leave Claimant with the use of Oxycodone for breakthrough pain and Claimant has established that Oxycodone is not as effective in treating her breakthrough pain. As Subsys is the most effective way to treat her breakthrough pain, Claimant has established that it is both reasonable and necessary to cure and relieve the effects of her industrial injury.

ORDER

It is therefore ordered that:

1. Subsys is reasonable and necessary to cure and relieve the effects of Claimant's industrial injury. Claimant shall be entitled to prescriptions for Subsys in place of Oxycodone.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 15, 2015 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his April 25, 2010 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant works as a Police Officer for Employer. On April 25, 2010 he suffered an admitted industrial injury in the form of a left lateral meniscus tear. Claimant jumped a fence while chasing a suspect. He heard a "pop" and experienced immediate, sharp pain in his left knee.

2. Claimant initially received medical treatment from Authorized Treating Physician (ATP) Cynthia Kuhn, M.D. He underwent a left knee MRI that revealed a left lateral meniscus tear and degenerative changes of the lateral compartment.

3. On April 30, 2010 Claimant visited Andrew W. Parker, M.D. at Orthopedic Associates, LLC for a surgical consultation. Dr. Parker noted that the MRI revealed "a displaced lateral meniscus bucket-handle type tear" as well as "significant lateral compartment" degenerative joint disease. He diagnosed Claimant with a "left knee displaced lateral meniscus tear" and left knee "lateral degenerative joint disease."

4. On May 13, 2010 Dr. Parker performed an arthroscopy and meniscectomy of Claimant's left knee. He observed "grade 4 changes throughout the entire weight-bearing surfaces of the lateral femoral condyle and lateral tibial plateau." Dr. Parker noted that the meniscus tear was "chronic in the sense that it was bulbous and non-repairable and appeared to be old."

5. During subsequent visits with Dr. Kuehn Claimant reported that, despite having some difficulty with lateral movement of the knees, "other activities such as jogging, walking, running or using the bike have been fine." On August 31, 2010 Dr. Kuehn determined that Claimant had reached Maximum Medical Improvement (MMI) with a 17% left lower extremity impairment rating.

6. Claimant subsequently reported lower back pain as the result of an altered gait from his left knee mensicectomy. He underwent physical therapy for his back condition and returned to Dr. Kuehn on January 10, 2011. Claimant mentioned that he had experienced increasing left knee pain over the weekend because of the cold weather.

7. More than three years passed without any medical records of reported left knee pain. However, on July 21, 2014 Claimant visited Dr. Kuehn for an examination of his left knee. Claimant explained that on July 12, 2014 he awoke with left knee pain and swelling. He remarked that on the prior day he had been out jogging in his spare time at home. Claimant did not mention any specific work-related incident but expressed concern that his symptoms might be related to his left knee compartment arthritis that had been diagnosed in 2010.

8. On July 21, 2014 Claimant underwent a left knee MRI. The MRI revealed mild patellofemoral and moderate lateral compartment degenerative changes. There were no left knee fractures or significant joint effusion.

9. On July 25, 2014 Claimant returned to Dr. Kuehn for an evaluation. Dr. Kuehn recounted that Claimant had undergone a left knee meniscectomy in 2010. The procedure provided good but not complete relief. Claimant had also been diagnosed with left lateral compartment arthritis in 2010. Dr. Kuehn remarked that Claimant had experienced intermittent left knee pain since reaching MMI but she attributed his symptoms to his underlying arthritis. She concluded that Claimant's left knee symptoms were not caused by work-related activities but instead constituted an exacerbation of his underlying arthritis.

10. On November 10, 2014 Claimant returned to Dr. Parker for an examination. Claimant reported that his surgery went relatively well, but his left knee was "never entirely normal." He explained that, although his left knee continued to bother him, the symptoms did not warrant additional treatment or intervention. Dr. Parker reviewed imaging studies from Claimant's personal medical provider Kaiser and noted that they revealed "bone on bone lateral compartment" degenerative changes. He thus diagnosed Claimant with left knee lateral compartment degenerative arthritis.

11. On December 23, 2014 Claimant underwent an independent medical examination with Lynn Parry, M.D. After reviewing Claimant's medical records subsequent to his April 25, 2010 industrial injury, Dr. Parry noted that he suffered from asymptomatic arthritis that became symptomatic as a result of his meniscus injury. She explained that Claimant's left knee meniscectomy predisposed him to more difficulties in managing his arthritis and "accelerat[ed] the development of intractable arthritis." Dr. Parry specified that Claimant's left knee injury and menisectomy caused him to suffer increased arthritis and symptoms. She summarized that Claimant's left knee symptoms were "clearly related" to his 2010 industrial injury. In a January 20, 2015 addendum Dr. Parry commented that Claimant's current left knee condition constitutes an aggravation of his April 25, 2010 industrial injury.

12. On February 11, 2015 Claimant filed a Petition to Reopen his April 25, 2010 claim. Respondents subsequently sought a medical records review with John T. McBride, Jr., M.D.

13. Dr. McBride performed an initial records review but issued an addendum report on June 26, 2015. He explained that in the initial review he lacked the original

MRI films of Claimant's left knee but had subsequently reviewed them. He commented that the April 29, 2010 MRI reflected moderate to severe osteoarthritis of Claimant's left knee lateral compartment. Dr. McBride specifically noted complete loss of the articular cartilage of the lateral compartment of the knee with cystic changes in the lateral femoral condyle and degenerative sclerotic changes in the tibial plateau. He also remarked that the significant erosion of the posterior of the lateral tibial plateau reflected a long-standing degenerative process.

14. Claimant testified at the hearing in this matter. He stated that his job as a Police Officer requires him to maintain a high level of physical fitness. Claimant explained that he jogged and played softball between January 2011 and July 2014 to remain physically active. He experienced minimal left knee discomfort but did not seek medical treatment. However, by July 12, 2014 his left knee symptoms worsened and he sought treatment with Dr. Kuehn.

15. Dr. Parry testified at the hearing in this matter. She maintained that Claimant had degenerative arthritis prior to his April 25, 2010 industrial left knee injury. Noting that the meniscus is a cushion that absorbs stress, Dr. Parry explained that the removal of the meniscus caused the rapid acceleration of Claimant's pre-existing left knee degenerative arthritis.

16. Dr. McBride testified at the hearing in this matter. He agreed with Dr. Parry that a meniscectomy can often cause or accelerate chronic osteoarthritis in the knee. However, he commented that mensicectomies are a risk factor for the onset or acceleration of degenerative osteoarthritis only in those cases where the meniscus had been performing a weight-bearing function prior to its removal. Dr. McBride explained that the function of the meniscus is to distribute the weight from the femur over the surface of the tibia. Removal of a functional meniscus will reduce the weight-bearing surface and cause the knee to concentrate the force from the femur to the tibia into a much smaller area. The additional force applied to a smaller area causes the cartilage to wear away more quickly on the weight-bearing surfaces. However, Dr. McBride explained that Claimant's left lateral meniscus was no longer performing its weight-bearing function prior to the meniscectomy. Therefore, removal of the meniscus on May 13, 2010 did not change the biomechanics of the lateral compartment of the left knee. Accordingly, there was no causal connection between Claimant's meniscectomy and the onset or acceleration of degenerative arthritis.

17. Dr. McBride also explained that there were no substantial differences between Claimant's 2014 MRI images and the 2010 images. He commented that the arthritic changes over the time period were no greater than those to be expected from the natural progression of the degenerative osteoarthritic process. The MRI's thus corroborate that the May 13, 2010 left knee menisectomy did not accelerate the degenerative process in Claimant's left knee.

18. Claimant has failed to establish that it is more probably true than not that his condition has worsened and he is entitled to benefits. As a result of Claimant's left lateral meniscus tear he underwent an arthroscopy and meniscectomy on May 13,

2010. He was also diagnosed with significant left, lateral degenerative joint disease. On August 31, 2010 he reached MMI for his left knee condition. More than three years passed without any medical records of reported left knee pain. However, on July 21, 2014 Claimant returned to ATP Dr. Kuehn for an examination of his left knee. Claimant explained that on July 12, 2014 he awoke with left knee pain and swelling because he had been out jogging on the day before. Dr. Kuehn determined that Claimant had experienced intermittent left knee pain since reaching MMI but she attributed his symptoms to his underlying arthritis. She concluded that Claimant's left knee symptoms were not caused by work-related activities but instead constituted an exacerbation of his underlying arthritis.

19. After conducting an independent medical examination Dr Parry explained that Claimant's left knee meniscectomy predisposed him to more difficulties in managing his arthritis and "accelerat[ed] the development of intractable arthritis." Dr. Parry specified that Claimant's left knee injury and menisectomy caused him to suffer increased arthritis and symptoms. She summarized that Claimant's left knee symptoms were "clearly related" to his 2010 industrial injury. In a January 20, 2015 addendum Dr. Parry commented that Claimant's current left knee condition constitutes an aggravation of his April 25, 2010 industrial injury. Dr. McBride agreed with Dr. Parry that a meniscectomy can often cause or accelerate chronic osteoarthritis in the knee. However, he commented that mensicectomies are a risk factor for the onset or acceleration of degenerative osteoarthritis only in those cases where the meniscus had been performing a weight-bearing function prior to its removal. Dr. McBride explained that Claimant's left lateral meniscus was no longer performing its weight-bearing function prior to the meniscectomy. Therefore, removal of the meniscus on May 13, 2010 did not change the biomechanics of the lateral compartment of the left knee. Accordingly, there was no causal connection between Claimant's meniscectomy and the onset or acceleration of degenerative arthritis. Based on the medical records, reports of Dr. Kuehn and persuasive testimony of Dr. McBride, Claimant has failed to demonstrate that he has suffered a change in the condition of his original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that his condition has worsened and he is entitled to benefits. As a result of Claimant's left lateral meniscus tear he underwent an arthroscopy and meniscectomy on May 13, 2010. He was also diagnosed with significant left, lateral degenerative joint disease. On August 31, 2010 he reached MMI for his left knee condition. More than three years passed without any medical records of reported left knee pain. However, on July 21, 2014 Claimant returned to ATP Dr. Kuehn for an examination of his left knee. Claimant explained that on July 12, 2014 he awoke with left knee pain and swelling because he had been out jogging on the day before. Dr. Kuehn determined that Claimant had experienced intermittent left knee pain since reaching MMI but she attributed his symptoms to his underlying arthritis. She concluded that Claimant's left knee symptoms were not caused by work-related activities but instead constituted an exacerbation of his underlying arthritis.

6. As found, after conducting an independent medical examination Dr Parry explained that Claimant's left knee meniscectomy predisposed him to more difficulties in managing his arthritis and "accelerat[ed] the development of intractable arthritis." Dr. Parry specified that Claimant's left knee injury and menisectomy caused him to suffer increased arthritis and symptoms. She summarized that Claimant's left knee symptoms were "clearly related" to his 2010 industrial injury. In a January 20, 2015 addendum Dr. Parry commented that Claimant's current left knee condition constitutes an aggravation

of his April 25, 2010 industrial injury. Dr. McBride agreed with Dr. Parry that a meniscectomy can often cause or accelerate chronic osteoarthritis in the knee. However, he commented that mensicectomies are a risk factor for the onset or acceleration of degenerative osteoarthritis only in those cases where the meniscus had been performing a weight-bearing function prior to its removal. Dr. McBride explained that Claimant's left lateral meniscus was no longer performing its weight-bearing function prior to the meniscectomy. Therefore, removal of the meniscus on May 13, 2010 did not change the biomechanics of the lateral compartment of the left knee. Accordingly, there was no causal connection between Claimant's meniscectomy and the onset or acceleration of degenerative arthritis. Based on the medical records, reports of Dr. Kuehn and persuasive testimony of Dr. McBride, Claimant has failed to demonstrate that he has suffered a change in the condition of his original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request to reopen his April 25, 2010 Workers' Compensation claim is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 16, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici

#J8G37N5S0D14BSv 2

Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Has the claimant proven by a preponderance of the evidence that she is entitled to housekeeping services?

2. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a walk-in tub?

3. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a walker?

4. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a sleep number mattress?

5. Has the claimant proven by a preponderance of the evidence that the respondents should pay for a treadmill?

6. Has the claimant proven by a preponderance of the evidence that the respondents should pay for an Aqua Sport Spa?

PROCEDURAL MATTER

1. The parties filed Position Statements dated August 7, 2015. The claimant, in her Position Statement, attempted to argue that the respondents are liable for all medical services because of violations of Rule 16-10. The respondents objected to the claimant arguing this issue inasmuch as the respondents indicated that the claimant never identified a Rule 16-10 violation as an issue to be litigated at hearing in her Application for Hearing, in her discovery responses, and in counsel for the claimant's discussion of the issues prior to the taking of evidence.

2. The ALJ concludes that the issue of a violation of Rule 16-10 is not properly endorsed for hearing and was not litigated by consent; therefore, the ALJ makes no decision concerning that issue.

FINDINGS OF FACT

1. On December 10, 2009, the claimant sustained serious admitted work injuries when she was getting out of a car in the course and scope of her employment and slipped and fell on ice. The claimant's injuries included, but are not limited to low back, neck, leg, right arm and visual changes, particularly related to depth perception.

2. Prior to the December 10, 2009 industrial injury, on March 14, 2000, the claimant underwent an L3-4, L4-5, and L5-S1 decompression and bilateral L3-4, L4-5, and L5-S1 partial facetectomie, as well as foraminotomies with an L4-5 diskectomy and left posterior iliac crest bone graft with L4, L5, L5-S1 pedicle screw instrumentation with interbody fusion at L4-5 by Dr. Richard Lazar.

3. Subsequent to the December 10, 2009 industrial injury, on September 22, 2010, the claimant underwent an operative procedure which included removal of posterior pedicle screw instrumentation L4,-S1; exploration of fusion at L4-S1, revision decompression and medial facetectomies and foraminotomies L3-4, complete diskectomy and interbody fusion L3-4, placement of PEEK interbody spacer filled with bone marrow aspirate and demineralized bone paste L3-4, pedicle screw instrumentation L2-S1, posterolateral arthrodesis L2-S1 with local bone, bone marrow aspirate and demineralized bone paste.

4. On September 24, 2010, Dr. Lazar, as the authorized treating surgeon prescribed for the claimant a wheeled walker as part of the discharge orders from Penrose St. Francis Health Services for which he later provided a Certificate of Medical Necessity which the respondents failed or refused to provide and was therefore obtained by the claimant personally to assist the claimant in her activities of daily living following the multi-level back surgery.

5. On January 18, 2010, Suzanne Malis, M.D., the claimant‘s then authorized treating physician, prescribed for the claimant a TENS Unit which the respondents stipulated at hearing is currently authorized and not disputed as being reasonable, necessary and related to cure or relieve the claimant from the effects of the admitted work injury and based upon said stipulation is hereby ordered as approved.

6. Following the multiple surgeries performed by Dr. Lazar, a follow-up CT was performed which demonstrated on November 24, 2010: widespread degenerative changes throughout the visualized lower thoracic and lumbar spine; a lumbar levoscoliosis centered at approximately the L2-3 disc level. Note was made of posterior bulging of the annulus fibrosus with what appears to be a disc osteophyte complex

effacing the anterior thecal sac at the T12-L1 level primarily within a right paracentral distribution. Minimal posterior bulging of the annulus fibrosus at the L1-L2 disc level was also noted. At the L2-3 level, there was more broad-based bulging noted in the annulus fibrosus which mildly effaces the anterior thecal sac extending laterally both to the left and right. Mild effacement of the anterior thecal sac at the L3-4 disc level with a left paracentral distribution was also noted. A spacer was noted within the L3-4 disc space, as well as a spacer within the L4-5 intervertebral disc space. Small disc osteophyte complex was seen arising from the posterior aspect of the L4-5 disc level and the patient was noted to be status post L4 posterior laminectomy.

7. Further objective testing was performed by x-ray on January 9, 2013 which found postoperative decompression and fusion changes. Bilateral pedicle screws from L2-S1 were seen with vertical stabilizing rod fixation. The right-sided rod was noted not to reach the S1 pedicle screw. Anterior fusion cages at L4-5 and space material at L3-4 was again noted. Posterolateral intertransverse bone graft and laminectomy defects in the lower lumbar region were also present. Worsening spondylosis with developing bridging osteophyte at L1-2 above the fusion was identified and rotational S-shaped scoliosis is seen.

8. X-rays were also performed on January 8, 2014 which noted a levoconvex scoliosis centered at L1-2 with a mild increase in the acuteness of the angle at the level with bending to the right.

9. An MRI of the lumbar spine without contrast was performed on January 17, 2014. The findings included a levocurvature of the thoracolumbar spine. Although the MRI was not a dedicated scoliosis series, it was found that the levocurvature measured about 23 degrees. A 2 mm of retrolisthesis of L2 on L3 was unchanged. Posterior decompression laminectomy and posterior spinal fusion were seen from L2 through S1. A medial right upper renal pole cyst is also again seen, although not fully characterized on the exam. There was an increase in discogenic change at L1-L2, now with moderate edema, especially on the right side, and mild fatty endplate change on the left side. Scattered fatty discogenic changes at the other levels were again seen. There was an interbody bone graft at L4-L5 with questionable small strut of bony bridging anteriorly. L1-L2 noted an increase in right-lateralizing disc bulging which mildly narrows the right neural foramen and the canal is mildly narrowed on the right. The final impression included: Interval increase in disc bulging, endplate spurring and discogenic change at L1-L2, worse on the right with mild right neural foraminal and canal narrowing with a stable small right posterolateral disc herniation at T12-L1.

10. X-rays were again performed on September 10, 2014 which also found instrumented anterior and posterior fusion evident at L2-S1 post decompression, vertical stabilizing bar placement again seen which did not extend to the right S1 pedicle screw. No change was noted in the alignment with abrupt angulation at the L1-2 interval with asymmetric spondylosis and sclerosis at that level.

11. Additional MRI testing was performed on December 21, 2014 of the thoracic spine which found T7-T-8 moderate to large-sized left paracentral and axillary disc protrusion resulting in left ventral cord contouring. T8-T-9 mild to moderate sized right paracentral subligamentous disc protrusion which does not appear to contact the lower thoracic cord though it does result in right ventral cord contouring. T9-T-10 mild sized broad based right paracentral and axillary subligamentous disc protrusion; T-10-T11 mild-sized broad-based right paracentral subligamentous disc protrustion; T12-L1 moderate-sized right paracentral and axillary subligamentous disc protrusion partially effacing the right ventral subarachnoid space without definite nerve root impingement; subtle bandlike increased T2 and STIR signal seen centrally within the thoracic cord at T7 retrovertebral level extending distally which could represent an evolving syrinx secondary to the spondylotic changes.

12. Jack Rook M.D., the claimant's authorized treating physician, in conjunction with other authorized treating physicians, have prescribed a number of housekeeping/essential services and various medical devices needed by the claimant to cure and relieve her of her admitted injuries which appear from the objective testing to continue to be worsening with time. Dr. Rook testified credibly at hearing regarding the need for some of these services and assistive devices as found below.

13. On January 10, 2011, Dr. Rook first prescribed essential services for the claimant to include housekeeping services for 8 hours per week. By February 21, 2011, Dr. Rook increased the recommendation for said services to 15 hours per week. The claimant's significant other and mother, with whom she lived, provided said services for her during this time. On March 20, 2011, Dr. Rook provided a detailed letter in support of his prescription for said services in which he stated the claimant "continues to experience severe back pain and she is on high dose opioid analgesic therapy. She also has neurogenic pain involving her lower extremities. Objective supporting documentation would include the patient's surgical reports as well as the postoperative CT myelogram which was ordered by her surgeon. Because of her pain and the extent of her fusion, the patient is currently functioning in a sub-sedentary physical demand level. She is not able to manage her home…because of her clinical condition. Therefore, it is my opinion that essential services for housework…are medically necessary and related to her occupational injury claim." Dr. Rook agreed that having a

friend provide the services was reasonable if the friend charged a comparable rate to a cleaning service.

14. The claimant's authorized treating surgeon, Jeffrey Kleiner, M.D., recommended a walk-in tub on October 26, 2011. He noted the claimant being unable to care for herself hygienically because of difficulty with flexing her hips to step over the curb of the bathtub due to the severe back pain. Dr. Kleiner opined that due to the severe back pain associated with the pseudarthrosis which is a consequence of her work-related injury, the walk-in tub was reasonable to help with the claimant's hygiene and necessary since all other strategies for self-hygiene which have been tried have failed to assist her. On said date, Dr. Kleiner also provided a similar prescription for essential services as was provided by Dr. Rook, to include *inter alia* assistance with dishes, bathroom cleaning, window cleaning, vacuuming, sweeping, and mopping.

15. By December 5, 2011, again due to the continued deterioration of the claimant's medical condition, Dr. Rook recommended personal assistance services for the claimant recommending "two hours per day, seven days per week to assist her with cleaning (floors, windows, bathrooms, kitchen) vacuuming, doing dishes, laundry and shopping. He also opined the patient would now require additional assistance for lower extremity dressing, including shoes and socks, which she was unable to do herself. These services were again being provided by the claimant's mother and significant other. At that time, additional surgery was tentatively scheduled to be performed by Dr. Kleiner for treatment of the pseudoarthrosis which was anticipated to include removal of her hardware and refusion using a posterior approach.

16. While waiting for the surgery to be performed, the claimant's moist heating pad ceased operation and Dr. Rook provided a prescription for said device as being medically necessary and related to her occupational injury claim to cure and relieve the claimant of said injuries.

17. On February 7, 2014, Dr. Kleiner, again recommends essential services since the claimant was having difficulty by this point performing any of her own activities of daily living. He went on to recommend a custom cane so the height could be altered based upon her degree of lean caused by the work-related injuries.

18. Complications to the claimant's medical condition arose and surgery was postponed which additional consultations and pre-surgery testing were performed. Dr. Rook noted on March 27, 2014 that the claimant had gotten "very weak over the past few years due to inactivity related to her back pain." He provided a prescription for a treadmill to use to strengthen her legs and back in preparation for the upcoming surgery

and he considered this modality to be one which would also be helpful postoperatively. The claimant purchased the recommended treadmill on sale at a price of $1,449.99 plus tax. Dr. Rook provided further support of the purchase in his May 8, 2014 progress report in which he stated: "[t]he reasoning for the treadmill is to improve her endurance and lower extremity strength in preparation for surgery. I also believe that will help with her postoperative recovery, which likely will be prolonged given the number of years that have passed since her on-the-job injury in conjunction with the severity of her current clinical condition." He further stated: "I do believe the treadmill that I requested is medically necessary, reasonable, and related to her occupational injury claim."

19. On October 21, 2014, Dr. Rook again prescribed a new moist heating pad since her current unit was in disrepair and also opined that due to the discomfort she was having with sleeping she required an orthopedic mattress or adjustable bed.

20. Dr. Rook personally contacted the claimant's surgeon, Dr. Kleiner. Dr. Kleiner informed Dr. Rook that due to the claimant's progressive deteriorating posture and spinal alignment that he no longer was comfortable performing what originally was felt to be a simple repair of a pseudoarthrosis. Dr. Kleiner was recommending in December 2014, a more extensive surgical procedure to straighten out the claimant's spine and was recommending that she be evaluated by a spinal reconstruction surgeon. The claimant is unable to stand up straight by this point, leans towards her right and has kyphotic posturing.

21. On January 7, 2015, Dr. Rook again opines the medical necessity, reasonableness and relatedness of an adjustable bed given her spinal condition. Disc protrusions were now noted at C5-6 and C6-7 resulting in mild spinal stenosis and ventral cord flattening without code edema and at the C2-3 level changes resulting in right-sided neural foraminal narrowing which could affect the exiting right C3 nerve root were noted. Dr. Rook provided an updated prescription for essential services noting her need for assistance with activities of daily living including dressing, bathing, housework and transportation. Essential services were prescribed at four hours per day. On this date Dr. Rook also prescribed a wheeled walker to assist the claimant in her independent household and toileting activities.

22. On February 18, 2015, Dr. Rook again followed the claimant's medical progress and opined in his Outpatient Progress Note that the claimant again was provided a prescription for a moist heating pad and TENS Unit. The respondents have admitted pre-authorization for the TENS Unit and it is therefore herein ordered.

23. Steven J. Barrick, D.O. provided the claimant a prescription for an Aquafit Sport therapy tub on February 24, 2015. The therapy tub provides a slight current against which the claimant walks to strength her muscles in a manner which provides more buoyancy and accommodates the claimant's phobia of germs present in public water therapy locations.

24. The respondents obtained their first medical records review by Dr. Nicholas Olsen on July 26, 2011. An IME was performed by Dr. Olsen on August 24, 2011 when a second recommendation for denial of services and devices was made. The respondents' third medical records review was performed by Dr. Olsen on May 7, 2015 which is more specifically directed toward the recommendation made for a spinal cord stimulator, which is not the subject before this ALJ at this hearing.

25. Dr. Olsen opined on August 24, 2011 and again at hearing that the claimant "would not be precluded from participating in light household chores" but should require assistance with heavy household chores. His opinion was that the respondents should not be required to pay for such services for the claimant, however, because those services should be performed by other members of the household without compensation and therefore his opinion was that she was not in need of any essential services. He also opined similarly about all devices recommended by all treating providers and simply not being needed or medically necessary to treat the claimant's condition.

26. Dr. Olsen opined that the claimant requests for a treadmill, an orthopedic bed or a Sleep Number bed, an Aquafit Sport Therapy Spa, and a walk-in tub were not reasonable or necessary for the claimant's work-related condition. The ALJ finds these opinions of Dr. Olsen to be credible and persuasive.

27. The ALJ finds that the claimant has established that it is more likely than not that she requires essential services for activities of daily living as opined by Dr. Rook for four hours per day and seven days a week.

28. The ALJ finds that the claimant has established that it is more likely than not that she requires a moist heating pad as recommended by Dr. Rook.

29. The ALJ finds that the claimant has established that it is more likely than not that she requires a wheeled walker as recommended by Dr. Rook. Dr. Rook opined that the claimant presently can only shuffle her feet which the ALJ infers would indicate the need for a wheeled walker.

30. The ALJ finds that the claimant has failed to establish that it is more likely than not that she requires a treadmill. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of a treadmill.

31. The ALJ finds that, given the essential services ordered herein and the opinion of Dr. Olsen that the Guidelines do not support the prescription for a specialized bed, the claimant has failed to establish that it is more likely than not that she requires an orthopedic bed or a sleep number bed.

32. The ALJ finds that the claimant has failed to establish that it is more likely than not that she requires an Aquafit Sport Therapy Spa. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of a treadmill an Aquafit Sport Therapy Spa.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that she requires a walk-in tub. Given the essential services ordered herein, the ALJ infers that the claimant will have assistance into and out of the tub.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents thus are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As hereby found based upon the evidence presented at hearing, the claimant showed it more probably true than not that the treatment recommended of essential services, a wheeled walker with brakes, and moist heating pads are reasonably necessary and casually related to the claimant's admitted industrial injury and are therefore the liability of the respondents.

7. The determination of whether a particular treatment is reasonable and necessary is a question of fact for the ALJ *City & County of Denver School Dist 1 v. ICAO,* 682 P.2d 513 (Colo. App. 1984) and the provision for payment of essential services is generally seen reasonable when the claimant requires *inter alia* assistance with medications, hygiene and nutrition. *Stormy Hebrew v. Dairy Queen,* W.C. 4-155-507 (Oct. 25, 2002).

8. As found, the claimant proved by a preponderance of the evidence that she required the assistance of others to provide the prescribed essential services. The claimant has also proved by a preponderance of the evidence that the reasonable value for the services provided those persons should be set by the fee schedule for such similar services.

9. The ALJ concludes that the respondents shall pay, at the fee schedule rate, for fours per day and seven days per week, beginning with the date of service of this order, for reasonably necessary medical benefits as sought by the claimant, including, all essential services recommended by the authorized treating physicians, wheeled walker with brakes, and most heating pads.

10. As found above the claimant has failed to establish by a preponderance of the evidence that the respondents are liable for the provision of a treadmill, an orthopedic bed or Sleep Number bed, an Aquafit Sport Therapy Spa, or a walk-in tub.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that she requires essential services for activities of daily living as opined by Dr. Rook for four hours per day and seven days a week.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that she requires a moist heating pad as recommended by Dr. Rook.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that she requires a wheeled walker as recommended by Dr. Rook. Dr. Rook opined that the claimant presently can only shuffle her feet which the ALJ infers would indicate the need for a wheeled walker.

14. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she requires a treadmill. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of a treadmill.

15. The ALJ concludes that, given the essential services ordered herein and the opinion of Dr. Olsen that the Guidelines do not support the prescription for a specialized bed, the claimant has failed to establish by a preponderance of the evidence that she requires an orthopedic bed or a sleep number bed.

16. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she requires an Aquafit Sport Therapy Spa. Dr. Rook opined that the claimant presently can only shuffle her feet, which the ALJ infers would contraindicate the use of an Aquafit Sport Therapy Spa.

17. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she requires a walk-in tub. Given the essential services ordered herein, the ALJ infers that the claimant will have assistance into and out of the tub.

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay for essential services for the claimant at the fee schedule rate, for fours per day and seven days per week, beginning with the date of service of this order.

2. The respondent-insurer shall pay for the provision of a moist heating pad.

3. The respondent-insurer shall pay for the provision of a wheeled walker as recommended by Dr. Rook.

4. The claimant's request for treadmill is denied and dismissed.

5. The claimant's request for an orthopedic bed or a Sleep Number Bed is denied and dismissed.

6. The claimant's request for an Aquafit Sport Therapy Spa is denied and dismissed.

7. The claimant's request for a walk-in tub is denied and dismissed.

8. Any and all issues not determined herein, and not closed by operation of law, are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: September 24, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination physician that she reached maximum medical improvement as of February 2, 2011 and that she suffered no permanent impairment.

2. Determination of Claimant's average weekly wage.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from October 4, 2010 through October 7, 2010 and from October 21, 2010 through November 10, 2013.

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary partial disability benefits from November 11, 2013 through June 18, 2015.

5. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of continued medical maintenance benefits.

6. Whether Claimant has established by a preponderance of the evidence that the emergent treatment as well as the treatment provided by Dr. Chimonas, Dr. Martin, and PA Peterson was authorized.

FINDINGS OF FACT

1. Claimant worked for Employer as a customer care representative beginning in approximately 2001. Claimant's duties included handling inbound calls, taking customer payments over the telephone, and setting up payment plans/arrangements with customers. Claimant had a brief absence from employment in May of 2005 and returned to employment in March of 2006.

2. Due to her requirement of accessing customers' financial information, Claimant was subject to background checks every six months which she always passed.

3. On October 4, 2010 while so employed, Claimant slipped and fell on Employer's bathroom floor. Claimant landed on her back and did not lose consciousness.

4. An ambulance was called and Claimant was transported to the emergency room at North Colorado Medical Center. *See* Exhibit 4.

5. Claimant arrived at North Colorado Medical Center at approximately 3:18 p.m. She was evaluated and was diagnosed with closed head trauma status post fall. She was discharged at 5:09 p.m. and was to follow up with her primary care physician. *See* Exhibit 15.

6. Claimant did not work the following day due to her pain from the injury. On October 6, 2010 Claimant attempted to return to work but the pain was intolerable and she was referred to Employer's workers' compensation provider.

7. On October 6, 2010 Claimant was evaluated by Marc-Andre Chimonas, M.D. Claimant reported pain in the right side of her neck, center of her thoracic spine, and lumbar spine radiating to the flanks. Claimant reported losing her footing on a wet floor at work and falling backwards landing on her back and striking her head against the floor. Claimant reported that at the emergency department she had CT scans of her head and neck which were negative. Dr. Chimonas assessed her with concussion, cervical strain, thoracic strain, and strain of the lumbar region. Dr. Chimonas provided a work status of no work capacity. *See* Exhibit 16.

8. On October 7, 2010 Claimant was evaluated by Dr. Chimonas. Claimant reported improvement overnight, that her neck pain had improved slightly, and that her headaches were becoming less frequent. Claimant reported her primary complaint as back pain. Dr. Chimonas provided a work status of restricted duty with a maximum of 4 hour shifts and with a work space allowing standing or sitting and changing positions as Claimant felt necessary. *See* Exhibit 16.

9. On October 8, 2010 Claimant returned to work. Employer accommodated her work restrictions and she continued to work within her restrictions until October 21, 2010. Although she was working within her restrictions of 4 hour shifts, Claimant did not establish that she suffered any wage loss during this period of time.

10. On October 12, 2010 Claimant was evaluated by Dr. Chimonas. Claimant continued to report pain in her neck that was improving as well as pain in her back that she reported was getting worse. Dr. Chimonas provided a continued work status of restricted duty with maximum 4 hour shifts and with a work space allowing standing or sitting and changing positions as Claimant felt necessary. *See* Exhibit 16.

11. On October 21, 2010 Employer advised Claimant that they no longer had light duty work available for her and Claimant stopped working for Employer. Claimant did not work again for any employer until November of 2013. Claimant did not look for work during this period of time.

12. On November 9, 2010 Claimant was evaluated by Dr. Chimonas. Claimant reported that her headaches, pain in her cervical spine, and pain in her thoracic spine had nearly completely resolved but that she had persistent pain in the center of her lower lumbar spine that was not improving. Dr. Chimonas noted that Claimant was not currently working and was not looking for work. Dr. Chimonas assessed resolved concussion, resolved cervical strain, resolved thoracic strain, and strain of the lumbar region. Dr. Chimonas provided a work status of restricted duty with no lifting of more than 10 pounds and a 5 minute stretch break every hour. *See* Exhibit 16.

13. Claimant was evaluated by Dr. Chimonas on November 16, 2010, November 23, 2010, and December 8, 2010. Dr. Chimonas continued his assessment of strain of the lumbar region on these visits and he continued the restricted duty work status with restrictions of lifting no more than 10 pounds and a 5 minute stretch break every hour. *See* Exhibit 16.

14. On December 22, 2010 Claimant was evaluated by Dr. Chimonas. Dr. Chimonas noted it had been 10 weeks since the onset of pain and that Claimant continued to have pain in the low back. Dr. Chimonas noted that Claimant's pain had not improved and that Claimant was willing to consider an injection or surgery as a treatment option. Dr. Chimonas requested an MRI be performed and continued the work restrictions. Dr. Chimonas noted that Claimant had failed conservative treatment and that an MRI would be performed as part of an evaluation for injection or surgery. *See* Exhibit 16.

15. On January 3, 2011 Claimant underwent an MRI of her lumbar spine interpreted by Sarah Jess, M.D. Dr. Jess noted Claimant had mild degenerative facet arthropathy in the lower lumbar spine without significant spinal or foraminal stenosis, mild degenerative disc disease in the lower thoracic spine worst at T11-12 where there is mild right lateral recess and mild right foraminal stenosis, an annular tear at T11-12, and left lateral curvature of the lumbar spine which may be positional or related to muscle spasm. *See* Exhibit 18.

16. On January 7, 2011 Claimant was evaluated by Dr. Chimonas. Claimant reported continued pain in the lumbar spine. Dr. Chimonas noted a small bulge at T10-T11 that did not cause foraminal stenosis and did not impinge on the spinal cord was shown by MRI and that the MRI also showed degenerative facet hypertrophy at L4-5 and L5-S1. He noted otherwise her MRI was unremarkable. Dr. Chimonas opined that the T10-T11 bulge was probably not causing Claimant's pain. Dr. Chimonas noted again that Claimant had failed conservative treatment and Claimant indicated she would be willing to undergo an injection. Dr. Chimonas continued her work restrictions and referred her to see if she was a candidate for diagnostic or therapeutic facet injection. *See* Exhibit 16.

17. On January 27, 2011 Claimant was evaluated by Rebekah Martin, M.D. Dr. Martin gave the impression that Claimant had low back pain most consistent with

lumbar facet syndrome and lumbar spondylosis. Dr. Martin discussed with Claimant at length doing bilateral L4-5 and L5-S1injections and Claimant wished to give it more consideration before having the injections done. Dr. Martin agreed with work restrictions of a 10 pound weight limit and recommended Claimant limit any lumbar extension activity and limit lumbar lifting, bending, and stooping. Dr. Martin noted that Claimant would return for follow up evaluation or return sooner if she decided to undergo facet joint injections. *See* Exhibit 19.

18. On February 2, 2011 Claimant was evaluated by Dr. Chimonas. Claimant reported continued pain in the lumbar spine. Claimant reported she was not working and not looking for work. Dr. Chimonas opined that because Claimant had undergone extensive therapy and chiropractic manipulations without improvement that he did not think continued therapy would benefit Claimant. He recommended facet injections but noted Claimant was not interested in facet injections and that she wished to just continue with medications to control her pain. Dr. Chimonas opined that there was no additional treatment that would benefit Claimant. Dr. Chimonas opined that Claimant did not have a ratable condition as her pain did not correlate to a single lesion with demonstrable objective findings and that she had no permanent impairment. Dr. Chimonas opined that Claimant was at maximum medical improvement (MMI) and released her to regular duty work status. Dr. Chimonas recommended refills of tramadol and ibuprofen for three months as the only recommendation for maintenance care. Dr. Chimonas did not recommend any further medical treatment other than the prescription refills. *See* Exhibit 1.

19. On March 24, 2011 Respondents filed a Final Admission of Liability (FAL). The FAL admitted for medical benefits to date, a 0 % impairment, and no medical maintenance benefits after MMI. The FAL noted a MMI date of February 2, 2011.

20. On April 22, 2011 Claimant filed an objection to the FAL and filed a notice and proposal for a Division Independent Medical Examination (DIME).

21. Shortly after being placed at MMI by Dr. Chimonas, Claimant attempted to fill prescriptions for tramadol and ibuprofen as part of the recommended maintenance care. Insurer denied payment for the prescriptions.

22. Claimant did not present any evidence that she reported to Insurer the denial of payment for medications nor did she request they pay for the medications. Claimant did not submit a written request to change authorized treating providers due to a failure to treat for non-medical reasons or for due to the denial of payment of the prescriptions.

23. On May 22, 2011 Claimant sought treatment with her personal care provider, Jim Peterson, P.A.-C. Claimant was not referred to PA Peterson by a workers' compensation physician. PA Peterson noted Claimant's continued back pain. Claimant reported to PA Peterson that she was fired from employment one week after her injury after being advised that she had the wrong social security number. Claimant reported

being currently unemployed. PA Peterson noted that Claimant had a three year old and one year old at home. He performed an examination and recommended Claimant continue with her medication and that she undergo a multi-disciplinary care plan for de-conditioning, range of motion, and strengthening exercises. *See* Exhibit 20.

24. On July 11, 2011 PA Peterson evaluated Claimant and again recommended she continue with medication and therapies. PA Peterson also prescribed hydrocodone for her pain. *See* Exhibit 20.

25. From 2011 through 2014 the parties had ongoing disputes not addressed by this order.

26. On February 2, 2015 Claimant underwent a DIME performed by Clarence Henke, M.D. Dr. Henke issued a DIME report on February 24, 2015. Dr. Henke opined that Claimant was moderately obese and had slight levoscoliosis curvature at the mid thoracic level of her spine. He opined that her lumbar spine ranges of motion were moderately restricted by the enlarged abdomen and were approximately: flexion 30 degrees, extension 20 degrees, and bilateral rotation 30 degrees. Dr. Henke assessed resolved concussion, resolved neck strain, resolved thoracic strain, and partially resolved lumbar strain. Dr. Henke noted that the MRI lumbar spine identified moderate degenerative disc disease in the lower thoracic spine with annular tear of disc at T11-12 and L4-5 and L5-S1 bilateral facet hypertrophy without significant central canal or foraminal stenosis. Dr. Henke noted that Claimant had declined facet injections and that she wanted to follow her own home program and take medications as needed. Dr. Henke opined that Claimant was very obese and de-conditioned and recommended she follow a prescribed diet management program and exercise program to reduce her BMI level to 25. *See* Exhibit H.

27. Dr. Henke opined that Claimant had reached MMI on February 2, 2011 and opined that she had no permanent impairment rating. Dr. Henke did not recommend any medical maintenance care. *See* Exhibit H.

28. On March 9, 2015 Respondents filed a FAL consistent with DIME physician Dr. Henke's report.

29. On April 8, 2015 Claimant filed an Application for Hearing seeking to overcome the DIME physician's opinion.

30. On June 18, 2015 Jack Rook, M.D. evaluated Claimant. Dr. Rook noted that Claimant was referred to him for commentary regarding the DIME. Claimant reported continued low back pain. Dr. Rook performed lumbar range of motion testing per AMA criteria. Dr. Rook diagnosed chronic low back pain: myofascial pain syndrome, facet mediated pain, right sided sacroiliac joint dysfunction, and an essentially negative lower extremity neurological examination. Dr. Rook opined that DIME physician Dr. Henke did not abide by the level II accreditation process or criteria outlined in the AMA guides to the evaluation of permanent impairment, third edition. Dr.

Rook noted Dr. Henke's approximations of lumbar range of motion restrictions and opined that noting approximations and not performing actual measurements was highly unusual. Dr. Rook opined that Dr. Henke's report was incomplete. *See* Exhibit 21.

31. Dr. Rook opined that Claimant has functional limitations associated with her chronic low back pain and that she has objective findings both on physical examination and on diagnostic imaging studies. He opined that she warranted a permanent impairment rating of 15% whole person. Dr. Rook opined that Claimant warranted a Table 53 impairment for chronic low back pain associated with muscle spasms and lumber facet arthropathy changes which accounted for a 5% impairment. He opined that he then calculated an additional 10% whole person impairment based on lumbar range of motion data he obtained. Dr. Rook noted that Claimant did not wish to pursue any additional treatment at this point in time and therefore opined that she had reached MMI. *See* Exhibit 21.

32. At hearing, Dr. Rook testified consistent with his report. Dr. Rook opined that annular tears are usually the result of trauma but that Claimant's facet degenerative changes were longstanding. He opined that Claimant had a table 53 diagnosis and that both Dr. Chimonas and Dr. Henke erred. He opined that facet injections recommended in January of 2011 would have been diagnostic and possibly therapeutic and was unsure why Claimant was placed at MMI rather than being given injections. He opined that facet injections could be done as maintenance treatment and that it would be reasonable to have anti-inflammatory and mild pain relief medications for maintenance. He opined that surgery would not be recommended for Claimant's annular tear. Dr. Rook also noted that he had previously believed Claimant declined facet injections so agreed with February 2, 2011 as the correct MMI date. However, he opined that if Claimant had wanted the injections it would have altered his MMI opinion.

33. Dr. Rook opined that Dr. Henke erred in his DIME by failing to follow the Division and the AMA Guidelines. He opined that Dr. Henke should have used an inclinometer to obtain range of motion testing results and that Dr. Henke should have filled out Figure 83, a worksheet form, for her range of motion measurements. He opined that both Dr. Chimonas and Dr. Henke made gross errors by failing to find a Table 53 diagnosis and perform proper range of motion testing.

34. The conflict between Dr. Rook's rating of permanent impairment and the zero rating provided by DIME physician Dr. Henke (and supported by Dr. Chimonas) amounts, at most, to a difference of medical opinion. Dr. Rook believes Claimant has a Table 53 diagnosis. Both the DIME physician and Claimant's treating provider do not believe she has a Table 53 diagnosis.

35. The testimony of Claimant at hearing is not found persuasive. Claimant's testimony surrounding whether or not she wished to undergo facet injections when offered in 2011 is inconsistent with multiple documented medical reports made more contemporaneously with her injury that occurred approximately five years ago. Claimant reported to Dr. Chimonas, Dr. Martin, and more recently to Dr. Henke that she

did not wish to undergo injections. Claimant's testimony at hearing that she did wish to undergo injections and that she called and was denied the opportunity to undergo injections is not credible or persuasive and is inconsistent with the multiple medical reports made more contemporaneously with her treatment.

36. The emergent treatment as well as the treatment provided by Dr. Chimonas and Dr. Martin was authorized.

37. The treatment provided by PA Peterson was not authorized, was not in the chain of referral from an authorized treating provider, and the right of selection had not passed to Claimant based on Insurer's failure to pay for prescription medications.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion

The DIME physician's findings concerning the date of MMI and the degree of medical impairment are binding on the parties unless overcome by clear and convincing evidence. *See* § 8-42-107(8)(b)(III) & (8)(c), C.R.S. "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). In other words, a DIME physician's findings may be not overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. Whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating has been overcome by clear and convincing evidence are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000). A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004).

Claimant has failed to overcome Dr. Henke's DIME opinion by clear and convincing evidence. Claimant failed to show that it is highly probable that Dr. Henke was incorrect in determining that Claimant had 0% permanent impairment or that Claimant reached MMI on February 2, 2011. Although the DIME physician did not perform range of motion testing consistent with the AMA guidelines, range of motion testing is not required unless a physician first finds that a Claimant has a ratable condition and a Table 53 diagnosis. Dr. Henke did not find that Claimant had a Table 53 diagnosis and found that she had no permanent impairment. His opinion is consistent with the opinion of her treating physician Dr. Chimonas who opined that Claimant did not have a ratable condition as her pain did not correlate to a single lesion with demonstrable objective findings. Table 53 provides for impairments due to specific disorders of the spine related to intervetebral disc or other soft-tissue lesions. Claimant's authorized treating provider Dr. Chimonas examined Claimant on February 2, 2011 and determined that although Claimant was diffusely tender throughout the lower spine, she had no appreciable lumbar muscle spasms or increased tone and that there was no additional treatment that would benefit Claimant. He concluded Claimant did not have a ratable condition under Table 53, had no impairment, and was at MMI.

Dr. Henke similarly concluded that Claimant had no impairment and had reached MMI on February 2, 2011.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S**.** The persuasive evidence establishes that Claimant told Dr. Chimonas that she did not wish to undergo facet injections at her February 2, 2011 appointment. Claimant similarly reported to Dr. Martin and DIME physician Dr. Henke that she did not wish to undergo injections. Placing Claimant at MMI on February 2, 2011 was proper as at that point there were no further treatment options reasonably expected to improve Claimant's condition. Dr. Chimonas opined that as of February 2, 2011 Claimant had reached MMI and the DIME physician came to the same conclusion. Claimant has failed to show by clear and convincing evidence that the DIME physician's determination of MMI was in error or that there was further treatment after February 2, 2011 that was reasonably expected to improve her lumbar condition.

Although Claimant argues that Dr. Henke's opinion is in error and is substantially flawed, this is not persuasive. Rather, Dr. Henke's opinion is supported by the same opinion reached by Claimant's treating provider Dr. Chimonas. The differing opinion of Dr. Rook shows merely a difference in medical opinion as to whether Claimant qualifies for a permanent impairment rating based on the use of Table 53. Dr. Chimonas and Dr. Henke opined that she does not, and Dr. Rook opined that she does. This difference in opinion does not show that the DIME physician erred in failing to perform range of motion testing for the lumbar spine using an inclinometer as range of motion testing is not required unless and until a Table 53 diagnosis exists. As Dr. Henke opined that Claimant did not have a Table 53 diagnosis warranting impairment, he was not required to perform range of motion testing. Claimant has failed to show by clear and convincing evidence that the DIME physician's opinion that she suffered 0% impairment and reached MMI on February 2, 2011 was incorrect. Rather, the DIME physician's opinion is supported by the same opinion as Claimant's treating provider and there is merely a difference in opinion between DIME physician Dr. Henke and Dr. Rook.

Temporary Total Disability

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that her industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires that Claimant establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v.*

Ace Electric, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Section 8-42-105(3)(a), C.R.S., provides that TTD benefits shall continue until Claimant reaches MMI. Section 8-42-107(8)(b)(I), C.R.S., provides that "an authorized treating physician shall make a determination as to when an injured employee reaches maximum medical improvement." If a party disputes the determination of an ATP that the claimant has reached MMI, that party may elect to seek a Division-sponsored independent medical examination (DIME) in accordance with § 8-42-107.2, C.R.S. Where the claimant proves an entitlement to TTD benefits, the burden of proof rests with the respondents to establish that the claimant has been placed at MMI by an ATP and justify a termination of TTD benefits under § 8-42-105(3)(a). *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P. 3d 790 (Colo. App. 2000); *Rakestraw v. American Medical Response,* W.C. No. 4-384-349 (I.C.A.O. October 3, 2005).

Claimant has established that after her industrial injury on October 4, 2010, she was off work through October 7, 2010. When she returned on October 8, 2010 she was accommodated within the work restrictions given to her by her treating provider until October 21, 2010. Starting October 21, 2010 Employer was unable to accommodate Claimant's restrictions or provide her light duty work. Claimant was unable to work and earn wages as of October 21, 2010 due to her industrial injury and Employer's unwillingness to accommodate her restrictions as of that date. Therefore, Claimant has established a causal connection between her industrial injury and her subsequent wage loss. Section 8-42-103(1)(b), C.R.S. provides that if the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. Claimant has shown a causal connection between her industrial injury and her subsequent work restrictions and wage loss and has shown that her period of disability lasted longer than two weeks. Claimant's period of disability lasted until she was placed at MMI with no restrictions on February 2, 2011. Claimant has therefore established an entitlement to TTD benefits from October 4, 2010 through October 7, 2010 and again from October 21, 2010 through February 2, 2011 when she was placed at MMI. Once she was placed at MMI by her authorized treating provider, her entitlement to TTD benefits ceased.

Claimant's arguments that she is entitled to TTD benefits from February 2, 2011 through November 10, 2013 is not persuasive. Claimant's entitlement to TTD benefits end as of the date she reaches MMI which, as found above, was on February 2, 2011. After February 2, 2011 Claimant was released to full duty with no work restrictions and was at MMI. Claimant similarly has failed to show an entitlement to temporary partial disability (TPD) benefits from November 11, 2013 through June 18, 2015 as she was

properly placed at MMI on February 2, 2011 and no entitlement to TPD benefits exists in this case.

Authorized Providers

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008). The Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. *See* § 8-43-404 (5)(a)(I)(A), C.R.S.; *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is normally a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Claimant has established that the initial emergent treatment as well as the treatment provided by Dr. Chimonas and Dr. Martin was authorized. Claimant has failed to show that the treatment she sought with her personal provider PA Peterson was authorized. Claimant's argument that Insurer's refusal to pay for her prescription medications provided her with the ability to choose her own physician to further treat her workers' compensation injury is not persuasive. Claimant was evaluated by her personal provider, PA Peterson, after she had received significant treatment from an authorized treating provider, after she had been placed at MMI with no impairment, and after a FAL had been filed. Claimant's argument that she was denied medical treatment and was denied access to medical care is not persuasive. Although Insurer, in err, failed to pay for her prescription medications this failure to pay for prescription medications is not equivalent to an authorized physician refusing to provide medical treatment nor is it equivalent to a discharge from medical care for nonmedical reasons. Here, the authorized physician Dr. Chimonas did not refuse to provide medical treatment nor did Dr. Chimonas discharge Claimant from medical care for nonmedical reasons. Rather, Claimant underwent extensive treatment with Dr. Chimonas from October 6, 2010 through February 2, 2011 when he opined she was at MMI with no impairment and no need for future medical treatment other than a short period of continued prescription medications. Claimant has not shown that she contacted Insurer about the failure to pay for medications or that she made a request that they pay for the medications. She also has not shown that she submitted a written request to allow her to change physicians. Claimant has not established that a basis exists to support her argument that the right to select a physician passed to her in this case. Therefore, the treatment she sought on her own with her personal provider is not authorized and PA Peterson did not become an authorized provider in this matter.

Grover Medical Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

Claimant has failed to establish that future medical treatment is reasonably necessary to relieve the effects of her industrial injury or to prevent further deterioration of her condition. Claimant's industrial injury was suffered approximately five years ago. The most recent evaluations by DIME physician Dr. Henke and by Claimant's retained physician Dr. Rook do not support or show substantial evidence that future medical treatment is reasonable and necessary to treat her injury. Although the doctors reference the recommendations made back in 2011 that Claimant undergo facet injections, there is no opinion that facet injections now would still reasonably be necessary to relieve the effects of Claimant's injury or would reasonably be necessary to prevent further deterioration of Claimant's current condition. Further, although Dr. Chimonas recommended three months of continued prescription medications in February of 2011, Claimant has failed to show that she still has a need for these prescription medications at this time several years later when her authorized treating provider had only recommended them for three months. Claimant has not presented sufficient evidence that facet injections or any other medical treatment is needed now or in the future to relieve the effects of her 2010 industrial injury or to prevent further deterioration of her condition. Therefore, her request for a general award of Grover medical benefits is denied.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The evidence presented by Claimant indicates that she was paid $11.92 per hour working 40 hours a week at the time she suffered her industrial injury. Therefore, at the time of her injury she was earning an average weekly wage of $476.80. Any indemnity benefits shall be based upon this average weekly wage.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME opinion by clear and convincing evidence. Claimant has no permanent impairment and reached MMI on February 2, 2011.

2. Claimant has established an entitlement to TTD benefits from October 4, 2010 through October 7, 2010 and from October 21, 2010 through February 2, 2011. Claimant has failed to establish an entitlement to any other indemnity benefits.

3 Claimant has established that her AWW at the time of her injury was $476.80. Insurer shall calculate her indemnity benefits based on this AWW.

4. Claimant has established that the emergent treatment and the treatment provided by Dr. Chimonas and Dr. Martin was authorized. Claimant has failed to establish that the treatment provided by PA Peterson was authorized.

5. Claimant has failed to establish an entitlement to medical maintenance benefits and her request for a general award of Grover medical benefits is denied and dismissed.

6. Insurer shall pay Claimant interest at a rate of 8% per annum on all compensation benefits not paid when due.

7. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2015 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether, following an approved stipulation wherein Respondents agreed to reopen the case and pay additional temporary total disability (TTD) benefits based upon a worsening of condition, the combined TTD and permanent partial (PPD) disability payments paid to Claimant in excess of the statutory cap under § 8-42-107.5, C.R.S. constitute an "overpayment" as that term is defined under § 8-40-201(15.5), C.R.S.; and if so,

II. Whether Respondents are entitled to take an offset for the overpayment of disability benefits against the disfigurement benefits award due and owing to Claimant in the amount of $1,600.00.

FINDINGS OF FACT

As noted, the parties presented this case to the ALJ for decision on hearing exhibits and the above referenced incomplete/ unsigned stipulation marked as Claimant's Exhibit 17. Based upon careful inspection of the documents comprising the evidentiary record, the ALJ finds that paragraphs 1-14 of the parties' incomplete and unsigned stipulation accurately set forth the medical and procedural history of the claim. Consequently, the ALJ adopts and incorporates paragraphs 1-14 of the parties' incomplete and unsigned stipulation in their entirety to find:

1. Claimant sustained industrial injuries on or about November 17, 2010. Respondents admitted liability.

2. Authorized treating physician Dr. Jinkins performed two surgeries on Claimant's right shoulder. Authorized treating physician Dr. Hattem placed Claimant at MMI on October 30, 2012 and issued a 20% upper extremity impairment rating. Respondents filed a final admission of liability on December 5, 2012.

3. Claimant objected to the final admission of liability and requested a Division IME. Dr. Sandell performed the Division IME on May 8, 2013. Dr. Sandell agreed Claimant had reached MMI, and he too issued a 20% upper extremity impairment rating. Respondents filed a final admission of liability on July 25, 2013. While the 20% rating was worth $10,613.41, Claimant received $5,166.57 due to application of the statutory cap in C.R.S. §8-42-107.5. Respondents admitted to a total of exactly $75,000.00 in combined TTD and PPD benefits.

4. Claimant objected to the final admission of liability and requested a hearing on

issues including overcoming the Division IME findings. Claimant later withdrew the application for hearing without prejudice, by agreement of the parties.

5. Dr. Jinkins continued to follow Claimant after MMI. A MRI on January 15, 2013 revealed what Dr. Jinkins found to be a new tear in claimant's right shoulder. Dr. Jinkins recommended repeat shoulder surgery. Respondents denied the request, and on December 17, 2013 they applied for a hearing on issues including the surgery Dr. Jinkins recommended.

6. In his response to the application for hearing, Claimant endorsed the issue of overcoming the Division IME findings of Dr. Sandell. Claimant also endorsed the issues of compensability of a left shoulder injury, bilateral carpal tunnel syndrome, and TTD and TPD benefits from October 30, 2012, ongoing. A hearing was scheduled for March 26, 2014 at 1:30 p.m. in Colorado Springs.

7. On March 25, 2014, The parties stipulated to the following;

a. Respondents authorize the right shoulder surgery Dr. Jinkins has recommended.

b. Respondents will pay TTD benefits to Claimant commencing the date of the right shoulder surgery, and continuing until terminated pursuant to law.

c. Claimant withdraws, with prejudice, his claim that he sustained Injuries to his left shoulder, and that he sustained bilateral carpal tunnel syndrome, as a result of the effects of his original injury on November 17, 2010.

d. Claimant withdraws, with prejudice, his claim for TTD and TPD benefits prior to the date of the right shoulder surgery that Respondents have agreed to authorize. As noted, Respondents agree to pay TTD benefits as of the date of the right shoulder surgery.

8. The Stipulation was approved by Order dated March 25, 2014. The hearing set for March 26, 2014 was vacated.

9. Dr. Jinkins performed right shoulder surgery on April 10, 2014. Respondents filed a General Admission of Liability on April 23, 2014, admitting to TTD as of April 10, 2014, and ongoing, "...until returned to MMI status."

10. Dr. Jinkins placed Claimant at MMI on March 23, 2015 and issued a 23% upper extremity impairment rating.

11. Respondents filed a final admission of liability on April 10, 2015. In the FAL,

Respondents stated that; "…As the claimant has been issued all indemnity up to the cap of $75,000.00 as per the Final Admission dated 7/25/13, all TTD paid from 4/10/14 – 4/082015 [sic] at $810.67 per week for 52 weeks is an overpayment."

12. Claimant attended a disfigurement hearing, and an order was issued on June 10, 2015 awarding him $1,600.00.

13. Respondents filed a final admission of liability on July 8, 2015. In it they stated that;

> "…As the claimant has been issued all indemnity up to the cap of $75,000.00 as per the Final Admission dated 7/25/13, all TTD paid from 4/10/14 – 4/082015 [sic] at $810.67 per week for 52 weeks is an overpayment. The TTD overpayment of $42,154.84 will be taken as a credit on any PPD owed and/or future settlement. Carrier also takes credit for previously paid PPD of $5,166.57 as per Final Admission dated 7/25/2013. Carrier admits to awarded disfigurement of $1,600.00. Carrier will deduct this award of $1,600.00 from the current overpayment credit of $42,154.84, therefore the current overpayment credit of $40,554.84 remains."

14. Claimant applied for hearings in response to the FAL's filed on April 10, 2015 and July 8, 2015. Claimant asserted;

> "Claimant contests the credits and overpayments asserted by Respondents. Respondents improperly claim that; "…As the claimant has been issued all indemnity up to the cap of $75,000.00 as per the Final Admission dated 7/25/13, all TTD paid from 4/10/14 – 4/082015 [sic] at $810.67 per week for 52 weeks is an overpayment." Claimant was not placed at MMI until 3/23/15. It is well settled that respondents must continue paying temporary disability benefits without application of the cap until such time as Claimant reaches MMI. See Leprino Foods v. ICAO, 134 P.3d 475 (Colo. App. 2005). Credits and overpayments do not apply to those benefits to which Claimant was entitled to receive. Respondents' claimed credits and overpayments are improper. C.R.S. 8-40-201(15.5)."

15. The ALJ finds that the intent of the parties March 25, 2014 stipulation was to avoid the expense and uncertainty of litigation by resolving the issues surrounding the compensable nature of alleged injuries to Claimant's left shoulder and bilateral hands and his challenge to MMI by compromising his claims of entitlement to medical benefits and additional TTD. Following careful review of the parties March 25, 2014 stipulation, the ALJ finds indication that Respondents intended to waive any right to claim an overpayment or offset any overpayment that may result as a consequence Claimant's receipt of additional TTD in accordance with the stipulation.

16. The ALJ also finds that Respondents paid Claimant 26 installments of TTD in the

amount of $1,621.34 for the time period extending from 4/10/2014 to 4/9/2015, for a total of $42,154.84 in excess of the $75,000.00 statutory cap pursuant to §8-42-107.5

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1).

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000)

Existence of an Overpayment- The Relevant Provisions of the Act

C. As noted above, the first issue presented involves application of C.R.S §8-42-107.5 to a lower cap case following an approved stipulation wherein Respondents agreed to reopen the case and pay additional temporary total disability (TTD) benefits based upon a worsening of condition. In relevant part, C.R.S. §8-42-107.5 holds:

> "[n]o claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. . . ."

Here, Respondents argue that since Claimant originally reached MMI on October 30, 2012, and was paid combined TTD and permanent partial disability (PPD) benefits up to the $75,000.00 cap, all TTD paid from 4/10/2014 through 4/8/2015 above the $75,000.00 cap constitutes money payments that exceed the amount that should have been paid pursuant to statute. Consequently, Respondents claim a $42,154.84 overpayment.

D. Citing *Leprino Foods v. ICAO*, 134 P.3d 475 (Colo.App. 2005), Claimant contests Respondents asserted overpayment arguing that "credits and overpayments do not apply to those benefits to which Claimant was entitled to receive". Based upon the

evidence presented, the ALJ concludes that while Claimant was entitled to receive additional TTD benefits, he received indemnity payments in excess of that which should have been paid pursuant to statute. Accordingly, the ALJ agrees with Respondents that Claimant has been overpaid.

E. Section 8-40-201(15.5), C.R.S. provides as follows:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability benefits under said articles.

Thus, §8-40-201(15.5), C.R.S. provides for three categories of possible overpayment: (1) a claimant receives money "that exceeds the amount that should have been paid"; (2) money received that a "claimant was not entitled to receive"; and (3) money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. *See Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010). In this case, the ALJ agrees with Respondents that when §8-40-201(15.5), C.R.S. and §8-42-107.5, C.R.S are read together, the clear intent of the statutes provides that payment of combined TTD and PPD benefits in excess of the applicable statutory cap results in an "overpayment." As stated above, "overpayment" is defined as money received by a claimant that exceeds the amount that should have been paid. *Section 8-40-201(15.5), C.R.S*. Since the Claimant here received more than $75,000.00 in combined temporary disability payments and permanent partial disability payments, Respondents contend that the TTD received from April 10, 2014 to 4/8/15 constitutes money that exceeds the amount that should have been paid regardless of whether Claimant was "entitled" to receive it. Consequently, Respondents argue that under the circumstances the statutory definition of "overpayment" as set forth in §8-40-201(15.5), C.R.S. has been satisfied. The ALJ agrees finding the holding in *Ryan Danks v. Rayburn Enterprises, Inc.,* W.C. No. 4-770-978-01(ICAO, September 10, 2014) instructive. In *Danks*, the Panel concluded that payment of combined TTD and PPD in the amount of $11,657.39 beyond $150,000 cap, following a reopening of the case due to rescission of MMI, constituted an overpayment in benefits which entitled respondents to an offset against liability for unpaid disfigurement benefits. The facts presented in *Danks* are analogous to those presented here.

F. Similar to the situation presented in *Danks*, the instant case involves a Claimant whose condition worsened. In this case, that worsening lead the parties to reach a stipulation that authorized additional surgery which resulted in the rescission of MMI, thus entitling Claimant to additional TTD benefits. Nonetheless, based upon the evidence presented, Claimant received money that exceeded the amount that should have been paid pursuant to §8-42-107.5. The ALJ is not convinced that the approved

stipulation dated March 25, 2014 or Claimant's subsequent surgery, which effectively rescinded MMI mandates a conclusion that no overpayment exists in this case.

G. It is well settled that a party may stipulate away valuable rights so long as it is not a violation of public policy. *Cherokee Metropolitan Dist. v. Simpson,* 148 P.3d 142, 151 (Colo. 2006); *USI Properties East, Inc. v. Simpson,* 938 P.2d 168, 173 (Colo. 1997). "A party's participation in a stipulation incorporated into a decree precludes that party from advancing legal contentions contrary to the plain and unambiguous terms contained therein." *USI Properties East, Inc. v. Simpson,* 938 P.2d at 173. Courts should give effect to stipulations, but "if there is a sound reason in law or equity for avoiding or repudiating a stipulation, a party is entitled to be relieved from its requirements upon timely application." *Lake Meredith Reservoir Co. v. Amity Mut. Irrigation Co.,* 698 P.2d 1340, 1346 (Colo. 1985). Whether to relieve a party of a stipulation is within the discretion of the trial court. *Id.* Here, the unambiguous language of the parties March 25, 2014 stipulation, approved by order of ALJ Stuber, indicates that in return for Claimant withdrawing claims for additional injuries to his left shoulder and bilateral hands, Respondents agreed to authorize the additional right shoulder surgery recommended by Dr. Jinkins. Moreover, the stipulation plainly provides that in return for Claimant's withdrawal of any claims for TTD and temporary partial disability (TPD) prior to the date of any right shoulder surgery, Respondents agreed to pay TTD benefits "commencing the date of the right shoulder surgery, and continuing until terminated pursuant to law". As found, there is no indication in the March 25, 2014 stipulation that Respondents intended to waive their right to claim any overpayment or credit should an overpayment arise as a consequence of Claimant's receipt of additional TTD. Giving effect to the stipulation leads to the inescapable conclusion that Respondents simply agreed to commence TTD once Claimant underwent surgery and continue TTD payments until they were permitted by law to terminate them rather than a conclusion that Respondents agreed to pay Claimant beyond the statutory cap while ignoring their rights concerning recovery and/or entitlement to credit. Respondents have not sought to be relieved from the stipulation and Claimant presented no evidence outlining a basis in law or equity to repudiate it.

H. Furthermore, the ALJ rejects, as misplaced, Claimant's reliance on the holding in *Leprino Foods*, *supra*, as standing for the proposition that the overpayment and asserted right to credit is this case does not apply because Claimant was entitled to receive the additional TTD. To the contrary, the ALJ concludes that the holding in *Leprino, citing Donald B. Murphy Contractors, Inc. v. Industrial Claims Appeals Office,* 916 P.2d 611 (Colo.App. 1995), stands for the proposition that Respondents are required to continue paying TTD benefits without application of the cap until such time as the Claimant reaches MMI, because the extent of Claimant's impairment could not be determined before such time. Based upon the evidence presented, the ALJ finds and concludes that Respondents followed March 25, 2014 stipulation and the holding of *Leprino* and its progeny by paying Claimant TTD until such time that he was returned to MMI with additional impairment by Dr. Jenkins on March 23, 2015. Thus, the fact that Claimant was "entitled" to receive TTD until be placed at MMI and his impairment determined does not negate the fact that he was paid benefits in excess of what should

have been paid given Dr. Jenkins assignment of 23% scheduled impairment upon being returned to MMI on March 23, 2015. Consequently, the ALJ concludes that under the circumstances of this case, Respondent has, demonstrated by a preponderance of the evidence that an "overpayment" as that term is defined in §8-40-201(15.5), C.R.S. exits in this case. Thus, consistent with the holding in *Danks*, Respondents may reduce the amount of the overpayment by taking credit against their liability for the unpaid disfigurement benefits awarded to Claimant. *See also*, *Donald B. Murphy Contractors, Inc. v. Industrial Claims Appeals Office,* 916 P.2d 611 (Colo.App. 1995)(petitioners entitled to offset permanent partial benefits against temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Respondents may reduce the amount of the overpayment by taking credit against their liability for the unpaid disfigurement benefits awarded to Claimant.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 24, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

Whether the left hip surgery (arthroscopy and/or labral debridement and osteoplastic repair of femur accetebulm, or both, and possible microfracture) recommended by Dr. Xenos is reasonable, necessary, and related to Claimant's April 24, 2011, injury.

FINDINGS OF FACT

1. On April 24, 2011, while in the course and scope of employment with respondent-employer, the claimant was attempting to catch a patient from falling when she was pinned between the patient and the wall. An admission of liability was filed.

2. In the Boulder Community Hospital Emergency Department Report the claimant's complaint was back pain.

3. The claimant did not begin having any hip complaints or pain until one year and eight months after her injury. This is consistent with the history the claimant provided to Dr. Kathy McCranie on June 17, 2014.

4. In the report of September 10, 2014, the claimant reports that she was having left hip pain for approximately three months. The claimant confirmed that this was the approximate time when she did begin to have left hip pain. At hearing, she further took the position that she was not claiming that this arose from the initial injury but her left hip pain and need for surgery was a result of overuse or altered gait not from an injury.

5. In the report of February 13, 2015, Dr. Xenos believed the claimant had a left hip labral tear and femoral acetabular impingement. Subsequent to that time a surgical request for "left hip labral tear, femoral acetabular impingement unspecified disorder of joint of pelvic region was requested.

6. A denial for the surgery was made by the respondent-insurer and the issue was set for hearing.

7. The respondent-insurer sought the opinion of Henry J. Roth, M.D. in regard to the relatedness of surgery. Dr. Roth testified in person at the hearing and explained the procedure that is being requested. Dr. Roth indicated he did an extensive evaluation including research, which is contained within his report, and spent approximately 25-30 hours in review of records.

8. After extensive review of the records and literature, Dr. Roth opined that the left hip condition experienced by the claimant is essentially that of the right hip. He opined that the left hip pain and the underlying abnormal anatomy are congenital in nature. The medical records indicate that her condition is a result of pincer-impingement and a CAM lesion.

9. The femoroacetabular impingement (FAI) can begin at adolescence and progress into adulthood causing pain and injury to the labrum and articular cartilage of the hip. Generally FAIs are either CAM or pincer type. The records indicate that the claimant had contributions from both pincer impingement and a CAM lesion. As testified by Dr. Roth, the claimant's need for surgery arises from congenital defects and would have caused her condition with or without the original workers' compensation injury or the subsequent right hip surgery which the claimant believes created her altered gait. This opinion was based on his personal experience with hip surgeries and his multiple years as a physician who has treated these conditions supplemented by multiple hours of research.

10. In evaluating the same complaints and essentially the same condition in the right hip, Dr. McCranie in her report of October 14, 2014 was unable to find any relationship of the right hip to the original workers' compensation injury.

11. Dr. John Douthit in his report opined that there was no evidence that the claimant sustained an injury to her right hip and given the fact the pain generators were unclear, she had good range of motion, x-rays were normal, he could find no relationship of the right hip surgery as related to this claim.

12. Dr. Roth's opinion is that the conditions of both the right and left hip would have occurred regardless of her workers' compensation injury.

13. In a report dated April 15, 2015, Dr. Xenos opined that he believed the need for the left hip surgery was related to the original injury because "she had a distinct injury followed by acute onset of symptoms …"

14. The ALJ finds the analyses and opinions of Dr. Roth to be more credible and persuasive than medical analyses and opinions to the contrary.

15. The ALJ finds that the claimant has failed to establish that it is more likely than not that the surgery recommended by Dr. Xenos for the claimant's left hip condition is reasonable, necessary, or related to the claimant's industrial injury of April 24, 2011.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592, P .2d 792 (1979); *People v. M.A.,* 104 P .3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P .3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337

(Colo. App. 1997), *cert. denied* September 15, 1997. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

5. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

6. The ALJ concludes that Dr. Roth's analyses and opinions that the recommended surgery is not reasonable, necessary, or related to the claimant's October 22, 2013 injury is found to be more credible and persuasive than medical analyses and opinions to the contrary.

7. As found, the claimant has failed to establish by a preponderance of the evidence that the need for the hip surgery recommended by Dr. Xenos is reasonable, necessary, or causally related to her April 24, 2011 industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for surgery as recommended by Dr. Xenos is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: September 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by electronic mail addressed as follows:

Matthew C. Gizzi, Esq.
sernay@fdazar.com

Emily F. Ahnell, Esq.
eahnell@tpm-law.com

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Date: **9/4/15** **Gabriela Chavez**
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-877-682-05

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Joseph Fillmore, M.D. that he reached Maximum Medical Improvement (MMI) on April 22, 2013.

2. Whether Claimant has presented a preponderance of the evidence to overcome Dr. Fillmore's 0% permanent impairment rating for his left upper extremity injury.

FINDINGS OF FACT

1. On January 15, 2012 Claimant suffered an admitted injury to his left upper extremity. While working as a Truck Driver for Employer he attempted to release the "5th wheel lever" underneath his truck with his left arm because of icy roads. When the lever became stuck Claimant slipped on ice, fell to the ground and experienced immediate left shoulder pain.

2. Claimant was transported to St. Anthony's Hospital. X-rays did not reveal any fractures and physicians suspected a rotator cuff injury. He subsequently received

pain medications, was taken off work and underwent an MRI. The MRI reflected minor cystic changes but no full thickness rotator cuff tear. Additional nerve testing revealed a left brachial plexus injury.

3. On May 21, 2012 Claimant visited Authorized Treating Physician (ATP) Michael B. Tracy, D.O. for an evaluation. Dr. Tracy diagnosed Claimant with a left brachial plexopathy and MRI imaging consistent with a partial tear of the suprapinatus tendon. There was no diagnosis of a labral tear. Dr. Tracy performed a therapeutic corticosteroid injection into the left subacromial space.

4. On November 7, 2012 Claimant returned to Dr. Tracy for an evaluation of his left brachial plexus injury. Claimant reported that his pain medications were 60% to 75% effective and improved his activity levels. During the physical examination he was in moderate physical discomfort and exhibited multiple pain behaviors. Dr. Tracy diagnosed Claimant with improving brachial plexopathy, a nonsurgical left shoulder labral tear and delayed recovery with psychogenic pain components.

5. Claimant continued to receive treatment from Dr. Tracy. By March 28, 2013 he reported that his pain medications permitted him to be approximately 45% functional. Claimant's pain behaviors were better with distraction and his left shoulder examination had improved. Dr. Tracy did not perform any impingement testing on Claimant's shoulders.

6. On April 22, 2013 Respondents conducted video surveillance of Claimant. The surveillance video revealed Claimant grasping a ball throwing device for his dog with his left hand, gripping onto the gate of a chain link fence, bending over with his left shoulder raised at or above head level, bringing his left arm and shoulder up to adjust his winter cap and lifting his left hand up to his mouth and face.

7. On May 28, 2013 Claimant underwent an independent medical examination with John J. Raschbacher, M.D. Claimant exhibited diffuse left upper extremity tenderness to palpation. Dr. Raschbacher noted that Claimant would clutch his left hand, flex at the elbow and raise it up to forward flex the shoulder to 80-90 degrees. He remarked that Claimant demonstrated significant pain behaviors. Dr. Raschbacher noted that Claimant experienced a great deal of deliberation and apparent labor with elbow flexion.

8. Dr. Raschbacher diagnosed Claimant with a left shoulder strain and possible brachial plexopathy. He determined that Claimant had inaccurately reported and misrepresented the degree of symptomatology. Dr. Raschbacher noted that Claimant's functional abilities on video surveillance were grossly inconsistent with his presentation. He concluded that Claimant had reached MMI on the date of the video surveillance or April 22, 2013. Dr. Raschbacher also noted that it was much more likely that Claimant had reached MMI "well before" April 22, 2013. He explained that it was not possible to find a rational basis for an impairment rating because of Claimant's grossly inconsistent reports of symptomatology and functional abilities.

9. On January 21, 2014 Claimant returned to Dr. Tracy for an examination. Claimant reported that his medications permitted him to be approximately 24% functional. Dr. Tracy diagnosed Claimant with brachial plexus lesions, a superior glenoid labrum lesion and sleep disturbances. He did not perform any impingement testing on Claimant's shoulders.

10. Because Claimant had been injured on January 12, 2012 and Dr. Tracy had not placed him at MMI, Respondents sought a 24-month DIME. On May 29, 2014 Claimant underwent the DIME with Joseph H. Fillmore, M.D. Dr. Fillmore diagnosed Claimant with left brachial plexopathy, a previous history of cervical neck surgery and a left shoulder strain with underlying degenerative changes. He also noted that Claimant had a brachial plexus injury as documented by two electrodiagnostic tests. Dr. Fillmore explained that Claimant exhibited significant pain behaviors upon examination. Moreover, the medical records revealed that Claimant repeatedly demonstrated non-physiologic findings upon examination. Furthermore, after reviewing the April 22, 2013 surveillance video, Dr. Fillmore remarked that Claimant demonstrated significantly more left arm capabilities than upon examination. Notably, Claimant was able to lift his left arm up to the top of his head without any visible signs of discomfort. Dr. Fillmore agreed with Dr. Raschbacher's observations that "the activities and functional abilities recorded on the video surveillance [were] grossly inconsistent with his presentation." Dr. Fillmore also determined that Claimant reached MMI on the date of the video surveillance or April 22, 2013.

11. Dr. Fillmore assigned Claimant a 0% impairment rating for his January 15, 2012 industrial accident. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*), he explained that Table 13 outlines impairment ratings for brachial plexus injuries. Dr. Fillmore specifically remarked that brachial plexus impairments are to be graded for motor impairment pursuant to Tables 10 and 11 on page 42 of the *AMA Guides*. He commented that, pursuant to page 44, "impairment due to brachial plexus injury or disease can be determined by evaluating the various functions that are lost." However, Dr. Fillmore declined to assign Claimant an impairment rating because Claimant did not accurately report his symptoms and functional levels regarding sensation or provide full effort to grade motor skills. He summarized that Claimant's reports were grossly inconsistent with his symptoms and functional abilities exhibited on the video surveillance.

12. On November 17, 2014 Claimant returned to Dr. Tracy for an evaluation. Dr. Tracy noted that Claimant continued to exhibit pain behaviors. He determined that Claimant reached MMI on June 16, 2014 and assigned a 32% left upper extremity impairment rating. Dr. Tracy converted the extremity rating to a 19% whole person impairment. He remarked that, because Claimant's brachial plexus injury was so severe, he could not properly evaluate Claimant's shoulder concerns. Dr. Tracy thus recommended a repeat left shoulder MRI to compare with the February 28, 2012 MRI to determine causality for Claimant's left shoulder symptoms.

13. On March 16, 2015 Claimant underwent a repeat left shoulder MRI. The MRI did not reveal a rotator cuff tear or shoulder atrophy. However, the MRI reflected

an anterior inferior labral tear that Dr. Tracy attributed to Claimant's January 15, 2012 industrial injury.

14. Dr. Tracy testified at the hearing in this matter. After reviewing two MRI's and an EMG he concurred that Claimant suffered a brachial plexus stretch injury, a partial tear of the supraspinatus tendon and a left labral tear as a result of his January 15, 2012 industrial accident. Dr. Tracy specifically remarked that Claimant sustained the following: (1) a brachial plexus injury that has taken more than two to three years to recover; and (2) a labral tear or a mechanical shoulder injury inside the joint that was deferred from treatment because of Claimant's brachial plexus injury.

15. Dr. Tracy maintained that Claimant had reached MMI for his brachial plexus injury on June 14, 2014. He assigned a 32% upper extremity impairment that converted to a 19% whole person rating because of his extensive nerve damage as a result of the January 15, 2012 industrial injury. However, Dr. Tracy commented that, because Claimant's left shoulder labral tear has not been adequately addressed, he has not reached MMI for the condition. He could not assign an impairment rating for the labral tear because Claimant requires surgery.

16. Dr. Tracy reviewed the April 22, 2013 video surveillance of Claimant. He acknowledged that Claimant exhibited greater left arm movement on the video than he had in the office. Dr. Tracy also recognized that Claimant's reported symptoms were not always accurate.

17. Dr. Tracy remarked that he disagreed with Dr. Fillmore's MMI determination because the opinion was based upon Claimant's range of motion, symptom magnification and pain behaviors. Moreover, Dr. Fillmore used incorrect tables from the *AMA Guides* in evaluating Claimant's brachial plexus injury. However, he acknowledged that he only had a difference of opinion with Dr. Fillmore.

18. Dr. Raschbacher testified at the hearing in this matter. He explained that Claimant gave poor effort during his physical examination. Dr. Raschbacher remarked that Claimant exhibited pain behavior when he clutched his left hand with the right, flexed the elbow, bent the elbow and raised it up. He testified that he did not diagnose a labral tear because imaging studies did not show a labral tear and the orthopedic notes did not reveal a clear diagnosis of a labral tear. Dr. Raschbacher maintained that Claimant reached MMI on April 22, 2013 because he reported symptoms were inaccurate and his subjective symptoms were unreliable.

19. Dr. Raschbacher testified that Claimant's brachial plexus was abnormal and providing an impairment rating was a function of both the sensory and motor aspects of the nerve. However, he remarked that the brachial plexus injury was not ratable because Claimant did not provide full and fair effort in terms of testing strength, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and his pain behavior was vastly out of proportion compared to typical symptoms of a brachial plexus injury. Dr. Rasbacher thus agreed with Dr. Fillmore that Claimant reached MMI on April 22, 2013 with a 0% impairment rating. He noted that

Claimant provided a poor effort for Dr. Fillmore and could not receive a rating for his brachial plexus injury. A ratable impairment requires a full effort to determine functional abilities.

20. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fillmore that he reached MMI on April 22, 2013. On January 15, 2012 Claimant suffered an admitted injury to his left upper extremity. After undergoing extensive conservative treatment for his condition with ATP Dr. Tracy and other medical providers without reaching MMI, Respondents sought a 24-month DIME. Dr. Fillmore diagnosed Claimant with left brachial plexopathy, a previous history of cervical neck surgery and a left shoulder strain with underlying degenerative changes. He noted that Claimant had a brachial plexus injury as documented by two electrodiagnostic tests. Dr. Fillmore explained that Claimant exhibited significant pain behaviors upon examination. Moreover, the medical records revealed that Claimant repeatedly demonstrated non-physiologic findings upon examination. Furthermore, after reviewing the April 22, 2013 surveillance video, Dr. Fillmore remarked that Claimant demonstrated significantly more left arm capabilities than upon examination. He agreed with Dr. Raschbacher's observations that "the activities and functional abilities recorded on the video surveillance [were] grossly inconsistent with his presentation." Dr. Fillmore also determined that Claimant reached MMI on the date of the video surveillance or April 22, 2013.

21. Dr. Raschbacher determined that Claimant had inaccurately reported and misrepresented his degree of symptomatology. Dr. Raschbacher noted that Claimant's functional abilities on the video surveillance were grossly inconsistent with his presentation. He testified that he did not diagnose a labral tear because imaging studies did not show a labral tear and the orthopedic notes did not reveal a clear diagnosis of a tear. Dr. Rasbacher thus agreed with Dr. Fillmore that Claimant reached MMI on April 22, 2013.

22. In contrast, Dr. Tracy determined that Claimant had reached MMI for his brachial plexus injury on June 14, 2014. Dr. Tracy remarked that he disagreed with Dr. Fillmore's MMI determination because the opinion was based upon Claimant's range of motion, symptom magnification and pain behaviors. Moreover, Dr. Tracy commented that, because Claimant's left shoulder labral tear had not been adequately addressed, he has not reached MMI for the condition. However, he acknowledged that Claimant exhibited greater left arm movement on the video than he had in the office. Dr. Tracy also recognized that Claimant's reported symptoms were not always accurate. Finally, he acknowledged that he only had a difference of opinion with Dr. Fillmore. Accordingly, based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Raschbacher, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's MMI determination was incorrect.

23. Claimant has failed to present a preponderance of the evidence to overcome Dr. Fillmore's 0% permanent impairment rating for his left upper extremity injury. Relying on the *AMA Guides*, he explained that Table 13 outlines impairment

ratings for brachial plexus injuries. Dr. Fillmore specifically remarked that brachial plexus impairments are to be graded for motor impairment pursuant to Tables 10 and 11 on page 42 of the *AMA Guides*. However, Dr. Fillmore declined to assign Claimant an impairment rating because Claimant did not accurately report his symptoms and functional levels or exhibit full effort to grade motor skills. He summarized that Claimant's reports were grossly inconsistent with his symptoms and functional abilities exhibited on the video surveillance.

24. Dr. Raschbacher testified that Claimant's brachial plexus was abnormal and providing an impairment rating was a function of both the sensory and motor aspects of the nerve. He remarked that the brachial plexus injury was not ratable because Claimant did not provide full and fair effort in terms of testing strength, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and his pain behavior was vastly out of proportion to typical symptoms of a brachial plexus injury. Dr. Raschbacher thus agreed with Dr. Fillmore and assigned Claimant a 0% permanent impairment rating.

25. In contrast, Dr. Tracy assigned a 32% upper extremity impairment that converted to a 19% whole person rating because of his extensive nerve damage as a result of the January 15, 2012 industrial injury. He noted that Dr. Fillmore used incorrect tables in the *AMA Guides* in evaluating Claimant's brachial plexus injury. However, Dr. Fillmore and Dr. Rasbacher persuasively determined that Claimant's brachial plexus condition could not be accurately rated. An impairment rating could not be assigned because Claimant did not accurately report his functional levels, did not provide full effort, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and he exhibited exaggerated pain behaviors. Accordingly, Claimant suffered a 0% permanent impairment as a result of his January 15, 2012 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

Maximum Medical Improvement

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fillmore that he reached MMI on April 22, 2013. On January 15, 2012 Claimant suffered an admitted injury to his left upper extremity. After undergoing extensive conservative treatment for his condition with ATP Dr. Tracy and

other medical providers without reaching MMI, Respondents sought a 24-month DIME. Dr. Fillmore diagnosed Claimant with left brachial plexopathy, a previous history of cervical neck surgery and a left shoulder strain with underlying degenerative changes. He noted that Claimant had a brachial plexus injury as documented by two electrodiagnostic tests. Dr. Fillmore explained that Claimant exhibited significant pain behaviors upon examination. Moreover, the medical records revealed that Claimant repeatedly demonstrated non-physiologic findings upon examination. Furthermore, after reviewing the April 22, 2013 surveillance video, Dr. Fillmore remarked that Claimant demonstrated significantly more left arm capabilities than upon examination. He agreed with Dr. Raschbacher's observations that "the activities and functional abilities recorded on the video surveillance [were] grossly inconsistent with his presentation." Dr. Fillmore also determined that Claimant reached MMI on the date of the video surveillance or April 22, 2013.

8. As found, Dr. Raschbacher determined that Claimant had inaccurately reported and misrepresented his degree of symptomatology. Dr. Raschbacher noted that Claimant's functional abilities on the video surveillance were grossly inconsistent with his presentation. He testified that he did not diagnose a labral tear because imaging studies did not show a labral tear and the orthopedic notes did not reveal a clear diagnosis of a tear. Dr. Rasbacher thus agreed with Dr. Fillmore that Claimant reached MMI on April 22, 2013.

9. As found, in contrast, Dr. Tracy determined that Claimant had reached MMI for his brachial plexus injury on June 14, 2014. Dr. Tracy remarked that he disagreed with Dr. Fillmore's MMI determination because the opinion was based upon Claimant's range of motion, symptom magnification and pain behaviors. Moreover, Dr. Tracy commented that, because Claimant's left shoulder labral tear had not been adequately addressed, he has not reached MMI for the condition. However, he acknowledged that Claimant exhibited greater left arm movement on the video than he had in the office. Dr. Tracy also recognized that Claimant's reported symptoms were not always accurate. Finally, he acknowledged that he only had a difference of opinion with Dr. Fillmore. Accordingly, based on the medical records, the *AMA Guides* and the persuasive analysis of Dr. Raschbacher, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fillmore's MMI determination was incorrect.

Permanent Impairment

10. The increased burden of proof required by DIME procedures is only applicable to non-scheduled impairments and is inapplicable to scheduled injuries in determining permanent impairment. *See Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691, 693 (Colo. App. 2000); *In Re Kamakele,* W.C. No. 4-732-992 (Apr. 26, 2010); *In Re Maestas,* W.C. No. 4-662-369 (ICAP, June 5, 2007); *see also* §8-42-107(8), C.R.S. Claimant suffered an admitted upper extremity left shoulder injury and Dr. Fillmore assigned a 0% permanent impairment rating. Because Claimant has suffered a scheduled impairment, Dr. Fillmore's opinion is not entitled to increased deference regarding permanent impairment.

11. As found, Claimant has failed to present a preponderance of the evidence to overcome Dr. Fillmore's 0% permanent impairment rating for his left upper extremity injury. Relying on the *AMA Guides*, he explained that Table 13 outlines impairment ratings for brachial plexus injuries. Dr. Fillmore specifically remarked that brachial plexus impairments are to be graded for motor impairment pursuant to Tables 10 and 11 on page 42 of the *AMA Guides*. However, Dr. Fillmore declined to assign Claimant an impairment rating because Claimant did not accurately report his symptoms and functional levels or exhibit full effort to grade motor skills. He summarized that Claimant's reports were grossly inconsistent with his symptoms and functional abilities exhibited on the video surveillance.

12. As found, Dr. Raschbacher testified that Claimant's brachial plexus was abnormal and providing an impairment rating was a function of both the sensory and motor aspects of the nerve. He remarked that the brachial plexus injury was not ratable because Claimant did not provide full and fair effort in terms of testing strength, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and his pain behavior was vastly out of proportion to typical symptoms of a brachial plexus injury. Dr. Raschbacher thus agreed with Dr. Fillmore and assigned Claimant a 0% permanent impairment rating.

13. As found, in contrast Dr. Tracy assigned a 32% upper extremity impairment that converted to a 19% whole person rating because of his extensive nerve damage as a result of the January 15, 2012 industrial injury. He noted that Dr. Fillmore used incorrect tables in the *AMA Guides* in evaluating Claimant's brachial plexus injury. However, Dr. Fillmore and Dr. Rasbacher persuasively determined that Claimant's brachial plexus condition could not be accurately rated. An impairment rating could not be assigned because Claimant did not accurately report his functional levels, did not provide full effort, there was no accurate assessment of sensory testing, his reported symptoms were unreliable and he exhibited exaggerated pain behaviors. Accordingly, Claimant suffered a 0% permanent impairment as a result of his January 15, 2012 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant reached MMI on April 22, 2013 with a 0% permanent impairment rating.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

SSUE:

- Whether Claimant proved by a preponderance of the evidence that her claim should be reopened.

FINDINGS OF FACT

Based on the evidence present at hearing the Judge enters the following findings of fact.

1. On January 15, 2011, Claimant, a 51 year old female, was employed with Vail Resorts as a ski instructor. While teaching a ski lesson, Claimant was struck on her left side by another skier. She testified that the skier who hit her was in a semi-tucked position and that his skis hit her boots sending her ten feet into the air and twenty feet down the mountain. Claimant landed "100%" on her left side. Claimant testified she finished her ski lesson that day and over the next few days continued to experience pain and symptoms including grogginess and soreness. Claimant testified inconsistently that the immediate pain in her in her bilateral hips was "killing her." Claimant testified she experienced anterior pain in the left and right hips.

2. Claimant reported her injury to her manager before leaving the scene.

3. On January 25, 2011, Claimant presented to Vail Medical Center, an authorized treating provider, and underwent an evaluation with nurse practitioner JoAnn Kargul. The pain diagram on the date of the evaluation indicated complaints with regards to her neck, lower back, and hips. The diagram further indicates pain in the 2/10 level for her low back and hip. Claimant advised NP Kargul that she fell on her left thigh and hip. She denied hitting her head or loss of consciousness. The onset of her left hip and lower back pain was the night following the collision. She began experiencing right hip pain approximately three days after the collision.

4. Claimant worked the ten days after the accident without seeking medical attention. NP Kargul noted that Claimant "has been working and teaching skiing since the date of injury without difficulty." NP Kargul's physical examination revealed, "Hips, no pain on palpation bilaterally." Additionally, the examination showed, "good strength with hip flexor movement. Full range of motion with external and internal rotation." NP Kargul noted "right thigh, pain on palpation along the anterior and lateral aspect of the right thigh." NP Kargul assessed Claimant with cervical pain, low back pain, left thigh contusion, and right thigh pain. She released Claimant to full duty without restrictions.

5. On February 1, 2011, Claimant returned to Vail Valley Medical Center and NP Kargul evaluated her again. Claimant advised she had been teaching full time without any restrictions and had not experienced any problems. Claimant described

right hip pain on the inside of her leg, but no pain while it rest. Claimant denied pain in her right hip for the past two days. Claimant denied any continued right thigh pain. Physical examination revealed, "hips: no pain on palpation bilaterally. Patrick stress test with some discomfort in the posterior hip." Additionally, physical examination revealed, "Good extension with hip flexion and extension."

6. NP Kargul recommended Claimant commence physical therapy two to three times per week for the next two weeks. It is unclear from NP Kargul's report what the physical therapy was for because Claimant's cervical pain had resolved; she had no lumbar issues noted on exam; her left thigh bruise had improved; and her right thigh pain had resolved. However, notes from Howard Head Sports Medicine Centers indicate the referral was for low back pain and left thigh contusion. Despite the referral being for low back pain and left thigh contusion, the physical therapy notes reflect the actual focus of her physical therapy was Claimant's right hip and pelvis.

7. By February 3, 2011, Claimant advised her physical therapist that she was "feeling much better overall." She described pain level of 3/10 with bilateral buttock pain, which she described as a "Charlie horse."

8. On February 5, 2011, Claimant reported further improvement regarding her right hip and glute area, with some remaining pain/tenderness. At this point, Claimant was participating in "spin classes" without pain.

9. On February 10, 2011, Claimant returned to physical therapy. Regarding her subjective examination, Claimant indicated that she experienced right glute pain intermittently into the posterior lower extremity. The subjective examination did not reveal a right hip complaint.

10. On February 15, 2011, Claimant returned to the physical therapist. Claimant described her current pain level as 1/10. She noted slight glute tenderness but was able to ski and perform all job duties without limitations. The physical therapist noted that Claimant exhibited a good prognosis and recommended discharge from skilled rehabilitation therapy in conjunction with a home exercise program.

11. On that same day, Claimant returned to NP Kargul. Claimant advised that she was "100% better" and she reported feeling ready to go back to work full-time without any difficulty. She denied any pain, numbness, tingling, bowel, or bladder problems. She did note some muscle tightness in different muscle areas at times but otherwise was doing well. Physical examination revealed, "hips: no pain on palpation bilaterally. Full range of motion." Accordingly, Claimant was placed at maximum medical improvement (MMI) with no impairment and no need for further medical treatment upon review by Dr. Cebrian.

12. On her own, Claimant returned to physical therapy on March 15, 2011. Claimant described, "slight right glute tenderness but able to ski and to perform all job duties without limitations."

13. Claimant testified she skied approximately 45 to 50 days over the remaining ski season, through April 2011. Further, Claimant testified she did not seek medical treatment during this period.

14. On May 3, 2011, Claimant presented to her personal physician for an annual examination. Under review of systems for muscular skeletal, Dr. Bock noted, "not present, joint pain and muscle pain." Additionally, under the subjective, "patient words: here for annual exam. No change in her health. No complaints today." Dr. Boch performed a lower extremity inspection which returned normal.

15. Claimant testified that during the summer of 2011, she drove a client's car from Colorado to Chicago. During the drive she began experiencing right hip pain. However, the pain resolved to such an extent that Claimant did not seek medical treatment. Notably, in 2010, Claimant had experienced similar right hip pain with prolonged sitting and had been diagnosed with right hip bursitis.

16. In November 2011, Claimant returned to her work activities at Vail Resorts. Claimant testified that upon her return she did not report to her supervisor any injury or continued pain complaints.

17. On December 2, 2011, Claimant presented to Dr. Boch complaining of a sore throat and other respiratory symptoms. The report does not indicate any complaint with regards to her right hip. On December 14, 2011, Claimant returned to her personal physician to address similar upper respiratory symptoms. Again, Claimant did not complain of any right hip issues.

18. On January 23, 2012, Claimant presented to her personal physician complaining of glass in the sole of her right foot. Dr. Bock confirmed, "[N]o other concerns today." The medical documentation does not note any complaints on the part of Claimant with regards to her right hip.

19. At hearing, Claimant testified that she is very in tune with her body, and is always very thorough and truthful when meeting with her physicians regarding current symptoms and complaints. The contemporaneous medical records in December 2011 and January 2012 do not document any right hip complaints. The ALJ concludes that if Claimant were experiencing right hip pain, she more likely than not would have reported it.

20. During the 2011/2012 ski season, Claimant continued to perform her regular work activities without complaint or treatment. It was not until February 24, 2012 that Claimant presented to Dr. Rick Cunningham to address her right hip. Under history of present illness, Dr. Cunningham noted that the Claimant presented, "with two weeks of increasing right buttock pain, groin pain, and lateral sided hip pain." This is consistent with the reports from her personal physician in December 2011 and January 2012 in which Claimant did not report any right hip pain. Accordingly, the ALJ concludes that Claimant began experiencing right hip pain on or about February 10, 2012,two weeks prior to her appointment with Dr. Cunningham.

21. Dr. Cunningham requested that Claimant consult with Dr. Scott Raub. Claimant complained to Dr. Raub, which she did on March 6, 2012. Dr. Raub's notes indicate Claimant had a history of "chronic hip issues for about 15 years." Claimant testified at hearing that while she had been diagnosed with right hip bursitis fifteen years earlier, the condition was not chronic. Claimant complained of right-sided hip pain with right inguinal pain, and right anterior and posterior thigh pain. Claimant conceded to Dr. Raub that she had to purchase a different motorcycle to accommodate her hip problem. This is inconsistent with Claimant's hearing testimony in which she testified she had not been riding her motorcycle. Dr. Raub recommended Claimant undergo an MRI of the right hip and possibly a right hip injection.

22. On March 8, 2012, Claimant underwent a right hip MRI that showed proximal femoral pathology, which the radiologist indicated "predisposes the patient to cam-type femoroacetabular impingement bilaterally." Additionally, the MRI showed a complex tear of the right acetabular labrum most prominently anterosuperiorly. Large field-of-view images demonstrated similar left labral and chondral pathology.

23. On March 15, 2012, Claimant returned to Dr. Raub. Based on the MRI report he diagnosed, "[P]robable systematic femoroacetabular impingement syndrome with labral tearing."

24. Claimant testified that her supervisor made an appointment for her with Dr. Susan Lan at the Vail Valley Medical Center. Dr. Lan referred Claimant to Dr. Brian White, an orthopedic surgeon.

25. On April 18, 2012, Claimant presented to Dr. White. She reported to that following completion of physical therapy after the initial injury, she was able to function reasonably well, but then experienced pain while driving cross-country to Chicago and "really could not walk afterwards." Dr. White's note indicates that "she could not ride her motorcycle and ended up selling it." Claimant's comments to Dr. White are inconsistent with Claimant's hearing testimony. She advised that apart from the one incident from driving to Chicago she was able to perform her regular activities over the summer. Additionally, she testified she continued to ride a motorcycle albeit not as much as in the past. Claimant advised Dr. White that she was "currently living at about 65% of her normal with respect to her activity." However, Claimant testified she was able to complete the entire 2011/2012 ski season. Dr. White assessed, "[T]his is a 51 year old female, who has cam-type femoroacetabular impingement with a labral tear from a collision while skiing. She likely twisted her hip at the time or subluxed it; it is hard to say." Dr. White indicated the need for treatment was related to the workers' compensation injury, and that he would be "happy to advocate for her if she needs."

26. On April 24, 2012, Claimant returned to Dr. Susan Lan. Claimant requested a referral for a second opinion with an orthopedic surgeon in the Vail area. Claimant disclosed to Dr. Lan that 15 years prior she had a diagnosis of bursitis and underwent a steroid injection by Dr. Gotlieb. Thereafter, her bursitis completely resolved and she did not have another issue until the January 2011 event. This is

incorrect. Claimant treated for right hip issues with Dr. Todd Peters in April 2010, less than one year prior to the work injury.

27. On May 21, 2012, Claimant underwent an evaluation with Dr. Philippon, who examined Claimant and reviewed the previous MRI which showed anterolateral labrum tear. He ordered a new MRI which he reviewed that same day. He diagnosed Claimant with "right hip pain secondary to to right hip femeroacetabular impingement, which is predominantly cam, in the setting of mild acetabular dysplasia." He recommended Claimant undergo surgical repair.

28. Dr. Philippon's operative note is dated May 21, 2012, revised May 29, 2012. Claimant underwent surgery, which included right hip arthroscopy with debridement, limited acetabuloplasty, chondroplasty, acetabular labral repair, femoroplasty, iliopsoas fractional lengthening, and capsular plication.

29. Two years later, Claimant filed an Application for Hearing seeking to reopen her workers' compensation claim.

30. Dr. Neil Pitzer performed a Respondent Independent Medical Examination. Dr. Pitzer is board certified in physical medicine and rehabilitation and level II accredited with the Division of Workers' Compensation. Dr. Pitzer has taught at the University of Colorado Health Sciences for the past 20 years. Dr. Pitzer reviewed the medical records and examined Claimant. Dr. Pitzer concluded that Claimant's need for surgery in May 2012 did not relate to the January 15, 2011 work incident. Dr. Pitzer observed that when Claimant was released at maximum medical improvement on February 15, 2011, she was essentially pain free. Dr. Pitzer noted that Claimant returned to work full duty and did not comment on any ongoing hip pain in clinical notes from late 2011 and early 2012. Dr. Pitzer noted that the surgical report revealed right hip degenerative changes, cam-type impingement, acetabular dysplasia, and additional degenerative changes which more likely than not caused the anterior labral tear as opposed to the work incident in 2011. He concluded that the treatment beginning in February 2012 was not for a natural progression the 2011 work injury as Claimant had extensive hip joint pathology on the MRI which related to femoroacetabular impingement and dysplasia which is not related to her contusion.

31. Dr. Pitzer testified at hearing as well. On cross examination, Claimant's counsel asked whether the tearing could have resulted from the trauma in January 2011. Dr. Pitzer noted that Claimant suffered an anterior labral tear, not a posterior labral tear. He credibly and persuasively explained that anterior tears of the labrum are far more likely to occur as a result of degenerative changes to the hip as opposed to trauma. Posterior tears are more often associated with trauma. Additionally, Dr. Pitzer testified that no other physician who had addressed the issue of causation had access to the surgical report, which showed extensive procedures related to correcting Claimant's preexisting and degenerative hip issues. Finally, Dr. Pitzer noted that studies have shown that women in their late 40's and early 50's with cam-impingement, as the MRI demonstrated here, often develop anterior labral tears.

32. The ALJ finds the Dr. Pitzer's opinions on the issue of relatedness to be more credible and persuasive than those expressed by other medical treatment providers.

33. Based on the totality of the evidence, the ALJ finds it more likely than not that Claimant sustained an industrial injury in January 2011 when she was struck by a skier and fell onto her left side. Claimant underwent physical therapy and returned to baseline. Further, the ALJ finds that Claimant presented to her personal physician in late 2011 and early 2012 and did not report any right hip issues. Claimant is very in tune with her body, as Claimant testified, and had she been experiencing right hip issues, the ALJ finds it is more likely than not that she would have reported those issues to her personal physician.

34. Approximately one year after the work incident Claimant began experiencing right hip issues again. During the course of that year Claimant performed her regular full-duty, unrestricted work activities. Over the summer, she performed numerous recreational activities including motorcycle riding, spin classes, yoga, and some softball.

35. The ALJ finds, based on the totality of the evidence, that Claimant has failed to establish by a preponderance of the evidence that her need for right hip treatment beginning in February 2012 is related to the work incident which resulted in Claimant being struck on her left side and falling onto her left hip. Rather, the ALJ finds that Claimant's need for right hip treatment beginning in February 2012 is the natural progression of her underlying preexisting right hip degenerative condition.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. § 8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Pursuant to Section 8-43-303(1), C.R.S., a claim may be reopened based on a change of condition which occurs after MMI. *See El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the claimant to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to section 8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985).

Here, Claimant failed to prove by a preponderance of the evidence that her need for treatment after February 2011 related to her January 15, 2011 work incident. The medical evidence does not support Claimant's assertion that she sustained a right hip labral tear in January 2011. Rather, the medical evidence supports a conclusion that the right hip labral tear and need for surgery resulted from Claimant's degenerative hip condition, which was neither caused nor aggravated by the work incident. Consequently, the petition to reopen must be denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

IT IS THEREFORE ORDERED that Claimant's claim to reopen is denied and dismissed.

DATED: September 18, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

- Did Claimant establish by a preponderance of the evidence that his claim should be reopened?

- Is Claimant entitled to additional permanent partial disability benefits?

PROCEDURAL STATUS

This case initially proceeded to hearing before ALJ Cain on March 11, 2015. Claimant was not present for that hearing, however, medical records were submitted. ALJ Cain held the matter in abeyance while the parties tried to reach a full and final settlement. Those settlement negotiations were unsuccessful. The undersigned ALJ reviewed the recording of the March 11, 2915 hearing.

Claimant then filed a new Application for Hearing dated May 2, 2015, listing as issues permanent partial disability benefits and petition to reopen.

On July 9, 2015, Respondents filed a Motion to Strike Hearing and Dismiss Issues with Prejudice. Respondents alleged that following the March 11, 2015 hearing, the parties had a tentative agreement to settle the claim and inasmuch as ALJ Cain retained jurisdiction to address the permanent partial disability issue that the hearing scheduled for July 28, 2015 should be vacated. Respondents also argued Claimant filed a timely Opposition to the Motion to Strike.

In an Order dated July 22, 2015, ALJ Cain denied Respondents' Motion to Strike Hearing and Dismiss Issues with Prejudice. In that Order, ALJ Cain concluded that the ALJ conducting the hearing set for July 28, 2015 would have jurisdiction to adjudicate the PPD issue. The undersigned ALJ concludes that he has jurisdiction to address the issues identified in Claimant's Application for Hearing, including the extent of Claimant's PPD and Claimant's Petition to reopen his claim.

Following the July 28, 2015 hearing, Claimant submitted a voluminous set of medical records concurrently with his Position Statement. Respondent objected to said exhibits. The ALJ has considered and sustains the Objection. Although the medical records in question appear to have previously been exchanged, these were not offered, nor admitted at hearing. Attachments to briefs are not considered evidence unless properly admitted at hearing or by order of an ALJ. *See Subsequent Injury Fund v. Gallegos,* 746 P.2d 71 (Colo. App. 1987). The obvious purposes of this rule are to protect the parties' right to know the evidence that will be considered, and to afford them a fair opportunity to present their own case and rebut adverse evidence. *See Hendricks v. Industrial Claim Appeals Office,* 809 P.2d 1076 (Colo. App. 1990). Since the records

submitted with Claimant's Position Statement were not admitted at hearing, these will not be considered as on the issues set for determination.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on March 27, 2012 while he was working as a maintenance worker for Respondent-Employer. He was pulling a lawnmower back onto a trailer, which caused his right knee to buckle. He continued to work, but the pain persisted.

2. On April 10, 2012, Claimant was examined by Thanh Chau, PA-C and Hiep Ritzer, M.D. at Heath-ONE who diagnosed right knee sprain. The initial x-rays taken of the knee were negative for any bony abnormality, however, pain and stiffness were noted when Claimant extended and flexed his knee. Prior knee injuries were denied. Dr. Ritzer was concerned about a meniscal injury, recommended a MRI scan as well as prescribing a knee brace and ibuprofen

3. A MRI of the right knee was performed on April 11, 2012, which showed an anterior cruciate ligament tear, along with bone contusions along the sulcus terminalis and postolateral tibial plateau. A radial tear of the lateral meniscus body was also noted.

4. Claimant was next seen by Dr. Ritzer on April 17, 2012, who diagnosed an ACL tear and lateral meniscus tear. Dr. Ritzer referred Claimant for an orthopedic evaluation.

5. Claimant was examined by Derek Johnson, M.D. on April 24, 2012 who diagnosed right knee sprain/strain, ACL tear and lateral meniscus tear. He noted Claimant was a candidate for arthroscopic surgery and ordered a knee brace.

6. Claimant was seen in follow-up by PA Chau and Dr. Ritzer on May 1, 2012 and it was noted that he was working modified duty. A request for authorization of the surgery was pending.

7. Claimant underwent surgery on June 15, 2012, which was performed by Dr. Johnson. The procedure performed was right knee arthroscopic ACL reconstruction and lateral meniscectomy.

8. Claimant returned to Dr. Johnson on June 21, 2012 and ACL rehabilitation protocol was begun. He saw PA Chau on June 27, 2012 and physical therapy was begun.

9. Dr. Ritzer and PA Chau examined Claimant on June 27, 2012 (12 days post-surgery). Claimant was still taking narcotic pain medication and some swelling was noted. Mr. Julin was to start physical therapy.

10. Claimant returned to PA Chau and Dr. Ritzer on July 13, 2012 and reported that he was feeling better, although he had pain on the lateral side of his knee. No swelling or effusion was noted and he was to continue with physical therapy. His next appointment at HealthONE was July 30, 2012 at which time Claimant reported his knee pain was worsening. He was scheduled to see Dr. Johnson in follow-up in approximately two weeks.

11. Claimant was next seen on August 20, 2012. At that time he reported his knee felt about the same, with his pain worsened by prolonged standing. He was to continue physical therapy and discontinue NSAIDs. Tramadol was prescribed, along with a Pennsaid solution.

12. Claimant was evaluated by Dr. Ritzer and PA Chau on September 10, 2012 at which time some improvement in his pain was noted. No swelling, effusion or infection was seen. There was a small palpable nodule noted at the medial proximal tibia. He was to continue his physical therapy and referred to radiology to evaluate the nodule.

13. Dr. Ritzer examined Claimant on October 1, 2012, at which time he reported no improvement in the knee. Some weakness was noted against resisted knee flexion and extension. A new knee brace was provided and it was noted that he was scheduled for follow-up with Dr. Johnson.

14. Claimant was examined by Dr. Johnson on October 16, 2012 at which time he reported continued pain. The medical records document that Claimant received physical therapy over 9 months (a total of 43 sessions) from June 29, 2012 through October 19, 2012. However, he continued to experience pain in his right knee. Dr. Johnson referred Claimant to his partner Dr. Oster for second opinion.

15. Claimant was next seen by Dr. Ritzer on October 22, 2012 with continued pain complaints. Dr. Ritzer ordered a repeat MRI, which was done on October 26, 2012. The MRI showed that the ACL graft was intact and there was no new meniscal tear. Resolved lateral meniscal compartment pivotal shift, bone bruising and small joint effusion were noted

16. Claimant was evaluated by Dr. Ritzer on October 30, 2012 at which time he referred Mr. Julin to a physiatrist, Dr. Wakeshima. Dr. Wakshima examined Claimant on November 15, 2012 and diagnosed persistent knee pain. Claimant's medications were changed and a TENS unit was prescribed.

17. Claimant was examined by Michael Hewitt, M.D. on November 16, 2012 and was experiencing medial and lateral joint line tenderness. A new tear in the lateral meniscus was noted, which was confirmed by contacting the radiologist who originally read his MRI. Dr. Hewitt saw Claimant for a follow-up on December 5, 2012 and he wanted to proceed with surgery.

18. Dr. Hewitt performed a right knee arthroscopic meniscetomy on January 9, 2013. The post-operative diagnosis was history of anterior cruciate ligament

reconstruction with intact graft; lateral meniscal tear, mid zone; localized grade 3 chondromalacia; suprapatellar and anterior notch synovitis.

19. Claimant received post-surgery follow-up care from Drs. Ritzer and Wakshima. On January 21, 2013, Dr. Wakeshima noted patient to be improving after surgery. No sign of infection was noted, although Claimant reported pain at the medical and lateral joint line region.

20. On January 30, 2013, Dr. Wakeshima evaluated Claimant, who reported that he still had ongoing right new pain. On examination, mild tenderness about the right anterior, medial and lateral knee region was noted. Dr. Wakeshima noted that he continued to progress with physical therapy. Dr. Wakeshima informed Claimant that he could wean himself off opioids and continue with the use of his TENS unit.

21. Dr. Wakeshima next examined Mr. Gerson on Febraury 21, 2013, who continued to have medical knee region pain about the pes anserine region. There was no swelling, crepitus or erythema noted in the right knee. A flector patch was refilled for Mr. Julin and he was to continue with his TENS unit and physical therapy.

22. Claimant was examined by Dr. Wakeshima on March 12, 2013. Very mild tenderness was noted in his right knee about the right pes anserine insertion. There was no lateral or medial joint line tenderness noted. Dr. Wakeshima opined that Claimant was approaching MMI, provided there was not further surgical intervention. He was given a re-fill for the Flector patch and Pennsaid drops.

23. Claimant next saw Dr. Wakeshima on June 5, 2013 and reported worsening pain since he returned to work. Mild tenderness to palpation was noted about the right anterolateral knee joint region. He was scheduled to have his hardware removed by Dr. Hewitt and Dr. Wakeshima wanted to wait for this to be done before his knee brace was modified or a new brace was ordered.

24. Dr. Wakeshima examined Claimant on June 20, 2013 and it was noted that his hardware was removed June 12, 2013. Tenderness was greater at the lateral as opposed to medial joint line. Dr. Hewitt had begun Claimant on physical therapy and Mr. Julin was going to bring in his knee braces at the next appointment.

25. Claimant returned to Dr. Wakeshima on August 14, 2013 and reported that the injection in his right medical knee region helped with some of his symptoms. Tenderness to palpation was noted about the insertion of the pes anserine. Dr. Wakeshima's impression was pes anserine tendinitis and he discussed that Claimant was approaching MMI. A prescription for compounded meloxicam/prilocaine/lidocaine cream was written.

26. On August 28, 2013, Dr. Wakeshima examined Claimant who reported that he reinjured his knee while jogging. Claimant had pain and could not fully extend his knee. A MRI was performed on August 23, 2013 and a copy of the report was going to be requested. Dr. Wakeshima recommended that Mr. Julin continue to use the hinged knee brace.

27. Dr. Wakeshima evaluated Claimant on September 13, 2013, with tenderness to palpation was noted about the pes anserine insertion and medial lower portion of his knee joint region. Surgery was not being contemplated Claimant and it was felt that Claimant was approaching MMI.

28. Claimant returned to see Dr. Ritzer on October 3, 2013. At that time, Dr. Ritzer concluded that Claimant had reached MMI. Dr. Ritzer also provided Claimant with an overall impairment of 28% to his right knee. Included in the impairment rating was a 10% impairment rating for the lateral meniscus tear and a 10% impairment rating for this ACL reconstruction. Dr. Ritzer specifically did not provide Claimant with an impairment rating because of the presence of his chondromalacia.

29. Respondents filed a Final Admission of Liability ("FAL") that is undated. Respondents admitted to the 28% impairment rating given by Dr. Ritzer. Claimant filed a timely objection to the FAL and requested a DIME.

30. Dr. Albert Hattem was selected as the DIME physician. Dr. Hattem, in a report dated May 14, 2014, concluded that Claimant was entitled to a 31% impairment rating to Claimant's lower extremity. Dr. Hattem included a 5% lower extremity impairment in the Claimant's medical impairment rating for the presence of chondromalacia.

31. Claimant testified at hearing that he was asking for further medical treatment. Specifically, he referenced a strengthening program as documented in Dr. Hewitt's 9/11/203 report.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to

find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The two issues before the ALJ are addressed below.

Reopening

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the Claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985).

Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Claimant submitted a copy of the Final Admission of Liability, including the discharge summary and impairment rating and issued by Dr. Ritzer [Exhibit 1]. Claimant also adduced copies of Dr. Hewitt's 9/6/13 and 9/11/13 reports, along with the 9/30/13 and 10/2/13 records from Rocky Mountain Spine and Sport at the hearing [Exhibit 2]. Most of Claimant's testimony at hearing centered on his request for additional medical treatment, as identified in the aforementioned records.

Respondents contended that there was insufficient evidence to support a Petition to Reopen and the ALJ is persuaded by this argument. First, there is no evidence which documents a worsening of claimant's condition, including any medical records from his authorized treating physicians. In addition, Claimant did not testify that his right knee had worsened, nor did he return to any of his authorized treating physicians and report a worsening of condition.

Second, even assuming *arguendo*, that Claimant's request for medical benefits is subsumed within the Petition to Reopen, there has been no showing that Claimant was denied medical benefits, including any treatment. Based upon the evidence before the ALJ, claimant has the right to maintenance medical benefits, as outlined in Dr. Ritzer's 10/3/13 report.

Permanent Partial Disability

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012).

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is Denied.

2. Claimant's request for additional PPD benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2015

s/Timothy L. Nemechek
Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The primary issue presented for determination is whether the Claimant's claim should be reopened based upon a mistake of fact. Specifically Claimant alleges that his average weekly wage (AWW) was calculated incorrectly due to an error in the date of injury, and that he is therefore owed more indemnity benefits. Claimant also alleges other mistakes the nature of which Claimant did not make very clear. Claimant alleges that Respondents should be penalized for various violations of the Workers' Compensation Act. Respondents assert that Claimant failed to properly plead his penalty allegations.

During the hearing, the Claimant attempted to allege a change of medical condition as a basis for reopening his claim. Respondents objected because Claimant did not previously identify a change of condition as a basis for reopening in the discovery responses he provided to the Respondents. The ALJ sustained the objection and did not permit the Claimant to proceed on worsening of condition.

FINDINGS OF FACT

1. The Claimant sustained an injury on December 27, 2011.

2. The Respondents admitted liability for Claimant's injury and he received medical treatment until he was placed at maximum medical improvement (MMI) on September 27, 2012.

3. Initially, Respondents filed a General Admission of Liability admitting for an AWW of $400.00.

4. The Claimant was represented by counsel in early 2012. On March 23, 2012, Claimant's attorney wrote a letter to the Insurer and stated, "The wage information that I have indicates that [Claimant's] average weekly wage was $513.99 per week."

5. On the Final Admission of Liability filed on July 18, 2013, the Respondents admitted for an AWW of $513.99, and a temporary partial disability (TPD) total of $9,069.58.

6. The Final Admission of Liability also indicated an overpayment of TPD in the amount of $1,241.07.

7. The claim closed based on the July 18, 2013 Final Admission because Claimant failed to timely object.

8. Claimant seeks a reopening of his claim citing various reasons. Claimant never filed a petition to reopen with the DOWC, but did file an application for hearing endorsing "petition to reopen."

9. The Claimant now asserts that his AWW was calculated incorrectly merely because an incorrect date of injury appears on the Employer's First Report of Injury. He asserts that because a claimant's AWW should be calculated based on his wages "at the time of the injury" that somehow his wages were incorrectly calculated. Claimant offered no persuasive evidence as to what he believes his AWW should be. In light of the fact that his attorney agreed to an AWW on March 23, 2012, and because Claimant failed to timely object to the Final Admission filed on July 19, 2013, the ALJ finds no basis to disturb the AWW in this case.

10. The Claimant also asserts that his TPD payments were inaccurate. Again, Claimant failed to timely object to the Final Admission of Liability filed on July 19, 2013, and he has offered no persuasive argument that any mistake has occurred that would justify reopening his claim as it pertains to the TPD payments. Further, based on the evidence presented, the ALJ can discern no mistake in the TPD payments made to the Claimant.

11. Prior to the July 18, 2013 Final Admission, the Claimant underwent a Division Independent Medical Examination with Dr. Justin Green on May 22, 2013.

12. As required by the Workers' Compensation Act, on May 7 2013, the Respondents sent Claimant's medical records to Dr. Green and to Claimant's counsel.

13. There is no evidence that Claimant's counsel made any attempt to supplement the medical records for the DIME. Apparently, Respondents did not include a record from William Beaver, M.A., in the DIME medical record packet, which Claimant now asserts should subject Respondents to a penalty.

14. Claimant provided no evidence as to how the missing record had any impact on Dr. Green's findings and conclusions. In fact, the Claimant did not offer Mr. Beaver's report into evidence.

15. Claimant essentially testified that Respondents should now be penalized for his attorney's mistake in failing to supplement the records provided to Dr. Green.

16. Claimant testified that he did not receive information about his rights when he initially injured himself and that his lack of notice concerning his rights in early 2012 which he believes impacted the processing of his claim. Claimant did not explain how this situation impacted his claim.

17. Claimant's application for hearing cites various allegations of penalties against Respondents including reporting an inaccurate date of injury on the First Report of Injury; timeliness of compensation payments; accuracy of compensation payments; average weekly wages; final admission of liability; no posting of insurance carrier at the employer's location; no rule 5 survey completed by the Claimant. Most of these allegations are not described with any level of specificity, and are insufficiently plead.

18. Further, the Claimant presented no persuasive or credible evidence to support his penalty claims, many of which he knew or should have known about more than one year prior to filing his application for hearing on February 19, 2015.

CONCLUSIONS OF LAW

Based on the findings of fact, the Judge enters the following conclusions of law:

General Provisions

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo.App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Reopening

4. Section 8-43-303(1), C.R.S., provides:

> At any time within six years after the date of injury, the director or an administrative law judge may … review and

> reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

5. During the hearing, the ALJ mistakenly stated that under WCRP, Rule 7, the Claimant must file a petition to reopen with the Division before proceeding to a hearing on reopening. However, §8-43-303, C.R.S., does not mandate the filing of a formal petition to reopen in order to confer jurisdiction on an ALJ to determine whether, in fact, a claim should be reopened. *Ward v. Azotea Contractors*, 748 P.2d 338; *Padilla v. Industrial Commission*, 696 P.2d 273 (Colo. 1985); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). As such, the ALJ has authority to determine whether the Claimant's claim should be reopened.

6. When a party seeks to reopen based on mistake, the ALJ must engage in a two-step process. The ALJ must determine "whether a mistake was made, and if so, whether It is the type of mistake which justifies reopening" the claim. *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981).

7. The Claimant has failed to show that there is a mistake or error which justifies reopening his claims. In reviewing the evidence presented, there may have been some clerical errors but the ALJ can find no mistake which would not have been apparent to Claimant or his attorney when this claim was still opened. For instance, Claimant's attorney could have agreed to a different AWW, but he did not. He agreed to an amount that Claimant now disputes more than three years after the alleged mistake was made. In addition, the issue involving any inaccuracies in TPD payments should have been addressed before this claim closed. The allegation that the DIME medical packet was incomplete could have been rectified by Claimant's attorney at that time. The types of mistakes, if any, to which Claimant cites, are not the types of mistakes that justify reopening this claim.

Penalties

8. The Claimant did not properly plead his penalty allegations. In any application for hearing for penalties, the applicant shall state with specificity the grounds on which the penalty is being asserted. Section 8-43-304(4), C.R.S. As found, Claimant did not state with specificity in his Application for Hearing filed on February 19, 2015 the basis for all of the penalty claims. In addition, a request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. Section 8-43-304(5), C.R.S. *See* also *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002). Many of the allegations made by Claimant were or should have been known to him more than one year before February 19, 2015. For instance, Claimant alleged that the Employer failed to post the name of its workers' compensation insurance carrier in its restaurants, an allegation which should have been known to him well in advance of February 2015. The ALJ makes the same conclusions regarding allegations of inaccurate AWW calculations, inaccurate

TPD payments, timeliness of TPD payments and the WCRP Rule 5 survey. All of these alleged violations of the Workers' Compensation Act occurred approximately three years ago and Claimant produced no credible evidence that these alleged violations were not known to him until February 19, 2014.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his workers' compensation claim is denied.

2. Claimant's claim for penalties against Respondents is denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 8, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Is Claimant entitled to *Grover* medical benefits?
- Was the treatment provided by Dr. Noonan reasonable, necessary and related to the admitted industrial injury?

PROCEDURAL ISSUE

One of the medical bills in question [Exhibit 8-Bates no. 31-date of service 5/6/15] was incurred after Claimant's Application for Hearing was filed. However, Respondent agreed that the issue of whether this treatment was part of Claimant's claim for *Grover* medical benefits and whether it was reasonable, necessary and related could be adjudicated at the this hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant has been employed as a firefighter for twenty-one (21) years. Claimant suffered an admitted industrial injury on September 25, 2012 while he was moving a fire hose as part of a training exercise. An Employer's First Report of Injury was filed on September 25, 2012.

2. Prior to this, Claimant injured his shoulder in 2009 while weightlifting. He testified that he did not lose time from work for this injury. Claimant testified that he did not require treatment for his shoulder prior to the 2012 injury. He was not diagnosed with arthritis prior to 9/25/12 and was not aware he had arthritis.

3. Claimant was examined by Benjamin Clower, M.D. on September 27, 2012, who noted that Claimant had intermittent pain, with decreased range of motion since suffering an injury in 2009. Dr. Clower's assessment was work-related right shoulder injury. Dr. Clower suspected a possible SLAP injury and referred Claimant for an MRI.

4. An MRI was done on Claimant's right shoulder on September 27, 2012, which showed advanced degenerative arthrosis in the glenohumeral joint, including a large marginal osteophyte; rotator cuff tendinopathy, but no frank tear; tight rotator cuff outlet due to multifactorial causes. Claimant testified that he understood the MRI showed arthritis in his right shoulder.

5. Dr. Clower saw Claimant in follow-up on October 9, 2012 noting that the MRI showed no labral tear, but a mild rotator cuff tear.

6. Claimant was evaluated by Thomas J. Noonan, M.D. on October 16, 2012. Dr. Noonan's impression was right shoulder pain, right shoulder advanced glenohumeral arthrosis. Dr. Noonan discussed treatment options, including a "watch and wait" conservative approach versus physical therapy versus occasional cortisone injections. A surgical procedure (arthroscopy) was also discussed. This procedure included joint debridement, capsular release, manipulation under anesthesia, subacromial decompression and possible biceps release.

7. Claimant was also examined by Dr. Clower on October 16, 2012. At that time, Dr. Clower's assessment was work-related right shoulder pain, secondary to glenohumeral arthritis. Approval for a second opinion by Thomas, Mann, M.D. at Cornerstone Orthopedics was obtained. Dr. Clower recommended that Claimant begin physical therapy while awaiting the second opinion.

8. Dr. Mann examined the Claimant on October 22, 2012. Dr. Mann's assessment was right shoulder pain with significant glenohumeral arthropathy and marginal osteophytes. Dr. Mann discussed treatment options from conservative treatment with therapy and activity modification as well as injection therapy, both cortisone and viscosupplementation versus arthroscopic debridement, humeral head resurfacing and total shoulder hemiarthroplasty. Dr. Mann noted there were significant mechanical issues in the shoulder that made Claimant a good candidate for arthroscopic debridement and removal of osteophytes. These issues were causing limitations in the shoulder.

9. On November 14, 2012, Claimant underwent a right shoulder arthroscopy, which was performed by Dr. Noonan. The procedures included arthroscopic debridement of humeral head spurring, removable of loose bodies, biceps release, subacromial decompression, capsular release, as well as manipulation under anesthesia.

10. Claimant testified that he returned to full duty after the surgery. He has continued to work full-time for Respondent-Employer.

11. Claimant was evaluated by William Miller, M.D. on July 19, 2013, at which time he was placed at maximum medical improvement. Dr. Miller assigned a 17% upper extremity permanent medical impairment. He also wrote a referral for massage therapy for twelve times over the next year, modalities as indicated. He also recommended two (2) follow-up visits at Exempla.

12. Respondent filed a Final Admission of Liability on August 28, 2013, admitting for the impairment rating of Dr. Miller. The Respondent's position on maintenance medical benefits after MMI stated: "admit" however, the FAL also noted "any and all benefits not admitted are hereby specifically denied".

13. Claimant testified he experienced a flare-up of his symptoms in the right shoulder, which he stated occurred approximately every six (6) months.

14. Claimant returned to Dr. Noonan's office on March 27, 2014 and was evaluated by Gary Sakryd, PA-C and Dr. Noonan. The chief complaint was listed as a new onset of mild right shoulder pain, as well as a new onset of numbness. The report [Exhibit 8] noted that Claimant was counseled that he had chondral changes globally throughout the glenohumeral joint and that he may need future intervention down the line. They also talked about cortisone injection to "calm his shoulder down". Claimant was going to consider an injection. Respondent paid for the March 27th evaluation.

15. Claimant returned to Dr. Noonan's office on November 6, 2014 complaining of right shoulder pain and numbness. Dr. Noonan's impression was right shoulder pain and a flare of existing glenohumeral arthritis. Dr. Noonan injected Claimant's right shoulder glenohumeral joint with 1cc of Kenalog and 4cc of lidocaine.

16. Claimant returned to Dr. Noonan's office on May 6, 2015. Dr. Noonan felt it was reasonable to repeat the cortisone for him and he received another injection at that time.

17. Claimant testified that the injections relieved his symptoms.

18. Respondents disputed whether the treatment received by Claimant on November 6, 2014 and May 6, 2015 was a result of the industrial injury or whether the treatment was necessitated by Claimant's pre-existing osteoarthritis.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1).

A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A Respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the

disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the Respondent files a Final Admission of Liability admitting for ongoing medical benefits after MMI, it retains the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 7 P.3d 863 (Colo. App. 2003). When the Respondent challenges the Claimant's request for specific medical treatment the Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the Claimant proved that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). In this case, the issue is whether Claimant satisfied his burden of proof with regard to the injections given by Dr. Noonan; more particularly whether this is properly considered post-MMI medical treatment under *Grover* and its progeny, as well as whether the treatment provided was reasonable and necessary.

Liability for Injections to Claimant's Right Shoulder

In that case at bench, Claimant has the burden of proving his entitlement to *Grover* medical benefits, along with the reasonableness and necessity of these treatments. More particularly, Claimant was required to establish that his need for the injections was caused by the 2012 injury and required to maintain MMI. Respondent has disputed whether the injections Claimant received were necessitated by the industrial injury as opposed to his pre-existing osteoarthritis. As a starting point, Claimant's admitted industrial injury on September 25, 2012 was a traumatic injury which caused him to experience symptoms in his right shoulder. The right shoulder had extensive arthritic changes in the glenohumeral joint, which most probably were present prior to the injury in 2012. Indeed, Claimant experienced symptoms in 2009 in the same shoulder and experienced intermittent symptoms afterward. Dr. Clower's records documented this fact.

However, there was no evidence that the osteoarthritis in Claimant's right shoulder limited him in any way before September of 2012, including performing his work duties. Claimant testified credibly that he did not require treatment for the arthritic changes in the right shoulder prior to the 2012 injury. Claimant contended that the 9/25/12 injury caused the pre-existing degenerative changes to become symptomatic and require treatment, including his surgery. This is supported by the medical records. Dr. Clower characterized Claimant's shoulder condition as exacerbation of glenohumeral arthritis and the surgery was necessary to alleviate the symptoms brought on by this exacerbation. The record established that Claimant's pre-MMI treatment for

his shoulder was necessary to cure and relieve the effects of the 2012 work injury. Thus, the ALJ concludes that since the 2012 injury directly led to Claimant's need for treatment, Respondent continues to be liable for treatment to maintain MMI.

Turning next to whether the modality of treatment (injections) was reasonable, both Dr. Mann and Dr. Noonan identified injections as a recommended course of treatment following the industrial injury. The ALJ notes that one of the treatment alternatives by Dr. Noonan was a cortisone injection. (Finding of Fact No. 6). Dr. Mann also identified this as a therapeutic option for Claimant. (Finding of Fact No. 8). However, Claimant chose to undergo surgery. The medical records admitted at hearing established that injections were a reasonable modality of treatment for Claimant's condition. No contrary evidence was received by the ALJ, who concludes that this form of treatment was reasonable.

There was no dispute that Claimant required treatment after MMI to maintain his condition, however, the question raised by Respondent was whether the injections constituted treatment that was necessary to maintain MMI. After Claimant reached MMI on July 19, 2013, Dr. Miller recommended that he continue to receive treatment, including physical therapy and follow-up visits at Exempla. Dr. Miller specifically identified this treatment as maintenance care Claimant required. An inference that is drawn from Dr. Noonan's records and Claimant's testimony is that the injections were required to maintain Claimant's condition following the surgery. Both the medical records and Claimant's testimony documented an improvement in Claimant's symptoms and function after he received the injections. The recommendation for an injection made by Dr. Noonan was within the one year time frame (after MMI), as specified by Dr. Miller.

There also was no dispute that through its FAL, Respondent admitted for maintenance medical benefits, although this admission did not specifically admit for the injection therapy provided by Dr. Noonan. Given that Claimant required maintenance treatment, Respondent admitted for said treatment, the treatment was recommended by authorized treating physicians and the treatment improved Claimant's symptoms; all lead to the conclusion that the injections were necessary under these circumstances. Therefore, the ALJ concludes that Claimant met his burden of proving that the injection therapy was necessary to relieve his symptoms, as well as to maintain MMI.

The record also established that Dr. Noonan was an authorized treating physician and was a treatment provider throughout the pendency of the claim. Dr. Noonan recommended a cortisone injection at the time of the March 27, 2014 visit. In his recommendation, Dr. Noonan opined that an injection was a reasonable treatment option and the medical records indicated that Claimant wanted time to think about it. Respondent paid for this post-MMI evaluation. As the treating surgeon, Dr. Noonan was in a position to evaluate and make recommendations regarding Claimant's need for post-MMI treatment. The evidence before the ALJ indicates that Dr. Noonan felt this treatment was reasonable and necessary. No medical opinion contradicted Dr. Noonan's conclusion. Therefore, the ALJ concludes that Claimant has proven that the injections were part of the treatment Claimant required as part of his post-MMI care.

This treatment was part of what was admitted in the FAL and included within Claimant's right to receive *Grover* medical benefits.

In coming to this conclusion, the ALJ has considered Respondent's contention that Claimant had osteoarthritis in the glenohumeral joint prior to the 2012 injury and this condition required the treatment at-issue. There was no dispute that arthritic changes were present in the glenohumeral joint and was borne out by the medical records, including the MRI scan of September 27, 2012. However, there is no medical evidence before the ALJ which documented that Claimant would have required the injections absent his industrial injury. Stated another way, there was no medical opinion which established the injections Claimant received were because of his pre-existing osteoarthritis, as opposed to his work injury.

The medical evidence demonstrated that the Claimant required treatment only after his industrial injury in 2012. This included, first, the surgery and second, the treatment which followed this procedure. The inference drawn from Dr. Noonan's records is that he considered this to be a consequence of the injury and reasonable in light of the flare up of Claimant's symptoms. Because Claimant needed this treatment as a result of the industrial injury, the injections were reasonable and necessary. The ALJ concludes that the treatment provided by Dr. Noonan was part of the sequelae from Claimant's industrial injury and required to maintain MMI. Respondent is therefore liable for said treatment.

ORDER

It is therefore ordered that:

1. Respondent shall pay for Claimant's injections provided by Dr. Noonan on November 6, 2014 and May 6, 2015, pursuant to the Worker's Compensation Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 8, 2015

s/Timothy L. Nemechek

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the L3-L5 fusion surgery performed by Chad Prusmack, M.D. on April 10, 2015 was reasonable, necessary and causally related to her November 12, 2012 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant is a 69 year old female who worked for Employer as a Financial Advisor for nursing students at the University of Phoenix. On November 12, 2012 Claimant suffered admitted industrial injuries as a result of a motor vehicle accident. In addition to other conditions, Claimant injured her lower back.

2. On November 16, 2012 Claimant underwent an x-ray of her lumbar spine. The x-ray reflected a minimal grade 1 anterolisthesis at L4-L5. There was also mild facet arthropathy and mild age-related spondylosis. The x-ray revealed degenerative changes but no evidence of a traumatic injury to Claimant's lumbar spine.

3. Claimant received conservative treatment for her injuries through Authorized Treating Physician (ATP) Darrell Quick, M.D. She obtained physical therapy, participated in a home exercise program and received injections. Claimant also underwent a lumbar spine MRI.

4. On June 28, 2013 Dr. Quick determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned Claimant a 30% whole person impairment rating for the physical and psychiatric aspects of her injuries. Dr. Quick noted that Claimant required medical maintenance treatment.

5. Because Claimant continued to experience lower back symptoms, Dr. Quick referred her for a neurological consultation with Bernard H. Guiott, M.D. Dr. Quick specifically referred Claimant to determine whether she was a candidate for a lumbar discectomy.

6. On March 5, 2014 Claimant visited Dr. Guiot for an examination. Claimant stated that her back pain was increasing in intensity and was limiting her daily activities. Dr. Guiot remarked that he reviewed Claimant's February 26, 2014 MRI. The MRI confirmed disc-based injuries at L3-L4 and L4-L5. Specifically, there was evidence of significant stenosis producing compression of the traversing L5 nerve root. Dr. Guiot's impressions were lumbar radiculopathy and lower back pain. He concluded that the site of Claimant's pain generator was localized to the L3-L4 and L4-L5 levels. Dr. Guiot recommended a two level TLIF fusion.

7. Dr. Quick also referred Claimant for a neurological consultation with Chad Prusmack, M.D. On April 1, 2014 Claimant underwent an evaluation with Dr. Prusmack. Claimant reported ongoing lower back pain and radiating pain around the right hip area and right medial thigh. On examination, Claimant exhibited worsening back pain on flexion and extension as well as a chronic baseline of axial back pain. Dr. Prusmack recommended a discography to determine whether the L4-L5 level was Claimant's pain generator.

8. On May 12, 2014 Claimant visited Dr. Prusmack for an evaluation. Dr. Prusmack noted that the discogram revealed a positive concordant pain response with a grade 4 annular tear at L5-S1 in the absence of any other positive concordant pain responses. He remarked that Claimant had significant right-sided anterior thigh pain and a right-sided L3-L4 far lateral disc protrusion. Dr. Prusmack recommended an L5-S1 minimally invasive TLIF.

9. On May 27, 2014 Brian Reiss, M.D. performed a records review of Claimant's case. He noted that Claimant had a history of prior recurrent lower back pain. Dr. Reiss remarked that Claimant's lower back pain had improved considerably and resolved with treatment. He commented that imaging studies revealed multiple levels of degenerative changes from L2-S1 and that all of the discs could be pain generators. Dr. Reiss thus concluded that the recurrence of Claimant's lower back pain was the natural course of her pre-existing condition.

10. On May 28, 2014 Dr. Prusmack recommended an L5-S1 fusion. He also recommended a right disc compression at L3 and possibly L4.

11. On July 21, 2014 Claimant underwent an independent medical examination with Michael J. Rauzzino, M.D. After conducting a physical examination he diagnosed right-sided L3-L4 disc herniation, right-sided L4-L5 disc herniation and degenerative changes, and a concordant disc protrusion at L5-S1. Dr. Rauzzino recommended a L3-L4 microdiscectomy. However, he remarked that, if Claimant underwent an L5-S1 fusion, there was a reasonable chance that Claimant would ultimately require a three level fusion.

12. In a July 29, 2014 note Dr. Rauzzino recommended a right L3-L4 microdiscectomy to treat Claimant's right leg pain. He hoped to avoid any fusion because of her severe disc disease at L3-L4. Dr. Rauzzino specified that, if Claimant underwent an L5-S1 fusion, there is a "reasonable chance that she would end up with a three-level fusion."

13. On August 13, 2014 Claimant returned to Dr. Guiot for an examination. He noted that, based on the discogram, the L5-S1 disc space was Claimant's pain generator. Dr. Guiot determined that Claimant would benefit from an L5-S1 interbody fusion and stabilization. He noted that decompression at the "degenerated" L3-L4 and L4-L5 sites "adjacent to instrumental fusions is not optimal." However, if the L3-L4 and L4-L5 segments were contributing to Claimant's pain, an interbody fusion from L3-S1 would be necessary.

14. On August 20, 2014 Claimant underwent an independent medical examination with Brian Reiss, M.D. Relying on the *Colorado Workers' Compensation Medical Treatment Guidelines* (*Guidelines*) Dr. Reiss noted that a pain generator must be clearly identified before proceeding with surgical intervention. However, Claimant's pain generator had not been clearly identified. Moreover, the *Guidelines* also reflect that a fusion should be limited to two or fewer levels. Finally, Dr. Reiss commented that Claimant's MRI revealed abnormalities at the L3-S1 levels. He diagnosed Claimant with degenerative disc disease and back pain. Dr. Reiss thus concluded that the surgeries requested by doctors Guiott and Prusmack were not warranted.

15. Respondents subsequently approved a L3-L4 decompression. On November 20, 2014 Claimant underwent a L3-L4 decompression of the nerve root with resection of a L3-L4 far lateral herniated disc.

16. On April 7, 2015 Claimant was admitted to SkyRidge Medical Center for an increase in lower back pain. Claimant stated that her lower back pain and radiculopathy improved following her L3-L4 decompression, but after bending over in an uncertain position she experienced a recurrence of symptoms. The impressions were acute on chronic intractable back pain with a history of degenerative joint disease and recent microdiscectomy. Claimant subsequently underwent a lower back MRI.

17. Based upon the Claimant's pain complaints, the MRI results and his concern about the possibility of potential diskitis as a result of the November 20, 2014 surgery, Dr. Prusmack performed urgent back surgery on Claimant on April 10, 2015. He specifically performed an anterior lumbar interbody fusion at L3-L4 and L4-L5. Dr. Prusmack did not have authorization for the procedure from Insurer.

18. Dr. Prusmack explained the necessity of the procedure in his operative report. He stated, in relevant part,

> [Claimant's] pain became relentless, leg became weak, so she came to the ER. At that point, we had a new MRI, which showed increased edema in the endplates, hyperemic in the disc as well as a large synovial cyst causing far lateral recess stenosis and progression of the adjacent level L4-5 stenosis. Based on the concern of diskitis as well as significant instability and synovial cyst, the patient needed an urgent decompression and fusion. Because the L3-4 fusion would be adjacent to an already stenotic level, we needed to include that into the fusion. I do believe that this is directly related from either the last surgery which was the discectomy or the natural progression of an unstable level, which was instigated originally by other work-related incident, now subsequently needed to be addressed or could have been due to instability incurred in the first L3-4 diskectomy.

19. On August 3, 2015 the parties conducted the pre-hearing evidentiary deposition of Dr. Prusmack. Dr. Prusmack noted that during the April 10, 2015 surgery he found a disc herniation with narrowed impingement and a severely decompressed

nerve. He described Claimant's worsening condition after the November 20, 2014 surgery. Claimant's additional pain was caused by instability in the spine because of the November 20, 2014 surgical procedure. He summarized that Claimant may have been headed toward additional surgery because of the motor vehicle accident but the "discectomy sure got her there faster." Moreover, Dr. Prusmack commented that Claimant's synovial cyst at L3-L4 caused further instability. Finally, Dr. Prusmack remarked that Claimant's mild degenerative arthritis had nothing to do with the necessity for the April 10, 2015 surgery.

20. Claimant testified that subsequent to the April 10, 2015 surgery she recuperated at a rehabilitation center for approximately 10 days. She then underwent physical therapy and progressed to the point where she has 100% use of her right leg. Claimant explained that she still experiences some soreness but is pleased with the outcome of the surgery.

21. Dr. Reiss testified at the hearing in this matter. He explained that Claimant suffered from pre-existing, recurring back problems. He remarked that the November 16, 2012 x-ray revealed no acute injuries. However, the MRI reflected degenerative changes in the form of minimal anterolisthesis at L4-L5. Dr. Reiss commented that degenerative disc disease occurs over a long period of time and degeneration is not caused by a specific incident. He remarked that there was no finding on Claimant's MRI reflecting an acute injury.

22. Dr. Reiss testified that he reviewed the January 22, 2013 MRI report in which there was a paracentral disc extrusion at L3-L4. The disc was protruding within the spinal canal but not outside of the canal. Dr. Reiss expressed concern that Dr. Prusmack performed a far lateral L3-L4 discectomy on the right, because from all of the medical records and MRI reports, there was nothing to suggest surgery in the far lateral location. All of Claimant's problems were in the spinal canal. Dr. Reiss explained that he would have performed a discectomy at L3-L4 within the spinal canal to relieve pressure from Claimant's L4 nerve root,

23. Dr. Reiss explained that the February 26, 2014 MRI revealed a worsening of Claimant's lower back symptoms. He specifically noted that Claimant suffered from the degenerative change of spondylosis at L3-L4 and L4-L5.

24. Dr. Reiss testified that the L3-L4 and L4-L5 fusion was not reasonable or necessary. He remarked that Claimant's pain generator had not been identified. Moreover, the L3-L4 and L4-L5 fusion surgery was not causally related to Claimant's November 12, 2012 work-related motor vehicle accident.

25. Claimant has failed to demonstrate that it is more probably true than not that the L3-L5 fusion surgery performed by Dr. Prusmack on April 10, 2015 was reasonable, necessary and causally related to her November 12, 2012 admitted industrial injuries. Claimant suffered from preexisting, degenerative lower back problems. In fact, the November 16, 2012 x-ray revealed degenerative changes but no evidence of a traumatic injury to the lumbar spine. As Dr. Reiss persuasively explained,

an MRI reflected degenerative changes in the form of minimal anterolisthesis at L4-L5. Dr. Reiss commented that degenerative disc disease occurs over a long period of time and degeneration is not caused by a specific incident. He remarked that there was no finding on Claimant's MRI reflecting an acute injury. The recurrence of Claimant's lower back pain was the natural course of her pre-existing condition. Moreover, imaging studies demonstrated multiple levels of degenerative changes from L2-S1. Dr. Reiss summarized that the L3-L4 and L4-L5 fusion was not reasonable or necessary. He remarked that Claimant's pain generator had not been identified. Moreover, the L3-L4 and L4-L5 fusion surgery was not causally related to Claimant's November 12, 2012 work-related motor vehicle accident.

26. In contrast, Dr. Prusmack explained that the additional pain Claimant was experiencing was caused by instability in the spine because of the November 20, 2014 surgical procedure. He summarized that Claimant may have been headed toward additional surgery because of the motor vehicle accident but the "discectomy sure got her there faster." Moreover, Dr. Prusmack commented that Claimant's synovial cyst at L3-L4 caused further instability. Dr. Prusmack concluded that Claimant's mild degenerative arthritis had nothing to do with the necessity for the April 10, 2015 surgery. However, Dr. Prusmack's testimony is not persuasive because doctors Guiot and Rauzzino determined that Claimant might need fusion surgery from L3-S1 before Dr. Prusmack performed the decompression at L3-L4. The need for surgery was due to Claimant's degenerative spine condition and unrelated to the November 12, 2012 work-related motor vehicle accident. As Dr. Reiss commented, the February 26, 2014 MRI revealed a worsening of Claimant's lower back symptoms. He specifically noted that Claimant suffered from the degenerative change of spondylosis at L3-L4 and L4-L5. Claimant's pre-existing lower back condition did not aggravate, accelerate or combine with her November 16, 2012 industrial injury to cause a need for the April 10, 2015 surgery.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the L3-L5 fusion surgery performed by Dr. Prusmack on April 10, 2015 was reasonable, necessary and causally related to her November 12, 2012 admitted industrial injuries. Claimant suffered from preexisting, degenerative lower back problems. In fact, the November 16, 2012 x-ray revealed degenerative changes but no evidence of a traumatic injury to the lumbar spine. As Dr. Reiss persuasively explained, an MRI reflected degenerative changes in the form of minimal anterolisthesis at L4-L5. Dr. Reiss commented that degenerative disc disease occurs over a long period of time and degeneration is not caused by a specific incident. He remarked that there was no finding on Claimant's MRI reflecting an acute injury. The recurrence of Claimant's lower back pain was the natural course of her pre-existing condition. Moreover, imaging studies demonstrated multiple levels of degenerative changes from L2-S1. Dr. Reiss summarized that the L3-L4 and L4-L5 fusion was not reasonable or necessary. He remarked that Claimant's pain generator had not been identified. Moreover, the L3-L4 and L4-L5 fusion surgery was not causally related to Claimant's November 12, 2012 work-related motor vehicle accident.

6. As found, in contrast, Dr. Prusmack explained that the additional pain Claimant was experiencing was caused by instability in the spine because of the November 20, 2014 surgical procedure. He summarized that Claimant may have been headed toward additional surgery because of the motor vehicle accident but the "discectomy sure got her there faster." Moreover, Dr. Prusmack commented that Claimant's synovial cyst at L3-L4 caused further instability. Dr. Prusmack concluded that Claimant's mild degenerative arthritis had nothing to do with the necessity for the April 10, 2015 surgery. However, Dr. Prusmack's testimony is not persuasive because doctors Guiot and Rauzzino determined that Claimant might need fusion surgery from

L3-S1 before Dr. Prusmack performed the decompression at L3-L4. The need for surgery was due to Claimant's degenerative spine condition and unrelated to the November 12, 2012 work-related motor vehicle accident. As Dr. Reiss commented, the February 26, 2014 MRI revealed a worsening of Claimant's lower back symptoms. He specifically noted that Claimant suffered from the degenerative change of spondylosis at L3-L4 and L4-L5. Claimant's pre-existing lower back condition did not aggravate, accelerate or combine with her November 16, 2012 industrial injury to cause a need for the April 10, 2015 surgery.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's L3-L5 fusion surgery on April 10, 2015 was not reasonable, necessary or causally related to her November 12, 2012 admitted industrial injury.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 11, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Compensability: whether the claimant has established by a preponderance of the evidence that her injury occurred arising out of and in the course of her employment with the respondent-employer.

2. If so, whether the claimant has established by a preponderance of the evidence that her medical treatment was reasonable, necessary and related to her work injury.

3. If so, whether the claimant has established by a preponderance of the evidence that the right of selection of an authorized treating physician passed to her.

FINDINGS OF FACT

1. The claimant works as a warehouse worker for the respondent-employer and did so at all relevant times. The claimant reported a work related injury to her right shoulder, right wrist and back that occurred on December 11, 2012 when she slipped and fell in the parking lot adjacent to the building in which she worked at approximately 4:05 p.m. on December 11, 2012.

2. The claimant was President of the union, an elected position that she voluntarily ran for with no encouragement from the respondent-employer. While employees have a nominal monthly amount deducted from their paycheck for union dues, they are not required to attend union meetings and/or run for an elected union office. Union meetings, except for those that involve negotiations with the employer, are not allowed to be held during work hours. Also, the employee participants, including the elected officers, are not paid to participate in union meetings unless it involves negotiations with the employer. The employer did nothing to encourage employees' participation in the union and there were no adverse repercussions to any employee who did not participate in the union.

3. On the date of her injury, the claimant arrived for work at approximately 7:00 a.m. and clocked out of work at approximately 3:30 p.m. The only things that she brought to work with her that morning were her car keys and wallet. She parked in a

location that was approximately fifty feet from her office building and it took her only a few minutes to walk from her vehicle to her office building.

4. The claimant arranged and participated in a union meeting after work on the date of her injury with Mr. Joe Gomez, the Vice President of the union, and Cheryl Hutchinson, the AFSCME Director who was based out of Denver and not employed by the respondent-employer. Other employee union members were allowed to participate in this meeting, but the employer was not allowed to participate in this meeting.

5. The purpose of the meeting was to review and make any necessary changes to the new collective bargaining agreement. The meeting was held in the first floor conference room of the building where the claimant worked. Immediately after she clocked out, the claimant went to the union meeting. If she had not attended the union meeting, it would have taken her only a few minutes to walk to her vehicle in the adjacent parking lot.

6. The employer allowed the conference room to be used for union meetings as an accommodation. It was not meant to signal the employer's approval or lack thereof of such activities. Union meeting were also held in other locations in town, including but not limited to the union hall and various restaurants in town.

7. At the meeting on the date of her injury, the claimant was given copies of contracts to take home with her. Also, during the meeting, the claimant made arrangements with Ms. Hutchinson for her to come to the claimant's home directly after the meeting to pick up some additional union documents.

8. The claimant left the meeting at approximately 4:05 p.m. and walked directly to her vehicle in the parking lot. In addition to her keys and wallet, the claimant was carrying union contracts as she walked to her car. Once she arrived at her car, she opened the car and "put her things down," on the seat of her car. Her "things" consisted of her car keys, wallet and the union contracts. After putting her things down, the claimant slipped and fell and her body hit her car door.

9. Ms. Hutchinson was walking to her vehicle at this same as the claimant was walking to her vehicle, but she did not appear to see the claimant fall. After the claimant fell, she drove to her home to meet Ms. Hutchinson as previously planned and told her what happened. Ms. Hutchinson arrived at the claimant's home, retrieved union documents from the claimant and left after five to ten minutes.

10. After initially providing medical care benefits to the claimant, on March 5, 2013, the respondent filed a Notice of Contest after discovering the claimant's participation in union activities at the time of her injury.

11. The ALJ finds that the claimant was not in the performance of duties that benefitted the respondent-employer at the time of her injury and that she was engaged in personal matters that were beyond the scope of her employment with the respondent-employer.

12. The ALJ finds that the claimant has failed to establish that it is more likely than not that her injury arose out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case the ALJ finds that while the claimant's testimony was credible, it supports that the claimant was not in the course and scope of

her employment at the time of her injury. The ALJ further finds Ms. Icabone's testimony to be credible and finds that it likewise supports that the claimant was not in the course and scope of her employment at the time of her injury.

4. An employee is entitled to worker's compensation benefits if injured performing service arising out of and in the course of employment. C.R.S. §8-41-301(1)(b)(c); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). Injuries "arise out of" the employment when the activity giving rise to the injuries is sufficiently interrelated to the conditions and circumstances under which the claimant generally performs his job, that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). In other words, the job or the injury placed the individual in a position where injury resulted. The "course of employment" requirement is met when the injuries occur during the time and place limits of the employment. *Popovich v. Irlando*, *supra*. There must be a direct causal relationship between the employment and the injuries. See C.R.S. §8-41-301 and *Ramsdale v. Horn*, 781 P.2d 150 (Colo. 1989).

5. While the claimant had clocked out from work, it is well settled that the "course of employment" embraces a reasonable interval before and after official working hours when the employee is on the employer's property. *Larson, Workers' Compensation Law* § 21.06(1); *Industrial Commission v. Hayden Coal Co., 113 Colo. 62, 155 P.2d 158 (1944)*; *Ventura v. Albertson's Inc., 856 P.2d 35 (Colo. App. 1992).* Here, the claimant's injury took place at least 35 minutes after the claimant "clocked out" with no intention of returning to work on that day. Therefore, the claimant was not in the course of her employment at the time of her injury. *Wilson v. Dillon Companies, Inc.*,W.C. No. 4-937-322-01 (2015) is distinguishable. In that case, the claimant, a barista in a grocery store, went grocery shopping after her shift and then slipped and fell in the parking lot. The *Wilson* claimant however was encouraged by her employer to grocery shop in the store and was provided incentives, including coupons. Therefore, the ALJ did not find the grocery shopping to be a personal deviation.

6. Assuming, *arguendo,* that the claimant was in the course of her employment at the time of her injury, the inquiry does not stop there. The claimant must also satisfy the "arising out of" requirement for compensability. The "arising out of" element is narrower than the "course" element and requires the claimant to prove that the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando, supra.* The "arising out of" test is one of causation. *See Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542 (1968).* The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's

employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *City of Brighton v. Rodriquez, supra*.

7. In order to satisfy the arising out of requirement, it is not necessary that the claimant actually be engaged in performing job duties at the time of the injury. *See Employers' Mutual Ins. Co. v. Industrial Commission, 76 Colo. 84, 230 P. 394 (1924).* Our courts have recognized that it is not essential for the compensability determination that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer so long as the employee's activities are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *See also Price v. Industrial Claim Appeals Office, 919 P.2d 207, 210 (Colo. 1996)* (an activity arises out of employment if it is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment"). It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst, 905 P.2d 9 (Colo. App. 1995).* Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary, and an accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, 907 P.2d 715 (Colo. App. 1995)*

8. In contrast, if an employee substantially deviates from the mandatory or incidental functions of her employment, such that she is acting for her sole benefit at the time of an injury, then the injury is not compensable. *Kater v. Industrial Commission, 728 P.2d 746 (Colo. App. 1986); see also Callahan v. Nekoosa Papers, Inc*., W.C. No. 3-866-766 (May 8, 1989)(claimant working on his car in the employer's parking lot with his own tools was not engaged in an activity incidental to his employment). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Panera Bread, LLC v. Industrial Claim Appeals Office, 141 P.3d 970 (Colo. App. 2006).*

9. The question of when a personal deviation has ended and the claimant has commenced the return to employment duties is generally one of fact for determination by the ALJ. Further, the claimant bears the burden of proof on this issue. *Wild West Radio, Inc. v. Industrial Claim Appeals Office, 905 P.2d 6 (Colo. App. 1995).*

10. As a general rule, union activities are personal and, therefore, if a worker is injured while participating in a union meeting, the claim is not compensable. *See*, 3-27 *Larson's Workers' Compensation Law* §27.03[3][a]. *See also, Spatafore v. Yale Univ.,* 684 A.2d 1155 (Conn. 1996) (Claimant who was injured walking back to work after attending a union meeting during her unpaid lunch break was denied workers' compensation benefits. The accident occurred on the defendant's premises, the union meeting was held on the defendant's premises, the meeting was not a grievance or negotiating meeting, employer representatives were not allowed and the claimant's participation was voluntary.)

11. After the claimant clocked out, she went directly to a union meeting. After the union meeting, the claimant walked directly to her vehicle. The claimant carried union contracts to her vehicle after the union meeting and had to put them down on the seat of her car prior to entering her vehicle and just before she slipped and fell. Prior to walking to the parking lot, the claimant made arrangements to meet Ms. Hutchinson, another union representative who was not employed by the respondent-employer, at her home to conduct additional union business. The claimant met Ms. Hutchinson at her home after her slip and fall and conducted additional union business.

12. The ALJ concludes that since at least 35 minutes elapsed since the claimant clocked out of work with no intention of returning, her injury did not occur within the course of her employment. Furthermore, since the claimant continuously participated in union activities from the time she clocked out until she arrived home and afterwards, the claimant's injury did not arise out of her employment. The claimant deviated from her employment when she attended the union meeting. This was a personal deviation from which she did not return that day. There is a clear chain of events that reflects the claimant's continuous participation in union activities from before, during and after her fall. Therefore, the claimant's injury did not arise out of her employment with the respondent-employer.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that her injury arose out of and in the course of her employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: September 3, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

PROCEDURAL MATTER

During the deposition testimony of Dr. Machanic on June 8 and June 18, 2015, Respondents objected to the introduction of Claimant's offered Exhibits 18, 19, 21, and 22, as in contravention of the ALJ's oral ruling at the conclusion of the April 30, 2015, wherein the ALJ precluded the development of additional evidence post hearing. Having reviewed the record and the deposition transcripts, the ALJ overrules Respondents' objections and admits Claimant's Exhibits 18, 19, 21 and 22 concluding that the aforementioned Exhibits do not constitute "new evidence" as contemplated by the ALJ's April 30, 2015 oral ruling. Rather, the ALJ finds and concludes that the Exhibits in question constitute materials which "explain" the foundation and basis for the various opinions expressed by multiple experts who have weighed in on the subject of Claimant's permanent impairment rating. Thus, the ALJ concludes that the exhibits merely provide context to the existing evidence, i.e. the various opinions and impairment rating reports authored by Drs. Lakin, Higginbotham, Ridings and Machanic. They do not represent substantive evidence or legal theories propounded by Claimant as prohibited by the ALJ's April 30, 2015 ruling.

ISSUES

I. Whether Respondents overcame the permanent partial impairment ratings assigned by Dr. Higginbotham Division IME physician, for thoracic spine impairment and for episodic neurologic disorders by clear and convincing evidence;

II. Whether Respondents overcame the scheduled permanent partial impairment rating assigned by Dr. Higginbotham for causalgia affecting the inferior lateral brachial cutaneous sensory nerve by a preponderance of the evidence;

III. Whether Claimant has proven by a preponderance of the evidence that he is entitles to maintenance medical benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the disposition testimony of Dr. Mechanic and Ridings, the ALJ enters the following findings of fact:

1. On June 26, 2013, while working for Employer, Claimant, a long-haul trucker, was cresting a hill with his tractor-trailer on a rural highway near Carrol, Nebraska when he encountered a piece of farm equipment in the road. Claimant, who was traveling with his 14 year old son, attempted to miss the slow-moving implement by passing it on the left. He struck the left front of the implement with the right side of his truck. After the impact, Claimant's truck left the highway, traveling into the ditch and a stand of trees. The truck

came to a rest after striking a tree after which the truck caught fire. Claimant briefly lost consciousness when his forehead hit the windshield in the accident,

2. Claimant's 14-year-old son pulled him from the truck, and he was taken by ambulance to Faith Regional Health Services, in Norfolk, Nebraska Claimant suffered burns over his left upper arm, left back, the tip of the left shoulder, and the right medial thigh (Respondents' Exhibit D, Bates 144-152)..

3. Claimant was initially diagnosed with flame burns of left arm, left tip of shoulder, eleven (11) different stripe-like burns across the left hemithorax and across the low back above the belt, and several smaller areas. In the emergency room, Claimant complained of a loss of consciousness, pain in his head, neck, left arm and elbow, confusion, syncope, nausea, and dizziness. The doctor noted impaired short-term memory, second-degree burns on the left elbow and distal humerus, left trapezius, left shoulder, a left ear laceration, and some burns on the left cheek (R's Ex. D, Bates 144-152).

4. Claimant remained in the hospital, and was released on June 27, 2013.

5. Claimant has no independent memory from just before seeing the farm equipment on the road until sometime later. He admitted that some of the information he has about the accident, his hospital stay in Nebraska, and the drive back to Colorado is probably from what others have told him.

6. Claimant was admitted to St. Mary-Corwin Hospital in Pueblo, Colorado, on June 29, 2013, with worsening complaints of headache, fatigue, confusion, extreme nausea, episodes of confusion, left elbow and knee tenderness, and left neck pain and spasms. Objective findings were a laceration at the attachment of the ear to the scalp, left cervical muscle spasm, erythema and burn over the left side of the neck, erythema and blistering at the waistband, blistering and yellow exudate on the left arm from the humerus to the mid forearm, with some "white tissue" underneath, and swelling in the left arm (R's Ex. E, Bates 154-156).

7. Claimant was discharged from St. Mary-Corwin on June 29, 2013, with additional diagnoses of whiplash and post-concussive syndrome (R's Ex. E, Bates 158), and he was referred to University of Colorado Health Sciences Center Burn Center (CU) because of the partial-thickness second-degree burn over a joint space (R's Ex. E, Bates 157,158).

8. Claimant was initially evaluated at CU on July 2, 2013, where he was diagnosed with mixed full- and partial-thickness burns to his left arm, and partial-thickness burns to his left neck, left periauricular area, and lower back (R's Ex. F, Bates 159). By July 9, 2013, the neck burns were healing well, however, it was determined that the proximal aspect of the burn near Claimant's left elbow remained white and non-blanching, with low chance of spontaneous healing of this full-thickness burn, and the left lower flank burn had healing interspersed with whitened areas, so grafting was prescribed (R's Ex. F, Bates 167-168).

9. Michael J. Schurr, M.D., performed skin grafting surgery on July 12, 2013. The post-operative diagnoses were full-thickness burn to the posterior left arm (200 sq.cm.) and left flank, with a healing partial-thickness burn to the left forearm (20 sq.cm.). The left thigh (200 sq. cm.) was the site of the donor graft (Claimant's Ex.6, Bates 86).

10. On July 19, 2013, Claimant continued to demonstrate left upper extremity edema and tenderness. By August 8, 2013, he was complaining of occasional sharp shooting pains in the left elbow skin graft. He was diagnosed with "Neuralgia, neuritis, and radiculitis, unspecified," and his burns were characterized as "Burn (any degree) involving 10-19% of body surface" (R's Ex. F, Bates 175)(C's Ex. 6, Bates 116).

11. Claimant continued his follow-up at CU through August 27, 2013, when complaints of shooting pain and tenderness to the back of the left arm were noted, as was decreased elbow range of motion (C's Ex. 6, Bates 127).

12. Terrence Lakin, D.O., first examined claimant on August 28, 2013. Claimant provided him with the history of the vehicle accident, and complained of pain (aching, burning, pins and needles) in the neck back, right (sic) arm, and bilateral knees (C's Ex. 7, Bates 132-140). Dr. Lakin's physical examination revealed tight muscles in the trapezii and tight thoracic spine paraspinal muscles, stiff neck in most planes, decreased range of motion in the elbow, full shoulder range of motion with the occasional "click," extensive scarring/graft resolving, with reduced range of motion due to scarring contractures, and the healing large horizontal lumbar scar. Dr. Lakin's diagnoses were: concussion with loss of consciousness, bilateral knee sprains, cervical strain, bilateral shoulder strains, and full-thickness skin loss. Dr. Lakin referred claimant for chiropractic, hand therapy, and medications.

13. At the September 19, 2013, visit, Dr. Lakin noted that ". . . he continues to have some vertigo symptoms. He identifies this occurring nearly once a day. Always happens with positional changes of bending over twisting or getting up" (C's Ex.7, Bates 146).

14. On October 10, 2013, Dr. Lakin noted claimant was "demonstrating some left lateral and medial epicodyles are pain" (NOTE from Swanberg: it appears that either Dr. Lakin uses voice-recognition software or types his notes himself and does not proof his reports, as there are many misspelled words and grammatical errors). Dr. Lakin opined that the epicondylitis may have been from inflammation and trauma from the burn scars (C's Ex. 7, Bates 154).

15. On October 31, 2013, Dr. Lakin again noted tight thoracic spine paraspinal muscles. Claimant stated that the chiropractic was helping his back, and that his dizziness and balance were improved from physical therapy. Dr. Lakin recommended continued hand therapy, chiropractic, and physical therapy, offering injections to the lateral epicondyle and trigger point injections to the left trapezius, but Claimant declined these because of a fear of needles (C's Ex.7, Bates 161-162).

16. At the November 21, 2013, visit, Claimant again complained of headaches, neck

stiffness, sleep difficulties, and symptoms of both lateral and medial epicondylitis. He advised Dr. Lakin that when he stopped chiropractic because he was out of town, his cervical and thoracic pain increased (C's Ex.7, Bates 168-169). Dr. Lakin prescribed Naprosyn, and referred Claimant to Dr. Caughfield regarding his headaches, sleep difficulties, and epicondylitis (C's Ex.7, Bates 168).

17. On December 5, 2013, Claimant was seen by Dwight K. Caughfield, M.D., complaining of vertigo, epicondylitis and elbow pain, chronic neck pain that, "he states is constant mid cervical to lower cervical, right side greater than left side. It will radiate suboccipitally and rates it around a 6-7/10. When it does get into the base of the skull, it will generate a headache. He gets an average 3-4/10 supoccipital headaches. If he does computer work, does much driving or manual work, it will progress towards a migraine type headache with photophobia, nausea, and sensitivity to motion of the head. It is not resolved with non-steroidals. He will have to go to sleep to get rid of the headache. These occur two to three times per week on average . . . He also reports he has problems with short-term memory. He cannot remember tasks that were common place for him before the accident." Claimant advised that he did not have any significant neck pain, headaches, left arm pain, or cognitive issues until his trucking accident on June 26, 2013 (C's Ex.9, Bates 249).

18. Dr. Caughfield's "review of systems" notes headaches, loss of sleep, forgetfulness, vertigo that is responding to therapy, occasional blurred vision particularly with the headaches, and nausea with headaches. Dr. Caughfield's "brief partial mini mental status exam" revealed claimant had some difficulty with object recall (immediate: 3/3; at ten minutes, 0/3). Claimant did not recall the day of the week and could only do three Serial 7's (C's Ex.9, Bates 250).

19. Dr. Caughfield's impressions were post-concussive complaints, memory loss, depression, increased irritability, agitation, headaches, and cervicalgia. The doctor opined that he did not believe claimant's headaches were post-concussive, "as much as cervicogenic with secondary migraines by claimant's description of neck pain precipitating suboccipital pain, and then migraines." He opined that Claimant's migraines were generated in the cervical spine (C's Ex.9, Bates 251).

20. Dr. Caughfield recommended a neuropsychological examination based on Claimant's cognitive complaints and the deficiencies on the brief cognitive evaluation, and also to address Claimant's anxiety and irritability, "which can mean an affective component of a closed head injury". He recommended a cervical MRI, increasing the Gabapentin, consideration of alternative medication if claimant didn't respond to the Gabapentin, consideration of trigger point injections, which claimant declined on December 5, 2013, because of his needle phobia, initiation of Imitrex, avoidance of non-steroidals because of possible rebound headaches, and consideration of a left lateral epicondylar steroid injection (C's Ex.9, Bates 251).

21. A December 9, 2013, cervical MRI revealed minor disc bulging and signal loss in

the nucleus pulposus at C3-4; shallow disc protrusion posterolaterally on the right with an indentation of the ventral margin of the right lateral recess, and crowding of the right C6 nerve with probable mild nerve impingement at C5-6; and minor disc bulging without nerve impingement at C6-7 (C's Ex. 10, Bates 264-265).

22. On December 10, 2013, Claimant complained to Dr. Lakin of head and neck pain, pain intensity 4-8/10, memory loss, joint pain, stiffness, muscle weakness, and muscle aches. Dr. Lakin's exam revealed neck stiffness in most planes, tight trapezius muscles, and tight thoracic spine paraspinals. The headaches were occurring nearly nightly. Dr. Lakin reviewed the MRI with claimant on December 10, 2013. Claimant advised that chiropractic had helped the headaches greatly and he wanted to continue with it. He also said that his balance was still subpar in physical therapy, and he would like to continue therapy for that. Dr. Lakin prescribed continued chiropractic, physical therapy including dry needling, TENS, and continued treatment of claimant's lateral epicondylitis, a referral to Dr. Hopkins for post concussion headaches and recall memory loss, and trigger point injections by Dr. Caughfield (C's Ex. 7, Bates173-177).

23. In the December 12, 2013, physical therapy report (NOTE: for some reason, this appears to be the first physical therapy report either party has, although the therapist notes that this was the tenth visit), the therapist notes that Claimant was resuming therapy at Dr. Lakin's request for ongoing daily headaches and persisting bilateral elbow pain, although Claimant had been "in therapy already for treatment of dizziness and chiropractic care for his neck with some improvements but remains most limited due to his headaches and ongoing intermittent elbow pain. He describes his elbows more as soreness and stiffness in the elbow that increases with activities. He reports that while the ROM and wrist area improved with hand therapy, the elbows have not really been formally address (sic). His headaches remain temporarily improved with chiropractic but he remains dependent on this care for movement within the neck" (C's Ex. 7, Bates 179).

24. The therapist's objective exam revealed "ongoing mild forward head and rounded shoulders, abducted and tilted scapulas, visible pectoralis contracture" . . . end-range extension range of motion of the elbow causing sharp pains on medial and lateral epicondyles on the left . . . left wrist and hand range of motion within full limits with ongoing soreness in the left Dequervain's region and mild pulling into forearm and elbow. The therapist found numbness along the skin graft and increased tenderness and adhesion present within the hypertrophic scar on the lateral elbow. She found severe point tenderness on the medial and lateral epicondyles with palpable scar tissue with mild tenderness on musculotendinous junctions of extensor carpi radialis longus and brevis and flexor digitorum, cervical increased tone, tenderness, and symptoms reported as pulling in the suboccipital region and upper trapeziums, and large trigger points in the upper trapeziums and pectorals. Her findings were that Claimant continued to have chronic left elbow epicondylitis and mild tendinosis caused by the traumatic accident and "likely excessive gripping of the steering wheel. The patient also continues to demonstrate ongoing cervical myalgia with large trigger points present that remain consistent with a whiplash injury" (C's Ex.7, Bates179-180).

25. The therapist utilized trigger point dry needling to claimant's distal posterior and anterior trigger points of the bilateral upper trapeziums, bilateral suboccipitals, superior upper trapezius as it inserts on the occiput, and his bilateral lateral pectoralis major (C's Ex.7, Bates 181).

26. On December 18, 2013, Claimant reported to Dr. Caughfield that the Imitrex helped with his migraines, usually within thirty minutes with a single dose. Claimant's headaches were overall decreasing, with the migraines occurring one to two (1-2) times per week. But, Claimant still had constant neck pain. Dr. Caughfield reviewed the cervical MRI. He diagnosed cervicalgia with cervical herniation and headaches, and cognitive complaints with concussion history. He continued the Imitrex, recommended increasing the Gabapentin dosage, and recommended an epidural steroid injection (C's Ex.9, Bates 253).

27. On January 2, 2014, Claimant reported to Dr. Lakin that he was having headaches twice a week, but that dry needling and chiropractic helped a lot. Dr. Lakin's exam revealed tenderness at C2-3, mild axial load tenderness in the neck, and reduced cervical range of motion. Dr. Lakin found tenderness at T4-7, most notably in the right thoracic paraspinal muscles, and nonspecific lumbar tenderness (C's Ex.7, Bates 185-186). Dr. Lakin continued making similar thoracic findings throughout the remainder of his examinations between February 2 and April 30, 2014 (C's Ex. 7, Bates 193, 200, and 210).

28. On January 9, 2014, Claimant complained to Dr. Caughfield of a "pounding" headache, suboccipital and occasional frontal, although he was no longer having migrainous type headaches. "He has not had to lock himself into his room." Claimant continued to have pain into the shoulders, with the left shoulder awakening him at night. Dr. Caughfield felt the headaches were improving and that they were due to the cervical herniation with myofascial generated headaches and not necessarily post concussive. Claimant had left shoulder weakness, which Dr. Caughfield stated was "progressive weakness since my first visit and may be due to deconditioning but may also be due to progression of pathology" (C's Ex.9, Bates 254).

29. Claimant was seen by Michael C. Sparr, M.D., on January 22, 2014. Claimant's chief complaints were severe headaches, neck and shoulder pain, and memory deficit. Claimant stated that, overall, he had had only 2% improvement since the initial accident. On a pain diagram (NOTE from Swanberg: we do not have this pain diagram in our medical records), Claimant placed marks indicating pain in the right and left sides of his occiput, bilateral cervical regions, mid thoracic, bilateral superior shoulders, and left lateral arm. He described his morning headaches as severe right-sided occipital burning pain. It had been exclusively right sided, but now, was occurring bilaterally. The pain radiated off the top of his head into the temporal and frontal regions, causing severe headaches which could become pounding and throbbing with some associated phonophobia and photophobia, and some nausea. The headaches were always associated with neck pain. The neck pain was bilateral, which Claimant described as "ripping" and radiating to the left scapula. This was usually mild early in the day, but became worse by the mid and later portions of the day. He had occasional shooting pain radiating to his bilateral thumbs. His

left shoulder pain was constant, achy, and at times sharp and stabbing, and was over the lateral aspect of the shoulder, radiating to the elbow (C's Ex. 12, Bates 272-273).

30. During his physical examination, Dr. Sparr found "profound increased muscle tension in bilateral upper quadrant musculature, straightening of the cervical lordosis at rest, and a rounded shoulder posture." There was exquisite tenderness to palpation over bilateral greater and lesser occipital nerves. Direct palpation caused reproduction of claimant's typical headache symptoms. Claimant was "quite exquisitely" tender over the upper cervical facets, tender over the cervical musculature including splenius capitis and cervicus, anterior and posterior scalenes, levator scapula, trapezius, and rhomboids. Dr. Sparr found numerous tight fibrocystic nodules and multiple trigger points within the upper quadrant muscles. Claimant was diffusely tender over the mid and upper thoracic facets (C's Ex. 12, Bates 274).

31. Dr. Sparr diagnosed:

- Cervical and thoracic sprain/strain injuries.
- Right C5-6 disc herniation causing intermittent right C6 radiculopathy.
- Upper cervical facet dysfunction and arthralgias.
- Profound cervical and parascapular myofasciitis.
- Mid thoracic facet dysfunction.
- Headaches likely related to a combination of myofasciitis, cervical facet dysfunction, and occipital neuritis as well as post concussive syndrome.
- Likely concussion.
- Left shoulder rotator cuff irritation and impingement.

He recommended ongoing chiropractic treatment, dry needling, massage therapy, that trigger point injections were "strongly recommended," consideration of a subacromial bursa injection, and possibly upper cervical facet or epidural steroid injections, continuation of Gabapentin, Sumatriptan, ibuprofen, and a combination analgesic ointment for topical use.(C's Ex. 12, Bates 273-274).

32. On February 5, 2014, Dr. Sparr's physical exam revealed persistent myofascial tightness in the cervical and parascapular muscles, moderate tenderness over the upper cervical facets, but far less tenderness over the greater and lesser occipital nerves. He found that claimant was still *tight* and tender over the mid thoracic paraspinals and minimally tender over the left rotator cuff. Dr. Sparr's diagnoses were the same as on January 22, 2014, and he found that Claimant had had an excellent response to the occipital nerve blocks. He provided trigger point injections into the bilateral upper quadrant muscles, recommended continued chiropractic with Dr. Young once per week, continued physical therapy, Gabapentin and Sumatriptan, and again recommended a cervical epidural steroid injection, which he felt may be of significant benefit (C's Ex. 12, Bates 276-277).

33. In his February 19, 2014, report, Dr. Sparr pointed out that claimant had found the

trigger point injections with chiropractic was partially beneficial in decreasing muscle tightness. He also stated that his headaches were "extremely good" after the occipital nerve block, but that they had become more recurrent and daily since then. Dr. Sparr's objective examination revealed persistent, profound and myofascial *tightness* in the bilateral upper quadrant muscles, *tight* and tender upper cervical facets, and exquisite tenderness over the greater and lesser occipital nerves. Spurling's maneuver was mildly positive on the right causing radiation of pain in the lateral arm and thumb. Claimant had left shoulder tenderness over the conjoined tendinous insertion, pain with mid-range abduction and internal rotation, and a positive impingement sign. He provided Claimant with trigger point injections in the bilateral upper quadrant muscles to be combined with Dr. Young's chiropractic, and a left subacromial bursa injection, which completely and immediately resolved claimant's shoulder pain. He requested authorization for a cervical epidural steroid injection, suggested repeat occipital nerve blocks and possibly facet injections, after determining how claimant responded to the trigger point injections and epidural steroid injection (C's Ex. 12, Bates 278-279).

34. Claimant did not see Dr. Sparr again, however. He testified that he would like to see Dr. Sparr and have the recommended cervical epidural steroid injection and occipital nerve blocks, subacromial bursa injection, ongoing chiropractic, dry needling, massage therapy, and trigger point injections.

35. Claimant was seen for neuropsychological testing on January 15, 2014, by David C. Hopkins, Ph.D. Claimant provided a history of having striking his head into the dashboard during the accident, that he was unconscious, and that he had a two-day period of anterograde amnesia with "some islands of memory during that time." He had no prior traumatic brain injury or psychiatric injury. Claimant complained of persistent headaches, sleep issue, and mental status deficits. Dr. Hopkins opined that Claimant tended to minimize his psychological problems. He complained of both cervical and lumbar discomfort. He complained of word-finding problems; easy distractibility; that he had trouble with cooking and other tasks that required multitasking, e.g. forgetting what was in the oven or microwave, that he had to be hypervigilant with his cooking; difficulty generating ideas when talking to people; that reading caused headaches; some irritability, which he felt was contrary to his personality and which began shortly after the accident (C's Ex. 11, Bates 268-269).

36. Dr. Hopkins utilized several tests on claimant, including the MMPI-2, Wechsler Memory Scale, and the WAIS-IV. Dr. Hopkins found that Claimant worked diligently on all tests, that those tests are sensitive to performance effort, and that there was no evidence of symptom magnification or malingering. His testing revealed the following:

- Claimant tended to minimize psychological distress and presented himself in a most favorable light;
- People like claimant tend to respond to stress with physical complaints "after using repression and denial and distractibility as front-line coping strategies," that claimant appeared to "be working very hard at pushing (his mild reactive depression) under the rug."
- His perceptual problem solving was a little slow;

- His auditory immediate memory was at the 18th percentile on the Wechsler Memory Scale, lower than Dr. Hopkins anticipated;
- He had a masked depression;
- While he had some mild slowing in his perceptual problem-solving speed, his overall processing speed and working memory were technically within normal limits, although some inconsistencies were noted;
- Mild, "but significant" difficulty with retrieving information from long-term storage;
- A reduction in his verbal fluency scores;
- Mild slowing in how much complex verbal material he could assimilate quickly;
- Overall, mild neurobehavioral deficits associated with retrieval and processing speed, and to a lesser degree with working memory (C's Ex. 11, Bates 269-270).

Dr. Hopkins' diagnoses included: "Significant" Concussion, Grade III; Cognitive Disorder; Adjustment reaction with depressed mood. Dr. Hopkins stated that Claimant's findings were "consistent with the mechanisms of injury . . . and with his reported difficulties in daily life." Dr. Hopkins felt that Claimant should be able to develop adequate compensatory strategies to continue to function successfully both vocationally and avocationally, with his recommended neuropsychological counseling sessions. He also recommended biofeedback and relaxation training in order to help claimant learn some cognitive behavioral coping strategies to deal more effectively with his pain (C's Ex. 11, Bates 271).

37. Claimant was seen by William G. Beaver, M.A, LPC, licensed biofeedback counselor, on February 21, 2014. Claimant complained of neck, shoulder, and mid back pain, with daily headaches and interrupted sleep. Mr. Beaver recommended 6-8 one-hour biofeedback sessions, but claimant declined (C's Ex. 13, Bates 280-281). Claimant testified that he did not want any treatment from Mr. Beaver, not because he didn't feel it could help, but because Mr. Beaver gave claimant the "creeps." Claimant would like to try biofeedback, just with someone other than Mr. Beaver.

38. A functional capacity evaluation was performed on April 17, 2014, at Dr. Lakin's office. The overall level of claimant's voluntary effort was deemed by the occupational therapist to be reliable. The therapist's permanent work restrictions placed claimant in the sedentary light/light categories for lifting. Claimant was also restricted to occasional in squatting, bending, stair climbing, and kneeling; sitting no more than forty-five (45) minutes without a stretching break because of upper back tightness and pain, and standing and walking fifteen to twenty (15-20) minutes at a time for a total of forty (40) minutes in any one-hour time period, because of upper/mid back tightness and pain. He was precluded from crawling (because of his intolerance to weight bearing through his left upper extremity/shoulder) and reaching above the shoulders. The therapist opined that claimant had a "significant left hand grip deficit," the right averaging 117 lbs. (90th percentile), and the left averaging 39 lbs. (4th percentile) (C's Ex. 7, Bates 220-221, 228-229).

39. Dr. Lakin placed claimant at maximum medical improvement on April 30, 2014. Claimant drew a "pain diagram" at this appointment, on which he noted as "burning" areas on the back left side of his shoulder up to his thoracic spine. He noted "stabbing" pain in his left

thumb, and “pins & needles” on the back of his left upper arm from below the shoulder to the elbow (C’s Ex. 7, Bates 231).

40. His examination revealed moderate tenderness to palpation of the cervical muscles into the thoracic paraspinals, and throughout the left parascapular muscles. His diagnoses included: concussion with loss of consciousness, cervical strain with C3-4 bulging disc and C5-6 protruding disc, left posterior elbow full-thickness burn, allograft from the left thigh, full-thickness burn lumbar/left flank, left shoulder rotator cuff impingement/tendinitis, irregularity and labrum, and myofascial pain including cervical muscles, left shoulder, and left lateral epicondylitis (C’s Ex.7, Bates 237). He adopted the FCE report’s restrictions (C’s Ex. 7, Bates 238).

41. Dr. Lakin provided claimant with permanent medical impairment ratings:

- cervical spine 15% whole person;
- left shoulder loss of range of motion was 10%, and elbow loss of range of motion was 3%, which combined for a total 13% upper extremity for loss of range of motion;
- to account for claimant’s left posterior triceps and elbow scar/graft, which measured 19 cm x 10 cm, he provided an additional 11% impairment of the left upper extremity, which Dr. Lakin stated created a grade 3 causalgia, using the inferior lateral brachial cutaneous sensory nerve, table 12, indicated a maximum 21% impairment, multiplied by 50%;
- left upper extremity range of motion rating of 13%;

He combined the range of motion deficits (13%) with 11% causalgia, resulting in a 23% left upper extremity permanent medical impairment, which he converted to 14% whole person. His final rating of 27% whole person is from the combining of 15% cervical with 14% left upper extremity (C’s Ex. 7, Bates 238-239).

42. Thomas Higgenbotham, M.D., performed the Division Independent Medical Examination (DIME) on October 1, 2014 (C’s Ex. 14). His review of Claimant’s medical history is extensive. He reviewed the medical records from June 26, 2013, through July 2, 2014. Claimant filled a pain diagram, noting pain on the back of his head, on the back of his neck, along the left shoulder area to the shoulder joint, at his left elbow, down the left side of his thoracic spine, and across his middle low back (C’s Ex. 14, Bates 299). Claimant presented with complaints of pain and discomfort about the head, neck, mid back, left shoulder, left elbow, low back, and both knees. He reported that Claimant stated, “he is less than 25% of his usual physical activity. He relates he generally ‘feels like crap.’ He relates of a constant headache. He can be awaken (sic) from sleep with a headache and wakes up daily with a headache. He feels as though somebody has hit him in the back of the head with a piece of wood. He describes his headaches as a ‘2 by 4 headaches’” (C’s Ex. 14, Bates 291). Claimant complained of burning sensations of both shoulders, particularly the left scapulothoracic area. He had a deep, throbbing ache in his left elbow with occasional sharp pain with activities such as gripping, grasping, and twisting. He had to get rid of his air tools

because of his inability to sustain left hand grip (C's Ex. 14, Bates 291).

43. Claimant told Dr. Higgenbotham he had frequent dizziness. "His balance was 'not worth a damn.' He bumps into things regularly and drops things a lot. He falls occasionally. He relates that he has 'never' tripped or fallen prior to the injury. He relates that his vision is not as good as it used to be. . . He relates of blurred vision. His night vision is not as good as it used to be, and he sees halos around lights at night" (C's Ex.14, Bates 292).

44. Dr. Higginbotham's physical exam was extensive and his reporting extremely detailed. His objective exam revealed no notable pain behaviors, and he wrote that Claimant's presentation was "stoic." Claimant was sensitive to pressure palpation about the left elbow and he requested that the blood pressure cuff be placed on the right arm because of the pain it caused his left elbow. Waddell's signs were negative. Tinel's sign at the left cubital tunnel was positive. There was marked tenderness about the left forearm extensor and flexor muscle masses on mild pressure palpation. There was "notable" swelling about the left extensor muscle mass. There was moderate tenderness about the left triceps. There were neurosensory deficits to light touch, pinprick, and vibratory sense in a non-dermatomal manner of the left hand. Gripping, pinching, grasping, and particularly twisting against resistance caused pains in the left elbow/forearm. Dr. Higgenbotham noted Claimant's burn scar about the posterior distal arm, which was about 7" by 4". Claimant had no feeling about the burn-graft area. Left elbow and shoulder range of motion were limited. There was marked left bicipital groove tenderness bilaterally (C's Ex. 14, Bates 292-293).

45. Dr. Higgenbotham elicited tenderness about the cervical paravertebral and left middle trapezius and rhomboid muscles. Claimant had "exquisite" tenderness about the suboccipital areas bilaterally. There was mild tenderness on palpation across the iliolumbar areas and anterior cervical muscles, tenderness about the left pectoralis muscles. Claimant's balance was poor to fair. Cervical and thoracic range of motion was limited by pain. Lumbar range of motion was full and without pain (C's Ex.14, Bates 293). Dr. Higginbotham's diagnoses included:

- Major causalgia, left upper torso, stemming from third-degree burns of the left distal arm and elbow with medial and lateral epicondylitis and forearm extensor and flexor muscle tendinitis with bicipital tendinitis and rotator cuff tendinopathy along with peripheral neuritis;
- Chronic cervicalgia with myofascial strain and pain with structural diagnostic evidence of a C5-6 disc protrusion;
- Chronic thoracalgia with myofascial strain and pain involving the left infraspinatus, rhomboid, and trapezius musculature;
- Unrelenting cephalgia with evidence of greater occipital neuritis related to chronic suboccipital muscle tension, as well as to head trauma;
- Visuospatial disorientation with imbalance and dizziness related to head injury; and;
- Scar, left posterior distal arm (elbow area) (C's Ex. 14, Bates 294).

46. Dr. Higgenbotham agreed with Dr. Lakin's April 30, 2014, maximum medical

improvement date, and provided permanent medical impairment ratings. For the cervical spine, he utilized Table 53 IIC of the *American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition Revised (AMA Guides)* for a 5% whole person rating and 9% for loss of range of motion, for a cervical spine rating of 14% whole person. For the thoracic spine, he provided a Table 53 IIB rating of 2% and 3% for loss of range of motion for a thoracic spine rating of 5% whole person. For episodic neurologic disorders he provided 15%. For the left upper extremity rating, he provided a 3% upper extremity rating for left elbow range of motion deficits and an 8% upper extremity rating for left shoulder loss of range of motion.

47. Dr. Higginbotham also provided a rating for left upper extremity causaliga using the same method for rating as did Dr. Lakin. Specifically, Dr. Higginbotham used the sensory distribution impairments of the cervical nerve roots from Table 12, C5 to C8 to calculate an additional 11% left upper extremity impairment (Ex. 21, pp.42-43). The combined upper extremity rating was 21% (3% with 8% with 11%), which converts to 13% whole person impairment rating (C's Ex. 14, Bates 296, 303).

48. Dr. Higginbotham's final permanent medical impairment is 39% whole person (C's Ex. 14, Bates 297, 303). Respondents challenge Dr. Higginbotham decision to rate Claimant's thoracic spine, the extent of impairment he assigned for episodic neurologic disorders and his rating methodology for sensory impairment as characterized by Dr. Higginbotham as causalgia totaling 11% scheduled impairment of the left upper extremity.

49. Eric O. Ridings, M.D., performed an independent medical examination (IME) for Respondents on March 18, 2015. He utilized the medical history found in Dr. Higginbotham's DIME report (C's Ex. 16, Bates 310). Claimant's complaints were of significant pain throughout the neck bilaterally including the suboccipitals. He had headaches which were primarily occipital, but could severely increase at irregular intervals when he will have a sudden sharp pain that radiates up over the top of his head to behind his eyeball on the left, or occasionally on right. He had constant pain across the posterior left shoulder and left interscapular region between the spine and the shoulder blade. His most severe pain is in the mid supraspinatus muscle. His interscapular pain is not directly over the spine, but begins in the paraspinals, although he added that he very rarely has pain that extends across the spine into the right interscapular area. He has numbness, tingling, and aching pain that shoots down the left upper extremity. This occurs every 30 seconds, but is not as noticeable with Gabapentin. With the Gabapentin, his left upper extremity is not "asleep all the time." The paresthesias down the left upper extremity can extend into the hand and down into the thumb and pinkie finger. He has constant soreness all about the left elbow (C's Ex. 16, Bates 316-317).

50. During his IME Claimant reported ongoing memory problems, stating that he can remember things earlier in a given day, but does not recall anything about the day before. He complained about arriving at a location but having no idea why he went there. He will need to take several things with him on an errand, but has to keep going back and forth from his truck to his house in order to get them individually because he cannot remember them except for one at a time. He has driven somewhere, only to return because he could not remember why

he went there. Claimant also complained of poor sleep due to pain, a poor appetite, and a poor energy level. He had lost ten (10) pounds from before the injury. He felt colder than before the accident, and reported heartburn, morning stiffness, joint swelling, decreased coordination, feelings of stress, and mood swings. Overall, he felt no improvement since the onset of his pain (C's Ex.16, Bates 317).

51. Dr. Ridings' physical examination revealed upper extremity reflexes 2+ and symmetric, strength 5/5 except for "giveway weakness" in the left shoulder abduction due to pain, pain at the left elbow with resisted elbow flexion, normal sensation throughout the right upper extremity, but "(h)e stated that he was anesthetic to pinprick in a glove distribution in the fingers, hand, and forearm to just below the left elbow. Sensation to pinprick was normal proximal to that. He reported that claimant had tenderness and again "flinched" when he used "modest palpation" throughout the cervical spine and bilateral upper quadrants, left more than right, extending down into the lower interscapular region, and about the anterior shoulder and over the deltoid, biceps, and triceps muscles, at the medial and lateral epicondyles and proximal half of the forearm. Claimant testified that he "flinched" because Dr. Ridings came up from behind him and because Ridings' hands were cold. Dr. Ridings found increased tone in the cervical paraspinals, but normal thoracic paraspinal tone while examined prone on the table. However, claimant complained of pain in certain areas while sitting and of pain throughout the thoracic paraspinals below the inferior scapulae, which Dr. Ridings noted had not been tender while claimant was sitting down. Claimant's cervical and left shoulder range of motion was decreased. Dr. Ridings did not perform range of motion testing on the elbow. Finally, claimant complained of pain at the CMC joint of the left thumb (C's Ex.16, Bates 318-319).

52. Dr. Ridings' diagnoses were:
    - Mild closed head injury;
    - Cervical strain with possible contribution from mild disc protrusion a C5-6;
    - Ongoing cervical myofascial pain;
    - Left greater than right occipital neuralgia;
    - Left upper quadrant myofascial pain;
    - No current findings of a thoracic diagnosis, including thoracic myofascial pain;
    - Burns to the left upper extremity and left flank;
    - Some nonanatomic complaints, such as complete anesthesia on pinprick testing from just below the elbow distally, and some symptoms out of proportion to objective findings, such as the patient's pain behaviors with *light* palpation over a wide area of his neck, left upper quadrant, and left upper extremity;
    - Multiple cognitive symptoms out of proportion to the remainder of the patient's history. (C's Ex. 16, Bates 319-320).

53. Claimant's attorney arranged for an IME with Bennett Mechanic, M.D. on April 2, 2015. Dr. Machanic, in his report from this examination, agreed that the medical records form Faith Regional health Services showed a brief period of amnesia after the accident, not the two days' amnesia claimant told Dr. Machanic he had when he described the accident and his subsequent medical treatment, in detail, to Dr. Machanic. Claimant said he had no symptoms or pain in his mid-back or thoracic spine. Dr. Machanic's physical exam showed no

tenderness in the mid-back. Dr. Machanic found claimant had, "elective weakness," in his left upper extremity in his exam, and no signs of clinical depression or anxiety. Claimant had normal, intact gait, station, and coordination. Dr. Machanic uniquely found claimant had a lumbar spine diagnosis with impairment causally related to this claim's injury, and rated that impairment as 5% for an unspecified specific disorder, and 9% ROM deficit, for a combined lumbar spine impairment of 14% whole-person. Dr. Machanic agreed with Dr. Higginbotham Claimant's cervical spine impairment was 14% of his whole-person, but based that impairment on different ratings for ROM and specific impairment under Table 53 of the Guides. He felt Claimant had an impairment of 15% of his whole-person for episodic neurological disorders. He rated Claimant's shoulder impairment for ROM deficit as 6% of the left upper extremity, and Claimant's left elbow for ROM deficit as 3% of the left upper extremity. These left upper extremity ROM impairments combined to 9% of the left upper extremity. Dr. Machanic rated Claimant's left upper extremity sensory impairment for his burn and graft as 8%. He testified that he strongly disagreed with Dr. Lakin's and Dr. Higginbotham's decisions to rate this sensory deficit of the left upper extremity using cervical spine nerve roots' impairments, testifying during his deposition that rating mythology was clearly erroneous. He found Claimant's sensory loss was best rated using thoracic outlet syndrome's rating methods, and gave Claimant an 8% impairment of his left upper extremity. Finally, alone among all other providers and the other IME, Dr. Mechanic found claimant had a 5% whole-person impairment for disfigurement. His IME report does not discuss in any way the basis for that impairment, merely concluding in the Comments paragraph, "I would rate disfigurement at 5% of the whole-person." During his deposition, he admitted he did not measure, take photographs, or remember the dimensions or appearance of the disfigurement inducing scars. He said that if claimant's burns were over 3% of his body, maybe a 3% disfigurement rating would be appropriate. He did not know anything about a disfigurement award issued under the Act. In a supplemental report sent May 5, 2015, Dr. Machanic agreed with Dr. Ridings that a cervical traction unit is not appropriate.

54. Dr. Ridings addressed Dr. Higginbotham's rating of claimant's left upper extremity sensory rating. He wrote, and later testified consistently, "This entire sensory rating for the left upper extremity is "utter nonsense." Apparently what Dr. Lakin did and which Dr. Higginbotham followed was to combine the maximum value for the sensory portions of the C5, C6, C7, and C8 nerve roots from Table 12 (which is to be used for radiculopathies) to come up with a combined maximum sensory value of 21% for all four nerve roots. This was then multiplied by the severity of impairment determined using Table 10. This is equivalent to finding a grade 3 impairment of the entirety of the sensory distributions of each of those found nerve roots, which essentially cover the entire service area of the upper extremity. Clearly, this is not a logical or reasonable way to determine an impairment rating for a relatively small patch of skin at the left elbow. . . . It is no appropriate or the correct use of the AMA guides to give a rating for the entirety of each cervical nerve root in rating that peripheral nerve." He concluded the correct way to rate claimant's left upper extremity's sensory deficit at his burn and graft site was:

A much more appropriate way to determine an impairment for a given peripheral nerve which does not happen to be identified specifically in Table 14 would be to find a comparable nerve and utilize the maximum sensory value for that nerve. For instance, both the medial antebrachial cutaneous and medical brachial cutaneous nerves are identified in Table 14, either of which would be in my opinion similar in the size of its geographic distribution in the upper extremity (one somewhat larger and one somewhat smaller). Each of these two nerves from Table 14 has a maximum sensory value of 5%. Multiplying that by the 50% value assigned by Dr. Higginbotham from Table 3 yields a 2.5%, round to 3% impairment of the upper extremity. When combined with the elbow and shoulder ranges of motion impairments, this would yield a 14% left upper extremity impairment which by Table 3 is an 8% whole person impairment.

He further wrote:

The issue regarding how to rate sensory impairment for a specific area of skin in the left upper extremity was discussed at length in my bracketed comments in the body of the report. However, on my examination today the patient reported not just decreased sensation, but lack of any sensation to pinprick from the upper forearm distally in a glove distribution. When discussing his ongoing complaints from the accident, he did not mention hyperesthesia or any other specific area of sensory complaint relating to the inferior lateral brachial cutaneous nerve. As that site was skin grafted and therefore would be expected to have loss of sensation, it is not inappropriate to provide an impairment rating for it, but certainly not in the manner in which it was done by the Division reviewer.

55. However, at his deposition, Dr. Ridings changed his analysis of how to properly rate Claimant's left upper extremity sensory problems. He testified, "the area of the patient's body that is being rated is the posterior part of his upper arm extending a little bit down onto the elbow. A fairly good-sized patch which has altered sensation. And is most -- approximates, actually, the inferior lateral brachial cutaneous nerve distribution" "and also the posterior brachial cutaneous" (Dr. Ridings' Depo., pg. 29, ll. 6-9, and pg. 30, ll. 6-10). He testified that his previous opinion about utilizing nerves that were about the same size as Drs. Lakin's and Higginbotham's inferior lateral brachial cutaneous sensory nerve "was not correct" (Depo., pg. 30, ll. 10-24). Upon further review the night before the deposition, Dr. Ridings decided that Drs. Lakin's and Higginbotham's inferior lateral brachial cutaneous sensory nerve is the appropriate nerve to rate, as well as the posterior brachial cutaneous nerve, and the superficial and dorsal digital nerves. He pointed out that on Table 14, page 46 of the AMA Guides, neither nerve is listed, but the radial nerve is in two positions. So, he determined that those radial nerves should be the ones used to come up with claimant's left upper extremity permanent medical impairment rating. Both of those nerves have a maximum percentage loss of function due to sensory deficit of 5%.

56. Dr. Machanic testified that Claimant's scar tissue on the left elbow area does cover the *inferior lateral brachial cutaneous nerve* (Dr. Machanic's 6/8/15 Depo., pg. 50, ll. 1-3). As noted, Dr. Machanic disagrees with Dr. Lakin and Higginbotham that the correct method for rating the sensory disturbances on Claimant's left arm would be use of Table 12, C5-8, then grading using Table 10. He did noted however, that this would be "an appropriate sequence," if he had agreed with Drs. Lakin's and Higginbotham's anatomy (Depo., pg. 50, l. 1, through pg.51, l. 13). Dr. Machanic testified that he would not, however, utilize any of the peripheral nerves used by the other physicians. Instead, Dr. Machanic used the ulnar nerve, because Claimant's sensory loss is over the 4th and 5th fingers in an ulnar distribution (C's Ex. 17, Bates 327).

57. Based upon the evidence presented, the ALJ finds that Claimant has consistently complained of sensory changes in the left forearm and hand in an ulnar distribution. Consequently, the ALJ finds that Claimant's sensory impairment is limited to his extremity and does not affect a bodily structure beyond the arm at the elbow. Crediting the testimony of Dr. Mechanic, a board certified neurologist, the ALJ finds that the most appropriate method to rate Claimant's left upper extremity sensory loss was that which Dr. Mechanic employed. As the rating in question involves scheduled impairment, the ALJ finds that Dr. Higginbotham's opinions concerning sensory impairment of the upper extremity are not subject to the clear and convincing burden of proof to be overcome. Here, a preponderance of the persuasive evidence demonstrates that the sensory rating methodology used by Dr. Higginbotham actually rated bodily structures (spinal nerve roots) that were not injured to justify a impairment for an insensate skin graft. The ALJ is convinced that such approach is not supported by the AMA Guides and likely resulted in a rating that exceeded Claimant's actual impairment for sensory loss. The ALJ finds Dr. Higginbotham's opinion regarding impairment for sensory loss in the left upper extremity incorrect and adopts Dr. Mechanic's scheduled impairment rating of 8%.

58. Concerning Claimant's thoracic spine Dr. Ridings concluded that Claimant had no thoracic spine impairment. Dr. Ridings explained during his testimony that any symptoms Claimant has in his upper or mid-back on the left were explained by his shoulder injury and resulting shoulder girdle muscular pathology with residual impairment to the left shoulder, and were not specific to or indicative of any thoracic spine pathology or diagnosis. Dr. Ridings testified at hearing that Claimant's shoulder extremity rating would convert to a 5% whole-person impairment, and respondents accept that converted 5% impairment should the ALJ credit Dr. Ridings' opinion on impairment of Claimant's left shoulder. Because Claimant had normal thoracic muscle tone during the IME, Dr. Ridings did not find a Table 53 specific diagnosis, and therefore Dr. Ridings found claimant did not injure his thoracic spine which would entitle him to additional spinal impairment.

59. Upon careful review of the record, the ALJ finds documentation to support Dr. Higginbotham's decision to rate Claimant's thoracic problems. Dr. Lakin's physical exams revealed thoracic tenderness, most notably the right paraspinal muscles, from his first evaluation on August 28, 2013, through his last on April 30, 2014. Dr. Sparr diagnosed thoracic sprain/strain and mid thoracic facet dysfunction. The occupational therapist placed permanent restrictions on claimant of no crawling because of his upper and mid back tightness and pain. Although Dr. Lakin reported Claimant's thoracic complaints as well as objective findings throughout his treatment, he did not provide Claimant with an impairment rating for the thoracic spine. He did, however, adopt the restriction for crawling secondary to "mid back tightness."

60. With regard to Dr. Higginbotham's diagnosis of chronic thoracalgia with myofascial strain and pain involving the left infraspinatus, rhomboid, and trapezius musculature, Dr. Ridings explained that the rhomboid is between the scapula and the thoracic spine, that the trapezius muscle is a large muscle, and is between the shoulder blade and the spine (Ridings' Depo. pg. 55, l. 16 through pg. 56, l. 2). Dr. Sparr diagnosed Claimant with "mid thoracic facet dysfunction" as the result of tenderness in the mid and upper thoracic facets.

Dr. Ridings testified he disagreed with Dr. Sparr's turning the "tenderness" into a diagnosis (Ridings' Depo. pg. 57, l. 23 through pg. 58, l. 2). However, Dr. Ridings conceded that Dr. Sparr did diagnose Claimant with "mid thoracic facet dysfunction" (Dr. Ridings' Deposition transcript, pg. 57, ll. 20-25). Dr. Ridings testified that Dr. Lakin's August 28, 2013, finding of *tight* thoracic spine paraspinal musculature is an objective finding, not a subjective complaint (Depo., pg.55, ll. 11-21). Dr. Ridings stated that on his exam, Claimant did not have increased myofascial tone in the thoracic paraspinals when relaxed (however, he did not comment on Claimant's tone when not relaxed). He opined that, therefore, Claimant "does not have 'rigidity' and does not qualify in my opinion for a Table 53, II-B rating. . . Hence, I disagree with rating the thoracic spine as Dr. Higgenbotham did."

61. Based on a totality of the evidence, the DIME's rating of Claimant's thoracic spine was within his discretion. The ALJ finds the various opinions of Drs. Lakin, the two opinions of Dr. Ridings, and Dr. Machanic to constitute a mere difference of opinion as to whether Claimant's thoracic complaints and objective findings should be rated. On the day of Dr. Higginbotham's DIME, he found both subjective and objective evidence of a thoracalgia, which comports with the thoracic complaints and findings throughout Claimant's treatment history. The difference of opinions between Claimant's treating physician and the parties' independent medical examiners do not rise to the level of clear and convincing evidence that is required to overcome Dr. Higginbotham's opinion as the DIME physician. Respondents have failed to meet their burden of proving, by clear and convincing evidence, that Dr. Higginbotham's opinion concerning Claimant's thoracic permanent medical impairment is highly probably incorrect.

62. Dr. Ridings testified that he did not believe Claimant's cognitive complaints were as severe as portrayed. He questioned Claimant's credibility noting as follows:

> Multiple cognitive symptoms out of proportion to the remainder of the patient's history. Specifically, the patient's contention that he cannot remember anything from one day before the present and cannot easily perform even household activities of daily living due to the severity of his memory impairment is entirely inconsistent with his level of functioning on neuropsychiatric testing discussed above. It is also not consistent with the level of function he demonstrated during history taking today. The neuropsychologist who evaluated him anticipated that he would be able to return to work requiring only modestly increased time to perform some activities. This is dramatically different than the patient's stated level of function.

Dr. Ridings felt find that Dr. Hopkins' extensive, researched, tested, accepted, and established neuropsychiatric testing was the best indicator of Claimant's permanent impairment for episodic neurologic disorders, not claimant's subjective complaints. Given the results of that testing Dr. Ridings assigned 5% whole-person for Claimant's ongoing cognitive symptoms.

63. Section 4.1b The Brain of the AMA Guides, at page 104, states:

> More than one category of impairment may result from brain disorders.

> In such cases the various degrees of impairment from the several categories are not added or combined, but the largest value, or greatest percentage of the seven categories of impairment, is used to represent the impairment for all of the types.

Dr. Machanic provided impairment ratings for claimant's headaches (8%), speech (8%), sleep (6%), and cognitive deficits (15%) pursuant to Table1, pg.109: episodic neurological disorders. He testified that, under the *AMA Guides*, Table 1, page 109, the rating physician looks at all potential impairments, and chooses the highest of them as the one impairment rating, which in this case is the 15% for cognitive deficits (Dr. Machanic's 6/8/15 Depo., pg. 5, ll.4-9). Dr. Mechanic's opinions comport with those of Dr. Higginbotham. Even Dr. Ridings agrees that Claimant is entitled to impairment for his cognitive disorder; he simply disagrees as to the extent of that impairment. Such professional differences of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Higginbotham's opinions as the Division IME physician.

64. Dr. Mechanic testified that Claimant's scars should be rated under the AMA Guides because widespread area of previous skin grafting and previous burns," are "typically rated" (Dr. Machanic's 6/18/15 Depo., pg. 22, l. 14 through pg. 23, l. 9). He could find no rationale in the *AMA Guides* which would leave disfigurement out because the scars are impairing although he did not explain how Claimant's scar was impairing. Based upon the evidence presented, the ALJ finds that Claimant produced insufficient evidence to establish that Dr. Higginbotham erred for failing to rate Claimant's scarring. While Claimant's scar may be disfiguring, the evidence fails to establish that the scarring impairs any bodily function or limits Claimant's ability to move joints outside of the elbow and shoulder which were appropriated rated for range of motion loss. Consequently, the ALJ finds that Claimant has failed to prove that it is highly probable that Dr. Higginbotham's decision not to rate Claimant's scarring is incorrect.

65. Based upon the evidence presented, the ALJ is not convinced that Dr. Higginbotham erred when he elected not to rate Claimant's lumbar spine as did Dr. Mechanic. The totality of the evidentiary record fails to support a rating for the lumbar spine.

66. After placing Claimant at maximum medical improvement on April 30, 2014, Dr. Lakin prescribed medical maintenance care as follows: purchase TENS unit for home use; 12-month gym membership; medical management with Dr. Caughfield for two (2) years to include medications and injections as warranted; follow up with Dr. Hopkins every three to four (3-4) months or six to eight (6-8) neuropsychological counseling sessions for two (2) years (C's Ex. 7, Bates 238). Respondents admitted to reasonable, necessary, and related medical treatment after MMI in their June 4, 2014, Final Admission of Liability. Claimant testified, however, that he did not receive any of Dr. Lakin's recommended treatment.

67. Based upon the evidence presented, Claimant has established the probable need for some treatment after MMI due to the work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.RS., *et seq.,* is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.RS. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.RS. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P .2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.RS. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Burden of *Proof*

D. A DIME physician's findings of causation, MMI and whole person impairment are binding on the parties unless overcome by “clear and convincing evidence.” *Section 8-42-107(8)(b)(III), C.R.S*.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant’s overall medical impairment, MMI or the degree of whole person impairment, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be “unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4,

2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.,* W.C. No. 4-380-560 (ICAP, Nov. 17,2000).

F. The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ. In deciding whether Claimant has met his burden of proof, the ALJ is empowered, "[t]o resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5. P3.d 385 (Colo.App.2000).

G. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). As found here, using cervical nerve roots not injured in the claim, and a "novel" methodology not found or supported by the *Guides*, is clear error as testified to by Dr. Mechanic and Ridings. As Dr. Machanic testified in part two of his deposition, this portion of Dr. Higginbotham's rating seeks to rate a condition that does not exist. According to Dr. Mechanic, "You can't rate Mr. Gibson using a cervical-root table because he doesn't have a pinched nerve in the neck." There is no anatomical correlation between claimant's left upper extremity sensory deficits secondary to his burn and subsequent skin graft and any cervical nerve root. Dr. Ridings also testified that this rating methodology of Dr. Higginbotham's was erroneous and, "Utter nonsense." Accordingly, the ALJ concludes that Respondents have established that Dr. Higginbotham's methodology in rating Claimant's scheduled sensory impairment was incorrect and his opinion in this regard is overcome. As found, the ALJ adopts Dr. Mechanic's opinion that Claimant sustained 8% scheduled impairment. Moreover, as found, this impairment is limited to the upper extremity.

H. Contrary to Respondents suggestion, the ALJ concludes that Dr. Higginbotham's

impairment rating for the thoracic spine and episodic neurologic discords is reliable, well-reasoned, and consistent with Claimant's medical history, medical treatment, diagnoses, impairments, and the *AMA Guides*. Based upon the evidence presented, the ALJ finds and concludes that Dr. Higginbotham accurately assessed and rated all pathologies causally related to this claim. As found, professional differences of opinion do not rise to the level of clear and convincing evidence that is required to overcome Dr. Higginbotham's opinions as the Division IME physician. Consequently, the ALJ concludes that Respondents have failed to prove that Dr. Higginbotham's opinions regarding thoracic spine and cognitive impairment are highly probably incorrect. Finally, concerning any request for a finding that Dr. Higginbotham erred in expressing his impairment related opinions because he did not rate Claimant's scar and/or lumbar spine, the ALJ is not convinced. Here, the records fails tom support any injury to the lumbar spine and Dr. Mechanic failed to explain any basis for his 5% disfigurement rating arbitrarily assigned in this case.

I. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

J. Nevertheless, *Grover* provided, "[B]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While claimant does not have to prove the need for a specific medical benefit at this time, and respondents remain free to contest the reasonable necessity of any future treatment, claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Claimant has made such a showing in this case. Here, the persuasive evidence establishes ongoing cervical, thoracic, shoulder and elbow pain which will likely be responsive to additional treatment including therapy, a TENS Unit and a gym membership. Moreover, the ALJ is convinced that Claimant continues to suffer from the effects of neuro-cognitive symptoms which would likely be ameliorated by additional neuropsychological counseling. Consequently, Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. *Section 8-42-101 (1) (a), C.R.S.*

ORDER

It is therefore ordered that:

1. Respondents' request to set aside Dr. Higginbotham's opinions regarding

permanent impairment of the thoracic spine and episodic neurologic disorders is denied and dismissed.

2. Respondents' request to set aside Dr. Higginbotham's opinion regarding sensory impairment for the left upper extremity is granted. The 11% scheduled impairment of the left upper extremity assigned by Dr. Higginbotham is set aside and replaced by the 8% scheduled impairment as expressed by Dr. Machanic.

3. Claimant's true impairment ratings causally related to this claim's injury are as follows: 14% impairment of the cervical spine as a whole-person rating; 5% impairment of the thoracic spine as a whole person; 15% for complex integrated cerebral function disturbances as a whole-person rating; 3% impairment of the left extremity at the elbow on the schedule of impairments associated with range of motion loss; 8% impairment of the left upper extremity for peripheral sensory disturbance on the schedule of impairments; and 5% whole-person impairment for claimant's left shoulder condition.

4. Respondents shall provide all reasonable necessary and related treatment to relieve the Claimant from the effects of his work-related injury. Respondents remain free to challenge any future request for treatment on the grounds that it is not reasonable, unnecessary or unrelated to Claimant's industrial injury.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 16, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906,

ISSUES

1. Whether Respondent has established by a preponderance of the evidence that Claimant is precluded from receiving Temporary Total Disability (TTD) benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

2. Whether Claimant has made a "proper showing" for a change of physician pursuant to §8-43-404(5)(a), C.R.S.

STIPULATION

The determination of whether Claimant is a candidate for left shoulder surgery will be resolved through the Division Independent Medical Examination (DIME) process.

FINDINGS OF FACT

1. Employer is a large supermarket. Claimant worked as a Deli Clerk for Employer. On March 31, 2013 Claimant suffered an admitted industrial injury to her left shoulder. The injury constituted an aggravation of her pre-existing acriomioclavicular arthritis and other degenerative conditions.

2. Employer referred Claimant for medical treatment to Concentra Medical Centers. Claimant stated that she has been receiving treatment from Concentra and is now under the care of Eric Tentori, M.D. He has referred Claimant to Orthopedic Specialist Eric McCarty, M.D. for a consultation.

3. Claimant testified that Concentra is "doing nothing for her" besides prescribing medications. She is awaiting possible left shoulder surgery. Claimant explained that she is dissatisfied with Concentra's care and her lack of progress. Nevertheless, she acknowledged that she is pleased with the care she has received from Dr. McCarty.

4. Claimant returned to work for Employer after her injury in a modified duty capacity. She typically worked from 10:30 a.m. until 7:00 p.m. Claimant's work restrictions included no lifting, pushing or pulling in excess of 20 pounds.

5. In early February 2015 Claimant was transferred to the night shift. Her work hours extended from 2:00 a.m. until 10:30 a.m. Claimant's Store Manager Robert Dicroce testified that Claimant was moved to the night shift to determine whether reduced duties consisting mostly of food preparation might improve her modified work performance.

6. On February 10-11, 2015 Mr. Dicroce requested Employer's Security Department to obtain video footage of Claimant working during the night shift. He explained that he requested the security video to determine whether Claimant was exceeding her restrictions while performing her job duties. After obtaining the video footage the security team alerted Mr. Dicroce that Claimant engaged in several unsanitary practices while performing her modified job duties.

7. Video footage revealed Claimant working on the evening of February 10, 2015. One clip showed Claimant handling what appeared to be cardboard boxes and other materials. She then used the same gloves to reach in and retrieve raw lettuce from a bag that was used to make a salad. Another clip showed Claimant working with a tortilla wrapped sandwich. She was folding food into the wrap. While she was folding the wrap, she touched her face and went back to finishing preparation of the wrap. Another clip revealed Claimant either blowing her nose or wiping a paper towel across her face. She then used the same paper towel to wipe off the meat slicer and counter. Claimant also acknowledged that she did not remove her apron when taking breaks.

8. Mr. Dicroce testified that Employer's Safety and Sanitation Policies and Procedures were distributed to every employee. Mr. Dicroce's administrative assistant also furnished employees with updates, changes and amendments to the Policies and Procedures. The Policies and Procedures included directives for employees to change gloves when alternating tasks and touching raw food. The Policies and Procedures also specified that employees were to avoid coughing or sneezing when handling food. Moreover, employees were not to touch the face, nose, mouth or hair when handling food. Finally, the Policies and Procedures specified that aprons were to be removed before leaving the perishable department to go to lunch or on breaks.

9. On February 18, 2015 Employer confronted Claimant about her unsanitary practices. Claimant was suspended after the meeting.

10. On February 25, 2015 Employer specified the unsanitary practices in a written document or "Behavioral Notice." The Notice specified numerous food safety and personnel hygiene concerns. The document detailed that Claimant committed numerous violations of Employer's Sanitary and Safety Policies on February 10-11, 2015 including the failure to change gloves when alternating tasks and touching her face while cleaning. Employer terminated Claimant at the meeting. Mr. Dicroce testified that Claimant's egregious violations constituted grounds for immediate termination of employment.

11. Claimant testified that when she was switched to the 2:00 a.m. until 10:30 a.m. night shift she was tired and fuzzy from her medications and lack of sleep. She maintained that her actions did not justify an immediate termination. Claimant remarked that she believed her termination constituted retaliation for her Worker's Compensation claim. Finally, she explained that her current Concentra physicians are not helping to improve her condition and are only prescribing medications.

12. Claimant has not worked subsequent to her termination by Employer. She continues to receive medical treatment at Concentra but has not yet reached Maximum Medical Improvement (MMI).

13. Respondent has established that it is more probably true than not that Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment under the termination statutes. Video footage revealed Claimant working on the evening of February 10, 2015. One clip showed the Claimant handling what appeared to be cardboard boxes and other materials. She then used the same gloves to reach in and retrieve raw lettuce from a bag that was used to make a salad. Another clip showed Claimant working with a tortilla wrapped sandwich. She was folding food into the wrap. While she was folding the wrap, she touched her face and went back to finishing preparation of the wrap. Another clip revealed Claimant either blowing her nose or wiping a paper towel across her face. She then used the same paper towel to wipe off the meat slicer and counter. Claimant also acknowledged that she did not remove her apron when taking breaks. Employer's Policies and Procedures included directives for employees to change gloves when alternating tasks and when touching raw food. The Policies and Procedures also specified that employees were to avoid coughing or sneezing when handling food. Moreover, employees were not to touch the face, nose, mouth or hair when handling food. Finally, the Policies and Procedures noted that aprons were to be removed before leaving the perishable department to go to lunch or on breaks. On February 25, 2015 Claimant was terminated for numerous violations of Employer's Sanitary and Safety Policies including the failure to change gloves when alternating tasks and touching her face while cleaning. In contrast, Claimant explained that her actions did not justify immediate termination and constituted retaliation for filing a Workers' Compensation claim. However, the record reveals numerous sanitary and safety violations in contravention of Employer's documented Policies and Procedures. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment.

14. Claimant has failed to make a proper showing that she is entitled to a change of physician from Concentra. Claimant stated that she is dissatisfied with Concentra's care and her lack of progress. However, she acknowledged that she is pleased with the care she has received from Orthopedic Specialist Dr. McCarty. Furthermore, the record reveals that the parties are awaiting a DIME determination about whether Claimant is a surgical candidate. Accordingly, Claimant's medical circumstances do not warrant a change of physician from Concentra.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering

all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Responsible for Termination

4. Respondent asserts that Claimant is precluded from receiving temporary disability benefits because she was responsible for her termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondent must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondent has established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment under the termination statutes. Video footage revealed Claimant working on the evening of February 10, 2015. One clip showed the Claimant handling what appeared to be cardboard boxes and other

materials. She then used the same gloves to reach in and retrieve raw lettuce from a bag that was used to make a salad. Another clip showed Claimant working with a tortilla wrapped sandwich. She was folding food into the wrap. While she was folding the wrap, she touched her face and went back to finishing preparation of the wrap. Another clip revealed Claimant either blowing her nose or wiping a paper towel across her face. She then used the same paper towel to wipe off the meat slicer and counter. Claimant also acknowledged that she did not remove her apron when taking breaks. Employer's Policies and Procedures included directives for employees to change gloves when alternating tasks and when touching raw food. The Policies and Procedures also specified that employees were to avoid coughing or sneezing when handling food. Moreover, employees were not to touch the face, nose, mouth or hair when handling food. Finally, the Policies and Procedures noted that aprons were to be removed before leaving the perishable department to go to lunch or on breaks. On February 25, 2015 Claimant was terminated for numerous violations of Employer's Sanitary and Safety Policies including the failure to change gloves when alternating tasks and touching her face while cleaning. In contrast, Claimant explained that her actions did not justify immediate termination and constituted retaliation for filing a Workers' Compensation claim. However, the record reveals numerous sanitary and safety violations in contravention of Employer's documented Policies and Procedures. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment.

Change of Physician

6. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.,* W.C. No. 3-985-493 (ICAP, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

7. As found, Claimant has failed to make a proper showing that she is entitled to a change of physician from Concentra. Claimant stated that she is dissatisfied with Concentra's care and her lack of progress. However, she acknowledged that she is pleased with the care she has received from Orthopedic Specialist Dr. McCarty. Furthermore, the record reveals that the parties are awaiting a DIME determination about whether Claimant is a surgical candidate. Accordingly,

Claimant's medical circumstances do not warrant a change of physician from Concentra.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment.

2. Claimant is not entitled to a change of physician.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 29, 2015.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- The issues presented for determination were whether Claimant established by a preponderance of the evidence that the proposed carpal tunnel release surgery for his left wrist and the proposed massage therapy treatments were reasonable and necessary, as well as related to the industrial injury.

PROCEDURAL STATUS

Claimant initially filed an Application for Hearing (left carpal release) on February 27, 2015 to which Respondents filed a Response to Application for Hearing on March 30, 2015 and an Amended Response to Application for Hearing on April 8, 2015. Claimant filed a subsequent Application for Hearing (massage therapy) on March 3, 2015 to which Respondents filed a Response to Application for Hearing on April 10, 2015.

The medical benefits issues raised by the foregoing Applications and Responses to Applications for Hearing were consolidated by the Order (dated April 10, 2015), which granted the Unopposed Motion to Consolidate Hearings.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant's suffered an admitted industrial injury on August 2, 2013 while working as a window washer for Employer. He has worked for the Employer for nineteen (19) years. Claimant was travelling in an employee shuttle bus when the driver stopped suddenly, slamming on the brakes. He was holding onto a bar with his right arm and upon impact braced himself with his left arm. His body was moved forward as a result of the vehicle stopping.

2. Claimant described the force as "dramatic" and he almost fell to the ground. Another passenger fell into him and Claimant testified that his body created a "net" when this person fell into him, however, he did not fall to the ground. Claimant felt pain in his back, neck and shoulder, as well as hand tingling and numbness.

3. Claimant testified that before the injury he did not have symptoms or pain in his left wrist. Before the injury he did not require any medical treatment for his left wrist.

4. Claimant initially treated with Dr. Harvey on August 13, 2013. He was seen in follow-up on August 21, 2013 at which time the assessment was neck pain, shoulder pain and thoracic strain. No overhead work, as well as continued ibuprofen and ice were recommended.

5. A cervical CT scan was done on August 22, 2013 which showed degenerative disc and joint changes with moderate dural sac narrowing at C5-6 and moderate left foraminal narrowing at C6-7. Disc space narrowing, as well as disc bulging and protrusion were noted at those levels. Claimant was given a 10 lb lifting restriction.

6. Claimant was evaluated by Kristin Mason, M.D. on October 17, 2013[1], who noted that Claimant was complaining of neck pain and bilateral upper extremity numbness and tingling. Claimant reported that he would awaken with his hands numb involving all fingers. Positive Tinel's sign was noted over the median nerves at the wrists and ulnar nerves at the elbows. Dr. Mason's assessment was cervical strain with some findings of C6 radiculopathy, as well as bilateral upper extremity parasthesias. She recommended MRI-s of the neck and shoulder as well as electrodiagnostic studies.

7. A cervical MRI done on October 31, 2013 revealed degenerative disc and joint changes with moderate dural sac indentation, foraminal narrowing, mild on the right at C5-6 and moderate on the left at C6. The left shoulder arthrogram done on the same day showed supraspinatus and infraspinatus tendinosis with large full-thickness tear of the supraspinatus. An anterior quadrant labral tear with involvement of the biceps anchor was also documented.

8. EMG studies were done on Claimant's upper extremities on November 11, 2013. Dr. Mason's impression was bilateral median mononueropathy at the wrist right>left and no clear-cut radiculopathy. Claimant saw Dr. Mason on December 2, 2013, who noted that the supraspinatus tear would not improve without surgery.

9. Claimant was evaluated by Armodios Hatzidakis, M.D. on November 26, 2013, noted left shoulder traumatic rotator cuff tear with long head of biceps tendinitis and subacromial impingement. The exam showed tenderness and reduced range of motion in the shoulder. Surgery was discussed.

10. Claimant saw Dr. Mason in follow-up on January 13, 2014 and her assessment was cervical strain with mild C6 radiculitis, bilateral median nerve dysfunction (likely acute), thoracic strain and rotator cuff tear. He underwent shoulder surgery on his left shoulder on January 21, 2014, which was performed by Dr. Hatzidakis.

11. On February 3, 2014, Dr. Mason examined the Claimant after the surgery. He continued to have mild left-sided sensory issues which were unchanged. Dr. Mason saw Claimant on May 5, 2014 at which time he complained of pain and tingling in his

[1] The findings from the initial evaluation by Dr. Mason (10/13/13) were summarized in Dr. Pitzer's report, dated 9/25/14 [Ex. B, p. 004].

hands, particularly bothersome at night. Median nerve sensory loss persisted. He was referred to Dr. Mordick.

12. Claimant was evaluated by Thomas Mordick, II, M.D. on May 13, 2014. Claimant complained of numbness and tingling mostly in the long, ring and small fingers on the right hand. He said at times his entire hand goes numb. Dr. Mordick noted that EMG studies showed carpal tunnel syndrome ("CTS"), with the sensory latencies prolonged right (5.2) and minimally prolonged left. Diminished sensation in the median and ulnar nerve distribution was noted upon examination. Dr. Mordick felt that the symptoms would "seem to be more consistent" with Claimant's cervical root compression diagnosis. Claimant was scheduled to have an injection and if the symptoms improved, they would monitor. If the symptoms did not, they would consider CTS release. Dr. Mordick also noted that given the nature of his employment as a window cleaner with heavy manual tasks, this would be appropriately treated as a work-related injury.

13. On June 3, 2014, Claimant returned to Dr. Mordick after the neck injection. On physical examination, Dr. Mordick noted continued diminished sensation in the median ulnar nerve distribution right compared to left. Dr. Mordick's assessment was CTS and possible neck cervical root compression. Claimant wished to proceed with the carpal tunnel release on the right.

14. On July 2, 2014, Claimant underwent a right carpal tunnel release that was performed by Dr. Mordick. He was examined by Dr. Mason on July 7, 2014 and some improvement in his numbness was reported by Claimant, who was also to begin therapy.

15. On August 12, 2014 (approximately six weeks post-surgery), Dr. Mordick saw the Claimant and noted no unusual scar formation or tenderness. There was excellent range of motion in the wrist and fingers. Claimant wanted to proceed with the surgery on his left hand.

16. Dr. Mordick's office requested authorization for left carpal tunnel release surgery on August 13, 2014. [Exhibit 8, page 000081].

17. On August 26, 2014, Jonathon Race M.D. issued a letter on behalf Broadspire as the agent for the insurer which evaluated the request for authorization of left carpal tunnel treatment. Dr. Race recommended that the treatment not be certified pursuant to the Colorado Medical Treatment Guidelines ("Guidelines"). Dr. Race opined that Claimant had not received

18. Claimant underwent Osteopathic Manipulative Treatment ("OMT") on September 2, 2014, which provided by Joshua Krembs, D.O. This treatment included myofascial release and trigger point injections. Claimant reported pain relief after the injections.

19. Dr. Mason sent a letter on September 8, 2014 in which she responded to the denial of the left carpal tunnel release. Dr. Mason noted that Claimant had

extensive conservative care, including splinting and anti-inflammatory medications. She opined that Claimant had failed conservative treatment and it would be in his best interest to proceed with the carpal tunnel release.

20. Neil Pitzer, M.D. examined the Claimant on September 25, 2014 at the request of Respondents. Dr. Pitzer is an expert in physical medicine and rehabilitation. He has experience treating peripheral nerve injuries for over 25 years at the University of Colorado Hospital.

21. After reviewing Claimant's treatment records, Dr. Pitzer noted mild restrictions in Claimant's cervical motion in all planes with complaints of pain. Wrist motion also was essentially normal, but some pain with extension in the right was found. Sensory exam showed decreased light touch and pinprick in the median radial, ulnar, dorsal cutaneous ulnar and lateral antebrachial cutaneous distribution bilaterally. Strength testing showed some mild weakness of APB strength bilaterally, but also weakness of flexor pollicis longus strength bilaterally and finger abduction bilaterally. Tinel's was positive over the carpal tunnel, cubital tunnel bilaterally as well as over the mid forearm not over a peripheral nerve distribution.

22. Dr. Pitzer noted that Claimant related that he had bilateral hand and arm numbness immediately occurring after the injury. Dr. Pitzer stated that the initial reports tended to refute this, as Claimant did not have numbness on exam or complaints of numbness immediately post injury, but had cervical and thoracic pain. Dr. Pitzer did not have the initial EMG available to review, but opined that Claimant's carpal tunnel syndrome was not related to the strain injury in the neck and shoulders. He recommended against authorization through worker's compensation of any further surgeries or EMG studies. He also opined that the right CTS was not related to Claimant's work injury.

23. Claimant underwent an epidural steroid injection at C6-7 on September 30, 2014, which was administered by Nicholas Olsen, D.O.

24. Dr. Mason saw Claimant for a follow-up evaluation on October 6, 2014. On physical exam, he had weakness of his APB on the left and medial distribution sensory disturbance. Positive Tinel's sign was noted. Dr. Mason reviewed the IME report from Dr. Pitzer and respectfully disagreed with its conclusions. Claimant's EMG in 11/13 was negative for polynueropathy. He was described as having classic carpal tunnel symptoms. Dr. Mason noted that Claimant may have had subclinical carpal tunnel that was "aggravated" by the wrist strain.

25. Claimant was examined by Dr. Mason on October 20, 2014 at which time numbness and tingling was noted in the median distribution of the left hand Dr. Mason discussed "double crush syndrome" and how he has both radiculopathy and CTS, which can each worsen the other. As part of her assessment of left CTS, Dr. Mason noted that it was clearly related in light of the C6 radiculitis, which has a well-known association in the medical literature.

26. Dr. Mason next examined Claimant on November 10, 2014. Claimant's right hand was described as doing reasonably well, with the numbness in his left hand getting more prominent.

27. A supplemental report dated November 10, 2014 was issued by Dr. Pitzer. Dr. Pitzer reviewed a videotape of Clamant on a riding lawnmower and using a pushmower. Dr. Pitzer noted that Claimant was able to walk with a normal gait without difficulty and it appeared he could return to work. Dr. Pitzer reiterated his opinion that the CTS and peripheral nerve compressions are not related to his nerve injury of 8-2-13.

28. Claimant was seen in follow-up by Dr. Mason on December 8, 2014, who had cleared him to return to work full-duty. Claimant reported that the massage therapy was helpful with the muscle component of pain and felt he was getting stronger. Dr. Mason anticipated that Claimant would probably placed at MMI for the shoulder in January, the left carpal tunnel issue remained pending.

29. Dr. Mason saw Claimant on January 5, 2015 and noted that his left thumb was weaker. He had a positive Tinel's with median sensory loss. Claimant report the numbness in the left hand was getting worse.

30. Dr. Mason examined Claimant on January 26, 2015 and it was noted that Dr. Hatzidakis had released him to continue strengthening. Claimant was continuing massage therapy which was helping his neck pain. Claimant reported some increased numbness and Dr. Mason recommended repeat EMG studies to look for change.

31. The repeat EMG studies were done on February 16, 2015. The summary documented differential slowing for the median nerve. Dr. Mason's impression was unchanged "mild" left CTS and improved right CTS.

32. John Obermiller, M.D. issued a report on March 4, 2015 evaluating the treatment request for four (4) massage therapy visits every other week as an outpatient. He recommended that the request be non-certified, as the guidelines would support a maximum duration of two months of massage therapy.

33. Claimant returned to Dr. Mason on March 9, 2015, at which time she noted weakness in the left thumb with median sensory loss and a positive Tinel's and median compression test. The results of the EMG were discussed and Dr. Mason noted that the left CTS was neither getting better nor worse.

34. Dr. Obermiller authored a report, dated March 26, 2015 in which he evaluated the request for 8 Physical Therapy 1-2/week x4 weeks for Claimant's left hand/wrist and recommended these be non-certified. Dr. Obermiller stated that the provided medical records did not indicate that the Claimant had failed to respond to a home exercise program for the treatment of the left had complaints for this case, which is approximately 1½ years out from the date of injury. The amount of physical therapy previously attended was not documented. Dr. Obermiller cited the Colorado Medical Treatment Guidelines Rule 17, Exhibit 5.

35. Dr. Mason examined Claimant on April 6, 2015 at which time he reported his shoulder was doing well. The treatment with Dr. Krembs was described as beneficial. Claimant's left hand continued to have numbness at night. Claimant continued to have weakness of the APB on the left with median sensory loss and a positive Tinel's, as well as positive median compression test. Dr. Mason's assessment was resolving left C6 radiculitis with myofascial pain which was responding to OMT; status post right carpal tunnel release with some ulnar neuropathy at the elbow; left rotator cuff repair with biceps tenodesis and subacromial decompression, doing well; left CTS. The plan articulated by Dr. Mason was continue the OMT and the tramadol (p.r.n.). Dr. Mason did not think that Claimant needed further PT, as the rotator cuff strength was good.

36. A General Admission of Liability was filed on or about May 17, 2015, admitting for medical and temporary total disability benefits.

37. Dr. Pitzer issued a written report, dated 6-25-14 (which appears to be a typographical error since it refers to Dr. Mason's 4-6-15 note and his addendum of 11-10-14). Dr. Pitzer opined that he did not feel any further physical therapy or massage therapy for Claimant's work injuries was medically indicated.

38. Claimant testified at hearing that he wanted the carpal tunnel release for his left wrist because he believed it would relieve his symptoms.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1). Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2007; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Medical Benefits

A Respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

In this case, the issue is whether the proposed treatment is reasonable and necessary, as well as related to the injury. The ALJ evaluated both the mechanism of Claimant's injury, his symptoms, the opinions of his treating physicians, along the medical opinions of Respondents' experts. Each of the proposed courses of treatment is reviewed, *infra*.

A. Osteopathic Manipulative Treatment

Respondents contend that additional Osteopathic Manipulative Treatment ("OMT") is neither reasonable nor necessary. In support of this argument, Respondents submitted the reports of Dr. Obermiller and Dr. Pitzer. In his March 4, 2015 report, Dr. Obermiller reviewed the request for authorization of four (4) massage therapy visits every other week as an outpatient. He recommended that this request be non-certified, as the Guidelines would support a maximum duration of two months of massage therapy. The ALJ is not persuaded by this opinion, as Dr. Obermiller did not know the mechanism of injury, nor did he have information as to the amount of previous massage therapy for this year. In addition, there is no evidence that Dr. Obermiller examined Claimant, nor he did not have the benefit of Dr. Mason's April 6th report which documented Claimant's improvement related to this therapy.

Respondents also relied upon the opinion of Dr. Pitzer who evaluated Mr. Zarate on September 25, 2014. Dr. Pitzer issued a supplemental report on June 25, 2015 in which he concluded that no further PT or massage therapy was medically indicated for his work injuries. Dr. Pitzer opined that the proposed treatment was "not consistent with Worker's Compensation treatment guidelines", but did not cite a specific section of the treatment guidelines, including any of the applicable appendices to the W.C.R.P. Dr. Pitzer's report also did not address the efficacy of the manipulation treatments and

injections provided by Dr. Krembs. In fact, there was no discussion by Dr. Pitzer regarding Claimant's response to this treatment.

Claimant's treating physician (Dr. Mason) recommended continued OMT and her April 6, 2015 report documented improvement in Claimant's symptoms. The ALJ is persuaded that Dr. Mason is in the best position to provide an opinion regarding the necessity of the proposed treatment. Specifically, Claimant reported symptom relief to Dr. Mason. (See for example, reports dated 12/8/14, page 00046; 1/26/15, page 000052). Claimant's testimony that the treatment was effective and provided symptom relief is also persuasive.

The ALJ concludes that the evidence has shown that the proposed OMT relieves Claimant's symptoms. Therefore, the ALJ finds that Claimant has sustained his burden of proof with regard to the Osteopathic Manipulative Treatment. Said treatment is reasonable and necessary to relieve the effects of the August 2, 2013 injury. Respondents are required to provide such treatment and are therefore ordered to provide the OMT as recommended by Dr. Mason.

B. Left Carpal Tunnel Release

The ALJ first considered Claimant's injury, course of treatment and the opinions of the various physicians in conjunction with the parties' contentions with regard to the proposed carpal tunnel surgery. Claimant contended that the proposed CTS release for the left wrist is reasonable and necessary, as the medical records supported the need for said treatment. In the record, bilateral hand complaints were documented during the acute phase of the injury, although Claimant apparently did not report symptoms when he first received treatment after August 2, 2013. (The ALJ notes that the records for Claimant's initial treatment during this timeframe were not admitted into evidence, but he has utilized Dr. Pitzer's treatment summary.)

In Dr. Mason's initial evaluation of October 17, 2013, she documented bilateral hand complaints, including numbness and tingling. A positive Tinel's sign over the median nerves was also noted. Dr. Mason's follow-up evaluations also documented positive findings related to CTS, including:

- 11/11/13-EMG: bilateral median mononueropathy.
- 5/5/14-Symptoms: numbness and tingling; Assessment: Bilateral persistent medial nerve dysfunction.
- 6/2/14-Bilateral carpal tunnel syndrome (epidural steroid injection did not affect numbness and tingling).
- 6/23/14-Bilateral carpal tunnel syndrome.
- 7/7/14-Assessment: Status post right carpal tunnel release with left carpal tunnel syndrome.

- 7/21/14-Assessment: Status post right carpal tunnel release with left carpal tunnel syndrome; Improvement noted on right after surgery.

- 8/25/14-Assessment: left carpal tunnel syndrome awaiting scheduling.

- 9/8/14-After the denial of left carpal tunnel release, Dr. Mason noted that Claimant had extensive conservative care, including splinting and anti-inflammatory medications.

- 9/15/14-Symptoms: more numbness down the left arm; Assessment: left carpal tunnel syndrome awaiting scheduling for surgery.

- 10/6/14-Assessment: left carpal tunnel syndrome. Dr. Mason disagreed with Dr. Pitzer's conclusions, noting that Claimant's EMG was negative for polyneuropathy and he had "classic" carpal tunnel symptoms on the left.

- 10/20/14-Assessment: left carpal tunnel syndrome; Dr. Mason opined "double crush syndrome".

- 11/10/14-Symptoms: numbness in left hand more prominent.

- 1/5/15- Positive Tinel's with median sensory loss.

- 2/6/15-Repeat EMG-mild CTS noted.

- 3/9/15-Weakness in left thumb, median sensory loss and positive Tinel's sign.

- 4/6/15-Weakness of the APB on the left, median sensory loss and positive Tinel's sign.

Dr. Mordick's reports also supported the conclusion that the proposed CTS release is reasonable and necessary given the circumstances of this case. Dr. Mordick initially focused on the cervical root compression diagnosis, noting if there was no symptom relief from the injection, they would need to consider a carpal tunnel release. When Claimant's symptoms did not abate, he recommended the carpal tunnel release. As part of his opinion, Dr. Mordick also noted that because of the nature of Claimant's employment this would be an appropriately treated as a work-related injury.

Under this rationale, Dr. Mordick performed with the carpal tunnel release on Claimant's right hand. He noted in his July 7, 2014 report that he would proceed with the procedure on the left side once Claimant had recovered. The inference the ALJ draws from this report is Dr. Mordick believed this treatment to be reasonable and necessary.

Respondents argued that the need for the proposed CTS release was not caused by the accident or related to it. Respondents rely upon Dr. Pitzer's opinion when he stated that Claimant's CTS was not related to the strain injury in the neck and

shoulders. Further Dr. Pitzer opined though Mr. Zarate was holding onto bars, "this would not cause trauma to the nerves requiring decompression". Since the industrial injury did not cause the CTS, Respondents argued that the proposed treatment would not be reasonable.

Dr. Pitzer also noted that Claimant did not meet the DOWC Guidelines for development of CTS related to trauma, but did not specify what guidelines upon which he had based that conclusion. Dr. Pitzer recommended against authorization of any further treatment through worker's compensation. The ALJ has given weight to Dr. Pitzer's opinion, given his expertise in the field of Physical Medicine Rehabilitation and 25 years of experience treating patients at University of Colorado Hospital.

Respondents also argued that the proposed left carpal tunnel release is not reasonable, nor is it necessary. In support, Respondents tendered the August 26, 2014 report of Dr. Race, whose conclusion was that a left CTS release was not indicated under the Medical Treatment Guidelines. In that report, Dr. Race states:

"The guidelines indicate carpal tunnel release would be supported in cases with motor latency of less than 5 miliseconds after failures of lower levels of care including job alterations. The electrodiagnostic testing provided for in review indicated the left wrist median and motor latency was 3.5 miliseconds which was less that the guideline indicated requirement. Dr. Race also noted "the records do not reflect failure of lower levels of care such as oral medications, splinting, physical therapy, or a steroid injection of the carpal tunnel". More particularly, Dr. Race said that the Guidelines indicated carpal tunnel release would be supported in cases with motor latency of less than 5 miliseconds after failures of lower levels of care including job alterations. The electrodiagnostic testing provided for in review indicated the left wrist median and motor latency was 3.5 miliseconds which was less that the Guideline indicated requirement. Dr. Race also noted "the records do not reflect failure of lower levels of care such as oral medications, splinting, physical therapy, or a steroid injection of the carpal tunnel".

The ALJ notes that the analysis done by Dr. Race was based upon his review of medical records, as there is no evidence that he examined Claimant. The rationale put forward by Dr. Race was that Claimant had not received conservative treatment modalities for his CTS. However, this was refuted by Dr. Mason. In this regard, the ALJ finds Dr. Mason to be credible on the subject of the treatment Claimant received, since she has overseen his treatment since October 2013. Dr. Mason noted that Claimant had received the lower levels of care, although the medical records admitted at hearing do not show whether a steroid injection of the carpal tunnel was tried. The 1.5 millisecond difference is dispositive of this question as the Guidelines describe this testing as a range. The ALJ is not persuaded by Dr. Race's conclusion that a CTS release is not indicated under the Guidelines.

The ALJ next considered the broader question of whether the Medical Treatment Guidelines ("Guidelines") applied to the requested CTS release. The Guidelines are contained in W.C. Rule of Procedure 17-2(A), 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers'

Compensation (Division). The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. 2008.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria). However, an ALJ is not required to award or deny medical benefits based on the Guidelines. In fact, there is generally a lack of authority as to whether the Guidelines require an ALJ to award of deny benefits in certain situations. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the Guidelines. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014)

W.C.R.P. 17-5(C) provides in relevant part:

> "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9."

The ALJ notes that the Guidelines do not direct address the factual scenario presented by this case; namely where an underlying condition (CTS) is present and is then potentially aggravated by a traumatic injury. Accordingly, the Guidelines do not definitively assist the ALJ in determining whether a CTS release is reasonable and necessary.

This is a case of diametrically opposed medical opinions. In the particular, the two ATP-s (Dr. Mason and Dr. Mordick) who support the request for surgery are pitted against the opinions of an IME physician (Dr. Pitzer), as well as the physician who performed a record review (Dr. Race.), who state it should be denied. The ALJ is persuaded by opinions expressed by the authorized treating physicians, particularly those of Dr. Mason, who has treated Claimant throughout the pendency of the claim. These opinions persuade the ALJ that Claimant's need for the CTS release was caused by the industrial injury and that the proposed treatment is reasonable and necessary.

First, the medical evidence admitted at hearing demonstrates Claimant had objective findings consistent with CTS and these were consistent throughout his course of treatment. In fact, Dr. Mason noted symptoms of bilateral upper extremity numbness

and tingling as early as October 17, 2013, which was two months post-injury. Positive Tinel's sign was noted over the median nerves at the wrists and ulnar nerves at the elbows. These objective findings were noted consistently throughout Dr. Mason's records. Dr. Mason's assessment at that time included bilateral upper extremity parasthesias. Dr. Mason described Claimant's presentation as "classic" CTS. Furthermore, after specifically reviewing the Respondents' IME physician's opinion (Dr. Pitzer), Dr. Mason offered a credible explanation; namely, double crush syndrome, which was not refuted.

The CTS findings were supported by the EMG studies. When Dr. Pitzer examined Claimant on September 25, 2014, he did not have the EMG studies available for review. In this regard, the record is unclear whether Dr. Pitzer was ever provided with the EMG studies, as his supplemental reports of 11/10/14 [Ex. C] and 6/25/15 [Ex. G] do not contain any reference to the EMG studies. Dr. Pitzer felt that Claimant may well have peripheral polyneuropathy, as opposed to nerve trauma. However, in her 10/26/14 report, Dr. Mason noted that the EMG studies were negative for polyneuropathy. Dr. Pitzer did not comment or provide any additional information concerning polyneuropathy in his subsequent reports. The ALJ therefore is not persuaded that polyneuropathy explains Claimant's symptoms.

Second, there was objective evidence that Claimant had no symptoms prior to the subject accident. The ALJ notes that medical records related to a prior DIME with Dr. Scaer were provided to Dr. Pitzer and there was no reference to upper extremity symptoms. Claimant's testimony also confirmed that he had no symptoms of CTS prior to the subject injury.

Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997) . In this case, the evidence leads the ALJ to conclude that while Claimant may have had carpal tunnel syndrome as an underlying asymptomatic condition, it was the industrial injury of August 2, 2013 that caused his symptoms and the need for medical treatment.

Third, even though the precise factual circumstances are not covered by the Guidelines, Claimant's physical findings meet the Guidelines criteria for CTS treatment. In his physical examination of Claimant, Dr. Pitzer noted decreased light touch and pinprick in the median, radial, ulnar, dorsal cutaneous ulnar and lateral antebrachial cutaneous distribution bilaterally. Claimant's grip strength was symmetric, with some mild weakness of APB strength bilaterally. Tinel's was positive over the carpal tunnel. (These are positive findings for CTS under the Medical Treatment Guidelines.)

The ALJ concludes that Claimant has satisfied his burden of proof with regard to the need for CTS surgery on the left. Claimant requires said treatment as a result of the industrial injury and the proposed carpal tunnel release is reasonable and necessary.

ORDER

It is therefore ordered that:

1. The Insurer shall pay for the cost of the OMT, provided by Dr. Krembs and Dr. Zarou, as recommended by Dr. Mason.

2. The request for CTS release surgery on the left is found to be reasonable and necessary. Insurer shall authorize proposed CTS release surgery for the left wrist.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 10, 2015

s/Timothy L. Nemechek

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for L4-L5 fusion surgery by Authorized Treating Physician (ATP) Chad Prusmack, M.D. is reasonable, necessary and causally related to her September 19, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 32 year old female who worked for Employer as a Restaurant Manager. On September 19, 2013 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. While bussing tables and lifting a tub of dishes, Claimant experienced a popping sensation in her lower back area.

2. Claimant obtained conservative treatment for her condition at Spine One. She underwent physical therapy, facet joint injections and epidural steroid injections. Claimant also received medications and underwent an MRI. Physicians also requested a discogram to identify the pain generator in Claimant's lower back.

3. On February 19, 2014 Claimant underwent an independent medical examination with Orthopedic Surgeon Brian Reiss, M.D. He reviewed Claimant's medical records, obtained an oral history and performed a physical examination. Dr. Reiss determined that Claimant suffered from multi-level degenerative disc disease without instability. He concluded that a discogram was not warranted because the procedure is only performed if a decision has been made to proceed with surgery. Relying on the *Colorado Workers' Compensation Medical Treatment Guidelines* (*Guidelines*) Dr. Reiss noted that prior to proceeding with surgery all conservative treatment should be exhausted. He maintained that conservative care had not been completed and additional conservative measures were warranted. He recommended core strengthening and aerobic conditioning. Moreover, because Claimant had only mild degenerative changes at two levels without any instability and was young in age, considerations of fusion surgery were not warranted.

4. Claimant subsequently visited Hashim Khan, M.D. for an examination. In a July 21, 2014 report Dr. Khan noted that Claimant had failed conservative treatment and was interested in visiting a spine surgeon. A subsequent MRI revealed positive findings at L4-L5 and L5-S1.

5. On August 11, 2014 Claimant underwent an evaluation with David Wong, M.D. After performing a physical examination Dr. Wong determined that Claimant suffered lower back pain with degeneration of a lumbar or lumbosacral disc and

probable multifactorial symptom complex. He remarked that Claimant had a significant myofascial component to her pain with very tender paraspinal muscles. Dr. Wong did not believe that the mild stenosis on MRI was clinically significant. He also noted that he could not "completely rule out both an element of nonorganic pain with her discomfort on simulated range of motion testing and contradictory straight leg raising." Dr. Wong explained that discogenic pain was a major component of Claimant's symptom complex. He recommended a psychological evaluation for possible non-organic pain.

6. On October 3, 2014 Claimant visited Kayvon Alizadeh, M.D. for an examination. Dr. Alizadeh recommended a discogram and referred Claimant to Neurosurgeon Chad Prusmack, M.D. for a second opinion. On November 17, 2014 Claimant was evaluated by Dr. Prusmack. After reviewing the conservative treatment Claimant had received, he recommended a discogram to ascertain Claimant's pain generator and need for surgery.

7. Respondents referred Claimant to Michael J. Rauzzino, M.D. for an evaluation of the discogram request. In a November 25, 2014 report Dr. Rauzzino determined that Claimant's annular tear/disc herniation was attributable to her September 19, 2013 industrial injury. Because Claimant had failed other conservative measures, he concluded that the request for a discogram constituted reasonable and necessary medical treatment.

8. Claimant underwent the discogram and returned to Dr. Prusmack on January 7, 2015. Dr. Prusmack noted concordant pain responses at the L2-L3 and L3-L4 levels. He also remarked that there were significant annular tears at L2-L3, L3-L4 and L4-L5. In a January 13, 2015 report Dr. Prusmack commented that "based on [Claimant's] intractable pain and a positive lumbar discography, we have recommended that she undertake a minimally invasive lumbar fusion at the L4-L5 level." Dr. Prusmack formally requested authorization for a discectomy, full facetectomy, interbody fusion and posterior segmental instrumentation.

9. Dr. Reiss reviewed the surgical request. He noted that the MRI reflected degenerative changes from L4-S1 but no signs of nerve root compression. He noted that the discogram revealed concordant pain at two levels and non-concordant pain at another level. Dr. Reiss determined that the discogram had not identified Claimant's pain generator. He remarked that, pursuant to the *Guidelines*, a pain generator must be identified and all conservative treatment measures must have been exhausted before proceeding with surgery. Dr. Reiss thus concluded that Dr. Prusmack's proposed lower back surgery was not reasonable or necessary.

10. On February 9, 2015 Claimant underwent an independent psychological evaluation with psychiatrist Laura J. Klein, M.D. to assess whether she was a good candidate for lower back surgery. Dr. Klein recounted that Dr. Wong had raised psychological concerns when Claimant's straight leg raising was inconsistent. She remarked that Claimant's reliability was highly suspect because her subjective complaints did not correlate with the objective findings. Dr. Klein stated that a

correlation was important because a discogram is a highly subjective test in which it is very difficult to identify a specific pain generator. She ultimately concluded that the proposed surgery was not reasonable from a psychological perspective.

11. On July 13, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Reiss. Dr. Reiss maintained that the surgery requested by Dr. Prusmack was not reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Reiss expressed significant concerns that L4-L5 was Claimant's pain generator. He noted that Claimant likely does not suffer from discogenic pain. Alternatively, if Claimant has discogenic pain, multiple discs are involved and operating on one of them is a "random" and "ludicrous" decision because it contravenes the *Guidelines.* Moreover, operating on multiple levels is inappropriate based on Claimant's young age. Dr. Reiss summarized that surgery would likely not improve Claimant's condition and additional surgeries would likely worsen her symptoms. Dr. Reiss also emphasized that Claimant has not completed conservative care and additional conservative measures would improve her function. Finally, Dr. Reiss noted that there are psychological concerns in proceeding with surgery because Claimant's symptoms have been out of proportion to expected pain levels.

12. On July 20, 2015 the parties conducted the post-hearing evidentiary deposition of Dr. Prusmack. He maintained that a minimally invasive lumbar fusion at L4-L5 was reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Prusmack explained that Claimant had failed all conservative treatment and her discogram revealed concordant pain responses at both L2-L3 and L4-L5. The L4-L5 level also had a Grade 4 tear. He identified L4-L5 as Claimant's pain generator.

13. Dr. Prusmack disagreed with Dr. Reiss that Claimant required additional conservative care. He remarked that Claimant has received conservative treatment for over one year. Dr. Prusmack stated that "[t]o go back to the same type of treatment she's already been getting and thinking that now somehow it's going to miraculously improve a lumbar disc which is torn from the accident. I don't think that's a viable alternative. I think it's repetitive and I think it's a waste of time and money."

14. Dr. Prusmack addressed whether Claimant required a psychological examination prior to surgery. He explained that it is not his practice to mandate psychological evaluations unless there are extreme circumstances requiring the need for an examination.

15. Dr. Prusmack detailed the minimally invasive surgery that he sought to perform on Claimant's L4-L5 level. He noted that doctors Wong, Rauzzino and Reiss perform traditional open surgeries in which they make a midline incision. They scrape off and destroy the main extensor muscle of the back called the multifidus. The surgeons then remove the interspinus ligament. Dr. Prusmack explained that the procedure destabilizes the patient globally and leads to dysfunction in terms of limiting future activities. In summary there is a gross dissection of the muscle. The inability to

maintain the muscular envelope produces worse outcomes because of the muscle destruction.

16. In contrast, Dr. Prusmack explained that he performs endoscopic surgery. The procedure involves maintaining the muscular envelope and ligaments. Dr. Prusmack characterized endoscopic surgery as a "muscle-sparing" technique in which adjacent level disc disease drops to about 5% every 10 years. The procedure also leads to less blood loss, fewer inflammatory markers and a decreased need for blood transfusions.

17. Claimant has demonstrated that it is more probably true than not that the request for back surgery by ATP Dr. Prusmack was reasonable, necessary and causally related to her September 19, 2013 admitted industrial injury. Claimant underwent extensive conservative treatment including physical therapy, facet joint injections and epidural steroid injections. Claimant also received medications and underwent an MRI. Because Claimant had failed other conservative measures, Dr. Rauzzino concluded that Claimant's request for a discogram to identify her pain generator constituted reasonable and necessary medical treatment. Upon reviewing the discogram, Dr. Prusmack noted concordant pain responses at the L2-L3 and L3-L4 levels. He also remarked that there were significant annular tears at L2-L3, L3-L4 and L4-L5. Dr. Prusmack identified L4-L5 as Claimant's pain generator.

18. Dr. Prusmack explained that a minimally invasive lumbar fusion at L4-L5 was reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. He detailed that he would perform endoscopic surgery at Claimant's L4-L5 level. The procedure involves maintaining the muscular envelope and ligaments. Dr. Prusmack characterized endoscopic surgery as a "muscle-sparing" technique in which adjacent level disc disease drops to about 5% every 10 years. The procedure also leads to less blood loss, fewer inflammatory markers and a decreased need for blood transfusions. Finally, Dr. Prusmack commented that Claimant did not require additional psychological evaluation prior to undergoing surgery because there were no extreme circumstances raising psychological concerns.

19. In contrast, Dr. Reiss maintained that the surgery requested by Dr. Prusmack was not reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Reiss expressed significant concerns that L4-L5 was Claimant's pain generator. He noted that Claimant likely does not suffer from discogenic pain. Dr. Reiss also emphasized that Claimant has not completed conservative care and additional conservative measures would improve her function. Moreover, Dr. Reiss noted that there are psychological concerns in proceeding with surgery because Claimant's symptoms have been out of proportion to expected pain levels. However, Dr. Prusmack was Claimant's ATP and persuasively explained that he had identified Claimant's pain generator, she had failed conservative care and she did not require additional psychological evaluation. Moreover, the proposed surgery on L4-L5 is minimally invasive. In contrast, a traditional open surgery destabilizes the patient globally and leads to dysfunction in terms of limiting future activities. Accordingly, based on the persuasive medical records and testimony of Dr. Prusmack, the proposed

minimally invasive L4-L5 fusion surgery is reasonable, necessary and causally related to Claimant's September 19, 2013 admitted industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that the request for back surgery by ATP Dr. Prusmack was reasonable, necessary and causally related to her September 19, 2013 admitted industrial injury. Claimant underwent extensive conservative treatment including physical therapy, facet joint injections and epidural steroid injections. Claimant also received medications and underwent an MRI. Because Claimant had failed other conservative measures, Dr.

Rauzzino concluded that Claimant's request for a discogram to identify her pain generator constituted reasonable and necessary medical treatment. Upon reviewing the discogram, Dr. Prusmack noted concordant pain responses at the L2-L3 and L3-L4 levels. He also remarked that there were significant annular tears at L2-L3, L3-L4 and L4-L5. Dr. Prusmack identified L4-L5 as Claimant's pain generator.

6. As found, Dr. Prusmack explained that a minimally invasive lumbar fusion at L4-L5 was reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. He detailed that he would perform endoscopic surgery at Claimant's L4-L5 level. The procedure involves maintaining the muscular envelope and ligaments. Dr. Prusmack characterized endoscopic surgery as a "muscle-sparing" technique in which adjacent level disc disease drops to about 5% every 10 years. The procedure also leads to less blood loss, fewer inflammatory markers and a decreased need for blood transfusions. Finally, Dr. Prusmack commented that Claimant did not require additional psychological evaluation prior to undergoing surgery because there were no extreme circumstances raising psychological concerns.

7. As found, in contrast, Dr. Reiss maintained that the surgery requested by Dr. Prusmack was not reasonable and necessary to cure or relieve the effects of Claimant's September 19, 2013 industrial injury. Dr. Reiss expressed significant concerns that L4-L5 was Claimant's pain generator. He noted that Claimant likely does not suffer from discogenic pain. Dr. Reiss also emphasized that Claimant has not completed conservative care and additional conservative measures would improve her function. Moreover, Dr. Reiss noted that there are psychological concerns in proceeding with surgery because Claimant's symptoms have been out of proportion to expected pain levels. However, Dr. Prusmack was Claimant's ATP and persuasively explained that he had identified Claimant's pain generator, she had failed conservative care and she did not require additional psychological evaluation. Moreover, the proposed surgery on L4-L5 is minimally invasive. In contrast, a traditional open surgery destabilizes the patient globally and leads to dysfunction in terms of limiting future activities. Accordingly, based on the persuasive medical records and testimony of Dr. Prusmack, the proposed minimally invasive L4-L5 fusion surgery is reasonable, necessary and causally related to Claimant's September 19, 2013 admitted industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Dr. Prusmack's request for L4-L5 fusion surgery is reasonable, necessary and causally related to Claimant's September 19, 2013 admitted industrial injury.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 9, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-932-393-01

ISSUES

The issues for determination at hearing are:

- Compensability
- Medical benefits, reasonably necessary, authorized provider;
- Average weekly wage;
- Temporary disability benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On February 7, 2013, Claimant sustained an injury to her bilateral upper extremities while working within the course and scope of her employment as a meat packer for Employer. She began working for Respondent-Employer more than 20 years ago. Because of her injury, Claimant was off work for several months. Claimant returned to her employment as a meat packer after undergoing treatment for the bilateral upper extremity injuries.

2. Claimant's job includes the packing of meat as it comes down a conveyor belt. She works multiple stations, each with varying sizes of meat to be packed into bags. Some require the use of a hook to pick up the meat, some require her to slide the meat into a bag, others require her to pick up each piece to be put into a bag which she attaches to the device in which the meat is collected, and one station is an automated station which she is rotated into every seventh shift she works. The processing of each piece of meat is expected to be done "the fastest we can do it." The picking up of the bag, the putting the meat inside the bag, and then putting the sealed bag back onto the belt is done at each station three or four times per minute.

3. From the time Claimant arrived at work at 5:30 a.m., Claimant would pick up her equipment, put on her apron, gloves and everything necessary to go to her station to begin work. Depending upon the station worked, she would immediately begin picking up meat with either her hands or the hook provided by the employer. Each bag contained multiple pieces of meat. The lightest weight of bagged meat was three and a half pounds; other bags weighed up to twenty-five pounds each.

4. At table 2, Claimant was required to use a hook in her left hand because the meat rolls from the right to the left. Claimant described the method by which the hook is used: first with the hook facing up, then the meat is grabbed, and by the time the meat is released, Claimant's wrist has rotated so the hook is facing down. The process is repeated until she has placed up to six pieces into a bag. She then closes each bag

and moves it down the line. In order to remove the meat from the hook she is required to move her wrist by extending her arm, collecting the meat on the hook, with the hook placed between the index and next finger. As she picks up the meat she faces her wrist toward the ground, then switches the position of her wrist so the thumb then faces into the air with the rotation so that the hand, when facing up and away from the body, is then again rotated so the hand moves back down to the ground to rotate the meat off the hook. The removal of the meat from the hook then requires a flipping motion which again requires rotation of the wrist with a degree of force required to make the meat come off the hook. At station 2, Claimant completed four bags per minute.

5. Claimant processes different cuts of meat at each station. But all require similar motions to open bags, place the bags on collection containers, deposit the meat into the bags, and then send the bags full of meat on for further processing.

6. When Claimant picks up the meat by hand, the meat is cold to the touch even through her work gloves. Claimant described one station where she is required to pick up the meat with her wrists going toward the ground, then reaching over with her right hand to pull the bag down, pushing the meat with her hands towards the bag, and then pushing the meat into the bag. Once full, Claimant lifts the bag and throws it toward the belt. Claimant provided similar descriptions of her duties at each of the additional stations where she worked. Each station processed different types and weights of meat and each had bagging equipment located either in front of or beside Claimant to grab or open for collecting meat.

7. Claimant's work at began at 5:30 a.m. at a station where she worked until 8:30 a.m. without a break. Claimant had a 15 minute rest period. She returned to a different station where she worked from 8:45 a.m. until 11:45. Claimant then had a thirty minute break, but it was shortened by the time it took her to completely clean up her work area. Employer required that any meat on the floor be picked up and washed in hot water, sprayed with a cleanser and returned to the processing belt.

8. Claimant's lunch break ended at 12:15 p.m. when the belt would restart. She would then work at a different station until her shift ended eight hours after it began.

9. The ALJ finds that Claimant understood and described her job duties more fully than Dr. Cebrian whose description of Claimant's job duties was not as complete or inclusive. For example, Dr. Cebrian testified that "There's already a plastic bag that's on the chute," without acknowledging or seeming to understand that Claimant was responsible for getting the bag, opening it, and putting it onto the chute.

10. Claimant described the onset of her symptoms as feeling like pins and needles in her hands and fingers. She immediately reported her injury to her supervisor, "the red hat," asking to be seen by the on-site nurse. The referral took approximately two to three days and was done at the plant site where Claimant saw Employer's nurse. Employer did not allow Claimant to see the plant physician, Dr. Carlos Cebrian, until the second week following her complaints to her supervisor.

11. After Claimant's first visit with Dr. Cebrian, he instructed her to seek medical care on her own. Although she asked for a second opinion, and went through the union process to obtain such approval, Employer sent her back to Dr. Cebrian for a second time. Dr. Cebrian again instructed Claimant to seek care through her own provider. Claimant selected her family physician, Carole Paynter, Scott Johnson, M.D.'s physician's assistant.

12. PA Paynter opined that Claimant's injuries were work related and she referred Claimant to Dr. Cebrian for treatment. He again sent her back to her personal primary care physician.

13. Claimant reported no non-vocational or recreational activities of a repetitive nature. She does not do yard work, play the piano, do needlework or knitting, or have any hobbies that require her to move her hands regularly. She had no prior treatment for bilateral carpel tunnel syndrome.

14. On August 6, 2013, Dr. Johnson assessed Claimant as having bilateral carpel tunnel syndrome. PA Paynter referred Claimant to see Randy Bussey, M.D. at Banner Health. After initial evaluation and EMG testing, Dr. Bussey recommended surgical repair of both upper extremities. On November 26, 2013 Claimant underwent an open single incision and decompression of the median nerve on the right side. On January 28, 2014, she underwent a similar procedure on the left side.

15. Dr. Bussey, the treating surgeon opined: "Regarding the repetitive nature of her profession and the period of time during which she has been experiencing these symptoms, it is my belief that her bilateral carpal tunnel syndrome is job related. Constant, repetitive use of hands and wrists for 19 years causes median nerve compression in the carpal tunnel in the wrist."

16. Raymond P. van den Hoven, M.D., who performed Claimant's electrodiagnostic testing, stated: "Based on her history, I suspect her work activities played a significant role in her symptoms given the highly repetitive and forceful nature of the activities and the fact that she noticed a 50% improvement within two weeks after discontinuing her work." Dr. van den Hoven diagnosed Claimant as having "moderate to severe bilateral carpal tunnel syndrome, right more than left, with at least moderate denervation on right, mild on left." He also recommended the carpal tunnel release procedure performed by Dr. Bussey.

17. On September 27, 2014, Jack Rook M.D. evaluated Claimant. He agreed with the opinions of Dr. Bussey and Dr. van den Hoven that the bilateral carpal tunnel syndrome is work related. He disagreed with Dr. Cebrian's attempt to use the Medical Treatment Guidelines to disallow the Claimant's injuries. Dr. Rook explained in his report that Claimant job duties meet both the primary and secondary risk factors under the Medical Treatment Guidelines. Dr. Rook also considered Claimant's history and noted that the work she performed for Employer represented the primary repetitive upper extremity activity Claimant performed, noting that her non-vocational activities

were not repetitive or forceful in nature, and she was not involved in any traumatic events causing injury to her hands.

18. Dr. Cebrian agrees with the diagnosis of bilateral carpal tunnel, but considers Claimant's condition to be idiopathic in origin. Dr. Cebrian offered his absolute opinion that no person doing Claimant's job could ever develop carpal tunnel as a result of the work activities.

19. Because Dr. Cebrian held this predetermined, absolute belief, he provided Claimant no diagnostic testing, no treatment, and no work restrictions. Rather, he opined that Claimant's carpel tunnel syndrome was idiopathic – without any known cause.

20. The ALJ finds that Dr. Cebrian is biased towards the Employer in this matter.

- Dr. Cebrian is paid by Employer and works as its medical director.
- Dr. Cebrian did not consider the context of Claimant's injuries but determined absolutely that no worker doing her job could ever develop carpel tunnel syndrome.
- Dr. Cebrian did not deviate from the Guides even though he acknowledged that it could be appropriate for a medical provider to do so.
- In light of Claimant's job duties and twenty year history with Employer, it is not credible to diagnose Claimant's carpel tunnel syndrome as idiopathic.

21. The Division of Worker's Compensation Rule 17, Exhibit 5, Cumulative Trauma Conditions Medical Treatment Guidelines specifically provides that "acceptable medical practice may include deviations from these guidelines as individual cases dictate." The Guidelines themselves dictate that the process used by Drs. Rook, Bussey and van den Hoven are more in line with the intent of the Guidelines which state: "Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions." It goes on to state: "Evaluation of cumulative trauma related conditions require an integrated approach that incorporates ergonomics assessment, clinical assessment, past medical history and psychosocial evaluation on a case-by-case basis." Dr. Cebrian's blanket dismissal of all potential is not credible or in keeping with the intent and appropriate application of the Medical Treatment Guidelines.

22. Dr. Rook explained that "by definition" the Medical Treatment Guidelines are in fact, "guidelines. They are not written in stone, but they are something we need to follow in helping to make our assessments. However, as physicians, we also have to

use our clinical knowledge and, quite frankly, some common sense when making medical decisions that affect people's lives."

23. Dr. Rook disagreed with Dr. Cebrian's opinions relating to both the primary and secondary risk factors mentioned in the Medical Treatment Guidelines. As he described: "She's picking it [meat] up and putting it into some sort of container or bag. This by itself requires her to flip her hands over. That's pronation and supination. And she is doing it, essentially for seven hours a day which is certainly more than six hours a day, and it's certainly more than four hours a day. Likewise, her lifting requirements easily fulfill the criteria of the primary and secondary risk factors." Dr. Rook concluded that the repetitive motion required at all of the stations was very similar. And based on Claimant's hearing testimony, opined that her work activities fulfilled the primary and secondary risk criteria.

24. Dr. Rook agreed the carpel tunnel release surgeries were reasonable and necessary and related to the occupational disease from which she suffered as a result of the exposure at work. He further opined that Claimant's time off work following the surgeries was appropriate to allow sufficient time for her to recuperate from her surgical procedures. Dr. Rook opined: "[t]here cannot be idiopathic carpal tunnel syndrome with the severe electrodiagnostic findings seen" here. Dr. Rook, an expert in electrodiagnostic medicine testified that her had never heard of or seen such a case.

25. Dr. Rook further diagnosed Claimant with an occupational tendon injury at the left middle finger, which caused Claimant an inability to fully flex the left middle finger. He further explained that when carpal tunnel syndrome initially develops and the physical trauma that caused the problem is not alleviated or changed in some way, it will accelerate the development of the condition, sometimes in an exponential fashion

26. Dr. Rook, board certified in electrodiagnostic medicine, explained that the prolongation of the distal latency seen on Claimant's EMG in his opinion was in the severe range for both hands. He explained that: "Something like that just doesn't happen spontaneously."

27. Dr. Rook opined that Dr. Cebrian was wrong to place Claimant at MMI on February 19, 2013, because Claimant was diagnosed with carpel Tunnel syndrome and had not been provided any treatment.

28. Dr. Rook testified that income from performing claimant IMEs constitutes less than 5% of his income. Of that, approximately one-third are referrals from Claimant's counsel's firm. Thus, only approximately 1.67% of Dr. Rook's income is generated by performing claimant IMEs referred by Claimant's counsel's firm. The ALJ finds that this amount is too small to demonstrate bias by Dr. Rook in favor of Claimant.

29. Employer released Claimant from all duty on August 6, 2013, telling her she could no longer work with restrictions. Employer told Claimant before her initial surgery that she would not be allowed to return to work until she was "well." Employer

charged Claimant personal illness for the time she required to recover from her bilateral carpal tunnel surgeries. Claimant returned to full duty work March 9, 2014.

30. Employer's payroll records demonstrate Claimant's gross earnings for the prior 12 full pay periods included wages of: $583.10 + 756.98 + 597.25+ 750.20 + 752.19 + 551.57 + 577.87 + 552.00 + 721.09 + 550.14 + 441.60 + 586.08 (Cl. Ex. 15, pp 80-82) = $7,420.07 for an average weekly wage of $618.34. Given Claimant also reported some periods of earnings in excess of $1,000.00 e.g. during July, 2013, Claimant's period of vacation during that same 12 week period was not deleted from the income stream because it would unreasonably reduce the income when considering only the immediate preceding 12 week period.

31. The ALJ finds, based on the totality of the evidence that Claimant has proven by a preponderance of the evidence that she suffered an occupational disease to her bilateral upper extremities, namely bilateral carpal tunnel syndrome, and damage to the tendon of Claimant's left middle index finger.

32. The ALJ finds, based on the totality of the evidence, that Claimant has proven by a preponderance of the evidence that it is more probably true than not that the treatment Claimant received from Carol Paynter, PA-C, Scott Johnson, M.D., Randy Bussey, M.D., Raymond P. van den Hoven, M.D., and all attendant care related thereto, was reasonably necessary and causally related to Claimant's occupational disease. Claimant has proven by a preponderance of the evidence that Insurer should be liable for all said medical benefits under the Act.

33. The ALJ finds, based on the totality of the evidence, that Claimant's average weekly wage is $618.34.

34. The ALJ finds, based on the totality of the evidence, that Claimant has proven by a preponderance of the evidence that she became temporarily and totally disabled commencing on August 6, 2013 and continued in that disability until she was returned to work on March 1, 2014. Claimant is entitled to temporary total disability through the entirety of said period.

35. The ALJ finds, based on the totality of the evidence, that Claimant has proven by a preponderance of the evidence that Drs. Johnson, Bussey, van den Hoven, and PA Paynter, should be deemed authorized providers.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Principals of Law/Compensability

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ"s factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). If the claimant makes the requisite showing of causation the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation the ALJ may consider the provisions of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the Guidelines upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined, every medical treatment provider except Dr. Cebrian reasonably attributed Claimant's carpel tunnel syndrome to her work activities. The ALJ finds and concludes that the opinions regarding causation offered by Carol Paynter, PA-C, Scott Johnson, M.D., Randy Bussey, M.D., Raymond P. van den Hoven, M.D support the ALJ's conclusion that Claimant's carpel tunnel and finger injury are causally related to her work activities. Dr. Cebrian's opinions to the contrary are less persuasive because of his bias toward Employer.

Claimant has proven by a preponderance of the evidence that she suffered an occupational disease to her bilateral upper extremities, including bilateral carpal tunnel and damage to the tendon of Claimant's left middle index finger.

Medical Benefits

Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Respondents thus are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

The ALJ finds and concludes that Claimant showed it more probably true than not that the treatment she received from Carol Paynter, PA-C, Scott Johnson, M.D., Randy Bussey, M.D., Raymond P. van den Hoven, M.D., and all attendant care related thereto, was reasonably necessary and causally related to Claimant's occupational disease and are hereby determined the liability of Insurer. This conclusion is supported by the persuasive evidence in the record and the opinions of Drs. Rook and Bussey.

Claimant is therefore entitled to ongoing treatment and follow-up with her authorized treating physicians subject to Respondents' right to challenge any specifically requested future care or form of treatment based on established case law. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

The determination of whether a particular treatment is reasonable and necessary is a question of fact for the ALJ. *City & County of Denver School Dist 1 v. ICAO,* 682 P.2d 513 (Colo. App. 1984). The ALJ finds and concludes that Claimant's bilateral surgeries, EMGs and care attendant thereto are reasonable, necessary and related to the compensable occupational disease.

Average Weekly Wage

Section 8-42-102(2), *supra*, requires the ALJ to base claimant's average weekly wage (AWW) on her earnings at the time of injury. Section 8-42-102(3), *supra*, grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

The ALJ finds and concludes that an average weekly wage of $618.34 most accurately approximates the wage loss and loss of earning capacity resulting from Claimant's occupational disease.

Temporary Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury or occupational disease caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The ALJ finds and concludes that Claimant proved by a preponderance of the evidence that she became temporarily and totally disabled commencing on August 6, 2013 and continued in that disability until she was returned to work on March 1, 2014. Claimant remained entitled to temporary total disability through the entirety of said period.

Authorized Provider

Section 8-43-404(5)(a)(I)(A) C.R.S. requires that in all cases, the employer or insurer shall provide a list of at least two physicians, two corporate medical providers, or at least one physician and one corporate medical provider in the first instance from which the employee may select a physician. Here, Claimant requested a second physician to attend to her injuries and was merely sent back to Dr. Cebrian, the same on-site physician she was originally referred to by the employer. There was no evidence that Claimant ever received, through any verifiable method, a list of potential providers from which she could select a physician. In addition, Dr. Cebrian instructed Claimant to seek care through her personal physician. As a result, the right of selection of the authorized treating physician passed to Claimant. She did, as found, select her primary treating physician who then became her selected provider. Thereafter, Scott Johnson, M.D. through his physician’s assistant Carol Paynter, referred Claimant for additional care and surgical evaluation by Dr. Bussey, who in turn referred her to Dr. van den Hoven.

The ALJ finds and concludes that PA Paynter, and Drs. Johnson, Bussey, and van den Hoven are all therefore hereby deemed to be authorized treating providers.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has proven by a preponderance of the evidence she suffered a compensable bilateral upper extremity carpal tunnel syndrome, including additional damage to her left middle finger.

2. Claimant has further proven by a preponderance of the evidence that reasonable, necessary, related and authorized medical care was provided by Drs. Bussey, van den Hoven and PA Paynter, including surgery to both upper extremities as performed by Dr. Bussey, along with all attendant care related thereto.

3. Drs. Johnson, Bussey and van den Hoven shall be considered Claimant's authorized treating physicians. Insurer shall pay, pursuant to fee schedule, for reasonably necessary medical treatment provided by all treating physicians, including, but not limited to said providers and as provided by medical providers to whom said providers referred Claimant for reasonable necessary and related medical care.

4. Claimant is entitled to ongoing medical treatment reasonably necessary and related to her compensable February 7, 2013 occupational disease until otherwise properly terminated by law. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's compensable occupational disease and/or that the recommended treatment is not reasonable or necessary.

5. Insurer shall calculate Claimant's indemnity benefits based upon an AWW of $618.34.

6. Claimant is entitled to temporary total disability compensation from August 6, 2013 until she was returned to work on March 1, 2014.

7. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

8. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 11, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether Claimant proved by a preponderance of the evidence that she suffered a compensable injury in the course and scope of her employment for Employer and whether she proved entitlement to medical benefits to cure and relieve her of the effects of the injury**.**

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Employer is a Moroccan restaurant with workers' compensation insurance coverage through Insurer.

2. Said Benjelloun, Claimant's spouse, is an officer of Employer and submitted the Workers' Compensation Application to the Insurer. The individuals specifically included for coverage are Said Benjelloun and Claimant. Claimant is listed as a cook on the application for coverage.

3. The workers' compensation policy issued to the Employer specifically lists coverage endorsement for Said Benjelloun and Claimant.

4. On June 12, 2013, Claimant was at the restaurant working in her capacity as a chef. She went to get a pan which fell and hit her in the nose causing her to fall down and hit her back.

5. Claimant was seen at the emergency room at Porter Adventist Hospital on June 14, 2013. The history given was that she had been hit in the nose by a pot, felt dizzy, and then fell onto her buttocks. She appeared in the emergency room complaining of back pain, nose pain, and dizziness.

6. Claimant was referred by Respondents to Concentra, where she has received medical care for her injuries. All medical reports are consistent with the history of the accident which occurred at work on June 12, 2013.

7. Insurer filed a Notice of Contest on November 12, 2013, for "further investigation." No subsequent Notice of Contest was filed.

8. Claimant was paid by the Employer for her services as a Moroccan chef. Claimant was not provided with a W-2 form, nor do the tax returns reflect the wages paid to the Claimant.

9. At the time Employer applied for workers' compensation insurance coverage with the Insurer, Employer intended to cover both Said Benjelloun and Claimant as employees. The workers' compensation policy that was issued and in effect on the date of accident reflects that Claimant was covered as an employee of Employer under the policy.

10. At the time of her injury on June 12, 2013, the Claimant was employed as a chef for the Employer. At the time of her injury she was performing a service arising out of and in the course of her employment.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,* 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or

compensation are sought. *Snyder v. Industrial Claim Appeals Office*, supra. Whether a claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

5. Under Section 8-41-301, the right to compensation applies where, at the time of the injury, both the Employer and the Employee are subject to the provisions of the Act, the Employer has complied with the provisions regarding insurance, the Employee is performing a service arising out of and in the course of the employment, and the injury is proximately caused by an injury arising out of and in the course of the Employee's employment and is not intentionally self-inflicted. In this case, all conditions of recovery have been met.

6. The Employer did comply with the provisions of the statute regarding insurance and specifically obtained a workers' compensation policy for the restaurant with coverage for both Said Benjelloun and Claimant.

7. The ALJ finds that Claimant was being paid for her services. Claimant has established that there was a contract of hire between herself and Employer. She was hired to perform services as a chef, which included duties of cooking, cleaning, and preparing food, and was in fact performing those services as a chef in a Moroccan restaurant on the date of the accident.

8. Insurer presented documentation, including tax returns, to establish that Employer did not report Claimant's wages on the tax returns. However, such documentation is not probative of the issue whether Claimant was an employee of the Employer at the time of the injury.

9. The ALJ finds that the Claimant has sustained her burden of proving entitlement to medical benefits by a preponderance of the evidence. She has established that she was an employee of the Employer at the time her injury occurred and that her injury occurred within the time and place limits of her employment and during an activity that was connected to the Claimant's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colorado 1991); *Triad Painting v. Blair*, 812 P.2d 638 (Colorado 1991). The Insurer presented no evidence to rebut the Claimant's testimony that her injury occurred while working as a chef. The medical records also support the Claimant's testimony in that regard.

ORDER

It is therefore ordered that:

1. Claimant sustained compensable industrial injuries while employed by Employer on June 12, 2013.

2. The medical care received by Claimant at Porter Adventist Hospital, and from Concentra Medical Centers and all referrals are authorized, reasonably necessary and related medical benefits.

3. Respondents shall pay costs of all medical care and treatment provided or ordered by the authorized medical providers, subject to the Division of Workers' Compensation medical fee schedule.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _August 31, 2015___

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Was the claim closed by Claimant's alleged failure timely to contest a final admission of liability?

- Did Respondents overcome by clear and convincing evidence the Division independent medical examiner's finding that Claimant has not reached MMI?

- Did Claimant prove by a preponderance of the evidence that piriformis muscle injections constitute reasonable and necessary medical treatment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 13 were admitted into evidence. Respondents' Exhibits A through G were admitted into evidence.

2. On June 21, 2013 Claimant sustained admitted injuries when she fell at work. Claimant was employed as a welder.

3. On June 21, 2013 Ted Villavicencio, M.D., examined Claimant at Concentra Medical Centers (Concentra). Claimant gave a history that she fell on an uneven surface and injured her left knee and low back. Dr. Villavicencio completed a physical examination (PE) and noted there was no tenderness over the thoracic and lumbar spine, the "SI J" was "nontender," and the paraspinous muscles exhibited tenderness that was greater on the right than the left. Dr. Villavicencio assessed a "fall with multiple injuries" including "axial pain-likely lumbar strain" and a left knee contusion. He prescribed medication, a knee brace and stated he would start "conservative treatment."

4. On July 17, 2013 Marion Wells, P.A., examined Claimant at Concentra. Claimant's knee and shoulder pain was improved with physical therapy (PT) however she continued to struggle with "central L/S" pain. PA Wells noted Claimant was "mildly tender over lumbar spine," "mildly tender over RSI J" and "tender over paraspinous muscles." PA Wells assessed improved lumbar pain, an improved left knee contusion and improved bilateral shoulder strains. PA Wells placed Claimant on "modified duty" and prescribed PT.

5. On August 20, 2013 physiatrist Samuel Chan, M.D., examined Claimant on referral from PA Wells. Claimant reported left-sided interscapular pain and left-sided lumbar spine pain "over the left PSIS area." On PE Dr. Chan noted "significant

tenderness" to palpation "over the left PSIS and sacral sulcus." Patrick's test was "grossly positive on the left." Dr. Chan assessed myofascial complaint of the thoracic spine and rule out left sacroiliac (SI) joint dysfunction. Dr. Chan issued prescriptions for Lodine and Ambien. Dr. Chan agreed with PA Wells that claimant should undergo an "active exercise program" and that referral to a chiropractor was appropriate. Dr. Chan opined that if the symptoms continued he would consider "trigger point injections v. SI injection."

6. Richard Mobus, D.C. provided 5 chiropractic treatments from August 21, 2013 through September 4, 2013. Dr. Mobus documented complaints of "mid back pain" somewhat stronger on the left side and left low back pain with "occasional pinching." On September 4, 2013 Dr. Mobus noted mild aggravation of the left low back pain with seated rotation at 20 degrees. He also recorded a positive straight leg raise test "at end range with mild aggravation of the left low back." A FABER maneuver was positive for mild aggravation of left low back pain. Dr. Mobus provided treatments including manipulation, active myofascial release and therapeutic stretching. Dr. Mobus reported the Claimant experienced "moderate benefits overall regarding symptomatic improvement and functional gains."

7. On October 8, 2013 Dr. Chan again examined Claimant. Dr. Chan recorded that Claimant's pain complaint continued to be "rather significant" despite the chiropractic treatments. On PE Dr. Chan noted tenderness and active trigger points in the rhomboid muscles, and "tenderness to palpation over the left PSIS and sacral sulcus." Dr. Chan observed that, "The left SI joint engages slower than the right with lumbar forward flexion." Straight leg raising was negative and Patrick's test was "positive on the left side." He stated that her findings were suggestive of "sacroiliac joint dysfunction as well as myofascial complaints of the thoracic spine area." Dr. Chan recommended an SI joint injection.

8. On October 24, 2013 Dr. Chan performed a "left sacroiliac joint steroid injection."

9. Claimant returned to Dr. Chan on October 29, 2013. Dr. Chan noted Claimant "did not fill out her pain diary, and we do not have a clear sense of how she feels immediately after the injection." However, Claimant reported that her pre-injection pain was 7 on a scale of 10 (7/10) and the post-injection level was 7/10. On October 29 Claimant rated her pain at 8.5/10. Dr. Chan recommended a low back MRI. He stated that if Claimant "truly has no response to the SI injection, no further injection therapy would be offered."

10. On November 5, 2013, Dr. Chan saw Claimant in follow up. Claimant reported temporary benefit from the SI joint injection but on November 5 her pain was 7/10. On PE Dr. Chan noted tenderness in the "rhomboideus, levator scapulae, and trapezius muscles" with "active trigger points." On PE of the lumbar spine Dr. Chan noted the bilateral SI joints "engaged symmetrically with lumbar forward flexion" and that "Patrick's [was] positive on the left." Dr. Chan wrote that he had discussed the case with Dr. Villavicencio and that "it is felt patient's presentation are mostly suggestive of

myofascial-type complaints." Dr. Chan performed injections to "4 active trigger points over the left levator scapulae, trapezius, and rhomboideus muscles."

11. On November 7, 2013, Claimant underwent an MRI of the lumbar spine. The radiologist interpreted the MRI as showing a small central "L5-S1 disc protrusion and mild bilateral facet arthropathy resulting in mild bilateral neural foraminal narrowing."

12. On November 11, 2013 Dr. Villavicencio examined Claimant. Claimant reported some improvement in the area of the right scapula after the trigger point injections, but her pain was recurring. Dr. Villavicencio described the lumbar MRI findings as "minimal." On PE of Claimant's back Dr. Villavicencio noted "mild R>L SI J tenderness" and a negative Patrick's test. Dr. Villavicencio's assessment included: "Lumbar pain – improved, had persisting pain in L SI J area – now S/P injection with Dr. Chan – not improved much." Dr. Villavicencio provided a prescription for a Lidoderm patch and referred Claimant for additional PT.

13. On November 19, 2013 Dr. Chan again examined Claimant. Dr. Chan noted Claimant had undergone multiple modes of treatment and had a "nondiagnositc left sacroiliac joint injection" and "nondiagnostic" trigger point injections. Dr. Chan reviewed the MRI results (including the films) and noted "minimal" disk bulges at L3-4 through L5-S1 and "mild bilateral neural foraminal narrowing, more pronounced on the right side L3-4 and L4-5 levels." Claimant advised Dr. Chan that she had read the MRI report and Dr. Chan stated that "indeed she is having more right-sided pain, per the MRI findings." Dr. Chan noted that before the MRI Claimant complained of left-sided pain but after the MRI she complained of right-sided pain. Dr. Chan opined that Claimant continued to be "rather highly suggestible," that Claimant's PE was "somewhat unrevealing" and that none of the treatment modalities had "offered any type of benefits." Dr. Chan stated that with "nonphysiologic findings and the absence of significant objective findings, clinical examination" Claimant should "follow through with an active exercise program." Dr. Chan stated that "at best" Claimant was "presenting with myofascial-type complaints and recommended a work conditioning program. Dr. Chan opined claimant would be at MMI after she completed the program.

14. On November 26, 2013, Darla Draper, M.D., examined Claimant at Concentra. Dr. Draper recorded that Claimant complained of back pain with "intensity of pain at 7-1/2 over 10, left greater than right." Dr. Draper recommended Claimant continue PT and prescribed Tizanidine.

15. On December 10, 2013 Dr. Villavicencio again examined Claimant. On PE of Claimant's back Dr. Villavicencio noted "mild R>L SI J tenderness" and a negative Patrick's test. Dr. Villavicencio's assessment included: "Lumbar pain – improved, had persisting pain in L SI J area – now S/P injection with Dr. Chan – not improved much, MRI with minimal changes." Dr. Villavicencio continued Lodine. Dr. Villavicencio noted Claimant was "frustrated with lack of progress" in her treatment and referred her for a "physiatry second opinion."

16. Claimant returned to Dr. Villavicencio on December 26, 2013. On PE of the back Dr. Villavicencio noted "some B upper lumbar paraspinous muscle tenderness, mild spasm R>L mild, mild R>L SI J tenderness." Dr. Villavicencio's assessment included: "Lumbar pain- Subjective > objective findings- persisting pain in L SI J area- and now mor [sic] diffuse B paraspinous lumbar area- S/P iSI J with Dr Chan – not improved much, MRI findings with minimal changes.

17. On January 8, 2014 John Aschberger, M.D., saw Claimant for a physical medicine evaluation. Claimant reported "irritation at the left low lumbar area with irritation superiorly to the medial scaupula and recurrent shooting pain at the posterior thigh into the calf on the left." On PE Dr. Aschberger noted significant lumbar restriction on extension. Patrick's test resulted in "Complaint of low back pain on the left, negative right." Dr. Aschberger assessed lumbosacral dysfunction and restriction and "secondary myofascial pain and irritation." Dr. Aschberger opined Claimant's treatment had "been appropriate." Dr. Aschberger stated that there were findings on examination that "localize toward the SI joint" and he agreed with the injection that had been performed. He stated Claimant had radicular symptoms but the PE was not suggestive of a radicular abnormality and the MRI did not show a "significant abnormality to account for the symptoms." Dr. Aschberger recommended manual therapy to improve movement of the low back and medication management.

18. On February 20, 2014 John Burris, M.D., examined Claimant at Concentra for "delayed recovery issues regarding her pain complaints." Claimant reported she was experiencing "5/10 diffuse back pain extending from the left shoulder blade down into the left buttocks region." Dr. Burris diagnosed "low back pain" and noted a "relatively benign examination with essentially negative diagnostic workup." He agreed with Dr. Chan and Dr. Aschberger that Claimant had "some myofascial pain." Dr. Burris agreed with Dr. Aschberger's recommendations for a more aggressive course of PT. Dr. Burris also recommended 6 osteopathic manipulation sessions and that Claimant wean off of medications including Lyrica, Zanaflex and Flexeril. He prescribed metaxalone.

19. Dr. Burris again saw Claimant on March 6, 2014. Dr. Burris noted that the PT and osteopathic manipulation therapies had not been authorized and he intended to inquire about the referrals. He prescribed diazepam.

20. On April 3, 2014, Claimant reported to Dr. Burris that diazepam had been "somewhat helpful" and the home exercise program had led to some gradual improvement. Claimant continued to perform light duty but could not do her normal welding activities. Dr. Burris stated that he intended to "appeal" the denial of the aggressive PT and osteopathic manipulations. He opined Claimant would reach MMI once she completed these treatments.

21. On May 15, 2014 Dr. Burris again examined Claimant. Dr. Burris noted that 6 sessions of osteopathic manipulation and 6 sessions of PT had been approved. Claimant had completed 2 sessions of osteopathic manipulation and 2 sessions of PT. Dr. Burris stated that Claimant continued to have a "benign examination with negative

diagnostic workup." Dr. Burris opined Claimant was at MMI and found "no objective basis for impairment or permanent work restrictions."

22. Between April 30, 2014 and June 9, 2014 Claimant underwent 5 osteopathic treatments performed by Mark Winslow, D.O. On June 9 Dr. Winslow noted that Claimant reported that modification of activities, exercises and osteopathic treatments and all been helpful in improving her symptoms. Dr. Winslow also stated Claimant had returned to full work activities.

23. On May 28, 2014 the Insurer filed a Final Admission of Liability (FAL) based on Dr. Burris's May 15, 2014 report. The FAL admits Claimant reached MMI on May 15 with no permanent impairment. The FAL contains a certificate of mailing certifying the admission was mailed to Claimant at 3255 West Avondale Drive Denver, CO 80204 and to Claimant's counsel at 1720 S Bellaire Suite 500 Denver, CO 80222. The certificate of mailing also indicates the FAL was mailed to the Division of Workers' Compensation (DOWC).

24. Claimant admitted that 3255 West Avondale Drive Denver, CO 80204 was her address. However, she testified that she did not receive the FAL.

25. On August 20, 2014 Claimant's counsel filed an Objection to Final Admission (Objection). The Objection contested various issues admitted in the May 28, 2014 FAL including the issue of whether Claimant had attained MMI. The Objection further stated the FAL was not received by Claimant's counsel until August 19, 2014.

26. Attached to the Objection was a verified affidavit of Claimant's counsel dated August 20, 2014. In the affidavit Claimant's counsel states the following. On August 19, 2014 she reviewed medical records forwarded by Respondents on July 18, 2014. Within the medical records was Dr. Burris's May 15, 2014 report placing the claimant at MMI without impairment. She contacted the DOWC and was advised that the Division received the FAL on June 3, 2014. Claimant's counsel then contacted the office of Respondents' counsel and a paralegal faxed a copy of the FAL. Claimant's counsel states she personally opens the mail and checks for final admissions and her office did not receive the FAL. Claimant's counsel also reviewed Claimant's file and did not find a copy of the FAL. Claimant's counsel stated that either the Insurer "did not actually put the Final Admission in the mail to my office, or the United States Postal Service did not deliver it to my office."

27. On August 20, 2014 Claimant's counsel completed and mailed a Notice and Proposal to Select an Independent Medical Examiner (N&P).

28. Respondents moved to strike the Claimant's Objection and N&P arguing they were not timely filed. However, on October 24, 2014 a prehearing administrative law judge denied the motion ruling that it presented questions of fact for determination by the OAC.

29. On December 23, 2014 William Watson, M.D. performed the DIME. Dr. Watson took a history from Claimant, reviewed medical records and performed a PE.

Claimant told Dr. Watson that her pain was "localized more to the left buttocks" and that when she welded in an "awkward position" she experienced increasing pain in the left buttocks region. The Claimant also reported continuing pain "in the left lower back region." The Claimant advised that the sacral injection by Dr. Chan had helped "at first" but her previous symptoms had returned. On PE Dr. Watson recorded that "Patrick's maneuver," a provocative test for SI joint dysfunction, caused mild pain in the left buttocks region. The Lasegue test, a provocative test for piriformis syndrome, caused "pain over the piriformis muscle on the left." Flexion, adduction and internal rotation caused pain in the left piriformis region.

30. Dr. Watson's impressions included "status post fall" with resolved left shoulder and knee symptoms and "status post fall with continued pain in the lower back and left buttocks region." Dr. Watson opined that "on top of the SI joint dysfunction" the Claimant exhibited "evidence of piriformis syndrome which may be causing continued pain and discomfort in the left buttocks." Dr. Watson opined Claimant has not reached MMI. He recommended Claimant undergo a "diagnostic injection of the piriformis muscle on the left side." Dr. Watson opined that if the injection provided a "good result [Claimant] may be a good candidate for Botox injection into the same muscle." He also opined Claimant "would be a good candidate for physical therapy sessions to address piriformis syndrome on the left side." Dr. Watson also opined that the Claimant's "SI joint dysfunction on the left side could be aggravating the piriformis type syndrome and may have to be addressed in the future."

31. On March 5, 2015 Allison Fall, M.D., performed an independent medical examination (IME) at Respondents' request. Dr. Fall is board certified in physical medicine and rehabilitation and is level II accredited. In connection with the IME Dr. Fall took a history from Claimant, reviewed pertinent medical records including that DIME report and performed a PE.

32. In the DIME report Dr. Fall assessed complaints of low back pain "without specific diagnosis or correlating objective findings." Dr. Fall disagreed with Dr. Watson that claimant has a diagnosis of SI joint dysfunction." Dr. Fall opined Claimant's "initial symptoms" were not consistent with a diagnosis of SI joint dysfunction. Specifically, Dr. Fall pointed out that when Dr. Villavicencio examined Claimant on June 21, 2014 she was "nontender" over the SI joints and the paraspinous muscles were more tender on the right than the left. Dr. Fall also agreed with Dr. Chan that Claimant's response to the SI joint injection was "nondiagnostic."

33. Dr. Fall disagreed with Dr. Watson's opinion that Claimant is not at MMI and that Claimant should undergo a diagnostic injection in the piriformis muscle and possibly Botox injections. Dr. Fall concurred with Dr. Chan that the Claimant is not a candidate for further injections considering "the longevity of the symptoms with changing area of symptoms and the fact that she has had no long-term improvement with any treatment to date."

34. Dr. Fall disagreed with Dr. Watson's opinion that the Claimant had a "Table 53 diagnosis" to support an impairment rating for the lumbar spine. Dr. Fall

explained that that Dr. Watson had not identified a specific diagnosis for the Claimant's back pain.

35. At hearing Dr. Fall testified as follows. Dr. Fall reiterated her disagreement with Dr. Watson's opinion that Claimant is not at MMI because she should undergo a piriformis injection and possibly Botox injections with additional PT. Dr. Fall opined that there is no reasonable expectation that the treatment proposed by Dr. Watson will result in functional gains or improvement in the Claimant's condition. In support of this opinion Dr. Fall explained that piriformis syndrome is a controversial diagnosis that involves a group of symptoms "seamed together" rather than an identifiable disease process or pathology. The diagnosis of piriformis syndrome posits that the piriformis muscles, which cross the SI joints in the buttocks, become tight and compress the sciatic nerve so as to cause lower extremity pain, weakness and numbness. Dr. Fall noted that Dr. Watson did not document any lower extremity weakness or numbness. She also noted that no other physician besides Dr. Watson has diagnosed piriformis syndrome.

36. Dr. Fall further noted that the PT records document that treatment provided for the SI joint dysfunction included piriformis stretches and hip abduction exercises. Dr. Fall explained that these exercises would treat both SI joint dysfunction and piriformis syndrome by strengthening the muscles. Dr. Fall opined that an injection into the piriformis syndrome would not improve the Claimant's condition and would, at best, provide short term relief of symptoms.

37. Dr. Fall opined that Botox injections are not likely to improve the Claimant's condition. Dr. Fall explained that Botox injections would weaken the piriformis muscle for three months and permit the strengthening of surrounding muscles. However, Dr. Fall stated that she has seen documentation of tightness, spasm or dysfunction of the piriformis muscle. Dr. Fall also stated that if Claimant truly had piriformis syndrome the pain would have stayed in the mid buttocks region rather than moving around.

38. On cross-examination Dr. Fall confirmed that Dr. Watson performed the appropriate provocative tests for SI joint dysfunction and piriformis syndrome.

39. On cross-examination Dr. Fall agreed that over the past five years she has testified in 194 workers' compensation cases. Dr. Fall testified that at least 95% of the time she was asked to testify for the respondents. Dr. Fall stated that over this time she has testified for the Respondents' counsel 29 times.

40. Dr. Watson testified at the hearing. Dr. Watson is level II accredited and board certified in orthopedic surgery. Dr. Watson testified that based on the mechanism of injury and his review of the medical records he was concerned Claimant had the low back condition of SI joint dysfunction or the much rarer condition known as piriformis syndrome. Dr. Watson stated that he conducted "provocative testing" for SI joint dysfunction and piriformis syndrome. Both tests were positive because they reproduced

the Claimant's symptoms. Claimant was tender in the area of the piriformis muscle. Dr. Watson explained that piriformis is a clinical diagnosis.

41. Dr. Watson opined Claimant is not at MMI. Dr. Watson testified that Claimant reported considerable pain and discomfort when she was working. Dr. Watson testified that the Medical Treatment Guidelines for treatment of piriformis syndrome call for an injection of lidocaine into the piriformis muscle and treatment with Botox injections if the lidocaine injection relieves symptoms. Dr. Watson also testified that he is familiar with a recent study that recommends the use of Botox to treat piriformis syndrome.

42. Dr. Watson testified on cross-examination that he considered Claimant's symptoms were "consistent" with respect to location.

43. In her position statement Claimant requests that the ALJ take administrative notice of WCRP 17 Exhibit 1, Low Back Pain Medical Treatment Guidelines (F)(4)(a) (Low Back MTG). The ALJ concludes that the Low Back MTG are a proper subject for administrative notice since they are published rules of the Division of Workers' Compensation (DOWC) and are readily available for review on the DOWC's website. *See Leprino Foods Co. v. Industrial Claim Appeals Office,* 134 P.3d 475, 479 (Colo. App. 2005) (judicial notice may be take of public matters including rules and regulations promulgated by an administrative agency).

44. The Low Back MTG [WCRP 17 Exhibit 1(F)(4)(a)] concerning the injection of botulinum toxin (Botox) provides as follows;

> They may be used for chronic piriformis syndrome. There is some evidence to support injections for electromyographically proven piriformis syndrome. Prior to consideration of botulinum toxin injection for piriformis syndrome, patients should have had marked (80% or better) but temporary improvement, verified with demonstrated improvement in functional activities, from three separate trigger point injections. To be a candidate for botulinum toxin injection for piriformis syndrome, patients should have had symptoms return to baseline or near baseline despite an appropriate stretching program after trigger point injections. Botulinum toxin injections of the piriformis muscle should be performed by a physician experienced in this procedure and utilize either ultrasound, fluoroscopy, or EMG needle guidance. Botulinum toxin should be followed by limb strengthening and reactivation.

FINDINGS CONCERNING NOTICE OF FAL

45. Claimant credibly testified that the FAL was mailed to her home address but she did not receive it. Claimant's testimony is corroborated by the affidavit of

Claimant's counsel who stated under oath that she did not receive the FAL even though it was addressed to her office.

46. Claimant's testimony that she did not receive the FAL, and Claimant's counsel's affidavit that she did not receive the FAL at her office, are credible and persuasive evidence sufficient to overcome the presumption of receipt created by the certificate of mailing contained in the FAL.

47. The evidence credibly and persuasively establishes that either the Insurer did not mail the FAL to Claimant and her attorney as represented in the certificate of mailing, or the postal system failed to deliver the FAL to Claimant and her attorney for reasons that cannot be ascertained from the evidence.

48. Because neither Claimant nor her attorney received notice of the FAL the FAL was not sufficient to close the claim and preclude Claimant from filing the N&P to select the DIME physician.

FINDINGS CONCERNING OVERCOMING DIME ON MMI

49. Respondents failed to prove it is highly probable and free from serious doubt that Dr. Watson, the DIME physician, erred in finding Claimant has not reached MMI.

50. Dr. Watson credibly testified that much of the Claimant's "low back pain" has localized to the area of the left buttocks. Dr. Watson credibly noted that testing designed to evoke symptoms of piriformis syndrome was positive and that Claimant was tender over the piriformis muscle. Dr. Watson credibly opined that in light of Claimant's history and medical records she needs further diagnostic testing for piriformis syndrome including injections as a possible prelude to Botox treatment. Dr. Watson credibly and persuasively opined that the Low Back MTG specifically address circumstances when piriformis injections followed by Botox injections are appropriate. Dr. Watsons' testimony that injections may be used to treat piriformis syndrome is corroborated by reference to the Low Back MTG noticed in Finding of Fact 43.

51. The opinions expressed by Dr. Fall are not sufficiently persuasive to demonstrate that it is highly probable and free from serious doubt that Claimant has reached MMI. Essentially, Dr. Fall disputes Dr. Watson's recommendation for injections in the piriformis muscle followed by possible Botox injections and PT because Dr. Fall is of the opinion that Claimant does not have piriformis syndrome. Dr. Fall also believes that the injections are not likely to benefit the Claimant and therefore are not reasonable and necessary.

52. Insofar as Dr. Fall opined the Claimant probably does not have piriformis syndrome because his symptoms have been "inconsistent," that opinion is not persuasive refutation of Dr. Watson's opinion. While the medical records demonstrate that Claimant's low back symptoms have sometimes varied in intensity and location, the medical records also demonstrate a rather consistent history of left sided-low back symptoms since the date of injury. When Claimant was examined by Dr. Villavicencio

on June 21, 2013 he noted paraspinous tenderness that was "greater" on the right than left." The ALJ infers from this record that on June 21 the left low back was symptomatic, but less so than the right low back. When Dr. Chan examined Claimant on August 20, 2012 he noted Patrick's test was "grossly positive on the left" and determined it was necessary to "rule out" left SI joint dysfunction. In September Dr. Mobus noted left low back pain with occasional "pinching." When Dr. Draper examined Claimant in November 2013 she noted back pain that was greater on the left than the right. When Dr. Aschberger examined Claimant in January 2014 he noted Patrick's test was positive on the left and negative on the right. When Dr. Burris examined Claimant on February 20, 2014 he noted "diffuse back pain radiating from the left shoulder blade down into the left buttocks region."

53. Insofar as Dr. Fall testified that Dr. Watson erroneously found a Table 53 diagnosis, that testimony is not persuasive evidence to refute Dr. Watson's opinion that Claimant has piriformis syndrome and should undergo diagnostic injections. The presence or absence of a "Table 53 diagnosis" is of importance when determining whether or not an injured worker sustained ratable permanent medical impairment after reaching MMI. Section 8-42-107(8)(c), C.R.S.; *McClane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999). However, Dr. Watson's critical finding in this case is that Claimant has never reached MMI because she needs additional diagnostic work-up for piriformis syndrome. Dr. Fall's opinion concerning the correctness of Dr. Watson's theoretical Table 53 diagnosis does not directly or substantially refute Dr. Watson's opinion concerning MMI and amounts to nothing more than a tangential attack on his credibility. The ALJ finds this attack is not persuasive because it does not address the real issue of MMI.

54. Dr. Fall's opinion that Claimant will probably not receive any benefit from the proposed piriformis injections is not persuasive. Dr. Fall admitted that Dr. Watson did the appropriate provocative testing for piriformis syndrome. In light of the positive provocative testing for piriformis syndrome Dr. Fall did not persuasively explain why further diagnostic injections should not be performed as a prelude to determining the propriety of additional treatment including Botox and/or PT. Dr. Fall was incorrect in classifying piriformis syndrome as a mere "group of symptoms" rather than an identifiable disease process. As noticed in Finding of Fact 43, the Low Back MTG recognize piriformis syndrome as a distinct medical diagnosis that can be treated by injections, including Botox injections. The Low Back MTG document that after diagnostic piriformis muscle injections Botox injections can have a positive effect on the treatment of piriformis syndrome.

55. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Subject to the exceptions noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

TIMELINESS OF CLAIMANT'S OBJECTION TO FAL

Relying on § 8-43-203(2)(b)(II)(A), C.R.S., Respondents contend Claimant did not file the Objection to the FAL or a N&P to select the DIME physician within 30 days of May 28, 2014. Therefore, Respondents argue the claim was closed by the filing of the FAL and Claimant is not entitled to contest the issue of MMI. Claimant contends the evidence establishes that neither she nor her counsel received notice of the FAL until August 19, 2014. Therefore, Claimant argues the claim was not closed because she timely filed the Objection and the N&P to select the DIME within 30 days of August 19.

Section 8-43-203(2)(b)(II)(A) provides that an FAL must notify the claimant that the case will be:

> "automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical examination is requested pursuant to section 8-42-107.2, the claimant is not

> required to file a request for hearing on the disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason.

Section 8-42-107.2(2)(b), C.R.S., provides that a party disputing a determination of the authorized treating physician must file a N&P to select the DIME "within thirty days after the date of mailing of the final admission of liability" or the "authorized treating physician's findings and determinations shall be binding on the parties and on the division." Failure of a claimant to contest the FAL by executing the procedural steps mandated by the statute may result in closure of the claim and denial of further benefits unless and until the claim is reopened. *Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004).

Section 8-43-203(2)(b)(II)(A) shows the "General Assembly intended for workers' compensation claimants to receive an FAL with accurate notice provided by employers or insurers." *Laboto v. Industrial Claim Appeals Office,* 105 P.3d 220, 227 (Colo. 2005). If such notice is not received the claimant's due process rights are implicated. *Id.* at 228; *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996); *Hall v. Home Furniture Co.*, 724 P.2d 94 (Colo. App. 1986); *Campos v. J.C. Penney Co.*, WC 4-869-186 (ICAO June 18, 2013). Indeed, due process dictates that the claimant's attorney of record must also receive notice of critical administrative determinations that could result in a denial of a significant property interest. *Hall v. Home Furniture Co.*, *supra*; *Campos v. J.C. Penney Co.*, *supra*.

It is true that a properly addressed certificate of mailing may create a "presumption" that a document was received by the addressees. See *Campbell v. IBM Corp.*, 867 P.27 77 (Colo. App. 1993); *Allred v. Squirrell,* 37 Colo. 84, 543 P.2d 110 (Colo. App. 1974); *Talamantes v. Wright Group Event Services, Inc.*, WC 4-823-822 (ICAO July 11, 2011). However, the presumption of receipt may be overcome by the presentation of credible and persuasive evidence that the document was not actually received. *Allred v. Squirrell, supra*; *Catlow v. Dairy Farmers of America,* WC 4-866-133-01 (ICAO February 26, 2014). The question of whether an FAL was or was not received presents a question of fact for the ALJ. *Campbell v. IBM Corp., supra.*

When the presumption of receipt is overcome the time for objecting to the FAL and filing a N&P to select a DIME physician does not begin to run until the time the FAL is actually received. *Hall v. Home Furniture Co.*, *supra*; *Catlow v. Dairy Farmers of America, supra.*

As determined in Findings of Fact 45 through 48, Claimant proved it is more probably true than not that despite the certificate of mailing on the FAL neither she nor her counsel received the FAL until August 19, 2014. Thus, Claimant overcame the presumption of receipt created by the certificate of mailing. Further, because the FAL was not actually received by Claimant's counsel until August 19 the time for objecting to the FAL and filing a N&P did not begin to run until August 19. Because the Claimant's Objection to the FAL and the N&P to select the DIME physician were filed on August 20,

2014 (Findings of Fact 25 and 27) they were timely and the claim was not closed by operation of § 8-43-203(2)(b)(II)(A) and § 8-42-107.2(2)(b).

Insofar as Respondents assert that Claimant "waived" the right to object to the FAL the ALJ concludes the argument is without merit. Waiver constitutes the voluntary, knowing and intelligent surrender of a known right. *Johnson v. Industrial Commission,* 761 P.2d 1140 (Colo. 1988). Where, as here, the evidence establishes that the Claimant and her attorney did not receive timely notice of the FAL their failure to file a timely objection was not the result of a "voluntary, knowing and intelligent" decision.

OVERCOMING DIME ON MMI

Respondents contend they proved by clear and convincing evidence that the DIME physician, Dr. Watson, incorrectly found Claimant has not reached MMI. Relying principally on the opinions expressed by Dr. Fall, Respondents argue Claimant has presented with inconsistent symptoms that fluctuate, that Dr. Watson erred in finding a table 53 diagnosis and that Dr. Watson erred in determining that "piriformis injection followed by Botox is reasonable and necessary." The ALJ disagrees that Respondents overcame by clear and convincing evidence Dr. Watson's opinion that Claimant is not at MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* WC 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As determined in Findings of Fact 49 through 54, Respondents failed to prove by clear and convincing evidence that the DIME physician erred in finding Claimant has not reached MMI. Specifically, the ALJ credits the opinion of Dr. Watson that Claimant's history and physical examination are consistent with the diagnosis of piriformis syndrome. Further, the ALJ credits Dr. Watson's opinion that in light of this diagnosis it is appropriate for Claimant to undergo further diagnostic testing in the form of piriformis muscle injections as a prelude to possible Botox injections and additional PT. The ALJ infers from Dr. Watson's opinions that he believes that the piriformis injections offer a reasonable prospect for improving Claimant's pain and improving her overall function.

As determined in Findings of Fact 51 through 54, Dr. Fall's opinions are not sufficiently persuasive to establish it is highly probable and free from serious that Dr. Watson incorrectly diagnosed piriformis syndrome and improperly recommended diagnostic piriformis injections. At best, Dr. Fall's report and testimony represent a difference of opinion with Dr. Watson and the ALJ finds that Dr. Watsons' opinions are more persuasive. Neither is any of the other evidence presented sufficiently credible and persuasive to overcome Dr. Watsons' opinions concerning MMI.

REASOANBLE AND NECESSARY MEDICAL TREATMENT

Claimant requests that she be awarded the medical treatment recommended by Dr. Watson. That treatment consists of diagnostic injections in the left piriformis muscle to determine if Claimant is a candidate for Botox injections and additional PT.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

Claimant proved it is more probably true than not that the diagnostic injections recommended by Dr. Watson offer a reasonable prospect for suggesting additional treatments that will relieve the ongoing effects of Claimant's condition. The ALJ credits Dr. Watson's opinion that Claimant's examination is consistent with work-related piriformis syndrome, and that diagnostic injections into the piriformis muscle offer a reasonable prospect for determining whether additional treatments are warranted. Dr. Watson's opinion is consistent with the Low Back MTG as set forth in Finding of Fact 43. Evidence and inferences contrary this finding are not credible and persuasive.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Claimant timely objected to the final admission dated May 28, 2014. Claimant timely requested a Division-sponsored independent medical examination.

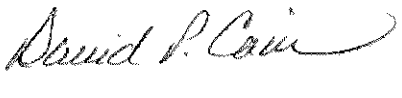
2. Respondents failed to overcome by clear and convincing evidence Dr. Watson's opinion that Claimant has not reached maximum medical improvement.

3. Insurer shall provide the diagnostic piriformis muscle injections recommended by Dr. Watson, and shall provide such other treatment as may be reasonable and necessary for Claimant to attain maximum medical improvement.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 1, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Thomas G. Fry, M.D. that Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's Temporary Total Disability (TTD) benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. for willfully misleading Employer concerning his physical abilities.

FINDINGS OF FACT

1. Claimant is a 69 year old male who began working for Employer on November 21, 2013. He worked at a United Parcel Service depot in Commerce City, Colorado. Claimant's job duties involved breaking steel seals on the back of semi-trailers so the doors could be opened to access the cargo inside the truck. Breaking the seals required using a steel bar about two feet long and one inch in diameter to pry apart a steel bolt.

2. Claimant suffered a previous work-related injury to his back in 1989. He also injured his left shoulder in an automobile accident in 1999. Prior to working for Employer Claimant had not suffered any injuries to his right shoulder.

3. On December 9, 2013 Claimant suffered an admitted industrial injury to his left ring finger during the course and scope of his employment with Employer. Claimant pulled on a steel bar in an attempt to break a steel sealing bolt on the back of a trailer. The bolt bent downward but did not break. Claimant then tried to bend the bolt upward by using the steel bar and pushing on it toward the back of the truck. The bar slipped off the bolt and Claimant's left hand was smashed between the bar and the truck. Claimant noted that he also strained his right shoulder when he struck the door of the truck.

4. Claimant's left ring finger began to swell and he sought medical care on the next day. Claimant was eventually referred to Susan Morrison, M.D. for treatment and was diagnosed with a severe fracture of his left ring finger. Dr. Morrison referred Claimant to Orthopedic Surgeon Edmund Rowland, M.D. because she feared that Claimant had suffered tendon damage as a result of the injury.

5. On December 17, 2013 Claimant visited Dr. Rowland for an examination. He mentioned that he was also experiencing right shoulder pain. Dr. Rowland told

Claimant that they would watch the problem to see if it got better and address it at his next visit on December 31, 2013. Claimant had suffered pain in his right shoulder since the December 9, 2013 incident but felt it was probably just a bruise or a sprain and would go away in time. However, the shoulder pain continued to increase.

6. On December 31, 2014 Claimant returned to Dr. Rowland for an examination. Dr. Rowland concluded that Claimant had clinical evidence of a right shoulder rotator cuff tear and requested an MRI.

7. Dr. Rowland referred Claimant to Orthopedic Surgeon Mitchell Seemann, M.D. for an evaluation. Dr. Seemann specializes in shoulder injuries. He confirmed the diagnosis of a right rotator cuff tear and agreed that Claimant should undergo a right shoulder MRI.

8. On February 19, 2014 Claimant visited personal physician Ryan Flint, D.O. because Respondents had disputed that his shoulder condition was work-related and refused additional diagnostic testing or treatment. On March 10, 2014 Dr. Flint authored a note agreeing that Claimant's right shoulder condition was related to his December 9, 2013 work activities.

9. On June 3, 2014 Claimant reached Maximum Medical Improvement (MMI) and his case was closed. On October 14, 2014 Respondents filed a Final Admission of Liability (FAL) regarding Claimant's left ring finger. Claimant sought a Division Independent Medical Examination (DIME) regarding his right shoulder.

10. On July 16, 2014 the parties conducted the pre-hearing evidentiary deposition of Susan Morrison, M.D. Dr. Morrison testified that Claimant's right shoulder injury was not related to his work incident on December 9, 2013. Dr. Morrison noted that Claimant did not complain of a right shoulder problem until he visited a physician about three weeks after the accident.

11. On January 22, 2015 Claimant underwent the DIME with Thomas G. Fry, M.D. Claimant reported that he was using a breaker bar at work to open a container. His right shoulder gave way and he struck the side of a truck. Claimant experienced the immediate onset of right shoulder pain. He noted continued pain and discomfort in his right shoulder. Dr. Fry remarked that Claimant's symptoms increased significantly with flexion greater than abduction and both internal and external rotation. He also remarked that Claimant exhibited weakness of the supraspinatus tendon. Dr. Fry diagnosed Claimant with a probable supraspinatus tendon tear. He recommended a right shoulder MRI and a repair of the rotator cuff if the MRI was positive. Dr. Fry thus determined that Claimant had not reached MMI. He assigned a 12% upper extremity impairment rating that converted to a 7% whole person rating.

12. On May 12, 2015 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Dr. Lesnak reviewed Claimant's medical records and conducted a physical examination. He initially noted that Claimant did not report any right shoulder symptoms until December 31, 2013. Dr. Lesnak determined

that it was medically improbable that Claimant sustained any type of injurious event to his right shoulder while at work on December 9, 2013. He commented that, even if Claimant "slammed" his right shoulder into a truck while attempting to break a steel sealing bolt, he would not have sustained any specific injuries to his right rotator cuff. Dr. Lesnak remarked that, based on Claimant's age of 69 years, he might have had some right shoulder joint pathology that was unrelated to the December 9, 2013 occupational incident. He thus concluded that Claimant had reached MMI on June 3, 2014. Dr. Lesnak summarized that the inconsistencies in Claimant's reported medical history and mechanism of injury demonstrated that there was no medical evidence to suggest that Claimant suffered a right shoulder injury or aggravated any pre-existing right shoulder pathology on December 9, 2013.

13. Employer's Assistant Manager at the Commerce City facility Brad High testified at the hearing in this matter. He confirmed that he had observed Claimant working before the December 9, 2013 incident. Mr. High commented that Claimant had no problems performing his job duties and had never mentioned any prior problems with his left hand or right shoulder. He explained that he would not have hired Claimant if he had known that Claimant could not properly perform his job duties.

14. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013. Claimant reported to Dr. Fry that he was using a breaker bar at work to open a container. His right shoulder gave way and he struck the side of a truck. Claimant experienced the immediate onset of right shoulder pain. He noted continued pain and discomfort in his right shoulder. Dr. Fry remarked that Claimant's symptoms increased significantly with flexion greater than abduction and both internal and external rotation. He also commented that Claimant exhibited weakness of the supraspinatus tendon. Dr. Fry diagnosed Claimant with a probable supraspinatus tendon tear. He recommended a right shoulder MRI and a repair of the rotator cuff if the MRI was positive. Dr. Fry thus determined that Claimant had not reached MMI.

15. The medical records are consistent with Dr. Fry's determination that Claimant suffered a right shoulder injury as a result of his December 9, 2013 industrial incident. On December 31, 2014 Dr. Rowland concluded that Claimant had clinical evidence of a right shoulder rotator cuff tear and requested an MRI. Dr. Seemann confirmed the diagnosis of a right rotator cuff tear and agreed that Claimant should undergo a right shoulder MRI. Finally, Dr. Flint issued a note on March 10, 2014 agreeing that Claimant's right shoulder condition was related to his December 9, 2013 work activities.

16. In contrast, Dr. Morrison testified that Claimant's right shoulder injury was not related to his work incident on December 9, 2013. Dr. Morrison noted that Claimant did not complain of a right shoulder problem until he visited a physician about three weeks after the accident. Moreover, Dr. Lesnak concluded that Claimant had reached MMI on June 3, 2014. Dr. Lesnak summarized that the inconsistencies in Claimant's reported medical history and mechanism of injury demonstrated that there was no

medical evidence to suggest that Claimant suffered a right shoulder injury or aggravated any pre-existing right shoulder pathology on December 9, 2013. Although doctors Morrison and Lesnak reached different conclusions than DIME physician Dr. Fry, the record is devoid of unmistakable evidence that Dr. Fry's opinion was incorrect. The determinations of doctors Morrison and Lesnak constitute mere differences of opinion with Dr. Fry and are insufficient to overcome his conclusion regarding the cause of Claimant's right shoulder condition. Accordingly, based on the medical records and persuasive reports of Claimant's treating physicians, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fry's causation determination is incorrect.

17. Respondents have failed to demonstrate that it is more probably true than not that Claimant's TTD benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. for willfully misleading Employer concerning his physical abilities. Claimant suffered a previous work-related injury to his back in 1989. He also injured his left shoulder in an automobile accident in 1999. Prior to working for Employer Claimant had not suffered any injuries to his right shoulder. Mr. High testified that Claimant had no problems performing his job duties and had never mentioned any prior problems with his left hand or right shoulder. Furthermore, the record reveals that Claimant was not injured as a result of any prior condition. Claimant injured his left index finger and right shoulder when he pulled on a steel bar in an attempt to break a steel sealing bolt on the back of a trailer. The record suggests that Claimant did not lack the physical abilities to perform his job duties. Respondents have thus failed to produce sufficient evidence to demonstrate that Claimant acted with deliberate intent in willfully misleading Employer about his physical abilities. Accordingly, Respondents have failed to establish that Claimant's TTD benefits should be reduced pursuant to §8-42-112(1)(d), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013. Claimant reported to Dr. Fry that he was using a breaker bar at work to open a container. His right shoulder gave way and he struck the side of a truck. Claimant experienced the immediate onset of right shoulder pain. He noted continued pain and discomfort in his right shoulder. Dr. Fry remarked that

Claimant's symptoms increased significantly with flexion greater than abduction and both internal and external rotation. He also commented that Claimant exhibited weakness of the supraspinatus tendon. Dr. Fry diagnosed Claimant with a probable supraspinatus tendon tear. He recommended a right shoulder MRI and a repair of the rotator cuff if the MRI was positive. Dr. Fry thus determined that Claimant had not reached MMI.

8. As found, the medical records are consistent with Dr. Fry's determination that Claimant suffered a right shoulder injury as a result of his December 9, 2013 industrial incident. On December 31, 2014 Dr. Rowland concluded that Claimant had clinical evidence of a right shoulder rotator cuff tear and requested an MRI. Dr. Seemann confirmed the diagnosis of a right rotator cuff tear and agreed that Claimant should undergo a right shoulder MRI. Finally, Dr. Flint issued a note on March 10, 2014 agreeing that Claimant's right shoulder condition was related to his December 9, 2013 work activities.

9. As found, in contrast, Dr. Morrison testified that Claimant's right shoulder injury was not related to his work incident on December 9, 2013. Dr. Morrison noted that Claimant did not complain of a right shoulder problem until he visited a physician about three weeks after the accident. Moreover, Dr. Lesnak concluded that Claimant had reached MMI on June 3, 2014. Dr. Lesnak summarized that the inconsistencies in Claimant's reported medical history and mechanism of injury demonstrated that there was no medical evidence to suggest that Claimant suffered a right shoulder injury or aggravated any pre-existing right shoulder pathology on December 9, 2013. Although doctors Morrison and Lesnak reached different conclusions than DIME physician Dr. Fry, the record is devoid of unmistakable evidence that Dr. Fry's opinion was incorrect. The determinations of doctors Morrison and Lesnak constitute mere differences of opinion with Dr. Fry and are insufficient to overcome his conclusion regarding the cause of Claimant's right shoulder condition. Accordingly, based on the medical records and persuasive reports of Claimant's treating physicians, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Fry's causation determination is incorrect.

Reduction of TTD Benefits

10. Section 8-42-112(1), C.R.S. provides that benefits shall be reduced by 50% in certain circumstances. Section 8-42-112(1)(d), C.R.S. specifically provides, in relevant part:

> (d) Where the employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer.

See In re Austin, W.C. No. 4-442-486 (ICAP, Mar. 22, 2001). To establish that a violation has been willful, a respondent must prove by a preponderance of the evidence

that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003).

11. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant's TTD benefits should be reduced by 50% pursuant to §8-42-112(1)(d), C.R.S. for willfully misleading Employer concerning his physical abilities. Claimant suffered a previous work-related injury to his back in 1989. He also injured his left shoulder in an automobile accident in 1999. Prior to working for Employer Claimant had not suffered any injuries to his right shoulder. Mr. High testified that Claimant had no problems performing his job duties and had never mentioned any prior problems with his left hand or right shoulder. Furthermore, the record reveals that Claimant was not injured as a result of any prior condition. Claimant injured his left index finger and right shoulder when he pulled on a steel bar in an attempt to break a steel sealing bolt on the back of a trailer. The record suggests that Claimant did not lack the physical abilities to perform his job duties. Respondents have thus failed to produce sufficient evidence to demonstrate that Claimant acted with deliberate intent in willfully misleading Employer about his physical abilities. Accordingly, Respondents have failed to establish that Claimant's TTD benefits should be reduced pursuant to §8-42-112(1)(d), C.R.S.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

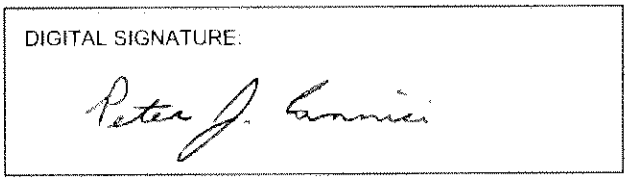
1. Claimant sustained a compensable right shoulder injury during the course and scope of his employment with Employer on December 9, 2013.

2. Respondents have failed to establish that Claimant's TTD benefits should be reduced pursuant to §8-42-112(1)(d), C.R.S.

3. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 21, 2015.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

PROCEDURAL HISTORY and ISSUES

The Claimant applied for hearing on the issues of compensability (although the Respondents had filed a General Admission of Liability), overcoming the opinions of the Division Independent Medical Examination (DIME) physician; medical benefits; temporary total disability (TTD) benefits; permanent partial disability (PPD) benefits; and change of physician.

On July 13, 2015, the Respondents filed a motion to reschedule the hearing citing discovery issues. The ALJ entered an order on July 22, 2015 denying the motion to continue. At the commencement of hearing on July 23, 2015, the Respondents renewed their motion to continue the hearing. After hearing statements from the parties and reviewing the file, the ALJ denied the motion to continue, but bifurcated the issues to allow Respondents to depose the DIME physician, Dr. Douglas Scott. Thus this order determines only whether the Claimant is entitled to a change of physician, and the remaining issues are reserved.

FINDINGS OF FACT

Based on the evidence presented during the hearing, the Judge finds as fact:

1. Claimant was born on June 30, 1972 and is currently 43 years old.

2. Claimant worked for the Employer as an auto body technician. On December 11, 2013, the Claimant was involved in a motor vehicle accident while taking a customer's vehicle out for a test drive. The Claimant was driving a SUV and was struck by a larger truck. The Claimant was wearing a seatbelt.

3. The Claimant initially complained of neck and shoulder pain, both of which eventually resolved. Claimant's ongoing complaints include low back pain and bilateral testicular pain.

4. The Claimant received medical treatment at Concentra first with Dr. Bird then with Dr. Sacha.

5. Dr. Sacha determined that the Claimant reached MMI on June 4, 2014 with no permanent impairment. Dr. Sacha stated, "As maintenance, he should be allowed a one-time urology evaluation. This is only at the patient's insistence. I do not see any pathology or any other reason for him to have his ongoing symptoms, but I certainly do not think that it is unreasonable to have a one-time urology evaluation as maintenance."

6. On August 7, 2014, Dr. Ericson Tentori, also a Concentra physician, reviewed Dr. Sacha's workup, and concurred with Dr. Sacha that Claimant had reached MMI. Dr. Tentori released Claimant to return to full duty work and determined he needed no additional medical treatment.

7. Both Drs. Tentori and Sacha were considered an authorized treating physician (ATP).

8. On August 20, 2014, the Respondents filed a Final Admission of Liability (FAL). The FAL specifically denied maintenance medical care per Dr. Tentori's August 7, 2014 report. The Final Admission of Liability indicates the claims adjuster's address is P.O. Box 968023, Schaumburg, IL 60196-8023.

9. Claimant objected and applied for a DIME. Dr. Scott performed the DIME and in his report, he indicated that the parties requested that he address maximum medical improvement, medical treatment and maintenance medical treatment.

10. On August 29, 2014, Claimant's attorney wrote a letter to Laura Orozco, the adjuster in this claim, and acknowledged receipt of the FAL. He requested a breakdown of indemnity payments made to the Claimant followed by a request to change Claimant's authorized treating physician to Dr. Kristen Mason. The letter contained no claim number or other identifying information other than the Claimant's name. The letter was addressed and mailed to 1400 American Lane, Schaumburg, IL 60196.

11. There is no serious dispute that Claimant's counsel mailed the letter on August 29, 2014.

12. The Employer's First Report of Injury indicates Insurer's address as 1400 American Lane, Schaumburg, IL 60196.

13. In other correspondence to the Insurer, Claimant's attorney used an address of P.O. Box 968023, Schaumburg, IL 60196-8023.

14. The Claimant's attorney also faxed correspondence to Orozco. Specifically, on June 26, 2014, the Claimant's attorney sent a letter by facsimile to Orozco requesting that she provide a copy of medical reports associated with the claim as well as the claim file. The Claimant's attorney identified a deadline for compliance with his request.

15. Because Claimant's counsel mailed the August 29, 2014 letter to the physical address for the Insurer in Schaumburg, IL, Orozco did not receive it right away. Orozco's office is located in Overland Park, Kansas.

16. A department within the Insurer's office known as the DDC, which is located in Schaumburg, IL, bears the responsibility of processing incoming mail. According to Orozco, the DDC staff stamps incoming mail, and adds it to the applicable claim.

17. The DDC date stamped the August 29, 2014 letter as received on September 12, 2014.

18. On September 29, 2014, Claimant's counsel sent a letter to Orozco by facsimile. The letter identifies the claim number assigned by the Insurer, the Claimant's name, the insured's name, and date of loss. The letter stated that Dr. Mason was the new authorized treating physician and provided her address and telephone number.

19. On September 30, 2014, Orozco denied the Claimant's request to change his physician to Dr. Mason, and sent the letter by facsimile to Claimant's counsel.

20. No evidence identified the date on which Orozco initially received the August 29, 2014 letter.

21. Claimant alleges that because the Respondents failed to timely respond to the request to change physicians, any objection by the Insurer is deemed waived making Dr. Mason the new authorized treating physician.

22. The Claimant admittedly pursued treatment with Dr. Mason to "help with pain." During cross examination, the Claimant refused to agree that he pursued treatment with Dr. Mason to "improve his condition." Regardless, the ALJ finds that Claimant sought treatment with Dr. Mason to improve his pain which is tantamount to improving his condition. Claimant wanted treatment to cure and relieve him of the affects his injury. He was not seeking treatment to maintain the condition he achieved at the time of MMI. This finding is further supported by the DIME physician's report that Claimant sought a DIME to address, among other things, MMI.

23. The Claimant did not attempt to seek treatment with any of his ATPs after he was placed at MMI nor did he request that the Insurer authorize any additional maintenance treatment.

24. The ALJ finds that based on the credible evidence, the Claimant is not entitled to a change of physician.

CONCLUSIONS OF LAW

1. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

3. Section 8-43-404(5)(a)(VI), C.R.S., allows the claimant to change his or her physician upon written request to the insurer. If the insurer neither grants nor refuses permission within 20 days of the request, the insurer shall be deemed to have waived any objection to the claimant's request. The objection shall be in writing and be deposited in the mail or hand-delivered to the claimant within 20 days.

4. In this case, the Claimant's attorney made a written request to change the Claimant's physician. He mailed the letter to the Insurer's physical address in Schaumburg, IL, an address to which he had never before mailed documents regarding this claim. Not only did Claimant's attorney mail the letter to an out-of-the-ordinary address, he provided little information concerning the identity of the Claimant in the letter. In other correspondence to the adjuster, Claimant's counsel provided identifying information and sent the letters by facsimile. It is apparent from the actions by Claimant's attorney that he mailed the letter to an unusual address with little identifying information about the Claimant to cause a delay in receipt by the claims adjuster.

5. Claimant asserts that he complied with §8-43-404(5)(a)(VI), C.R.S., because the First Report of Injury identifies the physical address for the Insurer making such address essentially "fair game." While that may be true had Claimant's counsel consistently sent correspondence to that address, the ALJ concludes that under the facts presented, Claimant's counsel used such address to cause a delay in receipt by the adjuster so that she would not have adequate time to object to the request. Her inability to object would result in a waiver to any objection.

6. The parties do not seriously dispute the fact that the Insurer did not provide a written objection to the change of physician request within 20 days of the date Claimant's written request was mailed. However, the ALJ concludes that under the circumstances, the request to change physicians was not properly made. The intent of §8-43-404(5)(a)(VI), C.R.S., is for claimants to provide an insurer with proper notice of a request to change physicians and allow the insurer an opportunity to object within a reasonable period of time. The statute also grants claimants the chance to change physicians without requiring express permission from the insurer, and without having to wait an unreasonable amount of time to receive an objection. The statute does not contemplate that change of physician will automatically occur when a claimant fails to provide proper notice.

7. Section 8-43-404(5)(a)(VI), C.R.S., indicates that an insurer's failure to object to request for a change physician is deemed a waiver of any objection. Waiver is the intentional relinquishment of a known right. A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984). Waiver may be explicit, or it may be implied, as where a party acts inconsistently with

the known right and where that action would prejudice the other parties. *Vanderbeek v. Vernon Corp.*, 25 P.3d 1242 (Colo. App. 2000); *Norden v. E.F. Hutton and Co Inc.*, 739 P.2d 914 (Colo. App. 1987); *Klein v. State Farm Mutual Automobile Ins. Co.*, 948 P.2d 43 (Colo. App. 1987); *Red Sky Homeowners Assoc. v. The Heritage Company*, 701 P. 2d 603 (Colo. App. 1984).

8. Under the facts presented, the Insurer, through its claims adjuster, was not aware of its right to object to the request to change physicians until September 12, 2014, at the earliest. In addition, once the adjuster was made aware that Claimant sought a change of physician, the adjuster issued a written objection to the Claimant's attorney. It is apparent that the Insurer did not intend to waive its right to object to Claimant's request, and did not act inconsistently with a known right. The ALJ concludes that the Insurer timely issued an objection to Claimant's request to change his physician.

9. Claimant's request to change physicians after he reached MMI was also improper. Claimant requested a change of physician for the purpose of seeking treatment to cure and relieve him from the effects of his injury not for the purpose of maintaining his condition. Claimant disagreed with his ATP's determination that he reached MMI and he pursued a DIME regarding his MMI status and need for additional treatment, including maintenance treatment. It is apparent from the record that Claimant sought a change of physician to constructively challenge the ATP's findings regarding MMI. Such a request for a change of physician when no recommendation or showing that maintenance care is needed is precluded. *Story v. Industrial Claims Appeals Office*, 89 P.2d 80 (Colo. App. 1995).

ORDER

It is therefore ordered that:

1. Claimant's request to change his authorized treating physician to Dr. Mason is denied and dismissed.

2. This matter shall be reset before the ALJ for a determination on the remaining issues. Although the ALJ entered an order requiring the parties to schedule the second hearing on or before October 30, 2015, the OAC cannot accommodate a hearing prior to October 30, 2015. As such, this matter shall be reset to commence no later than November 30, 2015.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that on May 24, 2014 he sustained an injury proximately caused by the performance of service arising out of and in the course of his employment?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable and necessary medical benefits to treat the alleged injury?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing May 24, 2014?

- What is Claimant's average weekly wage?

- Did Respondents prove by a preponderance of the evidence that Claimant was responsible for his termination from employment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 and 2 were admitted into evidence. Respondents' Exhibits A through HH were received into evidence.

2. The Employer is a temporary services agency. Claimant worked for the Employer as a laborer. The agency assigned Claimant to work at various jobsites.

3. On May 24, 2014 the Employer assigned Claimant to work at a King Soopers (KS) facility. May 24 was the second day Claimant had worked at the KS site.

CLAIMANT'S TESTIMONY REGARDING ALLEGED INJURY

4. Claimant testified as follows concerning the events of May 24, 2014. At KS he was assigned to lift "trays" from pallets. He would then sort and stack them. Between 9:45 a.m. and 10:15 a.m. Claimant bent over to lift some trays when a container of trays fell and struck him in the head, neck, shoulder, back and buttocks. He experienced a sharp pain in the middle of his back.

5. Claimant testified as follows concerning events after the incident with the trays. Claimant reported the incident to a nearby KS supervisor and told the supervisor that he could not continue working. Claimant stated he was then referred to a "head supervisor" at KS. Claimant believes the "head supervisor" was named "David." Claimant told the "head supervisor" that he couldn't work anymore. The head

supervisor told Claimant to report the injury to his Employer. Claimant then clocked out and drove to University of Colorado Hospital (UCH) for treatment.

MEDICAL RECORDS AND OTHER DOCUMENTS PRIOR TO ALLEGED INJURY OF MAY 24, 2014

6. On April 11, 2002 Claimant was seen at the Denver Health Medical Center (DHMC) emergency room for complaints of right knee pain and low back pain. These symptoms were reportedly the result of a bus accident. Claimant underwent lumbar x-rays that showed "minimal degenerative change" at L3-4 and L4-5. There was no spinal fracture.

7. On September 24, 2011, Claimant reported to UCH emergency room with complaints of neck pain, back pain and headaches. Claimant reported that he was involved in a motor vehicle accident (MVA). The low back was tender and painful. Claimant underwent spinal x-rays that revealed mild "degenerative disease and facet arthrosis" at L3-4 and L4-5.

8. From October 2011 through January 2012 Claimant underwent chiropractic treatment for low back pain and other symptoms associated with the September 2011 MVA.

9. Claimant filed a claim for damages he sustained in the September 24, 2011 MVA. In April 2012 Claimant agreed to settle the claim for $13,000.

10. On April 23, 2012 Claimant was seen at UCH for complaints of back pain. The pain reportedly began two days previously when claimant "slipped into water." The pain radiated into both lower extremities and was rated 8 on a scale of 10 (8/10). The examining physician assessed chronic back pain without evidence of neurologic compromise. Claimant was prescribed valium and Percocet.

11. On March 16, 2013 Claimant was seen at DHMC Urgent Care for a complaint of ongoing back pain of 6 months' duration.

12. On May 16, 2013 Claimant was seen DHMC for various complaints including low back pain. Claimant reported he had slipped on "wet gravel" the previous day.

13. On July 9, 2013 Claimant was seen at the Medical Center of Aurora (MCA). Claimant reported severe right low back pain. Claimant gave a history that he injured his back lifting heavy boxes at work.

14. On September 21, 2013 Claimant went to MCA and complained of injuries to the low back and right Achilles tendon. These injuries reportedly occurred the previous day (September 20, 2013) when the Claimant was riding on a bus that was hit from behind. Claimant underwent lumbar x-rays that showed "chronic severe degenerative changes" with no acute fracture. Claimant was prescribed Percocet for pain.

15. On October 8, 2013 Claimant was examined by Jerry Cupps, D.O. Claimant reported that as a result of the September 20, 2013 bus accident he had developed cervical, thoracic and lumbar pain as well as headaches. Dr. Cupps noted Claimant "denied a history of prior motor-vehicle accidents or prior work-related injuries." Dr. Cupps noted that prior to the bus accident Claimant "had no reported injuries of significance and no evidence of acute or chronic pain." Dr. Cupps assessed multiple conditions attributable to the bus accident. These included cervical, thoracic and lumbar spine pain.

16. As a result of the September 20, 2013 bus accident Claimant underwent physical therapy (PT) between October 9, 2013 and October 17, 2013. During this treatment Claimant complained of 7/10 low back pain.

17. Claimant filed a claim for damages against the driver of the vehicle that struck the bus on September 20, 2013. On October 29, 2013 Claimant agreed to settle the claim for a payment of $6,720.22.

18. On April 20, 2014 Claimant was involved in another MVA and was seen at MCA with a complaint of low back pain. Claimant was transported to the hospital by ambulance. The "clinical impression" was a lumbar sprain without sciatica or motor weakness. Claimant was initially prescribed Flexeril and Norco. However, Claimant advised the treating physician that he would not take Norco because it caused "upset." Instead, Claimant requested a prescription for oxycodone without Tylenol. The emergency room report states that the Claimant would be discharged "with the appropriate medications as requested."

19. On May 6, 2014 Claimant filed a civil suit against the driver of the other vehicle involved in the April 20, 2014 MVA. The Claimant requested $50,100 which includes damages for pain and suffering.

MEDICAL RECORDS AFTER ALLEGED INJURY OF MAY 24, 2014

20. On May 24, 2014 Claimant was examined at the UCH emergency room. Claimant gave a history that he had back pain after "getting 'trays' dropped on his back while bending over." Claimant denied radiation of pain. His range of motion was reportedly normal but the "midline and left-sided paraspinal" lumbar spine were tender to palpation. X-rays of the lumbar spine showed "no fracture or vertebral body subluxation." The emergency room physician assessed back pain and contusion. Claimant received prescriptions for Naprosyn and Percocet and was instructed to follow-up with a workers' compensation doctor.

21. On May 28, 2014 Claimant signed a form designating Aviation and Occupational Medicine (AOM) as the authorized medical provider for his injury.

22. On May 28, 2014 Michael Ladwig, D.O., examined Claimant at AOM. Claimant gave a history that on May 24, 2014 he was bent over picking up trays when some trays fell on to his back. Claimant reported that he was experiencing low back pain and numbness down in to the left leg and groin area. Dr. Ladwig noted left-sided

tenderness from T10-S1 with "slightly decreased forward flexion." Straight leg raising was negative and x-rays of the thoracic and lumbar spine were "negative for acute changes." Dr. Ladwig assessed a lumbosacral strain and, based on Claimant's history and mechanism of injury, opined that there is a "greater than 51% probability that this is a work – related injury or condition." Dr. Ladwig imposed restrictions of no lifting or repetitive lifting over 10 pounds and no forward bending. He prescribed various medications including Percocet and directed Claimant to use ice and heat.

23. On May 30, 2014 Claimant telephoned Kaiser Permanente (KP). He advised KP that he had been in an MVA the previous day (May 29) and was experiencing headaches, neck pain and lower back pain. Claimant requested to have medication prescribed over the phone "for pain and muscle spasms." The treating physician noted that he had never seen the Claimant and had no history on him. Consequently, the physician noted he was unable "to prescribe medications over the phone." An appointment was scheduled for Claimant to be examined in person.

24. On May 31, 2014 Claimant was examined at KP for complaints of headache, neck pain and low back pain. Claimant gave a history of being rear-ended in an "MVA 2 days ago." Claimant also reported he had "some numbness in the left leg" that had "resolved today." These notes contain no mention of the alleged work-related incident of May 24, 2014. On PE the examining physician noted tenderness in the lumbar paraspinals, "straight leg pos BL" and "very tight hamstrings." Claimant was prescribed a small number of Percocet and ibuprofen.

25. At hearing Claimant testified that he did not think he told KP that he was in an MVA 2 day previously. Rather, Claimant testified that he thought he told them about his workers' compensation injury.

26. On June 4, 2014 Claimant reported to Dr. Ladwig that he was experiencing numbness down his left leg. Dr. Ladwig noted a positive left straight leg test. He assessed a lumbosacral spine strain and radiculopathy. Dr. Ladwig referred Claimant for an MRI of the lumbar spine.

27. On June 12, 2014 Respondents issued a Notice of Contest and indicated the claim was "under investigation."

28. On June 16, 2014 Claimant underwent an MRI of the lumbar spine. The radiologist's impressions included: (1) Spondylosis at L3-4 and L4-5 accounting for moderate central spinal canal stenosis at L4-5 and mild central canal stenosis at L3-4; (2) Mild to moderate foraminal stenosis at both the L3-4 and L4-5 levels; (3) mildly degenerated facet joints at L5-S1; (4) No osseous trauma or spondylolisthesis.

29. On June 18, 2014 Dr. Ladwig reviewed the MRI. He referred the Claimant to Franklin Shih, M.D. for a physical medicine evaluation.

30. On July 1, 2014 Dr. Shih examined Claimant. Claimant gave a history that on May 24, 2014 he was bent over to pick up a stack of trays weighing 25 pounds when another stack of trays fell and hit his back. Claimant reported "pain in the back and the

posterior aspect of the left leg." The back pain was "predominant." Dr. Shih took a "past musculoskeletal history" and noted a right triceps tear, gout and a right foot injury in 2010. The history does not mention any previous low back problems. Claimant's medical history was "remarkable" for elevated cholesterol, thyroid dysfunction, hypertension, diabetes and gout. Dr. Shih assessed "post reported work injury" with "ongoing low back greater than left lower extremity symptomatology" and "predominantly mechanical features with mild radicular component." Dr. Shih opined the "it is unlikely the trays actually hitting the back were the primary mechanism." Dr. Shih opined it was more likely that Claimant's complaints resulted from "potentially jerking when he was hit by the trays." Dr. Shih also stated "within probability [Claimant's] current back complaints are related to the reported working injury." Dr. Shih advised Claimant of potential treatments and Claimant expressed interest in pursuing physical therapy and acupuncture.

31. On July 1, 2013 Claimant signed a form requesting a one-time change of physician to Arbor Occupational Medicine (Arbor). Claimant testified that he requested a change of physician because Dr. Ladwig referred him out to other providers and wasn't doing anything to treat his condition.

32. On July 14, 2014 Alisa Koval, M.D., examined Claimant at Arbor. Dr. Koval is board certified in occupational medicine and environmental medicine. Claimant gave a history that on May 24, 2014 when he was "in the bent-over position lifting trays from approximately floor level, a number of empty trays fell off a cart behind him and landed on his back." Claimant reported that his symptoms included dull pain throughout the lower back and shooting pain down the back of the left leg if he walked more than 30 minutes. When asked about prior treatment for back pain Claimant advised Dr. Koval that he had treatment from a chiropractor "Sometime in 2013." Dr. Koval described the Claimant as "somewhat evasive" when discussing prior back pain and treatment. Dr. Koval reported that on physical examination (PE) Claimant refused to "do many things I asked him to do because he sad it hurt his back." Dr, Koval stated that she did not "get an objective strength examination on the left" because Claimant "basically did not move" his leg. Claimant asked for a cane at the end of the examination. Dr. Koval's impressions included low back pain "likely with elements of lumbosacral strain." Dr. Koval recommended continued physical therapy (PT) and acupuncture and prescribed a muscle relaxer and an anti-inflammatory. She also referred Claimant J. Raschbacher, M.D., to get "another pair of eyes on the case."

33. Concerning the issue of causation, Dr. Koval noted that the MRI demonstrated a "multitude of degenerative changes" including "spondylosis at L3-4 and L4-5." Dr. Koval stated that she would like to review Claimant's old records before rendering a judgment on causation. Dr. Koval commented that "at first glance a lot of his changes are degenerative and have likely taken place over a much longer time period." She also wrote that the falling trays "may produce some soreness, contusion and maybe even muscle strain," but she did "not believe the degenerative changes" resulted from the incident with the trays.

34. On July 17, 2014, Claimant was seen at KP for nutrition therapy and weight management. At that time Claimant reported he was not doing any exercise because of an "automobile accident and chronic back pain."

35. On July 18, 2014 Dr. Raschbacher examined Claimant at AOM. Claimant reported "horrendous" back pain with "numbness in the back." Claimant advised he had "prior lumbar problems" but "never any numbness." Claimant had no lower extremity symptoms. On physical examination (PE) Dr. Raschbacher noted "diffuse lumbar tenderness" and that straight leg raising was negative. Dr. Raschbacher assessed lumbosacral strain. He prescribed Percocet and referred Claimant to Robert Kawasaki, M.D., for nerve conduction studies despite the absence of paresthesias.

36. On July 28, 2014 Claimant advised Dr. Raschbacher that he was scheduled for bariatric surgery at Kaiser Permanente (KP). Claimant also stated that he wanted his "narcotic pain medicines" without Tylenol. Dr. Raschbacher referred Claimant for PT and refilled the prescription for Percocet. Dr. Raschbacher also completed a Physician's Report of Worker's Compensation Injury (M164) and checked a box indicating that his "objective findings" were "consistent with history and or work related mechanism of injury."

37. On August 12, 2014 Dr. Kawasaki saw Claimant for the purpose of conducting the electordiagnostic testing prescribed by Dr. Raschbacher. Claimant gave a history that on May 24, 2014 he "was bent over lifting some empty trays when some other trays apparently fell over and landed on his back." Claimant stated that he developed low back pain and "some pain radiating down the left lower extremity." Claimant denied any prior "significant injury to his low back." However, Claimant told Dr. Kawasaki that he had some "motor vehicle accidents in the past but denied ongoing problems leading up to his injury." Dr. Kawasaki recorded that the "EMG/nerve conduction study" was normal and the test "was discussed with [Claimant] in detail." Dr. Kawasaki also noted that he reviewed Claimant's "PDMPs" and Claimant had received "frequent refills of opioid medications by multiple providers over the last year." Dr. Kawasaki further stated that in the past month Claimant had received "oxycodone/acetaminophen from three different providers."

38. On August 19, 2014 Claimant was once again examined by Dr. Koval. Dr. Koval noted that Arbor had received multiple communications from Respondents' counsel forwarding medical records from "local facilities" that reported previous injuries experienced by Claimant. Dr. Koval specifically noted medical reports documenting a low back injury in July 2013, an MVA in September 2013 and another MVA in 2014. Dr. Koval wrote that she told Claimant that "opposing counsel" was "building a significant case against him and advised him that it would probably be a good idea for him to obtain a lawyer." Dr. Koval opined that Respondents' counsel "built a reasonable case that [Claimant's] symptoms were not caused by this work-related injury." Dr. Koval further opined that "his symptoms may have been aggravated at most by this particular work-related incident, but it does seem from the medical records supplied that he did have most of these symptoms to some extent, on several occasions" prior to the May

24, 2014 "injury/incident." Dr. Koval continued PT, prescribed Percocet, imposed restrictions and referred Claimant to Dr. Raschbacher for follow-up.

39. On September 4, 2014 Dr. Raschbacher performed a "supplemental medical record review." Dr. Raschbacher reviewed Claimant's medical records dating back to April 2002.

40. Dr. Raschbacher examined Claimant on September 12, 2014 and authored a discharge note dated September 18, 2014. Claimant told Dr. Raschbacher the trays that struck him on May 24, 2014 "fell from a height of over six feet." Dr. Raschbacher advised Claimant that he had reviewed "all of the records." Claimant replied that "he was fine and that he was healthy before his most recent injury claim date" of May 24, 2014. Claimant also reported that "he never sought medical attention before" May 24, 2014 and that the April 20, 2014 MVA did not cause him any injury.

41. In the September 18, 2014 report Dr. Raschbacher stated that he did not "find a clear basis" to treat Claimant "for an injury claim from 05-24-14." Dr. Raschbacher wrote that the "mechanism of injury and the persistence of this degree of symptomatology and the use of a cane all do not make a great deal of sense to this examiner." Dr. Raschbacher further stated the Claimant had "quite an extensive history involving claims for the back" and "pre-existing, nonwork-related, degenerative changes at the spine." Dr. Raschbacher stated he did not "see any clear objective changes from the purported injury." Finally Dr. Raschbacher stated that he does not "think it is likely [Claimant] had a compensable injury." Dr. Raschbacher discharged Claimant from treatment effective September 12, 2014 and opined he had no ratable impairment or any restrictions.

42. On October 31, 2014 Claimant was examined by KP physician Alan Lidsky. Claimant reported that he experienced "chronic back pain all day every day." Claimant rated the pain as 6-7/10 and stated he had the pain "since May" when he "was at work and trays fell on his back – his workman's comp told him it was preexisting." Dr. Lidsky referred Claimant to neurosurgery for evaluation of "spinal stenosis of lumbar spine wo neurogenic claudication."

43. On December 12, 2014 Claimant was seen at KP by Daniela Grayeb M.D. Dr. Grayeb noted Claimant requested "pain medication for treatment of chronic back pain after work related injury in May and MVA x 2 in April and May 2014." Dr. Grayeb reviewed Claimant's PDMP and noted that "he has been getting narcotics and BZD from numerous providers several times a month." Dr. Grayeb opined the Claimant was engaged in "drug seeking behavior" and advised him that she would not be able to prescribe opioid medications.

44. KP scheduled Claimant to undergo bariatric surgery on April 9, 2015. However, KP cancelled the surgery because Claimant underwent a pre-surgical drug screen that was positive for "cocaine and THC." KP physician Luke Osborne, M.D., noted that cocaine and anesthesia "can lead to dangerous hemodynamic instability intra-op."

45. Claimant failed to prove it is more probably true than not that he sustained any injury while at work on May 24, 2014. Rather, the credible and persuasive evidence establishes that it is more probably true that Claimant did not sustain any compensable injury on May 24, 2014.

46. Claimant's testimony that on May 24, 2014 trays fell and struck him on the back is not credible. His testimony that the accident occurred was not corroborated by any credible and persuasive eyewitness testimony.

47. Claimant's testimony that on May 24, 2014 falling trays caused the immediate onset of low back pain is not credible. Rather, Dr. Raschbacher credibly and persuasively opined that he did not think it likely that Claimant experienced a "compensable injury." Dr. Raschbacher persuasively explained that Claimant's medical records prior to May 24, 2014 document "quite an extensive history involving claims for the back" and "pre-existing degenerative changes at the spine." Dr. Raschbacher also credibly and persuasively opined that there were not any "clear objective changes" caused by the alleged May 24 injury.

48. Dr. Raschbacher's opinions are supported by review of the pertinent medical records. As set forth in Findings of Fact 6 through 19, between April 2002 and May 23, 2014 Claimant sought medical treatment for back pain no less than 8 times. On at least 7 of these occasions Claimant reported that he sustained accidental injuries to his back. Claimant reported back injuries on the following dates: (1) Bus accident reported April 11, 2002; (2) MVA reported September 24, 2011; (3) Slip in water reported April 23, 2012; (4) Slip on wet gravel reported May 16, 2013; (5) Lifting boxes at work reported July 19, 2013 ; (6) MVA reported September 21, 2013; (7) MVA reported April 20, 2014. On May 16, 2013 Claimant went to DHMC Urgent Care and sought treatment for low back pain of 6 months' duration.

49. Moreover, the medical records corroborate Dr. Raschbacher's opinion that prior to May 24, 2014 Claimant already suffered from degenerative spinal disease. X-rays in September 2011 already showed "mild" degenerative disease and facet arthrosis. In September 2013 Claimant underwent lumbar x-rays that showed "chronic severe degenerative changes." Dr. Raschbacher's opinion is further corroborated by Dr. Koval who noted that the lumbar MRI showed a "multitude of degenerative changes" that likely occurred over a long period of time.

50. Claimant's credibility is also undermined because he has a documented history of obfuscating his medical history when seeking treatment for back problems. When Dr. Cupps examined Claimant for back problems allegedly associated with the September 20, 2013 MVA, Claimant "denied a history of prior motor-vehicle accidents or prior work-related injuries." However, the medical records establish that prior to Dr. Cupps' October 8, 2013 examination Claimant had sought treatment for back pain associated with a bus accident in 2002, an MVA in September 2011 and a work-related lifting incident in July 2013. The September 2011 MVA resulted in several months of chiropractic treatment and a settlement of $13,000. The ALJ finds it improbable that Claimant simply forgot this history when Dr. Cupps asked about it. This is especially

true because the ALJ infers that when Claimant saw Dr. Cupps in October 2013 Claimant had already made or was contemplating a claim for damages based on the September 20, 2013 MVA.

51. The ALJ infers that Claimant obfuscated his medical history when he was examined at KP on May 31, 2014. On that date Claimant sought narcotic pain medication for treatment of low back pain that he associated with a motor vehicle accident which Allegedly occurred on May 29, 2014. However, the KP record does not mention any history that on May 24, 2014, Claimant allegedly sustained a back injury at work.

52. The ALJ infers that Claimant obfuscated his medical history when he was examined by Dr. Koval on July 14, 2014. Dr. Koval credibly reported that Claimant was "evasive" when she asked about his prior treatment for back pain. Claimant merely told Dr. Koval that he received chiropractic treatment "sometime" in 2013. The ALJ finds it highly improbable that Claimant forgot about his numerous prior back injuries and the resulting treatments. See Finding of Fact 48. The ALJ finds it is more probable that Claimant was attempting to conceal his prior back problems from Dr. Koval in order to persuade Dr. Koval that the back pain was caused by the alleged work-related incident on May 24, 2014.

53. The ALJ infers that Claimant obfuscated his medical history when he was examined by Dr. Kawasaki on August 12, 2014. Although Claimant told Dr. Kawasaki that he had a few motor vehicle accidents in the past, Claimant denied "significant injury" to the low back or any problems leading up to the alleged injury of May 24, 2014. The ALJ infers from this record that Claimant failed to disclose the extent of his prior treatment for low back pain. The ALJ further infers Claimant failed to disclose the treatment, including the prescription of narcotic medication, associated with the April 20, 2014 MVA.

54. The ALJ infers that Claimant obfuscated his medical history when he was examined by Dr. Raschbacher on September 12, 2014. Dr. Raschbacher noted that Claimant stated that he never sought "medical attention" prior to May 24, 2014 and that he was not injured in the April 20, 2014 MVA. As Dr. Raschbacher credibly explained, Claimant's statements are contrary to numerous medical records.

55. Claimant's testimony is not credible because the ALJ finds that Claimant probably invented the injury as a means to obtain narcotic medication. On August 12, 2014 Dr. Kawasaki credibly recorded that he had reviewed Claimant's records and they showed Claimant had received "frequent refills of opioid medication by multiple providers over the last year." On December 12, 2014 Dr. Grayeb noted that Claimant's records showed he was receiving narcotics and "BZD" from "numerous providers several times per month." Dr. Grayeb credibly and persuasively opined Claimant was engaged in "drug seeking behavior."

56. Dr. Grayeb's opinion that Claimant has engaged in "drug seeking behavior" is corroborated by the medical records. MCA records from September 21,

2013 show Claimant was prescribed Percocet for pain. When Claimant was seen at MCA on April 20, 2014 he declined NORCO and specifically requested oxycodone without Tylenol. When Claimant reported to the UCH emergency room on May 24, 2014 he received a prescription for Percocet. On May 30, 2014 Claimant telephoned KP and requested pain medication because of an MVA the previous day. This request for pain medication, which occurred less than a week after the alleged injury of May 24, 2014, was denied until Claimant could be seen in person. Claimant was seen at KP on May 31, 2014 and he received a prescription for Percocet. The May 31 prescription for Percocet was apparently made without the physician's awareness that Claimant had received a prescription for Percocet on May 24.

57. Dr. Ladwig and Dr. Shih both opined Claimant sustained a work-related injury on May 24, 2014. Neither of these opinions is persuasive because neither physician was aware of Claimant's complete medical history prior to the alleged date of injury. Moreover, Dr. Shih based his opinion on the supposition that Claimant "jerked" when was struck by falling trays. However, the Claimant did not testify that he "jerked" and has consistently given the history that the injury was caused by trays striking his back. Dr. Shih himself stated that trays striking the Claimant's back is not a likely mechanism of injury.

58. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF ALLEGED INJURY

Claimant contends that the evidence demonstrates that he sustained an injury to his low back when a stack of trays fell on him while he was at work on May 24, 2014. Respondents contend that the evidence establishes the Claimant probably did not experience any accident while he was at work on May 24, 2014. Respondents further contend that if the Claimant experienced an accident he failed to prove that the accident caused any compensable injury. The ALJ agrees with Respondents that Claimant failed to prove that he suffered any accidental event while he was at work on May 24, 2014.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 45 through 57, Claimant failed to prove it is more probably true than not that on May 24, 2014 he sustained an injury proximately caused by the performance of service arising out of and in the course of his employment. The ALJ concludes Claimant's testimony that he sustained a back injury when the trays fell is not credible and persuasive. As found, Claimant's testimony that he sustained an injury on May 24, 2015 is not corroborated by any credible eyewitness evidence. The Claimant's testimony is not credible and persuasive because the medical records show he obfuscated his medical history on several occasions. Further, the ALJ is persuaded that Claimant's credibility is undermined because his drug seeking behavior provided a substantial motive to falsely report the alleged injury of May 24, 2014. Finally, the ALJ credits and is persuaded by Dr. Raschbacher's opinion that, based on his examination findings and review of the medical records Claimant probably did not suffer a compensable injury on May 24, 2014.

Based on these findings of fact and conclusions of law the claim for benefits must be denied and dismissed. In light of this determination it is unnecessary to address the other issues raised by the parties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-952-006-03 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 10, 2015

DIGITAL SIGNATURE:
David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

STIPULATIONS

1. If the Claimant's claims are found to be compensable, the Claimant is entitled to TPD and TTD in amounts to be determined. The parties agree to hold the issues of TPD and TTD in abeyance pending a ruling on compensability.

ISSUES

The issues for determination are:

1. Whether the Claimant has proven, by a preponderance of the evidence, that she sustained a compensable injury to her back on December 2, 2013.

2. Whether the Claimant has proven, by a preponderance of the evidence, that she sustained a compensable injury to her back, right shoulder and upper back/cervical spine on January 9, 2014.

FINDINGS OF FACT

1. The Claimant was employed by Employer as a Special Education paraprofessional who assists teachers with students who have special needs. Her duties vary by student, but include taking the students out, feeding students, changing diapers, etc. The paraprofessionals are assigned to specific children whom they assist.

2. In addition to working for Employer, during the relevant time period around and after the time of reporting a work injury, the Claimant worked part time as a child supervisor at KinderCare and performed cleaning for approximately 15 hours a week for Better Business (Claimant's Exhibit 4, p. 9; Respondents' Exhibit B, p. 2). The Claimant testified that she is still employed at KinderCare but she is no longer employed by Better Business because she cannot mop, sweep and vacuum or reach into tight places due to pain.

3. The Claimant testified that on December 2, 2013, she was working with a student who did not want to walk and he kept dropping himself to the floor. She testified that she was taking this student out and would walk him two times per day using a gait trainer (like a walker). The Claimant testified that she stood behind the student in a bent over position to guide the gait trainer to assist the student. Because the student did not want to walk, the Claimant had to use both hands to guide the student in the gait trainer even though she would only have needed to use one had if the student were cooperating. The Claimant testified that she had worked with this particular student for 4

years and he was 10 years old at the time and about 80-90 pounds and about 5'2'' in height. Since the student did not want to walk on this day, he would drop to the ground and the Claimant had to pick him up several times to get him back to the classroom. On cross-examination, the Claimant further described that when the child "crumpled" to the floor, his legs would be splayed to the side and he was sitting on his haunches and she would have to pick him up by his armpits. As she picked him up, the child would pick up his feet because he didn't want to walk.

4. The Claimant testified that her back was hurting on December 2, 2013, but she didn't report it right away because in the past when her back was hurting she would ice it and rest and it would get better. Winter break was about to start on December 17th and would continue until around January 5th. The Claimant testified that she believed that her back would get better since she would have time to rest over the break.

5. The Claimant's testimony regarding the mechanism of injury on December 2, 2013 of having to repeatedly pick up and physically support a special needs child she was assisting with walking with a gait trainer to be credible and generally consistent with her statements in the medical records. Her testimony regarding her symptoms and their progression is also credible as is the Claimant's initial belief that her back condition might get better with rest over an upcoming winter break from school. The Claimant's testimony on these matters is found as fact.

6. The Claimant testified that she returned to work after break on January 7, 2014 and, on January 9, 2014, she was working with the same student that she walked with on December 2, 2013. On January 9, 2014, he wouldn't walk at all. He also picked up the gait trainer as if to throw it. The Claimant testified that she was trying to keep him from falling and her back was arched as she came up behind him to hold him up. She testified that she screamed for help and felt pain immediately. The immediate pain was in her low back. Then, later when the low back symptoms calmed down a little, the Claimant began to notice neck and shoulder pain. On cross-examination, the Claimant testified that when the child was throwing a fit, she was trying to hold him and he thrust his head back and it struck the Claimant's right shoulder.

7. The Claimant testified that, again, she did not report a back injury right away because she felt that if she iced the back and rested, it would get better. She testified that over the following days, she reported the incident and had some additional help with this student.

8. The Claimant's testimony regarding the events of January 9, 2014 about when she was injured while working with the same special needs child that she was working with in December 2013 is credible. Her testimony regarding the change to her condition as a result of the January 9, 2014 work incident is also credible and found as fact.

9. The Claimant submitted an Employee Report of Injury/Incident on January 15, 2015 listing a date of injury/incident of "Monday Dec 2nd to present 1/15/14." She

reported that the student with whom she worked had regressed in August after returning to school with weak and unsteady legs that made walking difficult for him. She reported that she made progress with him up until Thanksgiving break, but when he returned to school after that break, the student had a hard time walking. He was not willing to walk and would drop to the floor and she had to pick him up. The Claimant reported that her back got a little better over winter break but then after that, the student was even less interested in walking and she often had to support the student's weight so he wouldn't fall. The Claimant reported her back was in "agony" since then. The Claimant noted that most of the other teachers and paras and staff had witnessed the difficulty the Claimant had with this student (Claimant's Exhibit 11). On redirect examination, the Claimant testified that she first verbally reported an injury on January 9, 2014 and then made the written report on January 15, 2014. She initially did not want to make a report but testified that other teachers told her that she should.

10. The Claimant testified she has had previous low back injuries and three workers' compensation back claims with surgeries. She testified that she had a back claim in 1990 and subsequent low back injuries in 1993 and 1996. As a result of these injuries in the 1990's, the Claimant underwent surgeries and was treated with a variety of narcotic medications including Tramadol, Percocet, OxyContin and Fentanyl patches. In 2006, the Claimant had a stomach/bile duct condition that required surgery. Due to the chronic abdominal pain, she continued to be treated with narcotic medications. However, for a period from 2005 – 2007, she testified that she was off all medications and only went back on the narcotic pain medications for the stomach/bile duct condition.

11. The Claimant testified that she had a prior low back injury in 2010 while working with a different Special Education child when employed by Employer. Treatment for that injury was one injection to the sciatic nerve and then she was better after this and placed at MMI with no restrictions or continuing care. The medical records in evidence are consistent with the Claimant's testimony.

12. Prior to December of 2013, the Claimant described her low back pain as constant but it could be controlled by pain medications and the pain was limited to her very low back, almost to her buttocks. To the extent that she had leg and hip pain from the injuries in the 1990's and 2010, the Claimant testified that it was on her left side. She testified that she previously had numbness in her hips but it went away and she has not had this for 6 years. After December of 2013, the Claimant describes her pain as higher up and it also goes down her right leg. She testified that she now also has muscle spasms at night and her right leg burns and feels like it is on fire. The Claimant further testified that prior to January of 2014, she had no shoulder pain and now it hurts to lift her arm above her head and the pain in her biceps hurts almost all the time. The Claimant testified that she had never received treatment for neck pain before and now her neck pain starts in the middle of her neck and radiates down to her shoulders.

13. On January 16, 2014, the Claimant saw Dr. Randolph Reims for an initial consultation. The Claimant reported that she was experiencing recurrent and worsening low back pain since 12/02/2013 due to difficulty with assisting a disabled child who she

repeatedly had to physically lift which is exacerbated every time she has to lift the child. On examination, Dr. Reims noted muscle spasms. Dr. Reims assessed recurrent low back pain and opined that "the exacerbation described by the patient as repeatedly lifting a child who weight in excess of 80 pounds would be consistent with the patient's described increase in her pain." Dr. Reims referred the Claimant for physical therapy and an MRI of the lumbar spine (Claimant's Exhibit 4, pp. 9-10; Respondents' Exhibit B). The Claimant testified that when she saw Dr. Reims on this occasion, she only spoke about the back pain and didn't mention the neck and shoulder pain because at first it was not as bad as the back pain and she didn't get concerned about it until it got worse. The Claimant also testified that in addition to telling Dr. Reims about repeatedly lifting the child, she also told him about the specific incident with the gait trainer.

14. On January 22, 2014, the Claimant returned to Dr. Reims and reported that she was injured on January 9, 2014. She reported that on that day she was working with a special needs student with a walker and that the student lifted the walker which then collapsed causing him to fall back onto Claimant. She told Dr. Reims she experienced immediate onset of right sided upper back pain and right shoulder pain. On physical examination, Dr. Reims found increased tone in the right upper trapezius and right levator scapula muscles. Dr. Reims diagnosed a right shoulder strain and recommended initiating physical therapy and concluded that it was probable that Claimant had suffered a work related injury. The pain medications the Claimant already took for her chronic pain were not altered (Claimant's Exhibit 4, pp. 12-14; Respondents' Exhibit C).

15. An MRI of the Claimant's lumbar spine taken on January 27, 2014 demonstrated a central posterior disc protrusion at L4-L5 which was new compared to a previous MRI on October 9, 2010. The radiologist noted that "since 2010, there has been development of a central posterior protrusion at L4-L5 associated with multifactoral central canal stenosis" (Claimant's Ex. 8, pp. 52-53; Respondents' Exhibit E).

16. On January 30, 2014, Dr. Reims noted that the Claimant reported that she was about the same. She reported pain in her right shoulder, right upper back and lower back with the right upper back pain being the most severe. After physical examination, review of the MRI showing a new central L4-5 disk protrusion, and a review of treatment options, the Claimant expressed a preference to avoid further surgery and Dr. Reims was in accord. Dr. Reims recommended a physiatry consultation and continued the Claimant's work restrictions limiting lifting and carrying to 10 lbs. and avoiding work over shoulder level (Respondents' Exhibit G).

17. On February 18, 2014, an MRI of the Claimant's cervical spine showed findings at C4-5 of a central disc extrusion with extension below the disc pace and mild spinal canal narrowing (Claimant's Exhibit 9, p. 55; Respondents' Exhibit J).

18. The Claimant saw Dr. Reims again on February 27, 2014 and reported she was working within her restrictions. The cervical spine MRI results were reviewed

with the Claimant and Dr. Reims characterized the findings as “reassuring.” On examinations, there was some tenderness of the posterior cervical musculature but no spasm on either side (Respondents’ Exhibit K).

19. In March of 2014, the Claimant saw Dr. Christopher Morelli of Spine West for physiatry evaluations and consultation. Based on a review of the available diagnostic imaging, Dr. Morelli recommended a lumbar ESI for diagnostic and therapeutic purposes since the Claimant was reporting no improvement with conservative treatments. The lumbar transforaminal epidural steroid injection was performed on March 12, 2014. The Claimant reported no benefit with this injection and, on March 28, 2014 a caudal epidural steroid injection was performed (Respondents’ Exhibits M, O and R).

20. On April 10, 2014, Dr. Reims responded to interrogatories from the Insurer’s claims specialist opining that he did not foresee changes to the Claimant’s work restrictions as she continued to be highly symptomatic in her low back, upper back and right shoulder and conservative measures, including 2 injections, have not yet brought about any significant improvement (Respondents’ Exhibit S).

21. On May 22, 2014, an MRI of the Claimant’s right shoulder demonstrated mild-moderate supraspinatus and mild infraspinatus tendinopathy and slight downsloping acromion abutting the supraspinatus tendon. The subscapularis tendon and long head of the biceps were intact and there was no atrophy of the rotator cuff muscles (Claimant’s Exhibit 9, p. 56; Respondents’ Exhibit X).

22. The Claimant saw Dr. Reims on May 28, 2014 reporting that she was improving and that bilateral SI injections performed by Dr. Gronseth provided full relief for a few hours and a return of pain but lessened pain for about a week. Dr. Reims recommended additional physical therapy and an orthopedic consult with Dr. McCarty for her right shoulder (Respondents’ Exhibit U).

23. AN EMG performed by Dr. Joshua Ward on June 27, 2014 showed no evidence for bilateral lumbosacral radiculopathy, right peroneal or tibial neuropathies or peripheral neuropathy with normal nerve conduction studies (Respondents’ Exhibit V, p. 86).

24. On July 16, 2014, Dr. Reims noted that, in the interest of being thorough, he believed that a spine surgery evaluation was appropriate for the lumbar spine and cervical spine area (Respondents’ Exhibit BB). The Claimant saw Dr. Matthew Gerlach on September 8, 2014 per this referral. After reviewing diagnostic imaging and a physical examination, Dr. Gerlach opined that “cause for the patient’s intractable pain is not clear. I suspect etiology is multi-factorial. Further surgery is likely not going to be recommended. However xrays today suggest possible pseudoarthrosis of the patient’s prior L5-S1 fusion.” Dr. Gerlach requested a CT scan of the lumbar spine for more definitive evaluation (Respondent’s Exhibit FF).

25. On September 16, 2014, a CT scan was performed and compared to the Claimant's January 27, 2014 MRI. By way of comparison, "no substantial interval change" was noted and the fusion at L5-S1 was intact (Respondents' Exhibit GG).

26. On October 8, 2014, Dr. Reims noted the Claimant reported improvement. Although she still reported pain in the right shoulder and low back, her pain has been less marked since she was taken off work completely by Employer. At the time she was still working one of her jobs approximately 15 hours per week (Respondents' Exhibit KK).

27. On October 20, 2014, Dr. Gerlach reviewed the results of the Claimant's CT scan with her and advised that the "cause for the patient's chronic pain does not have definitive structural explanation," thus, there was no indication for further surgical treatment and the Claimant was advised to continue conservative management (Respondents' Exhibit LL).

28. On November 3, 2014, Dr. Eric McCarty performed another steroid injection in her biceps. He also noted that given the Claimant's response to her previous biceps injection, the Claimant may have a component of impingement (Respondents' Exhibit NN).

29. On December 2, 2014, Dr. Carlos Cebrian performed an independent medical examination of the Claimant and authored a written report. Dr. Cebrian took a history from the Claimant related to her preexisting chronic conditions and regarding work incidents on December 2, 2013 and January 9, 2014. The Claimant described working with a special needs child on walking in a walker. Dr. Cebrian noted the Claimant reported that the child became stubborn about not wanting to participate in walking with the walker after returning from Thanksgiving break and he would drop to his knees and she would have to assist him back up. This would occur multiple times as they were walking with the walker and the Claimant would repeatedly help him to stand up (Respondents' Exhibit PP, p. 362). Dr. Cebrian noted that the Claimant reported that in December of 2013, she had low back pain on the left side of her low back that radiated down to both legs to her big toes and the symptoms were gradually getting worse. She reported that her condition improved after December 19, 2013 when the school was closed for winter break. Dr. Cebrian noted that the Claimant returned to work on January 7, 2014. On January 9, 2014, the Claimant reported assisting the same student with walking in a walker. Dr. Cebrian noted that the Claimant told him the student was again reluctant to walk and when they returned to the classroom, the student got upset and picked the walker up above his head as if he were going to throw it. The Claimant told him she was standing behind the student and he fell backwards into her and his head hit her over the right clavicle. She held him up for a few minutes and bent backwards in order to hold him up. She yelled for help and someone came so she and the student did not fall to the ground. After this, the Claimant reported to Dr. Cebrian that she felt excruciating pain in her low back, on the left side and in the middle, and in her right shoulder with radiation into her right arm after this incident (Respondents' Exhibit PP, pp. 362-363).

30. As part of his IME report, Dr. Cebrian also included a review of some recent medical records from 2011 forward. Of note, Dr. Cebrian expresses surprise that there was no mention of a 1/9/2014 incident at the time of the evaluation with Dr. Reims on 1/16/2014 even though this involved the same child from the 12/2/2014 incident (Respondents' Exhibit PP, pp. 368). On physical examination, Dr. Cebrian noted that pain behaviors were present. On examination of the cervical spine, Dr. Cebrian noted full range of motion with mild discomfort on movement to the left but no spasms, trigger points or atrophy (Respondents' Exhibit PP, p. 378). Examination of the bilateral shoulder revealed decreased range of motion of the right shoulder, negative impingement signs and mild tenderness to palpation laterally in the shoulder with normal range of motion of the left shoulder (Respondents' Exhibit PP, p. 378). Examination of the lumbar spines revealed no swelling, bruising or redness, but a large central scar from the lower thoracic spine to the sacrum. Tenderness to palpation was noted, left greater than right and the Claimant had pain into the left paraspinal muscles in the left side of the pelvis. The Claimant reported pain on all movements during range of motion measurements and leg raises (Respondents' Exhibit PP, pp. 378-379). Dr. Cebrian found no diagnoses of the Claimant to be claim related. He found she had chronic lumbar spine pain, depression, biliary bypass surgery, irritable bowel syndrome, chronic pain disorder, widespread and diffuse pain right shoulder/trapezius, cervical spine degenerative disease and opioid dependence (Respondents' Exhibit PP, p. 379). With respect to the Claimant's lumbar condition and need for treatment, Dr. Cebrian finds the current symptoms related to this condition is independent and unrelated to work activities (Respondents' Exhibit PP, p. 381). As for the Claimant's cervical and right shoulder/upper back conditions, Dr. Cebrian opines that the Claimant's subjective pain complaints have been out of proportion to the objective pathology. He believes that the Claimant has widespread myofascial pain, degenerative disease, a chronic pain disorder and opioid dependence. Therefore, he opines that the Claimant's right shoulder, trapezius and cervical spine complaints and any need for treatment are independent and unrelated to the Claimant's work activities (Respondents' Exhibit PP, p. 384).

31. On March 19, 2015, Dr. Caroline Gellrick performed an independent medical examination of the Claimant and she authored a written report. As part of the IME, Dr. Gellrick reviewed the Claimant's prior medical records and summarized records pertinent to the Claimant's claimed work injuries. Dr. Gellrick noted injuries and treatment to the Claimant's low back at L5-S1 in 1990, 1993, 1995, 2000, 2008 and 2010 as well 2014. Dr. Gellrick's review confirms an understanding of the Claimant's complicated preexisting condition (Claimant's Exhibit 7, pp. 41-46). In reviewing the Claimant's pain management questionnaire with the Claimant, Dr. Gellrick notes the Claimant reports (after correcting some errors in her written questionnaire) to being symptomatic for neck pain since January 9, 2014, for mid-back pain since December 2013, for low back pain since December 1990, left leg pain since December 2013, right arm pain since January 2014 and right leg pain since December 2013 (Claimant's Exhibit 7, p. 46-47). In the course of the IME, the Claimant described her injury to Dr. Gellrick as starting in December of 2013 when she was working with a special needs child using a walker and he kept falling to his knees and she had to keep picking him up

and helping him and she gradually developed worsening low back pain. The pain improved over the winter break when the school was on vacation, but when she returned to work in January 2014, there was another incident with the same child who picked up his gait trainer to throw it and he fell backwards on the Claimant, landing and pushing up against her right shoulder and causing her to arch her back. Since the second incident, the Claimant reported to Dr. Gellrick that her treatment and pain has continued and worsened in her low back, lower thoracic spine and her right shoulder (Claimant's Exhibit 7, pp. 47-48).

32. Dr. Gellrick diagnosed the Claimant with chronic low back pain status post six surgeries, right shoulder contusion/sprain, cervical spine pain most likely referred from the right shoulder contusion/sprain, opioid dependency managed by the Claimant's PCP, and chronic abdominal pain. In responding to interrogatories as to causation for both the December 2013 and January 2014 incidents, Dr. Gellrick opined that the Claimant suffered a temporary worsening of her low back pain as a result of the December 2, 2013 incident. Per the Claimant's admission, Dr. Gellrick concluded that for the most part, the pain subsided during the Claimant's holiday break. Dr. Gellrick then went on to conclude that the January 9, 2014 incident was the "straw that broke the camel's back." She opined that this incident caused a "marked worsening of condition" and concluded that the Claimant's current condition related to the January 9, 2014 incident. Specifically, Dr. Gellrick found that Claimant injuries to her low back and right shoulder as a result of the January 9, 2014 incident are the ongoing cause of the Claimant's worsened and aggravated condition (Claimant's Exhibit 7, pp. 49-51).

33. Dr. Carlos Cebrian testified at the hearing as an expert witness in the areas of occupational medicine, family medicine and as to matters related to Level II accreditation. He testified that he performed an IME of the Claimant on November 13, 2014. For his IME, he reviewed limited medical records and had not received any past medical records for the Claimant. After the IME, Dr. Cebrian received the Claimant's past records and some updated medical records. Dr. Cebrian testified that he understands that the Claimant's two consolidated workers' compensation claims involve the following body parts: lumbar spine, cervical spine, right shoulder and upper back.

34. In terms of the Claimant's low back diagnosis, he opined that the Claimant has low back pain, radiculopathy, facet problems and back strain. Regarding the Claimant's testimony as to her mechanism of injury, Dr. Cebrian commented on whether or not the stated mechanism of injury was likely to have led to a change in the Claimant's preexisting condition. In comparing her lumbar MRI of 1/27/2014 to prior MRIs, he opines that the only significant change was a disk bulge at L4-L5 which is the level right above her prior fusion. He notes that there is "calcification" at the disk protrusion which indicates that this isn't a new or acute problem. Additionally, Dr. Cebrian testified that the fact that 6 months after the incident the Claimant is not objectively improving and reports worsening is indicative that these symptoms are not part of an acute injury or permanent exacerbation, but rather part of her chronic pain issues. Dr. Cebrian also opined that Dr. Reims and the Claimant's other treating physicians are responding to her subjective complaints. He testified that, while they are

well-meaning, no treatment they are providing is giving the Claimant more than temporary relief and they need to look at the bigger picture. Ultimately, it is Dr. Cebrian's opinion that there is no objective evidence to support aggravation or acceleration of the Claimant's prior chronic back condition.

35. With respect to the Claimant's shoulder/cervical spine/upper back condition, Dr. Cebrian testified that it was significant to him that the Claimant did not specifically describe the 1/9/14 incident with the disabled child to Dr. Reims at her initial appointment with him on 1/16/2014 as this was a more recent incident that the December incident as relates to the doctor appointment. Dr. Cebrian also testified that the findings on the 2/18/2014 cervical MRI are relatively mild and generally expected with the Claimant's age. He noted the shoulder MRI should some hypertrophy but that these are relatively mild findings. Dr. Cebrian testified that there was no pathology to explain the Claimant's reported symptoms. He noted that about one year later, there was some evidence of disk changes but that this was due to the Claimant's underlying, preexisting condition and not to an incident on 1/9/2014.

36. Dr. Cebrian testified that pain is a subjective complaint, so, when making treatment decisions, you need to correlate pain scale reports to objective findings. At the time the Claimant appeared for her IME with Dr. Cebrian, she was reporting a pain level of 9, but Dr. Cebrian found the Claimant was able to sit through his examination, albeit with some pain behaviors. Dr. Cebrian further testified that the fact that there has been no decrease in the Claimant's pain levels in spite of the conservative treatment she has received is indicative that there has been no substantive change. He also testified that he finds some evidence of narcotic misuse, including a September 2014 medical record of the Claimant wearing 2 Fentanyl patches with a high level of alcohol in her symptom. Ultimately, Dr. Cebrian testified that he finds that the Claimant's levels of pain as she describes them do not justify the amounts of pain medications she has been prescribed. Dr. Cebrian also testified that, even to the extent that the Claimant sustained a compensable injury, no surgical treatment is indicated and no further treatment should occur for her lumbar or shoulder conditions. With respect to a thoracic or low back condition, the Claimant's mechanism of injury could have resulted in some injury, but this should have resolved in a few days and no further treatment is indicated.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S §§ 8-40-101, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The Claimant shoulders the burden of proving entitlement benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The fact in a workers' compensation case must be

interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness whether the testimony has been contradicted; and bias, prejudice, or interest. See, *Prudential Insurance Co v. Cline,* 98 Colo. 275, 57 p.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 138 P.3d 684 (Colo. App. 2008; *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the

industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The Claimant Suffered a Compensable Work Injury on December 2, 2013

A preponderance of the evidence indicates that Claimant suffered an acute exacerbation of her pre-existing low back condition on December 2, 2013. It is undisputed that Claimant suffered from severe, chronic low back pain for which has been treated with Tramadol, Percocet and Duragesic patches. However, the medical evidence supports the Claimant's testimony that, prior to December 2, 2013, the Claimant's low back condition was stable. In the several years prior to 2013, the Claimant's pain management physician maintained Claimant on the same dosages of Tramadol, Percocet, and Duragesic patches and she did not receive any treatment other than her ongoing prescription medications.

This ALJ also notes that Claimant continued to work three jobs without restrictions, without increased subjective complaints of pain, and without the need for additional invasive medical procedures until the work incidents involving the special needs child the Claimant was assisting on December 2, 2013 and January 9, 2014. Also relevant to this conclusion is the fact that in January 2011, the Claimant was released from care under a workers' compensation claim, without permanent impairment, permanent restrictions, and without recommendations for ongoing medical treatment.

In reaching this conclusion, this ALJ credits the testimony of the Claimant regarding the incident on December 2, 2013. On that date, after months and years of regularly having to pick up this particular student, the Claimant suffered an aggravation of her pre-existing degenerative disc disease after a particularly difficult day when the student was showing no interest in walking with the gait trainer and kept dropping to the ground requiring the Claimant to assist him in getting back up.

In addition to Claimant's testimony, the weight of the medical evidence, particularly the opinions of Dr. Gellrick and Dr. Reims, supports this conclusion. Dr. Gellrick and Dr. Reims opined that the Claimant suffered an acute exacerbation of her degenerative disc disease as a result of this incident. The ALJ credits the opinions of these physicians, particularly Dr. Reims as the treating physician, over that of Dr. Cebrian, whose opinions in this case are found to be less persuasive.

The Claimant suffered a Compensable Work Injury on January 9, 2014

The Claimant also established by a preponderance of the evidence that on January 9, 2014 she suffered an acute exacerbation of her pre-existing low back condition and a shoulder/upper back/cervical injury. Again, it is not disputed that the Claimant suffered from severe, chronic low back pain for which has been treated with Tramadol, Percocet and Duragesic patches. However, the medical evidence shows that prior to December 2, 2013, Claimant's low back condition was stable.

Per the opinion of Dr. Gellrick, the Claimant suffered a worsening of her low back pain as a result of the December 2, 2013 incident. Dr. Gellrick concluded that for the most part, the pain subsided during the Claimant's holiday break. Dr. Gellrick then went on to conclude that the January 9, 2014 incident was the "straw that broke the camel's back." She opined that this incident caused a "marked worsening of condition" and concluded that the Claimant's current condition related to the January 9, 2014 incident. Specifically, Dr. Gellrick found that Claimant injuries to her low back and right shoulder as a result of the January 9, 2014 incident are the ongoing cause of the Claimant's worsened and aggravated condition. Dr. Reims, the Claimant's treating physician repeatedly concluded that it was probable that the Claimant had suffered a work related injury related to her low back and shoulder/upper back/cervical conditions.

Respondents, by way of Dr. Cebrian's testimony, contend that the Claimant did not report the January 9, 2014 incident to Dr. Reims on January 16, 2014 and argued that the Claimant's testimony regarding this incident is not credible. However, the ALJ credits the testimony of the Claimant regarding the accident on January 9, 2014. The Claimant's testimony does not contradict the Claimant's report to Dr. Reims on January 16, 2014. The Claimant's report indicated that the student frequently dropped to the ground and that these incidents had continued even after December 2, 2013. The incident on January 9, 2013 involved similar circumstances to previous incidents with the exception that on January 9th, the special needs student lifted the gait trainer off the ground. It is also noteworthy that prior to the appointment with Dr. Reims, the Claimant reported this incident to her supervisor both verbally and in writing. She was certainly aware of this incident when she went to Dr. Reims for the first time and her testimony that she was focused on the low back condition because that was the most painful at the time is reasonable and believable.

In addition to the Claimant's testimony, the weight of the medical evidence, particularly the opinions of Dr. Gellrick and Dr. Reims, supports this conclusion. Dr. Gellrick and Dr. Reims opined that Claimant suffered an acute exacerbation of her chronic conditions as a result of this incident. This ALJ credits the opinions of these physicians over that of Dr. Cebrian.

The mechanism of injury described by the Claimant during testimony at the hearing, which is consistent with her description to medical providers, is not contested and, it is a mechanism of injury that is consistent with the physical findings on examination. The injury was significant enough to require significant work restrictions.

Based upon the Claimant's uncontroverted and supported testimony and the medical records confirming the Claimant's physical condition, it is found that the Claimant suffered a compensable injury on January 9, 2014.

ORDER

It is therefore ordered that:

1. The Claimant's suffered a compensable injury on December 2, 2013.

2. The Claimant suffered a compensable injury on January 9, 2014.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1523 Sherman Street, 4th Floor, Denver, Colorado 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301, C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. W.C. 4-953-502

ISSUES

- Whether the Division independent medical examiner's permanent medical impairment rating has been shown by clear and convincing evidence to be erroneous, and if so, what the correct permanent medical impairment rating is.

- Whether the claimant's permanent partial disability award should be based on the statutory schedule, Section 8-42-107(2), or on a whole person medical impairment rating pursuant to Section 8-42-107(8).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant has been employed as a police officer for Employer for nine years.

2. His duties include patrolling Auraria college campus, controlling traffic, providing security and making arrests.

3. On March 29, 2014, Claimant sustained a compensable left shoulder injury in a motor vehicle accident. The claimant is right handed, so his injury was to his non-dominant arm.

4. Claimant was treated by Dr. Kalevik at HealthOne. An MRI revealed a partial thickness rotator cuff tear. Claimant was referred to orthopedic surgeon, Dr. Bajesh Bazaz who referred Claimant to physical therapy. When that did not alleviate Claimant's symptoms, Dr. Bazaz injected Claimant's shoulder. This was also unsuccessful. On July 17, 2014 Dr. Bazaz performed arthroscopic subacromial decompression and rotator cuff repair. Claimant returned to physical therapy from August 5, 2014 through December 16, 2014.

5. Claimant was off work for six weeks and then did modified duty for another month. At that point the Claimant asked for and received a full-duty release from Dr. Bazaz.

6. On December 16, 2014 Dr. Kalevik placed Claimant at maximum medical improvement and gave him a 3% upper extremity impairment. This converted to a 2% whole person rating. Respondent filed a final admission of liability dated January 8, 2015 wherein they admitted for the 3% upper extremity rating. Claimant objected to the final admission and requested a Division IME.

7. Dr. Greg Reichhardt was selected to perform the Division IME. He examined Claimant on April 27, 2015 and issued a report the same day. Dr. Reichhardt agreed with the date of maximum medical improvement but found that Claimant had an 8% left upper extremity rating as a result of the shoulder injury which converted to 5% as a whole person.

8. Respondents filed an application for hearing to overcome the Division IME doctor's opinion by clear and convincing evidence pursuant to §8-42-107 C.R.S. In his Response to Hearing Application, Claimant listed the issue of conversion of the extremity rating to a whole person.

9. Claimant testified at hearing that he suffered pain in his left shoulder blade. This is made worse when he directs traffic with his left arm or forcibly detains people, which require him to use his left arm in a forceful manner. Claimant testified that he has pain across the top of his shoulder and in to the front of his chest when he makes right turns while driving. Also, he experiences pain into the front of the left side of his chest when he patrols by bicycle because he has to lean forward onto the handlebars.

10. Pain diagrams filled out by Claimant when he was treated at HealthOne consistently showed pain on the top or back of the shoulder between the glenohumeral joint and the neck. This was consistent with Claimant's testimony at hearing. No pain diagram shows pain in Claimant's left arm.

11. Dr. Reichhardt stated in his DIME report that Claimant has pain over the lateral aspect of the shoulder, spasms across the shoulder blade, and aching over the anterior shoulder. He does not reference pain in the arm.

12. Based upon his range of motion testing, Dr. Reichhardt found that the Claimant had an 8% upper extremity impairment which converts to a 5% whole person impairment. The range of motion measurements taken by Dr. Reichhardt were more restrictive than those found by Dr. Kalevik.

13. Dr. Elizabeth Bisgard performed a Claimant's IME. She was largely in agreement with Dr. Reichhardt's rating. She stated that the range of motion measurements she took were slightly diminished compared to Dr. Reichhardt's. She also thought that Dr. Reichhardt should have given an additional impairment for subacromial decompression but she considered this only a difference of opinion.

14. As part of the IME exam, Dr. Bisgard had Claimant fill out a questionnaire and pain diagram. The diagram shows pain in the front of the left shoulder between the shoulder joint and the neck, and also pain in the same location on the torso but in the back of the shoulder by the shoulder blade.

15. Dr. Kathy McCrainie performed a Respondent's IME. In her July 15, 2015 report she stated under "Impression" that Claimant has left shoulder pain. She did not state the location of the pain in relation to the shoulder. However, in her conclusions she stated that Claimant should not receive a whole person impairment because his

pain does not extend beyond his arm at the shoulder. She agreed with both Dr. Reichhardt and Dr. Kalevik's ratings and said they were correct based on the range of motion demonstrated during their respective exams. She assigned a rating of 5% of the upper extremity. However, when outlining Claimant's current symptomatology, she stated that Claimant reports pain across the front of the shoulder and muscle spasms across the shoulder blade.

16. Dr. McCrainie's report did not include a questionnaire or pain diagram filled out by Claimant.

17. Claimant testified that he still has discomfort in his shoulder as he pointed to the top of his shoulder, the front of this shoulder, and his shoulder blade. Claimant testified that he has no pain in his arm and that his pain is limited to his torso.

18. The ALJ finds that the impairment rating opinions given by Drs. Kalevik, Reichhardt, Bisgard, and McCrainie are merely differences of opinion and do not rise to a level that would show by clear and convincing evidence that Dr. Reichhardt was incorrect in his DIME opinion.

19. The medical records and Claimant's testimony clearly show Claimant having pain in the torso portion of his shoulder in an area between the glenohumeral joint and the neck as well as in the front and back of his shoulder in the torso area and shoulder blade.

20. The ALJ finds that Respondent has not proven by clear and convincing evidence that DIME Dr. Reichhardt erred in his impairment rating.

21. The ALJ finds that the whole person rating of 5% provided by Dr. Reichhardt as the DIME doctor is the appropriate rating of Claimant's impairment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University*

Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming a Division IME

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. §8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Respondent contends that because each of the IME doctors recorded different active range of motion (AROM) numbers, the largest AROM must be used because lower numbers were the result of Claimant using suboptimal effort. The ALJ is not persuaded. First, no evidence was provided that Claimant used suboptimal effort in any exam or that any of the AROM numbers were invalid. Second, Respondent offers no law to support its theory and the ALJ likewise finds none.

In this case, differences in Claimant's ratings between Dr. Kalevik and Dr. Reichhardt do not show that either doctor necessarily erred in their examination and calculations. While Dr. Bisgard said she would have included a rating for the subacromial decompression, she also stated that it was simply a difference of opinion. Dr. McCrainie stated that both Dr. Kalevik and Dr. Reichhardt gave correct ratings based upon the ranges of motion shown during their respective exams. She gave a rating of 5% of the upper extremity which is between the ratings given by Dr. Kalevik and Dr. Reichhardt. There is no strong evidence that Dr. Reichhardt was incorrect in his rating and certainly nothing that would prove error by the requisite clear and convincing evidence required by §8-42-107 (8)(b)(III) C.R.S.

Permanent Impairment

The law concerning the conversion of upper extremity ratings to whole person ratings in cases of shoulder injuries is well established. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *See Langton v. Rocky Mountain Healthcare Corp.,* supra*; Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the "arm at the shoulder." The credible evidence shows that Claimant's shoulder joint is impaired and that this impairment extends into the torso area between the top of Claimant's arm and his neck, both in the front and the back. This is consistent in the pain diagrams he filled out before he was placed at maximum medical improvement or given a rating. Dr. Reichardt also found pain in those areas and that Claimant's scapula was in spasm. The scapula is not part of the arm. None of the pain diagrams designate pain in Claimant's arm; and, indeed, Claimant testified that he has no pain in his arm but that his pain is limited to the torso in an area also considered to be part of the shoulder.

Based upon the situs of Claimant's impairment being in the torso, evidenced by the pain and symptoms being limited to that area, the ALJ concludes that Claimant should receive a whole person rating pursuant to §8-42-107(8) C.R.S.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay permanent partial disability benefits based upon the 5% whole person rating given the Dr. Reichardt in his DIME report.

2. Interest at the rate of 8% shall be paid on all compensatory benefits not paid when due.

3. Any issues not decided by this order are reserved for future determination if necessary.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that the proposed dental treatment is reasonable and necessary, as well as related to his injury?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant suffered a compensable industrial injury on June 20, 2014 while working for Respondent-Employer. Claimant was employed in a maintenance position and was trimming trees when injured. He lost his footing while on a ladder, which kicked out and caused him to fall to the ground. Claimant fell anywhere from twenty (20) to thirty (30) feet to the ground. He lost consciousness as a result of the fall.

2. Claimant was transported by ambulance to Denver Health where he was treated for multiple injuries. This included injuries to his left wrist, left hip and ankle. The EMS Patient Care Report noted that Claimant was missing his left front tooth and there was dried blood on his upper lip.

3. In the Denver Health Provider Initial Assessment record from June 20th, Dr. Holst recorded that Claimant was "missing L incisor, loose R incisor". Claimant was also examined by Dr. Sorensen (resident) and Dr. Pieracci (attending) at Denver Health, who documented blood in the area of Claimant's mouth on the Trauma History and Physical Consultation form.

4. In the Pre-Anesthetic Evaluation there was a reference to a loose tooth on the left side and a note which said "missing (lost tooth with fall)". A loose tooth was also noted on the right side. The number 1 was circled for both teeth and these notations appear to refer to Claimant's upper teeth. Claimant's dentition was described as "poor" and the doctor discussed the increased risk of dental damage with Claimant because of condition of his teeth. No other loose teeth were identified in this record.

5. Claimant underwent a surgical repair of his left wrist and left leg fractures at Denver Health. He was discharged after the surgery. He then began treating at Concentra, the ATP for Respondents.

6. Claimant was seen by Michael Noce, PA-C at Concentra on August 27, 2014. At that time, the assessment was subtrochanteric fracture of left femur, open fracture of left distal radius, left calcaneal fracture and tooth missing. He was given a dental referral for the missing tooth.

7. Claimant testified that he was unaware that he had preexisting bone loss, periodontal disease or decayed teeth. Claimant testified that prior to the accident, he was missing one tooth on his lower jaw. He stated that he did not have jaw pain or any loose teeth on the lower jaw prior to the fall.

8. An Employer's First Report of Injury (E-1) was filed on or about June 30, 2014.

9. A General Admission of Liability was filed on or about August 1, 2014, in which Respondents admitted for wage and medical benefits.

10. Claimant was examined by Amanda Jozsa, DDS at Edgewater Modern Dentistry on September 10, 2014. At that time, a full dental examination was performed and full mouth x-rays were taken. Claimant testified that a mold was taken of his upper teeth at this appointment. The treatment note specified: "Perio Eval: Inflammation moderate Calculus severe Prognosis poor Perio Type III candidate." No evidence was submitted to the ALJ concerning Dr. Jozsa's qualifications or experience.

11. Dr. Jozsa issued a letter (undated) in which she noted that Claimant had a fall at work which caused one front tooth (#9) to fall out and also caused twelve of his teeth (in the upper and lower arch) to become loose [Exhibit 7, p. 44]. Dr. Jozsa noted that this patient had advanced periodontal disease and his teeth had a poor prognosis. Dr. Jozsa stated that the accident caused Claimant's teeth to become mobile, which caused bacteria to attack the teeth and resulted in further deterioration. Recommended treatment was extraction of remaining teeth and implant retained dentures. Claimant testified that he was not provided with any other treatment options.

12. Additional records from Concentra (covering the period from 10/15/14 through 1/5/15) were submitted behalf of Claimant. The ALJ notes that these medical records concerned Claimant's injuries to the left wrist/ left leg (ankle and foot) and also documented the dental referral. However, these records did not address the issue of causation or Claimant's need for dental treatment.

13. A review of Claimant's medical and dental records (including x-rays) was conducted on behalf of Respondents by Joseph Tomlinson, DMD, who issued a report dated December 8, 2014. Dr. Tomlinson did not examine the Claimant. Dr. Tomlinson practiced dentistry and treated patients from 1973 to 2012. Dr. Tomlinson was qualified as an expert in dentistry and periodontal disease. Dr. Tomlinson testified that he worked for Nadent which is a national company that reviews dental trauma cases for insurance companies to determine whether treatment is necessary and related to the traumatic incident[1].

[1] Claimant argued that there was evidence of Dr. Tomlinson's bias in the reference in his CV which stated: "Of all the claims reviewed by Nadent consultants, about one-fourth are found to be either partially, or fully acceptable… For the remaining claims reviewed by Nadent consultants, a significant amount of the treatment submitted is determined to be for pre-existing conditions, not causally related to the accident in question." From Dr. Tomlinson's CV, it is clear that a majority of Dr. Tomlinson's work at

14. Dr. Tomlinson erroneously[2] stated in his report that no bleeding about the mouth area was noted in any of the medical records submitted to him. Dr. Tomlinson felt that the evaluation of Claimant which was done was missing several things, including periodontal probing and measurements of mobility; which he described as a normal part of an evaluation of someone with advanced periodontal disease. Dr. Tomlinson observed that the probing and measurement should be done for every tooth when this treatment was being considered. Dr. Tomlinson noted that Claimant waited nearly three months to visit a dentist.

15. Dr. Tomlinson testified that Claimant had a number of preexisting conditions in his mouth, including advanced bone loss in the upper and lower anterior teeth and several posterior teeth; that he was missing teeth numbers 20, 24 and 30 in the lower arch; and a chronic infection was present. He had advanced dental decay in tooth number 1. Dr. Tomlinson concluded that Claimant had advanced periodontal disease. This was shown in the dental x-rays, along with the photographs of Claimant's teeth. Dr. Tomlinson noted that a substantial amount of calculus (also called tartar) was present, which resulted in the bone loss and mobility of Claimant's teeth. The mobility in Claimant's teeth was present long before the accident and was associated with the bone loss. Dr. Tomlinson described the process where tartar pushed the gum tissue back, which caused infection and bone loss.

16. Dr. Tomlinson also opined that there was a lack of serious injury to the lower teeth, as evidenced by the medical records which referred to two loose teeth in the upper jaw.

17. Dr. Tomlinson concluded that it was highly probable that tooth #9 was missing prior to the accident. The contour of the bone at this site was evidence that tooth #9 was missing before the day of the incident in question.

18. Dr. Tomlinson testified that Claimant may have aggravated the prior condition of teeth #7 and #8, causing these to be more mobile than before. His report went on to say that tooth #7 and #8 "were loosened more than they were previously as a result of a traumatic impact, although the x-ray is more consistent with an impact that occurred just a few days before the x-ray images were taken on 9/1/14, not 80 days earlier". Bone loss around #7 and #8 was described as significant, with 70% occurring before the subject accident. Dr. Tomlinson opined that it was reasonable to extract those teeth.

Nadent was done on behalf of insurance carriers and the ALJ has considered this. However, the ALJ declines to draw the blanket inference that Dr. Tomlinson's opinions would only be favorable to insurance carriers and therefore all of his testimony was unreliable. Indeed, Dr. Tomlinson found that the treatment rendered to Claimant's upper jaw was reasonable and necessary, even though his periodontal disease was preexisting. The ALJ has considered Dr. Tomlinson's employment with Nadent, as well as his professional experience when determining what weight to give his opinions.

[2] Dr. Tomlinson testified at hearing and confirmed that this was an error in his report. Dr. Tomlinson also corrected another error in his report in the treatment section which he referred to tooth #19, which he corrected to tooth #20. [Exhibit A, p. 2]

19. Dr. Tomlinson concluded that the only treatment causally related to the subject accident was extraction of teeth #7 and #8 and only 50% of that treatment was related. He recommended a removable partial denture or six-tooth bridge, provided that nearby teeth #6 and #11 had healthy enough bone support.

20. Dr. Tomlinson opined that several teeth in the lower jaw had significant bone loss which required extraction. Dr. Tomlinson said tooth #1 required extraction because of decay; teeth #23-26 appeared to need extraction due to pre-existing bone loss caused by periodontal disease. However, Dr. Tomlinson believed that a number of the lower teeth could be retained. Dr. Tomlinson noted that teeth #20 and 30 were missing and along with #23-26 would benefit from a lower removable partial denture. Dr. Tomlinson stated that the treatment required by the lower jaw was completely unrelated to the incident. Dr. Tomlinson testified that prior to any further treatment, Claimant needed to be evaluated by a periodontist. The inference drawn from this expert testimony was that less expensive options were not fully considered by the treating dentist(s).

21. In March 2015, Respondents authorized the treatment proposed by Dr Jozsa at Edgewater Modern Dentistry for Claimant's upper teeth pursuant to the W.C.R.P. This was confirmed by adjuster Renessa Jensen on March 11, 2015 [Exhibit 7, page 43] and the ALJ concludes that the adjuster relied on Dr. Tomlinson's report when this treatment was authorized. Claimant confirmed that he had the dental surgery on his upper jaw in March, 2015, which included implants.

22. In the treatment notes from Edgewater Modern Dentistry, dated 3/27/15, the consulting dentist (Ryan Reyes) noted as the diagnosis: "gen severe chronic periodontitis, et: bact plaque: tx; all on 4 for max (mandible in the future)".

23. Claimant submitted a letter to his attorney of record from George Yash, operations manager (presumably from Edgewater Modern Dentistry), citing Dr. Jozsa's report. [Finding of Fact No. 11]. He stated that the proposed treatment of the insurance carrier in no way offered adequate care and stated Dr. Jozsa prognosis for a bridge was unacceptable. No information concerning Mr. Yash's qualifications was presented to the ALJ.

24. Medical records from Albert Hattem, M.D. were admitted at hearing. In his 4/3/15 report, Dr. Hattem referred to Claimant's dental trauma. The note said: status post denture fabrication currently being monitored by a dentist". Dr. Hattem did not have the dental records and made no conclusions with regard to this aspect of Claimant's injury.

25. Claimant testified that the upper portion of his mouth was doing well with the implants. He was requesting the proposed dental treatment. Claimant testified that he still has problems with his lower jaw and cannot eat hard foods due to the pressure on his teeth. Claimant said that his lower teeth have jagged edges and he feels pressure on the jaw, which causes pain.

26. The Claimant failed to prove it is more probably true than not that the fall caused the underlying periodontal disease in his lower jaw to become symptomatic to the point that it required treatment. The ALJ finds that the fall caused an injury to Claimant's upper jaw, which required treatment.

27. The ALJ credits the opinion of Dr. Tomlinson, who noted that Claimant's lower molar teeth (#20 and #30) were missing prior to the accident and, along with teeth #23-26, Dr. Tomlinson felt these teeth would benefit from by being replaced with a lower removable denture. Significantly, Dr. Tomlinson opined this was unrelated to the accident. Claimant's testimony that he was missing one tooth prior to the fall establishes that there were issues in the lower jaw prior to his industrial injury. In fact, there is evidence that he was missing other teeth in the lower jaw prior to June 20, 2014. Furthermore, there was no reference in the Denver Health records that teeth numbers 20 and 30 were lost as a result of the fall. The ALJ finds that the evidence supports the conclusion that the loss of these teeth was the result of Claimant's periodontal disease.

28. The ALJ also credits the explanation of periodontal disease provided by Dr. Tomlinson at hearing. Dr. Tomlinson explained the progression of periodontal disease and how it was the primary reason Claimant required treatment for teeth in the lower jaw. Thus, Claimant's need for on his lower jaw was the result of preexisting periodontal disease, not the industrial injury.

29. The ALJ is not persuaded by the opinion of Dr. Jozsa concerning treatment to the lower jaw. Dr. Jozsa's explanation that the fall loosened multiple teeth in the lower jaw was not supported by the Denver Health medical records. Dr. Jozsa's opinion also did not address the possibility that Claimant's teeth on the lower jaw became mobile as a result of the natural progression of the preexisting periodontal disease, irrespective of the subject fall. Further, Dr. Jozsa's conclusion that the trauma to the lower jaw caused bacteria to attack the teeth and led to further deterioration was rebutted by Dr. Tomlinson.

30. Evidence and inferences inconsistent with these findings are not credible and persuasive. Because the Claimant failed to prove a causal nexus between the injury and the requested treatment, the ALJ need not address the other issues raised by the parties with respect to this claim.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the

rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Medical (Dental) Benefits

Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, surgical, dental, nursing, and hospital treatment, medical, hospital and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Under this provision of the Act, Claimant has the burden of proving his/her entitlement to medical benefits. If Claimant meets this burden, Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The question in the case at bench has three parts; first, what was the scope of Claimant's injury to his mouth. Second, to what degree was the need for the proposed dental treatment causally related to the admitted industrial injury, as opposed to the pre-existing periodontal disease. Third, was the proposed treatment reasonable and necessary.

Claimant contended first that his need for dental treatment, including tooth extraction and implants, was caused by his injury. Claimant alleged that he injured his mouth in the 6/20/14 admitted industrial injury, which aggravated and/or accelerated his pre-existing periodontal disease. In this regard, he relied on the opinions of the treating dentists at Edgewater Modern Dentistry (Dr. Josza in particular). Second, he averred

that the proposed dental treatment was reasonable and necessary to cure the effects of his injury.

As a starting point, the ambulance records and medical records from Denver Health admitted at hearing established that Claimant suffered trauma to his mouth as a direct result of the work injury. This was a significant fall from height that injured the Claimant as documented by the Denver Health records. Specifically, the 6/20/14 records described "poor dentition, missing lost tooth after the fall on the left and loose right tooth". There was also the presence of blood in the area of Claimant's mouth which was further evidence of trauma. (Two references to blood in the mouth area are found in the Denver Health records.) The ALJ notes that the trauma appeared to be localized in the upper jaw, where the loose teeth were found. This was confirmed by the records for Denver Health.

Respondents did not dispute these facts and a logical inference derived from the evidence is that a fall from 20 to 30 feet in the air could have caused those injuries to Claimant's mouth. Put another way, the ALJ concludes that Claimant suffered an injury to his mouth in this case. Thus, there is no question that Respondents are liable to the extent that the industrial injury aggravated or accelerated his dental condition and led to the need for dental treatment in this case.

In this regard, while the ALJ concluded that Claimant's fall caused an injury to his mouth, the next question is whether he suffered an injury to the teeth in his lower jaw necessitating the treatment at issue here. The records submitted at hearing do not establish that Claimant lost teeth in his lower jaw as a result of the fall, nor was there evidence of loose teeth in the immediate aftermath. The Denver Health records do not document multiple loose teeth in the lower jaw. In fact, these records document loose teeth in the upper jaw. Dr. Tomlinson also opined that there was no treatment to the teeth in the lower jaw in the acute phase of Claimant's injury, which also tends to corroborate this fact. On the other hand, Claimant testified that his teeth were loose after he fell. In addition, Dr. Jozsa opined that the fall loosened the teeth, which allowed bacteria to damage the teeth in the lower jaw further.

Thus, there is a *bona fide* dispute as to whether the fall caused the teeth in the lower jaw to be loose. After considering all of the evidence, the ALJ is unable to conclude that the fall caused multiple teeth on the lower jaw to become loose. The ALJ is also unable to conclude that the fall caused the mobility in these teeth, as opposed to the periodontal disease. Claimant has the burden of proof on this issue and has failed to establish by a preponderance of the evidence that the fall injured his teeth in the lower jaw, as opposed to the periodontal disease. Where Claimant has not met his burden, the claim for medical (dental) benefits fails. As noted *infra,* the ALJ also concludes that Claimant has failed to meet his burden of proof on causation.

Causation

The inquiry then turns to the issue of what treatment Claimant requires as a result of the admitted injury, as opposed to the preexisting periodontal disease. This is the overarching issue in the case and the ALJ considered the competing opinions of the dental experts. Expert opinion is neither necessary nor conclusive on the issue of causation. However, where expert opinions are presented it is for the ALJ to assess their weight and credibility. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). The question of whether the Claimant has proven causation is one of fact for resolution by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 1999).

Dr. Tomlinson identified Claimant's pre-existing periodontal disease, which caused substantial bone loss as the primary reason for his need for treatment. Dr. Tomlinson noted that there was substantial calculus build-up, which caused Claimant's gums to recede. This in turn led to infection and bone loss, which caused Mr. Sullivan's teeth to be mobile. The ALJ finds this opinion to be more persuasive than Dr. Jozsa's. In his testimony, Dr. Tomlinson referred specifically to the photographs of Claimant's teeth, providing a detailed explanation of how periodontal disease progressed to the Court. He also referred to the x-rays when offering his opinion that the need for dental treatment on the lower jaw was not related to the fall. Rather, Dr. Tomlinson felt that this was due to preexisting bone loss and advanced periodontal disease.

On the other hand, Dr. Jozsa provided only a conclusory opinion and while she referred to the preexisting periodontal disease, her explanation was that the fall caused the teeth to become mobile, which in turn led to bacteria attacking the teeth. The ALJ did not find this opinion to be credible, particularly where there was evidence of infection directly resulting from the periodontal disease. Dr. Jozsa also did not address which teeth were missing before the accident. From the photographs, as well as in x-rays of Claimant's teeth, it is clear that there was a significant amount of tartar (calculus) around the teeth, which was not noted by Dr. Jozsa. Dr. Jozsa's records did not refer to the x-rays/photographs, nor did she address the preexisting disease in any detail. Dr. Jozsa did not address the cause of the bone loss in the lower jaw or provide information any opinion on apportionment.

On the other hand, Dr. Tomlinson's report and testimony addressed all of these issues. Based upon the evidence, the ALJ draws the logical inference that Claimant's poor dentition caused bacteria to be present and bone loss to occur; all of which occurred prior to the fall. Claimant's need for treatment, therefore, came from the preexisting periodontal disease, not his fall.

In addition, Dr. Tomlinson also offered the opinion that Claimant had several teeth on the lower jaw which did not require extraction. Dr. Tomlinson proffered a removable partial denture as an alternative treatment. In response, Claimant submitted a letter from Edgewater Modern Dentistry, authored by the office manager whose qualifications were unknown and simply cited Dr. Jozsa's prior report to conclude that removable denture was unreasonable. Without further explanation, the Dr. Josza's

report is insufficient to prove that Claimant's need for treatment on his lower jaw was a result of the injuries sustained in the fall.

As determined in Findings of Fact Numbers 15 through 20 and 27 through 29, the Claimant failed to prove it is more probably true than not that the fall on June 20, 2014 caused the condition in his lower jaw, which required the proposed dental treatment. There was no dispute that Claimant's dentition was poor, which caused deterioration in both his upper and lower jaw. He had significant periodontal disease prior to this accident. This was documented in the Denver Health records. The ALJ concludes that this preexisting condition was the substantial factor in Claimant's need for treatment. Dr. Tomlinson's testimony was directly on point and confirmed that Claimant's periodontal disease was primary factor in his need for treatment. In this regard, Dr. Tomlinson identified the extensive tartar around Claimant's teeth as the cause of bacteria and the migration of the teeth, which the ALJ finds persuasive. Even though there were errors in Dr. Tomlinson's report which somewhat impacted his credibility, his explanation as to the course of Claimant's periodontal disease was credible. This contrasted with the treating dentist, Dr. Jozsa, whose opinion did not establish a causal connection between the industrial injury and proposed dental treatment. Accordingly, the ALJ finds that Claimant's need for implant retained dentures was not caused by the subject accident.

Because the ALJ has determined that the industrial injury did not cause Claimant's need for treatment, the issue of whether Dr. Jozsa/Edgewater Modern Dentistry's proposed treatment was reasonable and necessary is not reached.

ORDER

It is therefore ordered that:

1. Claimant's request for dental treatment to his lower jaw is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2015

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he has received was authorized, reasonable and necessary to cure or relieve the effects of a work-related injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 23, 2014 until terminated by statute.

5. Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant is a 46 year old male. During the summer of 2013 Claimant lived in San Diego, California with his wife and daughter. He was unemployed and sent a number of resumes to companies in Colorado seeking work in financing in the automobile industry. He sent one of the resumes to Employer but did not initially obtain a position.

2. On October 17, 2013 Claimant was hired to work as a Branch Manager for JD Byrider in Denver, Colorado at a salary of $47,000 per year. Claimant moved to Denver to live with his mother while his wife and daughter remained in San Diego. Claimant also followed-up with Employer about a job opportunity.

3. Employer is a corporation that includes an automobile dealership and an automobile finance company. Employer is located in Colorado Springs, Colorado. Mike Bonicelli is the owner of Employer.

4. In late October 2013 Mr. Bonicelli determined that the General Manager of the finance company was not working out. He contacted Claimant about the position. Mr. Bonicelli and his wife Sharon Bonicelli subsequently had lunch with Claimant and his mother. Following the lunch meeting Mr. Bonicelli offered Claimant the position of

General Manager of Employer's finance company. Claimant accepted the position and was scheduled to begin work on November 18, 2013.

5. On November 18, 2013 Claimant reported to work for Employer and completed paperwork. The paperwork reflected that Claimant would earn a salary of $45,000 per year but did not include any benefits. Claimant then began work for Employer. On the following day Claimant resigned his position with J.D. Byrider.

6. Claimant moved from Denver to Colorado Springs to be closer to his place of employment. He told Ms. Bonicelli that his wife was very unhappy because he had not found a place to live in Colorado Springs. Claimant's wife refused to move from San Diego to Colorado Springs to live in a motel.

7. Ms. Bonicelli personally owned a home in the Broadmoor area of Colorado Springs that was unoccupied and for dale. The home was 4,000 square feet, had five bedrooms and was located in an excellent school district. Ms. Bonicelli told Claimant that she had previously rented the house at a reduced rate in exchange for the renter acting as a caretaker of the home. The previous renter had no affiliation with Employer. The renter furnished the house, kept it in staged condition for showings and maintained the house. In early December 2013 Ms. Bonicelli offered Claimant the same arrangement. Ms. Bonicelli's offer of rental housing at a reduced rate was neither an employment inducement nor benefit.

8. On December 17, 2013 Claimant and Ms. Bonicelli executed a Residential Lease Agreement for the Broadmoor house. The terms of the lease reflected a month-to-month tenancy and written termination of the lease by either party 10 days before the end of a monthly period. The Agreement also provided that Claimant would maintain the house in a staged condition devoid of clutter for showings.

9. By the third week of January 2014 Claimant had not moved his furniture from San Diego to Colorado Springs in order to properly stage the property for showings. Claimant, his wife and his daughter were living on boxes and sleeping on air mattresses. Claimant approached Mr. Bonicelli stating that his wife was going to leave him if he did not do something about the furniture. Mr. Bonicelli loaned Claimant $4,000 to move the furniture to Colorado.

10. On February 25, 2014 Ms. Bonicelli's realtor notified her stating that Claimant had declined a house showing. It was not the only showing that Claimant had refused. The Bonicelli's subsequently scheduled a time to inspect the Broadmoor house and examine the furniture. The inspection went poorly. There was a paucity of furniture in the house and the property was not in staged condition. The refrigerator was dirty, there were dog feces on the basement carpet and Claimant's daughter's room was completely unfurnished.

11. Based on the inspection Ms. Bonicelli concluded that Claimant was not complying with the Lease Agreement and decided to terminate the Agreement. On February 28, 2014 Ms. Bonicelli signed a Notice of Termination of Lease. Mr. Bonicelli

delivered the document to Claimant on March 1, 2014 at work. Because Claimant was on the telephone Mr. Bonicelli left the Lease Termination document on his desk. The lease was to terminate effective March 31, 2015.

12. During March 2014 Claimant told Mr. Bonicelli that he was not earning enough money. Mr. Bonicelli subsequently scheduled a performance review and offered Claimant a $3,000 raise to $48,000 annually. Claimant declined the offer. On March 31, 2014 Claimant e-mailed Mr. Bonicelli seeking a $15,000 raise to $60,000 per year plus a $4,000 bonus. Mr. Bonicelli informed Claimant that he could not meet the request.

13. Based upon Claimant's reaction to the salary dispute, Mr. Bonicelli believed Claimant was quitting his job and had an assistant prepare exit paperwork. On March 31, 2014 Mr. Bonicelli drove to Employer's finance office to have Claimant complete the paperwork. Claimant responded that he was not quitting and would not move out of Ms. Bonicelli's Broadmoor house. Mr. Bonicelli told Claimant to leave work for the day and return on the following day with a decision about how he would proceed.

14. On April 1, 2014 Claimant contacted Mr. Bonicelli and told him he was not going to return to work until the compensation situation was resolved. Later in the morning Claimant met with Mr. Bonicelli and Office Manager Chrystal Farr in a conference room at Employer's automobile dealership. Claimant and Mr. Bonicelli negotiated regarding compensation. Claimant reiterated that he was worth his salary demands and Mr. Bonicelli maintained that Employer could not meet his demands. Because the negotiations failed Claimant asked to be fired, but Mr. Bonicelli declined and told Claimant to return to work. Claimant responded that there was a hostile work environment, refused to work until he consulted a lawyer and left the premises.

15. Mr. Bonicelli consulted his attorney about Claimant's employment situation. The attorney recommended terminating Claimant. Mr. Bonicelli then drove to Employer's finance company to apprise Acting Manager Heidi Bissitt about Claimant's employment. Shortly after Mr. Bonicelli arrived Claimant reached the facility. Mr. Bonicelli then terminated Claimant's employment.

16. On April 4, 2015 Claimant applied for a new position with Lobel Financial. Approximately one week later Claimant experienced recurrent appendicitis symptoms and visited an emergency room. Claimant was hospitalized and underwent several surgical procedures. He underwent a GI procedure for chronic diarrhea and chronic diffuse abdominal pain, a colonoscopy and an appendectomy. The record reveals that before Claimant's hospitalization he suffered a number of mental and physical conditions prior to and during his employment with Employer. He suffered significant back pain, anxiety, chronic abdominal issues and excruciating headaches. Claimant received multiple medications for his conditions.

17. On April 17, 2014 Claimant was hired by Lobel and began working in the Denver office. However, Lobel soon granted Claimant's transfer request to its Seattle,

Washington location. The transfer became effective on May 12, 2014. In the meantime, Claimant continued to work in Lobel's Denver office.

18. On May 10, 2014 Claimant flew to Washington to begin working in Lobel's Seattle office. On May 11, 2014 Claimant visited the emergency department at St. Francis Hospital in Seattle for recurrent abdominal issues, nausea and diarrhea. Claimant returned to work at Lobel on May 12, 2014, but he left at 10:00 a.m. to return to the hospital. He was ultimately hospitalized between May 12, 2014 and May 22, 2014. While hospitalized, Claimant tested positive for a C-Diff infection. Although Claimant was discharged from the hospital on May 22, 2014, he was subsequently hospitalized at Oregon Health Sciences University (OHSU) in Portland, Oregon.

19. On May 30, 2014 Claimant lost his job with Lobel because of his prolonged absence from work as a result of his hospitalizations. Claimant negotiated a settlement agreement with Lobel as part of his employment separation.

20. After his termination from Lobel Claimant returned to Colorado. On July 2, 2014 Claimant began treatment at the Arapahoe/Douglas Mental Health Network. He primarily received care and treatment from Judith Olin, LCSW and Clinical Psychiatrist Ergi Gumusaneli, M.D.

21. On July 8, 2014 Claimant filed a Claim for Workers' Compensation. He asserted that he suffered mental stress because Employer reneged on the employment agreement. He suffered physical trauma resulting in four hospitalizations in two months.

22. Claimant initially visited Dr. Gumusaneli on July 17, 2014. Dr. Gumusaneli noted that Claimant presented with many depressive, anxiety and OCD symptoms that began after he was terminated from employment with Employer around March 2014. Claimant explained that he moved his family from San Diego to Colorado because of a "great offer" that included housing. Although his employment in Colorado Springs initially went well, he was subsequently evicted and terminated from employment. Dr. Gumusaneli remarked that Claimant suffered a number of mental and physical issues that produced numerous hospitalizations and surgery. Dr. Gumusaneli explained that Claimant initially may have suffered from an adjustment disorder from the loss of his job but developed major depressive symptoms, anxiety and OCD. He was uncertain whether Claimant truly struggled with OCD or whether his symptoms were related to his numerous losses. Dr. Gumusaneli suspected that treatment would be considered successful when Claimant could again provide for his family. Claimant subsequently received follow-up counseling and medications from Dr. Gumusaneli through July and August 2014.

23. On September 18, 2014 Claimant underwent an independent psychiatric evaluation with Psychiatrist Stephen A. Moe, M.D. Claimant reported to Dr. Moe that Mr. Bonicelli created a tense working environment by berating and criticizing employees. He also explained the he had been misled about the nature of his rental agreement for the Broadmoor house. Claimant remarked that, when he accepted his

job with Employer, he understood that he and his family could occupy the property for at least one year. When Mr. Bonicelli terminated the lease by dropping off an envelope on his work desk on a Saturday morning, Claimant felt betrayed and emotionally distressed. Claimant also recounted the circumstances surrounding his termination from employment and subsequent eviction from the Broadmoor house. He commented that he soon obtained a position with Lobel earning $15,000 more in annual salary than he had with Employer. However, he developed a myriad of physical and psychological problems that he attributed to Mr. Bonicelli's actions and his work for Employer.

24. Considering §8-41-301(2)(a), C.R.S., Dr. Moe evaluated the cause of Claimant's physical and psychological symptoms. He considered the following four potential causes of Claimant's psychiatric symptoms and impairment: (1) verbal abuse/bullying by Mr. Bonicelli; (2) reneging of promises by Mr. Bonicelli; (3) Claimant's termination from employment and (4) the impact of physical symptoms caused by work-related stress. Dr. Moe disagreed that Claimant's emotional stress during his employment with Employer was primarily caused by his job demands. He thus concluded that it was highly doubtful that Claimant met the legal criteria for a work-related mental stress claim.

25. On December 8, 2014 Dr. Moe issued a supplemental report. He reviewed additional medical and employment records. Dr. Moe maintained that Claimant failed to satisfy the criteria to establish a mental stress claim pursuant to §8-41-301(2)(a), C.R.S.

26. Claimant testified at the hearing in this matter. He explained that his agreement with Employer included a $45,000 per year salary and the reduced monthly rent of $700.00 on the Broadmoor house. Claimant stated that he would not have accepted the position with Employer if the discounted rent had not been part of the employment agreement. He associated his mental stress claim with the termination of his lease agreement on the Broadmoor property. Claimant recounted a myriad of physical and psychological conditions that occurred after the lease was terminated and his subsequent dismissal from employment

27. Dr. Gumusaneli testified at the hearing in this matter. He stated that he is a clinical psychiatrist who saw Claimant on five occasions between July 2014 and August 2014. He diagnosed Claimant with depression and anxiety. The conditions were caused by Claimant's loss of the Broadmoor house and termination of his job with Employer. However, Dr. Gumusaneli admitted he is not familiar with the mental stress statute and lacks training on how to perform causation evaluations. He acknowledged that he was unaware of any of the other stressors that impacted Claimant. Dr. Gumusaneli also noted that he did not know whether Claimant suffered any psychologically traumatic event generally outside a worker's usual experience and admitted that losing a job is an event common to all fields of employment.

28. On July 22, 2015 Dr. Moe testified through an evidentiary deposition in this matter. He reiterated that Claimant failed to meet the legal criteria for a work-related mental stress claim. Dr. Moe explained that in order to demonstrate a

compensable mental stress claim pursuant to §8-41-301(2)(a), C.R.S. a claimant must establish the following: (1) he experienced significant mental stress at work; (2) it was the type of mental stress that qualifies for a claim; (3) the stress gave rise to symptoms in the first place; and (4) the significant symptoms were largely due to the work stress. Dr. Moe maintained that Claimant's mental stress claim failed when considered under the preceding criteria. Moreover, he noted that there was an attenuated temporal relationship between Claimant's traumatic events and the necessity of psychiatric impairment. Claimant had physical and emotional symptoms before he began working for Employer, physical and emotional symptoms before the notice of eviction and physical and emotional issues before his employment termination.

29. Dr. Moe determined that a loss of employment benefits and a termination from employment are events common to all fields of employment. They are specifically excluded as mental stress claims pursuant to §8-41-301(2)(a), C.R.S. Furthermore, Dr. Moe remarked that neither the lease termination nor the employment termination appeared to be done in bad faith.

30. Claimant has failed to establish that it is more probably true than not that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. However, Claimant's mental stress claim fails for numerous reasons including that the lease arrangement was not part of the employment agreement, his contentions are specifically excluded as bases for mental stress claims pursuant to statute and the persuasive testimony of Dr. Moe.

31. The record reveals that Claimant's reduced rental rate of the Broadmoor property did not constitute a work-related benefit. Claimant explained that his agreement with Employer included a $45,000 per year salary and reduced monthly rent of $700.00 on the Broadmoor house. Claimant stated that he would not have accepted the position with Employer if the discounted rent had not been part of the employment agreement. However, Ms. Bonicelli credibly explained that she had previously rented the house at a reduced rate in exchange for the renter also acting as a caretaker of the home. The previous renter had no affiliation with Employer. The renter furnished the house, kept it in staged condition for showings and maintained the house. In early December 2013 Ms. Bonicelli offered Claimant the same arrangement. On December 17, 2013 Claimant and Ms. Bonicelli executed a Residential Lease Agreement for the Broadmoor house. The terms of the Agreement reflected a month-to-month tenancy and written termination of the lease by either party 10 days before the end of a monthly period. The Agreement also provided that Claimant would maintain the house in a staged condition with no clutter for showings. The circumstances and timing of the lease arrangement reveal that the reduced rental rate was neither an inducement nor benefit of Claimant's employment agreement with Employer.

32. The mental stress statute specifically provides that a mental impairment shall not be considered to arise out of and in the course of employment if it is based on "a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion,

termination, retirement, or similar action taken in good faith by the employer." Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. Even if Claimant's reduced rent was part of the employment agreement with Employer, his contentions are common to all fields of employment and similar to the enumerated statutory preclusions for a mental stress claim. Because Claimant's bases for his mental stress claim are precluded by statute, his assertion fails.

33. Dr. Moe's persuasive testimony demonstrates that Claimant has failed to establish a mental stress claim. Initially, Dr. Gumusaneli diagnosed Claimant with depression and anxiety. He explained that the preceding conditions were caused by Claimant's loss of the Broadmoor house and termination of his job with Employer. However, Dr. Gumusaneli admitted he is not familiar with the mental stress statute and lacks training on how to perform causation evaluations. He acknowledged that he was unaware of any of the other stressors that impacted Claimant. Dr. Gumusaneli also noted that he did not know if Claimant had any psychologically traumatic event generally outside a worker's usual experience and admitted that losing a job is an event common to all fields of employment. In contrast, Dr. Moe persuasively concluded that Claimant failed to meet the legal criteria for a work-related mental stress claim. Dr. Moe explained that in order to demonstrate a compensable mental stress claim pursuant to §8-41-301(2)(a), C.R.S. a claimant must establish the following: (1) he experienced significant mental stress at work; (2) it was the type of mental stress that qualifies for a claim; (3) the stress gave rise to symptoms in the first place; and (4) the significant symptoms were largely due to the work stress. Dr. Moe maintained that Claimant's mental stress claim failed when considered under the preceding criteria. Moreover, he noted that there was not a good temporal relation between Claimant's traumatic events and the development of psychiatric impairment. Claimant had physical and emotional symptoms before he began working for Employer, physical and emotional symptoms before the notice of eviction and physical and emotional issues before his employment termination. Finally, a loss of employment benefits and a termination from employment are events common to all fields of employment. They are specifically excluded as mental stress claims pursuant to statute. Dr. Moe remarked that neither the lease termination nor the employment termination appeared to be done in bad faith. Based on the determination that the reduced rent for the Broadmoor house was not part of the employment agreement, the specific statutory exclusions of Claimant's contentions as the bases for a mental stress claim and the persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a General Manager for Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical

symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAP, Jan. 6, 2009).

6. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a permanent mental impairment from an accidental injury arising out of and in the course and scope of his employment. Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. However, Claimant's mental stress claim fails for numerous reasons including that the lease arrangement was not part of the employment agreement, his contentions are specifically excluded as bases for mental stress claims pursuant to statute and the persuasive testimony of Dr. Moe.

8. As found, the record reveals that Claimant's reduced rental rate of the Broadmoor property did not constitute a work-related benefit. Claimant explained that his agreement with Employer included a $45,000 per year salary and reduced monthly rent of $700.00 on the Broadmoor house. Claimant stated that he would not have accepted the position with Employer if the discounted rent had not been part of the employment agreement. However, Ms. Bonicelli credibly explained that she had

previously rented the house at a reduced rate in exchange for the renter also acting as a caretaker of the home. The previous renter had no affiliation with Employer. The renter furnished the house, kept it in staged condition for showings and maintained the house. In early December 2013 Ms. Bonicelli offered Claimant the same arrangement. On December 17, 2013 Claimant and Ms. Bonicelli executed a Residential Lease Agreement for the Broadmoor house. The terms of the Agreement reflected a month-to-month tenancy and written termination of the lease by either party 10 days before the end of a monthly period. The Agreement also provided that Claimant would maintain the house in a staged condition with no clutter for showings. The circumstances and timing of the lease arrangement reveal that the reduced rental rate was neither an inducement nor benefit of Claimant's employment agreement with Employer.

9. As found, the mental stress statute specifically provides that a mental impairment shall not be considered to arise out of and in the course of employment if it is based on "a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer." Claimant's contention that he suffered from a mental impairment is predicated upon his eviction from the Broadmoor rental property and termination of employment. Even if Claimant's reduced rent was part of the employment agreement with Employer, his contentions are common to all fields of employment and similar to the enumerated statutory preclusions for a mental stress claim. Because Claimant's bases for his mental stress claim are precluded by statute, his assertion fails.

10. As found, Dr. Moe's persuasive testimony demonstrates that Claimant has failed to establish a mental stress claim. Initially, Dr. Gumusaneli diagnosed Claimant with depression and anxiety. He explained that the preceding conditions were caused by Claimant's loss of the Broadmoor house and termination of his job with Employer. However, Dr. Gumusaneli admitted he is not familiar with the mental stress statute and lacks training on how to perform causation evaluations. He acknowledged that he was unaware of any of the other stressors that impacted Claimant. Dr. Gumusaneli also noted that he did not know if Claimant had any psychologically traumatic event generally outside a worker's usual experience and admitted that losing a job is an event common to all fields of employment. In contrast, Dr. Moe persuasively concluded that Claimant failed to meet the legal criteria for a work-related mental stress claim. Dr. Moe explained that in order to demonstrate a compensable mental stress claim pursuant to §8-41-301(2)(a), C.R.S. a claimant must establish the following: (1) he experienced significant mental stress at work; (2) it was the type of mental stress that qualifies for a claim; (3) the stress gave rise to symptoms in the first place; and (4) the significant symptoms were largely due to the work stress. Dr. Moe maintained that Claimant's mental stress claim failed when considered under the preceding criteria. Moreover, he noted that there was not a good temporal relation between Claimant's traumatic events and the development of psychiatric impairment. Claimant had physical and emotional symptoms before he began working for Employer, physical and emotional symptoms before the notice of eviction and physical and emotional issues before his employment termination. Finally, a loss of employment benefits and a termination from employment are events common to all fields of employment. They are specifically excluded as

mental stress claims pursuant to statute. Dr. Moe remarked that neither the lease termination nor the employment termination appeared to be done in bad faith. Based on the determination that the reduced rent for the Broadmoor house was not part of the employment agreement, the specific statutory exclusions of Claimant's contentions as the bases for a mental stress claim and the persuasive testimony of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a General Manager for Employer.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues for determination are:

1. Maximum medical improvement;

2. Medical benefits;

3. Average weekly wage;

4. TPD and TTD benefits;

5. Whether the right of selection of the treating physician has passed to the claimant; and,

6. Change of physician.

FINDINGS OF FACT

1. The claimant is a 40 year old food preparation worker who injured her right knee while working at the respondent-employer's restaurant on August 9, 2014. The claimant reported the injury to a Kitchen Manager named Casey on the day it happened. The respondent-employer took no action at that time. The claimant was off work the next several days. When she returned to work on August 13, 2014 she reported the injury to a Store Manager named Amber. Amber filled out a report and gave the claimant a list of medical providers. Premier Urgent Care was already circled.

2. A co-worker, Heather, drove the claimant to Premier Urgent Care. It was closed. They returned to the restaurant. Management instructed the co-worker to take the claimant to Penrose Hospital. The claimant presented to the emergency room at Penrose Hospital at approximately 10:00 p.m. She was diagnosed with "right knee sprain versus contusion," and was taken off work for two days.

3. The claimant presented to Anjmun Sharma, M.D., at Premier Urgent Care on August 14, 2014. Dr. Sharma diagnosed "right knee internal derangement." He prescribed a hinged knee brace, Percocet, physical therapy, and an MRI. He imposed work restrictions, and took the claimant off work August 15 to August 17, 2014. He released her to return to work with restrictions from August 18-22.

4. The claimant underwent a MRI of her right knee on August 19, 2014. It revealed mild patellofemoral joint effusion, with "small area of focal nodular synovitis in the ventral aspect of the anterior horn of the lateral meniscus extending into the intercondylar notch anteriorly. Associated degenerative changes with intrasubstance heterogeneous increased T2 signal involving the anterior horn of the lateral meniscus without evidence of tear."

5. On August 22, 2014, Dr. Sharma reviewed the MRI results. He diagnosed right knee sprain and right knee contusion. Dr. Sharma took the claimant off work from August 22 to August 24, 2014, and released to return to work with restrictions August 25 to September 10.

6. The claimant began physical therapy at Northgate Physical Therapy ("Northgate") on August 22, 2014. Therapist Ben Saunders noted, "…She states she heard a pop when she hit her knee and continues to have popping in the knee." Mr. Saunders noted the MRI revealed "focal nodular synovitis lateral meniscus."

7. As part of her physical therapy, the claimant was instructed to ambulate up and down stairs without assistive devices. While doing so at Northgate in September, 2014, the claimant experienced sudden pain and what she testified felt like an "explosion" in her right knee.

8. On September 10, 2014, Dr. Sharma recommended an orthopedic evaluation, and continued work restrictions September 10-15.

9. Orthopedist David Walden, M.D., saw the claimant on September 11, 2014. Dr. Walden noted the claimant tried physical therapy, "…which only made the situation worse." He reviewed the MRI and noted, "…It shows some minor changes in the anterior horn of the lateral meniscus as well as the associated notch." Dr. Walden noted the claimant's knee was hypersensitive and she had "fairly diffuse pain." He indicated that; "...Although not classic for reflex sympathetic dystrophy, there may be some elements of sympathetically mediated pain and I would recommend referral to a pain specialist with consideration for neurotrophic agents or sympathetic blocks…For now, physical therapy would probably make her situation worse…"

10. Dr. Sharma saw the claimant on September 15, 2014. He did not refer to her to a pain specialist, as Dr. Walden recommended. He prescribed Neurontin and noted "can resume gentle PT" despite Dr. Walden's opinion that physical therapy would probably make the situation worse. He continued work restrictions through October 6, 2014.

11. On October 10, 2014, Dr. Sharma continued work restrictions to November 5, 2014.

12. The claimant began seeing a new therapist, Fawn Lewis, at Northgate on October 15, 2014. Ms. Lewis noted she was "unable to assess meniscus." On October 17, 2014, Ms. Lewis noted, "…She states her knee pain is worse than when she had an MRI completed on 8/20/14." On October 21, 2014, Ms. Lewis noted, "Patient states: a lot of pain, c/o popping in front of knee." On October 23, 2014, Ms. Lewis noted, "Patient states: cont'd c/o pain in front and back of knee." On October 28, 2014, Ms. Lewis noted, "Patient states: pain increased yesterday, no known cause. Pain on side of patella, which hurts to touch or brush pants leg across it." On November 5, 2014, Ms. Lewis noted, "Chief complaints of pain below knee and lateral and posterior knee, preventing her from walking normally and doing her normal job duties. Stairs significantly increases pain and she c/o frequent popping in her patella…"

13. On November 5, 2014, Dr. Sharma diagnosed right patellar tracking, and right quadriceps atrophy. He continued the claimant's work restrictions.

14. On December 1, 2014 Dr. Sharma inexplicitly indicated the claimant reached MMI with no restrictions, no impairment, and no need for treatment after MMI.

15. Also inexplicitly on December 1, 2014, Dr. Sharma reported the claimant was *not* at MMI. He reported the claimant's right knee pain was "not improved." He referred the claimant back to Dr. Walden, and ordered a repeat MRI. He noted, "MMI if above are negative. F/u on 12/17/14." He maintained her temporary work restrictions.

16. When the claimant attempted to return to Dr. Sharma on December 17, 2014 he refused to see her. The claimant then presented to the emergency room at Penrose Hospital because she needed medical treatment. The emergency room physician diagnosed "right knee pain" and recommended the claimant "Continue to ice the knee, take Ibuprofen or Aleve, and follow up with an orthopedic surgeon for further evaluation and treatment." The claimant was referred to orthopedic surgeon Paul Rahill, M.D.

17. The claimant credibly testified she contacted Dr. Rahill's office by telephone and was asked whether she preferred to see a Spanish or English speaking doctor. She indicated Spanish. She was told she would see Dr. Miguel Castrejon.

18. Dr. Castrejon examined the claimant on December 18, 2014. He noted that, "…In mid September she was participating in physical therapy. She was going up and down stairs as part of her exercise program. As she performed this activity she

states that she had a sudden 'explosive' sensation within her knee that was followed by severe pain that has persisted. Prior to this event she states that she was improving." Dr. Castrejon noted the claimant, "…is reporting moderate to severe knee pain with sensation of swelling, weakness, limping and episodes of giving way. There is popping within the knee." Under "objective findings," Dr. Castrejon noted,"…Unable to heel and toe walk. Antalgic gait. Trace effusion. Quad 4/5 with atrophy. Tender with patellar compression and at lateral joint line. There is a popping sensation to her knee that is intermittently reproducible with McMurray. No instability." Dr. Castrejon diagnosed "right knee contusion/strain with reinjury in September 2014 rule out internal derangement."

19. Dr. Castrejon reviewed the claimant's MRI and noted, "…The study is not normal. There are degenerative changes within the lateral meniscus with synovitis and patellofemoral joint effusion. When seen by Dr. Sharma on 11/5/14 he documented right knee patellar tracking and quadriceps atrophy…"

20. Dr. Castrejon addressed the conflicting reports issued by Dr. Sharma; "…When seen on 12/1/14 he completed two WC164 forms. One form documents the claimant at MMI with diagnosis of right knee pain status post sprain with no restrictions and no impairment or need for maintenance care. The other of the same date is completely different and places the patient at light duty with a return appointment. The patient states that Dr. Sharma advised her that he would order an MRI and have her follow-up with Dr. Walden. When contacting the MRI facility today they advised that a request had been submitted for MRI by Dr. Sharma but the study had not been completed…"

21. Dr. Castrejon summarized; "…Based upon my examination of the patient I am concerned with regard to her clinical examination that is supportive for internal derangement as well as the two opposing forms completed by Dr. Sharma on the same date. One form was provided to the patient and the other to the insurance carrier. I question what Dr. Sharma was actually considering at the completion of both documents. It would appear that he had concerns with regard to the patient's condition yet opted to place the patient at MMI for insurance purposes. My opinion is that the patient is not at MMI and that she requires repeat MRI and additional treatment…" Dr. Castrejon imposed work restrictions.

22. The ALJ finds that the record raises an ambiguity concerning whether the claimant was actually placed at MMI by Dr. Sharma on December 1, 2015.

23. Subsequently, on May 1, 2015 Dr. Sharma authored two documents at the behest of the respondent-insurer that are supportive of his finding the claimant to be at MMI on December 1, 2015. However, there is no indication that it was brought to Dr. Sharma's attention that he also found the claimant not to be at MMI on December 1, 2015. The request by the respondent-insurer's counsel merely asks the leading question of "whether or not you are still of the opinion that the claimant is at MMI as of December 1, 2014." To which Dr. Sharma X'd the form next to "Claimant is at MMI."

24. The record is devoid of any explanation from Dr. Sharma as to why he authored the WC164 on December 1, 2015 indicating that the claimant was not at MMI and why he indicated the claimant needed further diagnostic studies and a referral to Dr. Walden, all of which suddenly disappeared after the claimant left the clinic assuming she had a follow-up appointment with Dr. Sharma.

25. In fact Dr. Sharma authored the referral documentation for the referral to Dr. Walden in conjunction with the WC164 that provides for the referral.

26. Despite the form letter sent to Dr. Sharma and returned by him to the respondents, the ALJ finds that the ambiguity in the records supports by a preponderance of the evidence the fact that the claimant was not placed at MMI on December 1, 2014. The ALJ finds that Dr. Sharma's documents generated on May 1, 2015 are not credible in the face of the totality of the evidence presented, especially the medical documentation produced by Dr. Castrejon beginning on December 18, 2014, just 17 days later, wherein he finds considerable reason to be concerned about the condition of the claimant's knee and where he opines that the claimant is not at MMI and needs further treatment.

27. On January 16, 2015, Dr. Castrejon noted the claimant had not undergone the repeat MRI, "…and is unable to pay for it on her own." On February 5, 2015, Dr. Castrejon repeated that observation, and prescribed Norco for the claimant.

28. The respondent-insurer filed a Final Admission of Liability on March 4, 2015. In a pre-hearing conference order dated May 11, 2015, Judge DeMarino granted the claimant's motion to hold a DIME in abeyance, and to add MMI as an issue for hearing.

29. On March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment. Prior to this, the claimant paid $650.00 out-of-pocket for her treatment with Dr. Castrejon.

30. On March 19, 2015, Dr. Castrejon reported, "…Due to worsening pain requiring increased use of medication I have placed her on Butrans patch 10 mcg/hr. I will see her back in 1 month to review MRI and provide further rec's."

31. The claimant underwent a repeat MRI of her right knee on March 28, 2015. Dr. Castrejon reviewed it on April 20, 2015. He noted, "…A recent MRI has revealed a complex tear of the anterior horn of the lateral meniscus with extension to the femoral articular surface and possible oblique tear of the posterior horn of the lateral meniscus with extension to the tibial articular surface." He reported that "This would be consistent with her condition." Dr. Castrejon referred the claimant to orthopedist Dr. Michael Simpson. He confirmed she was not at MMI and required ongoing work restrictions.

32. Dr. Simpson examined the claimant on April 27, 2015. He reviewed her history, and noted that; "…In mid September, she was doing therapy, going up and down stairs, felt a sudden explosive sensation in her knee and had increasing pain in her knee…She continues to have sensation of swelling, limping, and the episodes of giving away. She had a recent MRI which shows complex tear of the lateral meniscus…" Dr. Simpson recommended EMG testing because, "…I think we need to find out to make sure she does not have a compressive neuropathy at her fibular neck. She did get hit in this area. This could explain some of her nerve pain and continued symptoms that she had…" Dr. Simpson also administered a diagnostic injection and opined that, "…I think she will probably ultimately require an arthroscopic lateral meniscectomy…"

33. Dr. Castrejon performed the recommended EMG testing on May 27, 2015 and reported the results were normal.

34. On June 10, 2015, Dr. Castrejon noted he spoke with Dr. Simpson, and "…I have voiced my opinion in terms of cultural differences with regard to pain and the chronic nature of her condition that has contributed to alteration of gait and diffuse distribution of her symptoms. She has, however, continued working and did achieve benefit with the steroid injection that supports good motivation on the part of the patient. She will be getting scheduled for surgery and I will see her back in 3-4 weeks for post operative care..."

35. Dr. Simpson performed right knee arthroscopic lateral meniscal repair surgery on July 9, 2015. Dr. Castrejon took the claimant off work as of that date.

36. Dr. Castrejon recommended physical therapy on July 13, 2015. The claimant began physical therapy on July 15, 2015.

37. The ALJ finds Dr. Castrejon's opinions and reasoning regarding the claimant having not reached MMI are more credible and persuasive than the contrary, conflicting opinions that Dr. Sharma issued regarding MMI.

38. The respondents have stipulated in their position statement that the claimant's average weekly wage is $659.68.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. "Maximum medical improvement" means:

> …a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no

> further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement. C.R.S. §8-40-201(11.5)

5. An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement. C.R.S. §8-42-107(8)(b)(I).

6. If either party disputes the determination of MMI, the claimant must undergo a Division IME. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995); C.R.S. §8-42-107(8)(b)(II).

7. A Division IME is not a pre-requisite to the ALJ's resolution of a factual dispute concerning the issuance of conflicting or ambiguous opinions concerning whether the claimant has reached MMI. *Blue Mesa Forest v. Lopez*, 928 P.2d 831, 833 (Colo. App. 1996). Where the authorized treating physician issues conflicting opinions concerning MMI, it is for the ALJ to resolve the conflict, and the ALJ may do so without requiring the claimant to obtain a Division IME*. Id.*

8. Here, Dr. Sharma issued conflicting opinions regarding MMI. In a one WC164 form dated December 1, 2014, with no narrative, he indicated the claimant reached MMI on December 1, 2014 with no restrictions, no impairment, and no need for treatment after MMI. In another WC164 form of the same date, Dr. Sharma indicated he claimant had not reached MMI; that she continued to require temporary work restrictions; that he referred her for a repeat MRI; that he referred her to Dr. Walden; and that she was to return on December 17, 2014 at 10:30 a.m. This WC164 was provided to the claimant. Dr. Sharma also completed a form entitled "Extremity Initial Assessment" in which he indicated the claimant's right knee pain was not improved. He again specifically referred the claimant back to Premier Orthopedic (Dr. Walden); recommended a repeat MRI; imposed 25 pound restrictions, and instructed the claimant to follow-up on December 17, 2014. Dr. Sharma also completed a specific referral form for the claimant to have a "high field 1.5T open MRI" of her right knee at Colorado Springs Imaging.

9. The ALJ notes that in the "discharge plan" section of his ""Extremity Initial Assessment" report dated December 1, 2014, after referring the claimant back to Dr. Walden at Premier Orthopedics and recommending a repeat MRI, Dr. Sharma appears to have written, "MMI if above are negative." The ALJ concludes Dr. Sharma actual determination was that the claimant was not at MMI on December 1, 2014, but she might be at MMI in the future, pending the outcome of the referral back to Dr. Walden, and the repeat MRI. The claimant's repeat MRI was not negative, per Dr. Simpson and Dr. Castrejon. The claimant came under the care of Dr. Castrejon, who confirmed she was not at MMI. Dr. Simpson ultimately performed knee surgery on July 9, 2015. The ALJ resolves Dr. Sharma's conflicting opinions regarding MMI by determining the claimant was not at MMI on December 1, 2014 and has not yet reached MMI. The ALJ also is persuaded by the fact that on March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment.

10. Because this matter is compensable, the respondent-insurer is liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The treatment the claimant received from Dr. Castrejon and his referrals was and is reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant of the effects of the injury. respondent-insurer is liable for reimbursement to the claimant for her out-of-pocket expenses to treat with Dr. Castrejon beginning December 18, 2014.

11. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's

ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

12. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

13. Here, the claimant testified she was scheduled to be off work the two days after her injury. She was seen at Penrose after 10:00 p.m. on August 13, 2014. PA Welpton at Penrose took the claimant off work two days. Those days would have been August 14 and 15. On August 15, Dr. Sharma took the claimant off work August 15-17 and released her to return to work with restrictions on August 18. The claimant is entitled to TTD benefits from August 13 through August 17.

14. The claimant is entitled to TPD benefits August 18-21 per Dr. Sharma's release to modified work.

15. On August 22, 2014, Dr. Sharma took the claimant off work August 22-24 and released her to return to work with restrictions on August 25. The claimant is entitled to TTD benefits August 22-24.

16. Beginning August 25, 2014, the claimant was under temporary work restrictions, initially from Dr. Sharma, then from Dr. Castrejon when he began treating the claimant on December 18, 2014. The claimant is entitled to TPD benefits from August 25, 2014 through July 8, 2015.

17. The claimant underwent knee surgery with Dr. Simpson on July 9, 2015. Dr. Castrejon took the claimant off work as of the date of surgery. The claimant is entitled to TTD benefits as of July 9, 2015 and continuing.

18. Pursuant to § 8-43-404 (5)(a)(I)(A), C.R.S., as applicable to the claimant's date of injury, the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984).

19. Here, respondent-employer's list of medical providers failed to comply with the requirements of C.R.S. §8-43-404(5)(a)(I)(A), and W.C.R.P. 8-2 as applicable to the claimant's date of injury. Specifically, the list was not delivered to the claimant in a verifiable manner, and a medical provider was already circled and selected for the

claimant by respondent-employer's management. The claimant was deprived of the opportunity to select her own treating provider. Because respondent-employer's list of medical providers was non-compliant, the right of selection passed to the claimant. The claimant selected Miguel Castrejon, M.D., and he began treating her on December 18, 2014. Dr. Castrejon is an authorized treating physician as of that date.

20. Moreover, when the claimant returned to see Dr. Sharma on December 17, 2014 he refused to see her. The claimant sought emergent care at Penrose Hospital. Penrose referred the claimant to Dr. Rahill in Dr. Castrejon's office. The claimant called to make an appointment, accepted the offer to see a Spanish speaking physician, and saw Dr. Castrejon the following day. The respondent-insurer did not designate a new treating physician after Dr. Sharma refused to treat the claimant. Later, on March 10, 2015, Dr. Sharma specifically referred the claimant to Dr. Castrejon.

ORDER

It is therefore ordered that:

1. The claimant has never reached MMI from the time of her injury to the hearing date.

2. The respondent-insurer shall reimburse Claimant $650.00 for the out-of-pocket expenses she incurred to treat with Dr. Castrejon beginning December 18, 2014.

3. The respondent-insurer is liable for all reasonable and necessary medical treatment needed to cure and relieve the claimant of the effects of the injury.

4. Claimant's AWW is $659.68.

5. The respondent-insurer shall pay the claimant TTD benefits from August 13 through August 17, 2014.

6. The respondent-insurer shall pay the claimant TPD benefits from August 18 through August 21, 2014.

7. The respondent-insurer shall pay the claimant TTD benefits August 22 through August 24, 2014.

8. The respondent-insurer shall pay the claimant TPD benefits from August 25, 2014 through July 8, 2015.

9. The respondent-insurer shall pay the claimant TTD benefits from July 9, 2015 ongoing, until such benefits can be terminated pursuant to law.

10. Dr. Castrejon is an authorized treating physician as of December 18, 2014.

11. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

12. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: September 17, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues for determination are:

1. Maximum medical improvement;

2. Medical benefits;

3. Average weekly wage;

4. TPD and TTD benefits;

5. Whether the right of selection of the treating physician has passed to the claimant; and,

6. Change of physician.

FINDINGS OF FACT

1. The claimant is a 40 year old food preparation worker who injured her right knee while working at the respondent-employer's restaurant on August 9, 2014. The claimant reported the injury to a Kitchen Manager named Casey on the day it happened. The respondent-employer took no action at that time. The claimant was off work the next several days. When she returned to work on August 13, 2014 she reported the injury to a Store Manager named Amber. Amber filled out a report and gave the claimant a list of medical providers. Premier Urgent Care was already circled.

2. A co-worker, Heather, drove the claimant to Premier Urgent Care. It was closed. They returned to the restaurant. Management instructed the co-worker to take the claimant to Penrose Hospital. The claimant presented to the emergency room at Penrose Hospital at approximately 10:00 p.m. She was diagnosed with "right knee sprain versus contusion," and was taken off work for two days.

3. The claimant presented to Anjmun Sharma, M.D., at Premier Urgent Care on August 14, 2014. Dr. Sharma diagnosed "right knee internal derangement." He prescribed a hinged knee brace, Percocet, physical therapy, and an MRI. He imposed work restrictions, and took the claimant off work August 15 to August 17, 2014. He released her to return to work with restrictions from August 18-22.

4. The claimant underwent a MRI of her right knee on August 19, 2014. It revealed mild patellofemoral joint effusion, with "small area of focal nodular synovitis in the ventral aspect of the anterior horn of the lateral meniscus extending into the intercondylar notch anteriorly. Associated degenerative changes with intrasubstance heterogeneous increased T2 signal involving the anterior horn of the lateral meniscus without evidence of tear."

5. On August 22, 2014, Dr. Sharma reviewed the MRI results. He diagnosed right knee sprain and right knee contusion. Dr. Sharma took the claimant off work from August 22 to August 24, 2014, and released to return to work with restrictions August 25 to September 10.

6. The claimant began physical therapy at Northgate Physical Therapy ("Northgate") on August 22, 2014. Therapist Ben Saunders noted, "…She states she heard a pop when she hit her knee and continues to have popping in the knee." Mr. Saunders noted the MRI revealed "focal nodular synovitis lateral meniscus."

7. As part of her physical therapy, the claimant was instructed to ambulate up and down stairs without assistive devices. While doing so at Northgate in September, 2014, the claimant experienced sudden pain and what she testified felt like an "explosion" in her right knee.

8. On September 10, 2014, Dr. Sharma recommended an orthopedic evaluation, and continued work restrictions September 10-15.

9. Orthopedist David Walden, M.D., saw the claimant on September 11, 2014. Dr. Walden noted the claimant tried physical therapy, "…which only made the situation worse." He reviewed the MRI and noted, "…It shows some minor changes in the anterior horn of the lateral meniscus as well as the associated notch." Dr. Walden noted the claimant's knee was hypersensitive and she had "fairly diffuse pain." He indicated that; "...Although not classic for reflex sympathetic dystrophy, there may be some elements of sympathetically mediated pain and I would recommend referral to a pain specialist with consideration for neurotrophic agents or sympathetic blocks…For now, physical therapy would probably make her situation worse…"

10. Dr. Sharma saw the claimant on September 15, 2014. He did not refer to her to a pain specialist, as Dr. Walden recommended. He prescribed Neurontin and noted "can resume gentle PT" despite Dr. Walden's opinion that physical therapy would probably make the situation worse. He continued work restrictions through October 6, 2014.

11. On October 10, 2014, Dr. Sharma continued work restrictions to November 5, 2014.

12. The claimant began seeing a new therapist, Fawn Lewis, at Northgate on October 15, 2014. Ms. Lewis noted she was "unable to assess meniscus." On October 17, 2014, Ms. Lewis noted, "…She states her knee pain is worse than when she had an MRI completed on 8/20/14." On October 21, 2014, Ms. Lewis noted, "Patient states: a lot of pain, c/o popping in front of knee." On October 23, 2014, Ms. Lewis noted, "Patient states: cont'd c/o pain in front and back of knee." On October 28, 2014, Ms. Lewis noted, "Patient states: pain increased yesterday, no known cause. Pain on side of patella, which hurts to touch or brush pants leg across it." On November 5, 2014, Ms. Lewis noted, "Chief complaints of pain below knee and lateral and posterior knee, preventing her from walking normally and doing her normal job duties. Stairs significantly increases pain and she c/o frequent popping in her patella…"

13. On November 5, 2014, Dr. Sharma diagnosed right patellar tracking, and right quadriceps atrophy. He continued the claimant's work restrictions.

14. On December 1, 2014 Dr. Sharma inexplicitly indicated the claimant reached MMI with no restrictions, no impairment, and no need for treatment after MMI.

15. Also inexplicitly on December 1, 2014, Dr. Sharma reported the claimant was *not* at MMI. He reported the claimant's right knee pain was "not improved." He referred the claimant back to Dr. Walden, and ordered a repeat MRI. He noted, "MMI if above are negative. F/u on 12/17/14." He maintained her temporary work restrictions.

16. When the claimant attempted to return to Dr. Sharma on December 17, 2014 he refused to see her. The claimant then presented to the emergency room at Penrose Hospital because she needed medical treatment. The emergency room physician diagnosed "right knee pain" and recommended the claimant "Continue to ice the knee, take Ibuprofen or Aleve, and follow up with an orthopedic surgeon for further evaluation and treatment." The claimant was referred to orthopedic surgeon Paul Rahill, M.D.

17. The claimant credibly testified she contacted Dr. Rahill's office by telephone and was asked whether she preferred to see a Spanish or English speaking doctor. She indicated Spanish. She was told she would see Dr. Miguel Castrejon.

18. Dr. Castrejon examined the claimant on December 18, 2014. He noted that, "…In mid September she was participating in physical therapy. She was going up and down stairs as part of her exercise program. As she performed this activity she

states that she had a sudden 'explosive' sensation within her knee that was followed by severe pain that has persisted. Prior to this event she states that she was improving." Dr. Castrejon noted the claimant, "…is reporting moderate to severe knee pain with sensation of swelling, weakness, limping and episodes of giving way. There is popping within the knee." Under "objective findings," Dr. Castrejon noted,"…Unable to heel and toe walk. Antalgic gait. Trace effusion. Quad 4/5 with atrophy. Tender with patellar compression and at lateral joint line. There is a popping sensation to her knee that is intermittently reproducible with McMurray. No instability." Dr. Castrejon diagnosed "right knee contusion/strain with reinjury in September 2014 rule out internal derangement."

19. Dr. Castrejon reviewed the claimant's MRI and noted, "…The study is not normal. There are degenerative changes within the lateral meniscus with synovitis and patellofemoral joint effusion. When seen by Dr. Sharma on 11/5/14 he documented right knee patellar tracking and quadriceps atrophy…"

20. Dr. Castrejon addressed the conflicting reports issued by Dr. Sharma; "…When seen on 12/1/14 he completed two WC164 forms. One form documents the claimant at MMI with diagnosis of right knee pain status post sprain with no restrictions and no impairment or need for maintenance care. The other of the same date is completely different and places the patient at light duty with a return appointment. The patient states that Dr. Sharma advised her that he would order an MRI and have her follow-up with Dr. Walden. When contacting the MRI facility today they advised that a request had been submitted for MRI by Dr. Sharma but the study had not been completed…"

21. Dr. Castrejon summarized; "…Based upon my examination of the patient I am concerned with regard to her clinical examination that is supportive for internal derangement as well as the two opposing forms completed by Dr. Sharma on the same date. One form was provided to the patient and the other to the insurance carrier. I question what Dr. Sharma was actually considering at the completion of both documents. It would appear that he had concerns with regard to the patient's condition yet opted to place the patient at MMI for insurance purposes. My opinion is that the patient is not at MMI and that she requires repeat MRI and additional treatment…" Dr. Castrejon imposed work restrictions.

22. The ALJ finds that the record raises an ambiguity concerning whether the claimant was actually placed at MMI by Dr. Sharma on December 1, 2015.

23. Subsequently, on May 1, 2015 Dr. Sharma authored two documents at the behest of the respondent-insurer that are supportive of his finding the claimant to be at MMI on December 1, 2015. However, there is no indication that it was brought to Dr. Sharma's attention that he also found the claimant not to be at MMI on December 1, 2015. The request by the respondent-insurer's counsel merely asks the leading question of "whether or not you are still of the opinion that the claimant is at MMI as of December 1, 2014." To which Dr. Sharma X'd the form next to "Claimant is at MMI."

24. The record is devoid of any explanation from Dr. Sharma as to why he authored the WC164 on December 1, 2015 indicating that the claimant was not at MMI and why he indicated the claimant needed further diagnostic studies and a referral to Dr. Walden, all of which suddenly disappeared after the claimant left the clinic assuming she had a follow-up appointment with Dr. Sharma.

25. In fact Dr. Sharma authored the referral documentation for the referral to Dr. Walden in conjunction with the WC164 that provides for the referral.

26. Despite the form letter sent to Dr. Sharma and returned by him to the respondents, the ALJ finds that the ambiguity in the records supports by a preponderance of the evidence the fact that the claimant was not placed at MMI on December 1, 2015. The ALJ finds that Dr. Sharma's documents generated on May 1, 2015 are not credible in the face of the totality of the evidence presented, especially the medical documentation produced by Dr. Castrejon beginning on December 18, 2014, just 17 days later, wherein he finds considerable reason to be concerned about the condition of the claimant's knee and where he opines that the claimant is not at MMI and needs further treatment.

27. On January 16, 2015, Dr. Castrejon noted the claimant had not undergone the repeat MRI, "…and is unable to pay for it on her own." On February 5, 2015, Dr. Castrejon repeated that observation, and prescribed Norco for the claimant.

28. The respondent-insurer filed a Final Admission of Liability on March 4, 2015. In a pre-hearing conference order dated May 11, 2015, Judge DeMarino granted the claimant's motion to hold a DIME in abeyance, and to add MMI as an issue for hearing.

29. On March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment. Prior to this, the claimant paid $650.00 out-of-pocket for her treatment with Dr. Castrejon.

30. On March 19, 2015, Dr. Castrejon reported, "…Due to worsening pain requiring increased use of medication I have placed her on Butrans patch 10 mcg/hr. I will see her back in 1 month to review MRI and provide further rec's."

31. The claimant underwent a repeat MRI of her right knee on March 28, 2015. Dr. Castrejon reviewed it on April 20, 2015. He noted, "…A recent MRI has revealed a complex tear of the anterior horn of the lateral meniscus with extension to the femoral articular surface and possible oblique tear of the posterior horn of the lateral meniscus with extension to the tibial articular surface." He reported that "This would be consistent with her condition." Dr. Castrejon referred the claimant to orthopedist Dr. Michael Simpson. He confirmed she was not at MMI and required ongoing work restrictions.

32. Dr. Simpson examined the claimant on April 27, 2015. He reviewed her history, and noted that; "…In mid September, she was doing therapy, going up and down stairs, felt a sudden explosive sensation in her knee and had increasing pain in her knee…She continues to have sensation of swelling, limping, and the episodes of giving away. She had a recent MRI which shows complex tear of the lateral meniscus…" Dr. Simpson recommended EMG testing because, "…I think we need to find out to make sure she does not have a compressive neuropathy at her fibular neck. She did get hit in this area. This could explain some of her nerve pain and continued symptoms that she had…" Dr. Simpson also administered a diagnostic injection and opined that, "…I think she will probably ultimately require an arthroscopic lateral meniscectomy…"

33. Dr. Castrejon performed the recommended EMG testing on May 27, 2015 and reported the results were normal.

34. On June 10, 2015, Dr. Castrejon noted he spoke with Dr. Simpson, and "…I have voiced my opinion in terms of cultural differences with regard to pain and the chronic nature of her condition that has contributed to alteration of gait and diffuse distribution of her symptoms. She has, however, continued working and did achieve benefit with the steroid injection that supports good motivation on the part of the patient. She will be getting scheduled for surgery and I will see her back in 3-4 weeks for post operative care..."

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36. Dr. Castrejon recommended physical therapy on July 13, 2015. The claimant began physical therapy on July 15, 2015.

37. The ALJ finds Dr. Castrejon's opinions and reasoning regarding the claimant having not reached MMI are more credible and persuasive than the contrary, conflicting opinions that Dr. Sharma issued regarding MMI.

38. The respondents have stipulated in their position statement that the claimant's average weekly wage is $659.68.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. "Maximum medical improvement" means:

> …a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is

> reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement. C.R.S. §8-40-201(11.5)

5. An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement. C.R.S. §8-42-107(8)(b)(I).

6. If either party disputes the determination of MMI, the claimant must undergo a Division IME. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995); C.R.S. §8-42-107(8)(b)(II).

7. A Division IME is not a pre-requisite to the ALJ's resolution of a factual dispute concerning the issuance of conflicting or ambiguous opinions concerning whether the claimant has reached MMI. *Blue Mesa Forest v. Lopez*, 928 P.2d 831, 833 (Colo. App. 1996). Where the authorized treating physician issues conflicting opinions concerning MMI, it is for the ALJ to resolve the conflict, and the ALJ may do so without requiring the claimant to obtain a Division IME*. Id.*

8. Here, Dr. Sharma issued conflicting opinions regarding MMI. In a one WC164 form dated December 1, 2014, with no narrative, he indicated the claimant reached MMI on December 1, 2014 with no restrictions, no impairment, and no need for treatment after MMI. In another WC164 form of the same date, Dr. Sharma indicated he claimant had not reached MMI; that she continued to require temporary work restrictions; that he referred her for a repeat MRI; that he referred her to Dr. Walden; and that she was to return on December 17, 2014 at 10:30 a.m. This WC164 was provided to the claimant. Dr. Sharma also completed a form entitled "Extremity Initial Assessment" in which he indicated the claimant's right knee pain was not improved. He again specifically referred the claimant back to Premier Orthopedic (Dr. Walden); recommended a repeat MRI; imposed 25 pound restrictions, and instructed the claimant to follow-up on December 17, 2014. Dr. Sharma also completed a specific referral form for the claimant to have a "high field 1.5T open MRI" of her right knee at Colorado Springs Imaging.

9. The ALJ notes that in the "discharge plan" section of his ""Extremity Initial Assessment" report dated December 1, 2014, after referring the claimant back to Dr. Walden at Premier Orthopedics and recommending a repeat MRI, Dr. Sharma appears

to have written, “MMI if above are negative.” The ALJ concludes Dr. Sharma actual determination was that the claimant was not at MMI on December 1, 2014, but she might be at MMI in the future, pending the outcome of the referral back to Dr. Walden, and the repeat MRI. The claimant’s repeat MRI was not negative, per Dr. Simpson and Dr. Castrejon. The claimant came under the care of Dr. Castrejon, who confirmed she was not at MMI. Dr. Simpson ultimately performed knee surgery on July 9, 2015. The ALJ resolves Dr. Sharma’s conflicting opinions regarding MMI by determining the claimant was not at MMI on December 1, 2014 and has not yet reached MMI. The ALJ also is persuaded by the fact that on March 10, 2015, Dr. Sharma indicated the claimant should be allowed the benefit of treating with Dr. Castrejon for her knee injury, and he referred the claimant to Dr. Castrejon for such treatment.

10. Because this matter is compensable, the respondent-insurer is liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The treatment the claimant received from Dr. Castrejon and his referrals was and is reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant of the effects of the injury. respondent-insurer is liable for reimbursement to the claimant for her out-of-pocket expenses to treat with Dr. Castrejon beginning December 18, 2014.

11. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

12. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

13. Here, the claimant testified she was scheduled to be off work the two days after her injury. She was seen at Penrose after 10:00 p.m. on August 13, 2014. PA Welpton at Penrose took the claimant off work two days. Those days would have been August 14 and 15. On August 15, Dr. Sharma took the claimant off work August 15-17 and released her to return to work with restrictions on August 18. The claimant is entitled to TTD benefits from August 13 through August 17.

14. The claimant is entitled to TPD benefits August 18-21 per Dr. Sharma's release to modified work.

15. On August 22, 2014, Dr. Sharma took the claimant off work August 22-24 and released her to return to work with restrictions on August 25. The claimant is entitled to TTD benefits August 22-24.

16. Beginning August 25, 2014, the claimant was under temporary work restrictions, initially from Dr. Sharma, then from Dr. Castrejon when he began treating the claimant on December 18, 2014. The claimant is entitled to TPD benefits from August 25, 2014 through July 8, 2015.

17. The claimant underwent knee surgery with Dr. Simpson on July 9, 2015. Dr. Castrejon took the claimant off work as of the date of surgery. The claimant is entitled to TTD benefits as of July 9, 2015 and continuing.

18. Pursuant to § 8-43-404 (5)(a)(I)(A), C.R.S., as applicable to the claimant's date of injury, the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984).

19. Here, respondent-employer's list of medical providers failed to comply with the requirements of C.R.S. §8-43-404(5)(a)(I)(A), and W.C.R.P. 8-2 as applicable to the claimant's date of injury. Specifically, the list was not delivered to the claimant in a verifiable manner, and a medical provider was already circled and selected for the claimant by respondent-employer's management. The claimant was deprived of the opportunity to select her own treating provider. Because respondent-employer's list of medical providers was non-compliant, the right of selection passed to the claimant. The

claimant selected Miguel Castrejon, M.D., and he began treating her on December 18, 2014. Dr. Castrejon is an authorized treating physician as of that date.

20. Moreover, when the claimant returned to see Dr. Sharma on December 17, 2014 he refused to see her. The claimant sought emergent care at Penrose Hospital. Penrose referred the claimant to Dr. Rahill in Dr. Castrejon's office. The claimant called to make an appointment, accepted the offer to see a Spanish speaking physician, and saw Dr. Castrejon the following day. The respondent-insurer did not designate a new treating physician after Dr. Sharma refused to treat the claimant. Later, on March 10, 2015, Dr. Sharma specifically referred the claimant to Dr. Castrejon.

ORDER

It is therefore ordered that:

1. The claimant has never reached MMI from the time of her injury to the hearing date.

2. The respondent-insurer shall reimburse Claimant $650.00 for the out-of-pocket expenses she incurred to treat with Dr. Castrejon beginning December 18, 2014.

3. The respondent-insurer is liable for all reasonable and necessary medical treatment needed to cure and relieve the claimant of the effects of the injury.

4. Claimant's AWW is $659.68.

5. The respondent-insurer shall pay the claimant TTD benefits from August 13 through August 17, 2014.

6. The respondent-insurer shall pay the claimant TPD benefits from August 18 through August 21, 2014.

7. The respondent-insurer shall pay the claimant TTD benefits August 22 through August 24, 2014.

8. The respondent-insurer shall pay the claimant TPD benefits from August 25, 2014 through July 8, 2015.

9. The respondent-insurer shall pay the claimant TTD benefits from July 9, 2015 ongoing, until such benefits can be terminated pursuant to law.

10. Dr. Castrejon is an authorized treating physician as of December 18, 2014.

11. The respondent-insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

12. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: September 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his low back condition is related to the admitted August 1, 2014 work injury?

- If claimant has proven that his low back condition is a compensable component to the admitted August 1, 2014 work injury, whether claimant has proven by a preponderance of the evidence that the medical treatment including the epidural steroid injection ("ESI") are reasonable and necessary medical treatment designated to cure and relieve claimant from the effects of the work injury?

- Whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased from the admitted rate of $1,200.00 to $1,665.04?

FINDINGS OF FACT

1. Claimant was employed as a mobile diesel mechanic for employer. Claimant sustained an admitted injury to his left knee on August 1, 2014 when he was moving batteries that weighed approximately sixty (60) pounds into the back of his work truck, bent down and felt a pop in his left knee. Claimant testified he reported his injury to his employer the following Monday. Specifically, claimant testified he reported the injury to Mr. Morgan, his supervisor, who contacted human resources and took claimant to St. Mary's Occupational Health.

2. Claimant was examined at St. Mary's Occupational Health by Mr. Harkreader on August 4, 2014. Mr. Harkreader noted claimant's accident history and noted on examination that claimant had a possible lateral meniscus tear. Mr. Harkreader recommended an x-ray, magnetic resonance image ("MRI") of the left knee and referred claimant to Dr. Vance for orthopedic evaluation.

3. Dr. Vance initially evaluated claimant on August 11, 2014. Dr. Vance noted claimant's complaints of lateral and anterior knee pain and reviewed claimant's MRI. Dr. Vance noted that the MRI showed a possible small tear at the attachment of the capsule, but reported that there was not a lateral meniscus tear appreciated on the MRI. Dr. Vance offered claimant with a corticosteroid injection, but claimant declined. Dr. Vance recommended claimant return in 2 weeks.

4. Claimant returned to Dr. Vance on August 25, 2014 with continued complaints of pain. Dr. Vance noted he felt claimant's pain was related to patellafemoral synovitis as opposed to any defects shown on the MRI. Dr. Vance again offered claimant a corticosteroid injection and claimant agreed.

5. Claimant returned to Dr. Vance on September 15, 2014 with complaints that Dr. Vance noted were more consistent with a medial meniscus tear. Dr. Vance noted that a knee arthroscopy with partial menisectomy would be warranted and claimant agreed with the recommendation for surgical intervention.

6. Claimant underwent surgery under the auspices of Dr. Vance on September 30, 2015 consisting of a diagnostic and operative arthroscopy of the left knee with partial debridement of the anterior cruciate ligaments and anterior synovial resection. The surgery revealed a partial treating of the anterior cruciate ligaments with mucoid degeneration and anterior synovitis.

7. Claimant returned to Dr. Vance on October 9, 2014. Dr. Vance noted that claimant was complaining that his low back was very sore and thought it could be due to an antalgic gait. Claimant also reported some popping in his left knee and Dr. Vance assured him this was normal.

8. Claimant testified that when he saw Dr. Vance on October 9, 2014 his back felt out of alignment and he was experiencing discomfort.

9. Claimant was evaluated by Mr. Harkreader on October 14, 2014. Mr. Harkreader noted that claimant was complaining of pain on a scale of 5/10 with some swelling that was worse at the end of the day. Mr. Harkreader continued claimant with a 10 pound lifting restriction.

10. Claimant returned to Dr. Vance on October 30, 2014 and noted he still had complaints of pain and swelling in his knee. Claimant was referred by Dr. Vance to Dr. Copeland for a second opinion to try to determine what was causing his ongoing symptoms.

11. Claimant testified at hearing that on November 2, 2014 he got up from the couch and had a large pop in his knee. Claimant denied falling down after experiencing the pop.

12. Claimant was evaluated by Dr. Copeland on November 5, 2014. Claimant reported the incident with his knee popping to Dr. Copeland and complained of increased swelling after his knee popped. Dr. Copeland recommended claimant proceed with laboratory screening and a repeat MRI of the left knee.

13. Claimant testified he fell at Walmart when he was in the bathroom, causing him to fall face first into the bathroom stall. Claimant testified he experienced numbness into his scrotum and genetalia after this fall. Claimant testified he reported this fall to Dr. Copeland, but Dr. Copeland didn't mention the fall.

14. Claimant returned to Mr. Harkreader on November 11, 2014. Mr. Harkreader noted claimant's pain was at a 5-7 out of 10 and claimant had experienced two episodes where his left knee gave out and he fell to the ground. Mr. Harkreader continued claimant's work restrictions and kept claimant off of work.

15. Claimant returned to Dr. Vance on November 17, 2014. Dr. Vance noted claimant was reporting a sensation in his leg of “feeling like it isn’t there” along with experiencing a fall before being seen by Dr. Copeland. Dr. Vance noted claimant reported numbness in the lateral femoral cutaneous that worsened over the previous two weeks. Dr. Vance noted that claimant’s complaints of numbness in his legs could be related to a L3-L4 nerve root distribution problem and referred claimant for an MRI of his lumbar spine.

16. Claimant called Mr. Harkreader on November 18, 2014 and noted some frustration with his ongoing care. Mr. Harkreader noted that claimant could have two different things going on with his condition and noted that claimant was scheduled to undergo an MRI of his lumbar spine.

17. The MRI was performed on November 21, 2014 and demonstrated a large left, far lateral disk herniation at the L4-L5 level.

18. Claimant was evaluated by Dr. Stagg on November 25, 2014. Claimant noted his fall at Walmart and noted that since then he had a significant amount of back pain with radiation to his left knee. Claimant reported the knee buckled on 2 occasions, causing him to fall. Dr. Stagg noted the MRI showed a lateral disk protrusion at the L4-L5 level. Claimant was referred to Dr. Clifford for consultation with his lumbar spine issues.

19. Claimant was examined by Dr. Clifford on December 4, 2014. Dr. Clifford noted an accident history of claimant lifting a battery using a twisting motion and developing symptoms down to the lateral anterior thigh and down to the lateral calf of the left side. Dr. Clifford noted he felt claimant’s symptoms were related to the lumbar spine, and not his knee. Dr. Clifford recommended transforaminal epidural steroid injections with the use of ice and nonsteroidal anti-inflammatories. Claimant was referred to Dr. Hehmann for electrodiagnostic studies.

20. Claimant subsequently returned to Dr. Stagg on December 29, 2014 with his wife and reported to Dr. Stagg that they did not believe the medical records reflect what they have been telling the providers. They asked Dr. Stagg to state in the records that since the initial injury, claimant has had pain and stiffness in his back with problems sitting, pain in the back and felt that his back was out of alignment.

21. Claimant testified at hearing that he discussed his knee and low back with Dr. Copeland on November 5, 2014. Claimant testified on cross examination that he did not talk with Mr. Harkreader about his low back when he was initially evaluated on August 4, 2014. Claimant testified he didn’t think he had injured his low back as of October 14, 2014 and didn’t talk to the doctors about his low back until the first part of November 2014. Claimant testified, however, that he did tell the doctors he felt his low back was mis-aligned in August, September and October 2014.

22. Claimant testified his low back pain gradually developed and became most serious following his two falls in November 2014.

23. Claimant was evaluated in the Delta County Memorial Hospital Emergency Room on January 19, 2015 with complaints of bowel and bladder control problems that involved both urine and feces. Claimant underwent another MRI that showed L5 changes on the left side consistent with nerve root pressure, but not full impingement.

24. Dr. Vance testified by deposition in this case. Dr. Vance testified that claimant did not begin complaining of issues with his low back until after the surgery. Dr. Vance testified he was unaware that claimant had a history of low back issues in November 2013. Dr. Vance opined that claimant's low back condition could be related to his falls, but testified causation was complicated by the fact that claimant didn't report his prior back complaints to his physicians and indicated to Dr. Stagg that he had been complaining of back issues dating back to August 1, 2014.

25. Claimant had a history of treatment to his low back dating back to April 1, 2012 when he was treated in Idaho at Kootenai Medical Center for left foot numbness and pain extending to the left leg that had been present over the previous month. Claimant underwent x-rays of the lumbar spine that showed degenerative changes. The x-ray report noted that claimant was complaining of radicular pain.

26. Claimant was evaluated at Delta County Memorial Hospital on November 2, 2013 for complaints of back pain after lifting a 50 gallon drum off a truck. Claimant reported left sided back pain and noted he was having a hard time waling due to the back pain. Examination revealed a positive straight leg raise test on the left and claimant reported that he had the urge to go to the bathroom more frequently. Claimant was provided with a steroid injection and provided with prescriptions for Soma and Vicodin.

27. Claimant underwent an independent medical examination ("IME") with Dr. Scott on March 18, 2015. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott noted claimant reported to him that his back condition was accelerated by his first and second falls. Dr. Scott noted claimant reported he had pulled a muscle in his low back in November 2013 when he moved a heavy drum of a truck. Claimant reported after this incident his back returned to normal and he had no stiffness in his back prior to the August 1, 2014 work injury.

28. Dr. Scott noted that claimant's November 2013 back injury resulted in a diagnosis of acute low back pain and lumbar radiculopathy. Dr. Scott ultimately opined in his report that claimant did not have an injury or an aggravation to his low back on August 1, 2014.

29. Dr. Scott testified at hearing consistent with his medical report. Dr. Scott testified that the medical records do not document an altered gait after October 9, 2014 and opined claimant's back condition was not the result of an altered gait from the knee injury. Dr. Scott testified claimant's falls in November 2014 were likely caused by claimant's back condition and not related to his knee surgery. Dr. Scott noted that

claimant's knee condition was stable. Dr. Scott testified claimant's low back evaluation and treatment was not related to claimant's August 1, 2014 knee injury.

30. Dr. Vance testified that claimant's buckling of his knee could have been related to the knee surgery, but admitted that he couldn't identify any instability of the knee related to the surgery.

31. The ALJ credits the reports and opinions of Dr. Scott and finds that claimant has failed to demonstrate that it is more likely true than not that his current low back complaints are related to the August 1, 2014 compensable knee injury. The ALJ notes that claimant reported to Dr. Stagg in December 2014 that he had been complaining of back complaints since the date of injury, but testified at hearing that his back complaints were limited to his back being mis-aligned. The ALJ also notes that claimant's wife testified at hearing and confirmed that claimant was not complaining of low back problems in August 2014.

32. The ALJ further finds that claimant has alleged that the low back condition was related to the falls, which are then related to the August 2014 knee injury. However, insufficient evidence was presented at hearing to establish that either of the falls claimant experienced in November 2014 were related to his left knee injury. The ALJ credits the medical records and the testimony of Dr. Vance that claimant's left knee was stable and finds that claimant has failed to demonstrate that the knee giving out in November 2014 was related to the August 2014 knee injury.

33. Moreover, this argument that the low back condition was related to the falls is undermined by the visit with Dr. Stagg on December 29, 2014 where claimant asked Dr. Stagg to document that he was complaining of low back pain since his initial injury in August 2014.

34. Based on the foregoing, the ALJ finds that claimant has failed to meet his burden of proving that his low back complaints are related to the August 1, 2014 admitted left knee injury. The ALJ further finds that claimant has failed to establish that his low back condition was related to falls in November 2014 that would be traced back to the August 1, 2014 work injury to his left knee.

35. Claimant testified at hearing that he was paid $30 per hour. The wage records entered into evidence establish that claimant was paid at a rate of $30 per hour at the time of his injury. The wage records further establish that in the 10 weeks prior to claimant's injury, claimant earned $16,650.36. The ALJ finds that this equates to an appropriate AWW calculation of $1,665.04.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that his low back condition was caused, aggravated or accelerated by the August 1, 2014 work injury. As found, claimant has failed to establish by a preponderance of the evidence that his low back condition was caused, aggravated or accelerated by the falls in November 2014 as related to the August 1, 2014 work injury.

5. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

6. As found, claimant earned $16,650.36 in the ten weeks covering the pay periods prior to his injury. As found, claimant has proven by a preponderance of the evidence that his AWW should be increased to $1,665.04 based on the wage records entered into evidence at hearing.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits based on an AWW of $1,665.04.

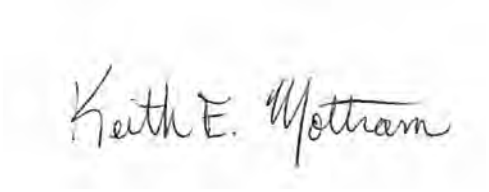
2. Claimant's claim for medical benefits related to his low back injury associated with the August 1, 2014 compensable work injury is denied.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer?

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve Claimant from the effects of the work injury?

3. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability ("TPD") benefits for the period beginning September 5, 2014 and ending September 8, 2014, and for the period beginning December 8, 2014 and ongoing?

4. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability ("TTD") benefits for the period beginning September 9, 2014 and ending December 7, 2014?

STIPULATIONS

1. After hearing, the parties stipulated that, should the claim be found compensable, the Claimant's average weekly wage shall be $535.00.

FINDINGS OF FACT

1. Claimant is a 29-year-old male, who began working for Employer as a granite fabricator and installer in September 2012. Claimant testified that his job duties included cutting rock and granite, finishing it into finished products (such as kitchen countertops), and installing the products in homes and businesses. Claimant testified that this work involved lifting and moving heavy slabs of granite. Claimant testified he is unsure if he is still employed by Employer as he has had no feedback from the Employer regarding this issue.

2. Claimant testified that he had treatment to his low back in late July and early August 2014 with Dr. Ben Dorenkamp at Dorenkamp Chiropractic. Claimant testified he did not have any medical treatment to his low back at any time prior to his first visit with Dr. Dorenkamp on July 25, 2014. The medical records in evidence support the Claimant's testimony.

3. Dorenkamp Chiropractic's patient history form dated July 25, 2014 noted that Claimant presented with low back pain that began three weeks earlier "after lifting heavy slabs of granite [and] deadlift" (Claimant's Exhibit 5, p. 131; Respondents' Exhibit F, p. 9). Claimant testified that the reference to "lifting heavy slabs of granite" was in regard to his work for Employer. Claimant testified that the reference to "deadlift" was in regard to an after-work exercise activity.

4. Claimant testified that the maximum weight he deadlifted while exercising was 150 pounds. He testified that when he deadlifted, he would lift a weighted bar in his hands from the ground using his legs while holding his low back in a set position. Claimant testified that granite slabs at work weighed between 800 and 1,200 pounds.

5. Claimant testified at hearing that he had been overweight since he was young, and had some back pain since middle school. He testified he had never received medical treatment for his low back prior to having chiropractic care on July 25, 2014 and never missed work due to back pain prior to September 2014.

6. Claimant received chiropractic care with Dr. Dorenkamp on July 25, 2014 and August 1, 2014 (Claimant's Exhibit 5, p. 135; Respondents' Exhibit F, p. 12). Dr. Dorenkamp did not provide any work restrictions at either visit. Claimant testified that he did not return to see Dr. Dorenkamp after August 1 because his symptoms felt somewhat resolved, and he was being careful with money and did not feel that it was worth returning to see the chiropractor. Claimant testified he still had some symptoms after receiving chiropractic care, but testified that his back symptoms did not prevent him from going to work. Claimant testified he did not have any additional treatment after he saw Dr. Dorenkamp on August 1 until after September 5, 2014.

7. On September 4, 2014, the Claimant presented to St. Mary's Medical Center due to concerns with his leg due to his long-term history of venous thrombosis and embolism. He came to the ER to request Coumadin for his condition but did not feel like there was a clot or infection at that time. The ER personnel noted that the options were limited at 3AM in the morning, but provided him with a 5-day prescription for Coumadin and referred him to a social worker who could find a doctor who will work with the Claimant's insurance and get him back with the Coumadin clinic who could follow up. At this visit, the Claimant had no other complaints (Respondents' Exhibit J, pp. 70-74).

8. Claimant testified that he began work on Friday, September 5, 2014 at 7:30 a.m. He testified that although his low back was not symptom-free on the morning of September 5, 2014, it was a normal day.

9. Claimant testified that on September 5, 2014, he moved a slab of granite while working for Employer. He testified that a "slab" of granite is rock that is cut down for further cutting to vanity size. He testified that each slab weighed between 800 and 1,200 pounds. He testified that Employer had a saw table where slabs were placed for cutting. He testified that a slab sat in a trench, and leaned against the table at an angle. He testified that chains are attached to the slab, and that he and another coworker

would generally lift the bottom of the slab upward and use leverage and the weight of the slab itself to gently lay the slab down on the saw table.

10. Claimant testified that on September 5, 2014, his coworkers who usually assist with moving slabs of granite in Employer's shop were installing products in Utah, and were not there. He testified that Tim Mallett, Employer's owner's son, helped him move a granite slab that day. Claimant testified that Tim has been there since before the Claimant started and he works on and off. Tim Mallett testified that he recalled helping the Claimant move a piece of granite on September 5, 2014.

11. Tim Mallett testified at the hearing. Tim Mallett testified that he was the manager of Mor Storage, an associated business of Employer's. He testified that, at times, he performed job duties for Employer. Tim Mallett testified that to get the slab of granite onto the saw table, you don't actually "lift" it. Rather, the slab is leaned against the table and it is supported by chains and all you have to do is tilt it when it swings up off the chains and lay it flat on the table so that it is halfway off the table. Then you slide or push the slab so that it is all the way on the table.

12. Claimant testified that Tim Mallett didn't know what to do on the lift. When the Claimant counted down (1-2-3), the Claimant lifted his part and Tim Mallett didn't pick up or take any weight, so the Claimant had all the weight and he felt his back shift. After lifting the slab, the Claimant felt tremendous pain in his lower back. The Claimant testified that due to the pain, the Claimant had to lie down on the table. The Claimant testified that there was no one to tell about the injury except Tim Mallett because everyone was out of town and the Claimant didn't have anyone's personal cell phone number. Claimant testified that just after this happened, he told Tim Mallett that he did not know what he was doing even though Tim told him that he did, that Tim Mallett did not lift enough of the weight, and that Claimant's back was now "messed up."

13. Tim Mallett testified that after he helped move the granite, he left the back area and did not see the Claimant again that day. Tim Mallett did not recall the Claimant telling him that he did not lift enough of the weight or that the Claimant was hurt. Tim Mallett was not aware what time the Claimant left work on Friday, but when he locked up the shop, the Claimant was no longer there. He testified that he did see the Claimant come in on Saturday, but his doesn't know when the Claimant left that day.

14. Claimant testified that after the injury, he continued to work on that slab on the saw table on Friday, September 5, 2014 for a while because the saw table was automated and didn't require any physical activity. He testified that he left work at approximately 2:00 p.m. because he could not perform his job duties due to his back pain. Claimant testified he did not report his back injury or back pain to Imogene Hampton, Employer's office manager, that day because he believed that she was not onsite. Claimant testified that he did not have Ms. Hampton's personal cell phone number.

15. Imogene Hampton has been employed as the receptionist, bookkeeper, assistant manager and office manager for Employer for about 2 years. She does the payroll and assists with the paperwork for worker's compensation injuries. She testified that prior to September 8, 2014, Claimant had never missed more than one day of work to see a chiropractor. Ms. Hampton testified that she worked a full day on September 5, 2014 and she is the one who went to ask Tim Mallett to help the Claimant with the granite slab. She testified that she does not recall the Claimant telling her on September 5, 2014 that he hurt his back that day when lifting a granite slab with Tim Mallett.

16. Claimant testified that he was scheduled to work the following day, Saturday, September 6, 2014. He testified that he clocked in that morning and planned on working. He testified that he expressed to another employee that his back hurt from lifting a slab of granite the day before. Claimant testified that the employee advised him to sit down to see if his symptoms improved. Claimant testified he still had symptoms and was unable to work. He testified that he and the other employee clocked out and left the premises. He testified he did not report his back injury or back pain to a supervisor because there was not a supervisor on Employer's premises that day.

17. Claimant testified that he tried to go on a hike with his wife and children on Saturday, September 6, 2014, but was unable to hike because of his back symptoms and left after taking a picture at the trail head.

18. Claimant testified that he went to work on Monday September 8, 2014. He testified that he talked to Ms. Hampton about his back injury. He testified he told Ms. Hampton that he hurt his back while lifting granite on Friday, September 5, 2014. Claimant testified Ms. Hampton instructed him to leave work early that day. Tim Mallett testified that he recalled that Claimant told Employer about an injury on Monday, September 8, 2014.

19. Ms. Hampton testified that on September 8, 2014, she went to the back room to see the guys who were working that day and asked how it was going. She testified that the Claimant told her "not good" because his back was hurting. She asked him why and he responded, "lifting all this." Ms. Hampton testified that she told Larry Mallett what Claimant had told her, and that he instructed her to send Claimant home for the day.

20. Larry Mallett, owner of Employer, testified at hearing. He testified that he was familiar with how granite slabs are placed on the saw table. He testified that the slabs are supported by chains and tilted onto the table. He testified that 65% of the slab's weight is on the table. He testified that two people are required to get a slab onto the table. He testified that he understood that one person would lift the slab from the bottom, and one person would push the slab from the top to move it onto the table. He testified: "I believe there's a little lifting" involved in getting granite slabs onto the table.

21. With respect to the conflicting testimony on the Claimant's mechanism of injury, the ALJ finds that, although Tim Mallett testified that lifting is not required when moving a granite slab onto the saw table, Tim Mallett testified that he had only moved approximately 10 slabs of granite onto the saw table at Employer's premises. The ALJ notes that Larry Mallet testified that some lifting is required in order to move slabs onto the saw table. The ALJ finds that the testimony of both Tim and Larry Mallett supports Claimant's testimony that Tim Mallett was not familiar with the way Claimant lifted slabs of granite, and supports Claimant's testimony that Tim Mallett did properly not help Claimant lift the slab. This finding, coupled with the Claimant's overall credible testimony, and the consistency with the medical records, makes it more likely than not that the Claimant did experience an injury while placing a piece of granite on the saw table with the assistance of Tim Mallett on September 5, 2014.

22. With regard to the conflicting testimony regarding whether or not Claimant reported a work injury and when he may have done so, the ALJ finds that Ms. Hampton's testimony supports Claimant's testimony that he reported the injury on Monday, September 8, 2014. The ALJ finds that Ms. Hampton understood on September 8, 2014 that Claimant's low back pain was related to work activities after Claimant told her that his back was hurting after lifting granite. Mr. Larry Mallett testified that he received a phone call from Imogene Hampton on September 8, 2014 who told him that Claimant "was hurting." Mr. Larry Mallett testified that he told Ms. Hampton: "If his back is hurting, send him home." Mr. Larry Mallett testified that Claimant was not staying in touch with Employer after September 8, 2014, and that Mr. Mallett visited Claimant at his home. Mr. Mallett testified that Claimant told him his phone had not been working. Mr. Larry Mallett also testified that Claimant in fact did provide him and Ms. Hampton with medical records from his treatment. While Mr. Mallett may or may not have understood that the Claimant's back pain was work related, this is immaterial where Ms. Hampton, the office manager and person responsible for initiating worker's compensation claims, did clearly understand that the Claimant's back pain was work related. The fact that Ms. Hampton may not have conveyed to Mr. Larry Mallett the nature of the Claimant's back pain, impacts her understanding that, on September 8, 2014, the Claimant had back pain due to lifting granite.

23. Claimant sought medical care on September 8, 2014 at St. Mary's Hospital. Claimant testified he did not go to the hospital until very late that night because he had to coordinate childcare for his four children so that his wife could accompany him.

24. The hospital record notes that on September 8, 2014, Claimant arrived at 11:05 p.m., was admitted to the hospital at 11:44 p.m., and was discharged at 12:29 a.m. on September 9, 2014 (Claimant's Exhibit 3, p. 18; Respondents' Exhibit J, p. 79). Janet Prager, NP, noted at 12:12 a.m. on September 9, 2014 that Claimant had lower back pain, more left-sided than right, with an onset date of five days earlier, and that he reported it worsened the day before he came to the emergency department (Claimant's Exhibit 3, p. 19; Respondents' Exhibit J, p. 80). At the hearing, Claimant that the onset timeframe of five days prior to the date he sought medical care was inaccurate. He testified he did not know why the record stated his pain had started five days earlier,

but testified that he may have just "thrown out a date" when asked by hospital staff. On cross-examination, the Claimant testified that he was casual about the specific date and not careful because he didn't realize that the specific date was important. In another note in the same hospital record for the September 8, 2014 ER visit, the "History of Present Illness" stated: "Lifting heavy things at work. Lower back pain since Friday (3 days ago). Pain goes down to left knee" (Claimant's Exhibit 3, p. 24). Claimant testified that this part of the record stated the correct timeframe: the injury occurred on Friday, September 5, 2014.

25. In the history of present illness, the September 8, 2014 ER note states that "[Claimant] was lifting a lot of heavy granite slabs at work the day that the pain came on. States it radiates to his left thigh to the level of the knee and is in his buttock. States that the pain is sharp and aching and it rates 8/10. States he's had issues with back discomfort in the past but it's never been this bad" (Claimant's Exhibit 3, p. 19; Respondents' Exhibit J, p. 80). Claimant testified that both those statements were accurate. Another note in the September 8, 2014 hospital record stated that Claimant presented to the emergency room with low back pain, which had worsened over the past week, and that Claimant had a very physically active job lifting heavy weight (Claimant's Exhibit 3, p. 21; Respondents' Exhibit J, p. 82). In the paperwork, the "guarantor" for Claimant's medical care was listed as Respondent-Employer (Claimant's Exhibit 3, p. 28; Respondents' Exhibit J, p. 87).

26. Ms. Hampton testified that she did not hear from the Claimant on September 9, 2014 and she kept trying to talk to him or text him by phone but got no response.

27. Claimant returned to St. Mary's Hospital at 11:10 p.m. on September 10, 2014 with a primary complaint of back pain (Claimant's Exhibit 3, p. 30; Respondents' Exhibit J, p. 89). At the hearing, Claimant testified he returned to the emergency room because he still had unbearable back pain. The hospital record notes that the Claimant stated,

> [H]e has had some back pain on and off for the last couple of months ever since he started his new weight lifting regimen to lose weight. He states he's been doing some heavy squatting at the local gym. Additionally he moves granite for a living and does a lot of heavy lifting at work. He was here the last couple of days for the same back pain after he was lifting a lot of heavy rock at work. He states the pain medication he has at home is not working (Claimant's Exhibit 3, p. 31; Respondents' Exhibit J, p. 90).

Claimant testified that he had been given pain medication by hospital staff at his last visit, but that the medications "weren't touching the pain" and the pain was unbearable enough that he had to go to the ER again.

28. Although the Claimant arrived at 11:10 p.m. on September 10, 2014, there was a high volume overload situation at the ER and there was a prolonged wait time. The Claimant finally saw Dr. Bradley Neese, who signed a provider note at 3:54

a.m. on September 11, 2014. Dr. Neese noted that, "the etiology of the patient's symptoms is consistent with acute muscle skeletal back strain likely secondary to improper lifting technique, a significant amount of stress from heavy weightlifting and lifting at work, and associated with poor body habitus to include obesity" (Claimant's Exhibit 3, pp. 30-35; Respondents' Exhibit J, pp. 89-94.

29. Claimant sought medical care with James Haraway, NP at Foresight Family Physicians on September 11, 2014, the same day he was discharged from the hospital. NP Haraway noted that Claimant had injured his low back while at work on September 5, 2014 "doing heavy lifting of granite." NP Haraway noted that Claimant had constant, sharp, and shooting pain in the left side of his low back, and had radiating pain into his left leg. NP Haraway noted that Claimant complained of previous back problems, including occasional mechanical back pain. NP Harwaway increased the Claimant's dose of Oxycodone and advised the Claimant of the "importance of going through employer for work related injury and seeing their preferred provider (Claimant's Exhibit 1, pp. 1-2; Respondents' Exhibit G, pp. 14-15).

30. Ms. Hampton testified that she spoke with Claimant again on September 11, 2014, and asked him whether "this is just the usual, or if he needed to file a state comp claim." She testified that Claimant told her he wasn't sure. Ms. Hampton testified that on the morning of September 12, 2014, she called the Claimant to advise him that if he was filing a work comp claim, she needed him to fill out some paperwork. He told her that he couldn't come in, so she testified that she visited Claimant at his home to fill out paperwork on September 12, 2014. Ms. Hampton testified that she gave Claimant a list of authorized physicians.

31. Ms. Hampton testified that she completed the Employer's First Report of Injury dated September 12, 2014 (Claimant's Exhibit 7, p. 143; Respondents' Exhibit A, p. 1). She noted that Claimant had a "strain" of his "Low Back (Lumbar & Lumbar-Sacral)," and that the mechanism of injury was "moving a slab off the table onto another table, and has back pain." Ms. Hampton testified that the date of injury listed as September 11, 2014 in the First Report was inaccurate. She also testified that the date listed as when Employer was first notified of the injury, September 12, 2014, was also inaccurate. She testified that actually Claimant had told her on the morning of September 8, 2014 that he had back pain from lifting granite. The Employer's First Report of Injury also noted "No Medical Treatment" under the box for "Initial Treatment." When asked whether she was aware that as of September 12, 2014, Claimant had sought medical care at Foresight Family Physicians and on several occasions at St. Mary's Hospital, Ms. Hampton testified that although Claimant had told her he had sought medical care, she "had no proof" that he had care and, without confirmation, she could not know for sure. Ms. Hampton testified that Claimant never gave her a written statement of his injury. However, she acknowledged that she did not give Claimant a form to fill out, but instead just "told him to write a statement on a piece of paper."

32. Ms. Hampton at first testified that after she visited Claimant at his home on September 12, she did not hear anything more from Claimant. However, she then

testified that Claimant's wife, Star Marquez, called in to report that Claimant had a partial work release from a physician and then faxed the medical record to Ms. Hampton.

33. Claimant saw Dr. Dale Utt for an initial evaluation on September 12, 2014. Dr. Utt noted that Claimant was "helping to lift a 100 pound granite tabletop at his place of employment so it could be worked on" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit G, p. 16). Claimant testified that the record is inaccurate, because the slabs of granite weighed between 800 and 1,200 pounds, not 100 pounds. Dr. Utt also noted that Claimant had an inexperienced employee helping him and Claimant "ended up lifting just too much weight and felt low back discomfort at that time" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit G, p. 16). At the hearing, Claimant testified that the "inexperienced employee" mentioned in the record was Tim Mallett. In the medical record, Dr. Utt noted that Claimant's symptoms had become progressively worse over the days following the injury. Dr. Utt noted that Claimant had been to the emergency room twice because of increasing pain in his back and radiating pain to his left thigh and knee. Dr. Utt noted: "Historically he has had just occasional back pain with no events like this and seeing a chiropractor occasionally in the past" (Claimant's Exhibit 1, p. 3; Respondents' Exhibit G, p. 16). Dr. Utt opined that he suspected that Claimant had a ruptured lumbar disc, which "appear[ed] to be work related" (Claimant's Exhibit 1, p. 4; Respondents' Exhibit G, p. 17). Dr. Utt recommended an MRI scan. He also noted that Claimant was "having a very difficult time managing the pain and may end up in the hospital. He indicated that the Claimant may be a candidate for an epidural or early surgical intervention (Claimant's Exhibit 1, p. 4; Respondents' Exhibit G, p. 17).

34. On the "Physician-Employer Communication Form," Dr. Utt indicated that it was medically probable that Claimant's injury was work-related and noted the Claimant was temporarily unable to work (Claimant's Exhibit 1, p. 5). Dr. Utt also produced a Physician's Report of Worker's Compensation Injury on September 14, 2014. He noted that his objective findings were consistent with Claimant's history and with a work-related mechanism of injury. Dr. Utt also noted that Claimant's description of the injury was "lifting a large piece of [granite]." Dr. Utt recommended an MRI and prescribed pain medications. Dr. Utt also listed the Claimant's work status as unable to work from 9/12/14 to 9/18/14 (Claimant's Exhibit 1, p. 6; Respondents' Exhibit G, p. 18).

35. Claimant returned to see Dr. Utt on September 15, 2014. Dr. Utt noted that Claimant was unable to get any relief of his back pain with both oxycodone and gabapentin. Dr. Utt noted that Claimant was tearful, hyperventilating, and could not get comfortable. Dr. Utt noted that Claimant had "intractable back pain" and, because the oral pain medications were not managing his intense pain, the Claimant needed to be admitted to the hospital and have a diagnostic MRI (Claimant's Exhibit 1, p. 7; Respondents' Exhibit G, p. 19).

36. Claimant returned to St. Mary's Hospital the same day he saw Dr. Utt on September 15, 2014. Dr. Saba Rizvi noted that Claimant had injured his back one

week ago lifting a heavy slab of granite Dr. Rizvi noted that Claimant's back pain was not being controlled by medications, and that Claimant had back pain radiating into his left buttock and leg. Dr. Rizvi noted the Claimant was evaluated earlier in the day by Dr. Utt who advised that Claimant go to the ER for further evaluation (Claimant's Exhibits, p. 50; Respondents' Exhibit J, p. 98). The hospital record also noted that Claimant had lifted something heavy ("almost 1,000lb") one and a half weeks prior to admission and had significant back pain radiating into the left leg (Claimant's Exhibit 3, p. 55; Respondents' Exhibit J, p. 110). Claimant testified that this record's timeline was accurate because his injury occurred 10 days before September 15, on September 5. In the medical record for this same visit, Dr. Victor Barton also noted that "approximately 10 days ago [Claimant] was lifting a granite countertop and he thinks that he overexerted himself and he had sudden sharp shooting pain in his left lower back which radiated down to just below his knee" (Claimant's Exhibit 3, p. 57; Respondents' Exhibit J, p. 112). Claimant testified that the 10-day timeline in Dr. Barton's note was accurate. Dr. Barton noted that Claimant had been seen twice in the emergency room, and that Claimant's pain was not being controlled by medications. Dr. Barton noted that Claimant appeared to be in severe pain and was tearful (Claimant's Exhibit 3, pp. 57-58; Respondents' Exhibit J, pp. 112-113). Dr. Barton noted that Claimant would be consulting with Dr. James Gebhard.

37. An MRI performed at St. Mary's Hospital on September 15, 2014 showed a "[l]arge left disc extrusion causing moderate central canal and left lateral recess stenosis affecting the S1 nerve" (Claimant's Exhibit 2, p. 17; Respondents' Exhibit I, p. 36). Dr. Randall Gehl, the radiologist, noted that Claimant had severe low back pain after lifting a heavy object. Dr. Gehl noted that Claimant was in a lot of pain and had difficulty keeping still (Claimant's Exhibit 2, p. 17).

38. Dr. Gebhard examined the Claimant at St. Mary's Hospital on September 15, 2014 for an orthopedic consult. Dr. Gebhard's note indicates that Claimant was lifting a nearly 1,000-pound slab of granite at work. Dr. Gebhard noted that Claimant "had a clerical worker trying to assist him who was unable to really take much [of] the load. [Claimant] took pretty much the whole load himself and had sudden onset of back pain. Over a short period of time, it started radiating into the left buttock and thigh, occasionally going down below the knee with shooting pain, but the constant pain stays in the buttock and thigh. The back pain itself was also slightly left sided." Dr. Gebhard noted that the September 5, 2015 MRI showed a large disk herniation at L5-S1, displacing the S1 nerve root and that Claimant had "severe symptoms. Dr. Gebhard noted that the Claimant was admitted to the hospital for pain control and for further treatment of his back as the Claimant was unable to function or stand the pain, even with large doses of oxycodone. Dr. Gebhard discussed treatment options with the Claimant and noted that Claimant elected to try epidural injections and further conservative care as opposed to possible microdiskectomy surgery (Claimant's Exhibit 3, pp. 61-63; Respondents' Exhibit J, pp. 116-117).

39. After staying overnight in the hospital, Claimant underwent a left S1 transforaminal epidural steroid injection on September 16, 2014. The Claimant

reported good pain relief after the procedure, bringing his pain level down to 2/10 (Claimant's Exhibit 3, p. 66; Respondents' Exhibit J, p. 121).

40. Claimant also had occupational therapy in the hospital with Callin Portra, OTR, and Jamie Gunnell, PT. The Claimant reported that "he does not have a history of back pain and he has only had sore muscles in his back." The Claimant reported that he planned on returning to work with granite. At this point the Claimant's mobility was limited by pain and he could only tolerate about 20 feet of ambulation. So, he was educated on back exercises and interventions. The Claimant had some pain relief with pelvic tilts and core exercises and they did not increase his back pain. PT Gunnell noted that the Claimant would need outpatient physical therapy for back pain on discharge (Claimant's Exhibit 3, p. 68; Respondents' Exhibit J, p. 123).

41. Claimant was discharged from St. Mary's Hospital at approximately 2:32 p.m. on September 16, 2014 (Claimant's Exhibit 3, p. 64; Respondents' Exhibit J, p. 119).

42. Claimant saw Dr. Gregory Reicks at Foresight Family Physicians on September 18, 2014. Dr. Reicks noted that Claimant had improvement following the epidural steroid injection. Dr. Reicks noted that Claimant was able to cut down on his oxycodone use, and had stopped taking gabapentin. Dr. Reicks reviewed the results of the MRI, and assessed the Claimant with low back pain on left side with sciatica and herniated lumbar intervertbral disc. Dr. Reicks prescribed prednisone and oxycodone. Dr. Reicks referred Claimant to physical therapy and to a spine surgeon. Dr. Reicks also provided work restrictions, including a 10-pound lifting limit, no repetitive bending, no squatting, and no kneeling (Claimant's Exhibit 1, pp. 10-11; Respondents' Exhibit G, pp. 21-22). On the Physician-Employer Communication Form Dr. Reicks checked the box for "yes" that it was medically probable that Claimant's injury was work-related (Claimants' Exhibit 1, p. 12).

43. Claimant returned to Dr. Reicks for follow up on September 29, 2014 reporting that his leg symptoms had worsened since the last visit, and that he had only two or three days of relief after their last visit. Dr. Reicks noted that Claimant had numbness in his left foot and radicular pain in his left buttock and leg. Dr. Reicks noted that Claimant was taking extended release morphine along with oxycodone and gabapentin and so he did not return to work. Dr. Reicks counseled the Claimant about his medications and pain management. Dr. Reicks noted that the Claimant was temporarily disabled from returning to work (Claimant's Exhibit 1, pp. 13-15; Respondents' Exhibit G, pp. 25-26).

44. Dr. Reicks noted on September 29, 2014 that Claimant had an appointment to see a specialist on October 10. Claimant testified that he never consulted with a specialist because Respondents denied his claim and would not authorize any more treatment. Claimant also has not returned to Foresight Family Physicians since September 29, 2014 because Respondents denied authorization for further visits. A telephone memo notes that in a telephone conversation between a staff member of Foresight Family Physicians and a representative for Insurer, Claimant's

physicians were notified by Jennifer Loucks that "this claim is being denied while under investigation." The staff member noted, "they will NOT pay for any visit, therapy OR medications. I have a call in to the patient, but in case they call you first, just wanted you to be aware. His appts. with Dr. Reicks have been cancelled" (Claimant's Exhibit 1, p. 16).

45. Insurer filed a Notice of Contest dated October 1, 2014 (Claimant's Exhibit 7, p. 144; Respondents' Exhibit b, p. 2).

46. Claimant testified that he has not returned to work for Employer since September 8, 2014. Claimant testified that he was not certain whether he was still employed with Employer. He testified that he had not yet been returned to full work duty by a physician.

47. Claimant took another job with StarTek beginning December 8, 2014. He testified that StarTek is an inbound call center for a collection agency, and that his job duties included sitting at a desk taking phone calls, and that there were no lifting or physical job duties. He testified he earned $11 per hour and worked 40 hours per week, which was less than he earned working for Employer. Claimant testified he took the second job because he had not received any wages or benefits from Respondents since September 8, 2014, and needed money to support his family. He testified he had already sold two vehicles for money but still needed to be able to pay his family's rent.

48. Claimant testified that his symptoms had improved since the injury. He testified that at rest, his pain level was a 0 out of 10, but rose to a 4 out of 10 with activity. He testified that he could walk and move around, but had a "huge problem" going up and down stairs or opening doors. Claimant testified that his symptoms since the injury have limited his activities of daily living. He testified that he cannot lift anything, cannot perform yard work, and is less independent than he used to be.

49. Claimant compared his back and leg symptoms before this injury when he saw a chiropractor and after the work injury. He testified that when he sought care with a chiropractor, his symptoms were uncomfortable and irritating, but "light," and the chiropractor could "just stretch him out." He testified that after the September 5, 2014 injury, his symptoms when he was admitted to the hospital required narcotic medications, injections, and physical therapy: much more treatment than was needed when he saw the chiropractor in July and August 2014.

50. The ALJ finds Claimant's testimony regarding his symptoms, the onset of his symptoms, and the reporting of his symptoms to Ms. Hampton to be credible and persuasive.

51. Respondents referred Claimant to Dr. George Schakaraschwili for an independent medical evaluation ("IME") on January 13, 2015. Dr. Schakaraschwili reviewed Claimant's medical records and prepared an extensive summary, obtained a medical history and performed a physical examination in connection with his IME. Dr. Schakaraschwili noted in his report that Claimant explained that the granite slabs are

"supported vertically and manually put [onto] a table for cutting and other finishing." Dr. Schakaraschwili noted that Claimant described that "two coworkers stand on either end of the granite slab and then pivot it so it is horizontal and place it on the table" (Respondents' Exhibit K, p. 132). He noted that on September 5, Tim Mallett ("an inexperienced helper") was assisting Claimant in getting a slab onto a table. He noted that when Claimant said to lift, Mr. Mallett did not lift, and Claimant took most of the weight of the slab. Dr. Schakaraschwili noted that Claimant reported he had immediate back pain in the midline and to the left side. He noted that Claimant might have left work early that day, and was unable to do any work the following day because his back hurt. He noted that Claimant reported his injury to Ms. Hampton the following Monday, that Ms. Hampton called the owner, and that he was told to take the rest of the day off (Respondents' Exhibit K, p. 133). Dr. Schakaraschwili noted that the Claimant told him that Employer "asked [Claimant] to sign papers saying that he was at work Monday and Tuesday although he was not. The Claimant also stated to Dr. Schakaraschwili that Ms. Hampton denied that he reported the injury. He then challenged her regarding the dates that they were asking him to sign on the paperwork and he was told that they were not insured on the date he was injured" (Respondents' Exhibit K, p. 133).

52. Dr. Schakaraschwili reported that after the claim was denied, his PCP provided him with pain medications for awhile but then stopped and the Claimant became depressed and suicidal. The Claimant reported that he stayed in his house and would have to lie on the floor when his back was hurting. The Claimant reported to Dr. Schakaraschwili that by Thanksgiving 2014, Claimant's pain had improved and he was "100% better" (Respondents' Exhibit K, p. 133). Although he reported reduced pain overall, the Claimant reported that "he gets the feeling that his back wants to collapse. He does not feel secure when he goes up stairs. He states his left leg feels weak" (Respondents' Exhibit K, p. 133). Dr. Schakaraschwili also noted that Claimant had pain between a 0 and 3 out of 10 at times, and noted that walking up hills and stairs, getting up off the ground, and lifting all made Claimant's pain worse (Respondents' Exhibit K, p. 133). Dr. Schakaraschwili also noted that Claimant had not returned to his prior activities because of fear that something might happen to his back (Respondents' Exhibits, p. 140).

53. Dr. Schakaraschwili noted that Claimant reported he had always had back problems, which he attributed to being overweight (Respondents' Exhibit K, pp. 132-133). Dr. Schakaraschwili opined that it was "quite possible" that the disc herniation on the September 15, 2014 MRI preexisted the work injury. However, he also noted that without prior lumbar MRI scans, it was "impossible to determine whether the disc herniation reported on the scan of September 15, 2014 was already present on the reported date of injury" (Respondents' Exhibit K, p. 140).

54. Dr. Schakaraschwili did agree that Claimant's symptoms were "suggestive of a disc herniation" or "could also be due to a sacroiliac joint disorder." Although, Dr. Schakaraschwili opined that "[t]here was no evidence that the disc herniation was caused by the incident reported at work." Dr. Schakaraschwili also opined that "lifting and squatting with almost any amount of weight could result in disc herniation" and disc herniation can occur when doing activities that do not involve lifting

(Respondents' Exhibit K, p. 141). Despite Claimant's ongoing symptoms, Dr. Schakaraschwili opined that no permanent exacerbation or injury arose from the work incident. Dr. Schakaraschwili did note that Claimant's low back condition "may have been temporarily exacerbated by events in early September 2014" (Respondents' Exhibit K, p. 140). In his report, when asked whether Claimant's low back condition was the result of a work-related injury, Dr. Schakaraschwili opined: "The work incident could have caused a temporary exacerbation of [Claimant's] preexisting condition" but he further opined that "there is no evidence of any objective worsening of his condition at this point as a result of the work incident as he is essentially pain free at this point (Respondents' Exhibit K, p. 141).

55. Dr. Schakaraschwili testified at hearing in this matter. Dr. Schakaraschwili's testimony was generally consistent with his January 13, 2015 IME report. For the IME, Dr. Schakaraschwili took a detailed medical history and the Claimant reported a long history of back pain to him. The Claimant told Dr. Schakaraschwilli that he had seen a chiropractor. The Claimant told Dr. Schakaraschwilli that sometimes his back pain was due to lifting at work and sometimes lifting outside of work. In comparing the pain diagram the Claimant completed for the chiropractor prior to the work incident, Dr. Schakaraschwili noted that the Claimant had low back pain with pain going down the back of the left leg. He testified that based on his review of the chiropractic notes, Claimant was having range of motion restrictions at that time. Dr. Schakaraschwili also noted a July 25, 2014 chiropractic progress note includes a notation about "sciatica." So, when considering the MRI of the Claimant's lumbar spine, Dr. Schakaraschwili testified that you cannot tell what caused the lumbar "large left disc extrusion" that is noted. Nor can you tell if this is the Claimant's pain generator. In going back to the pain diagram, Dr. Schakaraschwili testified that this could indicate discogenic pain, or, and more likely, this could be coming from the joint, based on the Claimant's response to the injection since he didn't have immediate pain relief.

56. Based on what Dr. Schakaraschwili opines is a diagnostic response (70% relief) on 9/16/14 to a left S1 transforaminal epidural steroid injection, Dr. Schakaraschwilli thought the Claimant's pain more likely from the SI joint and not a herniation. Ultimately, Dr. Schakaraschwilli opines that Claimant had a temporary exacerbation of a pre-existing condition. Claimant has episodes of back pain that go down the leg, but no evidence of structural change. Dr. Schakaraschwili opined that back pain is multifactoral and the Claimant had it most of his life. So, this incident was a temporary exacerbation of a preexisting condition. He finds that Claimant is now at MMI for any temporary exacerbation that may have happened on 9/5/14. The Claimant was at MMI by Thanksgiving when Claimant reported the pain was mostly gone. As for the incident, this is resolved and no additional treatment is required for that injury.

57. On cross-examination, Dr. Schakaraschwilli testified that he would have liked to see a follow up SI joint injection, but that didn't happen in this case. Nevertheless, Dr. Schakaraschwilit finds that the Claimant is back to his baseline – which is not symptom-free. Dr. Schakaraschwili testified that he was aware that Claimant had no prior low back treatment other than the two chiropractic visits, had no

prior back injuries, and that Claimant had no low back MRIs other than the one performed on September 15, 2014, but still opined that Claimant's symptoms following the work incident were attributable to a preexisting condition. When asked whether Claimant's symptoms worsened after the September 5, 2014 work incident, Dr. Schakaraschwili testified that Claimant's symptoms did worsen and required medical treatment. When asked whether a "temporary exacerbation of a preexisting condition" is compensable under Colorado workers' compensation law, Dr. Schakaraschwili testified that he was not qualified to answer a legal question, only medical questions.

58. In considering the conflicting medical opinions regarding the Claimant's condition and existence of a low back injury with an onset of September 5, 2014, the ALJ credits the medical opinions expressed by physicians and providers at St. Mary's Hospital, Dr. Gebhard, Dr. Utt, and Dr. Reicks in the medical records over the contrary opinions expressed by Dr. Schakaraschwili in his IME report and testimony. The ALJ finds that Claimant has proven that it is more likely than not that he suffered an injury arising out of and in the course of his employment with Employer. The ALJ finds Claimant's testimony regarding his symptoms to be consistent with the medical records in evidence. The ALJ credits Claimant's testimony that he injured his low back when he lifted granite while working on September 5, 2014. The ALJ further credits Claimant's testimony that although he had some existing back symptoms that preexisted the date of the injury, the symptoms were not independently disabling and did not require medical treatment before the September 5, 2014 injury occurred. The ALJ finds that Claimant has proven that it is more likely than not that his low back and leg symptoms were aggravated or exacerbated when he lifted granite while working on September 5, 2014, which aggravation required treatment.

59. The ALJ credits the medical opinions expressed by the various medical providers in the records and Claimant's testimony and finds that Claimant has proven that it is more likely than not that the medical treatment he received from St. Mary's Hospital and from Foresight Family Physicians was reasonable and necessary to cure and relieve the Claimant from the effects of his industrial injury. Specifically, the ALJ finds that Claimant sought care with St. Mary's Hospital on September 8, 2014 on an emergent basis for intractable low back pain. The ALJ finds that the office visits with Foresight Family Physicians after the September 5, 2014 injury were reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury, and finds that Foresight Family Physicians was Employer's authorized medical provider.

60. The ALJ further finds that the medical care provided by St. Mary's Hospital on September 10-11, 2014 and September 15-16, 2014 was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. With respect to September 10-11 hospital visit, the ALJ finds that Claimant sought medical care on an emergent basis because his back pain was too severe to wait until his appointment on September 11 with Foresight Family Physician, as noted in the medical records. With respect to the hospital visit on September 15-16, the ALJ finds that Dr. Reicks, Employer's authorized medical provider, referred Claimant to the hospital for an MRI and evaluation for "intractable back pain" on September 15, 2014. The medical

records reflect that Claimant then went directly from Dr. Reicks's office to St. Mary's Hospital.

61. The ALJ finds that the Claimant left work at 2:00 p.m. on Friday, September 5, 2014, but it is uncertain that there was an actual wage loss that day. As for Saturday, September 6, 2014, the Claimant testified that he stopped in but then he and another employee elected to clock out and leave. While this testimony was found to be credible, it was not established that September 6, 2014 was a full work day or how long the Claimant had intended to work that day or that there was an actual wage loss. The Claimant also made plans to hike with his family on that day, even though he did not end up hiking due to back pain.

62. The ALJ finds that Claimant's work injury caused him to be totally temporarily disabled from working beginning September 8, 2014, when he was told to leave work due to back pain, and continuing until December 7, 2014, the day before Claimant began working on a light duty basis for another employer.

63. The ALJ also finds that Claimant's work injury and associated symptoms have limited his capacity to earn his previous wage. He is has not been placed at MMI by and ATP, he is still not cleared to return to work for Employer and was never offered modified duty by Employer. The ALJ credits Claimant's testimony that he returned to work for another employer in a less physical office job, but earned less than he did while working for Employer. At the new employer his average weekly wage is $440.00 (40 hours per week at $11.00 per hour) and per stipulation, his average weekly wage working for Employer was $535.00, for a wage loss of $95.00 per week from December 8, 2014 ongoing.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

With respect to the conflicting testimony of the fact witnesses on the Claimant's mechanism of injury, the ALJ found the Claimant's testimony to be credible and further found that the testimony of both Tim and Larry Mallett supports Claimant's testimony that Tim Mallett was not familiar with the way Claimant lifted slabs of granite, and supported Claimant's testimony that Tim Mallett did properly not help Claimant lift the slab. This finding, coupled with the Claimant's overall credible testimony, and the consistency of the Claimant's symptoms and reporting in the medical records, makes it more likely than not that the Claimant did experience an injury while placing a piece of granite on the saw table with the assistance of Tim Mallett on September 5, 2014.

Then, in considering the conflicting medical opinions regarding the Claimant's condition and existence of a low back injury with an onset of September 5, 2014, the ALJ credits the medical opinions expressed by physicians and providers at St. Mary's Hospital, Dr. Gebhard, Dr. Utt, and Dr. Reicks in the medical records over the contrary opinions expressed by Dr. Schakaraschwili in his IME report and testimony. The ALJ found that Claimant has proven that it is more likely than not that he suffered an injury arising out of and in the course of his employment with Employer. The ALJ found Claimant's testimony regarding his symptoms to be consistent with the medical records in evidence. The ALJ credited Claimant's testimony that he injured his low back when he lifted granite while working on September 5, 2014 and has proven that it is more likely than not that his low back and leg symptoms were caused, aggravated or accelerated when he lifted granite while working on September 5, 2014. The ALJ further credited Claimant's testimony that, although he had some existing back symptoms that preexisted the date of the injury, the symptoms were not independently disabling and did not require medical treatment before the September 5, 2014 injury occurred.

Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that his work activities on September 5, 2014 caused or permanently aggravated, accelerated or combined with his preexisting low back condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on September 5, 2014.

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101 C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v, Industrial. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence musty establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971): *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Per C.R.S. § 8-43-404 (9)(a), health care services shall be deemed authorized if the claim is found to be compensable when:

- Compensability of a claim is initially denied

- The services of the physician selected by the employer are not tendered at the time of the injury; and

- The injured worker is treated….at a public health facility in the state (or within 150 miles of the residence of the injured worker).

If the treatment provided to a claimant is found to be reasonably necessary and related to the injury, the claimant shall not be liable for treatment by the provider where the conditions of C.R.S. § 8-43-404 (9) are met.

Authorized providers also include those medical providers to whom a claimant is directly referred by the employer, as well as providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

In an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing medical service and the employer then has the right to select a physician. *Sims v. Industrial Claim Appeals Office of State of Colo*., 797 P.2d 777 (Colo. App. 1990).

Awards of emergency medical treatment have been upheld where the claimant's condition was so acute, and the need for treatment so immediate, that the claimant could not reasonably wait for authorization or a hearing to obtain permission for the treatment. See *Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995); *Ashley v. Art Gutterson*, W.C. No. 3-893-674 (January 29, 1992). However, compensable emergency treatment is not restricted to such circumstances. *Lutz v. Western Pacific Airlines, Inc*., W.C. No. 3-333-031 (ICAO, December 27, 1999). There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether the claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. An ALJ's determination whether there was a bona fide emergency or not will be upheld if supported by substantial evidence. *Hoffman v. Wal-mart Stores, Inc*., W.C. No. 4-774-720 (ICAO, January 12, 2010); *Timko v. Cub Foods*, W. C. No. 3-969-031 (ICAO, June 29, 2005).

As found, the medical opinions expressed by the various medical providers in the records and Claimant's testimony established that it is more likely than not that the medical treatment he received from St. Mary's Hospital and from Foresight Family Physicians was reasonable and necessary to cure and relieve the Claimant from the effects of his industrial injury. Specifically, the ALJ finds that Claimant sought care with St. Mary's Hospital on September 8, 2014 on an emergent basis for intractable low back pain.

The ALJ further found that the office visits with Foresight Family Physicians after the September 5, 2014 injury and the conservative care provided was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury, and finds that Foresight Family Physicians was Claimant's authorized medical provider.

The ALJ also found that the medical care provided by St. Mary's Hospital on September 10-11, 2014 and September 15-16, 2014 was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. With respect to September 10-11 hospital visit, the ALJ finds that Claimant sought medical care on an emergent basis because his back pain was too severe to wait until his appointment on September 11 with Foresight Family Physician, as noted in the medical records. With respect to the hospital visit on September 15-16, the ALJ finds that Dr. Reicks, Employer's authorized medical provider, referred Claimant to the hospital for an MRI and evaluation for "intractable back pain" on September 15, 2014. The medical records reflect that Claimant then went directly from Dr. Reicks's office to St. Mary's Hospital.

Prior to September 5, 2014, Claimant had not been on medical restrictions, nor had the Claimant missed work due to low back problems. The conservative medical care that the Claimant received to date from Foresight Family Physicians and St. Mary's Hospital and all their referrals was reasonably necessary to treat the Claimant's work-related condition. The Claimant's authorized treating physicians have never placed the Claimant at MMI nor released him to return to work without restrictions. The Claimant has reported that his pain is significantly reduced, but still credibly reports some ongoing symptoms and/or reduced function in terms of his activities of daily living. The Claimant has established that he is entitled to further evaluation of his lower back condition to determine if he requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

Temporary Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2)

Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

In the case of temporary partial disability (TPD) benefits, the disability benefit is calculated on the "difference between the employer's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability…." Per § 8-42-106(2)(a)-(b), TPD benefits shall continue until the first occurrence of either one of the following:

- the employee reaches maximum medical improvement; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment

An authorized treating physician must make the determination of when the injured employee reaches maximum medical improvement (per § 8-42-107(8)(b)(I), C.R.S.), unless an ATP has not determined an employee is at MMI and an employer or insurer requests selection of an independent medical examiner after all of the following conditions are met: 24 months have passed since the date of injury, a party requests in writing that an ATP determine whether the employee has reached MMI, the ATP has not determined the employee reached MMI, and a physician other than the ATP has determined the employee has reached MMI. § 8-42-107(8)(b)(II)(A)-(D), C.R.S.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Here, it is not entirely clear that the Claimant suffered a wage loss on September 5, 2014 or September 6, 2014. While he may have left slightly early on Friday, the 5th, it is not clear there was a wage loss. Then, Saturday, the 6th, was not a typical work day and the testimony was that sometimes employees would work on Saturdays if there was extra work or to catch up on things. It is not clear how long the Claimant may have worked on Saturday or how long he had expected to work or that he suffered a wage loss for that day.

The Claimant came in to work on Monday, September 8, 2014, but after reporting his back pain and work injury to Ms. Hampton, the Claimant was told to leave work. From this point forward, the Claimant was not permitted to return to work due to back pain that was found to be work-related. Late in the evening of September 8, 2014, the Claimant's back pain was so severe, he sought treatment at the Emergency Department and was discharged in the very early hours of September 9, 2014. Then, again on September 10, 2014, the Claimant's back pain was severe enough for him to return to the Emergency Department for further medical treatment and he was discharged in the early hours of September 11, 2014. Later that day, the Claimant sought medical treatment with James Haraway, NP at Foresight Family Physicians.

On the morning of September 12, 2014, Ms. Hampton visited Claimant at his home because he could not come in to work due to pain in order to fill out worker's compensation claim paperwork. Then, Claimant saw Dr. Dale Utt for an initial evaluation on September 12, 2014. On September 12, 2014, Dr. Utt noted the Claimant was temporarily unable to work and he listed the Claimant's work status as unable to work from 9/12/14 to 9/18/14.

Claimant returned to see Dr. Utt on September 15, 2014 and Dr. Utt noted that Claimant had "intractable back pain" and, because the oral pain medications were not managing his intense pain, the Claimant needed to be admitted to the hospital and have a diagnostic MRI. Claimant returned to St. Mary's Hospital the same day he saw Dr. Utt on September 15, 2014 and he was admitted into the hospital. After staying overnight in the hospital, Claimant underwent a left S1 transforaminal epidural steroid injection on September 16, 2014. Claimant was discharged from St. Mary's Hospital at approximately 2:32 p.m. on September 16, 2014. Claimant saw Dr. Gregory Reicks at Foresight Family Physicians on September 18, 2014. Dr. Reicks also provided work restrictions, including a 10-pound lifting limit, no repetitive bending, no squatting, and no kneeling. It was established that the Claimant's wife provided these restrictions to Employer, but Claimant was not offered modified duty within his restrictions. At a follow up visit with Dr. Reicks on September 29, 2014, Dr. Reicks noted that the Claimant was temporarily disabled from returning to work. Dr. Reicks noted on September 29, 2014 that Claimant had an appointment to see a specialist on October 10. Claimant testified that he never consulted with a specialist because Respondents denied his claim and would not authorize any more treatment. Claimant also has not returned to Foresight Family Physicians since September 29, 2014 because Respondents denied authorization for further visits. Insurer filed a Notice of Contest dated October 1, 2014. Claimant testified that he has not returned to work for Employer since September 8, 2014 and he testified that he had not yet been returned to full work duty by a physician.

Claimant took another job with StarTek beginning December 8, 2014. He testified that StarTek is an inbound call center for a collection agency, and that his job duties included sitting at a desk taking phone calls, and that there were no lifting or physical job duties. He testified he earned $11 per hour and worked 40 hours per week, which was less than he earned working for Employer. Claimant testified he took the second job because he had not received any wages or benefits from Respondents since September 8, 2014.

The Claimant's work-related disability has resulted in him missing more than 3 work shifts and he has missed work shifts for more than two weeks resulting in a wage loss. Therefore the Claimant is entitled to temporary total disability benefits from the day he last worked until he returned to modified employment. The last day that the Claimant worked for Employer was September 8, 2014. So, the Claimant is entitled to TTD benefits from September 9, 2014 until December 7, 2014 (the day before he started working at StarTek on December 8, 2014).

While Dr. Schakaraschwili has opined the Claimant is at MMI, the Claimant has not been put at maximum medical improvement by authorized treating physician nor have the conditions of § 8-42-107(8)(b)(II)(A)-(D), C.R.S. been met. In addition, the Claimant's attending physician had not given him a written release to return to modified employment, with such employment having been offered to the employee in writing, and then employee failed to begin such employment. Therefore, the Claimant is entitled to TPD benefits from December 8, 2014 ongoing until one of the conditions of § 8-42-106(2)(a)-(b) has occurred.

ORDER

It is therefore ordered that:

1. Claimant proved that he suffered a compensable work injury on September 5, 2014.

2. Medical treatment provided by Foresight Family Physicians and St. Mary's Hospital was reasonably necessary to cure and relieve Claimant from the effects of his September 5, 2014 injury and Respondents shall be liable for payment for this medical treatment.

3. The Claimant is entitled to further medical benefits to treat his low back and associated symptoms which are causally related to the September 5, 2014 work injury, if any, as determined by his authorized treating physicians, and the Respondents are responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

4. Claimant's AWW is established to be $535.00 per stipulation of the parties approved by the ALJ.

5. Respondents shall pay Claimant temporary total disability benefits for the period of September 9, 2014 through December 7, 2014.

6. Respondents shall pay Claimant temporary disability benefits for the period beginning December 8, 2014 ongoing until terminated by statute based on a $535.00 AWW, reduced by a $440.00 weekly wage the Claimant earned at a light duty office job for another employer, resulting in an average weekly wage loss of $95.00 and a corresponding temporary partial disability rate of $63.33 per week.

7. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 3, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve the claimant from the effects of his industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits beginning October 18, 2014 and continuing?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to reimbursement of the cost of medical benefits pursuant to Section 8-42-101(6)?

- The parties stipulated that if the claim is compensable, the claimant's average weekly wage ("AWW") is $782.27.

FINDINGS OF FACT

1. Claimant was employed by employer as a driver hauling mail between Salida, Colorado and Gunnison, Colorado. Claimant testified the on Friday October 17, 2014 he was pulling an over the road container made of aluminum and filled with mail that weighed approximately 500 pounds when he got pinned between the container and another over the road container. Claimant testified he was struck in the middle of the back by a part on the container when he was pinned. Claimant testified he parked his mail truck and got into his personal vehicle to drive home and knew that something was not right as his legs felt like rubber.

2. Claimant works the overnight shift for employer, which required him to go to work in the afternoon of October 16, 2014 and return home early in the morning on October 17, 2014.

3. Claimant testified he drove home and called his supervisors to call in sick for his next shift before going to bed. Claimant testified he was subsequently unable to get into a car because of his symptoms and his wife had to call an ambulance to take him to the hospital.

4. Claimant's wife testified that when claimant left for work on October 16, 2014 he was not complaining of back symptoms. When she saw claimant at approximately 6:30 a.m. on October 17, 2014 claimant told her his back hurt. Claimant's wife testified claimant went to lie down on the couch and later got up to use the restroom and told her his legs felt like rubber. Claimant then went to bed, and when he tried to get up, he couldn't walk. Claimant's wife then called an ambulance for him.

5. Claimant was taken by ambulance to Montrose Memorial Hospital emergency room ("ER") on October 18, 2014 where he was admitted. Claimant underwent a MRI of the thoracic spine on October 19, 2015 as ordered by Dr. Lokey. The MRI showed high florid signal at T10 and T11 vertebral bodies with destructive endplate changes. Based on the results of the MRI, claimant was diagnosed with discitis and was transferred to St. Mary's Hospital for further treatment.

6. Claimant came under the care of Dr. Clifford at St. Mary's Hospital. Dr. Clifford noted claimant's accident history of being a postal worker who was moving a cart of mail when he felt a pop in his back followed by severe pain on Saturday morning resulting in claimant being taken to the hospital. Dr. Clifford diagnosed possible discitis as noted on the thoracic MRI and recommended surgery.

7. Dr. Clifford ultimately performed a T10-T11 posterior spinal fusion, posterior laminectomy and T10-T11 posterior segmental instrumentation pedicle screws. Claimant was subsequently transferred following the surgery to a rehabilitation center in Montrose. During rehab, claimant suffered a blockage of his large intestine that required a laparotomy performed by Dr. Jay on November 8, 2014.

8. Dr. Clifford testified at hearing in this matter. Dr. Clifford testified he treats 5-7 cases of discitis per year and classified the condition as very serious. Dr. Clifford testified discitis is an infection that causes instability of the spine resulting in the need for surgical intervention and fusion of the spine.

9. Dr. Clifford testified he first treated claimant in the present case in October 2014. Dr. Clifford testified he could not indicate how long claimant's infection was present prior to the surgery. Dr. Clifford testified that the MRI of the thoracic spine showed destructive changes at the end plates which demonstrated that the infection had been present for more than 24 hours. Dr. Clifford testified that claimant's infection could have been present, but asymptomatic for weeks or months.

10. Dr. Clifford testified that if there is an injury and the infection is already in the blood stream, the infection wouldn't advance quicker, but the symptoms could be increased. Dr. Clifford testified that it was his opinion in claimant's case that the injury at work accelerated claimant's symptoms. Dr. Clifford testified this was his opinion because claimant was not symptomatic before the injury.

11. Dr. Clifford testified that the infection is not affected by an outside source, but claimant's symptoms could become more severe and accelerate the need for

surgery. Dr. Clifford testified, however, that he has no way to determine if claimant's condition would have worsened at the same rate without the injury.

12. Dr. Clifford opined that claimant had a bladder infection at the time of the surgery and this bladder infection was the likely source of claimant's spine infection.

13. Respondents referred claimant for an independent medical examination ("IME") with Dr. Rauzzino on June 22, 2015. Dr. Rauzzino reviewed claimant's medical records, obtained a medical history and performed a physical evaluation in connection with his IME. Dr. Rauzzino issued a report following his IME that reflected his opinion that claimant's discitis was not caused or accelerated by claimant's injury. Dr. Rauzzino opined that claimant's infection occurred independent of his employment and was not related to trauma.

14. Dr. Rauzzino testified consistent with his report. Specifically, Dr. Rauzzino noted that claimant reported to him that when he was initially pinned between the carts he did not feel any terrible pain, but did feel a little bit of pain. Dr. Rauzzino testified, however, that the act of getting pinned between the carts did not cause, aggravate or accelerate claimant's discitis. Dr. Rauzzino testified that after claimant was pinned between the carts, he continued to be able to finish his work shift and went home. While at home, claimant developed the significant symptoms related to the discitis. Dr. Rauzzino testified the incident did not affect the onset of his symptoms and the traumatic event at work was incidental to the progression of those symptoms.

15. The ALJ credits the opinions expressed in Dr. Rauzzino's report and testimony and determines that claimant has failed to prove that it is more probable than not that he sustained a compensable injury arising out of and in the course of his employment with employer.

16. The ALJ notes that the opinions expressed by Dr. Clifford in his testimony rely heavily on the temporal relationship of claimant's symptoms to his work. Dr. Clifford appears, through his testimony, to agree that the discitis was not caused by the incident at work on October 17, 2014. Instead, Dr. Clifford testified it was his opinion that the incident increased claimant's symptoms and resulted in the need for treatment.

17. However, the ALJ does not find that the presence of that temporal relationship results in a finding that the incident at work on October 17, 2014 aggravated, accelerated or combined with claimant's pre-existing condition to cause the disability or need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of

the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to demonstrate by a preponderance of the evidence that his discitis was caused, aggravated, accelerated or that the incident of October 17, 2014 combined with his pre-existing bladder infection to produce the disability or need for treatment. As found, the ALJ credits the opinions expressed by Dr. Rauzzino in his report and testimony to support this finding.

ORDER

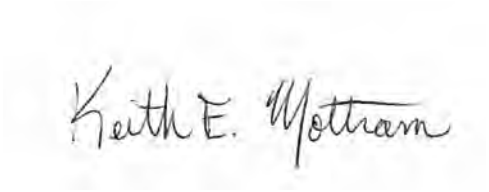
It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right shoulder and neck arising out of and in the course of her employment with Employer on October 12, 2014.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from December 29, 2014 and continuing until terminated by law.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to continued reasonable and necessary medical treatment and whether the treatment received so far has been authorized.

4. Whether Respondents have proven by a preponderance of the evidence that Claimant should be subject to penalties for failing to timely report her injury pursuant to §8-43-102(1)(a), C.R.S.

PROCEDURAL

At the outset of hearing Respondents requested that any medical benefits awarded be paid in accordance with the medical fee schedule. The parties agreed that the issues of average weekly wage, applicable offsets, overpayments, and credits would be reserved for future determination.

FINDINGS OF FACT

1. Claimant has worked for Employer as the fuel center manager since September 11, 2001.

2. The fuel center is separate from Employer's main grocery store on the opposite side of Employer's parking lot. Claimant works inside a kiosk. Claimant's job duties include assisting customers with purchasing gasoline and other items for sale in the kiosk including snacks, drinks, and lottery tickets. Claimant regularly has to lift, carry, and reach overhead with her right arm. Claimant uses her right arm to key purchases into the computer system.

3. As a manager, Claimant is familiar with Employer's rules and procedures concerning the requirements to report a work injury in writing. The requirement to report a work injury in writing within four days is posted in Employer's break room as well as in the fuel station kiosk where Claimant works.

4. On October 12, 2014 Claimant was so employed. Claimant received a phone call from a co-worker inside the main store asking Claimant to check on a "regular" customer named Judy who had phoned in needing help because she had fallen off her scooter.

5. Judy was described by multiple employees as an older, heavy-set woman who rides her scooter to Employer's store daily. Judy was described by several employees as being "not all there mentally."

6. Claimant left the fuel kiosk at approximately 9:44 a.m. Claimant walked to an area off Employer's premises. Claimant found Judy and attempted to help Judy back onto the scooter. Judy grabbed Claimant's right hand, and pulled hard to try to get back up. Claimant was unable to lift Judy up but helped Judy crawl back onto the scooter.

7. At 9:48 a.m. Claimant returned to the fuel kiosk and continued with her regular work duties.

8. Claimant worked the remainder of the day in the fuel kiosk and performed her regular duties. Claimant is seen in video surveillance working in and around the fuel center kiosk, reaching overhead with her right arm, using her right arm to handle money and type on the cash register, bending over, carrying items with her right arm, reaching with her right arm, holding the telephone with her right hand, and cradling the telephone between her neck and right shoulder. Claimant's movements the remainder of her shift on October 12, 2014 are unrestricted and she repeatedly used her right arm overhead and to perform her duties. *See* Exhibit L.

9. Claimant did not verbally report that she had suffered an injury attempting to help Judy to anyone on October 12, 2014. Claimant's testimony that she reported an injury to assistant store manager Rick Fender and to customs relations managers Patty Hutson and Connie Herrera on October 12, 2014 is not credible. Mr. Fender testified she did not report an injury, Ms. Hutson testified that she did not report an injury, and Ms. Herrera was not at work that day.

10. Claimant continued to work her regular schedule and regular duties as fuel center manage with no restrictions until October 30, 2014. Either the store's manager, assistant manager, or manager-in-training performed daily inspections of the fuel center credit card machines for skimming devices and would see Claimant in the morning while performing the inspections. Claimant did not report to any of them that she had suffered a right shoulder or neck injury attempting to help Judy and none of the managers observed Claimant to display any physical difficulties performing her job duties from October 12, 2014 through October 30, 2014.

11. On October 25, 2014 Claimant first mentioned the incident with Judy to store manager Ed Abila. Mr. Abila did not believe Claimant was reporting a work injury,

believed it was a personal situation that had occurred off store property, and referred Claimant to assistant manager Mr. Fender.

12. On October 27, 2014 Claimant advised Mr. Fender of the incident with Judy and reported it as a work injury. Claimant then met with Mr. Fender and manager-in-training Mark Friend on October 30, 2014.

13. On October 30, 2014, with the assistance of Mr. Fender, Claimant filled out and signed an Associate Work Related Injury Report. *See* Exhibit I.

14. Claimant reported that on October 12, 2014 she was asked to check on Judy. Claimant reported she found Judy and told Judy to grab the bench and that she couldn't pick Judy up. Claimant reported Judy said "don't leave me" and grabbed her right arm pulling her down and that she fell over the top of Judy on the ground and that her arm immediately started hurting. *See* Exhibit I.

15. On October 30, 3014 Mr. Fender and Mr. Friend filled out an Associate Incident In-Store Investigation Report and an Employee Incident Questionable Claim form. They reported that notification occurred on October 25, 2014 and that Claimant reported lifting a customer who had fallen off of Employer's property when Claimant felt a sharp pain in her arm and that she fell onto the customer. It was circled "yes" that they questioned the validity of the claim. It was circled "yes" that Claimant had medical treatment before reporting the injury. *See* Exhibit I.

16. On the Questionable Claim form, Mr. Fender noted that he believed the claim was questionable. He reported that he was not notified by Claimant that she had been hurt until October 27, 2014. He did not recall Claimant's assertion that she had reported the injury to him and to a group of employees in the break room on October 12, 2014. He noted Claimant's assertion that she had also reported the injury to Patty on October 12, 2014 and noted Patty denied being notified. He noted that Claimant had already gone to a doctor and had an MRI performed. *See* Exhibit I.

17. On November 5, 2014 Judy filled out a statement. The statement indicates that Judy lost her balance due to the wind and fell. She called the police who were too busy to help and then called City Market. Claimant then came out of the gas station and grabbed both of Judy's hands, pulled, and almost fell but never went to the ground. Judy then crawled to her 4-wheeler to pull herself up to the seat and asked Claimant to hold the 4-wheeler. *See* Exhibit I.

18. After Claimant reported the injury and filled out the report, Employer referred her for medical treatment with their authorized providers.

Medical treatment prior to October 12, 2014

19. Prior to her alleged October 12, 2014 work injury, Claimant underwent treatment for the same body parts she alleges were injured assisting Judy.

20. On November 17, 2004 it was noted that Claimant was evaluated for, amongst other things, a right shoulder problem. *See* Exhibit 2.

21. On October 7, 2009 Claimant underwent a MRI of her cervical spine that was interpreted by Robert Heasty, M.D. Dr. Heasty noted that Claimant had below average sagittal diameter of the central canal and that she had a low-grade disc protrusion and degenerative changes at the C5 level producing low grade central stenosis. *See* Exhibit B.

22. October 21, 2009 Claimant was evaluated by Neal Gilman, M.D. Claimant reported to Dr. Gillman that she had pain in her right arm for the past two years. Claimant had difficulty describing where the pain was located but noted her right wrist, lateral aspect of her right elbow, and indicated that when she used her right arm the pain radiated up into her shoulder and possibly into the right side of her neck. Claimant reported occasional tingling and numbness in her right arm. Dr. Gillman noted that Dr. Pulsipher had in the past injected Claimant's right shoulder and right elbow but that the injections did not alleviate Claimant's symptoms. Dr. Gillman noted that Claimant's MRI scan of October 7, 2009 showed mild vertical stenosis, particularly at the C4-5 level with a posterior central disc protrusion and some mild hypertrophic spurring. *See* Exhibit C.

23. On October 21, 2009 Dr. Gillman performed an EMG of Claimant's neck and right upper extremity that was normal. *See* Exhibit C.

24. On June 15, 2011 Claimant was evaluated by Dr. Gillman. Dr. Gillman noted he previously saw Claimant in October of 2009. Claimant reported to Dr. Gillman that since being evaluated in 2009, she continued to have the same symptoms mainly that of shoulder and right arm pain. Claimant reported that she continued to have right sided neck pain and that her entire right arm at times was achy and that she had intermittent tingling and numbness in her right arm and in the digits of her right hand. *See* Exhibit C.

25. On June 15, 2011 Dr. Gillman performed EMG testing of Claimant's right arm and right leg. His findings were normal. Dr. Gillman opined that Claimant had non-physiological sensory loss in her right arm and right leg and questioned the validity of her underlying sensory symptoms. *See* Exhibit C.

26. On June 16, 2011 Claimant underwent an MRI of her cervical spine that was interpreted by Charles Fowler, M. D. Dr. Fowler noted Claimant had slight central anterior extradural defect at C5-C6 with mild flattening of the thecal sac but no overt stenosis and that the remainder of the cervical spine was unremarkable. Dr. Fowler opined that similar findings were noted on the prior exam. *See* Exhibit B.

27. On July 11, 2011 Claimant was evaluated by Joseph Maruca, M.D. Claimant reported numbness in her right arm and Dr. Maruca opined this was due to a C5-C6 disc. *See* Exhibit E.

28. On August 15, 2011 Claimant was evaluated by Terri Wischhoeffer, PA-C. PA Wischhoeffer noted Claimant had neck and right arm pain since 2009 that was primarily in the posterior neck and right shoulder blade area, and was a constant but variable pain up to 4-5/10 in intensity. Claimant reported the pain radiated down through the arm as far as the hand with numbness in the fourth and fifth fingers of the right hand. Claimant reported two or three motor vehicle accidents over the last few years, one of which preceded the onset of her back and neck problems. PA Wischhoeffer noted that an MRI of Claimant's cervical spine showed multi level cervical spondylosis with a broad based right side eccentric disc bulge at C5-6 causing effacement of the spinal cord and mild to moderate stenosis of her foramina on the right side. PA Wischhoeffer noted Claimant's C6 radiculopathy, and cervical spondylosis with herniated disc at C6-6. Claimant also presented with and an MRI confirmed problems in her lumbar spine and PA Wischhoeffer opined that given Claimant's symptoms, the lumbar spine should be addressed first but that they might consider a C5-6 anterior cervical discectomy and fusion for the herniated disc at C5-6. *See* Exhibit F.

29. On September 4, 2011 Claimant was evaluated at Delta County Memorial Hospital Emergency Department by Jennifer Craig, M.D. Dr. Craig noted Claimant was the victim of a serious assault with her major injury being to her neck from blunt trauma and trouble with swelling. Dr. Craig noted Claimant's report of right shoulder pain, some trouble with swelling, and that on CT scan there was evidence of right vocal cord paresis. *See* Exhibit D.

30. Claimant was also evaluated at Delta County Memorial Hospital Emergency Department by Stephen Adams, M.D. Dr. Adams noted Claimant had decreased strength in her upper extremities, right greater than left, and that Claimant reported tingling down her right arm. *See* Exhibit D.

31. On November 5, 2012 Claimant was evaluated by Dr. Paulsipher. Dr. Paulsipher noted Claimant's pain in the head/neck area and objectively that she had spasm and somatic lesions in the neck. Dr. Paulsipher assessed stress myalgias in the neck and manipulated Claimant's cervical and thoracic spine with excellent results. *See* Exhibit G.

32. On October 29, 2013 Claimant was evaluated by Dr. Paulsipher. Claimant reported pain in her right shoulder that hurt when she lifted overhead, that she couldn't open jars, and that she couldn't put any tension on her shoulder. Dr. Paulsipher noted her history of right shoulder pain that was diffuse, aggravated by sleeping on the right shoulder, lifting her arm overhead, or making a throwing motion. Dr. Paulsipher noted Claimant's range of motion was poor due to the pain in her right shoulder. He assessed shoulder pain due to biceps tendinitis and rotator cuff tendinitis, and injected her right shoulder, noting she had excellent relief from the injection. *See* Exhibit G.

33. On March 27, 2014 Claimant was evaluated by Dr. Paulsipher. He noted she was there for follow up of her right shoulder pain and that her status was worse for more than 6 months. Claimant reported aggravation of her right shoulder pain with lifting and movement, decreased range of motion, and sharp, shooting, achy pain. Claimant reported it was tough to do her hair to her right shoulder pain. Dr. Paulsipher assessed right rotator cuff tendonitis and adhesive capsulitis, and injected her right shoulder. *See* Exhibit G.

34. On May 28, 2014 Claimant was evaluated by NP-C Julie Fournier. NP Fournier noted Claimant had significant enlarged muscle spasm in both shoulders and very tight and hard supraspinatus muscle and trapezius. *See* Exhibit G.

Medical treatment after October 12, 2014

35. On October 21, 2014 Claimant was evaluated by Mary Mebane, M.D. Claimant reported two weeks of upper respiratory symptoms. Claimant did not report any recent injury to her right shoulder or neck. *See* Exhibit G.

36. On October 24, 2014 Claimant was evaluated by Dr. Pulsipher. He noted that Claimant had returned for follow up of her right shoulder pain and that her status was worse with diffuse location. He noted that her right shoulder continued to be aggravated by lifting, movement, or sleeping on it. He noted the shoulder inspection revealed no swelling, ecchymosis, erythema, or step off deformity. He diagnosed right shoulder rotator cuff injury, subsequent encounter. He performed a right shoulder steroid injection. Claimant did not report to Dr. Paulsipher that she suffered an acute injury or acute aggravation to her right shoulder twelve days prior due to an incident with Judy. Rather, she reported *continued* pain and he documented she was there for follow up of her diffuse right shoulder pain. *See* Exhibit G.

37. On October 28, 2014 Claimant underwent an MRI of her right shoulder interpreted by Connie Beneteau, M.D. The MRI revealed tendinosis supraspinatous tendon without definitive tear, and degenerative signal superior labrum. *See* Exhibit 1.

38. On November 5, 2014 Claimant was evaluated by Terry Wade, D.O. Claimant reported right shoulder pain for the past month or so. Claimant reported that she was unable to move her shoulder much at all over the past month. Claimant denied having any previous injury to her right shoulder. Claimant was advised to start moving her shoulder to avoid getting frozen shoulder. *See* Exhibit 5.

39. On November 19, 2014 Claimant was evaluated by Dr. Wade. Claimant reported she still could not move her arm or shoulder very well.

40. On November 25, 2014 Claimant was evaluated by Douglas Huene, M.D. Claimant reported problems with her right shoulder since a work incident. Claimant reported diffuse neck pain, upper back pain, pain down into her arms to her hand, and diffuse numbness about her right arm. Dr. Huene noted that Claimant had decreased

sensation about the right arm diffusely up to the shoulder and involving the entire arm. He noted that right shoulder x-rays showed some AC arthritis and a Type II acromion. He noted that cervical spine x-rays showed mild facet arthritis. He assessed diffuse pain, right shoulder pain due to impingement syndrome, acromioclavicular inflammation with rotator cuff tendonitis, and right arm radiculopathy. *See* Exhibit 1.

41. On December 10, 2014 Claimant attended physical therapy. Claimant reported right shoulder and neck pain. Claimant reported that her right shoulder had hurt before the work incident, but that she had been taking Aleve to control the pain.

42. On December 24, 2014 Claimant underwent an MRI of her cervical spine interpreted by John Kim, M.D. Dr. Kim noted Claimant's history of neck pain and right arm radiculopathy. His impression was broad-based posterior central disc protrusion at C5-C6 with no cord compression and no other disc protrusions. *See* Exhibit 7.

43. On December 31, 2014 Claimant was evaluated by Dr. Huene. Claimant reported continued pain and that she now had diffuse numbness in the hand involving the ulnar 2 fingers and pain lifting over her head. Claimant reported that when she moves her neck she gets a pop and then her right arm goes numb. Dr. Huene discussed treatment options with Claimant at length and Claimant decided to have another steroid injection. Dr. Huene performed the steroid injection into the right AC joint and subacromial space and noted that after injection, her shoulder pain was improved.

44. On January 30, 2015 Claimant was evaluated by Dr. Huene. Claimant continued to have right shoulder pain that she reported was getting worse all the time. Claimant reported the prior injection helped some, but that she still had arm pain.

45. On February 27, 2015 Claimant was evaluated by Dr. Huene. Claimant continued to have right shoulder pain, diffuse neck pain, and diffuse upper back pain that traveled down into her arms to her hand. Claimant continued to have diffuse numbness about the right arm and right hand. Dr. Huene noted that Claimant wanted to undergo shoulder surgery. Dr. Huene advised Claimant that shoulder surgery would definitely not fix her right hand numbness and that the shoulder pain could be referred pain from the cervical spine. Dr. Huene advised Claimant that shoulder surgery may not take care of her symptoms. Dr. Huene performed another steroid injection in Claimant's right shoulder and she reported improved pain levels following the injection.

46. On March 12, 2015 Claimant underwent an Independent Medical Examination performed by Henry Roth, M.D. Claimant initially denied right shoulder problems that existed prior to her alleged work injury. Dr. Roth brought to her attention the prior right shoulder records including injection in March of 2014. Claimant reported the discomfort at her right shoulder was just a normal aching pain at that time. Claimant reported the incident at work caused her immediate discomfort at the shoulder and upper back that continued as the day progressed. She reported that she continued working and performed most of her duties with her left hand. Dr. Roth opined that

Claimant did not have an injury related condition and had no clinical residual as the result of the event she described occurred on October 12, 2014. Dr. Roth opined that there were no new physical findings and no new diagnostic abnormality and only pre-existing degenerative changes at both the shoulder and the neck. Dr. Roth opined that Claimant's current condition was not trauma related and that the MRI did not support an anatomic disruption of the right shoulder that occurred October 12, 2014. Dr. Roth noted that Claimant's report of symptom status that developed and progressed in October of 2014 is distinctly different from her subjective experience prior to October 12, 2014. He noted Claimant's incorrect report of her past medical history. Dr. Roth assessed Claimant with adhesive capsulitis of the right shoulder and degenerative cervical spine condition and concluded that both the right shoulder and neck conditions were not caused or aggravated by the October 12, 2014 incident. *See* Exhibit A.

47. On March 25, 2015 Claimant was evaluated by Mitchell Burnbaum, M.D. Claimant reported pain in her right shoulder, with occasional soreness in the dorsal right forearm but no radicular pain in her right arm. Claimant reported that her middle, ring, and small finger tingle most of the time. Claimant reported that she had not had any trouble with her right arm before, she reported no prior tingling, and no prior significant arm pain. However, Dr. Burnbaum noted in his report that Claimant had been seen for electrodiagnostic studies for right arm pain in 2011 and was seen in 2009 and that it had been noted between 2009 and 2011 that Claimant had continued symptoms of shoulder pain and right arm pain, elbow pain, tingling and numbness in the arm, especially the middle finger and ring finger. Dr. Burnbaum performed nerve conduction studies that were normal. He perf0ormed EMG testing and could not find a clear abnormality. Dr. Burnbaum noted that it was an interesting situation as Claimant displayed symptom magnification on neurologic exam, especially with muscle testing, and that she reported never having problems before the recent work mishap when in fact Claimant has had similar problems dating back to at least 2009. *See* Exhibit 3.

48. On May 4, 2015 Dr. Roth provided an updated report. Dr. Roth specifically noted he did not agree with Dr. Huene's recommendation for surgery. He opined that the surgery would not likely benefit Claimant, that her MRI revealed no trauma related pathology, and that there were only mild degenerative changes to which her clinical presentation did not conform. He opined that the surgery would only make Claimant's circumstances worse and would not benefit if her symptoms were due to cervical radiculopathy. *See* Exhibit A.

Testimony

49. Dr. Roth testified at hearing consistent with his reports. He noted that the imaging studies of Claimant's right shoulder and cervical spine did not show any evidence of an acute injury or trauma. He noted that Claimant had not been candid with him and with other providers when she reported no prior medical history of right shoulder and neck problems when the medical history suggested otherwise. He noted that even after he confronted Claimant with her prior medical history at the independent

medical examination he performed on March 12, 2015, Claimant still denied any prior history to Dr. Burnbaum at an appointment March 25, 2015.

50. Dr. Wade testified at hearing. Dr. Wade agreed that if Claimant delayed in reporting her October 12, 2014 work injury and if she failed to accurately provide her prior medical history, it would call into question whether or not her right shoulder condition was work related. He noted that Claimant advised him at the November 5, 2014 appointment that she was unable to move her right arm and shoulder since the October 12, 2014 work incident. He agreed that if Claimant was seen on video immediately following the incident moving her right arm and shoulder in a variety of activities, it would be inconsistent with Claimant's reports to him and also would cause him to question whether a work related injury occurred that day. Dr. Wade also agreed that the right shoulder MRI did not indicate an acute tear or injury, but was more representative of a degenerative, age-related condition.

51. Dr. Roth is found credible and persuasive. His opinions take into account Claimant's entire past medical history which she failed to report to multiple providers. His opinions are consistent with diagnostic imaging and with Claimant's symptoms prior to the alleged work incident on October 12, 2014 which remain very similar to her symptoms after the alleged work incident.

52. The opinion of Dr. Wade is not as credible or persuasive. Dr. Wade's opinion was based upon Claimant's subjective reports to him. Her subjective reports were not accurate. Claimant was shown in surveillance video moving her right arm and shoulder for the entire remainder of her shift on October 12, 2014 despite reporting to Dr. Wade that she was unable to move her right arm or shoulder. Claimant also has a significant history of right shoulder and neck problems prior to October 12, 2014 that she did not report to Dr. Wade. Dr. Wade acknowledged in his testimony that if movement of the right arm and shoulder was shown and if Claimant failed to accurately report her prior medical history, it would call into question the work relatedness of her right shoulder condition. As his opinion was based on incomplete/inaccurate information, his opinion regarding work relatedness is not as persuasive as the opinion of Dr. Roth.

53. Claimant's testimony lacks credibility. Claimant failed to report to multiple providers her prior right arm, right shoulder, neck, and right finger symptoms that pre-date her claim. The medical records document a significant history with symptoms the same or similar to those she alleges were caused by the October 12, 2014 work incident. Claimant had similar symptoms and problems in her right shoulder and neck dating back to at least 2009 and medical records document that in 2009 she reported having had pain in her right shoulder for the past two years. Similarly, in 2004 she was evaluated for right shoulder pain. The pain and symptoms in Claimant's right shoulder did not start as a result of the incident assisting Judy nor were they aggravated by the incident assisting Judy. The pain and symptoms had been ongoing for approximately 10 years prior to the work incident.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals*

Office, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010). "The Workers' Compensation Act creates a distinction between the terms 'accident' and 'injury.' The term 'accident' refers to an 'unexpected, unusual, or undersigned occurrence.' *See* §8-40-201(1) C.R.S. In contrast, an 'injury' refers to the physical trauma caused by the accident. In other words, an 'accident' is the cause and an 'injury' is the result. No benefits flow to the victim of an industrial accident unless the accident results in a compensable 'injury.'" *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002). Notice of the accident is not equivalent to notice of claim for compensable injury." *See City and County of Denver v. Bush,* 441 P.2d 666, 668 (Colo. 1968). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden to prove by a preponderance of the evidence that she suffered a right shoulder or neck injury proximately caused by her employment and the act of assisting Judy onto a scooter. Here, Claimant's symptoms and pain in her right shoulder and neck pre-existed the October 12, 2014 incident. In October of 2009 it was noted that Claimant had already had injections in her right shoulder in the past and that when she used her right arm she had pain radiating into her shoulder and the right side of her neck. In June of 2011 it was noted that she had continued to have symptoms of right shoulder and right arm pain since 2009. In October of 2013 Claimant continued to report pain in her right shoulder and that it hurt to lift overhead, that she couldn't open jars, and that she couldn't put any tension on her right shoulder. Claimant reported the pain was aggravated by lifting her arm overhead. Claimant continued to report the same symptoms, but worse, in March of 2014. Approximately seven months prior to her alleged work injury Claimant reported that her right shoulder pain had been worse, that it continued to be aggravated with lifting and movement, and that it was difficult to do her hair because of the pain. Claimant has failed to show that the incident with Judy on October 12, 2014 exacerbated or aggravated the right shoulder pain and symptoms that were documented by medical providers as having existed prior to 2009 and that were documented to have gotten worse in March of 2014 to the point that doing her hair was difficult.

Additionally, Claimant reported immediate pain following the incident with Judy that caused her to be unable to use her right arm. This is not credible or persuasive and is contradicted by surveillance video. After Claimant alleges she suffered an injury assisting Judy, Claimant is seen on surveillance video for the remainder of the day performing her normal job duties. Claimant used her right arm overhead, at chest level on the computer system, and moved without any visible hesitation or pain. Claimant

also did not report the injury to Employer on October 12, 2014 and waited almost two weeks to make a report of injury. Claimant also sought medical treatment on her own with Dr. Paulsipher on October 24, 2014 without reporting to him a work injury. Dr. Paulsipher merely noted she was there for follow up of her continued right shoulder pain. These actions are inconsistent with someone who has suffered an acute injury or an acute aggravation to a pre-existing condition. If Claimant had suffered an injury on October 12, 2014 it would be more logically reasonable that she would have reported the injury immediately, discontinued using her right arm overhead or limited her use of her right arm, and that she would have reported the incident causing the injury to her doctor at a visit for treatment of her right shoulder.

Claimant has failed to show that the condition of her right shoulder was stable on October 12, 2014 and that the act of assisting Judy caused her pain and complaints to become disabling. Rather, the medical records show that the condition of her right shoulder had become symptomatic to the point of it being difficult to do her hair just seven months prior to her alleged injury. Additionally, the MRI and X-rays do not support a conclusion that she suffered an acute injury on October 12, 2014. The testimony of Dr. Roth is found credible and persuasive. Dr. Roth pointed out the discrepancies in Claimant's reports and credibly opined that her current condition was not trauma related and was not caused or aggravated by the October 12, 2014 incident. Even Dr. Wade noted that if the surveillance video showed Claimant performing her regular duties using her right arm on the day of the alleged injury, it might call into question his causality assessment. The surveillance does in fact show Claimant performing such activities including repeated use of her right arm above her head and at chest level. Further, Dr. Burnbaum noted that Claimant displayed symptom magnification and denied prior problems the medical records show she had similar problems dating back to at least 2009. Claimant has failed to show that she suffered an injury to her right shoulder and neck on October 12, 2014 or that her right shoulder and neck condition had been stable until the act of assisting Judy caused her pain and symptoms to become disabling. Rather the persuasive evidence and testimony is that Claimant suffered no acute injury or aggravation to a pre-existing condition on October 12, 2014 and that she simply continues to suffer from the same right shoulder and neck symptoms that have been bothering her since prior to 2009.

Claimant's reporting and testimony overall is not credible and cannot be relied upon to any degree of certainty. Less than seven months prior to the alleged work injury, Claimant was actively seeking treatment for right shoulder pain, reported the pain made it difficult to do her hair, and had pain significant enough in her right shoulder to undergo an injection into her right shoulder in March of 2014. Although Claimant had this significant treatment of her right shoulder less than seven months prior to her alleged work injury, she failed to report this treatment to multiple providers and reported no prior problems or treatment to her right shoulder. Claimant had symptoms prior to the alleged work injury that are almost identical to her continued symptoms to date and has failed to show that the incident with Judy aggravated in any way the symptoms that she has had in both her right shoulder and neck for the past several years.

Temporary Total Disability

To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Claimant has failed to establish an entitlement to TTD benefits. Claimant did not suffer an injury or aggravation to a pre-existing condition on October 12, 2014. The incident on October 12, 2014 did not cause Claimant a disability lasting more than three work shifts or wage loss. Rather, Claimant had pre-existing non work related conditions in her right shoulder and neck and any lost wages or inability to work was due to the pre-existing and non work related conditions.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra.* Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Id.* Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, *supra; See* § 8-41-301(1)(c), C.R.S. Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Claimant has failed to show by a preponderance of the evidence that she suffered an industrial injury. Therefore, Claimant has failed to establish that Respondents are liable for any continued medical treatment. Although continued treatment for her right shoulder and neck may be reasonable, any continued treatment would be related to her pre-existing conditions and not related to an industrial injury. The incident of October 12, 2014 did not cause the need for treatment or accelerate the need for treatment that pre-existed the claim.

Further, Claimant has failed to establish by a preponderance of the evidence that the treatment she sought on her own with Dr. Paulsipher on Oct 24, 2014 was authorized. The evidence and medical records show that Claimant sought treatment for her *continued* right shoulder pain, that Claimant did not report to Dr. Paulsipher that she had recently suffered a work related injury, and that the treatment was sought on her own before reporting any work related injury to Employer.

If upon notice of the injury the employer fails forthwith to designate an authorized treating provider (ATP), the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*. Here, Claimant did not make a report that could be recognized as possibly resulting in a claim for compensation until she reported the incident with Judy to Mr. Abila on October 25, 2014. The treatment she sought on her own prior to that date therefore was not authorized and is not compensable. After Claimant reported her injury to Employer, Employer promptly responded and referred Claimant for medical treatment. Therefore, Claimant has failed to establish that Employer failed to designate an ATP or that the right of selection of physician passed to her. Claimant has failed to establish that the treatment she sought with Dr. Paulsipher prior to reporting a work injury is authorized.

Penalties-Failure to Timely Report

As found above, Claimant failed to timely report the injury to Employer in writing within four days of her alleged injury, in violation of § 8-43-102(1)(a), C.R.S. Claimant did not notify Employer of her injury at all until a verbal report on October 25, 2014. Claimant did not report the injury in writing until October 30, 2014. As a manager for Employer, Claimant was aware of the requirements for reporting a work injury and posters at her workplace reiterated the requirements of reporting. However, as the claim is not compensable, the request for penalties of one day's compensation for the period of time during which Claimant failed to report the injury is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she suffered a compensable injury to her right shoulder and neck arising out of and in the course of her employment on October 12, 2014. Her claim is denied and dismissed.

2. Claimant has failed to establish that she is entitled to temporary total disability benefits. Her claim for temporary total disability benefits is denied and dismissed.

3. Claimant has failed to establish an entitlement to continued medical treatment of her right shoulder and neck. Her request for medical benefits is denied and dismissed.

4. Claimant has failed to establish that the treatment she received from Dr. Paulsipher on October 24, 2014 and the MRI ordered by him was authorized.

5. Respondents request for penalties is denied as moot.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 9, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-966-994-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for September 25, 2015, in Greeley, Colorado. On August 26, 2015, the respondents filed a Motion for Summary Judgment with attached documents, asserting the there was no genuine issue of disputed material fact concerning the Claimant's announced residence in Westminster, Colorado, at the time of the Colorado medical visits for which he seeks mileage reimbursement from Florida to Colorado for a total of 11,460 miles, at the State mileage rate of 50 cents per mile, in an aggregate amount of $5,730.00.

On September 16, 2015, the Claimant filed an Objection to Motion for Summary Judgment, with the attached Affidavit of the Claimant, essentially alleging that he had arranged for the Postal Service to forward his Westminster, Colorado mail to Florida in early December 2014. There is **no** allegation that the Claimant advised the Respondents that he had moved back to Florida and/or that he would be commuting from Florida to Colorado to attend medical appointments.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact concerning whether the Claimant gave the Respondents proper notice that he was moving from Westminster, Colorado to Florida, thus, entitling him to mileage of 11, 460 miles to commute from Florida to Colorado to attend medical appointments related to his admitted work-related injury to two of his toes on November 19, 2014.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained an admitted workplace injury to two of his toes on November 19, 2014.

2. Following his industrial injury, the Claimant filled out and signed a First Report of Injury/Incident Form. The form included a box labeled "home address." He stated his home address as:

> 14770 Orchard Parkway, Apartment 335
> Westminster, CO 80023

This address is hereinafter referred to as the "Westminster address." The Claimant's First Report of Injury/Incident Form is lists his address as the Westminster address. The Claimant listed the same address as his home address on his 2014 W-4 form.

Lack of Notice of Change of Address to Florida

3. The Claimant began receiving indemnity payments from the Respondents, starting on November 25, 2014. From November 25, 2014 through February 17, 2015, the Claimant's indemnity checks were sent to the Westminster address. The Claimant's Affidavit, attached to his Objection to Motion for Summary Judgment states that he "arranged for the postal Service to forward my mail to Florida in early December 2014. I received all my TTD checks after that in Florida as a result of the forwarding." There is no allegation by the Claimant that he advised the Respondents of this forwarding situation nor is there any indication or allegation that the Respondents were aware of the inner working of the Postal Service in this situation.

4. One of Claimant's authorized treating providers was Frederick Scherr, M.D. On December 18, 2014, the Claimant reported to Dr. Scherr that "he is now going

to be moving back to Florida sometime in January, which is where he is originally from." This was the first mention in the Claimant's medical records of his intention to move to Florida.

5. A claim representative for the Respondent Insurer, Pinnacol, was in direct communication with the Claimant during this time period. On December 22, 2014, the claim representative, James Mysza, had a conversation with the Claimant. The Claimant told Mysza that he was moving to Florida, but the date was unknown. The Claimant represented that he would likely move after seeing his physicians on January 12, 2015. Mysza documented the conversation in the claim file. The Claimant is noted as "IW" or injured worker (portions of the claim notepad were attached to the Respondents' Motion as Exhibit E. The affidavit of James Mysza was attached as Exhibit F.

6. Mysza spoke with the Claimant again on January 5, 2015. The Claimant again stated that he was planning on moving to Florida after January 12, 2015, but was unsure of the date.

7. The Claimant had another visit with Dr. Scherr on January 12, 2015. He remarked to Dr. Scherr that: "He is also in the process of moving to Florida and only has his apartment to the end of the month. He would like to get back to Florida here soon and not have to keep coming back and forth."

8. Mysza spoke with the Claimant on January 12, 2015. At that time, the Claimant stated that he would be moving to Florida at the end of January 2015.

9. Mysza spoke with the Claimant on January 28, 2015. On that date, the Claimant told Mysza that he had not moved yet, and that the move would be sometime after February 9, 2015.

10. The Claimant had his final visit with Dr. Scherr on February 9, 2015. Dr. Scherr noted: "He is moving back to Florida. He is just kind of going back and forth between Florida and here until his care is finished up with us."

11. At all times material (December 4, 2014 through February 9, 2015), the Claimant had never submitted a change of physician request or a change of address form.

12. At all times material (December 4, 2014 through February 9, 2015), the Claimant had never asked the Respondents to transfer his care to Florida.

13. The Claimant is seeking mileage for physician visits on the following dates: December 4, 2014, December 18, 2014, and February 9, 2015. His answers to interrogatories are attached hereto as *Resp. Exhibit I, p. 5*. Claimant alleges that he

moved from the Westminster address to Sarasota, Florida on December 7, 2014. Exhibit I, p. 3. He claims that he is entitled to reimbursement for 11,460 miles traveled, despite his actual travel costs being significantly lower than the mileage reimbursement rate. *Exhibit I, p. 4*. The Claimant admits in his discovery responses that he never apprised the Respondents that he had moved to Florida.

Ultimate Findings

14. There is no genuine issue of disputed material fact that the Claimant had **not** given the Respondents notice that he had moved from Westminster, Colorado to Florida as of the times he seeks mileage reimbursement for attending medical appointments in Colorado.

15. An intent to live in a state other than the last known address in Colorado does not establish entitlement to greatly enhanced mileage reimbursements from Florida, the announced intended new residence, to Colorado and back.

16. The attachments to the Respondents' Motion show that there is no genuine issue of disputed fact with respect to their lack of knowledge that the Claimant had moved from Westminster, Colorado to Sarasota, Florida. The Claimant's affidavit, attached to his Objection, fails to allege any notice of an **actual** move from Westminster, Colorado to Sarasota, Florida.

17. The Respondents were reasonable in believing that the Westminster, Colorado address was the Claimant's home address. The Claimant represented that the Westminster address was his home address in government documents (his W-4), and the injury report that he filled out just after his injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As

found, the Motion for Summary Judgment and the Response thereto are supported by documents and/or affidavits.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the attachments to the Respondents' Motion show that there is no genuine issue of disputed fact with respect to their lack of knowledge that the Claimant had moved from Westminster, Colorado to Sarasota, Florida. The Claimant's affidavit, attached to his Objection, fails to allege any notice of an **actual** move from Westminster, Colorado to Sarasota, Florida.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). An adverse party may not rest upon the mere allegations or denials in its pleadings, but its response by affidavits or other means must set forth specific facts showing that there is a genuine issue of disputed material fact. C.R.C.P., Rule 56(e). Genuine issues of material fact cannot be manufactured and arguments alone will not preclude summary judgment; contentions must be supported. *See Bauer v. Southwest Denver Mental Health Center, Inc.*, 701 P.2d 114 (Colo. App. 1985). Indeed, the Claimant's Objection and his affidavit attached thereto, **do not** allege that the respondents had notice or knowledge of the Claimant's **actual** (not intended) move from Westminster, Colorado to Florida. Consequently, the Claimant's Objection fails to raise any genuine disputed issue of material fact.

No Notice of Actual Move to Florida

d. The "general rule is that a claimant is responsible for keeping the Division, opposing parties and their counsel advised of the claimant's current address. The claimant's official address for purposes of a workers' compensation claim is the claimant's home address." *Hroncheck v. California Cafe*, W.C. No. 4-496-790 [Indus. Claim Appeals Office (ICAO), July 14, 2003] (citing *Bowlen v. Munford*, 921 P2d 59 (Colo. App. 1996). As found, the Claimant did **not** keep the Respondents apprised of his change of address to Florida. As further found, the Respondents were reasonable in believing that the Westminster address was Claimant's home address. Claimant represented that the Westminster address was his home address in government documents (his W-4), and the injury report that he filled out just after his injury.

Burden of Proof

e. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, there is no genuine issue of disputed material fact concerning the Claimant's failure to notify the Respondents of his **actual** move from Colorado to Florida nor is it alleged that the Respondents knew of the **actual** move. The respondents have sustained their burden in this regard.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment on the mileage issue is hereby granted in the Respondents' favor.

B. The scheduled hearing of September 25, 2015 is hereby vacated.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of September 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of September 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.sjord

ISSUES

The issues for determination are:

1. Whether the claimant suffered a compensable industrial injury on or about September 8, 2014;

2. If so, whether the claimant is entitled to medical benefits to cure and relieve the alleged injury; and,

3. If so, whether the claimant is entitled to TTD after October 28, 2014.

FINDINGS OF FACT

1. The claimant has acknowledged that she has been diagnosed with rheumatoid arthritis since 2008. The claimant also admits that she has been treated for her rheumatoid arthritis since 2008.

2. The claimant also admitted that she has carried the diagnosis of osteoarthritis in her back and degenerative disk disease prior to September 2014.

3. The claimant was treated by a chiropractor named Dr. Craig Thornally for the period of time between November 7, 2013 and October 29, 2014. Prior to September 8, 2014, the claimant saw Dr. Thornally 36 times. For each visit, the claimant indicated what her levels of low back pain were. On average, the claimant reported levels of anywhere between 5-6 out of 10, with her highest pain levels being 9 out of 10. For the office visit just prior to September 8, 2014 (June 27, 2014), the claimant reported that her low back pain was 5 out of 10. Although the chiropractic records reflect that the claimant did not see Dr. Thornally between June 27, 2014 and September 8, 2014, Dr. Scott testified that it was unlikely that the claimant had resolution of her low back problems between those two dates. Dr. Scott based his opinion on the fact that the medical records reflected that the claimant had a chronic low back problem prior to September 8, 2014, as well as rheumatoid arthritis.

4. The claimant is alleging that she sustained an injury to her low back while providing a two-person transfer of a resident. The claimant testified at hearing that the

other person helping her during the two-person transfer was a co-employee named Arianna. The claimant testified that the injury occurred when the resident became agitated and aggressive during the transfer, resulting in her twisting her back and having an injury.

5. The claimant has apparently been confused as to what was the actual date of injury. The claimant testified at hearing that at her independent medical evaluation with Dr. Douglas Scott, she told Dr. Scott that the injury occurred on September 8, 2014. The claimant then testified that in her answers to interrogatories, she indicated that the date of injury was September 9, 2014. Finally, in her Workers' Claim for Compensation that was completed on November 2, 2014, by the claimant herself, she indicated the date of injury was September 12, 2014.

6. The claimant, at hearing, stated that she is picking September 8, 2014 as her final date of injury. The claimant then testified that on September 8, 2014 (the date that she said the injury occurred), she talked to the executive director of the facility, Shawn Anderson, to report this incident. The claimant testified that her discussion with Mr. Anderson occurred at the facility at which time she completed the incident report and gave it back to Mr. Anderson on the same day. However, Mr. Anderson testified that on September 8, 2014, he was not at the facility because it was his birthday and he was on vacation.

7. As outlined above, the claimant indicated that she suffered a low back injury at the time that she was assisting another co-employee, Arianna Ahern, in transferring a resident, at which time the resident became agitated and aggressive, resulting in the claimant suffering a low back injury. However, Arianna Ahern testified that, at no time during the month of September 2014, did she help transfer a female patient with the claimant who, at the time of the transfer, became agitated, aggressive, and combative. Ms. Ahern testified that if a resident does become combative or aggressive, the procedure at the facility mandates that she complete a behavioral report documenting the incident. Ms. Ahern testified that at no time during September 2014 did she complete any kind of form in which a resident became combative and aggressive during a transfer involving the claimant.

8. Lisa Wayne was the claimant's immediate supervisor. Ms. Wayne testified that she is the Reminiscence coordinator for the facility. The Reminiscence unit houses residents that need assistance because they suffer from Alzheimer's or Dementia.

9. Ms. Wayne testified that at no time between September 8, 2014 and October 27, 2014, did the claimant report that she had any kind of injury at work as a

result of transferring a resident. Ms. Wayne testified that at no time did the claimant, during that time period, complain of suffering low back pain. Ms. Wayne also testified that, at no time during that time period, did the claimant state that she was having any kind of ongoing back pain that was in any way preventing her from performing her job.

10. The claimant acknowledged that on September 8, 2014, she went to Dr. Thornally for a chiropractic adjustment. Although the claimant, at hearing, testified that she went to see Dr. Thornally because of excruciating pain, the pain log that she completed indicated that her low back pain at that time was 6 out of 10. Dr. Scott testified that the claimant reporting a 6 out of 10 pain on September 8, 2014, was not significantly higher than what her average pain levels were between November 7, 2013 and September 8, 2014 (a 5-6).

11. The claimant, during her evaluation with Dr. Scott, stated that when Dr. Thornally saw the claimant on September 8, 2014, Dr. Thornally did not believe that the claimant had any kind of new problem. Dr. Scott explained that the claimant's reporting of her level of low back pain prior to September 8, 2014, as compared to what she reported on September 8, 2014, indicated that there was not any kind of acute specific incident of increased pain. In fact, according to the claimant, the only thing that Dr. Thornally recommended at that time was another chiropractic adjustment.

12. The claimant was terminated from her job as of October 27, 2014. Less than a week later, on November 2, 2014, the claimant, for the first time, completed a Workers' Claim for Compensation. The claimant, at that time, reported that the injury occurred on September 12, 2014, at 6:00 a.m. However, the claimant acknowledged telling Dr. Scott that she told him the injury occurred on September 8, 2014. The claimant also told Dr. Scott that the injury occurred around noon.

13. Two days after the claimant was terminated from her job, she returned to see Dr. Thornally. At that time, the claimant was reporting that her pain levels in her low back was 2 out of 10. As of October 29, 2014, the severity of the claimant's low back pain was significantly lower than what her average base line low back pain was prior to September 8, 2014.

14. The claimant received chiropractic treatment with Dr. Forest Fix beginning March 10, 2015. It appears that the last time that the claimant saw Dr. Fix was on May 18, 2015. In comparing what the claimant reports to both Dr. Thornally and Dr. Fix in terms of the location of her pain and the severity of her pain, the claimant's reports of pain to Dr. Fix at this time are substantially similar to what her reports of pain were to Dr. Thornally prior to September 8, 2014.

15. As noted above, Dr. Douglas Scott performed an IME of the claimant on May 7, 2015. As noted by Dr. Scott, the claimant, at the time that she saw Dr. Scott, did not mention to him that she had a history of rheumatoid arthritis. After reviewing the medical records from Dr. Thornally, Dr. Scott believed that the claimant's rheumatoid arthritis most likely explained the presentation of the levels of pain in multiple areas as documented by Dr. Thornally. As explained by Dr. Scott, rheumatoid arthritis is an inflammatory disease that usually affects multiple joints. Someone with rheumatoid arthritis can complain of neck pain, arm pain, upper back pain, shoulder pain, mid-back pain, lower back pain, hip pain, and leg pain. As a result, Dr. Scott was of the opinion that a trauma of any kind to the claimant's low back condition was not a pre-condition for the symptom presentation that the claimant demonstrated subsequent to September 8, 2014.

16. When Dr. Scott was asked to assume that a trauma of some kind did in fact occur on September 8, 2014, it was his opinion that, based on his review of the medical records, that, at best, a trauma occurring on September 8, 2014, represented nothing more than a temporary flare-up of the claimant's pre-existing back problems that most likely resolved fairly quickly, if not spontaneously.

17. The ALJ finds Dr. Scott's analyses and opinions to be credible and persuasive.

18. The ALJ finds that the claimant has failed to establish that it is more likely than not that she sustained a compensable injury arising out of and in the course of her employment with the respondent-employer during the month of September 2014.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1)*. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury rose out of the course and scope of his employment, *Section 8-41-301(1);* see *City of Boulder v Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in the favor of Respondent. *Section* 8-43-201.

2. A workers' compensation case is decided on its merits. *Section* 8-43-201. The ALJs' factual findings need only concern evidence that is dispositive of the issues involved. The ALJ does not need to address every piece of evidence that might lead to a conflicting conclusion and reject evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finders should consider, among other things, the consistency or inconsistency of the witnesses' testimony and action; the reasonableness or the unreasonableness (the probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interests. *See Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

4. As outlined above, the claimant has a significant history of chronic low back pain that, according to Dr. Scott, dates back 10 to 20 years. The claimant, prior to September 8, 2014, had been seeking chiropractic care with Dr. Thornally, at which time she reported low back pain that averaged 5 to 6 in severity. The claimant did see Dr. Thornally on September 8, 2014, but her own reports of pain indicated that they were pretty much at baseline (6). The claimant, herself, told Dr. Scott that Dr. Thornally did not think there was any new problem, and provided her a regular chiropractic adjustment.

5. The greater weight of medical evidence establishes that the claimant did not suffer any kind of compensable injury as a result of the incident reported on November 2, 2014, when she completed her Workers' Claim for Compensation.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffered any kind of compensable injury as a result of any incident occurring in September 2014.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: September 14, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The following issues were raised for consideration at hearing:

1. What is Claimant's average weekly wage (AWW); and

2. Whether the right to select an authorized treating provider passed to Claimant.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant was hired by Employer on March 20, 2014, as a driver and loader. Claimant's duties for Employer included driving to various job sites, removing unwanted items and hauling them away. Claimant suffered an admitted work injury on September 29, 2014.

2. Claimant's initial rate of pay for Employer was $11.00 per hour. Claimant received a pay raise on September 8, 2014, to $13.50 per hour. When Claimant started working for Employer, he was not working in a full time capacity. In March, April and May of 2014, business at employer was slow and Claimant only worked between ten and twenty hours per week. Claimant's periods of low pay at Employer in March, April and May of 2014 was due, in part, to the fact that Claimant volunteered to give up his shifts at Employer during this slower period while Claimant worked at his second job at Two Men with Big Hearts Moving and Storage, where he received more working hours and earned more.

3. At Two Men with Big Hearts Moving and Storage, Claimant was employed as a driver, loader and mover between February and May of 2014. Claimant testified that he voluntarily left his job with Two Men with Big Hearts Moving and Storage because he was offered more hours at Employer.

4. In May 2014, Claimant's hours increased at Employer, although his hours continued to fluctuate depending on work availability.

5. Mr. Paul Durant, the owner of Employer, employed between six and nine workers in 2014. Each employee's hours depended on the amount of work Employer had available. Employer's busiest time of year starts in March or April, and continues until August. Mr. Durant did not guarantee any of his employees any number of hours,

but when hours were limited, he made an effort to give employees who were top performers as many hours as possible. Mr. Durant considered Claimant to be one of the top performers.

6. Using Employer's payroll records for Claimant's dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation reflects a fair and accurate approximation of Claimant's AWW at the time of his injury on September 29, 2014.

7. Claimant injured his right shoulder while performing work-related duties on September 29, 2014. Respondents filed General Admissions of Liability, dated April 2, and 30, 2015, for medical and temporary disability benefits. Respondents admitted for an AWW of $463.36

8. Mr. Durant was Claimant's supervisor on September 29, 2014. The parties offered conflicting evidence regarding whether Claimant discussed the September 29, 2014, work injury with Mr. Durant on September 30, 2014. Claimant maintained that he told Mr. Durant he had a work injury and needed medical attention but was provided none. Mr. Durant maintained that Claimant indicated he injured himself but he did not need medical attention on September 30, 2014. Mr. Durant advised Claimant to keep him posted whether he needed medical attention. Mr. Durant maintained, and it is found that, Employer was not advised that Claimant needed medical attention until November 2014 when Claimant advised Mr. Durant that his private health insurance provider diagnosed a rotator cuff tear.

9. Following the September 29, 2014, injury, Claimant sought treatment on his own through his primary care physician at Denver Health Medical Center, David Ginosar, M.D. In October 2014, Claimant began treating with Dr. Ginosar for the injuries sustained in this claim. Dr. Ginosar diagnosed Claimant with a rotator cuff tear.

10. In mid-November of 2014, following Dr. Ginosar's diagnosis, Claimant advised Mr. Durant he was diagnosed with a right rotator cuff tear. Mr. Durant instructed Claimant to seek medical care from Michael V. Ladwig, M.D. of Aviation and Occupational Medicine. Mr. Durant also instructed Claimant to discontinue treatment at Denver Health Medical Center. Claimant was not given a choice of providers from whom to seek treatment during the conversation with Mr. Durant in November of 2014.

11. Claimant began treatment with Dr. Ladwig on November 26, 2015. Since that date, Claimant has treated with Dr. Ladwig and the physicians to whom Dr. Ladwig has referred Claimant. Since commencing treatment with Dr. Ladwig, Claimant has not returned to Denver Health Medical Center for treatment related to his right shoulder.

12. The right of selection of a medical provider passed to Claimant in November 2014, when Claimant was not provided a choice of two medical providers as required by Section 8-43-404(5)(a), C.R.S.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

2. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

a. Average Weekly Wage

3. In this case, Claimant contends that he is entitled to increased AWW. The AWW of an injured employee shall be taken as the basis upon which to compute compensation payments. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. Section 8-42-102(1), C.R.S.; *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

4. When an injured employee is being paid by the hour, the AWW is usually determined using the "hourly rate" at which the employee was working "at the time of the injury or would have worked if the injury had not intervened." Section 8-42-102(2)(d), C.R.S. If this method does not result in a fair calculation of the injured worker's AWW, then subsection (3) of Section 8-42-102 may apply. An administrative law judge has broad discretion in calculating the employee's AWW according to the facts of the case. *RJS Painting v. Industrial Commission of State*, 732 P.2d 239 (Colo. App. 1986).

5. Using the procedure set forth in Section 8-42-102(2)(d), C.R.S., it is necessary to determine how much Claimant was earning at Employer at the time of the injury, or how much Claimant was likely to have earned had the injury not occurred. This is most fairly and accurately determined by considering checks issued to Claimant by Employer between July 18, 2014, and September 26, 2014. This period constitutes the 12-week period leading up to Claimant's injury, and excludes a period when Claimant was working reduced hours at a lower rate of pay

6. Using dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation is in accordance with Section 8-42-102(1)(d),

C.R.S., and reflects a fair and accurate approximation of Claimant's AWW at the time of his injury.

7. Respondents contend that Claimant's AWW is $463.36 using Claimant's pay between February 24, 2014 and September 26, 2014, combining wages earned from Employer and a concurrent employer, Two Men with Big Hearts Moving and Storage. Respondents' calculation of AWW is rejected as Respondents' calculation includes a period of almost four weeks wherein Claimant had not yet been hired as an employee for Employer and Respondents' calculation uses a period of time immediately following Claimant's date of hire when he volunteered to work reduced hours for Employer.

b. Authorized Treating Physician

8. Claimant contends that the right to select a medical provider passed to him when Respondents failed to comply with Section 8-43-404(5)(a)(I)(A). This section provides that:

> "In all cases of injury, the employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee."

9. The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

10. This statute affords the employer the right to designate at least two physicians and/or corporate providers that are deemed authorized to provide medical treatment. Consistent with the version of Section 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

11. If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

12. The credible and persuasive evidence presented at hearing established that November 2014 is when Mr. Durant was first advised that Claimant's September 29, 2014, work injury required medical attention. At that time, Mr. Durant referred Claimant to Dr. Ladwig and failed to comply with Section 8-43-404(5)(a), C.R.S. by providing Claimant with the choice to two medical providers from which to choose a provider. Therefore, the right of selection of medical provider passed to Claimant in November 2014.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $543.18.

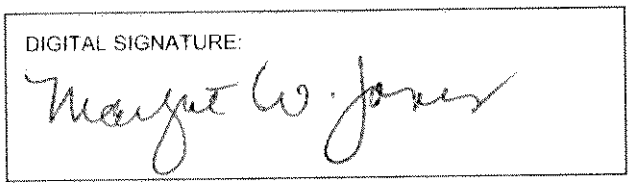
2. The right to select an authorized treating physician passed to Claimant in November 2014. Claimant shall appoint an authorized treating physician and notify Respondents of his choice within seven (7) business days of the date of this Order.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: __August 27, 2015___



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits beginning July 18, 2014 and continuing?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employer?

FINDINGS OF FACT

1. Claimant was employed as a dishwasher with employer beginning in approximately 2007. Claimant testified he worked approximately 8-9 hours per day and 35-40 hours per week for employer. Claimant testified that on July 18, 2014 he was carry a box of glass dishes when he tripped and fell with the box hitting claimant on the knees. Claimant testified that the incident was witnessed by his boss, Mr. Harvey, who inquired if he was OK. Claimant testified following this incident, his bone started hurting and felt like sand. However, claimant continued to work for employer.

2. Claimant testified he eventually went to El Salvador to deal with a family emergency in October 2014. Claimant testified he received an injection into his knee in El Salvador in November 2014. Claimant testified he returned to the United States on December 5, 2014 and went to a physician in the United States in December 2014.

3. The employment records establish that claimant continued to work for employer until October 12, 2014.

4. The medical records entered into evidence document that claimant sought medical treatment for his left knee on July 28, 2014 from Dr. Stanton with Mountain Family Health Center. Claimant reported to Dr. Stanton that there was no injury, but his pain was piercing and sharp and aggravated by movement and walking. Claimant reported an onset of pain 4 months ago.

5. At hearing, claimant testified he did not recall receiving medical treatment to his left knee on July 28, 2014.

6. Claimant returned to Mountain Family Health Center on December 11, 2014 and was evaluated by nurse practitioner Menke. Claimant reported an onset of left knee pain six months ago associated with an injury. The records do not indicate claimant's injury was work related, however.

7. Claimant eventually underwent an x-ray of the left knee on January 2, 2015. The x-ray demonstrated degenerative changes with no evidence of an acute fracture.

8. Respondents presented the testimony of Mr. Harvey at hearing. Mr. Harvey testified he worked with claimant as his supervisor on a daily basis. Mr. Harvey testified he noticed claimant limping prior to July 2014. Mr. Harvey testified he did not recall claimant tripping and falling with a large stack of plates in July 2014.

9. Mr. Harvey testified claimant was terminated on October 15, 2014 after he violated the employer's no call/no show policy of not showing up for a scheduled shift on 2 consecutive occasions. Mr. Harvey testified claimant's violation of this policy occurred on October 13, October 14 and October 15, 2014.

10. The ALJ finds the testimony of Mr. Harvey to be credible and persuasive.

11. Respondents referred claimant for an independent medical examination ("IME") with Dr. Fall on July 16, 2015. Dr. Fall reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her IME. Dr. Fall issued a report that noted claimant's accident history of an injury occurring on July 18, 2015 when he was carrying plates, tripped over a box and fell on both knees. Dr. Fall noted claimant reported he did not feel pain until the next day and did not report the injury to human resources.

12. Dr. Fall noted claimant's medical treatment on July 28, 2014 that did not indicate a work injury. Dr. Fall opined in her report that claimant had osteoarthritis of his left knee, but opined that the knee complaints predated the alleged injury on July 18, 2014.

13. Dr. Fall testified at hearing consistent with her IME report.

14. The ALJ credits the medical records entered into evidence that document a 4 month history of knee pain without a specific injury in July 2014, along with the testimony of Mr. Harvey and finds that claimant has failed to demonstrate that it is more likely true than not that claimant sustained a compensable injury arising out of and in the course of his employment with employer.

15. Because of the ALJ's conclusion regarding the compensable nature of claimant's alleged injury, the other issues raised at hearing need not be addressed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. As found, the medical records from Mountain Family Health Center indicating in July 2014 that claimant had knee pain with an onset 4 months ago is more credible and persuasive than claimant's testimony at hearing that his knee pain started after he fell at work on July 18, 2014. As found, the testimony of Mr. Harvey that he did not recall witnessing claimant carrying a large stack of plates and falling to the ground is more credible and persuasive than claimant's testimony that such an incident occurred.

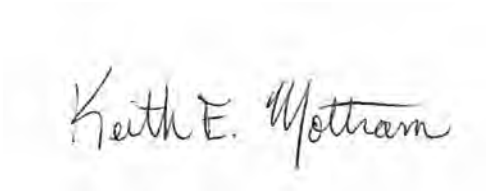
ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 10, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of his work injury and provided by a physician who was authorized to treat claimant for his injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of November 10, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer as a pipeline rig welder. Claimant testified that his job duties included welding on a natural gas pipeline in an area located above Debeque, Colorado where a new natural gas pipeline was being installed by employer.

2. Claimant testified that on August 11, 2014 he was welding a pipe and put the pipe into the ditch, but the pipe didn't fit in the ditch and needed to be cut. Claimant testified when he cut the pipe in the ditch, the pipe rolled and pinned him in the ditch. Claimant testified he was in a lot of pain and felt paralyzed from the waist down and was carried out of the ditch by a co-worker.

3. Claimant testified he was put into the passenger side of his truck and his helper, Mr. Montes, drove claimant towards town before stopping at the right of way where they had cell phone reception and calling the superintendant for employer ("Carlos"), who drove up to where claimant was parked. Claimant testified he spoke to another supervisor on the phone, Mr. Wilson, who told claimant to go home and "let it ride out a few days".

4. Mr. Montes testified at hearing in this matter. Mr. Montes worked with claimant as a team with claimant welding pipelines and Mr. Montes helping claimant. Mr. Montes testified they worked together for 2 ½ years. Mr. Montes testified he did not see the injury occur, but was told later by a co-worker that "your welder got hurt." Mr. Montes testified he took claimant to the truck and drove claimant home. Mr. Montes

testified he spoke to the superintendant on the phone while driving claimant home. Mr. Montes testified that claimant was off of work for approximately a week after the injury.

5. Mr. Wilson testified at hearing for respondents. Mr. Wilson testified he is the area manager for employer, but was the project manager at the time of claimant's injury. Mr. Wilson testified he received a phone call from the superintendent and another worker, Mr. Bradshaw, telling him of claimant's injury. Mr. Wilson testified he drove from Rangely, Colorado to the job site, a drive that took approximately two hours and twenty minutes. Mr. Wilson testified when he got to the job site he spoke to claimant, Mr. Bradshaw and Carlos to determine what had happened. Mr. Wilson testified he thought he spoke to claimant in person, but may have spoken to him on the phone.

6. Mr. Wilson testified claimant told him his knee was sore and he asked claimant if he wanted to see a doctor, to which claimant replied in the negative. Mr. Wilson testified he told claimant to take it easy for a couple of days.

7. Claimant testified Mr. Wilson eventually took claimant to the company's doctor at Grand River Medical on August 14, 2014. Mr. Wilson confirmed this in his testimony. The medical records from Mr. Zimmerman, the physician's assistant with Grand River Medical document that claimant was evaluated on August 14, 2014 and reported an injury in which both knees were smashed between a ditch and a pipe. The ALJ finds the medical records document claimant having ecchymosis present medially on both knees. Mr. Zimmerman released claimant to return to work full duty and instructed to follow up in 2 weeks.

8. The ALJ finds claimant was referred to Grand River Medical by employer and finds the treatment provided by Grand River Medical is authorized by the referral from employer.

9. The records indicate claimant was laid off from his work with employer on or about September 12, 2014.

10. Claimant returned to Mr. Zimmerman on September 15, 2014 and reported doing much better. Mr. Zimmerman recommended claimant continue with conservative treatment and return in one month. Claimant was noted to be complaining of stiffness and soreness in his left knee with a bit of swelling in his right knee during this visit.

11. Claimant testified Mr. Wilson paid for the medical treatment with a credit card. Mr. Wilson confirmed on his testimony that he paid for the first two medical appointments with Grand River Medical with a credit card. Mr. Wilson further confirmed that after the first medical appointment, he told claimant to take a week off of work and employer would pay his regular wages. Mr. Wilson testified he attended the medical appointments and was in the room as claimant was evaluated on these two occasions.

12. The ALJ concludes based on the testimony of claimant, Mr. Montes and Mr. Wilson that claimant sustained a compensable injury at work on August 11, 2014

that resulted in the need for medical treatment. Therefore, claimant has sustained his burden of proof establishing that he sustained a compensable injury in the first instance.

13. Claimant stopped working for employer at some point on or about October 2014 and immediately began working for Fugal, a different employer that performs the same pipeline welding work.

14. Claimant returned to Mr. Zimmerman at Grand River Health on November 10, 2014. Claimant testified that no representative from employer attended this visit with claimant. Mr. Zimmerman noted that claimant complained that his knees were getting worse instead of getting better. Mr. Zimmerman referred claimant to orthopedics for a second opinion and further evaluation and provided claimant with work restrictions of no lifting over 20 pounds and no crawling, kneeling, squatting or climbing.

15. Respondents filed a Notice of Contest on February 3, 2015 denying liability for the claim pending further investigation.

16. Claimant testified at hearing that he was unable to perform his regular duties of employment with Fugal and was laid off approximately November 6, 2014. Claimant testified that after his injury, he was working the back end of the welding pipe which is easier work and did not require claimant to have to jump over the pipe.

17. There was conflicting testimony presented as to whether claimant was signed in for work following his injury by employer. Claimant acknowledged that his signature appeared on the sign in sheet after his injury before his first medical appointment. Mr. Wilson testified however, that claimant did miss several days of work after his first appointment with Grand River Medical at the direction of Mr. Wilson who advised claimant to take a week off. Employer paid claimant his normal wages during this time off even though he was not at work.

18. Claimant testified he has not worked since receiving the medical restrictions from Mr. Zimmerman with Grand River Health. Claimant testified he could not perform his regular work with employer with the 20 pound work restrictions set forth by Grand River Health. Claimant testified he has been called by Fugal regarding work, but he is not able to perform the work with his restrictions.

19. The ALJ finds the testimony of claimant to be credible and persuasive on this point and finds that claimant has demonstrated that the work injury has resulted in restrictions set forth by Mr. Zimmerman with Grand River Health and that the restrictions have resulted in a wage loss for claimant. Therefore, the ALJ finds claimant has sustained his burden of proving that he is entitled to an award of temporary total disability ("TTD") benefits beginning November 10, 2014 and continuing until terminated by law or statute.

20. Claimant subsequently sought treatment from Dr. Mistry for low back pain with paresthesias in his feet and radiation to his buttock area on March 17, 2015. Dr. Mistry recommended claimant undergo a magnetic resonance image ("MRI") of the lumbar spine and a right knee MRI. The ALJ finds that claimant was referred by Mr.

Zimmerman for othropedic evaluation on November 10, 2014 and finds that Dr. Mistry performed the orthopedic evaluation pursuant to the referral. The ALJ notes that Mr. Zimmerman did not specify the orthopedic physician to perform the evaluation, but finds that Dr. Mistry's evaluation is consistent with this referral.

21. Claimant was referred by employer for an independent medical evaluation ("IME") with Dr. Brunworth on April 13, 2015. Dr. Brunworth reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her IME.

22. Dr. Brunworth noted claimant's complaints of knee pain over the medial joint line as well as proximal and distal to the medial joint line. Dr. Brunworth also noted mild crepitus in the knee and tenderness in the lumbosacral junction. Dr. Brunworth performed range of motion testing in connection with her IME. Dr. Brunworth diagnosed claimant with low back and lower extremity complaints and noted that claimant's complaints were suggestive of an L5-S1 herniated disc with bilateral radiculopathy. Dr. Brunworth noted that claimant reported having low back pain ever since his injury, but that was not noted in the medical records. Dr. Brunworth recommended further treatment including an MRI of the right knee and an MRI of the lumbar spine. Dr. Brunworth noted that if claimant did not have an injury to the low back, than only an MRI of the right knee would be indicated.

23. Dr. Brunworth testified by deposition in this matter. Dr. Brunworth noted that examination of claimant following the injury revealed a negative McMurray's exam and a negative Lachman's test. Dr. Brunworth further testified that when claimant was examined on November 10, 2014, there was no mention of claimant complaining of back pain in the medical records. Dr. Brunworth testified that claimant reported to Dr. Mistry of back pain, which was different that what the records from Mr. Zimmerman had indicated were his complaints.

24. Dr. Brunworth testified that if claimant had injured his back on August 11, 2014, she would have expected claimant to tell his providers about the back pain and radicular pain. Dr. Brunworth testified that it was her opinion that there was some injury to claimant's knees in the accident in August. Dr. Brunworth testified that if claimant did have a meniscal injury in August, and was doing activities, it was possible that the injury set claimant up to have a worsening if he was still very active.

25. The ALJ credits the medical records from Mr. Zimmerman and finds that claimant has failed to demonstrate that it is more likely true that the treatment recommended to his low back, including the lumbar spine MRI, is related to the August 11, 2014 work injury.

26. The wage records entered into evidence establish that claimant was paid an hourly wage, overtime, a per diem and rig rental. The ALJ finds that the AWW should not include the rig rental paid by employer to claimant as there is no indication under the Colorado Workers' Compensation Act that the rig rental is a component of the calculation of the AWW.

27. Claimant earned $9,363.50 in the three weeks prior to his injury if the rig rental is not included in the AWW calculation (wages included the week ending July 27, 2014, August 3, 2014 and August 10, 2014). This results in an AWW of $3,121.17.

28. The ALJ finds that claimant has failed to prove that it is more probable than not that the payment made to claimant by employer for the "rig rental" is a fringe benefit that would allow for the payment to be included in the AWW calculation under the Colorado Workers' Compensation Act.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he was pinned between the pipe and the wall of the ditch.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).\

6. As found, the treatment claimant received from Grand River Medical to claimant's knee was reasonable, necessary and related to claimant's August 11, 2014 work injury.

7. As found, claimant has failed to demonstrate that the recommended treatment for his alleged back injury is reasonable, necessary and related to his August 11, 2014 work injury. Claimant request for payment of the treatment provided by Dr. Mistry to claimant's back condition, including the lumbar spine MRI is denied.

8. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

9. The ALJ finds that claimant was referred by Grand River Medical for orthopedic evaluation on November 10, 2014. The ALJ finds that claimant underwent an orthopedic evaluation with Dr. Mistry pursuant to that referral and finds the treatment provided by Dr. Mistry to be consistent with this referral and finds his treatment for his knee to be reasonable, necessary and related to claimant's work injury and authorized by virtue of the referral from Mr. Zimmerman with Grand River Medical.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Wages are defined

under Section 8-40-201(19)(b) to include "the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefits not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage, the advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

11. Claimant argued at hearing that his AWW should include the money he earned from the rig rental paid by employer to claimant for purposes of using his truck to complete his job. However, under Section 8-40-201(19)(b), C.R.S. does not indicate a basis for the ALJ to include the "rig rental" payment as a fringe benefit for claimant in calculating his AWW.

12. As found, claimant's AWW for his August 11, 2014 injury is properly calculated at $3,121.17.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment provided by Grand River and Dr. Mistry, who are found to be authorized to provide treatment for claimant's knee injury.

2. Claimant request for an Order requiring respondents to pay for medical treatment to his low back is denied.

3. Respondents shall pay claimant TTD benefits for the period of November 10, 2014 and continuing based on an AWW of $3,121.17.

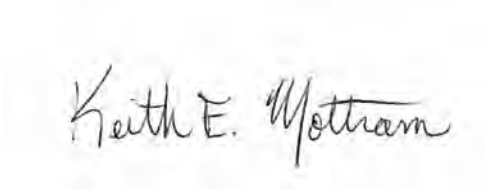
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
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ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence he is entitled to an award of temporary total disability ("TTD") benefits for the period of December 22, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that Dr. Quackenbush is authorized to treat claimant for his industrial injury?

FINDINGS OF FACT

1. Claimant began working for employer in July 2013 as a field supervisor. Claimant testified at hearing that on December 20, 2014 he was working with employer in Douglas, Wyoming when he went to employer's yard to check with the crew he and his crew were relieving before heading to a gas station to get fuel for the company vehicle and snacks. Claimant testified that as he got back into the vehicle he hit his head on the roof of the car.

2. Claimant testified that after he hit his head, he knew he wasn't feeling right and became nauseous.

3. Claimant presented the testimony of Mr. Durham, a co-worker for employer. Mr. Durham testified he was with claimant when claimant struck his head. Mr. Durham testified claimant "rung his bell pretty good" when he hit his head on the vehicle. Mr. Durham testified claimant requested someone else drive the vehicle.

4. Mr. Durham testified claimant became very pale and was unstable while walking. Mr. Durham testified claimant began vomiting in the parking lot and Mr. Durham proceeded to take claimant to the emergency room ("ER").

5. The ER physician noted claimant presented after hitting his head. Claimant reported he was feeling dizzy and nauseated and the records document claimant was dry heaving on arrival. Claimant reported a prior history of a concussion a year earlier. Claimant was referred for a computed tomography ("CT") scan of his head. The CT scan showed no acute intracranial process. Claimant was provided medications and instructed to follow up with a physician in Grand Junction.

6. Claimant testified he had previously suffered a concussion in December 2013 when he fell off a ladder at home for which he sought treatment with Dr. Quackenbush, his personal physician. Dr. Quckenbush's records noted a slow recovery from the concussion throughout 2014. Claimant was referred to Dr. Gilman on January 13, 2014 for neurological evaluation. Dr. Gilman noted post-concussive syndrome and recommended some balance exercises. After being released to return to work without restrictions on February 28, 2014, claimant suffered a recurrence of his symptoms in March 2014 and was again taken off of work by Dr. Quackenbush on April 1, 2014. On May 8, 2014, Dr. Quackenbush noted claimant was still having both cognitive and physical affects of the concussion and referred claimant to physical medicine and rehabilitation to begin therapeutic interventions. Claimant returned to Dr. Gilman who noted claimant was not improving. Dr. Gilman recommended an EEG, which was normal. Claimant was eventually released to return to work by Dr. Quackenbush on August 29, 2014 on one week cycles. After completing 2 one week cycles, Dr. Quackenbush released him to return to work on two week cycles as of October 8, 2014.

7. In December 2014, Claimant returned to Grand Junction and was referred to Dr. Gustafson by employer. Claimant was initially evaluated by Dr. Gustafson on December 22, 2014. Dr. Gustafson noted that claimant reported complaints of a headache with nausea, vomiting, and dizziness. Dr. Gustafson diagnosed claimant with a concussion and recommended claimant remain off of work. Dr. Gustafson noted that claimant was going to follow up with his primary care physician, Dr. Quackenbush.

8. Dr. Quackenbush's notes indicate that claimant's wife called to schedule an appointment on December 22, 2014. Claimant was evaluated by Dr. Quackenbush on December 23, 2014. Claimant reported to Dr. Quackenbush that he was injured four days ago at work when he struck his head on a car at work. Dr. Quackenbush noted that claimant had a history of a prior concussion. Dr. Quackenbush recommended cognitive rest and noted claimant had plans to follow up with the workers' compensation doctor.

9. Claimant returned to Dr. Gustafson on December 29, 2014. Dr. Gustafson noted that claimant was referred to a neurologist, but did not want to treat with Dr. Gilman because he did not have a good experience with Dr. Gilman with his previous treatment. Dr. Gustafson recommended Dr. Burnbaum. Dr. Gustafson noted that he would defer medical management decisions to Dr. Quackenbush.

10. Claimant was examined by Dr. Burnbaum on January 13, 2015. Dr. Burnbaum noted that claimant had a basically unremarkable neurologic examination.

Dr. Burnbaum recommended Topamax and a topical anti-inflammatory Voltaren cream for the reported tenderness.

11. Claimant returned to Dr. Gustafson on January 22, 2015 and continued to complain of headaches. Dr. Gustafson noted claimant had undergone a neurological exam that was unremarkable. Dr. Gustafson noted that work activities had aggravated an underlying pre-existing condition. Claimant returned to Dr. Gustafson on January 29, 2015 with complaints of right sided head discomfort. Claimant reported continued problems with fatigue, concentration and speech.

12. Claimant was next evaluated by Dr. Burnbaum on February 20, 2015. Dr. Burnbaum noted claimant was doing better. Dr. Burnbaum increased his medications to 75 mg of Topamax.

13. Claimant returned to Dr. Burnbaum on May 28, 2015. Dr. Burnbaum noted that claimant got worse when he went up to higher altitude on the monument. Dr. Burnbaum recommended neuropsychological testing.

14. Claimant was referred for an independent medical examination ("IME") with Dr. Hammerberg on June 24, 2015. Dr. Hammerberg reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Hammerberg issued a report that indicated it was his opinion that claimant suffered an injury when he struck his head on the vehicle on December 20, 2014. Dr. Hammerberg testified at hearing in this matter that at the time of his initial evaluation, he agreed that claimant's treatment he had received was appropriate. Dr. Hammerberg testified at hearing that the original opinion was not based on objective data. Dr. Hammerberg recommended neuropsychological testing.

15. Claimant eventually underwent a neuropsychological IME with Dr. Kenneally. Dr. Kenneally performed the neuropsychological IME over the course of two days, June 25, 2015 and July 16, 2015. Dr. Kenneally opined, based on the neuropsychological IME that claimant was malingering.

16. Dr. Kenneally testified at hearing in this matter regarding her IME. Dr. Kenneally testified claimant failed four separate validity measures and noted in her testimony that failing 3 validity tests requires a diagnosis of malingering. Dr. Kenneally testified claimant was choosing to underreport his symptoms. Dr. Kenneally testified she did not disagree that claimant struck his head on a car door, but noted that the MRI scan and CT scan support a finding of no head injury.

17. Dr. Kenneally testified on cross examination that she could not state that claimant was malingering in January 2015, but that he was malingering when she evaluated claimant in June and July.

18. The ALJ finds that testimony of Dr. Kenneally and Dr. Hammerberg to be credible and persuasive. The ALJ finds that claimant is likely malingering in his presentation to Dr. Kenneally. The ALJ finds, however, that this does not necessarily support a finding that claimant did not suffer a compensable injury in December 2014.

19. The ALJ credits the testimony of Mr. Durham regarding claimant's injury in December 2014 and finds that claimant has proven that it is more likely than not that he sustained an injury arising out of and in the course of his employment with employer. The ALJ further credits the opinions of Dr. Gustafson regarding claimant's work restrictions and finds that claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning December 22, 2014.

20. The ALJ specifically finds claimant's testimony regarding the effects of the injury to be not credible. The ALJ, however, credits the medical records over claimant's testimony and the testimony of Dr. Hammerberg that the treatment provided prior to his IME was reasonable and finds claimant has proven that it is more likely than not that claimant's treatment was reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

21. The ALJ notes that he is without jurisdiction to determine that claimant has reached maximum medical improvement. Such an opinion must come from an authorized treating physician, such as Dr. Gustafson or another authorized provider. Despite a finding that claimant may be malingering with regard to his symptoms in the IME, this does not provide the ALJ with authority to cut off an award of TTD benefits or ongoing medical benefits. Again, this needs to be addressed by an authorized treating physician before it is addressed by the ALJ.

22. While respondents argue that claimant did not suffer a compensable injury in this case, the ALJ would need to ignore the testimony of Mr. Durham regarding what he witnessed on December 20, 2014 in order to make this finding. The evidence, when viewed as a whole, does establish that it is more likely than not that claimant sustained a compensable injury on December 20, 2014 that resulted in the need for medical treatment.

23. With regard to the reasonable and necessary medical treatment, the ALJ finds the treatment before the IME with Dr. Kenneally to be reasonable and necessary medical treatment. No medical treatment after the IME is currently at issue before the ALJ. Moreover, the ALJ is without jurisdiction to indicate that no further treatment would be reasonable and necessary as this represents a de facto finding of MMI without having the DIME process run its' course. However, the reasonableness and necessity of future medical treatment may always be raised by respondents and this Order does mean that future medical treatment is reasonable and necessary to cure and relieve the claimant from the effects of the injury.

24. The ALJ credits the testimony of Dr. Hammerberg in this regard that the treatment provided to claimant prior to his IME was reasonable medical treatment necessary to treat claimant's injury.

25. With regard to the treatment from Dr. Quackenbush, the ALJ finds that claimant made an appointment on his own with Dr. Quackenbush and was not referred for medical treatment from Dr. Gustafson with Dr. Quackenbush. Therefore, the ALJ

finds Dr. Quackenbush was not an authorized provider for treatment related to claimant's work injury.

26. The wage records entered into evidence establish that claimant earned $6,335.01 (including a "bonus" of $100.00) in the 8 weeks prior to this injury (time period of November 1, 2014 through December 26, 2014). This equates to an AWW of $791.88. The ALJ notes that this time period takes into consideration the time in which claimant was released to return to his two week shifts by Dr. Quackenbush prior to his December 20, 2014 injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer.

As found, the testimony of Mr. Durham in found to be credible and persuasive in this regard.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

6. As found, claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Gustafson and Dr. Burnbaum was reasonable and necessary to cure and relieve claimant from the effects of his injury.

7. As found, claimant has failed to prove by a preponderance of the evidence that Dr. Quackenbush is authorized to treat claimant for his injuries. As found, claimant at least had plans to make an appointment with Dr. Quackenbush before his treatment with Dr. Gustafson, the physician claimant was referred to by employer.

8. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

9. As found, claimant has demonstrated that the injury resulted in work restrictions from Dr. Gustafson.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, claimant's AWW for his work injury is determined to be $791.88.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury.

2. Respondents shall pay claimant TTD benefits commencing December 22, 2014 and continuing until terminated by law or statute.

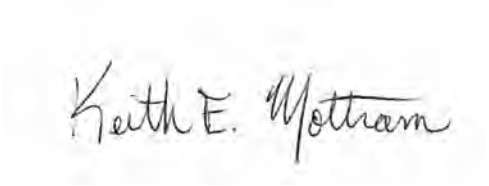
3. Dr. Quackenbush is determined to be not an authorized provider.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 17, 2015



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Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether Claimant established by a preponderance of the evidence that he sustained a compensable head injury in the course and scope of his employment of December 5, 2014.

- Whether Claimant established by a preponderance of the evidence that he suffered compensable bilateral inguinal hernias in the course and scope of his employment on December 5, 2014.

- Whether Claimant established by a preponderance of the evidence that as a consequence of his December 5, 2014 accident he suffered a compensable groin injury in the form of an infected hematoma which subsequently formed an abscess requiring surgical debridement.

- If Claimant suffered compensable bilateral inguinal hernias a groin abscess and/or head injury, whether he is entitled to reasonable, necessary and related medical benefits to cure and relieve him from the effects of said compensable injuries.

- The issue of Average Weekly Wage was reserved by the parties pending determination of the compensable nature of the alleged injuries.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works for Employer as a service electrician. His job duties consist of driving a company van to various locations to perform repair and service work. The van is equipped with a top mounted ladder rack which holds two ladders, one 12 feet in length and the other 10 feet. Two additional ladders, a 6 foot and a 4 foot, are carried inside the van.

2. On December 5, 2014, Claimant was called out to Denver to inspect a faulty ceiling fan. Claimant needed the 12 foot ladder to reach and inspect the fan which he retrieved from the ladder rack by standing on a rung on either side of the 4 foot stepladder placed on the ground on the side of the van. Upon inspection, Claimant determined why the fan was not working. He then provided the customer with an estimate for the repairs necessary to return the fan to working order. The customer declined further service and Claimant then returned to his van with the 12 foot ladder in hand. In the process of returning the ladder to the top rack Claimant injured his head

and groin. Claimant explained that while standing on the 4 foot ladder while straddling the top rung with his legs had managed to secure the front end of the ladder to the rack. He testified that the rear end of the ladder was not secure and slide from the rack striking him in the head. Claimant reportedly lost his footing on the 4 foot ladder and fell groin first onto the top rung "racking" himself in the process. He reportedly caught himself from proceeding to the ground by swinging one foot over the ladder and onto the ground. He then stepped around to the backside of the van for some privacy while he tried to gather himself. Claimant testified that he experienced blurred vision, pain in his head, pain in his groin and a buckling sensation in his knees, following the aforementioned incident.

3. Claimant testified that he composed himself and despite being in pain was able to secure the back of the 12 foot ladder to the rack and place the 4 foot ladder back into his work van. He testified that he drove a short distance down the road, stopping to rest for about an hour before proceeding to his next call during which time his vision cleared. Although his blurred vision resolved, Claimant testified that his sharp groin pain persisted. After resting, Claimant drove to Castle Rock to complete a service call. Once he finished, Claimant returned to Colorado Springs where he completed an easy job, he described as changing light bulbs which completed his work day. Claimant testified he was still experiencing groin pain upon his return home. He took a shower and inspected his groin. He testified that he did not notice any swelling in the groin area but because his pain persisted and he was experiencing numbness and tingling in his arm, his wife took him to Urgent care where he complained of dizziness, headache, tingling in his limbs, and pain in his right groin. Given the nature of his symptoms, Claimant appears to have been internally transferred from the Urgent Care section of Memorial Hospital to the Hospital's Emergency Room (ER).

4. On presentation to the (ER) on the evening of December 5, 2015, Claimant again complained of headache, nausea and groin pain. The attending ER physician noted that Claimant's presentation was concerning for possible head injury. Consequently, he ordered a CT scan of the head. The CT scan of the head was negative. Concerning Claimant's groin pain, the physician obtained the following history of present illness (HPI): "He also states right groin swelling. This has been going on for the past two days. Thinks he has an abscess there. He states pain, a little swelling. No history of MRSA or other skin abscesses. States that it hurts really bad especially when he pushes on it."

5. Inspection of the upper right thigh revealed a 5cm × 5cm area of induration/swelling, which the ER physician opined was possibly an early abscess, along with "some skin changes consistent with chronic skin irritation" just posterior to the scrotum. As the area felt indurated, the ER physician opined that the lesion appeared "chronic" leading the ER physician to note the need to initiate antibiotics. Claimant was diagnosed with a furuncle and prescribed pain medication, anti-inflammatory medication, anti-nausea medication and an antibiotic. He was discharged home with instructions to return to the ER for additional care should he experience worsening symptoms. Upon his discharge Claimant was provided patient

information/documentation regarding the nature and cause of abscess which provided as follows: "an abscess is an area under the skin where pus (infected fluid) collects. An abscess is often caused by bacteria. You can get an abscess anywhere on your body."

6. Per his discharge instructions, Claimant returned to the ER at Memorial Hospital on December 7, 2015, complaining of increasing swelling and pain in the groin. A report generated by Dr. Tanner Tollett, and later reviewed by Dr. Larry Butler, from Claimants initial presentation to the ER on this date reflects that Claimant had been seen in the ER previously, i.e. December 5, 2014 at which time examination failed to reveal "evidence for any acute traumatic injury."

7. Further ER evaluation on December 7, 2014 included multiple consultations, diagnostic testing and laboratory workup. Laboratory testing revealed an elevated blood sugar over 300 and blood work suggestive of infection consistent with an extending cellulitis and abscess in the right groin. Claimant was admitted to the hospital under the care of Dr. Tollett. (Respondents' Exhibit B, p. 129). Dr. William Kimball was consulted regarding Claimant's groin pain and swelling. Dr. Kimball examined the groin noting that Claimant had a "lot of cellulitis" and what felt like an "abscess inferior to the right inguinal ligament." He recommended incision and drainage (I & D) of the abscess and he performed the same at approximately 4:41 PM, December 7, 2014. (Respondents' Exhibit B, p. 129, 130 & 134-35). A note, which the undersigned ALJ ascribes to Dr. Kimball, likely prepared on December 7, 2014 at 4:41 PM following the I & D contains the following regarding the cause of Claimant's groin abscess: "I recommended I and D and when that was done it was mostly blood that came from beneath the skin with a little trickle of yellow purulent fluid in the blood, so it appeared to me that it was an infected hematoma secondary to that injury he sustained when he fell off a ladder." (Respondents' Exhibit B, p. 129-30).

8. Multiple CT scans were obtained during Claimant's diagnostic workup in the ER on December 7, 2015. A CT scan of the lumbar spine showed no acute traumatic injuries, but did demonstrate multiple cystic lesions in the right ileum which was felt to represent "a benign process." (Respondents' Hearing Exhibit B, p. 133). CT scan of the cervical spine demonstrated no acute injury. (Respondents' Hearing Exhibit B, p. 132-33). Most importantly, regarding the cause of Claimant's groin abscess, CT scan of the abdomen and pelvis demonstrated inflammatory changes in the medial aspect of the right thigh only. There was no evidence of focal soft tissue mass lesions or lymphadenopathy or fluid collection. (Respondents' Hearing Exhibit B, p. 133).

9. By record dated 12/7/2014 at 11:23 PM, Dr. Tollett noted Claimant to be a morbidly obese man with newly diagnosed diabetes. Abdominal examination was limited secondary to obesity. Concerning Claimant's abscess, Dr. Tollett noted that it was "likely caused by an infected furuncle, possibly exacerbated by recent trauma, but most likely, he is susceptible secondary to problem #2" (documented in his report to be Claimant's newly diagnosed diabetes)(Respondents' Exhibit B, p. 144).

10. On December 9, 2014 while hospitalized and preparing to undergo a

bedside dressing change for his abscess wound following the previous I & D, Claimant expressed extreme pain prompting the need to take a "second look to ensure no residual infection" was contributing to Claimant's ongoing pain. Accordingly, Claimant was taken to the operating room (OR) by Dr. Larry Butler. Once in the OR, Dr. Butler performed additional excision and debridement of a 5 × 3 cm right groin abscess under general anesthesia.

11. Claimant was discharged from the hospital on December 12, 2014. He received home health care services for dressing changes and post-operative care.

12. Medical records from Memorial Hospital establish that Claimant was seen in follow-up for his abscess by Dr. Butler on January 20, 2015. Dr. Butler's medical record from this date documents a second impression of "Inguinal hernia." Although Claimant testified that he was told during his hospital stay that he had bilateral hernias that required repair, the aforementioned note of Dr. Butler from January 20, 2015 is the first reference that the ALJ finds to Claimant having inguinal hernias in the medical records submitted as evidence in this case. Nonetheless, Dr. Butler's surgical note from March 10, 2015, during which time Claimant's hernias were repaired, notes that while Claimant was being treated for his right inner thigh abscess, he was "worked up with CT that demonstrated bilateral inguinal hernias." Consequently, the ALJ finds, more probably than not, that Claimant's bilateral inguinal hernias were discovered sometime during his hospitalization between December 7-12, 2014. Dr. Butler does not comment as to a cause of Claimant's hernias outside of listing obesity as a predisposing factor for the development of the same.

13. Dr. Allison Fall examined Claimant at Respondents' request on February 26, 2015. She was called to testify at hearing being qualified as a Board Certified Physical Medicine and Rehabilitation specialist who is also Level II Accredited by the Division of Workers Compensation.

14. Dr. Fall testified that it was her opinion, to a within reasonable degree of medical probability, that Claimant did not suffer any ongoing or significant injury to his head. The ALJ finds this testimony supported by the medical records from Claimant's visit to the ER on December 5, 2014 and December 7, 2014.

15. Dr. Fall testified that it was her opinion, within a reasonable degree of medical probability, that Claimant's mechanism of injury, as testified to by Claimant and as documented in the medical records, did not cause Claimant's inner thigh abscess and infection. According to Dr. Fall the report concerning the abscess dated December 5, 2015 report described the lesion as "indurated," meaning that the skin sinks down, and "chronic," meaning that it had been there for awhile. This would comport with Claimant's statements that he had right groin swelling that had been going on for the "past two days."

16. Dr. Fall testified that the mechanism of injury described by Claimant and reported in the medical records, could not have caused, aggravated or accelerated the

abscess/infection that was documented when Claimant was seen in the Emergency Department on December 5, 2015. She testified that infections are not changed or affected by a contusion or trauma to an area. Instead, she testified that they are due to bacteria.

17. Dr. Fall testified that there were chronic findings associated with the abscess discovered during the December 5, 2015 examination. Moreover, the record indicates that the process had advanced sufficiently that one of the recommended treatments was to initiate antibiotics. She testified that there was no prior documentation of a hematoma in the right thigh and no hematoma was revealed on CT scan. According to Dr. Fall, Claimant has risk factors, for developing infections, including diabetes and obesity.

18. The ALJ credits opinion of Dr. Tollett and the testimony of Dr. Fall to find that Claimant's abscess was, more probably than not caused by an infected furuncle which he is susceptible to developing due to his diabetes and obesity and not his fall onto the stepladder as he claims. The persuasive evidence, including Claimant's statements, the results of his physical examination on December 5, 2014, the results of his diagnostic testing on December 7, 2014 and the time line supports a finding that Claimant, likely developed a inner thigh boil a couple of days before he fell. While the fall likely resulted in the placement of extreme pressure to the affected area and subsequent pain in the groin, it did not cause the boil or subsequent infection. Based upon the totality of the evidence presented, the ALJ finds Dr. Kimball's suggestion that the abscess was caused by an infected hematoma unconvincing.

19. Claimant has failed to establish a causal connection between his work related fall and the development of his inner thigh abscess and subsequent infection requiring I & D and hospitalization.

20. Dr. Fall testified that Claimant's bilateral inguinal hernias were not caused by the December 5, 2015 incident. In support of her opinion, Dr. Fall noted the lack of medical documentation referencing any symptomatic complaints by Claimant consistent with an inguinal hernia at the time Claimant presented for treatment in the ER on December 5 or 7, 2014. Moreover, Dr. Fall testified that the mechanism of injury (MOI) as described by Claimant is not likely to cause or aggravate an inguinal hernia. According to Dr. Fall's uncontroverted testimony, the primary cause of inguinal hernias comes from increased pressure on the contents of the abdominal cavity associated with forceful Valsalva maneuvers rather than from falling or hitting something externally. Consequently, Dr. Fall testified that abdominal girth plays a role in the development of inguinal hernias and Claimant's obesity likely precipitated the development of the hernias discovered while he was hospitalized in this case. The ALJ finds the opinions of Dr. Fall credible, persuasive and in line with that of Dr. Butler who failed to comment on the cause of Claimant's hernias other than to indicate that his obesity predisposed him to development of the same.

21. Claimant has failed to establish a causal connection between his work

related fall and his bilateral inguinal hernias requiring surgical repair.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the Employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability

D. Claimant has failed to prove, by a preponderance of the evidence that he suffered a compensable head injury, groin abscess/infection or compensable bilateral inguinal hernias on December 5, 2014 when he fell onto his 4 foot stepladder, "racking" himself in the process. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-*

301(1), C.R.S.; Horodyskyj v. Karanian 32 P.3d 470 (Colo. 2001). The phrases "arising out of “and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant’s injuries arise out of his employment.

E. The term "arises out of” refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between employment and the alleged injuries. Section 8-43-201, C.R.S. 2013.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). While Claimant likely was struck in the head struck by a ladder causing him to fall onto the stepladder upon which he was standing, he did not sustain work-related injuries requiring medical treatment. Although Claimant may have reported a head injury and headache, he presented to the ER for treatment associated with his groin pain. In fact, Claimant presented to Urgent Care and then to the Emergency Department with a headache, rated 2/10 on a pain scale. Prior to seeking medical treatment, he had continued to work. His brain and cervical spine CT scans were negative and his visual disturbances had resolved by the time he was treated on December 5, 2015. Accordingly, the finds that the lack of objective findings supports the testimony of Dr. Fall that the Claimant did not suffer any significant injury to his head necessitating treatment.

G. Based upon the evidence presented, the ALJ concludes that Claimant’s groin abscess/infection was, probably caused by an infected furuncle which he is susceptible to developing due to his diabetes and obesity and not his fall onto the stepladder as he claims. The persuasive evidence establishes that Claimant presented to the ER with a chronic, indurated boil which appeared infected leading to the recommendation to initiate antibiotics. More likely than not, the infection process had already begun prior to

his fall which only brought additional attention to the area secondary to Claimant's reports of persistent pain. The medical records from December 5, 2015 do not document that there was evidence of traumatic or acute injury to the groin; however, they do document an indurated furuncle. Furthermore, there was no documentation of any hematoma on examination or borne out by substantial diagnostic testing on December 5 or 7, 2014. Consequently, the ALJ rejects Dr. Kimball's theory that the abscess was caused by an infected hematoma from Claimant's fall for the more persuasive opinions of Dr. Tollett and Dr. Fall, that Claimant's abscess was caused by an infected boil which he is at risk for developing as a consequence of his diabetes and obesity. Consequently, Claimant has failed to establish a causal connection between his work related fall and his abscess and infection requiring I & D with subsequent hospitalization.

H. As found, the ALJ concludes that Claimant has failed to establish a sufficient causal connection between his fall and his bilateral inguinal hernias. Here, the persuasive evidence establishes that Claimant's hernias were not caused by the December 5, 2015 incident as evidenced by the lack of medical documentation referencing any symptomatic complaints by Claimant consistent with an inguinal hernia at the time Claimant presented for treatment in the ER on December 5 or 7, 2014 and a described MOI unlikely to caused inguinal hernias. As found, the ALJ credits the testimony of Dr. Fall, when read in conjunction with Dr. Butler's March 10, 2015 operative report to conclude that Claimant's obesity (abdominal girth) is the precipitating cause of the "very small inguinal hernias" discovered and repaired by Dr. Butler, rather than his fall onto the stepladder on December 5, 2014.

I. Because Claimant had failed to carry his burden to establish that he sustained a compensable injury, his remaining claims regarding entitlement to medical and lost wage benefits need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits arising out of the December 5, 2014 incidnet involving his ladders is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: __September 15, 2015__

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered an occupational disease or injury to his bilateral hands, mouth, throat, or groin/hernia.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to disfigurement benefits.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer full time beginning in approximately 2008 as a baker. Claimant worked daily from 7:00 p.m. to 6:00 a.m. and earned an annual salary of $20,800.

2. Claimant's job duties included cleaning and sanitizing the kitchen, doing dishes, and preparing food items for the morning. Claimant cut and chopped food and fried donuts. Claimant also maintained the oil fryer machine.

3. In September of 2014 Claimant noticed lacerations below his thumb nails. Claimant used hand cream and liquid band aids on his lacerations.

4. Sometime in September or October of 2014 Claimant also noticed burns on his hands that were dime sized and peeling. Claimant initially believed his burns were caused by the frying oil, but then came to the conclusion that they were caused by dishwashing detergent soap used in the industrial dishwasher in Employer's kitchen.

5. Employer has an industrial dishwasher in the kitchen. The dishwashing detergent soap is in a large jug on the floor beneath a large sink basin. The soap is attached to the dishwasher by tube. The Claimant would load the dishwasher with dirty dishes, close the door, and press the button to run the load through. The machine would automatically inject through the tubing an amount of soap during the wash cycle. The dishwasher also would run sanitizer through the machine after the wash cycle with and the sanitizer was also stored in a large jug on the floor and attached by tube to the machine. Finally, the dishwasher would perform a rinse cycle with water. The entire cycle to run a load took between three and five minutes. After the cycle is complete, Claimant opened the door and would move the clean dishes out of the machine. When

the door was opened water would still be dripping inside the machine and dish items would still be wet. Claimant's hands would thus get wet while moving the dishes out of the machine.

6. Claimant never had a reaction to the dishwashing detergent soap from 2008 until late 2014. No other employees had a reaction to or problem with the dishwashing detergent soap.

7. A fellow employee recommended using vinegar on his peeling burns and Claimant began using vinegar on his hands in October of 2014. Any time Claimant felt a burning sensation or believed he had come into contact with the dishwashing detergent soap Claimant scrubbed his hands vigorously and poured undiluted vinegar on his hands until he felt a burning sensation. Claimant scrubbed his hands with an old soft bristle scrub brush that was in Employer's kitchen. Claimant believed he had an allergy to the dishwashing detergent soap and that by scrubbing his hands and pouring vinegar on his hands until he felt a burning sensation, he was resolving the allergy.

8. In October, Employer began having other employees perform the dishwashing duties and Claimant no longer used dishwasher.

9. Sometime in November of 2014 Claimant felt water splash the right side of his face and he felt immediate burning in his eyes. Claimant believed that the dishwashing detergent soap had gotten into his right eye and he poured vinegar into his right eye to alleviate the burning.

10. Claimant continued his routine of scrubbing his hands with undiluted vinegar from October through the end of December of 2014 at the end of his shift and any time he felt a burning sensation. He kept a cup of undiluted vinegar next to the sink in Employer's kitchen for this purpose.

11. On January 1, 2015 Claimant was slicing ham in the kitchen. The ham was on a tray that had been washed by Employer's dishwasher. While slicing ham and preparing food in the kitchen, Claimant routinely "grazed" on food and took small bites. On this date, Claimant ate a few bites of ham. Claimant alleges he felt an immediate burning sensation in his throat.

12. Claimant immediately gargled and scrubbed the inside of his mouth and throat with undiluted vinegar.

13. Claimant continued to use undiluted vinegar to scrub the inside of his mouth and throat and believed that the dishwashing detergent soap residue on the tray the ham was on caused blisters and sores in his mouth. Claimant began daily scrubbing of his mouth vigorously to the point of gagging and causing pieces of the interior surface of his mouth to come out.

14. On January 5, 2015 Claimant was evaluated at the emergency department of the VA hospital. Claimant reported to emergency nurse practitioner (NP) Tyler Schmidt and emergency NP Theresa Tomlin that he had a long history of work related burns to the bilateral forearms from a chemical dishwasher. Claimant reported having chemical burns to his hands, arms, and mouth for the **last several years**. *See* Exhibit H.

15. Claimant reported extensive health concerns related to work chemicals and reported he had been telling Employer about his concerns. The NPs evaluating Claimant noted he had red spots on his arms and a scabbed area to the right hand near the base of his thumb. It was noted on examination that Claimant had bilateral hand erythema and one healing wound to his right hand. Claimant was discharged from the emergency department with instructions to follow up with workers' compensation. *See* Exhibit H.

16. Claimant returned to work and worked until January 12, 2015 when he went to the emergency room. Claimant has not worked for Employer since January 12, 2015.

17. On January 12, 2015 Claimant was evaluated at the emergency department of St. Anthony Summit Medical Center by Marc Doucette, M.D. Claimant reported blistering in his throat, that his throat was closing, and that his voice was hoarse due to cleaning detergents he used at work. On examination Dr. Doucette noted that Claimant had some erythema of the tonsillar pillars but no blistering, no exudates, and no asymmetric swelling. Dr. Doucette noted that Claimant's airway was widely patent. Dr. Doucette noted that both of Claimant's hands over the dorsum had some healing lesions with no active or open sores, cuts, or evidence of infection or cellulitis. Dr. Doucette noted that Claimant had photos on an iphone showing ulcerative lesions of the throat that seemed to have healed but that Claimant had ongoing concerns that his problems were caused by work exposure. Dr. Doucette opined that Claimant should be evaluated by the workers compensation clinic, CCOM, for further management of his concerns and that he had no treatment options to offer in the emergency room. *See* Exhibit E.

18. On January 12, 2015 Claimant was evaluated at CCOM by Deborah Zimmerman, P.A.-C. Claimant reported burns on his hands with severe symptoms of burning and aching. Claimant reported the problem began on October 1, 2014 and that his pain level was 10/10. Claimant reported his pain was improved with vinegar and that he used vinegar to neutralize the pain. Claimant reported a rash in both eyes with blurred vision and seeing double since he splashed water from the dishwasher into his eyes. Claimant also reported burning pain in his tongue with blisters and that the pain was starting to move down his throat where he could not treat it himself with vinegar. PA Zimmerman diagnosed contact dermatitis and noted that the rash on Claimant's arms was consistent with contact dermatitis from chemicals and/or excessive exposure to water. She opined that the mouth and tongue symptoms were less clear but that a daily exposure for over one year put Claimant at risk for developing hypersensitivity.

She recommended Claimant discontinue using vinegar and/or abrasive methods in the mouth. *See* Exhibit C.

19. On January 16, 2015 Claimant was evaluated at CCOM by PA Zimmerman. Claimant again reported a pain level of 10/10. Claimant reported that vanicream had helped his hands not to feel so dry and chapped but that it did nothing for the pain inside his bones. Claimant reported he continued to have sores in his throat and was now feeling as if his throat was closing up. On examination PA Zimmerman noted that Claimant was sitting comfortably in no acute distress, continued to talk nonstop, but was alert, oriented, and appropriate. PA Zimmerman diagnosed contact dermatitis, asthma, and stomatitis and opined that further testing would be required before determining causation. *See* Exhibit C.

20. On January 16, 2015 Claimant was evaluated at the emergency department of St. Anthony Summit Medical Center by Kathryn Reaney, PA-C. PA Reaney noted Claimant was evaluated at CCOM earlier and was sent to them with concerns for Steven Johnson's syndrome. Claimant reported 10/10 pain levels, wheezing, and ulcers under his tongue and in his mouth. Claimant reported he had been treating ulcers in his mouth with vinegar. PA Reaney noted on examination that claimant had mild aphalous ulcers under the tongue and had no signs of Stevens-Johnson syndrome. Claimant was given an albuteral nebulizer treatment and 10 mg of decadron. After the nebulizer treatment, Claimant's reported wheezing was much improved and he was discharged. *See* Exhibit E.

21. On January 19, 2015 Claimant was evaluated at CCOM by PA Zimmerman. Claimant continued to report constant severe burning in his hands, swelling in his tongue and throat, pain in his eyes, and intense sore burning in his tongue. Claimant reported 10/10 pain, that he had ringing in his ears, headaches, pain in his stomach, no sense of taste, and that he got nauseous when eating. Claimant reported he was using his toothbrush soaked in vinegar on his tongue and in the back of his throat. *See* Exhibit C.

22. On January 22, 2015 Claimant was evaluated at CCOM by Robert Dixon, M.D. Dr. Dixon noted that Claimant had returned for a recheck of his burns/sores on his hands, forearms, and mouth with no change. Dr. Dixon noted the cause of Claimant's problem was not known at this time and that a dermatologic consultation was needed to help determine causality, diagnosis, and treatment. *See* Exhibit C.

23. On February 3, 2015 Claimant was evaluated by Paul Grant, M.D. at Advanced Dermatology. Claimant reported rash/irritated wounds on his hands, eyes, and in his mouth that was blistering, burning, and red. Claimant reported the irritation started on his hands in October, in his eyes in November, and in his throat in December. Claimant reported his belief that there was a direct association of his problems with exposure to Employer's dishwashing machine. Dr. Grant's impression included seborrheic keratoses (benign warty growth-age related), actinic keratoses (precancerous proliferations due to sun damage), and dermatitis unspecified. Dr. Grant

noted that the dermatitis had improved greatly per Claimant's reports. Dr. Grant noted that Claimant had only post-inflammatory hyper pigmentation and that there was distribution on the right proximal medial posterior thigh and right buttock. Dr. Grant noted that Claimant had no visible oral lesions. Dr. Grant opined that contact dermatitis could persist for several weeks before fully resolving. *See* Exhibit F.

24. On February 12, 2015 Claimant was evaluated at CCOM by Dr. Dixon. Claimant reported his pain was not improving and that his hands were splitting even though he had been using prescription cream. Claimant reported pain on the inside of his hands all the time and that the scabs and sores on the thumbs were at least 6 months old. Dr. Dixon noted that several of the lesions were keratoses but that Claimant seemed convinced they were work related. Dr. Dixon again opined that the cause of Claimant's problems were not known and recommended continued care with a dermatologist and referred Claimant to an ENT to determine if there was an actual disease and whether or not it would be work related. *See* Exhibit C.

25. On March 18, 2015 Claimant was evaluated at Aspen Ridge ENT- Summit by Christopher Mawn, M.D. Claimant reported a chemical reaction at work after washing and drying dishes with burns up and down his hands and arms. Claimant also reported eating a piece of ham that was on a tray that had been washed and dried with the chemicals and that his lips, tongue, and throat broke out in blisters. Claimant reported that as long as he stayed away from the detergent that washed equipment in the kitchen he did not have a problem. Dr. Mawn noted that he did not know what Claimant's diagnosis was but would do a workup for mucositis. *See* Exhibit D.

26. On March 19, 2015 Claimant was evaluated at CCOM by Brian McIntyre, D.O. Dr. McIntyre noted Claimant's reports of severe burning and aching in the hands with a 10/10 pain level. Dr. McIntyre noted that Claimant saw the ENT the day prior but that he had not reviewed notes from the ENT yet. Dr. McIntyre noted that the cause of Claimant's problem was not yet known. Dr. McIntyre opined that Claimant's reported pain was way out of proportion to his examination and demeanor. Dr. McIntyre noted that Claimant's work exposure had stopped over two months prior and noted concern with the work relatedness of Claimant's continued symptoms. Dr. McIntyre noted that he would support continued treatment and recommendations by both ENT and dermatology but envisioned Claimant would be at MMI imminently without permanent impairment. *See* Exhibit C.

27. On March 31, 2015 Claimant was evaluated again by Dr. Grant at Advanced Dermatology. Dr. Grant noted Claimant was following up for dermatitis unspecified on the right buttock. Dr. Grant provided the impression of right distal thumb fissure that had resolved, inflamed seborrheic keratoses, and dermatitis unspecified. Dr. Grant noted that seborrheic keratoses can become inflamed, itchy, tender, traumatized, caught on clothing, or could exhibit bleeding or crusting. Dr. Grant noted Claimant was seeing an ENT doctor for the intraoral problems. Dr. Grant noted the distribution of dermatitis was on the left hand, left forearm, right hand, right forearm, left cheek, and right buttock. *See* Exhibit F.

28. On April 1, 2015 Claimant was again evaluated by ENT Dr. Mawn. Dr. Mawn reported Claimant had improved slightly. Dr. Mawn opined that Claimant had vitamin D deficiency but he found no underlying inflammatory disorders. Dr. Mawn was unsure whether eating meat from a pan with chemicals on it could have caused Claimant's oral inflammation and recommended referral to an allergist for contact testing. *See* Exhibit D.

29. On April 3, 2015 Claimant was evaluated at CCOM by Dr. McIntyre. Claimant continued reporting 10/10 pain. Dr. McIntyre stated that he was honestly not sure what to make of Claimant's reports of pain and believed Claimant didn't understand what 10/10 pain 100% of the time was even after discussing the pain scale with Claimant. Dr. McIntyre again noted that Claimant had ceased work on January 1, 2015 and that the sequelae of symptoms were out of proportion. Dr. McIntyre also noted that Claimant had been an employee of Employer for many years without known exposure complaints. Dr. McIntyre noted his reliance on ENT and dermatology for treatment and noted the diagnosis of contact dermatitis from chemical products, and allergy with an unknown source of chemical sensitivity. Dr. McIntyre noted that the cause of the problem appeared to be, in part, related to work activities. *See* Exhibit C.

30. On April 28, 2015 Claimant was evaluated by Sarah Christensen, PA-C and Matthew Bodish, M.D at the Storms Allergy Clinic. Claimant reported a significant rash following the use of soap/detergent at his former place of employment. Claimant reported a rash from his elbow down that was so deep it went to the bone. Claimant reported suffering from blisters and swelling in his mouth and posterior pharynx after eating food that was prepared in the kitchen. Claimant reported the only alleviating factor for the rash was a vinegar wash and scrubbing his skin vigorously, and that the vinegar was also helpful for the blisters in his mouth and throat. Patches were applied to Claimant's back and he was instructed to return in 48 hours for a patch test read. It was noted that Claimant had a history of seeking out medical advice without any resolution of his symptoms. Claimant refused an offer of antihistamines and medications for asthma. *See* Exhibit G.

31. On April 30, 3015 Claimant returned to Storms Allergy Clinic for follow up of his patch test and was evaluated by Jill Smothers, NP. It was noted that Claimant had contact dermatitis that he believed was related to dish detergent. PA Smothers opined that the patch test showed a positive reaction to #37 fragrance mix II, and to #70 carmine. PA Smothers noted she had a long conversation with Claimant regarding his skin test and that Claimant did not believe he was allergic to any chemicals, but that he had become sensitized to dishwashing detergent. Claimant reported that the only way he ever got relief was by scrubbing his skin vigorously, then pouring white vinegar on his skin until he felt it burning. Claimant reported once it reached the burning state, he felt the allergy had been resolved. Claimant reported he would not take any medication to control the symptoms even though PA Smothers recommended antihistamines and leukotriene modifies to try and block the allergen. *See* Exhibit G.

32. Claimant was provided handouts on information related to his positive results. For Claimant's fragrance mix II allergy it was noted he had a strong positive result and that his allergy might cause his skin to react when exposed to the substance. Typical symptoms of exposure included redness, swelling, itching, and fluid-filled blisters. It was noted that fragrance mix II was in many products including: aftershaves, baby products, bath oils, breath mints, candy, colognes, cosmetics, dental cements, detergents, dryer sheets, fabric softener, foods, hair care, household cleaners, hygiene products, ice cream, impression materials, laundry products, lotions/creams, medicaments, mouthwash, perfumes, skin care, soap, soft drinks, and tonics. For Claimant's carmine allergy it was noted that the contact allergy could cause his skin to react with typical symptoms including redness, swelling, itching, and fluid-filled blisters. It was noted that carmine is found in cosmetics, paints, artificial flowers, and added to food products to dye them. *See* Exhibit G.

33. Claimant regularly uses multiple products containing fragrance mix II including body soap, dish soap, deodorant, shampoo, toothpaste, and he consumes food and soda regularly that likely contains either fragrance mix II or carmine.

34. On May 7, 2015 Claimant was evaluated at CCOM by Dr. McIntyre. Claimant reported wanting to use vinegar as part of his treatment regime to scrub his palate/throat. Dr. McIntyre recommended Claimant ask the ENT about this treatment. Dr. McIntyre again noted his concern with exacerbation of symptomatology. Dr. McIntyre noted Claimant had reacted to fragrance mix II and carmine at an allergist visit and that Claimant refused medicine/moisturizer/soak treatment. Dr. McIntyre again noted that Claimant had been removed from work exposure for months with treatment by an ENT and that Claimant still reported no improvement. Claimant reported that his own home remedy of scrubbing the affected area and rinsing with white vinegar was the only thing that worked. *See* Exhibit C.

35. On May 28, 2015 Claimant was evaluated by Dr. McIntyre. Claimant continued to report painful hands, grossly constant, with worsening symptoms. Claimant reported that he was not using any medicine or vinegar now on his hands. Dr. McIntyre again noted his concern with symptom amplification, and noted that he was perplexed by Claimants' continued symptomatology. Claimant felt that with further allergy testing it was imperative to have distilled white vinegar present. *See* Exhibit C.

36. On June 12, 2015 Claimant was evaluated by Kathryn Blair, NP at Storms Allergy Clinic. NP Blair noted that after a patch test to liquid dishwasher detergent soap, Claimant displayed a severe positive reaction with ulceration and irritant reaction. *See* Exhibit G.

37. On June 15, 2015 Claimant was evaluated at CCOM by PA Zimmerman. Claimant reported skin testing on June 10, 2015 and that he had a severe reaction and was concerned for infection. Claimant requested multiple times to apply white vinegar to the wound to neutralize it. Claimant was noted on examination to have a 1 cm by 1 cm square lesion with scabbing and black necrotic tissue. PA Zimmerman diagnosed

chemical burn. Claimant repeatedly talked about his concern that the wound would progress deeper into his skin and potentially eat its way through his body or damage his spine. *See* Exhibit C.

38. On June 16, 2015 Claimant was evaluated at CCOM by Dr. McIntyre. Dr. McIntyre noted Claimant's allergy testing showed severe positive reaction to dishwasher detergent soap. Dr. McIntyre recommended an urgent dermatology referral for the chemical burn. Dr. McIntyre opined that Claimant had not progressed much in ascribed symptomatology or with treatment provided by specialists. Dr. McIntyre noted he was not well versed in the use of vinegar for these types of allergic reactions, but that Claimant was confident it provided benefit and that Claimant would discuss his idea of using vinegar with dermatology. *See* Exhibit C.

39. On June 23, 2015 Claimant was evaluated by Rayanne Harris, NP. Claimant reported seeing an ENT last week and being given an okay to use distilled white vinegar in his mouth. Claimant reported starting the oral treatment Saturday and using a toothbrush to scrub his throat and affected oral mucosa with vinegar. Claimant reported while doing this treatment, he suffered gagging and vomiting which caused him right lower abdominal/groin pain and swelling. Claimant reported the pain recurred when coughing. *See* Exhibit C.

40. On July 2, 2015 Claimant was evaluated by Dr. McIntyre. Claimant reported that he had continued pain and swelling of the right inguinal region from hacking/vomiting after self treatment of his throat with vinegar. Claimant reported that if he needed surgical care for a right inguinal hernia he was afraid of a staph infection and would want the surgery performed at the VA. Claimant continued to report severe throbbing and pulsating in his back, throat, and hands. *See* Exhibit C.

41. On July 7, 2015 Claimant was evaluated by Dr. Grant at Advanced Dermatology. Dr. Grant noted visual evidence of a strongly reactive patch test that was as strong of a positive patch test as he had ever seen. Claimant reported to Dr. Grant that after the patch test he started to get blisters in his mouth and down his throat. Dr. Grant opined that Claimant had one of the most severe allergic reactions he had seen in thirty-plus years of practice and that Claimant's case was one of the most dramatic and perplexing cases he had ever seen. *See* Exhibit F.

42. On July 9, 2015 Claimant was evaluated by Dr. McIntyre. Dr. McIntyre noted Claimant had an ultrasound that showed a right inguinal hernia. Claimant reported continued symptoms in his mouth and upper throat and reported symptoms continuing throughout the lower throat and into the abdomen. Dr. McIntyre noted concerns with the causation and relatedness of the right inguinal hernia. Dr. McIntyre noted Claimant had been self treating his throat with vinegar and with aggressive scrubbing which caused coughing/hacking/straining and Claimant reported the pain/bulge developed thereafter. Dr. McIntyre opined that it was possible that the hernia occurred with coughing/hacking/straining, but not medically probable. Dr.

McIntyre reiterated that Claimant's case was quite involved and complicated and looked forward to an IME providing further opinions. *See* Exhibit C.

43. On July 10, 2015 Claimant was evaluated by NP Blair at Storms Allergy Clinic. Claimant wanted someone to definitively say that his skin reactions, chronic throat pain, and chronic hand and arm pain were due to the chemical dishwasher detergent soap. NP Blair was unable to do so or to clearly define boundaries for chemical exposure but advised Claimant to avoid the dishwasher soap. *See* Exhibit G.

44. On July 16, 2015 Claimant was evaluated by ENT Dr. Mawn. Dr. Mawn noted that Claimant's dermatitis was proven to be from the work detergent by patch testing. Dr. Mawn opined thus that Claimant's mucositis was secondary to his chemical exposure as it coincided with his dermatitis and was consistent with inflammation often found in a systemic reaction. *See* Exhibit D.

45. On July 19, 2015 Claimant underwent a psychiatric independent medical examination performed by Robert Kleinman, M.D. Claimant reported to Dr. Kleinman that he first noticed what he thought were burn marks while at work. Claimant first thought the burns were from hot oil from frying donuts. However, as he continued to perform work activities no longer involving the fryer, his pain intensified and he began to think it was something else and it occurred to him that it must be the dishwasher solution. Claimant reported the burns on his hands spread down his arms and were now on his hands, arms, mouth, throat, and eyes. Claimant reported his mouth and throat were affected when he was slicing ham and ate a piece off of a tray that had been washed in the dishwasher. Claimant reported the tray must have contained residual dishwasher solution. Claimant reported that as soon as he ate the ham he had a sharp pain and burning in his throat. Because of the burning in his throat, Claimant quickly splashed about half an ounce of vinegar in his mouth and vigorously scraped his tongue and mouth with his finger. Claimant reported that he continued to treat the burning in his mouth by using vinegar to brush his teeth, scrub his tongue, and scrub the back of his throat with a toothbrush. Claimant reported scrubbing the back of his mouth and throat with the toothbrush and vinegar so aggressively to the point where "meat" came from the back of his throat and caused him to gag. *See* Exhibit B.

46. Claimant reported to Dr. Kleinman that he had a hernia from the gagging after vigorously scrubbing the back of his mouth with vinegar. Claimant also reported that while unloading the dishwasher, something splashed on the right side of his face and must have splashed into his right eye. Claimant reported treating his right eye by putting vinegar in it. Claimant also reported that between January and June of 2015 his hands and arms did not get better. *See* Exhibit B.

47. Dr. Kleinman noted that Claimant's explanation of his eye irritation was an unlikely scenario, since unloading a dishwasher would not have a significant amount of dishwasher detergent soap but that Claimant had fixated on using vinegar in his eye. Dr. Kleinman noted the positive patch test for the dishwasher detergent soap, but opined that it did not explain all of Claimant's symptoms or problems nor did it explain

his mouth, throat, groin, or eye problems. Dr. Medlin noted Claimant's report that the patch test was so severe it was digging through his skin and going almost to his spine was either grossly exaggerated, or Claimant's belief. *See* Exhibit B.

48. Dr. Kleinman opined that there was almost a delusional quality to Claimant's somatic complaints. He noted that Claimant had a firm fixed belief that everything that had been wrong since the end of 2014 was due to the dishwasher solution and that Claimant was not likely to relinquish his belief despite medical evidence to the contrary. Dr. Kleinman noted that Claimant did not use recognized medical treatment and used vinegar excessively. Dr. Kleinman diagnosed unspecified somatic symptom and related disorder, rule out obsessive compulsive disorder, and rule out obsessive compulsive personality. Dr. Kleinman opined that Claimant's psychiatric diagnosis was not related to what Claimant believed was an industrial injury. Dr. Kleinman noted that it had to be considered that Claimant was so fixated on the use of vinegar with vigorous scrubbing that he was harming himself. Dr. Kleinman opined that Claimant should accept and comply with appropriate medical treatment, use appropriate precautions to prevent an allergic reaction, and return to work. *See* Exhibit B.

49. On July 27, 2015 Claimant underwent an independent medical examination (IME) performed by Alexander Jacobs, M.D. Dr. Jacobs noted Claimant's belief that scrubbing his skin and throat with vinegar was the only way to get relief and that Claimant had refused other medications to control his symptoms including antihistamines, leukotriene modifiers, and moisturizers. Dr. Jacobs provided an impression of: history of asthma, contact dermatitis, right inguinal hernia, history of aphthous stomatitis, somatoform disorder, degenerative joint disease of the hands affecting the PEP and DIP joints, tongue coating probably due to candida, and significant wear of teeth due to frequent acetic acid exposure. Dr. Jacobs noted that although Claimant experienced a positive skin patch test to the liquid dish soap solution, the solution used was full strength and not diluted which would cause a skin burn on anyone. Dr. Jacobs also noted that at work, Claimant's exposure was to washed and rinsed dishes or food that merely touched dishes cleaned by the dishwasher and that Claimant was never exposed to the undiluted dishwasher detergent soap. *See* Exhibit A.

50. Dr. Jacobs opined that with contact dermatitis once contact is avoided, lesions heal. He opined that lesions do not spread nor do they affect a wide distribution of organs as described by Claimant. Dr. Jacobs opined that putting acetic acid (vinegar) in the eyes is far more hazardous than being sprayed in the eyes with a diluted form of dishwashing detergent soap. Dr. Jacobs opined that even if Claimant had some sort of reaction related to the soap used at work, the reaction had long since resolved and opined that the continued symptom prolongation was a consequence of Claimant's home remedy and use of acetic acid (vinegar). *See* Exhibit A.

51. Dr. Jacobs opined that Claimant had somatic symptom disorder and that Claimant truly believed that a reaction to the dishwashing detergent soap was causing all of his problems and would continue to cause problems indefinitely. Dr. Jacobs

expressed his doubt that any logical or objective data would dissuade Claimant. Dr. Jacobs also opined that Claimant aggravated the condition by using vinegar and that Claimant never used the prescribed anti-allergic, anti-inflammatory, or steroidal preparations, and that Claimant believed he was not allergic to any chemicals other than the dish soap. Dr. Jacobs opined that the mental condition Claimant suffers from was not a consequence of work. *See* Exhibit A.

52. Dr. Jacobs testified at hearing consistent with his IME report. Dr. Jacobs opined that Claimant did not suffer a work related injury or occupational disease. Dr. Jacobs opined that Claimant had a number of diagnoses but that none of them were work related. Dr. Jacobs noted Claimant had eczema, keratoses, and contact dermatitis. However, Dr. Jacobs opined that there was no objective basis to opine that the symptoms Claimant developed in late 2014 and into 2015 were work related or caused by the dish soap. Dr. Jacobs noted inconsistencies in Claimant's reports to providers. Dr. Jacobs also opined that vinegar is an acetic acid and if used to excess the vinegar can cause skin irritations, burns, and yeast infections in the mouth. Dr. Jacobs opined that Claimant's use of undiluted vinegar in this case was causing injury.

53. Dr. Jacobs opined that there was no way to determine whether a work exposure or the excessive scrubbing with vinegar had caused Claimant's symptoms as Claimant did not seek medical attention until after he had been using vinegar as a home remedy. Dr. Jacobs opined that there was no way to untangle the potential exposure to diluted dish soap and the exposure to undiluted vinegar scrubbing.

54. Dr. Jacobs opined that Claimant's last exposure at work was in January of 2015 but that Claimant was still reporting trouble in July of 2015 despite removal from the work exposure. Dr. Jacobs opined that with contact dermatitis, after removal from exposure and at most a couple of weeks, the contact dermatitis goes away. Dr. Jacobs opined that if the work exposure or dish soap was causing the symptoms, after cessation of exposure the dermatitis would have gone away and that it was inconceivable that Claimant would still have the ongoing symptoms he has reported in this case.

55. Dr. Jacobs noted that Claimant was allergic to carmine and fragrance II which is found in a large number of products. Dr. Jacobs opined that Claimant has more exposure to these allergens outside of work given the large number of products that contain these two allergens. Dr. Jacobs noted he consulted with a specialist in contact dermatitis who concurred it was unlikely that Claimant's symptoms were due to the dish soap.

56. Dr. Jacobs opined that the patch test for the dish soap was not a valid test because the soap used was undiluted. Dr. Jacobs opined that although it was possible Claimant's initial symptoms were caused by the dish soap, it was not probable. He opined that Claimant's self-treatment with vinegar exacerbated or caused Claimant's symptoms in December and January. He opined that even if Claimant had an allergy to the dish soap, the allergy was internal to Claimant and was not caused by work. He

opined that all of Claimant's symptoms could have been due to the vinegar self treatment.

57. On July 30, 2015 Claimant was evaluated by Dr. McIntyre. Dr. McIntyre opined that Claimant was at maximum medical improvement (MMI) and that he had no permanent impairment. Dr. McIntyre opined that no maintenance was required, and released Claimant to regular full duty work noting his allergy to #37 fragrance mix, carmine, and keystone liquid dish detergent. *See* Exhibit C.

58. The opinions of Dr. Kleinman are found credible and persuasive. Dr. Kleinman's opinion that there was almost a delusional quality to Claimant's somatic complaints is supported by the voluminous medical records including: Claimant's concern that the patch test to the dishwashing detergent soap was digging through his skin and going almost to his spine; Claimant's concern that if he needed surgery for his hernia he would develop a staph infection; Claimant's report that the only way he got relief was to scrub his skin vigorously and pour vinegar on it until he felt burning; Claimant's repeated reports of 10/10 pain; Claimant's repeated reports that his throat was closing up; and the opinion of Dr. McIntyre that Claimant's reported symptoms were out of proportion.

59. The ALJ defers to the opinion of the Dr. Kleinman as a psychiatric examiner that Claimant's psychiatric diagnosis and problems are not work related.

60. The opinions of Dr. Jacobs are also found credible and persuasive and are supported by the opinions of Dr. McIntyre that Claimant's symptoms were out of proportion to his exposure. Dr. Jacobs is credible that Claimant's self-treatment/self-harm with acetic acid made it difficult to determine whether the symptoms were due to Claimant's self-treatment or were due to his occupational exposure.

61. Claimant is not found credible or persuasive. Claimant was inconsistent in many of his reports to medical providers. Claimant initially reported having the symptoms for two years prior to January of 2015. He later reported symptoms beginning in October of 2014 on his hands and in January of 2015 in his mouth. Claimant also reported inconsistently to many providers as to whether his symptoms were improved, the locations of his symptoms, and failed to explain the presence of symptoms on his right buttock or the improvement of symptoms with albuteral asthma treatment. Claimant's testimony, overall, is not consistent with medical reports and is not reasonable.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving

entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The right to compensation under the Workers' Compensation Act exists where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted. *See* § 8-41-301(1)(c), C.R.S. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.*

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "occupational disease" means disease which results directly from the employment of the conditions under which work was performed, which can be seen to have followed as a natural incident of the work, and as a result of the exposure occasioned by the nature of the employment, and which be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would been equally exposed outside of the employment. C.R.S. § 8-40-201(14). This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999). The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to meet his burden by a preponderance of the evidence to show that he suffered from an industrial injury on January 1, 2015 when he ate a piece of ham at work. The only evidence to support that eating ham caused an immediate burning sensation in his mouth, throat, and caused blisters is the testimony of Claimant. The Claimant's testimony is not found credible and persuasive. Further, Claimant admits that he immediately scrubbed his mouth with undiluted acetic acid and continued to vigorously scrub his mouth and throat with the undiluted acetic acid for several days prior to seeking medical attention. Claimant's actions caused injury to his mouth and throat and were unreasonable. The opinions of Dr. Jacobs is found credible and persuasive that given Claimant's admitted self treatment with vigorous scrubbing of his mouth and throat with acetic acid prior to medical treatment, there is no way to determine if he suffered an injury due to eating ham or to his own scrubbing with acetic acid. Further, the opinion of Dr. Jacobs that eating ham off of a clean tray that had been washed through the dishwashing machine cycle with dishwasher detergent soap, dishwasher sanitizer, and water and that any remaining residue would be unlikely to cause such a severe reaction as reported by Claimant is credible. Claimant had been working and eating food off plates and trays washed in this same dishwashing machine for several years prior with no problems. Claimant has failed to meet his burden to show he suffered an industrial injury on January 1, 2015 by eating a piece of ham off of

a clean tray. It is just as likely that Claimant's symptoms in his mouth and throat were due to his excessive self treatment/self harm by scrubbing vigorously with acetic acid.

Claimant has also failed to meet his burden by a preponderance of the evidence to show that he suffered from an industrial injury on October 1, 2014 to his bilateral hands or that he suffered from an occupational disease to his bilateral hands due to work exposure. Here, there is no way to discern whether any exposure to the dishwasher detergent soap caused injury to Claimant due to his immediate and excessive self treatment with acetic acid. Claimant admitted to scrubbing his hands with an old soft bristle scrub brush that was in Employer's kitchen. After scrubbing his hands, he poured undiluted acetic acid onto his hands until they burned. Claimant did this for several months after he first believed he had burns from the dishwasher detergent soap before he sought medical treatment. Had Claimant sought treatment after he first believed he suffered an injury due to the dishwasher detergent soap rather than self-treat/self-harm for several months, it might be easier to determine whether or not the dishwasher detergent soap itself caused any injury. As found above, this did not occur. When Claimant was first evaluated he had a strong belief that the dishwasher detergent soap had caused his skin lesions, dermatitis, and other symptoms. However, his belief is not reasonable. Dr. Jacobs is credible and persuasive that all of Claimant's reported symptoms just as likely were due to his excessive use of acetic acid. Claimant also was shown by allergy testing to be allergic to fragrance mix II and carmine. Claimant refused to believe the allergic testing was accurate and remained convinced that his only allergy was due to the dishwasher detergent soap and he became fixated on the soap as his only problem despite medical evidence and testing to the contrary. As found above, Claimant uses many products daily that contain fragrance mix II and/or carmine. It is just as likely that Claimant's dermatitis was caused by exposure outside of work and he has failed to establish that the dishwasher detergent soap was the proximate cause of his symptoms.

Further, Claimant displayed symptoms of dermatitis not only on his bilateral hands, but on his right buttock which would be unexplained by his work exposure. Claimant also did not show improvement in symptoms despite removal from the work exposure which according to Dr. Jacobs would be inconceivable as contact dermatitis usually resolves within a couple of weeks after removal from the exposure. Dr. McIntyre similarly was puzzled by Claimant's continued symptoms after removal from exposure and repeatedly opined that Claimant's symptoms were exaggerated and unexplained. Dr. Jacobs' opinion that Claimant did not suffer a work related injury or occupational disease is credible and persuasive. Although Claimant has the diagnoses of eczema, keratoses, and contact dermatitis, there is no objective basis to opine that these diagnoses or Claimant's symptoms are due to the dishwasher detergent soap. Dr. Jacobs' opinion that using acetic acid excessively can cause irritations, burns, yeast infections, and that Claimant's use of it caused injury in this case is also found persuasive.

In this case, Claimant repeatedly attempted to convince medical providers that his problems and symptoms were caused by the dishwasher detergent soap. Claimant

wanted NP Blair to definitively say that his skin reactions, chronic throat pain, and chronic hand pain and arm pain were due to a reaction to the dishwasher detergent soap but she was unable to do so. Several providers were unable to connect Claimant's ongoing complaints to his dishwasher detergent soap exposure. Claimant refused to believe the allergy clinic's test showing he was allergic to carmine and fragrance II. Dr. McIntyre noted repeatedly that Claimant's symptoms were out or proportion to his reported exposure. Dr. Dixon, Dr. Mawn, and Dr. McIntyre were all unsure of the cause of Claimant's problems, but all noted that Claimant seemed convinced that his problems were work related. Dr. Mawn later opined that Claimant's condition was work related but only based on the skin patch test that was performed with undiluted dishwasher detergent soap and that was invalid. His later opinion, based on an invalid test, is not persuasive. The diagnosis of Dr. Kleinman of a non work related somatic disorder and the opinion that Claimant's psychiatric diagnosis was not work related is credible and persuasive. Dr. Kleinman's opinion that there was almost a delusion quality to Claimant's somatic complaints is found persuasive.

Claimant has not established more likely than not that he suffered from an industrial injury or occupational disease. Although it might be possible that exposure to the diluted dishwasher detergent soap after it had run through the machine and run through a rinse cycle could cause dermatitis, it is not likely. Claimant has failed to show that it is more likely than not that this solution was the cause of his symptoms or injury. As found above, the patch test using the solution was not valid. The patch test was performed with undiluted dishwasher detergent soap which would cause burns and reaction on anyone. Claimant also never came into contact with undiluted dishwasher detergent soap as it was directly hooked up to the machine by tube, and the machine automatically injected an amount while the machine was running. After the soap was injection, the machine continued its cycle, including a rinse cycle and Claimant was only exposed to dripping water and clean dishes and was never exposed to the undiluted dishwasher detergent soap during the course of his employment. Claimant has failed to show that his exposure, more likely than not, caused him any injury. Rather, it is persuasive that that his somatic disorder caused him to fixate on the soap and the use of vinegar and caused him to self-treat/self-harm. This somatic disorder is not work related. Further, as argued by Respondents, as a condition of recovery under the workers' compensation system, an injury has to not only be proximately caused by injury or occupational disease arising out of and in the course of employment, but it also must not be intentionally self inflicted. Here, the persuasive medical opinions establish that Claimant self treated and self inflicted harm due to his unreasonable use of acetic acid.

Medical Benefits

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-*

Mart Stores, Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

As found above, Claimant has failed to establish that he suffered from an industrial injury. Therefore, as there is no causal relationship between any symptoms or injury the Claimant suffers from and his employment, Respondents are not liable for any medical treatment to treat Claimant's conditions.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffers from an occupational disease or injury to his bilateral hands, mouth, throat, and groin/hernia.

2. As Claimant did not suffer an industrial injury, Respondents are not liable for any medical treatment.

3. As there was no compensable injury, determination of Claimant's average weekly wage or entitlement to disfigurement is not necessary.

4. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 30, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course of his employment with employer?

- If claimant has proven he sustained a compensable occupational disease, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the injury and from a physician who was authorized to treat claimant?

- If claimant has proven he sustained a compensable occupational disease, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of January 16, 2015 through April 5, 2015 and from June 10, 2015 and continuing?

- Whether respondent has proven by a preponderance of the evidence that claimant is subject to a penalty for failing to timely report the injury in writing to employer pursuant to Section 8-43-102(1)(a) or (2), C.R.S.

- The parties stipulated prior to the hearing that if the claim is compensable, the parties will agree to a designated treating physician for future medical treatment.

- The parties stipulated prior to the hearing that if the claim is compensable, claimant's average weekly wage ("AWW") is $430.00.

FINDINGS OF FACT

1. Claimant was employed by employer as a checker for store #404. Claimant originally began working for employer in 1971 and has worked as a checker since 1994. Claimant testified at hearing that his job duties include reaching and lifting to take items and scan them for customers. Claimant reaches to the right and pulls groceries across from right to left to scan the items for customers. Claimant will lift on average up to 25-30 pounds and can lift up to a maximum of 50 pounds scanning items.

2. Claimant testified that in August 2014 he was scanning items and felt a pop in his right shoulder, but ignored the incident as it did not cause him significant problems. Claimant testified that in the weeks and months after August 2014, he developed additional pain in his right shoulder he associated with his work for employer.

3. Claimant was initially evaluated by Dr. Martin at Delta Family Physicians on November 13, 2014. Claimant reported to Dr. Martin that he started having difficulty with his right shoulder about 3-4 months ago while at work. Claimant reported to Dr.

Martin that his shoulder problems had progressively worsened to the point that he now had unbearable pain. Claimant reported a prior history of a neck injury resulting in a fusion, but reported he was fine after the surgery until recently. Dr. Martin recommended physical therapy, but claimant reported he would prefer conservative treatment first. Dr. Martin noted if claimant demonstrated slow improvement, they may consider a magnetic resonance image ("MRI") of the shoulder to evaluate for partial rotator cuff tear. Dr. Martin provided claimant with a prescription for Percocet, Mobic and Voltaren gel.

4. Claimant testified at hearing that when he sought treatment with Dr. Martin, he knew his shoulder condition was related to work but did not want to report a work injury to employer.

5. Claimant returned to Dr. Martin on January 15, 2015 and noted that he did not receive any relief with the Mobic. Claimant reported he started switching to his left arm at work, but then began to develop problems with his left arm, so he switched back to his right arm. Dr. Martin provided claimant with a steroid injection into the right shoulder and recommended claimant contact the workers' compensation department. Dr. Martin also took claimant off of work for two weeks and provided an opinion that claimant was off of work due to a work related right shoulder injury from overuse.

6. Claimant took the note taking him off of work to employer on January 15, 2015 and reported his injury to employer. Claimant testified that he reported the injury to Mr. Fender. Claimant testified at hearing that he didn't know why he wouldn't have reported the injury to employer in November 2014.

7. After reporting the injury to his employer, claimant was provided with a choice of two physicians, Dr. Wade or Dr. Marlin on January 17, 2015. Claimant testified at hearing that he placed a check mark next to Dr. Marlin and intended to treat with Dr. Marlin, but was informed by Dr. Marlin's office that they were not accepting workers' compensation patients[1]. Claimant testified that Dr. Marlin and Dr. Martin (with whom he had been treating with prior to January 17, 2015 are in the same office. The ALJ notes that Dr. Marlin and Dr. Martin have the same address and the work release given to claimant dated January 15, 2015 has Dr. Marlin's name listed on it (although it does not have Dr. Martin's name, but coincides with her medical treatment).

8. Claimant testified that after Dr. Marlin's office indicated that they were not accepting workers' compensation patients, he made an appointment with Dr. Wade, the other physician listed on the choice of physicians offered by employer. Claimant was evaluated by Dr. Wade on January 20, 2015. Claimant filled out a hand written form for Dr. Wade that indicated that he injured his arm in October 2014 when he was checking and lifting his arm, after which it started hurting and got worse over the next few weeks.

9. Dr. Wade noted that claimant was complaining of right shoulder pain for the past 3 months. Dr. Wade noted claimant had received an injection from his family

[1] The ALJ notes that Respondents timely objected to this line of questioning regarding what Dr. Marlin's office told claimant as hearsay. The objection was overruled by the ALJ.

doctor which helped a little bit. Dr. Wade recommended an MRI of the shoulder and diagnosed a possible rotator cuff tear. Dr. Wade indicated in his notes that his objective findings were consistent with the history and/or the work related mechanism of injury/illness. Dr. Wade took claimant off of work from January 20, 2015 until further notice and instructed claimant to follow up after he got his MRI.

10. Claimant testified the MRI was being scheduled but the claim was denied. Claimant testified he tried to return to Dr. Wade, but Dr. Wade would not see claimant.

11. Claimant eventually returned to see Dr. Martin on February 27, 2015. Claimant reported to Dr. Martin that his claim was denied and he was applying for short term disability. Dr. Martin noted claimant had performed physical therapy exercises at home, but had not gone through formal physical therapy. Dr. Martin noted claimant reported that the prior shoulder injection had only helped for a couple of days. Dr. Martin referred claimant for physical therapy for his shoulder.

12. Claimant began physical therapy for his shoulder on March 2, 2015. The physical therapy notes indicate claimant received some modest improvement with his pain while undergoing physical therapy in March 2015.

13. Claimant returned to Dr. Martin on March 30, 2015. Dr. Martin noted that claimant was undergoing physical therapy and in general felt he was slowly improving, especially with his range of motion. Dr. Martin released claimant to return to work with restrictions as of April 6, 2015. Dr. Martin noted that if claimant's weakness persisted, they would consider an MRI and if appropriate, refer claimant for an orthopedic evaluation.

14. The physical therapy notes indicate claimant reported that his shoulder was pretty sore on April 6, 2015, after his first day back to work. On April 10, 2015, claimant was reporting his pain was much increased with work. On April 13, 2015, claimant noted his pain was still very intense and 7 out of 10 as he had just gotten off work. Claimant reported to the physical therapist on April 17, 2015 that his right shoulder is worse with work. Claimant continued his physical therapy through April 24, 2015.

15. Claimant returned to Dr. Martin on April 27, 2015. Claimant reported to Dr. Martin that by the end of the day with work, he is in severe pain. Dr. Martin opined that claimant's right shoulder issues were due to his job environment as a checker and the repetitive motion associated with his job. Dr. Martin diagnosed claimant with a frozen shoulder and noted her concern for continuing damage for his shoulder associated with his work.

16. Dr. Wade's notes include a note on April 28, 2015 that indicate Dr. Wade had a discussion with claimant and advised him to follow up with his family doctor for now since his workers' compensation claim had been denied.

17. Claimant returned to Dr. Martin on May 26, 2015 with reports that his work was continuing to worsen the symptoms in his shoulder. Dr. Martin noted claimant was

no longer doing formal physical therapy, but continued his physical therapy exercises at home. Dr. Martin noted claimant was now having hand numbness and was dropping things. Dr. Martin recommended claimant stop working as she believed claimant's work was continuing to harm his shoulder. Dr. Martin referred claimant to an orthopedist, Dr. Huene, for further evaluation.

18. Claimant testified at hearing that he went off of work again as of June 10, 2015 due to continued problems with his shoulder.

19. Claimant underwent an independent medical examination ("IME") with Dr. Burris on June 15, 2015 at the request of respondent. Dr. Burris reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Burris diagnosed claimant with right and left shoulder pain, but opined that they were not related to his work with employer. Dr. Burris noted that shoulder discomfort is an extremely common disorder usually associated with degeneration, anatomical morphology and muscle imbalance. Dr. Burris noted that a formal causation investigation was not performed by Dr. Martin or Dr. Wade and opined that claimant's condition is normally associated with frequent repetitive overhead activities, which were not present in this case. Dr. Burris opined that claimant's conditions were not related to his described work activities.

20. Dr. Burris testified at hearing consistent with his report. Dr. Burris testified claimant's condition involved adhesive capsulitis, impingement syndrome and a frozen shoulder. Dr. Burris noted that when claimant reported his injury during the IME, he did not report a pop and did not report he was lifting any item, only that he felt sharp pain in his shoulder when he lifted his arm. Dr. Burris testified claimant's accident history did not lend itself to a specific event and noted that he did not believe claimant described a mechanism of injury related to work that would cause claimant's symptoms. Dr. Burris noted that claimant had reported his hobbies included fly fishing, and opined it was more likely that claimant would injury his shoulder fly fishing than performing activities at waist level. Dr. Burris testified that while claimant had symptoms with activities he performed at work, it was his opinion that the activities did not cause the injury that led to those symptoms.

21. Claimant retuned to Dr. Martin on June 25, 2015. Dr. Martin noted claimant stopped working as of June 9, 2015. Dr. Martin reiterated her opinion that claimant's condition was related to his work and opined claimant had a repetitive motion injury related to his work as a checker which required constant internal/external rotation of the arm along with reaching for items on the conveyor belt.

22. Consistent with Dr. Martin's report, claimant testified he went off of work again on June 9, 2015.

23. Respondent presented the testimony of Ms. Herrera, the Customer Relations Manager for employer. Ms. Herrera testified claimant did not report his injury to her. Respondent presented the testimony of Ms. Hutson, who likewise testified claimant did not report his injury to her before January 15, 2015.

24. Respondent presented the testimony of Mr. Abila, the Store Manager for employer. Mr. Abila testified claimant reported to him in early January 2015 that he had done something to his shoulder, but did not report that it was work related and did not provide a specific date. Mr. Abila testified he asked claimant how he had hurt his shoulder and claimant informed him that he did not know how he hurt his shoulder. Mr. Abila testified he did not speak to claimant again until after he had filled out paperwork for employer around January 17, 2015.

25. Respondent presented the testimony of Mr. Fender, the Assistant Store Manager for employer. Mr. Fender testified he spoke with claimant on January 15, 2015 regarding his right shoulder and claimant was no able to provide a specific date of injury for his right shoulder. Mr. Fender testified claimant reported he injured his shoulder at work but did not explain how he injured his shoulder at work. Mr. Fender testified claimant had a medical report that indicated his shoulder injury was related to work so he filled out paperwork and a written statement on January 15, 2015.

26. Mr. Fender testified that he inquired from claimant again on January 17, 2015 how he injured his shoulder and claimant indicated he had injured his shoulder lifting a turkey. Claimant testified he didn't report injuring his shoulder lifting a turkey to Mr. Fender, but reported to Mr. Fender that before Thanksgiving, checking the turkeys was giving him a lot of pain in his shoulder.

27. The ALJ credits the opinions expressed by Dr. Martin and Dr. Wade over the contrary opinions expressed by Dr. Burris and find that claimant has demonstrated that it is more likely true than not that he sustained a compensable occupational disease arising out of and in the course of his employment with employer. The ALJ notes that claimant's symptoms improved after he was taken off of work in January and was undergoing physical therapy, only to worsen when claimant returned to work. The ALJ finds that a preponderance of the credible evidence establishes that claimant's condition resulted directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment. The ALJ credits the opinions expressed by Dr. Martin in support of this conclusion.

28. The ALJ credits claimant's testimony at hearing and finds that claimant selected Dr. Marlin to treat his injury on January 17, 2015. The ALJ finds the treatment provided by Dr. Martin prior to January 17, 2015 was not authorized treatment and respondents are not liable for said treatment. However, after January 17, 2015, claimant selected Dr. Marlin to provide treatment. Dr. Marlin then did not agree to accept claimant as a patient and claimant selected Dr. Wade to treat him for his work injury. The ALJ finds the treatment provided by Dr. Wade on January 20, 2015 as authorized medical treatment.

29. The ALJ notes that Dr. Wade was the 2nd physician listed as a physician offered to claimant to treat his injury by employer and finds Dr. Wade to be authorized to treat claimant for his injury after Dr. Marlin's office indicated they would not accept additional workers' compensation patients.

30. The ALJ finds from the records and claimant's testimony that after treating with Dr. Wade on January 20, 2015, respondent denied claimant's claim for workers' compensation and denied Dr. Wade's referral for an MRI scan of his shoulder. The ALJ credits claimant's testimony as supported by the records entered into evidence and finds that claimant has demonstrated that it is more probable than not that that Dr. Wade then denied medical treatment to claimant for non-medical reasons based upon respondent refusing to authorize additional treatment.

31. The ALJ finds that the choice of physician then reverted back to claimant to choose a physician to treat claimant for his injuries. The ALJ finds that claimant selected Dr. Martin to treat claimant for his injuries and finds that the medical treatment provided by Dr. Martin on February 27, 2015, March 30, 2015, April 27, 2015, May 26, 2015 and June 25, 2015 was reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury. Respondents are therefore liable for the cost of this treatment pursuant to the Colorado Medical Fee Schedule.

32. The ALJ further finds that respondents are liable for the cost of the physical therapy as a referral from Dr. Martin when she was an authorized provider. Again, the cost of the treatment is subject to the Colorado Medical Fee Schedule.

33. The ALJ credits the testimony of claimant along with the medical records of Dr. Martin and Dr. Wade and determines that claimant has demonstrated that it is more probable than not that claimant is entitled to an award of temporary total disability benefits commencing January 16, 2015 when he was taken off of work by Dr. Martin and continuing until April 5, 2015. The ALJ further finds that claimant has established that it is more probable than not that claimant is entitled to an award of TTD benefits beginning June 10, 2015 when claimant left work for a second time at the recommendation of Dr. Martin after his symptoms worsened when he returned to work for employer.

34. The ALJ finds that respondent had proven that it is more likely than not that claimant failed to timely report his injury. The ALJ credits the reports from Dr. Martin and finds that claimant was aware of the compensable nature of his occupational disease by November 13, 2014, but did not report the injury to employer until January 15, 2015. The ALJ finds that claimant was required to report the injury to employer within 30 days of the November 13, 2014 medical treatment, but waited 63 days to report the injury.

35. The ALJ finds that the occupational disease was reported in writing on January 15, 2015 by virtue of the written report from Dr. Martin that was provided by claimant to employer which ultimately resulted in the written reports being completed by employer on January 15, 2015.

36. The ALJ finds that an appropriate penalty for the late reporting of the shoulder injury is one day's compensation for each day claimant failed to report the injury, or 63 days of temporary disability benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. As found, claimant has proven by a preponderance of the evidence that he suffered an occupational disease arising out of and in the course of his employment as a result of his job duties. As found, the ALJ credits the testimony of claimant along with the opinions expressed in the reports from Dr. Wade and Dr. Martin and finds that claimant has demonstrated that his occupational disease is related to his work duties for employer as a checker. The ALJ credits the opinion of Dr. Martin that claimant's duties involving the internal/external rotation of the arm resulted in the development of his adhesive capsulitis and frozen shoulder.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). However, if the physician refuses to treat claimant for non-medical reasons, the claimant has the right to choose a physician to treat his work related injury.

7. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. As found, the treatment provided by Dr. Martin on November 13, 2014 and January 15, 2015 is not authorized medical treatment. As found, claimant selected Dr. Marlin as his treating physician on January 17, 2015, but was advised by Dr. Marlin's office that they were no longer accepting workers' compensation patients. As found, claimant then properly sought treatment with Dr. Wade.

9. As found, claimant's January 20, 2015 treatment with Dr. Wade is found to be authorized medical treatment reasonably necessary to cure and relieve the claimant from the effects of the work injury. Dr. Wade recommended an MRI scan of the shoulder, but respondents then denied authorization for future medical treatment, including the MRI. As found, Dr. Wade then denied further medical care for non-medical reasons (non-authorization of medical treatment) and claimant is then allowed to seek a physician of his choosing to treat him for his injury. As found, claimant then selected Dr. Martin to treat him for his work related shoulder condition.

10. Pursuant to the stipulation of the parties, respondents may designate a physician authorized to provide treatment for claimant's work injury.

11. As found, claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Martin from February 2015 through June 2015, including the referral for physical therapy, was reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, Dr. Martin was an authorized provider as of the February 27, 2015 medical appointment. All medical treatment shall be paid pursuant to the Colorado Medical Fee Schedule.

12. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

13. As found, claimant has demonstrated that he is entitled to an award of TTD benefits for the period of January 16, 2015 through April 5, 2015 and from June 10, 2015 an ongoing. As found, claimant's testimony and the reports from Dr. Martin taking claimant off of work as of January 15, 2015 are credible and persuasive regarding the issue of TTD. As found, after claimant returned to work on April 6, 2015, claimant's condition continued to worsen resulting in Dr. Martin recommending claimant again be taken off of work. As found, claimant's testimony that he stopped working June 10, 2015 due to his continued problems with his shoulder is credible and persuasive.

14. Section 8-43-102(2), C.R.S. states in pertinent part:

> Written notice of the contraction of an occupational disease shall be given to the employer by the affected employee of by someone on behalf of the affected employee within thirty days after the first distinct manifestation thereof…. If the notice required in this section is not given as provided and within the time fixed, the director may reduce the compensation that would otherwise have been payable in such manner and to such extent as the director deems just, reasonable, and proper under the existing circumstances.

15. As found, claimant failed to timely report his injury in writing to employer after he was aware of the compensable nature of his condition. As found, claimant was aware of the compensable nature of his condition as of November 13, 2014 when he sought medical treatment for his shoulder. As found, November 13, 2014 is the first distinct manifestation of claimant's occupational disease.

16. As found, respondent is entitled to offset the award of TTD benefits by 63 days of TTD benefits for claimant's failure to timely report the injury to employer.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits for the period of January 16, 2015 through April 5, 2015 and from June 10, 2015 and continuing pursuant to an AWW of $430.00.

2. Respondents shall pay for the reasonable medical treatment from authorized treating physicians necessary to cure and relieve claimant from the effects of his injury pursuant to the Colorado Medical Fee Schedule. The treatment provided by Dr. Wade is found to be reasonable, necessary and authorized. The treatment provided by Dr. Martin on February 27, 2015, March 30, 2015, April 27, 2015, May 26, 2015 and June 25, 2015 is found to be reasonable, necessary and authorized. Additionally, the referral by Dr. Martin for physical therapy in March 2015 is found to be reasonable, necessary and authorized.

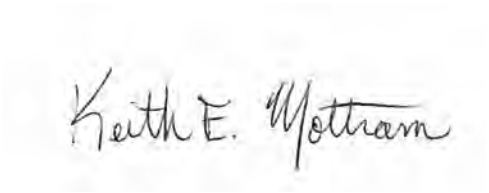
3. The treatment provided by Dr. Martin on November 13, 2014 and January 15, 2015 is not authorized medical treatment.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 23, 2015



_____

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she injury she suffered a compensable injury to her right knee and chin on February 15, 2015.

STIPULATIONS

Prior to the presentation of evidence, the parties reached the following stipulations should the injury be determined to be compensable:

a. Claimant's Average Weekly Wage (AWW) of $532.00;

b. Claimant is entitled to temporary total disability benefits at the rate of $354.66 per week commencing February 15, 2015 until terminated by statute;

c. Respondent shall pay for medical benefits for Claimant's treatment from Memorial Hospital on February 15, 2015 – February 16, 2015, Colorado Springs Orthopedic Group, and Colorado Sports and Spine Center to the extent that the treatment is related to Claimant's February 15, 2015 right knee and chin injury;

d. Claimant withdrew the issues of disfigurement and permanent partial disability benefits for hearing.

The ALJ approves the parties' stipulations.

FINDINGS OF FACT

1. Claimant works as a deli clerk for Respondent-Employer. On February 15, 2015, the date of her injury, she was working the "opener" shift, which begins at 4:00 a.m. and ends at 12:30 p.m. As an "opener", Claimant's job duties included setting up the meat counter, slicing and arranging meats and cheese, and waiting on customers.

2. On Sunday, February 15, 2015 at about 9:45–10:00 AM, Claimant was walking quickly across the store, from the deli to the store manager's office. Claimant testified that she was in front of the Starbucks kiosk when she her "shoe caught on the floor, and it threw her forward." She landed on her right knee and chin. Claimant testified that she was not carrying anything in her hands and that her arms went straight out as she fell. When Claimant's chin hit the floor, it split open and began bleeding, leaving a copious amount of blood on the floor. After falling, Claimant was unable to stand on her right leg. She was placed in a chair with the assistance from a co-worker and subsequently taken to the hospital for medical treatment.

3. Claimant testified that she did not have any medical problems, such as seizures or pain in her knees prior to her fall. Likewise, she did not have any dizziness or instability when walking and was able to walk without a limp or pain.

4. During cross examination, Claimant was able to recall answering interrogatories in which she reported that there was a sticky substance on the floor which caused her to fall. However, at hearing she testified that she was unsure if that was the case as she did not recall seeing anything on the ground that could have caused her to fall. She testified that there were no rugs or mats on the floor and that the surface of the floor was typical store linoleum.

5. Loretta Pacheco, a co-worker of Claimant was working the self-checkout area near the Starbucks, approximately 10 feet away from where Claimant fell. She testified that she did not witness Claimant fall but noticed "from the corner of [her] eye" Claimant down on the ground. She was the first person to assist the Claimant and when she reached her, she asked if she was okay. Ms Pacheco testified that Claimant mentioned that her knee "went out and she fell pretty hard." Ms. Pacheco testified that other than stating that her knee gave out, Claimant never made any other statements that she tripped on a sticky substance, that there was something sticky on her shoe, or made any additional statements as to the reason she fell. Ms Pacheco stayed with Claimant until Cory Howk, the acting store manager arrived. Ms Pacheco testified that the floor was checked and no debris, water or other substance were found on the floor.

6. Mr. Howk testified that he was straightening up the seasonal section of the store and looked over to see Claimant on the ground. He then went over to assist her. Mr. Howk testified that Claimant stated that she had fallen down, but did not say how or why she had fallen. Mr. Howk testified that Claimant never stated to him that her shoe caught on the floor causing her to fall. Mr. Howk testified that he got the Claimant a chair to sit in, and brought her a bottle of water. He noted that her chin was bleeding pretty badly, and there was a lot of blood everywhere. Mr. Howk cleaned up the blood on the floor. Once the floor was clean, he took pictures of the floor and the bottom of Claimant's shoe, which he testified was company policy.

7. At approximately 10:00 AM, Erica Solis, the front end manager of the store arrived for work. When she walked into the store to start her shift, she observed Claimant sitting in a chair by Starbucks and Mr. Howk cleaning the floor. Ms. Solis sat with Claimant while Mr. Howk completed an incident report. Ms. Solis asked what had happened, to which Ms. Solis testified Claimant responded by reporting that she fell but "didn't know if her knee gave out on her or what had happened, because she has (sic) no idea how she fell."

8. Claimant, after initially refusing medical attention, requested to go to the hospital. Ms. Solis volunteered to drive her. Ms. Solis testified that once at the hospital, Claimant stated that she <u>thought</u> her knee had given out, because there was nothing on the floor that could have caused her to fall (emphasis added). Ms. Solis also testified that

Claimant never stated that her foot had caught on the floor causing her to fall or that there had been anything sticky on the floor causing her to fall.

9. Claimant testified that her fall occurred as she was walking across the store to give Mr. Howk information to prepare her payroll. She testified, "…Corey always did payroll Sunday morning, and I had one vacation day left and I saw the office door open. So that meant he was in there doing payroll." Regarding this testimony, Mr. Howk testified that his job duties as assistant manager include responsibility for the deli department as well as "scheduling, payroll, planning, [and] merchandising." Mr. Howk testified that the department managers usually do the payroll and schedules and hand them into him to type into his computer. Mr. Howk was questioned under cross-examination, "…if the deli manager wasn't available and Ms. Harrigan was bringing her own schedule or her own information to you would that be helpful to you in preparing her payroll correctly?" and he answered that it would be. On further questioning he stated, "If she has vacation days and things like that, it's usually recommended because there is a lot of employees. So, yes, it would be helpful."

10. Based upon the evidence presented, the ALJ finds that Claimant has proven that her injury occurred "in the course of" her employment. The persuasive evidence establishes that the injury took place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions, specifically her need to walk across the store to discuss her work schedule/vacation time with the assistant manager. This finding is supported by Mr. Howk's testimony that this was not only helpful in his preparation of the work schedule, but it was recommended if the employee had "vacation days and things like that." If Mr. Howk did not have the information that Claimant sought to deliver to him, he could not have prepared the Claimant's payroll correctly. Consequently, the ALJ finds Claimant's activity at the time of her fall connected to her job-related functions. Nonetheless, the question of whether Claimant's injury "arose out of" her employment must be resolved.

11. Based upon the totality of the persuasive evidence presented, the ALJ finds that Claimant suffered an unexplained fall on February 15, 2015. The fall was not the result of an occupational hazard, i.e. the condition of the floor or a risk which was inherently personal or private to Claimant, i.e. an idiopathic condition. Respondent-Employer contends that Claimant's fall is not unexplained and due to an idiopathic condition. As support for this contention Respondents cite that Claimant reported the following different mechanisms of injury at some time throughout this case: (1) that her knee gave out, causing her to fall; (2) that her shoe got caught on the floor, causing her to fall; or (3) her shoe got caught on a sticky substance causing her to fall. The ALJ is not convinced, finding that Claimant's various accounts concerning the cause of her fall, while unhelpful to her overall credibility, reflects human nature to ascribe a cause to an otherwise unexplained event. The ALJ finds Claimant's statements regarding the cause of her fall, as testified to by Ms. Solis, the most reliable and therefore most credible history provided by Claimant. Specifically, the ALJ credits Claimant's statements- that she fell but "didn't know if her knee gave out on her or what had happened, because she has (sic) no idea how she fell" and later in the hospital- that she thought her knee had given out, because

there was nothing on the floor that could have caused her to fall, as persuasive evidence that Claimant had no understanding as to why she fell shortly after the incident. The ALJ rejects the balance of Claimant's later statements regarding the cause of fall as an expected outcome of litigation and the perceived need to assign as cause to her injuries.

12. The ALJ also finds Respondent-Employer's suggestion that Claimant fell due to an "idiopathic condition" unpersuasive. Careful inspection of the medical records submitted in this case along with the testimony presented fails to support that Claimant suffered from any idiopathic or self-originating condition causing her to fall. While the Respondents point to the Claimant's knee "giving out", there is no medical evidence to support that an idiopathic condition is responsible for Claimant's knee "giving out." Moreover, as noted above, the ALJ is unable to find record support that the knee "giving out" is the mechanism of injury in this case. To the contrary, the cause of Claimant's fall is unexplained. Based upon the evidence presented, the ALJ finds Respondent-Employer's assertion that Claimant's knee "gave out" because of an idiopathic condition speculation and conjecture.

13. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her right knee and chin as a consequence of an unexplained fall occurring on February 15, 2015.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following conclusions of law.

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. *§ 8-43-201, C.R.S.* A Workers' Compensation case is decided on its merits*. § 8-43-201, C.R.S.*

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As found here, Claimant's injury occurred in the scope of her employment. The question is whether Claimant's right knee and chin injuries "arose out of" her employment.

F. In C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the Colorado Supreme Court set forth the following three categories of risks that cause injury to employees in determining whether a fall down a flight of stairs was compensable: (1) employment risks which are directly tied to the work itself; (2) risks which are inherently personal or private to the employee; and (3) neutral risks that are neither employment-related, nor personal. *Id.* at 503.

G. Under the first category, a slip and fall at work is "typically…only attributable to an employment-related risk if it results from tripping on a defect or falling on an uneven or slippery surface on an employer's premises." *Id.* at 501, quoting from *In re Margeson*, 162 N.H. 273, 27 A.3d 663, 667 (2011). Based upon the evidence presented, the ALJ finds no record support to conclude that an employment-related risk caused Claimant's fall. To the contrary the overwhelming evidence demonstrates that the floor was clean, dry and otherwise free from defects or other hazardous conditions at the time of Claimant's fall.

H. The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Idiopathic conditions have been defined to mean "self-originated." *Id.* at 503. Purely idiopathic personal injuries generally are not

compensable unless an exception applies. *Id.* at 503. One exception is when an idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985); *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). However, in order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* The rationale for this exception is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's personal or idiopathic condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Gates, supra* at 7. Courts have previously held that hard level concrete floors, concrete stairs, and a sidewalk curb are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo. App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). Furthermore, there is no requirement that the idiopathic condition is symptomatic prior to the injury in order for the special hazard rule to apply. *Alexander v. Emergency Courier Services, supra*. As found here, the record evidence fails to support a conclusion that Claimant's fall was precipitated by an idiopathic condition. Consequently, an analysis of whether such idiopathic condition precipitated an accident and combined with a hazardous condition of employment to cause injury is unnecessary.

I. The third category includes injuries caused by "neutral risks." *City of Brighton*, *supra* at 503. Such risks are associated neither with the employment itself nor with the employee. *Id.* at 504. "An injury is compensable under the Act if triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question". *Id.* citing *Horodyskyj*, 32 P.3d at 477. Concerning unexplained falls the Court noted an "unexplained fall necessarily stems from a "neutral risk, one that is "attributable neither to the employment itself nor to the employee him or herself." (318 P. 3d 500) "Under our longstanding 'but-for' test, such an unexplained fall 'arises out of' employment if the fall would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he or she was injured." *City of Brighton* and *Cirsa v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Here, the evidence presented persuades the ALJ that the cause of Claimant's fall is truly unexplained and the injuries triggered by a neutral force. While Claimant reported various causes of her fall, careful review of her statements leads the ALJ to conclude that she had "no idea how she fell." As found, Claimant's inconsistent statements regarding the cause of her fall reflects human nature to attribute a cause to an otherwise unexplained event and renders the credibility of the statements as to a cause weeks after the event unreliable. In keeping with the decision announced in *City of Brighton*, the ALJ concludes that Claimant's fall would not have occurred "but for" the conditions and obligations of Claimant's employment, namely to keep the store manager abreast of her work schedule and vacation time to assure that her payroll was properly calculated. Consequently, the ALJ finds that the evidence presented supports a conclusion that Claimant's injury meets the "arises out of" analysis set forth in *City of Brighton.* Claimant has established the request causal connection between her injuries and her work duties. Thus, her injuries are compensable.

J. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, Claimant has proven by a preponderance of the evidence that she suffered an injury in the course and scope of her employment. Consequently, Respondents are liable for that medical treatment reasonably necessary to cure and relieve Claimant from the effects of her compensable right knee and chin injury.

ORDER

It is therefore ordered that:

1. The Claimant's injury is found to be a compensable injury. Respondent-Employer shall pay TTD benefits in accordance with the parties stipulation outlined above.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. Per the stipulation of the parties, Respondent shall pay for medical benefits for Claimant's treatment from Memorial Hospital on February 15, 2015 – February 16, 2015, Colorado Springs Orthopedic Group, and Colorado Sports and Spine Center to the extent that the treatment is related to Claimant's February 15, 2015 right knee and chin injury

4. Any and all issues not determined herein are reserved for future decision.

DATED: __September 1, 2015__

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise,

the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the back surgery recommended by Dr. Tice was reasonable and necessary to cure and relieve claimant from the effects of the injury?

FINDINGS OF FACT

1. Claimant is a 63-year-old male who has worked for Employer since 1999. Claimant testified at hearing that for the past six years he was worked as an equipment operator and mechanic at a wastewater treatment plant.

2. Claimant testified that in approximately 2003, he had a low back injury he described as a muscle strain that resulted from breaking concrete with a sledgehammer. Claimant testified that he sought medical care for approximately two months following the injury, and that he did not have any permanent impairment or work restrictions resulting from that injury. Claimant testified that over the following 11 years, he had occasional soreness in his back that he attributed to his advancing age and the hard labor that is required by his job. Claimant testified that he had some chiropractic care in the past five years, but that the chiropractic care was not intended to treat his low back. He testified specifically that some of the chiropractic care was intended to treat clavicle and neck problems he had arising out of a 2014 work-related injury with employer.

3. Claimant testified that during his treatment for the 2014 work injury, he had some leg numbness described in medical records by Dr. McLaughlin. Claimant testified that his left leg numbness caused pain at a level of two or three out of ten. Claimant testified that he did not know what caused the numbness, and his treating providers did not know what caused the numbness. Claimant did not recall sustaining a back injury that led to his left leg numbness. Claimant testified that the left leg numbness did not result in any work restrictions or further medical care. Claimant testified that in the months following July 2014 (when he was placed at maximum medical improvement ("MMI") for the neck and clavicle injury), the left leg numbness went away.

4. Claimant's medical records document claimant complaining of low back pain dating back to 1999. Claimant's treatment for his low back condition leading up to

the February 27, 2015 incident include claimant receiving chiropractic treatment in August 2012 for his low back. Claimant had complaints of left leg numbness in May 2014. Dr. McLaughlin noted that he believed the left leg symptoms were related to an edema issue and venous stasis difficulties.

5. Claimant testified that in February 2015, he was performing rather heavy maintenance work involving replacing a large water pump. Claimant testified that replacing the pump required strenuous work, including working on his hands and knees for extended periods of time. Claimant testified that while he was doing that project, he would notice soreness and stiffness in his lower back, but he did not have any leg numbness. Claimant testified that he attributed the soreness to his advancing age and working on his hands and knees for extended periods of time. Claimant testified that there was an incident when a pump shaft fell off a board and smashed his fingers, but did not cause any back symptoms. He testified that he did not report that incident or his back symptoms as work-related injuries because he was able to continue to work, and he attributed his symptoms to the heavy work he did during that time.

6. Claimant testified that he awoke on February 27, 2015, he did not notice anything unusual in his low back, other than some aches and pains that were customary. Claimant testified that he was scheduled to attend a wastewater seminar at Ute Water in Grand Junction as part of his work. Claimant testified he went to Employer's wastewater plant for approximately 10 minutes that morning before departing to go to the seminar. Claimant testified that when he arrived at Ute Water and stepped out of his truck, he felt a "tweak" in his low back. Claimant testified that he did not report the tweak because he was not at his workplace and there was no manager present to report it to. Claimant testified that the tweak did not result in any back symptoms at that time.

7. Claimant testified that over the course of the day, he observed seminars without any symptoms, other than stiffness from sitting. Claimant testified that when the seminars ended, he went to the front of the room to retrieve pamphlets for pipe fittings that were discussed during a seminar, because he thought they would work well for various work activities. Claimant testified that the pamphlets were on the floor and when he bent over to pick up the pamphlets and felt another tweak in his low back. Claimant testified that after this tweak, he began to have back pain and soreness.

8. Claimant testified that as he went to his truck and then returned home, and after he arrived home, his low back symptoms worsened and he began having left leg numbness. Claimant testified that he had radiating pain from his low back to the front of his left hip and left leg numbness. Claimant testified that he tried to sit down, and then lay down to ease his symptoms, but his pain was increasing and not improving.

9. Claimant testified that he sought treatment at Family Health West's emergency room ("ER") the evening of February 27, 2015 because he was having very intense pain and thought he might be experiencing another kidney stone. Claimant testified that the back pain he was having was consistent with his prior kidney stone, but

that his left leg numbness and radiating pain from his low back to the front of his body was not consistent with his recollection of his prior kidney stone symptoms.

10. Claimant testified that he called his supervisor, Mr. Etcheverry, to report he was on his way to the emergency room. Claimant testified that he did not report a work injury to Mr. Etcheverry because he did not know for sure what had caused his symptoms, and thought that he was having a kidney stone. Claimant testified that he called Mr. Etcheverry because he was on call for work that night, and wanted to let Mr. Etcheverry know that he could not take calls that night.

11. Dr. Mensing evaluated Claimant in the ER on February 27, 2015. Dr. Mensing noted that Claimant had acute onset of left-sided flank and low back pain that radiated to the lower left quadrant of his abdomen, his left groin, and down the back of his left thigh. Dr. Mensing noted that Claimant felt a small twinge in his back in the morning when he "go[t] out of his truck at work. Pain hit him full-on about 4:30 PM after he got home from work." Dr. Mensing noted that Claimant had a history of kidney stones. Claimant underwent a CT scan at Family Health West the same evening, which showed a left posterior paracentral disk protrusion at L3-4 effacing the left lateral recess. Dr. Reddy, the radiologist, noted that a magnetic resonance image ("MRI") could further evaluate the pathology.

12. On discharge, Dr. Mensing prescribed pain medication and referred Claimant to Dr. Tice for further evaluation. Claimant had an MRI scan of his low back performed on March 3, 2015. The MRI findings included a large left-sided herniated disk fragment measuring 18 by 10 by 11 millimeters at the L3-L4 level causing L3 nerve root impingement, and severe spinal stenosis at L4-L5 due to a disk bulge.

13. Claimant testified there was some delay in seeing Dr. Tice due to scheduling problems. Claimant testified he wanted to treat with Dr. Tice because Dr. Tice had performed his prior surgery. Claimant testified after being released from the hospital and before seeing Dr. Tice for the first time on March 5, 2015, he had low back pain, left, leg pain, and left leg numbness. Claimant testified that he had difficulty sleeping and had left leg weakness. Claimant testified that the left leg symptoms were at a level of six out of ten compared with the two or three out of ten he had during the summer of 2014.

14. Dr. Tice initially evaluated Claimant on March 5, 2015. Dr. Tice noted that Claimant had some stiffness and tightness in his left leg after some treatment for his sternum some time earlier, but that those symptoms went away and did not continue to bother him. Dr. Tice noted that about two weeks earlier, claimant began having some stiffness in his leg, and that claimant's wife noticed that he would walk stooped forward. Dr. Tice noted that on February 27, 2015, Claimant reached over to pick up some papers while attending an educational course for his employer, and had sharp pain in his left buttock. Dr. Tice noted that Claimant's pain progressed into his groin, and that he went to the emergency room that evening. The doctor noted that providers at Family Health West performed a CT scan "thinking that he probably had a kidney stone but saw a deranged disk."

15. Dr. Tice noted:

> I think this patient has a fairly large disk at the L3-4 level that is causing profound nerve root compression. He has moderate weakness and numbness….His disk is very large and given the amount of preexisting spinal stenosis, I do think there is some urgency in treating this….We did discuss his options of nonoperative care, giving it more time, and trying epidural injections, but these have failed in the past. Given the severity of his symptoms and the large size of the disk, I do think an urgent laminectomy-diskectomy should be accomplished….He does want to proceed with surgery as soon as possible….I do think this is a very urgent situation given the size of the disk and the impending progressive neurological deficit that he is facing.

Dr. Tice noted again on March 8, 2015 that he thought surgery was urgent because of significant pain, numbness, and weakness, and that claimant wanted to proceed "before further neurologic [deterioration]."

16. Claimant underwent a left L3-L4 laminectomy, foraminotomy, medial facetoctomy and discectomy surgery with Dr. Tice on March 9, 2015. Dr. Tice noted that Claimant's MRI scan showed a "very large, almost huge disk herniation" and that Claimant had "profound symptoms." Dr. Tice noted that Claimant's leg pain was improved following the surgery.

17. Claimant testified that he did not formally report the injury until March 11, 2015. Claimant testified that due to the pain he was in and the medications he was on for that pain, he was in "such a stupor" he was not capable of giving notice until after the surgery was completed. However, claimant was able to call his employer on the way to the ER when he believed he had a kidney stone. The ALJ finds that there was no reasonable basis for claimant to fail to report the injury to employer before his treatment with Dr. Tice.

18. Claimant filed a Report of Accident on March 11, 2015. He reported the injury as follows:

> The week of [February] 23rd I was working in the digester basement. I was bent down and on my hands and knees putting in a new C-PEX system []. I would go home sore and my legs hurting but thought it would go away. We were putting in the new shaft when it fell on my fingers and I sat up and jerked. On Friday I went to the class at Ute Water. My back twinged as I got out of my truck. Sat in the class all day, then bent over to pick up some papers and another twinge. By the time I got home I couldn't get off the commode. Went to the ER in Fruita because of intense pain. Called [Mr.] Etcheverry on the way to tell him I couldn't take my call[s].

Claimant testified at hearing that his written report was a fair description of what happened on February 27, 2015.

19. Dr. Tice noted on March 11, 2015, that Claimant was having back and leg pain. Dr. Tice noted that Claimant's back pain was much worse than his leg pain. Dr. Tice noted that Claimant actually had "a good result but a fair amount of spasm that is restricting his recovery." On March 19, 2015, Dr. Tice noted that Claimant's symptoms had improved, and that there was little spasm as compared to the week before. Dr. Tice recommended Claimant stay off work. On April 7, 2015, Dr. Tice noted that Claimant was doing better, but was still having leg numbness and back spasm. Dr. Tice recommended physical therapy. Claimant attended physical therapy at Family Health West.

20. Dr. Tice recommended that claimant stay off of work on May 21, 2015

21. Claimant testified at hearing that following surgery, his left leg numbness slowly went away. Claimant testified that he did not have full strength in his left leg, but that his pain had resolved. Claimant testified that he had ongoing back pain. Claimant testified that prior to surgery, his pain level was at approximately eight out of ten, and at hearing his pain level was approximately two out of ten. Claimant testified that he had not returned to work, and had not yet been returned to full work duty. Claimant testified that he has been receiving short- and long-term disability and paid time off benefits via Employer.

22. Dr. Rauzzino performed a medical records review independent medical examination ("IME") on behalf of respondent, and issued a report dated July 14, 2015. Dr. Rauzzino reviewed Dr. Tice's records, and noted Dr. Tice's opinions that the need for Claimant's back surgery was urgent. Dr. Rauzzino noted that Claimant sustained an acute left L3-L4 disk herniation. Dr. Rauzzino opined that Claimant did not have the disk herniation, or any lumbar spine injury, in 2014 when Claimant had leg numbness. Dr. Rauzzino opined that there was "nothing that would lead me to state, to a degree of medical probability, that the disk herniation occurred prior to his bending over to pick up the piece of paper" on the date of injury. Dr. Rauzzino opined that there was nothing conclusive to state that claimant had contribution to or aggravation of a low back condition prior to the acute disk herniation. Dr. Rauzzino opined that claimant's herniated disk was caused by claimant's degenerative disk disease such that the disk eventually failed. Dr. Rauzzino also opined that Dr. Tice treated Claimant on an emergent basis, and that the surgery performed by Dr. Tice was required. Dr. Rauzzino noted that it was his opinion that claimant experienced a disk herniation during a portion of the day during which he was at work, but that the act of bending over to pick up a piece of paper is not a work related injury.

23. Dr. Rauzzino testified at hearing consistent with his report. He testified that although the disk herniation occurred at work, it was not a work-related injury. He first testified that the type of the surgery performed by Dr. Tice was appropriately done on short notice given the severity of Claimant's symptoms. But Dr. Rauzzino later testified that Claimant could have delayed the surgery for some time in order to obtain authorization.

24. Respondents argue that claimant sustained a herniated disk either when getting out of the car at the meeting or when bending over to pick up the papers following the seminar. Claimant argues that he sustained the herniated disk in his back when he bent over to pick up the papers after the seminar. It is imperative to the ultimate findings in this case to determine when the claimant sustained his injury in this case. The ALJ relies on the opinions of Dr. Rauzzino and finds that claimant has demonstrated that it is more probable than not that he sustained the herniated disk when bending down to pick up the papers on February 27, 2015.

25. The question then becomes whether a herniated disk that occurs spontaneously while claimant is bending down to pick up papers related to work (and not while lifiting) is sufficient to establish that the injury arose out of his employment with employer. Respondents argue that the act of bending down to pick up papers is a ubiquitous activity and therefore is not a compensable injury.

26. The ALJ credits claimant's testimony and finds that the papers claimant was picking up at the time he sustained the herniated disk was paraphernalia related to the speaker, and therefore, related to his work. By finding that claimant sustained the injury while bending down to pick up papers related to his work, the ALJ is setting this case up as a question of law as to whether a herniated disk that occurs while an employee is bending down to pick up papers related to work while in the course of his employment represents a compensable injury arising out of an individual's employment. The ALJ recognizes that this could create de novo review for the appellate courts on this question.

27. The ALJ credits the opinions of Dr. Rauzzino and finds that claimant's herniated disk was caused by his pre-existing degenerative disk disease that herniated when he bent down to pick up the papers on February 27, 2015. The ALJ credits the testimony of Dr. Rauzzino and finds that the herniation was the result of it just being the time in which the disk chose to fail and not a specific activity that caused the disk to become herniated.

28. Respondents effectively argue that claimant's condition was the result of a "personal" condition claimant brought to the work site, that being his degenerative disk disease. The ALJ finds that because the disk chose to herniate at the time claimant was bending down to pick up the papers, and was related to his degenerative disk disease, the injury resulted from a risk that was inherent to claimant personally, and did not arise out of his employment.

29. Because the ALJ is finding that the herniated disk in this case arose out of a risk that was personal to claimant (his pre-existing degenerative disk disease), the ALJ finds claimant must establish that his work activities contributed to the herniation. In this case, the ALJ finds that the mere act of bending down did not combine with or cause the spontaneous herniation of his lumbar spine disk. Therefore, the ALJ finds that claimant's injury did not arise out of and in the course of his employment with employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. In Colorado, only injuries arising out of and in the course of employment are compensable under the Workers' Compensation Act. *See* Section 8-41-301(1), C.R.S.; *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 2120(Colo. 1996). The terms "arising out of" and "in the course of" are not synonymous, and both conditions must be proven in order to establish entitlement to workers' compensation benefits. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo. 1988).

5. The definition of "arising out of" is narrower than the definition of "in the course of". *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury only arises out of employment "when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Id.* There is no presumption that an employee injured at his place of employment has sustained an injury arising out of that employment, and if no causal connection can be established, a claim is not compensable. *Finn v. Industrial Commission*, 165 Colo. 106, 109, 437 P.2d 543-544 (1968).

6. In order to satisfy the course of employment requirement, claimant must show that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her job function. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). In this case, claimant was traveling for work at the time his disk herniated, so he has established that his injury occurred in the course of employment.

7. As found, claimant's herniated disk occurred while he was bending down to pick up papers while in the course and scope of his employment. As found, claimant was not lifting at the time the disk herniated. As found, claimant's herniated disk resulted from a personal condition (degenerative disk disease) that resulted in a herniation occurring while claimant was bending down.

8. As found, claimant has failed to prove by a preponderance of the evidence that the herniated disk arose out of and in the course of his employment with employer. Specifically, claimant established that the injury occurred in the course of his employment with employer, but did not arise out of his employment with employer.

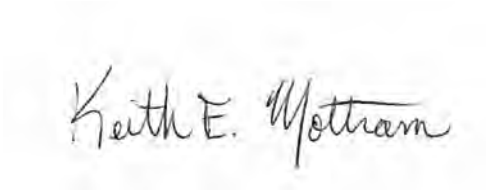
ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 17, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts

222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased to $1,231.59?

- The parties stipulated prior to the hearing that claimant's AWW with employer was $342.11, which is an increase from the admitted AWW of $272.38.

FINDINGS OF FACT

1. Claimant was employed by employer as a rental technician. Claimant had worked for employer previously, but had begun his most recent stint working with employer on November 17, 2014. Claimant earned $9.55 while working for employer and testified he typically worked from 8:00 a.m. until 11:00 a.m. and from 2:00 p.m. until 6:00 p.m. approximately 4 days per week. The parties stipulated to claimant's AWW of $342.11 based on his earnings with employer during the 9 5/7 weeks claimant was employed with employer. Claimant argues that this base amount should be increased based on his concurrent self employment and the inclusion of board as a fringe benefit for his employment with employer.

2. While working for employer, claimant received discounted food rates from restaurants that allowed for claimant to receive food from 30-50% off the regular price. Claimant also received $5.00 food specials. Claimant testified at hearing that he calculated that he saved approximately $13.00 per day from the regular price for food and usually ate three (3) days per week at the restaurants.

3. Claimant argues that this $39.00 in discounts claimant received by eating at restaurants should be considered "board" for purposes of calculating his AWW. The ALJ is not persuaded.

4. "Board" is defined in the Oxford Desk Dictionary as "2. Provision of regular meals or payment". Claimant's discount, as provided by employer, is not a provision of regular meals, nor a payment for meals. It is simply a discount offered to employees of which they may use or choose not to use. The ALJ determines that meal discounts offered by employers are not to be considered "board" for the purposes of calculating claimant's AWW.

5. Claimant sustained an admitted injury to his right shoulder on February 21, 2015 while employed with employer. Respondents admitted liability for the right shoulder injury and began paying benefits including medical benefits. Respondents filed a general admission of liability ("GAL") on March 23, 2015 admitting for temporary

total disability ("TTD") benefits commencing March 18, 2015 based on an AWW of $272.38.

6. In addition to his work with employer, claimant ran his own business as a general contractor. Claimant testified he had several contracts he was working on in the winter of 2014 through 2015, including a contract with Pet Kare, Cheezem, and City of Steamboat. Claimant testified his AWW should include the projects he was working on during his time working with employer, including the three projects mentioned above.

7. Claimant argues that his AWW would increase if the ALJ takes into consideration this general contracting work. According to the testimony of claimant, and records entered into evidence at hearing, claimant received payment from the City of Steamboat of $7,046.38 for a project that had expenses of $3,378.38 for a net of $3,668.00. Claimant likewise received payment from Pet Kare of $4,650.00 for a project that had expenses of $1,482.68, for a net of $3,167.32. Claimant received payment from Cheezum of $716.16 for a project that had expenses of $70.17 for a net of $646.00. Claimant testified he bid on a project with SEAD of $3,192.00, but this work had to be postponed because of his work with the City of Steamboat. Claimant testified he ultimately could not complete this project and the project was for labor only.

8. Claimant testified that the SEAD contract was started in September 2014 and would take 2 weeks to complete, but he was unable to complete the work. Claimant testified the Pet Kare project involved materials that were ordered in October and started in early November and completed on approximately February 5, 2015.

9. Claimant argues that his net income from these contracts result in an increase of his total earnings by $10,673.32 during the 9 5/7 weeks he was working for employer. However, including these earnings would include $3,192.00 work of work claimant did not perform because he was working on a different project (claimant testified he was unable to complete the SEAD project due to his work with City of Steamboat).

10. Moreover, claimant's tax returns document that claimant reported $8,508.00 in individual income from his business in 2014. Claimant's calculation of his AWW would effectively indicate that claimant's AWW should be increased by an amount greater than what claimant earned for the entire 2014, and then divided by the 9 5/7 weeks claimant worked with employer.

11. Claimant further testified that his work as a general contractor allows him to stay busy all year round for the most part. Claimant testified that he anticipated his construction business would be slow during the winter, and that is why he accepted a job with employer.

12. It is claimant's burden to prove the basis of his claim for an increase in his AWW. Claimant's testimony regarding wages he earned in his general contracting business is found to be not credible when compared to the amounts claimant claimed as income in his IRS forms.

13. While claimant may certainly claim expenses on his federal tax forms, the ALJ finds that claimant's testimony regarding his earnings during his alleged concurrent employment is simple not credible and does not sustain his burden of proving an increase in his AWW based on these alleged net profits.

14. Moreover, while claimant testified he would continue to have expenses from his business even if he weren't working, by including the full $10,673.32 claimant allegedly earned over this 9 5/7 week period, without taking into consideration claimant's ongoing business expenses, would effectively end with respondents underwriting the cost of claimant continuing his business operations during the period of time claimant was unable to work. The ALJ finds this is not the intended purpose of calculating an AWW pursuant to the Colorado Workers' Compensation Act.

15. The ALJ finds that claimant has failed to establish that it is more likely than not that his AWW should be increased based on his concurrent employment. The ALJ cannot establish based on the evidence presented at hearing what projects were started prior to claimant's employment with employer or what earnings claimant had at what time to establish a concurrent AWW. Claimant testified at hearing that he started some projects in September or October 2014, prior to his beginning his employment with employer. Claimant's testimony regarding the amount of money he earned in his general contracting business during the 9 5/7 weeks that he was working for employer is found to be not credible.

16. Based on the foregoing, claimant's request for an increase in his AWW based on his concurrent employment and the value of board provided by employer is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). Wages are defined under Section 8-40-201(19)(b) to include "the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefits not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage, the advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment.

4. Section 8-40-201(1)(19)(c) further adds that "No per diem payment shall be considered wages under this subsection (19) unless it is also considered wages for federal income tax purposes.

5. As found, "Board" is defined in the Oxford Desk Dictionary as "2. Provision of regular meals or payment". As found, claimant's discount, as provided by employer, is not a provision of regular meals, nor a payment for meals. As found, claimant's discount is simply a discount offered to employees of which they may use or choose not to use. As found, the meal discounts offered by employers are not to be considered "board" for the purposes of calculating claimant's AWW.

6. Claimant's argument to include the savings he was allowed by employ for the reduced lunch is not a "fringe benefit" as allowed under Section 8-40-201(19)(b). Perhaps more telling, even if employer were providing claimant with a per diem for lunch while working, it would not be included as wages unless it was also considered as wages for federal tax purposes. The ALJ further notes that there is no credible evidence that any per diem was provided to claimant that was considered wages for federal tax purposes. As such, the ALJ rejects claimant's argument to increase his AWW based on the $39.00 he saved by eating three days per week at the restaurants on employer's property.

7. As found, claimant's testimony regarding the money he earned with his general contracting business during the 9 5/7 weeks he was employed with employer prior to his injury is found to be not credible. Claimant's argument to include the

$10,673.32 he allegedly earned from his general contracting business is rejected in light of the federal tax returns that document personal income of $8,508.00 from his general contracting company for the entire 52 weeks of 2014.

8. Claimant's request for an Order increasing in his AWW to $1,231.59 is therefore denied.

ORDER

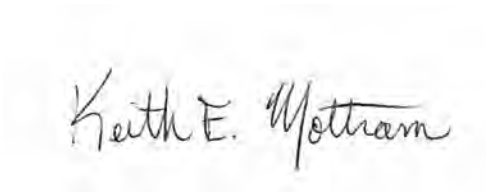
It is therefore ordered that:

1. Respondents shall pay TTD benefits based on an AWW of $342.11 and pursuant to the GAL.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 22, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-306-01

ISSUES

- Whether Claimant suffered a compensable hernia injury on March 11, 2015?
- Whether Claimant is entitled to medical treatment, specifically hernia surgery, as a result of his injury of March 11, 2015?
- Whether Claimant is entitled to TTD benefits?
- And if so, what is his average weekly wage (AWW)?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed by Employer as an apprentice or "Helper" mason. Employer hired Claimant on February 2, 2015.

2. Claimant alleges he sustained a hernia injury as a result of a March 11, 2015 event when Claimant was in the course and scope of employment for Employer.

3. Claimant testified that on that date he was lifting a five gallon container of wet cement weighing between 120 and 125 lbs. when he twisted to the left and felt an immediate pain in his stomach, testes, and anus.

4. Employer sent Claimant to Dr. Zuehlsdorff at OccMed. Dr. Zuehlsdorff's initial report is consistent with Claimant's statement of his injury. This report provides that from March 11, 2015, Claimant's pain gradually worsened, with abdominal, groin, scrotal, and anal pain. According to the March 12, 2015, evaluation Claimant's pain was 2-3/10. Dr. Zuehlsdorff reported, "He has no history of abdominal pain or surgeries in the past." At Claimant's March 20, 2015 recheck with Dr. Zuehlsdorff, he again reported, "He has no history of any herniations or abdominal pathology." Dr. Zuehlsdorff found Claimant to have a discernible right inguinal hernia.

5. Dr. Zuehlsdorff referred Claimant to Dr. Lampe, a surgeon, who evaluated Claimant on March 31, 2015. Dr. Lampe stated that Claimant suffered a strain at work carrying a heavy load on March 11, 2015, and noted swelling and discomfort in the right groin. He noted Claimant had no prior surgeries. According to Dr. Lampe's report of March 31, 2015, Claimant has a "large right inguinal hernia extending forward to the upper scrotum." On April 2, 2015, Dr. Lampe requested authorization for surgery to repair the hernia.

6. During the course of Respondents' compensability investigation, they discovered Health One and Saint Anthony Hospital medical records from December 2009.

7. On December 3, 2009, Claimant was seen at St. Anthony Hospital, which documented: "Chief complaint: Abdominal pain. Triage assessment: "pt. has herniated area in pelvic region onset August. Noticed small lump does heavy lifting lump has been growing. Does heavy lifting. Is able to reduce." The St. Anthony Hospital record documents: "pt. states hernia is growing," and "Diagnosis: right inguinal hernia, probable direct." Referral to a surgeon was made.

8. Dr. Dunkle at Health One evaluated Claimant on December 3, 2009. His record documents: "The patient notes that in August, he lifted a box of drywall and felt pain in his stomach. He saw a lump. …. He went to the doctor and was advised that he had a hernia." The record states, "he is complaining of a pain severity at a level of 8/10, very strong pain that interferes with the ability to do basic activities." Dr. Dunkle diagnosed Claimant with a "right inguinal hernia."

9. Claimant testified that he suffered right groin pain after lifting a heavy box in August 2009 when he "felt the same kind of pain." He later testified the pain was not the same and that his pain today occurs just with walking and using the restroom. He did not seek care in August 2009 because he "didn't feel it much, and thought it would go away on its own." When he sought treatment in December 2009, he was not given restrictions or time off of work.

10. On December 3, 2009, Dr. Dunkle determined Claimant's injury was not work related because Claimant's symptoms were longstanding since August 2009, and not reported until November 28, 2009. Claimant received no further care or treatment.

11. Claimant continued to work full duty after December 3, 2009 in a variety of construction and other jobs which all required strenuous and heavy lifting.

12. On April 7, 2015, Dr. Raschbacher preformed a records review to evaluate Claimant's request for right hernia repair surgery. He noted receipt of records from St. Anthony Hospital and Dr. Dunkle at HealthOne, dated December 3, 2009. After reviewing those records, Dr. Raschbacher stated: "It appears from review of the medical record that this right inguinal hernia was preexisting, and was symptomatic in the past. It appears his history was not obtained by current treating providers."

13. No persuasive evidence supports a finding that Claimant's hernia, diagnosed in December 2009, was surgically repaired.

14. On April 15, 2015, Dr. Zuehlsdorff noted that he received documentation from St. Anthony Hospital and Dr. Dunkle, at HealthOne, and medical records from Dr. Raschbacher. Dr. Zuehlsdorff reviewed the medical records and changed his initial opinion on relatedness based on that information. In relevant part, Dr. Zuehlsdorff states:

> Given the above, I would opine that the patient has had a previous right hernia. Whether or not he had surgery or not, he never told us anything about the history of the hernia or even a possible surgery. Given the above, I would opine that this was a significant pre-existing hernia and was not caused by the current injury, and therefore, this is not work causal. Given the above information, I would agree with Dr. Raschbacher that the claim should be denied, as this point, with no further care or treatment.

15. On July 6, 2015, Dr. Albert Hattem, M.D., performed a Respondents Independent Medical Examination (IME), of Claimant and issued a report. Dr. Hattem evaluated Claimant, took Claimant's medical history, and reviewed the medical records. Dr. Hattem's report noted the following:

- Claimant reported he developed abdominal pain while lifting a bucket of cement that weighed more than 50 pounds while at work. He experienced immediate pain in his right lower abdomen, right testicle and anus.

- Claimant specifically denies a prior history of hernia or abdominal pain.

16. Dr. Hattem stated that Claimant's right inguinal hernia was not causally related to a lifting incident on March 11, 2015, for the following reasons:

- The presence of a preexisting right inguinal hernia was unquestionable.

- "The right inguinal hernia diagnosed in 2009 is approximately the same size as the one diagnosed in March 2015. It represents the same condition – nothing has changed anatomically since 2009."

- Inguinal hernias do not resolve spontaneously – they require surgical repair. Claimant's condition could not have resolved and then recurred six years later. Claimant's hernia has persisted unchanged since 2009. Claimant required surgery for this condition in 2009 as he does currently. The work incident in March 2015 did not change the need for this surgery.

17. Dr. Hattem, a level II accredited physician, testified for Respondents as an expert in occupational medicine. He testified consistently with his report:

- He agreed with Dr. Zuehlsdorff and Dr. Raschbacher that Claimant's condition is not work related.

- Claimant's 2009 claim was denied so he was not surprised that work restrictions were not assigned at that time.

- Claimant should have had the same work restrictions in place in 2009 that he did in 2015.

- He has dealt with hernias for many years and is not surprised that someone with Claimant's condition could be able to work and earn wages, including performing heavy lifting tasks.

- Claimant's hernia diagnosed in 2009 is in the same place (right side) and is the same size in 2015 as it was in 2009.

- Many methods are used to diagnose a hernia, one of which involves a physical exam. Diagnostic testing such as ultrasound is not necessary and often yields false results.

18. Dr. Hattem's opinions are credible, persuasive, and supported by the weight of the medical records.

19. It is more probably true than not that the lifting event of March of 2015 did not aggravate and/or accelerate Claimant's need for medical treatment. Rather, the surgery needed to fix Claimant's hernia has been needed since 2009.

20. Claimant had only been in the United States for approximately four years prior to 2009, and did not speak English. However, the Saint Anthony medical record dated December 2, 2009 shows that Claimant reported, in the first person, "I think I have a hernia."

21. Claimant's testimony is inconsistent with the great weight of the medical records. Although Claimant apologized at hearing for not reporting his 2009 hernia diagnosis to his medical treatment providers in 2015, the ALJ finds that Claimant was not truthful with those providers during the course of his diagnosis and treatment. The ALJ thus finds Claimant's testimony to be less persuasive than his medical records and less persuasive than the relatedness opinions of his treatment providers and Dr. Hattem.

22. Claimant has failed to prove by a preponderance of the evidence that he sustained a work related injury on March 11, 2015. Thus, the ALJ need not address the remaining issues noticed for hearing.

23. All other issues are reserved.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Substantial Evidence

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions therein. See *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399-400 (Colo. App. 2009).

Causation/Compensability

An injury is compensable under Colorado's Workers' Compensation Act if incurred by an employee in the course and scope of employment. § 8-41-301(1)(b), C.R.S.; *Price v. ICAO,* 919 P.2d 207 (Colo. 1996). Claimant must show a connection between the employment and the injury, such that the injury has its origin of the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *See Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999).

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ finds and concludes that Claimant did not prove by a preponderance of the evidence that his hernia injury arose out of or was proximately caused by his

employment. Rather, the greater weight of the evidence, including the medical records from 2009, and the relatedness opinions of Dr. Hattem, Dr. Zuehlsdorff and Dr. Raschbacher, support the conclusion that Claimant's hernia, and his need for surgical repair of same, existed in December 2009.

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P .3d 999, 1001 (Colo. App. 2004). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *Id*., p. 1001. The ALJ finds and concludes that Claimant presented no persuasive evidence that his condition was aggravated, accelerated, or combined with the pre-existing disease or infirmity to produce a disability or need for medical treatment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 28, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant suffered a compensable injury on April 1, 2015.

2. Whether Claimant was an employee or independent contractor of Employer on April 1, 2015.

3. Whether Claimant department from the scope of his employment by engaging in horseplay on April 1, 2015.

FINDINGS OF FACT

1. Claimant responded to an employment advertisement on Craigslist in early March of 2015. Claimant arrived at Employer's office, was interviewed by an officer manager, and was hired on the spot.

2. The office manager explained to Claimant that the job was a sales job selling Kirby vacuum cleaners. The officer manager explained to Claimant that he would go through training before being sent out to sell vacuums. She briefly explained several documents to Claimant and pointed out to him where to sign on each page. Claimant did not read any of the documents prior to signing them. The following morning, the office manager called Claimant and gave him his training schedule.

3. On March 7, 2015 Claimant signed a "Kirby Independent Dealer Agreement." The agreement provided that Employer was a "distributor" engaged in the business of selling Kirby vacuum systems at wholesale to independent Kirby dealers for resale to consumer end-users through in-home demonstrations. It provided that Claimant was a "dealer" and desired to engage in his own business of buying and reselling Kirby systems to consumer end-users through in-home demonstrations as an independent dealer associated with distributor. *See* Exhibit A.

4. The agreement provided that Claimant understood that he was engaged in an independent business or occupation, that he would not be engaged in personal services for Employer, and that his activities would not be integrated into those of Employer. It provided that Claimant would use his best efforts in his retail sales activities during his association with Employer. Best effort meant spending 50% or more of Claimant's activities in the active retail sales of the Kirby systems whether it be by canvassing, appointment setting, or crew leader activities. *See* Exhibit A.

5. The agreement provided that Claimant would pay Employer the wholesale purchase price of Kirby systems and that at Employer's option, Employer could consign Kirby systems to Claimant for resale to the consumer end-user. If consignment occurred, then the money collected by Claimant would be held in trust for Employer and Claimant's profits/commissions would be measured by the difference between the price paid by the consumer end-user and the wholesale price established by Employer and Claimant for the system. *See* Exhibit A.

6. The agreement provided that Claimant would at all time hold himself out as an independent contractor and would operate as an independent merchant not subject to direction and control by Employer with respect to his selling activities. It provided that Claimant would establish his own place from which to work, times to work, territory to be worked, and was free to engage in other activities including representing competitive product lines. It provided that Claimant was not an agent or employee of Employer. It provided that no taxes would be withheld from Claimant's profits and that Claimant would not be treated as an employee with respect to any services for federal, state, local taxes and workers' compensation purposes which Claimant may elect to obtain on his own as an independent contractor or for unemployment compensation purposes as direct sellers of consumer products. It provided that Claimant understood as an independent contractor that he may incur a loss in his activities and all costs and expenses including providing all tools and equipment associated with Claimant's activities shall be born by Claimant. *See* Exhibit A.

7. The agreement provided that it was for a term of one year and indicated that Claimant's activities were not integrated into those of Employer. It provided that either party could cancel the agreement at any time upon notice to the other party based on any breach of the terms and conditions of the agreement. *See* Exhibit A.

8. The agreement was not notarized, nor were any of the provisions bold or italicized. *See* Exhibit A.

9. Claimant also signed an addendum to the Kirby Independent Dealer Agreement that provided he understood any resale other than to a consumer end-user through an in-home demonstration was a violation and would result in immediate termination of the agreement including sales through e-bay, to wholesalers, or online sales. *See* Exhibit B.

10. Claimant signed a sales contracts/financing form. The form provided that all sales shall clearly identify Claimant by name and phone number, and if the vacuum was consigned by Claimant, then the sale shall provide Employer's name, address, and phone number. The form indicated that Claimant was free to negotiate price discounts based on such things as receiving referrals from a customer, taking a trade-in, receiving credit for a contest, etc but provided that any discounts negotiated by Claimant in making sales of Kirby products to consumer end-users shall not be below the Claimant's consigned cost. It provided that Claimant could arrange his own financing arrangements with the customer and that Claimant was encouraged to seek any

assistance he deemed necessary from Employer prior to, at the time of, or following the sale of the product including, but not limited to, financing options. It provided that Claimant shall provide prospective consumers with business cards identifying himself by name and phone number as an independent contractor furthering his own business purpose. *See* Exhibit C.

11. Claimant signed a consignment agreement electing to consign equipment from Employer. Claimant acknowledged he was financially responsible for the equipment as part of the investment into Claimant's own independent business. Claimant agreed to keep the consigned equipment clean and in good repair and to immediately return the consigned equipment to Employer in the event their relationship ceased. *See* Exhibit D.

12. Claimant signed an agreement as to joint canvassing. The agreement provided that Claimant understood and agreed that participating in a joint sales program involving other dealers on a vehicle was voluntary and not required by Employer and that as an independent dealer he could create his own appointments to maximize the means of achieving retail sales. Claimant's signature acknowledged his agreement that that in the event he wished to engage other dealers to assist him in sales activities ("a helper") he did so independently of Employer and any compensation paid to said helper would be determined by and between Claimant and the helper and not subject to prior approval by Employer. The agreement provided that any such compensation to be paid to a helper shall be disclosed to Employer and paid to the helper in keeping with Employer's normal payment practices, it being further understood by Claimant and the helper that in all instances it is the primary job of the helper/dealer's to be actively engaged in the retail sales of the product and that at all times the helper shall spend fifty percent or more of his time engaged in retail sales activities. It provided that otherwise someone providing only support services for Claimant's retail sales activities may be considered to be an employee of Claimant subjecting him to payment of wages to the helper under state and federal laws. It provided that joint canvassing was Claimant's option in that at all times he could: cold call by himself, advertise, door hang, pre-set appointments, and solicit prospective customers at booths and shows. The agreement stated that if Claimant elected to ride on vehicles with other dealers, he was encouraged to be present at Employer's offices no later than 9:00 a.m. so that the dealers could meet to discuss joint canvassing opportunities. It provided that if Claimant no longer elected to engage in retail sales, he could elect to immediately cease doing so. It also provided that decisions as to what areas the vehicle will be operating will be made by Claimant and other voluntary participant dealers. *See* Exhibit E.

13. Despite what was outlined in all the documents signed by Claimant on March 7, 2014, the actual relationship between Claimant and Employer operated very differently from what was in the signed agreements.

14. When Claimant was hired, he was advised that he would be required to undergo training. Employer contacted Claimant and provided him a training schedule

and told him what times to be present for training. Claimant underwent five total days of training required by and provided by Employer.

15. The first three days were classroom type training sessions that covered a nine step program of what to say and how to present the Kirby vacuums during in-home presentations. The training was outlined by a boot camp packet that each salesperson received. Employer advised Claimant that he had to follow the nine step program during his in-home sales presentations, and that if he did not stick to the sales pitch he would be fired.

16. The next two days of training were in the field where Claimant was required to observe other salespersons.

17. After completing five days of training, Employer advised Claimant that he could begin sales work. Claimant was told to report to Employer's office at 10:00 a.m.

18. Claimant reported at 10:00 a.m. to Employer's office location the following day, and each day thereafter until he suffered an injury. Claimant worked 7 days per week for Employer, averaging 12-14 hours of work per day. Each morning after arriving at Employer's office, Employer went over the training and the required nine point program on how to sell the vacuums to "pump up" the salespersons for the day of selling.

19. Employer advised Claimant that to be on the sales team Claimant needed to be there 7 days per week and had to report to Employer's office in the mornings. Claimant could not set his own schedule. If Claimant wanted a day off, he was required to make a request to Employer two days in advance.

20. Employer provided a company van driven by one of Employer's more senior salespersons, Benjamin Hurd. Employer's owner, Wade Kinnewall, and Mr. Hurd chose the location where the van would go for the day. Claimant had no say in the decision of where the van was heading.

21. Claimant did not set the price of the Kirby vacuums he sold. Rather, after demonstrating to a customer, Claimant called Mr. Hurd to request the price be lowered. Mr. Hurd told Claimant what price Claimant could offer to the customers. Claimant also did not have a say in establishing the wholesale price that he would be required to reimburse Employer for in the event he sold a vacuum.

22. Claimant worked both on his own and with a partner when out for the day. Mr. Hurd made decisions to partner salespersons for the day to hopefully achieve higher sales volumes by having them work in pairs. Claimant had no say in who he would be partnered with during a sales day and the decision was made by Mr. Hurd.

23. Claimant did not set his own financing terms with customers or provide his own financing agreement. If a customer wanted to finance a vacuum, the financing options were provided by Employer.

24. Claimant did not provide any of his own tools and the vacuums and van were provided by Employer.

25. While out for the day in Employer's van, Mr. Hurd was the "team lead" for the salespersons in the van. Mr. Hurd received a portion of the commission from each salespersons sale of a Kirby vacuum. Claimant did not establish the amount that Mr. Hurd would receive if Claimant sold a vacuum. Mr. Hurd drove the van slowly down the sales routes as the salespersons knocked on doors and retrieved the vacuums from the back of the van as needed for demonstrations.

26. Claimant did not establish his own business entity selling vacuums. Claimant did not have a business name, business card, business address, phone listing, liability insurance, and did not sell Kirby vacuums in any manner other than riding along in Employer's van 7 days a week and 12-14 hours per day.

27. Employer paid Claimant personally. Claimant's pay was based on commissions and was not hourly. Claimant's overall pay was based on the sale price of the vacuum, less the wholesale price of the vacuum established by Employer, less the payout to the team lead. Claimant did not set the sales price of the vacuum, did not set the wholesale price he would buy the vacuum for, and did not establish the amount he paid out to his team lead.

28. Employer required that Claimant wear a button-down shirt and maintain a professional appearance.

29. On April 1, 2015 at approximately 5:30 p.m. Claimant was out in the company van performing vacuum sales work. Mr. Hurd was the team lead and was driving Employer's van while Claimant and three other salespersons went door to door attempting to sell Kirby vacuums.

30. Per normal practice, if a customer was interested in viewing a demonstration, the salesperson would go back to the van, take out a Kirby vacuum and return to put on an in-home demonstration.

31. Claimant loaded a Kirby vacuum into the back of Employer's van after performing an in-home demonstration. Claimant then took off running toward two of the salespersons who were walking in the road in front of him. As he was running, Claimant grabbed the hat off of one of the other salespersons head, and attempted to run off with the hat when he lost his balance, fell, and was struck by Employer's van driven by Mr. Hurd.

32. The van ran over Claimant's right leg and ankle and caused Claimant significant injuries for which he has undergone four separate surgeries.

33. At the time of the injury the salespersons were crossing the street on a diagonal to move into the next neighborhood. All the salespersons were in the road heading toward the next neighborhood while Mr. Hurd was driving the van toward the next neighborhood.

34. Horseplay activities were frequent in the course of sales work for Employer. The salespersons in the van on a daily basis were all young men working 7 days per week and 12-14 hours per day. They frequently threw snowballs at one another, joked around, pushed each other into bushes, performed pull-ups on tree branches, and performed push-ups in the middle of the roadway. The team lead also engaged in horseplay. Occasionally, if the team lead thought the horseplay had gotten out of hand or if he believed a customer might be watching, he told the salespersons to "knock it off."

35. Claimant is 23 years old, has no college degree, and is not sophisticated in business dealings. Claimant responded to an employment advertisement, began employment, and followed the instructions of Employer.

36. Mr. Hurd testified as to his belief that he and the other salespersons were independent dealers. He testified that some salespersons sold vacuums part-time through Employer and had other jobs. He testified that some salespersons were not required to sell from the van and went out independently, including one salesperson who took Kirby vacuums on a road trip to another state. He testified that new employees were only encouraged to go out in the van as a good way to learn how to sell. He testified that they were similarly encouraged, but not required, to dress a certain way. He also testified that each salesperson could set the price of the vacuum as they saw fit and that he only provided advice or suggestions to the salespersons in his van.

37. Mr. Hurd's testimony, overall, is not found persuasive. The testimony of Claimant is found more credible and persuasive surrounding the requirement to go out in the van to sell vacuums, the requirement to dress in a certain way, and that the price of the vacuum was set by Employer and the team lead.

38. Claimant's testimony overall is credible and persuasive. Claimant was forthright an open in his explanations of his employment relationship, the requirements of the job explained to him by Employer, and his actions of flipping a hat off of a co-worker.

39. Claimant was not just provided with guidelines on how to operate his independent vacuum selling business. Claimant was trained and advised on exactly how he was to sell Kirby vacuums, was required to ride in Employer's van in order to be

part of the sales team, and was required to work the hours and schedule Employer provided.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Independent Contractor v. Employee

Section 8-40-202(2)(a), C.R.S. provides that an individual performing services for pay is deemed to be an employee, "unless such individual is free from control and direction in the performance of the service, both under the contract for performance of

service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." In this case Claimant performed services for pay for Employer but there is a dispute as to whether the services were performed as an independent contractor or as an employee. Since the Claimant performed services for pay for Employer, Respondents in this case bear the burden of proof to prove the existence of an independent contractor relationship. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo.App. 1992); *Frank C. Klein v. Colorado Compensation Insurance Auth.*, 859 P.2d 323 (Colo. App. 1993). If Respondents establish that Claimant is an independent contractor, then Claimant has no cause of action and is not entitled to benefits under the Workers' Compensation Act. *See* § 8-41-401(3), C.R.S.

A document may satisfy Respondents' burden to prove Claimant's status as an independent contractor. A document creates a "rebuttable presumption of an independent contractor relationship between the parties where such document contains a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship." *See* § 8-42-202(2)(b)(IV), C.R.S. Although Claimant signed a "Kirby Independent Dealer Agreement" on March 7, 2015 the document did not contain the required disclosure in larger type or in bold-faced or underlined type. Therefore, the document signed on March 7, 2015 did not create a rebuttable presumption of an independent contractor relationship between the parties and the burden of proof remains with Respondent to establish that the relationship is that of an independent contractor. In this case, Respondent has failed to meet their burden.

Free from control and direction

To be deemed an independent contractor, an individual has to be free from control and direction in the performance of the service both under the contract for performance of service and in fact. The person also must be customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Under § 8-40-202(2)(b)(II), C.R.S., to prove a person is free from control and direction in the performance of the service and, therefore, an independent contractor, it must be shown by a preponderance of the evidence that the person for whom services are performed does not:

A. Require the individual to work exclusively for the person for whom services are performed; except that the individual, however, may choose to work exclusively for such person;
B. Establish a quality standard for the individual; except that the person may provide plans and specifications but cannot oversee the actual work or instruct the individual as to how the work will be performed;
C. Pay a salary or an hourly rate instead of a fixed or contract rate;

D. Terminate the work of the individual during the contract period unless the individual violated the terms of the contract or fails to produce a result that meets the specifications of the contract;
E. Provide the individual more than minimal training;
F. Provide the individual tools or benefits; except that materials and equipment may be supplied;
G. Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;
H. Pay the individual personally instead of making checks payable to the individual's business name; and
I. Combine the business operations of the person for whom service is provided in any way with the individual's business operations instead of maintaining all operations separately and distinctly.

The existence of any one of the factors is not conclusive evidence that an individual is an employee, nor does the statute require satisfaction of all nine factors to prove that the individual is an independent contractor. *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998). In the present case, after weighing the nine factors and examining the relationship as a whole, Respondents have failed to show that Claimant was free from control and direction in performing services.

Employer required Claimant to work 7 days per week with an average of 12-14 hours per day. Claimant was told when hired that this was the schedule and that if he wished to be part of the sales team, he was required to show up daily to go out in Employer's van. Employer thus dictated the time of performance and Claimant had no choice in his hours or schedule as a salesperson. Employer provided Claimant with substantial training prior to allowing him to begin sales work. Employer established a quality standard for Claimant and instructed Claimant that he had to perform his sales duties using the 9 steps outlined in Claimant's training and in the boot camp booklet. Employer provided a daily refresh of the training and went over the 9 sales steps each morning to "pump up" the salespersons before they went out to sell for the day. Mr. Hurd and Employer's owner decided where the van would go for the day and Claimant had no choice in the sales territory that would be covered each day. Claimant's sales work was monitored by Mr. Hurd the team lead. Claimant was often paired up with another salesperson for the day with no choice in the pairings. Employer provided the van as well as the vacuums used for demonstration. Claimant was also paid personally by Employer after Employer took out the wholesale price of the vacuum, and paid out the team lead.

Claimant signed a number of documents on the date he was hired without reading them. As found above, Claimant is 23 years old, without a college degree, and is unsophisticated in business dealings. Although the documents Claimant signed on March 7, 2015 and the contract of performance purport to establish that Claimant was free from control and direction in the performance of his duties, in fact Claimant was not. After examining the relationship and the 9 factors of § 8-202(2)(b)(II), C.R.S. to determine whether Claimant was in fact free from Employer's control and direction, the

ALJ concludes that Claimant was not. Rather, Claimant simply followed the directions of Employer, showed up to work when told, performed sales work following the mandatory sales script and 9 steps, and followed Employer's instructions as to what location he would sell in, who he would be paired with, what price he could sell the vacuums for, and what to wear. Respondents have therefore failed to show more likely than not that Claimant was free from control and direction in the performance of sales duties and that the relationship was that of an independent contractor.

Customarily engaged in an independent trade, occupation, profession, or business

For Claimant to be deemed an independent contractor, Respondents also must show that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. In this case, a preponderance of the evidence does not show that Claimant was engaged in the independent business of vacuum sales. Claimant did not have his own business entity, business name, business cards, business address, business phone listing, his own tools, any financial investment subject to a risk of loss, or liability insurance. Claimant did not set the price of the vacuums he sold, but was advised by Employer and Employer's team lead as to how much he could mark down the price of a vacuum to close a sale. Claimant did not prepare or submit invoices for Employer. Employer also was reasonably aware that Claimant was not engaged in an independent business based on the working relationship Employer had with Claimant. Employer knew that Claimant reported to their office 7 days a week and worked 12-14 hours per day, thus leaving no time for outside employment or for Claimant to independently sell vacuums on his own. Claimant did not have an independent trade, occupation, profession, or business selling vacuums. Rather, he responded to an employment advertisement and showed up to work doing as he was told by Employer. Claimant took no steps to create his own trade or business and simply followed the instructions of Employer. Although Claimant signed documents purporting to acknowledge he had an independent trade, occupation, profession, or business the true nature of the relationship fails to establish that Claimant was customarily engaged in an independent trade, occupation, profession, or business.

In *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not 'engaged' in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court declared "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in § 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015. The *Softrock* Court pointed as an example the

decision in *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008). In *Long View* the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. See *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015. In the present case, analyzing the nature of the working relationship, the nine factors of § 8-202(2)(b)(II), C.R.S., the *Long View* factors, and the overall relationship, the ALJ concludes that Claimant is not customarily engaged in an independent trade or business and that Respondent reasonably knew Claimant was not engaged in an independent trade or business based on their working relationship with Claimant. Employer expected Claimant not to take on other customers and required Claimant to work full time, 7 days a week, 12-14 hours per day for Employer.

Horseplay Doctrine

To establish that an injury is compensable, Claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with employer. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.* It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly considered as arising out of and in the course of the employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006).

If the claimant's activity at the time of the injury constitutes such a substantial deviation from the circumstances and conditions of the claimant's employment that the activity is for the claimant's sole benefit, the injury does not arise out of and in the course of employment. *Kater v. Industrial Commission,* 728 P.2d 746 (Colo. App. 1986). Where, the alleged deviation from employment involves "horseplay," our courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Industrial Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals held that the relevant factors are:

> (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved and abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.

No single factor is determinative, and the claimant need not prove the existence of every factor in order to establish compensability. Ultimately, resolution of the issue is one of fact for determination by the ALJ. *Panera Bread, LLC v. Industrial Claim Appeals Office, supra.*

Claimant has met his burden to show that he suffered an injury arising out of and in the course of his employment with Employer. Claimant did not substantially deviate from the circumstances and conditions of his employment by engaging in horseplay to make his injury outside the scope of his employment. The deviation was slight and not serious and was commingled with the performance of his job duties. While continuing to walk door to door to sell vacuums, and after having just loaded a demonstration vacuum into Employer's van, Claimant made the mistake of running to knock a hat off of a co-worker. Although this was a deviation from the act of selling vacuums, it was a slight deviation and occurred while moving through the neighborhood in furtherance of knocking on more doors to sell vacuums and was commingled with the job duty of walking the neighborhood. Additionally, as found above, horseplay amongst Employer's salespersons, including Employer's team lead was an accepted part of the employment. The salespersons who spent 7 days per week and 12-14 hours per day walking neighborhoods and riding in a shared van regularly engaged in horseplay including: throwing snowballs at one another, doing pull-ups on tree branches; doing pushups in the middle of roadways; and joking amongst each other. The act of Claimant running to flip a hat off of one of his co-workers was part of the camaraderie and accepted horseplay that had been part of the employment. Further, the nature of the employment with long hours and several young salespersons together 7 days per week was generally expected to include some horseplay. In reviewing the four-part test surrounding the horseplay in this case, Claimant did not substantially deviate from employment to make his injury outside the course and scope of his employment. Claimant has established that the injury arose out of and occurred in the course of his employment and is compensable.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on April 1, 2015.

2. Claimant was an Employee of Employer on April 1, 2015.

3. Claimant's horseplay activity at the time of the injury did not constitute such a substantial deviation from the conditions of his employment to take his injury outside the course and scope of his employment.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 1, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether respondents have proven by a preponderance of the evidence that claimant's injury was caused by a willful violation of a safety rule allowing for a reduction of non-medical benefits by 50% pursuant to Section 8-42-112(1)(b)?

FINDINGS OF FACT

1. The parties stipulated at the hearing that claimant was told by employer not to pile cardboard on the floor. The parties stipulated that Mr. Luzietti, a supervisor for employer, told employees not to pile cardboard on the floor at safety meetings. The parties stipulated that Mr. Luzietti was present in the store at the time of claimant's injury, but not where claimant fell.

2. Claimant sustained an admitted injury while employed with employer on March 28, 2015 when she stepped on cardboard and slipped. Respondents filed a general admission of liability on April 21, 2015 admitting for workers' compensation benefits including medical benefits and temporary total disability ("TTD") benefits.

3. Following claimant's injury, witness statements were obtained by employer. Copies of the witness statements were entered into evidence at hearing. Claimant's Associate Incident report indicates she was injured when she "steped (sic) on boxes to pick up small ones and they sliped (sic) beneath me". The manager, Mr. Luzietti, completed a section below claimant's written statement that read: "cardboard should not have been placed on the floor". The manager also indicated that claimant may need to undergo retraining on the correct way to store cardboard when working.

4. The witness statement from Mr. Luzietti indicated as follows:

> I was told of an accident up at our deli area. When I got to the deli, (claimant) was laying on the ground. She stated that she had slipped on cardboard that was on the ground. She believed she had twisted her knee.

5. The witness statement from Ms. Daugherty indicated as follows:

> (Claimant) and I had been working in Deli unloading and unpacking boxes. As boxes were unloaded and broken down the boxes were laid on floor under spy table. I told (claimant) to pick up boxes and take to compactor. I was in process of moving pallet to backroom. I walked with pallet on jack towards action alley about 35 yards away I heard (claimant) scream. I quickly went to her. I found her lying on floor directly in front of deli with

> boxes scattered around her. (claimant) was lying partially on right hip complaining of right knee pain. Management was called for. (claimant) stated she did not actually fall but only hands touched floor as she caught herself from complete fall. (claimant) declined call to 911 stating a feel of pulled knee muscles. After approximately 2 hours, (claimant) agreed to move to wheelchair. Manager Brandi and I gently moved (Claimant) to wheelchair. I then got (claimant)'s purse from her vehicle. Afterwards I attempted to call (claimant)'s boyfriend to pick her up… No further witnesses to accident.

6. Claimant testified at hearing that on the day of her injury, she was working with her supervisor, Ms. Daugherty. Claimant testified that they were stocking a new store for employer, preparing the store for its grand opening. Claimant testified this involved completely stocking the entire store. Claimant testified that normally employer would provide a pallet to place cardboard boxes on that would then be moved to the back area where a cardboard compactor was located. However, on the day of claimant's injury a pallet was not provided to place the cardboard boxes on. Claimant testified that she was placing her cardboard boxes on the table. Claimant denied placing her boxes on the floor and testified she did not know how that boxes in question got to the floor.

7. Claimant testified that Ms. Daugherty said she was taking the pallet jack to move some product that was not to be stocked in the deli area to the back of the store. Claimant testified she doesn't recall stepping on the boxes, but slipped and injured her knee. Claimant testified she did not fall all the way to the floor, but caught herself.

8. Claimant's testimony that she did not place boxes on the ground is not refuted by any credible evidence in this case. The witness statements do not indicate that claimant placed the cardboard on the ground that caused her fall and are found to be consistent with claimant's testimony at hearing. The ALJ finds claimant's testimony at hearing to be credible.

9. The ALJ finds that respondents have failed to establish that it is more likely than not that claimant placed cardboard on the ground, or that if claimant placed cardboard on the ground, that the cardboard caused her to slip. The ALJ finds that the evidence establishes that it is just as likely that that the cardboard in question was placed on the ground by Ms. Daugherty and therefore, the ALJ cannot find that respondents have established their burden of proving that claimant committed a willful violation of a safety rule that would subject claimant to penalties under the Colorado Workers' Compensation Act pursuant to Section 8-42-112(1)(b), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents argue that claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of an injured worker's "willful failure to obey any reasonable rule" adopted by the employer for the employee's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.,* 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.,* 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. Before getting to the consideration of whether the claimant's conduct in this case was "willful", respondents must first establish that claimant violated a safety rule. In this case, claimant testified that she placed her cardboard on the table and did not place it on the floor. This leaves the possibility that Ms. Daugherty may have placed her cardboard on the floor, resulting in claimant slipping on the cardboard. As such, respondents have failed to establish that claimant committed a safety rule violation by placing her cardboard on the ground.

6. Because respondents have not established that claimant willfully violated a safety rule, respondents request for a 50% reduction of non-medical benefits pursuant to Section 8-42-112(1)(b), C.R.S. must be denied and dismissed.

ORDER

It is therefore ordered that:

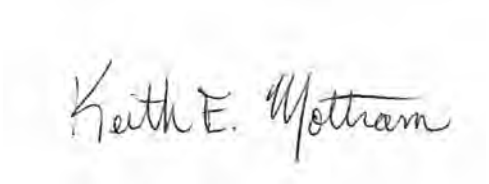
1. Respondents request for an Order allowing for a 50% reduction of non-medical benefits for a violation of a safety rule pursuant to Section 8-42-1112(1)(b), C.R.S. is denied and dismissed.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2015



Keith E. Mottram
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-985-670-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 23, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/23/15, Courtroom 3, beginning at 8:30 AM, and ending at 12:00 PM). Rashid Sadiq was the Somali/English Interpreter.

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through F were admitted into evidence, without objection. Claimant's objection to Respondents' Exhibit G was sustained and the exhibit was refused.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents. The proposed decision was filed, electronically, on September 28, 2015. On September 29, 2015, the Claimant filed objections in the form of suggested edits to the proposed decision. On the same date, the Respondents indicated no objection to the suggested edits, other than to the suggested edits to proposed Findings Nos. 7 and 11. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability and, if compensable, medical benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant drove a cab for the Employer as an independent contractor between 2012 and May 15, 2015.

2. As a condition of his contract with the Employer, the Claimant was required to periodically enter upon the Employer's premises to reconcile his account at the cashier's office.

3. Alfredo Maturo is the Operations Manager for the Employer. His responsibilities include overseeing driver accounts and, as necessary, retrieve leased vehicles from drivers whose accounts are substantially in arrears. Retrieval may be achieved by requesting keys to the cab and, if refused, reporting the vehicle stolen or sending a tow truck to the vehicle's location and towing it back to the Employer's premises.

The Incident

4. On May 15, 2015, the Claimant appeared at the Employer's premises to reconcile his account. While there, he encountered Jamal Bakar, Maturo's assistant operations manager. Bakar told the Claimant that he needed to see Maturo regarding his account.

5. The Claimant spoke with Maturo and Maturo told him that he needed to take the keys and take possession of the cab. The Claimant walked away from Maturo, exiting the building and walking toward East 41st Avenue between 11:00 and 11:30 AM. Maturo believed that the Claimant was walking to the cab which was the subject of his request. In fact, it was not the cab, but THE Claimant's personal vehicle.

6. The Claimant and Maturo had a discussion about return of the cab to the Employer as they walked in the direction of the Claimant's personal vehicle. The

Claimant testified that Maturo became aggressive and poked him in the chest once with his fingers. Maturo testified that he did not touch the Claimant, but merely extended his right hand with palm out and fingers pointed upward in the form of a gesture for the Claimant to stop. The upward palm is inconsistent with the Claimant's version of being poked in the chest by Maturo using the index, middle and ring fingers. Based on the Claimant's credibility deficits as herein below described, the ALJ finds Maturo's denial of touching the Claimant more credible than the Claimant's version. The ALJ, therefore, finds that Maturo did **not** touch the Claimant at the time in question.

7. At approximately the same time as the Claimant and Maturo walked to East 41st Avenue, another driver, Yusuf Ige, was exiting the premises. Ige represented himself as a committee leader, a form of driver representative equivalent to a union shop steward. On May 15 Ige arrived at the Employer's premises to reconcile his account before returning to the hospital to visit his wife and newborn child. He concluded his business and departed the premises. During the course of his departure, Ige observed the Claimant and Maturo facing each other and Maturo making a gesture of an outthrust right hand with palm directed at Claimant and fingers pointed upward. Ige did not stop to engage the Claimant or Maturo, continuing on his way.

8. The Claimant stated that he contacted the Denver Police Department on the afternoon of May 15th and reported being struck. He testified that he felt pain and sought medical attention at Rocky Mountain Occupational Services, implying or leaving the impression that such medical attention was in close proximity to his encounter with Maturo. In fact the Claimant first sought medical attention almost two months after the incident. The ALJ finds that this discrepancy compromises the Claimant's credibility. The Claimant stated that he experienced chest pain after the encounter and that he has not worked since May 15, 2015. Finally, he stated that he reported his injury to the Employer shortly after the event. The Workers' Claim for Compensation (Claimant's Exhibit 1) is dated June 11, 2015, almost one month after the incident, yet it recites a reporting on May 15, 2015. The ALJ, however, finds that the Employer was aware of the Claimant's claimed "assault" as of May 15, 2015, by virtue of the report to the Denver Police Department. The ALJ infers and finds that the Claimant felt that he was being deprived of his livelihood by Maturo and somehow felt that reporting a work-related injury would help him financially. As found, herein below, the Claimant had previous experience with a partially settled workers' compensation claim.

9. Maturo testified that after the Claimant left the premises, he returned to his office and proceeded to effectuate a recovery of the cab within the hour. Several hours later, he was visited by Denver Police Department officers and cited for striking the Claimant. The charge was ultimately dismissed on motion of the prosecution.

10. During cross examination, the Claimant was asked about interrogatory responses he had given concerning whether he had sustained any work related or non-work related injuries. The Claimant answered that question in the negative, denying

that he had sustained any injuries other than from the May 15, 2015 confrontation with Maturo. As found herein below, this answer was not truthful.

11. The ALJ took administrative notice of W.C. No. 4-906-836, a worker's compensation claim maintained by the Claimant on account of a December 19, 2012 accident with the same Employer and in which he injured his neck and low back. A November 26, 2013 Final Admission of Liability (FAL) and a July 25, 2013 Partial Stipulation and Motion for Approval bearing the Claimant's notarized signature was offered and accepted into the record. The record also contained a claim for compensation by Claimant dated June 11, 2015 and an accident report from the Employer which noted the report of injury as June 24, 2015 (Respondents' Exhibit F). The ALJ finds that the inconsistency between the Claimant's hearing testimony, under oath, and his answer to the above interrogatory, under oath, significantly compromises the Claimant's credibility.

12. The Claimant was first seen at Rocky Mountain Occupational Services on July 7, 2015 (almost two months after the incident in question). A physician diagnosed him with costochondritis. The initial report of that date states that the findings were consistent with the history and/or work related mechanism of injury, but no history of injury is contained within the report. Indeed, the "physician's signature is undecipherable and there is no explanation concerning the diagnosis. The ALJ is reminded of the anecdote where an individual who had allegedly suffered a traumatic event, which should have caused immediate consequences, fell down two weeks later, asked his lawyer how he did on the witness stand. His lawyer replied: "let me put it to you this way. If a punch Muhhamad Ali and he falls down two weeks later, I don't get to be heavy weight champion of the world." Based on the Claimant's delay in seeking medical treatment and the undecipherable and inadequate medical report, the ALJ infer and finds that the Claimant has failed to meet his burden of proving a work-related "costochronditis," caused by the circumstances of May 15, 2015.

Ultimate Findings

13. The ALJ finds the Claimant's testimony lacking in credibility for the reasons stated herein above. The ALJ finds Maturo's testimony that he did **not** touch the Claimant at the time in question credible and supported by the totality of the evidence.

14. Between the conflicting testimony of the Claimant and mature, the ALJ makes a rational choice to accept Maturo's version of the incident in question and to reject the Claimant's version.

15. The Claimant has failed to prove, by a preponderance of the evidence that he sustained a compensable injury on May 15, 2015, as he alleges.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, the Claimant's testimony was lacking in credibility for the reasons stated herein above. Maturo's testimony that he did **not** touch the Claimant at the time in question was credible, supported by the totality of the evidence, and dispositive of the compensability issue.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An

ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between the conflicting testimony of the Claimant and Maturo, the ALJ made a rational choice to accept Maturo's version of the incident in question and to reject the Claimant's version, which is dispositive of the compensability issue.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to prove that he sustained a compensable injury on May 15, 2015, as he alleges.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of September 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of September 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

The issue addressed in this decision concerns Claimant's entitlement to medical benefits, specifically an arthroplasty of the right hip. Because Respondents' medical expert agreed that the arthroplasty was reasonable and necessary the only question to be resolved is whether the need for the total hip replacement procedure was causally related to Claimant's admitted August 6, 2010 industrial injury

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on August 6, 2010 while working for Womack's Casino. She slipped on a wet floor and fell to the ground. She fell on her right side, but also injured her left knee. The left knee has been the primary focus of treatment throughout the course of her claim. She had two surgeries on the left knee, including a patellofemoral replacement in March 2014.

2. In addition to her left knee problems, Claimant has experienced slowly progressive right hip pain since the accident. As noted previously, she fell directly on her right side, including her right hip, in the initial accident. Claimant was referred to Dr. James, whose initial report documents "[t]he fall also caused pain in … [her] hip."

3. The right hip pain eventually diminished and became minor. The hip pain was far overshadowed by the significant and protracted problems she was having with her left knee (including multiple surgeries).

4. Claimant was referred to Dr. Messner for authorized treatment in December 2010. Dr. Messner has performed both surgeries on Claimant' left knee, and has been managing her treatment for several years.

5. On April 13, 2012, Claimant reported to Dr. Messner that she had "been having some intermittent pain in her right groin area for a while now." Dr. Messner explained in his deposition that groin pain is actually a classic sign of hip pathology. Dr. Messner obtained an x-ray of the right hip, which was interpreted as showing mild

arthritis. (Ex. 1/70). Dr. Messner explained in his deposition that the quality of the x-rays was limited, but at the time he did not see any significant issue other than the arthritis.

6. On February 25, 2013, Claimant' was evaluated by Dr. James' PA-C, Denver Hagar, for her right hip pain. The record notes "[s]he states that this is pain that occurred during the original workmen's comp injury." Claimant also reported "she had [sic] her hip during the original fall and it has hurt intermittently. She states that 2 months ago it started hurting more." She also reported that she had recently strained her hip while getting in her truck. PA-C Hagar did not believe the hip pain was related to the original injury and did not refer her for any additional evaluation.

7. Claimant underwent patellofemoral replacement surgery on the left knee on March 10, 2014.

8. In July 2014, Claimant again asked Dr. Messner to evaluate her right hip. She indicated that "for the last two months her hip pain has been increasing. The pain starts in the joint area and travels through her groin. She uses a walker at home when the pain is too great for the hip to hold her." Dr. Messner obtained x-rays of the right hip, which showed osteonecrosis of the femoral head. Dr. Messner referred Claimant for an MRI of the right hip.

9. The MRI confirmed osteonecrosis of the femoral head and showed a nondisplaced fracture of the femoral head. After reviewing the MRI, Dr. Messner discussed the history of the hip problems with Claimant in detail. Dr. Messner noted "[s]he does not recall a recent injury. She only remembers the fall on her hip when she injured her knee several years ago. . . . Her range of motion has been decreasing over the last year. She now has very little range of motion."

10. Claimant had a right total hip arthroplasty on August 25, 2014.

11. Dr. Messner testified in deposition regarding his opinion that the right hip osteonecrosis is medically probably related to Claimant' August 6, 2010 fall at work.

12. Dr. Larson performed a RIME at the request of the Respondents. Dr. Larson agreed that the right hip arthroplasty was reasonable and necessary treatment for the osteonecrosis in Claimant's right hip. But, Dr. Larson opined that the osteonecrosis is not causally related to Claimant's industrial injury. Dr. Larson did not offer any alternate causal explanation for the development of osteonecrosis. Rather, Dr. Larson opined that the cause is unknown.

13. The ALJ finds Claimant to be credible.

14. The ALJ finds Dr. Messner's analysis and medical opinions to be credible and more persuasive than medical evidence to the contrary.

15. The ALJ finds Caimant has proven by a preponderance of the evidence that she developed osteonecrosis as a direct and proximate consequence of her August 6, 2010 work injury.

CONCLUSIONS OF LAW

1. The Respondents are liable for authorized medical treatment that is reasonable, necessary and causally related to an industrial injury. C.R.S. § 8-42-101(1)(a). Specifically, C.R.S. § 8-42-101(1)(a) provides, "[e]very employer . . . shall furnish such medical [treatment] . . . as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." Whether a particular condition or treatment modality is causally related to the accident is a question of fact for the ALJ. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1999).

2. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. In deciding whether a claimant has met her burden of proof, the ALJ is empowered, "[t]o resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

4. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

5. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

6. The preponderance of persuasive evidence demonstrates that Claimant has met her burden in establishing that her right hip osteonecrosis, necessitating her need for right hip arthroplasty, is related to her industrial injury. While 20-50% of the cases of osteonecrosis develop without a known cause, i.e., they are "idiopathic", Dr. Messner persuasively articulated the factors which establish a causal connection between Claimant's osteonecrosis and her August 6, 2010 fall. Here, Claimant fell and landed on her right hip. As a consequence, her right hip directly impacted the floor. Claimant reported pain in the right hip at her first ATP evaluation after the accident; however, her hip pain was likely overshadowed by severe problems with the left knee, which became the primary focus of her treatment, as evidenced by her multiple left knee surgeries. Consequently, the Claimant did not mention or seek treatment for her hip pain until it worsened considerably approximately 20 months later. When Claimant requested that Dr. Messner evaluate her hip pain in April 2012, she reported that the pain had been present "for a while now." When she again sought treatment for the progressive hip pain in February 2013, she explained that "this is pain that occurred during her original workmen's comp injury." She further reported that "she had [sic] her hip during the original fall and it has hurt intermittently."

7. Dr. Messner took an x-ray of the right hip in April 2012. At that time, he did not perceive any fracture, but simply saw some "mild" arthritis. Subsequently, a MRI obtained in July 2014 revealed an "old" non-displaced fracture of the femoral head, and advanced bone destruction caused by osteonecrosis. Looking back on the 2012 x-ray with the benefit of hindsight, Dr. Messner realized that he had missed indicators that the fracture was present at that time. Dr. Messner likely missed it, he testified, because x-rays are less sensitive for subtle bone changes than MRIs and because of under-penetration during the 2012 x-ray resulting in a low quality image.

8. As Dr. Messner testified, the type of fall and impact that Claimant suffered is sufficient to cause a non-displaced femoral head fracture and the subsequent development of osteonecrosis secondary to disrupted blood supply to the femoral head. According to Dr. Messner about 90% of all femoral head fractures are caused by a direct fall to the ground without extra height added to it. Moreover, Dr. Messner

explained that when he was able to compare the 2014 MRI with the 2012 x-ray, he was able to discern an area of signal consistent with bone healing (i.e., increased mineralization) ***in the exact same area*** where the fracture and osteonecrosis appeared on the MRI in 2014. Specifically, Dr. Messner testified:

> A. [I]n 2012 when I'm looking at the X-ray in retrospect, I can see darkness in that area, which would mean . . . there is more mineral in that area. It could be that it's trying to heal but I just never picked up the fact that there was anything more going on there.
>
> Q. When you say "that area" –
>
> A. The area that's right in the center of the femoral head, ***just exactly where the basic outline of what the MRI shows, that area***. There was a pathology going on at that point.
>
> Q. So is that . . . the area where the most bone death had occurred?
>
> A. Yeah, that's where everything above that basic line there pretty much died, and then, therefore, once it got weaker, it just collapsed, and that was kind of the end of the hip.
>
> . . .
>
> A. Well, in retrospect, if you put the MRI right next to the [2012] X-ray, the location and even the undulation of where this fracture line and avascular necrosis superior to it, which the blood supply comes from the inferior aspect of the femoral neck up into the head, so it's only basically a one-directional supply for the most part. . . .
>
> So reality is, once you have a fracture across there, then you disrupt the blood supply, and it actually takes, basically, time. It's trying to heal, but it fails, and then it starts getting softer, then starts collapsing, and then two years later I've seen the results of that where it actually starts to destroy the rest of the joint because she is still walking on it. (Messner depo, at 16-17).

9. Dr. Messner also explained that the timeline for development of osteonecrosis in this case supports his opinion regarding causation. As a general rule, osteonecrosis can take up to five years to develop following a hip trauma. Here, Claimant developed symptoms of true hip pathology inside of 20 months following her fall. On the evidence presented, the ALJ concludes that Claimant's osteonecrosis developed well within the window of time expected following her initial trauma. The speed with which osteonecrosis develops is influenced by the degree of trauma. According to Dr. Messner, a high-energy displaced fracture is likely to progress to

osteonecrosis much more rapidly than does osteonecrosis from lower impact trauma causing, as found here a non-displaced fracture.

10. Finally, Dr. Messner testified that outside of trauma, Claimant has none of the other well known risk factors associated with the development of osteonecrosis. Studies have shown osteonecrosis can be associated with systemic steroid use (such as prednisone), smoking, excessive alcohol consumption, diabetes, radiation treatment, pregnancy and sickle-cell anemia. None of those risk factors are present in Claimant's case leading to Dr. Messner's opinion that her osteonecrosis developed after the blood supply to the femoral head was disrupted by her fall and subsequent femoral head fracture.

11. Based upon a totality of the evidence presented, the ALJ concludes that the opinions of Dr. Messner are more persuasive than the contrary opinions of Dr. Larson. Dr. Larson conceded that trauma is a well-established risk factor for the development of osteonecrosis, but that only "high-energy" trauma involving displaced fractures or fracture-dislocations were sufficient to cause osteonecrosis because those injuries will disrupt blood flow to the head of the femur. Dr. Larson opined that the "trauma" in this case was "insufficient" to cause such disruption, that he has not seen a case where a low energy fall caused osteonecrosis and that the mainstream orthopedic literature does not describe such a catalyst for the development of osteonecrosis. On the other hand, Dr. Messner explained, osteonecrosis frequently develops after less severe trauma, including non-displaced fractures, and subluxation of the hip joint such as being tackled from behind in football. According to Dr. Messner, anything that disrupts the blood supply to the femoral head can lead to osteonecrosis, a fact with which Dr. Larson apparently agrees. Based upon the evidence presented, the ALJ concludes that Claimant's August 6, 2010 fall, more probably than not, resulted in a non-displaced femoral head fracture causing disruption in the blood supply to the femoral head setting the stage for Claimant's eventual development of osteonecrosis and subsequent need for a hip replacement procedure. In so concluding, the ALJ credits the testimony of Dr. Messner to find that, with the benefit of hindsight, the clinical picture over time is consistent with slow and incomplete healing from the initial injury, likely due to disrupted blood supply, followed by progressive bone death and eventual joint destruction caused by osteonecrosis, all culminating in the need for a right hip arthroplasty. Accordingly, Claimant has met her burden to prove that her need for medical treatment for the right hip flows proximately and naturally from her August 6, 2010 industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The Claimant's right hip osteonecrosis is a compensable component of her August 2010 injury.

2. Respondents shall pay all reasonable and necessary medical benefits related to Claimant's right hip, including the cost of the right total hip arthroplasty.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: 9/28/15

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant is entitled to temporary total disability (TTD) benefits from March 13, 2014, through April 9, 2014?

2. Whether the claimant is entitled to TTD benefits from May 1, 2014, through June 17, 2014?

3. Whether the claimant's injuries include her back and other body parts as mentioned in the opinion of Dr. Timothy Hall, the division sponsored independent medical examiner (DIME)?

4. Whether the issue of the claimant's back being related to this claim was previously litigated and resolved in the claimant's favor?

The ALJ resolved issues 1, 2, and 3 above favorably for the claimant and thus does not render a decision on issue 4 as it is now moot.

FINDINGS OF FACT

1. On March 13, 2014 Dr. Richard Nanes, the claimant's authorized treating physician (ATP) for her work related left knee injury, declared the claimant to be unable to work beginning that date, due to her left knee total knee replacement being quite painful, as well as requiring diagnostic tests to determine the nature of her back pain. Specifically, Dr. Nanes observed that the claimant was "only able to flex her left knee to 90◦ and extension is mildly limited and these movements are very painful for the patient."

2. Dr. Nanes erroneously attributed her back pain at the time to the work injury based upon a misreading of a prior Summary Order issued by this ALJ.

3. Nonetheless, the ALJ finds that the Division independent medical examination (DIME) opinion of Dr. Hall asserts that the back symptomatology is related to the claimant's underlying work related total knee replacement as a result of her altered gait. The ALJ finds that Dr. Hall's opinion on this issue is credible and

persuasive and the ALJ finds that the claimant's back symptoms are related to the claimant's work injury of March 13, 2005.

4. On April 8, 2014 Dr. Nanes returned the claimant to modified duty effective April 10, 2014.

5. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including March 13, 2014 through and including April 9, 2014 as a direct result of her work related injury of March 13, 2005.

6. On May 1, 2014 the claimant's work related left total knee replacement became unstable while the claimant was at home causing her to fall.

7. This is consistent with the claimant's history of having problems with her knee giving out on her a number of times previously. The knee instability had already been documented previously by the surgeon Shawn Nakamura, M.D., on August 26, 2013, observing: "I definitely think she has flexion instability."; "I also think she tore her PCL…."; and, "She does have slight instability in extension, particularly medial. Positive instability in flexion. Positive anterior and posterior instability in flexion. When she ambulates, when the knee gets into flexion, she feels like she is going to fall." Dr. Nanes also found a lot of play in the knee as of October 23, 2012.

8. The claimant sought treatment on May 1, 2014 at the Emergency Department that same day at the St. Thomas More Hospital. The claimant was referred back to Dr. Nanes.

9. The claimant was seen by Dr. Nanes later that same day. Dr. Nanes took the claimant off of work from and including May 1, 2014 and the claimant was continued off work up to and including June 17, 2014, which was the day prior to the claimant having work related revision surgery on the left knee, and on which day the respondent began paying the claimant TTD benefits as a result of that surgery.

10. Dr. William Ciccone, the respondent's IME doctor, agreed that there was documented knee instability before the claimant's May 1, 2014 fall and that the instability would not have resolved on its own before the June 18, 2014 surgery by Dr. Nakamura.

11. The ALJ finds that the claimant was taken off work by Dr. Nanes from and including May 1, 2014 through and including June 17, 2014 as a direct result of her work related injury of March 13, 2005.

12. Dr. William Ciccone opined that an altered gait from a knee injury could cause back pain. He stated that it would be expected to get worse over time as was determined by Dr. Hall in his report.

13. The ALJ finds that the claimant's back has been injured, along with her head, shoulders, neck, and upper extremities, as a result of the fall that occurred in October of 2012. This was specifically part of the opinion by the DIME physician. The ALJ finds the opinions of Dr. Hall with respect to the relatedness of the back, head, shoulders, neck, and upper extremities, to be credible and persuasive. In addition, as a result of the claimant's latest fall, on May 1, 2014, the claimant suffered further injury to her back. Most likely the back pain stems from a combination of these events. Either way, the ALJ finds that the claimant has established that it is more likely than not that the claimant's current back issues, as well as her head, shoulders, neck, and upper extremities issues, are causally related to her industrial injury of March 13, 2005.

14. The ALJ finds that the claimant has established that it is more likely than not that the claimant's current medical issues with her back, head, neck, and shoulders are related to her industrial injury of March 13, 2005 and that the respondent is responsible for the payment of medical treatment related to these issues.

15. The respondent, at the time of the hearing, had not received a bill for the ED services received by the claimant on May 1, 2014 and thus, understandably, had not paid it by the time of the hearing. The ALJ finds that the respondent is responsible for the payment of the May 1, 2014 ED visit as it was causally related to the claimant's industrial injury.

16. The ALJ finds that the respondent has paid for the claimant's MRI of March 26, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S.

2. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

5. A workers' compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1)(c); *Faulkner v. ICAO,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores v. Industrial Claim Appeals Office*, 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). This includes establishing entitlement to medical treatment. See *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term “disability”

connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to TTD benefits from and including March 13, 2014 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.

9. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, *supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

10. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013.

11. The claimant seeks medical benefits in the way of payment for the March 26, 2014 low back MRI and the claimant’s May 1, 2014 visit to St. Thomas More Hospital. As found, the respondent paid for the MRI, making that issue moot. It is noted that it has generally been held that payment of medical services is not in itself an

admission of liability. *Ashburn v. La Plata School District*, W.C. No. 3-062-779 (May 4, 2007).

12. Payment for the May 1, 2014 hospital visit pivots on whether the fall that morning occurred due to the claimant's left knee buckling as a result of her industrial injury. As found above, the claimant has established by a preponderance of the evidence that the ED visit was as a result of the industrial injury. The ALJ concludes that the respondent is therefore liable for payment of the ED bill.

13. The claimant seeks treatment for her shoulders, neck, headaches, left thumb, and right hand.

14. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that her current issues involving her back, head, shoulders, neck, and upper extremities are related to her industrial injury and that the respondent is responsible for payment of medical care to cure or relive the claimant from the effects of these issues.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant TTD benefits from and including March 13, 2104 through and including April 9, 2014 as well as the period from and including May 1, 2014 through and including June 17, 2014.

2. The respondent shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of her conditions to her back, head, shoulders, neck, and upper extremities as found herein.

3. The respondent shall pay for the claimant's emergency department visit to St. Thomas More Hospital on May 1, 2014.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DAE: April 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

This matter is remanded to the Administrative Law Judge by the ICAO Final Order dated February 2, 2015. The ICAO remanded this matter to the Judge for further findings whether Claimant established by a preponderance of the evidence that her scheduled impairment should be converted to whole person. Specifically, the matter is remanded to the Judge for determination whether Claimant established by a preponderance of the evidence that the situs of her functional impairment is off the schedule and thus she is entitled to an order converting her scheduled impairment rating to a whole person.

FINDINGS OF FACT

1. The Judge incorporates by reference Findings of Fact paragraphs 1 through 24 of the August 21, 2014, "Corrected Order: Findings of Fact, Conclusions of Law and Order."

2. The Judge makes these further findings based on Claimant's credible testimony. Claimant testified that she cannot walk straight because of her limp. Claimant testified that she has been limping since a work related surgery in April 2010. Claimant explained that her limp was caused by the fact that she cannot place her full weight on her left foot because it hurts on both the front and back of the left foot. Claimant further testified that she experiences burning pain in her thigh and stabbing pain in the left side of her upper thigh and buttock. Claimant testified that she experiences pain in her kneecap and ankle. Claimant testified that she uses a cane whenever her pain increases and her balance is off. Use of the cane by Claimant occurs in both the winter and summer months. Claimant further testified that her pain increases when the weather is windy or very cold. Claimant testified that her pain never goes away.

3. Claimant further testified credibly that her left leg is colder than the right leg and that the color of the left foot changes. Though no treating physician ever observed a change in color of the left leg or foot, Claimant had admitted into evidence a photograph of her legs on a date after she was placed at MMI. The photograph depicts Claimant's left and right legs looking downward from a standing position reflecting the pigment of the left leg to be different and darker than the pigment of the right leg. Claimant testified that she has no sensation in four toes on the left foot and she experiences ankle swelling.

4. Claimant takes a number of different medications for pain and depression. Claimant cannot kneel, crawl, crouch or climb stairs as a result of the pain in her

left lower extremity, low back, buttock and left groin areas. Claimant has limitations on the amount of time she can walk, sit, and stand because of the pain she experiences in the left lower extremity, low back, buttock and left groin areas.

5. The evidence established that Claimant proved by a preponderance of the evidence that the situs of her functional impairment extends beyond the left lower extremity into the low back, buttock and left groin areas.

6. The situs of Claimant's functional impairment is not on the schedule of disabilities and should be converted to a whole person impairment. Dr. Fall, the DIME, determined that Claimant's impairment rating was 11% scheduled and 4% whole person. This rating was rendered by Dr. Fall on April 26, 2013, when she performed the DIME examination and prepared a report. Dr. Cebrian credibly opined regarding Claimant's work injury, her course of treatment and impairment rating in an April 24, 2014, report. He credibly opined that Dr. Fall erred in rating Claimant's left knee because there is no left knee diagnosis and no objective pathology. Dr. Cebrian credibly opined that Claimant's original injury was to her left knee when she slipped and fell on it in a parking lot. However, Dr. Cebrian credibly opined that Claimant had a contusion of the left knee as a result of the December 2009 work injury which long ago resolved.

7. Dr. Fall assigned 7% scheduled impairment for Claimant's left ankle injury. It is found that Claimant has a 7% scheduled impairment of the left ankle, which converts to a 3% whole person impairment, using Table 46 of the *AMA Guides*.

CONCLUSIONS OF LAW

On remand, the following conclusions of law are entered:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-

43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Claimant contends that she is entitled to a whole person impairment rating for her left lower extremity because her functional impairment extends beyond the left lower extremity into the left groin, buttock and low back. Respondents contend that Claimant did not prove entitlement to a whole person impairment rating for the left lower extremity.

4. The term "injury" refers to the part of the body that has sustained the ultimate loss. *Mountain City Meat Co. v. Oqueda,* 919 P.2d 246 (Colo. 1996). In the context of Section 8-42-107(1), the term "injury" refers to the part or parts of the body that have been functionally impaired or disabled as a result of the injury. *Maree v. Jefferson County Sheriff's Department*, W.C. No. 4-260-536 (ICAO August 6, 1998), citing *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366 (Colo. App. 1996). Section 8-42-107(1)(a), C.R.S. (2003), limits medical impairment benefits to those provided in subsection (2) where the claimant's injury is one enumerated on the schedule. The schedule of specific injuries includes, in Section 8-42-107(2), the loss of the leg; however, impairment of the buttock and low back is not listed in the schedule of disabilities. *Maree v. Jefferson County Sheriff's Department*, *supra*. Although Section 8-42-107(2) does not describe a buttock or low back injury, our courts have construed that the dispositive issue is whether the claimant sustained a functional impairment to the portion of the body that is listed on the schedule of disabilities. *See Strauch v. PSL Swedish Healthcare*, *supra*. Thus, the ALJ is constrained to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Id.* Pain and discomfort which limit the claimant's use of a portion of his body may be considered functional impairment. *Beck v. Mile Hi Express, Inc.*, W.C. No. 4-283-483 (ICAO February 11, 1997).

5. The Judge finds and concludes that Claimant established by a preponderance of the evidence that situs of her functional impairment extends from the left lower extremity into the low back, left groin and buttock where Claimant suffers functional impairment restricting her from kneeling, crawling, crouching, climbing stairs, walking sitting and standing. Claimant proved that she experiences pain in the left lower extremity, low back and left groin, which causes her to limp and limits her functioning. Since the situs of Claimant's functional impairment does not appear on the schedule of disabilities, Claimant is entitled to a whole person impairment rating.

6. The evidence presented at hearing further established that Claimant is entitled to a 3% whole person impairment of her left ankle injury. This rating is arrived at based on the opinions of Drs. Fall and Cebrian. Claimant is not entitled to a rating for loss of range of motion in Claimant's left knee because, as Dr. Cebrian points out, there is no left knee diagnosis and no objective pathology. The Judge adopts Dr. Fall's 7%

scheduled rating for Claimant's left ankle injury, which converts to a 3% whole person impairment.

ORDER

It is therefore ordered that:

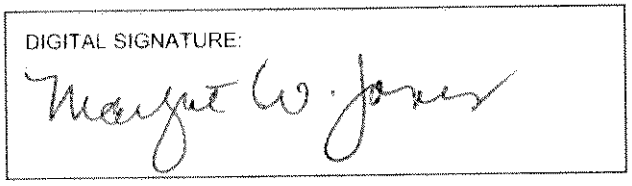
1. Respondents shall pay Claimant workers' compensation benefits based on a 3% whole person impairment.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: __April 3, 2015____



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

This matter is remanded to the Administrative Law Judge by the ICAO Final Order dated February 2, 2015. The ICAO remanded this matter to the Judge for further findings whether Claimant established by a preponderance of the evidence that her scheduled impairment should be converted to whole person. Specifically, the matter is remanded to the Judge for determination whether Claimant established by a preponderance of the evidence that the situs of her functional impairment is off the schedule and thus she is entitled to an order converting her scheduled impairment rating to a whole person.

FINDINGS OF FACT

1. The Judge incorporates by reference Findings of Fact paragraphs 1 through 24 of the August 21, 2014, "Corrected Order: Findings of Fact, Conclusions of Law and Order."

2. The Judge makes these further findings based on Claimant's credible testimony. Claimant testified that she cannot walk straight because of her limp. Claimant testified that she has been limping since a work related surgery in April 2010. Claimant explained that her limp was caused by the fact that she cannot place her full weight on her left foot because it hurts on both the front and back of the left foot. Claimant further testified that she experiences burning pain in her thigh and stabbing pain in the left side of her upper thigh and buttock. Claimant testified that she experiences pain in her kneecap and ankle. Claimant testified that she uses a cane whenever her pain increases and her balance is off. Use of the cane by Claimant occurs in both the winter and summer months. Claimant further testified that her pain increases when the weather is windy or very cold. Claimant testified that her pain never goes away.

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left lower extremity, low back, buttock and left groin areas. Claimant has limitations on the amount of time she can walk, sit, and stand because of the pain she experiences in the left lower extremity, low back, buttock and left groin areas.

5. The evidence established that Claimant proved by a preponderance of the evidence that the situs of her functional impairment extends beyond the left lower extremity into the low back, buttock and left groin areas.

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7. Dr. Fall assigned 7% scheduled impairment for Claimant's left ankle injury. It is found that Claimant has a 7% scheduled impairment of the left ankle, which converts to a 3% whole person impairment, using Table 46 of the *AMA Guides*.

CONCLUSIONS OF LAW

On remand, the following conclusions of law are entered:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-

43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Claimant contends that she is entitled to a whole person impairment rating for her left lower extremity because her functional impairment extends beyond the left lower extremity into the left groin, buttock and low back. Respondents contend that Claimant did not prove entitlement to a whole person impairment rating for the left lower extremity.

4. The term "injury" refers to the part of the body that has sustained the ultimate loss. *Mountain City Meat Co. v. Oqueda,* 919 P.2d 246 (Colo. 1996). In the context of Section 8-42-107(1), the term "injury" refers to the part or parts of the body that have been functionally impaired or disabled as a result of the injury. *Maree v. Jefferson County Sheriff's Department*, W.C. No. 4-260-536 (ICAO August 6, 1998), citing *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366 (Colo. App. 1996). Section 8-42-107(1)(a), C.R.S. (2003), limits medical impairment benefits to those provided in subsection (2) where the claimant's injury is one enumerated on the schedule. The schedule of specific injuries includes, in Section 8-42-107(2), the loss of the leg; however, impairment of the buttock and low back is not listed in the schedule of disabilities. *Maree v. Jefferson County Sheriff's Department*, *supra*. Although Section 8-42-107(2) does not describe a buttock or low back injury, our courts have construed that the dispositive issue is whether the claimant sustained a functional impairment to the portion of the body that is listed on the schedule of disabilities. *See Strauch v. PSL Swedish Healthcare*, *supra*. Thus, the ALJ is constrained to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Id.* Pain and discomfort which limit the claimant's use of a portion of his body may be considered functional impairment. *Beck v. Mile Hi Express, Inc.*, W.C. No. 4-283-483 (ICAO February 11, 1997).

5. The Judge finds and concludes that Claimant established by a preponderance of the evidence that situs of her functional impairment extends from the left lower extremity into the low back, left groin and buttock where Claimant suffers functional impairment restricting her from kneeling, crawling, crouching, climbing stairs, walking sitting and standing. Claimant proved that she experiences pain in the left lower extremity, low back and left groin, which causes her to limp and limits her functioning. Since the situs of Claimant's functional impairment does not appear on the schedule of disabilities, Claimant is entitled to a whole person impairment rating.

6. The evidence presented at hearing further established that Claimant is entitled to a 3% whole person impairment of her left ankle injury. This rating is arrived at based on the opinions of Drs. Fall and Cebrian. Claimant is not entitled to a rating for loss of range of motion in Claimant's left knee because, as Dr. Cebrian points out, there is no left knee diagnosis and no objective pathology. The Judge adopts Dr. Fall's 7%

scheduled rating for Claimant's left ankle injury, which converts to a 3% whole person impairment.

ORDER

It is therefore ordered that:

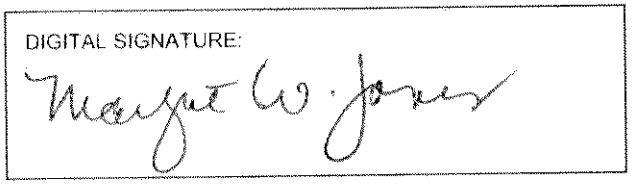
1. Respondents shall pay Claimant workers' compensation benefits based on a 3% whole person impairment.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: __April 3, 2015____



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issue on remand is whether or not the respondent-insurer is entitled to recoup an overpayment that was specifically included in negotiations between the respondent-insurer, the claimant, and the third-party insurer in the settlement of the third-party claim.

FINDINGS OF FACT

1. In 2010, the claimant sustained admitted, compensable injuries to her neck, shoulders, and elbows when she was rear-ended in an automobile accident while she was en route from a client's home to the respondent-employer's office. In addition to medical benefits, the respondent-insurer paid the claimant temporary total disability (TTD) benefits for the period during which she could not work as a result of her compensable injuries.

2. The claimant started working for a different employer sometime in 2011 or 2012 but admits that she continued receiving TTD benefits. The benefits continued because the claimant failed to provide the respondent-employer with a completed return to work questionnaire.

3. Because the respondent-employer could not fully document the claimant's return to work, the division of workers' compensation would not release the respondent-insurer from paying the claimant TTD benefits. The respondent-insurer therefore claimed an overpayment of $8,451.08 on its final admission of liability (FAL).

4. In addition to receiving workers' compensation benefits, the claimant also pursued an action against the driver who rear-ended her. The other driver's insurer offered to settle with the claimant for the policy limit of $50,000.

5. Because it had a statutory subrogation right to compensation it had paid to the claimant, the respondent-insurer participated in the settlement negotiations with the other driver's insurer and the attorney representing the claimant in the automobile action. At the time of the settlement negotiations, the respondent-insurer's lien totaled $44,739.39, which represented the total amount of worker's compensation benefits the

respondent-insurer had paid to the claimant to that date. The three parties agreed to divide the settlement proceeds as follows: $18,000 payable to the respondent-insurer; $13,000 payable to the claimant; and, the remainder ($19,000) payable to the claimant's automobile accident attorney.

6. The letter memorializing the parties' agreement makes no mention of the overpayment. The letter states: "This letter is to confirm that [the respondent-insurer] has accepted your offer of $18,000.00 for full and final settlement of its third party subrogation lien in the above-matter." The letter went on to invite the claimant to "contact [the respondent-insurer's subrogation counsel] immediately in the event this correspondence does not accurately reflect the terms of our agreement or should you have additional questions/concerns."

7. Several months after the distribution of the settlement funds, the respondent-insurer claimed reimbursement of the overpayment. The respondent-insurer maintained that because the overpayment was not addressed in the settlement negotiations, it was excluded from the settlement proceeds.

8. The ALJ finds that the overpayment was considered and/or negotiated as a part of the resolution between the claimant and the respondent-insurer over division of the negligent third-party's settlement proceeds. Thus, any overpayment made to the claimant is not recoverable separately from the claimant, as the respondent-insurer received the settlement proceeds from the third-party insurer that specifically included the consideration of the overpayment. The respondent-insurer fully received the benefit of their bargain with the claimant and the third-party insurer.

CONCLUSIONS OF LAW

1. "When a contract is unambiguous, the court must give effect to the contract as written, unless the contract is voidable on grounds such as mistake, fraud, duress, undue influence, or the like, or unless the result would be an absurdity." *Ringquist v. Wall Custom Homes, LLC*, 176 P.3d 846, 849 (Colo. App. 2007).

2. When a document is ambiguous, a court may consider parol evidence to explain or clarify the meaning of a document or the effect of its provisions. *E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 974 (Colo. 2005). Courts do not, however, "consider parol evidence unless the contract is so ambiguous

that the intent of the parties is unclear." *Janicek v. Obsideo, LLC*, 271 P.3d 1133, 1138 (Colo. App. 2011).

3. Here, the letter memorializing the parties' settlement agreement specified that it was for "full and final settlement" of the respondent-insurer's "subrogation lien." A "full and final settlement" necessarily entails a settlement of all claims and debts associated with a claim. It constitutes resolution of the entire dispute between the parties. *See, e.g., River Bend Capital, LLC v. Lloyd's of London*, 63 So. 3d 1092, 1096 (La. Ct. App. 2011) (further discovery and hearing unnecessary to ascertain meaning of "in full and final settlement" because "language is clear and unambiguous").

4. Because the settlement letter at issue here incorporated the phrase "full and final settlement of [the respondent-insurer's] third party subrogation lien," the settlement unambiguously encompassed all portions of the lien, including the overpayment.

5. The respondents have failed to establish by a preponderance of the evidence that they are entitled to recover the overpayment from the claimant.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents request for reimbursement of the overpayment paid to the claimant in the amount of $8,451.08 is denied and dismissed.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 30, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-867-720-03

ISSUE

- Whether Claimant established by a preponderance of the evidence that the recommended surgical repair of the peroneal nerve is reasonable and necessary and related to the Claimant's work injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained a work related injury on September 28, 2011 when he was assaulted while doing a security check of his employer's building. The peroneal nerve issue which is heard today is the only medical benefit that remains at issue.

2. Claimant suffered severe injuries. The injuries included facial and jaw fractures, lung contusion, kidney injury, broken fingers, and a right patellar fracture.

3. Initially, the right patellar fracture was treated non-operatively with a knee immobilizer.

4. On January 24, 2012 Denver Health Medical Center records show that Dr. Hak ordered an MRI of Claimant's right knee following the full healing of the patellar fracture for the possibility of meniscal injuries.

5. Claimant had previous right knee injuries outlined in Dr. King's February 12, 2012 evaluation. Dr. King's notes indicate that Claimant had an ACL repair in the 1980's as a result of a participating in athletics. His initial repair required revision surgery as well as treatment of catastrophic lateral meniscus tears with lateral meniscal transplant in the 1990's by Dr. Ferrari at Denver Health Medical Center. Claimant testified that following Dr. Ferrari's repair, his right knee was doing very well and he was not having any problems with his right knee. Claimant testified that he was very physically active, and engaged in activities including snowboarding, mixed martial arts, cage fighting, and a job that was very physical prior to the assault.

6. On March 20, 2012 Claimant was diagnosed with right patellar fracture, healed, with right lateral and medial meniscal issues, and mild ACL insufficiency.

7. On May 2, 2012 Dr. Jarrod King at Denver Health Medical Center performed right knee surgery on Claimant which included a partial arthroscopic medial and lateral meniscectomy; lysis of adhesions; chondroplasty of the medial femoral condyle medial facet of the patella and posterior trochlea; removal of loose bodies.

8. Claimant underwent post operative physical therapy for his right knee, and as of October 31, 2012 physical therapy notes show ongoing pain 8/10 of the right knee. Claimant continued with poor strength, antalgic gait, and decreased weight bearing of his right lower extremity with limited patellar mobility.

9. On January 22, 2013 Claimant transferred his medical care to Dr. Kristin Mason who noted Claimant's complaints of right knee pain increased by walking, standing, and driving.

10. Claimant underwent numerous treatments in attempts to relieve his right knee complaints, including physical therapy and Hyalagan injections. However his medical records document continued decreased range of motion in his right knee, increased pain with ambulation, and continued use of a knee brace and later of a cane.

11. On September 18, 2013 Claimant underwent TMJ replacement surgery using donor bone from his right hip. He stopped physical therapy while he recovered from that surgery. Following the surgery Dr. Mason recommended Claimant begin physical therapy again for his knee and back which was denied by Insurer.

12. On November 15, 2013 Insurer requested a medical record review with Dr. Allison Fall to address the issue of *relatedness of Claimants low back condition* and if related whether the low back required medical care and treatment. Dr. Fall opined at that time that there was no objective evidence of a work related lumbar spine condition.

13. On December 10, 2013, in response to Respondents' inquiry, Dr. Mason continued to opine that Claimant needed additional physical therapy for his knee.

14. Physical therapy was eventually authorized and notes from Camie Cooper, PT dated January 2, 2014 state that Claimant is very sore in right knee.

15. Claimant testified that he started to notice increased problems with his right knee during what he described as the second round of physical therapy. In January of 2014, he began to notice pain from his knee down into his shin that would cause his foot to pull up and his calf to cramp, waking him at night, and increasing over time. Claimant's testimony is consistent with Dr. Mason's medical records.

16. According to Dr. Mason during her January 3, 2014 evaluation, Claimant had restarted physical therapy. Claimant noted that his medial unloader brace had broken but he was using a neoprene sleeve for his knee. Dr. Mason noted on physical examination that Claimant's right knee lacked full extension; there was atrophy of the Vastus Medialis Obliquus ("VMO"), and hypertrophic medial compartment changes.

17. Respondent requested that Claimant attend a Respondents' IME examination with Dr. Fall which included a physical examination. This occurred on January 23, 2014. Dr. Fall performed a physical examination of Claimant's right knee as

part of her evaluation and noted obvious bony osteoarthritic changes when comparing the right to left knee. There was retro patellar crepitus bilaterally, right worse than left and noted loss of range of motion of flexion of the knee. Dr. Fall opined Claimant was at MMI as of that date and the only part of his current problems that would require physical restrictions was his right knee.

18. On February 11, 2014 Dr. Mason noted that Claimant was complaining of increased pain which she attributed in part to a more aggressive work out in physical therapy. Claimant reported having more pain in the shin below the knee as well. On physical examination she noted more tenderness over the anterior tibia, and tibial tubercle on the right.

19. Claimant testified that following his injury he always had pain in his right knee cap area which was sharp and pain around his knee, like a horseshoe around the knee cap, but the shooting pain in his shin was new.

20. On February 25, 2014 Dr. Mason noted that Claimant was experiencing more pain on the right side of his shin, especially when he walked. On exam, Claimant had decreased sensation in the superficial and deep peroneal nerve distribution on the right and lesser at the saphenous. Dr. Mason noted prominent osteophyte formation over the medial compartment and tenderness over the fibular head. Because she was concerned Claimant might be developing a peroneal nerve issue. She ordered x-rays of the right knee and an EMG.

21. On March 14, 2014 Dr. Mason performed the EMG which showed a mild lesion in the peroneal nerve across the fibular head. According to Dr. Mason, Claimant had a patellar fracture with some contracture of the knee and now peroneal nerve dysfunction. Dr. Mason referred Claimant to Dr. David Schnur for evaluation and treatment of the peroneal neuropathy.

22. On April 16, 2014 Dr. Schnur evaluated Claimant and agreed with Dr. Mason that Claimant had a lesion of the peroneal nerve. Dr. Schnur indicated that surgery to release the peroneal nerve would be reasonable for shin pain but would not alleviate much of the knee pain.

23. On April 22, 2014 Dr. Mason indicated that she agreed with the surgical plan by Dr. Schnur for the peroneal nerve release. Dr. Mason recorded ongoing right knee pain with patellar fracture and peroneal nerve entrapment due to scar tissue around the knee. Dr. Mason noted that the peroneal nerve entrapment was confirmed by clear EMG abnormalities. She advised that Claimant had significant trauma to the knee and "one must believe that included soft tissue trauma since there was enough force to fracture the patella."

24. Dr. Fall, however, found the nerve testing "inclusive" and "non-diagnostic." Dr. Fall's opinion that the nerve testing was not reliable for diagnosing an injury to the peroneal nerve was based upon the subjective nature of the testing, the lack of H-testing, as well as the lack of comparison to the left leg. Dr. Fall, noting the

lack of denervation, ultimately described the nerve testing as “soft findings.”

25. On May 14, 2014 Dr. Fall prepared another medical record review and addendum to her January 23, 2014 Respondents’ IME report. She did not re-examine Claimant even though his peroneal nerve entrapment arose after her Respondent’s IME exam. Dr. Fall provided an opinion that the recommendation for the peroneal nerve release at the right knee by Dr. Schnur was not medically reasonable and necessary as related to the work injury because (1) there was no documented injury to the nerve and (2) Claimant’s symptoms were not consistent with that diagnosis.

26. On May 27, 2014 Insurer denied Dr. Schnur’s request for authorization of peroneal nerve release based upon the opinion of Dr. Fall that the surgery was not reasonable, necessary or related to the injury.

27. On June 3, 2014 Dr. Mason defended her recommendations and noted that it was her understanding that Dr. Fall was not impressed with the EMG findings despite significant slowing across the fibular head and did not agree to the surgery although Dr. Schnur concurred and recommend it. Dr. Mason noted that Dr. Schnur is the local expert in peroneal nerve decompression. She indicated that she was continuing to recommend the peroneal nerve decompression as recommended by Dr. Schnur. She noted that in her opinion there were clear-cut EMG abnormalities and symptoms congruent with those abnormalities.

28. On June 4, 2014 Dr. Mason, in response to detailed questions from Insurer, indicated:

> That with respect to Dr. Fall’s findings that the peroneal nerve release is unrelated, I disagree, I am the one who performed the EMG/NCV. I do not think the findings are nonspecific. He has swelling across the fibular head, which is the area of entrapment. Because he does not have acute denervation that does not necessarily mean he does not have a problem with the nerve. I do not even have a copy of her report to review so it is difficult me to refute her opinions when they are offered secondhand, but I believe she is mistaken on this issue. It is not difficult to presume that he had a soft tissue injury from the trauma in addition to the patellar fracture. Entrapment due to scar tissue is something that tends to occur over time and is a gradual process. I believe the patient’s symptomatology does fit in with the EMG findings and, obviously, Dr. Schnur agreed with me. I have worked with Dr. Schnur on a couple of other cases and I think he is pretty conservative about recommending surgery for this type of problem and the fact that he did recommend surgery on [Claimant] is significant.

29. The ALJ gives more weight to the opinions of the treating physicians, Dr. Kristin Mason who is board certified in physical medicine and rehabilitation and electrodiagnostic medicine, and Dr. David Schnur who specializes in peroneal nerve treatment, than the opinions of Dr. Allison Fall, an expert retained by Insurer who performed a records review and did not physically examine Claimant for a peroneal nerve problem as it developed subsequent to her physical examination of Claimant.

30. Dr. Mason's deposition testimony was persuasive and credible. Dr. Mason testified as an expert in physical medicine rehabilitation and electrodiagnostic testing, an area in which she is board certified. She testified that she assumed medical care of Claimant on January 22, 2013 for his September 28, 2011 injury. Dr. Mason testified that Claimant had significant trauma to his knee as a part of the assault including a patellar fracture and two torn menisci which required surgery. Dr. Mason testified that Claimant's right knee had multiple operations, before and after the injury, but that Claimant's knee was hit hard enough during the assault that it broke bone and tore cartilage.

31. Dr. Mason acknowledged that the symptoms that led her to perform an electrodiagnostic study were remote from the actual injury date because her theory is that the peroneal nerve injury developed because of the formation of scar tissue in the injured areas as a result of the surgical repair of the torn meniscus, and as a consequence always develops remote in time from the injury date. According to Dr. Mason Claimant began to complain of pain in the outer compartment of his leg and shin which was a new complaint in February of 2014 in addition to his other complaints of ongoing knee problems. Claimant was also having cramping on the outside of the leg along with a physical examination consistent with nerve irritation and a positive Tinel's sign at the top of his fibular head.

32. Based upon Claimants symptoms and physical examination, Dr. Mason performed an EMG to confirm the nerve damage, and the EMG showed slowing of the nerve at the fibular head and some slowing of the sensory nerve which were significant for peroneal nerve damage. Dr. Mason testified that she could have tested Claimant's other knee to compare, but because an EMG is not a stand-alone test in physical medicine and rehabilitation but an adjunct to physical examination she did not perform the EMG test on the other leg. Dr. Mason testified that it was not necessary in her opinion to diagnosis the peroneal nerve problem by performing the EMG on Claimant's other knee because she had been following him as a patient for some time and these were new complaints, the examination was consistent with the nerve problem, and the EMG results confirmed the nerve damage. Dr. Mason also preformed a new knee X-Ray to confirm that there was not some other reason for the new symptoms. There were no new findings on X-Ray.

33. Dr. Mason testified that she referred Claimant to Dr. Schnur for evaluation of peroneal nerve entrapment including treatment recommendations, and he agreed

with her diagnosis and recommended a nerve release. Dr. Mason testified that the her Deposition Exhibit 1 was a highly simplified and schematic diagram but was helpful in demonstrating where the nerve itself is located on the body that both makes it vulnerable to injury and how close it is to the patella where Claimant sustained his original injury.

34. Dr. Mason testified that once scar tissue establishes itself, it worsens over time, and that over time Claimant's nerve became entrapped in the scar tissue because of all the surgeries Claimant had to the knee. She noted that Claimant had started to develop scar tissue from the previous surgery to his knee which was apparent during the surgery that was performed for the work injury, which according to Dr. Mason showed that Claimant had a propensity to develop scar tissue.

35. Dr. Mason also discussed that Dr. Fall's opinion that Claimant did not have the diagnosis of peroneal nerve pain because of the description of shooting calf pain taken from the medical records was a mistake or misunderstanding because Dr. Mason was referring to or meant to refer to Claimant's shooting shin pain as the reason she diagnosed peroneal nerve entrapment. Dr. Mason's February 25, 2014 note indicates that Claimant is getting more pain into the right side of his shin when he walks. There is an error in the report under plan Note #2 when the medical report states that Dr. Mason will obtain x-rays and an EMG to evaluate the shooting calf pain. Dr. Mason described the three areas of the calf and the lateral part which is innervated by the peroneal nerve, but indicated that the symptom that lead to the diagnosis of a peroneal nerve entrapment was Claimant's complaint of pain into the right side of his shin particularly when he walks.

36. Dr. Mason addressed Dr. Fall's statement that Claimant's pain complaints in his entire knee were not consistent with peroneal nerve entrapment. Dr. Mason indicated that Claimant had ongoing knee pain because of other problems in the knee related to his patellar fracture and meniscus surgery which he had all along. Dr. Mason also discussed the different inferences to be drawn from Dr. Schnur's report and evaluation, her reports and evaluation, and those of Dr. Fall. According to Dr. Mason, Dr. Fall did not give a complete description of Claimant's symptoms and would pick and choose the complaints that she relied upon.

37. Dr. Mason summarized Dr. Schnur's evaluation as noting knee pathology as the pain generator of the knee separate and apart from the symptoms consistent with the peroneal nerve problems. On physical examination Dr. Schnur noted a positive Tinel sign over the fibular head, the abnormal EMG, and shooting pain complaints consistent with a peroneal neuropathy. Dr. Schnur noted that Claimant had knee pain as well, but that was not why he was evaluating Claimant for surgery. Dr. Mason indicated that Dr. Schnur noted the presence of scarring because as a plastic surgeon who releases nerves, scarring is one of the things he needs to evaluate.

38. Dr. Mason testified that both she and Dr. Schnur did not anticipate that the nerve release would help with Claimant's knee pain itself which is caused by other problems, but that the nerve release should help with the shooting pains and hopefully keep the problem from worsening.

39. Dr. Mason testified that Dr. Fall's opinion that Dr. Schnur's statement that the nerve release will not help with the knee pain as a reason to deny the requested surgery as a statement that "surgery won't do much good" was not an accurate inference of her opinion. Dr. Mason was of the opinion that Dr. Schnur was outlining in his records what he told the patient regarding a reasonable expectation of what the procedure he was recommending would do, it was not an opinion that surgery would not be a benefit for treatment of the nerve injury.

40. Dr. Mason addressed Dr. Fall's criticism of her EMG findings as support for the diagnosis of a peroneal nerve lesion and testified that EMG findings are described as chronic if they are 12 weeks out from injury. Dr. Mason indicated that you would expect this type of nerve slowing to be chronic and not acute because it developed over time, much like carpal tunnel. Dr. Mason clarified that the nerve damage itself is classified as mild because it is demylinating, not axonal, damage to the nerve, but that the slowing in the nerve was significant in regards to nerve damage.

41. On cross-examination, Dr. Mason indicated that she did not recommend surgery or take the recommendation of surgery lightly, but that once you have nerve entrapment it worsens over time. Dr. Mason was hopeful that the surgery would alleviate the shooting pains Claimant was experiencing but was also in favor of releasing the nerve because if it were not repaired Claimant could develop significant problems in the future, including foot drop.

42. Dr. Mason also testified that there is no way to know with certainty whether the scar tissue that she believes is entrapping the nerve developed as a result of the previous knee surgeries or the surgery that occurred in May of 2012 as a result of this injury. She opined that it was medically more probably that the scarring developed from the May of 2012 surgery because scar tissue matures between one and two years and the other previous surgeries occurred decades ago.

43. It is difficult to determine how Dr. Fall could criticize or question Dr. Mason's and Dr. Schnurr's findings on physical examination when she herself did not physically examine Claimant after the diagnosis of peroneal nerve entrapment was diagnosed.

44. It is also difficult to understand how not one but two doctors that are well qualified to make the diagnosis would make the same diagnosis. Regardless of the criticism regarding the EMG findings, EMG's are objective evidence of the clinical diagnosis of peroneal nerve lesion. Dr. Fall only physically examined Claimant one time on January 23, 2014, prior to the presence of the new symptoms consistent with a peroneal nerve entrapment. Dr. Fall agreed that a diagnosis in

medicine is made based upon a clinical physical examination, test results and a history from the patient. Dr. Fall also agreed that the peroneal nerve is responsible for transmitting impulses from the leg to the foot and toes, and when damaged can effect the ability to flex the foot consistent with Claimant's complaints. She also agreed on cross-examination that peroneal nerve damage is commonly caused by injuries to the leg which include knee injuries and surgery to the knee, both of which occurred in this case.

45. Claimant has proven by a preponderance of the evidence that the peroneal nerve release that has been diagnosed by Dr. Kristin Mason and surgery recommended by Dr. David Schnur is reasonable, necessary, and related to the work injury in this claim.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant also shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), *supra.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A claimant bears the burden of proof to establish a direct causal relationship between an industrial injury and the need for medical treatment. *Snyder v. Indus. Claim Apps.*

Office, 942 P.2d 1337 (Colo. App. 1997). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Therefore, even when respondents have filed an admission of liability, their actions "cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury." *Sanchez v. Family Dollar Stores, Inc. ,* W.C. No. 4-631-793, 2007 WL 2142098 (ICAP, July 17, 2007). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. P*arker v. Iowa Tanklines* , W.C. No. 4-517-537, 2006 WL 1579866 (ICAP, May 31, 2006); *Frazier v. Montgomery Ward,* W.C. No. 3-920-202, 2000L WL 1868897 (ICAP, Nov. 13, 2000).

The ALJ concludes that the medical opinion of Dr. Fall is less persuasive that the opinions of Drs. Mason and Schnur, and entitled to less weight. The ALJ concludes that the medical opinions of Drs. Mason and Schnur about the right peroneal nerve injury are more persuasive than medical evidence to the contrary. The Claimant's account of shooting pain is consistent with peroneal nerve entrapment. Claimant's complaints of general knee pain are reasonably attributed to his other knee injuries. The normal examination of the peroneal nerve on December 2, 2011, over a year and a half before the onset of symptoms is consistent with peroneal nerve injury as symptoms develop as scar tissue develops over a one to two year period of time. The ALJ concludes that Claimant's nerve conduction studies were not uncertain as they were conducted and interpreted by a doctor board certified in electrodiagnostic testing. Dr. Mason noted that Dr. Schnur is the local expert in peroneal nerve decompression, and Dr. Schnur also recommended surgery. Claimant has proven by a preponderance of the evidence that he suffered a peroneal nerve injury related to, or caused by, the assault on September 28, 2011, or treatment related thereto.

Claimant has also proven by a preponderance of the evidence that the arthroscopic surgery in May of 2012 was the cause of a peroneal nerve injury emerging in February of 2014. Dr. Fall's testimony that arthroscopic surgery would not create or cause scar tissue near the peroneal nerve was less persuasive than Dr. Mason's explanation that scar tissue from the surgery caused a peroneal nerve injury.

Claimant has proven by a preponderance of the evidence that surgery to release the peroneal nerve entrapment is reasonable and necessary to relieve the shooting pain Claimant experiences in his right leg and to reduce or eliminate the risk of progression and worsening of those symptoms over time. Dr. Schnur recommended the surgery knowing that it would treat Claimant's symptoms resulting from the nerve entrapment, and would not address his other knee complaints. Dr. Fall's testimony to the contrary was not convincing.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury to the right peroneal nerve arising from the September 28, 2011 work related injuries and treatment of them.

2. The proposed right peroneal nerve release is reasonable and necessary medical treatment for which Insurer is liable.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For further statutory reference, see 8-43-301(2). (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm

DATED: April 6, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Shimon T. Blau, M.D. that Claimant suffered a 7% whole person permanent impairment as a result of his October 31, 2011 industrial injury to his cervical spine.

FINDINGS OF FACT

1. On February 14, 2004 Claimant suffered compensable Workers' Compensation injuries to his back. He ultimately received a 20% whole person impairment rating from Jill A. Castro, M.D. for his condition. The rating consisted of a 16% impairment for the cervical spine and a 5% impairment for the thoracic spine. The cervical spine rating involved 4% pursuant to Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) and 12% for range of motion impairment. The thoracic rating consisted of 2% pursuant to Table 53 and 3% for range of motion deficits.

2. On July 13, 2005 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Castro's impairment rating. The FAL acknowledged that Claimant suffered a 20% whole person impairment rating as a result of the February 14, 2004 incident.

3. Claimant worked for Employer as a Technician. On October 31, 2011 Claimant sustained a industrial injuries when he was carrying a 24 foot ladder on his left shoulder while walking down a snowy slope. He slipped, landed on his buttocks and the ladder struck him in the neck region.

4. Claimant underwent conservative treatment and diagnostic studies for his condition. On February 5, 2014 he reached Maximum Medical Improvement (MMI) with a 19% whole person impairment rating.

5. On June 3, 2014 Claimant underwent a DIME with Shimon T. Blau, M.D. Claimant informed Dr. Blau of a previous Workers' Compensation injury in 2004. He specifically noted that he had suffered a T7 vertebra fracture that had healed. Claimant remarked that he was not sure whether he had received any impairment rating.

6. Dr. Blau diagnosed Claimant with "cervical spondylosis without myelopathy/facet syndrome" and degenerative disc disease of the cervical spine. Dr. Blau assigned Claimant a 7% whole person impairment rating pursuant to Table 53 of the *AMA* Guides for his cervical spine condition. However, on two separate occasions Dr. Blau attempted to obtain Claimant's range of motion measurements but they were

not within the validity criteria. He thus did not assign Claimant any impairment rating for range of motion limitations. Moreover, Dr. Blau did not attempt to apportion the rating based on the 2004 Workers' Compensation injury because he did not have any information at the time pertaining to any prior impairment rating. Accordingly, Dr. Blau assigned Claimant a 7% whole person impairment rating for the October 31, 2011 incident. He agreed that Claimant had reached MMI on February 5, 2014.

7. On February 4, 2015 Dr. Blau testified through an evidentiary deposition in this matter. He reviewed Dr.Castro's March 2005 report and the July 13, 2005 FAL pertaining to Claimant's 2004 injuries. Dr. Blau acknowledged that the impairment ratings for the 2004 and 2011 injuries both involved the cervical spine. However, he reasoned that apportionment was inappropriate because he could not tell by reviewing Dr. Castro's March 5, 2005 report the level of pathology in Claimant's cervical spine.

8. Nicholas K. Olsen, D.O. testified at the hearing in this matter. He explained that pursuant to the *AMA Guides* an individual's body is broken down into separate parts for impairment rating purposes. The *AMA Guides* specifically treat the lumbar, thoracic and cervical spines as three separate body parts. Consequently, if an individual has an injury to his lumbar spine and later suffers an injury to his cervical spine the person would receive impairment ratings for both the lumbar and cervical spines. However, if an individual injures the cervical spine and then again later injures the cervical spine the evaluating physician must treat them as the same body part for impairment rating purposes.

9. Dr. Olsen concluded that Dr. Blau was clearly wrong in failing to apportion the impairment rating for the 2004 cervical spine injury out of the rating for the 2011 cervical spine injury. Dr. Olsen noted that the impairment ratings involved the same body part for impairment rating purposes. Although the pathology may have included different levels of Claimant's cervical spine in 2004 and 2011, both injuries involved the cervical spine or the same body part for apportionment purposes. The 2004 injury consisted of a 4% whole person cervical spine rating pursuant to Table 53 of the *AMA Guides* and a 12% whole person rating for cervical spine range of motion deficits for a total 16% whole person rating for the cervical spine. Dr. Blau assigned Claimant a 7% cervical spine whole person impairment rating for the October 31, 2011 incident. Accordingly, Dr. Olsen maintained that Dr. Blau should have subtracted the 2004 rating from the 2011 impairment to yield a total 0% whole person impairment rating pursuant to the *AMA Guides.*

10. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered a 7% whole person permanent impairment as a result of his October 31, 2011 industrial injury to his cervical spine. On February 14, 2004 Claimant suffered compensable injuries to his back. He ultimately received a 20% whole person impairment rating from Dr. Castro for his condition. The rating consisted of a 16% impairment for the cervical spine and a 5% impairment for the thoracic spine. On October 31, 2011 Claimant sustained an industrial injury involving his cervical spine. DIME physician Dr. Blau assigned Claimant a 7% whole person impairment rating pursuant to Table 53 of the *AMA* Guides for his cervical spine

condition. At his deposition Dr. Blau acknowledged that the impairment ratings for the 2004 and 2011 injuries both involved the cervical spine. However, he reasoned that apportionment was inappropriate because he could not tell by reviewing Dr. Castro's March 5, 2005 report the level of pathology in Claimant's cervical spine.

11. Dr. Olsen persuasively explained that pursuant to the *AMA Guides* an individual's body is broken down into separate parts for impairment rating purposes. The *AMA Guides* specifically treat the lumbar, thoracic and cervical spines as three separate body parts. If an individual injures different parts of the cervical spine, the evaluating physician must treat them as the same body part for impairment rating purposes. Dr. Olsen concluded that Dr. Blau was clearly wrong in failing to apportion the impairment rating for the 2004 cervical spine injury out of the rating for the 2011 cervical spine injury. Dr. Olsen noted that the impairments involved the same body part for rating purposes. Although the pathology may have included different levels of Claimant's cervical spine in 2004 and 2011, both injuries involved the cervical spine or the same body part for apportionment purposes. Accordingly, Dr. Olsen maintained that Dr. Blau should have subtracted the 2004 rating from the 2011 impairment to yield a total 0% whole person impairment rating pursuant to the *AMA Guides.* Based on the persuasive testimony of Dr. Olsen, a review of the *AMA Guides* and a consideration of relevant statutory authority, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Blau's 7% whole person impairment rating was incorrect. Accordingly, Claimant suffered a 0% permanent impairment as a result of his October 31, 2011 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

7. Section 8-42-104(5)(a), C.R.S. provides that in cases of permanent medical impairment, the employee's award or settlement for a new injury shall be reduced when an employee has suffered more than one permanent medical impairment to the same body part and has received an award of settlement under the "Workers' Compensation Act of Colorado" or a similar act from another state. Under those cases, the permanent medical impairment rating applicable to the previous injury to the same body part or established by award or settlement shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.

8. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered a 7% whole person permanent impairment as a result of his October 31, 2011 industrial injury to his cervical

spine. On February 14, 2004 Claimant suffered compensable injuries to his back. He ultimately received a 20% whole person impairment rating from Dr. Castro for his condition. The rating consisted of a 16% impairment for the cervical spine and a 5% impairment for the thoracic spine. On October 31, 2011 Claimant sustained an industrial injury involving his cervical spine. DIME physician Dr. Blau assigned Claimant a 7% whole person impairment rating pursuant to Table 53 of the *AMA* Guides for his cervical spine condition. At his deposition Dr. Blau acknowledged that the impairment ratings for the 2004 and 2011 injuries both involved the cervical spine. However, he reasoned that apportionment was inappropriate because he could not tell by reviewing Dr. Castro's March 5, 2005 report the level of pathology in Claimant's cervical spine.

9. As found, Dr. Olsen persuasively explained that pursuant to the *AMA Guides* an individual's body is broken down into separate parts for impairment rating purposes. The *AMA Guides* specifically treat the lumbar, thoracic and cervical spines as three separate body parts. If an individual injures different parts of the cervical spine, the evaluating physician must treat them as the same body part for impairment rating purposes. Dr. Olsen concluded that Dr. Blau was clearly wrong in failing to apportion the impairment rating for the 2004 cervical spine injury out of the rating for the 2011 cervical spine injury. Dr. Olsen noted that the impairments involved the same body part for rating purposes. Although the pathology may have included different levels of Claimant's cervical spine in 2004 and 2011, both injuries involved the cervical spine or the same body part for apportionment purposes. Accordingly, Dr. Olsen maintained that Dr. Blau should have subtracted the 2004 rating from the 2011 impairment to yield a total 0% whole person impairment rating pursuant to the *AMA Guides.* Based on the persuasive testimony of Dr. Olsen, a review of the *AMA Guides* and a consideration of relevant statutory authority, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Blau's 7% whole person impairment rating was incorrect. Accordingly, Claimant suffered a 0% permanent impairment as a result of his October 31, 2011 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Blau that Claimant suffered a 7% whole person impairment as a result of his October 31, 2011 industrial injury. Based on the persuasive testimony of Dr. Olsen, a review of the *AMA Guides* and a consideration of relevant statutory authority Claimant suffered a 0% permanent impairment as a result of his October 31, 2011 industrial injury.

2. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street,

4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 10, 2015.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did the claimant suffer a compensable industrial injury on March 25, 2013?

2. Is the claimant entitled to medical treatment that is reasonable, necessary and causally related to the March 25, 2013 industrial injury?

3. What is the claimant's AWW?

Based upon the findings and conclusions below that the claim is not compensable the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. The claimant is employed by the respondent-employer as an aircraft mechanic. He also serves in the U.S. Air Force Reserves. The claimant's shift with his job at the respondent-employer was from 9:00 p.m. to 7:00 a.m. On March 25, 2013, the claimant arrived for work with the respondent-employer at approximately 8:30 p.m. He changed into his work uniform, got coffee, unlocked his toolbox, and prepared for his shift to begin.

2. The claimant participated in two mandatory work meetings when his shift began at 9:00 p.m. The first meeting was with his supervisor and lasted 5-10 minutes. The second meeting was with other mechanics and their "leads," and lasted 10-20 minutes. The purpose of the meetings was to identify and review the work that was to be performed on aircraft during the shift.

3. When the meetings ended, the claimant got up from the chair he was sitting in. As he did so, he felt sudden pain in his left knee. He did not strike his knee on any object, nor did he twist his knee.

4. The claimant's knee pain increased as his shift progressed. His knee started to swell. He reported his knee pain to a supervisor. He worked through lunch in order to complete the work he was assigned to perform on an airplane. He left work at

approximately 2:30 a.m. and drove himself to the emergency room at Penrose St. Francis Hospital. The claimant was seen at 2:50 a.m.

5. The emergency room nurse, Karleen Graham, RN, noted, "…Reports injury occurred on 3/25/13 at approx 2130. States he heard his L knee pop. Observed L knee to be swollen, red, and filled with fluid on palp."

6. The emergency room physician, Dr. Sooch, reported, "…34 male aviation mechanic presenting for swelling over the anterior left knee. He noticed the symptoms initially when he stood up from a work meeting…" Dr. Sooch diagnosed pre-patellar bursitis of the left knee. The claimant was discharged with prescriptions for Naproxen and Prednisone. He was instructed to follow up with Stephanie Barriere, NP, or David Matthews, M.D.

7. The claimant returned to work after being discharged from the emergency room in order to complete workers' compensation paperwork. The respondent-employer's "OJI report" confirms that; "…after shift meeting, stood up knee hurt. Continued working, it got worse, can't bend leg at knee."

8. The claimant was seen by Joseph Mullen, PA-C, at CCOM on March 27, 2013. CCOM is a designated medical provider. Mr. Mullen reported, "He developed pain and tightness in the left knee when he got up from sitting position." Mr. Mullen noted; "…Left knee has swelling and is pink over the lower patella and tibial tubercle area. It is not hot. He swelling areas [sic] approximately 2-3 inches in diameter and is very soft nearly flocculent."

9. Mr. Mullen reported that "a couple years ago" the claimant experienced swelling and pain in his *right* knee after kneeling on a bottle cap. Mr. Mullen reported the claimant also had some swelling around the left knee at the same time. The claimant fully recovered from that incident and was having no difficulty with either knee immediately prior to the incident at work on March 25, 2013.

10. Mr. Mullen diagnosed pre-patellar bursitis. He imposed work restrictions and recommended the claimant take the medications prescribed in the emergency room. Mr. Mullen recommended the claimant follow-up in two weeks.

11. The claimant did not obtain additional treatment from respondents' designated medical provider because the respondent-insurer denied his claim. The claimant has not been placed at MMI.

12. The claimant was off work due to the effects of his knee injury until April 9, 2013. The claimant then returned to work and continues to work for the respondent-employer.

13. The ALJ finds that the claimant is credible; however, the credible evidence does not establish that the claimant's knee condition arose out of of his employment with the respondent-employer, only that the claimant became symptomatic during the course of his employment.

14. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. § 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

2. Pursuant to § 8-41-301(1)(c), C.R.S., a disability is compensable if it is shown that it was "proximately caused by an injury ... arising out of and in the course of the employee's employment." *See also* § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Court of Appeals*, 905 P.2d 6 (Colo. App. 1995). The question of whether an injury "arises out of" employment is a factual question and is to be resolved by considering the totality of the circumstances. *Triad Painting Co. v. Blair*, 812 P.2d 638, 643 (Colo. 1991). "For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991)).

3. However, the mere fact that a claimant develops an injury during the course of his employment does not relieve him of the duty to establish the injury arose out of that employment. The Supreme Court addressed this issue most recently in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). In *City of Brighton*, the court identified three categories of injuries. These are (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which

are neither employment related nor personal. The first category was observed to be compensable, while the second category was not. The third category of neutral risks would be compensable if the application of a *but for* test revealed that the simple fact of being at work would have caused any employee to have been injured. The Court also further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are said to be "self-originated" injuries that spring from a personal risk of the claimant. The second category contains risks that are entirely personal or private to the employee him- or herself. *See Horodyskyj,* 32 P.3d at 475–77. These risks include, for example, an employee's preexisting idiopathic illness or medical condition that is completely unrelated to his or her employment (quote from Brighton at P. 503). These types of *purely* idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. For example, when it comes to idiopathic injuries, the "special hazard" doctrine represents an important exception to the general rule of non-compensability. Under this doctrine, an injury is compensable even if the most direct cause of that injury is a preexisting idiopathic disease or condition so long as a special employment hazard also contributed to the injury. *See, e.g., Ramsdell v. Horn,* 781 P.2d 150, 152 (Colo.App.1989) (holding that a carpenter's injuries from a fall were compensable even though he had an epileptic seizure directly causing his fall because the fall occurred while he was working on a twenty-five-foot-high scaffold, a "special hazard" of employment).

4. Colorado law clearly holds that where the claimant suffers from a preexisting idiopathic condition or abnormality which becomes symptomatic at work, the resulting injuries are not compensable unless the conditions of employment contribute to the accident or to the extent of the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Ramsdell v. Horn*, *supra.* In order for there to be a sufficient employment connection for such an injury to arise out of employment the claimant must prove the employment created a "special hazard." Ubiquitous conditions, such as concrete floors, do not qualify as special hazards. *Gates Rubber v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985).

5. There are a number of cases holding a claim not to be compensable where the claimant suffered an injury while arising from a chair. *See Horne v. St. Mary-Corwin Hospital*, W.C. No. 4-205-014 (April 14, 1995); *Crass v. Cobe Laboratories*, W.C. No. 3 960 662 (October 10, 1991), *aff'd., Crass v. Industrial Claim Appeals Office*, (Colo. App. No. 91CA1776, July 2, 1992) (NSOP) (injury not compensable where there was no evidence that arising from chair precipitated aggravation of the prior knee strain, or that the chair aggravated or elevated risk or extent of injury).

6. It's claimant's burden to prove a causal connection between his employment and the resulting condition for which medical treatment and indemnity benefits are sought. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkne*r *v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The determination of whether the claimant sustained that burden of proof is factual in nature. The claimant bears the burden of proof, by a preponderance of the evidence, to establish that an injury arising out of and in the course of the employment was the cause of the disability and need for treatment. The question of whether the claimant has met the burden is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, *supra.*

7. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

8. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between his employment and his injuries. Colorado law does not create a presumption that injuries which occur in the course of employment, necessarily arise out of employment. *See Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). *See also, Industrial Commission v. London & Lancashire Indemnity Co.*, 135 Colo. 372, 311 P.2d 705 (1957).

9. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

10. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found, claimant's testimony is credible but that testimony failed to prove by a preponderance of the evidence that he suffered

an accidental injury to his right lower extremity arising out of and in the course of his employment on March 25, 2013.

11. The claimant failed to establish that there is a causal connection between the injury and the claimant's work related functions. The simple act of standing up lacks the required causal connection, as the facts of this case do not establish that it is related to the claimant's work related functions. The claimant specifically admitted that his left knee pain resulted from the act of standing up and that such action is no different than if he was standing up from a chair at his home.

12. Additionally, the claimant failed to establish that any pre-existing condition combined with a special hazard of employment to cause the alleged work injury. The ALJ finds that no special hazard of employment has been shown by the claimant and that his left knee injury did not arise out of employment with the respondent-employer. Any pre-existing idiopathic condition of the claimant's left knee that became symptomatic by the ubiquitous act of standing up does not create a compensable injury.

13. As found, the claimant failed to prove by a preponderance of the evidence that he suffered a traumatic injury to his left knee arising out of and in the course of employment with the respondent-employer on March 25, 2013.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 29, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury while working for Employer to body parts above her right hand in the admitted claim of 4-923-167 on March 27, 2013.

2. Whether Claimant has established by a preponderance of the evidence that she received authorized medical treatment that was reasonable and necessary to cure or relieve the effects of her industrial injuries.

PROCEDURAL MATTER

Case Nos. 4-923-167 and 4-948-593 were consolidated by Order dated June 2, 2014. At the outset of the hearing, counsel for both parties briefed the Judge as to the legal theories behind Claimant's filing of an acute injury claim in case No. 4-923-167, with an assigned date of injury of March 27, 2013, and an occupational disease claim based upon an aggravation of the underlying injury claim in case No. 4-948-593, with an assigned date of injury of March 21, 2014. Both claims pertained to the same right upper extremity injury. The Judge determined that the claim in case No. 4-948-593 could not exist independently, or logically be asserted in combination with case No. 4-923-167 because of Claimant's allegations of an acute injury and symptoms on March 27, 2013. Accordingly, the Judge dismissed the occupational disease claim in case No. 4-948-593.

FINDINGS OF FACT

1. On March 27, 2013 Claimant suffered an injury to her right hand when it became caught in the rollers of a laminating machine while working for Employer. Respondents admitted liability for injuries to Claimant's right hand. Claimant is alleging that she also suffered injuries to her right shoulder, neck, and upper trapezius areas as a result of the work-related incident.

2. Claimant testified that the laminating machine jerked her right arm. She remarked that she attempted to pull her hand out of the machine. Claimant's daughter M.L. was working with Claimant at the time of the incident. Claimant stated that M.L. hopped over cardboard on the floor to get to the other side of the machine and turn it off. She remarked that they then called out to co-worker Todd, who was working nearby, once the machine was shut off. Todd began looking for a piece of equipment to loosen the rollers of the laminating machine. He returned with a piece of metal to put in between the rollers, but Claimant's daughter then told him to start turning knobs on the machine to loosen the rollers. They loosened the rollers enough that they were able to release Claimant's hand.

3. Claimant explained her right hand was caught in the laminating machine for 2-4 minutes. She noted that she was attempting to pull her arm out of the machine while the machine was still on, but acknowledged that she ceased attempting to extract her arm once the power was off. Claimant experienced immediate pain in her fingers but when she jerked her arm she felt pain all the way up to her right shoulder.

4. Owner of Employer Mike Moravec transported Claimant and her daughter to Concentra Medical Centers after the incident. Claimant initially detailed her injury to a nurse but then visited Authorized Treating Physician (ATP) Jonathan Bloch, D.O. for an examination. Claimant noted that her daughter M. L. was unable to join her in the examination room and no interpreter was available. She explained that she expressed her pain to Dr. Bloch by using her fingers to point out that her pain was located from her wrist to her right upper shoulder. They communicated with bits of Spanish and English. Dr. Bloch conducted a physical examination of her right hand and arm.

5. M.L. testified that she was working with Claimant at the time of the accident. She heard Claimant yell and try to pull her arm out of the laminating machine. M.L. accompanied Claimant to Concentra. She went with Claimant to several physician appointments and almost all physical therapy appointments. M.L. testified that Claimant would complain of pain from her fingers up her arm to the back of her neck. Nevertheless, the medical providers "refused to accept it." At physical therapy appointments the therapist would tell them he was documenting Claimant's complaints in his computer. M.L. noted that she saw him type the complaints into his system. She explained that the therapist later provided a paper to give to Dr. Bloch documenting the expanded complaints. She subsequently handed the paper to Dr. Bloch. M.L. helped Claimant complete pain diagrams at every physician visit and they submitted them to the front desk when completed.

6. Claimant's coworker Carol Kennedy testified that she did not witness Claimant's injury but examined her hand shortly afterward. Claimant's fingers were blue, her knuckles were swollen and her fingernail pads were white. Ms. Kennedy remarked that she did not see Claimant holding her shoulder. Instead, Claimant was holding her elbow with her right hand extended. Ms. Kennedy recalled that after the date of injury Claimant stated that her right hand was hurting. She did not observe Claimant ever complaining of shoulder or neck pain after the date of injury.

7. Mr. Moravec testified that he drove Claimant and her daughter to Concentra after the March 27, 2013 incident. Claimant did not complain of shoulder, neck or back pain on the way to Concentra. Mr. Moravec explained that he helped fill-in the intake forms at the initial visit because Claimant could not write with her right hand. He completed a portion of one page of the Patient Information Form, including the pain diagram, in which he circled Claimant's right hand. Mr. Moravec remarked that he only circled Claimant's right hand on the pain diagram because he had no reason to suspect Claimant suffered any other injuries. Claimant had not informed him of any pain besides her right hand nor did he see her favor any other portion of her body.

8. Dr. Bloch described Claimant's injury as "[c]leaning rollers, hand sucked in." He noted Claimant had no numbness, weakness, or tingling, and she "otherwise denies any other bodily injuries or subjective complaints related to this injury." On physical examination, Claimant's right hand was swollen and tender but without deformity. Dr. Bloch diagnosed Claimant with a "crush hand" and "IP strains." He prescribed physical therapy and released Claimant to work with restrictions of no lifting in excess of 10 pounds and no use of impact or power tools with her right arm and/or hand. X-rays of Claimant's right hand were normal.

9. Claimant testified that on some occasions her daughter accompanied her to the examining room with Dr. Bloch to serve as an interpreter. She explained to Dr. Bloch that she continued to have pain up to and in her right shoulder area. Claimant also filled out a pain diagram at each appointment that showed her pain running up to her right shoulder.

10. Claimant continued to receive medical treatment from Dr. Bloch and undergo physical therapy. From March 27, 2013 until June 17, 2013, Claimant attended five appointments with Dr. Bloch and 17 physical therapy appointments. The notes from all 22 appointments contain no reference to Claimant reporting pain to body parts above the right forearm except for a single reference to back pain that Dr. Bloch attributed to soreness from her return to work. The records reflect Claimant's consistent denial of injuries to other body parts from the March 27, 2013 incident.

11. Claimant explained that she also mentioned right shoulder complaints to her physical therapist but he apologized that he could not treat her because she was referred only for treatment of her right hand. He provided her with hot towels to put on her back and shoulder. In April 2013 Claimant's physical therapist provided an elbow brace that was meant to help her shoulder.

12. On June 17, 2013 Dr. Bloch recorded that Claimant complained of a "tolerable dull ache located at right knuckles and now radiating all the way up to neck." Dr. Bloch performed a physical examination of Claimant's right shoulder and arm. All findings were normal. Claimant completed a pain diagram showing complaints of pain through her right arm to the shoulder. Dr. Bloch kept Claimant on regular duty without restrictions.

13. On June 18, 2013 Claimant attended physical therapy at Concentra. Josh Corbin, OT noted that Claimant reported pain in the lateral epicondyle, upper trapezius and hand. OT Corbin remarked that her complaints had changed, and noted, "in what appears to be a shift in concern. . . more intense pain is located around the lateral epicondyle region pushing up to upper trapezius . . ." He commented that he placed electrical stimulation pads at her upper trapezius. The physical therapy notes preceding the date do not reference any treatment directed to her upper trapezius area.

14. Claimant explained that her physical therapist wrote Dr. Bloch a note specifying that she was complaining of pain into her right shoulder because he was not sure if Dr. Bloch was reading the computer notes. Claimant testified that her daughter

gave Dr. Bloch the note from the therapist in June 2013. She further commented that Dr. Bloch told her that her accident was in her fingers but she responded that the machine pulled her arm. Claimant thus decided to obtain an attorney and request a new physician. On June 25, 2013 Claimant filed a On-Time Change of Physician request to Flory Kreutter, M.D. at Cherry Creek Family Practice.

15. On July 10, 2013 Claimant visited Michael Johnson, PA, of Cherry Creek Family Practice. PA Johnson reported that Claimant was working on March 27, 2013 and her fingers became caught in a machine. Her arm and shoulder were also jerked forward. PA Johnson stated that Claimant had subsequently experienced pain in her fingers that radiated up her right arm to her shoulder. The pain was sharp, constant, worse with movement and improved with rest. He reported that his objective findings were consistent with the history and/or work related mechanism of injury. PA Johnson diagnosed Claimant with hand/arm/shoulder pain, neuropathy and muscle spasm. He restricted Claimant to no lifting, carrying, pushing or pulling over 10 pounds, pinching and gripping as tolerated and noted that Claimant must rest her hand for 10 minutes of every hour.

16. PA Johnson subsequently examined Claimant on numerous occasions from August 12, 2013 through May 14, 2014. On each occasion he reported that his objective findings were consistent with a work-related mechanism of injury. The record reflects that throughout Claimant's visits with PA Johnson she complained of muscle cramps, joint pain, muscle weakness, decreased sensation and strength, and muscle aches into the right upper extremity, shoulder and neck.

17. On April 6, 2014 Claimant underwent an independent medical examination with Neil Pitzer, M.D. Claimant explained that she had been experiencing continuing hand, shoulder and neck pain since the date of her industrial injury. She stated that she told her "doctors at Concentra but they told me it was all from the same thing. I kept telling them but they ignored me." Claimant noted her pain ranged from 7-9/10 throughout her hand, forearm, arm, and shoulder blade. Dr. Pitzer commented that Claimant's complaints of pain were diffuse. He determined that Claimant's symptoms were more myofascial in origin and not related to the small supraspinatus tear identified on MRI. Dr. Pitzer noted that Claimant had a non-physiologic sensory examination in the right wrist that was not consistent with a neurologic trauma. He concluded that Claimant's right hand trauma had resolved because she had negative test results and full range of motion.

18. Dr. Pitzer determined that there was no evidence of any significant pain or trauma to her right shoulder. He noted multiple examinations early in the claim showed no evidence of range of motion loss in her shoulder and her impingement testing had been normal. Dr. Pitzer remarked the "long period of time" between the injury event and her reports of right shoulder pain. He also mentioned that Claimant had 70 sessions of occupational/ physical therapy and her complaints increased over time. Dr. Pitzer ultimately concluded that Claimant's primary complaint was myofascial pain that he could not relate to the March 27, 2013 incident because there was no documentation of the complaints in her first three months of treatment.

19. On December 4, 2014 Edwin M. Healey, M.D. conducted an independent medical examination of Claimant. He noted that Claimant suffered right shoulder and neck pain immediately after the March 27, 2013 accident. Dr. Healey remarked that Claimant had completed pain diagrams for each evaluation with Dr. Bloch that documented her right shoulder and neck pain. Claimant reported current symptoms of pain in her right shoulder, right arm, lower cervical and right upper trapezius areas. She also noted tingling and numbness in the second through fourth digits of her right hand, headaches and depression. After performing a physical examination, Dr. Healey diagnosed Claimant with a right hand crush injury with chronic neuropathic pain, right lateral epicondylitis, right shoulder sprain/strain with a small rotator cuff tear, cervical myofascial pain, possible cervical disc herniation and depression. He explained that there was a prominent component of myofascial pain that could explain both her cervical and right shoulder pain due to a sprain/strain injury. Dr. Healey summarized that Claimant's diagnoses related directly to the March 27, 2013 accident.

20. On December 8, 2014 Claimant underwent an independent medical examination with Jon Erickson, M.D. Dr. Erickson recorded that Claimant was adamant that she informed all of her initial physicians and therapists about her neck and right shoulder pain. On physical examination Claimant displayed cogwheel weakness and reduced range of motion in her right shoulder with severe pain. He also noted that her only consistent behavior was that "every maneuver she was asked to perform caused severe pain. This simply goes against the physiology associated with an injury." Dr. Erickson identified Claimant's rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. Regarding causation, Dr. Erickson stated "it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months." Therefore, he did not believe that her shoulder pathology was related to the March 27, 2013 incident. Moreover, Dr. Erickson remarked that the small tear did not correspond with Claimant's pain level. Furthermore, Claimant's cervical spine showed no sign of acute trauma and a cervical neuropathy or compression radiculopathy had been ruled out by the negative EMG. Dr. Erickson concluded that Claimant only injured her right hand on March 27, 2013 and there was no involvement of her right shoulder or neck.

21. On January 16, 2015 Dr. Bloch testified through an evidentiary deposition in this matter. He specifically remembered his examinations of Claimant and she did not make any injury complaints above the right wrist prior to June 17, 2013. Dr. Bloch explained that his standard practice is to include in his notes all complaints a patient makes so he can determine whether they are part of a Workers' Compensation injury. He did not recall Claimant alleging that she was jerking her hand and arm back during the March 27, 2013 incident. Dr. Bloch remarked that he takes jerk injuries very seriously because they can lead to serious problems.

22. Dr. Bloch explained that his standard practice is to review any pain diagrams or handwritten notes completed by a patient either before or during an examination. He would verbally inquire as to a patient's symptoms during an examination and not rely solely upon pain diagrams. In Claimant's case, Dr. Bloch did not recall viewing any pain diagrams not included in the Concentra notes presented to

him for the deposition. He maintained that, if he had seen any pain diagrams in which Claimant marked any body parts other than her right hand, he would have examined the areas and performed a causation analysis.

23. Dr. Bloch testified that his characterization of Claimant's symptoms on June 17, 2013 as "now radiating all the way up to the neck" was meant to connote a new complaint. He commented that he reviewed Claimant's physical therapy records at each one of her office visits as a matter of standard practice. Dr. Bloch stated that he had seen no reason to collaborate with Claimant's physical therapists at Concentra because there were no red flags that Claimant was complaining of anything other than what had previously been documented.

24. Dr. Bloch testified that he referred Claimant to delayed recovery specialist Albert Hattem, M.D. He explained that Claimant's complaints by June 17, 2013 were "not physiological anymore. I was no longer treating the injury. I mean, causation and everything, it all changed. All of a sudden, it's a shoulder injury, you know, and this is a hand injury . . . now it's a shoulder injury, which obviously was associated with a different mechanism of injury, as [Claimant] reported a different mechanism of injury for that, all of a sudden."

25. Dr. Bloch stated that he has significant experience identifying and treating rotator cuff tears. He did not believe a rotator cuff tear caused by an acute injury would have a two month delayed onset. Dr. Bloch testified that Claimant did not suffer a rotator cuff tear as part of the March 27, 2013 incident because it would have appeared earlier in his clinical examinations. He remarked that Claimant may have focused on her hand pain over any other pain on the first visit, but that would not justify her lack of subsequent complaints.

26. Dr. Healey testified at the hearing in this matter. He remarked that Dr. Bloch's March 27, 2013 notes did not contain a history or mechanism of injury and were generally superficial. Dr. Healey explained that Claimant described her mechanism of injury as jerking her arm and neck back. The mechanism of injury could cause either a rotator cuff tear, shoulder sprain/strain or myofascial pain in and around the neck and shoulder. Claimant's statement that she suffered initial pain at the time of injury to her shoulder, upper trapezius and neck was consistent with the mechanism of injury. However, Dr. Healey could not state with a reasonable degree of medical probability that the rotator cuff tear was caused by the March 27, 2013 work incident. Rather, Claimant suffered a right shoulder sprain with secondary myofascial pain.

27. On cross-examination Dr. Healey reviewed Claimant's June 18, 2013 physical therapy notes. He acknowledged that the June 18, 2013 notation that there was a "shift in concern" was contradictory to Claimant's statements that the physical therapist had recognized her shoulder symptoms prior to the date. Dr. Healey also agreed that Dr. Bloch's June 17, 2013 documentation of Claimant's pain "now radiating all the way up to the neck" connoted documentation of a new complaint.

28. Dr. Erickson testified at the hearing in this matter. In evaluating Claimant's right shoulder he explained that she had moderate range of motion restrictions and displayed significant pain behaviors. However, when Claimant discussed the cause of her right shoulder symptoms and demonstrated various job activities her pain behaviors diminished. Her pain behaviors returned upon formal examination. Dr. Erickson also remarked that Claimant displayed cogwheel weakness that could be a self-limiting behavior.

29. Dr. Erickson determined that Claimant had a very small rotator cuff tear in her right shoulder. He commented that minor tears could be asymptomatic or minimally symptomatic. However, Claimant's level of pain complaints did not correlate to the size of her tear. Dr. Erickson specifically identified Claimant's rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. He interpreted the cervical MRI as showing "very mild, early degenerative disc disease." Regarding causation, Dr. Erickson stated "it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months." Therefore, Dr. Erickson summarized that Claimant's right shoulder pathology was not related to the March 27, 2013 incident.

30. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury while working for Employer to body parts above the hand in the admitted claim of 4-923-167 on March 27, 2013. On March 27, 2013 Claimant suffered an injury to her right hand when it became caught in the rollers of a laminating machine while working for Employer. Claimant maintained that she repeatedly informed ATP Dr. Bloch that she suffered pain up her right arm into her shoulder area. She also filled out a pain diagram at each appointment that showed her pain running up to her right shoulder. Finally, Claimant explained that she also mentioned right shoulder complaints to her physical therapist but he apologized that he could not treat her because she was referred only for treatment of her right hand.

31. Despite Claimant's contentions the medical records do not reflect that she reported right shoulder symptoms to Dr. Bloch and her physical therapist until approximately three months after the March 27, 2013 accident. From March 27, 2013 until June 17, 2013, Claimant attended five appointments with Dr. Bloch and 17 physical therapy appointments. The notes from all 22 appointments contain no reference to Claimant reporting pain to body parts above the right forearm except for a single reference to back pain that Dr. Bloch attributed to soreness from her return to work. The records reflect Claimant's consistent denial of injuries to other body parts from the March 27, 2013 incident. On June 17, 2013 Dr. Bloch recorded that Claimant complained of a "tolerable dull ache located at right knuckles and now radiating all the way up to neck." Claimant completed a pain diagram showing complaints of pain all through her right arm to the shoulder. Dr. Bloch testified that his characterization of Claimant's symptoms on June 17, 2013 as "now radiating all the way up to the neck" was meant to connote a new complaint. He explained that Claimant's right shoulder complaints by June 17, 2013 constituted a different mechanism of injury that was no longer physiological. Moreover, on June 18, 2013 at a physical therapy appointment with OT Corbin Claimant reported pain in the lateral epicondyle, upper trapezius and hand. OT Corbin remarked that her complaints had changed, and noted, "in what

appears to be a shift in concern. . . more intense pain is located around the lateral epicondyle region pushing up to upper trapezius . . ."

32. The persuasive medical records and testimony reveal that Claimant's right shoulder symptoms were not related to the March 27, 2013 accident. On April 6, 2014 Dr. Pitzer conducted an independent medical examination of Claimant. He noted the "long period of time" between the injury event and her reports of right shoulder pain. He also mentioned that Claimant had 70 sessions of occupational/ physical therapy and her complaints increased over time. Dr. Pitzer ultimately concluded that Claimant's primary complaint was myofascial pain that he could not relate to the March 27, 2013 incident because there was no documentation of right shoulder complaints in her first three months of treatment. Dr. Bloch testified that Claimant did not make any complaints of injury above the right wrist prior to June 17, 2013. He also did not recall viewing any pain diagrams not included in the Concentra notes presented to him for the deposition. Dr. Bloch noted that he has significant experience identifying and treating rotator cuff tears. He did not believe a rotator cuff tear caused by an acute injury would have a two month delayed onset. Dr. Bloch testified that Claimant did not suffer a rotator cuff tear as part of the March 27, 2013 incident because it would have appeared earlier in his clinical examinations. Dr. Erickson specifically identified Claimant's rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. He interpreted the cervical MRI as showing "very mild, early degenerative disc disease." Regarding causation, Dr. Erickson stated "it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months." Therefore, Dr. Erickson summarized that Claimant's right shoulder pathology was not related to the March 27, 2013 incident.

33. In contrast, Dr. Healey diagnosed Claimant with a number of conditions involving her right hand, arm and shoulder that were directly related to the March 27, 2013 accident. He remarked that Claimant described her mechanism of injury as jerking her arm and neck back. The mechanism of injury could cause either a rotator cuff tear, shoulder sprain/strain or myofascial pain in and around the neck and shoulder. He commented that Claimant's statement that she suffered initial pain at the time of injury to her shoulder, upper trapezius and neck was consistent with the mechanism of injury. However, after reviewing Claimant's June 18, 2013 physical therapy notes he acknowledged that the "shift in concern" was contradictory to Claimant's statements that the physical therapist had recognized her shoulder symptoms prior to the date. Moreover, the medical records and persuasive testimony reflect that the temporal proximity of Claimant's shoulder symptoms approximately three months after the March 27, 2013 incident suggest that they were unrelated to the accident. The bulk of the evidence demonstrates that Claimant's job activities on March 27, 2013 did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment above her right hand. .

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo.

App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury while working for Employer to body parts above the hand in the admitted claim of 4-923-167 on March 27, 2013. On March 27, 2013 Claimant suffered an injury to her right hand when it became caught in the rollers of a laminating machine while working for Employer. Claimant maintained that she repeatedly informed ATP Dr. Bloch that she suffered pain up her right arm into her shoulder area. She also filled out a pain diagram at each appointment that showed her pain running up to her right shoulder. Finally, Claimant explained that she also mentioned right shoulder complaints to her physical therapist but he apologized that he could not treat her because she was referred only for treatment of her right hand.

8. As found, despite Claimant's contentions the medical records do not reflect that she reported right shoulder symptoms to Dr. Bloch and her physical therapist until approximately three months after the March 27, 2013 accident. From March 27, 2013 until June 17, 2013, Claimant attended five appointments with Dr. Bloch and 17 physical therapy appointments. The notes from all 22 appointments contain no reference to Claimant reporting pain to body parts above the right forearm except for a single reference to back pain that Dr. Bloch attributed to soreness from her return to work. The records reflect Claimant's consistent denial of injuries to other body parts from the March 27, 2013 incident. On June 17, 2013 Dr. Bloch recorded that Claimant complained of a "tolerable dull ache located at right knuckles and now radiating all the way up to neck." Claimant completed a pain diagram showing complaints of pain all through her right arm to the shoulder. Dr. Bloch testified that his characterization of Claimant's symptoms on June 17, 2013 as "now radiating all the way up to the neck" was meant to connote a new complaint. He explained that Claimant's right shoulder complaints by June 17, 2013 constituted a different mechanism of injury that was no longer physiological. Moreover, on June 18, 2013 at a physical therapy appointment with OT Corbin Claimant reported pain in the lateral epicondyle, upper trapezius and hand. OT Corbin remarked that her complaints had changed, and noted, "in what appears to be a shift in concern. . . more intense pain is located around the lateral epicondyle region pushing up to upper trapezius . . ."

9. As found, the persuasive medical records and testimony reveal that Claimant's right shoulder symptoms were not related to the March 27, 2013 accident. On April 6, 2014 Dr. Pitzer conducted an independent medical examination of Claimant. He noted the "long period of time" between the injury event and her reports of right shoulder pain. He also mentioned that Claimant had 70 sessions of occupational/ physical therapy and her complaints increased over time. Dr. Pitzer ultimately concluded that Claimant's primary complaint was myofascial pain that he could not

relate to the March 27, 2013 incident because there was no documentation of right shoulder complaints in her first three months of treatment. Dr. Bloch testified that Claimant did not make any complaints of injury above the right wrist prior to June 17, 2013. He also did not recall viewing any pain diagrams not included in the Concentra notes presented to him for the deposition. Dr. Bloch noted that he has significant experience identifying and treating rotator cuff tears. He did not believe a rotator cuff tear caused by an acute injury would have a two month delayed onset. Dr. Bloch testified that Claimant did not suffer a rotator cuff tear as part of the March 27, 2013 incident because it would have appeared earlier in his clinical examinations. Dr. Erickson specifically identified Claimant's rotator cuff condition as a small 1 cm tear of the anterior portion of the supraspinatus tendon. He interpreted the cervical MRI as showing "very mild, early degenerative disc disease." Regarding causation, Dr. Erickson stated "it is simply unreasonable to believe that a rotator cuff tear would not cause symptoms for 3 months." Therefore, Dr. Erickson summarized that Claimant's right shoulder pathology was not related to the March 27, 2013 incident.

10. As found, in contrast, Dr. Healey diagnosed Claimant with a number of conditions involving her right hand, arm and shoulder that were directly related to the March 27, 2013 accident. He remarked that Claimant described her mechanism of injury as jerking her arm and neck back. The mechanism of injury could cause either a rotator cuff tear, shoulder sprain/strain or myofascial pain in and around the neck and shoulder. He commented that Claimant's statement that she suffered initial pain at the time of injury to her shoulder, upper trapezius and neck was consistent with the mechanism of injury. However, after reviewing Claimant's June 18, 2013 physical therapy notes he acknowledged that the "shift in concern" was contradictory to Claimant's statements that the physical therapist had recognized her shoulder symptoms prior to the date. Moreover, the medical records and persuasive testimony reflect that the temporal proximity of Claimant's shoulder symptoms approximately three months after the March 27, 2013 incident suggest that they were unrelated to the accident. The bulk of the evidence demonstrates that Claimant's job activities on March 27, 2013 did not aggravate, accelerate, or combine with a pre-existing condition to produce a need for medical treatment above her right hand.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge;

and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 8, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Average weekly wage,

2. Temporary total disability benefits if there is a change in AWW;

3. Medical benefits; and

4. Recovery of for a no show fee and transportation costs against the claimant's attorney for the claimant's failure to attend the respondent IME.

FINDINGS OF FACT

1. The claimant worked for the respondent-employer Construction Company as a laborer. His regular rate of pay was $15.00 per hour. He was hired on September 4, 2012.

2. In addition to the claimant's regular job, the respondent-employer occasionally worked on government jobs which mandated that skilled workers were to be paid $17.49 per hour and non-skilled workers $23.36 per hour. Skilled workers could also be paid $15.04 per hour for tape and finish tasks and $17.49 per hour for framing and drywall.

3. From December 9, 2012 through February 3, 2013, the claimant worked as a non-skilled worker on a government job at Fort Carson where he earned $23.36 per hour. The claimant verified that this 9 week time period was the only government job he worked where he earned $23.36 per hour. During this time, the claimant did not work a 40 hour work week, but instead worked between 18.50 hours and 40 hours per week. During this time, the claimant worked a total of 216.5 hours at $23.36 per hour, 61.5 hours at $17.49 per hour and 24 hours at $15.04 per hour. He continued working on this government job for 4 more weeks (February 10 through March 3, 2013), for 145 total hours and was paid $15.04 per hour. The claimant did not work any hours at any rate for the week of March 10, 2013. After March 10, he worked his regular rate of pay of $15.00 per hour up until the June 27, 2013 date of injury.

4. Prior to and subsequent to the Fort Carson job, the claimant earned his regular pay for the respondent-employer at $15.00 per hour.

5. There was no other government job the claimant was scheduled to have worked for the respondent-employer at any time at the $23.36 rate.

6. The respondent-employer First Report of Injury was filed on June 27, 2013, stating that the claimant sustained an abdomen/groin injury on that same date at 2:00 p.m. Dr. George Johnson, the claimant's authorized treating physician, reported that the claimant's primary problem, located in the left groin, began on June 27, 2013, and was described by the claimant to be severe aching and stabling. It was noted that the claimant, age 31, was using a screw gun to secure drywall on June 27th when the injury occurred.

7. A General Admission of Liability ("GAL") was filed on July 29, 2013. There was no specified average weekly wage in the admission because the claimant did not lose any time from work and the initial GAL was for medical benefits only as stated on the admission.

8. On November 1, 2013, the claimant underwent groin surgery with David Brown, M.D. Dr. Brown's surgical report indicates that hernia surgery was being done as a result of a work injury claimant had in June 2013.

9. On April 30, 2014, a second GAL was filed which admitted for temporary total disability benefits from November 1, 2013 (the date of surgery) through January 22, 2014. The respondent-insurer admitted to an average weekly wage (AWW) of $602.45. This AWW was computed using claimant's gross wages from September 10, 2012 through June 23, 2013, which totaled $24,700.34. The admitted AWW includes all of the increased wages from the Fort Carson job despite that this was the sole job for which the claimant earned the higher $23.36 per hour while working for the respondent-employer.

10. The claimant began to work for a subsequent employer beginning January 23, 2014 through February 18, 2014, so the respondent-insurer did not pay TTD or TPD to the claimant for this time period. No issue was raised at hearing for TTD or TPD benefits to the claimant for this time period, as such issue, which had been endorsed by the claimant, was stricken pursuant to a pre-hearing conference order.

11. The respondent-insurer reinstated TTD to the claimant at the $602.45 admitted AWW on March 1, 2014 through ongoing and continuing.

12. The claimant claims that his correct and only date of injury was January 24, 2013 and not June 27, 2013. The claimant testified that he sustained an admitted groin strain on January 24, 2013 while working for the respondent-employer. The claimant admitted that this was a non-lost time claim for which he was placed at MMI on February 28, 2013 with no impairment, no restrictions and no medical maintenance care. This non-lost time claim is not included in the General Admissions of Liability in Carrier No. 3576405 which admits for a date of injury of June 27, 2013.

13. The claimant did not consolidate his two claims.

14. The claimant did not endorse date of injury ("DOI") as a hearing issue.

15. The ALJ finds that the claimant's proposed AWW of $738.05, using the higher $23.36 hourly rate that the claimant earned from a one-time, temporary Fort Carson job for a 6 week period of time prior to January 24, 2013 (5 months before the admitted June 27, 2013) injury, is not a true or accurate or fair depiction of the claimant's actual AWW while working for the respondent-employer. The ALJ rejects claimant's computation of AWW by using wages earned exclusively during a time period that consists of 5 months before the admitted work injury and excludes in its entirety claimant's correct hourly rate of $15.00 per hour.

16. The ALJ finds that the admitted AWW of $602.45 is a fair computation of AWW, as it includes the $23.36 hourly wage earned by the claimant for the entire 9 week period of time the claimant worked at the Fort Carson job even though this government job was solely for a 9 week period of time (from December 9, 2012 through February 3, 2013) and the claimant was not scheduled to work on any other government job at the $23.36 hourly rate at any time for the respondent-employer.

17. After undergoing hernia surgery with Dr. Brown, in November 2013, the claimant, Dr. Brown recommended an umbilical hernia repair and left groin exploration for a left groin mass.

18. The respondent-insurer sent the claimant to surgeon Janine C. Meza, M.D., for a second opinion regarding the surgery recommended by Dr. Brown.

19. Dr. Meza evaluated the claimant on October 14, 2013, and documented that the claimant developed left groin pain after heavy lifting at work. He initially was noted to have pain following an injury on June 27, 2013. Since that time, he has had persistent left groin pain that has not improved. Dr. Meza opined that the recommended surgery was reasonable and necessary.

20. On May 16, 2014, the claimant underwent a second surgery with Dr. Meza. There are no medical records following this procedure by Dr. Meza.

21. Following surgery, the claimant continued to treat with ATP, Dr. Johnson. On January 9, 2015, Dr. Johnson anticipated that the claimant would reach MMI on March 9, 2015.

22. Dr. Johnson also referred the claimant to Dr. Malinky, who opined that following an epidural steroid injection on November 13, 2014, the claimant had 75% improvement of pain for 3 weeks; that a lumbar MRI was "fairly benign"; that he did not believe any more steroid injections would be helpful; and he did not recommend surgery. During a telephone conference with Dr. Johnson on January 13, 2015, Dr. Malinky indicated that he did not have any other medical treatment to offer claimant.

23. On February 25, 2015, Dr. Johnson reported that the claimant "continues to have pain which is severe and unrelenting. No treatments have been beneficial. The patient's subjective symptoms are not supported by objective findings. I believe he is amplifying his symptoms. An IME has been scheduled for [March 4, 2015]. I do not believe any additional treatment will help his condition. I believe he is nearing MMI. We will need a rating. May need permanent restrictions, a functional capacity exam is scheduled for [March 20, 2015]. He rescheduled the FCE because of personal issues . . ."

24. On February 26, 2015, Dr. Johnson referred claimant to John Tyler, M.D., for pain management. The request for authorization for this referral and treatment was authorized by respondent-insurer.

25. No physician in this case has referred the claimant for a surgical evaluation.

26. The claimant testified that he conducted a "Google search" of hernia physicians and found a Dr. Robert McDonald from CU Medical School. According to the claimant, he wants to see Dr. McDonald because Dr. Meza "told me" that she does not know how to fix failed hernia surgeries.

27. The claimant presented no medical records from Dr. Meza subsequent to the May 16, 2014 surgery. The claimant presented no evidence documenting Dr. Meza's alleged statements.

28. The claimant failed to make a proper showing in support of his request for a change of physician to a hernia surgeon, Dr. McDonald.

29. There is insufficient evidence that the claimant has failed surgeries or that the claimant is in need of a surgeon to fix any failed surgeries.

30. There is no referral to Dr. McDonald by any authorized treating physician or any physician in this case.

31. Insufficient evidence was presented regarding Dr. Robert McDonald, his background or credentials.

32. A lack of evidence was presented that the claimant is not receiving adequate medical treatment for his admitted work injury. Based upon review of the medical records the ALJ finds the claimant has received adequate medical treatment in this claim.

33. The claimant has failed to establish appropriate grounds for his request to change physicians to Dr. Robert McDonald.

34. Respondents scheduled the claimant for an IME with John Raschbacher, M.D. on March 4, 2015.

35. Notice of the IME was sent to the claimant on February 9, 2015.

36. A prehearing conference was held on February 24, 2015 on issues including respondents' motion to compel the claimant to attend the March 4, 2015 IME. The ALJ did not issue a ruling on the motion because as stated in her Order, the claimant agreed to attend the IME as scheduled.

37. The claimant called Dr. Raschbacher's office on March 2, 2015 and informed them that he would be unable to attend the IME and that it needed to be rescheduled at a later date and he was informed by the person answering the phone at Dr. Raschbacher's office that he could not reschedule the IME and his attorney had to.

38. The respondent-insurer arranged for transportation of the claimant to Dr. Raschbacher's office for the scheduled IME with a business called Where 2 Transportation and gave notice of the scheduled transportation to the claimant's attorney on March 3, 2015, only hours before the scheduled IME.

39. The claimant was left a phone message by a Mr. Weishzhaar at Where 2 Transportation in the late afternoon of March 3, 2014 and the claimant returned this call shortly after receiving it and told Mr. Weishzhaar that he had tried to reschedule the IME

and that he would not be attending it the following day and they should not send anyone to pick him up.

40. The ALJ finds insufficient evidence to hold the claimant or his attorney responsible for the no show fee or the transportation fee.

CONCLUSIONS OF LAW

1. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under some circumstances, the ALJ may determine a claimant's TTD rate based upon earnings the claimant received on a date other than the date of injury. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P.3d 867 (Colo. App. 2001); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Avalanche Industries, Inc. v. Clark,* __P.3d__ (Colo. Sup. Ct. No. 07SC255, December 15, 2008).

4. The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Where a claimant's earnings increase periodically his AWW may be calculated based upon earnings during a given period of disability, not the earnings on the date of the original injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*. Claimant has the burden to establish by a preponderance of the evidence that the admitted AWW should be increased. *Section 8-43-201, C.R.S.*

5. The ALJ, in the exercise of his discretion § 8-42-102(3), concludes that a fair calculation of the claimant's AWW is the admitted one in the amount of $602.45.

6. There is a statutory obligation for the claimant to prescribed procedures in C.R.S. § 8-43-404(5)(a), for requesting a change of physician. Y*eck v. Indus. Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999). The Act does not permit an injured worker to change physicians or employ additional physicians without notice and consent. *Pickett v. Colorado State Hospital*, 513 P.2d 228 (Colo. App. 1973). However, a claimant may seek a change of physician upon a "proper showing" to the division. C.R.S.§ 8-43-404(5)(a)(VI); *also see Carlson v. Industrial Claim Appeals Office* 950 P.2d 663 (Colo. App. 1997). §8-43-404(5) does not contain a specific definition of a "proper showing."

7. An ALJ possesses broad discretionary authority to grant a change of physician depending on the particular circumstances of the claim. *Yeck v. Industrial Claim Appeals Office, supra; Szocinski v. Powderhorn Coal Co*., W.C. No. 3-109-400 (I.C.A.O. December 14, 1998). An ALJ's order as to change of physician may only be overturned for an abuse of discretion. An abuse exists if the ALJ's order is beyond the bounds of reason, as where it is unsupported by the evidence or is contrary to law. *Rosenberg v. Board of Education of School District No. 1*, 710 P.2d 1095 (Colo. 1995).

8. In ruling as to whether or not a claimant has made a "proper showing", the ALJ may consider whether the patient and physician were unable to communicate such that the physician¹s treatment failed to prove effective. *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 16, 1995). However, where a claimant is receiving adequate medical treatment, the court need not allow a change of physician because of a claimant's personal reasons, including mere dissatisfaction, especially where no specific evidence is provided regarding the qualifications or abilities of a different physician to treat the Claimant is presented. *Loza v. Ken¹s Welding*, W.C. 4-712-246 (I.C.A.O. January 7, 2009).

9. The ALJ¹s decision should consider the need to insure the claimant is provided reasonable and necessary medical treatment as required by C.R.S. §8-42-101(1), while protecting the respondent¹s interest in being apprised of the course of treatment for which it may ultimately be held liable*. Solok v. Final Order Wal-Mart Stores, Inc*., W.C. No. 4-743-263 (I.C.A.O. October 22, 2009); *Jones v. T.T.C. Illinois,Inc.*, W.C. 4-503-150 (I.C.A.O. May 5, 2006).

10. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.;

Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence

11. "Authorization" refers to the physician's legal authority to treat the claimant and to expect to receive payment from the insurer for services that are reasonable and necessary to treat the industrial injury. Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *SeeOne Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 507 (Colo. App. 1995).A physician may become authorized to treat the claimant as a result of a referral from a previously authorized treating physician. The referral must be made in the "normal progression of authorized treatment." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

12. As found, the claimant has failed to make a proper showing for requesting a change of physician to Dr. Robert McDonald, a hernia surgeon. Moreover, no physician referred the claimant to Dr. Robert McDonald and no physician has opined that a referral to any hernia surgeon, including Dr. McDonald, is reasonable and necessary. As found, the claimant has received adequate medical treatment in this claim.

13. An ALJ has discretion to order a claimant and/or a claimant's attorney to reimburse an insurer for a no show fee and transportation costs for failure to attend a Respondent IME. *See Hummer v. CTSI,* W.C. No. 4-6120-449 (ICAO May 31, 2012). Here, given the circumstances that the claimant put everyone on notice well ahead of time that he was unable to make the appointment, the ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that either the claimant or his attorney should be responsible for the payment of those costs.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for an increase in his average weekly wage is denied and dismissed.

2. The claimant's request for a change of physician to Dr. McDonald and/or evaluation and treatment by Dr. McDonald is denied and dismissed.

3. The respondents request for reimbursement of a No Show fee and transportation costs is denied and dismissed.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 14, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury, staph infection and discitis during the course and scope of his employment with Employer on June 21, 2013.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $507.69.

2. If the claim is found compensable, Claimant is entitled to receive Temporary Partial Disability (TPD) benefits in the amount of $1,023.84.

FINDINGS OF FACT

1. Claimant was born on May 8, 1957. On April 1, 2000 Claimant began working for Employer as a Cattleman.

2. Claimant's job duties involve caring for and feeding cattle. One of his responsibilities is "sleeving" cows. "Sleeving" is a procedure in which Claimant wears a shoulder length rubber glove and extends his left arm into the uterus of a cow to remove afterbirth products. Claimant has "sleeved" over 1,000 cows in his 35 years as a Cattleman.

3. On June 21, 2013 Claimant was sleeving a cow that had recently delivered a calf. He noticed that the cow became agitated and moved during the sleeving process. He thus stood in a sideways position with his left foot in front of his right foot attempting to brace himself. Claimant continued the sleeving process but the cow began swinging him back and forth in a manner that was different and more aggressive than in his prior experience. Claimant then pulled his arm out and experienced immediate lower back pain. His symptoms gradually increased throughout the day. By evening his family members transported him to Longmont United Hospital for medical treatment.

4. On the evening of Friday, June 21, 2013 Claimant arrived at the Longmont United Hospital Emergency Room complaining of back pain. The pain began at work when a cow jerked him forward. The treating physician reported that Claimant sustained lower back pain as a result of a work incident. There were no other diagnoses Claimant was discharged with pain medications.

5. Claimant continued to experience lower back pain over the next several days. On June 25, 2013 he also began to develop a number of symptoms that included: right wrist pain, left shoulder pain and swelling, neck pain, a headache and a sore throat. After obtaining treatment from NextCare Urgent Care, Claimant returned to Longmont United Hospital.

6. Claimant initially received treatment from Suzanne Metcalf, M.D. However, Dr. Metcalf sought an orthopedic consultation and was also suspicious of an infectious disease process.

7. Claimant underwent treatment with infectious disease specialist Eva Patricia Gill, M.D. at Longmont United Hospital. Dr. Gill diagnosed Claimant with polyarthritis and polyarthralgia but also included differential diagnoses of rheumatic fever or an illness associated with exposure to cattle such as brucellosis or Q. fever. However, blood work revealed that Claimant suffered from staphylococcus aureus sepsis or staph infection.

8. Claimant remained at Longmont United Hospital from June 25, 2013 through July 12, 2013. During his hospitalization Claimant received antibiotic treatment for the staph infection. At his discharge Obianuju Mba, M.D. diagnosed Claimant with "subcutaneous abscess of the right wrist, status post incision and drainage with associated staph sepsis." Dr. Mba reported that infectious disease was involved in Claimant's treatment and "it was thought that the source of his infection was a subcutaneous abscess of his right wrist, which underwent incision and drainage on July 8, 2013." Claimant was discharged on July 12, 2013 and set up for home care that included IV antibiotics with a PICC line.

9. On July 17, 2013 Dr. Gill responded to a letter from Insurer regarding the causation of Claimant's symptoms. She explained that Claimant sustained trauma to his back during the incident with the cow on June 21, 2013. The incident permitted "seeding" of the piriformus muscle with staph infection that spread into other areas of Claimant's body. Consequently, Claimant's health condition was directly related to the June 21, 2013 work injury.

10. Claimant continued to receive outpatient care from Dr. Gill. All of his symptoms were resolving except lower back pain. Because Claimant's lower back pain increased, he underwent a second MRI of the lumbar spine on August 1, 2013. The second MRI revealed marked progression of discitis, osteommyelitis at the L5-S1 level with endplate erosive changes and a marked increase in infection causing moderate thecal sac compression. Claimant's infection extended into the prevertebral soft tissues at the L5-S1 level.

11. On August 7, 2013 Claimant underwent lumbar surgery to treat an infected disc at L4-L5 and L5-S1. The surgery included a partial L4 corpectomy, debridement of the L4-5 disc space and a posterior fusion.

12. On November 4, 2013 Claimant underwent an independent medical examination with Alexander Jacobs, M.D. Dr. Jacobs concluded that Claimant's lower

back symptoms were not related to the June 21, 2013 work incident with the cow. He reasoned:

> [Claimant's] symptoms occurred almost immediately at the time that he was jostled by the cow. This time frame is inconsistent with any form of inoculation from the cow that would cause the lumbar discitis and the seeding of multiple other joints that he experienced…This time period is absolutely too soon to consider inoculation, bacteremia, and seeding that was ultimately proven by cultures, biopsy and surgery.
>
> It is far more likely that the patient inoculated himself either from his skin source in the upper extremities or from poor oral hygiene. This inoculation would have taken place sometime prior to the onset of symptoms on June 21, 2013. It was because the discs were already inflamed that he experienced pain when being jostled by the cow when his left arm was inserted in her uterus.
>
> There is no evidence whatsoever that [Claimant] had any trauma at the time of the alleged Workers' Comp injury. In fact, he told a number of physicians and interviewers that he didn't think the cow had anything to do with his pain. However, the pain in the lumbosacral area became so significant that he could barely walk. There is nothing that occurred at the time of the removal of the products of conception that could have caused him to develop a Staph aureus infection. There is no portal of entry, no fall, no kick by the cow, no hematoma, no bruising, and no skin break or laceration to prompt inoculation.

13. On July 6, 2014 infectious disease specialist Daniel Mogyoros, M.D. conducted a records review of Claimant's case. He determined that Claimant's staph infection and lower back symptoms were not caused by the June 21, 2013 cow incident. Dr. Mogyoros initially noted that a 56 year old male such as Claimant is in the right epidemiologic group to develop a spinal infection. Moreover, the lumbar spine is the most common site for an infection. Dr. Mogyoros considered whether Claimant's spine was seeded with staph infection prior to or at the time of the cow incident. He remarked that it was unlikely that seeding occurred while Claimant's left arm was in the cow because he was wearing a shoulder glove on his left arm and there was no evidence of infection in his left arm. Instead, Claimant had a "subcutaneous abscess of the right wrist and probable septic bursitis of the right elbow." Dr. Mogyoros explained that "[m]ore likely the port of entry was from one of the documented skin lesions, or possibly from either the site of the subcutaneous abscess at the wrist of the septic bursitis, prior to these events and unrelated to the incident with the cow. (In fact, [Claimant] did not begin to improve until the debridement of the wrist on July 8). He then either seeded the spine directly or developed endocarditis, and then secondarily seeded the spine."

14. Dr. Mogyoros detailed that skeletal muscles are quite resistant to infection in the absence of actual trauma to the muscle or overuse. Studies show that muscle

injected with staph aureus developed abscesses only if it had been traumatized in some fashion such as a pinch, electric shock or ischemia. There is no evidence that Claimant had the preceding type of mechanical injury to his piriformis or that there was overuse as has been described in cases of athletes who develop pyomyositis. Finally, pyomyositis is a subclinical infection that usually develops over a matter of weeks.

15. Dr. Gill testified at the hearing in this matter. She maintained that the June 21, 2013 cow incident caused Claimant to develop a Staph infection and undergo subsequent lumbar spine surgery. Dr. Gill testified that Staphylococcus is an aggressive bacteria that rapidly multiplies and can spread fairly quickly in the right circumstances. Dr. Gill explained that "seeding" occurs when bacteria circulate through the bloodstream then drop off like a farmer sowing seed. The bacteria tend to seed in an area such as an injured muscle that is fertile. Although skeletal muscle is particularly resistant to infection, this is not the case if there has been an injury. Experiments were conducted on dogs and it was not until the muscle was injured that the infection seeded in the muscle. In Claimant's case bacteria flowed through the bloodstream, took root and began to multiply and grow in an area that was susceptible. Claimant's lower back area was particularly susceptible to the seeding by the staph after the cow incident on June 21, 2013. Dr. Gill commented that a few days of infection can cause symptoms to develop. Several weeks of infection are not required before the development of symptoms.

16. Dr. Jacobs testified at the hearing in this matter. He maintained that Claimant's lower back symptoms and need for surgery were not related to the June 21, 2013 work incident with the cow. He explained that the skin is the most common site for staph infections. Based on Claimant's history of skin issues on his arms, Dr. Jacobs stated that the staph infection likely settled on his arm. Dr. Jacobs noted that it takes weeks or even months to develop an abscess or osteomyleitis on a lumbar disc. It was unlikely that the staph infection began in Claimant's piriformis muscle in his lower back. Dr. Jacobs commented that in his 40 years of practicing medicine he has never seen a piriformis infection. A piriformis infection requires recurrent trauma or abuse as potentially exhibited by a professional athlete. Finally, Dr. Jacobs remarked that Claimant's back pain became so severe so quickly that there was likely existing staph in his lumbar spine that caused the symptoms.

17. Dr. Mogyoros testified at the hearing in this matter. He agreed with Dr. Gill's diagnosis of staph aureus infection. Although he has seen approximately 2,500 cases of staph in patients he does not believe he has ever treated a patient where staph developed primarily as a muscle infection then spread through the blood distally. Two observations suggestive of endocarditis or infection of the heart valve include Claimant's multiple site and multiple joint infections. Piriformis abscesses in which the piriformis muscle is the initial site of infection is exceedingly rare. Cases in the literature reflect that the piriformis pyomyositis is typically associated with epidural catheters and overuse in athletes. Furthermore, if a common back sprain or strain could result in an infection, staph would be much more prevalent.

18. Dr. Mogyoros explained that the timing of Claimant's symptoms suggest that his lower back condition was not caused by the June 21, 2013 cow incident. It

would take a couple of weeks for the muscles to abscess, the bacteria to infiltrate the infected area and Claimant to develop inflammation causing symptoms. Dr. Mogyoros summarized that Claimant had a brewing spinal infection by the time of the cow incident that caused the already inflamed muscles to go into spasm. Claimant's extreme initial symptoms and intractable pain were consistent with a preexisting infection. The infection would have spread regardless of the June 21, 2013 incident.

19. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury, staph infection and discitis during the course and scope of his employment with Employer on June 21, 2013. Claimant maintained that on June 21, 2013 he was sleeving a cow that began to swing him back and forth. Claimant then pulled his arm out and experienced immediate lower back pain. His symptoms gradually increased throughout the day. After receiving initial medical treatment his lower back pain continued to increase and he was diagnosed with staph infection. The staph infection of Claimant's piriformis muscle in his lower back caused an abscess that required lumbar surgery to treat an infected disc at L4-L5 and L5-S1. Dr. Gill explained that Claimant sustained trauma to his back during the incident with the cow on June 21, 2013. The incident permitted "seeding" of the piriformus muscle with staph infection that spread into other areas of Claimant's body. Consequently, Claimant's lower back symptoms and need for surgery were directly related to the June 21, 2013 work injury.

20. In contrast to Dr. Gill's opinion, the bulk of the medical evidence demonstrates that the Claimant was already infected with staph at the time of the cow incident. Drs. Mogyoros and Jacobs explained that the degree of pain and symptoms reported by Claimant were caused by the presence of the staph infection at the time the incident occurred. They testified that it is extremely difficult to seed staph infection in the piriformus muscle. In fact, studies show that when pyomyitis is diagnosed, it normally occurs in overuse by athletes. Drs. Mogyoros and Jacobs explained that Claimant's lower back sprain or strain would be insufficient for the seeding of staph infection. Otherwise, based on the high incidences of lower back sprains and strains, many more patients would develop staph infection. It is more likely that Claimant developed staph on one of his upper extremities prior to June 21, 2013 that settled in the piriformus muscle in his lower back. Claimant's discs were thus likely already inflamed while he was sleeving the cow on June 21, 2013.

21. The development of symptoms consistent with a staph infection within days of the cow incident suggests that the staph infection in Claimant's lower back existed prior to June 21, 2013. Drs. Mogyoros and Jacobs persuasively maintained that the timing of Claimant's symptoms suggest that his lower back condition was not caused by the June 21, 2013 cow incident. It would take a couple of weeks for the muscles to abscess, the bacteria to infiltrate the infected area and Claimant to develop inflammation causing symptoms. Dr. Mogyoros summarized that Claimant had an already brewing spinal infection by the time of the cow incident that caused the already inflamed muscles to go into spasm. Claimant's extreme initial symptoms and intractable pain were consistent with a preexisting infection. The infection would have spread regardless of the June 21, 2013 incident. The temporal proximity between Claimant's

work activities and lower back symptoms does not mean there is a causal connection between his lower back condition and his work. Accordingly, Claimant's June 21, 2013 cow incident did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for

medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and his work.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury, staph infection and discitis during the course and scope of his employment with Employer on June 21, 2013. Claimant maintained that on June 21, 2013 he was sleeving a cow that began to swing him back and forth. Claimant then pulled his arm out and experienced immediate lower back pain. His symptoms gradually increased throughout the day. After receiving initial medical treatment his lower back pain continued to increase and he was diagnosed with staph infection. The staph infection of Claimant's piriformis muscle in his lower back caused an abscess that required lumbar surgery to treat an infected disc at L4-L5 and L5-S1. Dr. Gill explained that Claimant sustained trauma to his back during the incident with the cow on June 21, 2013. The incident permitted "seeding" of the piriformus muscle with staph infection that spread into other areas of Claimant's body. Consequently, Claimant's lower back symptoms and need for surgery were directly related to the June 21, 2013 work injury.

8. As found, in contrast to Dr. Gill's opinion, the bulk of the medical evidence demonstrates that the Claimant was already infected with staph at the time of the cow incident. Drs. Mogyoros and Jacobs explained that the degree of pain and symptoms reported by Claimant were caused by the presence of the staph infection at the time the incident occurred. They testified that it is extremely difficult to seed staph infection in the piriformus muscle. In fact, studies show that when pyomyitis is diagnosed, it normally occurs in overuse by athletes. Drs. Mogyoros and Jacobs explained that Claimant's lower back sprain or strain would be insufficient for the seeding of staph infection. Otherwise, based on the high incidences of lower back sprains and strains, many more patients would develop staph infection. It is more likely that Claimant developed staph on one of his upper extremities prior to June 21, 2013 that settled in the piriformus muscle in his lower back. Claimant's discs were thus likely already inflamed while he was sleeving the cow on June 21, 2013.

9. As found, the development of symptoms consistent with a staph infection within days of the cow incident suggests that the staph infection in Claimant's lower back existed prior to June 21, 2013. Drs. Mogyoros and Jacobs persuasively maintained that the timing of Claimant's symptoms suggest that his lower back condition was not caused by the June 21, 2013 cow incident. It would take a couple of weeks for the muscles to abscess, the bacteria to infiltrate the infected area and Claimant to develop inflammation causing symptoms. Dr. Mogyoros summarized that Claimant had an already brewing spinal infection by the time of the cow incident that caused the already inflamed muscles to go into spasm. Claimant's extreme initial symptoms and intractable pain were consistent with a preexisting infection. The infection would have spread regardless of the June 21, 2013 incident. The temporal proximity between Claimant's work activities and lower back symptoms does not mean there is a causal connection between his lower back condition and his work. Accordingly, Claimant's June 21, 2013 cow incident did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Workers' Compensation benefits is denied and dismissed.

2. Claimant earned an AWW of $507.69.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 2, 2015.

DIGITAL SIGNATURE:

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether the surgery recommended by Alexander Mason, M.D. is reasonably necessary to cure and relieve the effects of Claimant's September 1, 2013 industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a driver, with duties that included driving semi-trailer trucks and delivering fuel to various locations.

2. On September 1, 2013 Claimant suffered an admitted work related injury. On that date, Claimant moved a loading arm on the truck, twisted, and felt a sharp pain in his lower back.

3. Prior to the work related injury, Claimant had three surgeries on his back. Claimant underwent two laminectomies/discectomies at the L4-5 level and in 2005 underwent a lumbar interbody fusion at L4-5. *See* Exhibit 10.

4. From 2005 until Claimant's September 1, 2013 work related injury Claimant did not have any ongoing back problems. His fusion in 2005 was considered successful.

5. On September 1, 2013 Claimant sought medical treatment at North Suburban Medical Center. He reported to the emergency room physician that he was turning a large pivot arm when he felt a pull in his lower back. Claimant reported sharp back pain in the left mid lumbar spine, left lower lumbar spine, left gluteus, and pain in the left leg. *See* Exhibit P.

6. On September 3, 2013 Claimant saw Michael Ladwig, M.D. Claimant reported to Dr. Ladwig that he was positioning a load and while moving the arm and twisting, he felt a sharp pain in his lower back which shot pain into his right leg and buckled his legs. Claimant reported back pain and pain into his right foot. *See* Exhibit O.

7. Dr. Ladwig referred Claimant for an MRI of his lumbar spine. Claimant underwent the MRI on September 14, 2013.

8. The MRI report was interpreted by Bao Nguyen, M.D. Dr. Nguyen confirmed prior surgical changes from an L4-5 interbody fusion and decompressive laminectomy. He also noted at the L3-4 level, and above the L4-5 fusion block that the disc was desiccated, moderately narrowed, and associated with a broad-based

protrusion which extended into both neural foramina and combined with facet arthrosis to produce moderate bilateral L3-4 neural foramina stenosis. He noted that the central spinal canal was also mild to moderately narrowed. *See* Exhibit 8.

9. Dr. Nguyen's impression was L4-5 interbody fusion with disc degeneration above the fusion block, accounting for moderate bilateral foraminal stenosis and mild to moderate central spinal canal narrowing at L3-4. *See* Exhibit 8.

10. Dr. Ladwig referred Claimant for physical therapy and also referred Claimant to Rehabilitation Associates of Colorado for treatment. *See* Exhibit O.

11. On October 16, 2013 Claimant saw Franklin Shih, M.D. Claimant reported discomfort in his low back with radiation into the right leg. Claimant reported his current pain level as 4/10 with his worst level 10/10 and best level 3/10. Dr. Shih assessed Claimant with status post work injury with secondary low back pain – mechanical and radicular features. Dr. Shih noted that the lumbar MRI was remarkable for disc pathology at L3/4 with bilateral foraminal stenosis. He noted multilevel multifactorial degenerative changes contributing to the stenosis. He opined that the likely cause of Claimant's acute symptomatology was the disc pathology superimposed on the other degenerative features and that Claimant had some radicular irritation associated with the foraminal stenosis. Dr. Shih thought it would be appropriate for Claimant to be evaluated by Dr. Olsen for selective injections. *See* Exhibit L.

12. On October 21, 2013 Claimant saw Nicholas Olsen, D.O. Claimant reported his pain level as 4/10 and reported it was as high as a 10/10 at the time of his injury. Dr. Olsen assessed lumbar sprain/strain, work related injury that occurred on September 1, 2013 and assessed clinical signs of facet arthrosis, right L5-S1. Dr. Olsen opined that Claimant's subjective symptoms correlated with the MRI. Dr. Olsen noted Claimant's facet arthrosis was quite significant, clearly painful, and opined that Claimant's complaints were due to his acute work injury. *See* Exhibit L.

13. On October 29, 2013 Dr. Olsen performed an L4/5 diagnostic facet injection, which provided some relief, but not significant enough relief to return to full duty work safely or effectively. See Exhibit L.

14. On November 12, 2013 Dr. Olsen performed a right L4 medial branch block which did not provide relief. Following the block, Claimant reported his pain complaints were at a 2-3/10. *See* Exhibit L.

15. On November 25, 2013 Dr. Olsen noted that Claimant had a nondiagnostic response to the medial branch block and that Claimant was not a candidate for a radiofrequency neurotomy. *See* Exhibit L.

16. On December 16, 2013 Claimant again saw Dr. Olsen. Claimant reported a pain level of 4/10. Dr. Olsen recommended a bilateral L4-5 and L5-S1 medial branch

block for diagnostic purposes. Dr. Olsen noted that the surgical site from Claimant's prior surgery was uncomplicated and a very unlikely pain generator. *See* Exhibit L.

17. On January 7, 2014 Claimant saw David Yamamoto, M.D. Claimant reported pain in his back and down his right leg at a level ranging from 4-7/10. Dr. Yamamoto diagnosed lumbosacral strain and referred Claimant to Centeno-Shultz Clinic for treatment. *See* Exhibit 3.

18. On January 27, 2014 Claimant saw Christopher Centeno, M.D. who noted Claimant's low back pain, right greater than left. Dr. Centeno reviewed the September 2013 MRI and noted facet arthropathy in the L4-5 and L5-S1 regions of the lower back. Dr. Centeno recommended Claimant undergo an EMG/nerve conduction study and recommended epidural injections at the L4-L5 and L5-S1 regions of the right low back. *See* Exhibit K.

19. On February 13, 2014 Ben Newton, M.D. saw Claimant. Dr. Newton noted that Claimant's EMG showed abnormalities. *See* Exhibit 4.

20. In April of 2014, Claimant was referred to and began treating with Peter Reusswig, M.D. Claimant noted pain down both legs, and indicated that the left leg was worse. Dr. Reusswig diagnosed neuropathic pain and opined that Claimant's pain was from posterior elements above and below Claimant's prior fusion hardware level with associated left radicular pain. Dr. Reusswig performed medial branch blocks from L2 to L5 bilaterally that provided 65% temporary pain relief. During the course of treatment with Dr. Reusswig, Claimant's pain complaints ranged from 2-8/10. *See* Exhibit 5.

21. In July of 2014, Claimant was referred to Alexander Mason, M.D. for a surgical evaluation. On July 28, 2014 Dr. Mason noted that Claimant had lumbar degeneration at L3-4 above his previous fusion that became symptomatic after his work incident. Dr. Mason noted the leg symptoms were somewhat nonspecific and were of secondary importance. Claimant rated his back pain as an 8/10 and his leg pain as 4/10. Dr. Mason requested a new MRI be performed. *See* Exhibit 1.

22. On August 27, 2014 Claimant underwent an MRI interpreted by Scott Loomis, M.D. Dr. Loomis' impression included evidence of prior L4-L5 discectomy and posterior spinal fusion, mild to moderate degenerative changes throughout the lumbar spine, L1-L2 mild central canal narrowing and mild bilateral neural foraminal narrowing, and L-3-L4 mild central canal narrowing and mild to moderate bilateral neural foraminal narrowing. *See* Exhibit 1.

23. On September 22, 2014 Dr. Mason, after reviewing the new MRI, recommended surgery consisting of hardware removal at L4/5 with transfer lumbar interbody fusion (TLIF) at L3/4. *See* Exhibit 1.

24. On September 26, 2014 Respondents applied for a hearing regarding whether the surgery recommended by Dr. Mason was reasonable and necessary. *See* Exhibit 12.

25. On October 1, 2014 Dr. Yamamoto noted that he was in agreement with Dr. Mason's plan for L3-5 fusion. *See* Exhibit 3.

26. On October 7, 2014 Robert Messenbaugh, M.D. performed an independent medical examination at Respondents' request to review the reasonableness and necessity of the surgery recommended by Dr. Mason. Dr. Messenbaugh issued a report dated October 9, 2014. Dr. Messenbaugh opined that Claimant's low back was asymptomatic following his 2005 lumbar spine surgery and that Claimant returned to full work activities following the 2005 surgery. Dr. Messenbaugh also opined that Claimant injured his lower back on September 1, 2013 while working and that he had failed proper and extensive conservative treatment. Dr. Messenbaugh opined that diagnostic testing and examinations had been employed and determined that Claimant's major source of lumbar pain was from the broad-based disc protrusion, facet arthrosis, and neural foraminal stenosis at the L3-4 level as noted by MRI. Dr. Messenbaugh opined that the surgery recommended by Dr. Mason was the next reasonable, necessary, and related treatment for Claimant. *See* Exhibit D.

27. At the October 7, 2014 appointment with Dr. Messenbaugh Claimant presented with exaggerated symptoms. At the appointment Claimant reported a 10/10 pain level. Claimant presented with extreme difficulty and excruciating pain while standing to an erect position, ambulating, walking, and sitting down. Claimant complained of severe constant debilitating back pain. Dr. Messenbaugh could not recall seeing an individual exhibit such horrifically restricted motion.

28. Part of Dr. Messenbaugh's opinion that the surgery recommended by Dr. Mason was reasonable, necessary, and related was based upon his physical examination of October 7, 2014. Dr. Messenbaugh indicated he would only recommend surgery based upon Claimant's symptoms in conjunction with the findings on the MRI, and not based solely on MRI findings.

29. On October 18, 2014, October 20, 2014, October 21, 2014, and October 22, 2014 surveillance video of Claimant was taken. The surveillance shows, amongst other things, Claimant raking leaves, bending forward at the waist, standing erect, getting into and out of vehicles, driving a vehicle, vacuuming and cleaning a vehicle, using an electric leaf blower and an electric powered vacuum, bending onto one knee, and carrying bags of leaves. *See* Exhibits 14, 15, 16.

30. Dr. Messenbaugh viewed the surveillance videos and issued a supplemental report on October 31, 2014. Based upon his review of the surveillance videos, Dr. Messenbaugh opined that Claimant did not require the lumbar surgical procedure previously recommended, nor would Claimant benefit from such a surgical procedure. *See* Exhibit D.

31. Dr. Messenbaugh found the activities he viewed on the surveillance videos to be completely inconsistent with the October 7, 2014 examination. He testified that he would not recommend such an extensive lumbar surgical procedure for an individual capable of performing the wide range of unrestricted activities shown by the surveillance video.

32. On November 3, 2014 Claimant saw Dr. Yamamoto. Dr. Yamamoto noted Claimant's pain level in the back was 8/10. Dr. Yamamoto noted that there was apparently video surveillance of Claimant raking leaves that he had not viewed. Dr. Yamamoto again concurred with Dr. Mason's recommendation for an L3-5 fusion. *See* Exhibit 3.

33. On January 5, 2015 Claimant returned to Dr. Mason's office and saw Gene Cook, P.A. PA Cook noted Claimant's pain was at an 8-9/10, that Claimant has good and bad days, and that Claimant's level of functioning improves somewhat on high doses of pain medication. P.A. Cook noted that the office had not reviewed the surveillance video and did not feel that it was appropriate to provide investigational oversight or interpretation. P.A. Cook noted that the recommendation by Dr. Mason for surgical intervention was continued in light of failure of other conservative options and the imaging culprit at L3-4. P.A. Cook noted that Claimant could possibly seek a second opinion regarding this case. *See* Exhibit B.

34. On January 8, 2015 Dr. Yamamoto referred Claimant to Jeffrey Kleiner, M.D. for a second opinion. *See* Exhibit 3.

35. On February 3, 2015 Claimant saw Dr. Kleiner. Dr. Kleiner recommended that Claimant have decompression and stabilization at the L3-4 level to assist Claimant with his severe symptoms and to allow Claimant to resume active work activity and improve his functionality. *See* Exhibit 2.

36. Dr. Kleiner opined after reviewing Claimant's history, the MRI reports, and after physical examination that Claimant's symptoms emanate from the L3-4 area.

37. The surgery recommended by Dr. Kleiner is essentially the same procedure as the surgery recommended by Dr. Mason. Both Dr. Kleiner and Dr. Mason opined that there is a high probability that the surgery will help relieve Claimant's symptoms.

38. Dr. Kleiner also reviewed the surveillance videos. Dr. Kleiner has previously changed surgical opinions based on surveillance. However, Dr. Kleiner opined that the surveillance in this case did not change his opinion as to the recommended surgery. Dr. Kleiner indicated that the videos would have to have shown much greater physical activity in this case to have changed his mind and to contraindicate surgery.

39. Currently, Claimant is in constant pain. Claimant cannot drive a semi-trailer truck or perform the heavy work he performed prior to his September 1, 2013 injury. Claimant understands the risks and possible benefits of the recommended L3-L5 fusion and wants to undergo the procedure.

40. Although Claimant is in constant pain, he is not in as much pain as he exhibited at his October 7, 2014 appointment with Dr. Messenbaugh. Claimant understood that appointment to be a second opinion that would potentially determine whether or not he received the surgery recommended by Dr. Mason and Claimant exaggerated his symptoms.

41. Although Claimant exaggerated his symptoms at the October 7, 2014 appointment, Claimant is found credible that he is in continuous varied pain due to the work injury. The pain Claimant suffers is consistently documented from the date of injury, and is supported by the MRI imaging and objective testing performed by multiple medical providers.

42. The surveillance videos do not show any physically demanding activities. In the surveillance videos, although Claimant is able to perform many activities and has much better movement than Claimant displayed at his appointment with Dr. Messenbaugh, Claimant often moves slowly, stiffly, and at points in the video Claimant walks with a slight limp.

43. The testimony and opinion of Dr. Kleiner is found credible and persuasive that the surveillance videos do not change his surgery recommendation and that surgery is still both reasonable and necessary for Claimant.

44. The testimony and opinion of Dr. Messenbaugh that the surgery is not reasonable or necessary is not found as persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has met his burden to show that the hardware removal at L4/5 with transfer lumbar interbody fusion (TLIF) at L3/4 surgery recommended by Dr. Mason, Dr. Kleiner, and Dr. Yamamoto is reasonable and necessary to cure and relieve the effects of his industrial injury. As a result of Claimant's September 1, 2013 admitted workplace injury he has had consistent pain that has been documented by multiple medical providers. Both Dr. Mason and Dr. Kleiner opined that there is a high probability that the surgery will be successful in relieving Claimant's pain and the effects of the work injury. Claimant has undergone more conservative treatments including injections and physical therapy that have not relieved his symptoms. Although Claimant is found to have exaggerated his symptoms at the October 7, 2014 appointment with Dr. Messenbaugh, Claimant does have continuous pain which limits his function. Claimant's continuous pain is consistently documented from the time of his injury until now. Claimant's MRI also objectively supports the recommendation for surgery. Dr. Kleiner's opinion is persuasive and the surveillance video does not show a level of physical activity that would contraindicate surgery.

In weighing the evidence to determine if the recommended treatment is both reasonable and necessary the ALJ looks to alternative options and also to the potential risks involved with the treatment. The L3-L5 fusion surgery will potentially allow Claimant to live without constant pain if the surgery is successful. Although the risks of the procedure are notable, two surgeons as well as Claimant's authorized treating provider have reviewed the MRI and Claimant's symptoms and have recommended surgery after necessarily weighing the risks. The ALJ defers to their opinions that surgery is a reasonable and necessary option for Claimant. As found above, Claimant has undergone extensive treatments without success. To require Claimant to just live with the pain and stop treatment at this time is not reasonable when there is a viable surgical option that will possibly cure and relieve his pain. Therefore, the recommended surgery is found both reasonable and necessary.

ORDER

1. The surgery recommended by Dr. Mason is reasonable and necessary to cure and relieve the effects of Claimant's September 1, 2013 industrial injury. Respondents shall authorize and pay for the surgery.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 2, 2015

/s/ Michelle Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues presented for determination include:

1. Compensability;

2. Medical Benefits;

3. Temporary disability benefits;

4. Deviation from employment.

FINDINGS OF FACT

1. The claimant was a resident of Pueblo in November of 2013.

2. The claimant worked for the respondent-employer on or about November 1, 2013.

3. The claimant had been employed by the respondent-employer for approximately 3 years at that time.

4. The claimant was employed as a CNA technician.

5. Between 8:00 a.m. and 4:30 p.m., the claimant would report to work at 401 W. Northern Ave., Pueblo, Colorado, the respondent-employer's principal place of business.

6. The claimant's duties include assisting participants with activities of daily living, such as feeding, bathing, dressing, grooming, hair care, mouth care, taking vitals, weighing participants, making sure medication is taken as prescribed, and encouraging social interactions.

7. The claimant worked 40 hours per week at the respondent-employer's principal place of employment.

8. During the summer of 2012, the claimant, in addition to working at the respondent-employer's principal place of employment, began providing homecare to

patients through the respondent-employer.

9. The claimant's homecare duties include traveling to patient's homes, monitoring participants' health status, household chores, and providing care similar to the care provided at the respondent-employer location.

10. The respondent-employer Manager, Darlene Espinosa, would organize a weekly schedule for the claimant to provide care on the respondent-employer's behalf.

11. The claimant's adherence to the provided homecare schedule was required and not optional. The claimant was expressly required to "meet or exceed" punctuality and attendance expectations/requirements in the homecare manual.

12. If the claimant did not meet attendance requirements of the provided schedule, the claimant would be reprimanded by her employer and could possibly lose her healthcare licensure.

13. The claimant was required to make home visits to participants who live in non-handicapped accessible dwellings.

14. The respondent-employer required the claimant to intermittently drive throughout the day between patients' homes.

15. The claimant was required to provide a personal vehicle for transportation, hold a valid driver's license, and maintain insurance on the vehicle.

16. The respondent-employer received a benefit by the claimant providing her own transportation for homecare purposes because the respondent-employer is relieved from having to own and maintain a fleet of vehicles and associated insurance.

17. The claimant's travel to participants' houses using her own personal car was a special benefit to the respondent-employer beyond that of simply having the claimant show up for work.

18. The respondent-employer's homecare employment manual advised that the claimant may be subjected to adverse driving conditions.

19. The respondent-employer's homecare employment manual states, "There may be moderate pressure to meet transportation schedules while dealing with frail and confused participants."

20. The claimant would provide homecare to approximately two (2) to five (5)

patients in a week.

21. The claimant's homecare schedule would vary. Due to time constraints, the claimant would sometimes be required to leave straight from the respondent-employer's principal place of employment. At other times, the claimant would have a two (2) hour "gap" between duties at the respondent-employer and homecare. In these instances, the claimant would return to her house before traveling to the scheduled homecare.

22. The respondent-employer would reimburse the claimant for miles driven between homecare participants' houses.

23. The claimant was paid wages for fifteen (15) minutes of travel to homecare participants' houses.

24. The respondent-employer was not able to explain why the claimant was arbitrarily paid for fifteen (15) minutes of travel even though distances to homecare participants' houses varied.

25. On November 1, 2013, at 4:30 p.m., the claimant had completed her shift at the respondent-employer's principal place of employment.

26. The claimant was scheduled to provide homecare at 6:00 p.m.

27. Between 4:30 p.m. and 6:00 p.m., the claimant went home.

28. In order to meet or exceed punctuality and attendance expectations/requirements, the claimant left her house around 5:30 p.m.

29. The claimant lived on the east side of Pueblo and her scheduled homecare was at a location on the southwest side of Pueblo.

30. There was only one reasonable route to take to the patient's house, and that route was heading west on Highway 96.

31. The claimant would take the same route, west on Highway 96, to arrive at the respondent-employer's principal place of employment located at 401 W. Northern Ave, Pueblo, CO.

32. A Loaf 'N Jug is located directly off Highway 96 between the claimant's residence and the homecare patient's location.

33. The claimant was headed west on Highway 96 when she turned into the Loaf ‘N Jug.

34. The claimant intended to make a brief stop in order to return a rental DVD.

35. The Loaf ‘N Jug was crowded when the claimant pulled in and there was no place for her to park.

36. The claimant’s van’s automatic transmission was in “drive” when she had come to a stop near the entrance of the Loaf ‘N Jug.

37. The claimant did not park her van, exit her van, or return any DVD.

38. The claimant was then struck by a large, fifty-three (53) foot “lowboy” tractor-trailer attempting to exit the Loaf ‘N Jug.

39. The claimant’s van was dragged several feet in a jerking motion when the trailer of the truck partially impaled her van.

40. The collision happened after 5:30 p.m. and before 5:45 p.m.

41. After the collision, the Loaf ‘N Jug employees instructed the claimant and the truck driver to move both vehicles as they were obstructing the entrance.

42. An Accident Report was filed by the Pueblo County Sheriff’s Office corroborating the claimant’s testimony that she had just entered the Loaf ‘N Jug when she was impacted by the large trailer and pulled a short distance.

43. The Accident Report notes that the claimant was indicating pain on the right side of her body.

44. An ambulance arrived at the scene, but the claimant did not wish to take the ambulance. The claimant was worried about incurring substantial expenses associated with medical transportation.

45. The claimant immediately informed the respondent-employer management of the collision and reported her injury.

46. After the Accident Report was filed, the claimant was taken to the hospital by her husband. The claimant was complaining of back pain and was diagnosed with a back strain at the time.

47. The claimant attempted to return to work on modified duty, but was unable

to continue working due to her pain. The claimant's doctor eventually took her off work.

48. In addition to back pain, the claimant experienced an onset of pain in her neck and the pain continued to increase over time.

49. The claimant did not return to work until December 2, 2013.

50. Before November 1, 2013, the claimant was able to perform her duties pain-free.

51. After November 1, 2013, the claimant could not perform work duties pain-free.

52. Restrictions placed on the claimant, as well as continuing pain, affected the claimant's ability to return to the same level of employment as it was prior to November 1, 2013.

53. The respondent-employer told the claimant that medical benefits were being denied because the collision happened five (5) minutes before she "clocked-in."

54. The claimant's van was damaged and lengthy repairs rendered the vehicle unavailable, limiting her ability to return to performing healthcare.

55. The claimant's back has improved, but her neck pain is still bothersome and hindering her ability to work at the same level as before.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

2. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

3. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in

favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

4. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

5. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

6. In *Madden v. Mountain West Fabricators*, 977 P.2d 861, (Colo. 1999), the court reiterated the longstanding rule that injuries sustained by claimants going to work from home and while returning, are not compensable because they are not seen as arising out of employment. The *Madden* opinion however, acknowledged the facts of any particular case may justify an exception to this general rule. The decision set forth four categories of evidence that may establish a travel injury to be an exception to the going and coming exclusion: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

7. The *Madden* opinion observed that many of the exceptions to the going and coming rule recognized in previous cases were pertinent to the third exception asking if "the travel was contemplated by the employment contract." The court then listed three categories of cases generally recognized as exceptions to the going and coming exclusion because travel is contemplated by the employment contract: (a) the particular journey was assigned or directed by the employer, (b) the travel was at the

express or implied request of the employer and conferred a benefit beyond the employee's arrival at work, and (c) the travel was singled out for special treatment as an inducement to employment. The common element in these types of cases is that the travel is a substantial part of the service to the employer. Finally, if the claimant establishes only one of the four "variables," recovery depends upon whether the evidence supporting that variable demonstrates a causal connection between the employment and the injury such that the travel to and from the work arises out of and in the course of employment. *Id* at 865.

8. The ALJ concludes that the claimant was engaged in transportation to her assignment and that the travel conferred a benefit upon the respondent-employer beyond that of just arriving at work and that this travel was contemplated by the contract of employment.

9. To obtain compensation for an injury, an injured employee must, at the time of injury, have been "performing service arising out of and in the course of the employee's employment." Section 8-41-301(1)(b), C.R.S. 2009. Under Colorado's Workers' Compensation Act (Act), the terms "in the course of and "arising out of are not synonymous. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). However, whichever theoretical framework is applied, the issue remains whether the claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing activity for his sole benefit. *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). It is not essential to compensability that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer, as long as they are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Under the Act, it is generally not necessary for an employee to be actually engaged in work duties at the time of an accident for an injury to be compensable. *See Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9 (Colo. App. 1995). It is sufficient if the injury arises out of a risk, which is reasonably incidental to the conditions and circumstances of the particular employment. *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973); *Roache v. Industrial Commission*, 729 P.2d 991 (Colo. App. 1986).

10. The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is one of fact for determination by

the ALJ. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, *supra*.

11. Our state has adopted the "dual purpose" doctrine. *See Deterts v. Times Pub. Co*. 38 Colo. App. 48, 552 P.2d 1033 (Colo. App. 1976). That doctrine holds that an injury suffered by an employee while performing acts for the mutual benefit of the employer and employee is usually compensable. Thus, when some advantage to an employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to employment.

12. The “dual purpose” doctrine shows that if the trip is essentially a business trip with a business destination and a separate personal destination along the same route, a mutual benefit to both employer and employee may occur and thus the personal deviation is not a “sole benefit” of the employee during a minor deviation.

13. “An injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly, an injury resulting from such an act arises out of, and in the course of, the employment; and this rule is applicable, even though the advantage to the employer is slight.” *Berry’s Coffee Shop v. Palomba*, 161 Colo. 369, 423 P.2d at 5 (1967); *See also In re Claim of Hanson*, 072313 COWC, 4-892-321-01.

14. The ALJ concludes that the claimant has shown by a preponderance of evidence that her injury was in the course of, and arose out of, her employment.

15. The ALJ concludes that the claimant falls within an exception to the “coming and going” rule and that benefits being received by both employer and employee place the claimant in the compensable category of the “dual purpose” doctrine.

16. The ALJ finds that travel to and from the respondent-employer’s homecare participants’ houses was contemplated by the contract of employment because travel was an integral part of the requirement of the employer to fulfill its contract with the participants. The claimant's travel by way of her personal car was a special benefit to the employer beyond that of simply having the claimant show up for work.

17. The ALJ concludes the claimant's transport of her car to work was a benefit to the employer contemplated by the contract of hire when the injury occurred on the way to perform homecare.

18. The ALJ concludes this travel was, of necessity, accomplished through the use of the claimant's personal automobile.

19. The ALJ concludes that the claimant providing her own transportation was an essential and substantial part of the job and the respondent-employer had contemplated that benefit as they reimbursed mileage to the claimant between homecare locations, and they paid the claimant fifteen (15) minutes of wages for traveling to and from those locations.

20. The ALJ concludes that the dominant purpose of the claimant's trip was for employment purposes and the claimant's slight deviation did not remove the benefit to the employer of providing transportation to and between off-site locations caring for patients on the respondent-employer's behalf. A substantial deviation is required for the claimant to be found not within the course and scope of employment. The mere act of pulling into a gas station parking lot is not a substantial deviation from the claimant's employment.

21. Accordingly, the Claimant's auto accident injuries were incurred performing an activity which arose out of and in the course of her employment and benefits are awarded.

22. Because this matter is compensable, the respondent-insurer is liable for medical treatment which is reasonably necessary to cure or relieve the the claimant from the effects of her industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). All of the medical treatment the claimant received for her industrial injury, from November 1, 2013 and onward, was reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

23. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Here, as a result of the injury the claimant experienced an unspecified partial wage loss beginning December 3, 2013 and continuing.

24. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish

a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

25. The ALJ concludes that the claimant was unable to work from November 1, 2013 through December 2, 2013 as a result of her industrial injuries.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical expenses to cure and relieve claimant from the effects of her industrial injury.

3. The respondent-insurer shall pay the claimant TTD benefits from November 1, 2014 through December 2, 2013.

4. The respondent-insurer shall pay the claimant TPD beginning December 3, 2013 and continuing until terminated by operation of law.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 7, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant is barred from litigating the issues of average weekly wage and temporary benefits for concurrent employment that was previously explicitly reserved;

2. If the claimant is not barred, whether the claimant is entitled to temporary total disability (TTD) benefits for her concurrent employment with Service Master; and,

3. If so entitled to TTD, whether the claimant has established an average weekly wage for the concurrent employment.

FINDINGS OF FACT

1. The claimant sustained an injury on November 13, 2013.

2. At the time of the injury, the claimant worked for the respondent-employer as a Special Education Assistant.

3. The claimant also held concurrent employment with Service Master at the time of injury.

4. The respondent initially denied liability for the claimant's injury.

5. On January 22, 2014, the claimant filed an application for hearing on compensability, temporary benefits, medical benefits, and average weekly wage.

6. Hearing on the claimant's January 22, 2014 application went forward on May 6, 2014. The claimant proceeded on AWW and "temporary partial and/or temporary total disability benefits from November 13, 2013 and ongoing" but reserved "concurrent employment" for future determination.

7. On May 28, 2014, the undersigned ALJ issued Findings of Fact, Conclusions of Law, and Order finding claimant's injury compensable, ordering the respondent to pay medical benefits, and fixing claimant's AWW at $342.19. Neither party appealed the order.

8. The ALJ denied claimant's claim for temporary benefits. It was specifically found that claimant failed to show by a preponderance of the evidence that she suffered a wage loss as the result of her injury.

9. Respondent subsequently filed a General Admission of Liability on July 18, 2014 admitting for medical benefits and AWW.

10. On November 12, 2014 the claimant filed an Application for Hearing on the issues of AWW, TPD and TTD.

11. The claimant alleges that she is entitled to an increased AWW based on concurrent employment at the time of injury. She further alleges she is entitled to temporary benefits due to her inability to work at her concurrent employment as a result of her injury.

12. The ALJ finds that the claimant was unable to continue her concurrent employment with Service Master as a result of her injury beginning with the date of injury, November 13, 2013 and ongoing. The claimant claims entitlement based on lost wages from Service Master from the date of injury and ongoing.

13. At the current hearing the claimant established that as of May 6, 2014 (the date of the first hearing) she was aware she earned eligible wages from concurrent employment with Service Master. The claimant further testified that as of May 6, 2014 she was aware that she lost wages from Service Master as a result of her November 13, 2014 injury beginning November 13, 2013 and ongoing.

14. The ALJ finds that the AWW and temporary benefits at issue in the current dispute are not identical to the AWW and temporary benefits at issue in the May 6, 2014 hearing.

15. The ALJ finds that the temporary benefits sought as a result of claimant's lost wages from Service Master were specifically reserved at the time of the initial hearing as stated in the order on May 28, 2014.

16. The ALJ finds that claimant is not collaterally estopped from litigating the issues of AWW and entitlement to temporary benefits.

17. The claimant obtained wage records from Service Master after the May 6, 2014 hearing, as indicated by the date of faxing on those records of May 30, 2104.

18. In November of 2013, the claimant was employed by both the respondent-employer and Service Master. She began working for Service Master in the beginning

of August of 2013. She worked Monday through Friday from 7pm until 10pm. Her rate of pay was $7.78 per hour. She worked 3 hours per day, five days per week for a total of 15 hours per week. This equates to an AWW of $116.70.

19. The claimant last worked for Service Master on November 12, 2013, the date before her compensable injury occurred. On November 13, 2013 and up to her recovery from surgery on January 21, 2015 the claimant did not work due to her injury. She has not yet returned to work for Service Master since the surgery.

20. The claimant's typical duties for Service Master included taking out trash, vacuuming, and cleaning. The vacuum was the type that was required to be carried on her back. Her job required her to be on her feet the entire three hour shift, except for her 10 minute break.

21. The claimant was having difficulty walking after her injury. She was on crutches for almost two months and had been wearing a brace since then. She could not go up and down stairs without significant pain, nor could she squat or kneel. This prevented her from performing her job duties at Service Master.

22. The claimant had surgery on her right knee on January 21, 2015 and her knee has been doing well since that date. The claimant's knee remained essentially unchanged between the date of the injury, November 13, 2013, and the date of her surgery, January 21, 2015.

23. The claimant first sought treatment from Dr. Miguel Castrejon on November 13, 2013, the day of the injury. Dr. Castrejon made a determination that the injury was not work related and referred the claimant to Memorial Hospital for x-rays. He did not address any work restrictions.

24. Claimant sought treatment from Memorial Hospital after her visit with Dr. Castrejon. She then followed up with Dr. Charles Waldron on November 22, 2013 per instructions given at Memorial.

25. Dr. Waldron instructed the claimant to not work for three weeks or until further evaluation.

26. The claimant was unable to receive any further treatment in the following months due to the fact that the respondent had contested compensability that was set for determination on May 6, 2014.

27. The claimant's next examination was with Dr. Timothy Hall on July 28, 2014, after a finding of compensability had been made.

28. Dr. Hall determined that the claimant has had restrictions that precluded her from performing her work with Service Master, including no kneeling, no squatting, limited bending, no prolonged standing or walking, and limited lifting from floor to waist of no more than 15 pounds.

29. Dr. Hall explained that her job with Service Master is outside these restrictions, as opposed to her day job with the School District where she is sitting most of the day. Her condition had not improved over time.

30. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to TTD benefits for her concurrent employment only beginning November 13, 2013 and continuing until terminated by operation of law.

31. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to an AWW of $116.70.

32. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to indemnity benefits for periods of time that she was unable to work with Service Master at the weekly rate of $77.80.

33. The ALJ finds that the claimant has established that it is more likely than not, that she is entitled to an AWW of $342.19 + $116.70 equaling $458.89 for periods of time when the claimant was unable to work for both the respondent and Service Master.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The respondent cites various equitable defenses in opposing the claimant's pursuit of the benefits requested herein. As found above, the issue of concurrent employment was specifically reserved at the previous hearing and subsequent Order. Reserving such issue would be meaningless unless all attendant corollary issues are reserved as well. By finding and concluding that the claimant has established concurrent employment, all benefits flowing from that decision are necessarily included within the reservation of the concurrent employment issue.

5. To receive temporary disability benefits, the claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

6. The claimant was fully able to perform her duties with Service Master from her date of hire through November 12, 2013. It was not until she sustained an injury to her right knee while working for the respondent-employer that she became unable to perform her work with Service Master. Dr. Castrejon was the workers' compensation physician that first examined the claimant on the date of injury. Dr. Castrejon made an erroneous legal determination that the claimant's injury was not compensable. He did not address her work restrictions at that time for this reason. The claimant's work

restrictions were not addressed until November 22, 2013 when she was examined by Dr. Waldron. He took her off of work for a few weeks, but with the assumption that she would receive further evaluation to better determine her ability to work. She did not see another doctor until July 20, 2014 as a result of litigation.

7. The claimant's knee condition remained virtually unchanged between the date of injury until her surgery more than a year later. Dr. Hall, the claimant's ATP, was clear in his assessment of the claimant's work restrictions. He opined that she has been completely unable to perform her job with Service Master because of its physical demands being outside of the restrictions she has had since the injury occurred. It is evident that the claimant is entitled to TTD benefits for her job with Service Master.

8. The statutory term "wages" is defined as the money rate at which services are paid under the contract of hire at the time of hire for accidental injuries. C.R.S. 8-40-201(19)(a), *See Also* § 8-42-102(5)(a), C.R.S. 2010 Colo. Sess. Laws, ch. 310, p. 1457. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

9. The claimant earned $7.78 per hour with Service Master. She worked three hours per day, from 7pm to 10pm, Monday through Friday. Her wage records support her testimony. $7.78 per hour, multiplied by 15 hours per week, equals an AWW of $116.70 for her concurrent employer and a TTD rate of $77.80. The claimant's AWW for the respondent-employer is $342.19. Therefore, the claimant's combined AWW is $458.89.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent's defenses are denied and dismissed.

2. The claimant's AWW from concurrent employment is $116.70.

3. The respondent shall pay the claimant temporary total disability benefits based upon her concurrent employment beginning on and including November 13, 2013 and continuing until terminated by operation of law at the weekly rate of $77.80.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 24, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has proven by a preponderance of the evidence that she sustained a cervical spine injury arising out of and in the course of her employment with the respondent-employer on February 3, 2014;

2. Whether the claimant has proven by a preponderance of the evidence that she is entitled to authorized, related, reasonable and necessary medical benefits for her cervical spine injury, including cervical injections recommended by Dr. Bainbridge;

3. Whether the claimant has proven by a preponderance of the evidence that she is entitled to authorized, related, reasonable and necessary medical benefits for her right wrist injury including surgery as recommended by Dr. Larsen; and,

4. Whether the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 20, 2014 and continuing.

FINDINGS OF FACT

1. The claimant is a 53 year old female who was employed with the respondent-employer as a physical therapy assistant for seven years. The claimant's job duties included assisting with outpatient rehabilitation at the YMCA location. Those duties specifically involved writing, typing, filling out forms, compliance with patient care, lifting and moving equipment, and massage.

2. On February 3, 2014, the claimant sustained work related injuries at 7:25 a.m. when she slipped on ice and fell onto her tailbone and left elbow outside of the front doors at the respondent-employer. The claimant had immediate burning in the left elbow, right wrist, right hand, she was dizzy, and had neck pain. The claimant filled out an accident report for the respondent-employer in which she described the slip and fall incident and noted that her injured body parts were "tailbone/R wrist/neck."

3. The claimant presented to Michael A. Dallenbach, M.D. on February 3, 2014, for an initial evaluation. Dr. Dallenbach documented the claimant's "chief complaints of right wrist and low back pain." Dr. Dallenbach further noted that, "At this point in time she complains only of right wrist and low back pain." The claimant denied

any prior trauma to her right wrist, but admitted to a prior C5-C6 fusion and "left shoulder SLAP/biceps tendon tear for which she is scheduled to undergo operative repair on 02/20/14 as per Rickland Likes, M.D. [The claimant] denies new injury to her left shoulder." There is no indication in Dr. Dallenbach's report of claimant injuring her cervical spine. However, the pain diagram submitted to Dr. Dallenbach at this visit did indicate aching pain in the cervical spine region (as well as low back and right wrist). Dr. Dallenbach testified at hearing that he must have missed the neck during this initial evaluation. He testified that he focused on the low back due to the severity of this low back pain (8 out of 10).

4. The claimant continues to have neck and right wrist pain "the same" as after her fall on February 3, 2014. The claimant's symptoms in her left elbow and low back have resolved.

5. On February 4, 2014, the claimant returned to Dr. Dallenbach in follow-up with complaints of "constant" pain in her right wrist and low back. The claimant had also "begun to complain of left posterior elbow pain." Dr. Dallenbach ordered an MRI of the lumbar spine and right wrist and radiographs of the left elbow. He did not order diagnostic tests with respect to the cervical spine and recommended no treatment for the neck. Finally, Dr. Dallenbach referred the claimant to "Occupational and Physical therapy" for strength, endurance, flexibility and coordination.

6. On February 6, 2014, the claimant presented to Parkview Medical Center–Emergency Room with an admitting diagnosis of "LBP/R WRIST/THUMB PAIN/L ELBBOW PAIN." There was no indication of neck pain.

7. On February 6, 2014, the claimant presented to Parkview Medical Center – Outpatient Rehab for an initial evaluation. The claimant reported her slip and fall accident with ongoing symptoms in her low back and right lower extremity. She admitted to a prior cervical fusion and right foot surgery with present non-industrial left shoulder condition. No complaints of neck pain or any cervical spine symptoms were documented.

8. On February 11, 2014, the claimant presented to Dr. Dallenbach in follow-up with persistent complaints of pain in her left elbow, right wrist and low back. Dr. Dallenbach performed a physical examination and noted that claimant had begun OT and PT. He recommended that the claimant continue in OT and PT and return for reevaluation. Dr. Dallenbach assigned work restrictions to include, "Wear splint; may use upper extremities only to do activities with the plane of gravity; no bend, twist, turn;

no crawling, kneeling, squatting, climbing; no pinching or gripping activities; sitting essentially 100% of the time must be allowed to change position as needed for comfort."

9. In his "Physicians Progress Notes" of February 18, 2014, Dr. Dallenbach documented claimant's preexisting SLAP tear in the left shoulder, bilateral hand numbness and symptoms in the left elbow arising out of the fall on 2/3/14. Notations were made on a "stick figure" of the claimant's symptoms. There were no indications neck complaints.

10. On February 18, 2014, claimant presented to Dwight K. Caughfield, M.D. for an EMG of the left upper extremity on referral from Dr. Dallenbach. The claimant described the work incident, reporting immediate neck/elbow pain. Dr. Caughfield's document noted "Old Left C6 and/or C7 radiculopathy…No acute changes noted" with mild left carpal tunnel syndrome and no EDX evidence of an ulnar neuropathy or radial neuropathy or brachial plexopathy." Dr. Caughfield recommended "cervical imaging for c/o Bilateral hand numbness in C6 pattern after a fall. She had prior fusion and sensor findings may be old but given onset of numbness with the fall I believe cervical imaging is merited."

11. On February 19, 2014, the claimant underwent cervical spine x-rays with comparison to those of March 18, 2013 at Parkwest Imaging Center. The impression was "No malalignment with flexion or extension. No evidence of hardware complication."

12. In his follow-up evaluation report of February 19, 2014, Dr. Dallenbach documented the claimant's report of improving symptoms in the left arm and low back, with constant pain in her right upper extremity. Dr. Dallenbach noted the claimant's examination with Dr. Caughfield and the subsequent recommendations with regard to cervical spine imaging. Dr. Dallenbach also documented the claimant's preexisting history of left shoulder and cervical spine pathology that led to the claimant's cervical fusion in December of 2012. With respect to the cervical spine symptoms that the claimant reported to Dr. Caughfield on February 187, 2014, Dr. Dallenbach stated,

13. Because of the nature of her mechanism of injury 02/03/14 [the claimant] was questioned repeatedly regarding neck pain or any upper extremity radicular symptoms at that point in time she had none. At that time of reevaluation the following day on 02/04/14 though [the claimant] had in addition to her right wrist and low back pain began to complain of left elbow pain she had no complaints of neck pain and she denied, "Any radiation or radicular component to her pain."

14. On physical examination, Dr. Dallenbach found, “Cervical AROM is within functional limits. There is no cervical or upper thoracic paraspinal hypertonicity. There is no cervical spinous process or facet joint tenderness. Cervical AROM is within functional limits.”

15. Dr. Dallenbach’s assessment with regard to the new neck symptoms was “questionable acute cervical spine pathology.” He ordered an MRI and 7-view radiographic series of the cervical spine to rule out acute cervical spine pathology.

16. Dr. Dallenbach added an “ADDENDUM” in which he noted that the “7-view radiographic series of the cervical spine revealed no acute changes or malalignment with flexion or extension.”

17. At hearing on cross-examination, the claimant testified that she couldn’t remember telling the PT and OT therapists at Parkview Medical Center whether she had cervical spine symptoms in her treatment from February 6, 2014 through February 17, 2014. The claimant also stated that she couldn’t remember whether Dr. Dallenbach had questioned her “repeatedly” as to whether the claimant was experiencing any neck pain or symptoms in her examinations and treatment with Dr. Dallenbach through February 18, 2014.

18. On March 18, 2014, the claimant underwent a cervical spine MRI at Parkwest Imaging Center with comparison to MRI of 11/28/12 that showed no acute findings and no significant central canal or neuroforaminal stenosis. The final impression was status post anterior C5-C6 fusion, status post C5-C6 discectomy, and age-related changed as detailed in the body of the report.

19. On March 26, 2014, the claimant presented to Rickland Likes, M.D. in follow-up for her non-work related left shoulder surgery. She reported that she was doing well until a couple of weeks prior when she was putting on her brace and heard a loud pop with immediate onset of pain with ongoing discomfort. Then, in a second incident, the claimant nearly slipped and fell in the shower and braced herself with her left shoulder. Over the past couple of weeks, the claimant noted popping in the shoulder and increased pain.

20. The claimant underwent an EMG/NCV of the right upper extremity with Dr. Caughfield on April 9, 2014. The impression included, “Subacute right C7 radiculopathy with reinnervation and progress via axonal sprouting. No acute findings. No EDX evidence of ulnar neuropathy.”

21. As of April 10, 2014, Dr. Dallenbach remained unclear with respect to whether the claimant's neck pain was related to the industrial incident of February 3, 2014. He stated in his report, "further evaluation is required to more definitely define work relate casualty (sic) in terms of [the claimant's] neck pain." Dr. Dallenbach referred claimant to J. Scott Bainbridge, M.D. for further assessment of the claimant's neck pain and bilateral upper extremity symptoms.

22. On April 28, 2014, the claimant underwent cervical spine x-rays at Parkview Medical Center with comparison to records from 2/19/14. It was noted that the claimant had, "Stable postsurgical appearance of C5-C6 ACDF, and Moderate to severe C6-C7 cervical spondylosis.

23. The claimant initially presented to Julie Archibald, PA-C at the office of J. Scott Bainbridge, M.D. on the referral of Dr. Dallenbach on April 29, 2014, for evaluation of the upper extremities and issue of causation with respect to the neck symptoms. Ms. Archibald noted that the "Left forearm sx as well following her fall that does not seem, today, to be directly correlated to her neck sx, will continue to monitor." Ms. Archibald recommended Left C4-5 +/- C6-7 facet blocks.

24. In his Physician Advisor report dated May 7, 2014, Joseph Fillmore, M.D. recommended denial of the left C4-5 and left C6-7 facet blocks due to inconsistencies in reporting and questions of causation with respect to the alleged neck injury.

25. On May 9, 2014, the claimant presented to James H. Evans, Ph.D. on referral from Dr. Dallenbach for psychological care. In his initial evaluation report, Dr. Evans noted that "psychological factors are going to play a large role in terms of her response to treatment and recovery from this injury" due to chronic anxiety and depression and possible mild thought disorder."

26. On May 21, 2014, the respondent-employer authored a letter to the claimant in which the claimant was advised that her FMLA expired on May 14, 2014. The claimant was placed on inactive status for up to twelve weeks from May 16, 2014. The employer advised the claimant that when she was released to full duty work, she could apply for any open position. However, if she failed to return to active status by August 8, 2014, the employer would terminate the claimant's employment. Finally, the employer noted, "If you return to work, you **must** present to the **Employee Health Office a release from your doctor stating whether or not you have any work restrictions**. (Emphasis in the original.)

27. On July 1, 2014, Dr. Bainbridge examined the claimant for the first time following the examination and recommendations of Ms. Archibald. He recommended "bilateral C6-7 TFESIs for both diagnosis and potentially therapeutic benefit. We will put the request for cervical facet blocks on hold for now."

28. On July 9, 2014, Dr. Caughfield completed a repeat EMG.NCV of the left upper extremity. The impression included, "Old left C6 radiculopathy without acute axonal loss. No EDX evidence of a C7 radiculopathy either acute or chronic."

29. In review of Dr. Bainbridge's recommendations from July 1, 2014, Dr. Fillmore again noted on July 9, 2014, "inconsistency with the reports of this injury." He recommended denial of the requested bilateral C6-7 transforaminal ESI as there had been "no clarification upon the treating providers of how the neck pain is directly related to this work injury."

30. On July 9, 2014, after reviewing the cervical MRI and EMG results, Dr. Bainbridge retracted his request stating in his follow-up note of July 16, 2014, "I would not recommend CTFESIs at this point."

31. On July 23, 2014, claimant verbalized to Dr. Evans "that if she did not back (sic) to work by 08/08/2014, she will be terminated from her employment."

32. On August 8, 2014, Albert Hattem, M.D. completed a Physician Advisor review with respect to Dr. Bainbridge's recommendations. He noted the prior requests for authorization and questions of causation regarding the cervical spine. Dr. Hattem agreed with Dr. Fillmore's two determinations that the neck condition is not causally related to the 2/3/14 slip and fall. He recommended against authorizing the medial branch blocks.

33. On October 22, 2014, Jonathan Sollender, M.D. – Orthopedic Hand Surgery, completed a Physician Advisor reviewed issued his report. Dr. Sollender noted his prior staffing report in which he recommended authorization for a right psisform excision and carpal tunnel release which was performed on 5/20/14 with minimal improvement post-operatively. He also reviewed Dr. Larsen's records with respect to "multiple injections…attempting to chase her pain with (sic) any significant benefit." Dr. Sollender had reviewed the "extensive Independent Medical Evaluation on 09/08/14 by Dr. Bisgard. She recommended against any further invasive treatment for her neck or hand…concern about psychological overlay…for these reasons, I do not recommend any invasive procedures, especially ones which rely on subjective response or any pain medications, especially narcotics." In the context of Dr. Larsen's request for right wrist

surgery, Dr. Sollender opined that, “For the reasons recommended by Dr. Bisgard…I would recommend denial of the surgery as requested.”

34. At hearing, when questioned regarding her understanding of the FMLA procedures and her prior claims for FMLA benefits in 2008, 2010, 2012, and in 2014 the claimant initially claimed that she could not remember filing for FMLA prior to 2014. Later in her testimony she agreed that she had filed previously for FMLA. On July 14, 2010, the respondent-employer sent the claimant a letter similar to that of May 21, 2014 in which the respondent-employer warned the claimant that her employment would be terminated without a release to return to work from her doctor. The claimant agreed that she complied with the FMLA provisions outlined by her employer and she returned to work in her regular position in 2010. Similarly, the claimant agreed at hearing that had she been released to return to work from her non-work related left shoulder condition prior to August 8, 2014, she would have been able to return to work for the respondent-employer without being terminated. The claimant agreed that but for her inability to return to work because of her left shoulder condition, she would have been employed with the respondent-employer and would not have sustained lost wages. Finally, the claimant agreed that she did not obtain a release to return to work from Dr. Likes until November 19, 2014.

35. Tisha DeNiro, RN was present at the hearing and offered credible hearing testimony. She is a registered nurse with Parkview Medical Center and is employed in the Employee Health Services office. In that capacity, Ms. DeNiro handles workers’ compensation and FMLA claims. With regard to FMLA procedures, Ms. DeNiro credibly testified that employees on FMLA must stay in contact with the employer particularly when FMLA is expiring. When an employee receives a release from their doctor prior to FMLA expiring or before the 12 week post-FMLA inactive period expires, the employee is permitted to return to work. That precise scenario had occurred with claimant in several instances since 2008. Ms. DeNiro credibly testified that had claimant in this case provided employer with a release to return to work from her doctor with respect to the non-work related left shoulder condition, employer would have permitted claimant to return to work. On cross-examination, Ms. DeNiro stated that employer would have accommodated claimant’s work-related restrictions had claimant been timely released from the left shoulder condition. However, employer does not accommodate restrictions for non-work related conditions. The claimant was not initially placed on modified duty, but was instead on administrative leave through February 19, 2014, because the claimant’s drug screen had been positive. The claimant was supposed to have met with EAP in order to return to work, but the claimant failed to do so before going out on FMLA on February 20, 2014, for the non-work related left shoulder condition. On cross-

examination, Ms. DeNiro agreed that the claimant had not been terminated due to her intoxication as the claimant failed to follow-up with EAP and it is not the respondent-employer's general policy to terminate employees for their first positive drug screen. Rather, the respondent-employer's general policy is to refer the employee to EAP for treatment of their problem.

36. Dr. Dallenbach was present at the hearing, listened to all testimony and provided his own testimony. He testified that he is licensed to practice medicine in the state of Colorado, that his specialty is Occupational Medicine, and that he is Level II accredited with the Division of Workers' Compensation. Dr. Dallenbach was qualified as an expert in Occupational Medicine. Dr. Dallenbach testified that the claimant's symptoms in the low back and left elbow had resolved. The claimant's primary complaints as of the date of the hearing were in the right wrist and neck. In general, Dr. Dallenbach refers patients to specialists, defers to their expertise, and incorporates the specialist's recommendations in his own treatment plan. That is true with respect to Dr. Evans and his psychological assessment and recommendations. Dr. Dallenbach also agreed with the current recommendations of Drs. Larsen and Bainbridge with respect treatment for the claimant's symptoms in the right wrist and neck, respectively. Dr. Dallenbach stated with respect to the claimant's right wrist and Dr. Larsen's recommendation of exploratory surgery that there was nothing left to be done, this was the last step for claimant, and that there was no guarantee that surgery would provide pain relief. He further believed that Dr. Bainbridge's request for facet blocks was reasonable.

37. On direct examination, when asked why he initially opined that the cervical spine was not work-related, Dr. Dallenbach stated, "I dropped the ball initially." He didn't look at the neck. That is why, after the fact, Dr. Dallenbach referred the claimant to Dr. Bainbridge in order to address causation.

38. On cross-examination, Dr. Dallenbach agreed that it is extremely important to take careful notes when interviewing and examining a patient, and that his narrative reports are generally quite comprehensive. Having admitted that, Dr. Dallenbach agreed that his initial reports of his examination of the claimant and her corresponding complaints were completely void of cervical spine complaints or objective pathology.

39. Dr. Dallenbach's report of February 4, 2014 documented that the claimant "has no new complaints specifically no complaints of neck pain." He further documented that he performed a physical examination, documenting no problems in the cervical spine, and recommended no diagnostic tests with respect to the cervical spine.

40. Elizabeth W. Bisgard, M.D. was present at hearing, listened to all testimony, and provided her own testimony. Dr. Bisgard is licensed to practice medicine in the state of Colorado, she has been a Level II accredited physician with the Division of Workers' Compensation since 1995, and she is Board Certified in Occupational Medicine. She explained that the Board Certification requires a Masters Degree in Public Health which she acquired, and additional training with respect to causality. She has undergone additional training with Katherine Mueller, M.D. at the Division and Dr. Bisgard teaches the Division course on Causality to other physicians. Finally, Dr. Bisgard was invited and she joined the faculty of the University of Colorado School of Medicine as an Assistant Clinical Professor in PM&R two years ago. Dr. Bisgard was qualified as an expert in Occupational Medicine.

41. Dr. Bisgard credibly and persuasively testified at hearing consistently with her comprehensive IME report of September 8, 2014. Dr. Bisgard opined that the claimant's fall on February 3, 2014, did not result in an aggravation, exacerbation or worsening of the claimant's significant pre-existing cervical disc disease. Furthermore, the claimant's reported subjective cervical spine symptoms do not correlate with the objective evidence, a clear pain generator has not been identified, there is nothing documented in the initial medical records regarding cervical spine pain or any pathology, and as a result, the alleged cervical spine condition is not work-related, and no further injections are indicated. With regard to the claimant's right wrist symptoms and Dr. Larsen's recommendation for arthroscopic debridement of the right wrist with limited denervation, Dr. Bisgard testified similarly that she did not find the recommendation reasonable. Dr. Larsen had provided appropriate and reasonable treatment for claimant's right wrist pathology to that point. However, at this point, it appears that Dr. Larsen is chasing the claimant's symptoms hoping to find a cure. Dr. Bisgard cautioned against any further invasive procedures as the claimant's symptoms appear to be migrating, and Dr. Bisgard agreed with Dr. Evans in that psychological factors were playing a large role in the claimant's response to treatment and recovery.

42. Dr. Bisgard testified consistently with her IME report that she agreed with Dr. Evans that psychological factors are playing a large role in this claim. Dr. Bisgard noted claimant's pre-existing problems with pain out of proportion to what would be expected when the claimant had right foot surgery. She also noted multiple occasions when the claimant was treated in emergency rooms for chest pain deemed non-cardiac.

43. Dr. Bisgard testified that none of the diagnostic examinations (i.e. X-rays, EMG/NCV, MRIs) demonstrated any acute pathology and the results of those tests could not explain the claimant's subjective complaints. The claimant's symptoms were non-physiologic and appear to psychologically based. As a result, with respect to the

cervical spine and right wrist, no pain generator had been identified which would support the invasive procedures recommended by Dr. Bainbridge and Larsen. For these reasons, Dr. Bisgard strongly recommended against proceeding with the invasive procedures. Instead, Dr. Bisgard recommended that claimant be placed at MMI and that the treating physicians do nothing at this time. She concluded that the "worst treatment is to go in and have a complication" with the recommended procedures.

44. The ALJ finds Dr. Bisgard's opinions to be credible and more persuasive than medical evidence to the contrary.

45. The ALJ finds that the claimant has failed to establish that it is more likely than not that her neck symptoms are causally related to her industrial injury of February 3, 2104.

46. The ALJ finds that the claimant has failed to establish that it is more likely than not that the treatment recommended for the claimant's wrist condition is reasonable or necessary to cure or relieve the claimant from the effects of her industrial injury.

47. The ALJ finds that the claimant has failed to establish that it is more likely than not that she is entitled to temporary total disability benefits from November 20, 2014 and ongoing.

CONCLUSIONS OF LAW

1. According to C.R.S. §8-43-201, "(a) claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hosier v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

2. In deciding whether claimant has met her burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *See* C.R.S. §8-41-301(1)(c); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). In other words, Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *See Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

4. In meeting her burden of proof that her claim is compensable, Claimant must prove that the injury arose out of and in the course of employment. *See* C.R.S. §8-41-301(1)(b); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003); *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). In this case, claimant's alleged cervical spine injury did not arise out of and in the course of her employment with employer.

5. The respondents rely on the hearing testimony and report of Dr. Bisgard with respect to causation of the claimant's cervical spine conditions. The respondents further rely upon the opinions of Drs. Fillmore, Evans, Sollender, and Hattem, and the lack of cervical spine complaints or pathology in Dr. Dallenbach's initial records, as evidence that claimant did not sustain a work-related injury to her cervical spine on February 3, 2014.

6. The ALJ concludes that Dr. Bisgard's opinions are credible and more persuasive than medical opinions to the contrary.

7. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained a work related injury to her neck area on or about February 3, 2014. Thus, no medical treatment for this condition is the responsibility of the respondent-insurer.

8. C.R.S. §8-42-101(1)(a) provides that respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. An award of future medical benefits is proper when there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of the industrial injury or prevent a deterioration of a claimant's condition. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if ongoing benefits have been provided, the insurer retains the right to contest the reasonableness, necessity, or relatedness of a particular treatment. *Rizo v. Monfort, Inc.,* W.C. No. 4-310-241 (ICAO June 16, 1999). While an ALJ may find that a particular condition is related to the industrial injury, the ALJ may also find that a specific treatment is not necessary, nor reasonable. *Terry v. First American Insurance Co*., W.C. No. 4-314-361 (ICAO June 16, 1999).

9. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). Claimant is not entitled to medical care that is not causally related to her work-related injury or condition. Respondents do not "implicitly" admit for a disputed condition by paying for medical benefits. *Hays v. Hyper Shoppes*, W.C. No. 4-221-570 (ICAO April 13, 1999). The respondents remain free to contest the compensability of any particular treatment. *Id.* As noted in *Ashburn, supra,* "it has generally been held that payment of medical services is not in itself an admission of liability. This is based on the sound public policy that carriers should be allowed to make voluntary payments without running the risk of being held thereby to have made an irrevocable admission of liability."

10. As found above, and relying upon the opinions of Dr. Bisgard, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the recommended surgery for her wrist is reasonable or necessary to cure or relieve her from the effects of her industrial injury.

11. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001). To establish a causal connection, claimant must prove that the industrial injury caused a "disability" lasting more than three work shifts, and that he left work as a result of the disability. *Id.*

12. Tisha DeNiro credibly and persuasively testified that had the claimant provided a release to return to work from claimant's doctor, claimant's employment with employer would have continued. Ms. DeNiro testified that respondent-employer would have accommodated claimant's work-related restrictions. However, claimant failed to provide the necessary release and claimant's employment was thus terminated.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 20, 2014 and ongoing.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits for her neck related symptoms is denied and dismissed.

2. The claimant's request for wrist surgery is denied and dismissed.

3. The claimant's request for temporary total disability benefits is denied and dismissed.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: April 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues presented for determination are as follows:

- Whether the Claimant sustained a compensable injury to his right shoulder,
- Whether the Claimant is entitled to medical benefits to treat his right shoulder including surgery already performed by Dr. Phillip Stull; and
- The appropriate calculation of Claimant's average weekly wage ("AWW").

STIPULATIONS

If the matter is deemed compensable, the parties agree to the following:

1. Claimant would receive temporary total disability ("TTD") benefits from December 15, 2014 through January 4, 2015.

2. Claimant would receive temporary partial disability ("TPD") benefits from January 5, 2015 through ongoing.

3. The surgery performed by Dr. Phillip Stull on December 15, 2014 is reasonable and necessary.

4. Claimant earned an average weekly wage with the Employer of $305.17. If the ALJ determines that Claimant's wages from his concurrent employment should be included in the AWW, this amount would equal $951.97. The total AWW would equal $1,257.14.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. Claimant is a 63 year old man who works part time for the Employer as a material handler. As a material handler, Claimant's job duties include driving tugs, loading and unloading airplanes, sorting packages, loading containers, and taking containers from the dock out to the airplanes to be loaded.

2. On July 23, 2013, while working for the Employer, Claimant grabbed two dollies, pulled them around, and began walking backwards while pulling the dollies. The dolly is a flat bed, with two wheels in the front and two in the back. The dolly is pulled with a tongue similar to a wagon. The dollies are moved by grasping the end of the

tongue and pulling the dolly. While walking with the dollies, Claimant slipped and fell onto his right side.

3. Claimant continued to hold onto the tongue with his right arm when he fell so his right arm was pulled over his head. He did not break his fall because it happened so fast. Claimant could not specifically recall whether his right arm was close to his side or out from his side because he recalls that he was still holding onto the dolly with his right hand when he initially fell.

4. Claimant reported his fall to his supervisor, David King. After going to the restroom and cleaning up the abrasions on his leg, Claimant continued working and did not seek medical treatment.

5. Over the next few months, Claimant continued to perform his regular work activities for the Employer.

6. On January 17, 2014, Claimant presented to his personal physician, Dr. Alan Ruff, to refill medications. During the examination, Claimant complained of pain over his right shoulder for the past three to four months. Claimant described the pain as getting worse, with less mobility in the right shoulder and he was unsure if it was a rotator cuff problem. Physical examination revealed full range of motion in the right shoulder with some discomfort in the deltoid area.

7. After the appointment with Dr. Ruff, Claimant returned to the Employer and indicated a need to see a physician. Employer referred the Claimant to OccMed of Colorado.

8. Claimant underwent an initial evaluation with Dr. Gary Smith at OccMed on February 3, 2014. Claimant reported that he fell on July 26 and hit the pavement. He reported that his right shoulder hurt approximately in the range of 2-3 out of 10 on most days. He described difficulty raising his right arm above chest height. Claimant denied any previous injuries or treatment to his right shoulder. Dr. Smith recommended Claimant undergo an MRI. Claimant remained at full duty status.

9. On the M164 form, Dr. Smith noted that Claimant's work related diagnosis was a rotator cuff tear and he checked the "yes" box indicating that the objective findings are consistent with the history and/or work related mechanism of injury.

10. On February 5, 2014, Respondent prepared an Employer's First Report of Injury.

11. On February 10, 2014, Claimant underwent the recommended MRI which showed a large tear in the supraspinatus component of the rotator cuff wit hteh defect measuring between 2.5 and 3 cm in diameter. Additionally, the MRI showed chronic, moderate changes at acromioclavicular joint. The radiologist's impression was:

"massive tear of the rotator cuff and chronic, age appropriate arthrosis at the acromioclavicular joint."

12. On February 10, 2014, Claimant returned to Dr. Smith. After reviewing the MRI, Dr. Smith recommended Claimant undergo an orthopedic evaluation with Dr. Phil Stull. Claimant told Dr. Smith he would like to continue working up until the point in time he needs surgery. Claimant reported difficulty using his right arm with certain activities, but that he was still able to complete his job. Dr. Smith noted that Claimant still had strength of 4 out of 5 in his right arm which was surprising to Dr. Smith.

13. On February 27, 2014, Claimant presented to Dr. Stull. Dr. Stull recommended Claimant undergo right shoulder reconstructive surgery. Dr. Stull requested that Respondent authorize the surgery.

14. Respondent filed a Notice of Contest, contending that Claimant's right shoulder symptoms and conditions were not caused by any work incident. Thereafter, Claimant underwent the surgery through his personal insurance on December 15, 2014.

15. Dr. Mark Paz, a level ll accredited physician, examined the Claimant, reviewed the medical records, and prepared an Independent Medical Evaluation ("IME") report. Dr. Paz's report reflects that on the date Claimant fell, he was walking backwards, pulling the dolly, when he slipped and fell to the ground, landing onto his right side as he was turned slightly to the right while walking backwards. Claimant reported to Dr. Paz that immediately following the fall he experienced pain in his right shoulder, among other symptoms. Claimant's other symptoms resolved over time. Claimant also reported to Dr. Paz that later in 2013 he started working more hours which increased his shoulder pain.

16. Dr. Paz examined the Claimant and found that Claimant had reduced range of motion in his right shoulder compared with his left shoulder.

17. Dr. Paz concluded that based upon the direct history provided by the Claimant during the evaluation, findings on physical examination, and review of the prior medical records, to a reasonable degree of medical probability it was not probable that Claimant's right shoulder impingement syndrome, right shoulder rotator cuff tear, or right shoulder acromioclavicular arthritis were related to his fall on July 23, 2013. Dr. Paz explained that the mechanism of injury associated with an acute rotator cuff tear in the shoulder is lifting, pushing or pulling with the upper extremity in an outstretched fashion, above chest level, applying excessive force across the rotator cuff unit. The mechanism of injury specifically described by Mr. Foster was inconsistent with an acute traumatic rotator cuff tear. Dr. Paz explained that the presence of asymptomatic right shoulder rotator cuff tears in the population over the age of 45 is well documented in the literature. Even assuming Claimant had a pre-existing asymptomatic rotator cuff tear, Dr. Paz opined that it remained not medically probable that the July 23, 2013 event aggravated or accelerated the preexisting right shoulder rotator cuff tear. Rather, Dr.

Paz opined Claimant's right shoulder condition is consistent with chronic degenerative changes of the right shoulder joint.

18. David King testified during the hearing. King has been employed with the Employer for over 31 years. His current position is manager of ramp operations. He supervises approximately 35 employees. King testified that the physical requirements of Claimant's job include lifting 75 lbs. and up to 150 lbs. with assistance. King testified this sort of lifting activity is something his employees do every day. King testified that Claimant's job activities include lifting overhead up to 25% of the time or 15-20 minutes out of a two-hour shift. King confirmed that when an employee loads a dolly, the heavier items are loaded on bottom and the lighter items are placed on top. Thus, items lifted at shoulder height or above would be lighter items.

19. King confirmed Claimant reported falling at work on July 2013. Claimant was wearing shorts and King observed abrasions on the Claimant's legs. King testified that Claimant advised him that he had fallen, hitting his shoulder on his right side. However, Claimant was much more concerned with his knee than his right shoulder. King asked Claimant whether he required medical treatment, and Claimant declined.

20. Because the Claimant reported an incident at work, King filled out an incident report. King testified that the Employer requires these forms to be completed so that if a Claimant later does seek medical treatment, the form may be forwarded to the workers' compensation carrier.

21. Claimant testified that in the weeks subsequent to the July 23, 2013 incident, he did not seek medical treatment. Rather, Claimant continued to work his regular activities. King observed Claimant on a daily basis through the fall and into 2014, and he did not observe any pain behaviors on the part of the Claimant. Additionally, Claimant did not request assistance or otherwise indicate he was unable to perform his work activities as a result of a shoulder injury.

22. According to King, Claimant did not mention the July 23, 2013 incident again until January 2014 when he reported that his shoulder was hurting and he believed it was related to the incident in July 2013.

23. Claimant did not miss any work as a result of the fall on July 23, 2013 until his shoulder surgery in December 2014. Claimant knew he had a rotator cuff tear as of February 2014 and his symptoms were bothering him to the point that he wished to pursue surgery as of February 27, 2014, yet he continued to work.

24. Claimant was not permitted to return to work for this Employer or his other employer following the shoulder surgery until January 5, 2015 when he was released to return to work for SFI Compliance. As of the date of the hearing, he had not been released to return to work for the Employer.

25. Dr. Paz testified at the hearing as an expert in occupational medicine. Dr. Paz observed the testimony of Claimant and King. Dr. Paz testified that as a level II accredited physician, he is trained to address causation in workers' compensation matters. Dr. Paz testified that to address causation, a medical diagnosis must first be established based upon history and physical examination findings. Then, the physician would address the circumstances regarding the injury, for example, whether it is an exposure or an acute injury, to determine the mechanism of injury. Finally, taking all that information together, the physician renders an opinion as to whether it is greater than 50% likely that the diagnosis is related to the mechanism of injury reported.

26. Dr. Paz testified he applied the level II causation training to the present case and reached the conclusion to a reasonable degree of medical probability that Claimant's right shoulder symptoms and conditions did not relate to Claimant's work activities, specifically the July 2013 incident.

27. Dr. Paz testified that when he examined the Claimant in June 2014, the Claimant was unable to fully extend his right arm in front of himself. Dr. Paz opined that it would be unlikely that the Claimant would "casually involve himself with lifting anything upwards of 35 pounds to an area at or above chest height."

28. Dr. Paz testified that with regard to a rotator cuff tear, the mechanism of injury is very important. He opined that an acute injury results from a load or tension across the rotator cuff, or at least the segment which is injured. In this particular case, Dr. Paz opined that there was no load across the supraspinatus tendon at the time of the fall. Dr. Paz testified that the supraspinatus muscle is fully engaged between 60 and 120 degrees, so at about chest level and up to above the horizon with the right upper extremity. Beyond that other muscles take over the lifting load and overhead activity. Accordingly, for an injury such as Claimant's to occur as a result of a fall, the right upper extremity would have to have been out away from the body between 60 and 120 degrees.

29. Dr. Paz went on to explain the circumstances relayed by the Claimant would not have created a rotator cuff tear because falling onto the right shoulder with the arm against the body would not result in a supraspinatus rotator cuff tear. Additionally, Dr. Paz testified he was present when King and Claimant described Claimant's job duties performed for the Employer. Dr. Paz opined that an individual with an acute rotator cuff tear could not have performed those work activities in the 6 months subsequent to an acute injury. Dr. Paz did not render an opinion concerning whether a person with a chronic rotator cuff tear that has become symptomatic could perform full duty work for approximately 17 months.

30. Dr. Paz admitted that he could not determine from the MRI scan whether Claimant's rotator cuff tear was acute or chronic.

31. Dr. Paz testified that more likely than not Claimant suffered from an asymptomatic preexisting degenerative tear in his rotator cuff. Dr. Paz opined that

numerous morbid symptoms can increase a person's likelihood of developing such a degenerative condition, such as vascular problems, and that Claimant does suffer from a number of these conditions.

32. Dr. Paz opined that assuming the rotator cuff tear preexisted the July 23, 2013 fall, it is not likely Claimant's fall aggravated the condition and rendered it symptomatic. He explained that to aggravate a preexisting condition the same mechanism of injury is necessary as with an acute tear. In other words, Claimant falling on his right shoulder with his arm against his body would not aggravate a rotator cuff tear. In contrast, Claimant falling with his arm outstretched could potentially aggravate the preexisting condition. Dr. Paz concluded it is more likely than not that Claimant's asymptomatic rotator cuff tear became symptomatic over a period of 6 months time. Claimant simply sought care when the symptoms became progressively worse. Dr. Paz opined that the mechanism of injury as described by the Claimant is not consistent with either an acute injury causing the rotator cuff tear or an aggravation of the preexisting condition.

33. Dr. Paz agreed that the surgery Claimant underwent on December 15, 2015 was reasonable and necessary.

34. Claimant had some previous problems with his upper extremities in 2002. Claimant recalled that he underwent treatment for ganglion cysts in his biceps, but did not have specific treatment for shoulder pain. Claimant did not recall any type of medical treatment to his right shoulder other than the cyst removal nor did he recall being told that he had subacromial bursitis in his right shoulder. There are no medical records documenting treatment to Claimant's right shoulder over the ensuing 11.5 years until January 2014. Given the remoteness of Claimant's prior right shoulder issues, the ALJ does not find it significant that Claimant failed to remember any prior shoulder problems.

35. Following the July 23, 2013 incident, Claimant testified he continued to work not only his job with the Employer but with two other employers. He did not experience any issues with his right shoulder while performing his other jobs.

36. Dr. Paz's opinions are unpersuasive. First, Dr. Paz assumes that Claimant fell onto his right side with his right arm against his body; however, Dr. Paz's report does not state that Claimant reported that he fell with his right arm against his body. Even Claimant could not specifically recall if his right arm was up against his body because he also remembered that he continued to hold onto the dolly tongue with his right arm as he fell. If Claimant fell onto his side while still holding the dolly, his arm could certainly have been extended to 60 degrees. Further, Dr. Paz also discounts the notion that Claimant suffered an aggravation or exacerbation of a pre-existing rotator cuff tear stating that the mechanism of injury would need to be similar to that which would produce an acute tear. Again, it is not clear that Claimant fell with his right arm against his body. He described recalling that he held onto the dolly tongue when he initially fell onto his right side. As Claimant described, the fall happened fast and he

cannot recall his body's exact positioning, which is not unreasonable for a person who is in the midst of falling.

37. Claimant has proven that on July 23, 2013, in the course and scope of his employment with the Employer, he sustained an injury to his right shoulder. The Claimant credibly testified on July 23, 2014 he was performing his job pulling dollies when he slipped on wet cement and went down landing on his knee, hip and shoulder while holding on to a dolly. Since that date, Claimant has had right shoulder pain that he hoped would resolve with time. The fact that Claimant continued to work after the industrial accident is of little consequence. The medical records reflect that Claimant asked to continue working up through the date of his surgery which was approximately 10 months even after he learned he had a rotator cuff tear. It is apparent that Claimant wished to and had the ability to work through any symptoms he was experiencing.

38. The medical treatment provided by OccMed Colorado through Dr. Smith, his referral for an MRI on February 10, 2014 at Denver Integrated Imaging, and the visits with Dr. Stull following the first visit on February 27, 2014 were reasonable, necessary and related to the injury of July 23, 2013.

39. Claimant has proven that the medical treatment in the form of a right shoulder rotator cuff repair is related to his July 23, 2013 industrial injury. The record reflects that Claimant did not have any limitations, symptoms or complaints related this is right shoulder prior to his July 23, 2013 industrial injury. There are no medical records reflecting any treatment of Claimant's right shoulder prior to the industrial incident and after 2002.

40. Claimant is entitled to temporary total disability benefits from December 15, 2014 through and including January 4, 2015 pursuant to the stipulation of the parties. Although Claimant has returned to work at SFI Compliance, he has not been permitted to work for the Employer as of the date of the hearing.

41. Pursuant to the parties' stipulation, Claimant is entitled to temporary partial disability benefits from January 5, 2015 and ongoing.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Compensability

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. The Claimant has proven by a preponderance of the evidence that he sustained an injury to his right shoulder while in the course and scope of his employment with the Employer on July 23, 2013. While it is difficult to ascertain whether Claimant suffered an acute right rotator cuff tear or whether he aggravated a pre-existing asymptomatic condition, the ALJ nevertheless finds and concludes that the industrial accident produced the need for medical treatment to Claimant's right shoulder. The Claimant consistently reported that he experienced right shoulder pain immediately following the fall, and that he hoped it would resolve with time. After the symptoms increased over time, he pursued medical treatment. As found above, the opinions of Dr. Paz to the contrary are not persuasive.

Medical Benefits

6. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant has proven that he is entitled to medical treatment to cure and relieve him of the effects of his right shoulder injury. Drs. Smith and Stull have

provided Claimant with reasonable and necessary medical treatment, and as found, such treatment, including the shoulder surgery, is related to the industrial injury.

Average Weekly Wage

7. Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

8. The Claimant urges the ALJ to include the wages he earns working for SFI Compliance as part of his overall AWW for this claim. Claimant missed work at SFI while undergoing and recovering from the shoulder surgery related to this workers' compensation claim. As such, Claimant's overall wage loss was directly impacted by his industrial injury. Claimant's average weekly wage for the purposes of indemnity benefits shall include his earnings from SFI of $951.97 making Claimant's total AWW $1,257.14. Because permanency is not at issue, any determination of AWW as it relates to permanency is reserved for future determination.

Temporary Disability Benefits and Temporary Partial Disability Benefits

9. As stipulated by the parties, the Claimant is entitled to TTD from December 15, 2014 through January 4, 2015, and TPD from January 5, 2015 and ongoing until terminated pursuant to law.

ORDER

1. Claimant sustained an injury to his right shoulder in the course and scope of his employment for Employer on July 23, 2013.

2. All medical care rendered by Dr. Smith at OccMed of Colorado, Dr. Stull at Colorado Orthopedic Consultants and their referrals are reasonable, necessary and related, including the surgery performed to Claimant's right shoulder by Dr. Stull on December 15, 2014. Respondent shall pay for such treatment consistent with the fee schedule.

3. Claimant's average weekly wage is $305.17 with the Employer, and with SFI Compliance $951.97. These two wages combine for a combined average weekly wage of $1,257.14, for the purposes of indemnity benefits only.

4. Respondent shall pay temporary total disability benefits for the period of time between December 15, 2014 and January 4, 2015, a period of 21 days, at the average weekly wage rate of $1,257.14.

5. Claimant is entitled to temporary partial disability benefits from January 5, 2015 and ongoing for his wage loss from Employer until terminated pursuant to law.

6. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 9, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-942-867-02

ISSUES

- Did Claimant prove by a preponderance of the evidence that his lumbar spine problems are related to his claim, and that lumbar-directed chiropractic care is reasonable, necessary, and related to his claim?
- Did Claimant prove by a preponderance of the evidence that his right knee arthritis and chondromalacia are related to his claim, and that repeat Orthovisc injections are reasonable, necessary, and related to his claim?
- Did Claimant prove by a preponderance of the evidence that repeat arthroscopic right knee surgery is reasonable, necessary, and related to his claim?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked for Employer as a facility maintenance technician starting on October 27, 2011. Claimant's job duties involved facilities maintenance, and removing snow and ice as needed.

2. Claimant's history is significant for low back problems that date back years, and moderately to severely impacted his daily activities. Claimant complained of low back problems to his personal care physicians ("PCP") between September 2008 and January 10, 2014. On January 10, 2014, less than a month before his work accident, Claimant saw his PCP for cervical, thoracic, and lumbar back pain associated with muscle spasm. Claimant described the pain as fluctuating, intermittent, deep, and diffuse. Claimant received lumbar directed osteopathic manipulation that day.

3. Claimant's history is also significant for right knee problems that pre-date his work accident. On January 31, 2014, less than ten days before his work accident, Claimant saw his PCP for right knee pain and crepitus, aggravated by climbing and descending stairs. Claimant requested a right knee adjustment on that date.

4. On Friday, February 7, 2014, while at work, Claimant was de-icing a cooling tower catwalk for Employer when he slipped on ice, twisting his right knee.

5. On Saturday, February 8, 2014, Claimant went to the emergency department at St. Anthony North Hospital, where he reported right knee pain after a twisting fall injury at work. At that time Claimant denied any other injury. On examination of Claimant's right knee, no significant swelling, effusion, or obvious deformity were noted. An x-ray revealed a small effusion but not fracture. An MRI was recommended

6. On Monday, February 10, 2014, Claimant reported a right knee injury to Employer by email, making no mention of a back injury. That day, Employer prepared

an Employers' First Report of Injury which reflected Claimant twisted his knee on an icy catwalk, but did not mention a back injury.

7. Claimant chose Arbor Occupational Medicine ("Arbor") as his designated provider, and on February 11, 2014, Claimant was seen at Arbor by Richard Shouse, PA-C, who obtained a history that Claimant slipped and twisted his knee while walking on a slick catwalk. Claimant reported no previous knee injuries. Claimant was assessed with a right knee strain and a suspected meniscus tear. A right knee MRI was ordered.

8. On February 13, 2014, Claimant's right knee MRI was interpreted as showing a horizontal tear in the posterior horn of the medial meniscus, and moderate chronic chondromalacia of grades 3-4. Claimant followed up with Mr. Shouse on February 17, 2014 and was assessed with knee strain with meniscus tear. Mr. Shouse referred Claimant to Dr. Joseph Hsin for a surgical evaluation.

9. On February 18, 2014, Dr. Hsin reviewed Claimant's MRI, noting it showed a complex posterior horn medial meniscus tear, consistent with the work injury. Dr. Hsin recommended an arthroscopic meniscectomy.

10. On February 19, 2014, Claimant started in therapy at Alpha Rehab, where he denied a pre-morbid history of right knee problems.

11. On February 27, 2014, Dr. Hsin, performed a right knee arthroscopy, partial medial meniscectomy, and right knee chondroplasty. Dr. Hsin reported intraoperative findings of Grade 3 to almost Grade 4 chondral lesions.

12. On March 3, 2014, Claimant started post-operative therapy. As of April 11, 2014, Claimant had eleven therapy sessions without documentation of low back issues.

13. On March 10, 2014, Insurer filed a general admission.

14. On March 12, 2014, Dr. Thurston of Arbor noted that he and Claimant's physical therapist were puzzled by Claimant's degree of pain. Dr. Thurston opined that "much of the sharp pains and popping have to do with the chondroplasty of the medial femoral condyle."

15. On March 21, 2014, Dr. Hsin noted Claimant's recovery from routine surgery had been slower than normal with inexplicable sharp stabbing pains. Dr. Hsin injected Claimant's knee with Lidocaine, Marcaine, and Celetone. Claimant reported only transient benefit for the next two or three days.

16. On March 26, 2014, Dr. Thurston again noted that he could not explain Claimant's slow progress. He further noted that Claimant and his wife were unhappy with Dr. Hsin, and wanted a second opinion. Although Dr. Thurston was pleased with Dr. Hsin's care, he referred Claimant for a second opinion with another orthopedic surgeon.

17. On April 8, 2014, Claimant was evaluated by Douglas Foulk, M.D., an orthopedic surgeon, who diagnosed the issue as right knee osteoarthrosis, and who recommended a repeat right knee MRI to evaluate the degree of osteoarthritis progression. X-rays taken on April 14, 2014 revealed mild medial narrowing with osteophytes formation along the femur and tibia and patellofemoral joint. Dr. Faulk also

recommended three Orthovisc injections, as Claimant had failed all other treatments. He also opined a medial unloader brace would likely help.

18. On April 10, 2014, a post-operative right knee MRI was interpreted as showing Grade 4 chondral thinning and subcortical cystic change. The radiologist noted that the chondral degeneration was similar to the prior MRI.

19. On April 14, 2014, Claimant presented to Dr. Ray at Chiropractic Plus, where he was seen under his personal insurance on his wife's referral. Claimant filled out paperwork in which he admitted to a long history of low back problems that severely limited his activities of daily living. Claimant filled out a pain diagram, noting he had back problems for "years." Dr. Ray reported that Claimant had "[c]onstant burning and aching lower back pains, pelvic pains" and "The patient stated that he has had this problem for years and with an acute attack today." Claimant received 17 chiropractic treatments from Dr. Ray between April 14, 2014 and May 27, 2014.

20. At no time did Claimant tell any of his workers' compensation physicians that he had prior low back problems, that he had an acute attack on April 14, 2014, or that he was receiving chiropractic care under private insurance.

21. On April 16, 2014, just two days after his acute attack of low back pain, Claimant told his workers' compensation physical therapist that he had a low back problem which Claimant related to crutch use.

22. On April 22, 2014, Dr. Foulk reviewed the April 10, 2014 right knee MRI, and formalized a treatment plan of medications, an occasional cortisone injection and/or an Orthovisc injection series "as a mean[s] to treat arthritic symptoms."

23. On April 28, 2014, Dr. Thurston referred Claimant to Dr. Ronald Carbaugh, a psychologist, secondary to concerns of depression and delayed recovery. Dr. Carbaugh provided psychological care from May 22, 2014 through January 7, 2015. Dr. Carbaugh noted Claimant had high pain behaviors, a profound dependence on his wife, with development of the helpless role. He also noted "It is very likely that psychological symptoms will interfere with physical pain treatment." He noted significant concerns regarding [Claimant's] cognitive functioning. Dr. Carbaugh's July 29, 2014 notes record Claimant reporting his back pain as 9/10. Dr. Carbaugh's diagnosis includes somatic symptom disorder and adjustment disorder with depressed mood.

24. On April 29, 2014, Dr. Stephen Horan, an orthopedic surgeon, performed a record review. Dr. Horan opined that the wearing down of cartilage in Claimant's knee to cause Grade 3-4 chondromalacia was "certainly" pre-existing. Dr. Horan also opined the Orthovisc injections and unloader brace would be beneficial in the post-operative period to help the chondromalacia and arthritis, but not the work injury related medial meniscus tear. Dr. Horan opined that "should the patient have persistent pain and discomfort in the future, I feel that it would be solely due to the pre-existing knee issues".

25. On May 2, 2014, Claimant was fitted for the unloader brace. Claimant then underwent a series of Orthovisc injections through Dr. Foulk's office, administered on May 8, 2014, May 15, 2014, and May 22, 2014.

26. The Orthovisc injections failed to provide a functional gain lasting at least three months, as documented in the following reports: (1) on May 22 2014, Claimant told Dr. Carbaugh that recent Orthovisc injections were of no benefit; (2) on May 28, 2014, Dr. Thurston noted Claimant had his third Orthovisc injection on May 22, 2014, and had not noticed any significant benefit; (3) on June 24, 2014, Dr. Carbaugh noted that Claimant reported the Orthovisc injections were completed, without noticeable change in his knee pain; (4) on July 8, 2014, Dr. Foulk noted that Claimant was reporting he did not believe the Orthovisc injections had improved his symptoms; (5) on July 23, 2014, Dr. Patel noted that Claimant reported cortisone and Orthovisc injections offered "slight" improvement; (6) on July 29, 2014, Dr. Carbaugh reported Claimant "underwent a previous series of Orthovisc injections some four to five weeks ago with no noticeable change in his knee pain or function."; (7) on August 13, 2014, Dr. Carbaugh reported that cortisone and Orthovisc injections had yet to provide any significant benefit; (8) on October 8, 2014, Dr. Thurston reported Claimant had cortisone and Orthovisc injections without significant improvement; and (9) on November 4, 2014, Dr. Thurston noted that Claimant still had significant knee pain that did not respond to the first set of Orthovisc injections.

27. On May 28, 2014, Dr. Thurston noted that Claimant was complaining of low back pain, and his wife had been complaining of it for a while. Claimant concealed from Dr. Thurston his history of chronic, disabling low back pain. Without this history, Dr. Thurston surmised that Claimant's pain was due to myofascial imbalance and overcompensation.

28. On June 18, 2014, Claimant was sent for a lumbar MRI after complaining of low back, left buttock, and left posterior leg pain for six to eight weeks. The MRI was interpreted as showing multi-level degenerative issues, including stenosis, an osteophyte complex formation, and annular tearing at L5-S1. Dr. Thurston reviewed the MRI, opining Claimant's symptoms were due to an exacerbation of degenerative joint disease and lumbar spondylosis.

29. Again, on July 8, 2014, Claimant told Dr. Foulk that the Orthovisc injections did not improve his symptoms, and the combination of injections and the unloader brace had only helped slightly. Dr. Foulk told Claimant he should see a total joint doctor and referred Claimant to Dr. Nimesh Patel.

30. On July 23, 2014, Dr. Patel opined that Claimant had right knee osteoarthritis. Dr. Patel's plan was to administer additional cortisone injections. On July 23 or 31, 2014, Dr. Patel re-injected Claimant's right knee with cortisone.

31. Claimant treated with Dr. Leif Sorensen for pain management between June 24, 2014 and December 31, 2014. On August 12, 2014, Dr. Sorensen administered left sided L4-5 and L5-S1 transforaminal ESI injections. On September 9, 2014, Dr. Sorensen noted that the prior injection provided 10% relief, and Claimant was a candidate for repeat injections, or interlaminar ESI at L5-S1, but he first wanted Claimant evaluated for surgical options. On October 1, 2014, Dr. Andrew Castro evaluated Claimant and noted significant pain behaviors. He assessed a lumbar sprain/strain injury. Dr. Castro noted the onset of Claimant's injury as February 7, 2014,

which is inconsistent with the majority of the medical records and Claimant's reports. Dr. Castro opined that Claimant was not a lumbar surgical candidate.

32. On October 10, 2014, Dr. Sorensen recommended L5-S1 interlaminar ESIs. Thereafter, Dr. Gregory Reichardt performed a medical record review, and in a report dated October 17, 2014, Dr. Reichardt recommended the injections be denied pending an IME to address work relatedness, indicating "of concern is how a disc abnormality would occur as a result of a gait deviation." On October 20, 2014, Insurer formally denied the injection request.

33. On October 22, 2014, Claimant returned to Dr. Patel, who continued to opine that Claimant's right knee pain was secondary to osteoarthritis. Dr. Patel indicated Claimant was a candidate for repeat Orthovisc injections after November 22, 2014.

34. On November 17, 2014, Dr. Horan reviewed Dr. Patel's recommendation, he noted that the prior Orthovisc injections provided somewhere between no improvement, to slight improvement, and he opined that per the *Medical Treatment Guidelines*, to qualify for repeat injections, there must be a showing functional gain lasting three months, which in this case had not been met.

35. On December 3, 2014, Dr. Scott Primack performed an IME at Respondents' request. Dr. Primack performed a comprehensive causation evaluation with the information available, although he did not have any medical records from before the date of injury. Claimant specifically denied having prior low back or right knee issues. With regard to Claimant's right knee, Dr. Primack opined that Claimant had a work-related meniscus tear, but a total knee replacement would not be work-related. Further, he felt psychosocial perceptions precluded Claimant from doing well with any additional interventional procedures. With regard to Claimant's low back, Dr. Primack opined that Claimant's lumbar symptoms were not work-injury related; that there was no evidence of a specific, acute injury on February 7, 2014; and "it would be unusual for the patient to have compensatory back pain with radiating symptoms going down the left lower extremity well over 3 months following his injury."

36. On December 3, 2014, Claimant was seen by Dr. David Orgel of Arbor. (Clt. Ex. 4, bn 23-24) Dr. Orgel, who was not aware of Claimant's preexisting chronic low back problems, or that Claimant had already had numerous sessions of chiropractic care, recommended chiropractic care directed at the sacroiliac joint. On December 17, 2014, Paul Springer, PA-C noted Claimant had not received much relief from anything, and he was not sure chiropractic care would be of any benefit.

37. Between January 6, 2015, and January 16, 2015, Claimant received chiropractic care through Summit Chiropractic. At each session, Claimant reported his low back pain was at a level of 8/10, present 80% of the time, verifying that this care provided no benefit.

38. On January 7, 2015, Dr. Patel appealed the denial of repeat Orthovisc injections, indicating repeat injections were warranted because he was trying to exhaust all conservative measures, and Claimant told him that the first Orthovisc injections

provided relief. This history is contradicted by the medical records following the May 2014 Orthovisc injections.

39. On January 14, 2014, Dr. Horan reiterated that there must be functional gain lasting three months to support repeat injections, there was no new medical evidence showing the prior injections were helpful, and therefore repeat injections should be denied. On January 15, 2015, the appeal was denied.

40. On January 23, 2015, Dr. Patel referred Claimant to his partner, Dr. David Schneider, for a surgical opinion. On January 28, 2015, Dr. Schneider examined Claimant, and issued a limited report which recommended arthroscopic knee surgery. On January 30, 2015, Dr. Orgel noted that Dr. Schneider was recommending arthroscopic knee surgery, but based upon a New England Journal of Medicine article about meniscal surgeries on the substrate of arthritis, it was unlikely arthroscopic surgery would be beneficial.

41. On January 28, 2015, Mark Testa, D.C., performed a record review to address whether additional chiropractic care was warranted. By that date, Respondents had obtained Claimant's PCPs' records, including records from Chiropractic Plus, which Dr. Testa reviewed. Dr. Testa noted that Chiropractic Plus and Summit Chiropractic records failed to demonstrate that chiropractic care had resulted in functional gains, achievement of treatment goals, reduction of pain, or reduction of medication use. Dr. Testa concluded that "in light of how [Claimant] has responded to other treatment modalities, including the previous 21 chiropractic visits, the overlying pain behavior, helplessness, depression, it is my opinion and experience, more visits of manipulation will not lead to significant improvement."

42. Dr. Testa also noted Claimant's long history of low back pain, and that causation of Claimant's current low back symptoms had not been adequately demonstrated, so he could not state to a reasonable degree of medical probability that the low back symptoms were causally related. On January 28, 2015, Insurer denied the request for additional chiropractic care.

43. On February 4, 2015, Mark Failinger, M.D., an orthopedic surgeon, reviewed Dr. Schneider's request for a repeat right knee arthroscopy. Dr. Failinger was provided with a complete set of medical records, including Claimant's prior records. Based upon his record review, Dr. Failinger opined that a right knee arthroscopy was totally inappropriate, and did not provide even a slight chance of improvement. Dr. Failinger based his opinions on the fact Claimant had severe pain dramatically out of proportion to anything his providers could explain, Claimant's prior arthroscopy did not help, and Claimant had post surgery severe and chronic pain complaints with the inability to tolerate therapy.

44. Dr. Failinger also opined that the recommended surgery was not to address problems related to this claim. Dr. Failinger explained that the work related meniscus tear had already been surgically addressed, and the recommended surgery and any ongoing medical care was to address preexisting conditions, including osteoarthritis and chondromalacia. Dr. Failinger opined that Claimant was at MMI, and "any further treatment for arthritis would be to treat preexisting degenerative changes and not for the meniscal tear which was addressed at surgery by Dr. Joseph Hsin."

Finally, Dr. Failinger opined that no further visco-supplementation was reasonable as Claimant failed to demonstrate any benefit from the prior injections. On February 9, 2015, Insurer formally denied Dr. Schneider's request for a right knee arthroscopic procedure.

45. On February 18, 2015, Dr. Primack testified by deposition that he is a board certified physical medicine and rehabilitation physician, he is Level II accredited, and he teaches the causation section for the Division of Labor. Prior to his deposition, Dr. Primack was provided additional medical records, including records generated after his IME, and medical records from Claimant's PCPs. Dr. Primack testified that the history provided in Claimant's PCPs' records bolstered his opinion that Claimant's lumbar symptoms were not work related. Dr. Primack explained that he went through a five step causation evaluation, and the preexisting history of chronic symptomatic low back pain represented a significant factor. Dr. Primack disagreed with Dr. Thurston's opinion on lumbar causation, explaining that if Claimant's lumbar problems were related to altered gait or a compensatory phenomenon, the problems would have started immediately after the knee surgery, and would not "jump the hip" and first present at the lumbar spine. Dr. Primack further opined the findings documented on lumbar MRI were the product of the degenerative cascade of the spine, not an altered gait. Finally, Dr. Primack agreed that further chiropractic care was not reasonable and necessary, regardless of causation.

46. With regard to Claimant's right knee problems, and need for treatment, Dr. Primack opined that now that he had documentation proving Claimant had a preexisting, symptomatic right knee problem, Claimant's post surgery ongoing right knee pain and need for care are not causally related to the work injury. Dr. Primack explained the chondromalacia seen on Claimant's right knee MRIs was preexisting, and unrelated to this claim, noting that chondromalacia develops over time, and is not caused by an acute injury unless the person dislocates or fractures his or her patella.

47. Dr. Primack opined that Orthovisc injections are not causally related to the February 7, 2014 work injury. Dr. Primack administers Orthovisc injections, and indicated that the injections should be providing benefit on the short side within five days, and within two to three weeks the patient should really be feeling better lubrication and less discomfort. Dr. Primack testified that the first series of Orthovisc injections did not provide three months of functional gain, and therefore, as per the Medical Treatment Guidelines Rule 17, Ex. 6.F.5.d., repeat injections were not reasonable and necessary. Dr. Primack stated his opinions to a reasonable degree of medical probability.

48. Dr. Primack persuasively opined that regardless of causation, the arthroscopy recommended by Dr. Schneider was not reasonable and necessary. Dr. Primack explained that medical literature, including Dr. Moseley's New England Journal of Medicine article, verified that the procedure recommended by Dr. Schneider (an arthroscopy in the face of a degenerative condition) does not work for patients with Claimant's knee conditions. Dr. Primack fully agreed with Dr. Failinger's opinion that the procedure did not provide even a possibility of improvement for Claimant.

49. Dr. Primack explained that Claimant's lumbar problems are preexisting and related to a degenerative cascade of the spine. Dr. Primack's opinions are comprehensive, based upon complete information, and persuasive.

50. Dr. Testa's and Dr. Primack's opinions that additional chiropractic care is not reasonable or necessary, in light of the lack of benefit from previous chiropractic care, is credible and persuasive.

51. The ALJ finds that Claimant did not prove by a preponderance of the evidence that his lumbar spine condition was causally related to his February 7, 2014 claim, and also did not prove by a preponderance of the evidence that further lumbar-directed chiropractic care is reasonable and necessary.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. M*agnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d, 385 (Colo. App. 2000).

A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See* K*roupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Respondents are required to provide medical benefits reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. (2014); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Similarly, the question

of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa*, 53 P.3d at 1197.

When evaluating the issue of causation and reasonable and necessary medical care the ALJ may consider the provisions of the Colorado *Medical Treatment Guidelines* because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the *Medical Treatment Guidelines* are not dispositive, and the ALJ need not give them more weight than she determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (ICAO February 23, 2009).

Claimant's Lumbar Spine Condition is Not Causally Related to this Claim, and Additional Lumbar Spine Chiropractic Care is Not Reasonable and Necessary

The first issue for the ALJ's determination is whether Claimant proved by a preponderance of the evidence that his lumbar spine condition was causally related to his February 7, 2014 claim, and if so, whether Claimant also proved that additional lumbar-directed chiropractic care is reasonable and necessary. As found, Claimant failed to meet his burden. Claimant's lumbar spine condition is not causally related to this claim, and additional chiropractic care is not reasonable and necessary.

As found, Claimant has a long history of low back pain that preexisted his claim. For years, Claimant intermittently sought and received care for his low back pain, including seeking and receiving osteopathic manipulation for chronic low back pain less than a month before his work injury. Following his work injury, Claimant made no complaints of low back pain to any of his medical providers until April 14, 2014, when Claimant sought chiropractic care under private insurance after having an acute attack of low back pain earlier that day. Dr. Testa and Dr. Primack are the only medical providers to address causation who had complete documentation of Claimant's prior and post accident history. Dr. Testa could not relate Claimant's back problems to his claim. Dr. Primack, who teaches physicians on how to evaluate causation, persuasively opined that Claimant's low back problems and MRI findings are not causally related to the initial work accident, and are not causally related to this claim through an altered gait or compensatory phenomenon theory. Dr. Primack explained that Claimant's lumbar problems are preexisting and related to a degenerative cascade of the spine. Dr. Primack's opinions are comprehensive, based upon complete information, and persuasive. Claimant's low back condition is not causally related to this claim.

Claimant concealed his prior lumbar history and post accident acute attack from all of his workers' compensation physicians, so that none of his physicians had any knowledge Claimant had preexisting chronic back issues. Dr. Thurston's and Dr. Orgel's causation opinions were based upon incomplete and inaccurate information, and are therefore less persuasive than the opinions of Dr. Testa and Dr. Primack.

Claimant also failed to prove by a preponderance of the evidence that additional lumbar-directed chiropractic care was reasonable and necessary. Dr. Orgel, who recommended chiropractic care in December 2014, was unaware at that time that Claimant had already received 17 sessions of chiropractic care at Chiropractic Plus without benefit. Claimant then received four additional sessions of chiropractic care in

January 2015, again without any documented benefit. Dr. Testa's and Dr. Primack's opinions that additional chiropractic care is not reasonable or necessary, in light of the lack of benefit from previous chiropractic care, are credible and persuasive. Claimant's request for additional chiropractic care is not reasonable or necessary, and is denied.

Claimant's Right Knee Chondromalacia and Arthritis Are Not Causally Related to this Claim, and Repeat Orthovisc Injections and Repeat Arthroscopic Knee Surgery are Not Reasonable, Necessary, or Related to this Claim

As found, Dr. Primack credibly testified: (1) Claimant had a work related right medial meniscus tear; (2) Claimant also had preexisting, symptomatic, and unrelated right knee osteoarthritis and chondromalacia; (3) Claimant had received an adjustment less than ten days before his work injury; and (4) Claimant concealed this information from his workers' compensation providers.

On February 7, 2014, in the face of his preexisting and symptomatic condition, Claimant sustained a work related accident, which resulted in a torn medial meniscus. Respondents admitted to this injury, and provided medical care, which included a right knee medial meniscus repair. Following surgery, Claimant's right knee pain and dysfunction did not improve, and if anything, escalated. Dr. Thurston, Dr. Hsin, Dr. Foulk, Dr. Patel, Dr. Horan, Dr. Primack and Dr. Failinger have all opined that Claimant's ongoing right knee issues are related to preexisting chondromalacia and arthritis. Claimant's current right knee condition and need for medical care for that condition, are not causally related to his work injury.

Claimant failed to prove by a preponderance of the evidence that repeat Orthovisc injections are reasonable and necessary care for his right knee condition. While the *Medical Treatment Guidelines* are not dispositive, they are instructive of the standard of medicine, and in this regard, the Guidelines instruct that there is good evidence that these injections will only provide a small effect, if any, in terms of improvement of pain and dysfunction. The *Guidelines* further indicate that the first set of injections must provide functional benefit lasting three months to warrant repeat injections. As found, the Orthovisc injections provided in May 2014 failed to provide functional benefit for any amount of time, and as such, repeat injections are not reasonable and necessary. Claimant's request for repeat Orthovisc injections is denied.

Claimant failed to prove by a preponderance of the evidence that the right knee arthroscopy recommended by Dr. Schneider is reasonable and necessary, or related to this claim. The contrary opinions of Dr. Fallinger, Dr. Orgel and Dr. Primack are more persuasive. Arthroscopic surgery in the face of a degenerative process is not reasonable and necessary. Claimant's request for repeat arthroscopic knee surgery is denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to prove that his lumbar spine condition is causally related to this claim. Claimant's claim for additional medical benefits for his low back is denied.

2. Claimant failed to prove that his right knee chondromalacia and osteoarthritis are causally related to this claim, or that care for those conditions including repeat Orthovisc injections are reasonable, necessary, or related to this claim. Claimant's claim for repeat right knee Orthovisc injections is denied.

3. Claimant's claim for a right knee arthroscopic procedure is denied as Claimant failed to prove that this care was reasonable, necessary, or related to this claim.

DATED: April 15, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issue presented for determination is whether the Claimant is entitled to temporary total disability ("TTD") benefits from May 2, 2014 and ongoing. The Respondents contend that Claimant was responsible for the termination of his employment which would preclude an award of TTD benefits. If Claimant is entitled to TTD, Respondents seek an offset for unemployment insurance benefits ("UIB") Claimant received.

FINDINGS OF FACT

1. The Employer is a fast food chain. Claimant worked for the Employer as an assistant manager in one of its restaurants. His job duties included manual labor such as stocking food and supplies, doing preparation work, ordering supplies and food, scheduling shifts, safety monitoring, managing employees and hiring new employees.

2. On April 15, 2014, Claimant sustained an injury to his left shoulder. Respondents accepted this claim and filed a medical only general admission of liability because Claimant returned to modified duty following his injury.

3. Claimant was initially restricted to lifting no more than 10 pounds, but on April 23, 2014, a Concentra physician modified his restrictions to lifting no more than five pounds, no pushing/pulling over five pounds of force, and no reaching above his shoulders.

4. Claimant continued to work for the Employer within his restrictions. His job duties often required him to ask for help from other employees so he could remain in compliance with his restrictions.

5. The Employer provided a computer in the office at the restaurant site in which Claimant worked. Claimant was authorized to use the company computer, and did so for the purpose of accessing a web application called Job Apps, which allows Claimant to access the online applications of individuals who have applied for employment with the Employer.

6. At the time claimant was initially hired by the Employer, he was provided a company handbook. Claimant signed a statement verifying that he read the policies outlined in this handbook and agreed to abide by the same. One of the policies Claimant agreed to comply with was the Electronic Communications System policy. That policy states:

> Electronic Communications System tools are provided for business purposes and are not to be used for any other

> reason, including solicitations for commercial ventures, religious or political causes or other personal uses. Inappropriate messages are strictly prohibited. Team members are responsible for avoiding anything that is offensive, disruptive, harmful to morale or considered to be harassment. Inappropriate messages may be grounds for termination.

7. In April 2014, Employer's employees were experiencing difficulty accessing the Job Apps web application through whichever web browser they had been using, so the Employer installed the Google Chrome web browser.

8. On April 22, 2014, Claimant logged on to the company computer and accessed the Chrome web browser to obtain an internet connection. At that same time, he also logged into Google Chrome using his personal Gmail account log in name and password. When Claimant finished working on the computer, he did not log out of his personal account.

9. On April 22, 2014, prior to reporting for work at 2:00 p.m., Claimant had accessed a number of adult websites on his mobile device using the Google Chrome web browser. The Claimant did not log out of Google Chrome on the Employer's computer so the adult websites accessed on Claimant's mobile device appeared in the browsing history on the Employer's computer.

10. Deb Kendall is a regional director for the Employer. She oversees the district managers within her region. During the hearing, Kendall testified that all employees were properly trained on how to use the computer, including turning it on, logging on to the internet, and logging off. She further testified that the Chrome web browser was installed for the sole purpose of allowing Claimant to access the Job Apps web application, and that there is absolutely no need to log into a personal email account or into Google Chrome to access the internet or Job Apps website.

11. On April 29, 2014, Kendall learned that the Employer's IT department had found pornographic material on the computer located at the restaurant where Claimant worked. A screen shot of a list of the adult websites was obtained which listed several websites all of which were accessed on April 22, 2014, between 12:58 p.m. and 1:08 p.m.

12. Also on April 29, 2014, the Employer suspended Claimant pending a completion of an investigation into the inappropriate websites.

13. An Employee Reprimand Record was completed on April 29, 2014. It is unclear who drafted the language found in the Employee Reprimand Record. It states that Claimant was signed into his personal Google Chrome account on the Employer's computer and that the browsing history "over several days" indicates that Claimant was accessing inappropriate websites from the computer. In the "Action Taken" section, it states, "Third written reprimand or Major Offense – Termination." Claimant's signature,

Kendall's signature and Ali Aljormandi's signature. Kendall's signature has a date of May 2, 2014 next to it.

14. Another document concerning the circumstances surrounding Claimant's termination is dated May 2, 2014, and it states:

> [Claimant] signed into his personal Google Chrome account on the [Employer's] back office computer. History browsing over several days indicates that [Claimant] was accessing inappropriate websites from the office computer and the same sites were in his browsing history and accessed from his mobile device. [Claimant] also gave his login to other managers which is against company policy. Signing into a personal [G]oogle [C]hrome account and browsing inappropriate pornographic sites violate the company policy. [Claimant] is being terminated immediately.

15. Another version of the May 2, 2014 document contains handwritten notes including a comment that Claimant refused to sign the separation notice. This version contained the signatures of Kendall and Aljormandi.

16. Kendall testified that on May 2, 2014 she met with the Claimant to discuss his violation of the Electronic Communications System policy. Kendall testified that during the meeting Claimant denied accessing Google Chrome with his personal account. Claimant, however, testified that he admitted to accessing Google Chrome with his personal account.

17. Kendall testified that one of the primary purposes of the Electronic Communications System policy is to protect the company computer system from potential viruses and security breaches, as all of the Employer's computers are linked across the country.

18. Claimant was terminated on May 2, 2014 for violating the Electronic Communications System policy.

19. Claimant testified, and the ALJ finds, that he did not understand that logging into Google Chrome with his personal Gmail account would cause the browsing history to appear on the Employer's computer. The Claimant also did not realize that logging into his personal account was in violation of the Employer's policy. There is no evidence in the record that Claimant actually accessed any inappropriate web sites or any other personal sites, including e-mail, while logged into Google Chrome.

20. On May 1, 2014, Claimant was assessed temporary work restrictions to include no use of his left upper extremity. Kendall testified that Employer was able to, and did accommodate this restriction. The Claimant, however, had been suspended from working as of April 29, 2014 and never worked with the "no use of the left upper extremity" restriction. As such, the Employer never had the opportunity to accommodate the Claimant's restrictions that had been imposed on May 1, 2014.

21. Claimant continued to have some form of work restrictions regarding his left shoulder through December 17, 2014.

22. Following the termination of his employment, the Claimant continued to receive medical treatment, which included a referral to Dr. Michael Hewitt for a surgical consultation. On August 6, 2014, Claimant saw Dr. Hewitt's physician's assistant, Nickolas Curcija. Curcija noted that Claimant was permitted to return to work on August 6 with restrictions that included no lifting over 10 pounds, no pushing/pulling more than 10 pounds of force, and no reaching above shoulders. Curcija also noted that starting the day of surgery, Claimant should engage in no activity, which was anticipated to last 4-6 weeks following surgery.

23. Dr. Hewitt performed surgery on Claimant's left shoulder on September 23, 2014.

24. Claimant testified that he was removed from work entirely by his treating physician subsequent to his surgery.

25. The surgery discharge records reflect that restrictions to include no lifting greater than 3 pounds with the left upper extremity and no strenuous activity. These surgery discharge instructions dated September 23, 2014 are not an indication of work restrictions. They are the surgeon's instructions for the days immediately following surgery. They cannot be construed as work restrictions especially when read in context of the other medical evidence.

26. On September 30, 2014, Dr. Hewitt indicated Claimant could return to work "per PCP" with no repetitive overhead use of his arm and no lifting more than five pounds.

27. The next record admitted into evidence is from Concentra dated October 23, 2014, which reflects that Claimant is released to return to work on October 24, 2014 with restrictions of no lifting more than five pounds; no pushing/pulling more than five pounds of force; and no reaching above the shoulder with the left arm. It is apparent from both Dr. Hewitt's record and the Concentra record that Claimant was restricted from working in any capacity from September 23, 2014 through October 24, 2014 due to his work injury.

28. None of the evidence presented reflects that Claimant has been placed at maximum medical improvement.

29. Claimant received $6,120.00 between May 24, 2014 and September 20, 2014, in UIB.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge makes the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

5. Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S., (termination statutes) provide that, where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. Respondents shoulder the burden of proving by a preponderance of

the evidence that claimant was responsible for his or her termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000).

6. By enacting the termination statutes, the General Assembly sought to preclude an injured worker from recovering temporary disability benefits where the worker is at fault for the loss of regular or modified employment, irrespective whether the industrial injury remains the proximate cause of the subsequent wage loss. *Colorado Springs Disposal v. Martinez*, 58 P.3d 1061 (Colo. App. 2002) (court held termination statutes inapplicable where employer terminates an employee because of employee's injury or injury-producing conduct). An employee is "responsible" if the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995).

7. A claimant, however, is not necessarily precluded from receiving TTD benefits if a worsening of the claimant's work-related condition causes the wage loss. *See Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). A wage loss is caused by a worsened condition if the worsening results in physical restrictions which did not exist at the time of the termination and such restrictions cause a limitation on the claimant's temporary earning capacity which did not exist when the claimant caused the termination. *Martinez v. Denver Health*, W.C. 4-527-415 (August 8, 2005). The question of whether a worsened condition has caused a claimant's wage loss following a termination from employment is a factual determination for the ALJ. *Harris v. Diocese of Colorado Springs*, WC 4-669-016 (ICAP, Sept. 3, 2008).

8. The ALJ concludes that Claimant did not commit a volitional act that constituted a violation of an established company policy when he logged into Google Chrome with his personal Google login and password. The mere act of logging in with no evidence that Claimant accessed his personal e-mail or used the Google Chrome browser for personal use is insufficient to establish that Claimant violated the Employer's Electronic Communications System policy. While it is true that Claimant caused the inappropriate website links to appear in the Google Chrome web browsing history on the Employer's computer, Claimant did not do so intentionally. He was unaware that the browsing history from his mobile device would appear on the Employer's computer when he logged into Google Chrome on the Employer's computer. The Employer presented no credible or persuasive evidence that Claimant accessed inappropriate web content while using the Employer's computer. Claimant merely made a mistake which the ALJ finds does not constitute a volitional act under the circumstances. As such, the Claimant is not precluded from receiving TTD based on the termination of his employment.

9. Claimant has proven entitlement to TTD benefits. Claimant has had work restrictions since the date of his injury. Beginning on May 1, 2014, Claimant's work restrictions included no use of his left arm. Claimant's restrictions then varied over the ensuing months until the Claimant had surgery on September 23, 2014, during which Claimant clearly could not use his left arm. Contrary to Respondents' assertion, the surgery discharge instructions dated September 23, 2014 are not an indication of work restrictions. They are the surgeon's instructions for the days immediately following surgery, and cannot be construed as work restrictions. On September 30, 2014, Dr. Hewitt indicated Claimant could return to work "per PCP" with no repetitive overhead use of his arm and no lifting more than five pounds. The next record admitted into evidence is from Concentra dated October 23, 2014, which reflects that Claimant is released to return to work on October 24, 2014 with restrictions of no lifting more than five pounds; no pushing/pulling more than five pounds of force; and no reaching above the shoulder with the left arm. It is apparent from both Dr. Hewitt's record and the Concentra record that Claimant was restricted from working in any capacity from September 23, 2014 through October 24, 2014. Claimant's work restrictions have continued and there is no evidence he has been placed at MMI.

10. Finally, Respondents' assertion that it accommodated the restriction of "no use of the left upper extremity" for one day defies logic. First, both Kendall and Claimant testified that Claimant was suspended from working starting on April 29, 2014 pending the outcome an investigation into the adult website issue. It was not until May 1, 2014, when Claimant's physician restricted the use of his left arm. The Employer terminated the Claimant on May 2, 2014. There is no evidence that the Claimant actually performed any work for the Employer between April 29 and May 2, 2014. Kendall's testimony concerning Employer's future or anticipated accommodations of Claimant's restrictions is hereby rejected as unpersuasive.

ORDER

It is therefore ordered that:

1. The Respondents are liable for TTD commencing on May 6, 2014, and ongoing (Claimant conceded that although his employment was terminated on May 2, 2014, TTD should not commence until May 6, 2014).

2. Because Claimant received unemployment insurance benefits in the amount of $6,120.00 between May 24, 2014 and September 20, 2014, Respondents are entitled to a credit against TTD owed to the Claimant.

3. The Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 10, 2015

DIGITAL SIGNATURE:

L. Broniak

Laura A. Broniak
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he has received was authorized, reasonable and necessary to cure or relieve the effects of a work-related injury.

FINDINGS OF FACT

1. Claimant is a 47 year old male. On April 16, 2012 Claimant began working for Employer as a Customer Service Representative. His job duties included dealing with accounts and supporting their needs regarding imports. He predominantly worked with ocean imports and cargo ships. Claimant detailed three incidents that he asserts subjected him to unusual mental stress while working for Employer.

2. Claimant testified that in 2013 he had a cold sore and requested the day off from work to address his condition. However, Employer denied his request and required him to report to work. Claimant explained that the supervisor of the Brokerage Department Ms. Jill told him to remain 10 feet away from her desk because he was spreading germs. He complained to his supervisor Ms. Dolly in her cubby. However, after Claimant left the cubby another supervisor sprayed bug repellant around the area where he had been standing. Claimant remarked that the activity humiliated him in front of other office staff.

3. Claimant explained that a second incident causing unusual mental stress occurred on June 18, 2014. His direct supervisor Branch Manager John Krupar called him into his office to discuss a promotional opportunity for which Claimant had been denied. Claimant commented that Mr. Krupar told him to "look at your face in the mirror" and then made a face that Claimant interpreted to be that of a monkey.

4. Claimant subsequently filed a complaint and a claim for Workers' Compensation. Claimant took family medical leave to address the stress from the June 18, 2014 incident. He visited his primary care physician at East West Health Centers on two occasions in June 2014. On July 5, 2014 Claimant visited designated medical provider Concentra Medical Centers and was released to full work duty on July 14, 2014.

5. After returning to Employer's office Claimant sent an e-mail to Mr. Krupar inquiring about additional training to become a better employee. Claimant testified that

on November 14, 2014 Mr. Krupar called him into his office for a closed door meeting. Claimant noted that Mr. Krupar was aggressive in tone and once again stated that he should look at his face in the mirror. Claimant interpreted Mr. Krupar's remark as again comparing him to a monkey. He commented that Mr. Krupar told him not to tell anyone about the meeting or he would be terminated from employment.

6. After the November 14, 2014 meeting Claimant returned to his desk and felt sick. He explained that he lost consciousness and paramedics were called. Claimant was taken to an ambulance but refused medical treatment. He returned to work approximately one hour later.

7. Mr. Krupar testified at the hearing in this matter regarding the three incidents of mental stress outlined by Claimant. Mr. Krupar explained that the "bug spray" mentioned by Claimant was a Wal-Mart brand disinfectant in a white can with an orange label that said "disinfectant." He commented that there was no bug spray in the office that had a mosquito on it and that they used the disinfectant on all employees' desks to prevent the spread of germs. Mr. Krupar stated that he used spray and wipes in his own office to prevent the spread of germs. He noted that an employee recently had pink eye and he wiped down the person's desk to prevent the spread of the condition.

8. Mr. Krupar testified that around June 18, 2014 Claimant applied for his supervisor's position with Employer because she was retiring. He noted that Claimant did not receive the position and Chad Tessler was hired. Mr. Krupar remarked that Mr. Tessler had more experience and was a better candidate for the job. He explained that at an office meeting Claimant became angry and started yelling at him. Mr. Krupar told Claimant that he needed to speak in a professional manner. He noted that Claimant was upset because he was not given the promotion. Claimant filed a Workers' Compensation claim shortly after the incident.

9. Mr. Krupar also testified that at no time did he ever call Claimant a monkey or refer to him as a chimpanzee. He detailed that on June 23, 2014 he had a meeting with Claimant to discuss Claimant's attitude. Mr. Krupar mentioned that Claimant needed to look at himself in the mirror because he was becoming upset. Moreover, Claimant had a facial expression of scowling and gritting his teeth when he looked at supervisor Dolly Dallacarus.

10. Claimant filed another claim for Workers' Compensation alleging an injury date of November 14, 2014. Mr. Krupar testified that on that day he was trying to meet with Claimant prior to having a group meeting to discuss account assignments. He noted that the meetings were common and occurred on a regular basis. Mr. Krupar testified that he wanted to meet with Claimant because he had undermined a co-worker by going directly to an account that was already assigned to another employee. When Mr. Krupar approached Claimant to discuss the matter he became upset, said that this was bothering his heart and the meeting ended. Mr. Krupar reported that he told Claimant he could not refuse to meet and he was going to call human resources. Claimant was ultimately terminated from employment on December 17, 2014.

11. On October 29, 2014 Claimant underwent an independent medical examination with Psychiatrist Stephen A. Moe, M.D. Claimant reported various episodes of workplace harassment and humiliation. However, Dr. Moe's report preceded the November 14, 2014 incident. Dr. Moe considered whether Claimant had suffered a compensable work-related mental health stress claim under the mental impairment statute. He concluded that his "opinion on the fundamental question is unavoidably conditional" because it hinged upon the "validity of [Claimant's] report of mistreatment in his workplace." Dr. Moe explained that mental stress for failure to receive a promotion and disciplinary issues are specifically excluded from Workers' Compensation coverage. Moreover, any mental stress associated with the "misinterpretation of normal workplace hijinks" was not compensable. However, if Claimant was subject to repeated episodes of harassment and humiliation that were sanctioned or insufficiently controlled, then his mental stress claim was work-related. Notably, Dr. Moe commented that an average worker under the mental stress statute "is expected to possess some degree of resilience."

12. Dr. Moe testified at the hearing in this matter. He explained that the mental stress statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. Dr. Moe noted that traumatic events include things like witnessing a co-worker fall off a building and seeing a friend or co-worker that has been physically injured or shot at work. Dr. Moe testified he did not believe the incidents described by Claimant at the hearing constituted psychologically traumatic events. He summarized that Claimant did not suffer a compensable mental stress impairment while working for Employer.

13. Dr. Moe testified that Claimant was an over-sensitized individual so that little things tended to bother or irritate him more than the average worker. He specifically noted that the event in which Claimant stated he was called a monkey did not constitute a traumatic event that qualified as mental stress claim under the statute. The event did not traumatize Claimant as he stated because he continued to contact Mr. Krupar and other co-workers. Dr. Moe testified that the incident sounded more like an argument involving two people at work. It may have been a heated moment but everything settled down. Dr. Moe commented that the incident was "possibly a work-related frustration matter that workers' comp is not designed to address."

14. Dr. Moe testified that the mental stress statute contemplates the "average worker." He explained that "you do not take the worker as you find them but rather flip it on its end and then you are focused on the average worker, and if we were to encounter a highly sensitive person who is then upset by relatively common place experiences, that is actually a bar to recovery so it is a flip. It is kind of striking."

15. On cross-examination Claimant's counsel suggested that Dr. Moe essentially changed his opinion from his report. However, Dr. Moe clarified his opinion. He initially noted that Claimant's claim was based on three distinct incidents and he considered the testimony of Claimant's supervisor. Dr. Moe commented that, if we assume Claimant was subjected to several years of bullying or harassment, a

compensable claim could exist. Claimant would have experienced long term stress based on the length of time. However, Claimant's contention was based on three distinct incidents and he was more sensitive than others to stressful events. Dr. Moe explained that the mental stress statute focuses on the average worker as compared to the subjective response of a particular individual. Accordingly, Dr. Moe maintained that Claimant did not suffer a work-related mental stress impairment during the course and scope of his employment with Employer.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable mental impairment during the course and scope of his employment with Employer. Claimant asserted that he suffered a compensable mental impairment claim based on three workplace incidents during 2013 and 2014. He detailed a bug spray incident, Mr. Krupar's actions in a closed door meeting that he interpreted to suggest he was a monkey and a subsequent closed door meeting in which Mr. Krupar was aggressive and again suggested Claimant was a monkey. In contrast, Mr. Krupar explained that the bug spray was actually a disinfectant to kill germs. Moreover, around June 18, 2014 Claimant applied for his former supervisor's position. At a closed door meeting Mr. Krupar mentioned that Claimant needed to look at himself in the mirror because he was becoming upset. Finally, Mr. Krupar testified that on November 14, 2014 he wanted to meet with Claimant because he had undermined a co-worker by going directly to an account that was already assigned to another employee. When Mr. Krupar approached Claimant to discuss the matter, Claimant became upset, said that this was bothering his heart and the meeting ended.

17. Dr. Moe conducted an independent medical examination and testified at the hearing in this matter. He concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that the mental stress statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. Dr. Moe testified he did not believe the incidents described by Claimant at the hearing constituted psychologically traumatic events. He noted that the mental stress statute focuses on the average worker as compared to the subjective response of a particular individual. Dr. Moe determined that Claimant was an over-sensitized individual so that little things tended to bother or irritate him more than the average worker. He acknowledged that, if we assume Claimant was subjected to several years of bullying or harassment, a compensable claim could exist. However, Claimant's contention was based on three distinct incidents and he was more sensitive than others to stressful events. Accordingly, Dr. Moe persuasively maintained that Claimant did not suffer a work-related mental stress impairment during the course and scope of his employment with Employer. Based on the testimony of Mr. Krupar and persuasive opinion of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Customer Service Representative for Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19,

2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAP, Jan. 6, 2009).

6. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment." *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer. Claimant asserted that he suffered a compensable mental impairment claim based on three workplace incidents during 2013 and 2014. He detailed a bug spray incident, Mr. Krupar's actions in a closed door meeting that he interpreted to suggest he was a monkey and a subsequent closed door meeting in which Mr. Krupar was aggressive and again suggested Claimant was a monkey. In contrast, Mr. Krupar explained that the bug spray was actually a disinfectant to kill germs. Moreover, around June 18, 2014 Claimant applied for his former supervisor's position. At a closed door meeting Mr. Krupar mentioned that Claimant needed to look at himself in the mirror because he was becoming upset. Finally, Mr. Krupar testified that on November 14, 2014 he wanted to meet with Claimant because he had undermined a co-worker by going directly to an account that was already assigned to another employee. When Mr. Krupar approached Claimant to discuss the matter, Claimant became upset, said that this was bothering his heart and the meeting ended.

8. As found, Dr. Moe conducted an independent medical examination and testified at the hearing in this matter. He concluded that Claimant did not meet the legal criteria for a work-related mental stress claim. He explained that the mental stress statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. Dr. Moe testified he did not believe the incidents described by Claimant at the hearing constituted psychologically traumatic events. He noted that the mental stress statute focuses on the average worker as compared to the subjective response of a particular individual. Dr. Moe determined that Claimant was an over-sensitized individual so that little things tended to bother or irritate him more than the average worker. He acknowledged that, if we assume Claimant was subjected to several years of bullying or harassment, a compensable claim could exist. However, Claimant's contention was based on three distinct incidents and he was more sensitive than others to stressful events. Accordingly, Dr. Moe persuasively maintained that Claimant did not suffer a work-related mental stress impairment during the course and scope of his employment with Employer. Based on the testimony of Mr. Krupar and persuasive opinion of Dr. Moe, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Customer Service Representative for Employer.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 14, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-960-410-01

ISSUES

- Whether Claimant established compensability by a preponderance of the evidence.
- Whether Claimant established by a preponderance of the evidence that he is entitled to medical benefits.
- Whether Claimant established by a preponderance of the evidence that he is entitled to a disfigurement award.

STIPULATION

The parties stipulated that Claimant's AWW equaled $580.00.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed by Employer beginning February 20, 2014. Employer's business is providing temporary workers to its clients. At times relevant to this claim "EMJ" was a client of Employer and the entity where Claimant worked as a metal-cutter. At the time he was hired by Employer, he signed a contract that provided in relevant part:

    - "Any individual assigned to a position by [Employer] is an employee of [Employer] and not of the client company."
    - "On the Job Injury: . . . If the accident is life or limb threatening, call 911 or go to the nearest emergency facility."

2. Claimant testified working he was injured early on the morning of August 6, 2014 while on the night shift which started on August 5, 2014 and ran through the morning of August 6, 2014, while performing functions of his job. Specifically, Claimant testified that he was pulling a metal tube onto a table saw when the tube became unstable. Claimant tried to stabilize the tube by reaching for the left end of the tube with his left hand while holding the right end of the tube with his right hand. When Claimant caught the left end of the tube it forced his right hand up and into the saw blade. Although the saw was turned off, the force of the action was sufficient to cause a deep cut into Claimant's right index finger. Claimant's testimony is consistent with Employer's August 29, 2014 form in which Claimant reported that on August 5, 2014, he "smashed and cut right index finger – pipe smashed then cut on saw blade (not running)," and his August 29, 2014 written statement he provided to Ms. Roemer. His testimony is also consistent with his repot to Lutheran Medical Center where he eventually sought treatment.

3. Claimant testified that the cut is depicted in Claimant's exhibit 2 which is a photograph of the cut which Claimant took immediately after the incident in the break room and accurately represented the condition of his finger at that time.

4. Claimant testified that he immediately notified his supervisor on duty at EMJ, Manual, who helped him clean and dress his wound. Claimant further testified that he was not offered treatment.

5. Claimant misunderstood that EMJ was his employer and that Aspen was EMJ's payroll service, stating that his injury happened at EMJ "on [Employer's] clock." Claimant testified that he was not hired by Employer, but was hired by EMJ. Thus, he thought that reporting the injury to Manual was sufficient reporting of his injury.

6. On or about August 5, 2014, EMJ fired Claimant for reasons unrelated to his injury.

7. On August 18, 2014, Employer terminated Claimant for not reporting that he had been let go by EMJ and for not calling in when he missed work.

8. Claimant testified that when he saw Ms. Roemer, Employer's business manager in charge of workers' compensation matters, on August 18, he did not discuss his injury with her because he did not know at that time that he had a workers' compensation injury; he did not appreciate or understand that Employer, not EMJ, was his employer; and that he thought reporting the injury to EMJ had been sufficient. Claimant's testimony was consistent with that of Ms. Roemer who testified that she noticed Claimant's finger was very swollen and injured when she saw him on the 18th. Ms. Roemer's notes of her investigation include substantially similar comments. Ms. Roemer testified that when she asked Claimant what happened; he said he smashed it but did not indicate that it was work-related. Claimant's testimony is also corroborated by notes from Ms. Roemer's investigation which state, "I received a call from [Claimant] stating he was not sure if he should be telling me or not about an injury that he states happened while working at EMJ."

9. Claimant continued communicating with Manual in an effort to seek treatment for his finger. It was not until approximately August 20, 2014 that Claimant understood that EMJ would not provide him with medical treatment. At some point after he was fired but before he obtained treatment, Claimant understood that EMJ would not provide treatment, and that he should report his injury to Employer.

10. Claimant testified that he first reported his injury to Employer after he was told that EMJ would not help him seek medical treatment. Ms. Roemer began an investigation and filed a first report of injury with Insurer on August 27, 2014, to which she attached her notes of her investigation. Based on her discussions with "Loren" at EMJ, Employer filed a notice of contest asserting that the injury was not work related.[1]

11. Ms. Roemer testified that she first learned that Claimant was injured at work when he called her on August 27, 2014 to report that he had had surgery on his finger.

[1] Notes of Ms. Roemer's investigation are admissible to show the effect on listener. However, to the extent the investigation notes include hearsay and hearsay within hearsay, the ALJ declines to consider them for the truth of the matter asserted.

Claimant testified that Employer told Claimant a co-employee had reported that Claimant injured his hand outside of work, he "was disgusted to hear that because it happened at work."

12. On August 20, 2014, Claimant's finger worsened to such an extent that he texted his supervisor Manual, "Bro im going to have to see a doctor my finger isn't doing well im scared I don't want to lose it."

13. The ALJ finds that Claimant sought emergency medical treatment as provided by his employment contract ("If the accident is life or limb threatening, call 911 or go to the nearest emergency facility."), and pursuant to section 8-42-101(1)(a) and Colorado case law.

14. The record contains medical records from Lutheran Medical Center, Denver Health Medical Center, and ancillary medical treatment associated with these providers.

15. Claimant presented to Lutheran at approximately 1:00 a.m. on August 22, 2014 for evaluation of his right index finger injury and pain. His report of the injury to all of his providers was consistent with his testimony. Notes of Claimant's visit provide that Claimant reported that over the last two days there had been a significant increase in redness, swelling, and pus drainage; and that he had not been able to extend his finger at the injured joint since the injury. Upon examination, the doctor noted :

> Evaluation of the right hand reveals significant edema at the PIP joint of the index finger with associated erythema. There is an overlying crusting lesion consistent with a recent laceration. . . . There is no active extension at the PIP or DIP joints of the index finger.

Claimant's finger was x-rayed at Lutheran by SVB Stress Services and the radiology report identified a mildly displaced fracture involving the distal aspect of the index finger. Claimant was diagnosed with (1) open fracture of finger, (2) Extensor tendon laceration of finger with open wound, and (3) Cellulitis and abscess of finger, unspecified. Claimant was given oral and IV antibiotics and pain medication.

16. The orthopedic surgeon at Lutheran assessed that Claimant needed to be evaluated by a hand surgeon and the hand surgeon at Denver Health accepted Claimant for emergency department to emergency department transfer. Claimant was then transferred from Lutheran to Denver Health by ambulance.

17. Upon arrival at Denver Health Claimant immediately underwent right index finger exam under anesthesia, irrigation and debridement down to the bone, and extensor tendon repair. Claimant was prescribed pain medication and placed in a splint.

18. Claimant had a follow up visit with his hand surgeon on September 9, 2014. He was sent for therapy to work on range of motion exercises and to have a custom splint made. He was to return back to the hand clinic in six weeks.

19. Respondents did not provide any persuasive evidence that they exercised the right to designate the first "non-emergency" physician after the emergency situation resolved.

20. The ALJ finds that Claimant may now designate an ATP to continue providing reasonable, necessary and related medical treatment for his injury.

21. Claimant testified he still needs physical therapy to regain function in his injured finger.

22. The ALJ finds that treatment rendered by Lutheran Medical Center, Denver Health Medical Center, and ancillary treatment was reasonable and necessary to cure and relieve the effects of the industrial injury.

23. Claimant's testimony was reasonable, consistent throughout the hearing, was corroborated by the record, and corroborated at least in part by Ms. Roemero's testimony. The ALJ credits Claimant's testimony as credible and persuasive.

24. Ms. Roemer's testimony was often consistent with Claimant's, but offered from a different perspective. For example, Claimant testified he did not report his injury to Ms. Roemer on August 18 because he was mistaken about who his employer was. Ms. Roemer also testified that Claimant did not report his injury to her on August 18, but the inference from her testimony was that Claimant's failure to report to her then indicated that he was not injured at work. In addition, the ALJ finds Ms. Roemer's testimony less reliable to the extent it was based on hearsay within hearsay reports she received during her investigation.

25. The ALJ finds Claimant's testimony to more persuasive and reliable than that of Ms. Roemer.

26. To the extent Respondents assert the defense that Claimant's injury occurred off the job, the ALJ finds no persuasive evidence to support that defense.

27. To the extent Respondents assert a penalty for late reporting, the ALJ finds any such penalty inapplicable to Claimant's claim because he does not seek disability benefits to which such penalty would apply. *See* section 8-43-102(1)(a), C.R.S. 2014.

28. It is uncontested that Employer has not offered Claimant any medical treatment.

29. The ALJ finds it more likely than not that Claimant suffered a work related injury for which Employer was required to provide medical treatment.

30. Claimant suffers a permanent disfigurement as provided in section 8-42-108(1) consisting of a discolored and irregular scar running a total of one and three-quarter inches long across his right index finger over the PIP joint.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within

the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

Claimant contends the evidence establishes that the injury he sustained to his right index finger, on the morning of August 6, 2014 is compensable because it arose out of and in the course of his employment. The ALJ agrees.

In order to recover benefits the claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

The ALJ concludes that early on August 6, 2014 Claimant sustained a compensable injury arising out of and in the course of his employment.

MEDICAL BENEFITS

Claimant seeks a general award of medical benefits and appointment of an authorized treating physician (ATP) to continue care.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Section 8-43-404(5)(a)(I)(A), C.R.S. gives the respondents the right in the first instance to select the ATP by offering a list of at least two providers to the claimant. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997).

Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). If upon notice of the injury the employer fails forthwith to exercise its right to designate an ATP, the statute provides that the right of selection passes to the claimant. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

Generally, medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Of course, the claimant may obtain "authorized treatment" without giving notice and obtaining a referral from the employer if the treatment is necessitated by a bona fide emergency. Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

The ALJ concludes Claimant proved by a preponderance of the evidence he needs reasonable and necessary medical treatment to cure and relieve the effects of the injury he sustained. The medical records establish that the care and treatment provided at Lutheran Medical Center, ambulance transportation to Denver Health Medical Center, Denver Medical Health Center, and follow up care with Dr.Kyros Ipaktchi, Claimant's hand surgeon, was reasonable, necessary and related to the industrial injury. Further, the treatment received at these facilities was authorized since it resulted from a bona fide emergency. Insurer is liable to pay for treatment rendered at Lutheran Medical Center and Denver Health Medical Center, as well as ancillary medical costs associated with these providers.

There is no credible or persuasive evidence that after the conclusion of the emergency (when Claimant was first released from Denver Health Medical Center) that Employer promptly designated any ATP to continue to provide Claimant's care. In these circumstances the ALJ concludes the right of selection passed to Claimant and he may now designate an ATP to continue providing reasonable, necessary and related medical treatment for his injury.

Respondents remain free to challenge the reasonableness, necessity or cause of the need for any medical treatment not specifically addressed by this order.

The ALJ finds and concludes that as a result of Claimant's August 6, 2014 work injury, Claimant has a visible disfigurement to the body consisting of a discolored and irregular scar running a total of one and three-quarter inches long across his right index finger over the PIP joint. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation of $775. Section 8-42-108 (1), C.R.S. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall pay for authorized, reasonable and necessary medical treatment including the cost of treatment provided to Claimant at Lutheran Medical Center and Denver Health Medical Center, as well as ancillary medical costs associated with these providers.

2. Claimant may designate an authorized treating physician to provide medical treatment as ordered.

3. Insurer shall pay Claimant $775 for his permanent disfigurement.

4. Issues not addressed by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 1, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-960-953-01

ISSUES

- Whether the Claimant established by a preponderance of the evidence that her accident and injury were work-related?

- If Claimant met her burden of proving compensability, whether Claimant established by a preponderance of the evidence that Dr. Swarsen is her authorized treating provider?

- At hearing Claimant withdrew the issues of temporary total disability and temporary partial disability.

STIPULATION

The parties stipulated to an average weekly wage of $428.59.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is employed by Employer as a tour consultant. Her job duties include interacting over the telephone with customers and travel agents. She has worked for Employer for approximately twenty-one years.

2. Claimant asserts that at the end of the work day on September 2, 2014, she was moving items from her cubicle to the adjacent cubicle and sustained an injury while pushing a rolling office chair with some light weight files on it. She testified that she did not feel pain immediately, but that pain came on as or after she stood up from the bent position she was in while pushing the wheeled chair.

3. Claimant testified that she needed the help of six people, including her supervisor and two others whom she named, to help her from her work area on the second floor down to the building's lobby. No confirming evidence from any of the named witnesses was presented.

4. Claimant testified that she reported her injury to Employer and that the human resources department authorized her to seek treatment at HealthOne Occupational Medicine Center-Englewood.

5. On September 3, 2014 Dr. White, a Health One physician, evaluated Claimant. Claimant reported to Dr. White that she was pushing a rolling chair when she started to feel some pain which came on gradually but worsened. She reported

initial pain "located behind her right shoulder blade, above the shoulder blade, and down to her right low back . . . up into the trapezius as well." Dr. White noted the onset of pain occurred without trauma or heavy lifting and involved only "very minimal pushing and pulling." Dr. White also noted "questionable pain behavior on exam." Dr. White assessed myofacial pain, noting, "Pain and injury out of proportion to the mechanism of injury." Dr. White did not agree to Claimant's request to be taken off work. He prescribed six massage therapy sessions, a home exercise program, Naproxen and Flexeril. While Claimant initially denied any prior neck or back pain, she later told Dr. White she had experienced a couple of self-limited back pains about six months earlier but did not seek care. Dr. White's diagnoses were: myofacial syndrome, Thoracic Spine and myofacial syndrome, Lumbar Spine.

6. On September 4, 2014 Claimant presented to the emergency department at the Medical Center of Aurora where she was evaluated by Rachelle Klammer, M.D. There Claimant reported the mechanism of injury as lifting, and gave the location of her initial pain as her right low back and left chest/rib pain. Claimant reported that her symptoms were then radiating into her right shoulder and right leg. Claimant denied nausea, vomiting, headaches and repeatedly denied neck pain. She also denied any similar prior symptoms. Notes from the visit state, "[Patient] reports she saw a workmans [sic] comp doc, but wanted a second opinion so came to ER." Claimant reported lumbar and thoracic pain but denied neck pain. On examination, Dr. Klammer noted that Claimant reported tenderness out of proportion to light palpation. Dr. Klammer's primary impression was "Back muscle spasm." Claimant was given Acetaminophen, Hydrocodone, and Diazepam, which improved her function and ambulation. She was discharged with prescriptions for Norco and Valium. Dr. Klammer noted that there was no indication in the history or exam for imaging. Dr. Klammer ultimately assessed myofacial syndrome, thoracic spine and lumbar spine, consistent with Dr. White's diagnoses.

7. On September 4, 2014 Respondents responded to Claimant's request for a change of treatment provider by notifying Claimant that she could go to a different HealthOne Occupational facility.

8. On September 8, 2014 Claimant transferred care to HealthOne-Centennial where Kristina Robinson, M.D. evaluated her. Claimant reported to Dr. Robinson that when she went to move her chair, she felt a sudden sharp pain in her back. On September 8, 2014 Claimant's chief complaint was bilateral neck and shoulder pain with radiation to the right leg, nausea, and vomiting. She reported then-current symptoms of pain from her neck all the way down to her right leg and ankle. Claimant reported that she had been to the ER "because she was unable to lift her head, stating that the pain was so bad, she could not raise it up straight." The ALJ finds that Claimant's reports to Dr. Robinson are inconsistent with records from the ER visit four days earlier when Claimant repeatedly denied neck pain, nausea, and vomiting, and stated she presented to the ER for a second opinion.

9. With respect to transfer of care Claimant reported to Dr. Robinson that "she felt that Dr. White had not properly addressed her issues and that he stated that he did not believe that the mechanism of injury, mainly transfer of the chair, would result in the injury and complaints that she was describing . . . The patient is now asking for further evaluation, treatment, and documentation to remain off work."

10. Dr. Robinson opined that the injury was not work-related, "given the mechanism of injury compared to the exaggeration of symptoms and pain out of proportion to [the] mechanism that she is exhibiting at this time. It is, therefore, less probable than not that injury is work related."

11. Dr. Robinson discharged Claimant from care due to the non-work related nature of her injury. She asked Claimant to follow-up with her primary care doctor for further evaluation and treatment.

12. Claimant testified that Dr. Messa is her primary care doctor, but was unavailable to treat her. The record contains an undated note signed by Dr. Messa stating that she could not get Claimant in for an appointment.

13. On September 9, 2014 Insurer filed a notice of contest on the stated basis that the mechanism of injury was not consistent with the injury.

14. On September 10, 2014 Claimant began treating with a chiropractor, Chad Cotter, D.C. at HealthSource Chiropractic & Progressive Wellness. The records, which are very difficult to read, appear to reflect that Claimant received adjustments to areas including her right side ribs, and for pain generating down her left arm.

15. On October 10, 2014 the Office of Administrative Courts received Claimant's application for hearing on the issues of compensability; medical benefits including authorized provider, change of physician, reasonably necessary, and related to injury; Average weekly wage, TTD; and TPD. At the commencement of the hearing, Claimant's counsel noted that they were pursuing only compensability and authorizing treatment provider.

16. On October 13, 2014 Claimant was evaluated by Dr. R.J. Swarsen upon her counsel's recommendation and referral. Dr. Swarsen's report indicates that he performed a records review and spent sixty minutes face-to-face with Claimant. Claimant reported to Dr. Swarsen that she experienced instant pain across her whole low back, and that she was not able to stand up straight for about three days. She did not report to Dr. Swarsen any neck or upper or mid back pain as she had in her initial evaluation with Dr. White or her later evaluation by Dr. Robinson. Claimant reported that her left shoulder "started bugging her" three weeks earlier, on approximately September 22, twenty days after the alleged injury. These reports are inconsistent with Claimant's earlier reports of shoulder pain occurring at the time of injury, neck pain, and mid back pain.

17. With respect to this claim, Dr. Swarsen assessed (1) sprain sacroiliac – chronic; and (2) likely upper back, sprain of thoracic spine – resolved. Dr. Swarsen reviewed x-rays of Claimant's spine from the cervical to sacral regions and noted mild osteoarthritic changes most obvious at the mid to lower lumbar levels with some mild disc space narrowing of the lower lumbar segments. No persuasive evidence was presented to suggest that Claimant's osteoarthritic changes and lumbar disc space narrowing were not the cause of her alleged injury.

18. Dr. Swarsen's plan was to return Claimant to work full duty with caution. With respect to medications and treatment, Dr. Swarsen had Claimant take extra strength Tylenol, Ibuprofen, and the Flexeril that had been previously prescribed. He indicated "Hold Vicodin." Dr. Swarsen did not recommend any treatments or make any referrals.

19. Dr. Swarsen opined that because Claimant was required to change cubicles, she was required to move her chair, and her injury was therefore work-related. He stated that symptom magnification did not negate symptoms or a mechanism of injury. "The history, mechanism of injury, onset of symptoms related to a work-related activity, [all] suggest a causal relationship to a work-related activity."

20. The ALJ finds Dr. Swarsen's opinion on work relatedness lacks analysis of proximate causation; specifically he does not address how moving a rolling chair, an act involving only minimal force could have caused Claimant's alleged injury.

21. Claimant testified she still experiences back pain that restricts her activities of daily living.

22. Claimant testified that she is satisfied that Dr. Swarsen understood her condition and would agree to his treatment.

23. On November 10, 2014 Dr. Cotter wrote a "To Whom It May Concern" letter which stated he had seen Claimant for injuries sustained from a workplace accident. However, he does not state what the alleged accident was or describe any mechanism of injury. He states he took x-rays of Claimant's spine, and recommended (1) non-surgical spinal decompression for her bulging or herniated disc without specifying its level, (2) physical therapy for the injured and spastic muscles, again without identification, and (3) adjustment for an unidentified subluxated vertebra. However, there is no persuasive evidence that Dr. Cotter recommended or performed any of those treatments during the two months that he treated Claimant. Without any analysis, Dr. Cotter opined, "Based on the condition of her spine, it is plausible and likely that the workplace accident caused the injuries." And finally, Dr. Cotter purports to refer Claimant to Dr. Swarsen for "another" opinion.

24. The ALJ finds Dr. Cotter's opinions to be based on his presumptive conclusion that Claimant had sustained injuries in a workplace accident, putting the proverbial cart before the horse. The ALJ fault's his opinion for not including any

mechanism of injury, lack of specificity, failure to contain any analysis about the condition of her spine as it related to her alleged injury, and his failure to treat or refer Claimant for treatment he did not identify or document as necessary until after two months of treatment.

25. Given that both Dr. White and Dr. Robinson diagnosed Claimant with myofacial pain of her thoracic and lumbar spine, and that Claimant responded positively to treatment for a muscle spasm under the care of Dr. Klammer, the ALJ finds it more likely than not that Claimant suffered from a muscle spasm in her lower and mid back. The ALJ further finds that Dr. Swarsen's recommendations that Claimant continue taking anti-inflammatory medication and a muscle relaxant, without recommending any additional treatment, are not inconsistent with such a diagnosis.

26. The ALJ finds the opinions of Dr. White, Dr. Robinson and Dr. Klammer more credible than those of Dr. Cotter and Dr. Swarsen.

27. Claimant inconsistently reported her symptoms to her treatment providers. The ALJ also finds it unlikely that the act of pushing a wheeled chair could cause the extensive injuries Claimant alleges, a finding supported by the fact that Claimant's first three doctors did not find it necessary to perform any imaging diagnostics. Finally, the ALJ finds that Claimant's conduct was in part based on a motivation to find a doctor who would take her off work. Based on all of these considerations, the ALJ finds Claimant is not credible.

28. The ALJ finds Claimant has failed to demonstrate that it is more probable than not that she suffered a compensable injury arising out of and in the course of her employment and therefore denies her claim.

29. As the ALJ has found the claim not compensable, the issue of authorized treatment provider need not be addressed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

It is the ALJ's sole province to assess the credibility of the witnesses. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The ALJ's finding that Claimant is not credible is supported by Claimant repeatedly reporting inconsistent symptoms, the unlikelihood that pushing a chair with wheels could cause significant injury, her positive response to treatment for back spasm, and her motivation to be taken off work.

Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing

condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant did not meet this burden of proof. Claimant admitted experiencing back pain six months prior to her alleged work injury. In addition, x-rays of Claimant's spine revealed mild osteoarthritic changes most obvious at the mid to lower lumbar levels with some mild disc space narrowing of the lower lumbar segments. However, the record contains no persuasive evidence that Claimant's employment aggravated or accelerated any pre-existing condition. Rather, the ALJ concludes that Claimant's occurrence of symptoms at work represents the result of or natural progression of her pre-existent back pain, and the conditions revealed by x-ray that are unrelated to her employment. This conclusion is further supported by the opinions of Drs. White and Robinson who found Claimant's symptoms to be inconsistent with pushing a rolling chair, the alleged mechanism of injury.

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App.1998). As found, the opinions of Dr. White, Dr. Robinson and Dr. Klammer more credible than those of Dr. Cotter and Dr. Swarsen on the issue of work relatedness.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to establish by a preponderance of the evidence that her injury is work related.

2. It is therefore ordered that Claimant's claim for worker's compensation benefits is denied and dismissed.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 9, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did the claimant prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment?

- Did the claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and authorized medical expenses?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the hearing Claimant's Exhibits 1 through 9 were admitted into evidence. Respondents' Exhibits A through E and G through M were admitted into evidence.

2. The claimant testified as follows. On Sunday, October 26, 2014 she worked for the employer performing sanitation duties such as sweeping and cleaning surfaces. She had been employed since September 9, 2014. On October 26 between 8:45 a.m. and 9:00 a.m. she felt something strike her from behind in the area of her right waist and hip. She was pushed forward and realized had been hit by a large yellow barrel on casters. The barrel contained 55 to 65 gallons of "solution" used to rinse ovens and the floors. She did not fall to the ground but felt immediate pain. She also experienced the sensation that the bones in her back were "moving like dominos" and that the bones in her knees were also moving.

3. The claimant testified that at the time of this incident coworker Juan Lopez (JL) was to her side and another man was in front of her. Maribel Osequera (MO) and Leticia Garcia (LG) were behind her. The claimant had the impression that the LG had deliberately pushed the barrel into her because LG was closer than MO. The claimant explained that LG and MO had been "aggressive" towards her and had mocked her. The claimant believes that is the reason that they tried to hurt her on purpose.

4. The claimant further testified as follows. About one hour after this incident she reported the injury to a lead person named Guillermo Mora (GM). However, Mora did not take any action. The next day she reported her injury to Elga Flores (EF). Flores made a notation of the report but did not have her fill out any paperwork. On Tuesday, October 28, 2014 EF told the claimant that a manager named Vasquez wanted her to explain what had happened. Vasquez told the claimant that the next day he would fill out paperwork to see a doctor for the injuries. The next day, October 29, 2014, Vasquez wanted the claimant to sign a paper but she refused to do so because

the paper stated that she was "rejecting medical treatment." The next day she was again given the same paper but refused to sign it.

5. The claimant testified that she was not given any notice of her right to select a treating physician until November 14, 2014. She noted that the designated provider form (Claimant's Exhibit 9) contains the dates November 14, 2014 and November 3, 2014. The claimant stated that she actually signed the form November 14. The date of November 3, 2014 was placed on the form by Vasquez pursuant to the instructions of "Mr. Black."

6. The claimant testified that she injured her low back in a motor vehicle accident in 2001. However, she testified that she recovered from this injury and was not experiencing any back problems prior to the alleged events of October 26, 2014. The claimant testified she still works for the employer but experiences whole body pain when walking. The claimant specifically identified pain in the low back and spinal cord that is "like giving birth."

7. Matthew Miller, M.D., examined the claimant at Concentra on November 3, 2014. The claimant gave a history that on October 26, 2014 someone ran into her with a large container of water. She was hit in the lower back on the right side but not knocked down. She reported pain in both of her hips, her back, neck and head. She reported dizziness, tingling and numbness. On physical examination Dr. Miller noted that the lumbosacral spine did not exhibit erythema, ecchymosis or swelling. There was no tenderness and range of motion was full in extension and flexion. The neurologic examination did not exhibit abnormalities. Dr. Miller assessed a lumbar contusion. He noted that the claimant "described a fairly minimal blow to the back" and that her reported symptoms were more than he expected from the described mechanism of injury. Other than the lumbar contusion Dr. Miller stated that the claimant had very diffuse complaints and he didn't see how the "other complaints would be a result of this blow." Dr. Miller ordered an x-ray that showed no fracture. He also released the claimant to full duty work and prescribed over the counter medications. Dr. Miller wrote that if the claimant was not better at the next visit he would suggest physical therapy (PT) or "possibly chiro." Dr. Miller completed a Physician's Report of Workers' Compensation Injury in which he marked a box stating that his "objective findings" were "consistent with history and/or work related mechanism of injury/illness."

8. EF testified as follows. She is the claimant's supervisor. She was working on Sunday October 26, 2014 but was not present when the claimant alleges she was injured. The claimant first reported an injury to EF on Monday, October 27, 2014. The claimant advised EF that the day before between 8:00 a.m. and 9:00 a.m. she had been "pushed" by a bucket full of water and needed to go to the doctor. The claimant asked EF to complete an accident report but the claimant then refused to sign the report. EF then took the claimant to a manager, Juan Vasquez (JV). EF was present at the meeting between the claimant and JV. The claimant again asked to go to the doctor but she was not sent to one. EF denied that she ever tried to have the claimant sign a statement rejecting medical treatment. EF recalled that on several occasions before the alleged accident the claimant asked to leave work early because she felt tired.

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9. JV testified as follows. He is sometimes known as Juan Manuel Vasquez. He is the employer's senior sanitation manager and the claimant's indirect supervisor. He testified that he learned of the alleged injury on Monday October 27, 2014 and conducted an investigation. On October 27 JV spoke to claimant and asked her about the claimed injury. He presented her with the incident report paperwork, including a designated provider list. However the claimant refused to sign any paperwork that day. JV also spoke to EF and JL.

10. JV testified that video cameras are present at all locations on the employer's premises and recordings are taken "twenty-four seven." As part of his investigation JV reviewed the video at the location and time the claimant was allegedly struck by the bucket. JV testified that he felt sure he watched the video during all of the relevant time periods. Although he saw the claimant on the video he did not see the claimant get hit by a bucket. JV testified he viewed the video in the presence of EF, JL and the claimant. JV testified that he did not see anything in the video that he thought was important to save. However, on cross-examination he stated that he thought it would have been a good idea to keep the video to prove that nothing happened to the claimant. JV testified he had no control over how long the employer saved the video.

11. Blake Brown (BB) testified as follows. He is the employer's health and safety manager. He believes he is the person that the claimant referred to as "Mr. Black." BB stated the employer's injury packet contains an incident report, a designated provider list and a rejection of medical treatment form. BB believes the claimant confused the incident report with the rejection of care form and therefore refused to sign anything. BB states that the claimant signed the designated provider list on November 14, 2014 after refusing to sign it on November 3, 2014. That is why he wrote the date November 3 on the designated provider form. BB denied that he ever asked the claimant to sign the rejection of care form.

12. BB testified that he watched the video of the claimant working on October 26, 2014. He did not see any accident or incident involving claimant. BB stated he was in a position to order that the video be preserved. He admitted that he had reviewed video footage in previous cases but stated he had never preserved it. BB testified that after he reviewed the video he did not feel there was any reason to preserve it. He explained that after the witnesses confirmed that nothing happened and after considering the medical reports he did not think it was necessary to preserve the video.

13. JL testified as follows. He is a lead in claimant's department and was working with the claimant on October 26, 2014. He did not see the claimant get hit with a bucket. As a lead person the claimant should have reported any injury to him so he could notify his supervisor. However, the claimant did not tell him that she had been hit by a bucket and injured. JL moved the claimant from one location to another that day because he wanted her to have an easier job and because he did not think it was safe for her to be in an area with certain chemicals.

14. On November 3, 2014 BB completed a First Report of Injury stating the claimant sustained an injury on October 26, 2014 when another employee allegedly "pushed a barrel of water into her." The report states the employer was notified of this injury on October 27, 2014.

15. On November 5, 2014 the respondents filed a Notice of Contest on the grounds that the injury was not work-related.

16. On November 4, 2014 radiologist Steven Handler, D.O., issued a report concerning his review of the claimant's lumbar x-rays. He noted "no acute lumbar pathology."

17. On November 15, 2015 Ted Villavicencio, M.D., examined the claimant at Concentra. She reported that she had pain all over her body that felt like "labor pain." The claimant also reported chest pain, chest pressure, headaches, lightheadedness, arm and leg weakness, confusion and lower extremity edema. She complained of joint pain, back pain, neck pain, joint stiffness and limping. Dr. Villavicencio assessed a "lumbar contusion." He also opined that the claimant's subjective complaints were greater than objective findings and the reported mechanism of injury would not cause the diffuse symptoms described. Dr. Villavicencio wrote that the claimant should return for treatment in 4 or 5 days and he anticipated she would reach MMI on December 12, 2014. The treatment plan states the claimant should start Cyclobenzaprine and refers the claimant for 2 weeks of physical therapy (PT). Dr. Villavicencio wrote the claimant could lift up to 20 pounds and "push/pull up to 40 pounds."

18. On November 15, 2014 Dr. Villavicencio also issued a Physician Work Activity Status Report. This report is somewhat contrary to his office note. The activity status report releases the claimant from care and releases her to return to "regular duty on 11/15/14." The activity report also lists November 3, 2014 as the "actual date" of MMI.

19. On November 19, 2015 Dr. Villavicencio completed a Physician's Report of Workers' Compensation Injury. This report was apparently based on the November 15, 2014 examination of the claimant. In the report Dr. Villavicencio states the claimant was able to return to full duty on November 15, 2014 and reached MMI on November 15, 2014 without any impairment.

20. LG testified as follows. She worked on October 26, 2014. She saw the claimant on October 26 but she did not push a bucket into the claimant and did not accidentally hit the claimant with a bucket. She did not see the claimant hit by a bucket. The employer has two buckets. One is yellow and contains acid and the other is white and contains sanitizer.

21. MO testified as follows. She worked with claimant on October 26, 2014. She did not see claimant get hit by a bucket. The first or second day that the claimant worked for the employer she asked for a belt because her back hurt. MO had never gotten in an argument with the claimant. MO did not have any relationship with the

claimant because the claimant was "kind of apart." MO never saw LG have an argument with the claimant.

22. The claimant testified that she did not attend any PT sessions. She explained that the "receptionist" told her that the company would have to reopen the case in order for her to receive PT.

23. On December 8, 2014 the claimant filed a formal Worker's Claim for Compensation.

24. The claimant failed to prove it is more probably true than not that she sustained any injury arising out of and in the course of her employment.

25. The claimant's testimony that on October 26, 2014 that she was struck in the back by a large container or bucket of fluid is not credible. The claimant testified that she reported the injury to lead person GM on October 26, but that testimony is not corroborated by any other credible evidence. The claimant testified that at the moment she was struck by the container JL was right beside her. However, that testimony was contradicted by JL's credible testimony that he was the claimant's lead person on October 26 and did not see the claimant struck by a bucket. JL also credibly testified that if the claimant had been injured she should have reported the injury to him, but she did not. The claimant also testified that she believed LG deliberately pushed the container into her because LG and MO were "aggressive" towards her. However, the claimant's testimony that LG and MO were "aggressive" towards her is not corroborated by any other credible and persuasive evidence.

26. The claimant's testimony that on October 26, 2014 she was struck in the back by a large container and injured is also substantially contradicted by the medical evidence. When Dr. Miller examined the claimant on November 3, 2014 (8 days after the alleged injury) his spinal and neurological examinations were essentially normal. Despite diagnosing a "lumbar contusion," Dr. Miller did not find any lumbar erythema, ecchymosis or swelling. The claimant's spine was not tender and she exhibited full ROM in flexion and extension. Although the claimant reported a number of symptoms in addition to back pain, Dr. Miller credibly opined that these other complaints were not consistent with a "minimal blow to the back" and more than he would expect from the described mechanism of injury. This evidence undermines the claimant's credibility because it evidences a willingness to dramatize her testimony for the purpose of proving her case.

27. The claimant's testimony that she was injured on October 26, 2014 is also undermined by Dr. Villavicencio's report of November 15, 2014 report. Once again the claimant listed a large array of symptoms in addition to back pain. Dr. Villavicencio opined that the claimant's subjective symptoms were "greater than objective findings" and that the reported mechanism of injury would not cause the "diffuse symptoms described."

28. The claimant's tendency to dramatize her case is also evidenced by her testimony that at the time the bucket impacted her she felt as though the bones in her back were "moving like dominos." The claimant gave this testimony after describing a mechanism of injury which Dr. Miller classified as a "minimal blow to the back." The claimant admitted that the impact was not sufficient to knock her down, a fact which she also reported to Dr. Miller on November 3.

29. As an evidentiary matter the ALJ declines to draw any "adverse inference" from the employer's destruction of the video taken on October 26, 2014. Considering the finding that the claimant's testimony is not credible and has been contradicted in the manner described above, the ALJ finds as a matter of fact that the video did not depict the incident described by the claimant. In this regard the ALJ finds that in order to infer that the video showed the incident described the claimant he would be required to find that both JV and BB lied about the contents of the video. However, their testimony that nothing is depicted on the video is corroborated by the testimony of JL, the supervisor whom the claimant testified was just to her side when she was allegedly struck by the bucket so hard that her bones "moved like dominoes." JL denied seeing any incident.

30. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

LAW OF COMPENSABILITY

The claimant contends that she proved by a preponderance of the evidence that she sustained a compensable injury proximately caused by being struck in the back by a large yellow bucket on casters. In so doing the claimant argues that because the employer destroyed the video the ALJ should draw an "adverse inference" that the video would corroborate her testimony by showing the incident as it occurred. The respondents contend the claimant did not prove that she sustained any injury arising out of and in the course of her employment. Alternatively, the respondents argue that if an "incident" occurred on October 26, 2014 the claimant failed to prove that the incident amounted to a "compensable injury." The respondents also argue that an "adverse inference" is not justified in this case.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of her employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Painting Co. v. Blair*, *supra.*

The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

LAW OF SPOLIATION

The claimant's argument that the ALJ should infer that the video depicts her injury is based on the law of "spoliation" or destruction/loss of evidence. Generally an ALJ has wide discretion in making procedural and evidentiary rulings. This discretion encompasses the authority to impose appropriate sanctions where a party "spoils" evidence. *Trinkline v. Mini Mart, Inc.,* WC 4-734-561 (ICAO December 12, 2008). Assessing sanctions against a party that destroys evidence serves the "punitive

function" of deterring parties from destroying evidence to prevent its introduction at trial. Sanctions also serve the "remedial function" of restoring the putatively injured party to the same position it would have held prior to the destruction of the evidence. *Aloi v. Union Pacific Railroad Corp*., 129 P.3d 999 (Colo. 2006).

In *Pfantz v. Kmart Corp.*, 85 P.3d 564 (Colo. App. 2003), the Court of Appeals held that where the trial judge found that the defendant intentionally or recklessly destroyed evidence (a bench), after the plaintiff requested that it be preserved, the trial court did not abuse its discretion by instructing the jury that it could "presume" the bench was defective and that the defendant's conduct caused the defect. (The court noted that it was not expressing any opinion on the difference between an inference and a presumption). The defendant argued that the court did not have power to impose any sanction for spoliation unless the destruction was "intentional." The court held that bad faith, recklessness and gross negligence all describe conduct that is not necessarily deliberate or intentional but is "more than negligent and less than intentional." The court reasoned that reckless or bad faith destruction of evidence is "so aggravated as to be all but intentional" and that the spoliator's conduct need not be "intentional" to justify sanctions. The court further held that "merely negligent" destruction of evidence may justify the imposition of an adverse inference as a remedial sanction when the inference is "reasonably likely to have been contained in the destroyed evidence." *Pfantz v. Kmart Corp.*, 85 P.3d at 568-569.

In *Aloi v. Union Pacific Railroad Corp*., *supra*, the Supreme Court held that a trial court did not err when instructing the jury that it could infer from the defendant's destruction of relevant documents that the documents would have been unfavorable to the defendant. In *Aloi* the trial court found the defendant "willfully" destroyed the documents. The defendant argued on review that an adverse inference instruction can't be given unless the trial court finds "intentional" or "bad faith" destruction of the evidence. However, the Supreme Court held that the trial court's finding of "willful" destruction justified issuance of the adverse inference instruction to the jury. The court discerned "no useful distinction" between bad faith destruction of evidence and willful destruction of evidence. The court reasoned that that the "remedial" purpose for imposing sanctions is served regardless of the destroying party's "mental state" because the opposing party will suffer the same prejudice in either case. Further the court stated that permitting an "adverse inference" from the willful destruction of evidence serves a "punitive purpose" because it deters a parties from destroying evidence "that they know or should know will be relevant to litigation." *Aloi v. Union Pacific Railroad Corp*., 129 P.3d at 1003.

The *Aloi* court also rejected the argument that in the absence of "bad faith" the trial court cannot give an adverse inference instruction unless there is "extrinsic evidence" that the destroyed evidence would have been unfavorable to the spoliator. The court determined that at a minimum it would have to appear from the evidence that the evidence "would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence." *Aloi v. Union Pacific Railroad Corp*., 129 P.3d at 1004. The court concluded that this rule serves the "remedial purpose" of an adverse inference instruction because it minimizes prejudice to the "non-destroying

party." It reasoned that the rule serves the "punitive purpose" because it places the risk that the destroyed evidence "may not have been detrimental on the party responsible for the destruction." *Aloi v. Union Pacific Railroad Corp*., 129 P.3d at 1004.

In *People In the Interest of A.E.L. and K.C-M.,* 181 P.3d 1186, (Colo. App. 2008) the Court of Appeals cited *Pfantz v. Kmart Corp.*, *supra*, for the proposition that a court is "not limited to imposing a sanction only for intentional spoliation, but may impose one based on mere negligence." In *Castillo v. Chief Alternative, LLC,* 140 P.3d 234 (Colo. App. 2006) the Court of Appeals relied on *Aloi v. Union Pacific Railroad Corp*., *supra*, as supporting the proposition that destruction of evidence may justify the imposition of sanctions for pre-complaint destruction of evidence where the "evidence was relevant to pending, imminent, or reasonably forseeable litigation."

The ALJ concludes that in the civil context the facts of this case would justify the imposition of an "adverse inference" instruction as a sanction for the employer's destruction of the video taken on October 26, 2014. While the employer may not have destroyed the video with the "intent" to eliminate evidence favorable to the claimant, the conduct of its employees amounts to at least "willful" destruction of evidence that it knew or reasonably should have known would be relevant to forseeable litigation. BB admitted that as the employer's safety manger he was in a position to preserve the video but decided it was not necessary to do so in light of other evidence which he considered favorable to the employer. When BB reached the conclusion that the video need not be preserved the claimant had already reported the alleged work-related injury and requested medical treatment. Thus, BB was aware of forseeable workers' compensation litigation when he permitted the destruction of the video. Further, the ALJ infers that BB knew or should have known that the video was "relevant" to the potential litigation since he himself reviewed it and had reviewed video in other cases. Moreover, JV, who also reviewed the video as part of his investigation, credibly testified that it would have been a "good idea" to keep the video to prove that nothing happened to the claimant.

However, this issue does not arise in a purely civil matter but instead in the context of a workers' compensation case. Thus, the ALJ serves as the fact-finder and there are no jury instructions to be given. Consequently, the ALJ concludes that as a legal matter it is sufficient to find the employer's destruction of the video warrants a sanction for spoliation of the video. The ALJ concludes that the specific sanction to be imposed is the workers' compensation equivalent of the "adverse inference instruction" given in civil cases. Put another way, the ALJ recognizes that the employer's conduct would permit him to draw the "adverse inference" that the video documented the claimant being struck in the back by a large container of fluid while at work on October 26, 2014. Conversely, the ALJ understands that in his role as fact-finder the imposition of the "adverse inference" sanction does not *mandate* that he draw the adverse inference. Rather, the inference ultimately to be drawn from the destruction of the video, if any, is left to the ALJ after considering the totality of the evidence. *Cf. Aloi v. Union Pacific Railroad Corp*., *supra* ("adverse instructions" given to jury were that: (1) Based on destruction of the documents by defendant it was reasonable to infer that the destruction was willful and designed to impede the plaintiff's ability to prove the case;

(2) The jury "may infer" the evidence contained in the documents was unfavorable to the defendant).

COMPENSABILITY OF ALLEGED INJURY

The claimant failed to prove it is more probably true than not that she sustained any injury arising out of and in the course of her employment. For the reasons stated in Findings of Fact 25 through 28, the claimant's testimony that she sustained an injury when a large bucket container was pushed into her is not credible and persuasive. While the ALJ recognizes that the facts of this case would permit drawing an "adverse inference" from the employer's destruction of the video, the ALJ declines to draw such an inference for the reasons state in Finding of Fact 28. In light of this determination the ALJ need not discuss the respondents' alternative argument.

ORDER

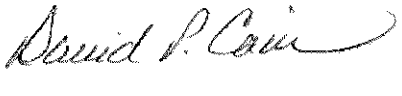
Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-965-591 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 6, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on November 5, 2014.

FINDINGS OF FACT

1. Claimant works for Employer as an underwriting team manager.

2. On November 5, 2014 Claimant attended a voluntary blood draw program, which was sponsored by Employer.

3. Employer offered a $15/month reduction in all employees' medical insurance premiums if the employees participated in Employer's sponsored monthly blood draw program.

4. Claimant regularly participated in the program in order to receive a reduction in his monthly medical insurance premium.

5. On November 5, 2014 while at the monthly blood draw donation clinic, the medical technician had a hard time finding a vein from which to draw blood from Claimant's right arm. Claimant was "stuck" in his right arm several times with a needle, without success.

6. The technician then attempted to switch to Claimant's left arm in order to draw blood. Before the technician attempted to draw blood from Claimant's left arm, Claimant started feeling poorly. Claimant put his elbows on his legs, and put his head in his hands. Claimant passed out, fell forward, and hit the epoxy cement floor. Claimant came to, lying on his right side, with blood coming out of his nose.

7. After Claimant came to, he did not believe he needed medical attention and thought he would be okay.

8. Approximately two weeks later, Claimant was still experiencing pain and sought medical treatment.

9. On November 19, 2014 Claimant was evaluated by John Charbonneau, M.D. Dr. Charbonneau diagnosed syncopal episode. Dr. Charbonneau opined that Claimant was not in the course of his normal employment at the time of the injury but was having blood drawn at a wellness event, and that it appeared to be a "premises

injury." Dr. Charbonneau opined that Claimant fractured his nose and had trauma to the right orbit. *See* Exhibit B.

10. Dr. Charbonneau ordered X-rays and a CT scan of the nose and facial bones and referred Claimant to Dr. Sabour for otolaryngology consultation and treatment. Dr. Charbonneau indicated he would see Claimant after the x-rays and consultation. *See* Exhibit B.

11. On December 3, 2014 Respondents filed a Notice of Contest alleging the injury/illness was not work related. Claimant filed an Application for Expedited Hearing on December 12, 2014. *See* Exhibit E.

12. Claimant had several visits with Front Range ENT. Sarmad Sabour, M.D. saw Claimant on February 19, 2015 and assessed fracture of nasal bones, nasal septal deviation, nasal obstruction, and snoring.

13. Dr. Sabour noted that Claimant had a prior nasal septoplasty in 2009 that provided only minimal improvement in Claimant's nasal symptoms at that time.

14. Claimant had two syncopal episodes prior to November 5, 2014. One episode was approximately two years prior when he was also having his blood drawn, felt light headed, and passed out. The other episode was approximately five years prior when medical personnel were removing the packing from Claimant's nose following nasal surgery, and Claimant again passed out.

15. Claimant appeared pro se at hearing and testified that he believed the injury should be compensable since he was at a company sponsored event at the time of the injury. Claimant asked for Respondents to be held responsible for paying for visits to the ENT, X-ray and CT testing, and follow up care.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2014). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained the burden of proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. (2014). The Claimant must establish that the injury meets this two pronged requirement by a preponderance of the evidence. *See* § 8-43-201(1), C.R.S. (2014).

The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). Employment is defined by §8-40-201(8), C.R.S. (2014). The definition specifically excludes as employment "…the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." In the present case, Claimant has failed to establish that his injury occurred within the time and place

limits of his employment relationship or during an activity that had some connection with his job-related functions. Rather, at the time of Claimant's injury, Claimant was participating in a voluntary blood draw program. The voluntary program, although sponsored by Employer, is specifically excluded from the definition of employment under the Workers' Compensation Act.

Claimant has not show that the injury occurred while he was performing any work related activities. There was no benefit to Employer of having Claimant participate in the voluntary blood draw program. Claimant was the sole beneficiary of the program as he received a monthly deduction in his health insurance premium by participating. Claimant has failed to meet his burden to show the injury arose out of or in the course of his employment. Rather, the injury occurred during Claimant's voluntary participation in a blood draw program that had no connection to his job or job duties.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to show he suffered a compensable injury on November 5, 2014. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 13, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-933-389-02

ISSUE

Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on September 27, 2013 during the course and scope of his employment with Employer.

STIPULATION

The parties agreed that, if Claimant's claim is compensable, he incurred authorized, out-of-pocket medical expenses in the amount of $40.00.

FINDINGS OF FACT

1. Claimant worked for Employer as a Concert Stagehand. On September 27, 2013 Claimant's supervisor and Union Steward Laura Payne contacted Claimant and asked him to help "load out" a band from the Fillmore Theater in Denver, Colorado. Claimant testified that a "load out" involves removing band equipment from a concert venue.

2. Claimant explained that he was told to be on the loading dock or near the concert stage by 11:30 p.m. on September 27, 2013 to begin the load out. He noted that he receives four hours of pay when performing a load out regardless of how long the process lasts. Claimant emphasized that it is critical for stagehands to be at the loading dock area as soon as the band has completed a performance.

3. Claimant reported to the Fillmore Theater and signed in at slightly before 11:00 p.m. on September 27, 2013. He remarked that he reached the venue by 11:00 p.m. because arriving early is the custom in the concert industry. Claimant detailed that a semi-truck is waiting to be loaded and the driver is likely to spend the next 12 hours on the road. Moreover, the road crew for a band has often been at the venue for an entire day and usually wants to leave as soon as possible. Claimant commented that he could possibly have received a work "write-up" if he had arrived at the Fillmore Theater at the designated time of 11:30 p.m. Nevertheless, he acknowledged that he was not paid for arriving 30 minutes before shows and stagehands were permitted to do what they wanted before the designated reporting time.

4. Claimant commented that he explored the concert venue because he was looking for some caffeine to keep him awake. However, he only found water. Claimant then asked Ms. Payne whether he could leave the facility to buy a soda from a convenience store located across the street. Ms. Payne replied that she did not care where he went as long as he returned to the loading dock by 11:30 p.m.

5. Claimant subsequently left the Fillmore Theater to purchase a soda shortly after 11:00 p.m. As he was crossing a street he was struck by a motor vehicle. Claimant acknowledged that he was walking on a public street when struck. He was taken by ambulance to Denver General Hospital. The record reveals that the ambulance was dispatched at 11:04 p.m. and arrived at the accident scene at 11:06 p.m. Claimant suffered a left wrist injury and underwent surgical repair through Denver General Hospital. Employer did not pay Claimant for any work on September 27, 2013.

6. Ms. Payne also testified at the hearing in this matter. She noted that Claimant's reporting time on September 27, 2013 was 11:30 p.m. He was not required to arrive until 11:30 p.m. Claimant did not get paid for arriving early and was permitted to do what he wanted prior to 11:30 p.m. Ms. Payne denied that the custom in the industry was to arrive at a venue 30 minutes prior to the reporting time. She simply expected employees to arrive at the designated time. Employer had no requirement that stagehands were required to arrive early for a "load out." However, some stagehands arrived early to watch the end of concerts. Claimant was not paid for September 27, 2013 because he contacted Ms. Payne after he was struck by a motor vehicle and was unable to perform his job duties.

7. Claimant has failed to establish by a preponderance of the evidence that he suffered compensable injuries on September 27, 2013 during the course and scope of his employment with Employer. On September 27, 2013 Claimant arrived at the Fillmore Theater to participate in a load out of band equipment for Employer. Although the load out was scheduled to begin at 11:30 p.m., he explained that he reached the venue by 11:00 p.m. because arriving early is the custom in the concert industry. However, he acknowledged that he was not paid for arriving 30 minutes before shows and stagehands were permitted to do what they wanted before the designated reporting time. Furthermore, Ms. Payne credibly explained that Claimant was not required to arrive until 11:30 p.m. He did not get paid for arriving early and was permitted to do what he wanted prior to 11:30 p.m. Ms. Payne denied that the custom in the industry was to arrive at a venue 30 minutes prior to the reporting time. The preceding testimony reveals that Claimant's job did not begin until 11:30 p.m. on September 27, 2013 and he was permitted to do what he wanted prior to the designated reporting time.

8. Claimant left the Fillmore Theater shortly after 11:00 p.m. to buy a soda from a convenience store located across the street. He explained that he left the facility to purchase a soda because he needed caffeine to keep him awake. Claimant's actions were devoid of any duty component, and were unrelated to any specific benefit to Employer. While crossing a public street Claimant was struck by a vehicle at approximately 11:04 p.m. Claimant was hit prior to his assigned reporting time and was not on Employer's premises when he was struck by the vehicle.

9. The record reveals that Claimant's left wrist injury did not arise in the course and scope of his employment with Employer. Claimant's injury did not occur within the time and place limits of his employment because the accident happened almost 30 minutes before his scheduled work shift and he was not on Employer's premises when struck by a vehicle. Claimant's injury also did not arise out of his job

duties for Employer. Claimant's attempt to purchase a soda from a store across the street prior to his scheduled work shift was for his sole benefit and constituted a substantial deviation from the mandatory or incidental duties of employment. Claimant's job duties involved removing band equipment from a concert venue. His action of seeking to buy a soda from a convenience store across the street did not have its origin in his work-related functions and was not sufficiently related to his work activities to be considered part of his service to Employer. Accordingly, Claimant has failed to demonstrate that he suffered a compensable left wrist injury during the course and scope of his employment with Employer on September 27, 2013.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAP, Jan. 10, 2006). The "place" limits of employment include parking

lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

5. Although injuries incurred while traveling to and from work do not occur in the course of employment, an employee who has fixed hours and a place of work is covered while going to and coming from work while on the employer's premises. *In Re Broyles,* W.C. No. 4-510-146 (ICAP, July 16, 2002). The preceding principle has been extended to injuries that occur on the employer's premises during an unpaid lunch break even if the employee is not required to remain on the premises for lunch. *Id.*

6. There is no requirement under the Act that a claimant must be on the clock or performing an act "preparatory to employment" in order to satisfy the "course of employment" requirement. *Broyles,* W.C. No. 4-510-146. As noted in *Ventura v. Albertson's, Inc.,* 856 P.2d 35, 38 (Colo. App. 1992):

> The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the "course of employment" requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

7. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Actions including eating, sleeping, resting, washing, toileting, seeking fresh air, drinking water and keeping warm have been determined to be incidental to employment under the personal comfort doctrine. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

8. The issue is thus whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant

stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). Ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00.

9. When the employer asserts a personal deviation from employment activities "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

10. As found, Claimant has failed to establish that it is more probably true than not that he suffered compensable injuries on September 27, 2013 during the course and scope of his employment with Employer. On September 27, 2013 Claimant arrived at the Fillmore Theater to participate in a load out of band equipment for Employer. Although the load out was scheduled to begin at 11:30 p.m., he explained that he reached the venue by 11:00 p.m. because arriving early is the custom in the concert industry. However, he acknowledged that he was not paid for arriving 30 minutes before shows and stagehands were permitted to do what they wanted before the designated reporting time. Furthermore, Ms. Payne credibly explained that Claimant was not required to arrive until 11:30 p.m. He did not get paid for arriving early and was permitted to do what he wanted prior to 11:30 p.m. Ms. Payne denied that the custom in the industry was to arrive at a venue 30 minutes prior to the reporting time. The preceding testimony reveals that Claimant's job did not begin until 11:30 p.m. on September 27, 2013 and he was permitted to do what he wanted prior to the designated reporting time.

11. As found, Claimant left the Fillmore Theater shortly after 11:00 p.m. to buy a soda from a convenience store located across the street. He explained that he left the facility to purchase a soda because he needed caffeine to keep him awake. Claimant's actions were devoid of any duty component, and were unrelated to any specific benefit to Employer. While crossing a public street Claimant was struck by a vehicle at approximately 11:04 p.m. Claimant was hit prior to his assigned reporting time and was not on Employer's premises when he was struck by the vehicle.

12. As found, the record reveals that Claimant's left wrist injury did not arise in the course and scope of his employment with Employer. Claimant's injury did not occur within the time and place limits of his employment because the accident happened almost 30 minutes before his scheduled work shift and he was not on Employer's premises when struck by a vehicle. Claimant's injury also did not arise out of his job duties for Employer. Claimant's attempt to purchase a soda from a store across the street prior to his scheduled work shift was for his sole benefit and constituted a substantial deviation from the mandatory or incidental duties of employment. Claimant's job duties involved removing band equipment from a concert venue. His action of seeking to buy a soda from a convenience store across the street did not have its origin in his work-related functions and was not sufficiently related to his work activities to be considered part of his service to Employer. Accordingly, Claimant has failed to demonstrate that he suffered a compensable left wrist injury during the course and scope of his employment with Employer on September 27, 2013.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant has failed to demonstrate that he suffered a compensable left wrist injury during the course and scope of his employment with Employer on September 27, 2013.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 23, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-499-370-07

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 17, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 11/17/15, Courtroom 4, beginning at 1:34 PM, and ending at 3:50 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through N were admitted into evidence, without objection. A transcript of the evidentiary deposition of Guadalupe Ledezma, Ph.D., clinical psychologist, was received in lieu of Dr. Ledezma's testimony at hearing.

At the commencement of the hearing, the Claimant withdrew the issue of medical maintenance benefits and penalties against the Respondents. Also, the parties agreed to strike the Final Admission of Liability (FAL), dated November 4, 2011. The parties further stipulated to reasonably necessary and causally related medical maintenance care by ATPs, with the exception of ongoing care by Dr. Ledezma, and the ongoing prescription of Zoloft, an anti-depressant.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, giving the Respondents 2 working days within which to object as to form. The proposed decision was filed on

November 30, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the Claimant's ongoing psychological care and medication recommended by her authorized treating physician (ATP), Lon Noel, M.D., and her authorized treating psychologist, Dr. Ledezma, is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of August 31, 2000; and, is it causally related thereto.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On August 31, 2000, the Claimant sustained admitted injuries to her right wrist and hand during the course and scope of her employment. As a result of her right upper extremity (RUE) injury, in 2001, the Claimant developed an injury in her left upper extremity (LUE) (Claimant's Exhibit 1).

2. On April 24, 2001, ATP Dr. Noel noted that the Claimant was quite frustrated and was having mental problems secondary to the injury. He referred her to Cynthia Johnsrud, Psy.D., a clinical psychologist, for an evaluation of her functional state and depression related to the Claimant's bilateral wrist injuries (Claimant's Exhibit 2).

3. On May 15, 2001, Dr. Johnsrud diagnosed the Claimant as having an adjustment disorder with somatic reactivity and characteristics of a dependent personality (Claimant's Exhibit 3).

4. On January 11, 2002, the Claimant met with her personal physician, Alicia Vasquez, M.D. Dr. Vasquez reported that the Claimant was feeling depressed and experiencing crying spells. Dr. Vasquez diagnosed the Claimant with depression and started her on 50 mg of Zoloft (Claimant's Exhibit 4).

5. On January 18, 2002, the Claimant returned to see Dr. Johnsrud. Dr. Johnsrud diagnosed the Claimant with a mild depression and stated the opinion that psychotherapy (4-6 sessions) would be beneficial for her" (Claimant's Exhibit 3).

6. In March 2003, Dr. Vasquez reported that the Claimant "wants to try being off Zoloft as per the medical examiner's recommendation (evaluation done as part of her workman's comp exam)." After approximately six weeks, in April 2003, Dr. Vasquez reported that the Claimant's depression had worsened since being taken off Zoloft. Additionally, the Claimant now had anxiety, as well. Dr. Vasquez started the Claimant on 20 mg of Prozac (Claimant's Exhibit 4)

7. On May 2, 2003, Dr. Noel confirmed that the Claimant had begun having anxiety attacks after weaning her off antidepressant medication. Dr. Noel referred the Claimant to Dr. Ledezma for a psychological evaluation Claimant's (Exhibit 2). During her testimony, the Claimant could not recall being weaned off Zoloft because, as she stated, she "has taken Zoloft for such a long time." Nonetheless, the Claimant recalled that at one time she had been prescribed Prozac. She stated that her body "could not take it [Prozac]" and that "it agitated her real bad."

8. On May 9, 2003, Dr. Ledezma recommended that the Claimant's medication be switched back to Zoloft since the Claimant felt increased nervousness, irritability, and continued depression while on Prozac. Dr. Ledezma also noted that when the Claimant's pain was high, she often became depressed and irritable, despite the use of Prozac (Claimant's Exhibit 6).

9. On May 20, 2003, J. Stephen Gray, M.D., a Division Independent Medical Examiner (DIME), reported that the Claimant was seeing Dr. Ledezma for her depression and anxiety. Dr. Gray stated that it was appropriate to allow further treatment under the maintenance care rubric. According to Dr. Gray, "it is this examiner's opinion that [Claimant's] depression is related to her work-related problems. She had no history of prior depression" (Claimant's Exhibit 7).

10. After Dr. Gray's report, Dr. Noel restarted the Claimant's prescription of Zoloft on May 30, 2003 (Claimant's Exhibit 2).

11. After the Claimant began taking Zoloft, Dr. Ledezma reported that the Claimant was doing well overall and was responding well to Zoloft (Claimant's Exhibit 6).

12. On September 29, 2003, Dr. Ledezma reported that the Claimant was making considerable progress in her psychological state and anticipated the following session to focus on preparing the Claimant for discharge from treatment (Claimant's Exhibit 6).

13. On January 29, 2004, Dr. Noel referred the Claimant for "psych follow-up, 4-6 additional visits with Dr. Ledezma" (Claimant's Exhibit 2).

14. On October 13, 2004, the undersigned ALJ issued Specific Findings of Fact, Conclusions of Law and Order stating, "Respondents shall pay the costs of continuing maintenance medical benefits, under the *Grover* case, to maintain medical stability as recommended by Dr. Gray and prescribed by Dr. Noel including maintenance psychological treatment under Dr. Ledezma" (Claimant's Exhibit 8).

The Present Situation

15. The Claimant testified, however, that she had not sought further treatment from Dr. Ledezma after the October 2004 hearing because she did not know that she had the option of seeing Dr. Ledezma after what she considered the conclusion of her case.

16. On November 11, 2014, Dr. Noel noted that an interaction that Claimant had with the insurance carrier, wherein the adjuster enquired whether the Claimant had a re-injury, created a lot of stress, which caused an increase in symptoms (Claimant's Exhibit 2). The increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The ALJ draws a plausible inference and finds that the Claimant's fear and anxiety about losing her source of income triggered the renewed visits to Dr. Ledezma in 2015.

17. During her testimony, the Claimant confirmed this interaction and her resultant increase in stress because she believed she may have been at risk of losing her benefits.

18. According to the Claimant, after her interaction with the Insurance carrier, she discovered that she was still represented by counsel and contacted her attorney. The Claimant verbalized to her attorney that she was having difficulty coping with her pain. Her attorney informed her that she could return to see Dr. Ledezma pursuant to a court order.

19. On May 12, 2015, Dr. Noel reported that Claimant had some depressive affect (Claimant's Exhibit 2).

20. On May 14, 2015, Dr. Ledezma noted that the Claimant returned for psychotherapy after several years. Dr. Ledezma noted that a court ruling provided the Claimant with long-term psychotherapy treatment when she requires additional psychological assistance. Dr. Ledezma noted that the Claimant had been having more anxiety and emotional upset in the past months. Dr. Ledezma recommended that the Claimant's dose of Zoloft be increased since she was having increased psychological distress. On May 26, 2015, Dr. Ledezma continued to recommend that the Claimant's dose of Zoloft be increased (Claimant's Exhibit 6).

21. On June 2, 2015, Dr. Noel noted that the Claimant returned to see her authorized treating psychotherapist, Dr. Ledezma, for a post-maximum medical improvement (MMI) psychological reevaluation and follow-up visit. Dr. Noel issued a referral, stating, "My current referral was to cover the 05/14/2015 visit and to approve the 4 to 6 total maintenance followups [*sic*] pertaining to her work-related injury" (Claimant's Exhibit 2)

22. On June 16, 2015, Dr. Noel noted that the Claimant had another appointment scheduled with Dr. Ledezma, and that her appointments with Dr. Ledezma had been "okayed" per an adjudication judge. Dr. Noel reported that the Claimant was demonstrating some depressive affect. He noted that there were a few tears shed as she talked about her case, and she appeared to be upset and worried about the future. Dr. Noel increased the Claimant's Zoloft to 75 mg daily (Claimant's Exhibit 2).

Independent Medical Examination by Stephen Moe, M.D.

23. The Respondents contested the referral to and treatment from Dr. Ledezma. The Respondents requested an IME, which was performed by Dr. Moe, a psychiatrist. Dr. Moe is of the opinion that the Claimant's current psychological status is not causally related to her work injuries of 2000 and 2001.

24. Dr. Moe did not offer a persuasive opinion concerning whether ongoing psychological/psychiatric care for the Claimant, if not causally related, is reasonably necessary to cure the Claimant's chronic pain and depression nor did he offer a persuasive opinion concerning the Zoloft prescription.

25. The Claimant testified, however, that she needs care from Dr. Ledezma to cope with the pain and decreased functionality caused by her injuries. She stated, "Every day is hard for me dealing with my injuries, doing tasks with my hands. It's hard coping with the pain part, not being able to function the way a person functions that has the mobility in her hands." The Claimant complained that even simple household tasks require much effort on her part.

Dr. Ledezma's Evidentiary Deposition

26. On October 22, 2015, the evidentiary deposition of Dr. Ledezma was taken. Dr. Ledezma testified that anybody living with chronic pain and physical limitations will likely have times when their psychological state deteriorates, and therefore may require ongoing psychological treatment for the rest of the person's life if there continues to be problems that occur that will cause that regression in the person's functioning (Ledezma Depo. pp. 25-26, lines 21-25 & 1-2).

27. Dr. Ledezma testified that the treatment she provided in May and June of 2015 was strictly limited to issues related to the Claimant's work-related injuries and

chronic pain (Ledezma Depo. p. 8, lines 9-13; p. 10, lines 17-22; p. 11, lines 19-22; p. 51, lines 23-25; p. 66, lines 13-4).

28. According to Dr. Ledezma, the Claimant's situation is chronic by nature. She stated that the depression and anxiety that the Claimant is having is primarily related to issues around being physically limited and having to depend on other people for assistance with a lot of activities of daily living, and feeling basically that there is no sense of improvement forthcoming. Dr. Ledezma stated that this has been really emotionally devastating for the Claimant (Ledezma Depo. pp. 8-9, lines 25 & 1-9; pp. 56-57, lines 19-25 & 1; p. 57, lines 7-8).

29. According to Dr. Ledezma, it's not necessarily one specific thing that will cause the Claimant to have more depression or problems sleeping. It is a cumulative effect of basically realizing that as time goes on, she's noticing more and more problems here and there that are impacting her self-esteem, her quality of life, etc. (Ledezma Depo. p. 51, lines 13-18).

30. Dr. Ledezma stated that when she saw the Claimant in September of 2003, the Claimant was functioning fairly well, and she would consider the way she was functioning then to be her general baseline (Ledezma Depo. p. 58, lines 2-5).

31. Dr. Ledezma stated that when the Claimant came back into treatment in 2015, she was no longer at psychological baseline. There was a regression and deterioration in her psychological functioning. Dr. Ledezma stated that part of maintenance care is to maintain that baseline level, which at the time she saw the Claimant, she was not at baseline level in her opinion (Ledezma Depo. p. 13, lines 11-18; pp. 17-18, lines 25 & 1-4; pp. 22-23, lines 24-25 & 1-3; p. 43, lines 9-10).

32. Dr. Ledezma recommended ongoing maintenance care, which included the treatment she received in May and June 2015. Her recommendation, which is based upon her last visit in June 2015, would have been six to eight visits over the course of a year, more or less. Dr. Ledezma stated that that recommendation was consistent with her reading of the "medical treatment guidelines" [Division of Workers' Compensation Medical Treatment Guidelines]. Dr. Ledezma also stated that the possible treatment requirements for the future are something that she may need to assess on an as-needed basis, depending on what is going on with the Claimant. (Ledezma Depo. p. 13, lines 2-10; p. 14, lines 2-15; p. 54, lines 21-23; p. 57, lines 9-13; p. 66, lines 10-11).

33. According to Dr. Ledezma, if the Claimant's current functioning is the way she presented at her last session in June 2015, she would need ongoing treatment of some kind (Ledezma Depo. p. 18, lines 11-13).

34. In fact, Dr. Ledezma observed the Claimant's demeanor during the deposition and stated that it was more likely than not that the Claimant was still having symptoms of depression that had not been resolved or treated. Dr. Ledezma recommended possibly more psychological treatment, definitely ongoing medication, with a possible increase of medication, and a psychiatric referral (Ledezma Depo. p. 62, lines 15-20; p. 63, lines 14-20).

The Claimant's Testimony at Hearing

35. The Claimant testified that she has continuously been taking Zoloft from 2002 to the present and that Dr. Noel has continued to renew her prescription of Zoloft.

36. The Claimant also testified that on one occasion she discovered by accident that she cannot take the generic form of Zoloft. According to her testimony, Dr. Noel forgot to indicate on the prescription that the Claimant could not substitute the generic brand of Zoloft for the name brand. Consequently, she was dispensed Zoloft in generic form. The Claimant testified that she took it for approximately three months and the generic Zoloft did not work for her. The Claimant felt it did not stabilize her mood the same way that the name brand Zoloft did.

37. Dr. Moe testified that there is no consensus in the medical literature regarding the efficacy of generic versus name brand drugs. Dr. Moe also testified that it is a commonly reported phenomenon that some patients do not tolerate or do not do well on generic brands.

38. Dr. Moe was of the opinion that the Claimant has suffered from chronic disorder involving a blend of depression and anxiety since the mid-1990s, where she presented with symptoms associated with stress. It was recommended at that time that the Claimant get treatment and she declined.

39. According to Dr. Moe it is **possible** (emphasis supplied) that the Claimant could have been benefited from Zoloft even without the work injury. Dr. Moe, however, could not testify that this opinion was within a reasonable degree of psychological probability because the Claimant had not taken nor was prescribed any antidepressant medication prior to her work injury. The ALJ infers and finds that this is sheer speculation on Dr. Moe's part.

40. Based on her review of the records, however, Dr. Ledezma stated the opinion that the disorder has been persistent since the early aftermath of the Claimant's work injury. Dr. Ledezma stated, "Her depression has been present since the time that she was injured and was unable to return to her previous level of functioning, which makes it a chronic depression" (Ledezma Depo. p. 16, lines 19-24; p. 17, lines 1-4).

41. Dr. Ledezma further stated that there was no indication of any ongoing prior psychological issues or problems that were treated or identified prior to her 2000 injury, other than a medical report from 1995 that noted that the Claimant was taking care of her diabetic and blind mother and the death of Claimant's brother (Ledezma Depo. p. 16, lines 16-18; p. 17, lines 11-13).

42. According to Dr. Ledezma, the situation [in 1995] would have been a stressor that might have created a limited situational depression; however, she would expect there to be a lot of medical records if the depression had significantly continued, and the lack of records indicated to her that once the situational stressor was resolved, the Claimant's symptoms would also resolve (Ledezma Depo. p. 59, lines 6-20). Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and ATP Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible.

43. During his testimony, Dr. Moe agreed that the death of the Claimant's brother and the disabling condition of her mother could cause a situational depression and that it is not unusual for patients who suffer from chronic pain to experience depression and anxiety.

44. According to Dr. Ledezma, she did not see any indication that there would be any reason for the Claimant's depression other than her deep-rooted depression and anxiety from this injury (Ledezma Depo. p. 17, lines 17-21).

45. Dr. Ledezma is of the opinion that the Claimant's psychological state would worsen if the psychological care and the antidepressant medication were taken away from her (Ledezma Depo. p. 26, lines 20-24).

46. Dr. Ledezma stated that her goal is to bring the Claimant to a level of stable functioning where she's at a baseline level that she feels she can cope on a day-to-day basis with all the issues that she's facing (Ledezma Depo. p. 23, lines 19-22).

47. Dr. Ledezma stated that all of her opinions were within a reasonable degree of psychological probability (Ledezma Depo. pp. 26-27, lines 25 & 1-2).

Ultimate Findings

48. Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a

thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

49. Between conflicting psychiatric/psychological opinions, the ALJ makes a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

50. The Claimant has proven, by a preponderance of the evidence that her continuing need for psychological treatment and the Zoloft prescription is reasonably necessary to maintain her at MMI and to prevent a deterioration of her work-related psychological condition. The Claimant did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

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CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or

inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting psychiatric/psychological opinions, the ALJ made a rational choice to accept the ultimate opinions of ATP Dr. Noel and Dr. Ledezma, and to reject the ultimate opinions of Dr. Moe.

Pre-Existing Condition

c. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). Despite

the Respondents' argument that the Claimant could easily have benefited from psychotherapy treatment and medication, and been on Zoloft for the past 20 years, she did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

Maintenance Medical Care (*Grover Medicals*)/Psycholgical/Zoloft Prescription

d. A claimant has suffered a compensable injury if the industrial accident is the proximate cause of the claimant's need for medical treatment or disability. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law*, § 13.00 (1997). As found, the increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The call from the adjuster in 2014 and ongoing uncertainly about the possible loss of her benefits increased the Claimant's anxiety. As found, The ALJ drew a plausible inference and found that fear and anxiety about the Claimant losing her source of income triggered the renewed visits to Dr. Ledezma in 2015. There is no persuasive evidence that the Claimant's need for psychological treatment is based on a subsequent intervening event. The totality of the evidence, including the Claimant's testimony, demonstrated that the need for psychotherapy treatment and medication recommended by Dr. Ledezma and ATP Dr. Noel are reasonably necessary and causally related to the admitted injury of 2000 and the sequelae thereof

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld*

County Bi-Products, Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the ongoing need for psychological treatment and the Zoloft prescription.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The respondents shall pay the costs of ongoing psychological care at the hands of Guadalupe Ledezma, Ph.D., Licensed Clinical Psychologist, and Lon Noel, M.D., including the continuing costs of the Claimant's Zoloft prescription, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

PROCEDURAL BACKGROUND

A Hearing in this matter was held on August 6, 2015 before Kimberly A. Allegretti, Administrative Law Judge. The Claimant appeared and was represented by Kerry L. Sullivan, Esq. Respondents were represented by Tama Levine, Esq. This matter was digitally recorded in Courtroom 4 from 8:30 am to 12:00 pm in Denver, Colorado.

On August 27, 2015 an Order was entered by the ALJ and it was served on the parties on August 29, 2015.

A Petition to Review was filed on September 4, 2015 and a briefing schedule was set. A Brief in Support of the Petition to review was filed by the Respondents on November 17, 2015 and the Claimant did not file an Opposition Brief by the deadline specified in C.R.S. § 8-43-301(4). Upon review of the transcript, the evidence and the Respondents' brief, the ALJ has determined that a Supplemental Order is necessary and appropriate per C.R.S. § 8-43-301(4).

As set forth in more detail below, independent medical examinations ordered in the original Findings of Fact, Conclusions of Law and Order are no longer ordered. The ALJ continues to deny the Respondents' request to change physicians and continues to find post-MMI treatment, recommended by Dr. Jones, of trigger point injections and the prescription medication Skelaxin, to be reasonable and necessary to maintain the Claimant at his MMI status and to assist in the prevention of further deterioration of his condition.

ISSUES

1. Whether the ongoing medical maintenance care being provided by Byron Jones, M.D. consisting of ongoing trigger point injections, opioids, and a muscle relaxant constitutes reasonable and necessary medical maintenance care for the Claimant's January 7, 2002 industrial injury.

2. Whether the Respondents' request to change physicians should be granted.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant sustained a compensable industrial low back injury on January 6, 2002 when he slipped and fell at work (Respondents' Exhibit I, p. 152).

2. The Claimant was placed at maximum medical improvement on September 15, 2004 by the Division Independent Medical Examiner, Erasmus Morfe, M.D. (Respondents' Exhibit G).

3. The Claimant had sustained a prior low back injury in 1992 and has been under the care of Byron Jones, M.D. for approximately 23 years total. Dr. Jones has also been the primary treating physician for the last 13 years for the January 7, 2002 industrial injury.

4. The Claimant failed conservative care management and underwent an L-5 decompression with fusion at L5-S1 with Dr. Jatana on October 16, 2003. Dr. Jones testified credibly and persuasively that, although the surgical intervention was appropriate, ultimately, the Claimant did not have a good result overall.

5. Dr. Jones testified at hearing that he has been treating the Claimant for chronic pain since the Claimant was placed at maximum medical improvement in 2004. He testified that the Claimant would have some periods of improvement, but also times when the Claimant was essentially bedridden. He testified that over the course of treatment, many different modalities have been tried with the overriding concern of achieving a better level of function for the Claimant. He testified that he attempts to reach a balance with the Claimant's medication and treatment so that the Claimant is neither under-medicated nor over-medicated and the follow-up focuses on what the Claimant is able to do function-wise in his activities of daily living.

6. Dr. Jones is not Level II accredited, but testified that he is aware of the Colorado Medical Treatment Guidelines. He testified that the Claimant's care was initially within the Medical Treatment Guidelines, but after a certain point in this case, he found it necessary to exceed the Guidelines in terms of the numbers of trigger point injections provided and the sites injected. Over the course of care, Dr. Jones testified that, at times, he has tried to decrease the frequency of injections but this has resulted in increased pain and significantly decreased function for the Claimant. Dr. Jones further testified that the trigger point injections are combined with an active exercise approach, self-directed pain management and medical management of opioid prescriptions.

7. Dr. Jones acknowledged that under the Medical Treatment Guidelines, the maintenance duration for injection therapy is not more than four injections per session, not to exceed four sessions per 12 month period (Respondents' Exhibit J, p. 263). Dr.

Jones disagrees with this recommendation in this case and believes the Claimant is a "unique" case and requires eight injection sites every six weeks. Under the Medical Treatment Guidelines, if patients are provided with trigger point injections they should be reassessed after each injection session for an 80% improvement in pain and evidence of functional improvement for three months. Dr. Jones acknowledged that there is no documentation in the medical records of 80% improvement in pain or functional improvement for three months as the injections are provided every six weeks (Respondents' Exhibit J, p. 201).

8. Dr. Jones specifically acknowledged that his care and treatment for the Claimant exceeds the recommended treatment under the Medical Treatment Guidelines, but argues that, in this case, the treatment beyond the Guidelines boundaries is warranted. Dr. Jones performs trigger point injections on the Claimant every six weeks and when these injections are performed he injects eight sites. Over the course of care in this case, Dr. Jones has determined that the Claimant gets 6 weeks of good relief, after which the Claimant has a significant increase in pain and would come in to the office "writhing in pain."

9. Dr. Jones opined that the trigger point injections provided in excess of the Medical Treatment Guidelines is reducing the need for opioid medications and the potential need for having to increase the dosage of these medications. He believes that the Claimant is "not addicted" to the injections, but is physically dependent on such injections. The Claimant's level of opiates has not changed in the last 11 years and his use of opiates has not decreased with the ongoing trigger point injections being provided by Dr. Jones. However the use of opiates has not increased significantly either.

10. Dr. Jones does not follow Rule 16 or the Medical Treatment Guidelines in providing trigger point injections. He does not request preauthorization for the injections. According to Dr. Jones, he provides his office notes to the insurance company and he felt that this was a way that the insurance carrier would be apprised of his medical treatment of the Claimant. Dr. Jones also testified that "when Claimant comes in he is likely going to need trigger point injections."

11. An MRI was performed on January 20, 2015 (Respondents' Exhibit B). Dr. Jones opined that this showed a "worsening" at the L4-5 segment. His office notes reflect a potential referral to a surgeon but Dr. Jones has not made any referral for a surgical evaluation since January of 2015. The ALJ finds that the Respondents have not denied any written request from Dr. Jones for a surgical referral.

12. Dr. Jones has prescribed Skelaxin, a muscle relaxant, for over 13 years. He has opined that the Claimant obtains "functional benefit" from such medication and that since this is not a scheduled drug, it has a far lower risk than opiates. Dr. Jones specifically opined that he prefers Skelaxin to Flexeril because it is less sedating and allows for increased function.

13. According to Dr. Jones, the Claimant follows instructions and has been extremely compliant. However, Dr. Jones acknowledged that the Claimant utilizes marijuana and that Dr. Jones does not agree with this. `

14. Dr. Jones testified that the Claimant does not receive long-term, lasting relief from the injections. If the Claimant is not a surgical candidate, Dr. Jones intends to continue the same treatment program consisting of trigger point injections, opiates, muscle relaxant, and physical therapy. In the future Claimant may be referred for stem cell therapy or a spinal stimulator. Dr. Jones testified that he does not like to perform trigger point injections every six weeks because he is aware of the risks. However, Dr. Jones testified that, at the current time, this is the best treatment option for the Claimant of which he is aware.

15. The Claimant was evaluated by Joel L. Cohen, Ph.D. on July 22, 2013. Dr. Cohen's clinical impressions and recommendations were:

> Diagnostically, the information rendered thus far would suggest: Pain Disorder with a General Medical Condition and Psychological Factors (307.89) and Adjustment Reaction with Depressed Mood (309.00). I consider both to be injury related. More broadly, [the Claimant's] presentation now 11 years post-injury is also consistent with what we see as a behavioral chronic pain syndrome in the fact of significant injury and substantial ongoing pathophysiology. Clearly, much of the medical care he receives at this point is supportive and it is unclear to the extent that it increases his level of function. He has certainly not had psychological care since the injury and I think 8-10 behaviorally based psychotherapy would be beneficial if only to introduce cognitive behavioral techniques to stabilize his mood, diminish his depression and also address the possibility that he might engage in avoidant pain behavior (Respondents' Exhibit E, pp. 130-131).

16. The Claimant has been evaluated by John J. Aschberger, M.D. on numerous occasions since he was placed at maximum medical improvement. On March 25, 2013 Dr. Aschberger noted that there had been continued utilization of trigger point injections by Dr. Jones with no clear justification regarding the necessity of the injections for maintenance purposes other than from the Claimant regarding deterioration in his condition with attempts at tapering out the injections. Dr. Aschberger indicated that "there may be a pain avoidance/fear issue going on, and some psychological support and intervention may be helpful in terms of further weaning of treatment. It is unlikely that Mr. Sanchez will willingly taper down." (Respondents' Exhibit F, p. 133).

17. From November 20, 2013 to January 27, 2014, the Claimant treated with Amy Milkavich, Psy.D., and, per Dr. Cebrian's October 13, 2014 report, the Claimant's mood was significantly improved and he was more socially engaged over the course of the psychological treatment. There was no discharge summary provided, it was simply

noted that the last note available was from January 27, 2014 (Respondents' Exhibit D, p. 109).

18. Dr. Carlos Cebrian evaluated the Claimant on August 28, 2014 and issued a detailed report dated October 13, 2014 (Respondents' Exhibit D). Dr. Cebrian is Level II accredited. Dr. Cebrian testified at hearing that, subsequent to his independent medical examination, he had also had the opportunity to review the updated medical records and hear the testimony of Byron Jones, M.D.

19. Dr. Cebrian testified that he agrees that the Claimant does require long-term care and medications. However, he testified that the ongoing care and treatment provided by Dr. Jones consisting of trigger point injections, ongoing physical therapy, and use of a muscle relaxant, is not reasonable and necessary medical care under the Medical Treatment Guidelines.

20. According to Dr. Cebrian, chronic use of any muscle relaxant, including Skelaxin, is not recommended under the Medical Treatment Guidelines due to their habit-forming potential, seizure risk following abrupt withdrawal, and documented contribution to deaths of patients on chronic opioids due to respiratory depression. In this case, the Claimant has been on chronic opioids for over 20 years. Therefore, he believes that Skelaxin is an inappropriate medication for the Claimant in combination with sedating opioids. Dr. Cebrian believes that the opiates are more beneficial than the Skelaxin and that the combination of medications creates a dangerous situation. Dr. Cebrian testified that muscle relaxants should only be used for acute situations and never for chronic pain. He recommended that the Claimant be weaned from the Skelaxin over a 30 day period under the supervision of a physician. Dr. Cebrian recommended Flexeril instead of Skelaxin that, over time, would be tapered down.

21. Dr. Cebrian has reviewed the complete medical records in this matter dating back to 1994. He testified that these records reflect that the Claimant has been receiving trigger point injections to his thoracic and lumbar spine since 1994. Under Medical Treatment Guidelines Rule 17 regarding trigger point injections, Dr. Cebrian testified that there are certain guidelines that must be followed in terms of trigger point injections. Patients should be reassessed after each injection section for an 80% improvement in pain as well as evidence of functional improvement for three months. The Claimant has not had an 80% improvement in evidence of functional improvement for three months from the trigger point injections. Not only has he not returned to baseline function or had any increased activities, the trigger point injections have not decreased the use of the opioid medications in Dr. Cebrian's opinion. Dr. Cebrian notes that the injections have been going on since 1996 and do not constitute a recent phenomenon to maintain Claimant's condition. In addition, there is no documentation in Dr. Jones' records that he has ever attempted to increase the periods of time between injections. Dr. Cebrian has opined that it is not medically probable that the need for trigger point injections in the thoracic and lumbar spine is related to the January 7, 2002 industrial injury. Dr. Cebrian indicated that under the Medical Treatment Guidelines, a patient should never receive injections to more than four areas. Under maintenance

care, trigger point injections should only be provided four times per year with four injection sites. Dr. Jones has been injecting eight sites at one time, every six weeks. Dr. Cebrian indicated that this is not appropriate nor reasonable and necessary maintenance care.

22. In terms of other potential treatment modalities, Dr. Cebrian testified that he agrees with Dr. Aschberger that the continued trigger point injections and use of passive treatments is creating reliance in the Claimant. He opined that physical therapy can be appropriate in maintenance care, but it is not in this case. Dr. Cebrian testified that regular, self-directed exercise is the best form of therapy for chronic pain, including specific exercises to achieve a sustained, elevated heart rate. Dr. Cebrian testified that the new MRI findings were not unexpected and he was surprised the changes were not worse. However, he does not recommend a surgical consult and does not believe the changes are significant to necessitate a second surgery, especially as the first surgery was not successful.

23. In rebuttal testimony, Dr. Jones addressed some of the points discussed by Dr. Cebrian. He opines that a surgical consult is appropriate as there are objective findings and indicators of discogenic pain. In terms of the Claimant's exercise regimen, Dr. Jones testified that spine specific stability exercises are addressed but the Claimant is not yet at a point to receive benefit from aerobic exercises.

24. Rule 17-2(A) provides that all healthcare providers shall use the Medical Treatment Guidelines adopted by the Division. Rule 17-2(B) provides that payers shall routinely and regularly review claims to ensure that care is consistent with the Division's Medical Treatment Guidelines.

25. Rule 16-5(A) provides that in cases where treatment falls within the purview of a Medical Treatment Guideline, prior authorization for payment is unnecessary. However, in cases in which the treatment deviates from the Guidelines, the provider must request care and follow the procedures for prior authorization in Rule 16-9. Dr. Jones testified that he has not requested preauthorization for the treatment or the medication usage, although he is aware his treatment exceeds the recommendations in the Medical Treatment Guidelines.

26. C.R.S. § 8-43-501(2)(a) provides that, "an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider." Per C.R.S. § 8-43-501(2)(b), "prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) "when an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate.

27. Rule 10-1(A) provides that "a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, "the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure."

28. The ALJ finds that Dr. Jones has the Claimant's best interests in mind and that Dr. Jones, as the physician who has treated the Claimant over many years, is in a strong position to understand the Claimant's ongoing medical maintenance needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections beyond the recommendations in the Medical Treatment Guidelines is not optimal, but he reasonably believes that it is the best available option for the Claimant's pain management at this time. However, Dr. Jones is not following the rules of the workers' compensation system. His treatment is beyond the Medical Treatment Guidelines recommendations and yet he is not seeking prior authorization for this treatment. By bypassing the prior authorization procedure, he is prohibiting additional input from other physicians.

29. The Respondents have not requested a review of services by Dr. Jones per the utilization review process authorized by the statute and the Rules. This is an avenue by which the Respondents could obtain additional input from other physicians as to whether the medical services provided by Dr. Jones are reasonably necessary as medical maintenance treatment and by which the Respondents' request for change of physician (which is effectively seeking a de-authorization of Dr. Jones) could be addressed.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Medical Maintenance Treatment after MMI and Respondents' Request for Change of Physician

Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at

W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

A change of physician can be requested by a claimant pursuant to C.R.S. 8-43-404(5)(a)(III) or (VI66666). However, nothing in these provisions authorizes Respondents to seek a change of physician. Rather, a medical utilization review is the process by which a medical provider's course of treatment of a claimant can be examined to determine its reasonableness. To the extent that Respondents seeks a "change of physician," Respondents are essentially seeking to de-authorize a treating physician and this would be governed by the medical utilization review process. *Franz v. Industrial Claim Appeals Office,* 250 P.3d 755 (Colo. App. 2010); *Garner v. Town of Ignacio,* W.C. 4-288-201 (ICAO October 5, 2001). C.R.S. §8-43-501(1) provides that,

> Insurers and self-insured employers should not be liable to pay for care unrelated to a compensable injury or services which are not reasonably necessary or not reasonably appropriate according to accepted professional standards. The general assembly, therefore, herby declares that the purpose of the utilization review process authorized by this section is to provide a mechanism to review and remedy services rendered pursuant to this article which may not be reasonably necessary or reasonably appropriate according to professional standards.

C.R.S. § 8-43-501(2)(a) provides that, "an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider." Per C.R.S. § 8-43-501(2)(b), "prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) "when an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate. Rule 10-1(A) provides that "a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one

prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, “the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure.”

All medical providers and evaluating physicians in this matter agree that some degree and level of ongoing medical maintenance care is reasonable and necessary for the Claimant. The physicians disagree as to the best course of care and as to which prescription would be most appropriate for a muscle relaxant.

Dr. Jones has expressed a level of frustration with the system and believes that the workers’ compensation system hampers his treatment of the Claimant. However, the ALJ finds that the care that is being provided is under the workers’ compensation system and this system holds the Respondents responsible for payment of the medical care but provides Respondents with the opportunity to challenge specific medical treatment, and the Claimant must prove that the treatment is reasonably necessary.

Over the course of his treatment of the Claimant, Dr. Jones has failed to comply with the Medical Treatment Guidelines and is not following the rules of the workers’ compensation system and this has the effect of preventing the Respondents from one of the various avenues by which they can evaluate ongoing medical treatment to ensure it is appropriate. Physicians are required to use the Medical Treatment Guidelines per Rule 17-1(A). In cases that require deviation, the physicians should follow the request for preauthorization. The ALJ finds that this process would benefit all parties. Dr. Jones should follow the prior authorization process which will allow additional input on the care and treatment being provided to the Claimant.

While the ALJ finds that Dr. Cebrian performed a thorough and extensive review of the medical records and provided additional insight and guidance for the Claimant’s medical treatment, and the ALJ also finds that Dr. Jones’ treatment has exceeded the Medical Treatment Guidelines, the ALJ declines to order a change in physician. The ALJ is uncomfortable making what is essentially a medical decision without the benefit of the utilization review process that the Respondents have not initiated. The Respondents have cited no legal authority to support a change of physician in the manner in which they are seeking, nor have Respondents provided any rationale for failing to comply with C.R.S. § 8-43-501(2)(a) and Rule 10-1(A) to seek a utilization review.

Further, in weighing the conflicting evidence and opinions presented at the hearing, it was found that, as the physician who has treated the Claimant over many years, Dr. Jones is in a stronger position to understand the Claimant’s ongoing medical maintenance needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections he is performing are beyond the

recommendations in the Medical Treatment Guidelines and that this is not optimal. Nevertheless, he reasonably believes that this the best available option for the Claimant's pain management at this time, along with the prescription of Skelaxin as a muscle relaxant and he persuasively opined that these treatments are necessary for the Claimant to maintain his level of function. While contradictory evidence was presented at the hearing, none of the evidence presented was as persuasive as the testimony of Dr. Jones on the issue of whether the current maintenance treatment was reasonable and necessary for the Claimant to prevent deterioration of his condition. The Claimant has established that these ongoing medical treatments provided by Dr. Jones are reasonably necessary as ongoing maintenance care in this case.

ORDER

It is therefore ordered that:

1. The Respondents' request to change physicians is denied.

2. Dr. Jones shall comply with the Medical Treatment Guidelines and Rule 16 in requesting preauthorization for any medications or treatment outside of the Colorado Medical Treatment Guidelines.

3. Respondents shall be liable for the post-MMI medical treatment consisting of, among other treatment, trigger point injections and muscle relaxants prescribed by Dr. Jones that is reasonably necessary to maintain the Claimant's MMI status, subject to the above limitations. Respondent shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's supplemental order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after the certificate of mailing in the supplemental order, as indicated on the certificate of mailing or service; otherwise, the Judge's supplemental order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the supplemental order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. The petition shall be in writing, shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. For statutory reference, *see* § 8-43-301(6), C.R.S.

DATED: December 21, 2015

_____

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

I. Whether Respondent is collaterally estopped from seeking to withdraw its general admission of liability GAL) for post-MMI medical, and if not;

II. Whether Respondent has proven by a preponderance of the evidenced that it should be permitted to withdraw its admission of liability for post-MMI medical treatment, and if not;

III. Whether Claimant is entitled to post-MMI treatment consisting of additional injections, pool therapy and supplies, i.e. pads for her electrical stimulation (TENS) unit.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. This matter proceeded to hearing before the ALJ on June 12, 2014, and a resulting order was issued on July 17, 2014. The July 17, 2014 was not appealed and is final. At the June 12, 2014 hearing, the Respondent explicitly stated that it was not seeking to withdraw its admission for post-MMI medical treatment. Instead, the issues for consideration at that hearing were the Claimant's Petition to Reopen and her request for past medical benefits.

2. The Claimant has neither endorsed collateral estoppel as an affirmative defense in any pleading nor attained an order adding its consideration. Respondent did not agree to litigate the issue of collateral estoppel at hearing on October 8, 2015.

3. The Claimant suffered an injury to her left anterior cruciate ligament (ACL) in 2001. According to the Claimant's testimony, she underwent therapy prior to being released to work.

4. Claimant was involved in a motor vehicle (MVA) accident in March 2005 and sought treatment for low back and left knee pain, among other conditions, with Dressen Chiropractic as a result of her MVA. As of August 24, 2005, the Claimant was still complaining to Dr. Dressen of pain in her left knee despite testifying at hearing that her left knee pain resolved within a couple of weeks of the MVA.

5. Claimant was working in her usual capacity as a correctional officer for

Employer on June 16, 2008 when she suffered an injury to her left knee. On this date, at approximately 10:00 PM, after assuming her shift, Claimant began her rounds. In order to complete her rounds, Claimant had to descend a flight of stairs. When Claimant reached the bottom of the stairway; she placed her left foot on the floor. As she transferred her weight to the left leg in order to step down with her right foot, Claimant's left knee popped and hyperextended. Claimant testified that she twisted the knee in the process. She did not slip. She did not fall. Claimant experienced acute pain and dysfunction of the left knee and leg, testifying that following this incident she had 10/10 pain and an inability to bear weight on her left leg.

6. Application of ice and a period of rest failed to relieve Claimant's symptoms. She then sought medical attention through the emergency room at St. Thomas Moore Hospital where she was evaluated by Dr. Dorothy Twellman. X-rays of the left knee were ordered and interpreted by Dr. Conor Heaney as negative for acute findings.

7. Claimant was subsequently evaluated at the Centura Centers for Occupational Medicine (CCOM) on June 18, 2008 by Physician Assistant (PA) Al Schultz. PA Shultz preformed a physical examination noting Claimant's inability to fully extend and flex the left knee. Examination of the knee was "very difficult" secondary to complaints of diffuse pain. PA Schultz recommended MRI to "further evaluate the cause" of Claimant's symptoms; he documented further that the work relatedness of Claimant's condition was "undetermined."

8. MRI of the left knee was completed June 23, 2008 at "Open MRI of Pueblo" and interpreted by Dr. William Needell. After review of the MRI images, Dr. Needell reached the following impressions: 1. "Fluid in the Joint especially the cruciate compartment with a probable partial tear of the anterior cruciate ligament estimated at approximately 30%. 2. Minimal Bone Bruise of the medial femoral condyle."

9. After conservative treatment, Claimant was placed at Maximum Medical Improvement (MMI) with impairment by her authorized treating physician (ATP), Dr. Nanes on February 6, 2009. Dr. Nanes recommended maintenance care in the "form of pain medications and the possibility of a Synvisc injection every six months time for the next two years." A follow-up maintenance care appointment was recommended in five months time.

10. The claim was later reopened and on March 17, 2010 the Claimant underwent an arthroscopic chondroplasty, lateral release and Fulkerson osteotomy on her knee with Dr. Walden. She underwent a second procedure on November 10, 2010 to remove surgical screws and have a fat pad excision, at which time her ACL was found to be "completely normal."

11. On February 25, 2011, Dr. Nanes returned Claimant to MMI status with an indication that maintenance care was unnecessary and that Claimant was being released from care.

12. On April 5, 2011, Claimant was re-evaluated by Dr. Nanes who rescinded MMI secondary to Claimant's worsened condition. Claimant was referred for a repeat MRI and second opinion with another orthopedist. Repeat MRI was completed on April 15, 2011.

13. Per Dr. Nanes' April 5, 2011 request, Claimant was evaluated by Dr. James Duffy, an orthopedic specialist on May 11, 2011. Dr. Duffy reviewed Claimant's April 15, 2011 MRI. He opined that Claimant's Fulkerson osteotomy had healed and that the MRI failed to reveal evidence of "chondral, meniscal or ligamentous deficit." Dr. Duffy suspected that Claimant had a "significant component of sympathetic mediated pain" for which he recommended the addition of Cymbalta and/or Neurontin to Claimant's prescription drug regime. Pool therapy was recommended for continued exercise. Further surgical procedures were not advised.

14. Claimant was returned to MMI for a third time on June 8, 2011 by Dr. Nanes.

15. Claimant testified that while her left knee "gives out" at times, the condition of her left knee did not change from the time she was placed at MMI on June 8, 2011 to June 12, 2014, and that she was at maximum recovery for her left knee on that date.

16. On July 3, 2014, Claimant treated with Centura Health and noted her recent diagnoses of diabetes.

17. On July 30, 2014, Claimant returned to Dr. Nanes seeking more treatment for her left knee. He noted good range of motion, no swelling and normal ambulation. Dr. Nanes' only diagnosis on this date was "Chondromalacia of patella." He stated that "we will go ahead and try to get a repeat Synvisc injection and renewal of her open pool therapy." Dr. Nanes did not plan to see the Claimant again until 2015.

18. On August 20, 2014, Dr. Nanes authored a letter in which he recounted reviewing Dr. Timothy O'Brien's IME report.[1] He stated agreement with Dr. O'Brien that further maintenance care was not warranted under this claim.

19. Claimant returned to Centura Health on January 22, 2015. She reported that she was not treating for her left knee. The Claimant brought unused left knee medications to return.

20. Claimant treated with her chiropractor six times between June 12, 2014 and March 9, 2015. Only once, on January 7, 2015, did the Claimant mark her pain diagram to indicate knee pain. On all other occasions she complained only of lower back pain.

[1] Dr. Nanes does not reference which report, but the only two reports from Dr. O'Brien in existence at this point in time were those dated March 24, 2014 and August 11, 2014, both included in the record.

21. Dr. Timothy O'Brien, M.D., is a Harvard-trained, board-certified orthopedic surgeon. He is a fellow of the American Academy of Orthopedic Surgeons, and diplomat for both the American Academy and the National Board of Medical Examiners. He has been Level II accredited in Colorado since 1996. He has performed numerous arthroscopic surgeries of the knee and has replaced approximately 3000 knees throughout the span of his career. Claimant has twice assented to Dr. O'Brien's expertise in orthopedic medicine.

22. On August 19, 2015, Claimant returned for a second Independent Medical Examination (IME) with Dr. O'Brien. In his report issued following this second IME, Dr. O'Brien notes his previous examination and evaluation of the Claimant took place on March 7, 2014. During his second IME, Dr. O'Brien again examined the Claimant and reviewed relevant records. He reiterated his conclusions from 2014, that the Claimant suffered no anatomic change to her left knee on June 16, 2008, only an aggravation of her non-industrial, arthritic condition. Dr. O'Brien opined that any future treatment for the Claimant's left knee is unrelated to her June 16, 2008 injury and is instead directed at her non-industrial, arthritic condition. This ALJ finds Dr. O'Brien's testimony persuasive.

23. Dr. O'Brien testified via deposition on October 6, 2015. Dr. O'Brien testified that the Claimant showed no real change in her left knee condition from his initial evaluation in 2014.

24. Despite his previous testimony and opinions in 2014, Dr. O'Brien testified with the understanding that the Claimant did indeed twist her knee as reported on June 16, 2008.

25. Dr. O'Brien testified that the knee twist on June 16, 2008 caused enough tissue-yielding to aggravate the Claimant's underlying arthritis. But there was no effusion in the left knee immediately after the twisting injury and she had a relatively normal left knee exam within two days of the twisting injury.

26. Dr. O'Brien testified that left knee hyperextension, left knee pain, left knee instability, left knee locking, left knee swelling, left knee popping, clicking, cracking and crunching are all expected symptoms of the Claimant's progressive non-industrial arthritis.

27. Dr. O'Brien testified that the Claimant's ongoing complaints of her left knee "giving out" is a symptom of her non-industrial arthritis. He explained that the sensation of "giving out" is caused by the knee muscles' protective reaction to the inflammatory pain caused by her non-industrial arthritis.

28. Dr. O'Brien testified that the June 16, 2008 injury did not in any way accelerate or permanently alter the Claimant's non-industrial arthritis.

29. Dr. O'Brien testified that the Claimant's recently diagnosed diabetes is

acting in concert with her non-industrial arthritis to cause even more adverse impact to her knee tissue and is likely making that tissue weaker.

30. Dr. O'Brien reiterated his initial opinion that there is no evidence or scientific basis for any type of over-compensation injury to the Claimant's right lower extremity.

31. The Claimant testified that she is seeking the following specific medical treatment under the Respondent's current general admission for post-MMI medical treatment: (1) replacement pads for her e-stimulator unit, (2) pool therapy, and (3) injections. The Claimant testified that no medical professional has recommended any of this medical treatment since July 30, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Collateral Estoppel

D. Claimant has failed to demonstrate that Respondent is collaterally estopped from attempting to withdraw its admission of liability for post-MMI medical treatment. Collateral estoppel is an affirmative defense and affirmative defenses must be must be explicitly pled. *See Kersting v. Industrial Commission*, 39 Colo. App. 297, 567 P.2d 394 (1977). Thus, in order to take advantage of collateral estoppel the proponent must, in a timely fashion, affirmatively plead the doctrine or it is waived. *Kersting v. Industrial Commission, supra.; See also* C.R.C.P. 8(c); *Terry v. Terry,* 154 Colo. 41, 387 P.2d 902 (1963); *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo. App. 1995); *Salazar v. Alamosa County Road and Bridge*, W. C. Nos. 4-333-3 85; 4-393-720; 4-393-723; 4-393-726 4-397-554 (December 4, 2000)(an affirmative defense may be deemed waived if not raised at a point in the proceedings which affords the opposing party an opportunity to present rebuttal evidence). Furthermore, the mere mention of the defense in a brief or other pleading is not sufficient to raise the defense. *See Trujillo v. Farmers Insurance Exchange,* 862 P.2d 962 (Colo. App. 1993); *See majority opinion in Mahana v. Grand County* W.C. No. 4-430-788 (February 15, 2007).

E. As noted, affirmative defenses are subject to procedural waiver if they are not asserted and proven in a timely fashion. *Lewis v. Scientific Supply Co*., 897 P.2d 905 (Colo. App. 1995). Waiver is the intentional relinquishment of a known right, which may be express or implied*. Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); *Reese v. Cripple Creek Mountain Estates Country Club* (Colo. App. No. 91CA0291, November 29, 1991) (not selected for publication) (statute of limitations defense waived where not endorsed at beginning of hearing). Although issues may be "tried by consent" if not properly raised by the pleadings, amendments to pleadings at the conclusion of a trial or hearing should not be permitted unless there is no reasonable doubt that the issue was intentionally and actually tried. *Bill Dreiling Motor Co. v. Schultz*, 168 Colo. 59, 450 P.2d 70 (Colo. 1969); *Bradford v. Nationsway Transport Service*, W. C. No. 4-349-599 (March 16, 2000).

F. Generally, the question of whether a party waived a right is one of fact for

determination by the ALJ. *Quintana v. Sundstrand Aviation OPS*, W.C. No. 3-062-456 (September 24, 2007); *Wielgosz v. Denver Post* W. C. No. 4-285-153 (December 3, 1998). In this case, the record supports Respondent's contention that Claimant did not explicitly plead the defense of collateral estoppel prior to hearing. Moreover, the ALJ not persuaded by Claimant's assertion that Respondent was adequately notified of Claimant's intention on raising the defense because of the prior order issued in this case by the undersigned on July 17, 2014 and/or because OACRP 8 does not require Claimant to file a reply to a response to an application for hearing. Finally, and importantly, the record supports that Respondent did not consent to trying the issue at hearing. Because the record demonstrates that the affirmative defense was not timely plead, that Respondents did not have adequate notice that Claimant would be relying upon the affirmative defense and because Respondent did not try the issue by consent, the ALJ concludes that Claimant waived the defense of collateral estoppel. Consequently, this order does not address whether Claimant met his burden to establish the elements of the doctrine.

Withdrawal of Admission for Maintenance Care and Claimant's Entitlement to Additional Treatment Post MMI

G. Respondent has demonstrated by a preponderance of the evidence that Claimant's need for additional injections, pool therapy and TENS unit supplies are no longer reasonable and necessary to treat the effects of her industrial injury. Furthermore, Respondent has established that Claimant's current need for treatment is unrelated to her June 16, 2008 industrial injury. It is well settled that where respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), respondents are not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, *supra; Snyder v. Industrial Claim Appeals Office*, *supra.*

H. Where, however, respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general

> or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

I. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. The statute serves the same function in regard to maintenance medical benefits. The Supreme Court in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), provided that after the respondents had admitted for maintenance medical benefits "the employer retains the right to file a petition to reopen, … for the purpose of either terminating the claimant's right to receive medical benefits or reducing the amount of benefits available to the claimant." The amendments to § 8-43-201(1), C.R.S., then, require that when the respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits, " they are seen as seeking to reopen that admission and the burden is theirs. In *Salisbury v. Prowers County School District*, *supra,* the Industrial Claims Panel held that where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden pursuant §8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related. Based upon the evidence presented, the ALJ finds and concludes that Claimant's need for ongoing care in the form of injections, pool therapy and TENS unit supplies no longer reasonable or necessary to treat the effects of her 2008 industrial injury as the need for that treatment is not related to her injury.

J. Once a claimant has established the compensable nature of his/her work injury, as in this case, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of

employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

K. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The Court stated "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Thus, while a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI due to the work injury. The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact for resolution by the ALJ. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984).

L. Based on the evidence presented, the ALJ is persuaded that while additional injections, pool therapy and continued use of a TENS unit is reasonable and necessary; the need for this treatment is not related to Claimant's June 16, 2008 work-related injury. In this case, the record demonstrates that Claimant has received substantial conservative and surgical care over the years since her 2008 injury. Moreover, by her accord, Claimant returned to baseline regarding her left knee by 2011, yet she remains symptomatic. While Claimant asserts that these ongoing symptoms are related to her industrial injury, the ALJ is not convinced. Instead, the ALJ credits the opinions of Dr. O'Brien to find and conclude that Claimant's ongoing symptoms are, more probably than not, associated with the natural progression of her pre-existing degenerative left knee osteoarthritis. Consequently, while Claimant would likely benefit from continued care in the form of additional injections, pool therapy and continued use of a TENS unit, those treatment modalities are not necessary to treat the effects caused by Claimant's industrial injury. Rather that treatment is necessary to address the ongoing symptoms caused by the progression of Claimant's pre-existing degenerative arthritis. Indeed, both Claimant's ATP and Dr. O'Brien have opined that no further medical care is warranted under this claim. Claimant's contrary opinions are not convincing. Based on the evidence presented, the ALJ concludes that Respondents have met their burden to prove that the current request for additional injections, pool therapy and TENS unit supplies is not reasonable, necessary or related to Claimant's June 16, 2008 industrial injury. Furthermore, based upon a totality of the evidentiary record, the ALJ is persuaded that Respondent's have proven that there is no longer any need for future care associated with Claimant's June 16, 2008 work-injury. Consequently, Respondents request to terminate all treatment under this claim is granted.

ORDER

It is therefore ordered that:

1. Respondent's request to terminate all medical benefits under this claim is granted. The Claimant is not entitled to further medical treatment under this claim.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 14, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-802-098-04

ISSUES

- Whether Claimant proved by a preponderance of the evidence mistake or change of condition sufficient to reopen medical benefits closed by the Stipulation of the Parties.

- Whether the fluoro guided Marcaine steroid injections and the right hip arthroscopy with resection of the pincer FAI OS acetabular labral repair and cold therapy are reasonable, necessary and causally related to the work injury of August 19, 2009.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, a detective with Douglas County, sustained a right knee injury on August 19, 2009, during a training exercise when she was hit on the lateral aspect of her right knee.

2. Claimant was initially seen on August 24, 2009 at Arbor Occupational Medicine by Dr. Robert Watson who became her authorized treating physician (ATP). An MRI taken the same day showed a full thickness disruption of Claimant's previous ACL graft. Dr. Garramone, M.D., an orthopedist, recommended ACL reconstruction, which was performed by Dr. Davis on October 9, 2009.

3. Claimant's femoral nerve was superficially injured during the ACL reconstruction which led to a significant amount of additional medical treatment, including physical therapy.

4. Claimant testified inconsistently about when her right hip pain began. She initially testified that all of her hip problems started during physical therapy in 2011. However, she later testified that she had an MRI in 2010 because of her hip problems, and later that she had hip complaints "early on in 2009 after physical therapy." When asked if she could pin point the time when she first started noticing hip pain, Claimant was not able to identify a date, but instead testified, "I cannot tell you that there was this one day when I was laying on the table, or when I was walking around, or anything like that." On cross-examination, Claimant identified Ms. Karen Kramer at Denver PT in Castle Rock as the therapist she was treating with when she felt pain in her right hip. Records for same are not entirely legible, but do clearly identify treatment of Claimant's *left* leg. They also include a diagnosis of left side bursitis.

5. In October 2010, Dr. Watson referred Claimant for a physical medicine evaluation, which was performed by Dr. Brunworth. Dr. Brunworth diagnosed a femoral

neuropathy and recommended EMG testing. Dr. Brunworth diagnosed a primary sensory nerve injury and referred Claimant for a right hip MRI to rule out a calcified hematoma. An incidental finding on the October 15, 2010 MRI was "Tearing involving the superior to anterior right acetabular labrum."

6. Claimant testified that she discussed treatment options for the labrum tear with Dr. Watson, but they deferred treating it then because Claimant was trialing a spinal stimulator at that time and her treatment needed to focus on that. Dr. Watson's notes from that time period (October 21, 2010; November 16, 2010; and November 23, 2010) do not document discussion of treatment options for the right labral tear. Dr. Watson's January 4, 2011 report is the first to even mention a right labral tear. On January 31, 2011, Dr. Watson first mentions treatment of the right hip as follows: "Angela and I talked about doing physical therapy for her hip . . . If [the spinal cord stimulator] does not help, then I would send her back to physical therapy for the labral tear." No persuasive evidence was offered to suggest that surgical repair of the labral tear was discussed.

7. Dr. Watson ordered an MRI to rule out a disc herniation, and referred Claimant to Dr. Barton Goldman. Dr. Goldman performed a records review and diagnosed Claimant in part with "Bilateral greater trochanteric bursitis of questionable correlation to the present claim."

8. On February 1, 2011, Claimant presented to the ER at Sky Ridge Medical Center complaining of severe right hip pain. An MRI was repeated and read as normal. Claimant was discharged with a diagnosis of "Right hip pain likely secondary to trochanteric bursitis seen on MRI." No labral tear was seen on the MRI. In his February 7, 2011 report, Dr. Watson subsequently adopted the diagnosis of "left greater than right greater trochanteric bursitis," noting also that the labral tear was not evident on the MRI. He recommended a repeat of an EMG, which was positive for no saphenous nerve response.

9. On June 2, 2011, Dr. Watson documented that the right labral tear was asymptomatic. Dr. Watson's documentation does not contain an analysis of whether he correlated the labral tear to the work injury.

10. Between August 26, 2011 and October 31, 2011, Claimant underwent unsuccessful trials of spinal cord stimulator implants with numerous complications and related treatment.

11. In December 2011 Dr. Watson indicated he was leaving the practice at Arbor. In his December 5, 2011 report he indicated that all narcotic medications were discontinued by Claimant. His successor, Dr. Jade Dillon, reported on December 23, 2011 that Claimant felt she had no restrictions and believed she could return to regular duties. Her gait was normal, low back range of motion was full and painless and there was no local tenderness in the lower extremities.

12. Subsequent hip complaints are not documented as often. Claimant even noted she was negative for hip pain between February 2011 and April 15, 2013. Then, on August 30, 2013, right hip pain was noted on Claimant's acupuncture records.

13. On October 7, 2013, Arbor physician Dr. Raschbacher placed Claimant at MMI by with a 13% lower extremity rating. He was aware of Claimant's hip complaints and diagnoses yet chose not to treat, rate, or diagnose a right hip injury. He gave Claimant no permanent restrictions. He did not reference any maintenance medical care related to her hip.

14. Claimant requested a DIME which was performed by Dr. Allison Fall who on April 30, 2014 placed Claimant at MMI as of October 7, 2013 with a 13% lower extremity rating. Dr. Fall documented that there was some right hip pain and discussed the diagnostic findings of labral tear and greater trochanteric bursitis. Dr. Fall specified in her report, "I have considered but did not find any impairment for . . . either hip."

15. Respondents filed a Final Admission accepting the rating of the DIME doctor, Dr. Fall. On July 2, 2014, Claimant filed an Application for Hearing on all issues ripe for hearing. Subsequently, the parties entered a Stipulation to resolve the issues remaining for hearing and this matter closed, except for specified maintenance medical care, subject to the reopening provisions in §8-43-303 C.R.S.

16. On May 14, 2015, almost two years after being placed at MMI, Claimant first presented for maintenance care for right hip complaints at Arbor. Claimant saw Dr. Alisa Koval who recommended a right hip MRI which was performed on May 19, 2015. The MRI read that there was no evidence of a tear within the labrum, and "there is no . . . greater trochanteric bursitis." Dr. Koval testified at hearing that she was not aware of any previous MRIs.

17. Claimant attributed her increased pain to an increased activity level and weight loss after November 2014 when she was diagnosed as diabetic. In a single answer, Claimant testified, "I lost a significant amount of weight," and "I lost some weight," and "I've lost a little bit of weight." Claimant also reported gaining over 30 pounds during the course of her claim. While Claimant's weight fluctuated over the course of her claim, her weight on the date of her injury was 167 pounds and her weight on June 22, 2015 was 165 pounds.

18. Dr. Koval referred Claimant to Dr. Papilion. Dr. Papilion's report dated May 26, 2015 remarked that Claimant's MRI from earlier that month "revealed some early degenerative changes in the acetabular rim" and "an os acetabuli consistent with pincer femoral acetabular impingement." He recommended right hip arthroscopy.

19. Dr. Papilion performed a CT-guided Marcaine/lidocaine injection in Claimant's right hip on June 12, 2015. Dr. Papilion noted that if Claimant had good relief from the injection, "she may be a good candidate for arthroscopy labral repair with resection of the femoral acetabular impingement." The injection was not successful as

Claimant's pre- and post-injection pain levels were both 5/10. In addition, Claimant testified that the injection "did not work."

20. On a partially illegible and undated fax sheet from Dr. Papilion's office to Insurer's claims adjuster, Dr. Papilion requested authorization for a right "scope hip resect pincer FAI. Os acetabular. Labral tear cold therapy." The cold therapy was for "post op use."

21. On August 21st, 2015, Insurer denied the request for steroid injections and arthroscopy as both not related to Claimant's claim, and not reasonable and necessary. Insurer relied in part on Dr. Cebrian's June 22, 2015 report in which he expressed his medically probable opinion that Claimant's right femoral acetabular impingement secondary to pincer type morphology with labral tear and the need for treatment "is independent, unrelated, and incidental to work activities performed on 8/19/2009 or her treatment thereafter." He concluded, "I recommend that any further treatment on the right hip, including a fluoroscopically guided Marcaine and steroid injection into the right hip and a possible right hip arthroscopy be denied as they are not medically reasonable, necessary and related to [Claimant's] 8/19/2009 claim."

22. Respondents applied for hearing pursuant to Rule 16 to contest Insurer's denial of treatment requested by Dr. Papillion.

23. At hearing, Dr. Cebrian testified as an expert in family practice. He performed a Rule 16 evaluation on June 22, 2015 and physical examinations of Claimant on August 29, 2014 and August 14, 2015 at Respondents' request.

24. Per Dr. Cebrian's record review, the first documentation related to Claimant's right hip was the MRI performed on October 15, 2010. That MRI was conducted to determine whether the damage to her right femoral nerve was caused by a calcified hematoma of the saphenous nerve. Incidentally, it revealed a right labral tear. After that, Claimant was treated for *left* hip complaints. To the extent bilateral hip pain was noted, it was noted as left greater than right.

25. Dr. Cebrian was critical that none of Claimant's medical providers, particularly Drs. Koval and Papilion, never explained how Claimant's right hip pain, which arose eighteen months after her injury, still correlated and was causally related to it. Dr. Cebrian also noted that neither Dr. Raschberger nor Dr. Fall related Claimant's right labrum tear to her claim.

26. Dr. Cebrian explained that Claimant's right labral tear was associated with her primary condition, femoral acetabular impingement, which can coincide with and cause labral tears. Dr. Cebrian testified that femoral acetabular impingement is a congenital abnormality and cannot be traumatically caused. Dr. Cebrian testified that Claimant had an "os acetabuli," a bone on the rim of the acetabulum of the hip that has not fused properly. This caused Claimant to develop a pincer abnormality, meaning that the labrum was pinched between the extra bone growth and the femoral head, causing damage to the labrum over time.

27. Dr. Cebrian explained that an altered gait could cause trochanteric bursitis, but could not caused labral tears. He explained that the majority of labral tears develop as the result of acetabular impingement, and that Claimant's labral tear did not show up on certain diagnostic imaging tests because it "is very subtle. It's not a significant tear."

28. Dr. Cebrian explained that a labral tear such as Claimant's would be treated by removing the extra bone, the os acetabuli, that was causing the pinching and then repairing the labral tear with re-suturing, and anchoring the tear into the joint.

29. Dr. Koval testified as an expert in occupational medicine over Respondents' objection. Dr. Koval had not previously testified as an expert or offered deposition testimony, however she had provided expert causation opinions based on record reviews and became Level II certified in April of 2014. Dr. Koval first evaluated Claimant on May 14, 2015, and reviewed medical records that were in Claimant's folder at Arbor.

30. The ALJ finds the following factors reduce the credibility and persuasiveness of Dr. Koval's testimony:

- Dr. Koval relied heavily on Claimant's subjective reports rather than on the more objective medical exams and diagnostic tests.

- Dr. Koval accepted as proof of relatedness Claimant's reports that her right hip complaints developed as the result of her physical therapy.

- Dr. Koval was not familiar with Claimant's extensive medical history. For example, she did not realize that imaging of Claimant's right hip had been performed prior to May 2015. Additionally, Dr. Koval had not seen Dr. Fall's DIME report or Dr. Cebrian's September 14, 2015 report.

31. Dr. Brendan Essary read the May 19, 2015 MRI, performed without contrast. He reported, "There is no evidence of a tear within the labrum." Under the heading "Impression," Dr. Essary noted, "8mm region of grade 3 cartilage loss in the superior anterior aspect of the acetabulum with minimal Subchondral edema. Adjacent to this area is a tiny area of fluid separating the labral cartilaginous junction. No discrete labral tear." Dr. Koval remained suspicious of a labral tear, notwithstanding the contrary MRI findings, and sent Claimant to Dr. Papilion who, she assessed, would be better able to interpret the sentence, "Adjacent to this area is a tiny area of fluid separating the labral cartilaginous junction."

32. Although Dr. Koval did not receive a follow-up note from Dr. Papilion's office, she understood him to have recommended arthroscopy. Dr. Koval's testimony was not offered to a reasonable degree of medical probability and suggested that Dr. Papilion's surgical recommendation was also speculative in that it proposed the surgery in order to determine whether there even was a problem:

> I actually never received a follow-up note from Dr. Papilion's office. We've requested it several times and not received it. So, I'm guessing at what – I'm kind of guessing at what he's trying to do, but I do know that hip arthroscopy – I think I got a handwritten note from him at one point that said he was he was recommending arthroscopy because, despite the fact that that there was no discreet obvious labral tear seen on the MRI, he felt that that sort of nebulous cartilage finding was suspicious for it nonetheless and that he should go in – the only way to know for sure was to go in and take a look and he could fix it if he encountered it.

33. Dr. Koval speculated that Claimant's hip injury could have been brought on during physical therapy, stating, "I think it's possible that it could have started there." She was unaware of what specific exercises Claimant was performing but stated she could "imagine . . . there had been quite a bit of exercise that used the hip joint." Dr. Koval acknowledged that she did not have any physical therapy notes.

34. Dr. Koval speculated that Claimant's abnormal gait combined with atrophy of the right leg could have caused a labrum tear.

35. Despite Claimant's counsel's numerous questions regarding the causation and treatment of trochanteric bursitis, the ALJ specifically finds that no issue regarding right hip bursitis was properly noticed for this hearing, and thus, will not be considered unless somehow relevant to the issues properly noticed.

36. Dr. Koval testified that a steroid injection "can be very helpful" for inflammation of the bursa, so long as there is not another chronic abnormality, in which case the steroid injection would "just be a Band-Aid." However, when asked whether she was recommending treatment for inflammation of the bursa, Dr. Koval answered, "I honestly don't know the answer to that."

37. Dr. Koval testified that she did not believe there were conservative measures to correct a labrum tear. She further testified, "However, I'm not an orthopedist so I'm not going to guess at this, but there seems to be, you know, some clinical judgment involved on the part of the specialist that, you know, this is too big to let it heal conservatively, so we need to go in and do arthroscopy."

38. Dr. Koval was critical of Dr Cebrian's diagnosis of femoral acetabular impingement because the diagnosis "is really common in active women," but Claimant had not been active for two years when she began complaining of right hip pain in 2011. Because Claimant had not been active for two years, and based on Claimant's subjective complaints, Dr. Koval testified, "So that's the part where I question that this is a completely [unrelated] issue and I do tend to think it's related." Dr. Koval further testified, "So, I'm led to believe that because of where her activity level was and because of the history she gives that this right hip pain that she was experiencing was

indeed the same right hip pain that she first reported in January 2011 and that it evolved over time."

39. The Lower Extremity Medical Treatment Guidelines provide that there are two types of impingement: pincer; resulting from overcoverage of the acetabulum and cam; resulting from the aspherical portion of the head and neck junction. Persistence of these abnormalities can cause early arthritis or labral tears. Regarding the Occupational Relationship, the Lower Extremity Guidelines indicate that impingement abnormalities are usually congenital; however they may be aggravated by repetitive rotational force or trauma. Labral tears may accompany impingement or result from high energy trauma. Ms. Fritz Spezzano did not sustain any high energy trauma to her hip that resulted in any hip complaints upon the occurrence of the August 19, 2009 injury or after that would sustain a finding of aggravation.

40. Dr. Cebrian testified that Dr. Koval misunderstood his report and that he did not indicate that Claimant's condition was caused by her level of activity, but rather that her condition was commonly associated with active females.

41. With respect to physical therapy, Dr. Cebrian noted that no physical therapy notes referenced activities that caused right hip pain. In addition, the physical therapy activities that Claimant described as causing her pain would not cause or worsen a labral tear.

42. The ALJ finds the opinions of Dr. Cebrian more credible and persuasive than those of Dr. Koval for the following reasons:

- Dr. Koval's testimony did not rise to the level of medical opinion, but rather was couched in weaker terms such as "tend to think that' and "I'm led to believe." Dr. Cebrian's opinions, in contrast, were stated in terms of reasonable medical probability.

- Dr. Cebrian was more familiar with the case having been involved for a longer period of time and having access to virtually all of Claimant's records. Dr. Koval was not even aware of previous diagnostic imaging of Claimant's hip.

- Dr. Cebrian's explanation of Claimant's torn labrum was more credible and persuasive, and more well-supported by objective medical evidence tha the testimony of Dr. Koval.

- Dr. Koval did not know whether the injections recommended by Dr. Papilion were for the treatment of bursitis.

- Dr. Koval offered no persuasive evidence that the injections, surgery, and cold therapy recommended by Dr. Papilion were reasonable, necessary, and related to her work injury.

43. The fluoro guided Marcaine steroid injections and right scope hip resect pincer FAI OS acetabular labral repair and cold therapy recommended by Dr. Papillion is for femoral acetabular impingement which is a congenital condition and which leads often to labral tears. Claimant anatomically has an os acetabuli which occurs when there is a bone on the rim of the acetabulum of the hip that has not fused properly and is a congenital condition. Claimant has developed a pincer abnormality which occurs when the labrum in the hip is pinched between the extra growth of bone and the femoral head. This causes damage over time and is why labral tears are associated with femoral acetabular impingement.

44. Based on the totality of the evidence, the ALJ finds it more medically probable that Claimant has a congenital condition not related to her work injury that resulted in a labral tear than that physical therapy caused labral tearing and the need for treatment.

45. Based on the totality of the evidence, Claimant has failed to establish by a preponderance of the evidence mistake or change of condition sufficient to reopen medical benefits closed by the Stipulation of the Parties.

46. Based on the totality of the evidence, Claimant has failed to establish by a preponderance of the evidence that the fluoro guided Marcaine steroid injections and the right hip arthroscopy with resection of the pincer FAI OS acetabular labral repair and cold therapy are reasonable, necessary and causally related to the work injury of August 19, 2009.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, et seq., C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2014). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. (2015). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. § 8-43-201, C.R.S. (2015).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted, bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Section § 8-43-303, C.R.S., provides that at any time within six years after the date of injury, any award may be reopened on the grounds of error, mistake, or change in condition. As pertinent here, a change of condition refers to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328, 1330 (Colo. App. 1985). The party seeking reopening bears "the burden of proof as to any issues sought to be reopened." Section 8-43-303(4), C.R.S. The reopening authority is permissive. *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996).

Considering all the evidence, the ALJ concludes that Claimant has failed to prove by the preponderance of the evidence that there has been a mistake or that her condition has worsened sufficient to reopen medical benefits. The ALJ further concludes that the injections and surgery recommended by Dr. Papillion are not reasonably necessary nor causally related to cure and relieve the effects of Claimant's work injury or to maintain maximum medical improvement.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to prove by a preponderance of the evidence mistake or change of condition sufficient to reopen her claim for additional medical benefits.

2. The fluoro guided Marcaine steroid injections and the right hip arthroscopy with resection of the pincer FAI OS acetabular labral repair and cold therapy recommended by Dr. Papillion are not reasonable, necessary or causally related to the work injury of August 19, 2009.

3. As a result, the medical treatment recommended by Dr. Papillion is denied.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at the hearing:

1. Whether Claimant proved by a preponderance of the evidence that he is permanently totally disabled;

2. Whether Claimant proved by a preponderance of the evidence his impairment rating should be converted from 18% scheduled rating to whole person rating;

3. Whether Claimant proved by clear and convincing evidence that the Division Independent Medical Examiner's opinion regarding the relatedness of the back injury and impairment rating was most probably incorrect; and

4. Whether Claimant proved that he is entitled to a disfigurement award.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1.Claimant is a 46-year-old undocumented Mexican immigrant with a sixth grade education. His work experience before coming to the United States was in agriculture which he performed without any mechanical tools, only manual tools such as a shovel and rake. Claimant has worked in the United States since 1997. He has worked in two industries, house framing and masonry. Claimant worked as a laborer in house framing and then as a laborer in masonry until he learned how to lay brick, block and stone. Claimant worked in masonry until May 25, 2010, the date of his work injury.

2. Claimant has never had any formal training in English. Claimant's ability to speak English is limited. He can communicate simple terms such as salutations and can understand parts of conversations. Claimant is not a licensed driver but does drive.

3. On May 25, 2010, Clamant was standing on scaffolding working when the scaffolding was hit by a tractor. Claimant jumped 12 to 15 feet, landing on broken pieces of bricks, injuring right lower extremity.

4. Claimant was taken by ambulance to North Colorado Medical Center. In the emergency room, Claimant was given fentanyl 25 mcg, intravenously. A hour later

the dosage was up to 50 mg with slow intravenous push and then followed by morphine for pain. He was diagnosed from x-rays and CT scans with fractures and dislocations in the Lisfranc area of his right foot at the first, second, third, fourth and fifth metatarsals. Claimant required an open reduction and internal fixation.

5. On May 25, 2010, Claimant was admitted to the hospital, he was examined by Scott Dhupar, an orthopedic surgeon. Claimant's right foot was painful and he was unable to walk on his right foot. Because of his foot swelling, Claimant's surgery was postponed.

6. On May 28, 2010, Claimant was discharged without surgery and sent home. His leg was splinted with a short leg mold and given a prescription for crutches.

7. On June 10, 2010, Claimant went to the Greeley Medical Clinic and was seen by Dr. Sides. Dr. Sides assessed severe displacement/injury in all five digits of Claimant's foot in need of open fixation. The surgery was scheduled and delayed because Respondents refused responsibility for his surgery, until sometime before October 8, 2010, when Dr. Bharat Desai, an orthopedic surgeon, performed an open reduction internal fixation of right first metatarsal medial cuneiform using orthohelix maxlock plates with proximal and distal fixations. He also did an ORIF of right second metatarsal middle cuneiform and fracture dislocation and fusion. The Lisfranc joint was reduced and supported with orthohelix maxlock plates.

8. On February 7, 2011, Respondents admitted liability for Claimant's injury.

9. Following the first surgery, Claimant was doing well until February 16, 2011, when physical therapy required full weight bearing only on his injured right foot. Claimant injured himself during physical therapy. He complained to Dr. Desai who ordered x-rays which showed that screws on one of his plates were broken.

10. Claimant underwent a lumbar MRI on February 22, 2011, which revealed multilevel degenerative disc disease with no stenosis nor surgical lesion.

11. On March 16, 2011, a second surgery was performed by Dr. Desai to remove Claimant's hardware from the Lisfranc joint, noting that the joint was unstable and failed to fuse. Dr. Desai re-fused the right tarsal metatarsal joint with a neutralization plate and compression screw.

12. On May 11, 2011, Claimant saw Dr. Desai. He was doing well with some mild pain and was using his walking boot. Physical therapy was restarted, but a week later, his foot began to worsen. A month later, he began to have ankle pain and his ankle was making noise and popping. On June 21, 2011, Dr. Desai documented moderate daily pain and swelling in Claimant's ankle with increased activity. His ankle was locking. Dr. Desai recommended arthrotomy, synovectomy, debridement and saucerization to correct the symptoms. Authorization was denied.

13. On June 30, 2011, Respondents obtained a second opinion from Dr. Kevin Nagamani who disagreed that surgery was necessary and recommended conservative treatment instead. On July 7, 2011, Dr. Desai reported that physical therapy was not helping Claimant's ankle pain. Claimant's ankle showed moderate tenderness in the lateral malleolus. Dr. Desai again recommended a debridement of post-traumatic synovitis and loose body removal. The surgery was denied. On September 7, 2011, Claimant continued to report to Dr. Desai constant pain and swelling in the right ankle. Dr. Desai recommended hardware removal in addition to his previously recommended surgery and Respondents authorized the surgery.

14. On October 4, 2011, Dr. Basse determined that Claimant had reached maximum medical improvement (MMI) for his low back complaints but deferred determination of MMI of Claimant's foot to Dr. Desai. Dr. Basse assigned work restrictions of medium work category based on Claimant's persistent subjective complaints.

15. On November 18, 2011, Dr. Desai performed a third surgery. He removed the painful hardware from the right first metatarsal cuneiform joint and did a right anterolateral synovectomy and debridement of soft tissue impingement on Claimant's ankle.

16. On January 10, 2012, Claimant reported feeling 60% better and walking up to a mile per day, and taking OxyContin for pain. Physical therapy from January 5 to February 23, 2012, improved the function of Claimant's foot but not his pain. On April 19, 2012, Claimant reported nerve pain and complained that his third and fourth toe were getting stuck and cramping. Dr. Desai diagnosed a neuroma in the second web space and injected the space and recommended removal of the neuroma.

17. On March 13, 2012, Dr. Desai determined that Claimant was at MMI and he communicated his opinion to Dr. Basse. She discussed case closure and restrictions with Claimant. She assigned restrictions of lift in the medium work category. For his foot injury, she assigned a maximum walk and stand of maximum 30 minutes per hour. Dr. Basse assigned a scheduled impairment of 17% for his foot which she converted to a 2% whole person impairment. For his back, Dr. Basse assigned a 21% whole person rating for his back.

18. Post-MMI, on May 29, 2012, Dr. Desai performed a neurectomy between the right second and third toes. He removed painful hardware in its entirety at the Lisfranc joint and shaved a bony prominence that had appeared over the medial cuneiform where the original hardware had been placed. Following his fourth surgery, Claimant continued to experience a lot of pain despite taking Oxycodone and Vicodin. He felt like his foot was pulsating and would go numb.

19. On August 14, 2012, Claimant returned to Dr. Basse for post-MMI maintenance treatment. Claimant reported foot pain increases with walking to a 7/10 and decreases to a 5/10 when he is not walking. Dr. Basse kept Claimant at MMI.

20. Dr. Brian Beatty performed a records review on September 7, 2012. Dr. Beatty opined that there was no known back injury at the time of Claimant's fall on May 25, 2010. Dr. Beatty stated Claimant has multilevel degenerative disc disease which pre-existed the injury and was not a ratable injury.

21. Claimant underwent a Division IME with Dr. Hompland on September 17, 2012. Dr. Hompland opined that Claimant reached MMI on March 13, 2012. The DIME examiner stated that although Claimant might have had some back pain due to gait abnormalities, Claimant did not suffer a spine injury requiring an impairment rating. Dr. Hompland assigned a lower extremity rating of 11% for the right foot, which would convert to 4% whole person.

22. On October 16, 2012, Respondents filed a final admission of liability (FAL) consistent with the DIME report. The FAL terminated TTD benefits and admitted to the 11% rating, worth $5,812.89. The FAL asserted an overpayment for TTD paid after MMI, and thus no benefits were owed pursuant to the FAL.

23. On November 8, 2012, Dr. Desai diagnosed post-traumatic degenerative joint disease. He injected the Lisfranc degenerative joint and proposed to reopen treatment and fuse the second and third cuneiform junction to alleviate Claimant's symptoms and reach MMI post-surgery.

24. On January 15, 2013. Dr. Timothy O'Brien performed an IME at the request of Respondents. According to Dr. O'Brien's report, Claimant exhibited full lumbosacral range of motion on exam. Dr. O'Brien opined that Claimant did not sustain a work-related low back injury, stating there was no temporal relationship to the work injury and Claimant's pain complaints were non-organic. Dr. O'Brien opined Claimant's back pain was most likely the result of age, genetics, and physical deconditioning.

25. Dr. O'Brien also addressed Claimant's right foot during the January 15, 2013, IME. Dr. O'Brien opined that Claimant had not reached MMI because he had untreated arthritis in his midfoot due to the injury and should undergo additional surgical intervention. Dr. O'Brien disagreed with Dr. Desai's proposed surgery of a fusion to the 2nd and 3rd metatarsal, stating that Dr. Desai's surgical treatment was not reasonable and had not met the appropriate standard of care. He criticized the multiple piece meal surgery approach and made it clear that Dr. Desai's approach was ill advised. Dr. O'Brien stated that Dr. Desai had failed to address the 3rd, 4th, or 5th tarsometatarsal fracture disclosations. He recommended that Claimant obtain a second opinion from a foot and ankle specialist for additional treatment.

26. In January 2013, Claimant's attorney wrote his ATP asking that she confirm Claimant suffered a work-related back injury. In a letter dated January 30, 2013, Dr. Basse responded, stating that her opinion regarding relatedness of Claimant's low back symptoms were based on Claimant's account; however, medical records suggest that low back symptoms were not present at the time of the injury.

27. On September 24, 2013, Claimant next treated with Dr. Scott Resig. On October 11, 2013, Respondents reopened the claim and filed a general admission, admitting for medical benefits and temporary total disability.

28. On October 31, 2013, Claimant returned to Dr. Resig. Claimant had pain with weight bearing and less pain without weight bearing. He proposed to fuse the first, second and third metatarsal with bone grafting and evaluate whether the Strayer procedure would work.

29. On December 13, 2013, Dr. Resig preformed a right midfoot fusion of the first, second and third tarsal metatarsal joint, fixing the joints with a cannulated screw and locking plates and using a bone graft from the proximal tibia. Midfoot was also fused. Regarding the Achilles, Dr. Resig did a Strayer procedure which improved the dorsiflexion from 0 degrees to 10 degrees with the knee extended. Claimant was to remain non-weight bearing for 6 to 8 weeks.

30. By March 25, 2014, Dr. Resig noted that the radiology reports shows that the first, second and third tarsal metatarsal joints were fused. By April 1, 2014, Claimant resumed activities of daily living and experienced most of his pain in the morning. He continued to have pain which Dr. Resig opined was nerve pain.

31. On April 29, 2014, Claimant reported to Dr. Resig that he was having more pain but Dr. Resig opined that from the standpoint of surgery he is doing well and that that Claimant's ongoing pain may be nerve related.

32. On May 27, 2014, Claimant complained of constant pain in the dorsum of his foot which radiated up into his right leg. On July 1, 2014, Dr. Resig diagnosed a neuroma and injected the neuroma between the 3rd and 4th metatarsals with significant relief.

33. Respondents denied authorization for recommended orthotics..

34. On August 18, 2014, Dr. Basse found Claimant was at maximum medical improvement for "any injuries that occurred on the job on 05-25-10" She noted she would address work restrictions after an FCE scheduled for August 22, 2014.

35. On August 19, 2014, Dr. Basse assigned an impairment rating of 9% lower extremity which she converted to a 4% whole person rating. She did not give Claimant an impairment for his lumbar spine, stating that she agreed with previous evaluators that his low back and knee are not part of this claim.

36. At the request of Claimant's counsel, Claimant underwent an FCE on August 28, 2014. Claimant reported that in a typical day, he spent 6 hours sleeping or lying, 9 hours standing or walking, and 9 hours sitting. The evaluation established that Claimant was able to work at the medium physical demand level. Postural limitations included occasional standing and walking. There were no limits on sitting.

37. Dr. Basse completed a post-MMI report on October 15, 2014, to address permanent restrictions. Upon exam Claimant showed a much more normalized gait and had no swelling. Dr. Basse reviewed Claimant's FCE and confirmed that Claimant was able to work at a medium capacity level.

38. Claimant was returned to Dr. Hompland for a follow-up DIME on October 22, 2014. The DIME examiner placed claimant at MMI as of May 27, 2014, and assigned an impairment rating of 18% lower extremity. The DIME examiner noted that Claimant had a limp but wore normal socks and athletic shoes.

39. On December 15, 2014, Respondents filed a Final Admission of Liability admitting to Dr. Hompland's 18% lower extremity impairment rating. Claimant objected and filed an application for hearing.

40. On December 16, 2014, Dr. Basse assigned restrictions of stand and walk occasionally (3 to 33 percent to up to 34 to 66 percent of the time) but he cannot walk over 67 percent of the time. His walking and standing should be limited to occasional to frequent which puts him in the sedentary to light category.

41. Video surveillance of Claimant taken February 10, and February 11, 2015, showed Claimant shopping in a grocery store, walking and standing outside of a mattress store, and outside his home, carrying groceries, getting in and out of a car and driving, and carrying chairs from the trunk of his car into his home. Claimant does not walk with a limp at any time in the video.

42. Dr. O'Brien performed a second IME of Claimant on February 18, 2015. Dr. O'Brien noted in his IME report, consistent with video surveillance, that Claimant did not walk with a limp at the IME. Claimant's foot was not swollen, and actually had less of a flat foot deformity when compared to the left side. Dr. O'Brien assigned Claimant a 12% lower extremity impairment rating, specifically stating that Claimant's injury was isolated to his foot.

43. During the February 18, 2015, IME with Dr. O'Brien, Dr. O'Brien opined that Claimant had an excellent outcome from the surgery with Dr. Resig. Dr. O'Brien agreed with the ATP's original restrictions of medium-duty work with no restriction on standing or sitting. Dr. O'Brien opined that Claimant is able to work in any capacity he wants. Claimant will not hurt his foot by standing on it.

44 Dr. Jeffry Wunder testified at hearing on March 26, 2015, as an expert in physical rehabilitation. Dr. Wunder testified that Claimant told him he felt back pain a day or two after the accident. Dr. Wunder opined Claimant suffered a back injury and assigned Claimant a 20% whole person impairment for his back. Dr. Wunder's opinion was contrary to four other physicians; Dr. Beatty, Dr. Basse, Dr. O'Brien, and Dr. Hompland. Dr. Wunder's opinion was less credible and persuasive as it is based on Claimant's subjective complaints and Dr. Wunder did not review Claimant's lumbar MRI scan nor MRI report. Dr. Wunder reviewed Dr. Beatty's interpretation of the MRI in

forming his opinions regarding Claimant's lumbar spine. Dr. Wunder assigned Claimant a 12% lower extremity impairment, identical to that of Dr. O'Brien. Yet, Dr. Wunder assessed Claimant to require greater permanent restrictions, limiting Claimant to only occasional walking and standing. Dr. Wunder also added additional restrictions of standing ten minutes of every hour, sitting and lifting no greater than 35 pounds.

45. Dr. Wunder's opinions were less credible and persuasive than the opinions rendered by experts called by Respondents. Dr. Wunder testified that he did not recall seeing Dr. Basse's letter indicating Claimant's ability to stand and walk up to two-thirds of the day. Dr. Wunder also was not aware of the fact that Dr. Resig limited Claimant to walk or stand 66 and 2/3% of the day. Dr. Wunder's opinions placed greater value on the FCE results over the opinions of longstanding treating physicians about the Claimant's physical abilities.

46. Ms. Katie Montoya testified at hearing on September 11, 2015, as an expert in vocational rehabilitation. Ms. Montoya provided a vocational assessment on March 5, 2015. Claimant reported to Ms. Montoya foot pain and constant back pain. Claimant told Ms. Montoya that he has difficulty driving and does not do it often, he cannot clean or cook, and he does not know how to use a computer.

47. Ms. Montoya addressed work restrictions provided by Dr. Basse, by Dr. O'Brien, and by Dr. Wunder. Ms. Montoya credibly determined that Claimant had work options within the Denver metropolitan labor market under each set of restrictions.

48. Ms. Montoya testified that Dr. Basse's letter indicating a standing and walking tolerance up to frequently would equate to 66% of Claimant's shift, 40 minutes an hour or 5 hours of a typical work day. Ms. Montoya testified that Dr. Basse did not place any restrictions on Claimant's ability to sit.

49. Claimant told Ms. Montoya that when applying for jobs, he tells employers he cannot walk more than 15 or 20 minutes and cannot sit for more than 15 or 20 minutes. Claimant also stated that according to restrictions he cannot lift more than 30 to 35 pounds. The restrictions Claimant reported when applying for jobs is in contrast to even the highest restrictions provided by Claimant's IME, Dr. Wunder, who provided that Claimant could walk 20 minutes, sit all day so long as he took a 10 minute break after 50 minutes of sitting, and lift 35 pounds.

50. Even with the exceedingly high restrictions Claimant reported to employers, Claimant told Ms. Montoya that he had secured an interview with Labor Ready. However, Labor Ready informed Claimant they could not offer him a job because he does not have documentation of eligibility to work in the United States.

51. Ms. Montoya testified that in accordance with the opinion of Dr. O'Brien who opined that Claimant should not be limited in his standing and walking ability, Claimant could return to some of his past work. Under Dr. O'Brien's restriction of avoiding walking on uneven surfaces, Ms. Montoya credibly opined Claimant would be

able to find work in maintenance, landscaping, production, cleaning/janitorial, warehouse, and driving.

52. Ms. Montoya opined that under the stricter restrictions of Dr. Basse, Claimant would still have work opportunities in production, assembly, office cleaning, and forklift operation. There are also possibility of landscaping alternatives as these often require operating machinery such as mowers that would allow for seated work and work done on the ground including planting.

53. Claimant testified that prior to May 2010, his lack of documentation of U.S. citizenship was not an issue to finding employment, but now potential employers ask him if he is documented to work in the United States or to complete E-verify. Claimant credibly testified that potential employers tell him they cannot hire him because he is undocumented.

54. Ms. Montoya credibly testified that Claimant would be employable regardless of the restrictions provided by either Dr. Wunder, Dr. Basse, or Dr. O'Brien. Ms. Montoya credibly testified that Claimant could qualify for the job physically, but may not be eligible for work because of E-verify.

55. Ms. Gail Pickett testified as a vocational expert for Claimant. Her testimony and opinions were found less credible and persuasive than that of Ms. Montoya. Some of the reasons Ms. Pickett's opinions are found to be less credible are that Ms. Pickett relied upon Claimant's assertions regarding his physical ability to form her opinion regarding Claimant's employability. Also, Ms. Pickett formed her opinion regarding Claimant's employability without a clear understanding of Dr. Basse's opinion of Claimant's physical abilities. Ultimately, Ms. Picket wrote her report and performed her vocational research under the incorrect assumption that Claimant could only walk and stand occasionally, a third of the time. Ms. Pickett found Claimant is unable to return to the workforce. Ms. Pickett stated she relied upon factors including that Claimant's education, ability to read and write in English, work history, and that he is undocumented and thus does not have a driver's license.

56. Based on the totality of the credible and persuasive evidence, it is found that the May 25, 2010, work injury did not constitute a significant causative factor in Claimant's permanent total disability. In order for Claimant to recover PTD benefits, there must be a causal relationship between the May 25, 2010, work injury to the right lower extremity and Claimant's disability. A disability arising from the work injury that prevents Claimant from working was not proven. The vocational expert, Katie Montoya, and all physicians, barring Dr. Wunder, agree that Claimant can perform medium work. And, according to Ms. Montoya, medium work is available to Claimant.

57. Claimant contends that his lack of documentation is a contributing factor which must be considered in determining PTD. However, it is found that Claimant's work injury is not a significant causative factor. Claimant does not have a disability resulting from the work injury which prevents him from working. The Judge need not

speak to the contribution played by Claimant's lack of documentation when the evidence established that Claimant's work injury is not significant causative factor in his PTD.

58. The ALJ finds that as a result of Claimant's May 25, 2010, work injury, Claimant has a visible disfigurement to the body consisting of scars on his right lower extremity, as follows: a 3" long and ¼" wide scar on the right knee; a right calf scar 1" and 1/8" wide; a right ankle scar ¾" long and ¼ " wide; two scars on the top of the right foot ½" wide and 1 and 3/4" long and 2" long; and a scar on the right toe 1/4" long. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Legal Principles

1.The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8- 40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A*., 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. An ALJ's factual findings concern only evidence that is dispositive of the issues involved; an ALJ need not address every piece of evidence that might lead to a conflicting conclusion and rejects evidence contrary to findings of fact. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

DIME opinion

4. Claimant contends that he presented clear and convincing evidence to establish that the DIME's determination with regard to impairment rating and causation of the back injury is most probably incorrect.

5. A DIME's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see also Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

6. It is in the ALJ's sole prerogative to assess the credibility of the witnesses and the probative value of the evidence to determine whether the Claimant has met his burden of proof. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). It is within an ALJ's purview to assess the relative weight and credibility of various opinions. See, *Kraft v. Medlogic Global Corp*. *et al*., W.C. No. 4-412-711 (ICAO, Mar. 15, 2001) (citing *Rockwell Internat'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)). Additionally, if an individual expert's opinion contains contradictions or is subject to multiple interpretations, the ALJ may resolve the conflict by crediting only a portion of the opinion, or discrediting the opinion in its entirety. *See Kraft*, W.C. No. 4-412-711; *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). Furthermore, an ALJ may resolve conflicts in the evidence based upon her credibility determinations. *See*, *Brodbeck v. Too Busy Painting and Pinnacol Assurance*, W.C. No. 4-163-762 (ICAO, Apr. 16, 2002).

7. Here, the weight of the credible and persuasive evidence supports the opinion of the DIME examiner, Dr. Hompland, that Claimant's back is not causally related to the work injury and that Claimant suffers no permanent impairment to his back.

8. The evidence established that Claimant was placed at MMI by his authorized treating physician (ATP), Dr. Basse, on August 18, 2014. On August 19, 2014, the ATP assigned Claimant a 9% lower extremity rating. Though the ATP had previously treated Claimant's back based on his subjective complaints, in her final

report, Dr. Basse stated that she was in agreement with previous evaluators that Claimant's low back was not part of this claim.

9. Claimant originally underwent a Division IME with Dr. Hompland on September 17, 2012. The DIME examiner opined that Claimant did not have a spine injury requiring an impairment rating. The DIME assigned Claimant an 11% lower extremity rating. Claimant returned for a follow-up DIME on October 22, 2014. Dr. Hompland assigned Claimant an 18% lower extremity rating and reaffirmed Claimant had not suffered permanent impairment to his back.

10. Two additional physicians, Dr. Beatty and Dr. O'Brien, also found Claimant had not sustained a work-related back injury.

11. The credible evidence established that the only physician that presently asserts Claimant suffered a work-related back injury or permanent impairment is Claimant's IME, Dr. Wunder, who admitted that he had not reviewed Claimant's lumbar MRI, that Claimant was in the hospital at the time Claimant alleged back pain appeared, and that hospital records show Claimant denied back pain while in the hospital, Claimant's back was examined, and Claimant's back examination was normal. Then, the evidence showed that Claimant testified that he felt low back pain a day or two after the work injury. However, hospital records reveal Claimant specifically denied back pain and state that Claimant's back was examined and revealed no spinal injury

12. It is concluded that Dr. Wunder's assessment constitutes a mere difference of opinion. This is especially true considering the fact that the opinion from the Division IME on the low back is supported by Dr. Basse, Dr. Beatty and Dr. O'Brien. Claimant failed to meet his burden of proof of overcoming the DIME opinion of Dr. Hompland by clear and convincing evidence. Claimant reached MMI with 18% lower extremity rating and no permanent impairment to his back on May 27, 2014.

Permanent Total Disability (PTD)

13. Claimant contends that he proved by a preponderance of the evidence that he is unable to earn wages and is therefore permanently totally disabled. The burden is on Claimant to prove entitlement to permanent total disability benefits by a preponderance of the evidence. Section 8-40-201(16.5)(a), C.R.S. A preponderance of the evidence is evidence that leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984). PTD is defined as an employee's inability to earn any wages in the same or other employment. Section 8-40-201(16.5)(a), *C.R.S.* The determination of PTD is based on human factors including the claimant's physical condition, mental ability, age, employment history, education and availability of work the claimant can perform. *Christie v. Coors Transp. Co.*, 933 P.2d 1330 (Colo. 1997). The test for determining the availability of work is whether the employment exists that is reasonably available to the claimant under his or her particular circumstances. *Weld County Sch. Dist. RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998)(holding that factor for consideration

includes commutable labor market or other analogous concept to determine employment reasonably available to claimant).

14. The industrial injury must be a significant causative factor in the claimant's permanent total disability in that it must bear a direct causal relationship between the precipitating event and the resulting disability. *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986).

15. There is little question that Claimant suffered a significant injury to his right foot. However, Claimant can return to work under the restrictions provided by Dr. O'Brien, Dr. Basse, the FCE and/or Dr. Wunder.

16. Dr. Basse initially restricted Claimant to medium duty work with no limitations on standing or walking. Subsequently, based on Claimant's subjective complaints, Dr. Basse's changed the restrictions providing walking and standing restrictions from occasional (33% of the time) up to frequently (66% of the time).

17. Dr. O'Brien confirmed that there is no mechanical or anatomical reason to restrict Claimant. Dr. O'Brien opined that Claimant will not re-injure his foot by walking or standing on it. Dr. O'Brien found that Claimant could walk and stand 100% of the day. Both surgeons on this case, Dr. O'Brien and Dr. Resig, found that Claimant could walk or stand between 2/3rd of the day or up to a full day. All of the doctors including the FCE found that claimant could perform medium duty work.

18. The evidence established that Claimant can drive his children to school, do grocery shopping, lift a gallon of milk, push a shopping cart, drive, and walk without a limp. Surveillance shows Claimant engaged in daily activities inconsistent with the limitations he relayed to Dr. Wunder and Ms. Pickett.

19. Ms. Pickett's vocational evaluation and report are unreliable and unpersuasive given the fact that her assessment relied on Claimant's subjective complaints, limited medical records and a misreading of Dr. Basse's letter dated December 16, 2014, wherein Ms. Pickett mistakenly states Dr. Basse limited Claimant's ability to stand and walk to occasional or 33% of the time. No treating physician has limited claimant's walking and standing ability to occasional. Ms. Pickett also relied upon Claimant's status as an undocumented worker in making her determination that Claimant is not employable. Ms. Pickett also mistakenly stated in her report that Claimant sustained an injury to his right foot and low back restricting his ability to work. Four physicians, including Claimant's ATP, Dr. Basse, and the DIME examiner, Dr. Hompland, found Claimant did not sustain a ratable injury to his back.

20. Mrs. Montoya's vocational assessment and report are more reliable and credible because she had the benefit of additional medical reports and performed her vocational analysis under various sets of restrictions, including a correct reading of Dr. Basse's letter.

21. Mrs. Montoya's report provided several jobs within Claimant's labor market which are within Claimant's permanent restrictions. Ms. Montoya testified that jobs were available consistent with permanent restrictions that were provided by Dr. O'Brien, Dr. Basse and even Dr. Wunder. The types of jobs which were identified as appropriate for Claimant's skill set, even with his limitations of education and Spanish-speaking, were production, assembly, office cleaning, and forklift operation.

22. Claimant is only permanently and totally disabled if he is unable to earn any wages in the same or other employment. Section 8-40-201 (16.5), C.R.S. A claimant is not permanently and totally disabled if he is able to earn some wages in modified or part-time employment. *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995).

23. Ms. Pickett and Ms. Montoya both testified that all employers are now required to use E-verify or a similar verification process to verify the employment eligibility of a person to work in the United States. Claimant's job search records and testimony reveal that the primary reason employers did not hire claimant was his ineligibility to work in the United States, not his work restrictions. Claimant's inability to find work is due to his ineligibility to work in the United States and recently established requirement employers verify the employee's eligibility to work in the United States. Though Claimant may be ineligible for employment due to his status as an undocumented worker, work is available to Claimant in the Denver labor market taking into consideration his physical restrictions, education, language abilities, and skills. The evidence established that Claimant's work injury is not a significant causative factor in his inability to work.

24. As stated above, the determination of permanent total disability benefits is based on the claimant's physical condition, age, employment history, education and availability of work. *Christie*, 933 P.2d at 1330; *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Using these factors, Mrs. Montoya found several suitable employment positions for Claimant. Ms. Montoya's testimony is persuasive. Claimant failed to prove by a preponderance of evidence that he is permanently and totally disabled.

25. Claimant failed to prove that the May 25, 2010, work injury to Claimant's right lower extremity was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

Disfigurement

26. he ALJ concludes that as a result of Claimant's May 25, 2010, work injury, Claimant has a visible disfigurement to the body consisting of scars on his right lower extremity, as follows: a 3" long and ¼" wide scar on the right knee; a right calf scar 1" and 1/8" wide; a right ankle scar ¾" long and ¼ " wide, two scars on the top of the right foot ½" wide and 1 and 3/4" long and 2" long; and a scar on the right toe 1/4" long.

Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed overcome the DIME opinion by clear and convincing evidence. This claim is denied and dismissed with prejudice.

2. Claimant failed to prove by a preponderance of evidence that he is permanently and total disabled. This claim is denied and dismissed with prejudice.

3. Insurer shall pay Claimant $3,000.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: __December 29, 2015__

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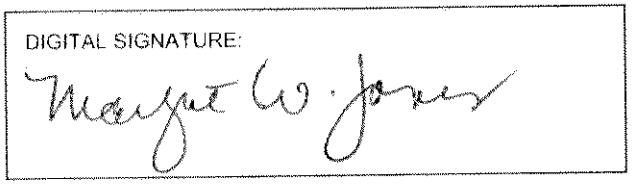
DIGITAL SIGNATURE:



MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

The issues to be determined by the ALJ are:

1. Whether the claimant has proven by a preponderance of the evidence that her medical condition causally related to her February 9, 2011, injury covered by this claim has worsened since she was placed at maximum medical improvement (MMI) on July 22, 2013, by authorized provider (ATP) Timothy Sandell, M.D. and Division IME (DIME) provider William Watson, M.D. so that she is no longer at MMI, and her claim shall be reopened for additional medical benefits due to a change in condition pursuant to C.R.S. § 8-43-303 (1).

2. Whether the claimant has satisfied her burden of proof by showing by a preponderance of the evidence that she needs additional curative medical benefits that are causally related to her injury covered by this claim;

3. Whether the claimant has proven by a preponderance of the evidence that, if her condition causally related to this claim has worsened and she no longer is at MMI, she is entitled to temporary total disability (TTD) benefits beginning April 30, 2015, and continuing.

PROCEDURAL MATTERS

The parties reached the following stipulations:

1. Scott Stanley, M.D. is an authorized provider effective April 30, 2015. The claimant therefore withdrew the issue of a change of provider endorsed for hearing.

2. Respondents reserved the Workers' Compensation medical fee schedule for any medical benefit awarded or ordered.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

1. The claimant sustained an admitted industrial injury on February 9, 2011. The claimant's injury affected her lumbar spine and she also suffered radicular symptoms. As a result of her injury, the claimant underwent a lumbar fusion at the hands of Dr. David A. Wong, M.D.

2. Subsequent to surgery, the claimant continued her treatment with her primary physician, Dr. Timothy Sandell. On February 25, 2013, the claimant reported to Dr. Sandell that she was getting worse. On that date, an EMG was completed, noting the only abnormality was some nerve root irritation, which the doctor found not to be uncommon.

3. Dr. Sandell placed the claimant at Maximum Medical Improvement on July 22, 2013. In so doing, Dr. Sandell noted the July 18, 2013 re-evaluation of Dr. Wong who found that there is no significant surgical lesion and agreed with ongoing rehab and pain management. By report of November 13, 2013, Dr. Sandell addressed permanent impairment and permanent work restrictions. On December 4, 2013, Dr. Sandell noted that despite ongoing symptoms, there are no new treatment options available for the claimant. He continued to monitor her medications. On December 23, 2013, Dr. Sandell notes that the claimant comes in with concerns of worsening symptoms. He noted that while she had previously reported some tingling and numbness in the feet, this has become worse and is described as a burning sensation in the feet. He noted that she felt she was having difficulty walking and has used a cane. He noted that she had gone to the emergency room based on his instructions on December 19, 2013, where a lumbar MRI was performed that showed no acute changes. Dr. Sandell noted that an IME had been scheduled which he felt would be appropriate. In his report of March 18, 2014, Dr. Sandell noted that the claimant complained of six falls since she was last seen and has suffered episodes of not being able to walk.

4. On April 8, 2014, the claimant underwent a Division Independent Medical Examination (DIME) by Dr. William Watson. Dr. Watson stated in the discussions portion that he felt that it was appropriate, as the claimant still had so much pain and disability, to provide a provocative discography at the L4-5, L5-S1 and L3-4 level above. Depending on the results, he opined she may be a candidate for interbody fusion at either L4-5 or L5-S1 or both levels. He further stated that the claimant should return to Dr. Wong after the evaluation. He felt the discography should be done under maintenance care and he also stated that she would not be at Maximum Medical Improvement if it was found that she needed further surgery.

5. Dr. Sandell agreed with Dr. Watson's recommendation for lumbar discogram and possible surgical evaluation. Dr. Sandell referred the claimant to Dr. Mark Meyer for a lumbar discogram on June 2, 2014.

6. On July 31, 2014, Dr. Sandell indicated that he had no idea why the discogram was not approved as he had made the referral. The claimant was noted to have an evaluation with Dr. Wong.

7. The claimant was evaluated by Dr. Wong on August 5, 2014. Dr. Wong opined that other evaluations would be of higher priority than a discography. He recommended an evaluation with a neurologist and a psychological evaluation. The claimant was referred for a neurological evaluation and a psychological evaluation subsequent to her visit with Dr. Wong. On September 24, 2014, Dr. Sandell wrote a letter to Giovonna Maestas, a paralegal with Ritsema & Lyons, outlining that there was really no significant treatment recommendations by the psychologist, Dr. Weingarten. On September 29, 2014, Dr. Sandell made a recommendation for an evaluation by a neurologist. As of November 24, 2014, Dr. Sandell noted the claimant's continued complaints but felt that there was nothing new to offer her in regard to treatment.

8. On or about January 14, 2015, the claimant underwent an evaluation by Dr. Scott Stanley. At that time, Dr. Stanley recommended a CT myelogram as well as an EMG.

9. On a follow up evaluation, Dr. Timothy Sandell made a referral for a CT myelogram and an EMG. On April 30, 2015, Dr. Sandell noted that the claimant had the CT myelogram and the EMG with Dr. Pamela Knight. At that time, noting the new studies, Dr. Sandell referred the claimant to Dr. Stanley for surgical evaluation and likely treatment at his discretion. He further stated that, "Because she is pursuing further treatment and likely another surgery, she is now off Maximum Medical Improvement status until she stabilizes once again," which he anticipated to be post-operatively. On April 30, 2015, Dr. Sandell wrote a letter to Susan Canny, a Strategic Nurse Consultant of Pinnacol Assurance, indicating that we are anticipating another surgery. He further made a referral to Dr. Stanley. On June 4, 2015, Dr. Wong again examined and evaluated the claimant. At that time, he had the CT myelogram and EMG studies completed by Dr. Knight. Dr. Wong was of the opinion that he would need to know whether the finding of Dr. Pamela Knight were chronic or acute. He asked that Dr. Knight clarify acute vs. chronic question in terms of her right L5 changes on the EMG and nerve conductive studies. If more of the right L5 changes are seen, then the more likely that additional decompression might be helpful. Dr. Knight issued an addendum

to her report on August 17, 2015 indicating that the findings on the EMG were sub-acute.

10. The ALJ finds that the claimant has established as more likely than not that her condition has changed and worsened subsequent to MMI. This is based on the medical opinions of Dr. Sandell as well as that of Dr. Scott Stanley and Dr. Pamela Knight. It is also based on the opinion of Dr. Wong. It is noted that for some time after she was placed at MMI Dr. Sandell had nothing further to offer the claimant. However, after further testing and based on a progression of her symptoms post MMI, Drs. Wong, Sandell and Stanley all feel that the claimant would benefit from surgery. A change of her condition is supported by the EMG findings which were noted as sub-acute. The ALJ also credits the testimony of the claimant as to the progression of her symptoms including new symptoms which were noted by Dr. Sandell on December 23, 2013, a point in time subsequent to MMI.

11. The ALJ finds the claimant to be credible in her statements regarding the change in her condition. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to additional and curative care, including surgery, as recommended by Dr. Stanley.

12. The ALJ finds that the claimant has established that it is more likely than not that her case should be reopened as of April 30, 2015.

13. Based on the medical records and evidence submitted the ALJ finds that the claimant has established as more likely than not that she has been temporarily totally disabled from April 30, 2015 and continuing. The claimant testified that she has not earned any wages from at least April 30, 3015 and continuing. Further, the records support that the claimant had physical restrictions at all times which would prevent her from working in her occupation.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado, C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102 (1). Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the

facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); C.R.S. § 8-43-201. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102 (1), C.R.S.

2. The question of whether the claimant met her burden of proof is one of fact for determination by the ALJ. See *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

3. A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark*, 593 P. 2d 792 (Colo. 1979).

4. When determining credibility, the fact finder should consider among other things the consistency or any inconsistencies of the witness' testimony, the fact that the witness' testimony in important particulars was contradicted by other witnesses; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness, and the bias or prejudice of the witness, if any. See *Prudential Insurance Co. of America v. Cline*, 57 P.2d 1205 (1936), CJI Civil 3:16 (2005).

5. After considering all of the evidence, the ALJ concludes that the claimant has met her burden of proof and the ALJ concludes that the claimant has established by a preponderance of the evidence that her condition changed as of April 30, 2015, a time subsequent to Maximum Medical Improvement as contemplated by section 8-43-303(1) C.R.S. and that her case should be reopened thereunder.

6. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. See § 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. As found, the claimant has established by a preponderance of the evidence that treatment and surgery as recommended by Dr.

Scott Stanley is related to this work injury and the ALJ concludes that such is reasonable and necessary to cure and relieve the worker from the effects of her injury.

7. A workers' compensation claimant is eligible for temporary total disability (TTD) benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (2004). This ALJ has concluded that this claim should be reopened as of April 30, 2015. The ALJ further concludes that the claimant's injury has resulted in total disability as of April 30, 2015 and this total disability continues. Therefore the ALJ concludes that the respondents shall pay the claimant temporary total disability benefits starting April 30, 2015 and continuing until terminated by law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. This claim is reopened as of April 30, 2015.

2. The respondent-insurer is responsible for the payment of the claimant's reasonable, necessary, and related medical benefits for her low back injury, including the surgical treatment recommended by Dr. Scott Stanley.

3. The claimant is entitled to temporary total disability benefits from and including April 30, 2015 and continuing until terminated by operation of law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: December 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examiner's (DIME) determination regarding maximum medical improvement (MMI) is most probably incorrect; and

2. Whether Claimant proved by a preponderance of the evidence that Respondents are liable for reasonably necessary and related medical benefits, specifically, repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair.

FINDINGS OF FACT

Based upon the evidence presented at hearing, that ALJ enters the following findings of fact:

1. Claimant was employed by Employer for two and one half years as a commercial truck driver. On February 10, 2012, Claimant sustained an admitted injury to his left shoulder.

2. Claimant was walking around a truck trailer doing a pre-trip check on the vehicle before beginning a driving trip for Employer. As Claimant came around the back of the vehicle and started walking up towards the front, his feet went out from under him when he stepped on some black ice and fell on his left side.

3. Since it was Friday evening when the accident occurred, Claimant could not report the accident because there was no one at Employer to whom to report.

4. Claimant tried to complete his driving trip, which was supposed to go to Grand Junction, Colorado. However, he only made it to Rifle, Colorado. He was having too much pain from his fall. He called the team he was supposed to meet, and they exchanged trailers in Rifle, Colorado.

5. Claimant reported his injury and had his initial medical appointment with authorized treating physician, Michael Ladwig, M.D., on February 14, 2012. The initial diagnosis was contusion of the left humerus.

6. On February 21, 2012, Claimant was referred to have a MRI to rule out occult fracture of the left humerus.

7. The MRI, taken on March 6, 2012, was normal for the humerus, but a MR arthrogram was also done on March 6, 2012, on the left shoulder, which showed a full thickness tear distal supraspinatus tendon with 1 cm retraction, mild osteoarthritic changes AC joint and glenohumeral joint, and subchondral cyst formation at the junction of the rotator cuff tendons.

8. On March 8, 2012, Claimant was referred to Dr. John Papilion, orthopedic surgeon, by Dr. Ladwig. Claimant had his initial appointment with Dr. Papilion on March 20, 2012. Dr. Papilion found that Claimant failed conservative care, and that he was an excellent candidate for arthroscopy subacromial decompression and distal clavicle resection with arthroscopic rotator cuff repair.

9. Claimant had the surgery on June 11, 2012. The post-operative diagnoses were full thickness tear supraspinatus tendon, 2.5 cm, rotator cuff, left shoulder, chronic impingement, left shoulder, acromiculavicular joint arthropathy, left shoulder, and chronic biceps tendon rupture with degenerative tear superior labrum, left shoulder.

10. The operations performed consisted of examination under anesthesia, diagnostic video arthroscopy, arthroscopic debridement of the superior labrum and rotator cuff, arthroscopic subacromial decompression with release of coraccacromial ligament, arthroscopic distal clavicle resection, and arthroscopic rotator cuff repair with 4.7-mm Bic-Swivelocks x 4 with fibertape.

11. Claimant was placed in an abduction pillow shoulder immobilizer after the surgery. Claimant had to keep this device on all the time.

12. Claimant was prescribed Percocet upon discharge from the Lowry Surgery Center where the shoulder surgery was performed. The dosage prescribed was 1 – 2 pills by mouth every 4 – 6 hours, as needed.

13. Initially, Claimant took Percocet a few times during the day, one or two pills, depending upon how he felt. Claimant took at least two Percocet at night. When Claimant took the Percocet during the day, he would lie on the couch and nap.

14. Claimant was sleeping on a couch where he would not be able to roll over onto his left side because his arm was in the sling. In the last couple days of June 2012, Claimant fell at home.

15. On the night of the fall, Claimant took two (2) Percocet before or at bedtime. The Percocet prescription was a part of Claimant's medical care prescribed by an authorized treating physician.

16. Around midnight or one a.m., Claimant got up to go to the bathroom, and in the process of returning to the couch as he took a step to the right, he leaned over and fell on a living room chair and ottoman.

17. Claimant landed on his right side when he fell onto the cushioned chair with padded arms and a padded seat. Claimant came down on his right shoulder and hit his nose against the side of the cushion.

18. Claimant's use of the drug Percocet for pain following the first surgery made Claimant feel tired, groggy, and light headed such that he used the wall to steady himself going to and from the bathroom. Claimant's Percocet usage contributed to his fall in late June.

19. Claimant was wearing the shoulder immobilizer sling at the time he fell. Claimant did not feel any increased symptoms in his surgical left arm and shoulder after the fall or the next day.

20. Claimant began physical therapy on July 18, 2012. Claimant's fall occurred before this first physical therapy appointment. In the initial phase of physical therapy, Claimant progressed well. Claimant started to have problems occur as the physical therapy exercises became more difficult.

21. By September 10, 2012, Claimant was experiencing pain in his joint involving his upper arm. Claimant was also experiencing pain with overhead movement. By September 20, 2012, Claimant was experiencing popping in his shoulder. By September 27, 2012, Claimant reported soreness in the left shoulder that was not like the last physical therapy visit. His pain had increased.

22. By October 1, 2012, the pain was so bad that Claimant needed to sleep in a recliner. At the remaining physical therapy visits on October 4, 2012, October 15, 2012, October 22, 2012, October 25, 2012, October 31, 2012, November 1, 2012, November 5, 2012, November 8, 2012, and November 12, 2012, Claimant continued to report pain problems with certain motions of the shoulder.

23. Claimant had a follow up visit with Dr. Papilion on November 1, 2012, where he found that Claimant was almost five (5) months out from the repair of a tear in the rotator cuff and doing only fair. He noted persistent loss of motion and weakness that had plateaued in therapy.

24. Dr. Papilion ordered a post-surgical MRI, which was done on November 8, 2012. The repeat MRI showed a prior central rotator cuff repair but recurrent focal (12 x 10 mm) full-thickness tear of the anterior distal supraspinatus tendon overlying a suture anchor which may be bent or broken at the end sticking out.

25. Claimant had a follow up visit with Dr. Papilion on November 13, 2012, at which time Dr. Papilion found Claimant was a good candidate for repeat arthroscopy and rotator cuff repair.

26. Dr. Papilion's office scheduled the surgery to occur on December 7, 2012, but Respondents refused to authorize the surgery. In denying the request for authorization for surgery, Respondents relied on a record review performed by Dr. Allison Fall dated December 4, 2012. Dr. Fall opined that she was unable to state within a reasonable degree of medical probability that the second shoulder surgery was related to the work injury. She reasoned that the issue was the fall, which occurred three weeks after the first rotator cuff repair surgery. Dr. Fall opined that if this fall did cause the injury to the rotator cuff repair and caused a recurrent tear, this would be an intervening injury.

27. A second medical record review by J. Raschbacher, M.D. was performed on October 21, 2013. He opined that it would appear that a broken anchor would be more likely consistent with a fall rather than a spontaneous breakage or failure of the suture anchor. He did agree with Dr. Papilion that a certain number of rotator cuff repairs simply fail. He also stated that even if there was not a question of broken materials at the repair site, a fall in and of itself would be enough to cause a re-tear of the cuff. Dr. Raschbacher noted that Claimant's risk of surgical failure was higher because he smokes.

28. Claimant reported to Dr. Papilion that he fell three weeks after the first surgery on the right shoulder.

29. Claimant underwent a Division Independent Medical Examination with Dr. Thomas Fry on August 26, 2014. Dr. Fry assessed Claimant not at maximum medical improvement (MMI). Dr. Fry opined that it was unlikely that the fall three weeks post-surgery on the right shoulder re-injured the left shoulder, and the broken shoulder anchor and high surgical failure rate made it reasonable to assign Claimant's condition to a failure to heal from the original injury and surgery, and therefore a work related condition.

30. Dr. Papilion saw Claimant again on September 12, 2013. He found that Claimant had persistent symptoms with a recurrent tear 10 x 12 mm in

the rotator cuff of his left shoulder. He also noted Claimant was having pain, loss of function, weakness, and that he was unable to lift. He continued to recommend a repeat examination under anesthesia, arthroscopy, and a revision rotator cuff repair of the left shoulder.

31. Dr. Papilion's deposition was taken by Claimant on March 18, 2014. Dr. Papilion was accepted as an expert in orthopedic surgery. Dr. Papilion opined that the type of surgical repair that he performed on Claimant can fail without trauma.

32. Dr. Papilion described the shoulder immobilizer with an abduction pillow that Claimant was required to wear after surgery. Dr. Papilion opined that the anchor may not be broken, it could be dislodged. Dr. Papilion stated that a trauma would not necessarily be required for an anchor to pull out.

33. Dr. Papilion opined that a minor fall like that described by Claimant may have caused the rotator cuff to tear; because of its weakened state, in the early postoperative phase, the doctor opined that the shoulder's weakened state was susceptible to any kind of trauma, in physical therapy or a fall. Dr. Papilion's review of physical therapy notes caused him to credibly opine that the surgical failure occurred in the September time frame during the advancing physical therapy regiment.

34. Dr. Papilion provided letters dated September 26, and October 1, 2013, in response to letters sent by counsel. He found that Claimant was not at MMI. He stated that he was not convinced that the presumed second injury was responsible for the recurrent rotator cuff tear since physical therapy records document the advance of symptoms of pain, weakness, and loss of motion concurrent with the advance of physical therapy. Dr. Papilion opined that "There are percentages of rotator cuff repairs that do not heal and remain symptomatic, that require revision surgery." (Claimant Exhibit, pp. 2 – 3.) Dr. Papilion opined that the need for repair of the recurrent rotator cuff tear is related to the original work injury and subsequent surgical intervention.

35. On January 14, 2015, Dr. Hendrick Arnold opined, consistent with the opinions of Dr. Raschbacher and Dr. Fall, that it is within medical probability that the need for surgery is not related to the workers' compensation injury of February 10, 2012. Dr. Arnold found Claimant at MMI as of July 1, 2012. Drs. Arnold and Raschbacher acknowledged that a percentage of rotator cuff repairs fail spontaneously and require repeat surgery. Additionally, both doctors agree that Claimant needs repeat left shoulder surgery.

36. Dr. Arnold mentioned that medical records in 2013 reflect that Claimant had some substance abuse problems, however, Claimant took a drug test after the accident of February 10, 2012, that was negative. And, Claimant while employed by Employer for two and a half years gave random urine analysis samples that were negative for illegal drugs.

37. Claimant also maintained a commercial driver's license to drive for Employer. This license required physical examinations to maintain. Claimant also took a pre-surgical physical on May 25, 2012, which he passed.

38. The ALJ finds the medical records and the opinions in this case by Dr. Papilion and Dr. Fry are the most credible and persuasive. Drs. Arnold, Fall and Raschbacher presented different theories regarding the cause of the rotator cuff re-tear, however, their opinions do not rise to the level of clear and convincing evidence that the DIME opinion of Dr. Fry on the issue of MMI is most probably incorrect. Respondents failed to present clear and convincing evidence that Claimant's fall at the end of June 2012 was a separate intervening event and therefore not work related.

39. The ALJ finds Drs. Fry and Papilion's opinions are most persuasive that the need for additional surgical repair of the recurrent rotator cuff tear is related to the original work injury and subsequent surgical intervention. Further, Dr. Papilion explains that Claimant's initial tear was large and statistically a significant percentage of repairs do go on to fail for various reasons. Also, the doctor notes that Claimant had increased pain when physical therapy was advanced as corroborated by the physical therapy records and Claimant's testimony of increasing problems as physical therapy exercises progressed.

40. The ALJ finds the DIME opinion of Dr. Fry that Claimant is not at MMI and that the recurrent tear of the left rotator cuff is work related has not been overcome by clear and convincing evidence.

41. The ALJ finds that Claimant proved by a preponderance of the evidence that the rotator cuff repair recommended by Dr. Fry and the repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair recommended by Dr. Papilion are reasonably necessary and related medical benefits to which Claimant is entitled and for which Respondents are liable.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, *et seq.,* C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessary of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents and a workers' compensation case shall be decided on its merits. Section 8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

OVERCOMING THE DIME ON MMI AND CAUSATION

4. In this case, Respondents contend that they presented clear and convincing evidence through the medical reports of Drs. Fall, Raschbacher and Arnold that the MMI and causation determinations of the DIME physician was most probably incorrect. Claimant argues that Respondents failed to sustain its burden of proof to establish that the DIME physician's opinion regarding MMI and causation are incorrect.

5. Sections 8-42-107(8)(b)(III) and (c), C.R.S., provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*.

6. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding

must produce evidence showing it highly probable the DIME physician's finding concerning MMI and causation is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

7. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

8. In this case, Respondents failed to meet their burden of proof to overcome by clear and convincing evidence Dr. Fry's DIME opinion regarding MMI and causation. Specifically, it is concluded that Dr. Fry's determination that Claimant is not at MMI and that the current need for medical treatment and surgery for the left upper extremity is related to the work injury of February 10, 2012, was not overcome by clear and convincing evidence.

9. The evidence presented at hearing by Respondents through the reports of Drs. Raschbacher, Fall and Arnold amount to no more than a difference of opinion among experts and does not rise to the level of clear and convincing evidence. Claimant credibly testified regarding the mechanism of the late June 2012 fall onto a chair at home. Claimant was wearing an immobilizing arm sling and he fell on the right side. Relevant evidence was also revealed by Claimant's physical therapy records which showed Claimant's increasing

pain and loss of function as physical therapy progressed. Furthermore, Dr. Fry, Arnold, Raschbacher, and Papilion agreed that rotator cuff repair surgery fails at a very high incident rate with or without a precipitating traumatic event. Thus, it is concluded that Respondents' failed to establish by clear and convincing Dr. Fry's opinion on MMI and causation is most probably incorrect. Claimant is not at MMI and his need for medical treatment for the left rotator cuff is related to the work injury and is therefore compensable

REASAONBLE AND NECESSARY MEDICAL BENEFITS

10. Respondents contend that Claimant's need for left rotator cuff repair is not reasonably necessary medical treatment. Claimant contends that his need for repair of his left rotator cuff is reasonably necessary and that Respondents are liable for this medical treatment. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

11. The credible and persuasive evidence presented through the medical reports of Dr. Papilion and Dr. Fry established that Claimant proved by a preponderance that the repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair is reasonably necessary medical treatment for which Respondents are liable.

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ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Respondents failed to sustain their burden of proof to establish that the DIME opinion regarding MMI and causation is most probably incorrect.

2. Claimant is not at maximum medical improvement and his need for medical treatment of the left rotator cuff is related to the work injury.

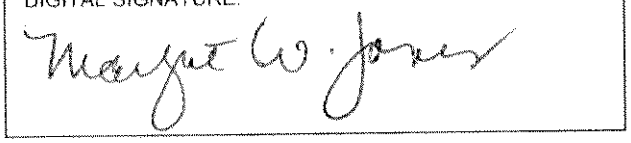
3. Respondents shall be liable medical treatment to cure and relieve Claimant of the effects of the left shoulder recurrent rotator cuff tear. Specifically, Respondents shall be liable for medical treatment in the nature of repeat examination under anesthesia, arthroscopy and revision left rotator cuff repair.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _December 2, 2015_____

DIGITAL SIGNATURE:



MARGOT W. JONES
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#J6P535XS0D0WW1v 11

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a functional impairment contained off the schedule of injuries set forth at C.R.S. § 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

2. Whether the opinion of the DIME physician is ambiguous, and, if so, determination of the true opinion of the DIME physician.

3. Whether the party seeking to overcome the opinion of the DIME physician has proven that the DIME opinion is incorrect.

FINDINGS OF FACT

1. The Claimant worked for Employer as a painter, drywall finisher and wallpaper hanger. His job duties required that he often worked at, or above, shoulder level. He had to lift buckets of paint weighing up to 50 or 60 pounds. On March 22, 2012, the Claimant was up on a scaffold approximately 5 to 5 ½ feet high. The scaffold started to move, catching the Claimant off balance. He started to fall, but fell against a post. His injuries were initially to the right shoulder and upper back. He eventually underwent two surgeries on his right shoulder with little if any permanent benefit. Over the course of his medical treatment for the right shoulder injury, he had slightly over 100 sessions of physical therapy. During most of the nearly two years after the injury, the Claimant worked under restrictions. The principal restriction was to avoid working overhead with the right upper extremity. The Claimant also had other problems using his right shoulder.

2. The Claimant testified his left shoulder began hurting, "about five or six months" after his March 22, 2012 right shoulder injury. The Claimant testified he was, "just doing therapy, and started feeling a stabbing sensation on the shoulder." The Claimant testified the therapy caused problems with his left shoulder because he, "overdid it with the left shoulder, compensating. Even though, doing the machines – I had to compensate the strength that I didn't have in my right arm with my left." In another records, he claims lifting boxes in therapy caused his left shoulder to hurt. The Claimant also testified he was doing more with his left arm and shoulder than he was with his injured right arm and shoulder in therapy and in day-to-day life.

3. The Claimant testified he told his providers about his problems with his left shoulder, but the medical and physical therapy records do not support this statement. When looking at records from five to six months after the March 22, 2012 injury (the time frame when the Claimant testified his left shoulder began hurting because of

therapy and day-to-day overcompensation for his injured right shoulder), there is no mention of any left shoulder problems in the records. Five to six months after the injury is roughly July to September 2012. The records from July to September 2012 show no reports of left shoulder problems or any mention of overcompensation of the left shoulder.

4. The Claimant was initially evaluated by Dr. Steve Danahey on March 26, 2012. At the initial evaluation, there is no mention of any left shoulder issues. Dr. Danahey noted that the Claimant's primary complaint was pain over the right AC joint area and over the superior anterior shoulder. Dr. Danahey noted reduced range of motion limited by pain and discomfort. He initially diagnosed right shoulder and upper back sprain and strain. Dr. Danahey provided work restrictions limiting lifting to 10 lbs. and no repetitive shoulder motion or reaching above the shoulders. The Claimant was referred for physical therapy (Claimant's Exhibit 5, pp. 151-153; Respondents' Exhibit C, pp. 40-42). Dr. Danahey continued to treat the Claimant, but makes no mention of any left shoulder problems from July to September of 2012. On August 14, 2012, the Claimant saw Dr. Danahey and the Claimant had his employer come with to the appointment to review the Claimant's full history and to discuss the treatment options, including a recommended surgery. Dr. Danahey noted that the employer was very supportive of the Claimant's treatment and that they were interested in the Claimant's long-term outcome as he was a valuable employee. Dr. Danahey noted that he spent a significant amount of time discussing the history of the Claimant's injury and treatment thus far. There is no mention of any left shoulder pain or conditions. On September 24, 2012, the right shoulder was evaluated after his September 11, 2012 surgery and the note indicates that everything was good and there is no mention of left shoulder pain at this time either (Claimant's Exhibit 5, pp. 130-138; Respondents' Exhibit C, pp. 54-61). The Claimant continues to treat with Dr. Danahey from October of 2012 through August of 2013 with no complaints of left shoulder pain noted in the medical records from this time period (Claimant's Exhibit 5, pp. 117-129; Respondents' Exhibit C, pp. 62-84).

5. Dr. Hewitt, the Claimant's surgeon, first sees the Claimant on May 7, 2012. From that first visit through his visits in September of 2012, there is no mention of any left shoulder complaints (Claimant's Exhibit 4, pp. 83-89; Respondents' Exhibit D, pp. 104-109).

6. The physical therapy records from Concentra (Claimant's Exhibit 10) in the July through September 2012 time period make no mention of left shoulder pain or problems. The Division IME, Dr. Sharma, reviewed the records from that time period (Claimant's Exhibit 2, pp. 11-12; Respondents' Exhibit A, pp. 9-10) and found no mention of any left shoulder pain or problems.

7. On September 9, 2013 (one year and five months after the March 22, 2012 injury date), the Claimant reported to Dr. Danahey that he had left shoulder soreness that started two weeks earlier (which would have been approximately late-August, 2013). Dr. Danahey stated the Claimant still had "full range of motion with very slight impingement signs noted today on examination." The Claimant told Dr. Danahey

that he thought this might be “an overcompensation issue” (Claimant’s Exhibit 5, pp. 115; Respondent’s Exhibit C, p. 85). On September 30, 2013, Dr. Danahey noted that the Claimant reported more pain and discomfort in the left shoulder and that the Claimant experiences this primarily at night. The Claimant states to Dr. Danahey there was no specific event that occurred to the left shoulder. He wondered if it was gradual overcompensation, but he reported that he was doing nothing at work that aggravated the left shoulder. Dr. Danahey examined the shoulder and the findings were minimal. The Claimant had full abduction, full forward flexion, excellent motion, excellent strength, and no popping or clicking. Dr. Danahey suspected arthritis and took an x-ray (Claimant’s Exhibit 5, pp. 114; Respondents’ Exhibit C, p. 85).

8. On October 21, 2013, the Claimant again wondered on October 21, 2013 whether his exercises in physical therapy might have aggravated the left shoulder. But, his primary complaint was merely increasing discomfort in the shoulder without any aggravation from his work. Dr. Danahey questioned whether worker’s compensation should handle the complaint, since there was nothing specifically tied to work with the left shoulder complaints. However, Dr. Danahey nevertheless referred the Claimant for a physical medicine evaluation to see if there was anything that could be offered under the Workers’ Compensation claim (Claimant’s Exhibit 5, pp. 113; Respondents’ Exhibit C, p. 87).

9. Physical therapy records from around that time provide little support for claimant’s report of an injury in physical therapy. On September 11, 2013, the Claimant reported to his physical therapist that he feels a “little achy” in both shoulders perhaps because of the rainy weather. On September 27, 2013, the Claimant reported to the physical therapist he had not been sleeping well because he stopped taking sleep medication. The Claimant noted he was not comfortable on the left or the right side. On October 21, 2013, the Claimant reported pain on the left shoulder to his physical therapist; he wondered if he “slept too long on it and [that] caused him the pain.” As of October 14, 2013, the Claimant reported “no new complaints.” Then, on November 21, 2013, the physical therapy notes reflect that “patient reports onset of left upper extremity symptoms similar to right, i.e. sharp pain at distal anterior clavicle (Claimant’s Exhibit 9, pp. 285-236).

10. Dr. Aschberger first sees the Claimant on referral from Dr. Danahey on October 24, 2013. Dr. Aschberger notes the history of the Claimant’s injury and subsequent surgeries on his right shoulder and also notes that the Claimant is experiencing “irritation at the left shoulder.” The Claimant reported to Dr. Aschberger that as he has progressed through exercises and therapy, “he has experienced an increase in symptoms at the left shoulder predominantly at the anterior aspect” with trapezial pain but no cervical pain. Dr. Aschberger noted the Claimant was restricted from working above chest height and performed no heavy lifting. The Claimant reported no significant aggravation with his current work activities. Dr. Aschberger diagnosed “left shoulder bursitis with an element of impingement on examination.” He noted that he suspected “some aggravation with the rehabilitation program.” Dr. Aschberger recommended massage therapy and a prescription of Voltaren gel for both of his

shoulders. He also indicated the Claimant is a candidate for a subacromial injection at the left shoulder (Claimant's Exhibit 4, pp. 77-78; Respondents' Exhibit B, pp. 27-28).

11. On November 14, 2013, Dr. Aschberger notes that the Claimant continues to report pain at both shoulders. Dr. Aschberger also notes that he "received a letter from the insurer indicating that the left shoulder was not accepted as compensable under the claim." Dr. Aschberger nevertheless notes that the Claimant has positive impingement testing at the left shoulder and exhibits tenderness, but with good passive range of motion bilaterally (Claimant's Exhibit 4, p. 76; Respondents' Exhibit B, p. 29).

12. On November 18, 2013, the Dr. Danahey notes persistent right shoulder pain after operations on 9/11/2012 and 5/7/2013. He also notes "recent reports of left shoulder discomfort – not currently accepted as part of claims. On physical examination, Dr. Danahey notes that "with respect to the left shoulder, he has full range of motion , but he reports some discomfort at end ranges and has some slight impingement signs." On December 11, 2013, Dr. Danahey notes that he has been asked for clarification with regard to the Claimant's reports that he aggravated his shoulder doing a military press in physical therapy. Dr. Danahey notes that the Claimant described that he sat on a bench and pushed up against the weight with one arm at a time, alternating the arms. As of this office visit, the Claimant was no longer in formal physical therapy, but he was doing and independent exercise program (Claimant's Exhibit 5, p. 110; Respondents' Exhibit C, pp. 91-94).

13. As of December 4, 2013 and December 23, 2013 visits, the Claimant reported continued bilateral shoulder pain to Dr. Aschberger. Dr. Aschberger noted that the left shoulder was not currently authorized for treatment under the Workers' Compensation claim (Claimant's Exhibit 4, p. 72-74; Respondents' Exhibit B, p. 30-31).

14. The Claimant saw Dr. Aschberger on January 20, 2014 for an impairment determination. Dr. Aschberger continued to report irritation of his shoulders bilaterally. With respect to the left shoulder, Dr. Aschberger noted,

> [the Claimant] denies any specific injury. He thought there may be some irritation as a result of single-sided exercises performed while in rehabilitation. He describes some soreness and pain when lying down on the left shoulder at night. There has been no significant crepitation. On review of the records, Dr. Danahey initially noted symptoms in the left shoulder as reported by [the Claimant] with his evaluation on 09/30/13. That was noted to occur especially at night. Nothing specific happened with the left shoulder and the patient was wondering if it is gradual overcompensation. Dr. Danahey noted that [the Claimant] did not report anything at work that seemed to aggravate the shoulder. Examination showed near full range of motion of the right shoulder with minimal findings on the left with full motion and excellent strength and no popping or clicking. X-ray was negative.

On examination at the January 20, 2014 visit, Dr. Aschberger noted that the left shoulder had full range of motion with no crepitation. Dr. Aschberger again noted that he initially saw an element of left shoulder bursitis and impingement and he had recommended a subacromial injection. However, Dr. Aschberger further noted that the left shoulder was not accepted as compensable. In assessing the Claimant's left shoulder, Dr. Aschberger noted that there was probable left shoulder bursitis and that conservative measures were followed. He stated that a corticosteroid would be reasonable to prevent further deterioration of the left shoulder, but did not anticipate any permanent impairment. Dr. Aschberger noted that although the Claimant attributed the left shoulder irritation to overuse, he found "the etiology is likely multifactorial and that certainly can play a role. The left shoulder is not directly linked to the original event, however." In providing an impairment rating, Dr. Aschberger gave a 13% upper extremity rating for the right shoulder (which would convert to an 8% whole person rating) and he provided no impairment rating for the left upper extremity (Claimant's Exhibit 4, pp. 57-68; Respondents' Exhibit B, pp. 32-34).

15. On February 6, 2014, the Claimant underwent an FCE that showed he was capable of working heavy labor for an 8 hour day. The Claimant did report right shoulder pain and the evaluator was able to feel the "click" the Claimant described. The Claimant did not report his left shoulder as having any symptoms to the evaluator, although slight tenderness over the AC joint and AC ligament on the left side were reported on palpation, as compared to moderate tenderness over the right AC joint and AC ligament. The FCE was considered valid (Respondents' Exhibit F)

16. A Final Admission of Liability was filed on February 20, 2014 admitting for a 13% scheduled impairment consistent with the impairment determination by Dr. Aschberger on January 20, 2014 (Respondents' Exhibit H, p. 222).

17. The Claimant objected and, on April 10, 2014, requested a Division IME. In his request for a Division IME, the Claimant requested the following body parts be evaluated: "neck, right shoulder, right shoulder blade and left shoulder" (Respondents' Exhibit H, pp. 262-263).

18. Dr. Sharma was chosen as the Division IME. He prepared a written Division IME report on June 10, 2014 (Claimant's Exhibit 2; Respondents' Exhibit A). Dr. Sharma took a history from the Claimant and performed a very thorough review of the medical records and provided an extensive summary. His review of the medical records is provided in almost 18 pages of detailed notes regarding the Claimant's treatment over the years. The chronology is thorough and demonstrates Dr. Sharma's comprehensive knowledge of the Claimant's complaints and treatment. Dr. Sharma noted the diagnostics, injections, surgeries, physical therapy, medications, and massage therapy provided to him by his treatment providers. Dr. Sharma painstakingly goes through the 99 physical therapy visits the Claimant attended. There is no documentation supporting the Claimant's allegation he injured his left shoulder in therapy. Dr. Sharma documents on August 14, 2013 that the Claimant externally rotated his injured right arm, which aggravated his right shoulder. But there is no corresponding records indicating that the

Claimant injured his left shoulder in therapy (Claimant's Exhibit 2, pp. 8-26; Respondents' Exhibit A, pp.6-24).

19. Dr. Sharma notes that Dr. Aschberger placed the Claimant at MMI on January 20, 2014 and assigned a 13% upper extremity impairment rating which would convert to an 8% whole person impairment rating. Dr. Sharma notes that Dr. Aschberger did not count the left shoulder as part of the impairment and Dr. Sharma specifically noted this "appears to be appropriate" (Claimant's Exhibit 2, p. 25; Respondents' Exhibit A, p. 23). Dr. Sharma also reviewed the report from the functional capacity evaluation (FCE) performed on February 6, 2014, noting that the Claimant's work classification corresponds to a "heavy" classification, and lighter for constant activities (Claimant's Exhibit 2, p. 26; Respondents' Exhibit A, p. 24). Dr. Sharma also notes that Dr. Danahey saw the Claimant on February 6, 2014 and reviewed the impairment rating with the Claimant. Dr. Sharma's report points out that a comment on the left shoulder was made and it was determined that the Claimant would likely benefit from a left shoulder injection "although the left shoulder was not felt to be related to the injury" (Claimant's Exhibit 2, p. 26; Respondents' Exhibit A, p. 24).

20. On physical examination at the Division IME, Dr. Sharma noted that,

> The patient's shoulders are examined. The shoulder appears to have no atrophy in the upper extremity up to the forearm or in comparison to the left side. On palpation, there is a palpable crepitus when the patient moves his shoulder in abduction, adduction, external and internal rotation as well as cross abduction. I do not notice any impingement signs. The Claimant did not report any symptoms of pain when he was moving his shoulder but I found this to be somewhat concerning. However, on further questioning to the patient, the patient reported his symptoms were stable. The patient's range of motion was also measured by myself, Dr. Anjmun Sharma.

(Claimant's Exhibit 2, p. 26; Respondents' Exhibit A, p. 24).

21. Dr. Sharma agreed Claimant reached MMI for his injury on January 20, 2014. He provided an impairment rating of 21% for the upper extremity which would convert to a 13% whole person impairment rating. He noted that "no maintenance therapy is required at this time." Dr. Sharma opined the Claimant "is capable of working full duty with minimal restrictions." The restrictions provided were "to limit overhead lifting with his right and left arms to more than 10 lbs. He specifically noted that the restrictions were provided for 2 reasons: to decrease the risk of reinjury to his "shoulder", not shoulders, which implies he only consider one shoulder as injured. Additionally, Dr. Sharma indicated he thought the restriction would prevent further degeneration of his shoulder apparatus (Claimant's Exhibit 2, p. 27; Respondents' Exhibit B, p. 25). In his report, Dr. Sharma mentions only one injury to one arm when justifying the restrictions. Presumably that is the injury to the right shoulder, since that injury is undisputed. Had he said there were "injuries" to both shoulders rather than an

"injury" only to the right shoulder, such a statement might be some evidence of him finding a causal relationship between the left shoulder and the work injury. But he did not say there was more than one injury. This statement supports other conclusions he reaches in his report finding there was no causal relationship between the left shoulder and the work injury. Dr. Sharma notes there is ongoing degeneration in the shoulder apparatus. Again, this finding of "degeneration" is consistent with a non-work related cause for the left shoulder complaints and consistent with the rest of his conclusions regarding causation of the left shoulder complaints. Dr. Sharma noted the Claimant continued to work for the employer at that time and he felt the overhead lifting restriction was the only restriction necessary for the Claimant to "continue to do well in this capacity."

22. At the time of the Division IME appointment, the Employer and the Claimant worked together well and it was anticipated it would be a long-term relationship. Rather than a statement regarding causation, Dr. Sharma appears to be concerned with the Claimant continuing to work long term for the Employer. He remarks in paragraph 22 of his report (Claimant's Exhibit 2, p. 28; Respondents' Exhibit B, p. 26), the restrictions given "will be the least disruptive to his current position and will maintain him for the long-term." Dr. Sharma's restrictions are consistent with his efforts to maintain the good employment relationship the Claimant had with his Employer, not to assess causation for the left shoulder.

23. On causation, Dr. Sharma had numerous opportunities to state in his report there was a causal relationship between the Claimant's left shoulder complaints and the work injury, but makes no mention that he believes the left shoulder is related. Dr. Sharma's "Final Impressions" are:

- Claimant is at MMI as of February 6, 2014;
- Final whole person impairment of 13%;
- Status post subacromial decompression right shoulder;
- Status post right shoulder rotator cuff repair;
- Status post right shoulder distal clavicle resection;
- Maintenance therapy: None at this time. This patient has achieved maximum medical improvement and requires no maintenance care;
- Permanent work restrictions: The patient will be assigned a 10-pound permanent work restriction overhead lifting only. The patient is capable of working full duty in all other capacities at this time. This will be the least disruptive to his current position and will maintain him for the long-term.

(Claimant's Exhibit 2, p. 28; Respondents' Exhibit B, p. 26).

24. The Respondents filed an amended Final Admission of Liability on July 2, 2014 admitting for a 21% scheduled impairment consistent with the impairment rating provided by Dr. Sharma on June 10, 2014 (Respondents' Exhibit H, p. 222).

25. The Claimant saw Dr. Caroline Gellrick for an IME and she prepared a written report dated July 8, 2015. She performed a thorough medical record review that was summarized over 8 pages in her report (Claimant's Exhibit 2, pp. 33-40). The Claimant reported to Dr. Gellrick that he "is having ongoing problems with the shoulder with pain to the neck, right arm pain and left arm pain." He reported a pain level of 4/10 on the day of this IME (Claimant's Exhibit 2, p. 40). Dr. Gellrick noted that the Claimant reported that his pain was present all day and increased with sitting, standing, exercise, working, housecleaning, pushing, pulling, lifting and sexual activities. She noted that the Claimant's functional history showed that his hobbies and recreational activities have been impacted as he is unable to bike as he used to, work on cars, play with the children, play basketball, fun, fish and work out at the gym. She noted that the Claimant's activities of daily living were also impacted as he has trouble dressing, and yard work and housework aggravate the pain (Claimant's Exhibit 2, p. 40). The Claimant told Dr. Gellrick that at his new job he is able to work at chest level and below and does not have to do overhead painting. He typically paints below shoulder height for half the day and he supervises workers on the job for the other half of the day (Claimant's Exhibit 2, p. 41).

26. On the issue of whether whole person impairment should be considered as opposed to simply an upper extremity rating, Dr. Gellrick explained that,

> [the Claimant] should avoid overhead lift much above 5 pounds. This is going to exacerbate his right shoulder in particular and cause more pain and spasm in the trapezius muscles and the paraspinal muscles of the cervical spine. If one looks at the anatomy of the shoulder and the neck, the shoulder is connected to the neck and the major muscle body in between is the trapezius muscle. Under that, there are layers of muscles, including the supraspinatus and under the shoulder blade itself where this patient has tenderness, subscapularis, infraspinatus and these muscles are tight. When you reach overhead, these muscles are stretched and utilized, for reaching and tie in to the proximal areas of the trunk directly below the cervical spine, whereas the trapezius muscle goes partially into the cervical spine, and mostly the thoracic spine. It should be remembered initially this patient complained of upper thoracic pain and tenderness. Today, it is realized the pain is coming from the shoulder into this region and is manifest as subscapularis pain. Massage therapy notes have shown levator scapulae spasm, supraspinatus, subscapularis, latissimus dorsi, pectoralis minor.
>
> (Claimant's Exhibit 2, p. 44)

27. Dr. Gellrick also opined on the causation of the left shoulder symptoms. She acknowledged that there was "no defined injury status within the records reviewed" (Claimant's Exhibit 2, p. 43). However, she found tightness in the left upper trapezius. She also believed the Claimant has subacromial bursitis which should respond to a steroid injection. Dr. Gellrick stated:

> There is also tightness present, not as severe, with the left upper trapezius. This does affect function for this patient and his work. He is left with permanent work restrictions of avoidance of overhead work for prolonged periods of time. He cannot do repetitious work using his arms above chest level. He cannot lift heavy above chest level because of the pain in the right shoulder and the developing pan in the left shoulder. This examiner agrees with Dr. Aschberger. Through the rehab process, the left shoulder could have been affected, however, it is not a surgical situation. On testing he is intact on the left shoulder, but has pain and tenderness in the region. Most likely this represents subacromial bursitis and would respond to a steroid injection as recommended by Dr. Aschberger.
>
> (Claimant's Exhibit 2, p. 43)

28. The Claimant's credible testimony of pain in his shoulder, trapezius and neck, along with evidence of impairment, including supporting medical records, and the opinion of Dr. Gellrick which is persuasive on this issue, is consistent with functional impairment of the Claimant's right upper extremity as well as functional impairment extending past the arm. The functional impairment is evident in the Claimant's inability or limited ability to lift his arm past a certain point, to engage in actions requiring overhead movement, to reach behind him, or to turn his head. His impairments require him to make adaptations in the performance of work duties due to permanent work restrictions. Therefore, it is found as fact that, as a result of his March 22, 2012 work injury, the Claimant has a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Disability Compensation Based on Scheduled Injury vs. Whole Person Impairment

The claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under§ 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4- 662-3 69 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W. C. No. 4-536-198 (ICAO June 20, 2005).

The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996); *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004).

There is no requirement that functional impairment take any particular form in order to be compensable under § 8-42-107(8)(c), C.R.S. Evidence of pain and discomfort which interferes with the claimant’s ability to use a portion of the body may be considered impairment for this purpose. Aligaze *v. Colorado Cab Co. / Veolio Transportation*; W.C. No. 4-705-940 (ICAO April 29, 2009); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (ICAO November 29, 2004); *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-878 (ICAO November 20, 2001), aff'd., *Pinnacle Glass Co. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA2386, August 22, 2002) (not selected for publication). The courts have held that damage to structures of the "shoulders" may or may not reflect a "functional impairment" enumerated on the schedule of disabilities. *See Walker v. Jim Fouco Motor Company,* supra*; Strauch v. PSL Swedish Healthcare System,* supra, *Langton v. Rocky Mountain Health Care Corp.,* supra*; Price v. United Airlines,* W.C. No. 4-441-206 (ICAO January 28, 2002); *Johnson-Wood v. City of Colorado Springs,* supra.

In this case, the Claimant’s testimony, substantiated by the medical records, including the opinion of Dr. Gellrick, establish that the Claimant is entitled to a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. because he

has suffered a functional impairment to a part of the body that is not contained on the schedule. The Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the arm at the shoulder. Work activities and other activities of daily living cause pain in his shoulders, trapezius, and neck such that the Claimant is unable or limited in his ability to lift his arm past a certain point, to engage in actions requiring overhead movement, to reach behind him, or to turn his head. His impairment requires him to make adaptations in the performance of work duties due to permanent work restrictions. Therefore, the Claimant suffered a functional impairment contained off the schedule of injuries set forth at Section 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

ALJ Clarification of Conflicting or Ambiguous Opinions Issued by the DIME Physician

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). If a Division IME physician issues conflicting or ambiguous opinions, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. Once the ALJ clarifies the ambiguous opinion, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. The Division IME's opinions concerning a claimant's MMI status or permanent medical impairment, therefore, must be overcome by clear and convincing evidence even if the opinion is arguably initially ambiguous. C.R.S. § 8-42-107(8)(b)(III); *Clark v. Hudick Excavating*, W.C. No. 4-524-162 (November 5, 2004); *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). However the heightened burden to overcome the DIME opinion in the statute is only explicitly applicable to the issues of MMI status and permanent medical impairment.

Anjmun Sharma, M.D. acted as the Division IME physician for this March 22, 2012 work injury. The Claimant asserts the Division IME physician's opinion on the relatedness of the left shoulder is ambiguous because (1) Dr. Sharma made the decision to examine the left shoulder; and (2) Dr. Sharma provided work restrictions for left shoulder (in addition to the right shoulder).

As for the Claimant's first contention, Dr. Sharma examined the left shoulder because the Claimant requested that left shoulder evaluation as part of the Division IME process. After the treating physicians placed the Claimant at MMI and provided no impairment rating for the left shoulder, the Claimant requested a Division IME that, in part, asked the Division IME to determine whether the left shoulder complaints were causally related to the work injury. Dr. Sharma complied with that request as part of his Division IME evaluation. There is no authority for the proposition that the mere act of examining a body part renders that body part as causally related to an injury. Such a rule would create absurd results, as the party requesting an evaluation of a body part would unilaterally have almost unlimited control over what body parts are related.

Regarding the second argument, Dr. Sharma ultimately determined it was appropriate to exclude the Claimant's left shoulder from any impairment rating. Dr. Sharma, as the Division IME, exercised his statutory authority to determine the causal relationship, if any, of various complaints by the Claimant to the admitted work injury. The Division IME found the Claimant's left shoulder complaints were not causally related to the work injury. He assigned no impairment for the left shoulder in his Division IME report. He did not list the Claimant's left shoulder as part of his "final impressions" of the Claimant's work related conditions. He agreed with the conclusion of treating providers who found the Claimant's left shoulder complaints unrelated to the admitted work injury. Specifically, Dr. Sharma explicitly agreed with Dr. Aschberger, when he found the left shoulder should not be counted as part of the impairment rating for the work injury. Dr. Sharma states he made the determination to restrict the use of the right and left arms in overhead lifting for two reasons: to decrease the risk of re-injury to his "shoulder", not "shoulders," which implies he only considers one shoulder as injured. Additionally, Dr. Sharma indicated he thought the restriction would prevent further degeneration of his shoulder apparatus. By itself, Dr. Sharma's providing work restrictions that included the left shoulder in this case is not sufficient to create an ambiguity regarding the causation determination.

The ALJ finds Dr. Sharma's causation determination to be unambiguous. Regardless of why Dr. Sharma took the time to evaluate the left shoulder condition and provide an advisory opinion on permanent restrictions, his ultimate conclusion is clear that the left shoulder is not causally related to the claim. However, the ultimate effect of this on the burden of proof is further discussed below.

Challenging an Opinion Rendered by a DIME Physician on Causation

At the hearing and in post-hearing briefs, the Claimant argues that because the dispute in this case only concerns maintenance treatment for the left shoulder, and not MMI nor a challenge to the impairment rating for the left shoulder, the DIME physician's opinion is not entitled to enhanced weight and Claimant need only establish the right to maintenance care for the left shoulder by a preponderance of the evidence and not by the standard of clear and convincing evidence.

C.R.S. § 8-42-107(8)(b)(III) provides for an enhanced burden to overcome the DIME opinion as to MMI and impairment. Yet, the Act does not expressly set forth the standard of probability that a DIME physician must apply when determining whether or not a particular medical condition is causally related to an industrial injury. However, at C.R.S. §8-42-101(3)(a)(I), the statute authorizes the Director of the Division of Workers' Compensation (Director) to establish an accreditation program for physicians treating and rating workers compensation injuries. The ALJ notes that the Director's Level II accreditation curriculum, available on the Department of Labor's website, contains an express discussion of causation determinations by physicians in the section titled "Quality Medical Reporting for Workers' Comp." This section of the curriculum (on p. 22 of the current version on the website) states as follows:

> In workers' compensation the health care provider must discuss the relationship between the patient's diagnosis and the work-related exposure. The assessment process requires estimating the risk of developing the suspected diagnosis as a result of the actual exposure of the individual patient. Legally the physician must be able to state the medical probability, greater than 50 percent likelihood, that the patient's diagnosis and physical findings are related to the work-related exposure.

The ALJ concludes that it is appropriate to defer to the Director's determination of the standard of probability that a DIME physician must apply when determining whether a particular condition is or is not related to the industrial injury. *See Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005) (when construing workers' compensation statute deference should be given to the director's interpretation as the official charged with the statute's enforcement). The Director's interpretation, as reflected in the Level II curriculum, is consistent with the traditional rule in workers' compensation cases that causation must be established by a preponderance of the evidence. *See Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Finally, C.R.S. § 8-42-107(8)(b)(III) only provides for an enhanced burden to overcome the DIME opinion as to MMI and impairment. By omission, all other DIME opinion findings are challenged and overcome by the preponderance of the evidence standard which is the default burden of proof of the Colorado Workers' Compensation Act. Thus, no extra weight is given to the DIME physician's opinion and the Claimant must establish entitlement to benefits by a preponderance of the evidence.

The Claimant testified his left shoulder began hurting, "about five or six months" after his March 22, 2012 right shoulder injury. The Claimant testified he was, "just doing therapy, and started feeling a stabbing sensation on the shoulder." This history is inconsistent with other statements the Claimant made regarding the genesis of his left shoulder complaints. Claimant testified the therapy caused problems with his left shoulder because he, "overdid it with the left shoulder, compensating. Even though, doing the machines – I had to compensate the strength that I didn't have in my right arm with my left." In another records, he claims lifting boxes in therapy caused his left shoulder to hurt. The Claimant testified he was doing more with his left arm and shoulder than he was with his injured right arm and shoulder in therapy and in day-to-day life.

The Claimant testified he told his providers about his problems with his left shoulder, but the medical and physical therapy records do not support this statement. When looking at records from five to six months after the March 22, 2012 injury (the time frame when claimant testified his left shoulder began hurting because of therapy and day-to-day overcompensation for his injured right shoulder), there is no mention of any left shoulder problems in the records. Five to six months after the injury is roughly July to September 2012. The records from July to September 2012 show no reports of left shoulder problems or any mention of overcompensation of the left shoulder.

- Dr. Aschberger, a treatment provider, does not see the Claimant until October of 2013.

- Dr. Danahey, the Claimant's treatment provider from four days following the injury to the present, makes no mention of any left shoulder problems from July to September of 2012.

- Dr. Hewitt, the Claimant's surgeon, first sees the Claimant on May 7, 2012. From that first visit through his visits in September of 2012, there is no mention of any left shoulder complaints.

- The physical therapy records from Concentra (Claimant's Exhibit 10) in the July through September 2012 time period make no mention of left shoulder pain or problems.

The Division IME, Dr. Sharma, reviewed the records from that time period five to six months following the injury and found no mention of any left shoulder pain or problems. Thus, the Claimant's testimony that he began having left shoulder complaints five to six months after his injury and reported those complaints to providers is not supported by the medical and physical therapy records.

The medical records reflect a much later reporting of left shoulder symptoms to the Claimant's providers than per the Claimant's testimony. The first record of any left shoulder complaint did not occur until September of 2013 – more than 17 months after the right shoulder injury and almost a year after when he testified he reported his left shoulder problems to providers.

- On September 9, 2013 (one year and five months after the March 22, 2012 injury date), the Claimant tells Dr. Danahey he has left shoulder soreness that started two weeks earlier (late-August, 2013).

- On September 30, 2013, Dr. Danahey explains the Claimant is primarily feeling the left shoulder pain at night; there is no association with physical therapy. The Claimant states to Dr. Danahey there was no specific event that occurred to the left shoulder. He wondered if it was gradual overcompensation, but he was doing nothing at work that aggravated the left shoulder. Dr. Danahey examined the shoulder and the findings were minimal. The Claimant had full abduction, full forward flexion, excellent motion, excellent strength, and no popping or clicking. Dr. Danahey suspected arthritis and took an x-ray.

- The Claimant again wondered on October 21, 2013 whether his exercises in physical therapy might have aggravated the left shoulder. But, his primary complaint was merely increasing discomfort in the shoulder without any aggravation from his work. Dr. Danahey questioned whether worker's

compensation should handle the complaint, since there was nothing specifically tied to work with the left shoulder complaints. Dr. Aschberger was asked to help with both the right and left shoulder complaints. Dr. Aschberger reported the left shoulder as having "irritation." He believed there might be bursitis in the left shoulder. He "suspected" some aggravation with physical therapy.

- Physical therapy records from around that time provide little support for the Claimant's report of an injury in physical therapy. On September 11, 2013, the Claimant reported to his physical therapist that he feels a "little achy" in both shoulders perhaps because of the rainy weather. He noted he tolerated the prior treatment without any adverse reactions. On September 27, 2013, the Claimant reported to the physical therapist he had not been sleeping well because he stopped taking sleep medication. The Claimant noted he was not comfortable on the left or the right side. On October 21, 2013, the Claimant reported pain on the left shoulder to his physical therapist; he wondered if he "slept too long on it and [that] caused him the pain."

Following evaluations of the left shoulder, which included an x-ray, the treatment providers reached a consensus that it may be possible there was some overcompensation, but there were a myriad of possible causes. Overcompensation as a cause for the left shoulder complaints was a possibility, not a probability. Eventually, Dr. Danahey noted the left shoulder was not related to the current injury.

An impairment rating was provided by Dr. Aschberger, who opined the Claimant's left shoulder irritation had a multifactorial etiology, "The etiology is likely multifactorial and [overuse] can certainly play a role. The left shoulder is not directly related to the original event, however." The records do not support the Claimant's report of left shoulder pain five to six months after the original injury. While there is a "possibility" of work relatedness of the left shoulder, it does not rise to level of a probability.

Based on the findings of Drs. Aschberger and Danahey regarding impairment and permanent impairment, a final admission of liability was filed consistent with their findings. The Claimant objected and requested a Division IME. In his request for a Division IME, the Claimant requested the following body parts be evaluated: "neck, right shoulder, right shoulder blade and left shoulder." Dr. Sharma was chosen as the Division IME. In his June 10, 2014 report, he agreed the Claimant attained MMI for the work related components of his injury on January 20, 2014 with a 21% scheduled rating of the right upper extremity. If converted, the whole person rating was 13%. Respondents filed a final admission consistent with Dr. Sharma's report.

On causation, Dr. Sharma had numerous opportunities to state in his report there was a causal relationship between the Claimant's left shoulder complaints and the work injury, but makes no mention that he believes the left shoulder is related. Dr. Sharma's "Final Impressions" are:

- Claimant is at MMI as of February 6, 2014;
- Final whole person impairment of 13%;
- Status post subacromial decompression right shoulder;
- Status post right shoulder rotator cuff repair;
- Status post right shoulder distal clavicle resection;
- Maintenance therapy: None at this time. This patient has achieved maximum medical improvement and requires no maintenance care;
- Permanent work restrictions: The patient will be assigned a 10-pound permanent work restriction overhead lifting only. The patient is capable of working full duty in all other capacities at this time. This will be the least disruptive to his current position and will maintain him for the long-term.

Dr. Sharma's impairment rating analysis rates only the right shoulder, not the left. There is no evidence Dr. Sharma's rating was inconsistent with the Act, the Rules, or the AMA Guides. He rated the right shoulder for range of motion deficits and for the distal clavicle resection of the right shoulder. Dr. Sharma finds a right upper extremity rating of 21%. As provided for by the Colorado Division of Workers' Compensation, Dr. Sharma provides the whole person equivalent of 13% WP for the 21% right upper extremity rating. Dr. Sharma provides the appropriate worksheet for the right shoulder impairment evaluation. There is no mention of any related left shoulder injury or impairment when performing impairment rating.

Dr. Sharma's review of the medical records is provided in almost 18 pages of detailed notes regarding the Claimant's treatment over the years. The chronology is thorough and demonstrates Dr. Sharma's comprehensive knowledge of the Claimant's complaints and treatment. Dr. Sharma noted the diagnostics, injections, surgeries, physical therapy, medications, and massage therapy provided to him by his treatment providers. Dr. Sharma goes through the 99 physical therapy visits the Claimant attended. There is no documentation supporting the Claimant's allegation he injured his left shoulder in therapy. Dr. Sharma documents on August 14, 2013 that the Claimant externally rotated his injured right arm, which aggravated his right shoulder. But there is no corresponding records indicating the Claimant injured his left shoulder in therapy.

In his Division IME report, Dr. Sharma found no causal relationship between claimant's left shoulder complaints and the work injury. He notes there was no initial injury to the left shoulder. He chronicled the long history of treatment provided to claimant that included diagnostics, therapy, mental health counseling, injections, massage, and two surgeries. In addition to Drs. Danahey and Aschberger, the Claimant was also treated by Dr. Hewitt (surgeon), Dr. Esparza (psych), and various therapists and radiologists. None of the treating physicians found it probable the left shoulder complaints related to the work injury. Some acknowledged the possibility based on the Claimant's reports, but there were causes (the weather, sleeping on it the wrong way) that made causation difficult to associate with the work injury. The PT notes do not support claimant's version of how left shoulder began hurting.

Dr. Sharma thoroughly documented his review of the records. When the treatment providers questioned the relatedness of the left shoulder complaints to the work injury, Dr. Sharma stated he agreed when Dr. Aschberger found the left shoulder should not be part of the claim. Dr. Sharma stated it was "appropriate" to not include the left shoulder. This finding is consistent with causation standards that demand the causation be probably related to the work injury, not possibly related.

The Claimant relies on the opinion of Dr. Gellrick, his IME physician. Dr. Gellrick did not testify at hearing. Like other providers and evaluators, Dr. Gellrick admits it is a possibility the left shoulder is related to the work injury. Dr. Gellrick in her report states she agrees with Dr. Aschberger that the Claimant may have overcompensated with his left shoulder as the right shoulder was being rehabilitated, but her opinion never rises to the level of probability that the left shoulder is related to the work injury. The opinion of Dr. Gellrick is also less persuasive on this issue than that of the treating physicians, Drs. Danahey and Aschberger and the Division IME Dr. Sharma.

At the hearing, the Claimant testified that he believed he overused his left shoulder in therapy and that caused his left shoulder to begin hurt. That may be possible, but he has not established it is probable. The Claimant provided various explanations of why his left shoulder hurt. He told providers it was the poor weather. He indicated he might have slept on it wrong. He thought it was possible he was overcompensating. All of these are possibilities. The medical evidence ultimately demonstrates that the Claimant's theory is only a possibility and not probable as a cause for the left shoulder pain sufficient to meet the burden of proof.

The Claimant has failed to establish that it is more likely than not that his left shoulder condition is causally linked to a work related exposure.

ORDER

It is therefore ordered that:

1. The Claimant suffered a functional impairment contained off the schedule of injuries set forth at C.R.S. § 8-42-107(2), and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

2. The opinion of the DIME physician Dr. Sharma was not ambiguous and he did not find the Claimant's left shoulder to be causally related to the Claimant's work-related exposure.

3. The Claimant failed to establish by a preponderance of the evidence that his left shoulder condition is causally related to his work injury.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 1, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined are as follows:

1. Whether the Claimant has proven that his request for right shoulder surgery recommended by Dr. Hatzidakis is reasonable, necessary and related to his work-related injury of September 18, 2012.

2. Whether the Claimant has proven that he is entitled to temporary total disability benefits from January 22, 2013 through March 31, 2013.

FINDINGS OF FACT

1. The Claimant is a 56 year-old man who sustained an admitted work-related injury on September 18, 2012. The Claimant's job duties are typically to deliver tanks of oxygen to patients who need home delivery. Prior to his injury, the Claimant testified that he could do his job with no restrictions. The Claimant testified that there is an FDA regulation that the delivered tanks have only one label with the name of the correct center on the tank. So, the employees were scraping the labels with the name of an incorrect center off the tanks. The Claimant was lifting tanks to assist with this process. He testified that he was twisting and lifting an oxygen cylinder that weighed about 15 pounds from floor level to about a 4-5 foot height when his right forearm was slashed by a blade from a knife used to remove labels that had been left on a cart shelf near where the Claimant was working. When the laceration occurred, the cylinder the Claimant was lifting was about shoulder height. The Claimant testified that as he felt the pain of the laceration, he jerked his arm away and that he hurt his shoulder as well as sustaining the laceration to the forearm. The Claimant testified that he is unsure about what he did with the oxygen tank that he was in the process of lifting. Upon sustaining the laceration, the Claimant testified that he immediately called out for assistance and a supervisor came over and put gauze on the cut and took the Claimant to the Emergency Department at Good Samaritan Hospital. He further testified that he told the doctor at the ER that he had laceration in his right arm and pain in his right shoulder. The Claimant's testimony on the mechanism of injury and initial emergency treatment is supported by the records in evidence, is credible and is found as fact.

2. The Claimant testified that he next saw Dr. Leonard at the clinic. He testified that he personally marked X's on the pain diagram on his forearm and shoulder. He couldn't fill out the rest of the form himself. The pain diagram in Claimant's Exhibit 1 dated 9/27/12 does have his right forearm and his right shoulder marked with X's which is consistent with the Claimant's testimony. The Claimant testified that he also told Dr. Leonard that he strained his shoulder in addition to the laceration. The Claimant

testified that he was referred to physical therapy for the shoulder, going to the clinic in Lafayette. The Claimant's testimony regarding his initial care with Dr. Leonard is credible and found as fact.

3. The Claimant saw Dr. Leonard on October 18, 2012 for recheck of the laceration on the right arm. The Claimant reported that, since his initial visit at Dr. Leonard's clinic on October 4, 2012, the Claimant had started therapy and was feeling a little better. The Claimant reported "pain over the anterior aspect of the shoulder with exercises. Physical examination confirmed mild tenderness to palpation over the anterior lateral shoulder region of the Claimant's right and left shoulders. Dr. Leonard noted "little, if any, tenderness while testing for impingement." Dr. Leonard suspected that the Claimant may have strained his biceps tendon and recommended continuation of supervised physical therapy. Dr. Leonard imposed a 10 pound lifting restriction for the right upper extremity (Claimant's Exhibit 1).

4. The Claimant saw Dr. Leonard again on November 15, 2012 for a recheck. Dr. Leonard noted the Claimant's right shoulder was improving and that he was moving his shoulder more easily. Examination showed "little, if any, tenderness while testing for impingement" and good rotator cuff strength. Dr. Leonard recommended continuation of physical therapy for the shoulders. He also recommended work restrictions limiting lifting to 15 pounds with the right upper extremity (Claimant's Exhibit 1).

5. On December 13, 2012, the Claimant saw Dr. Leonard again for a recheck appointment for the right arm and the Claimant reported no change in his symptoms. Dr. Leonard noted that he suspected "pectoralis major and minor strain." Dr. Leonard recommended an MRI with contrast for the right shoulder and noted that further treatment, which may include an injection or further therapy, would be based on the MRI. The 15-pound lifting restriction for the right upper extremity was continued (Claimant's Exhibit 1).

6. Although Dr. Leonard recommended a shoulder MRI at the visit on December 13, 2012, and further treatment would be based in part on those results, the Insurer declined to authorize the MRI, and instead sent the Claimant to Dr. Timothy Pater, a colleague of Dr. Leonard. Michael Ketter a senior claims consultant for Insurer had reviewed some of Dr. Leonard's medical records and physical therapy reports and determined that Dr. Leonard had not sufficiently established causation. Therefore, without having another physician review the MRI request from Dr. Leonard, the request was denied.[1] This denial proceeded to a hearing and ALJ Harr found that Mr. Ketter, and not Dr. Leonard, referred the Claimant to Dr. Pater for the MMI determination and impairment rating. Dr. Pater had only assessed the Claimant's forearm laceration, and

[1] In Dr. Lesnak's August 13, 2014 medical record review, he noted that Dr. Allison Fall later performed a Rule 16 review on the request for an MRI on September 24, 2013 and she stated, "in my opinion, Dr. Leonard"s request for a right shoulder MRI is reasonable and necessary based on the initial ER complaints and the ongoing complaints about the right shoulder area despite conservative treatment" (Respondents' Exhibit A, p. 18).

declared that the Claimant was at MMI with zero impairment on February 25, 2013. Based upon this opinion, the Insurer filed a Final Admission of Liability on March 20, 2013. The Claimant proceeded to challenge the FAL, and a Hearing was conducted on July 31, 2013. ALJ Harr ultimately determined that Dr. Pater was not an authorized physician, having not been referred in the ordinary course of treatment, and that Respondents could not rely on his declaration of MMI (Respondents' Exhibit F). However, for the purposes of determining eligibility for temporary disability benefits in this hearing, the date Dr. Pater placed the Claimant at MMI is still relevant.

7. On October 17, 2013, the Claimant underwent an MRI. The MRI report was not offered into evidence by either party. However, in his medical record review, Dr. Lesnak quoted directly from the report which stated, "Partial thickness articular sided rim rent type tear of the distal supraspinatus and infraspinatus tendons. No full thickness tear visualized, mild subacromial/subdeltoid bursitis. SLAP type glenoid labral tear with full thickness chondral loss at the anterior central glenoid cartilage. Osteoarthritis which is moderate to severe at the acromioclavicular articulation and mild to moderate at the glenohumeral articulation. There is anterolateral downsloping of a type 2 anterior acromion with undersurface spurring noted. An element of impingement is not excluded" (Respondents' Exhibit A, p. 19). After reviewing this MRI report with the Claimant, Dr. Leonard recommended that the Claimant see Dr. Cooney, who ultimately performed a subacromial injection on January 7, 2014 and a fluoroscopically guided intraarticular glenohumeral injection on February 24, 2014. Dr. Cooney noted that if the second injection did not provide benefit, then a surgical intervention should be considered (Respondents' Exhibit A, p. 19).

8. The Claimant testified that following the work injury and after his laceration had healed, he continued to work for his Employer with a weight restriction for lifting. He performed modified duty for approximately 4 months, working within his restrictions. The Claimant testified that in January 2013, he was told by his supervisor that he could no longer work light duty but that he couldn't work full duty until he received a medical release. The Claimant testified that Dr. Pater placed him at MMI and he brought paperwork to his Employer and went back to full duty work in March of 2013. Although the Claimant disputed the finding of MMI, he nevertheless had returned to work and no longer suffered a wage loss from that point forward. The Claimant's testimony generally corresponds to medical records in evidence on this issue and the August 12, 2013 Order issued by ALJ Harr, and his testimony on this issue is found as fact.

9. The Claimant testified that he is currently employed as a truck driver for a different employer. His current job duties include driving a truck, and loading and unloading pallets.

10. Claimant testified that his current authorized treating physician (ATP) is Dr. Mason and that she referred him to Dr. Hatzidakis to evaluate right elbow and shoulder pain. Claimant saw PA Fenton and Dr. Hatzidakis at Dr. Hatzidakis' office on two appointments in February and March 2015 (Claimant's Exhibit B, Respondents' Exhibit 3).

11. The Claimant testified that he currently experiences right shoulder pain and his current right shoulder symptoms are that he feels like it is “pinched” and “fatigued.” He testified that he can neither move his arm to the side or above shoulder height, nor can he move his arm towards his back. The Claimant testified that he can push and pull with his right arm. The Claimant testified that his current work as a truck driver requires job duties consisting of moving pallets and office products, requiring pushing and pulling. The Claimant testified that he wants the surgery requested by Dr. Hatzidakis because he feels it is his only option, based in the fact that he has not had relief from medications, physical therapy and two injections. He testified that he has lived with the pain for the last 3 years and it is not getting better.

12. On August 13, 2014, the Claimant first saw Dr. Lawrence Lesnak for an Independent Medical Evaluation. Dr. Lesnak prepared a thorough written report, found at Respondents’ Exhibit A, pp. 220-229. Dr. Lesnak took a history from the Claimant and discussed the Claimant’s current symptoms. The Claimant complained of “constant pain involving his right anterior shoulder and occasional pain radiating into his right medial upper arm” along with “intermittent ‘tightness’ involving his right volar forearm.” The Claimant reported symptoms increased with any type of overhead activities with the right upper extremity. Dr. Lesnak prepared an extensive summary of his review of medical records from May of 2005 – February of 2014. Although Dr. Lesnak noted a significant history of documented low back pain from 2005 to 2012, there is no record of right shoulder symptoms prior to the Claimant’s 9/18/2012 work injury. Dr. Lesnak also conducted a physical examination and noted the Claimant had “giveway weakness secondary to pain when testing his right shoulder abductor musculature, right shoulder flexor musculature, and right elbow flexor musculature.” Dr. Lesnak also noted tenderness to palpation over the Claimant’s right anterior shoulder in the area of his right proximal biceps brachia tendon. Dr. Lesnak concluded that the Claimant’s ongoing symptoms “correlate with a right biceps tendinitis” but he did not find clinical evidence of right rotator cuff impingement signs or symptomatic intraarticular right shoulder pathology or symptomatic right AC joint pathology. Dr. Lesnak did not find the Claimant a candidate for any type of surgical intervention directed at his right shoulder. Although, Dr. Lesnak did find that consideration of a one-time diagnostic/therapeutic right proximal biceps tendon sheath injection had merit prior to placing the Claimant at MMI. He opined that “any further treatments at this point in time should only be directed at his right proximal biceps tendon as it would pertain to the occupational injury of 09/18/2012” (Respondents’ Exhibit A, pp. 220-229).

13. On December 15, 2014 the Claimant saw Dr. Mason for his initial evaluation with her office. Dr. Mason notes the Claimant suffered a right forearm laceration that has healed and right shoulder pain. Dr. Mason notes the Claimant continues to complain of forearm symptoms and pain in the anterior shoulder. On physical examination, Dr. Mason noted that the Claimant was “able to give full resistance of supraspinatus and deltoid but he describes pain in the shoulder. Impingement signs are weakly positive times one. Speed’s test is positive. Maximum tenderness in the bicipital groove and, to a lesser extent, over the common rotator cuff

tendon." She assessed the Claimant with probable bicipital tendinitis with some evidence of rotator cuff involvement. Dr. Mason reviewed prior medical records and performed a physical examination. She noted that the Claimant received a shoulder injection and four physical therapy visits that did not improve the condition. In fact, the Claimant reported the physical therapy was too painful to continue. The Claimant advised Dr. Mason he had not received any medical treatment since a 2/24/14 follow up visit with Dr. Cooney, the doctor who provided a subacromial injection on 1/9/14. Dr. Mason referred the Claimant to Dr. Hatzidakis and noted the Claimant was not enthusiastic about medications or invasive options such as injections or surgery (Claimant's Exhibit 2, Respondents' Exhibit E, pp. 49-52).

14. The Claimant saw Dr. Mason again for a follow up examination on January 12, 2015. Dr. Mason noted that the Claimant was awaiting authorization for an appointment with Dr. Hatzidakis. The Claimant reported that the Claimant continued to report anterior shoulder pain and was able to lay on the shoulder only for short periods. The Claimant reported that driving was painful and keeping his arm extended for any reason is painful. The Claimant stated that he had trouble tolerating the MRI and that he feels things are getting worse with time with a current pain level of 7/10 (Claimant's Exhibit 2; Respondents' Exhibit E, p. 46).

15. On February 27, 2015, the Claimant saw Duane Fenton, PA-C at the office of Dr. Armodios Hatzidakis for evaluation of right shoulder and right elbow pain. Mr. Fenton performed a physical examination and noted that a right shoulder MRI from October 20, 2013 showed a partial-thickness articular surface rotator cuff tear. Mr. Fenton recommended an MRI with arthrogram to evaluate the rotator cuff, labrum and biceps tendon (Claimant's Exhibit 3; Respondents' Exhibit B, pp. 29-31).

16. The Claimant underwent an MRI of his right shoulder on March 11, 2015, at the request of Dr. Hatzidakis. The MRI report documented a type I acromion with moderate lateral downward sloping and noted a small partial thickness tear of the rotator cuff. It also identified early infraspinitis tendinosis and mild to moderate impingement anatomy (Claimant's Exhibit 4; Respondents' Exhibit C).

17. The Claimant saw Duane Fenton, PA-C from Dr. Hatzidakis' office again on March 24, 2015 and Dr. Hatzidakis also evaluated the Claimant and recommended the treatment plan. After review of the shoulder MRI from March 11, 2015, and a long discussion with the Claimant about his treatment options, Dr. Hatzidakis recommended surgical intervention and the Claimant advised that he was seriously considering the recommended surgery (Respondents' Exhibit B, pp. 24-25).

18. The Claimant saw Dr. Mason again on March 25, 2015 and she noted that Dr. Hatzidakis was recommending a subacromial decompression. Dr. Mason noted the Claimant continued to be tender to palpation over the extensor bundle with some tenderness over the bicipital groove. She opined that "impingement signs are strongly positive times two" with ongoing tenderness over the AC joint and some myofascial spasm in the trapezius. Dr. Mason assessed "right shoulder impingement and bicipital

tendinitis, which has become more symptomatic over time." Dr. Mason opined that "it does seem reasonable to go forward with surgery at this point as the patient has had a full trial of conservative care" (Claimant's Exhibit 2; Respondents' Exhibit E, p. 40).

19. The Claimant saw Dr. Mason again on April 23, 2015 and she noted that she had reviewed a note from Dr. Hatzidakis' PA that the proposed surgery was denied. Dr. Mason continued to asses "right shoulder impingement and bicipital tendinitis, more symptomatic over time, with a partial rotator cuff tear." Dr. Mason opined that she is "in agreement with him going forward with the surgery given that his symptoms have not remitted with a full trial of conservative care. I am not sure what the basis for the denial is…." (Claimant's Exhibit 2; Respondents' Exhibit E).

20. The Claimant saw Dr. Mason on June 25, 2015 for a follow up examination. On physical examination, Dr. Mason again noted, "impingement sign is strongly positive times two" with tenderness noted over the common rotator cuff tendon, bicipital groove and AC joint. She found no muscle atrophy but noted that "rotator cuff tests are somewhat provocative of pain, particularly supraspinatus." Dr. Mason also noted that the Claimant informed her that he had an IME scheduled but was not sure what type of doctor he was seeing for this (Claimant's Exhibit 2).

21. The Claimant saw Dr. Lesnak again for a reevaluation IME on July 21, 2015. Dr. Lesnak's IME report dated July 21, 2015 is found at Respondents' Exhibit A, pp. 3-9. Dr. Lesnak reviewed new medical records and performed another physical examination and interview. This July 21, 2015 report documented that rotator cuff impingement signs were negative. Dr. Lesnak reported that the Claimant had tenderness to palpation over his right anterior shoulder in the area of his right proximal biceps tendon but had no tenderness to palpation throughout the right suprascapular and scapular region, the glenohumeral joint or the AC joint. The July 21, 2015 IME report documented that the Claimant had undergone two corticosteroid injections on the shoulder, subsequent to an October 2013 MRI. Dr. Lesnak noted that the Claimant had a non-diagnostic response to these injections. Dr. Lesnak documented in the July 21, 2015 IME report that when he first examined the Claimant at the August 13, 2014 IME, the Claimant presented with clinical evidence of right proximal biceps tendinitis without clinical evidence of any other type of shoulder pathology, including any signs of impingement.

22. Dr. Lesnak noted in the July 21, 2015 IME report that the Claimant was referred to Dr. Hatzidakis' office by Dr. Mason for consideration of an ultrasound guided proximal biceps tendon sheath injection. Dr. Lesnak noted that upon examination at Dr. Hatzidakis' office, what Dr. Lesnak opines was a very incomplete history was obtained from the Claimant prior to Dr. Hatzidakis or his PA recommending an MRI. Dr. Lesnak also documented that the Claimant returned to Dr. Hatzidakis' office for follow-up with the PA, who again, per Dr. Lesnak's opinion, did not obtain a complete history, but then recommended right shoulder surgery based on the MRI which reported unchanged right shoulder joint pathology. Dr. Lesnak noted that the right biceps injection requested by Dr. Mason was not performed (Respondents' Exhibit A, p. 8).

23. Dr. Lesnak opined in the July 21, 2015 IME report that the Claimant had a non-diagnostic response to two steroid injections in the right shoulder. He opined that this would confirm that the Claimant's current symptoms are not stemming from any pathology involving the right shoulder joint, including a small partial thickness tear with tendinosis and osteoarthritis. He further opined that therefore, the Claimant is not a candidate for surgery directed at the right shoulder for treatment of a non-symptomatic reported MRI pathology. Dr. Lesnak opined that there is no evidence that any of the Claimant's right shoulder joint pathology is related to the September 18, 2012 work injury. He stated that this was due to the fact that no treating physician noted any evidence of shoulder impingement or symptomatic right shoulder joint pathology for at least five months subsequent to the date of the work injury. Dr. Lesnak specifically noted that the Claimant's most recent ATP, Dr. Mason, documented that Claimant had no significant evidence of impingement from the time of her initial evaluation on December 15, 2014 through February 2015 and only noted it beginning in March 2015, two and half years after the date of injury (Respondents' Exhibit A, p. 9).

24. The Claimant saw Dr. Mason again on July 30, 2015 for a follow up examination. Dr. Mason noted that the Claimant underwent an IME with Dr. Lesnak but has not seen the report yet. Dr. Mason expressed some disappointment that the IME was not with an orthopedic surgeon since the question was surgical. On physical examination, Dr. Mason noted "Neer and Hawkins-Kennedy impingement signs are both present" with tenderness over the common rotator cuff tendon, bicipital groove and AC joint. She also noted "quite a bit of tightness in the trapezius and somewhat of a forward rotation of the shoulder." She noted a "painful arc" between approximately 60 and 120 degrees. Dr. Mason continued to assess, "right shoulder impingement, bicipital tendinitis and partial rotator cuff tear with surgery recommended but not yet authorized" (Claimant' Exhibit 2).

25. Dr. Mason testified in a prehearing deposition on October 5, 2015. Dr. Mason testified that she began treating Claimant on December 15, 2014 and she had reviewed medical reports from Dr. Lesnak as well (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp 4-5). She testified that she was unaware of Claimant having any prior shoulder problems prior to his date of injury (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 6).

26. Dr. Mason testified that she performed a physical examination of Claimant's shoulder and found no instability. She stated that her initial assessment was probable bicep tendonitis and possibly rotator cuff involvement (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 7-8). She testified that she referred Claimant to Dr. Hatzidakis who referred Claimant for a second MRI of the right shoulder. Dr. Mason testified that it was her opinion that the tendonitis and Claimant's anterior shoulder pain began with the work-related injury because these structures are in close proximity to each other. She further opined that Claimant does have some pain coming from the biceps tendon due to the work related injury (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 9).

27. Dr. Mason testified that it was her understanding that PA Fenton from Dr. Hatzidakis' office was more concerned with the rotator cuff tear and the possibility of impingement (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 10-11). Dr. Mason testified that Dr. Hatzidakis had recommended arthroscopic surgery, which is expected to be rotator cuff repair and subacrominal decompression. Dr. Mason testified that she agrees with this recommendation (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 13).

28. Dr. Mason stated that the second MRI of the right shoulder, performed in March 2015, demonstrated normal biceps, a small partial tear of the supraspinatus, some impingement, and a little arthritis (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 12). Dr. Mason testified that upon examination, the Claimant did have a positive Speed's test, which assesses biceps tendon stress. She further testified that Claimant was not particularly tender over the AC joint and that the AC joint provocation tests were not positive (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 8). She also testified that the Claimant has had clinical impingement signs and the MRI showed impingement anatomy, so she is in disagreement with Dr. Lesnak on this point (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 14-16).

29. On cross-examination, Dr. Mason testified that the Claimant was averse to both medications and physical therapy and that the physical therapy actually made his pin worse. She noted that the Claimant had four physical therapy sessions and saw no improvement, so she did not recommend that the Claimant continue with physical therapy (Depo. Tr., Dr. Kristin Mason, October 5, 2015, p. 21). Dr. Mason also agreed that the Claimant had undergone a subacromial injection with Dr. Cooney and that there was no benefit (Depo. Tr., Dr. Kristin Mason, October 5, 2015, pp. 23-24).

30. Dr. Lesnak testified at the hearing regarding his IMEs and record reviews performed in this case. He testified that the Claimant reported to him that he sustained an acute work-related laceration to his right forearm while moving an oxygen cylinder. Dr. Lesnak noted that the Claimant went the ER for the laceration. He further noted that the medical records document that the Claimant reported some tenderness reported by Claimant in the front part of the shoulder. Dr. Lesnak testified that nine days after the date of injury, the Claimant's then ATP, Dr. Leonard, noted that the laceration was healing and that Claimant had also suffered a strain to his biceps tendon. Dr. Lesnak testified that the biceps tendon and chest muscles are outside of the shoulder joint. Dr. Lesnak further testified that about 6 weeks later Dr. Leonard had noted the forearm and front of the shoulder symptoms improving. Dr. Lesnak testified regarding the Claimant's MRIs . He testified that there was no presentation of an abnormal biceps tendon on an MRI. However, Dr. Lesnak did agree that an MRI may be normal and but an individual can still have symptoms stemming from the biceps tendon. Dr. Lesnak also testified that the MRI showed a partial thickness tear of the distal supraspinatus and infraspinatus tendons. Although, he also testified that current medical literature states that 75% of the general population over age 50 have partial rotator cuff tears. In discussing the March 11, 2015 MRI, Dr. Lesnak explained that the documented MRI findings were

inconsistent because the radiologist noted “impingement anatomy,” but that there was no evidence of impingement in the MRI and furthermore, that would not be something that a radiologist would see on an MRI because the MRI described type 1 acromion, which is anatomy not associated with impingement syndrome. He noted that if there was type II or type III acromion shown, then this could possibly lead to impingement. Dr. Lesnak testified that Claimant’s 2015 MRI noted a type I acromion which does not indicate impingement, even though a radiologist noted impingement anatomy.

31. Dr. Lesnak testified that Dr. Leonard had overseen injection therapy but the Claimant saw no improvement in his symptoms from those injections. Dr. Lesnak testified that there was diagnostic information obtained from those injections because the Claimant had no relief from them. Essentially, the lack of relief was an indicator that there were no symptoms generated from inside the shoulder, where the injection was performed.

32. Dr. Lesnak noted that the Claimant presented at the IME complaining of a constant soreness in the right anterior shoulder region that was worsened with prolonged driving activity. Dr. Lesnak further testified that Claimant also reported increased pain when attempting to move his arm in front of him across his body. Dr. Lesnak had documented in his IME report that it was his opinion that the Claimant presented with clinical evidence of a proximal right biceps tendinitis without clinical evidence of right rotator cuff impingement signs or symptomatic right AC joint pathology. He further testified that Claimant had no clinical evidence of symptomatic intra-articular right shoulder joint pathology and had a previous non-diagnostic response to the corticosteroid injection trials performed by Dr. Cooney. He testified that the Claimant had two intra-articular joint injections performed and had no diagnostic responses, noting that the injections did not numb or take away Claimant’s reported symptoms. He testified that it was his opinion that all of this indicated that the symptoms were not coming from those joints. Dr. Lesnak testified that there was no evidence of impingement and had a negative diagnostic response to the shoulder injections. He further testified that the Claimant is working full duty but that the Claimant perceives himself as functionally limited. Dr. Lesnak testified that during both of his examinations of the Claimant, he opined that the symptoms were coming from outside the shoulder joint. Dr. Lesnak testified that it was his opinion that, within a reasonable degree of medical probability, the proposed shoulder surgery is not indicated and that it would not help the Claimant’s condition because the symptoms are not coming from the shoulder joint. Dr. Lesnak testified that the current medical literature does not recommend surgical intervention for partial tears. Dr. Lesnak’s opinion regarding the lack of evidence of impingement is at odds with the opinions of other treating physicians in this case and the MRI reports. Additionally, Dr. Cooney, the physician who performed the injections noted that if there was no response, then surgical intervention should be considered, which contradicts Dr. Lesnak’s opinion that the lack of benefit from the injections was a contraindication for surgical intervention.

33. On cross examination, Dr. Lesnak testified that the Claimant’s mechanism of injury is not consistent with the shoulder injury on the MRI. He opined that when a

person is lifting a 15-pound oxygen tank at shoulder level, a person would not put any significant stress on the rotator cuff. He stated that stress or injury to the rotator cuff would only occur if there was lifting above the shoulder level or overhead. He testified that the Claimant is too tall for the injury to occur with him lifting above the shoulder. He opined that as the Claimant reported the mechanism of injury, the Claimant would only have been lifting at or below shoulder level. Dr. Lesnak opined, that based on the Claimant's reported mechanism of injury, if anything was stressed during the work accident, it would be the Claimant's biceps tendon, not his shoulder joint or rotator cuff. Dr. Lesnak stated that if anything, the Claimant would have been extending or flexing his elbow because he was lifting, and that would stress the biceps tendon. Dr. Lesnak testified that he had previously recommended an injection to the right proximal biceps tendon but was unsure what he would currently recommend that because he is not sure if it would help given the amount of time that has passed. He does disagree with Dr. Mason that the Claimant needs a rotator cuff repair with subacromial decompression.

34. In considering the opinions of Dr. Mason and Dr. Lesnak, the ALJ finds the opinion of Dr. Mason, as further supported by the medical records from the office of Dr. Hatzidakis and the Claimant's MRI imaging, to be more persuasive than the opinion of Dr. Lesnak in this case.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits – Related and Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting

condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the “Medical Treatment Guidelines”) when furnishing medical aid under the Workers’ Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff’d Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

In this claim, there was no persuasive evidence presented of the Claimant being symptomatic in his right shoulder prior to his reported work injury on September 18, 2012. As stated above, the Claimant was performing his work duties for his Employer which provides home oxygen equipment and supplies. The employees were scraping labels off of oxygen tanks. The Claimant was moving oxygen tanks that were having old labels scraped off, moving them from the bottom shelf of a cart and pivoting around to place them on a counter up at a higher level. As the Claimant was lifting one of the tanks he felt that his right arm was being sliced open, and he abruptly jerked his arm away from the blade while releasing the tank.

After Claimant was seen at the Emergency Room, he went to Front Range Orthopedic on September 27, 2012. The intake form filled out by the Claimant shows demarcations of pain on his right forearm, the site of the laceration, and his right shoulder. On October 18, Dr. Leonard stated that the Claimant likely strained his shoulder at the time of injury, and limited Claimant to 10 pounds lifting. Physical therapy was done. On November 15, Dr. Leonard increased lifting to 15 pounds, assessment of right shoulder bursitis and right forearm laceration. Dr. Leonard recommended a shoulder MRI at the visit on December 13, 2012, and indicated further treatment would be based in part on those results.

The Insurer declined to authorize the MRI, and instead sent the Claimant to Dr. Timothy Pater, a colleague of Dr. Leonard. Dr. Pater only assessed the Claimant's forearm laceration, and declared that the Claimant was at MMI with zero impairment. Based upon this opinion, the Insurer filed a Final Admission of Liability. The Claimant proceeded to challenge the FAL, and a Hearing was conducted on July 31, 2013. The ALJ determined that Dr. Pater was not an authorized physician, and that Respondents could not rely on his declaration of MMI. Meanwhile, the Claimant lost time from work due to the continuing restrictions from Dr. Leonard beginning in January of 2013, and he did not return to work until he obtained a full duty release in March of 2013.

Following the Order from the ALJ on the issue of MMI and striking the FAL, the Claimant resumed medical treatment for this work injury, and received two injections at Front Range Orthopedic Center. His care was then transferred to Kristin Mason, M.D. On December 15, 2014, Dr. Mason assessed the Claimant with probable bicipital tendinitis, with some evidence of rotator cuff involvement as well. She referred the Claimant to Dr. Hatzidakis, an orthopedic surgeon. The Claimant was evaluated at Western Orthopedics on February 27, 2015. The assessment was traumatic right shoulder pain with rotator cuff strain, versus possible rotator cuff tear and subacromial impingement. An MRI with arthrogram was recommended for further imaging of the damage. On March 24, 2015, Dr. Hatzidakis reviewed the MRI, and he recommended that the Claimant consider surgery.

The medical benefits issue in this case generally comes down to consideration of the contrasting opinions of Dr. Mason and Dr. Lesnak. In considering the opinions of Dr. Mason and Dr. Lesnak, the ALJ finds the opinion of Dr. Mason, as further supported by

the medical records from the office of Dr. Hatzidakis and the Claimant's MRI imaging, to be more persuasive than the opinion of Dr. Lesnak in this case.

Dr. Lesnak has opined that the Claimant presented with clinical evidence of a proximal right biceps tendinitis without clinical evidence of right rotator cuff impingement signs or symptomatic right AC joint pathology. He further testified that Claimant had no clinical evidence of symptomatic intra-articular right shoulder joint pathology and had a previous non-diagnostic response to the corticosteroid injection trials performed by Dr. Cooney. He testified that the Claimant had two intra-articular joint injections performed and had no diagnostic responses, noting that the injections did not numb or take away Claimant's reported symptoms. He testified that it was his opinion that all of this indicated that the symptoms were not coming from those joints. Dr. Lesnak testified that there was no evidence of impingement and had a negative diagnostic response to the shoulder injections. He further testified that the Claimant is working full duty but that the Claimant perceives himself as functionally limited. Dr. Lesnak testified that during both of his examinations of the Claimant, he opined that the symptoms were coming from outside the shoulder joint. Therefore, Dr. Lesnak testified that it was his opinion that, within a reasonable degree of medical probability, the proposed shoulder surgery is not indicated and that it would not help the Claimant's condition because the symptoms are not coming from the shoulder joint. He also opines that the Claimant's mechanism of injury is not consistent with the shoulder injury on the MRI. Dr. Lesnak opined, that based on the Claimant's reported mechanism of injury, if anything was stressed during the work accident, it would be the Claimant's biceps tendon, not his shoulder joint or rotator cuff. Dr. Lesnak testified that he had previously recommended an injection to the right proximal biceps tendon but was unsure what he would currently recommend that because he is not sure if it would help given the amount of time that has passed. He does disagree with Dr. Mason that the Claimant needs a rotator cuff repair with subacromial decompression.

Dr. Mason testified that the Claimant has consistently described anterior shoulder pain. At the time of her first visit, she was not certain whether this was coming from the biceps tendon, or more from the shoulder area. The newer MRI demonstrated that the biceps tendon looked pretty normal, but there was an articular surface rotator cuff tear coupled with an impingement anatomy. The surgery needed is a rotator cuff repair along with a subacromial decompression. Dr. Mason observed that surgery was mentioned by Dr. Cooney back in early 2014 as a possible treatment option. The impingement anatomy allows for less room for the movement of tendons, and it is probable that the Claimant's condition is a result of the traumatic injury on top of chronic wear and tear. The recoil of the Claimant's arm during the work injury more likely than not caused the rotator cuff problem. Dr. Mason further testified that conservative medical treatment has not helped and the Claimant's condition seems to be worsening, which is also consistent with Dr. Fall's observation on September 24, 2013 during her Rule 16 medical review of the recommendation for an MRI. Ultimately, based on the opinions and recommendations of Dr. Mason and Dr. Hatzidakis, the proposed surgery is found to be reasonable, necessary, and causally related to the accident.

The Claimant has established that the surgical recommendations of Dr. Hatzidakis are reasonable and necessary to treat the Claimant's right shoulder condition.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The Claimant testified credibly and persuasively that following the work injury, and after his laceration had healed, he continued to work for his Employer with a weight restriction for lifting. He performed modified duty for approximately 4 months, working within his restrictions. The Claimant testified that in January 2013, he was told by his supervisor that he could no longer work light duty but that he couldn't work full duty until he received a medical release. No persuasive evidence to the contrary was presented. The Claimant testified that Dr. Pater later placed him at MMI and he brought paperwork to his Employer and went back to full duty work in March of 2013. Although the Claimant disputed the finding of MMI, he nevertheless had returned to work and no longer suffered a wage loss from that point forward. The Claimant's testimony generally corresponds to medical records in evidence on this issue and the August 12, 2013 Order issued by ALJ Harr.

There was no persuasive evidence to establish the exact start date for TTD. The Claimant did not specifically provide a date in January and no employment or other records were entered into evidence to establish when in January he was not permitted to work. However, the Claimant's testimony that it occurred in January of 2013 is found to be credible. Therefore, the start date will be January 31, 2013. Even if no other evidence was introduced to establish the start date, because the Claimant's testimony was found credible as to the month and no evidence to contradict this was introduced, then the Claimant suffered a wage loss as of January 31, 2013. He may have suffered a wage loss prior to this date in January. However, the Claimant had the burden to establish that date and did not present sufficient evidence of an earlier start date.

There is likewise a problem regarding determination of the exact date in March of 2013 that the Claimant returned to work after bringing a full duty release to his Employer. In the absence of this evidence, the ALJ nevertheless finds that it is not likely Claimant would not have returned to work full duty prior to being placed at MMI by Dr. Pater on February 25, 2013. In addition, the Claimant's testimony that he returned to work in March of 2013 was credible, and no evidence to the contrary was presented. Therefore, it is more likely than not that the Claimant suffered a wage loss due to his injury until at least March 1, 2013. Again, he may have suffered wage loss due to his injury until a later date in March, 2013. However, the Claimant had the burden to establish the last date that he suffered a wage loss that would entitle him to TTD and did not present sufficient evidence of any later date in March of 2013.

Thus, the ALJ concludes that the Claimant has proven entitlement to TTD benefits from January 31, 2013 to March 1, 2013. The Claimant failed to prove entitlement to TTD benefits outside of those dates by a preponderance of the evidence even though it is possible that there was wage loss prior to and after the TTD period determined.

ORDER

It is therefore ordered that:

1. The right shoulder surgery recommended and requested by Dr. Hatzidakis is reasonable and necessary to treat the Claimant's right shoulder condition, and is causally related to the September 18, 2012 work injury.

2. Respondent's liability shall specifically include medical treatment consisting of the above surgery, and all related medical treatment required for appropriate preparation for the surgery, as well as reasonably necessary post-surgical follow-up treatment per the Division of Workers Compensation Medical Fee Schedule.

3. Respondents shall pay the Claimant temporary total disability ("TTD") benefits for the time period commencing January 31, 2013 through March 1, 2013.

4. Respondents shall pay the Claimant statutory interest at the rate of 8% per annum on all amounts not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 14, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether a new Division-sponsored Independent Medical Examination ("DIME") Panel should be issued in this case based upon respondents filing a motion to cancel and strike the DIME prior to the DIME panel being issued?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on October 29, 2012. Claimant was eventually placed at maximum medical improvement ("MMI") for her injuries and a final admission of liability ("FAL") was filed by respondents in this case. Claimant objected to the FAL and filed a Notice and Proposal to Select an Independent Medical Examiner on June 2, 2015.

2. Respondents subsequently filed a Notice of Failed IME negotiations on June 22, 2015. Claimant then was required to file the application for hearing pursuant to the applicable rules. Notably, W.C.R.P. 11-3(A)(3), states in pertinent part:

> The requesting party shall submit an application for an IME according to 11-3(B), below. If the parties did not agree on the physician, the insurer shall notify the Division and the other party on a prescribed form regarding the failed negotiation within 30 calendar days of their failure to agree. The party disputing the determinations of the authorized treating physician, and seeking review of those determinations ("requesting party") shall file an application for IME within 30 days of the date of the failure to agree upon an IME physician.

3. The parties agree that claimant did not file an application for IME within 30 days of the date the respondents filed the Notice of Failed IME negotiations. Respondents then moved to strike the DIME process on July 28, 2015. A copy of respondents' motion was sent to eh DIME unit.

4. Claimant responded by immediately filing the application for DIME on July 29, 2015.

5. The DIME unit issued a three physician panel pursuant to W.C.R.P. 11-3(C) on July 30, 2015. W.C.R.P. 11-3(C) states in pertinent part:

> IME Physician Selection: If the parties are unable to agree upon a physician to conduct the IME, the Division will select via a revolving selection process a panel of three qualified physicians from its list of qualified physicians, from which one physician shall be designated to perform the IME. To obtain a pool of qualified physicians from which the Division shall make the selection of the three physician panel, the Division shall consider to the extent possible the criteria identified in

the application for IME as set forth in section 11-3(B) of this rule. The Division will correlate the body parts or medical conditions on the IME application with the appropriate medical treatment guideline on the table designated in section 11-12. The three-physician panel will be comprised of physicians based on their accreditation to perform impairment ratings on the body part(s) and/or medical conditions designated by the requesting party on the IME application. At the time a physician applies to join the IME panel of physicians, he/she shall designate the body parts or medical conditions that he/she is willing and able to evaluate. Physicians electing not to perform impairment ratings on certain body parts or conditions shall not be included in any three-doctor panel where those body parts or conditions are listed on the IME application pursuant to section 11-3(B)(2).

6. Claimant responded to respondents' Motion to Strike the DIME on July 31, 2015. PALJ De Marino denied Respondents Motion to Strike the DIME on August 4, 2015. Claimant struck a physician from the Panel issued by the DIME unit on August 5, 2015.

7. Respondents then filed a Contested Motion to Hold the DIME process in Abeyance, Strike the IME Physician Panel Issued on July 30, 2015 and to reissue the IME Physician Panel on August 7, 2015. This Motion was denied by PALJ De Marino on August 14, 2015. Respondents filed an application for hearing to address the denial of their Motion by PALJ De Marino. Because respondents did not strike one of the physicians, Dr. Yamamoto was selected as the DIME physician on September 9, 2015.

8. Respondents argue that the DIME unit improvidently issued the DIME Panel on July 30, 2015 while their Motion to Strike the DIME was still pending. Respondents argue that the entire DIME proceeding should have been held completely in abeyance while the motion was pending and the issuance of the DIME Panel is contrary to the rules.

9. Respondents noted during the hearing that this case is governed by the rules of procedure as they apply to the DIME process. Notably, W.C.R.P. 11-3(O) states in pertinent part:

> IME Proceedings Held in Abeyance: If a party files a motion involving a pending IME proceeding, the moving party shall provide a copy of the motion directly to the Division's IME Unit. The IME proceeding shall be held in abeyance until the Division IME Unit is notified of the disposition as provided in this rule. When the motion is disposed of by written order or other means, the moving party shall provide a copy of the order or other dispositive document to the Division's IME Unit

10. As respondents noted at hearing, this case hinges on the interpretation of the phrase, "The IME proceeding shall be held in abeyance until …." and whether that phrasing negates an IME panel from being issued where a motion is currently pending.

11. Respondents argue that because the DIME procedure should have been held in abeyance with the filing of their Motion to Strike the DIME on July 29, 2015, the DIME panel that was issued on July 30, 2015 should be stricken.

12. The ALJ finds no error in the issuance of the DIME Physician Panel on July 30, 2015 by the DIME Unit. The ALJ finds that the mere issuance of the DIME Panel does not violate the provision of W.C.R.P. 11-3(O) that requires that the IME proceeding be held in abeyance. The ALJ notes that the Motion was replied to and ruled on within a few days of the Motion and determines that, based on a reading of the rules requiring the IME Unit to provide the parties with the DIME panel under W.C.R.P. 11-3(C) that the filing of a motion does not preclude the IME Unit from issuing the DIME Panel to comply with the DIME process.

13. The ALJ finds that the term "shall be held in abeyance until the Division IME Unit is notified of the disposition as provided in this rule" does not prohibit the DIME Unit from issuing the DIME Panel with the motion pending.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S, 2008. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. As the parties note, there is no current case on point as to how to interpret the Workers' Compensation Rules of Procedure involving the DIME process as it relates to this specific fact scenario.

3. As found, the purpose of the Workers' Compensation Act is not compromised by the interpretation of the Workers' Compensation Rules of Procedure to allow for the DIME Unit to issue the DIME Panel while a motion is pending. In this case, the mere issuance of the DIME Panel does not require that the entire DIME process (going back to the issuance of the DIME Panel) be restarted at this point.

4. Respondents' request to reissue the DIME panel is DENIED.

ORDER

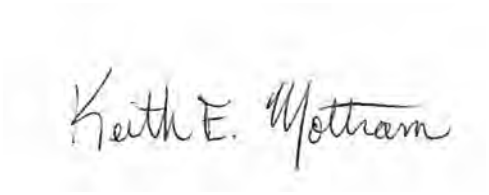
It is therefore ordered that:

1. The DIME procedure may continue with Dr. Yamamoto as the DIME physician.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 30, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-906-018-01

ISSUES ON REMAND

- Whether Claimant is at maximal medical improvement?
- Whether Claimant has established a permanent impairment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge finds as fact:

1. This claim involves an admitted left wrist injury and subsequent medical treatments.

2. On June 17, 2014, Claimant's authorized treating physician (ATP), Dr. Mars, placed Claimant at MMI and assigned a 19% upper extremity impairment rating which converts to an 11% whole person impairment.

3. Respondents subsequently filed an Application for Hearing pursuant to the version of Workers' Compensation Rule of Procedure 5-5, 7 CCR 1101-3, in effect at that time. At that time, W.C. Rule 5-5(H) provided that after a determination of permanent impairment from an authorized Level II accredited physician is mailed or delivered, Insurer shall either file a final admission of liability consistent with the physician's opinion, or set the matter for hearing at the Office of Administrative Courts. This Rule was amended effective January 1, 2015. Respondents endorsed, as issues to be heard at the hearing, medical benefits, reasonably necessary, permanent partial disability (PPD) benefits, and whether the scheduled rating for Claimant's industrial injury was correct. Respondents contended that Claimant's left shoulder condition was not related to her admitted injury, the treatment Claimant received for her left shoulder was not reasonable and necessary, and Claimant's scheduled impairment was only 3% of the left upper extremity.

4. In her response to Respondents' Application, Claimant identified medical benefits, authorized provider, reasonably necessary, and temporary partial disability (TPD) benefits from 5/1/2014, through 8/26/2014. As "other issues," Claimant identified temporary total disability (TTD) benefits and TPD benefits from 5/1/2014 to continuing.

5. At the commencement of the hearing, Claimant argued that even though Respondents had endorsed the issue of PPD benefits in their Application for Hearing, this issue was not ripe for hearing because Claimant was not yet entitled to a Division-sponsored Independent Medical Examination (DIME) to

determine MMI, and MMI had to be determined before impairment. Claimant also argued that the ALJ could not determine a permanent impairment rating before Claimant went to a DIME on a possible non-scheduled rating, since Claimant's shoulder condition likely was related to the admitted injury and could be converted to a whole person permanent impairment rating. Claimant then argued that the ALJ should delay considering the issue of impairment until she obtained a DIME.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

It is well settled that an ATP makes the initial finding of MMI, and assigns a permanent impairment rating if appropriate. If a party wishes to challenge the ATP's MMI determination, the impairment rating, or both, the party must request a DIME in accordance with the procedures established in §8-42-107.2, C.R.S. Section 8-42-107(8)(b)(II), C.R.S.; §8-42-107(8)(c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002). The DIME physician's opinions concerning MMI and permanent impairment then become binding on the parties and the ALJ unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III) and (8)(c), C.R.S.; *Cordova v. Industrial Claim Appeals office, supra*.

Additionally, the initial question of whether a claimant sustained a scheduled or non-scheduled rating is one of fact for determination by the ALJ. That determination depends on whether the claimant establishes the industrial injury caused functional impairment not found on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Although the opinions and findings of the DIME physician may be relevant to this determination, a DIME physician's opinion is not mandated by the statute nor is the ALJ required to afford it any special weight. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000). It is only after the ALJ determines the claimant sustained whole person impairment that the DIME physician's rating becomes entitled to presumptive effect under §8-42-107(8)(c), C.R.S. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998)(DIME provisions do not apply to the rating of scheduled injuries).

In *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000), the Colorado Court of Appeals addressed a situation similar to that presented here. In *Delaney*, the claimant suffered an admitted industrial injury, originally diagnosed as a cervical strain. The ATP placed her at MMI with 5% impairment of each upper extremity because of diffuse shoulder girdle myofascial pain. The physician opined the claimant suffered no impairment of the cervical spine.

The claimant applied for a hearing on medical and temporary disability benefits and on compensability of a second injury. The respondents endorsed the issue of permanent impairment benefits. The claimant filed for a DIME to dispute the ATP's extremity rating, and she also moved to strike the issue of permanency, arguing that the

DIME could not be completed by the time of the scheduled hearing, and she would be unable to meet her burden of proof as to that issue. The ALJ denied the motion.

Hearings eventually were held, and at the beginning of the first hearing, the claimant argued that the permanency issue was not ripe because the DIME had not yet taken place. The ALJ disagreed, concluding that a DIME report was a prerequisite to a hearing on permanent disability only in cases involving non-scheduled injuries. Then, based on the evidence presented at the hearing, the ALJ determined that the claimant had failed to prove she sustained a non-scheduled impairment and was thus entitled only to a scheduled benefits award. The Panel affirmed.

On appeal to the Court of Appeals, the claimant argued that the ALJ erred in awarding her benefits for a scheduled injury under §8-42-107(2), C.R.S. rather than for whole person impairment under §8-42-107(8), C.R.S. The claimant contended that under §8-42-107(8)(c), C.R.S., injured workers have an absolute right to a DIME before a hearing can be held on permanency, regardless of whether scheduled or non-scheduled injuries are involved. She argued that because she requested a DIME, the ALJ erred in adjudicating her right to whole person impairment benefits before he received the DIME physician's report, and he also erred in declining to reopen the evidence to consider the DIME report.

The Court agreed with the claimant's argument that resolution of the permanency issue should have been deferred until after the DIME report had been filed. The Court explained that it was not a case in which it was undisputed that only a scheduled injury was involved. Instead, the Court held that at the time the hearing was held, there was a legitimate dispute as to whether the claimant had a non-scheduled impairment, and the claimant had requested a DIME to challenge the ATP's determination as to this issue. According to the Court, whether the claimant had a non-scheduled as well as a scheduled impairment was central to determining her entitlement to permanent benefits. Consequently, the Court held that in the particular circumstances, even though the statute did not so require, the claimant should have been given the opportunity to have the DIME report considered before the permanent benefits issue was resolved or, at a minimum, to have the evidence reopened when the report became available. The Court explained that considerations of due process and fairness make such a procedure appropriate since the respondents, and not the claimant, sought to have the permanency issue resolved at a time when the DIME had not yet been performed. The Court therefore concluded that where an employer endorses the issue of permanency for hearing, a legitimate dispute has been raised as to whether the claimant has a non-scheduled injury, and a DIME has been requested, resolution of the permanent impairment issue should be deferred until after the DIME report has been filed.

Here, while it is undisputed that Claimant had not requested a DIME prior to the time the hearing was held, the holding in *Delaney* is instructive. Similar to *Delaney*, in their Application for Hearing, Respondents sought to have the permanency issue resolved at a time when the DIME had not yet been performed, and Claimant raised a legitimate dispute at the hearing as to whether she was at MMI and whether she had sustained a non-scheduled injury. That is, in her Response to Respondents' Application

for Hearing, Claimant endorsed medical benefits, and TPD and TTD from 5/1/14 to continuing under “other issues” as issues for hearing. Further, in her Case Information Sheet, Claimant identified medical benefits, TPD, and TTD as issues remaining for hearing. Because temporary benefits must cease at the point of MMI, the endorsement of this issue of temporary benefits is necessarily a contention that MMI is in dispute. Section 8-42-105(3)(a), C.R.S. Also, during the hearing, Claimant testified that she felt as though she was not 100%, and that she believed she needed further treatment. Additionally, during the hearing, Claimant repeatedly argued that the ALJ should defer ruling on permanency until the DIME had been completed on the issues of MMI and whole person conversion. While it is for the ALJ to decide whether Claimant sustained a scheduled or non-scheduled rating, the issues of MMI and impairment are DIME issues. Section 8-42-107(8)(b)(III) and (8)(c), C.R.S. Thus, similar to the holding in *Delaney*, even though the statute did not so require, Claimant should have been given the opportunity to have the DIME report considered before the permanent benefits issue was resolved.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. A DIME is required before the issues of MMI and permanent impairment can be decided. Claimant may proceed with the DIME process as provided by statute.

2. If disputed issues remain after the DIME process is complete, either party may file an application for hearing as provided by statute.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 22, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of permanent total disability benefits?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of ongoing medical benefits after maximum medical improvement?

- Did Claimant make a proper showing for a change of physician?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1, 2 and 4 were admitted into evidence. Respondents' Exhibits A through AA were admitted into evidence.

2. Claimant sustained an admitted low back injury on August 6, 2012.

MEDICAL EVIDENCE

3. Claimant was treated at Concentra on referral from the Employer.

4. On August 21, 2012 PA Chelsea Dezen examined Claimant at Concetnra. At that time Claimant reported low back pain, worse on the left side. PA Dezen assessed lumbosacral sprain with radiculopathy of the left leg. She imposed restrictions of no lifting greater than 25 pounds.

5. On September 5, 2012 Claimant underwent an MRI of the lumbar spine. At L3-4 the radiologist noted an extruded disc abutting the exiting L3 nerve. The radiologist opined this "could be producing left sided radicular symptoms." At L4-5 there was a right paracentral extrusion and at L5-S1 there was a large disk extrusion that appeared to be abutting but not impinging the S1 nerve root.

6. PA Dezen referred Claimant to a physiatrist, Fredric Zimmerman, D.O. Dr. Zimmerman examined Claimant on October 4, 2012. Claimant reported symptoms of left-sided lumbar pain radiating down the left lower extremity. Dr. Zimmerman reviewed the MRI. He assessed lumbar spondylosis and lumbar radiculitis with neurologic encroachment in the L3-4 distribution consistent with left-sided L3-4 radicular symptoms. Dr. Zimmerman prescribed medication including Vicodin and recommended Claimant undergo L3 and L4 transforaminal epidural steroid injections (ESI).

7. On October 18, 2012 Dr. Zimmerman noted Claimant demonstrated a "diagnostic and partial therapeutic response" to an ESI performed on October 10, 2014. The Claimant's left leg pain resolved but the Claimant reported new pain shooting down the right lower extremity. Dr. Zimmerman again recommended bilateral L4 transforaminal ESI.

8. On November 8, 2012 Dr. Zimmerman noted he performed a repeat L-4 transforaminal ESI on October 23, 2012. Claimant reportedly had a diagnostic response. Dr. Zimmerman assessed lumbar spondylosis and lumbar radiculitis with resolution of L3-4 radicular symptoms in both lower extremities. He also assessed bilateral lower extremity weakness and posterior leg pain classified as mild. Dr. Zimmerman recommended continuation of "aggressive" physical therapy (PT) and Vicodin for pain.

9. On November 9, 2012 Joel Cohen, Psy. D., performed a psychological evaluation of Claimant. Dr. Cohen assessed the Claimant as suffering from an injury-related adjustment reaction with anxious mood. Dr. Cohen recommended six treatment sessions to address stress management and pain coping skills. In addition, Dr. Cohen opined Claimant has underlying posttraumatic stress disorder (PTSD) with some indication of residuals from a closed head injury. Dr. Cohen attributed the PTSD to the Claimant's wartime military service in Bosnia. Dr. Cohen opined the PTSD is not attributable to the industrial injury and should be treated outside the workers' compensation system.

10. On December 17, 2012 John Aschberger, M.D., performed an electromyographic assessment of Claimant's right lower extremity. Dr. Aschberger wrote that the testing was "negative for any acute, subacute, or chronic radicular abnormality."

11. On January 24, 2013 Dr. Zimmerman noted he performed an L5 plus S1 transforaminal ESI on January 16, 2013. Dr. Zimmerman noted that this injection was "diagnostic" and provided only "minimal therapeutic benefit." Dr. Zimmerman assessed lumbar spondylosis and lumbar radiculitis in the right lower extremity with evidence of L5-S1 disk herniation causing S1 nerve root compression. Dr. Zimmerman referred Claimant to orthopedic surgeon Bryan Castro, M.D.

12. Dr. Castro examined Claimant on February 6, 2013. Claimant stated that his main complaint was right lower extremity pain. Dr. Castro reviewed imaging studies and noted disk herniations at L4-5 and L5-S1. Dr. Castro's impression was "a large disk herniation at L5-S1 causing S1 radiculopathy." Dr. Castro stated the Claimant's radicular complaints were consistent with the imaging studies and that a microdiscectomy/decompression of L5-S1 on the right side was a reasonable consideration.

13. On March 14, 2013 Dr. Castro performed surgery on Claimant described as a partial laminectomy right-side at L5-S1 and microdiscectomy right-side at L5-S1.

14. On April 11, 2013 Steve Danahey, M.D., examined Claimant at Concentra. Claimant advised Dr. Danahey that he was experiencing some right low back pain with radiation into the right gluteal region. Claimant also reported that he was feeling back pain that radiated down his left leg to the foot. Dr. Danahey opined that Claimant appeared to have developed a left lower extremity radicular component. Claimant was on a "no activity status" at this time.

15. On April 18 2013 Claimant advised Dr. Danahey that he had pain "going down the right lower extremity" and rated this pain at 5/10. Claimant told Dr. Danahey that this level of discomfort was very much upsetting his life. Dr. Danahey referred the Claimant to Dr. Zimmerman for assistance in full rehabilitation, started PT, and submitted a referral for a psychiatric consultation.

16. On May 2, 2013 Dr. Zimmerman examined Claimant. Dr. Zimmerman noted Claimant was "showing significant improvement and has strength and mobility that are better than prior to his surgery." Nevertheless, Claimant was "frustrated with his progress." On physical examination Dr. Zimmerman noted Claimant ambulated "with an upright posture and normal gait pattern." Straight leg raising was positive on the right and neural tension sign was positive bilaterally. Dr. Zimmerman assessed spondylosis post microdiscectomy, lumbar radiculitis greater in the right than the left lower extremity and depression "possibly interfering with the rehabilitation process." Dr. Zimmerman recommended Claimant continue with PT and prescribed Cymbalta, Vicodin, and Celebrex.

17. On May 7, 2013 Gary Gutterman, M.D., performed a psychiatric evaluation of Claimant. Claimant told Dr. Gutterman that surgery had not helped him but PT was beneficial. Claimant reported he had become more irritable since being injured and since he had surgery. He was having difficulty sleeping and was experiencing nightmares involving relatives and friends who were in the Bosnian war. Dr. Gutterman stated that during the evaluation Claimant "sat comfortably in an oversized chair for one hour." Dr. Gutterman described Claimant's speech as coherent and logical and Claimant's thoughts were goal directed. Dr. Gutterman determined that the Claimant had a mild exacerbation of his PTSD associated with the Bosnian war. Dr. Gutterman opined this "may have been triggered by his having had surgery and his being more limited in his activity." Dr. Gutterman opined that Cymbalta was appropriate medication to treat the residual PTSD symptoms.

18. On May 10, 2013 Claimant underwent another lumbar MRI.

19. On May 15, 2013 Dr. Castro examined Claimant. Dr. Castro commented that Claimant was doing "much better" and was "standing and walking without difficulty." Dr. Castro reviewed the recent MRI that showed the "previous significant disc herniation seen on the right side at L5-S1 is largely resolved" and there was no "significant compression" of the L5 nerve root. Dr. Castro stated he would allow Claimant to "buckle down and increase his activities" to include PT and walking a mile per day.

20. Dr. Danahey examined Claimant on June 17, 2013. Claimant reported that he was "not good" and had strong low back pain radiating into the gluteal area. Dr. Danahey noted that Dr. Castro "felt there was nothing further surgical to do" and that Claimant had refused an ESI offered by Dr. Zimmerman. On physical examination (PE) Claimant was comfortable in the seated position, uncomfortable standing and with movement and his gait was "nonantalgic." Dr. Danahey noted Claimant was on a no work activity status and should be transitioned to light duty in the near future. Dr. Danahey recommended continued PT and referred claimant to Dr. Burris "to deal with slow and/or delayed recovery situations."

21. On July 22, 2013 Dr. Danahey imposed restrictions of no lifting over 5 pounds, no bending greater than 4 times per hour and no pushing and/or pulling with over 10 pounds of force.

22. On July 30, 2013 John Burris, M.D., examined Claimant at Concentra. Dr. Burris noted Claimant was referred for "delayed recovery issues." Claimant reported to Dr. Burris that he had "5/10 low back pain with some intermittent pain down both legs along the back of the legs." Claimant denied persistent numbness or weakness in the legs. On examination Dr. Burris noted Claimant's range of motion (ROM) was functional with some limitations particularly in forward flexion." Claimant's motor strength was "5/5 in all muscle groups" and straight leg raising to 90 degrees was negative bilaterally. Dr. Burris diagnosed "low back pain" and wrote that Claimant exhibited "a benign examination with no evidence of radiculopathy." Dr. Burris recommended that Claimant's rehabilitation be finalized with "6 additional weeks in therapy." Dr. Burris imposed restrictions of no lifting over 20 pounds.

23. On August 6, 2013 Claimant returned to Dr. Danahey and expressed concern about the 20-pound lifting restriction imposed by Dr. Burris. Claimant reported "excessive pain with exercise" and expressed the view that he would "never be 100%." On physical examination Claimant appeared comfortable in the seated position and his gait was "nonantalgic." Dr. Danahey agreed with the 20-pound lifting restriction imposed by Dr. Burris and stated his preference that Claimant "stay with Dr. Burris."

24. Following the surgery in March 2013 Claimant underwent an extensive course of PT. On May 3, 2013 the therapist opined Claimant's progress was "slower than expected" and that claimant reported 3/10 pain. On August 13, 2013 Claimant reported 5/10 pain and told the therapist that his back was "not improved with surgery" and that he wanted to "retire" when therapy was over. On September 12, 2013 Claimant rated his pain at 1-2/10 during the day and "5 grade max at night." On this date Claimant advised the therapist he was feeling a "lot better" and that working out at the gym was helping him feel better. The therapist noted "significant improvement" and that the Claimant's progress was "as expected." On September 16, 2013 Claimant advised the therapist that he back was feeling better and he was working out at the gym every day. Claimant stated that by next year he would be back to his pre-injury status.

25. Claimant returned to Dr. Burris on September 17, 2013. Claimant reported "diffuse pain complaints involving the low back, 5/10 in severity extending

down the back of both legs." Claimant walked with a normal gait and transferred "without hesitation." Dr. Burris attempted to measure ROM by the dual inclinometry method but reported the measurements were "completely nonphysiologic and inconsistent with [Claimant's] observed behavior." Dr. Burris opined Claimant demonstrated a "benign examination with significant nonphysiologic overlay and no objective findings." Dr. Burris opined Claimant had reached maximum medical improvement (MMI) and was entitled to a 10% whole person impairment rating based on a specific disorder of the lumbar spine. Dr. Burris assigned claimant to the medium duty category with a permanent restriction of no lifting greater than 40 pounds. Dr. Burris opined that no maintenance or follow-up care was necessary.

26. On September 18, 2013 Claimant told the physical therapist that "the other day" during therapy he bent over to pick up a box and experienced marked pain from the lumbar region to his neck. Claimant rated his pain as 10/10.

27. On September 23, 2013 the physical therapist reported Claimant was depressed. Claimant advised the therapist that his pain had increased "last week" after picking up a 27 pound box.

28. On September 24, 2013 Dr. Burris again saw Claimant for the purpose of performing repeat ROM measurements. However, Dr. Burris wrote Claimant was not cooperative with the ROM maneuvers and chose "to spend the majority of the visit verbalizing his discontent with Concentra as well as this provider personally." Dr. Burris opined Claimant had been through exhaustive therapy and that no further treatment would change Claimant's "subjective complaints."

29. On October 10, 2013 Insurer filed a Final Admission of Liability (FAL). The FAL admitted for permanent partial disability (PPD) benefits based on Dr. Burris's 10% whole person impairment rating.

30. On January 21, 2014 Claimant underwent a Division-sponsored independent medical examination (DIME) performed by Stanley Ginsburg, M.D. Dr. Ginsberg took a history from Claimant, reviewed medical records and performed a physical examination. Claimant reported that he had "severe" pain with some right buttock pain and numbness. Claimant also reported that the back pain went down his legs and that he experienced numbness in the legs. Claimant added that he developed headaches at the time of the injury and was depressed.

31. On physical examination Dr. Ginsberg noted the Claimant was "at times depressed and at times angry, firmly stating that he had not been helped at all by any of the therapeutic maneuvers, which had been utilized for his benefit." Dr. Ginsberg reported that on examination of the lower extremities, particularly the right, there was "a great deal of 'giving in' weakness – non-physiological." Sensory examination produced complaints of "hypalgesia in a non-physiological pattern in the right lower extremity intermittently." Dr. Ginsberg performed extensive ROM testing but stated the Claimant had "markedly non-physiological responses." Dr. Ginsberg commented that he could not "regard these findings at all accurate" and declined to use them as the basis for

formulating an impairment rating. He also observed that this was the third attempt at ROM measurements and all had the "same result." Dr. Ginsberg assigned a 10% whole person impairment rating based on a specific disorder of the lumbar spine. Dr. Ginsberg opined there was no psychiatric impairment.

32. On February 13, 2014 Insurer filed an FAL. The Insurer admitted liability for PPD benefits based on Dr. Ginsberg's 10% rating. Insurer denied liability for medical benefits after MMI.

33. On May 1, 2014 Claimant was seen by Lon Noel, M.D. This visit was apparently on referral by the Insurer to determine if further treatment was appropriate. Dr. Noel noted that Claimant appeared "using a cane as an assistive device with some antalgia." Claimant reportedly appeared "angry at various timed during the history taking portion of the examination."

34. Claimant returned to Dr. Noel on May 8, 2014. Dr. Noel assessed "status post low back surgery with chronic pain." Dr. Noel referred Claimant for chiropractic/acupuncture treatments with Dr. Gridley, maintained previous restrictions and stated that the "current treatments" were considered to be post MMI maintenance treatments.

35. On May 15, 2014 Dr. Zimmerman examined the Claimant again. Claimant told Dr. Zimmerman that he "did nothing right." Claimant stated he had disabling low back pain radiating down both legs. Claimant advised Dr. Zimmerman that his impairment rating was "very little" and he "couldn't live on that." Claimant stated he needed a 5-pound lifting restriction so that he could apply for disability or no restrictions so that he could return to work. Claimant was taking a number of medications including hydrocodone, methcarbamol, nabumetone, cyclobenzaprine, Celebrex, respiridone, buspirone, lisinopril, benztropine, Lyrica and Cymbalta. Dr. Zimmerman assessed Claimant with "postlaminectomy syndrome" and observed that Dr. Burris had placed Claimant at MMI in September 2013 with empirical permanent work restrictions of 40 pounds lifting. Dr. Zimmerman advised Claimant to either pursue permanent work restrictions or apply for disability. Dr. Zimmerman further advised Claimant "to perform range of motion legitimately with his best effort so that consistency and validity is most likely to occur." Dr. Zimmerman suggested to Claimant that he request "Dr. Leon [sic]" to obtain an FCE "as part of determining more objective permanent work restrictions." Dr. Zimmerman released Claimant with restrictions "of Primary Care Physician." (Respondents' Exhibit X p. 1064). Dr. Zimmerman stated that further "maintenance decisions" would be "managed by Dr. Leon [sic]." The ALJ infers that Dr. Zimmerman's reference to Dr. "Leon" is actually a reference to Dr. Lon Noel.

36. Claimant received chiropractic treatment from Jason Gridley, D.C., between May 16, 2014 and August 19, 2014.

37. Claimant saw Dr. Noel on July 24, 2014. Claimant advised Dr. Noel that the chiropractic treatment was helping "somewhat." Dr. Noel noted chiropractic treatment would be finished after 2 more treatments by Dr. Gridley. Dr. Noel stated

Claimant had completed the recommended course of post MMI treatments and no further appointments were necessary. Dr. Noel listed Claimant's "work restrictions" as "per previous impairment rating."

38. On August 19, 2014 Dr. Gridley checked boxes on a form indicating that Claimant was "poorly stabilizing" and experienced a "poor response" to chiropractic/acupuncture treatment. Dr. Gridley wrote that no further treatment was recommended and referred Claimant back to Dr. Noel.

39. In December 2014 Claimant underwent a functional capacities evaluation (FCE). The FCE was performed by Kristine Couch, OTR. As part of the FCE Claimant underwent the "West Lifting Evaluation." OTR Couch reported Claimant was unable to lift from floor to knuckle level on an occasional basis. Couch explained that Claimant "reported" that his low back pain rendered him "unable to safely forward bend, squat, kneel or 1/2 kneel to manage lifting at this level." Claimant was able to occasionally lift 15 pounds from knuckle level to shoulder level. Claimant "determined" that this "represented his maximum safe, reliable lift at this level at this time secondary to his symptom report." Claimant was able to complete a maximum bilateral lift of 10 pounds from shoulder to eye level. Claimant "determined" that this "represented his maximum safe reliable lift at this level at this time secondary to his symptom report." Claimant was able to complete a maximum bilateral lift of 5 pounds from shoulder level to overhead on an occasional basis. Claimant "determined" that this "represented his maximum safe, reliable lift at this level at this time secondary to his symptom report."

40. OTR Couch reported that Claimant demonstrated a sustained seated tolerance of 36 minutes before needing to alter his position "secondary to his report of increased low back pain and bilateral lower extremity 'numbness, pain, needle' symptoms." Claimant demonstrated a standing tolerance of 18 minutes "before changing position secondary to his report of increased low back and bilateral lower extremity symptoms." On a walking test Claimant was able to complete 1 of 10 laps (100 feet) before he "determined he was unable to continue with this test secondary to his symptom report." OTR Couch noted Claimant ambulated with an "antalgic gait pattern, using a single point cane." Claimant reported that his walking was limited to 5-10 minutes secondary to pain.

41. OTR Couch reported that Claimant's "overall capacities as evidenced by his ability to lift weight are perhaps most closely described BETWEEN the SEDENTARY & LIGHT work groups as described by the United States Department of Labor." In her report OTR Couch "requested" that the results of the FCE "be correlated with objective physical findings" and stated that the results are "subject to further interpretation and determination of validity by the treating physician."

42. On March 10, 2015 David Orgel, M.D., evaluated Claimant for purposes of completing a social security disability evaluation. This evaluation was performed at Claimant's request. The Claimant advised Dr. Orgel that he was experiencing 5/10 pain in his low back with the pain radiating into both legs. Claimant stated that these symptoms had caused "balance problems" causing him to fall. Consequently Claimant

stated that he walked with a cane. On PE Dr. Orgel noted there was pain on percussion of the lumbar spine with "decreased range of motion in all planes due to pain with very limited motion to side bending and extension and, to a lesser extent flexion." A straight leg raising test caused "axial back pain bilaterally" and no weakness was noted. Dr. Orgel reviewed the FCE performed by OTR Couch and had a discussion with Claimant about his "functional capabilities." Dr. Orgel wrote that Claimant is limited to lifting up to 10 pounds occasionally; no carrying; a maximum of 30 minutes sitting at one time and a total of 4 hours sitting in an 8 hour work day; a maximum 20 minutes standing at one time and a total of 2 hours in an 8 hour work day; a maximum walking 10 minutes at one time and a total of 1 hour in an 8 hour work day. Dr. Orgel opined that Claimant requires use of a cane to ambulate. Dr. Orgel imposed restrictions of no climbing ladders or scaffolds, no balancing, stooping, kneeling, crouching or crawling; no unprotected heights; occasional operation of a motor vehicle; and, occasional presence around moving machinery. Dr. Orgel noted that the Claimant said he needed to "lie down frequently throughout the day because of his pain."

43. Dr. Orgel testified at the hearing. Dr. Orgel stated that based on PE Claimant's straight leg raising test was "not positive" because it did not produce radiating pain in the legs. Dr. Orgel also stated there "were no obvious neurological abnormalities." Dr. Orgel explained that he imposed the 10-pound occasional lifting "limitation" based on the FCE and his discussion with Claimant. Dr. Orgel explained that the limitations on sitting, standing and walking were also based on the FCE.

44. On cross-examination Dr. Orgel stated that the only medical records he possessed were the FCE, Dr. Burris's September 17, 2013 report, the "IME report" authored by Dr. Scott and his own report. Dr. Orgel testified he had not reviewed Dr. Noel's reports or Dr. Ginsberg's impairment rating. Dr. Orgel did not have Dr. Danahey's treatment records. Dr. Orgel stated that his opinions regarding Claimant's inability to crawl, crouch and kneel were based on the FCE and his discussion with Claimant. Dr. Orgel stated that if Claimant testified he could kneel that this would "change" his opinion regarding Claimant's limitations.

45. On May 19, 2015 Douglas Scott, M.D., conducted an independent medical examination of Claimant at the Respondents' request. Dr. Scott is board certified in occupational medicine and is level II accredited. Dr. Scott took a history from Claimant, reviewed medical records and performed a PE.

46. In the written report Dr. Scott stated that he agreed with Dr. Burris, Dr. Zimmerman and Dr. Noel that Claimant "can work in a medium work category with a 40 pound weight lifting restriction." Dr. Scott further opined that it is probable Claimant is employable within the 40-pound restriction and that Claimant is not "totally or permanently disabled."

47. Dr. Scott testified at the hearing. Dr. Scott opined that on July 24, 2014 Dr. Noel adopted the 40-pound lifting restriction imposed by Dr. Burris in September 2013. Dr. Scott based this opinion on Dr. Noel's statement that Claimant's restrictions

were “per previous impairment rating.” Dr. Scott reasoned that Dr. Noel must have been referring to Dr. Burris’s September 17, 2013 report.

48. Dr. Scott opined that Dr. Zimmerman adopted the 40-pound lifting restriction imposed by Dr. Burris in September 2013. Dr. Scott pointed out that Dr. Zimmerman’s May 15, 2014 explicitly refers to the 40-pound restriction imposed by Burris.

49. Dr. Scott testified that the FCE conducted by OTR Couch was not correlated with “objective findings.” Dr. Scott opined that much of the FCE was based on Claimant’s self-reported symptoms and his self-reported ability or inability to perform the physical tasks. Dr. Scott stated that the FCE results would best be interpreted by a treating physician in the context of serial examinations.

50. Dr. Scott opined that in light of Dr. Burris’s examination findings Claimant exhibited symptoms without a basis in physiology or pathology. Dr. Scott further opined that in light of Claimant’s failure to produce valid ROM measurements it could not be expected Claimant would produce valid measurements on a “subjective” FCE.

51. Dr. Scott testified the Claimant has reached the point where no further care is needed. According to Dr. Scott Claimant reached that point when Dr. Burris placed the Claimant at MMI on September 17, 2013. Dr. Scott is aware Claimant received post-MMI treatment from Dr. Noel and the chiropractor, Dr. Gridley. Dr. Scott opined that the post-MMI treatment was not reasonable because it did not help the Claimant.

52. Claimant reported to his personal healthcare provider, Kaiser Permanente, on June 22, 2015. Claimant was treated for the problems of paresthesia and lumbar radiculopathy. Lumbosacral x-rays were ordered. On June 26, 2015 Claimant returned to Kaiser Permanente and was seen by Mark Ptaskiewicz, M.D. Dr. Ptaskiewicz prescribed gabapentin for Claimant’s “lumbar radiculopathy.”

VOCATIONAL EVIDENCE

53. Ms. Katie Montoya (Montoya) was qualified as an expert in vocational rehabilitation. Montoya performed a vocational evaluation of Claimant at Respondents’ request. Montoya produced a written report dated June 22, 2015 and testified at the hearing.

54. As part of her vocational evaluation Montoya interviewed Claimant, reviewed pertinent medical records, performed vocational research and conducted a labor market “investigation.” In the vocational report Montoya noted Claimant had a high school education in Bosnia and had been in the United States since May 2001. Prior to coming to the United States Claimant had experience doing mining work in Bosnia. In Colorado Claimant performed various jobs including roofing, masonry and “caulking” work. Montoya noted Claimant “primarily” speaks Bosnian. However, she was able to use English for 15 to 20 minutes when she interviewed Claimant.

55. Montoya testified that it is her understanding that Dr. Burris, Dr. Noel and Dr. Scott opined that Claimant has a permanent work restriction of no lifting in excess of 40 pounds. Montoya stated this restriction does not give Claimant full access to the medium work category because the Dictionary of Occupational Titles states that medium work requires occasional lifting of up to 50 pounds. However, Montoya stated that the 40-pound restriction is most reasonably understood as placing Claimant in the medium work category. Montoya opined that the 40-pound lifting restriction means Claimant is employable in the Denver metropolitan labor market. According to Montoya Claimant is employable in various jobs including porter, office cleaning, production work, car wash agent, janitorial work, delivery and some maintenance positions. Montoya testified that in accordance with her research these types of positions are routinely available in the Denver labor market.

56. Montoya reviewed the FCE and the opinions of Dr. Orgel. Montoya stated that the FCE restrictions would place the Claimant in the sedentary to light work classifications. Montoya testified that in her experience an FCE is a tool that should be used in the context of the "objective medical evidence." Montoya explained that the results of an FCE can be influenced by the subject's "desire to perform." Montoya testified that in this case she saw no medical evidence indicating that any physician except Dr. Orgel agreed with the FCE results. Montoya opined that if the FCE and the opinions of Dr. Orgel are correct regarding Claimant's physical limitations then it is highly unlikely Claimant can earn any wages.

CLAIMANT'S TESTIMONY

57. Claimant testified as follows. The work he has performed in the United States required him to lift weights of 80 to100 pounds. The most weight he has lifted since the surgery in March 2013 is about 10 pounds. He began walking with a cane 10 to 15 days after surgery, although the cane was not prescribed by any authorized treating physician. He began to walk with the cane because weakness in his legs caused him to fall. He uses a cane at all times. He could not walk "normally" in September 2013 and the medical records are "mistaken" if they say he could. Claimant believes he could return to work for the Employer if he had a 5-pound lifting restriction and could rest ½ hour after each hour of work.

58. Claimant further testified as follows. He currently needs assistance from his wife when showering, shaving and brushing his teeth. He does not cook and the heaviest thing he can lift is a cup of coffee. He cannot walk more than 15 minutes at a time, cannot sit longer than 20 minutes at a time, cannot drive more than 30 minutes at a time and cannot climb ladders. He cannot stoop or crouch, but he believes he can be on his knees. Claimant also testified that he has problems with vision, hearing and exposure to dust and noise. He does not sleep well.

59. Claimant admitted that since his surgery he has not looked for any work other than contacting the Employer. Claimant stated that he called the Employer and was told they do not want him back at work.

FINDINGS CONCERNING CLAIM FOR PERMANENT TOTAL DISABILITY BENEFITS

60. Claimant failed to prove it is more probably true than not that the industrial injury of August 6, 2012 has rendered him unable to earn any wages in the same or other employment. Rather, a preponderance of the credible and persuasive evidence establishes Claimant can earn wages in the Denver metropolitan labor market.

61. The ALJ credits Dr. Burris's opinion that Claimant's only injury-related restriction is the 40-pund lifting restriction. In his report of September 17, 2013 Dr. Burris credibly opined that Claimant's PE was "benign" and that Claimant evidenced "non-physiologic overlay" without objective findings. Dr. Burris persuasively explained that Claimant demonstrated "non-physiologic" ROM measurements.

62. Dr. Burris's opinion that Claimant demonstrated a "benign" PE and non-physiologic ROM measurements is corroborated by opinions of the DIME physician, Dr. Ginsberg. The ALJ finds that Dr. Ginsberg's opinions are very credible and persuasive since there is no apparent reason for him to favor one side or the other in this case. On PE Dr. Ginsberg noted that Claimant exhibited "non-physiological" lower extremity weakness, right lower extremity "hypalgesia in a non-physiological pattern" and "markedly non-physiological responses" on ROM testing.

63. Dr. Burris's opinion that Claimant has a 40-pound lifting restriction is corroborated by the credible opinion of Dr. Zimmerman. The ALJ infers (as did Dr. Scott) that Dr. Zimmerman endorsed the 40-pound lifting restriction in his May 15, 2014 reports. On that date Dr. Zimmerman recognized that Dr. Burris imposed the 40-pound lifting restriction and released Claimant from treatment with the restriction imposed by the "Primary Care Physician." In context and considering the totality of the May 15 reports it is apparent Dr. Zimmerman agreed with Dr. Burris's 40-pound lifting restriction and certainly did not alter it.

64. Dr. Burris's opinion that Claimant has a 40-pound lifting restriction is corroborated by the credible opinion of Dr. Noel. On July 24, 2014 Dr. Noel endorsed the work restrictions "per previous impairment rating." The ALJ infers from this statement (as did Dr. Scott) that Dr. Noel was referring to the 40-pound restriction imposed by Dr. Burris in his September 17, 2013 report. It was on that date that Dr. Burris also assessed the 10% whole person impairment rating.

65. Dr. Burris's opinion that Claimant has a 40-pound lifting restriction is also corroborated by the credible opinion of Dr. Scott.

66. Insofar as the FCE would permit findings that Claimant is limited to lifting 10 pounds occasionally, no carrying, 20 minutes of standing and 10 minutes of walking, this evidence is not persuasive. The findings of the FCE demonstrate that the alleged "limitations" on Claimant's activities are largely based on Claimant's self-reported symptoms and limitations. Dr. Scott credibly and persuasively opined that FCE is not reliable since it is based on Claimant's self-reporting and not correlated with "objective

findings." Dr. Scott explained that the FCE is not a reliable indicator of Claimant's limitations because Dr. Burris and Dr. Ginsberg both found that Claimant produced invalid ROM measurements. Dr. Scott persuasively argued that if Claimant did not report valid ROM he cannot be expected to reliably report his symptoms and limitations at an FCE.

67. Dr. Orgel's opinion, which is largely based on the FCE and Claimant's self-reported limitations, is not persuasive for these same reasons stated in Finding of Fact 66. Moreover, Dr. Orgel failed to review a complete set of Claimant's medical records. Dr. Orgel also stated his opinions would change if Claimant testified he could kneel. Claimant in fact testified he believes he can be on his knees.

68. Claimant's testimony that he is severely limited by injury-related symptoms is not credible and persuasive. Claimant's credibility is undermined by his failure to report valid ROM to Dr. Burris and Dr. Ginsberg. Claimant's testimony also lacks credibility because it differs significantly from pertinent medical records. Claimant testified that he began using a cane within two weeks of the March 2013 surgery because of weakness and instability of his lower extremities. However, on May 2, 2013 Dr. Zimmerman noted claimant demonstrated a "normal gait pattern." On May 15, 2013 Dr. Castro noted Claimant was "standing and walking without difficulty." On June 17, 2013 and August 6, 2013 Dr. Danahey described Claimant's gait as "nonantalgic." On July 30, 2013 Claimant saw Dr. Burris and denied persistent numbness or weakness in his legs. On September 17, 2013 Dr. Burris noted Claimant walked with a "normal gait." In January 2014 Dr. Ginsburg examined Claimant's lower extremities and noted a "great deal of 'giving in' weakness." The ALJ is not persuaded by Claimant's assertion that all of these physicians recorded "mistaken" observations about his ability to ambulate.

69. Claimant's credibility is further undermined by evidence from which the ALJ infers that Claimant's testimony was significantly influenced by a desire to portray himself as disabled in order to reap financial gain. The ALJ notes that on May 15, 2014 Claimant requested Dr. Zimmerman to give him no restrictions so he could return to work or a 5-pound restriction so he could apply for disability. Claimant also told Dr. Zimmerman he could not live on the impairment rating. On July 30, 2013 Dr. Burris reduced Claimant's restriction to permit lifting up to 20 pounds. Within a week of July 30 Claimant went to Dr. Danahey and expressed his concern about Dr. Burris's modification of the lifting restriction. On August 13, 2013 Claimant advised his physical therapist that surgery had not helped him and he wanted to "retire" after therapy was complete. On September 16, 2013, one day *before* Dr. Burris placed Claimant at MMI and imposed the 40-pound lifting restriction, Claimant told his physical therapist that he was feeling better and going to the gym every day. However, on September 18, 2013, one day *after* Dr. Burris placed Claimant at MMI and imposed the 40-pound lifting restriction, Claimant advised the physical therapist that "the other day" he hurt is back in when picking up a box and that his pain level was 10/10. There is no credible evidence that Claimant reported the alleged box-lifting incident to Dr. Burris on September 17, 2013, and Dr. Burris stated that Claimant's pain level was only 5/10 on that date.

70. The ALJ credits Montoya's expert vocational testimony that with a 40-pund lifting restriction Claimant is employable in various positions that are readily available in the Denver metropolitan labor market. Montoya's opinion was not refuted by any credible and persuasive opinion to the contrary.

FINDINGS CONCERNING CLAIM FOR POST-MMI MEDICAL BENEFITS

71. Claimant failed to prove it is more probably true than not that he is entitled to a general award of post-MMI medical benefits to relieve the effects of the injury or prevent deterioration of his condition.

72. On September 17, 2013, the date of MMI, Dr. Burris credibly and persuasively opined that no maintenance or follow-up care was necessary. On September 24, 2013 Dr. Burris persuasively opined that nor further treatment would change Claimant's subjective complaints.

73. Dr. Burris's opinion that no further treatment is necessary is corroborated by the credible opinion of Dr. Scott.

74. Despite the opinion of Dr. Burris the Respondents provided post-MMI treatment in the form of a referral to Dr. Noel. Dr. Noel in turn referred Claimant to Dr. Gridley for chiropractic/acupuncture treatment. On July 24, 2014 Dr. Noel indicated that no further visits were necessary. Claimant then completed two more treatments with Dr. Gridley. On August 19, 2014 Dr. Gridley stated that Claimant was "poorly stabilizing" and had a "poor response" to treatment. Dr. Gridley recommended against any further chiropractic/acupuncture treatment. The ALJ infers from this evidence that the course of post-MMI treatment rendered by Dr. Noel and Dr. Gridley provided no significant and lasting relief and was not reasonable and necessary to relieve Claimant's condition or to prevent further deterioration of the condition.

75. Insofar as the treatment recommended by Kaiser Permanente might permit a different conclusion, the ALJ finds this evidence is not persuasive. A review of the Kaiser records provides no persuasive evidence that Dr. Ptaskiewicz is familiar with Claimant's long course of treatment or the results of that treatment. Therefore, Dr. Ptaskiewicz's recommendations for additional treatment are not persuasive evidence that Claimant needs ongoing treatment after MMI.

76. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

PERMANENT TOTAL DISABILITY

Claimant alleges that a preponderance of the credible and persuasive evidence establishes that he is permanently and totally disabled. He relies heavily on the FCE results, the opinions expressed by Dr. Orgel and his own testimony to establish that he has severe restrictions on lifting, standing, sitting and walking. The ALJ disagrees with Claimant's argument.

To prove his claim that he is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

The term "any wages" means more than zero wages. *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant is able to earn any wages the ALJ may consider various human factors including Claimant's physical condition, mental ability, age, employment history, education, and the availability of

work that he could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (ICAO April 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether Claimant proved inability to earn wages in the same or other employment presents an issue of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

As determined in Findings of Fact 60 through 70, the Claimant failed to prove it is more probably true than not that the effects of the admitted industrial back injury have rendered unable to earn any wages in his labor market. The ALJ is persuaded that the only permanent restriction resulting from the industrial injury is the 40-pound lifting restriction imposed by Dr. Burris and endorsed by Dr. Zimmerman, Dr. Noel and Dr. Scott. The ALJ is further persuaded by Ms. Montoya's testimony that with this restriction Claimant is able to earn wages in the Denver metropolitan labor market.

For the reasons stated in Findings of Fact 66 and 67 the ALJ is not persuaded by the FCE and the opinions of Dr. Orgel that Claimant has much more extensive permanent restrictions than that imposed by Dr. Burris. The ALJ is also not persuaded by Claimant's testimony for the reasons stated in Findings of Fact 68 and 69.

The ALJ concludes the claim for permanent and total disability benefits must be denied.

POST-MMI MEDICAL BENEFITS

Claimant contends he has proven by a preponderance of the evidence that he is entitled to a general award of ongoing medical treatment after MMI to relieve the effects of the industrial injury. In support of this contention argues that he obtained relief of his symptoms during the "brief period" of post-MMI treatment provided by Dr. Noel and Dr. Gridley. The ALJ is not persuaded.

The right to receive medical treatment may extend beyond the date of MMI where a claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for ongoing medical benefits after MMI is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to ongoing medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As determined in Findings of Fact 71 through 75, Claimant failed to prove it is more probably true than not that he is entitled to a general award of post-MMI medical benefits to relieve the effects of the injury or prevent deterioration of his condition. To the contrary, the ALJ is persuaded by the credible opinions of Dr. Burris and Dr. Scott that no additional treatment is necessary. The ALJ also finds, contrary to Claimant's argument, the post-MMI treatment rendered by Dr. Noel and Dr. Gridley did not provide any significant relief to Claimant or prevent any deterioration in his condition. Rather, the persuasive evidence establishes that this post-MMI treatment was not reasonably necessary to relieve the effects of the injury or prevent any deterioration of Claimant's condition.

In light of this determination the issue of whether Claimant has made a showing sufficient to change the authorized treating physician is moot.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for permanent total disability benefits is denied and dismissed.

2. The claim for ongoing medical benefits after maximum medical improvement is denied and dismissed.

3. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 2, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

I. Whether scars located on Claimant's wrist and shoulder constitute serious permanent disfigurement which would entitle her to additional compensation pursuant to C.R.S. § 8-42-108.

II. Whether Claimant is entitled to have her average weekly wage ("AWW") adjusted.

III. Whether Claimant's scheduled impairment should be converted to whole person impairment.

IV. Whether Claimant has established, by a preponderance of the evidence that she is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of her admitted May 7, 2013, industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a 46 year old female who resides in Pueblo, Colorado. She immigrated to the United States from Guatemala in 1989 when she was approximately 18 years of age. She received formal education in Guatemala to the sixth grade and after moving to the U.S. never returned to school. She has no GED.

2. Since moving to the U.S. Claimant has worked as a babysitter, a housekeeper/head housekeeper- working supervisor at a hotel, a school cafeteria worker and lastly as a packager for Employer for the past seven years.

3. As a packager, Claimant's job duties were repetitive and included sealing bags, sorting, and packing tortillas by hand for 8 – 12 hours a day.

4. On May 7, 2013, Claimant reported an onset of bilateral shoulder, bilateral elbow and bilateral wrist pain to Employer. Liability for the claimed injuries/conditions was admitted and on May 13, 2013, Claimant began treatment with Dr. Terrence Lakin of the Southern Colorado Clinic.

5. On May 14, 2013 Dr. Lakin injected claimant's right shoulder with cortisone. He imposed work restrictions, which consisted of limited use of both arms, no repetitive work, a maximum limit of 5lbs for lifting, and no overhead use of right arm.

Claimant was returned to light duty work and from May 8, 2013 to September 17, 2013. spent her time doing less repetitive work. Dr. Lakin noted that her left arm improved.[1] However, Claimant's symptoms concerning her bilateral wrists, bilateral elbows and right shoulder failed to progress with conservative care. Consequently, diagnostic testing was performed to determine Claimant's surgical candidacy.

6. On June 26, 2013, Dr. Dwight Caughfield performed a nerve conduction study and clinic exam. The study displayed right median neuropathy consistent with carpal tunnel syndrome and his physical examination was consistent with right rotator cuff tendonitis with impingement.

7. On September 18, 2013 Claimant underwent right carpal tunnel release by Dr. Philip Marin. At this time, Claimant was taken off work and did not return to modified duty as there was no accommodation. Claimant has not returned to work since this date.

8. On November 18, 2013 an MRI of the right shoulder revealed distal rotator cuff tendinitis with a short segment area of interstitial delamination. On March 1, 2014 Claimant underwent right ASO with acromioplasty and distal clavicectomy by Dr. Roger Davis.

9. Claimant continued treating and became symptomatic for right dorsal wrist ganglion. On September 9, 2014 she underwent a ganglion excision, synovectomy of the wrist, and FCR tendon synovectomy, performed by Dr. Marin.

10. On April 9, 2014, Claimant was released from care by Dr. Martin following her right carpal tunnel release. At that time, she had full range of motion, flexion and extension of her fingers and she had good sensation throughout the hand. She was to return on an 'as needed' basis. Claimant testified she never returned to see Dr. Martin for this condition.

11. On July 24, 2014, Claimant was released from care by Dr. Davis following her right shoulder surgery. At that time, she had some pain but good functional return. She was essentially at MMI. She was to continue rehabilitation exercises on her own. She had no restrictions from Dr. Davis' perspective in regards to her right shoulder. Claimant testified she never returned to see Dr. Davis after that.

12. On 2/16/15, Claimant was released from care by Dr. Martin for her right dorsal ganglion excision and FCR synovectomy. At that time, she had some pain in her index finger. She had good range of motion of her fingers and she was able to make a full fist with full extension. She was to return on an 'as needed' basis. Claimant testified she never returned to see Dr. Martin for this condition.

[1] As of March 13, 2015, Claimant's left arm complaints had resolved completely according to the impairment rating report of Dr. Lakin.

13. During the time Claimant was convalescing from her three right arm surgeries, Dr. Lakin cautioned her to not overuse her left arm to compensate for her right arm limitations.

14. On March 13, 2015 Dr. Lakin determined Claimant had reached maximum medical Improvement ("MMI"). He assigned 34% right upper extremity impairment. Claimant's 34% right upper extremity scheduled impairment equates to 20% whole person impairment. No impairment was assigned for the left arm. Dr. Lakin assigned permanent physical restrictions consistent with the results of a functional capacity assessment including, "lifting/carrying capabilities between sedentary and sedentary light, no crawling activities as unable to bear weight on right wrist, displays frequent tolerance to upper extremity repetitive motion activity of light weight objects between waist and chest height, with 10-15 minutes at a time and 20-30 minutes in any one hour time period; limit above shoulder height activities." and a recommendation for maintenance medical care

15. On April 20, 2015 a Final Admission of Liability was filed by respondent-insurer. Claimant objected and filed an Application for Hearing on April 29, 2015.

16. Claimant testified that she moved to Pueblo, Colorado in 1992 and got a job as a "lunch lady" working in the cafeteria a school where she also occasionally acted as an interpreter. As this job did not provide sufficient hours, Claimant quit and secured employment in the hotel industry as a maid.

17. After approximately 2-3 years as a maid, Claimant was promoted to a head housekeeper position supervising other maids due to her experience and work ethic. She spent about 7 years as the head housekeeper/supervisor where her duties included hiring, firing, training, completing paperwork and ordering supplies. Claimant was terminated after a disagreement with another supervisor. She then gained employment with Employer in 2005. Claimant completed her application for employment with Employer in English.

18. Claimant has a valid, unrestricted Colorado driver's license. She took the driver's test in English and testified that she understands English and can read, write and speak it at a basic level. Claimant did not require the use of an interpreter at any of her medical appointments or for her meetings with the parties' respective vocational experts in this case. Rather, Claimant testified that she has never claimed that she does not understand English or that she is non-conversant in English. Based upon the evidence presented, the ALJ finds that while English is not Claimant's first language, she has sufficient command of English to complete written job applications in English and otherwise work in environments where English is spoken routinely.

19. Claimant testified that she currently has daily pain in her neck, her right shoulder blade, her upper back (trapezius) and left arm when she is active. She testified that her pain and limited range of motion in her neck and arms limits her driving. She reportedly

cannot lift a gallon of milk or reach overhead for more than ten minutes. Consequently, Claimant testified she requires some assistance with household chores and activities of daily living, such as combing her hair. The ALJ finds a dearth of medical evidence to support Claimant's assertions of impaired functional ability concerning the use of her arms, especially the left arm or her reported neck/upper back pain. Consequently, the ALJ finds her testimony as to her subjective physical limitations, pain complaints and restrictions unconvincing.

20. Claimant has failed to prove, by a preponderance of the evidence, that she has a functional impairment beyond the arm at the shoulder which would warrant conversion of her right upper extremity scheduled impairment to impairment of the whole person.

21. Claimant testified that she applied for and received unemployment benefits during the pendency of the claim. She admitted she understood that by receiving those benefits, she was admitting to the State of Colorado she was ready, willing, and able to work.

22. While Claimant testified that, post MMI, she had applied for jobs and was not hired; she had no idea if any of the employer's where she had applied were actually hiring at the time. While alleging she was permanently and totally disabled; Claimant failed, without explanation, to apply for Social Security benefits.

23. Bruce Magnuson testified as to the human factors specifically unique to Claimant in this case. He testified that she is 46 years of age, lives in Pueblo, Colorado, has sixth grade education from Guatemala, is not a native English speaker, and her past employment consists of the tortilla packager position, a maid position, and lunch room position. He testified as to the permanent restrictions provided by Dr. Lakin. He testified he heard Claimant's testimony regarding her residual functional capacity. He testified that based upon his review of the medical records and Claimant's testimony that she cannot perform her past employment. Mr. Magnuson also testified that there is not employment reasonably available to the claimant. In his opinion, the claimant meets the definition of permanent total disability in Colorado.

24. On cross examination, Mr. Magnuson conceded that he assumed Claimant's restrictions to include the bilateral upper extremities. He admitted further that it would be unusual for a doctor to place restrictions on a body part that was not permanently injured, such as Claimant's left arm in this case. Finally, Mr. Magnuson admitted that Claimant's age, in and of itself, was not a detriment to her being able to work and earn wages.

25. Mr. Magnuson did not do any labor market research or formal testing on the Claimant and he did not meet with or speak to any potential employers. Rather, he met with Claimant on one occasion for about one hour.

26. Patricia Anctil, Respondents' vocational expert, testified that Claimant is still able

to earn wages. Ms. Anctil based her opinions in part on an analysis of transferable skills and her vocational research. Ms. Anctil testified that, based upon her review of the medical records in the case; Claimant's work restrictions only involve her right upper extremity.

27. Ms. Anctil noted correctly that Claimant is bilingual; although the ALJ finds Claimant only possesses basic English skills.

28. Ms. Anctil also correctly noted that per the FCE results, Claimant had the frequent ability for upper extremity repetitive motions (Mr. Magnuson's opinion incorrectly notes this limitation as occasional).

29. In her reports and subsequent testimony, Ms. Anctil identified several positions that Claimant could perform including front desk clerk at La Quinta Inn or Super 8; order-taker/cashier at McDonalds or ticket seller/cashier at Cinemark theatres.

30. Based upon a totality of the evidence presented, including the medical records, the ALJ finds Ms. Anctil's opinions credible and more persuasive than the contrary opinions of Mr. Magnuson. Accordingly, the ALJ finds that Claimant failed to prove she is unable to earn any wages and is permanently and totally disabled.

31. Claimant presented evidence which establishes an average weekly wage of $549.36. Documentation entered into evidence regarding this issue consists of the wage records demonstrating Claimant's gross wages from May 6, 2012 through May 4, 2013 for a period of 363 days. The injury in this case occurred on May 7, 2013. Wage records submitted into evidence for this time period establish that Claimant was paid $27,660.75 leading up to the date of injury. When one performs the necessary calculation ($27,660.75 / 364 days × 7 days/week = $533.40), Claimant's average weekly wage, at the time of injury was $533.40. However, after January 1, 2015, Claimant lost her employer sponsored health insurance benefits that had previously been valued at $15.96 per week. When the $15.96 is added to the $533.40, it yields a value of $547.90. Consistent therewith, after January 1, 2015, Claimant's average weekly wage is calculated to be $549.36.

32. The ALJ finds that as a result of her May 7, 2013 work injury, Claimant has a visible disfigurement to the body consisting of surgical scarring on the right wrist and shoulder described as follows: There are three surgical scars about the right wrist, the first appearing approximately ⅜ inch long and red in color when compared to the surrounding skin. The second scar is approximately 1 inch long by 1/16 inch wide. This scar is lightly pigmented when compared to the surrounding skin. The third scar appears approximately 1 inch in diameter and is variously pigmented when compared to the surrounding skin. There are also three scars located on the right shoulder. The first scar, located on front of the shoulder, is approximately ½ inch long by 1/16 inch wide. This scar is lightly pigmented and slightly depressed when compared to the surrounding skin. On the outside portion of the right shoulder, there is a surgical scar possessing the same dimensions and overall characteristics of the scar located on the front of the

shoulder, except this scar is light pink in color when compared to the surrounding skin. On the back of the right shoulder there is red surgical scar appearing approximately ½ inch long by 1/16 inch wide. Claimant's residual scarring about the right wrist and shoulder alters the natural appearance of her skin which constitutes a disfigurement as provided for by Section 8-42-108 (1), C.R.S. Consequently, the ALJ finds that Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The ALJ has considered these factors and concludes, based upon the totality of the evidence presented, that Ms. Anctil is a credible witness. Moreover, the ALJ finds and concludes, based upon the evidence presented, that Ms. Anctil's opinions are more persuasive than those of Mr. Magnuson. Conversely, the ALJ finds Claimant's testimony regarding her asserted current functional limitations, restrictions and pain complaints incredible and unconvincing.

C. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item

contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Disfigurement

D. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." In this case, the ALJ conducted a disfigurement viewing. As part of that viewing, the ALJ observed the residual surgical scarring described above at FOF ¶ 32. As found, Claimant's scars constitute a disfigurement as provided for by § 8-42-108 (1), C.R.S. Accordingly, Insurer shall pay Claimant $1,200.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

Average Weekly Wage Adjustment

E. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

F. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), gives the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of her diminished earning capacity comes from the wage records submitted into evidence. In this case, the ALJ concludes that Respondent's methodology in utilizing the first 133 days in 2013 to calculate Claimant's AWW results in a fundamentally unfair figure that does not represent Claimant's earnings over time. The ALJ adopts Claimant's methodology in calculating his AWW, but utilizes the total number of days in the time period extending from May 6, 2012 to May 4, 2013 to arrive at a daily rate which the ALJ subsequently multiplies by 7 to arrive at a weekly rate as this method accounts for Claimant's average weekly earnings over a 363 day time period leading up to the injury in this case. Accordingly, the ALJ determines that Claimant's average weekly wage is $549.36. The ALJ finds that this figure most closely approximates Claimant's actual wage loss and diminished earning capacity.

Conversion

G. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person.

This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder.

H. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Furthermore, as pointed out by Claimant's counsel, functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Consequently, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare*

System, supra; Langton v. Rocky Mountain Health Care Corp., 937 P.2d 883 (Colo. App. 1996)

I. Based upon the evidence presented, the ALJ finds that Claimant has failed to meet her burden to establish that she has sustained functional impairment beyond the arm at the shoulder warranting conversion of her scheduled impairment to impairment of the whole person. At hearing, Claimant testified that since her admitted shoulder injury she has experienced neck pain, difficulty sleeping, upper back (trapezius) pain, difficulty reaching overhead for more than 10 minutes and using her arms to lift objects. Accordingly, Claimant asserts that she has functional limitations in her ability to carry out activities of daily living, including driving and combing her hair. Claimant argues that these complaints/limitations justify an award of whole person impairment. The ALJ is not persuaded for the following reasons: (1) The ALJ finds Claimant's report of symptoms beyond the shoulder into the neck and upper back unsupported by the totality of the medical record and; (2) no restrictions have been imposed on the use of Claimant's left arm. Indeed according to Dr. Lakin, the authorized treating physician in this case, Claimant's left upper extremity resolved fully by March 13, 2015. Consequently, the ALJ finds Claimant's assertions of functional impairment beyond the arm at the shoulder contradicted and substantially eroded by the balance of the evidence presented. While the Claimant's shoulder injury may have caused referred pain to other parts of the body, including the trapezius and the lower neck, the ALJ is not persuaded that Claimant's shoulder injury has resulted in any decreased capacity in Claimant's ability to meet her personal, or social demands.

Permanent Total Disability

J. Under applicable law, Claimant is permanently and totally disabled if he is unable to "earn any wages in the same or other employment." *Section 8-40-201(16.5)(a), C.R.S.* The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

K. There is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes

that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995).

L. When determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Considering Claimant's unique "human factors", the ALJ is not convinced that she is incapable of earning any wages. Here, the evidence presented establishes that Claimant is a younger worker who has sufficient skills to obtain and maintain employment. While Claimant has a limited education, she understands and is conversant in English. She reads and writes English at a basic level. Her education background and her language skills were the same prior to her May 7, 2013 injury and have never precluded her from securing employment in the past. She has a sufficiently diverse work background which includes supervising others and ordering inventory. Moreover, she possesses a unrestricted driver's license and while she suggests that her shoulder injury limits her driving and therefore her access to the labor market, the assertion is unsupported by the record evidence. Here, despite claimant's assertions, there is a paucity of evidence to support a conclusion that Claimant's restrictions include the left arm. Furthermore, the restrictions imposed are not likely to affect Claimant's ability to drive. Consequently, the ALJ is not persuaded by the suggestion that Claimant does not have access to labor markets within a reasonable commutable distance from Pueblo.

M. Likewise the ALJ is not persuaded by Claimant's assertion that there is no work available to her given the restrictions assigned by Dr. Lakin. While it is more probably true than not, that Claimant is precluded from returning to her former occupation as a packager and/or the housekeeping positions she held in the past, the representative sampling of positions identified by Respondents' vocational expert as being within Claimant's physical/mental capabilities represent a number of perspective job positions existing in the local labor market affording Claimant the opportunity to earn a wage. As noted above, there is no requirement that Respondents locate a specific job Claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc*., *supra*. Nonetheless, Ms. Anctil reviewed the restrictions imposed by Dr. Lakin and took all into account when performing labor market research to identify those positions comprising her sampling. She identified Claimant's transferable skills and persuasively testified that Claimant retains the ability to earn wages in the positions she identified as being within Claimant's capacity.

N. Based upon the evidence presented, the ALJ concludes that Ms. Anctil's opinions and testimony are credible and more persuasive than the contrary opinions of Mr. Magnuson who failed to document any transferrable skills or conduct any labor market research. He offered opinions on Claimant's ability to perform specific jobs without ever contacting the employers to determine the actual job duties. Finally, he incorrectly assumed that Claimant's upper extremity restrictions extended to both arms

and he incorrectly noted that Claimant was limited to occasional repetitive movements of the upper extremities when the FCE listed the same as frequent. Accordingly, Claimant has failed to demonstrate by a preponderance of the evidence that she is incapable of earning any wage in the same or other employment as a result of her May 7, 2013 work injury.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant $1,200.00 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

2. Claimant is entitled to an adjustment of her AWW to $549.36

3. Claimant's request for conversion of her scheduled upper extremity impairment to impairment of the whole person is denied and dismissed.

4. Claimant's claim for permanent total disability benefits is denied and dismissed.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 23, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has overcome the opinion of the Division Independent Medical Examiner ("DIME") regarding maximum medical improvement ('MMI") by clear and convincing evidence.

II. Whether the left total knee replacement procedure recommended by Dr. O'Brien is reasonable, necessary and causally related to Claimant's admitted industrial injury.

III. If Claimant is at MMI for the work-related injury, whether she has established by a preponderance of the evidence that her scheduled impairment rating should be converted to a whole person impairment rating.

IV. Whether Claimant is entitled to disfigurement benefits for her work-related injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On March 27, 2015, Claimant was in the course and scope of her employment as a flight attendant for Employer when she injured her left knee. Claimant was working in the galley of the plane when the aircraft was shaken violently by some turbulence causing her to twist her left knee. Claimant completed her shift by working a flight from Houston, Texas to Colorado Springs, Colorado; however, she began to experience swelling and pain in her knee on the return flight. Claimant reported the injury to her employer upon her return and the claim was admitted.

2. Claimant came under the care of Dr. John Reasoner. Dr. Reasoner obtained MRI images of the claimant's left knee which revealed moderate to advanced degenerative changes and osteoarthritis along with associated degenerative tearing of the medial meniscus. Conservative treatment failed to resolve Claimant's symptoms and she was referred to Dr. David Walden for an orthopedic consult.

3. Dr. Walden diagnosed left knee degenerative joint disease. He opined further that Claimant likely sustained an acute medial meniscus tear "superimposed" on her degenerative joint disease. Dr. Walden determined that Claimant had not made significant improvement with conservative care and thus he recommended an "arthroscopic partial medial meniscectomy and chrondroplasty to try to return [her] to as close to baseline as possible". Dr. Walden requested pre-authorization from the workers' compensation insurer to proceed with the recommended surgical intervention.

Insurer approved the surgery and on May 31, 2013, Dr. Walden performed a left knee arthroscopic partial medial meniscectomy, a left knee arthroscopic partial lateral meniscectomy, and a left knee arthroscopic chondroplasty of the patellafemoral joint, medial femoral condyle, and medical tibial plateau.

4. Surgery failed to resolve Claimant's symptoms and actually made them worse. Consequently, Dr. Walden directed visco-supplementation to the left knee which also failed to produce any material effect on Claimant's ongoing symptoms. A new MRI was performed on December 4, 2013, which, according to a December 16, 2013 report from Dr. Walden, confirmed severe degenerative changes in Claimant's left knee as well as degenerative tears of the medial and lateral meniscus. Dr. Walden opined that Claimant would not benefit from additional arthroscopies and that the majority of her pain was coming from osteoarthritis. Dr. Walden opined further that because Claimant was not "benefiting from conservative measures she would be considered a candidate for a total knee arthroplasty". According to Dr. Walden, the work-relatedness of the need for this procedure was a "somewhat difficult" question because, while it was clear that the work injury did not cause Claimant's osteoarthritis, the work related tearing of the meniscus was exacerbating the situation and Claimant had not returned to her pre-injury baseline since her injury and subsequent surgery. Dr. Walden referred Claimant for consideration of a total knee replacement.

5. On February 17, 2014, Claimant was evaluated by orthopedic surgeon, Dr. Timothy O'Brien regarding her need for a total knee arthroplasty. Dr. O'Brian noted Claimant's report that the surgery performed by Dr. Walden had actually made her symptoms worse. Dr. O'Brian agreed that the claimant was in need of a total knee replacement; however, he withheld an opinion on causation between Claimant's work injury and her need for a replacement arthroplasty as he was unable to review all of the medical documentation.

6. On April 21, 2014, Dr. Mark Failinger evaluated Claimant in the setting of an independent medical examination (IME) at Respondents' request. Dr. Failinger made note of the mechanism of injury, describing how Claimant twisted her knee and continued working despite experiencing pain and swelling of her knee because she thought she had "tweaked" her knee. He also documented Claimant's report that she was able to walk to her car following completion of her shift on the day of injury as well as her reported history of intermittent left knee pain prior to the work injury for which no treatment was sought. Focusing on the work related injury, i.e. the exacerbation of pre-existing arthritis and meniscal tearing, Dr. Failinger opined as follows: "in my opinion, there was high-grade chrondromalacia, in other words, degenerative joint disease, prior to the 3/27/2013 incident. There was an exacerbation of preexisting arthritis and lower chance that the 3/27/2013 event created significant new pathology, but, may have caused some further meniscus tearing for which the appropriate treatment has occurred. No further treatment needed for such". Based upon Dr. Failinger's report, the ALJ finds that Dr. Failinger believes that Claimant's meniscal tearing was causally related to her March 27, 2013 industrial injury. Moreover, the ALJ infers from the content of Dr. Failinger's IME report that this compensable meniscal tearing was

adequately treated with the care provided by Dr. Reasoner and Dr. Walden. Consequently, while Dr. Failinger did not expressly address whether Claimant's need for a left total knee arthroplasty was causally related to the industrial injury, the ALJ finds that Dr. Failinger's report supports a finding that he does not believe that Claimant's need for a total knee replacement is related to the work injury.

7. Following Dr. Failinger's IME, Claimant as placed at MMI by Dr. Reasoner, on May 15, 2014. During his exam of Claimant, Dr. Reasoner noted that there was a normal exam of the lumbar spine. He provided a diagnosis of left knee osteoarthritis aggravation. Dr. Reasoner specifically opined that "no further active medical or surgical treatment with (sic) be beneficial," thus implicitly opining against a left total knee replacement as being related to the work injury. Two years of medication was put forth as maintenance care.

8. Dr. Cynthia Lund examined Claimant on June 7, 2014, for purposes of assigning an impairment rating. Dr. Lund made note of the fact that Claimant stated she had occasional minor pain in her knee prior to the work injury. Dr. Lund agreed with the MMI date of May 15, 2014, and assigned a 36% scheduled impairment rating of the left lower extremity. Maintenance care to include two years of pain medication was recommended. Dr. Lund did not opine that the left total knee replacement surgery should be performed as a result of this work injury nor did Dr. Lund state that Claimant's scheduled impairment rating should be converted to whole person impairment.

9. Respondents filed a Final Admission of Liability ("FAL") on September 9, 2014, consistent with the opinions of Dr. Reasoner and Dr. Lund. Claimant objected to the FAL in a timely manner and requested a Division Independent Medical Examination ("DIME").

10. The DIME was performed by Dr. Scott Ross on January 16, 2015. Dr. Ross agreed with the MMI date of May 15, 2014 and assigned a 45% scheduled impairment rating of the left lower extremity. He did not indicate that Claimant's scheduled impairment should be converted to whole person impairment. He also indicated that because the work injury did not cause Claimant's degenerative arthritis, there was no liability for the total knee arthroplasty under the workers compensation system. While acknowledging that Claimant had seen Dr. O'Brien and noting that Dr. O'Brien had recommended a TKA, the evidence presented fails to establish that Dr. Ross requested Dr. O'Brien's records before placing Claimant at MMI. Moreover, although available prior to hearing, Dr. Ross was not provided with Dr. O'Brien's records review report for comment. Based upon the evidence presented, the ALJ finds Dr. Ross' opinions concerning MMI to be based upon an incomplete review of the medical record concerning cause of Claimant's need for a total knee arthroplasty, its relatedness to her industrial injury and its impact on MMI. Consequently, the ALJ finds Dr. Ross' opinions regarding MMI highly probably incorrect. Claimant has proven by clear and convincing evidence that she was not at MMI on May 16, 2014. Consequently, the ALJ finds Claimant entitled to temporary total disability benefits as requested by Claimant from October 6, 2015 and ongoing.

11. Respondents filed a FAL on March 13, 2015, that is consistent with the DIME opinion. The claimant objected and requested a hearing.

12. On September 15, 2015, Dr. O'Brien was asked to conduct a records review and address the question of whether Claimant's need for a total knee arthroplasty was causally related to her March 27, 2013 industrial injury. Following that records review, Dr. O'Brien opined that the arthroscopic procedure performed by Dr. Walden was contraindicated, and that the performance of this procedure accelerated the progression of Claimant's preexisting osteoarthritis, thereby causing her need for a total knee replacement. According to Dr. O'Brien, the only thing that Dr. Walden's surgery served to do was to introduce a rigid arthroscope into Claimant's osteoarthritic knee causing surgical trauma which in turn created an "intractable synovitis, which in almost all cases results in a dramatic progression of osteoarthritic symptomology".

13. Based on the evidence presented, the ALJ finds that Dr. O'Brien was presented with a comprehensive set of Claimant's medical records including the DIME report of Dr. Ross when he was tasked by Respondents to address the cause of Claimant's need for a TKA and the relatedness of the procedure to her admitted left knee injury. Conversely, as noted above, Dr. Ross did not have a complete set of records when he placed Claimant at MMI, nor was he provided with Dr. O'Brien's records review report for additional comment prior to the October 6, 2015 hearing. Consequently, the ALJ credits the opinions of Dr. O'Brien over those of Dr. Ross to find that Claimant's need for total knee arthroplasty is reasonable, necessary and causally related to her March 27, 2013 industrial injury.

14. Claimant testified at the hearing in this matter. She testified that she was active prior to suffering the work-related injury in this case. She testified that, prior to the date of injury; she never had any significant pain or functional limitations relative to her left knee. She was able to walk approximately two miles daily, was able to hike occasionally and engage in gold panning and rock hounding. The claimant testified as to her mechanism of injury and the pain she experienced leading up to the May 31, 2013 arthroscopic surgery performed by Dr. Walden. She testified that, after the surgery performed by Dr. Walden; her left knee symptoms became significantly worse. She testified that at no time since the work-related injury has she returned to her pre-injury baseline. Nonetheless, the admitted that she retains the ability to cook, do laundry, grocery shop, perform general housekeeping tasks, groom herself, take trips in a car to Missouri and Nebraska to visit her children and get into and drive her Dodge Ram 2500 truck. She testified that she gets pain in her low back and left hip, and that she had a bursitis in her left hip approximately three years prior to the work injury. Claimant further testified that she does not use any medical assistive devices, such as a cane or walker.

15. Dr. Michael Dallenbach testified at hearing. He testified that Claimant suffered from severe preexisting osteoarthritis and cartilage loss in the left knee resulting in bone on bone contact. He also testified that Claimant likely suffered from preexisting

meniscus tears in her left knee. According to Dr. Dallenbach, Claimant's condition became symptomatic following the work injury and that the arthroscopic procedure performed by Dr. Walden could have caused Claimant's preexisting condition to become symptomatic. He testified that, in his expert opinion, Claimant's need for a total knee arthroplasty was caused by the work-injury and the treatment thereof. He testified that a proper analysis of whether the claimant is at MMI includes an analysis of whether the injury aggravated or accelerated the underlying degenerative condition causing the need for treatment. He testified that in his opinion, the work injury aggravated and accelerated the need for the total knee replacement. Therefore, Dr. Dallenbach opined that Claimant is not at MMI.

16. Claimant was sent a letter informing her of her award of Social Security Disability Insurance benefits on April 20, 2015. That letter stated that Claimant became disabled under their rules on March 27, 2013. However, because Claimant did not file for benefits until March 3, 2015, she was only entitled to benefits beginning in March of 2014. Claimant was to receive a lump sum payment of $8,780.00 around April 26, 2015, and monthly benefits of $683.00 moving forward.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

D. Claimant's request to set aside the Division IME opinion of Dr. Ross that Claimant reached MMI for the effects of her admitted industrial injury on May 15, 2014 is granted. A DIME physician's finding regarding MMI is binding on the parties unless overcome by "clear and convincing evidence." *Section 8-42-107(8)(b)(III), C.R.S.*; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Furthermore, the Colorado Court of Appeals has previously held that the DIME physician's opinion on the cause of a claimant's disability is an inherent part of the diagnostic assessment which comprises the DIME process of determining MMI and rating permanent impairment. *Denham v. L & L Disposal and Pinnacol Assurance, supra; citing Qual Med, Inc., v. Industrial Claim Appeals Office, supra; Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). "Because the issue of MMI inherently requires a determination of the cause or causes of the claimant's medical condition, a DIME physician's opinion that a causal relationship does or does not exist between a particular condition and the industrial injury must also be overcome by clear and convincing evidence." *Nilsestuen v. Nuanez Trucking and Pinnacol Assurance*, 2002 WL 1008778, at *1.

E. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI or the cause of a particular component of a claimant's medical condition the party challenging the DIME physicians opinions must demonstrate that the determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

F. The question of whether the Claimant has overcome the DIME physician's

findings regarding MMI and/or causality, by clear and convincing evidence, are one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert*, *supra*. In deciding whether Claimant has met her burden of proof, the ALJ is empowered, "[t]o resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). In this case, the issue of whether Claimant was properly placed at MMI by Dr. Ross involves a complex medico-legal question regarding the cause of Claimant's need for a total knee replacement procedure. Succinctly, Claimant contends that her compensable left knee injury necessitated an arthroscopic surgery which aggravated and also accelerated the progression of her underlying pre-existing left knee osteoarthritis thereby contributing substantially to her need for a total knee arthroplasty (TKA). As such, Claimant contends that her need for a TKA is directly causally related to her admitted work injury. Claimant contends further that because Dr. Ross did not independently consider whether Claimant's arthroscopic surgery, as performed by Dr. Walden aggravated, accelerated, or combined with her pre-existing arthritis so as to produce the need for the TKA, his opinion regarding MMI is erroneous.

G. Because the question of whether Claimant attained MMI inherently requires a determination of the cause or causes of the claimant's medical condition and need for medical treatment, the ALJ concludes that a proper analysis of whether the need for a TKA is causally related to the industrial injury is fundamental to the question of whether Claimant was properly placed at MMI. Here, the evidence presented persuades the ALJ that Dr. Ross' opinion concerning MMI is highly probably incorrect because it is based upon an incomplete understanding of the cause or causes of the claimant's current medical condition and her need for a TKA. Careful review of the DIME report persuades the ALJ that rather than considering whether the work injury or any treatment (surgery) received as a consequence aggravated, accelerated or combined with Claimant's pre-existing condition to produce the need for a TKA, Dr. Ross rather simply opined that Claimant's work injury did not cause her pre-existing condition. Thus, according to Dr. Ross there is no liability for the TKA under the workers compensation system. He did not explain this opinion, nor did he address whether the admitted "exacerbation" was temporary or permanent in nature or whether it accelerated Claimant's underlying arthritis beyond its normal rate of progression. He simply did not render opinions in this regard. Moreover, while acknowledging that Claimant had seen Dr. O'Brien and noting that Dr. O'Brien had recommended a TKA, Dr. Ross failed to request Dr. O'Brien's records before placing Claimant at MMI despite the availability of the record. Finally, although available Dr. Ross was not provided with Dr. O'Brien's records review report for comment. Consequently, as found above, the ALJ finds Dr. Ross' opinion that Claimant had reached MMI to be based upon an incomplete review of the record concerning cause of her need for a TKA and its relatedness to her industrial injury.

H. To the extent that Dr. Ross' opinions concerning causality, and therefore, MMI diverge from those expressed by Dr. O'Brien, the ALJ concludes those discrepancies constitute more than a professional difference of opinion. While a mere difference of

opinion between physicians fails to constitute error, *Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000), the evidence presented in this case persuades the ALJ that Dr. Ross' opinion regarding MMI is based upon an incomplete review of the record and the cause of Claimant's need for a TKA and its relationship to her March 27, 2013 industrial injury. Consequently, the ALJ concludes that Dr. Ross performed an incomplete causality assessment regarding Claimant's need for a TKA and its relationship to her MMI status. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. *Section 8-40-201(11.5), C.R.S.* Here, the weight of the persuasive evidence demonstrates that Claimant's need for a TKA is directly related to the treatment she received for her industrial injury. Because the TKA is necessary to cure Claimant of the ongoing effects of the aggravation caused by the surgery performed by Dr. Walden and is likely to improve her condition, and because Dr. Ross failed to consider the totality of the medical record before placing Claimant at MMI or perform a complete causality assessment addressing Claimant's need for a TKA to her MMI status, the ALJ concludes that Claimant has proven that it is highly probable that Dr. Ross erroneously placed her at MMI on May 15, 2014 for her March 27, 2013 left knee injury.

Relatedness of Claimant's Need for a Total Left Knee Arthroplasty to the March 27, 2013 Injury

I. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

J. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

K. Based on the totality of the evidence presented, the ALJ credits the opinions of Dr. O'Brien to conclude that Claimant's immediate need for a left total knee replacement is reasonable, necessary and directly related to the admitted March 27, 2013 left knee injury. Here, the conclusions of the medical literature cited by Dr. O'Brien persuades the ALJ that the arthroscopic surgery performed by Dr. Walden, to treat pain emanating

from Claimant's compensable injury, was contraindicated and served only to accelerate the progression of her underlying osteoarthritis hastening her need for a total knee replacement. As eloquently stated by Dr. O'Brien, "[t]he only thing that this surgery serves to do is introduce surgical trauma that creates an intractable synovitis which in almost all cases results in dramatic progression of osteoarthritic symtomatology". Consequently, the ALJ concludes that Respondents are liable for the left knee TKA to cure and relieve Claimant of the ongoing symptoms associated with the progression/acceleration of the underlying arthritis caused by Dr. Walden's original arthroscopic surgery.

Conversion

L. Because this order determines that Claimant has proven by clear and convincing evidence that Dr. Ross' opinion regarding MMI is erroneous and that she is in need of a TKA, the ALJ concludes that Claimant's request for conversion of her scheduled impairment rating to impairment of the whole person is moot. Consequently, this order does not address this issue further.

Disfigurement

M. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." In this case, the ALJ conducted a disfigurement viewing. As part of that viewing, the ALJ observed mild generalized swelling of the left knee when compared to the contra-lateral limb. Additionally, Claimant has two (2)⅜ inch in diameter semi -circular, light red arthroscopic scars located in the area of the left knee. Finally, Claimant ambulates with a perceptible limp favoring the left leg as a consequence of what the ALJ concludes emanates from a stiff knee lacking full range of motion. The ALJ concludes that Claimant's mild swelling, scars and appreciable limp constitutes disfigurement as provided for by § 8-42-108 (1), C.R.S. Accordingly, Insurer shall pay Claimant $1,800.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

Offset for Claimant's Receipt of SSDI Benefits

N. Pursuant to C.R.S. § 8-42-103(1)(c)(I) the aggregate benefits payable to a Claimant for TTD shall be reduced, but not below zero, "by an amount equal as nearly as practical" to one-half the federal periodic benefits paid to a Claimant for federal "Old-Age, Survivors, and Disability Insurance Amendments of 1965". The "offsets" provided for under C.R.S. § 8-42-103(1)(c)(I) are statutory in nature. Consequently, Respondent's are entitled to apply the provisions of C.R.S. § 8-42-103(1)(c)(I) and offset the TTD benefit to be paid to Claimant if the circumstances raised by C.R.S. § 8-42-103(1)(c)(I) otherwise apply to the case. Here, Respondents have proven by a preponderance of the evidence that Claimant became entitled to SSDI benefits

beginning March 2014 in the amount of $683.00 per month. Accordingly, the offset provisions of C.R.S. § 8-42-103(1)(c)(I) apply in this case. However, Claimant simply requested that TTD benefits be reinstated in this case from the date of the hearing and ongoing, should Claimant be found not at MMI. Based on this, Respondents are entitled to a weekly offset of $78.81 ($683.00 x 12 months, divided by 52 weeks and divided by .50), beginning October 6, 2015 and ongoing.

O. Based on the admitted AWW of $747.29 and resulting TTD rate of $498.22, Claimant shall be entitled to weekly TTD payments, after application of the aforementioned offset, in the amount of $419.41 beginning October 6, 2015 per her request.

ORDER

It is therefore ordered that:

1. Claimant has overcome the opinion of the DIME physician in regards to MMI by clear and convincing evidence.

2. Claimant has established, by a preponderance of the evidence, that the left total knee replacement procedure recommended by Dr. Walden is reasonable and necessary medical treatment, which is causally related to her March 27, 2013 work injury.

3. Claimant has proven by clear and convincing evidence that she is not at MMI. Consequently, her request for conversion of her scheduled impairment rating to whole person impairment is moot.

4. Claimant is entitled to disfigurement benefits in the amount of $1,800.00.

5. As Claimant has proven that she is not at MMI, her request for reinstatement of TTD benefits beginning October 6, 2015 is GRANTED. Respondents are entitled to a weekly offset against temporary disability benefits of $78.81 based on Claimant's receipt of SSDI benefits, to be applied to any TTD benefits paid in conjunction with the claim beginning October 6, 2015 and ongoing.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that the need for a total hip replacement was proximately caused by the industrial injury she sustained on May 18, 2013?

- Did Claimant prove by a preponderance of the evidence that a total hip replacement constitutes reasonable and necessary medical treatment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At hearing Claimant's Exhibits 1 through 8 were received into evidence. Respondents' Exhibits A though M were received into evidence.

2. Claimant was born on January 4, 1943. She was 72 years of age on the date of the hearing.

3. Claimant was employed a "grocery stocker" in the Employer's store. Claimant credibly testified that on May 18, 2013 she was climbing a ladder to move materials when she experienced low back pain. On December 6, 2013 the Respondents filed a General Admission of Liability for Claimant's injury.

4. Claimant selected Colorado Health Management Group (CHMG) as the authorized medical provider for this injury.

5. Nurse Practitioner Laura Turk evaluated Claimant at CHMG on May 18, 2013. Claimant complained of low back pain but denied any "loss of strength or sensation in the legs." NP Turk assessed lower back pain and recommended activity modification and rest. NP Turk prescribed "Norco" for pain and diazepam for muscle spasm.

6. Physician's Assistant Michael Dietz evaluated the claimant on May 23, 2013. PA Dietz assessed acute left back pain, strain. He prescribed Tylenol 500 and Lidoderm patches. He also referred Claimant for physical therapy (PT). PA Dietz imposed lifting, walking and standing restrictions and limited Claimant's work to 4 hours per day.

7. On June 5, 2013 Claimant commenced PT at Pro Active Physical Therapy (Pro Active). On June 10, 2013 the Pro Active physical therapist noted that Claimant

was now complaining of right-sided hip pain. The therapist wrote the pain was in the right buttock.

8. On June 11, 2013 Claimant told PA Dietz that she underwent her first "formal" PT visit the previous day and that she was "stiff and sore." Claimant also reported that she was experiencing some right hip pain that sometimes radiated to her right knee. PA Dietz referred Claimant for an MRI to "rule out HNP pathology lumbar."

9. On June 14, 2013 Claimant underwent a lumbar MRI. The radiologist's general impression was "spondylitic changes in the lumbar spine."

10. On July 12, 2013 Kevin T. O'Connell, M.D., examined Claimant at CHMG. Claimant reported "intense pain coming from the right SI joint radiating into the right leg." Claimant advised Dr. O'Connell that PT was not helpful and that on the "initial sessions there was 1 movement that particularly aggravated her back with pronounced pain down into her right leg." Dr. O'Connell noted Claimant had recently been seen by Robert Benz, M.D., for an orthopedic spine consultation. Dr. Benz had recommended an L4-5 facet injection and an L5-S1 right-sided transforaminal epidural steroid injection (ESI). Dr. O'Connell also reviewed the lumbar MRI. Dr. O'Connell assessed right L5 lumbar disc syndrome secondary to facet arthropathy and a degenerative L4-5 disc. Dr. O'Connell referred Claimant to George Girardi, M.D., to perform the injections recommended by Dr. Benz.

11. On August 14, 2013 Dr. O'Connell noted Claimant underwent a transforaminal ESI which provided significant but brief relief of her symptoms. Dr. O'Connell referred Claimant for additional PT with a different provider.

12. On September 19, 2013 Dr. O'Connell assessed lumbar sprain with aggravation of lumbar degenerative disc disease and right leg sciatica. Dr. O'Connell referred Claimant to Rebekah Martin, M.D., for a pain management consultation.

13. Dr. Martin examined the Claimant on September 24, 2013. Claimant reported pain from the suboccipital region all the way down into the low back and right lower extremity. When Dr. Martin asked Claimant where she experienced the most pain Claimant pointed to the right groin and lateral hip regions. Based on the history, physical examination and review of imaging studies Dr. Martin opined that Claimant's pain generator "may be coming" from her right hip. Dr. Martin recommended a right hip intraarticular joint injection. Dr. Martin explained that she was suspicious Claimant might have sustained a labral tear at the time of her first PT visit.

14. On October 7, 2013 I. Stephen Davis, M.D., conducted an independent medical evaluation at the request of the Insurer. Dr. Davis is board certified in orthopedic surgery and is level II accredited. Dr. Davis took a history from Claimant, reviewed pertinent medical records and performed a physical examination. Dr. Davis noted that Claimant's pain complaints were in her right lower extremity and not the back. On physical examination Dr. Davis found Claimant's right hip was "irritable to compression and rotation." Based on the clinical examination Dr. Davis opined the

claimant's lumbar spine was not the pain generator. Rather, Dr. Davis was more "impressed" with the findings about the right hip. Dr. Davis opined that Claimant's "pain generator" had not yet been determined. He recommended Claimant undergo an MRI arthrogram of the hip and pelvis and a bone scan.

15. On October 22, 2013 Dr. Martin noted Claimant had a favorable response to a hip joint injection performed on October 8, 2013. Dr. Martin recommended Claimant undergo a right hip MRI with contrast to determine if a labral tear was present.

16. On December 2, 2013 Claimant underwent a right hip MRI with contrast. The radiologist's impression was a nondisplaced tearing of the anterosuperior acetabular labrum.

17. On December 30, 2013 Dr. O'Connell assessed Claimant with a right hip acetabular tear and lumbar degenerative discs at L3-4 and L4-5. Dr. O'Connell referred Claimant to "hip specialist" Brian White, M.D., for an orthopedic consultation.

18. On January 8, 2014 Claimant was examined by Dr. White and Physician's Assistant Shawn Karns. Claimant's chief complaint was "right hip pain." Claimant gave a history that she injured her back on May 18, 2013 while standing on a ladder and pushing some items onto a top shelf. Claimant also reported that while she was stretching her hip in PT she "felt a sharp pain deep in the groin." PA Karns noted Claimant was 5 feet 4 inches tall and weighed 210 pounds. Claimant reported that she had gained 30 pounds because the hip problems prevented her from being active.

19. In his office note of January 8, 2014 Dr. White commented that Claimant's hip pain was affecting her "quality of life" and that her function was "becoming more restricted." Dr. White noted that x-rays of Claimant's hip showed "reasonably well-preserved joint space" and that the MRI confirmed there was a "significant" labral tear. Dr. White recommended the Claimant undergo a total hip replacement (THR) as opposed to arthroscopic debridement of the labral tear. Dr. White opined that arthroscopic debridement was not the "ideal" treatment for Claimant because of her "body habitus" and age of 71 years. Dr. White further stated that a THR would "last for as long as" Claimant needed it and that a THR would be a more "predictable" surgery than arthroscopic debridement.

20. On January 8, 2014 Dr. White wrote a letter to Dr. O'Connell explaining his recommendation that Claimant undergo a THR. Dr. White acknowledged that Claimant had "preserved joint space with minimal arthritis." However Dr. White stated that Claimant was "probably a little bit older than someone who should undergo" hip arthroscopy and that a THR is the "more predictable longer-lasting surgery."

21. On January 23, 2014 Dr. O'Connell stated that he concurred with Dr. White's recommendation for a THR.

22. The Insurer requested Gwendolyn Henke, M.D., to conduct a "Rule 16 review" of Dr. White's request for prior authorization to perform a THR. Dr. Henke is

board certified in orthopedic surgery and level II accredited. On February 20, 2014 Dr. Henke issued a report setting forth her findings and opinions. Dr. Henke assessed Claimant as suffering the following conditions as a result of the May 18, 2013 industrial injury: (1) Acute low back strain; (2) Aggravation of pre-existing lumbar spondylosis with intermittent L5 radicular symptoms; (3) Aggravation of pre-existing, asymptomatic tear of the right acetabular labrum. Dr. Henke opined that Claimant suffered the aggravation of the pre-existing labral tear while undergoing PT to treat the work-related low back strain.

23. Dr. Henke opined that the THR proposed by Dr. White is not reasonable and necessary medical treatment for Claimant's torn labrum. Dr. Henke noted that there is a "high incidence of asymptomatic labral tears associated with age of greater than 60 years, suggesting that they occur as a result of the degenerative process." She further noted that untreated symptomatic labral tears are "thought to contribute to early osteoarthritis." Dr. Henke opined that the recommended treatment for labral tears is arthroscopic repair or debridement of the tear. Dr. Henke explained that she did not "encounter any recommendations" that a labral tear be treated with THR. Rather, Dr. Henke stated that THR is indicated for symptomatic advanced hip osteoarthritis and specific hip fractures in elderly patients. Dr. Henke opined it is not medically necessary to replace electively a hip joint in which there is little or no arthritis.

24. On March 10, 2014 Dr. White wrote a "to whom it may concern" letter requesting that he be allowed to proceed with the THR. Dr. White stated Claimant was getting progressively worse and could not "function well at all." Dr. White reported Claimant could not work, had difficulty with activities of daily living and could walk only short distances. Dr. White reiterated that a THR is the "most predictable surgery" for Claimant. Dr. White also stated that a THR is the "most predictable way to get her fixed for now and for the longest period of time." Dr. White opined that arthroscopy to treat the labrum would be "fraught with multiple problems" and is not likely to help Claimant's "overall condition."

25. On March 27, 2014 Dr. O'Connell noted that the THR had been denied and that Dr. White would appeal the denial. Claimant reported that her symptoms improved after Dr. Martin performed another intraarticular injection on March 4, 2014.

26. On June 20, 2014 Dr. Davis performed a follow-up independent medical evaluation at the request of Insurer. Dr. Davis took additional history, reviewed additional medical records and performed a PE. Regarding the right hip Dr. Davis noted irritability with compression and rotation. He also noted positive impingement signs. Dr. Davis performed x-ray studies of the pelvis and right hip that revealed "minimal arthritic change" without cam or pincer deformity and without evidence of femoral acetabular impingement. Dr. Davis agreed that the MR arthrogram revealed a labral tear.

27. In the June 20, 2014 report Dr. Davis opined that the May 18, 2013 incident caused a lumbar spine injury and a right hip labral tear. Dr. Davis also opined that the symptoms of the labral tear were later aggravated during a PT session. Dr.

Davis recommended that Claimant undergo a right hip arthroscopy with debridement and/or repair of the labral tear. He "favored" Dr. Henke's opinion that the THR procedure recommended by Dr. White is not indicated. Dr. Davis explained that it is not reasonable or necessary to proceed with a THR to treat a labral tear.

28. On September 25, 2015 Claimant told Dr. O'Connell her right hip pain was "recurring" and she felt like her hip was going to give out. Dr. O'Connell noted Claimant was restricted from work at his direction and had not worked for many months. Dr. O'Connell assessed right hip labral tear with impingement syndrome and lumbar pain with exacerbation of lumbar degenerative disk disease. He referred Claimant for another hip injection. Dr. O'Connell also referred Claimant to Kirk Kindsfater, M.D., for an "assessment of whether [Claimant] would be a candidate for labral repair, versus a total hip arthroplasty, and which would be the preferred approach."

29. On October 2, 2015 Dr. Martin performed another right hip intraarticular joint injection.

30. On October 15, 2014 Dr. Kindsfater, M.D., evaluated Claimant for a "second opinion" regarding the proposed THR. Dr. Kindsfater took a history from Claimant, reviewed medical records, performed a PE and reviewed radiographs. Claimant complained primarily of right-sided anterior groin pain and deep groin pain. On PE Claimant experienced the most pain with abduction of the hip. Dr. Kindsfater opined Claimant's MRI revealed a "small labral tear anterosuperiorly" without evidence of "significant chondrosis." Dr. Kindsfater recommended Claimant undergo a hip arthroscopy to address the labral tear and visualize the hip. Dr. Kindsfater further stated that if the hip arthroscopy reveals "advanced chondrosis" and Claimant does poorly after the procedure she would be a candidate for THR. Dr. Kindsfater concluded that if the arthroscopy reveals minimal chondrosis he would "hesitate to consider arthroplasty in this otherwise relatively normal appearing hip."

31. Dr. Kindsfater opined that it is "difficult to surmise from [Claimant's] studies" whether the labral tear is related to her injury at work or to "early degenerative change." He stated that the "timing of her pain" suggests that the labral tear is related to employment. However, Dr. Kindsfater added that he frequently sees "asymptomatic labral tears in many of [his] patients when we do obtain MRIs so there is no guarantee that the labral tear is causing her symptoms."

32. On October 28, 2015 Dr. O'Connell noted that the recent hip joint injection did not provide as much relief as the previous injections. Dr. O'Connell stated he would "identify a hip specialist to evaluate [Claimant] for arthroscopy."

33. On November 12, 2014 Dr. White wrote a letter to the Insurer. Dr. White stated he was "quite surprised" by the opinions of Dr. Davis and Dr. Henke that a THR is not indicated. Dr. White stated that he does not agree with Dr. Davis and Dr. Henke because Claimant's age of 71, soon to be 72, is "simply too old for hip arthroscopy." He explained Claimant will have some cartilage wear adjacent to the torn labrum and that the long-term results of labral debridement are not known. Conversely, Dr. White

stated that the long-term results of a THR are known. He explained that THR is a "definitive solution" that will alleviate Claimant's pain and "will be very durable, and will outlive her." Dr. White stated he loves "doing a hip arthroscopy" and recommends arthroscopy for the "vast majority of [his] patients who have a joint space that looks like" Claimant's. However, Dr. White emphasized that in his opinion there is "no question" Claimant's pain was coming from her hip joint and again reiterated that a THR is the "best procedure for [Claimant] in the long run."

34. On November 17, 2014 Michael B. Ellman, M.D., performed another orthopedic surgical evaluation of Claimant. Claimant reported a one and one-half year history of acute onset right hip and back pain secondary to a work related injury. Claimant reported her pain was quite debilitating and caused her to wake up throughout the night. Dr. Ellman reviewed multiple radiographic studies and the MRI studies. He opined the MRI studies demonstrate a "nondisplaced tearing of [Claimant's] right anterosuperior acetabular labrum." He noted there was no "significant arthritis and [a] relatively normal-appearing MRI for somebody her age." Dr. Ellman stated it was difficult to determine "how much of [Claimant's] pain is secondary to intraarticular versus extraarticular etiologies." Dr. Ellman explained Claimant likely "has greater than one issue going on." Specifically, she likely has pain that emanates from her labral tear and mild degenerative changes about the hip joint." She also likely has "some imbalance about the muscles around her hip." Dr. Ellman also opined Claimant likely has some paraspinal spasm secondary to lumbar spondylosis. Dr. Ellman recommended Claimant undergo another course of PT to alleviate "hip imbalance" and improve function with activities of daily living. Dr. Ellman stated that if Claimant failed PT then the "only other option in [his] opinion would be a total hip arthroplasty despite the lack of objective arthritis on her imaging findings." Dr. Ellman explained that Claimant would not be "an ideal candidate for labral repair given her age and body habitus."

35. On November 25, 2014 Dr. O'Connell wrote a letter to the Insurer concerning his reasons for recommending a THR. Dr. O'Connell stated he recently referred Claimant for a brief course of PT pursuant to Dr. Ellman's suggestion. However, Dr. O'Connell stated that if the PT failed it was his opinion Claimant would be best served by undergoing a THR. In support Dr. O'Connell expressed agreement with the opinions of Dr. White and Dr. Ellman. Dr. O'Connell opined that although THR is not in the "treatment guidelines" to treat a labral tear "not every case fits neatly into protocols of treatment guidelines" and guidelines "are by their nature guidelines."

36. On April 1, 2015 a physical therapist reported that Claimant had undergone 8 visits and was being discharged from treatment. The therapist noted that Claimant had not reported any change in functional abilities.

37. Dr. Davis testified at the July 31, 2015 hearing as an expert in the field of orthopedic surgery. Dr. Davis has performed many THR's and many arthroscopic hip debridement/repairs. However, he has not performed orthopedic operations since 2006.

38. Dr. Davis contrasted a THR procedure with an arthroscopic debridement/repair procedure. Dr. Davis explained that a THR requires the surgical insertion of metal devices to form an artificial hip joint. In contrast arthroscopic debridement/repair involves making small holes in the hip to insert the "scope," which is "smaller than a pen," and the tools needed to operate on the labrum. Dr. Davis opined that the risks associated with THR far outweigh the risks associated with an arthroscopic labral debridement/repair.

39. Dr. Davis testified that he did not see evidence of acetabular impingement. Dr. Davis opined that performance of a THR would constitute "over-treatment" because Claimant's pathology is a torn labrum, not arthritis. Dr. Davis testified he is familiar with the "medical treatment guidelines" (MTG) and the MTG do not recommend THR as treatment for a torn labrum.

40. Dr. Davis testified that he is unaware of any "literature" indicating that age and body habitus are factors to be considered when determining whether to perform an arthroscopic procedure or a THR.

41. Respondents' "Exhibit M" is a copy of portions of WCRP 17, Exhibit 6, Lower Extremity Injury Medical Treatment Guidelines. The Lower Extremity MTG state that the "Operative Procedures" for a torn hip labrum are: "Debridement or repair of labrum and removal of excessive bone." The MTG for labral tears further state that where "surgery is contraindicated due to obesity, it may be appropriate to recommend a weight loss program if the patient is unsuccessful losing weight on their own."

42. The Lower Extremity MTG for hip arthroplasty state that the "Surgical Indications/Considerations" are: "Severe osteoarthritis and all reasonable conservative measures have been exhausted and other reasonable surgical options have been considered or implemented." The Lower Extremity MTG for hip arthroplasty further state that "possible contraindications" to the procedure include obesity and "it may be appropriate to recommend a weight loss program if the patient is unsuccessful losing weight on their own." The MTG for hip arthroplasty also indicate that "patients may be assessed for any mental health or low back pain issues that may affect rehabilitation."

43. At Claimant's request, the ALJ notices that WCRP 17-5 (C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers." However, the rule also provides that the "Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

44. Claimant testified that she would like the right hip arthroplasty so she can become more productive with her life. Claimant testified that she has been in continuous pain since May 18, 2013 and she has problems going up or down stairs. She testified that she is unable to do many of the things she was able to do before her injury. Before the injury she performed physical activities such as farming, taking care of her yard and gardening. She testified that her sleep has been affected and she must get up every one and one half hours. Her pain has affected her ability to work and she

is unable to take pain medications due to a gastrointestinal problem. Claimant testified that she received immediate relief from the intraarticular hip injections but the relief gradually wears off. Claimant testified that the PT has been more harmful then helpful.

45. Claimant failed to prove it is more probably true than not that THR constitutes reasonable and necessary medical treatment for her right hip.

46. The credible and persuasive evidence establishes that Claimant has a torn right hip labrum. The presence of the torn labrum is proven by the results of the MRI arthrogram and the opinions of numerous medical experts including Dr. White, Dr. Henke, Dr. Davis, Dr. Kindsfater and Dr. Ellman.

47. There is a sharp division between the medical experts concerning whether or not THR or arthroscopic debridement/repair is the reasonable and necessary treatment for Claimant's torn labrum.

48. Dr. White, an orthopedic surgeon, recommends the THR procedure. He explained that Claimant's advanced age, her "body habitus" and the "predictability" of the THR procedure makes Claimant an ideal candidate for THR. The ALJ infers from Dr. White's reports that he believes Claimant's age and body habitus make it more likely than usual that arthroscopic repair of the labrum will fail and Claimant would then require another procedure. The ALJ further infers that Dr. White believes this risk can be avoided by performing a THR which is likely to remain intact and "outlive" the Claimant. Dr. White acknowledged in his January 8, 2014 report that Claimant has a "preserved joint space with minimal arthritis."

49. In light of Claimant's failure successfully to complete the recent course of PT, the ALJ infers from Dr Ellman's November 17, 2014 report that he agrees with Dr. White's recommendation for a THR. Dr. Ellman also believes Claimant is not an "ideal candidate for labral repair given her age and body habitus." Dr. Ellman is an orthopedic surgeon. Dr. Ellman acknowledged in his November 17 report that Claimant has a "relatively normal-appearing MRI" and no significant arthritis.

50. Dr. O'Connell, who is not an orthopedic surgeon, agrees with the recommendations of Dr. White and Dr. Ellman. In so doing Dr. O'Connell admitted that the MTG do not provide for THR as a treatment for a torn labrum. Rather, Dr. O'Connell argued that Claimant presents an exceptional case that does not fit within the treatment protocols of the MTG.

51. Dr. Henke, Dr. Davis and Dr. Kindsfater, all of whom are orthopedic surgeons, opined that the appropriate treatment for Claimant's torn labrum is arthroscopic debridement/repair. These physicians further agree that the THR procedure is reserved for cases involving advanced arthritis of the hip joint, which has not been shown to exist in Claimant's hip.

52. Considering the substantial conflict between qualified medical experts, the ALJ concludes it is appropriate to give substantial weight to the treatment protocols

contained in the Lower Extremity MTG. Dr. Davis credibly and persuasively testified that the MTG do not recognize THR as a treatment for a torn labrum. Dr. Davis's testimony is corroborated by reference to the MTG themselves, which indicate that arthroscopic debridement/repair is the appropriate surgical treatment for a torn labrum and that THR is indicated in cases of "severe arthritis" where conservative treatments have failed. (Findings of Fact 41 and 42).

53. In this case not even Dr. White or Dr. Ellman alleges that Claimant has "severe arthritis" in her hip joint. Rather there is near unanimous agreement among the various physicians that Claimant does not have "significant" arthritis in her hip.

54. The ALJ is not persuaded that the weight of the evidence establishes a reason to depart from the treatment protocols of the MTG when choosing a surgical procedure to treat Claimant's torn labrum. Dr. White, Dr. Ellman and Dr. O'Connell have not credibly and persuasively pointed to any part of the MTG that specifies a patient's "age" as an appropriate factor to consider when determining whether to perform arthroscopic surgery or THR. This is true despite the fact that the MTG identify various "contraindications" to performing both procedures.

55. The MTG indicate that "obesity," a type of "body habitus," may constitute a contraindication for arthroscopic debridement/repair of a labral tear. However, the MTG also indicate that obesity may be a contraindication for THR. (Findings of Fact 41 and 42). Thus, to the extent that doctors White, Ellman and O'Connell rely on Claimant's "body habitus" as a basis for performing THR instead of arthroscopic debridement/repair, their opinions are undermined by the MTG. None of these physicians has offered a persuasive, scientific explanation of why Claimant's "body habitus" indicates that THR should be favored over the arthroscopic procedure.

56. In contrast, Dr. Davis credibly and persuasively opined that the MTG do not recommend THR for treatment of a torn labrum. Dr. Davis credibly and persuasively opined that the MTG recommend arthroscopic debridement/repair of a torn labrum. Dr. Davis credibly and persuasively opined that performing a THR on Claimant would constitute "over-treatment" in the absence of significant arthritis. Dr. Davis's opinion is corroborated by the specific provisions of the MTG. (Findings of Fact 41 and 42).

57. Dr. Davis's opinions are also corroborated by Dr. Henke who reported that arthroscopic debridement/repair is the "recommended treatment for labral tears" and that she has not "encountered" any recommendations that labral tears be treated with THR. Further, Dr. Henke credibly opined that it is "not medically necessary to replace electively a hip joint in which there is little or no arthritis."

58. Dr. Davis's opinions are also corroborated by the persuasive opinions of Dr. Kindsfater. Dr. Kindsfater recommended the Claimant undergo arthroscopic repair of the torn labrum. He further opined that Claimant could undergo THR if the arthroscopy showed "advanced chondrosis" and she recovered poorly from the arthroscopic procedure. Dr. Kindsfater expressed "hesitation" to perform THR on

Claimant's "normal appearing hip" if the arthroscopy does not reveal more than "minimal chondrosis."

59. Evidence and inferences not consistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

REASONABLENESS AND NECESSITY OF TOTL HIP PREPLACEMENT SURGERY

Claimant contends that she proved by a preponderance of the evidence that a THR constitutes reasonable and necessary medical treatment for the torn labrum in her right hip. The ALJ disagrees.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Section 8-42-101(3)(b), C.R.S. provides that the MTG "shall be used by health care providers for compliance with this section."

Section 8-43-201(3) C.R.S., provides that it is "appropriate" for an ALJ to consider the MTG "in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury." However, the statute further provides that the ALJ "is not required to utilize the medical treatment guidelines as the sole basis for such determinations." As demonstrated by WCRP 17-5 (C) the MTG themselves recognize that deviations from the guidelines are reasonable in individual cases. *Madrid v. TRTNET Group, Inc*., WC 4-851-315-03 (ICAO April 1, 2014). Consequently, evidence of compliance or non-compliance with the treatment protocols of the MTG has not been considered dispositive when determining whether medical treatment is reasonable and necessary. *Madrid v. TRTNET Group, Inc*., *supra*. The ALJ may weigh evidence of compliance or non-compliance with the MTG and assign such evidence an appropriate weight considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

For purposes of this order the ALJ assumes without deciding that the need for treatment of the Claimant's torn labrum is causally related to the industrial injury.

As determined in Findings of Fact 45 through 58, Claimant failed to prove it is more probably true than not that a THR constitutes reasonable and necessary medical treatment for the torn labrum. As found, there is a significant conflict between several qualified medical experts concerning whether or not THR is an appropriate treatment for Claimant's torn labrum. Considering this conflict the ALJ places significant weight on the treatment protocols contained in the Lower Extremity Injury MTG. The Lower Extremity Injury MTG recommend arthroscopic debridement/repair for treatment of a torn labrum. The Lower Extremity MTG do not recommend THR for treatment of a torn labrum, but instead recommend THR for treatment of severe arthritis. The credible and persuasive evidence establishes that Claimant does not have severe arthritis of the hip.

As found Dr. Davis, Dr. Henke and Dr. Kindsfater persuasively opined that THR is not a recommended treatment for a torn labrum and is only appropriate in cases of severe arthritis. To the extent Dr. White, Dr. Ellman and Dr. O'Connell opined to the contrary, the ALJ does not find their opinions persuasive for the reasons stated in Findings of Fact 53 through 55. For the reasons stated in Findings of Fact 54 and 55 the ALJ concludes that Claimant has not proved a persuasive justification for deviating from the treatment protocols of the MTG.

The request for an order requiring Respondents' to pay for a THR is denied because such treatment is not reasonable and necessary to treat Claimant's condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for medical treatment in the form of THR is denied.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 8, 2015

DIGITAL SIGNATURE:

David P. Cain

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

I. Whether Claimant's average weekly wage is $1,397.69.

II. Whether Claimant established by a preponderance of the evidence, that his 16% scheduled right knee impairment rating should be converted to whole person impairment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a millwright for Respondent-Employer. As a millwright Claimant erects, services and maintains Respondent-Employer's heavy industrial equipment. Completion of his work duties requires Claimant to engage in substantial amounts of bending, stooping, kneeling, ladder and stair climbing and heavy lifting, sometimes up to 100 pounds. The job also requires that Claimant assume and maintain awkward positions for prolonged periods of time to weld and clean equipment. The ALJ finds Claimant's job physically demanding.

2. Claimant testified that he often has aches, pains, bruises, and contusions that he simply works through. He testified that he does not report every ache and pain as work-related and he generally does not seek medical treatment. Nonetheless, Claimant testified that, prior to the injury in this case, he would occasionally experience stiffness in his back and neck from the physical nature of his job. Consequently, Claimant has sought chiropractic treatment predating the injury in this case. The chiropractic records reflect that Claimant was seen two times in the two years leading up to the injury in this case, once on December 8, 2011 and once on May 2, 2013. At his December 8, 2011, appointment Claimant reported that his low back was "tight, sore". Adjustments to the thoracic, and cervical spine were provided. Although he complained of a tight, sore low back, it does not appear that Claimant's lumbar spine, identified as [L] 5 4 3 2 1 in Dr. Pratt's December 8, 2011 report, was adjusted. On May 02, 2013, Claimant again complained of low back soreness and again the record fails to document treatment focused to the lumbar spine. Based upon the evidence presented, including the chiropractic records documenting a lack of any treatment to the segmental levels of the lumbar spine, the ALJ finds that Claimant would, on occasion, suffer from low back pain likely of a muscular nature caused by the physical demands of his employment as a millwright.

3. Claimant was in his usual state of health prior to July 21, 2013, when he suffered

a right knee injury. Liability for the injury was denied but, on March14, 2014, Respondents accepted the injury as work-related and Claimant began treating. An MRI of the right knee was obtained September 13, 2013. The MRI demonstrated medial meniscal and anterior cruciate ligament (ACL) tears for which surgery was recommended. Consequently, Claimant underwent an ACL reconstruction and partial medial meniscectomy procedure, performed by Dr. Alex Romero on July 25, 2014.

4. Claimant worked light duty for approximately one year between the date of injury and his July 25, 2014 surgery. During this period, Claimant testified that he performed his light duty work activities with a significant limp caused by pain in the right knee. Claimant was not limited in the performance of his light duty work by his alleged limping. Claimant also testified that during this time he began to experience low back and right hip pain which he connected to walking with a limp due to his right knee injury.

5. Review of the medical records between the date of injury and the time of Claimant's surgery fails to support his assertions. Rather, the medical records in the days, weeks and months following Claimant's injury are devoid of references to Claimant ambulating with a limp. To the contrary on July 22, 2013 a medical report from Respondent-Employers medical clinic indicates that Claimant was ambulatory without a limp. Similar references to Claimant's ambulatory status were documented in clinic notes dated July 24 and July 29, 2013.

6. On July 29, 2013, while at Employers clinic, Claimant expressed a distrust of "company doctors". Thus, Claimant scheduled an appointment to be seen at Pueblo Community Health Centers, the offices of his personal care provider (PCP) the next day, July 30, 2013. During this visit Claimant reported right knee pain and his associated right knee symptoms were documented as crepitus, joint tenderness, locking, popping and swelling Negatives associated with the right knee included, among other things, "decreased mobility", "joint instability", and **"limping"** (Claimant's Hearing Exhibits (CHE), Tab 2, Bate Stamp pg. 23)(emphasis added). The same was noted on a follow-up visit approximately 2 ½ months later on October 18, 2013.

7. Moreover, careful review of the records from Claimant's authorized treating provider (ATP), Daniel Olson, at Centura Centers for Occupational Medicine (CCOM) fails to support Claimant's assertion of limping and/or the development of back pain as a consequence. Between August 30, 2014 and June 4, 2014, there is no mention in the CCOM records of Claimant limping or complaining of back pain. Rather, the records support the following: On September 5, 2013, Claimant was advised that he could wear a knee brace for comfort if he chose. On September 18, 2013, Claimant was noted to have full right knee range of motion without the need for walking restrictions.

8. Finally, review of the orthopedic records from Dr. Romero directly contradicts Claimant's assertions of limping. On June 24, 2014, approximately one month prior to the arthroscopic surgery, Dr. Romero noted "examination of the patient's gait demonstrates that is non-antalgic in nature. He has neutral alignment of the lower extremity with good stance and coordination" (CHE, Tab 4, Bate Stamp pg.53).

9. Claimant did not seek treatment with his chiropractor for back pain during the approximate one year time period between the date of his injury and his surgery despite having, what he testified was hip and low back pain from limping the entire time. Rather, Claimant testified that the symptoms were not severe enough at that time to seek medical treatment.

10. Based upon the totality of the evidence presented, the ALJ finds Claimant's assertions that his right knee injury caused him to limp for approximately one year before he had surgery on July 25, 2014 unreliable. The content of the medical records does not support this claim. In fact, Dr. Romero's report of June 24, 2014, approximately one month before Claimant's surgery, directly contradicts this allegation. As there is no reference to an altered gait before this note, the ALJ is not convinced that Claimant was limping as he claims. Even if Claimant's testimony that his injury caused him to limp for the 12 months prior to his surgery credited, his testimony that the symptoms caused by his alleged limping were not significant enough to warrant medical treatment combined with the fact that his alleged limping did not preclude him from the performance of his modified work duties persuades the ALJ that any purported limping, causing back pain was not functionally impairing to Claimant between the date of injury and his July 25, 2014 surgery.

11. Claimant missed six weeks of work and returned to light duty following his July 25, 2014 surgery. Claimant returned to and worked light duty from September 5, 2014 to January 9, 2015. During this period of light duty, Claimant again testified that he performed his light duty work with a significant limp caused by pain in the right knee. He also testified that during this time, he continued to experience low back and right hip pain that he associated his limp caused by the right knee injury. While the medical records during this time frame document a loss of extension in the right knee, thereby establishing an objective basis for Claimant's assertion that he was limping post-surgery, he once again testified that his low back and right hip symptoms were not severe enough to seek medical treatment. Moreover, there is a dearth of evidence to suggest that any limp was functionally impairing Claimant's ability to carry out his activities of daily living or his modified work duties.

12. On January 9, 2015, Claimant was released to return to unrestricted full duty by Dr. Romero. Claimant also saw Dr. Olson on this date. Dr. Olson noted full range of motion for extension of the right knee at 0° where as at the September 15, 2014 appointment Claimant was lacking 6-7° of extension. Nonetheless, Dr. Olson documented range of motion limitations in the right knee for flexion at 114° when compared to the left knee which measured 130°. Consequently, the ALJ finds that while Claimant's right knee extension had improved, he likely had an altered gait at the time of release to full duty work. Claimant's post surgical rehabilitation to strengthen is quadriceps was continued and he was instructed to return for a follow-up visit in one month.

13. Claimant testified that as he resumed his pre-injury full duties, he began to notice

that some days the right knee tolerated full duty work activities and some days it did not. Claimant testified that when his knee was not tolerating the work activities, he developed increased knee pain causing him, to limp significantly. As a consequence, Claimant testified that his altered gait, combined with his work activities, significantly increased his low back and right hip pain. The claimant testified that the low back and right hip pain got so bad he sought treatment from his chiropractor. The chiropractic notes reflect that Claimant was treated on February 2, 2015.

14. Dr. Pratt's notes form the February 2, 2015 visit indicate that Claimant had a "knot in neck" / right shoulder blade area, along with "some" low back tightness. Dr. Pratt did adjustments to the cervical, thoracic, and hip area similar to his adjustments in 2011 and 2013. There is no indication in this chiropractic note that Dr. Pratt did any adjustment to the lumbar spine segments, identified in the note as [L] 5 4 3 2 1. Rather, the treatment appears focused to the left and right hips, in addition to the thoracic and cervical spine. Furthermore, there is no mention in Dr. Pratt's notes of any relationship between Claimant's right knee injury and his asserted low back tightness (CHE, Tab 6).

15. On March 2, 2015, the workers' compensation physician placed the claimant at MMI. During this visit, Dr. Olson documented that Claimant was "back at regular duty and does notice that he fatigues when he does ladders and stairs". He also noted that Claimant was not taking pain medication for his knee. The ALJ interprets these references to indicate that Claimant had become deconditioned regarding the amount of ladder and stair climbing required in his job, but that he did not have pain sufficient to warrant the use of pain medication. Moreover, there is no notation or mention of Claimant having back or hip pain in Dr. Olsen's MMI report and the report contains no reference to any treatment with Dr. Pratt.

16. On March 19, 2015, the ATP completed the claimant's impairment rating. The ATP provided 11% impairment for range of motion deficit in the right knee and an additional 6% for the ACL and meniscus tears for a total scheduled impairment of 16%. This converts to 6% whole person impairment. There is no reference in Dr. Olsen's impairment rating report of Claimant having back or hip problems. (Respondent's Hearing Exhibits (RHE), Tab J, Bate Stamp pg. 74-75). Dr. Olsen made no recommendation for future medical treatment that would involve the low back or hip.

17. Based upon the evidence presented, the ALJ finds Claimant's testimony that he did not mention his hip or his low back pain to the workers' compensation physicians because "he did not believe it was their problem" unpersuasive. Rather the ALJ finds, more probably than not, that if Claimant believed his low back and right hip condition was functionally impairing his ability to carry out his ADL's or work duties and was related to his work injury, he would have mentioned it to Dr. Olson at either his MMI or impairment rating appointments.

18. Respondents sought an independent medical examination (IME) opinion from Dr. Eric Ridings regarding the issue of converting Claimant's scheduled impairment to impairment of the whole person on August 24, 2015. In reaching his opinion that

Claimant had not suffered impairment beyond the lower extremity, Dr. Ridings noted that "Dr. Olsen did not document any complaints of right buttock or hip or low back pain during the pendency of his treatment. Nor did he document any limping." Dr. Ridings further noted that on examination during the IME Claimant's antalgic gait was only present part of the time. Dr. Ridings also documented that Claimant reported an ability to leg press 400 pounds with his left extremity and 325 pounds with his right leg.

19. Claimant admitted during cross examination that he is not impaired in any way in doing his job although he reported that his low back and right hip symptoms cause him pain and limit how he can go about doing certain tasks.

20. Based upon the evidence presented, the ALJ finds that while Claimant had a serious right knee injury, his claims of suffering a related low back and right hip condition as a consequence of limping are not supported by the record evidence when viewed in its totality. Rather, the ALJ finds that the record supports an inference that Claimant, who is a large, physically imposing and stoic young man, likely suffers from occasional low back muscle soreness/stiffness as a consequence of his job as a millwright. The ALJ also finds that the persuasive record evidence supports an inference that once Claimant injured his right knee and was placed on modified duty, he deconditioned while waiting for surgery preformed approximately one year later. Following that surgery, Claimant deconditioned further. Consequently, when Claimant returned to his job in a full duty, unrestricted capacity approximately 17 months after his original injury, he simply was not in shape to perform the physically demanding aspects of his work without suffering adverse effects, including low back tightness/soreness. This is borne out by Claimant's report to Dr. Olson that he would fatigue quickly when climbing ladders and stairs as required in his position. Moreover, the inference is supported by the fact that Claimant's chiropractic was unchanged from that which he had prior to his industrial injury and which prior chiropractics treatment he testified was due to the physical nature of his job. Consequently, the ALJ credits the opinions of Dr. Ridings to find that Claimant's low back and right hip condition is not related to limping as a consequence of his right knee injury. Even if Claimant's low back and right hip condition were related to limping caused by his right knee injury, the evidence presented, including Claimant's own testimony, persuades the ALJ that it, i.e. the low back and right hip condition is not functionally impairing. Accordingly, Claimant has failed to establish that he has a "functional impairment" beyond the schedule which would entitle him/her to "conversion" of his scheduled impairment to impairment of the whole person.

21. Claimant presented evidence which establishes an average weekly wage of $1,397.69. Documentation entered into evidence regarding this issue consists of the wage report showing Claimant's gross wages from September 1, 2012 through July 19, 2013. The injury in this case occurred on July 21, 2013. Consistent therewith, the wage documents evidence the Claimant's earnings for 46 weeks leading up to the injury. In the 46 weeks leading up to the injury, the claimant earned a gross wage of $64,293.60. When the gross earnings are divided by 46 weeks, the calculation yields a value of $1,397.69. Therefore, Claimant has established that his average weekly wage,

for purposes of this claim, is $1,397.69.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. Claimant's request for conversion of his scheduled lower extremity impairment to impairment of the whole person is denied and dismissed. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a knee injury, the question is whether the claimant has sustained functional impairment beyond the leg at the hip.

B. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Furthermore, as pointed out by Claimant's counsel, functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Alberston's LLC, W.C. No. 4-692-947 (June 30, 2008*). Consequently, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence

that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the knee is similar to an injury to structures of the shoulder and may or may not result in functional impairment beyond the leg at the hip. See generally, ***Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp.,*** 937 P.2d 883 (Colo. App. 1996)

C. In this case the ALJ concludes that conversion of Claimant's scheduled lower extremity impairment to impairment of the whole person is not warranted. While the Claimant's knee injury may have caused a limp, Claimant himself admitted during his testimony that his limp "comes and goes". Based upon the evidenced presented, the ALJ is not persuaded that Claimant's low back and right hip pain is a consequence of an asserted limp. Rather, the evidence presented supports a conclusion that Claimant's intermittent low back and right hip pain is similar to that which he experienced periodically as consequence of the physically demand nature of his job. Here, the evidence presented persuades the ALJ that Claimant's low back and hip pain is likely a consequence of being substantially deconditioned and having to suddenly return to full duty, unrestricted work as a millwright. Indeed, the chiropractic treatment Claimant received following his return to full duty work was substantially the same as the treatment he received prior to his work related right knee injury, which prior treatment Claimant attributed to the physical demands of his work.

D. Regardless, as found above, Claimant has returned to work full duty as a millwright. As a millwright Claimant must engage in substantial amounts of bending, stooping, kneeling, ladder and stair climbing and heavy lifting, sometimes up to 100 pounds. During hearing, Claimant admitted he performed the full range of duties required of a millwright. He reported a capacity to push 400 pounds with his left leg and 325 pounds with the right to Dr. Ridings during his IME. In this case, Claimant's demonstrated functional capacity substantially erodes his claims that he has pain in his low back and hip which has resulted in a functional loss beyond the leg. Furthermore, the persuasive evidence demonstrates that Claimant's complaints and treatment were associated with and directed to his right knee. Claimant did not testify and the medical records do not support that his right knee injury has resulted in a decreased capacity to meet his personal, social or occupational demands. Because Claimant has failed to sufficiently connect his back and hip pain to his right knee injury and because the evidence presented establishes that Claimant's low back/right hip pain has not resulted in any decreased capacity in Claimant to meet his personal, social or occupational

demands, the ALJ is persuaded that the situs of Claimant's impairment does not extend beyond the leg at the hip. Consequently, the ALJ concludes that Claimant does not have functional loss that would support an award of permanent disability benefits as a whole person.

E. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

F. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), gives the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity comes from the wage records submitted into evidence. In this case, the ALJ concludes that Respondent's methodology in utilizing 16 weeks to calculate Claimant's AWW results in a fundamentally unfair figure that does not represent Claimant's earnings over time. The ALJ adopts Claimant's calculation of his AWW as this figure accounts for his average weekly earnings over a forty-six week period leading up to the injury in this case. Accordingly, the ALJ determines that Claimant's average weekly wage is $1,397.69. The ALJ finds that this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his July 21, 2013 compensable work related injury.

ORDER

It is therefore ordered that:

1. Claimant's request for conversion of his 16% scheduled right knee impairment to the corresponding 6% whole person impairment is denied and dismissed.

2. Claimant's average weekly wage is $1,397.69.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 3, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

PRELIMINARY PROCEDURAL ORDER

On October 23, 2015, Claimant filed an opposed motion to take the evidentiary post hearing deposition of Dr. Vikas Patel. As a response to the motion was not due prior to the commencement of hearing, the ALJ elected to allow counsel an opportunity to argue the motion prior to the presentation of evidence at hearing. Following oral argument, the ALJ denied Claimant's request for the deposition of Dr. Patel citing a lack of good cause shown for the deposition.

ISSUE

The issue addressed in this decision involves Claimant's entitlement to medical benefits. The question to be answered is:

I. Whether bilateral CT guided sacroiliac (SI) joint injections as requested by Dr. Patel are reasonable, necessary, and causally related to Claimant's admitted October 24, 2013 low back and hip injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered a work related injury to her back while working for the employer on October 24, 2013.

2. Claimant had a significant pre-existing history of treatment for low back pain, hip pain and chronic sciatic pain dating back to 2005, when she was 21 weeks pregnant. (R. Exh. H & I, Bate Stamp ("BS") 298). According to Dr. Manning's and Helm's reports, bilateral SI injections were administered by Dr. Helm on December 6, 2011, for this pain. (R. Exh. J, BS 162). Claimant continued to report left hip and SI joint pain in May 2013, and advised Dr. Manning that she was getting injections, but that she had joint pain all over her body as reflected in his report of May 16, 2013. (R. Exh. H, BS 302).

3. Medical reports from Accelerated Recovery Specialist, mostly authored by Dr. Sparr date back to November 5, 2011. These reports contain an initial history of claimant' suffering from chronic sciatic pain since 2005, to include treatment involving SI joint injections on the left (three times a year for past three years), with no relief reported. On this date, claimant rated her typical pain as a 7/10, reporting that her primary pain location was the SI joint area. The doctor prescribed Vicodin, 5/500 three

times a day, along with a trial of Celebrex and Lyrica. On this date, Dr. Sparr administered a bilateral trochanteric bursa/lateral piriformis injection. (BS 291-293). Claimant completed her first Pain Diagram on this date, noting pain in the left buttock area, left IT band area with radiation down the left hamstring. (BS 298).

4. Dr. Sparr noted minimal relief from the injection in his report of November 30, 2011. (BS 285). Then as noted above, Claimant then underwent bilateral SI injections as performed by Dr. Helm on December 6, 2011. (R. Exh. J, BS 162). Claimant reported significant relief from this injection; and as such, on December 21, 2013, Dr. Sparr administered a left lateral piriformis muscle and trochanteric bursa injection. (BS 281-282). On January 18, 2012, claimant reported to Dr. Sparr that she fell roller skating two weeks prior and was experiencing increased pain. (BS 278). As such, Dr. Sparr prescribed another round of bilateral SI joint injections. (BS 278-279). These injections were administered by Dr. Helm on February 5, 2013, along with an L-5 interlaminer lumbar ESI, on the left. (BS 159).

5. Claimant returned to Dr. Sparr reporting 60% improvement from the above injections that targeted both her SI joints and the lumbar spine at the L5 segment. The doctor noted that "she has now a new complaint of left leg and plantar foot cramping… She continues to have left lateral hip severe pain that she describes as someone is cutting my muscles, even with any light touch or pressure over that area." She continues to have exquisite discomfort over the pubic symphysis somewhat improved with SI injection. Dr. Sparr recommended securing MRI scans of the left hip and pelvis, and an orthopedic consult with Dr. Tim O'Brien. (BS 273).

6. Dr. O'Brien examined claimant on May 1, 2012, for her complaints of left hip Pain, which he noted she had been experiencing since delivering her son. He also noted her pain could be in the low back on the left side, and that nothing relieves her pain. He noted the administration of injections outside the hip, spine and buttock and that she reported that she was in as much pain now as prior to any treatment. He reviewed the MRI scan of the lumbar spine, noting that it demonstrated multi-level degenerative disc disease with diffuse bulging and no significant canal or neuroforaminal narrowing. His impression was: Diffuse hip pain. He advised that there was nothing that could be done from a surgical standpoint, and recommended a fitness regimen and core strengthening. (R. Exh. L, BS 134-139).

7. On June 20, 2012, Dr. Sparr noted Dr. O'Brien's opinion and recorded that she suffers from "some underlying hip joint pathology, but that her greatest problem appeared to be piriformis myofascitis". Hence, he administered a left mid-belly piriformis muscle and trochanteric bursa injection on this date. (BS 262). On September 7, 2012, claimant returned reporting that she had slipped on a step at home with severe increased pain on the left side of the mid back. As such, Dr. Sparr administered another left mid-belly piriformis muscle and trochanteric bursa injection. Claimant prepared a Pain Diagram on this date. (BS 261). According to Dr. Sparr, claimant did well until November 9, 2012, when she reported with increased pain at a level of 7/10, reporting that she did not know why her pain had increased.

Consequently, Dr. Sparr administered another left mid-belly piriformis muscle and trochanteric bursa injection. (BS 255).

8. Claimant returned to Dr. Sparr again on January 9, 2013, noting that she had just returned from a road trip to Oklahoma and was experiencing severe left sided buttock pain. Dr. Sparr administered a left piriformis muscle and trochanteric bursa injection. (BS 252). On February 2, 2013, Dr. Helm administered bilateral SI joint injections as well as a L5-S1 interlaminer lumbar ESI injection on the left. (BS 159). Claimant returned to Dr. Sparr on April 17, 2013, he noted the prior injections and claimant's report of unexplained worsening symptoms over the past few weeks on the left side of her back and buttock. On this date, Dr. Spar's diagnosis was: Chronic sacroilitis causing piriformis syndrome and trochanteric bursitis, with some iliotibial myofascitis as well. As such, Dr. Sparr administered another left trochanteric bursa, piriformis muscle and proximal iliotibial band injection. (BS 248). As noted above, when claimant returned to her primary care doctor, Dr. Manning on May 16, 2013, she advised that she was getting injections, and that she had joint pain all over her body. (R. Exh. H, BS 302).

9. According to the above reports, claimant had undergone approximately thirteen (13) separate injections prior to the work related injury of October 24, 2013, with at least four (4) of them comprising bilateral SI joint injections.

10. Claimant was then involved in the work related lifting incident on October 24, 2013. On this date, claimant reportedly climbed on a bed to assist a patient onto the bed, and while pulling the patient onto the bed, she reported to Dr. Liggett that she felt immediate sharp pain across the pelvis, which soon traveled to her back and down left greater than right gluteal muscles. (R. Exh. I, BS 240). Upon examination, Dr. Liggett's diagnosis was: 1) Acute on chronic bilateral trochanteric bursitis with gluteus medius myofascitis and piriformis syndrome; 2) acute on chronic bilateral, left greater than right sacroiliac joint dysfunction, and 3) Thoracolumbar sprain/strain with associated myofascitis.

11. At the October 29, 2013 consult, Dr. Liggett noted that claimant had previously treated at their clinic in the past for left buttock pain and sacroiliac dysfunction for which she had been maintained on baclofen and Vicodin. Upon examination, the doctor recorded that provocative testing of the SI joints was positive. A large amount of myofascial tightness was noted, left greater than right iliotibial bands, and that palpation over the lumbar facets as well as facet loading was equivocal as claimant was diffusely sensitive during the exam. Due to her reported complaints of increased pain, the doctor administered bilateral trochanteric bursa, gluteus medius and piriformis Injections. On the date of this examination, as she had on previous examinations, claimant completed a pain diagram, which depicts pain in the left buttock, left leg to the knee, and new pain in the thoracic spine area. (R. Exh. I, BS 247).

12. On November 4, 2013, claimant reported that she felt good for a short time

after the last injection. Dr. Sparr administered a mid-belly lateral piriformis muscle injection. (BS 236). On November 26, 2013, claimant's reported pain level was a 7-8/10. Dr. Sparr's diagnosis was: persistent left greater than right lumbosacral pain, predominantly sacroiliac in origin with secondary diffuse myofascial component unresponsive to targeted injections. Hence the doctor recommended another bilateral SI joint injection. (BS 232-233). These injections were administered November 26, 2013. On this date, claimant completed another pain diagram, which when compared to the diagram she completed on November 5, 2011, two years prior, appears almost identical. (BS 228-231 & BS 298).

13. Claimant returned on December 11, 2013, with reported increased pain of 8/10; at which time, the doctor recommended a sacral MRI scan. Thereafter, Dr. Sparr reviewed the Coccyx MRI scan and corresponded with the insurance adjuster and advised that claimant suffered from an anatomic abnormality of the coccyx which was aggravated by the work injury. He therefore began administering coccygeal injections in December 2013and January 2014. (BS 216-222). Thereafter, on February 24, 2014, Dr. Leggett noted that all of the prior injections yielded only short term or very limited relief; and as such, he had exhausted all physiatric options. He thus recommended a referral to a pain specialist. He then administered trigger point injections into the gluteus maximus, piriformis and obliques on this date. (BS 204-205).

14. Claimant was examined by Dr. Scott Ross on April 16, 2014. After examination, Dr. Ross noted non-organic findings. His impressions were: Low back and buttock pain of unclear etiology. Normal MRI scan of lumbar spine, MRI of coccyx suggestive of developmental etiology and 4/5 Waddells signs. He found no specific cause for claimant's buttock pain, and found her exam complicated by non-organic features. He did not recommend any additional interventional procedures. (R. Exh. p. BS 19-21).

15. Despite requesting this opinion, Dr. Leggett never mentions Dr. Ross' Opinions. Instead he refers claimant for an L3-4 selective nerve block which was performed by Dr. Helm on June 3, 2014. (BS 157-158). This was followed by an L5-S1 interlaminar left ESI and left SI joint injection and Left L5 paraspineous trigger point injections (X3), all administered by Dr. Helm on June 10, 2014. (BS 155-156). Claimant next returned to Dr. Scheper July 28, 2014, reporting severe left pelvic pain causing her to report to the emergency room, where a CT of her pelvis was secured, and proved unremarkable. The doctor's impressions were: 1) Acute exacerbation of chronic recurrent sacroilitis; 2) secondary diffuse lumbar myofascial dysfunction, and 3) coccydinia stable. (BS 193-194). On August 19, 2014, Dr. Helm performed three more injections to include: L5-S1 interlaminar Left ESI, Left SI joint injection and Left piriformis injection. (BS 153).

16. On September 9, 2014, claimant returned to Dr. Scheper and advised that the injections only provided temporary relief and that she was unsure as to what was causing her pain and that it may have something to do with the weather changes. On examination, the doctor noted that her pain was diffuse and severe. (BS 184).

Importantly, on October 6, 2014, the claimant advised Dr. Leggett that she feels just as painful as the day the incident happened. She rated her pain a 7-8/10. Dr. Leggett recommended one last trial of a lumbar sympathetic block. (BS 181-183). On October 21, 2014, Dr. Helm administered the Left side L3 sympathetic block. (BS 151-152).

17. On November 26, 2014, claimant was evaluated by a Dr. Vikas Patel. Dr. Patel secured x-rays. In this report, the doctor notes that the x-rays of the lumbar spine are essentially normal and that the MRI scan shows no obvious evidence of nerve compression or sacroillitis. Dr. Patel recommended a repeat MRI scan and physical therapy to include core strengthening. (BS 32-34). Claimant returned to Dr. Patel on February 3, 2015. In his report from this date, he records that "claimant did not have severe low back pain until a work injury of October 2013." He goes on to indicate: "after the injury, she is now debilitated." He then that x-rays show a wider SI joint on the left side than the right SI joint, and asymmetry as compared to the right. He noted that he had no prior injection report to review. He referenced a website for claimant to look at sibone.com to determine if her symptoms fit with symptoms of SI joint pain, and requested prior authorization to proceed with a SI joint injection under CT guidance. Dr. Patel also discusses the potential that the results of the injections could lead to a recommendation for an SI joint fusion. (BS 26). This request was timely denied per WCRP 16, resulting in the instant hearing. (R. Exh. Q).

18. On March 31, 2015, Dr. Nanes placed claimant at MMI, and rated her impairment at 15%. He recommended maintenance care. (BS 44-48). Subsequent to the date of injury and prior to the date of MMI, claimant had undergone approximately thirteen (13) additional injections with at three (3) of these comprising of bilateral SI joint injections.

19. The Respondent insurer filed a Final Admission of Liability on April 6, 2015, admitting to the 15% rating provided by Dr. Nanes, while also admitting for maintenance medical care per Dr. Nanes recommendation. (R. Exh., B, BS 325).

20. Claimant returned to Dr. Leggett on June 2, 2015, reporting a pain level of 6/10. (BS 164). Of import is the improvement in intensity and location of claimant's pain as reflected by the claimant in the pain diagram she completed on this date. On this date, claimant noted on her follow-up questionnaire, that she was taking Vicodin, 3x/day, baclofen, 1-2x/day and Ibuprofen. (BS 168).

21. Dr. Brian Reiss, a board certified orthopedic surgeon, conducted an independent medical Examination IME) as Respondents' request on September 2, 2015. Dr. Reiss was asked to examine the claimant and review the entire packet of medical reports and address the critical issues of: A) whether the CT guided SI joint injections were reasonable and necessary; and if so, B) whether the injections were causally related to the industrial lifting incident of October 24, 2013? Dr. Reiss opined that the requested CT guided SI joint injections are not reasonable, necessary or causally related to the industrial injury. (R. Exh. R., BS 1-14).

22. In his report, Dr. Reiss opines that his diagnosis for the work related injury of October 23, 2013, is lumbosacral strain with pain. He further opined that her symptoms prior to the date of injury and after are very similar as were her responses to the numerous varied injections administered both before and after the October 24, 2013 work related strain. He concludes that she likely returned to her baseline of function and MMI, in January 2014 or in March 2014, as suggested by Dr. Nanes. He further opined that he personally reviewed the actual lumbar MRI scan noting that it failed to demonstrate any sacroiliac abnormality in his opinion. He finds support in his opinion against the reasonableness and necessity for any additional SI joint injections in the fact that the previously performed injections have failed to demonstrate diagnostic benefits and claimant had failed to report therapeutic benefit from the multiple prior SI joint injections that she has undergone, both before and after, the industrial lumbar strain. He further opined that an SI joint fusion is not indicated. (BS 8-9).

23. At hearing, Dr. Reiss, testified that at his examination, claimant reported her typical pain level to be a 6-7 out of 10. Claimant completed a pain diagram at his office. When comparing her reported level of pain to that reported back on November 5, 2011, the reported pain levels today appear very similar to those reported four years ago, and prior to the lifting incident. (BS 10 & BS 291). Of import, Dr. Reiss reviewed the pain diagram completed by claimant at his office on September 2, 2015, and compared it to the diagram claimant completed on November 5, 2011. Again, he noted they appear very similar. (BS 14- 298, Hearing Transcript, ("Hrg. Tr.") pages 22-25). In reviewing the pain diagram claimant completed just after the industrial lifting incident, Dr. Reiss does note a new aspect to that diagram, that being markings over the thoracic spine area. (R. Exh. I, BS 247 & Hr. Tr. p. 24, ll. 1-3)

24. Dr. Reiss further testified that it is his opinion the CT guided SI joint injections recommended by Dr. Patel are neither reasonable nor necessary. (Hr. Tr. PP. 26-29). Dr. Reiss bases his opinion on the variability of claimant's responses to multiple injections in multiple different areas of the back and buttock area which make it difficult to formulate a diagnosis based on any response to any of those injections. Hence, it is his opinion; that the correct diagnosis does not involve SI joint pain, as upon his examination, he found diffuse pain, myofascial pain, lumbar pain, back pain, not SI joint pain – on a chronic basis. This diagnosis is consistent with that of Drs. O'Brien and Ross. (Hr. Tr. pages 27-29).

25. Further, Dr. Reiss noted that even though Dr. Patel has indicated that the x-ray show that the SI joint on the left side looks widened as the basis for his request to conduct these injections, this opinion is inconsistent with his review of the x-ray and that of the reading radiologist as set forth in the report, as the radiologist noted no such finding. Also, Dr. Reiss reviewed the MRI scan of the lumbar spine which evidenced no such widening, edema, or any abnormality whatsoever. Dr. Reiss testified that if such widening existed, the MRI scan would show this, and it evidenced no such abnormality. Dr. Reiss further commented that performing the injection under CT guidance does not necessarily make the injection any better. (Hr. Tr. p. 29).

26. Dr. Reiss also opined that the requested CT guided SI injection is not causally related to the October 24, 2013 industrial lumbar strain injury. He believes that on that date, claimant suffered a lumbar strain with some non-specific myofascial pain into her buttock as opposed to an injury to her SI joint; and that at this point, two years post strain, she appears to be suffering from the same symptoms as she had prior to this injury. He noted that claimant appears to be taking the same dosage and quantity of Vicodin to control her pain and he finds it significant that her pain diagrams now are almost identical to those prior to the industrial strain injury. (Hr. Tr. p. 33). Hence, Dr. Reiss concludes that claimant's current pain is no longer related to the industrial strain, in addition to the fact that he does not believe her pain originates at the SI joint. (Hr. Tr. p. 34). Dr. Reiss' diagnosis is consistent with that set forth by Dr. Ross, who diagnosed claimant as suffering from low back pain and buttock pain of unclear etiology. (Hr. Tr. p. 35).

27. Dr. Reiss further noted that that the medical reports contain similar instances of non-work related aggravations of claimant's pain before the industrial strain and after the strain as evidenced by claimant's reports to the doctors of simply waking up with pain, being unsure of what caused her increased pain and consistently reporting both before the strain and after, that none of the injections had helped her pain. (Hr. Tr. pages 40 -41). Hence, Dr. Reiss opined, that at this point, claimant is suffering from the same pre-existing condition and symptoms which continue to wax and wane, as before the industrial lumbar strain. (Hr. Tr. p. 42).

28. The ALJ finds Dr. Reiss testimony to be credible and persuasive. Crediting the opinions of Dr. Reiss and the record as a whole, the ALJ finds that the evidence does not support a finding that the CT guided SI joint injections and/or a subsequent SI joint fusion are reasonable or necessary or causally related to the industrial strain of October 24, 2013. Rather, the persuasive evidence presented at hearing establishes that Claimant sustained an industrial strain injury on the date of injury, and that as of March 2014, she attained MMI from that strain. Furthermore, due to the overwhelming and voluminous medical evidence that establishes the pre-existing state of claimant's back, hip and pelvic area, the evidence further establishes that claimant has returned to her pre-existing baseline of function and that no further medical care is causally related or necessary to maintain her lumbar strain at MMI. Consequently, the ALJ finds Claimant's alleged need for a CT guided SI joint injection and/or any subsequent medical care to be not causally related to her industrial strain injury of October 24, 2013.

29. Claimant has failed to prove by a preponderance of the evidence that the proposed CT guided SI joint injections and potentially subsequent SI fusion are causally related to her October 24, 2013 lifting incident. Even if Claimant had established the requisite causal connection between her lumbar strain and the requested CT guided SI joint injections, the record evidence supports Dr. Reiss' opinion that the proposed injections and potential subsequent SI joint fusion are not reasonable or necessary given Claimant's numerous prior SI joint injections and various non-diagnostic responses thereto, both prior to the industrial strain and subsequent thereto. Hence,

the ALJ finds that the proposed CT guided SI injections are not medically reasonable based upon the totality of the record evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

D. Once a claimant has established the compensable nature of his/her work injury,

he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

As found, the evidence in the instant case persuades the ALJ that Claimant has not met her burden in establishing that the October 24, 2013 work injury proximately caused the need for bilateral CT guided SI joint injections. Rather, the persuasive evidence establishes that Claimant's lifting injury is no longer a causative factor precipitating the need for additional medical care to the back, hip, pelvis, or SI joint area. Rather, the totality of the evidence presented establishes that claimant had preexisting low back pain and SI joint dysfunction and that she has now returned to her prior baseline, both in terms of function and pain, as before her industrial lifting injury. Consequently, the ALJ concludes that Claimant's need any additional SI joint injections is no longer reasonable, necessary or related to her October 24, 2013 industrial back strain. Moreover, as found, even if Claimant had proven the requisite causal connection between her need for the requested CT guided SI injections and her October 24, 2013, lifting injury, the ALJ concludes that the requested injections and/or surgery are not reasonable or necessary given Claimant's response to multiple prior SI injections and the persuasive opinion of Dr. Reiss that Claimant's pain generator has not been adequately identified as the SI joint. Because Claimant has failed to prove by a preponderance of the evidence that her need for CT Guided SI injections are reasonably necessary or causally related to her October 24, 2013 industrial injury, Respondents' are not obligated to provide them.

ORDER

It is therefore ordered that:

1. Claimant's request for CT Guided SI joint injections, as recommended by Dr. Patel, is denied and dismissed as the current need for these injections are no longer causally related to claimant's October 24, 2013 workers' compensation injury.

Moreover, the requested injections are not reasonable or necessary given claimant's response to prior numerous SI joint injections administered both before and after the industrial injury in this case.

2. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 11, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-942-096-01

ISSUES AND STIPULATION

The following issues were raised for consideration at hearing:

1. Whether Respondents proved by clear and convincing evidence that the impairment rating provided by the Division independent medical examiner (DIME) is most probably incorrect;

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to an order awarding a whole person impairment;

3. Whether Claimant proved by a preponderance of the evidence the reasonableness and necessity of medications, Norco and Amitiza; and

4. Whether Claimant proved by a preponderance of the evidence that she is entitled to a disfigurement award.

The parties stipulated and agree that Claimant's average weekly wage (AWW) is $1238.80.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant sustained an admitted injury to her left shoulder on January 28, 2014, while working as a nurse at Platte Valley Medical Center. A sharps container fell approximately 16 inches striking the top of her shoulder

2. Claimant reported to the emergency room at her place of employment soon after the incident. The physician found no bruising or lacerations and noted mild tenderness to palpation across the superior deltoid. The physician considered the incident a "minor trauma" and provided no work restrictions.

3. Claimant was seen the following day by her authorized treating physician, Gregory Reichhardt, M.D. Dr. Reichhardt found no swelling, bruising, or lacerations in the shoulder region.

4. On February 3, 2014, Dr. Reichhardt documented tenderness over the left shoulder laterally, posteriorly, and anteriorly. By contrast, the emergency room

physician noted tenderness over the superior aspect of the shoulder. Dr. Reichhardt confirmed with Claimant that the sharps container hit the top of her shoulder.

5. On February 10, 2014, Dr. Reichhardt documented that Claimant was doing 95% better and felt she could go back to full duty work. Upon examination, he noted normal strength in the upper extremities, including the supraspinatus and infraspinatus muscles. Dr. Reichhardt did not believe that the mechanism of injury was suggestive of a rotator cuff tear and he released Claimant to full duty.

6. On February 26, 2014, Claimant told Dr. Reichhardt that she was doing worse and her pain was now at a level of 7/10. Dr. Reichhardt noted tenderness to palpation over the anterior and lateral aspect of the shoulder. Dr. Reichhardt looked at a picture of the sharps container provided by Claimant and commented that it did not look like the container fell from a great height.

7. By March 12, 2014, Claimant asked to be seen by a surgeon, although Dr. Reichhardt did not think it was clear that surgery would be recommended.

8. Daniel Hamman, M.D. performed surgery on Claimant's left shoulder on March 25, 2014. The postoperative diagnosis was left shoulder synovitis, medially subluxated biceps tenotomy, posterior labral tear and impingement, plus degenerative type II SLAP tear. Dr. Hamman also resected a 3 mm bone spur at the undersurface of the anterolateral acromion. The DIME physician, Dr. Leggett, and Dr. Reichhardt opined that these conditions were likely degenerative in nature, were caused by wear and tear and were likely asymptomatic prior to the work incident.

9. Dr. Hamman prescribed Norco postoperatively. Norco may also be referred to as Vicodin or hydrocodone.

10. At the time of her discharge from physical therapy on July 28, 2014, Claimant was still experiencing significant pain in her shoulder and was having more nerve pain. Claimant reported that the pain could range from 0 to 10/10.

11. Claimant moved to Texas on August 21, 2014, and started a new job as a nurse at a hospital in Texas on September 8, 2014, which lasted until December 20, 2014. Claimant began a new job as a school nurse on January 5, 2015, in Texas, which is a much less physical job than her job at the hospital.

12. Sometime between July 23 and August 27, 2014, Claimant stopped taking her Vicodin.

13. On or about August 25, 2014, Frederick Scherr, M.D. performed a records review independent medical examination (IME) at Respondents' request. Dr. Scherr opined that it was highly unlikely that the labral tear, tendinosis of the bicep and other abnormalities noted during the surgical procedure was sustained by the described mechanism of injury.

14. By October 21, 2014, Claimant was again taking Vicodin and was increasing the dosage due to her increased level of pain associated with working.

15. Claimant visited Colorado and saw Dr. Reichhardt on November 18, 2014, for maximum medical improvement determination (MMI) and an impairment rating. The pain diagram from that visit indicated pain over the posterior aspect of the shoulder and some pain over the biceps. Claimant informed Dr. Reichhardt that she was having increased pain in her shoulder, often by the second day of her night shift, and noted that on one occasion she was doing a heavy lift in order to slide a patient up in bed and experienced increased shoulder pain.

16. Dr. Reichhardt placed Claimant at MMI on November 18, 2014, with restrictions of limited lifting, pushing, pulling, and carrying to 50 pounds occasionally, 25 pounds frequently. He provided no restrictions for overhead activity or reaching away from the body. He assessed Claimant with a 9% upper extremity impairment which would convert to 5% whole person. The 9% rating consisted of a 7% upper extremity impairment rating for limitations in range of motion of the left shoulder and a 2% upper extremity impairment for axillary sensory nerve involvement. Dr. Reichhardt reviewed with Claimant that it would be best to taper off the Norco as he did not consider it to be a good long-term medication for her condition.

17. Claimant was first seen in Texas by Dr. Camarillo on October 14, 2014, and again on October 21, 2014. Dr. Camarillo referred Claimant to a pain management specialist, Baominh Vinh, M.D., who first saw Claimant on December 11, 2014. Claimant described her symptoms as severe and worsening. Dr. Vinh prescribed Norco along with the other maintenance medications of Naproxen, Flexeril, and Neurontin. A urine drug screen taken on December 11, 2014, was negative for all substances.

18. On April 3, 2015, Dr. Vinh prescribed Amitiza to address Claimant's constipation caused by the Norco. There is no discussion in Dr. Vinh's notes of attempts to manage Claimant's constipation using more conservative methods or nonprescription medication. .Additionally, there was no credible or persuasive evidence that Dr. Vinh reviewed the medical records or had a complete understanding of Claimant's medical condition when initiating his treatment.

19. Amitiza is a prescription medication specifically promoted for the use of opoid-induced constipation. It costs the insurer approximately $380 for a 30 day supply. Dr. Reichhardt discussed the management of constipation with the claimant on April 23, 2014. He generally discusses intake of fruits and vegetables and water, and exercise if tolerated. If that does not work, he recommends a fiber supplement and then add a stool softener if needed. If the problem remains, he recommends adding Senokot or a senna preparation. Given the small dosage of hydrocodone that Claimant is taking, he felt it would be unusual for that protocol to not be adequate.

20. Dr. Reichhardt was also concerned about the side effects of long-term opoid use, particularly for Claimant who has a history of migraine headaches, as opoid's can contribute to worsened headache problems. Other side effects may be decreased

mental status, including effects on memory, attention, and concentration, sleep apnea, and lowered testosterone levels.

21. There is no discussion in Dr. Vinh's notes of attempts to manage the constipation using more conservative methods or nonprescription medication.

22. As of the date of the December 11, 2015, hearing, Claimant continued on the Norco and Amitiza for pain relief and constipation, although she had recently been prescribed Opana in place of the Norco. Claimant's use of narcotic pain medication and Amitiza for constipation was not established by a preponderance of the evidence to be reasonable or necessary. Claimant risk adverse side effects from narcotic pain medication for chronic pain relief and without narcotic pain medication Claimant does not require Amitiza. Use of these medications is also contrary to Medical Treatment Guidelines regarding treatment of chronic pain and constipation.

23. On April 14, 2015, Dr. Leggett performed the DIME. Dr. Leggett found tenderness with both light and deep touch and hypersensitivity over the biceps tendon and acromioclavicular joint. He commented that it was difficult to differentiate between the overlying soft tissue pain and the deeper structural pain. He noted that the decrease in sensation into the forearm and hand did not seem to follow any specific dermatomal pattern. He found that Claimant exhibited a large amount of pain behavior throughout the examination and was found to have breakaway weakness. He noted two positive Waddell signs of regional weakness and overreaction. Upon examination, Dr. Leggett found minimal tenderness with palpation in the cervical region and full range of motion of the cervical region with tightness reported at the end range of rotation. Claimant reported to Dr. Leggett that her cervical region was doing "okay," but that she had some intermittent tightness with movement. Dr. Leggett commented that the cervical region seemed to be doing well and there was minimal support for relationship to neck impairment given the mechanism of injury.

24. Dr. Leggett concurred with Dr. Reichhardt's conclusion that Claimant reached MMI on November 18, 2014, and with Dr. Reichhardt's permanent restrictions. Dr. Leggett also concurred with Dr. Reichhardt's recommendation to taper Claimant off the medication, Norco, based on the Medical Treatment Guidelines (Exhibit A, page 7), case reports, and his own experience. He testified that both high and low use of opiates can lead to problems. Dr. Leggett concurred with Dr. Reichhardt's impairment rating based on the range of motion deficit and axillary sensory nerve involvement. However, Dr. Leggett also assigned a 10% upper extremity impairment using table 19 on page 50 of the *AMA Guides*, 3rd edition, revised. Dr. Leggett found the total impairment to be 18% upper extremity impairment, which would convert to an 11% whole person impairment. (Exhibit A, page 8).

25. Dr. Reichhardt credibly testified at hearing that Dr. Leggett's use of table 19 to assign a 10% extremity rating was a mistake. Dr. Leggett attempted to explain his rationale for using this table that applies only to arthroplasty. He explained that on page 5 of the impairment rating tips that a rating can be assigned for resection of the humeral head, but this was not done in this case. He also stated that the rating tips allow distal

clavicular resections to be assigned a 10% extremity rating. Again, this procedure was not done in this case. Dr. Reichhardt testified that the table used by Dr. Leggett does not address the issues that Dr. Leggett was testifying about. The table references only arthroplasty, not synovectomy, acromioplasty, or Popeye deformity. Dr. Reichhardt's own familiarity with the level II accreditation course materials and impairment rating tips led him to conclude that this part of Dr. Leggett's rating was most probably incorrect.

26. The ALJ finds that as a result of her January 28, 2014, work injury, Claimant has a visible disfigurement to the body consisting of three arthroscopic left shoulder scars, each one a half inch in diameter with keloids. Claimant's left shoulder slopes downward and the left arm lacks muscle tone.

CONCLUSIONS OF LAW

GENERAL LEGAL AUTHORITY

1.The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessary of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents and a workers' compensation case shall be decided on its merits. Section 8-43-201(1), C.R.S.

2.When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See Prudential Ins. Co. v. Cline, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3.The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

PERMANENT PARTIAL DISABILITY BENEFITS

4.The parties raise interrelated issues regarding PPD. First, it is found and concluded that Respondents proved by clear and convincing evidence that the impairment rating provided by the DIME physician was most probably incorrect. Then, it is concluded that Claimant failed to establish by a preponderance of the evidence that

her impairment rating should be converted to a whole person impairment because the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder.

5.The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S.

6.In reviewing the rating given by Dr. Reichhardt, the authorized treating physician, and Dr. Leggett, the DIME physician, there is agreement that there was a 7% extremity impairment for range of motion deficit and a 2% impairment for axillary sensory nerve involvement, which totals to a 9% impairment of the upper extremity. Where the physicians differ is Dr. Leggett's additional 10% extremity rating using table 19 of the *AMA Guides*.

7.Table 19 covers impairments of the upper extremity following arthroplasty. (Exhibit O, page 3). A resection arthroplasty at the shoulder level is valued at 24% upper extremity and an implant arthroplasty is valued at 30% upper extremity. The claimant did not undergo an arthroplasty and there is nothing in the *AMA Guides* that provide an impairment rating for arthroscopic surgery.

8.Dr. Leggett relied upon page 5 of the impairment rating tips, reproduced below from the Division's website:

> **Shoulder Surgery:** Resection arthroplasty referred to in the *AMA Guides 3rd Edition (rev.)* is to be used only for partial resection of the humeral head, a procedure rarely performed currently. Neither resection nor implant arthroplasty values should be used for a distal clavicular resection. If providing a rating for a distal clavicular resection, the upper extremity value is 10%.
>
> https://www.colorado.gov/pacific/sites/default/files/Desk_Aid_11_Impairment_Rating_Tips.pdf

9.The rating tips provide that: "Resection arthroplasty… is to be used *only* for partial resection of the humeral head." (Emphasis added). If a distal clavicular resection is involved, a rating of 10% extremity can be provided. A distal clavicular resection was not performed in this case.

10.The use of table 19 by the DIME makes his opinion regarding impairment rating most probably incorrect. Table 19 of the *AMA Guides* apply only to arthroplasty, which did not occur in this case, and the rating tips specifically state that the use of table 19 for resection arthroplasty is to be used only for a partial resection of the humeral head, which also did not occur. Accordingly it is concluded that Claimant's impairment rating is 9% to the upper extremity, or 5% whole person.

11.Claimant argues that the situs of her functional impairment is not listed on the schedule and therefore should be converted to a whole person impairment. Section 8-42-107(1), C.R.S. limits a claimant to a scheduled disability award if the injury results in permanent medical impairment enumerated on the schedule of disabilities in Section 8-42-107(2). Where the claimant suffers functional impairment that is not listed on the schedule, the claimant is limited to medical impairment benefits for whole person impairment calculated in accordance with Section 8-42-107(8)(c), C.R.S.

12.The claimant bears the burden of establishing by a preponderance of the evidence that her functional impairment extends beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under Section 8-42-107(8)(c), C.R.S. The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of Section 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S., is one of fact for determination by the ALJ.

13.In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App.1996). The Court of Appeals has specifically stated that the determination whether a claimant sustained a scheduled or nonscheduled injury is a question of fact for the ALJ, not the rating physician. *City Market, Inc. v. Indus. Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

14.Here, Claimant's impairment should be limited to the schedule of disabilities. The claimant did not sustain a rotator cuff tear and, as testified by the physicians, the damage found within the structure of the shoulder was pre-existing. Further, it was unclear what structures, if any, were causing Claimant's pain. Dr. Reichhardt credibly testified that the mechanism of injury would not necessarily suggest a significant underlying structural problem. Dr. Leggett did not find any issues at the time of his examination with the cervical region.

15.The situs of Claimant's functional impairment is the arm at the shoulder. Several providers, including the DIME physician, found full range of motion of the cervical region. The limitations described by Claimant at hearing involve limitations to the use of her arm caused by her shoulder pain. This is covered by the schedule of disabilities.

MAINTENANCE MEDICAL BENEFITS

16.In cases such as this, where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment, the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* WC 4-309-217 (ICAO February 12, 2009).

17.Here, Claimant continues the use of narcotic pain medication and a prescription laxative prescribed to counteract the constipating effect of narcotic pain relievers. Respondents challenge the use of these medications arguing that the medications are not reasonable and necessary. Respondents contend that the use of opiod pain medications in Claimant's case is not advised by the Medical Treatment Guidelines. It is concluded that Claimant failed to sustain her burden of proof to prove that opiate pain medication and a prescription drug for constipation, Amitiza, is reasonable and necessary

18.The use of the Medical Treatment Guidelines is contained in W.C.R.P. 17-2(A), and provides as follows: "All health care providers shall use the medical treatment guidelines adopted by the Division." The medical treatment guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The guidelines may be considered as evidence of accepted professional standards for treatment of workers' compensation injuries. See also § 8-43-201(3), C.R.S.

19.With regard to the use of opiods, the Medical Treatment Guidelines state the following:

> **Opoids:** are the most powerful analgesics. Their use in acute pain and moderate-to-severe cancer pain is well accepted. Their use in chronic nonmalignant pain, however, is fraught with controversy and lack of scientific research.
>
> Rule 17, Exh. 9, Part F.7.g. (p.68)

20.Dr. Leggett reproduced another section from the Medical Treatment Guidelines, section H-6, in his DIME report. Based on the guidelines, case studies, and his own experience, he recommended that Claimant taper off narcotics and transition to a non-narcotic. He was concerned that a prolonged use of opiates usually leads to tolerance, which decreases the effectiveness of the medication. Given the small dosage taken by Claimant, Dr. Leggett felt that the medication could be stopped immediately without any side effects or withdrawal.

21.Dr. Reichhardt, who treated Claimant until she moved to Texas just before reaching MMI, also recommended that Claimant discontinue opiates. He testified that

there was no good data on the safety and efficacy of opoids over the long term, consistent with what is stated in the Medical Treatment Guidelines. The risk is that the patient may become dependent on the opoids or have dosage escalation over time and, even possibly addiction. He testified that the use of opoid's for nonmalignant pain is not as safe as previously thought. He also did not believe that 5 mg of hydrocodone was going to do much in terms of improving Claimant's function or quality of life.

22.Dr. Reichhardt was also concerned about the side effects of long-term opoid use, particularly for Claimant who has a history of migraine headaches, as opoid's can contribute to worsened headache problems. Other side effects may be decreased mental status, including effects on memory, attention, and concentration, sleep apnea, and lowered testosterone levels.

23.It is not clear that Claimant's problem with constipation is opiate-induced. Dr. Leggett testified that the dosage Claimant is taking would usually not lead to constipation. Nonetheless, none of the other medications the claimant is using is likely to lead to constipation. If the claimant discontinued the opiates, as recommended by Dr. Leggett and Dr. Reichhardt, the Amitiza would become a non-issue. If the claimant continues on the opiates and continues with constipation problems, the use of Amitiza at the cost of $380 a month, without exhausting other measures, is unreasonable. For constipation associated with long-term opoid use, the Medical Treatment Guidelines state that "stool softeners, laxatives and increased dietary fluid may be prescribed." Rule 17, Exh. 9 "Chronic Pain Disorder," Part F.7.g.vii. (p.77). As stated by Dr. Reichhardt, it is questionable to provide a medication to treat the side effects from a medication that has dubious benefits to begin with.

DISFIGUREMENT

24.The ALJ concludes that as a result of her January 28, 2014, work injury, Claimant has a visible disfigurement to the body consisting of three arthroscopic left shoulder scars, each one a half inch in diameter with keloids. Claimant's left shoulder slopes downward and the left arm lacks muscle tone. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Respondents overcame the opinion of the DIME physician with regard to impairment rating by clear and convincing evidence . Respondents shall be liable for PPD based on a 9% scheduled impairment.

2. Claimant failed to prove by a preponderance of the evidence that she is entitled to a whole person impairment rating.

3. Claimant failed to prove by a preponderance of the evidence that opiod pain medication and Amitiza for constipation is reasonable and necessary.

4. Insurer shall pay Claimant $2500.00 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 17, 2015__

DIGITAL SIGNATURE:
Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

- Whether claimant has proven by a preponderance of the evidence that the recommended physical therapy is reasonable and necessary medical treatment related to her January 21, 2014 work injury?

FINDINGS OF FACT

1. Claimant is employed as a Driver Trainer for employer. Claimant sustained an admitted injury on January 21, 2014 when she was walking to her pickup truck, when something caught her left toe causing her to fall approximately 12 feet off a retaining wall and landing on her head.

2. Claimant initially sought medical treatment from the Mercy Regional Hospital Emergency Room. Claimant was diagnosed with a possible intracranial injury, cervical injury, thoracic injury, wrist fracture, clavicular fracture, and occult intra-abdominal injury. Claimant underwent x-rays and a computed tomography of her head.

3. Claimant was referred by employer to Dr. Jernigan for medical treatment related to her work injury. Dr. Jernigan testified at hearing that claimant was not knocked unconscious in her fall, but did sustain a closed head injury in addition to a number of fractures and a laceration of her liver. Dr. Jernigan testified that claimant's case is complex due to the nature of her injuries and testified that he felt the physical therapy he had prescribed had significantly helped claimant.

4. Dr. Jernigan testified that without the physical therapy he has noticed claimant has decreased strength in her neck and decreased range of motion of her neck. Dr. Jernigan testified he believed claimant would continue to progress with continued physical therapy and opined that the physical therapy was reasonable, necessary and related to her compensable work injury. Dr. Jernigan testified he most recently wrote another prescription for physical therapy on September 29, 2015.

5. Dr. Jernigan testified on cross examination that the physical therapy in this case exceeds the recommended number of treatments set forth in the Colorado Medical Treatment Guidelines. Dr. Jernigan testified that during the course of her treatment he had claimant receiving physical therapy 2 times per week, then tried claimant at 1 physical therapy appointment per week, but claimant's condition worsened. Dr. Jernigan then recommended claimant again increase her physical therapy to 2 times per week.

6. Mr. Alexander, the physical therapist, testified at hearing in this matter. Mr. Alexander testified that he has been providing physical therapy to claimant since

2014. Mr. Alexander testified he has seen claimant's improvement when receiving physical therapy and noticed that when claimant is not receiving physical therapy, it has resulted in claimant having a loss of her range of motion. Mr. Alexander testified claimant has undergone approximately 130 physical therapy sessions with the clinic where Mr. Alexander works. Mr. Alexander testified he believed the physical therapy of two times per week would help cure and relieve claimant from the effects of her work injury. The ALJ finds the testimony of Mr. Alexander to be credible and persuasive.

7. Respondents obtained a utilization review from Dr. Hoffeld on September 28, 2015. Dr. Hoffeld noted that claimant had completed 137 sessions of physical therapy related to her work injury. Dr. Hoffeld noted that there was a recommendation for an additional 12 physical therapy visits. Dr. Hoffeld noted that claimant's medical records documented limited evidence of objective and functional improvement with the physical therapy and recommended denying additional requests for physical therapy as the treatment exceeded the recommendations set forth by Rule 17, Exhibit 8 of the Colorado Medical Treatment Guidelines.

8. Claimant testified at hearing that she believes the physical therapy is helping her condition. Claimant testified that when she isn't receiving physical therapy, her physical condition gets worse. Claimant testified that she performs a home exercise program that she discussed with her physical therapist. The ALJ finds the testimony of claimant to be credible and persuasive.

9. The ALJ credits the opinions expressed by Dr. Jernigan and Mr. Alexander as credible and persuasive and finds that claimant has demonstrated that it is more likely than not that the ongoing requests for physical therapy are reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. The ALJ credits that testimony of Dr. Jernigan and Mr. Alexander and finds that claimant's range of motion and strength continue to improve with the physical therapy and get worse when claimant does not have the physical therapy. The ALJ credits the opinions expressed by Dr. Jernigan on Mr. Alexander and finds that the ongoing physical therapy, while exceeding the recommended Colorado Medical Treatment Guidelines, continues to be curative in nature regarding claimant's condition and is reasonable medical treatment necessary to cure and relieve claimant from the effects of her January 21, 2014 work injury.

10. Claimant testified she has paid out of pocket for her physical therapy following the denial of her physical therapy. Claimant entered into evidence a patient payment log indicating claimant has paid $306 for six physical therapy sessions dated October 13, 2015, October 20, 2015, October 29, 2015, November 3, 2015, November 10, 2015 and November 17, 2015. The ALJ finds these physical therapy visits to be reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, the recommendation for ongoing physical therapy is found to be reasonable and necessary to cure and relieve claimant from the effects of her work related injury. As found, respondents are liable for the cost of claimant's recommended physical therapy treatment.

5. Section 8-42-101(6)(b), C.R.S. states in pertinent part:

> If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier, shall reimburse the claimant for the full amount paid. The employer or carrier is entitled to reimbursement from the medical providers for the amount in excess of the amount specified in the worker's compensation fee schedule.

6. As found, claimant paid $306.00 out of pocket for her physical therapy treatment. As found, respondents are required to pay the full amount paid by claimant and, if necessary, seek reimbursement from the medical provider if the amount paid is in excess of the fee schedule.

ORDER

It is therefore ordered that:

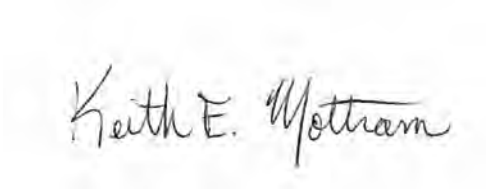
1. Respondents shall pay for the reasonable medical treatment including physical therapy necessary to cure and relieve claimant from the effects of the work injury.

2. Respondents shall reimburse claimant $306.00 for out of pocket expenses related to claimant's physical therapy.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 8, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether respondents have overcome the opinion of the Division-sponsored Independent Medical Exam ("DIME") physician regarding the issue of permanent partial disability ("PPD") benefits by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of and in the course and scope of his employment with employer on January 27, 2014 when he was involved in a motor vehicle accident. Claimant testified he was employed as a pastor and was driving through Glenwood Canyon when a rockslide occurred causing the motor vehicle accident. Claimant testified the airbags deployed as a result of the accident and he injured his neck and burned his arms (from the airbags). Claimant testified he was asked to go in the ambulance at the scene of the accident, but denied this request. Claimant testified the next morning he knew he was more injured than he originally thought.

2. Claimant sought medical treatment with Dr. Findley following the accident. Dr. Findley evaluated claimant on February 3, 2014 and noted claimant was complaining of neck pain on the right side radiating into the upper trapezius and on the left side in the cervical and scalene areas. Dr. Findley diagnosed claimant with a cervical sprain/strain and recommended physical therapy.

3. Claimant returned to Dr. Findley on March 4, 2014. Dr. Findley noted that the x-rays of claimant's cervical spine brought some concern regarding a compression fracture and referred claimant for a computed tomography ("CT") scan for further evaluation. The CT scan showed no fracture and claimant was referred to Dr. Dickstein for further evaluation as of March 21, 2014.

4. Dr. Dickstein evaluated claimant and referred claimant for a magnetic resonance image ("MRI") of the cervical spine along with flexion/extension x-rays. The MRI showed severe degenerative disk disease as well as a broad based disc bulge at the C4-5 level. Dr. Dickstein noted claimant had moderate canal stenosis with mild cord compression and severe bilateral foraminal stenosis, but also noted that claimant was nt complaining of radicular symptoms.

5. Claimant was evaluated by Dr. Miller on June 12, 2014. Dr. Miller noted claimant was complaining of significant pain in his cervical spine on both sides with radiation into either shoulder that was increased with head tilting. Dr. Miller found poor range of motion of the cervical spine, but no evidence of a myelopathy. Dr. Miller

recommended a series of epidural steroid injections ("ESI's") and noted that claimant may need surgery later in life.

6. Claimant underwent a series of ESI's in June and August 2014 under the auspices of Dr. Dickstein. Claimant reported pain relief following the first injection, but noted that it returned over the next few weeks. Claimant again reported pain relief following the second injection, but the pain again returned and the length of relief was not as long as the first injection.

7. Claimant returned to Dr. Spence on October 27, 2014. Dr. Spence noted claimant's injections and ongoing complaints and placed claimant at maximum medical improvement ("MMI") as of October 27, 2014. Dr. Spence noted that he discussed the case with claimant and noted that claimant wanted to bring his case to a close. Dr. Spence noted that claimant indicated that he didn't feel that he has any significant disability and did not want to pursue further treatment. Dr. Spence noted he talked with claimant about referring him for a disability rating, but he feels like there is no disability and prefers not to have any further evaluation or treatment regarding this injury. Therefore, Dr. Spence opined that claimant had no permanent impairment as a result of the work injury.

8. Respondents filed a final admission of liability ("FAL") on December 1, 2014 admitting for the 0% impairment. Claimant objected to the FAL and requested a DIME. Claimant eventually underwent the DIME with Dr. Parry on April 23, 2015.

9. Dr. Parry reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her DIME evaluation. Dr. Parry noted claimant continued to complain of pain in his cervical spine and noted that claimant reported he has not been skiing and no longer plays softball after his work injury. Dr. Parry noted claimant was currently depressed and recommended claimant seek counseling to deal with his emotional issues.

10. Dr. Parry agreed that claimant was at MMI as of October 27, 2014. Dr. Parry provided claimant with a PPD rating for the cervical spine of 15% whole person. This impairment rating was comprised of an impairment rating of 6% whole person for a unoperated cervical spine disorder with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with moderate to severe degenerative chances on structural tests. Dr. Parry also provided claimant with an additional 10% impairment for range of motion deficits of claimant's cervical spine. Dr. Parry combined the 6% specific disorder with the 10% range of motion to come to the 15% whole person impairment rating.

11. Respondents obtained a records review independent medical examination ("IME") of claimant's case with Dr. Fall on June 14, 2015. Dr. Fall reviewed claimant's medical records, including the DIME report, and issued a report outlining her opinions regarding claimant's case.

12. Dr. Fall noted that it was her opinion that the 15% impairment rating was incorrect because the degenerative findings on the MRI were not caused by the accident nor were they found to be the main symptomatic issue. Dr. Fall further noted that the impairment rating from Dr. Parry was inconsistent with the report of Dr. Spence that indicated claimant did not feel he had any disability. Dr. Fall noted that this was consistent with the mechanism of injury and the minimal objective findings and further noted that loss of range of motion would be expected with this amount of underlying degenerative changes. Dr. Fall therefore opined that the DIME report from Dr. Parry was internally inconsistent.

13. The ALJ finds that the IME report from Dr. Fall does not demonstrate that it is highly probable and free from substantial doubt that opinion of Dr. Parry regarding claimant's PPD rating is incorrect. While Dr. Fall notes in her report that claimant felt he reported to Dr. Spence did not feel he had any disability, this had obviously changed as claimant then requested a DIME evaluation to assess this specific issue. Moreover, Dr. Parry opined that claimant was entitled to an impairment rating for the underlying degenerative changes in his cervical spine. Dr. Fall, in her report, noted that Dr. Parry indicated that the underlying degenerative changes were not causing claimant's symptoms, and if she were provided claimant an impairment rating for a soft tissue injury, the appropriate rating would have been 4%.

14. The ALJ finds that this demonstrates a mere difference of opinion between Dr. Fall and Dr. Parry as to whether the appropriate rating in this case could be the 6% under Table 53(II)(C) or the 4% impairment rating provided under Table 53(II)(B) involving the cervical spine. Moreover, the ALJ finds that the impairment rating that included the 10% loss of range of motion is appropriate in this case.

15. While Dr. Fall indicates that the range of motion was likely related to the underlying arthritic condition and not necessarily caused by the accident, this opinion is not supported by credible documented medical evidence. The ALJ refuses to find that claimant's loss of range of motion should be apportioned to a pre-existing condition in this case, or simply found to be not related to the injury, without any credible evidence to support this finding.

16. The ALJ credits claimant's testimony at hearing as being credible and persuasive. The ALJ notes claimant testified he still has neck pain "all the time" and experiences pain with range of motion of his neck. The ALJ credits the reports from Dr. Parry and rejects the contrary findings in the report of Dr. Fall and finds that respondents have failed to overcome the opinion of the DIME physician by clear and convincing evidence regarding the issue of permanent impairment related to the industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the findings of the DIME physician by clear and convincing evidence regarding the issue of permanent impairment. As found, the DIME physician's findings that claimant sustained a 15% whole person impairment rating as a result of the compensable industrial injury is substantiated by the records entered into evidence. Insofar as Dr. Fall disagreed with Dr. Parry's PPD rating, the ALJ finds that this opinion does not arise to the clear and convincing evidence standard applied to the opinions of the DIME physician on this issue.

ORDER

It is therefore ordered that:

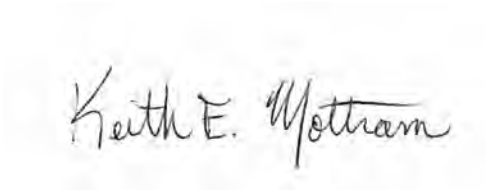
1. Respondents shall pay claimant PPD benefits based on the 15% whole person impairment rating provided by the DIME physician.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2015



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ISSUES

The issues presented for determination are whether the claim should be reopened based upon a change in the Claimant's condition. If the claim is reopened, whether the Claimant is entitled to surgery recommended by Dr. Bryan Castro. Respondents contend that Claimant's condition has not worsened, and even if the claim were to be reopened, the surgery is not reasonable, necessary or related to the industrial injury.

FINDINGS OF FACT

1. The Claimant worked for the Employer as a truck driver. On April 16, 2013, he sustained an admitted injury to his low back after being rear-ended by another truck.

2. The Claimant initially received medical treatment through Concentra. The treatment consisted mostly of physical therapy and medications. After his symptoms did not improve, Concentra physician, Dr. Parsons, referred Claimant to Dr. John Sacha who began treating the Claimant on July 17, 2013.

3. Prior to his first visit with Dr. Sacha, Claimant had undergone an MRI scan. According to Dr. Sacha's July 17, 2013 report, the MRI showed: "evidence of L5-S1 degenerative disc disease with a disc bulge with some bilateral foraminal narrowing and some modest foraminal narrowing at L4-5 secondary to facet spondylosis and degenerative changes. The Claimant received medical treatment, consisting primarily of injections and physical therapy.

4. Dr. Sacha referred the Claimant to Dr. Castro for a surgical evaluation. On October 16, 2013, Dr. Castro evaluated the Claimant as well as Claimant's MRI scan. Dr. Castro felt the MRI was of poor quality and requested that Claimant have a repeat MRI and undergo an EMG.

5. Following the repeat MRI and EMG, Claimant returned to see Dr. Castro on November 20, 2013. Dr. Castro concluded Claimant had a normal EMG, and that the MRI showed advanced disc space collapse, particularly at L5-S1, and that it is causing advanced stenosis with neural foraminal narrowing, and some disc bulging into the foramen which does seem to be compressing the existing L5 nerve roots at the L5-S1 level. Dr. Castro discussed both surgical and non-surgical treatment options with the Claimant, and concluded that non-operative treatment would be most appropriate. Dr. Castro stated that because of the advanced disc space collapse, Claimant would need a lumbar fusion of the L5-S1 level. Dr. Castro, however, recommended avoidance

of surgery “at all cost” and to continue conservative treatment. Claimant agreed with Dr. Castro’s plan.

6. Claimant continued with the conservative treatment until Dr. Sacha determined that he reached maximum medical improvement (MMI) on January 15, 2014.

7. The Respondents filed a Final Admission of Liability on February 28, 2014, and admitted for maintenance medical care. Thereafter Claimant received periodic maintenance medical treatment with Dr. Sacha.

8. On September 10, 2014, Claimant reported to Dr. Sacha a significant flare up in the pain in his low back and legs. He stated the pain has made it more difficult to do his new job. Dr. Sacha noted that Claimant has had to try new jobs because of his increased leg symptoms. On physical exam, Dr. Sacha noted pain with extension and extension rotation localized to the back with radiation into the leg; borderline positive straight leg raise and neural tension test on the left side. Claimant had slightly decreased sensation in left L5 distribution and motor strength at 5/5. As part of the treatment plan, Dr. Sacha stated that surgical intervention remains a possibility especially in light of Claimant’s recurrent lumbar radicular symptoms.

9. On September 25, 2014, Dr. Sacha performed a transforaminal epidural injection/spinal nerve block at the L5-S1 level of Claimant’s spine as maintenance treatment.

10. Claimant returned to Dr. Sacha’s office on October 22, 2014. Claimant reported increased back and leg pain, especially on his left side. On physical exam, Dr. Sacha noted decreased sensation in a patchy distribution in the left leg; motor strength 5/5; paraspinal muscle spasms; pain with straight leg raise and neural tension on the left side; and pain with extension and extension rotation causing radiation of pain into the left leg. Claimant indicated that he wanted to move forward with surgical intervention so Dr. Sacha referred him back to Dr. Castro for reevaluation.

11. Claimant had another MRI on December 2, 2014. The radiologist’s impression was: “Multilevel degenerative disc disease, most severely affecting L3-4 and L5-S1 as described above. No evidence of focal disc bulge or severe canal stenosis. Overall, the appearance of the lumbar spine is quite similar [to] the prior study.” The radiologist noted several disc bulges, but he did not observe any definitive nerve root contact.

12. On December 17, 2014, Dr. Castro reevaluated the Claimant. He noted that the findings on the December 2, 2014 MRI seemed worse than the previous MRI. Dr. Castro stated, “There is quite significant foraminal narrowing at the L5-S1 level secondary to disk space narrowing and a slight retrolisthesis, quite severe foraminal compromise the exiting L5 nerve roots with some moderate recess encroachment traversing the S1 nerve root as well.” Dr. Castro recommended that a “lumbar

decompression at the L5-S1 level, left sided, to affect decompressive laminotomy and to affect decompression of the L5 and S1 nerve roots."

13. On March 26, 2015, Claimant filed a petition to reopen to pursue the surgery recommended by Dr. Castro. The Insurer had denied the request for surgery by that time.

14. The Respondents referred the Claimant to Dr. Carlos Cebrian for an independent medical evaluation. Dr. Cebrian examined the Claimant on June 1, 2015, and he also reviewed Claimant's medical records, including the MRI films. Dr. Cebrian opined that Claimant had not sustained a worsening of condition since being placed at MMI on January 15, 2014. Dr. Cebrian explained that there were subjective pain complaints but no objective evidence of a worsening of condition. Dr. Cebrian noted that the Claimant had severe underlying degenerative disc disease particularly at L5-S1 that was not an acute finding.

15. Dr. Cebrian noted that the findings on Claimant's MRIs were not the result of work exposures but rather, was a natural progression of his underlying degenerative condition. Ultimately, Dr. Cebrian opined that the proposed surgery, although different from what Dr. Castro had original recommended, (i.e. fusion versus decompression), was to correct Claimant's degenerative changes in Claimant's spine that pre-existed the work injury.

16. On July 14, 2015, Jorge Klajnbart, D.O., an orthopedic surgeon, reviewed the Claimant's medical records and MRI films. Dr. Klajnbart noted that Claimant's MRIs showed multilevel degenerative disc disease, most severely affecting L3-4 and L5-S1, with no evidence of focal disc bulge or severe canal stenosis. Dr. Klajnbart further stated that when comparing the December 2014 MRI to the November 2013 MRI, the findings are similar and demonstrate severe bilateral neural foraminal narrowing, and compression of bilateral exiting L5 nerve roots.

17. Dr. Klajnbart explained that based upon his review of the MRI films, the Claimant had a natural progression of the degenerative process. Dr. Klajnbart noted that the claimant's ongoing pain complaints were a continued evolution of the established degenerative process not attributable to the original April 16 2013 accident. Dr. Klajnbart based his opinion, in part, on Claimant's ability to continue working after the accident and on Claimant's initial response to chiropractic care and acupuncture. Dr. Klajnbart concluded that Claimant's current pain flare-ups into this left leg are suggestive of an "evolution of his established significant disease process, to include his congenital short pedicles, which are noted on the MRI and are not attributable to the motor vehicle collision."

18. Claimant continued to work for the Employer until September 2014 when his symptoms worsened such that he could not continue the type of work he had been performing. Claimant testified, and the ALJ finds, that Claimant sought other similar employment with other employers that was less physically demanding. Claimant

worked for two other transportation companies both of which required that he merely drive and deliver construction materials without the need to unload a flat bed truck or place and strap tarps.

19. The Claimant testified, and the ALJ finds, that he has not sustained any new injuries to his low back since April 16, 2013.

20. Claimant had a prior back injury sometime in the 1990s, but he has not received any medical treatment for his low back since that time.

21. During the hearing, the Claimant provided a description of his pain. He testified that it starts in the left side of his back and radiates into the left side of his buttocks and down his left leg. He stated that it can be unbearable at times such that he must shift his weight to his right side when driving long distances. One year prior to the hearing, he rated his pain at 4-5 out of 10, and at the hearing he rated his pain at 7-8 out of 10.

22. The Claimant testified that his pain now is worse than it was in January 2014 when Dr. Sacha first found that he reached MMI. Claimant did not want surgery in January 2014, but because of his worsening pain, he wants to undergo the surgery recommended by Dr. Castro.

23. Dr. Cebrian testified during the hearing that there was no objective evidence to demonstrate an overall worsening of Claimant's condition. Dr. Cebrian explained that the three MRIs of the Claimant's lumbar spine from 2013 through 2014 demonstrated degenerative changes in the lumbar spine. Most notably, Dr. Cebrian explained that the December 2, 2014 MRI was similar to the MRIs taken on 2013 and showed multi-level changes to the lower lumbar spine and ongoing degenerative congenital stenosis. Dr. Cebrian also testified when he examined the Claimant, he had a negative straight leg test, tight hamstrings and normal motor strength in his lower extremities. Dr. Cebrian explained that these objective findings demonstrated that the Claimant's overall condition had not worsened. Instead, Dr. Cebrian noted that the Claimant was experiencing a gradual worsening of his overall degenerative condition. Dr. Cebrian agreed with Dr. Klajnbart's findings that Claimant's flare-ups of pain were typical of what would clinically be seen from most patients experiencing the same symptoms with similar MRI findings.

24. Dr. Cebrian also testified with regard to the proposed surgery from Dr. Castro and the Medical Treatment Guidelines. Specifically, Dr. Cebrian noted that the surgery proposed from Dr. Castro that was the subject of hearing was a decompression at L5-S1. This was a different surgery than had been proposed prior to MMI. Notably, Dr. Castro proposed a lumbar fusion in 2013 and that the Claimant did not meet the requirements under the Medical Treatment Guidelines for a decompression surgery. Dr. Cebrian explained that according to the Medical Treatment Guidelines, Claimant had to have pain in the legs greater than the low back pain. Claimant also had to have physical exam findings of abnormal reflexes and motor weakness coupled with objective

evidence of nerve root impingement upon MRI. Dr. Cebrian explained that Dr. Sacha had noted 5/5 motor strength as recently as June 10, 2015 and that the MRIs did not show any definitive nerve root contact. Ultimately, Dr. Cebrian testified that the surgery proposed by Dr. Castro was not reasonable or necessary as it was aimed to correct a degenerative condition and was not supported by the Treatment Guidelines.

25. Claimant has proven that his condition has changed/worsened since Dr. Sacha placed him at MMI in January 2014. Claimant credibly testified that his subjective pain has increased since January 2014, making it more difficult to perform his job duties and causing him sleep deprivation. In addition, Dr. Castro's interpretation of Claimant's most recent MRI supports that Claimant has experienced a worsening of his condition. Dr. Sacha's physical examination findings also support Dr. Castro's recommendation for surgery.

26. The ALJ rejects the opinions of Drs. Cebrian and Klajnbart. Dr. Cebrian examined the Claimant one time and concluded that Claimant's clinical presentation combined with the MRI findings did not meet the criteria for the surgery recommended by Dr. Castro. In addition, Dr. Cebrian testified that the findings on Claimant's December 2014 MRI showed degenerative changes and the natural progression of Claimant's degenerative condition, and that the surgery recommended by Dr. Castro would be directed toward the MRI findings, but that surgery is not reasonable. Dr. Cebrian's testimony is confusing. Either the surgery is unreasonable or it would be reasonable, but only to treat the pre-existing degenerative condition. Regardless, the ALJ is not persuaded by Dr. Cebrian's opinions.

27. Dr. Klajnbart performed only a records review and never examined the Claimant making his opinions less persuasive.

28. The Claimant had no ongoing low back or leg complaints prior to the industrial injury. Since the injury, he has had ongoing low back and left leg complaints despite conservative treatment. His pain has worsened since placement at MMI, and the objective findings per Drs. Castro and Sacha support the need for the surgery recommended by Dr. Castro.

CONCLUSIONS OF LAW

General Provisions

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo.App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Reopening – Change in Condition

4. Section 8-43-303(1), C.R.S., provides:

> At any time within six years after the date of injury, the director or an administrative law judge may … review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

5. Claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *see Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to change in claimant's physical or mental condition which can be causally connected to the original injury. *Jarosinski v. Indus. Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002).

6. As found above, the Claimant has proven that his work-related medical condition has worsened. In addition to the subjective increase in his pain in both his low back and left leg, Claimant's function has been impacted. He has had to secure new employment due to his work-related condition and he has experienced sleep deprivation due to his pain. The opinions of Dr. Castro also support a worsened condition.

Medical Benefits

7. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the

time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

8. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury.

9. The Claimant has proven that he is entitled to the surgery recommended by Dr. Castro. As found above, the Claimant's pain has worsened since placement at MMI, and the objective findings per Drs. Castro and Sacha support the need for the surgery recommended by Dr. Castro. The ALJ is not persuaded by the contrary opinions offered by Drs. Cebrian and Klajnbart for the reasons stated above.

ORDER

It is therefore ordered that:

1. The Claimant's workers' compensation claim is reopened.

2. Claimant is entitled to undergo the surgery recommended by Dr. Castro.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 6, 2015

DIGITAL SIGNATURE:
L. Broniak

LAURA A. BRONIAK

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-943-950-03

ISSUES

1. .Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period February 20, 2014 until terminated by statute.

2. Whether Claimant has made a "proper showing" for a change of physician to Kristin Mason, M.D. pursuant to §8-43-404(5)(a), C.R.S.

FINDINGS OF FACT

1. On January 7, 2014 Claimant suffered admitted industrial injuries to his back, neck, left knee and left shoulder. He slipped on ice and snow while attempting to dislodge a large tarp that was stuck on concrete.

2. Claimant continued to perform his regular job duties for several weeks after the January 7, 2014 incident. He explained that by February 20, 2014 he was no longer able to perform his regular job duties because of increasing symptoms in his back, neck, left knee and left shoulder. Claimant sent a message through a co-worker to inform his supervisor that he would be unable to work because of his pain. When Claimant arrived at work on February 21, 2014 he was terminated due to a reduction in work force.

3. On February 26, 2014 Claimant visited the Denver Health Medical Center because of continuing left shoulder, neck and back pain. He received advice on how to proceed with his Workers' Compensation claim and staff at the Denver Health Medical Center contacted Insurer. Insurer then instructed Claimant to contact Travis Kauffman at Employer. Claimant spoke with Mr. Kauffman and was informed that he had a medical appointment at Concentra Medical Centers scheduled for March 7, 2014.

4. On March 7, 2014 Claimant visited Authorized Treating Physician (ATP) Darla Draper, M.D. at Concentra for an examination. Dr. Draper diagnosed Claimant with a left knee strain/sprain, a left shoulder contusion, a left knee contusion, a back strain and a cervical strain. She prescribed medications, referred Claimant to physical therapy and recommended an orthopedic evaluation of Claimant's left knee. Dr. Draper also assigned Claimant work restrictions including no lifting, no pushing or pulling in excess of 10 pounds with the right upper extremity, no use of the left upper extremity except for light use of the left hand, sitting 80% of the time, no climbing stairs or ladders and no kneeling or squatting.

5. On April 15, 2014 Respondents filed a General Admission of Liability (GAL) but denied responsibility for lost wages.

6. On April 23, 2014 Dr. Draper continued Claimant's work restrictions to include no lifting, pushing or pulling in excess of 10 pounds, no squatting and/or kneeling and no use of the left upper extremity except for light use of the left hand. She also noted that Claimant should sit 80% of the time, wear a brace and use crutches 100% of the time.

7. On May 14, 2014 Claimant returned to Dr. Draper for an examination. She noted that Claimant had visited Mark Failinger, M.D. on May 1, 2014 for his left shoulder condition. Dr. Failinger had administered a left shoulder steroid injection that only helped for 2-3 days. Diagnostic testing of the left knee revealed that it was essentially normal. Dr. Draper continued Claimant's work restrictions and anticipated that he would reach Maximum Medical Improvement (MMI) by August 1, 2014. She referred Claimant to a delayed recovery specialist for an evaluation.

8. On June 4, 2015 Claimant returned to Dr. Draper for an examination. She remarked that Claimant would be visiting delayed recovery specialist John Burris, M.D. at the end of the month. She specifically noted that Claimant's care would be transferred to Dr. Burris at his first available appointment on June 27, 2014. Dr. Draper continued Claimant's work restrictions to include no repetitive lifting in excess of 10 pounds, no pushing or pulling.with greater than 10 pounds of force, no squatting, no kneeling and no climbing. She again anticipated that Claimant would reach MMI by August 1, 2014.

9. On June 27, 2014 Claimant visited ATP Dr. Burris for an evaluation. Dr. Burris diagnosed Claimant with a left knee strain and a left shoulder strain. He remarked that Claimant had a benign examination with no objective findings and negative diagnostic testing. Dr. Burris commented that Claimant exhibited a somatic overlay and was very pain averse. He did not note any objective basis for work restrictions. Dr. Burris commented that Claimant could assume his normal activities at work and home. He did not place Claimant at MMI pending additional evaluation with John Papilion, M.D.

10. On July 3, 2014 Claimant visited Dr. Papilion for an examination. Dr. Papilion noted that Claimant exhibited instability and pathology in his ACL. Dr. Papilion stated "I believe it is reasonable to proceed with exam under anesthesia, arthroscopy in the left knee with electrothermal shrinkage of his partial ACL tear." Dr. Papilion restricted Claimant to no squatting, kneeling, climbing or overhead work.

11. On August 8, 2014 Claimant returned to Dr. Burris for an examination. Dr. Burris noted that Claimant continued to exhibit a benign examination with no objective findings and an essentially negative diagnostic work-up. Dr. Burris explained that all treating providers had noted a significant somatic overlay to Claimant's presentation. Seven months of conservative care had not caused significant changes in Claimant's subjective complaints. He specifically enumerated that Claimant had received physical therapy with transition to a home program, massage therapy, chiropractic treatment, acupuncture and medication management. There was no objective basis to assign impairment or permanent work restrictions and Dr. Burris released Claimant to regular

employment. Dr. Burris concluded that Claimant had reached MMI with no impairment or restrictions.

12. On August 26, 2014 Insurer filed a Final Admission of Liability (FAL). The FAL specified that Claimant had reached MMI on August 8, 2014 with no impairment or work restrictions.

13. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME). On December 18, 2014 Claimant underwent a DIME with Edwin M. Healey, M.D. Dr. Healey concluded that Claimant had not reached MMI and required further evaluation and treatment. He recommended that Claimant visit a Spanish-speaking psychologist, undergo psychological counseling and receive antidepressant medications. He also recommended a change of physician "especially Dr. Burris." He suggested a referral to a physiatrist for additional evaluation and treatment.

14. On January 13, 2015 Insurer filed an Amended FAL. The FAL acknowledged reasonable and necessary medical treatment for Claimant's left knee, left shoulder, neck and back. Dr. Draper and referrals were listed as the designated providers. Respondents denied TTD benefits because Claimant was terminated for cause on February 26, 2014. However, Respondents did not raise the termination for cause defense at the hearing in this matter.

15. During February and March 2015 Dr. Papilion continued Claimant's work restrictions. On March 2, 2015 Claimant underwent left knee surgery.

16. On March 11, 2015 Claimant was referred to physiatrist John J. Aschberger, M.D. as recommended by Dr. Healey. Dr. Aschberger remarked that Claimant had undergone left knee surgery. He commented that Claimant exhibited left upper quarter myofascial pain and left lumbosacral inflammation. He reviewed Dr. Healey's DIME recommendations and began Claimant in therapy that included postural exercises and appropriate stretches. Dr. Aschberger also mentioned massage therapy and possible trigger point injections. He remarked that he would be glad to assume Claimant's medication management care. Dr. Aschberger did not assign work restrictions.

17. Dr. Aschberger referred Claimant for a psychological evaluation. On August 5, 2015 Claimant visited Walter J. Torres, PhD. for a psychological consultation. Dr. Torres remarked that Dr. Aschberger had initially referred Claimant to him in late May 2015. However, Claimant did not attend the evaluation. After speaking to Claimant about the matter, Dr. Torres documented that Claimant declined the appointment because of transportation difficulties and problems with his previous attorney.

18. Dr. Torres determined that Claimant exhibited paranoid personality features that were aggravated by his Workers' Compensation injury and associated depression. He commented that it had become very difficult to medically assist

Claimant and "attempts to aggressively treat his condition can be expected to be fruitless." Dr. Torres remarked that reaching MMI might aggravate Claimant's depression and hostile behavior. He recommended anti-depressant medications "to lessen the potential for acute instability."

19. On August 18, 2015 Claimant underwent an examination with Kristin Mason, M.D. Dr. Mason recommended additional diagnostic testing including an MRI arthrogram of the left shoulder, an MRI of the left knee and second orthopedic opinions for both the shoulder and the knee. She also suggested an EMG study of Claimant's left upper extremity and additional physical therapy.

20. On September 15, 2015 Claimant underwent an MRI arthrogram of his left shoulder. The MRI revealed a superior labral tear with anterior and posterior extension as well as a partial thickness tear of the superior and middle glenohumeral ligaments. On October 19, 2015 Claimant underwent left shoulder surgery with Dr. Papilion.

21. Claimant testified at the hearing in this matter. He explained that he became unable to perform his job duties for Employer by February 20, 2014. Claimant remarked that he could not return to his job because of the work restrictions assigned by his treating physicians.

22. Claimant requested a change of physician because he did not trust Dr. Burris or any of the medical providers at Concentra. He noted that the doctors at Concentra were uncaring and sought a transfer of care to Dr. Mason because she was considerate and listened to his concerns.

23. Dr. Healey testified at the hearing in this matter. He explained that he performed a DIME and determined that Claimant required significantly more medical treatment. Dr. Healey remarked that Claimant should not return to Dr. Burris or Concentra. He commented that Claimant was unable to perform more than sedentary work until his surgeon released him or changed his restrictions. Dr. Healey acknowledged that Claimant's care had been transferred to physiatrist Dr. Aschberger and he had undergone a psychological evaluation.

24. Claimant has demonstrated that it is more probably true than not that he is entitled to receive TTD benefits for the period February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute. On January 7, 2014 Claimant suffered admitted industrial injuries to his back, neck, left knee and left shoulder. He credibly explained that by February 20, 2014 he was no longer able to perform his regular job duties because of increasing symptoms. On March 7, 2014 Dr. Draper assigned Claimant work restrictions including no lifting, no pushing or pulling in excess of 10 pounds with the right upper extremity, no use of the left upper extremity except for light use of the left hand, sitting 80% of the time, no climbing stairs or ladders and no kneeling or squatting. By June 4, 2015 Dr. Draper continued Claimant's work restrictions to include no repetitive lifting in excess of 10 pounds, no pushing or pulling with greater than 10 pounds of force, no squatting, no kneeling and no climbing. Because of his work restrictions and ongoing symptoms, Claimant has been off of work

and has not earned any wages since February 20, 2014. Claimant's industrial injuries caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

25. Dr. Draper subsequently transferred Claimant's care to ATP Dr. Burris. She specifically noted that Claimant's care would be transferred to Dr. Burris at his first available appointment on June 27, 2014. Dr. Burris thus became "the attending physician" for purposes of §8-42-105(3)(c) C.R.S. At Claimant's June 27, 2014 visit with Dr. Burris he stated that Claimant could assume normal activities at work and home. He did not place Claimant at MMI pending additional evaluation with Dr. Papilion. Although Dr. Burris mentioned that Claimant could resume normal activities, his reservations regarding MMI suggest that it was equivocal for purposes of §8-42-105(3)(c) C.R.S.

26. On August 8, 2014 Claimant returned to Dr. Burris for an examination. Dr. Burris enumerated that Claimant had received physical therapy with transition to a home program, massage therapy, chiropractic treatment, acupuncture and medication management. There was no objective basis for impairment or permanent work restrictions and Dr. Burris released Claimant to regular employment. Dr. Burris concluded that Claimant had reached MMI with no impairment or restrictions. The August 8, 2014 report constitutes a written release to return to regular employment by the attending physician pursuant to §8-42-105(3)(c) C.R.S. Accordingly, Claimant's entitlement to TTD benefits terminated on August 8, 2014.

27. On March 2, 2015 Claimant underwent left knee surgery. Respondents thus resumed paying Claimant TTD benefits. Accordingly, Claimant is entitled to receive TTD benefits for the periods February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute.

28. Claimant has failed to make a "proper showing" to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. On December 8, 2014 DIME Dr. Healey recommended a change of physician "especially Dr. Burris." He suggested a referral to a physiatrist for additional evaluation and treatment. Claimant requested a change of physician because he did not trust Dr. Burris or any of the medical providers at Concentra. He noted that the doctors at Concentra were uncaring and sought a transfer of care to Dr. Mason. However, on March 11, 2015 Claimant was referred to physiatrist Dr. Aschberger as recommended by Dr. Healey. Moreover, Dr. Healey acknowledged that Claimant's care had been transferred to physiatrist Dr. Aschberger and he had undergone a psychological evaluation. Because Claimant has already received a change of physician to Dr. Aschberger, he has failed to make a "proper showing" that his care should again be transferred to Dr. Mason. Accordingly, Claimant's request for a change of physician to Dr. Mason is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

TTD Benefits

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. "Attending physician" as used in §8-42-105(3)(c) C.R.S. "includes only those physicians who are authorized to provide treatment." *Popke v. Industrial Claim Appeals Office,* 944 P.2d. 677, 680 (Colo. App. 1997). An "attending physician" thus is one within the chain of authorization. *Id.* However, §8-42-105(3)(c) C.R.S. does not

include all attending physicians but is limited to the health care provider determined to be "the attending physician." *Id.* Resolution of a doctor's status as "the attending physician" is a question of fact for resolution by the ALJ. *Id.* The attending physician's opinion concerning the claimant's ability to perform regular or modified work is dispositive for purposes of terminating temporary disability benefits under §8-42-105(3), C.R.S. unless there are multiple attending physicians with conflicting opinions. See *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d. 680 (Colo. App. 1999).

6. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive TTD benefits for the period February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute. On January 7, 2014 Claimant suffered admitted industrial injuries to his back, neck, left knee and left shoulder. He credibly explained that by February 20, 2014 he was no longer able to perform his regular job duties because of increasing symptoms. On March 7, 2014 Dr. Draper assigned Claimant work restrictions including no lifting, no pushing or pulling in excess of 10 pounds with the right upper extremity, no use of the left upper extremity except for light use of the left hand, sitting 80% of the time, no climbing stairs or ladders and no kneeling or squatting. By June 4, 2015 Dr. Draper continued Claimant's work restrictions to include no repetitive lifting in excess of 10 pounds, no pushing or pulling with greater than 10 pounds of force, no squatting, no kneeling and no climbing. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and has not earned any wages since February 20, 2014. Claimant's industrial injuries caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

7. As found, Dr. Draper subsequently transferred Claimant's care to ATP Dr. Burris. She specifically noted that Claimant's care would be transferred to Dr. Burris at his first available appointment on June 27, 2014. Dr. Burris thus became "the attending physician" for purposes of §8-42-105(3)(c) C.R.S. At Claimant's June 27, 2014 visit with Dr. Burris he stated that Claimant could assume normal activities at work and home. He did not place Claimant at MMI pending additional evaluation with Dr. Papilion. Although Dr. Burris mentioned that Claimant could resume normal activities, his reservations regarding MMI suggest that it was equivocal for purposes of §8-42-105(3)(c) C.R.S.

8. As found, on August 8, 2014 Claimant returned to Dr. Burris for an examination. Dr. Burris enumerated that Claimant had received physical therapy with transition to a home program, massage therapy, chiropractic treatment, acupuncture and medication management. There was no objective basis for impairment or permanent work restrictions and Dr. Burris released Claimant to regular employment. Dr. Burris concluded that Claimant had reached MMI with no impairment or restrictions. The August 8, 2014 report constitutes a written release to return to regular employment by the attending physician pursuant to §8-42-105(3)(c) C.R.S. Accordingly, Claimant's entitlement to TTD benefits terminated on August 8, 2014.

9. As found, on March 2, 2015 Claimant underwent left knee surgery. Respondents thus resumed paying Claimant TTD benefits. Accordingly, Claimant is entitled to receive TTD benefits for the periods February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute.

Change of Physician

10. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.,* W.C. No. 3-985-493 (ICAP, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAP, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAP, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

11. As found, Claimant has failed to make a "proper showing" to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. On December 8, 2014 DIME Dr. Healey recommended a change of physician "especially Dr. Burris." He suggested a referral to a physiatrist for additional evaluation and treatment. Claimant requested a change of physician because he did not trust Dr. Burris or any of the medical providers at Concentra. He noted that the doctors at Concentra were uncaring and sought a transfer of care to Dr. Mason. However, on March 11, 2015 Claimant was referred to physiatrist Dr. Aschberger as recommended by Dr. Healey. Moreover, Dr. Healey acknowledged that Claimant's care had been transferred to physiatrist Dr. Aschberger and he had undergone a psychological evaluation. Because Claimant has already received a change of physician to Dr. Aschberger, he has failed to make a "proper showing" that his care should again be transferred to Dr. Mason. Accordingly, Claimant's request for a change of physician to Dr. Mason is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

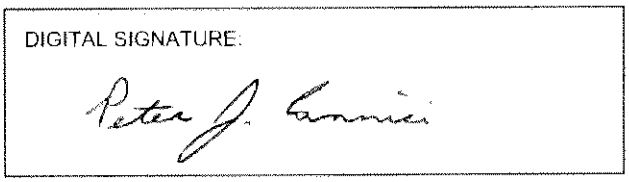
1. Claimant shall receive TTD benefits for the periods February 20, 2014 until August 8, 2014 and March 2, 2015 until terminated by statute.

2. Claimant's request for a change of physician to Dr. Mason is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 15, 2015.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant proved by a preponderance of the evidence that he suffered a work injury in the course and scope of his employment for the Employers, David Cruz and Barlo Inc.;

b. Whether Claimant established by a preponderance of the evidence that he is entitled to an order awarding authorized, reasonably necessary and related medical benefits;

c. What is Claimant's employee status as to Barlo, Inc./Interstate and Pinnacol Assurance;

d. Whether Barlo, Inc./Interstate is entitled to an award of penalties against Claimant;

e. Whether the doctrine of estoppel should be applied as against Barlo, Inc./Interstate's subcontractor David Cruz and/or Texas Mutual Insurance for denial of coverage based upon a certificate of insurance provided to Barlo, Inc./Interstate dated November 1, 2013; and

f. Whether Claimant is entitled to an order awarding penalties as against David Cruz.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. All parties to this claim were provided notice of hearing, dated June 16, 2015, consistent with the provisions of Section 8-43-211(1). Respondent David Cruz made no appearance at hearing. Respondent Texas Mutual Insurance Company made no appearance at hearing.

2. At hearing on July 7, 2015, Claimant was granted leave to obtain evidence in support of the admission of Exhibit 7. At hearing, Exhibit 7 was not admitted into evidence as it was determined to be hearsay, to lack foundation and to be neither an employment record nor a medical record. On August 10, 2015, Claimant offered Exhibit

10. Again, Exhibit 10 is hearsay, lacks foundation and is neither an employment record nor a medical record. Exhibits 7 and 10 are intend to address the issue raised in this proceeding of statutory employer. Exhibit 10 purports to establish through the affidavit of "an agent, office manager and custodian of records" in a Texas insurance agency, which is not a party to these proceedings, that Respondent Texas Mutual Insurance cancelled the workers' compensation insurance coverage of Respondent David Cruz on September 12, 2013. Exhibits 7 and 10 are not made part of the record in this proceeding because the evidence contains hearsay, lacks foundation and is neither an employment record or medical record as provided by Section 8-43-210, C.R.S.

3. Claimant is a 36 year old man who was an employee of David Cruz as a laborer for roofing work. Claimant alleges that he was injured on January 21, 2014, when he fell from a roof at a home with the address of 8 Mountain Laurel in Littleton, Colorado. Claimant was one of six workers on the roof.

4. Claimant testified that late in the afternoon, close to 5:00 pm or about 30 minutes before it was dark, David Cruz, who was on the roof working with him, told Claimant to cut a piece of shingle near the edge of the roof. As he bent to cut the shingle, he slipped and fell off the edge of the roof. He tried to hold onto the gutter but fell anyway, landing on his heels, and then falling back, striking his buttocks, back and head on grass.

5. On January 25, 2014, Claimant first sought treatment. At that time, he was treated by Heuser Chiropractic South, PC, which he chose from a billboard advertisement. He complained of pain all over his body, especially on his right side, arm, elbow and his highest concern was his lower back pain but he was also experiencing pain in his neck, arm, mid-back, shoulder and hip, together with dizziness and inability to sleep. Claimant reported on the intake form that he had treated himself by taking pills and applying heating patches, but after about five minutes of walking, he was experiencing extreme pain. He felt like his body was jammed at this lower back.

6. Claimant treated with that chiropractor through February 7, 2014. He went to Memorial Hospital in Colorado Springs on February 7, 2014. Those records state that it was "unclear" why Claimant came in. Memorial Hospital records say that Claimant complained of pain in his bottom and his rectum. He was prescribed medication. Claimant next sought treatment on October 13, 2014, at Penrose Community Urgent Care. The Penrose assessment was abdominal pain and coccyx injury. He was prescribed Ranitidine, Tramadol and told to use ice. Claimant testified that he has since bought natural medicine of his choice, has not received any medical treatment since his October 13, 2014 urgent care visit and has not used any prescription medicine. Claimant testified at the hearing that since his injury, his neck, shoulder and arm pain originally documented at the chiropractor had resolved but he still suffered from a painful coccyx, lumbar spine and head pain. He continues to feel dizziness.

7. Claimant provided varied reports of the mechanism of his injury. Claimant has reported that David Cruz saw him fall from the roof, knew he fell, and did not even look over the side when he fell. Claimant has offered varied and contradictory

explanation of Mr. Cruz's actions following Claimant's fall. Claimant's differing statements cast doubt on his overall credibility.

8. Dr. Jeffrey Raschbacher evaluated Claimant on November 17, 2014, and testified as an expert at hearing. His conclusion after evaluation of Claimant and review of the records is that Claimant did not sustain an injury at work on January 21, 2014, that lead to the need for medical treatment or to disability. Dr. Raschbacher testified that he did not see evidence of a fall. He testified that there was no objective basis to indicate there was an injury. Dr. Raschbacher testified that Claimant's Waddells signs were positive, which indicated that the manner in which Claimant was presenting does not make medical sense. Although a MRI shows a disc bulge, Dr. Raschbacher testified that it is not significant that Claimant has a disc bulge. He testified that this is a normal variant in the disc, is not pathology showing injury and explained studies that supported this medical fact. Dr. Raschbacher opined that a diagnosis of malingering must be entertained for Claimant.

9. Dr. Wunder evaluated Claimant on May 27, 2015. He reported that Claimant had a disc herniation. His impression was right L5-S1 radiculopathy and disc abnormality at L5-S1. He felt that Claimant did experience a work injury. He provided an impairment rating for the back. Dr. Wunder did not address the absence of objective evidence of a fall from the top of a roof in the records, and mischaracterized or misunderstood Claimant's MRI result.

10. To the extent Dr. Wunder's opinion differs from that of Dr. Raschbacher, Dr. Raschbacher is found more credible.

11. David Cruz was Claimant's Employer. David Cruz was a subcontractor of Barlo, Inc./Interstate. Mr. Cruz signed various documents including a contract with Barlo, Inc./Interstate on November 1, 2013. This Master Subcontract Agreement includes a clause that states that Mr. Cruz shall maintain workers compensation insurance during the term of the agreement. A certificate of insurance was provided to Barlo, Inc./Interstate on November 1, 2013, declaring there was a workers' compensation policy for Mr. Cruz in effect at that time through Respondent Texas Mutual. The workers' compensation policy had an effective period of June 5, 2013 through June 5, 2014, and therefore covered the alleged date of injury in this matter. There is no dispute that Mr. Cruz purchased a workers' compensation policy. The Certificate of Insurance states, "Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions." It is undisputed that Barlo, Inc./Interstate was provided this documentation showing ongoing insurance coverage at the time of the claimed fall, which post-dates any documentation to the contrary.

12. Operations manager for Employer, Danielle Riopelle, credibly testified at hearing. She testified that the company obtained the Certificate of Insurance as a matter of course when hiring Mr. Cruz as a sub-contractor in November 2013. She testified that her company obtains these certificates when they hire sub-contractors, verifies with the insurance company that insurance is in place and that it is valid and up to date, and then

submits this to Pinnacol. She testified this was done in this case. She testified that she and the company relied upon this Certificate of Insurance, and that such certificates of insurance are required of all sub-contractors. She testified that if there was not a workers' compensation policy active during the time period of their contract with Mr. Cruz, Barlo, Inc./Interstate would not continue their relationship with him. She testified that Mr. Cruz would not have been allowed to move forward with his work for Barlo, Inc./Interstate if there was no confirmation that he had valid and up to date workers' compensation insurance in place. She testified that Barlo, Inc./Interstate relied up the promised notice of any cancellation in proceeding to use Mr. Cruz as a sub-contractor, and continuing to use him for work during their contracted period. During the time that Mr. Cruz was working for Barlo, Inc./Interstate she received no notice from anyone that there was cancellation of Respondent Mr. Cruz's policy with Respondent Texas Mutual. She testified that she has never received a notice that the policy was cancelled after the certificate of insurance was issued on November 1, 2013. Mr. Cruz never indicated to Barlo, Inc./Interstate that his policy had been cancelled when he was asked about this claim, and he provided another certificate of insurance three or four months after this claim, showing that he had insurance. She testified that Barlo, Inc./Interstate did not learn of the claim against them as a statutory employer until March of 2014. She learned of the claim that there was no insurance asserted by Claimant at that time. She testified that it was and continues to be her belief that there was workers' compensation insurance for subcontractor David Cruz on the date of injury. At the time of the claim against Barlo, Inc./Interstate, a first report was completed by her and Ms. Riopelle investigated the claim. She learned that no fall was reported at the time of the claimed fall. She testified that Respondent Cruz was asked about the claim and told Barlo, Inc./Interstate that there was never any fall on any of his jobs while working for Barlo, Inc./Interstate.

13. Steve Angelo, senior project manager for Barlo, Inc./Interstate, offered credible testimony that, by virtue of his constant presence and communication with those on site, and the number of people around at the time of the claimed fall, he was certain he would know of Claimant's fall, if it occurred. Mr. Angelo speaks fluent Spanish. Mr. Angelo credibly testified that such a fall could not be entirely unwitnessed by the many present and it was not possible that no action to provide assistance to Claimant or report the fall was taken by anyone in the vicinity of the fall.

14. Claimant testified that he had a wage dispute with Mr. Cruz, starting on January 21, 2014. Claimant testified that after he discontinued work with Mr. Cruz, he sought medical treatment from a chiropractic for 16 visits. He testified that he told the chiropractor that he was going to get an attorney because Claimant expected the chiropractic treatment to be free and they subsequently charged him.

15. Claimant is found not credible because his presentation at Dr. Raschbacher's examination showed no clear objective basis for the findings on physical examination and did not serve as an explanation for the degree of subjective symptomology.

16. Respondents Barlo, Inc./Interstate learned of Claimant's claim for compensation after Claimant's attorney filed a first report of injury on March 27, 2014. Barlo, Inc./Interstate is insured by Respondent Pinnacol Assurance. A notice of contest was filed by Barlo, Inc./Interstate and Pinnacol Assurance on April 21, 2014, noting, "Injured worker is not an employee of this policyholder." All treatment in dispute aside from the October 13, 2014, Penrose Urgent Care visit was undertaken by Claimant prior to his report to Barlo, Inc./Interstate.

17. Claimant alleges that there was a cancellation of Mr. Cruz's workers' compensation policy and that Barlo, Inc/Interstate and its insurer Pinnacol Assurance are therefore responsible as his statutory employer. It is found that the persuasive evidence shows there was a policy in force for Claimant's employer, David Cruz, as of November 1, 2013, and there is no evidence of cancellation of that policy after that date.

18. Claimant failed to sustain his burden of proof to establish by a preponderance of the evidence that he sustained a compensable workers' compensation injury in this matter. He has not shown that the need for medical treatment or disability resulted from a fall off a roof on January 21, 2014. Dr. Raschbacher credibly testified that there is no objective medical evidence of injury from a fall as described by Claimant. There is no documentation of any outward physical evidence of trauma that one would expect to see after the described fall. Claimant admitted that he had a financial dispute with Cruz. Claimant's assertion that he fell from the roof of a house on January 21, 2014, and sustained a compensable work injury is therefore found not found credible.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,* 104 P3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions, and has rejected

evidence contrary to the findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, 12 P.3d. at 846.

5. The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

6. Claimant alleges that there was a cancellation of Mr. Cruz's workers' compensation policy and that Respondent Barlo, Inc/Interstate and its insurer Pinnacol Assurance are therefore responsible as his statutory employer. It is found that the persuasive evidence shows there was a policy in force for Claimant's employer, David Cruz, as of November 1, 2013, and there is no evidence of cancellation of that policy after that date.

7. Claimant has not proven by a preponderance of the evidence that he sustained a compensable workers' compensation injury in this matter. He has not shown that the need for medical treatment or disability resulted from a fall off the roof on January 21, 2014. Dr. Raschbacher credibly testified that there is no objective medical evidence of injury from a fall as described by claimant. There is no documentation of any outward physical evidence of trauma that one would expect to see after the described fall.

8. Claimant's assertion that contrary evidence in the record, as provided by Claimant's own testimony and Dr. Wunder's report, should be relied upon. However, Claimant's testimony and Dr. Wunder's report did not overshadow the fact that there is

an absence of objective evidence and Dr. Wunder's opinions mischaracterize or misunderstood Claimant's MRI result. Other than his own inconsistent testimony, Claimant has not provided evidence that he fell from the roof. Claimant admitted that he had a financial dispute with Mr. Cruz and his chosen chiropractor. Claimant's assertion that he fell from the highest point of the roof on January 21, 2014 and sustained a compensable work injury is therefore found not found credible.

9. Claimant's claim for workers' compensation benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim is denied and dismissed.

2. Respondents Barlo, Inc./Interstate and Pinnacol Assurance are dismissed as parties to this claim.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 30, 2015

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Court
«Venue_Filing_Address»
«Venue_Filing_CT_ST_ZIP»

#JVTS1Z340D11VYv 2

ISSUES

- Whether Respondents have overcome the DIME Dr. Christopher Ryan's 19% whole person rating by clear and convincing evidence.
- Whether Claimant has permanent impairment under the AMA *Guides*.
- What, if any, is Claimant's medical impairment rating under the AMA *Guides*?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked as a firefighter for the Red, White & Blue Fire Protection District.

2. On March 25, 2014, Claimant was performing CPR on a woman who was being transported on a litter/backboard pulled by a snowmobile. The litter hit a rock and Claimant was ejected off the litter and landed on a snow packed trail. He was not sure how he landed but reported neck pain with increasing stiffness down his spine. Claimant reported sustaining a brief loss of consciousness and came to when the snowmobile driver roused him. Claimant then returned to the litter and resumed compressions on the patient for the remaining quarter mile to the parking lot. Claimant reported to his captain that his neck hurt.

3. That same day, Claimant presented for medical treatment at CCOM in Summit Frisco. While medical records from the visit do not indicate the name of the treating provider, the initial Physician's Report of Injury was submitted by Dr. Rosanne D. Shaw. Claimant reported landing face-up, and that he hit his head but did not lose consciousness. Claimant reported feeling immediate pain in his neck. Soon after, his thoracic and lower back began to spasm and hurt. Claimant specifically denied visual changes, dizziness, tinnitus and headache. He had a few moments of balance disturbance at the car but this only lasted a few minutes and he denied any symptoms since. Claimant did not initially report any traumatic brain injury symptoms.

4. On examination, Claimant's head was atraumatic with no abrasions, swelling or tenderness. However, the Physician's Initial Report of Injury included the diagnosis of closed head injury, nonspecific.

5. On March 26, 2014, at his initial physical therapy session, Clamant reported onset of neck pain after hitting his head on the snow. Amanda Gotschall, the licensed

physical therapist noted that Claimant's mental status/cognitive function did not appear impaired.

6. Subsequently, on March 31, 2014, Claimant reported trouble sleeping, headache, numbness, tingling, weakness, and joint and muscle pain. Claimant also reported experiencing "slowing mentation and difficulty with memory since that time." Dr. Fox added post-concussion syndrome and cervical strain as new diagnoses.

7. On April 18, 21, 24 and 28, 2014, Donald Aspergren, D.C., M.S., assessed cervical and upper back strain. Claimant appeared alert, oriented, and in no acute distress.

8. On May 16, 2014, Dr. Carbaugh evaluated Claimant. Claimant reported some continuing cognitive issues such as problems with word finding and losing his train of thought. Claimant noted, though, that his symptoms had improved over time. Dr. Carbaugh assessed that if Claimant's symptoms continued to resolve as expected, neuropsychological assessment and intervention would likely not be needed. Dr. Carbaugh also noted that muscle tension was contributing to Claimant's neck, head, and upper back symptoms.

9. On May 21, 2014, Dr. Fox limited his diagnosis to neck sprain. The post concussive diagnosis no longer appeared by that date.

10. On June 17, 2014, Claimant reported to Dr. Fox that he was still having intermittent headaches. However, "[Claimant] states that his mental status has cleared."

11. On July 23, 2014, Dr. Eric Hammerberg performed a neurological evaluation. He noted neuro symptoms had included neck pain, occipital headaches, impaired cognition, and intermittent vertigo. Dr. Hammerberg's impression was that Claimant was experiencing posttraumatic vertigo. He recommended an MRI study of the brain, brainstem, and internal auditory canals as well as a CT angiogram of the head and neck and, if normal, an ENT evaluation for vestibular testing.

12. On August 1, 2014, the MRI study of the brain, brainstem, and internal auditory canals was read as normal. A CT angiogram of the head and neck were performed and also considered normal.

13. On August 7, 2014, Claimant was evaluated by Dr. Alan Lipkin, ENT. His report noted that "initially dizzy spells occurred randomly four times a week. Episodes lasted a few seconds. Currently the patient only becomes dizzy upon lying down in a supine position."

14. On August 11, 2014, Dr. J. Tashof Bernton performed an independent medical examination. He reviewed medical records and examined Claimant. Claimant reported to Dr. Bernton that he lost consciousness during the incident and experienced immediate dizziness. These reports are at odds with Claimant's first reports of injury. Dr. Bernton noted that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities.

One certainly would not anticipate cognitive difficulties with the history of either no or brief loss of consciousness. At this point in time, cognitive complaints are much more likely a result of some anxiety and depression." Dr. Bernton recommended a vestibular workup which he expected to be normal. He also commented that on a physical basis he expected a full recovery and that Claimant had received extensive care to date.

15. On September 17, 2014, Dr. Lipkin reported after testing that Claimant's vestibular workup was normal and a major vestibular system injury was unlikely. With respect to higher integrative functions, Claimant was noted to have normal orientation, memory, attention span, and concentration, language and fund of knowledge. Dr. Lipkin concluded: "No other particular medical treatment is warranted."

16. Also, on September 17, 2014, Ron Carbaugh, Psy.D. noted Claimant had met with Dr. Kennealy following Claimant's neuropsychological evaluation and Dr. Kennealy did not recommend cognitive treatment. Dr. Kennealy reported that Claimant's cognitive symptomology would resolve spontaneously in the next weeks to months.

17. On November 24, 2014, Dr. Fox discharged Claimant at maximum medical improvement (MMI) without permanent impairment and without restriction. Dr. Fox recommended medical maintenance in the form of 4 – 6 more chiropractic visits if needed, and requested continuing treatment with Dr. Carbaugh as needed. Dr. Fox noted that Claimant presented in no acute distress, had mild diffuse tenderness in his neck with full range of motion and minimal discomfort. Also, Claimant reported he worked full duty with reasonable tolerance. His only concerns were mild neck stiffness and some discomfort, but otherwise he did quite well.

18. On November 26, 2014, Respondents filed a Final Admission based on Dr. Fox's report. Claimant timely objected to the Final Admission and started the Division IME process.

19. Dr. Christopher Ryan was selected to perform the Division IME and examined Claimant on March 17, 2015. Dr. Ryan failed to timely issue a report and the DIME Unit sent "Late Notice" letters to Dr. Ryan on April 28, 2015, May 12, 2015, and a "Notice of Rule Violation" letter on June 18, 2015.

20. Dr. Ryan's prepared a report post-dated March 17, 2015. Dr. Ryan listed the "issues to be endorsed include recommendations for testing needed, maintenance medical treatment, and 'evaluate and physically examine for pain.'" Dr. Ryan's report contained a number of factual inaccuracies. For example, he notes that Claimant first sought treatment one week post injury, when Claimant actually sought medical treatment the day of his injury. Dr. Ryan did not review Dr. Fox's maximum medical improvement report. Dr. Ryan limited his evaluation comments to:

> Mr. Livengood today reports a difficult transition back to work. He felt that he was 'freezing' during the summer of 2014, even though the temperature was quite warm. He

> continues to have right-sided more than left-sided neck pain, in the cervico-occipital region. This extends into the upper thoracic area, and into the right more than left upper scapular region. He at this point is overwhelmed by multiple inputs, as well as intense stimulation.

Dr. Ryan performed a physical examination that primarily focused on limited range of motion in Claimant's cervical spine. Dr. Ryan concluded Claimant had reached MMI as of March 17, 2015. He diagnosed cervical facet dysfunction with persistent loss of range of motion and probable mild traumatic brain injury resulting in mild memory difficulties as well as difficulty with multitasking and hypersensitization. Dr. Ryan rated Claimant with a 19% whole person impairment comprised of 4% cervical per Table 53, 6% cervical range of motion, and 10% brain impairment per Table 1 page 109. The mental impairment was based on "some difficulties with complex integrated cerebral function. He also has emotional disturbance, as well documented in the medical record. He has episodic neurologic disorders in the form of headaches. He also has sleep and arousal disorders, which I would characterize as a hyperarousal, with his sympathetic nervous system dysfunction."

21. Employer's Performance Record and Appraisal for the period June 1, 2014 – May 31, 2015 reflected Clamant met all expectations and that his performance was trending upward.

22. Dr. Nicholas Olsen performed a Respondents' independent medical examination and prepared a report dated August 12, 2015. Dr. Olsen reviewed medical records including Dr. Fox's MMI report. Dr. Olsen took a detailed statement from Claimant and allowed Claimant numerous opportunities to describe his symptoms and whether he suffered from any cognitive problems following the accident. Claimant detailed then-current neck symptoms, a "whole back effect" approximately once a week, headaches twice a week, and dizziness one to two times a week for periods of ten seconds. He reported some dizziness or vertigo occasionally if he turns over to his left side while sleeping. Claimant had not experienced vertigo or dizziness at work.

23. Claimant did not mention any cognitive difficulties to Dr. Olsen. Claimant admitted he had not made mistakes at work, been written up or cited for any errors, or been reprimanded by his supervisors. He felt less motivation at work and stated several times that he would rather fight wildfires for the higher level of excitement.

24. With respect to Claimant's reports of migraines, Claimant denied any associated neurologic and visual disorders including light sensitivity and prodromal characteristics. Dr. Olson opined Claimant's symptoms were more characteristic of cluster headaches, related to the muscular system than migraines which are of neurologic origin. During Claimant's interview, Dr. Olson observed that Claimant demonstrated "full cervical rotation right and left, full lateral bending to both sides, full lateral bending to both sides," and motion was observed to be "full and synchronous without restrictions." Inspection of Claimant's cervicothoracic spine

demonstrated neutral mechanics. Cervical range of motion was measured with dual inclinometers with deficits noted in cervical flexion, right lateral bending, and rotation. However, these limitations were not observed during Claimant's forty-five to fifty minute interview. Dr. Olson noted that Claimant had a normal cervical MRI, and that he would expect normal range of motion. He noted the deficits were inconsistent with Claimant's activities prior to being placed at MMI. Dr. Olson opined that the deficits noted on Claimant's physical examination would not be considered objective. Claimant's neurological examination was normal and intact. Claimant's statements and presentation were consistent with Dr. Fox's reports and with the performance evaluations that showed that Claimant's performance in all areas had improved since the date of the injury.

25. Dr. Olsen also pointed out that no physician prior to Dr. Ryan diagnosed a traumatic brain injury including the two neuropsychologists who had evaluated Claimant. In addition, Claimant initially reported no loss of consciousness or associated symptoms suggestive of a brain injury, and imaging studies of Claimant's brain were all normal. As a result, Dr. Olsen opined that Dr. Ryan was clearly wrong when he rated permanent impairment for a traumatic brain injury.

26. Claimant testified at hearing that he was ejected off the litter and landed on a snow packed trail. He was not sure how he landed but reported neck pain with increasing stiffness down his spine. Claimant returned to the litter and resumed compressions. The incident occurred halfway down the trail and Claimant continued a quarter mile, approximately another 5 to 10 minutes. Claimant reported to his captain that his neck hurt. Claimant, an emergency medical provider himself, understands the importance of accurate reporting of injuries and symptoms. Claimant prepared a written notice of injury a couple of hours after the incident occurred and in that notice reported neck pain with increasing stiffness down his spine.

27. Claimant admitted that Dr. Kennealy performed a neuropsychological evaluation and did not recommend any cognitive treatment.

28. Claimant returned to regular work November 4, 2014. His job duties include fighting fires, EMS response, and transporting patients. The majority of calls are EMS responses that require quick thinking and multitasking. Since Claimant's return to work, his supervisors have not written him up or cited him for any errors nor reprimanded him for any errors or problems. Claimant agreed that his performance evaluations accurately reflected an upward trend. He explained the improvement was due to working in the gym more and trying to get stronger to return to work. Despite his performance evaluation, Claimant testified that occasionally he had a hard time remembering questions when he interviewed patients. Also, on occasion, he did not do his job as well because of headaches that were primarily neck related. The headaches made it difficult to concentrate and evaluate patients due to levels of pain and stress in his neck and down his spine and shoulder into the base of his skull. Also, Claimant testified that he was dizzy for a few moments sometimes when he lay down. After MMI in November 2014, Claimant did not treat for this work injury

for several months. Claimant admitted he would rather fight wildfires for the higher level of excitement.

29. Dr. Ronald Swarsen testified at hearing. Dr. Swarsen reviewed some medical records but did not examine Claimant and did not prepare a report. Dr. Swarsen testified that certain symptoms are expected immediately following a mild traumatic brain injury. Also, symptoms from a mild traumatic brain injury normally resolve within 3 – 6 months. Dr. Swarsen reviewed Dr. Fox's June 17, 2014, report in which Dr. Fox noted that Claimant reported that his mental status had cleared. Dr. Swarsen admitted that, if correct, Claimant's symptoms would have resolved within the expected 3 – 6 month time period. Dr. Swarsen testified that once symptoms cleared, they should not return. Dr. Swarsen agreed that a rating for mild traumatic brain injury should be based on a claimant's presentation at the time of MMI and not on medical records prior to MMI that may reflect resolved symptoms. Initially, Dr. Swarsen testified that Dr. Ryan addressed the issues of MMI and permanent impairment presented to him. During cross examination, however, Dr. Swarsen reviewed the *AMA Guides 3rd ed. rev*. and conceded that, even though Dr. Ryan based his 10% brain impairment rating in part on complex integrated cerebral function, Dr. Ryan did not identify in his report any element or impairment to support a rating under that category. Dr. Swarsen admitted that Dr. Ryan's reliance on the complex integrated cerebral function section to support a rating was incorrect. Also, Dr. Swarsen testified that the *AMA Guides* require doctors to prepare reports that provide sufficient information to allow another doctor to understand the basis of the first doctor's rating and, in this case, Dr. Ryan's report was insufficient. Dr. Ryan failed to include a detailed history section and Dr. Ryan failed to sufficiently explain the basis or support for his brain impairment rating.

30. Dr. Olsen testified at hearing that a rating of permanent impairment occurs at the time of MMI. In this case, the medical records reflected that Claimant sporadically reported some cognitive difficulties. When Dr. Olsen interviewed Claimant, post MMI, however, Claimant failed to report any cognitive issues during the evaluation. Claimant did not report any cognitive symptoms other than a few moments of minor dizziness when he rolled over during sleep. Dr. Olsen considered that amount of dizziness – ten seconds once or twice a week – insufficient to support a rating for mild traumatic brain injury. Claimant reported no work problems to Dr. Olsen. Also, Dr. Olsen reviewed Claimant's employment records noting that Claimant performed his job well and without problems.

31. Claimant discussed motivation and anxiety issues that appeared more to do with career changes to accommodate Claimant's family status rather than with cognitive issues. Dr. Olsen agreed with Dr. Bernton that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities… At this point in time, cognitive complaints are much more likely a result of some anxiety and depression." Dr. Olsen testified that Claimant's reported cognitive issues did not follow the expected pattern: Claimant failed to mention traumatic brain injury symptoms in his initial report of injury and in other initial

medical reports.

32. Dr. Olsen testified that Dr. Ryan erred when he rated permanent impairment for a mild traumatic brain injury.

    - Dr. Ryan's discussion of cognitive issues of mild memory difficulties as well as difficulty with multitasking and hypersensitization was very brief and inconsistent with other medical records. Specifically, Dr. Ryan reported that Claimant is forgetful. However, rather than accept a patient's report of forgetfulness, a physician should observe the patient being forgetful. Claimant was not forgetful during the DIME or during his hearing testimony.

    - Claimant performed well at work including multitasking. Traumatic brain injury symptoms make it difficult to perform work duties. Claimant's employment records bear no indication of any work problems.

    - Dr. Ryan simply stated Claimant presented with some difficulties but did not explain what the symptoms were or provide support for why the symptoms warranted a rating.

    - Dr. Ryan's conclusions are contrary to those of the treating physicians.

        - Dr. Lipkin concluded that testing was normal and a major vestibular system injury unlikely.

        - Dr. Kenneally, a neuropsychologist, did not recommend treatment for any cognitive complaints.

        - Dr. Hammerberg, a neurologist, did not diagnose a mild traumatic brain injury.

        - Dr. Carbaugh did not make a diagnosis of mild traumatic brain injury.

        - The MRI of the brain was normal as was the CT angiogram of the head and neck.

33. Claimant's symptoms do not support a diagnosis of migraines.

    - Claimant denied light sensitivity or any neurologic symptoms associated with migraines.

    - Claimant's headaches arose from muscle tension in his neck.

34. Dr. Ryan did not properly use the *AMA Guides* and the categories that allow a rating nor did he explain in his report the basis for the rating. There was no persuasive evidence to support a diagnosis or rating of complex integrated cerebral function. The neuropsychologist did not identify a need for cognitive treatment and no symptoms were present at the time of MMI.

35. There was no persuasive evidence of emotional disturbance. The evidence supported that Claimant was returned to work without problems and there were no medical referrals for treatment.

36. There was no persuasive evidence of neurologic disorders. While episodic neurologic disorders can include headaches, Claimant's headaches were not neurologic but rather were muscular. There was no persuasive evidence of sleep and arousal problems. While Claimant had been diagnosed with dizziness or vertigo, the episodes lasted only moments and all objective testing was normal or negative. Dr. Olsen concluded that Claimant's 20 seconds of dizziness was more likely due to anxiety and stress than due to his injury.

37. Dr. Olsen concluded that Dr. Ryan's report contained more than simply a difference of opinion. Dr Ryan erred by giving Claimant a 10% brain impairment per Table 1 page 109.

38. The ALJ finds the opinions and testimony of Dr. Olsen to be credible and persuasive.

39. Respondents have met their burden of proving by clear and convincing evidence that Dr. Ryan erred by giving Claimant a 10% brain impairment per Table 1 page 109.

40. Dr. Olsen acknowledged that Claimant suffered a cervical strain with loss of range of motion as a result of this injury which supports a permanent impairment rating for the cervical spine. That rating is not challenged. As a result, the cervical impairment rating of 4% cervical per Table 53 and 6% cervical range of motion stands.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Respondents have the burden of overcoming the Division sponsored independent medical examiner's determination of permanent impairment by clear and convincing evidence. *See* § 8-42-107(8), C.R.S. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's findings must present evidence showing it highly probable that the DIME physician is incorrect. *Metro Moving & Storage Company v. Gussert,* 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier of fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Company v. Gussert*, supra.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

As found, Respondents have met their burden in this case and have established by clear and convincing evidence that the DIME physician, Dr. Ryan, erred by assigning Claimant a permanent impairment for a traumatic brain injury.

The opinions and testimony of Dr. Olsen are found credible and persuasive. Dr. Olsen's overall opinion was detailed and supported by the medical records, employment records, the opinions of Dr. Bernton, and, to a large extent, the opinions of Claimant's expert, Dr. Swarsen.

Claimant's medical history did not support a traumatic brain injury rating. Dr. Swarsen testified that immediate symptoms are expected following a mild traumatic brain injury. Claimant, an emergency medical provider, understood the importance of accurately reporting injuries and symptoms. In this case, Claimant did not initially report any traumatic brain injury symptoms. Claimant returned to the sled and resumed compressions on the patient. Claimant reported to his captain that his neck hurt. Claimant prepared a written notice of injury a couple of hours after the incident occurred and reported neck pain with increasing stiffness down his spine. Claimant presented for medical treatment at CCOM and reported pain in his neck and his thoracic and lower back. Claimant specifically denied neurologic or cognitive symptoms including visual changes, dizziness, tinnitus or headache other than a few minutes of balance issue at the car that resolved. Claimant reported to the physical therapist his neck hurt. The mental status/cognitive function line indicated Claimant did not appear impaired.

Dr. Olsen and Dr. Swarsen agreed that symptoms from a mild traumatic brain injury normally resolve within 3 – 6 months. Dr. Swarsen reviewed Dr. Fox's June 17, 2014, report in which Dr. Fox noted that Claimant reported that his mental status had cleared. Dr. Swarsen admitted that, if correct, Claimant's symptoms would have resolved within the expected 3 – 6 month time period. Dr. Swarsen testified that once symptoms cleared, they should not return.

On November 24, 2014, Dr. Fox discharged Claimant at MMI without permanent impairment and without restriction. Dr. Fox noted that Claimant presented in no acute distress, had mild diffuse tenderness in his neck with full range of motion and minimal discomfort. Also, Claimant reported he worked full duty with reasonable tolerance. His only concerns were mild neck stiffness and some discomfort but otherwise he did quite well. Dr. Fox did not reference any traumatic brain injury symptoms at the time of maximum medical improvement.

Claimant's presentation in court was consistent with Dr. Fox's MMI report and with the performance evaluations that showed that Claimant was discharged without impairment and returned to work without problem.

Rating permanent impairment occurs at the time of MMI. Dr. Olsen and Dr. Swarsen agreed that rating permanent impairment of a mild traumatic brain injury should occur at the time of MMI and be based on Claimant's presentation at the time of MMI. The rating should not be based on past medical findings or that certain treatment occurred prior to MMI. In this case, the medical records reflect that Claimant sporadically reported some cognitive difficulties and received treatment. Records also reflect that Claimant reported that those symptoms cleared on June 17, 2015. In any event, on November 24, 2014, Dr. Fox discharged Claimant at MMI without permanent impairment and without restriction. Dr. Fox noted that Claimant presented in no acute distress and his only concerns were mild neck stiffness and some discomfort. Dr. Fox did not reference any traumatic brain injury symptoms. Dr. Ryan did not review the MMI report.

When Dr. Olsen interviewed Claimant, after MMI, Dr. Olsen gave Claimant the opportunity to report cognitive issues. Claimant did not report any problems other than a few moments of minor dizziness when he rolled over during sleep. Dr. Olsen did not consider a few moments of dizziness to be relevant or able to support a rating for mild traumatic brain injury especially because Claimant reported no problems at work.

Claimant's work history did not support a traumatic brain injury rating. According to Dr. Olsen, symptoms of a traumatic brain injury make it difficult to perform work duties. Claimant's job duties include fighting fires, EMS response, and transporting patients. The majority of his calls were EMS responses which require quick thinking and multitasking. Claimant returned to work and performed well. He was not written up, cited, or reprimanded for any errors or mistakes. Claimant agreed with his performance evaluation and that it accurately reflected satisfactory performance and an upward trend. He attributed his improvement to working out more in the gym and getting stronger. Despite the high and improving performance evaluation, Claimant testified that occasionally he had a hard time remembering sequential questions when he interviewed patients. Also, on occasion, he did not do his job as well because of headaches that were primarily related to muscular neck pain. The headaches made it difficult to concentrate and evaluate patients due to levels of pain and stress in his neck and down his spine and shoulder into the base of his skull. Also, Claimant testified that he was dizzy for a few moments in bed at night.

Dr. Olsen credibly related Claimant's symptoms to motivation and anxiety issues that appeared more to do with career change due to family status rather than with cognitive issues. Dr. Olsen agreed with Dr. Bernton that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities … At this point in time, cognitive complaints are much more likely a result of some anxiety and depression."

Dr. Ryan's report did not comply with the *AMA Guides*. Dr. Ryan failed to timely prepare his report. When he finally submitted his report, Dr. Ryan summarized medical records but provided very limited information concerning Claimant's current traumatic brain injury symptoms or his reasoning to support a traumatic brain injury rating. Dr. Swarsen testified that the *AMA Guides* require doctors to prepare reports that provide

sufficient information to allow another doctor to understand the basis of the first doctor's rating and, in this case, Dr. Ryan's report was insufficient. Dr. Ryan failed to include a detailed history section and Dr. Ryan failed to sufficiently explain the basis or support for his rating.

Dr. Ryan's traumatic brain injury impairment is not supported by the *AMA Guides*. Dr. Ryan's report reflects that he performed a physical examination that focused on Claimant's neck. Dr. Ryan did not perform a neurologic exam. Nevertheless, Dr. Ryan diagnosed probable mild traumatic brain injury resulting in mild memory difficulties as well as difficulty with multitasking and hypersensitization in addition to cervical facet dysfunction with persistent loss of range of motion. Dr. Ryan rated Claimant with 19% whole person impairment; 4% cervical per Table 53, 6% cervical range of motion, and 10% brain impairment per Table 1 page 109. The mental impairment was based on "some difficulties with complex integrated cerebral function. He also has emotional disturbance, as well documented in the medical record. He has episodic neurologic disorders in the form of headaches. He also has sleep and arousal disorders, which I would characterize as a hyperarousal, with his sympathetic nervous system dysfunction."

Dr. Ryan's conclusions are contrary to the great weight of evidence which supports a contrary conclusion. Dr. Lipkin concluded that testing was normal and a major vestibular system injury unlikely. Dr. Kenneally, a neuropsychologist, did not recommend treatment for any cognitive complaints. Dr. Hammerberg, a neurologist, did not diagnose a mild traumatic brain injury. Dr. Carbaugh did not make a diagnosis of mild traumatic brain injury. The MRI of the brain was normal as was the CT angiogram of the head and neck.

According to the *AMA Guides*, evidence of complex integrated cerebral function includes defects in orientation; ability to abstract or understand concepts; memory; judgment; ability to initiate decisions and perform planned action; and acceptable social behavior. Dr. Swarsen reviewed the *AMA Guides 3rd ed. rev*. and, even though Dr. Ryan based his 10% brain impairment rating in part on complex integrated cerebral function, Dr. Swarsen did not identify in Dr. Ryan's report any element or impairment to support a rating under that category. Dr. Swarsen admitted that Dr. Ryan's reliance on the complex integrated cerebral function section to support a rating was incorrect.

Also, Dr. Olsen credibly testified that Dr. Ryan failed to note any evidence of complex integrated cerebral function to support an impairment rating. The neuropsychologist did not identify a need for cognitive treatment. Symptoms were not present at the time of maximum medical improvement. Claimant alleged slight memory issues or processing issues at work. But a physician should not simply accept a report of forgetfulness but rather should observe the patient being forgetful. Claimant was not forgetful during Dr. Olsen's examination or when he testified at hearing and his employment reviews do not support any memory problems. Also, Claimant's report to Dr. Ryan of symptoms of significant cognitive problems that affected his ability to perform his job was not consistent with Employer's performance records that reflect

Clamant returned to regular work, met all expectations, and that his performance trended upward.

According to the *AMA Guides*, evidence of emotional disturbances may range from irritability to outbursts of severe rage and aggression to an absence of normal emotional response. Abnormalities include inappropriate euphoria, depression, fluctuation of emotional state, impairment of normal emotional interactions with others, involuntary laughing and crying, etc. Dr. Olsen credibly testified there was no evidence of emotional disturbance to support an impairment rating. Claimant returned to work without problem. Dr. Olsen credibly related Claimant's emotional symptoms to motivation and anxiety issues that appeared more to do with career change due to family status rather than anything to do with cognitive issues. Dr. Olsen agreed with Dr. Bernton that "The patient has persistent complaints but benign examination and workup has been negative for neurologic abnormalities… At this point in time, cognitive complaints are much more likely a result of some anxiety and depression."

According to the *AMA Guides*, evidence of episodic neurological disorders includes syncope, epilepsy, and the convulsive disorders. Dr. Olsen credibly testified there was no evidence of neurologic disorders. Episodic neurologic disorders may include headaches; however, Claimant testified that his headaches were primarily in his neck and moved down his spine and shoulder into the base of his skull. Claimant denied light sensitivity or any neurologic symptoms associated with migraines. Dr. Olsen credibly testified that Claimant's headaches were cluster headaches with a muscular base and not migraines or neurologically based.

According to the *AMA Guides*, evidence of sleep and arousal disorders include problems initiating and maintaining sleep, or insomnia, excessive somnolence, disorders of the sleep-wake schedule, and dysfunctions associated with sleep that lead to reduced daytime attention, concentration, and other cognitive capacities and/or mental and behavioral factors, and/or cardiovascular problems. When assessing permanent impairment due to sleep and arousal disorder, the physician must complete a thorough diagnostic evaluation. Dr. Olsen credibly testified there was no evidence of sleep and arousal problems. Claimant reported some dizziness or vertigo occasionally if he turns over to his left side while sleeping. Claimant did not experience vertigo or dizziness at work. The doctors included a diagnosis of dizziness or vertigo based on Claimant's reports, but all objective testing was normal or negative. Dr. Olsen concluded that Claimant's 10 to 20 seconds of dizziness when he turned over while sleeping was not sufficient to rate an impairment and was more likely due to anxiety and stress resulting from his change in occupation than any sleep or arousal disorder. Claimant felt less motivation at work and would rather fight wildfires for the higher level of excitement.

The ALJ finds and concludes that Dr. Olsen's opinions that Dr. Ryan erred by finding Claimant suffered a traumatic brain injury and impairment are credible and persuasive. Respondents have proven by clear and convincing evidence that Dr. Ryan did not properly use the *AMA Guides.*

Dr. Olsen acknowledged that Claimant suffered a cervical strain with loss of range of motion as a result of this injury which supports a permanent impairment rating for the cervical spine. That rating is not challenged. As a result, the cervical impairment rating of 4% cervical per Table 53 and 6% cervical range of motion stands.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have overcome Dr. Ryan's opinion by clear and convincing evidence, thus Claimant is not entitled to a traumatic brain injury permanent impairment rating.

2. Claimant is entitled to a cervical impairment award of 10%.

3. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

5. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 10, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

- Whether respondents have overcome the Division-sponsored Independent Medical Examination ("DIME") physician's finding that claimant's neck condition is causally related to claimant's admitted March 6, 2014 workers' compensation injury by clear and convincing evidence?

- The parties stipulated at the commencement of the hearing that if respondents are successful in overcoming the DIME physician's finding regarding the causal connection of claimant's neck condition to his work injury, claimant would be at maximum medical improvement ("MMI") as of March 17, 2014 with a 0% impairment for the admitted injuries to claimant's lumbar spine and right wrist.

FINDINGS OF FACT

1. Claimant was employed by employer as a recreational basketball referee. Claimant testified that in addition to his work as a basketball referee, he also works as a baseball and softball umpire. Claimant testified that while working as a basketball referee for a youth game on March 6, 2014, he tossed the ball to begin the basketball game, back up and tripped over a child that was on one of the teams playing. Claimant testified he fell to the ground on his back and fell on his right wrist.

2. Claimant sought treatment following his injury with Dr. Lorah on March 7, 2014. Claimant reported he tripped over a child while refereeing a basketball game and fell. Claimant was diagnosed with a right wrist sprain and a low back sprain. Dr. Lorah recommended claimant use a splint for his wrist and treat with ice and rest. Dr. Lorah prescribed medications for claimant' back including naprosyn, flexeril, and vicodin.

3. Claimant testified he then went to California for a previously planned trip to visit his son, leaving the evening on March 7, 2014.

4. After claimant returned from his trip, he was evaluated by Dr. Faught on March 17, 2014. Dr. Faught noted claimant's right wrist sprain and low back strain had resolved and discharged claimant from further care.

5. Claimant returned to Dr. Faught on April 1, 2014 with complaints of pain between his shoulders and right triceps pain. Dr. Faught noted that claimant noticed this pain 5 days ago upon wakening and that his pain was worse with tilting his head back. Claimant also reported left triceps pain while shaving. Dr. Faught provided claimant with work restrictions that included no heavy lifting above his shoulders and continued claimant's prescriptions, including the naprosyn, flexerial and hydrocodone.

6. Claimant testified at hearing that when he went to Dr. Faught on March 17, 2014 he was doing great and did not believe he had a neck problem. Claimant testified that he didn't recall specifically if he struck his head on the ground when he fell, but believed that he had. Claimant testified that his medical history of developing pain in his shoulders and left tricep that he reported to Dr. Faught on April 1, 2014 was correct based on his recollection. Claimant testified he felt things were going well with his treatment up until he work up with pain in his shoulders and left arm.

7. Claimant continued to treat with Dr. Faught and was eventually referred for a cervical spine magnetic resonance image ("MRI") on April 15, 2014. The MRI was performed on April 28, 2014 and demonstrated midline protrusion at the C3-C4, C4-C5 and C5-C6 levels with foraminal narrowing on the right at C4-C5 due to bony encroachment.

8. Claimant returned to Dr. Lorah on April 29, 2014 for re-evaluation. Dr. Lorah noted that despite claimant reporting symptoms into his left upper extremities, the MRI did not show significant neural impingement on the left. Dr. Lorah referred claimant to Dr. Hahn for evaluation.

9. Dr. Hahn evaluated claimant initially on May 9, 2014. Dr. Hahn noted that claimant had fallen on March 6, 2014 while refereeing a basketball game and had developed left sided neck pain shortly thereafter. Dr. Hahn noted claimant's symptoms included arm symptoms including pain into claimant's left triceps down in to his arm and including his 4th and 5th digit. Dr. Hahn reviewed the MRI and opined claimant had a C7-T1 disc herniation on the left. Dr. Hahn diagnosed claimant with a C8 radiculopathy secondary to C7 T1 disc herniation. Dr. Hahn recommended an intralaminar epidural steroid injection ("ESI") on the left at the C7-T1 level.

10. Claimant returned to Dr. Lorah on May 14, 2014. Dr. Lorah noted that based on the revised MRI reading, claimant does have an anatomic lesion at the C7-T1 level that would correspond with his symptoms. Dr. Lorah refilled claimant's medications and noted that Dr. Hahn was recommending an injection. Claimant returned to Dr. Lorah on June 4, 2014. Dr. Lorah noted he was again recommending claimant proceed with the ESI and noted claimant had a positive Spurling test on his left. Dr. Lorah refilled claimant's prescription medications

11. The injection was eventually performed on June 10, 2014.

12. Following the ESI, claimant returned to Dr. Lorah on June 27, 2014. Dr. Lorah noted some improvement with regard to his numbness and weakness following the injection. Dr. Lorah recommended claimant consult with Dr. Krauth regarding a neurosurgical consultation.

13. Claimant was evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth noted that claimant reported he fell during a basketball game resulting in some pain in the base of his neck. Dr. Krauth noted that over the ensuing 24-48 hours, his pain localized under his left scapula and was piercing and radiating down the left arm into the fourth

and fifth fingers of the left hand. Dr. Krauth noted claimant reported that over the next several weeks he was almost incapacitated by constant, boring, interscapular pain radiating down into the arm and hand. Dr. Krauth further noted that he had reviewed the MRI scans and opined that they showed without question a small free fragment of disc in the C8 neuroforamen on the left impinging on the C8 nerve root. Dr. Krauth recommended claimant undergo a second ESI and, if claimant's radicular symptoms persisted, claimant could be a candidate for decompression of the nerve root.

14. Claimant underwent a second ESI on July 8, 2014 and returned to Dr. Krauth on July 15, 2014. Claimant reported the ESI did not help him at all and felt the pain could be worse than when he was initially evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth performed a physical examination and recommended claimant undergo a lateral C7-T1 foraminotomy to decompress his C8 nerve root.

15. Respondents referred claimant for an independent medical examination ("IME") with Dr. Raschbacher on October 27, 2014. Dr. Raschbacher reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Raschbacher noted that when claimant was examined on March 17, 2014, 11 days of the injury claim date, claimant had no complaints at the lumbar spine, the right wrist and presumably no symptoms in his neck. Dr. Raschbacher also noted that the initial radiologic interpretation of the MRI was negative for any herniated disc.

16. Dr. Raschbacher took issue with the report of symptoms noted in Dr. Krauth's records that claimant developed symptoms within 24-48 hours of the fall and recommended denying treatment for the cervical spine as it was not related to claimant's fall on March 6, 2014.

17. Respondents obtained a records review IME with Dr. Rauzzino on December 15, 2014. Dr. Rauzzino reviewed the MRI study and agreed that there was a focal disc protrusion between C7 and T1 on the left which could affect the exiting nerve root. Dr. Rauzzino noted claimant's history of reporting no pain in his neck or arm until his examination on April 1, 2014 and opined that the disc herniation shown on the MRI was not related to claimant's work injury on March 6, 2014.

18. Respondents' filed a final admission of liability ("FAL") on December 23, 2014 admitting for a 0% impairment rating and denying further maintenance medical treatment. Respondents attached a copy of Dr. Faught's March 17, 2014 medical report to the FAL. Claimant objected to the FAL and requested a DIME.

19. Dr. Krauth issued a letter on February 17, 2015 to claimant's counsel in connection with this case. Dr. Krauth noted that he saw claimant in church on Sunday March 16, 2014 and noted that in speaking with claimant following the church service, claimant complained of pain in his neck and left arm. Dr. Krauth indicated in his report that as of March 16, 2014 he came to the realization that claimant was suffering from an acute cervical radiculopathy on the left.

20. Claimant underwent a DIME with Dr. Shea on April 14, 2015. Dr. Shea reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Shea noted in his report that when he was seen at Glenwood Medical Associates on March 17, 2014, he did not mention any neck or arm symptoms. Dr. Shea's report further notes claimant developed neck pain, according to the medical records, five days prior to the April 1, 2014 medical appointment.

21. Dr. Shea reviewed the IME reports from Dr. Raschbacher and Dr. Rauzzino that called into question the temporary relationship of claimant's neck symptoms and recommended no further medical treatment to the neck as the symptoms were not related to the March 6, 2014 work injury. Dr. Shea indicated in his report, however, that he considered the cervical injury as part of the original workplace injury for the following reasons: (1) claimant had a very awkward fall on March 6, 2014 when he fell backwards, twisting and landing hard on the right arm; (2) in Dr. Shea's clinical experience, when there is an awkward fall, there can be a delay of symptomatology onset of significant proportions (up to 4-6 weeks after the original accident); (3) Dr. Lorah, who treated claimant immediately after the incident and watched the whole sequence unfold from the day after claimant's falling incident concluded that the neck condition was causally related to claimant's work injury; and (4) Dr. Krauth mentioned seeing claimant on March 16, 2014 and noting that claimant was having difficulty with his left arm on that date.

22. Dr. Shea opined that claimant was not at MMI and recommended further medical treatment to include a return to Dr. Krauth and consideration of a microdiskectomy. Dr. Shea provided claimant with a provisional impairment of 11% whole person and noted that if surgery was not an option, claimant would need maintenance medical treatment including physical therapy and massage.

23. Dr. Rauzzino testified by deposition in this matter consistent with his medical report. Dr. Rauzzino noted that pursuant to the medical records, claimant's symptoms involving his left arm and neck did not develop until approximately March 25, or March 26, 2014. Dr. Rauzzino opined that in his practice, most disc herniations result spontaneously and noted that there does not need to be a traumatic injury for a disc to become herniated. Dr. Rauzzino noted that according to the medical records, claimant did not have symptoms in his left arm and neck as of March 17, 2014 when he was released from care by Dr. Faught. Dr. Rauzzino opined that if claimant's fall had resulted in an acute herniation of his cervical disk, claimant would have presented with symptoms to Dr. Lorah or Dr. Faught in the medical appointments he received after his injury. Dr. Rauzzino opined that claimant's fall on March 6, 2014 did not result in an injury to his cervical spine.

24. The ALJ credits the opinions expressed by Dr. Shea in his DIME report as being reasonable and supported by the medical records entered into evidence. The ALJ finds that the contrary opinions expressed by Dr. Rauzzino and Dr. Raschbacher do not overcome the opinion of Dr. Shea that claimant's cervical spine condition is related to the March 6, 2014 fall at work.

25. The ALJ credits the testimony of claimant at hearing regarding his work injury and the onset of his symptoms to be credible and persuasive and finds that this testimony is consistent with the accident history he provided to Dr. Shea and relied upon by Dr. Shea in formulating his opinions regarding the cause of claimant's cervical spine condition.

26. The ALJ therefore determines that respondents have failed to overcome the finding of Dr. Shea that claimant's cervical condition is related to his March 6, 2014 work injury by clear and convincing evidence.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence that claimant's neck condition is causally related to the admitted March 6, 2014 work injury. As found, Dr. Shea's opinion that

claimant sustained a compensable injury to his neck and that claimant is not at MMI for his work injury is found to be credible and persuasive.

6. The ALJ considers the contrary opinions expressed by Dr. Rauzzino in his report and testimony, but finds the opinions expressed by Dr. Shea to be more credible and persuasive and concludes that respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence.

ORDER

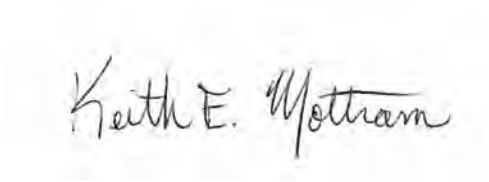
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury, including the treatment to claimant's cervical spine.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 8, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Respondents prove by clear and convincing evidence that the Division-sponsored Independent Medical Examination physician erred in finding the Claimant had not reached maximum medical improvement?

- If Respondents did not overcome the opinions of the DIME and the Claimant is not at maximum medical improvement, is Claimant entitled to temporary total disability benefits?

- Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

- What was Claimant's average weekly wage at the time of his injury?

- Is Claimant entitled to a change of physician?

- Are Respondents entitled to offsets for Claimant's receipt of unemployment and social security retirement benefits?

FINDINGS OF FACT

1. Claimant began working for Employer in 1998. He was employed as an internal sales person. His job duties in that position included taking care of customers on the phone, assisting those customers that came in to make purchases, pulling stock from the warehouse and taking care of outside salespeople.

2. Claimant generally was not required to lift anything other than lightweight parts. If he had to lift anything heavier, he could request assistance from warehouse employees.

3. Claimant's medical history was significant in that he suffered an industrial injury in 2000 when he was hit by a forklift while working for Employer. He injured his cervical spine and filed a workers' compensation claim for this injury. Claimant testified that he required medical treatment for this injury, which included physical therapy.

4. There was no evidence that Claimant sustained a permanent medical impairment as a result of the 2000 industrial injury.

5. Claimant treated for cervical spine symptoms after the aforementioned injury. The first record detailing that treatment before the ALJ was a report from Stephen Johnson, M.D. (neurosurgeon), dated February 16, 2007. At that neurosurgical evaluation, Claimant complained of neck pain and occasional arm symptoms. He stated he had difficulty sleeping because he awakened frequently due to neck pain. An x-ray showed significant degenerative disc disease at C3-4 through C6-7. Dr. Johnson's diagnosis was probable symptomatic cervical spondylosis present to some degree from C3-4 through C6-7. Dr. Johnson ordered a repeat MRI.

6. Claimant had an MRI on February 28, 2007 and the films were read by Kevin Woolley, M.D. Dr. Woolley's impression was minimal grade 1 anterolisthesis of C7 relative to T1 likely on the basis of facet degenerative changes; reversal of the normal cervical lordosis with apex at C3-C4 level; mild spinal stenosis at C3-4 and C4-5 vertebral levels accentuated by congenital narrowing of the AP dimensions of the spinal canal; bilateral foraminal impingement at these levels.

7. Claimant was reevaluated by Dr. Johnson on March 9, 2007, at which time the results of the MRI were reviewed. Dr. Johnson noted that in the absence of a neurologic deficit, he was "less enthusiastic" about surgery, favoring physical therapy ("PT") and epidural steroid injections. If Claimant failed to improve or developed a focal neurologic abnormality, surgery would be considered.

8. Claimant was seen by Dr. Johnson on April 6, 2007, at which time his cervical symptoms were noted to be about the same. A trial of cervical traction was suggested and a referral for an epidural steroid injection was made.

9. The next record before the ALJ was from 2009. Claimant was examined Douglas Wong, M.D. on September 15, 2009. He reported chronic cervical and left arm pain, as well as difficulty sleeping. X-rays showed endstage DDD at C-6. On examination, Claimant's cervical spine had normal curvature, with strength testing and sensation normal. Dr. Wong's assessment was degenerative disc cervical without myelopathy. Dr. Wong noted Claimant was not interested in any spinal fusion surgery, so he was referred to a physiatrist for non-operative treatment. The ALJ infers that Dr. Wong discussed treatment options with Claimant during this appointment, although it does not appear a surgical recommendation was made.

10. Claimant was evaluated by George Schakaraschwili, M.D. on September 22, 2009 Claimant reported severe neck pain up to a level of 8/10, as well as some episodes of depression and anxiety. Claimant's cervical range of motion ("ROM") was limited at the end ranges of rotation. Pain was noted in the mid-cervical spine with extension and rotation to the right and left. Dr. Schakarashwili's assessment was chronic neck pain. Dr. Schakarashwili discussed treatment options, including injections and prescribed tramadol. Dr. Schakarashwili saw Claimant again on 9/29/09 with essentially the same findings and treatment recommendations.

11. Dr. Schakaraschwili saw Claimant for follow-up on October 20, 2009. Claimant was taking between zero (0) and five (5) tramadol each day. Claimant had restricted cervical range of motion, with pain at the mid cervical spine with extension and rotation. Dr. Schakaraschwili noted that x-rays and an MRI showed Claimant had mild spondylitic changes, mild bilateral foraminal narrowing at several levels and mild degenerative disc disease. Dr. Schakaraschwili opined that Claimant's pain was controlled by the tramadol and the prescription was re-filled.

12. Dr. Schakaraschwili reexamined Claimant on December 15, 2009. Claimant reported jerking movements of the arms and legs, noting that he had previously been diagnosed with restless leg syndrome. Dr. Schakaraschwili felt that this could be a generalized anxiety disorder. He was still taking between zero (0) and five (5) tramadol each day, had tried a single dose of Cymbalta, but felt paranoid. Limited ROM was noted in the cervical spine and Dr. Schakaraschwili's assessment was chronic neck pain. Claimant was not interested in diagnostic/therapeutic spine injections and Dr. Schakaraschwili would see him in two (2) months.

13. Claimant returned to Dr. Schakaraschwili on February 23, 2010, with similar symptoms and findings as the 12/15/09 evaluation. Claimant was examined by Dr. Schakarashwili on October 20, 2010, at which time he was complaining of neck pain and stiffness. Limited cervical ROM was noted and Claimant was not in acute distress. Dr. Schakarashwili's assessment was chronic neck pain, which he described as longstanding. Claimant did not want to undergo treatment and repeat x-rays were ordered.

14. Claimant was seen on August 11, 2011 at Skyline Internal Medicine. At that time, it was noted that he had chronic neck pain from the forklift accident and his tramadol prescription was filled by Dr. "Schack"[1]. Claimant was to have acupuncture treatments.

15. Dr. Schakaraschwili next evaluated Claimant on September 21, 2011. Claimant said he had pain moving his head side to side and often when he woke up in the morning Dr. Schakaraschwili's assessment was longstanding, chronic neck pain. Claimant was reluctant to undergo interventional therapy and could not take off time from work to do PT. Dr. Schakaraschwili said Claimant could return on an as needed basis.

16. Claimant returned to Skyline Internal Medicine on February 29, 2012, complaining of persistent neck pain, mainly at night. He was having spasms and numbness, going down both of his arms. Restrictions in neck ROM was noted on lateral flexion, along with markedly reduced deep tendon reflexes at the elbows bilaterally. A prescription for Flexeril was issued and a repeat MRI was ordered. Claimant was to have acupuncture treatments.

[1] Claimant testified at hearing that this was his nickname for Dr. Schakarashwili.

17. Claimant underwent an MRI on March 6, 2012 and the films were read by Elizabeth Sebestyen, M.D. Dr. Sebestyen's impression was moderate to severe multi-level degenerative disc disease, with mild to moderate stenosis and foraminal impingement.

18. Claimant was evaluated at Skyline Internal Medicine on March 29, 2012, for continuing neck complaints, including muscle cramps and tingling in his arms. Claimant's ROM was noted to have increased to 80 deg. His MRI results were reviewed. Claimant was to follow-up with Dr. Johnson and given a re-fill of the tramadol.

19. Claimant returned to Dr. Johnson on April 11, 2012, who noted that it had been five years since his last office visit. Claimant said he had a constant aching pain. Dr. Johnson's assessment was persistent pain primarily involving the posterior neck, associated with significant cervical spondylosis most marked at C3-4, with a degenerative slip at C6-C7, which was probably not symptomatic. Dr. Johnson noted that Claimant's reflexes were within normal limits, as were other neurological tests. Dr. Johnson recommended PT, ultrasound, traction and massage.

20. Claimant had a PT evaluation at Presbyterian/St. Lukes on May 1, 2012. His original work injury involving the forklift was referenced and it was noted that he had some PT, but his symptoms had worsened. His cervical ROM was noted to be within normal limits, but a small reversal of the lordotic curve was seen. PT was recommended.

21. Claimant returned to Dr. Johnson on May 23, 2012. Dr. Johnson found no focal neurological deficit and because Claimant was continuing to improve, Dr. Johnson noted that he would not favor immediate consideration of surgical intervention for the cervical spine. Dr. Johnson noted, "if, with time, his symptoms persist, I would probably favor anterior cervical disc compression at C3-4 and C4-5".

22. Dr. Schakaraschwili examined Claimant on December 5, 2012. It was noted that Claimant had chronic neck pain and likely facet syndrome secondary to his spondylosis. Claimant was being seen because Dr. Schakaraschwili had renewed his tramadol prescription. Dr. Schakaraschwili noted limited ROM at the end ranges of his cervical spine. Dr. Schakaraschwili's assessment was chronic neck pain and he opined that the only reason Claimant would need a cervical fusion would be if he developed instability in his neck.

23. Claimant also injured his low back on or about April 19, 2013 while working for Employer. He testified this injury occurred while he was lifting a 300 pound bathtub into a truck. Claimant testified that he was diagnosed as suffering a back strain, received some treatment then was discharged.

24. Claimant was examined by Cynthia Kuehn, M.D. at the Denver Health Center for Occupational Safety and Health at OHC on May 9, 2013 for the 4/19/13

injury. Claimant reported that felt some pressure or a pulling sensation in his low back, which persisted and had gotten worse. On examination, Claimant had mild distal parathoracic muscle tenderness for T10-12 and L1-3. Extension was painful. Dr. Kuehn's assessment was distal thoracic and proximal low back strains. Dr. Kuehn prescribed Robaxin and higher dose Ibuprofen. Dr. Kuehn issued work restrictions, which included not bending/stooping/twisting at the waist and occasional 20lb push/pull/lift to waist. Claimant was not to lift to or above shoulder height.

25. Claimant returned to Dr. Kuehn on May 14, 2013, at which time his symptoms had improved. On examination, Claimant had mild proximal paralumbar muscle tenderness at L1-2. Dr. Kuehn's assessment was improved thorocolumbar strain. Since there was limited staffing at work, Claimant asked if he could continue with the medications and be careful with activity, which Dr. Kuehn felt was reasonable. Claimant's work restrictions included 30 lb infrequent push/pull/lift to waist/lift to or above shoulder height; 25 lb occasional push/pull/lift to waist/lift to or above shoulder height.

26. Claimant was evaluated by Ann Dickson, M.D. on May 28, 2013. Claimant's symptoms were worse, as he reported trying to stretch out his back muscles. He had prominent muscle spasms bilaterally in the lower thoracic and lumbar regions. Claimant's pain was exacerbated with flexion and any extension beyond neutral. Dr. Dickson diagnosed lumbar strain and referred Claimant to Dr. Jason Gridley for chiropractic. His same work restrictions were continued.

27. Claimant returned to Skyline Internal Medicine on June 6, 2013 for complaints of chest and abdominal pain, as well as pain in the low back. Tenderness was noted on palpation at T7-8 and L1-3. X-rays were taken of the lumbar spine and Claimant was prescribed Vicodin.

28. A CT scan of Claimant's abdomen and pelvis was done on June 6, 2013. Kim McMillin, M.D. noted degenerative disc disease at L4-S1. No osseous or lytic abnormality was identified.

29. Claimant returned to Dr. Kuehn on June 12, 2013, who noted he had seen Dr. Dickson for an exacerbation of his pain. He was feeling better and his lumbar spine, paralumbar muscles and SI joint were nontender to palpation. His restrictions were changed to 60 lb infrequent push/pull/lift to waist/lift to or above shoulder height; 50 lb occasional push/pull/lift to waist/lift to or above shoulder height; 40 lb frequent push/pull/lift to waist/lift to or above shoulder height.

30. Claimant returned to Dr. Schakaraschwili on July 3, 2013. He had pain/stiffness in the neck and continued to take up to four (4) tramadol per day. On examination, cervical ROM was limited and cervical facet loading maneuvers were positive. Dr. Schakaraschwili's assessment was chronic neck pain (facet syndrome); chest wall pain (myofacial in nature).

31. Claimant was evaluated by Dr. Kuehn on July 11, 2013, at which time he was noted to be doing well, with no pain. On examination, his lumbar spine, thoracic spine, parathoracic muscles and paralumbar muscles were nontender and no spasm was noted. Dr. Kuehn released Claimant to full duty and noted he had no impairment.

32. There was no evidence submitted to the ALJ that any admission (GAL or FAL) was filed to reflect the fact that Claimant was injured or that he reached MMI and had no permanent medical impairment for the April, 2013 industrial injury.

33. Claimant returned to Dr. Schakaraschwili on November 6, 2013 for chronic neck pain. Claimant's symptoms were the same as the July 2013 evaluation, as was Dr. Schakaraschwili's assessment. In particular, Claimant denied radicular symptoms or arm weakness and he did not want interventional treatment. Dr. Schakaraschwili refilled the tramadol prescription.

34. The ALJ notes that from 2009-13, Dr. Schakaraschwili evaluated Claimant approximately every six (6) months for his chronic neck pain. Claimant's condition was generally stable and controlled by the tramadol prescription. Dr. Schakaraschwili discussed various interventional modalities over the course of his treatment of Claimant, who was not interested in interventional treatment, including injections and blocks. Claimant's tramadol prescription was re-filled at regular intervals. The ALJ infers that Claimant's cervical spine symptoms were generally stable during this period and controlled by the tramadol.

35. Claimant was evaluated at Skyline Internal Medicine on November 20, 2013, at which time he was noted to have neck pain. By history, it was noted that he had severe DDD of cervical spine and surgery was recommended by Dr. Johnson. Limitations on flexion/extension were noted, along with muscle spasms. There was a discussion of alternatives for pain management including medications, acupuncture, and physical therapy. It was explained to Claimant that given the severity of his degenerative disc disease, these would likely only provide temporary relief. There is a statement that Claimant would follow up with the surgeon, Dr. Johnson. Claimant's Vicodin was refilled.

36. Claimant suffered an admitted industrial injury on November 21, 2013 while working for Employer. The injury occurred when he slipped and fell in the parking lot on ice while he was going to an employer-mandated medical appointment.

37. Claimant testified that he heard a pop when he fell on 11/21/13. He said he felt very bad neck and back pain as a result of the fall.

38. Claimant continued to work for Employer after the 11/21/13 injury. There was no evidence that Claimant lost time from work up to his termination.

39. Claimant was evaluated on November 22, 2013 by Sara Harvey, M.D. at Concentra Medical Center. Claimant said he slipped on ice and landed on his back.

Claimant reported he heard cracking down his spine from the neck down. Claimant's history of chronic neck pain was noted by Dr. Harvey, who found full range of motion in the neck. Dr. Harvey diagnosed Claimant with a back contusion and treated the Claimant with an ice pack. Claimant was released to regular duty.

40. Claimant returned to Concentra on December 10, 2013 and was examined by Lori Rossi, M.D. Claimant reported he was about the same, with lumbar pain which occasionally radiated. He also noted his current duties aggravated his neck pain. Decreased active range of motion was noted in the lumbar spine on flexion and extension. Pain was noted on left and right side bending. Dr. Rossi's assessment was back contusion and neck pain. No medications were given and Claimant was to return in three (3) weeks.

41. Claimant was evaluated by William Choi, M.D. on January 4, 2014 for pain in the neck, which became worse after falling. Claimant also had arm symptoms and his pain level was reported to be 7/10. Dr. Choi did motor testing of Claimant's upper extremities and reflexes which were normal. Dr. Choi's diagnosis was cervical spondylosis without myelopathy, spinal stenois in the cervical region and degenerative cervical disk. Dr. Choi recommended a C3-6 discectomy and fusion.[2]

42. Claimant was seen by Kirk Holmboe, D.O on January 7, 2014., who reviewed his history. At that time, Claimant had low back and neck pain. In particular, he had pain across the lumbosacral junction on both sides. Dr. Holmboe noted good cervical ROM with minimal pain. Claimant had low back pain, which was greater with extension, side bending and rotation. Dr. Holmboe's assessment was back contusion with chronic cervical strain with recent exacerbation and acute lumbosacral strain. A course of PT 2-3X per week was ordered.

43. An Employer's First Report of Injury was filed on or about January 7, 2014. Claimant's back[3] was listed as the part of body injured, with a contusion noted. Claimant's average weekly wage was $880.00 per week.

44. Dr. Holmboe evaluated Claimant on January 21, 2014, at which time he reported significant neck pain. Dr. Holmboe's diagnosis was acute exacerbation of chronic cervical strain and acute LS strain. PT was continued and Claimant was referred for a physiatry evaluation.

45. Claimant was evaluated by Allison Fall, M.D. (physical medicine consultation) on January 31, 2014. He reported severe neck pain since he was hit by a forklift 13 years ago. Surgery had been considered. Dr. Fall reviewed a cervical MRI from prior to the date of injury which showed severe multilevel degenerative changes and stenosis. Claimant reported that prior to his fall his neck pain was 4/10, but after it

[2] As noted *infra,* based upon the evidence before the ALJ, it was after the 11/21/13 fall and a worsening of the condition of Claimant's cervical spine that the surgical recommendation was made.

[3] The words "all other" were also included, which may have been a typographical error. The ALJ infers that it probably was meant to read "all over", which makes more sense in this context.

increased to a 7/10. He had current complaints of severe neck pain and isolated low back pain but he had no weakness, numbness or tingling in his upper or lower extremities. He stated his low back pain increased from 3/10 to 6/10 after the slip and fall.

46. Dr. Fall's neurological and straight leg examinations were normal. Decreased lordosis was found in the cervical spine. Claimant had tenderness at L4-5, with increased pain with flexion and extension. Dr. Fall's assessment was chronic neck pain with recommendations for surgery predating injury with increased pain after fall; complaints of low back pain, possibly facetogenic. Dr. Fall recommended a repeat cervical MRI for comparison purposes and acupuncture.

47. A repeat cervical MRI was performed on February 17, 2014 and was read by Benjamin Aronovitz, M.D. Findings included moderate to severe degenerative disc disease, disc bulging, facet arthropathy, and central canal foraminal stenosis at multiple levels.

48. Claimant returned Dr. Fall on February 21, 2014. He reported that the PT was not helping and he continued to have neck pain, mainly on the left side. Dr. Fall noted decreased cervical lordosis and pain just to the left of the spinous process. Dr Fall's assessment was complaints of increased neck pain upon prior chronic neck pain; complaints of low back pain, possibly facetogenic. She recommended acupuncture.

49. Claimant was seen on February 26, 2014 by Don Aspegren, D.C., who noted that Claimant had pain in the cervical and lumbar region. Claimant had cervical pain before the fall, but it was worse. Dr. Aspegren noted Claimant worked at a restricted level and he could perform 50% of his normal activities of daily living. Dr. Aspegren found restrictions in Claimant's trapezius and shoulder region, as well as on compression in the cervical spine. Restriction in the ROM of Claimant's lumbar spine was also found.

50. Dr. Aspegren's assessment was chronic neck pain with recommendations of surgery, predating injury with increased pain after fall; complaints of low back pain, possibly facetogenic. Claimant received acupuncture treatment in his cervical, trapezius and lumbosacral regions, as well as tissue mobilization and exercise for deep core stabilization.

51. Claimant's supervisor, Scott Petitt testified at hearing. In March, 2014, Mr. Pettit was attempting to increase the business with a plumbing supply company called Spectrum. On March 13, 2014, Mr. Petitt approached all of his employees requesting everyone be particularly courteous and helpful to all representatives of Spectrum. These comments were not specific to Claimant. Instead, Mr. Petit was trying to make sure that everyone treated Spectrum well to obtain the additional business.

52. Claimant had previously had a disagreement with one of the Spectrum employees, Nick. Mr. Pettit believed Claimant interpreted his comment as being a reference to his prior dispute with Nick. Claimant became very upset and made several

inappropriate comments including a statement that he would go after Nick if he ever started anything. Mr. Pettit testified that Claimant said he did not care if the police were called because it would take the police to get him off Nick, which caused concern. Mr. Petitt described that during the conversation as Claimant was very volatile and irrational. Mr. Pettit testified he was concerned because the Employer was trying to get new business worth a lot of additional money.

53. Claimant was seen by Dr. Fall on March 14, 2014, at which time his treatments with Dr. Aspegren were noted, however he did not notice any improvement. Claimant developed rib pain after a recent treatment. Decreased cervical lordosis was found by Dr. Fall, but no findings were made with regard to the lumbar spine. Claimant was to continue with PT and chiropractic treatment.

54. Claimant received acupuncture, manipulation and exercise for tissue mobilization from Dr. Aspegren for March 2-April 8, 2014. Claimant's last treatment with Dr. Aspegren was April 8, 20014. At that time Claimant was reporting improvement in his low back, less in his cervical spine. His pain score was 6/10. Dr. Aspegren noted decreased segmental motion in the cervical and lumbar region. Though these treatments, Dr. Aspegren's assessment was chronic neck pain with cervical spondylosis; low back pain, possibly facetogenic.

55. Mr. Pettit made the determination that Claimant should be disciplined for inappropriate conduct. He stated the intent at that time was to address the behavioral issue through a written reprimand and anger management classes. A meeting was held on March 28, 2014 to discuss the written reprimand. Mr. Pettit testified that Claimant agreed he had anger control issues, which were getting worse as he was getting older and he initially agreed to take anger management classes. Claimant became more agitated. Mr. Pettit disengaged from the meeting and then talked to Claimant again after thirty (30) minutes. However, Mr. Pettit testified that Claimant again became upset once they started talking.

56. Claimant testified that he removed himself from a meeting with Mr. Pettit on March 28, 2014 to avoid saying something that might jeopardize his job. Claimant stated that there are only two ways to respond to a confrontation—fight or flight and that he would never flee, which he did not deny on cross-examination. Claimant disputed whether he refused to take the anger management classes.

57. Mr. Petitt described Claimant's statements to be both offensive and scary. He was concerned for the safety of his employees and customers. Mr. Petitt testified that because of Claimant's implicit threats and refusal to take anger management classes, the Employer had no option but to terminate Claimant's employment. The ALJ credits Mr. Pettit's testimony as to the reason for Claimant's termination. The ALJ finds that Claimant's conduct was volitional in his response to Mr. Pettit's concerns and not signing the reprimand. Claimant was responsible for his termination.

58. Claimant was seen by Dr. Fall in follow-up on March 28, 2014 and once again the focus was his cervical spine. He noted his back was doing better. Dr. Fall's

assessment was cervical spondylosis and Claimant was to continue with PT and chiropractic treatment.

59. Claimant was terminated on March 31, 2014. The ALJ notes that an Employer Disciplinary report [Exhibit A, p. 0001] was admitted into evidence at hearing. This document was not signed by Claimant and the "Action to be taken" was listed as "Reprimand".

60. Claimant returned to Dr. Schakaraschwili on April 7, 2014. Dr. Schakaraschwili noted Claimant had a long history of chronic neck pain that was facet mediated. Claimant's new work injury in November 2013 was discussed, as well as his treatment through Concentra, including PT, chiropractic and acupuncture treatments. Claimant felt his condition had not returned to baseline. Dr. Schakaraschwili opined that the fall exacerbated his condition and Claimant still wished to avoid interventional spinal injections, so Dr. Schakaraschwili increased his tramadol from four (4) to six (6) per day, as needed.

61. Claimant was seen by Dr. Fall in follow-up on April 14, 2014 at which time he had continuing pain complaints in his neck. He had good voluntary spontaneous movements in his neck and midline pain at C3. Dr. Fall discussed the fact that surgery had been recommended prior to the work-related injury and therefore "would not be related to the work-related injury"[4]. Dr. Fall was requesting Dr. Choi's records, so she could review when the surgical recommendation was made. The ALJ infers that those records were not received by Dr. Fall, as no further reference to this issue was made by her.

62. Claimant returned to Dr. Choi on April 24, 2014 at which time Claimant was reporting that his cervical pain had worsened and he was having occasional radiculopathy. He had to increase his tramadol dosage to keep ahead of the pain. Dr. Choi's diagnosis was spinal stenosis in the cervical region, degenerative cervical intervertebral disk and displacement disc site uns. w/o myelopathy. Dr. Choi reiterated the recommendation for C3-5 ACDF.

63. Dr. Fall evaluated Claimant on April 28, 2014 and Dr. Choi's surgical recommendations were reviewed. Dr. Fall found decreased cervical lordosis and midline pain, but no radicular symptoms. Dr. Fall's assessment was cervical spondylosis and Claimant indicated he wished to pursue surgery with Dr. Choi, which Dr. Fall said would likely be through private insurance. Dr. Fall had no further recommendations concerning the work-related exacerbation. Dr. Fall made no findings with regard to Claimant's lumbar spine.

[4] It appears that Claimant related to a number of his treating physicians that surgery had been recommended, including Drs. Holmboe and Fall. In several of the records, when Claimant's history was taken, surgery was noted as an option. However, even the 11/2/13 evaluation at Skyline Medical, which talked about a return to Dr. Johnson, did not constitute a surgical recommendation. The ALJ finds although surgery was discussed during several evaluations before the 11/21/13 fall, these did not constitute recommendations for surgery.

64. Claimant received a Notice of Continuation of Insurance Benefits sometime in April, 2014. The cost of the health insurance premium was $513.77 per month.

65. Claimant's wife covers him under her employer-provided medical insurance policy. Although it is somewhat unclear, it appears the cost of the health insurance premium is $282.00 per month.

66. The ALJ finds that Claimant lost his health insurance coverage as a result of his termination from Employer. This entitled him to an increased AWW. The ALJ is unable to determine how much Claimant's average weekly wage should be increased and is unsure what the parties agreement was on AWW.

67. A Worker's Claim for Compensation was filed on or about May 13, 2014. On this pleading, Claimant stated he was experiencing pain in his neck and back as a result of slipping in the Employer's parking lot.

68. On May 22, 2014, Claimant's counsel faxed a letter to the Sedgwick CMS Claims Adjuster, Kimberly Danneker. Within the letter, Claimant's counsel made a written request to change the Claimant's authorized treating provider from Dr. Holmboe to Caroline Gellrick, M.D. This letter, including the confirmation that the fax was received, was admitted into evidence. Respondents never responded to Claimant's request to change the authorized treating provider.

69. A General Admission of Liability ("GAL") was filed on or about June 4, 2014. Ms. Danneker at Sedgwick Claims Management Services, Inc. filed the GAL on behalf of Respondents, admitting for medical benefits only.

70. Dr. Holmboe examined Claimant on July 8, 2014, at which time it was noted that Claimant was still having neck and low back symptoms. The musculoskeletal exam was deferred. Dr. Holmboe noted that Claimant was seeking authorization for surgery. Dr. Holmboe released Claimant from care, but said that if this was handled through the work comp system, he was willing to act as the PCP. The ALJ finds that there was no evidence that Dr. Holmboe conducted range of motion studies on either Claimant's cervical or lumbar spine when he made the MMI determination.

71. Records from the State of Colorado Department of Labor concerning unemployment benefits for the period 4/5/14-7/19/14 were admitted at hearing. Claimant received unemployment benefits from May 10 through June 22, 2014. Claimant was paid at a rate of $481.00 per week. Claimant was paid for seven (7) weeks and received a total of $3,367.00.

72. However, Claimant testified that he was required to repay the unemployment benefits he received. The ALJ credits Claimant's testimony on this point.

73. On July 23, 2014, Dr. Caroline Gellrick evaluated the Claimant, at the request of his attorney. He complained of neck pain radiating into his arms and low back pain radiating into his legs. The pain was 75% in the neck/low back and 25% in the extremities. Claimant stated his cervical pain increased from a 3 to 3.5/10 to 8/10 after the fall. On examination, Claimant had restrictions in the ROM in both his cervical and lumbar spine.

74. Dr. Gellrick's diagnoses were cervical spine strain with MRI showing multilevel moderate to severe degenerative disk disease (preexistent cervical spine strain but doubled or tripled since fall); lumbosacral strain left-sided with persistent pain; no radiology studies. The ALJ infers that Claimant's symptoms had worsened as of this evaluation. Dr. Gellrick recommended an MRI of the lumbar spine. Dr. Gellrick assigned restrictions of no overhead work, no lifting more than 30 pounds and no pushing/pulling more than 50 pounds.

74. A Final Admission of Liability ("FAL") was filed on or about July 30, 2014, based upon the determination by Dr. Holmboe that Claimant reached MMI and had a 0% impairment rating. Liability for *Grover* medical benefits was denied. Claimant filed a timely Objection to the FAL and request for DIME.

75. Claimant underwent an EMG study on August 4, 2014 with L. Barton Goldman, M.D. Claimant's right median compound motor and sensory nerve action was borderline normal. His right lateral antebrachial cutaneous sensory nerve action potential distal latency was slow. Dr. Goldman concluded this was an abnormal study and Claimant had right neurogenic TOS/upper trunk brachial plexitis.

76. On December 9, 2014, Dr. Justin Green, M.D., who was selected to perform the DIME, evaluated the Claimant. Dr. Green found limitations in Claimant's ROM in the cervical and lumbar spine. Claimant's movement was also limited in the scapular region. At that time, Dr. Green's diagnosis was: status post 11/21/13 fall, with cervical and lumbar pain; lumbar strain syndrome; cervical strain syndrome; pre-existing history of C4-5, C5-6 severe central stenosis; EMG finding noting right neurogenic thoracic outlet syndrome, possible incipient right median entrapment, mononeuritis at the carpal tunnel and no evidence of cervical radiculopathy. Dr. Green found Claimant to be at MMI for his cervical spine. Dr. Green opined that it was medically possible, though not medically probably that the recommended cervical surgery was related to the 11/21/13 injury.

77. Dr. Green opined that Claimant was not at MMI for the low back injury, because he had not had significant evaluation or treatment. Dr. Green opined additional treatment was needed, as well as further diagnostic workup, physical therapy, medication, and imaging.

78. Dr. Fall testified as an expert in physical medicine and rehabilitation at hearing, as well as Level II accredited pursuant to the W.C.R.P. Dr. Fall opined that Claimant's need for cervical surgery was not related to the 11/21/13 injury. Dr. Fall disagreed that Claimant required more treatment or testing for his lumbar spine. On

cross-examination, Dr. Fall agreed that she did not evaluate Claimant's lumbar spine at the last appointments. The ALJ finds that Dr. Fall's opinions constitute a difference of opinion.

79. The ALJ credits Dr. Green's opinion that Claimant was not at MMI with regard to the lumbar spine. Respondents failed to overcome Dr. Green's opinion by clear and convincing evidence.

80. Claimant began regular social security retirement benefits in December, 2014. Claimant's monthly retirement is $1,318.50 per month.

81. Claimant began receiving pension benefits from Employer in the amount of $643.50 per month beginning January 1, 2014. The ALJ did not have information regarding Employer's contribution to the plan.

82. The ALJ finds that the 11/21/13 injury exacerbated the degenerative condition in Claimant's cervical spine, worsened its condition and caused an increase in symptoms. Claimant required medical treatment as a result.

83. The ALJ finds that although Claimant was treated for cervical spine symptoms before the 11/21/13 industrial injury and surgery was discussed, surgery was discussed only as an option and was not recommended by Dr. Johnson, Dr. Schakaraschwili or Dr. Wong. Based upon the evidence admitted at hearing, the ALJ finds that the recommendation for cervical surgery came after the 11/21/13 injury[5]. This recommendation was made by Dr. Choi on 1/4/14.

84. The ALJ finds that the 11/21/13 injury exacerbated the degenerative condition in Claimant's lumbar spine and caused an increase in symptoms, which required medical treatment.

85. Claimant has continued to have symptoms referable to his low back. The ALJ credits Claimant's testimony that his symptoms have worsened over the past year. Claimant also described a reduction in his activities, as well as radiating pain down his legs. The ALJ finds that this worsening of condition has been present at least since the DIME appointment on December 9, 2014. Therefore, despite his termination for cause, Claimant is entitled to TTD from December 8, 2014 until terminated by law based upon this worsening.

86. The evidence and inferences inconsistent with these findings were not credible and persuasive.

[5] As noted *supra*, Claimant discussed the option of surgery with a number of his treating physicians. However, these did not constitute surgical recommendations. It appears that Claimant referenced these discussions with several of his doctors. The first cervical surgery recommendation, which specified was a candidate for an actual procedure was Dr. Choi's 1/4/14 recommendation.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Overcoming the DIME On the Issue of MMI

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Respondents contended that Dr. Green, the DIME physician, erred in determining the Claimant was not at MMI for his lumbar spine. Respondents argued that Claimant had multiple modalities of treatment, including PT and chiropractic. This treatment had improved Claimant's condition. Respondents also relied upon the opinion of Dr. Fall.

Claimant argued that Dr. Green's findings were correct and Claimant requires diagnostic testing and/or additional treatment. More particularly, it was noted that no

MRI had been done on Claimant's lumbar spine. Claimant relied upon the reports of Dr. Gellrick and Dr. Goldman, as well as Claimant's testimony.

In this case, Respondents bear the burden of overcoming Dr. Green's findings after he performed the DIME and by clear and convincing evidence. The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, *supra.*

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute, MMI is primarily a medical determination involving diagnosis of the Claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO March 2, 2000).

Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Furthermore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

As determined in Findings of Fact 77 through 79, the Respondents failed to prove by clear and convincing evidence that the DIME physician was incorrect in determining the Claimant is not at MMI.

The ALJ finds the opinions of Dr. Green credible and persuasive. In particular, he reviewed Claimant's course of treatment in detail and opined that additional

diagnostic testing and potentially treatment was needed for the lumbar spine. Dr. Green's rational for determining that Claimant was not at MMI for his lumbar spine was clearly articulated in his report.

Dr. Fall had a differing opinion based on her evaluation of Claimant. However, Dr. Fall admitted on cross-examination that she did not focus on Claimant's lumbar spine in her last evaluations. She also acknowledged the Medical Treatment Guidelines contemplated an MRI in these circumstances. The ALJ found that this constituted and disagreement between physicians and Respondents did not introduce sufficient evidence to overcome Dr. Green's opinions by clear and convincing evidence.

Temporary Total Disability Benefits

The claim for additional temporary disability benefits in the instant case is governed by the termination statutes, as well as *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004) and its progeny. "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". Sections 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S. 2013. Thus, where the employee is responsible for the termination, TTD benefits may be denied. *Id.;* See also *Apex Trans., Inc. v. Indust. Claim Appeals Office*, 321 P.3d 630, 631 (Colo. App. 2014)

In *Anderson*, the Colorado Supreme Court construed § 8-42-105(4), C.R.S., holding that termination for cause may bar temporary disability benefits. More particularly, the Court noted that the statute bars "TTD wage loss claims when voluntary for-cause termination of modified employment causes wage loss, but not when the worsening of a prior work-related injury causes wage loss." *Anderson v. Longmont Toyota, supra*, 102 P.3d at 325-326. Therefore, where Respondents can establish Claimant engaged in volitional conduct which led to his termination, this can act as a bar to temporary total disability benefits.

Anderson was followed by *Grisbaum v. ICAO,* 109 P.3d 1055 (Colo. App. 2005). In *Grisbaum*, Claimant suffered a compensable back injury in June 2001, but continued to work with no restrictions until he voluntarily resigned in January 2002. In May 2002, the Claimant was completely restricted from working due to his June 2001 injury and underwent two surgeries. The ALJ determined that § 8-42-105(4) barred Claimant from receipt of TTD benefits, which was affirmed by the Industrial Claims Appeals Office and that decision was initially affirmed by the Colorado Court of Appeals. However, the opinion was vacated after *the issuance of Anderson v. Longmont Toyota*. The Colorado Court of Appeals that *Anderson* applied equally to scenarios involving regular or modified employment when there is "a worsening of condition or the development of a disability after the termination." *Grisbaum v. ICAO, supra, 109 P.3d 1056.* Accordingly, the Court remanded the case for an appropriate award of TTD benefits.

Most recently, the Colorado Court of Appeals decided *Apex Trans., Inc. v. Indust. Claim Appeals Office*, *supra*, 321 P.3d at 630. In *Apex*, Claimant worked as a truck driver for Apex for five and a half years before sustaining an injury to his shoulder. Claimant initially did not receive medical treatment for this injury, but self-medicated by obtaining a pain pill from his brother. However, Claimant's symptoms persisted and after reporting the injury, he went to the ATP for the employer. A physician's assistant evaluated Claimant and found that he had no restrictions and could return to work. Claimant was terminated for a violation of the employer's "zero tolerance" drug policy, as he had a positive drug test (from the pain pill he got from his brother). Subsequently, a physician took Claimant off work. Claimant requested a hearing, seeking TTD benefits.

The ALJ found that Claimant's termination from employment was volitional and that Claimant had failed to establish that his condition had worsened after he was terminated. On appeal, the Panel reversed the decision, concluding that the ALJ's factual findings would support the conclusion that Claimant's condition had worsened and he would be entitled to TTD. The Panel remanded the case and on remand, the ALJ awarded TTD benefits. The Court of Appeals then reviewed the Final Order and concluded that the Panel exceeded its authority by re-weighing the evidence.

"We know of no case that has held that an increase in work restrictions is per se evidence of a worsening condition. To the contrary, the Panel itself has previously held that an ALJ may look at several factors when considering whether a condition had worsened to the extent that the worsened condition, and not an intervening termination of employment, caused the Claimant's wage loss." *Apex Trans., Inc. v. Indust. Claim Appeals Office*, *supra*, 321 P.3d at 633. The Court noted that the Panel had rejected the contention that Claimant was entitled to TTD reinstatement because of increased work restrictions [*Encisco v. C.F. Meier Composites, Inc.,* 2009 WL 2520525 (W.C. No. 4-764-288, Aug. 12, 2009)] and rejected the contention that additional restrictions was sufficient to show a causal connection between the injury and wage loss and that there was no requirement to show a worsening of condition [*Hammack v. Falcon School Dist. No. 49,*2006 WL 3146358 (W.C. No. 4-637-865, Oct. 23, 2006)].

Accordingly, the issue of termination for cause requires a two-part analysis. First, the ALJ must determine whether Respondents satisfied their burden of proof on the termination for cause, which is an affirmative defense. Second, the ALJ will evaluate whether Claimant suffered a worsening and was disabled the following his termination.

As found, Claimant acted in a manner which caused a serious concern on the part of his supervisor. In particular, Claimant's conduct concerning Spectrum raised concerns on the part of his supervisor, specifically with reference to his comment that the police would have to be called and it was reasonable for Mr. Pettit to be concerned. Claimant disputed that he refused to take anger management classes as requested by

Employer, but agreed he refused to sign the reprimand. Claimant also did not dispute that he was angry and had a negative reaction to the discussions concerning Spectrum. This left the Employer in the unenviable position of having a potential safety concern, as well as an issue concerning an important customer.

The ALJ finds Claimant's actions were volitional during his exchanges with Mr. Pettit. Claimant chose a course of conduct, which was intentional. As such these actions led to Employer's decision to terminate him and Claimant is responsible for his termination of employment. Accordingly, Claimant is not entitled to TTD benefits from April 1, 2014 through December 8, 2014.

The ALJ turns to the question of whether Claimant's condition has worsened since his termination, which based upon the evidence is answered in the affirmative. Claimant's testimony and the medical records established a worsening in symptoms, in late 2014. The ALJ concluded that this worsening of condition would have prevented him from completing his job duties and constitutes a disability. Accordingly, Claimant is entitled to TTD benefits from 12/9/14 and continuing, until terminated by law.

Average Weekly Wage

As found, Claimant and Respondents indicated that they reached an agreement on AWW, which would includes the loss of Claimant's health insurance benefits. However, it was unclear as to what the final agreement was. Counsel for the parties were ordered to confer on this issue.

Offsets[6]

Respondents contend they are entitled to reduce the Claimant's award of TTD benefits based on his receipt of unemployment and social security retirement benefits. The ALJ agrees.

As a starting point, the ALJ notes that Respondents are entitled to a statutory offset for Claimant's receipt of unemployment benefits. Both Claimant and Respondent submitted the same record for the State of Colorado Department of Labor which Claimant received unemployment benefits from May 10 through June 22, 2014. [Exhibits 30 and B]. Claimant was paid at a rate of $481.00 per week. Claimant received a total of $3,367.00 in unemployment benefits. However, Claimant testified that he was required to repay those benefits.

There was no other evidence before the ALJ on the issue of unemployment benefits. Since the ALJ credited Claimant's testimony regarding the repayment of those

[6] Claimant's Position Statement noted the parties had agreed to hold the question of offsets in abeyance. There was not a corresponding notation in Respondents' Position Statement.

benefits, there would be no offset, since Claimant had to repay the unemployment benefits he received.

As found, Claimant began regular social security retirement benefits in December, 2014. Claimant's monthly retirement is $1,318.50 per month. Respondents are entitled to offset those benefits pursuant to Section 8-42-103(1)(d)(I), C.R.S., which provides that in cases where the employee is receiving "periodic disability benefits" payable under a "pension or disability plan financed in whole or in part by the employer" the "aggregate benefits payable for" TTD shall be "reduced, but not below zero, by an amount equal as nearly as practical to the employer pension or disability plan benefits."

In addition, Respondents are entitled to offset Claimant's TTD benefits by the amount received in pension. However, the ALJ has insufficient information concerning the Employer's contribution to the pension. At this time, the ALJ is unable to determine the exact amount of the offset. Accordingly, the parties are ordered to confer regarding the issue offsets and report to the ALJ.

Change of Physician

The ALJ considered whether Claimant is entitled to a change of physician pursuant to Section 8-43-404(5)(a)(VI), C.R.S.[7] This section provides in relevant part:

"In addition to the one-time change of physician allowed in subparagraph (III) of this paragraph (a), upon written request to the insurance carrier or to the employer's representative, if self-insured, an injured employee may procure written permission to have a personal physician or chiropractor treat the employee. If permission is neither granted nor refused within twenty days, the employer or insurance carrier **shall be deemed to have waived any objection** to the employee's request. Objection shall be in writing and shall be deposited in the United States mail or hand-delivered to the employee within twenty days…" [Emphasis added]

As a starting point, the evidence establishes that a one-time change of physician request was sent to Respondents' adjuster on May 22, 2014. Specifically, the request for change of physician was sent to Kimberly Danneker at Sedgwick. (Exhibit 34). The ALJ notes that Ms. Danneker filed the FAL on behalf of Respondents on or about 7/30/14.

Respondents argued that although the letter requesting a change of physician to Dr. Gellrick was admitted, no evidence or testimony was submitted regarding a lack of response. Respondents also contended that Claimant waived his right to a change of physician by returning to Concentra after the alleged change.

[7] See also W.C.R.P. Rule 8-7

The ALJ found there was no response to the request for change of physician within twenty (20) days. It was uncontroverted that the faxed letter was sent to the adjuster who had acted on behalf of Respondents. A response was required on or before June 11, 2014. Under the statute, the failure to respond to the request for change of physician by Respondents constituted a waiver and by operation of law, Dr. Gellrick became an ATP.

As to the Respondents' other argument, no authority was cited to support the contention that a return to the designated ATP constituted a waiver after a request for change of physician was made and the ALJ determines there was no waiver in this instance. By virtue of the request for change of physician and no response by Respondents, Dr. Gellrick is an authorized treating physician in this case.

ORDER

It is therefore ordered that:

1. Claimant is not at MMI for the injury to his lumbar spine.

2. Since Claimant is not at MMI, Respondents shall provide medical benefits to Claimant.

3. Claimant's request for change of physician is GRANTED.

4. Respondents shall pay medical expenses charged by Dr. Gellrick pursuant to the Worker's Compensation Fee Schedule, after June 11, 2014, as well as all referrals made by Dr. Gellrick.

5. Claimant request for TTD benefits from April 1, 2014 through December 8, 2014 is denied and dismissed.

6. Respondents shall pay Claimant TTD for December 9, 2014, until terminated by law.

7. Respondents shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

8. Since the ALJ was unable to determine what the parties' agreement was on AWW and did not have sufficient facts on the issue of offsets, counsel for Claimant and Respondents shall confer within twenty (20) days on these issues. Counsel for Claimant shall provide a status report to the ALJ regarding the status of any agreement. In the event the parties are unable to agree, Claimant and Respondents may submit evidence concerning the issue of offsets, or in the alternative, the matter may be set for hearing.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 29, 2015

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

The sole issue to be determined is as follows:

1. Whether the Claimant has proven that her request for right hip surgery recommended by Dr. White is reasonable, necessary and related to her work-related injury of July 19, 2014.

All other issues listed in the Claimant's Response to Application for Hearing were reserved without prejudice pending determination of the above issue.

FINDINGS OF FACT

1. The Claimant is a 56 year old woman who worked for Employer on July 19, 2014 as an occupational therapy assistant. Her job duties were assisting with the rehabilitation of ill or injured patients. Her job involved physical contact with patients including helping disabled patients to stand, sit and walk (Hearing Tr., p. 7). She had worked for Employer for approximately 2 years as of the date of her work injury (Hearing Tr., p. 8).

2. On July 19, 2014, the Claimant was assisting a patient with a transfer from the toilet to a wheelchair. The Claimant testified at the hearing that while she was assisting the patient, she injured her right shoulder, lower back and groin area (Hearing Tr., p. 8).

3. On July 25, 2014, a First Report of Injury or Illness was completed by Employer's HR representative noting the Claimant experienced an injury to her lower back and arm when she was transferring a patient (Respondents' Exhibit I, p. 79).

4. The Claimant was seen by Craig Hare, PA-C at Concentra on July 25, 2014. Mr. Hare noted that the Claimant complained of shoulder pain and back pain. The back pain was "located in the low back bilaterally. Onset was gradual immediately after injury. The pain is constant. She describes her pain as dull and aching in nature. She describes this as moderate in severity." There was "catching and clicking" noted for the shoulder, but not for the low back or groin or hip areas. The Claimant was assessed with right shoulder strain and lumbosacral pain. The Claimant was referred to physical therapy (Respondents' Exhibit C, pp. 39-41).

5. The Claimant returned to Concentra again on July 29, 2014 and saw Craig Hare, PA-C who noted that the Claimant reported her "back and shoulder both feel improved but she is still getting clicking and catching sensation, randomly, in right

shoulder." On examination, "bilateral muscle spasms" were noted in the lumbosacral spine with tenderness to palpation. An MRI was ordered for the right shoulder, but none was ordered for the low back or hip at this point (Respondents' Exhibit C, pp. 35-36).

6. The Claimant first went to Concentra for physical therapy on July 31, 2014. In performing the initial assessment for therapy, Jennifer Verwers, PT noted that the patient assessment was consistent with the medical diagnoses of lumbosacral strain and right shoulder strain (Respondents' Exhibit G, pp. 67-70).

7. On August 3, 2014, the Claimant completed an Employee's Report of her July 19, 2014 injury. She stated that the injury occurred in the transfer of a non-weight bearing patient from the toilet to the wheelchair. She listed the following injuries sustained as a result of the work injury, "shoulder burning and locking with movement; lumbar spine burning and shooting sharp pain" (Respondents' Exhibit K, p. 81).

8. On August 5, 2014, an MRI of the Claimant's right shoulder showed supraspinatus, infraspinatus and biceps tendon changes and a large superior labral tear (Respondents' Exhibit H, pp. 76-77).

9. A Worker's Claim for Compensation dated August 8, 2014 lists the Claimant's injuries to her "right shoulder and back" (Respondents' Exhibit J, p. 80).

10. On August 13, 2014, the Claimant saw Dr. Jennifer Huldin at Concentra. Dr. Huldin reported that the Claimant was not working due to restrictions and she was "frustrated at her lack of mobility, gets shooting pains to right groin with steps wrong…" (Claimant's Exhibit 9, p. 17; Respondents' Exhibit C, p. 32). On that same date, the Claimant saw physical therapist David Schnell, who noted that the Claimant was referred for an EMG on the "R hip/LB" (Claimant's Exhibit 8, p. 16).

11. The Claimant was initially evaluated at Western Orthopaedics with an emphasis on the right shoulder condition. The Claimant reported continued and worsening pain in her right shoulder since July 19, 2014. Dr. Bazaz noted that the Claimant had stopped physical therapy once the MRI results were obtained (Respondents' Exhibit D, p. 53).

12. The Claimant saw Dr. Huldin again on August 27, 2014. Dr. Huldin noted that the Claimant notices that when she turns her head to the side, her 4th and 5th fingers go numb on the right side. Dr. Huldin reported that the Claimant would be undergoing shoulder surgery, although it was not yet scheduled. With respect to the Claimant's low back, she continued with physical therapy which the Claimant reported was helpful, but also noted that the Claimant gets stiff and sore if she sits or walks too long. On examination, Dr. Huldin noted "tender lower lumbar paraspinal erectors and right piriformis." Dr. Huldin also reported that a physiatry referral was pending (Respondents' Exhibit G, pp. 28-29).

13. On September 5, 2014, the Claimant saw Dr. John J. Aschberger. On a pain diagram the Claimant completed, she placed an X in the middle of the low back on the body diagram facing backwards. On the body diagram facing forwards, she placed an X on the right shoulder. On the same questionnaire/intake form, she questioned why an MRI has not been performed on her back (Respondents' Exhibit B, p. 16). Dr. Aschberger noted that the Claimant has been treating for her right shoulder and low back pain since her July 19, 2014 work injury. He noted that the Claimant reported "complaints of low back pain predominantly on the right. She notes burning pain at the low back and increasing stiffness with prolonged sit, stand, or walk. She notes increased irritation and tightness when going from sit to stand occurring bilaterally. She has some radiated symptoms into the heel on the right leg. That tends to clear up when she is up walking about." With respect to Dr. Aschberger's assessment of lumbosacral strain, he noted, "findings on examination of SI and facet irritation. Her symptoms and findings are consistent." Dr. Aschberger recommended an MRI of the lumbar spine (Respondents' Exhibit B, pp. 14-15).

14. The Claimant underwent an MRI of the lumbar spine on September 15, 2014. The radiologist made findings that, "lumbar alignment is normal. No acute fracture is seen. No suspicious bone lesion is noted. No marrow edema is seen. There is bilateral facet arthropathy L3-L4, L4-L5 and L5-S1 with minimal disc degeneration and disc bulges at these levels as well" Respondents' Exhibit H, pp. 74-75).

15. On return to see Dr. Bazaz at Western Orthopaedics post-surgery on October 2, 2014, the emphasis of the visit was on the right shoulder recovery. Dr. Bazaz noted that the Claimant was doing well after her right shoulder arthroscopy with subacromial decompression, distal clavicle resection and removal of a calcium deposit, small rotator cuff repair, removal of a loose body and labral debridement (Respondents' Exhibit D, p. 51).

16. The Claimant saw Dr. Aschberger on October 3, 2014 for review of the lumbar MRI performed on September 15, 2014. Dr. Aschberger noted the MRI findings demonstrated "multilevel degenerative changes with facet arthropathy L3 through S1 and some foraminal narrowing at L4-L5 without nerve root encroachment." He found that this correlated with his limited physical examination of the Claimant, noting pain with extension, some restriction of motion and positive facet loading for the lower back. Dr. Aschberger recommended interventional injections for the low back but indicated that these would have to wait for the Claimant's postoperative pain to settle down (Respondents' Exhibit B, p. 13).

17. The Claimant saw Dr. Huldin again on October 8, 2014 after her shoulder surgery on September 25, 2014. Dr. Huldin noted that the MRI of the Claimant's back showed degenerative changes and injections with Dr. Aschberger were planned once the shoulder surgeon released her to obtain those (Respondents' Exhibit G, pp. 24-25).

18. The Claimant saw Dr. Aschberger again on December 5, 2014 and he noted that the Claimant reported "she still has some stabbing pain in the back and she

has a sensation of the right leg wanting to buckle." On examination, Dr. Aschberger noted the Claimant 'is tender at the right sacral sulcus. She has some restriction of motion with forward flexion. Straight leg raise is negative for radicular symptoms or findings. Reflexes are intact and strength is intact" (Respondents' Exhibit B, p. 12).

19. On February 3, 2015, the Claimant underwent an MRI of the right hip that showed an "anterior superior quadrant labral tear with slight extension into the adjacent articular cartilage" (Claimant's Exhibit 1, p. 1; Respondents' Exhibit H, p. 73).

20. On February 5, 2015, the Claimant saw Dr. Huldin at Concentra. The Claimant reported that Dr. Aschberger had ordered an MRI of the right hip which showed a labral tear and the Claimant wondered what she should do about this. Dr. Huldin noted that she would "refer her to ortho for opinion as to whether work related or chronic, and whether surgery will relieve her symptoms of walking stiffly, right hip locking and right groin pains" (Respondents' Exhibit G, p. 21).

21. On February 13, 2015, the Claimant saw Dr. Bazaz at Western Orthopaedics again. The Claimant reported that she was happy with her right shoulder progress and although she continued to have some popping, it was different that the popping with pain she had before. The Claimant's most significant complaints at this visit were related to her low back and hip. The Claimant reported to Dr. Bazaz that, "she might be getting injections for the low back. With regard to her hip pain, she notes specific groin pain. She did not have difficulty before the trauma. She notes mechanical symptoms." On examination, Dr. Bazaz noted that, "examination of the right hip reveals no pain with axial load. She does have maintained range of motion, but there is pain at the extremes of flexion, abduction, external rotation, and extension (FABERE) findings." Based on the examination and the MRI of the right hip, Dr. Bazaz found evidence of labral tearing and recommended evaluation by Dr. White, a specialist from a labral irregularity standpoint (Claimant's Exhibit 2, pp. 2-3; Respondents' Exhibit D, pp. 49-50).

22. On February 13, 2015, the Claimant also saw Dr. Aschberger for review of her hip MRI. He noted the MRI demonstrated a superior labral tear with extension into the adjacent articular cartilage and mild greater trochanter bursitis. Dr. Aschberger noted that Dr. Huldin referred the Claimant back to Dr. Bazaz for an orthopedic evaluation and that Dr. Bazaz, in turn, referred the Claimant for hip evaluation with Dr. White. He noted the Claimant cancelled her SI block after learning of the orthopedic referral. The Claimant reported that she still has pain in the back as well as at the right groin. Dr. Aschberger stated that, "to help differentiate contributions from the SI versus the hip, I did advise [the Claimant] to go ahead and follow through with the SI blocks" (Respondents' Exhibit B, p. 10).

23. On February 18, 2015, Dr. Rick D. Zimmerman performed a bilateral sacroiliac joint steroid injection and noted that the procedure produced a diagnostic response (Respondents' Exhibit E).

24. On March 4, 2015, the Claimant saw Dr. Burris on referral due to delayed recovery issues. Dr. Burris summarized her treatment since the July 19, 2014 injury, which he characterized as, “a relatively minor event.” He noted that the Claimant underwent surgery for the right shoulder and her rehabilitation was supervised by Dr. Aschberger. He also noted that the Claimant has received treatment for her lumbar spine including physical therapy, chiropractic manipulation and SI injections. He noted that the Claimant was being evaluated by an orthopedic surgeon regarding hip pathology revealed on the right hip MRI. The Claimant reported that her biggest complaint is “cramping over the front part of her thighs with prolonged standing or walking.” Dr. Burris recommended that the Claimant remain active with an aggressive home exercise program with an emphasis on stretching, strengthening and conditioning along with pool therapy (Respondents’ Exhibit C, pp. 19-20).

25. The Claimant was also seen on March 4, 2015 by Dr. Brian J. White and Shawn B. Kams, MPA, PA-C for an orthopedic evaluation related to her right hip pain. The Claimant advised that she has had an extensive low back work up with physical therapy and injections which have helped the low back but not the hip. The Claimant advised Dr. White that with the physical therapy she was getting for her back, she kept getting sharp catches and pain within her hip joint and she was never sure if this was coming from her hip or not. She reported that “she never really did well with this and has gotten progressively worse. At this point, she is confused as to where the pain is coming from.” On physical examination, Dr. White noted that the Claimant “does have obvious pain with the anterior impingement maneuver. This reproduces pain in her hip. I think that the hip is the main source of pain with regard to rotation and twisting that we reproduced here, but I think she also has a problem with her lower back with some central lower back pain that radiates more to the left side.” Dr. White recommended a diagnostic injection to see how much of the pain is coming from her hip. He assessed the situation as follows: “A very complex patient. I think the hip has been part of the problem all along.” Dr. White noted that trying to fix this problem will be challenging. He opined that hip arthroscopy could be reasonable” (Claimant’s Exhibit 3, pp. 4-6; Respondents’ Exhibit D, pp. 46-48).

26. On March 9, 2015, Dr. Jeffrey Guyon performed a therapeutic right hip injection with fluoroscopic guidance. A handwritten note on the typed medical report states, “3/9/15 great relief of pain 6 -> 1/10” (Claimant’s Exhibit 4).

27. The Claimant saw Dr. Bazaz again on March 13, 2015 for follow up on the shoulder and he noted that she was at MMI with regard to the shoulder. He also noted that “it sounds like her right hip is an issue. She had a diagnostic injection that made a tremendous difference in her discomfort across that region” (Respondents’ Exhibit D, p. 44).

28. On March 13, 2015, a request from Western Orthopaedics from Dr. White was made for right hip surgery with the proposed surgery: right hip; scope labral repair; reconstruction; femoral acetabular osteoplasty (Claimant’s Exhibit 5, p. 12).

29. On March 27, 2015, the Claimant saw Dr. Aschberger regarding the hip injection that was performed approximately 3 weeks prior. The Claimant reported "excellent symptom alleviation of the groin and hip pain" which Dr. Aschberger opined would be a positive diagnostic response. Dr. Aschberger noted that Dr. White was recommending surgical intervention and that the Claimant was scheduled for an IME (Respondents' Exhibit B, p. 9).

30. On March 31, 2015, Dr. I. Stephen Davis performed an independent medical examination of the Claimant to address causation issues with regard to the Claimant's right shoulder, lumbar spine and right hip conditions. Dr. Davis reviewed the Claimant's medical records and interviewed and physically examined the Claimant (Respondents' Exhibit A, pp. 1-2). The Claimant reported to Dr. Davis that, as of the date of this IME, the groin was the focus of the Claimant's discomfort with catching and popping sensations and discomfort that limits her walking to 15 minute periods (Respondents' Exhibit A, p. 3). On examination, Dr. Davis notes that the Claimant does walk with a slightly altered gait favoring her right hip. He notes that range of motion of the right hip is restricted in full flexion and with impingement testing, the response is positive. Dr. Davis agrees that the Claimant has documented injuries to her right shoulder and lumbar spine. He opines that "the primary issue is the right groin pain." He notes that this condition is not documented at the time of her incident and he finds that the Claimant has not made right hip complaints until September of 2014, two months following the incident. The Claimant explained to him that "she believes the confusion is related to the similar complaints experienced with back issues and thus not well understood by her treating physicians." In considering causation of the right hip condition, Dr. Davis opines that "femoral acetabular impingement is not caused by trauma. This is a pre-existing condition." Next, he raises his concern that there was no report of a right hip injury or a correlating mechanism of injury resulting from the July 19, 2014 event. Dr. Davis ultimately opines that he finds not causal relationship between the right hip pathology on the February 3, 2015 MRI and the work injury on July 19, 2014 noting that, "based on clinical findings I agree with the diagnosis and the recommended treatment but I do not find a causal relationship to the subject accident…" (Respondents' Exhibit A, p. 4).

31. On April 17, 2015, the Claimant saw Dr. Aschberger again and he noted that the Claimant still had persistent irritation at the low back as well as at the right groin. She also continued to report issues of the hip catching and a sensation of buckling (Respondents' Exhibit B, p. 8).

32. The Claimant saw Dr. Burris again on April 29, 2015. He noted that since his first visit with the Claimant, she had undergone an IME with Dr. Davis who did not feel her chief complaints were work related and so the hip surgery recommended by Dr. White was denied by the carrier. Dr. Burris noted that as the labral tear to the right hip was not considered to be work-related based on the IME, the Claimant was approaching MMI for her right shoulder and low back complaints. He noted that he reviewed the Workers' Compensation concepts of MMI, impairment, permanent work restrictions and maintenance care with the Claimant. He also modified the Claimant's

current temporary work restrictions to allow for lifting up to 20 pounds (Respondents' Exhibit C, pp. 17-18).

33. The Claimant saw Dr. Aschberger on May 15, 2015 and he noted that both he and Dr. Burris had reviewed the issues of MMI and impairment with the Claimant. Dr. Aschberger noted that the issue of the hip labral tear was being contested regarding whether or not that was causally related to the work injury. Dr. Aschberger opined that if the hip issue is clarified and found to be related, then the Claimant is not at MMI. If the hip issue is not found to be related, then Dr. Aschberger anticipated impairment for the back, but little, if any, impairment at the shoulder (Respondents' Exhibit B, p. 6).

34. Dr. I. Stephen Davis testified by evidentiary deposition on July 27, 2015 as an expert in the field of orthopedic surgery (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 3-4). Dr. Davis testified that he is familiar with the Claimant from an independent orthopedic evaluation conducted on March 31, 2015 (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 4). Dr. Davis testified that the Claimant described a work injury to him involving assisting a patient transfer from a toilet to a wheelchair where she was lifting and twisting and she strained her low back and right shoulder. Dr. Davis found the description the Claimant provided to him to be consistent with the medical records of other providers (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 6). Dr. Davis was asked to evaluate the Claimant's complaint of right hip pain which he found to have developed after initial treatment. He testified that the first documentation that he noted regarding a possible right hip complaint was Dr. Aschberger's note of December 5, 2014 which led to an MRI of the hip on February 3, 2015 which revealed a tear of the labrum (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 7). Dr. Davis testified that the Claimant has been diagnosed with a labrum tear which is evidenced by the February 2015 MRI of her right hip. Labrum tears can be degenerative or they can be caused by trauma (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 9-10). However, Dr. Davis testified that there is no way to date the labrum tear from the MRI image and the tear may or may not have predated her July 19, 2014 injury. There were no MRI studies prior to July 19, 2014 and Dr. Glassman had documented pre-existing hip joint complaints but he attributed them to bursitis at that time and did not document the possibility of a labral tear (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 10).

35. Dr. Davis testified that the Claimant advised him she was having right groin pain at the March 31, 2015 IME and that she thought it might have started a couple of months after her work injury (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 10-11). Yet, Dr. Davis opined that the medical records that he reviewed did not support the Claimant's statements to him. Rather, Dr. Davis testified that the first record after the injury that documents pain that could be related to the hip or groin is the December 5, 2014 note of Dr. Aschberger which discusses a stabbing pain in the back and a sensation of the right leg wanting to buckle, which Dr. Davis assumes led Dr. Aschberger to recommend an MRI of the hip (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 11). Dr. Davis testified that if the Claimant had injured her hip causing the labral tear evidenced on the MRI on the date of her work injury, he would expect groin

pain, along with catching, popping and snapping at the groin right after the injury date (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 12). Dr. David opined that the arthroscopic hip surgery proposed by Dr. White is reasonable and necessary (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, pp. 14-15). However, Dr. Davis testified that, while it is possible that the Claimant's hip condition is causally related to her July 19, 2014 work injury, he can't state this to a reasonable degree of probability because there is no medical documentation of the Claimant complaining of groin pain and catching and popping until many months after the work injury (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 15).

36. The Claimant testified at the hearing that she gets a "popping, grabbing, burning sensation" in her groin (Hearing Tr., p. 8). The Claimant testified that she mentioned this to her physical therapist and to Dr. Holden and on July 25, 2014, she put an X on her pain diagram in the middle of the body below the waist area which she intended to indicate the whole area of her lower back, groin and down her leg was where she was experiencing pain (Hearing Tr., p. 9; Claimant's Exhibit 7; Respondents' Exhibit C, p. 42). The Claimant testified that she also experienced popping and clicking in her shoulder and her right leg (Hearing Tr., p. 10). The Claimant testified that she has mentioned the clicking and popping and groin pain to her physical therapist and to Drs. Holden, Aschberger and Bazaz (Hearing Tr., p. 11).

37. The Claimant testified at the hearing that she first was able to distinguish her low back pain from the groin pain after a diagnostic hip injection. After this, she was able to separate the pain and realized it was two distinct pains (Hearing Tr., p. 12). The Claimant testified that, at first, she did not specifically complain about hip pain and groin pain and the pain radiating down her leg separately from the low back pain because she didn't realize they were separate and distinct until after the diagnostic shot, which she stated "separated the pain" for her (Hearing Tr., pp. 14-16). The other thing that caused the Claimant to realize that she had hip and groin pain that was separate from her low back pain was the MRI (Hearing Tr., pp. 25-26). She testified that regardless, the whole time she was having pain in her low back and hip and the whole region, along with the popping and catching, although it has worsened over time (Hearing Tr., p. 16). The Claimant testified that both Dr. White and Dr. Aschberger recommend she undergo hip surgery and, if offered hip surgery, she would have it done (Hearing Tr., p. 18).

38. Prior to her injury on July 19, 2014, there was mention of hip pain in the Claimant's medical record of a March 31, 2013 office visit with her PCP Dr. Glassman, who suspected "possible iliotibial band syndrome" (Respondents' Exhibit F, pp. 61-62). On April 23, 2013, Dr. Glassman noted the Claimant had "mild-to-moderate tenderness right at the superior portion of the greater trochanteric part of the hip" with a positive FABER sign. Dr. Glassman suspected trochanteric bursitis and recommended a right hip x-ray (Respondents' Exhibit F, p. 63). The right hip x-ray taken on April 23, 2013 was essentially normal (Respondents' Exhibit H, p. 78). While Dr. I. Stephen Davis testified that a labral tear would not have been revealed on an x-ray (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 14), it is also not very likely that these complaints of hip pain in 2013 are related to the labral tear seen on the Claimant's

February 3, 2015 MRI since Dr. Davis testified that the reason he doesn't believe the Claimant's current hip condition is related to the July 19, 2014 work injury is that he believes she did not complain of groin pain and catching and popping until many months after the work injury (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 15), where he would have suspected symptoms right after the injury date. Also, Dr. Glassman's diagnosis of trochanteric bursitis would have been associated with a different type of hip pain, which is consistent with the Claimant's reports to treating physicians and to Dr. Davis that she had not previously experienced the type of symptoms that she does now with respect to her groin/hip area (Depo. Tr., I. Stephen Davis, M.D., July 27, 2015, p. 12-13).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial*

Commission, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits – Related and Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of

the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the “Medical Treatment Guidelines”) when furnishing medical aid under the Workers’ Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff’d Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

In this claim, there was some evidence of the Claimant raising complaints of hip pain that predated the work injury on July 19, 2014. However, it was found that it is more likely than not that these prior complaints of hip pain in 2013 are unrelated to the labral tear seen on the Claimant’s February 3, 2015 MRI. The Claimant was working full duty prior to July 19, 2014, and, other than 2 complaints of hip pain in March and April of 2013, there are no other medical records showing the Claimant sought or received medical treatment for any hip condition prior to July 19, 2014. Dr. Davis testified that that the reason he doesn’t believe the Claimant’s current hip condition is related to the

July 19, 2014 work injury is that he believes she did not complain of groin pain and catching and popping until many months after the work injury, where he would have suspected symptoms right after the injury date. So if the labral tear was going back to 2013, or otherwise predated the work injury, it would not make sense that the Claimant made no additional complaints of hip pain between April 23, 2013 and July 19, 2014. Also, Dr. Glassman's diagnosis of trochanteric bursitis would have been associated with a different type of hip pain, which is consistent with the Claimant's reports to treating physicians and to Dr. Davis that she had not previously experienced the type of symptoms that she does now with respect to her groin/hip area.

In this case, there is no disagreement that the February 3, 2015 MRI of the Claimant's right hip evidences a labral tear. Dr. Davis testified that he does not disagree with Dr. White's diagnosis of the Claimant's hip condition, nor does he disagree that the proposed surgery is reasonable and necessary to treat that condition.

Rather, the medical benefits issue in this case generally comes down to consideration of the contrasting opinions of Dr. White and Dr. Davis as to whether the hip condition is causally related to the July 19, 2014 work injury. In considering the opinions of Dr. White and Dr. Davis, the ALJ finds the opinion of Dr. White, as further supported by the medical records from Dr. Aschberger, Dr. Huldin and Dr. Bazaz and the Claimant's MRI imaging, to be more persuasive than the opinion of Dr. Davis in this case.

The Claimant repeatedly and consistently described her mechanism of injury as occurring when she was assisting a patient with a transfer from a toilet to a wheelchair and she was lifting and twisting as this occurred. While Dr. Davis opined that he does not believe the mechanism of injury is consistent with her current hip condition, Dr. White opined that rotation and twisting motions reproduced in his office were causing pain and that the main source of the pain was coming from the hip. Dr. White further opined that this was a "very complex patient" and he thought "the hip has been part of the problem all along."

Over the course of the medical treatment, there were indications of pain that may have been coming from the hip, but that the Claimant associated with the low back pain, as did some of her treating physicians for quite some time. As early as August 13, 2014, less than one month after the work injury, there were complaints of shooting pains to the right groin. The Claimant testified credibly that at first she was unable to distinguish her low back pain from her groin pain and did not realize that they were two separate and distinct pains. She testified that she was experiencing the low back and hip region pain the whole time after the work injury, including the popping and catching, although it worsened over time. It was only after the diagnostic hip injection that the Claimant was fully able to appreciate that she was experiences separate pain from two locations and it was not all emanating from the same generator. The Claimant's testimony in this regard is consistent with the medical records. It is also important to note that for the first few months of treatment after her work injury on July 19, 2014, the focus of the treatment was on her shoulder, leading up to right shoulder surgery on September 24, 2014. In

fact, on October 3, 2014, Dr. Aschberger even noted that while he recommended injections for therapeutic and diagnostic purposes, they would have to be delayed until after the Claimant recovered from the postoperative pain from her shoulder surgery. Therefore, bilateral SI joint injections were not performed until February 18, 2015 and the right hip injection was not performed until March 9, 2015. The Claimant experienced a positive diagnostic response with both injections, with her hip injection taking her pain level from 6/10 to 1/10. These responses, in addition to the Claimant's clinical presentation and the pathology seen on the MRI prompted Dr. White to submit a request for right hip surgery on March 13, 2015.

Ultimately, based on the opinions and recommendations of Dr. White, the proposed right hip surgery is found to be reasonable, necessary, and causally related to the July 19, 2014 work injury .

ORDER

It is therefore ordered that:

1. The right hip surgery recommended and requested by Dr. White is reasonable and necessary to treat the Claimant's right hip condition, and is causally related to the July 19, 2014 work injury.

2. Respondent's liability shall specifically include medical treatment consisting of the above surgery, and all related medical treatment required for appropriate preparation for the surgery, as well as reasonably necessary post-surgical follow-up treatment per the Division of Workers Compensation Medical Fee Schedule.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 16, 2015

_____

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues for hearing as determined at the outset of the hearing were:

1. Compensability; and,

2. Medical benefits.

FINDINGS OF FACT

1. The claimant was an employee of the respondent-employer on June 25, 2014 and had been so employed for approximately 5 years.

2. The claimant's position was photo specialist. Her duties included checking out customers, bagging purchases, processing film, cleaning up, and cashier.

3. On June 25, 2014 the claimant started her shift at 2 or 3 pm. The claimant was injured while working at approximately 3:20 pm.

4. Just before the time of her injury the claimant was scheduled to be on the register and was so engaged. The claimant began to check out a customer. She placed a bag on the counter to facilitate loading the bag.

5. The claimant carries two liter bottles by holding onto the spout and then lifting the bottle.

6. Upon picking up a two liter plastic bottle of soda that was being purchased the claimant felt immediate pain in her right shoulder. She continued bagging using her left hand and arm to assist.

7. The claimant then went to the manager.

8. More specifically, the claimant reached to get the bottle from the countertop, grabbed the bottle around the cap and lifted it up to bag it. The claimant reached out to her side to perform this action.

9. Upon lifting the bottle she felt burning and sharp pain in her right shoulder. She didn't know what it was.

10. She then immediately told the manager, Mr. Young, because she needed a replacement.

11. The claimant filled out an incident report and then Mr. Young called HR.

12. The claimant was sent to an urgent care clinic at first but she was then told to come back and was sent to the Emergency Department because the workers' compensation doctors were not available at the time, which was around 4:45 pm.

13. The claimant had no prior pain in her shoulder and had suffered no significant prior right shoulder injury. The claimant cannot think of anything else that would cause the pain.

14. At the ED the claimant was provided a sling and underwent x-ray examination.

15. The following day the claimant went to the WC doctor. She was then referred to an orthopedic surgeon, Dr. Simpson. The claimant was diagnosed with a partial tear. She was set up with some physical therapy for 6-8 visits. This provided the claimant with some relief but she was still unable to work with her right arm.

16. The claimant was then informed that her worker's compensation claim had been denied.

17. Currently, there days where the claimant's shoulder aches; she cannot put her arm up behind her back; and, she can't reach. She can no longer lift her granddaughter with her right arm. She holds her right arm down by her side. She asserts she has compensated for the loss of use of her right arm and would be willing to try physical therapy again.

18. The only witness to the incident was the unknown customer.

19. The ALJ finds the claimant to be credible.

20. Dr. Peterson, the claimant's authorized treating physician has opined that the claimant aggravated or exacerbated a previously asymptomatic supraspinatus tear.

21. Dr. Simpson, the orthopedic surgeon, has opined that the claimant exacerbated her pre-existing condition.

22. Dr. Hall conducted an IME and has opined that the claimant's mechanism of injury is consistent with a work related injury.

23. All of the medical opinions from these physicians indicate that the claimant is still in need of treatment. Dr. Peterson indicates that he placed the claimant at MMI solely because the claim was denied by the respondent-insurer. Thus, he in essence found her to be at maximum *administrative* improvement rather than maximum *medical* improvement.

24. The ALJ finds the opinions and analyses of Dr. Peterson, Dr. Simpson, and Dr. Hall to be credible and persuasive with respect to causation and need for further medical treatment.

25. The ALJ finds that the claimant has established that it is more likely than not that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

26. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to reasonable, necessary, and related medical care to cure or relieve her from the effects of her injury.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. §

8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

7. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

8. The claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Even after an admission of liability is filed, respondents retain the right to dispute the relatedness of the need for continuing treatment. This principle recognizes that the mere admission that an injury occurred

cannot be construed as a concession that all subsequent conditions and treatments were caused by the admitted injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997).

9. The claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

10. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment the claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). And where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

11. The ALJ concludes that the claimant is credible.

12. The ALJ concludes that the opinions and analyses of Dr. Peterson, Dr. Simpson, and Dr. Hall are credible and persuasive with respect to causation and need for further medical treatment.

13. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

14. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to reasonable, necessary, and related medical care to cure or relieve her from the effects of her injury.

ORDER

It is therefore ordered that:

1. The claimant's claim is compensable under the Workers' Compensation Act of Colorado.

2. The respondent-insurer is responsible for payment of the claimant's medical care to cure or relieve her from the effects of her industrial injury, including care already provided to date.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law. are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: December 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-958-741-02

ISSUES

I. Whether Claimant sustained a compensable injury to his left leg on August 6, 2014.

II. If Claimant did sustain a compensable left leg injury, whether he established by a preponderance of the evidence that he is entitled to an award of medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of the Pueblo Police Department. He has worked as a patrol officer for the City of Pueblo for approximately 25 years.

2. In order to carry out his routine duties, Claimant is required to get in and out of a patrol car multiple times a day.

3. On August 6, 2014, as Claimant was exiting his patrol car to investigate a burglary, he injured his left leg. Claimant explained that his patrol vehicle sits very low to the ground. Consequently, Claimant must put extra weight on his left leg in an effort to get up from the seat. According to Claimant's testimony, there was sand and gravel on the ground where he had stopped to exit his car on August 6, 2014. Afraid that he would slip while standing up, Claimant testified that he extended his left leg further in front of himself away from the sand and gravel. In the process of standing, Claimant felt a tearing and burning sensation in the back of his leg, above his knee. Claimant testified that he had no prior injuries to the left leg. He further testified that he had no restrictions or requirements for modified duty as a consequence of prior conditions involving the left leg. Based upon the record presented, the ALJ finds no supporting evidence to refute Claimant's testimony regarding the condition of his left leg or his full duty work status prior to the incident in question.

4. Claimant reported his injury and was referred to Centura Centers for Occupational Medicine (CCOM) where he was evaluated by physician Assistant (PA), Steven Byrne on August 7, 2014. Claimant's Health and Injury History form provides the following description of the injury: "stepping out of car, felt a tearing sensation, my left hamstring (leg)". This form also indicates that the physical requirements of Claimant's job include getting "in and out of vehicle, arrest violent offenders". There is

no description of the patrol car riding low or any other obstacle, i.e. sand Claimant testified he encountered while exiting the patrol car documented in the CCOM intake form. Although he did not include the detail that his injury occurred because his patrol vehicle sat low to the ground and he was trying to avoid slipping on sand, Claimant's testimony regarding the mechanism of injury has been consistent throughout the pendency of this case. Based upon the totality of the evidence presented, the ALJ finds that Claimant had little space in which to write down the details of what happened. Moreover, the evidence offered persuades the ALJ that Claimant likely was not questioned by either PA Byrne or Dr. Merchant about the specifics of how the injury occurred. Rather, both PA Byrne and Dr. Merchant felt that Claimant's objective clinical findings were consistent with Claimant's described mechanism of injury (MOI). Consequently, the ALJ finds Claimant would have no reason to think he needed to elaborate and discuss the physical characteristics of his patrol vehicle or the specifics of exactly how he stepped when he was raising himself from the seat of his car. Because this injury was personal to Claimant, the ALJ is also finds it reasonable that he would have reason to recall the events surrounding the injury, i.e. that the car sat low and that he was trying to avoid sand and gravel in the area while rising up from a seated position.

5. Claimant was first seen by Dr. Merchant on August 12, 2014, after his initial visit with PA Byrne. During Dr. Merchant's examination Claimant described the mechanism of injury as exiting his patrol car and that he suffered immediate pain and tenderness in the posterior of his thigh secondary to this event. Dr. Merchant's examination of the patient showed no swelling and only some minimal tenderness on the posterior region of his thigh. Claimant was returned to regular duty without restriction by Dr. Merchant.

6. Subsequent evaluation showed Claimant's condition stabilized and the identified hamstring strain suffered by Claimant was resolving without incident. The only issue was difficulty Claimant had in extending his leg fully. See, deposition of Dr. Merchant, page 21 lines 4-23.

7. Claimant was referred for orthopedic evaluation by a Dr. Alex Romero. Dr. Romero found no objective evidence suggesting significant injury and recommended Claimant continue his usual activities. Claimant was discharged at maximum medical improvement (MMI) effective September 23, 2014 with no impairment. *Id., page 29 lines 15-25.*

8. Claimant's testimony regarding the mechanism of injury is consistent, credible and convincing. The ALJ credits Claimant's testimony that his patrol vehicle rode low to the ground and that he was trying to avoid sand and gravel while exiting his car to complete an investigation when he injured his left leg. Accordingly, the ALJ finds that Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left leg on August 6, 2014 while exiting his vehicle to investigate a burglary in the course of his employment.

9. Based upon the evidence presented, the ALJ finds the care Claimant received at

CCOM and through their referrals, reasonable, necessary to relieve him from the effects of his acute left hamstring strain. Moreover, the need for the care received from CCOM and the referrals made by providers there was directly related to Claimant's August 6, 2014 injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant sustained an injury to his left leg "arising out of" his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991);

Hoffman v. Climax Molybdenum Company, W.C. No. 3-850-024 (December 14, 1989).

G. The totality of the evidence presented in this case persuades the ALJ that Claimant has established the requisite causal connection between his work duties and his left leg injury. In concluding as much, the ALJ agrees with Claimant that Respondent's compensability defense rests largely on the suggestion that Claimant is not credible because he was able to recall details surrounding the injury are not evident in the intake forms he completed at CCOM. As found above, the ALJ is not persuaded. Furthermore, the ALJ is not convinced by Respondents suggestion that there is nothing unique about the patrol car in question and as such Claimant's injury is not compensable because it could have happened by stepping out of any car outside of work. Merely because Claimant was engaged in activity, specifically rising from a seated position, which is performed many times a day outside of work does not compel a finding that Claimant's injury is not work-related. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Here, the evidence presented persuades the ALJ that Claimant's employment caused him to suffer an acute left hamstring injury because it obligated him to exit a low riding vehicle on terrain possessing a dangerous defect likely to cause injury if un-avoided under the circumstances presented. In keeping with the decision announced by the Court in C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the ALJ concludes that Claimant's left hamstring strain probably would not have occurred "but for" the obligations and conditions of Claimant's employment. Contrary to Respondent's assertion, it was not the simple fortuity of being at work that Claimant contends makes his injury compensable.

H. Finally, the ALJ finds Respondent's argument that the current claim is akin to the situation presented in *Alexander v. Emergency Courier Service*s, W.C. No. 4-917-156 (ICAP October 14, 2014) misplaced. In *Alexander* the claimant was simply stepping while carrying coolers he used to make deliveries as a part of his job. He felt a pop in his knee when his foot struck the ground. The ALJ resolved the issue of whether a causal connection existed between the claimant's work and his injury by determining that the claimant's pre-existing condition was the direct cause of the injury. Conversely, in this case there is a dearth of evidence suggesting that Claimant's hamstring injury was caused by a pre-existing condition. Rather, the balance of the persuasive evidence supports a conclusion that there is a direct connection between Claimant's obligation to exit his low riding vehicle in an area covered by sand to investigate a burglary call and his left leg injury. Simply put, Claimant's obligation to complete his investigation combined with condition of his car and the ground directly caused his injury. As noted above, the mere fact that Claimant had performed this maneuver many times without injury prior does not negate the causal connection between his work activity and his injury on August 6, 2014. Consequently, the ALJ finds that Claimant has established that his injury arose out of his employment. The injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury,

he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

J. As found here, the evidence demonstrates that Claimant's medical care as provided at CCOM and their referrals, including the orthopedic evaluation performed by Dr. Romero was reasonable, necessary and related to his acute left hamstring strain sustained August 6, 2014. The aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of the sprain. Additionally, the specialist referrals were reasonable and necessary to determine the extent of injury in light of Claimant's ongoing difficulty in extending his left knee and the persistent popping in the left leg. Consequently, Respondents are liable for that medical treatment reasonably necessary to cure and relieve Claimant from the effects of his compensable left leg injury.

ORDER

It is therefore ordered that:

1. Claimant's August 6, 2014 left leg injury is compensable.

2. Respondent shall pay for all authorized, reasonable, necessary and related medical treatment, resulting from Claimants August 6, 2014 left leg injury, including but not limited to the care provided or directed by providers at CCOM including PA Byrne, Dr. Merchant. This order extends to the care provided by those referrals made by providers at CCOM, including Dr. Romero.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 8, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Claimant has established by a preponderance of the evidence that the right total knee arthroplasty recommended by Rocci Trumper, M.D. is reasonable, necessary, and causally related to the April 5, 2014 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer at one of Employer's stores.

2. On April 5, 2014 Claimant was assembling resin tables on Employer's east patio. Claimant caught his right foot on the middle leg of the table, twisted his right knee, and had immediate sharp pain.

3. Claimant had pain and swelling in his right knee afterwards but hoped the pain and swelling would resolve. Claimant did not immediately report the incident or seek treatment. After a couple of weeks his pain and swelling persisted and Claimant sought medical treatment.

4. On April 23, 2014 Claimant was evaluated by Rocci Trumper, M.D. at the Orthopedic & Spine Center of the Rockies. Claimant reported twisting his knee several weeks ago and having difficulty getting through his workday. Claimant reported pain in the medial aspect of his knee with some activity-related swelling and no improvement over the past few weeks. Dr. Trumper noted that x-rays showed early to moderate degenerative changes in the medial compartments bilaterally. Dr. Trumper suspected Claimant might have a right medial meniscal tear in addition to degenerative changes in the medial compartments in both knees. Dr. Trumper injected Claimant's right knee and noted if no improvement he would consider an MRI scan. *See* Exhibit 4.

5. On April 28, 2014 Claimant reported the injury to Employer. Employer filled out an Employer's First Report of Injury and referred Claimant for treatment.

6. On April 29, 2014 Claimant was evaluated by Robert Nystrom, D.O. Claimant reported working at a table with flowers on it when he turned to the right and caught his right toe on the table leg, twisted his knee, and had immediate pain. Claimant reported the pain gradually worsened over the next week or so and that he went to see Dr. Trumper. Claimant reported no previous injuries to his knees. Dr. Nystrom assessed knee strain and ordered an MRI of Claimant's knee. Dr. Nystrom agreed with Dr. Trumper that Claimant probably had a medial meniscus tear and an MCL sprain. Dr. Nystrom noted he would most likely refer Claimant back to Dr. Trumper once he had the MRI results. *See* Exhibit 2.

7. On May 6, 2014 Claimant underwent an MRI of his right knee that was interpreted by Russell Fritz, M.D. Dr. Fritz provided the impression of complex tear of the medial meniscus communicating with a parameniscal cyst along the anteromedial joint line and arthrosis with areas of cartilage loss and chondral fissuring in the medial and lateral compartments. *See* Exhibit 3.

8. On May 7, 2014 Claimant was evaluated by Rosalinda Pineiro, M.D. Dr. Pineiro assessed knee strain, arthritis, and meniscus medial derangement. Dr. Pineiro noted that Claimant's tear was complex and explained the MRI to Claimant. Dr. Pineiro noted that Claimant's right knee had swelling and tenderness as well as limited range of motion and weakness. Dr. Pineiro referred Claimant to Dr. Trumper. *See* Exhibit 2.

9. On June 4, 2014 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that the MRI revealed a medial meniscal tear, along with some early degenerative changes. Dr. Trumper noted that Claimant had a symptomatic medial meniscal tear in the right knee that failed to respond to conservative treatment and opined that a knee arthroscopy was a reasonable option. *See* Exhibit 4.

10. On August 15, 2014 Claimant underwent right knee surgery performed by Dr. Trumper. Dr. Trumper's postoperative diagnoses were degenerative medial meniscal tear right knee, grade 3 chondral changes of medial femoral condyle, and grade 4 chondral defect lateral femoral condyle right knee. *See* Exhibit 4.

11. On October 1, 2014 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that Claimant was making slow progress and Dr. Trumper injected Claimant's right knee to see if it would help jump-start the recovery progress. *See* Exhibit 4.

12. On November 3, 2014 Claimant was evaluated by Dr. Trumper. Dr. Trumper again noted that Claimant was making slow progress. Dr. Trumper opined that clinically Claimant's knee looked reasonably good but noted that at the time of arthroscopy Claimant had some grade 4 chondral changes in the lateral femoral condyle and he suspected the slow progress was related to that. Dr. Trumper noted they would try a series of hyalgan injections as a reasonable next stop and opined that if Claimant did not improve enough the only other option would be to consider a knee replacement. *See* Exhibit 4.

13. Claimant underwent three separate hyalgan injections without improvement.

14. On January 12, 2015 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted Claimant was still symptomatic and having trouble with an increasingly antalgic gait. Dr. Trumper opined that the only other option would be to consider a knee replacement. Dr. Trumper opined that Claimant had essentially failed all other conservative treatment and that the knee replacement was Claimant's only remaining option. *See* Exhibit 4.

15. On March 9, 2015 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that Claimant had not improved with oral anti-inflammatory, knee arthroscopy, or injections. Claimant reported that he did not feel that his symptoms were bad enough where he wanted to consider a knee replacement. *See* Exhibit 4.

16. On May 18, 2015 Claimant was evaluated by Dr. Trumper. Dr. Trumper noted that Claimant was continuing to struggle with the right knee. Dr. Trumper noted that Claimant's history and exam suggested that most of Claimant's symptoms were related to his degenerative changes and that Claimant had grade 4 changes on the lateral femoral condyle. Dr. Trumper opined that Claimant's only reasonable option was a knee replacement. Claimant wanted to get the knee replacement set up. *See* Exhibit 4.

17. On July 9, 2015 Claimant underwent an Independent Orthopedic Evaluation performed by I. Stephen Davis, M.D. Claimant reported assembling tables at work for the garden section when he caught his foot and twisted his right knee with immediate pain and swelling. Claimant reported no prior right knee problems before the work incident and that he held a very active and athletic lifestyle including bicycle touring, golfing, playing with grandchildren, fishing, and maintaining his home. Claimant reported being unable to do the activities presently due to his right knee complaints. *See* Exhibit F.

18. Dr. Davis opined that Claimant sustained an injury to his right knee that was causally related to the April 5, 2014 on the job incident. Dr. Davis opined that the injury was an aggravation of right knee joint symptoms due to a degenerative tear of the medial meniscus and pre-existing osteoarthritis. Dr. Davis agreed that a right total knee arthroplasty as recommended by Dr. Trumper was appropriate based on complaints and examination findings. Dr. Davis opined that the meniscus tear was reasonably considered as causally related to the on the job incident but that Claimant's osteoarthritis was not causally related. Dr. Davis opined that Dr. Trumper's recommendation for right total knee arthroplasty was for treatment of the osteoarthritis and that the operation was not causally related to the subject on the job incident. *See* Exhibit F.

19. Dr. Davis testified at hearing consistent with his report. Dr. Davis opined that Claimant likely suffered a medial meniscus tear on April 5, 2014 but that it was likely an acute tear to an already degenerative meniscus. Dr. Davis reiterated that Claimant's moderate to severe degenerative knee joint disease pre-existed April 5, 2014 and that someone with grade III or IV osteoarthritis similar to Claimant's would normally have pain, swelling, popping, and locking. Dr. Davis opined that there was no objective evidence to show that the April 5, 2014 incident caused any acceleration of Claimant's knee condition and that the total knee replacement was not causally related because it was treating the pre-existing osteoarthritis. Dr. Davis opined that Claimant's baseline condition before the work incident was severe longstanding osteoarthritis and

that his baseline condition after the injury continues to be severe longstanding osteoarthritis.

20. Dr. Trumper testified by deposition. Dr. Trumper opined that a meniscal tear can, no question, be the result of a twisting injury. Dr. Trumper noted that while performing surgery they noted the meniscal tear as well as arthritic changes in the inside part of Claimant's knee and the outside/lateral part of Claimant's knee. Dr. Trumper opined that it would be believable if Claimant reported that he was functional prior to the work injury despite the level of arthritis in Claimant's knee. Dr. Trumper opined that he has seen a lot of patients with degenerative osteoarthritis in their joint which is minimally symptomatic or asymptomatic. Dr. Trumper opined that a twisting injury could cause the pathology in a knee to become more symptomatic and less functional and that any injury could make arthritic symptoms become symptomatic. Dr. Trumper opined that based on Claimant's history, he believed the twisting injury in this case caused Claimant's osteoarthritis to become symptomatic. Dr. Trumper opined that Claimant's meniscal tear was essentially gone at this point but that Claimant remained symptomatic and that it the exacerbation of arthritis was the source of Claimant's pain.

21. Dr. Trumper opined that a twisting injury can advance or accelerate arthritis or a degenerative condition, and that exacerbation of Claimant's arthritis occurred in this case. Dr. Trumper opined that all conservative options had been exhausted at this point and that the right total knee replacement was reasonable and necessary. Dr. Trumper opined that the need for the total knee replacement was due to the exacerbation of Claimant's pre-existing osteoarthritis caused by the work injury. Dr. Trumper opined that an injury can lead to needing a knee much sooner than if you hadn't had an injury, and that is what happened in Claimant's case.

22. Dr. Trumper opined that he had lots of patients who have had grade 4 arthritis but have been asymptomatic. Dr. Trumper noted patients with knees similar to Claimant's knee who become asymptomatic after surgery to repair the meniscal tear even though he knows they have exposed bone arthritis. He opined that was actually pretty common.

23. Claimant testified at hearing that prior to the April 5, 2014 work injury, he had no history of right knee pain or limitations due to his right knee. There were no medical records presented identifying any prior pain or limitations in Claimant's right knee. Prior to the injury, Claimant was very active with bicycle riding and golfing (walking). Claimant participated in regular bicycle riding including long tours of 500 to 700 miles and golfed approximately three times per week.

24. Claimant's testimony is credible and persuasive. It is consistent with Dr. Trumper's opinion that it can be common to be asymptomatic despite underlying osteoarthritis and is consistent with a lack of medical documentation on prior right knee pain or limitations. Claimant presented openly, candidly, and is found credible. Claimant did not have pain or symptoms in his right knee prior to the April 5, 2014 work injury.

25. The opinion of Dr. Trumper is found more credible and persuasive than the opinion of Dr. Davis. Although Dr. Davis opined that someone with osteoarthritis similar to Claimant's would normally have pain, swelling, popping, and locking, Dr. Trumper is more persuasive that it is common to be asymptomatic despite osteoarthritis similar to Claimant's. Dr. Trumper is persuasive that the work injury caused an aggravation to Claimant's underlying osteoarthritis, caused it to become symptomatic, and sped up Claimant's need for a right total knee replacement.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to show, more likely than not, that the right total knee replacement recommended by Dr. Trumper is reasonable, necessary, and causally related to his April 5, 2014 work injury. Although the MRI reflects that Claimant had pre-existing and significant osteoarthritis of his right knee, the work injury on April 5, 2014 aggravated Claimant's underlying osteoarthritis, caused it to become symptomatic, and accelerated Claimant's need for a right total knee replacement. Prior to April 5, 2014 Claimant was able to work full duty without restrictions, Claimant had no pain complaints specific to his right knee, Claimant had no limitations in his right knee, and Claimant lived a very active lifestyle. Claimant's testimony is credible and persuasive that he had no prior right knee pain or limitations before his work injury. The injury, as found above, involved a twisting mechanism which caused not only a degenerative meniscus to suffer an acute tear, but it caused the underlying osteoarthritis to become symptomatic. Claimant has established that his need for a right total knee replacement is due to his work injury which significantly aggravated his asymptomatic underlying osteoarthritis and accelerated his need for treatment. Therefore, the ALJ concludes that Claimant has met his burden to show, more likely than not, that the need for a right total knee replacement was aggravated and accelerated by his work injury and that the treatment is causally related to his work injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that the right total knee arthroplasty recommended by Dr. Trumper is reasonable, necessary, and causally related to his April 5, 2014 work injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 23, 2015 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues to be determined by this decision are the following:

1. Whether the claimant has proven by a preponderance of the evidence that on August 11, 2014 she sustained an injury to her neck arising out of and in the course of her employment with the respondent-employer.

2. If so whether, the medical benefits claimant received on and after August 11, 2014, specifically treatment at the Southern Colorado Clinic, P.C., are reasonable, necessary, and causally related to claimant's August 11, 2014, injury.

Based upon the findings and conclusions below that the claim is not compensable as it did not arise out of nor occur in the course of her employment with the respondent-employer, the ALJ does not address any additional theories of liability raised in the pleadings.

FINDINGS OF FACT

1. The claimant was an employee of the respondent-employer on August 11, 2014 employed as a massage therapist. The claimant had worked for the respondent-employer for five years prior to this date. She had never made any previous workers' compensation claims. The claimant is currently a 34 year old female who is no longer employed by the respondent-employer.

2. On August 11, 2014 the claimant reported to work and had a full-day of massages scheduled. On this morning, she was complaining of constant aching, tingling, and numbness. The claimant said she suffered from tightness and her shoulders would "lock-up" on her preventing her from completing her job duties.

3. It was a practice of the respondent-employer, and specifically Dr. Robert Avila, to perform chiropractic adjustments on employees on an as needed basis. Dr. Avila admitted that it was a perk or fringe benefit of employment that employees receive free treatment, whether it is chiropractic care from him or self-administered care to include ultra-sounds. The claimant received treatment in the form of an adjustment from

Dr. Avila on August 11, 2014.

4. On August 11, 2014, Dr. Avila agreed to adjust the claimant. During the adjustment, while the claimant was lying down on her stomach, the claimant stated that Dr. Avila grasped her head from the right side with one hand while yanking her right shoulder away from head. The claimant stated that this manipulation of her cervical spine caused immediate, jarring pain and that she told Dr. Avila to stop and began to cry. She used a pillow case to wrap around her head vertically while holding up her head with the pillow case end with left hand.

5. The claimant thereafter completed a massage and at the end of the massage appointment, the claimant left the respondent-employer and went home where she attempted to rest and treat her cervical spine condition with no success. She placed herself in a C-Collar she had and used it to help brace her neck, along with a towel. The claimant eventually went to Parkview Medical Center in the early morning hours of August 12, 2014. She reported to treating staff that she was suffering from "right-sided neck pain after undergoing spinal manipulation by chiropractor." Her examination revealed neck tenderness. She was told to see her primary care physician for an MRI to rule-out a disc bulge. She was prescribed hydrocodone and diagnosed with a cervical strain.

6. On August 12, 2014, the claimant made her first report of injury to Office Manager Kellie Avila.

7. The claimant did not return to work for over one week.

8. On August 12, 2014, the claimant went to CCOM in Pueblo, CO and began treatment with her ATP Dr. Terrance Lakin.

9. The ALJ finds that the claimant's taking advantage of free chiropractic care create a mutual benefit for the employer and the employee.

10. The ALJ finds that, assuming arguendo that the claimant suffered an injury at the hands of Dr. Avila, such injury did not arise out of nor occur in the course of her employment with the respondent-employer.

11. The ALJ finds that the claimant was obtaining healthcare from Dr. Avila outside of work. She was not on the clock at the time her treatment occurred, and the claimant testified she was not seeing patients or working at the time this treatment occurred. The claimant was not told by the respondent-employer to obtain this treatment on August 11, 2014, and it was not required for her to see Dr. Avila to be able

to work that day or to perform any work for the respondent-employer that day. This is therefore not an injury that arises out of and in the course of the claimant's employment.

12. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffered an injury on August 11, 2014 arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things: the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; a witness' bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course

of a worker's employment arise out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); see also, *Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957). The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms, or that the employment aggravated or accelerated a preexisting condition. Instead, the appearance of symptoms may be the logical and recurrent consequence of a preexisting condition *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985). As noted in *Martinez v. Monfort, Inc*., W.C. No. 4-284-273 (ICAO August 6, 1997), "The fact that the claimant's job duties may have intensified her pain does not compel a different result because the ALJ was persuaded that it is the underlying condition which prevents the claimant from returning to work." *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO October 27, 2008), holds that because claimant's symptoms arise after the performance of a job function a causal relationship based on temporal proximity is not established. The panel in *Scully* noted, "[C]orrelation is not causation," and a coincidental correlation between the claimant's work and his symptoms does not mean there is a causal connection between claimant's injury and her work sufficient to prove compensability. To establish a compensable injury the claimant must prove to a, "reasonable probability" that there is a causal connection between the need for treatment and the employment. *Morrison v. Industrial Claim Appeals Office*, 760 P.2d 654 (Colo. App. 1988).

5. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1) (c); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

6. The question of whether the claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

7. Under the 'dual purpose' doctrine, an injury suffered by an employee performing acts for the mutual benefit of the employer and the employee is compensable. *E.g., Deterts v. Times Publishing Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976). This doctrine has been applied in cases where claimant sustained an injury as

claimant conducted some personal business or activity that also involved an errand for employer. For example, in *Capalety v. The Humane Society of the Pikes Peak Region*, W.C. No. 4-232-993 (October 24, 1996) the ICAO affirmed an award of benefits where claimant was injured on his lunch hour after conducting some personal business at the courthouse. On the way to the courthouse to tend to his personal affairs, the claimant had stopped at another office to check for subpoenas in connection with his employment. Because the claimant's trip during his lunch hour had the dual purpose of benefitting both his employer and him, the accident that occurred while returning to the office was compensable. *Shirzadian v. University of Colorado/Denver*, W. C. No. 4-619-435 (February 13, 2006) In order for the 'dual purpose' doctrine to apply, there must be in fact a purpose of the activity that benefits the employer and claimant. It is not sufficient that claimant may be happy because of the activity. The employer needs to practically benefit from the action causing the alleged injury *Hanson v. Fairfield & Woods PC*, W.C. No. 4-892-321-01 (July 23, 2013). In *Hanson*, ICAO reversed the ALJ's decision finding the claim's injury compensable, holding that finding the activity that lead to the injury made the employee happier does not trigger or implicate the 'dual purpose' doctrine to make the claim compensable. The ICAO warned in its ruling to avoid extending the 'dual purpose' doctrine to cases where there was no connection to the course and scope of employment, such as cases where claimant was injured shopping for clothes to wear at work. ICAO stated, "In order for fringe benefit to be considered a part of employment, there must be shown a substantial nexus between employment and the use of the benefit," such as direction by the employer to engage in the activity, and if this nexus does not exist, the activity is extraneous to any fringe benefit offered to claimant. *Hanson*, supra. If the action of an employee is for the employee's sole benefit, the injury does not arise out of and in the course of employment. *Hanson*, supra; citing *Brogger v. Kezer*, 626 P.2d 700 (Colo. App. 1980). In *Zamecnik v. Bradsby Group*, W.C. No. 4-684-646 (April 9, 2007), the mere fact that the employer reimbursed claimant the cost of parking or traveling to work did not mean an injury while walking from a parking lot to the employer's building was compensable, because the employer did not require where the employee must park or required the employee to take a certain mode of transportation to work. Citing this case, ICAO stated, "This absence of direction by the employer led to the conclusion there was no nexus between the employment and the process of arriving at work." *Hanson*, supra. In *Hanson,* supra, the employee's provision of a parking pass to claimant that allowed her to park in the employer's building, thus making her happier, was not directed or controlled by the employer, was for the sole benefit of claimant, and the injury that occurred while claimant was obtaining the parking pass from her employer was found not compensable.

8. The ALJ concludes that any possible injury suffered by the claimant arising out of the events of August 11, 2014 did not arise out of nor occur in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: December 4, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

The issues presented for hearing were compensability, medical benefits, temporary total disability benefits and average weekly wage. The parties stipulated to an AWW of $501.46.

FINDINGS OF FACT

1. The Claimant was employed as a custodian in maintenance for the Employer on September 25, 2014. Her job required her to mop, sweep, change light bulbs and haul bags of trash to the dumpster.

2. At about 7:25 p.m. Claimant testified that she was mopping inside the warehouse break room shortly before her work shift ended. Her mop hit a white table leaning against a larger, brown rectangular table that was propped against a wall. This caused the white table to fall onto her left foot in turn knocking her over so that she hit her right shoulder against a nearby upright table then fell to the floor.

3. Claimant testified that she initially was shaken up by the fall, but she got up, used her left hand to pick up the white table and prop it up back to where it had been leaning against the brown table.

4. Claimant finished mopping the break room floor then went to report the injury to her supervisor, Amber (Powell) Samora. Ms. Samora, however, was not at her desk. Because Claimant was not paid overtime she punched out, as required, and left the premises. Employer's records show Claimant punched out at 7:43 p.m.

5. Claimant testified she did not know how to use the Employer's phone, and so could not page her supervisor after the injury. Oscar Franco, assistant store manager for Employer, testified he had not taught Claimant how to use the Employer's phone system, but still felt she "could have" contacted Ms. Samora before she left work.

6. After she arrived home, Claimant took off her shoe and then first noticed her foot was sore. She did not know she was injured until she got home. At 8:20 p.m., she left a message for Fred Mecillas, her direct supervisor, who was not then at the store. Claimant then called the store and reached the manager on duty, Amber Samora (formerly Powell). Ms. Samora wanted to know why Claimant left before reporting the incident. Eventually, about two hours later, an Employer representative called and told her to go to the emergency room for treatment.

7. Around 8:32 p.m., directly after speaking to Claimant, Ms. Samora went to the break room. Nothing looked out of place to her.

8. Mr. Franco also took photos of the break room and he testified about the position of the tables located in the break room. He did not believe that Claimant's work accident could have happened as she described based upon his knowledge of the break room setup.

9. After considering the conflicting and confusing testimony of the various witnesses concerning Claimant's accident, the ALJ finds that a table fell onto Claimant's foot as she described and she fell into another table and onto the floor.

10. Claimant went to Longmont United Hospital Emergency Department after speaking with the Employer representative. Dr. Leslie Armstrong documented a history and physical exam consistent with multiple areas of contusion and muscular strain status post fall. Dr. Armstrong noted limited range of motion in Claimant's right shoulder, no tenderness to palpation over bony structures and mild tenderness to palpation over the deltoid muscle. Claimant had normal neck range of motion, and small left dorsal foot contusion with no swelling. Dr. Armstrong diagnosed a right shoulder strain and left foot contusion. Dr. Armstrong recommended that Claimant remain off work two to three days and to follow up with a workers' compensation doctor. Claimant was sent home with her arm in a sling. Claimant did not report neck pain to the emergency room staff.

11. The next morning, September 26, 2014, Claimant filled out an injury report with Mr. Franco, assistant manager, and reported an injury to her left foot and right shoulder. She did not report striking her head nor did she report neck pain.

12. The Employer referred the Claimant to Workwell for medical treatment. William Ford, a nurse practitioner, examined the Claimant and noted limited range of motion of the right shoulder in all planes and significant shoulder pain with strength testing. Claimant reported pain in the left dorsal foot and Mr. Ford noted swelling in the dorsal area, but no bruising. The Claimant reported, for the first time, upper back and neck pain. The PA took Claimant off work and stated, "The cause of this problem is related to work activities."

13. At a follow-up visit September 29, 2014 Claimant's condition was assessed as contusion of the left foot and back; strain of the right shoulder and cervical strain.

14. Claimant saw Dr. William Alexander at Workwell on October 20, 2014. Claimant posterior neck, but no swelling was observed. Claimant reported that her left foot pain had resolved. Dr. Alexander recommended that Claimant continue physical therapy and get an MRI of her cervical spine.

15. Mr. Ford evaluated the Claimant again on November 3, 2014, at which time she did not complain of any left foot or ankle pain. She complained only of pain in her neck and right shoulder.

16. On November 13, 2014, the Claimant, for the first time, complained of pain over the left lateral ankle to Mr. Ford. Mr. Ford also noted that Claimant had a cervical MRI which showed multilevel degenerative changes, and degenerative stenosis.

17. On December 1, 2014 Dr. Alexander requested MRIs of Claimant's left foot and right shoulder.

18. On December 18, 2014, an MRI of Claimant's right shoulder showed degenerative disease of the acromioclavicular joint, a tear of the supraspinatus, and osteophytes

19. The MRI of Claimant's left ankle, which occurred on December 17, 2014, showed edema around the anterior talofibular ligament, suggesting sequela of a high-grade sprain and/or partial tear.

20. Dr. Alexander referred Claimant to Dr. Gregg Koldenhoven at Front Range Orthopedics & Spine for evaluation and treatment for her right shoulder and left ankle injuries. Dr. Koldenhoven examined the Claimant on December 29, 2014 and noted swelling of the right shoulder, painful movements and a positive impingement test. He also noted swelling, decreased range of motion and painful movement of the left ankle, along with evidence of instability.

21. On January 20, 2015, Claimant also was evaluated at Front Range Orthopedics by Dr. Robert Fitzgibbons for her right shoulder injury. Dr. Fitzgibbons recommended arthroscopic repair of Claimant's rotator cuff and prescribed aggressive physical therapy.

22. On March 6, 2015, Dr. Mars, a provider at Workwell, imposed work restrictions of 10 pounds maximum with occasional lifting and/or carrying; no squatting or bending. Dr. Mars noted that Claimant's complaints seem out of proportion with the findings, and she exhibited non-physiologic findings s well.

23. Claimant testified at hearing that as a result of the work incident of September 25, 2014, she had injuries to her left ankle and right shoulder, for which she requested treatment, including surgery. Claimant testified that as a result of the work incident, she also injured her neck, upper back, and had persistent headaches.

24. On February 10, 2015. Dr. Kathleen D'Angelo evaluated the Claimant at the request of Respondents. Dr. D'Angelo supplemented her initial report on March 25, 2015 after additional materials were provided, including medical records and a surveillance report.

25. Dr. D'Angelo opined that Claimant's right shoulder problems are degenerative and not due to an acute injury. Dr. D'Angelo opined that Claimant did not sustain an acute rotator cuff tear nor did Claimant aggravate a pre-existing rotator cuff tear. Dr. D'Angelo stated that she did not "believe it's an aggravation because I'm not seeing anything within the MRI nor did I see anything on her evaluation, particularly in

the early evaluations, that would lead me to believe there was intra-articular acute damage." Dr. D'Angelo did not further explain her opinions concerning lack of intra-articular acute damage and why that would mean Claimant could not have aggravated a pre-existing degenerative shoulder condition when she fell.

26. Dr. D'Angelo also opined, and the ALJ agrees, that Claimant did not sustain an injury to her cervical spine nor are the left ankle MRI findings related to or aggravated by the work incident.

27. Claimant sustained a contusion to her foot, and she reported resolution of her foot pain on October 20, 2014. There is no credible evidence that Claimant's left ankle condition or need for any surgery to her left ankle is related to the work accident.

28. There is no persuasive evidence which supports Claimant's testimony that she suffered injuries to her upper back and neck as well as ongoing headaches as a result of the September 25, 2014 incident. Claimant had normal neck range of motion in the emergency room on September 25, 2014 and did not report any pain in her neck or upper back at that time.

29. The ALJ finds that although some of Claimant's shoulder pathology was preexisting, she aggravated the pre-existing condition to produce the need for medical treatment when she fell at work on September 25, 2014. There was no persuasive or credible evidence to suggest that Claimant had right shoulder symptoms prior to September 25, 2014, or that she had sought treatment for similar symptoms in her right shoulder in the past.

30. Claimant has not returned to work since her work injury, and continued to have work restrictions. Employer has not offered any modified work within Claimant's restrictions. As such, Claimant is entitled to temporary disability benefits beginning September 26, 2014, less any applicable offsets, based on the stipulated AWW of $501.46.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. A preexisting condition does not disqualify a Claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. The evidence presented in this case consisted primarily of conflicting testimony concerning whether the Claimant indeed injured herself in the manner she described. After carefully considering and weighing the evidence presented, the ALJ concludes that Claimant proved a table fell onto her left foot while she mopped the break room in the course and scope of her employment. The ALJ credits Claimant's testimony regarding the table falling onto her foot as credible. However, the Claimant has failed to prove that the ongoing need for treatment of her left *ankle* is related to the industrial accident. The Claimant received reasonable and necessary conservative treatment for her left foot contusion and reported resolution of her foot pain on October 20, 2014. The left ankle pain surfaced much later as referenced in the medical records. The ALJ is not persuaded that the table falling on Claimant's foot somehow caused a high grade left ankle sprain especially in light of Claimant's reports that her left foot pain had resolved. Any request for additional medical treatment to the left foot including surgery to the left ankle is denied.

7. The Claimant has also proven that she fell into a table and onto to the floor causing an aggravation of a pre-existing degenerative condition in her right shoulder. Again, the ALJ credits Claimant's testimony as credible although the ALJ notes that Claimant has reported subjective symptoms that are out of proportion with objective findings. To date, Claimant has undergone reasonable, necessary and related conservative treatment for the right shoulder. The Claimant has proven entitlement to ongoing treatment for the right shoulder, including a rotator cuff tear repair. The ALJ is not persuaded by evidence to the contrary including Dr. D'Angelo's opinions.

8. Claimant has also alleged upper back and neck pain, and headaches, but the ALJ can find no persuasive evidence that links any of her ongoing complaints to the industrial accident. As such, Claimant has failed to prove that she sustained an upper back or neck injury or headaches as a result of the September 25, 2014 industrial accident, and any request for medical treatment to those body parts is denied.

9. Claimant is entitled to TTD benefits if her work injury causes a disability, the disability causes claimant to leave work, and claimant misses more than three regular working days. Section 8-42-105, C.R.S. The Workwell staff restricted Claimant from working beginning on September 26, 2014. Her restrictions were later modified, but never fully lifted. In addition, there was no evidence that Respondents offered modified duty work. Claimant has not worked since September 25, 2014. Claimant's inability to work was precipitated by the injury to her left foot and right shoulder. Given that Claimant is still on work restrictions and requires ongoing treatment to her right shoulder, the Claimant has proven entitlement to TTD commencing on September 26, 2014 at the stipulated AWW. Respondents are entitled to any applicable offsets.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim is granted. Claimant sustained a contusion to her left foot, and an injury (aggravation of a pre-existing condition) to her right shoulder on September 25, 2014.

2. Claimant is entitled to TTD commencing on September 26, 2014, and ongoing at the stipulated AWW of $501.46.

3. Claimant is entitled to additional medical treatment for her right shoulder, including but not limited to, the rotator cuff repair surgery recommended by Dr. Fitzgibbons.

4. Any request for additional medical treatment for the left foot, headaches, neck pain or upper back is denied.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 27, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-964-938-02

ISSUES

1. Whether the Claimant prove by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on September 16, 2014 while performing services arising out of and in the course of his employment with his Employer.

2. If the Claimant proved he suffered a compensable injury, whether he proves he is entitled to medical benefits

FINDINGS OF FACT

1. The Claimant is a line cook who has worked for the Employer since the summer of 2014 through recruitment from his culinary school. The Claimant's job duties generally include prep work and cooking or preparing meals from scratch.

2. The Claimant's shift would either start at 6:00 a.m. or 7:00 a.m. If the Claimant was scheduled to work a 6:00 a.m. shift, the Claimant would be working the breakfast line. As part of his job duties working the breakfast line, the Claimant would need to make bacon and eggs and would need to get baked goods into the oven. If the Claimant worked the 7:00 a.m. shift, then the Claimant would be working prep for the lunch meal. As part of his prep for the lunch meal, the Claimant would be required to set up salads, get fruit and finish up on the grill. If the Claimant was working the 7:00 a.m. shift, he would not be responsible for any breakfast prep work, including making bacon.

3. Both the Claimant and the Respondents submitted Claimant's time card for September 16, 2014. The time card reflects that the Claimant started his shift at 7:17 a.m. Consequently, on September 16, 2014, the Claimant was not working the breakfast shift; rather, the Claimant was working the shift involving lunch preparation.

4. Both the Claimant and the Respondents submitted into evidence an Incident Report dated September 16, 2014. The Incident Report is signed by the Claimant and the Claimant's supervisor, Michael Wishon. The Claimant, in his own handwriting, indicated that at approximately 6:00 a.m., he injured his left shoulder while he was taking trays of salad into the walk-in cooler. Specifically, the Claimant stated that while taking the trays of salads into the cooler, the door of the walk-in cooler closed on his left shoulder causing an injury. The incident report reflects that the Claimant reported this incident at approximately 9:00 a.m. on September 16, 2014.

5. At the hearing, the Claimant testified that his alleged injury to his left shoulder on September 16, 2014, occurred while he was taking trays of salad into the walk-in cooler. He testified that he had prepped the salads and placed them on metal

sheet trays and then he had to take the trays of salads and put them on racks located in the freezer. He testified that he had opened the freezer door and was in the process of putting the tray onto the speed rack but as he was doing this the freezer door started to close on him while his hands were still full with the salad trays. He testified that the freezer door caught him and hit him on the shoulder and he felt immediate pain and the pain continued throughout the day. He kept working through that pain because he just had to finish. Later that day, he went to fill out workers' compensation paperwork. Although the Claimant acknowledged that he had previously reported there were no witnesses or other employees working at the time of the incident, at the hearing he testified on cross-examination that another employee would have been working as the line cook at that time. The Claimant's testimony at the hearing is rather significantly inconsistent with other previous reports that the Claimant made about the incident to his supervisor, to an insurance company investigator and to an evaluating physician.

6. The Claimant introduced as evidence the transcription of a recorded statement that was taken of him by a private investigator dated November 26, 2014. During his recorded statement, the Claimant told the private investigator that he had injured his left shoulder at 6:00 a.m. on September 16, 2014, and that the injury occurred while he was taking trays of bacon out of the walk-in cooler, that the door to the walk-in cooler suddenly closed, striking his left shoulder. The Claimant told the private investigator that, because the injury occurred at 6:00 a.m., he was the only person in the kitchen at the time. Based on the review of the transcript of the recorded statement, the Claimant exhibited no uncertainty in describing how he believed the September 16, 2014 incident occurred.

7. At hearing, the Claimant acknowledged that, in his answers to Respondents' interrogatories dated March 27, 2015, he had stated that his left shoulder injury occurred at 6:00 a.m. on the morning of September 16, 2014, while he was taking trays of bacon and sausage out of the cooler. The Claimant also admitted that, in his answers to interrogatories, he indicated that there were no witnesses to this alleged incident.

8. The Claimant attended an independent medical evaluation with Dr. Elizabeth Bisgard on April 13, 2015. At that time, Dr. Bisgard attempted to take as detailed a statement as possible of how this incident occurred. Dr. Bisgard testified that, because her task was to make a causality analysis as to whether an injury at work caused the Claimant's left shoulder problems, it was important to take as detailed a statement as possible as to how the Claimant believes his left shoulder injury occurred. According to Dr. Bisgard's report, as well as her testimony at hearing, the Claimant stated that on September 16, 2014, he worked the early shift from 6:00 a.m. to 2:00 p.m. After he put the water on for oatmeal, he went into the walk-in cooler to retrieve eight trays of bacon and/or sausage. The Claimant described to Dr. Bisgard holding the door with his left foot and grabbing the trays with both hands. The Claimant told Dr. Bisgard that, as he turned to his left to go out the door, the door came back too fast, and that in order to protect his left hand from being slammed by the door, he leaned forward

and allowed the refrigerator door to hit the top anterior part of his left shoulder. The Claimant told Dr. Bisgard that he developed immediate and severe pain in his left shoulder and cried out in pain. The Claimant told Dr. Bisgard that he set the trays down in the refrigerator and stood in the main kitchen area for about 20 minutes because of the pain. The Claimant told Dr. Bisgard that Ray, the person coming in for the 7:00 a.m. shift, had not arrived at that point. The Claimant told Dr. Bisgard that he was eventually able to finish the setup for breakfast by using only his right hand and placing the food on the cart to set up the line. The Claimant recalled cooking bacon that morning in the oven, scrambling eggs with his right hand, and either making pancakes or waffles. The Claimant told Dr. Bisgard that he was able to make oatmeal, but he could not lift the pot off the stove, so he used a pan and scooped the oatmeal into smaller bowls. The Claimant told Dr. Bisgard when his co-worker Ray arrived at 7:00 a.m., the Claimant did not discuss the injury, as Ray had to set up his own station. At approximately 9:00 a.m., when the Claimant's supervisor, Michael Wishon arrived, the Claimant told Dr. Bisgard that he spoke with him about the injury.

9. At the hearing, Dr. Bisgard testified that the Claimant had absolutely no difficulty recalling in detail the details of the alleged incident. At no time did the Claimant tell Dr. Bisgard that he was not sure of how the injury occurred, or that he was in any way confused as to how it occurred.

10. Dr. Bisgard also testified that the Claimant has a partial tear to the left supraspinatus. Usually, the mechanism of injury for this type of injury would be a "throwing" mechanism. Dr. Bisgard testified that this type of injury is not usually caused from a strike to the shoulder, such as from a freezer door closing.

11. At the hearing, the Claimant testified that subsequent to filing the Employer's First Report of Injury, the Employer had not provided him a copy of the September 16, 2014 incident report. This ALJ finds that the first time that the Claimant received a copy of the September 16, 2014 incident report was sometime in early May 2015, after counsel for Respondents had provided counsel for the Claimant a copy of the Incident Report. As found above, Claimant's review of the Incident Report in early May 2015 was subsequent to his recorded statement with the private investigator, subsequent to answering Respondents interrogatories, and subsequent to his statements made to Dr. Bisgard.

12. The Claimant acknowledged that, on several occasions subsequent to the completion of his Incident Report, he in fact had stated that the September 16, 2014 incident occurred while he was taking trays of bacon out of the walk-in cooler at 6:00 a.m. on September 16, 2014, as opposed to what he stated in his Incident Report, which was the injury occurred while taking trays of salad into the walk-in cooler at approximately 6:00 a.m. As an explanation, the Claimant testified that he was "confused" about the details of how this incident actually occurred. However, during his testimony, the Claimant acknowledged that, in his answers to interrogatories, he stated that he experienced immediate pain on a scale of 9 out of 10 following this alleged

incident. Dr. Bisgard testified that, in 20 years of her practice, she has never experienced a patient who, following an incident, experienced immediate and sudden onset of severe pain, and was not able to describe the details of the actual incident.

13. The Claimant acknowledged that, as of September 16, 2014, he did not have any health insurance.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents, and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Ctr. v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The totality of the evidence does not support a determination that the Claimant suffered a compensable injury on or about September 16, 2014 while performing his work activities. As outlined in below, the Claimant's various inconsistent statements as to how this injury occurred contain too many discrepancies for this Judge to find that the Claimant has proven by a preponderance of the evidence that he has suffered a compensable injury on September 16, 2014:

a. In the incident report completed by the Claimant on the date of the injury, the Claimant reported that the injury occurred at 6:00. However, the Claimant's time card of September 16, 2014 reflects that the Claimant did not begin his shift until 7:17 a.m.

b. Because the Claimant's time card reflects that he did not begin his shift until after 7:00 a.m., the Claimant would have been working the salad shift. If that is the case, then another employee would have been present at the time of the alleged injury. As found above, the Claimant told both the private investigator and Dr. Bisgard that, in no uncertain terms, no employee was present at the time of this alleged injury.

c. As found above, the Claimant, in his incident report completed on September 16, 2014, described that the injury occurred as a result of him taking trays of salad into the cooler at approximately 6:00 a.m. The Claimant was then not required to provide another description of how this incident occurred until Claimant provided a recorded statement to the private investigator on November 26, 2014. At that time, the Claimant told the private investigator that the injury occurred at 6:00 a.m. taking trays of bacon out of the cooler. As found above, the Claimant consistently provided this description of how this incident occurred through late April 2015. At that time, for the first time, Claimant received a copy of the Incident Report he completed which, in his own writing, he described the incident occurring when he was taking trays of salad into the cooler.

As noted above, Claimant attempted to explain the significant discrepancies in how this incident occurred by stating that he was confused about the details. However, as found above, Claimant showed no uncertainty of the details when describing the incident to both the private investigator and Dr. Bisgard. As found above, the Claimant provided Dr. Bisgard minute details of all the events that he believed occurred subsequent to his alleged work injury.

The Claimant acknowledged that, as of September 16, 2014, he did not have health insurance. This fact raises the concern that the Claimant may have suffered an injury to his left shoulder outside of work, and then chose to report this injury as an injury that occurred at work in order to obtain medical treatment through the workers' compensation system.

Because there are concerns regarding the credibility of the Claimant's testimony and his prior inconsistent statements, the Claimant has failed to meet his burden of proving that he suffered a compensable injury while performing services arising out of and in the course of his employment in this case.

ORDER

Based on the foregoing, it is ORDERED:

1. The Claimant has failed to meet his burden of proving a compensable injury by a preponderance of the evidence. As such, any remaining issues are moot.

2. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is therefore denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 30, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-966-802-01

ISSUES

- Whether Claimant proved by a preponderance of the credible evidence that the industrial injury to his left shoulder should convert to a whole person impairment.

- Whether Respondents proved by the preponderance of the credible evidence that Claimant has a 6% scheduled impairment rating.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 61 year old male who sustained an industrial injury to his left shoulder on August 5, 2014. Claimant testified he was injured when a picnic table he was sitting on at work collapsed. Claimant tried to catch himself with his outstretched left hand. After the fall, he stated he had pain in his left shoulder, neck, and back.

2. An MRI on August 5, 2014 revealed, among other things, a full thickness tear of the supraspinatus.

3. On January 9, 2015, Claimant underwent surgery with Mark Failinger, M.D. Dr. Failinger performed the following procedures, "Left shoulder examination under anesthesia; left shoulder arthroscopic subacromial decompression; left shoulder mini-open rotator cuff repair; left shoulder distal clavicle resection with inferior osteophyte resection; left shoulder debridement of the labrum, rotator cuff with glenoid chondroplasty; and left shoulder biopsy of crystals."

4. On February 8, 2015, Claimant returned to full duty work, and was able to perform the essential functions of his job. Claimant testified the pain in his back resolved. His current pain included pain in his shoulder, neck, and chest. with the onset of pain when he reached overhead.

5. On April 7, 2015, Claimant saw Dr. Kathryn Bird. Claimant rated his pain as two out of ten. Claimant indicated he was able to sleep on his left shoulder. He specifically denied neck pain. Claimant described good range of motion of his arm except above his shoulder. Dr. Bird noted Claimant had no crepitus, full range of motion, and five out of five strength.

6. On June 1, 2015, Claimant returned to Dr. Bird. He rated his pain as one out of ten. Dr. Bird noted Claimant had normal bilateral shoulder strength. Dr. Bird

opined Claimant was at maximum medical improvement ("MMI") with 6% scheduled impairment for loss of range of motion, and 10% scheduled impairment for distal clavicle resection. These impairments combined for 15% upper extremity impairment rating which can convert to 9% whole person impairment if appropriate.

7. On June 30, 2015 Respondents issues an Amended Final Admission of Liability admitting to the 15% schedule rating and reasonably necessary medical care.

8. On July 29, 2015, Claimant filed his Application for Hearing seeking to convert his scheduled impairment rating to a whole person rating.

9. On August 25, 2015, Respondents filed their Response to Application for Hearing contesting Claimant's permanent partial disability benefits.

10. On September 2, 2015, Claimant returned to Dr. Failinger reporting the onset of mild pain in his left shoulder due to "doing more around the house such as mowing" and specifically "trying to take out a bush with a chainsaw." Dr. Failinger noted Claimant had full and painless abduction of his shoulder on all planes. Claimant's strength on forward elevation, external rotation, and abduction were all 5/5. Claimant also had active forward elevation greater than 150 degrees, with no discomfort elicited.

11. On September 30, 2015, Claimant saw Dr. Failinger again. Claimant described shoulder pain and stiffness with lifting arm above head. Claimant specifically denied any night pain or additional symptoms. Dr. Failinger noted Claimant had full range of motion of his cervical spine. Claimant also had full range of motion of his left arm in all planes. Claimant specifically denied night pain or additional symptoms. Dr. Failinger recommended a repeat MRI scan.

12. On October 29, 2015 Claimant returned to Dr. Bird. Dr. Bird noted, "[Claimant] mostly notices pain when reach[ing] overhead. Pt. has occasional numbness and states it's hard to get comfortable at night." Dr. Bird noted Claimant had stopped doing his home exercise program. She noted Claimant saw Dr. Failinger who recommended six more therapy visits which Claimant reported had "helped." Claimant's repeat MRI scan showed tendinosis of the supraspinatus and the infraspinatus. She opined Claimant remained at MMI and recommended he continue with his home exercise program and continue taking naproxen. Dr. Bird's assessment includes "impingement syndrome, shoulder, left."

13. Because Claimant's August 5, 2014 MRI revealed a full thickness tear of the supraspinatus, the ALJ reasonably infers that the tendinosis of the supraspinatus revealed on Claimant's repeat MRI scan more likely than not was related to his August 5, 2014 industrial injury or treatment for that injury.

14. But Claimant failed to present persuasive evidence that the tendinosis of the supraspinatus required any treatment, would not resolve on its own, or further restricted his range of motion beyond his rated impairment.

15. Respondents hired Michael R. Striplin, M.D., to review Claimant's medical records set forth below. These were limited to:

    - 1/7/2015 note from Denver-Vail Orthopedics
    - 1/20/2015 note from Angela Waller, PA-C.
    - 6/1/2015 note from Dr. Bird.
    - 9/2/2015 note from Dr. Failinger.
    - 10/29/2015 note from Dr. Bird.

16. On November 6, 2015, in response to Respondents' interrogatories, Dr. Striplin opined:

    - Claimant's left upper extremity rating would not convert to a whole person equivalent.
        - He reasoned that the definition of "arm" used in the AMA Guides should be used when interpreting the word "arm" in section 8-42-107(2) of the Workers' Compensation Act. Because this is a legal opinion, the ALJ gives it no weight.
        - He also reasoned that the assignment of impairment for resection of the distal clavicle is "controversial" sine Table 19 of the AMA Guides does not contain a does not contain a space identified for the resection rating. The ALJ finds this reasoning to be incredible and not persuasive.
    - Claimant's then-current left shoulder symptoms "may be related" to residual post-operative pain. The ALJ finds this opinion is not stated to a reasonable degree of medical probability and does not find it persuasive.
    - Claimant remained at MMI.
    - No further treatment appeared necessary based on the records reviewed. The ALJ finds that because Dr. Striplin reviewed so few medical records, his opinion regarding the need for further treatment is not persuasive.
    - Dr. Bird's impairment rating was performed correctly.

17. Claimant returned to work with no restrictions and was able to perform all of his job duties.

18. Claimant testified he has ongoing left shoulder pain when attempting to lift his arm above shoulder height. Claimant testified that he experiences dull pain in his neck and pectoral area when attempting to move his arm above shoulder height. However, Claimant can perform that task.

19. On cross-examination, Claimant testified that medical records which reported he was able to sleep on his left shoulder, had no joint pain, no back pain, no neck pain, and no night pain, were wrong. He denied ever reporting his pain level at 1/10 although medical records so reflect. He also testified that Dr. Failinger's report dated October 5, 2015was wrong to the extent that that it reports that he had no night pain; other symptoms; and had full, painless active range of motion in all planes of his cervical spine.

20. Based on the totality of the evidence, the ALJ credits Claimant's medical records over Claimant's testimony where the two conflict.

21. Based on the totality of the evidence, the ALJ finds that Claimant did not establish by a preponderance of the evidence that the part of his body that has been functionally disabled or impaired does not appear on the schedule of disabilities.

22. Based on the totality of the evidence, the ALJ finds Respondent's did not establish by a preponderance of the evidence that Claimant should not have been assigned a 10% rating for his distal clavicle resection.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000). The ALJ has found Claimant's testimony less credible than his medical records. The ALJ has also found relevant portions of Dr. Striplin's report to be incredible and unpersuasive.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.*

Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.* The ALJ has found that Claimant did not meet this burden of proof.

Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO November 16, 2007); *O'Connell v. Don's Masonry,* WC 4-609-719 (ICAO December 28, 2006). The ALJ finds and concludes that Claimant's alleged pectoral and neck pain do not represent a functional impairment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is not entitled to a conversion of his scheduled impairment rating to a whole person impairment rating.

2. Claimant is entitled to a 15% scheduled impairment rating.

3. Issues not expressly decided herein are reserved to the parties for future determination.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 24, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her low back on August 11, 2014.

2. Whether Claimant established by a preponderance of the evidence an entitlement to reasonable, necessary, and related medical benefits for treatment of her low back including but not limited to epidural steroid injections.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from November 11, 2014 and ongoing.

STIPULATIONS

1. Claimant's average weekly wage is $306.00.

2. Dr. Weber is an authorized provider.

FINDINGS OF FACT

1. Claimant worked for Employer as a donation clerk with duties that included assisting with and collecting donations dropped off by donors at Employer's donation center.

2. On August 11, 2014 Claimant was assisting a donor with a television and was attempting to carry the television with the donor into the donation center. The donor lost grip of the television and Claimant attempted to catch the television to keep it from hitting the ground. Claimant felt immediate pain in her low back and immediately reported the injury to her supervisors.

3. Claimant did not seek immediate medical attention and continued to work for Employer. On August 20, 2014 Claimant attempted to help a donor get clothing out of a car when she felt worse pain in her back and she sought medical attention.

4. On August 20, 2014 Claimant was evaluated by Michelle Waller, PA-C. Claimant reported right mid back pain with some numbness below her scapula as well as lower back pain and right sided hip pain after trying to move a television at work on August 11, 2014. Claimant also reported having right leg numbness since August 11, 2014 and that both of her hands were numb at times. Claimant reported the pain was

excruciating and that she was helping a donor get clothes out of a car that day which caused worse pain. *See* Exhibit G.

5. Claimant reported no prior back issues. PA Waller noted that claimant was tender to palpation on the right SI joint, right lower back, lumbar spine, right sided parathoracic muscles, and medial to and inferior to the scapula. PA Waller noted Claimant was unable to walk on her toes and had pain with thigh extension and weakness and pain with right leg flexion. PA Waller assessed low back pain, radiculopathy, back pain, and sacroilitis. PA Waller recommended a referral for physical therapy and that Claimant undergo an MRI of her lumbosacral spine. PA Waller asked Claimant to hold returning to work until August 25, 2014 and noted at that time Claimant could return with restrictions of no lifting over 10 pounds, no repetitive lifting over 5 pounds, no carrying over 10 pounds, and no kneeling, squatting, or climbing. *See* Exhibit G.

6. On August 22, 2014 Claimant underwent an MRI of her lumbar spine that was interpreted by David Solsberg, M.D. Dr. Solsberg noted mild degenerative retrolisthesis at L5-S1 with mild zygapophyseal joint arthritis and no stenosis, fluid in the interspinous space at L4-5 and L5-S1 consistent with interspinous bursitis, dorsal paraspinal fatty muscle atrophy, mild curvature of the spine convex to the left, and no fracture, epidural hemorrhage, conus lesion, or plexus pathology identified. *See* Exhibit 5.

7. On August 28, 2014 Claimant began physical therapy at Mountain View Physical Therapy. Claimant reported a prior history of right greater than left hip pain with x-rays performed one year ago and some arthritis. See Exhibit 10.

8. On September 2, 2014 Claimant was evaluated by PA Waller. PA Waller assessed lower back pain. PA Waller noted that Claimant was improving significantly and had performed one full day of work where she had significant pain but was working again and was doing a little bit better. PA Waller recommended Claimant maintain her work restrictions and continue with physical therapy. PA Waller requested that Claimant follow up with the clinic in two weeks. *See* Exhibit G.

9. On September 16, 2014 Claimant was evaluated by Andrea Weber, M.D. Claimant reported continued pain at her mid to lower back with the pain occasionally radiating down the right side, with wrap around and radiation down the right buttock and lateral to the anterior thigh but not below the knee. Claimant reported that she needed to get back to her usual function and that she had never had back problems before this. Claimant reported being uncomfortable if in any position for too long. *See* Exhibit G.

10. Dr. Weber noted on examination that Claimant had some significant spasm at the left lower thoracic and entire lumbar paraspinous muscles, that Claimant was tender to palpation on the right greater than left SI joint, in the right lower back, the lumbar spine, and on the right sided parathoracic muscles. Dr. Weber assessed lower back pain and lumbosacral radiculopathy. Dr. Weber opined that Claimant had an

acute injury to the back with abnormal MRI suggesting pathology and inflammation at L4-S1 and that Claimant's symptoms were consistent. Dr. Weber noted that Claimant was better than on the first day seen but had some persisting symptoms. Dr. Weber did not see anything surgical on the MRI report and recommended Claimant continue with physical therapy and return in one month for follow up. *See* Exhibit G.

11. On October 14, 2014 Claimant was evaluated by Dr. Weber. Claimant reported that she was not getting much better and had no major improvement overall. Claimant reported her job did not care about her restrictions and that she still had to do some lifting as there was not enough staff to do the jobs needed. On examination, Dr. Weber again noted some significant spasm in the bilateral lumbar paraspinous muscles and tenderness to palpation right greater than left SI join, right lower back, lumbar spine, and in the right sided parathroacic muscles. Dr. Weber continued to assess lower back pain and lumbosacral radiculopathy. Dr. Weber noted that Claimant would continue physical therapy and would be referred to a specialist. Dr. Weber opined that Claimant had symptoms compatible with nerve root issues at L5 on the right. *See* Exhibit G.

12. On November 11, 2014 Claimant was evaluated by Dr. Weber. Claimant reported increased pain and that on the right side it now radiated to her foot and on the left side that it radiated to her knee. Claimant reported that she had continued to work and had continued to do physical therapy but had missed physical therapy due to concerns for her job and her inability to get to physical therapy on days that she had to work. Claimant reported needing her job and that her job had made some accommodations but she did not feel that they had made enough and that she lifted things outside her restrictions because she was afraid of getting fired if she did not. Claimant reported she had not seen a specialist because she did not hear from them. On examination, Dr. Weber again noted some significant spasm in the bilateral lumbar paraspinous muscles, tenderness to palpation right greater than left SI joint, right lower back along the lower lumbar spine, and right sided parathoracic muscles. Dr. Weber noted tenderness deeply at the gluteous bilaterally. Dr. Weber assessed lower back pain, and lumbosacral radiculopathy. *See* Exhibit G.

13. Dr. Weber noted Claimant was getting worse and not adhering to the restrictions due to the threat of job loss. Dr. Weber noted she was taking Claimant out of work and that Claimant needed to see neurosurgery/spine specialist. Dr. Weber noted her concern with Claimant's symptoms and worsening. Dr. Weber provided Claimant direct information for specialist and told Claimant to make an appointment as soon as possible. *See* Exhibit G.

14. On November 28, 2014 Claimant was evaluated at physical therapy by Hannah Johnson, PT. PT Johnson noted that Claimant had demonstrated minimal to no improvement since initiating physical therapy in August. PT Johnson opined that the objective impairments are often inconsistent with Claimant's subjective reports and that Claimant displayed a minimal amount of distress while reporting 8-9/10 pain unless a formal assessment is being conducted. PT Johnson opined that upon physical

examination, the vocalization of pain is often disproportionate to the test performed. PT Johnson also noted that the previous MRI does not support Claimant's complaints of severe radicular symptoms. PT Johnson noted that Waddell testing of the lumbar spine was positive suggesting non-organic pain or malingering. *See* Exhibit 10.

15. On December 1, 2015 Claimant was evaluated by J. Paul Elliott, M.D. Dr. Elliott noted on examination that Claimant was tender to palpation over the lumbar spine and bilateral SI joints. Dr. Elliott noted that Claimant presented with symptoms of axial low back pain and bilateral lower extremity radiculopathy but that her imaging revealed no significant central or foraminal stenosis or dynamic instability. He noted that Claimant's exam was notable for diffuse proximal lower extremity weakness, which did not entirely correlate with her imaging. Thus, he discussed considering bilateral lower extremity EMG/NCVs to better evaluate Claimant's weakness. He also recommended that Claimant undergo a high volume epidural steroid injection. *See* Exhibit 7.

16. On December 18, 2014 a physician advisor provided a review of Claimant's case. Yusuke Wakeshima, M.D. noted Dr. Elliot's recommendation for EMG/NCV testing and his request for high volume epidural steroid injection midline at L5-S1. Dr. Wakeshima noted that questions arose as to whether this is appropriate at this juncture. Dr. Wakeshima opined that for the injection to be considered Claimant must first undergo electrodiagnostic studies to confirm whether there are any radiculopathy issues and that based on the electrodiagnostic studies if significant radiculopathy is appreciated, then consideration can be made for epidural steroid injections. Dr. Wakeshima opined that if no significant pathology is appreciated, then consideration can be made for possible facet joint injections. *See* Exhibit 6.

17. On December 23, 2014 Claimant underwent EMG and NCV studies performed by Daryl Figa, M.D. Dr. Figa noted that Claimant presented with lower back pain radiating to the legs. Dr. Figa provided the impression that Claimant had moderate acute L5 and S1 radiculopathy on the right and left. *See* Exhibit 7.

18. On December 26, 2014 Claimant was evaluated by Dr. Weber. Claimant reported she had seen the specialist and reported that her EMG was abnormal. Dr. Weber noted on examination that Claimant had some minimal spasm bilaterally in the lumbar paraspinous muscles, tenderness to palpation in the right greater than left SI joint, right lower back just along the lower lumbar spine, at the right sided parathroacic muscles, and in the right buttock deeply. Dr. Weber noted the physical therapist's note about right hip concern and Claimant reported not being aware of any hip problems in the past. Dr. Weber noted on examination some discomfort in the hip with internal and external rotation. Dr. Weber assessed lower back pain, lumbosacral radiculopathy, and right hip pain. Dr. Weber noted that an x-ray of the hip was completed and that Claimant had evidence of arthritis at the right hip that was likely contributing to her symptoms and advised Claimant to see her PCP about the right hip. Dr. Weber opined that the right hip was not workers' compensation related. *See* Exhibit G.

19. On January 12, 2015 a physician advisor provided a review of Claimant's case. Lynne Fernandez, M.D. opined that based on multiple non-organic signs and lack of clear findings on MRI, the epidural steroid injection should be declined and opined that there were not clear physical findings and history to show the injection would be beneficial. *See* Exhibit 6.

20. On January 29, 2015 Claimant was evaluated by Dr. Weber. Claimant reported continued back pain and right posterior hip pain. Claimant reported being frustrated as she needed to get back to work and reported that insurance had not agreed to provide her with any injections. Dr. Weber noted that Claimant was in a holding pattern, had seen neurosurgery, and had an EMG test but that Claimant had not been approved for further therapy including physical therapy and spinal injections. Dr. Weber noted she was at the limit of what she could do. Dr. Weber noted that she would request a Level II evaluation. Dr. Weber opined that Claimant had osteoarthritis of the right hip which was a chronic condition but that Claimant's current symptoms were not all due to the right hip. *See* Exhibit G.

21. On March 2, 2015 Claimant was evaluated by Joseph Fillmore, M.D. Dr. Fillmore noted that Claimant was sent by Dr. Weber for an evaluation and that it appeared they were looking for a second opinion. Claimant reported primarily right leg pain and back pain that began on August 11, 2014. Dr. Fillmore noted in physical findings that Claimant had decreased sensation in an L5 pattern on the right, and positive fabers/patricks on the right. Dr. Fillmore noted that the MRI findings showed a retrolisthesis at L5-S1 and that the EMG showed an L5 and S1 radiculopathy. Dr. Fillmore assessed acute back pain with sciatica, and spondylolisthesis, acquired. Dr. Fillmore opined that Claimant was not at maximum medical improvement (MMI) and recommended deferring an impairment rating. Dr. Fillmore opined that Claimant should have the epidural injections and that he did not see any contraindications or significant non-physiologic findings during his visit. Dr. Fillmore also opined that pending the outcome of the epidural injections, Claimant could hopefully return to work but that she was not yet at maximum medical improvement. *See* Exhibit 8.

22. On May 8, 2015 Claimant was evaluated by Dr. Weber. Claimant continued to report low back pain with pressure at the low back and right side, into the buttocks, and to the sacrum. Dr. Weber noted that Claimant had been recommended to have an epidural steroid injection by two separate physician specialists but that it had not yet been approved by workers' compensation insurance. Dr. Weber advised Claimant that she needed to get going on treatment and recommended that Claimant go through her other insurance because the longer Claimant had pain the harder it would be to treat. Dr. Weber advocated that Claimant get treatment with the next step sooner rather than later since Claimant's symptoms had failed to resolve with conservative measures. *See* Exhibit G.

23. On May 9, 2015 Claimant underwent an independent medical evaluation performed by Michael Rauzzino, M.D. Claimant reported being injured on August 11, 2014 and that she had immediate back pain. Claimant denied having a prior back

injury. Claimant reported prior hip problems that were not currently a concern. Claimant reported lower back pain that started at about the L3 level and that radiated down to the gluteal cleft with some radiation into the right buttock. Dr. Rauzzino reviewed the MRI as well as the EMG/NCV tests. Dr. Rauzzino opined that the MRI showed no significant foraminal stenosis at any level and did not show any significant nerve root compression at any level. Dr. Rauzzino opined that Claimant did not have a herniated disc or fracture but had mild facet joint arthritis in her lower back. Dr. Rauzzino noted that the EMG, however, was positive for L5 and S1 radiculopathy bilaterally despite the absence of a structural lesion compressing those nerves. *See* Exhibit F.

24. Dr. Rauzzino opined that based on imaging there was no evidence of compression of any of the nerve roots which would be consistent with bilateral L5 and S1 radiculopathy and noted that although Claimant had mild degenerative changes at L5-S1 there was no acute structural injury to her lumbar spine that would account for the severity of her symptoms eight months after her injury. Dr. Rauzzino opined that quite possibly Claimant sustained a muscular strain when moving the television set, but that the strain should have resolved with time. Dr. Rauzzino noted that Claimant had some non-organic findings with numbness only at the tips of her feet from the metatarsals to the tips of her toes that is not explained physiologically by examination. He noted that Claimant also had weakness more proximally than disatally which was not consistent with the levels suggested by the EMG. Dr. Rauzzino opined that the only abnormal finding in Claimant's workup was the EMG/NCV. Dr. Rauzzino believed Claimant's diagnosis was acute lumbar strain and mild chronic degenerative changes of her lumbar spine and did not see any evidence of a new structural injury to her back that would be attributable to her work related injury. *See* Exhibit F.

25. Dr. Rauzzino noted that Claimant reported prior right hip pathology. Dr. Rauzzino opined that Claimant's current presentation was not the same as the pre-existing condition. Dr. Rauzzino opined that an epidural steroid injection would only be done if there was some structural problem that it would treat in the L5-S1 area. Dr. Rauzzino opined that in Claimant's case there was no evidence to support and noted that although a positive EMG existed, the EMG is not an exact science and that he weighed the MRI more heavily than the EMG. He also opined that Claimant's physical examination did not correlate with the EMG. Dr. Rauzzino opined that Claimant's ongoing complaints were not related to her reported August 11, 2014 work injury. *See* Exhibit F.

26. On July 14, 2015 Claimant was evaluated by Dr. Weber. Claimant reported continued low back pain. Dr. Weber noted Claimant had chronic issues for almost one year now without resolution. Dr. Weber again recommended that Claimant go forward with treatment for her back through regular insurance rather than waiting for workers' compensation to come through. Dr. Weber noted she would refer Claimant to Dr. Rentz but suspected the referral might need to come from Claimant's primary care provider. Dr. Weber continued to list Claimant's work status as unable to work. *See* Exhibit G.

27. On August 13, 2015 Claimant was evaluated by Jack Rentz, M.D. Dr. Rentz noted that Claimant was being evaluated for chronic pain associated with low back pain. Dr. Rentz performed an examination and noted the treatment plan would be for lumbar transforaminal epidural steroid injection at L5-S1 on the left and right. Dr. Rentz noted that physical therapy would be considered after the epidural steroid injection for facet if Claimant had better symptom control. *See* Exhibit 9

28. On September 14, 2015 Claimant underwent bilateral L5-S1 transforaminal epidural steroid injections performed by Dr. Rentz. *See* Exhibit 9.

29. Dr. Weber testified at hearing consistent with her medical reports. Dr. Weber opined that the claim was work related and that Claimant's MRI after the first visit showed evidence of inflammation and acute L5/S1 pathology. Dr. Weber opined that the EMG referral a few months later also was consistent with acute radiculopathy. Dr. Weber was unaware of Claimant's significant treatment for her right hip previously in Texas. However, Dr. Weber opined that Claimant's back pain radiates in a different pattern. Dr. Weber noted the physical therapist's opinion and that the opinion told her that Claimant might have some exaggeration during physical therapy. Dr. Weber maintained her opinion that the injury was work related and that both the MRI and EMG were two objective sources that showed an acute back injury occurred.

30. Dr. Rauzzino testified at hearing consistent with his IME opinion. Dr. Rauzzino opined that the lumbar spine was not the cause of Claimant's current complaints and that her complaints were not emanating from a low back injury. He opined that the MRI did not show a structural lesion that would be causing her reported pain. He opined that x-rays did not show instability in the spine or impingement. Dr. Rauzzino opined that the only limits are Claimant's subjective reports of pain. He opined that the EMG, although positive, is not an exact test and that the MRI test is more objective. He opined that the EMG is positive in an area where Claimant does not display radiculopathy and that the EMG does not correlate with Claimant's reported symptoms. Dr. Rauzzino opined that with only Claimant's subjective complaints and an invalid EMG, the current symptoms Claimant had were not work related. Dr. Rauzzino opined that although he knows Dr. Elliott and believes him to be competent and qualified, that Dr. Elliott got it wrong and that injections were not the correct thing to do in Claimant's case.

Prior medical treatment

31. On September 2, 2010 Claimant was evaluated by James Spradlin, D.O. Claimant reported pain on the right hip that radiated to her right knee when there is a low pressure storm in the area. Claimant reported that after the weather improved, she noted improvement in her pain. Claimant reported the right hip pain and radiation stemmed from a fall down the stairs at her home two years prior. Dr. Spradlin noted that Claimant would be sent for an x-ray of the right hip and right knee to assess the joint and cause of her pain. *See* Exhibit N.

32. On December 16, 2010 Claimant was evaluated by Christopher Loar, M.D. Claimant reported right hip pain, depression, headaches, lightheadedness, and difficulty sleeping and that her symptoms started in May of 2008. Claimant reported that she had osteoarthritis in the right hip and that her symptoms impaired her ability to perform her daily life activities. Claimant reported pain of 7-10/10. Dr. Loar opined that Claimant's gait was embellished and dramatic and that there was no objective difficulty in Claimant's ability to do work activities such as sit, stand, move about, lift, carry, handle objects, hear, or speak. Dr. Loar opined that based on the history and physical exam there were no objective neurological abnormalities to support Claimant's complaint of 7-10/10 pain. *See* Exhibit M.

33. On January 12, 2011 Claimant was evaluated by Dr. Spradlin for a primary complaint of a cough. Dr. Spradlin noted that Claimant's norco prescription for her severe hip osteoarthritis was refilled. *See* Exhibit N.

34. On February 8, 2011 Claimant was evaluated by Dr. Spradlin. Claimant reported severe right hip pain that was interfering with her activities of daily living. Claimant reported limited mobility due to her right hip and that she required assistance at home. Dr. Spradlin noted her limited range of motion in the right hip. *See* Exhibit N.

35. On March 2, 2011 Claimant was evaluated by Dr. Spradlin and again reported hip pain and that she required assistance at home as the hip pain affected her activities of daily living. Dr. Spradlin noted her decreased range of motion and pain in the right hip and noted that Claimant felt some discomfort in her low back from the hip. *See* Exhibit N.

36. On March 15, 2011 Dr. Spradlin wrote a letter to the Law Office of William Bonilla. Dr. Spradlin indicated that Claimant was being seen by his office for depression and severe hip pain and that Claimant was unable to do very much due to the pain. Dr. Spradlin wrote that Claimant was unable to do all the activities of daily living and that Claimant required assistance. *See* Exhibit N.

37. On March 21, 2011 Claimant was evaluated by Dr. Spradlin. Claimant reported that her disability attorney had withdrawn from her case and that she had a hearing in three weeks. Claimant reported worsened hip pain. *See* Exhibit N.

38. On April 5, 2011 Dr. Spradlin wrote a letter addressed "to whom it may concern." Dr. Spradlin again indicated Claimant was being treated for depression and severe hip pain. In this letter Dr. Spradlin noted that Claimant was not able to do all her activities of daily living and that she required assistance. Dr. Spradlin noted that Claimant had difficulty with bending, stooping, and navigating stairs. Dr. Spradlin noted that Claimant had been off work for the last year due to medical problems and that she needed continued care and could not work the next year per doctors' orders. *See* Exhibit N.

39. On May 18, 2011 Claimant was evaluated by Dr. Spradlin. Claimant reported diarrhea that she felt might be related to the stress of being turned down by the disability office. Claimant also reported hip pain and that she was willing to have surgery. Claimant denied having any back pain. *See* Exhibit N.

40. On October 24, 2012 Claimant was evaluated by Dr. Spradlin. Claimant reported severe right hip pain with associated symptoms of muscle pain and back pain. Claimant reported she recently moved back from Corpus Christi where she was living with her uncle helping to care for him. Claimant reported being unable to keep her home due to financial reasons but that she moved back and had a job pending to help. Dr. Spradlin noted that Claimant was aware she needed surgery on her hip and that she had been seeing a pain management doctor in Corpus Christi. Claimant reported her hip was getting worse and that she had back pain but reported that she had no financial ability to pay for the surgery and after care required. Dr. Spradlin noted pain on the hips with some difficulty getting from the chair to a standing position and pain after walking short distances and standing for a while. Dr. Spradlin noted that Claimant had an MRI which showed dysplasia of the right hip and that Claimant was aware she needed to see an orthopedic surgeon to help with the joint. *See* Exhibit N.

41. On November 27, 2012 Claimant was evaluated by Dr. Spradlin. Claimant reported she suffered a fall over a pit bull the previous Wednesday. Claimant reported continued right hip pain. Claimant denied back pain. *See* Exhibit N.

42. On August 16, 2013 Claimant was evaluated by Dr. Spradlin. Dr. Spradlin noted Claimant's medication for her hip was refilled and that Claimant would need a hip replacement. Claimant again denied back pain. Dr. Spradlin noted that Claimant had pain in her right hip with prior imaging showing severe degenerative changes and that her pain impaired her ability to walk and stand and secondarily gave her back pain. *See* Exhibit N.

43. On June 26, 2013 Claimant was evaluated at Denver Health Medical Center Emergency Department. Claimant reported right lower extremity pain and that she had been tubing and fell out of the tube and hit a rock on her right hip. Claimant reported being unable to walk and that she could not lift her legs due to her right hip pain. Claimant reported her pain as 10/10. *See* Exhibit O.

44. On January 17, 2014 Claimant was evaluated by Dr. Spradlin. Dr. Spradlin noted that Claimant had chronic hip and back pain and that she would need surgery soon but was unable to afford surgery. Dr. Spradlin noted that Claimant had not been able to work and had limited gait and limited standing abilities. Under ROS Dr. Spradlin noted that Claimant denied back pain. On physical examination Dr. Spradlin noted that Claimant had pain on the hips bilaterally and had some low back pain with difficulty getting up and antalgic gait. *See* Exhibit N.

45. On December 9, 2014 a letter from Dr. Spradlin's office indicated that neither Dr. Spradlin nor any other physician in the practice had treated Claimant for any back or neck injury. *See* Exhibit N.

Credibility

46. Claimant's testimony, overall, is not credible or persuasive. Claimant denied filing a social security claim, living in Corpus Christie, or having any prior back pain before the work injury when she reported otherwise to her past medical providers. Either her reports to the medical providers or her testimony is inaccurate. Claimant also reported to Dr. Weber that she had no prior hip problems when she had a clear and disabling hip condition within the several years prior to seeing Dr. Weber. Claimant's testimony claims no memory of certain events or medical treatment visits but clear memory of others. Overall, Claimant's testimony cannot be relied upon to any degree of certainty.

47. Although Claimant's testimony cannot be relied upon to any degree of certainty, the medical records reflect that Claimant does not shy away from seeking medical treatment for any ailment/incident. Claimant has received extensive medical treatment for various reasons over the past several years. Claimant also exaggerates her reports of pain and pain levels despite a lack of objective evidence to correlate with her extremely high pain level reports. Although Claimant has this history, there is no prior report of a back injury or lumbar injury prior to August 11, 2014.

48. Dr. Spradlin is credible that Claimant had significant and limiting right hip pain and symptoms for which she treated with him from 2008 through 2014. These limitations were to the point where he opined that she had been unable or incapable of working for two years during this period of time. Dr. Spradlin, however, also opined that Claimant's pain reports were never related to back pain or lumbar radiculopathy but were related to the hip and that any pain for which he treated Claimant that dealt with the low back was secondary to and caused by the severe hip osteoarthritis. Dr. Spradlin credibly opined that Claimant had no low back injury or specific pain while treating with him and that he never considered low back disc conditions because most all of her complaints were centered around the hip. Dr. Spradlin is found credible and persuasive.

49. Dr. Weber is also found credible and persuasive that the low back injury (but not the right hip pain) is work related. Dr. Weber opined that the initial MRI after the work incident showed evidence of acute L5/S1 pathology and inflammation and that the EMG study performed a few months later was also consistent with an acute radiculopathy. Dr. Weber opined credibly that hip pain can radiate on the lateral side but that back pain radiates in a different pattern. Dr. Weber opined that Claimant had an acute back injury and that two objective sources, the MRI and the EMG, showed an acute injury. Dr. Weber opined that the treatment provided to Claimant was reasonable, necessary, and related to her August 11, 2014 injury. Dr. Weber is found credible and persuasive.

50. Dr. Fillmore's opinions are also found credible and persuasive. Dr. Fillmore opined that Claimant suffered acute back pain with sciatica, that she was not at maximum medical improvement, and that Claimant should have the epidural injections recommended by Dr. Figa and Dr. Elliott. Dr. Fillmore credibly opined that the MRI showed retrolisthesis at L5-S1 and that the EMG showed an L5 and S1 radiculopathy.

51. Dr. Elliott opined that Claimant's exam did not entirely correlate with her imaging and that is why he recommended she undergo bilateral lower extremity EMG/NCV testing and recommended a high volume epidural steroid injection for her pain. Dr. Elliott did not provide any opinion on causation or relatedness of Claimant's symptoms to her August 11, 2014 work injury. There also is no opinion by Dr. Elliot after EMG testing or any injections.

52. Dr. Rauzzino's opinions are not as credible or persuasive as the opinions of Dr. Weber, Dr. Fillmore, and Dr. Spradlin.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See § 8-41-301(1)(b), C.R.S.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has established by a preponderance of the evidence that she suffered a low back injury that arose out of the course and scope of her employment on August 11, 2014. Claimant suffered a low back injury when attempting to help a donor with a television donation. Claimant has shown that after the injury she has suffered low back complaints and radiculopathy that was different from her prior and pre-existing hip osteoarthritis. This is supported by objective EMG and MRI testing and by the opinions of Dr. Weber, Dr. Fillmore, and Dr. Spradlin. Although Claimant had significant pain complaints in the past surrounding her right hip with corresponding treatment and medical evaluations for her right hip and pain, the current pain Claimant is suffering is more likely than not different and due to her low back work injury. Although Claimant’s testimony is not found to be credible and cannot be relied upon to any degree of

certainty, the objective medical testing through MRI and EMG and the opinions of Dr. Spradlin, Dr. Weber, and Dr. Fillmore are found credible and persuasive that she suffered an acute injury to her low back and that the low back injury was distinct and separate from her pre-existing severe right hip osteoarthritis. The ALJ concludes that Claimant's August 11, 2014 back injury is an independent injury and source of pain from her pre-existing hip issues based on the persuasive medical opinions and the objective testing. The opinion of Dr. Rauzzino is not found as credible or persuasive. Dr. Rauzzino comes to a different conclusion surrounding the MRI and discounts the positive EMG test.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S. (2014); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

As found above, Claimant has established that she suffered a compensable injury on August 11, 2014. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve the effects of her injury. The medical treatment provided for her low back injury to date, including the steroid lumbar injections performed by Dr. Rentz, has been reasonable, necessary, and causally related to her work injury. The injections were recommended to cure and relieve the effects of her work related low back pain. Claimant was referred to Dr. Rentz by her authorized treating provider Dr. Weber who also recommended she undergo the injections. Claimant has established that the injections and the treatment received to date for her lower back was recommended by different authorized treating providers and was reasonable and necessary to attempt to cure and relieve her low back pain.

Temporary Total Disability

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to

establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Claimant has established that her August 11, 2014 work injury caused her a disability that resulted in actual wage loss. Claimant has established that she has been unable to work or earn wages due to her work injury from November 11, 2014 through the present time. Claimant was taken off work by her treating provider Dr. Weber on November 11, 2014 and remains under a no work restriction. This restriction impairs her ability to perform her regular employment. Claimant has not reached maximum medical improvement, has not returned to regular or modified employment, and has not been released to return to regular or modified employment. Thus, Claimant has shown that she is entitled to TTD benefits from November 11, 2014 and ongoing until terminated by law.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her low back on August 11, 2014.

2. Claimant has established by a preponderance of the evidence that the medical treatment she has received to date for her low back is reasonable, necessary, and causally related to her August 11, 2014 injury. Claimant is entitled to continued reasonable and necessary medical treatment for her low back.

3. Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 11, 2014 and ongoing until terminated by law.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 9, 2015

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

- Are Respondents entitled to withdraw a Final Admission of Liability because they proved by a preponderance of the evidence that on September 17, 2014 Claimant did not sustain an injury arising out of and in the course of his employment?

- If Claimant is found to have experienced an incident at work on September 17, 2014 are the respondents entitled to withdraw a Final Admission of Liability because the event did not result in an injury that caused disability or the need for medical treatment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 7 and 9, 10, 11, 12, 14 and 15 were admitted into evidence without objection. The ALJ reserved ruling on Claimant's Exhibit 8. Exhibit 8 is now excluded from evidence because it is not relevant to the issues presented for hearing. Respondents Exhibits A through I were admitted into evidence. Respondents' Exhibit J (interrogatories and Claimant's answers to interrogatories) was partially admitted. Exhibit J was admitted insofar as it contains interrogatory questions 1, 4, 11, 12, 13 and Claimant's answers to these questions.

2. Respondents contend that they should be permitted to withdraw a Final Admission of Liability (FAL) that was filed on January 27, 2015. The FAL admitted Claimant sustained a compensable injury on September 17, 2014 and that Insurer is liable to pay certain medical benefits. The FAL further admitted that Claimant reached maximum medical improvement (MMI) on January 21, 2015 with no permanent impairment. Respondents' now seek to withdraw the FAL by establishing that Claimant did not experience any injurious event while at work on September 17, 2014. Alternatively, Respondents contend that if any potentially injurious event occurred on September 17, 2014 that event did not rise to the level of a "compensable injury."

3. On August 15, 2014 Claimant reported to Mile High Internal Med & Urgent Care (Urgent Care) where he was examined by PA-C Teresa Slager. PA-C Slager noted that Claimant wished to "establish care and be evaluated for shoulder pain." PA-C Slager recorded that Claimant was experiencing "chronic left shoulder pain with acute exacerbation." Claimant advised that his pain had been increasing over the last one and one-half years, that he could no longer lift his arm and that he experienced "catching in the joint" with range of motion (ROM). Claimant stated he could not lift

significant weight or do push-ups. Claimant gave a history that he "separated" his shoulder in high school" and that over the course of his lifetime he "continued to re-exacerbate the injury whether lifting weight, driving for his job, or performing other routine activities." Claimant denied "any new trauma/falls" that could have exacerbated his pain. PA-C Slager assessed chronic left shoulder pain with acute exacerbation and "concern for a rotator cuff tear." PA-C Slager referred Claimant for a left shoulder MRI with contrast.

4. On August 28, 2014 Claimant underwent an MR arthrogram of the left shoulder. The radiologist, Charles Wennogle, M.D., listed his impressions as: (1) Circumferential tear of the labrum with cartilage loss along the glenoid fossa and humeral head with "mild to moderate osteoarthritic changes of the glenohumeral joint;" (2) Through-and-through full-thickness tear but partial-width tear of the distal infraspinatus tendon allowing contrast into the subacromial-subdeltoid bursa with no retraction; (3) Os acromiale with no evidence of significant motion about the fibrocartilaginous articulation.

5. On September 5, 2014 Claimant returned to PA-C Slager to discuss the results of the MRI. On this occasion Claimant reported that his pain had not changed since the previous visit and that significantly limited his ability to work. PA-C Slager advised Claimant of the MRI results and referred Claimant to an orthopedic surgeon. PA-C Slager also advised Claimant to avoid heavy lifting, pushing and pulling.

6. Gregory Labs (Labs) credibly testified as follows. He worked with Claimant in August and September 2014. He recalls that Claimant reported to him that he sustained a shoulder injury. Labs cannot recall the date the Claimant reported the shoulder injury. Claimant only reported one injury to Labs and Labs then sent Claimant to talk to the "boss," Adam Reece. On one occasion Labs observed Claimant performing push-ups, but Labs does not recall when he observed this activity.

7. Adam Reece (Reece) credibly testified as follows. In August and September 2014 he was acting in the role of branch manager at the Employer's Aurora facility. Claimant reported to Reece that he sustained an injury and Reece called the Employer's human resource department to find out what to do. The human resource department advised Reece to "fill out a couple of forms and send" Claimant to a "Workman's Comp facility to be examined." One of the forms Reece was required to fill out was the Supervisor's Accident Investigation Report (SAIR). The SAIR was to be completed within 24 hours of the time Claimant reported the injury. Reece completed the SAIR. (Respondents' Exhibit I, p. 77) Some of the information found in the SAIR was provided by Claimant. The SAIR describes the one and only "incident" that was reported to Reece by Claimant.

8. The SAIR reflects that Claimant's date of injury (DOI) was September 17, 2014 and that the report was completed on September 18, 2014. The SAIR states that Claimant reported a "strain/sprain" of his left shoulder. The description of the "accident" was: "Pulling vinyl insulation, guy was standing on it strained left shoulder."

9. On September 18, 2014 Claimant completed and signed an Employee's Report of Injury. (Respondents' Exhibit I, p.78) In this report Claimant listed the DOI as September 17, 2014 and the date he reported the injury as September 18, 2014. Claimant described the "accident" as follows: "Off loading rolled insulation. Dragging behind me, 1 in each hand. While pulling these rolls my helper by chance stepped on the bag that I was forcing up and over on to the waiting pallet creating a major strain on my left arm and shoulder." Claimant wrote that he wanted to undergo treatment at "Concentra Medical."

10. On September 18, 2014 PA-C Stephanie Missey examined Claimant at Concentra Medical Centers (Concentra). Claimant gave a history that on September 17, 2014 he experienced the "sudden onset" of pain in the anterior left shoulder while "dragging something behind him." PA-C Missey's notes do not contain any indication that Claimant gave a history of shoulder problems prior to September 17, 2014 and do not mention the August treatment for shoulder problems that was provided by PA-C Slager on August 15, 2014 and September 5, 2014. On physical examination Claimant exhibited tenderness to palpation of the anterior AC joint. He demonstrated restricted and painful active ROM. PA-C Missey assessed a shoulder strain and prescribed medication and physical therapy (PT). PA-C Missey imposed restrictions of no lifting, no pushing and no pulling in excess of 20 pounds, no driving and no overhead reaching with the left upper extremity and no use of power tools.

11. On October 2, 2014 PA-C Missey referred Claimant for an MR arthrogram of the left shoulder. She also referred Claimant to an orthopedic surgeon.

12. On October 20, 2014 Claimant underwent a second MR arthrogram of the left shoulder. The radiologist, Dr. Eduardo Seda, M.D., noted that the arthrogram was compared to the "prior MR arthrogram of August 28, 2014." Regarding the supraspinatus tendon Dr. Seda noted a "stable partial tear at the common tendon extending from the articular surface" with contrast "extending into approximately 50% of the tendon." Dr. Seda's impressions were: (1) Stable partial-thickness tear of the common tendon and os acromiale with no changes of abnormal motion and no impingement; (2) Stable large labral tear of the inferior and posterior superior quadrants with suspected old healed posterior inferior glenoid fracture; (3) Stable degenerative cartilage thinning in the posterior glenoid with small inferior humeral osteophytes.

13. On October 23, 2014 orthopedic surgeon John Papilion, M.D., examined Claimant on referral from Concentra. Dr. Papilion noted a history that on September 17, 2014 Claimant was "moving some heavy pallets" when a pallet "got stuck and he pulled it and had immediate pain on the anterior and lateral aspects" of the left shoulder. Claimant also gave a history that about twelve years previously he suffered an injury to the left shoulder. Claimant advised he was treated for this old injury with a subacromial steroid injection and PT resulting in complete resolution of his symptoms. Claimant advised that he "never" had x-rays or an MRI for his shoulder problem. Dr. Papilion's October 23 note does not contain any indication that Claimant mentioned the August 28, 2014 MRI or that PA-C Slager provided treatment for left shoulder symptoms on August 15, 2014 and September 5, 2014.

14. On October 23, 2014 Dr. Papilion reviewed an "MRI arthrogram." According to Dr. Papillion this study revealed a "50% thickness tear of the supraspinatus tendon at the insertion on the greater tuberosity" and "large complex tearing in the posterior-superior labrum. Dr. Papillion assessed a "moderate-grade 50% tear" of the supraspinatus tendon, rotator cuff tear of the left shoulder and a posterior-superior labral tear. From the totality of the October 23 note the ALJ infers that Dr. Papilion reviewed the MRI arthrogram performed on October 20, 2014 and was not aware of the August 28, 2014 MRI.

15. On November 13, 2014 Dr. Papilion opined that Claimant was not doing well and had failed conservative treatment. Dr. Papilion recommended Claimant undergo "exam under anesthesia, arthroscopy, subacromial decompression, and rotator cuff repair."

16. On January 15, 2015 the insurance adjuster wrote a letter to Dr. Papilion providing a copy of the August 2014 MRI and PA-C Slager's Urgent Care notes. Dr. Papilion stated that based on this new information the Claimant's need for surgery was not "work related" and that Claimant had returned to baseline for the injury of September 17, 2014. Dr. Papilion wrote that the newly provided information was "completely different" than the information related to him by Claimant.

17. On January 21, 2015 Concentra physician Matthew Miller, M.D., dictated a note concerning Claimant's condition. Dr. Miller wrote that he examined Claimant on January 20, 2015 and Claimant denied any "prior injuries or problems with his shoulder." However, Dr. Miller stated that Concentra had "received notes from [Claimant's] prior care" and that these records indicated Claimant had undergone a left shoulder MRI 3 weeks prior to the alleged injury of September 17, 2014. Dr. Miller wrote that he asked Claimant why he had an MRI prior to the alleged DOI and Claimant stated "this was related to the same injury despite the date discrepancy." Dr. Miller explained that the "story was a bit unclear, but [Claimant] suggested that he had a prior work injury that led to the first MRI." Dr. Miller stated that upon review of the new medical reports Claimant "has had chronic shoulder problems and the MRI we requested didn't show any changes from the MRI 3 weeks prior to the date of injury." Dr. Miller also noted that Claimant did not "mention" any work-related injury "in the notes from his PCP." Dr. Miller opined Claimant had reached MMI and that "his need for further care is related to non-work related issues."

18. On February 24, 2015 orthopedic surgeon Stewart Weinerman, M.D., examined Claimant. Claimant reported that he had left shoulder pain and the "DOI was in 8/2014 [when] he was pulling a pallet off his work truck it got stuck and he felt sharp pain in the shoulder." Dr. Weinerman noted that he "personally viewed" the shoulder MRI of August 28, 2014 and his findings included an acute rotator cuff tear. Dr. Weinerman diagnosed an acute "Slap tear," shoulder pain and "Rtc Tear Supraspinatus." Dr. Weinerman recommended surgery to treat these diagnoses.

19. On June 2, 2015 Claimant underwent a Division-sponsored Independent Medical Examination (DIME) by Scott Hompland, D.O. Claimant gave a history to Dr.

Hompland that on September 17, 2014 he was "delivering a heavy load" and "his pallet jack became stuck underneath the dock plate." As Claimant was pulling the pallet jack with is "strength" he reportedly felt "instant pain in his left shoulder." Claimant also told Dr. Hompland that he injured his left shoulder when he was 16 years old and again in 2003. However, Claimant state that after both of these injuries his symptoms resolved.

20. Dr. Hompland reviewed the August and October 2014 MRI's. He also reviewed extensive medical records including PA-C Slager's Urgent Care records, the Concentra records, Dr. Papilion's report of November 13, 2014 and Dr. Weinerman's report of February 24, 2015. Dr. Hompland opined that if the August 2014 MRI (requested by PA-C Slager) and Claimant's left shoulder pain pre-existed the DOI (September 17, 2014) then he would agree with Dr. Miller concerning the Date of MMI and conclude Claimant has no impairment related to the injury of September 17. Conversely, if there are "typographical errors" in the medical records and the MRI ordered by PA-C Slager was caused by the injury of September 17, 2014 he would conclude Claimant was not at MMI and needs to undergo surgery.

21. Dr. Papilion testified by deposition on June 9, 2015. Dr. Papilion stated that he reviewed the radiologist's report and the actual MRI images from October 20, 2014. At the deposition Dr. Papilion reviewed the radiologist's report from the August 28, 2014 MRI. Dr. Papilion opined that the two MRI's are different from each other. Specifically, Dr. Papilion opined the October 20 MRI shows a 50 percent tear of the *supraspinatus* tendon while the radiologist's report of the August 28 MRI describes a tear of the *infraspinatus* tendon. Dr. Papilion testified that tears of the infraspinatus and supraspinatus tendons occur at different physiological locations.

22. Dr. Papilion testified that in his opinion Claimant sustained an "acute injury" on September 17, 2014 because there was a "documented work injury" and because there are "definitely different findings on the two MRIs." Dr. Papilion opined that even if there was some "underlying preexisting problems, they were worse" after the September 17 injury.

23. On June 17, 2015 John McBride, M.D., issued a report at Respondents' request. Dr. McBride is board certified in orthopedic surgery and is level II accredited. Dr. McBride's practice involves the treatment of shoulder and knee pathology.

24. In the June 17, 2015 report Dr. McBride stated that he reviewed the MR arthrograms of August 28, 2014 and October 20, 2014. Dr. McBride reviewed the actual images which were available to him on compact disc. Dr. McBride opined that the August 28, 2014 MR arthrogram shows a 13 millimeter "articular-sided tear of the rotator cuff supraspinatus tendon." Dr. McBride further opined that the October 24, 2014 MR arthrogram shows a 14 millimeter "large articular-sided tear" of the supraspinatus tendon. Dr. McBride wrote that the two MR arthrograms "are very similar, if not identical." He further opined that Claimant's pain diagrams are also identical with respect to his left shoulder. In these circumstances Dr. McBride opined that Claimant's "rotator cuff pathology and the labral pathology, as well as the osteoarthritis existed prior to any alleged injuries of September 17, 2014."

25. Dr. McBride testified by deposition on July 13, 2015. Dr. McBride stated that as an orthopedic surgeon he personally reviews MRI films and does not rely solely on a radiologist's report. Dr. McBride reiterated that he personally reviewed Claimant's MRI images from August 28, 2014 and October 20, 2014. He opined that the August 28 MRI image (9 of 20) depicts a 13 millimeter tear of the supraspinatus tendon and that the August 28 MRI does not show a tear of the infraspinatus tendon. Dr. McBride explained the August 28 MRI depicts a tear of the supraspinatus tendon because the torn tendon is attached to a muscle that is "above the spine of the scapula." Dr. McBride reiterated that the October 20 MRI depicts a 14 millimeter tear of the supraspinatus tendon and does not show any tear of the infraspinatus tendon. Dr. McBride explained that the fact the two MRI studies depict a 1 millimeter difference in the length of the tear is not statistically significant. He stated that the 1 millimeter difference is within the "margin of error" and can be explained by how the shoulder was "set up in the MRI gantry."

26. Claimant testified as follows. In early August 2014 he was working on a dock unloading heavy pallets with a hand jack. A pallet caught on something while he was pulling the hand jack "using every last bit of [his] energy." He felt severe left shoulder pain and dropped to his knees. Claimant reported this incident Greg Labs and Wayne Cohen, who he believes were the warehouse manager and the store manager. Claimant did not request medical treatment on this occasion but instead told Labs and Cohen he would "work through the pain."

27. Claimant testified as follows concerning the events of September 17, 2014. He was dragging rolls of insulation that weighed between 75 and 100 pounds. Claimant had a helper who stepped on a roll of insulation that Claimant was dragging. This event caused Claimant to experience shoulder pain that was "like a fire." Claimant felt that he was no longer able to work after the September 17, 2014 event.

28. Claimant testified that on September 18, 2014 he reported the September 17 incident to Greg Labs and Wayne Cohen. According to Claimant, Labs and Cohen "directed" him to "Adam."

29. Claimant admitted that when he was examined by PA-C Slager on August 15, 2015 he did not report any recent traumas or falls. Claimant admitted that when he was examined by PA-C Missey on September 18, 2014 he did not mention the shoulder treatment provided by PA-C Slager in August 2014 and early September 2014. Claimant admitted that despite PA-C Slager's referral he did not seek treatment from an orthopedic surgeon prior to the alleged injury of September 17, 2014. Claimant admitted that he failed to mention the treatment provided by PA-C Slager when the insurance adjuster asked him whether he received treatment prior to September 17, 2014. Claimant agreed that did not mention the August 28, 2014 MRI when Dr. Papilion asked whether Claimant had undergone an MRI prior to October 20, 2014. Claimant admitted that when he was first examined by Dr. Miller he did not mention that he saw his "personal doctor" shortly before the alleged injury of September 17, 2014.

30. Claimant was asked why after the alleged injury of September 17, 2014 he did not disclose to his medical providers that he received prior treatment for his shoulder in August 2014 and early September 2014. Claimant testified that his "thoughts" were that such a disclosure "would jeopardize more if I were to let them know that I had seen my doctors before going to talk to them." Claimant conceded that he did not make a "good decision" when he failed to disclose the pre-injury treatment.

31. The OAC file reflects that on or about March 13, 2015 Claimant filed an Application for Hearing and Notice to Set listing the issues as medical benefits, temporary total disability benefits, petition to reopen and FAL "wrong date and address."

32. On April 10, 2015 Respondents filed a response to the application for hearing and listed, among other things, the issue as "withdraw of admissions."

33. At the hearing the parties agreed that the sole issue for determination by the ALJ is the Respondents' request to withdraw the FAL. (Transcript pp. 3-4).

34. Respondents proved it is more probably true than not that on September 17, 2014 Claimant did not sustain any injury arising out of an in the course of his employment.

35. A preponderance of the credible and persuasive evidence establishes that it is more probably true than not that Claimant falsely reported a September 17, 2014 work-related injury to obtain compensation for a left shoulder condition that is not causally-related to any activity arising out of and in the course of his employment.

36. Claimant's testimony that he sustained a left shoulder injury on September 17, 2014 when a co-employee stepped on a roll of insulation is not credible. The medical records generated after the alleged DOI consistently demonstrate that Claimant failed to tell his authorized providers that in the weeks prior to September 17 he received treatment for a left shoulder condition. Claimant did not disclose to his providers that in the weeks just prior to September 17 PA-C Slager treated him for left shoulder problems, prescribed an MRI and referred him to an orthopedic specialist. Claimant himself admitted that he failed to disclose this information to his various providers. (Finding of Fact 29). Claimant admitted that he did not disclose this information because he realized it might "jeopardize" his claim. Claimant also obfuscated his medical history when he spoke to the insurance adjuster. The ALJ infers from this evidence that Claimant was motivated to conceal his true medical history from his authorized providers and the Respondents in order to obtain workers' compensation benefits for his pre-existing left shoulder condition.

37. Moreover, at hearing Claimant testified that he suffered separate work-related left shoulder injuries in August 2014 *and* September 2014. This testimony is so inconsistent with the history Claimant gave various medical providers that the ALJ finds the testimony is incredible. On September 18, 2014 Claimant reported to his employer that he injured his left shoulder on September 17, 2014 while pulling insulation. On September 18, 2014 Claimant told PA-C Missey at Concentra that he injured his

shoulder on September 17, 2014. On October 23, 2014 Claimant told Dr. Papilion that he injured his shoulder on September 17, 2014 when a "pallet got stuck." Claimant told Dr. Weinerman that he injured his shoulder in August 2014 when he was pulling a pallet off of his truck and a pallet got stuck. On June 2, 2015 Claimant told Dr. Hompland that he injured himself on September 17, 2014 while pulling a pallet jack that got stuck under a "dock plate." The history Claimant gave to these providers is inconsistent with the history recorded by PA-C Slager in August 2014. PA-C Slager documented that Claimant reported chronic left shoulder pain and that he had not suffered any recent trauma that would explain the escalation in his chronic shoulder pain.

38. Claimant's testimony that he suffered injuries in August and September 2014, and that he reported both injuries to the Employer, is contradicted by the credible testimony of Labs and Reece. Labs credibly testified that Claimant reported only *one* injury and that when Claimant reported the injury Labs promptly referred Claimant to Reece. Reece credibly testified that after Claimant reported the injury he promptly completed the SAIR showing that Claimant's DOI was September 17, 2014 and the mechanism of injury was a co-employee standing on insulation dragged by Claimant. The ALJ infers Claimant reported only one injury to the Employer and that was the alleged injury of September 17, 2014.

39. The ALJ is also persuaded that Claimant's condition after September 17, 2014 was no different than it was prior to September 17, 2014. On August 15, 2015 Claimant reported to PA-C Slager that he was experiencing left shoulder symptoms not substantially different than those he reported to PA-C Missey on September 18, 2014.

40. Dr. McBride credibly opined that the shoulder pathology depicted in the October 2014 MR arthrogram (tear of the supraspinatus tendon) predated the alleged injury of September 17, 2014. Dr. McBride persuasively explained that he personally reviewed the August 2014 and October 2014 MRI arthrogram images and that both of them depict nearly identical tears of the supraspinatus tendon and no tear of the infraspinatus tendon. Dr. McBride's opinion is corroborated by Dr. Weinerman who reported that he personally reviewed the MR arthrogram images of August 28, 2014 and these images reveal a tear of the supraspinatus tendon. Dr. Papilion's opinion that the August 28 arthrogram showed a tear of the infraspinatus tendon is not persuasive. Dr. Papilion did not review the actual images but instead relied on the report of the radiologist. The ALJ is persuaded by the testimony of Dr. McBride, as corroborated by Dr. Weinerman, that the radiologist erroneously read the August 28 MR arthrogram as depicting a tear of the infraspinatus tendon rather than the supraspinatus tendon.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. Section 8-40-102(1), C.R.S. Except as noted below, a claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

WITHDRAW OF FINAL ADMISSION OF LIABILITY

Respondents contend a preponderance of the evidence establishes that on September 17, 2014 Claimant did not sustain any injury arising out of and in the course of his employment with the Employer. Consequently, Respondents contend that they should be permitted to withdraw the FAL filed on January 27, 2015. The ALJ agrees with this argument.

Ordinarily, the claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

However, in this case Respondents filed an FAL admitting, among other things, that on September 17, 2014 Claimant sustained an injury arising out of and in the course of his employment and that this injury rendered them liable for medical benefits. The Claimant contested the FAL by seeking medical and TTD benefits. The Respondents then sought to withdraw the FAL by taking the position that Claimant, contrary to his reports, did not experience any injurious event while at work on September 17, 2014.

It is permissible for respondents to seek to withdraw of their own FAL's in cases where the claimant has contested the FAL in accordance with law. *HLJ Management Group v. Kim,* 804 P.2d 250 (Colo. App. 1990); *Parker v. Home Depot USA, Inc.,* WC 4-665-039-01 (ICAO January 14, 2013); *Fausnacht v. Inflated Dough, Inc.,* WC 4-160-133 (ICAO July 20, 1999), *aff'd., Fausnacht v. Industrial Claim Appeals Office,* Colo. App.

No. 99CA1499 (May 4, 2000) (not selected for publication). In this case Claimant has not disputed the right of Respondents to seek withdrawal of the FAL.

Because the FAL admitted that on September 17, 2014 Claimant sustained a compensable injury on arising out of and in the course of his employment, the Respondents now bear the burden of proof to establish that Claimant did not sustain a compensable injury on September 17, 2014. Section 8-43-101(1), C.R.S. (party seeking to modify issue determined by general of final admission shall bear burden of proof for modification); *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

The ALJ concludes Respondents are entitled to withdraw the FAL filed on January 27, 2015. As found, Respondents proved it is more probably true than not that Claimant falsely reported that on September 17, 2014 he sustained an injury to his left shoulder when a co-employee stepped on insulation that Claimant was dragging behind him. Rather, the ALJ finds it is more probably true than not that Claimant reported the alleged injury as a means of obtaining workers' compensation benefits to compensate for a condition that is probably not related to any injury that he suffered while working for the Employer. Specifically, the ALJ has found as a matter of fact that Claimant did not sustain any work-related injury on September 17, 2014. Similarly the ALJ has discredited Claimant's testimony that he suffered a work-related injury in August 2014. Claimant's testimony that he suffered an injurious event on September 17, 2014 is incredible for the reasons stated in Findings of Fact 36 though 38. Moreover, for the reasons stated in Findings of Fact 39 through 40 the ALJ is persuaded Claimant's medical condition after September 17, 2014 was no different than it was prior to September 17, 2014. As found, the ALJ credits the opinion of Dr. McBride that the MRI arthrograms taken on August 28, 2014 and October 20, 2014 are substantially identical. Therefore, the credible and persuasive evidence establishes that after the August 2014 MRI Claimant did not exhibit any new pathology that could have resulted from the alleged injury of September 17, 2014.

In light of these findings Respondents are entitled to withdraw the FAL. The ALJ need not consider Respondents' alternative argument that if Claimant experienced a potentially injurious event on September 17, 2014 the event did not result in a "compensable injury."

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

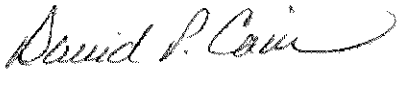
1. Respondents' request to withdraw the Final Admission of Liability filed on January 27, 2015 is granted.

2. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 15, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant was employed with employer as a groundskeeper. Claimant testified that on October 26, 2014, he was working cleaning parking lots at a local high school and was sucking leaves around a sidewalk when he sucked up some glass and reached into bag to empty the bag when he felt a pull from his arm down into his neck. Claimant testified he reported the incident to his supervisor, Mr. Demi.

2. Claimant testified he did not seek medical treatment immediately following his injury because he felt he may have only incurred a strain. Claimant testified he had previously received medical treatment for arthritis with Dr. Eicher and Dr. Lippmann, Jr. The medical records entered into evidence establish claimant was seeking medical treatment for issues involving joint pain and swelling in his wrists and elbow, that was diagnosed as possible rheumatoid arthritis and a potential tick bite during June through September 2014.

3. Claimant testified he was not referred for medical treatment by employer and eventually came under that care of Dr. Liotta. Dr. Liotta first evaluated claimant on December 18, 2014 and noted claimant was complaining of symptoms that had been going on for about six months and came on insidiously. Claimant denied a recollection of the event that brought on claimant's symptoms. Dr. Liotta diagnosed claimant with degenerative disc disease and C5-C6 radiculopathy. Dr. Liotta recommended a magnetic resonance image ("MRI") of the cervical spine.

4. Claimant underwent the MRI on December 30, 2014. The MRI revealed degenerative changes most pronounced at C6-C7 with a large fragment extruding on the right.

5. Claimant was evaluated by Dr. Ceola on January 2, 2015. Dr. Ceola noted that claimant began having quite a bit of pain in his hand and arm back in May. Dr. Ceoloa reviewed the MRI and noted claimant's treatment options would include

possible C6-7 anterior cervical diskectomy with interbody cage and plating. The ALJ notes that this medical record is almost identical to a record from Dr. Miller also dated January 2, 2015, but this record appears to be from an evaluation from Dr. Ceola.

6. Employer filed a first report of injury on January 5, 2015. The first report of injury notes that employer was first informed of the injury on October 26, 2014.

7. Claimant was again seen by Dr. Lippman, Jr. on January 8, 2015. Claimant reported to Dr. Lippman, Jr. on this occasion that he injured his neck on October 26, 2014 while emptying leaves from a leaf blower at work. Dr. Lippman, Jr. noted that he would obtain the records from Dr. Miller. The ALJ notes that this is the first medical history provided by claimant of his symptoms being related to a work injury in October 2014.

8. Claimant returned to Dr. Lippman, Jr. on January 12, 2015. Dr. Lippman, Jr. diagnosed claimant with cervical radiculopathy and provided claimant with work restrictions. Claimant testified he continued to work with the restrictions set forth by Dr. Lippman, Jr.

9. Claimant continued to treat with Dr. Lippman, Jr. On March 10, 2015, Dr. Lippman, Jr. noted claimant's work related diagnosis included cervical radiculopathy and his plan of care included surgery. This diagnosis continued consistently for Dr. Lippman, Jr. after January 2015. Dr. Lippman, Jr. does not explain the relationship of the symptoms in light of the discrepancies that are contained within the medical records. The ALJ further notes that claimant first reported his symptoms being related to an incident at work on October 26, 2014 after claimant obtained the MRI of his cervical spine, over two months after his alleged work injury.

10. The ALJ notes that there are discrepancies in the medical records regarding claimant's report of symptoms to his physicians and when he developed the onset of those symptoms as related to the work injury. The ALJ finds that these discrepancies indicate that claimant's symptoms predated his alleged work injury on October 26, 2014. The ALJ credits the medical history provided in claimant's medical records over claimant's testimony at hearing that his symptoms developed after his October 26, 2014 work injury.

11. The ALJ finds that claimant has failed to demonstrate that it is more probable than not that the medical treatment with Dr. Lippman, Jr. after he reported the work injury to employer in writing on January 5, 2015 related to his alleged October 26, 2014 work injury. The ALJ notes that claimant did not request medical treatment from employer following the work injury and when he did eventually seek medical treatment following his alleged October 26, 2014 work injury, he did not relate his symptoms to the incident when he was reaching into the bag at work.

12. The ALJ therefore determines that claimant has failed to meet his burden of proving that the incident at work on October 26, 2014 resulted in the need for medical treatment to cure and relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S, 2008. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the ALJ credits the medical records entered into evidence at hearing over the testimony of claimant at hearing and finds that claimant has failed to prove that he sustained a compensable injury arising out of and in the course of his employment with employer.

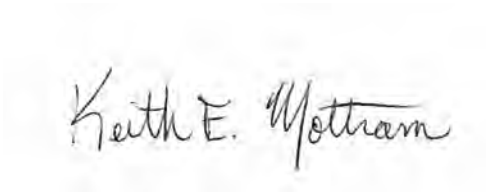
ORDER

It is therefore ordered that:

1. Claimant's claim for benefits related to an October 26, 2014 work injury is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 31, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The issues presented for determination are whether Claimant's ongoing headaches are causally related to his August 12, 2014 work injury; and whether treatment (Depakote and Cambia) for headaches recommended by neurologist Dr. Bennett Machanic is reasonable, necessary and related to the work injury.

FINDINGS OF FACT

1. The Claimant worked for the Employer as a technician and maintenance supervisor. His job duties primarily entailed maintaining rental units.

2. On August 12, 2014, Claimant injured his low back and left elbow when he slipped on stairs while carrying a window air conditioning unit.

3. The Respondents admitted liability for the injury and Claimant has continued to receive medical treatment.

4. Claimant initially received treatment at Union Medical with Dr. Mark Paz. Dr. Paz eventually referred the Claimant to Dr. Franklin Shih.

5. On August 25, 2014, Dr. Shih evaluated the Claimant for his left elbow and low back symptoms.

6. Dr. Shih referred the Claimant to Dr. Nicholas Olsen for an interventional pain management consultation. On November 18, 2014, Dr. Olsen performed a lumbar epidural steroid injection (ESI) at the L5-S1 level of Claimant's spine.

7. On November 20, 2014, Claimant saw Dr. Paz, and reported that since the ESI he feels discomfort his right leg, right buttock and anterior thigh. Claimant reported that the pain in his leg increases with weight bearing. Claimant did not report any headache symptoms to Dr. Paz.

8. On December 1, 2014, Claimant returned to see Dr. Paz. Claimant did not report headache symptoms at that time.

9. Claimant testified that two to three days after the ESI he began to experience headaches, and that he contacted Dr. Olsen's office by telephone two times. Claimant testified that he had never experienced headaches like that prior to the ESI.

10. On December 2, 2014, Dr. Olsen diagnosed dural headaches, a side effect of ESIs. In Dr. Olsen's December 2, 2014 report, he stated that he had talked to

Claimant the day prior and that Claimant reported improvement in his headaches when lying in a supine position and exacerbation when sitting up right.

11. On December 2, 2014, Dr. Olsen and performed a blood patch procedure at the L5-S1 level of Claimant's spine. Claimant reported immediate relief of his headache symptoms.

12. Dr. Olsen re-evaluated the Claimant on December 4, 2014, for Claimant's low back symptoms and headaches. Dr. Olsen's report notes that Claimant experienced significant relief of his headache symptoms following the blood patch on December 2, 2014, but that his headache returned the following day. Dr. Olsen noted that Claimant may need a repeat blood patch, and recommended that Claimant try to rest the remainder of that day and over the ensuing weekend to see if lying down, increasing his fluids and using moderate caffeine will affect the headaches. Dr. Olsen restricted Claimant from working at all to allow him the opportunity to rest over the weekend.

13. Claimant returned to see Dr. Olsen on December 8, 2014. Claimant reported that the Employer required him to work over the weekend despite the "off-duty" order given by Dr. Olsen. Dr. Olsen recommended a repeat blood patch and explained the importance of resting for five days following the repeat blood patch. Claimant agreed to coordinate a rest period following the second blood patch.

14. On December 9, 2014, Dr. Olsen performed the repeat blood patch procedure for the diagnosed dural headaches. Claimant reported a reduction in his headache pain from 9 out of 10 to 5 out of 10 on the pain scale.

15. On December 15, 2014, Claimant returned to see Dr. Olsen. Claimant reported that after the blood patch, he felt better the first day, okay on the second day and by the third day, he his headache and back pain increased. Claimant went to the emergency room, and was prescribed steroids and instructed to follow up with Dr. Olsen. Dr. Olsen diagnosed persistent dural headaches. Dr. Olsen recommended that Claimant continue to observe supine positioning, and increasing his fluid intake including caffeine intake.

16. The emergency room record dated December 10, 2014 discusses only back pain. There is no mention of headaches.

17. On December 22, 2014, Dr. Paz's physician's assistant, Erin Lay, evaluated the Claimant. Claimant reported that his headaches improved but have persisted, occurring twice per day for up to two to three hours in duration.

18. On January 6, 2015, Dr. Shih noted that Claimant's headaches had resolved.

19. Dr. Paz discharged Claimant for "non-compliance" on January 16, 2015. Dr. Paz did not examine or even see the Claimant on that date.

20. On February 13, 2015, Dr. David Yamamoto evaluated the Claimant. Claimant reported headache pain up to 10 out of 10. Dr. Yamamoto indicated he would refer the Claimant to a neurologist.

21. Claimant was eventually evaluated by neurologist, Dr. Bennett Machanic, on May 21, 2015. Dr. Machanic stated that, "[Claimant] has headaches secondary to apparently complications of the epidural steroid injection." Dr. Machanic took a history from Claimant and documented that Claimant had an ESI which resulted in immediate headaches although the Claimant stated to Dr. Machanic that he does not experience a worsening or improvement in his headaches regardless of positional change. Claimant described the headaches as daily and "predominantly occupying the occipital region and apical region with a steady character, interspersed with severe headaches twice daily." Claimant reported the severe headaches typically last two to three hours, but sometimes four to six hours with throbbing, nausea and oftentimes photophobia. Dr. Machanic reiterated that the headaches are not dependent upon Claimant's posture.

22. Dr. Machanic's assessment included post epidural steroid injection headache due to apparent penetration of the dura. Dr. Machanic noted, "This is a mixed headache type of phenomena, mainly involving interspersed migrainous events, but also associated with tension-cephalgic mechanisms." Dr. Machanic recommended Depakote and Cambia to treat Claimant's headaches.

23. Claimant returned to see Dr. Machanic on June 25, 2015. Claimant reported significant improvement in his headaches with the Depakote. He told Dr. Machanic that he missed his Depakote dosage two times which resulted in a headache within 24 hours of the missed dose. Claimant took the Cambia packs on those occasions which reversed the headaches. Dr. Machanic continued the prescriptions for Depakote and Cambia.

24. On August 5, 2015, Claimant saw Dr. Machanic. He reported that he had been experiencing headaches once per day despite the Depakote. Claimant described the headache as an aching hemicranial pain. Claimant had tried Cambia for these headaches but he had run out because a large supply for Cambia had not been authorized. Dr. Machanic increased Claimant's Depakote dosage to twice per day.

25. The Respondents referred Claimant to Dr. Eric Ridings for an independent medical examination which occurred on August 25, 2015. Dr. Ridings met with the Claimant and reviewed Claimant's medical records. Claimant reported to Dr. Ridings that his headaches did not change whether he was lying down or sitting up. He told Dr. Ridings that at first, he experienced random headaches three times per day, and that he would have no headaches for much of the day even when he was up and about. Claimant reported that a headache could arise when he was lying in bed. Claimant reported that the Depakote prevents onset of a headache and that since August 5, he had experienced only one headache because he had forgotten to take the Depakote.

26. Claimant described his headaches to Dr. Ridings as running from the top of neck, up over the back of his head, the top of his head to the bifrontal region, and that

they generalize throughout his head. Claimant stated his headaches were not positional. Dr. Ridings opined that the Claimant's headaches include migrainous features based on the description Claimant provided, and that no specific pathology for the headaches has been identified.

27. In his report, Dr. Ridings ultimately opined that Claimant's ongoing headaches and treatment recommended to alleviate the headache symptoms is not related to the work injury or the ESI performed by Dr. Olsen. Dr. Ridings indicated that the blood patch procedures were reasonable, but any treatment beyond those procedures is unrelated. Dr. Ridings' opinion relied, in part, on lack of documentation in the record that Claimant's headaches were positional and Claimant's reports to Dr. Ridings that his headaches were not positional. Dr. Ridings explained in his report that the hallmark of dural headaches is resolution of symptoms when the patient is lying down and onset or severe worsening of symptoms when the patient sits up.

28. On September 11, 2015 Dr. Machanic opined that Claimant's ongoing headaches and need for ongoing headache treatments is "absolutely" related to the ESI. Dr. Machanic provided no explanation concerning the reported resolution of symptoms as of January 6, 2015 or Claimant's self-report that he does not experience a change in symptoms with a change in position.

29. Claimant testified that about two to three days after the ESI he experienced massive pain from the back of his head over the top to his head. He rated his pain at a level 10 out of 10 on the pain scale. He called Dr. Olsen and eventually returned to see him on December 2, 2014 when he had the first blood patch procedure. Claimant felt relief for a few hours after each blood patch procedure but his headaches continued.

30. Claimant testified that his headaches have continued and if he does not take his pills, he will have headaches all day. Claimant testified that his headaches are better when he lies down and worse when he is sitting up.

31. Claimant admitted that he told Dr. Machanic that his headaches are the same all of the time with no changes in symptoms regardless of his position (sitting/standing versus lying down). Claimant also testified that he told Dr. Ridings that his headache symptoms improve when he is lying down although Dr. Ridings documented no changes in his symptoms with postural changes.

32. Dr. Ridings testified as an expert in physical medicine and rehabilitation. He explained that when an ESI is performed, a small tear can occur in the dura which causes cerebrospinal fluid to leak which leads to headache symptoms. The characteristics of dural headaches include increased severity when standing or sitting within 15 minutes of assuming an upright position; and disappearance or dramatic improvement in symptoms when lying down. Dr. Ridings explained that a blood patch procedure is the most common treatment for a suspected dural puncture.

33. Dr. Ridings testified that based upon specific studies done of post lumbar puncture headaches (or dural headaches), the headaches usually last no more than 14 days.

34. Prior to issuing his report or testifying at the hearing, Dr. Ridings had not reviewed Dr. Olsen's December 2, 2014 report in which Dr. Olsen noted that Claimant had improvement in his headaches when lying in a supine position and exacerbation when sitting up right. Dr. Ridings admitted that if he had the same history Dr. Olsen had at that time he also would have diagnosed dural headaches. Dr. Ridings opined that the blood patch procedures were reasonable to treat the Claimant's suspected dural puncture and resulting headaches.

35. Dr. Ridings admitted that Claimant likely had dural headaches initially, but he opined that Claimant's ongoing headaches are no longer dural. Dr. Ridings relied on Dr. Machanic's report which indicated that Claimant's ongoing headaches were migrainous and "tension-cephalgic" in nature. Dr. Ridings also opined that Depakote and Cambia should not improve a dural headache because the dural headache is caused by a cerebrospinal fluid leak and to improve symptoms related to such leak, the leak needs to be repaired. Depakote and Cambia are not used to treat dural headaches. Finally, Dr. Ridings pointed out that Claimant's headaches resolved as of January 6, 2015 per Dr. Shih which is consistent with a positive response to the blood patch used to treat a dural headache within the appropriate timeframe.

36. Dr. Ridings testified that Claimant should be better now if his headaches were indeed dural in nature, but Dr. Ridings admitted that the medical literature documents one case in which an individual suffered a dural headache for 19 months.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury.

6. Claimant testified that he continues to experience headache symptoms and that lying down improves his symptoms and sitting up or standing worsens them. The medical records, however, contradict Claimant's description of his symptoms. Claimant admittedly told Dr. Machanic that his symptoms remain the same throughout the day, and Dr. Ridings documented no changes in symptoms with postural changes. Both of these providers closely questioned Claimant on the specific issue of postural change because as Dr. Ridings explained, the hallmark of dural headaches is resolution of symptoms when the patient is lying down and onset or severe worsening of symptoms when the patient sits up. Claimant explicitly denied to Drs. Machanic and Ridings that postural changes affected his headaches. Claimant's testimony concerning postural changes impacting his headaches lacks credibility given his inconsistent statements to the medical providers.

7. The ALJ credits the opinions and testimony of Dr. Ridings that Claimant may have suffered a dural headache as a result of the lumbar ESI, but that his dural headache symptoms resolved as of January 6, 2015. Claimant has failed to prove by a preponderance of the evidence that his ongoing headaches are causally related to his work injury or the ESI. Thus, Claimant has failed to prove that the current need for treatment of his headaches, including the Depakote and Cambia prescriptions as well as ongoing treatment with Dr. Machanic specifically for his headaches, is causally related to the ESI of November 18, 2014.

ORDER

It is therefore ordered that:

1. Claimant's request for an award of medical benefits for treatment related to his headaches, including the Depakote and Cambia prescriptions and treatment by Dr. Machanic specifically for his headaches, is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 16, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-972-684-02

STIPULATIONS

1. The parties stipulate that Respondents have never designated an authorized treating physician and all medical providers are in the chain of referral from authorized treating providers.

ISSUES

The following issues were raised for consideration at hearing:

1. Whether the Claimant proved she suffered compensable injuries while performing services arising out of and in the course of her employment with Respondent Employer when she was injured in a motor vehicle accident on November 11, 2014.

2. If the Claimant sustained a compensable work injury, determination of the Claimant's average weekly wage ("AWW").

3. If the Claimant sustained a compensable work injury, whether the Claimant proved she is entitled to temporary total disability benefits from November 12, 2014 ongoing.

4. If the Claimant sustained a compensable work injury, whether the Claimant proved she is entitled to medical benefits for medical care she received as a result of the November 11, 2014 motor vehicle accident.

FINDINGS OF FACT

1. Dr. Amy Jorgensen-Blackburn is the owner of the Employer dental clinic, Amazing Smiles. She is a general dentist, but she chooses to only see kids, so she considers herself a pediatric dentist. Dr. Jorgensen-Blackburn employed the Claimant in her clinic as the "lead assistant" who managed the other 3-4 assistants in the back. Dr. Jorgensen-Blackburn was the Claimant's direct supervisor. Joan Jorgensen is the office manager for the clinic and also Dr. Jorgensen-Blackburn's mother. The Claimant was employed by Employer at about the time the new dental clinic first opened, since May 10, 2010 and she helped the business start up. Dr. Jorgensen-Blackburn testified that she considered the Claimant to be an integral part of her dental clinic. The Claimant was employed there on November 11, 2014, the day on which she sustained physical injuries in a motor vehicle accident ("MVA") while driving home from the clinic where she worked.

2. The Employer's dental clinic was open for business Tuesday – Friday each week, scheduling all client appointments on those days and it was closed Saturday, Sunday and Monday. The Claimant testified that she averaged about 36 hours a week. She saw typically patients from 8am – 5pm. The Claimant agrees that she did not always arrive at work on time, depending on weather, traffic. The Claimant testified that she typically left the office at about 6:00 pm each day the clinic was open after cleaning up and sterilizing the instruments.

3. The Claimant was paid $22.00 per hour. The Claimant did receive a bonus in 2013. She was not promised a 2014 bonus nor did she receive one. The Claimant testified that she had a health insurance benefit until receiving notice that it was terminated. The Employer paid 100% of the health insurance premium. The Claimant testified that she also received a credit card from her Employer for her to put gas in her car. Although, Dr. Jorgensen-Blackburn testified more persuasively that the Claimant did not receive any gas or mileage reimbursement as part of her employment compensation. Rather, the Claimant would often state to Dr. Jorgensen-Blackburn that she was short on money and Dr. Jorgensen-Blackburn felt bad about this and allowed the Claimant to use a gas card every once in a while, but this was a gift, not compensation, and the Claimant would have no expectation that she would have the right to use the gas card or be reimbursed for mileage for travel between her home and the dental clinic.

4. The Claimant's work duties were different at the beginning of her employment in 2010 than they were on the date of her MVA. Her start up work duties included marketing and promotion. Claimant was also a dental assistant and she managed the girls in the back. At beginning, the marketing duties were prevalent and included travel to schools to do orientations. However, as of November 11, 2014, the Claimant's duties were managing the other dental assistants, working as a dental assistant which included chair-side prep and completion of work with clients, obtaining consents from parents for issues related to children receiving dental care (eg papoose boards, nitrous oxide), taking daily notes for regular meetings, and ordering all supplies for the office.

5. The Claimant's duties also included scheduling patients. She would try to fit in patients who were scheduled out further in order to get them in to earlier dates. On Tuesdays – Fridays, the Claimant would confirm patients in the office for scheduled appointments. On Friday, the Claimant would bring home the schedule so that on Monday, when the clinic was closed to clients, she could contact the Spanish-speaking patients with Tuesday appointments to confirm. This activity would occur on and off all day because she would leave messages for patients from Employer's emergency phone line and they would often call back later in the day.

6. In addition to her patient contact for scheduling reminders on Mondays, the Claimant also used the clinic's emergency phone to follow up with parents of

kids/patients after hours at times in cases of a tooth extraction or in cases like that. The Claimant also used the emergency phone at her home in order to answer calls or take messages off the phone when patient's (or the parents) called that line outside of the clinic's normal hours. If there was an emergency call, the Claimant testified that she would text her supervisor, Dr. Amy, to let her know about it. The Claimant testified that she does not recall how many emergency calls came in through this line in 2014. Dr. Amy Jorgensen-Blackburn testified that, on average, about 1 emergency call per month would come in to the emergency phone that the Claimant maintained. The ALJ finds Dr. Jorgensen-Blackburn's testimony to be credible and persuasive on this issue.

7. The Claimant does not have a land line at her home. She does have a personal cell phone in addition to the emergency phone for the clinic. The Claimant agreed that she permitted her daughter to make calls and receive calls on the Employer's emergency phone. The Claimant states that her daughter did not take the phone with her to school, it would remain at home, but she is not sure how the phone was used while it was at home and she was at work. The Claimant stated that the agreement with her daughter about the emergency phone usage was due to the fact that the Claimant wasn't home when her daughter left for school and came home from school, so her daughter was to text the Claimant to let her know when she left for school and when she came home. In any event, the intention was that the emergency phone remain at the Claimant's home and that the Claimant would make calls on Mondays and would receive emergency calls and/or retrieve messages outside of the hours the clinic was open while the Claimant was at her home. The Claimant did not keep the emergency phone with her, so she would only have access to it when she was at home.

8. On Monday, Nov. 10, 2014, the Claimant did call patients to confirm Tuesday scheduled appointments, but she does not recall how many calls that she made on that date.

9. On November 11, 2014, the Claimant worked at the clinic. On that day, it was snowy. This was the last day that the Claimant showed up to work for Employer. Dr. Jorgensen-Blackburn reviewed the Claimant's timesheet for that day which showed the Claimant had clocked out at 5:45 pm. Dr. Jorgensen-Blackburn testified credibly that she did not give the Claimant any additional assignment or work that night (a Tuesday). The Claimant testified that her normal route home from the clinic in Westminster to her home near Johnstown is: Federal to I-25, exits on Hwy 66 and gets on County road 13. The Claimant testified credibly that she was driving her normal route and hit a patch of ice and rolled her vehicle.

10. Medical records from the emergency room where the Claimant was transported from the accident indicate the Claimant was not wearing a seatbelt and she was ejected from the vehicle. The Claimant testified that a passerby saw the Claimant's truck had rolled and called it in. The Claimant was taken to Emergency Department for the University of Colorado Health. The Claimant was admitted and stayed overnight and she was released the next day. Medical records from the University of Colorado Health

confirm this and note that the Claimant suffered pulmonary contusions, a rib fracture, and some neck and back pain, but no evidence of head trauma or loss of consciousness (Claimant's Exhibit 1).

11. The night of the motor vehicle accident, the Claimant had her sister call Dr. Jorgensen-Blackburn to let her know what happened. Dr. Jorgensen-Blackburn agreed that the Claimant's sister called her to let her know what had happened to the Claimant on November 11, 2014. The Claimant testified that the next contact with her Employer was when the Claimant called and talked to Dr. Jorgensen-Blackburn and the Claimant let her know she was in a lot of pain. The Claimant testified that Dr. Jorgensen-Blackburn told her that she hoped the Claimant got better soon. The Claimant doesn't recall if she advised Dr. Jorgensen-Blackburn that she could not return to work that day. The Claimant testified that she believes that on either November 15th or 16th that she wasn't able to get to work because she was currently at the doctor. The day after the Claimant saw the doctor, she had just been referred to Colorado Clinic and she didn't have any new information about her condition yet. The Claimant testified that she told Dr. Jorgensen-Blackburn that she was waiting for the doctor to call her back. The Claimant testified that on about November 22, 2014, she spoke with Dr. Jorgensen-Blackburn about missing work and Dr. Jorgensen-Blackburn asked if the Claimant could get a note from her doctor. The Claimant testified that she called the doctor and obtained a note dismissing her from work and the Claimant photocopied it and faxed it to the Amazing Smiles clinic. Per the Claimant's testimony, this note kept the Claimant off work until Dec. 8, 2014. The Claimant testified that on about December 8, 2014 she received another note excusing her from work and she mailed this to the Amazing Smiles clinic. The Claimant testified that there was one more note excusing the Claimant from work until January and the Claimant testified that she also provided this to the Amazing Smiles clinic. On cross-examination, the Claimant testified that she sent the work status notices to the Amazing Smiles clinic, but did not address them to anyone in particular. There is a note from Dr. Kenigsberg dated November 26, 2014 excusing the Claimant from work until December 11, 2014 due to her MVA (Claimant's Exhibit 2, p. 32). A second note from the Colorado Clinic dated December 11, 2014 requests an excuse from work through December 18, 2014 (Claimant's Exhibit 2, p. 33) and a third note from the Colorado Clinic dated December 17, 2014 requests an excuse for Claimant from work until January 1, 2015 (Claimant's Exhibit 2, p. 34).

12. Dr. Jorgensen-Blackburn testified that the Claimant communicated with her twice by phone call after her motor vehicle accident. Dr. Jorgensen-Blackburn testified that she communicated to the Claimant that I hoped she was feeling better and asked when she would come back to work and indicated that the Claimant could just answer phones at the clinic instead of her regular duties. Other than this, Dr. Jorgensen-Blackburn testified that she only had communications with the Claimant by text after the November 11, 2014 MVA. The text messages between Dr. Jorgensen-Blackburn and the Claimant were exchanged between November 13, 2014 and December 2, 2014. Dr. Jorgensen-Blackburn testified that during all of the communications that she had with the Claimant following the November 11, 2014 MVA, she never receive a note from the Claimant from a doctor taking her off work. Dr.

Jorgensen-Blackburn further testified that if one had been sent to the clinic, she would have received it because she reads all of her mail after the office manager Joan opens it.

13. The Claimant testified that at some point, she received a note that her insurance coverage terminated as of 11/5/14 (See Ex 10, p. 62). When the Claimant received the letter regarding termination of insurance, she believed that she was no longer an employee of Employer. The Claimant testified that she also received notification from Facebook that she was removed as the "administrator" for the clinic's Facebook page and she could no longer access the Facebook account to post pictures, etc. The Claimant testified that she was also aware that the other employees at the Employer's clinic received Christmas bonuses in 2014 and she did not receive a bonus or any notification about a bonus. The Claimant testified that she also became aware that the emergency phone line was turned off. The Claimant still has possession of the phone that she previously used for the clinic's emergency phone line. She stated that she would be willing to return it. The Claimant still has not returned the key to the front door of the clinic and she never received any official notice that her employment with Employer was terminated.

14. Dr. Jorgensen testified that neither she nor the office manager fired the Claimant. She further testified that she did not take the Claimant off as the clinic's Facebook administrator because Dr. Jorgensen-Blackburn does not even know how to do this. Dr. Jorgensen-Blackburn also disconnected the emergency phone at some point because the Claimant wasn't responding to her or answering the phone and she wanted to make sure that someone would answer the clinic's emergency line over the Thanksgiving weekend. As for the health insurance, Dr. Jorgensen-Blackburn testified that she is not sure when the Claimant's health insurance was terminated, but stated that this was done after she received a phone call from Weld County human services offices with the Claimant present as well. The caller advised Dr. Jorgensen-Blackburn that the Claimant was with her at the Weld County offices and advised them that she was fired and they were asking about the Claimant's wages. Dr. Jorgensen-Blackburn testified that she called the Claimant after this phone call and she didn't answer the phone. Dr. Jorgensen-Blackburn further testified that since it was clear to her after this that the Claimant wasn't coming back to work, the health insurance and emergency phone service were cancelled.

15. The Employer typically gives staff bonuses, depending on performance, at the clinic's holiday party. The Claimant was invited to the party but did not come and so she did not receive any bonus for 2014.

16. Dr. Jorgensen-Blackburn testified that she didn't think to reach out to the Claimant to tell her she wasn't fired because she thought the Claimant knew she was not fired. Dr. Jorgensen-Blackburn testified that the Claimant had previously been involved in a motorcycle accident and the Employer held her job for her for over a month until she could return to work. Dr. Jorgensen-Blackburn testified that just as with the 2013 motorcycle accident, the Employer would have made accommodations at work

for the Claimant so she could come in and leave when she needed and she could just answer phones or assist the front office person instead of her regular duties. On rebuttal, the Claimant agreed that she had been in a motorcycle accident and had missed work. However, the Claimant testified that for the prior motorcycle accident, the Employer did not require a note from doctor that she was off work or couldn't work.

17. On January 19, 2015, a Worker's Claim for Compensation was completed for the Claimant by a paralegal for the Claimant's attorney. The claim states that the Claimant injured her mid to low back, radiating upwards, and ribs. The claim arises out of the Claimant's motor vehicle accident on November 11, 2014 when her car slid on black ice and rolled over, ejecting her from the vehicle (Respondents' Exhibit C). Employer completed an Employer's First Report of Injury on January 27, 2015 noting the same injuries and mechanism of injury (Respondents' Exhibit D). A Notice of Contest was file on February 4, 2015 (Respondents' Exhibit E).

18. The Claimant treated with Dr. Doug Lerner who indicated the Claimant was under temporary work and activity restrictions pending cervical surgery. Dr. Lerner provided medication management treatment for the Claimant's neck pain that also caused migraines. Dr. Lerner noted the Claimant was scheduled for 2 level cervical fusion. The Claimant had cervical spine fusion surgery in May of 2015. Her post-operative care consists of physical therapy and follow up with her neurologist, Dr. Beth Gibbons (Claimant's Exhibit 6; Respondents' Exhibit G).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57

P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability
(Going to and Coming from Work Rule and Exceptions)

The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo.App.Div. 5 2009).

The general rule is that injuries sustained by employees going to and from work are not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 212 (Colo. 1967). An exception to this general rule exists when "special circumstances" create a causal relationship between the employment and the travel, beyond the sole fact of the employee's arrival at work. *Madden v. Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). *Madden, supra,* listed four factors which are relevant in determining whether "special circumstances" have been established which create an exception to the "going to and coming from" rule. These factors are: (1) whether the travel occurred during work hours; (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the

obligations or conditions of employment created a "zone of special danger." *Madden* at 864.

Although the Claimant appeared to argue that the motor vehicle accident occurred during work hours under the first *Madden* factor, the facts do not support this. The Claimant testified that her MVA occurred on a Tuesday and an hour of time would be added to her Tuesday payroll for work performed by the Claimant on Mondays. However, this was a legal fiction to compensate the Claimant for work she performed on the phone on Mondays when the Employer's dental office was closed. It did not actually extend the Tuesday work day by an hour. Even if this was the case, the clinic had closed at about 5:00 pm and Claimant had clocked out from work at 5:45 pm on the date of her MVA after cleaning instruments and closing up and then she left the clinic in Westminster. She drove directly home that night with no errands and she testified on cross-examination that the traffic that day was slower than usual due to the weather, but it takes from 1 hour to 1 ½ hours to drive home from work depending on the weather. The Claimant's claim for compensation indicated the injury occurred at 6:45 pm. The MVA occurred near the Claimant's home near Johnstown, so the Claimant would have been outside of the work hours for the clinic even if the extra hour from Monday was included as a work hour on Tuesday. Therefore, under any circumstance, the Claimant's travel was not during work hours.

The third factor was also implicated in this case by the Claimant and, as the *Madden* court recognized, a claimant may be found to be in "travel status," because the travel is a substantial part of the service to the employer. *Id at 865.* This variable covers many different fact situations. For example, claims have been compensable when a particular journey was assigned or directed by the employer. *See Walsh v. Industrial Commission*, 34 Colo. App. 371, 374-75, 527 P.2d 1180, 1181-82 (1974) (holding that the claimant could recover for injuries sustained in a fall on ice because she had previously turned back from an attempt to drive to work in a snowstorm and was injured after she was subsequently ordered to come to work). Claims have been compensable when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 495, 391 P.2d 677, 679 (1964) (holding that when an employee uses his own car to perform services for or at the direction of his employer, the employee remains in the course of his employment until he returns home).

Claims have also been compensable when the employer provides transportation or pays the cost of the employee's travel to and from work. *See Industrial Commission v. Lavach*, 439 P.2d 359 (Colo. App. 1968). However, "the 'traveling employee' doctrine does not distinguish between salaried and non-salaried workers; nor does the doctrine depend upon the employee being compensated by the employer for transportation, lodging, and meals. While these factors may be indicative of business travel when that is an issue in dispute, the absence of one or more of these factors does not, in and of

itself, disqualify a claimant from receiving benefits. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995).

Another situation which may also fall within the *Madden* factors creating a special circumstance under the third factor, is when an employee is "on call" for work duty. However, simply being "on call" is not enough to transform the act of traveling home into the performance of employment duties. There needs to be some evidence that, at the time of an injury, the employee was actively engaged in performing a duty or responsibility related to work activities under the express or implied direction of the employer. With specific reference to an accident that occurs while traveling home, for example, there should be some evidence that a claimant intended to perform office work at home on the evening of an accident that occurs on the way home from an office, or that a claimant performed work for employer at home with sufficient regularity such that the employee's home genuinely became a part of the employment premises. *Rogers v. Industrial Commission,* 574 P.2d 116 (Colo. App. 1978); *Varsity Contractors v. Baca,* 709 P.2d 55 (Colo. App. 1985).

In this case, the facts, when viewed in their entirety, do not support a finding that, at the time of her MVA, the Claimant was performing services arising out of and in the course of the employee's employment under any theory advanced by the Claimant.

There is a conflict in the record as to whether the Claimant was "on call" after clinic hours in order to immediately respond to emergency calls. The Claimant maintains that she was required to answer the emergency phone when it rang, but Dr. Jorgensen-Blackburn testified that Claimant was directed to let the emergency phone ring so that the caller would leave a message, then listen to the message and respond appropriately. Yet, in any event, the record is clear that the emergency phone was to remain at the Claimant's home. Therefore, the Claimant was not required to deal with emergency calls during clinic hours nor did she handle emergency calls during her commute from the clinic to her home. She did not have possession of the emergency phone until she returned home. While she was driving, the Claimant was not actively engaged in work duties. Further, the number of emergency calls per month was minimal, and no additional payments were made to the Claimant for emergency phone call work. Therefore, the Claimant's emergency phone duties were not sufficiently regular such that the Claimant's home genuinely became a part of the employment premises. Thus, the Claimant's "on call" status after clinic hours in this case is not enough to transform the act of traveling home into the performance of employment duties.

The other duties that the Claimant performed using the emergency phone were to make calls to Spanish-speaking patients/parents on Mondays to confirm appointments scheduled for Tuesdays. These duties were estimated to take an hour total and an additional hour of compensation was added to the Claimant's payroll on Tuesdays. However, the work itself was performed on Mondays. Therefore, there was no expectation that the Claimant had to perform any work duties, at home or otherwise, after she left the clinic on Tuesday, November 11, 2014. On that date, the Claimant was merely commuting

home from work when she was in a motor vehicle accident near her home approximately one hour after leaving work.

Based on the foregoing, the Claimant has failed to meet her burden of proof to establish that she was performing service arising out of and in the course of her employment when she suffered injuries while driving home from the clinic where she worked.

Remaining Issues

The Claimant failed to prove that her November 11, 2014 motor vehicle accident resulted in a compensable work injury. As such, the remaining issues regarding temporary disability benefits, average weekly wage and medical benefits are moot.

ORDER

Based on the above factual findings and legal conclusions, it is therefore ORDERED that:

1. The Claimant failed to meet her burden of proving that the injuries she suffered during a motor vehicle accident while she was travelling home from the Employer's clinic on November 11, 2014 constituted a compensable work injury.

2. The Claimant's claim for worker's compensation benefits under WC 4-972-684-02 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. (Please note the new address for the Denver Office, effective November 12, 2013, is: 1525 Sherman Street, 4th Floor, Denver, CO 80203). You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 24, 2015

#J9PXTAR40D13PAv 1

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether the medical treatment recommended to treat Claimant's urinary and fecal incontinence is reasonable, necessary, and causally related to the Claimant's work injury. Specifically, authorized treating physician (ATP) Dr. Caroline Gellrick made a referral to a colorectal specialist and physical therapy for urinary incontinence.

FINDINGS OF FACT

1. On December 1, 2014, Claimant sustained an admitted work injury when he was involved in a motor vehicle accident (MVA) while driving a box truck for the employer.

2. Following the MVA, paramedics took Claimant to Good Samaritan Medical Center. It was reported that Claimant was driving a large 20 foot panel van when he was rear ended by a Jeep. The truck's bumper sustained minimal damage and the air bags did not deploy.

3. At the emergency room, Claimant complained of numbness and tingling to his face which had resolved, and also numbness and tingling to his hands and feet. Claimant's medical history included incontinence of bowel, urinary incontinence, and thoracic and lumbar back pain. Claimant told the emergency room medical providers that he had not used significant pain medications for a long time, but had recently used muscle relaxants.

4. According to the emergency room report Claimant's current medications included: Flexeril, Valium, Norco, and Vicodin.

5. A physical exam of Claimant's musculoskeletal system indicated, "good range of motion in all major joints with complaints of pain with movement but no specific complaint of pain in one area being greater than any other area. No major deformities noted." Claimant was discharged from the emergency room with prescriptions for Flexeril, Valium, and Norco and he was instructed to follow up with his doctor.

6. Claimant was referred to Dr. Gellrick who initially evaluated him on December 4, 2014. Dr. Gellrick noted that Claimant has a history of bowel problems which Claimant felt had worsened since the MVA. Claimant wondered if the worsened bowel incontinence was related to the muscle relaxers or Valium he received in the emergency room. In Dr. Gellrick's "post-MVA on the job resulting" diagnoses, Dr.

Gellrick refers to Claimant having a history of bowel incontinence and a *new* history of bladder incontinence.

7. Claimant admitted that when he first saw Dr. Gellrick he did not provide her with a complete medical history regarding his incontinence issues.

8. Claimant reported to Dr. Gellrick that he had a back injury in 2006 that had totally resolved yet he had sought treatment for pain in the lumbar and thoracic spine on October 23, 2014 with Dr. Andy Fine.

9. Dr. Gellrick recommended MRIs of Claimant's spine due to problems with incontinence.

10. On December 4, 2014, the Claimant was also evaluated by Dr. Tomm Vanderhorst who is a physician with Exempla. Dr. Vanderhorst documented a history of urinary and bowel incontinence, and noted that Claimant reported "some post void urinary leakage since the injury," but no urgency leakage or incontinence. Dr. Vanderhorst noted that Claimant had no problems with bowel control. Dr. Vanderhorst's report does not document worsening bowel incontinence although Claimant described such worsening to Dr. Gellrick on the same day.

11. On December 31, 2014, Dr. Gellrick referred Claimant for a urological consultation, EMG studies, and consultation with an orthopedic spine specialist.

12. On December 13, 2014, Claimant had an MRI of his lumbar spine. The radiologist compared the results with an MRI Claimant had on April 20, 2011. She noted that the L4-5 disc protrusion found in April 2011 had actually significantly decreased in size as of December 13, 2014, and that the other levels in the lumbar region were essentially unchanged.

13. Dr. Gellrick's diagnosis was thoracic, lumbar and cervical strains.

14. On January 27, 2015, Dr. Richard Augspurger with the Urology Center of Colorado evaluated the Claimant based on Dr. Gellrick's referral. Dr. Augspurger reported that Claimant has a long history of rectal incontinence. Claimant told Dr. Augspurger that since the motor vehicle accident he has had "increased rectal incontinence and has now developed urinary incontinence." Dr. Augspurger noted that Claimant reported dribbling at the end of urination and squirts of urine with urinary urgency but no true urge incontinence. Dr. Augspurger noted that some of Claimant's incontinence sounds like post-void dribbling, but does not explain the sudden squirt of urine. Dr. Augspurger also stated that when Claimant was taking Valium and Flexeril his urinary and bowel incontinence worsened. Claimant was referred for urodynamics testing.

15. The Claimant was also evaluated by orthopedic surgeon, Dr. Bryan Castro, on February 2, 2015. Claimant reported that his rectal incontinence had

worsened following the MVA. He reported diminished control and loss of control that lasts several hours following a bowel movement. Dr. Castro's report also documents that Claimant experienced loss of control for several hours after a bowel movement before the MVA. Claimant also reported new urinary symptoms described as pain and urgency, but he is able to typically hold it until he can get to a bathroom. Dr. Castro concluded that Claimant suffered a thoracic and lumbar sprain/strain. Dr. Castro recommended against any surgical intervention.

16. On February 27, 2015, Claimant underwent urodynamics testing with Physician Assistant (PA) Lisa Zwiers. Claimant told PA Zwiers that he had no urinary problems prior to his December 1, 2014, work injury, but did acknowledge a history of bowel incontinence.

17. The urodynamics testing revealed a normal capacity bladder with no evidence of detrusor over-activity. The testing also showed no sensory urgency at capacity with no leak. PA Zwiers noted a voiding dysfunction, and prescribed Flomax and noted that Claimant would benefit from pelvic floor physical therapy (PT).

18. On March 9, 2015, Dr. Augspurger recommended the following treatment options for Claimant: (1) alpha blocker, (2) pelvic floor physical therapy, (3) bladder retraining biofeedback, and (4) InterStim. Claimant was referred to either Dr. Montoya or Dr. Hsu—physicians who performed InterStim procedures.

19. On March 26, 2015, Dr. Hsu counseled Claimant on InterStim. Dr. Hsu noted that Claimant had a history of rectal incontinence that post-MVA worsened to 24-hour rectal leakage that appears positional. Claimant reported new urinary urge incontinence following the December 2014 MVA. Dr. Hsu indicated that he was unsure of the exact etiology for Claimant's incontinence, but that his pre-existing rectal issues may have been exacerbated by spinal trauma from the MVA. With respect to InterStim, Dr. Hsu stated that "it is possible [Claimant] will experience improvement in both his urinary and fecal incontinence with an InterStim."

20. Claimant has a history of both bowel and urinary incontinence that preexists the work-related MVA. Regarding the urinary incontinence, the medical records reflect the following:

> On February 10, 2011, Claimant reported to Dr. William Elzi that he had begun experiencing dribbling after urinating and that he voided in his pants when he was unable to get to a restroom fast enough while at work.
>
> On April 28, 2011, Claimant reported to Dr. E. Lee Nelson that he started experiencing urinary incontinence since January or February 2011.
>
> On May 17, 2011, Dr. Nelson documented bladder urgency/frequency with bouts of incontinence since March 2011. Dr. Nelson referred Claimant to a neurologist.

On May 17, 2011, neurologist Dr. Douglas Redosh documented a history of urinary incontinence for 16 months.

Dr. Redosh's June 7, 2011 report states that Claimant was refused a urology appointment until he had a neurological work-up.

21. The Claimant also had a significant history of bowel incontinence. On January 19, 2010, the Claimant reported to Dr. Brenda Westhoff that he was experiencing rectal incontinence for the past three years, and that it has increased in severity. She documented that Claimant experiences fecal incontinence for "several hours" after having a bowel movement. Dr. Westhoff recommended a colonoscopy and manometry.

22. On February 10, 2011, Claimant reported to Dr. William Elzi that had a two-year history of rectal incontinence with seepage for "several hours" after a bowel movement.

23. On April 28, 2011, Claimant reported to Dr. Nelson that he experienced leaking stool for approximately one hour after a bowel movement.

24. On October 30, 2014, Claimant was evaluated by Dr. Glenn Sakamoto regarding bowel incontinence. Dr. Sakamoto's report reflects that Claimant has had continual stool leakage following bowel movements throughout the day, and that the symptoms had been ongoing for eight years. Dr. Sakamoto recommended an anal manometry and pudendal nerve latency studies. Dr. Sakomoto also stated that Claimant may need and InterStim.

25. On November 6, 2014, Dr. Susan Sgambati performed the manometry procedure and pudendal nerve latency testing. She concluded that Claimant had left pudendal neuropathy, and impaired rectal tone. She recommended biofeedback therapy or sacral nerve stimulation.

26. Dr. Sakamoto reviewed the manometry and nerve latency test results with the Claimant on November 13, 2014. Dr. Sakamoto assessed weak external sphincter and high normal pudendal nerve latency. He recommended a trial of biofeedback and then InterStim.

27. Claimant testified that his bowel and urinary incontinence pre-existed the work-related MVA, but that both conditions had worsened after the MVA.

28. Claimant described the differences in both the fecal and urinary incontinence pre- and post-MVA. Claimant explained after the MVA, his rectal leakage lasted longer than usual and that he had to keep cleaning supplies with him to clean himself throughout the day. He also testified that he has more urinary leakage after he

urinates so he has to wear pads or shields in his underwear to prevent wetness from showing through.

29. The subjective reports of worsening rectal or urinary incontinence symptoms Claimant provided during his testimony are not significantly different than the symptoms he reported to medical providers prior to the work-related MVA.

30. On August 17, 2015, Dr. Jeffrey Snyder examined the Claimant. The Claimant reported to Dr. Snyder that his rectal incontinence had worsened since the MVA. Claimant also told Dr. Snyder that he is experiencing urinary incontinence in the form of leaking requiring him to use pads.

31. Dr. Snyder also performed a physical examination of Claimant. He noted that claimant has a three-quarters external anal sphincter weakness and that there was no evidence of rectal incontinence or soiling noted on a pad or anus during the examination. According to Dr. Snyder, Claimant had a "dry anus on exam" and there was no rectal irritation or proctitis noted.

32. Dr. Snyder provided written responses to questions posed by Respondents. He noted that he reviewed Claimant's medical records and that Claimant had a pre-existing history of urinary and rectal incontinence. Dr. Snyder also opined that based on the history and mechanism of injury, Claimant's "current complaints' were consistent with an "exacerbation of his pre-existing condition and not a de novo event. The radiologic findings have been deemed as predominantly chronic degenerative disease." Dr. Snyder clarified that "current complaints" referred to Claimant's subjective complaints of worsening urinary incontinence.

33. Dr. Snyder indicated that a referral to a colorectal specialist and physical therapy were reasonable first line therapies for the treatment of both urinary and fecal incontinence. He also opined that Claimant should repeat the urodynamic evaluation to confirm an accurate diagnosis. Dr. Synder suspected that Claimant's post-void dribbling is related to bladder outlet obstruction, and that once the diagnosis is confirmed, treatment could be maximized such that Claimant could reach maximum medical improvement within a few months.

34. Dr. Snyder testified at hearing as an expert in urinary and rectal incontinence issues. He has been certified by the American Board of Urology since 1982.

35. Dr. Snyder testified that according to Claimant's subjective complaints of incontinence, Claimant experienced a worsening of his incontinence due to the work injury. However, Dr. Snyder testified there is no objective evidence to support that the December 1, 2014, MVA worsened Claimant's pre-existing rectal or urinary incontinence. He also testified that there was no connection between the MVA and worsening rectal or urinary incontinence.

36. Dr. Snyder testified that back pain from the MVA could contribute to and exacerbate Claimant's bowel and urinary incontinence. He also testified that Flexeril and other muscle relaxers may contribute to incontinence problems.

37. Claimant also had pre-existing back pain as reflected in the medical records.

38. Dr. Snyder testified there was no known cause of Claimant's pre-existing urinary and rectal incontinence.

39. Dr. Snyder testified that incontinence is a multi-factorial condition that is affected by diet, activities; and that incontinence issues symptoms will wax and wane over time. Dr. Snyder further testified that in individuals with an organic disease, the condition will generally stay the same or will get worse. For instance, Dr. Snyder explained that a person with an organic cause of incontinence—such as "MS"—may have progressively worsening incontinence over time depending on the severity of "MS." Dr. Snyder testified that no organic cause of Claimant's incontinence has been discovered.

40. Dr. Snyder discussed the InterStim treatment recommended by both Dr. Sakamoto and Dr. Augspurger. Dr. Snyder testified that InterStim is a pacemaker type of device that can be used to control nerve impulses. The device can stimulate or shutdown overactive nerves, and can be used urologically in patients who are not urinating enough or too much. Dr. Snyder explained that for rectal incontinence the InterStim is used for the same purpose.

41. Dr. Snyder explained that the InterStim recommended by Dr. Augspurger and Dr. Sakamoto are based on the same principle and are virtually identical procedures.

42. Claimant has failed to prove that the work-related MVA worsened his ongoing and chronic urinary and rectal incontinence.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Section 8-42-101(1)(a), C.R.S., provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

5. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Id.*

6. The Claimant has failed to prove entitlement to ongoing treatment for urinary or bowel incontinence under his workers' compensation claim. Claimant has failed to prove that the work-related MVA worsened his ongoing and chronic urinary and rectal incontinence. Claimant provided subjective reports of worsening but the medical

records do not support a worsening. First, the idea that muscle relaxers may have worsened the incontinence is actually contradicted by Claimant's self-report to the Good Samaritan emergency room that he had recently been taking muscle relaxers. It defies logic that some new muscle relaxers would have a dramatic effect on Claimant's pre-existing incontinence. In addition, Claimant had pre-existing spine problems as evidenced by his visit with Dr. Fine just six weeks before the MVA. The MRIs taken before and after the MVA are not significantly different. There are no new persuasive objective findings that support Claimant's subjective reports of worsening incontinence. There is no persuasive or credible evidence that any increased back pain worsened his incontinence. The ALJ concludes that the work-related MVA did not, in fact, exacerbate Claimant's urinary or rectal incontinence.

ORDER

It is therefore ordered that:

1. Claimant's request for medical treatment for bowel and urinary incontinence, including a referral to a colorectal specialist and physical therapy directed at urinary incontinence, is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 11, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable injury to her left knee in the course and scope of her employment for Employer on January 26, 2015?

- Whether Claimant established the right to select a physician based on the Respondents' refusal to tender care after February 5, 2015?

- Whether medical care rendered by Denver Health East Grand Community Clinic and Olive View Medical Center was reasonable, necessary, and related to Claimant's January 26, 2015 injury?

STIPLUATIONS

The parties stipulated that if the claim is found compensable;

1. Claimant's average weekly wage ("AWW") at the time of injury from her two separate places of employment is $693;

2. Claimant is entitled to temporary total disability benefits, subject to applicable offsets, from January 26, 2015 until June 3, 2015.

3. Claimant is entitled to temporary partial disability benefits from June 4, 2015 ongoing until terminated pursuant to statute.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 41 years old, and has worked as a snowboard instructor for Employer for six seasons.

2. Prior to the injury at issue, Claimant experienced laxity in the ligaments of her knees and sought preventative care in December 2013. At that time, an MRI of her left knee was taken and her doctor prescribed braces for both knees. The MRI was read as, "lax MCL, no tears, ACL ok." Claimant testified that she had worked for seventeen years as a stunt woman and that several of her joints were hyper-flexible. Claimant testified that she always wore the braces while boarding to protect her knees.

3. Between the hours of 8 and 9 a.m. on January 26, 2015, Claimant was teaching a clinic to 5 other board instructors which was titled, “Open Topic – Rotation Once You Leave the Air.” This activity was in the course and scope of her employment for Employer.

4. Claimant credibly testified that at the end of her clinic she fell on the last run while demonstrating spins and felt “an explosion in my left knee” while she was doing a rotation. She then debriefed her students, walked a short distance to the locker room building, took the elevator down to the ski and board instructor room to change and complete online surveys for the instructors who had taken part in the clinic.

5. Stephan Littlejohn-Adkins, Tim Neary, and Erin Daley were instructors who participated in Claimant’s clinic. Mr. Littlejohn-Adkins testified that he saw Claimant fall during the clinic. Mr. Neary testified he did not recall anything specific about Claimant falling, and that he did not know if Claimant fell during the clinic. Mr. Neary acknowledged that prior to testifying, he spoke both with Respondents’ counsel and with Toni Terrari, his supervisor in 2016 and Employer’s manager, who “told him about the situation.” Ms. Daley testified that she did not see Claimant fall during the clinic, but saw her limping during the following weeks.

6. Claimant credibly testified that at approximately 10:44 a.m. she walked to and rode up the Zephyr lift to practice her turns in the super pipe staging area below the rails and rollers at the top of the run. Claimant is a level 3 certified instructor and indicated she was training to maintain her certification level and that she does not have time to free board.

7. After exiting the top of the Zephyr lift and snowboarding down approximately two to three hundred yards, Claimant came to the first roller on the run and her left knee gave out causing her to fall. Claimant credibly testified that she was not doing any rotational moves, and was not attempting to do any rotational moves at the time she fell.

8. Mixed evidence was offered at the hearing concerning whether Claimant was thinking about an Ollie or attempting to Ollie at the time of her fall. The ALJ finds, based on the totality of evidence presented at hearing, that an Ollie is not a rotational move.

9. Claimant was unable to move her left leg and Mr. Littlejohn-Adkins, who arrived at the scene moments later, called ski patrol for assistance. Mr. Littlejohn-Adkins was Claimant’s supervisor that season, and Claimant effectively communicated her injury to him. Patroller Derek Lowery picked Claimant up off the ski slope at approximately 11:25 a.m. Mr. Lowery subsequently writing a report five days later at Employer’s request. His report stated that Claimant had “tried to do an Ollie [on] a roller, heard a click, knee locked up. Patient could not straighten knee.” Mr. Lowery’s report reflects that Claimant was in the middle of the rail yard at the top of the run.

10. After being taken to the bottom of the ski lift by the Ski Patrol, Claimant was evaluated at Denver Health East Grand Community Clinic ("Denver Health") where a history was taken as follows:

> 40 yo [female] presents [with] c/o severe knee pain and decreased ROM was snowboarding and was standing & knees flexed when she felt her knee "go out." She then fell.

Claimant's testimony clarified that she was not standing still, but rather in a standing position on her moving board when she felt her knee go out.

11. The treating physicians at Denver Health placed Claimant on modified-duty work restrictions which included only the ability to perform inside office duties, to not perform physical work of any kind, and an inability to ski or ride. Employer was unable to accommodate Claimant's temporary work restrictions.

12. On January 30, 2015 Claimant filled out a Supervisor's Notification of Workplace Incident alleging that her injury had occurred at 9:00 a.m. on January 26, 2015 at the end of practice and setting forth:

> Teaching a clinic and fell on corridor then my knee got worse and went out and had to be taken down by sled at entrance of Railyard. Teaching rotation as a snowboard, demonstrating the movement on Corridor, hit ice block and fell.

13. On January 29, 2015 and again on January 30, 2015, Claimant returned to Denver Health for follow up care. On January 30, 2015, Claimant reported to Dr. Meaghan Hughes and Dr. Alorkeza Khodaee that she fell with a twisting mechanism during a snowboard lesson. She was not permitted to return to Denver Health after that time.

14. On January 31, 2015, five days after the fact and at Employer's request, Mr. Lowery wrote a statement in which he reaffirmed that Claimant was starting at the beginning of the railyard when she began her downward descent and attempted an Ollie. Mr. Lowery did not witness the event and could not state whether Claimant actually performed the activity or only thought about it. Claimant testified that she did not attempt an Ollie. Mr. Lowery indicated that he has completed over several hundred reports. However, this was one of about ten instances where Employer requested he complete a follow up statement. Claimant disputed Mr. Lowery's statements regarding her alleged history of similar previous events.

15. Mr. Lowery testified for Respondents on direct. Mr. Lowery testified that he received the information that Claimant was attempting an Ollie from Claimant and that based on where Claimant fell she would have either been attempting an Ollie to get to the top of the rail, or she would be going over rollers. To the extent that Claimant's and Mr. Lowery's testimonies and statements are inconsistent, the ALJ finds Claimant to be a more credible historian of the events recounted.

16. On February 5, 2015, Dr. Gen Maruyama at Middle Park Medical Center performed an MRI on Claimant's left knee. The doctor found Claimant had a "buckle-handle tear of the medial meniscus," as well as a "complete ACL tear."

17. Claimant credibly testified that Employer's Human Resources ("HR") Director, Paula Labin, informed her that her workers' compensation claim was denied and she was not permitted to receive any further medical care paid for by Employer and "that she would need to go home."

18. Claimant credibly testified she was also contacted by Insurer's Adjuster and told that her claim was denied and no further medical care would be forthcoming as a result of the denial.

19. On February 6, 2015 Respondents' filed their Notice of Contest.

20. After Respondents denied Claimant medical treatment, she returned to California where she was treated under the California Medi-Cal program. On February 19, 2015, Claimant sought treatment at Olive View Medical Center, where she reported sustaining a left ACL medial meniscus tear while snowboarding on 01/26/2015 in Colorado. She described it as a twisting injury and that she heard a pop. Despite working on motion and continuing the use of crutches and a knee immobilizer, she was unable to reach full extension. The doctor assessed an acute anterior cruciate ligament injury with a bucket handle tear of the medial meniscus. Dr. Petrigliano also evaluated Claimant and scheduled ACL reconstruction within the next 1-2 weeks. Dr. Petrigliano discussed using allograft from Claimant's Achilles.

21. On April 3, 2015 Claimant underwent knee surgery at Olive View Medical Center to address the anterior cruciate ligament tear and bucket handle medial meniscus tear.

22. On April 14, 2015, at Claimant's initial post-surgical physical therapy assessment, Claimant reported that her injury occurred while she was turning on her snowboard and felt her left knee give out.

23. Claimant has not been returned to full-duty worknor has she been placed at MMI.

24. On June 4, 2015, Claimant began working as a server in a restaurant in California and has been working different jobs since that time.

25. Claimant credibly testified that she had no left knee symptoms prior to her injury, however, in the past had suffered laxity and, therefore, had an MRI and braces made to protect her knees as a "preventative measure." The MRI performed on December 9, 2015 reflected lax MCL, no tears, ACL ok. *See* Respondents' Submission Tab E, BS 23.

26. In anticipation of hearing, Respondents' retained Eric O. Ridings, M.D., to perform a Respondent-requested independent medical evaluation. Dr. Ridings understood he was to address the following issues for Respondents:

> The issue for my evaluation today per your telephone conference of 07-09-15 is primarily to obtain a detailed history from Ms. Littlejohn regarding her mechanism of injury, with a question regarding the work-relatedness of her left knee injury, as well as determination of her current medical status. Provided medical records in five sections per your index as well as subsequently provided records from the patient's employer including the incident report and statement from ski patrol were carefully reviewed. No treatment was provided to the patient, and no doctor-patient relationship was established. Per Rule 8, this visit was audio-recorded. Ms. Littlejohn expressed understanding of the nature of today's evaluation.

27. After reviewing the medical records, interviewing and examining Claimant, Respondent's expert Dr. Ridings opined that Claimant had suffered a work-related injury stating:

> In my opinion within a reasonable degree of medical probability, Ms. Littlejohn injured her left knee in her fall while instructing the class of [board] instructors on the morning of January 26, 2015. Falling while performing rotational movements on a snowboard could cause a meniscal tear and/or ACL tear, both of which she was found to have on subsequent evaluation. I suspect she was having some swelling of the knee (whether she noticed it or not) subsequent to that event. The difference in time between that fall and calling the ski patrol by her history is related to completing the paperwork after the instructor class. After that she got on a lift and when she next attempted to snowboard nearly immediately fell, with her knee locked in a bent position. This is consistent with her bucket handle medial meniscus tear, with the bucket handle likely flipping up out of position and getting caught, preventing her knee from extending.

28. Dr. Ridings also opined that medical care rendered by Denver Health and thereafter at the Olive View Medical Center and its referrals was reasonable, necessary and related to Claimant's January 26, 2015 injury stating:

> Her work-related diagnoses are a left medial meniscus tear and ACL tear, both operatively repaired April 3, 2015. She has a good prognosis, having made excellent strides toward

> recovery with postoperative physical therapy and her home exercise program. She has already regained good knee range of motion, and her examination is benign today. I would anticipate that she would be found to be at maximum medical improvement on follow-up with her orthopedic surgeon at the completion of physical therapy, which will be in three weeks. She does not have a follow-up visit scheduled, however, and she should make such an appointment. I would recommend a 6-month gym membership as maintenance care.

29. Dr. Ridings was present throughout Claimant's testimony, but Respondents did not call him during their case in Chief. Dr. Ridings' written report indicated:

> In the absence of evidence to the contrary, it is my opinion within a reasonable degree of medical probability that the initial fall was the fall that caused the injury, and that the injury is work-related.

30. No medical professional opined that an attempt to perform an Ollie maneuver caused the meniscus and ACL tears. The persuasive evidence regarding an Ollie maneuver is that it requires no twisting to perform. Dr. Ridings' written report indicates that a rotational movement on a snowboard could cause an ACL tear.

31. In their case in chief, Respondents contend that Claimant's attempt to perform an Ollie maneuver approximately two hours after her original fall caused her left knee injuries. No persuasive medical evidence supports this position.

32. Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she was injured in the course and scope of her employment at the end of her clinic when she tore her ACL and medial meniscus.

33. Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established the right to select a physician based on Respondents' refusal to tender care after February 5, 2015, and that her medical treatment providers on and after February 5, 2015 are authorized.

34. Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established the medical treatment she received was reasonable, necessary and related to her work injury.

33. All issues not decided herein are reserved.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers Compensation Act of Colorado" (Act), Title 8, Articles 40 to 47, C.R.S., is to ensure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to the employers without the necessity of any litigation. C.R.S. § 8-40-102(1). A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Therefore a claimant must prove by a preponderance of the evidence that his injury arose out of and in the course and scope of his employment. C.R.S. § 8-43-201*; City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). Proof that something happened at work, without more, is insufficient to carry burden of proof. *Finn v. Industrial Commission*, 165 Colo. 106 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). Moreover, if an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-181 (March 7, 2002). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12P.3d at 846. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant, as an employee, carries the burden of proving by a preponderance of the evidence that her accidental injury arose out of the course and scope of her employment. *See City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201. C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

Claimant has sustained her burden of proving by a preponderance of the evidence that she sustained a left knee injury on January 26, 2015, and, therefore, Claimant is entitled to benefits under the Workers' Compensation Act.

Medical Benefits

Once compensability is established, Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *See Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ, and an ALJ's resolution should not be disturbed if supported by substantial evidence in the record.

Respondents were on notice of Claimant's injury through Claimant's reporting to Employer. However, Insurer denied the claim, and Employer told Claimant to "go home" for treatment. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Respondents' actions constitute a failure to treat and triggered Claimant's right to select a doctor. She exercised the right by continuing treatment with doctors at the Olive View Medical Center.

The ALJ concludes that Claimant established the right to select a physician based on the Respondents' refusal to tender care after February 5, 2015, and that her medical treatment providers on and after February 5, 2015 are authorized.

Respondents' own expert concurs that the medical treatment Claimant received was reasonable, necessary and related to Claimant's admitted industrial injury. The ALJ concludes the medical care rendered by Denver Health and Olive View Medical Center was reasonable, necessary, and related to Claimant's January 26, 2015 injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has established by a preponderance of the evidence a compensable left knee injury which occurred in the course and scope of her employment on January 26, 2015.

2. All medical benefits provided by Denver Health Medical Center and the Olive View Medical Center are reasonable, necessary and related to Claimant's January 26, 2015 work injury.

3. After January 30, 2015 the Respondents failed to tender medical care, and the right to pursue care passed to Claimant who selected Olive View Medical Center.

4. Pursuant to the parties' stipulation, Claimant is entitled to temporary total disability benefits at two-thirds of her average weekly wage, subject to applicable offsets, from January 26, 2015 until June 3, 2015.

5. Pursuant to the parties' stipulation, Claimant is entitled to temporary partial disability benefits from June 4, 2015 until terminated pursuant to statute.

6. Pursuant to the parties' stipulation, Claimant's average weekly wage is $693.

7. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

8. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 1, 2015

Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her low back on February 8, 2015 while scooping ice cream.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to reasonable, necessary, and related medical treatment as a result of the February 8, 2015 injury.

III. Whether Claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits from February 9, 2015 through April 19, 2015; TPD benefits from April 20, 2015 through May 14, 2015; and TPD benefits from August 20, 2015 and ongoing.

STIPULATIONS

The parties stipulated to holding the issue of AWW in abeyance pending the resolution of the issue of compensability.

The parties agreed that there is no wage loss resulting from the work injury, if compensable, from May 20, 2015 – August 19, 2015 when Claimant was not working during the summer. The ALJ approves the parties' stipulations

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as an assistant supervisor at the Preserve Restaurant located on the campus of the Colorado College in Colorado Springs. Claimant's job includes serving customers, using the cash register, and preparing the restaurant for service. She has worked for Employer since February 1, 2013. Claimant works the academic year extending from the middle of August until the middle of May of the following year. She does not work from in June or July. Claimant generally works seven and a half (7.5) hours a day, Wednesday through Friday.

2. Claimant testified that she sustained an injury to her low back at approximately 2:00 PM on February 8, 2015 while working for Employer. Claimant explained that she was bending over while reaching out and down from her body into a display freezer to scoop ice cream when she felt something snap in her back.

3. Claimant estimates that she was flexed forward at the waist at approximately 90 degrees and that she was reaching toward the back of the cooler at the time she felt the pain in her back. She described the pain as a burning sensation followed by a stabbing pain in the lower left quadrant of her back.

4. Claimant testified that she has never had any previous low back injuries nor has she received treatment to her lower back prior to February 8, 2015. The ALJ finds this testimony corroborated by the medical record evidence submitted at hearing.

5. After the injury, Claimant applied ice to her back and took some medication, probably a Midol, in an attempt to relieve her pain while she contacted her supervisors to notify them of her injury.

6. Claimant attempted to call her direct supervisor, Beatrice Russell, but she did not answer so she sent her a text message. She also tried calling Chef John, the supervisor above Beatrice.

7. Claimant was instructed to fill out an incident report while witness statements were obtained from Claimant's coworkers, Jessica Clancey and Ashlee Ramirez. Ms. Clancy documented that she "did not notice anything amiss after the incident" and that Claimant told her approximately 5-10 minutes after the incident that she had hurt her back. According to Ms. Clancy, Claimant was not showing any signs of distress immediately after the incident, but that she began to "limp and worsen" as time went on. Ms. Clancy's statement corroborates Claimant's report that her pain was not immediately debilitating and worsened with the passage of time as she moved around. Ms. Ramirez's statement confirms that Claimant was limping as the afternoon progressed and that Claimant explained to Ms. Ramirez that she injured her back while bending to scoop ice cream.

8. Claimant continued to work the rest of her shift on February 8, 2015 until approximately 6:00 PM; however, she did not perform her normal job duties after the incident. She remained seated at the register for most of the remaining portion of her shift because she was in too much pain to stand as time progressed.

9. Claimant did not seek medical treatment the evening of the incident because she wanted to go home and rest in hopes that she would be okay the next day. The following morning, Claimant continued to have low back pain along with pins and needles sensations with shooting pain down her left leg. Consequently, Claimant contacted Chef John on the morning of February 9, 2015 to report her condition. Chef John instructed Claimant to return to work in order to finish filling out the paperwork. Claimant went straight to Concentra upon completion of this paperwork.

10. Dr. Walter Larimore examined Claimant on February 9, 2015. Dr. Larimore noted that Claimant reported to him that she was scooping ice cream on February 8, 2015 and felt a snap on the left side of her back and later in the evening developed pain

radiating down to the “left buttocks, to the posterior, lateral and anterior thigh and calf; however, there was no radiation to the foot. X-rays of the low back were obtained which were later interpreted as “unremarkable”.

11. Dr. Larimore’s physical examination revealed reported tenderness of the left paraspinals at the L3-5 levels along with palpable left-sided muscle spasms with associated reduced range of motion in all planes.

12. Dr. Larimore diagnosed Claimant with a lumbar strain and concluded, based on the history and the exam of Claimant, that there was a greater than 50% chance that her injury was work related. Dr. Larimore prescribed naproxen, cyclobenzaprine, along with instruction to use an ice pack and to begin physical therapy three times per week for up to three weeks. Dr. Larimore also spoke to Claimant’s supervisors at this time.

13. Dr. Larimore imposed restrictions of no climbing stairs, ladders, and working no more than six hour shifts at a time. He also specifically noted that lifting, pushing and pulling activities must be performed “close to body”. Claimant was later instructed against engaging in activities which involved extended reaching by her physical therapist.

14. Claimant began physical therapy on February 9, 2015. Mr. Aaron Pieffer, PT documented a positive supine straight leg test and a positive crossed straight leg test. He also documented moderate muscle spasms on palpation to the lumbroscaral joint and lumbar spine at the L4-5 levels. Similar findings were documented at Claimant’s February 10th and 12th, 2015 PT appointments.

15. On February 17, 2015, Claimant was seen in PT by Janine Rodriguez who documented reports of improving low back pain down to a 5/10 level. Nonetheless, Claimant continued to report lower extremity numbness. Physical examination revealed continued moderate muscle spasms in the lumbroscaral joint and lumbar spine. In addition, Ms. Rodriguez documented hypomobile painful joint segments at L4-5 and L5-S1with anterior glide testing.

16. Dr. Larimore examined Claimant again on February 18, 2015. Claimant reported feeling approximately 25% better at this time with reduced levels of pain, but she was still experiencing the left leg symptoms. Dr. Larimore again documented left sided tenderness and muscle spasms. He instructed Claimant to continue with physical therapy and renewed Claimant’s work restrictions.

17. Dr. Larimore’s final examination before the Claim was denied was on March 4, 2015. Dr. Larimore referred Claimant for chiropractic treatment because her condition had failed to improve.

18. Claimant was out of work, without wages from February 9, 2015 through April 19, 2015, as a consequence of her low back injury. Claimant returned to work pursuant to a modified job duty offer on April 20, 2015, working no more than 6 hours per day.

Claimant had been working 7.5 hours per day prior to her injury. Claimant was out of work from May 15, 2015, for her regularly scheduled summer break until returning to work on August 20, 2015. Claimant continued to work reduced hours until October 26, 2015, which was the first day she returned to full hours.

19. Dr. Timothy Hall performed an independent medical examination (IME) on July 15, 2015, at Claimant's request. Claimant was symptomatic at this examination, although not as symptomatic as she had been in March of 2015. Dr. Hall's physical examination revealed tenderness over the left sacrotuberous ligaments, the SI area, and into the piriformis and gluteal muscle on the left side.

20. Dr. Hall diagnosed Claimant with SI joint dysfunction versus possible facet injury, piriformis syndrome more likely than radiculopathy, and myofascial pain in the lumbosacral area. Dr. Hall explained that, at the time of the injury, Claimant was bending over at approximately 90 degrees and forcibly scooping ice cream. According to Dr. Hall, Claimant's described mechanism of injury (MOI) was reasonable for causing injury to the low back because Claimant was involved in a "torquing maneuver with the back in a vulnerable position with the body leaning forward". Dr. Hall noted that this posture involves poor body mechanics and is the likely cause of Claimant's low back injury.

21. Dr. Hall concluded, "It is therefore my opinion within a reasonable degree of probability that her present symptoms in the low back and leg are the direct consequence of the February 8, 2015 work injury." He recommended that Claimant undergo chiropractic treatment and consider trigger point injections along with soft tissue mobilization of the piriformis.

22. Claimant was questioned at hearing about her answers to interrogatories regarding employment with another company: Pikes Peak Chocolate Factory. Her interrogatories indicated that she worked for Pikes Peak Chocolate from August of 2014 through May of 2015. Claimant explained that these dates were erroneously reversed, in that she worked for them from May of 2014 through August of 2014.

23. Claimant was questioned about her work as an author under the name "Pamela Nihiser." Claimant explained that she writes books under her maiden name. Claimant does not sell her books, the publishing company does. She explained that she did not disclose this information on her employment history in the interrogatories because she does not get paid for her work. The ALJ finds Claimant's testimony regarding the omission of her writing activities in her discovery responses reasonable.

24. Claimant testified that she spoke at "Galaxy Fest" at the Hilton in Colorado Springs on February 28, 2015 and March 1, 2015. Claimant does not recall if she was scheduled to speak at this convention prior to her February 8, 2015 injury. She does not get paid for speaking at these conventions. Facebook Photos of Claimant taken during this time show her wearing boots and posing for pictures. It is unclear whether Claimant's boots have heels, as suggested by Respondents; however, the ALJ finds

from the pictures that Claimant looks to be in no apparent distress. Though she told the physical therapist that she had pain with sitting for any amount of time, additional photos show Claimant sitting in a soft backed chair at a table. While the photos appear to be taken from a substantial distance, the ALJ is able to discern that Claimant does not appear to be in any distress in the photos presented. Regardless, Claimant explained that her pain "came and went," and she was still able to do activities such as go to the gym in attempt to "exercise a little bit of it out." Claimant's Facebook postings bear this out. Moreover, Claimant was provided with muscle relaxers and instructed in an exercise program which she reportedly took and preformed which helped relieve her pain as reported during a PT session on February 10, 2015. Consequently, the ALJ finds little evidentiary value in photos of Claimant smiling and posing several weeks after her injury as related to the issues presented for determination.

25. Claimant went for a hike on March 31, 2015 outside of the Garden of the Gods on "the little trails and stuff" nearby. Claimant testified that "it was not climbing a mountain" as suggested by Respondents. Respondents submitted Facebook photos of this activity. A photo from Claimant's hike depicts a pair of feet and lower extremities with landscape in the background. The ALJ is unable to accurately discern the elevation or other identifying information regarding the terrain from the picture presented. Consequently, the ALJ is not persuaded that the hike was strenuous and; therefore, inconsistent with Claimant's physical capabilities or her stated pain complaints. The ALJ finds the photo of limited evidentiary value when weighed against the totality of the evidence presented, including Dr. Ridings testimony as outlined at paragraph 34 below.

26. Claimant also went to her boyfriend's concerts during the summer where she testified that she would stand for approximately 45 minutes during the show. Review of Claimant's Facebook page photos reveals a picture of Claimant probably taken during one of these concerts. It shows Claimant leaning back on a male companion, presumably her boyfriend, in what appears to be a bar or a pool hall. Outside of this picture, the ALJ is unable to find any depiction of Claimant engaging in any activity that would be inconsistent with her stated capabilities at a concert. Consequently, the ALJ finds Claimant's Facebook page photos of her boyfriend playing in a band of no evidentiary value to the issue of whether Claimant sustained an injury to her low back while scooping ice cream on February 8, 2015.

27. Mr. Randy Kruse testified at hearing on behalf of Respondents as the general manager for Employer. He testified that he was present in the courtroom during Claimant's testimony and that her demonstration of how she would scoop the ice cream was "for the most part" an accurate depiction of what she would need to do in order to scoop. Mr. Kruse's testimony differed from Claimant's in that Mr. Kruse estimated that Claimant needed to bend only to 45 degrees to scoop ice cream. The ALJ finds this a difference without distinction as Claimant would have been, even according to Mr. Kruse, bent at the waist with her arms extended away from her body to forcibly scoop ice cream.

28. Mr. Kruse testified that, at the time of Claimant's injury, she had .52 hours of vacation time remaining. He testified that if Claimant had requested time off to attend the aforementioned convention on February 28, 2015, she could have taken the day off, without pay, if there was somebody who could cover her shift. Based upon the evidence presented, the ALJ finds Respondents' suggestion that Claimant fabricated the February 8, 2015 injury to attend a science fiction convention unpersuasive.

29. Dr. Eric Ridings performed a respondent requested IME of Claimant on October 7, 2015. Dr. Ridings testified consistent with his review of the available medical records his examination of Claimant and his report. He opined to a reasonable degree of medical probability that Claimant did not suffer an injury to her left low back on February 8, 2015.

30. In support of his conclusion, Dr. Ridings noted that, Claimant had no abnormal findings on his physical examination and based upon the Claimant's description of the injury (i.e. feeling a pop in her back) and the subsequent symptoms into the lower left leg, he opined that the most medically probable explanation would be a left sided disc herniation in the low back. However, Dr. Ridings explained that the distribution of nerve pain into the left leg was not anatomically consistent, or possible, given the pain complaints into the front of the leg, but not into the ankle. Dr. Ridings further explained, that when conducting facet loading on the right side of the low back, the Claimant complained of pain whereas she did not complain of pain when the left sided was loaded. Dr. Ridings explained that Claimant's pain complaints were not anatomically consistent since she should have had pain on the left when the left sided was loaded.

31. Furthermore, Dr. Ridings ruled out piriformis syndrome as a possible cause of Claimants pain as suggested by Dr. Hall. Dr. Ridings conducted a piriformis stretch, which did not reproduce any radicular or pain symptoms. Dr. Ridings explained that, if the Claimant had piriformis syndrome, she more likely than not would have had a reaction to this test.

32. Dr. Ridings expressed additional concerns regarding the Claimant's pain presentations. He explained that he measured her flexion range of motion at 80 degrees of free movement initiated by Claimant while she was distracted. However, during formal range of motion of testing Claimant could not move beyond 59 degrees. Dr. Ridings explained that scooping ice cream while bending is not a reasonable mechanism of injury. (Dr. Ridings doubted that the Claimant was bending over at 90 degrees while scooping ice cream).

33. Dr. Ridings concluded that Claimant's mechanism of injury "would not be expected" to cause an injury; however, Dr. Ridings agreed that there are no medical records documenting that Claimant had any sort of pre-existing lower back injuries or that she was suffering from lower back pain prior to February 8, 2015. He also testified that "It's possible to have a lumbar strain just from bending over".

34. Dr. Ridings testified that, for a lumbar strain, he would recommend that the

injured person try to remain active and to stay active with their usual daily activities as much as possible. He testified that activities such as taking a hike and standing around at a concert would be activities that he would have no problem encouraging his own patient to perform with a lumbar strain.

35. Based upon the totality of the evidence presented, the ALJ finds Dr. Hall's opinions credible and more persuasive than the contrary opinions of Dr. Ridings. Similarly, the ALJ finds Claimant's testimony credible and more persuasive that the contrary opinions of Mr. Kruse, who did not witness the injury or how the Claimant was scooping ice cream at the time of the incident in question.

36. The ALJ finds the examinations of Dr. Larimore, PT Pieffer and PT Rodriguez to contain objective findings consistent with a low back injury. The ALJ further finds it more probable than not that Claimant's described MOI is the cause of her low back spasms, pain and limited mobility.

37. Claimant has proven by a preponderance of the evidence that she sustained an injury to her low back in the form of a lumbar strain on February 8, 2015 while scooping ice cream. The ALJ finds further that the care required for this injury, as provided by Dr. Larimore and PT's Pieffer and Rodriquez, was reasonably necessary to cure or relieve her from its effects. Claimant has proven by a preponderance of the evidence that she is entitled to an award of medical benefits to cure and relieve her from the effects of her February 8, 2015 industrial injury

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo.

App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment relationship with Employer and during an activity, specifically scooping ice cream which is connected to her duties and position for Employer. Nonetheless, the question of whether the alleged injury "arose out of" Claimant's employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced

an onset of pain while performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

G. In this case, the question is whether Claimant's low back pain and her subsequent need for treatment was caused by her work related functions of scooping ice cream. Here the evidence presented establishes that Claimant was bent at the waist in an effort to scoop ice cream for a customer. The un-refuted evidence also establishes that her arms were extended in an effort to reach the back of the cooler and she was torquing her body to scoop the ice cream, placing additional stress on her low back. As persuasively explained by Dr. Hall, such torqueing maneuvers with the back in a vulnerable, bent position, involved poor body mechanics which caused Claimant's low back strain in this case.

H. Dr. Ridings' opinions to the contrary are unpursuasive. Dr. Ridings calls into question the degree to which Claimant was bent over at the time of the injury and not that the incident did not occur. Claimant stated that she was bent at 90 degrees at the time she was scooping. Dr. Ridings stated that his measurement of Claimant's bend was actually 80 degrees, but he still doubted that she was bent over to that degree based on his "experience frequenting ice cream shops." More importantly, Dr. Ridings provided no explanation as to why bending at 45 degrees, as testified to by Mr. Kruse, versus bending at 80 or 90 degrees makes a difference in the likelihood of Claimant sustaining a lower back injury in light of her need to reach away from the body and torque to scoop the ice cream. Based upon the evidence presented, the ALJ credits the opinion testimony of Dr. Hall to conclude that a combination of hip flexion, while reaching away from the body and torquing to scoop the ice cream, more probably than not, resulted in Claimant sustaining a lumbar strain. There was no question in Dr. Larimore's mind that the mechanism of injury was reasonable when he concluded the day after the incident that it was more than 50% likely that her symptoms and need for treatment were causally related to the bending and scooping activities that she described to him. Moreover, Dr. Larimore specifically noted that Claimant was to keep all lifting, pushing and pulling activities close to the body. These body mechanics were reiterated by PT Pieffer when he instructed Claimant to keep all objects close to the body and not engage in extended reaching. Based upon the totality of the evidence presented, including instructions to use proper body mechanics to avoid injury, Dr. Ridings' opinion, that the described MOI would be unlikely to cause an injury, is not credible as this is the exact posture and activity that Claimant was in at the time of her

injury, specifically a loaded torquing activity with the arms extended away from the body while in a bent position at the waist.

I. Dr. Ridings opinion that Claimant did not sustain an injury to her low back is further undermined when on February 9, 2015, less than 24 hours after the initial incident, Dr. Larimore documented objective physical findings consistent with Claimant's mechanism or injury and subjective complaints. Claimant reported to her supervisors, commented to her co-workers, and told her physicians, that she felt a snap on the left lower side of her back at the time of the injury at that she began feeling left lower extremity symptoms later than evening. Dr. Larimore documented that Claimant was tender on the left side of her lumbar spine and was experiencing muscle spasms only on the left side of her back. Co-worker Jessica Clancy wrote a statement documenting that she personally witnessed Claimant begin to limp at work shortly after the event occurred, and in her own words, noticed that Claimant's condition "seemed to worsen as time went [on]." Co-worker Ashlee Ramirez wrote a statement documenting that she arrived to work at 4:30pm, roughly 2.5 hours after the incident, and saw Claimant limping around. The witness statements support Claimant's exact timeline of events. Moreover, subsequent examinations by PT Pieffer and Rodriquez document similar objective findings, including spasm and hypomobility. Consequently, the ALJ concludes that Claimant has established the requisite causal connection between her work duties and her low back injury. The injury is compensable. Respondents' suggestions, including the theory that Claimant fabricated her injury to speak at a convention on February 28- March 1, 2015, are unconvincing.

Medical Benefits

J. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

K. As found here, the evidence demonstrates that Claimant's initial care from Dr. Larimore and his referral to physical therapy was reasonable, necessary and related to her acute low back injury. Dr. Larimore's care and treatment was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her low back sprain. Additionally, the PT referral was reasonable and necessary to determine an exact rehabilitation plan and further ameliorate Claimant's ongoing symptoms.

Temporary Disability Benefits

L. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

M. If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. Section 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

N. In this case, the evidence presented establishes that Claimant was injured on February 8, 2015 and left work February 9, 2015, suffering an actual wage loss as a consequence of her compensable injury. Moreover, as of February 9, she was under restrictions provided by Dr. Larimore. Claimant was not offered modified employment until April 20, 2015. Consequently, the ALJ concludes that Claimant was "disabled"

within the meaning of section 8-42-105, C.R.S. and entitled to TTD benefits for the time period of February 9, 2015 through April 19, 2015. *See generally*, *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999); § 8-42-103(1)(b), C.R.S. Claimant returned to work on April 20, 2015 and worked through May 14, 2015; however, as found, she worked modified duty. Claimant was limited to 6 hours per day per Dr. Larimore's orders rather than the 7 hours she worked prior to her compensable injury. Consequently, Claimant is entitled to temporary partial disability (TPD) for the time periods extending from April 20, 2015 through May 14, 2015. Because Claimant admittedly did not work over the summer and is not asserting any lost wages beginning May 15, 2015 through August 19, 2015, no temporary benefits are ordered paid to Claimant during this time frame. However, Claimant returned to work on August 20, 2015, in a modified duty capacity working only 6 hours per day until October 26, 2015 when she returned to full duty work at full wages on October 26, 2015. Therefore, the ALJ concludes that Claimant is entitled to TPD from August 20, 2015 through and including October 25, 2015.

ORDER

It is therefore ordered that:

1. Claimant's February 8, 2015 lumbar strain injury is compensable.

2. Respondent shall pay for all reasonable and necessary and related medical treatment, resulting from the Claimants compensable low back injury, including but not limited to the care provided by all providers at Concentra, specifically Dr. Larimore, and the physical therapy department.

3. Respondents shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-103(1)(b), beginning February 9, 2015 through April 19, 2015 at a rate of sixty-six and two-thirds percent of her average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week so long as Claimant's disability is total. C.R.S. § 8-42-105(1).

4. Respondents shall pay temporary partial disability benefits (TPD) in accordance with C.R.S. § 8-42-106 at a rate of sixty-six and two-thirds percent of the difference between Claimant's AWW at the time of the injury and Claimant's AWW during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for the time periods April 20, 2015 through May 15, 2015 and August 20, 2015 through October 25, 2015.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 9, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. The following issues were presented for determination at hearing:

   a. Whether Claimant proved by a preponderance of the evidence that he suffered work related injuries in the course and scope of his employment for Respondent-Employer;

   b. Under Section 8-43-404(5)(a)(I)(A), whether Claimant exercised his right to select a physician; and

   c. Whether Claimant proved by a preponderance of the evidence that he was disabled from his usual employment from December 26, 2014, and ongoing and is therefore entitled to temporary total disability benefits.

STIPULATION OF FACT

The parties stipulate that, if the case is found to be compensable, Claimant's average weekly wage as of the date of injury was $884.80 per week.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 61 years old man employed by Employer for 15 years. English is Claimant's second language and he does not write English. Employer operates a very large facility, approximately the size of two football fields, which produces cement.

2. In October 2013, Claimant switched jobs from being a day laborer to being a dust collector maintenance employee. Ten of the dust collectors were located on top of 140 foot high silos. Another 95 dust collectors of lesser heights were also Claimant's responsibility to clean. Normally, the dust collectors are accessed via elevator. In September 2013, Employer's plant lost electricity as a result of a flood. As a consequence, the elevators used to access the dust collectors no longer operated. In order to perform Claimant's maintenance tasks, he was required to climb vertical steel ladders, on steps that were approximately as big around as his index finger and 14 inches apart, to the top of each silo. Claimant

performed these duties every workday for fourteen months beginning in October 2013 and December 2014.

3. Claimant's job included changing the belts and the motors in the dust collectors, and placing new bags inside the dust collectors when the old bags were full. In order to change the bags, once he had reached the top of the silo where the dust collectors were located, Claimant had to enter into the inside of the dust collector, stand on a ladder, and work with his hands in the air to remove the bags, and then replace them. The large dust collectors were as large as the court room in which this case was heard. There were ten of the very tall dust collectors, but approximately 95 dust collectors in all that Claimant was responsible for maintaining. Claimant carried his tools on his back in a backpack when he climbed the ladders. The tools weighed between 25 to 30 pounds.

4. Claimant's job as a dust collector maintenance worker was the hardest job he had ever had. Claimant was exhausted when he finished work and laid down at home. Claimant credibly testified that he had no outside activities that could contribute to or cause his condition. Claimant credibly testified that his extracurricular activities only included an occasional walk and attending church.

5. Claimant's low back began to hurt in December 2013, 2 months after beginning climbing the ladders, and around the time Claimant treated for prostate cancer. Claimant told his safety director in June 2014 that he had low back pain and he asked for a back-belt. The safety director did not provide him with a back-belt so Claimant bought his own. The safety director did not send Claimant to a doctor in June 2014 regarding his back pain complaints. Claimant went to a chiropractor of his own choice in July 2014.

6. Claimant began to experience problems with his right shoulder in October 2014. Claimant advised his supervisor about his shoulder problems in October 2014 and again in November 2014. Claimant's supervisor did not fill out any paperwork or send him to a doctor at that time. Claimant again complained to his supervisor on December 10, 2014, and the supervisor advised Claimant he would speak to upper management and they would decide what to do.

7. There was no persuasive medical evidence introduced that Claimant had right shoulder and low back pain as a result of pre-existing degenerative conditions. Even if Claimant had latent degenerative conditions in his low back and right shoulder, those conditions did not become acutely symptomatic until 2014 after Claimant climbed high ladders at work on a daily basis.

8. On December 26, 2014, Claimant reported to his supervisor that he could not take the pain any longer. Employer sent Claimant to a doctor. Since Claimant does not write in English, his supervisor wrote up an injury report. Claimant reported to his supervisor that he was having pain in his neck, his shoulder and

his low back. Claimant did not read the report prepared by his supervisor, he did sign it. Claimant was sent to Workwell. He was not given a choice of doctors.

9. Claimant had a prior shoulder work injury in 2009 for which he was treated at Workwell for about a month with physical therapy and medication. Claimant did not miss any time from work, did not get an impairment rating, and was discharged to full duties for the 2009 injury. Claimant credibly testified that he had not had any problems that required medical care for his neck or right shoulder after the 2009 work injury until he began to experience pain in 2014 from his current injury.

10. Claimant treated at Workwell for approximately five weeks, primarily receiving physical therapy. Claimant reported to Workwell physicians, physician's assistant and physical therapist that he had pain in his neck, shoulder, and low back.

11. Workwell sent Claimant for a surgical consultation with Dr. Fitzgibbons in March 2015. Dr. Fitzgibbons requested authorization for shoulder surgery and Respondent Insurer denied authorization and Claimant was discharged by Workwell.

12. After being discharged by Workwell, Claimant treated with Dr. Yamamoto for his shoulder and neck problems. Dr. Yamamoto referred Claimant to Dr. Eric McCarty for his shoulder care. Dr. McCarty performed surgery on the Claimant's right shoulder on May 12, 2015.

13. On March 11, 2015, Respondents denied compensability of Claimant's low back condition. Workwell referred Claimant to his primary care doctor, Dr. Jaramillo, at the SALUD family health center, for treatment of his low back injury. Jaramillo sent Claimant to Dr. Kara Beasley at Boulder Neurosurgical & Spine associates for his low back care.

14. In fact, Claimant had been seeing Dr. Jaramillo for the work injury since December 30, 2014. Claimant saw Dr. Jaramillo and received treatment January 5, 2015, January 26, 2015, February 10, 2015, February 24, 2015, March 23, 2015, April 23, 2015 and May 6, 2015.

15. It is found that Dr. Jaramillo is the physician that Claimant selected in December 2014, when he reported the work injury to Employer and Employer failed to comply with Section 8-43-404(5)(a)(I)(A). It is further found that Claimant demonstrated by his words and conduct that he chose Dr. Jaramillo to treat the industrial injury.

16. Claimant was disabled from his usual employment after December 26, 2014, because of his work injuries.

17. Dr. John Hughes conducted an Independent Medical Examination (IME) on June 9, 2015. Dr. Hughes credibly opined that Claimant sustained a work related right shoulder rotator cuff tear and aggravated a previously occult degenerative lumbar spine pathology, both injuries occurring as a result of repetitive ladder climbing.

18. Dr. Hughes credibly testified that Claimant's occupational history, includes climbing ladders that were up to 150 feet in height while carrying a backpack and a tool belt over the course of fourteen months which required climbing, reaching, and bending. Dr. Hughes credibly opined that Claimant suffered a right shoulder sprain and strain secondary to repetitive climbing of ladders. Dr. Hughes credibly testified that in the process of climbing the 150 foot tall ladders while carrying a backpack, Claimant's shoulder "would sustain all of the traction forces of holding on to the vertical part of the ladder during both ascent and descent of the ladder. A hundred and fifty feet is fifteen stories. That is quite a rigorous ascent. And forces are increased if the individual is obese, as Mr. Rivas is…or was as of June 9. And increased still further by wearing tools and a backpack." Hearing Transcript p. 15.

19. Dr. Hughes credibly testified that Claimant also had "relatively occult lumbar spondylosis, consistent with being a 61 year old man, until the year 2014, and then I believe his work related activities accelerated his lumbar degenerative disease to where he became relatively more symptomatic... So I believe that his work of the year 2014 substantially and permanently aggravated his lumbar spine condition, leading to the need for medical evaluation and treatment of his lumbar spine". Hearing Transcript p. 18. Dr. Hughes further credibly testified that the "twisting activity that would occur from climbing a 15 story high ladder and descending a 15 story high ladder on a regular basis" would cause an aggravation of the Claimant's lumbar pathology. Hearing Transcript p. 18 and 19.

20. Dr. Hughes further credibly testified that the Claimant's low back pain in June 2010 was caused by Claimant's bout with shingles and was not related to his current back pain. Likewise, Dr. Hughes credibly testified that Claimant's diffuse back pain in August 2010 was caused by post-herpetic neuralgia and was not related in any way to his current back pain complaints. Last, Dr. Hughes credibly testified that the Claimant's low back pain documented in the medical records in December 2013 was, at least, in part, caused by the treatment for prostate cancer that occurred that month, as well as by the high ladder climbing for the prior 2 ½ months.

21. Dr. Lesnak saw Claimant for an IME on June 16, 2015, and Dr. Lesnak testified in a post-hearing deposition on September 9, 2015. Dr. Lesnak concluded in his IME report that Claimant suffered no work injury as a result of his occupational activities at Employer.

22. Dr. Lesnak testified that Claimant made no mention of low back pain in any of the initial medical records. Dr. Lesnak reviewed Claimant's first physical therapy visit note dated December 30, 2014, but did not note Claimant's complaint of low back pain and subsequently opined that the records did not contain reports of low back pain.

23. Dr. Lesnak's IME report and testimony is found not to be as credible and persuasive as the testimony and IME report of Dr. Hughes. Dr. Lesnak's opinion lacked medical probability. No credible or persuasive evidence was offered to mitigate the finding regarding the intensity of these duties. No one credibly contradicted Claimant's account of his duties and his consistency in the performance of those duties.

24. It is found that Claimant suffered an occupational injury/disease to his right shoulder and to his low back as a result of his repetitive ladder climbing in 2014.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

General Legal Authority

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

3.Claimant sustained his burden of proof to establish that he suffered an occupational injury/disease to his low back and shoulders as a result of his work related job duties with this Employer. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "occupational disease" is defined by Section 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

4. This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* Indeed, a compensable occupational disease may be found where the ALJ determines that the hazards of a claimant's employment have aggravated or accelerated a medical condition caused in part by a prior industrial injury. *Cf. University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001). However, a claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.*

5. The claimant was required to prove by a preponderance of the evidence that the alleged occupational disease was directly and proximately caused by the employment or working conditions. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999).

6. The ALJ concludes that Claimant proved by a preponderance of the evidence that his assigned duties for Employer were the direct and proximate cause of his low back and shoulder injuries and/or the hazards of Claimant's employment have aggravated or accelerated a medical condition caused in part by a prior industrial injury. Claimant's credible testimony and the testimony and medical report of Dr. Hughes

established that Claimant suffered a compensable occupational disease in the course and scope of his employment for Employer.

Right of Selection of Medical Provider

7. Claimant contends that the right of selection of medical provider passed to him when he advised Employer of his work injury and Employer did not comply with the provisions of Section 8-43-404(5)(a)(I)(A). Claimant argues that Respondents did not comply with Section 8-43-404(5)(a)(I)(A) when Respondents directed Claimant to obtain medical treatment at Workwell. It is Claimant's contention that he had another opportunity to select a physician when Workwell determined Claimant's low back condition was not work related and released him from care for non-medical reasons. Claimant argues that he selected Dr. Yamamoto as his physician for his right shoulder injury and he selected Dr. Jaramillo for his low back condition.

8. Respondents contend that Workwell is the authorized provider of medical treatment and was designated as such when Claimant was directed by Respondents to seek treatment there and Respondents agreed to pay for Claimant's medical expenses. Respondents argue that Workwell is a medical facility that has numerous physicians from whom Claimant could obtain treatment. Respondents argue that Claimant was not directed to one specific doctor at Workwell.

9. Authorization refers to the physician's legal authority to treat the injury at respondents' expense, and not necessarily the reasonableness of the particular treatment. *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Section 8-43-404(5), *supra*, allows the employer the right in the first instance to designate the authorized treating physician; the right to select however passes to claimant where the employer fails to designate in the first instance. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The employer's right to select the treating physician is triggered when the employer receives oral or written notice from the employee or has:

> [S]ome knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.
>
> *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo.App. 1984).

Where the right to select passes to the claimant, treatment from the physician the claimant selects after that date is authorized. *See Grove v. Denver Oxford Club*, et al., W.C. No. 4-293-338 (ICAO November 14, 1997).

10. Claimant contends that the right of selection of medical provider passed to him when Respondents failed to comply with Section 8-43-404(5)(a)(I)(A), C.R.S. to designate providers.

11. Section 8-43-404(5)(a)(I)(A), C.R.S. applicable to this 2014 injury and claim for benefits, provides that:

> In all cases of injury, the employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee.

The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

12. In *Squitieri v. Tayco Screen Printing, Inc.,* W.C. No. 4-421-960 (ICAO September 18, 2000), the ICAO held that the term "select," as it appears in the predecessor to Section 8-43-404(5)(a)(I)(A) is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives. Thus, the ICAO held that a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." The ICAO also indicated that the question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ, and the ALJ's resolution of this issue must be upheld if supported by the record.

13. Based on the medical records, it is concluded that Claimant selected Dr. Jaramillo at the Salud Clinic as the physician from whom he would receive care for the work injuries. Claimant appeared for treatment with Dr. Jaramillo on December 30, 2014, and continued treatment with this physician at least through May 2015. Claimant's words and conduct while in treatment with Dr. Jaramillo evidenced his intent to select the physician for treatment. The ALJ rejects Claimant's contention that he is entitled to select a second physician as his treating physician based on Respondents action dismissing Claimant from care for non-medical reasons.

TTD

14. Finally, Claimant contends entitlement to TTD benefits from December 26, 2014, and ongoing. Respondents argue that Claimant's injury is not work related and therefore he is not entitled to TTD benefits because he is not disabled by the work injury. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his/her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to

work, or by restrictions which impair the claimant's ability effectively and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

15. Based on the totality of the evidence, it is concluded that Claimant established by a preponderance of the evidence that he is disabled from his usual employment by the work injury and therefore his is entitled to TTD from December 26, 2014, and ongoing until terminated by law.

ORDER

It is therefore ordered that:

1. Respondents shall be liable for workers' compensation benefits for the occupational disease injury with the onset of disability date of December 26, 2014, affecting Claimant's right shoulder and low back.

2. Under Section 8-43-404(5)(a)(I)(A), Claimant selected Dr. Jaramillo as his treating physician for the occupational disease injury.

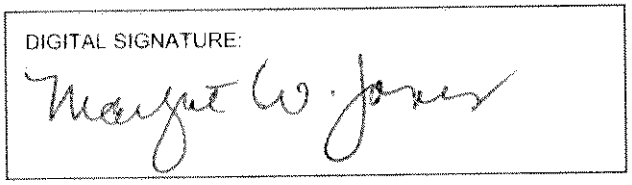
3. Respondents shall be liable for TTD from December 26, 2014, and continuing until terminated by law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 9, 2015___



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

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STIPULATIONS

Prior to the commencement of hearing, the parties reached the following stipulations:

- Claimant withdrew his request for TTD and TPD benefits without prejudice.

- The parties stipulated that should the injury be found compensable, Claimant's authorized medical provider is the Southern Colorado Clinic.

- Respondents stipulated that, should the injury be found compensable, the medical treatment for Claimant's right knee provided by Southern Colorado Clinic and its written referrals are reasonable, necessary, authorized, and causally related to this claim's injury.

- The parties stipulated that, should be the injury be found compensable, Claimant's average weekly wage (AWW) is $237.58.

These stipulations were accepted and approved by the ALJ.

REMAINING ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury to his right knee on February 17, 2015.

II. If Claimant did suffer a compensable injury to his right knee, whether he proved by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was working as a laborer for Employer on February 17, 2015, when he injured his right knee while attempting to enter a narrow trench to attach a tracer line to a newly installed sewer pipe. The trench was approximately 4 feet deep and 18 inches wide. Interspersed with the dirt forming the side walls of the trench were discarded buried bricks which, along with surrounding attached dirt, would extend out from the

sidewall to form small ledges along the trench. Consequently, the sidewalls of the trench were not completely smooth.

2. Although he is relatively short in stature, being 5 feet 8 inches tall, Claimant is a large man, weighing approximately 275 pounds. He felt the trench was too deep for him to jump into. Consequently, he chose to enter the trench by placing his left foot on one of the small sidewall ledges located about half way down and on the far side of the trench. Claimant was effectively straddling the trench in this position with his left foot lower than the right which remained on the ground at the top of the trench. According to Claimant, as he transferred his weight to his left foot, the ledge gave way and his left foot slid abruptly to the bottom of the trench. Claimant testified that his right foot remained on the ground at the top of the trench.

3. Claimant testified that his left knee buckled as he slid to the bottom of the trench, but his right ankle got hung up on the top, and that his right knee was at a really "weird angle." Claimant felt immediate burning pain and felt a tearing sensation in his right knee. Claimant gathered himself and crawled out of the trench. He took some Tylenol that he carried in his lunch bag, and tried to continue to work for the rest of the day. Claimant testified that he was unable to perform all of his work duties.

4. Don Chapman is the owner of the property which Claimant was working on. Mr. Chapman testified that he witnessed Claimant slip getting into the trench, but that Claimant slipped slowly and only half way down the side of the trench, not to the bottom. He did not see Claimant twist his knee, act as if he were injured, or observe Claimant's leg was in an awkward angle as Claimant testified to. Mr. Chapman also testified that Claimant came up to him later to confirm that he (Mr. Chapman) witnessed the slipping. According to Mr. Chapman, Claimant did not say he hurt his knee or mention any knee injury at that time.

5. Claimant was able to complete his shift and drive another employee home after their shift had ended. After dropping his co-employee off, Claimant called Employer to report his injury. According to an undated and unsigned Employee incident report, Claimant reportedly informed Employer that he was "calling . . . to let [Employer] know that earlier in the day when [he] jumped into the ditch, [he] sprained [his] knee." Claimant did not provide a specific time for the injury. Rather, he estimated that it occurred around "mid-morning". A witness statement was obtained from the co-worker Claimant drove home the day of his injury. That witness, Khalid Morales provided a witness statement on February 19, 2015. He indicated in his witness statement that Claimant reported that as he was "getting in our trench his left foot got caught and fell in the trench". According to Mr. Morales' statement, this incident occurred around 10:00 AM on February 17, 2015. Claimant mentioned to Mr. Morales during the lunch break that he thought, "[H]e might have twisted his knee while jumping into the ditch." Although Claimant did not discuss the alleged injury while driving Mr. Morales home that day, Mr. Morales, in describing the incident in his witness statement, noted that that Claimant had a "limp" and did not appear to want to be at the job site to work. The ALJ finds Mr. Morales' statement to Employer about Claimant standing around a lot and not

appearing interested in working suggestive of and consistent with Claimant's testimony that he could not perform all of his work duties after he was injured.

6. While record inconsistencies between the testimony of Claimant and Employer exist regarding how Claimant entered the trench, the ALJ resolves those differences in favor of Claimant to find that if Claimant used the word "jumped" when describing getting into the trench, it was used, more probably than not, as a term of art in expressing his willingness to get in the trench and get the job done rather than the contrary suggestion that he, being 5 feet 8 inches tall and weighing 275 pounds literally "jumped" into a four foot deep, 18 inch wide trench. Furthermore, the testimony of Mr. Chapman convinces the ALJ that Claimant did not actually "jump" into the trench.

7. Claimant has a history of a prior February 5, 2014 injury to the right knee for which he was treated by Dr. Lakin and which resulted in a right knee arthroscopy with partial lateral meniscectomy and lateral retinacular release performed by Dr. Ritter on April 4, 2014. Claimant was placed at MMI for his February 5, 2014 right knee injury by Dr. Lakin on August 13, 2014. At the time of his discharge from care for this injury, Claimant reported aching pain in his right knee, difficulty kneeling, and difficulty putting on socks and activities involving complex bending and rotation. He had an independent exercise program as maintenance medical care for that prior injury. Nevertheless, Claimant was released to full duty work. Consequently, he secured employment with a stucco supply company in the Denver area. As part of his duties, Claimant would fill customer orders by transferring 90 pound bags of stucco and other materials onto his truck for delivery. Claimant would also unload these materials at the designated drop site. Claimant injured his neck on January 6, 2015 while working as a stucco supply man. He then returned to Pueblo and the necessary care for his neck injury was transferred to Dr. Lakin at the Southern Colorado Clinic.

8. On the morning of February 18, 2015, Employer called Claimant and requested that he see a doctor for the "knee he injured yesterday". Claimant had a previously scheduled appointment with Dr. Lakin on this date to obtain a final release for his compensable neck injury as described above. While this previously scheduled appointment had nothing to do with Claimant's knees, Dr. Lakin saw Claimant for his claimed new right knee injury and wrote a report. In his initial examination report, Dr. Lakin indicated yes to the question "are your objective findings consistent with history and/or work related mechanism of injury/illness?" Dr. Lakin also imposed work restrictions.

9. Claimant testified that he had no problems or symptoms from his February 5, 2014 injury at the time he reinjured the knee forming the basis of this claim. The ALJ finds Claimant's testimony in this regard credible given the physical demands associated with his job as a stucco supply man and the paucity of medical records documenting any symptoms and/or need for treatment concerning the right knee in the months, weeks and days leading up to his right knee injury in this case. Consequently, the ALJ finds, as unpersuasive, Respondents' suggestion that Claimant's current knee condition and need for medical treatment is related to his February 5, 2014 injury.

10. Claimant had multiple follow up visits with Dr. Lakin concerning his right knee. On March 10, 2015, Claimant underwent an MRI of the right knee which revealed a horizontal tear in the lateral meniscal body that extends to the superior articular surface, partial meniscectomy changes involving the lateral meniscus and a small area of full-thickness cartilage defect in the posterolateral femoral condyle. The MRI also showed a Grade 2 medial collateral ligament (MCL) sprain.

11. On April 9, 2015, Claimant had an appointment at Parkview Orthopedics. He was seen by Physician Assistant Mark Rice, PA-C. PA Rice described a mechanism of injury consistent with what Claimant testified to at hearing. In his note from this date, PA Rice wrote, "I think the patient sustained a significant injury to his right knee when he fell." He further wrote "my clinical examination also suggests a medial meniscus tear, which the MRI films support."

12. Claimant returned to Parkview Orthopedics on April 30, 2015, and was seen/evaluated by Dr. Ritter. Dr. Ritter reviewed Claimant's MRI scan, and stated, "I think that the symptoms have shifted from a medial collateral strain to symptoms of a meniscal tear. I think that these are related to his more recent injury." To support this conclusion, Dr. Ritter noted that Claimant "had done very well after his last scope and had gone back to work doing heavy labor."

13. In his report from Claimant's May 27, 2015 appointment, Dr. Lakin stated, "I believe it is clear [from] Dr Ritter's over-read of MRIs in his note that this is a new meniscal tear from a new injury."

14. Dr. Anjmun Sharma examined Claimant at the request of Respondents on August 6, 2015. He also testified at hearing. Dr. Sharma opined that Claimant's right knee condition, diagnoses, and anatomic changes seen on the MRI pre-existed Claimant's alleged February 17, 2015, right knee injury. According to Dr. Sharma, the MRI findings would have been seen without any incident on February 17, 2015. Dr. Sharma explained that no force sufficient to cause a meniscus tear or injury was placed on Claimant's knee given the mechanism of injury described by Claimant at hearing or during the IME appointment he conducted on August 6, 2015. The ALJ has carefully considered Dr. Sharma's opinions and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. Sharma's opinions less persuasive than those of Dr. Ritter.

15. Based upon the evidence presented, including the testimony of Claimant and Mr. Chapman, the witness statement of Mr. Morales and the medical record as a whole, the ALJ is persuaded that Claimant attempted to enter the trench by straddling it and placing his left foot on a sidewall ledge which subsequently gave way causing his left foot to slide toward the bottom of the trench while leaving his right foot at ground level above. The depth of the trench, in combination with Claimant's height and weight persuades the ALJ that Claimant's right knee was placed in an awkward position causing an MCL strain and a traumatic tear to the lateral meniscus of the right knee.

Consequently, the ALJ finds that Claimant's right MCL strain and lateral meniscal tear occurred in the course and scope of and arose out of his work related functions as a laborer for Employer. Claimant has proven by a preponderance of the evidence that his right knee injury is compensable.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. As found above, Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right knee on February 17, 2015 as he attempted to descend to the bottom of a trench to tape a tracer line on to a newly installed sewer pipe. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

B. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically taping a tracer line onto a sewer pipe which was connected to his position as a laborer for Employer. Nonetheless, the question of whether the injury "arose out of" Claimant's employment must be resolved before the injury is deemed compensable.

C. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum*

Company, W.C. No. 3-850-024 (December 14, 1989). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

D. In this case, the question is whether Claimant's right knee pain and pathology, specifically his medial collateral ligament strain and the horizontal lateral meniscal tear was caused by his work related functions of attempting to enter the trench to tag the sewer line or whether the aforementioned pathology is a consequence of the natural progression of a pre-existing degenerative condition of the right knee. Opposing opinions were presented in this regard. On one hand, Dr. Ritter opines that Claimant's lateral meniscal tear is acute and related to his February 17, 2015 injury. On the other hand, Dr. Sharma testified that the findings noted on Claimant's MRI are not suggestive of acute injuries. Dr. Sharma testified further that Claimant's reported mechanism of injury (MOI) lacks a sufficient torquing component likely to cause meniscal tearing. According to Dr. Sharma, in the absence of twisting a planted and bent knee, meniscal tearing does not occur. Based upon the evidence presented, the ALJ is not persuaded by Dr. Sharma's opinions for the following reasons: First, Claimant's MOI as explained establishes that his right leg was in an awkward bent position and that it twisted as the left leg descended into the trench as the dirt wall upon which he was standing gave way. Second, the MRI references a Grade 2 MCL strain along with the aforementioned horizontal left lateral meniscal tear. While the report does describe probable degenerative chondral changes in the patella and posterolateral femoral condyle, the record presented fails to support a conclusion that the meniscal tear in question is degenerative in nature. Indeed, Dr. Ritter described the tear as traumatic. Here, Dr. Ritter's opinions are more persuasive than the contrary opinions of Dr. Sharma. In fact, Dr. Sharma indicates that Claimant may have sustained a knee strain, albeit a "small" one in his opinion. Based upon the totality of the evidence presented, the ALJ concludes that Claimant likely sustained a Grade 2 MCL strain along with a traumatic lateral meniscus tear of the right knee when the dirt ledge he was standing on gave way and his left leg slid toward the bottom of the trench while his right leg was left atop of the trench in a twisted, bent position. This conclusion is consistent with Claimant's report of immediate pain and a tearing sensation in the right knee. Consequently, the ALJ concludes that Claimant has established the requisite causal connection between his work duties and his right knee injury. The injury is compensable.

E. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such

benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). In this case, Claimant has established that his need for a right knee arthroscopy is directly related to his compensable right knee injury. Nonetheless, the question of whether the arthroscopy was reasonable and necessary must be addressed.

F. The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Based upon the evidence presented, the ALJ concludes that Claimant has proven by a preponderance of the evidence that the right knee arthroscopy recommended by Dr. Ritter is reasonable and necessary. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Ritter to recommend an arthroscopy. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the recommended right knee arthroscopic procedure is reasonable and necessary to cure and relieve Claimant from the ongoing effects of his compensable injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right knee of February 17, 2015.

2. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical treatment, including but not limited to the right knee arthroscopic procedure, recommended by Dr. Ritter to cure and relieve him of the effects of his February 17, 2015 compensable right knee injury.

3. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his right knee condition, including, but not limited to the right knee arthroscopic procedure recommended by Dr. Ritter.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 30, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUE

The issue to be determined by this decision is as follows:

Is the requested injection from Dr. Blau reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. The claimant was employed by the respondent-employer, an auto body shop, as a service writer in Fort Collins, Colorado. On November 26, 2014 the claimant was a walking across the shop floor when he slipped and fell. The claimant injured his back in the fall. The claimant was referred by the respondent-employer to Concentra Medical Center. The claimant had been employed by the respondent-employer for two weeks prior to this injury.

2. The claimant was seen by Dr. Jeffrey Winkler on December 3, 2014. The claimant reported that he had previously injured his low back and had a disc problem, but did not give a detailed history as to the multiple incidents over the years. Dr. Winkler noted that the claimant had only been working for the respondent-employer for ten days at the time of injury. Physical therapy were prescribed medications were to be handled by his PCP. The claimant was diagnosed with back contusions after x-rays had been performed.

3. The claimant relocated to the Colorado Springs area and transferred his care to Concentra in Colorado Springs. The claimant was seen by Dr. Randall Jones on January 6, 2015. Dr. Jones noted the claimant's current use of medications for his chronic back condition. Physical therapy was prescribed. The claimant had an acute pain increase which required a visit to the emergency room on January 19, 2015. The claimant returned to Dr. Jones on January 30, 2015. It was noted there was minimal swelling at the impact site. Dr. Jones noted that the claimant was a high risk for delayed recovery. Acupuncture was considered.

4. The claimant was referred to Dr. Shimon Blau on February 16, 2015. Dr. Blau noted the history that had been contained in the records. He did record right sided

pain. Dr. Blau obtained a history of PTSD, Bi-Polar Disorder, and Hypertension. The claimant reported that he incurred a back injury in the motor cycle accident, but failed to mention the multiple other traumas and ongoing chronic issues over the years. Dr. Blau diagnosed the claimant with a radiculopathy, but also noted a normal gait. Physical therapy was recommended to continue. Weaning of medications was discussed.

5. Dr. Blau saw the claimant again on April 27, 2015. The claimant noted an increase in pain in the morning, but that medications and use of a TENS unit there was improvement. Straight leg raises were negative and range of motion was noted to be good. There was pain with facet loading, however, neural tension was normal and there was normal tone in the bilateral extremities as well as no atrophy. Gait was also normal. Dr. Blau recommended L4 and L5 nerve root blocks.

6. The respondent-insurer had Dr. Shirley Conibear review the request from Dr. Blau. Dr. Conibear reviewed the complete medical chart for this claim. Dr. Conibear noted the long standing use of narcotics and that on physical exam lower extremity strength was normal as well as reflexes. She noted that there was no objective finding of a Radiculopathy that must correlate with imaging studies. Also, there is no failure of conservative care outlined, but notes that indicated the claimant was progressing with physical therapy. It was her opinion that medical necessity of the request was not established and recommended denial of the procedure. Insure issued a letter pursuant to W.C.R.P. Rule 16-10(b) on May 13, 2015 pursuant to this request.

7. The claimant returned to work at a book store owned by his parents sometime in the summer of 2015.

8. The claimant was seen by Dr. Floyd Ring for an IME on August 11, 2015. The claimant reported the injury consistent with records. The claimant did inform Dr. Ring of his dissatisfaction with Dr. Winkler. The claimant did not recall that he had an increase in pain which led to his February emergency room visit. His past history was recovered for narcotic use, however, the claimant was not very detailed as to his multiple recurrent injuries. He did mention to Dr. Ring that while treating for his motorcycle accident, he had an issue with the injection and did experience needle phobia. The claimant informed Dr. Ring of his long time narcotic usage.

9. On the claimant pain diagram, pain was noted in the small area of the back. There was no indication of radicular pain. Exercise and stretching were noted to be of benefit. Medications were recorded. On physical exam, tenderness was noted but the exact etiology could not be ascertained. There was no atrophy in the muscles

and lower extremity strength was exhibited as 5/5. Sensation was intact throughout the bilateral extremities. No evidence of any neurological abnormality, radicular findings, or evidence of facet mediated pain was noted.

10. Dr. Ring's impressions were prior history of motor vehicle accident, chronic narcotic and Benzodiazepine use, and myofacial back pain. The claimant reported to Dr. Ring that he was not experiencing radicular symptoms and that he did not plan on returning to Dr. Blau in the form of injections. Dr. Ring noted that due to the claimant's normal physical examination and minimal pain complaints that the requested epidural injection was not reasonable or necessary. Dr. Ring viewed the surveillance video taken in the spring of 2015. Dr. Ring noted that the claimant was able to bend and lift multiple items without difficulty. He also noted that there was no evidence of pain behaviors and that the claimant walked with a non-antalgic gait. It was Dr. Ring's impression after viewing the videos that the claimant did not demonstrate restrictions in range of motion, pain behavior or necessity for any restrictions.

11. The claimant continued to treat at Concentra and was released at MMI in October of 2015, prior to the hearing.

12. The ALJ finds Dr. Ring's analyses and opinions to be credible and persuasive.

13. The ALJ finds that the claimant has failed to establish that is more likely than not that he requires the injections as recommended by Dr. Blau.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Except as specifically discussed below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents.

Section 8-43-201(1). The injured worker bears the burden of proof to entitlement to medical benefits.

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000). Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the record.

5. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge’s sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251, 252 (Colo. App. 1999). Further, the respondents are liable if employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. ICAO,*. Pain is a typical symptom from the aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-mart Stores*, W.C. No. 4-669-654 (January 28, 2008).

6. Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the

condition for which benefits or compensation are sought. *Snyder v. ICAO, supra*. Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

7. The ALJ concludes that Dr. Ring is credible and persuasive in his opinion that the requested procedure is not reasonable and necessary. Dr. Ring came to the same conclusion that Dr. Conibear had reached that there was no objective finding of a radiculopathy. Dr. Ring was consistent in his testimony that claimant did not display the required radicular symptoms to warrant the requested procedure.

8. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the procedure requested by D. Blau is reasonable or necessary.

ORDER

It is therefore ordered that:

1. The claimant's request for medical care in the form of injections, as recommended by Dr. Blau, is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: December 17, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing June 23, 2015, even though he previously was released to return to regular employment and lost that employment for economic reasons?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 and 3 were received in evidence. Respondents' Exhibits A, B and D through H were received in evidence.

2. Employer is in the business of installing and maintaining vapor recovery units on large oil storage tanks. Claimant was employed as a "field technician." This job required Claimant to perform work on the vapor recovery units.

3. Claimant sustained admitted work-related injuries on March 9, 2015, when he was involved in a motor vehicle accident (MVA). On March 9, 2015 Claimant was seen at the emergency room where he was assessed as suffering from multiple accident related injuries including injuries to the cervical spine and the low back.

4. John Borkert, M.D., of Banner Health, became Claimant's primary authorized treating physician (ATP) for the admitted industrial injury. On March 11, 2013 Dr. Borkert placed Claimant on "sedentary" work restrictions. Under these restrictions Claimant was limited to standing "only occasionally, lifting 10 pounds maximum and frequent lifting or carrying of objects such as small tools." The employer accommodated Claimant's restrictions and he returned to work performing light duty.

5. Dr. Borkert examined Claimant on April 29, 2015. Dr. Borkert noted claimant was status post-MVA and "feeling much better overall." Nevertheless Claimant reported some neck soreness and middle back soreness. Dr. Borkert noted Claimant was then under "light-medium restrictions" and had undergone a "negative neck MRI."

6. On April 29, 2015 Dr. Borkert assessed "muscle spasms of neck" and "some bilateral trapezium muscle spasm." Dr. Borkert released Claimant to "return to regular work without restrictions." Dr. Borkert also referred Claimant to physical therapy (PT) three times per week for four weeks. Dr. Borkert wrote that his "goals" for the PT included pain relief and increased function. Dr. Borkert also continued prescriptions of oxycodone-acetaminophen (Percocet), Robaxin and Valium.

7. Following Dr. Borkert's release to regular employment Claimant returned to his pre-injury employment as a service technician.

8. Mr. Keith Segura (Segura) was Claimant's supervisor. Segura testified that after Dr. Borkert issued the April 29, 2015 release to regular employment Claimant returned to work at "full duty." Segura testified that after April 29 he observed Claimant performing his duties and Claimant appeared to be doing fine. Segura further testified that he regularly asked Claimant how he was feeling and Claimant said he was doing fine and there was nothing Segura could do.

9. Claimant testified that after he returned to work at full duty he told Segura that he still was experiencing pain. Claimant stated that some days were better than others.

10. Claimant commenced PT on May 18, 2015. On May 18 Claimant complained of mid and low back pain with "prolonged sitting, standing, and walking."

11. On May 22, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported he was sore after the last treatment then "felt much better."

12. On May 26, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "feeling OK" but was "still pretty sore."

13. On May 29, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "feeling pretty good."

14. On June 4, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "still pretty sore in the mid back."

15. On June 10, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "stiff in the mid back."

16. On June 15, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was "feeling a little better."

17. On June 16, 2015 Dr. Borkert again examined Claimant. Dr. Borkert noted Claimant was "doing well overall" and his thoracic back pain was improving. However, Claimant stated that he felt he needed additional PT. Dr. Borkert noted his physical examination (PE) of Claimant was "consistent with paraspinous muscle spasm." Dr. Borkert prescribed 4 more weeks of PT and continued Percocet, Robaxin and Valium.

18. On June 19, 2015 Employer terminated Claimant's employment. Segura credibly testified that Claimant was terminated by direction of upper management because there was a significant drop in oil prices and the Employer no longer needed as many service technicians. Segura explained Claimant was selected for termination because he was the most recently hired service technician.

19. Following the termination from employment Claimant made an appointment to see Dr. Borkert on June 23, 2015.

20. On June 23, 2015 Dr. Borkert noted that Claimant gave a history that he was "fired from his job last Friday" and was "wondering about work restrictions." Claimant reported his back was "feeling worse." Dr. Borkert noted the PE was consistent with muscle spasms of the neck and myofascial back pain. Dr. Borkert recommended that Claimant continue with PT and medications.

21. On June 23, 2015 Dr. Borkert also authored a "Work Status Note." The Work Status Note states that Claimant "has an existing medical condition which limits him from doing additional activity beyond light duty restrictions." Dr. Borkert wrote Claimant was permitted to engage in "a light level of activity, which means lifting 20 pounds maximum, frequent lifting or carrying objects that weigh up to 10 pounds, walking or standing to a significant degree, or sitting most of the time with pushing/pulling arm/leg controls."

22. Claimant testified he did not ask Dr. Borkert to author a letter imposing restrictions. Rather, Claimant explained that he asked what type of work he should avoid in order to let his back heal.

23. Segura credibly testified that Claimant could not have returned to his regular employment as a service technician given the "light duty" restrictions imposed by Dr. Borkert on June 23, 2015.

24. Claimant continued with PT after he was terminated from employment. On June 24, 2015 Claimant reported to the physical therapist that he was "still pretty sore."

25. On July 1, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that his cervical spine was "feeling pretty good" but the thoracic spine was still painful.

26. On July 9, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant reported that he was feeling "pretty good overall."

27. On July 15, 2015 the physical therapist placed an "x" in a box on the PT record indicating that Claimant was subjectively "better." The therapist noted Claimant

reported that since he had stopped working he felt as though his “neck and back have been able to calm down.”

28. Claimant proved it is more probably true than not that he is entitled to an award of temporary total disability benefits commencing June 23, 2015. The ALJ is persuaded that the restrictions imposed by Dr. Borkert on June 23, 2015 were causally related to the admitted industrial injury, that these restrictions physically precluded Claimant from returning to his regular employment as a service technician and that Claimant sustained an actual wage loss as a result of these restrictions.

29. On June 23, 2015 Dr. Borkert was still treating the Claimant’s injury-related back symptoms with medications and PT. On June 23, 2015 Dr. Borkert performed a PE and noted findings consistent with muscle spasms and mysofascial back pain. On June 23, 2015 Dr. Borkert had not found Claimant to have reached maximum medical improvement (MMI).

30. The Claimant credibly testified that on June 23, 2015 he asked Dr. Borkert about work restrictions that would permit Claimant to obtain new employment while also allowing his back to heal.

31. The ALJ infers from the totality of the circumstances that when Dr. Borkert imposed the new restrictions on June 23, 2012 he was exercising his independent medical judgment concerning the course of Claimant’s medical treatment. The ALJ is not persuaded that Dr. Borkert imposed the restrictions merely because Claimant asked for them. In this regard the ALJ finds that at the time Dr. Borkert imposed the June 23, 2015 restrictions he knew Claimant had returned to regular duties after the April 29, 2015 release. Dr. Borkert also knew that since the April 29 release Claimant’s injury-related neck and back symptoms had persisted despite the ongoing PT and the use of narcotic medication and muscle relaxants. The ALJ infers that Dr. Borkert determined that imposition of the June 23 activity restrictions was necessary for Claimant to obtain the maximum sustained benefit from the ongoing medical treatment. The ALJ finds that Dr. Borkert reached this conclusion regardless of whether Claimant’s overall condition could be described as “improving” or “worsening.”

32. Claimant proved it is more probably true than not that the restrictions imposed by Dr. Borkert caused him to be temporarily disabled from performing his regular duties as a service technician. As determined in Finding of Fact 23, Segura credibly testified that the June 23, 2015 restrictions placed Claimant in the “light duty” category which precluded him from performing the regular duties of a service technician. Dr. Borkert’s decision to impose these restrictions is credible and persuasive evidence that Claimant was disabled commencing June 23, 2015. Therefore, the Claimant has been disabled from performing his regular duties for longer than three days. Indeed the PT records establish Claimant was still not working when he saw the therapist on July 15, 2015.

33. At the hearing the parties stipulated Claimant’s average weekly wage (AWW) is $1515.76.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

CLAIM FOR TEMPORARY TOTAL DISABLITY BENEFITS

Claimant seeks an award of TTD benefits commencing June 23, 2015 and continuing. Claimant argues, based on his testimony and the restrictions imposed by Dr. Borkert on June 23, 2015, that he became temporarily totally disabled on that date.

Conversely, Respondents argue the June 23, 2015 restrictions are not credible and persuasive evidence of Claimant's alleged disability because Claimant requested imposition of the restrictions "immediately after" his termination from employment on June 19, 2015. Respondents also argue the medical and PT records establish that on June 23, 2015 Claimant's condition was "improving" after he had already successfully returned to regular employment pursuant to Dr. Borkert's April 29, 2015 release. Respondents reason that this evidence credibly and persuasively demonstrates there was no "worsening" of Claimant's condition after April 29 that could justify a finding of temporary disability beginning on June 23, 2015. The ALJ concludes Claimant proved that he is entitled to an award of TTD benefits.

To prove an initial entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he or she left work as a result of the disability, and that the disability resulted in an actual wage loss.

Anderson v. Longmont Toyota, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to prove a causal connection between the work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of "disability" presents a question of fact for the ALJ. To prove disability there is no requirement that a claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). When a claimant does present medical evidence of restrictions it is for the ALJ to assess the weight and credibility to be assigned such evidence. *King v. The Inn at Silver Creek,* WC 4-844-514 (ICAO February 6, 2012).

Section 8-42-105(3)(c) provides that TTD benefits are terminated when the "the attending physician gives the employee a written release to return to regular employment." When applying this statute our courts hold that an unequivocal release to regular employment by an attending physician is conclusive and may not be altered by an ALJ. *Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000). In this case Claimant does not dispute that his initial entitlement to TTD benefits, if any, ended when Dr. Borkert released him to return to regular employment on April 29, 2015. Section 8-42-105(3)(c), C.R.S. However, Claimant contends that the release to regular employment did not bar him from establishing a right to TTD benefits when Dr. Borkert imposed the new disabling restrictions on June 23, 2015.

The ICAO has held in a number of cases that termination of TTD benefits pursuant to § 8-42-105(3)(c) does not establish a *permanent* bar to receipt of TTD benefits. Rather the ICAO has held that where an attending physician has released the claimant to return to regular employment, but the claimant proves a post-release "worsening of condition" causing "additional disability restrictions" the Claimant is again entitled to TTD benefits. *Aragon v. Western LCM, Inc.,* WC 4-874-169 (ICAO December 13, 2012); *Vigil v. Pioneer Healthcare,* WC 4-779-599 (ICAO March 24, 2010); *Rivera v. Ames Construction,* WC 4-421-438 (ICAO August 25, 2000), *aff'd., St. Paul Fire & Marine Insurance v. Industrial Claim Appeals Office,* (Colo. App. No. 00CA1664, January 18, 2001) (not selected for publication). The ICAO has reasoned

that after a release to regular employment a request for TTD benefits based on a subsequent worsened condition does not constitute an impermissible "attack on the attending physician's opinion that the claimant was previously able to perform regular employment." *Vigil v. Pioneer Healthcare, supra.*

Although most of the ICAO cases regarding reinstatement of TTD benefits after a release to return to regular employment involve an alleged "worsened condition," the ALJ does not understand the cases as holding that a "worsened condition" is the only fact pattern that would justify reinstatement of TTD benefits. To the contrary, the ICAO has emphasized a request to reinstate TTD benefits is to be determined under the same legal standards applicable to the initial claim for TTD benefits. *Aragon v. Western LCM, Inc., supra*; *Vigil v. Pioneer Healthcare, supra; Vigil v. Pioneer Healthcare, supra.* As set forth above, the standards applicable to an initial claim for TTD require only that the claimant prove the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, that the disability resulted in an actual wage loss, and that there is a causal connection between the injury and the wage loss.

Applying the standards governing an "initial" claim for TTD benefits the ALJ concludes Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing June 23, 2015. As determined in Findings of Fact 29 through 31 the ALJ is persuaded that the admitted industrial injury caused Dr. Borkert to impose the June 23 restrictions. Specifically, the ALJ is persuaded that Dr. Borkert imposed the limitations on Claimant's physical activities in order to facilitate maximum benefit from the ongoing medical treatment program and to produce maximum relief of Claimant's symptoms.

Claimant proved that the restrictions were "disabling" in the sense that they precluded him from performing all of the duties of his regular employment as a service technician. The restrictions have not, so far as the evidence indicates, ever been rescinded. Thus, Claimant's disability has lasted longer than three days.

The ALJ concludes that Claimant proved the industrial injury has caused Claimant's wage loss since June 23, 2013. At the time the June 23 restrictions were imposed Claimant was unemployed through no fault of his own. As determined in Finding of Fact 18 the Employer terminated Claimant's post-injury employment on June 19, 2015 for economic reasons. A termination from employment for economic reasons does not sever the causal relationship between an injury-related disability and subsequent wage loss. This is true because injury-related disability impairs a claimant's ability to obtain comparable employment on the open labor market. *See Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993); *Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989).

The ALJ concludes that in this case it is does not matter whether or not Claimant's overall medical condition "improved" or "worsened" after the April 29, 2015 release to regular employment. As determined in Finding of Fact 31, the ALJ infers from the circumstances that Dr. Borkert imposed the June 23 restrictions as a means of insuring maximum sustained benefit from the medical treatment program, including the

PT. Put another way, Dr. Borkert determined that whether or not Claimant was generally improving or worsening, it was detrimental to the effectiveness of the treatment plan for Claimant to perform physical activities in excess of the restrictions.

Moreover, the ALJ notes Respondents did not present any credible or persuasive medical expert who opined that the restrictions imposed by Dr. Borkert on June 23, 2015 restrictions were not reasonable and necessary to treat Claimant's injury-related symptoms. Although Respondents do not have the burden of proof and were not required to present medical evidence to defeat the claim for TTD benefits, the ALJ considers Respondents' failure to present expert testimony contravening Dr. Borkert's decision to impose the restrictions to be a significant factor in considering the weight to be assigned Dr. Borkert's decision to assign the restrictions. As noted above, the ALJ may consider whether or not evidence has been contradicted as a factor in evaluating the credibility of the evidence.

The Insurer is liable to pay TTD benefits to Claimant commencing June 23, 2015. Such benefits shall be based on the stipulated AWW and the statutory formula for calculating TTD benefits. Section 8-42-105(1), C.R.S. In light of this determination the ALJ need not consider Claimant's argument that his need to attend PT during work hours constitutes a form of "disability" that entitles him to an award of TTD benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

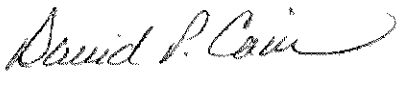
2. Insurer shall pay Claimant temporary total disability benefits at the statutory rate commencing June 23, 2015 and continuing until terminated by law or order.

3. Issues not resolved by this order are reserved for future consideration.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 18, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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Claimant's opening brief was filed, electronically, on December 8, 2015. After the granting of an extension of time, Respondents' double-spaced 20-page answer brief was filed, electronically, on December 16, 2015. On the same date, the Claimant indicated that no reply brief would be filed, at which time the matter was deemed submitted for decision.

ISSUES

The issue to be determined by this decision is whether the right rotator cuff surgery recommended by one of the Claimant's authorized treating physicians (ATPs), Steven E. Horan, M.D., an orthopedic surgeon, is causally related to the admitted injury of February 17, 2015 and reasonably necessary to cure and relieve the effects of that injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Respondents filed a General Admission of Liability (GAL), dated March 20, 2015, admitting for reasonably necessary and causally related medical care; an average weekly wage (AWW) 0f $1,089.13; and, temporary total disability (TTD) benefits of $726.09 per week from March 6, 2015 to "undet." The GAL continues to be in full force and effect.

2. The Claimant is a 46 year old female who was employed with the Employer as a counselor since October 28, 2014 (Respondents' Exhibit A). The Employer is a juvenile facility for troubled girls with backgrounds of abuse. Some of the girls visited the Employer for school only while others were patient-residents. Some of the patient residents have a propensity for violent behaviors. The Claimant's duties included checking on, monitoring, and assisting patients.

The Admitted Work-Related Incident

3. On February 17, 2015, the Claimant sustained work related injuries when a patient-resident, who was 17 years old, 5' 7" to 5' 9" tall, 280 pounds, attacked the Claimant. The patient-resident punched, kicked, grabbed, stomped the Claimant's foot, picked the Claimant up and threw the Claimant. The First Report of Injury documented that the Claimant sustained a contusion with injury to the "R Upper Leg" when the Claimant was "attempting to physically manage a client and de-escalate the client, staff was kicked, thrown, hit" (Respondents' Exhibit. A). The patient-resident jumped on the Claimant's back and tried to choke her. Then the patient-resident kicked, hit the

Claimant and reached for a butcher knife, whereupon the Claimant had to slam their hands in a filing cabinet to have the patient release the knife. The patient threw the Claimant onto a table as the Claimant was reaching for the telephone to call for help and hurt the Claimant's right shoulder. . The Claimant, however, gave a history of right-sided trauma. The patient grabbed the telephone and ripped it from the wall. As the claimant was trying to reach for her cell phone underneath the desk the patient jerked claimant's right arm back and kicked her in her legs. The attack continued for 8 minutes until help arrived. The Respondents dispute that the violent patient-resident specifically hurt the Claimant's right should because the Claimant did not give a specific medical history of a right shoulder injury until approximately May 2015 and the Claimant did not mark an "X" on pain diagrams of the right shoulder. Also, the Respondents rely on physician medical records reviewers who base their opinions on lack of causal relatedness on the later manifestations of right shoulder pain and the fact that the Claimant had had pre-injury right shoulder problems years before the date of injury.

Medical History of the Admitted Injury

4. On February 18, 2015, the Claimant filled out a form for HealthONE, indicating that she had pain in her right side, quad, knee, left side, hand-pinky, quad, foot, and back (Claimant Exhibit 3, p. 3).

5. On the same date, Robert White, M.D. her then treating physician at HealthONE, noted, "Again, multiple pain complaints. Pain is achy pain. All in her back from below her neck, midback mostly. Left fifth finger. Sore over her right hip, above her left knee and left hip, over her left knee, left top of her foot. Right knee anterior and right anterior lower thigh. Everything is sort of achy" (Claimant's Exhibit. 3, p.5).

6. On the same date, Dr. White performed a physical examination of the Claimant's musculoskeletal system that showed tenderness over the infrascapular and parascapular areas, in addition to minimal discomfort in the thoracic area. Dr. White prescribed Motrin and Flexeril (Claimant's Exhibit. 3, p. 6). The ALJ infers and finds that these areas are close to the right shoulder, although specific right shoulder pain was not articulated.

7. On February 24, 2015, Dr. White noted that the Claimant is a "little sore in the midback and infrascapular area." He gave the Claimant restrictions of no grasping or pinching with her left hand (Claimant's Exhibit. 3, p. 9).

8. On March 6, 2015, the Claimant filled out a pain diagram for HealthONE, indicating aching from the neck across her back (Claimant's Exhibit. 3, p.12). Again, the ALJ infers and finds that this general area is close to the right shoulder although specific reference to the right shoulder was not made.

9. On the same date, Dr. White noted more trapezial tenderness and infrascapular bilateral and gives restrictions of lifting no more than 20 pounds. (Claimant's Exhibit 3, pp. 13-14).

10. On April 16, 2015, the Claimant was referred for psychological treatment to Lupe Ledezma, Ph.D., licensed clinical psychologist, and Dr. Ledezma noted soreness over most of the Claimant's body (Claimant's Exhibit 5, p.61).

Specific Complaints Involving the Right Shoulder

11. On the May 21, 2015, the Claimant saw Chiropractor Dr. Keith J. Graves, D.C. , and the pain diagram specifically shows aching over the upper back and **right shoulder** (Claimant's Exhibit 6, p. 77) on referral from HealthONE, Deana Halat, FNP (nurse practitioner).

12. On the same date, Dr. Graves, D.C., started treating the **Claimant's rotator cuff.** Dr. Graves, D.C., treated the Claimant's Infraspinatus, Teres Minor, and Subscapularis (Claimant's Exhibit 6, p. 78).

13. Also, on the same date, Nurse Deana Halat noted "posterior shoulder girdle complaints" (Claimant's Exhibit 6, p. 81) and the Claimant indicated that she currently has shoulder pain (Claimant's Exhibit 6, p. 88).

14. On June 4, 2015, Dr. Graves, D.C. circled pain in the right shoulder when providing treatment (Claimant's Exhibit 6, p. 95).

15. On June 8, 2015, Dr. Megan Hahler, D.C., of Denver Spine & Extremity noted that "the Claimant's right shoulder pain began a week or two ago and she is now having difficulty maneuvering her right arm. Claimant complains of stiffness and limited range of motion and denies new trauma" (Claimant's Exhibit 6, p. 97).

16. On the same date, Dr. Hahler, D.C., noted that the shoulder decompression test is positive for reproducing local anterior shoulder pain. Right shoulder ranges of motion were limited to 90 degrees in flexion and abduction due to local anterior shoulder pain. Dr. Hahler, D.C., noted that shoulder pain is 5-7 (Claimant's Exhibit 6, pp. 99-102).

17. On June 17, 2015, Nurse Deana Halat of HealthONE noted that the Claimant's right shoulder is extremely painful Halat recommended a MRI (magnetic resonance imaging) of the Claimant's right shoulder and left knee and referred the Claimant for an orthopedic evaluation of the right shoulder (Claimant's Exhibit 3, pp. 34-36).

18. On the same date, Nurse Halat noted that the Claimant's right shoulder has pain with Neer testing and has limited abduction and adduction both actively and passively (Claimant's Exhibit 3, p. 35).

19. On June 24, 2015, Nurse Halat noted that the Claimant has increased right shoulder pain (Claimant's Exhibit 3 p. 41).

The MRI of June 29, 2015

20. On June 29, 2015, the Claimant received an MRI of her right shoulder. The MRI showed multifocal concealed laminar tears of the supraspinatus tendon, 7 to 10 mm in length, estimated intermediate to high-grade (Claimant's Exhibit 10, p. 156). The Respondents' medical records reviewers offer no plausible alternative explanation, other than the Claimant's underlying pre-existing right shoulder condition, for these "concealed" laminal tears.

Orthopedic Surgeon Steven E. Horan, M.D. and Caroline Gellrick, M.D.

21. On July 7, 2015, Dr. Horan noted that the Claimant had decreased strength in abduction against the right. He also noted that the Claimant had a positive Hawkins' and Neer's test. Dr. Horan stated, "At this point, I really do not think anything short of a surgery and a rotator cuff repair for the right shoulder makes sense. We are going to go ahead and set her up for that" (Claimant's Exhibit 7, p. 115).

22. On July 8, 2015, Dr. Horan recommended right shoulder arthroscopy and a rotator cuff repair (Claimant's Exhibit 7, p. 117).

23. On July 23, 2015, Nurse Halat noted that the Claimant was likely to get shoulder surgery done before foot surgery (Claimant's Exhibit 3, p. 50).

24. On August 28, 2015, Dr. Gellrick noted that the Claimant had multiple injuries including a right shoulder tear of the supraspinatus (Claimant's Exhibit 9, p. 141).

25. On August 31, 2015, Dr. Horan noted: **"Radiological and clinical exam were consistent with a high-grade tear of the supraspinatus. I feel that the description of the injury and the results seen on examination and MRI are consistent, and there is a causal relationship. I feel that the patient does need to have her shoulder repaired due to the injuries sustained in February 2015"** (Claimant's Exhibit 7, p. 123). The ALJ finds Dr. Horan's opinion on the causal relatedness of the need for right shoulder surgery to be rendered to a reasonable degree of medical probability, and it is contrary to the opinions of medical records reviewers, Christopher Isaacs, D.O., and James Lindberg, M.D., both of whom never

physically examined the Claimant and both of whom were engaged by the Respondents to render opinions on causality. In a manner of speaking, Dr. Horan does not "have a dog in this fight."

26. On September 2, 2015, Dr. Gellrick noted that the Claimant sustained injuries to her right shoulder with MRI showing supraspinatus tear (Claimant 's Exhibit 9, p. 143). Dr. Gellrick's exam showed that the Claimant's right shoulder was very painful. And the Claimant was positive for supraspinatus and impingement testing, and had a decreased range of motion by 30% noted on the right shoulder (Claimant's Exhibit 9, p. 145). Dr. Gellrick noted:, "**In the mind of this examiner, the patient had eight minutes of assault and was thrown and stomped on and the shoulder injury can certainly be compensable to the current work comp claim"** (Claimant's Exhibit 9, p. 147). The ALJ draws a plausible inference and finds that Dr. Gellrick has rendered an opinion, to a reasonable degree of medical probability, that the need for the right shoulder surgery is causally related to the admitted injury of February 17, 2015.

27. On October 1, 2015, Dr. Gellrick noted that the Claimant's right shoulder can only actively flex to 90 degrees. Dr. Gellrick noted that Claimant's Spurling remained positive with a tight right trapezius (Claimant's Exhibit 9, p. 153). Dr. Gellrick noted that the Claimant **has a right shoulder strain with a positive rotator cuff and needs to have surgery** (Claimant's Exhibit 9, p. 154).

28. On October 6, 2015, **Dr. Horan again requested authorization of the surgery** (Claimant's Exhibit 7, p. 121).

Independent Medical Records Reviewers Dr. Isaacs and Dr. Lindberg

29. Dr. Lindberg was of the following opinion: "I do not believe that the shoulder (right) complaints had any relationship whatsoever to her assault...Therefore, any kind of surgical intervention under workers' compensation **is** (emphasis supplied) is denied." When the ALJ asked Dr. Lindberg, at hearing, what his "denial" meant, his response was not that satisfactory. When asked if he had an alternative plausible explanation for the Claimant's right shoulder condition, Dr. Lindberg stated that was not within his purview. His mission was to render an opinion on medical causality, or a lack thereof. This statement substantially weakens his opinion. Indeed, his ultimate opinion departs, substantially, from the opinion of an objective medical evaluator, and it crosses over into the realm of advocacy for the Respondents on his part. For this reason, the ALJ finds the opinion of Dr. Horan on causality considerably more credible and persuasive than Dr. Lindberg's opinion.

30. Dr. Isaacs stated: "I am in agreement with Dr. Lindberg that the shoulder complaints come many months after the original injury and therefore (are) not related to the injury." The ALJ infers and finds that the underlying parapet for Dr. Isaacs opinion. involves the time between the admitted injury and the Claimant's first complaints of right

shoulder pain. Dr. Isaacs further opines that he MRI findings are "very soft" (whatever that means) and would not indicate the need for rotator cuff repair. Dr. Isaacs recommends that any treatment of the shoulder should be denied. The ALJ finds Dr. Isaacs' opinions far less credible than the opinions of Dr. Horan.

The Claimant

31. It was the Claimant's undisputed testimony at hearing, that after the attack she was focusing on the body parts that were "screaming" in pain and that is why she did not mention her right shoulder pain initially. The ALJ finds this testimony plausible and credible. The Claimant stated that after the other body parts started to recover, she noticed that the pain in her right shoulder was continuing and that she was also experiencing weakness in her right shoulder and problems undoing her bra and brushing her hair. The ALJ finds this testimony plausible, credible and persuasive.

32. The Claimant also testified that prior to the admitted work injury she did martial arts and also taught kick boxing and was not having any problems with her right shoulder while doing those activities, which compromises the medical opinions that her right shoulder condition must be related to her pre-existing right shoulder condition.

Lupe Ledezma, Ph.D, Clindal Psychologist

33. The Claimant is currently undergoing psychological treatment with Dr. Ledezma for the work-related psychological conditions, including major depression, acute stress disorder and history of post-traumatic stress disorder (PTSD). Against this backdrop, the Claimant's explanation of why she did not mention the right shoulder pain as herein above described makes even more sense

Ultimate Findings

34. The Claimant presented in a straight-forward and credible manner. She offered a plausible explanation why she did not specifically mention, or focus on, her right shoulder condition until a few months after the admitted injury. The ALJ makes a finding of evidentiary (basic) fact that the Claimant's testimony is credible, consistent with the weight of credible evidence, and un-rebutted other than by the Respondents' arguments, based on the opinions of their experts.

35. As found, the ALJ finds the opinions of Dr. Horan and Dr. Gellrick more credible and persuasive than the opinions of Dr. Lindberg, Dr. Isaacs, and all other opinions to the contrary.

36. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Horan and Dr. Gellrick, concerning the causal relatedness

and reasonably necessity of the surgery recommended by Dr. Horan, and to reject all opinions to the contrary.

37. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that the rotator cuff repair, recommended by Dr. Horan, is causally related to the admitted injury of February 17, 2015 and is reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant presented in a straight-forward and credible manner. She offered a plausible explanation why she did not specifically mention, or focus on, her right shoulder condition, until a few months after the admitted injury. As further found, the

ALJ made a finding of evidentiary (basic) fact that the Claimant's testimony was credible and consistent with the weight of credible evidence. Indeed, as found, it was un-rebutted other than by the Respondents' arguments, based primarily on the opinions of their medical experts. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. Also, as found, the opinions of Dr. Horan and Dr. Gellrick on the causal relatedness and reasonable necessity of the recommended right rotator cuff repair were more credible and persuasive the opinions of Dr. Lindberg and Dr. Isaacs, based on medical records review only. Indeed, the opinions of Dr. Horan and Dr. Gellrick are more credible and persuasive than any other opinions to the contrary.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Horan and Dr. Gellrick, concerning the causal relatedness and reasonably necessity of the surgery recommended by Dr. Horan, and to reject all opinions to the contrary.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979).

People v. M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven, by a preponderance of the evidence that the rotator cuff repair, recommended by Dr. Horan, is causally related to the admitted injury of February 17, 2015 and is reasonably necessary to cure and relieve the effects thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of the right rotator cuff repair, recommended by Steve E. Horan, M.D., and all other treatment for the right shoulder injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The General Admission of Liability, dated March 20, 2015, remains in full force and effect.

C. Any and all issues not determined herein are reserved for future decision.

DATED this 18 day of December 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease in the form of left knee patellar tendonitis during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his work-related injuries.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period April 8, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 30 year old male. He worked for Employer as a Package Car Driver. His job duties involved delivering packages out of his delivery truck. Claimant averaged approximately 250 deliveries in an eight hour day. He noted that the delivery truck is approximately one foot off of the ground and he maintained three points of contact when removing a package from the truck for delivery.

2. On February 23, 2015 Claimant was walking over snow on the ground while making a package delivery. He experienced the immediate onset of pain in his left knee area. Claimant completed his work shift for the day.

3. On February 24, 2015 Claimant continued to experience sharp pain in his left knee area. He thus reported his symptoms to his supervisor and was directed to Authorized Treating Physician (ATP) Tanya Michelle Kern, M.D. for treatment.

4. On February 25, 2015 Claimant visited Dr. Kern for an examination. Claimant reported the gradual onset of left knee pain that began on February 23, 2015. He specifically noted that his "left knee started aching in the cold weather and his knee almost "gave out" but he did not fall. Dr. Kern commented that she was uncertain whether Claimant's left knee condition was at least 50% likely to have been caused by his exposure at work. She noted that there was no specific mechanism of injury and Claimant's "sensitivity seems a bit out of proportion to the injury as there is no effusion or soft tissue swelling on exam."

5. On March 4, 2015 Claimant returned to Dr. Kern for an evaluation. Dr. Kern was still uncertain about the cause of Claimant's left knee symptoms but noted that it was possible Claimant was suffering from patellofemoral syndrome that was

aggravated by his delivery work. She remarked that Claimant could not complete his job duties for Employer because he had developed a severe limp.

6. On March 17, 2015 Claimant visited private orthopedic surgeon Steven Weinerman, M.D. Dr. Weinerman commented that Claimant had undergone an "unremarkable" MRI of his left knee on March 7, 2015. He diagnosed Claimant with patellar tendonitis and prescribed physical therapy, occupational therapy and a knee brace.

7. On April 1, 2015 Claimant returned to Dr. Kern for an examination. Dr. Kern noted that Claimant suffered from patellofemoral instability of his left knee. Claimant reported that his knee injury was likely caused by getting in and out of his truck to make package deliveries for Employer. Dr. Kern stated "while I do agree that patellar tendonitis could be due to his work that requires frequent getting in and out of a truck, I cannot explain the level of dysfunction he has and I believe there is a psychological overlay."

8. In a note dated April 7, 2015 Dr. Weinerman drafted a letter stating that Claimant's patellar tendonitis was caused "from this type of work." He did not perform any causation analysis connecting Claimant's left knee symptoms to his work activities.

9. On April 17, 2015 Claimant returned to Dr. Kern for an evaluation. Dr. Kern remarked that Claimant "has secondary reasons for not working and he is likely to do poorly with treatment." She noted that Claimant was not working because his Temporary Alternative Work (TAW) for Employer had ceased earlier in the month.

10. On May 15, 2015 Claimant again visited Dr. Kern for an examination. Dr. Kern could not explain Claimant's range of motion loss, severe persistent limp and pain that was out of proportion to his left knee condition. Dr. Kern commented that she was "not sure that his persistent pain and lost ability to walk and work [could] be considered work related." Nevertheless, she stated that Claimant could not perform his job for Employer.

11. On July 6, 2015 Claimant returned to Dr. Kern for n evaluation. Dr. Kern noted that Claimant continued to suffer from patellofemoral instability and pain in the left knee. She continued Claimant's work restrictions and noted that he was scheduled to undergo left knee surgery with Dr. Weinerman on July 24, 2015. Dr. Kern explained that a second orthopedic opinion would be valuable because Claimant did not have an "impressive knee injury."

12. On July 24, 2015 Dr. Weinerman performed arthroscopic surgery on Claimant to repair the left knee patellar tendon. He specifically removed a portion of the fat pad and patellar tendon with granulation tissue. On August 7, 2015 he assigned work restrictions of no kneeling, squatting or climbing.

13. On August 19, 2015 Claimant underwent an independent medical examination with John R. Schwappach, M.D. Dr. Schwappach agreed that Claimant

had suffered from "recalcitrant patellar tendonitis" and the surgery performed by Dr. Weinerman was reasonable and necessary. He explained that Claimant's left knee injury was not caused by his work activities for Employer but constituted the aggravation of a pre-existing condition.

14. Claimant testified at the hearing in this matter. He explained that his job duties for Employer were physically demanding and required significant walking and stepping. He noted that on February 23, 2015 the weather was very cold and he was delivering a normal-sized package. Claimant was simply walking on uneven ground and experienced left knee pain. He was not kneeling, bending, squatting or twisting when his left knee pain began. Claimant commented that he engages in predominantly sedentary activities outside of work. He asserts that he suffered an occupational disease in the form of left knee patellar tendonitis as a result of repetitive walking and stepping in and out of his work truck to deliver packages.

15. On October 27, 2015 the parties conducted the evidentiary deposition of Dr. Schwappach. Dr. Schwappach maintained that Claimant's left knee patellar tendonitis was not caused by his work activities as a Package Car Driver for Employer. He noted that Claimant may have had asymptomatic, pre-existing patellar tendonitis prior to February 23, 2015. Claimant's left knee symptoms became clinically relevant on February 23, 2015 but his symptoms could have manifested themselves at any place or time. Claimant was merely walking when he experienced left knee pain. He was not doing anything medically relevant while working that would have constituted an aggravation of a pre-existing condition. Dr. Schwappach explained that the causal mechanism of Claimant's left knee injury was unclear but the cold weather and change in barometric pressure could have explained the onset of symptoms. He acknowledged that Claimant could have aggravated his left patellar tendonitis by entering and exiting his delivery truck, but there was no medical evidence to support the aggravation of a pre-existing condition at work on February 23, 2015.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease in the form of left knee patellar tendonitis during the course and scope of his employment with Employer. Claimant explained that he was walking and carrying a normal-sized package when he suddenly experienced left knee pain on February 23, 2015. The medical records consistently reflect that Claimant suffered from pre-existing patellar tendonitis and thus brought a personal risk of injury to the workplace. The circumstances surrounding Claimant's experience of left knee pain do not constitute a special hazard. He was simply engaged in the ubiquitous activity of walking when he noticed left knee symptoms.

17. Dr. Schwappach persuasively maintained that Claimant's left knee patellar tendonitis was not caused by his work activities as a Package Car Driver for Employer. He noted that Claimant may have had asymptomatic, pre-existing patellar tendonitis prior to February 23, 2015. Claimant's left knee condition became clinically relevant on February 23, 2015 but his symptoms could have manifested themselves at any place or time. Claimant was merely walking when he experienced left knee pain. He was not doing anything medically relevant while working that would have constituted an

aggravation of a pre-existing condition. Dr. Schwappach acknowledged that Claimant could have aggravated his left patellar tendonitis by entering and exiting his delivery truck, but there was no medical evidence to support the aggravation of a pre-existing condition at work on February 23, 2015.

18. ATP Dr. Kern expressed ambiguous opinions about whether Claimant's patellar tendonitis was caused by his work activities for Employer. She explained that getting in and out of a truck could cause patellar tendonitis but could not identify a specific mechanism of injury to Claimant's left knee. She was unsure whether Claimant's condition was work-related because of persistent concerns about Claimant's level of pain behavior and desire for secondary gain. Even by May 15, 2015 Dr. Kern specifically stated that she was "not sure that [Claimant's] persistent pain and lost ability to walk and work [could] be considered work related." In contrast, Dr. Weinerman attributed Claimant's left knee condition to his work activities for Employer. He drafted a letter stating that Claimant's patellar tendonitis of the left knee was caused "from this type of work." However, Dr. Weinerman did not perform any causation analysis connecting Claimant's left knee symptoms to his work activities. Accordingly, Claimant has failed to establish a direct causal relationship between the conditions of his employment and his left knee injury. Claimant's work activities on February 23, 2015 did not trigger the onset of left knee symptoms. Instead, the symptoms constituted the manifestation of Claimant's pre-existing patellar tendonitis or an idiopathic condition that did not arise out of his employment with Employer on February 23, 2015. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his pre-existing patellar tendonitis.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. When the precipitating cause of an injury is a pre-existing condition that the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the injury. *In Re Shelton,* W.C. No. 4-724-391 (ICAP, May 30, 2008). The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's pre-existing condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Id.* A condition does not constitute a "special hazard" if it is "'ubiquitous' in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo.

App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

8. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of Colorado's Workers' Compensation Act and is thus compensable as a work-related injury. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. For example, if an employee was struck by lightning while at work, his resulting injuries would be compensable because any employee standing at that spot at that time would have been struck. *Id.* at 504-05.

9. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease in the form of left knee patellar tendonitis during the course and scope of his employment with Employer. Claimant explained that he was walking and carrying a normal-sized package when he suddenly experienced left knee pain on February 23, 2015. The medical records consistently reflect that Claimant suffered from pre-existing patellar tendonitis and thus brought a personal risk of injury to the workplace. The circumstances surrounding Claimant's experience of left knee pain do not constitute a special hazard. He was simply engaged in the ubiquitous activity of walking when he noticed left knee symptoms.

10. As found, Dr. Schwappach persuasively maintained that Claimant's left knee patellar tendonitis was not caused by his work activities as a Package Car Driver for Employer. He noted that Claimant may have had asymptomatic, pre-existing patellar tendonitis prior to February 23, 2015. Claimant's left knee condition became clinically relevant on February 23, 2015 but his symptoms could have manifested themselves at any place or time. Claimant was merely walking when he experienced left knee pain. He was not doing anything medically relevant while working that would have constituted an aggravation of a pre-existing condition. Dr. Schwappach acknowledged that Claimant could have aggravated his left patellar tendonitis by

entering and exiting his delivery truck, but there was no medical evidence to support the aggravation of a pre-existing condition at work on February 23, 2015.

11. As found, ATP Dr. Kern expressed ambiguous opinions about whether Claimant's patellar tendonitis was caused by his work activities for Employer. She explained that getting in and out of a truck could cause patellar tendonitis but could not identify a specific mechanism of injury to Claimant's left knee. She was unsure whether Claimant's condition was work-related because of persistent concerns about Claimant's level of pain behavior and desire for secondary gain. Even by May 15, 2015 Dr. Kern specifically stated that she was "not sure that [Claimant's] persistent pain and lost ability to walk and work [could] be considered work related." In contrast, Dr. Weinerman attributed Claimant's left knee condition to his work activities for Employer. He drafted a letter stating that Claimant's patellar tendonitis of the left knee was caused "from this type of work." However, Dr. Weinerman did not perform any causation analysis connecting Claimant's left knee symptoms to his work activities. Accordingly, Claimant has failed to establish a direct causal relationship between the conditions of his employment and his left knee injury. Claimant's work activities on February 23, 2015 did not trigger the onset of left knee symptoms. Instead, the symptoms constituted the manifestation of Claimant's pre-existing patellar tendonitis or an idiopathic condition that did not arise out of his employment with Employer on February 23, 2015. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his pre-existing patellar tendonitis. *See In re Gray,* W.C. No. 4-721-655 (ICAP, Sept. 25, 2008) (where claimant passed out and could not explain what caused him to fall, his fall was unexplained and therefore not compensable); *In re Licalzi,* W.C. No. 4-661-550 (ICAP, Sept. 7, 2006) (where claimant was walking down a linoleum hallway but fell for reasons she could not describe, fall was unexplained and therefore not compensable).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 31, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues determined by this decision involve Claimant's entitlement to death benefits under the Workers Compensation Act following a fatal injury to her son on July 8, 2013. The specific questions to be answered are:

I. Whether the decedent was an employee of Carrera's Tires at the time of his death.

II. If the decedent was an employee of Carrera's Tires at the time of his death, whether his death was proximately caused by an injury arising out of and in the course and scope of his employment for Carrera's Tires.

III. Whether Claimant established by a preponderance of the evidence that she is a wholly dependent family member of the decedent, Oscar Muro-Cardoza.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. At the time of his death, Claimant's son, Oscar Muro-Cardoza ("Mr. Cardoza"), was routinely working at a liquor store on afternoons and evenings. This employment did not afford Mr. Cardoza sufficient living expenses. Consequently, he sought additional employment at a tire shop owned and operated by Respondent-Employer.

2. Based upon the evidence presented, the ALJ finds that Mr. Cardoza probably had been working for Respondent-Employer in excess of one year before his death on July 8, 2013. According to the testimony of Respondent-Employer, Mr. Cardoza would come to the shop "every day" to help out. Per Respondent-Employer, Mr. Cardoza was free to come and go as he chose; he had no set hours.

3. Respondent-Employer testified that Mr. Cardoza would clean up around the shop and hand him tools as he was installing tires onto customer's vehicles. Occasionally, Respondent-Employer would leave Mr. Cardoza in charge of the front office while he would leave to run errands. According to Respondent-Employer, Mr. Cardoza was not hired to nor did he perform mechanical work when at the shop. Furthermore, Respondent-Employer testified that Mr. Cardoza was not hired to and did not work with or on tires when he was at the shop.

4. Claimant disputes Respondent-Employer's description of Mr. Cardoza's duties as

that of a janitor, claiming instead that he was working as a mechanic and tire installer for Respondent-Employer. Outside of her claim, Claimant presented no independent evidence to establish that Mr. Cardoza's duties included working as a mechanic or a tire installer.

5. On July 8, 2013, Mr. Cardoza brought his personal vehicle to Respondent-Employer's tire shop and parked it outside, to the left of the shop entrance bay and away from the building. Respondent-Employer testified that he left Mr. Cardoza at the tire shop to go and pick up some tires that morning. When Respondent-Employer returned to the shop he could not locate Mr. Cardoza inside where he expected him to be. He then searched outside and found Mr. Cardoza pinned and lifeless under his car.

6. Emergency medical services were requested and responded to the scene. Mr. Cardoza's body was removed from under the car and transported to the coroner's office where an autopsy was performed. The immediate cause of death is listed on Claimant's death certificate as "mechanical asphyxia". The death certificate lists Mr. Cardoza's usual occupation as "Mechanic".

7. Mr. Cardoza was 22 years old and was not married on July 8, 2013. He had no children at the time of his death.

8. Respondent-Employer testified as follows:

- That he has no employees claiming that Mr. Cardoza was an independent contractor.

- That Mr. Cardoza had not sought permission to work on his personal vehicle at the shop on July 8, 2013 or at any other time prior.

- That Respondent-Employer never gave Mr. Cardoza permission to work on his personal vehicle at the shop on July 8, 2013 or any other day prior.

- That Respondent-Employer had no idea that Mr. Cardoza intended to work on his car outside of the shop on July 8, 2013.

- That Mr. Cardoza was not using tools owned by Respondent-Employer at the time of the accident. Rather, according to Respondent-Employer, Mr. Cardoza was using his personal tools to work on his personal vehicle at the time of the accident.

9. An Officer from the Colorado Springs Police Department investigated the accident. Office John DeClerck took witness statements from several people, including Respondent-Employer. Based upon the evidence presented, including the witness statements, the ALJ finds that Claimant's was probably killed sometime during the late morning hours of July 8, 2013, after he elected to take his lunch break and begin

working on his car alone. The car likely slipped off the jacks it was resting on and fell onto Mr. Cardoza, crushing him to death.

10. As noted, Respondent-Employer gave a witness statement. In that statement, he refers to Mr. Cardoza as his "employee". Per the witness statement Respondent-Employer had employed Mr. Cardoza for "about a year". The witness statement also indicates that Mr. Cardoza had been an "excellent employee".

11. According to this witness statement, Respondent-Employer noted that Mr. Cardoza had taken an old Honda Civic to the shop and asked if he could "use the shop equipment to work on the Honda during his lunch breaks". Respondent-Employer "gladly" allowed Mr. Cardoza to do so. The statement also indicates that on July 8, 2013, around noon Respondent-Employer went to make a tire delivery while Mr. Cardoza began working on his car in the parking lot.

12. Respondent-Employer's prior witness statement and his testimony at hearing are materially inconsistent in the following respects:

- While he testified that he did not employ Mr. Cardoza, his witness statement refers to Mr. Cardoza as his employee on a number of occasions.

- While he testified that Mr. Cardoza had not sought permission and he did not give Mr. Cardoza permission to work on his personal vehicle at the shop, his witness statement provides otherwise. Specifically, his witness statement indicates that Mr. Cardoza brought an old Honda to the shop and asked to use shop equipment to work on it during his lunch breaks to which Respondent-Employer "gladly" consented.

- While he testified that he had no idea that Mr. Cardoza intended to work on his car outside of the shop on July 8, 2013, his witness statement indicates otherwise. Specifically, Respondent-Employer informed Office DeClerck that he went to make a tire delivery around noon and Mr. Cardoza began working on his car in the parking lot.

13. Based upon the evidence presented, the ALJ finds much of Respondent-Employer's hearing testimony incredible and unconvincing. Contrary to Respondent-Employer's suggestion, the balance of the persuasive evidence establishes that Mr. Cardoza was an employee and not an independent contractor of Carrera's Tires at the time of the July 8, 2013 accident. More probably than not, Mr. Cardoza was hired to clean and maintain the shop and act as an assistant to Respondent-Employer during tire installation or repair jobs.

14. Moreover, Claimant's prior statements to a police officer investigating the accident within hours after its occurrence persuades the ALJ that Mr. Cardoza had asked Respondent-Employer if he could work on his car, using shop equipment during his lunch hours and that Respondent-Employer acquiesced to the request.

Nonetheless, Claimant failed to establish that Mr. Cardoza was using shop equipment to work on his car over the lunch hour.

15. Finally, Respondent-Employer's claim that he had no knowledge that Mr. Cardoza intended on working on his car on July 8, 2013 is refuted by his prior statement to Officer DeClerck that Mr. Cardoza began working on his car as he left to "make a tire delivery". Consequently, Respondent-Employer's hearing testimony that he could not find Mr. Cardoza inside where he expected him to be upon his return to the shop after making a tire delivery is unpersuasive.

16. Mr. Cardoza resided with his mother and step-father at the time of the accident.

17. Claimant testified that Mr. Cardoza helped with some expenses in the household. She also testified that her name, her husband's name and the Mr. Cordoza's name were on the lease to their apartment, but no lease was entered into evidence. Claimant did not establish the extent of support or the length of time Mr. Cardoza provided such financial support before his death.

18. Manual Gonzalez testified that he regularly came to Respondent-Employers tire shop and never saw Mr. Cardoza working with/on tires or as a mechanic in the shop.

19. All witnesses testified that the car involved in the accident was outside the shop and to the left of the building when they came to the shop after the accident occurred. The police report supports this testimony.

20. Claimant has failed to establish by a preponderance of the evidence that Mr. Cardoza's death arose out of and in the course and scope of his employment.

21. Claimant has failed to establish by a preponderance of the evidence that she is entitled to death benefits as a wholly dependent family member of Mr. Cardoza.

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or

respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Employee Status

D. As a general rule, any individual who performs services for another is an employee. *Section 8-40-202(2)(a), C.R.S.* This provision applies unless the individual is free from the control or direction of the person for whom services are preformed and who otherwise meets the definition of a person engaged in an independent trade occupation, profession of business. *Section 8-40-202(2)(b), C.R.S*. As found here, the totality of the evidence presented establishes that decedent was an employee of Carrera's Tires and that he was hired to clean up and maintain the shop in addition to acting as an assistant during repair or tire installation jobs. The ALJ concludes the testimony that Mr. Cardoza was free to come and go from the shop as he chose insufficient, by itself, to establish that he was acting as an independent contractor. Outside of the scant evidence that decedent had no set hours, Respondent-Employer presented no evidence to establish decedent's freedom from control and direction. Indeed Respondent-Employer acknowledges that his claim of independent contractor status is not a "strong" position in light of the fact that no written independent contractor agreement was introduced at hearing. While Claimant has proven that decedent was an employee of Carrera's Tires, she must still establish the compensable nature of his death.

Compensability

E. To sustain her burden of proof concerning the compensable nature of her son's death, Claimant must establish, by a preponderance of the evidence, all the elements necessary to find a work related injury compensable, specifically that the death arose out of and in the course of employment. *See generally, Matter of Death of McLaughlin, 728 P.2d 337 (Colo. App. 1986); Gates Rubber Co. v. Industrial Commission, 705 P.2d 6 (Colo. App. 1986); see also, Deane Buick Co. v. Kendall, 160 Colo. 265, 417 P.2d 11 (1966)..*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for an injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

G. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

H. In this case, the persuasive evidence establishes that at the time of Mr. Cardoza's accident and injury, he was working on his personal vehicle, probably with his own tools in the parking lot outside Respondent-Employer's shop; not in close proximity to the entrance bay doors where cars were brought in for tires or repair. Moreover, the evidence presented persuades the ALJ that Mr. Cardoza elected to do mechanical work on his vehicle, outside the course of his work with Respondent-Employer. Consequently, the ALJ concludes that Mr. Cardoza's injury did not "arise out of" his employment because it did not have its origin in his work-related functions of cleaning and maintaining the shop or assisting Respondent-Employer with tire installation and auto repair. The ALJ concludes that Mr. Cardoza's work on his personal car over his lunch hour, with his own tools is not sufficiently related to his work functions to be considered part of his employment contract. Nor is the ALJ convinced, based upon the evidence presented that Mr. Cardoza's death occurred "in the course of" his employment since it did not take place within the time and place limits of the employment relationship and was not an activity connected to his job-related functions.

Dependency

I. Pursuant to § 8-41-502, family members who are not presumed to be dependents can nevertheless prove entitlement to death benefits as whole dependents. As in this case, a mother can claim entitlement to benefits related to the death of a child even though she is living with her husband and supported in part by him. *See Industrial Commission of Colorado v. Di Nardi, 87 Colo. 591, 87 P.2d 494 (1939).* However, entitlement to death benefits in the case of a family member who not presumed dependent requires the proponent to prove the following:

- That the deceased employee (Mr. Cardoza) provided financial support to the family member at the time of death and for a reasonable period before death, *See Largo v. Industrial Commission*, 82 Colo. 341, 259 P.516 (1927);

- That the family member was wholly dependent on the decedent, and;

- That the dependent family member is incapable of or disabled from employment. *Picardi v. Industrial Commission*, 70 Colo. 266, 199 P. 420 (1921)

J. As found here, Claimant testified that Mr. Cardoza helped with some expenses in the household. She also testified that her name, her husband's name and the Mr. Cordoza's name were on the lease to their apartment, but no lease was entered into evidence. Nonetheless, Claimant did not establish the extent of support or the length of time Mr. Cardoza provided such financial support before his death. While it has been settled that 30 days[1] to two months[2] of support provided to an alleged dependent family member is sufficient to constitute a reasonable time period before death to prove dependency, Claimant failed to present any evidence establishing the time period she received financial support from Mr. Cardoza before his death. Claimant also failed to present evidence that she was incapable of or disabled from earning a living, as is required to prove dependence. Rather, Claimant simply noted on her "Dependents Notice and Claim for Compensation" admitted as part of Claimant's Hearing Exhibit 1 that she was a homemaker and "stays home to care for child". Without additional evidence to consider, the ALJ concludes that being a mother and homemaker is not a disability that would render Claimant incapable from earning a living. Under the circumstances and on the evidence presented in this case, the ALJ concludes that Claimant has failed to prove entitlement to benefits as a wholly dependent family member of Mr. Cardoza. Consequently, her claim must be denied and dismissed.

[1] Empire Zinc Co. v. Industrial Commission, 102 Colo. 26, 77 P.2d 130 (1937).
[2] Mile High Masonry v. Industrial Commission, 718 P.2d 257 (Colo. App, 1986).

ORDER

It is therefore ordered that:

1. Claimant's claim for death benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 10, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

The issue to be determined is as follows:

Have the respondents established by a preponderance of the evidence that the claimant is not entitled to temporary total disability benefits for the closed period beginning June 19, 2015 and ending through October 21, 2015 due to the claimant's volitional acts causing his termination of employment.

STIPULATION

Pursuant to a stipulation of the parties, the claimant's average weekly wage is $798.85.

FINDINGS OF FACT

1. On March, 18, 2015 the claimant sustained an injury to his right shoulder arising out of and in the course of his employment with the respondent-employer.

2. The claimant was hired by the respondent-employer on July 9, 2014. Prior to being hired, the claimant had to undergo a pre-employment physical examination and a lift test, both of which he passed.

3. At the July 9, 2014 orientation meeting for new employees, the claimant was required to complete a Conditional Job Offer and Medical Review form. In this form, the claimant was asked to list any on-the-job injuries. The claimant wrote that he had a back injury in 1990 while working for Mid Coast Welding and a left shoulder injury in 2011 while working for Pagosa Springs Resort. This form reads that false or misleading statements are grounds for rescinding this job offer. This form also reads that the job offer is valid only if the back of the form is signed by a company representative. This form also has a section that is for a medical professional to sign. The form was not signed by a company representative or a medical professional.

4. Cindy Morris, the DOT/OSHA coordinator at the respondent-employer observed that the Medical Review Form is used to determine a baseline for employees if something were to happen to an employee in the future. Regarding the form not being signed by a company representative, Ms. Morris testified she never signs the Medical Review forms.

5. After the claimant was injured, he was referred by the respondent-employer to Colorado Springs Health Partners, where he saw Dr. Cindy Lockett on March 25, 2015. Dr. Lockett diagnosed a trapezius strain and an upper arm strain. Dr. Lockett gave the claimant work restrictions of: no lifting over 10 pounds and no repetitive lifting over 5 pounds. The claimant returned back to Dr. Lockett on April 8, 2015. At that time, Dr. Lockett diagnosed the claimant with a right arm stain, trapezius strain, and a shoulder strain. Dr. Lockett changed the claimant's work restrictions to: no lifting over 10 pounds, and no overhead lifting. The claimant had these work restrictions up until October 22, 2015.

6. The claimant had no problems in performing his job duties up until the date he was injured. Mr. Gordon, the respondent-employer's HR manager declared that the respondent-employer wants honest and trustworthy employees working for them and that is why it is important to the respondent-employer that its potential employees honestly fill out the Medical Review Form. However, Mr. Gordon acknowledged that as far as he knew, the claimant accurately completed his paperwork and was truthful in performing his job. The claimant was never disciplined or reprimanded and in fact received raises while employed with the respondent-employer.

7. On June 19, 2015, the claimant was terminated from his employment with the respondent-employer. According to Mr. Gordon the reason for termination was the claimant's willful failure to truthfully report his past medical history as part of the post-offer medical evaluation.

8. The claimant had other prior on–the-job injuries other than those listed on the Medical Review Form. The first was an injury to his right forearm while employed with American Courier in November 2011. The second was an injury to his right shoulder on January 12, 2012, also while employed with American Courier. According to the claimant, these were consolidated into one claim and treated as such. For these injuries, the claimant was off work for approximately three months and made a full recovery without restrictions or impairment. The third on-the-job injury was an injury was to the claimant's right shoulder which occurred with Pagosa Springs Resort on February 12, 2013. The claimant was off work for approximately three months and was

released with no restrictions or impairment. The claimant did receive a nominal settlement of $1,500.00 in this particular claim.

9. The claimant credibly testified that he was confused about the date and employer for the 2012 injury. He said that he considered the November 2011 right forearm injury part of the 2012 injury since Dr. Jernigan treated them as one injury. Regarding the 2013 injury, the claimant said he just forgot it. The claimant denied deliberately and willfully withholding any of his on-the-job injuries. The claimant testified that he assumed the 2011 injury was the same as the 2012 injury since they were combined into one claim. In addition, the claimant testified that between 2011 and 2013 he had worked for a number of different employers.

10. The claimant testified that he fully recovered from both of his shoulder injuries with no restrictions or impairment. After both of his shoulder injuries, the claimant was able to do heavy work including lifting over 75 pounds, extensive overhead lifting, and carrying heavy objects without any problems. The claimant testified that he was able to perform all of his job duties at the respondent-employer without any problems.

11. The ALJ finds the claimant to be credible.

12. The ALJ finds that the respondents have failed to establish that it is more likely than not that the claimant was responsible for his termination.

CONCLUSIONS OF LAW

1. Section 8-42-105(4) C.R.S. and 8-42-103(1)(g), C.R.S. state that in cases where it is determined that a temporarily disabled worker is responsible for termination of employment, the resulting wage loss shall not be attributable to an on-the-job injury. The concept of "responsibility" appears to have been reintroduced with the Worker's Compensation Act as the concept of "fault." *Colorado Springs Disposal v. Industrial Claim Appeals Office*. 58 P. 3d 1061, 1064 (Colo. App. 2002). "Fault requires that the Claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination." *See Padilla v. Digital Equipment Corp.,* 902, P. 2d 414 (Colo. App. 1995). The employer bears the burden of establishing evidence that a Claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office,* 187 P. 3d 1129 (Colo. App. 2008). The question whether the Claimant acted volitionally or

exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ.

2. The ALJ concludes as found above that the claimant inadvertently failed to provide information about a specific injury. The claimant did in fact provide information about a prior shoulder injury and he was hired nonetheless.

3. The ALJ concludes that the claimant is credible.

4. There is insufficient evidence to establish that the claimant would not have been hired but for this inadvertent omission.

5. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the claimant was responsible for his termination under the Workers' Compensation Act of Colorado.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant temporary total disability benefits from and including June 19, 2015 through and including October 21, 2015.

2. The claimant's average weekly wage is $798.85.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

f you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

December 28, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven that he sustained a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant was hired by employer on April 12, 2011 as a rig hand. Claimant began working as a crane operator for employer in December 2011.

2. Prior to claimant beginning his work for employer, claimant sustained a workers' compensation injury while employed with a different employer. Claimant's workers' compensation claim resulted from an injury to his low back that occurred on January 31, 2011. Claimant treated for his low back injury with Dr. Loftis.

3. Claimant testified that on October 30, 2014 he was working operating a crane on the construction of the new Walmart store in Pagosa Springs, Colorado. Claimant testified he came up to the cockpit of the crane at about 2:00 p.m. and started to jump to grab the hand rail when he hit his head on a window that was hinged open.

4. Claimant testified that after striking his head on the window, he fell into the seated position and sat for several seconds in order to get his wits. Claimant testified he felt immediate pain in his neck following the incident and was frustrated, but continued to work that day and the following day. Claimant testified that over the next few days his symptoms got worse to the point that he could not do the essential functions of his job.

5. Claimant presented testimony at the hearing from Mr. Melendy, a co-worker. Mr. Melendy testified he was present with claimant on the job site on October 30, 2014. Mr. Melendy testified he was not looking at claimant but heard claimant hit his head, turned around and saw claimant on his knees grabbing and holding his head. Mr. Melendy testified claimant appeared to be in pain and sat for a while. Mr. Melendy testified he asked claimant if he was OK, and claimant replied "I think so".

6. Claimant presented the testimony of Mr. John at hearing. Mr. John testified he is a rigger/signaler for employer. Mr. John testified that on October 30, 2014, he saw claimant approximately 10 seconds prior to the incident, then turned to

walk away, heard a sound he described as a “turtle shell” of the hard hat hitting the window, turned around and saw claimant in a crouched position with a gimmace on his face. Mr. John testified he walked over to the crane and picked up claimant’s sunglasses off the ground and handed them to claimant. Mr. John testified that after this incident, heavy lifting was difficult for claimant. Mr. John testified he now helps claimant with lifting on the job site.

7. Claimant testified that after the incident, he did not go to the doctor right away, and hoped his neck would get better. Claimant testified he eventually sought treatment with Dr. Lake a couple of weeks after the incident, but did not report to Dr. Lake that he was injured on the job. Instead, claimant told Dr. Lake that he did not know why his neck and shoulders hurt. Claimant was referred for physical therapy and again did not tell the physical therapist about his work injury.

8. Claimant testified he eventually reported the injury to Mr. Carlson, his supervisor at work. Claimant testified he did not recall the date he told Mr. Carlson of the injury. Claimant’s testimony in this regard was corroborated by the testimony of Mr. Melendy and Mr. John, who testified they recalled claimant discussing the incident in question in the presence of Mr. Carlson after the injury.

9. Claimant testified he eventually spoke to Mr. Carlson on the phone in a plea to have his neck injury treated through workers’ compensation. Mr. Carlson testified he had made an appointment with Dr. Loftis at this point. Claimant testified Mr. and Mrs. Carlson called claimant back 30 minutes later and asked claimant to cancel the appointment and come in to the office the next day to discuss the injury.

10. Claimant testified he arrived at the office and Mr. and Mrs. Carlson had claimant fill out an incident report and gave claimant a list of physicians to choose from.

11. Mrs. Carlson testified at hearing in this matter. Mrs. Carlson is the bookkeeper and safety coordinator for employer. Mrs. Carlson testified that on January 12, 2015 she became aware for the first time that claimant was alleging a work injury when she received a phone call from La Plata Family Medicine requesting information for a workers’ compensation claim. Mrs. Carlson testified she then called claimant and had him on a speaker phone to ask him what had happened and inform claimant that there were proper procedures to follow regarding work injuries. Mrs. Carlson testified claimant said he wasn’t sure why he hadn’t reported the work injury and was trying to take care of it on his own but had taken it as far as he could on his own.

12. Mrs. Carlson testified she met with claimant on January 13, 2015 in order to have claimant fill out an accident report and refer claimant for medical treatment. Mrs. Carlson testified she did not refer claimant to Dr. Lake, Dr. Loftis of physical therapy.

13. The employer records document claimant reporting the injury in writing on January 13, 2015. Claimant indicated in his claim for compensation that he had

reported the injury to employer on January 2, 2015. Claimant was referred by employer to Dr. Jernigan for medical treatment.

14. Claimant testified he had prior issues with his low back for which he would see a chiropractor up to four times per year. The medical records entered into evidence show claimant treated with Dr. Lake, a chiropractor, on April 16, 2014 with complaints of lumbar and sacral discomfort that started 3 ½ to 4 years earlier. During the course of this treatment, claimant received subluxation to his thoracic and cervical spine in addition to treatment involving his low back.

15. Claimant returned to Dr. Lake on August 25, 2014 and reported pain he described as dull, aching, tightness and tingling discomfort in the back of his neck. Claimant was treated with subluxation of his lumbar, thoracic and cervical spine and was instructed to return as needed for treatment.

16. Following claimant's injury on October 30, 2014, claimant again sought treatment with Dr. Lake on November 10, 2014. Claimant did not report to Dr. Lake that the pain he was experiencing in his neck was related to any specific incident. Claimant was treated with subluxation of his cervical, thoracic and lumbar spine and instructed to return as need.

17. Claimant returned to Dr. Lake on November 12, 2014, and again did not report an accident history related to his symptoms. Dr. Lake noted claimant reported responding well to the treatment and again performed regional manipulation and adjustments involving the cervical, thoracic and lumbar spine. Claimant returned to Dr. Lake on November 19, 2014 for additional chiropractic treatment.

18. Claimant was evaluated by Dr. Loftis on November 22, 2014. Dr. Loftis noted claimant started having lower back pain, then started getting tight in his right lateral neck and now was having a loss of sensation with a hard time moving his neck and shoulder. Dr. Loftis did not note a history of a work injury. Dr. Loftis prescribed claimant medications and recommended physical therapy.

19. Claimant was seen at Rakita Tomsic Physical Therapy on referral from Dr. Loftis. Claimant reported to the physical therapist initially on December 8, 2014 and noted an accident history of waking up approximately one month earlier with a very stiff neck. Claimant reported he had two visits with his chiropractor before he began having pain in his shoulder with pain shooting across his lat, back and chest.

20. Claimant returned to Dr. Loftis on December 12, 2014 and noted claimant continued to complain of pain in his right lateral and upper neck with radiating symptoms into the right axilla that was worse with neck movement. Dr. Loftis prescribed medications for claimant along with physical therapy.

21. As noted, after claimant reported the injury in writing to Mr. and Mrs. Carlson on January 13, 2015, claimant was provided with a choice of physician's and chose Dr. Jernigan from the list of physicians to treat claimant for his work injury. Claimant was initially evaluated by Dr. Jernigan on January 22, 2015. The intake form

from Dr. Jernigan's office filled out by claimant notes a date of injury of October 30, 2014. Dr. Jernigan noted an accident history of claimant striking his head into a very solid window on a crane with the development of neck tightening over the next 24 hours and very severe neck pain within 3 days. Dr. Jernigan noted claimant initially sought treatment with Dr. Loftis and after his condition got worse, Dr. Loftis suggested claimant file a workers' compensation claim. Dr. Jernigan diagnosed claimant with a likely C6 radiculopathy and provided claimant with medications and recommended a magnetic resonance image ("MRI") of the cervical spine.

22. Dr. Jernigan's January 22, 2014 report indicates that the problem began on December 8, 2014. However, the ALJ finds that this information is not consistent with the patient health history filled out by claimant. The ALJ therefore disregards this portion of Dr. Jernigan's report that indicates that problem started on December 8, 2014 and instead credits the patient health history form filled out by claimant regarding the onset of his symptoms.

23. The cervical MRI took place on January 30, 2015 and was read to show degenerative disk disease at the C5-6 and C6-7 levels with resultant significant right-sided neural froaminal narrowing at C5-6 and C6-7 and to a lesser degree, neural foraminal narrowing on the left at C6-7.

24. Claimant returned to Dr. Jernigan on February 2, 2015 with continued complaints of pain. Dr. Jernigan noted that the MRI showed severe changes in the cervical spine at the C5-C7 levels. Dr. Jernigan referred claimant to Spine Colorado for further medical treatment.

25. Claimant was examined by Mr. Baumchen, a physicians' assistant with Spine Colorado, on February 18, 2015. Mr. Baumchen noted an accident history of claimant striking his head on a window-type entry to a crane cockpit on October 30, 2014. Mr. Baumchen noted the MRI findings and reviewed x-rays that were obtained in the Spine Colorado offices. Mr. Baumchen noted that claimant had not improved with two rounds of oral steroids and recommended claimant be assessed for surgical consultation. Mr. Baumchen noted claimant would need to cease smoking prior to any surgical procedure being performed.

26. Claimant returned to Dr. Jernigan on March 2, 2015. Dr. Jernigan noted claimant was trying to quit smoking and had become irritable as a result. Dr. Jernigan reported claimant felt he was getting worse. Dr. Jernigan recommended claimant continue with his medications and agreed with the recommendations of the orthopedic consultation.

27. Claimant was examined by Dr. Youssef with Spine Colorado on April 3, 2015. Dr. Youssef diagnosed claimant with a spondylosis at C5-6 and C6-7 with right sided radiculopathy with is failing non-operative efforts. Dr. Youssef noted claimant reported he struck his head while entering a crane cockpit, following which he developed worsening symptoms radiating into his right hand and arm. Dr. Youssef recommended claimant undergo an electromyelogram ("EMG") of his right upper

extremity based on his complaints of symptoms into the right hand. Dr. Youssef opined that claimant's condition was directly related to his workers' compensation injury.

28. Dr. Youssef wrote a letter to Dr. Loftis following his April 3, 2015 evalutation that outlined his evaluation and enclosed his surgical consultation. Dr. Youssef testified in his deposition he sent the exact same letter to Dr. Jernigan following the evaluation.

29. Claimant was also seen by Dr. Jernigan on April 3, 2015. Dr. Jernigan noted Dr. Youssef was recommending an EMG and claimant was unchanged clinically with the exception of the onset of headaches. Dr. Jernigan diagnosed claimant with disc disorder with myelopathy of his cervical spine and opined that the cause of this problem was related to his work activities.

30. The EMG was performed on April 16, 2015. The EMG was noted to be normal.

31. Claimant was examined again by Dr. Youssef on April 22, 2015. Dr. Youssef noted claimant's EMG results and recommended claimant undergo surgery consisting of anterior decompression of the spinal cord with arthrodesis at C5-6 and C6-7 with allograft bone and titanium planting. Claimant was instructed that he would need to quit all tobacco products prior to his surgery.

32. Respondents obtained an independent medical examination ("IME") of claimant with Dr. Hattem on April 27, 2015. Dr. Hattem reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME.

33. Dr. Hattem noted in his IME report that claimant reported an injury when he struck his head on an overhead window while getting into a crane at work on October 30, 2014. Dr. Hattem noted claimant received medical treatment two weeks later with Dr. Lake, before seeing Dr. Loftis, his personal physician, on November 22, 2014. Dr. Hattem noted the findings of the MRI showed performed in January 2015 showed significant degenerative changes, but no acute findings.

34. Dr. Hattem ultimately opined that claimant's current condition was not related to his work injury as his condition was primarily an age related hereditary condition. Dr. Hattem noted that claimant didn't seek medical treatment for two weeks and had reported some mild cervical pain in the past.

35. Claimant returned to Dr. Jernigan on May 5, 2015. Dr. Jernigan noted that the recommended surgery had been denied. Dr. Jernigan outlined claimant's options regarding his medical treatment and indicated that claimant would discuss his options with his attorney.

36. Claimant returned to Dr. Jernigan on June 5, 2015. Dr. Jernigan noted claimant would be going to court regarding his proposed surgery and recommended

claimant continue with his medications. Claimant again returned to Dr. Jernigan on July 13, 2015 and continued his recommendations for ongoing medications.

37. In response to an inquiry from claimant's attorney, Dr. Yousseff issued a report dated June 8, 2015 that addressed a series of questions raised by claimant's attorney. Specifically, Dr. Youssef opined in the report that after reviewing Dr. Hattem's IME, Dr. Youssef felt claimant sustained an exacerbation of a pre-existing condition as a result of his October 30, 2014 work injury. Dr. Youssef noted claimant was essentially asymptomatic with regard to neck pain and arm pain before his injury. Dr. Youssef further indicated that claimant's injury on October 30, 2014 combined with his pre-existing condition to cause the need for medical treatment. Dr. Youssef opined claimant's reported headaches were not related to his neck injury, but deferred to any neurology input with regards to whether they would be related to claimant's work injury.

38. Dr. Jernigan provided a letter to claimant's attorney on July 30, 2015 addressing the incorrect date of injury noted on some of his medical reports and clarified that claimant's date of injury for his medical treatment should be October 30, 2014.

39. Claimant returned to Dr. Jernigan on August 24, 2015. Claimant reported to Dr. Jernigan that he was getting more depressed and occasionally smoking again. Dr. Jernigan continued claimant's medications and recommended adding Wellbutrin. Dr. Jernigan noted in his report that it was his opinion that claimant's cervical condition was clearly work related.

40. Dr. Youssef testified by deposition in this matter. Dr. Youssef testified consistent with his medical reports and opined in his deposition that claimant's work injury on October 30, 2014 exacerbated his pre-existing degenerative spine condition and caused his need for medical treatment.

41. Dr. Youssef noted in his deposition that he was unaware of any treatment to claimant's cervical spine from prior to his work injury. Dr. Youssef noted that prior treatment to his cervical spine could change his opinion, but he would need to see the medical records to ascertain the nature and extent of the treatment prior to changing his opinion.

42. Dr. Hattem likewise testified in this case. Dr. Hattem's testimony was consistent with his medical report. Dr. Hattem testified that the findings depicted on the MRI from January 2015 showed degenerative changes that were not associated with claimant hitting his head on October 30, 2014.

43. The ALJ credits the testimony of claimant at hearing, along with the supporting testimony of Mr. John and Mr. Melendy and finds that claimant has established that it is more likely than not that he sustained a compensable injury arising out of and in the course of his employment with employer on October 30, 2014 when he struck his head on the window of the crane that was hinged open. The ALJ further

credits the medical opinions expressed by Dr. Youssef and Dr. Jernigan as being credible an persuasive regarding this issue.

44. The ALJ notes that claimant did report some symptoms in his cervical spine prior to his work injury, but finds the records establish that claimant's incident on October 30, 2014 aggravated, accelerated or combined with a pre-existing condition and resulted in the need for medical treatment. Significantly, the ALJ credits that testimony of Mr. John and Mr. Melendy that the incident that claimant testified to did in fact occur and resulted in claimant appearing in pain on the date of the injury as testified to by claimant.

45. The ALJ notes that there is conflicting evidence in this case as to claimant's condition prior to the October 30, 2014 incident and conflicting evidence as to whether the incident of October 30, 2014 caused, aggravated or accelerated claimant's need for medical treatment. However, after reviewing the evidence, the ALJ has credited the opinions of Dr. Jernigan and Dr. Youssef over the conflicting opinions and finds that claimant has demonstrated that it is more probable than not that the incident at work on October 30, 2014 where claimant struck his head on the overhead window while getting into the crane aggravated, accelerated or combined with claimant's pre-existing condition resulting in the need for medical treatment.

46. The ALJ finds that the treatment provided by Dr. Lake, Dr. Loftis and the physical therapy provided claimant through December 22, 2014 was not authorized medical treatment. The ALJ credits the testimony of the claimant that he was trying to treat this injury on his own and finds that claimant had not reported to employer that he had sustained a work injury that required medical treatment until January 12, 2015 when he spoke to Mr. and Mrs. Carlson regarding the work injury. The ALJ therefore finds that respondents are not liable for claimant's medical treatment with these providers.

47. The ALJ finds that claimant was referred for medical treatment on January 13, 2015 by employer and elected to treat with Dr. Jernigan for his work injury pursuant to a referral from employer. The ALJ credits the records from Dr. Jernigan, the medical records from Dr. Youssef, along with the supporting testimony of claimant and Dr. Youssef at hearing and finds that Dr. Jernigan's medical treatment was reasonable and necessary to treat claimant for the compensable work injury.

48. The ALJ notes that Dr. Youssef testified in his deposition that he would need to re-evaluate the claimant to determine of the proposed surgery was still being recommended and the ALJ makes no finding regarding this specific issue in light of Dr. Youssef's testimony.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he stood up and struck his head on the window of his crane that was hinged open. The ALJ credits the testimony of claimant, Mr. John and Mr. Melendy to determine the incident did indeed occur and that it was significant enough that it drew the attention of Mr. John and Mr. Melendy who inquired as to claimant's well being following the incident. The ALJ further credits the medical opinions of Dr. Jernigan and Dr. Youssef regarding the need for medical treatment following the incident and it's relatedness to claimant's current medical condition and finds those opinions credible and persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

7. "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. The ALJ notes that claimant testified at hearing that he initially sought to treat his injury on his own without reporting to his employer that the injury was work related. The ALJ finds that the employer became aware that claimant was alleging a work injury for which he was seeking medical treatment on or about January 13, 2015. The ALJ finds that the medical treatment claimant received prior to January 13, 2015, including the treatment from Dr. Lake, Dr. Loftis and Rakita Tomsic Physical Therapy is not "authorized medical treatment" as contemplated by the Colorado Workers' Compensation Act. The ALJ determines that respondents are therefore not liable for the medical treatment provided by Dr. Lake, Dr. Loftis and Rakita Tomsic Physical Therapy that was presented at the hearing.

9. The ALJ credits the testimony of claimant and Mrs. Carlson and finds that claimant was referred for medical treatment with Dr. Jernigan. The ALJ further finds that Dr. Jernigan referred claimant for evaluation with Dr. Youssef. The ALJ finds and concludes that Dr. Jernigan and Dr. Youssef are authorized providers within the chain of referrals in this case.

10. As found, the ALJ credits the medical reports and testimony of claimant and Dr. Youssef presented at hearing and finds that claimant has proven by a preponderance of the evidence that the treatment provided by Dr. Jernigan and Dr. Youssef is reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his compensable work injury provided by physicians authorized to treat claimant for his work injury.

2. The ALJ finds that Dr. Jernigan and Dr. Youssef are authorized to provide claimant treatment related to his work injury.

3. The ALJ finds that the treatment provided by Dr. Lake after claimant's injury through November 19, 2014 is not authorized medical treatment.

4. The ALJ finds that the treatment provided by Dr. Loftis after claimant's injury through December 12, 2014 is not authorized medical treatment.

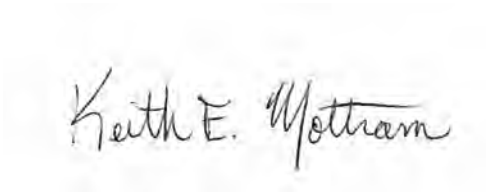
5. The ALJ finds that the physical therapy treatment provided after claimant's injury through December 22, 2014 from Rakita Tomsic Physical Therapy is not authorized medical treatment.

6. Any medical benefits shall be paid pursuant to the Colorado Medical Fee Schedule.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 18, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-980-660-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 28 and December 7, 2015, in Denver, Colorado. The hearing was digitally recorded (reference:10/28/15, Courtroom 1, beginning at 8:30 AM, and ending at 11:30 AM; and, 12/7/15, Courtroom 4, beginning at 8:30 AM, and ending at 11:30 AM). Hayate Roobaa was the official Somali/English Interpreter.

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. The Respondents objected to Claimant's Exhibit 6, the objection was overruled and the Exhibit was admitted into evidence. Respondents' Exhibits G through S were admitted into evidence, without objection. The ALJ sustained the Claimant's objection to Exhibits E and F, and the Exhibits were refused, with the exception of Exhibit E-5 (Claimant's answer to Interrogatory No. 16 –a foundation for the admission of extrinsic evidence to impeach having been laid) The ALJ overruled the Claimant's objections to Exhibits A through D, and the Exhibits were admitted into evidence.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, pursuant to the ALJ's instructions, on December 15, 2015.

Respondents' Objection to Claimant's Proposed Order

Contrary to the ALJ's instructions, a hard copy, entitled "Respondents' Objection to Claimant's Proposed Order" was filed on December 18, 2015. Other than minor objections as to form, the thrust of the Respondents' Objection calls for a re-weighing of the evidence, according to the Respondents' spin on the evidence.

Paragraph 2 of the Respondents' Objection argues for a re-weighing of the evidence and dismissal of the claim for compensation or, at least, re-weighing of the evidence and a new finding that the Claimant was "responsible for his termination from employment" through a volitional act on his part that he knew or reasonably should have known would result in his firing. The ALJ, in findings of evidentiary (basic) facts has ruled in a manner consistent with the weight of the evidence and contrary to the Respondents' arguments. *See* § 24-4-105 (15) (b), C.R.S. [which provides that a finding of evidentiary fact **shall** not be set aside unless "contrary to the weight of the evidence].

Paragraph 3 of the Objection concerns the spelling of witnesses' names. This objection is well taken.

Paragraphs 4 through 9 of the Respondents' Objection amount to a request for augmentation of Findings of Fact Nos. 9 and15, in a manner consistent with the Respondents' spin on the evidence. Also, additional findings to buttress the Respondents' argument that the decision reflected in the proposed findings is erroneous are requested. Some of the objections are well taken and other objections seem to amount to a premature launch of an appeal.

After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; temporary total disability (TTD) and/or temporary partial disability (TPD) benefits from March 31, 2015 and continuing; and, the Respondents raised the affirmative defense of "responsibility for termination."

The Claimant bears the burden of proof on all issues other than "responsibility for termination," in which case the Respondents bear the burden of proof by preponderant evidence

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated that the Claimant's average weekly wage (AWW) is $455.33, and the ALJ so finds.

2. The Employer, a staffing agency, hired the Claimant on or about November 28, 2014. The Employer placed the Claimant with Udi's – a company that makes pizzas, where he was working at the time of injury.

Findings

3. On March 31, 2015, at about 10:30 AM, the Claimant was pulling trays from the rack to the "pizza cars." He was moving five trays at a time. When he pulled one set he felt they were stuck then he pulled again and felt a pop in his right shoulder up to his neck.

4. The Claimant timely reported the work-related nature of his injury and we went to HealthONE the Employer's designated medical provider, where he was first seen by George Kohake, M.D., who became the Claimant's authorized treating physician (ATP). After July 8, 2015, HealthONE cancelled the Claimant's medical appointment because the Respondents were denying the claim (*See* Claimant's Exhibit 6).

5. Dr. Kohake, initially evaluated the Claimant on April 1, 2015..Dr. Kohake obtained a history that the Claimant is "a 27-year old who works doing pizza line production. … Patient states that he had to lift heavy trays, about five of them, into a delivery vehicle. He said the trays were improperly arranged. They got stuck, and he was trying to push and pull them into position. When he pulled hard, he felt a movement in his shoulder and pain." This history has remained consistent throughout, including in the Claimant's hearing testimony.

6. Dr. Kohake placed the Claimant in a sling and advised him to ice it down over the next five days. Dr. Kohake also restricted the Claimant only to return to work with no use of the right arm.

7. The Claimant's regular employment required the use of both arms in lifting the trays, and the ALJ finds that the Claimant could not perform his regular duties with the restrictions that Dr. Kohake placed on him. As of the last session of the hearing on December 7, 2015, the Claimant still remained under restricted use of the right upper

extremity (RUE). The Claimant earned **no** wages until May 18, 2015, when he began modified employment in the Employer staffing agency's office.

8. The Employer made the Claimant a modified job offer on May 6, 2105, for the Claimant to begin clerical work at the Employer's office, beginning on May 18, 2015 at 8:30 AM -- for 40 hours a week at $9.25 an hour. This equates to $370 per week. This rate yields a temporary wage loss of $85.73 per week.

Responsibility for Termination

9. The Claimant presented for work on May 18, but allegedly arrived five minutes late. Jo Noulin, his supervisor, under the impression that the Claimant should have arrived at 8:00 AM (when the modified offer specified 8:30 AM) testified that the Claimant arrived at 8:05 AM, and was late. The ALJ infers and finds that in their zeal to part ways with the Claimant, the Employer, specifically, Noulin, was not very careful in the time clock department. At about 12:30 PM, the Claimant advised his supervisor, Jo Noulin, that he had to leave the jobsite because of a medical appointment. Noulin testified that she believed the medical appointment to be for Claimant's work injury, although the Claimant was not specific about the medical appointment. The ALJ infers and finds that the communication between Noulin and the Claimant, regarding the medical appointment, was minimal and complicated by a partial language barrier. There was no clarification that the appointment was for the Claimant's mother. Respondents unsuccessfully attempted to parlay this communication into a "lie" that formed part of the basis for the Claimant's termination. The ALJ infers and finds that the Claimant did **not** volitionally intend to mislead the Employer, nor did he intend to **lie** about the nature of the medical appointment. The ALJ finds that the Claimant's mother needed her son to take her to her medical appointment. The Federal Family Medical Leave Act (FMLA) requires employers to allow medical leave for their employees to attend to the medical needs of immediate family members. Consequently, it makes no difference whether the Claimant was going to a medical appointment for his "denied" workers' compensation claim, or for his mother's medical appointment, other than the Employer attempting to parlay the matter into a **lie** worthy of termination from employment. Although it was never specified how far away the medical appointment was, or how long the Claimant would be gone, the Employer vaguely implied, without explicitly specifying, that the Claimant was expected back later that afternoon. Indeed, the ALJ infers and finds that this implied expectation was unfounded.

10. When the Claimant had not yet returned from the medical appointment on the day in question, the Employer and Pinnacol made inquiries to the Claimant's workers' compensation ATPs and determined that the Claimant did not have a workers' compensation medical appointment with any of his ATPs. The ALJ infers and finds that these inquiries were triggered by the Employer's misunderstanding concerning the specific nature of the medical appointment –an appointment for the Claimant's mother. Indeed, the Employer's "rush to judgment" on the issue of the alleged "lie" about the medical appointment leads the ALJ to infer that the Employer was not pleased with

having to provide the Claimant with modified work at their office, instead of being deployed to one of the Employer's customers such as Udi's, where the Employer could earn a fee from Udi's. The Employer chose not to give the Claimant any slack whatsoever. The ALJ infers that such a Draconian approach exceeds the bounds of how a reasonable employer would handle such a situation in a good faith effort at providing modified employment to an injured worker. English is not the Claimant's first language. Dr. Kohake noted that there "is limited communication, as he speaks limited English."

11. The following day, May 19, 2015, the Claimant returned to work about 20 minutes late due to increased traffic from a car accident. When he arrived at work on the 19th, the Claimant explained that the medical appointment was for his mother, Fatuma Hassan, with Jessica Bull, M.D., at the Lowry Health Center, across town from the Employer's location. Subsequently, Dr. Bull wrote a letter after-the-fact, dated September 9, 2015, corroborating the Claimant and asking that he be excused for the day "as he was needed to bring his mother to her appointment." Questioning by the Respondents at hearing implies that the Claimant should have contacted the Employer that he would be late when he was ensnarled in traffic. There was no persuasive evidence that the Claimant was in possession of a cell phone to do so, nor would it have been reasonable for him to abandon his vehicle and walk to a pay phone, if one existed nearby. Again, in their Draconian approach to slavish adherence to the Employer's policies, the Employer insinuated unrealistic expectations for the Claimant to contact the Employer concerning the fact that he was ensnarled in traffic and would be late to work. Again, the ALJ infers that such a Draconian approach exceeds the bounds of how a reasonable employer would handle such a situation in a good faith effort at providing modified employment to an injured worker.

12. The Respondents cite the Employer's policies (Respondents' Exhibit P), which provides, in relevant part:

> When on assignment if you are absent, late, or need to leave e for any reason you are required to contact our office at 303-867-5150. You must also inform your immediate supervisor. If you are late or absent within the first two weeks this can result in ending your assignment or future assignments….
>
> You are expected to complete your assignment as communicated. If you walk off your assignment, No call, No Show or fail to give 48 hours when resigning, any wages owed will be paid at **Minimum Wage** (emphasis supplied) on the next payroll date.

The ALJ infers and finds that reference to these provisions, in support of the Claimant's termination, is a stretch of analogizing and, essentially, irrelevant to the specific circumstances herein.

13. The Employer terminated the Claimant's modified employment at the start of May 19, 2015, on the allegations that the Claimant for was tardy to work two times, and "misrepresented the medical appointment absence." The alleged misrepresentation, as found, resulted from miscommunication between the Claimant and his supervisor, Jo Noulin, whereupon a whole constellation of alleged facts became implanted in the mind of his supervisor. Again, the ALJ infers that such a Draconian approach exceeds the bounds of how a reasonable employer would handle such a situation in a good faith effort at providing modified employment to an injured worker. Indeed, the ALJ finds the "misrepresentation" ground to be without merit.

14. Corrine Vanosdoll, the Owner and Executive Director of the Employer, testified that being late more than 7 minutes or later constitutes a tardy. This is not consistent with Noulin's testimony concerning the Claimant being 5-minutes late. Indeed, Noulin's testimony that the Claimant was 5-minutes late, as found herein above, is not consistent with the Claimant's modified start time of 8:30 AM. Such a lack of care by Noulin, concerning the facts of May 18, lead the ALJ to infer and find desperation on the part of the Employer to come up with **two or three** grounds for the Claimant's termination. Indeed, the ALJ finds that the May 18 tardiness ground is not supported by preponderant evidence.

15. The Employer was not legally obliged to even offer the Claimant modified employment. Also, the Employer could choose to fire the Claimant and not be accountable as long as the Employer did not fire the Claimant for discriminatory reasons against a legally protected class. A "responsibility for termination" defense in the contemplation of workers' compensation is very narrow. The termination must result from a volitional act on the part of the employee whereby the employee knows, or reasonably should know, that such an act, or acts, would get him fired. The ALJ finds that the Respondents failed to prove that the conduct of the Claimant as herein above described amounted to volitional acts that the Claimant knew, or reasonably should have known, would get him fired.

Referral to Colorado Orthopedic Consultants, Nathan D. Faulkner, M.D.

16. HealthONE referred the Claimant to Colorado Orthopedic Consultants, and Dr. Faulkner saw the Claimant on June 22, 2015 and reviewed the MRI (magnetic resonance imaging). Dr. Faulkner's opinion, to a reasonable degree of medical probability, is that the Claimant has "multidirectional instability that was exacerbated by his work-related injury on 3/31/15." Dr. Faulkner recommended physical therapy, home exercise, a steroid injection, and a continuation of the Claimant's work restrictions concerning the RUE.

Independent Medical Examination by (IME) James P. Lindberg, M.D.

17. Dr. Lindberg performed an IME on the Claimant, at the Respondents' request, on August 4, 2015. Dr. Lindberg disagreed with Dr. Faulkner's diagnosis of "multidirectional instability exacerbated by the work-injury. Indeed, Dr. Lindberg is of the opinion that the Claimant's problems are non-physiological (a catchall analysis); that the Claimant did **not** suffer a work-related injury and no further medical treatment is warranted, if any medical treatment was warranted in the first place. The underlying bases of Dr. Lindberg's opinions, in this regard are inadequate if any exist in the first place. For these reasons, the ALJ finds the opinions of the ATP, Dr. Kohake, HealthONE, and Dr. Faulkner, more persuasive and credible than the opinions of IME Dr. Lindberg.

Temporary Disability

18. The Claimant was unable to work from the date of injury, March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days. During this period of time, he earned no wages and he was temporarily and totally disabled. He worked at the modified job on May 18 and was presumably paid the modified wage of $370 per week, thus, sustaining a temporary wage loss of $85.73 per week, which yields a temporary partial disability (TPD) benefit rate of $57.15 per week, or $8.16 per day. There is no persuasive evidence that the Claimant was paid for work on May 19, 2015, the date he was fired. Consequently, he was restricted, could not perform his pre-injury work on that date and was, therefore, temporarily and totally disabled on that date.

19. As of the last session of the hearing on December 7, 2015, the Claimant's ATPs at HealthONE had not lifted that Claimant's restrictions concerning his RUE, nor had they released him to return to his pre-injury job. Indeed, they had cut him off from further medical treatment in July 2015because the Respondents were denying his claim. The Claimant still cannot perform his pre-injury job with these restrictions. Therefore, he was temporarily and total disabled from May 19, 2015, through June 20, 2015, both dates inclusive, a total of 35 days.

20. The Claimant began working with a rental car service on June 21, 2015 driving cars. Claimant is able to work within his restrictions in this lesser paying job. From June 21, 2015 to August 30, 2015 (a period of 71 days) the Claimant earned $4,454.33, which equates to $439.16 per week, thus, yielding a temporary wage loss of $16.17 per week. Based on this temporary wage loss, a TPD rate of $10.78 per week, or $1.54 per day is yielded. After August 30, 2015, wage records from Budget are required to establish whether there is a temporary wage loss.

Ultimate Findings

21. The ALJ finds that the Claimant presented in a straight-forward and credible manner. His testimony concerning his injury was consistent with the medical

histories he gave to providers throughout his treatment. His testimony concerning the circumstances of his termination is more credible and persuasive than the testimony of Jo Noulin and Corrine Vanosdoll and the implications made by them. Additionally, the ALJ finds the opinions of Dr. Kohake, HealthOne nurses, and Dr. Faulkner more persuasive and credible than the opinions of IME Dr. Lindberg.

22. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Kohake, the HealthONE nurse practitioners, Dr. Faulkner, and to reject the opinions of Dr. Lindberg.

23. The ALJ finds that the Claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on March 31, 2015, arising out of the course and scope of his employment for the Employer herein.

24. The ALJ finds that the medical care and treatment that the Claimant has received for his compensable right shoulder injury at HealthONE, by Dr. Kohake and by Dr. Faulkner (an authorized referral) was authorized, reasonably necessary to cure and relieve the effects of his compensable injury and causally related to the compensable right shoulder injury of March 31, 2015.

25. The Claimant has proven, by preponderant evidence that he was temporarily and totally disabled from March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days, based on the admitted AWW of $455.33, the Claimant is entitled to a TTD benefit rate of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of $2,081.28. He worked at the modified job on May 18 and was presumably paid the modified wage of $370 per week, thus, sustaining a temporary wage loss of $85.73 per week, which yields a temporary partial disability (TPD) benefit rate of $57.15 per week, or $8.16 per day, for one day. Additionally, as found herein above, the Claimant was temporarily and totally disabled from May 19, 2015 through June 20, 2015, both dates inclusive, a total of 35 days and is entitled to TTD benefits of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of$1,517.60.

26. As found herein above, the Claimant is able to work within his restrictions in this lesser paying job. From June 21, 2015 to August 30, 2015 (a period of 71 days) he earned $4,454.33, which equates to $439.16 per week, thus, yielding a temporary wage loss of $16.17 per week. Based on this temporary wage loss, a TPD rate of $10.78 per week, or $1.54 per day is yielded. Aggregate subtotal TPD benefits for this period equal $109.34. After August 30, 2015, wage records from Budget are required to establish whether there is a temporary wage loss.

27. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant was responsible for his termination, by virtue of a volitional act on his part, that he knew, or reasonably should have known, would get him fired, or that he exercised a degree of control over the circumstances leading to his termination from employment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See §* 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant presented in a straight-forward and credible manner. His testimony concerning his injury was consistent with the medical histories he gave to providers throughout his treatment. His testimony concerning the circumstances of his termination was more credible and persuasive than the testimony of Jo Noulin and Corrine Vanosdoll and the implications made by them. Additionally, as found, the opinions of Dr. Kohake, HealthOne nurses, and Dr. Faulkner were more persuasive and credible than the opinions of IME Dr. Lindberg.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Kohake, the HealthONE nurse practitioners, Dr. Faulkner, and to reject the opinions of Dr. Lindberg.

Medical

c. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease with the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As found, the Claimant was treated at an Employer-Designated facility, HealthONE until July 2015 when HealthONE refused to further treat the Claimant because the respondents were denying the claim. Consequently, all of the Claimant's care and treatment at HealthONE was authorized.

d. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, Colorado Orthopedic Consultants and Dr. Faulkner were upon referral from HealthONE and, therefore, within the chain of authorized referrals.

e. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). As found, the compensable injury of March 31, 2015 caused the need for treatment of the Claimant's right shoulder thereafter.

f. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment for the right shoulder was and is reasonably necessary to cure and relieve the effects of the compensable injury of March 31, 2015.

Temporary Disability

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not his fault. As found, the Claimant was **not** responsible for his termination, by virtue of a volitional act on his part, that he knew, or reasonably should have known, would get him fired. The Claimant's testimony alone is sufficient to establish a temporary "disability." See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997), although his temporary disability, as found, is amply supported by medical evidence.

h. Once the causal prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Commission,* 725 P. 2d

107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, that he was temporarily and totally disabled from March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days, based on the admitted AWW of $455.33, the Claimant is entitled to a TTD benefit rate of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of $2,081.28. He worked at the modified job on May 18 and was presumably paid the modified wage of $370 per week, thus, sustaining a temporary wage loss of $85.73 per week, which yields a temporary partial disability (TPD) benefit rate of $57.15 per week, or $8.16 per day, for one day. Additionally, as found herein above, the Claimant was temporarily and totally disabled from May 19, 2015 through June 20, 2015, both dates inclusive, a total of 35 days and is entitled to TTD benefits of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of$1,517.60.

i. Also, as further found herein above, the Claimant was able to work within his restrictions in this lesser paying job. From June 21, 2015 to August 30, 2015 (a period of 71 days) he earned $4,454.33, which equates to $439.16 per week, thus, yielding a temporary wage loss of $16.17 per week. Based on this temporary wage loss, a TPD rate of $10.78 per week, or $1.54 per day is yielded. Aggregate subtotal TPD benefits for this period equal $109.34. After August 30, 2015, wage records from Budget are required to establish whether there is a temporary wage loss.

Responsibility for Termination

j. A discharge in accordance to policy does not compel finding of fault. The mere fact that an employer discharges a claimant in accordance with the employer's policy does not establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *See Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987); *Pace v. Commercial Design Engineering,* W.C. No. 4-451-277 [Indus. Claim Appeals Office (ICAO), May 15, 2001]. § 8-42-105 (4), C.R.S., provides that an employee responsible for his own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that “responsibility for termination” must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether a claimant is responsible for his termination, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788, (ICAO, June 25, 2003). As found, the Respondents failed to satisfy their burden of proof on the affirmative defense that the Claimant was responsible for his termination through a volitional act on his part and/or that Claimant exercised ad degree of control over the circumstances leading to termination.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant satisfied his burden on compensability, specific medical benefits as distinguished from a general award of medical benefits [*See Padilla v. Markley Motors, Inc.,* W.C. No. 4-923-087-02 (ICAO, April 14, 2015) [determining that a general award of medical benefits is interlocutory]; AWW; and, TTD and TPD benefits through August 30, 2015.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of medical care and treatment with HealthONE, its referrals, Colorado Orthopedic Consultants and Nathan D. Faulkner, in the specific amounts billed, subject to the Division of Workers' Compensation Medical Fee Schedule. Respondents are entitled to a credit for amounts already paid.

B. The Respondents shall pay the Claimant temporary total disability benefits in the following amounts: from March 31, 2015 through May 17, 2015, both dates inclusive, a total of 48 days, $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of $2,081.28; $57.15 per week, or $8.16 per day, for one day in the subtotal amount of $8.16; from May 19, 2015 through June 20, 2015, both dates inclusive, a total of 35 days, temporary total disability benefits of $303.55 per week, or $43.36 per day, in the aggregate subtotal amount of$1,517.60.

C. From June 21, 2015 to August 30, 2015 (a period of 71 days), $10.78 per week, or $1.54 per day, in the aggregate subtotal amount of $109.34.

D. Grand total temporary disability benefits, payable through August 30, 2015 inclusive, equal $3,607.04, which is payable retroactively and forthwith.

E. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein, including entitlement to temporary disability benefits after August 30, 2015, are reserved for future decision.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-980-909-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for January 28, 2016, in Denver, Colorado. On November 12, 2015, the Claimant filed a Motion for Summary Judgment with attached supporting documents, asserting the there was no genuine issue of disputed material fact concerning the fact that the Respondents failed to timely respond to a Request for Prior Authorization, pursuant to Workers' Compensation Rules of Procedure (WCRP), Rule 16-10, 7 CCR 1101-3. On December 2, 2015, the Respondents filed a Response to the Claimant's Motion for Summary Judgment, with **no** attachments, asserting that there was a genuine issue of disputed material fact, *i.e.,* whether the request for prior authorization by Rocci Trumper, M.D. was "complete" in compliance with WCRP, Rule 16-9.

The summary judgment matter was referred to Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 2, 2015, for a ruling thereon.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact as to whether the Respondents failed to timely respond to a Request for Prior Authorization, pursuant to Workers' Compensation Rules of Procedure (WCRP), Rule 16-10, 7 CCR 1101-3; if so, whether the Respondents waived the right to contest the Request for Prior Authorization (hereinafter "request for PA). The Respondents concede an untimely response to the Request for PA, asserting that there was a genuine issue of disputed material fact, *i.e.,* whether the request for prior authorization by Rocci Trumper, M.D. was "complete" in compliance with WCRP, Rule 16-9. A corollary of this issue is whether an alleged "incomplete" request for PA excuses an untimely contest of the request. Subsidiary issues also concern whether there is a disputed issue of material fact concerning how "complete" is "complete," and whether there is a disputed issue of material fact concerning compliance with WCRP, Rule 16-9. Indeed, may the Respondents allege that the request for prior authorization is not complete until they determine that it is complete—in the nature of a "personal satisfaction" contract. Or, may the ALJ make a legal determination of whether the ATP complied with the requirements of WCRP, Rule 16-9 by use of the principles of statutory construction.

The Claimant bears the burden of establishing that there is no genuine issue of disputed material fact concerning: (1) an untimely contest of the Request for Prior Authorization; and (2) whether Dr. Trumper's request was "complete" as defined by WCRP, Rule 16-9.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained an admitted left knee injury on April 14, 2014.

2. On October 5, 2014, the Claimant filed an Application for Hearing seeking, in-part, medical benefits under the Workers' Compensation Act for an admitted injury occurring on April 14, 2015. Specifically, authorized treating physician (ATP) Rocci Trumper M.D. requested prior authorization for an arthroscopic left knee surgery.

3. The Respondents do not dispute that Dr. Trumper is the Claimant's ATP. Dr. Trumper recommended the procedure on September 21, 2015 and faxed a Request for Prior Authorization to Respondents on the same date (Exhibit 2, attached to the

Motion for Summary Judgment). The Respondents do not dispute that the Request was successfully received by them as indicated on the top of the Request.

4. Dr. Trumper's Request for Prior Authorization accurately defined the requested procedure and he attached his September 14, 2015 report as supporting medical documentation (Exhibit 2, attached to Motion). Dr. Trumper's September 14, 2015 report included documentation of the relevant diagnostic and/or surgical indications including the mechanism of injury discussion and physical examination findings (Exhibit 2). Dr. Trumper's recommendation was preceded by and based on the April 22, 2015 MRI (magnetic resonance imaging), performed by Russell Fritz, M.D., which shows a medial meniscal tear (*See* Exhibit 3, attached to the Motion).

5. The Respondents do not dispute that their letter contesting Dr. Trumper's Request for prior Authorization was sent on October 1, 2015, more than seven (7) business days after receiving the September 21, 2015 Request for Prior Authorization. (Exhibit 4, attached to the Motion). Attached to the Respondents' late, October 1 denial of prior authorization was a report, dated September 26, 2015, from Robert P. Mack, M.D., who did a medical record review and expressed the opinion that the Claimant's meniscus tear as documented by the MRI of April 28, 2015, was preexisting and related to previous meniscal surgery (of 2001) and marked obesity. Indeed, this opinion would set up a factual controversy to be litigated but it was a "day late and a dollar short." Indeed, the four-corners of Dr. Mack's report indicate that the Claimant did not, in fact, sustain a left knee injury of April 14, 2014 and it implies that the Respondents were wrong in admitting liability therefore. The Respondents Response to Application for Hearing does not designate "withdrawal of admission" as an issue.

Ultimate Findings

6. There is no genuine issue of disputed material fact concerning the untimely response of the Respondents to Dr. Trumper's Request for Prior Authorization.

7. There is no genuine issue of disputed material fact regarding the "completeness" of Dr. Trumper's request as required by Rule 16-9. Analyzing Dr. Trumper's request and the attachments thereto simply requires a statutory construction assessment of whether the request complies with the requirements of Rule 16-9. The wording on Rule 16-9, as applied to Dr. Trumper's request, along with the attachments thereto, is plain and unambiguous Just because the Respondents say that Dr. Trumper's request is not "complete" does not allow them to create a disputed factual issue on the bald argument concerning an interpretation of WCRP, Rule 16-9, that Dr. Trumper's request is not "complete," along the lines of "it's not complete until we say it's complete to our satisfaction."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents. The Respondents' Response contains no supporting documents. Indeed, it argues their interpretation of the meaning of WCRP, Rule 16-9, and how Dr. Trumper's request is not "complete" as defined by Rule 16-9.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, there is no genuine issue of disputed material fact that the Respondents' response to Dr. Trumper's request for prior authorization was not timely. Also,as found, there is no genuine issue of disputed material fact that Dr. Trumper's request was "complete" as defined by WCRP, Rule 16-9.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). An adverse party may not rest upon the mere allegations or denials in its pleadings, but its response by affidavits or other means must set forth specific facts showing that there is a genuine issue of disputed material fact. C.R.C.P., Rule 56(e). Genuine issues of material fact cannot be manufactured and arguments alone will not preclude summary judgment; contentions must be supported. *See Bauer v. Southwest Denver Mental Health Center, Inc.*, 701 P.2d 114 (Colo. App. 1985). As found, there is no genuine issue of disputed material fact regarding the "completeness" of Dr. Trumper's request as required by Rule 16-9. Analyzing Dr. Trumper's request and the attachments thereto simply requires a statutory construction assessment of whether the

request complies with the requirements of Rule 16-9. Just because the Respondents say that his request is not "complete" does not allow them to create a disputed factual issue on the bald argument concerning an interpretation of WCRP, Rule 16-9, that Dr. Trumper's request is not "complete," along the lines of "it's not complete until we say it's complete to our satisfaction,." with a late report (by Dr. Mack) indicating that the Claimant's claim is not compensable.

Respondents' Argument

d. Citing *Aguirre v. Noatak and Wausau Insurance*, W.C. No. 4-742-953 [Indus. Claim Appeals Office (ICAO), March 19, 2012] (upholding the ALJ's interpretation that the correspondence attached to support the prior authorization request was incomplete as it only offered claimant's subjective observation and not any other explanation as to why the procedure is needed or how the proposed procedure would cure or relieve the effects of the injury –also, the ALJ determined that Dr. Barolo never explained the medical necessity of the requested service), The Respondents argue that a determination of whether a provider submitted a "completed request" under WCRP, Rule 16-9 is a question a fact. The ALJ concludes that sometimes it is and sometimes it is not as in the present case.Indeed, the facts in *Aguirre* are significantly distinguishable from the facts in the present case. In *Aguirre,* the ALJ was affirmed because he made a factual determination that Dr. Barolat's request was not a "completed request." The present case is substantially different because the ALJ herein deems it unnecessary to hear evidence because there is no factual dispute to resolve. A plain reading of Rule 16-9 reveals that Dr. Trumper's request, along with the attachments thereto, is "complete" as defined by Rule 16-9. *See Lassner v. Civil Service Comm'n,* 177 Colo. 257, 493 P.2d 1087 (1972) [where the natural significance of a clause is **plain** and **unambiguous** and involves no absurdity, statutory construction is unnecessary). The wording on Rule 16-9, as applied to Dr. Trunmper's request, along with the attachments thereto, is plain and unambiguous. It is undisputed in the present case that the Request for Prior Authorization is supported by an objective MRI that reveals a medial meniscus tear in the left knee. Further, Dr. Trumper attached the MRI report of Dr. Fritz to his request, which reveals a history of previous surgery (2001). The Respondents admitted liability for the April 14, 2014 left knee injury on the inferred proposition that the Claimant sustained an aggravation and acceleration of his 2001 left knee condition. Ultimately, the holding in *Aguirre* is inapposite to its applicability to the present case.

e. The Respondents cite *McDaniel v. Vail Associates Inc., et a*l., W.C. No. 3-111-363 (ICAP – 2011 WL 3148609) (remanding the matter for the ALJ to make a sufficient findings as to whether a complete prior authorization request existed in conjunction with a request for penalties). Reference to the ICAO decision in *McDaniel* is not helpful to the statutory construction of the plain meaning of Rule 16-9 as applied to Dr. Trumper's Request for Prior Authorization and the attachments thereto.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, there is no genuine issue of disputed material fact concerning the fact that the Respondents' Response to the Request for Prior Authorization of the left knee arthroscopy was untimely.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's Motion for Summary Judgment is hereby granted and Respondents shall forthwith contact Dr. Trumper's office and authorize the arthroscopic left knee procedure requested by Dr. Trumper on September 21, 2015. Respondents shall pay the costs thereof, subject to the Division of Workers' Compensation Medical fee Schedule.

B. Any and all other issues endorsed on Claimant's October 5, 2015 Application for Hearing or added thereafter are reserved for determination at the hearing currently set for January 28, 2016.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.sjord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine.

2. Whether Claimant has established by a preponderance of the evidence that the medical treatment he received for his lumbar spine was reasonable, necessary, and causally related to a work injury.

FINDINGS OF FACT

1. Claimant works for Employer as a firefighter/engineer/emergency medical technician and has been so employed for approximately twenty eight years. As part of his employment, Claimant typically works 48 hour shifts and sleeps at the fire station.

2. Claimant also occasionally performs handyman type work and in 2014 he earned approximately five thousand dollars from such work.

3. On April 7, 2015 Claimant was working for Employer when he responded to a call to assist an individual with medical care. The individual was a woman who weighed approximately 110 pounds, was calm, and was cooperative. The woman walked outside of her residence and sat on a gurney.

4. The electric gurney was raised to working height and then Claimant and his co-workers pushed the gurney to the end of a waiting ambulance. At the ambulance, one end of the gurney was hooked onto the ambulance. Claimant held the other end of the gurney as the electric legs folded underneath the gurney. After the legs folded, Claimant slid the gurney into the ambulance.

5. While assisting the gurney into the ambulance, Claimant stood straight and primarily used his biceps, leg strength, and core strength to both hold the gurney and to slide it into the ambulance.

6. While holding the gurney, Claimant felt a slight twinge in his back that went away very quickly. Claimant did not report the twinge to any co-workers or supervisors.

7. After the call, Claimant and his co-workers returned to the fire station. Claimant participated in normal activities that included cooking dinner, mopping and cleaning the kitchen, and watching television. Claimant went to sleep at the fire station and slept well. Claimant did not experience any back pain during this period of time.

8. On April 8, 2015 Claimant woke up and tried to stand to go to the bathroom. While attempting to get out of bed, Claimant felt severe pain in his lower back and left leg.

9. Claimant immediately notified his supervisor Taylor Stephens, Lt. and sat back down on his bed. Lt. Stevens called a medical unit.

10. Claimant was transported by ambulance to Parker Adventist Hospital. Claimant reported to Paramedic Brian McCoy that he woke up that morning to go from his bedroom to the bathroom when he had a sudden onset of lower back pain location in the region of T10 through about L2 that radiated down his left leg. Claimant reported pain in his entire left leg but more focused toward his left thigh. Claimant reported a similar episode of back pain approximately one week prior which caused him to miss work. Paramedic McCoy noted tenderness at approximately T10 through L3. Claimant did not report to paramedic McCoy that he had a back twinge the day prior while loading a gurney into an ambulance. *See* Exhibit I.

11. At Parker Adventist Hospital, Claimant was evaluated by Gia Viscardi, M.D. Claimant reported that he got out of bed and shortly after standing he developed pain in his left low back in the T10/L1 area. Claimant reported the pain radiated down the lateral and anterior aspect of his left thigh. Dr. Viscardi noted Claimant had a very physical job with frequent heavy lifting but that Claimant had no recent trauma. Claimant reported a similar episode of low back pain a week ago that improved with physical therapy, massage, and chiropractic intervention. Claimant did not report to Dr. Viscardi any back twinge the day prior while loading a gurney into an ambulance. Dr. Viscardi noted tenderness to palpation in the lumbar area more pronounced over the left side. *See* Exhibit J.

12. Dr. Viscardi noted that Claimant had suffered intermittently with back pain including a recent flare that was treated with NSAIDs, physical therapy, and massage and that Claimant presented with an acute flare of the same type of back pain this morning when he got out of bed. Dr. Viscardi discharged Claimant. *See* Exhibit J.

13. Later on April 8, 2015 Claimant returned to the emergency department at Parker Adventist Hospital and was evaluated by Michael Fortner, M.D. Claimant reported that he had injured his back nine days ago and over the course of the next seven days it was getting better with physical therapy and massage. Claimant reported he went back to work the day before yesterday and was feeling fine and had a normal first half of his 48 hours shift. Claimant reported when he woke in the morning he had to go to the bathroom and had the return of sudden onset of left-sided back pain that radiated down his lateral left hip to the anterior left thigh that was severe. Claimant reported being released that morning but that his pain was worse and that he was very uncomfortable. *See* Exhibit K.

14. On April 8, 2015, Lt. Stephens filled out an Employer's First Report of Injury. Lt. Stephens noted that Claimant was walking into the bathroom upon waking up in the a.m. and that there was no specific cause to Claimant's injury and that the Claimant's pain just began while standing. Lt. Stephens listed the injury date as April 8, 2015. Lt. Stephens also filled out a Safety Committee Supervisor's Investigation Report in which he indicated there was no apparent direct cause of Claimant's pain/injury and therefore no specific remedy or action existed that required attention. Claimant did not report to Lt. Stephens that he had a twinge in his back the day prior while loading a gurney into an ambulance. *See* Exhibit S.

15. On April 9, 2015 Claimant was evaluated by J. Grope, M.D. Claimant reported lower back pain that radiated into his left thigh and leg with some numbness. Claimant reported that he was on a call on April 7, 2015 when he lifted a patient onto a pram and felt a pull in his left lower back. Claimant reported he was okay until the next morning when he awoke with sharp pain in the mid lower back and left sciatic/buttock area, with numbness into his thigh. Claimant reported still having considerable pain in the area. Dr. Grope assessed low back pain and parasthesias. Dr. Grope opined that Claimant appeared to have lumbar disc pathology and nerve impingement/sciatica that appeared to be directly related to a work injury. Dr. Grope ordered an MRI of Claimant's lumbar spine. *See* Exhibit L.

16. On April 16, 2015 Claimant underwent an MRI of his lumbar spine that was interpreted by Mark McGehee, M.D. Dr. McGehee noted a history of lifting a patient into an ambulance when Claimant felt low back pain. Dr. McGehee noted a previous injury to the back but no prior surgery. Dr. McGehee concluded that Claimant had a large L1-2 disc protrusion with extrusion effacing the left superior lateral recess and the exiting L2 root, a moderate sized L3-4 focal protrusion contacting the superior lateral recesses but not effacing them, and bilateral moderate to severe L4-5 foraminal stenosis. *See* Exhibit M.

17. On April 17, 2015 Claimant was evaluated by Dr. Grope. Claimant reported continued pain. Dr. Grope reviewed the MRI results and noted the L1-2 and L4-5 pathology. Dr. Grope suspected that Claimant's L1-2 disc popped as described and was related to his workers' compensation injury. Dr. Grope referred Claimant to neurosurgery for further evaluation. *See* Exhibit 5.

18. On April 29, 2015 Claimant was evaluated at Rocky Mountain Spine Clinic by Chad Prusmack, M.D. Claimant reported that three weeks ago he was assisting with the transport of a patient in his job as a firefighter and felt a popping sensation in his back and developed some numbness into the left thigh. Dr. Prusmack noted that Claimant was transported from the scene of the event to the hospital for evaluation based on the severity of his acute back pain at the time. Dr. Prusmack opined that Claimant would not improve with conservative treatment and recommended urgent authorization for a left L1-2 microdiscectomy and decompression. Dr. Prusmack also noted that Claimant had some chronic low back pain but that Claimant's current

symptoms were markedly different than those problems and noted they would focus on the L1-2 level at the present time. *See* Exhibit N.

19. On May 12, 2015 Claimant underwent left L1-2 microdiscectomy performed by Dr. Prusmack. Dr. Prusmack indicated that Claimant had a work related injuring causing an acute onset of back pain, spasms, and radiculopathy and that the MRI showed extruded disc fragment with inferior migration. *See* Exhibit O.

20. On May 26, 2015 Claimant was evaluated by Dr. Prusmack who noted that Claimant was making good progress following surgery and had a small amount of persistent parasthesias but overall that Claimant was much improved. Dr. Prusmack reiterated that Claimant's need for surgery was caused by the acute onset of a herniated disc that he felt was work related when Claimant was lifting a patient into an emergency response vehicle in his job as a firefighter. Dr. Prusmack opined that Claimant was asymptomatic prior to the event and was transported from the fire station within the same shift for evaluation at the emergency department because of the onset of symptoms from the herniated disc. Dr. Prusmack opined that Claimant had no symptoms prior to this and no imaging to suggest that he had any prior issues with his back. *See* Exhibit P.

21. Claimant recovered from surgery and went back to full duty work on August 29, 2015.

22. Prior to the work incident, Claimant had treated for and had back pain for many years, dating back to the 1980's.

23. On June 19, 2000 Claimant was evaluated by Alan Plunkett, M.D. Dr. Plunkett noted that three views of Claimant's lumbar spine showed moderate changes of degenerative disc disease at L4-5 with chronic end plate changes. Dr. Plunkett noted a history of a back injury 20 years prior with recurrent back pain. Dr. Plunkett noted no evidence of acute lumbar pathology or trauma. *See* Exhibit B.

24. On April 18, 2003 Claimant was evaluated by Larry Wilner, D.O. Claimant reported sledding and falling down causing an axial compression along his back with instantaneous pain. Dr. Wilner assessed low back pain with probable osteoarthritis or degenerative disc disease of the back. *See* Exhibit C.

25. On April 18, 2003 three views of Claimant's lumbar spine were taken and reviewed by James Wilson, M.D. Dr. Wilson provided the impression of degenerative changes centered at L4-5. *See* Exhibit C.

26. On December 17, 2008 Claimant was evaluated by Phillip Gunther, M.D. Dr. Gunther noted no previous exams were available for comparison but reviewed imaging and gave the impression of degenerative disc disease at L4-5. Dr. Gunther noted that the disc thinning could cause some nerve irritation and could be causing the leg symptoms. *See* Exhibit D.

27. On June 2, 2014 Claimant was evaluated by Amy Trevey, DC for insidious onset of acute, dull, and aching discomfort in the left side of the neck, right side of the neck, upper thoracic and mid thoracic regions of an unknown origin. Claimant was again evaluated for this pain on June 13, 2014 and on July 2, 2014 with improved complaints and pain levels. *See* Exhibit 10.

28. On December 1, 2014 Claimant was evaluated by DC Trevey for complaints of lumbar left and right sacroiliac dull and aching discomfort. Claimant reported his lower back was acting up and causing pain across the belt line with an insidious onset.

29. The weekend of March 28, 2015 Claimant injured his back at home. Claimant was unsure what specifically caused the injury at home, but took time off work due to the injury and sought treatment due to the injury.

30. On March 31, 2015 Claimant was evaluated by Employer's wellness manager and athletic trainer, Vince Garcia. Claimant reported hurting his back over the weekend and complained of pain midline into both sides of his lower back, more on the left side. Claimant reported a history of minor lower back injuries somewhat similar in nature. Mr. Garcia assessed lumbar strain and noted limited range of motion, tightness, and pt on the left paraspinal lumbar musculature beginning L3 region. *See* Exhibit F.

31. On April 1, 2015 Claimant was evaluated by DC Trevey. Claimant was treated for low back pain.

32. On April 1, 2015 Claimant was evaluated by Mr. Garcia. Claimant reported feeling a little bit better but still complained of pain with sitting and or standing from sitting or lying position. *See* Exhibit F.

33. On April 3, 2015 Claimant was evaluated by Mr. Garcia who noted continued improvement. Claimant reported he was still not 100% and that his symptoms were still present. Mr. Garcia noted improved range of motion in the lumbar region but still limited in flexion. *See* Exhibit F.

34. On April 6, 2015 Claimant stopped by to speak with Mr. Garcia but was not treated or evaluated. Claimant reported feeling great and that he believed he could return to work the next day for his shift. Mr. Garcia noted it was Claimant's choice whether or not to go back to work. *See* Exhibit F.

35. On September 21, 2015 Claimant underwent an Independent Medical Examination performed by Nicholas Olsen, M.D. Claimant reported having a lower compressed disc between the L4-5 levels and that he had been treating with chiropractic care for years. Claimant reported on March 31, 2015 he was doing normal stuff around the house when he noted the onset of lower back pain at 5-7/10 in pain.

Claimant reported consulting Mr. Garcia for a few days and that his symptoms resolved and he then returned to work on April 7, 2015. Claimant reported on April 7, 2015 while on a call he felt a little twinge in his back while loading the gurney onto the ambulance. Claimant reported that the twinge went away just as quickly as it came. *See* Exhibit A.

36. Claimant reported going back to the station, cooking dinner, performing assigned cleaning duties of mopping and cleaning the kitchen, then watched television, and went to bed. Claimant reported he had no pain during this time period. Claimant reported sleeping fine with no pain. Claimant reported when he woke up his left leg felt weird that he sat at the edge of his bed and went to stand up when it felt a little worse and then he noted intense pain in his left leg and lower back that he rated at a 10/10. *See* Exhibit A.

37. After reviewing Claimant's medical history and performing an examination, Dr. Olsen opined that Claimant's disc protrusion at L1-2 was not the result of a work related injury but was related and directly connected to the symptoms Claimant developed at home the weekend of March 28, 2015. Dr. Olsen noted Claimant's left lower back pain greater than right centered around the L3 level after the weekend incident with pain as high as 7/10 compared to a twinge of pain while loading the gurney at work. Dr. Olsen opined that the medical records and history support that the injury that led to the disc protrusion and need for surgery occurred at home on March 28, 2015 and that the alleged work injury described by Claimant was a very minor event that caused no injury at all. Dr. Olsen noted that Claimant may have simply noted a twinge from the same source of pain that Claimant had experienced in March. Dr. Olsen opined that there was no specific or separate injury on April 7, 2015 that would be considered a work related injury. *See* Exhibit A.

38. Dr. Olsen testified at hearing consistent with his IME opinion. Dr. Olsen opined that Claimant did not suffer a work related injury. Dr. Olsen opined that the physical activity in lifting the gurney was not great enough to cause the injury later diagnosed, and noted Claimant's pre-existing symptoms that were similar to those reported post injury. Dr. Olsen opined that Claimant had a significant aggravation of back pain during the weekend of March 28, 2015 while at home. Dr. Olsen noted that Claimant's pain was noted by Mr. Garcia to be at the L3 area which is very close to the L1/L2 diagnosis. Dr. Olsen noted that Claimant reported to Mr. Garcia pain with movement from sitting to standing, similar to the pain he experienced on April 8, 2015 when getting out of bed. Dr. Olsen opined that Claimant was in a standing position when moving the gurney into the ambulance and was not sitting, bending forward, or twisting and it was not likely to cause a disc injury in that position. Dr. Olsen opined that if loading the gurney did cause the disc injury, you would expect an immediate onset of pain and not just a twinge, you would expect some type of pressure on the disc during the movement which did not exist, and you would expect that Claimant would not have been able to continue working. Dr. Olsen opined that if the large disc exclusion had occurred at the time of the incident loading the gurney, Claimant would have experienced significant pain.

39. Dr. Olsen further noted that several providers failed to document the gurney incident and that several noted the pain started after getting out of bed and that Claimant reported pain similar to the March 31, 2015 pain. Dr. Olsen opined that Claimant's testimony that all the providers were wrong and didn't include information he told them did not make sense. Dr. Olsen noted that Dr. Prusmack and Dr. Grope did not have an accurate history of the pain that Claimant had the week prior and that they did not have the whole records to review before concluding that the injury was work related. Dr. Olsen opined that the events of March 31, 2015 set the stage for the significant pain Claimant experienced while climbing out of bed on April 8, 2015 and that the injury/pain and need for surgery was not causally related to the incident lifting the gurney into the ambulance.

40. Dr. Olsen's report and testimony is found credible and persuasive. It is detailed, consistent with the overall medical history, and consistent with the description of the April 7, 2015 incident.

41. The opinions of Dr. Grope and Dr. Prusmack are not found as credible or persuasive. Neither doctor noted a complete history of Claimant's prior issues, including significant pain and issues noted less than one week prior to the alleged work injury involving pain at the L3 level. Dr. Prusmack bases his opinion, in part, on his incorrect belief that Claimant had an acute onset of a herniated disc, that Claimant was asymptomatic prior to the event, and that Claimant had no symptoms prior to this event and no imaging to suggest any prior issues with his back. Here, Claimant did not have an acute onset of symptoms of a herniated disc on April 7, 2015. Claimant had a slight twinge that went away quickly until the next morning when he then felt symptoms that he reported were similar to an episode at home one week prior. Claimant had a long history and prior imaging suggesting many prior back issues, including issues less than one week prior to the alleged work injury centered at the L3 level. Dr. Grope similarly failed to note Claimant's prior history of back pain including the pain less than one week prior to the alleged work injury. With neither doctor having a full history, their opinions are less persuasive than the opinion of Dr. Olsen.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844,

846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has failed to meet his burden to show that he suffered from a work related injury on April 7, 2015. Rather, the testimony of Dr. Olsen is persuasive that the task described by Claimant in loading a gurney into an ambulance would not have put enough stress on the affected discs to cause the damage seen on MRI and that the gurney incident did not mechanically support a disc injury. Dr. Olsen's opinion that Claimant experienced similar symptoms the week prior at home is persuasive and consistent with the treatment notes of Mr. Garcia noting pain centered around the L3 level and is also consistent with Claimant's own report to the emergency room doctor and the paramedic that he had a similar episode of back pain one week prior. Further, Claimant's testimony surrounding his reports of the injury and incident involving the gurney are not persuasive. Claimant testified that he reported the specific gurney incident/twinge to the ambulance drive, his supervisor, and the emergency room doctor. However, all three of those people noted no specific incident/trauma causing Claimant's injury and that his pain just occurred while standing after getting out of bed. Claimant's testimony that all three of those people got it wrong and that he told them all about the incident with the gurney is not persuasive. Further, treating providers Dr. Grope and Dr. Prusmack fail to adequately note Claimant's prior and significant history of back pain including the pain Claimant had less than one week prior to the incident centered at L3. The incident at home the week prior was significant enough for Claimant to rate it a 7/10 pain level, to seek treatment with both Mr. Garcia and his chiropractic doctor, and to take time off of work. The opinions of Dr. Grope and Dr. Prusmack that the incident lifting the gurney caused the injury at L1/L2 are based on incomplete information and are not as persuasive as the opinion of Dr. Olsen. Claimant has failed to establish, more likely than not, that the slight twinge he felt while lifting and pushing the gurney into the ambulance caused his lower back symptoms or L1/L2 disc injury. Rather, it is more likely that Claimant's L1/L2 disc herniation was a result of the natural progression of his injury from the week prior and was not related to work duties or the incident loading the gurney into the ambulance.

Further, Claimant also argues that the act of getting out of bed on April 8, 2015 caused the injury and that he was in the course and scope of employment while getting out of bed at the fire station, and asks for the injury to be compensable based on an April 8, 2015 date of injury. Claimant also has failed to meet his burden to show that a compensable injury occurred on April 8, 2015. Although Claimant was within the time and place limits of his employment while sleeping and arising from sleep at the fire station, Claimant has failed to establish a causal connection between any work related functions and his injury. The simple act of standing up from bed is not sufficiently a work related duty or work related function to be considered part of Claimant's employment requirements and Claimant has not established any meaningful connection to work when he stood up to attempt to go to the bathroom. Claimant has failed to show a nexus between his employment and his back injury.

Medical Benefits

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S. (2014); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

As found above, Claimant has failed to establish a causal connection between his L1/L2 disc herniation and his employment. Therefore, Claimant has failed to establish an entitlement to medical benefits. Although the treatment Claimant has received to date has been reasonable and necessary, it is not causally related to either an April 7, 2015 or April 8, 2015 work related injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffered a compensable injury to his lower back on April 7, 2015 or April 8, 2015.

2. Claimant has failed to meet his burden of proof to establish an entitlement to medical benefits.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 17, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

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ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits.

3. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment on June 1, 2015.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage is $665.54.

FINDINGS OF FACT

1. Claimant was employed by Employer as a truck driver. Employer's business involves dry bulk truck hauling across several states.

2. In February of 2015 Claimant was living in New Mexico and was assigned to Employer's Albuquerque, New Mexico terminal. Claimant regularly drove hauls regionally around the New Mexico area, and also performed longer hauls which took him into Colorado and Wyoming.

3. In February of 2015 Claimant was asked to work out of Employer's Denver terminal on a temporary assignment for a few weeks, as the Denver terminal had more work available than the New Mexico terminal.

4. On February 9, 2015 Claimant drove a haul from Albuquerque to Denver.

5. On February 10, 2015 Claimant began working the temporary assignment out of the Denver terminal. On that day, Claimant hauled a load from Florence, Colorado to Broomfield, Colorado.

6. On February 10, 2015 and while in Broomfield unloading product through a product hose, the hose popped off the truck's storage tanks and struck Claimant on the right side of his head. Claimant was wearing his hard hat at the time of the incident.

7. Claimant notified Employer of the incident the day it occurred and he was referred for medical care and drug testing.

8. On February 11, 2015 Claimant was evaluated at Concentra in Denver by Janine Boyt, PA. Claimant was assessed with cervical strain and headache. PA Boyt provided work restrictions of 30 pounds lifting and no driving. Claimant was prescribed physical therapy three times per week for two weeks. Claimant was taken off work for the rest of the day. *See* Exhibit B.

9. On February 11, 2015 and February 12, 2015 Claimant worked in the Denver terminal shop, performing light duty work. Claimant worked 6 hours on the 11th and 8 hours on the 12th earning $11.60 per hour.

10. On February 13, 2015 Claimant was evaluated at Concentra in Denver by Scott Richardson, M.D. Dr. Richardson released Claimant to regular duty work. See Exhibit B.

11. On February 14, 2015 Claimant returned to his regular duties and again began driving hauls as needed for Employer. Claimant continued driving hauls locally, regionally, and performing long hauls between New Mexico and Colorado or Wyoming as needed by Employer. Claimant continued with his normal duties until April 17, 2015.

12. On February 19, 2015 and February 27, 2015 Claimant was evaluated at Concentra in Albuquerque, New Mexico by Susan Roberts, D.O. Dr. Roberts continued Claimant's full duty work release and continued the recommendation for physical therapy. *See* Exhibit C.

13. On February 27, 2015 Claimant was evaluated at Concentra in Albuquerque by Steven Drilling, D.O. Dr. Drilling assessed neck sprain and headache. Dr. Drilling continued Claimant's full duty work release and continued the recommendation for physical therapy. Dr. Drilling also provided a referral to El Camino Imaging. *See* Exhibit C.

14. On March 3, 2015 Claimant underwent a CT scan of his head at El Camino Imaging that was interpreted by Brian Jellison, M.D. Dr. Jellison opined that the CT scan reflected no acute intracranial abnormality. *See* Exhibit D.

15. On March 6, 2015 Claimant was evaluated by Dr. Drilling. Dr. Drilling continued Claimant's full duty work release. *See* Exhibit C.

16. On April 14, 2015 Claimant was evaluated by pain specialist Timothy Hansen, D.O. Dr. Hansen gave the impression that Claimant's symptoms were consistent with cervical facet syndrome, right greater than left and ligamentous strain of the cervical thoracic junction. Dr. Hansen opined that the right upper cervical facet syndrome was most likely the etiology of Claimant's headache pain. Dr. Hansen injected Claimant's right C2-3, C3-4, and C4-5 facet joints. *See* Exhibit E.

17. On April 17, 2015 Claimant was evaluated by Dr. Drilling. Claimant reported his injury had worsened, that he was having more frequent headaches, and that he was having depression. Claimant reported receiving neck injections on April 14, 2015 that did not make his headaches go away. Claimant reported having a hard time focusing in his daily activities, that he had poor concentration, poor memory, dizziness, insomnia, and reported that he was worried about safety issues of driving a truck due to his poor concentration. *See* Exhibit C.

18. Dr. Drilling provided additional prescription medications and referred Claimant for acupuncture treatment and psychological treatment. Dr. Drilling imposed a work restriction that Claimant could not drive a company vehicle due to Claimant's medication. *See* Exhibit C.

19. At this time, Claimant had filed a workers' compensation claim in New Mexico. Mediation was scheduled for the New Mexico claim on April 29, 2015.

20. On April 28, 2015 the Human Resources (HR) director for Employer, Patty Knapp, traveled to New Mexico in order to meet with Claimant and to participate in the mediation. Ms. Knapp met with Claimant to address his new restriction of not being able to drive a company vehicle and provided Claimant a written offer to perform full-time light duty work in the New Mexico shop as a shop assistant with duties to include pre-tripping company tractors and trailers and other duties as assigned. The offer was for 40 hours per week at $11.60 per hour. *See* Exhibit M.

21. Soon after beginning to work in the New Mexico shop, Claimant contacted Ms. Knapp and advised her that he was homeless and that he was living in one of Employer's truck trailers. Clamant asked if he could work out of the Denver terminal to be closer to family in Cheyenne, Wyoming.

22. Employer accommodated Claimant's request to work out of the Denver terminal. Employer also advanced Claimant $100 to get to Denver. On or about May 5, 2015 Claimant began working light duty in the Denver terminal.

23. On May 8, 2015 Claimant was evaluated by Valerie Mays, PA at Concentra in Denver. Claimant reported neck pain and that injections and physical therapy had not helped. Claimant requested a referral to a psychologist and a spine surgeon. PA Mays ordered an MRI and placed Claimant on work restrictions of no pushing/pulling, no driving company vehicles, no work in safety sensitive positions, no work at heights, and to change positions as needed to relieve discomfort. Claimant was scheduled for a follow up appointment on May 15, 2015. *See* Exhibit F.

24. Claimant went home from work early on May 8, 2015. Claimant failed to report for scheduled work shifts on May 9, May 10, and May 11, 2015.

25. On May 11, 2015 Ms. Knapp spoke with Claimant and advised him that because he had missed the last three days of work that she had moved up his May 15, 2015 doctor's appointment to May 12, 2015.

26. On May 12, 2015 Claimant was evaluated by PA Mays. PA Mays noted that Claimant would continue with the same work restrictions she provided on May 8, 2015 but added that he should not drive to and from work when under the influence of Soma and that he should not work if he had increased neck pain or headache symptoms. See Exhibit F.

27. On May 12, 2015 Claimant underwent a cervical MRI that was interpreted by David Weiland, M.D. Dr. Weiland provided an impression of mild degenerative arthritis and degenerative disc disease with mild central canal stenosis at C5-6 and mild foraminal narrowing at C2-3, C3-4, and C5-6. *See* Exhibit G.

28. On May 12, 2015 PA Boyt reviewed the duties listed in a modified job duty offer that Employer intended to offer Claimant. PA Boyt signed off that she had reviewed the job offer and that it was her opinion that Claimant had the physical capacity and ability to perform the job duties offered. PA Boyt approved the job offer. *See* Exhibit M.

29. Ms. Knapp hand delivered the PA approved modified duty job offer to Claimant on May 12, 2015.

30. On May 15, 2015 Claimant called Ms. Knapp and reported that he could not drive due to his medications. Ms. Knapp advised Claimant that he needed to find a way to get to work.

31. Claimant did not report to work on May 15, 2015. Claimant also did not report to work for scheduled shifts on May 16, 2015 and May 17, 2015.

32. On May 19, 2015 Claimant was evaluated by Kirk Nelson, D.O. Claimant reported pins and needles in his cervical spine area with pain of 6/10. Claimant reported he was enticed to return to Denver by his HR representative but that he had no home in Denver and was traveling from Cheyenne, Wyoming where he lived with his son to Denver to work and for appointments. Claimant reported he had not been working due to his inability to drive while on medications. Dr. Nelson assessed cervicogenic headache and cervical spondylosis. Dr. Nelson noted a plan of starting Soma and provided a referral for an orthopedic spine evaluation. Dr. Nelson opined that Claimant did not appear to have anything surgical and anticipated the recommendations would be to return to conservative care and pain management. Dr. Nelson opined that Claimant was not safe to drive while on the Soma medication and that he could not work in any safety sensitive areas. *See* Exhibit F.

33. Claimant was scheduled to work on May 22, 2015. Claimant did not report to work for his scheduled shift. Ms. Knapp spoke with Claimant and advised him

he either needed to get to work or to see Dr. Nelson. Claimant did not report to work and did not go see Dr. Nelson.

34. On May 22, 2015 Dr. Nelson reviewed the duties listed in a modified job duty offer that Employer intended to offer Claimant. Dr. Nelson signed off that he had reviewed the job offer and opined that Claimant had the physical capacity and ability to perform the job duties offered. Dr. Nelson approved the job offer. The job offer was mailed to Claimant that day. The job offer noted that Claimant would be provided hotel accommodations in Denver and that the hotel offered shuttle service to and from Employer's Denver office. *See* Exhibit M.

35. On or about May 22, 2015 Claimant spoke with Dr. Nelson and discussed the light duty job offer including Employer's offer to put Claimant up in a hotel with shuttle service between the hotel and Employer's Denver office. Claimant was aware the job offer was coming and that Dr. Nelson had approved the offer.

36. Claimant did not report to work for scheduled shifts on May 23, 2015 and May 24, 2015.

37. On or about May 26, 2015 Claimant and Ms. Knapp discussed the May 22, 2015 modified duty offer. Ms. Knapp told Claimant that Employer could have someone drive to Cheyenne to pick him up to bring him to Denver for his next scheduled shift and that hotel accommodations in Denver would be provided. Claimant reported that he did not need transportation to Denver and that he would be at work on May 28, 2015.

38. On May 28, 2015 Claimant failed to report to work for his scheduled shift.

39. On May 28, 2015 Ms. Knapp called Claimant. Claimant reported he could not drive on his medication.

40. On May 28, 2015 Claimant failed to appear for a doctor's appointment with Dr. Nelson.

41. On May 29, 2015, May 30, 2015, May 31, 2015, and June 1, 2015 Claimant failed to report to work. After May 28, 2015 Claimant did not report to work for any scheduled shifts and Claimant did not contact Employer at all after this date.

42. On June 1, 2015 Claimant was terminated from employment. Ms. Knapp mailed a letter to Claimant providing that he was no longer employed due to attendance and job abandonment. Ms. Knapp noted that Claimant failed to report to work on May 28, 2015 after stating he did not need a ride. This letter was sent to an old address and was not received by Claimant. *See* Exhibit M.

43. Claimant did not become aware of the fact that he had been terminated until approximately 3-4 weeks later when he received notification from child support that

his job had been terminated. During this period of time, Claimant did not make any attempt to call or contact Employer.

44. Claimant's testimony, overall, is not found credible or persuasive. Claimant was not enticed to come to Denver by Employer, rather Employer accommodated Claimant's request to work out of the Denver terminal.

45. The testimony of Ms. Knapp is found credible and persuasive. Employer made several attempts to work with Claimant and to provide him modified employment within his restrictions.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. § 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Temporary Disability Benefits

Temporary Partial Disability

In cases of temporary partial disability (TPD), the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. *See* § 8-42-106, C.R.S. TPD payments shall continue until the first occurrence of either one of the following: the employee reaches maximum medical improvement; OR the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

Here, Respondents agree that Claimant is owed TPD benefits from February 11, 2015 through February 13, 2015 and again from April 17, 2015 through May 29, 2015. Claimant has failed to establish by a preponderance of the evidence an entitlement to any other TPD benefits. In addition to the TPD benefits that Respondents agree are due, Claimant requests TPD benefits from February 14, 2015 through April 17, 2015. Claimant, however, has failed to show any loss of wages during this time period that can be attributed to his work injury. Rather, the evidence and testimony shows that during this period of time, Claimant worked his normal duties, drove normal loads, and performed work as needed. Claimant was not under any work restrictions. Claimant has not established that any difference in wages during this time period was, more likely than not, due to his injury and not simply due to the amount of work and loads available to drive.

The plain language of § 8-42-106(2)(b), C.R.S. indicates that any TPD benefits shall continue until an attending physician gives the employee a written release to modified employment, such modified employment is offered to the employee in writing, and the employee fails to begin such employment. In the present case, the facts establish that Dr. Nelson provided Employer with approval and a written release that Claimant could perform the modified duties offered. This modified employment was offered to Claimant in writing on May 22, 2015 and Claimant not only received the letter offering modified employment but Claimant also spoke with Employer indicating he would be present for the modified employment on May 28, 2015. Despite this, Claimant failed to begin the modified employment. Claimant failed to report for the modified employment on May 28, 2015, May 29, 2015, May 30, 2015, May 31, 2015, and June 1, 2015.

Claimant was able to perform the modified employment that was offered to him, and Dr. Nelson agreed that Claimant could perform the modified employment. The modified employment was in Claimant's normal work location at the Denver terminal. Although Claimant chose to live far from his employment, the modified employment was in the same location that Claimant was assigned to prior to his injury and the location that Claimant requested to work from after his injury. Employer did not assign him to a new or far away terminal for the modified employment offer. The modified employment offer was made at a location that Claimant requested he be allowed to work from. Further, Claimant's testimony that he was enticed to move from New Mexico to the Denver location by human resources is not persuasive. Rather, Claimant sought to work out of the Denver location due to family being nearby in Cheyenne, Wyoming and

Employer accommodated Claimant's request. The ALJ is not persuaded that the opinion of Dr. Nelson should be rejected. Rather, it appears Dr. Nelson carefully reviewed the modified employment, noted it should include hotel accommodations, and Employer included this in their offer to Claimant. Claimant is not credible in explaining that he was waiting for a further phone call or information from Employer. Rather, the testimony of Ms. Knapp is found persuasive that Claimant was aware the hotel accommodations were in place, that Employer could pick him up and drive him from Cheyenne, Wyoming to Denver for work if needed, and that Claimant rejected the offer of transportation and indicated he would be at work. Despite this, Claimant made the decision not to begin the modified employment offered to him by failing to show up for work on May 28, 2015 and thereafter. The modified employment offered to Claimant was not impractical as argued by Claimant and the modified employment offer complied with Dr. Nelson's restrictions and was signed off on by Dr. Nelson. Despite this, Claimant subjectively decided he could not work despite a medical opinion to the contrary. Claimant's argument that he could not, as a practical matter, accept the modified employment offer is rejected and is not persuasive. Employer attempted multiple times to get Claimant back to work within the restrictions provided by his authorized treating providers. The modified employment offer made on May 22, 2015 for Claimant to begin employment on May 28, 2015 or May 29, 2015 complied with his work restrictions, was not impractical, and provided hotel accommodations in Denver if needed. In addition, Employer offered Claimant a ride to Denver to start his first shift but Claimant indicated he did not need transportation to Denver. Despite this, Claimant failed to begin work after the offer of modified employment and therefore the statutory provision of § 8-42-106(2)(b), C.R.S. enables Employer to terminate Claimant's TPD benefits as of May 30, 2015.

Temporary Total Disability

To prove entitlement to temporary total disability (TTD) benefits, the Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until the first occurrence of any one of the following: the employee reaches maximum medical improvement; the employee returns to regular or modified employment; the attending physician gives the employee a written release to return to regular employment; or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. § 8-42-105(3), C.R.S.

Claimant has failed to show, by a preponderance of the evidence, an entitlement to TTD benefits from May 19, 2015 and ongoing. Claimant has not shown that as of May 19, 2015 he was temporarily totally disabled. Rather, on that date, Claimant remained under work restrictions that were being accommodated by Employer with light duty work in the Denver terminal/shop. Per his treating providers, Claimant was able to work within his work restrictions. Claimant, however, failed to report to work on multiple dates during this time period including: May 9, 10, 11, 15, 16, 17, 22, 23, 24, 28, and at any time after May 28. Claimant has failed to establish, more likely than not, that he was unable to work on these dates due to his work injury. The evidence shows that Claimant reported he was unable to work on several of these dates due to medications he was taking as a result of his injury. However, the authorized treating providers noted that Claimant could still work despite medications and only that he could not drive to and from work while on the medications. Claimant was not totally disabled from working and if he had gotten a ride or requested a ride from Employer to get to work, he was fully capable of working at the shop in modified employment that was within his work restrictions from May 19, 2015 and ongoing. Additionally, despite Claimant's contention that he was totally disabled from May 19, 2015 and ongoing, wage records show that between May 19, 2015 and May 27, 2015 Claimant earned wages. Claimant similarly earned wages between April 17, 2015 and May 19, 2015.

Further, the plain language of § 8-42-105(3)(d) (I), C.R.S. indicates that any TTD benefits shall continue until an attending physician gives the employee a written release to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. In the present case, the facts establish that Dr. Nelson provided Employer with approval and a written release that Claimant could perform the modified duties offered. This modified employment was offered to Claimant in writing on May 22, 2015 and Claimant not only received the letter offering modified employment but Claimant also spoke with Employer indicating he would be present for the modified employment on May 28, 2015. Despite this, Claimant failed to begin the modified employment. Claimant failed to report for the modified employment on May 28, 2015, May 29, 2015, May 30, 2015, May 31, 2015, and June 1, 2015. Therefore, pursuant to the plain statutory language, Claimant is unable to show an entitlement to TTD benefits from May 30, 2015 and ongoing. Claimant failed to begin modified employment offered to him on May 29, 2015 and any entitlement to TTD would end pursuant to statute on that date. As found above, Claimant's arguments that the modified employment offer was impractical and that he was unable to accept the offer are rejected and not persuasive.

Responsible for Termination

Although Claimant has failed to establish an entitlement to TTD or TPD benefits on or after May 30, 2015 due to his failure to begin an offer of modified employment, in the alternative, the ALJ also concludes that Respondents have established that Claimant was responsible for his termination from employment effective June 1, 2015. A claimant found to be responsible for his or her own termination is barred from

recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term “responsible” as used in the termination statutes reintroduces the concept of “fault” as it was understood prior to the Supreme Court’s decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office, supra; Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). A claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*.

Here, Claimant was not terminated due to his injury. In fact, the evidence shows that Employer continued to employ Claimant and accommodated Claimant’s request to work out of the Denver terminal, provided Claimant with modified employment positions that fit his work restrictions, and continued to attempt to get Claimant back to work after Claimant repeatedly failed to report for scheduled shifts. Claimant was able to work in modified employment as noted by the work restrictions imposed by his authorized providers. However, Claimant failed to report to work on May 9, 10, 11, 15, 16, 17, 22, 23, 24, 28, 29, 30, and June 1 before Employer terminated his employment. The failure to work or report for scheduled shifts was not a consequence of Claimant’s work related injury or work restrictions. The failure to work or report for scheduled shifts was due to Claimant’s failure to get to and from Employer’s location. Claimant’s authorized treating providers were aware of his medications and opined that he could work while on the medications. Claimant’s decision not to get a ride to and from work and not to report to work were volitional decisions made by him despite Employer’s attempt to work with him. Whether or not to get a ride to work or to ask Employer for a ride was within Claimant’s control. Further, Claimant’s failure to communicate with Employer at any time after May 28, 2015 was also a volitional decision made by him. Under a totality of the circumstances Claimant’s conduct was the cause of his termination.

Respondents have established by a preponderance of the evidence that Claimant was responsible for termination of his employment on June 1, 2015. Claimant not only failed to get to work for modified employment that was within his work restrictions, but he failed to communicate whatsoever with Employer after May 28, 2015 to report whether or not he would be coming in to work. After several days of no communication whatsoever from Claimant and due to multiple dates where Claimant

failed to report for work that was within the work restrictions imposed by his authorized treating providers, Employer terminated his employment. Claimant's actions were volitional and Respondents have established Claimant was at fault for his termination.

ORDER

It is therefore ordered that:

1. Claimant is entitled to temporary partial disability benefits from February 11, 2015 through February 13, 2015 and from April 17, 2015 through May 29, 2015.

2. Claimant has failed to establish an entitlement to temporary total disability benefits. His claim for temporary total disability benefits is denied and dismissed.

3. Respondents have established that Claimant was responsible for his termination from employment on June 1, 2015.

4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 15, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-983-888-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

NON-INSURED.

Non-Insured Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 16, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 12/16/2015, Courtroom 1, beginning at 8:30 AM, and ending at 10:00 AM).

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection. Because the Non-Insured Employer failed to appear or respond, there were no exhibits on behalf of the Employer.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement. The ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether or not the Employer was and "employer," as defined by the Workers' Compensation Act (hereinafter the "Act"); whether the Claimant was an "employee," as defined by the Act;; whether the Employer failed to insure its liability for workers' compensation and is,

therefore, subject to a 50% penalty on indemnity benefits; and, whether the Employer is subject to penalties of up to one day's compensation for failure to timely admit or contest. If compensable, the additional issues concern medical benefits, average weekly wage (AWW); temporary total disability (TTD) benefits from April 30, 2015 through May 29, 2015, a subtotal of 30 days, both dates inclusive; temporary partial disability (TPD) benefits, based on a temporary wage loss of $310 per week, from May 30, 2015 through December 7, 2015, a subtotal of 192 days, both dates inclusive; TPD benefits, based on a temporary wage loss of $150 per week, from December 8, 2015 through the hearing date, December 16, 2015, a subtotal of 9 days, both dates inclusive, and continuing; and, daily penalties, up to one day's compensation, against the Employer for failure to timely admit or contest from July 29, 2015 (21 days after the Employer had notice of more than 3 days disability) through the hearing date of December 16, 2015, a subtotal of 141 days, and continuing; and, authorized, causally related and reasonably necessary medical expenses.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Notice

1. Notice of the hearing was sent to the Employer and Partner at its last known and regular address, addressed to Catalino Villalobos, 4912 Steele Street, Denver, CO 80216. The Claimant, in his sworn testimony, verified that this was the correct address for the Employer/Partner. The notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing of December 16, 2015 and failed to appear or respond in any fashion.

Employer/Employee

2. On April 30, 2015, the Claimant was working for the Employer as a laborer, which the ALJ infers and finds was under a verbal contract of hire. Therefore, the Respondents were an "employer," as defined by the Workers' Compensation Act (hereinafter the "Act"); and, the Claimant was an "employee" as defined by the Act.

Failure to Insure

3. On the date of injury, the Employer did not insure its liability for workers' compensation (*See* Claimant's Exhibit 5).

Compensability

4. The Claimant had worked for the Employer since November 2014. On April 30, 2015, while preparing to pour concrete, the Partner was sawing a board, which the Claimant was supporting on his right knee. The Claimant temporarily looked away and the saw went through the board, cutting the Claimant across the top of his right knee cap. The Employer/Partner witnessed the work-related accident and indicated that the Claimant should go to the hospital immediately. The Employer did not specify any specific hospital or medical provider.

Medical

5. Immediately after the work-related accident, the Claimant's girlfriend drove him to the emergency room (ER) of St. Anthony's North, where several stitches were placed across the Claimant's right knee cap, he was given crutches, and told not to do any heavy lifting, bending or squatting for the next month. The Claimant could not perform his job for the Employer as a laborer with these restrictions. The Claimant incurred medical bills of approximately $3,200 from St. Anthony's North and he has not yet been billed by the Clinica Campesino, where the stitches were removed at the on or about May 29, 2015.

Temporary Total Disability (TTD)

6. The Claimant could not work at his pre-injury job from April 30, 2015 through May 29, 2015, both dates inclusive, a total of 30 days, nor did he work or earn any wages during this period of time.

Additional Temporary Disability After the Claimant's Return to Work at Another Job

7. On May 30, 2015, the Claimant returned to work, fulltime, as a roofer, earning less wages than his pre-injury wage. Specifically, he was earning $11 an hour, or $440 per week, thus, sustaining a temporary wage loss of $310 per week. He received a raise to $15 an hour on December 8, 2015, which equates to $600 per week. It is unclear from the evidence whether there is a causal connection between the effects of the Claimant's compensable injury and his temporary wage loss after May 30, 2015. *See* § 8-42-103, C.R.S: *Liberty Heights at Northgate v. Indus. Claim Appeals Office,* 30 P.3d. 872 (Colo. App. 2001).

Daily Penalties for Employer's Failure to Timely Admit or Contest

8. It was the Claimant's undisputed testimony that he filed his workers' compensation claim on May 20, 2015. The Employer was aware and reasonably should have been aware that the Claimant has sustained more than three days

temporary total disability as of May 7, 2015, at which time the Employer had 20 days, or until May 27, 2015, within which to admit or contest liability. To this date, the Employer has not responded in any fashion. There is no evidence in mitigation or aggravation, however, in order to encourage the Employer to comply with this decision, the ALJ determines that a daily penalty of 2/3rds of the TTD benefit, or $100 per day is appropriate.

Bodily Disfigurement

9. The Claimant sustained bodily disfigurement, consisting of a raised, brownish, keloid scar transecting the Claimant's right knee cap, three inches long and 1/3 of an inch wide. It is plainly visible to public view when the Claimant is wearing a bathing suit.

Ultimate Findings

10. Notice of the hearing was sent to the Employer and Partner at its last known and regular address, addressed to Catalino Villalobos, 4912 Steele Street, Denver, CO 80216. The Claimant, in his sworn testimony, verified that this was the correct address for the Employer/Partner. The notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing of December 16, 2015 and failed to appear or respond in any fashion.

11. The Claimant's testimony was, essentially, undisputed, straight-forward, and credible. There was no persuasive testimony to the contrary.

12. The Claimant was an "employee" of the Employer herein on the date of injury, and the "Employer was an 'employer,' as defined by the Act.

13. On April 30, 2015, the Claimant sustained a compensable injury to his right knee, and the injury arose out of the course and scope of his employment for the non-insured Employer herein and was not intentionally self-inflicted.

14. The Employer was contemporaneously aware of the injury and told the Claimant to go to the hospital. The Employer made no specific medical referrals. The Claimant presented to the ER of St. Anthony's North, and his treatment there was of an emergent nature. Thereafter, the Claimant selected the Clinica Campesino for the removal of his stitches on or about May 29, 2015. All medical treatment and referrals emanating from St. Anthony's North and the Clinica Campesino for treatment of the right knee was authorized, causally related to the April 30, 2015 compensable injury, and reasonably necessary to cure and relieve the effects thereof.

15. The Claimant's AWW is $750, thus yielding a 50% penalized TTD rate of $720 per week, or $150 per day.

16. The Claimant was temporarily and totally disabled since from April 30, 2015 through May 29, 2015, both dates inclusive and total of 30 days. He is entitled to TTD benefits of $750 per week, or $150 per day, for this period, in the aggregate amount of $4,500.

17. Issues involving additional temporary disability benefits after May 30, 2015 should be reserved for future decision.

18. The Employer's failed to timely admit or contest from May 27, 2015 (21 days after the Employer had notice of more than 3 days disability) through December 16, 2015, both dates inclusive, a total of 204 days, and continuing. As found, a daily penalty of $100 is appropriate. The aggregate daily penalty to date is $20,400.00

19. The Claimant has sustained his burden of proof, by preponderant evidence, on all issues.

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CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions); the motives of a witness; whether the testimony has been contradicted; and, bias,

prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005 *Also see, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was, essentially, undisputed, straight-forward, and credible. There was no persuasive testimony to the contrary.

Notice

b. "The fundamental requisites of due process are notice and the opportunity to be heard." *Franz v. Indus. Claim Appeals Office,* 250 P.3d 755, 758 (Colo. App. 2010) [quoting *Hendricks v. Indus. Claim Appeals Office,* 809 P.2d 1076, 1077 (Colo. App. 1990)]. Workers' compensation benefits are a constitutionally protected property interest which cannot be taken without the due process guarantees of notice and an opportunity to be heard. *See Whiteside v. Smith,* 67 P.3d 1240, 1247 (Colo. 2003). Notice requirements apply to both parties. When an item is properly mailed through the U.S. Mails and is not returned as undeliverable, there is a legal presumption of receipt. *Olsen v. Davidson,* 142 Colo. 205, 350 P.2d 338 (Colo. 1960). As found, notice of the hearing was sent to the Employer and Partner at its last known and regular address, addressed to Catalino Villalobos, 4912 Steele Street, Denver, CO 80216. The Claimant, in his sworn testimony, verified that this was the correct address for the Employer/Partner. The notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing of December 16, 2015 and failed to appear or respond in any fashion, having had an opportunity to do so.

Non-Insurance and Employee Status

c. Section 8-43-408 (1), C.R.S., provides a 50% penalty on indemnity benefits for failure of an employer to insure its liability for workers compensation. As found, the Employer herein failed to insure its liability for workers' compensation and is, therefore, subject to a 50% increase in all indemnity benefits.

d. As found, the Claimant performed work for hire for the Employer herein and he was an "employee" within the definition of § 8-40-202, C.R.S., at the time of the compensable injury, and the Employer was an "employer as defined by § 8-40-203.

Compensability

e. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,*

165 Colo. 106, 108-09, 4437 P.2d 542 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury to his right knee on April 30, 2015, and this injury arose out of the course and scope of his employment.

Medical

f. Because this matter is compensable, the non-insured Respondent is liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer was contemporaneously aware of the injury and advised the Claimant to go to the hospital without making a specific referral. As further found, the Claimant first presented at the ER of St. Anthony's North for emergent care, which is exempt from the authorized chain of referrals. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Next, the Claimant first selected the Clinica Campesino for removal of the stitches on his right knee. This was the first non-emergent selection of medical providers which, as found, was made because the Employer failed to promptly tender medical care. Therefore, all of the Claimant's medical care and treatment for the right knee injury was authorized, causally related to the April 30, 2015 compensable injury, and reasonably necessary to cure and relieve the effects thereof.

g. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all referrals emanating from the Clinica Campesino would be within the chain of authorized referrals.

h. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the right knee injury of April 30, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the April 30, 2015 compensable injury.

Average Weekly Wage (AWW)

i. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant's AWW is $750 which, ordinarily, would yield an insured TTD benefit of 2/3rds of $750, however, penalized by 50% for failure to insure the weekly TTD benefit is $750 per week, or $150 per day.

Penalized Temporary Disability Benefits

j. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). . There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant could not, and did not work or earn any wages from April 30, 2015 through May 29, 2015, both dates inclusive, a total of 30 days. The Claimant is, therefore, entitled to aggregate, penalized TTD benefits of $4,500.00 for this period of time.

Daily Penalty for Failure to Timely Admit or Contest

k. Section 8-43-203 (2) (a), C.R.S., provides for a daily penalty of up to one day's compensation for each day's failure to timely admit or contest, up to 365 days, 50% payable to the Subsequent Injury Fund and 50% payable to the Claimant. As found, the Employer's failed to timely admit or contest from May 27, 2015 (21 days after the Employer had notice of more than 3 days disability) through December 16, 2015, both dates inclusive, a total of 204 days, and continuing. As found, a daily penalty of $100 is appropriate. The aggregate daily penalty to date is $20,400.00.

Bodily Disfigurement

l. Section 8-42-108 (1), C.R.S., provides for a disfigurement award up to $4,000, plus an annual escalator based on the State Average Weekly Wage (AWW) [which is $4,840.14 for FY 15/16] plus the if the injury is to an area in public view and is permanent. Bodily disfigurement is assessed according to appearance not loss of function. *Arkin v. Indus. Comm'n. of Colorado,* 145 Colo. 463, 358 P.2d 879 (1961). Compensation beyond $4,840.14 is only appropriate if the disfigurement affects the face, is comprised of extensive body scars or burns, or manifests itself as stumps due to loss or partial loss of limbs. § 8-42-108 (2). Because facial deformities "are presumed to impact on an individual's social and vocational functioning." the statutory maximum award is appropriate. *See Gonzales v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997). As found, in the present case, the Claimant's disfigurement affects the right knee, but is serious, unpleasant looking and plainly visible to public view in swimming trunks. It is not among the listed schedule disfigurements in § 8-42-108 (2), with an $9,678.66 maximum award for FY 15/16. It is within the purview of a maximum $4,840.14 for FY 15/16. Therefore, an award of $2,000, penalized by 50% for a total disfigurement award of $3,000 is appropriate.

Burden of Proof

m. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As

found, the Claimant has sustained his burden, by preponderant evidence, on all issues with the exception of entitlement to temporary disability benefits after May 30, 2015, which issue should be reserved for future decision.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent Non-Insured Employer, and Partner, individually, shall pay all of the costs of medical care and treatment for the Claimant's compensable right knee injury, subject to the Division of Workers' Compensation Medical Fee Schedule. Current liquidated medical costs equal approximately $3,200. Medical providers may no longer bill the Claimant directly. *See* § 8-42-101, C.R.S.

B. The Respondent Non-Insured Employer and Partner, individually, shall pay the Claimant temporary total disability benefits at the rate of $750.00 per week, or $150.00 per day, from April 30, 2015 through May 29, 2015, both dates inclusive a total of 30 days (penalized 50% for failure to insure) in the aggregate amount of $4,500.00, which is payable retroactively and forthwith.

C. For failing to timely admit or contest, Respondent Non-Insured Employer and Partner, individually, shall pay daily penalty benefits at the rate of $100.00 per day for the penalty period from May 27, 2015 (21 days after the Employer had notice of more than 3 days disability) through December 16, 2015, both dates inclusive, a total of 204 days, and continuing, in the aggregate amount of $20,400.00, 50% payable to the Subsequent Injury Fund of the Division of Workers' Compensation, and 50% payable to the Claimant.

D. For and account of the Claimant's bodily disfigurement, the Respondent Employer and Partner, individually, shall pay the Claimant the sum of $3,000.00 in addition to all other benefits due and payable.

E. The Non-Insured Respondent Employer and Partner, individually, shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein, including the entitlement to temporary disability benefits after May 30, 2015, are reserved for future decision.

G. In lieu of payment of the above compensation and benefits to the Claimant, the Respondent Employer and Partner, individually, shall:

a. Deposit the sum of $ 31,100.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; or

b. File a bond in the sum of $ 35,000.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:
   (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
   (2) Issued by a surety company authorized to do business in Colorado.
   The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Non-insured Respondent Employer and Partner, individually, shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the Non-Insured Respondent Employer and Partner, individually, of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

DATED this_____day of December 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2015, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
Sue.Sobolik@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Did Claimant establish by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment on March 16, 2015?

FINDINGS OF FACT

1. Claimant is fifty-two (52) years old and has worked as a journeyman plumber for over thirty (30) years.

2. Claimant worked for Employer for approximately three years and testified that the job was very physical and demanding. Examples of the type of physical duties included lifting hot water heaters; lifting jackhammer drills in and out of window wells; using other power tools; moving sinks; and lifting cast iron tubs.

3. Claimant testified that he had no injuries before March 16, 2015 and stated that he had never experienced symptoms like this. Although he had previously experienced soreness, he attributed this to the physically demanding nature of his job. Prior to this, he never missed time from work due to an injury. Claimant stated he never filed a worker's compensation claim before. There was no record of a prior injury to Claimant's neck, back or right arm before the ALJ.

4. Claimant testified at hearing that his injury occurred on March 16, 2015, while he was moving a tub. He initially felt pain in his chest the next day and thought he was having a heart attack. It lasted for about five (5) minutes and pain then developed in his back. Claimant stated that he continued to work, but over time the pain worsened in both his back and chest. Claimant credibly testified that he first thought he had pulled a muscle.

5. Claimant testified that he discussed the injury with Employer[1], who gave him the name of his chiropractor. The ALJ infers that the Employer had notice of Claimant's injury and symptoms, as it is unlikely Mr. Bershinsky would have referred him to his chiropractor otherwise.

6. Claimant testified that his symptoms did not improve and got so intense that he could not bend over and was having trouble sleeping. Claimant related that Mr. Bershinsky said they would "put him on work comp". The worker's compensation claim

[1] Mr. Bershinsky attended the hearing, but did not testify. The ALJ infers that Claimant's statements regarding the discussions concerning the injury, the report of claim and referral to Mr. Bershinsky's chiropractor were accurate or Mr. Bershinsky would have been called to testify to refute these.

was then reported to Insurer. Claimant testified on cross-examination that he agreed the first report of injury[2] was made on April 21 or 22, 2015, although he did not recall the exact date. The ALJ finds this explanation to be credible, as Claimant was sent to Concentra thereafter. He was not sure whether he referenced the 3-16-15 date of injury when this report of injury was made.

7. Claimant was seen on April 29, 2015 at the University of Colorado Health-Poudre Valley Hospital Emergency Department. Claimant testified that there was a concern that he had a blood clot in his lungs, but did not remember what he said at that time. Claimant presented with chest wall pain and arm pain, along with shortness of breath. The emergency department notes reflected Claimant stated the symptoms had been ongoing for 2 weeks and developed abruptly when he sat up in bed. There was no reference to an injury at work in the Poudre Valley Hospital records.

8. On examination, Claimant had tenderness to palpation in the chest and right paraspinal thoracic region. Claimant had a chest x-ray and other diagnostic testing, which was performed in the emergency department, including blood tests and an EKG. Travis Brown, D.O. suspected the pain was musculoskeletal. Claimant was given an IV dose of Toradol, which reduced his pain, as well as a prescription for Lodine (anti-inflammatory) and Norco (at nighttime). Dr. Brown also wrote a work note.

9. Claimant next treated at Family and Sport Chiropractic on May 4, 2015. On the patient information form, there was the following question: "What type of injury are we seeing you for?" Claimant checked the box next to "Other". Claimant did not check the box next to "Work". Claimant complained of right-sided neck pain, with pain into his shoulder, and down into his arm. In the consultation/history, Claimant's chief complaint was listed as chest pain and there was a reference to right shoulder blade "'X' months ago". Claimant checked the boxes for back and neck pain or stiffness and numbness or pain in the arms. X-rays were taken and the neurological evaluation was normal. The assessment was neck pain with radiculopathy. Claimant received chiropractic treatment to his cervical spine.

10. Claimant returned to Family and Sport Chiropractic on May 5, 2015. It was noted that the x-rays showed multilevel degeneration at C4/5, C5/6 and C6/7. The assessment was the same as the 5/4/15 appointment. Claimant received treatment for his neck, including manual traction.

11. Claimant also received chiropractic treatment on May 6 & 8, 2015. On 5/6/15, pain was noted to be radiating down into his arm. The pain was lessened with traction. On 5/8/15, Claimant reported sleeping 6 hours per night after home traction. The assessment was radiculopathy. Although the notes said there was a follow-up appointment on Monday, no additional records were admitted from Family and Sport Chiropractic.

[2] The ALJ notes that Claimant referenced a First Report of Injury in the Proposed Findings of Fact, Conclusions of Law and Order. (See paragraph 4). However, this document was not admitted into evidence.

12. Claimant was evaluated by Amber Payne, PA at Concentra Medical Center on May 23, 2015. Claimant testified that got to Concentra after he talked to "Bill", who said that they would "put him on work comp". The ALJ infers that Claimant was referred to Concentra (the ATP for Employer) after discussing his condition with Employer (Bill Bershinsky). On the 5/23/15 initial record from Concentra, Claimant's chief complaint was listed as a slipped disc at C-5[3], with pain shooting down the right arm. In the history section, the injury date was listed as March 17, 2015 as a result of lifting a 350 pound cast iron tub. Claimant noted that he felt right-sided chest and thoracic pain the next day. Claimant continued to work and the pain progressed, including pain under his right shoulder blade, down his arm to his finger tips. Claimant denied cervical pain. Claimant reported that he had 3-4 acupuncture visits[4] and 7 chiropractic treatments with two chiropractors (Drs. Ober and Wilburn)[5], but these treatments were not helpful.

13. On examination, tenderness was noted in Claimant's cervical spine-right rhomboid, but not the AC joint. Claimant's range of motion in the thoracic and lumbosacral spine was full. PA Payne's assessment was cervical radiculopathy at C7 and rhomboid muscle strain. PA Payne noted that she was unable to determine causality. Physical Therapy (PT) was ordered and Claimant was referred for an MRI of the cervical spine.

14. Claimant returned to Concentra on May 28, 2015, at which time he was complaining of back pain (right shoulder pain). He was also experiencing discomfort in his neck, near the scapula. PA Payne found tenderness in the rhomboid. No tenderness or muscle spasm was noted in the cervical spine; however, pain was noted on right rotation. Her assessment was rhomboid muscle strain and cervical radiculopathy at C7. Claimant was given work restrictions, including: may lift up to 5lbs constantly and may push/pull up to 5lbs constantly.

15. On June 3, 2015, Claimant presented at Fort Collins MRI, for an MRI of the cervical spine. The MRI films were read by Jay Kaiser, M.D. Dr. Kaiser's impression was C4-C5 mild bilateral facet arthropathy; C5-C6 disc degeneration with type 1 endplate changes, uncovertebral spurring with severe bilateral foraminal stenosis; C6-C7 disc osteophyte complex with mild thecal sac effacement, moderate left and mild right foraminal stenosis; C7-T1 uncovertebral spurring with moderate to severe right and moderate left foraminal stenosis with type 1 endplate changes. The ALJ concludes from the MRI that Claimant had degenerative changes in his cervical spine.

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[3] Claimant testified that Dr. Ober had told him he had this.

[4] No acupuncture treatment records were admitted at hearing.

[5] The ALJ notes that Dr. Wilburn was part of Family and Sport Chiropractic. The records from that facility document four (4) chiropractic treatments. Accordingly, The ALJ concludes that the Concentra note refers to two separate courses of chiropractic treatment, which was consistent with Claimant's testimony. However, no records from Dr. Ober were admitted at hearing.

16. Claimant was examined by Joel Schwartzkopf, M.D. at Concentra on June 3, 2015 for complaints of abdominal pain, which had been getting worse for 2-3 days. Claimant also had pressure in his neck following the MRI. Dr. Schwartzkopf's assessment was right upper quadrant abdominal pain and he referred Claimant to the ER. Dr. Schwartzkopf felt the complaint was not related to the Claimant's existing wc problem and discussed the issue with Dr. Pineiro.

17. Claimant then went to the Poudre Valley Emergency Department on June 3, 2015. Claimant presented with abdominal pain, which started three (3) days ago. Claimant's abdominal pain became worse after drinking heavily the night before. A history of chronic low back pain was also noted, as well as the fact that he had an MRI. Claimant was examined by Thomas McNally, PAC whose impression was abdominal pain and gastritis. Claimant was given prescriptions for Prilosec, Zofran and Norco.

18. Claimant was re-evaluated by PA Payne on June 5, 2015 and his symptoms were noted to be unchanged, including pain in the right arm in the C7 distribution. The MRI findings were discussed with Claimant. PA Payne's assessment was rhomboid muscle strain and cervical radiculopathy at C7. A referral to a massage therapist and a physiatrist was made.

19. A copy of a M-164 (initial exam) completed by Rosalinda Pineiro, M.D. on June 7, 2015 was admitted into evidence, although no narrative report was attached. [Exhibit 2, first page]. In that report, Dr. Pineiro noted that her objective findings were consistent with history and/or work-related mechanism of injury/illness. Claimant was to have therapy 3x/wk and medications. The ALJ credits Dr. Pineiro's opinion regarding whether Claimant's symptoms were related to a work injury.

20. Claimant returned to Concentra on June 15, 2015 and was examined by Keith Meier, FNP. Claimant reported that his symptoms were unchanged since the last visit and he was waiting for approval of massage therapy. Tenderness was noted in the cervical spine at C5-T1, as well as in the rhomboid, scapula, right paraspinal and trapezius muscles. Right-sided muscle spasms were also found, along with painful range of motion in the cervical spine. FNP Meier's assessment was cervical radiculopathy at C7 and rhomboid muscle strain. Claimant was given a prescription for Cyclobenzaprine and Hydrocodone-Acetaminophen.

21. Claimant was seen by Dr. Pineiro at Concentra on June 22, 2015 for a re-check of arm pain. Dr. Pineiro noted Claimant had been discharged from PT and was taking medications. Loss of normal lordosis was noted in the cervical spine on examination, as well as tenderness at the C5-7 levels and bilateral muscle spasms. ROM was noted to be full, but painful on flexion, extension and left side bending. Dr. Pineiro's assessment was cervical radiculopathy at C7 and rhomboid muscle strain. She continued Claimant's work restrictions and agreed with the referral to Dr. Pouliot.

22. Claimant was examined by Matthew Pouliot, D.O on July 6, 2015. His chief complaints were neck and right arm pain. Mild to moderate cervical tenderness was noted, along with a negative Spurling test on the right, which produced arm pain. Sensation was slightly decreased to light touch over the 6th and 7th dermatomes.

23. Dr. Pouliot's assessment was: 1. 52-year-old male with injury on 3/16/15, reported on 3/17/15, lifted a heavy cast iron tub as a plumber up to the 2nd floor with resultant ongoing cervical and radicular type pain in the C6 and C7 distributions; 2. MRI evidence of multilevel disease, which is likely preexisting, although he was not symptomatic prior to this injury. The treatment plan was a cervical epidural to be performed at C6-7 on the right, with an EMG of the right upper extremity. Claimant testified that the epidural injection was not authorized. The ALJ infers that Dr. Pouliot concluded Claimant's symptoms were consistent with his report of injury.

24. Michael J. Rauzzino, M.D. from Front Range Spine & Neurosurgery reviewed Claimant's medical records and issued a report, dated July 30, 2015. Dr. Rauzzino noted Claimant had chronic degenerative cervical disc disease, worst at C5-C6 and C6-C7. Dr. Rauzzino opined there was no evidence of acute injury, as the MRI that was done did not show any acute structural change to the spine. There were chronic degenerative cervical spine changes which argued against an acute injury and the history that the Claimant described. Dr. Rauzzino also concluded that the medical records did not support a work-related injury, saying that the history he related to his doctors at Concentra was not supported by the medical records. There was no documentation to his treating providers (prior to presenting to Concentra), that he had any sort of work-related injury; in fact, the documentation supports that he did not have a work-related injury.

25. Dr. Rauzzino concluded Claimant had subjective complaints of neck and radicular pain. Claimant presented with symptomatic cervical degenerative disc disease. Disc degeneration was related to aging and occurred in the normal population outside of any work-related activity. Dr. Rauzzino opined that the fact that he worked as a plumber did not necessarily mean that his occupation caused or accelerated his disease. Dr. Rauzzino stated: "In my neurosurgery practice, we see cervical degenerative disc disease routinely in an association with aging and unrelated to specific work activities. There is no causality to his job as a plumber to him having cervical degenerative disc disease as people who do not work as plumbers in other physical labor capacities develop the same type of disease."

26. The ALJ notes that Dr. Rauzzino's credibility is undercut by the fact that he did not examine Claimant. In addition, Dr. Rauzzino did not address whether the act of lifting a tub could cause an aggravation of Claimant's previously asymptomatic degenerative cervical spine changes, which also undermines his credibility. Dr. Rauzzino did not consider whether Claimant tried to initially work through the pain, but could not, as a possible explanation why he delayed in seeking treatment. The ALJ was not persuaded by the opinions expressed by Dr. Rauzzino that Claimant's symptoms were not related to a work injury.

27. Claimant underwent EMG testing on August 25, 2015 at Orthopaedic & Spine Center of the Rockies. Raymond P. van den Hoven's impression was: subtle changes on EMG, right upper extremity, that suggest minor right C6 and C8 root impingement (chronic and/or old), but no acute denervation; suspected acute superimposed irritation, especially of the C8 nerve root on the right side; no carpal tunnel syndrome or ulnar neuropathy-right upper extremity; no peripheral neuropathy. Dr. van den Hoven thought an epidural injection would be appropriate, along with aggressive cervical extensor strengthening exercises. He did not recommend surgical intervention.

28. Claimant testified that he has symptoms, which he described felt like a "knife in his back". It is located below the neck between his shoulder blades and radiates into his right arm.

29. Claimant continues to work part time for Employer, performing light duty.

30. The ALJ credits Claimant's testimony concerning the circumstances of his injury. Although Claimant did not initially report his injury as work related, no contrary evidence presented to refute his direct testimony that he was lifting a tub on the day in question. The ALJ found Claimant to be credible when he testified that he thought he pulled a muscle, which was why he did not initially seek treatment.

31. The ALJ finds that Claimant proved that it is more probable than not that he sustained a compensable injury while working for Employer.

32. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant contends that he suffered an injury on March 16, 2015 and initially thought his symptoms would resolve, which was why he delayed seeking treatment. Claimant averred that the Employer was aware that had been injured and initially gave him the name of a chiropractor. When his symptoms persisted, Claimant made a formal worker's compensation claim through the Employer. Although Claimant had pre-existing degenerative changes in his cervical spine, Claimant argued that he did not have symptoms of this type until his work-related injury.

Respondents argued that Claimant failed to satisfy his burden of proof with regard to the claimed industrial injury. Respondents contended that Claimant gave an inconsistent history and did not mention that it occurred at work either at the Poudre Valley Hospital ER or at Family and Sport Chiropractic. Respondents urge that the claim should be denied due to a lack of credibility on the part of Claimant.

Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." *See CF & I Steel Corp. v. Industrial Commission,* 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. (term "injury" includes disability resulting from accident or occupational disease.

The question of whether the Claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000) (proof of causation is threshold requirement that must be established before any compensation is awarded); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999) (Claimant seeking benefits for occupational disease

must establish existence of the disease and that it was directly and proximately caused the conditions of employment).

As a preliminary matter, the ALJ concludes that the evidence does not support a finding that Claimant suffers from an occupational disease, which was raised by Respondents as an affirmative defense[6]. Rather, Claimant's testimony coupled with the medical records frame the issue as whether Claimant suffered a traumatic injury which caused underlying degenerative changes in his cervical spine to become symptomatic.

In making the determination on compensability, the ALJ first considered what evidence tended to show Claimant was injured as alleged. This included the following:

- Claimant testified that he lifted a bath tub.
- Claimant testified that he told Mr. Bershinsky that he was injured and was having symptoms.
- Claimant's testified that Mr. Bershinsky gave him the name of his chiropractor.
- Claimant's testimony that the report of injury was made to Insurer after he talked to Employer and was told that they would "put him on work comp".

This testimony was direct evidence that the injury occurred as alleged by Claimant. It also provided support for his claim that Employer knew of his injury, as well as how he initially treated with a chiropractor and then Concentra. Significantly, no contrary evidence was presented which rebutted these facts.

Second, the ALJ considered whether the medical evidence supported a finding of compensability. This included:

- Claimant had no prior injuries that caused the same type of symptoms in his neck, back or right arm. [Finding of Fact No. 3].
- Dr. Pineiro concluded that the physical findings made upon examination were consistent with the reported injury. [Finding of Fact No. 19].
- Dr. Pouliot found objective findings of injury upon examination, including reduced sensation in the 6th and 7th dermatomes. The inference derived from this was that Dr. Pouliot opined that Claimant's symptoms were consistent with an injury of this type. [Finding of Fact No. 23].
- Claimant's radiculopathy, with symptoms going down his right arm were noted consistently in the Concentra records. Claimant had no such

[6] Respondents appear to have abandoned this affirmative defense, as they did not argue it in Respondents'' Position Statement and Proposed Findings of Fact, Conclusions of Law and Order.

symptoms or treatment prior to March, 2015. [Finding of Fact Nos. 12-14, 18-21].

- Claimant's symptoms, including right arm pain, were consistent with a trauma superimposed on degenerative changes in the cervical spine as shown on the MRI and EMG testing.

As found, the medical evidence, as well as the inferences therefrom lead to the conclusion that while Claimant had preexisting degenerative changes in his cervical spine, these became symptomatic after he suffered an industrial injury while working for Employer. The trauma combined with the degeneration in the cervical spine led Claimant to seek medical treatment.

Third and finally, the ALJ considered Claimant's credibility, which is a significant issue in the case. Claimant was not a good historian, particularly since he did not initially report describe the work incident at either Poudre Valley Hospital ER or at Family and Sport Chiropractic. Claimant did not recall a number of dates, nor did he remember what was said at the aforementioned facilities. This hurt his credibility.

However, the ALJ found Claimant to be credible on other key issues, including his discussion with Employer. Claimant's explanation that he thought it was a muscle injury and would resolve was plausible. Also, Claimant had not experienced symptoms of this type and that coupled with the objective medical records satisfies Claimant's burden of proof. [Findings of Fact Nos. 24-25]. In considering the evidence, Claimant proved it was more probable than not that he suffered and a compensable injury and is entitled to benefits

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable industrial arising out of and in the course and scope of his employment with Employer.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 7, 2015

Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues presented for consideration at hearing are whether Claimant proved by a preponderance of the evidence that she suffered injury to her left upper extremity in the course and scope of her employment for Employer and whether Claimant is entitled to reasonably necessary and related medical benefits.

Claimant's claim for benefits comes forward on an expedited application for hearing. Claimant raised the additional issues of average weekly wage and penalty under Section 8-43-304, C.R.S. These issues are reserved for future determination. Section 8-43-203(1), C.R.S.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 32 year old right hand dominant female who has been employed by the Employer for three years. Claimant is employed by Employer performing numerous jobs including cashier, sales associate in the drapery department, customer service representative and stocker.

2. Claimant testified that her assigned duties in the various positions required her to use her left arm repetitively, rotating her wrist occasionally and lifting items frequently. Claimant experienced numbness and tingling first in the palm of her left hand, then in the left arm and left fingers. Claimant did not testify when the symptoms first appeared in the left arm.

3. Claimant testified that she experienced the onset of her disability on May 27, 2015, when she saw a physician's assistant (PA) at Swedish Family Medical Center, Cassandra Rusche. The PA recommended that Claimant wear a brace and undergo a course of occupational therapy. Claimant attended occupational therapy one time per week starting on or about June 3, 2015, and continuing through July 29, 2015.

4. Claimant was initially diagnosed with carpel tunnel syndrome by the PA. Subsequently, when Claimant did not respond to treatment for carpel tunnel syndrome, Claimant underwent an EMG and it was determined that Claimant did not have carpel tunnel syndrome but did have cubital tunnel syndrome. The PA referred Claimant to Dr. Clinkscales.

5. On September 14, 2015, Claimant underwent surgery, an ulnar nerve procedure, performed by Dr. Clinkscales. Claimant remained off work for three weeks through October 3, 2015, recovering from the surgical procedure.

6. On October 8, 2015, Claimant saw Dr. Montano, a "workers' compensation doctor," on referral from Dr. Clinkscales. Dr. Montano noted that Claimant was experiencing steady improvement following the ulnar nerve procedure. However, the doctor reported that Claimant continued to have pain in the whole left arm.

7. Dr. Montano did not offer an opinion regarding the cause of Claimant's condition and recommended that Claimant undergo a job site evaluation for use in determining causality and worksite recommendations. Dr. Montano recommended ongoing physical therapy and an orthopedic evaluation.

8. Claimant did not present credible or persuasive evidence that her condition, cubital tunnel syndrome, was caused by her work duties. Claimant testified that she could not obtain a job description for her position from Employer despite her repeated requests. Claimant did not present credible or persuasive evidence that her symptoms arose from activities at work which involved holding a tool in position with repetition for six hours during her work day. Nor was their evidence that, for four hours periods during the work day, Claimant had duties requiring her to wrist bend and/or full elbow flexion/extension with vibration, repetitive pronation of the forearm or sustained pressure at the cubital tunnel.

9. Claimant did not provide evidence of specific repetitive work activity or the frequency with which she performed any work duty. Claimant testified generally that she performed duties as a cashier, a stocker, a customer service representative and a sales representative. Claimant did not provide information how the specific use of her non-dominant arm caused cubital tunnel syndrome.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following conclusions of Law are entered.

1. The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial*

Claim Appeals Office, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

2. The Colorado Department of Labor and Employment, Division of Workers' Compensation promulgates rules of procedure pertaining to many aspects of the workers' compensation process. Workers' Compensation Rules of Procedure, 7 CCR 1101-3. Rules 17 contains the Medical Treatment Guidelines (MTG). Rules 17-1 (A) provides,

> 17-1. STATEMENT OF PURPOSE
>
> (A) In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these "Medical Treatment Guidelines." This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

3. Rule 17-7 of the MTG includes "Exhibits" which pertain to the diagnosis, treatment and causal analysis of specific conditions, including the condition of cubital tunnel syndrome at Exhibit 5.

4. Exhibit 5(3) provides a physician treating an injured worker with guidance regarding the assessment of work relatedness.

> **MEDICAL CAUSATION ASSESSMENT FOR CUMULATIVE TRAUMA CONDITIONS (CTC)**
>
> **General Principles of Causation Assessment**
>
> The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic

condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is “yes,” then the condition is not work-related. If the answer is “no,” then the condition is most likely work-related. In some cases, the clinician may need to order diagnostic testing or jobsite evaluations to make a judgment on medical probability. The following steps should be used to evaluate causality in CTC cases:

Step 1: Make a specific and supportable diagnosis. Remember that cumulative trauma, repetitive strain and repetitive motion are not diagnoses. Examples of appropriate diagnoses include: specific tendonopathies, strains, sprains, and mono-neuropathies. Refer to Sections F (Specific Musculoskeletal Disorders) and G (Specific Peripheral Nerve Disorders) for the specific findings of common CTCs.

Step 2: Determine whether the disorder is known to be or is plausibly associated with work. The identification of work-related risk factors is largely based on comparison of risk factors (as described in Section D.3. a. & b. Foundations for Evidence of Occupational Relationships and Using Risk Factors to Determine Causation) with the patient's work tasks.

Step 3: Interview the patient to find out whether risk factors are present in sufficient degree and duration to cause or aggravate the condition. Consider any recent change in the frequency or intensity of occupational or non-occupational tasks. In some cases, a formal jobsite evaluation may be necessary to quantify the actual ergonomic risks. Refer to the Jobsite Evaluation Section E.6.c.

Step 4: Complete the required match between the risk factors identified on the Risk Factor Table and the established diagnosis using the system described in Section D. 3. b.

Step 5: Determine whether a temporal association exists between the workplace risk factors and the onset or aggravation of symptoms.

Step 6: Identify non-occupational diagnoses, such as rheumatoid arthritis, obesity, diabetes, as well as avocational activities, such as golf and tennis. This information infrequently affects the work-related causation decision. It may be applicable when exposure levels are low and the case does not meet evidence-based criteria.

5. The MTG in Exhibit 5 provide direction to the clinician to collect information from the injured worker regarding duties, to collect the information regarding duties from the employer’s job description and from a jobsite evaluation in order to ascertain whether the work injury is caused, aggravated or accelerated by work duties. The MTG identify risk factors which may be present on the injured worker’s job and support the claim of work relatedness. These medically documented risk factors consider the worker’s job duties with a specificity regarding the repetitive movement of upper extremity, the posture

of the worker, the force utilized by the workers' extremities to perform the work duties and the cumulative nature of all these factors.

6. At hearing in this case, Claimant failed to establish by a preponderance of the evidence that her duties as stocker, sales representative or cashier caused her cubital tunnel syndrome. There was no credible or persuasive evidence presented from which it could be concluded that Claimant's job duties required her to spend 4 to 6 hours of her work day using her non-dominant arm in an awkward position, exerting repetitive force with the left arm, using vibratory tools, or working in a cold environment. These risk factors were not established to be present in Claimant's position with this Employer.

7. Claimant failed to establish that it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in this case is due to a work-related exposure or injury.

ORDER

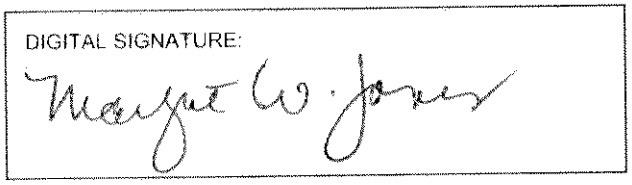
It is therefore ordered that:

1. Claimant's claim is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _November 27, 2015_____



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

#JFC82SM50D16XNv 7

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from June 4, 2015 and continuing?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of medical benefits?

- If claimant has proven a compensable injury, what is claimant's average weekly wage?

FINDINGS OF FACT

1. Claimant testified at hearing that on June 3, 2015 he was employed with employer performing demolition of a building. Claimant testified he was paid $13 per hour for his work with employer and worked between 65-66 hours per week.

2. Claimant testified that on June 3, 2015 at approximately 11:00 a.m., he was using a pick and hit a rock and injured his left shoulder and right hand. Claimant testified he experienced strong pain after hitting the rock with his pick. Claimant testified his injury was witnessed by "Darwin" and "Mr. Luiz".

3. Claimant testified he went to lunch and another worker named Mike Losey, a contractor at the work site, asked claimant to take him to Vail to get his truck. Claimant testified he took Mr. Losey to get his truck and when he returned to employer, he was working light duty.

4. Claimant testified Mr. Losey was not his supervisor. Claimant testified that during the drive to get Mr. Losey's truck, he told Mr. Losey that he had hurt himself. Claimant also testified that on the date of his injury he informed Eric Coronado of his injury. Claimant testified Mr. Coronado was his supervisor. Claimant testified Mr. Coronado told claimant to be careful.

5. Claimant testified he continued to work on June 3, 2015 and finished his shift. Claimant testified he went home but could not sleep that night because he was in too much pain.

6. Claimant testified he went to work the next day and told Mr. Coronado that morning that he needed medical attention. Claimant testified Mr. Coronado called the owner who told Mr. Coronado to send claimant home and they would pay him for 4 hours worth of work that day and to return to work when he felt better.

7. Claimant testified Mr. Coronado later informed him that they were not going to pay claimant for the previous week and a half of work he had performed for employer. Claimant testified he called Mr. Coronado who informed him that there was no longer any work for claimant to perform for employer.

8. Claimant testified that he has not worked since June 4, 2015 due to the pain in his left shoulder.

9. Claimant testified that on or about July 15, 2015 he contacted employer and demanded that he be paid for the time he worked for employer, but employer told claimant that they couldn't pay him because he had an attorney.

10. Claimant testified that he hand delivered his workers' compensation paperwork to Richard Molina, another supervisor for employer, on October 23, 2015.

11. According to the records entered into evidence in this case, the application for hearing was mailed to employer at the following address: 8101 E. Prentice Ave., Suite 800, Greenwood Village, CO 80111 on July 10, 2015. The Notice of Hearing was mailed to this same address by the Office of Administrative Courts on September 10, 2015.

12. Interrogatories and an entry of appearance were sent to employer at the following address: 2618 West 13th Ave., Denver, CO 80204.

13. Certified letters were delivered by claimant to employer on October 24, 2015 at 9:47 a.m. and 12:44 p.m. Employer did not appear at the November 12, 2015 hearing in Glenwood Springs to defend this claim, however.

14. The ALJ credits claimant's testimony at hearing that he sustained an injury to his left shoulder and right hand on June 3, 2015 while performing work for employer and that claimant requested medical treatment from employer on June 4, 2015. The ALJ finds that claimant has proven through his testimony that it is more probable than not that he sustained a compensable injury arising out of his employment with employer.

15. The ALJ finds that claimant has demonstrated that it is more likely than not that as a result of the injury, he sought a referral for medical treatment from employer but was not referred by employer for any treatment. The ALJ finds claimant has proven that it is more likely than not that as a result of the injury, claimant needs to be evaluated by a medical physician for the purposes of receiving medical treatment.

16. The ALJ notes that employer has failed to refer claimant for medical treatment and determines that the right to select a physician to treat claimant for his

injuries has passed to claimant. Claimant is therefore allowed to choose a physician to treat his injuries resulting from the June 3, 2015 work injury.

17. The ALJ credits claimant's testimony that he has not been able to work since the injury due to the pain in his left shoulder and finds that claimant has proven that it is more probable than not that he is entitled to an award of TTD benefits as a result of his work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2008. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2008. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment with employer. As found, the ALJ credits the testimony of claimant at

hearing and determines that claimant sustained an injury on June 3, 2015 that resulted in his missing time from work.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2014. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

7. As found, claimant has demonstrated that he is in need of medical treatment for his work injury. As found, employer failed to refer claimant to a physician willing to treat claimant for his injury after being informed of claimant's injury and, therefore, the right to select a physician or chiropractor has passed to claimant pursuant to Section 8-43-404(5)(a), C.R.S.

8. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

9. As found, claimant has proven by a preponderance of the evidence that his injury resulted in disability that resulted in his inability to perform his job for employer. Claimant's testimony in this regard is credited with establishing this finding that claimant's injury resulted in his inability to perform his regular employment. As found, claimant is entitled to an award of TTD benefits commencing June 4, 2015 and continuing until terminated by law.

10. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

11. As found, claimant testified he was paid an hourly rate of $13.00 per hour and worked approximately 65 to 66 hours per week. As found, claimant's testimony is not contradicted by any credible evidence at hearing. As found, the ALJ determines that claimant's appropriate AWW should be $845.00 per week based on the hourly rate of $13.00 per hour multiplied by 65 hours per week.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits commencing June 4, 2015 and continuing until terminated by law based on an AWW of $845.00

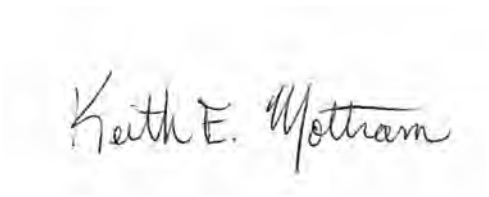
2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury provided by physicians authorized to treat claimant for his work injury.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 2, 2015



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Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on June 9, 2015 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

3. . Whether Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondents failed to designate a medical provider.

4. A determination of Claimant's Average Weekly Wage (AWW).

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period June 9, 2015 until terminated by statute.

FINDINGS OF FACT

1. Employer is in the business of tree trimming. Claimant essentially worked for Employer as a lumberjack who used a chainsaw to remove trees and brush. He was initially hired by Employer in the position of Groundsman. Claimant earned between $14.00 and $15.00 per hour. One or two months after his date of hire Claimant was promoted to a Trimmer D and then in late 2014 or early 2015 he was promoted to a Trimmer C. Each of Claimant's promotions included a raise in his hourly rate of pay. When Claimant was promoted to Trimmer C, he earned approximately $17.00 per hour. Claimant worked about 40 hours each week.

2. Claimant testified that on June 9, 2015 he was working with coworker Mario and foreman Justin to remove trees and debris near power structures in Sedalia, Colorado. Claimant explained that shortly after lunch he was walking towards his coworkers while carrying his chainsaw and supplies. Claimant slipped, fell and landed on his tailbone. He immediately experienced pain in his tailbone area as well as tingling in his legs. Claimant estimated he was approximately 300-400 yards away from his coworkers when he fell.

3. Claimant explained that he told Justin that he had fallen and was injured. Justin descended the tree on which he had been working in order to assist Claimant. Justin contacted General Foreman Frank Calhoun by telephone and inquired about

possible medical treatment for Claimant. Mr. Calhoun instructed Justin to have Claimant wait at the jobsite until he arrived to take Claimant to a doctor.

4. Claimant sat and waited for Mr. Calhoun for approximately four hours before he arrived at approximately 5:00 p.m. Claimant testified that Mr. Calhoun offered to take him to a physician. However, Claimant responded that he could not go with him to seek immediate medical care because he had to go home and care for his dog. Claimant commented that he always let his dog out at the end of the day because there was no one else in his household. He thus notified Mr. Calhoun of his intention to seek medical care after letting his dog out. Mr. Calhoun did not provide Claimant with any information regarding where to seek medical care. At no point did Respondents provide Claimant with any information about where to obtain medical treatment.

5. After Claimant arrived home and checked on his dog he visited a Nextcare Urgent Care facility near his home in Golden, Colorado for medical treatment. The medical record reflects that Claimant fell while carrying his chainsaw and attempting to step over a log when working for Employer. Erick Gomer, M.D, conducted a physical examination and took x-rays of Claimant's coccyx. The x-rays did not reveal any acute fractures. He determined that the objective findings upon examination were consistent with a work-related mechanism of injury. Dr. Gomer prescribed medications, took Claimant off work completely from June 10-11, 2015 and assigned modified duty employment until June 23, 2015.

6. Dr. Gomer assigned Claimant lifting, carrying, climbing and squatting restrictions. Claimant testified that the restrictions were never lifted. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and unable to earn wages since his date of injury. Claimant noted that he has not received benefits or wages from any source since June 9, 2015.

7. Claimant subsequently received follow-up treatment and physical therapy through Nextcare. He was diagnosed with an injury to the coccyx and received a sacral doughnut pillow for sitting. In a June 15, 2015 telephone visit, Dr. Gomer specifically diagnosed Claimant with a work-related sacral contusion, sacral pain and coccydynia. After June 26, 2015 medical treatment through Nextcare ceased because Respondents denied Claimant's Workers' Compensation claim.

8. Claimant explained that, because of the denial of his claim, inability to work and earn wages, he could not continue to pay rent in Colorado. He thus moved to California to live with family. On August 6, 2015 Claimant's counsel filed a Notice of Change of Address reflecting Claimant's out-of-state move. Respondents have not designated a California Authorized Treating Physician (ATP) for Claimant. Claimant has thus not obtained medical treatment in California for his June 9, 2015 injuries. He noted that he still suffers substantial pain involving his hip and buttocks/tailbone area.

9. Claimant commented that prior to his June 9, 2015 accident he had never suffered from an injury or illness involving his hip or buttocks/tailbone. Claimant's discovery responses reflect that he was involved in motor vehicle accidents in 2007 and

again in 2011 that involved injuries to his back. Claimant explained that he received some medical treatment and physical therapy for each of the injuries including emergency examination and physical therapy. The treatment was minimal and he was no longer receiving care for either of the injuries at the time of his June 9, 2015 work incident.

10. Claimant has established that it is more probably true than not that he suffered compensable injuries on June 9, 2015 during the course and scope of his employment with Employer. Claimant credibly explained that on June 9, 2015 he was working to remove trees and debris near power structures in Sedalia, Colorado. Shortly after lunch he was walking towards his coworkers while carrying his chainsaw and supplies. Claimant attempted to step over a log and slipped. He fell to the ground and landed on his tailbone. Claimant immediately experienced pain in his tailbone area and tingling in his legs. Dr. Gomer diagnosed Claimant with a work-related sacral contusion, sacral pain and coccydynia. Claimant's credible testimony in conjunction with the consistent medical records reveal that Claimant injured his tailbone area while performing his job duties for Employer.

11. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Although Claimant initially declined medical care, he notified Mr. Calhoun of his intention to seek medical care after letting his dog out. On the evening of June 9, 2015 Claimant sought emergency treatment at Nextcare. He continued to receive medical treatment through Nextcare until treatment ceased after June 26, 2015. At no point did Employer provide Claimant with any information about where to obtain medical treatment. Specifically, Employer never provided Claimant with a written list of at least two designated medical providers. The right to select a physician thus passed to Claimant. Accordingly, the treatment Claimant received at Nextcare was authorized, reasonable and necessary to cure or relieve the effects of his June 9, 2015 industrial injuries.

.12. Claimant has established that it is more probably true than not that the right of medical selection passed to him because Respondents failed to designate a medical provider. On August 6, 2015 Claimant informed Respondents that he had relocated to California. When Claimant moved to California, Respondents had a duty to designate a medical provider because it had some knowledge of facts that would lead a reasonably conscientious respondent to believe that Claimant was relocating and would require treatment in California. However, Respondents failed to designate a new ATP in California. The right of selection has thus passed to Claimant.

13. Claimant received a promotion and pay raise in approximately late 2014 or early 2015. The best method for calculating Claimant's AWW to ascertain his diminished earning capacity is to consider the wages he earned after receiving his raise. Considering the dates from January 3, 2015 through May 30, 2015 yields an AWW of $643.03. An AWW of $643.03 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

14. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period June 9, 2015 until terminated by statute. On June 9, 2015 Dr. Gomer assigned Claimant lifting, carrying, climbing and squatting restrictions. Claimant testified that the restrictions were never lifted. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and has not earned any wages since June 9, 2015. Claimant's industrial injury caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached Maximum Medical Improvement (MMI) and has been unable to return to regular work due to the effects of his June 9, 2015 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries on June 9, 2015 during the course and scope of his employment with Employer. Claimant credibly explained that on June 9, 2015 he was working to remove trees and debris near power structures in Sedalia, Colorado. Shortly after lunch he was walking towards his coworkers while carrying his chainsaw and supplies. Claimant attempted to step over a log and slipped. He fell to the ground and landed on his tailbone. Claimant immediately experienced pain in his tailbone area and tingling in his legs. Dr. Gomer diagnosed Claimant with a work-related sacral contusion, sacral pain and coccydynia. Claimant's credible testimony in conjunction with the consistent medical records reveal that Claimant injured his tailbone area while performing his job duties for Employer.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. Although Claimant initially declined medical care, he notified Mr. Calhoun of his intention to seek medical care after letting his dog out. On the evening of June 9, 2015 Claimant sought emergency treatment at Nextcare. He continued to receive medical treatment through Nextcare until treatment ceased after June 26, 2015. At no point did Employer provide Claimant with any information about where to obtain medical treatment. Specifically, Employer never provided Claimant with a written list of at least two designated medical providers. The right to select a physician thus passed to Claimant. Accordingly, the treatment Claimant received at Nextcare was authorized, reasonable and necessary to cure or relieve the effects of his June 9, 2015 industrial injuries.

Right of Selection

9. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43-404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(D) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

10. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

11. A respondent's duty to designate a medical provider when a claimant moves to another state is triggered when the respondent has some knowledge of facts that would lead a reasonably conscientious manager to believe the claimant was relocating and would require continuing medical treatment. *See Bunch*, 148 P.3d at 383.; *In Re Ries,* W.C. No. 4-674-408 (ICAP, Jan. 12, 2011). The resolution of whether a respondent has timely fulfilled its duty to designate a medical provider in another state is one of fact for resolution by an ALJ. *See Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997); *In Re Ries,* W.C. No. 4-674-408 (ICAP, Jan. 12, 2011).

12. As found, Claimant has established by a preponderance of the evidence that the right of medical selection passed to him because Respondents failed to designate a medical provider. On August 6, 2015 Claimant informed Respondents that he had relocated to California. When Claimant moved to California, Respondents had a duty to designate a medical provider because it had some knowledge of facts that would lead a reasonably conscientious respondent to believe that Claimant was relocating and would require treatment in California. However, Respondents failed to designate a new ATP in California. The right of selection has thus passed to Claimant.

AWW

13. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

14. As found, Claimant received a promotion and pay raise in approximately late 2014 or early 2015. The best method for calculating Claimant's AWW to ascertain his diminished earning capacity is to consider the wages he earned after receiving his raise. Considering the dates from January 3, 2015 through May 30, 2015 yields an AWW of $643.03. An AWW of $643.03 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

TTD Benefits

15. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Temporary disability benefits continue until the occurrence of one of the four terminating events specified in §8-42-105(3), C.R.S. *PDM Molding, Inc.*, 898 P.2d at 549-50.

16. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period June 9, 2015 until terminated by statute. On June 9, 2015 Dr. Gomer assigned Claimant lifting, carrying, climbing and squatting restrictions. Claimant testified that the restrictions were never lifted. Because of his work restrictions and ongoing symptoms, Claimant has been off of work and has

not earned any wages since June 9, 2015. Claimant's industrial injury caused a disability that lasted more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Claimant has not reached MMI and has been unable to return to regular work due to the effects of his June 9, 2015 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable injuries during the course and scope of his employment with Employer on June 9, 2015.

2. Respondents are financially responsible for the medical treatment Claimant received at Nextcare following his June 9, 2015 industrial injuries.

3. The right of selection to choose a California ATP passed to Claimant. Respondents shall pay for reasonable and necessary medical treatment designed to cure and relieve the effects of Claimant's June 9, 2015 industrial injuries.

4. Claimant earned an AWW of $643.03.

5. Respondents shall pay Claimant TTD benefits for the period June 9, 2015 until terminated by statute.

6. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 2, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

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ISSUES

The issues to be determined were:

1. Whether the claimant established by a preponderance of the evidence that he suffered a compensable injury on June 8, 2015 arising out of and in the course of his employment with the respondent-employer; and,

2. If so, whether the claimant has established by a preponderance of the evidence that he received authorized medical treatment that was reasonable and necessary to cure and relieve him from the effects of his industrial injury.

FINDINGS OF FACT

1. The claimant has been employed by the respondent-employer as a nurse since April 18, 2011.

2. On May 26, 2015, the claimant called off of work from the respondent-employer because he could not lift his left arm. That day, Ms. Cynthia Miller, the claimant's operating room director, called the claimant to see how he was doing and to find out if something occurred at work that contributed to his condition. The claimant told Ms. Miller he had neck and left arm issues, he was not injured at work, he was going to see his personal physician, and after seeing that physician he would let Ms. Miller know if he would be able to work the following day.

3. The claimant sought medical care from Matthew Furman, D.O. In a report dated May 26, 2015, Dr. Furman reported that the claimant had neck pain, left shoulder pain, numbness down his left arm to his pinky, and upper thoracic pain. Dr. Furman diagnosed the claimant as having cervical radiculopathy. Dr. Furman administered a C6-7 epidural steroid injection, and post injection osteopathic manipulation.

4. Despite the injection, the claimant had to take a second day off of work. The claimant returned to work on May 28, 2015. When the claimant saw Ms. Miller on May 28, 2015, he told her he was doing better.

5. On Monday June 8, 2015, the claimant was working in the operating room, helping position a patient, when he felt a small pop in his neck and upper back. The claimant experienced pain in his left scapula and neck, and he experienced numbness down his left arm into his fingers.

6. Following this incident, the claimant continued to work full duty on June 8, 2015, and he also worked full duty on June 9, 2015, and June 10, 2015. The claimant did not report an injury or seek medical care on those dates.

7. On June 11, 2015, the claimant woke up with left scapular pain and neck pain, he took a shower, and the claimant reported that the shower "set something off." The claimant called the respondent-employer to call off of work and to report a claim, and he was asked to come to work to complete workers' compensation paperwork.

8. Later that morning, the claimant met with Ms. April Baudino, the claimant's direct supervisor, Ms. Miller, and Ms. Tisha DeNiro, an employee health nurse for the respondent-employer, who handled the respondent-employer's workers' compensation claims. The claimant completed workers' compensation claim paperwork at that time. The claimant was given a designated provider list, and he chose Terrance Lakin, D.O., at Southern Colorado Clinic as his designated provider because Dr. Lakin was able to see him that day.

9. On June 11, 2015, Dr. Lakin obtained a medical history and examined the claimant. Dr. Lakin noted that the claimant reported that his neck popped on Monday, June 8, 2015, but that he awoke the morning of June 11, 2015 and was unable to move his neck. Dr. Lakin obtained a cervical x-ray which showed significant narrowing at C6-7, and significant degeneration at C6 and C7. Dr. Lakin reviewed Dr. Furman's May 26, 2015 report and findings, and documented those findings within his report. The claimant admitted to Dr. Lakin that he had similar symptoms prior to June 8, 2015, that he had received an ESI at C6-7, but he claimed he became pain free on Friday, June 5, 2015, just three days before the work incident.

10. On June 11, 2015, after taking the claimant's history and clinical findings into consideration, Dr. Lakin opined that ". . . with (his) history and presentation this appears to be exacerbation of pre-existing condition with delay in acute onset, would not be considered specificly (sic) work comp injury."

11. After being told that he did not have a work related injury, and that he would need to seek care outside of the workers' compensation system, the claimant set an appointment to be seen by his colleague, Jan Davis, M.D. that same day. Dr. Davis

works with the claimant at the respondent-employer, and they have a close working relationship. In a report dated June 11, 2015, Dr. Davis documented that the claimant had an onset of symptoms on June 8, 2015 after positioning a patient at work. There is no indication that Dr. Davis was aware that the claimant had similar symptoms on May 26, 2015, that the claimant was previously diagnosed with cervical radiculopathy, or that the claimant had a cervical ESI two weeks earlier. Dr. Davis' assessment was cervical radiculopathy. He ordered a cervical MRI, and he asked the claimant to follow-up with him after the cervical MRI.

12. On June 12, 2015, the claimant had cervical spine x-ray, and thoracic spine x-rays. The cervical spine x-ray series was read as showing diffuse degenerative changes and moderately severe neural foraminal stenosis at C6-7, and Grade 1 anterolisthesis of C5 on C6. The thoracic x-rays were read as showing diffuse degenerative disc disease, disc bulges and osteophytes, resulting in mild to moderate central spinal stenosis, and moderately severe left neural foraminal stenosis.

13. On June 13, 2015, the claimant underwent a cervical CT scan, which Dr. Volk reported as showing an anterior C5 subluxation, mild focal C5-6 kyphosis, and moderate-sized osteophytes extending around the C5-6, 6-7 and C7-T1.

14. The claimant's June 15, 2015 cervical MRI was compared to the June 13, 2015 cervical CT scan, and read by Dean Volk, M.D., as showing (1) severe bilateral C6-7 and moderate left C7-T1, bilateral C5-6, bilateral C4-5, and right C3-4 neural foraminal stenosis, (2) cervical spinal canal stenoses were moderate at C5-6 and mild at C3-4, C4-5, C6-7 and C7-T11, (3) left sided C7-T1 lateral recess stenosis may be effecting the C8 nerve roots, and (4) diffuse cervical intervertebral disc degeneration moderate at C5-6, C6-7, and C7-T11, and (5) degenerative mild anterior C5 subluxation. Dr. Volk did not characterize any of these findings as acute.

15. On June 29, 2015, Dr. Davis reviewed the cervical CT, and reported that he thought the claimant's C7-T1 neural foraminal stenosis was the result of an acute herniation, disagreeing with Dr. Volk's interpretation that this was a chronic disc osteophyte complex. Dr. Davis did not provide a causation opinion as to when or how the alleged herniation occurred.

16. Dr. Davis inaccurately noted that the onset of the claimant's cervical radiculopathy symptoms was June 8, 2015. Dr. Davis makes no mention of the claimant's prior cervical radiculopathy diagnosis and care. To the extent Dr. Davis' report can be interpreted as providing an opinion that the claimant's issues were related

to the June 8, 2015 incident, his opinion is based upon incomplete and inaccurate information, and is rejected as unpersuasive.

17. On September 2, 2015, Dr. F. Mark Paz issued a record review IME report. Within his report, Dr. Paz documented the medical records and employment records he reviewed as part of his IME. At that time, Dr. Paz did not have copies of Dr. Davis' reports, nor Dr. Furman's May 26, 2015 report, but he did have Dr. Lakin's June 11, 2015 report within which Dr. Furman's report and care was discussed. He also had access to the claimant's cervical and thoracic x-ray reports, cervical CT scan report, and cervical MRI report.

18. Dr. Paz opined it is not medically probable that the claimant's cervical degenerative disc disease at C6-7 and left sided radiculopathy were causally related to the June 8, 2015 event. Under the heading "Causation Analysis", Dr. Paz opined and explained:

> Based on reasonable medical probability, it is not medically probable that the June 8, 2015 reported event, is the etiology of the left-sided cervical radiculopathy. The left-sided cervical radiculopathy was a pre-existing condition. In addition, based on reasonable medical probability, it is not medically probable that the June 8, 2015, reported event aggravated or accelerated the pre-existing cervical radiculopathy.
>
> The etiology of the left-sided cervical radiculopathy symptoms which were treated on May 26, 2015, are not documented to have been associated with a traumatic event, a lifting event, or activities of daily living. The symptoms which developed prior to, and were treated on May 26, 2015, were a result of the natural history and evolution of cervical degenerative disc disease and degenerative joint disease of the cervical spine.
>
> [The claimant] documented that he was assisting with at least one coworker, if not more, to transition a 130 pound patient in bed. In my medical opinion, the documented physical activity reported to have occurred on June 8, 2015, is inconsistent with a mechanism of injury which is medically probable to have aggravated or accelerated the preexisting C6-7 cervical spine foraminal stenosis. In addition, predictably, the natural history of cervical spine degenerative disc disease and degenerative joint disease will continue to evolve and deteriorate. This is further emphasized given the advanced stages of the thoracic and cervical degenerative disc disease and degenerative joint disease evident on radiographic imaging.

19. After the issuance of his September 2, 2015 report, Dr. Paz was provided, and reviewed, Dr. Furman's May 26, 2015 records, Dr. Davis' medical reports, the claimant's interrogatory answers, and the actual cervical and thoracic imaging. Dr. Paz also heard the testimony of the claimant, Ms. Miller, and Ms. DeNiro. Dr. Paz opined that based upon his review of the new materials, and with consideration of the hearing testimony, it remained his opinion that the claimant's left sided cervical radiculopathy and need for medical care was preexisting, and not related to the June 8, 2015 incident. Dr. Paz opined the June 8, 2015 incident did not cause, aggravate or accelerated the preexisting condition.

20. Dr. Paz did not agree with Dr. Davis' interpretation of the cervical MRI as showing an acute herniation, and he noted that even if Dr. Davis was correct, he would not conclude the herniation was related to the June 8, 2015 incident, as the claimant had symptoms consistent with cervical radiculopathy prior to June 8, 2015. He noted that the cervical CT scan suggested the problem was not acute, and was longstanding, and related to the osteophyte complex. Dr. Paz's opinions, which were stated to a reasonable degree of medical probability, are supported by the great weight of the evidence, and are credible and persuasive.

21. The ALJ finds the opinions and analyses of Dr. Paz to be credible and more persuasive than medical opinions to the contrary.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury on June 8, 2015 arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197

Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

5. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

6. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

7. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of

evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

8. The ALJ concludes that Dr. Paz's analyses and opinions are credible and more persuasive than analyses and opinions to the contrary.

9. As found above, the claimant has failed to establish by a preponderance of the evidence that on or about June 8, 2015 he sustained a compensable injury arising out of and in the course of his employment.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: December 21, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his work-related injuries.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 15, 2015 until terminated by statute.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is a 56 year old male who has worked for Employer as a Cement Truck Driver for approximately 15 years. His job duties involved driving a truck equipped with an auxiliary concrete mixer to deliver concrete to job sites. Claimant explained that he operates an auger on his truck by pushing levers to release concrete into designated locations at job sites. He remarked that he frequently moved an approximately 100 pound cement chute into various positions to deliver cement from the mixer. Claimant also used a pneumatic tool to clean surfaces after cement deliveries to prevent material from hardening in the mixer and on the truck.

2. Claimant testified that he earned $21.00 per hour and worked approximately 35-40 hours each week for a total AWW of $840.00. However, he noted that his position as a Cement Truck Driver was a seasonal job that typically began in late March and ended in late November. Claimant collected unemployment compensation benefits during the winter months when he was not working for Employer. Respondents thus assert that the period from January 1, 2015 through July 14, 2015 constitutes a more appropriate measure of Claimant's AWW. Respondents gross wages during the preceding period total $11,018.17. Dividing $11,018.17 by 27 and 6/7 weeks yields an AWW of $395.52. Respondents therefore contend that $395.52 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. Claimant suffered a previously admitted Workers' Compensation injury to his hands in 2014. He explained that his hand pain gradually migrated into his right shoulder area. On July 14, 2015 Claimant visited the University of Colorado Emergency

Room. He explained that he was suffering right shoulder pain that he attributed to his repetitive job duties. The pain began in his right hand and emanated through his wrist and elbow up to his right shoulder. Claimant was diagnosed with a possible right rotator cuff injury.

4. Claimant reported his injury to Employer and was directed to Concentra Medical Centers for an examination. On July 17, 2015 Claimant visited Concentra and reported progressively worsening right shoulder pain over the previous several weeks. Claimant was diagnosed with right shoulder pain and taken off of work.

5. On July 24, 2015 Claimant visited Authorized Treating Physician (ATP) Brian Counts, M.D. at Concentra for an examination. Claimant reported that he had been experiencing right shoulder pain since November 2014. Dr. Counts noted that Claimant "regularly mixes the concrete with vigorous use of the right arm and shoulder." He diagnosed Claimant with right shoulder pain and impingement syndrome. Dr. Counts recommended a right shoulder MRI. He explained that, because Claimant had not suffered any prior right shoulder problems, there was a greater than 50% probability that Claimant's work activities caused his right shoulder symptoms. Dr. Counts changed Claimant's work restrictions to occasional lifting up to one pound, no driving his company vehicle because of functional limitations and no lifting above the shoulders.

6. On August 3, 2015 Claimant underwent a right shoulder MRI. The MRI revealed mild supraspinatus and infraspinatus tendinosis.

7. On August 7, 2015 Claimant returned to Dr. Counts for an examination. Dr. Counts recounted that Claimant engages in mechanical work involving pneumatic scrapers with a significant vibratory component. He noted that the vibrations triggered Claimant's hand and shoulder pain. Dr. Counts also remarked that Claimant pulls an overhead lever twice on each stop with his concrete truck. He commented that pulling on the lever requires significant force. He stated that the MRI revealed a sprain of the inferior glenohumeral ligament anterior and inferior labral scuffing and tendinosis of the supraspinatus and infraspinatus tendons. He diagnosed Claimant with right shoulder pain, impingement syndrome and tendinitis.

8. On August 13, 2015 Claimant visited Orthopedic Surgeon Mark S. Failinger, M.D. for an evaluation. Claimant reported that he began experiencing right wrist pain in November 2014 that progressed into his elbow and right shoulder. He noted that in the previous five weeks it had been difficult to raise his right arm. Dr. Failinger reviewed Claimant's MRI and conducted a physical examination. He determined that Claimant suffered right shoulder range of motion deficits. Dr. Failinger diagnosed Claimant with adhesive capsulitis and expected his pain to decrease with stretching.

9. On September 21, 2015 Claimant underwent an independent medical examination with Jon M. Erickson, M.D. After reviewing Claimant's medical records and conducting a physical examination Dr. Erickson responded to several of Respondents' questions. He remarked that an MRI reflected objective evidence of a right shoulder

injury. Dr. Erickson determined that Claimant did not suffer an acute right shoulder injury at work but instead suffered an occupational disease based on 15 years of heavy-duty work for Employer. He specifically remarked that Claimant's job involves a great deal of extremely heavy lifting, pushing and pulling. Dr. Erickson also noted that Claimant was older, under-muscled and drove a type of truck that exposed him to occupational risk factors.

10. Dr. Erickson concluded that Claimant's right shoulder condition was caused by his occupational activities for Employer. He explained:

> It is my opinion, to a reasonable degree of medical probability, that 15 years of driving a cement truck, with repeated heavy overhead lifting and pulling, commonly involving awkward positions, coupled with repeated use of a heavy jackhammer, resulted in a cumulative trauma disorder to the right shoulder.

11. On November 7, 2015 Vocational Evaluator Joe Blythe performed a Job Demands Analysis. He assessed Claimant's work activities for purposes of quantifying the force and repetition involved. Mr. Blythe extrapolated his findings based on average workdays of 7.0, 8.0, 9.0 and 9.5 hours in length. He applied his data to the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5 Cumulative Trauma Conditions (*Guidelines*). The purpose of his evaluation was to obtain the correct measurements and data necessary to determine whether Claimant's work activities meet the criteria set forth in the *Guidelines*. Mr. Blythe observed one of Claimant's coworkers perform the job duties of a Cement Truck Driver over a five hour period and recorded the length of each activity.

12. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater. Finally, the *Guidelines* define a cold environment as one with an ambient temperature of less than 45 degrees for four hours or more "such as handling frozen foods that are 10 degrees."

13. Mr. Blythe drafted a vocational report evaluating the job site for primary and secondary risk factors for cumulative trauma. He did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He

noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture, repetition/duration (elbow flexion) and a cold working environment. Mr. Blythe concluded that in an 8.0 hour day Claimant would meet the force time risk factor only 1.94 hours per day or far less than the required six hours. Even in a 9.5-hour day the force measurement only reached 2.3 hours per day. Similarly, Mr. Blythe concluded that in an 8.0-hour day Claimant would meet the elbow flexion risk factor only 58.4 minutes per day or far less than the required six hours. Even in a 9.5 hour workday the elbow flexion measurement only reached 1.2 hours each day. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Finally, cold working environment was a potential risk factor because Claimant averaged 54% of his time or 4.32 hours of an eight hour workday in a cold environment based on mean temperatures for Denver, Colorado. However, Claimant explained that his position as a Cement Truck Driver is a seasonal job that typically begins in late March and ends in late November. He thus does not typically work for Employer during the colder months. Accordingly, although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration.

14. On November 11, 2015 Dr. Erickson issued an addendum report to his initial independent medical examination after reviewing Mr. Blythe's job demands analysis. He remarked that Mr. Blythe's report adequately analyzed all aspects of Claimant's job duties. Dr. Erickson explained that Mr. Blythe considered Claimant's work activities against various occupational risk factors including force and repetition, awkward posture and repetition, computer work, use of vibratory power tools and a cold working environment. He summarized that none of the occupational risk factors applied to Claimant. Dr. Erickson concluded that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. He noted that "it is quite clear that [Claimant] may have overstated the strenuous nature of his occupation, which caused me to conclude that his right shoulder difficulties are work-related." Dr. Erickson commented that Mr. Blythe's job demands analysis forced him to alter his conclusion. He thus summarized that Claimant's right shoulder symptoms "are much more likely due to non-occupational risk factors than his work activities as a cement truck driver." The non-occupational risk factors included Claimant's age, smoking history, comorbidity in the form of CREST syndrome, the hooked nature of his acromion and psychosocial factors.

15. Dr. Erickson testified at the hearing in this matter consistently with his addendum report. He explained that he initially relied on Claimant's representations of his job duties in concluding that Claimant suffered a work-related occupational disease to his right shoulder. However, relying on Mr. Blythe's comprehensive job analysis, Dr. Erickson determined that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. .Specifically, Claimant did not use a jackhammer and did not perform as much shoveling as Dr. Erickson originally believed. Although Claimant engaged in forceful activities at times in his job, his duties did not meet the minimum threshold of force, repetition and duration

to develop right shoulder pathology. Dr. Erickson concluded that Claimant's MRI reflected that his right shoulder condition was consistent with the natural degenerative process rather than an occupational exposure.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of his employment with Employer. Although Claimant attributed his symptoms to his work activities, a review of his job duties as a Cement Truck Driver reflects that they lacked the requisite force or repetition to cause his symptoms. Claimant engaged in a variety of tasks throughout each shift. The persuasive reports and testimony of Mr. Blythe and Dr. Erickson reveal that, although Claimant engaged in some forceful activities, his job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

17. Mr. Blythe drafted a vocational report evaluating the job site for primary and secondary risk factors for cumulative trauma. He did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time), awkward posture, repetition/duration (elbow flexion) and a cold working environment. Mr. Blythe concluded that even in a 9.5-hour day the force measurement only reached 2.3 hours per day. Similarly, Mr. Blythe concluded that in a 9.5 hour workday the elbow flexion measurement only reached 1.2 hours each day. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Finally, cold working environment was a potential risk factor because Claimant averaged 54% of his time or 4.32 hours of an eight hour workday in a cold environment based on mean temperatures for Denver, Colorado. However, Claimant explained that his position as a Cement Truck Driver is a seasonal job that typically begins in late March and ends in late November. He thus does not typically work for Employer during the colder months. Accordingly, although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration.

18. Dr. Erickson initially concluded that Claimant's right shoulder condition was caused by his occupational activities for Employer. He noted that Claimant's job involved a great deal of extremely heavy lifting, pushing and pulling over a period of 15 years. Dr. Erickson was under the impression that Claimant repeatedly used a jackhammer to perform his job duties and did not have Mr. Blythe's report detailing the duration, force and repetition of Claimant's job activities.

19. Dr. Erickson subsequently issued an addendum report to his initial independent medical examination after reviewing Mr. Blythe's job demands analysis. He remarked that Mr. Blythe's report adequately analyzed all aspects of Claimant's job duties. Dr. Erickson explained that Mr. Blythe considered Claimant's work activities against various occupational risk factors including force and repetition, awkward posture and repetition, computer work, use of vibratory power tools and a cold working environment. He summarized that none of the occupational risk factors applied to

Claimant. Dr. Erickson concluded that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. He noted that "it is quite clear that [Claimant] may have overstated the strenuous nature of his occupation, which caused me to conclude that his right shoulder difficulties are work-related." He summarized that Claimant's right shoulder symptoms were much more likely related to non-occupational risk factors.

20. In contrast, ATP Dr. Counts explained that, because Claimant had not suffered any prior right shoulder problems, there was a greater than 50% probability that Claimant's work activities caused his right shoulder symptoms. However, Dr. Counts did not conduct a causation analysis pursuant to Rule 17, Exhibit 5 of the *Guidelines*. Furthermore, Dr. Counts did not consider the jobs demands analysis performed by Mr. Blythe in reaching his conclusion. The record reflects that, although Claimant engaged in forceful activities at times in his job, his duties did not meet the minimum threshold of force, repetition and duration to develop right shoulder pathology pursuant to the *Guidelines.* Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the

development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

8. Rule 17, Exhibit 4 specifically includes factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Vibration can also be considered an additional risk factor pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology.

9. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease in the form of a right shoulder injury during the course and scope of his employment with Employer. Although Claimant attributed his symptoms to his work activities, a review of his job duties as a Cement Truck Driver reflects that they lacked the requisite force or repetition to cause his symptoms. Claimant engaged in a variety of tasks throughout each shift. The persuasive reports and testimony of Mr. Blythe and Dr. Erickson reveal that, although Claimant engaged in some forceful activities, his job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

10. As found, Mr. Blythe drafted a vocational report evaluating the job site for primary and secondary risk factors for cumulative trauma. He did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time), awkward posture, repetition/duration (elbow flexion) and a cold working environment. Mr. Blythe concluded that even in a 9.5-hour day the force measurement only reached 2.3 hours per day. Similarly, Mr. Blythe concluded that in a 9.5 hour workday the elbow flexion measurement only reached 1.2 hours each day. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Finally, cold working environment was a potential risk factor because Claimant averaged 54% of his time or 4.32 hours of an eight hour workday in a cold environment based on mean temperatures for Denver, Colorado. However, Claimant explained that his position as a Cement Truck Driver is a seasonal job that typically begins in late March and ends in late November. He thus does not typically work for Employer during the colder months. Accordingly, although Claimant engages in forceful activities at times in his job, his duties do not meet the minimum threshold of force, repetition and duration.

11. As found, Dr. Erickson initially concluded that Claimant's right shoulder condition was caused by his occupational activities for Employer. He noted that

Claimant's job involved a great deal of extremely heavy lifting, pushing and pulling over a period of 15 years. Dr. Erickson was under the impression that Claimant repeatedly used a jackhammer to perform his job duties and did not have Mr. Blythe's report detailing the duration, force and repetition of Claimant's job activities.

12. As found, Dr. Erickson subsequently issued an addendum report to his initial independent medical examination after reviewing Mr. Blythe's job demands analysis. He remarked that Mr. Blythe's report adequately analyzed all aspects of Claimant's job duties. Dr. Erickson explained that Mr. Blythe considered Claimant's work activities against various occupational risk factors including force and repetition, awkward posture and repetition, computer work, use of vibratory power tools and a cold working environment. He summarized that none of the occupational risk factors applied to Claimant. Dr. Erickson concluded that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. He noted that "it is quite clear that [Claimant] may have overstated the strenuous nature of his occupation, which caused me to conclude that his right shoulder difficulties are work-related." He summarized that Claimant's right shoulder symptoms were much more likely related to non-occupational risk factors.

13. As found, in contrast, ATP Dr. Counts explained that, because Claimant had not suffered any prior right shoulder problems, there was a greater than 50% probability that Claimant's work activities caused his right shoulder symptoms. However, Dr. Counts did not conduct a causation analysis pursuant to Rule 17, Exhibit 5 of the *Guidelines*. Furthermore, Dr. Counts did not consider the jobs demands analysis performed by Mr. Blythe in reaching his conclusion. The record reflects that, although Claimant engaged in forceful activities at times in his job, his duties did not meet the minimum threshold of force, repetition and duration to develop right shoulder pathology pursuant to the *Guidelines.* Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-*

070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 22, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

1. Whether the claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course of her employment with the respondent-employer;

2. If so, whether she is entitled to any and all reasonable and necessary medical benefits for her compensable injury; and,

3. If so, whether the treatment rendered at CCOM is reasonable and necessary medical treatment for the compensable injury.

Based upon the findings and conclusions below that the claim is not compensable, the ALJ does not reach a decision on the remaining two issues.

FINDINGS OF FACT

1. The claimant is a case worker manager for the respondent-employer. The claimant is a professional who, in turn, supervises professionals.

2. The essential functions of the claimant's job duties include:

a. Supervise a full range of intake and ongoing social case work services for a variety of programs.

b. Supervise a service area consisting of support units, staffed by professional social case workers and paraprofessionals.

c. Oversee staff scheduling.

d. Conduct individual group conferences to set and monitor deadlines.

e. Establish unit goals and tables.

f. Meet with administration as needed to participate in program meetings.

g. Organize the work within the unit to assure coverage and efficiency in case load handling.

h. Oversee the budget.

i. Determine the resources required to achieve the goals of the unit.

j. Provide written and verbal instructions to subordinates of program issues.

k. Meet with workers individually and in groups to explain rules, policies, procedures, and laws.

l. Monitor the work of subordinates and review the work of the total unit's effectiveness with regards to plans and programs.

m. Train social workers.

n. Review the performance of workers on a periodic basis and complete their annual performance reviews.

3. The claimant is not considered a word processor or an individual who does nothing but perform data entry.

4. The claimant also described a special project that she performed from January 2015 through May 2015. According to the claimant, this project required her to review numerous disks in preparation for a court proceeding. Specifically, the claimant was required to review these disks on the computer, and, because she is a professional, analyze the information on the disks.

5. According to the Employer's First Report of Injury completed by the claimant, the claimant complained that she developed bilateral upper extremity wrist pain as a result of her work activities. The claimant reported that the onset of these symptoms began on July 21, 2015.

6. Following the report of the injury, the claimant was referred to Emergicare and was seen by Dr. Bradley as the authorized treating physician. Dr. Bradley eventually referred the claimant to Dr. Primack for an evaluation. Dr. Primack indicated that he had spoken with Dr. Bradley subsequent to the referral to ascertain the purposes of the evaluation. Dr. Primack reported that Dr. Bradley was requesting a causality analysis of the claimant's upper extremity complaints.

7. As part of her treatment, the claimant had an MRI performed of her right wrist on August 24, 2015. The MRI revealed that there was no tendon sheath fluid collection. The MRI did reveal that there were three compartment joint effusions identified in the wrist.

8. On August 6, 2015, Sara Nowotny, a qualified rehabilitation counselor, performed a job analysis of the claimant's position. A job analyses is a report to provide a quantitative, accurate assessment of the physical demands of the job, either for assessing risk factors, return to work, or ergonomic considerations. With regards to the job analysis that she performed of the claimant's position, Ms. Nowotny obtained the information about the claimant's essential job functions directly from the claimant. Prior to the evaluation, Ms. Nowotny explained to the claimant that the purpose of the evaluation was to determine the physical demands of her occupation. The claimant also testified as to the job analysis evaluation. The claimant acknowledged that Ms. Nowotny asked questions to her about what the claimant did in her job. The claimant acknowledged that she provided honest, accurate information to Ms. Nowotny during this job evaluation. Ms. Nowotny spent over one hour of time questioning the claimant concerning her general work activities.

9. Ms. Nowotny was of the opinion that her job analysis accurately described the physical requirements of the claimant's general work activities.

10. The ALJ finds Ms. Nowotny to be credible and persuasive concerning the functions of the claimant's position with the respondent-employer.

11. As identified by the claimant in her job analysis, the following represent the essential functions of her job as a case worker manager:

a. Participate in staff, supervisory, and community meetings (approximately 10, one to one and a half hour meetings per week) (20-25% of work activity).

b. Process referrals on the computer (25% of work activity).

c. Case/document review, consisting of answering complaints in person, by telephone, or by computer (20-25% of work activity).

d. Attend home visits (1-3 times per month), including driving 30-50 miles a month.

e. Distributing mail by placing paperwork in employee bins outside of their cubicle (5-10% of work activity).

f. Attend court hearings (4-5 times per month) (10% of work activity).

12. According to the job analysis completed by the claimant and Sara Nowotny, the following represents the claimant's job tasks and corresponding physical demands:

a. Meeting attendance – involving taking notes by hand 2-3 pages per hour per meeting.

b. Processing referrals on computers – reviewing information approving activities primarily with mouse operation.

c. Case/document review – read and review files to verify compliance with guidelines. May circle items for change and initial/date document. Places notes on files and returns to table for storage.

d. Home visit attendance – drive to residence and communicate with clients about services or concerns.

e. Mail distribution – may occur several times a day when pages of documentation are delivered around the office to bens next to cubicle.

f. Court hearing attendance – involving preparation of documents for presentation at hearing. Sitting and listening/participating in court proceedings.

13. Based on a combination of Ms. Nowotny's interview of the claimant, as well as her measurement and observation of work activities, Ms. Nowotny determined that, on average, the claimant uses her mouse 2.1 hours per day and uses a keyboard .35 hours per day.

14. Within the Medical Treatment Guidelines for the category of Cumulative Trauma Disorder, the Division has promulgated primary risk factors and secondary risk factors associated with Cumulative Trauma Disorders of the upper extremities. *W.C.R.P. 17, Exhibit 5, Section D.3.b.* The primary risk factors and the secondary risk factors identified in the Medical Treatment Guidelines are also listed in the claimant's job analysis. Based on Ms. Nowotny's professional experience, the claimant's work activities did not rise to the level of the presence of any of the primary risk factors and secondary risk factors listed in the Medical Treatment Guidelines.

15. The ALJ finds that the claimant's testimony is consistent with the August 6, 2015 job analysis completed by the claimant and Ms. Nowotny. The claimant testified that the physical tasks that she performs vary from day to day. The claimant testified that although there are days where she may be required to mouse more than 6 hours

per day, she also stated that depending on her job functions on a particular day, she would be mousing significantly less that day, or not at all.

16. The claimant was evaluated by Dr. Primack on September 8, 2015. In his September 8, 2015 report, Dr. Primack noted that he had reviewed a "physical demands analysis." At hearing, Dr. Primack confirmed that the "physical demands analysis" that he reviewed was the job analysis performed by Sara Nowotny. In addition, Dr. Primack confirmed that the information identified in the section entitled "Right Upper Extremity" of page 2 of his report was information that he obtained directly from the job analysis. Dr. Primack opined in his September 8, 2015 report that the claimant's ongoing upper extremity problems were not related to her employment.

17. Dr. Primack provided testimony at hearing in explanation of his opinion. Dr. Primack noted that the August 24, 2015 MRI did not show any fluid along the tendons or within the tendon sheath. Although the MRI did show fluids in the wrist, the MRI did not show any fluid in the tendons, which would lead to the conclusion that the symptoms that the claimant is reporting are not because of repetitive motion. In addition, the MRI did not show that the claimant had any inflammation in the tendons of her hand. As a result, Dr. Primack was of the opinion that based on objective medical evidence the claimant did not have a pathology consistent with repetitive motion.

18. Dr. Primack was of the opinion that based on his review of the job analysis, the claimant did not have a sufficient amount of repetitive motion that would rise to the level of a compensable occupational disease. Dr. Primack testified that the job analysis indicated that the claimant had variability of job tasks. Dr. Primack noted that the claimant writes, she uses a computer, she talks, she walks, and does many other things throughout the day. Dr. Primack further testified that the variability of her tasks would result in different loads across her fingers, in different positions across her fingers, and also rest cycles. As it pertains to rest cycles, Dr. Primack noted that with the variability in tasks, the rest cycles in between the variability allows her tendons to rest. Because the tendons are allowed to rest, these tendons will not get inflamed, which is correlated with the MRI findings.

19. The claimant's counsel, during cross examination, suggested to Dr. Primack that the claimant's work activities aggravated her pre-existing de Quervain's tenosynovitis. However, Dr. Primack disagreed that the claimant properly carried the diagnosis of de Quervain's tenosynovitis. Specifically, Dr. Primack testified that in order to properly diagnose a person with de Quervain's tenosynovitis, the MRI must disclose fluids in the tendon, as well as different types of dimensions of the tendon to ascertain any changes in the size of tendons. Because the August 24, 2015 MRI did not show

these pathological findings, he reached the conclusion that the claimant did not have de Quervain's tenosynovitis. Even if the claimant did carry the diagnosis of de Quervain's tenosynovitis, Dr. Primack rendered the opinion that, because of the variability of tasks in the claimant's job activities, the claimant would not have the necessary force, load, and cycle necessary for her work activities to cause or aggravate her de Quervain's tenosynovitis.

20. The ALJ finds that Dr. Primack's analyses and opinions are credible and more persuasive than medical evidence to the contrary.

21. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant suffers from an occupational disease arising out of and occurring in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

5. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. Section 8-40-201(14) C.R.S. (2015) defines “occupational disease” as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

7. An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill,* 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

8. The hazardous conditions of employment need not be the sole cause of the disease. The existence of a preexisting condition does not defeat a claim for an occupational disease unless it can be shown that a non-industrial cause was an equally exposing stimulus. A claimant is entitled to recovery if he or she demonstrates that the

hazards of employment cause, intensify or aggravate to some reasonable degree, the disability. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

9. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

10. Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office*, N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines*, W.C. 4-785-790 (ICAO September 9, 2011).

11. Of particular note in the Claimant's case, as this is a right upper extremity claim, is analysis of whether or not she has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines.

12. Rule 17, Exhibit 5 (D)(3) provides that,

> The clinician must determine if it is medically probable (greater than 50% likely or

> more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is “yes,” then the condition is not work-related. If the answer is “no,” then the condition is most likely work-related.

13. The Cumulative Trauma Guidelines then set out the steps the clinician should follow to make a proper causation evaluation. There is a 6-step general causation analysis and a 5-step causation analysis when using risk factors to determine causation.

14. As outlined above, Ms. Nowotny spent an hour obtaining information from the claimant as to her job activities, and the physical demands of each of these job activities. The claimant confirmed that she provided accurate information to Ms. Nowotny during this evaluation.

15. The claimant testified that she needs to perform certain activities frequently and repetitively. However, the claimant also acknowledged that her job activities vary on a daily basis. The claimant also acknowledged that she is a professional, who is supervising professionals. The claimant is not a word processor, or someone that does nothing but data entry. The claimant reviews and analyzes information on a regular basis. Consequently, the claimant’s job is not a position where she is continuously performing repetitive activities of her upper extremities with any kind of force or duration.

16. As outlined above, Dr. Primack reviewed the job analyses and, based on the contents of the job analyses, did not believe that the claimant’s work activities rose to the level of a compensable occupational disease. As testified to by Dr. Primack, the basis of his opinion is multi-factorial.

17. Dr. Primack’s opinion is supported by the Medical Treatment Guidelines. The claimant does not meet any primary risk factors or secondary risk factors articulated in the Medical Treatment Guidelines.

18. The ALJ concludes that Ms. Nowotny is credible and persuasive.

19. The ALJ concludes that Dr. Primack's analyses and opinions are credible and more persuasive than medical analyses and opinions to the contrary.

20. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffers from an occupational disease arising out of and in the course of her employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: December 31, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle, Suite 810
Colorado Springs, CO 80906

ISSUES

- Did Claimant establish by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course and scope of her employment on December 23, 2014?

- If Claimant suffered a compensable injury, did she establish by a preponderance of the evidence that she is entitled to Temporary Total Disability benefits from December 23, 2014 and continuing?

- If compensable, what medical treatment is Claimant entitled to in order to cure and relieve the effects of the December 23, 2014 industrial injury?

FINDINGS OF FACT

1. Claimant initially started working for Employer as a temporary employee. She became a permanent employee after approximately six months in November, 2014. A new hire information packet was completed on or about November 11, 2014. Claimant's start date was December 2, 2014. Claimant's hourly pay rate was $9.00 per hour and it was a full-time position.

2. In this position, Claimant worked loading magazines into boxes that moved along a conveyor belt. Claimant testified that there were approximately 25 magazines in each box.

3. Claimant's medical history was significant in that she suffered a prior industrial injury to her low back on September 20, 2000 while employed for Metrex Research. Claimant confirmed that this injury occurred, but did not have a recollection concerning her treatment or whether she sustained a permanent medical impairment. This case was settled on a full and final basis.

4. Claimant also sustained injuries to her low back in a motor vehicle accident ("MVA") in 2008. She received treatment including physical therapy and injections for her 2008 injury.

5. An MRI of Claimant's low back was performed on May 9, 2008. The MRI showed degenerative disc disease at L4-5. No dural sac or root sleeve deformity was noted. The ALJ infers Claimant was having low back symptoms in 2008 which required the MRI scan to be performed.

6. Claimant testified that she could not recall her course of treatment, nor the symptoms she experienced in 2008. This undermined Claimant's credibility as she appeared evasive when questions concerning the MVA were posed.

7. Claimant stated that her job with Employer required her to frequently lift 25 pounds. She was occasionally required to lift between 25 and 50 pounds and occasionally lift more than 50 pounds. The job also required Claimant to frequently bend, squat down, stand and kneel, as well as occasionally reaching above her shoulder.

8. Claimant testified that the line was very heavy and the conveyor was moving fast on December 23, 2014, when she knelt down to pick up magazines to place in a box. She felt pain when she bent down and could not get up. The pain was in her back and went down her right leg. Claimant said she continued working with a back support and finished her shift. She notified her supervisor (Richard) that her back hurt, but did not specifically describe an injury. Claimant testified that Richard knew the loads were heavy.

9. Claimant went to work the next day (12/24/14), but could not continue. She testified that the line had to be stopped and the supervisor (Richard) sent her home. Claimant has not returned to work since that day. The ALJ notes that two time records from Employer were admitted into evidence, the first of which noted Claimant to be on a leave of absence as of 12/23/14 and the second which said the leave of absence began on 12/30/14.

10. Claimant thought it was 3 to 4 days before she received treatment. She testified that she went to the doctor, as she was not feeling well and was sent to Concentra by Employer. Claimant testified that she was not given a list of doctors. The ALJ infers that Concentra was the designated ATP for Employer.

11. Claimant completed a Report of Accident on January 30, 2015, which difficult to read. It said she was working on the main line and was lifting bundles in the totes when she was injured.

12. Claimant first went to Concentra Medical Center on December 30, 2014 and was evaluated by Lacie Esser, PA-C. Claimant reported that she was working quickly on an assembly line and developed back pain. She also had pain in her left arm and occasional numbness in her left hand. Claimant described the arm pain as going on "a long time". Claimant failed to give PA Esser a complete history, as she did not report the 2000 industrial injury, nor the 2008 MVA.

13. PA-C Esser recorded Claimant had tenderness at all levels of her lumbar spine-left and right paraspinal, left and right sciatica notch on examination. Exquisite tenderness to very light touch was noted and ROM testing could not be completed because of Claimant's pain complaints.

14. Claimant was given prescriptions and referred for physical therapy 2-3x/week for six visits. Claimant was also given restrictions of: may lift or push/pull up to 5 pounds occasionally; may bend, stand or engage in activities requiring trunk rotation occasionally; she was advised to change positions periodically and limited to mostly sedentary work and minimal bending at the waist.

15. An Employer's First Report of Injury was completed on or about January 6, 2015. The injury time was listed as 1:00 and noted that Claimant notified of the employer that same day. The description of the injury said Claimant was working as a tie-line picker and the injury occurred while she was up to the "in the main line and was lifting in the totes".

16. Claimant returned to PA-C Esser on January 26, 2015. At that time, she was having severe pain in her back, as well as pain going up her mid back and neck. Claimant had not attended PT for two (2) weeks. PA-C Esser's assessment was lumbar and cervical strain. She referred Claimant back to PT and renewed her prescriptions. Claimant's physical restrictions remained the same.

17. Claimant was evaluated by Kirk Holmboe, D.O. on February 9, 2015. She had complaints of pain in the lower back, with radiation into the upper lumbar area, along with increased pain with weight on her left foot. Claimant moved very slowly and had difficulty getting up from the chair.

18. Dr. Holmboe found very limited ROM in all planes and tenderness in the lower lumbar area. His assessment was lumbar strain. He continued Claimant's restrictions and made a referral to a massage therapist, along with a physical medicine and rehab physician referral.

19. Claimant was examined by Robert Kawasaki, M.D. on February 23, 2015, with complaints of low back pain. She described her injury to Dr. Kawasaki as the result of repeatedly lifting boxes over a period of time. Claimant stated that on December 23, 2014, she developed some pain in her chest and neck so she took a break. The ALJ notes these were new symptoms. She stated that she returned to work and began having increasing low back pain. Dr. Kawasaki noted "There did not appear to be a specific injury but increased pain from repetitive lifting." Claimant stated that she requested a lifting belt from a supervisor, which she was given, but it didn't really help.

20. On examination, Dr. Kawasaki noted that Claimant had significant pain behaviors including significant expression of pain with a light touch over the lumbar segments. It was also noted that she had an exaggerated antalgic gait pattern. "On neurologic examination, the patient has give-way pattern weakness with poor volitional effort on both sides."

21. Dr. Kawasaki's impressions included lumbar strain with poor core strength; significant pain behaviors and multiple Waddell signs seen; right lower extremity pain, numbness and tingling with radicular symptoms that were difficult to correlate; multiple red flags for non-physiologic nature of her injury-strong potential for

delayed recovery. He recommended an MRI and possible psychological evaluation for cognitive behavioral therapy.

22. Claimant was examined by PA Esser on March 2, 2015, at which time it was noted she was not doing well with a lot of pain in her low back and down her leg. PA-C Esser's assessment was lumbar and cervical strain. Claimant was noted to walk antalgically and had generalized exquisite tenderness. Claimant was to continue PT and reschedule missed massage therapy appointments

23. An MRI of the lumbar spine was done on March 18, 2015. The findings were normal lumbar alignment, no acute fracture seen. The impression by Charles Wennogle, M.D., who read the films, was L4-L5 minimal disc degeneration, mild to moderate bilateral facet arthropathy with facet articulation effusions, mild bilateral lateral recess and foraminal stenosis without nerve root deformity; L5-S1 mild disc degeneration with broad-based disc bulge and bilateral facet arthropathy, mild bilateral lateral recess and foraminal stenosis without nerve root deformity. The ALJ infers that the MRI showed degenerative changes in Claimant's lumbar spine, as opposed to an acute injury.

24. Dr. Holmboe examined Claimant on March 20, 2015 and noted that she still had back pain, but felt therapy had been helpful. Dr. Holmboe described her pain as "sharp" upon examination and he continued her treatment and work restrictions.

25. Claimant returned to Dr. Holmboe on April 17, 2015. Claimant reported pain at a 7/10 level- severe pain. Dr. Holmboe noted that Claimant sat on the edge of her chair with legs extended out in front of her. She had a cane and ambulated in a slow, guarded fashion. Dr. Holmboe's assessment was lumbar strain.

26. Claimant was seen on May 15, 2015 by Glenn Petersen, PA-C, who noted Claimant reported neck, lower back and right upper leg pain. Claimant reported pain at a 6/10 level-severe pain. PA Petersen stated "no therapy ordered as pt. not cooperating with therapist and trying to get better. Not cooperative with exam and unknown to me if pt. really has injury or not. F/U with provider who has followed pt." The note also indicated that MMI was anticipated in 1-2 months and Claimant was instructed to follow-up with Dr. Holmboe.

27. Dr. Kawasaki reevaluated Claimant on June 25, 2015. He noted that Claimant had some massage therapy, but none of his other recommendations from three (3) months prior were authorized. Claimant had an antalgic gait, as well as having some exaggerated gait patterns and exaggerated pain behaviors.

28. Dr. Kawasaki noted tenderness to palpation in the lower lumbar segments on the right side. His impressions were: lumbar strain with radicular symptoms down the right lower extremity; multiple Waddell signs and pain behaviors; multiple red flags of a non physiological nature and potential delayed recovery. Dr. Kawasaki recommended EMG/nerve conduction study the right lower extremity, a referral to

Walter Torres, Ph.D. for severe pain behaviors and a right L4-5 and L5-S1 transforaminal epidural steroid injection.

29. Claimant returned to Dr. Holmboe on June 5, 2015, reporting neck and back pain-7/10 in severity, self reported. Claimant stood up with some difficulty and had limited ROM of the lower back. Cyclobenzaprine was begun, along with Diclofenac. Claimant was to follow-up with Dr. Kawasaki.

30. Claimant was seen for an IME with Robert Larson, M.D. on August 20, 2015, which was requested by Respondents. Dr. Larson noted that Claimant subjectively reported pain with very minimal lumbar spine movement and she moved very slowly. Claimant had no lumbar spine flexion and limitations on extension.

31. Dr. Larson opined that Claimant did not have any documented anatomic injury. She had multiple non-physiologic signs/symptoms and did not require any specific treatment, diagnostic studies or interventions. Dr. Larson noted Claimant's symptoms did not appear to be related to a structural deficiency. He also believed that she was at maximum medical improvement without any ratable impairment.

32. Claimant was examined by John Hughes, M.D. on August 24, 2015 for an IME which was requested by her attorney. She told Dr. Hughes that on 12/23/14, she was lifting “heavy” packages of magazines into boxes and something was bothering her in the back. She experienced progressive pain as she worked that day. Dr. Hughes noted diffuse superficial touch tenderness throughout the low back. Claimant's active ranges of motion were restricted, particularly with regard to flexion.

33. Dr. Hughes’ assessment was past medical history of work-related and motor vehicle collision-related lumbar spine injuries with no documentation of permanent impairment existing prior to the work-related low back injury of December 23, 2014. Dr. Hughes felt Claimant had suffered a lumbar spine sprain/strain, with development of right lower extremity radicular symptoms, meriting further evaluation and treatment, as recommended by Dr. Kawasaki. He also diagnosed somataform pain disorder, which warranted further evaluation and treatment. Although he did not believe Claimant had reached MMI, he provided an estimate of permanent impairment, including a specific disorder impairment totaling 14% whole person.

34. Dr. Hughes issued a supplemental report on August 31, 2015, after he reviewed Dr. Larson's report. Dr. Hughes agreed with Dr. Larson's observations that Claimant manifested nonphysiologic signs on physical examination, noting that he documented the same. He stated these supported the diagnosis of somataform pain disorder. He disagreed with Dr. Larson that the presence of nonphysiologic signs merited dismissal of Claimant's injury claim. Dr. Hughes felt that Claimant's symptoms warranted medical treatment, which is why he endorsed the recommendations of Dr. Kawasaki.

35. Dr. Larson’s deposition was taken on September 24, 2015. Dr. Larson opined that Claimant did not suffer an injury while working. He testified that there was

no objective evidence of an injury, nor was there evidence to support Claimant's ongoing subjective complaints. This was consistent throughout the medical records. He also stated that her MRI showed degenerative changes and did not believe that the disc bulge at L4-5 represented an injury. Claimant's L5-S1 disc bulge with facet arthropathy was an arthritic change in this part of her spine. Dr. Larson noted that he could not complete range of motion studies, but this did not correlate to any structural injury, but rather a voluntary restriction on Claimant's part.

36. Dr. Larson also testified that Claimant's presentation was exaggerated and that the records did not support her pain allegations. Further, he noted that both Dr. Kawasaki and Dr. Holmboe agreed that Claimant's presentation had red flags. He disagreed with the treatment recommendations made because these were not supported by objective findings. He also found no basis for medical restrictions. The ALJ credited Dr. Larson's opinion that Claimant presentation did not support finding that she suffered an injury.

37. Claimant failed to prove by a preponderance of the evidence that she suffered an injury to her lumbar spine arising out of and in the course and scope of her employment on December 23, 2914

38. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant alleged that she proved by a preponderance of the evidence that she suffered an industrial injury because she was performing her job duties of loading magazines into boxes on December 23, 2014. This caused her to experience symptoms in her low back. She argued that although she had previously hurt her low back, there was no evidence of any disability six (6) months before 12/23/14. She also argued that she had performed her job duties for that period of time and was not experiencing lumbar pain which required medical treatment.

Respondents contended that Claimant failed to prove she suffered a compensable injury. Respondents cited the report of Dr. Larson to support their contention that there was no objective evidence of an injury in this case. Respondents argued that Claimant was not a credible witness, noting there were multiple references in the medical records of exaggerated symptoms, inconsistent effort and the diagnosis of somatoform pain disorder from several providers.

Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." *See CF & I Steel Corp. v. Industrial Commission,* 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. The question of whether the Claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

More particularly, the issue in this case is whether Claimant suffered an injury which aggravated , accelerated a preexisting condition. As a general rule, an injury is compensable if work activates, causes, aggravates, accelerates, or combines with nonindustrial factors to result in disability or the need for medical treatment. The mere existence of the pre-existing condition does not prevent the injury from "arising out of" the employment. *Merriman v. Industrial Comm'n*, 210 P.2d 448 (1949). Conversely, the mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the pre-existing condition. Resolution of that issue is also one of fact for the judge. *F.R. Orr Construction v. Ringa*, 717 P.2d 965 (Colo. App. 1985).

As found, Claimant failed to meet her burden of proof to show she suffered a compensable industrial injury. The ALJ had two primary bases for this determination.

First, Claimant's description of the alleged injury was not consistent. Sometimes she described a traumatic event, while other times she described a gradual onset of symptoms. Examples of the inconsistent description of the injury included:

- Clamant testified at hearing that on 12/23/14 she was injured while lifting magazines and felt such pain that she could not straighten up.

- However, when she first treated at Concentra, she told PA Esser that there was nothing different about that day of work.

- When Claimant was evaluated by Dr. Kawasaki, she told him that after working that day, she developed pain in her chest and neck. There did not appear to be a specific injury but increased pain from repetitive lifting.

- She told Dr. Larson that she had to bend down and squat to pick up packages to place then in boxes and felt pain. She felt strong pain in her back and could not move.

- She told Dr. Hughes that she would lift "heavy" packages of magazines into boxes and something was bothering her in the back. She experienced progressive pain as she worked that day.

In short, Claimant's description of the accident varied and was not consistent. Claimant's description her injury was different to PA Esser than what she told Dr. Kawasaki. This differed from what she described to Dr. Hughes, which varied from what she testified to at hearing. These variations undermined her credibility. In a case like this, where credibility is crucial, Claimant failed to persuade the ALJ that she suffered an injury which caused, aggravated or accelerated the condition of her low back.

Second, the medical evidence was replete with inconsistent and exaggerated symptoms reported by Claimant, as well as physical findings that did not correlate to an injury. This raised significant questions about whether Claimant was injured as alleged. Some examples included:

- 12/30/14: Claimant had exquisite tenderness to very light palpation at all levels of her lumbar spine-left and right paraspinal, left and right sciatica notch on examination. No range of motion testing performed because of pain. [PA Esser].

- 2/9/15: Claimant moved very slowly and difficulty getting up. Has very limited ROM in all planes and tender to the lower lumbar area. [Dr. Holmboe].[1]

[1] Dr. Holmboe also found extensive pain behaviors when he evaluated Claimant on 3/20/15, 4/17/15 and 6/5/15.

- 2/23/15: Claimant had tenderness to palpation in the lower lumbar segments on the right side,significant pain behaviors, multiple Waddell signs; multiple red flags for non physiolog nature of her injury- potential delayed recovery. [Dr. Kawasaki].[2]

- 5/15/15: Claimant was not cooperative with examination, reported pain in neck, back and leg. PA Petersen questioned whether she had an injury.

- 8/24/15[3]: Claimant manifested nonphysiologic signs on physical examination, noting that he documented the same. He stated these supported the diagnosis of somataform pain disorder. [Dr. Hughes].

In addition, the ALJ was persuaded by the opinions of Dr. Larson, who concluded that that there was no objective evidence of an injury, nor was there evidence to support Claimant's ongoing subjective complaints. (Finding of Fact Nos. 30, 34-35).

After considering the totality of the evidence, the ALJ concludes that Claimant failed to prove it is more probably true than not that she suffered a compensable industrial injury arising out of and in the course and scope of her employment.

In light of the finding on compensability, the ALJ need not address the issues of liability for TTD and medical benefits.

ORDER

It is therefore ordered that:

1. The claim for worker's compensation benefits in w.c. case no. 4-975-337-01 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

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[2] Dr. Kawasaki found exaggerated pain behaviors when he examined Claimant on 6/25/15.

[3] These were noted in the Dr. Hughes' 8/31/15 report.

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 17, 2015

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203